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November 18, 2026

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

Re: Finance Docket No. 36873 (Union Pacific/Norfolk Southern): Comment on Proposed Transaction

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 and acquisitions where the effect of the transaction may be to substantially lessen competition for Texas businesses and consumers. The proposed merger between Union Pacific and Norfolk Southern ("UP/NS"), which would create the largest railroad in the United States and the first in the history of the nation with transcontinental scope, is one such transaction.

Efficient and competitive freight rail is critically important to the economy of Texas. By tonnage, Texas sends or receives more rail freight than any other state, and is second largest in the nation by fees.[1] In 2024, Texas freight rail customers ("shippers") collectively shipped or received over [redacted] million tons of petrochemicals, minerals, agricultural products, and other commodities via rail to destinations across the continent, collectively incurring over [redacted] billion in rates.[2] Major Texas industries, including oil & gas, chemicals, and agriculture, rely almost entirely on freight rail, as their products cannot be economically shipped (if at all) via truck or

[1] Based on waybills with origins and destinations in the State. Calculations based on UP, NS, CSXT, BNSF, CN, and CPKC Waybills 2019-2024.
[2] Calculations based on UP, NS, CSXT, BNSF, CN, and CPKC Waybills 2019-2024.

barge.[3] As such, any change to the competitive dynamics in the freight rail industry would have an immediate impact on the strength and competitiveness of substantial Texas industries and countless Texas businesses.

The State of Texas previously submitted a comment to this Board[4] recognizing the potential of the proposed UP/NS transaction to harm competition. Following three months of additional investigation, including interviewing a wide spectrum of market participants and Texas shippers who collectively account for well over $1 billion in freight rail rates annually, Texas remains concerned about the proposed UP/NS transaction, including its potential for anticompetitive effects on Texas shippers.

Texas takes no position on the merger. Texas offers four points to the Board to aid its analysis of the proposed transaction.

First: a UP/NS combination creates a significant threat of anticompetitive foreclosure—*i.e.*, the ability of UP/NS to exclude some or all of a market from its rivals. Post-transaction, a combined UP/NS will collectively control over 54% of captive shipper locations nationwide, converting thousands of competitive interline routes to single-line routes containing at least one UP/NS monopoly segment, far beyond the scope of any transaction previously considered by the Board.[5] Foreclosure, whether complete or partial, could result in UP/NS capturing billions of dollars in incremental fares through eliminating competition and, more importantly, would deprive shippers of a valuable mechanism for disciplining UP/NS's rates.

Second: the proposed transaction creates a new risk of anticompetitive tying—i.e., forcing

[3] This reliance is reflected in the fact that shippers in these industries pay higher rates than other, intermodal shippers. *See, e.g.*, Ex. 1, UP 0703629 at -632 [redacted]).

[4] *See* Office of the Attorney General of the State of Texas, Comments (filed Aug. 28, 2026).

[5] RSI Data. SCRS data produced by the parties shows UP/NS will control a slightly lower percentage of national captive shipping locations (47%) but a higher percentage of Texas captive shipping locations (72 %). Either way, the result is a substantial increase in leverage post-transaction.

shippers to accept freight rail services across multiple routes.[6] As with foreclosure, the sheer breadth of UP/NS's network, together with its ownership of 54% of captive shipper locations, could enable the combined firm to force captive customers to purchase UP/NS services across non-captive routes or else be subject to rate increases on captive segments. While bundled rates are common today, the sheer scope of UP/NS's ownership of captive locations creates a substantial risk that such a leverage strategy would succeed post-transaction at a far broader scale.

Third: these concerns are not merely academic. Shippers, including Texas shippers, have identified the potential for UP/NS to engage in successful foreclosure and tying strategies post-transaction, and Texas understands more shippers intend to submit comments that will echo these concerns. Customer concerns like these are paramount in antitrust merger investigations, and this Board should likewise afford these shippers' concerns outsized weight in its analysis. And these customer comments are all the more salient in light of the Board's recent action in response to comments by UP's CEO, Jim Vena, which recognized the potential chilling effect of these comments coupled with UP's substantial post-transaction market share.

Fourth: UP/NS, competitive railroads, and shippers have offered a grab bag of remedies to lessen these concerns. But antitrust law disfavors the types of remedies proposed, because they are difficult to monitor and even more difficult to enforce. Such concerns are self-evident in a transaction of this size and complexity, and with the scope of remedies being considered.

To be sure, UP/NS have identified synergies and efficiencies made possible by the transaction that could benefit (at least some) Texas shippers. These potential procompetitive

[6] In antitrust parlance, "tying" (*i.e.*, conditioning the sale of one product (the tying product) on buying a separate product (the tied product)) is a different theory of harm from "bundling" (i.e., offering a lower price if a customer buys multiple products together). Here, Texas is concerned with the former, though "bundled pricing" is often used by shippers to describe the agreement between the shipper and railroad which would contain the forced tie. *See* Section II.B, *infra*, at 10-12.

benefits should not be ignored. But the Board should take seriously the concerns of shippers who have expressed fears of rate increases and degradations of service. And, before it approves the transaction, the Board must ensure there are robust, administrable, and enforceable mechanisms in place to protect competition—and not to merely shift the burden on harmed customers, competitors, or even this Board.

I. The Freight Rail Industry Is Characterized by Few Competitors, High Concentration, and Extreme Barriers to Entry, Making It Acutely Susceptible to Anticompetitive Effects from Mergers.

The freight rail industry forms the backbone of the American—and Texas—economy. Dozens of industries critical to our national well-being and security, ranging from automotive to petrochemicals to agriculture, rely on efficient, cost-competitive freight rail transportation. This dependence, in turn, means any potential anticompetitive effects from mergers and acquisitions would have an outsized role on Texas's economic health.

Four distinct characteristics merit additional consideration, because they are the types of qualities that courts and enforcers alike have found important in merger review for assessing anticompetitive effects. *First*, and most critically, the barriers to entry or expansion in this industry are likely insurmountable.[7] The costs of replicating a Class I rail is inestimable due to the difficulty in obtaining private land for constructing rail, to say nothing of the enormous capital expenditure and difficulty obtaining interconnections with existing railroads.[8] Nor does there appear to be any meaningful ability for smaller railroads to consolidate and replicate the network breadth of the existing Class I rails.

Second, the freight rail industry is unique, in that participants do not talk about potential

[7] *See Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 29 n.48 (2006) (recognizing high capital cost as a potential entry barrier); *United States v. Marine Bancorporation, Inc*, 418 U.S. 602, 627 (1974) (recognizing regulation as potential entry barrier); *Chicago Bridge & Iron Co. N.V. v. Fed. Trade Comm'n*, 534 F.3d 410, 439 (5th Cir. 2008) (technical expertise is a barrier to entry).

[8] For example, the last greenfield freight main line, the Powder River Basin Joint Line, went into service in 1984.

entry, but instead potential *exit.* For example, in the 2001 Merger Consolidation Guidelines, the Board and industry commenters (including UP) expressed concern that any further freight rail consolidation could trigger an "end game" leaving only two Class I railways in the United States, partially as a result of the high barriers to entry.[9] "[A] trend toward concentration in an industry, whatever its causes, is a highly relevant factor in deciding how substantial the anticompetitive effect of a merger may be."[10] That factor is present here.

Third, the freight rail industry is uniquely characterized by the widespread existence of so-called "captive" shippers, *i.e.*, shippers served by a single Class I railroad at either origin or destination. This arrangement gives the railroad enormous leverage in its negotiations, as the captive shippers rely on the railroad's service to move their products into and out of their captive facilities.[11] As explained below,[12] this leverage means that shippers typically pay much higher prices for shipments to and from captive facilities. Railroads also can, and do, use the leverage over these captive shippers when negotiating for business from non-captive facilities.[13]

Fourth, the freight rail industry is also unique in that it is a "network of competing and complementary components," forcing railroads to share inputs (*i.e.*, the rails themselves) to effectively service their customers.[14] This dynamic—where rivals control each other's essential facilities—is one reason that railroads have been subject to antitrust enforcement for more than a century.[15]

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[9] *Major Rail Consolidation Procedures*, 5 S.T.B. 539, 688 (2001).
[10] *United States v. Pabst Brewing*, 384 U.S. 546, 552-53 (1966), *quoted with approval by See* U.S. Dep't of Justice and Fed. Trade Comm'n, Merger Guidelines ("2023 Merger Guidelines") §2.7 at 22.
[11] United States Government Accountability Office, Report to Congressional Committee, *FREIGHT RAIL PRICING: Contracts Provide Shippers and Railroads Flexibility, but High Rates Concern Some Shippers*, December 2016.
[12] *See infra* at 10-12.
[13] *See id.*
[14] 49 C.F.R. § 1180.1(a).
[15] *See U. S. v. Terminal R. R. Ass'n of St. Louis*, 224 U.S. 383, 411 (1912) (holding that St. Louis railroad terminal was required to allow all railroads access under "just and reasonable terms and regulations").

II. The Proposed Transaction Creates Substantial Risks of Anticompetitive Foreclosure and Tying ("Bundling").

As Texas explained in its previous submission, the proposed transaction creates at least two primary risks of anticompetitive harm: (1) potential foreclosure of competing railroads through forcing (or *de facto* forcing) shippers to take newly-formed single-line routes; and (2) anticompetitive bundling of rates across multiple origins and destinations (in antitrust terms, tying) to the exclusion of rivals. Based on Texas's investigation and comments submitted to date, these concerns are shared by industry participants, including Texas shippers, who have indicated that the proposed remedies will be either insufficient or ineffective to deter such conduct. Texas urges the Board to carefully consider these issues in its review.

A. The Proposed Transaction Creates a Substantial Risk of Anticompetitive Foreclosure.

The Supreme Court has long recognized the potential for mergers to cause anticompetitive foreclosure—*i.e.*, to allow a competitor to exclude its rivals from all or some of a market.[16] So too this Board has long recognized the potential for freight rail mergers to lead to foreclosure,[17] which it reaffirmed in the 2001 Major Rail Consolidated Procedures[18] and mergers considered since those amendments.[19] For example, just three years ago in CP/KC, this Board imposed

[16] *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); *Heatransfer Corp. v. Volkeswagenwerk, 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).

[17] *Detroit, Toledo & Ironton R. Co. Control*, 275 I.C.C. 455, 492 (1950) (finding that the merged firm must "maintain and keep open all routes and channels of trade via existing junctions and gateways" to maintain competition.)*; see also Gulf, Mobile & Ohio Railroad Co. Merger*, 236 I.C.C. 61 (1939), cited in RAILROAD CONSOLIDATIONS AND THE PUBLIC INTEREST – A PRELIMINARY EXAMINATION, Staff Study by Bureau of Transport Economics and Statistics, Interstate Commerce Commission, 1962 (finding the "usual requirement that existing gateways and through routes be maintained" in a merger to maintain competition post-merger).

[18] Major Rail Consolidation Procedures, 2001 WL 648944, at *14 ("Competition in product and geographic markets can be eliminated or reduced by mergers, including end-to-end mergers.").

[19] *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

conditions to prevent foreclosure by ensuring a competitive gateway remained open to rivals, both "commercially and operationally (physically)."[20]

Foreclosure can take many shapes, including complete foreclosure (*i.e.*, where a rival totally deprives rivals from accessing a needed input) or partial (*i.e.,* where rivals still have access to the input but their access is diminished or otherwise encumbered). In the rail context, foreclosure can occur when a rival with market power deprives rivals of the ability to compete for one or more segments in an origin-and-destination pair. Examples of partial and complete foreclosure are shown below.

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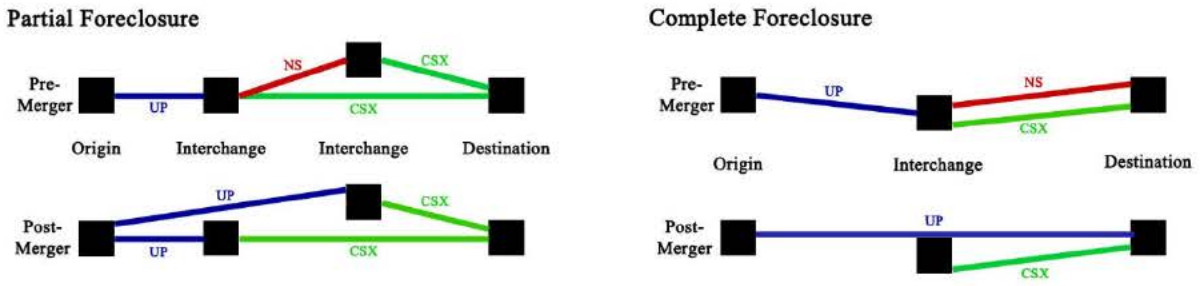
the potential for CN to impair the terms of trackage rights, interchange, or service associated with competing line haul carriers using EJ&E. . . . The Board takes seriously any possibility that CN might raise its rivals' costs by acquiring a line that currently provides neutral access to alternative line-haul railroads that compete with one another"); *Can. Nat'l Ry. Co.- Control- Iowa N. Ry. Co.*, FD 36744, 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 System*s, 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.").

[20] *Canadian Pacific Railway – Control – Kansas City Southern*, STB FD 36500, at 71 (2023) ("CPKC Decision") citing *CSX Corporation – Control and Merger – Pan Am Systems*, STB Finance Docket 36472. at 16 (2022) (endorsing applicants' commitment to "not do anything either physically or financially that is going to take away a competitive option that exists today"). *See also Canadian National Railway – Control – Elgin, Joliet & Eastern Railroad Company*, STB Finance Docket 35087 (2008) ("Applicants must adhere to their representation that they will keep all existing active gateways affected by the CN/EJ&E transaction open on commercially reasonable terms").



Three aspects of the proposed transaction significantly increase the risk of anticompetitive foreclosure, including on routes to or from Texas.

First, the transaction converts thousands of interline, origin-and-destination pairs (where UP serves one segment and NS serves a different segment) to single-line pairs (where UP/NS serves the entire route). While the parties laud this fact as improved service, it simultaneously creates the possibility of foreclosure on the thousands of routes that will include at least one UP/NS monopoly segment. UP acknowledged this foreclosure risk in the 2023 CP/KC transaction in a report by economist Steve Salop, albeit on a much smaller scale.[21] The scope of this potential foreclosure dwarfs anything previously considered by the Board and will affect all five major gateways.

Second, the risk of foreclosure is exacerbated by the sheer size of the proposed merger. Post-transaction, UP/NS will control at least [redacted] of all U.S. freight rail traffic and at least [redacted] of all captive shipper locations. The merger creates thousands of origin-and-destination pairs at risk of foreclosure, with one UP/NS monopoly segment and one "competitive" segment served by UP/NS and another rail. And this risk impacts every major gateway in the United States, far beyond what was considered in CP/KC.

[21] 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 §§ 3-4 (Feb. 28, 2022). For example, even post-transaction, CPKC remains one of the smallest Class I railroads, with the merger impacting a single gateway.

Third, the thousands of new single-line routes will provide UP/NS new information about competitor rates that it could use successfully to foreclose rivals. Today, UP and NS generally do not know one another's rates, including for complementary segments on an interline move. Thus, even when one of the two firms has a monopoly segment on an interline move, the monopolist's prices are constrained due to its awareness that too-high prices on the monopoly segment could push the entire interline rate above the shipper's reservation price.[22] Post-transaction, that information asymmetry disappears, potentially allowing a combined UP/NS to increase the rate on the captive, monopoly leg to its monopoly price, while keeping the price competitive on the competitive segment, enabling a foreclosure strategy. Indeed, UP acknowledge this potential in its comments to the CP/KC merger.[23]

As further explained in Texas's prior letter to the Board,[24] UP/NS did not adequately address the risk of foreclosure in its application or through the verified statement of its economic expert, Dr. Mark Israel, principally because Dr. Israel assumed such foreclosure cannot occur from an end-to-end merger,[25] a position which this Board firmly rejected in 2023.[26]

More recently, during his deposition, Dr. Israel acknowledged that his analysis is untethered to the actual day-to-day contracting practices of railroads and shippers. For example, Dr. Israel admitted that [redacted]

[22] Serge Moresi, David Reitman, Steven C. Salop & Yianis Sarafidis, *Vertical Mergers in a Model of Upstream Monopoly and Incomplete Information*, 59 REV. IND. ORG. 363 (2021).
[23] *See* 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 § 3.2 (Feb. 28, 2022); *see also* Serge Moresi, David Reitman, Steven C. Salop & Yianis Sarafidis, *Vertical Mergers in a Model of Upstream Monopoly and Incomplete Information*, 59 REV. IND. ORG. 363 (2021).
[24] Office of the Attorney General of the State of Texas, Comments, at 12 (filed Aug. 28, 2026).
[25] *See* Israel Verified Statement, App., Vol. 2 at 190-92.
[26] *See Can. Pac. Ry. Ltd – Control – Kans. City S.*, Decision No. 35, FD 36500 at 47.

[redacted] Likewise, although Dr. Israel acknowledges that comments from shippers are worth [redacted] before writing and filing his verified statement, Dr. Israel had [redacted][28] Without this factual foundation, his opinions cannot meaningfully respond to the real-world concerns expressed by shippers directly to the Board—and, more directly, how a merger would change UP/NS's bargaining power, and its ability to capture benefits from the shippers.[29]

Accordingly, the Board should require a greater showing by UP/NS on the potential for foreclosure, including economic analysis tethered to actual facts.[30]

B. The Proposed Transaction Creates a Substantial Risk of Increased Anticompetitive Tying (Take-It-or-Leave-It "Rate Bundling").

The proposed UP/NS transaction also creates a substantial risk of anticompetitive tying—*i.e.*, forcing shippers who wish to purchase one service (here, freight rail from one origin to one destination) to also purchase one or more additional services (freight rail from different origins to different destinations). When a seller has market power or some other form of leverage, it can force a customer (here, a shipper) to buy a product or service that they would not buy in a competitive market, turning the tie anticompetitive.[31] Mergers can make anticompetitive tying possible.[32]

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[27] Ex. 2, Israel Oct. 15, 2026 Dep. Tr. at 118:11-21.
[28] Ex. 2, Israel Oct. 15, 2026 Dep. Tr. at 61:2-13.
[29] Israel Verified Statement, App., Vol. 2 at 193-97.
[30] *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (excluding from consideration ipse dixit expert opinion based on "analytical gap" between the opinion and the analysis).
[31] *See U.S. Steel Corp. v. Fed. Trade Comm'n*, 426 F.2d 592 (6th Cir. 1970); *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984); *Teradata Corp. v. SAP SE*, 124 F.4th 555 (9th Cir. 2024).
[32] The 2023 Merger Guidelines contemplate the use of tying by a monopolist to entrench or extend their position. *See* 2023 Merger Guidelines § 2.6.B ("The Agencies also examine the risk that a merger could enable a firm to extend a dominant position from one market into related market, thereby substantially lessening competition or tending to create a monopoly in the related market. For example, the merger might lead the merged firm to leverage its position by tying, bundling, conditioning, or otherwise linking the sales of two products.").

The Board is well-acquainted with anticompetitive tying in freight rail. Rail market participants often call it "rate bundling."[33] More specifically, shippers have complained that railroads bundle closed or "captive" routes with competitive ones to impose unreasonable fares and terms on shippers, as recognized by the U.S. Government Accountability Office.[34] Captive routes enable railroads to impose "'take it or leave it' pricing."[35]

UP's documents show that it leverages captive routes in bundling. For example: in [redacted].[36] Indeed, a [redacted].[37]

This merger will increase UP/NS's leverage by increasing its share of captive routes, making anticompetitive tying more likely. UP alone already controls approximately [redacted]% of the captive facilities in Texas.[38] And, as far back [redacted], UP [redacted].[39] Post-merger, the combined UP/NS will control over [redacted]% of all captive facilities in the United States, totaling over 10,000

[33] Written Testimony of Olin Corporation, EP No. 761, *Hearing on Revenue Adequacy,* at 16-18 (filed Nov. 26, 2019) (""Rate bundling refers to railroads bundling multiple lanes together into single contract rates and refusing to provide shippers with common carrier rates for individual lanes that would then be subject to regulatory challenge."); *see id.* ("Olin has informed the Board of railroad-imposed, anti-competitive bundling arrangements…).UP's expert, Dr. Mark Israel, testified that he thinks [redacted]". Ex. 2, Israel Oct. 15, 2026 Dep. Tr. at 281:13-17.

[34] United States Government Accountability Office, Report to Congressional Committee, GAO-17-166 *FREIGHT RAIL PRICING: Contracts Provide Shippers and Railroads Flexibility, but High Rates Concern Some Shippers*, 17 (2016) ("Despite the volume discounts and other advantages to contracts with multiple O-D routes, some shippers said that contracts effectively constrain them into paying higher rates on some routes, because railroads will propose contracts with multiple O-D routes where some of the routes are priced unreasonably high, in the shippers' view. This is particularly an issue for shippers that are 'captive'…")

[35] Comments of the American Chemistry Council et al., EP 676, *Rail Transportation Contracts Under 49 U.S.C. 10709*, at 24 (filed Feb. 5, 2009); *see also id*. ("take it or leave it' pricing and service terms are widespread"

[36] Ex. 3, UP_1131105 at -106.

[37] *See* Ex. 4, UP_1072024 at -026.

[38] Calculation based on Combined Waybill Data, UPRR_SCRS_Full_Desc_20250815.txt, 1-ARaw_ UPRR_AAR_Station_Master.txt .

[39] Ex. 5, UP_0082882, at -914.

facilities nationally.[40] [redacted].[41]

This dynamic is not a secret from customers. As UP's share of "captive" shippers grows, shippers expect its use of bundled contracts will further expand, at worse terms for shippers. For example:

- Marathon estimates that its exposure exceeds "$618 million over five years across captive-lane and gateway scenarios, with downside cost increases of approximately $99 million depending on how aggressively the merger carrier exercises its pricing power."[42]
- Lubrizol believes that it "and similar shippers . . . will bear the cost of this merger through both retaliatory and monopolistic rail rate increases."[43]
- PBF Energy believes "the merged entity will have every incentive to make sure that PBF uses UP in the west to maximize its length of haul, and UP could use its leverage at our captive NS destinations to make that happen."[44]

These concerns were echoed in our interviews with Texas shippers who declined to be named.

UP/NS did not address bundling with captive routes in its Amended Application[45] and Dr. Israel acknowledged that he did not address bundling in his Verified Statement.[46] Instead, he claims without explanation that no "[redacted]" of the harm of bundling has been developed.[47] But name-calling is not an argument.

The Board should closely examine UP and NS's existing practice of "bundling" rates with captive routes to force shippers to accept supracompetitive prices on otherwise competitive routes and consider whether UP's control over even more captive shipper locations will lead to an expansion of this practice, to shippers' detriment.

[40] RSI Data.
[41] Ex. 5, UP_0082882, at -914.
[42] Marathon Petroleum Corporation, Comments (filed Nov. 17, 2026) at 6.
[43] Lubrizol Corporation, Comments (filed Nov. 17, 2026) at 5.
[44] PBF Energy, Comments (filed Nov. 13, 2026) at 2.
[45] *See generally* App., Vol. 1.
[46] Israel Oct. 15, 2026 Dep. Tr. at 281:13-283:12.
[47] *Id*.

III. The Board Should Give Outsized Weight to Shipper Concerns.

As part of the antitrust merger review process, federal and state enforcers place substantial weight on the views of customers, particularly those views tied to evidence developed in the ordinary course of business. "[T]he principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively."[48] Thus, the 2023 Merger Guidelines emphasize the role of customers in merger review, ranging from information on "their own purchasing behavior and choices" to "the effects of the merger itself."[49] And enforcers have challenged, and courts have blocked, transactions that result in price increases for even small segments of customers.[50]

Already, Texas shippers have voiced substantial concerns to the Board about the potential for a UP/NS merger to cause anticompetitive harm.[51] For example, PBF Energy, Inc. warned of the risks of foreclosure, cautioning that a combined UP/NS could "use its leverage at [our] captive locations" to either "work less efficiently with BNSF" or "charge higher rates on the former NS leg of our shipments."[52] Texas understands that additional shippers, including Texas-based shippers, intend to file comments on or before November 18 echoing these same foreclosure and tying concerns from PBF's November 10 letter and Texas's prior submission.

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[48] 1 P. Areeda & H. Hovenkamp, Antitrust Law ¶ 100, p. 4 (3d ed. 2006), *quoted with approval by Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 539 (2013).
[49] 2023 Merger Guidelines §4.1 (Sources of Evidence), at 34.
[50] *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); *see also* 2023 Merger Guidelines §4.3.D.1, at 44 ("If the merged firm could profitably target a subset of customers for changes in prices or other terms, the Agencies may identify relevant markets defined around those targeted customers.").
[51] *See*, *e.g.*, Letter to Board from Alliance for Chemical Distribution, American Chemistry Council, American Fuel & Petrochemical Manufacturers, National Industrial Transportation League, and The Fertilizer Institute (filed Oct. 13, 2026); PBF Energy Inc., Comments (filed Nov. 10, 2026); Marathon Petroleum Corp., Comments (filed Nov. 17, 2026).
[52] PBF Energy Inc., Comments, at 2 (filed Nov. 10, 2026).

These shippers' willingness to express their concerns publicly is commendable in light of their ongoing business relationships with UP and NS, and any potential fear of retaliation. The 2023 Merger Guidelines acknowledge that ongoing business relationships "may discourage the customer from providing evidence inconsistent with the interests of the merging parties."[53] This problem is particularly acute here, following the March 17, 2026 comments by UP's CEO, Jim Vena, suggesting UP would "probably increase … rates" of any shipper who opposed the merger "by three or four extra percent *to teach you a lesson.*"[54] Texas applauds the Board's thoughtful response to this statement, [55] and urges the Board to continue its careful consideration into whether this was a veiled threat or bad joke,[56] and whether the comment "serve[d] to chill shipper voices," as some have suggested. [57]

Texas also appreciates that other shippers have submitted letters in support of the proposed transaction. Others, too, may submit letters in support. Consistent with the 2023 Merger Guidelines, in weighing these competing views, Texas respectfully urges the Board to consider, among other things, (i) whether the shippers are intermodal or must use rail; (ii) if the synergies that UP/NS anticipate from the transaction will benefit the shippers—or not; (iii) the ongoing

[53] 2023 Merger Guidelines § 4.1 (Sources of Evidence), at 34.
[54] *See* Union Pac. R.R., Customers Deserve a Debate Based on Facts, https://www.up.com/about-us/contact-us/play (last visited Nov. 16, 2026).
[55] "Retaliation, whether perceived or actual, can seriously undermine the integrity of the Board's processes." Union Pac. Corp.—Control—Norfolk S. Corp., (Decision No. 45), FD 36873, slip op. at 3 (STB served Nov. 4, 2026). This is one reason why evaluators regularly "throw any procompetitive assumption out the window when record evidence suggests coercion by the monopolist." *Chase Mfg., Inc. v. Johns Manville Corp*., 84 F.4th 1157, 1172 (10th Cir. 2023) (cleaned up).
[56] Courts routinely hold that the threats themselves can be anticompetitive. In *Lorain Journal Co. v. United States*, a dominant local newspaper threatened to discontinue advertising for any customer that also advertised with a competitor. 342 U.S. 143, 152–53 (1951). The U.S. Supreme Court concluded that the newspaper had acted anticompetitively. Likewise, in *United States v. Microsoft*, when Microsoft backed some "advice" to Intel with a "threat of retaliation," the D.C. Circuit held that its conduct was anticompetitive. 253 F.3d 34, 77-78 (D.C. Cir. 2001).
[57] *See* Letter to Board from Alliance for Chemical Distribution, American Chemistry Council, American Fuel & Petrochemical Manufacturers, National Industrial Transportation League, and The Fertilizer Institute (filed Oct. 13, 2026).

business relationship between UP/NS and the shippers, including whether the shipper has captive facilities to UP/NS; and (iv) the evidence provided by the shippers in support of their respective statements.[58]

IV. To Be Effective, Merger Remedies Must Be Administrable and Enforceable.

As in prior freight rail mergers, UP/NS—as well as competing railways, customer coalitions, and other interested parties—have proposed a variety of remedies to resolve these competitive concerns as well as other potential impacts of the transaction on other aspects of the industry, including its impact on labor, safety, and roadway congestion.

Texas and other antitrust enforcers routinely assess divestitures and other conditions to reduce the likelihood of anticompetitive effects from a transaction. Enforcers and courts alike have long favored structural solutions that are simple, easily administrable, and final.[59] Conversely, conduct remedies—i.e., remedies that require the combined firm to do, or not do, something—are disfavored, because they require ongoing monitoring and enforcement, and risk "excessive government entanglement in the market."[60] Moreover, non-structural remedies can be cumbersome, enforcement of violations can take years, and regulators cannot anticipate every way that improper influence might manifest.[61] Accordingly, such remedies are not usually accepted

[58] *See, e.g.*, 2023 Merger Guidelines, § 4.1 (Sources of Evidence), at 34 ("[T]he [antitrust] Agencies give less weight to evidence created in anticipation of a merger investigation and more weight to evidence developed in the ordinary course of business.").
[59] *See United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 330-31 (1961) ("Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure.") citing Hale and Hale, Market Power: Size and Shape Under the Sherman Act 370 (1958); *California v. Am. Stores Co.*, 495 U.S. 271, 280 (1990) (emphasizing the use of divestiture as a preferred remedy in the context of a merger).
[60] *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd*., 778 F.3d 775 (9th Cir. 2015) citing U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies § II n. 12 (2011) (noting that conduct remedies need to be "tailored as precisely as possible to the competitive harms associated with the merger to avoid unnecessary entanglements with the competitive process"); *see also Steves & Sons, Inc. v. JELD-WEN, Inc*., 988 F.3d 690, 720 (4th Cir. 2021) (finding that Congress intended structural remedies, like divestiture, to be favored and behavioral remedies to risk government overreach); *ProMedica Health Sys., Inc. v. Fed. Trade Comm'n.*, 749 F.3d at 573 (noting that monitoring conduct remedies can impose costs that are much higher than simple divestiture).
[61] *See E. I. du Pont de Nemours & Co.*, 366 U.S. at 334.

unless the conduct will completely cure the anticompetitive harm and the remedy can be enforced effectively.[62]

The Board is already faced with a patchwork of proposed remedies and "enhancements" offered by UP/NS and other industry participants. These remedies proposed by UP/NS will require near-constant monitoring and oversight by the Board, including:

- **Open Gateway Commitments**: requiring UP/NS to keep all existing gateways open at "commercially reasonable rates."[63] The Board will be required to ultimately determine what rates are "commercially reasonable."
- **Committed Gateway Pricing ("CGP")**: guaranteed rates for qualifying cross-country shipments that use UP/NS rail for a portion of their service and move through certain interchanges.[64] The Board will be required to assess and enforce these rates.[65]
- **Targeted Access Program**: an arbitration process available to a subset of shippers, if service declines by a fixed percentage following the merger.[66] The Board must handle all rate appeals following arbitration, and any service disputes following the implementation period.
- **Rate Alternative Dispute Resolution Program**: another arbitration forum to resolve rate disputes during the oversight period.[67] The Board must handle all rate appeals following arbitration, and any rate disputes following the implementation period.

In addition, other interested parties have proposed:

- **Gulf Coast Conditions:** a new, neutral switching facility or terminal railroad in the Gulf Coast region.[68] The Board must evaluate any necessary operating authorizations and determine the scope of any divestitures.
- **New and Adjusted Trackage Rights:** new and adjusted trackage rights for competing railroads, including new rights in Texas, to protect against disruptions caused by the merger. The Board would modify existing trackage rights to achieve

[62] Fed. Trade Comm'n and Dep't of Justice, Merger Remedies Manual (Sept. 2020), at 16. While the Merger Remedies Manual was subsequently withdrawn by the federal agencies in 2022, the guidance is instructive and consistent with the case law cited elsewhere in this letter.
[63] *See* Errata Verified Statement of Kenny Rocker and Claude E. Elkins, *Union Pacific Corporation and Union Pacific R.R. Company—Control—Norfolk Southern Corporation and Norfolk Southern Railway Company*, FD 36873 at §IV.C.6 (July 27, 2026).
[64] *See* Verified Statement of Kim Novak, *Union Pacific Corporation and Union Pacific R.R. Company—Control—Norfolk Southern Corporation and Norfolk Southern Railway Company*, FD 36873 (April 30, 2026).
[65] *See Id.* at ¶ 7.
[66] Applicants' Second Response to Decision 21, *Union Pacific Corporation and Union Pacific R.R. Company—Control—Norfolk Southern Corporation and Norfolk Southern Railway Company*, FD 36873 at 189-195 (July 27, 2026).
[67] *See id.* at 196-201.
[68] *See id.* at 9.

this by, *inter alia*, removing paper barriers and establishing enforcement mechanisms.[69]

- **Gateway Divestiture:** CSX has requested divestiture of a competitive gateway to ensure the competitive flow of traffic.[70]

The common element to each of these remedies is near-constant supervision and administration by the Board, effectively shifting the burden of ensuring an enhancement of competition to the Board. To be sure, many of these functions are within the Board's remit, even if the scope would drastically change post-transaction. Nevertheless, the Board must ensure that the remedies would completely cure the anticompetitive harm from the transaction, which should include an assessment of whether shippers or competition itself would be harmed during the time needed to conduct arbitration and for the Board to handle rate appeals—particularly if such disputes must be handled on a case-by-case basis. If so, the remedies do not solve the competitive concerns from the transaction.

[69] BNSF Railway Company's Description of Responsive Application, *Union Pacific Corporation and Union Pacific R.R. Company—Control—Norfolk Southern Corporation and Norfolk Southern Railway Company*, FD 36873 at 8 (September 9, 2026); CPKC's Description of a Responsive Application, *Union Pacific Corporation and Union Pacific R.R. Company—Control—Norfolk Southern Corporation and Norfolk Southern Railway Company*, FD 36873 at 3-4 (September 9, 2026); See CSX Transportation Inc.'s Description of Anticipated Responsive Applications, *Union Pacific Corporation and Union Pacific R.R. Company—Control—Norfolk Southern Corporation and Norfolk Southern Railway Company*, FD 36873 at 4-10 (Nov. 10, 2026).

[70] *See* CSX Transportation Inc.'s Description of Anticipated Responsive Applications, *Union Pacific Corporation and Union Pacific R.R. Company—Control—Norfolk Southern Corporation and Norfolk Southern Railway Company*, FD 36873 at 4-10 (Nov. 10, 2026).

V. Conclusion

Texas appreciates the Board's thoughtful and deliberate review of the proposed transaction and its consideration of Texas's views in doing so.

/s/ Joshua Ciampi

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CERTIFICATE OF SERVICE

I certify that on November 18, 2026, a true and correct copy of these Comments was served electronically on all parties of record in Docket No. FD 36873 and Administrative Law Judge Soulikias:

/s/ Joshua Ciampi

JOSHUA CIAMPI
Assistant Attorney General

EXHIBIT A

UP_0703629

Highly Confidential
Attachment

Filed under seal Pursuant to Protective Order

EXHIBIT B

DEPOSITION TRANSCRIPT 10/15/2026

Highly Confidential
Attachment

Filed under seal Pursuant to Protective Order

EXHIBIT C

UP_1131105

Highly Confidential
Attachment

Filed under seal Pursuant to Protective Order

EXHIBIT D

UP_1072024

Highly Confidential
Attachment

Filed under seal Pursuant to Protective Order

EXHIBIT E

UP_0092882

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Attachment

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