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June 19, 2017

Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: Finance Docket No. 32760, *Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company – Control and Merger – Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver And Rio Grande Western Railroad Company*

Dear Ms. Brown:

On Friday, June 16, 2017, and on behalf of Mission Rail Industrial Park, LLC, we filed a Petition for Leave to File Rebuttal Statement, along with the Rebuttal Verified Statement of Richard Kinsel. At that time, we also both asked that the Board approve the Motion for Protective Order that had been filed by Union Pacific and enter such an order.

The purpose of this letter is to make two changes in that submission. First, as part of that submission, we filed both a Public and Highly Confidential version of the Rebuttal Verified Statement of Richard Kinsel, but have now concluded that it would be more appropriate for the proposed Rebuttal Verified Statement of Mr. Kinsel to be labeled as Confidential rather than Highly Confidential. Second, Mr. Kinsel has revised paragraphs 14 and 36 of his Rebuttal Verified Statement concerning the status of the confidential report discussed therein.

We are accordingly filing a revised Confidential and Public version of the Rebuttal Verified Statement of Richard Kinsel and request that these be physically replaced in the docket in lieu of the original versions.



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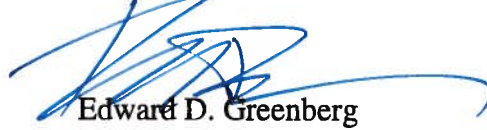
Cynthia Brown

June 19, 2017

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Please let me know if you have any questions concerning this.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'ED', with a long horizontal flourish extending to the right.

Edward D. Greenberg

cc: All Parties of Record

PUBLIC - REDACTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 32760

**UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY
—CONTROL AND MERGER—
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC
TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, SPCSL CORP. AND THE DENVER AND RIO GRANDE WESTERN
RAILROAD COMPANY**

REBUTTAL VERIFIED STATEMENT OF RICHARD KINSEL

I, Richard Kinsel, of lawful age and being first duly sworn on my oath, state as follows:

1. I previously submitted a verified statement in this proceeding that was part of the Joint Petition of BNSF Railway Company (“BNSF”) and Mission Rail Industrial Park, LLC (“MRIP”) for enforcement of Decision No. 44 (“Joint Petition”), by which MRIP was seeking to obtain the badly needed competitive rail service of BNSF into Mission Rail Park (the “Park”). The purpose of this rebuttal statement is to clarify and correct several statements made by the Union Pacific Railroad Company (“Union Pacific”) and its supporting witnesses, that were filed in its reply dated May 25, 2017 to the Joint Petition, that are either inaccurate or are materially misleading.

2. The first point that needs correction pertains to the issue of the so-called town and/or station of Purcell, Texas. Throughout the reply of the Union Pacific and its supporting witnesses, Union Pacific claims that the Park is located at a station called Purcell, which is purportedly geographically distinct and separate from the switching district of Elmendorf, Texas.

For example, the Reply Verified Statement of Stephen L. Bybee (“Bybee VS”) claims that Union Pacific’s Rockport subdivision consists of five stations, including Purcell. (Bybee VS at 1.) Mr. Bybee goes on to say that Union Pacific began serving the Park after obtaining an exemption to operate as the common carrier “between Elmendorf and Purcell.” (*Id.*) Similarly, the Verified Statement of Jacqueline Bendon (“Bendon VS”) at page 1, indicates that the Park is “located at Purcell, Texas.”

3. There is no town of Purcell, Texas. That location has no residents, houses or stores and exists solely as the theoretical milepost designation of 17.5 and a few railroad signs that indicate where Union Pacific’s maintenance responsibilities end. (See Exhibit 5 appended to the Union Pacific Reply for pictures that show the “town.”)

4. Moreover, Mr. Bybee’s statement that Union Pacific sought authority to serve Purcell is incorrect. A review of the Notice of Exemption filed by Union Pacific in Docket No. FD-35776, *Union Pacific Railroad Company – Operation Exemption in Bexar and Wilson Counties, Texas*, indicates only that Union Pacific was seeking an exemption to operate between milepost 16.1 and 17.5. There is no mention of a town or station called Purcell.

5. That is not surprising since there is no town or station called Purcell. To the contrary, it seems clear that the use of the term “Purcell” is a fiction created by Union Pacific solely for the purpose of attempting to support its contention that the Park was somehow not connected or adjacent to the Elmendorf switching district but instead is geographically distinct and distant.

6. Indeed, Mr. Ken Lueckenhoff, who was until relatively recently employed by Union Pacific’s business development group, specifically told us that Union Pacific created the

Purcell station as a way of keeping the Park out of the Elmendorf switching district and accordingly frustrate BNSF's attempt to gain access to our facility.

7. The second point that needs clarification pertains to Ms. Bendon's contention that Union Pacific rates and service have not hurt either the Park or the Park's major tenant, Twin Eagle Sand Logistics, LLC ("Twin Eagle") (Bendon VS at 2-3). To support this argument, Ms. Bendon indicates that Union Pacific's "tariff rates for moving frac sand to Purcell are exactly the same as our tariff rates for moving frac sand to Elmendorf." Bendon VS at 2. Ms. Bendon then asserts her belief that the reduced volumes of frac sand at the Park in 2016 were attributable to changes in the market, rather than the lack of rail competition at the Park, citing statistics indicating the amount by which the consumption of frac sand in the Eagle Ford Shale area fell from 2015 to 2016 "by some estimates." These statements are very misleading as they have no relevance to the geographic market in which both MRIP and Twin Eagle operate.

8. Initially, the bulk of the frac sand moving to the oil and gas wells in the Eagle Ford Shale region originates in various parts of the United States that are too distant to make long-haul trucking economically viable. As a result, and regardless of its actual origin, the frac sand that is required by the various well drilling and production companies almost always moves by rail to various transload sites that are local to the drilling areas. From those transload sites, the sand moves by truck to the wellhead destinations. However, the cost of trucking restricts movements to a distance of approximately 50 miles, so that the geographic market that can economically and practically served by any transload operator is limited to a 50 mile radius.

9. The entire Eagle Ford Shale area is a large geographic area as is evidenced by the map attached as my Exhibit 3. Elmendorf is located approximately 20 miles southwest of San

Antonio, and accordingly is located near the top of the central portion of this region. However, frac sand delivery statistics concerning the entire region are irrelevant to the competitive situation Twin Eagle and the Park face vis-à-vis frac sand receivers at Alamo. The only relevant frac sand tonnage data is that which pertains to the 50-mile radius from Elmendorf that is served by truck, as, again, that is how frac sand is delivered from the various transloading sites at the Park and Alamo to the oil and gas wells.¹

10. Accordingly, the data proffered by Ms. Bendon pertaining to frac sand tonnage reduction and the percentage drop in Union Pacific's carloadings in the entire region in 2016 as compared to 2015 has no bearing on the geographic market in which MRIP and Twin Eagle operate or to the competition and service issues that are relevant in this proceeding. However, such data is readily and publicly available.

11. Drilling companies in Texas are required to provide the state with a list and volumes of all materials that are placed or injected into wells and this information is publicly available. The data from NavPort Analytics, a data company that tracks the actual frac volumes in this specific market area applicable to the Park and Alamo and which is based on information provided by the oil and gas drilling and production companies shows that in 2015, the volume of frac sand used was 5,679,700 tons, while in 2016, that volume fell to 4,302,342. That was a decline in usage of 24%.

12. Further, based on the calculation of the volumes of frac sand received in the Park during those years, and the NavPort Analytics data of this market area, the percentage of frac

¹ The map in Exhibit 3 was created in 2010 and accurately portrays the geographic scope of the Eagle Ford Shale region although the location of the oil and gas wells in the area have changed over this 7-year period, as new wells have developed and old wells have shut in. Nonetheless, the map is useful in showing the limited scope of the market area which can realistically be serviced by shippers at the Park.

sand handled at the Park fell by 71% in 2016 from 2015 and the market share of the Park's customer in its market area was reduced from 9.68% to 3.06%, a reduction of two-thirds. (See my Exhibit 4.)

13. The significant reduction in the volumes of frac sand moving to the Park, even though the Park's customers had invested significant sums in rail transload infrastructure in 2015, was clearly attributable to Union Pacific's lack of responsiveness to BNSF's competition.

14. Neither the Park nor Twin Eagle has any access to the actual rates Union Pacific has provided the various shippers of frac sand who can choose to ship and use the services of either the transload companies at the Park or at Alamo. However, it is apparent that the reason for the 71% drop in frac sand deliveries to the Park in 2016 is that Union Pacific did not offer rates that kept Twin Eagle competitive. [

]

16. While MRIP doesn't have the specifics on the rail rates for shipments moving through Alamo, based on anecdotal market information it has obtained we understand that there was roughly a \$1,600 per car differential in 2016 between Union Pacific rates at the Park and the BNSF rates at Alamo. []

17. Moreover, [] we are aware that BNSF was an early advocate of using unit trains due to the greater efficiency and lower cost involved, and was passing along the savings to the customers. On the other hand, even when Union Pacific did handle unit trains, that railroad regard this as "premium" service and refused to share the cost savings with the customers, instead charging higher prices.

18. Not surprisingly, as I indicated in my original statement in this proceeding, the Park lost tenants that went to Alamo. Similarly, due to the current situation with only Union Pacific rail service, MRIP cannot attract other tenants to this industrial facility, as evidenced by the fact that it only has one rail-served tenant. On the other hand, Twin Eagle cannot easily leave the Park, both because of its lease and the significant capital investments it made in rail-related infrastructure.

19. In 2017, Union Pacific management became somewhat more responsive and has now apparently provided discounts to a few large frac sand shippers so that Twin Eagle and the Park at this point may be price competitive with shipments to Alamo. [

]

20. While this recent shift in Union Pacific's pricing philosophy is welcome, there is no way, without BNSF's effective rail competition, to ensure that Union Pacific's pricing and service attitude will not revert back to what we experienced in 2016. As a result, MRIP still cannot provide the necessary assurance to prospective tenants that they can take advantage of the Park's facilities and remain competitive over the long term, as we remain solely dependent on Union Pacific's enlightened management.

21. Moreover, [] there are a number of frac sand mines that are located at origins served solely by BNSF. Thus, the lack of BNSF service has reduced the number of mines that can ship frac sand to the Park and its customers.

22. Ms. Bendon contends that Union Pacific has "strong incentives to encourage shippers to locate" in the Park due to its recent construction of a \$16.4 Million yard within the Park. But that investment in yard facilities has little if any relevance to its service at the Park. Instead, Union Pacific commissioned that yard to serve all shippers in the Elmendorf switching district that are located on the main line, not just the Park. Accordingly, Union Pacific's investment is not jeopardized by the financial viability of the Park or Twin Eagle and does not serve to constrain its pricing and service actions.

23. Another point that needs clarification pertains to Union Pacific's contention about the nature of discussions we had relating to BNSF access. For example, Union Pacific's reply, at P. 23, states that I was "very careful not to claim that Union Pacific actually told [me] or anyone else that BNSF could access the Park, because that would be untrue." While it is true that Union Pacific never agreed to permit BNSF access, it is also true Frac Resources, which owned the Park at that time, consistently indicated that it wanted BNSF competitive service at the facility. Accordingly, the Verified Statement of Mr. Chris Sanford who states that he wasn't aware of any requests for BNSF access and that he would have known if there was such a request (Sanford VS, at 5) is misleading. We had a number of discussions on this subject with various members of the Union Pacific business development group, including Ken Lueckenhoff, Kevin Klein and Stephen McGill. It is surprising that Mr. Sanford was unaware of those discussions.

24. It is also curious that Mr. Watkins states, at pages 3-4 of his statement, that he never dealt with me or that he was aware of our concerns about being solely served by Union Pacific. I regret that he has no recollection of our meetings, but he was clearly present in at least one meeting I had with him and various other people representing Frac Resources, where we discussed the construction of the Union Pacific's yard within the Park.

25. Notwithstanding Union Pacific's denials, Frac Resources had ample reason to believe that BNSF would be able to obtain access to the Park either through negotiations with Union Pacific by order of the Board. We were aware, for example, that BNSF had expressed an interest in purchasing the real estate that comprises the Park if Frac had not exercised its option to buy the parcel. After all, we thought, why would BNSF be interested in purchasing the parcel if it could not get access to the property.

26. And, with respect to Section 22 of the May 21, 2013 Industry Track Agreement, which is appended as Union Pacific's Exhibit 4, Mr. Watkins contends that the provision about multi-rail carrier service doesn't mean anything and in any event "appears in many of our agreements." (Watkins VS at 3.) However, his statement that we never asked about the meaning of that provision is again misleading and in any event, irrelevant. There was no need for us to ask about the meaning of that section, since the language clearly states that the ITA would be applicable for the use of any other railroads that could either reach agreement with Union Pacific or be able to access the facility by order of the STB.

27. I cannot say whether this provision is something standard that "appears in many" of Union Pacific's agreements, but I can state that this language does not appear in more recent drafts of an ITA that Union Pacific has requested that we sign (which we have so far refused to do).

28. I also believe that Mr. Watkins' statement about Union Pacific's reimbursement of our construction of Track 793 is misleading. Mr. Watkins says, on page 3 of his statement, that Union Pacific determined to "restructure our arrangement . . . to provide for a lump sum reimbursement" rather than a per-car refund over a three-year period because it "recognized [at some undisclosed point] that the new facility would likely include multiple shippers and receivers." It is simply a fact that both Frac Resources and later MRIP always intended that the facility would include multiple shippers and receivers, and Union Pacific was well-aware of this from the outset of our negotiations. There was no new revelation about this fact.

29. Now that we are more aware of what Union Pacific intended by accelerating the payback, it seems far more likely that the change in repayment was motivated by Union Pacific's

desire to avoid having this track segment classified as an excepted spur, rather than so-called Section 10901 track, when it commenced service to the Park. From our vantage point, the change in repayment merely meant that we would be repaid faster, so that we were indifferent to the restructuring. That appears not have been Union Pacific's motivation.

30. Moreover, it seems clear that Union Pacific originally believed that this track that Frac Resources constructed between the railroad's main line and the Park was a spur or industrial lead that would not require approval from the STB. The original Memorandum of Understanding between Union Pacific and ST One Logistics, which was appended as Exhibit 1 to my original Verified Statement in this proceeding, refers to what became Track 793 as "*the private extension of the Rock Port Industrial Lead track from the current track to the ST One property line.*" (Emphasis supplied.) At some point after that construction was completed, ownership of the track was to be transferred to Union Pacific. But that change of ownership did not convert the character of the track from what it was – a short spur between the mainline and the Park. Contrary to Mr. Bybee's statement (Bybee VS at 1-2) that the railroad needed operating authority from the Board, I believe that Union Pacific created the fiction of treating this as Section 10901 track only after it realized that BNSF also wanted access to the Park.

31. Finally, a number of other statements by Mr. Bybee concerning the nature of Track 793 are misleading. For example, his statement (at p.2) that the Union Pacific needed operating authority from the Board to operate over the line is questionable, if not inaccurate. Once Frac Resources completed the construction of this line, there was only a single rail receiver in the Park. Nevertheless, Union Pacific refused to provide service until the Notice of

Exemption it filed to operate over what otherwise appears to be an industrial or spur track became effective.

32. Mr. Bybee's description of this line as being within a Union Pacific right-of-way over which the Southern Pacific once operated between San Antonio and Southern Texas (*Id.*) suggests that Track 793 remains part of a significant line of railroad. However, the former Southern Pacific line, which he refers to as the Rockport Subdivision, went much farther south to Rockport, a city which is on the Texas coast near Corpus Christi, a distance of approximately 150 miles. Track 793, on the other hand, is 1.4 miles in length, and runs between the Union Pacific mainline at MP 16.1 and ends at the Park. This track serves no facilities other than the Park, is stub ended at the Park and does not extend the mainline into any new territory but instead simply expands Union Pacific's operations in the Elmendorf area.

33. Although Mr. Bybee is technically correct that Union Pacific does no switching on Track 793 (*Id.*), that fact is not surprising since it is a single track only 1.4 miles long with no sidings. However, Union Pacific uses Track 793 to access its yard within the Park – for which it paid \$16.4 million – to switch, store and classify cars for its customers in this area, including those located at Alamo, Southton and other industries along the Rockport Subdivision. (*See* Union Pacific's Exhibit 2 which displays its yard within the Park.)

34. Mr. Bybee correctly notes that Track 793 is well constructed with 135-pound continuous welded rail. (*Id.*) Again, that is not surprising since Frac Resources wanted to attract significant rail-served tenants that required significant volumes of both manifest and unit train service. It was therefore necessary to build this short piece of track to high standards in order to accommodate the nature of the traffic we hoped would move to and from the Park.

35. However, Mr. Watkins' assertion that Track 793 is "used as part of our route for providing continuous transportation to shippers in the Park" (Watkins VS at 3) is a bit of hyperbole. The fact is that Union Pacific serves only a single customer in the Park.

36. In conclusion, the issue of whether a railroad is providing competitive service is not measured simply by whether cars are picked up or delivered timely but rather is whether the railroad is responsive to the shipper's needs. It is evident from our experience, [

] and the graphic declining market share figures that Union Pacific has historically not satisfied its service obligation to the Park or its customers. To the contrary, completely aside from its apparent lack of interest in the welfare of the Park, it seems to have spent an inordinate amount of time trying to figure out how to keep BNSF from being a competitive factor, including denying BNSF's repeated requests for access and creating a fictitious town and rail station to support its contention that the Park is somehow not part of Elmendorf.

VERIFICATION

I, Richard Kinsel, hereby certify that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: 6-14, 2017

Richard Kinsel
Richard Kinsel

STATE OF Texas)
COUNTY OF Harris) ss:

SUBSCRIBED AND SWORN TO before me this 14th day of June 2017 by Richard Kinsel.

Witness my hand and official seal.

Melinda Nichols
Notary Public

My commission expires:

6-4-2019

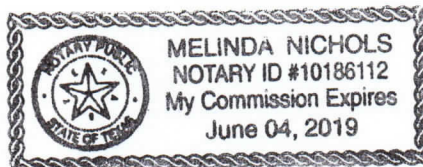


EXHIBIT 3

Eagle Ford Shale Play, Western Gulf Basin, South Texas

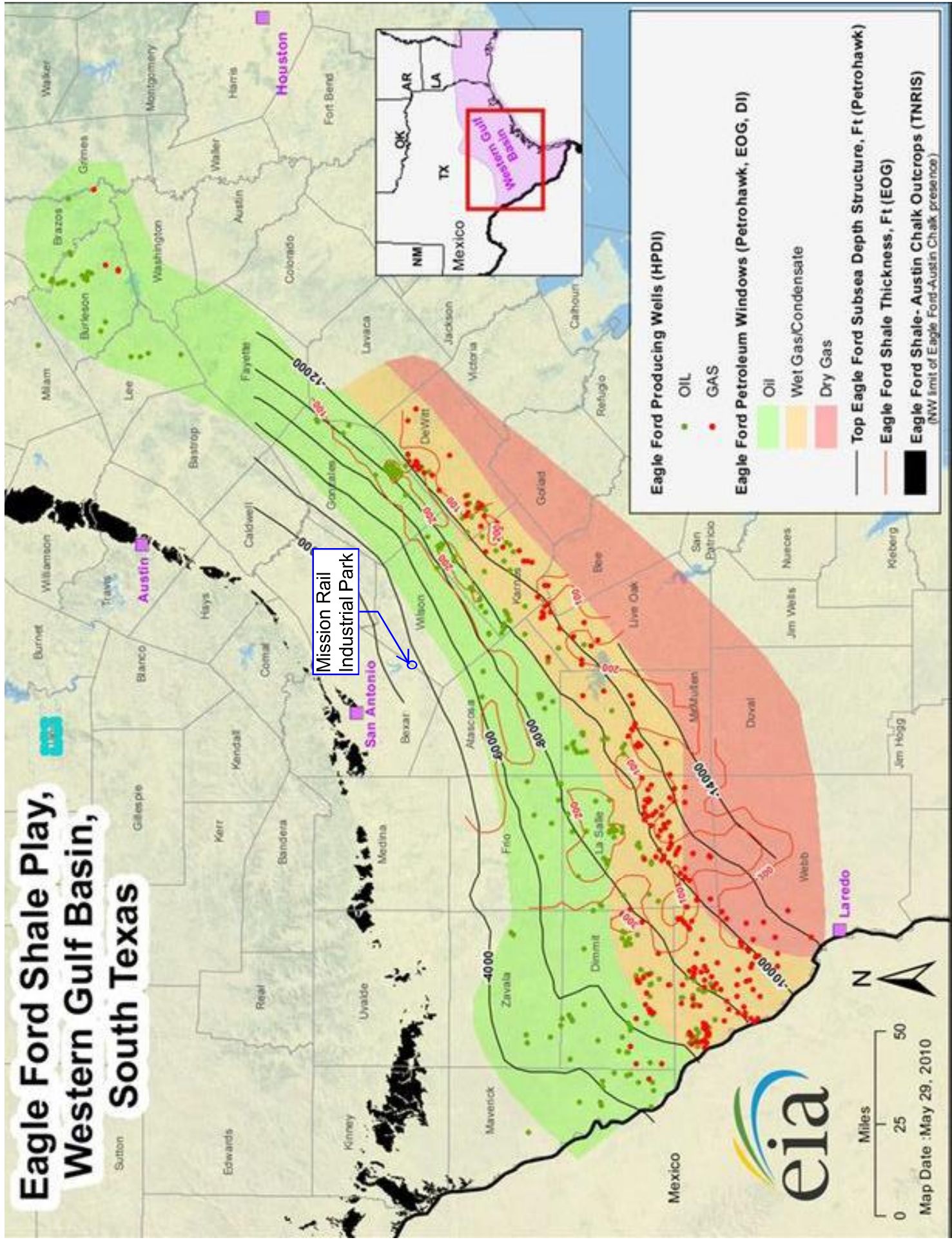


EXHIBIT 4

Mission Rail 50 Mile Radius - Volume Comparison

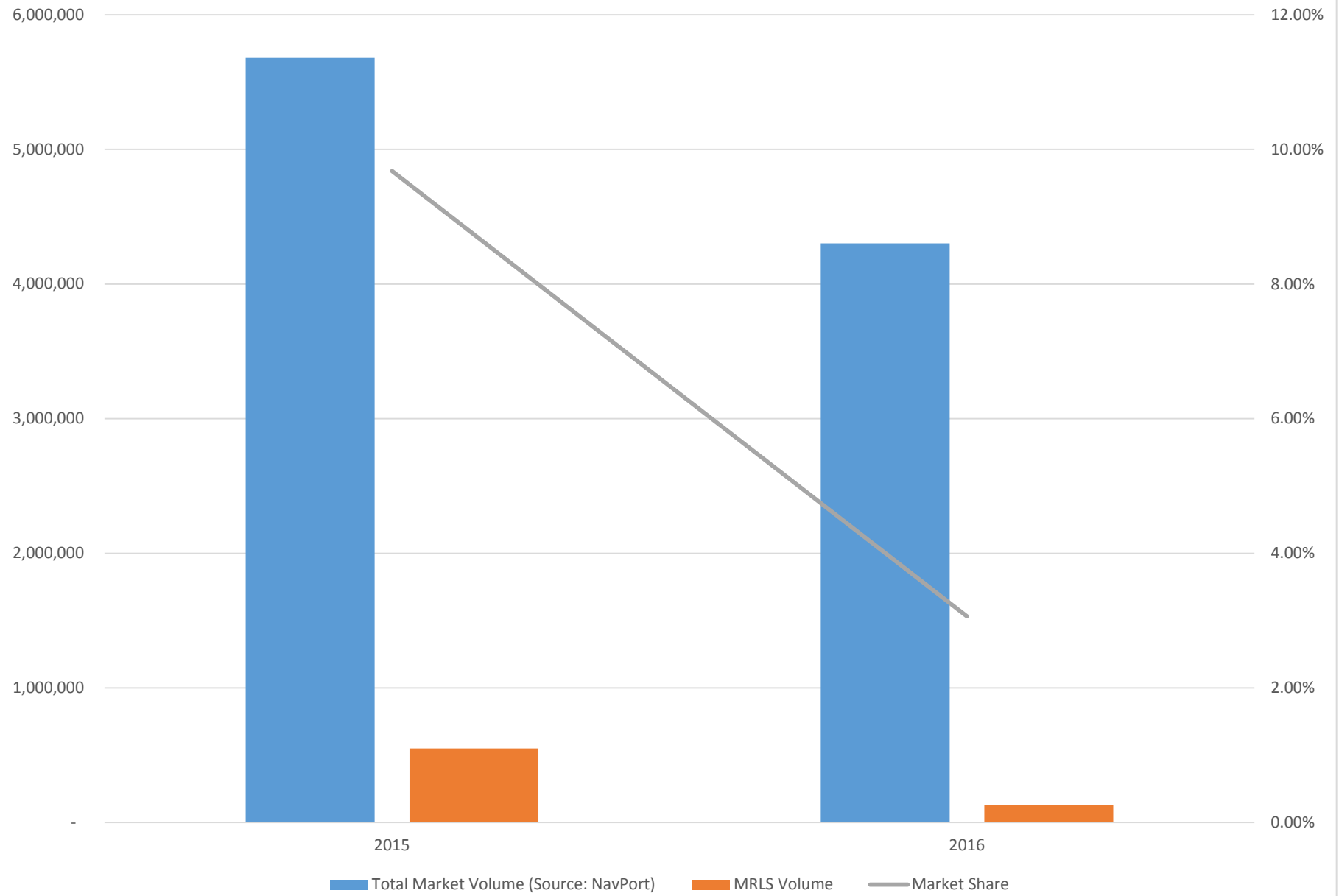


EXHIBIT 5

REDACTED