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June 16, 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 behalf of Mission Rail Industrial Park, LLC, we are filing a Petition for Leave to File Rebuttal Statement in this proceeding along with the Rebuttal Verified Statement of Richard Kinsel.

Please note that we are filing both a public and highly confidential version of the Rebuttal Verified Statement of Richard Kinsel, the latter of which is intended to be treated in accordance with the provisions of the Motion for a Protective Order that was filed by Union Pacific Company in this proceeding on May 24, 2017. It appears that the Board has not yet ruled on that motion, so we have attached an extra copy of the May 24, 2017 motion Union Pacific filed for the convenience of the Board and the parties.

Accordingly, we request that the Board and the parties treat the attached Highly Confidential version in accordance with the terms of the proposed Protective Order and also request that the Board formally enter that order at its earliest convenience.



*An International Association of Independent Law Firms in Major World Centers*

GKG LAW, P.C.

Cynthia Brown

June 16, 2016

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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 be 'E. Greenberg', with a long horizontal flourish extending to the right.

Edward D. Greenberg

cc: All Parties of Record

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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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

---

**MOTION FOR PROTECTIVE ORDER**

RHONDA S. FERGUSON  
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*Attorneys for Union Pacific Railroad Company*

May 24, 2017

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

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**MOTION FOR PROTECTIVE ORDER**

Pursuant to 49 C.F.R. § 1104.14(b), Union Pacific Railroad Company respectfully requests that the Surface Transportation Board enter a protective order in the above-captioned proceeding, in the form provided in Appendix A to this motion. The proposed order is required to permit Union Pacific to submit to the Board certain railroad-specific and shipper-specific competitively sensitive and proprietary information in order to respond to the joint petition for enforcement of Decision No. 44 filed by BNSF Railway Company (“BNSF”) and Mission Rail Industrial Park, LLC (“MRIP”). The proposed order will also facilitate expeditious resolution of this proceeding. The proposed order generally follows the format of protective orders the Board has entered in other recent cases.

Counsel for BNSF and MRIP have indicated that BNSF and MRIP do not object to the entry of the proposed order. Accordingly, Union Pacific requests that the Board enter the proposed order, including the forms of undertaking that accompany it.

Respectfully submitted,

/s/ Michael L. Rosenthal  
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Covington & Burling LLP  
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850 Tenth Street, NW  
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(402) 544-3309

*Attorneys for Union Pacific Railroad Company*

May 24, 2017

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 24th day of May, 2017, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or a more expeditious manner of delivery on the following counsel of record in Finance Docket No. 32760:

Adrian L. Steel, Jr.  
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2401 Pennsylvania Ave, NW, Suite 300  
Washington, DC 20037

/s/ Michael L. Rosenthal

## **Appendix A**

### **PROTECTIVE ORDER**

1. For purposes of this Protective Order:
  - a. “Confidential material” means information or material designated as “CONFIDENTIAL,” and any information or material derived therefrom.
  - b. “Highly Confidential material” means information or material designated as “HIGHLY CONFIDENTIAL,” and any information or material derived therefrom.
  - c. “Party” means the Union Pacific Railroad Company, BNSF Railway Company, and Mission Rail Industrial Park, LLC.
  - d. “Proceeding” means the proceedings in STB Docket No. 32760 related to the Joint Petition of BNSF Railway Company and Mission Rail Industrial Park, LLC for Enforcement of Decision No. 44 (BNSF-129/MRIP-1) and any judicial review proceeding arising therefrom.
2. Any Party producing information or material in discovery to another Party in this Proceeding, or submitting information or material in pleadings or evidence in this Proceeding, that the Party believes in good faith reveals confidential information may designate such information or material as “CONFIDENTIAL” in accordance with paragraph 4.
3. Any Party producing information or material in discovery to another Party in this Proceeding, or submitting information or material in pleadings or evidence in this Proceeding, that the Party believes in good faith reveals shipper-specific or railroad-specific rate, cost, quantity, routing, or other competitively sensitive or proprietary information may designate such information or material as “HIGHLY CONFIDENTIAL” in accordance with paragraph 4.
4. The designation of information or material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” shall be made as follows:
  - a. For pleadings, by imprinting the word(s) “Confidential” or “Highly Confidential” on the cover page of the pleading.
  - b. For documents and other materials, by imprinting the word(s) “Confidential” or “Highly Confidential” on the face of each page of a document so designated or in a similarly conspicuous location for non-document materials.
  - c. For depositions, by indicating on the record at the deposition or upon review of the deposition transcript which portions of the transcript and/or responses should be treated as “Confidential” or “Highly Confidential.”

- d. For electronically stored information, either by imprinting the word(s) “Confidential” or “Highly Confidential” on any disk or storage medium, or on the face of each page of a document so designated.
5. Confidential Material may not be disclosed in any way, directly or indirectly, to any person or entity, except to an employee, counsel, consultant, or agent of a Party to these Proceedings, or an employee of such counsel, consultant, or agent, who, before receiving access to such information or material, has received and read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking in the form set forth in the Undertaking for Confidential Material.
  6. Highly Confidential Material may not be disclosed in any way, directly or indirectly, to any employee of a Party to these Proceedings, or to any other person or entity, except to an outside counsel or outside consultant of a Party, who, before receiving access to such information or material, has received and read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking in the form set forth in the Undertaking for Highly Confidential Material.
  7. Confidential Material and Highly Confidential Material shall be used solely for the purposes of this Proceeding, and not for any other business, commercial, operational, or competitive purposes.
  8. In the event that a Party produces material which should have been designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” and inadvertently fails to designate the material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL,” the producing Party may notify the other parties in writing within 10 days of discovery of its inadvertent failure to make the confidentiality designation and promptly furnish properly designated material. A Party that received the material without the confidentiality designation must return the non-designated material or destroy it, as directed by the producing Party, or take such other steps as the parties agree to in writing, and must make all reasonable efforts to recover such material from any non-parties to which it may have been disclosed, and any copies made by such non-parties.
  9. In the event that a Party inadvertently produces material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, the producing Party may make a written request within a reasonable time after it discovers the inadvertent disclosure that another Party return the inadvertently produced material. A Party that received the inadvertently produced material must either return the material or destroy it immediately upon receipt of the written request, as directed by the producing Party. By returning or destroying the material, the receiving Party is not conceding that the material is privileged and is not waiving its right to later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege.
  10. No Party may include Confidential Material or Highly Confidential Material in any pleading, brief, discovery request or response, or other document submitted to the Board,

unless the pleading or other document is submitted under seal, in a package clearly marked on the outside as “Confidential Materials Subject to Protective Order.” See 49 CFR 1104.14.

11. If any Party intends to use Confidential Material or Highly Confidential Material at a Board hearing or mediation in this Proceeding, or in any judicial review proceeding arising herefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such Confidential Material or Highly Confidential Material to the Board, the mediator, or the court, as appropriate, with a written request that the Board, the mediator, or the court: (a) restrict attendance at the hearings or mediation sessions during discussion of such Confidential Material or Highly Confidential Material and (b) restrict access to the portion of the record or briefs reflecting discussion of such Confidential Material or Highly Confidential Material in accordance with the terms of this Protective Order.
12. If any Party intends to use Confidential Material or Highly Confidential Material in the course of any deposition in this proceeding, the Party so intending shall so advise counsel for the Party producing the materials, counsel for the deponent, and all other counsel attending the deposition, and all portions of the deposition at which any such Confidential Material or Highly Confidential material is used shall be restricted to persons who may review the material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose Confidential Material or Highly Confidential Material shall be kept under seal and treated as Confidential Material or Highly Confidential Material in accordance with the terms of this Protective Order.
13. Except for this proceeding, the Parties agree that if a Party is required by law or order of a governmental or judicial body to release “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material produced by the other Party or copies or notes thereof as to which it obtained access pursuant to this Protective Order, the Party so required shall notify the producing Party in writing within three working days of the determination that the “CONFIDENTIAL” material, “HIGHLY CONFIDENTIAL” material, or copies or notes are to be released, or within three working days prior to such release, whichever is soonest, to permit the producing Party the opportunity to contest the release.
15. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it shall not be subject to this Protective Order even if the same information is produced and designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in this proceeding.
16. A “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” designation may be removed by consent of a Party who asserts the confidential, proprietary, or commercially sensitive interest, or absent such consent, by appropriate decision of the Board upon application of a Party seeking to remove such designation.
17. Each Party has a right to view its own data, information and documentation (i.e., information originally generated or compiled by or for that Party or if generated or

compiled by another Party, the information the data, information or documentation was disclosed by the producing Party in the ordinary course of business to the other Party), even if that data, information and documentation has been designated as “HIGHLY CONFIDENTIAL” by a producing Party, without securing prior permission from the producing Party.

18. If a Party or Parties (the “filing party or parties”) file and serve upon another party or parties (the “reviewing party or parties”) a pleading or evidence containing the “HIGHLY CONFIDENTIAL” material of the filing party or parties, the filing party or parties shall also contemporaneously provide to outside counsel for the reviewing party or parties a list of the “HIGHLY CONFIDENTIAL” information of the filing party or parties contained in the pleading that must be redacted from the “HIGHLY CONFIDENTIAL” version prior to review by the In-house Personnel of the reviewing party or parties.
19. Any Party that receives Confidential Material or Highly Confidential Material that is not the Party’s own information or material, and any information or material derived therefrom, must be destroyed by the receiving Party, its employees, counsel, and agents at the completion of this Proceeding, except that (1) outside counsel for each Party may retain file copies of all pleadings and evidence filed with the Board; and (2) in-house counsel for each Party may retain file copies of all pleadings and evidence which they were authorized to review under this Protective Order.
20. Any Party filing with the Board a “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” pleading in this proceeding should simultaneously file a public version of the pleading.

## UNDERTAKING

### CONFIDENTIAL MATERIAL

I, \_\_\_\_\_, have read the Protective Order served on \_\_\_\_\_ [ date ], governing the production of confidential documents in STB Docket No. 32760, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than the preparation and presentation of evidence and argument in STB Docket No. 32760 or any judicial review proceeding arising herefrom. I further agree not to disclose any data or information obtained under this Protective Order to any person who has not executed an Undertaking in the form hereof. At the conclusion of this proceeding and any judicial review proceeding arising herefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that counsel may retain copies of pleadings which they were authorized to review under the Protective Order.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

\_\_\_\_\_  
Dated: \_\_\_\_\_

## UNDERTAKING

### HIGHLY CONFIDENTIAL MATERIAL

As outside [ counsel ] [ consultant ] for \_\_\_\_\_, for which I am acting in this proceeding, I have read the Protective Order served on \_\_\_\_\_ [date ], governing the production of confidential documents in STB Docket No. 32760, understand the same, and agree to be bound by its terms. I further agree not to disclose any data, information or material designated “HIGHLY CONFIDENTIAL” to any person or entity who: (i) is not eligible for access to “HIGHLY CONFIDENTIAL” material under the terms of the Protective Order, or (ii) has not executed a “HIGHLY CONFIDENTIAL” undertaking in the form hereof. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated “HIGHLY CONFIDENTIAL,” that I will limit my use of those documents and the information they contain to this proceeding and any judicial review proceeding arising herefrom, that I will take all necessary steps to assure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners, and that at the conclusion of this proceeding and any judicial review proceeding arising herefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel and consultants may retain file copies of pleadings filed with the Board. I further understand that I must destroy all notes or other documents containing such highly confidential information in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated “HIGHLY CONFIDENTIAL” by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

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OUTSIDE [COUNSEL] [CONSULTANT]

Dated: \_\_\_\_\_

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**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**

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**PETITION FOR LEAVE TO FILE REBUTTAL STATEMENT**

Pursuant to the provisions of 49 C.F.R. § 1117.1, Mission Rail Industrial Park, LLC (“MRIP”) respectfully requests leave to file the attached Rebuttal Verified Statement of Richard Kinsel, responding to Union Pacific’s Reply to Joint Petition for Enforcement of Decision No. 44 submitted on May 25, 2017 (the “Union Pacific Reply”).<sup>1</sup>

Although the Board’s rules do not permit the submission of a reply to a reply as a matter of right, 49 C.F.R. § 1104.13(c), the Board has waived this restriction in situations where good cause has been shown in the interest of compiling a full record.<sup>2</sup> The Union Pacific Reply and the supporting verified statements that were submitted at the same time contain a number of inaccurate and misleading statements of purported fact. MRIP is compelled to respond to several

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<sup>1</sup> The acronyms and defined terms used herein are the same as those used in the Petition and in Appendix B to Decision No. 44.

<sup>2</sup> See, e.g., F.D. 35960, *Petition of Union Pac. R.R. Co. for Declaratory Order* (served Sept. 30, 2016); F.D. 35157, *The City of Alexandria, Virginia – Petition for Declaratory Order* (served Nov. 6, 2008); F.D. 35765, *Wichita Terminal Association, BNSF Railway Company and Union Pacific Railroad Company – Petition for Declaratory Order* (served May 20, 2014). See also 49 C.F.R. §1100.3 (“The rules will be construed liberally to secure just, speedy and inexpensive determination of the issues presented.”)

specific assertions by the submission of the rebuttal verified statement of Richard Kinsel in order to correct the record, so that the Board can have an accurate record on which to base its decision in this matter.

For example, the Union Pacific Reply, including the statements of its witnesses, creates a fictitious town and rail station called Purcell for the apparent purpose of buttressing its contention that the location of MRIP's industrial park (the "Park") is wholly distinct and apart from the city of Elmendorf, Texas. Mr. Kinsel's rebuttal verified statement explains that there is no town of Purcell, Texas and that Union Pacific created the Purcell "station" for the purpose of defeating BNSF's attempt to provide competitive rail service to the Park and its tenants.

Similarly, in replying to the competitive market issues raised in the Joint Petition and Mr. Kinsel's initial verified statement, the Union Pacific Reply contends that its rates and service have not been responsible for the economic difficulties that both MRIP and its tenant have faced. In doing so, Union Pacific has carefully provided data on frac sand usage and its own carloadings of that commodity in a broad geographic market encompassing the vast Eagle Ford Shale region. However, that market has no relevance to the issues in this proceeding and significantly distorts the economic situation that its service to the Park created. Mr. Kinsel's rebuttal verified statement explains why Union Pacific's use of data pertaining to the entire Eagle Ford Shale region inaccurately portrays the relevant geographic market and corrects the record as to the economic harm MRIP and its shipper have sustained.

The Union Pacific Reply also contains a number of inaccurate assertions about the nature of discussions between MRIP and its predecessor Frac Resources, LLC, on the one hand, and Union Pacific on the other relating to the future potential access to the Park by BNSF. For example, Union Pacific proffered a statement from one witness (Mr. Chris Sanford) who denied

having any knowledge that MRIP or Frac Resources wanted both Union Pacific and BNSF to serve the Park, stating that had there been any such discussions, he surely would have known about it. Mr. Kinsel's rebuttal verified statement provides the names of three employees in Union Pacific's business development group who were privy to those specific discussions.

Similarly, the Union Pacific reply misrepresents the meaning of a provision in the Industrial Track Agreement that Union Pacific required Frac Resources to sign, contending that MRIP must have known that the reference to multiple carrier service at the Park was meaningless since it never asked what that provision meant. The rebuttal verified statement of Mr. Kinsel explains why Frac Resources did not question the meaning of the plain language in that section of the ITA, as well as his understanding of Union Pacific's motivation for accelerating repayment of the cost of construction of the spur connecting the Park with the Union Pacific's mainline.

Finally, Mr. Kinsel's rebuttal verified statement also addresses a number of misleading statements made by Union Pacific's witnesses about the nature of the track that was constructed to serve the Park. These issues are relevant to the determination of (1) whether the Track is currently properly classified as § 10906 excepted track or a § 10901 line of railroad, and (2) whether the Track's current jurisdictional classification matters given that BNSF's right to serve the Park via the Track under the RASA accrued upon completion of the Track's construction as § 10906 excepted track and cannot be defeated by Union Pacific's after-the-fact actions to convert the track to a § 10901 line of railroad.

MRIP could not have anticipated that the Union Pacific Reply would contain the various inaccuracies and misleading statements, and MRIP had no opportunity to address the purported facts presented by Union Pacific in Mr. Kinsel's initial Verified Statement. Where a party could

not reasonably have anticipated the contentions of an opponent that could be material to the resolution of a case, it has good cause for being granted leave to reply. *See, e.g., Delaware & Hudson Ry. Co. v. Consol. Rail Corp. – Reciprocal Switching Agreement*, 9 I.C.C. 2d 989, 990 (1993). MRIP therefore believes that good cause exists for it to now correct the record so that the Board will have an accurate basis on which to render a decision.

Neither this Petition nor the proposed Rebuttal Verified Statement of Mr. Kinsel raise any new legal issues or expand the nature of this proceeding. And, allowing this rebuttal statement into the record will not prejudice any party because the Board has not yet issued any rulings on the merits of the issues raised in this proceeding other than to deny Union Pacific's Motion to Dismiss. (See Decision No. 108, served May 5, 2017.) *See, e.g., Tongue River R.R. Co., Inc. – Construction and Operation – Western Alignment*, F.D. 30186 (Sub. No. 3).

Accordingly, and for the reasons stated above, MRIP requests that the Board grant this Petition for Leave to File the Rebuttal Verified Statement of Mr. Richard Kinsel in this proceeding.

Respectfully submitted,

/s/ Edward D. Greenberg  
Edward D. Greenberg  
GKG Law, P.C.  
1055 Thomas Jefferson Street, N.W.  
Suite 500  
Washington, D.C. 20007  
Tel: 202-342-5277

*Counsel for Mission Rail Industrial Park, LLC*

Dated: June 16, 2017

## CERTIFICATE OF SERVICE

I hereby certify this 16<sup>th</sup> day of June, 2017, that I have caused the foregoing Petition to for Leave to File Rebuttal Statement to be served as indicated below on the following counsel of record for the parties:

Michael L. Rosenthal  
Covington & Burling LLP  
One CityCenter  
850 Tenth Street, NW  
Washington, D.C. 20001

Adrian L. Steel, Jr.  
Adam C. Sloane  
Peter W. Denton  
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William A. Mullins  
Baker & Miller PLLC  
2401 Pennsylvania Ave, NW, Suite 300  
Washington, DC 20037

/s/ Edward D. Greenberg  
Edward D. Greenberg

**PUBLIC - REDACTED**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**Finance Docket No. 32760**

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

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**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.<sup>1</sup>

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

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<sup>1</sup> 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, the Simmons Report, 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:

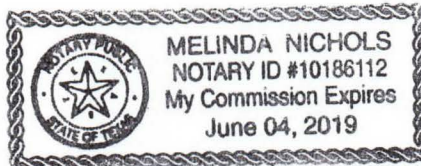
SUBSCRIBED AND SWORN TO before me this 14<sup>th</sup> day of June 2017 by Richard Kinsel.

Witness my hand and official seal.

*Melinda Nichols*  
Notary Public

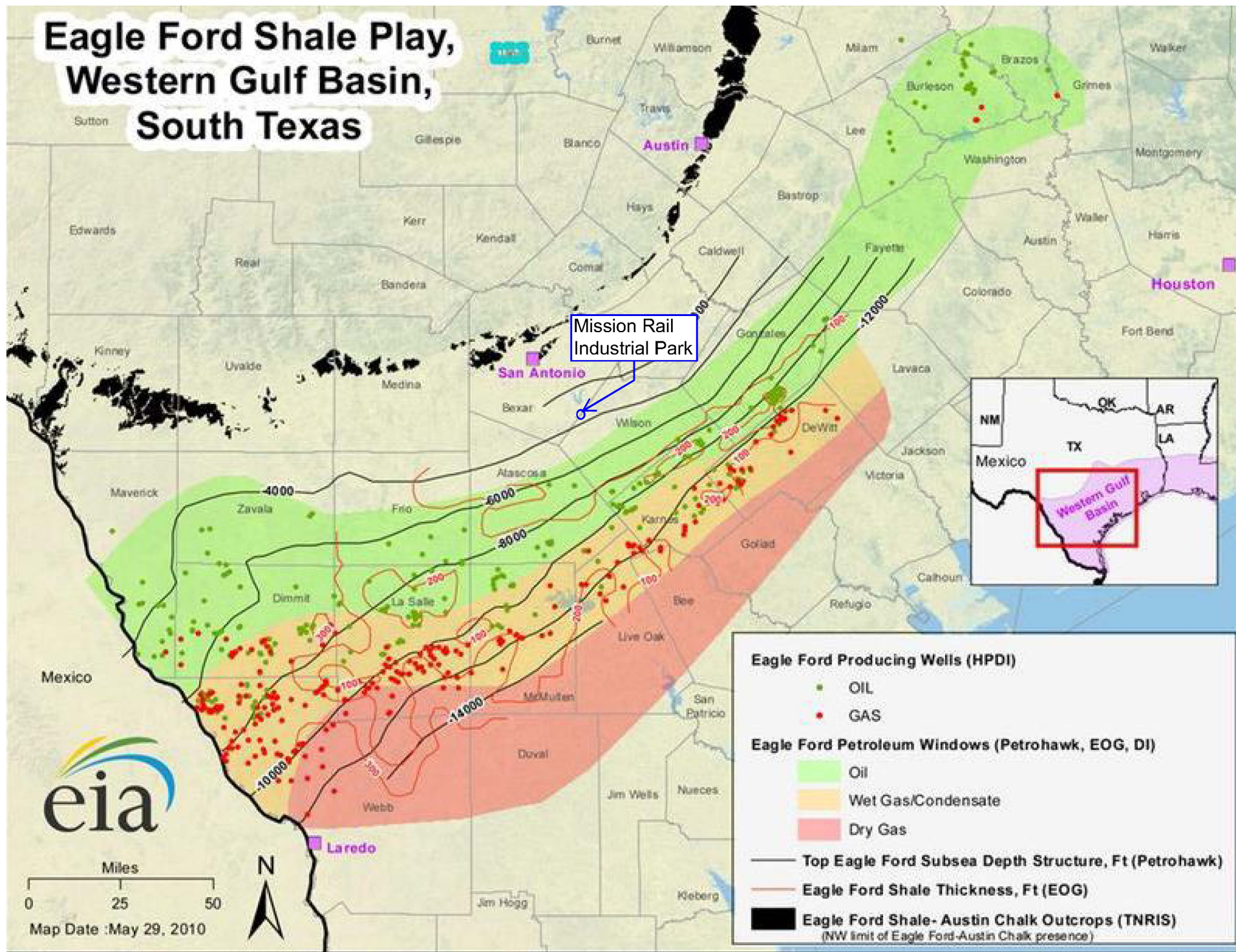
My commission expires:

6-4-2019



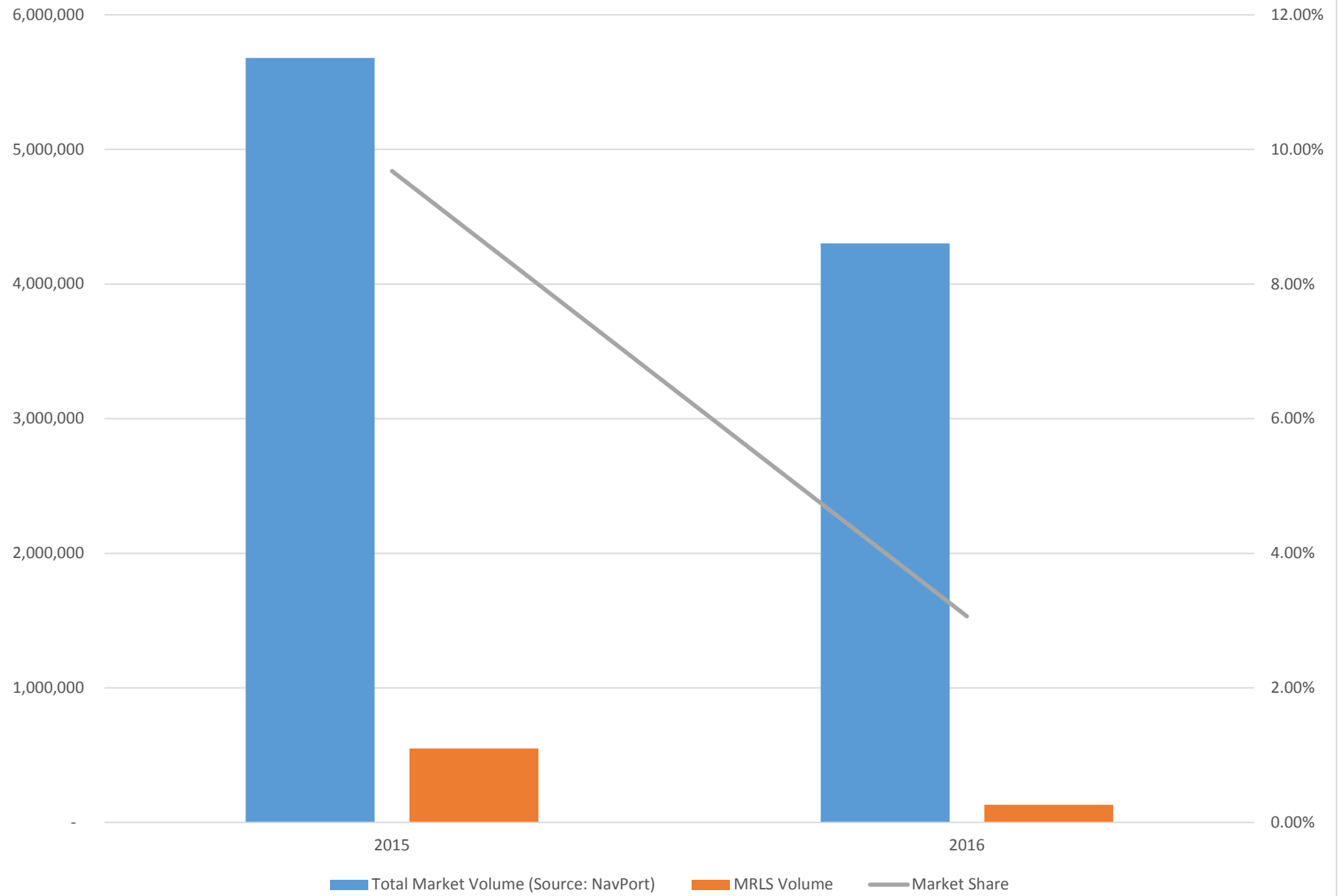
# **EXHIBIT 3**

# Eagle Ford Shale Play, Western Gulf Basin, South Texas



# **EXHIBIT 4**

Mission Rail 50 Mile Radius - Volume Comparison



# **EXHIBIT 5**

**REDACTED**