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February 4, 2019

VIA E-FILING

Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: FD 32760 (Sub-No. 46)
BNSF Railway Company – Terminal Trackage Rights – The Kansas City
Southern Railway Company And Union Pacific Railroad Company

Dear Ms. Brown:

The Kansas City Southern Railway Company ("KCS") hereby files, via e-filing, KCS's response to the Surface Transportation Board's ("Board") request issued in Decision No. 6 to provide additional information that would assist the Board in establishing compensation for BNSF's use of the Rosebluff Lead. KCS's response is being filed in both a "Public Version" and a "Highly Confidential" version. If there are any questions concerning this e-filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com.

Sincerely,



William A. Mullins

Enclosures

cc: Parties of Record

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 32760 (SUB-NO. 46)

BNSF RAILWAY COMPANY
-- TERMINAL TRACKAGE RIGHTS APPLICATION --
THE KANSAS CITY SOUTHERN RAILWAY COMPANY AND
UNION PACIFIC RAILROAD COMPANY

RESPONSE OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY
TO DECISION NO. 6

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February 4, 2019

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**BEFORE THE
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**BNSF RAILWAY COMPANY
-- TERMINAL TRACKAGE RIGHTS APPLICATION --
THE KANSAS CITY SOUTHERN RAILWAY COMPANY AND
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**RESPONSE OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY
TO DECISION NO. 6**

SUMMARY¹

In Decision No. 6, the Board has requested KCS, UP and BNSF to provide information about a methodology the Board has suggested sua sponte that it might use for determining BNSF's payment for the trackage rights BNSF seeks to serve Lyondell. KCS here responds to the Board's questions,² including discussion of compensation principles that the Board should

¹ KCS adopts the various short citations and abbreviations that it previously used throughout this proceeding.

² In Decision No. 6, the Board asks a number of questions related to what compensation BNSF should pay for the grant of trackage rights that BNSF currently seeks to serve Lyondell. Decision No. 6 does not contain sufficient information regarding BNSF's scope of operations for KCS to calculate certain elements of the SSW compensation that can only be calculated if one knows the operating conditions. Likewise, Decision No. 6 did not provide sufficient time, even with the government shutdown, for KCS to develop and provide the evidence relevant to the interest rental component of an SSW calculation. As such, KCS understands that the intent of Decision No. 6 is to bifurcate the proceeding into two separate phases: first, a determination on the choice of valuation methodology to be applied based upon the parties' answers to Decision No. 6; and then second, the parties would produce and develop evidence addressing the application of the Board's chosen methodology. See New England Central Railroad, Inc. – Trackage Rights Order – Pan Am Southern LLC, FD 35842, slip op. at 4 (STB served February 12, 2016). This would be consistent with Public Service Company of Colorado D/B/A Xcel Energy v. The Burlington Northern & Santa Fe Railway Company, NOR 42057, slip op. at 5 (STB served January 19, 2005) ("PSC Xcel"), reconsideration denied Burlington Northern &

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consider in fulfilling its statutory and Constitutional obligations for the proposed taking of KCS's property rights for BNSF's benefit.

SSW compensation principles are inapplicable and inappropriate in this case, as established by Board precedent. This case does not involve implementing bridge trackage rights upon the parties involved in a merger, the circumstances in which SSW has applied in the past. Here, KCS was not a merger applicant. It was not KCS's actions that resulted in the loss of SP service to the Lake Charles Area. KCS was not a party to any settlement agreements or economic terms between UP and BNSF. KCS was not free to walk away if it did not like the Lake Charles Condition. KCS is not free to walk away if it does not like the Board's decision in this case. Thus, in the circumstances of this case, imposing BNSF access is a taking of KCS property requiring KCS be given compensation to put it in the same economic condition it would have been absent the taking. SSW, standing alone, does not meet that standard.

Over nearly fifty years, KCS bought, built, and invested in the Rosebluff Lead, competing to serve West Lake Charles shippers on market-based terms that had been negotiated with UP's predecessors. By imposing the Lake Charles Condition in the UP/SP merger and now appearing to be on the precipice of granting BNSF direct terminal trackage rights, the Board will be using its extraordinary regulatory powers to force KCS to allow a second competitor, ten times its size, to use KCS's tracks and property to compete for shippers' traffic, not at market rates, but at very favorable cost and service terms not available to KCS. The Board may believe that it is merely preserving pre-merger competition, but it is not. That competition was

Santa Fe Ry. v. STB, 453 F.3d 473, 2006 U.S. App. LEXIS 14749 ("BNSF Ry"); and Duke Energy Corp. v. Norfolk S. Ry., NOR 42069, slip op. at 13-15 (served Nov. 6, 2003) ("Duke/NS") where the Board allowed the parties to develop their best case before the Board made a decision on the evidence.

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preserved or enhanced when UP replaced SP, and was further expanded beyond pre-merger competition when the Board imposed the Lake Charles Condition, allowing a third competitor - BNSF - access via reciprocal switch.³ Those actions created an unlevel playing field that has allowed BNSF to garner a significant share of Lyondell's traffic.

Though the Board may now believe granting BNSF direct terminal trackage rights is also merely preserving pre-merger competition, depending upon what operational and compensation terms are adopted, the Board's decision could have precisely the opposite effect - a reduction in KCS's ability to invest and compete for Lake Charles Area traffic by granting BNSF a further competitively advantaged position at KCS' expense. The Board's contemplation of imposing simple SSW compensation for BNSF trackage rights to Lyondell would tilt the unlevel playing field even further by (1) giving BNSF access at sub-market rates, and competitively disadvantaging KCS; (2) granting BNSF access to Lyondell for manifest traffic that even KCS as a co-owner of the Rosebluff Lead doesn't have;⁴ and (3) forcing KCS to bear costs caused by

³ Prior to the UP/SP merger, West Lake Charles Zone 2 shippers (Zone 2 is where CITGO and Lyondell are located) was served only by SP and KCS, with SP providing a reciprocal switch to KCS via a negotiated market rate. Given that UP stepped into the shoes of SP and that UP was a much stronger competitor, the pre-merger competitive landscape with respect to Lyondell was at least preserved, if not improved, without BNSF access. The grant of access to BNSF by UP and the Board imposed Lake Charles Condition, and the implementation of that condition via UP providing BNSF with a reciprocal switch (even BNSF acknowledged that it could access Lake Charles shippers via a reciprocal switch, see Decision No. 63, slip op. at 5), actually provided more competitive options to Lyondell than existed pre-merger. Thus, to the extent competition is to be preserved or even enhanced in a merger situation, such a competitive landscape already exists without the need to impose additional competitive access via BNSF direct terminal trackage rights. Granting BNSF additional access via direct trackage rights for manifest traffic to Lyondell -- a right that KCS does not even possess -- only further enhances BNSF's competitive advantage at KCS's expense.

⁴ Under the 1981 switching agreement between KCS and SP, which long predates the UP/SP merger, KCS itself can't operate directly to Lyondell in the same manner that BNSF proposes via direct access to Lyondell, but can only deliver unit trains of 25 or more cars moving on a single bill of lading.

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BNSF's operation that are not accounted for in SSW; and (4) depriving KCS of contribution to support its local and interstate network.

Beyond that unfair outcome for KCS at Lake Charles, the Board may also unintentionally set in motion precedent that, if applied in future access proceedings, would undermine the economic principles that are a critical underpinning of successful investment in rail capacity by the owners of private infrastructure. BNSF's demand for access to KCS' property is akin to forced switching, and thus the compensation principles established here may have much broader implications in matters like the pending Ex Parte 711 (Sub-No. 1) rulemaking.

The Board should not grant BNSF terminal trackage rights to serve Lyondell. But if the Board does, then the terms and conditions of that access must not provide BNSF with an undue competitive advantage. To be consistent with the Fifth Amendment and ICCTA's mandate to adopt policies allowing KCS to earn adequate revenues, *i.e.*, achieve revenue adequacy,⁵ KCS must be compensated in a manner that puts it in as good a position economically as it would have been absent access by BNSF. Seaboard Air Line Ry. v. United States, 261 U.S. 299, 304 (1923) (citation omitted); see also Olson v. United States, 292 U.S. 246, 254-55 (1934); United States v. Miller, 317 U.S. 369, 373 (1943); United States v. 564.54 Acres of Land, 441 U.S. 506, 510 (1979); and United States v. Virginia Elec. & Power Co., 365 U.S. 624, 633 (1961).

To comply with these mandates and if the Board moves forward, "just compensation" requires that the Board compensate KCS for all additional operating costs associated with BNSF's access, a return on KCS's invested track infrastructure, and compensation for the lost contribution caused by BNSF's access to Lyondell. These will be discussed below and in

⁵ See 49 U.S.C. §10101(3). Since the Board began publishing Railroad Revenue Adequacy Determinations in 1995, KCS has never been found by the STB to be revenue adequate and consistently remains near the bottom of the revenue adequacy list.

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responding to the specific questions set forth in Decision No. 6, but to summarize the general principles briefly, they are:

First, BNSF's operations must be limited to serving only Lyondell and must occur during UP's window. It was UP - not KCS - that entered the agreement with BNSF under which BNSF claims access. To the extent BNSF's operations, even confined to UP's window, nevertheless cause delays and additional costs to KCS's use of its window to serve shippers it switches, BNSF should compensate KCS for those additional costs.

Second, BNSF should be required to pay KCS a market-based per car rate representing the lost contribution that KCS otherwise could have achieved absent BNSF's government-mandated use of KCS's property. SSW does not account for the contribution to network costs that the Lyondell traffic generates - contribution that has already has largely been lost to KCS due to BNSF access through reciprocal switching and could be further lost due to BNSF's requested direct access.

Third, because BNSF will be using the Rosebluff Lead, KCS is entitled to compensation for any additional costs associated with that movement and is entitled to a return on its invested capital in the Rosebluff Lead. To the extent that SSW applies at all, it only applies to calculate the rental rate BNSF should pay for use of the Rosebluff Lead trackage. If the Board applies SSW to determine the interest rental portion of the rate, it should use replacement costs, specifically reproduction cost new less depreciation. As explained by Julie M. Carey, an economist and Director of National Economic Research Associates, Inc. and Adjunct Professor at Georgetown University ("Professor Carey") in the Verified Statement of Julie M. Carey, Exhibit A ("VS Carey"), the use of capitalized earnings for the interest rental component ("Interest Rental Component") would diminish KCS's ability to achieve revenue adequacy.

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Fourth, BNSF should be required to pay for any additional infrastructure necessary to accommodate BNSF's operations. This should apply for the present and in the future. Likewise, to the extent that there are extraordinary expenses, such as those caused by a natural disaster; BNSF should be required to contribute to those costs, as commonly provided in trackage rights agreements stemming from the UP/SP merger.

Finally, BNSF should be required to enter into contractual arrangements with KCS and UP governing BNSF's use of the Rosebluff Lead. Those arrangements should provide for the implementation of the above principles and require BNSF to indemnify KCS due to its presence on the Rosebluff Lead. BNSF should also be required to carry appropriate amounts of insurance or to provide appropriate self-insurance commitments.

ARGUMENT

I. THIS PROCEEDING IS AN UNPRECEDENTED COMMINGLING OF THE BOARD'S MERGER AND COMPETITIVE ACCESS PRECEDENTS

In continuing to treat this proceeding as simply implementing a condition imposed twenty-two years ago on the UP/SP merger, as well as in suggesting application of the merger-based SSW compensation principles, the Board overlooks key considerations demonstrating that this proceeding could not be farther from the simple implementation of merger conditions.

Had KCS been a merger applicant, then giving KCS the choice whether to allow BNSF access over its tracks to serve Lyondell or, instead, to forego its merger, would have been consistent with merger precedent. However, KCS was not a merger applicant. Rather, KCS is the innocent bystander of a promise that UP made but had no legal right to make, and which the Board had no legal right to impose on KCS. When KCS first raised this issue in September 1996 by petitioning the Board to reopen or reconsider

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UP/SP Decision No. 44, the Board, in effect, declined to rule on the very difficult issue of how it could impose access over KCS and deferred to future negotiation or a future terminal trackage rights application under Section 11102(a).

In Decision No. 3, the Board said that allowing UP to deny BNSF access that UP promised in settlement negotiations based on the presence of a co-owner would severely undermine the purpose of the merger conditions and the integrity of the Board's processes. But this ignores the fact that UP did not deny BNSF the access it promised. Instead, UP implemented that access through reciprocal switching. In doing so, competition was not only preserved, but enhanced by making West Lake Charles a 2-to-3 service area.

Now the Board appears to believe that it needs to do even more to preserve pre-merger competition or else its merger conditions would be undermined, but the Board's statement that denying BNSF access to property partly owned by KCS would undermine the integrity of the Board's processes⁶ overlooks that it was BNSF and UP, not KCS, that undermined the Board's processes by entering into an agreement that they lacked the property and contractual rights to enter.⁷ Moreover, when they proposed it to the Board, neither one of them informed the Board of the legal impediments to implementation of that condition. By the time the Board reconsidered the issue in Decision No. 63 in December 1996, the horse was already out of the barn, the merger already consummated.

⁶ Decision No. 3, slip op. at 12.

⁷ The March 29, 1948 contract between UP's predecessor and KCS governing management of the Rosebluff Lead acknowledges that the parties are joint and equal owners of the Rosebluff Lead, and that "neither shall sell, lease or transfer its interest in the jointly owned tracks, or any part thereof, without the advance written approval by the other party." It is KCS's position that an agreement by UP to allow BNSF to operate on the Rosebluff Lead transfers a part of UP's interest in the track, without KCS's agreement.

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Today, if anything is undermining the integrity of the Board's processes and precedents, it is the imposition of BNSF access over KCS's property as a condition to a merger to which KCS was not a party, especially when that access is not needed to preserve the pre-merger competitive landscape. KCS was not a party to any settlement agreements or economic terms between UP and BNSF. KCS was not free to walk away if it did not like the Lake Charles Condition. The Board is well aware that it is black letter law that the Board cannot compel trackage rights over a non-merging carrier, as KCS was in the UP/SP merger, except in the very limited bridge-the-gap situation. See In Rio Grande Industries, et al.—Pur. & Track. – CMW Ry. Co., 5 I.C.C.2d 952, 1989 ICC LEXIS 284, *56 (1989) (the Interstate Commerce Commission ("ICC") explained that it could not use its "plenary" authority under former section 11341 (now section 11324) "to compel a [non-applicant] carrier to grant trackage rights over its line to another carrier."); see also Rio Grande Industries, Inc., et al. – Purchase and Related Trackage Rights – Soo Line Railroad Company Line Between Kansas City, MO and Chicago, IL, Finance Docket No. 31505, 1989 ICC LEXIS 351, Decision No. 6, slip op. at 8 (ICC served Nov. 13, 1989). Yet, that is precisely what the Board apparently intends to do in this proceeding.

There are several problems with this approach. First, as noted, the Board cannot impose merger conditions on a non-applicant carrier, yet that is what the Board proposes to do in this proceeding. Second, the Board is ignoring that the Board's public interest standard for imposing a merger condition is far different than the higher public interest standard required under Section 11102. The Board also ignores the fact that the Board cannot rely upon a factual record more than twenty years old supporting a merger condition as a proxy for the factual findings required to grant a terminal trackage rights application filed almost twenty years later under Section 11102. Finally, even if the Board were here imposing a merger condition, and even if the Board

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could use Section 11102 as the means to impose that condition, such an approach disregards years of precedent that merger conditions must not put the proponent of the condition in a better position than before the merger and must be the least intrusive remedy. BNSF trackage rights to Lyondell would give Lyondell more competition than its predecessor had prior to the UP-SP merger, and terminal trackage rights are not the least intrusive remedy. When considered collectively, these very considerations make it apparent that the Board is not simply implementing merger conditions, but rather exercising an unprecedented use of its competitive access powers without establishing the required predicates for granting such relief.

A. The Public Interest Analysis

Decision No. 3 not only cast aside the Midtec analysis normally applicable to a public interest finding in a Section 11102 case, but it also cast aside the application of Section 11102 in the UP/SP merger to impose “bridge the gap” overhead trackage rights. Decision No. 3, at 8. In lieu of these long-standing public interest precedents, the Board has created a totally new public interest standard in this case. This Board’s new standard is simplistic: 22 years ago the Board found that the public interest required BNSF access to Lyondell’s predecessor and other West Lake Charles shippers, so now that BNSF desires direct access to Lyondell, the Board will ignore that BNSF has had access to Lyondell for 22 years via reciprocal switching and will instead cut and paste the public interest findings from 22 years ago – when BNSF didn’t have access to Lyondell’s predecessor - to grant BNSF terminal trackage rights under Section 11102(a). By this conflation of Section 11343 and Section 11102, the Board would allow BNSF to garner an even larger market share of West Lake Charles business that KCS and UP spent decades building.

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To sustain a change in the type of access after twenty-two years, the public interest finding required under Section 11102(a) must be based upon the competitive environment that exists today. The Board cannot cut and paste public interest findings from the 1996 UP/SP merger for the requisite public interest findings required in 2018 to decide an application under a Section 11102(a). The Board ignores that Section 11102 appropriately has a different public interest standard than the one the Board reviews and applies in determining whether a merger condition should be imposed, because Section 11102(a) applies to involuntarily imposed rights whereas a merger is a voluntary transaction.

The Board's public interest finding simply assumes that Lyondell's competitive posture today is the same as Lyondell's predecessor's competitive posture was in 1996, before the Board first imposed the Lake Charles Condition. That assumption is plainly false. At the time of the UP/SP merger, Lyondell's predecessor Montell was served by SP and KCS. SP was to be replaced by UP. Under normal STB merger precedent, that should have been enough. There would be two carriers before the merger and two carriers after the merger. But as a result of the Lake Charles Condition and UP's subsequent implementation of that merger condition through granting BNSF a reciprocal switch, Lyondell has been able to access three carriers – UP, KCS, and BNSF via a UP switch. Access by BNSF via reciprocal switching has resulted in BNSF gaining a significant market share.⁸

Notwithstanding that BNSF has gained a considerable market share over the past two decades serving Lyondell via reciprocal switching, the Board now claims that its public interest findings of 22 years ago – findings under Section 11323, et seq., not under Section 11102(a) -

⁸ See VS Carey, Exhibit A. Clearly, BNSF's presence via reciprocal switching has resulted in BNSF gaining a considerable market share of Lyondell traffic. The existence of both UP and BNSF service has more than preserved the pre-merger competitive landscape.

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justify granting BNSF even more intrusive use of KCS's property to directly serve Lyondell. The Board's findings 22 years ago are inapplicable to Lyondell's competitive posture today. Lyondell is in a completely different competitive situation today than was Montell and the other Rosebluff Lead shippers for whom the Lake Charles Condition was imposed. Lyondell's competitive posture today does not justify a grant of terminal trackage rights.

At a minimum, the Board must make contemporary findings under Section 11102 to show that Lyondell needs direct access for BNSF in order for Lyondell to be in the same competitive posture as Montell was pre and post-merger. Yet, BNSF's Petition and the Board's prior findings are completely devoid of such evidence. At most, there is a letter from Lyondell that says it desires and needs BNSF service in order to improve its transit times. The Lyondell letter fails to show that existing access by UP, KCS, and BNSF places Lyondell in a competitive posture such that the public interest requires direct BNSF access to Lyondell.

Lyondell's complaint that UP's reciprocal switching of Lyondell traffic to BNSF requires two extra days of transit time does not equate to the same showing of public interest that led to the imposition of the Lake Charles Condition in the first place. Lyondell (unlike Montell in 1996) already has access to BNSF via a UP reciprocal switch. The fact that Lyondell thinks it can move its shipments to storage two days⁹ faster through direct BNSF service than through a reciprocal switch does not meet the public interest standard of Section 11102. Granting BNSF direct competitive access under Section 11102 under the facts as they exist today, and thus

⁹ Lyondell does not show why the two days it hopes to gain are important. Montell's traffic, which was one of the basis of the Lake Charles Condition and thus is the basis of the Board's public interest finding adopted in this case, was traffic destined to storage. Nothing shows why Lyondell's traffic needs to move to storage two days more quickly.

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expanding Lyondell's competitive position even further, violates all prior applications of the public interest requirements of Section 11102.

B. A Grant of Section 11102 Competitive Access Fails To Follow Precedent Regarding Imposition of Conditions in a Merger

Even if the Board believes that it can use Section 11102 as the “means” by which to implement its merger condition from 22 years ago, i.e., the Lake Charles Condition, the Board still cannot impose BNSF direct access. This is because the Board has two long-standing principles that it follows when implementing and fashioning a merger condition: First, the condition must not put the proponent of the condition in a better position than before the merger, and second, whatever condition is imposed must be narrowly crafted and the least intrusive means to achieve the desired effect. Decision No. 44, 1 S.T.B. 233, 1996 STB LEXIS 220, *419 (STB served Aug. 12, 1996). The Board fails that test if it grants BNSF terminal trackage rights to serve Lyondell.

There is no need to impose terminal rights to preserve the pre-merger competitive landscape. Lyondell already has access to BNSF via reciprocal switching, giving it access to three carriers rather than the two that served Montell. BNSF's existing access, which is subsidized at non-remunerative rates, has allowed BNSF to gain a significant share of Lyondell's traffic.¹⁰ As such, BNSF's existing access through switching and haulage rights has allowed BNSF to more than fully replicate the competition that might otherwise have been lost when SP merged into UP.

Imposing terminal trackage rights likewise is not a narrowly tailored merger remedy. Terminal trackage rights are to be the remedy of last resort, and are only to be imposed in the

¹⁰ See VS Carey, Exhibit A.

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rarest of circumstances.¹¹ If the Board is to use Section 11102 at all to implement the Lake Charles Condition twenty-two years later, the least intrusive remedy is to invoke Section 11102(c) and impose reciprocal switching (which, in fact, already occurs). Granting terminal trackage rights under these circumstances would, contrary to precedent, actually put Lyondell in a better competitive position than its facility had prior to the merger, with BNSF having unfettered, unlimited rights broader than the contractual rights UP or KCS ever had – or even KCS has now.

C. The Board's Decision Could Have Implications for EP 711

If the Board intends to grant BNSF trackage rights over KCS's property, the Board should be mindful that its decision may have implications with respect to future compensation levels applicable to any EP 711 proceeding. Setting the terms and conditions of BNSF's access in a manner that does not compensate KCS for its lost contribution and provide a return on the replacement cost of its invested capital would place KCS in a worse position than it is in today and hamper KCS's ability to compete against both UP and BNSF for Lyondell traffic. The terms BNSF seeks, if adopted by the Board, would so competitively advantage BNSF as to diminish KCS's, and perhaps UP's, ability to compete for Lyondell's traffic; resulting in less competition, not more. The Board's goal should be - and in fact constitutional principles require - that KCS should be in the same position as it would be without BNSF access. Otherwise, the Board has

¹¹ See Shenango Inc., et. al. v. Pitts., Chartiers & Youghiogeny Ry. Co., 5 I.C.C.2d 995, 1989 ICC LEXIS 281, *16 (ICC served Sept. 28, 1989) (as an ameliorative condition, "[t]rackage rights are a remedy of last resort for use when less intrusive remedies such as rate relief and reciprocal switching are insufficient"); Western Fuels Service Corporation v. The Burlington Northern and Santa Fe Railway Company, et al., NOR 41987, et al. (STB served Jul. 28, 1997), slip op. at 7 ("[a]s we have stated on several occasions, the prescription of terminal trackage rights is an extraordinary remedy, one to be afforded only when less intrusive remedies such as rate relief, alternative through routes, or reciprocal switching are insufficient") (citations omitted).

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taken KCS's property without full compensation¹² and has created an uneven competitive field by giving BNSF an undue competitive advantage without any fault of KCS.

Likewise, as a Section 11102 case, the same statute involved in EP 711, the Board should be concerned about the potentially significant implications of this proceeding to EP 711. If, for example, the Board determines that the only compensation due KCS is for the usage of the Rosebluff Lead under the SSW approach, without any compensation for lost contribution to KCS's network, it may be difficult to adopt another approach in the context of setting the methodology in an EP 711 proceeding, assuming that proceeding moves forward. Granted, terminal trackage rights arise under Subsection 11102(a) while reciprocal switching arises under Subsection 11102(c), and Subsection 11102(a) explicitly articulates the constitutional principle controlling compensation in condemnation proceedings as the Board's guidepost in setting terms for terminal trackage rights compensation. Nevertheless, it is notable that BNSF has never proposed a compensation methodology outside of simply proposing to pay to UP, and UP only, what UP and BNSF negotiated in the BNSF Settlement, an amount even the Board has acknowledged is below SSW. BNSF appears to avoid wanting to be on record proposing something that could come back to bite it, and the industry, in EP 711.

Unfortunately, KCS does not have the luxury to avoid the question: it is KCS's property that would be taken by any STB order in this proceeding. As such, and consistent with its position in EP 711, KCS continues to believe Efficient Component Pricing ("ECP") is the best

¹² Indeed, BNSF apparently acknowledges that an uncompensated taking has already occurred, stating, "[G]iven that this proceeding is merely about substituting one form of access to shippers for another and that UP trains (sometimes operating under a reciprocal switching arrangement with BNSF) already run over the same tracks, it is inconceivable that any KCS property has been "taken" in the constitutional sense merely because of a grant of terminal trackage rights to allow BNSF direct access." BNSF-138, n. 25.

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means by which to compensate KCS for granting BNSF direct access. Absent the ECP approach, the only constitutional and statutory method to avoid prejudicing any future EP 711 decision is to adopt KCS's proposed compensation approach as discussed in these comments. Any other methodology, especially the simple application of a capitalized earnings SSW approach for just the track use and without any compensation for KCS's lost contribution, would not only be unconstitutional, but it could also have significant adverse consequences with respect to the EP 711 proceeding and the rail industry as a whole.

II. AS A NON-APPLICANT CARRIER, KCS SHOULD NOT BEAR THE OPERATIONAL OR CAPITAL BURDENS ASSOCIATED WITH UP'S PROMISE TO GRANT BNSF ACCESS

A. BNSF Operations Should Be Limited to Lyondell and to UP's Window

KCS believes that BNSF should not be granted terminal trackage rights to Lyondell, both because there is no public need based on current three-carrier competition and because of the significant operational interference threatened by BNSF's proposal. Nevertheless, if BNSF is granted access, BNSF's operations should be limited to serving Lyondell, and only during UP's Rosebluff Yard window.

BNSF's request to set terms and conditions was directed at serving Lyondell, and only Lyondell. The operating evidence submitted in the most recent round of comments was directed at serving Lyondell. Having requested the Board to set the terms and conditions of access to serve Lyondell, any Board order should not go beyond that request. Indeed, having a narrow "target" will help the Board and KCS determine the outside parameters of what costs KCS could and would incur.¹³

¹³ Decision No. 6 recognizes that the issue before the Board is limited to the price of access to Lyondell: "While each party has put forth its conceptual approach to calculating the

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Likewise, BNSF's operations should be limited to UP's window. Since commencing this proceeding, BNSF repeatedly has submitted sworn testimony that BNSF's operations through Rosebluff Yard will occur during UP's window. See e.g., "[T]he only change to KCS's operations will be a reduction in congestion in Rosebluff Yard..." BNSF's Opening Statement and Evidence at 20 (filed December 31, 2014) and Bredenberg Opening VS at 8. "BNSF direct service could not affect KCS operations, because the BNSF trains would operate solely during UP's operating window." BNSF Final Brief (filed December 30, 2015) at 14. Also, Reilly VS (filed January 12, 2018) at 11 and Exhibit A at 6 ("operational flexibility ... exists for BNSF trains to operate during UP's operating window of 0600 to 1800".)

The Board has also acknowledged these representations as a basis for Decision No. 3: "BNSF has proposed to operate all of its direct trains during UP's daily 12-hour window of operations at the Rosebluff Yard. (See BNSF Final Brief 14; Bredenberg Rebuttal V.S. 6, 8.)" Decision No. 3 at 14. "BNSF argues that its direct service will not negatively affect KCS's operations because the BNSF trains would operate solely during UP's operating window at the Yard. (BNSF Rebuttal 29.)" Id. The Board must ensure that BNSF abides by those commitments.

BNSF must stay in UP's 'window' regardless of when that 'window' occurs. KCS has pointed out innumerable times in this proceeding that the beginning and end of the UP and KCS operating windows in Rosebluff Yard are not fixed. The evidence throughout this proceeding clearly demonstrates that the beginning and end of UP and KCS 'windows' in Rosebluff Yard is

compensation that BNSF would pay to use the Rosebluff Lead **to serve the Lyondell facility**..., additional information is needed." Decision No. 6 at 2 (emphasis added).

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fluid. Years of operations have shown that fluidity is necessary and inevitable.¹⁴ Shipper delay, traffic volume spikes, equipment problems, track blockages and other issues regularly delay one or the other of the owners in completing its scheduled service on the Rosebluff Lead. Id. The Board has acknowledged this variability. “It is true that such slack periods vary from day to day, and the addition of a third carrier could entail many operational adjustments, some of which may be complicated.” Decision No. 3 at 16.

BNSF’s operations likewise need to be fluid and, consistent with BNSF’s sworn testimony, need to occur solely in UP’s window. Allocating a specific time for BNSF’s passage through Rosebluff Yard, as proposed in BNSF’s plan and as perhaps implied by Decision No. 6’s “one daily, exclusive window of time for [BNSF] direct operations”, would mean having to stop short of finishing the service that KCS and UP customers require.¹⁵ As such, to avoid substantial interference with KCS, BNSF must keep its operations through Rosebluff Yard within UP’s window and must be fluid and fluctuate within UP’s window.

BNSF also must not be allowed to operate in Rosebluff Yard, but merely through it. As the evidence in this proceeding has established, Rosebluff Yard is heavily congested, with cars occupying most or all of the tracks most of the time. Given the heavy use of Rosebluff Yard tracks, any switching, interchange, setout, or other yard activities by BNSF would substantially impair KCS and UP operations. BNSF’s operating plan says it will simply transit the Yard in a continuous motion. Opening Statement and Evidence at 20 (filed December 31, 2014),

¹⁴ See KCS’s Reply to BNSF Railway Company’s Opening Statement As Supplemented on May 11, 2018, O’Neal VS, Exhibit B at 6-7, Exhibit C at 9.

¹⁵ KCS’s Reply to BNSF Railway Company’s Opening Statement As Supplemented on May 11, 2018, O’Neal VS, Exhibit B at 6.

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Bredenberg VS at 7; Reilly VS (filed January 12, 2018) Exhibit A at 2. BNSF should be held to its prior representations to avoid impairment of the owners' operations.

In short, to avoid substantial impairment of KCS's operations, BNSF must –

- operate through Rosebluff Yard only during UP's window, and must be penalized if it fails to do so;
- adjust its operations to coincide with the *actual* start and stop times of UP's window, not just the *scheduled* start and stop times;
- pass through the Rosebluff Yard without stopping or setting out or picking up traffic; and,
- avoid interfering with or delaying KCS operations, and to the extent it does, BNSF should pay for all costs associated with those delays.

B. KCS Should Not Be Required To Contribute To Any Additional Capital Requirements Caused By the Addition of BNSF Direct Access

While not specifically addressed in Decision No. 6, the evidence of record, mainly through UP's testimony, establishes that additional infrastructure would be required to accommodate BNSF's proposed use of UP's window. See Union Pacific Railroad Company's Reply to BNSF's Petition to Establish Conditions of Use and Compensation (Filed June 25, 2018) at 2-4 and 13-18. To the extent additional infrastructure is required to accommodate BNSF and to prevent interference with KCS's operations, KCS should not be required to contribute to capital or maintenance costs of infrastructure related to BNSF direct access. Such costs are a direct result of UP's agreement to grant BNSF access. Any such infrastructure costs should be borne by BNSF and UP in accordance with whatever agreements they have governing the UP/SP merger. For future infrastructure investments, to the extent that those infrastructure improvements will benefit all three parties then all parties should contribute to those costs in accordance with the principles of the existing joint facility agreements, which apportion such costs on a usage basis.

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C. BNSF Should Bear All Costs Associated With Any Access

Decision No. 6 also requests KCS's position with respect to accounting for potential external costs that KCS may incur as a result of BNSF's operations, should the Board order the parties to utilize SSW methodology to calculate the trackage rights fee owed to one or more owners of the Rosebluff Lead. Recognizing that SSW does not account for such external costs, the Board's Decision asks whether SSW should be adjusted to account for those costs. The answer is an unequivocal "yes."

BNSF should pay for any KCS external costs. By external costs, KCS does not mean costs, like maintenance, dispatching, and others directly attributable to BNSF's trackage rights operation, which would be covered by SSW. Rather, in KCS's view, such external costs are those that KCS would incur to its own operations as a result of any potential interference. For example, even if BNSF's train does not stop or switch in the Rosebluff Yard and BNSF operates wholly within UP's window, to the extent that BNSF delays KCS's use of its window and such delays create additional costs to KCS, BNSF should compensate KCS for those additional costs.

Standing alone, SSW does not account for these additional costs that KCS might incur. Such additional costs that KCS could incur involve KCS paying overtime dollars, being forced to add crews, incurring additional car hire charges, incurring additional locomotive hours,¹⁶ experiencing delays in its ability to meet customer schedules, including possibly even paying delay penalties under its contracts, and possibly the need to hire additional manager(s).

¹⁶ KCS has proposed an hourly delay fee of \$842.00. The proposed train delay charge is an amount advocated by BNSF in a case where BNSF incurred train delay from damage to one of its bridges, and is consistent with BNSF's position that its operations would not unreasonably interfere with KCS and UP operations.

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These additional costs cannot be calculated without knowing the parameters of BNSF's operations. To determine these costs, KCS would need to analyze existing detailed on-lead train movement data and make comparisons based on BNSF's future operations upon implementation. Nonetheless, regardless of how long the BNSF train is, how much capacity it uses, and how much time it takes to traverse to and from Lyondell, to the extent BNSF's operations cause a delay in KCS's ability to use its window or disrupts KCS's normal operations whether through its own operations or UP's operations in KCS's window, BNSF should pay for those additional KCS costs.

D. BNSF Should Pay Its Proportionate Share of Other Costs and Capital Investments Currently Incurred By UP and KCS

As the record reflects, operations on the Rosebluff Lead are governed by a series of joint facility agreements. Those agreements govern a variety of obligations, liabilities, indemnities, cost allocations, capital improvement requirements, dispute resolutions, and management responsibilities. Granting BNSF trackage rights to serve Lyondell should not relieve BNSF of paying its fair share of additional costs. For example, BNSF should contribute its usage-based share of extraordinary costs, such as costs associated with significant flooding, fire, or other natural disasters that may occur on the Rosebluff Lead. Such provisions are common in many current trackage rights agreements. And, as noted previously, BNSF should also pay for all additional capital improvement costs that are required to accommodate BNSF's initial access and any additional future capital assessments needed to accommodate BNSF service without causing interference to KCS's and UP's operations.

Costs are not the only considerations. BNSF should be required to enter into an agreement to indemnify UP and KCS from liability that may result from BNSF's presence and to carry required insurance or make self-insurance commitments. The agreement should also

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include standard terms utilized in KCS, UP, and BNSF trackage rights agreements, modified to account for any specific parameters unique to the Rosebluff Lead. BNSF should not be given any special treatment or exempted from any of the normal obligations that would be imposed on a tenant in a voluntary trackage rights agreement.

III. APPLICATION OF SSW, STANDING ALONE, WOULD BE INCONSISTENT WITH PRECEDENT AND INAPPROPRIATE TO THE FACTS OF THIS CASE

A. Application of SSW for Compelled Terminal Trackage Rights Would Be Unprecedented

The intended goal of SSW is to place the landlord and the tenant in the same economic position and ensure that both the landlord and tenant carry the same cost burden.¹⁷ In imposing SSW in the past, the Board has generally limited SSW to determining compensation for overhead or bridge trackage rights. It has never used that methodology to impose compensation in a Section 11102 compelled terminal trackage rights case unless the parties' consented to that use. SSW I applied SSW to establish compensation for the tenant's bridge trackage rights, and declined to grant and establish compensation for local service to Labadie, which was outside the scope of the tenant railroad's bridge trackage rights. Id. at *50-*52. The ICC recognized in that case that "the Commission and rail carriers in general have recognized a distinction between trackage rights for bridge purposes and trackage rights for local service...."¹⁸ Here, the purpose

¹⁷ See SSW I, 1 I.C.C.2d 776, 786 (1984). The Board and the ICC time and again have affirmed that the tenant needs to pay its fair, usage-based portion of the cost of capital in order to "put the tenant on an equal footing with the landlord." See WCTL, 169 F.3d at 781. Absent such a requirement, the landlord would end up subsidizing the tenant, it would not receive an adequate return, and there would be no economic incentive for it to maintain or replace the line as necessary to continue efficient service. See also Missouri Pac. R. Co. v. ICC, 23 F.3d 531, 534 (D.C. Cir. 1994).

¹⁸ Id. at *50-*52.

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of the BNSF trackage rights is clearly to give it local access, which is outside the intended purpose of the SSW methodology.

In cases where SSW has been used to determine trackage rights compensation in merger cases, the trackage rights were limited to bridge rights, not access to local traffic. Here, BNSF seeks local access – direct access to customers, not just the bridge right to pass over the track – over KCS’s objection. ICC/STB precedent demonstrates that SSW was not intended to apply to establish terminal trackage rights compensation for proceedings in which the tenant will be obtaining access to local shippers via a Section 11102 proceeding and over the objections of the landlord. During the Conrail split-up between NS and CSX, the Board used SSW to calculate trackage rights compensation for overhead/bridge trackage rights, while simultaneously making it clear that Canadian Pacific Railway Company, Delaware and Hudson Railway Company, Inc., Soo Line Railroad Company, and St. Lawrence & Hudson Railway Company Limited’s (collectively “CP”) “prospective trackage rights [were] limited to overhead traffic between Albany and New York City, and local access to industries situated between those points [would] not be permitted.”¹⁹

In addition to the cases above, in 1990, SSW was applied in A&M when the ICC used SSW to calculate trackage rights compensation over 1.63 miles of track owned by the Arkansas and Missouri Railroad Company, a large portion of which was a bridge that was needed to connect two segments of trackage separated by the Arkansas River.²⁰ In A&M, the tenant was

¹⁹ See CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company – Control and Operating Leases/Agreements – Conrail Inc. and Consolidated Rail Corporation, FD 33388 and FD 33388 (Sub-No. 69), slip op. at 6 (STB served Dec. 18, 1998).

²⁰ Arkansas and Missouri Railroad Company v. Missouri Pacific Railroad Company, FD 31281, 1990 ICC Lexis 110 (ICC served March 23, 1990) (“A&M”).

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not seeking rights to serve local traffic and the Board did not grant such local access. In fact a review of all cases where SSW was applied shows that the only case in which SSW was used to establish compensation for compelled trackage rights that included rights to serve a very limited number of local shippers was NECR; however, in that case, compensation was not originally established using SSW in the first instance, and both parties agreed to use of SSW.²¹

When SSW was used in the context of the UP/SP merger case to establish compensation for terminal trackage rights, it too only applied to those bridge or overhead rights on terminal trackage, and only with the parties' consent. In that case, the Board granted BNSF bridge rights when BNSF filed a terminal trackage rights application to use two small segments of KCS track in Shreveport and one small segment of KCS track in Beaumont that were necessary for BNSF to connect its operations over segments between Houston and Memphis and between Houston and New Orleans. See Decision No. 44, 1 S.T.B 233, 1996 STB Lexis 200, at *446. BNSF and KCS agreed to the use of SSW to establish compensation for those very limited, bridge-the-gap overhead terminal trackage rights.

Applying SSW to establish terminal trackage compensation for BNSF's access to a specific shipper traffic (Lyondell), as opposed to overhead bridge rights, would be unprecedented. Indeed, absent the parties' consent, the Board has never imposed terminal trackage rights for local access to a shipper in a merger. Instead, terminal trackage rights have only been granted "in limited circumstances where the rights were designed to bridge a gap within broader trackage rights imposed on applicants and deemed necessary to remedy or mitigate anticompetitive effects in the transaction." See CN/IC, slip op. at 51-52 (citation

²¹ New England Central Railroad, Inc. – Trackage Rights Order – Pan Am Southern LLC, FD 35842, slip op. at 4 (STB served October 31, 2017) ("NECR").

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omitted)(noting that the Board has required non-applicant carriers to grant terminal trackage rights to another carrier only in limited circumstances where the rights were designed to bridge a gap within broader trackage rights imposed on applicants or deemed necessary to remedy or mitigate anticompetitive effects in the transaction).

As the Board moves forward in this proceeding, it is crucial that it remember three things. First, even in merger cases, the Board has recognized a distinction between trackage rights for bridge purposes and trackage rights for local service. Second, while SSW was first developed in the mid-eighties, neither the ICC nor the Board has ever applied SSW to establish terminal trackage rights compensation that included access to local shippers, absent the consent of the parties. Lastly, there is a distinct reason that the Board has avoided using SSW to determine compensation in trackage rights cases involving local service; namely, SSW alone is not adequate compensation for the rights sought, as is discussed later.

B. In Other Unique Cases, the Board Likewise Did Not Apply SSW

The Board should be comfortable refusing to apply SSW in this case. SSW is not always applied in landlord/tenant compensation disputes. For example, in NCR,²² the Board declined to apply SSW in a lease compensation case because the tenant-lessee would be the exclusive operator of the subject rail line. Likewise, the ICC declined to apply SSW in Amtrak I and Amtrak II.²³ In Amtrak II, the ICC imposed terms and conditions for the trackage rights for the

²² See North Carolina Railroad – Petition to Set Trackage Compensation and Other Terms and Conditions – Norfolk Southern Railway Company (“NCR”), FD 33134, 1997 STB Lexis 123, at *10 (STB served May 29, 1997).

²³ See National Railroad Passenger Corp.—Conveyance of Boston & Maine Corp. Interests in Connecticut River Line in Vermont & New Hampshire (Amtrak I), 4 I.C.C.2d 761 (1988), aff’d sub nom. National Railroad Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407 (1992); National Railroad Passenger Corp.—Conveyance of Boston & Maine Corp. Interests in Connecticut River Line in Vermont & New Hampshire (Amtrak II), 6 I.C.C.2d 539 (1990). In

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48.8-mile portion at issue in Amtrak I (the Middle Segment), as well as two adjoining CV-owned segments (the Northern and Southern Segments) over which B&M previously had trackage rights. In doing so, the Board declined to apply SSW due to the additional considerations involved in those proceedings (the ICC was forcing the carrier to sell its line to another carrier and, to offset the operational disruption to the seller from the forced sale, granted trackage rights back to the selling carrier).²⁴ Id. In UP/SP, the Board did not even apply SSW to the terminal trackage rights granted Tex Mex over the HB&T.²⁵ Granting BNSF the ability to serve Lyondell directly hauling manifest traffic over KCS-owned property when KCS is limited by its 1981 agreement with SP from likewise directly serving Lyondell for manifest traffic makes this proceeding much more similar to the Amtrak Proceedings or the NCR proceeding than the standard application of SSW in a merger context.²⁶

Amtrak I the ICC ordered Boston and Maine Corporation (“B&M”) to sell to Central Vermont Railway, Inc. (“CV”), a 48.8-mile portion of B&M’s rail line from Windsor, Vt., to Brattleboro, Vt., and CV to grant back to B&M trackage rights over that portion of the rail line. Id. Amtrak I and Amtrak II are referred to herein as the “Amtrak Proceedings.”

²⁴ SSW was decided before Amtrak II. The Board could have used SSW to set trackage rights compensation in Amtrak II, but it did not. Instead, the Board calculated compensation that was designed to fully compensate B&M for the taking of its line.

²⁵ UP/SP, Decision No. 47.

²⁶ As recognized by the ICC in a 1995 trackage rights compensation case involving BNSF, SSW alone is not always adequate compensation for trackage rights. SSW does not account for the costs associated with additional facilities that are utilized in serving a particular shipper where such additional facilities are not part of the tracks themselves. In such a case, the Board recognized that SSW should apply to the use of the tracks but additional compensation would be needed to contribute to the use of the additional facilities. Burlington Northern Inc. and Burlington Northern Railway Company – Control and Merger – Santa Fe Pacific Corporation and Atchison, Topeka, and Santa Fe Railway Company, FD 32549, Decision No. 40, 1995 ICC Lexis 242 (ICC served August 23, 1995) (“Decision No. 40”). When discussing what type of compensation the Board would apply if asked by the parties to set compensation, the Board said the circumstances of the case warranted “some combination of a fixed charge and usage-based compensation” and an evaluation of the specific circumstances involved in the case would ultimately be used to determine the split. Id. at FN 19.

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None of the cases discussed above were run-of-the-mill compensation cases for which application of SSW would be appropriate. In each of the cases, the Board considered the unique circumstances of the case and rejected, or suggested an alternative approach to SSW to calculate trackage rights compensation in those cases. The Board should likewise choose not to apply SSW here.

C. Application of SSW Without More Will Give BNSF An Undue Competitive Advantage

Having been designed for use in merger cases to remedy anticompetitive effects and to place tenants and landlords in a similar position via overhead trackage rights, SSW would be particularly inappropriate here where local access is being sought, where KCS as a landlord does not have the same rights as the tenant BNSF, and KCS objects to the use of SSW. BNSF is not seeking terminal trackage rights to preserve competition, as that has already been accomplished through BNSF access via reciprocal switching. Rather, BNSF is seeking terminal trackage rights here to obtain lower costs and to achieve an undue competitive advantage over UP and KCS through government-mandated rates. Use of SSW here would only serve to increase and enhance BNSF's market share by expanding BNSF's government-mandated access at below market cost.

One need only to review the record to understand BNSF's motivations. After years of serving the area via reciprocal switching and gaining market share, BNSF began evaluating the Lake Charles region to determine whether the area was ripe for further BNSF investment and economic growth in the coming years. BNSF ultimately produced a report entitled

[[REDACTED]] which explained that [[REDACTED]]

[[REDACTED]]

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[REDACTED]
[REDACTED]].²⁷ BNSF decided based on the current economic conditions, not the post-1996 merger environment, that it would [[REDACTED]], pursue direct access, and [[REDACTED]]
[REDACTED]
[REDACTED]

[REDACTED]].²⁸

Clearly, this proceeding is not an attempt to remedy competitive concerns pre and post-merger or to ensure that Lyondell's pre-merger competitive posture was preserved. Rather, this proceeding is really a non-merger competitive access case filed under Section 11102(a) to cherry-pick one particular shipper to "skim the cream" off UP's and KCS's decades-long investments in the Rosebluff Lead. SSW has never been applied in such a proceeding in such a manner, and it should not be here.²⁹

BNSF's Petition seeks to tilt the competitive playing field so heavily toward BNSF that competing for Lyondell's traffic will be difficult for KCS, and perhaps for UP as well. In addition to BNSF's much larger network and artificially low switch rates, which already have allowed BNSF to capture traffic once handled by KCS, BNSF's Petition seeks to foster BNSF's

²⁷ See BNSF-HC-001597- BNSF-HC-001613.

²⁸ See BNSF-HC-000007

²⁹ This is precisely the type of inappropriate use of Section 11102 that UP, BNSF, and the rest of the rail industry have warned about in the context of EP 711. Here, UP and KCS have invested in infrastructure for decades to maintain service to shippers and grow market opportunities for all Rosebluff Lead shippers. BNSF seeks to use its competitive access to "skim the cream" of UP's and KCS's efforts, leaving KCS and UP to provide costly switching service to other shippers. Lyondell obtains supra-competitive rates, but at the expense of other shippers and UP's and KCS's revenues.

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cherry-picking of certain Rosebluff Lead traffic (Lyondell) with at least the following additional operational and cost advantages that KCS as a landlord, does not enjoy:

- BNSF to pick and choose which shipper it desires to serve via UP or KCS switching versus which shippers it desires to provide direct access to, while KCS, an owner of the track, is not given that option;
- BNSF avoids the burdens of switching traffic for UP and KCS, while UP and KCS are required to switch traffic for BNSF;
- BNSF can pick up and deliver any number of cars on request, avoiding 25-car unit restriction KCS and UP long ago agreed was necessary to avoid operational disruption when entering the zone that the other switches;
- BNSF gets to use 70 years of KCS and UP investment with no capital contribution;
- BNSF doesn't propose to add any infrastructure needed to handle its traffic, shifting the burden to KCS and UP to compensate with their own infrastructure dollars; and,
- BNSF proposes to pay nothing to KCS for increased operating costs.

Granting the Petition would force KCS and UP to subsidize BNSF by giving it these and other cost and operational advantages. That government-mandated subsidy would largely or wholly undermine the competitive environment the Board thought it was creating in 1996.

Given the unique circumstances present in this case, including the fact that SSW was not designed for use in non-merger competitive access cases, has only been used in merger cases to determine compensation for overhead rights (mostly with the parties' consent), and would not be used here to preserve competition but rather to benefit BNSF at the expense of KCS, use of SSW would be unprecedented. SSW-based compensation would not adequately compensate KCS. If the Board uses SSW at all, the Board should only do so as part of a comprehensive compensation approach pursuant to which the Board orders BNSF to pay an access fee to contribute to KCS's lost contribution, SSW for BNSF's actual usage of the Rosebluff Lead, and pay KCS for any additional costs incurred by KCS and not accounted for in SSW.

IV. AT A MINIMUM, THE BOARD SHOULD BASE ANY COMPENSATION METHODOLOGY ON MARKET BASED RATES PLUS AN ADJUSTED APPLICATION OF SSW

As noted, SSW standing alone would be insufficient compensation and would not place KCS in the same position it would have been in absent the taking of its property. This is because, prior to BNSF's Board-mandated access, KCS received revenues from handling Montell (Lyondell) that covered both direct costs, a return on capital for the Rosebluff Lead, and a contribution toward KCS's network costs. However, in the future, if BNSF is granted direct access and SSW was the only compensation applied, KCS would lose the contribution toward its network costs.

It is widely understood that SSW does not account for lost contribution (profit) to the rest of the network. For example, the International Transport Forum ("ITF"), a 59-country (including the U.S.) 'think tank' consortium, recently issued a report entitled "Regulatory Capacity Building: Tools for Analyzing Rail Connectivity".³⁰ In the report, ITF discussed appropriate compensation in trackage rights access cases in Mexico. ITF recognized that SSW is used in the U.S. under certain circumstances, noting that the interest rental component is often a source of considerable controversy and litigation. More importantly, however, ITF acknowledged that the U.S. methodology:

has not considered the costs or revenue loss imposed on other parts of the rail network. The existing rules only provide for the incumbent to receive a fee for the specific track at issue and neglect to include any profit the railroad might have earned for the rest of its system on the traffic now captured by the entrant.

The failure of SSW to compensate KCS for its lost opportunity profits that would contribute to BNSF's undue competitive advantage and result in a reduction in KCS's ability to

³⁰ ITF (2018), "Regulatory Capacity Building: Tools for Analysing Rail Connectivity," OECD Publishing, Paris.

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compete for Lyondell and other Rosebluff Lead traffic. Indeed, this same issue – the potential for lost profits and the reduction in capital available for reinvestment in the network – is the topic of significant discussion in EP 711. One only needs to read the Association of American Railroads' comments in Ex Parte No. 711 (Sub-No. 1) - comments that BNSF joined - to understand how granting shippers' access to another carrier at rates that do not compensate the carrier providing the access for lost opportunity profits will eventually result in less capacity, worse service, and less competition.³¹

Failure to compensate KCS for lost contribution would adversely affect KCS's revenue adequacy and overall ability to reinvest and maintain infrastructure over the entire network to detriment of all rail stakeholders. Accordingly, if the Board is going to apply SSW to BNSF's use of the Rosebluff Lead to serve Lyondell, it should also require BNSF to pay a market-based rate to compensate KCS for its lost opportunity profits. Failure to do so will not place KCS and BNSF in the same economic position that they would be in absent Board-mandated access, and this would not pass constitutional muster.³²

³¹ See Opening Comments of The Association of American Railroads, Reciprocal Switching, EP 711 (Sub-No. 1) (Filed Oct. 26, 2016); and see also, Opening Comments And Evidence Of BNSF Railway Company, Reciprocal Switching, EP 711 (Sub-No. 1), at pages 11-13 (Filed October 26, 2016). These pleadings are hereby incorporated into the record pursuant to 49 C.F.R. §1114.4 and §1114.5 (the Board already has a true copy in its possession) and KCS requests the Board also to take official notice of this corroborative evidence pursuant to 49 C.F.R. §1114.6.

³² To be consistent with the Fifth Amendment and ICCTA's mandate to adopt policies allowing KCS to earn adequate revenues, i.e., achieve revenue adequacy, KCS must be compensated in a manner that puts it in as good condition as it would have been absent the grant of competitive access by BNSF. Seaboard Air Line Ry. v. United States, 261 U.S. 299, 304 (1923) (citation omitted); see also Olson v. United States, 292 U.S. 246, 254-55 (1934); United States v. Miller, 317 U.S. 369, 373 (1943); United States v. 564.54 Acres of Land, 441 U.S. 506, 510 (1979); and United States v. Virginia Elec. & Power Co., 365 U.S. 624, 633 (1961). KCS is entitled to receive "what a willing buyer would pay in cash to a willing seller" at the time of the taking, which, in this case, is the market rate that BNSF would have otherwise paid KCS for access. U.S.

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A. Calculation of a Market Based Rate

Absent Board intervention, BNSF would be required to seek consent from both UP and KCS to serve Lyondell directly. One would expect that UP and KCS would both request market-based compensation from BNSF for that access – compensation that reflected the value to the owners of their asset. That value includes the income they could earn by hauling Lyondell's traffic themselves absent granting BNSF access. This market-based compensation would require BNSF to cover the incremental costs for its use of the Rosebluff Lead, including a return on the invested capital, similar to an SSW calculation. But the requested compensation would also require BNSF to pay UP and KCS a “market-based fee” to account for the addition of BNSF service and to reimburse UP and KCS for the stream of potential earnings that could be lost due to BNSF's access. Failure to provide for that lost contribution could adversely affect future investment and competition.³³

As explained in the VS Carey, the appropriate measure of KCS's loss as a result of the taking of its property is market-based compensation, representing opportunity profits lost to KCS because BNSF's government-mandated access results in a taking by BNSF of economic rents (i.e., profits) that KCS and BNSF otherwise would share through negotiations akin to a negotiated contract for a joint-line movement. A competitive negotiations process with a willing buyer and willing seller results in the appropriate economic outcome and arms-length

v. 564.54 Acres of Land, 441 U.S. 506, 510-511 (1979); see also Kirby Forest Indus. v. United States, 467 U.S. 1, 104 S. Ct. 2187, 10 (1984).

³³ As BNSF advocated in its EP 711 (Sub-No. 1) testimony on October 26, 2016, the Board must allow “market forces” to govern commercial relationships between carriers, and failure to do so could adversely impact functioning markets. See BNSF's October 26, 2016 Comments at 2; Id. at 13. BNSF goes on to say, “[a]s set forth in the RTP, the Board is required to facilitate rail investment by helping carriers earn revenues adequate to promote the development of a safe and efficient rail network that will meet the needs of the public.”

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transactions that are consistent with a fair market value rate. The Board's compensation approach should replicate the fair market value negotiated rate as best as it can.

UP and BNSF have already reached agreement for the terms of BNSF's access over UP through the BNSF Settlement Agreement. But BNSF has not yet reached such an agreement with KCS.³⁴ Instead, BNSF seeks to use government intervention, both to avoid the requirement to obtain KCS's consent and to avoid compensating KCS at a market-based rate.

If the Board mandates BNSF direct access to Lyondell, at the very least the Board should not allow BNSF to avoid compensating KCS for that access at market-based rates. Market-based rates are a better indicator of fair market value than government-set regulation. Moreover, allowing KCS to be compensated for contribution to its network lost due to BNSF access to Lyondell is consistent with the Fifth Amendment and condemnation principles.

The issue is how to approximate a market-based access fee in the context of a government imposed taking. KCS has previously suggested application of ECP as a market-based substitute. See KCS's Reply to BNSF Railway Company's Opening Statement as Supplemented on May 11, 2018, Filed June 25, 2018) at 26-35. Knowing that ECP is extremely difficult to apply in this context, KCS suggests that in addition to SSW, BNSF should be required to pay KCS an access fee based upon comparable market-based rates charged by UP, KCS, and BNSF for access to shippers.³⁵ UP and KCS have not given another carrier trackage

³⁴ BNSF's claim that it should only pay what it and UP have agreed upon and nothing more ignores the marketplace reality that BNSF, absent government mandated access, would also need consent from KCS and need to pay KCS a separate access fee.

³⁵ The Board has recognized that market based rates can serve as the basis for resolving competitive concerns resulting from mergers and provides shippers with adequate access to another carrier when that access is threatened through a merger. Canadian National Railway Company, Grand Trunk Corporation, And Grand Trunk Western Railroad Incorporated – Control – Illinois Central Corporation, Illinois Central Railroad Company, Chicago, Central And

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rights to access Rosebluff Lead shippers, so there is no directly comparable, market-based rate to compare. The closest substitute as previously proposed by KCS was to use the market-based rate that UP charges KCS for switching cars to/from the Lake Charles Harbor and Terminal District. See KCS Rebuttal Comments at KCS's Reply to BNSF Railway Company's Opening Statement as Supplemented on May 11, 2018, Filed June 25, 2018) at 26-35. This approach remains valid as it approximates the market-based rates in the Lake Charles Area.

Another approach is to examine the switching rates that BNSF charges KCS for access to shippers of manufactured products on BNSF lines.³⁶ Such a list is attached as Exhibit B. One can develop either an average from this list. The resultant switching rate approximately represents what BNSF would charge KCS for access to Lyondell in an arms-length, market-based transaction if BNSF's and KCS's roles before the Board here were reversed.

Once this average market access rate is determined, one would have to remove the portion of that fee that BNSF would pay to KCS for using trackage rights over the Rosebluff Lead. This could be done by removing the SSW amount that is calculated for BNSF's trackage rights over the Rosebluff Lead.³⁷ The remaining fee would approximate the market rate that

Pacific Railroad Company, And Cedar River Railroad Company, 4 S.T.B. 122, 1999 STB LEXIS 305, *30-*33 (1999) (approving privately negotiated settlement agreement granting KCS haulage rights to access certain shippers and at market based rates much higher than the rates suggested here).

³⁶ Because grain, more so than chemicals and plastics, often moves in unit trains, KCS suggests excluding from consideration switching rates that apply to grain.

³⁷ With respect to the existing UP/KCS switching rate for the Lake Charles Harbor and Terminal District, KCS previously proposed subtracting the URCS switching costs, rather than the SSW costs, to arrive at the lost opportunity profit amount. This is because KCS and UP provide each other with access via a reciprocal switch and the URCS costs could be easily calculated. However, because Decision No. 6 contemplates the potential use of SSW and BNSF's access to Lyondell would be via direct trackage rights, the Board, if it uses SSW, should subtract the SSW rate to arrive at the market "access rate." Furthermore, removing the SSW rate eliminates any

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KCS would require from BNSF in a market-based approach to compensate KCS for the lost contribution to KCS's network costs, as necessary to help achieve revenue adequacy.³⁸ This market-based rate to compensate KCS for lost contribution would be in addition to an SSW-based fee.³⁹ There would likewise be standard rate escalations and penalties for operational delays or interference caused by the presence of the tenant.

B. Calculating the Interest Rental Component Under SSW

The most controversial component of SSW trackage rights compensation is the Interest Rental Component, which is supposed to ensure that a landlord railroad can earn an economically appropriate contribution on the capital invested in the track used by the tenant, so as to promote the landlord's revenue adequacy.⁴⁰ If the Interest Rental Component is calculated correctly, the tenant using the landlord's tracks should make a proportional payment for track that it uses (instead of the landlord absorbing all costs) and should also provide the landlord a

argument that KCS would obtain a double count of either its costs or the Interest Rental Component.

³⁸ Of course, depending upon the market conditions, the amount of contribution may be more or less than is required to achieve revenue adequacy. To be consistent with revenue adequacy requirements, the Board could also consider using KCS's RSAM number and applying that to the URCS costs associated with BNSF operating over the Rosebluff Lead. This would develop the rate that KCS would need to charge BNSF to support KCS's drive to achieve revenue adequacy. This rate may be more or less than a market based rate.

³⁹ SSW would be calculated using RCNLD as discussed in VS Carey. Professor Carey also explains that the adjusted switching rate provides a method to quantify the market access compensation, but she acknowledges that other alternative calculations may be used. If the Board believes that use of published reciprocal switching rates may not accurately reflect market-based negotiations, Professor Carey notes that requiring BNSF to submit historical revenue and traffic as well as current customer contracts and appropriate line-haul discussions could be used to develop an economically appropriate revenue division of the movement based upon comparable line-haul movements and divisions.

⁴⁰ 49 U.S.C. §10704(a)(2); *See also* 49 U.S.C. §10101(3) (a principal policy in regulating railroad industry is "to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues").

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return on its invested capital in the track being used (but, as noted, SSW does not account for the lost contribution to the network as a whole). In other words, the tenant should make the payment that the landlord would otherwise need to earn from shippers in the absence of the tenant. This approach places the tenant in the exact same economic position that the landlord would otherwise be in for the use of those specific assets, although, as noted, it does not account for any contribution lost due to the tenant's use.

The importance of this economic concept can also be understood by considering the economic contribution expected from a shipper as compared to a tenant railroad. One can think about the tenant railroad as replacing the landlord's existing shipper. A shipper's contribution to the invested capital (not including the shipper's contributions to profits) and the tenant railroad's contribution to capital must be the same to ensure that the landlord remains in the same exact economic position irrespective of the tenant. When this does not occur, the landlord is underpaid and placed at an inferior economic position to the shipper it serves. Underpayment by the tenant railroad to the landlord results in two materially adverse effects: (1) creates an undue competitive advantage for the tenant and precludes a level playing field; and, (2) the landlord railroad will under-recover the necessary capital contribution and return, resulting in inadequate revenues. Without adequate compensation, over time the condition of the asset will deteriorate.

There is only one independent and objective measure--a cost-based measure--of calculating the appropriate economic value for BNSF's trackage rights and determining the appropriate trackage rights compensation level - replacement (or reproduction) costs.⁴¹

⁴¹ See Simplified Standards for Rail Rate Cases, EP 646 (Sub-No. 1), slip op. at 13 (STB served Sep. 5, 2007) (stating "[t]he principal objective of the SAC constraint is to restrain a railroad from exploiting market power over a captive shipper by charging more than it needs to earn a reasonable return on the replacement cost of the infrastructure used to serve that shipper.")

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Specifically, the Board has long recognized the relevant cost for determining the rates required to earn adequate revenues is the reproduction cost of the facilities. Reproduction cost new less depreciation - RCNLD - is an objective and standard methodology already used for ratemaking by the STB. RCNLD provides an estimate of the cost to duplicate the railroad assets in their present position and assuming the parties would build the asset today to serve existing traffic. An interest rental component based on a legitimate RCNLD measure of the value of the tracks would best simulate the actual value of the trackage rights to KCS and UP. RCNLD is a reasonable proxy for replacement costs and generates the proper economic measure of costs, if technology has remained consistent. Applying RCNLD in this case is the more appropriate means by which to ensure that KCS and UP can continue to achieve revenue adequacy due to the use of the Rosebluff Lead by BNSF. VS Carey at 13-16.

Application of the capitalized earnings approach - CE - to calculate the Interest Rental Component of SSW would result in artificially low compensation and effectively preclude KCS from earning adequate revenues on the Rosebluff Lead. See Exhibit A, VS Carey at 4. Not only will CE force KCS and UP to continue to subsidize BNSF's expanded usage, but it will deprive KCS and UP of an ability to recoup an equitable share of its capital costs from the shippers BNSF serves. As explained above, an inadequate Interest Rental Component that results in below market revenues will directly impair KCS's and UP's ability to continue efficient and safe rail operations over the Rosebluff Lead, contrary to the overarching objective of SSW, which is ensure that the tenant and the landlord both have the same cost burden. See SSW I, 1 I.C.C.2d at 786.

As explained in the VS Carey, the Board's use of the CE method of asset valuation cannot as a matter of basic economics produce the appropriate valuation. As a logical matter, CE

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can only reflect replacement cost if the revenues being capitalized are economically adequate. Here the revenues have been artificially low for over two decades due to imposition of the Lake Charles Condition, granting BNSF access at abnormally low cost. As such, the market value cannot be appropriately correlated to the actual costs of providing a service. Instead, CE calculates a value based on a discounted stream of revenue based on what the users are currently paying (which is artificially low in the case at hand). As a result, application of CE analysis cannot ensure that KCS or UP are compensated in a manner consistent with revenue adequacy requirements, nor place BNSF, as the tenant carrier, in the shoes of KCS and UP, the landlord, as required. Lastly, the CE method does not account for growth in traffic, which has occurred on the Rosebluff Lead during the historical period and can reasonably be expected to grow further in the future due to robust oil, gas, and petrochemical businesses in the area. See VS Carey at 7-8.

While CE may still be appropriate in certain cases, due to the inherent flaws in the real-world input data that would be used here, the use of CE in this proceeding is unreliable. It would not allow KCS to achieve revenue adequacy over time, and would give BNSF an undue competitive advantage.

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V. ANSWERS TO SPECIFIC QUESTIONS SET FORTH IN DECISION NO. 6

1. Provide documents sufficient to demonstrate the current fee that BNSF pays to UP for reciprocal switching on the Rosebluff Lead, including governing agreements, terms, and clauses (e.g., escalation clauses).

N/A To KCS

2. Provide documents sufficient to demonstrate the current Prescribed Fee (i.e., the trackage rights fee that BNSF pays to UP under the UP/SP merger agreements/conditions), including governing agreements, terms, and clauses (e.g., escalation clauses).

N/A To KCS.⁴²

3. If the Board determines that its SSW Compensation methodology should be used to calculate the trackage rights fee owed to one or more owners of the Rosebluff Lead/Yard,
 - a. What adjustments or modifications to the SSW Compensation methodology would be needed if BNSF is allocated one daily, exclusive window of time for direct operations on the Rosebluff Lead and BNSF's window occurs:
 - i. during UP's 12-hour window in Rosebluff Yard;
 - ii. during KCS's 12-hour window in Rosebluff Yard;
 - iii. during both UP's and KCS's 12-hour windows in Rosebluff Yard?

KCS's consistent position is that trackage rights, if they are established for BNSF, must occur exclusively in UP's window. UP was a party to the settlement agreements and merger. KCS was not. UP is the one that agreed to grant BNSF access, ignoring KCS's ownership. Requiring BNSF to stay within UP's window is also consistent with the representations made in the record by BNSF that BNSF's operations would not interfere with KCS's operations.

The problem with granting BNSF a daily, exclusive window of time for BNSF's direct operations, whether that is done during UP's window, KCS's window, or both, is that having such a "fixed" time takes up capacity that could be used by UP and KCS and is inconsistent with the fluid nature of UP's and KCS's operations. The record clearly indicates that capacity in the yard fluctuates daily. Thus, due to the fluidity of operations and the uncertainties associated with switching and shipper demands, even a fixed window for BNSF could cause delays and disruptions to KCS's operations, and additional costs to KCS.

SSW standing alone does not account for these additional costs that KCS might incur. Such additional costs that KCS could incur involve KCS paying overtime dollars, being forced to add crews, incurring additional car hire charges, incurring additional locomotive hours, experiencing delays in its ability to meet customer

⁴² KCS notes, however, that the Board has already found that the Prescribed Fee is below the level of SSW. See Decision No. 44, slip op. at 17.

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schedules, including possibly even paying delay penalties under its contracts, and possibly the need for additional manager(s).

These additional costs are difficult to calculate without knowing the parameters of BNSF's operations. Nonetheless, regardless of how long the BNSF train is, how much capacity it uses, and how much time it takes to traverse or what extra work must be done ahead of its arrival to clear a path for it, to the extent BNSF's operations cause a delay in KCS's ability to use its window or disrupt KCS's normal operations, BNSF should be required to pay for those additional KCS costs.

- b. Would the SSW Compensation methodology need to be modified to properly account for operations in Rosebluff Yard if BNSF's proposed direct train service traverses Rosebluff Yard without stopping or switching?

BNSF has never proposed in this proceeding to use Rosebluff Yard for switching, stopping, starting, or sorting. But even if BNSF's train does not stop or switch in the yard and even if the BNSF train transits the yard wholly within UP's window, to the extent that BNSF's train delays KCS's use of its window and such delays add costs to KCS, BNSF should pay for those costs.

- c. What method should be used to calculate the interest rental component? Provide all information and data needed to support the suitability of your preferred method, and to calculate the interest rental component under that method.

Under SSW, total compensation is the sum of three elements: (a) the variable cost incurred by the owning carrier due to the tenant carrier's operations over the owning carrier's track; (b) the tenant carrier's usage-proportionate share of the track's maintenance and operation expenses; and (c) an interest rental component designed to compensate the owning carrier for the tenant carrier's use of its capital dedicated to the track. Professor Carey's attached verified statement explains why CE is not appropriate in this proceeding. Use of CE in this case fails to allow a railroad to achieve revenue adequacy. In this proceeding, RCNLD is the more appropriate methodology. However, as noted previously, SSW, even calculated using RCNLD, does not account for lost contribution to KCS's network. As such, BNSF should be required to pay both the SSW rate for the use of actual physical assets and a market based access fee to contribute to KCS's other network costs and to achieve revenue adequacy.

At this time, KCS does not have the information available to calculate RCNLD. To the extent this question is requesting KCS to produce such information necessary to calculate RCNLD, it would have been practically impossible to gather and produce that information in short time period provided for this reply, even without the holiday interruption. In order to calculate RCNLD, at a minimum, KCS, and the other parties, will need the following:

1. Category Asset Values: to calculate replacement costs, an inventory and valuation of all assets on the Rosebluff Lead must be developed. This can be done in one of two ways – either through original acquisition costs, which would have to be updated to current values using appropriate

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inflation indexes and making other necessary adjustments, or through actual replacement costs which would be developed by taking a complete inventory of all of the asset categories that comprise the totality of the infrastructure on the Rosebluff Lead that BNSF will use to calculate a total replacement cost. Once the inventory of all assets associated with the Rosebluff Lead, including the number of miles of track, switches, structures, signals, etc., is developed, each of the individual cost categories would be multiplied by current per mile track construction costs, to determine a replacement cost for such infrastructure.

- KCS does not have complete information on all of the physical facilities that comprise the Rosebluff Lead. Under the joint facility agreement, KCS maintains part of the Rosebluff Lead and UP maintains the other part., KCS would need UP to produce information and collaborate with KCS to develop a complete inventory by cost category.
 - KCS would also need to know accumulated depreciation and assumed lifetime for each asset category to account for the required “Less Depreciation” portion of the calculation.
 - 2. Real Estate - a land inventory must also be established and an appraiser familiar with the area would have to perform an appraisal of the land to gauge accurately replacement costs under RCNLD.
 - Both the overall land market value for the Rosebluff Lead and the market value for the real estate to be used by BNSF must be determined.
 - 3. To complete the RCNLD SSW analysis, the Board would also need detailed traffic data for all three railroads (UP, BNSF and KCS), including on how traffic is handled; i.e., where traffic originates, terminates, or is handed off; whose locomotives and crews are used, and other analogous detailed operational data. KCS does have its 100% traffic data available that it could provide to the Board, UP, and BNSF under the Protective Order. KCS would expect BNSF and UP to provide it, and the Board, with similar traffic information.
 - 4. If the Board orders use of SSW and use of RCNLD, KCS will coordinate with UP to produce the relevant calculations and will provide both the Board and BNSF with the relevant data and related workpapers.
- d. Should the below-the-wheel variable costs and maintenance-of-way costs be calculated based on actual costs or system-average costs under the Uniform Railroad Costing System (URCS)?

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URCS would be the most suitable method of calculating the below-the-wheel variable costs and maintenance-of-way costs.

- e. Should the SSW Compensation methodology take into account how costs and fees are currently allocated between the two owners of the Rosebluff Lead/Yard? If so, explain how certain SSW Compensation cost categories (e.g., maintenance-of-way) should be allocated between the owners of the property? What other adjustments or modifications to the SSW Compensation methodology would be needed to account for the fact that the Rosebluff Lead/Yard has two owners?

The switching fee that BNSF currently pays was part of the BNSF Settlement Agreement. Presumably, BNSF would pay UP, but not KCS, the appropriate trackage rights under the BNSF Settlement Agreement. The “Prescribed Fee” under the BNSF Settlement Agreement is not SSW. As the Board said:

UP/SP has explained that the compensation terms agreed to with BNSF, which we have found to be lower than what we would impose under SSW Compensation, were a component of a far broader arrangement through which UP/SP received other rights in return.^[FN 33] [T]hese other rights... confer significant value to UP/SP.

FN33: Among the benefits UP/SP received from BNSF as components of this arrangement were: (1) trackage rights between Chemult and Bend; (2) trackage rights between Mojave and Barstow; (3) a proportional rate agreement for traffic moving over the Portland gateway; (4) improved access to the ports of Seattle, Portland, and Superior; and (5) new connections between UP/SP and BNSF in Illinois to permit more efficient access to UP/SP’s facilities in Chicago.

See Decision No. 47, at *615.

It is clear from the above that the Prescribed Fee that UP agreed to with BNSF was only a portion of the compensation UP received including, among other things, BNSF’s non-opposition to UP’s proposed merger. But as a non-party to the merger, KCS received no such benefit and never bargained away its right to just compensation. So whatever payment BNSF currently pays to UP is irrelevant to the question of what just compensation is due to KCS. As noted, in a free marketplace, BNSF would need to negotiate with both UP and KCS to obtain access and would have to compensate both of them separately. KCS should receive what a willing buyer (BNSF) and a willing seller (KCS) would negotiate in an arm’s length free market transaction. Anything less does not provide KCS with just compensation.

As proposed by KCS, BNSF would pay the SSW rate for its use of the Rosebluff Lead; any specific additional costs incurred by KCS due to BNSF’s presence

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would be paid by BNSF solely to KCS; and finally, a market rate to compensate KCS for its lost opportunity profits.

To the extent that there are additional costs specific to KCS and caused by BNSF's operations interfering with or delaying KCS's use of its window and adding to KCS's costs, such additional costs should be paid to KCS.

- f. Should the trackage rights fee set by the Board be calculated on a carload, per car mile, or per ton-mile basis?

The market-based fee paid to KCS for KCS's lost opportunity profits should be on a carload basis. This is consistent with the market-based (i.e., reciprocal switching) fee which is charged per carload (the one fee encompasses both the load and the matching empty). The fee for BNSF's use of the Rosebluff Lead, if calculated under SSW should be a per-car mile basis for both loads and empties, particularly because a portion of the track to Lyondell is not owned by KCS and UP. As noted, the SSW fee should be charged for both loads and empties.

- g. Identify additional costs, if any, specific to the Rosebluff Lead/Yard that would not be accounted for under the Board's SSW Compensation methodology.

- BNSF should contribute its usage-based share of extraordinary costs, such as costs associated with flooding, fire, or other natural disasters that may occur on the Rosebluff Lead.
- BNSF should pay for all additional capital improvement costs that are required to accommodate BNSF's initial access. Any additional future capital improvements should be paid for in accordance with an agreement among the parties.
- BNSF should be required to enter into an agreement to indemnify UP and KCS from liability that may result from BNSF's presence.
- BNSF should also pay a per hour train delay charge if BNSF train operations cause delays to KCS's operations because BNSF operations do not conform to agreed parameters for BNSF train movements or cause UP's operations to be delayed outside its assigned window. KCS has proposed an hourly fee of \$842.00. The proposed train delay charge is an amount advocated by BNSF in a case where BNSF incurred train delay from damage to one of its bridges, and is consistent with BNSF's position that its operations would not unreasonably interfere with KCS and UP operations.⁴³

⁴³ In re Matteson Marine Serv., No. 08-cv-4023, 2011 U.S. Dist. LEXIS 75168, *48 -*50; *53 -*60 (C.D. Ill. July 13, 2011).

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If all of the above is agreed to, these charges would become part of a complete access agreement. The agreement would also need to include liability and other standard trackage rights protections for both UP and KCS.

CONCLUSION

Decision No. 6, which implies that the Board has already determined that BNSF should be granted direct terminal trackage rights over the Rosebluff Lead to serve Lyondell, but fails to provide the information needed to compute an appropriate access cost. Decision No. 6 does not address BNSF's plans for operations and fails to define the scope of BNSF's proposed access – elements that impact compensation issues. While it appears the Board wants to fast-track the compensation issue, there are too many critical operational and capital considerations that the Board should first address before moving to the compensation phase.

If the Board does move forward with the compensation phase at this time, the Board should be mindful that its decision on the compensation issue could have significant implications. Should the Board grant BNSF terminal trackage rights here, it will be using extraordinary regulatory powers to force KCS to allow a competitor ten times its size to use KCS's tracks to gain traffic that KCS otherwise could handle and earn contribution to its local and network costs – contribution that would be lost due to BNSF's presence. Granting BNSF access at below-market SSW-only rates will further distort and likely diminish competition on the Rosebluff Lead, not to mention the implications for similar issues in the EP 711 proceeding.

The terms and conditions for any BNSF terminal trackage rights on the Rosebluff Lead must not provide BNSF with an undue competitive advantage vis-à-vis KCS. The Fifth Amendment and ICCTA's mandate to adopt policies allowing KCS to earn adequate revenues, i.e., achieve revenue adequacy, obligate the Board to ensure that KCS is compensated in a

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manner that puts KCS in as good a position economically as it would have been before the Board intervened in the market by imposing the Lake Charles Condition on KCS's property over KCS's objection.

If the Board moves forward, "just compensation" requires that the Board compensate KCS for all additional costs associated with BNSF's access, a return on KCS's invested track infrastructure, and compensation for the lost contribution caused by BNSF's access to Lyondell. The best means to accomplish these goals is apply SSW to calculate the rental rate BNSF should pay for use of the Rosebluff Lead, using RCNLD for the Interest Rental Component, plus BNSF must also provide KCS with a market-based fee to cover the contribution lost to KCS by turning over use of KCS's property to KCS's much larger competitor. BNSF should also be required to pay for any additional capital necessary to accommodate BNSF's operations and to pay for any additional costs KCS may incur due to the inability to operate in its window in a timely fashion. Keeping KCS whole in the above manner consistent with these comments should alleviate many of KCS's concerns with respect to BNSF's access.

Respectfully submitted,



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February 4, 2019

Attorneys for The Kansas City Southern
Railway Company

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of The Kansas City Southern Railway Company's response to Decision No. 6 was served by first-class mail, postage prepaid, or by a more expeditious manner, this 4th day of February, 2019, on counsel for BNSF Railway Company, Union Pacific Railroad Company, and all other parties of record.



William A. Mullins
Attorney for The Kansas City Southern
Railway Company

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 32760 (SUB-NO. 46)

**BNSF RAILWAY COMPANY
– TERMINAL TRACKAGE RIGHTS APPLICATION –
THE KANSAS CITY SOUTHERN RAILWAY COMPANY AND
UNION PACIFIC RAILROAD COMPANY**

**RESPONSE OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY
TO DECISION NO. 6**

EXHIBIT A

VERIFIED STATEMENT OF JULIE M. CAREY

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**BEFORE THE
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**BNSF RAILWAY COMPANY
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THE KANSAS CITY SOUTHERN RAILWAY COMPANY AND
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**RESPONSE OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY
TO DECISION NO. 6**

VERIFIED STATEMENT OF JULIE M. CAREY

I. INTRODUCTION AND SUMMARY OF OPINIONS

My name is Julie M. Carey. I am an economist and Director with National Economic Research Associates, Inc. (“NERA”). I routinely provide expert evidence before regulatory agencies, including the Surface Transportation Board (“STB” or the “Board”), in commercial disputes in arbitrations, and before state and federal courts. I have over 20 years of experience addressing economic issues in the energy and transportation sectors. I have worked on numerous rate reasonableness disputes before the STB by providing economic evidence regarding stand-alone costs and future expectations of volume, revenue and rates. I also routinely work on many other cases in which I provide consulting and testifying expert services involving railroad rates, traffic, economic damages, valuation, competition, and other economic analyses within regulatory and commercial disputes associated with transportation and other regulated and unregulated industries.

In addition to my economic consultancy practice, I am an Adjunct Professor at Georgetown University, where I teach energy economics in the graduate economics program, which includes instruction on the economics and regulation of railroad transportation. My Curriculum Vitae is attached as Attachment 1.

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I was retained by Baker and Miller PLLC on behalf of The Kansas City Southern Railway Company (“KCS”) to review Decision No. 6 in FD 32760 (Sub-No. 46) (“Decision No. 6”)¹ and the economic evidence submitted by the parties in this proceeding to provide an opinion on the compensation that should be paid by BNSF Railway Company (“BNSF”) for terminal trackage rights over the Rosebluff Lead to provide direct access for movements to/from LyondellBasell’s (“Lyondell”) facilities in West Lake Charles, LA. I was asked to discuss the appropriate economic framework to ensure the economically appropriate compensation to KCS for BNSF’s use of the Rosebluff Lead to access Lyondell. I also discuss the economic implications of inadequate compensation to KCS.

To adequately compensate KCS for BNSF’s proposed terminal trackage rights, any fee established in this case must include components for both BNSF’s use of the Rosebluff Lead and related tracks (including a return component) and the lost opportunity profits arising from the government-mandated access that represent the lost contribution to KCS’s network costs. Providing for both compensation for the use of the Rosebluff Lead and the lost opportunity profits to the remainder of the KCS network is the only means of ensuring a level competitive playing field in the future. SSW,² appropriately calculated and applied using reproduction cost new less depreciation (“RCNLD”), can comprise a portion of the compensation to KCS for BNSF’s use of the Rosebluff Lead. However, SSW alone will not place KCS in the same economic position it would have been absent BNSF’s mandated access because SSW does not include or account for the lost contribution to KCS’s overall network costs or allow KCS to achieve revenue adequacy.

¹ FD 32760 (Sub-No. 46), Decision No. 6 (December 4, 2018).

² See St. Louis S.W. Ry. – Trackage Rights Over Mo. Pac. R.R. – Kan. City to St. Louis (“SSW I”), 1 I.C.C.2d 776 (1984) & St. Louis S.W. Ry.—Trackage Rights Over Mo. Pac. R.R.— Kan. City to St. Louis, 4 I.C.C.2d 668 (1987) (collectively, “SSW”). Under SSW, total compensation is the sum of three elements: (a) the variable cost incurred by the owning carrier due to the tenant carrier’s operations over the owning carrier’s track; (b) the tenant carrier’s usage-proportionate share of the track’s maintenance and operation expenses; and (c) an interest rental component designed to compensate the owning carrier for the tenant carrier’s use of its capital dedicated to the track. E.g., SSW I, 1 I.C.C.2d at 779-80.

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A trackage rights fee based on SSW and nothing else would be inadequate for numerous reasons. BNSF seeks direct, government-mandated access to a KCS-served shipper on tracks KCS jointly owns with another carrier. That government mandate will provide BNSF direct market access to a substantial high-value customer, which has considerable economic value beyond the typical overhead trackage rights to which an SSW trackage fee approach has been applied. From an economic perspective, in the current circumstance the trackage rights fee must appropriately put the tenant railroad in the economic shoes of the landlord (*i.e.*, make a proportional payment for railroad track that it uses including providing the landlord a return on its invested capital). This would require compensation to include both a capital recovery component and a market-based access rate.

An artificially low trackage rights fee is distortive in nature and will diminish competition and jeopardize future investment in maintenance and expanded facilities by putting KCS at a competitive disadvantage (and simultaneously provide BNSF an undue competitive advantage). An artificially low trackage rights fee also is inconsistent with revenue adequacy and public interest requirements of the National Transportation Policy.

To the extent that SSW is utilized/applied by the Board to establish trackage rights compensation for the Rosebluff Lead, the interest rental component (“IRC”),³ which represents the capital recovery compensation for BNSF’s use of the KCS/UP trackage, should rely on RCNLD. RCNLD is an independent and objective cost-based measure of an appropriate economic value of the Rosebluff Lead. RCNLD will appropriately compensate KCS and help support KCS in earning adequate revenues on the railroad assets used by BNSF. It is also a standard methodology already used for ratemaking by the STB.

In response to the Board’s inquiry regarding use of capitalized earnings (“CE”), the CE approach to calculating the IRC does not suitably measure the capital costs of the Rosebluff Lead that must be recovered or the return on the capital cost (*i.e.*, cost of capital). The CE approach is inappropriate because it is circular by relying on a low historical rate to develop a future rate. It does not approximate replacement cost as required by the statute, and it does not provide a

³ I refer to the interest rental component (“IRC”), interest rental factor (“IRF”), or interest rental compensation (“IRC”) interchangeably throughout my Verified Statement.

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contribution to KCS's network costs. For these reasons, the CE approach would preclude KCS from earning adequate revenues on the assets used by BNSF.

Secondly, sound economic principles require that BNSF provide a second form of compensation to KCS in the form of a market-based access rate to cover lost opportunity profits associated with diverted and potentially divertible traffic. From an economic perspective, the Board should consider a KCS/BNSF arrangement as one analogous to a joint-line movement (KCS acting as the terminal carrier) where the sharing of economic rents (*i.e.*, profits) based on market-based rate principles is the appropriate and expected outcome (when adjusted by excluding the SSW-based rate, as explained below). This approach produces a market-based outcome that recognizes that BNSF does not own the railroad tracks and that no merger-related condition should favor BNSF or the landlord.⁴ Further this approach results in an appropriate economic outcome which should reflect a fair market value rate consistent with that which would have resulted from competitive negotiations between a willing buyer and willing seller (*i.e.* resulting in the estimated rate that KCS would have charged BNSF in order to provide BNSF access to Lyondell.).

Without such an economically appropriate framework, BNSF would be given an undue competitive advantage and KCS's traffic volumes and revenues from serving Lyondell could further erode in favor of BNSF and foreclose KCS' ability to regain future market share (or further challenge the ability to do so). For example, [[REDACTED]]
[REDACTED]
[REDACTED]].⁵

The appropriate approach to avoid BNSF receiving an undue competitive advantage based on a government mandate is to develop a methodology that accounts for the lost opportunity profit component of what KCS would charge BNSF in the marketplace for KCS to consent to access by BNSF to Lyondell. One possible approach is to examine existing

⁴ See Burlington Northern Inc. And Burlington Northern Railroad Company – Control And Merger – Santa Fe Pacific Corporation And The Atchison, Topeka And Santa Fe Railway Company, FD 32549, 1995 ICC LEXIS 214, *233, 10 I.C.C. 2d 661 (1995) (noting that the goal of SSW is to put the tenant and the landlord in the same economic position).

⁵ [[REDACTED]], BNSF-HC-001597-BNSF-HC-001612.

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BNSF/KCS reciprocal switching rates and then exclude the SSW-based rate. Other alternative methods to estimate the lost opportunity profit component may be considered, but any selection must ensure KCS is put in the same economic position it would be except in for the government mandating BNSF use of KCS's property. Another idea is to consider requiring BNSF to submit evidence of customer contracts, historical and forecasted revenue, and traffic volumes so as to develop what the standard division of revenue would be in a joint KCS/BNSF negotiated rate to serve Lyondell. As discussed below, these approaches are conservative as compared to the financial harm to KCS and the revenues it would have received but for the government mandated access.

In short, an economically appropriate trackage rights fee and compensation by BNSF to KCS requires both compensation for BNSF's use of KCS/UP's railroad assets (including return on the investment) and a market-based access compensation component to provide KCS compensation for lost opportunity profits. Absent the foregoing, an artificially low trackage rights fee will implicitly result in a regulatory decision that picks the winner and loser instead of relying on light-handed regulation and allowing competitive market forces to determine the outcome. An artificially low trackage rights fee would deprive KCS of its property without just compensation and place KCS in a competitive disadvantage and BNSF in an undue competitive advantage for the foreseeable future for serving Lyondell. Furthermore, broader economic and regulatory issues of revenue adequacy, fairness, equity and the public interest would not be appropriately addressed with an artificially low trackage rights fee.

II. BACKGROUND TO THE CASE

The trackage at issue in this proceeding, the Rosebluff Lead (and related tracks) includes a single-track line originating at the Lafayette Subdivision between Dawes, Texas and Avondale, Louisiana at MP 222.3 and extending nine miles south. The Rosebluff Lead also runs through the Rosebluff Yard at the northern end of the Lead (containing six tracks, one of which is periodically used as a running track). The trackage at issue in this proceeding provides access to many high-value customers located in the Lake Charles market area (which will be discussed further in the next section.) Importantly, KCS and UP jointly own the Rosebluff Lead and the

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Rosebluff Yard with equal rights to use the tracks.⁶ The joint ownership is specifically on a 50/50 equal sharing basis.⁷

KCS and UP share responsibility for switching the customers on the Rosebluff Lead by designating two zones on the jointly owned trackage. Specifically, KCS switches in Zone 1, which encompasses the geographic area east and a short distance south of the Yard, and UP takes the switching responsibility in Zone 2, which consists of the geographic area beginning about 2.3 miles south of the Yard at Bayou D'Inde. KCS and UP each provide switching of cars for the other railroad within the geographic regions of the designated zones, as well as maintaining the track in most of the area that they switch. Both carriers use Rosebluff Yard to exchange cars destined for or originating from the other carrier's zone.⁸ I understand this zone switching was implemented to enhance operational efficiency and reduce congestion.

BNSF has had access on the Rosebluff Lead since 1996 (after the UP/SP Merger) through a reciprocal switching agreement with UP whereby BNSF delivers and picks up cars at UP's Lake Charles Yard, where the cars are switched by UP to and from the Rosebluff Yard to be switched to or from the shipper by KCS or UP depending on which carrier serves the zone where the shipper is located.⁹

In February 2013, BNSF filed a terminal trackage rights application requesting direct access to CITGO's West Lake Charles refinery (located in Zone 2 on the Rosebluff Lead and switched by UP) and potentially other customers. The Board granted BNSF terminal trackage rights to CITGO's West Lake Charles refinery in July 2016, without determining the terms or conditions of that use or foreclosing the possibly of BNSF accessing other customers.¹⁰

⁶ FD 32760 (Sub-No. 46), Decision No. 3, slip op. at 1 (July 5, 2016) ("Decision No. 3").

⁷ Decision No. 3, slip op. at 2.

⁸ Decision No. 3, slip op. at 2.

⁹ Decision No. 3, slip op. at 1-2. UP's Lake Charles Yard is located on what was previously called the SP Lafayette Subdivision (between Dawes, Texas and Avondale, Louisiana). The Lafayette Subdivision is now jointly owned by UP and BNSF and is sometimes referred to as the "50/50 Line."

¹⁰ Decision No. 3.

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In January 2018, BNSF filed a further application requesting that the Board establish conditions of use and compensation for BNSF to directly serve the Lyondell facility in West Lake Charles, LA over the Rosebluff Lead. It appears from Decision No. 6 that the Board has already determined that BNSF should be granted direct terminal trackage rights over the Rosebluff Lead to serve Lyondell.¹¹ I understand that the Board now seeks to establish compensation for BNSF's use of the Rosebluff Lead.¹²

III. OVERVIEW OF THE COMPETITIVE MARKET CIRCUMSTANCES

The Lake Charles market area includes many industries that generated large volumes of rail traffic including substantial oil, gas, petrochemical, and a wide range of other businesses such as manufacturing, aerospace, and agribusiness.¹³ In addition to the CITGO West Lake Charles refinery (the fourth largest refinery in the U.S.)^{14,15} and Lyondell (one of the largest global plastics, chemical and refining companies¹⁶ that BNSF now seeks direct access to via the Rosebluff Lead), other large companies served by the KCS/UP's Rosebluff Lead include Westlake Polymers and Firestone Polymers.

BNSF has been allowed to serve these customers, including Lyondell, for 22 years through its reciprocal switching arrangement with UP, resulting from the Lake Charles Merger Conditions.¹⁷ Through the reciprocal switching arrangement, BNSF has gained a significant

¹¹ Decision No. 4.

¹² Decision No. 6.

¹³ See <https://chooselakecharles.com/Lake-Charles-economy/industries>

¹⁴ <http://refineryreport.org/numill.php?id=1460> . EIA reports the CITGO Lake Charles Refinery as the 6th largest, "Refinery Capacity Data by individual Refinery," January 1, 2018. Rank based on total operable capacity as measured by atmospheric crude distillation capacity (barrels per calendar day)."

¹⁵ I understand that in the original trackage rights application for the Rosebluff Lead, BNSF sought direct access to CITGO. Decision No. 3.

¹⁶ See <https://www.lyondellbasell.com/>

¹⁷ Decision No. 3, slip op. at 2.

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market share of Lyondell traffic over the years, reaffirming that the existing reciprocal switching rate is artificially low and demonstrating that BNSF doesn't need direct access to compete.¹⁸

The Lake Charles market area has experienced significant business growth, generating increased rail traffic, in recent years, and further growth in the future is expected.¹⁹ Several Lake Charles companies have expanded in recent years. Westlake Chemical (which purchased Axiall in 2016 for \$3.8 billion to become the second largest purchaser of ethylene in the US) is building an ethane cracker in Lake Charles, which is expected to be in service in 2019.²⁰ Phillips 66 recently announced its 2019 capital program which includes plans for an isomerization unit at its Lake Charles Refinery.²¹

BNSF has been keenly aware of the economic boom transforming the Lake Charles market area²² and has tactically sought to secure inroads through direct customer access via the Rosebluff Lead with a strategic goal to substantially expand its control of customer traffic in this region in recent years. Specifically, BNSF built its Lacassine Yard (in service April 2015) based

¹⁸ See Attachment 2, which is waybill and traffic data provided to me by Mr. Kevin Neels of The Brattle Group. Attachment 2 shows historical market shares for Lyondell traffic and [REDACTED]

¹⁹ For example, from 2001 to 2017, GDP growth in the Lake Charles Metropolitan Statistical Area ("MSA") was 33% and manufacturing growth was 42% during 2001 to 2017. In addition, a bright spot was observed in chemical manufacturing, which grew 115% from 2001 to 2015. Bureau of Economic Analysis, Lake Charles MSA Real GDP Growth, accessed December 20, 2018. Series MAGDP9 Real GDP by metropolitan area in millions of chained 2009 dollars.

²⁰ See <https://www.houstonchronicle.com/business/energy/article/Merger-proves-the-right-formula-for-Westlake-12974801.php>

²¹ See <https://investor.phillips66.com/default.aspx?SectionId=5cc5ecae-6c48-4521-a1ad-480e593e4835&LanguageId=1&PressReleaseId=a8986d9e-2476-4c56-bbae-8a7454a01789>; EIA, "Refinery Capacity Data by individual Refinery," January 1, 2018; Also, PPG Industries Inc. announced a 10,000 ton-per-year increase in production of silica at its Lake Charles area manufacturing facility in addition to the 22,000 ton-per-year increase in 2014.

²² BNSF was aware of [REDACTED]

[REDACTED] BNSF-HC-002373. (Document bates BNSF-HC-002370- BNSF-HC-002388.)

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on [[REDACTED]]
[[REDACTED]]²³ BNSF's internal business documents show [[REDACTED]]
[[REDACTED]]²⁴

Any notion that BNSF is simply seeking access to preserve the competition that would have been lost in an unconditioned merger is contradicted by BNSF's own documents. The increase in Lake Charles market area economic opportunity is likely the true motivation for BNSF's seeking further inroads and direct market access to KCS/UP customers. The competitive market circumstances highlight the substantial direct financial harm that would result to KCS if an artificially low trackage rights fee was mandated by the Board. It also highlights the importance of ensuring that KCS is not competitively disadvantaged by the Board's actions, which would have far-reaching implications into the future.

The historical Lyondell traffic volumes and revenue since BNSF began serving Lyondell through the reciprocal switching arrangement it obtained from the UP/SP merger demonstrates the additional competitive pressures observed from three railroads competing in the market (including the undue competitive advantage that BNSF has over KCS). For example, Attachment 2 shows numerous attempts by KCS to increase market share, for which BNSF (and sometimes UP) subsequently regained the market share.²⁵ The additional competitive pressures observed from 3 railroads in the West Lake Charles market and Lyondell is also relevant given the Board's historical reliance on two competitors in a market, for mergers and within rate reasonableness

²³ [[REDACTED]]
[[REDACTED]] BNSF-HC-001597-BNSF-HC-001613 BNSF referenced expected revenue [[REDACTED]]
[[REDACTED]] BNSF-HC-001607.

²⁴ Id. BNSF conservative estimate of approximately [[REDACTED]] in new business opportunities in the Lake Charles market area. [[REDACTED]]
[[REDACTED]] BNSF-HC-002373. (Document bates BNSF-HC-002370 - BNSF-HC-002388.)

²⁵ See Attachment 2. [[REDACTED]]
[[REDACTED]]

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disputes, as sufficient to achieve a competitive market outcome. Allowing BNSF as the third competitor in the market, initially through reciprocal switching and now through the request for direct access, is excessive for the competitive circumstances today (and when the UP/SP merger was approved).

IV. ECONOMIC APPROACH TO DEVELOP THE APPROPRIATE TRACKAGE RIGHTS COMPENSATION FOR THE ROSEBLUFF LEAD

The following section discusses the appropriate economic approach to quantify a trackage rights rate and compensation to KCS for BNSF's use of its tracks and the lost opportunity profits resulting from the market-based access to its customers.

A. An SSW-Based Trackage Rights Fee Is Not Economically Appropriate for the Rosebluff Lead

Reliance on SSW and the resulting trackage rights fee is inappropriate for the economic circumstances of the Rosebluff Lead for numerous reasons. BNSF's request for direct market access to KCS customers cannot be viewed as a specific condition of a merger to which KCS is a merging party. KCS was clearly not a party to the merger. Rather, BNSF access is a government mandate of BNSF competitive access to KCS's shippers over KCS's jointly owned property, without KCS's permission.²⁶ Further, unlike a typical overhead bridge trackage service imposed upon the parties involved in a merger ascribed for in SSW, BNSF seeks direct market access to KCS/UP's robust customer base as well as the use of non-BNSF railroad assets to reach these non-BNSF customers. Industry experts have recognized that SSW does not account for lost contribution (profit) to the rest of its railroad system.²⁷ For these reasons, a trackage rights fee based solely on SSW does not adequately compensate KCS for the lost opportunity profits associated with an otherwise competitive market access and does not account for the lost contribution to KCS's network costs or the ability to recover its cost of capital, *i.e.*, achieve revenue adequacy.

²⁶ Such requirements for reciprocal switching can arise from Intramodal Rail Competition, 1 I.C.C.2d 822 (1985), *aff'd sub nom Balt. Gas & Elec. v. United States*, 817 F.2d 108 (D.C. Cir. 1987). These regulations did not include a prescription for terminal trackage rights. *Id.* at 835.

²⁷ For example, International Transport Forum ("ITF") which is a 59-country (including the U.S.) 'think tank' consortium ITF (2018), "Regulatory Capacity Building: Tools for Analysing Rail Connectivity," OECD Publishing, Paris.

B. Economic Principles Underlying the IRC

To the extent that SSW is utilized/applied by the Board, the determination of the appropriate IRC is required.²⁸ This section outlines the economic principles that apply to the calculation of the IRC resulting from BNSF (the tenant) to KCS and UP (the landlord railroads) for use of KCS/UP's railroad tracks. As discussed below, in addition to the IRC component of the trackage rights fee that compensates KCS for use of the Rosebluff Lead, additional compensation in the trackage rights fee in the form of a market-based access rate is also required to compensate KCS for its lost opportunity profit and contribution to its network.

It is necessary for the IRC to be calculated in a manner to ensure that a landlord railroad can earn an economically appropriate contribution to capital and a return on its capital, as required by statute, for the specific assets being used.²⁹ The tenant using the landlord's tracks should make a proportional payment based on usage for railroad track that it uses (instead of the landlord absorbing all costs) and should also provide the landlord a return on its invested capital. The tenant should make the payment that the landlord would otherwise earn from shippers in the absence of the tenant. This approach places the tenant in the exact same economic position in which the landlord would otherwise be situated (*i.e.*, place the tenant in the landlord's shoes).

The importance of this economic concept can also be understood by considering the economic contribution expected from a shipper as compared to a tenant railroad. One can think about the payment from the tenant railroad as replacing the contribution that the landlord would otherwise receive from the landlord's existing shipper. A shipper's contribution to capital and the tenant railroad's contribution to capital must be the same to ensure that the landlord remains in the same exact economic position irrespective of the tenant. If a tenant railroad does not have

²⁸ The term "interest rental component" or interest rental factor is a misnomer since it's not merely a return on debt as the name suggests. The interest rental component should include a capital component and the economic return on this capital. The Board stated "[a]n interest rental component designed to compensate the owning carrier for the tenant carrier's use of its capital dedicated to the track." See New England Central Railroad, Inc – Trackage Rights Order – Pan Am Southern LLC, FD 35842, slip op. at 3 (STB served October 31, 2017).

²⁹ 49 U.S.C. § 10704(a)(2); See also 49 U.S.C. § 10101(3) (a principal policy in regulating railroad industry is "to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues").

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to contribute to capital and return, the landlord will be underpaid relative to its economic position in serving the shipper.

Underpayment by the tenant railroad to the landlord has two material effects. First, it creates an undue competitive advantage for the tenant over the landlord such that a level playing field will not exist. Second, the landlord railroad will under-recover the necessary capital contribution and return, with the result that its revenues will be inadequate (*i.e.*, too low) if an artificially low rate is mandated. Thus, avoiding underpayment by the tenant is critical in order to provide incentives to maintain and expand facilities in an expanding transportation market.

C. A Reproduction Cost-Based IRC is the Appropriate Economic Rate to Use

1. RCNLD as the Appropriate Interest Rental Component

To the extent that SSW is utilized/applied by the Board, the Board should recognize that a cost-based measurement based upon the reproduction costs of the assets used by BNSF together with an economically appropriate contribution to capital for the Rosebluff Lead is the most reliable approach to develop an economically appropriate IRC. Under SSW, such a measure is RCNLD. It is an independent and objective measure and has been used for ratemaking by the STB.³⁰ RCNLD provides an estimate of the cost to duplicate the railroad assets in their present position and assuming the parties would build the asset today to serve existing traffic. Historically, the Board has concluded that replacement costs are the appropriate economic measurement to use in ratemaking. RCNLD is a reasonable proxy for replacement cost, which is the proper economic measure of costs.³¹

³⁰ “The principal objective of the stand-alone cost (“SAC”) constraint is to restrain a railroad from exploiting market power over a captive shipper by charging more than it needs to earn a reasonable return on the replacement cost of the infrastructure used to serve that shipper.” See, e.g., Simplified Standards for Rail Rate Cases, EP 646 (Sub-No. 1), (STB served Sep. 5, 2007) STB LEXIS 516, *27-28.

³¹ The Board identified a SAC approach to develop the IRC component of the trackage rights fee for BNSF’s use of KCS’s trackage. A SAC analysis--based on a hypothetical least cost, most efficient railroad--utilizes a discounted cash flow analysis that determines the rate by comparing the revenues of the stand-alone railroad to the costs (capital and operating costs). There is no a priori reason for reliance on SAC test in this case.

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A railroad rate based on the reproduction cost provides an objective standard for ratemaking routinely used by the Board. RCNLD is an acceptable approach to measure replacement costs and IRC, and does so in a manner economically consistent with the STB's methodology for quantifying the capital recovery component in the rate reasonableness disputes.³² The STB's methodology develops a future annual capital requirement for railroad property adjusted for taxes to derive the required future cash flow associated with that capital requirement, which is converted to a present value.

2. Revenue Adequacy Considerations

Revenue adequacy considerations are relevant when developing the trackage rights fee that BNSF will pay to the owners of the Rosebluff Lead as an additional competitor. As indicated above, the appropriate trackage rights fee must ensure that a landlord railroad can earn an economically appropriate contribution to the capital used by the tenant, but it must also include a return on the landlord's cost of capital for KCS's network costs, as the landlord, to achieve revenue adequacy.³³ Including a lost opportunity profit component furthers this objective (as discussed below).

D. The CE Approach is Not Appropriate for the IRC

To the extent that SSW is utilized/applied by the Board, the Board should rely on RCNLD rather than the CE approach to estimate the IRC. The CE approach is not appropriate in the current case because it does not approximate replacement cost as required by the statute and the RTP in a manner consistent with the STB's general practice. Further, the CE approach is circular because it relies on expected revenues, which have been historically too low as BNSF has only paid an artificially low, non-market-based switching fee to UP in the past. KCS and UP

³² See TOTAL Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc., NOR 42121, slip op. at 215-228 and (Appendix D) and Table D-1 and D-2 (STB served Sept. 14, 2016), and TPI Opening TOTAL Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc., NOR 42121 at Exhibit III-H-1, Table I.

³³ Statutory regulatory requirements have long recognized the importance to ensure revenue adequacy of each railroad. 49 U.S.C. § 10704(a)(2); *See also* the Railroad Transportation Policy ("RTP") at 49 U.S.C. § 10101(3) (a principal policy in regulating railroad industry is "to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues").

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likewise charge themselves non-market-based fees based upon arrangements from the joint owners' agreements that date back to the 1940's, where the switching was truly reciprocal in nature and some costs are not encompassed by the fee. Accordingly, using historical revenue (or expected future revenues based on these historical switching fee revenues) will not produce an accurate or reliable CE calculation. Such an approach will not adequately compensate the landlord railroad.

In short, the CE approach to developing the IRC component of the trackage rights fee is circular and, by relying on a historically low rate to develop a future rate, does not approximate replacement cost as required by the statute and the RTP to ensure revenue adequacy, and it does not provide a contribution for KCS's network costs. As discussed below, such compensation in the form of lost opportunity profits is required.

E. Market-Based Compensation to Account for Lost Opportunity Profits to KCS

To ensure adequate compensation the Board should require BNSF to provide additional compensation above and beyond the SSW compensation amount, which at best only covers a portion of the costs associated with BNSF's use of the Rosebluff Lead. The additional compensation to KCS should represent the lost opportunity profits associated with the lost traffic from shippers for which KCS would have otherwise earned but for the government-mandated BNSF access.

The form of this compensation is most appropriately identified as a market-based payment. From an economic perspective, the revenue that KCS should receive should be similar what KCS would have received through a market-based negotiation -- either the KCS division that would apply in a KCS/BNSF a joint-line movement or the reciprocal switching rate that KCS would have otherwise charged BNSF in order to provide BNSF access to Lyondell. Such a compensation approach results in a market-based outcome that recognizes that BNSF does not own the tracks and ensures that KCS is not put at a competitive disadvantage because of government-mandated access through a merger condition where KCS was not even a merger applicant.

Such an outcome is also consistent with a fair market value fee that would have resulted from competitive negotiation of a willing buyer and a willing seller whom were free to "walk away" from any agreement (*i.e.*, absent the government mandating BNSF competitive access to

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KCS served joint line shippers).³⁴ Without such a sharing of profits and compensation to KCS for its lost opportunity profits, BNSF's additional financial gains from the artificially low trackage rights fee will result in direct financial harm to KCS and reduce the contribution to the rest of KCS network that it otherwise should have received (but for the government mandating BNSF competitive access). This economic issue directly impacts revenue adequacy requirements. It has further implications with respect to ensuring a level playing field (as will be discussed later) as well as from a fairness, equitableness and public interest perspective.³⁵

An approach to estimating the lost opportunity profit component (*i.e.*, shared profit of BNSF/KCS joint-line move) may be developed by examining the reciprocal switching rates that BNSF charges KCS for market access to its shippers. A reasonable and conservative approach is to develop an average (*i.e.*, mean) of the switching rates BNSF charges KCS for all products, which is equal to \$323/car³⁶ or the most common rate agreed upon by the parties, which equals \$400/car.³⁷ This traffic is reasonably comparable to Lyondell's and serves as a proxy market-

³⁴ There is broad agreement among academics, government agencies, regulators, and judicial bodies that the resulting contractual terms should be deemed representative of fair market value and, therefore, to have been determined through a competitive process. In the U.S., the concept of fair market value appears throughout the Internal Revenue Code, as a means to establish the value of an asset for purposes of taxation. It is defined as the "price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts." Title 26 of the Internal Revenue Code, 26 C.F.R. §20.2031-1(b) (Definition of Gross Estate; Valuation of Property). Standard economic theories of bargaining predict that each party will consider its best alternative to a negotiated agreement ("BATNA") when negotiating and will "walk away" from an agreement if it does not yield gains in excess of the BATNA. See also Avinash Dixit and Susan Skeath, *Games of Strategy*, 524-47 (1999). For a discussion of factors affecting bargaining weights, see Kenneth Binmore, Ariel Rubinstein & Asher Wolinsky, "The Nash Bargaining Solution in Economic Modeling," 17 *Rand Journal of Economics*, 176-188 (1986).

³⁵ Further consideration may be given to requiring BNSF to submit historical revenue and traffic as well as customer contracts in this proceeding. The actual BNSF traffic and revenue data (recent history and expected future) would be helpful to the Board to ensure an economically appropriate revenue division and profit sharing between BNSF and KCS for the issue movement(s).

³⁶ See Exhibit B to this Filing.

³⁷ The most frequent rate agreed upon by the parties is equal to \$400/car and it occurred in nearly 50% of the negotiations for commercial switching rates for all products. Specifically, 33 out of the 76 switching rates identified, which is equal to 43%.

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based rate for BNSF to pay KCS to access Lyondell. Specifically, the average BNSF switching rate represents an estimate of what KCS would charge BNSF for access to Lyondell in an arms-length, market-based transaction. In fact, the proxy market-based reciprocal switching rate, which is based on all traffic types (including grain traffic which often relies on unit trains), is conservative as compared to higher rates for chemicals and plastic products and other comparable market circumstances.³⁸³⁹

One adjustment to the average market-based access rate is required and that is to remove the portion of that fee that BNSF would pay to KCS for using trackage rights over the Rosebluff Lead. This could be done by removing the SSW amount that is calculated for BNSF's trackage rights over the Rosebluff Lead.⁴⁰ The remaining fee would approximate the proxy market-based reciprocal switching rate that KCS would require from BNSF in a market-based approach to compensate KCS for the lost contribution to KCS's network costs, as necessary to help achieve

³⁸ The Board has recognized that market-based rates can serve as the basis for resolving competitive concerns resulting from mergers and provides shippers with adequate access to another carrier when that access is threatened through a merger. Canadian National Railway Company, Grand Trunk Corporation, And Grand Trunk Western Railroad Incorporated – Control – Illinois Central Corporation, Illinois Central Railroad Company, Chicago, Central And Pacific Railroad Company, And Cedar River Railroad Company, 4 S.T.B. 122, 1999 STB LEXIS 305, *30-*33 (1999) (approving privately negotiated settlement agreement granting KCS haulage rights to access certain shippers and at market based rates much higher than the market rates suggested here).

³⁹ There are numerous examples of KCS' reciprocal switching rates charged to BNSF for chemical and plastic products that are greater than the \$400/car rate including the following: East Saint Louis, Quality Distribution (with chemical industry) (\$525/car); Kansas City, MO, Quality Carriers (d/b/a Transplastics) (\$525/car); Baton Rouge, LA, many chemical and plastics customers (\$625/car), Inter-terminal (\$395/car). See KCS Switching and terminal Tariff KCS 8100-E Revision 29.

⁴⁰ Removing the SSW rate eliminates any argument that KCS would obtain a double count of the Interest Rental Component – first through SSW and second through a market rate that presumably includes an Interest Rental Component.

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revenue adequacy.⁴¹ For convenience, the full equation is shown below:

Average or Most Common BNSF Switch Rate Charged to KCS for Manufactured Products	- (minus) SSW Rosebluff Rate based on RCNLD	= (equals) Proxy Market Based Access Fee Rate
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Importantly, the above-discussed approach to estimate a market access rate that BNSF should pay KCS is conservative as compared to the financial harm to KCS and the revenues it would have received but for the government-mandated access. Absent the government mandated access, the following economic circumstances are expected: (1) without revenue sharing between KCS and BNSF, KCS can reasonably be expected to have received the volumes and profit level achieved by BNSF; and (2) KCS's achieved rate (and revenue) can be expected to be somewhat higher due to a resulting competitive rate from 2 railroads competing instead of 3 railroads.

BNSF's undue competitive advantage has resulted in substantial financial benefits to BNSF that have come at the direct and material expense to KCS. According to the waybill traffic data summarized in Attachment 2, during the 1996 to 2016 period, BNSF received [[REDACTED]] in revenues from Lyondell.⁴² Market-based compensation is necessary to ensure BNSF is not given an undue competitive advantage in the future and to ensure a level playing field for KCS to compete.

⁴¹ The market-based rate would only contribute to, not totally make up for, KCS's shortfall in achieving systemwide revenue adequacy. To be consistent with revenue adequacy requirements, the Board could also consider using KCS's RSAM number and applying that to the URCS costs associated with BNSF operating over the Rosebluff Lead. This would develop the rate that KCS would need to charge BNSF to achieve revenue adequacy. This rate may be more or less than a market-based rate.

⁴² This figure is not adjusted for inflation.

V. FURTHER IMPLICATIONS OF INADEQUATE COMPENSATION FOR USE OF KCS' TRACKAGE AND COMPETITIVE ACCESS TO ITS CUSTOMERS

There are numerous economic implications of an artificially low trackage rights fee and compensation to KCS. The earlier discussion focused on revenue adequacy; however, there are numerous additional market and competitiveness impacts. Without the appropriate economic compensation, KCS traffic volumes to Lyondell will likely continue to erode and BNSF's market share will only further increase as a direct result of an artificially low trackage rights fee.⁴³ The erosion of KCS's Lyondell traffic on the Rosebluff Lead, in the case of an artificially low trackage rights rate, is not appropriate as it is not the result of competitive market forces at work.⁴⁴ As such, the resulting effect of an artificially low trackage rights fee from government-mandated access is that it will enable BNSF to unfairly compete for years to come due to an undue, artificial competitive advantage.

To better understand the competitive dynamic and the impact of a non-market-based BNSF trackage rights fee on KCS/UP's traffic and revenues, consider the following. If a customer knows of a lower market rate than KCS or UP offers (and the lower rate exists because of the artificially depressed trackage rights fee), then the customer has the economic incentive to either:

- (1) use the lower rate as a bargaining tool to force KCS or UP to accede a lower rate to keep the business; or
- (2) If KCS or UP do not agree to the lower price, the customer is likely to walk away from them and seek rail service from BNSF, who can offer a lower rate because of the artificially depressed trackage rights fee.

In fact, that undue competitive advantage to BNSF could be significant and lead a customer to entirely forego any potential negotiations with KCS.

⁴³ [REDACTED], BNSF-HC-001597-BNSF-HC-001612.

⁴⁴ The Board's Decision 6 only encompasses Lyondell. To the extent the Board sets artificially low compensation rates for access to Lyondell and then applied that principle to other Rosebluff Lead shippers that BNSF might in the future seek direct access to, that would extend BNSF's undue competitive advantage and financial benefit and create further irreparable harm to KCS and a non-level playing field resulting from the Board's decision in the instant matter.

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In other words, the resulting effect of an artificially low, non-market-based trackage rights fee does not enhance competition (the justification that the Board gave for approving the UP-BNSF settlement and the Lake Charles Condition in the UP/SP merger) but rather substantially reduces competition as KCS, and perhaps UP, are placed at a competitive disadvantage. In addition, providing BNSF an undue competitive advantage from an artificially low, non-market-based trackage rights fee misaligns economic incentives of the landlord carriers to invest in the railroad facilities. Simply put, a non-market-based trackage rights fee removes the landlord carriers' economic incentive to maintain and/or expand the railroad facilities when doing so would facilitate BNSF's gaining market share in which the landlord carriers do not participate.

For this reason, it is essential that an economically-appropriate trackage rights fee and compensation be paid by BNSF to KCS for use of KCS's railroad assets, including return on the investment, as well as compensation for the lost opportunity profit. An artificially low trackage rights fee will implicitly result in a regulatory decision that determines the winners and losers instead of relying on light-handed regulation and allowing competitive market forces to determine the outcome. Furthermore, an artificially low trackage rights fee does not comport with broader economic and regulatory issues of revenue adequacy, fairness, equity and the public interest.

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VERIFICATION

I, Julie M. Carey, declare under penalty of perjury that I have read the foregoing Verified Statement, that I know the facts asserted therein, and that the same are true as stated. Further, I certify that I am qualified to and authorized to submit this Verified Statement.

Executed on January 25, 2019

A handwritten signature in black ink that reads "Julie M. Carey". The signature is written in a cursive style with a large, looped 'J' and a stylized 'C'.

Julie M. Carey

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 32760 (SUB-NO. 46)

**BNSF RAILWAY COMPANY
- TERMINAL TRACKAGE RIGHTS APPLICATION -
THE KANSAS CITY SOUTHERN RAILWAY COMPANY AND
UNION PACIFIC RAILROAD COMPANY**

**RESPONSE OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY
TO DECISION NO. 6**

EXHIBIT A

VERIFIED STATEMENT OF JULIE M. CAREY

ATTACHMENT 1 - CURRICULUM VITAE

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JULIE M. CAREY

DIRECTOR

Julie M. Carey is a Director at NERA Economic Consulting. She has substantial experience as an energy economist, providing expert evidence in energy related commercial and regulatory disputes, as well as international arbitrations. She has more than 20 years of experience addressing economic issues in oil and gas, natural gas liquids, pipelines, power, renewables, and railroad sectors.

In addition to her expert consultancy assignments, Ms. Carey is also an Adjunct Professor at Georgetown University where she teaches a graduate level course in energy economics, which includes instruction on economics of energy products and transportation, regulatory economics, and competition analyses.

Ms. Carey provides expert consulting and testifying services on energy economic issues in commercial disputes before U.S. federal and state courts, and before arbitration panels in the U.S. and internationally. She also routinely assists energy regulators in the U.S. and Canada (U.S. Federal Energy Regulatory Commission (FERC), and the Canadian National Energy Board (NEB), the Surface Transportation Board (STB)) and many other state and provincial regulatory agencies in the U.S. and Canada.

Ms. Carey has substantial expertise in economic analyses of energy and transportation markets. She routinely conducts economic analyses of energy and transportation markets to understand historical and forecasted market conditions (supply, demand and prices), as well as to evaluate competition, claims of market manipulation, and other anticompetitive acts. She has conducted these analyses many dozens of times for the purposes of the regulatory approval of mergers and acquisitions, market-based rate authority, market rules, negotiated rates, as well as within investigations and commercial disputes. Her work includes evaluation of the reasonableness of rates and whether market participant bidding, trading and other behavior is economically appropriate and if prices reflect competitive market prices. Ms. Carey's work includes a variety of other regulatory economic analysis including affiliate relationships, cost of service and forward-looking costs, among others.

Within her commercial dispute work, Ms. Carey has been involved in many claims of breach of contract including: crude oil, natural gas, refined products, oil pipeline transportation, coal, power, renewable, and railroad transportation. She has also been involved in cases concerning partnership disputes, delayed plant operations, diminished value claims, replacement power, antitrust and manipulation claims, clean air act, qui tam, intellectual property, fiduciary duty, and bankruptcy, among others. Ms. Carey has substantial experience with economic damages (historical and future lost profit analyses) and conducts asset valuation analyses. She has assessed and quantified economic damages and valuations in dozens of cases

which include breach of contract, antitrust, class action, and other types of disputes.

Ms. Carey also has experience with environmental analysis (e.g., greenhouse gases and other types of emissions) and macroeconomic modeling (i.e., jobs, GDP, taxes) in which she studies the impact of energy infrastructure construction and operations on the economy for regulatory and business decision-making.

EDUCATION

- **Pennsylvania State University**
Doctoral Studies Program Coursework/M.A., Economics, 1993
- **Allegheny College**
Bachelor of Science, Economics, 1991

PROFESSIONAL EXPERIENCE

2017-Present	NERA Economic Consulting - Director
2016-Present	Georgetown University (Washington, DC) - Adjunct Professor
2011-2017	Navigant Consulting, Inc. (Washington, DC) - Director
2004-2010	LECG, Inc. (Washington, DC) - Principal
2000-2004	FTI Consulting, Inc. (Washington, DC) - Director, Manager
1996-2000	LECG, Inc. (Washington, DC) - Economist, Senior Associate, Associate
1994-1996	American Public Power Association (Washington, DC) - Research Analyst

CERTIFICATIONS, MEMBERSHIPS, AND AWARDS

- International Association for Energy Economists
- U.S. Association for Energy Economists

SELECTED ENERGY PROJECT EXPERIENCE

Railroad

- Expert report addressing economic and regulatory aspects of the appropriate rate to use for trackage rights fees, including valuation methodologies.
- Expert report and expert testimony regarding multiple breach of contract claims for joint-line transportation service, and financial, economic and regulatory considerations regarding the contracts, negotiations and the financial and economic impact.
- Expert consultation analyzing economics of containerized freight transportation, including intermodal rail and competition with alternative transportation modes in a transportation contract dispute and claims of anticompetitive behavior for a commercial arbitration.
- Expert report in STB proceeding regarding the potential introduction of indirect competition analyses within market dominance determinations for coal transportation rates to utility generation facilities.

- Expert consultation analyzing the economics of competition and anticompetitive behavior in railroad transportation services including evaluating the impact of fuel surcharges in a commercial dispute.
- Expert reports in a coal contract commercial dispute analyzing economic damages and replacement coal source and transportation alternatives.
- Expert evidence in numerous regulatory proceedings involving rail transportation rate disputes for coal, including evaluation of appropriate regulatory economic approach to assess the reasonableness of a railroad rate, long term forecasts of coal deliveries, transportation rates (all modes), and revenue attribution methodologies for shared facilities.

Oil and Gas

- Expert report and testimony in an arbitration regarding economic analysis of crude oil markets (Western Canadian and global markets), economics of conventional and unconventional oil and gas production resources, and the economic impact of falling crude oil prices since 2014 on the energy construction industry and certain companies located in Western Canada.
- Economic consulting and expert report before the NEB regarding potential of discriminatory behavior that can arise from an unregulated affiliate of a regulated oil pipeline and other economic issues pertaining to a crude oil pipeline. The economic analysis includes evaluation of substantial quantities of butane and other oil products injections into the pipeline system and the impact on the quality and financial harm and economic damages for the product. This work included econometric analysis and the statistical significance of butane in the diminution of crude oil value.
- Retained testifying expert in an ongoing matter to provide economic evidence regarding potential competitiveness of refined product pipeline markets (gasoline, distillates, fuel oil, jet fuel) for a proceeding before the FERC involving a complaint regarding the reasonableness of current rates and continuation of its market-based rate authority. This work includes evaluation of product and transportation markets (rail, truck, waterborne, and pipeline), competition, and competitive prices.
- Expert consulting assisting the Canadian Competition Bureau (CCB) in an investigation of potential energy market manipulation within the natural gas liquids product markets and price spikes. This work includes market analysis and econometric analysis to evaluate whether the actual market prices reflect competitive market prices (i.e., consistent with supply, demand, prices, constraints, etc.) or if manipulative or anticompetitive behavior occurred. This work included economic analysis of product and transportation markets (including pipeline, railroad, and trucking).
- Expert consulting in a regulatory investigation into the reasonableness of market prices paid for natural gas purchases and bidding behavior of certain natural gas fired power generation facilities made during the 2013/2014 winter often referred to as the polar vortex.
- Retained testifying expert to conduct economic analysis of crude oil markets, pricing, and alternative transportation economics (rail, truck, waterborne, and pipeline) in a crude oil product contract dispute in a commercial arbitration.
- Expert consulting providing economic analysis of the competitiveness of crude oil transportation market in Western Canada to evaluate competition within pipeline markets (including railroad competition) before the NEB. This work also included economic analysis of the negotiations process and negotiated rates for new transportation contract sales to determine if the process was competitive and the rates were consistent with fair market value prices.
- Expert consulting in numerous disputes/investigations involving claims of market manipulation and anticompetitive behavior within natural gas product markets. This work included evaluation of economic purpose of natural gas product purchases and sales as well as economic analysis to evaluate

whether the market prices reflect competitive market prices (i.e., consistent with supply, demand, prices and constraints, etc.).

- Expert consulting for a natural gas product dispute within an arbitration to evaluate the asset valuations of numerous natural gas-fired power plants, including long term forecasts of market prices, revenues and costs, cost of capital, and the development of a discounted cash flow analysis. This work included a probabilistic analysis to forecast cash flows under different financial and operational conditions.
- Expert consulting in a claimed breach of a refined product contract involving economic analysis of crude oil and refined product markets, as well as rail, truck, and pipeline transportation economics and economic damages.
- Expert consulting in a refined product transportation contract dispute involving economic analysis of rail, truck, and pipeline transportation.
- Economic and competition analyses in numerous regulatory proceedings pertaining to refined product (gasoline, distillates, fuel oil, and jet fuel) and transportation markets for oil pipelines market-based rate authority. This work includes analysis of product and geographic markets and the evaluation of origin and destination market, analysis of refined product markets and alternative transportation economics (rail, truck, waterborne, and pipeline).
- Economic consulting supporting numerous Association of Oil Pipe Lines (AOPL) whitepapers analyzing competitiveness of crude oil and refined product transportation markets (rail, truck, waterborne, and pipeline). This work also included economic analysis demonstrating that efficient oil pipelines earn higher returns and charge lower rates than less efficient oil pipelines.
- Economic consulting including the evaluation and analysis of the potential effects of EPA gasoline sulfur content regulations (Tier 3”) on U.S. retail gasoline prices and the economic impact.
- Economic consulting in numerous regulatory proceedings conducting economic and competition analyses in crude oil product and transportation markets for oil pipelines market-based rate authority. This work includes analysis of product and geographic markets and the evaluation of origin and destination market, analyses of many U.S. and Canadian crude oil production supply and demand regions and alternative transportation economics (rail, truck, waterborne and pipeline).
- Economic analysis and expert evidence regarding the economic benefits of proposed crude oil and natural gas pipelines seeking regulatory approval.
- Consulting expert assistance to develop a cost of service rate model for a major oil pipeline to include within a compliance filing before a regulatory agency.

Power and Renewables

- Expert testimony regarding a claim of economic damages (past and future) associated with the alleged breach of a power purchase agreement within an international arbitration (SCC). This work included analysis of the appropriate economic theory of damages, quantification of economic damages and energy market related analysis.
- Expert report regarding past and future economic damages and economics of the silane gas market and supply, demand and pricing in the solar power panel market in a contract dispute before a bankruptcy court.
- Expert consulting and economic damages analyses in a dispute regarding the failed performance of a steam generator turbine in an ICC international arbitration. This work included economic theory and quantification of damages under a benefit of the bargain and rescission damages theories as well as evaluation of long term energy forecasts, economic performance and replacement power purchases.

- Expert evidence and consulting in many matters related to competition within wholesale electricity markets for regulatory approval of mergers and acquisitions and market-based rate authority. This work includes market power screens and delivered price test analyses and analysis of product and geographic markets, including assessments of transmission constraints. The economic analysis includes evaluation of delivered fuel costs (natural gas, coal, etc.) and operational characteristics of power plants (seasonal capabilities, short run marginal costs, efficiency rates, etc.).
- Expert reports and expert testimony analyzing economic and environmental analysis of the greenhouse gases (GHG) impact from the construction and operation of a new coal terminal export facility and downstream power markets for regulatory approval. This work included long term market and economic analysis of the elasticity of demand of coal, forecast of GHG emission and other energy market impacts within downstream energy markets (U.S. and Pacific Basin). This work also included analysis of power generation economics (short run marginal costs and power plant efficiencies), delivered fuel prices (coal, LNG, natural gas, etc.), and the range of potential outcomes of the GHG forecasts.
- Expert testimony before an Alberta Utility Commission regarding the impact of a proposed market rule regarding the transmission allocation among market participants, incentives for new entry, and an evaluation of economic efficiency and potential market power within the wholesale electricity market.
- Retained testifying expert in an investigation involving claims of market manipulation of wholesale power markets to evaluate the energy companies' economic behavior, including economic purpose of the transactions and the reasonableness of the prices reflective of market outcomes.
- Expert report in an international arbitration providing an analysis of the Chinese and global solar panel market, reasonableness of market prices, and the market value of solar power products.

SELECTED EXPERT AFFIDAVITS AND TESTIMONY

National Energy Board Hearing Order RHW-002-2017, File OF-Tolls-Group2-T309-2017-01 01, TEMPL Westspur Pipelines Limited, Notice of Complaint pursuant to Part IV of the National Energy Board Act by Crescent Point Resources Partnership, Reply to Sur-Reply Expert Report of Julie M. Carey, November 23, 2018. Joint Reply Expert Report, August 31, 2018. Expert Report, September 15, 2017.

FERC Docket No. ER11-47, Triennial Update for Market Based Rate Authority for American Electric Power Company, et al. in the Southwestern Power Pool region, Affidavit of Julie M. Carey and Laura Olive, June 27, 2018.

In the Matter of Arbitration Proceeding Concern disputes with respect to a share purchase agreement dated June 26, 2014 Between Pacer Construction Holdings Corporation, Pacer Construction Management Corporation, Pacer Mamisiwin Corporation, Pacer Construction Corporation, Pacer Foundations Corporation, Pacer Projects Corporation, FTI Consulting Canada Inc. (in its capacity as receiver and manager of Pacer Promec Energy Corporation and Pacer Promec Energy Construction Corporation) and Mastec, Inc. and Richard Pelletier holdings Inc., Richard Pelletier, Resman holdings ltd., Don Taylor, 592652 Alberta ltd., and John Simpson; Direct Testimony of Julie M. Carey and Bradley A. Heys, June 18, 2018. Reply Expert Report, April 9, 2018.

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Company; Marquette Rail, LLC; Meridian & Bigbee Railroad, LLC; Mid-Michigan Railroad, Inc. d/b/a Michigan Shore Railroad, Inc.; and Riceboro Southern Railway, LLC, Expert Testimony of Julie M. Carey, April 20, 2018. Expert Report, November 15, 2017.

In the Matter of New England Central Railroad, Inc., Trackage Rights Order, Pan Am Southern, LLC. Surface Transportation Board (“STB”), Docket No. FD 35842, Verified Statement of Julie M. Carey, December 6, 2017.

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U.S. Army Corps of Engineers, Seattle District, Response to Draft Environmental Impact Statement for the National Environmental Policy Act Regarding the Proposed Millennium Bulk Terminals Longview Project, Expert Evidence. November 29, 2016.

Cowlitz County and the Washington State Department of Ecology, Response to Draft Environmental Impact Statement for the State Environmental Policy Act Regarding the Proposed Millennium Bulk Terminals Longview Project, Expert Evidence of Julie M. Carey. June 13, 2016.

FERC Docket No. Docket No. EC16-, Supplemental Affidavit of Julie M. Carey to Support Ohio Valley Electric Corporation’s Application for Market Based Rate Authority in PJM, MISO, and other market areas. January 17, 2016. (Initial Report November 6, 2015)

Wisconsin Public Service Commission, Docket No. 6800-CE-176, Application for a CPCN To Build an Natural Gas-Fueled Power Plant at its Riverside Energy Center Facility, Surrebuttal Testimony of Julie M. Carey. December 16, 2015.

Wisconsin Public Service Commission, Docket No. 6800-CE-176, Application for a CPCN To Build an Natural Gas-Fueled Power Plant at its Riverside Energy Center Facility, Rebuttal Testimony of Julie M. Carey. December 4, 2015.

FERC Docket No. Docket No. EC15-, Supplemental Affidavit of Julie M. Carey to Support PNM’s Application for Authorization of Disposition of Jurisdictional Facilities. November 6, 2015. (Initial Report September 25, 2015.)

FERC Docket No. ER11-47, Triennial Update for Market Based Rate Authority for American Electric

Power Company, et al. in the Southwestern Power Pool region, Affidavit of Julie M. Carey. June 30, 2015.

FERC Docket No. ER10-2302, Change in Status Filing for Public Service Company of New Mexico, et al., Affidavit of Julie M. Carey. August 15, 2014.

FERC Docket No. ER14-, Change in Status Filing for American Electric Power Company, et al., Affidavit of Julie M. Carey (with Ben Ullman). December 27, 2013.

FERC Docket No. ER11-47 et al., Triennial Update for Market Based Rate Authority for American Electric Power Company, et al. in the PJM RTO region, Affidavit of Julie M. Carey. December 20, 2013.

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ULVAC, INC vs. China Solar Power (Holdings) Ltd., In the Matter of a Commercial Arbitration, Hong Kong International Arbitration Centre, HKIAC /A11013, Expert Report of Julie Carey. June 11, 2013.

Energy Conversion Devices, Inc., et al., Chapter 11, Case No. 12-43166, U.S. Bankruptcy Court Eastern District of Michigan Southern Division, Expert Report for Praxair by Julie Carey (with Graham Stevens). April 17, 2013.

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HS Orka hf. vs. Nordural Grundartangi, ehf and Orkauveita Reykjavíkur, In the Matter of a Commercial Arbitration, Stockholm Chamber of Commerce Arbitration V (191/2011), Expert Rebuttal Report of Julie M. Carey. October 24, 2012.

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FERC Docket No. ER11-47, Triennial Update for Market Based Rate Authority for American Electric Power Company, et al. (Southwestern Power Pool), Affidavit of Julie M. Carey. June 29, 2012.

On behalf of Montana Alberta Tie Ltd (“Enbridge – MATL”), Alberta Utilities Commission, Proceeding 1633, Testimony of Julie M. Carey (with Cliff Hamal). June 15, 2012.

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FERC Docket No. ER96-1551 and ER01-615 and ER09-74, Triennial Update for Market Based Rate Authority for Public Service Company of New Mexico, Affidavit of Julie M. Carey. March 8, 2010.

On behalf of COALSALES II, L.L.C., In the matter of Gulf Power Company v. COALSALES II, L.L.C. Docket no. 3:06 CV 270/MCR/MD, before the US District Court for the Northern District of Florida, Pensacola Division, Expert Reports of Julie M. Carey (with Cliff Hamal). December 11, 2008 and August 19, 2008.

FERC Docket Nos. ER96-2495, ER97-4143, ER97-1238, ER98-2075 and ER98-542, Change in Status Filing for American Electric Power for Market-Based Rate Authority, Affidavit of Julie M. Carey. May 25, 2007.

FERC Docket No. Docket EC06-113-000, Application for Asset Transfer of Contra Costa #8 for Pacific Gas and Electric Company, Mirant Delta, LLC and Mirant Special Procurement, Inc., Affidavit of Julie A. Murphy (now Julie M. Carey). April 17, 2006.

FERC Docket No. ER96-1551 and ER01-615, Change in Status Filing for Public Service Company of New Mexico for Market-Based Rate Authority, Affidavit of Julie A. Murphy. January 12, 2006.

FERC Docket No. ER05-1244-000 and ER05-1244-001, Application by Societe Generale Energie (USA) Corp. for Market-Based Rate Authority, Affidavit of Julie A. Murphy. July 21, 2005.

Testimony of Julie Murphy on behalf of Onvoy, Inc., Onvoy, Inc. v. Allete, Inc. f/k/a Minnesota Power, Inc. d/b/a Minnesota Power and Light Company and, Enventis Telecom, Inc., Sixth Judicial District Court File No. 69-C9-03-601595, St. Louis County, Minnesota. April 21, 2005.

STB Docket No. 42071, Otter Tail Power Co. v. BNSF Railway Co, Sponsored Evidence within Section III-A Stand-Alone Traffic Group of the Supplemental Response. March 1, 2005. Additional Reply Evidence, March 22, 2004. Reply Evidence, October 8, 2003.

Expert Report Julie A. Murphy (with John Klick) on behalf of Onvoy, Inc., Onvoy, Inc. v. Allete, Inc. f/k/a Minnesota Power, Inc. d/b/a Minnesota Power and Light Company and, Enventis Telecom, Inc., Sixth Judicial District Court File No. 69-C9-03-601595, St. Louis County, Minnesota. December 5, 2004.

STB Docket No. 41191 (Sub-No. 1), AEP Texas North Company v. Burlington Northern and Santa Fe Railway Company, Verified Statement of Julie A. Murphy. September 9, 2004. Reply Evidence Section III-A Stand-Alone Traffic Group, May 24, 2004.

MI PSC Case No. U-13531, In the Matter of the Commission's Own Motion to Review the Costs of Telecommunication Services Provided by SBC Michigan, Final Reply Declaration of Julie A. Murphy (with Michael Baranowski). May 10, 2004. Initial Declaration, January 20, 2004.

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Texas PUC SOAH Docket. No.473-04-0001, PUC Project No. 27957, Application of CenturyTel of San Marcos, Inc. for Approval of a Plan for Disaggregation of State and Federal Universal Service Support, Testimony of Julie Murphy on Behalf of Grande Communications Networks, Inc. February 19, 2004. (Direct Testimony, December 29, 2003.)

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STB Docket No. 42072, Carolina Power & Light Co v. Norfolk Southern Railway Company, Sponsored Testimony within Section III-A Stand-Alone Traffic Group, Supplemental Reply Evidence January 12, 2004. Reply Evidence, October 11, 2002.

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PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 32760 (SUB-NO. 46)

**BNSF RAILWAY COMPANY
– TERMINAL TRACKAGE RIGHTS APPLICATION –
THE KANSAS CITY SOUTHERN RAILWAY COMPANY AND
UNION PACIFIC RAILROAD COMPANY**

**RESPONSE OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY
TO DECISION NO. 6**

EXHIBIT A

VERIFIED STATEMENT OF JULIE M. CAREY

**ATTACHMENT 2 – WAYBILL AND TRAFFIC DATA [[OMITTED IN PUBLIC
VERSION]]**

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 32760 (SUB-NO. 46)

**BNSF RAILWAY COMPANY
– TERMINAL TRACKAGE RIGHTS APPLICATION –
THE KANSAS CITY SOUTHERN RAILWAY COMPANY AND
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**RESPONSE OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY
TO DECISION NO. 6**

EXHIBIT A

VERIFIED STATEMENT OF JULIE M. CAREY

**ATTACHMENT 3 -HIGHLY CONFIDENTIAL DOCUMENTS PRODUCED IN
DISCOVERY, WHICH ARE REFERENCED IN THE VS CAREY [[OMITTED IN
PUBLIC VERSION]]**

PUBLIC VERSION

[BNSF-HC-002370- BNSF-HC-002388 OMITTED]

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 32760 (SUB-NO. 46)

**BNSF RAILWAY COMPANY
-- TERMINAL TRACKAGE RIGHTS APPLICATION --
THE KANSAS CITY SOUTHERN RAILWAY COMPANY AND
UNION PACIFIC RAILROAD COMPANY**

**RESPONSE OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY
TO DECISION NO. 6**

EXHIBIT B

BNSF Switching Rates to KCSR

BNSF Switching Book
8005-D (Page #)

Industry Name

Location

Switch rate
(\$)

Commodity listed in
Notes 1 - 3 of BNSF 8005-
D?*

19	B4 Lumber Company LP	Valley Park, MO	285	No
10	A&K Railroad Materials Inc	Kansas City, KS	400	No
9	Adams Warehouse & Delivery Inc.	Houston, TX	235	No
13	ADM Grain	N. St. Louis, MO	163	Yes**
13	ADM Grain	N. St. Louis, MO	285	No**
11	ADM Milling Co	Lincoln, NE	295	Yes
11	AG Processing Inc	Lincoln, NE	295	Yes
10	Alheim Quirk & Sons Inc	Kansas City, MO	200	Yes
9	Altor Trading Co	Havelsok, NE	295	No
12	American Rail Marketing LLC	Morris, KS	400	No
10	American Railcar Industries Inc	Kansas City, MO	400	No
9	Archer Daniel Midland Co	Havelsok, NE	295	Yes
14	Ardent Mills LLC	Omaha, NE	285	Yes
18	Ardent Mills LLC	Topeka, KS	220	Yes
15	Bartlett Grain Company LP	Randolph, MO	200	Yes
10	Bluelinx Corp	Kansas City, MO	400	No
15	Brenntag Mid-South Inc	Randolph, MO	400	No
5	Building Products Inc	Council Bluffs, IA	295	No
3	Bunge North America Inc	Island Park, IA	235	Yes
11	Capital Contractors Inc	Lincoln, NE	295	No
10	Certified DEF LLC	Kansas City, MO	400	No
17	Chemsphere Corp	St. Louis, MO	285	No
12	Consolidated Lumber Company	Morris, KS	400	No
11	Consolidated Container Company	Lenexa, KS	400	No
10	Consolidated Transfer & Warehouse (d/b/a CTW Transportation Services Inc)	Kansas City, MO	400	No
12	Erman Corporation	Morris, KS	400	No
12	GATX Rail	Morris, KS	400	No
15	Georgia-Pacific Corrugated LLC	Randolph, MO	400	No
11	Gill Stodice Inc	Lenexa, KS	400	No
10	Graham Packaging Company LP	Kansas City, MO	400	No
10	Grain Craft Inc	Kansas City, MO	200	Yes
9	Hansen-Mueller Co	Havelsok, NE	295	Yes
10	Harcros Chemicals Inc	Kansas City, KS	400	No
10	Henkel Corp	Kansas City, MO	400	No
15	Heritage Environmental Services	Randolph, MO	400	No
10	Holcom (US) Inc	Kansas City, MO	400	No
10	Ingredion Inc	Kansas City, MO	200	Yes
10	Ingredion Inc	Kansas City, MO	400	No
19	Innavor, Inc.	Tupelo, MS	285	No
13	International Food Products Corp	N. St. Louis, MO	285	No
19	International Paper Co	Valley Park, MO	285	No
17	J.D. Smith & Company Inc	St. Louis, MO	285	No
10	Kansas City Water Department	Kansas City, MO	400	No
18	Lanigloy Recycling of Topeka Inc	Topeka, KS	220	No
10	Livestock Nutrition Center LLC	Kansas City, MO	200	Yes
17	Manor Chemical Co	St. Louis, MO	285	No
10	Maverick Converting Inc	Kansas City, MO	400	No
18	McCoy Lumber Co	Topeka, KS	220	No
10	Metro Park Warehousing, Inc., S. 35th St	Kansas City, KS	400	No
10	Metro Park Warehousing, Inc., Fairbanks Ave.	Kansas City, KS	400	No
10	Metro Park Warehousing, Inc., Schwartz Rd.	Kansas City, KS	400	No
10	Metro Park Warehousing, Inc., Quebec St	Kansas City, MO	400	No
11	Mid America Recycling LLC	Lincoln, NE	295	No
10	Midwest Reload	Kansas City, MO	400	No
9	Nabco Inc	Havelsok, NE	295	No
11	Nabco Inc	Lincoln, NE	295	No
11	Nebraska Department of Correctional Services	Lincoln, NE	295	No
10	Nexeo Solutions LLC	Kansas City, KS	400	No
15	Norag LLC	Randolph, MO	200	Yes
14	Nox-Crete of Nebraska Inc	Omaha, NE	295	No
14	Packaging Corporation of America	Omaha, NE	195	No
4	Paris Brothers Inc	Birmingham, MO	400	No
10	Pioneer Container Corp	Kansas City, MO	400	No
10	Pizza Blends Inc	Kansas City, MO	200	Yes
9	Professional Distribution Center Inc	Houston, TX	235	No
9	Purina Animal Nutrition LLC	Havelsok, NE	295	Yes
19	Reichhold LLC 2	Valley Park, MO	285	No
10	REW Materials Inc	Kansas City, MO	400	No
10	Schulte Lumber Co	Kansas City, MO	400	No
10	SMWC Acquisition Company Inc	Kansas City, MO	400	No
11	Sprenger Midwest Inc	Lincoln, NE	295	No
10	Steel Ventures LLC	Kansas City, MO	400	No
9	Sustex Inc	Houston, TX	235	No
14	Syngenta Crop Protection	Omaha, NE	295	No
10	United States Gypsum Co	Kansas City, MO	400	No
17	Waico Terminal & Port Services	St. Louis, MO	285	No
14	Westway Feed Products LLC	Omaha, NE	295	No
11	Yankee Hill Brick Manufacturing	Lincoln, NE	295	No

*Yellow lines in this table indicate that KCSR served the shipper at the named location in 2018. Where KCSR served the shipper in 2018, the Yes/No answer in this column is based on commodities handled by KCSR for the shipper. For other shippers, the Yes/No answer in this column is based on the shipper's website.

** \$163 rate applies to Note 1 grain; \$285 rate applies to other commodities

Total: 25278
78
\$324.08