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February 1, 2018

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: Finance Docket No. 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 hereby files, via e-filing, its “Motion To Dismiss” BNSF Railway Company’s January 12, 2018 petition to establish terms and conditions for its use of the terminal trackage rights granted in the above-captioned matter. This Motion 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

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

MOTION TO DISMISS BNSF'S PETITION TO ESTABLISH
CONDITIONS OF USE AND COMPENSATION

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Railway Company

February 1, 2018

PUBLIC VERSION

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**MOTION TO DISMISS BNSF'S PETITION TO ESTABLISH
CONDITIONS OF USE AND COMPENSATION**

SUMMARY OF ARGUMENT

On January 12, 2018, BNSF Railway Company ("BNSF") filed a petition requesting the Surface Transportation Board (the "Board") to establish conditions of use and compensation for BNSF to directly serve a LyondellBasell ("Lyondell") facility in the Lake Charles, Louisiana area using the Rosebluff Lead and related tracks via the terminal trackage rights granted to BNSF by the Board in Decision No. 3¹ ("Petition"). The Board should dismiss the Petition. BNSF has pulled a classic "bait and switch" hoping the Board bites. It should not.

BNSF's filings in this proceeding, including the Application, the BNSF Opening, BNSF's Rebuttal, and BNSF Final Brief all focused exclusively on BNSF's efforts to get terminal trackage rights to serve CITGO delivering unit trains of crude oil. During the course of the proceeding, BNSF and CITGO introduced evidence into the record that CITGO was a direct and intended beneficiary of the Board-imposed Lake Charles merger condition, that the public

¹ In the interest of making this Motion to Dismiss ("Motion") as succinct as possible, The Kansas City Southern Railway Company ("KCS") refers the Board to the Background established in the Board's July 5, 2016 decision (Decision No. 3) for a procedural history of the proceeding. KCS also adopts the various short citations and abbreviations that it previously used throughout this proceeding.

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interest supported CITGO receiving BNSF direct service, that CITGO invested in its infrastructure to accommodate BNSF direct service, and that BNSF direct service to CITGO was possible without substantially impairing UP and KCS's operations. In Decision No. 3 the Board granted BNSF's request to provide direct service to CITGO based on that record.

Now, BNSF wants to use Decision No. 3, and a record in which BNSF mentioned Lyondell in passing in its Rebuttal, as a basis to skip any public interest or practicability findings with respect to service to Lyondell. Instead, BNSF wants the Board to expeditiously establish conditions of use and compensation for BNSF to provide direct service to Lyondell without any further legal or evidentiary findings. The Board should reject BNSF's attempts to "put the cart before the horse."

BNSF has not presented a prima facie case that it has both the legal and contractual right to serve Lyondell. Decision No. 3 does not state access to Lyondell is included. The Application was directed at CITGO. The evidence of record was based on BNSF serving CITGO, not Lyondell. Even if one broadly read Decision No. 3 to cover other West Lake Charles shippers (and it should not be so read), the Petition presents no evidence to establish that Lyondell was and is a West Lake Charles shipper subject to the Lake Charles Condition. BNSF just assumes it is and offers no evidence in support of its assumption.

Furthermore, the Petition includes no legal analysis indicating that the specific terminal trackage rights over the Rosebluff Lead that were granted in Decision No. 3 allows BNSF to get on and off that lead and operate over industry and third party tracks to serve shippers such as Lyondell who are not directly on or adjacent to the Rosebluff Lead. Even if Decision No. 3 did allow BNSF to get on/off the Rosebluff Lead to access shippers not connected directly to or adjacent to the Rosebluff Lead, BNSF has failed to present any evidence that it has rights to

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operate over industry or third party industry tracks to access Lyondell. Additionally, there is no evidence that Lyondell desires BNSF direct service or that the Port of Lake Charles will allow BNSF to use its tracks. Having failed to set forth a prima facie case, the Petition should be dismissed.

Given that BNSF has not yet established a prima facie case,² there is no basis for establishing a procedural schedule at this time. Accordingly, the Petition should be dismissed.³ If not dismissed, at a minimum, until BNSF can make a prima facie case by providing evidence and argument on the above fundamental predicates, evidence that BNSF has not yet presented and may not be able to present, the Board should toll any applicable statutory time periods until ruling on this Motion. This is entirely consistent with precedent.

ARGUMENT

I. BNSF HAS NOT ESTABLISHED THAT ITS APPLICATION, AND THE BOARD'S DECISION, PROVIDED ACCESS TO LYONDELL

The Petition seeks to “establish conditions of use and compensation for BNSF to directly serve a LyondellBassell facility at West Lake Charles, Louisiana over the Rosebluff Lead and related tracks via the terminal trackage rights granted by the Board to BNSF in Decision No. 3.” Petition at 1 (emphasis supplied). For the Board to move to the conditions of use and compensation stage, BNSF must first establish the basic fundamental predicates necessary for

² Union Pacific Corporation, Union Pacific Railroad Company And Missouri Pacific Railroad Company – Control – Chicago And North Western Holdings Corp. And Chicago And North Western Transportation Company, 9 I.C.C. 2d 939, 950 (ICC 1993) (“The statute is subject to a general limitation made explicit in the Commission's regulations, that an application must contain enough evidence to enable the Commission to exercise its statutory responsibilities, i.e., the application must present a prima facie case.”).

³ Department Of Public Service Regulation And Public Service Commission Of The State Of Montana v. Union Pacific Railroad Company, No. 40913, 1994 ICC LEXIS 86 (ICC served June 3, 1994) (Dismissing complaint for failure to submit the detailed evidence necessary to make out a prima facie case) (“Montana v. UP”).

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the Board to even address the Petition. BNSF has not done so. First, because Decision No. 3 granted access to CITGO and the Board's findings were directed at CITGO, BNSF cannot just assume that the Board's findings also covered access to Lyondell. Second, even if other shippers can be governed by the Board's findings, as BNSF will undoubtedly argue, there is no proof that the Lyondell facility is governed by the Lake Charles Condition on which the Board found the public interest would be served in granting BNSF's Application.⁴ Third, BNSF has to establish that the scope of BNSF's trackage rights "over" the Rosebluff Lead to serve shippers on the Rosebluff Lead also allows it to carry traffic and serve shippers on connecting and independently-owned tracks.⁵ Decision No. 3 did not grant BNSF access over "related tracks" as asserted by BNSF so that BNSF could get on/off the Rosebluff Lead to serve other shippers.⁶ Fourth, BNSF's own operating plan relies upon the ability to access Lyondell through 0.40 miles of tracks owned by parties BNSF does not identify.⁷ BNSF has not established that it even has the contractual right to operate over these tracks to serve Lyondell – a critical missing element of the Petition. Finally, and just as important, the Petition assumes that Lyondell has requested BNSF service and that BNSF's service would be in the public interest.

Without these fundamental facts being addressed, the Board cannot make findings required by Section 11102(a) and should not move to the next stage, i.e., the establishment of

⁴ Decision No. 3 at 13.

⁵ "The Board may require terminal facilities...*owned by a rail carrier*...to be used by another rail carrier..." 49 U.S.C. §11102(a) (emphasis added). The Board has no legal authority to impose terminal trackage rights over industry track not owned by a rail carrier.

⁶ "BNSF seeks terminal trackage rights over the Rosebluff Lead, a nine-mile track jointly owned by Kansas City Southern Railway Company (KCS) and UP. The Board will grant BNSF's application." Decision No. 3 at 1.

⁷ "BNSF Job will ...make the approximately 0.40-mile move from the Montell Lead onto the Rosebluff Lead. . ." Verified Statement of Rob Reilly ("Reilly Petition VS") at 8. Also, Exhibit A to Reilly Petition VS at 3.

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operating conditions or compensation. BNSF must first make a showing that it has both the legal and contractual right to serve Lyondell. BNSF has not made that showing. As such, the Petition should be dismissed.

A. The Application And The Board's Findings Were Based Upon Evidence Directed At Service To CITGO, Not Lyondell

The Petition seeks to establish conditions of use and compensation for BNSF to directly serve a Lyondell facility that BNSF claims is located in West Lake Charles, Louisiana. BNSF has not filed a terminal trackage rights application seeking access to the Lyondell facility. BNSF has not made any arguments or provided any evidence as required by 49 U.S.C. §11102(a) to establish that service to Lyondell is the “public interest” or was covered by its prior Application. BNSF skips those steps. BNSF simply assumes that Decision No. 3 already made those findings with respect to service to Lyondell and that the only issue with respect to service to Lyondell is whether BNSF’s proposed operating plan would substantially interfere with UP’s and KCS’s service on the Rosebluff Lead and what is the appropriate compensation. BNSF’s assumption is wrong. There is no evidence in the record of this proceeding that BNSF service to Lyondell, as opposed to CITGO, meets either the Midtec standard or the public interest standard as articulated by the Board in Decision No. 3 and was intended to be covered by the scope of Decision No. 3’s findings.

The Application, the BNSF Opening, BNSF’s Rebuttal, and BNSF Final Brief all focused on BNSF’s efforts to get terminal trackage rights to serve CITGO. During the course of proceeding, BNSF and CITGO introduced evidence into the record that CITGO was a direct and intended beneficiary of the Board-imposed Lake Charles merger condition, that the public interest supported CITGO receiving BNSF direct service, that CITGO invested in its infrastructure to accommodate BNSF direct service, and that BNSF direct service to CITGO was

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possible without substantially impairing UP and KCS's operations. BNSF cannot now use the authority granted to it to serve CITGO and the findings made therein based upon that record to morph into similar findings with respect to Lyondell.

Yet, that is precisely what BNSF seeks to do. As just one example, in its evidence with respect to CITGO, BNSF stressed that it could clear the lead and chamber its train in CITGO's facility to avoid interfering with UP trains on the lead. See Decision No. 3 at 14. By contrast, BNSF's Petition now proposes that it would occupy the Montell Lead, and either occupy Rosebluff Yard or force UP to adjust its schedule to stay out of BNSF's way. Exhibit A to Reilly Petition VS at 2. Similarly, while previously asserting that it would run from the 50/50 line to CITGO's facility in 25 minutes (see Decision No. 3 at 14), Mr. Reilly now testifies that "BNSF expects the movement [through Rosebluff Yard to the Montell Lead would] take approximately thirty minutes to *ninety* minutes, depending on traffic." Reilly Petition VS at 7 (emphasis added). Likewise, in its Rebuttal, BNSF argued 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" (see Decision No. 3 at 14). Now, in the Petition, Option 1 of BNSF's only example of how it could operate to Lyondell shows BNSF entering Rosebluff Yard two hours *before* KCS departs. Exhibit A to Reilly Petition VS at 7 (BNSF arrives on the Rosebluff Lead at 0836; KCS departs Rosebluff Yard at 1045). In short, this is just one example where BNSF wants the Board to ignore all of the previous evidence directed at CITGO and the Board's findings with respect to that evidence and just assume that the same findings are applicable to Lyondell. They are not, and the Board should not allow its processes and procedures to be manipulated in such a manner.

The Board granted BNSF the right to serve CITGO. BNSF's evidence leading to Decision No. 3 and the record relied upon by the Board was directed at serving CITGO.

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Application at 14. CITGO was the only shipper that BNSF specifically identified in its Application that it intended to serve via the terminal trackage rights that BNSF sought.⁸ This was confirmed in its Responses and Objections of BNSF to KCSR's Second Set of Discovery Requests when BNSF stated that:

[a]t this time BNSF identifies CITGO as the only shipper that it will initially serve using the proposed terminal trackage rights. Upon approval of the proposed terminal trackage rights, BNSF anticipates that additional shippers will request BNSF service using the proposed terminal trackage rights. BNSF cannot speculate as to which other shippers it may seek to serve with these rights.

BNSF, by its own admission, presented no evidence related to serving any other shipper other than CITGO.⁹

BNSF's Opening also used CITGO alone to substantiate its argument that direct terminal trackage rights were warranted, practicable, necessary, in the public interest, and would not substantially interfere with UP's or KCS's operations. See BNSF Opening at 9-11 and 17-20. The BNSF Opening also noted that BNSF plans to serve "CITGO and other customers" directly, but no evidence regarding service to these "other customers" was presented. See Bredenberg

⁸ BNSF attached nine CITGO-specific exhibits in support of its Application.

⁹ It appears that BNSF may have been contemplating a "bait and switch" the entire time.

Documents produced in discovery indicate [[REDACTED]]. See BNSF-HC-001574 - BNSF-HC-001581, BNSF-HC-000273 - BNSF-HC-000276, BNSF-HC-000308, and BNSF-HC-001597 - BNSF-HC-001613. Indeed, those documents show [[REDACTED]]

.]] See BNSF-HC-000308, Bredenberg Rebuttal VS at 10, and BNSF-HC-001597 - BNSF-HC-001613. If the [[REDACTED]], one must ask why the Application did not

[[REDACTED]] See Bredenberg Rebuttal VS at 7-8. As such, BNSF should have included evidence concerning whether service to [[REDACTED]] was in the public interest for the Board to consider in evaluating when making its findings in Decision No. 3. It did not. As stated previously, Decision No. 3 was based upon evidence solely related to CITGO.

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Opening VS at 5. In BNSF's October 23, 2015 Rebuttal, BNSF again offered argument and evidence based exclusively on CITGO's experience, including evidence that serving CITGO directly rather than via reciprocal switch is in the public interest because "BNSF is paying significantly more per car for reciprocal switch service to CITGO compared to the cost of direct service." BNSF's Rebuttal at 27.

BNSF now wants the Board to ignore the evidentiary record related only to CITGO, and pretend as if the entire proceeding also included evidentiary and legal findings addressed to service to Lyondell. The Board should reject BNSF's attempts to substitute Lyondell in place of CITGO. Decision No. 3's legal conclusions and findings could only be based on service to CITGO because BNSF did not provide any evidence concerning service to other shippers. In fact, BNSF only briefly mentioned Lyondell in BNSF's Rebuttal.¹⁰ The only evidentiary record, and the one the Board relied upon to make its findings, involved evidence at providing unit train service over the Rosebluff Lead to provide CITGO with crude oil, chambering BNSF's train in the shipper's facility to avoid interference.

The Board can only make findings based on the evidentiary record presented to it.¹¹ It cannot use evidence directed at CITGO to make public interest and practicality findings with respect to Lyondell when there was no evidence directed at service to Lyondell. For the Board to simply apply its CITGO-based findings to Lyondell when there was no evidence in the record

¹⁰ BNSF's Final Brief also referenced page numbers to the handful of sentences in BNSF's Rebuttal where it discussed service to Lyondell. See BNSF Final Brief at 12.

¹¹ 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 Jan. 19, 2005), reconsideration denied Burlington Northern & Santa Fe Ry. v. STB, 453 F.3d 473, 2006 U.S. App. LEXIS 14749 (discussing the evidentiary standards developed by the Board to assist it in carrying out its statutory obligation and ensure that decisions are based on the evidentiary record). See also Duke Energy Corp. v. Norfolk S. Ry., NOR 42069, slip op. at 13-15 (STB served Nov. 6, 2003).

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directed at serving Lyondell risks judicial reversal.¹² Having produced evidence focused on CITGO and the Board's findings being based upon that evidence, the Board has not made, and cannot make, the requisite findings that service to Lyondell is in the public interest or practicable. Until those findings are made, neither BNSF nor the Board can proceed to the next step – i.e., the substantial interference test. As such, the Petition should be dismissed.

B. Even If Shippers Other Than CITGO Are Entitled To BNSF Access Under Decision No. 3, BNSF Has Not Shown That Lyondell Is Such A Shipper

BNSF argues that Decision No. 3 granted BNSF the right to serve other shippers besides CITGO. See Petition at 3, n. 3. Even if other shippers could be included, which KCS does not concede that the Board could have legally expanded its coverage to include shippers other than CITGO, the Board could only include shippers for which evidence was presented. As noted above, the Application sought access to CITGO and the evidentiary record was based upon access to CITGO.

With respect to service to other shippers, there was no evidence presented with respect to such other shippers – a fact that the Board itself noted when it said, “BNSF has provided no specific proposal regarding who will be served or how, and has not yet formally elected direct access to such “other customers” under BNSF Agreement Section 5(d).” Decision No. 3 at 13-14. There is some language indicating that BNSF desired to serve other “West Lake Charles” shippers, although no evidence related to such shippers, but even if one could argue that Decision No. 3 granted access to CITGO and other “West Lake Charles” shippers (a point that

¹² 5 U.S.C. § 706(e); see also, CSX Transp. v. Surface Transp. Bd., 96 F.3d 1528, 1996 U.S. App. LEXIS 26609 (D.C. Cir. 1996) (reversing a decision by the ICC/Board after finding that the record lacked substantial evidence to support the ICC/Board's findings); and Jost v. Surface Transp. Bd., 194 F.3d 79, 1999 U.S. App. LEXIS 26582 (D.C. Cir. 1999) (remanding case to the Board because the Court, based upon the underlying record, was unable to determine the basis for the Board's decision).

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KCS does not concede), BNSF would still need to establish that Lyondell is (1) a shipper that was in existence at the time of the UP/SP merger and is entitled to receive BNSF access under the UP/SP decision and the “Lake Charles Condition;”¹³ and (2) that Lyondell is located in “West Lake Charles” as opposed to “Westlake,” which was not within even a broad reading of BNSF’s Application nor mentioned in Decision No. 3.¹⁴

BNSF must present a prima facie case that the Lake Charles Condition applies to Lyondell in the first place. Because BNSF has not presented sufficient facts to create a prima facie case, its Petition must be dismissed.¹⁵ Here, other than noting the geographic location of

¹³ BNSF has presented no evidence that Lyondell was in existence at the time of the merger and is entitled to BNSF access. These are important factors. See, e.g., UP/SP, Decision No. 106, slip op. at 7-9 (STB served Dec. 20, 2013) (UP’s promise during merger to keep facility open to reciprocal switching did not transfer to new buyer when the facility was sold five years after the merger and granting access to BNSF would “effectively increase rather than preserve the pre-merger level of competition in Modesto.”)

¹⁴ These distinctions are important. The Lake Charles area consists of three distinct railroad stations: Lake Charles, Westlake, and West Lake Charles. Prior to the UP/SP merger, Lake Charles was served exclusively by UP, but was open through reciprocal switching to SP and KCS. Westlake was served by KCS and SP jointly, but was open to UP through reciprocal switching. West Lake Charles was served by KCS and SP, and was not open to reciprocal switching by UP. If Lyondell was in existence at the time of the UP/SP merger and was located in West Lake Charles - facts that BNSF has not yet established and that are necessary predicates to the Board’s Decision No. 3 findings of the public interest under Section 11102(a) - granting BNSF access now actually expands Lyondell’s competitive options, not merely preserves them. Such an action goes beyond prior merger precedent. See UP/SP, Decision No. 19, slip op. at 9 (STB served Nov. 8, 2001); see also UP/SP, Decision No. 20, slip op. at 4 (STB served Dec. 20, 2001) (explaining that BNSF’s right to serve 2-to-1 shipper facilities based on the BNSF Agreement is limited).

¹⁵ See CSX Transportation, Inc. – Abandonment Exemption – In Summit County, OH; Terminal Warehouse, Inc. v. CSX Transportation, Inc., AB-55 (Sub-No. 631X); NOR. 4208, 2004 STB LEXIS 293 (STB served May 12, 2004) (The Board may dismiss a complaint that it finds “does not state reasonable grounds for investigation and action” citing 49 U.S.C. 11701(b)); see, also, Montana v. UP, Consolidated Rail Corporation – Abandonment Exemption – In Erie County, NY; Buffalo Crushed Stone, Inc. v. R.J. Corman Railroad / Allentown Lines, Inc. and R.J. Corman Cos., STB Docket No. AB-167 (Sub-No. 1164X), NOR 42028 (STB served Oct. 7, 1998) (dismissing complaint that failed to allege sufficient facts to support claims); South Mississippi Electric Power Association v. Norfolk Southern Railway Company, NOR. 42128, 2011 STB LEXIS 183 (STB served Apr. 21, 2011) (Dismissing complaint for failure to provide

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the Lyondell facility BNSF seeks to serve, the Petition contains no evidence that Lyondell was a shipper in existence at the time of the UP/SP merger who is entitled to BNSF access under the Lake Charles Condition. Was this facility “open” to “all of KCS, SP, and UP” (as requested in the Application)? Was this a captive facility in 1996? If Lyondell existed in 1996 and was either captive or served only by SP and KCS prior to the merger, why is it now in the public interest for it to have three carrier access when other shippers were only entitled to two carrier access?

There is no evidence in the record of this proceeding or in the Petition itself addressing these basic questions. Yet, answers to these questions are necessary for the Board to move forward on the basis that Lyondell is covered by the Lake Charles Condition and Decision No. 3.

Similarly, even if Decision No. 3 could be read to grant access to CITGO and other West Lake Charles shippers and even if Lyondell was in existence at the time of the merger, there remains the issue of whether Lyondell is in Westlake or West Lake Charles. This is an important distinction. The Petition contains no evidence that Lyondell is in West Lake Charles to which BNSF could argue Decision No. 3 granted them access. A cursory review of Lyondell’s website indicates an address and a location of Westlake, not West Lake Charles. See <https://www.lyondellbasell.com/en/lake-charles-plant>. If this facility is in Westlake and not West Lake Charles, the facility is not covered by even the most liberal reading of Decision No. 3 or BNSF’s Application.

Because the Board relied on the conditions imposed in the UP/SP merger for the public interest finding in Decision No. 3, and assuming that such a public interest finding directed at CITGO can cover shippers other than CITGO, BNSF must still establish that the Lyondell

specific terms or evidence to establish a prima facie showing that the railroads practices were unreasonable). The Petition is not a formal complaint; however, the legal principles should be the same. The Petition should contain sufficient evidence to support its claims. At this point, BNSF’s Petition does not contain such evidence.

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facility qualifies for BNSF access under the Lake Charles Condition. The fact that it took 20 years for BNSF to seek direct access does not excuse BNSF from providing the information necessary for the Board to evaluate its request; indeed, it should make the need for such information even greater. Making BNSF responsible for providing the required information is also consistent with other Board proceedings in which the party seeking a change has the burden of proof.¹⁶

BNSF may have evidence that Lyondell was indeed a “2-to-1” shipper covered by the Lake Charles Condition and it may also be able to present evidence that Lyondell is located in West Lake Charles, which BNSF would argue the Application covered, but there is no such evidence in the record at this time. Without these underlying predicates being established, the Petition must be dismissed.

C. BNSF Has Failed To Establish That Its Rosebluff Lead Terminal Trackage Rights Allow It To Serve Shippers Not On The Rosebluff Lead Via “Related Tracks”

Even if BNSF’s Application could be read to encompass access to CITGO and other West Lake Charles shippers and the Board could have legally made public interest findings with respect to such other shippers, the scope of BNSF’s actual trackage rights granted must be confined to the evidence and operating plan presented in the Application and the proceeding. That plan was directed at operating over the Rosebluff Lead to serve CITGO, a shipper with

¹⁶ See, e.g., UP/SP, Decision No. 11, slip op. at 3 (STB served Jan. 23, 1998) (Noting that it was appropriate to put the burden on BNSF to present evidence regarding shipper eligibility because “[p]ertinent 2-to-1 information should be available to BNSF from its supporting shipper, which should be eager [to provide such information] to gain access to an additional rail carrier.”); Rapid City, Pierre & Eastern Railroad, Inc. – Acquisition And Operation Exemption – Dakota, Minnesota & Eastern Railroad Corporate; Genesee & Wyoming Inc. – Continuance In Control Exemption – Rapid City, Pierre & Eastern Railroad, Inc., FD 35799; FD 35800 (STB served May 14, 2015) (Petitioner has burden of proof); and Gen. Procedures For Presenting Evidence in Stand-Alone Cost Rate Cases, 5 S.T.B. 441, 445-46 (2001) (explaining that “the party with the burden of proof on a particular issue must present its entire case-in-chief in its opening evidence”).

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industry track that connected directly to the Rosebluff Lead. Application at 2 and 10. There is no indication in either the Application or Decision No. 3 that the trackage rights granted to BNSF included the right to get on and off the Rosebluff Lead so as to access other tracks and other shippers not on the Rosebluff Lead nor is there evidence that BNSF's trackage rights encompassed the right to carry any commodity other than that utilized by CITGO.

BNSF's operating plan, its request for specific trackage rights, and the scope of the commodity that it would carry were all directed at going "over" the Rosebluff Lead to directly access tracks in CITGO's plant to deliver unit trains of crude oil. BNSF's Application states that the evidence it expects to submit will show that its terminal trackage rights will involve the following: "BNSF ... will initially use four axle locomotives and bypass all switching yards. Once inside the CITGO facility, BNSF will run around its train and pick up empties to return to BNSF's Lafayette Yard." Application at 15. This straightforward statement and the other evidence offered by BNSF in this proceeding indicates that upon the Board granting terminal trackage rights, BNSF would move unit trains of crude oil from its Lafayette Yard (Point A) over the Rosebluff Lead to CITGO's in-plant tracks (Point B) connecting to the Rosebluff Lead, stay there until the cars were unloaded, and return with a unit train of empty cars to BNSF's Lafayette Yard (Point A).

The BNSF Opening asked the Board to "confirm the direct trackage rights granted to BNSF over the Rosebluff Lead".¹⁷ The BNSF Opening further discussed in detail BNSF's efforts to serve CITGO and only CITGO. Application at 9-12. BNSF stated that "service [to CITGO] would involve BNSF running its own trains over the Rosebluff Industrial Lead." BNSF Opening at 9. Nowhere in BNSF's evidence does BNSF include a specific request that its

¹⁷ BNSF Opening at 1 and 3.

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terminal trackage rights gave it the right to get off the Rosebluff Lead to traverse industry track owned by third parties to serve shippers like Lyondell that are not located on and whose tracks are not adjacent to the Rosebluff Lead. At best, BNSF's witness, Rollin D. Bredenberg, stated that "[i]n my experience and based on my understanding of the operations of the Rosebluff Industrial Lead, there is clearly capacity for BNSF to operate directly to CITGO and other customers." Bredenberg Opening VS at 5. But there is no evidence regarding operations to such "other customers" nor did BNSF ever specifically request that it be allowed to use Rosebluff Lead trackage rights to get off the Rosebluff Lead to serve other shippers over industry tracks for other commodities.

As noted, BNSF's only evidence on the record reflected unit train service over the Rosebluff Lead to serve CITGO for the delivery of crude oil and the transportation of empties. "BNSF has provided no specific proposal regarding who will be served or how, and has not yet formally elected direct access to such "other customers" under BNSF Agreement Section 5(d)." Decision No. 3 at 13 – 14. BNSF's Application did not include evidence of operations on or off the Rosebluff Lead or for less than unit trains to shippers not located on the Rosebluff Lead. At best, and while not entirely clear, one could argue that BNSF requested, but presented no evidence backing up that request, for terminal trackage rights to operate "over" the Rosebluff Lead to serve other shippers directly on the Rosebluff Lead.¹⁸ Such is not the case here. Lyondell is neither on the Rosebluff Lead nor do the tracks at its plant connect to the Rosebluff lead.

¹⁸ See e.g., Decision No. 3 at 2 (explaining that BNSF sought "the option of delivering its cars directly from its recently completed Lacassine Yard (located on the 50/50 Line, 20 miles east of the Lead) to shippers on the Lead, avoiding the extra stop in UP's Lake Charles Yard and the associated additional time and cost.")

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There is no legal argument or evidence in the Petition indicating that BNSF was granted unfettered access to any tracks connecting with any shipper BNSF wished to serve irrespective of the ownership of those tracks or the location of the shipper's facility. By granting the Application, the Board granted BNSF what it specifically provided evidence on -- the right to travel from Point A to Point B and back to Point A by way of the Rosebluff Lead to serve CITGO and arguably, other shippers on the Lead.

BNSF ignores this record. It claims without analysis or evidence that it was given rights to travel from the 50/50 Line onto the Rosebluff Lead, down the Rosebluff Lead to a connection with an industry track that parallels Highway 108,¹⁹ go 0.40 miles over that industry track to get onto the Montell Lead,²⁰ then use the Montell Lead, occupy the Montell Lead to get into and out of Lyondell's yard and industry tracks, and then reverse the process. Yet, as noted above, all of the operating evidence submitted by BNSF, which forms part of the basis for Decision No. 3, focused exclusively on BNSF traveling over the Rosebluff Lead and directly into the CITGO plant.

Lyondell is not on the Rosebluff Lead nor do its tracks connect to the Rosebluff Lead. Lyondell's industry tracks connect to the Montell Lead. The Montell Lead does not connect to the Rosebluff Lead. Rather, the Montell Lead connects with an industry track whose ownership BNSF does not disclose. That industry track, which connects to the Rosebluff Lead, was never identified or discussed in the Application or Decision No. 3. Decision No. 3 could not, and did not, grant BNSF the right to get off the Rosebluff Lead, travel down industry track not even

¹⁹ It is not clear who owns this industry track. The Petition does not provide any evidence regarding its ownership or whether BNSF has any contractual right to operate over it. It clearly was not part of Decision No. 3 nor was BNSF granted any rights in Decision No. 3 to operate over it.

²⁰ The Montell Lead is an industry track not owned by a rail carrier. It is apparently owned by the Port of Lake Charles. It too was not part of any rights granted to BNSF in Decision No. 3.

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identified in the Application or discussed in Decision No. 3, and then use terminal trackage rights to operate over the Montell Lead, another piece of track not identified in the Application or Decision No. 3, nor could it. As such, the grant of terminal trackage rights in Decision No. 3 cannot encompass operations over the “related track” that BNSF seeks to use to serve Lyondell.

The scope of BNSF’s actual trackage rights is not a peripheral issue. As the Board knows full well, the extent of BNSF’s right to access facilities, tracks, and customers who claimed to be “2-to-1” shippers but nonetheless were not directly located on the trackage rights line has been and continues to be, these many years later, the subject of dispute. The Board in Decision No. 44, the BNSF Settlement Agreement, and countless decisions since then has carefully crafted exactly what rights BNSF has, exactly what tracks BNSF can operate over, and get on/off of, and exactly what shipper facilities it can serve.²¹ Likewise, in a terminal trackage rights application, a railroad must be specific as to what tracks it seeks terminal trackage rights over. See UP/SP, Decision No. 44, 1 S.T.B. 233, 1996 STB LEXIS 220, at *271-*276 (ICC served Aug. 12, 1996) (identifying metes and bounds of trackage right granted to The Texas Mexican Railway Company (“Tex Mex”) based on the description of the lines provided in Tex Mex’s application for trackage rights).²²

²¹ See UP/SP Oversight, FD 32760 (Sub-No. 21), Decision No. 19, slip op. at 9 (STB served Nov. 8, 2001) (rejecting BNSF’s efforts to remove the entry/exit and Texas/Louisiana restrictions as they apply to St. Louis Gateway); and Decision No. 20, slip op. at 4 (STB served Dec. 20, 2001) (explaining that BNSF’s right to serve 2-to-1 shipper facilities based on the BNSF Agreement provides BNSF only “overhead” trackage rights and does not allow BNSF access to intermediate points on the trackage rights lines, except for access to points expressly provided for in Exhibit A to the BNSF Agreement.); Decision No. 106, slip op. at 7-9 (STB served Dec. 20, 2013) (declining a shipper’s request to be treated as a 2-to-1 shipper); and Decision No. 109 (STB served Jan. 31, 2018) (finding that BNSF does have access to Mission Rail Industrial Park, LLC).

²² Given that terminal trackage rights are granted to specific tracks, at best, BNSF was granted trackage rights over the Rosebluff Lead and was not granted access over other “related tracks” regardless of ownership of those tracks.

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In this case, BNSF's Application provided evidence related to what tracks it intended to operate over --- the Rosebluff Lead – and for the purpose of providing service to/from CITGO. BNSF's Application did not request, nor did Decision No. 3 grant, BNSF access over industry tracks so that BNSF could operate over such industry tracks in order to connect to other leads serving other shippers not directly connecting to the Rosebluff Lead. BNSF has failed to establish that the trackage rights granted to it in Decision No. 3 included the legal right to operate over the 0.4 mile industry track and the Montell Lead to serve Lyondell.

Operation over these pieces of industry track are fundamental to the service BNSF asks the Board to impose, yet they are critically missing elements of the Petition and of the legal authority granted to BNSF in Decision No. 3. As such, even if BNSF could establish that Lyondell is a West Lake Charles shipper and was initially intended to be part of the Lake Charles Condition, BNSF did not seek, and was not granted, terminal trackage rights to get off of the Rosebluff Lead and operate over a piece of "Other & Industry Track"²³ to reach the Montell Lead, another piece of industry track not owned or controlled by UP or KCS. BNSF was not granted rights over these tracks and to the extent these tracks are shipper owned, BNSF cannot be granted access over such tracks. Unless and until BNSF obtains the legal or contractual right to operate over these tracks, the Petition is premature and should be dismissed.

D. BNSF Has Not Established That It Has The Contractual Right To Use The Industry Tracks

As noted, BNSF was granted the right to operate over the Rosebluff Lead to serve CITGO. BNSF was not granted, and could not have been granted, terminal trackage rights over industry tracks owned by third parties who are not carriers, such as the Montell Lead. Its Application did not request or encompass such rights, nor did Decision No. 3. As such, for the

²³ Exhibit 1 to Petition at 4.

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Application to move forward, BNSF has to establish that it has either the legal or private contractual right to operate over the industry tracks and that those contractual rights would allow BNSF to undertake its proposed operating plan. The Petition fails to establish either of these factors and should be dismissed for its failure to do so.

The Petition proposes direct service to Lyondell via the Rosebluff Lead, the connecting “Other & Industry Track,” and the Montell Lead. In describing the operating plan, BNSF said “[t]he BNSF job would depart from BNSF’s Lacassine Yard on the 50/50 Line by 7:30 a.m., pass through the Rosebluff Yard via the Rosebluff Lead running track, continue southbound to the connecting Montell Lead, and arrive at the Lyondell facility on the Montell Lead by approximately 9:30 a.m. *Id.* at 7.” Petition at 9. However, as noted previously above, contrary to the operating plan statements, the Montell Lead does not connect directly to the Rosebluff Lead. Rather as shown in the map attached to Petition (Exhibit 1, page 4), the yard connects to “Other & Industry Track,” which connects to the Rosebluff Lead. Yet, the operating plan fails to consider or even discuss who owns the “Other & Industry Track” that BNSF must use to connect the Rosebluff Lead with the Montell Lead and whether BNSF has a contractual right to use that track.

BNSF does state that it “does not believe that additional capital improvements are required to the Rosebluff Lead, the Rosebluff Yard, or the Montell Lead, in order to implement direct BNSF service to LyondellBasell.” Petition at 10-11. But again, this statement is completely silent with respect to the 0.4 miles of “Other & Industry Track” that connects the Rosebluff Lead to the Montell Lead, including whether any improvements to the “Other & Industry Track” are necessary for BNSF to provide direct service to Lyondell; whether BNSF has the legal or contractual right to use this track, and whether that contractual right is consistent

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with the proposed operating plan presented in the Petition. None of these questions are addressed.

The same concerns relate to BNSF's plans to use the Montell Lead, however, BNSF does address some of those concerns. BNSF offers two statements indicating that BNSF will obtain permission to access the Montell Lead, but BNSF admits that it currently lacks the contractual right to use the Montell Lead. The Petition states that the "Montell Lead is owned by the Port of Lake Charles, which has indicated to BNSF that it does not object to BNSF operating on the Montell Lead." Petition at 5. This statement is not testimony by someone shown to have personal knowledge of the assertion, but rather is a pleading. Neither does the statement demonstrate that BNSF has a contractual right to operate over the Montell Lead. 'Not objecting' to BNSF operating (under what conditions the Port does not object is not shown) is not the same as having a contractual right to operate over the Montell Lead. The statement is far too speculative to be considered a legitimate basis for BNSF's proposed operations over the Montell Lead.

The Michael Baranowski Petition Verified Statement ("Baranowski Petition VS") also offers some unsubstantiated claims regarding BNSF's use of the Montell Lead. Mr. Baranowski says, "[t]he BNSF plan *assumes* that BNSF will obtain comparable rights from the Port to operate over the Montell Lead. *I understand that* the Port has indicated to BNSF that it does not have objections to BNSF operating on the Montell Lead."²⁴ (emphases added.) Therefore, again, BNSF recognizes that it cannot serve Lyondell without the Montell Lead,²⁵ but has yet to secure operating rights to do just that.

²⁴ See Baranowski Petition VS at 8.

²⁵ See Reilly Petition VS at 4.

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Because BNSF can only “assume” that it has some undefined right to use the Montell Lead, and cannot provide even a similar vague statement about the 0.40 miles of “Other & Industry Track” connecting the Montell and Rosebluff Leads, BNSF has failed to make a prima facie case. BNSF wants the Board to ignore all of these issues. BNSF simply wants the Board to move forward on approving its operating plan under the assumption that it will obtain the legal rights to operate over the “Other & Industry Track” and the Montell Lead and that those rights would be entirely consistent with the proposed operating plan. This is completely nonsensical. The Board cannot find that BNSF’s service to Lyondell is in the public interest, practical, and would not substantially interfere with KCS’s or UP’s service when BNSF has not even established that it has a right to operate over industry tracks necessary to serve Lyondell, nor can the Board find that BNSF’s operations over such tracks would be consistent with the assumptions underlying BNSF’s proposed operating plan. The Board cannot make a finding that the operational plan would not interfere with UP’s operations until the Board knows the scope of BNSF’s contractual rights, assuming BNSF can obtain them. The Board should not even consider BNSF’s proposed operating plan until these issues are addressed. As such, the Petition is demonstrably incomplete and should be dismissed.

E. BNSF Has Not Established That Lyondell Has A Need For BNSF Direct Service And That BNSF Direct Service Is In The Public Interest

As noted, the Lyondell facility is served via the Montell Lead, which does not connect with the Rosebluff Lead. According to the Petition, BNSF currently provides service to Lyondell via a reciprocal switch provided by UP but now seeks direct access. A fundamental predicate of that request is that Lyondell desires direct BNSF service and that such service is in

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the public interest.²⁶ Yet, unlike CITGO, there is no evidence in the Petition or the record demonstrating that Lyondell has requested direct BNSF service. This is in stark contrast to BNSF's request to serve CITGO. In that case, shortly after BNSF filed its Application, CITGO filed a Petition to Intervene ("PTI") in which it established its interest in the proceeding and explained that it supported direct unit train service from BNSF as an alternative to UP's service. The PTI also explained that "direct service is therefore immensely important to the efficient operations of the CITGO facility and its continuing contribution to the economy of the Lake Charles region." See PTI at 3. Including discovery, CITGO submitted seven pleadings supporting BNSF's "Application seek[ing] terminal trackage rights over the Rosebluff Lead in order to provide the direct unit train service requested by CITGO."²⁷ "[A]s a direct and intended beneficiary of the Board-imposed Lake Charles Condition, CITGO has a right to receive the direct competitive rail service that BNSF is willing and able to provide" CITGO said. *Id.* at 2. CITGO submitted evidence demonstrating that it invested heavily in its infrastructure to accommodate such service. *Id.* at 3, 17-18.

Based upon these statements and others, Decision No. 3 granted BNSF access to serve CITGO. Yet, for Lyondell, BNSF offers no such similar evidence whatsoever to show that

²⁶ The most fundamentally unfair result of the Board's various actions with respect to the Lake Charles Condition and Decision No. 3 is that BNSF is given greater access, *i.e.*, the ability to directly serve CITGO and Lyondell with less than 25 car blocks (if the Petition is granted) than KCS, who must rely upon a UP reciprocal switch to serve these very same shippers or with groups of 25 or more cars originating at a single location on a single bill of lading. KCS was not a merger applicant in the UP/SP merger. It was not KCS's in actions that allegedly caused the competitive concern in the first instance. KCS also was not given the "choice" to accept the Board's condition or not (see Decision No. 3 noting that UP had the choice to accept the merger condition). KCS has been given no such choice. KCS has simply been told – tough – the government is going to use its regulatory powers to grant KCS's larger competitor better access than KCS as one-half owner of the track itself enjoys.

²⁷ See Reply of CITGO Petroleum to BNSF Application for Terminal Trackage Rights at 2, filed August 24, 2015.

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Lyondell has both requested BNSF direct service, that it was an intended beneficiary of the Board-imposed Lake Charles merger condition, or that Lyondell's operations can support both UP operations and BNSF direct service. Instead, BNSF wants the Board to take its word that Lyondell has requested direct BNSF service and is entitled to such service, but there is no evidence establishing those facts.

BNSF also has not established that direct service to Lyondell is in the public interest. There is no evidence in the record of this proceeding that BNSF service to Lyondell, as opposed to CITGO, meets either the Midtec standard or the public interest standard as articulated by the Board in Decision No. 3. It would be impossible for Decision No. 3 to have addressed such considerations because the only time BNSF offered mention of service to Lyondell was in its Rebuttal.²⁸ There is simply no evidence in the Rebuttal or the Petition that allowing BNSF to serve Lyondell promotes the public interest in any way, including but not limited to reducing transportation costs for Lyondell's operations. Absent evidence that Lyondell has requested BNSF direct service and such service meets the applicable public interest test under the statute, BNSF essentially seeks an "Advance to Go, Collect \$200" Chance card to skip the steps required by the statute in order to move directly to "Go". Neither the record nor precedent supports such a request. As such, the Petition should be dismissed.

II. THE BOARD SHOULD RULE ON THIS MOTION TO DISMISS BEFORE ESTABLISHING A PROCEDURAL SCHEDULE

In the Petition, BNSF has requested that the Board establish conditions of use and compensation for BNSF to provide direct service to Lyondell by March 13, 2018, or in any event

²⁸ As noted, BNSF did mention Lyondell in its Rebuttal where [[REDACTED]] business even though such service was via a UP reciprocal switch and that [[REDACTED]] See Bredenberg Rebuttal VS at 7-8.

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no later than July 11, 2018. Petition at 1. The Board should reject this request. Instead, the Board should defer establishing a procedural schedule for BNSF direct service to Lyondell until such time as the Board rules on this Motion.²⁹ The Petition and the information entered into the record concerning BNSF's plans to serve Lyondell is wholly unsatisfactory,³⁰ yet BNSF still wants the Board to act expeditiously. This the Board should not do.³¹

Since Decision No. 3, BNSF has had over a year and half to gather and present sufficient evidence to the Board to establish it has both a legal and contractual right to serve Lyondell. Yet, BNSF has not done so. BNSF has failed to even make a prima facie showing that it is entitled to serve Lyondell. BNSF has not established that (1) Decision No. 3 granted BNSF access to shippers other than CITGO; (2) Lyondell is a shipper covered by Lake Charles Condition and the access granted in Decision No. 3; (3) the terminal trackage rights granted in Decision No. 3 allow BNSF to get on and off the Rosebluff Lead in order to serve shippers not directly on or adjacent to the Rosebluff Lead; (4) BNSF has the legal or contractual right to use industry tracks to provide direct service to Lyondell; and (5) Lyondell, in fact, desires BNSF direct service and that BNSF direct service to Lyondell promotes the public interest. Until these critical elements necessary for making a prima facie showing are in the record, there is no basis

²⁹ At a minimum, the Board should not establish a procedural schedule or move forward with the Petition until BNSF provides the necessary information to make a prima facie case. At that point, the Board should rule on this Motion, and then, depending upon the outcome of that decision, either close the proceeding or establish a procedural schedule.

³⁰ In fact, the lack of substantive information concerning BNSF's plans to serve Lyondell forced UP to serve discovery on BNSF on January 23, 2018. If this Motion is denied and the Board does establish a procedural schedule, KCS likewise requests sufficient time to file and undertake discovery and then prepare a substantive reply to BNSF's Petition.

³¹ The expedited schedule is unwarranted. As the Petition states, UP and KCS presented operating and compensation proposals to BNSF in April. If accelerated handling were needed, BNSF should have filed its Petition before mid-January, 2018.

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for moving forward with a procedural schedule until the record is supplemented and the Board rules on this Motion.

Holding off moving forward on the merits until the Board can rule on this Motion is entirely consistent with precedent. See Western Fuels Service Corporation v. The Burlington Northern and Santa Fe Railway Company, NOR 41987, slip op. at 2 (STB served Feb. 11, 1997) (deferring establishing a procedural schedule in a proceeding to make certain terminal facilities available for use by the complainant until the Board rules on the defendant's motion to dismiss in a subsequent decision); Meridian Southern Railway, LLC—Acquisition And Operation—Line Of Kansas City Southern Railway Company, FD 33854, 2000 STB LEXIS 270 (STB served May 15, 2000) (holding proceeding in abeyance so that the Board could rule on pending motions before allowing the transaction to move forward); and New England Central Railroad, Inc. — Trackage Rights Order – Pan Am Southern LLC, FD 35842 (STB served Dec. 14, 2017) (tolling procedural schedule until such time as the Board can consider and rule on a motion to strike).

Deferring establishing a procedural schedule with respect to the merits of the Petition until the Board can rule on the issues raised in this Motion will significantly impact the scope and breadth of the BNSF, KCS, and UP's arguments. It will also narrow the scope of any discovery sought concerning the Petition, which could save all parties and the Board significant time and expense having to deal with superfluous issues. Moreover, deferring establishing a procedural schedule in this proceeding is particularly appropriate until BNSF has established the critical elements necessary to lay the foundation that must be established for the Board to consider whether BNSF's request to serve Lyondell directly satisfies Section 11102(a).

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III. A FINAL NOTE REGARDING THE SETTLEMENT NEGOTIATIONS

BNSF states that it is observing the parties' agreement that settlement discussions would not be part of the record before the Board and that "the parties would not characterize each other's positions at that [August 26, 2016] meeting in any Board filing," Petition at 5, note 5. Despite these statements, BNSF nevertheless comments that the operating plan in its Petition "is substantially similar to the plan proposed by BNSF in the [settlement discussion] letter dated February 29, 2017." Petition at 6, note 7. It also seeks to spur the Board to action by commenting at the beginning of the Petition that "UP and KCS have made intractable and unreasonable demands." Petition at 2.

KCS disagrees with BNSF's characterization that KCS was "intractable and unreasonable" in the settlement discussions. KCS will adhere to the settlement discussion agreement and will simply point out that the BNSF Petition's recitation of the chronology of the settlement discussions does not mention any response by BNSF to the letters KCS and UP sent BNSF in April 2017; and that BNSF's position on compensation in its Petition is the same position that the Board rejected in Decision No. 3. See Decision No. 3 at 19-20.

CONCLUSION

BNSF spent several years presenting public interest, eligibility, and operating evidence to the Board to obtain terminal trackage rights to provide direct unit trains service to CITGO for the transportation of crude oil. Decision No. 3, which was based on the record established in this proceeding, granted BNSF exactly that – terminal trackage rights over specific tracks (the Rosebluff Lead) to serve CITGO via unit trains for crude oil. Given the access granted in Decision No. 3, one would have thought that after failing to agree on compensation and terms for BNSF to use the Rosebluff Lead, BNSF would have filed a petition to establish the conditions of

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use and compensation to provide such service to CITGO. BNSF did file a Petition; however, it ignored CITGO and instead asked the Board to impose terms and conditions for access to Lyondell, a shipper that is not located on the Rosebluff Lead and who can only be accessed over industry tracks not part of the actual terminal trackage rights granted in Decision No. 3.

The Petition creates more questions than it provides answers to. Was Lyondell a shipper covered by the access granted in Decision No. 3? Is it a shipper even entitled to ask for BNSF service under the Board's Lake Charles Condition? Is it even located in West Lake Charles? Does it even desire BNSF direct service? Is it in the public interest for Lyondell to get BNSF direct access? Did the terminal trackage rights granted to BNSF to operate over the Rosebluff Lead allow BNSF to get on or off that trackage so as to serve shippers not directly on or adjacent to the Rosebluff Lead? Did Decision No. 3 provide access for other commodities in non-unit train service? Does BNSF have a legal or contractual right to use industry tracks to get off the Rosebluff Lead and operate over those tracks in order to serve Lyondell? Has the Port of Lake Charles granted BNSF a legal right to use its tracks? None of these critical questions are addressed. Instead, BNSF just wants the Board to skip these questions and move directly to ruling on whether BNSF's operating plan would substantially interfere with KCS or UP service. BNSF cannot skip these necessary elements to establishing a prima facie case and the Board should not allow them to. Answers to these questions would allow the Board to rule on this Motion. Until these questions are resolved and the Board has ruled on the Motion, the Board should defer establishing a procedural schedule or moving forward with the merits of BNSF's operating plan.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the The Kansas City Southern Railway Company's Motion To Dismiss BNSF Railway Company's January 12, 2018 petition seeking to establish terms and conditions for its use of the terminal trackage rights granted in the above-captioned matter was served by first-class mail, postage prepaid, or by a more expeditious manner, this 1st day of February, 2018, 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

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**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**

**MOTION TO DISMISS BNSF'S PETITION TO ESTABLISH
CONDITIONS OF USE AND COMPENSATION**

**EXHIBIT CONTAINING HIGHLY CONFIDENTIAL DISCOVERY DOCUMENTS
CITED IN THE MOTION**

(OMITTED IN PUBLIC VERSION)