

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 32760 (Sub-No. 46)

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

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CITGO REPLY TO MOTION TO COMPEL

Pursuant to Rules 1104.13 and 1114.31(a)(1) of the Surface Transportation Board's (hereinafter, "Board" or "STB") Rules of Practice, 49 CFR §§ 1104.13 and 1114.31(a)(1), Intervenor CITGO Petroleum Corporation ("CITGO") hereby submits its Reply to the Motion to Compel filed by the Kansas City Southern Railway Company ("KCSR") on February 9, 2015.

I. INTRODUCTION

On January 15, 2015, KCSR served a first set of discovery requests on Intervenor CITGO, containing two Requests for Admissions, six Interrogatories and ten Document Requests.¹ CITGO served its responses to the KCSR discovery requests on January 30, 2015, providing substantive responses to 13 of the 18 discovery requests, while objecting to one interrogatory and four document requests.² Specifically, CITGO has objected to Interrogatory

¹ CITGO has intervened in this proceeding in support of its right to receive direct rail service from BNSF pursuant to rights granted to BNSF and shippers in the Lake Charles area in the UP/SP merger proceeding. *See Union Pacific Corporation et al. – Merger – Southern Pacific Rail Corporation et al.* ("UP/SP"), Finance Docket No. 32760, Decision No. 44, 1 STB 233, 427-429 (August 12, 1996)(hereinafter, "Decision No. 44"). *See also* Finance Docket No. 32760, Decision No. 63, slip op. at 8-9 (served December 4, 1996)(hereinafter, "Decision No. 63").

² KCSR's asserts that CITGO provided answers to "at most seven (including partial responses)" of the 18 discovery requests. *See* KCSR Motion at 4. KCSR's claim is perplexing, since it is so obviously and demonstrably false, as even a cursory review of CITGO's responses shows. While KCSR is free to argue – as it does – that some of CITGO's responses do not provide as many documents as KCSR would have expected to exist, it cannot in good faith baldly misstate the facts. CITGO responded to 13 of 18 requests and refused to provide substantive answers only to the remaining five requests.

No. 3 and Document Requests Nos. 2, 4, 8 and 9, primarily on the grounds that these discovery requests seek the unduly burdensome production of information that is not relevant to the subject matter of this proceeding. The requests to which CITGO has objected fall into three categories: (a) requests seeking extremely detailed and voluminous information about CITGO's inbound/outbound shipments of all products via all modes of transportation (Interrogatory No. 3 and DR No. 4), (b) information relating to the rates and marketing efforts of CITGO's rail and non-rail transportation options (DR Nos. 2 and 8), and (c) analyses of costs savings of direct vs. switched rail service (DR No. 9).

KCSR has filed its motion to compel responses to the requests to which CITGO objected. In addition, KCSR's motion to compel also claims that CITGO's responses to several discovery requests are "confusing" or not consistent with KCSR's expectations. As set forth more fully below, KCSR's Motion to Compel is without merit.

II. KCSR'S MOTION TO COMPEL SHOULD BE DENIED

A. A "Competitive Analysis" Is Not Relevant To The Subject Matter Of This Proceeding Because The Board Has Already Determined That BNSF Direct Access To Lake Charles Shippers Is In The Public Interest.

KCSR argues that the discovery requests to which CITGO objected seek information or documents relevant to the determination whether allowing BNSF direct access to CITGO and other Lake Charles shippers is in the public interest. *See* KCSR Motion at 4. In particular, KCSR claims it is necessary to conduct a "competitive analysis" of CITGO's rail and non-rail transportation options in order to determine whether BNSF's proposed direct unit train service for CITGO's crude oil shipments is competitively necessary. *Id.* at 6-7. Although it does not expressly say so in its Motion, KCSR appears to suggest that the public interest with respect to BNSF's application must be determined with reference to the standard set forth in *Midtec Paper*

Corp. v. Chi. & Nw. Transp. Co., 3 I.C.C. 2d 171 (1986), *aff'd sub nom Midtec Paper Corp. v. United States*, 857 F.2d 1457 (D.C. Cir 1988) and the Intramodal Competitive Access regulations (“CARs”); 49 C.F.R. Part 1144 (2014).³

KCSR’s claim that a competitive analysis is necessary in this proceeding appears to be nonsensical. The Board expressly found in the UP/SP merger proceeding that the public interest in preserving effective rail competition *requires* that Lake Charles shippers have direct access to BNSF. *See* Decision No. 44 at 427-428; Decision No. 63 at 8-9. Indeed, the Board refused to approve the UP/SP merger unless Lake Charles shippers were granted the unfettered right to direct service from BNSF.⁴ It makes no sense to suggest that – having made the determination that the public interest *requires* that Lake Charles shippers have direct access to BNSF service – the Board might decide here that BNSF’s application to fulfill its common carrier obligation to serve CITGO in furtherance of that public interest is somehow not in the public interest. Such a reversal would render illusory the very merger condition imposed by the Board in the UP/SP proceeding, and, at the very least, would seem to require a reopening of the UP/SP merger case.⁵

Moreover, the *Midtec* standard and the CARs simply do not apply to the circumstances in this case. The *Midtec* standard and the CARs set an “exacting” standard for requests to *create* rail competition where none had previously existed. *See* Decision No. 44 at 448. The broader public interest standards in §§ 11102 and 11343, as applied to the imposition of competitive

³ KCSR states its position more directly in its Motion to Compel discovery from BNSF filed on February 6, 2015. *See* KCSR Motion to Compel (BNSF) at 17, n.7 (*citing Midtec* decision).

⁴ The Board expanded the right of Lake Charles shippers to direct service by BNSF by eliminating geographic restrictions and a “phantom” haulage charge included in the so-called BNSF Agreement as amended by the CMA Agreement.

⁵ The Board’s decision in UP/SP made clear that all Lake Charles shippers were the intended beneficiaries of the Board-imposed merger conditions relating to BNSF access in the Lake Charles area. *See* Decision No. 44 at 247 n. 15 (striking the “no third-party beneficiary” clauses in the BNSF and CMA Agreements and specifically providing that Lake Charles shippers could enforce the terms of those agreements).

conditions in merger cases, are designed to address a completely different set of circumstances – the *preservation of existing* rail competition that would otherwise be lost as a result of a rail merger.

The Board has itself recognized this distinction in granting trackage rights in support of merger conditions designed to preserve existing rail competition. For example, in Decision No. 44, the Board expressly declined to apply the *Midtec* standard to the grant of trackage rights in the context of the UP/SP merger case. *See* Decision No. 44 at 448. In doing so, the Board noted:

Nevertheless, KCS contends that the terminal trackage rights here cannot be considered to be in the public interest as construed in *Midtec Paper Corporation v. CNW et al.*, 3 I.C.C.2d 171 (1986) (*Midtec*). In *Midtec*, the ICC said that it would not grant terminal trackage rights under section 11103 unless they were necessary to remedy or prevent an anticompetitive act by the owning carrier. KCS is arguing that in *Midtec* the ICC replaced the flexible public interest standard of *UP/MP/WP* with a much narrower standard.

Whether the ICC ever applied its relatively exacting *Midtec* precedent in the context of a merger is a matter of some debate. In any event, we believe that it is inappropriate to do so here, and, to the extent that ICC cases suggest otherwise, we specifically overrule them. Instead, we will apply the broad “public interest” standard that is in section 11103(a) itself. Congress gave us broad authority in both the public interest standard in section 11103 and in the public interest standard of section 11343. Thus, we believe that it is appropriate for us to retain the flexibility to use the terminal trackage rights provision to prevent carriers opposing a merger from blocking our ability to craft merger conditions that are clearly in the public interest as the ICC did in the past. [footnotes omitted].

Decision No. 44 at 448-449.

Finally, KCSR argues that although the Board clearly granted BNSF access to Lake Charles shippers in Decisions Nos. 44 and 63, it did not determine that direct access – as opposed to service by reciprocal switch – is required to provide effective competition. *See* Motion at 14 (suggesting that while the Board may have granted BNSF access to Lake Charles shippers, it did not determine the “form or type” of access required to provide effective

competition). Based upon this premise, KCSR contends that a competitive analysis is required to determine whether direct access is necessary or whether BNSF's access to CITGO via reciprocal switch service is adequate to satisfy the merger conditions imposed by the Board in Decision Nos. 44 and 63. *Id.* However, the language in the Board's decisions in the UP/SP merger case, as well as the agreements upon which the Board's merger conditions are based, make clear that BNSF was indeed granted direct access to the Rosebluff Industrial Lead. *See, e.g.*, Decision No. 44 at 428 (requiring removal of "geographic restrictions on direct BNSF service" to Lake Charles shippers); Decision No. 63 at 10 (referencing trackage rights under § 11102(a) as opposed to reciprocal switching under § 11102(c)). *See also* BNSF Agreement, § 5(c)(BNSF access to Lake Charles shippers shall be direct or through reciprocal switch).

The Board's decision in the UP/SP merger proceeding makes clear that the broad public interest standard applied in granting Lake Charles shippers direct access to BNSF service is the appropriate public interest standard to be applied here. Since the Board has already determined under that standard the public interest requires that Lake Charles shippers have direct service from BNSF, the "competition analysis" suggested by KCSR is unnecessary and irrelevant to BNSF's application. KCSR's attempt to impose burdensome discovery on CITGO in support of an irrelevant competitive analysis should be denied.⁶

⁶ Responding to KCSR's discovery requests requesting detailed information about CITGO's commercial and transportation activities over an unlimited time frame would obviously be extremely burdensome.

B. CITGO Has Properly Objected To Interrogatory No. 3 And Document Requests Nos. 2, 4, 8 And 9.

1. Interrogatory No. 3

Interrogatory No. 3 asks that CITGO provide detailed information about all shipments of all products in and out of CITGO's Lake Charles facility by every possible mode of transportation:

Interrogatory No. 3: Describe in detail each transportation mode used by CITGO for the previous three years for each inbound or outbound fuel, lubricant, petrochemical or other industrial product that was shipped to/from CITGO's Lake Charles Area facility, including volumes for each product and the modal percentage for each mode for each product category.

CITGO objects to Interrogatory No. 3 on two grounds – (1) the request seeks information having no relevance to the issues in this proceeding, and (2) responding to the request would be unduly burdensome, requiring CITGO to analyze and compile voluminous information.

In its motion to compel a response to Interrogatory No. 3, KCSR attempts to demonstrate the relevance of the information sought in two ways.⁷ First, KCSR suggests that the information sought by Interrogatory No. 3 is relevant because KCSR wishes to conduct a “competitive analysis” of CITGO's transportation options at Lake Charles.⁸ However, as set forth more fully above, the competitiveness of CITGO's rail and non-rail transportation options is not at issue in this proceeding. Indeed, the issue of whether the public interest requires that Lake Charles shippers have direct service by BNSF as a competitive option has already been conclusively determined by the Board's orders in the UP/SP merger proceedings.

⁷ As the proponent of the discovery, KCSR has the burden of demonstrating that its requests call for the production of information and/or documents that are relevant to the subject matter of this proceeding. *See, e.g., Application of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. § 24308(a) – Can. Nat'l Ry.*, Finance Docket No. 35743, slip op. at 9-10.

⁸ KCSR contends that the public interest prong of the test for terminal trackage rights under § 11102(a) requires a determination whether direct service by BNSF is “competitively necessary.” *See* Motion at 14-15.

KCSR also suggests that the information it seeks in Interrogatory No. 3 is relevant to whether direct service by BNSF would substantially impair KCSR's ability to operate at Lake Charles. In particular, KCSR posits that CITGO might, sometime in the future, shift some of its transportation requirements from other modes to rail, thereby increasing congestion on the Rosebluff Industrial Lead and possibly interfering with KCSR's operations. KCSR's strained attempt to conjure up some connection between Interrogatory No. 3 and the substantial impairment prong of the test under §11102(a), while showing a considerable amount of imagination, simply fails to demonstrate the relevance of Interrogatory No. 3.

As a preliminary matter, BNSF's application makes clear that its direct service to CITGO would operate during UP's window of operations on the Rosebluff Industrial Lead, and thus would have no appreciable impact on KCSR's operations. In addition, BNSF's application indicates that its direct unit train service would be more efficient than the current switched service, since BNSF would assemble the CITGO unit trains in its own yards, thus freeing up capacity in the congested UP/KCSR Rosebluff Yard. As a result, the direct service proposed by BNSF would likely reduce the potential for future congestion at the Rosebluff Yard and allow for more efficient use of the Rosebluff Industrial Lead.

More to the point, the possibility that CITGO might in the future shift some of its transportation requirements from other modes to rail has absolutely no bearing on BNSF's application for trackage rights to provide direct service to CITGO. Any future increase in CITGO's rail transportation requirements would increase traffic on the Rosebluff Industrial Lead whether or not BNSF were providing direct, as opposed to switched, service at Lake Charles. Moreover, the direct unit train service proposed by BNSF would be significantly more efficient than the current service via reciprocal switch. Thus, any increase in CITGO's rail transportation

needs would be *less* likely to interfere with other operations on the Rosebluff Industrial Lead if BNSF's application is granted here.

2. Document Request No. 2

Document Request No. 2 seeks the production of all documents relating to any efforts by UP or BNSF to solicit rail transportation business from CITGO's Lake Charles facility for any product:

Document Request No. 2: Provide copies of all Documents involving efforts by BNSF or UP to market or solicit CITGO's business for the transportation of any fuel, lubricant, petrochemical and other industrial product to/from CITGO's Lake Charles Area facility, including copies of any existing, prior or future contracts, proposals or tariffs.

CITGO objects to Document Request No. 2 on two grounds – (1) the request seeks documents having no relevance to the issues in this proceeding, and (2) responding to the request would be unduly burdensome, requiring CITGO to locate and produce extremely voluminous documentation generated over an unlimited period of time.

KCSR asserts in conclusory fashion that Document Request No. 2 is somehow relevant to the public interest prong of the test for terminal trackage rights under § 11102(a). However, KCSR makes no attempt to actually explain *how* the marketing efforts BNSF or UP, or rail tariffs and contracts, relating to CITGO's rail shipments could possibly be relevant to the public interest in this case. Consequently, KCSR has clearly failed to meet its burden to demonstrate the relevance of Document Request No. 2 to the issues in this case.

Moreover, to the extent KCSR may be suggesting that the public interest prong of the test for terminal trackage rights under § 11102(a) requires the Board to determine whether direct access to CITGO's facility is necessary to protect or preserve competition, that finding has already been made in the UP/SP merger proceeding, as noted above. The Board mandated the merger conditions relating to Lake Charles to preserve the right of all Lake Charles shippers to

competitive rail service from BNSF. KCSR's contention that the competitive necessity of direct service by BNSF is an open issue in this proceeding is tantamount to arguing that the Board should alter the merger conditions relating to Lake Charles without reopening the UP/SP merger case.⁹

3. Document Request No. 4

Document Request No. 4 seeks the production of all documents relating to CITGO's use of non-rail modes of transportation for the shipments of all products to or from CITGO's Lake Charles facility:

Document Request No. 4: Provide copies of all Documents relating to CITGO's use, lack of use, or proposed use of other non-rail transportation modes for the movement of fuels, lubricants, petrochemicals and other industrial products to/from CITGO's Lake Charles Area facility.

CITGO objects to Document Request No. 4 on two grounds – (1) the request seeks documents having no relevance to the issues in this proceeding, and (2) responding to the request would be unduly burdensome, requiring CITGO to locate and produce extremely voluminous documentation generated over an unlimited period of time.¹⁰

KCSR claims that documents relating to CITGO's use or lack of use of other modes of transportation are relevant to the question whether BNSF direct service to CITGO might substantially impair KCSR's operations at Lake Charles. In particular, KCSR argues that any future shift by CITGO from non-rail to rail transportation could increase the traffic on the Rosebluff Industrial Lead. For the reasons explained above with respect to Interrogatory No. 3,

⁹ It should again be noted that the conditions imposed by the Board in the UP/SP merger requiring BNSF service at Lake Charles were for the benefit of all the affected shippers – including numerous shippers not a party to this proceeding. See Decision No. 44 at 247; *UP/SP*, Finance Docket No. 32760 (Sub-No. 21), (Decision No. 21) slip op. at 6 (STB served December 20, 2001) (Lake Charles shippers have independent right to seek Board action to ensure merger conditions are implemented to preserve pre-merger competition.)

¹⁰ There is no limitation of the time period covered by Document Request No. 4. Accordingly, by its terms, Document Request No. 4 would require the production of an enormous volume of documents.

however, KCSR's conclusory assertion of relevance regarding Document Request No.4 is clearly without substance. BNSF's proposed direct service to CITGO will not affect KCSR's operations, since BNSF direct service will occur during UP's window of operations and BNSF will not use the congested Rosebluff Yard to assemble its trains. In addition, any future increase in CITGO's rail transportation requirements would increase the traffic on the Rosebluff Industrial Lead irrespective whether BNSF was providing direct or switched service to CITGO.¹¹

4. Document Requests Nos. 8 and 9

Document Request No. 8 seeks the production of all documents relating to BNSF's rates vis-a-vis other rail and non-rail transportation rates:

Document Request No. 8: Provide copies of all documents relating to the adequacy, inadequacy, level of, and/or market effectiveness of BNSF's rates vis-à-vis the rates provided by UP, KCSR, or any other transportation mode for the transportation of any product transported to/from CITGO's Lake Charles Area facility.

Document Request No. 9 seeks the production of all documents relating to potential cost savings CITGO may enjoy as a result of direct service by BNSF:

Document Request No. 9: Provide copies of all Documents, including any studies, analyses, or reports, relating to any cost savings CITGO may incur by BNSF providing direct unit train service to CITGO's Lake Charles Area facility instead of continuing to serve CITGO via a reciprocal switch provided by UP.

CITGO objects to Document Requests Nos. 8 and 9 on the grounds that they seek documents having no relevance to the issues in this proceeding.¹²

KCSR asserts in conclusory fashion that Document Requests No. 8 and 9 are relevant to the public interest prong of the test for terminal trackage rights under § 11102(a). However, KCSR does not explain *how* (a) the respective rates of BNSF, UP, KCSR – much less the rates of

¹¹ The greater efficiency of BNSF's direct unit train service to CITGO would actually lessen the potential impact of any future increases in CITGO's rail shipments.

¹² CITGO also objected generally to the production of what would clearly be extremely voluminous documentation covering an unlimited time period.

ocean vessel, barge, pipeline, truck or other possible modes of transportation – or (b) the possibility of cost savings by CITGO could be relevant to the issues in this proceeding.¹³ Consequently, KCSR has clearly failed to meet its burden to demonstrate the relevance of Document Requests Nos. 8 and 9 to the issues in this case.

Moreover, to the extent KCSR is suggesting that the public interest prong of the test for terminal trackage rights under § 11102(a) requires the Board to determine whether direct access to CITGO's facility is necessary to promote, protect or preserve competition, that finding has already been made in the UP/SP merger proceeding, as noted above. The Board mandated the merger conditions relating to Lake Charles to preserve the right of all Lake Charles shippers to competitive rail service through direct BNSF service. KCSR's contention that the competitive necessity of direct service by BNSF is an open issue in this proceeding is tantamount to arguing that the Board should alter or restrict the merger conditions relating to Lake Charles without reopening the UP/SP merger case.

C. KCSR's Remaining Complaints About CITGO's Responses Are Without Merit

KCSR also complains that several of the responses provided by CITGO are "confusing," incomplete, or not consistent with the response that KCSR expected. For example, KCSR professes to be "confused" by CITGO's response to Interrogatory No. 4 – which asks for the current track capacity at the CITGO Lake Charles facility. CITGO's verified response to Interrogatory No. 4 clearly states that the total operational track capacity available at its Lake Charles facility for the proposed BNSF crude oil service is 161 railcars. Notwithstanding CITGO's clear, unequivocal and verified response, KCSR claims that CITGO has provided

¹³ KCSR's apparent focus on rates and/or cost savings ignores other potential benefits of direct unit train service by BNSF such as single-line service, more predictable service, safer operations, more efficient use of cars, as well as more efficient use of CITGO's unloading facility.

differing responses regarding the track capacity of its facility because one of the documents produced by CITGO in response to a document request indicates that the track capacity is 151 railcars.

There is nothing either confusing or inconsistent about CITGO's response to Interrogatory No. 4. It clearly states the current track capacity of the CITGO Lake Charles facility as 161 railcars. Any confusion on the part of KCSR appears to arise from its failure to recognize the difference between an interrogatory and a document request. A party responding to an interrogatory is required to verify that the information provided is current and accurate. In contrast, a party responding to a document request is required only to produce documents that fit the description set forth in the request. A party producing documents does not verify or in any way vouch for the accuracy of the information contained in the documents produced. Indeed, common sense would suggest that information in documents prepared months or years prior to their production in discovery may no longer contain information that is current and/or accurate. In this case, the information in the document that KCSR claims is the source of its confusion was accurate at the time the document was prepared, but is no longer current.¹⁴

Similarly, KCSR claims that CITGO "refuses" to produce documents regarding BNSF's operational capabilities in response to Document Request No. 1, despite the fact that KCSR acknowledges that CITGO *did* indeed produce documents responsive to Document Request No. 1. KCSR argues that because KCSR would have expected there to be more documents relating to BNSF's operational capabilities, the Board should order CITGO to produce more documents. But CITGO undertook a reasonable, good faith search for responsive documents and produced

¹⁴ To the extent KCSR was genuinely confused about the actual track capacity of CITGO's facility, its confusion could have been easily remedied by a telephone call or email to CITGO's counsel. Nor is it explained why the difference between 161 and 151 cars is any way material to any issue here or why this somehow frustrates KCSR's ability to present its opposition to BNSF's application.

the documents it found. KCSR's expectations notwithstanding, that is exactly what is required by the discovery rules.

KCSR also claims that CITGO failed to include an attachment referenced in an email (CPC-0039-C to CPC-0040-C) produced in response to Document Request No. 1. However, CITGO did in fact produce the attachment. Indeed, it would have been hard to miss, since it was produced in sequential Bates number order immediately following the email to which it was attached (CPC-0041-HC to CPC-0056-HC).¹⁵

KCSR also complains about CITGO's response to Document Request No. 5 – which seeks documents relating to the adequacy of UP and KCSR service at CITGO's Lake Charles facility. As an initial matter, KCSR claims that CITGO produced only one email in response to Document Request No. 5. However, CITGO in fact produced a number of documents responsive to Document Request No. 5. *See, e.g.*, CPC-0031-C through CPC-0036-C and CPC-0057-C through CPC-0063-HC. KCSR also grumbles that it cannot determine from the documents produced by CITGO the underlying causes of service problems. However, once again, KCSR appears to be confused about the fundamental difference between an interrogatory and a document request. CITGO's obligation in responding to a document request is to search for and produce responsive documents. CITGO is not required to interpret or explain the contents of the documents it produces.

Finally, KCSR complains about CITGO's response to Document Request No. 6 – which seeks documents relating to the adequacy, level or quality of BNSF service to CITGO's Lake Charles facility. However, as CITGO explained in its response to this document request, BNSF does not provide direct service to CITGO at Lake Charles – all BNSF cars are delivered to

¹⁵ As noted above, there were a variety of ways of easily clearing up any confusion on the part of KCSR short of a motion to compel – a telephone call or email to CITGO's counsel comes immediately to mind. It is not clear why KCSR chose instead to raise it in a motion to compel.

CITGO via reciprocal switch by UP. Consequently, CITGO has no documents relating to BNSF's service at Lake Charles because BNSF has not yet begun direct service to Lake Charles.¹⁶

III. CONCLUSION

For the reasons set forth above, KCSR's motion to compel should be denied.

Respectfully submitted,



Edward D. Greenberg
David K. Monroe
Svetlana Lyubchenko
GKG Law, P.C.
Canal Square
1054 Thirty-First Street, N.W.
Washington, D.C. 20007
Ph.: 202-342-5277

Charles N. Harper
Senior Corporate Counsel
Refining Ops-LCMC
CITGO Petroleum Corporation
P. O. Box 1562
Lake Charles, LA 70602
Ph.: 337-708-7422

*Counsel for CITGO Petroleum
Corporation*

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¹⁶ To the extent KCSR seeks documents relating to BNSF's service to Lake Charles via reciprocal switch by UP, then Document Request No. 6 is duplicative of Document Request No. 7 – which seeks documents relating to UP's switching service at Lake Charles. KCSR has not challenged CITGO's response to Document Request No. 7.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March, 2015, copies of the foregoing CITGO Reply To Motion To Compel have been served by email on all parties of record in Finance Docket No. 32760 (Sub-No.46).



David K. Monroe