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

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

APPLICATION FOR TERMINAL TRACKAGE RIGHTS

BNSF's Rebuttal in Support of Application for Terminal Trackage Rights

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TABLE OF CONTENTS

Page

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Through this proceeding,[1] BNSF has filed an application for terminal trackage rights, requesting that the Surface Transportation Board ("STB" or "Board") implement the Lake Charles Condition[2] to the UP/SP merger, which provides for BNSF rights over the Rose Bluff Lead. *See* BNSF Application (February 27, 2013). On August 24, 2015, UP, KCS, and CITGO each filed Replies (hereinafter "UP Reply," "KCS Reply," and "CITGO Reply") to the BNSF Opening Statement and Evidence ("Opening Statement") filed on December 31, 2014. In this Rebuttal, BNSF responds to these Replies and reaffirms that the Board should grant the terminal

[1] The acronyms and defined terms used herein are the same as those in BNSF's Opening Statement.

[2] As defined in the Opening Statement at 4, the "Lake Charles Condition" is, collectively, the trackage rights conditions under the BNSF Settlement Agreement and the CMA Agreement imposed on the UP/SP merger by the Board in Decision No. 44 that provide BNSF the right (i) to handle traffic of shippers open to all of UP, SP, and KCS at Lake Charles and Westlake; and (ii) to handle traffic of shippers open to SP and KCS at West Lake Charles.

trackage rights requested by BNSF to enable BNSF to fully implement the Lake Charles Condition. Also submitted herewith are:

1. Rebuttal Verified Statement of Richard E. Weicher ("Weicher Rebuttal V.S.") describing the rights of BNSF and Lake Charles area shippers under the CMA Agreement and rebutting UP's assertion that Section 8(n) of the BNSF Settlement Agreement is applicable here;

2. Rebuttal Verified Statement of Rollin D. Bredenberg ("Bredenberg Rebuttal V.S.") further establishing that direct BNSF service via trackage rights would not substantially interfere with the operations of UP or KCS;

3. Rebuttal Verified Statement of Denis J. Smith ("Smith Rebuttal V.S.") describing the limitations imposed on BNSF's ability to provide fully competitive service to customers on the Rose Bluff Lead without being able to provide direct train service via trackage rights to those customers;

4. Rebuttal Verified Statement of David A. Reishus, Ph.D. ("Reishus Rebuttal V.S.") describing the need for trackage rights so that BNSF may fulfill the competitive role envisioned by the Board; and

5. Rebuttal Verified Statement of Michael R. Baranowski ("Baranowski Rebuttal V.S.") describing deficiencies in the analyses conducted by KCS's economic witnesses, the differential in operating costs to BNSF between service via trackage rights and reciprocal switch on the Rose Bluff Lead, and likely operating windows for BNSF trains at the Rose Bluff Yard and on the Rose Bluff Lead.

I. INTRODUCTION

As set forth in the Opening Statement at 4-9, the Board conditioned the UP/SP merger on the granting of direct trackage rights to BNSF over various tracks, including the Rose Bluff Lead. *UP/SP* Decision No. 44, 1 S.T.B. at 427-29. Among other things, the Board imposed the Lake Charles Condition, conditioning the merger on adherence to the CMA Agreement, which provides that BNSF's access at Lake Charles will be "on the same basis as is provided for in the BN/Santa Fe Settlement Agreement for '2-to-1' points." The BNSF Settlement Agreement, in turn, allows BNSF to *elect* trackage rights or other forms of access.

In denying KCS's challenge in 1996 to the Lake Charles Condition, the Board anticipated that BNSF, UP and KCS would negotiate an agreement to implement the Lake Charles

Condition, or that KCS or UP would submit the issues to arbitration under the relevant joint facility agreement. *UP/SP* Decision No. 63, slip op. at 9-10. If the Lake Charles Condition were not implemented through negotiations or arbitration, the Board indicated that BNSF could return to the Board to seek approval of a terminal trackage rights application to gain direct access to the Rose Bluff Lead, or that a statutory override of the joint facility agreement (see UP Reply, Counsel's Exhibit 9, hereinafter "1948 Joint Facility Agreement") may be necessary in order for BNSF to obtain direct access and fully implement the Lake Charles Condition. *Id.* at 10.

Faced with these facts, UP's and KCS's Replies resort to novel theories never before raised in the pleadings in this proceeding in a concerted effort by those two companies to block BNSF from providing competition as a replacement for SP on the Rose Bluff Lead and to avoid the reality of the Lake Charles Condition – including asserting that the Board did not do what it twice said in 1996 that it was doing, and that a never-before cited provision in the BNSF Settlement Agreement obviates the need for the Board to grant BNSF's terminal trackage rights Application and provides an escape hatch for UP to not honor a condition of the UP/SP merger.

Both carriers also invoke a number of other theories – some factual and some legal, but all misguided – for blocking BNSF direct train service on the Rose Bluff Lead. For instance, UP and KCS each argue for the first time that UP and the Board did not grant BNSF trackage rights over the Rose Bluff Lead in connection with the UP/SP merger, and thus that the Board need not approve BNSF's Application to implement any such rights. However, the Board's decisions in this proceeding, the plain language of the relevant agreements, and the parties' pleadings themselves confirm that the Lake Charles Condition provides for BNSF trackage rights over the Rose Bluff Lead. Moreover, the complementary interpretations of the UP/SP merger conditions being advanced by UP and KCS, and UP's tacit acquiescence in KCS's objections, serve their mutual commercial interest to avoid the implementation of merger conditions prescribed by the Board.

Further, as BNSF explains below, each of UP's and KCS's objections to BNSF's Application is meritless. BNSF's Application fully meets the standards set forth in 49 U.S.C. § 11102(a). First, it is undisputed that the Rose Bluff Lead and Yard are terminal trackage. Second, BNSF's use of the Rose Bluff Lead is "in the public interest" because trackage rights are necessary to implement the direct service right given to BNSF and Lake Charles shippers under the CMA Agreement to preserve the shippers' pre-merger competitive options. Moreover, simplistic analyses of historical traffic shares among carriers such as those presented here by UP and KCS do not provide a valid basis for determining whether trackage rights are needed for BNSF to fully replace lost SP service at Lake Charles. Even so, the Baranowski Rebuttal V.S. shows that BNSF has averaged annually less than half the traffic to and from Lake Charles that SP carried before the UP/SP merger. Third, although UP already agreed to potential interference when it accepted the Lake Charles Condition, the Rebuttal Verified Statement of Rollin D. Bredenberg establishes that BNSF direct service during UP's daily 12-hour period of operations is practicable and would not substantially interfere with UP or KCS operations at the Rose Bluff Yard or on the Rose Bluff Lead. Indeed, UP's and KCS's own documents confirm the availability of windows at the Yard and on the Lead that would allow BNSF trains to serve CITGO and other Rose Bluff Lead shippers without interfering with either carrier's operations. In any event, KCS operations would not be affected since the BNSF direct trains would operate solely during UP's operations in the Yard.

Independent and apart from any terminal trackage rights granted by the Board through this proceeding, BNSF is entitled to provide direct BNSF train service via trackage rights because, to the extent the provisions in the 1948 Joint Facility Agreement cited by KCS would preclude the grant of such rights by UP without KCS's consent,[3] those provisions are overridden by 49 U.S.C. § 11321(a). Section 11321(a) provides for the override of contractual provisions "as necessary" to carry out a merger, and the UP/SP merger could not be carried out, as conditioned by the Board, without BNSF receiving trackage rights on the Rose Bluff Lead. The Board applied this governing principle in Decision No. 66 in the UP/SP proceeding, and that precedent controls here.

Absent any purported KCS consent requirement, UP has the authority as co-owner of the Rose Bluff Lead to fulfill its obligations under the CMA Agreement and the conditions to the UP/SP merger to grant BNSF trackage rights over the Lead. If BNSF does not receive trackage rights over the Rose Bluff Lead (either through this Application for terminal trackage rights or as a result of any purported KCS consent requirements in the 1948 Joint Facility Agreement being overridden pursuant to Section 11321(a)), then the UP/SP merger would need to be reopened, and the CMA Agreement and the BNSF Settlement Agreement that provide for such BNSF trackage rights would need to be renegotiated.

II. THE CMA AGREEMENT AND THE BOARD'S MERGER CONDITIONS GAVE BNSF THE RIGHT TO SERVE LAKE CHARLES SHIPPERS DIRECT OR VIA RECIPROCAL SWITCH SERVICE

UP and KCS devote numerous pages of their Replies to an attempt to stifle competition by showing that words granting BNSF trackage rights on the Rose Bluff Lead cannot be found in any of the settlement agreements or in the Board's decisions, and thus there is no need to grant BNSF's Application. Their arguments are wrong; both the relevant agreements and the Board's decisions expressly support BNSF's position. The parties' pleadings further confirm that UP and

[3] As discussed below, BNSF disagrees that KCS must consent under the 1948 Joint Facility Agreement to any grant of trackage rights by UP to BNSF.

KCS fully understood that the grant of the right to BNSF to provide "direct" service to Lake Charles shippers (including shippers on the Rose Bluff Lead) would be implemented through trackage rights.

A. The CMA Agreement Provides BNSF with Trackage Rights Over the Rose Bluff Lead

Section 8 of the CMA Agreement provides BNSF with the "right to handle" certain defined Lake Charles area traffic. Section 8 then provides that BNSF's access will be "on the same basis as is provided for in the BN/Santa Fe Settlement Agreement for '2-to-1' points." In turn, Sections 5(c) and 5(d) of the BNSF Settlement Agreement provide that access "shall be direct or through reciprocal switch" and that BNSF may (and must) "elect" whether its service shall be direct or through reciprocal switching. In that context, the word "direct" can have no other meaning than service using trackage rights, and it is clear that both the parties and the Board intended that BNSF would have the right to provide service via trackage rights.

Indeed, this sub-docket and the parties' long-standing dispute are premised on UP's agreement to grant BNSF trackage rights on the Rose Bluff Lead and KCS's claim that UP had no authority to do so. It borders on the nonsensical for them to now argue that BNSF was not granted the right to serve Rose Bluff Lead shippers directly, even when BNSF elects trackage rights. Moreover, UP and KCS have acknowledged in the past on numerous occasions that BNSF has been granted trackage rights, [4] and neither in 1996 when the issue first arose nor at any point since, until their Replies, did either carrier assert that BNSF was not granted trackage rights. The position was not advanced until the railroads filed their Replies – including in their

[4] For example, in an internal email from Owen J. Durkin, UP, to Patrick P. Pensick, UP, dated September 21, 2012 (UP-WLC-0000664, attached hereto as Counsel's Exhibit 1), {

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commercial communications between the three carriers, in their answers to BNSF's Application, in their discovery responses, or in any other pleading. This assertion by UP is disingenuous at best, if not a lack of good faith and fair dealing.

For example, there is no claim by UP or KCS in any of their letters, e-mails and other communications that have been submitted by the parties as exhibits to their pleadings of a claim or argument that BNSF was not granted trackage rights. Further, in KCS's Petition to Reopen/Reconsider the Lake Charles conditions imposed by the Board (KCS-65) in 1996, KCS challenged UP's right "to grant BNSF access over KCSR trackage in the Lake Charles area, *as ¶ 8 of the CMA agreement purports to do*." KCS-65 at 13 (emphasis added). KCS also argued that the "addition of BNSF as another carrier with direct access in [the Lake Charles] area would further complicate the operational and switching aspects" of KCS and UP operations. KCS-65 at 4-5. By positing that BNSF trains would cause operational issues, KCS necessarily acknowledged that the CMA Agreement commitment to grant "direct access" was for trackage rights service. UP likewise acknowledged in its March 19, 2013 Answer to BNSF's Application in this sub-docket (UP/SP-410, at 3) that UP agreed to grant BNSF trackage rights to directly serve CITGO and other Rose Bluff Lead shippers: "[t]he conditions the Board imposed on the UP/SP merger contemplated that *BNSF could obtain trackage rights to serve shippers that had been 'open to SP and KCS at West Lake Charles, LA.'*" (emphasis added).

Similarly, the Board has consistently referred to BNSF's access at Lake Charles as including direct trackage rights service (in addition to reciprocal switch). For example, in Decision No. 63, the Board stated that "[t]he trackage rights provided for in the BNSF agreement, as modified by the amendments required by Decision No. 44," allow BNSF to serve Lake Charles shippers and that those "BNSF trackage rights . . . were not . . . in the initial version of the BNSF agreement dated September 25, 1995," but rather were "*first provided for in Paragraph 8 of the CMA agreement dated April 18, 1996.*" *UP/SP* Decision No. 63 at 2-3 (emphasis added). *See also UP/SP* Decision No. 44, 1 S.T.B. at 429 ("It appears . . . that BNSF will have direct access to [Lake Charles area] shippers when it begins to operate under its trackage rights arrangement.") The Board's understanding that UP agreed in the CMA Agreement to grant BNSF trackage rights has continued to this sub-docket. In Decision No. 2 (served December 1, 2014), at 2, the Board stated in describing the history of KCS's challenge to BNSF's right to serve CITGO via trackage rights: "In Decision No. 63, the Board denied KCS's petition to reconsider the trackage rights granted to BNSF in Decision No. 44" at Lake Charles.

The arguments by UP and KCS that UP never committed to grant BNSF the right to provide direct train service via trackage rights are thus demonstrably wrong. Those arguments are nothing more than legal posturing aimed at maintaining and extending their efforts to make competition from BNSF at Lake Charles less effective than the Board long ago determined it should be. For example, Roger D. Lambeth, General Superintendent for Transportation Services in the Western Region for UP, sent an email to Cameron A. Scott, Executive Vice President of Operations for UP, dated November 22, 2013, stating that { } UP-WLC-0000702, attached hereto as Counsel's Exhibit 2.[5]

Both carriers as well as the Board understood and confirmed that Section 8 of the CMA Agreement granted BNSF the right to provide direct trackage rights service. In fact, as noted, the underlying premise of KCS's challenge to BNSF's Application is that UP improperly agreed to grant and the Board improperly imposed trackage rights over the joint facility trackage. That

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[5] *See also* Email from Owen J. Durkin, UP, to Doug Banks, KCS, dated December 18, 2012 (UP-WLC-0000687, attached hereto as Counsel's Exhibit 3) { }.

premise is fatally inconsistent with KCS's (and UP's) claim that trackage rights were never granted or imposed. As Mr. Weicher describes in his Rebuttal Verified Statement, KCS was not a party to the negotiations of any of the settlement agreements or the CMA Agreement and is not in a position to describe their intent. Indeed, KCS objected to the trackage rights before the Board, and its objections were rejected in Decision No. 63.

B. Lake Charles Shippers Benefit From BNSF's Right to Elect Service Under the CMA Agreement

CMA argued vigorously in the UP/SP merger proceeding that Lake Charles area shippers should have access to BNSF, and CMA bargained for the same type of access – *i.e.*, access via trackage rights or reciprocal switch, at BNSF's election – that was to be provided in the BNSF Settlement Agreement. *See* CMA Agreement, Section 12. This right of Lake Charles shippers to receive direct service was imposed as a condition to the merger, and CITGO as a beneficiary of the CMA Agreement condition is entitled to direct service should BNSF initiate it.

Shippers, and particularly oil and gas industry shippers like CITGO, benefit greatly from direct service. Service via reciprocal switching is often irregular and unpredictable, leading to operating inefficiencies for shippers who rely on a regular supply of materials. Oil and gas industry shippers such as CITGO without access to direct service (especially for unit trains or trains of less than unit size handling only cars destined to a single customer) are at a competitive disadvantage to their competitors who have such access. Reciprocal switching also involves additional costs and increased transit times, including at least one additional day each of cycle time for both loaded and empty cycles, because of the additional hand-off to the switching carrier and dwell time spent in the switching carrier's yards. *See* Smith Rebuttal V.S. at 2.

If UP's and KCS's positions were to prevail, BNSF would no longer be allowed to make an election for traffic covered by Section 8 of the CMA Agreement, but rather would for the remaining eight decades of the Agreement have to serve CITGO and others only through reciprocal switching. That is not the "same basis" as access to "2-to-1" points under the BNSF Settlement Agreement. Because the CMA and BNSF Agreements were imposed as merger conditions, taking away BNSF's ability to "elect" direct service would nullify those conditions. CITGO's rights under the CMA Agreement would be similarly gutted.

C. Section 8(n) of the BNSF Settlement Agreement Does Not Apply Here

Citing Section 8(n) of the BNSF Settlement Agreement, which provides for alternative service if there is a "lack of sufficient legal authority" to grant specified trackage rights, UP contends that BNSF is not entitled to trackage rights on the Rose Bluff Lead. UP Reply at 19. UP (and its lawyers) have cited Section 8(n) for the first time here in its Reply, never having previously done so in this proceeding or elsewhere.

Section 8(n) simply does not apply here. The plain language of Section 8(n) indicates that the section applies only if trackage rights granted cannot be implemented because of the lack of "sufficient legal authority" – not the lack of "sufficient contract authority." The intention of the parties with respect to Section 8(n) was to address the situation where BNSF could not obtain legal authority for the implementation of trackage rights that UP granted (or agreed to grant) to BNSF under the BNSF Settlement Agreement, not to relieve UP of its obligation to provide BNSF with trackage rights where UP needed to secure the contractual consent of a third party to grant such rights.[6] Weicher Rebuttal V.S. at 5. In that situation, the intent was that UP would secure any necessary consent. BNSF did not intend, and would not have agreed, that UP could avoid its obligation to provide trackage rights by simply failing to secure contractual authority to

[6] In discovery in this proceeding, UP confirmed that UP has not sought KCS's consent for the grant of trackage rights to BNSF, nor has UP initiated legal action, arbitration, or otherwise asserted a claim against KCS with respect to the provisions of the 1948 Joint Facility Agreement.

enable it to do so. Furthermore, the Board would not have imposed a binding condition with such an escape hatch for UP. *Id.*

As Mr. Weicher notes, UP knew at the time it consummated its merger with SP of KCS's claim that its consent was required to grant BNSF trackage rights over the Rose Bluff Lead. Weicher Rebuttal V.S. at 5-6. UP cannot now invoke the Section 8(n) language to avoid UP's voluntary and knowing acceptance of the Lake Charles Condition to the UP/SP merger.[7] Surely, if Section 8(n) was intended as UP posits, UP would have raised it when KCS first objected to the grant to BNSF of Lake Charles trackage rights and the Board decided Decision No. 63. Tellingly, however, UP did not even make a filing in that sub-docket.[8]

UP's failure to raise the Section 8(n) issue previously or even to take affirmative steps to address KCS's contentions about the consent provision in the 1948 Joint Facility Agreement *may* be attributable to the fact that KCS's contentions serve UP's commercial interests in limiting BNSF's ability to provide direct service on the Rose Bluff Lead. The relevant language from the 1948 Joint Facility Agreement at Section 19 states that neither party can "sell, lease or transfer its interest in the jointly owned tracks, or any part thereof, without advance written approval by the other party." On its face, this language does not require the consent of the other party for one party to grant trackage rights to a third party. The words "sell, lease or transfer its interest" refer

[7] Additionally, the 50/50 Line Agreement between UP and BNSF contains a provision granting BNSF trackage rights on former SP spurs and branches connecting to the 50/50 Line, including the Rose Bluff Lead. *See* Opening Statement at 7-8. This independent grant of trackage rights in the 50/50 Line Agreement stands alone as "sufficient legal authority" for implementation of trackage rights on the Rose Bluff Lead and precludes the application of Section 8(n).

[8] To summarize UP's role (or lack thereof) in this process, (i) UP knew in 1996 that it had an obligation under the BNSF Settlement Agreement, the CMA Agreement and the UP/SP merger conditions to enable BNSF to provide direct service over the Rose Bluff Lead, (ii) UP knew that KCS objected to BNSF providing such direct service, and (iii) UP has done nothing to attempt to resolve KCS's objections, despite its obligations to BNSF and affected shippers. Now, in its Reply, UP continues to shirk its obligations. Having consummated the UP/SP merger and accepted the conditions thereon, UP should be held to its commitments.

to each party's *ownership interest* in the tracks, not to each party's ability to grant a third party the right to *use* the trackage. This view is supported by language in Section 9 of the 1948 Joint Facilities Agreement that uses the term "interest in the jointly owned tracks" in a way that clearly refers to the parties' ownership interest, and a grant of trackage rights does not vest an ownership interest in the tenant. Therefore, by the plain language of the agreement, UP has the authority as co-owner of the Lead to grant BNSF direct trackage rights on the Lead without first obtaining KCS's consent.

Had UP in fact advanced such an argument in, for example, an arbitration with KCS about the effect of the consent provision, the consent provision may well have been found not to pose an impediment to BNSF's direct access to the Rose Bluff Lead. That outcome would be to neither UP's nor KCS's commercial advantage. Attempting to resolve that issue of contract interpretation *now*, however, would only further delay the proceedings, and would require an arbitration in which the only parties to the agreement (and, hence, the only parties to the arbitration) – UP and KCS – share a strong interest in delay. In any event, the issue need not be resolved, because what is clear is that, regardless of what the consent provision means, UP's Section 8(n) argument is meritless. Even if the Board were to deny BNSF's terminal trackage rights Application, raising the issue of the necessity of an override, BNSF is not required to specify in advance the provisions to be overridden, and the self-executing nature of the override frees the Board from having to make a determination about the meaning of the consent provision. *See infra*, Section VII.

Furthermore, there cannot be a "lack of sufficient legal authority" to implement the grant of trackage rights by UP to BNSF provided in the CMA Agreement at this time. As the Board described in Decision No. 63, either the Board will approve this Application for terminal trackage rights, or, alternatively, the Board will determine whether it is necessary to override any purported KCS consent rights that would bar UP's grant to BNSF of the CMA Agreement trackage rights. Only if the Board denies the Application and the Board determines that it is not necessary to override any purported KCS consent rights could Section 8(n) potentially apply. In such a scenario, the trackage rights granted under the BNSF Settlement Agreement could not "be implemented because of the lack of sufficient legal authority to carry out such grant," and **only then** would UP be required to "provide an alternative route or routes, or means of access of commercially equivalent utility at the same level of cost to BNSF as would have been provided by the originally contemplated rights."[9] To argue otherwise, as UP does in its Reply, ignores the Board's clear path set forth in Decision No. 63 for the implementation of the Lake Charles Condition and the granting of trackage rights to BNSF.

One example of the bankruptcy of UP's Section 8(n) argument can be seen in its conduct in late 2012. UP did not cite Section 8(n) as a basis for rejecting BNSF's request for direct service at that time nor did it do so in any of the communications between the parties. For instance, in a November 20, 2012 letter to Chris Bigoness of BNSF, Daniel Hartmann of UP (UP Counsel's Exhibit 18) expressed UP's detailed objections to BNSF's direct service via trackage rights to the CITGO facility. Nowhere in that letter did Mr. Hartmann mention or refer to Section 8(n) nor for that matter did Mr. Hartmann refer to any purported requirement that KCS's consent would be needed.[10] Similarly, in 1996 when UP (and BNSF) sought terminal trackage rights over

[9] In any event, as established by Mr. Baranowski, the reciprocal switch service provided by UP today does not represent the same level of cost as direct access. Baranowski Rebuttal V.S. at 8-11.

[10] The operating plan, which Mr. Lambeth sent just three days before BNSF was scheduled to operate a direct train to the CITGO facility, inherently recognized that BNSF had trackage rights. Mr. Lambeth did not mention Section 8(n) nor did he indicate that KCS's consent was required.

joint KCS-UP line segments at Beaumont and Shreveport, LA, UP did not take the position that it was relieved of any obligation to provide BNSF with trackage rights by Section 8(n).

Nevertheless, any UP argument that BNSF access via reciprocal switch should be deemed "commercially equivalent" so as to satisfy Section 8(n) of the BNSF Settlement Agreement and thus obviate the need for direct trackage rights service is fully rebutted by CITGO's evidence which forcefully shows that the access BNSF has been granted is not commercially equivalent. *See* CITGO Reply at 5-6, 8-9, 17-19.

UP committed in 1996 to give BNSF access to Lake Charles shippers "on the same basis as" BNSF's access at "2-to-1" points, and any limitations on UP's ability to deliver on its promise should be addressed in damages litigation between UP and KCS under their contract, not by denying BNSF the access that was specifically promised and that the Board determined to be in the public interest in an attempt to limit competition.

III. THE ROSE BLUFF LEAD AND YARD ARE "TERMINAL FACILITIES"

As BNSF established in its Opening Statement at 14-15, and as acknowledged by the Board in Decision No. 63, the Rose Bluff Lead and the Rose Bluff Yard are "terminal facilities" under the meaning of 49 U.S.C. § 11102(a). *UP/SP* Decision No. 63, slip op. at 6, n. 22. Neither UP nor KCS has disputed this characterization in their Replies.

IV. BNSF DIRECT SERVICE IS IN THE "PUBLIC INTEREST"

As BNSF established in its Opening Statement at 15-18, the requested terminal trackage rights are clearly in the public interest. In imposing the Lake Charles Condition on the UP/SP merger in Decision No. 44 and reaffirming the Condition in Decision No. 63, the Board conclusively determined that BNSF trackage rights in the Lake Charles area serve the public interest by mitigating the loss of competitive rail service options to Lake Charles area shippers, including those on the Rose Bluff Lead such as CITGO. *See* UP/SP Decision No. 44, 1 S.T.B. at

427-29, 448-49. Therefore, the "public interest" component of the terminal trackage rights analysis has already been determined to be met.

A. KCS and UP Argue for the Application of Incorrect "Public Interest" Standards

KCS and UP attempt to misdirect and obfuscate by arguing that only certain narrow standards apply to the "public interest" test in this terminal trackage rights proceeding. *See* KCS Reply at 29-34; UP Reply at 26-32. They argue that the grant of terminal trackage rights can be found to be in the public interest only if the rights are necessary to remedy anticompetitive conduct under *Midtec Paper Corporation v. CNW et al.*, 3 I.C.C.2d 171 (1986), *aff'd sub nom. Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988) ("*Midtec*"), or when the rights are needed to "bridge a gap" in broader trackage rights in order to remedy or mitigate anticompetitive effects of a transaction.

The Board conclusively determined in Decision No. 44 that the appropriate public interest test in a merger proceeding is not limited to the narrow standards suggested by KCS and UP, but instead is a "broad" and "flexible" public interest determination that the Board can invoke in order "to make the agency's overall merger conditions effective." *UP/SP* Decision No. 44, 1 S.T.B. at 448-49. As the Board stated in Decision No. 44, "Congress gave [the Board] broad authority" in the public interest standard for Section 11102(a), and "it is appropriate for [the Board] to retain the flexibility to use the terminal trackage rights provision to prevent carriers opposing a merger from blocking [the Board's] ability to craft merger conditions that are clearly in the public interest as the ICC did in the past." *Id.* at 449. The phrase "public interest" is thus a quintessentially flexible phrase. It is surely in the public interest to prevent a party (here, UP) from negating obligations that were expressly imposed on it by the Board as conditions to its merger.

Furthermore, the Board in Decision No. 44 explicitly rejected the application in merger proceedings of the *Midtec* standard (which requires that the terminal trackage rights are necessary to remedy or prevent an anticompetitive act). *Id.* at 448. Instead, the Board found that the terminal trackage rights at issue in Decision No. 44 were warranted because they were "essential to the merger conditions permitting BNSF to provide a competitive alternative." *Id.*

Just such a situation exists here. There is no dispute that the Rose Bluff Lead is a terminal facility, and the Board recognized the essential nature of the Lead and related Lake Charles tracks in imposing the Lake Charles Condition on the UP/SP merger. These determinations were sufficient for the Board in Decision No. 44 to apply the broad and flexible public interest standard in granting terminal trackage rights, and the Board should apply the same standard here.

To the extent that the Board desires to undertake a "bridge the gap" analysis, BNSF trackage rights over the Rose Bluff Lead clearly would "bridge a gap" between a line over which BNSF received trackage rights from UP in the UP/SP merger (the former SP line between Houston, TX and Iowa Junction, LA) and shippers on the Rose Bluff Lead. Bridging such a "gap" between a trackage rights line and shippers protected by a merger condition is just as, if not more, important to the implementation of the merger conditions as is bridging a "gap" between two trackage rights lines that will ultimately serve shippers. In other words, the competitive balance that a merger condition seeks to achieve is affected similarly whether a gap exists between two line segments or whether the gap exists between a trackage line and a shipper protected by a merger condition. Nothing in the governing precedents indicates that a "gap" must be between trackage rights line segments rather than at the end of a trackage rights line, and in either scenario the "bridge" is required to implement merger conditions.

Contrary to KCS's assertions, the Board in the *CN/IC* merger proceeding upheld the applicability of the flexible public interest standard set forth in Decision No. 44, but found an "insufficient nexus between the merger and the applicants' trackage rights proposal" to justify applying that standard, and held that the applicants did not show that an override of certain contractual obligations was necessary in order to implement the merger. *Can. Nat'l Ry., et al – Control – Ill. Cent. Corp., et al*, Dec. No. 37, 4 S.T.B. 1222, 173-75, slip op. at 52-53 (STB served May 25, 1999). Here, BNSF has firmly established the nexus between the Lake Charles Condition to the UP/SP merger and BNSF's Application for terminal trackage rights – the requested terminal trackage rights are necessary to implement the Lake Charles Condition.

B. The "Competitive Effectiveness" of the Lake Charles Condition Is Not at Issue in This Proceeding

UP and KCS both cite certain traffic data in an effort to show that BNSF direct train service is not necessary in order for BNSF to have a competitive presence at Lake Charles or for CITGO to benefit from competitive alternatives. However, historical traffic share studies such as those presented here by UP and KCS neither demonstrate that BNSF has fully replaced SP as a competitor at Lake Charles nor serve to determine whether BNSF should have trackage rights to fully replace SP at Lake Charles.

As a threshold matter, the "competitive effectiveness" of the Lake Charles Condition is not at issue in this proceeding. In Decision Nos. 44 and 63, the Board decided that the Lake Charles Condition was competitively necessary in order to address the potential loss of competition resulting from the UP/SP merger. As we have shown, the Lake Charles Condition means that BNSF has the right to serve shippers in the Lake Charles area by direct service over trackage rights or by reciprocal switch at its election. KCS's attempt to raise an issue concerning the "competitive effectiveness" of that Condition now, as a way to deny BNSF the previously granted ability to elect trackage rights, is nothing more than a transparent attempt to block BNSF from competing and to re-litigate an issue that was resolved years ago adversely to KCS.[11] The Lake Charles Condition cannot now be changed without a reopening of the UP/SP merger.[12]

Furthermore, the granting of access as a merger condition is intended to unleash the forces of competition through introduction of a new carrier, and to replace the competition lost when another carrier is merged out of existence. The Board does not intend through such a grant of access to substitute superficial assessments of market shares or other competitive effectiveness metrics for the actual competitive process. *See* Reishus Rebuttal V.S. at 3-6. If the Board determined here that the Lake Charles Condition actually meant that BNSF has the right to serve shippers by reciprocal switch, or by direct service over trackage rights so long as the Board determines that BNSF is not competing effectively for traffic via reciprocal switch, as KCS urges in its Reply at 37-42, then the Board would have to perform a competitive analysis each time a railroad or a shipper seeks to implement a merger condition requiring trackage rights. The Board cannot have intended to create such a cumbersome and ineffective process through its carefully crafted merger conditions. The Board has never applied such a standard in this proceeding or in any other merger proceeding, and the substitution of regulatory oversight for the forces of

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11 KCS sought reconsideration in 1996 of the Lake Charles Condition, and the Board specifically rejected the KCS competition argument in Decision No. 63, including the argument that KCS itself provided a sufficient remedy for the loss of competition resulting from the UP/SP merger. *See* Opening Statement at 5-7. In rejecting KCS's argument, the Board stated: "Moreover, we continue to believe that the conditions we imposed, by building upon a privately negotiated settlement agreement, as endorsed by all relevant shippers, offer a better competitive solution than KCS has offered." *UP/SP* Decision No. 63, slip op. at 8 (STB served Dec. 4, 1996).

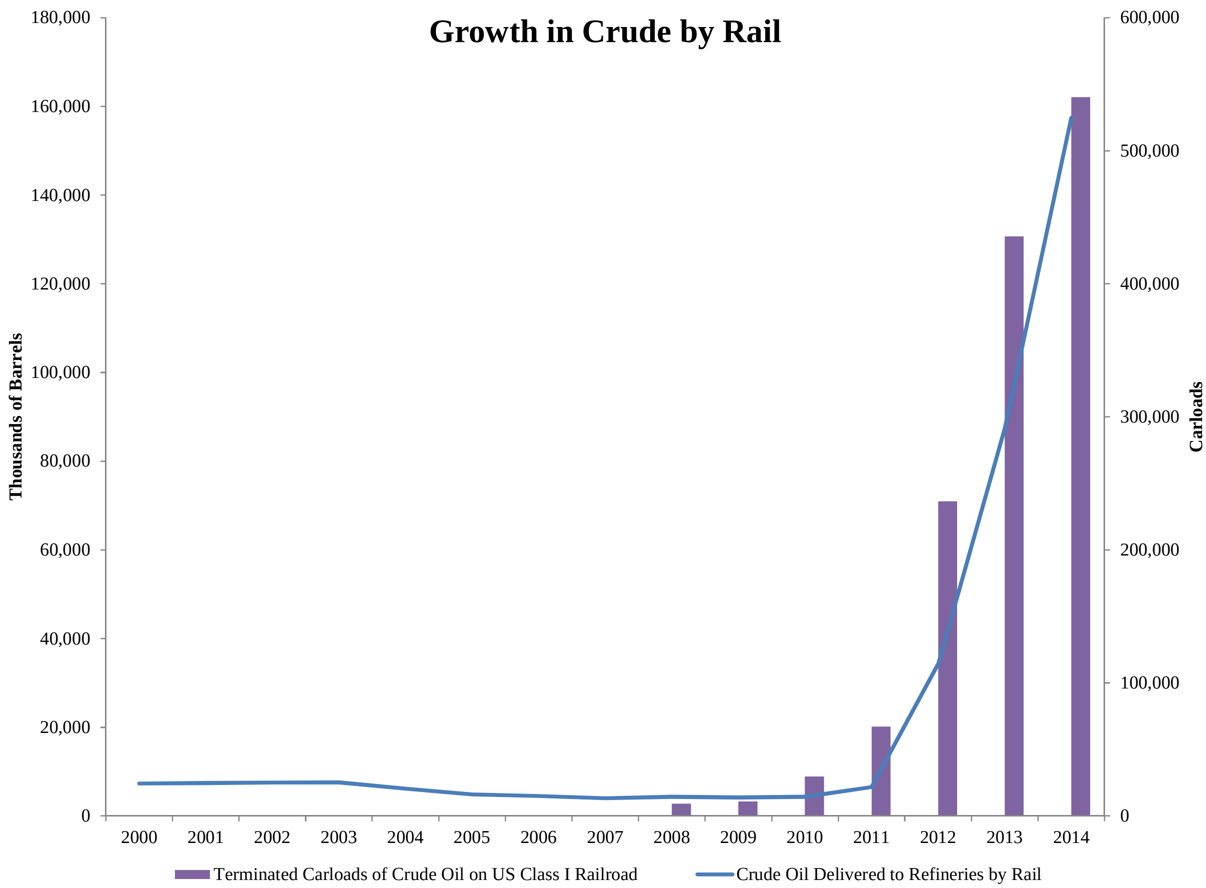
12 The Board's merger conditions vested rights not only in BNSF but also in shippers, and KCS cannot seek to modify a merger condition, including the Lake Charles Condition, without the participation of all beneficiaries of the merger conditions. *See UP/SP* Decision No. 44, 1 S.T.B. at 247 n.15. *See also UP/SP* Finance Docket No. 32760 (Sub-No. 21), Decision No. 21, slip op. at 6 (STB served Dec. 20, 2001) (BNSF and shippers have independent rights to seek Board intervention "to ensure that the conditions [the Board] imposed on the merger are implemented in a manner that effectively preserves pre-merger competition.").

competition – with whatever results those competitive forces might produce – would be poor public policy.

Even more important, as Dr. Reishus also explains, competition is a dynamic process in which an effective competitor must be able to respond to changing market conditions as they occur – such as the increased ability of railroads using unit-train service to compete with pipelines for the transportation of crude oil. Reishus Rebuttal V.S. at 7-8. Denying BNSF the tools necessary to compete fully at Lake Charles in the present and future, based on an analysis of past market shares, is inconsistent with the premise that BNSF's role is to replace SP, which would have been able to respond competitively to changing market conditions without having to persuade anyone that it had or had not been an effective competitor in the past. *See id.* at 10-11.

In addition, market conditions at Lake Charles are changing in ways extremely relevant to this proceeding. *See* CITGO Reply at 2-3. In particular, the flexibility, reliability and efficiency of unit train service combined with innovation in crude oil production technology have led to crude-by-rail alternatives unforeseen twenty years ago. *See* CITGO Reply at 3, 19; Reishus Rebuttal V.S. at 8-10; Smith Rebuttal V.S. at 2-3. The recent upsurge in the movement of crude oil by rail underscores the value to shippers of the service flexibility and cost that efficient rail service can provide. As seen in Figure 3, shipments of crude-by-rail have increased by more than 30-fold from the mid-2000s.

Figure 3



Reishus Rebuttal V.S. at 9.

The rapid growth in crude-by-rail is driven first by changing oil production technology that has opened up large new domestic and Canadian crude oil producing regions with limited existing pipeline capacity. The flexibility of rail transportation, however, makes it a viable alternative to producers and refiners despite the generally higher cost relative to pipeline transportation. *See* Reishus Rebuttal V.S. at 9-10.

Fully successful rail transportation of crude requires that railroads operate at large scale and high efficiency. Refineries consume crude in vast quantities and require that crude be available when needed. The CITGO refinery, for example, is rated at 470,000 barrels per day. A unit train is reported to move “up to 81,000 barrels,” while a 50-car trainload is roughly 34,000 barrels. As railroads operate at a cost disadvantage to pipeline and water transportation, the ability to provide high-volume, cost-efficient service is crucial to maintaining the competitiveness of this service. *See* Reishus Rebuttal V.S. at 9-10.

An efficient competitive response calls for changes in methods of service and delivery (for example, direct delivery of crude oil unit trains) in response to changing market conditions. As explained by CITGO, the limited delivery of crude oil under existing terms is inconsistent with effective competitive service. CITGO Reply at 5-6, 8-9, 17-19.[13] All – not just some – railroads need to be able to respond to those changed conditions, if the goal of preserving the competition lost when SP merged into UP is to be met. As Dr. Reishus explains, "[w]ere an independent SP still extant, with rights to provide direct service, it would be in similar position as BNSF with the incentive to provide more valuable direct unit train (or large block) service in competition with, and as an alternative to, the existing service provided by KCS." Reishus Rebuttal V.S. at 11. Customers would benefit from such service, and KCS, in order not to lose out, would have the incentive to find cost-effective means for meeting or beating this competitive alternative. This is the essence of the competitive process and alternatives that the Board attempted to preserve in imposing the Lake Charles Condition. *See id.*

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[13] KCS asserts that the inadequate service CITGO has received via switched service was caused by CITGO's lack of unloading capacity and its car ordering practices during the period 2012-2014. *See* KCS Reply at 46-51. However, as shown in CITGO's Reply, the limited rail service CITGO received during 2012-2014 via switched service resulted not from a lack of unloading capacity at the CITGO refinery, but rather from the arbitrary limit imposed by UP and KCS on the number of cars that could be delivered to the CITGO facility on any day. Indeed, as noted in the CITGO Reply and accompanying Verified Statement of Michael Barrett, CITGO's unloading facilities were chronically underutilized during 2012-2014 because UP and KCS could not, or would not, deliver a sufficient number of loaded railcars to keep CITGO's unloading facilities fully occupied. Similarly, the consistent underutilization of CITGO's unloading facilities also belies KCS' assertion that CITGO's car ordering processes caused backups and necessitated the diversion and transload of rail crude shipments to barge transportation.

The issue is not whether the rights BNSF has exercised up to now have made it competitive on the Rose Bluff Lead across a variety of commodities, but rather whether BNSF going forward can exert the same competitive force that a surviving SP would have exerted, with its own direct access to CITGO and other customers. BNSF's ability to meet new market conditions requires that BNSF be allowed to exercise its negotiated election to have access via trackage rights, just as SP would have had access on its own (jointly-owned) track.

SP, had it not been merged out of existence, could not have been denied direct access in the same ways that KCS and UP now propose to deny BNSF direct access. To replace the competitive force that SP exerted pre-merger and would have continued to exert in the absence of the merger, BNSF needs to be given similar shipper access, not access that KCS or UP gets to justify as merely "equivalent" and less inconvenient for UP because KCS and UP have old contracts with each other.

C. KCS's Economic Evidence Lacks Probative Value

Even assuming *arguendo* that the competitive necessity of the Lake Charles Condition is relevant, KCS's economic evidence lacks probative value, both because it is a flawed economic analysis and because competitive conditions have changed since 2012 and may change going forward.

As Dr. Reishus explains, KCS's economic witnesses calculate "market shares" without properly defining any relevant market, and their data could just as easily be read to support the proposition that BNSF has *not* been as effective a competitor as SP as to support the opposite conclusion. *See* Reishus Rebuttal V.S. at 3-6. Since being provided access following the UP/SP merger, KCS's economic witnesses show that BNSF has been responsible for less than {{ }}% of the tons moving from (or to) the Lake Charles area. *See* Figure 1. Per the Carload Waybill Sample, the BNSF share of traffic peaked in 2013 at {{ }}%. The data provided directly by the railroads indicate that BNSF's percentage of tons to and from the Lake Charles area was {{ }}% in 2012 and {{ }}% in 2013. *See* Baranowski Rebuttal V.S. at 8, Table 5. The traffic included in these calculations, as presented by Drs. Neels and Reynolds, includes, but is apparently not limited to, shippers located on the Rose Bluff Lead. To the extent the tabulations include non-Lead traffic, the reported values blur the distinctions between traffic on and off the Rose Bluff Lead.

{{ }}

For comparison, Figure 2 shows the corresponding share of traffic by carrier to and from Lake Charles before the UP/SP merger. Before the merger, SP accounted for {{ }}% of the total tons. Since the merger, BNSF has averaged {{ }}.[14]

{{ }}

If share of traffic were a reliable and useful measure of competition, then the conclusion would be that {{ }}. As Dr. Reishus explains, however, such reasoning is invalid. Competition can be understood only within the context of a properly defined market, and no such market has been defined. *See* Reishus Rebuttal V.S. at 5.

The same reasoning applies to looking at inbound only, or outbound only, traffic. Indeed, the same reasoning applies to all of the commodity or commodity-location breakouts identified by KCS's economic witnesses. It is no more logical to conclude that UP has a near-monopoly on "Food or Kindred Products" due to its {{ }}% share of the traffic, than it is to conclude that BNSF's share of rail transportation of any product or product-location demonstrates effective

[14] Figure 2 is derived from data contained in the Verified Statement of Dr. Curtis Grimm in support of the KCS Petition to Reopen/Reconsider, filed by KCS in the UP/SP merger proceeding on September 3, 1996 (KCS-65).

competition in the market until the market has been properly defined. *See* Reishus Rebuttal V.S. at 6.

The same illogic applies to the price trends calculated by KCS's economic witnesses. They find that prices have increased on average for some commodities, locations, and direction (*i.e.*, inbound or outbound) and declined for others. If these shipments were all part of the same market, then market forces would tend to cause prices to move in the same manner. If each of these commodity-location-directional shipment flows were in separate markets, then it would be necessary to analyze competition separately in each of these markets. Neither extreme is likely to apply. In either case, no analysis has been performed by Drs. Neels and Reynolds in any of these so-called markets of the effect of BNSF presence or activities on pricing. Moreover, these backward-looking analyses of price trends provide no useful information on the effect of the access at issue in this proceeding on the competitive alternatives that would be available to shippers. Without an economically coherent analysis of the competitive market alternatives available, no useful conclusion can be drawn regarding the degree of competition offered by BNSF. *See* Reishus Rebuttal V.S. at 6.

In addition to lacking probative value because they fail to measure shares of a properly defined relevant market, the traffic data tabulations provided by KCS's economic witnesses are subject to a number of errors. As shown by Mr. Baranowski, the analysis by KCS's economic witnesses has a number of conceptual and implementation flaws that call into question the relevance of the analysis and the potential significance of any findings or conclusions that might be inferred from the results. *See* Baranowski Rebuttal V.S. at 2.

First, the geographic scope of the Neels/Reynolds analysis extends well beyond the boundaries of the Rose Bluff Lead, extending instead to virtually all non-coal shipments originating or terminating in the stations of Westlake, Lake Charles or West Lake Charles. Baranowski Rebuttal V.S. at 2. Second, Neels/Reynolds misclassified and omitted certain of the KCS and UP originating and terminating traffic in 2012-2013, which has the effect of overstating their calculations of BNSF market share and understating their calculations of UP market share. *Id.* at 3-4. Third, the Neels/Reynolds analysis of 2012-2013 inbound traffic by commodity incorrectly grouped KCS traffic by STCC Section 49 hazardous materials codes while grouping corresponding BNSF and UP traffic by standard STCC codes, resulting in the improper assignment of tonnages to individual commodity codes and a corresponding skewing of the calculated market share percentages by STCC. *Id.* at 5.

Fourth, Neels/Reynolds mistakenly omitted approximately one-quarter of all 1997 records from the starting point of their analysis of the Board's confidential waybill data, which materially affects the calculated distributions and HHI index values for the base year. Baranowski Rebuttal V.S. at 6-7. Fifth, Neels/Reynolds mistakenly assert that they use traffic distributions from Dr. Curtis Grimm's Verified Statement based on percent of tonnage distributions, when in fact these distributions are based on revenue distributions. *Id.* at 7. Sixth, Neels/Reynolds calculate the inbound and outbound market separately, despite the share of outbound tonnage exceeding inbound tonnage by four times, thereby masking the fact that BNSF's share of all traffic into and out of the Lake Charles area is {{ }}. When using the correct inputs, the Neels/Reynolds conclusion in Table 3 of their Verified Statement that {{ }} evaporates, and the correct data shows that {{ }}. *Id.* at 7-8, Table 5.

Moreover, as shown by Mr. Baranowski, the increased costs and service time associated with reciprocal switch service cause adverse competitive effects. Using BNSF's 2013 URCS costs indexed to current levels and current UP switching, handling and haulage fees, Mr. Baranowski estimated the variable cost to BNSF of ${{ }} per car, regardless of shipment size, to serve CITGO from Lacassine Yard under current UP reciprocal switch operations. Alternatively, the variable costs to BNSF for direct service from BNSF's Lacassine Yard to CITGO are ${{ }} per car for single car shipments, ${{ }} per car for multiple car shipments, and ${{ }} per car for unit train shipments. Baranowski Rebuttal V.S. at 8-11. As such, BNSF is paying significantly more per car for reciprocal switch service to CITGO compared to the cost of direct service. These results would be similar for other customers on the Rose Bluff Lead. Therefore, BNSF's ability to match UP's offering is compromised, and CITGO's ability to compete with its competitors in the oil-and-gas industry is similarly adversely affected.

V. BNSF DIRECT SERVICE WOULD NOT SUBSTANTIALLY INTERFERE WITH UP OR KCS OPERATIONS

BNSF established in its Opening Statement at 18-20 and in the initial Verified Statement of Rollin D. Bredenberg that BNSF direct service on the Rose Bluff Lead would be practicable and would not substantially interfere with UP or KCS operations at the Rose Bluff Yard or on the Rose Bluff Lead. In their Replies, UP and KCS argue mistakenly that BNSF's proposed operations would not be practicable and that BNSF has not met its burden of proof in this proceeding.

A. UP Must Provide BNSF With a Window for BNSF to Operate Direct Service on the Rose Bluff Lead

As a threshold matter, UP, as a merger applicant and as a signatory to at least four separate agreements granting BNSF direct access,[15] should be expected (and can properly be required) to provide BNSF with a window during its daily 12-hour period of operations for each direct service train to and from the Rose Bluff Lead. Doing so may cause UP some operating inconvenience and require it to keep the run-though track at the Yard clear long enough for the BNSF direct train to transit the Yard and to accommodate the BNSF trains on the Lead, but that is not enough to overcome the public interest served by BNSF direct service under the CMA Agreement.

The Board has acknowledged just such a scenario in two prior decisions in this docket. *See UP/SP* Decision No. 44, 1 S.T.B. at 447 ("We realize that the terminal trackage rights we are approving may make operations . . . slightly more complicated than they are now because three carriers will be operating over them rather than two, but this will simply 'require coordination of operations between the parties'" (quoting *UP/MP/WP*, 366 I.C.C. at 576)); *see also UP/SP* Decision No. 95, slip op. at 4 ("BNSF's trackage rights operations, by definition, potentially interfere with UP's operations on the trackage rights lines and UP agreed to this potential interference when it accepted the conditions, including the terms of the BNSF Agreement, that we imposed when we approved the UP/SP merger.").

[15] As discussed above in note 5, the 50/50 Line Agreement contains a provision granting BNSF trackage rights on former SP spurs and branches connecting to the 50/50 Line, including the Rose Bluff Lead. *See* Opening Statement at 7-8. The 50/50 Line Agreement represents an independent commitment (outside of the BNSF Settlement Agreement, the CMA Agreement, and the UP/SP merger conditions) for UP to accommodate BNSF direct service on the Rose Bluff Lead.

B. UP and KCS Reply Arguments Regarding Operations on the Rose Bluff Lead Have No Merit

Notwithstanding what their own documents show, UP and KCS go to great lengths to detail the daily movement of their trains at the Rose Bluff Yard and on the Rose Bluff Lead and assert that there is no room for a BNSF train to operate without affecting those operations. As noted, KCS operations would not be affected since the BNSF direct trains would operate solely during UP's operations in the Yard. The Bredenberg Rebuttal V.S. addresses issues raised in the KCS and UP Replies and affirms the Opening Statement, concluding that there is clearly sufficient capacity for BNSF to operate directly to CITGO and other customers on the Rose Bluff Lead and that BNSF's proposed operations will not impede the ability of KCS or UP to handle their business. *See* Bredenberg Rebuttal V.S. at 2.

As an initial matter, Mr. Bredenberg testifies that BNSF will accept a nonexclusive operating window at any time within UP's 12-hour operating period. *See* Bredenberg Rebuttal V.S. at 2-3. Contrary to UP's assertion, UP Reply at 18, the December 18, 2012 e-mail from UP's Roger Lambeth proposing an operating plan wherein UP would allocate BNSF a two-hour window during UP's 12-hour operating period was no "straw man proposal." Bredenberg Rebuttal V.S. at 2 (citing Exhibit F to Bredenberg 12/23/14 V.S.). In fact, Mr. Bredenberg testifies that BNSF and UP had scheduled to move BNSF's first direct CITGO train on December 21, 2012, during that window only to be prevented from operating the train by KCS. *Id.* (citing Exhibit G to Bredenberg 12/23/14 V.S.). UP also claims that BNSF proposed an operating plan that would involve using an hour of KCS's 12-hour operating period. UP Reply at 35. As Mr. Bredenberg testifies, BNSF has no preference as to what time it would operate directly to CITGO and other customers, and initially suggested the 5:00 a.m. to 7:00 a.m.

window solely because Mr. Lambeth offered that period in writing in his December 18, 2012 email. Bredenberg Rebuttal V.S. at 2-3.

Second, Mr. Bredenberg establishes in his Rebuttal Verified Statement at 3-4 that operations on the 50/50 Line leading to the Rose Bluff Lead are fluid and that the 50/50 Line has excess capacity, rebutting UP's assertions in its Reply at 10. Mr. Bredenberg testifies that BNSF and UP run trains every day on the relevant portion of the 50/50 Line and are well practiced at addressing its limitations, including the Calcasieu River swing bridge. Bredenberg Rebuttal V.S. at 3. Furthermore, Mr. Bredenberg notes that, during a recent 18-day period, the daily number of trains on the relevant portion of the 50/50 Line ranged from 12 to 24 trains per day, well within the 32-train maximum limit. *Id.* at 4.

Third, Mr. Bredenberg testifies that BNSF does not need storage or sorting capacity in the West Lake Charles area, addressing and rendering irrelevant the concerns raised in the KCS Reply at 45. Bredenberg Rebuttal V.S. at 4. According to Mr. Bredenberg, BNSF will "sort and process both manifest and unit train cars destined for CITGO in its newly-constructed Lacassine Yard prior to entering the Rose Bluff Lead."[16]

Fourth, Mr. Bredenberg establishes that a clear route exists daily through the Rose Bluff Yard and over the Rose Bluff Lead. Bredenberg Rebuttal V.S. at 4-6. BNSF studied the operations of the Rose Bluff Yard in December 2014 and determined that a clear route through the Yard and Lead exists at least {{ }}% of the time during UP's 12-hour operating window, and that a clear route to CITGO would exist another {{ }}% of the time if UP could clear a switch engine that was working in the Yard or on the Lead to allow BNSF to pass. *Id.* at 4-5

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[16] Ryan Larsen, UP Marketing & Sales, confirmed this point, writing in an internal UP email dated September 21, 2012 {

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(citing Bredenberg Rebuttal V.S. Exhibit A (BNSF-C-000599(R)). Based on this excess clear route capacity, Mr. Bredenberg testifies that "there is an opportunity every day during UP's 12-hour operating period for BNSF to operate a CITGO direct train and direct trains to other customers on the Rose Bluff Lead without interference to UP or KCS." *Id.* at 5. Furthermore, based on an additional study by BNSF employees in October 2015, BNSF observed that UP and KCS were not using the yard tracks in the Rose Bluff Yard in the most efficient manner. *Id.* Mr. Bredenberg testifies that UP could "easily identify one of the tracks [in the Yard] as a run-through track so that a BNSF direct train could operate through the Yard without interference." *Id.*

Fifth, documents produced in this proceeding by UP and KCS (*see, e.g.*, UP Counsel's Map Exhibit D, UP-WLC-0000398(R); KCS-C-0014(R) to 0024(R)) indicate that a route through the Yard and the Lead for a BNSF train that would not materially interfere with UP operations does in fact exist. For example, KCS-C-0024(R) (Bredenberg Rebuttal V.S., Exhibit D) shows that in April 2014 the tracks at the Rose Bluff Yard were blocked for an estimated {{ }}% of the day, thereby providing ample opportunity for a BNSF train to transit the Yard. UP Counsel's Map Exhibit D shows the periods during the 24-hour day when the various UP trains operate in the Yard and on the Rose Bluff Lead. The document shows that just one UP train (YRB65) is active in the Rose Bluff Yard and just one UP train (YRB66) is active on the Rose Bluff Lead during the early afternoon each day.[17] A second document from the UP production

[17] UP filed an errata to Counsel's Map Exhibit D on October 22, 2015, just one day before BNSF's Rebuttal was due, but the fact remains that UP operates up to four trains at the same time on the Rose Bluff Lead. BNSF reserves the right to respond more fully to UP's errata as necessary. There is one additional UP train that arrives in the Rose Bluff Yard each day, but Messrs. Chappell and Matya indicated at page 11 of their Reply Verified Statement that YAK63 does not reach the Yard until between 3:00 p.m. to 5:00 p.m. Thus, a BNSF run-through train in the morning or early afternoon should not interfere with the train's switching activity.

(UP-WLC-0000398(R), Bredenberg Rebuttal V.S., Exhibit D) shows that the train working the Lead (YRB66) operates mostly on branch lines off the Lead, with the Lead itself clear. Mr. Bredenberg testifies that these UP documents show that an {{ }} window exists when up to {{ }} more trains could operate on the Lead, creating a "perfect opportunity for BNSF to run up to {{ }} direct trains through the Yard and over the Lead just as UP does when it simultaneously operates a total of {{ }} trains on the Lead in the afternoon." Bredenberg Rebuttal V.S. at 6.

Additionally, Mr. Baranowski reviewed data produced by KCS and UP in discovery in this proceeding, and testifies that the data indicates that operating windows sufficient to allow the transit of BNSF trains exist routinely under current Rose Bluff Yard and Lead operating practices. Mr. Baranowski also demonstrates that the vast majority of industry switching activity on the Rose Bluff Lead occurs outside of UP's twelve-hour Rose Bluff Yard operating window, and thus the Lead could easily accommodate BNSF trains during the daytime. *See* Baranowski Rebuttal V.S. at 11-16.[18]

Sixth, Mr. Bredenberg rebuts UP's argument, UP Reply at 39, that BNSF's CITGO direct train will interfere with UP service at and occupy track capacity within the CITGO facility. Bredenberg Rebuttal V.S. at 7. As established by Mr. Bredenberg, CITGO has plans for expansion to accommodate incremental unit train volumes, and that traffic volume to the CITGO facility will expand incrementally regardless of which railroad carries the volume. *Id.*

Seventh, contrary to UP and KCS complaints that BNSF has not provided an operating plan for other customers on the Rose Bluff Lead, UP Reply at 46 and KCS Reply at 14, 61, Mr. Bredenberg testifies that BNSF has not yet formally made an election concerning service to any

[18] *See* Counsel's Exhibit 5, collecting various documents produced in this proceeding and contained in Verified Statements showing that the operating windows exist.

new customers, and that BNSF will follow the established, time-tested process for electing to serve additional customers directly via the trackage rights that BNSF will receive through this proceeding. Bredenberg Rebuttal V.S. at 7-9. Furthermore, Mr. Bredenberg notes that UP and BNSF are experienced in successfully coordinating operations on joint facilities similar to the Rose Bluff Lead. *Id.* at 9.

Thus, BNSF has clearly established, through evidence submitted in its Opening Statement and through responses to UP and KCS Reply arguments in this Rebuttal, that there is sufficient capacity for BNSF to operate directly to CITGO and other customers on the Rose Bluff Lead and that BNSF's proposed operations will not interfere with KCS or UP operations.

VI. THE BOARD HAS CONCLUSIVELY DETERMINED THE LEVEL OF COMPENSATION THAT BNSF SHOULD PAY FOR ITS UP/SP MERGER TRACKAGE RIGHTS

Section 11102(a) requires that the parties here establish the conditions and compensation for BNSF's use of the Rose Bluff Lead, and provides that, if the parties cannot agree, the Board "may establish conditions and compensation for use of the facilities under the principle controlling compensation in condemnation proceedings." 49 U.S.C. 11102(a).

In its Opening Statement at 21-22, BNSF established that the level of compensation that BNSF should pay for the use of the trackage rights that the Board should grant through this proceeding has been conclusively determined in the UP/SP merger conditions imposed by the Board: the rate set by the BNSF Settlement Agreement as escalated by the CMA Agreement and confirmed by the Board (as modified by BNSF and UP in the 50/50 Line Agreement). UP and KCS each criticize BNSF's compensation proposal as being deficient and advance alternative proposals. In particular, KCS argues in its Reply at 65-68 that KCS deserves greater compensation than the rate set by the Board.

As BNSF set forth in its Opening Statement at 21, BNSF will pay UP (or KCS if UP prefers) the rate already confirmed by the Board for trackage rights such as those contemplated by this Application, and UP can pay KCS any additional amount that UP and KCS agree is due to KCS.[19] UP undertook that obligation when it consummated the UP/SP merger subject to the Lake Charles Condition. KCS's argument reveals that KCS's dispute with UP is really about economics and the compensation to be received by KCS. This shows the hollowness of UP's argument about legal insufficiency to implement the Lake Charles Condition.

VII. IF THE TERMINAL TRACKAGE RIGHTS APPLICATION IS DENIED, THE JOINT FACILITY CONSENT PROVISIONS AND ANY OTHER CONTRACTUAL PROVISIONS THAT PREVENT BNSF'S DIRECT ACCESS ARE STATUTORILY OVERRIDDEN

If the Board denies BNSF's terminal trackage rights Application, any applicable consent provision of the 1948 Joint Facility Agreement that would make BNSF's direct access to Rose Bluff Lead shippers contingent upon KCS's consent (and any other contractual provisions that would block BNSF's direct access) would necessarily be overridden under the self-executing provisions of 49 U.S.C. § 11321(a). As noted above, BNSF believes that, because the 1948 Joint Facility Agreement requires KCS consent only to changes in *ownership* of, not access to, the jointly owned lines, the Agreement is not an obstacle to BNSF trackage rights and should not

[19] As BNSF emphasized in its Opening Statement, any potential dispute between the parties regarding compensation should not delay the Board's granting of this terminal trackage rights Application and BNSF's commencement of direct trackage rights service. Just as in the UP/MP/WP merger, BNSF should be permitted to commence direct trackage rights service immediately upon the Board's grant of terminal trackage rights through this proceeding. *See UP/MP/WP*, 366 I.C.C. 462, 590 (1982). To the extent that the parties disagree regarding compensation for such service, the parties should negotiate compensation terms, and, if no agreement is reached, the Board can then impose the terms under the statutory condemnation standard. *Id.* at 576 n.114. The compensation terms would then be payable after the terms were conclusively established, accruing from the start of trackage rights operations, just as in the UP/MP/WP merger. *Id.* at 590.

need to be overridden. To the extent, however, that the Board does see the 1948 Joint Facility Agreement as an obstacle, the conditions for an override are met.

A. Override Under Section 11321(a)

Section 11321(a) provides for the override of contractual provisions as necessary to secure the benefits of a merger. In pertinent part, the statutory provision states:

> The authority of the Board under this subchapter is exclusive. . . . A rail carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws *and from all other law*, including State and municipal law, as necessary to let that rail carrier, corporation, or person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

49 U.S.C. § 11321(a) (emphasis added). The STB, following Supreme Court precedent, has affirmed that contracts, including consent provisions, may be overridden under Section 11321(a). *See Consolidation Coal Sales Co. v. Consolidated Rail Corp.*, STB Finance Docket No. 34169, slip op. at 4 (served May 24, 2002); *UP/SP* Decision No. 44, 1 S.T.B. at 449 & 450 n.217.[20]

As the Board has noted, an override cannot be deemed necessary if other means are available to obtain the sought-after merger benefits. *See UP/SP* Decision No. 63 at 10 n. 30 ("If BNSF were to file a terminal trackage rights application . . . and we granted the application, BNSF could not claim . . . any necessity for an override of the terms of the four joint facility agreements."); *see also UP/SP* Decision No. 66 (served Dec. 31, 1996), slip op. at 11-12.

But where such alternate means of obtaining merger benefits are *not* available, then the statutory override would be triggered. Thus, in Decision No. 63 the Board stated that "if the parties (KCS, BNSF, and UP/SP) are unable to agree [on BNSF direct access to the Lake Charles

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[20] The Supreme Court put to rest any doubts about whether contractual consent requirements could be statutorily overridden under former Section 11341(a) (now Section 11321(a)) in *Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 127-130 (1991).

area] and the arbitral interpretation produces a situation where BNSF access to the Lake Charles area is blocked, BNSF may return to the Board to seek approval of a terminal trackage rights application under new 49 U.S.C. 11102(a); and, *if and to the extent that application is ultimately denied*, an override of the terms of the four joint facility agreements might be necessary under old 49 U.S.C. 11341(a)." *UP/SP* Decision No. 63, slip op. at 10 (emphasis added; footnotes omitted). The Board's holding in Decision No. 63 was not unique. The Board has applied the same analysis to the override provisions repeatedly. *See UP/SP* Decision No. 66, slip op. at 12 (terminal trackage rights could not be granted so override was necessary); *UP/SP* Decision No. 44, 1 S.T.B. at 450 ("We think that an override of the restrictions in KCS' trackage rights agreements would be necessary to carry out the merger here if section 11103 were unavailable.").

B. KCS and UP Override Arguments Hold No Weight

In its Reply, KCS attempts to evade and distort the import of the Board's clear statements regarding overrides under Section 11321(a). First, KCS claims that the Board already has rejected the imposition of an override in this case. *See* KCS Reply at 69 (citing footnote 31 of Decision No. 63). It is clear, however, that, in Decision No. 63, the Board merely rejected the invocation of the override provision at *that point in the case.* As noted above, the Board stated that an override would be inappropriate unless and until BNSF had applied for terminal trackage rights, and that application was *denied*: "if and to the extent that [terminal trackage rights] application is ultimately denied, an override of the terms of the four joint facility agreements might be necessary under old 49 U.S.C. 11341(a)."[21] Decision No. 63, slip op. at 10.

[21] Although UP opposes an override of any purported consent provisions of the 1948 Joint Facility Agreement (*see* UP Reply at 46-48), UP's position that the Board left the issue open in

KCS also argues that the Board cannot impose trackage rights through the statutory override provision. This argument fundamentally misconstrues the issue. BNSF would not be seeking the Board's imposition of trackage rights via the override provision. UP already has agreed to grant BNSF trackage rights on the Rose Bluff Lead, in accordance with the requirements of the CMA Agreement – an agreement that was made a condition of the UP/SP merger. KCS, however, has argued that, under the 1948 Joint Facility Agreement, KCS's consent is required for such trackage rights to become effective. The Board would not be imposing trackage rights through the statutory override of the consent requirement. Rather, the statutory override would – indeed, does – merely give effect to the commitment to grant trackage rights made by UP in the CMA Agreement and imposed long ago by the Board as a UP/SP merger condition.

This disposes of another of KCS's arguments against the application of an override – the argument that to permit an override if the Board denies BNSF's terminal trackage rights Application would be giving BNSF an unfair second "bite at the apple." KCS Reply at 69, 70, 72. BNSF would not be getting "another bite" at any apple, because the relief sought in the Application – which, of course, would be the *Board's* grant of terminal trackage rights – is fundamentally different from the relief obtainable through the override – which would be the preemption of a joint facility consent provision that might otherwise interfere with UP's grant of trackage rights to BNSF in accordance with a merger condition. The comparison between the remedies is apples to oranges, not apples to apples.

Moreover, in light of the Board's clear statement that BNSF can invoke the override only *if* the Board denies a terminal trackage rights application, KCS's "another bite at the apple"

Decision No. 63 confirms the error of KCS's claim that the Board intended its treatment of the override issue in Decision No. 63 to be its final word on the matter.

argument turns out to be nothing more than a complaint about what the Board has held. It is too late in the day to air that complaint now.

KCS also argues that the statutory override cannot be triggered because service via an override is not "necessary" as required by Section 11321(a). Thus, purporting to rely on the Board's statements that the statutory override is not "necessary" where a terminal trackage rights remedy is "available" (*see*, *e.g.*, *UP/SP* Decision No. 63, slip op. at 10 n.31), KCS argues that, if BNSF can apply for terminal trackage rights, the terminal trackage rights remedy is "available," precluding the application of the statutory override. *See* KCS Reply at 69-70. As KCS states, "the mere availability of Section 11102 as a potential remedy, whether successful or not, means that an override is not 'necessary.'" KCS Reply at 70.

This argument is directly contradicted by what the Board actually said in Decision No. 63. To repeat, the Board stated that, if a terminal trackage rights application is "denied," the override might be necessary. *UP/SP* Decision No. 63, slip op. at 10. To say, as KCS does, that the override cannot be invoked just because BNSF can apply for terminal trackage rights is squarely inconsistent with the Board's holding in Decision No. 63. Moreover, it is simply disingenuous to claim – as KCS does (*see* KCS Reply at 70) – that terminal trackage rights are "available" as long as an application for such rights involves terminal trackage, even if the application is ultimately *denied*. KCS points to no cases in which the Board or a court ever actually articulated such a strained definition of the term "available."[22]

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[22] KCS does cite a decision – Decision No. 66 – in which the Board's conclusion that the terminal trackage rights option was not "available" was based on the "factual situation" that the trackage was not in a terminal area. KCS Reply at 70. It is true that, in Decision No. 66, the Board found the override inapplicable because the trackage at issue there was not in a terminal. But KCS is simply wrong in suggesting that the only situation in which terminal trackage rights would not be "available" is the circumstance in which the trackage is not in a terminal. The Board said no such thing in Decision No. 66, and KCS cites no decision in which the Board has

KCS also argues that an override is not necessary because BNSF has served shippers in the Lake Charles area since the merger via reciprocal switching. KCS Reply at 70-71. UP makes a similar assertion. UP Reply at 47-48. These arguments misstate the "necessity" test applicable to the override statute. As the Board stated in *Consolidation Coal Sales Company*, "the necessity test does not require a finding that that the merger could not go forward" without the arrangement that would be facilitated by an override. Rather, all that is needed is that "there is a nexus between" the arrangement that would be facilitated by an override "and the effectuation of the transportation benefits intended to result from the authorized transaction." *Consolidation Coal Sales Co*., slip op. at 6; *see also ICC v. Locomotive Engineers*, 482 U.S. 270, 298 (1987 (Stevens, J., concurring) ("The breadth of the [override] exemption is defined by the scope of the approved transaction."). Here, the transportation benefit is the *direct* BNSF service for Lake Charles areas shippers that was provided for in Section 8 of the CMA Agreement, which was made a condition of the UP/SP merger. The statutory override would enable the condition imposed by the Board to be implemented.

This conclusion is compelled by the Board's analysis of the override of a consent provision in Decision No. 66. There, as here, the Board confronted an argument that UP/SP could not admit BNSF to track that was subject to an agreement with another carrier – in that case, Utah Railway Company ("URC") – because a consent provision in the agreement effectively gave URC a veto over the admission of other railroads to the trackage. If the consent provision were deemed to have that effect, "UP/SP, acting on its own initiative and without URC's consent, could not have allowed BNSF to serve new facilities (including new transload

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ever suggested anything so bizarre as the proposition that terminal trackage rights are always "available" if the trackage at issue is in a terminal even if the other criteria for the grant of terminal trackage rights are not met.

facilities) located on" the affected track. *UP/SP* Decision No. 66 at 11. Because there were no other means to implement the Board-imposed new facilities and transload merger conditions, "[a]n override of the URC requirement is therefore necessary, and is hereby effected under 49 U.S.C. 11341(a)." *Id.* at 12. As the Board explained, "[t]he override is necessary if the new facilities and transload conditions are to fulfill, on the Provo-Utah Railway Jct. line, the purposes they were intended to serve." *Id.* at 12 n.25.

The same analysis applies here: If BNSF's terminal trackage rights Application is not granted, an override would be necessary for the "effectuation of the transportation benefits intended to result" from the Lake Charles Condition. *Consolidation Coal Sales Co.*, slip op. at 6.[23] As UP stated in 1995 in support of terminal trackage rights that it (and BNSF) sought in the UP/SP merger proceeding:

> Commission approval of the primary application, conditioned, as the primary Applicants have requested, by the UP/SP-BN/Santa Fe settlement agreement, should constitute sufficient authority to permit BN/Santa Fe to use the subject trackage, regardless of whether KCS consents to such use.

Finance Docket No. 32760 (Sub-No. 9), UP/SP Application, Vol. 5 at 123.

KCS also argues (KCS Reply at 71) that the Board does not know what it should override. This argument is meritless. *First,* as the Board has repeatedly stated, the statutory override is ***self-executing***. *See UP/SP* Decision No. 66 at 10 n.22 ("Even if our conditions have been deemed to contravene URC's contract rights, those rights *have been preempted* under 49 U.S.C. 11341(a)) (emphasis added); *Consolidation Coal Sales Co.*, slip op. at 4 (stating that then

[23] Contrary to KCS's claims, there is nothing at all odd about the hypothetical that KCS constructs on page 70 of its reply – a circumstance in which the requirements for terminal trackage rights are not met, but the statutory override provision is nonetheless applicable. The terminal trackage rights and override tests focus on distinct issues. An override may be necessary even if some element of the test for terminal trackage rights cannot be satisfied. This is precisely what happened in Decision No. 66.

49 U.S.C. 11341(a) (now, 49 U.S.C. 11321(a)) "is 'self-executing,' that is, its immunizing power is effective when necessary to permit the carrying out of a project"); *CSX Corp., et al. – Control – Conrail Inc., et al.,* Decision No. 89, 3 S.T.B. 196, 329 n. 198 (1998) (stating that "the courts have made clear that, under what is now 49 U.S.C. 11321(a), agency approval of a rail merger confers self-executing immunity on all material terms of the transaction from all other laws to the extent necessary to permit implementation of the transaction"); *UP/SP* Decision No. 44, 1 S.T.B. at 454. The self-executing nature of the override means that a party need not itemize the provisions to be overridden in advance of invoking the override. *Cf. UP/SP* Decision No. 44, 1 S.T.B. at 454 ("Parties seeking approval of a transaction . . . have never been required to identify all anticipated changes might affect [contract] rights. Such a requirement could negate many benefits from changes whose necessity only becomes apparent after consummation. Moreover, there is no legal requirement for identification because 49 U.S.C. 11341(a) is 'self-executing,' that is, its immunizing power is effective when necessary to permit the carrying out of a project.") *quoted with approval in Consolidation Coal Sales Co.,* slip op. at 4. It also means that the Board is not called upon to make the override determination that KCS claims the Board lacks the information to make. Thus, from the Board's perspective, KCS is raising a non-issue.[24]

And *second*, as noted above, the override would apply to any contractual provision that prevents BNSF's direct access to shippers. If KCS now wishes to suggest (as it appears to on page 71 of its Reply) that it is not clear whether the consent provision *does* bar BNSF direct

[24] By the same token, UP's implicit assertion in the heading on page 46 of its Reply that the Board must have a "compelling reason" to override a contractual provision is wrong on two counts. First, there is no requirement that a Section 11321(a) override be supported by a "compelling reason." Rather, all that is required is a "nexus between" the override "and the effectuation of the transportation benefits intended to result from the authorized transaction." *Consolidation Coal Sales Co.*, slip op. at 6. And second, because the override is *self-executing*, the Board need not do anything for an override to occur.

access, then, to the extent that it does not, the provision would not need to be overridden. If there are operational agreements between UP and KCS that bar BNSF's direct access, then those are overridden to the extent that they bar access. In neither case is a Board (or, for that matter, a court) determination required. Again, this is a non-issue, and KCS's reference to it reflects desperation more than sound argument.

Thus, if BNSF's terminal trackage rights Application is denied, the self-executing statutory override would nullify any contractual provision that prevents BNSF direct access to Rose Bluff Lead shippers in accordance with the merger conditions imposed by the Board in the UP/SP merger. UP would then be obligated to grant BNSF trackage rights over the Rose Bluff Lead to serve CITGO and other shippers on the Lead as it contractually agreed to do under Section 8 of the CMA Agreement and under the Board's merger conditions.

VIII. CONCLUSION

Despite UP's and KCS's attempts in their Replies to confuse and complicate this proceeding, the facts of this case are quite simple: the Board in 1996 imposed and reaffirmed the Lake Charles Condition and set a course whereby (1) BNSF – if faced with any issues in implementing the Lake Charles Condition – could return to the Board to seek approval of a terminal trackage rights application to gain direct access to the Rose Bluff Lead, or (2) if such application were denied, a statutory override of any purported consent provisions in the 1948 Joint Facility Agreement that limit BNSF's direct access to the Rose Bluff Lead may be necessary, allowing UP to fulfill the Lake Charles Condition and implement the trackage rights grant to BNSF. From UP's and KCS's perspectives, the carriers are best positioned if they do not need to compete for traffic on the Rose Bluff Lead with BNSF direct service. The actions (and inactions) of UP and KCS with respect to this dispute, as detailed herein, serve this mutual commercial interest, but that interest is directly contrary to the interest to be protected by the

Lake Charles Condition to preserve post- merger competition imposed by the Board in the UP/SP merger.

As BNSF has established in its Opening Statement and affirmed in this Rebuttal, BNSF has met the statutory standard under Section 11102(a) for the Board to grant this Application for terminal trackage rights. First, BNSF direct service on the Rose Bluff Lead (undisputedly a terminal facility) is "in the public interest" because trackage rights are necessary to implement the Lake Charles Condition, and a "competitive analysis" using historical traffic data in the Lake Charles area is neither necessary nor useful in determining whether BNSF has fully replaced lost SP service on the Rose Bluff Lead. Second, BNSF direct service is practicable and would not substantially interfere with UP or KCS operations at the Rose Bluff Yard or on the Rose Bluff Lead, because, as Mr. Bredenberg and Mr. Baranowski have shown and UP's and KCS's own documents reflect, there is sufficient capacity to accommodate BNSF run-through trains at the Rose Bluff Yard and on the Rose Bluff Lead. Moreover, UP already agreed to accommodate BNSF when it accepted the Lake Charles Condition. If the Board denies this Application, then, to the extent that a contractual provision cited by KCS would preclude the grant of trackage rights by UP to BNSF over the Rose Bluff Lead, those provisions would be overridden by 49 U.S.C. § 11321(a) because such an override would be "necessary" to carry out the Lake Charles Condition to the UP/SP merger.

In either case, UP would bear the responsibility of adjusting operations at the Rose Bluff Yard and on the Rose Bluff Lead (as it committed to do, both contractually and through acceptance of the merger condition) during its 12-hour operating period to enable BNSF to provide such service. If UP wants to avoid the obligation that it undertook, it would need to seek to re-open the UP/SP merger. UP would also be responsible for resolving any claims that KCS may have under the 1948 Joint Facility Agreement.

For the reasons stated above, Applicant BNSF Railway Company respectfully requests that its Application for terminal trackage rights as herein described be GRANTED.

Respectfully submitted,

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Dated: October 23, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of October, 2015, copies of the foregoing Rebuttal of BNSF Railway Company have been served by e-mail on Counsel for UP, KCS and CITGO, and by first-class U.S. Mail on all parties as listed on the Board's website for the service list in Finance Docket No. 32760 (Sub-No. 46).

Adrian L. Steel, Jr.

COUNSEL'S EXHIBITS

REBUTTAL VERIFIED STATEMENT OF
RICHARD E. WEICHER

I. BACKGROUND

I am Vice President and General Counsel-Regulatory for BNSF Railway Company ("BNSF"). I have worked in the areas of regulatory practice, administrative litigation and transactions in the railroad business throughout my over 40 year career with BNSF and its predecessor companies, and have had responsibility in these areas since the creation of BNSF, including the merger of Burlington Northern and Santa Fe in 1995. I was a direct participant on behalf of BNSF in the negotiations of the settlement agreement executed between BNSF and UP on September 25, 1995 ("BNSF Settlement Agreement") as well as the settlement agreement executed between UP, BNSF and the Chemical Manufacturers Association ("CMA") on April 18, 1996 ("CMA Agreement"). I executed the CMA agreement on behalf of BNSF. (A copy of the relevant portions of the BNSF Settlement Agreement and a copy of the CMA Agreement are attached hereto as Exhibits 1 and 2, respectively.)

I submitted a Verified Statement in December 2014 as part of BNSF's Opening Statement and Evidence in this proceeding (BNSF-121). My background and credentials are also summarized in that statement.

My first Verified Statement in December 2014 described the history of the conditions imposed by the Surface Transportation Board ("Board" or "STB") on the UP/SP merger, including in particular the conditions imposed in the Lake Charles, LA area, and explained the importance of ensuring that those conditions remain fully effective during the 99-year term of the settlement agreement executed between BNSF and UP. The Board imposed conditions on the merger of UP and SP to address extensive concerns about the loss of competitive options for shippers who, prior to the merger, received service from UP and SP.

In this rebuttal statement, I address the claims of UP and KCSR that BNSF was not granted the right to provide direct service via trackage rights over the Rose Bluff Lead and UP's claim that Section 8(n) of the BNSF Settlement Agreement obviates the need for the grant of terminal trackage rights. As I establish below, UP's and KCSR's arguments do not support the denial of BNSF's Application, and if anything represent a concurrent effort UP and KCS to undermine the intent and efficacy of the settlement agreements and the Board's imposition of those agreements as merger conditions, in particular the CMA Agreement intended to provide competitive service options for chemical and plastics shippers on the Gulf.

II. BNSF WAS GRANTED THE RIGHT TO SERVE ROSE BLUFF LEAD SHIPPERS BY DIRECT BNSF TRAIN SERVICE VIA TRACKAGE RIGHTS

UP's and KCSR's assertions that BNSF was not granted the right to provide direct service using trackage rights over the Rose Bluff Lead are without foundation. That right was, as I described in my first Verified Statement, granted to BNSF by UP in the CMA Agreement and was imposed as a condition of the merger by the Board. Lake Charles shippers also obtained the specific corresponding right from UP to direct trackage rights service from BNSF at that time.

After the initial BNSF Settlement Agreement between BNSF and UP/SP was filed with the STB, many plastics and chemical shippers in the Gulf Coast area criticized the BNSF Settlement Agreement as insufficient to preserve competition in the rail freight market in Gulf Coast chemicals, including specifically in the Lake Charles area. The trade association for these Gulf Coast Shippers – CMA – argued strenuously that Lake Charles area shippers should have access to BNSF and sought the same type of access that was to be provided under the BNSF Settlement Agreement, not an inferior or second-tier level of competition..

CMA entered into negotiations with UP/SP for additional conditions to address its concerns and opposition to the UP/SP merger. As reflected in Section 8 of the CMA Agreement, the parties agreed to provide BNSF with access to Lake Charles area shippers "on the same basis as is provided for in the BNSF Settlement Agreement for '2-to-1' points." That access includes both direct train service and reciprocal switch at BNSF's election under Section 5(c) of the BNSF Settlement Agreement.

Specifically, Section 8 of the CMA Agreement provides BNSF with the "right to handle" certain defined Lake Charles area traffic. Section 8 then provides that BNSF's access will be "on the same basis as is provided for in the BN/Santa Fe Settlement Agreement for '2-to-1' points". Sections 5(c) and 5(d) of the BNSF Settlement Agreement in turn provide that access by BNSF "shall be direct or through reciprocal switch" and that BNSF may (and must) "elect" whether its service shall be direct or through reciprocal switching. In that context, the word "direct" can have no other meaning than direct service using trackage rights, and it is clear that both the parties and the Board intended that BNSF would have the right to provide service via direct trackage rights.[1] The ability for BNSF to over time "ramp up" or increase the intensity of its service offerings to customers at Lake Charles was and is important to give BNSF the ability to be an effective new entrant and replacement for SP over time.

This right of Lake Charles shippers to receive direct service was imposed as a condition to the merger, and CITGO as a beneficiary of the CMA Agreement condition is entitled to the service type and level of service BNSF is able to provide of its choice and cannot be deprived of

[1] UP's assertion that the fact that BNSF chose to initially use reciprocal switch to serve shippers at Lake Charles undermines BNSF's position that it was granted trackage rights is meritless. It was the parties' intent that BNSF would have service alternatives that it could use at its discretion as traffic grew, and it is entirely unremarkable that BNSF chose to initiate service using switching. The BNSF Settlement Agreement provided that BNSF could change its election as to method of service upon 180 days written notice every five years into the indefinite future. If UP's assertion were correct, there would be no reason to have such language.

that right absent reopening of the UP/SP merger conditions. The CMA Agreement implemented the remedy agreed to between UP, BNSF and CMA to address CMA's concerns.

Thus, the Board did not simply impose a Lake Charles access condition and leave the determination of the method of access to UP and KCS . By adoption of the service alternatives set forth in the BNSF Settlement Agreement, the CMA Agreement expressly provided that BNSF could elect at its discretion to serve its customers via direct service or reciprocal switch. As shippers' needs for service and the movement of volumes grow, BNSF, at its sole option, can choose the service – direct or reciprocal switch – that provides the best competitive alternative for each individual shipper. BNSF and CMA were conscious that initial volumes of BNSF as an entrant whose role would be to preserve competition would logically be smaller, and to avoid imposing a barrier to entry the condition would include the ability to change the manner of service over time to become an effective competitor. The incumbent (SP) would not have been restricted to only one type of service, nor require the acquiescence of UP or KCS in its service offering, so BNSF must not be.

If UP's and KCSR's positions were to prevail, BNSF would no longer be allowed to make an election for traffic covered by Section 8 of the CMA Agreement, but would instead be limited to serving CITGO and others at Lake Charles only through reciprocal switching. That is not the "same basis" as access to 2-to-1 points under the BNSF Settlement Agreement. Because the CMA and BNSF Agreements were imposed as merger conditions, taking away BNSF's ability to "elect" would be changing the merger conditions. CITGO's rights under the CMA Agreement would be similarly limited. Such changes cannot be made without reopening the proceeding which approved and conditioned the UP/SP merger and without the participation of CMA's successor, the American Chemistry Council ("ACC").

III. SECTION 8(N) OF THE BNSF SETTLEMENT AGREEMENT DOES NOT OBVIATE THE NEED FOR BNSF TRACKAGE RIGHTS

Section 8(n) of the BNSF Settlement Agreement, which provides for alternative service if there is a "lack of sufficient legal authority" to grant specified trackage rights, does not apply here, and UP's claim that BNSF "already fully enjoys the access" at Lake Charles that it bargained for and obtained is flatly incorrect.

I directly participated in the BNSF Settlement Agreement negotiations, and the intention of the parties was to address the situation where, after all possibilities were exhausted, legal authority for the implementation of trackage rights that were to be granted under the Agreement could not be obtained.[2] This provision was never intended to be an escape hatch for UP, but on the contrary is to ensure that under all possible circumstances the right of BNSF to serve these customers as an effective competitor for both service and rates would be protected. The intent was not to relieve UP of its obligation to provide BNSF with trackage rights in the situation where UP needed to secure the consent of another party under a joint facilities or other contract. In that situation, the intent was that UP would secure any necessary consent. BNSF and CMA did not intend and would not have agreed that UP could avoid its obligation to provide trackage rights by simply failing to secure contractual authority to enable it to do so. The Board would not have imposed a binding condition with such unilateral escape hatch for UP. As I noted in my initial Verified Statement, UP consummated its merger with SP knowing of KCSR's claim that its consent was required to grant BNSF trackage rights over the Lake Charles joint facility trackage, and UP's voluntary and knowing acceptance of the Board's merger conditions providing for direct trackage rights service cannot be avoided by reliance on the Section 8(n) language.

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[2] An example of such a situation would be when trackage rights could not be implemented because a required environmental or other regulatory approval could not be obtained.

Indeed, UP"s willingness to tacitly acquiesce in KCS's objection, making minimal effort, if any, to implement these trackage rights, is a perversion of the intent of the CMA Agreement, if not a lack of good faith and fair dealing in implementing the Agreement.

Furthermore, there cannot be a "lack of sufficient legal authority" to implement the grant of trackage rights by UP to BNSF provided in the CMA Agreement at this time. As the Board already addressed described in Decision No. 63 several years ago, in the situation before it now either the Board will approve this Application for terminal trackage rights, or, the Board will determine whether it is necessary to confirm the override of any purported KCSR consent rights that would bar UP's grant to BNSF of the CMA Agreement trackage rights, which override was implicit in its original imposition of the conditions when it approved the UP/SP merger with the CMA agreement as a condition.. Only if the Board denies the Application and the Board determines that it is not necessary to override any purported KCSR consent rights would Section 8(n) apply. In such an unlikely scenario, the trackage rights granted under the BNSF Settlement Agreement could not "be implemented because of the lack of sufficient legal authority to carry out such grant," and **only then** would UP be required to "provide an alternative route [or] routes, or means of access of commercially equivalent utility at the same level of cost to BNSF as would have been provided by the originally contemplated rights." To argue otherwise, as UP does in its Reply, ignores the Board's clear path set forth in Decision No. 63 for the implementation of the Lake Charles Condition and the granting of trackage rights to BNSF.

By the same token, KCS's arguments of what should be sufficient level of competition to be offered by BNSF under the UP/SP merger settlement agreements, in particular the CMA Agreement, should be disregarded and afforded no weight. KCS was not a party to those negotiations ofany of those agreements, and its objections were ruled against in Decision No. 63

years ago. If the objection of KCS is in fact based upon a question of how much compensation it should receive for trackage rights operation, that is a question between KCS and UP, not BNSF. What BNSF is to pay for these rights was determined in the CMA Agreement, imposed as a condition by this Board to ensure BNSF could be an effective competitor. It is UP's responsibility to address an issue, if any, of the adequacy of compensation to KCS for these rights. Section 8 provides without qualification that UP will provide and BNSF and correspondingly shippers have the right to offer and receive direct trackage rights service.

VERIFICATION

I, Richard E. Weicher, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on October 22, 2015.

Richard E. Weicher

Richard E. Weicher

PUBLIC

REBUTTAL VERIFIED STATEMENT OF ROLLIN D. BREDENBERG

My name is Rollin D. Bredenberg, and my business address is 2600 Lou Menk Drive, NOC-1, Fort Worth, Texas 76131. I am Vice President, Capacity Planning and Operations Research for BNSF Railway Company ("BNSF"). I have over 50 years of experience in railroad operations and management, including over six years as the Southern Pacific's General Manager responsible for operations in the Lake Charles area. I am familiar with BNSF's operations system wide, including those at West Lake Charles, Louisiana.

I submitted a Verified Statement in December 2014 as part of BNSF's Opening Statement and Evidence in this proceeding (BNSF-121). My first Verified Statement in December 2014 described communications between BNSF and UP regarding BNSF's direct access to Citgo and BNSF's operating plan for direct access to West Lake Charles. I further described why BNSF direct service to West Lake Charles was more effective and cost effective than reciprocal switch service and thus necessary for BNSF to provide effective competitive service.

I am making this statement to rebut UP and KCS arguments that BNSF's proposed service using terminal trackage rights is not practicable and would substantially impair UP's and KCS's ability to handle their own traffic on the Rose Bluff Industrial Lead.

UP and KCS Arguments against BNSF Proposed Service

Despite acknowledging my long experience in railroad operations and capacity planning, UP believes there are significant gaps in my understanding of current operations in the Rose Bluff Yard and on the Rose Bluff Lead. Any gaps, however, are the result of my reliance on statements made by UP regarding its operations on the Rose Bluff Lead and Rose Bluff Yard or the result of UP misinterpreting my original verified statement. With respect to UP's operations on the Rose Bluff Lead, I will stipulate that UP trains work the Rose Bluff Lead south of the Yard 24 hours a day, that UP operates up to eight jobs a day to serve customers on the Lead and that UP uses all of the yard tracks when its crews are switching cars during UP's 12-hour operating period in the Rose Bluff Yard. None of these stipulations, however, change my opinion that there is clearly sufficient capacity for BNSF to operate directly to CITGO and other customers and that BNSF's proposed operation on the Rose Bluff Lead will not impede the ability of KCS or UP to handle their business.

BNSF will accept a nonexclusive operating window at any time within UP's 12-hour operating period.

As I testified in my original verified statement, on December 18, 2012, UP's Roger Lambeth proposed in writing an operating plan wherein UP would allocate BNSF a two-hour window during UP's 12-hour operating period, from 5:00 A.M. to 7:00 A.M. in order to operate to CITGO's facility. (See Exhibit F to Bredenberg 12/23/14 V.S.) UP now conveniently characterizes that email as a "straw man proposal" designed only to "spark discussion among UP, BNSF and KCS" and not a "practicable plan for BNSF operations." Mr. Lambeth's email contained no such disclaimer, and BNSF at the time certainly did not consider UP's communication to be nothing more than a "straw man proposal". (See Exhibit F to Bredenberg 12/23/14 V.S.). In fact, BNSF and UP had scheduled to move BNSF's first direct CITGO train on December 21, 2012 during that window only to be prevented from operating the train by KCS. (See Exhibit G to Bredenberg 12/23/14 V.S.).

UP further criticizes me for proposing an operating plan that would closely resemble Mr. Lambeth's plan because it would involve using an hour of KCS's 12-hour operating period, a period that UP now complains is often overstayed by KCS. I had suggested an operating window of 5:00 A.M. – 7:00 A.M. simply because Mr. Lambeth offered that period in writing on December 18, 2012. BNSF has no preference as to what time it operates directly to CITGO and other customers. BNSF can and will ensure that its direct train will leave BNSF's Lacassine Yard in sufficient time in order to arrive at the Rose Bluff Lead at any time directed by UP. I would expect that the time may differ from day to day as ordinary operations are always evolving. For example, if KCS overstays its 12-hour operating period, I would expect that UP would adjust the time for BNSF's window accordingly, and BNSF will leave its Lacassine Yard in sufficient time in order to arrive at the Rose Bluff Lead at the appointed time. Furthermore, BNSF does not need an exclusive two-hour window or exclusive use of a Rose Bluff Yard track for two hours nor did I testify as such in my original verified statement.

Operations on the 50/50 Line are fluid and there is excess capacity.

In its Reply, UP warns that BNSF may not have a clear route from BNSF's Lacassine Yard to the Rose Bluff Lead. While I appreciate UP's concerns for BNSF's ability to run its own trains over a line on which BNSF has equal rights, BNSF and UP run trains every day on this portion of the 50/50 Line and are well practiced at addressing its limitations – the single track layout and the number of sidings, the frequency of BNSF and UP trains, the frequency of Amtrak trains and their priority status, and the delays associated with the swing bridge over the Calcasieu River and the resulting priority given to certain non-recreational maritime traffic. The fact remains that, when UP gives BNSF a window to operate over the Rose Bluff Lead and through the Rose Bluff Yard, BNSF will take into consideration all operating circumstances for that particular day, and the CITGO direct train will leave BNSF's Lacassine Yard at the appropriate time so that it arrives to the Rose Bluff Lead during the UP-designated window. Furthermore, the Calcasieu River swing bridge presents no more formidable challenges than any of the other six swing bridges and two lift bridges on the 50/50 Line. BNSF routinely handles its tactical operations planning locally to ensure that it has enough advance notice of maritime traffic to work around bridge openings as necessary.

It is my understanding that the maximum number of trains operated on UP's managed portion of the 50/50 Line has been 32 trains in one day. From October 1 to October 18, 2015, the daily number of trains operated on this portion of the line ranged from 12 to 24 trains a day. Therefore, despite UP's statements in this proceeding, plenty of capacity remains for additional trains to run across the 50/50 Line.

BNSF does not need storage or sorting capacity in the West Lake Charles area.

As set forth in my original verified statement, BNSF intends to operate through the Rose Bluff Yard on any running track designated by UP, then over the Rose Bluff Lead to the CITGO facility without stopping. Therefore, KCS's concern about there being no storage capacity or room to construct additional trackage in the Rose Bluff Yard is of no relevance to BNSF's proposed operations. BNSF will not need to store or sort cars in UP's Lake Charles Yard or the Rose Bluff Yard since BNSF will sort and process both manifest and unit train cars destined for CITGO in its newly-constructed Lacassine Yard prior to entering the Rose Bluff Lead. This will undeniably result in more capacity in the Rose Bluff Yard because there will be fewer BNSF cars in UP switch service to be stored or sorted there and thus, fewer work events.

A clear route exists daily through the Rose Bluff Yard and over the Rose Bluff Lead.

From December 8, 2014, to December 22, 2014, at my direction, BNSF employees studied operations in West Lake Charles and determined that { }% of the time, a clear route existed through the Rose Bluff Yard and over the Rose Bluff Lead to CITGO without the need for any railroad to clear a track. See Exhibit A (BNSF-C-000599(R))[1]. Our study also showed that a clear route would exist to CITGO another { }% of the time if UP could clear a switch engine that was working in the Yard or on the Lead to allow BNSF to pass. See Exhibit A (BNSF-C-000599(R))[2]. Therefore, given this excess clear route capacity, without even taking into account reduced train events as a result of BNSF direct service in lieu of UP switch service, it is my opinion that there is an opportunity every day during UP's 12-hour operating period for BNSF to operate a CITGO direct train and direct trains to other customers on the Rose Bluff Lead without interference to UP or KCS.

After reviewing the replies and verified statements filed by UP and KCS in this proceeding, I again directed BNSF employees to study operations in West Lake Charles. From October 5, 2015 to October 8, 2015, BNSF employees observed UP and KCS operations in the Rose Bluff Yard and on the Rose Bluff Lead. BNSF employees observed that UP and KCS were not using the yard tracks in the Rose Bluff Yard in the most efficient manner. For example, BNSF employees observed that both UP and KCS placed small cuts of cars on each of the six tracks in the Yard before going off duty thus eliminating any of the tracks as running tracks. If providing a running track were a priority, it is my opinion that UP could easily identify one of the tracks as a run-through track so that a BNSF direct train could operate through the Yard without interference.

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[1] The study incorrectly labels the tracks in the Rose Bluff Yard. The track farthest from the 50/50 Line is track #1 and the track closest to the 50/50 Line is track #6.

[2] The { }% and { }% figures are derived from (i) the 15-day average of the daily percentage of time when the entire route was accessible (green shaded portion of the daily column on BNSF-C-000600(R)); and (ii) the 15-day average of the daily percentage of time when a UP switch engine could shove to clear the Yard or Lead (yellow shaded portion of the daily columns in BNSF-C-000600(R)). The column on the far right of BNSF-C-000600(R) reflects these averages.

Based on my experience, it is my opinion that BNSF could operate direct trains through the Rose Bluff Yard and over the Rose Bluff Lead to serve customers on a daily basis during the UP 12-hour operating window. If the yard tracks were being used in a more resourceful manner, I would expect that there would be a running track clear through the Rose Bluff Yard, which BNSF could use to run direct trains.

UP and KCS's own documents prove that there is capacity for BNSF direct trains.

I have reviewed documents produced by UP and KCS related to their operations in West Lake Charles, which prove that there is capacity in West Lake Charles for additional trains. UP produced a chart showing the jobs it operates each day in the Rose Bluff Yard and on the Rose Bluff Lead. See Exhibit B (UP-WLC-0000397(R)). The chart shows that UP operates { } on the Lead at the same time. The chart also shows { } window within UP's 12-hour operating period in the Yard when UP operates only one train on the Lead. Based on UP's own practice of running { } on the Lead at one time, there is an { } when up to { } more trains could operate on the Lead. That window matches up with UP's 12-hour operating period in the Yard thereby creating a perfect opportunity for BNSF to run up to { } direct trains through the Yard and over the Lead just as UP does when it simultaneously operates a total of { } trains on the Lead in the afternoon. UP also produced a map that demonstrates how each UP job spreads blocks and serves customers on various branches of the Lead and, by doing so, presumably avoids interfering with other UP jobs. See Exhibit C (UP-WLC-0000398(R)). UP should have no problem coordinating similar operations with BNSF to allow BNSF direct trains to operate to customers such as CITGO. Finally, KCS produced a table that estimated the tracks in the Rose Bluff Yard were blocked only { }% of the time for the month of April 2014. See Exhibit D (KCS-C-0024(R)). Thus, KCS's own records are consistent with BNSF's finding that a clear route exists through the Rose Bluff Yard { }% of the time.

CITGO has plans for expansion to accommodate incremental unit train volumes.

UP argues that BNSF's CITGO direct train will interfere with UP service at the CITGO facility and occupy track capacity within the CITGO facility. However, there will be incremental volume going into the CITGO facility regardless of which railroad takes it in. This is an issue that BNSF and UP operating personnel deal with on a daily basis when it comes to serving customers where both railroads have joint access. BNSF has had widespread success working with customers to rationalize their switching operations to reduce the amount of time on the mainline and eliminate the need for sorting by the railroad. CITGO has previously provided BNSF with track expansion diagrams, not yet acted upon, which would increase the facility's railcar capacity, including a final phase in which an entire unit train could be delivered to the CITGO facility. If the Board confirms BNSF's right to directly serve customers in West Lake Charles, BNSF intends to work with CITGO to finalize plans for expansion. In any event, it is CITGO's responsibility – and not UP's – to match facility capacity with targeted demand and decide how best to use its available tracks to receive competitive trainload service.

BNSF will follow the established, time-tested process for electing to serve additional customers directly.

Both UP and KCS complain that BNSF has not provided an operating plan for other customers on the Rose Bluff Lead. Since the filing of BNSF's Application in this proceeding, BNSF has competed for and won the business of two additional customers in West Lake Charles – Westlake Chemical and LyondellBasell. Both customers desire BNSF direct service without UP reciprocal switching. UP argues that BNSF has not submitted an operating plan for these customers; however, BNSF has not yet formally made an election concerning service to these customers. If BNSF prevails in this proceeding and begins running directly to CITGO, BNSF will assess the feasibility of serving these or other customers on the Rose Bluff Lead in combination with or separately from CITGO. As I have established, there is ample capacity at the Yard and on the Lead for BNSF to operate direct trains to both customers.

BNSF and UP have an established process whereby BNSF notifies UP of its election to serve customers. This process has worked for nearly 20 years. Pursuant to Section 5(d) of the Restated and Amended Settlement Agreement, BNSF is required to send a notification to UP electing to change the method of service to a customer 180 days before the change of service is planned to commence. To date, BNSF has not elected to change the method of service to any customer on the Rose Bluff Lead except for CITGO. If the STB confirms BNSF's right to direct access in this proceeding, BNSF may elect to change its method of service for additional customers on the Rose Bluff Lead and, in that event, BNSF will follow the process for doing so. During the 180 day notification period, local operations personnel from BNSF and UP will discuss an optimal operating plan for each additional customer, as they do in other scenarios.

If BNSF elects to serve directly, BNSF would request a window during UP's 12-hour operating period and run direct trains that would include both manifest and unit volumes to the customers. If necessary, BNSF could store additional power at the customers' facilities in order to allow for more efficient shoving moves. Pursuant to the commercial agreements with these customers, a large majority of the volumes originating at these customers will move on BNSF. To the extent there are manifest volumes still moving on UP or KCS, BNSF would be willing to switch those volumes for UP and KCS at a standard switch fee to reduce the number of carriers operating into each customer's facility, should they so desire.

UP's operations would be impacted in that they would be moving less business to and from CITGO, Westlake Chemicals and LyondellBasell. Most importantly, BNSF direct movements would free up considerable capacity in the Lake Charles and Rose Bluff Yards because BNSF cars to and from those customers would not need to be stored or sorted there. With respect to KCS's operations, as described in more detail below, it is my opinion that they will not be affected because BNSF will only operate during UP's 12-hour operating period.

UP and BNSF are experienced in coordinating operations on Joint Facilities.

While the Baytown Branch and Sabine Lead – both off of the 50/50 Line – do vary geographically from the Rose Bluff Lead, the operations on those joint facilities require daily coordination between railroads just as BNSF's direct operations will require on the Rose Bluff Lead. As a practical matter, the railroad operating personnel that operate those joint facilities communicate on a daily basis to coordinate train operations and tactically plan in such a way that ensures fluid operations, maximizes velocity and reduces congestion. For example, on the Baytown Branch, UP and BNSF have worked together for years post-merger to optimize operations and provide consistent and efficient service to customers there in a very dynamic environment. BNSF direct service on the Rose Bluff Lead will require the same level of coordination, and I do not see any obstacles to the parties working together to achieve a joint operation like those that exist on the Baytown Branch and the Sabine Lead. In these cases, both BNSF and UP have had to adapt their operating plans over time to changes in overall traffic levels, share shifts between carriers, and the introduction of unit trains to previously all-manifest industrial zones, the same types of changes expected over time in the Lake Charles area.

KCS Operations will not be negatively affected.

BNSF does not intend to operate on the Rose Bluff Lead during KCS's 12-hour operating window. As I stated in my original verified statement, the only change to KCS's operation will be a reduction in congestion and an increase in storage capacity in the Rose Bluff Yard because BNSF CITGO cars and cars destined to or originated from other customers that BNSF may elect to directly serve will no longer be stored, classified, staged or switched there. Furthermore, as I stated above, I believe there is sufficient capacity in the Rose Bluff Yard such that additional BNSF direct trains would not affect UP to overstay its 12-hour operating period.

Customers on the Rose Bluff Lead deserve the direct service they were promised in the UP/SP merger.

In conclusion, customers in West Lake Charles have been requesting direct service from BNSF for several years, and they deserve the direct service by BNSF as a service competitor which they were promised in the UP/SP merger. In December of 2012, our first direct train was scheduled during a window suggested by UP and was ready to go when KCS prevented the BNSF direct train from serving CITGO. For nearly three years, we have responded to and resolved every operational barrier the other carriers have raised. We have made a significant $31 million investment to construct a new yard in Lacassine in order to allow us to bypass UP's Lake Charles Yard and the joint UP/KCS Rose Bluff Yard, which would result in significant capacity gains in those yards. We are committed to fulfilling the competition-preserving role that the Board intended, and that customers expect, by serving customers in West Lake Charles directly. I have spent the last 20 years of my 50+ year career working for BNSF and coordinating operations with UP and/or KCS where we share assets or have joint operations. The seasoned operating professionals at these railroads share the same goal of maximizing the use of those joint facilities in the safest and most efficient way possible. I have seen no insurmountable obstacles that would prevent BNSF, UP and KCS from working together to jointly serve customers in West Lake Charles.

VERIFICATION

I, Rollin D. Bredenberg, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on October 23, 2015.

Rollin D. Bredenberg

Rollin D. Bredenberg

VERIFIED STATEMENT OF
DENIS J. SMITH

My name is Denis J. Smith, and my business address is 2600 Lou Menk Drive, MOB-3, Fort Worth, Texas 76131. I am Vice President, Industrial Products Marketing for BNSF Railway Company ("BNSF"). I have been with BNSF for over 22 years and have been in my current role since 2001. Prior to joining BNSF in 1993, I worked in marketing at Continental Grain Company.

I am making this statement in support of BNSF's Application for Terminal Trackage Rights in Finance Docket No. 32760 (Sub-No. 46) (BNSF-118) (hereinafter "Application"). More specifically, the purposes of this statement are to rebut arguments made by UP and KCS that BNSF competes very effectively in the Lake Charles area through the current reciprocal switch operation and should be satisfied with its current market share and service capability and that BNSF does not require terminal trackage rights to compete.

As I understand it, when the STB approved the UP-SP merger in 1996, in order to avoid the anticompetitive consequences of a 2-to-1 merger, it conditioned that approval on multiple rights granted to BNSF that would enable BNSF to replace the competition and future competitive capability that would be lost when SP was absorbed into UP. One such right was the right of BNSF to handle traffic of shippers open to SP and KCS at West Lake Charles by either (1) direct BNSF train service or (2) reciprocal switch performed by UP on behalf of BNSF, at BNSF's sole election. Because the rights granted to BNSF were meant to be remain effective in perpetuity and customer needs or market characteristics change over time, BNSF has the right to elect the type of service. Therefore, BNSF may initially elect to serve a customer by reciprocal switch but may transition to serving the customer directly to respond to any number of changes, including changes in the market, in overall volume levels, or in the service need profile of specific shippers. Alternatively, BNSF may decide to change its method of service from direct to reciprocal switch for any of these same reasons.

UP and KCS argue that BNSF is already competitive in West Lake Charles because it has the right to access customers via reciprocal switch by UP. Reciprocal switch service, however, requires a hand-off to UP that results in at least one additional day of cycle time for both loaded and empty cycles, leading to longer round-trip cycle times and increased railcar costs. Furthermore, in reciprocal switch service, BNSF is obligated to pay UP reciprocal switch fees and haulage expenses for UP to move the traffic from UP's Lake Charles Yard to the customers in West Lake Charles; this raises the overall delivered cost of products to customers.

If BNSF is able to serve customers directly, the traffic can originate and terminate on BNSF without adding another railroad to the itinerary. This is especially true where the origin or destination for a customer's traffic is on BNSF. Direct service preserves that competitive efficiency though the entire route of movement by eliminating the need to interchange shipments to another carrier (here UP), providing a more streamlined operation and more attractive cycle times and greater consistency in service. It also eliminates the need to pay switching and haulage fees to the non-line haul carrier and instead pay over-the-road trackage rights fees for the movement of its train when it provides service with its own crew and power. All of these factors allow BNSF to provide a more competitive service product to the marketplace.

The majority of traffic being handled now through reciprocal switch and destined to the Citgo facility in West Lake Charles is crude oil originating at facilities on BNSF and handled in direct service up to the point of the UP reciprocal switch at Lake Charles. This is traffic that was unforeseen to BNSF twenty years ago. Only in the last six years has crude by rail become a viable alternative to pipeline transportation of crude oil. BNSF has invested millions of dollars in network facilities to enable BNSF to efficiently move crude oil shipments originating in the crude-rich regions that we serve to refinery destinations, and our shipping community has answered that investment with their own investment in facilities and equipment. In order to be competitive with pipelines and other railroads, BNSF must be able to directly deliver crude oil to the customer in large blocks or unit train service.

UP and KCS argue that BNSF should be satisfied with its current market share or level of service in West Lake Charles. It is my opinion that BNSF should be able to compete in the most cost effective and efficient manner such that BNSF can provide customers with a market-competitive service offering. As described above, reciprocal switch is less efficient and cost effective than direct service. As long as customers demand BNSF service, BNSF will continue endeavors to drive competitive, cost effective and efficient service offerings and direct service is the way to do it.

BNSF works diligently to maintain and increase its share of rail volumes moving to and from Lake Charles. In this market, railroads move high-value products in costly railcars. Consequently, reliable service and transit time are important considerations for all of our potential customers. If BNSF is not allowed to serve customers directly, BNSF's service and transit time are placed at a disadvantage to other railroads. This makes it more difficult for BNSF to meet our customer's needs. As a result of the incremental cost and operational inefficiency of UP switch service, BNSF maintains a market share that we believe is below BNSF's potential in a direct-service environment.

VERIFICATION

I, Denis J. Smith, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on October 22, 2015.

Denis J. Smith

Denis J. Smith

PUBLIC

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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

____

REBUTTAL VERIFIED STATEMENT OF

DAVID A. REISHUS, PH.D.

OCTOBER 23, 2015

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY

A. Qualifications

1. My name is David Reishus. I am currently an Executive Vice President at Compass Lexecon in Boston, Massachusetts. Compass Lexecon is an economics consulting firm with offices in various cities throughout North America, South America, and Europe. I earned my M.A. and Ph.D. degrees in economics from Harvard University.

2. Over the past 25 years, I have worked extensively on the organization of markets, competition, and firm behavior in a variety of industries. I have testified before various state, Federal and international bodies on competition issues, primarily in the energy and transportation industries. I have provided testimony multiple times before the Surface Transportation Board on matters involving competition in the railroad industry.

3. I have analyzed competition issues associated with railroad merger transactions and associated conditions on those mergers. I participated in the analysis of the competitive effects and associated merger conditions for the major railroad consolidations in the 1990s involving Union Pacific/Southern Pacific, Burlington Northern/Santa Fe, and the Conrail transaction. In addition, since then I have testified before (or made presentations to) the responsible government authorities regarding competitive issues arising from proposed transactions involving railroads in the U.S., Canada, and Mexico. My full vita is attached.

B. Purpose

4. BNSF Railway Company ("BNSF"), supported by CITGO Petroleum Corporation ("CITGO"), is requesting confirmation "of direct trackage rights granted to BNSF over the Rose Bluff Industrial Lead as a condition of the UP/SP merger."[1] Kansas City Southern Railway ("KCS") and Union Pacific Railroad Company ("UP") oppose this request.

5. I have been asked to apply the economics of competition to these filings. I have specifically been asked to evaluate and respond to the Verified Statement of Drs. Kevin

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[1] BNSF's Opening Statement at 1.

Neels and Robert Reynolds ("Neels/Reynolds").[2] Neels/Reynolds present tabulations regarding historical rail movements into and out of the Lake Charles area. These tabulations show historical shares of rail tonnage (and corresponding calculated HHIs) moved by UP, KCS and BNSF. They likewise show historical average rates per ton-mile for various traffic into and out of the Lake Charles area. From these tabulations they conclude, that "There is nothing in the evidence we have examined to suggest any inability or failure on the part of the BNSF to fulfill successfully the competitive role envisioned by the STB."[3]

C. Summary of Conclusions

6. Historical shares of rail traffic serving the Lake Charles area provide no useful guidance as to whether BNSF is fulfilling "the competitive role envisioned by the STB." The conditions imposed on the merger between UP and the Southern Pacific Railroad ("SP") that grant BNSF access to certain shippers were intended to preserve into the future competition that would be lost through the elimination of SP as an independent railroad competitor as a result of the merger. Traffic data show that BNSF has served shippers in the Lake Charles area, including those on the Rose Bluff Lead; they do not show that BNSF is able now and into the future to provide fully competitive service consistent with terms of the UP/SP merger.

7. The traffic data tabulations are subject to errors that lead Neels/Reynolds to overstate BNSF's overall share of traffic to shippers on Rose Bluff. The evidence clearly shows that BNSF carries a {{ }} share of the Lake Charles traffic than did SP prior to the merger. Fundamentally, however, the failure to provide a coherent definition of the market (or markets) and any analysis of the economic forces affecting competition in those markets render these tabulations meaningless for determining whether BNSF is now fulfilling the competitive role envisioned by the STB. The widely varying percentages of traffic across commodities and locations carried by different railroads demonstrate that the calculated "market shares" do not reflect the outcomes of competitive forces in coherently defined markets. Similarly, the demonstration that rail rates for different products and locations have moved in different directions further

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2 Verified Statement of Dr. Kevin Neels and Dr. Robert Reynolds, August 19, 2015, Exh. A to the Reply of The Kansas City Railway Company ("Neels/Reynolds V.S.").

3 Neels/Reynolds V.S. at 14.

indicates that Neels/Reynolds have identified no coherent definition of markets and market forces.

8. The process of competition is dynamic and involves innovation and the introduction of new or improved services and products over time that supplant previous products and methods. As methods and markets change, competitors introduce new methods, services and products. What may have been effective competition for certain products and services will no longer be under new market circumstances. An evaluation of the effectiveness of competition requires an evaluation of how competitors are able to adapt to these changing market conditions.

9. The post-Staggers era of the railroad industry has seen substantial innovation and change in rail service and products offered. Of particular relevance to CITGO (and other shippers in the Lake Charles area) is the ability of railroads to compete against pipelines in the transportation of crude oil. The flexibility, reliability and efficiency of unit train service combined with innovation in crude oil production technology have led to crude-by-rail alternatives unforeseen twenty years ago. An efficient competitive response calls for changes in methods of service and delivery, e.g., direct delivery of crude oil in trainload or unit train service, in response to changing market conditions. As explained by CITGO, the limited delivery of crude oil under existing terms is inconsistent with effective competitive service. Artificial limitations on the competitive response available to BNSF are inconsistent with the preservation of competition that could have been provided by an independent SP.

II. BNSF'S ROLE IN RESPONSE TO THE UP/SP MERGER

10. The UP/SP merger in 1996 provided the opportunity for a substantial improvement in the efficiency of the U.S. rail network through reduced costs and improved, single-line service. Absent conditions or modifications, the merger could have harmed numerous shippers as a result of a loss of effective competition due to the elimination on an independent SP competitor. As part of one of a series of negotiated agreements imposed as a condition of the merger, BNSF was granted access to shippers on the Rose Bluff Industrial Lead ("Rose Bluff") in response to the loss of the independent SP due to the merger. This access has currently been provided through a combination of haulage and reciprocal switching.

A. Traffic Measures Fail to Provide Relevant Information on Competitive Outcomes

11. Since being provided access to Rose Bluff following the UP/SP merger, BNSF has been responsible for {{ }}% of the tons moving from (or to) the Lake Charles area. (See

Figure 1.) Per the Carload Waybill Sample, the BNSF share of traffic {{ }}. Using the total traffic data provided directly by the railroads, BNSF's proportion of this traffic was {{ }}% in 2012 and {{ }}% in 2013.[4] The traffic included in these calculations, as presented by Drs. Neels and Reynolds, includes, but is apparently not limited to, shippers located on the Rose Bluff Lead.[5] To the extent the tabulations include non-Rose Bluff traffic, the reported values blur the distinctions between traffic on and off Rose Bluff Lead.

{{ }}

[4] Rebuttal Verified Statement of Michael R. Baranowski, October 23, 2015 ("Baranowski Rebuttal V.S.") at Figure 5.

[5] Neels/Reynolds defines the relevant traffic as non-coal traffic moving into or out of Lake Charles, West Lake Charles, and Westlake. Figure 1 adopts the same definition used by Neels/Reynolds in Tables 5 through 9, incorporating a correction for a misclassification of traffic in 1997. *See* Baranowski Rebuttal V.S.

12. For comparison, Figure 2 shows the corresponding share of traffic by carrier to and from Lake Charles area prior to the UP/SP merger, measured in tons consistent with Figure 1.[6] Prior to the merger, SP accounted for {{ }}% of the total tonnage. Since the merger, BNSF has averaged {{ }}.

{{ }}

13. If share of traffic were a reliable and useful measure of competition, then the conclusion would be that {{ }}. Such reasoning, however, is invalid. Competition can only be understood within the context of a properly defined market, and no such market has been defined. To talk about market shares, as do Drs. Neels and Reynolds, it is necessary to have properly delimited a market. As is well understood in the economics field, the scope of the market depends on the alternatives available to constrain pricing within that market.[7] The extent of competition for a given rail transportation provider may include other rail carriers, other transportation modes—truck, barge or pipeline—and geographic and product competition. These alternatives can vary across shippers and products even along the few miles of the Rose Bluff Lead. Shippers of commodities with multiple alternative destinations (or origins) and potential alternative cost-effective modes of transportation may have extensive competitive alternatives. Shippers of products with limited origins and destinations and other feasible modes may have few alternatives. For example, to the extent that the relevant origins are found only (or primarily) on one originating rail carrier, the remaining carriers capable of serving the destination may not provide effective competition. In any case, the alternatives may differ across shippers

6 Neels/Reynolds presents analysis of post-merger traffic shares based on tons.

7 See, for example, U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, August 19, 2010, and Carlton, Dennis W. and Jeffrey Perloff, *Modern Industrial Organization,4th ed.*, Pearson, 2005, at 642-648..

and commodities, and the resulting scope of the market, the competitors in those markets, and the resulting market shares will differ.

14. Absent a finding that all movements in and out of Lake Charles are in the same rail transportation market, it is improper to treat these movements as "market shares" resulting from a process of competition among carriers. The same reasoning applies to looking at inbound only, or outbound only, traffic. Indeed, the same reasoning applies to all of the commodity or commodity-location breakouts identified in Neels/Reynolds. It is no more logical to conclude that UP dominates the "market" for {{ }}, than to conclude that BNSF's share of rail transportation of any product or combination of product and location demonstrates effective competition in the market until the market has been properly defined.[8]

15. The vast differences in "market shares" of rail transportation calculated by Drs. Neels and Reynolds across commodities, locations, and inbound and outbound movements demonstrate the illogic of treating any of these as "markets" in which shares, and market concentration as summarized by HHIs, can be meaningfully compared. The same illogic applies to the price trends calculated by Neels/Reynolds. They find that prices have increased on average for some commodities, locations and direction (i.e., inbound or outbound to Lake Charles) and declined for others, relative to the industry average trend in prices. If these shipments were all part of the same market, then market forces would tend to cause prices to move in the same manner. If each of these commodity-location-directional shipment flows were in separate markets, then it would be necessary to analyze competition separately in each of these markets. Neither extreme is likely to apply. In either case, no analysis has been performed in any of these so-called markets of the effect of BNSF presence or activities on pricing. Moreover, these backward-looking reviews of price trends provide no useful information on the effect of the access at issue in this case on the competitive alternatives that would be available to shippers. Absent an economically coherent analysis of the competitive market alternatives available, no useful conclusion can be drawn regarding the degree of competition offered by BNSF.

[8] *See* Baranowksi Rebuttal V.S., correcting errors in Table 4 of Neels/Reynolds v.s.

B. Evidence on BNSF's Changing Role in Lieu of SP

16. The available traffic data demonstrate that over the past 18 years {{ }}. To the extent that this traffic is in competition with traffic that could (or would) otherwise have been carried by KCS or UP, then BNSF may have provided some competitive discipline on service and pricing provided by KCS and UP. The extent and effectiveness of such competitive discipline, however, cannot be determined absent an analysis of specific competitive factors associated with that traffic.

17. The issue arising in this proceeding stems from potential traffic over which the existing service arrangements—in terms of cost, timeliness, and reliability—are insufficient to satisfy customer demands and for which alternative terms of service are required to provide effective competition that an independent competitive railroad would have been able to provide. Changes in transportation and energy markets now call for the provision of regular shipments of large volumes of crude oil (and potentially other commodities) in a reliable and timely manner through direct access by BNSF. Failure to allow such a market response by BNSF would deny shippers on Rose Bluff the competitive response of a more efficient direct BNSF train service product offering that could have been provided by an independent SP.

III. BNSF'S CHANGING ROLE IN RESPONSE TO CHANGING MARKET CONDITIONS

A. Competition Requires Adapting to Changing Market Forces

18. The process of competition benefits consumers—in this case, shippers—by providing alternatives from which the preferred combination of price and quality can be chosen. Competitors who charge lower prices for the same quality service, or provide better service at comparable prices, will attract customers and sales in the marketplace relative to other potential suppliers. Given existing technology, capital and costs of inputs, competition in the marketplace tends toward satisfying demands of customers at the lowest cost.

19. Markets, however, are not static. Competition over price is only one aspect of the competitive process. Suppliers must be able to respond to changes in demands, costs, and technology to continue to provide desired products at competitive prices.

"Competition focuses on producing new products as much as on selling old products at lower prices."[9] Any theory of competitive success:

> must start from the premise that competition is dynamic and evolving… Competition is a constantly changing landscape in which new products, new ways of marketing, new production processes, and whole new markets emerge … [Economic theory] must make improvement and innovation in methods and technology a central element.[10]

Effective competition over time requires that competitors adapt to new market circumstances through innovation in terms of the products and services they provide.

B. Competitive Success in the Rail Industry

20. The ability of railroads to respond flexibly to changing marketplace conditions—through adaptation of technology, rationalization and restructuring of railroad networks and organization, and innovation in service offerings support by new and on-going capital investment—have driven the post-Staggers success of the railroad industry. This success is generally reflected in increased productivity, improved service quality, higher volumes and competitive success relative to other modes of transportation.

21. The major rail consolidations of the 1990s as conditioned by the STB (e.g., the UP/SP merger with the various access agreements) ultimately led to improved service options and cost savings to shippers while generally preserving the benefits of competition.[11] A primary recognized benefit of these transactions was the extension of direct, single-line service across a broader network. Where shipping volumes support the scale required, direct, single-line rail service is usually less costly, faster and more reliable than service that requires one or more switches or exchanges among carriers.

22. The adaptation of the rail industry to changing market forces has been reflected in the long-term growth in intermodal traffic in terms of absolute and relative volumes. Railroads provide a generally increasingly competitive service against trucking, albeit with a somewhat different combination of cost, speed, and reliability. More recently the

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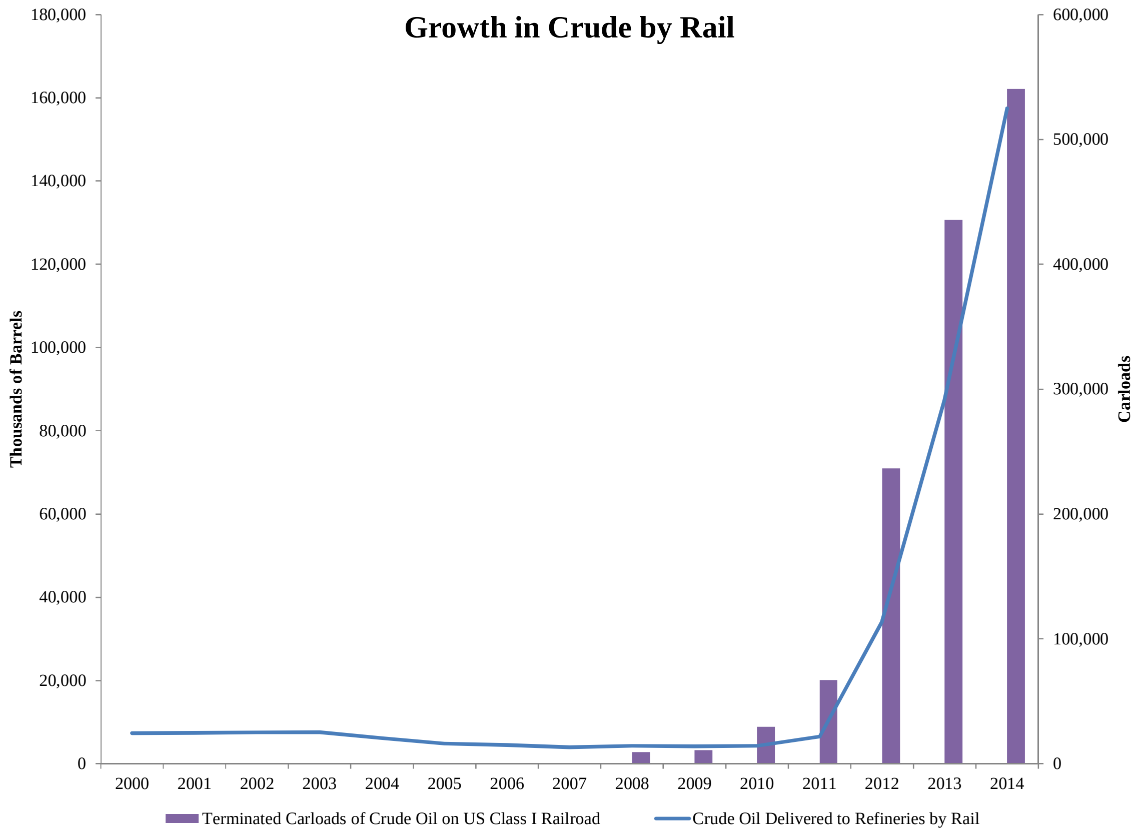
9 Joseph E. Stiglitz and Carl E. Walsh, *Economics, 4th ed.*,W.W. Norton, 2006, at 463.

10 Lynne Pepall, Daniel J. Richards, and George Norman, *Industrial Organization: Contemporary Theory and Practice, 2nd ed.*¸South-Western/Thomson Learning, 2002, at 590, quoting Michael Porter, *The Competitive Advantage of Nations,* New York: The Free Press, 1990, at 20.

11 See, for example, Breen, Denis A., "The Union Pacific/Southern Pacific Rail Merger: A Retrospective on Merger Benefits," *Review of Network Economics*, 3:3, September 2004 at 283-322

upsurge in the movement of crude oil by rail underscores the value to shippers of the service flexibility and cost that efficient trainload rail service can provide. As seen in Figure 3, shipments of crude-by-rail have increased by more than 30-fold from the mid-2000s.[12]

Figure 3



Note: Terminated carloads data starting in 2008.
Source: Energy Information Agency; Association of American Railroads.

23. The rapid growth in crude-by-rail is driven first by changing oil production technology that has opened up large new domestic and Canadian crude oil producing regions with limited existing pipeline capacity. The flexibility of rail transportation, however, makes it a viable alternative to producers and refiners despite the generally higher cost relative to pipeline transportation. Although shippers and railroads have invested billions in

[12] Different data sources give different values but show a similar pattern.

terminals, railcars, and network upgrades to support expanded shipments of crude by rail, the startup costs remain lower than for pipelines. Movement by rail is also substantially faster, and perhaps more important, is geographically flexible in both origin and destination. Relative to pipelines, refiners can change the quantity (if any) and source of crude in response to changing relative prices, net of rail transportation costs. Producers can likewise seek refinery locations that will generate the highest price for crude oil in the field after taking account of transportation costs relative to those of other refiners.

24. Fully successful rail transportation of crude requires that railroads operate at large scale and high efficiency. Refineries consume crude in vast quantities and require that crude be available when needed. The CITGO Lake Charles refinery, for example, is rated at 470,000 barrels per day. A unit train is reported to move "up to 81,000 barrels," while a 50-car trainload is roughly 34,000 barrels.[13] As railroads operate at a cost disadvantage to pipeline and water transportation, the ability to provide high-volume, cost-efficient service is crucial to maintaining the competitiveness of this service.[14]

C. Existing BNSF Rose Bluff Service Is Inconsistent With the Competitive Alternatives of An Independent Competitor with Direct Access

25. As explained by BNSF and CITGO, the existing service arrangements fall short of the competitive alternatives that a willing shipper and railroad would provide absent the current inability to utilize direct train service. CITGO considers the current service achieved through reciprocal switch "problematic."[15] Restrictions on the volume and reliability of the service provided impose direct costs on CITGO, requiring them to use less desirable alternatives to source their crude, including additional transportation costs. Moreover, CITGO has been forced to turn other competitive alternatives to source its crude that compete with the crude-by-rail and CITGO has been unable to take advantage of market opportunities due to the inability to obtain reliable rail service on switched service of BNSF-originated crude deliveries. Likewise, BNSF points out the service

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[13] http://www.bnsf.com/customers/oil-gas/shipping/shipping-benefits.html#flexible. A tank car is estimated to carry on average 682 barrels of crude. Association of American Railroads, "U.S. Rail Crude Oil Traffic," June 2015, at 3.

[14] See Association of American Railroads, "U.S. Rail Crude Oil Traffic," June 2015, at 6.

[15] Verified Statement of Michael Barrett, August 20, 2015 at ¶18.

improvements and cost reductions that would result from direct service where BNSF can bring a full train to the facility rather than the existing switched service.[16]

26. CITGO has sought, and BNSF is willing to provide, direct transportation service in preference to the existing service alternatives. This passes the market test for innovation in response to changing market forces—a willing buyer and seller seeking to transact on a service not currently available in the market. Were an independent SP still extant, with rights to provide direct service, it would be in similar position as BNSF with the incentive to provide more valuable direct unit train (or large block) service in competition with, and as an alternative to, the existing service provided by KCS. Customers would benefit from such service, and KCS, in order to not lose out, would have the incentive to find cost-effective means for meeting or beating this competitive alternative. This is the essence of the competitive process and alternatives that the STB attempted to preserve in conditioning major rail mergers.

27. As the existing data show, BNSF currently carries {{ }} of crude oil delivered to Lake Charles.[17] This does not mean, however, that the existing level of service and competition by BNSF is somehow "good enough." BNSF (and its customers) seek to have higher-quality, lower-cost service than is currently provided. This service could only benefit customers—if it were not a better combination of price and quality, customers could continue to choose the existing service alternatives. The higher-quality service could only represent an improved competitive alternative that the other railroads could try to match or beat through a combination of price and quality satisfying customer needs. If they failed to do so, BNSF may capture an even greater volume of traffic, but this increase would be the result of successful, efficiency-enhancing competition benefiting shippers. If this were to occur, it would represent competitive success, not a failure in competition.

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[16] The extent to which the cost savings are passed on to shippers in lower rates would reflect the process of competition with the other carriers and with the many other competitive alternatives for obtaining crude oil available to CITGO.

[17] Baranowski Rebuttal V.S.

VERIFICATION

I, David A. Reishus, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on October 22, 2015.

David A Reishus

David A. Reishus

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PROFESSIONAL EXPERIENCE

Compass Lexecon
Boston, MA
Executive Vice President, April 2013 – present
Senior Vice President/Senior Managing Director, July 1999 – March 2013

The Economics Resource Group, Inc., Cambridge, MA
President, 1993 – June 1999
Senior Economist, 1990 – 1993

> Provides economic analysis and advice on issues of regulation, antitrust, taxation and applied microeconomics to a variety of clients. Develops, manages, and oversees economic analyses for clients and other principals. Responsible for the management and operations of the company.

U.S. Congress, Joint Committee on Taxation, Washington, DC
Economist, 1987 – 1990

> Provided economic analysis and development of legislative tax proposals. Responsibilities included corporate and foreign taxation and proposals related to low-income taxpayers, child care, and health issues.

Harvard University, Cambridge, MA
Instructor, 1986 – 1987

> Leader of senior thesis tutorial for industrial organization and finance topics. Previously taught Introductory Economics.

Information Resources, Inc., Chicago, IL
Consultant, 1979 – 1980

EDUCATION

Harvard University, Cambridge, MA
Ph.D. in Economics, 1988
Dissertation: "Empirical Essays on the Economics of Taxation and the Firm"
M.A. in Economics, 1983

Northwestern University, Chicago, IL
B.A. in Economics, 1979

TESTIMONY AND OTHER REPORTS

Association of American Railroads
Petition of the Association of American Railroads to Institute a Rulemaking Proceeding to Reintroduce Indirect Competition as a Factor Considered in Market Dominance Determinations for Coal Transported to Utility Generation Facilities; Surface Transportation Board Ex Parte No. 717. Verified Statement, November 14, 2012.

Modis
In the United States District Court for the District of Columbia, Case 1:09-cv-01051-RWR, Modis, Inc. v. Infotran Systems, Inc. and Tien H. Tran v. Modis Inc. and Timothy W. Martin. Expert Report, October 18, 2010. Deposition testimony December 7, 2011.

Government of Canada
In the Matter of Arbitration No. 91312, Canada v. The United States of America. Expert Witness Statement of Joseph P. Kalt and David Reishus, May 12, 2009.

Government of Canada
In the Matter of Arbitration No. 7941, The United States of America v. Canada. Expert Witness Statement, June 29, 2008. Rebuttal Expert Witness Statement, August 11, 2008. (With Joseph Kalt).

Government of Canada
In the Matter of an Arbitration Under Chapter Eleven of the North American Free Trade Agreement Between Merrill & Ring Forestry, L.P. and The Government Of Canada. Expert Report, May 9, 2008. Supplemental Expert Affidavit, March 19, 2009. Oral testimony, May 21, 2009.

Dynegy
In the Circuit Court of Colbert County, State of Alabama, NO. CV-2003-142JMH,

Nelson Brothers, LLC v. Cherokee Nitrogen v. Dynegy Marketing & Trade; Dynegy Inc. Expert Report, August 22, 2007.

Independent Energy Producers Association of California

Before the Federal Energy Regulatory Commission, Docket No. R.06-02-013, Long-Term Procurement Plans, Prepared Testimony of the Independent Energy Producers Association; Prepared Testimony of David Reishus and Joseph Cavicchi on behalf of the IEPA, March 2, 2007.

ExxonMobil Corporation

Internal Revenue Service, Reports, June 29, 2006, December 15, 2006 (with J. Kalt).

First Energy

Before the Pennsylvania Public Utility Commission, Petition of Metropolitan Edison Company for Approval of a Rate Transition Plan (Metropolitan Edison Company Docket No. R-00061366) and Petition of Pennsylvania Electric Company for Approval of a Rate Transition Plan (Pennsylvania Electric Company Docket No. R-00061367), Direct Testimony of David A. Reishus, April 10, 2006.

ExpressTrak LLC

In the United States District Court For the District of Columbia, Case No. 02-CV-1773, National Railroad Passenger Corporation v. ExpressTrak, L.L.C., Expert Report, Dated January 3, 2006; revised April 7, 2006. Deposition testimony, March 24 and April 26, 2006.

British Columbia Lumber Trade Council and the Province of British Columbia

Before the International Trade Administration, Department of Commerce, In the Matter of Certain Softwood Lumber Products from Canada (C-122-839). Statement for the First Administrative Review, March 15, 2004 (with Joseph Kalt); Response to Price Impact of Canadian Log Restraints, March 16, 2004 (with Joseph Kalt); Response to Coalition Submission on Pass-Through Issues, April 15, 2004 (with Joseph Kalt); Economics of Arm's-Length Transactions and Subsidy Pass-Through, September 15, 2004 (with Joseph Kalt); Economic Analysis of the Vancouver Log Market, February 28, 2005 (with Joseph Kalt); Comment on the Economic Implications of the Annual Allowable Cut, December 5, 2005 (with Joseph Kalt); Update to Economic Analysis of the Vancouver Log Market, December 5, 2005 (with Joseph Kalt). Reports filed from March 15, 2004 to December 5, 2005.

Multiple Associations of Energy Producers

Before the Public Utilities Commission of the State of California, Rulemakings R.04-04-025 – R.04-04-003, "Prepared Rebuttal Testimony," October 28, 2005 (with A. Joseph Cavicchi). Oral testimony, January 23 and 24, 2006.

PPL Corporation

United States of America, Before the Federal Energy Regulatory Commission, Docket No. ER05-1416-000, "Affidavit of A. Joseph Cavicchi, Joseph P. Kalt, Ph.D., and David A. Reishus, Ph.D. on Behalf of the PPL Parties," October 19, 2005.

The Burlington Northern and Santa Fe Railway Company

Before the Surface Transportation Board, Finance Docket No. 34342, Kansas City Southern -- Control -- The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company. Verified Statement, June 3, 2003; Verified Statement, August 4, 2003; Reply Verified Statement, August 29, 2003.

Dynegy Inc.

United States of America, Before the Federal Energy Regulatory Commission, San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services, Investigation of Practices of the California ISO and PX; Pub. Utils. Comm'n of the State of California v. Sellers of Long-Term Contracts. Prepared Rebuttal Testimony (with Patrick Wang), March 20, 2003.

Duke Energy Trading and Marketing LLC

United States of America, Before the Federal Energy Regulatory Commission, San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange; Investigation of Practices of the California Independent System Operator and the California Power Exchange. Prepared Rebuttal Testimony (with Patrick Wang), March 20, 2003.

Dynegy Inc.; Duke Energy Services LLC; Mirant Americas, Inc.; Reliant Energy; Williams Energy Marketing and Trading Co.

United States of America, Before the Federal Energy Regulatory Commission, San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange; Investigation of Practices of the California Independent System Operator and the California Power Exchange. Affidavit (with Patrick Wang), October 15, 2002 (revised November 12, 2002).

Association of American Railroads

Review of Rail Access and Competition Issues, Before the Surface Transportation Board, Ex Parte No. 575. Joint Verified Statement (with Joseph Kalt), March 26, 1998.

Crow Tribe of Indians

Report Concerning the Crow Tribe Resort Tax (with Joseph P. Kalt), November 27, 1996; *Surrebuttal Report Concerning the Crow Tribe Resort Tax* (with Joseph P. Kalt), February 25, 1997; and *Report Concerning the Crow Tribe Resort Tax* (with Joseph P. Kalt), March 31, 2000.

Sithe Energies

Economic Impact on New York State of the Sithe Plan, Chapter IV of *Energizing New York: The Sithe Plan*, December 8, 1995.

Massachusetts Department of Environmental Protection

Use of an Economic Test for Distinguishing Legitimate Recycling Activities, July 1993.

SELECTED OTHER CONSULTING EXPERIENCE

Major Regional Hospital

Performed statistical analysis of patient waiting-times and follow-up.

Petroleum Products Pipeline

Analyzed business and regulatory options for large interstate petroleum products pipeline subject to market-based and regulated tariffs.

Group of Class 1 Railroads

Analyzed claims of competitive harm and the development and use of econometric models for pricing, damages and class certification in the context of alleged price-fixing.

Government of Canada

In context of international arbitration under the U.S. Canada Softwood Lumber Agreement, analyzed pricing patterns, effects of risk and government development and timber pricing policies in multiple provinces on the North American lumber markets,. Developed dynamic economic models of production and trade capable of determining appropriate export measure adjustments.

Major Energy Traders

Assisted in analyses of claims of market manipulation in physical and financial energy markets.

U.S. Generation Companies

Advise on methods for performing merger analysis and analysis of competitive effects of proposed divestitures.

Western Refining

Analyzed effect of a contested proposed merger involving southwestern refining, wholesale, and marketing operations

AT&T

Analyzed competitive issues in the long-distance telephone market in the context of a class-action price-fixing suit.

Pacific Lumber/Scotia Pacific

Assisted in analysis and projections involving redwood product markets for business valuation in bankruptcy.

TAPS Carriers

Assisted in development of ratemaking analyses for oil pipeline rates.

General Electric & Bechtel

Analyzed derivation of cost of equity, discount factor, and method for contract damages and expropriation of Dabhol power plant in the context of I.C.C. arbitration.

Class 1 Railroad

Analyzed potential competitive harm of vertical rail merger and possible remedies before the Canadian Competition Bureau.

Multinational Oil Company

Analyzed alternative approaches for identifying and measuring price risk in long-term contracts in connection with multi-billion-dollar joint venture.

Frontier Oil Corporation

Analyzed application of discount factors and method in damages arising from a failed merger.

Amoco

Analyzed marketability and market value of natural gas for purposes of class-action royalty valuation.

Class 1 Railroad

Analyzed claims of vertical market foreclosure and anticompetitive conduct in rail transportation.

Government of Canada

Assisted in analysis of changes in forestry practices and stumpage charges in the context of international trade agreements.

Exxon Corporation and Affiliated Companies

Performed analysis of design and effect of U.K. oil and gas tax system.

CSX Corporation and CSX Transportation, Inc.

Analyzed historical evidence of rail consolidations and the impact of the proposed Conrail transaction on Eastern coal shippers. Evaluated competitive requirements of proposed conditions on the transaction.

Group of Major Oil Companies

Developed and analyzed a database of crude oil purchases for analyzing issues of crude oil valuation at the wellhead in the context of multiple class action litigations.

Koch Pipeline

Assisted in developing product and market definitions relating oil pipeline antitrust allegations.

British Petroleum

Performed economic analysis of alternative organizational forms for operating petroleum assets. Developed advanced financial tools for valuing decision alternatives and contingent assets.

Exxon

Performed economic analysis of certain fuel used and cost allocations among the Prudhoe Bay Unit owners for a royalty dispute with the State of Alaska.

Burlington Northern Railroad/Santa Fe Railroad

Analyzed competitive impacts of proposed railroad merger for use before the Interstate Commerce Commission.

PSI/CINergy

Adapted economic model of regional economy and performed analysis of the economic impact of alternative merger scenarios for a public utility.

El Paso Natural Gas Company

Performed economic analysis of markets and competition for an open-access natural gas pipeline for use in an antitrust case.

Better Home Heat Council, Inc.

Performed economic analysis of a local gas utility's conservation programs effect on consumer fuel-switching decisions and public policy impact for use before the Massachusetts Department of Public Utilities.

Association of American Railroads

Analyzed the impact of market conditions for the exemption of rail transportation of export corn and soybeans from Interstate Commerce Commission regulation.

ARCO Pipe Line Company

Evaluation of market power of petroleum products pipeline in consideration of light-handed regulation for use before the Federal Energy Regulatory Commission.

BP/America

Assisted in the design and implementation of crude oil valuation analyses for royalty litigation.

Williams Natural Gas Pipeline Co.

Prepared pricing analysis of natural gas purchase contracts, performed calculation of damages, and analyzed economic submissions for use in antitrust case.

El Paso Corporation

Various projects including strategic analysis of market opportunities to enhance value of the pipeline and analysis of market competition in gathering and long-distance gas transportation.

Government of British Columbia

Assisted in evaluation of impact of Canadian log export regulations on U.S. and Pacific Rim log and wood products trade and industry.

Atlantic Richfield Company

Provided economic analysis of market structure and conduct for the distribution of motor fuels for use in an antitrust case.

Burlington-Northern Railroad

Assisted in evaluating market impacts of innovative railroad grain car service rate and reservation policy for use before the Interstate Commerce Commission.

National Cattleman's Association

Researched and wrote report analyzing the welfare and environmental effects of domestic U.S. beef production with particular concern about appropriate policy responses.

PUBLICATIONS AND RESEARCH

“Corporate Reorganizations: Tax Treatment of Corporate Mergers, Acquisitions, and Reorganizations,” *The Encyclopedia of Taxation and Tax Policy, 2nd ed.*, The Urban Institute Press, 2006. (Revised and updated.)

“Corporate Reorganizations: Tax Treatment of Corporate Mergers, Acquisitions, and Reorganizations,” *The Encyclopedia of Taxation and Tax Policy*, The Urban Institute Press, 1999.

"Outside Directorships, the Reputation of Managers, and Corporate Performance" (with S. Kaplan), *Journal of Financial Economics,* Vol. 27, No. 2, September 1990.

"Financing Child Care: Who Will Pay for the Kids?," *National Tax Journal,* Vol. XLII, No. 3, September, 1989.

"The Effects of Taxation on the Merger Decision" (with A. Auerbach), in A. Auerbach, ed., *Corporate Takeovers: Causes and Consequences*, University of Chicago Press, 1988.

"Taxes and the Merger Decision" (with A. Auerbach), in J. Coffee, L. Lowenstein, and S. Rose-Ackerman, eds., *Knights, Raiders and Targets*, Oxford University Press, 1988.

"The Impact of Taxation on Mergers and Acquisitions" (with A. Auerbach), in A. Auerbach, ed., *Mergers and Acquisitions*, University of Chicago Press, 1988.

OTHER PROFESSIONAL ACTIVITIES

Presentations to National Bureau of Economic Research, Federal Reserve Bank of Cleveland, Federal Reserve Bank of New York, Harvard University, Tax Economists Forum, National Tax Association, Western Economic Association, The Institute for Energy Law of The Center for American and International Law.

Memberships in National Tax Association, American Economic Association.

Referee for *Quarterly Journal of Economics, Journal of Law and Economics.*

HONORS AND AWARDS

National Science Foundation Fellowship, 1981-1985.
International Foundation of Employee Benefit Plans, Graduate Research Fellowship, 1984.
Phi Beta Kappa, 1979.

PUBLIC

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

REBUTTAL VERIFIED STATEMENT OF

MICHAEL R. BARANOWSKI

OCTOBER 23, 2015

I. INTRODUCTION

I am Michael R. Baranowski, a Senior Managing Director at FTI Consulting and the head of FTI's Network Industries Strategies group within the Economic Consulting division. I have over thirty years of experience in analyzing railroad traffic and revenue patterns, evaluating railroad operations, analyzing railroad data, calculating and projecting the costs of providing railroad service, analyzing contribution and profitability, analyzing damage claims and determining the reasonableness of railroad rates and charges. I have testified numerous times before the Surface Transportation Board, arbitration panels and other federal and state regulatory agencies regarding economic issues related to transportation. A copy of my Curriculum Vitae is included as Attachment 1 to this verified statement.

I have been asked by counsel for BNSF to address several issues related to the Kansas City Southern and Union Pacific reply submissions in this matter. In Section II, I address conceptual shortcomings and implementation flaws in various analyses conducted by KCS witnesses Dr. Kevin Neels and Dr. Robert Reynolds (Neels/Reynolds). In Section III, I develop the differences in operating costs to BNSF between service via reciprocal switch and direct rail service on the Rose Bluff Lead. In Section IV, based on data provided by KCS and UP in discovery in this proceeding, I evaluate the likely operating windows for potential BNSF train operations through the Rose Bluff Yard and on the Rose Bluff Lead.

II. CONCEPTUAL AND IMPLEMENTATION FLAWS IN NEELS/REYNOLDS ANALYSES

In their reply verified statement, Neels/Reynolds report the results of their analyses of data contained in the Surface Transportation Board's confidential carload waybill sample for the years 1997 through 2013 for the Lake Charles BEA and traffic tape data provided by UP, BNSF and KCS on traffic shipments into or out of the Lake Charles area in 2012 and 2013 and show a mix of KCS, UP and BNSF calculated traffic distributions[1] in the Lake Charles area over a seventeen year time period. I have reviewed the Neels/Reynolds analyses and supporting work papers and have identified a number of conceptual and implementation flaws that call into question the relevance of the analysis and the potential significance of any findings or conclusions that might be inferred from the results.

First, although I understand this proceeding to be focused on BNSF's request for terminal trackage rights over the Rose Bluff Lead, the Neels/Reynolds analysis is not limited to shipments originating or terminating on the Rose Bluff Lead. Instead, the analysis extends to virtually all non-coal shipments originating or terminating in the stations of Westlake, Lake Charles or West Lake Charles. As the map below provided by KCS in discovery clearly shows, the geographic scope of the Neels/Reynolds analysis extends well beyond the boundaries of the Rose Bluff Lead, which is shown as the rail line and yard on the lower left of the map. Specifically, both the West Lake and Lake Charles stations encompass significant area off of the Rose Bluff Lead. As such, the Neels/Reynolds analysis tells little, if anything, about the historical traffic distributions for customers on the Rose Bluff Lead.

[1] As explained in the Reishus V.S., Neels/Reynolds' reference to "market shares" is misleading, and accordingly I refer to these measures instead as calculated percentages or traffic distributions.

Figure 1: Location of Railroad Stations in Lake Charles Area

Source: KCS-C-69

Second, in their analysis of the 2012 and 2013 UP, KCS and BNSF traffic tape data covering shipments into and out of the Lake Charles area produced by UP, KCS, and BNSF, Neels/Reynolds omitted some and misidentified other KCS and UP originating and terminating traffic. These errors have the effect of overstating their calculated percentages attributable to BNSF and understating their calculated percentages attributable to UP of the Lake Charles area traffic distributions. Specifically, Neels/Reynolds made the following errors:

1. Omitted UP shipments originated and terminated via KCS reciprocal switch
2. Omitted KCS shipments originated and terminated via UP reciprocal switch
3. Incorrectly counted KCS reciprocal switch moves of UP shipments as KCS shipments

Correcting these errors reduces BNSF's 2012 and 2013 calculated inbound percentages by approximately {{ }}, respectively, and reduces BNSF's 2012 and 2013 calculated outbound percentages by approximately {{ }}, respectively.

The reductions to the BNSF calculated percentages are absorbed by UP and KCS as summarized in the following tables.

Table 1: Corrected Neels/Reynolds Table 1

Inbound Percentages, by Tonnage
based on Traffic Tapes, 2012-2013

		Neels/Reynolds Original		Corrected	
		2012	2013	2012	2013
	Tonnage				
[1]	KCS	{{ }}	{{ }}	{{ }}	{{ }}
[2]	BNSF	{{ }}	{{ }}	{{ }}	{{ }}
[3]	UP	{{ }}	{{ }}	{{ }}	{{ }}
[4]	Total	{{ }}	{{ }}	{{ }}	{{ }}
	Percentage				
[5]	KCS	{{ }}	{{ }}	{{ }}	{{ }}
[6]	BNSF	{{ }}	{{ }}	{{ }}	{{ }}
[7]	UP	{{ }}	{{ }}	{{ }}	{{ }}

Source: Baranowski RVS Workpaper "Traffic Tape Analysis.xlsx" tab "In&Out Bound Market Shares"

Table 2: Corrected Neels/Reynolds Table 2

Outbound Percentages, by Tonnage
based on Traffic Tapes, 2012-2013

		Neels/Reynolds Original		Corrected	
		2012	2013	2012	2013
	Tonnage				
[1]	KCS	{{ }}	{{ }}	{{ }}	{{ }}
[2]	BNSF	{{ }}	{{ }}	{{ }}	{{ }}
[3]	UP	{{ }}	{{ }}	{{ }}	{{ }}
[4]	Total	{{ }}	{{ }}	{{ }}	{{ }}
	Percentages				
[5]	KCS	{{ }}	{{ }}	{{ }}	{{ }}
[6]	BNSF	{{ }}	{{ }}	{{ }}	{{ }}
[7]	UP	{{ }}	{{ }}	{{ }}	{{ }}

Source: Baranowski RVS Workpaper "Traffic Tape Analysis.xlsx" tab "In&Out Bound Market Shares"

Third, the Neels/Reynolds 2012-2013 analysis of inbound traffic by commodity incorrectly groups KCS traffic by STCC Section 49 hazardous materials codes[2] while grouping corresponding BNSF and UP traffic by standard STCC codes. This resulted in the improper assignment of tonnages to individual commodity codes in Neels/Reynolds' Table 4 and a corresponding skewing of the calculated percentages by STCC. Correcting this error increases the calculated percentage of KCS's traffic for commodities such as Chemicals (STCC 28) and Petroleum or Coal Products (STCC 29), while simultaneously decreasing the calculated percentages for BNSF's and UP's traffic. For example, correcting this error along with the above error reduces BNSF's 2012-2013 share of inbound tonnage from {{ }} for chemicals and from {{ }} for Petroleum or Coal Products as shown in the following table.

[2] Effective January 1, 1976, STCC Section 49 was created to meet carriers' need to identify those commodities designated as hazardous by the U.S. Department of Transportation. STCC Section 49 reflects the type and level of hazard associated with the particular commodity being transported. STCC Section 49 codes are assigned to all proper shipping names listed in DOT's Hazardous Materials Table 172.101 that are matched to the appropriate STCC Product Class tariff description.

Table 3: Corrected Neels/Reynolds Table 4

Inbound Tonnage to Lake Charles Area, by Commodity, based on Traffic Tapes, 2012-2013

	Neels/Reynolds Original			**Corrected**		
	Tonnage %			**Tonnage %**		
Commodity	UP [5]	KCS [6]	BNSF [7]	UP [5]	KCS [6]	BNSF [7]
Petroleum Oil or Shale Oil, Crude	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}
Chemicals or Allied Products	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}
Petroleum or Coal Products	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}
Hazardous Materials (STCC 49)	*{{ }}*	*{{ }}*	*{{ }}*	*{{ }}*	*{{ }}*	*{{ }}*
Food or Kindred Products	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}
Transportation Equipment	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}
Clay, Concrete, Glass, or Stone Products	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}
Farm Products	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}
Primary Metal Products	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}
Metallic Ores	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}
Containers, Carriers or Devices	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}
Non-metallic Minerals	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}
Fabricated Metal Products	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}
Waste or Scrap Materials	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}
Electrical Machinery, Equipment, or Supplies	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}
Lumber or Wood Products, excluding Furniture	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}
Freight All Kinds	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}
Waste Hazardous Materials/Substances	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}

Source: Baranowski RVS Workpaper "Traffic Tape Analysis.xlsx" tab "Inbound Commodity Breakdown"

Fourth, regarding their analysis of the Board's confidential waybill data, Neels/Reynolds mistakenly omit approximately one-quarter of all 1997 records from the starting point of their analysis. This oversight affects the calculated traffic distributions and HHI index values for the base year. Correcting this error increases UP's 1997 calculated traffic distribution from {{ }} for inbound traffic and from {{ }} for outbound traffic, and decreases KCS's traffic distributions correspondingly. See Baranowski RVS Workpaper "Carload Waybill Sample Analysis.xlsx" tab "1997 to 2013 Tables".

Fifth, Neels/Reynolds mistakenly assert that the traffic distributions they reference from Dr. Grimm's testimony are tonnage based, when in fact those calculations are revenue based. Table 4 shows Dr. Grimm's relative percentages for inbound and outbound shipments based both on revenues as originally relied upon by Dr. Grimm and based on tons as now relied upon by Neels/Reynolds.[3]

Table 4: Figures from Dr. Grimm

Traffic Percentages in 1996 Testimony of Dr. Curtis Grimm

	Inbound		Outbound	
Carrier	**Percent Revenue (Neels/Reynolds Original)**	**Percent Tons**	**Percent Revenue (Neels/Reynolds Original)**	**Percent Tons**
KCS	{{ }}	{{ }}	{{ }}	{{ }}
UP	{{ }}	{{ }}	{{ }}	{{ }}
SP/BNSF	{{ }}	{{ }}	{{ }}	{{ }}

Source: Baranowski RVS Workpaper "Grimm Analysis.xlsx" tab "Percents"

Sixth, Neels/Reynolds present only the results of separately calculated inbound and outbound percentages. Because the amount of outbound tonnage from the Lake Charles area is approximately {{ }} the size of the inbound tonnage, Neels/Reynolds' presentation masks the fact that BNSF's calculated percentage of all traffic into and out of the Lake Charles area {{ }} the percentages of UP and KCS, respectively.[4] Table 5 shows the combined inbound and outbound calculated percentages for Dr. Grimm's 1996 results based on

[3] Excerpts of Dr. Grimm's 1996 testimony were produced as KCS-HC-3036-3037, copies of which are included in my work papers.
[4] See Baranowski RVS Workpaper "Carload Waybill Sample Analysis.xlsx" tab "1997 to 2013 Tables."

tons and Neels/Reynolds' 2012 and 2013 calculated percentages after making the corrections described above.

Table 5: Neels/Reynolds 2012-2013 Traffic Percentages Corrected and Combined

		Combined In/Outbound Percentages, by Tonnage based on Traffic Tapes, 2012-2013		
		Grimm Percent Tons	2012	2013
	Tonnage			
[1]	KCS	{{ }}	{{ }}	{{ }}
[2]	SP/BNSF	{{ }}	{{ }}	{{ }}
[3]	UP	{{ }}	{{ }}	{{ }}
[4]	Total	{{ }}	{{ }}	{{ }}
	Percentage			
[5]	KCS	{{ }}	{{ }}	{{ }}
[6]	SP/BNSF	{{ }}	{{ }}	{{ }}
[7]	UP	{{ }}	{{ }}	{{ }}

Source: Baranowski RVS Workpaper "Traffic Tape Analysis.xlsx" tab "In&Out Bound Market Shares"

III. COST DIFFERENCES BETWEEN SERVICE VIA RECIPROCAL SWITCH AND DIRECT SERVICE

I have been asked to estimate the cost differential to BNSF between service to customers on the Rose Bluff Lead via reciprocal switch and direct service. For purposes of my comparison, I developed cost estimates for service to the CITGO facility located on the Rose Bluff Lead and used the Board's Uniform Rail Costing System (URCS) and other applicable fees as a the basis for developing costs.

To calculate BNSF costs under UP reciprocal switch, I used BNSF's 2013 URCS system-average unit costs indexed to current levels and current UP reciprocal switch, handling and haulage fees under the merger Settlement Agreement provisions applicable to this service.

I calculated a variable cost to BNSF of {{ }} per car,[5] regardless of shipment size, to serve CITGO from Lacassine Yard under current UP reciprocal switch operations.

To calculate costs under BNSF direct service, I also used URCS system-average variable costs combined with a unit cost for trackage rights based on the current gross ton mile rate from the 50/50 Line Agreement. My costs for BNSF direct service from Lacassine Yard to CITGO are {{ }} per car for single car shipments, {{ }} per car for multiple car shipments and {{ }} per car for unit train shipments. As such, BNSF is paying significantly more per car for reciprocal switch service to CITGO compared to the URCS based cost of direct service. These results would be similar for other customers on the Rose Bluff Lead. Details of my cost comparisons are set forth in the following tables.

[5] Of BNSF's {{ }} in costs per car for reciprocal switch service, {{ }} represent reciprocal switch, haulage and handling fees paid to UP. Based on UP's 2013 URCS, UP's cost to provide reciprocal switch service between North Yard and CITGO is {{ }} per car for single car shipments and {{ }} per car for multiple car shipments. See Baranowski RVC Workpaper "Cost Difference Analysis.xlsx" tab "UP Fees and Costs."

Table 6: BNSF Switch Cost Via UP Reciprocal Switch Service

Loaded Car		
#1	{{ }}	{{ }}
#2	{{ }}	{{ }}
#3	{{ }}	{{ }}
#4	{{ }}	{{ }}
#5	{{ }}	{{ }}
#6	{{ }}	{{ }}
#7	{{ }}	{{ }}
Empty Car		
#8	{{ }}	{{ }}
#9	{{ }}	{{ }}
#10	{{ }}	{{ }}
#11	{{ }}	{{ }}
#12	{{ }}	{{ }}
#13	{{ }}	{{ }}
	BNSF Switch Cost Via UP Reciprocal Switch	**{{ }}**

Source: Baranowski RVC Workpaper "Cost Difference Analysis.xlsx" tab "BNSF Cost Difference"

Table 7: BNSF Switch Cost Via Direct Service

		Shipment Size		
		Single	Multiple	Unit
Loaded Car				
#1	{{ }}	{{ }}		
#2	{{ }}	{{ }}		
#3	{{ }}	{{ }}	{{ }}	{{ }}
#4	{{ }}	{{ }}	{{ }}	{{ }}
#5	{{ }}	{{ }}	{{ }}	{{ }}
Empty Car				
#6	{{ }}	{{ }}	{{ }}	{{ }}
#7	{{ }}	{{ }}	{{ }}	{{ }}
#8	{{ }}	{{ }}	{{ }}	{{ }}
#9	{{ }}	{{ }}		
#10	{{ }}	{{ }}		
	BNSF Switch Cost Via Direct Service	**{{ }}**	**{{ }}**	**{{ }}**

Source: Baranowski RVC Workpaper "Cost Difference Analysis.xlsx" tab "BNSF Cost Difference"

In addition to the {{ }}, the URCS formulas recognize the increased time required to perform railroad interchanges and allot an additional two days of elapsed time for the two interchange switches between BNSF and UP for service via reciprocal switch.

The {{ }} between BNSF service via reciprocal switch and BNSF direct service is not surprising. As detailed in Tables 6 and 7, service via reciprocal switch involves a {{ }} and includes the payment of a reciprocal switch fee, separate handling fees and a haulage fee to UP. It also requires two interchanges with UP – one each in the loaded and empty direction. Under the BNSF direct service alternative, BNSF crews and locomotives run directly from {{ }}. The {{ }} incurred by BNSF for service via reciprocal switch and the additional time required for the necessary interchanges with UP for service via reciprocal switch make BNSF both less cost and service competitive to shippers on the Rose Bluff Lead.

IV. POTENTIAL OPERATING WINDOWS

I have been asked by counsel to review data produced by KCS and UP in discovery in this proceeding to determine if operating windows sufficient to allow transit of BNSF trains exist routinely under current Rose Bluff Yard and Lead operating practices. KCS produced logs of when UP and KCS trains arrived and departed Rose Bluff Yard covering periods of May and June, 2014 and January and February, 2015,[6] as well as study of UP and KCS activity in Rose Bluff Yard during April 2014. UP, in response to supplemental discovery requests by BNSF, produced payroll information for its train crews working in the Rose Bluff Yard and on the Lead between January 2014 and July 2015. It also produced limited car event data for the same time

[6] Portions of these data are relied upon in KCS's V.S. of Richard Bartoskewitz at pages 5-6, in KCS's V.S. of Jimmy Wayne Scott at pages 7-8, and in KCS's V.S. of Steve Sullivan and John Ireland at page 12.

period indicating when UP trains and associated cars arrive or depart at Rose Bluff Yard and when cars are switched into and out of customers it serves along the Rose Bluff Lead.

Although much of the information produced by KCS and UP is not sufficiently detailed to identify the precise times and locations of trains operating in the Yard and on the Lead, the data suggest that openings do routinely exist, although not at the same time each day. My findings are summarized below.

A. Rose Bluff Yard Operating Windows

KCS-produced data showing when UP and KCS trains enter and exit Rose Bluff Yard for a time period covering May 1, 2014 through June 16, 2014.[7] The data show, by reported KCS and UP train symbol, the time window within Rose Bluff Yard occupied by each train each day. Figure 2 below charts the reported train yard occupancy times by train symbol and day between May 1, 2014 and June 16, 2014.[8]

[7] KCS also produced data for the January and February 2015 period, but this data did not include actual times when UP's YRB 65 entered the Rose Bluff Yard.

[8] A full-size version of this figure and supporting details are included in my work papers. See Baranowski RVC Workpaper "Operating Data Analysis.xlsx" tab "Yard Occupancy."

Figure 2

{{

}}

Source: Baranowski RVC Workpaper "Operating Data Analysis.xlsx" tab "Yard Occupancy" See also KCS-C-0319-0320

Gaps between vertical bars in Figure 2 indicate times when no train is reported by KCS as occupying the Rose Bluff Yard and shows that the times and duration of potential windows vary. I note that the KCS data does not include information on UP train YAK63, which I understand works in the Rose Bluff Yard in the late afternoon. The typical duration of the reported gaps for the trains that are reported by KCS occurring during UP's 12-hour operating period between 6AM and 6PM each day average {{ }}.

KCS also produced a study based on April 2014 data that concludes that Rose Bluff Yard was occupied {{ }} of the time by either UP or KCS, and that an average day had about {{ }} hour long windows with no trains in the yard. Figure 3 below is a replication of the study result produced by KCS.

Figure 3

{{

}}

Source: KCS-HC-0034

I also looked at a combination of KCS produced data and UP event data that report when certain UP trains exit and enter Rose Bluff Yard on both the north end of the Yard for trains enroute to and from UP's North Yard on the 50/50 Line and the south end for trains moving on the Lead to determine the presence of any potential operating windows. Figure 4 depicts with green bars, for the same time period for which KCS produced data depicted in Figure 2 above – May 1, 2014 through June 16, 2014 – the amount of time that {{ }}.

Figure 4

{{

}}

Source: Baranowski RVC Workpaper "Operating Data Analysis.xlsx" tab "Openings"
See also KCS-C-0319-0320 and UP-WLC-0000920

Figure 4 shows that {{ }}.

B. Rose Bluff Lead Operating Windows

From the customer switching event data provided by UP, I was able to identify the relative time of day that UP switches the individual customers it serves along the Rose Bluff Lead. Table 8 below identifies the relative percentage of industry switching that UP performs during each of eight three-hour time blocks during each day from January 2, 2014 to July 31, 2015. The results of my calculations are set forth in Table 8.

Table 8: UP Customer Switching by Time Block

Customer - 1/	Switch Train Designated by UP (UP-WLC-398)	Percent of Industry Switching Performed by Time of Day							
		12am to 3am	3am to 6am	6am to 9am	9am to 12pm	12pm to 3pm	3pm to 6pm	6pm to 9pm	9pm to 12am
{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}
{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}
{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}
{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}
{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}
{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}
{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}
{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}
{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}
{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}
{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}
{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}	{{ }}
1/ - {{ }}									

Source: Baranowski RVC Workpaper "Operating Data Analysis.xlsx" tab "Switching Times" See also UP-WLC-0000398(R) and UP-WLC-0000919

Table 8 shows that that vast majority of UP customer switching occurs outside of the {{ }} time blocks, suggesting that the Rose Bluff Lead is unlikely to be blocked by industry switching efforts during that time each day.[9]

[9] Table 8 shows that only {{ }} switching performed between {{ }}. UP's V.S. of Jamal Chappell and Michael Matya states that "most of YRB66's work is performed on spur tracks off the [lead]…but YRB 66 fouls (i.e. obstructs) the Lead while switching cars for customer facilities located closer to the lead." (page 12). Maps produced by UP indicate that {{ }} are located at the end of the spur furthest from the Lead (See UP-WLC-0000398(R)).

VERIFICATION

I, Michael R. Baranowski, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on October 22, 2015.

Michael R. Baranowski

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EDUCATION

B.S. in Accounting, Fairfield University

Supplemental Finance Studies, Kean College

Mike Baranowski heads FTI's Network Industries Strategies practice and provides strategic, financial and economic consulting services to the telecommunications and railroad and pipeline transportation industries. He has special expertise in analyzing and developing complex costing and cash flow models, conducting detailed operations analysis, and transportation engineering. Much of his work involves providing oral and written expert testimony before courts, arbitration panels and regulatory bodies.

He is a recognized expert in railroad regulatory economics and has assisted FTI's railroad clients in a broad range of litigation and regulatory engagements involving pricing of services, contract disputes, damage calculations and analyses of the specific effects of pending or proposed changes in policy or regulation.

Some of Mr. Baranowski's representative experience includes:

- Development of strategic litigation approach for large railroad rate proceedings based on the theory of Constrained Market Pricing and the Stand-Alone cost test. Theory assumes the existence of a hypothetical, efficient competitor and involves detailed analysis of railroad operations, expenses, captial expenditures and revenues.
- Development of a suite of modeling tools to assess the regulatory risk of railroad rates for a mix of commodities based on key cost drivers and forecasts.
- Design and development of modeling tools designed to simulate the cost of competitive entry into local telecommunications markets and directing the efforts of a nationwide team of testifying experts presenting the cost model results in multiple proceedings across the country.
- Detailed analysis, critique and restatement of complex cost models developed for the railroad, telecommunications, pipeline and trucking industries.
- Designing modeling tools for use in calculating the costs of competitive entry into railroad, telecommunications and pipeline markets.
- Conducting detailed analyses of railroad operations and developing the associated capital requirements and operating expenses attributable to specific movements and the incremental capital and operating expense requirements attributable to major changes in anticipated traffic levels.

Mr. Baranowski holds a B.S. in Accounting from Fairfield University in Fairfield, Connecticut and has pursued supplemental finance studies at Kean College in Union, New Jersey.

SELECT RAILROAD TESTIMONY

Surface Transportation Board

March 1, 2005	Docket No. 42071 Otter Tail Power Company v BNSF Railway Company, Supplemental Evidence of BNSF Railway Company
April 4, 2005	Docket No. 42071 Otter Tail Power Company v BNSF Railway Company, Reply of BNSF Railway Company to Supplemental Evidence
July 20, 2005	Docket No. 42088 Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Company, Reply Evidence of BNSF Railway Company
May 1, 2006	Docket No. Ex Parte 657 (Sub-No. 1) Major Issues in Rail Rate Cases, Verified Statement Supporting Comments of BNSF Railway Company
May 31, 2006	Ex Parte 657 (Sub-No. 1) Major Issues in Rail Rate Cases; Verified Statement Supporting Reply Comments of BNSF Railway Company
June 15, 2006	Docket No. 42088 Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Company, Reply Supplemental Evidence of BNSF Railway Company
June 15, 2006	Docket No. 41191 (Sub 1) AEP Texas North Company v. BNSF Railway Company, Reply Supplemental Evidence of BNSF Railway Company
June 30, 2006	Docket No. Ex Parte 657 (Sub-No. 1) Major Issues in Rail Rate Cases; Verified Statement Supporting Rebuttal Comments of BNSF Railway Company
February 4, 2008	Docket No. 42099 E.I. DuPont De Nemours and Company v. CSX Transportation, Inc., Opening Evidence of CSX Transportation, Inc.
February 4, 2008	Docket No. 42100 E.I. DuPont De Nemours and Company v. CSX Transportation, Inc., Opening Evidence of CSX Transportation, Inc.
February 4, 2008	Docket No. 42101 E.I. DuPont De Nemours and Company v. CSX Transportation, Inc., Opening Evidence of CSX Transportation, Inc.
May 1, 2008	Docket No. Ex Parte 679 Petition of the AAR to Institute a Rulemaking Proceeding to Adopt a Replacement Cost Methodology to Determine Railroad Revenue Adequacy, Verified Statement of Michael R. Baranowski
July 14, 2008	Docket No. 42088 Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Company, Third Supplemental Reply Evidence of BNSF Railway Company
July 14, 2008	Docket No. AB-515 (Sub-No. 2) Central Oregon & Pacific Railroad, Inc. -- Abandonment and Discontinuance of Service -- in Coos, Douglas, and Lane Counties, Oregon (Coos Bay Rail Line)
August 8, 2008	Docket No. 41191 (Sub-No. 1) AEP Texas North Company v. BNSF Railway Company, Fourth Supplemental Evidence of BNSF Railway Company
August 11, 2008	Docket No. 42104 Entergy Arkansas, Inc. and Entergy Services, Inc. v Union Pacific Railroad Company and Missouri & Northern Arkansas Railroad Company, Inc.; Finance Docket No. 32187 Missouri & Northern Arkansas Railroad Company, Inc. – Lease, Acquisition and Operations Exemption – Missouri Pacific Railroad Company and Burlington Northern Railroad Company, Reply Evidence and Argument of Union Pacific

September 5, 2008	Docket No. 41191 (Sub-No. 1) AEP Texas North Company v. BNSF Railway Company, Fourth Supplemental Reply Evidence of BNSF Railway Company
September 12, 2008	Docket No. AB-515 (Sub-No. 2) Central Oregon & Pacific Railroad, Inc. -- Abandonment and Discontinuance of Service -- in Coos, Douglas, and Lane Counties, Oregon (Coos Bay Rail Line); Rebuttal to Protests
August 24, 2009	Docket No. 42114 US Magnesium, L.L.C. v. Union Pacific Railroad Company, Opening Evidence of Union Pacific Railroad Company
October 22, 2009	Docket No. 42114 US Magnesium, L.L.C. v. Union Pacific Railroad Company, Rebuttal Evidence of Union Pacific Railroad Company
January 19, 2010	Docket No. 42110 Seminole Electric Cooperative, Inc. v. CSX Transportation, Inc., Reply Evidence of CSX Transportation, Inc.
May 7, 2010	Docket No. 42113 Arizona Electric Power Cooperative, Inc. v. BNSF Railway Company and Union Pacific Railroad Company, Joint Reply Evidence of BNSF Railway Company and Union Pacific Railroad Company
November 22, 2010	Docket No. 42088 Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Company, BNSF Comments on Remand, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
January 6, 2011	Docket No. 42056 Texas Municipal Power Agency v. BNSF Railway Company, BNSF Reply to TMPA Petition for Enforcement of Decision, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
October 28, 2011	Docket No. FD 35506 Western Coal Traffic League - Petition for Declaratory Order, Opening Evidence of BNSF Railway Company, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
November 10, 2011	Docket No. 42127 Intermountain Power Agency v. Union Pacific Railroad Company, Reply Evidence of Union Pacific Railroad Company
November 28, 2011	Docket No. FD 35506 Western Coal Traffic League - Petition for Declaratory Order, Reply Evidence of BNSF Railway Company, Joint Reply Verified Statement of Michael R. Baranowski and Benton V. Fisher
May 10, 2012	Docket No. 42056 Texas Municipal Power Agency v. BNSF Railway Company, BNSF Reply to TMPA Petition to Reopen and Modify Rate Prescription, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
November 30, 2012	Docket No. 42125 E.I. DuPont De Nemours & Company v. Norfolk Southern Railway Company, Reply Evidence of Norfolk Southern Railway Company
December 7, 2012	Docket No. Ex Parte 715, Rate Regulation Reforms, Reply Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski
January 7, 2013	Docket No. 42130 SunBelt Chlor Alkali Partnership v. Norfolk Southern Railway Company, Reply Evidence of Norfolk Southern Railway Company
March 1, 2013	Ex Parte No. 711 Petition for Rulemaking to Adopt Revised Competitive Switching Rules, Opening Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski and Richard W. Brown

April 12, 2013	Docket No. 42136 Intermountain Power Agency v. Union Pacific Railroad Company, Reply Evidence of Union Pacific Railroad Company
April 30, 2013	Ex Parte No. 711 Petition for Rulemaking to Adopt Revised Competitive Switching Rules, Reply Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski and Richard W. Brown
June 20, 2013	Ex Parte No. 431 (Sub-No. 4) Review of the General Purpose Costing System, Comments of the Association of American Railroads, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
September 5, 2013	Ex Parte No. 431 (Sub-No. 4) Review of the General Purpose Costing System, Reply Comments of the Association of American Railroads, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
July 21, 2014	Docket No. 42121 Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc., Reply Evidence of CSX Transportation, Inc.
September 5, 2014	Ex Parte No. 722 Railroad Revenue Adequacy, Opening Comments of Norfolk Southern Railway Company, Verified Statement of Michael R. Baranowski
November 4, 2014	Ex Parte No. 722 Railroad Revenue Adequacy, Reply Comments of Norfolk Southern Railway Company, Verified Statement of Michael R. Baranowski
September 4, 2015	Docket No. FD 35743 Application of the National Railroad Passenger Corporation Under 49 U.S.C. § 24308(a) - Canadian National Railway Company, Opening Evidence of Illinois Central Railroad Company and Grand Trunk Western Railroad, Joint Verified Statement of Michael Baranowski and Benton Fisher
October 7, 2015	Docket No. 42121 Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc., Supplemental and Compliance Evidence of CSX Transportation, Inc.

US District Court for Northern District of Oklahoma

January 2, 2007	Case No. 06-CV-33 TCK-SAJ, Grand River Dam Authority v. BNSF Railway Company; Report of Michael R. Baranowski
February 2, 2007	Case No. 06-CV-33 TCK-SAJ, Grand River Dam Authority v. BNSF Railway Company; Reply Report of Michael R. Baranowski

Circuit Court of Pulaski County, Arkansas

August 17, 2007	Case No. CV 2006-2711, Union Pacific Railroad v. Entergy Arkansas, Inc. and Entergy Services, Inc., Expert Witness Report of Michael R. Baranowski
December 14, 2007	Case No. CV 2006-2711, Union Pacific Railroad v. Entergy Arkansas, Inc. and Entergy Services, Inc., Reply Expert Witness Report of Michael R. Baranowski

U.S. District Court for the Eastern District of Wisconsin

February 15, 2008	Case No. 06-C-0515, Wisconsin Electric Power Company v. Union Pacific Railroad Company, Expert Reply Report of Michael R. Baranowski

Arbitrations and Mediations

March 7, 2005	Arbitration Case #181 Y 00490 04 BNSF Railway Company and J.B. Hunt Transport, Inc., Expert Report on behalf of BNSF Railway Company
March 28, 2005	Arbitration Case #181 Y 00490 04 BNSF Railway Company and J.B. Hunt Transport, Inc., Rebuttal Expert Report on behalf of BNSF Railway Company
April 12, 2005	Arbitration Case #181 Y 00490 04 BNSF Railway Company and J.B. Hunt Transport, Inc., Supplemental Expert Report on behalf of BNSF Railway Company
April 19, 2005	Arbitration Case #181 Y 00490 04 BNSF Railway Company and J.B. Hunt Transport, Inc., Supplemental Rebuttal Expert Report on behalf of BNSF Railway Company
April/May 2005	Arbitration Case #181 Y 00490 04 BNSF Railway Company and J.B. Hunt Transport, Inc., Hearings before Arbitration Panel
February 20, 2007	In the Matter of the Arbitration between the Detroit Edison Company, et al, and BNSF Railway Company, Expert Report of Michael R. Baranowski on behalf of BNSF Railway Company
March 19, 2007	In the Matter of the Arbitration between the Detroit Edison Company, et al, and BNSF Railway Company, Supplemental Expert Report of Michael R. Baranowski on behalf of BNSF Railway Company
February 12, 2009	In the Matter of the Arbitration between Wisconsin Public Service Corporation and Union Pacific Railroad Company, Rebuttal Expert Report of Michael R. Baranowski on behalf of Union Pacific Railroad Company
October 16, 2009	In the Matter of Arbitration Between Norfolk Southern Railway Company and Drummond Coal Sales, Inc., Expert Report of Michael R. Baranowski on behalf of Norfolk Southern Railway Company
July 25, 2011	American Arbitration Association Case No. 58 147 Y 0031809, BNSF Railway Company and Kansas City Southern Railway Company, Expert Report of Michael R. Baranowski on behalf of BNSF Railway Company
April 25, 2013	JAMS REF #1340009009, Union Pacific Railroad vs. Canadian Pacific and Dakota, Minnesota & Eastern Railroad Arbitration, Expert Report of Michael R. Baranowski on behalf of Union Pacific Railroad Company
September 6, 2013	IN JAMS ARBITRATION, Case No. 1220044715, Union Pacific Railroad Company v. BNSF Railway Company, Expert Report of Michael R. Baranowski
October 25, 2013	IN JAMS ARBITRATION, Case No. 1220044715, Union Pacific Railroad Company v. BNSF Railway Company, Expert Reply Report of Michael R. Baranowski
January 1, 2014	IN JAMS ARBITRATION, Case No. 1220044715, Union Pacific Railroad Company v. BNSF Railway Company, BNSF Post-Argument Submission, Affidavit of Michael R. Baranowski