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**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**

**REPLY OF CITGO PETROLEUM TO
BNSF APPLICATION FOR TERMINAL TRACKAGE RIGHTS**

Intervenor CITGO Petroleum Corporation (“CITGO”) hereby submits its Reply in Support of the Application for Terminal Trackage Rights (“Application”) filed by BNSF Railway Company (“BNSF”) in this proceeding.¹

I. INTRODUCTION

CITGO has requested that BNSF provide direct unit train service for crude oil shipments to CITGO’s Lake Charles Refinery located on the Rosebluff Industrial Lead (the “Rosebluff Lead”). Although CITGO currently receives limited manifest rail service for crude oil shipments via reciprocal switch service performed by Union Pacific Railroad Company (“UP”), that service is inefficient, unreliable and inadequate to meet CITGO’s current and future needs. Only BNSF is willing and able to provide the direct unit train rail service required to assure CITGO of a reliable supply of domestic crude oil for its Lake Charles Refinery.

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

BNSF's Application seeks terminal trackage rights over the Rosebluff Lead in order to provide the direct unit train service requested by CITGO. The Board has already determined that the public interest requires that BNSF have the authority to provide competitive direct service to CITGO and other Lake Charles shippers. Indeed, in order to preserve effective rail competition that would otherwise have been lost as a result of the proposed UP/SP merger, the Board specifically conditioned its approval of the UP/SP merger on the requirement that Lake Charles shippers have direct access to BNSF service (hereinafter, the "Lake Charles merger condition").

The grant of BNSF's Application for terminal trackage rights over the Rosebluff Lead is necessary to effectuate the Lake Charles merger condition imposed by the Board in the UP/SP merger proceedings and thereby preserve effective rail competition in the Lake Charles area. Accordingly, BNSF has a clear right to provide the direct unit train service over the Rosebluff Lead that CITGO needs. Moreover, as a direct and intended beneficiary of the Board-imposed Lake Charles merger condition, CITGO has a right to receive the direct competitive rail service that BNSF is willing and able to provide.

For the reasons set forth below, CITGO strongly supports the grant of terminal trackage rights to BNSF in this proceeding.

II. FACTUAL BACKGROUND

A. The CITGO Lake Charles Refinery

CITGO owns and operates an oil refinery located in Lake Charles, Louisiana (the "Lake Charles Refinery"). The Lake Charles Refinery is the fourth largest refinery in the United States, with the capacity to process 430,000 barrels of crude oil per day. The Lake Charles Refinery processes crude oil to produce gasoline, diesel and jet fuel as well as other products. The predictable, reliable, and economical supply of crude oil is critical to the efficient and profitable

operation of the Lake Charles Refinery. Verified Statement of Michael Barrett (hereinafter, “Barrett V.S.”) at ¶ 3.

In the past, the Lake Charles Refinery primarily received crude oil exclusively via marine, barge and pipeline transportation. Moreover, a substantial portion of the crude oil processed at the Lake Charles Refinery historically has been imported from outside the United States. However, the recent dramatic increase in domestic crude oil production in the United States has caused significant changes in the market for crude oil. The increased availability of domestic crude oil at favorable prices has made the use of domestic crude oil at the Lake Charles Refinery a competitive necessity. Barrett V.S. at ¶4.

Many of the new sources of domestic crude oil do not have access to the interstate crude oil pipeline system and cannot economically be transported to the Lake Charles Refinery by water, leaving rail as the only viable mode of transportation. As a result, rail transportation has become an increasingly important factor in the procurement and receipt of crude oil at the CITGO Lake Charles Refinery since 2012. Barrett V.S. at ¶ 5.

B. CITGO’s Investment in Rail Infrastructure

Recognizing the need for greater reliance on rail shipments for the delivery of domestic crude oil, and after discussions with UP and KCS, CITGO commenced a three-year project in 2011 to establish and upgrade a crude oil unloading facility at the Lake Charles Refinery in order to increase its capacity to receive and unload crude oil from railcars. CITGO has invested approximately \$6.5 million dollars since 2011 to increase the storage and capacity of its rail unloading infrastructure, including significant work to build, repair, maintain and interconnect track within the facility, as well as, upgrades to pumping equipment and piping capacity. These improvements have increased CITGO’s unloading capacity from about 12 railcars per day in late 2011 to more than 42 railcars per day today. Barrett V.S. at ¶ 6.

CITGO's facility for receiving and unloading crude oil transported in railcars is located off the Rosebluff Industrial Lead, a 9-mile track running southwest from the so-called 50/50 Line – a major rail line located north of the CITGO Lake Charles Refinery and operated jointly by BNSF and UP. The CITGO crude oil unloading facility for railcars is located approximately 5 miles south of the 50/50 Line. CITGO currently receives manifest rail service directly from UP and indirectly from BNSF and KCS via reciprocal switching provided by UP. Barrett V.S. at ¶ 7.

CITGO's rail unloading facility currently has the capacity to receive and store up to 161 rail cars. See Barrett V.S. at ¶ 8 and Exhibit A. Track 827, which runs around the perimeter of the CITGO property, has the capacity to hold 90 loaded railcars. In addition, the CITGO unloading facility has the capacity to store up to 71 empty railcars on Tracks 828-836 and interconnecting track. Id. (Interconnecting tracks are not shown on Exhibit A.) CITGO stages loaded cars in blocks of 12 railcars at two unloading stations located on Tracks 834 and 835. After unloading, empty railcars are moved to the empty car storage tracks. All of the staging and movement of railcars in connection with unloading and storage of empty railcars is conducted solely by CITGO on CITGO property using its own rail equipment. Barrett V.S. at ¶ 8.

C. BNSF's Proposed Unit Train Service

BNSF has proposed to provide direct unit train service of up to 60 railcars loaded with crude oil. The CITGO unloading facility is easily capable of efficiently receiving and processing a unit train of 60 railcars. In fact, UP has on at least 11 occasions delivered 50 or more railcars at a time in manifest service, and CITGO had no difficulty receiving, unloading and managing the loaded and empty railcars on those occasions. The 60-car BNSF unit train would be brought straight into the facility on Track 827 as one continuous train of loaded cars clearing the Rosebluff Lead. CITGO would stage and unload cars in blocks of 12. After unloading, empty

railcars would be moved to the empty storage locations on Tracks 828-832 at the East side of the facility. BNSF would then pull the empties at one time from the storage track. The drop off, staging, unloading, storage and pick up of railcars for a BNSF 60-car unit train service would all occur on CITGO property and would not require the use of tracks outside the CITGO facility except for ingress and egress. Barrett V.S. at ¶ 9.

D. Existing Manifest Service Via Reciprocal Switch Has Been Inadequate To Meet CITGO's Needs

CITGO has been receiving manifest rail service for crude oil shipments since 2012 from BNSF, UP and KCS. Irrespective of the originating rail carrier providing long haul service from sources of domestic crude oil, all rail shipments of crude oil have been delivered to CITGO's Lake Charles facility via reciprocal switch service provided by UP. CITGO has been advised by UP that UP assembles the manifest trains serving the CITGO facility at least in part in the Rosebluff Yard, a switching yard located on the Rosebluff Industrial Lead approximately 4.5 miles from the CITGO unloading facility. UP has repeatedly advised CITGO that because the Rosebluff Yard has limited capacity, is chronically congested, and cannot be expanded, significant increases in rail service to CITGO crude unloading facility cannot be accommodated. In addition, UP has repeatedly advised CITGO that, at least in part because of the limited capacity of the Rosebluff Yard, it cannot provide direct unit train service for crude oil shipments to the Lake Charles Refinery. Barrett V.S. ¶ 10.

The rail service CITGO has received via reciprocal switching since 2012 has not been adequate to meet CITGO's need for adequate, predictable, and reliable deliveries of domestic crude oil. The number of railcars delivered in manifest service via reciprocal switching has consistently fallen well short of the capacity of CITGO's railcar unloading facility. See Exhibit B to Barrett V.S. (showing the utilization rate for CITGO's track capacity for loaded cars at only

28% for a three-month period in 2014). In addition, the manifest service via reciprocal switching has been irregular and unpredictable, often resulting in days when no loaded railcars are delivered despite the presence of CITGO-destined railcars in the Rosebluff Yard. *See* Exhibit C to Barrett V.S. (showing no rail deliveries on 23% of days of the same three-month period in 2014). As a result, CITGO has not been able to operate its unloading facilities on an efficient 24-hour basis, and has frequently been required to suspend unloading activities for lack of delivery of enough loaded railcars. The inefficiencies in unloading activities caused by the lack of adequate and reliable rail service have denied CITGO the expected return on its investment in upgrading its rail infrastructure. In addition, as a result of the limited, irregular and disrupted service via reciprocal switch, CITGO has had to limit its purchases of crude oil from locations that require rail transportation, foregoing lost profit opportunities of as much as \$9 million per year. Barrett V.S. at ¶ 11.

When CITGO first approached UP in 2011 about receiving rail service for crude oil shipments at Lake Charles, UP claimed that a significant amount of track rehabilitation work on the Rosebluff Lead would be necessary before service could be provided. However, UP refused to commit to do the track work necessary for service, or to provide a timetable for when it would decide whether to proceed with the project. CITGO hired an expert consultant in rail operations, Richard McDonald, to evaluate the condition of the track and to recommend appropriate operating procedures for the relevant CITGO crude oil shipments. Mr. McDonald concluded that the track work required would not entail a significant investment and could be completed in a short period of time. UP did, in fact, complete the work necessary to begin to provide service to the Lake Charles Refinery, but only after CITGO sought the assistance of the Board's Rail Customer and Public Assistance office in February 2012. Barrett V.S. at ¶ 12.

Prior to agreeing to the commencement of rail service for crude oil shipments at CITGO's Lake Charles Refinery in 2012, UP and KCS cancelled their existing Industry Track Agreement ("ITA") for the CITGO facility signed in 1948, and required the execution of a new ITA that, at the railroads' insistence, arbitrarily limited the number of railcars that could be delivered to CITGO to 20 per day. The 1948 ITA governing rail service at the CITGO facility location did not limit of the number of cars that could be delivered per day. While CITGO objected to what seemed to be an arbitrary limitation of the railcars that could be delivered, it ultimately capitulated when UP and KCS made it clear that they would not agree to provide service without a new ITA and that any new ITA had to include that car limitation. Barrett V.S. at ¶ 13.

As a result of the limited service UP and KCS were willing to offer, CITGO began discussions with BNSF about receiving direct unit train service to CITGO's Lake Charles facility under rights granted to Lake Charles shippers and BNSF in the UP/SP merger proceeding. BNSF agreed to provide direct unit train service to CITGO's facility in mid-2012, and made arrangements to commence service in November 2012. However, BNSF's first attempt to provide direct train service to CITGO was blocked by UP and KCS, when they refused BNSF's train access to the Rosebluff Industrial Lead. BNSF subsequently filed its Application in this proceeding for confirmation of its right to provide direct service to CITGO. Barrett V.S. at ¶ 14.

While BNSF's application to the Board was pending, CITGO attempted to maximize the switched service that UP was willing to provide by upgrading its rail unloading facilities. UP was aware of CITGO's investments to upgrade and expand the receiving and unloading capacity of the CITGO facility. In fact, UP was kept apprised of CITGO's goals and needs, reviewed the track construction, and posed no objection to this project. CITGO expected that UP would agree

to increase the limit on service contained in the ITA as the capacity to receive, unload and store railcars increased. UP eventually did agree to increase the limit in the ITA from 20 to 30 railcars per day, but then interpreted the limit in the ITA to be – not the number of railcars delivered per day – but rather the number of railcars that could be located at the CITGO facility at one time. As a result, although CITGO had storage space for more than 160 railcars on its property, UP would not deliver loaded rail cars if there were 30 loaded or empty railcars already at the CITGO facility -- including any cars that were put aside for repairs. Barrett V.S. at ¶ 16.

Neither UP nor KCS would or could provide any logical or operational reasons for enforcing the ITA limitation on the number of railcars that could be delivered or stored at CITGO's facility. Nonetheless, the restriction on the number of loaded railcars delivered to CITGO was enforced by UP and/or KCS, even when loaded railcars in the Rosebluff Yard could have been delivered and stored at the CITGO facility to relieve congestion in the Rosebluff Yard. The limitation on the number of railcars that could be delivered or stored at CITGO's facility resulted in the rejection of BNSF railcars for interchange, return or storage of loaded railcars by BNSF, and on several occasions, the need to divert and transload crude oil from railcars to barge, substantially increasing the cost of delivery. To date, CITGO has been required to divert and transload to barge approximately 350,000 barrels of crude oil as a result of inadequate rail service via reciprocal switched service. Transloading railcars to barge involved an additional cost of approximately \$1.6 million for additional rail freight, inspection, fleeting services, terminal throughput, and barge transportation. Barrett V.S. at ¶ 17.

Although the railroad-imposed restrictions on the number of railcars that could be delivered or stored at the CITGO facility appears to have been eased as a result of the Board-ordered mediation during an earlier phase of this proceeding, rail service via reciprocal switch

remains inadequate. The switched rail service CITGO currently receives generally requires that railcars originating on BNSF's system be handled multiple times and stored in multiple yards before they are delivered by UP. The extra handling required for switched service increases the possibility of delays, disruptions and also raises possible safety and security concerns. In addition, the congestion and constrained capacity of the Rosebluff Yard and other nearby UP yards continue to be a significant factor limiting the volume and reliability of rail service via reciprocal switch, with little likelihood that UP's switched service can be improved in the future. The lack of adequate and reliable rail service for crude oil shipments limits CITGO's ability to benefit from favorably priced domestic crude oil and places the Lake Charles Refinery at a competitive disadvantage to refineries that do enjoy adequate rail service. Barrett V.S. at ¶ 18.

III. BNSF'S APPLICATION FOR TERMINAL TRACKAGE RIGHTS OVER THE ROSEBLUFF LEAD SHOULD BE GRANTED

A. Applicable Legal Standards

Section 11102(a) provides that the Board may require terminal facilities owned by one rail carrier to be used by another rail carrier if the Board finds that the use of such terminal facilities (1) is practicable, (2) will not substantially impair the ability of the incumbent rail carrier(s) to handle their own business, and (3) is in the public interest. *See* 49 U.S.C. § 11102(a). As set forth below, BNSF's Application satisfies all of the relevant requirements of Section 11102(a).²

² As discussed more fully below, in mandating that Lake Charles shippers have access to direct BNSF service on the Rosebluff Lead as an express condition for the approval of the UP/SP merger, the Board has already conclusively determined that BNSF access to the Rosebluff Lead is *required* to preserve the effective rail competition that existed at Lake Charles before the UP/SP merger. CITGO views the BNSF Application as only one means of effectuating the Board's Lake Charles merger condition. The Board clearly has the authority to enforce the Lake Charles merger condition granting Lake Charles shippers access to BNSF service through override under Section 11321(a) even if the requirements of Section 11102(a) could not be met.

B. BNSF's Direct Unit Train Service to CITGO Is Practicable And Will Not Substantially Impair The Operations Of UP Or KCS Over the Rosebluff Lead

The direct unit train service proposed by BNSF is clearly practicable and can be operated without substantially impairing the ability of UP or KCS to operate on the Rosebluff Lead.³ As a preliminary matter, UP does not appear to deny that BNSF's proposed service to CITGO would be practicable and would not substantially impair UP's ability to conduct its own business on the Rosebluff Lead. *See* UP Reply to BNSF Application at 6-7 (indicating that UP and BNSF have an established procedure for coordinating operations on jointly shared track). Perhaps more to the point, it is not at all clear that UP is in a position to argue – consistent with its agreements with BNSF and the Chemical Manufacturer's Association, and the Board's expansion and incorporation of those agreements into the Lake Charles merger condition – that any alleged impracticability or impairment of UP's operations would require denial of the BNSF Application. Indeed, it is difficult to see how UP could equitably take such a position, after having accepted the benefits of the Board's approval of the UP/SP merger subject to the condition that Lake Charles shippers have direct access to BNSF service on the Rosebluff Lead.

Similarly, KCS also appears to agree that unit train service to the Lake Charles Refinery is practicable. As noted in the Barrett Verified Statement, after KCS spent several days at the Lake Charles Refinery unloading facility examining the track and layout in July 2015, it advised CITGO that it intended to provide direct service for a block of 30 crude oil tank cars, rather than having them switched into the CITGO facility by UP. *See* Barrett V.S. at ¶ 15. Thus, KCS has itself apparently determined that the kind of service to CITGO's facility proposed by BNSF is practicable. CITGO was later advised, however, that UP blocked KCS from providing the direct

³ There appears to be no dispute that the Rosebluff Lead is a terminal facility for the purposes of Section 11102(a). *See Union Pacific Corporation et al. – Merger – Southern Pacific Rail Corporation et al.* (“UP/SP”), Finance Docket No. 32760, Decision No. 63, slip op. at 6, n. 22.

service, and instead required the 30-car block of tank cars to be dropped off at the Rosebluff Yard. UP ultimately delivered all 30 cars in one block to the CITGO facility.

Moreover, the proposed BNSF direct service to CITGO would not impair KCS operations over the Rosebluff Lead. BNSF's Application makes clear that its direct service to CITGO would operate only during UP's window of operations on the Rosebluff Industrial Lead, and thus would have no appreciable impact on KCS's operations. Since KCS suggested to CITGO in July 2015 that it could provide direct service for the block of 30 railcars during its own operating window without impacting UP's operations, it seems clear that BNSF could provide a similar service during UP's operating window without impacting KCS' operations on the Rosebluff Lead.

BNSF's Application also indicates that its direct unit train service will be more efficient than the current switched service, since BNSF will assemble the CITGO unit trains in its own yards, thus freeing up capacity in the congested UP/KCS Rosebluff Yard. Furthermore, as noted in the Barrett Verified Statement, the entire BNSF trains will move directly into and out of the CITGO facility as a unit without requiring any use of the Rosebluff Lead for staging or similar operations. Barrett V.S. at ¶ 9. As a result, the direct service proposed by BNSF will *reduce* the potential for current and future congestion at the Rosebluff Yard and allow for more efficient use of the Rosebluff Industrial Lead by both UP and KCS.

C. The Board Has Already Determined That Direct Competitive Service To The Lake Charles Area Is In The Public Interest.

BNSF's Application also clearly satisfies the public interest requirement of Section 11102(a). The Board has already expressly found in the UP/SP merger proceeding that the public interest in preserving effective rail competition *requires* that Lake Charles shippers have direct access to BNSF. *See* Decision No. 44 at 427-428; Decision No. 63 at 8-9. Indeed, the

Board refused to approve the UP/SP merger unless Lake Charles shippers were granted the unfettered right to direct service from BNSF.⁴

Since the Board has already made the determination that the public interest *requires* that Lake Charles shippers have direct access to BNSF service, it seems self-evident that the grant of trackage rights necessary to allow BNSF to fulfill its common carrier obligation to serve CITGO is also in the public interest. A contrary result would render illusory the very merger condition imposed by the Board in the UP/SP proceeding, and, at the very least, would seem to require a reopening of the UP/SP merger case.⁵

KCS has argued in discovery proceedings that it is necessary to conduct a “competitive analysis” of CITGO’s rail and non-rail transportation options in order to determine whether BNSF’s proposed direct unit train service for CITGO’s crude oil shipments is competitively necessary. Although KCS does not expressly say so, it appears to suggest that the public interest with respect to BNSF’s application must be determined with reference to the standard set forth in *Midtec Paper Corp. v. Chi. & Nw. Transp. Co.*, 3 I.C.C. 2d 171 (1986), *aff’d sub nom Midtec Paper Corp. v. United States*, 857 F.2d 1457 (D.C. Cir 1988), and the Intramodal Competitive Access Regulations (“CARs”), 49 C.F.R. Part 1144 (2014). *See* KCS Motion to Compel (BNSF) at 17, n.7 (citing *Midtec* decision).

However, the *Midtec* standard and the CARs simply do not apply to the circumstances in this case. The *Midtec* standard and the CARs set an “exacting” standard for requests to *create* rail competition by one railroad over the tracks of another where none had previously existed.

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

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

See Decision No. 44 at 448. The broader public interest standards in §§ 11102 and 11343, as applied to the imposition of competitive conditions in merger cases, are designed to address a completely different set of circumstances – the *preservation of existing* rail competition that would otherwise be lost as a result of a rail merger.

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

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

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

Decision No. 44 at 448-449. Consequently, since BNSF has already been granted direct access to CITGO under the Lake Charles merger condition, neither the CARs nor the *Midtec* analysis are relevant here.

KCS also has argued in discovery that although the Board clearly granted BNSF access to Lake Charles shippers in Decisions Nos. 44 and 63, it did not determine that direct access -- as opposed to service via reciprocal switch -- is required to provide effective competition. *See* KCS Motion to Compel (CITGO) at 14 (suggesting that while the Board may have granted BNSF access to Lake Charles shippers, it did not determine the “form or type” of access required to provide effective competition). Based upon this premise, KCS appears to contend that a competitive analysis is required to determine whether direct access is necessary or whether BNSF’s access to CITGO via reciprocal switch service is adequate to satisfy the merger conditions imposed by the Board in Decision Nos. 44 and 63. *Id.*

However, the language in the Board’s decisions in the UP/SP merger case, as well as the agreements upon which the Board’s merger conditions are based, make clear that BNSF was indeed granted direct access to the Rosebluff Industrial Lead. *See, e.g.*, Decision No. 44 at 428 (requiring removal of “geographic restrictions on direct BNSF service” to Lake Charles shippers); Decision No. 63 at 10 (referencing trackage rights under § 11102(a) as opposed to reciprocal switching under § 11102(c)). *See also* BNSF Agreement, § 5(c)(stating that BNSF access to 2-to-1 shippers shall be by direct or through reciprocal switch service); CMA Agreement, § 8 (providing for BNSF access to Lake Charles shippers on the same basis as available for 2-to-1 shippers in the BNSF Agreement).

Consequently, the Board’s decision in the UP/SP merger proceeding makes clear that the public interest standard applied in granting Lake Charles shippers direct access to BNSF service is the appropriate public interest standard to be applied here. Since the Board has already determined under that standard the public interest requires that Lake Charles shippers have direct

service from BNSF, the “competition analysis” suggested by KCS is unnecessary and irrelevant to BNSF’s application.

IV. CITGO HAS A RIGHT UNDER THE BOARD’S LAKE CHARLES MERGER CONDITION TO RECEIVE THE DIRECT UNIT TRAIN RAIL SERVICE FROM BNSF THAT IT NEEDS

A. CITGO Has A Right To Receive The Direct Unit Train Service That BNSF Proposes To Provide

Although BNSF was clearly an additional beneficiary of the Board’s rulings in Decision Nos. 44 and 63, the Board imposed the Lake Charles merger condition for the express purpose of protecting the interests of Lake Charles shippers like CITGO – specifically their right to effective rail competition via direct BNSF service. Accordingly, CITGO has a right to receive the proposed BNSF unit train service both under UP’s agreement with BNSF (the “BNSF Agreement”), UP’s agreement with BNSF and the Chemical Manufacturers Association (the “CMA Agreement”), as well as the Board’s decisions that expanded and imposed the provisions of those agreements as a condition of the UP/SP merger. *See* Decisions Nos. 44 and 63. Indeed, in Decision 44, the Board specifically required that Lake Charles shippers like CITGO be deemed intended beneficiaries of the BNSF Agreement capable of enforcing their rights thereunder. *See* Decision No. 44 at 247 n.15 (striking the “no third-party beneficiary” clauses in the BNSF and CMA Agreements, and specifically providing that Lake Charles shippers could enforce the terms of those Agreements).

As outlined in the Weicher Verified Statement accompanying the BNSF Application, UP and BNSF negotiated the BNSF Agreement during the pendency of the UP/SP merger proceeding to address the loss of rail competition at 2-to-1 points should the UP/SP merger be approved. The BNSF Agreement granted BNSF full access to shippers at 2-to-1 points, including the option to provide direct or switched service. However, the Chemical

Manufacturers Association (“CMA”), unhappy with the scope of the BNSF Agreement, negotiated with UP and BNSF for additional service options for chemical shippers, *inter alia*, in the Lake Charles area. Those negotiations resulted in the so-called CMA Agreement, which granted Lake Charles shippers – including shippers like CITGO on the Rosebluff Lead – the right to receive both direct and switched rail service from BNSF.⁶ The BNSF Agreement was subsequently amended to incorporate the additional rights granted to Lake Charles shippers in the CMA Agreement. *See* Exhibit 3 to the Weicher V.S., attached to the BNSF Application.

As a condition for approving the UP/SP merger, the Board in Decision No. 44 required UP to modify the BNSF Agreement to remove certain geographical restrictions on BNSF’s direct service to Lake Charles shippers and to eliminate “phantom” haulage charges. *See* Decision No. 44, at 427-428. The effect of the Board’s adoption of the BNSF and CMA Agreements with the Board-imposed modifications was to confirm and expand the right of Lake Charles shippers like CITGO to receive exactly the kind of competitive direct BNSF service that CITGO wants and needs for its Lake Charles Refinery.

KCS challenged the Board’s Lake Charles merger condition in a motion to reopen and reconsider Decision No. 44. KCS argued that BNSF should not be given direct access to Lake Charles shippers and also contended – as it apparently does here – that the access to BNSF service granted to Lake Charles shippers is unenforceable without KCS’ consent. In Decision No. 63, the Board rejected KCS’ motion for reconsideration, and reconfirmed that the public interest in preserving existing rail competition required that Lake Charles shippers be assured access to direct service from BNSF. *See* Decision No. 63, at 8-9. The Board also made clear in Decision No. 63 that the Board’s Lake Charles merger condition requiring direct BNSF access to

⁶ Section 8 of the CMA Agreement provides Lake Charles shippers with the same service options available to 2-to-1 points under the BNSF Agreement.

Lake Charles shippers could be enforced over the objection of KCS by the grant of terminal trackage rights under § 11102(a) or, if necessary, by override of KCS' contractual rights under § 11321(a). *Id.* at 9-10.

Consequently, CITGO has a clear and unequivocal right to receive the benefit of the Board's Lake Charles merger condition – in this case, direct unit train service from BNSF at its Lake Charles Refinery. Moreover, CITGO's rights under the Lake Charles merger condition are not contingent on any competitive analysis of whether CITGO “needs” BNSF direct service – that determination has already been made in Decisions Nos. 44 and 63 by the Board's finding that direct BNSF access to Lake Charles shippers is required to preserve effective rail competition that existed prior to the consummation of the UP/SP merger. Nonetheless, as set forth below, CITGO clearly does need direct unit train service from BNSF.

B. CITGO's Current Rail Service Via Reciprocal Switch Is Not Adequate To Meet Its Current And Future Needs

The manifest service CITGO currently receives via reciprocal switch is simply not adequate to meet the current and future needs of the Lake Charles Refinery. The efficient and profitable operation of a petroleum refinery requires a reliable and predictable supply of crude oil. Rail service via reciprocal switch has been neither reliable nor predictable. The artificial restriction on the number of railcars to be delivered imposed by UP and KCS in their Industry Track Agreement with CITGO, practical limitations on the level of switched rail service due to congestion and capacity constraints at the Rosebluff Yard, and the inherent inefficiencies of switched manifest service have severely limited the potential benefits of shipping crude oil by rail to the Lake Charles Refinery.

As set forth more fully in the Verified Statement of Michael Barrett, CITGO's existing rail service via reciprocal switch has resulted in persistent and significant under utilization of

CITGO's rail infrastructure. For example, utilization of CITGO track capacity during a three-month period in 2014 was less than 30%. Moreover, the significant number of days when no service is provided, coupled with the limited number of railcars that can be delivered on any day via reciprocal switch, has made efficient use of CITGO's rail unloading facility all but impossible.

The unreliable and unpredictable rail service at Lake Charles has also required that CITGO limit its purchases of domestic crude oil and made it difficult for CITGO to take advantage of favorable purchasing opportunities. In addition, disruptions and delays in the switched rail service at Lake Charles has required CITGO to reroute rail shipments of crude oil and transload them onto barges, at an additional cost of approximately \$1.6 million.

C. CITGO's Existing Rail Infrastructure Is Clearly Capable Of Handling The Proposed BNSF Unit Train Service

The CITGO Lake Charles Refinery is capable of efficiently handling the 60-railcar unit train service BNSF is prepared to provide. The Lake Charles refinery has sufficient track to store up to 90 loaded railcars and additional track sufficient to hold 71 empty railcars. Moreover, the CITGO rail facilities at Lake Charles will allow BNSF to drop off and pick up 60-railcar unit trains entirely on CITGO property. Since BNSF will assemble the CITGO unit train at BNSF's own yards in the Lake Charles area, the direct BNSF service to CITGO will also relieve congestion at the Rosebluff Yard and result in more efficient use of the Rosebluff Lead.

D. BNSF's Direct Unit Train Service Will Be More Efficient And Reliable, And Will Better Enable CITGO To Effectively Compete In The Marketplace

CITGO has requested that BNSF provide direct unit train service to CITGO's crude oil unloading facility in order to increase the volume and reliability of its rail service. CITGO expects to obtain a number of benefits from BNSF's direct unit train service. First, direct unit train service by BNSF will allow for the delivery of more railcars on a regular and predictable

schedule than the current switched service. Since BNSF will assemble the CITGO unit train at BNSF's nearby Lacassine Yard, BNSF's direct service will not be affected by the congestion and constrained capacity of the Rosebluff Yard. Second, BNSF's more stable and predictable service will allow CITGO to more efficiently utilize its unloading facilities to maximize the return on its investment in rail infrastructure and enjoy the benefit of increasing its access to lower priced domestic crude oil. Third, more efficient and reliable rail service will allow CITGO greater flexibility both in purchasing crude oil at locations served by BNSF and scheduling deliveries of domestic crude oil by rail. Fourth, since most of the sources from which CITGO purchases domestic crude oil requiring rail transportation originate on BNSF's lines, direct service by BNSF will allow CITGO to obtain the benefits of single line service for the majority of its rail shipments, including reduced transit times, greater and more efficient utilization of cars, and greater safety and security due to decreased handling and interchange of railcars loaded with crude oil. Finally, obtaining adequate rail service for favorably priced domestic crude oil will allow CITGO's Lake Charles Refinery to more effectively compete in the market for refined petroleum products. *See Barrett V.S. at ¶ 19.*

V. CONCLUSION

For all the forgoing reasons, Intervenor CITGO respectfully requests that BNSF's Application for Terminal Trackage Rights in order to serve CITGO's Lake Charles Refinery be granted.

Respectfully submitted,



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*Counsel for CITGO Petroleum
Corporation*

Dated: August 24, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of August, 2015, copies of the foregoing Reply of CITGO Petroleum to BNSF Application For Terminal Trackage Rights have been served by email on all parties of record in Finance Docket No. 32760 (Sub-No.46).


Edward D. Greenberg

**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**

VERIFIED STATEMENT OF MICHAEL BARRETT

I, Michael Barrett, am making this verified statement in support of CITGO's position supporting BNSF's Application for Terminal Trackage Rights in Finance Docket No. 32760 (Sub-No. 46) before the Surface Transportation Board, and more specifically to explain why direct unit train service from BNSF at CITGO's Lake Charles refinery is both necessary and operationally feasible.

1. I am currently employed by CITGO Petroleum Corporation ("CITGO") as the Area Manager for Oil Movement. My business address is 4401 Hwy 108, Lake Charles, LA 70601. My responsibilities as Area Manager for Oil Movement include the receipt and unloading of crude oil shipments by rail and other modes of transportation at the CITGO refinery facility in Lake Charles, Louisiana. I am intimately familiar with the layout, operation, and unloading and storage capacity of the rail unloading facilities at the CITGO Lake Charles refinery facility, as well as the improvements and expansions that CITGO has made since 2012 to increase the efficiency and unloading capacity at the Lake Charles refinery. I am also familiar with the frequency, volume, limitations, and shortcomings of the rail service CITGO has received via reciprocal switch since 2012.

2. Prior to assuming my current position in mid-2014, I was CITGO's Lead Crude Trader, operating out of CITGO's office located at 1293 Eldridge Parkway, Houston, Texas 77077. My responsibilities as Lead Crude Trader for CITGO included purchasing and coordinating the transportation of crude oil rail shipments to CITGO's Lake Charles Refinery. As a result, I am familiar with the marketplace for crude oil in the United States as well as the changes in domestic crude production that have led to CITGO's increased need to receive deliveries of crude oil via rail transportation.

3. CITGO owns and operates an oil refinery located in Lake Charles, Louisiana (the "Lake Charles Refinery"). The Lake Charles Refinery is the fourth largest refinery in the United States, with the capacity to process 430,000 barrels of crude oil per day. The Lake Charles Refinery processes crude oil to produce gasoline, diesel and jet fuel as well as other products. The predictable, reliable, and economic supply of crude oil is critical to the efficient and profitable operation of the Lake Charles Refinery.

4. In the past, the Lake Charles Refinery primarily has received crude oil primarily via marine, barge and pipeline transportation. Historically, a significant portion of the crude oil processed at the Lake Charles Refinery has been imported from outside the United States. However, the recent dramatic increase in domestic crude oil production in the United States has caused significant changes in the market for crude oil. The increased availability of domestic crude oil at favorable prices has made the increased use of domestic crude oil at the Lake Charles Refinery a competitive necessity.

5. An increasing number of new sources of domestic crude oil do not have access to the interstate crude oil pipeline system and cannot economically be transported to the Lake Charles Refinery by water, leaving rail as the only viable mode of transportation. As a result,

rail transportation has become an increasingly important factor in the procurement and receipt of crude oil at the CITGO Lake Charles Refinery since 2012.

6. Recognizing the need for increased reliance on rail shipments for the delivery of domestic crude oil, and after discussions with UP and KCS, CITGO commenced a three-year project in 2011 to establish and upgrade a crude oil unloading facility at the Lake Charles Refinery in order to increase its capacity to receive and unload crude oil from railcars. CITGO has invested approximately \$6.5 million dollars since 2011 to increase the storage and capacity of its rail unloading infrastructure, including significant work to build, repair, maintain and interconnect track within the facility, as well as, upgrades to pumping equipment and piping improvements. These improvements have increased CITGO's unloading capacity from about 12 railcars per day in late 2011 to more than 42 railcars per day today.

7. CITGO's facility for receiving and unloading crude oil transported in railcars is located off the Rosebluff Industrial Lead, a 9-mile track running southwest from the so-called 50/50 Line – a major rail line located north of the CITGO Lake Charles Refinery and operated jointly by BNSF and UP. The CITGO crude oil unloading facility for railcars is located approximately 5 miles south of the 50/50 Line. CITGO currently receives manifest rail service directly from UP and indirectly from BNSF and KCS via reciprocal switching provided by UP.

8. CITGO's rail unloading facility currently has the capacity to receive and store up to 161 rail cars. Track 827, which runs around the perimeter of the CITGO property, has the capacity to hold 90 loaded railcars. In addition, the CITGO unloading facility has the capacity to store up to 71 empty railcars on Tracks 828-836 and interconnecting track not shown on Exhibit A. CITGO stages loaded cars in blocks of 12 railcars at two unloading stations located on Tracks 834 and 835. After unloading, empty railcars are moved to the empty car storage tracks.

All of the staging and movement of railcars in connection with unloading and storage of empty railcars is conducted solely by CITGO on CITGO property using its own rail equipment.

9. BNSF has proposed to provide direct unit train service of up to 60 rail cars loaded with crude oil. The CITGO unloading facilities are easily capable of efficiently receiving and processing a unit train of 60 railcars. In fact, UP has on at least 11 occasions delivered 50 or more railcars at a time in manifest service, and CITGO had no difficulty receiving, unloading and managing the loaded and empty railcars on those occasions. The 60-car BNSF unit train would be brought into the facility on Track 827 as one continuous train of loaded cars. CITGO would stage and unload cars in blocks of 12. After unloading, empty railcars would be moved to the empty storage locations on Tracks 828-832 at the East side of the facility. BNSF would then pull the empties at one time from the storage track. The delivery, staging, unloading, storage and pick up of railcars for a BNSF 60-car unit train service would all occur on CITGO property and would not require the use of tracks outside the CITGO facility.

10. CITGO has been receiving manifest rail service for crude oil shipments since 2012 from BNSF, UP and KCS. Irrespective of the originating rail carrier providing long haul service from sources of domestic crude oil, rail shipments of crude oil have been delivered to CITGO's Lake Charles facility via reciprocal switch service provided by UP. CITGO has been advised by UP that UP assembles the manifest trains serving the CITGO facility at least in part in the Rosebluff Yard, a switching yard located on the Rosebluff Industrial Lead approximately 4.5 miles from the CITGO unloading facility. UP has repeatedly advised CITGO that because the Rosebluff Yard has limited capacity, is chronically congested, and cannot be expanded, significant increases in rail service to CITGO crude unloading facility cannot be accommodated. In addition, UP has repeatedly advised CITGO that, at least in part because of the limited

capacity of the Rosebluff Yard, it cannot provide direct unit train service for crude oil shipments to the Lake Charles Refinery.

11. The rail service CITGO has received via reciprocal switching since 2012 has not been adequate to meet CITGO's need for adequate, predictable, and reliable deliveries of domestic crude oil. The number of railcars delivered in manifest service via reciprocal switching has consistently fallen well short of the capacity of CITGO's railcar unloading facility. In addition, the manifest service via reciprocal switching has been irregular and unpredictable, often resulting in days when no loaded railcars are delivered. As a result, CITGO has not been able to operate its unloading facilities on an efficient 24-hour basis, and has frequently been required to suspend unloading activities for lack of delivery of enough loaded railcars. The inefficiencies in unloading activities caused by the lack of adequate and reliable rail service have denied CITGO the expected return on its investment in upgrading its rail infrastructure. In addition, as a result of the limited, irregular and disrupted service via reciprocal switch, CITGO has had to limit its purchases of crude oil from locations that require rail transportation, foregoing lost profit opportunities of as much as \$9 million per year.

12. When CITGO first approached UP in 2011 about receiving rail service for crude oil shipments at Lake Charles, UP claimed that a significant amount of track rehabilitation work on the Rosebluff Lead would be necessary before service could be provided. However, UP refused to commit to do the track work necessary for service, or to provide a timetable for when it would decide whether to proceed with the project. CITGO hired an expert consultant in rail operations, Richard McDonald, to evaluate the condition of the track and to recommend appropriate operating procedures for the relevant CITGO crude oil shipments. Mr. McDonald concluded that the track work required would not entail a significant investment and could be

completed in a short period of time. UP did, in fact, complete the work necessary to begin to provide service to the Lake Charles Refinery, but only after CITGO sought the assistance of the Board's Rail Customer and Public Assistance office in February 2012.

13. Prior to agreeing to the commencement of rail service for crude oil shipments at CITGO's Lake Charles Refinery in 2012, UP and KCS cancelled the existing Industry Track Agreement ("ITA") signed in 1948, and required the execution of a new ITA that, at the railroads' insistence, arbitrarily limited the number of railcars that could be delivered to CITGO to 20 per day. The 1948 ITA governing rail service at the CITGO facility location did not limit of the number of cars that could be delivered per day. While CITGO objected to what seemed to be an arbitrary limitation of the railcars that could be delivered, it ultimately capitulated when UP and KCS made it clear that they would not agree to provide service without a new ITA and that any new ITA had to include that car limitation.

14. As a result of the limited service UP and KCS were willing to offer, CITGO began discussions with BNSF about receiving direct unit train service to CITGO's Lake Charles facility under rights granted to BNSF and Lake Charles shippers in the UP/SP merger proceedings. BNSF agreed to provide direct unit train service to CITGO's facility in mid-2012, and made arrangements to commence service in November 2012. However, BNSF's first attempt to provide direct train service to CITGO was blocked by UP and KCS, when they refused BNSF's train access to the Rosebluff Industrial Lead. BNSF subsequently filed its application in this proceeding for confirmation of its right to provide direct service to CITGO.

15. Interestingly, in July of this year, representatives of the KCS spent several days at CITGO's Lake Charles Refinery examining the company's track facilities as well as the connection off the Rosebluff Lead track. They advised us at that time that they had a block of 30

crude tank cars in the KCS system and that they wanted to deliver all 30 cars directly into the plant, rather than having them switched into the facility by UP. However, although these cars were scheduled by KCS to be delivered on August 2, 2015, KCS was unable to do so despite what their local roadmaster described as several attempts that were made over the next few days. The KCS roadmaster advised that UP blocked KCS from providing this service even though KCS indicated that they could and would work around the UP operating hours on the Rosebluff Lead. Instead, UP required that KCS drop the cars into the Rosebluff Yard. UP ultimately delivered all 30 cars in a block to CITGO on August 8.

16. While BNSF's application to the Board was pending, CITGO attempted to maximize the switched service that UP was willing to provide by upgrading its rail unloading facilities. UP was aware of CITGO's investments to upgrade and expand the receiving and unloading capacity of the CITGO facility. In fact, UP was kept apprised of CITGO's goals and needs, reviewed the track construction, and posed no objection to this project. CITGO expected that UP would agree to increase the limit on service contained in the ITA as the capacity to receive, unload and store railcars increased. UP eventually did agree to increase the limit in the ITA from 20 to 30 railcars per day, but then interpreted the limit in the ITA to be – not the number of railcars delivered per day – but rather the number of railcars that could be located at the CITGO facility at one time. As a result, although CITGO had storage space for more than 160 railcars on its property, UP would not deliver loaded rail cars if there were 30 loaded or empty railcars already at the CITGO facility -- including any cars that were put aside for repairs.

17. Neither UP nor KCS could or would provide any logical or operational reasons for enforcing the ITA limitation on the number of railcars that could be delivered or stored at CITGO's facility. Nonetheless, the restriction on the number of loaded railcars delivered to

CITGO was enforced by UP and/or KCS, even when loaded railcars in the Rosebluff Yard could have been delivered and stored at the CITGO facility to relieve congestion in the Rosebluff Yard. The limitation on the number of railcars that could be delivered or stored at CITGO's facility resulted in the rejection of BNSF railcars for interchange, return or storage of loaded railcars by BNSF, and on several occasions, the need to divert and transload crude oil from railcars to barge, substantially increasing the cost of delivery. To date, CITGO has been required to divert and transload to barge approximately 350,000 barrels of crude oil at an additional cost of approximately \$1.6 million for additional rail freight, inspection, fleeting services, terminal throughput, and barge transportation.

18. Although the railroad-imposed restrictions on the number of railcars that could be delivered or stored at the CITGO facility appears to have been eased as a result of the mediation that was ordered during an earlier phase of this proceeding, rail service via reciprocal switch remains problematic. The switched rail service CITGO currently receives generally requires that railcars originating on BNSF's system be handled multiple times and stored in multiple yards before they are delivered by UP. The extra handling required for switched service increases the possibility of delays, disruptions and also raises possible safety and security concerns. In addition, the congestion and constrained capacity of the Rosebluff Yard and other nearby UP yards continue to be a significant factor limiting the volume and reliability of rail service via reciprocal switch, with little likelihood that UP's switched service can be improved in the future. The lack of adequate and reliable rail service for crude oil shipments limits CITGO's ability to benefit from favorably priced domestic crude oil and places the Lake Charles Refinery at a competitive disadvantage to refineries that do enjoy adequate rail service.

19. CITGO has requested that BNSF provide direct unit train service to CITGO's crude oil unloading facility in order to increase the volume and reliability of its rail service. CITGO expects to obtain a number of benefits from direct unit train service. First, direct unit train service by BNSF will allow for the delivery of more railcars on a regular and predictable schedule than the current switched service. Since BNSF will assemble the CITGO unit train at BNSF's nearby Lacassine Yard, BNSF's direct service will not be affected by the congestion and constrained capacity of the Rosebluff Yard. Second, BNSF's more stable and predictable service will allow CITGO to more efficiently utilize its unloading facilities to maximize the return on its investment in rail infrastructure and enjoy the benefit of increasing its access to lower priced domestic crude oil. Third, this increased reliability of rail service will allow CITGO greater flexibility in purchasing crude oil at locations served by BNSF and scheduling deliveries of domestic crude oil by rail. Fourth, since most of the sources from which CITGO purchases domestic crude oil requiring rail transportation originate on BNSF's lines, direct service by BNSF will allow CITGO to obtain the benefits of single line service for the majority of its rail shipments, including reduced transit times, greater and more efficient utilization of cars, and greater safety and security due to decreased handling and interchange of railcars loaded with crude oil.

I hereby certify that the above information is accurate and complete to the best of my knowledge, information and belief.

Executed this 20 day of August, 2015



Michael Barrett
Area Manager for Oil Movement

STATE OF LOUISIANA :
COUNTY OF Calcasieu : SS:
Parish :

On this day, August 20, 2015, Michael Barrett, Area Manager for Oil Movement, appeared before me; and upon his oath did swear that the statements contained in his Verified Statement of even date herewith and the statements therein contained are true and correct to the best of his knowledge.

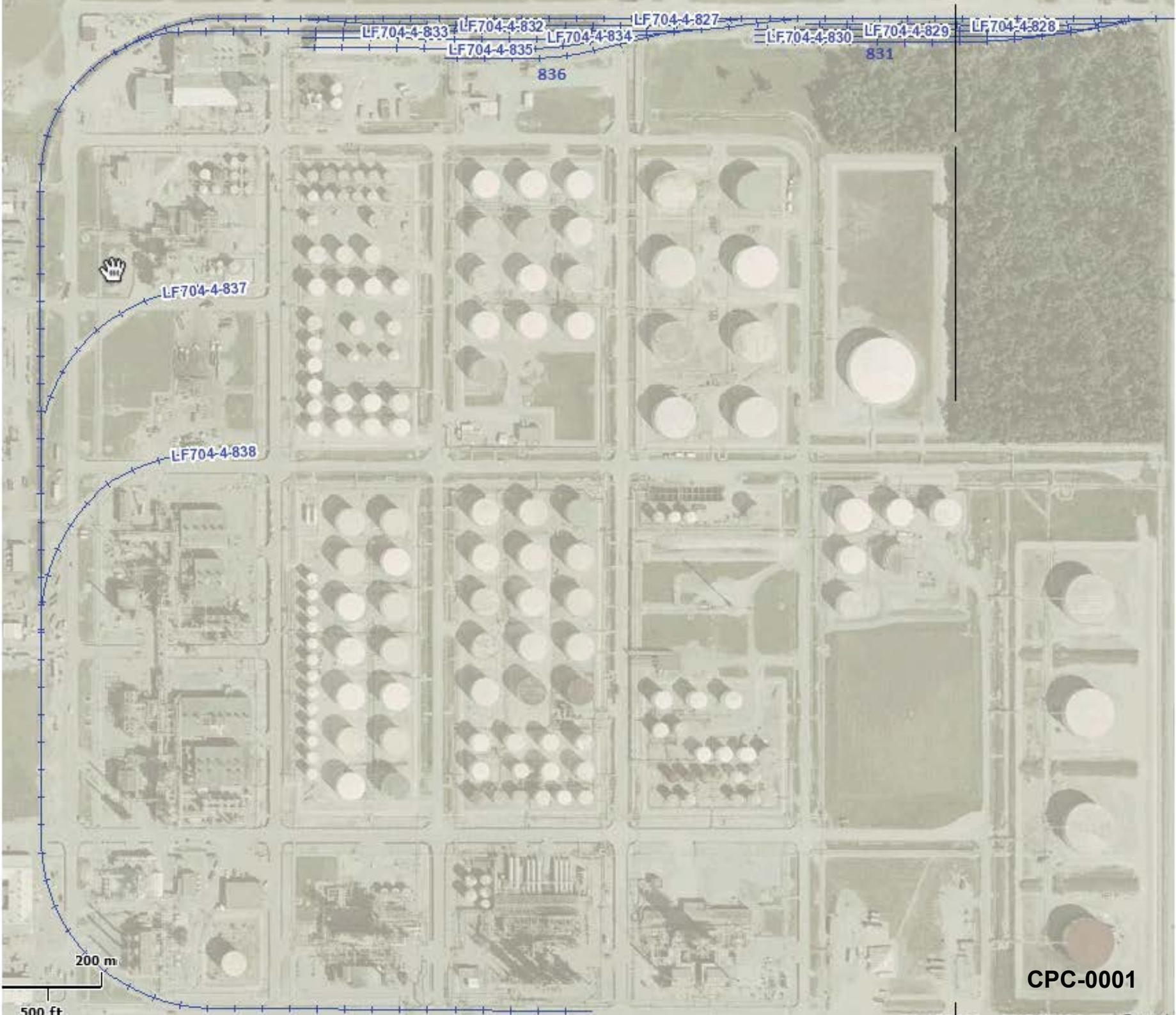


Notary Public
Charles N. Harper

My commission expires: at death

Bar ID# 01069

EXHIBIT A



LF704-4-833 LF704-4-832 LF704-4-827 LF704-4-830 LF704-4-829 LF704-4-828

836

831



LF704-4-837

LF704-4-838

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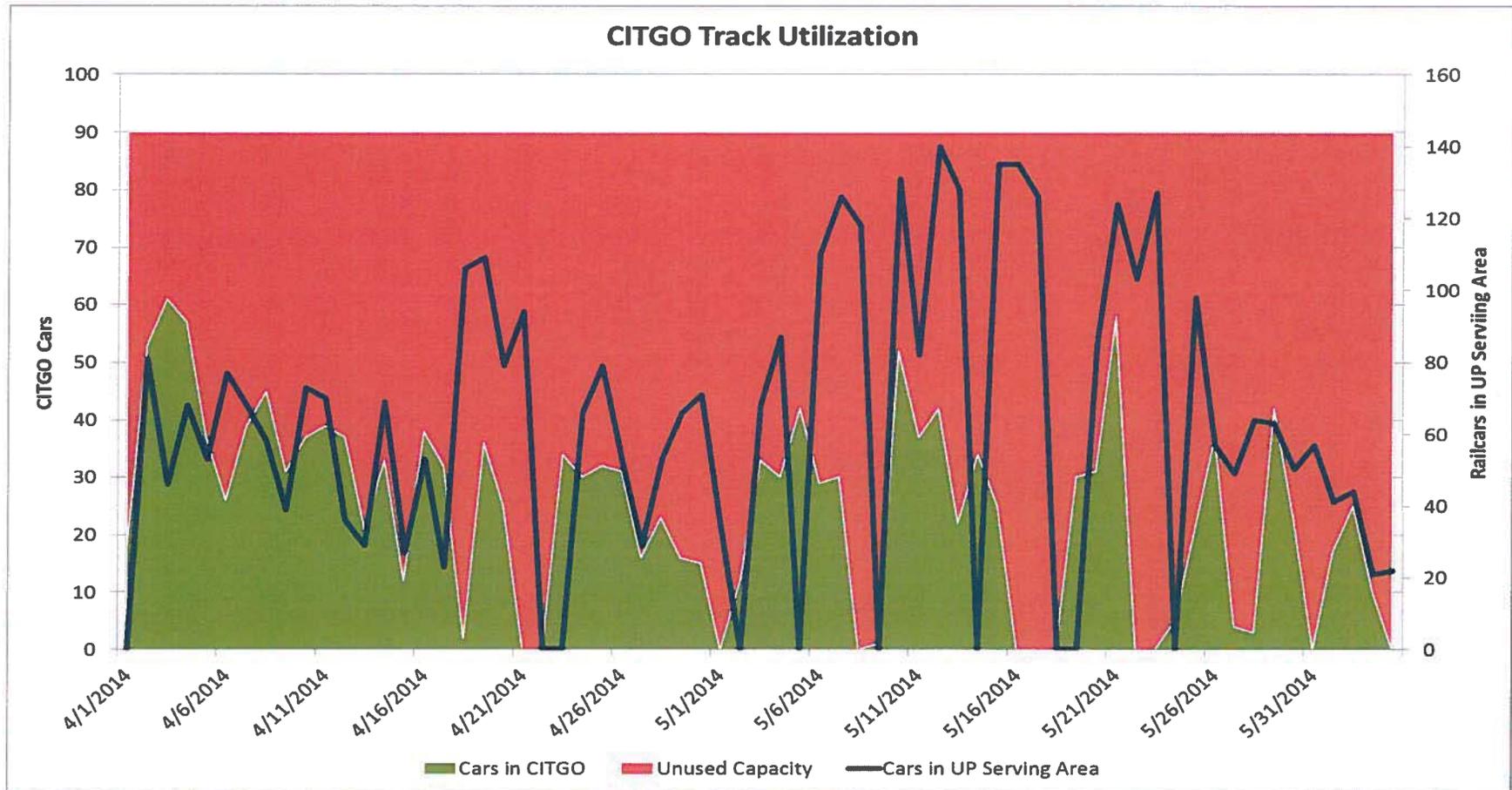
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EXHIBIT B

CITGO Rail Utilization

- CITGO's track capacity for full cars is only 28% utilized.
- Numerous full cars have been returned to Lafayette, while CITGO has spare track capacity.



CONFIDENTIAL

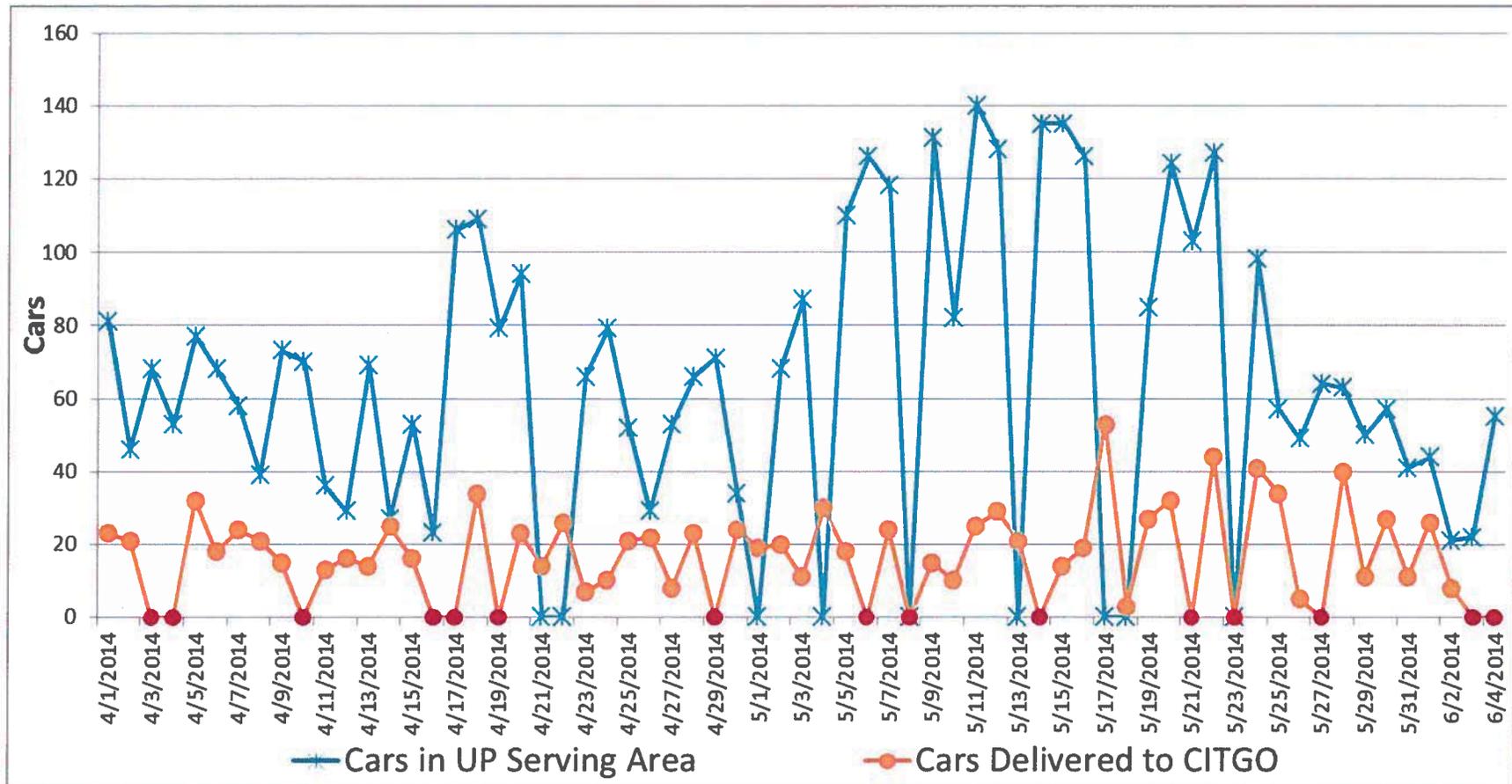


EXHIBIT C

Lack of Service to CITGO

UP has cars in the serving area, but fail to deliver.

23% of days UP does not provide service.



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