UP-94/NS-93

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36873

UNION PACIFIC CORPORATION AND UNION PACIFIC RAILROAD COMPANY
—CONTROL—
NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY

APPLICANTS' RESPONSE REGARDING THEIR PRIMA FACIE CASE

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In this document, Highly Confidential material is enclosed in double braces. Highly Confidential material is redacted from the public version of the document filed at the Board.

I. Applicants Have Presented A Prima Facie Case.

There can be no dispute that Applicants have presented a prima facie case in support of the proposed transaction. As the Board noted in Decision No. 30, many of the claims presented by BNSF, CPKC, CSX, the Joint Shipper Associations ("JSA"), and others "focus on merits-related issues." Decision No. 30 at 4. Those claims are neither relevant to the prima facie inquiry nor correct.

The prima facie inquiry asks whether a merger application presents facts, "construed in their most favorable light," sufficient to support a finding that the transaction is "consistent with the public interest." 49 C.F.R. § 1180.4(c)(8). The application meets the standard as long as it "contain[s] enough evidence to enable the [Board] to exercise its statutory responsibilities." *Union Pac. Corp.—Control—Chicago & N. W. Holdings Corp.* ("*UP—Control—CNW*"), 9 I.C.C.2d 939, 950 (1993).

Here, the Amended Application presents "facts" reflecting an unprecedented level of evidence, including robust expert analysis. The facts in the record reflect months of hard work—both by Applicants and by the Board—to ensure that the Board has sufficient evidence to exercise its statutory responsibilities and properly evaluate the proposed transaction.

Construing all of the evidence in the light most favorable to Applicants, the Amended Application indisputably presents facts that are more than sufficient to show the merger is consistent with the public interest. The Amended Application and supplemental filings provided at the Board's request contain voluminous evidence that the UP/NS merger will produce significant public benefits and will not produce any significant harms.

In that context, filings by opponents of the transaction are properly seen as thinly disguised efforts to steal additional bites at the apple for their merits-related arguments. Those arguments are not well-taken. Merits-related disagreements do not bear on the prima facie analysis; opponents of the transaction may dispute this evidence or disagree with Applicants' conclusions. But arguments between Applicants and opponents regarding the merits of the proposed transaction have no bearing on the question of whether Applicants have presented a prima facie case. And more fundamentally, as detailed in Applicants' submissions and summarized below, the opponents' arguments are wrong—they do nothing to undermine the conclusion that the proposed transaction meets every element of the relevant statutes and regulations and is consistent with the public interest.

A. Applicants' Evidence Shows the Merger Will Produce Substantial Public Benefits.

The Board's regulations explain that the public benefits from a merger include "improved service and safety, enhanced competition, and greater economic efficiency." 49 C.F.R. § 1180.1(c). These benefits can be achieved by "eliminating transaction cost barriers between firms, increasing the productivity of investment, and enabling carriers to lower costs through economies of scale, scope, and density." *Id.* § 1180.1(c)(1). Applicants' evidence shows the transaction will result in each of these types of benefits.

Before turning to the specific benefits addressed by the Board's regulations, the governing standard of review bears mention. The prima facie inquiry is about sufficiency of evidence, not whether challengers can present contrary evidence or whether the Board agrees in some or all respects with the conclusions that Applicants draw from their evidence. The only question is whether the application "contain[s] enough evidence to enable the [Board] to exercise its statutory responsibilities" and "rationally to apply the criteria of [49 U.S.C. § 11324(b)]." *UP—Control—CNW*, 9 I.C.C.2d at 950.[1]

Applicants can fail to present a prima facie case only by "(i) disclosing facts that, even if construed in their most favorable light, are insufficient to support a finding that the proposal is consistent with the public interest, or by (ii) disclosing facts that affirmatively demonstrate that the proposal is not in the public interest." *Id.*; *see also Railroad Consolidation Procedures*, 363 I.C.C. 767, 769 & n.6 (1980).

As demonstrated below, the Amended Application does not fail under either of those prongs, and there can be no doubt that the Amended Application contains more than enough evidence to enable the Board to exercise its statutory responsibilities.

1. Improved Single-Line Service

Through the merger, UP and NS will establish America's first transcontinental railroad. UP/NS will operate as a unified network, and the Amended Application provides evidence that the transaction will transform approximately 10,000 existing UP-NS lanes and more than 88,000 county-to-county lane pairs in which shippers currently truck freight from interline to single-line service. *See* Amended App., Vol. 1 at 38; *id.*, Vol. 2 at 434, Hunt VS § 4.2.3.

[1] *UP—Control—CNW* referred here to then-§ 11344(b), which was recodified in the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, at the current § 11324(b).

Applicants have also presented evidence that single-line rail service provides significant benefits to shippers. When freight moves on an integrated network, customers experience faster transit times, greater reliability, and lower logistics costs. As a unified network, UP/NS will create more efficient routes and implement new train and blocking plans that significantly reduce the number of handlings. *See* Amended App., Vol. 1 at 61–62 (providing examples). The Board and its predecessor, the Interstate Commerce Commission, have long recognized that introduction of single-line service is a significant public benefit of railroad mergers. *See* Amended App., Vol. 1 at 38–39.[2] Economists at the Federal Trade Commission have also recognized that single-line service provides public benefits.[3] And other Class I

[2] *See also, e.g.*, *Canadian Pac. Ry. Ltd.—Control—Kan. City S.*, FD 36500, at 24 (STB served Mar. 15, 2023) (describing "more single-line service" as one of the "qualitative benefits to the shipping public"); *Canadian Nat'l Ry. Co.—Control—Illinois Cent. Corp.*, 4 S.T.B. 122, 140, 142 (1999) (explaining that "[q]ualitative public benefits include enhanced opportunities for single-line service" and calling single-line service the "chief benefit of the merger"); *CSX Corp.—Control and Operating Leases/Agreements—Conrail Inc.*, 3 S.T.B. 196, 248 (1998) (recognizing the merger would create significant public benefits by permitting both CSX and NS "to offer new and efficient single-line service in competition with motor carriers and with each other to thousands of shippers that received only joint-line service before"); *Burlington N. Inc.—Control and Merger—Santa Fe Pac. Corp.*, 10 I.C.C.2d 661, 741 (1995) ("Single-line service is important to shipper logistics strategies."); *Rio Grande Indus., Inc.—Control—S. Pac. Transp. Co.*, 4 I.C.C.2d 834, 837 (1988) ("The public benefits of a DRGW/SPT merger are improved, more efficient single-line service for shippers . . . ."); *Midwestern Rail Props., Inc.—Purchase (Portion)—Chicago, Rock Island & Pac. R.R. Co.*, 366 I.C.C. 915, 939 (1983) ("Soo's extension of single-line service for some shippers is also a public benefit."); *Union Pac. Corp.—Control—Missouri Pac. Corp.*, 366 I.C.C. 462, 489 (1982) ("Shippers prefer single line or single system service because it improves reliability and transit times, and equipment availability."); *CSX Corp.—Control—Chessie Sys., Inc.*, 363 I.C.C. 521, 553 (1980).

[3] *See* Dennis A. Breen, Bureau of Economics, Federal Trade Commission, *The Union Pacific/Southern Pacific Rail Merger: A Retrospective on Merger Benefits* at 10 (Mar. 11, 2004), https://www.ftc.gov/sites/default/files/documents/reports/union-pacific/southern-pacific-rail-merger-retrospective-merger-benefits/wp269_0.pdf ("The (continued…)

railroads have consistently recognized in their own merger applications that expansion of single-line service is a public benefit. *See* Amended App., Vol. 1 at 40 (citing examples from BNSF, CN, CP, and CSX applications). Finally, shippers consistently affirm the benefits of single-line service by selecting it when they have that option. *See* Amended App., Vol. 2 at 402–03, Hunt VS § 2.3 & Ex. 2–2.

2. Enhanced Competition

Applicants' merger will strengthen rail-to-rail competition and competition between rail and trucking. Applicants' evidence shows that UP/NS's new single-line service offerings will attract hundreds of thousands of carloads from railroad competitors and more than two million truckloads of freight. *See* Amended App., Vol. 2 at 404–05, Hunt VS § 2.3 & Ex. 2–4. "Diversions of traffic to the merged carriers from either trucks or other rail carriers are a demonstration of the pro-competitive effects of the merger." Amended App., Vol. 2 at 240, Israel VS ¶ 129. "Said differently, [diversions] are evidence of enhanced competition—of customers 'voting with their feet' and shifting business to more efficient and attractive options." *Id.*[4]

generally recognized benefits of single-line service include elimination of freight car interchanges and associated costs and delays, simplification of rate negotiations, and reduced billing errors. These in turn yield better service and allow shippers to expand markets geographically.").

[4] The merger will also enhance competition for customers currently using UP-NS interline service to interchange hundreds of thousands of carloads of traffic. These customers will not divert traffic to UP/NS, but they will obtain the same pro-competitive service and efficiency benefits as customers that switch their business to UP/NS. *See* Amended App., Vol. 2 at 31, Bailey VS ¶¶ 51–52.

As discussed below in Part III, Applicants' proposed Committed Gateway Pricing ("CGP") condition will further enhance competition by extending haulage-like access between BNSF- and CSX-served locations and UP/NS sole-served locations.

3. Greater Economic Efficiency

The merger will create operating efficiencies, providing cost savings that will be shared with customers and consumers. Applicants' evidence shows projected cost savings of approximately $1.1 billion in annual operating costs and capital expenditures from more efficient administration and rail operations. *See* Amended App., Vol. 1 at 503–14, Janke VS ¶¶ 25–57.

Customers will also benefit directly from the merged railroad's increased efficiency. A combined UP/NS will improve railcar cycle times by eliminating handlings and shifting traffic to more efficient routes. Customers with their own fleets will benefit from improved cycle times, which will allow them to ship the same volume with fewer cars and lower inventory costs.

Applicants' evidence also shows that shippers that switch from higher-cost truck service to lower-cost rail service will experience significant savings. Applicants estimate that these shippers will save approximately $3.5 billion in the normal year. *See* Amended App., Vol. 2 at 482–83, Hunt VS § 8.2. These are savings that can ultimately benefit the American consumer.

4. Improved Safety

UP and NS share a deep-rooted commitment to safety as a core value. Applicants' evidence shows that the merger will improve rail safety by eliminating 931,000 handlings per year. *See* Amended App., Vol. 1 at 47. Eliminating unnecessary handlings reduces exposure to the operational risks associated with those events. *See id.* at 234, Vena VS ¶ 55.

The merger will also improve public safety by diverting freight from truck to rail. Applicants' evidence shows that the projected diversion of 3.6 billion truck miles is expected to result in approximately 1,750 fewer injuries and 65 fewer fatalities from large-truck accidents per year. *See* Amended App., Vol. 1 at 651–52, Graham VS ¶ 30. Additionally, shipping by rail reduces the likelihood of hazardous-material releases when compared with shipping by truck due to rail's safety advantage. *See id.* at 652, Graham VS ¶ 31.

5. Additional Benefits

Applicants' evidence shows the merger will have additional benefits beyond those specified in 49 C.F.R. § 1180.1(c).

Benefits for Railroad Employees. Applicants are committed to preserving job opportunities for all union-represented employees employed by UP and NS immediately prior to the merger. *See* Amended App., Vol. 1 at 223–24, 233, Vena VS ¶¶ 30, 54; *id.* at 543–44, Parkerson VS ¶ 13. Moreover, Applicants project that the merger will create more than 1,100 new, well-paid craft jobs to support projected traffic growth. *See id.* at 540–41, Parkerson VS ¶ 8.

Benefits for the Environment. The merger will substantially reduce pollutants by improving the efficiency of existing rail operations, reducing the use of trucks for interchanges, and diverting traffic from trucks to rail. *See* Amended App., Vol. 1 at 645–46, Graham VS ¶ 20 & Tbl. 1. Reducing truck traffic will also decrease highway congestion, noise, road wear, and other externalities associated with long-haul trucking. *See id.* at 650, Graham VS ¶¶ 27–28.

Infrastructure Benefits. Applicants are planning substantial capital investments to increase capacity on main line track and in yards and terminals to handle projected growth. *See* Amended App., Vol. 2 at 747–56, Gehringer/Orr VS ¶¶ 277–94. The merger will also allow Applicants to target future capital spending more efficiently, ensuring that each marginal dollar of capital investment is used in a manner that yields more capacity and efficiency than Applicants would realize as separate railroads. *See id.* at 238, Israel VS ¶ 122.

Short Line Benefits. Short lines will also benefit from the transaction because Applicants' faster and more reliable single-line service supports the short lines that often handle first-mile and last-mile moves. *See* Amended App., Vol. 1 at 326–27, Rocker/Elkins VS ¶¶ 113–15.

National Defense and Security Benefits. Applicants' single-line network will improve military logistics and mission readiness by eliminating handoffs during cross-country moves and improving coordination for large exercises and deployments. *See* Amended App., Vol. 1 at 47–48. The merger will also aid national security by creating a more resilient rail infrastructure and more reliable, cost-effective service, thereby strengthening America's economic security through reindustrialization, reshoring, and investment in the U.S. economy and workforce. *Id.* at 48.

B. Opponents' Arguments Regarding Applicants' Public Benefits Evidence Are Merits Challenges.

Opponents do not deny that Applicants have presented evidence that the merger will produce substantial and demonstrable gains in important public benefits; rather, they improperly challenge the merits of the evidence.[5] For example, the JSA claims that Applicants' truck-to-rail diversion methodology exaggerates the potential for diversions. *See* JSA Br. 48–53. The JSA are wrong, but their challenge should be addressed during the adjudication proceeding, not at the prima facie stage. There can be no doubt that the Amended Application "contain[s] enough evidence to enable the [Board] to exercise its statutory responsibilities" and "rationally to apply the criteria of [§ 11324(b)]." *UP—Control—CNW*, 9 I.C.C.2d at 950.

Similarly, CSX argues that Applicants' public benefits showing is deficient because Applicants have not quantified shipper savings from rail-to-rail diversions. *See* CSX Br. 43–44. But the Board's rules do not require such quantification; indeed, the Board's rules presume savings will be passed on to shippers through competition. 49 C.F.R. § 1180.1(c)(1). Even so, Applicants have provided specific data and information addressing the operating benefits passed on to shippers, including transit time savings and reduced handlings. *See* Amended App., Vol. 2 at 613–16, Gehringer/Orr VS ¶¶ 5–11; *id.* at 863–69, Turner VS ¶¶ 29–40. And both CSX and the Board have recognized that single-line service provides benefits to shippers. *See*

[5] Applicants refer collectively to the parties that filed variously titled pleadings raising prima facie challenges as "Opponents" and cite specific pages of those pleadings using the abbreviation "Br." to refer to "briefs."

supra pp. 3–4. Once again, there can be no doubt that the Amended Application "contain[s] enough evidence to enable the [Board] to exercise its statutory responsibilities" and "rationally to apply the criteria of [§ 11324(b)]." *UP—Control—CNW*, 9 I.C.C.2d at 950.

C. Applicants' Evidence Shows That the Merger Will Produce No Meaningful Harms.

The Amended Application contains a thorough analysis of the types of harms that mergers may cause. The Board's rules specifically identify harms to competition and transitional service problems as potential harms from a major rail merger. *See* 49 C.F.R. § 1180.1(c)(2). In their submissions, Applicants showed as to each potential harm that (i) it is not likely to occur as a result of this merger, or (ii) it has been mitigated by conditions that Applicants have proposed. With regard to potential harms, the Amended Application plainly "contain[s] enough evidence to enable the [Board] to exercise its statutory responsibilities" and "rationally to apply the criteria of [§ 11324(b)]." *UP—Control—CNW*, 9 I.C.C.2d at 950.

1. Applicants' Evidence Shows That the Merger Will Not Harm Competition.

a) Applicants' Evidence Addresses Potential Horizontal Harms.

Applicants' evidence regarding potential competitive harms includes expert testimony and analysis from Dr. Elizabeth Bailey. Dr. Bailey's evidence focuses on potential reductions of competition at origin and destination points and within corridors, as well as potential reductions of geographic competition. *See* Amended App., Vol. 2 at 49–87, Bailey VS ¶¶ 88–188. Dr. Bailey found limited scope for harm, including no BEAs in which the number of serving railroads would fall from two to one or from three to two, and no corridors where competition would be reduced from two railroads to one as a result of the transaction. *See id.* at 12, Bailey VS ¶ 22.

Applicants also identified all shipper facilities at which access to Class I carriers would be reduced from two to one or from three to two in an unconditioned merger, and they committed to granting those facilities access to an additional Class I railroad where they have legal authority to grant such access. *See* Applicants' Second Supp. at 53–64.[6] The Board has previously found similar access remedies appropriate for ensuring that there will be no injury to specific shippers, a point that reinforces the conclusion that the Amended Application "contain[s] enough evidence to enable the [Board] to exercise its statutory responsibilities" and "rationally to apply the criteria of [§ 11324(b)]." *UP—Control—CNW*, 9 I.C.C.2d at 950.

b) Applicants' Evidence Addresses Potential Vertical Harms.

Applicants' evidence regarding potential competitive harms also includes expert testimony and analysis from Dr. Mark Israel. As discussed in more detail in Part II, Dr. Israel analyzed vertical foreclosure theories and concluded that most are ill-suited to this transaction and to the rail industry generally. Dr. Israel studied the vertical foreclosure theories that might apply here using actual railroad data and concluded that (i) the merger is overwhelmingly complementary, and (ii) the merger

[6] In addition, Dr. Bailey addressed why additional access was not required to preserve competition to the facilities for which Applicants could not offer a remedy. *See* Applicants' Second Supp. at 222–29, Bailey Supp. VS ¶¶ 3–14.

would enhance competition, create downward pressure on price relative to the but-for world, and benefit shippers through investment, higher-quality service, and a more efficient network. *See* Amended App., Vol. 2 at 204–19, 225–46, Israel VS ¶¶ 47–76, 93–142. He also used actual railroad data to determine the merger would not reduce the number of viable independent routings in corridors where UP and NS may serve different legs of the movement. *See id.* at 220–24, Israel VS ¶¶ 78–89.

Although Applicants have shown that the merger will not harm competition, they have agreed to accept the same open gateway conditions that the Board imposed on the applicants in the CP/KCS merger proceeding. *See* Amended App., Vol. 1 at 347–48, Rocker/Elkins VS ¶¶ 162–63. These commitments ensure the preservation of competitive options for shippers that had access to interline options before the merger. As Dr. Israel explained, the open gateway commitment is "designed to address" concerns that there may be edge cases in which the merger could lead to foreclosure. Amended App., Vol. 2 at 224, Israel VS ¶ 90.[7]

The JSA and CSX complain that UP argued in the CP/KCS proceeding that CP's open gateway commitment was an insufficient remedy. *See* JSA Br. 34–35; CSX Br. 27–28 & n.18. However, in that proceeding, the Board strengthened CP's original commitment after UP raised its concerns with the Board. *See Canadian Pac. Ry.—Control—Kan. City S.*, FD 36500, at 23, 43, 65–83 (STB served Mar. 15, 2023)

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[7] *See also* Amended App., Vol. 2 at 225, Israel VS ¶ 92 ("These open gateway commitments provide further support for the conclusion that the merger will not create any material vertical harm. These commitments demonstrate [Applicants'] intention to work with interline partners to maintain efficient competitive alternatives and provide monitoring mechanisms and enforceable obligations with respect to [Applicants'] treatment of shippers and interline partners.").

("*CP/KCS*"). Surprisingly, CPKC now suggests that the open gateway commitment is *not* effective at preserving pre-merger competitive options. *See* CPKC Br. 13 n.21, 16. But CPKC offers no evidence to support its assertion. That failure is telling. Given that CPKC is subject to an open gateway commitment, it should be able to present evidence from its post-merger operations to back up its claims, if those claims have any merit. That the Board has previously found that open gateway commitments are sufficient to address the potential risk of vertical foreclosure reinforces the conclusion that the Amended Application "contain[s] enough evidence to enable the [Board] to exercise its statutory responsibilities" and "rationally to apply the criteria of [§ 11324(b)]." *UP—Control—CNW*, 9 I.C.C.2d at 950.

2. Applicants' Evidence Shows That Shippers Will Be Protected Against Potential Transitional Disruptions.

Applicants' Service Assurance Plan provides metrics to measure post-merger service, identifies the precise steps that Applicants will take to ensure adequate service, and provides for improved service following the merger. *See* Amended App., Vol. 2 at 857–77, 1003–43, 1089–1116, Turner VS ¶¶ 14–60, 329–435, 551–70. Applicants engaged in a risk assessment, identifying areas that could cause merger-related service disruptions. *See id.* at 1005, Turner VS ¶ 336. Applicants then developed contingency plans for merger-related service disruptions at interchange points. *See id.* at 1003–43, 1118–37, Turner VS ¶¶ 329–435, Appx. A.

In addition, Applicants provided a formal arbitration process to resolve claims for merger-related service deterioration, the Damages ADR Program. *See id.* at 1042–43, 1138–43, Turner VS ¶¶ 434–35, Appx. B. In their Second Response to Decision

No. 21, Applicants provided additional information regarding the nature of the Damages ADR Program that they proposed, along with a new Targeted Access Program. *See* Applicants' Second Supp. at 119–28. The new Targeted Access Program makes customer-specific performance metrics available upon request and establishes objective thresholds to trigger eligibility for reciprocal switching unless Applicants have an affirmative defense to the reduced performance metrics.

The JSA argue that Applicants "cannot present a *prima facie* case" because their Damages ADR Program "excludes most of the traffic that would be affected" by the merger. JSA Br. 56. However, Applicants' program addresses all regulated traffic—*i.e.*, non-exempt commodities moving under common carrier service. *See* 49 U.S.C. § 10709.[8] If the JSA or other parties wish to suggest modifications to the program, they may do so in their comments. Applicants have complied with the rules by suggesting a protocol for resolving merger-related service claims, thereby making a prima facie case that in this respect the transaction is in the public interest.

II. Applicants' Evidence Appropriately Addresses Potential Vertical Harms.

In the Amended Application, Applicants thoroughly addressed the potential harms arising from the vertical nature of the proposed transaction. Contrary to Opponents' claims, Applicants did not rest on presumptions or dismiss concerns regarding potential anticompetitive foreclosure out of hand. Rather, as discussed

[8] Applicants have committed that if their view of the regulation is determined to be incorrect they "would also make exempt traffic eligible for the Damages ADR program." Applicants' Second Supp. at 127 n.235.

below, Applicants and their expert, Dr. Israel, used UP and NS waybill data and empirical testing to explain in great detail why economic theories identifying potential harms are inconsistent with the characteristics of commercial practices in the railroad industry. Applicants nevertheless also addressed potential concerns regarding anticompetitive foreclosure by voluntarily agreeing to all the open gateway conditions imposed in *CP/KCS*, which the Board found sufficient to address any potential vertical concerns.

A. Applicants Do Not Rest on a Presumption of No Vertical Harm.

Despite this robust record, CSX and the JSA claim that the Amended Application insufficiently addresses potential vertical harm. *See* CSX Br. 20–22; JSA Br. 21–22, 27–36. They contend that Applicants rely on a rebuttable presumption that the proposed transaction will result in no vertical foreclosure and that Applicants' approach is foreclosed by the Board's decision in *CP/KCS*. Those contentions are unfounded. Nowhere do Applicants substitute presumptions for detailed analysis. Instead, Applicants provided extensive analysis of the potential vertical effects of the proposed transaction, including through Dr. Israel's expert testimony. Further, no part of Dr. Israel's analysis is foreclosed by the Board's decision in *CP/KCS*.

In *CP/KCS*, the Board recognized that "vertical mergers can provide both competitive benefits and competitive risks," and therefore concluded that "appropriate safeguards should be implemented to mitigate the risks." *CP/KCS* at 43. And the Board reiterated its long-held position that "[a] robust and readily enforceable open gateway requirement is the best means to mitigate vertical foreclosure concerns without impeding the Transaction's benefits." *Id.* Applicants have voluntarily agreed to that important and effective safeguard as discussed in more detail below.

Dr. Israel directly evaluated the concerns expressed by the Board in *CP/KCS*. His verified statement provides expert economic analysis of the economic literature that informed the Board's concerns, and explains why those theories are not well suited to this transaction and to the railroad industry generally. *See* Amended App., Vol. 2 at 190–92, 214–18, Israel VS ¶¶ 15–19, 65–73. There is nothing "contrary to law" about Dr. Israel's testimony engaging with the Board's concerns about vertical foreclosure. CSX Br. 22. Indeed, the Board allowed in *CP/KCS* that "merger applicants are free to argue that the facts in an individual proceeding" make foreclosure unlikely. *CP/KCS* at 47. That is precisely what Dr. Israel did; CSX's and the JSA's claims to the contrary are unsupported and simply wrong.[9] Neither Applicants nor Dr. Israel rely on or argue for the application of a rebuttable presumption that the proposed transaction will result in no vertical foreclosure because it is end-to-end. That is a strawman of CSX's and the JSA's making.

Dr. Israel directly addressed potential harms flowing from vertical foreclosure highlighted in comments filed by CPKC on Applicants' original application. He used a counting algorithm deployed in the *CP/KCS* proceeding to identify all independent routings that create competition that could be diminished by the UP/NS merger. *See* Amended App., Vol. 2 at 220–21, Israel VS ¶¶ 78–81. He then evaluated those

[9] *See* CSX Br. 21–22; JSA Br. 21–22.

independent routings and determined that "all of them have viable alternative routes" such that the merger would result in "no reduction in independent routes." *Id.* at 223, Israel VS ¶ 85. He also conducted regression analyses using UP and NS waybill data from 2019 through 2024 to test whether the empirical conditions necessary for operation of standard foreclosure theories exist in the UP/NS merger, concluding that they do not. *See id.* at 203–14, Israel VS ¶¶ 44–64.

Dr. Israel's engagement with the Board's concerns and the economic literature was in service of his case-specific analysis, not in lieu of it. Tellingly, no commenter (including CSX and the JSA) has identified any analysis of potential vertical harm that Dr. Israel should have performed but did not. CSX's and JSA's objections are to his conclusions, not to any gap in his methodologies or analyses. *See* CSX Br. 20–22; JSA Br. 21–22. Applicants have satisfied their prima facie burden of providing the Board with robust record evidence on which to evaluate the potential for vertical harm in this transaction.

The JSA nonetheless posit the possibility of vertical harm, raising concerns such as bundling and short-hauling. They even speculate about a "death spiral" for CSX and BNSF—a concern that neither of those railroads raised. JSA Br. 32. The JSA's discussion of potential harms is entirely speculative; the JSA provide no evidence, expert testimony, or serious engagement with the submitted data and expert analyses. As discussed above, Applicants have addressed the competitive concerns identified in the Board's rules and precedent, including by committing to the same robust open gateway commitment crafted by the Board in *CP/KCS*.

Applicants need not preemptively rebut every potential commenter's speculation of harm in order to present a prima facie case.

B. Applicants' Open Gateway Commitment Addresses Any Potential Vertical Harms.

In the Amended Application, Applicants committed to keeping all existing gateways open for eligible traffic on commercially reasonable terms, and voluntarily agreed to all the open gateway commitment provisions that the Board imposed in the *CP/KCS* proceeding. *See* Amended App., Vol. 1 at 348–50, Rocker/Elkins VS ¶¶ 164–72; *CP/KCS* at 70–71. This open gateway commitment sufficiently addresses any vertical issues associated with the transaction.

The Board has "embraced the use of open gateway conditions to mitigate vertical impacts." *Canadian Nat'l Ry.—Control—Iowa N. Ry.*, FD 36744, at 10 (STB served Jan. 14, 2025). Applicants' open gateway commitment is the same commitment crafted and imposed by the Board in the *CP/KCS* proceeding. That fact alone demonstrates, contrary to the rhetoric of CSX and the JSA, that the Application "contain[s] enough evidence to enable the [Board] to exercise its statutory responsibilities." *UP—Control—CNW*, 9 I.C.C.2d at 950.

The JSA and CSX claim without any basis that Applicants failed to address the effects of their commitment. These claims, including CSX's incorrect contention that Applicants failed to comply with 49 C.F.R. § 1180.7(b)(1), are akin to collateral attacks on the Board's finding of completeness and can be rejected on that basis alone. In any event, Applicants' expert analyses do address their commitment. Dr. Bailey shows that the open gateway commitment would provide additional protection for much of the sole-served, single-line traffic identified in her analysis. *See* Applicants' Second Supp. at 234–39, Bailey Supp. VS ¶¶ 29–33, 39, Exs. 4 & 5. And Dr. Israel concludes that any remote concerns about foreclosure or reductions in independent routings are addressed by Applicants' open gateway commitment. *See* Amended App., Vol. 2 at 186–89, 192, 201–02, 215, 224–25, Israel VS ¶¶ 14, 19, 39, 66, 90–92.

Several members of the JSA, including the American Chemistry Council, The National Industrial Transportation League, and The Fertilizer Institute, specifically called for what the Board ultimately adopted as the open gateway condition in the *CP/KCS* proceeding.[10] The Board imposed the open gateway condition as part of its approval of the *CP/KCS* merger.[11] Despite nearly three years of monitoring and data reporting (including monthly interchange reporting),[12] the Board has found no issue with the gateway condition. CSX and the JSA's members are well aware of these facts, as they are all parties of record in the *CP/KCS* general oversight proceeding.[13]

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[10] *See, e.g.,* Final Brief of The American Chemistry Council, The Fertilizer Institute, and the National Industrial Transportation League at 10, *Canadian Pac. Ry.—Control—Kan. City S.,* FD 36500 (STB filed Oct. 21, 2022).

[11] *CP/KCS* at 23.

[12] *Canadian Pac. Ry.—Control—Kan. City S., (General Oversight),* FD 36500 (Sub-No. 6), at 12 (STB served Aug. 31, 2023).

[13] *See* Notice of Intent to Participate by the American Chemistry Council, *Canadian Pac. Ry.—Control—Kan. City S. (General Oversight),* FD 36500 (Sub-No. 6) (STB filed Sept. 11, 2023); Notice of Intent to Participate by The National Industrial Transportation League, *Canadian Pac. Ry.—Control—Kan. City S. (General Oversight),* FD 36500 (Sub-No. 6) (STB filed Sept. 11, 2023); Notice of Intent to Participate by The Fertilizer Institute, *Canadian Pac. Ry.—Control—Kan. City S. (General Oversight),* FD 36500 (Sub-No. 6) (STB filed Sept. 11, 2023); Notice of Intent to Participate by CSX Transportation, Inc., *Canadian Pac. Ry.—Control—Kan. City S. (General Oversight),* FD 36500 (Sub-No. 6) (STB filed Sept. 11, 2023).

Instead of identifying any particularized concern with the open gateway commitment, CSX and the JSA argue that the proposed transaction is somehow different in kind from the *CP/KCS* merger. *See, e.g.,* JSA Br. 34. Yet again, these are merits arguments that CSX and the JSA may try to support with evidence in their substantive filings. Their generalized assertions that this transaction is "differen[t]" provide no insight into why that would impact the efficacy of the open gateway commitment.[14]

The Board has imposed open gateway commitments on a number of transactions of different size and scope. CSX and the JSA fail to explain why the scope of a transaction affects the ability of the open gateway commitment to avoid vertical competition issues, despite the real-world experience of two different-sized transactions—*CP/KCS* and *CN/Iowa Northern*—that already employ it and are also both providing reporting under active oversight.[15]

Finally, the JSA and CSX point to a years-old verified statement from Kenny Rocker in an attempted "gotcha" argument that falls flat. In that statement, Mr. Rocker referred to CP's *initially proposed* open gateway commitment as "illusory

[14] CSX asserts that there are no alternative gateways and says that the Board has emphasized that such alternatives provide "meaningful competitive pressures," CSX Br. 27 n.17. But it provides no explanation as to what it means by there being "no alternative gateways." *Id.* And the "meaningful competitive pressures" quote is actually from the Board's examination of the Laredo gateway and cross-border traffic in particular, not the broader open gateway commitment. *CP/KCS* at 54.

[15] *See supra* n.13; *see also Canadian Nat'l Ry.—Control—Iowa N. Ry. (General Oversight)*, FD 36744 (Sub-No. 3) (STB served March 13, 2025).

and unenforceable."[16] But the CPKC open gateway commitment was significantly expanded by CPKC over the course of the proceeding and further expanded in the Board's final decision.[17] Applicants have adopted that final CPKC open gateway provision, and Mr. Rocker is right to describe it as "robust and readily enforceable"—just as the Board did when it described that condition.[18]

III. Applicants' Evidence Shows That The UP/NS Merger Satisfies The Board's Enhanced Competition Rules.

Opponents' arguments regarding enhanced competition and competition-enhancing conditions fail at the threshold because the Board's rules encourage, but do not require, applicants to propose competition-enhancing conditions as part of a prima facie case. The Board's rules permit Applicants to rely on the "transaction" itself to demonstrate enhanced competition. 49 C.F.R. § 1180.1(c)(2)(iv). Here, Applicants have presented significant evidence that the UP/NS merger's core public benefits will provide a transformational enhancement of rail-to-rail competition and competition between railroads and trucks by creating a single, integrated railroad network.

Furthermore, Applicants have indeed proposed a competition-enhancing condition in addition to the evidence that the proposed merger will enhance rail-to-rail competition and competition between railroads and trucks. Applicants' proposed

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[16] Verified Statement of Kenny Rocker & John Turner at 19, *Union Pac. R.R. Co.'s Comments and Req. for Conditions, Canadian Pac. Ry.—Control—Kan. City S.,*, FD 36500 (STB filed Feb. 28, 2022).

[17] *CP/KCS* at 23.

[18] *Id.* at 43.

Committed Gateway Pricing condition will further enhance competition by providing haulage-like access between hundreds of BNSF-served and CSX-served locations, on the one hand, and hundreds of sole-served locations on UP/NS, on the other hand.

A. Applicants Are Not Required to Propose Competition-Enhancing Conditions to Present a Prima Facie Case.

Opponents err in asserting that applicants must propose competition-enhancing conditions to present a prima facie case. The Board initially proposed to require merger applicants to propose competition-enhancing conditions in their merger applications, but it changed course in the final rules. *See Major Rail Consol. Procs.*, 5 S.T.B. at 550.[19] The Board thus rejected a requirement that merger proposals contain competition-enhancing conditions to present a prima facie case. *See Major Rail Consol. Procs.*, 5 S.T.B. at 550 ("[W]e have not proposed, and we are not adopting, any such presumption, nor do we wish to prejudge the merits of any future merger proposals."). That decision was consistent with the Board's statutory authority, which does not require "enhanced competition" as a condition to merger approval.[20] As Commissioner Burkes explained in discussing the current rules,

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[19] *Compare* 49 C.F.R. § 1180.1(c), *with Major Rail Consol. Procs.*, EP 582 (Sub-No. 1), at 12 (STB served Oct. 3, 2000) (proposed § 1180.1(c)). Commissioner Burkes noted this change. *See Major Rail Consol. Procs.*, 5 S.T.B. at 607 (Burkes, commenting).

[20] Congress's specific instruction in 49 U.S.C. § 11324(b)(5) to focus on *adverse* competitive effects among rail carriers appears to preclude the Board from requiring applicants to *enhance* rail-to-rail competition to satisfy the public interest standard. *See, e.g.*, *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 302 (2017).

The legislative history also shows Congress did not intend to impede railroad consolidations by requiring that they enhance competition. Since 1920, federal policy has encouraged mergers that increase efficiency and quality of service. *See Penn-Central Merger & N&W Inclusion Cases*, 389 U.S. 486, 492 (1968); *Lamoille Valley R.R. v. ICC*, 711 F.2d 295, 301 (D.C. Cir. 1983). The 4-R Act and the Staggers Act (continued…)

enhanced competition is "an encouraged goal rather than a mandated standard." *Major Rail Consol. Procs.*, 5 S.T.B. at 607 (Burkes, commenting). Rather, Board rules expressly permit Applicants to rely on the competition-enhancing nature of the transaction itself to demonstrate enhanced competition. *See* 49 C.F.R. § 1180.1(c)(2)(iv) ("To offset harms that would not otherwise be mitigated, applicants should explain how *the transaction* and *conditions they propose* would enhance competition.").

Moreover, the ultimate weighing of a proposed transaction's benefits and harms is a merits-stage decision. And contrary to Opponents' claims, in weighing benefits, including enhanced competition, the Board has not limited itself to considering benefits from rail-to-rail competition,[21] or "new" competition.[22] In explaining the rules' focus on enhanced competition, the Board recognized that

reinforced that policy. *See Lamoille*, 711 F.2d at 301–02. Congress continued the same approach in the ICC Termination Act of 1995, placing rail merger authority with the Board and streamlining review timelines. *See* Pub. L. No. 104-88, § 102, 109 Stat. 803, 841–42 (1995); *see also* H. Rep. 104-422, at 191–92 (104th Cong., 1st Sess. 1995).

[21] Where the merger rules address enhanced competition, they never limit the concept to rail-to-rail competition. *See* 49 C.F.R. §§ 1180.1(c), 1180.1(c)(2)(i), 1180.1(c)(2)(iv), 1180.1(d), and 1180.6(b)(10).

[22] CSX misstates the rules when it asserts that the "Board's Rules equate 'enhanced competition' with 'new competition.'" CSX Br. 32. The rules expressly equate "enhanced competition" with both new competition and improvements to existing competition. *See* 49 C.F.R. § 1180.1(c)(1) ("A merger transaction can also *improve existing competition* or *provide new competitive opportunities*, and *such enhanced competition* will be given substantial weight in our analysis.") (emphasis added).

"[c]ompetition can be enhanced in many ways." *Major Rail Consol. Procs.*, 5 S.T.B. at 554.[23]

B. The UP/NS Merger, Including the Committed Gateway Pricing Proposal, Will Substantially Enhance Rail-to-Rail Competition and Competition Between Railroads and Trucks.

The UP/NS merger will significantly enhance rail-to-rail competition and competition between railroads and trucks. As discussed in Part I, Applicants' evidence shows that UP/NS's new single-line service offerings will divert substantial volumes of traffic from other railroads and trucks, and that such diversions "are a demonstration of the pro-competitive effects of the merger." Amended App., Vol. 2 at 240, Israel VS ¶ 129. Applicants will attract traffic from their rail competitors by offering faster transit times, fewer handlings, and lower costs than competitors' interline offerings. *See, e.g.*, *id.* at 863–69, Turner VS ¶¶ 29–40 (discussing new services, improved transit times, and reduced handlings); *id.* at 230–36, Israel VS ¶¶ 105–17 (cost savings and the elimination of double marginalization "will put downward pressure on prices relative to a no-merger world"). Applicants' new single-line service offerings will also win traffic by giving customers a streamlined experience that simplifies doing business. *See* Amended App., Vol. 1 at 332–33, Rocker/Elkins VS ¶¶ 131–35. Applicants' creation of new single-line services represents a massive enhancement of rail-to-rail competition.[24] Similarly, Applicants

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[23] *See also id.* at 607 ("However, enhanced competition also 'could be' the enhancement of intermodal competition or some other type of competition that may not even be related to transportation.") (Commissioner Burkes, commenting).

[24] CSX ignores many facets of single-line service when it incorrectly claims that single-line service, despite making railroads "more efficient," is not "procompetitive." (continued…)

will create new and enhanced competition between railroads and trucks by providing lower-cost, single-line alternatives in lanes dominated by trucking. *See* Amended App., Vol. 2 at 482–83, Hunt VS § 8.2.

Opponents do not deny that the UP/NS merger will enhance competition between railroads and trucks. Rather, they say that in its public interest analysis, the Board should give no weight to the important public benefits that flow from such enhanced competition. *See, e.g.*, BNSF Br. 10–11; CSX Br. 35–38. Their position conflicts with the Board's merger rules and its decision in *Major Rail Consolidation Procedures*, which do not limit the concept of enhanced competition to rail-to-rail competition. Opponents' position is also inconsistent with the Board's responsibilities under the national Rail Transportation Policy "to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes" and "to ensure effective competition . . . between rail carriers and other modes," 49 U.S.C. §§ 10101(4), (5), as well as its obligation "to take environmental considerations into account in rail consolidation cases." 49 C.F.R. § 1180.1(f)(1).

CSX Br. 33. Dr. Israel and Dr. Bailey both explain that cost savings associated with more efficient single-line service translate directly into lower, more competitive rates, as discussed in the text.

Similarly, the JSA ignore the mechanisms by which single-line service delivers competitive benefits when it claims those benefits are "uncertain." JSA Br. 42. Applicants can deliver concrete benefits from optimizing the UP and NS networks and the customer experience. By contrast, no benefit would be certain to flow from opening access to facilities or removing interchange commitments. Whether such access-related actions would generate benefits, and the timing of any such benefits, depends on actions of other carriers and the existence of market demand for services those other carriers could provide.

Moreover, Committed Gateway Pricing is plainly a rail-to-rail competition-enhancing condition. It will enhance competitive options for shippers of transcontinental traffic to and from sole-served facilities on UP and NS. CGP will operate as the equivalent of thousands of haulage agreements, giving BNSF and CSX commercial access to sole-served facilities deep within the legacy NS and UP systems. As expanded, CGP will create new head-to-head competitive options for shippers who also gain access to the merged railroad's expanded network of single-line options. Some eligible shippers may not benefit from CGP, but none will be harmed because they are not required to use CGP: they can continue to use traditional Rule 11, contract, and joint rate options.

Applicants' evidence shows that CGP will enhance rail competition, including product and geographic competition, and will produce net public benefits. Dr. Israel testified that CGP will enhance competition by providing improved pricing for certain routes, expanding product and geographic competitive options to new routes, and providing non-price competitive benefits that come from offering shippers the higher-quality customer experience associated with working with a single railroad. *See* Amended App., Vol. 2 at 247, 249, 251, Israel VS ¶¶ 148, 152–53, 157.[25] Dr. Israel's economic modeling shows that CGP will generate substantial public benefits. *See* Applicants' Second Supp. at 269–70, Israel Supp. VS ¶¶ 33–34.[26] And Dr. Israel

[25] *See also* Applicants' Second Supp. at 252, 256–59, Israel Supp. VS ¶¶ 9, 15–22.

[26] Arguments that CGP does not "sufficiently" enhance competition (*see, e.g.*, CPKC Br. 13–16), including claims that CGP is insufficient because it is a temporary (continued…)

provided real-world evidence showing similar rate arrangements—specifically, UP's I-5 Agreement with BNSF—have enhanced rail competition. *See* Amended App., Vol. 2 at 250–54, Israel VS ¶¶ 154–61.[27]

Opponents' arguments that CGP will affect only a small percentage of total U.S. rail traffic (*see, e.g.*, BNSF Br. 5) ignore that the proposed transaction by itself substantially enhances competition and creates little or no risk of unremedied harm. Dr. Bailey and Dr. Israel establish that the merger poses little or no risk of competitive harm. Applicants have also directly addressed potential merger-related harms to service through their proposed Targeted Access Program. Opponents' arguments also ignore the realities that UP and NS move only a portion of total U.S. rail traffic, that a substantial part of the traffic they move is already competitive or will become more competitive as a result of the merger, and that most of the remaining traffic is local to UP or NS. Calls to open local traffic to competition are calls for open access, which the Board rejected in adopting the current rules.[28] BNSF's

measure (*see, e.g.*, CSX Br. 38; CPKC Br. 14; NGFA Br. 4), concede that Applicants have shown that CGP does enhance competition.

Further, Applicants have noted that extending CGP's time limitation might be justified if the record shows actual evidence of a permanent loss of geographic competition, rather than just speculation that a merger might cause unremedied competitive harms. *See* Applicants' Second Supp. at 39.

[27] CSX's claim that CGP could only be "competition preserving" (CSX Br. 38) and "would not be as fast or reliable as single-line service" (*id.* at 40), ignores that CGP applies to situations in which single-line service is not available, as well as situations in which single-line service is available. CSX's claim also ignores Dr. Israel's analysis of Union Pacific's successful experience in competing with BNSF single-line service under the I-5 Agreement, which is discussed in the text.

[28] *See id.* at 570 ("[W]e recognize that carriers need to be able to engage in some degree of differential pricing and that opening up every one of their solely served shippers to (continued…)

claim that Applicants were obligated to "maximize benefits for CGP-eligible traffic" (BNSF Br. 16)—which would mean charging nothing for CGP moves on UP/NS lines—likewise ignores reality.

In sum, the Amended Application presents facts that, construed in their most favorable light, show the merger itself will dramatically enhance competition, Committed Gateway Pricing will further enhance competition, and the merger's public benefits will more than offset any speculative risk of public harm, which the evidence demonstrates is minimal.

IV. Applicants' Evidence Shows That The Benefits Of The Transaction Cannot Be Achieved Without A Merger.

Contrary to Opponents' claims, Applicants' evidence shows that the benefits of the transaction cannot be achieved without a merger. As described above and in the Amended Application, the transaction's benefits primarily result from the introduction of single-line service, which, by its nature, requires a single, integrated railroad. Decades of industry experience demonstrate that similar benefits cannot be achieved through alliances or joint-line arrangements.

A. The Benefits of Single-Line Service Require a Single, Integrated Railroad.

CPKC, CSX, and the JSA argue that Applicants failed to provide a basis for the Board to identify which public benefits require a merger and which are achievable without one. *See* CPKC Br. 5–12; CSX Br. 41–43; JSA Br. 47–48. Applicants' witnesses addressed the reasons that merger benefits cannot be achieved without the

competition from other rail carriers could dramatically affect not just the merged carrier's bottom line but also the shape of the rail system for the future.").

transaction. Contrary to CSX's suggestion (*see* CSX Br. 41–42), Applicants were not required to parse out and quantify which portions of the merger's benefits, if any, could possibly be achieved without the transaction.

Opponents ignore Applicants' analysis of the merger's benefits, the majority of which come from creating single-line service. Single-line service's faster speeds, greater reliability, and greater efficiency are made possible by the unified interest and operational alignment of a single railroad. As the Interstate Commerce Commission recognized, "Railroads compete with each other for the longest haul and maximum revenue on traffic." *Burlington N., Inc.—Control & Merger—St. L.*, 360 I.C.C. 788, 936 (1980). "Without a merger this single-line service could not be provided without bringing into question management's duty to investors and the public." *Id.*

Separate railroads lack sufficient alignment of interests to pursue the long-term capital investments and operational strategies necessary to provide the enduring benefits of single-line service. Applicants are planning significant capital investments to create faster, more reliable, more efficient service, and those investments would not occur without the merger. Those investments are designed to support an operational and commercial strategy that makes sense for a unified railroad. *See* Amended App., Vol. 1 at 231–32, Vena VS ¶ 49; *see also* Amended App., Vol. 2 at 615–16, Gehringer/Orr VS ¶ 10. Those investments will produce public benefits in the form of improved service, enhanced competition, and greater economic efficiency achievable only through the merger. Similarly, Applicants have significant operating changes planned to improve the speed, reliability, and efficiency of their interline movements, including changing blocking plans, operating new trains, and consolidating facilities. *See* Amended App., Vol. 2 at 613–20, 689–743, Gehringer/Orr VS ¶¶ 5–17, 179–268. These changes would not take place if UP and NS remained separate railroads, because "each railroad [would] maximize its individual profits at the expense of the optimal outcome that maximizes joint profit across the complementary networks." *Id.* at 226–27, Israel VS ¶ 95.

Similarly, Applicants cannot achieve the savings projected in the Summary of Benefits exhibit, which will be passed on to customers in the form of better service, lower rates, or a combination of both, without the consolidated operations resulting from the merger. This is because those savings represent efficiencies achieved by combining the separate operations of UP and NS. *See* Amended App., Vol. 1 at 502–14, Janke VS ¶¶ 19–57. These savings are not achievable without the centralized planning and uniformity of interest that the merger provides.

In addition to other public benefits, a unified railroad creates public benefits by eliminating double marginalization, which occurs when each firm raises its prices to maximize its own profits without regard for the negative impact of its price on the sales of its partner on joint movements. Elimination of double marginalization benefits the public interest by putting "downward pressure on prices relative to prices that would exist absent the merger." Amended App., Vol. 2 at 229, Israel VS ¶ 101.

Applicants' evidence confirms that despite decades of experience with contractual alliances, such arrangements cannot match the scale or scope of service improvements that are achieved by single-line service. As Messrs. Rocker and Elkins explained, alliances are hampered by both operational and planning impediments. Amended App., Vol. 1 at 338–39, Rocker/Elkins VS ¶ 144 (listing impediments); *see also id.* at 245–46, George VS ¶ 7 (explaining that in an alliance arrangement "physical interchanges still exist, management teams change with time, and incentives don't align as the financial and other interests of one party often prevail over the collective interest that benefits the customer"); Amended App., Vol. 2 at 692, Gehringer/Orr VS ¶ 183 ("a railroad will not take on an unequal amount of extra blocking work, even when doing so would be more efficient overall for shippers and the receiving railroad"). The merger will transform approximately 10,000 existing UP-NS lanes and more than 88,000 county-to-county lane pairs in which shippers currently truck freight from interline to single-line service. Service improvements of that scale could not be achieved without a merger.

Indeed, despite decades of opportunities to form alliances, rail has been unable to solve the watershed problem and compete with trucking in the watershed region. Railroads simply lack sufficient incentives to pursue interchange traffic originating near or terminating near gateways given the low return on management and capital investment in such short hauls. *See* Amended App., Vol. 2 at 615–16, Gehringer/Orr VS ¶ 10. "A contractual partnership simply cannot match the power and seamless service consistency of full transcontinental integration. Nor can alliances deliver real-time responsiveness and optimal levels of capital investment. In short, a national, unified railroad is needed to compete head-to-head with the highway." Amended App., Vol. 1 at 246, George VS ¶ 8.

CPKC challenges the idea that mergers are necessary, arguing that alliances can produce the same improved service. *See* CPKC Br. 10–12. But just a few years ago, CPKC aptly explained that "when two railroads try to collaborate on arrangements such as joint marketing and joint operating agreements, they [often] fail." Application, Verified Statement of Patrick J. Ottensmeyer, App. Vol. 1 at 198, C*anadian Pac. Ry.—Control—Kan. City S.,* FD 36500 (STB filed Oct. 29, 2021). "This is because each railroad works to protect its interests or not expend its capital on a risky commercial opportunity for which there is no guarantee of adequate returns." *Id.* Nothing has changed in the five years since CPKC explained these points to the Board to justify its own merger.

CPKC focuses on the I-5 Agreement as an example of an arrangement that yields benefits similar to a merger. *See* CPKC Br. 10–11. But the I-5 Agreement is not an alliance between UP and BNSF. BNSF agreed to the arrangement because UP gave BNSF a new, single-line route in the I-5 Corridor to obtain BNSF's support for UP's merger with SP. *See* Amended App., Vol. 1 at 377–78, 392, Novak VS ¶¶ 11, 49. CPKC is correct that the I-5 Agreement has been a success for UP and its customers (and thus unintentionally lends support to CGP). But if, as CPKC suggests, similar arrangements could be achieved without a merger, then surely other railroads would have entered into similar arrangements in the past 29 years.

B. CPKC's Transit Time Analysis Actually Highlights the Benefits of Single-Line Service.

CPKC also contends that a merger is not necessary to achieve Applicants' projected service benefits. *See* CPKC Br. 5–12. CPKC's fact-based argument goes to the merits of the merger, not whether Applicants have presented a prima facie case. CPKC is also incorrect.

Focusing on UP-NS interline traffic moving over the Meridian Speedway, CPKC relies on an analysis performed by a consultant, Dr. Nicholas Powers, to claim interchanges "are not an obstacle that requires a merger to overcome." *Id.* at 7. However, CPKC's comparison of transit times for traffic moving over the Meridian Speedway with transit times for traffic moving over other routes is meaningless. Different routes have different operating characteristics and different mixes of business that result in different transit times. A more appropriate comparison would involve pre- and post-merger transit times for traffic moving on the same route.

Further, CPKC's analysis actually demonstrates why the alignment of incentives provided by a merger is critical. CPKC claims the UP-CPKC-NS trains moving over the Meridian Speedway perform so well because "there is essentially no dwell at either Shreveport or Meridian, where operational changes occur. Locomotive run through and crew changes are essentially step-on/step-off." CPKC Br. 9–10 n.15. Dr. Powers' data tell another story. For Lathrop-Charlotte service, Dr. Powers' "Figure 1" shows an average dwell of {{ }} at the UP-CPKC handoff in Shreveport. For Lathrop-Atlanta service, Dr. Powers' "Figure 3" shows an average dwell of {{ }} at the UP-CPKC handoff in Shreveport.

For Lathrop-Jacksonville service, Dr. Powers' "Figure 5" shows an average dwell of {{ }} at the UP-CPKC handoff in Shreveport.

The UP-CPKC interchange at Shreveport might indeed be "step-on/step-off," but UP-NS trains that use the Meridian Speedway route experience interchange delays that result from CPKC's incentives not being aligned with those of UP and NS. NS and UP have complained about CPKC's conduct to the Board. As CPKC's own analysis shows, CPKC is not making the same quick change one would expect if a single railroad obtained the benefit of, and took full responsibility for, the service provided to the customer. By contrast, if this were single-line service, there would be no interchange and the quality of service would be solely in the hands of a railroad whose economic interests are fully aligned with the quality of that service.

In fact, Applicants' evidence, together with CPKC's evidence, shows that the UP/NS merger is projected to improve transit times for traffic moving between the same origins and destinations by changing from an interline route over the Meridian Speedway to a single-line UP-NS route. For example:

- Dr. Powers estimates that the average pre-merger transit time between Lathrop and Charlotte via the Meridian Speedway is approximately {{ }} hours; Applicants project that the transit time for their Lathrop to Charlotte (ZLTCT) single-line service will be 109 hours. *Compare* CPKC Br., Powers VS Appx. A, Fig. 1, *with* Amended App., Vol. 2 at 835, Gehringer/Orr VS, Appx. B.

- Dr. Powers estimates that the average pre-merger transit time between Charlotte and Lathrop via the Meridian Speedway is approximately {{ }} hours; Applicants project that the transit time on this route for their Charlotte to Lathrop (ZCTLT) single-line service will be 108 hours. *Compare* CPKC Br., Powers VS Appx. A, Fig. 2, *with* Amended App., Vol. 2 at 835, Gehringer/Orr VS, Appx. B.

CPKC previously recognized that removing interchanges improves reliability and reduces transit times, touting those features as benefits of the *CP/KCS* merger.[29] If CP and KCS needed their merger to provide "considerably more reliable" service, including "eliminat[ing] unpredictable delays associated with interchange traffic" when they interchanged at just a single location, then a merger will plainly have much greater benefits here, where UP and NS interchange at several major gateways.

V. Arguments About Potential Impacts Of Hypothetical Responsive Mergers Have No Bearing On Applicants' Prima Facie Case.

Applicants complied with Board rules regarding downstream mergers by providing all required information and more. Regardless, none of that information bears on whether Applicants presented a prima facie case that their merger is consistent with the public interest.

The Board's rationale for seeking information about downstream mergers is "to develop a consistent set of principles for analyzing all of the applications that could be brought to us in . . . a final round of mergers." *Major Rail Consol. Procs.*, 5 S.T.B. at 582. In the Amended Application and Supplements, Applicants provide the required information by discussing why an industry structure involving two transcontinental railroads would be consistent with the public interest if the

[29] *See* Application, App. Vol. 1 at 25, *Canadian Pac. Ry.—Control—Kan. City S.*, FD 36500 (STB filed Oct. 29, 2021) ("The single-line rail service provided by CPKC will be considerably more reliable than the interline offerings in which CP and KCS participate today. By replacing interchanges with a single continuous network, CPKC will eliminate unpredictable delays associated with interchanging traffic. Such delays are associated with additional yard work, coordination between railways and capacity constraints at interchange locations, all of which add to overall trip time, reduce predictability, and contribute to the possibility of service disruptions.").

subsequent transaction is appropriately conditioned to address competitive issues. *See* Amended App., Vol. 1 at 95–96; Amended App., Vol. 2 at 246–47, Israel VS ¶¶ 143–45; Applicants' Second Supp. at 143–47, 149–50. Applicants also address how potential conditions in this transaction might be affected by a subsequent transaction, including one potential condition that would require further analysis: Committed Gateway Pricing. *See* Amended App., Vol. 1 at 96–97; Applicants' Second Supp. at 155–58; *id.* at 273–78, Israel Supp. VS ¶¶ 36–50. And Applicants discuss in great detail the principles for analyzing proposed conditions, and in particular, the Board's authority to impose conditions here in an attempt to address the as-yet-unknown cumulative effects of as-yet-unknown potential future transactions. *See* Applicants' Second Supp. at 150–55.

Opponents' claims regarding downstream mergers support Applicants' conclusion that responsive mergers are not likely. *See* Amended App., Vol. 1 at 95. BNSF does not dispute Applicants' evidence that it is not interested in a major merger. *See id.* Nor does CSX claim that it plans to merge. CSX instead twists itself into a knot, arguing that there "are many reasons [a subsequent] merger might not occur, even if carriers were motivated or pressured to pursue one." CSX Br. 45.[30]

Insofar as potential impacts of hypothetical responsive mergers are relevant, they must be evaluated based on evidence, which means that their consideration

[30] CSX's quotation of *Major Rail Consolidation Procedures* is highly misleading. *See* CSX Br. 48. The Board never concluded that one major merger proposal would trigger other proposals. And the Board never said that its approval of one merger would require it to approve responsive mergers. Rather, the Board noted "*the prospect* that future major merger proposals would trigger other proposals that, *if approved*," could result in further industry consolidation. *Major Rail Consol. Procs.*, 5 S.T.B. at 545.

belongs at the merits stage. Yet CPKC, CSX, and the JSA have responded with rhetoric, not evidence. They want the Board to end this proceeding, based on speculation about a transaction that may never occur, before their arguments face scrutiny.[31] Their mere speculation regarding potential cumulative impacts of hypothetical responsive mergers is insufficient to defeat Applicants' prima facie showing and would fail even at the merits stage.[32]

VI. Conclusion

The record before the Board is clear. Applicants have presented an unprecedented evidentiary case establishing that America's first transcontinental railroad will transform approximately 10,000 existing UP-NS lanes and more than 88,000 county-to-county lane pairs in which shippers currently truck freight from interline service into seamless single-line service, divert more than two million truckloads of freight to lower-cost rail, eliminate unnecessary handlings, and deliver approximately $3.5 billion in annual savings to shippers. More than 2,000 shippers,

[31] *Cf.* Lewis Carroll, *Alice's Adventures in Wonderland* 150 ("Sentence first—verdict afterwards."), https://www.open-bks.com/alice-149-150.html. CPKC provides a particularly notable example. Fresh off winning approval for its own end-to-end merger, CPKC sheds all credibility by arguing that no evidentiary analysis is needed to reject Applicants' merger because foreclosure is inevitable and gateway conditions provide no protection. *See* CPKC Br. 15–16.

[32] Agency decisions must be supported by substantial evidence, and "'[s]ubstantial evidence cannot be based upon an inference drawn from facts which are uncertain or speculative and which raise only a conjecture or possibility.'" *California State Water Resources Control Board v. FERC*, 43 F.4th 920, 930 (9th Cir. 2022) (quoting *Woods v. U.S.*, 724 F.2d 1444, 1451 (9th Cir. 1984)); *see also Sorenson Comms., Inc. v. FCC*, 755 F.3d 702, 708–09 (D.C. Cir. 2014) (agency action based on speculation rather than evidence is arbitrary and capricious); *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1227 (5th Cir. 1991) ("Musings and conjecture are not the stuff of which substantial evidence is made." (internal quotation omitted)).

smaller railroads, ports, public officials, labor unions, and other rail industry stakeholders have told this Board those benefits are real. Opponents do not contend that this evidence is absent; they dispute its weight. That is not a prima facie argument.

Instead, Opponents' filings are a coordinated effort to litigate the merits before their own arguments face scrutiny. CPKC, fresh off approval for its own merger, now derides the very same single-line benefits that it touted in seeking approval. BNSF, which says it has no interest in pursuing a merger, seeks to freeze the competitive landscape for its own benefit. CSX invokes concepts of competitive balance, as though the Board's task is to insulate CSX from having to compete on better service for customers. And the JSA speculate about "death spirals" without any evidence or even support from the purportedly affected railroads, and without challenging the effectiveness of the same open gateway mechanism that JSA members demanded in *CP/KCS* and the Board has since monitored without a single finding of violation.

The Amended Application plainly "contain[s] enough evidence to enable the [Board] to exercise its statutory responsibilities" and "rationally to apply the criteria of [49 U.S.C. § 11324(b)]." *UP—Control—CNW*, 9 I.C.C.2d at 950. Opponents' merits-based objections are untethered from that governing legal standard and provide no basis to conclude otherwise.

Respectfully submitted,

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August 26, 2026

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August, 2026, the foregoing document was served by first-class mail or email on all parties of record in this proceeding, the Secretary of Transportation, the Attorney General of the United States, and Administrative Law Judge Jenifer Soulikias.

/s/ Daniel Damitio