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BY ELECTRONIC FILING

The Honorable Cynthia T. Brown
Chief, Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: Finance Docket No. 36500

Dear Ms. Brown:

I write on behalf of Applicants regarding the "Comment" filed yesterday by the Department of Justice ("DOJ"). Applicants respectfully submit that DOJ's comment does not support revocation of the KCS waiver. Applicants agree with DOJ that the Board should "ensure that the parties do not take any action that would undermine the Board's ability to conduct a meaningful review" (DOJ Comment at 1), and welcome a meaningful review under the pre-2001 rules. But, importantly, DOJ has not articulated either a factual or a legal basis for its suggestion that Applicants' use of a voting trust *in this specific circumstance* will interfere with that review. To the contrary, use of a voting trust here is *essential* if there is to be any transaction at all.

First, it is clear that DOJ has not undertaken any real analysis of the competitive effects of the CP-KCS transaction. *See Id.* ("the Department does not yet have a view on the merits of the proposed transaction"). But even without such an analysis, DOJ is able nevertheless to conclude that "on its face this transaction may raise fewer competitive problems than other possible combinations of Class I railroads." *Id.* at 9. That is manifestly clear given that, unlike every other possible Class I combination, there is no competitive overlap between CP and KCS. To the extent DOJ urges the Board to "carefully consider the competitive implications" (*id.* at 8, 9, 10), we agree that the Board should do so. The Board's pre-2001 rules are fully up to the job of examining the competitive effects of an end-to-end transaction like the CP/KCS proposal. *See* CP-8/KCS-8 at 20-24. DOJ's generic concerns about consolidation in the railroad industry do not provide a basis for applying the 2001 rules to this specific transaction. Indeed, Applicants believe that the issue of greater concern from the perspective of the

competition analysis is the fact that the parties leading the charge to impose further delay on this transaction are the same Class Is who would face more intense competition as soon as the Board approves CP's combination with KCS. The 375 shippers and other stakeholders who have already submitted statements supporting the transaction – many explicitly supporting application of the pre-2001 rules – recognize these competitive benefits and are eager to realize them.

Second, DOJ repeats its longstanding disagreement with the Board's even-more-longstanding precedent regarding the use of voting trusts.[1] DOJ acknowledges that Applicants' proposed voting trust raises none of the "significantly heightened" concerns that DOJ identified in connection with the CP/NS proposed trust. DOJ Comment at 3. It also agrees that voting trusts can sometimes "serve some public purpose." DOJ Comment at 2. But DOJ nonetheless repeats its generic concerns about voting trusts, concluding that they "should not be used routinely." *Id*. None of DOJ's concerns relate to the specific proposal before the Board. Indeed, though Applicants shared with DOJ the details of their voting trust proposal three weeks ago (in the form of their letter to Board Staff seeking an informal opinion), DOJ raises no particularized concern.

As Applicants have already explained, their proposal will fully insulate KCS from control by CP pending Board review and there is no basis for any concern that KCS (with its management intact) could not be readily sold out from under CP control in the unlikely event that proved necessary. *See* CP-8/KCS-8 at 30. CP and KCS are not arch-rival competitors, unlike GM and Ford (DOJ Comment at 3), and there is thus no realistic concern about either of them pulling their competitive punches while KCS is in trust and insulated from CP influence.

To the contrary, the proposed voting trust here is unambiguously *good for competition*: it permits the KCS assets to be acquired by a buyer that has the expertise and incentives to use them effectively in competition with other Class I railroads, as opposed to by a buyer "without railroad experience" that could "decrease . . . the company's ability to compete" (*id.* at 5), would evade Board review, and would certainly bring none of the procompetitive benefits of the CP/KCS transaction.

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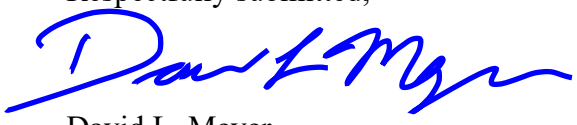
[1] The Board's tradition of allowing voting trusts in appropriate cases was already well established by 1983, when the D.C. Circuit observed that the long regulatory process gives "merging carriers … an economic incentive to complete the transaction first and seek ICC approval later," and that "[t]he ICC has *long permitted carriers to do this by use of an independent voting trust*." *Water Transport Ass'n v. ICC,* 715 F.2d 581, 582 (D.C. Cir. 1983) (emphasis added).

At bottom, then, DOJ's objection to the use of voting trusts is an indictment of the Board's broader statutory public interest mandate, under which the Board has the authority to determine for itself whether a specific proposal is in the public interest. In fact, DOJ's comment does not address the key public interest fact here: without a voting trust, there will be no CP/KCS transaction, and thus no chance at a once-in-a-lifetime injection of new competition into north-south trade flows. CP-8/KCS-8 at 30-31. DOJ's extensive experience with its HSR-based review of mergers in other industries is inapposite to the realities of this industry: whereas a clearly-procompetitive transaction under DOJ jurisdiction could be cleared within 30-60 days with no need for a voting trust, in the railroad industry even the most procompetitive transaction ever proposed must undergo 12-plus months of regulatory review. That is why, in the face of a competing private equity bid for KCS, CP was compelled to use a plain vanilla trust to carry out this transaction – consistent with the Board's longstanding precedent. DOJ's generic concerns should not give the Board any pause regarding the appropriateness of the trust that CP proposes in this case.

We respectfully urge the Board to decline DOJ's invitation to require further process beyond that provided for by the robust pre-2001 merger rules.

Respectfully submitted,



David L. Meyer

cc: All Parties of Record