

Because the KCS/TM common control transaction proposed in the KCS/TM application has been determined to be a minor transaction, no responsive applications will be permitted. *See* 49 CFR 1180.4(d)(1).

Protesting parties are advised that, if they seek either the denial of the KCS/TM application or the imposition of conditions upon any approval, on the theory that approval (or approval without imposition of conditions) will harm competition and/or their ability to provide essential services, they must present substantial evidence in support of their positions. *See Lamoille Valley R.R. Co. v. ICC*, 711 F.2d 295 (DC Cir. 1983).

Responses to Comments, Protests, Requests for Conditions, and other Opposition, Including DOJ and DOT; Rebuttal in Support of KCS/TM Application. Responses to comments, protests, requests for conditions, and other opposition submissions, responses to comments of DOJ and DOT, and rebuttal in support of the KCS/TM application must be filed by September 2, 2003.

Environmental Matters. Applicants assert in their application that the proposed KCS/TM transaction will have insignificant environmental effects and therefore does not require a formal environmental review under the National Environmental Policy Act of 1969 (NEPA). Applicants state that the transaction will not result in changes in carrier operations that would exceed the thresholds triggering environmental review established in the Board's environmental rules at 49 CFR 1105.7(e)(4) or (5).³⁰ Applicants further state that, under 49 CFR 1105.8(b)(1) and (3), the transaction is exempt from historic preservation reporting requirements because rail operations will continue after consummation of common control, further Board approval would be required to abandon any service, and there are no plans to dispose of or alter properties subject to Board jurisdiction that are 50 years old or older. Finally, applicants explain that the transaction is subject to a "categorical exclusion" from environmental analysis under NEPA and the Board's environmental rules.³¹

³⁰ Applicants explain that KCS/TM common control will generate less than a 1% increase in KCSR traffic and less than a 7% increase in Tex Mex traffic. Applicants add that, although there are significant rehabilitation and improvement plans that will take place on Tex Mex property if KCS obtains control authority, such improvements do not require Board approval or environmental review under NEPA. *See* KCS-3 at 41.

³¹ Under the regulations of the President's Council on Environmental Quality implementing NEPA and the Board's environmental regulations,

The information set forth in the application is sufficient to create a presumption that this transaction is covered by a categorical exclusion. However, the Board's Section of Environmental Analysis (SEA) must independently determine whether applicants' transaction is appropriately exempt from NEPA. To assist SEA in determining whether formal environmental review of the transaction is necessary, the Board has directed applicants to prepare an Environmental Appendix providing additional details and explanation, including maps, supporting applicants' conclusion that this transaction does not warrant environmental documentation. Applicants shall submit the Environmental Appendix to SEA by June 23, 2003.

Applicants also have been working with the Federal Railroad Administration (FRA) to develop a Safety Integration Plan (SIP), pursuant to the joint regulations adopted by FRA and the Board to ensure adequate and coordinated consideration of safety integration issues by both the Board and FRA. *See* 49 CFR Parts 244 and 1106. The SIP will specifically address the process of safely combining applicants' systems, if the proposed transaction is approved. Applicants shall submit their SIP to SEA by June 23, 2003.

To facilitate public review and comment on all aspects of the Environmental Appendix and the SIP, applicants must, by July 1, 2003, distribute the Environmental Appendix and the SIP to all parties of record and to appropriate agencies (consisting of the regional offices of the U.S. Environmental Protection Agency and the Governor's Office and state equivalent of EPA in each state in which KCS owns track). Applicants must also, by July 1, 2003, publish a notice in major newspapers in communities between Beaumont, TX, and Laredo, TX, with populations more than 5,000 people, alerting the public that the Environmental Appendix and SIP are available and explaining how to obtain

actions are separated into three classes that prescribe the level of documentation required in the NEPA process. Actions that may significantly affect the environment generally require the agency to prepare a full Environmental Impact Statement (EIS). 40 CFR 1501.4(a)(1); 49 CFR 1105.4(f), 1105.6(a). Actions that may or may not have a significant environmental impact ordinarily require the agency to prepare a more limited Environmental Assessment (EA). 40 CFR 1501.4(c); 49 CFR 1105.4(d), 1105.6(b). Finally, actions whose environmental effects are ordinarily insignificant may be excluded from NEPA review across the board, without a case-by-case review. Such activities are said to be covered by a categorical exclusion. 40 CFR 1500.4(p), 1501.4(a)(2), 1508.4; 49 CFR 1105.6(c).

copies and submit comments. Interested parties will have 30 days—until July 31, 2003—to submit comments on the Environmental Appendix and the SIP to SEA. Applicants shall certify that they have met these distribution and newspaper notice requirements. The Board will further ensure broad access to the Environmental Appendix and the SIP by making them available on the Board's Web site at "<http://www.stb.dot.gov>."

As discussed above, the information provided by applicants is sufficient to create a presumption that this action does not require formal environmental review. Accordingly, comments challenging the presumption that this matter is categorically excluded from NEPA must demonstrate with specificity why an EA or EIS appears to be warranted in this case.

Based on its consideration of all timely comments and its own independent review of all available environmental information, including the SIP, SEA will then recommend to the Board whether there is a need for formal environmental review in this case. The Board will then determine whether this transaction is categorically excluded from NEPA or, alternatively, whether an EA or an EIS should be prepared. If it appears that an EA or an EIS is required to meet the Board's obligations under NEPA, the procedural schedule set forth in this decision will be adjusted accordingly. Even if no EA or EIS is warranted, the Board intends to include in any decision approving the KCS/TM transaction a condition requiring applicants to comply with their SIP. *See* 49 CFR 1106.4(b)(4).

Discovery. Discovery may begin immediately. The parties are encouraged to resolve all discovery matters expeditiously and amicably.

Electronic Submissions: In General. As already mentioned, in addition to submitting an original and 25 paper copies of each document filed with the Board, parties must submit, on 3.5-inch IBM-compatible floppy diskettes (disks) or on compact discs (CDs), copies of all textual materials, electronic workpapers, data bases, and spreadsheets used to develop quantitative evidence.³² Textual materials must be in, or compatible with, WordPerfect 10.0. Electronic spreadsheets must be in, or compatible with, Lotus 1-2-3 Release 9 or Microsoft Excel 2002. Each disk or CD should be clearly labeled with the identification acronym and number of

³² Parties unable to comply with the electronic submission requirement can seek a waiver from the Board.