

FD 30400

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ALJ 9

3392

INTERSTATE COMMERCE COMMISSION

SERVICE DATE

DECISION

SEP 6 1985

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FINANCE DOCKET NO. 30400\*

SANTA FE SOUTHERN PACIFIC CORPORATION - CONTROL -  
SOUTHERN PACIFIC TRANSPORTATION COMPANY

Decided: September 3, 1985

The hearings for the cross-examination of witnesses in these proceedings were completed August 29, 1985. As agreed at the hearings the schedule for the filing of briefs shall be as follows:

Simultaneous initial briefs by the parties will be due October 21, 1985.

Simultaneous closing briefs by the parties will be due December 16, 1985.

*James E. Hopkins*  
By the Commission, James E. Hopkins, Administrative Law Judge.

JAMES H. BAYNE  
Secretary

(SEAL)

\*Embraces F.D. Nos. 30400 (Sub-No. 1-20 and MC-F-15628).

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INTERSTATE COMMERCE COMMISSION

DECISION  
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3392  
SERVICE DATE  
SEP 13 1985

FINANCE DOCKET NO. 30400\*

SANTA FE SOUTHERN PACIFIC CORPORATION - CONTROL -  
SOUTHERN PACIFIC TRANSPORTATION COMPANY

Decided: September 10, 1985

In a petition filed August 14, 1985, the East Bay Regional Park District petitions the Commission for leave to intervene in these proceedings. The Park District contends that it should be permitted to intervene because public access to and use of recreational parks and shoreline will be adversely affected by proposed diversion of traffic over the lines of the applicants. The petition indicates that no party will be prejudiced by the grant of the petition since it merely seeks the right to participate in the final briefing and any remaining or additional proceedings.

It is ordered, that the petition for leave to intervene is granted, since such intervention will not unduly broaden the issues raised in these proceedings.

*James E. Hopkins*  
By the Commission, James E. Hopkins, Administrative Law Judge.

JAMES H. BAYNE  
Secretary

(SEAL)

\* Embraces F.D. Nos. 30400 (Sub-No. 1-20 and MC-F-15628).

FD 30400

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ALJ 11

## INTERSTATE COMMERCE COMMISSION

DECISION  
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SERVICE DATE

SEP 28 1985

FINANCE DOCKET NO. 30400\*

SANTA FE SOUTHERN PACIFIC CORPORATION - CONTROL -  
SOUTHERN PACIFIC TRANSPORTATION COMPANY

Decided: September 19, 1985

By a motion filed August 16, 1985, the State of Kansas moves to amend its Statement of Position in these proceedings, by incorporating therein a letter to this Administrative Law Judge from Governor John Carlin, Governor of Kansas. This letter indicates a modification of the State's position in these proceedings, particularly concerning the conditions sought by Missouri Kansas-Texas Railroad Company (Katy).

The Katy on August 29, 1985, filed a reply opposing the motion. The Katy in its reply argues that the Commission's Rules do not recognize a "Motion to Amend" a Statement of Position, that statements of position are filed at the outset of a proceeding, and that what comes later is either (a) evidence or (b) argument. Since the period for filing of evidence which is filed under oath, and tested by cross-examination, has been completed, the evidence which is in the Governor's letter, Katy argues, cannot now be received as evidence. The Katy contends that the arguments raised in the Governor's letter are properly matters to be raised in the brief of the State of Kansas in these proceedings.

It is the Administrative Law Judge's finding that the Governor's letter should be placed in the correspondence section of the docket in these proceedings, that the evidential matters raised in the letter are not proper at this time, and that the change of position of the State of Kansas in these matters is more properly a matter of argument to be raised on brief.

It is therefore ordered, that the motion to amend the Statement of Position of the State of Kansas by incorporating therein a letter from Governor John Carlin is denied, and it is ordered that the letter be placed in the correspondence section of the dockets in these proceedings.

*James E. Hopkins*  
By the Commission, James E. Hopkins, Administrative Law Judge.

JAMES H. BAYNE  
Secretary

(SEAL)

\* Embraces F.D. Nos. 30400 (Sub-No. 1-20 and MC-F-15628).

FD 30400

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INTERSTATE COMMERCE COMMISSION

DECISION

SERVICE DATE

FEB 3 1987

Finance Docket No. 30400

SANTA FE SOUTHERN PACIFIC CORPORATION-CONTROL-SOUTHERN PACIFIC TRANSPORTATION COMPANY

Decided: January 30, 1987

By decision served October 9, 1986, we gave applicants 60 days to perfect their September 6, 1986, petition to reopen, based on their representation that they were negotiating agreements to resolve the competitive issues in this proceeding. We specifically stated that "[i]f agreements are negotiated which address those public interest issues and not merely the private interests of their negotiating partners, the Commission will be receptive to reopening the proceeding." We also instructed the applicants to submit "a detailed description of their entire proposal and the evidence they intend to submit in support of it."

Reopening this proceeding may well be appropriate if the proposed merger's competitive problems can be resolved and a basis is provided upon which the Commission can conclude that the public benefits outweigh the public harm. At this juncture, however, the applicants have failed to submit a comprehensive proposal, as directed. For example, in September 1986, the applicants announced that they had entered into a settlement with DRGW. However, by January 5, 1987, DRGW informed the Commission that in fact there was no settlement. As a result, DRGW took a neutral position on the question of whether the proceeding should be reopened, saying it was "not opposed" to reopening. Most recently, on January 28, 1987, the applicants filed a "Binding Settlement Agreement" entered into with DRGW. Although that agreement purports to be the last word on the matter, it incorporates by reference portions of the September 1987 "agreement" and of yet another document (the "lease draft") which has not been filed. The nature and extent of the agreement with DRGW thus remains unclear. UP supports reopening, but its agreement with the applicants covering the Southern Corridor and California has not been presented in final, detailed form. The Missouri-Kansas-Texas Railroad Co. (MKT) has also settled with Santa Fe Southern Pacific Corporation (SFSP) and supports reopening, but the applicants have failed to address the effect of settlements with both the Union Pacific Railroad (UP) and MKT in relation to the pending UP-MKT merger application. Finally, negotiations with other parties, such as Texas Mexican Railway Company, apparently are still continuing. Until these matters are resolved, there is not really a clear proposal before the Commission.

Moreover, the applicants have not provided a detailed explanation of how the foregoing agreements or potential agreements would ameliorate the anticompetitive effects of the proposed merger. Nor have they submitted a detailed summary of the public benefits that the merger, as modified by settlement agreements, would produce. And, although the applicants have announced plans for a broad restructuring of both The Atchison, Topeka & Santa Fe Railway Company and the Southern Pacific Transportation Company involving personnel, plant, and facilities, they have not explained how that restructuring would affect the financial and operational characteristics of the merged company. In sum, the record to date suggests that for purposes of reopening we will be presented with what could be characterized as essentially a new case. As yet, however, we do not have a complete proposal before us.

Recognizing the important public interest in giving full consideration to this merger proposal, we will give the applicants additional time to perfect their petition to reopen.



Accordingly, the applicants may supplement their petition to reopen within 30 days of the date of service of this decision. We expect that any supplement will describe in detail the full scope of the merger proposal including the evidence that applicants intend to submit and a showing of how that evidence will address the effects of the merger, as to both its anticipated harm and its projected benefits.

The applicants are reminded that they have the burden to show changed circumstances. That test is not satisfied simply by an expression of their new willingness to accept conditions. We will not reopen on the basis of speculation that ongoing negotiations might produce an acceptable solution sometime in the future. The petition to reopen will be granted only if applicants can show in sufficient detail what their proposal is and that they satisfactorily address all the problems present in the proposal at this time.

Applicants and all interested parties are also specifically cautioned that this decision or a favorable decision later on the petition to reopen must not be construed as indicating any predisposition on our part to ultimately approve or disapprove the modified merger proposal. Any speculation to this effect would be seriously in error.

Under 49 U.S.C. 10327(g)(1) we are empowered to reopen a proceeding at any time. Thus, if the applicants wish to take more than 30 days, they can do so without losing their right to petition to reopen. However, if the applicants do not renew and supplement their petition within 30 days from the date of service of this decision, our divestiture order becomes effective. At that point, also, competing applications may be filed.

This decision will not adversely affect the quality of the human environment or energy conservation.

It is ordered:

1. Applicants' petition to reopen this proceeding will be held in abeyance for a further period of 30 days from the date this decision is served to allow them to perfect their petition, as discussed above.
2. Within 20 days of applicants' filing, parties may comment on whether applicants have complied with our criteria for reopening, 49 CFR 1115.3.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons. Commissioner Simmons commented with a separate expression. Chairman Gradison concurred in part and dissented in part with a separate expression.

Noreta R. McGee  
Secretary

(SEAL)

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COMMISSIONER SIMMONS, commenting:

The need for an expeditious resolution of the status of SPT and STSF is self-evident. Because of this, I believe applicants should have been formally put on notice that if a supplemented petition to reopen is denied, our prior divestiture order will become effective immediately and no extensions of the 90-day deadline for submission of a divestiture plan will be granted.



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CHAIRMAN GRADISON, concurring in part and dissenting in part:

While I do not disagree with issuance of a decision which clarifies what additional information should be filed before the Commission will consider reopening, in my view both the importance of the proceeding and the magnitude of the anticipated public benefits warrant immediate reopening. Based on the suggested processing schedule included in the Commission's order served December 16, 1986, we could promptly reopen now and require applicants to submit their initial evidence (including within the order any necessary Commission guidance on what further evidence is deemed essential), with responsive and rebuttal evidence due within the two months after that. However, given that the Commission has decided to give the applicants 30 more days to provide further details, the applicants would be wise to make the most of this opportunity.

F.D. 30400

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ALJ 8

INTERSTATE COMMERCE COMMISSION

CORRECTED DECISION

SERVICE DATE

MAY 28 1985

FINANCE DOCKET NO. 30400\*

SANTA FE SOUTHERN PACIFIC CORPORATION - CONTROL -  
SOUTHERN PACIFIC TRANSPORTATION COMPANY

Decided: May 23, 1985

In ALJ 8, served May 22, 1985, fourth paragraph, delete 3rd sentence.

*James E. Hopkins*

By the Commission, James E. Hopkins, on May 23, 1985.

JAMES H. BAYNE  
Secretary

(SEAL)

\* Embraces F.D. Nos. 30400 (Sub-No. 1-20 and MC-F-15628).

F.D. 30400\*/

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ORDER

SERVICE DATE

MAR 25 1986

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 30400\*/

SANTA FE SOUTHERN PACIFIC CORPORATION  
-CONTROL-  
SOUTHERN PACIFIC TRANSPORTATION COMPANY

Decided: March 20, 1986

By decision served January 30, 1986, the Commission established a schedule for submission of evidence relevant to issues raised by the FN-SPSF Agency-Solicitation Agreement submitted by Applicants and EN on December 5, 1985. Pursuant thereto, the parties in these matters offered evidence in satisfaction of filing dates (February 13 and 27, 1986) established by the Commission's decision.

There also was a filing of evidence on March 13, 1986, in accordance with a procedural order served March 5, 1986, whereby a provision was made for the submission of documents produced in discovery on or after February 27, 1986.

No objection is made to any of the evidence submitted by the parties as described above and that evidence, therefore, is received.

*Paul S. Cross*  
By the Commission, Paul S. Cross, Administrative Law Judge, on March 20, 1986.

JAMES H. BAYNE  
Secretary

(SEAL)

FD- 30400

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3392

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SERVICE DATE

JAN 30 1986

INTERSTATE COMMERCE COMMISSION

Decision No. 23

Finance Docket No. 30400<sup>1/</sup>

SANTA FE SOUTHERN PACIFIC CORPORATION - CONTROL - SOUTHERN PACIFIC TRANSPORTATION COMPANY

Decided: January 23, 1986

On December 5, 1985, Santa Fe Southern Pacific Corporation, the Atchison, Topeka and Santa Fe Railway Company, the Southern Pacific Transportation Company (collectively, applicants), and the Burlington Northern Railroad Company (BN) filed a "Notification of Settlement Agreement Relating to Competitive Impact Issues."<sup>2/</sup> The agreement was filed to inform the Commission that applicants have entered into an "agency solicitation" agreement with BN covering traffic that is subject to a "reasonable possibility that competition might be lessened as a result of the [proposed] merger." Applicants and BN state that a complete list of the traffic to be covered by the agreement is not yet available.<sup>3/</sup>

The agreement becomes effective only when the merger is consummated. Consequently, applicants seek to have the agreement imposed as a condition to the approval of their merger. In their reply brief, applicants rely on the agreement as providing "the solution to all potential adverse competitive consequences of the merger". App. Reply Brief, p. 262.

The agreement gives BN the right to solicit covered traffic and requires applicants to move the traffic for BN at a rate of compensation that is the higher of: (1) applicants' existing rate levels on the date of the merger plus inflation; or (2) 150 percent of applicants' 1982 Rail Form A variable costs, indexed and modified. If applicants increase their rates above the charges to BN, they must notify the affected shippers that they may go to BN in order to negotiate more favorable rates; applicants must notify BN of the identity of the traffic. Prior to approval, the agreement sets a rate ceiling on covered traffic.

BN must also notify applicants of all movements under the agreement, so that applicants can compute the charges. The Commission may audit applicants' computation of charges under the Rail Form A alternative. All disputes under the agreement are to be resolved by binding arbitration.

<sup>1/</sup> Embraces Finance Docket No. 30400 (Sub-Nos. 1-20 and MC-F-15628).

<sup>2/</sup> The settlement agreement was filed 11 days before reply briefs were filed.

<sup>3/</sup> This is alleged to be derived from the traffic that the United States Department of Transportation (DOT) has testified is subject to adverse competitive effects.



The Missouri-Kansas-Texas Railroad Company (MKT) replied, and argued that the agreement is evidence that should have been submitted earlier and subjected to discovery and cross-examination, that it is not a settlement because BN has not been an active party, and that the agreement appears to be an independent ratemaking authority (IRMA), which applicants criticized in this case. MKT believes that the record has been closed, and asks that the agreement be rejected or stricken from the record. MKT also asks that portions of the reply briefs filed by applicants and DOT be stricken because they rely on the BN agreement which has not been subjected to discovery and cross-examination. The Kansas City Southern Railway Company (KCS) also asks that the agreement be stricken from the record because it is an untimely amendment to the application.

It is unclear what action, if any, the Commission ought to take specifically with respect to the BN agreement in this consolidation proceeding. Nevertheless, we believe it is a development that warrants consideration. Consequently, we are scheduling further hearing and supplemental briefs to enable the parties and the Commission adequately to address all relevant issues raised by the agreement.

Applicants and BN shall submit evidence addressing relevant issues, including, at a minimum, the following:

1. The traffic covered by the agreement;
2. The significant distinctions between the BN agreement and KCS's IRMA;
3. The application and effects of the proposed floors on charges to BN, and its ability and incentive to provide competitive service;
4. The competitive effects on other railroads throughout the western region;
5. The competitive effects on shippers with respect to rates and service;
6. The effect on BN's route structure;
7. BN's ability to control costs and service over applicants' lines;
8. The interrelationship between the agreement and applicants' earlier proposed rate and routing constraints; and
9. The necessity or propriety of the Commission's taking any action at all on the agreement.

Applicants' evidence must be filed within two weeks of the service of this decision; responsive evidence will be due two weeks thereafter. Applicants' rebuttal must be filed one week after responsive evidence is filed, and supplemental briefs are due one week thereafter.

Cross-examination may be held if warranted by the evidence. Requests for cross examination must be directed to Chief Administrative Law Judge Allard.

This decision will not significantly affect the quality of the human environment or energy conservation.



It is ordered:

1. The requests of KCS and MKT that applicants' Notification of Settlement Agreement with BN be stricken or rejected are denied.
2. MKT's request to strike portions of the reply briefs of applicants and DOT is denied.
3. The parties shall comply with the schedule set out above.
4. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Sterrett, Andre and Lamboley.

James H. Bayne  
Secretary

(SEAL)