FINANCE DOCKET NO. 32549

BURLINGTON NORTHERN INC. AND BURLINGTON NORTHERN RAILROAD COMPANY --CONTROL AND MERGER--SANTA FE PACIFIC CORPORATION AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

Decision No. 38

Decided August 16, 1995

The Commission approves, with certain conditions, the common control and merger of the Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company.[1]

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[1] This decision embraces: Finance Docket No. 32549 (Sub-No. 1), Burlington Northern Inc., Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company-- Control Exemption--The Wichita Union Terminal Railway Company; Finance Docket No. 32549 (Sub-No. 2), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Construction and Operation Exemption--Amarillo, TX; Finance Docket No. 32549 (Sub-No. 3), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Construction and Operation Exemption--Amarillo, TX; Finance Docket No. 32549 (Sub-No. 4), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Construction and Operation Exemption--Dobbin, TX; Finance Docket No. 32549 (Sub-No. 5), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Construction and Operation Exemption--Dobbin, TX; Finance Docket No. 32549 (Sub-No. 6), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Construction and Operation Exemption--Cameron, IL; Finance Docket No. 32549 (Sub-No. 7), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Construction and Operation Exemption--Enid, OK; Finance Docket No. 32549 (Sub-No. 8), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Construction and Operation Exemption--Fairmont, OK; Finance Docket No. 32549 (Sub-No. 9), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Construction and Operation Exemption--Perry, OK; Finance Docket No. 32549 (Sub-No. 10), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Construction and Operation Exemption--Perry, OK; Finance Docket No. 32549 (Sub-No. 11), Burlington Northern Railroad Company and The

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INTRODUCTION

Applicants. On October 13, 1994,[2] Burlington Northern Inc. (BNI), Burlington Northern Railroad Company (BN), Santa Fe Pacific Corporation (SFP), The Atchison, Topeka and Santa Fe Railway Company (Santa Fe), and BNSF Corporation (BNSF)[3] filed an application under 49 U.S.C. 11343-45 for BNI's acquisition of control of and merger with SFP, the resulting common control of BN and Santa Fe by the merged company, the consolidation of BN and Santa Fe railroad operations, and the merger of BN and Santa Fe. (BNI, BN, SFP, Santa Fe, and BNSF are referred to collectively as applicants.)[4]

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[2] Applicants filed an application (BN/SF-7, -8, -9, -10, -11, -12, -13, and -14), which was supplemented on November 3, 1994 (BN/SF-15), November 21, 1994 (BN/SF-17), November 30, 1994 (BN/SF-21), and February 17, 1995 (BN/SF-25).

[3] These and other abbreviations frequently used in this decision are listed in Appendix A.

[4] BN, a class I railroad, is a wholly owned subsidiary of BNI, a noncarrier holding company. Santa Fe, another class I railroad, is a wholly owned subsidiary of SFP, which is also a noncarrier holding company. BNSF is a newly formed noncarrier corporation owned 50% by BNI and 50% by SFP. Applicants anticipate that, upon approval, SFP will merge with and into BNI, which will

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Applicants indicate that the merger will be accomplished by the exchange of all outstanding shares of SFP common stock for BNI common stock at an exchange ratio ranging between (i) a minimum of 0.40 shares of BNI common stock for each share of SFP common stock and (ii) a maximum of 0.4347 shares of BNI common stock for each share of SFP common stock.[5] They indicate that no new securities will be issued by any company subject to regulation under 49 U.S.C. 11301 as a result. They add, however, that they seek any approval that may be required by BN's succession to then-outstanding debt obligations of Santa Fe.

Applicants also have filed petitions seeking exemption from regulation under 49 U.S.C. 10505 (i) for the merged entities to control The Wichita Union Terminal Railway Company (WUTR), in which BN and Santa Fe each owns a one-third stock interest,[6] and (ii) for 11 related construction projects.[7]

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change its name to Burlington Northern Santa Fe Corporation. Applicants anticipate that Santa Fe will merge thereafter with and into BN, which will change its name to The Burlington Northern and Santa Fe Railway Company. Applicants have indicated that they may use an alternative merger structure. They have agreed that either BNI or SFP may elect to effect the merger of SFP with and into BNI through the use of a noncarrier holding company, BNSF, which has been established for that purpose. BNSF would become a party to the BNI/SFP Agreement and Plan of Merger and would assume all obligations of BNI thereunder with respect to consummating the merger. BNSF would create two new wholly owned subsidiaries, one of which would merge into BNI, and the other into SFP. BNSF would be the surviving holding company controlling the two new wholly owned subsidiaries, which in turn would control BN and Santa Fe.

[5] *See* BN/SF-25 (explaining the circumstances under which the BNI/SFP exchange ratio will range between 0.40 and 0.4347 shares of BNI common stock for each share of SFP common stock). Applicants add that, if they employ the alternative merger structure, each holder of BNI common stock would receive, for each such share, one share of BNSF common stock, and each holder of SFP common stock would receive, for each such share, not less than 0.40 shares of BNSF common stock and not more than 0.4347 shares of BNSF common stock. Applicants have requested that BNSF and, to the extent deemed necessary, the subsidiaries it would create under the alternative merger structure be joined as applicants for purposes of this proceeding and that the filing requirements of 49 CFR 1180.4 - 1180.9 be waived with respect to these entities. *See* BN/SF-25 at 3 n.2.

[6] This petition has been docketed as Finance Docket No. 32549 (Sub-No. 1).

[7] These petitions have been docketed as Finance Docket No. 32549 (Sub-Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12).

Settlement Agreements. Settlement agreements have been entered into by applicants and several railroads: UP;[8] SP;[9] Kansas City Southern Railway Company (KCS); Kyle Railroad Company (Kyle); Gateway Western Railway Company (GTWRY); Cen-Tex Rail Link Ltd. (Cen-Tex);[10] Georgetown Railroad Company (GTRR); and Toledo, Peoria & Western Railway Corporation (TP&W). Another settlement agreement has been entered into by applicants and the Ports of Tacoma and Seattle, WA. *See* BN/SF-32. Except as indicated in the next paragraph, applicants do not contemplate that the settlement agreements will be imposed as conditions to approval of the application.

An additional settlement agreement has been entered into between applicants and The National Industrial Transportation League (NITL) requesting that we condition the application by requiring that applicants: grant certain trackage rights and/or access rights; submit, no later than November 22, 1995, implementing agreements to carry out any other trackage rights arrangements contained in the settlement agreements referenced above; and commence operations pursuant to all other provisions of these settlement agreements promptly after consummation of BN/Santa Fe common control.

Protestants: Four Categories. Submissions generally opposing the merger, and generally urging in the alternative the imposition of certain conditions upon any approval of the application, have been filed by four sets of parties--railroads, electric utilities, other protestants, and rail labor.

Railroads. Conditions assertedly necessary to ameliorate certain asserted anticompetitive impacts have been requested by Illinois Central Railroad Company (IC), Grainbelt Corporation (GNBC), Keokuk Junction Railway (KJRY), and Seagraves, Whiteface and Lubbock Railroad Co. (SWGR). Conditions to ameliorate certain asserted operational impacts have been requested by the National Railroad Passenger Corporation (Amtrak) and the Southern California Regional Rail Authority (SCRRA).

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[8] UP refers to affiliates Union Pacific Railroad Company (UPRR) and Missouri Pacific Railroad Company (MPRR).

[9] SP refers to affiliates Southern Pacific Transportation Company (SPT), Denver and Rio Grande Western Railroad Company (DRGW), St. Louis Southwestern Railway Company (SSW), and SPCSL Corp. (SPCSL).

[10] Cen-Tex is an affiliate of South Orient Railroad (SORR).

Electric Utilities. Conditions have been requested by Western Fuels Service Corp. (WFSC), Houston Lighting & Power Company (HL&P), Southwestern Public Service Company (SPS), Central Power & Light Company (CP&L), Arizona Public Service Company (APS), Chaco Energy Company (Chaco), Arizona Electric Power Cooperative, Inc. (AEPCO), Western Coal Traffic League (WCTL), Western Resources, Inc. (WRI), Tucson Electric Power Company (TEP), and Oklahoma Gas and Electric Company (OG&E).

Other Protestants. Conditions have been requested by Phillips Petroleum Company (PPC), Montana Wheat and Barley Committee (MWBC), Bunge Corporation (Bunge), The Society of the Plastics Industry, Inc. (SPI), American Maize-Products Company (American Maize), Cargill, Incorporated (Cargill), Chaparral Steel Company (Chaparral), the Chicago Board of Trade (CBOT), "K" Line America, Inc. (K Line), Kansas Shippers Association (KSA), and Owens-Corning Fiberglas Corporation (Owens-Corning). Additional conditions have been requested by the California Public Utilities Commission (CPUC), the Illinois Department of Transportation (IDOT), the Kansas Department of Transportation (KDOT), and the Oklahoma Department of Transportation (ODOT).

Rail Labor. Rail Labor, represented principally by the Allied Rail Unions (ARU), the Transportation•Communications Union (TCU), the United Transportation Union (UTU), the International Association of Machinists and Aerospace Workers (IAM), and the Brotherhood of Locomotive Engineers (BLE), urges the imposition of an upgraded version of the *New York Dock* protective conditions[11] and asks that we clarify that any protective arrangements imposed in this proceeding are not in lieu of and do not supersede prior protective arrangements.

Federal Parties. We have also received submissions from the United States Department of Agriculture (USDA), the United States Department of Transportation (USDOT), and the United States Department of Justice (DOJ).

Additional Parties. Numerous additional parties, including elected officials, government agencies, shippers, shortline railroads, and labor organizations, have

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[11] *New York Dock Ry.--Control--Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979) (*New York Dock*).

participated in this proceeding. Their submissions have generally been limited to expressions of either support for or opposition to: BN/Santa Fe common control; the conditions requested by one or more of the parties urging the imposition of conditions upon any approval of the application; and/or the conditions that would have been requested (but ultimately were not) by the railroads with which applicants have entered into settlement agreements.[12]

Summary of Decision. In this decision, we are taking the following action: (1) we are approving common control and merger of BN and Santa Fe as proposed in the BN/Santa Fe application; (2) we are imposing as conditions the trackage rights/access rights provided for in paragraph 1 of the NITL settlement agreement and the two stipulations in paragraph 2 of the NITL settlement agreement; (3) we are granting 12 related petitions for exemption in Finance Docket No. 32549 (Sub-Nos. 1-12); (4) we are imposing certain conditions with respect to GNBC; (5) we are imposing certain conditions with respect to OG&E and PPC; (6) we are imposing standard labor protective conditions in Finance Docket No. 32549 and Finance Docket No. 32549 (Sub-No. 1), and with respect to all trackage rights imposed as conditions; (7) we are imposing certain environmental mitigating conditions; and (8) we are denying all other conditions sought by the various parties in this proceeding.

THE RECORD

The evidence and arguments submitted in this proceeding are extensive, and are summarized at length in the briefs. We have chosen to summarize only the most important aspects of this evidence and these arguments.

APPLICANTS. BN operates approximately 25,000 miles of road and secondary main tracks in the United States and Canada. BN's principal routes are as follows: from the Pacific Northwest (Washington, Oregon, Idaho, and southern British Columbia) across Montana, North Dakota, Minnesota, and the western edge of Wisconsin to Chicago, IL; southeast from the Powder River Basin (PRB) in Wyoming through Lincoln, NE, to Chicago and Kansas City, KS; from the PRB in Wyoming south to Denver, CO, and Fort Worth, TX; from

[12] All late-tendered pleadings submitted by persons we have described as "additional parties" will be accepted for filing.

the PRB in Montana to Bismarck, ND, and Minneapolis/St. Paul, MN, with an auxiliary line to the Head of the Lakes; from Denver to Chicago with a junction at Lincoln; from Avard, OK, east to Memphis, TN, and Birmingham, AL; and from Chicago to Houston, TX, through Kansas City and Dallas, TX, with an auxiliary line from St. Louis to a junction point east of Tulsa, OK.[13]

Santa Fe operates approximately 10,400 miles of road and secondary main tracks in the United States. Santa Fe's principal routes are as follows: from Chicago across Illinois, Iowa, Missouri, Kansas, Oklahoma, Texas, New Mexico, and Arizona to California; from Kansas City to Colorado and New Mexico with an auxiliary line to Superior, NE; and from Chicago to Dallas/Fort Worth and Houston with an auxiliary line to east Texas and Louisiana.[14]

Overview of Public Interest Justifications. Applicants assert that the merger will enable them to provide more efficient, more responsive and more competitive rail service to the shipping public. Within this context, they seek to accomplish a number of specific purposes that will result in substantial benefits to the shipping public.

First, applicants seek to create an expanded rail system with broader geographic coverage than either of the applicant carriers' existing systems, with new single-line service between points on the BN system and points on the Santa Fe system.[15]

Second, applicants seek to increase opportunities for intermodal partnerships between the combined company and motor carriers, resulting in more efficient service and substantial environmental benefits, both in reduced

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[13] BN's principal termini are at Seattle, Tacoma, and Spokane, WA; Portland, OR; Bieber, CA; Vancouver, British Columbia; Winnipeg, Manitoba; Billings, MT; Cheyenne, WY; Denver, CO; Duluth, MN/Superior, WI; Fargo, ND/Moorhead, MN; Minneapolis/St. Paul, MN; Chicago, IL; Omaha and Lincoln, NE; Des Moines, IA; Wichita and Kansas City, KS; Kansas City, Springfield, and St. Louis, MO; Tulsa, OK; Fort Worth, Dallas, Houston, and Galveston, TX; Memphis, TN; Birmingham and Mobile, AL; and Pensacola, FL. BN's principal points of interchange are at those termini and at Avard, OK.

[14] Santa Fe's principal termini are at San Francisco/Oakland, Los Angeles, San Diego, and Barstow, CA; Phoenix, AZ; Albuquerque and Clovis, NM; Denver, CO; El Paso, Dallas, and Houston, TX; Kansas City, KS; and Chicago, IL.

[15] These new routes would include the following: (a) between points in central and southern California (including California ports) served by Santa Fe and points in the Midwest and Southeast served by BN; (b) between Seattle and other points in the Pacific Northwest served by BN and points in the Southwest served by Santa Fe; (c) between points in the Southwest served by Santa Fe and points in the Southeast served by BN; (d) between points in the Northern Tier states served by BN and points in the Southwest served by Santa Fe; and (e) between points in Western Canada served by BN and points in the Southwest served by Santa Fe.

energy consumption and in improved air quality. This would enable them to compete more effectively with long-haul motor carriers, particularly between points in the Southeast and Lower Midwest and points in Arizona, New Mexico, and California, and between points in the Upper Midwest and points in the Far West.

Third, applicants seek to provide shippers with more efficient and cost-effective single-line service, including new single-line service between Canada and Mexico, that would enhance shippers' ability to respond to the opportunities created by the North American Free Trade Agreement (NAFTA).

Fourth, applicants seek to enhance their ability to compete effectively with other major western rail carriers.

Fifth, applicants seek to diversify their traffic base, balancing BN's strengths in coal and grain with Santa Fe's strengths in intermodal traffic.

Finally, applicants seek to increase operating efficiencies and reduce costs through, among other things: (a) internal rerouting of traffic over shorter routes; (b) integration of the productive facilities of the two carriers; (c) better use of equipment, including grain cars, effectively expanding the capacity of the existing fleet; (d) more efficient use of existing yards and terminals; (e) reductions in general and administrative costs; (f) reductions in costs of maintenance of way and maintenance of equipment; (g) increased traffic densities; (h) lower materials costs resulting from improved purchasing power; and (i) avoidance of capital expenditures that would otherwise be required.

Competitive Impacts. Applicants argue that the transaction will enhance competition among rail carriers, and between rail carriers and motor carriers for intermodal traffic. If approved, the transaction will result in the integration of the BN and Santa Fe networks, allowing the combined carriers to take advantage of network efficiencies that will improve service to the public and enhance competition with trucks and other rail carriers. Applicants maintain that integration of their systems will permit high quality single-line service, streamlined traffic handling, and elimination of duplicative costs, as detailed above.

Applicants stress that the transaction will result in the integration of two rail networks with little overlap. They argue that the pro-competitive opportunities that the majority of BN and Santa Fe customers will enjoy will far outweigh any adverse effects on competition between rail carriers.

Effects on Traffic, Revenues, and Earnings. Applicants state that they expect the transaction to yield increases in traffic, revenues, and earnings because new single-line service and related efficiencies would attract both rail and intermodal truck traffic to the combined system. They state that they have conducted three traffic studies (focusing on extended hauls, other intramodal diversions, and intermodal diversions, respectively) that estimate the traffic gains and resulting revenues that could be achieved by the combined BN/Santa Fe system.

Applicants estimate that the increase in traffic would generate $306.5 million in additional revenue. After deducting the costs associated with handling the increased traffic, a net contribution of $107 million was estimated.

Economies to Be Effected in Operations. Applicants project annual savings of $453 million, including $107 million in annual operating costs and $346 million in general, administrative, and support functions (including management of operating and maintenance departments).[16] In addition, they predict that they will achieve one-time savings of $79.9 million in avoided capital costs and that they will recover $30.8 million in salvage value from disposition of assets.

Adequacy of Transportation. Applicants allege that the merger will enhance the adequacy of rail transportation service and will not have any adverse impact on the continuation of essential transportation services to the public. Transportation service would be enhanced because they will be able to provide more efficient single-line service over a broader geographic area than they currently serve. Shippers prefer single-line service because it is more reliable and therefore allows them to achieve economies such as reduced inventory carrying costs. Applicants also contend that expanded single-line service should permit them to improve equipment utilization and reduce loss and damage to commodities.

Applicants maintain that they do not contemplate ceasing rail service to any customer who currently receives it. Similarly, they assert that the ability of other rail carriers to furnish essential services will not be affected. They contend that the projected revenue impact of the proposed transaction on other rail carriers is *de minimis*.

Labor Impact. Applicants project that the total labor impact of the BN/Santa Fe control transaction will be 2,918 jobs abolished, 390 jobs transferred, and 157 jobs created. *See* BN/SF-8 at 424-431. Applicants assume that approval will be subject to the standard *New York Dock* labor protective conditions.

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[16] Applicants state that the operating savings would be generated from internal rerouting of traffic, consolidation of common point facilities, and rationalization of system facilities.

Embraced Proceedings. Applicants have filed 12 related exemption petitions. The first seeks an exemption from regulation under 49 U.S.C. 11343-45 for the acquisition of control of WUTR. The remaining 11 petitions seek exemptions from regulation under 49 U.S.C. 10901, and under any other applicable provisions of 49 U.S.C. Subtitle IV and related regulations, for 11 construction projects. Applicants indicate that these projects will be undertaken as part of the consolidation of BN and Santa Fe operations. They insist that these projects will enhance efficient single-line operations on the consolidated railroad.

Sub-No. 1. WUTR currently is owned by BN, Santa Fe, and MPRR, each of which holds a one-third stock interest therein and has two representatives on WUTR's six-member board. Applicants seek an exemption for the control of WUTR that will result from the merger. Applicants anticipate that their control of WUTR will affect neither WUTR's operations nor service over its lines. They further anticipate that MPRR will continue to participate in the management of WUTR.[17]

Sub-No. 2 (Amarillo, TX). Applicants seek an exemption for the construction of a 3,134-foot connection between the SantaFe main line near milepost 3 and the SPS facility near Amarillo. Applicants concede that a connection (referred to as the ASARCO spur) presently exists between the Santa Fe main line and the SPS facility, but they note that this connection can be accessed only from the south, so that southbound SPS traffic must move several miles past SPS and be switched in Amarillo. The proposed connection would allow southbound SPS traffic to move directly into the SPS facility.

Sub-No. 3 (Amarillo, TX). Applicants seek an exemption for the upgrading and realignment of the connection between the BN track near milepost 334.71 and the Santa Fe track near milepost 552.2 in Amarillo. Applicants allege that this project will facilitate the movement of traffic between points west of

[17] In Decision No. 5 (slip op. at 11-12), applicants were directed to submit certain supplemental information regarding the Houston Belt & Terminal Railway Company (HBT), another small carrier in which both BN and Santa Fe hold interests. Their supplemental submission, *see* BN/SF-17, indicates that BN effectively exercises control of 25% of HBT stock, that Santa Fe likewise effectively exercises control of 25% of HBT stock, and that MPRR effectively exercises control of the remaining 50% of HBT stock. Applicants apparently think that, in view of MPRR's control of 50% of HBT stock, their own combined control of the other 50% of HBT stock will not enable them to "control" HBT as that word is used in 49 U.S.C. 11343. This apparent opinion is at least superficially plausible, and, in any event, no party to this proceeding has claimed that applicants will "control" HBT in the aftermath of the BNI/SFP merger.

Amarillo on Santa Fe lines and points east of Amarillo on BN lines. The curvature and turnout size of the existing connection, applicants claim, limit speed through this connection to 10 miles per hour, which is inadequate for intermodal and other time-sensitive traffic.

Sub-No. 4 (Dobbin, TX). Applicants seek an exemption for the construction of a 1,100-foot connection in the southeast quadrant of the intersection between the BN main line near milepost 105 and the Santa Fe main line near milepost 49.9 in Dobbin. Applicants indicate that the proposed connection, which is in virtually the same location as a previous connection, will provide for the efficient movement of traffic originating on Santa Fe's Beaumont line and destined either south to Houston or north to Fort Worth and beyond.

Sub-No. 5 (Dobbin, TX). Applicants seek an exemption for the construction of a 2,970-foot connection in the southwest quadrant of the intersection between the BN main line near milepost 105 and the Santa Fe main line near milepost 49.7 in Dobbin. Applicants indicate that the connection will facilitate the movement of traffic between points served by Santa Fe lines and points served by BN lines, as well as provide expedited access for traffic on Santa Fe lines to the intermodal facility in North Houston, where applicants propose to consolidate BN and Santa Fe intermodal operations.

Sub-No. 6 (Cameron, IL). Applicants seek an exemption for the construction of a 4,165-foot connecting track (with a 2,390-foot wye track) between the Santa Fe main line near milepost 186.4 and the BN main line near milepost 171.7 near Cameron. Applicants maintain that the connection will allow east-west traffic on Santa Fe to gain access to BN's Galesburg Yard and terminal facilities, which will become a major switching point for the consolidated rail system. Applicants add that the connection will also facilitate Kansas City-Chicago through train movements.

Sub-No. 7 (Enid, OK). Applicants seek an exemption for the construction of a 7,000-foot connection between the BN track near milepost 543 and the Santa Fe track near milepost 62 at Enid. Applicants indicate that the connection, in addition to providing an alternative route for main line trains moving through Enid, will allow through trains to avoid potential delays due to frequent switching activities in the nearby rail yards.

Sub-No. 8 (Fairmont, OK). Applicants seek an exemption for the construction of a 486-foot connection between the BN Avard line near milepost 534.29 and the Santa Fe Guthrie branch line near milepost 73.6 near Fairmont. Applicants maintain that this connection will allow BN traffic access to the Enid-Fairmont portion of the Santa Fe Guthrie branch line. Applicants add that, as a consequence of the construction projects proposed in Sub-Nos. 7 and 8, the 10-mile segment between Enid and Fairmont will become an alternative line for anticipated increased volumes of traffic moving between Avard and Tulsa, OK.

Sub-No. 9 (Perry, OK). Applicants seek an exemption for the construction of a 1,268-foot connection in the southwestern quadrant of the interchange between the BN main line near milepost 508.8 and the Santa Fe main line near milepost 322 at Perry. Applicants state that the connection will allow northbound Santa Fe western U.S. traffic to transfer to the BN line heading west toward Avard, OK, where the traffic could access Santa Fe's main line. Applicants add that eastbound BN Oklahoma traffic would similarly be able to transfer to the Santa Fe line at Perry.

Sub-No. 10 (Perry, OK). Applicants seek an exemption for the construction of a 1,090-foot connection between the BN line near milepost 508 and the Santa Fe line near milepost 321.2 in Perry. Applicants indicate that this connection will allow BN and Santa Fe trains to operate between Black Bear, OK, and Perry, OK, in a double-track arrangement that will improve the capacity of both rail lines. Applicants add that the connection will also allow for the more efficient swapping of blocks of rail cars.

Sub-No. 11 (Saginaw, TX). Applicants seek an exemption for the construction of a 1,255-foot connection between the BN line near milepost 9.2 and the Santa Fe line near milepost 353.9 at Saginaw. Applicants maintain that the connection will facilitate and expedite the movement of traffic to and from Irving and Dallas, TX into the Santa Fe Alliance Yard.

Sub-No. 12 (Saginaw, TX). Applicants seek an exemption for the construction of a 6,142-foot connection between the BN line near milepost 11 and the Santa Fe line near milepost 356 at Saginaw. Applicants assert that the connection will allow traffic to and from BN's Wichita Falls Subdivision to move onto and off the Santa Fe line for movements to and from the Santa Fe Alliance Yard and the Santa Fe Saginaw Yard.

Settlement Agreements. The settlement agreements entered into between applicants and various other carriers provide that various rights to use BN/Santa Fe facilities will be received by UP, SP, KCS, Kyle, GTWRY, Cen-Tex, GTRR, and TP&W, and in some instances BN/Santa Fe will receive rights to use certain facilities of those carriers as well. A description of these agreements is set forth in Appendix B.

NITL Settlement Agreement. The National Industrial Transportation League, in its NITL-8 comments submitted May 10, 1995, sought two conditions with respect to the settlement agreements that the applicants had entered into prior to May 10th with UP, SP, KCS, Kyle, GTWRY, Cen-Tex, GTRR, and TP&W. First, to guarantee that the beneficial effects of these settlement agreements could not be undone by future agreements not requiring regulatory review, NITL asked that we impose the terms of these settlement agreements as conditions to approval. Second, to guarantee that the rail services provided under these settlement agreements actually would be competitive with the rail services provided by BN/Santa Fe, NITL asked that we establish compensation standards for services under these settlement agreements.

On May 26, 1995, applicants and NITL entered a settlement agreement of their own (referred to as a stipulation). *See* BN/SF-33. The stipulation consists of four numbered paragraphs.

Paragraph 1 is an agreement by applicants that, upon consummation, they will grant to a class I rail carrier that is unaffiliated with applicants the following trackage rights and/or access: (a) bridge trackage rights between Abilene, KS, and Superior, NE, over Santa Fe's lines, with access to all facilities at Superior that are (when such rights become effective) open to service by both BN and Santa Fe (either directly, by reciprocal switching, or by any other means); (b) bridge trackage rights between Pueblo, CO, and Stratford, TX, over Santa Fe's lines, and between Dalhart, TX, and Fort Worth, TX, over BN's lines; access to all industries served by BN and Santa Fe, directly or through reciprocal switching, at Amarillo, TX; access to Plainview, TX, and Lubbock, TX; and access to the SWGR; (c) access to the TP&W at Bushnell, IL; and (d) access to all industries served by BN or Santa Fe directly or by reciprocal switching at Fort Madison, IA, and Galesburg, IL.[18]

Paragraph 2 consists of two stipulations by applicants. They stipulate that implementing agreements to carry out trackage rights granted by the settlement agreements entered into with other parties to this proceeding will be submitted for consideration by the Commission or any successor agency no later than November 22, 1995. They further stipulate that the involved carriers will

[18] The trackage rights and access rights promised in Paragraph 1 are to be granted "upon consummation" of the BNI/SFP merger. It is possible, however, that consummation of BN/Santa Fe common control might precede consummation of the BNI/SFP merger. We therefore assume that the parties envision that the trackage rights and access rights promised in Paragraph 1 are to be granted upon consummation of BN/Santa Fe common control. Also, although the literal wording of Paragraph 1 suggests that a single class I railroad will receive all the trackage rights and access rights referenced therein, the record indicates that UP will receive the trackage rights and access rights referenced in Paragraph 1(a) and that SP will receive the trackage rights and access rights referenced in Paragraphs 1(b), 1(c), and 1(d).

commence operations pursuant to all other provisions of the settlement agreements in this proceeding (including haulage rights) promptly after consummation of BN/Santa Fe common control.

Paragraph 3 is a stipulation by NITL that the concerns expressed in its NITL-8 comments have been addressed by the NITL settlement agreement, provided that approval of the application is conditioned as requested in Paragraph 4.

Paragraph 4 is a stipulation by applicants and NITL that compliance by applicants with the NITL settlement agreement should be made a condition to approval of the application. Paragraph 4 is, in effect, a request that we condition the application by requiring applicants: to grant the trackage rights and/or access rights stipulated in Paragraph 1; to submit, no later than November 22, 1995, implementing agreements to carry out any other trackage rights arrangements contained in the settlement agreements entered into with other parties; and to commence operations pursuant to all other provisions of the settlement agreements (including haulage rights) promptly after consummation of BN/Santa Fe common control.

Conditions Imposed; Compensation Terms. Certain parties have argued, as NITL itself initially argued, that additional provisions (perhaps all provisions) of the settlement agreements (not merely the few such provisions referenced in Paragraph 1 of the NITL settlement agreement) should be imposed as conditions. Certain parties have further argued that the Commission should set (or at least review) the compensation terms applicable to the operative provisions of all settlement agreements.

Applicants have noted that the NITL settlement agreement envisions that we will impose as conditions only the specific trackage/access rights referenced in its Paragraph 1, and not the various additional rights contained in the underlying settlement agreements. With respect to such additional rights, the NITL settlement agreement envisions only (a) with respect to trackage rights, that we will require that implementing agreements be submitted by November 22, 1995, and (b) with respect to all other rights (particularly haulage rights), that we will require applicants to begin operations under them promptly after consummation. BN/SF-33 at 1. Applicants have added that, although the underlying settlement agreements may resolve legitimate competitive issues, it would be inappropriate and contrary to public policy for us to impose any condition without a showing that the condition is required to ameliorate harm caused by the consolidation. BN/SF-36 at 4-5. Applicants have also argued that compensation terms should be negotiated between railroads rather than imposed by regulatory directive, BN/SF-36 at 16 and at 103 n.50, and that regulatory modification of settlement agreements could make it difficult for railroads to determine the true costs and benefits of such agreements and could discourage their formation. BN/SF-36 at 7-8.

UP contends that no provision beyond those in Paragraph 1 of the NITL settlement agreement should be imposed unless the transaction would have a serious anticompetitive effect that is addressed by that provision. Otherwise, UP states that settlement agreements should be treated as private matters not requiring our review or imposition as a condition. UP-7 at 1-2.

UP further contends that if we impose the Pueblo-Fort Worth portion of the SP settlement agreement, we should require that the section 9 proviso be removed. It provides that in the event of (among other things) an acquisition by UP of a certain interest in an SP rail entity: (a) BN and Santa Fe can require a renegotiation of the settlement agreement compensation terms to reflect the effect of such transaction on operations over BN and Santa Fe lines; and (b) the trackage rights charge paid by SP for moving Wyoming and Montana coal between Pueblo and Fort Worth shall be increased to a certain specified amount. UP contends that, even though a UP/SP transaction would itself have no effect in the Pueblo-Fort Worth corridor or at Amarillo, Plainview, or Lubbock (because UP does not operate there), this proviso threatens effective rail competition between Pueblo and Fort Worth, and at Amarillo, Plainview, and Lubbock, in the event of a UP/SP transaction. UP, suggesting that a competitive response to the BN/SantaFe transaction might be a UP/SP transaction, argues that the challenged proviso would shift certain anticompetitive effects in the Colorado-Texas area from the present BN/Santa Fe transaction to a possible future UP/SP transaction. Applicants reply that, if UP were to acquire control of SP, reopening and adjustment of the compensation terms would be entirely logical: "If UP were to control SP, it could route significant overhead traffic over Applicants' lines. A change in compensation could be required to defray increased operating and capital costs, including costs attributable to congestion on Applicants' lines." BN/SF-48 at 23.[19]

Amtrak urges that we not impose as conditions those aspects of the SP settlement agreement that grant SP trackage rights over Santa Fe's lines: (1) between Pueblo and Stratford; and (2) between Kansas City and Chicago (the

[19] UP's submission regarding the section 9 proviso, including the text of the proviso itself, was filed under seal. UP-7 at 6-8. Applicants' response was filed on the record, but lacks certain details. BN/SF-48 at 22-23. We need not disclose further details to resolve this issue.

Kansas City-Chicago rights are embraced in the Hutchinson-Chicago rights). Amtrak notes that its Southwest Chief (the focus of a protective condition sought by Amtrak) operates over a short stretch of the Pueblo-Stratford line (between La Junta, CO, and Las Animas Junction, CO) and over all of the Kansas City-Chicago line. Because SP trackage rights operations might congest that line, Amtrak contends that the SP trackage rights would not be in the public interest.

WCTL asks that we impose as a condition that portion of the SP settlement agreement embracing the Caldwell-Elmendorf haulage services that SP will provide to BN/Santa Fe. WCTL-6 at 11 n.7.

ILLINOIS CENTRAL RAILROAD COMPANY. IC, which operates 2,700 miles of track in the north-south corridor connecting Chicago and New Orleans, insists that the rail transportation services it provides are highly efficient. The condition it seeks in this proceeding, IC contends, is designed to preserve its ability to compete.

IC contends that with the merger, six railroads--BN/Santa Fe, UP, CSX, NS, Conrail, and SP[20]--will control 92% of the operating revenues earned by *all* class I railroads in the United States, and BN/Santa Fe alone will control 25%. IC maintains that the growing disparity between large and small class I carriers creates a threat to competition. It argues that the newly merged carrier will use its market power and leverage over shippers and connecting lines to force traffic to move via potentially less efficient routes, thus weakening its smaller rivals in the marketplace.

The conventional economic theory cited by applicants, IC concedes, is that a rational profit-maximizing monopolist will not engage in such inefficient routings. IC maintains, however, that practical experience demonstrates that this conventional economic theory is wrong. IC insists, by way of example, that BN--subsequent to its merger with the St. Louis-San Francisco Railway Company (Frisco)[21]--has whittled away at BN/IC joint-line traffic, and has made little effort to attract new traffic to potentially efficient BN/IC routes. IC fears that a commonly controlled BN/Santa Fe will extend this practice over Santa Fe routes.

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[20] CSX is the acronym for CSX Transportation, Inc. NS is the acronym for Norfolk Southern Corporation. Conrail is the acronym for Consolidated Rail Corporation.

[21] *See Burlington Northern, Inc.--Control & Merger--St. L.*, 360 I.C.C. 788 (1980) (*BN/Frisco*), *aff'd sub nom. Missouri-Kansas-Texas R.R. v. United States*, 632 F.2d 392 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981).

IC contends that, as respects the Chicago-New Orleans corridor, BN's power to impose a short-haul route on IC traffic or to exclude IC from the routing altogether was acquired by virtue of the BN/Frisco merger. Prior to that transaction, BN and IC interchanged along this route only at Chicago and Centralia, IL. When BN acquired access to East St. Louis and Memphis, it preferred those gateways and eliminated IC's ability to participate in routes via Chicago, Centralia, or East St. Louis. IC fears that approval of the application would allow a commonly controlled BN/Santa Fe to extend BN's present leverage.

Thus, IC seeks conditions requiring applicants to participate in through rates with IC over the Memphis gateway on a basis that gives applicants the same revenue per mile they now receive on their preferred route. IC proposes arbitration to resolve any compensation disputes. These conditions, IC maintains, will protect competition and shipper routing alternatives by preventing the foreclosure of efficient routings, without burdening applicants.

GRAINBELT CORPORATION. Grainbelt Corporation (GNBC) and Farmrail Corporation (FMRC), two wholly owned subsidiaries of Farmrail System, Inc. (Farmrail), operate a network of rail lines in western Oklahoma. GNBC operates 178 route miles (acquired from BN in 1987) between Enid and Frederick. GNBC also has incidental overhead trackage rights over 59 miles of a BN line between Quanah, TX, and Snyder, OK (Snyder lies on GNBC's Enid-Frederick line); and GNBC indicates that, although it has never operated trains over the Quanah-Snyder line, it expects to begin operations some time this year. FMRC operates an additional 187 routes miles, all of which have been leased from the Oklahoma Department of Transportation (ODOT). FMRC's route structure consists of its Erick-Hydro line and its Thomas-Elmer line (formerly operated by Santa Fe). GNBC and FMRC connect at Clinton. FMRC connects with the Quanah-Snyder line at Altus, roughly the mid-point of the Quanah-Snyder line; Altus, however, cannot now be used as a GNBC/FMRC connection because GNBC holds only overhead trackage rights on the Quanah-Snyder line.

GNBC and FMRC have three class I rail connections--BN, Santa Fe, and UP. GNBC connects with BN, Santa Fe, and UP at Enid (GNBC connects directly with BN, but does not connect directly with Santa Fe or UP; BN, on the other hand, connects directly with Santa Fe and UP, and, pursuant to agreement, BN transfers freight between GNBC and Santa Fe and between GNBC and UP). GNBC also connects with BN at Snyder (and at Quanah, via its trackage rights over the Quanah-Snyder line). FMRC connects with BN at Altus (located on the

Quanah-Snyder line). GNBC and FMRC connect with each other at Clinton, thus giving FMRC access (via GNBC) to GNBC's Enid connections. Although GNBC and FMRC have three class I rail connections, almost all of their interline freight is interchanged with only two--BN and Santa Fe (over the past 2 calendar years, GNBC interchanged 80% of its interline freight with BN and 19% with Santa Fe, and FMRC interchanged 63% of its interline freight with BN and 36% with Santa Fe).

Wheat is FMRC's predominant commodity, and nearly half of FMRC's wheat moves to the Texas Gulf Coast ports via FMRC's BN connection at Altus. Wheat also dominates GNBC's traffic, although gypsum rock and derivatives originating at Southard, OK, form an increasingly important part of GNBC's traffic mix and move throughout the United States over a variety of routes via Enid.

GNBC fears that BN/Santa Fe common control will have two adverse impacts upon the rail operations conducted by GNBC/FMRC (hereinafter referred to collectively as Farmrail).

First, it argues that common control will exacerbate an aspect of the GNBC/BN purchase and sale agreement (dated August 20, 1987) pursuant to which GNBC acquired its line from BN. The agreement, pursuant to which GNBC leases from BN the real estate underlying the Enid-Frederick line, provides that GNBC shall pay substantial additional rent for shipments between GNBC and a rail carrier other than BN or FMRC to or from points also served by BN. GNBC notes that it has not handled *any* traffic that would cause it to incur additional rent under this "blocking provision." Common control, GNBC contends, *may* expand the scope of the blocking provision by also precluding alternative routes to points served by Santa Fe.

Second, GNBC states that common control will reduce from three to two the number of class I rail connections available to the Farmrail system. And this 3-to-2 reduction, GNBC suggests, will actually be more like a 2-to-1 reduction because most Farmrail interline freight is interchanged with either BN or Santa Fe. GNBC claims that the merger will lead to an $86,000 annual revenue loss for the Farmrail system mostly because of changes in the routing of traffic from or to points on FMRC's Thomas-Elmer line. GNBC notes that it currently handles such traffic between Clinton and Enid under a Santa Fe haulage agreement. GNBC fears that BN/Santa Fe would divert that traffic.

GNBC notes that the SP settlement agreement involves, among other things, SP trackage rights over BN's line between Dalhart, TX, and Fort Worth, TX. The SP settlement agreement, GNBC adds, fails to resolve GNBC's problem because the SP trackage rights do not permit an SP/GNBC interchange at Quanah.

GNBC requests that we impose two conditions. First, GNBC requests that we require an amendment to the 1987 GNBC/BN purchase and sale agreement removing or modifying the blocking provision.[22] Second, GNBC requests that we require an amendment to the 1987 GNBC/BN trackage rights agreement to allow GNBC to interchange with SP at Quanah, to interchange with FMRC at Altus, and to serve local industries at Altus.

GNBC contends that, without its conditions, the merger will result in reduced competition in western Oklahoma. GNBC asserts that the shipping public dependent upon the Farmrail carriers for rail service will have substantially fewer opportunities for competitive pricing and will be deprived of alternative sources of car supply. GNBC maintains that wheat shippers will be harmed during peak periods when available truck capacity is employed fully in local hauls.

The requested trackage rights modifications as respects Altus, GNBC contends, would enable GNBC and FMRC to achieve greater efficiencies through new coordinations and would lead to new business over the Farmrail system, and would not detract from the merger.

KEOKUK JUNCTION RAILWAY. KJRY, whose main line runs 28 miles between Keokuk, IA, and La Harpe, IL, currently has two class I rail connections: BN (at Keokuk) and Santa Fe (at Fort Madison, IA). KJRY's connection with Santa Fe is through the Toledo, Peoria & Western Railway at La Harpe. TP&W connects with Santa Fe at Fort Madison. Fort Madison is also a point of connection between BN and Santa Fe.

KJRY fears that the merger will harm KJRY and its rail dependent shippers by reducing from two to one the number of available independent class I rail connections. Midwest Carbide Corporation, for example, argues that it will be placed at a serious competitive disadvantage as respects its competitors with rail service options. Keokuk Ferro-Sil, Inc., has indicated that it relies on BN-Santa Fe competition to assure it of responsive rail service at reasonable rates.

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[22] Applicants insist that BN/Santa Fe common control would not expand the scope of the blocking provision to traffic originating at or destined to points now served by Santa Fe. BN/SF-36 at 106-108. GNBC indicates that its concerns would be satisfied if we would impose a condition incorporating the essence of applicants' representations. GNBC-5 at 2-3.

KJRY also fears that a commonly controlled BN/Santa Fe will divert to BN (at Keokuk) the substantial amount of traffic KJRY currently interchanges with Santa Fe at Fort Madison. This traffic can apparently be originated/terminated at Keokuk by BN as well as by KJRY, and KJRY fears that with common control Santa Fe will be able to reach Keokuk without KJRY. KJRY argues that the loss of this traffic would jeopardize essential rail services in at least two respects. First, local shippers on the La Harpe line likely would lose all rail service because KJRY could not afford to keep that line absent this overhead traffic. Second, abandonment of the La Harpe line would sever KJRY's TP&W connection, which provides certain customers with connections to important eastern and midwestern rail outlets.

KJRY seeks trackage rights conditions: (1) over 41 miles of BN line between Keokuk and West Quincy, MO, with a right of interchange at West Quincy with SP and NS; and (2) over 17.2 miles of BN line between West Quincy and Hannibal, MO, with a right of interchange at Hannibal with NS. It also seeks terminal access conditions requiring: (1) that BN sell to KJRY at fair market or going concern value all BN terminal tracks and facilities at Keokuk; (2) that BN absorb KJRY's switch charges at a level no higher than BN's current switch charges in Keokuk, subject to inflation; and (3) that BN open Quincy, IL, to traffic originating or terminating on KJRY.

The Bushnell Interchange. The SP settlement agreement gives SP the right to interchange traffic with TP&W at Bushnell, IL, approximately 24 miles east of La Harpe. TP&W states that the Bushnell interchange would enable TP&W and SP to provide effective competitive rail service to shippers and would provide other carriers, such as KJRY, alternative routings.

KJRY contends that the Bushnell interchange is not a viable solution because TP&W is weak financially and has difficulty keeping its track in good operating condition; as respects westbound traffic, the KJRY/TP&W/SP 328-mile Kansas City route via La Harpe and Bushnell is more circuitous than the present KJRY/TP&W/Santa Fe 270-mile route or the 236-mile BN/Santa Fe route; the KJRY/TP&W/SP routing via La Harpe and Bushnell necessarily involves a three-carrier operation, as compared to the single-line operation of BN/Santa Fe; and the track layout in Bushnell makes interchange difficult and expensive.

The Iowa Department of Transportation (IADOT) supports the merger, but is concerned that the Bushnell interchange may not be physically practical or efficient. SP responds that the Bushnell interchange will be both operationally and commercially viable, and will provide KJRY and TP&W shippers with a competitive alternative to BN/Santa Fe. SP indicates that its service plan for operations at Bushnell will ensure a level of service appropriate to handle the needs of SP's present and future customers, and it provides a detailed plan for that service. SP insists that there is sufficient space at Bushnell to conduct interchange operations between SP and TP&W, and that the facility is similar to that at many SP locations. SP notes that, to Kansas City, the KJRY/TP&W/SP route will be longer than the current KJRY/TP&W/Santa Fe route, but argues that, because much of the traffic will be moving to West Coast points approximately 2,000 miles from Keokuk, the additional mileage is insubstantial.

TP&W's Reply. TP&W, which provides local service on its 290-mile system between Fort Madison, IA, and Logansport, IN, interchanges traffic with eight class I railroads (including Santa Fe) and several shortline railroads (including KJRY). TP&W indicates that an integral part of its traffic is interchanged with KJRY at La Harpe, and it envisions that the new routing via Bushnell will replace the old routing via Fort Madison. TP&W believes the trackage rights conditions sought by KJRY would enable KJRY to reroute off of TP&W virtually all of the traffic KJRY now interchanges with TP&W, harming TP&W without curing any merger-caused harm to KJRY.

TP&W further contends that the merger will not cause a loss of any essential rail services now provided by KJRY, and will not lead to the abandonment of KJRY's line between Keokuk and La Harpe (because KJRY will need to operate over that line in order to connect with TP&W). TP&W adds, however, that the trackage rights conditions sought by KJRY might lead to the abandonment of the Keokuk-La Harpe line (because KJRY, with no need to interchange with TP&W at La Harpe, would have no particular need for a line that generates very little traffic).

The various arguments advanced by KJRY regarding the Bushnell interchange, TP&W insists, cannot withstand analysis. TP&W contends: that TP&W is involved in a financial restructuring that will put it on a sound footing for the foreseeable future; that TP&W's track is in good operating condition; that very little, if any, KJRY traffic from Keokuk terminates at Kansas City, and that the Bushnell interchange involves limited circuity when viewed in an overall routing of 1,000 to over 2,000 miles; and that the track layout at Bushnell is such that traffic can be interchanged there in an efficient and effective manner (TP&W adds that, post-merger, the BN interchange at Bushnell will be moved to Galesburg, which will free up the tracks for the new SP interchange).

KJRY's Rebuttal. KJRY contends that TP&W itself will be dominated by BN/Santa Fe, so that no routing over that shortline could be a *competitive* alternative to a routing via BN/Santa Fe. KJRY claims that TP&W (like other shortlines created by Santa Fe, including KJRY itself in large measure) has traditionally enjoyed a close "family relationship" with Santa Fe as reflected by substantial interline traffic with Santa Fe, common marketing efforts, and general support (as depicted in Santa Fe's map of its regiona railroad connections). KJRY claims that TP&W (which has suffered substantial losses throughout its 6 years of operations to date) is further beholden to Santa Fe because of numerous financial ties.[23]

The existing Santa Fe/TP&W relationship, KJRY maintains, is not an impediment to the present KJRY/TP&W/Santa Fe routing; all three participants in that routing have an interest in promoting it. But that relationship, KJRY continues, will impede a KJRY/TP&W/SP routing because TP&W (acting on behalf of BN/Santa Fe) will favor a single-line BN/Santa Fe routing. KJRY adds that, without the conditions it seeks, BN/Santa Fe will dominate the Keokuk market.[24]

SEAGRAVES, WHITEFACE AND LUBBOCK RAILROAD. SWGR operates 103 miles of track in west Texas, south and west of Lubbock. Its two lines, which connect at Doud, run between Lubbock and Seagraves (63.8 miles) and between Doud and Whiteface (39.2 miles). At Lubbock, SWGR interchanges traffic with both Santa Fe and BN. The SWGR/Santa Fe interchange is on Santa Fe tracks at Lubbock; the SWGR/BN interchange is in Santa Fe's Lubbock yard through a reciprocal switch arrangement with Santa Fe. SWGR fears that the merger, by reducing its class I rail connections from two to one, will make SWGR and its customers captive to BN/Santa Fe.

SWGR believes that this prospective reduction in competition threatens serious damage to SWGR's rail dependent principal shipper, Elf Atochem North America, Inc. (Atochem), whose traffic represents approximately one fourth of SWGR's total volume. Atochem, SWGR indicates, has been able to use competition between Santa Fe and BN to bid successfully on a large volume

[23] KJRY suggests that the Santa Fe/TP&W control relationship raises a question whether Santa Fe has achieved unauthorized control over TP&W. Applicants and TP&W contend that the Santa Fe/TP&W control allegation has no merit. BN/SF-48 at 43 n.25. TPW-3 at 28-31.

[24] TP&W insists that it has no plans to abandon its line west of Peoria (including that portion of this line that lies west of Bushnell). TPW-3 at 7.

movement of sodium sulfate into the Southeast. SWGR fears that common control will harm Atochem and that the loss of Atochem's traffic would jeopardize essential rail services to all other shippers on SWGR.

The SP settlement agreement, SWGR acknowledges, gives SP certain haulage rights to Lubbock markets, including interchange access to SWGR, but SWGR questions whether haulage rights will really make SP an effective competitor.[25]

SWGR seeks unrestricted overhead trackage rights on Santa Fe's Lubbock and Slaton Subdivisions between Lubbock and Sweetwater, TX (67 miles), with interchange rights with UP at Sweetwater.[26]

AMTRAK. Amtrak indicates that its trains serve 45 states, operate over 24,000 miles of rail lines, and carry more than 20 million passengers each year. Amtrak notes that, on more than 96% of its national system, its trains operate over the lines of freight railroads or, in a few cases, commuter authorities. Thus, Amtrak depends upon the nation's freight railroads to ensure that its trains can operate expeditiously, with appropriate priority over freight trains.

Amtrak indicates that nearly all of its trains in the Western United States travel over the lines of either BN or Santa Fe on all or part of their routes. Amtrak operates 32 trains over Santa Fe's lines, and an additional 16 trains on BN. Amtrak adds that it also operates commuter trains on Santa Fe's line between Los Angeles and Fullerton, CA, under contract with the Southern California Regional Rail Authority (SCRRA).

Amtrak contends that the merger will have a substantial adverse effect on what it sees as an already less than satisfactory on-time performance situation on both railroads. Merger, Amtrak adds, will also pose a serious threat to one of Amtrak's most important long-distance trains, the Chicago-to-Los Angeles Southwest Chief. Amtrak therefore seeks two conditions.

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[25] Applicants contend that the Lubbock access rights provided in the SP settlement agreement (trackage rights to and through Amarillo, and haulage rights from Amarillo to Lubbock) satisfy the competitive concerns raised by SWGR. BN/SF-36 at 105-106. SWGR, though it supports the SP Amarillo-Lubbock haulage rights, urges review (either by the ICC or by DOJ) of the terms of settlement arrangements. SWGR-4 at 2-3; SWGR-5 at 2-3. SP urges the denial of SWGR's trackage rights request. SP-40 at 9-11.

[26] SWGR also seeks four additional conditions: (1) elimination of Santa Fe's $75 per car each way reciprocal switch charge for each rail car interchanged between SWGR and BN at Santa Fe's Lubbock rail yard; (2) continuation of existing revenue divisions on movements over BN lines; (3) enforcement of current contractual obligations between SWGR and BN and between SWGR and Santa Fe; and (4) continuation of car supply that BN and Santa Fe each provide today.

First, Amtrak indicates that one of the most critical challenges it faces is maintaining and improving the on-time performance of its trains. Late trains, Amtrak notes, are the number one cause of complaints from its customers. Amtrak adds that late trains also increase Amtrak's operating expenses for fuel, crew wages and overtime, station staffing, and equipment utilization, and have a negative impact upon other connecting trains in the Amtrak system. Amtrak notes too that on-time performance is critical to Amtrak's mail business, which is one of its most important sources of revenue.

The present on-time performance of both BN and Santa Fe, Amtrak claims, is below the 80% level that Amtrak considers to be the minimum acceptable level.[27] Amtrak fears that the merger will significantly worsen this problem. Amtrak claims that, with only a few exceptions, its trains on both railroads operate over lines that are projected to experience freight traffic increases of 10% or more as a result of common control.

Accordingly, Amtrak asks that common control be conditioned upon the achievement of at least 80% on-time performance for Amtrak's trains over all BN/Santa Fe routes. Amtrak believes that the parties should be allowed to determine how this standard will be enforced. Amtrak asks, however, that the 80% on-time performance condition be accompanied by an appropriate oversight mechanism.[28]

Second, Amtrak fears that BN/Santa Fe common control will threaten Amtrak's Chicago-to-Los Angeles Southwest Chief. Amtrak notes that almost all Santa Fe east-west freight trains use Santa Fe's Southern Route via Amarillo, TX. The Southwest Chief operates over Santa Fe's Northern Route, which is currently maintained to Federal Railroad Administration (FRA) class 4 or class 5 standards, permitting passenger trains to operate at maximum speeds of 79 and 90 mph, respectively. Amtrak alleges that Santa Fe has indicated that track maintenance standards most likely will be reduced to FRA class 3 after the current operating agreement between the parties expires. These changes, Amtrak contends, would reduce the maximum passenger train speed on the line to 60 mph or less.

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[27] Applicants contend that their actual on-time performance levels are substantially greater than Amtrak claims. BN/SF-36 at 112-113.

[28] Applicants contend that, while Amtrak trains are entitled to dispatching priority as a matter of law, specific on-time performance issues are purely a matter of contract between Amtrak and the railroads over which it operates. Applicants add that Amtrak's current contracts with both BN and Santa Fe are due to expire in April 1996, and that the negotiation of new agreements will take place prior to that date. BN/SF-36 at 112-113.

Amtrak argues that, if the Northern Route is downgraded, it will have to reroute the Southwest Chief via the Southern Route. That line now has sufficient track capacity to accommodate the Southwest Chief, but Amtrak fears that common control will result in increased traffic and additional expense for it if it has to pay for expansion of the line's capacity.

Amtrak asks for a requirement that BN/Santa Fe ensure that there is sufficient track capacity on Santa Fe's Southern Route to permit Amtrak's Southwest Chief to operate over that line at a minimum standard of 80% on-time performance and that BN/Santa Fe be required to bear the cost of any necessary improvements in track capacity.[29]

SOUTHERN CALIFORNIA REGIONAL RAIL AUTHORITY. SCRRA, a joint powers authority set up to plan, construct, and administer regional passenger lines in Los Angeles, Orange, Riverside, San Bernardino, and Ventura Counties, operates in these counties a 344-mile commuter rail route network. SCRRA has submitted a request for conditions on its own behalf and on behalf of the five county agencies that comprise its membership.

The rail lines operated by SCRRA are, for the most part, rail lines presently or formerly owned by three class I freight railroads--UP, SP, and Santa Fe. SCRRA has acquired, in each instance, either the line itself or rights to use the line. By and large, however, SCRRA does not have an exclusive right to use these lines; the owning (or formerly owning) class I railroads have retained their own use rights for freight service. SCRRA's ongoing relationships with UP, SP, and Santa Fe are governed by a series of agreements that (a) detail the specific property interests acquired or to be acquired by SCRRA, (b) provide for the joint use (by freight trains operated by the class I railroads and by passenger trains operated either by SCRRA or by Amtrak) of the various lines, and (c) allocate, between SCRRA and the class I railroads, responsibility for funding of capital improvements.

SCRRA's relationship with Santa Fe on 92 miles of jointly used track is the focus of SCRRA's interest. SCRRA fears that the merger will trigger substantially increased Santa Fe freight traffic over these lines, and thus will delay its passenger trains or oblige it to make capital improvements made necessary by the increased Santa Fe traffic. SCRRA notes that freight traffic on

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[29] Applicants contend that the premise of Amtrak's route-change scenario is precluded by the terms of the existing Amtrak/Santa Fe contract, requiring Santa Fe to maintain all lines over which Amtrak operates at the 1989 level. BN/SF-36 at 114.

the joint-use lines has already attained levels that SCRRA initially anticipated would not be attained for several years to come.

To ameliorate these problems, SCRRA asks for certain conditions modifying the relevant agreements between SCRRA and Santa Fe. SCRRA insists that the conditions it has requested are essential to continued viable and responsive commuter rail service in southern California.[30]

WESTERN FUELS SERVICE CORP. WFSC, a wholly owned subsidiary of Western Fuels Association, Inc. (WFA), seeks trackage rights to move coal over Santa Fe's lines between Denver, CO, and Holcomb Station, KS. WFA is a non-profit fuel supply cooperative whose member-owners are municipally and cooperatively owned electric utilities in the Rocky Mountain West, the Midwest, the Southwest, and Louisiana. Holcomb Station is a coal-burning electric generating facility owned by a WFA member.

The coal used at Holcomb Station originates in the PRB, and WFSC contends that the trackage rights it seeks will remedy the injury to competitive rail service between the PRB and Holcomb Station that is threatened by the merger. WFSC indicates that WFA is contractually obligated to acquire coal for Holcomb Station and to arrange for its transportation to Holcomb Station. WFA has entered into two additional contracts: (1) an arrangement to purchase coal from the Caballo Rojo mine in the Gillette area of the PRB; and (2) a Rail Transportation Contract (RTC) under which coal is originated by BN in the PRB and delivered by Santa Fe to Holcomb Station. The RTC began in 1985 and expires in 2002, but WFA may terminate it upon 18 months' notice and upon the payment of liquidated damages. WFSC concedes that there is no destination competition for these unit-train movements because only Santa Fe can deliver the coal at Holcomb Station. But it argues that there is origin competition because UP also can originate the coal. WFSC contends that WFA can obtain

[30] SCRRA seeks six conditions: (1) transferring control of the San Bernardino double slip switches from Santa Fe to SCRRA to allow SCRRA to control its own access to its San Gabriel Subdivision; (2) requiring certain capital improvements on the San Bernardino Subdivision with 100% funding by Santa Fe or, in the alternative, requiring modification or renegotiation of the percentage allocation provisions applicable to the capital improvements provided under agreements with Santa Fe; (3) changing existing dispatching arrangements; (4) imposing existing service priorities; (5) requiring Santa Fe to submit to us yearly reports on the levels of traffic moving on SCRRA's Orange and San Gabriel Subdivisions; and (6) clarifying that, except as modified by Conditions #1, #2, #3, #4, and/or #5, the relevant agreements entered into by SCRRA and Santa Fe will remain in force.

the benefits of this origin competition by exercising its buy-out rights under the RTC (on 18 months' notice) or when the RTC expires (in 2002). WFSC fears that the merger would eliminate the origin competition because BN/Santa Fe would have no incentive to short-haul itself by allowing UP to originate the coal.

WFSC argues that, although the carriers currently capture monopoly profits by virtue of Santa Fe's destination monopoly, upon the expiration of the RTC in 2002 there will no longer be any origin competition and the carriers will be able to charge even higher rates. The trackage rights it seeks, WFSC insists, are the only means to restore the competitive leverage that WFA would otherwise have in 2002 upon expiration of the RTC.

Reply by SP. SP contends that the Denver-Pueblo segment of the lines over which WFSC's trackage rights would run is not solely owned by Santa Fe, but is in large part a double track joint facility in which one track is owned by Santa Fe and the other by SP. The joint facility, SP adds, is used by SP and Santa Fe pursuant to a 1936 agreement under which Santa Fe may not admit another operator on the facility without SP's permission. SP also notes that on certain portions of the route Santa Fe's track has been removed and the railroads operate over a single track owned by SP. SP insists that it will not consent to WFSC's use of the joint facility or SP's tracks, and it contends that our conditioning power does not extend to its property.[31]

Build-Out Option. Applicants contend that, although only Santa Fe can deliver coal to Holcomb Station, an alternative UP routing could easily be made available if a 2.5-mile spur were constructed into Holcomb Station.

WFSC contends, in rebuttal, that the alternative routing suggested by applicants is not feasible because: (1) SP will neither participate nor grant trackage rights unless it has the entire haul past Denver; and (2) UP will neither participate nor grant trackage rights unless it has the entire haul past Pueblo. WFSC adds that, in any event, the alternative routing is not feasible because of the cost of *both* upgrading the tracks of the Garden City Western and Central Kansas Railroads *and* constructing the spur.

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[31] Applicants indicate that the Denver-Pueblo line is owned by Santa Fe and SP, and that BN is authorized by a joint facilities agreement to operate over the line. BN/SF-36 at 54 n.18.

HOUSTON LIGHTING & POWER COMPANY. The coal burned at HL&P's Parish Station at Smithers Lake, TX, moves 1,200+ miles from the PRB, either on BN or on UP/CNW,[32] to a junction with Santa Fe at Fort Worth, TX, and then moves on Santa Fe 300 miles to Smithers Lake. Despite being captive to Santa Fe, HL&P claims to have benefitted from lower transportation costs from the existing origin-end rail competition between BN and UP/CNW. HL&P fears that the merger would eliminate this competition by allowing BN/Santa Fe to provide single-line service to the exclusion of joint service with UP/CNW.

According to HL&P, the bulk of HL&P's coal traffic (7.5 million tons per year) is committed to a long-term contract with BN and Santa Fe (the base contract). HL&P states that it has offered up the remaining portion of its annual coal requirements (incremental tonnage of approximately 2.5 million tons per year) for competitive bidding for short-term contracts. HL&P argues that the competitive bids for its incremental tonnage demonstrate that HL&P enjoys origin competition.

HL&P claims that, as a direct result of the origin-end competition between BN and UP/CNW, its rail rates for incremental coal traffic have been significantly lower than the rail rates under its base contract. HL&P believes that these lower rates have come at the expense of the competing origin carriers.

HL&P contends that a combined BN/Santa Fe would know the economics that would be offered to HL&P for the entire length of haul over the BN and Santa Fe lines. In addition, HL&P argues, the combined system would have extensive commercial intelligence about the rates UP/CNW offers for unit coal traffic and would have sophisticated costing expertise regarding high volume coal unit-train movements out of the PRB. Therefore, HL&P contends, the combined system would be able to exert in full the market power Santa Fe possesses by virtue of its position as the only rail carrier serving the Parish Station.

HL&P's witness Dr. Christensen contends that economic studies show an absence of significant economies of scale in the U.S. railroad industry, and that increasing the size of the network has not resulted in efficiency gains for U.S.

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[32] Chicago and North Western Railway Company (CNW) is a class I railroad controlled by UP. Common control of UP and CNW, which we approved in *Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control--Chicago and North Western Transportation Company and Chicago and North Western Railway Company*, Finance Docket No. 32133 (ICC served Mar. 7, 1995) (*UP/CNW*), was consummated on April 25, 1995.

railroads. Dr. Christensen adds that research has indicated substantial economies of density in the U.S. railroad industry. He argues that, because the proposed merger is primarily end-to-end, the efficiencies and public benefits to be gained from it would have to be largely economies of scale. Dr. Christensen contends that the merger would fail to create economies of scale, and would facilitate vertical foreclosure.

Dr. Christensen rejects the "one lump" theory, which holds that the firm possessing market power on any segment of a route will be able to extract its monopoly profit from the entire route. He maintains that the theory is valid only where the exclusive service provider has exercised its maximum market power prior to the merger, so that no more harm can be imposed on the shipper after the merger. He claims, however, that railroads that are the only provider of service at a destination do not always fully exercise such power over shippers. Dr. Christensen states that this is due to a variety of causes, including a carrier's participation in a broader market where it is subject to competitive pressures from other carriers, imperfect knowledge, and options possessed by shippers. Dr. Christensen maintains that where market power cannot be fully leveraged, interline competition benefits shippers.

Dr. Christensen further contends that another assumption that is required for the one lump theory to hold is that the exclusive service provider determines the maximum rate the shipper will pay and also dictates the division of revenues with other carriers participating in the movement. The theory predicts that the monopolist practices a "price squeeze" on the other carriers, paying them only for the incremental cost, but he argues that price squeezes are not standard practice on railroad interline movements. He notes that the exclusive carrier does not have perfect information or control over the pricing of the movement. Overall, Dr. Christensen claims that the one lump theory does not apply in the case of coal movements to HL&P's Parish Station at Smithers Lake, and that the merger would create potential economic harm for this plant.

HL&P concede that certain preliminary analyses have indicated that it could construct a spur connecting Paris Station with a nearby UP line. Those analyses, HL&P adds, did not entail definitive analyses of environmental issues, the cost of constructing the spur, or even the final alignment of the route for the spur. HL&P-16, Brackeen V.S. at 3-4. A trackage rights grant, HL&P adds, would be a superior solution to construction of a spur because construction of a redundant facility would be wasteful. HL&P-16, Christensen V.S. at 11-12.

HL&P claims that it is restricted by law, economics, the physics of electricity transmission, the physical limitations of its operating system, and existing coal supply agreements from significantly reducing or eliminating its dependence on coal. HL&P-16, Brackeen V.S. at 27. The simple fact, HL&P insists, is that natural gas and purchased power are not competitive with PRB coal delivered to Parish Station. HL&P-16, Sansom V.S. at 1.

Thus, HL&P urges denial of the application, and requests that any approval be made subject to protective conditions for HL&P's benefit. Specifically, HL&P requests that overhead trackage rights for the movement of coal trains over Santa Fe's lines be granted *either* to UP/CNW *and/or* to SP.[33] HL&P maintains that the requested trackage rights are operationally feasible, and would require only the construction of a new connection at the UP/Santa Fe junction or the SP/Santa Fe junction to allow direct movement of the unit-trains onto the Santa Fe line.

HL&P contends that its proposed trackage rights will produce public benefits that outweigh any reduction in the public benefits produced by the merger.[34]

SOUTHWESTERN PUBLIC SERVICE COMPANY. SPS is an electric utility with coal-fired generating stations on Santa Fe lines at Amarillo, TX (the Harrington Station) and near Muleshoe or Mill, TX (the Tolk Station). Both Santa Fe and BN can deliver coal to Harrington Station (BN via reciprocal switching rights); only Santa Fe can deliver coal to Tolk Station. Each station burns about four million tons of coal annually. TUCO, Inc. (TUCO), a coal procurement agent for Harrington and Tolk Stations, purchases this coal from mines in the PRB. (SPS and TUCO will be referred to collectively as SPST.)

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[33] HL&P notes that, for trackage rights to be effective, reasonable compensation terms would have to be established.

[34] HL&P submitted its trackage rights proposal in the form of a responsive application, which we have docketed as Finance Docket No. 32549 (Sub-No. 13). ARU has argued that this application is not a *bona fide* application over which we can exert jurisdiction because HL&P does not itself intend to provide rail service. ARU-8. A similar argument has been made by UTU General Chairman John D. Fitzgerald. JDF-6 at 2. We think that HL&P's application suffices for purposes of this proceeding as a means for the presentation of HL&P's trackage rights proposal. We realize, however, and HL&P has itself acknowledged, that, if any carrier were to receive trackage rights as a result of this application, there would necessarily have to be a follow-up proceeding to resolve carrier-specific issues. Decision No. 22 (served May 24, 1995), slip op. at 2 n.1.

Both Harrington Station and Tolk Station went on-line before CNW gained access to PRB coal, and thus early shipments were handled by BN with Santa Fe participating in the joint-line movement as to Tolk. In 1984, TUCO entered into long-term unit-train contracts with BN (for Harrington Station) and with BN and Santa Fe jointly (for Tolk Station). SPST alleges that the base rates in both contracts were the result of TUCO's solicitation and receipt of bids from CNW/UP/Santa Fe for the Harrington and Tolk traffic.

Coal shipments from the PRB to Harrington Station presently can move via either of two independent routes--BN "direct" (with Santa Fe acting as its delivery agent under a reciprocal switching agreement) or CNW/UP/Santa Fe. SPST claims that both routes are practicable and efficient, and that the carriers involved in each have competed vigorously for the Harrington traffic, with BN having won the right to handle the "base" tonnage in 1984 but with CNW/UP/Santa Fe prevailing in the bidding for remaining, "discretionary" tonnages in 1993 and 1994. SPST indicates that SPS and TUCO have enjoyed significant transportation cost savings as a result of this competition.

The proposed merger, SPST fears, would eliminate that competition at Harrington Station, which would be captive to the combined BN/Santa Fe. SPST claims that applicants concede this issue, and it argues that trackage rights on behalf of another carrier are needed.

Coal shipments from the PRB to Tolk Station can be delivered only by Santa Fe, but SPST alleges that SPS and TUCO have reaped significant cost savings on shipments to Tolk as a result of competition between BN and UP/CNW for the right to originate those shipments. It argues that Santa Fe has allowed their rate concessions to flow through to SPS and TUCO. It argues that the merger will allow the merged entity to exploit fully its control over the Tolk destination, excluding any competition from UP/CNW for traffic to that destination--or at least excluding any flow-through of competitive benefits to the captive shipper.[35]

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[35] SPST concedes that intramodal competition has not been the driving force behind rate reductions on discretionary tonnages to Tolk; rather, such reductions have been the result of product competition (gas) or end-use competition (wholesale power market conditions). SPST adds, however, that this will not help restrain rail rates on SPS' baseload coal volumes, because those volumes--unlike the discretionary volumes--are relatively insensitive to price increases and therefore will continue to move by rail even if rail rates are increased significantly. On such volumes, SPST argues, the only market restraint on rates is the risk faced by BN (and by UP/CNW) that the coal will move by the other railroad.

(continued...)

SPST notes that BN, unlike Santa Fe, is a dominant coal originator and transporter, and has no need, as Santa Fe does, to curry favor with UP. Accordingly, SPST argues, BN/Santa Fe will maximize its revenues on the single-line haul it will have for PRB coal shipments to Tolk. SPST asserts that the result will inevitably be a significant increase in its rail rates when its baseload contract is renewed.

SPST requests denial of the application, or that any approval be made subject to overhead trackage rights on behalf of a rail carrier(s) unaffiliated with applicants over the lines of Santa Fe (and, if necessary, BN) for the movement of coal trains 441 miles between Pueblo, CO, and Tolk Station with the right to serve Harrington Station at Amarillo. [36]

SPST concedes that the SP settlement agreement would preserve dual carrier access to, and competition for, traffic to Harrington Station. SPST argues, however, that unless the Commission imposes those rights, they will remain subject to change or cancellation by the carriers involved, leaving them without protection.[37] SPS adds that, in any event, the SPST trackage rights do not redress the loss of competitive options at Tolk.[38]

CENTRAL POWER & LIGHT COMPANY. CP&L, which provides electric service to 589,000 customers in south Texas, owns and operates the Coleto Creek Generating Station. Most of Coleto Creek's coal originates on the DRGW (an SP affiliate) and is delivered to Coleto Creek by SPT (another SP affiliate). CP&L concedes that it has been and remains captive to SP for the delivery portion of its coal movements, but it maintains that BN and Santa Fe

(...continued)

SPST maintains that natural gas and purchased power are not competitive with PRB coal delivered to Harrington and Tolk. The consensus view, SPST adds, is that, in the future, natural gas prices (in real dollars) will increase much faster than PRB coal prices. SPST-16, Sansom V.S. at 1.

[36] SPST apparently intends that the trackage rights would run over the lines of either BN or Santa Fe between Pueblo and Amarillo (Harrington Station), and over the lines of Santa Fe between Amarillo and Muleshoe (Tolk Station).

[37] The NITL settlement agreement provides for SP trackage rights to Amarillo, which will enable SP to serve Harrington Station. BN/SF-36 at 43 and 46. SPST acknowledges, in rebuttal, that the SP trackage rights to Amarillo, if imposed, satisfy SPST's concerns about competitive options at Harrington Station. SPST-16, Christensen V.S. at 16. SPST adds in its brief, however, that it believes the compensation arrangement provided for in the SP settlement agreement is excessive. SPST-17 at 2 n.1 (submitted under seal).

[38] Dr. Christensen essentially repeats his arguments made on behalf of HL&P.

have competed for the intermediate segment of CP&L's coal movement (between the DRGW interchange in Colorado and the SP interchanges in Texas).

CP&L indicates that its coal traffic is now originated at the Colowyo Mine located at Axial, CO, under a long-term contract that will not expire until December 31, 1999. CP&L concedes that the only rail carrier serving the Colowyo Mine is DRGW, and it concedes too that the only rail carrier serving Coleto Creek is SPT. CP&L notes, however, that SP cannot haul the coal between the DRGW origin segment in Colorado and the SPT destination segment in Texas except by a circuitous route, and that SP has had to rely on either BN or Santa Fe for the bridge segment. Absent the merger, CP&L argues it could look to competition between BN and Santa Fe to provide reasonable rate levels after its coal supply contract expires, at least for the bridge segment.

CP&L contends that the SP settlement agreement has made matters worse by allowing SP to handle CP&L's Colorado coal traffic in single-line service. CP&L argues that, although there would still be two carriers (SP and BN/Santa Fe) capable of handling the bridge segment, SP would no longer have an incentive to allow BN/Santa Fe to compete for the bridge segment.[39]

CP&L requests that we condition SP's use of the overhead trackage rights for CP&L's coal traffic on a requirement that SP publish proportional rates on the origin and destination segments to allow BN/Santa Fe to compete with SP for the bridge segment.

Reply by SP. SP maintains that the underlying dispute between SP and CP&L is of long standing: CP&L wants SP to quote proportional rates for segments of through movements; SP has refused to quote such rates, and has quoted instead through origin-destination joint rates in conjunction with its connections. SP points out that this dispute is before us in the Docket No. 41242 proceeding. SP argues that the harm alleged by CP&L has no connection to the merger because with or without a merger it will not offer proportional rates.

SP contends that there will be no diminution in competition in the Pueblo-Fort Worth corridor because of the merger, nor will any essential services therein be lost. SP notes that two railroads (BN and Santa Fe) serve the corridor now, and that two railroads (BN/Santa Fe and SP) will serve the corridor after the merger.

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[39] By a separate complaint filed April 12, 1994, CP&L has alleged that SP has refused to establish a reasonable rate on unit coal train service from the MPRR interchange at Victoria to Coleto Creek. *Central Power & Light Company v. Southern Pacific Transportation Company,* Docket No. 41242 (ICC served May 24, 1994, and Aug. 12, 1994).

SP also disputes CP&L's claim that SP will have no incentive to permit BN/Santa Fe to compete with it for the bridge segment. This argument, SP contends, makes no sense. Both trackage rights and joint rates require a payment to BN/Santa Fe. SP notes that it will use whichever variant is cheaper.

ARIZONA PUBLIC SERVICE COMPANY. APS operates various electric generating stations in Arizona and New Mexico, and produces electric power for customers in Arizona. One APS electric generating facility is the Cholla Station near Joseph City, AZ, which is comprised of four coal-fired units.[40]

All of the coal burned at Cholla Station comes from the McKinley Mine, near Gallup, NM, pursuant to a long-term coal supply agreement executed in 1974 and not expiring until December 31, 2000. Santa Fe transports the coal from the McKinley Mine to Cholla Station. APS claims that the Santa Fe routing is the only practicable means of transporting coal over that 114-mile distance, and that Santa Fe is market dominant with respect to APS' coal movement.[41]

APS contends that it had hoped to negotiate to receive coal after 2000 from origins served by other carriers such as BN, UP, and SP in Wyoming, Montana, Colorado, and Utah, thereby obtaining benefits from origin rail competition, but argues that the merger will preclude that possibility. APS concedes that, no matter where its coal originates, it will remain captive to Santa Fe as respects delivery because the nearest connection with a rail carrier other than Santa Fe is 250 miles away.

The merger, APS further contends, may also diminish regulatory relief it believes would otherwise be available. APS argues that, if it were to acquire post-2000 coal supplies from the PRB, it could then bring a rate case against Santa Fe to obtain a reasonable rate for the 250-mile destination portion of the movement. APS contends that as a result of the merger it may be limited to challenging the rate applicable to the entire movement.

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[40] APS owns three of the four units (PacifiCorp owns the fourth), but operates all four. APS has submitted comments on its own behalf as owner of its three units. Applicants note that PacifiCorp, the owner of the fourth unit, supports the application. BN/SF-36 at 68 n.25. *See also* BN/SF-34, Supporter No. 86.

[41] By a separate complaint filed January 3, 1994, APS and PacifiCorp seek reasonable rates and other terms for the unit-train transportation of coal by Santa Fe from Gallup, NM, to Joseph City, AZ. *Arizona Public Service Company and PacifiCorp v. The Atchison, Topeka and Santa Fe Railway Company*, No. 41185.

APS asks that we either deny the application or impose a condition giving origin carriers transporting coal for APS haulage rights over BN/Santa Fe lines to Cholla Station. Haulage rights, APS maintains, would permit other carriers to compete for APS' traffic, and would allow APS to take advantage of competition within the coal supply and coal transportation marketplace.

APS proposes that the compensation for the haulage rights be set at the lower of: (a) the rate per ton-mile charged for the movement of coal to the BN/Santa Fe interchange by the origin carrier; or (b) the average rate per ton-mile charged by BN/Santa Fe for unit-train coal movements for other customers. APS adds that equivalent relief could be given by requiring BN/Santa Fe to publish and maintain a tariff or enter contract rates at the same level.

CHACO ENERGY COMPANY. Chaco, which owns and operates facilities for acquiring, producing, selling, and delivering coal and other fuels, currently leases extensive coal reserves in the San Juan Basin of New Mexico. These reserves could be served by Santa Fe, if the traffic is developed, but no coal has moved so far. Chaco's coal reserves at South Hospah and Star Lake, NM, would access the Santa Fe main line at Baca, NM.[42]

Santa Fe, Chaco alleges, has strong market incentives to assist Chaco and other San Juan Basin coal producers in the marketing of this coal because Santa Fe originates coal only in the San Juan and Raton Basins, and because it has only a small percentage share of the western coal transportation market.

Chaco argues that the merger will have substantial anticompetitive impacts because the combined entity will control three separate coal producing basins--the San Juan Basin, the Raton Basin, and the northern PRB--giving it the power to favor one coal-producing area over another. Chaco is concerned that BN/Santa Fe will prefer its long-haul movements from mines in the PRB.

Chaco argues that the merger also will create a virtual duopoly over rail service from the major western coal-producing areas. At present, Chaco notes, there are four rail systems providing origin coal transportation service in the West--BN, UP/CNW, Santa Fe, and SP. Chaco asserts that BN and UP already dominate this market, and that the combined BN/Santa Fe would further increase

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[42] Chaco indicates that "construction of the [Star Lake] rail line to the South Hospah reserves is proceeding and right-of-way is also currently being acquired to connect the Star Lake reserves." CEC-1, Warren V.S. at 2. We approved construction of the Star Lake Railroad line in a series of decisions in the 1980s. *Star Lake Railroad Company--Rail Construction and Operation in McKinley County, New Mexico*, Finance Docket No 28272 (ICC served Mar. 23, 1981, Feb. 3, 1982, Dec. 7, 1984, and Apr. 20, 1987).

its market share, producing anticompetitive impacts for Chaco and other San Juan Basin shippers.

Chaco requests that we deny the merger or adopt a condition requiring that BN/Santa Fe not charge rates on new San Juan Basin traffic that exceed the average rates per ton-mile charged by BN/Santa Fe on its PRB traffic. Chaco further requests that we grant the trackage rights conditions requested by the Western Coal Traffic League, which would provide a second carrier in the San Juan Basin.

Chaco alleges that the rate cap condition it seeks is reasonable, will help prevent price discrimination, and will promote inter-basin coal and coal transportation competition. Chaco further alleges that the rate cap will cause no harm to BN/Santa Fe, other than a potential reduction in profits.

ARIZONA ELECTRIC POWER COOPERATIVE, INC. AEPCO provides electricity for approximately 89,000 customers in California, Arizona, and New Mexico. AEPCO generates the majority of its power through its Apache Generating Station (Apache Station), near Cochise, AZ, on SP's east-west main line. Apache Station includes three steam turbines used to generate the bulk of AEPCO's load and three smaller combustion turbines used for peak load purposes. AEPCO states that it historically has depended heavily upon coal to meet its baseload fuel needs.

AEPCO indicates that it appreciates the impact that rail-to-rail competition has on rail rates. In the 1970s, it entered into a long-term coal supply agreement requiring it to buy all of its coal from a particular mine near Gallup, NM, through 1994. Santa Fe was the only carrier serving the mine and SP was the only carrier serving Apache Station, and AEPCO alleges that it was subject to unconstrained rate demands of both. AEPCO indicates that it eventually filed a rate complaint against Santa Fe and SP, but that it came to realize that litigation is not an effective means of constraining railroad pricing.

AEPCO states that it eventually recognized that the only way to achieve leverage was to regain the ability to seek coal from sources on different railroad lines. In 1986, AEPCO bought out of its earlier coal supply contract, and it argues that it then began to enjoy the benefits of rail competition. BN, AEPCO argues, was able to offer origin competition to Santa Fe. BN can originate coal in Wyoming and in southern Colorado. This BN vs. Santa Fe origin competition, AEPCO claims, led to dramatic rate concessions from Santa Fe. The merger, AEPCO insists, would harm the public interest by removing the only source of origin competition for AEPCO's coal.

AEPCO (much like CP&L) contends that the SP settlement agreement will accentuate its captivity to SP. That agreement gives SP trackage rights to move coal traffic over Santa Fe's line from the DRGW junction at Pueblo, CO, to the SSW junction at Stratford, TX. Although there would still be two carriers (BN/Santa Fe and DRGW/SPT; perhaps also BN/Santa Fe and UP) able to originate its coal and to transport such coal to SP junctions, AEPCO argues that SP will use its trackage rights in combination with its exclusive access to Apache Station to monopolize all AEPCO coal movements (or at least those originated in Colorado).

AEPCO argues that the application should be denied. In the alternative, it seeks certain conditions: (1) a memorialized rate representing Santa Fe's most current division of the pre-merger Santa Fe/SP AEPCO rate; and (2) rate parity for movements from PRB coal origins.

WESTERN COAL TRAFFIC LEAGUE. WCTL is an organization of electric utilities (including HL&P, SPS, CP&L, and AEPCO) that purchase coal mined in the Western United States and pay for the transportation of that coal from western mines to utility generating stations.

WCTL contends that applicants have demonstrated no potential benefits to western coal shippers from the proposed merger, and have not indicated how any merger-generated cost savings will be passed along to their coal transportation customers.

WCTL maintains that the merger will have substantial anticompetitive effects in the already concentrated market for western coal transportation. There are now only four class I rail carriers capable of providing western coal transportation service. The concentrated nature of this market, WCTL claims, is illustrated by application of the Herfindahl-Hirschman Index (HHI). By WCTL's calculations, the HHI for the western coal transportation market is today 4080, but with the merger will increase 496 points to 4576. WCTL notes: that the HHI is routinely used by DOJ to analyze mergers; that any market with an HHI index at or above 1800 is said to be highly concentrated; and that, in such a market, a proposed merger that will cause an HHI increase of at least 100 is presumed unlawful under the antitrust laws.[43]

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[43] The HHI, an index of market concentration, is based on the sum of the squares of the market share of each participant in a market. A low HHI for a market occurs when a large number of firms have equal market shares; a high HHI occurs when there are only a few firms in a market;

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WCTL presents market share statistics showing that BN today originates 53% of the coal moved in the West, whereas BN/Santa Fe will originate 58%. WCTL insists that such concentration increases have repeatedly been found to violate the antitrust laws because they are likely to lead to anticompetitive price increases.

Market-specific evidence, WCTL maintains, confirms that the merger will have anticompetitive effects. Recent history in the western coal transportation market (regarding coal slurry pipelines in particular), WCTL insists, teaches that western coal carriers have engaged in anticompetitive conduct when it suited their purposes. The merger, WCTL warns, will eliminate all existing competition between BN and Santa Fe, and make it easier for the combined system to resort to collusive pricing tactics.

WCTL contends that our recent approval of UP/CNW common control exacerbated this problem by reducing the number of carriers able to originate western coal from five to four. With the merger, WCTL continues, only three independent carriers will remain, and two of these (BN and UP) will control over 92% of all western coal originations.

WCTL notes that BN serves coal mines in the PRB and in the Raton Basin of New Mexico/Colorado, while Santa Fe serves coal mines in the Raton Basin and in the San Juan Basin. It argues that the merger will give BN/Santa Fe control over three separate coal-producing regions, eliminating all origin competition between BN and Santa Fe. WCTL is concerned that the merger will reduce the already limited choices western coal shippers have for origin transportation service, resulting in increased rail transportation prices.

WCTL contends that approval of the application must be subject to one or the other of two conditions. First, WCTL asks that trackage rights be granted to any railroad over certain Santa Fe lines located largely in New Mexico. These trackage rights, WCTL notes, will allow for coal originations in the San Juan and Raton Basins and connections to other railroads at Pueblo (DRGW and UP), at El Paso (SP and UP), at Vaughn (SP), and at Deming (SP). Second, WCTL asks, in the alternative, that a rate cap be imposed on new BN/Santa Fe coal traffic (i.e., traffic not now moving under existing contracts or tariffs) originating in the San Juan and Raton Basins equal, on a per ton-mile basis, to the rates charged by BN and Santa Fe for unit-train coal traffic.

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and the highest HHI (10000) occurs when there is only a single firm in a market. *See Horizontal Merger Guidelines*, 57 FR 41552 (Sept. 10, 1992).

WCTL also asks that we approve the additional conditions sought by HL&P, SPS, CP&L, and AEPCO.

WESTERN RESOURCES, INC. WRI sells electricity in Kansas, and distributes natural gas in Kansas and Oklahoma. WRI generates power at ten centers with a combined 1995 capacity of 5240 MW, 61.9% of which is coal-fired generation. Coal provided 76% of WRI's 1994 energy requirements, and WRI predicts that for the next 20 years coal will remain the most economic fuel to burn at its energy centers. Neither alternative fuels nor purchased power, WRI adds, constitute competitive alternatives to coal-fired electricity production.[44]

WRI has two coal-fired energy centers in Lawrence, KS, and in Tecumseh, KS. The two centers are located along the Santa Fe track between Topeka and Kansas City. WRI currently has contracts with Santa Fe and SP for the delivery of coal to these centers. SP originates the coal in Colorado and transports the coal east to Kansas City, and Santa Fe then transports the coal west back to the two centers.

WRI indicates that it is captive to Santa Fe at destination; but it notes that it has access to compatible coal sources at numerous mines served by UP, BN, Santa Fe, and SP in various states. This coal, WRI alleges, can be delivered to Lawrence and Tecumseh through joint-line movements between the carriers serving these origins and Santa Fe via the carriers' interchanges with Santa Fe. WRI alleges that this flexibility regarding coal origins has enabled it to obtain competitive rail rates for the origin segment. WRI asserts that it used this competitive leverage in 1994, when it sent requests for bids to UP, Santa Fe, and SP. WRI reports that it switched its origin mine from the Hanna Basin in Wyoming to mines served by SP in northern Colorado, and thus switched its origin carrier from UP to SP, resulting in lower coal and rail rates for the origin leg of its movements.

WRI maintains that its specific evidence of its competitive alternatives at origin, the resulting benefits obtained, and the negotiating behavior of Santa Fe in 1994 rebut the presumption set out in our prior decisions that a monopoly over any segment of a route can be rendered ineffective only by "independent

[44] WRI seeks to supplement the record with a BN document titled "Energy, Coal and Low Cost Electricity Facts" (*see* WSTR-17, Attachment 2). Applicants reply that we should not accept it, or that we should supplement the record with the verified statement they attached to BN/SF-41. We will make both the BN Report and the verified statement explaining it part of the record.

access" from origin to destination. WRI contends that Santa Fe, in its negotiations with WRI, was indifferent to SP's and UP's rates, and did not attempt to secure for itself the maximum amount of available profits.

WRI contends that the merged railroad will have an economic incentive to favor its own origins and its own single-line routing, and thwart SP's and UP's ability to participate in a joint-line movement.[45]

Santa Fe, WRI adds, does not now have complete knowledge of the costs and revenue requirements of the origin carriers, whereas BN/Santa Fe will have that knowledge and the ability to set a profit maximizing price and to squeeze out rail competitors serving origin mines to which WRI presently has access. WRI argues that the combined system will thus deprive shippers like WRI of competitive alternatives. WRI warns that where a shipper currently has access to multiple origins served by competitors, those alternatives will be eliminated.[46]

WRI requests that, if we approve the merger, we impose certain trackage rights for SP and UP (or just SP) over the Santa Fe track between Topeka and Kansas City to allow those carriers to provide direct single-line service. It also asks for "reasonable" terms governing compensation at a precise level it suggests.[47]

TUCSON ELECTRIC POWER COMPANY. TEP is an electric utility in southern Arizona. TEP's coal-fired Irvington Generating Station at Tucson, AZ, burns coal obtained from mines in New Mexico under a long-term coal supply contract. This coal is delivered pursuant to a rail transportation contract between TEP, Santa Fe, and SP. The coal is originated by Santa Fe in New Mexico; it is transported by Santa Fe to the Santa Fe/SP interchange at Deming, NM; and it is delivered to Irvington Station by SP.

TEP asserts that Irvington Station can also burn coal originated at mines in Colorado, and did so as recently as 1994. Colorado coal can be obtained over two routes involving DRGW origins and delivery by SP, with either BN or Santa Fe providing the bridge movement. SP can handle the bridge movement only by using a circuitous routing.

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[45] Applicants claim that BN-originated PRB coal is not part of WRI's competitive calculations. Applicants explain that the generating units at Lawrence and Tecumseh require high-Btu coal, and cannot burn lower-Btu PRB coal without new capital investment. BN/SF-36 at 48-49.

[46] Applicants note that Santa Fe itself can already provide single-line service from Colorado and New Mexico coal origins to Lawrence and Tecumseh. BN/SF-36 at 50.

[47] WRI further requests that we retain jurisdiction to impose its conditions in the future if the need arises, if we conclude that its conditions are not necessary. WSTR-19 at 28.

TEP claims that the competition for the bridge movement of Colorado coal has resulted in rail competition for New Mexico coal as well. Santa Fe controls the New Mexico coal origins; but, because Santa Fe is not an indispensable link on coal originated in Colorado, Santa Fe has not been able to exploit its monopoly with respect to coal originated in New Mexico.

The SP settlement agreement, TEP notes, provides for SP trackage rights over Santa Fe's line between Pueblo and Stratford. These trackage rights would allow SP to deliver Colorado coal in single-line service. TEP contends, however, that the SP settlement agreement provides only a partial cure for the anticompetitive effects of the merger because it is subject to change at any time upon the further agreement of BN/Santa Fe and SP.

TEP requests that we impose a condition requiring the trackage rights set forth in the SP settlement agreement, effective upon consummation.[48] It also requests that we set the compensation at no more than a certain rate submitted under seal. It argues that prescribed terms are required to prevent the involved carriers from protecting existing excessive returns. TEP insists that the levels of compensation in the settlement agreements negotiated here are excessive when compared to the costs of the service involved.[49]

TEP challenges the interest rental component of the compensation method established in *SSW Compensation*, claiming that our "capitalized earnings" method preserves the monopoly rents accruing to the landlord carrier from its ownership of its line.

TEP would prefer the bifurcated valuation approach it attributes to the Railroad Accounting Principles Board. The assets used in providing trackage rights would be divided into two categories: (1) incremental assets (assets made necessary by the imposed trackage rights, which would be valued at current market value); and (2) non-incremental assets (assets that would be required even without the imposed trackage rights, which would be valued at net book value).

[48] The NITL settlement agreement provides that the SP trackage rights between Pueblo and Stratford are to be imposed as a condition to approval of the application. BN/SF-36 at 62-63.

[49] The key proceeding that TEP references required the establishment of a compensation method applicable to the trackage rights awarded to SSW over MPRR's Kansas City-St. Louis lines in *Union Pacific--Control--Missouri Pacific; Western Pacific*, 366 I.C.C. 462, 585-589 (1982) (*UP/MP/WP*). *See St. Louis Southwestern Ry. Co. Compensation--Trackage Rights*, 1 I.C.C.2d 776 (1984), 4 I.C.C.2d 668 (1988), 5 I.C.C.2d 525 (1989), 8 I.C.C.2d 80 (1991), and 8 I.C.C.2d 213 (1991) (the *SSW Compensation* cases; *SSW Compensation I, II, III, IV*, and *V*, respectively).

OKLAHOMA GAS AND ELECTRIC COMPANY. OG&E provides electric service in Oklahoma and western Arkansas. Coal from the PRB generates the majority of OG&E's power. OG&E has two coal-fired generating complexes, both in Oklahoma, that burn substantial PRB tonnage. One of these, the Sooner Generating Station in Red Rock, OK (Sooner Station), is the focus of OG&E's interest. OG&E indicates that both UP and BN serve the PRB mines at which OG&E's coal is originated.

Sooner Station now uses a UP-Santa Fe service. Santa Fe is the only railroad that can deliver coal to Sooner Station. OG&E insists, however, that it is not captive to Santa Fe because it has a feasible build-out option that would permit it to reach a BN line approximately 13 miles to the south at Morrison, OK.

In 1983, OG&E entered into a rail transportation contract with BN and Santa Fe regarding coal deliveries to Sooner Station. BN was then the only carrier serving the PRB, and Santa Fe was then (and is now) the only carrier serving Sooner Station. OG&E alleges that, after CNW gained access to the southern PRB mines in 1985, OG&E began to experience BN vs. CNW/UP competition on the origin leg of PRB-Sooner Station coal traffic.

OG&E claims that in 1990 and 1991, in anticipation of rail contract renegotiations in 1994 and beyond, it analyzed its rail transportation options and identified (apparently for the first time) the 13-mile rail spur "build-out" option from Sooner Station to the BN line at Morrison. Such a spur, OG&E notes, would allow for a single-line BN haul. OG&E claims to have used the build-out option in negotiations with Santa Fe and eventually to have reached an agreement on a reduced competitive rate. This reduction, OG&E insists, reflects Santa Fe's recognition that OG&E could indeed construct a Morrison spur at a reasonable cost.[50] OG&E notes that the merger will make its build-out option meaningless.

There would be, OG&E maintains, no other competitive constraints that might temper the monopoly power of the merged carrier. Sooner Station was designed to burn PRB coal; it is not located on a navigable waterway; there are no slurry lines in the vicinity; and the massive volumes and great distances

[50] Applicants contend under seal that a build-out to Morrison would not provide a competitive alternative because the BN route would be too circuitous, but they admit that OG&E has successfully used the threat of a build-out to negotiate its present contract with Santa Fe. BN/SF-35 at 57-58. Applicants suggest that, if OG&E's Morrison build-out option exists, it can best be duplicated by granting UP or KCS trackage rights over BN (vis-a-vis Santa Fe), with the right to operate over the prospective rail spur connecting Sooner Station and Morrison. BN/SF-48 at 36.

preclude truck competition. Alternative fuels, OG&E adds, are simply not practical. Purchased power is not practical either, it says, because Sooner Station is a base load facility (and, for the remainder of its useful life, 100% of the fuel burned there will be PRB coal).

OG&E asks that we impose conditions: (1) requiring BN/Santa Fe to grant trackage rights to UP over Santa Fe's line between Arkansas City, KS, and the junction with the Sooner Station spur; and (2) setting compensation at a particular level.

OG&E adds that, because the trackage rights requested are designed to preserve the competitive status quo, they should be paid for as in an arm's length agreement, and the landlord carrier's compensation should be limited to OG&E's pro-rata volume share of return on investment and maintenance of the trackage rights line. By OG&E's calculations, this works out to be $11.82 per carload.

OTHER PROTESTANTS. Numerous parties, in addition to those previously discussed, have requested conditions.

Phillips Petroleum Company. PPC, an oil and petrochemical company, operates a refinery at Borger, TX. PPC produces hazardous chemicals at Borger, and ships them in carload volumes to destinations throughout the United States. Over 80% of this traffic, approximately 5,000 to 6,000 carloads of petroleum products annually, moves by rail; pipelines are not a viable option foı this freight, PPC insists, for various reasons, including environmental concerns, market locations, batch size, and physical nature; tank trucks are not a viable option either, PPC adds, except perhaps for emergency shipments moving under 700 miles; and a truck/rail transload operation is infeasible due to a number of constraints. The only railroad at Borger is the Panhandle Northern Railroad (PNR), a class III shortline that operates a 29-mile former Santa Fe line from Borger to Panhandle; PNR hauls PPC's freight to the PNR/Santa Fe connection at Panhandle; and Santa Fe hauls the freight either approximately 28 miles southwest to Amarillo or approximately 188 miles northeast to Avard. Most if not all of PPC's freight is destined to points beyond.

PPC's interest is focused upon its outbound freight. PPC's traffic may be captive at Borger to Santa Fe (Santa Fe accesses Borger via PNR, which PPC indicates is captive to Santa Fe because it must interchange all traffic with Santa Fe at Panhandle). PPC notes that Amarillo, the closest point with competitive rail options, is served by both SantaFe and BN. It contends that BN can reach, directly or via interchange, and without any excessive circuity, all of the points to which PPC's carloads are destined. PPC argues that it could obtain independent access to BN at Amarillo through a viable build-out option. This build-out would extend approximately 19 miles north from Amarillo to Masterson along an abandoned Rock Island right-of-way, and another 13.5 miles east from Masterson to Pomeroy (the point of connection with PNR).[51] PPC and BN, PPC indicates, engaged in a feasibility study of the build-out as recently as early 1994. The build-out, PPC claims, was not pursued because BN's preliminary studies determined that current traffic volumes and rate levels did not make it economical.

PPC insists that its own study indicates that the build-out would indeed be feasible. PPC suggests that BN's determination was premised upon inaccurate data (BN's estimate of the competitive rate level was too low, PPC suggests, although this appears to have been PPC's doing; PPC, wanting BN to compete for the traffic, did not inform BN of the then-current Santa Fe rates). PPC claims that the target rates BN quoted as the rates required to convince BN to go forward with the project were quite competitive and compared favorably with the Santa Fe rates. PPC contends that it has a right to rely on BN's target rates as conclusive evidence that the build-out is feasible.

The merger, PPC contends, will eliminate its build-out option once and for all.[52] PPC further contends that the merger would generate anticompetitive effects even if there were no build-out option because of vertical foreclosure.

PPC asks that we impose certain trackage rights arrangements. The SP settlement agreement, PPC concedes, encompasses much of the relief it has sought. But it does not include, PPC notes, two elements that would allow SP to serve PPC--trackage rights from Amarillo to Panhandle and an SP right to interchange traffic at Amarillo or to serve shippers not directly served at Amarillo by BN or Santa Fe. PPC adds that the compensation for the SP trackage rights should be limited to the costs incurred by the applicants as a result of PPC's traffic moving over the trackage rights line.

Montana Wheat & Barley Committee. MWBC contends that the Montana wheat and barley producers it represents are captive shippers that will be harmed by common control because they must absorb increased transportation costs.

[51] The exact mileages are subject to dispute. PPC-6 at 5-6; PPC-12 at 2-3; BN/SF-48 at 39.

[52] Applicants contend that a build-out never was and is not now feasible, and that neither Santa Fe nor PPC ever factored the threat of a build-out into negotiations over Borger rates. BN/SF-36 at 78.

Montana's export economy, MWBC notes, is based on bulk commodities derived from mining, lumber, and agriculture. These commodities must be moved great distances. MWBC adds that truck movements generally are not economically practicable, and that Montana has no direct access to waterborne transportation.

Over 90% of all Montana grain is shipped by rail. MWBC notes that one of the key components of this transportation system is the grain elevator storage facility located adjacent to a rail line. The grower, MWBC points out, must rely upon the elevator to consolidate the grain prior to shipment by rail. Rail shipments in Montana, for the most part, move in multiple car quantities. These shipments may involve up to 52 or more rail carloads handling over 170,000 bushels per shipment.

MWBC contends that Montana's rail infrastructure is controlled by BN, and that BN controls the rail rates in nearly all movements from Montana. It alleges that BN's rates in Montana are some of the most profitable anywhere on the BN system. MWBC adds that the grain rate disparity between those growing areas where there is rail-to-rail competition, such as Nebraska origins, and those growing areas where there is no rail-to-rail competition, such as Montana origins, is continuing to widen.

MWBC insists that Montana grain producers need protection from BN's pricing, which it argues is geared to financing BN/Santa Fe common control. MWBC argues that Montana wheat and barley rates should be restrained pending the establishment of lawful Montana rates in the ongoing McCarty Farms proceeding.[53] Accordingly, MWBC requests conditions: (1) capping the maximum per ton-mile earnings that BN can charge on Montana wheat and barley movements at the levels applicable on October 13, 1994 (the date of filing of the application); and (2) requiring BN to index all Montana origins against Nebraska ton-mile earnings, so that, if Nebraska ton-mile earnings are

[53] *McCarty Farms* involves the rates for all shipments of export wheat and barley from Montana to Pacific Coast ports from 1978 forward. By decision served March 26, 1993, the proceeding was reopened following remand from the United States Court of Appeals for the District of Columbia Circuit. *McCarty Farms, et al. v. Burlington Northern Inc.*, No. 37809 (ICC served Mar. 26, 1993) (reopening proceeding). By decision served May 2, 1995, the briefing date in the procedural schedule in the reopened proceeding was extended to August 16, 1995. *McCarty Farms, et al. v. Burlington Northern Inc.*, No. 37809 (ICC served May 2, 1995) (setting briefing date). *See also McCarty Farms, et al. v. Burlington Northern Inc.*, No. 37809 (ICC served June 13, 1995) (denying an appeal from the decision served May 2, 1995).

voluntarily increased or reduced, Montana producers will be afforded identical treatment.

Bunge Corporation. One of Bunge's many facilities is a soybean processing facility at Emporia, KS, served exclusively by Santa Fe. At this facility, inbound freight moves mostly by truck and outbound freight moves entirely by rail. Bunge acknowledges that BN/Santa Fe common control will not curtail Bunge's rail options.

Bunge indicates that three soybean processing facilities, operated by two of Bunge's competitors, will receive new access to SP as a result of the SP settlement agreement. Bunge fears that adverse competitive consequences will result if its competitors have rail options that it lacks. Bunge notes that SP access to Bunge's Emporia facility could be achieved simply by modifying the SP agreement to give SP stop-off privileges at Emporia.[54]

Bunge contends that the SP settlement agreement amounts to a geographic division of markets between SP and BN/Santa Fe that should not be allowed under the Interstate Commerce Act.[55]

The Society of the Plastics Industry, Inc. SPI argues that the plastics industry is dependent on rail transportation (much of it in shipper-supplied hopper cars) for the distribution of plastics resins, and it adds that many shipper locations are served by a single railroad only. SPI fears that common control of BN and Santa Fe threatens to reduce rail competitive alternatives because both are major service providers to the plastics industry, and there are significant corridors and pockets of service overlaps. Both BN and Santa Fe, SPI notes, provide service to the Houston area; both provide service to Chicago, a major eastern gateway; and both provide service to numerous common points in Colorado, Iowa, Illinois, Kansas, Missouri, Oklahoma and Texas, which

[54] Bunge further urges that we impose the same condition upon any approval of the trackage rights provided for in the SP settlement agreement, whether that approval is sought under 49 U.S.C. 11344, 49 U.S.C. 10505, or 49 CFR Part 1180. And the 49 CFR 1180.2(d)(7) class exemption otherwise applicable to trackage rights, Bunge adds, should not apply to the trackage rights provided for in the SP settlement agreement; that provision, Bunge notes, excludes trackage rights filed or sought in responsive applications in rail consolidation proceedings such as the present proceeding; and the SP settlement agreement, Bunge suggests, is the functional equivalent of a responsive application.

[55] A grievance akin to Bunge's has been voiced by certain interested parties in Arkansas City, KS, which object that the Kansas City-Fort Worth component of the SP settlement agreement gives SP overhead trackage rights through Arkansas City but does not allow SP to provide service at Arkansas City. *See* BN/SF-36 at 86-87. *See also* BN/SF-36, Kalt V.S. at 104.

themselves may be ultimate destinations or, alternatively, may serve to provide alternative traffic routings.

SPI therefore urges that approval be made subject to certain conditions: (1) a requirement that existing junctions remain open; (2) a condition that the merged railroad provide reciprocal switching or proportional rates to the first competitively served junction at a rate level no more than the jurisdictional threshold for rate reasonableness where competitive access is lost through the merger; (3) grants of trackage rights to competing railroads where necessary to ensure competitive service to shippers; and (4) where common control may eliminate competitive service in particular corridors completely, a maximum rate restriction.

American Maize-Products Company. American Maize fears that BN/Santa Fe common control will mean reduced rail competition at its plant at Dimmitt, TX. This plant, American Maize indicates, is served exclusively by BN, but American Maize notes that it now has several routing options to reach markets in Arizona and the West Coast. BN/Santa Fe common control, American Maize claims, will eliminate downstream competition from Dimmitt because UP and SP downstream routing options will no longer be available. American Maize therefore urges that the rights granted to SP in the SP settlement agreement be enlarged to include haulage rights between Dimmitt and Plainview, TX (thus enabling SP to reach American Maize's Dimmitt plant).

Cargill, Incorporated. Cargill urges: (1) provisions mandating the interchange of traffic by BN/Santa Fe to all railroads at all junction points to allow captive shippers permanent access to markets not served by BN/Santa Fe; (2) provisions establishing reasonable switch costs to allow other railroads access to shippers otherwise captive to BN/Santa Fe; (3) guidelines indicating the conditions under which a railroad's denial of access to a private rail car is unreasonable; (4) provisions for competitive interchange and service to any shortlines spun off in consequence of BN/Santa Fe common control; (5) standards to ensure the financial viability of these newly created shortlines; and (6) provisions ensuring the continuation of the common carrier obligations of BN/Santa Fe.

Chaparral Steel Company. Chaparral indicates that the two largest North American producers of structural steel products, including heavy structurals, are Chaparral (served by Santa Fe at Midlothian, TX) and Nucor-Yamato (served by BN at Armorel, AR). Chaparral adds that Chaparral and Nucor-Yamato are in direct competition, and that the customers of both rely on transportation competition from Santa Fe-served Chaparral and BN-served Nucor-Yamato as an essential element in protecting their competitive positions as buyers of structural steel. Chaparral fears that, with BN/Santa Fe common control, there will be no adequate alternative to replace the absence of competition between BN and Santa Fe for transportation of structural steel products in general, and heavy structurals in particular. Chaparral therefore urges the imposition of competitive access by other rail carriers to Chaparral's plant site at Midlothian.[56]

Chicago Board of Trade. CBOT does not oppose the proposed merger but requests that we condition approval on retention by SP of trackage rights it now holds over BN's line between Kansas City and Chicago.

"K" Line America, Inc. K Line, a large steamship company, indicates that its major western railroad partners are UP and Santa Fe. K Line agrees that BN/Santa Fe common control will provide significant long-term benefits for the intermodal industry, but urges several protective conditions: (1) a grant to UP of certain trackage rights over BN in Washington State (to facilitate access to the Port of Tacoma, WA); (2) grants to UP and SP of broad access to Terminal 6 at the Port of Portland, OR (access to which is controlled by BN);[57] and (3) assurances that K Line's traffic will not be held when it moves on a rail carrier's trackage rights over another rail carrier's line.

Kansas Shippers Association. KSA asks for clarification that BN/Santa Fe will maintain the Santa Fe railroad car ordering system, demurrage rules, and per car LO Hopper car mileage payment. KSA also asks for assurances that BN/Santa Fe will maintain service to main line shippers on Santa Fe. KSA, speaking on behalf of shippers on the Kansas Southwestern Railway (KSW), further asks that KSW be given access to SP at Wichita, KS.[58]

Owens-Corning Fiberglas Corporation. Owens-Corning ships borate rock in covered hopper cars from Kings Creek, SC, to its plant in Amarillo, TX. This shipment moves via NS-Memphis-BN. Owens-Corning notes that, because its

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[56] Applicants contend that the merger will have no effect on the three competitive transportation options Chaparral's Midlothian plant currently enjoys: (1) direct rail service by Santa Fe; (2) access to a nearby reload facility operated by SP; and (3) access to motor carrier service, on which Chaparral currently relies (applicants claim) to move roughly two-thirds of its traffic. BN/SF-36 at 84.

[57] UP indicates that Terminal 6 is a joint UP-BN facility, to which UP already has access. UP-7 at 9-10.

[58] KSW, a short line operating in Kansas over approximately 300 miles of track leased from UP, submitted comments of its own. KSW, noting that the majority of its traffic is interchanged with either UP or Santa Fe, indicates that it supports BN/Santa Fe common control, which it claims will be beneficial both to KSW and to KSW's shippers. KSW has not addressed KSA's request that KSW be given access to SP at Wichita.

Amarillo plant is open to reciprocal switching, it has had the option of routing into its plant via either BN or Santa Fe. Noting that the SP settlement agreement provides SP access to all Amarillo industries served by BN and Santa Fe, Owens-Corning requests that this agreement be made a condition to approval.

California Public Utilities Commission. CPUC generally supports the merger but requests two conditions: (1) trackage rights for SP over BN's line from Portland, OR, to Tacoma, Seattle, and Sumas, WA, and Vancouver, B.C.; and (2) haulage rights for SP over UP's line between Denver, CO, and Council Bluffs, IA, for interchange with regional lines at Council Bluffs.[59] CPUC asks that we require applicants to fulfill what it regards as a pledge not to abandon any branch line or line segment as a result of the consolidation. CPUC asks that we expressly forbid the merged entity from selling any line to any company that dismantles railroad lines and sells recovered rail and fittings for relay or scrap purposes. Furthermore, CPUC asks that we direct BN/Santa Fe to establish an agreement with each line sale purchaser providing that the property would revert to BN/Santa Fe if the purchaser failed to maintain and operate the line on a sound commercial basis for a minimum of 5 years.

Illinois Department of Transportation. IDOT supports the merger, but asks that we consider several matters: (1) the economic impact upon Illinois resulting from major changes in its transportation systems; (2) any potential abandonments in Illinois resulting from the proposed common control; (3) the possible relocation or closing of Santa Fe's corporate headquarters, now located in Schaumburg, IL, and the resulting labor impacts; (4) other labor impacts in Illinois; and (5) the impacts on KJRY and IC and the conditions those parties seek.

Kansas Department Of Transportation. KDOT supports BN/Santa Fe common control, but urges imposition of the following conditions: (1) that BN/Santa Fe grant trackage and interchange rights, on reasonable terms, as may be requested by shortline railroads in Wichita between shortlines and class I railroads, between shortlines and what is known currently as the Wichita Terminal, and between shortlines operating in the Wichita area; (2) that representatives of SP and of local shortlines be placed on the WUTR Board of Directors; (3) that shortlines be permitted to purchase from BN/Santa Fe, or to

[59] UP, opposing CPUC's Denver-Council Bluffs condition, argues that reductions in recent years in SP's Central Corridor volumes do not reflect any material loss in SP's transcontinental market share, but rather reflect a decision by SP to make greater use of its southern transcontinental routes. UP-7 at 9-10.

obtain trackage rights over, certain low density branch lines; (4) that BN/Santa Fe provide its shortline interchange partners with reasonable car ordering and supply systems, as well as tariff and rate freedom for originating and terminating traffic; (5) that employment levels of BN/Santa Fe employees in Kansas, as of May 1, 1995, be preserved; and (6) that BN/Santa Fe accept private cars tendered in interchange by shortlines and pay reasonable allowances for them.

Oklahoma Department Of Transportation. ODOT, noting that Oklahoma has invested heavily in the maintenance of in-State rail lines, believes that we should impose any conditions deemed appropriate to assure the continued vitality of those lines. ODOT urges a condition that, for a specific period following the merger, lines determined by the merged company to be redundant should be conveyed to the State for bid to shortline operators or directly transferred to such shortline operators. ODOT adds that the large scale competitive benefits foreseen by applicants do not diminish the importance of preserving regional rail services in many rural areas of Oklahoma that provide competitive outlets for the State's agricultural products.

RAIL LABOR. Rail Labor is represented principally by ARU, TCU, UTU, IAM, and BLE.[60]

Allied Rail Unions. ARU, which opposes the merger, asks that we impose New York Dock conditions for the benefit of BN and Santa Fe employees, the employees of any carrier controlled by BN and/or Santa Fe, and the employees of any other carrier who may be considered "joint employees" of both that carrier and BN and/or Santa Fe.

ARU contends that we must consider what impact the increased cost of the merger, estimated at $1.2 billion, already has had on the operations of BN and Santa Fe and will have on the proposed operations of the merged entity. ARU

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[60] John D. Fitzgerald (a UTU General Chairman on certain BN lines), contends generally that the procedures employed in this case have substantially prejudiced protestants. JDF-4. We disagree. The procedural schedule adopted in this case is such as to ensure that all parties are accorded due process (Decision No. 10, served Mar. 7, 1995; slip op. at 6). We would add that Mr. Fitzgerald's service list argument is frivolous because even the existing regulations anticipate that comments will be filed *before* a service list is issued (*compare* 49 CFR 1180.4(d)(1)(i)(A) *with* 49 CFR 1180.4(a)(4)). We would add too that only the Attorney General and the Secretary of Transportation can assert the "plus 15 days" provision of 49 U.S.C. 11345(b)(1). Mr. Fitzgerald also alleges error in the Administrative Law Judge's denial of his motion to compel answers to certain interrogatories (ALJ Decision served May 2, 1995). We see no error; the "Trainmen" category is adequate for present purposes.

claims, in this regard, that there already have been force reductions in Santa Fe's Engineering Department that it alleges are related to the pending merger.[61]

ARU notes that we must consider the impact of the transaction upon employees. Applicants' employee impact exhibit, ARU argues, was prepared with an eye to net force changes and thus understates the total number of job abolishments and employee exercises of seniority required to reach that net number.

Finally, ARU contends that Santa Fe controls Gateway Western Railway. ARU adds, in the alternative, that, even if Santa Fe does not control GTWRY, the Santa Fe/GTWRY relationship is so intertwined that GTWRY employees must be considered joint employees of both Santa Fe and GTWRY, so New York Dock conditions must cover GTWRY employees.[62]

Transportation•Communications Union. TCU makes two requests. First, TCU asks that we clarify that any protective arrangements imposed here do not supersede prior protective arrangements, whether imposed by the Commission or arrived at in collective bargaining. TCU also asks that we clarify that, under New York Dock, Article I, Section 3, employees protected under such prior arrangements may elect either the protections created by the prior arrangements or the protections created by any arrangements imposed here. Second, TCU asks that we impose attrition-type protections here.[63] Employee protective conditions have been imposed in the three prior mergers that created and

[61] To finance their stock purchases under the tender offers submitted in response to tender offers made by UP, BNI borrowed $500 million and SFP borrowed $760 million (for a total borrowing of $1.26 billion). BN/SF-25, Hund/Snyder V.S. at 3. This is apparently the source of ARU's $1.2 billion cost estimate.

[62] ARU's ARU-7 submission contains numerous documents governing the Santa Fe/GTWRY relationship, including the 1990 Santa Fe/GTWRY Rail Services Agreement (dated January 9, 1990) and the 1995 Santa Fe/GTWRY settlement agreement arranged in connection with the instant proceeding (dated April 7, 1995). ARU's arguments regarding common control and joint employee status are developed in its brief. *See* ARU-10 at 1-25.

[63] TCU is the successor by merger to the Brotherhood of Railway Clerks (BRAC), the Brotherhood Railway Carmen (BRC), the Association of Railway Patrolmen, and the Transportation Communication Employees' Union (Telegraphers). References to TCU include, where appropriate, its predecessors. TCU's predecessors represented four crafts: Clerks, Carmen, Patrolmen, and Telegraphers. On BN, TCU represents three of these crafts (Clerks, Carmen, and Patrolmen); the fourth craft (Telegraphers) was merged into the Clerks craft in connection with the 1980 BN/Frisco merger. On Santa Fe, TCU represents two of these crafts (Clerks and Carmen).

expanded BN. We imposed attrition-type protections in some of them.[64] These provisions provide, in varying language, for benefits to employees substantially more favorable than the benefits provided for in New York Dock.

The protections provided by these agreements, TCU insists, have uniformly been understood to be cumulative; the protections provided in connection with the 1980 BN/Frisco merger have been understood to be in addition to the protections provided in connection with the 1970 BN merger; and the protections negotiated in connection with a prior merger have never been lost or lessened in connection with a subsequent merger.

TCU adds that each of the two crafts it represents on the Santa Fe (Clerks and Carmen) has negotiated a job stabilization agreement with the Santa Fe. The 1979 Clerks' agreement, TCU indicates, provides attrition-type protection. The 1964 Carmen's agreement, TCU adds, does not provide attrition-type protection. TCU indicates that there has been no prior experience on the Santa Fe involving employees covered by more than one protective agreement.

TCU anticipates that we will impose New York Dock conditions, which it argues preserves all benefits arising under the agreements negotiated in connection with the prior BN merger proceedings. TCU cites New York Dock, Article I, Section 3. New York Dock, 360 I.C.C. at 84-85. TCU adds that the election-of-benefits proviso to Article I, Section 3 allows employees potentially protected under two or more protective arrangements to choose the arrangement that provides the best protection, if they do not duplicate, combine, or "pyramid" the benefits available to them under New York Dock and another protective arrangement. TCU's attention appears to be focused upon the question whether an employee can refuse a job transfer and still receive protective benefits, which TCU argues is possible under certain prior conditions.

TCU recognizes that we no longer favor attrition-type protections,[65] but it insists that "exceptional circumstances" call for them here. TCU relies upon the history of attrition conditions in the prior BN merger proceedings; and the job losses that will result from BN/Santa Fe common control.

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[64] *See Great Northern Pac.--Merger--Great Northern*, 331 I.C.C. 228 (1967) (*BN Merger*); *Burlington Northern, Inc.--Control & Merger--St. L.*, 360 I.C.C. 788 (1980) (*BN/Frisco*); and *Burlington Northern Railroad Company--Merger Exemption--Fort Worth and Denver Railway Company*, Finance Docket No. 30061 (ICC served Nov. 18, 1982), 47 FR 52236 (Nov. 19, 1982) (*BN/FW&D*).

[65] We recently stated: "Attrition-type conditions are calculated to preserve unnecessary jobs, and unduly restrict a carrier's ability to establish economical operations." *UP/CNW*, slip op. at 96.

TCU notes that applicants have indicated that they plan to abolish 1,400 clerical jobs (1,200 on BN alone). The 1,200 BN clerical jobs, TCU points out, amount to 31.8% of all of BN's roughly 3,771 clerical jobs; the 1,400 BN/Santa Fe clerical jobs, TCU adds, amount to 28.5% of all of BN/Santa Fe's roughly 4,904 clerical jobs; and this, TCU insists, is a substantial hardship. TCU concedes that applicants have indicated that they will abolish only 53 jobs out of the roughly 3,183 carmen jobs on BN/Santa Fe, but predicts far higher job losses. TCU adds that, in addition to these job losses, there are on the two railroads 693 non-agreement employees holding clerks' seniority, and 685 non-agreement employees holding carmen's seniority. If these employees are among the 1,353 non-agreement jobs to be eliminated, they may exercise their seniority back into the ranks, which will result in further displacements of TCU-represented employees.

United Transportation Union. UTU makes three requests on behalf of the employees it represents (conductors, enginemen, trainmen, and yardmen, on Santa Fe; brakemen, conductors, engineers, firemen, and yardmen, on BN). First, UTU makes the same argument concerning prior arrangements as did TCU. Second, UTU asks that we impose attrition conditions here.

Third, UTU notes that the immunity provision, 49 U.S.C. 11341(a), permits modification of collective bargaining only as far as is "necessary" to carry out an approved transaction. Applicants have indicated that they anticipate certain changes in the operations conducted by BN and Santa Fe. Work will be transferred; employees may be required to relocate; seniority systems may be consolidated; and operating crew districts will be realigned. Most if not all of the specific changes contemplated by applicants are certain to require overrides of CBAs negotiated under the RLA.[66] UTU insists that the merged carrier will seek to transfer employees solely to rid itself of the obligation to pay protections to the employees who would be dismissed or displaced if they chose not to

[66] "Employees whose positions are abolished as a consequence of the implementation of this consolidation of operations, whether at yards and terminals or elsewhere, may be required to accept available work at places on the combined system, including places beyond their general locality, *in order to maintain their right to receive protective benefits*. Further, some additional seniority consolidations may be necessary to avoid underutilization of a portion of the combined workforce (*and protective benefit payments*) in the face of personnel shortfalls in adjacent or nearby locations. This too applies to the entire workforce." BN/SF-8 at 44 (emphasis added). *See also* BN/SF-8 at 131 (applicants anticipate that certain changes in operating crew districts will be required) and BN/SF-8 at 429-431 (applicants anticipate that 142 Trainmen jobs will be transferred).

transfer to distant locations and were not otherwise used in compliance with their CBAs.

UTU asks that we make a general statement now that the CBA overrides contemplated by applicants (specifically the CBA overrides that would accompany the changes referenced in the preceding footnote) exceed the override authority provided by 49 U.S.C. 11341(a) and 11347 because they are unnecessary to carry out the BN/Santa Fe merger.[67]

Machinists. IAM, referencing many of the arguments advanced by TCU, asks that we impose, at a minimum, the New York Dock conditions.

Locomotive Engineers. BLE, which represents the craft of locomotive engineers on BN and Santa Fe, urges denial of the application, contending that this is really a horizontal merger that will lead to reduction in competition, higher rates, losses of rail service, and reductions in employment.

BLE argues that, in view of the breadth and scope of the transaction, employees need conditions above and beyond the New York Dock conditions to ensure that they receive the proper levels of benefits mandated by 49 U.S.C. 11347. Adverse impacts, BLE notes, may not occur for several years following approval. BLE therefore suggests that any employee suffering an adverse impact from the transaction at any future time would have his/her protections commence at the point of adverse effect, whenever that would occur, and that any monetary allowances due the employee would run for the full period of protection provided by New York Dock. This, BLE adds, could also be accomplished by providing a presumption of adverse effect in favor of an employee claimant for a 10-year period following approval. BLE also urges us to find that approval should not be construed as a wholesale grant of immunity from the RLA or the CBAs negotiated thereunder.

Reply By Applicants. Applicants contend that we should not grant protective conditions in excess of New York Dock.[68]

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[67] UTU would incorporate into the immunity provision a high standard of necessity. UTU would incorporate into section 11347 an even higher standard of necessity, on the theory that the protection provision serves as an independent limitation on the immunity provision.

[68] They contend we should "reexamine" *New York Dock* itself if and when legislative changes said to be pending provide the occasion for such reexamination. BN/SF-40, Northrup V.S. at 20-28 (proposing reduced protective benefits; proposing also that the merged carrier be allowed to implement merger-related changes *prior* to negotiation and arbitration).

Applicants maintain that job loss percentages cited in support of attrition conditions are greatly overstated. The total BN/Santa Fe work force for 1993, they claim, is over 45,000; predicted job reductions are approximately 2,750; this works out to 6% of the total work force. Applicants add that, in any event, the clerical work force (where predicted reductions are concentrated) has the best set of skills to transfer to other industries. BN/SF-36 at 121.[69]

Applicants claim that the Santa Fe/GTWRY relationship is a purely arm's-length commercial one, not one of control, and that GTWRY's employees are solely its own. BN/SF-36 at 120-121. See also BN/SF-36, Ice V.S. at 26-29.

Applicants contend "the prohibition of implementing consolidation-related changes that would affect previously agreed-to attrition conditions . . . would deprive BN/Santa Fe of the unquestioned public benefits of the proposed transaction. Centralization of the customer support function and the elimination of the material management and storage functions in favor of a just-in-time inventory practice would be impeded by the employees' use of prior attrition conditions to remain at their present locations and receive attrition payments for performing no work." BN/SF-36 at 122. See also BN/SF-40, Robinson V.S. at 5 ("[I]f the merged company is to realize the efficiencies and public benefits of the merger, employees who now perform [material handling and storage functions] cannot be permitted to stay in place and collect their guaranteed wages or refuse to transfer to another location to perform work that is either outside their present seniority district boundaries or more than thirty miles from their residence.").

Applicants contend that they have clearly set forth the need for certain transfers and seniority consolidations that TCU, UTU, and IAM seek to prevent. Applicants insist that these changes (including changes in crew districts, transfers of operating craft employees, and the centralization of and changes in the customer support and material management and storage functions) are directly related to achieving the transportation benefits of the merger. BN/SF-36 at 120.

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[69] Applicants predict that the BN/Santa Fe transaction will result in 2,918 jobs abolished and 157 jobs created. BN/SF-8 at 424-431. The "approximately 2,750" figure referenced here is apparently a net figure (jobs abolished less jobs created). By our calculations, the 2,918 jobs to be abolished represent approximately 6.5% of the total work force.

FEDERAL PARTIES. The Departments of Agriculture, Transportation, and Justice have submitted comments in this proceeding.

United States Department of Agriculture. USDA notes that rail service is critical to the economic well-being of the nation's agricultural and rural economies: nearly one-half of all grain produced in the United States moves to market by rail. The merger, USDA fears, may generate anticompetitive impacts, and may affect rail service options, transportation options, and the rates shippers must pay to transport their grain and other agricultural commodities and products. The merger, USDA notes, would reduce from four to three the number of class I railroads connecting the Midwest with the Pacific Coast and the Lower Plains States of Kansas and Oklahoma with the Texas Gulf. The number of railroad options, USDA adds, would also be reduced on the route from Colorado to east Texas, now served only by BN and Santa Fe, and on the route linking Kansas City and Tulsa/Oklahoma City with Dallas/Fort Worth and Houston/Galveston, where rail carrier options would be reduced from four to three. Approval of the merger, USDA suggests, could also stimulate interest in further railroad consolidations, which could adversely affect some shippers.

USDA's primary emphasis is on wheat. It notes that BN and Santa Fe are two of the nation's largest wheat hauling railroads and are the two most important in the movement of wheat from the Lower Plains States. The Lower Plains States, USDA indicates, produce virtually all of the nation's high protein hard red wheats, and are in the nation's most rail dependent region. Wheat shippers in the Upper and Lower Plains States, USDA adds, have few transportation alternatives. Their wheat must move long distances to domestic markets for processing and consumption or to coastal ports for export; these regions have little direct access to inland water transportation; the distances involved make truck transportation uneconomical; rail is therefore the only real option for wheat shippers in this region.

USDA maintains, with respect to product and geographic competition, that the proposed merger raises competitive issues even in the Upper Plains wheat market (where BN and Santa Fe do not compete directly). The two railroads together, USDA claims, control just under half of all wheat shipments made by rail, and, with their main wheat origination territories centered in the Upper and Lower Plains States, the merged carrier would control an even larger share of the high protein red wheat market. USDA adds that, in the export market, BN and Santa Fe are even more important, and the merged carrier would control just over half of all export rail shipments.

The merger, USDA warns, will significantly reduce geographic and product competition in the Upper and Lower Plains wheat markets. Geographic competition would be affected by the reduction in the number of carriers serving competing wheat source and destination markets; product competition would be affected by a reduction in the number of carriers that can originate substitutable products.

USDA also fears a loss of intramodal competition in the export market for hard red winter wheat. BN and Santa Fe, USDA indicates, are already the most significant players in the Texas Gulf export wheat market, and--with the merger--will control well over half of the Texas Gulf hard red winter wheat export market. USDA adds that the central Kansas, western Oklahoma, northeast Texas, and northwest Texas origination areas for export hard red winter wheat would all be adversely affected by the proposed merger.

USDA does not oppose the merger, but asks that we assure (through trackage rights and operating concessions if necessary) that an adequate level of competition is maintained in markets and on routes where competition will likely suffer as a result of the merger.

United States Department of Transportation. USDOT has addressed several important issues in this proceeding.

BN/Santa Fe. USDOT maintains that the merger is primarily an end-to-end consolidation between two railroads that compete with each other only in relatively isolated instances. USDOT notes that applicants have consented to the imposition of conditions that allow unaffiliated class I railroads access to the few areas and points where intramodal competition might otherwise be eliminated.

Amtrak. USDOT fears that the merger may threaten the vital public interest in reliable, efficient intercity rail passenger service. USDOT therefore urges the imposition of an appropriate condition to hold applicants to their representation that their future on-time performance and other operations will not deteriorate to the detriment of Amtrak. USDOT believes a more narrow condition should be imposed than that specifically sought by Amtrak. Specifically, USDOT urges that we impose an open-ended oversight condition (with oversight to be conducted at Amtrak's request) that would allow Amtrak the opportunity to demonstrate that, as a result of the merger, it has suffered harm with respect to the on-time performance of the merged carrier.

USDOT adds that, because of some uncertainty not related to the merger surrounding the future routing of the Southwest Chief, it supports a condition that would, for a certain period of time, exempt Amtrak from paying for merger-related capacity increases on a new route. This would give Amtrak 3 years to decide if a switch to the Santa Fe Southern Route is necessary, based on declining freight traffic densities on the Northern Route and expenses associated with maintenance. USDOT envisions that, if Amtrak decides to switch to the Southern Route during this time period, it will not have to contribute to any capacity-related expenditures if it can establish to our satisfaction that those expenditures are primarily designed to accommodate freight traffic resulting from the merger. USDOT claims that a 3-year time period is short enough to ensure that the condition will address only the specific potential impacts resulting from the consolidation, but long enough to allow Amtrak sufficient time to evaluate the need for a route change.

SCRRA. USDOT does not support the conditions sought by SCRRA. SCRRA and Santa Fe, USDOT claims, have recently entered into comprehensive contracts that already address their rights and obligations in the event of a Santa Fe merger and in other circumstances anticipated by SCRRA. USDOT adds that it believes that the concerns raised by SCRRA--unlike those raised by Amtrak--do not arise from the merger. Thus, SCRRA, USDOT maintains, can achieve all of its legitimate claims through enforcement of its contracts without federal regulatory intervention.

Utilities. USDOT urges that we fashion a limited oversight condition for those instances in which utility companies have presented plausible, though not conclusive, evidence that the merger will significantly reduce competition. USDOT has in mind that, during the period of such oversight, these utilities would be free to demonstrate any actual adverse effects of the merger on the rail rates and service they receive. USDOT envisions that, under such a condition, a probative showing that BN/Santa Fe has engaged in anticompetitive conduct would trigger an appropriate corrective response. Immediate action is not required, USDOT indicates; there is time to wait, watching competitive developments up to and including the time when long-term contracts are renegotiated. USDOT envisions that trackage rights or other conditions could eventually be imposed if abusive ratemaking by BN/Santa Fe is found in the interim (on incremental coal) or at the time of contract renegotiation.

Other Protestants. USDOT adds that, because no other party has demonstrated any loss of competition arising from the merger, no additional conditions are warranted on this basis.

Rail Labor. USDOT urges that we expressly affirm the principle of Article I, Section 3 of New York Dock that employees may elect coverage under either New York Dock or existing protective conditions if they do not combine or pyramid benefits.

United States Department of Justice. DOJ addresses several key issues in this proceeding.

BN/Santa Fe. DOJ states that the unconditioned merger of BN and Santa Fe would substantially lessen competition in several markets. Commodities affected include mineral and metal products, processed and unprocessed grains, and other agricultural products in and out of the Texas Panhandle; grain moving out of Superior, NE; and all products reliant on rail transportation in and out of Fort Madison and Keokuk, IA. In addition, DOJ argues, an unconditioned merger would eliminate potential competition between BN and Santa Fe for coal shipments from the PRB to Red Rock, and for rail dependent movements, primarily of chemicals, out of Borger.

NITL Stipulation. According to DOJ, applicants' stipulation with NITL, as implemented by the agreements with UP and SP, could solve the competitive problems identified by DOJ in the Texas Panhandle, Nebraska, and Iowa (assuming that the TP&W/SP interchange at Bushnell is operationally adequate). DOJ contends, however, that in these agreements applicants have set compensation from UP and SP at levels that may be higher than the costs that the applicants themselves would have incurred in providing service to shippers over their tracks prior to the merger. DOJ insists that the settlement agreements implementing NITL Paragraph 1 must be subject to our review and approval in light of our articulated compensation standards.

Red Rock and Borger. DOJ notes that the various settlement agreements have failed to address competitive problems in Red Rock and Borger, even though shippers in these areas (OG&E and PPC, respectively) have proposed conditions that would resolve these competitive concerns. DOJ states that, to the extent the trackage rights conditions sought by OG&E and PPC would provide access to the facilities at Red Rock and Borger, DOJ supports those conditions.

Trackage Rights Compensation. The evidence of record, DOJ contends, does not include all of the data that we need to determine whether the UP and SP settlement agreements will provide UP and SP with opportunities to restore the pre-merger competitive balance in the affected markets. The record, DOJ adds, does include data indicating that the negotiated compensation levels for the trackage rights in the UP and SP settlement agreements may be too high to allow UP and SP to compete effectively against the merged railroad at pre-merger prices. Although it generally supports the SSW Compensation method, DOJ rejects the Capitalized Earnings approach to valuation, preferring instead the Comparative Line Segments approach, the Stand Alone Cost approach, and the

Reproduction Cost New Less Depreciation approach.[70] DOJ adds, however, that whereas the valuation arrived at in the SSW Compensation framework is regarded as the valuation, the three valuation approaches preferred by DOJ should be used to establish only a maximum valuation to be reduced on a case-by-case basis, in order to permit the landlord to maintain the track at pre-merger levels while placing the minimal necessary variable cost "handicap" on the tenant. DOJ-4 at 39. DOJ therefore urges that we defer approval of the merger until applicants demonstrate that the compensation levels are at levels that preserve the pre-merger competitive balance. DOJ further urges, in the alternative, that we prescribe such compensation levels as a condition of approval. DOJ-4 at 28.

DISCUSSION AND CONCLUSIONS

APPLICABLE STANDARDS. We turn first to the decisional standards under which we must judge the control application and the many conditions requested by the several protestants.

The Public Interest. The applicable statutory provisions are codified at 49 U.S.C. 11341-51. "The Act's single and essential standard of approval is that the Commission find the [transaction] to be 'consistent with the public interest.' 49 U.S.C. § 11344(c)." Missouri-Kansas-Texas R. Co. v. United States, 632 F.2d 392, 395 (5th Cir. 1980), cert. denied, 451 U.S. 1017 (1981). See also Penn Central Merger Cases, 389 U.S. 486, 498-499 (1968). Several sources help define this broad standard.

Section 11344(b)(1) provides that, in a proceeding involving the merger or control of at least two class I railroads, five factors must be considered: (1) the effect of the proposed transaction on the adequacy of transportation to the public; (2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction; (3) the total fixed charges that result from the proposed transaction; (4) the interest of carrier employees affected by the proposed transaction; and (5) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

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[70] *See Atchison, T. & S.F. Ry. Co.--Operating Agreement*, 8 I.C.C.2d 297, 304-305 (1992).

Public Benefits. Section 11344(b)(1)(A) requires that, in determining whether a proposed transaction is consistent with the public interest, we must examine its effect on the adequacy of transportation to the public. This necessarily involves an examination of the public benefits that will result from the transaction.

Public benefits may be defined as efficiency gains that may or may not be shared with shippers and which include cost reductions and service improvements. Cost reductions, regardless of whether they are passed on to shippers, are public benefits because they permit a railroad to provide the same level of rail services with fewer resources or a greater level of rail services with the same resources. An integrated railroad can realize additional benefits by capitalizing on the economies of scale, scope, and density which stem from expanded operations. These benefits, in varying degrees depending on competitive conditions, are passed on to most shippers as reduced rates and/or improved services. When cost reductions from the merger are passed on to shippers, public benefits are extended and shipper benefits are increased. The effects of shifting traffic patterns due to better service and lower rates on resource use for the economy as a whole should also be included as public benefits, but these benefits are usually difficult to quantify. On the other hand, traffic gains that come at the expense of other carriers or modes are considered to be neutral in terms of public benefits because the gains to the combining carriers are offset by losses to other carriers. Finally, benefits to the combining carriers that are the result of increased market power, such as the ability to increase rates that associated with a control transaction. *See CSX Corp.--Control--Chessie and Seaboard C.L.I.*, 363 I.C.C. 518, 551-552 (1980) (*CSX Control*); *UP/MP/WP*, 366 I.C.C. at 487-489; *Union Pacific Corp. et al.--Cont.--MO-KS-TX Co. et al.*, 4 I.C.C.2d 409, 428-429 (1988) (*UP/MKT*); and *Rio Grande Industries, et al.--Control--SPT Co., et al.*, 4 I.C.C.2d 834, 875 (1988) (*DRGW/SP*).

Cost savings can come from a variety of sources. Examples include:

- elimination of interchanges;
- internal reroutes;
- more efficient movements between the two merging parties;
- reduced overhead; and
- elimination of redundant facilities.

A major reason for firms to integrate vertically[71] is the prospect of eliminating transaction costs. Transaction costs are additional expenses associated with incomplete knowledge and difficulties in processing information that may result when separate entities attempt to engage in joint processes through market transactions rather than by integrating into a single firm.

In railroading, the most important joint process is the provision of interline service. By vertically integrating operations, railroads avoid the added disturbance of negotiations and accounting associated with divisions of joint rates, of disagreement over responsibility for providing cars, and of having to draft contracts that attempt to anticipate all issues that may cause disputes in the future. Elimination of these costs properly are included as public benefits of a rail merger.

Competitive Effects. Section 11344(b)(1)(E), dealing with competitive effects on other railroads, was added by section 228(a)(2) of the Staggers Rail Act of 1980, Pub. L. No. 96-448 (Staggers Act). In evaluating "whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region," 49 U.S.C. 11344(b)(1)(E), we do not limit our consideration of competition to rail carriers alone, but examine the total transportation market.[72] As the first step in that process, we generally examine the effects of the merger on the existing railroad network, with particular attention to whether the consolidation is primarily parallel--combining routes between the same points--or end-to-end--combining routes that may serve some of the same points but generally serve separate, if neighboring, parts of the country. We have recognized that "consolidations of end-to-end railroads rarely raise competitive concerns." *UP/CNW*, slip op. at 70.

We are also guided by the rail transportation policy, 49 U.S.C. 10101a, added by the Staggers Act. *See Norfolk Southern Corp.--Control--Norfolk & W. Ry Co.*, 366 I.C.C. 171, 190 (1982) (*NS Control*). The 15 elements of that policy set forth in section 10101a, taken as a whole, emphasize reliance on competitive forces, not government regulation, to modernize railroad actions and to promote efficiency. H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 88 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4110, 4119.

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[71] Vertical integration is the combination of firms operating at successive stages of marketing or production.

[72] *See UP/MP/WP*, 366 I.C.C. at 516 n.46 (defining market power as the "ability profitably to sustain higher prices or lower service quality"); *accord UP/MKT*, 4 I.C.C.2d at 433.

Antitrust Considerations. The policies embodied in the antitrust laws provide guidance on public interest considerations in control proceedings.[73] In *McLean Trucking Co. v. United States*, 321 U.S. 67, 87-88 (1944), the Supreme Court noted the proper weight to be accorded to antitrust policy in carrier control proceedings:

> In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operations, lower costs, etc., to determine whether the consolidation will assist in effectuating the overall transportation policy. . . . "The wisdom and experience of that Commission," not of the courts, must determine whether the proposed consolidation is "consistent with the public interest."

Accord, Bowman Transportation v. Arkansas-Best Freight, 419 U.S. 281, 298 (1974); *Port of Portland v. United States*, 408 U.S. 811, 841 (1972); *Northern Lines Merger Cases*, 396 U.S. 491, 514 (1970); *Denver & R. G. W. R. Co. v. United States*, 387 U.S. 485 (1967).

The Commission does not sit as an antitrust court in determining compliance with the Clayton, Sherman, or related antitrust acts. The Commission's statutory obligation under the public interest standard requires that any anticompetitive effects of a control transaction be balanced against its anticipated benefits. The Commission is empowered to disapprove transactions that would not violate the antitrust laws and to approve transactions even if they otherwise would violate the antitrust laws. *Northern Lines Merger Cases*, 396 U.S. at 511-514.

Special Public Interest Factors. The Commission is also required by 49 U.S.C. 11344(c) to make special, narrowly focused public interest findings (where applicable) on the following aspects of any major rail consolidation: (1) a guaranty or assumption of the payment of dividends or of fixed charges, or an increase of total fixed charges (the transaction may be approved only if we find that the guaranty, assumption, or increase is consistent with the public interest);

[73] Under 49 U.S.C. 11341(a), transactions approved by us are exempt from the antitrust laws, and all other laws, as necessary to effect the transactions. *Northern Lines Merger Cases*, 396 U.S. 491, 504 (1970). As the Supreme Court has observed, the antitrust laws give "understandable content to the broad statutory concept of 'the public interest,'" *FMC v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 244 (1968).

(2) rail acquisitions of motor carriers (the transaction may be approved only if we find, among other things, that the transaction will enable the rail carrier to use motor carrier transportation to public advantage in its operations); and (3) inclusion of other rail carriers located in the area (we may require inclusion of such other rail carriers in the transaction if they apply for inclusion and we find their inclusion to be consistent with the public interest). Except as regards the assumption by BNI of the fixed charges of SFP, however, these provisions are not applicable in this case. Applicants have not proposed any guaranty or assumption as regards dividends; total fixed charges will not increase; no motor carriers are being acquired; and no other rail carriers have sought inclusion in the transaction.

Minor Stockholders. Section 11344(c) directs us to approve any transaction referred to in 49 U.S.C. 11343 when we find that the transaction is consistent with the public interest, provided that the terms and conditions thereof are just and reasonable. The "just and reasonable" standard requires, among other things, that we determine, in an appropriate case, that the transaction is just and reasonable with respect to minority stockholders. *See Schwabacher v. United States*, 334 U.S. 182, 198-199 (1948); and *UP/MKT*, 4 I.C.C.2d at 515.

Environmental Factors. Under the National Environmental Policy Act (NEPA) and related environmental laws, the environmental effects of the merger and the ancillary construction projects envisioned by applicants must be considered.

General Policy Statement. Our general policy statement on rail consolidations was issued in *Railroad Consolidation Procedures*, 363 I.C.C. 784 (1981), and codified at 49 CFR 1180.1. It indicates how we incorporate the numerous elements of the public interest in evaluating specific consolidation proposals. In essence, we perform a balancing test weighing "the potential benefits to applicants and the public against the potential harm to the public." 49 CFR 1180.1(c).

Generally, benefits are realized from operating efficiencies and marketing opportunities that can make the consolidated carrier financially stronger and, therefore, a better competitor that can more easily provide adequate service on demand. 49 CFR 1180.1(c)(1). Operating efficiencies often result from elimination of duplicative facilities and the use of more direct routings.

We recognize, of course, that the consolidation of two carriers serving the same market might be contrary to the public interest. In evaluating the effect of the consolidation on long-haul movements of bulk commodities, the focus may be on retaining effective intramodal competition. 49 CFR 1180.1(c)(2)(i).

Potential harm from a proposed consolidation may occur from a reduction in competition, 49 CFR 1180.1(c)(2)(i), or from harm to a competing carrier's ability to provide essential services, 49 CFR 1180.1(c)(2)(ii). In assessing the effects of a rail merger, we must evaluate whether opposing railroads will be financially and competitively able to withstand the projected loss of traffic to the consolidated system. In assessing the probable impacts and determining whether to impose conditions, however, our concern is the preservation of essential services, not the survival of particular carriers. It is not our duty to ensure preconsolidation levels of traffic or the survival of competitors; we are concerned only with the preservation of the essential services they provide. An essential service, for this purpose, is a service for which there is a sufficient public need, but for which adequate alternative transportation is not available. 49 CFR 1180.1(c)(2)(ii).

Competitive Harm. Competitive harm results from a merger to the extent the merging parties gain sufficient market power to raise rates or reduce service (or both), and to do so profitably, relative to premerger levels. In evaluating whether a merger is in the public interest, we seek to determine what competitive harm is directly and causally related to the merger and to distinguish that harm from any pre-existing, anticompetitive condition or disadvantage that other railroads, shippers, or communities may have been experiencing. It is the harm that is causally related to the merger that we attempt to ameliorate with conditions.

We examine several criteria in assessing whether markets[74] served by the merging parties will suffer competitive harm. The commodity in question and length of haul provide an indication of the effectiveness of truck competition. The reduction in independent rail routings or the increase in concentration or shares of relevant traffic flows indicate to some extent the likelihood of adverse change in post-merger market power. Where most or all of the firms in the market have sufficient capacity to serve a significant amount of total market sales, and there is no significant disadvantage in obtaining these sales, the analysis considers the number of competitors rather than their market shares. The determination of competitive harm is more evident where the possible routing options on a rail-bound commodity drop from two originating or

[74] We accept as a starting point the definition of a market in the DOJ/Federal Trade Commission's *Horizontal Merger Guidelines*, 57 FR 41552 (Sept. 10, 1992): "a set of products or services within a geographic area for which a hypothetical monopolist could profitably impose a 'small but significant and nontransitory' price increase."

terminating railroads to one. Even in these situations, geographic or product competition may be sufficient to act as a constraint to prevent competitive harm.

We evaluate whether effects are horizontal or vertical in nature or whether both types of effects are present. Horizontal effects occur where applicant carriers currently offer competing service within a defined market. These effects can range from loss of direct, head-to-head competition between two railroads serving the same origin/destination pair to loss of geographic competition between railroads, as would occur if each of the merging parties exclusively serves a different competing port from the same origin. Vertical effects occur where the merging parties connect end-to-end or form alternative routings for interline movements in which a single railroad controls a "bottleneck" at origin or destination.[75] The key test for competitive harm remains the same for both horizontal and vertical effects: will the merger result in increased rates or deteriorated service or both?

Conditions Requested By Protestants. The various conditions requested by protestants involve the exercise of our conditioning power under section 11344(c) as part of any approval of the application.[76]

Section 11344(c) gives us broad authority to impose conditions governing railroad consolidations. We have previously noted, however, that, because conditions generally tend to reduce the benefits of a consolidation, they will be imposed only where certain criteria are met. *UP/MKT*, 4 I.C.C.2d at 437.

Criteria for imposing conditions to remedy anticompetitive effects were set out in our *UP/MP/WP* decision, 366 I.C.C. at 562-565. There, we stated that we will not impose conditions unless we find that the consolidation may produce effects harmful to the public interest (such as a significant reduction of competition in an affected market), and that the conditions will ameliorate or eliminate the harmful effects, will be operationally feasible, and will produce public benefits (through reduction or elimination of the possible harm) outweighing any reduction to the public benefits produced by the merger. We are also disinclined to impose conditions that would broadly restructure the competitive balance among railroads with unpredictable effects. *See, e.g., Santa Fe Southern Pacific Corp.--Control--SPT Co.*, 2 I.C.C.2d 709, 827 (1986), 3 I.C.C.2d 926, 928 (1987) (*SF/SP*); and *UP/MKT*, 4 I.C.C.2d at 437.

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[75] The situation where the merger would *create* a bottleneck properly is treated as a horizontal issue.

[76] The responsive applications filed by HL&P, SPS/TUCO, GNBC, WFSC, KJRY, and SWGR are not independent applications.

To be granted, a condition must first address an effect of the transaction. We will not impose conditions "to ameliorate longstanding problems which were not created by the merger," nor will we impose conditions that "are in no way related either directly or indirectly to the involved merger." *BN/Frisco*, 360 I.C.C. at 952 (footnote omitted); *see also UP/CNW*, slip op. at 97.

While showing that a condition addresses adverse effects of the transaction is necessary to gain our approval, it is by no means sufficient. The condition must also be narrowly tailored to remedy those effects. We will not impose a condition that would put its proponent in a better position than it occupied before the consolidation. *See UP/CNW*, slip. op. at 97; *Milwaukee--Reorganization--Acquisition by GTC*, 2 I.C.C.2d 427, 455 (1985) (*Soo/Milwaukee II*). If, for example, the harm to be remedied consists of the loss of a rail option, any conditions should be confined to restoring that option rather than creating new ones. *See Soo/Milwaukee II*, 2 I.C.C.2d at 455; *UP/MP/WP*, 366 I.C.C. at 564. Moreover, conditions are not warranted to offset revenue losses by competitors. *BN/Frisco*, 360 I.C.C. at 951.

PRELIMINARY MATTERS. There are several preliminary matters that we must address.

TPW-2. On June 29, 1995, TP&W filed its TPW-2 motion to strike certain evidence and argument submitted by KJRY in its KJRY-4 rebuttal submission of June 19, 1995. The challenged material embraces KJRY's Santa Fe/TP&W control allegation and certain net revenue loss calculations. TP&W contends that the challenged material should have been submitted in KJRY's KJRY-3 opening submission of May 10, 1995, and (at the rebuttal stage) amounts to an improper attempt to put on a new affirmative case. TP&W asks that we strike the challenged material or, in the alternative, that we accept two verified statements attached to TPW-2 (the attached statements discuss the Santa Fe/TP&W control allegation). KJRY, in its KJRY-4.1 reply filed July 10, 1995,[77] urges denial of the TPW-2 motion.

The challenged material is of the sort that should have been contained in KJRY's May 10th opening submission if available at that time. We note, however, that at an earlier stage of this proceeding KJRY and TP&W shared common interests, and that their interests diverged only when TP&W entered into a settlement agreement with applicants on May 5th, *see* BN/SF-32. The

[77] KJRY's reply filed July 10, 1995, lacks an acronym/number designation. For ease of reference, we have informally designated this reply KJRY-4.1.

first disclosure of this agreement may have been made as late as May 10th. KJRY claims that it first learned of the agreement on May 11th. For this reason, we will deny the TPW-2 motion, but we will accept the two verified statements attached thereto.

TPW-4. On July 10, 1995, TP&W filed its TPW-4 motion to strike certain portions of the KJRY-5 brief filed June 29, 1995. The challenged material, which TP&W contends should not have been submitted on brief, embraces KJRY's arguments respecting the Santa Fe/TP&W control allegation and the net revenue loss calculations as well as certain exhibits attached to the KJRY-5 brief.[78] KJRY, in its KJRY-5.1 reply filed July 18, 1995,[79] urges denial of the TPW-4 motion.

As respects the Santa Fe/TP&W control allegation and the net revenue loss calculations, we will deny the TPW-4 motion for the same reason we are denying the TPW-2 motion. As respects the challenged exhibits, we will deny the TPW-4 motion because the challenged material, insofar as relevant at all, is cumulative at worst.

UP-9. Applicants' brief includes, among other things, a discussion of UP's challenge to the section 9 proviso of the SP settlement agreement. BN/SF-47 at 22-23 (confidential version); BN/SF-48 at 22-23 (public version). By motion (UP-9) filed July 7, 1995, UP requests that we strike this discussion because it contains unsupported and inaccurate claims made by applicants for the first time in their brief. Applicants, in their BN/SF-49 reply filed July 11, 1995, urge denial of the UP-9 motion.

We will deny the UP-9 motion because the challenged material simply presents new arguments explaining the rationale of the section 9 proviso, not new evidence.

UP/SP. Union Pacific Corporation (UPC) is a holding company that controls UP; Southern Pacific Rail Corporation (SPRC) is a holding company that controls SP. On August 3, 1995, UPC and SPRC announced that they had

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[78] Exhibit A is an excerpt from a filing in another proceeding regarding the Santa Fe/GTWRY relationship (KJRY apparently believes that its arguments respecting the Santa Fe/TP&W relationship can be supported by citing similar arguments made by an unaffiliated entity respecting the Santa Fe/GTWRY relationship). Exhibit C contains selected correspondence. Exhibits D, E, and F are deposition excerpts.

[79] KJRY's reply filed July 18, 1995, is actually designated KJRY-5. For ease of reference (because this designation was previously used for KJRY's brief), we have informally designated this reply KJRY-5.1.

reached an agreement providing for the merger of SPRC with and into UPRR.[80] The UP/SP transaction may be carried out only with the approval and authorization of this agency, 49 U.S.C. 11343(a), and will require the filing of a "major merger" application, 49 U.S.C. 11344(a), (b)(1). UPC and SPRC have indicated that they expect to file such an application no later than December 1995.

Although such a transaction may change the number of major western railroads, we will not consider the effects of UP/SP common control in the present BN/Santa Fe proceeding, nor will we hold the BN/Santa Fe proceeding in abeyance pending the outcome of the UP/SP proceeding. Our long established "one case at a time" rule provides that, in major merger proceedings, "consideration will be limited to the impacts of transactions which have already been approved and are, therefore, reasonably certain to occur." 49 CFR 1180.1(g).[81] We adhered to that rule in our recent *UP/CNW* decision (we rejected a request that we hold the UP/CNW proceeding in abeyance pending the outcome of the BN/Santa Fe proceeding, *UP/CNW*, slip op. at 60-61), and we will adhere to that rule in this decision. We can and we will effectively guard against harm to competition, and if necessary take appropriate steps to preserve competition, in the decision we ultimately will issue in the UP/SP proceeding.

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[80] Under the terms of the agreement, UPC will make a first-step cash tender offer of $25.00 a share for up to 25% of the common stock of SPRC (the tender offer commenced August 9, 1995). It is envisioned that the shares purchased in the tender offer will be held in a voting trust. It is further envisioned: that, following completion of the tender offer and the satisfaction of other conditions (including approval by this agency), SPRC will be merged with and into UPRR; that, upon completion of the transaction, each share of SPRC stock will be converted, at the holder's election (subject to proration), into the right to receive $25.00 in cash or 0.4065 shares of UPC common stock; and that, as a result of the transaction, 60% of SPRC shares will be converted into UPC shares and the remaining 40% of SPRC shares will be converted into cash.

[81] Section 1180.1(g) provides in its entirety: "*Cumulative impacts and crossover effects.* The Commission recognizes that events can occur during its consideration of a consolidation that can have an effect on various of the concerned parties. However, the Commission is mindful of the need to meet its statutory deadlines and make timely, administratively final decisions. Therefore, the Commission will not reopen pending proceedings in order to assess the impact of potential or hypothetical combinations or transactions. The proper forum for considering cumulative impacts and crossover effects is in a later proceeding. In this manner, consideration will be limited to the impacts of transactions which have already been approved and are, therefore, reasonably certain to occur. Furthermore, the Commission will have the benefit of its findings from the prior proceeding to identify more precisely the impacts of that transaction. Proceedings will remain manageable in scope and size, statutory time limits will be met, and all parties will be assured of timely, administratively final decisions."

COMMON CONTROL: IN THE PUBLIC INTEREST. We conclude in this decision that, subject to imposition of competitive conditions, standard labor protective conditions, and environmental mitigating conditions, common control of BN and Santa Fe, as proposed in the BN/Santa Fe application, will be consistent with the public interest. We find that common control will generate substantial public benefits. We find that, subject to competitive conditions designed to eliminate the problems referenced in the next sentence, common control will cause no meaningful reduction in the transportation competition in any of the markets in which either BN or Santa Fe operates. We find that unconditioned common control would generate anticompetitive impacts at Superior; in the Pueblo-Fort Worth corridor; at Amarillo, Plainview, and Lubbock; at Keokuk; at Fort Madison and Galesburg; at Red Rock; at Borger; and in the territory served by GNBC. We find, however, that the rights provided for in NITL Paragraph 1 (which will be imposed as conditions) will effectively eliminate the anticompetitive impacts at Superior and in the Pueblo-Fort Worth corridor, and at Amarillo, Plainview, Lubbock, Keokuk, Fort Madison, and Galesburg, and we will impose additional conditions not provided for in NITL Paragraph 1 that will effectively eliminate the anticompetitive impacts at Red Rock and Borger and in the territory served by GNBC. We further find that common control will not threaten any essential services now provided by the two railroads that have advanced essential services arguments.[82]

Competitive Impacts. The evidence demonstrates that common control of BN and Santa Fe will be in large part pro-competitive: it will stimulate price and service competition in markets served by the merged carrier, and shippers will experience lower rates and improved service over many routes. The evidence further demonstrates that, with the competitive conditions we are imposing, common control will result in no meaningful reduction in transportation competition, and that transportation competition will be as robust and effective following the merger as it is presently. We rest this conclusion primarily upon continued intramodal competition, and we will impose certain competitive conditions to eliminate what would otherwise be transaction-caused diminutions of competition at Superior, in the Pueblo-Fort Worth corridor, at

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[82] We are approving *both* the original merger structure proposed in the application as originally filed *and* the alternative merger structure proposed in the BN/SF-25 supplemental submission. The differences between the two involve mere technical details. We will therefore allow BNSF Corporation and its anticipated subsidiaries to be joined as applicants for purposes of this proceeding, and we will waive with respect to these entities the filing requirements of 49 CFR Part 1180.

Amarillo, Plainview, Lubbock, Keokuk, Fort Madison, Galesburg, Red Rock, and Borger, and in the territory served by GNBC.

In General. A commonly controlled BN/Santa Fe will encompass significantly more of the major western freight transportation markets than either BN or Santa Fe covers alone. Current customers of BN and Santa Fe will benefit from extended market coverage, which will result in new competition for other railroads, trucks, and water carriers, and, ultimately, improvements in services and/or decreases in rates. There are several significant new markets in which the consolidated system would provide new single-line service.

Southwest-Southeast; California-Southeast. A commonly controlled BN/Santa Fe could offer what no railroad has ever offered: single-line rail service linking major California, Arizona, and New Mexico markets with those in Mississippi, Alabama, and Florida. Through intermodal service, the single-line reach would extend to eastern Tennessee, the Carolinas, Georgia, and significant Florida markets. The consolidation will introduce a strong single-line competitor into the Southwest-Memphis market to compete with SP and UP.[83] Although BN operates in the Midwest and the Southeast, it does not have an efficient route to California and the Southwest. The merger with Santa Fe will provide the critical link needed to improve the quality of service offerings between points where BN is strong and points where Santa Fe is strong.

This corridor would also include the intermediate States of Missouri, Arkansas, Oklahoma, and Texas. The combined route would be the most direct and comprehensive rail route available to shippers in this corridor, linking growing U.S. population centers with growing industrial sectors. The BN/Santa Fe route would link the Pacific Rim intermodal market with the Southeastern United States, and it would connect North Central Mexico with the Southeast via El Paso.

The new coverage between the Southwest and the Southeast would enable BN/Santa Fe to be a more effective competitor against UP and SP, and would directly benefit the shipping public. The combined system could likely attract general merchandise moving between California and the industrial center of the country. The combined system could also compete with UP and SP in the

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[83] In the current east-west railroad transportation market, BN and Santa Fe face substantial single-line competition from both UP and SP. Both of those carriers are able to link the high density regions of the Midwest to western markets, and the merger will improve BN/Santa Fe's ability to compete against UP and SP between those regions, as well as between the Southwest and Southeast.

transportation of motor vehicles because BN can reach auto manufacturing centers in locations such as Kentucky and Tennessee, and, after the merger, BN/Santa Fe will be able to provide single-line service to the California market.

Upper Midwest/Northern Plains-Southwestern United States/ Mexico. The second major source of enhanced market coverage would be the single-line service linking northern U.S. markets with southwestern U.S. markets. Single-line railroad service will become available between Los Angeles and Minneapolis, between Phoenix and Des Moines, between El Paso and Minot, between Seattle and Albuquerque, between Sioux Falls and Beaumont, and between numerous other points as well.

The north-south corridor is becoming ever more important in the domestic freight market. The BN/Santa Fe consolidation would dramatically affect traffic shipped between the Pacific Northwest (PNW) and the Upper Midwest (UMW)[84], on the one hand, and the Southwest (SW) and the Pacific Southwest (PSW), on the other.[85] A commonly controlled BN/Santa Fe will provide shippers new opportunities in several traffic lanes: in the PNW-SW lanes, BN/Santa Fe will offer improved industry access in the Southwest and better opportunities for population center coverage; in the UMW-PSW lane, BN/Santa Fe will offer a superior service route to the large population centers in California and the growth areas in Arizona and New Mexico; and in the UMW-SW lanes, BN/Santa Fe will offer a new single-line transportation product and improved coverage.

Canada-Southwestern United States. The third major market enhancement would be the establishment of new single-line U.S. rail service between Central and Western Canada and Southwestern United States. A commonly controlled BN/Santa Fe will foster the American-Canadian economic integration implicit in NAFTA. BN/Santa Fe, by way of illustration, will provide single-line service between Winnipeg and Los Angeles, and between Vancouver and Albuquerque. International North American flows have also seen strong north-south growth in recent years, and the coverage afforded by a combined BN/Santa Fe will support the development of that transnational trade.

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[84] For purposes of this discussion, the Pacific Northwest includes Washington, Oregon, Idaho, and Montana, and the Upper Midwest includes North Dakota, South Dakota, Minnesota, and Wisconsin.

[85] For purposes of this discussion, the Southwest includes Missouri, Arkansas, Oklahoma, and Texas, and the Pacific Southwest includes California, Arizona, and New Mexico.

Canada-Mexico. The fourth major route enhancement would be the creation of a direct single-line route between Central and Western Canada and the major Mexican gateway at El Paso. BN's Northern Corridor access to British Columbia, Alberta, and Saskatchewan would attract minerals, chemicals, metals, forest products, and other products for efficient movement on the consolidated system via El Paso to many of the burgeoning industrial and population centers of Mexico. BN's access to Manitoba and Ontario would generate new BN/Santa Fe traffic over El Paso for the rapidly growing North Central Mexico market. Via these routes, the United States would participate economically in the movement of goods such as forest products, minerals, chemicals, and metals that might otherwise move entirely outside the U.S. transportation network via Canadian ports on the Great Lakes or in British Columbia. The consolidated route, furthermore, would reduce growing demand for additional north-south highway capacity in the Central and Western United States.

Expanded Coverage. The expanded coverage that common control promises will have numerous beneficial impacts.

International Markets. The integration of BN and Santa Fe into a commonly owned network will enhance the productivity of rail service in reaching international markets in general and the Mexican market in particular. U.S. railroads have a major role to play in increasing trade with other countries, and each of the major railroads reaching Mexico is attempting to expand business. Both UP and SP are well-positioned, having the only rail access at the key gateways of Laredo and Brownsville. Laredo is the largest gateway in terms of export traffic, and UP handles the majority of Laredo's cross-border rail traffic. The Laredo gateway that UP and SP serve is clearly a key link in U.S.-Mexico rail traffic.

Because Santa Fe accesses the El Paso gateway, a commonly controlled BN/Santa Fe will have single-line access to Mexico. Moreover, a significant amount of trade in grain is now carried out by rail and barge movement to Gulf Coast ports, with subsequent waterborne shipment to the Veracruz region of central Mexico. The introduction of new single-line service in grain transportation to the Gulf by BN/Santa Fe will enable it to compete more effectively (primarily with KCS). This will enhance the grain trade with Mexico, and with other international markets as well.

Truck Competition. Traditional interline railroad service has had difficulty competing with truck service. Trucks provide high quality service with fast transit times, and can meet tight schedules. Rail service, if it is to compete with truck service, must match trucks' quality threshold and provide competitive rates. The record indicates that a commonly controlled BN/Santa Fe will have the wherewithal to compete with trucks in two major corridors: Southwest-Southeast, and Southwest-Upper Midwest. The shift to rail of freight that might otherwise have moved by truck should reduce both highway congestion and fuel consumption.

Port Coverage. Common control offers the prospect of improved port coverage. Present BN shippers would gain access to Beaumont (on the Gulf) and to San Diego, Los Angeles, and Oakland (on the Pacific). Present Santa Fe shippers would gain access to Mobile and Pensacola (on the Gulf) and to Portland, Tacoma, Seattle, and Vancouver (on the Pacific). Santa Fe shippers would also have single-line availability to Duluth/Superior on Lake Superior as well as improved direct access to ports on the Mississippi River and the Tennessee Tombigbee system.

Intermodal Service. The expanded coverage of regions and ports should increase the options of intermodal shippers that require transportation from and to numerous sources and destinations. Those shippers will have a single-line network connecting them to almost all major western ports and important inland hubs such as Birmingham, Memphis, Dallas, Houston, St. Paul, and Chicago. This has the potential to enhance U.S. competitiveness in export commerce and to create additional single-line opportunities among Canada, the United States, and Mexico.

A commonly controlled BN/Santa Fe will be able to compete more effectively for intermodal traffic with other railroad systems, including UP and SP. Both of those carriers have access to many western points and many important eastern gateways, and can offer shippers better geographic packages than can now be offered by either BN alone or Santa Fe alone. The lack of broad coverage has heretofore hindered BN's ability to compete for intermodal traffic. Further, anticompetitive impacts will not result from the combined system's improved capability in the intermodal area because there is no significant intermodal competition today between BN and Santa Fe.

Grain Transportation. The expanded single-line service capability of the combined system will also affect transportation of grain for shippers located on either BN or Santa Fe. New markets will be made available for those shippers, including markets in which BN and Santa Fe could not compete strongly on a joint-line basis. The new domestic market opportunities include: (1) access from Nebraska and Iowa to southwestern markets; (2) access from points in the Midwest to California markets; (3) access from Nebraska to export elevators at Beaumont; (4) single-line service from barley producing areas in Washington, Montana, and North Dakota to malt plants in Los Angeles; and (5) access from wheat producing regions in Oklahoma to the Pacific Northwest. BN's new access to the Mexican market via El Paso could also offer an opportunity to grain shippers.

The record further indicates that the prospect of an expanded grain traffic base is especially positive given the current location of Santa Fe's and BN's grain shippers and the sequence of grain harvests. Santa Fe originates most of its grain traffic in Texas, Oklahoma, and Kansas; BN originates most of its grain traffic in Nebraska and other northern points that Santa Fe does not serve. Generally, the grain harvest begins in late May with the hard red winter wheat crop grown in Santa Fe's service territory. The wheat harvest gradually moves north through Oklahoma, and by the fall reaches North Dakota and Montana, where a great deal of BN's wheat traffic originates. The combined carriers may be able to use their combined grain transportation capacity more efficiently because the peak demand for their respective equipment would occur at different times.[86]

Problem Areas. Analyses conducted by applicants, NITL, and DOJ used the 1993 Waybill Sample in an attempt to ascertain adverse competitive impacts that might result from common control. Particular attention was accorded to traffic flows with respect to which unconditioned common control would result in a reduction of rail carriers from four to three, or from three to two, or (especially) from two to one. Various levels of geographic aggregation, most often BEAs or 4-digit SPLCs, were used in these analyses.[87] DOJ evaluated the amenability of traffic to truck transportation, so that merchandise traffic, for example, would be broken down on a BEA-to-BEA basis. Applicants used five commodity classes, while DOJ used 5-digit STCCs.[88] DOJ and applicants both took account of truck competition in selecting areas of potential competitive concern. The several analyses indicate, and we agree, that, of the roughly 29

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[86] USDA fears that the merger will eliminate competition between hard red winter wheat originated by Santa Fe in Kansas, Oklahoma, and Texas, and spring wheat originated by BN in Montana, North Dakota, and South Dakota. We realize that these flows compete, to the extent wheat can be directed to ports in either the Pacific Northwest or the Gulf. We note, however, that, because UP and Soo serve portions of the North Central region, and because UP connects South Central states with both the Pacific Northwest and the Gulf, competitive alternative routings will remain available post-merger. We therefore conclude that USDA has not demonstrated that the merger, by reducing independent routings for these commodities, will cause competitive harm.

[87] BEA is the acronym for Business Economic Area. SPLC is the acronym for the Standard Point Location Code.

[88] STCC is the acronym for the Standard Transportation Commodity Code.

locations that are served by both BN and Santa Fe, only a few would sustain merger-caused competitive harm.

Superior. Common control, if not conditioned, would result in competitive harm at Superior. Santa Fe and BN compete at Superior, carrying freight (primarily grain) from Superior to Chicago, to Kansas City, and to the Gulf. (Only BN, however, can move this freight single-line to the Pacific Northwest.) Santa Fe's efficient, high-speed grain loading facilities in Superior draw grain from as far as 50 to 150 miles to the north. Neither truck nor truck/barge competition is a factor at Superior (the distances are too great), and UP, despite its presence at Hastings, is not a substantial factor either. NITL Paragraph 1(a), however, provides a remedy for the anticompetitive impact at Superior.

Pueblo-Fort Worth Corridor; Amarillo, Plainview, and Lubbock. Common control, if not conditioned, would result in competitive harm in the Pueblo-Fort Worth corridor, and at Amarillo, Plainview, and Lubbock. Santa Fe and BN compete for traffic moving either in that corridor or from or to those points, and rate concessions deriving from the head-to-head competition between BN and Santa Fe are well documented. Both SP and UP have routes in the area, but their routes are too distant (for the bulk commodities involved) to have more than a minor mitigating effect on the loss of direct competition between BN and Santa Fe. Because rail traffic moving into and out of Amarillo is predominantly low value bulk freight (such as processed and unprocessed grains, mineral and metal products, and animal grease), truck competition is not a significant factor. NITL Paragraph 1(b), however, provides a remedy for the anticompetitive impact in the Pueblo-Fort Worth corridor, and at Amarillo, Plainview, and Lubbock.

Keokuk, Fort Madison, and Galesburg. Common control, if not conditioned, would result in competitive harm at Keokuk, Fort Madison, and Galesburg. These points are served by both BN and Santa Fe on their Kansas City-Chicago lines, and the importance of competitive rail service at these points to local industries and local shortline connections is well documented by the DOJ and NITL analyses. The commodities affected include corn syrup (moving in tank cars to Texas and California) and chemical solvents (hazardous materials not suitable for truck transportation). NITL Paragraph 1(c) provides a remedy for the anticompetitive impact at Keokuk, and NITL Paragraph 1(d) provides a remedy for the anticompetitive impact at Fort Madison and Galesburg.

Red Rock, Borger, and GNBC. Common control, if not conditioned, would result in competitive harm at Red Rock and in the territory served by GNBC, and might result in competitive harm at Borger. NITL Paragraph 1 provides no remedy for these impacts, and we have therefore crafted remedies of our own. These matters are discussed below in connection with our discussion of the conditions requested by OG&E, GNBC, and PPC, respectively.

Public Benefits. The primarily end-to-end (vertical) integration of the rail operations conducted by BN and Santa Fe will enable the consolidated carrier to reduce the costs it incurs and to improve the services it provides. Shippers should benefit from lower rates and improved service, including new single-line service. Shippers should also benefit from the price and service competition brought about by the combined system's ability to reach new markets.

Cost Savings. The record indicates that the consolidation of BN and Santa Fe will result in annual cost savings of approximately $453 million, mostly from efficiencies that can be realized only through a consolidation. These include: improvements in equipment utilization due to consolidated dispatching and scheduling; better integration of the production facilities of BN and Santa Fe; consolidation of duplicative yard and terminal functions; lower maintenance costs for both equipment and way; lower materials costs resulting from purchasing efficiencies; and substantial savings in general administrative overhead and support functions. The savings in overhead and support functions will be achieved by operating the combined company with unified executive offices, an integrated and consolidated management information system, and a centralized customer support function and just-in-time inventory practices. There will also be rationalization and specialization in various support and clerical areas. The following table summarizes the cost savings resulting from the proposed transaction, as identified by applicants:

Applicants' Projected Annual Efficiencies and
Cost Savings (in millions of dollars)

Operational Savings

Operations-Common Point and Route Consolidations	$26.6
Mechanical	45.7
Engineering - Maintenance of Way	12.7
Purchasing & Materials	13.3
Intermodal Operations	8.7
Subtotal	$107.0

Support Functions Savings

Chairman's Office	$ 9.4
Transportation Overhead	18.8
Maintenance of Way	12.3
Maintenance of Equipment	6.2
Purchasing	32.4
Operating Support	24.2
Management Information Systems	45.1
Business Unit Overheads	86.8
Other General and Administrative	110.8
Subtotal	$346.0
Total Annual Savings	$453.0

Operating Efficiencies. The record indicates that, in addition to the efficiencies discussed above, the combined system will be able to offer shippers single-line service with internal reroutes that, in the aggregate, would have moved the base 1993 traffic with reductions of 34 million car miles, 2 billion gross ton-miles, and 1.7 million locomotive unit miles compared to operations over the separate railroads. Applicants project that the annual mileage savings will enable them to save, each year, approximately four million gallons of fuel. It also appears that with the more efficient use of equipment that will be made possible with common control, there should be fewer problems with car shortages, which should result in improved service to shippers.

Single-line service is important to shipper logistics strategies. Interchange between railroads can be costly. A single-line railroad route is becoming more important for carriers wanting to compete for service-sensitive freight. As a result of the new single-line service capability of the combined BN/Santa Fe, shippers will likely see decreases in working capital requirements as base inventories shrink due to improved transit times, and as safety stocks of inventory are reduced because the combined system can eliminate the uncertainty of interchange. The transaction costs shippers incur in initial rate negotiations, in arranging equipment supply, in tracking shipments, and in billing and payment procedures, will likely be reduced.

Economies of Scale. There has been some controversy in this proceeding regarding whether applicants can realistically expect significant savings to result from economies of scale.[89] We agree with applicants that where, as here, two railroad networks are integrated, the possibilities for longer hauls increase. While the utilities' witnesses note that in the past the proportion of interlined BN/Santa Fe movements has been low, we expect that the merger will bring about a significant number of new single-line BN/Santa Fe movements.

Whether applicants or the utilities are correct as to economic terminology is largely irrelevant. The fact is that the merging carriers can expect substantial savings. Increases in length of haul are expected, as more interline movements become single-line, as interchange costs are eliminated, and as equipment becomes more efficiently distributed and used. Regardless of the terminology, applicants have demonstrated that such savings will occur and are likely to be substantial. The fact that the methods used to estimate those savings relied on engineering or operations research more than on econometric studies does not detract from their accuracy.

Shipper Support. The public benefits that will be generated by common control of BN and Santa Fe have been recognized by the numerous shippers that have submitted comments in support of the proposed transaction. These shippers seek better service and lower rates. If the proposed transaction were to have anticompetitive consequences, these shippers would have the most to lose. If, on the other hand, the proposed transaction presents opportunities for important efficiencies, these shippers would have strong incentives to express their support. Shipper support, of course, is not itself a public benefit, but it is an indication that the most immediately affected "public" interest expects that common control will generate public benefits.

Many participating shippers believe that common control of BN and Santa Fe will bring significant improvements in the way shipments are handled on BN and Santa Fe lines. The efficiencies that they expect to be generated are those identified by applicants, *e.g.*, that the combined system will have the

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[89] Applicants' witness, Dr. Kalt, claims that railroads exhibit economies of scale, but Dr. Christensen, representing selected utilities, claims that they do not. Dr. Christensen stresses the need to differentiate between economies of scale and economies of density. A railroad exhibits economies of scale if it can reduce its cost per ton-mile by simply adding ton-miles and track-miles proportionately; it exhibits economies of density if it can reduce its cost per ton-mile by adding more tons over its existing track-miles. Applicants' witness Dr. Schmalensee, on rebuttal, responds that, if evidence of economies of scale in railroading is not strong, it is only when the average length of haul of the system in question is held constant while scale economies are measured. Where average length of haul increases along with carrier size, he contends, stronger evidence of economies of scale has been obtained.

capability to offer single-line service to more points, and that improved efficiency of BN/Santa Fe will benefit shippers on both carriers' lines.

Some non-coal shippers have submitted comments in opposition to the proposed transaction. These opponents, however, appear either to be located on competing rail lines or to be concerned about the effects of applicants' settlement agreements with other carriers. Some of these shippers are primarily concerned about the impact common control will have on the carrier they use and their own ability to compete with shippers on a more efficient BN/Santa Fe system; others are worried about competitors' improved competitive situations resulting from the settlement agreements. Their purpose, essentially, appears to be to handicap their competitors in order to protect their own ability to compete in certain markets which will benefit either from common control or from one or another of the settlement agreements. Regulatory intervention designed to protect carriers and shippers from competition is not in the public interest. To the contrary, regulation should foster efficiency. The public interest is best served when suppliers are permitted to compete in the marketplace on the basis of their efficiency.

Coal. Various electric utility interests, all concerned with the movement of unit-trains of coal from mines to electric utility plants, have alleged that the merger, even as conditioned by NITL Paragraph 1, will cause certain competitive harms.[90] Two (WCTL and Chaco) argue that the reduction in the number of coal-originating railroads in the West from four to three will unduly inhibit source competition among the western coal producing basins. Nine (HL&P, SPS, WFSC, OG&E, WRI, APS, CP&L, AEPCO, and TEP) argue that the merger will result in significant competitive harm at specific coal-burning electric utility plants. Each of the nine has a plant that is served by either Santa Fe or SP as the only destination rail carrier (the plants of interest to

[90] This broad statement is subject to several qualifications: Two utility interests (SPS and TEP) have acknowledged that NITL Paragraph 1 will mitigate all merger-related competitive harms as respects two particular plants (Harrington Station at Amarillo and Irvington Station at Tucson, respectively), provided only that the relevant SP rights are imposed as conditions and that the compensation arrangement provided for in the SP settlement agreement is such as to make SP an effective competitor with BN/Santa Fe. SPS and TEP insist, however, that the compensation payments called for in the SP settlement agreement are in fact too high, and that SP therefore will not be an effective competitor. SPS continues to claim that NITL Paragraph 1 will not have any mitigating impact at all as respects merger-related competitive harm at SPS' Tolk Station at Muleshoe.

HL&P, SPS,[91] WFSC, OG&E, WRI, and APS are served exclusively by Santa Fe; the plants of interest to CP&L, AEPCO, and TEP are served exclusively by SP). Each of the nine argues that each plant of interest now benefits from competition among various actual or potential origin and/or bridge carriers. Each of the nine (except TEP) fears that the merger, even as conditioned by NITL Paragraph 1, will eliminate that competition. One of the nine (OG&E) also fears that the merger will eliminate potential destination competition linked to its ability to "build out" to BN.

We conclude that the merger will reduce OG&E's competitive options at Red Rock by negating its ability to "build out" to a neutral carrier (and we have fashioned a remedy suitable to mitigate this harm). We also conclude that the claims by WCTL and Chaco that coal shippers will be substantially harmed by a reduction in geographic competition are without merit. We further conclude that the claims by various utilities that they will be substantially harmed by vertical effects of the merger are without merit.[92]

OG&E. We consider first the parallel effect feared by OG&E: the loss of what is today potential BN competition at Red Rock. In 1993, OG&E signed a new long-term contract with Santa Fe for deliveries from 1994 through 2008 containing much lower rates than previously available, and with a very favorable (to the utility) escalation mechanism. According to both Santa Fe and OG&E, Santa Fe agreed to the contract largely due to OG&E's threat to build a spur to the nearby BN line. This threat was perceived to be real, and Santa Fe priced its services accordingly.

The negotiating leverage provided by the build-out option will disappear with the merger. The record indicates that OG&E has still other options (the ability to switch generation between plants and between kinds of fuel, and to purchase power off the grid), and the record also indicates that these other options constrain rates for incremental shipments. But the record further indicates, and we conclude, that whereas the build-out option can effectively constrain rates for base-load movements, the other options cannot.

OG&E's proposed remedy, trackage rights for UP to serve Sooner Station directly, would permit OG&E to obtain the benefits of a second carrier at

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[91] The SPS plant referenced here is Tolk Station at Muleshoe.

[92] The competitive impacts feared by the utility interests involve a mixture of parallel effects (often referred to as horizontal effects) and end-to-end effects (often referred to as vertical effects). *Cf. Milwaukee--Reorganization--Acquisition by GTC*, 2 I.C.C.2d 161, 224-225 (1984) (*Soo/Milwaukee I*).

destination minus the trouble and expense of building out to the BN line. This remedy would thus significantly improve OG&E's existing competitive situation. Because the conditioning power is used to *preserve* competitive options (not to *expand* them), we will not impose the remedy sought by OG&E.

To preserve the competitive status quo, we have crafted a condition that will permit OG&E to maintain its existing build-out option. After the merger, there will be three class I railroads not affiliated with applicants (UP, SP, and KCS) operating near Sooner Station. We will require applicants to grant trackage rights to one of the three over the BN line to a convenient point of interchange (perhaps Morrison) to which OG&E would retain the ability to build out. We will allow OG&E (not applicants) to choose the carrier that is to receive the trackage rights. We will further allow the interested parties (BN, OG&E, and the carrier chosen by OG&E) an opportunity to reach a negotiated settlement respecting the details of the condition we are imposing. Because time is not of the essence in this matter, we will allow these parties 120 days from the date of service of this decision to submit agreed-upon terms respecting implementation of this condition. If the parties are unable to agree to such terms, they shall submit, by such date, separate proposals respecting implementation of such condition, and we will establish the terms.

WCTL. WCTL argues that the merger will harm competition by reducing from four to three the number of class I rail carriers capable of originating western coal. WCTL also argues that none of the benefits of the merger will flow through to any coal shippers. To remedy these problems, WCTL seeks either (1) trackage rights for any railroad over the Santa Fe line between Pueblo and El Paso, and over certain other Santa Fe lines as well, or (2) a rate cap on new BN/Santa Fe coal traffic originating in the San Juan and Raton Basins.

We are not persuaded that the merger will have any substantial impact on the current economics of coal transportation from various sources in the West. We note that, although numerous coal shippers have participated here, none (possibly excepting OG&E) has shown that the merger, as conditioned, will make it captive where it was not captive before. WCTL provided no example of such a shipper. Moreover, despite the reduction in the number of carriers in the region, intramodal rail source competition will remain largely undisturbed, and coal quality and characteristics will continue to be a driving force in the demand for certain types of coals. As explained below, we find that the effects on the competitive environment as the number of class I coal hauling railroads in the West is reduced from 4 to 3 will be extremely limited.

After the merger, the same rail carriers will continue to compete for transportation from various coal fields in the same relative positions. UP and BN will continue to compete for coal movements from the PRB. The only Colorado mine that BN now serves is the Golden Eagle/New Elk mine, which is also served by SP and Santa Fe. Post-merger, BN/Santa Fe will continue to have access to that mine in competition with SP. Other Colorado origins that are now served by UP, SP, and/or Santa Fe will not be affected by the merger at all. SP and UP will likewise continue to serve Utah origins. Because BN does not serve New Mexico coal mines, the merger will have no effect on the number of rail carriers competing for rail transportation services from that source.

In addition, all of these coal regions produce varying types of coal with differing qualities and characteristics. These factors have influenced and will continue to influence demand for coal in the West and will be unaffected by the proposed merger.

As a consequence of the merger, there will be competitive gains. The merger will create improved single-line direct service from some western coal sources. The merger, as conditioned by NITL Paragraph 1(b), will provide SP with the ability to offer improved service as well, with a new north-south route from Pueblo to Fort Worth, including a new UP/SP north-south route from the PRB. We expect that, for shippers in certain areas, these developments will streamline deliveries and permit more efficient routings, and generally enhance competition.

Chaco. For much the same reasons, we reject Chaco's claim that the combined BN/Santa Fe system will control such a significant number of coal producing areas that it will be able to exercise considerably more market power than BN alone does now. Chaco is already captive to Santa Fe; the merger should make no difference in that regard. Chaco also neglects to mention that there are several other coal producing regions in the West not served by either BN or Santa Fe.

Chaco's claim--that Santa Fe's economic incentives to assist Chaco and other San Juan Basin coal producers in the marketing of coal will suddenly disappear because BN/Santa Fe will serve other coal producing regions--is not plausible either. Although Chaco now ships no coal and has no customers, there is no reason to believe that, if a demand for Chaco's coal does develop, the combined carriers will attempt to repress the marketing of this coal in favor of that produced elsewhere on their system. To the contrary, the newly available BN/Santa Fe single-line service to many coal users may allow Chaco to develop some traffic. Chaco alleges that applicants will favor their long-haul movements from the PRB. If there really is a demand for Chaco's coal, utilities will be willing to make satisfactory arrangements with the railroads for its transportation.

In sum, we find Chaco's charge of merger-related competitive harm to be unsubstantiated. Moreover, the relief Chaco seeks--a condition that BN/Santa Fe rates per ton-mile on new coal traffic from the San Juan Basin not exceed the average rates charged by BN/Santa Fe for PRB coal traffic--would not be appropriate because it would unduly interfere with the carrier pricing initiative that is embodied in the Interstate Commerce Act.

Vertical Effects. Before analyzing the particular vertical issues raised by the utilities, we will provide our general framework for analysis. Claims of competitive harm arising from the merger of a railroad with a bottleneck segment with a carrier that feeds or distributes traffic through the bottleneck segment were raised in two intermodal mergers we approved, *CSX Corp.--Control--American Commercial Lines, Inc.*, 2 I.C.C.2d 490 (1984) (*CSX/ACL*), and *Norfolk Southern Corp.--Control NAVL*, 1 I.C.C.2d 842 (1985) (*NS/NAVL*). Whether competitive harm would result from the merger of one of several potential coal originating railroads with the only rail carrier providing coal to a specific utility plant was an important consideration in *CSX Control*, 363 I.C.C. at 567-573; *UP/MP/WP*, 366 I.C.C. at 533-546; *Soo/Milwaukee II*, 2 I.C.C.2d at 454-456; and *UP/MKT*, 4 I.C.C.2d at 476-477. In each case, we found that the merger would not enhance or extend the existing market power of the bottleneck carrier. *See also UP/CNW*, slip op. at 87-89.

Our most extensive treatment of this type of vertical impact is contained in *UP/MP/WP*, where we evaluated and rejected the proposition that a utility served by a single destination carrier and two or more origin carriers would benefit from the origin competition only so long as the destination monopolist remained "neutral" (i.e., unaffiliated with any of the originating railroads). We concluded that the market power faced by an existing utility is neither created nor increased by consolidation of a monopoly destination carrier with an origin carrier. *UP/MP/WP*, 366 I.C.C. at 539. In rejecting the argument that the destination carrier could enhance its market power by merging with one of its (origin) interline partners, we said:

> A carrier with a destination monopoly will likely push the through rate as high as possible and keep the monopoly profits to itself by playing off competing connecting carriers against one another in setting divisions. That is, the through rate will be at the level maximizing net revenue for the traffic, subject to regulatory limits, and the destination carrier will establish favorable through service with the origin carrier willing to take the lowest division of the through rate for its segment

of the movement. Although a destination carrier might not always be successful in executing this strategy, it will always have the incentive of profit-maximization to attempt to execute the strategy. Therefore, this rate strategy will be pursued and should succeed unless there are obstacles to its execution with respect to a specific movement.
[It has been asserted, however,] that a neutral destination carrier usually will not be able to execute this "vertical price squeeze" and, therefore, has an incentive to merge with an origin carrier in order to drive the through rate to the optimum profit-maximizing level. We are not convinced either that a carrier with a destination monopoly for steam coal traffic will generally be unable to execute the described rate strategy or, on the other hand, that a neutral destination carrier that is unable to execute the strategy would be significantly more capable of raising the through rate to the level that maximizes its profits after affiliation with an origin carrier.

UP/MP/WP, 366 I.C.C. at 538. *See also CSX Control*, 363 I.C.C. at 572-573 (a similar analysis).

We have not altogether rejected the possibility that the benefits of origin competition might flow through to a utility, but we have presumed that they will not. *Soo/Milwaukee II*, 2 I.C.C.2d at 455. Thus, to qualify for relief, we have required an affirmative showing that a specific utility was able to obtain real benefits from origin competition even though it was served exclusively by one carrier at the destination.

> [T]he record must clearly show the following in order for a nonmerging carrier to qualify for a grant of trackage rights to a utility over the line of the destination monopoly carrier. First, it must show that, prior to the merger, the benefits of origin competition flowed through to the utility and were not captured by the destination monopoly carrier. Second, if it is established that the benefits of origin competition are in fact passed on to the utility, there must be an additional showing that such a competitive flow-through will be significantly curtailed by the merger.

UP/MKT, 4 I.C.C.2d at 476. *See also Soo/Milwaukee II*, 2 I.C.C.2d at 455 (a similar analysis, explaining that a mere showing that a grant of trackage rights would enhance competition is not sufficient).

We have also dealt with end-to-end aspects of rail mergers in a series of cases involving our imposition of rate and routing conditions that were intended to require railroads to maintain open gateways post-merger with unaffiliated interline partners. In *Traffic Protective Conditions*, 366 I.C.C. 112 (1982), *aff'd in relevant part, Detroit, Toledo & Ironton R. Co. v. U.S.*, 725 F.2d 47 (6th Cir. 1984), we rejected the notion that new single-line movements created through merger would lead the merged carrier to "vertically foreclose" competition over efficient routes by refusing to cooperate with unaffiliated carriers. In *Seaboard Air Line Railroad Company--Merger--Atlantic Coast Line Railroad Company (Petition to Remove Traffic Protective Conditions)*, Finance Docket No. 21215 (Sub-No. 5) (ICC served Mar. 27, 1995) (*CSX/FEC*), we recently reaffirmed that "merged railroads--regardless of whether they maintain bottleneck facilities or market dominance--have the incentive to encourage full use of the most efficient routing, even when it entails a joint-line alternative to a single system route." *CSX/FEC*, slip op. at 5.

In *Lamoille Valley R. Co. v. I.C.C.*, 711 F.2d 295, 318 (D.C. Cir. 1983), the court succinctly described what is referred to by applicants as the "one lump" theory:

> The merger of the Maine Central with the Boston & Maine is, in antitrust terminology, a "vertical" merger. Ordinarily, a vertically integrated monopolist has no incentive to use its monopoly power over one level of production (rail service in Maine) to increase profits at another level (rail service from Maine to the Midwest). As the leading treatise puts it, "there is but one maximum monopoly profit to be gained" from a monopoly of one level of production, and that profit may be gained directly at the monopolized level (here, rail service in Maine) through appropriate pricing.[93]

Applicants here have relied upon the "one maximum monopoly profit" theory, which they have referred to as the "one lump" theory (by which is meant that a firm with market power in a vertical chain can extract only "one lump" of profit, even though it operates at two or more levels in the vertical chain). Applicants' presentation essentially restates our approach in the cases discussed above. It provides a coherent explanation as to why the merger of a bottleneck destination carrier with one of several origin or bridge carriers will not enhance or extend the bottleneck carrier's market power, and thus will not harm shippers.

Nonetheless, six utilities served solely by Santa Fe argue that they benefit from actual or potential origin competition between BN and either SP or UP, and that this competition will be foreclosed by the single-line BN/Santa Fe service created by the merger. Similarly, three utilities served solely by SP argue that they benefit from origin or bridge competition between BN and Santa Fe that will be eliminated by the merger.

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[93] The court added, however, that for a regulated monopolist there is an exception to this rule. A regulated monopolist, the court noted, "may be able to obtain from a second level of production the monopoly profits which effective regulation of the franchised monopoly precludes." 711 F.2d at 318 (internal citation omitted).

Each utility party has proposed a specific remedy to address the merger-related harm it alleges. The remedies, however, are generally broader than the harms. Whether through trackage rights or haulage rights or some form of rate prescription, each remedy is aimed at eliminating the existing market power of the destination bottleneck carrier. As applicants explain, "[a]ll seek to *expand*--not simply *preserve*--their competitive options . . . ." BN/SF-48 at 23 (emphasis in original). Some utilities admit this, but claim that they can retain existing origin competition only through such an extensive remedy. For example, HL&P explains:

> Applicants also claim, stridently, that HL&P is opportunistically attempting to expand *destination* competition for its Parish plant rather than to preserve the existing origin-end competition. The fact is that there is no way that the Commission can replicate, through protective conditions, exactly the same level of competition that currently exists. Accordingly, it is true that granting trackage rights will expand the level of competition. But the alternative, to approve the merger without imposing the trackage rights, will substantially reduce--in fact, eliminate--the existing competition.

HLP-18 at 30 (emphasis in original). We agree with USDOT, however, that it would be inappropriate to grant relief that substantially exceeds the harm threatened by the merger. DOT-2 at 22-23.

In arguing that competition will be reduced for unit-train coal shipments moving to plants now served by a single carrier, the utility parties challenge the applicability and logic of the one lump theory, and submit evidence that they believe shows that the theory does not apply here.

The utility parties argue that the one lump theory is inherently fragile, and depends crucially on assumptions that are unlikely to hold in real coal transportation market(s). In essence, they claim that our prior cases relied upon flawed reasoning in establishing the framework we use to determine whether shippers served by one destination carrier before the merger will be harmed by vertical integration. WFSC, for example, argues that we should reverse our rebuttable presumption by requiring that "the burden of proving whether the destination carrier is appropriating the benefits of origin competition should be on the merging carriers rather than on the shippers." WFSC Brief at 10 (unredacted version) and 11 (redacted version). HL&P and SPST, by way of further example, contend that "although the one lump theorem has become accepted doctrine in railroad merger proceedings, the theorem does not generally apply to railroads." HLP-11, Christensen V.S. at 10; SPST-9, Christensen V.S. at 10.[94]

In particular, the utilities claim that the continued use of our existing economic framework to assess a merger's competitive effects is inappropriate. They argue that for our reasoning to hold true: (1) the bottleneck carrier must have perfect information regarding all aspects of pricing; (2) it must control all aspects of pricing of the movement; (3) it must have exercised maximum market power before the merger; (4) prior to the merger, it must have carried out a perfect price squeeze on connecting carriers, by holding their revenue share to incremental costs; and, most crucially, (5) it must not have passed through to the shipper any rate reductions of connecting carriers.

We do not think that the one lump theory requires the series of perfect conditions that the utilities claim must be present for the theory accurately to represent the coal transportation markets at issue here. Our focus here is properly on *substantial* harm to competition. Our experience has been that where a single rail carrier controls a destination segment, and no transportation alternatives are available, the shipper will be captive and the single rail carrier will be able to capture the preponderance of the economic profits. Conversely, when certain factors are present that limit a carrier's ability to take full advantage of a bottleneck, those factors will remain in place as effective safeguards after the merger. We have consistently adhered to these principles in assessing harm in merger cases and in making market dominance determinations in rate cases. The fact that a bottleneck carrier might not have sufficient information to execute a perfect price squeeze or to extract the last penny of economic profits does not mean that *substantial* benefits to shippers will be lost when the bottleneck carrier merges with a connecting carrier.

The utilities also depend heavily on the companion argument that they will be harmed by the merger because a vertically integrated BN/Santa Fe will always act to foreclose unaffiliated origin or bridge carriers from participating in efficient through routes. Again, both experience and logic are to the contrary.

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[94] Dr. Christensen relies upon a journal article by Curtis M. Grimm et al., SPST-9, Christensen V.S. at 15, but we think the arguments in the article are adequately rebutted by applicants' witness Dr. Schmalensee, who explains that the number of interline carriers at a destination or origin, as examined in the article, are likely to measure the intensity of geographic or source competition at those points because "given the availability of a single-line option, the presence of other lines likely indicates either a diversity of sources, a diversity of outlets, or both," and this would account for any downward pressure on the rate for the entire movement. BN/SF-35, Schmalensee V.S. at 35-39. *See also CSX/FEC*, slip op. at 10.

Simply put, there is no reason for a carrier to foreclose an efficient connecting carrier just to achieve a long haul. If a connecting carrier can provide service at a lower cost than can BN/Santa Fe, it is in the interest of all the carriers to reach an agreement for a joint service.[95]

The utilities contend that, because destination monopolists participate in a broader market where they are subject to competitive pressures from other carriers, they are normally unwilling or unable to force revenue shares of connecting carriers down to incremental costs. This reality, the utilities further contend, invalidates the one lump theory. We agree with the answer provided by applicants' witness Dr. Kalt:

> If the destination carrier's economic incentive of "broader" market interaction is to be temperate with upstream railroads in order to keep them happy, doing so in some way that passes the benefit of "temperateness" through to shippers does nothing for the upstream railroads. If being temperate with upstream carriers means doing so in some way that allows those carriers to benefit (e.g., by sharing the "lump" with them . . .), shippers do not benefit.

BN/SF-36, Kalt V.S. at 64 (footnote omitted).

Most importantly, Dr. Kalt shows that the one lump theory is consistent with the destination bottleneck carrier passing along to the shipper some portion of origin rate reductions in situations where a pass-through can lead to a profitable increase in traffic volumes. We think that the record amply demonstrates that this is the case for "incremental" coal movements to utilities. The evidence shows that utilities frequently are able to meet some of their demands for power by using natural gas, by buying power from other utilities, or by buying coal from different origins. This has resulted in active bidding and reduced rates (below baseload rate levels) for these incremental movements.

Finally, Dr. Kalt uses the "make or buy" paradigm to explain why a vertically integrated BN/Santa Fe will not foreclose unaffiliated carriers from participating in efficient routings to utility plants. He also provides examples from the record, which we find persuasive, that support that theory:

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[95] A railroad's choice of using its own single-line route or a joint-line alternative route is similar to the "make or buy" decision made by firms throughout the economy. Railroads, like other firms, normally have no incentive to foreclose efficient alternatives to in-house production.

> One clear case is provided by Santa Fe's service to WRI. . . . Santa Fe is the sole destination carrier to WRI's Lawrence and Tecumseh Energy Centers, and could provide single-line service from the Raton Basin in New Mexico and southern Colorado. Notwithstanding this position of vertical integration, Santa Fe has not foreclosed upstream competition by SP and UP. Both have been able to bid on upstream movements, and SP, in fact, has been awarded a contract for carrying Colorado coal downstream to Santa Fe in competition with Santa Fe's upstream system.

BN/SF-35, Kalt V.S. at 51. Dr. Kalt goes on to describe a similar situation at OG&E's Muskogee plant. He notes that, even though UP is the exclusive destination carrier for movements of PRB coal, "BN has not been foreclosed from bidding for upstream traffic out of the PRB--in competition with the upstream leg of the WRPI/UP system." BN/SF-35, Kalt V.S. at 51-52 (footnote omitted).

A number of utilities raise concerns that, absent the specific conditions they propose, the merger will unduly interfere with their ability to seek future rate relief. They are particularly concerned that a new BN/Santa Fe single-line routing would mean that we would be unable or unwilling to prescribe maximum reasonable proportional rates over bottleneck segments. APS-4 at 5; OG&E comments filed May 10, 1995, Volume II, Tye V.S. at 13-15.

We assessed this issue in *UP/MP/WP*, where we explained that the greatest potential for a regulated monopolist to evade regulatory constraints through vertical merger was when the regulatory agency used maximum rate of return regulation. We noted, however:

> Our policy regarding the maximum reasonable rate for a coal movement is based on computation of costs for the entire movement. We do not use maximum rate of return regulation of the type discussed by [a witness in that case]. Therefore, a destination carrier with the power to set coal rates at the maximum regulated level before merger would not be able to increase the rates after merger. To the extent our maximum rate regulations inhibit monopoly pricing, merger has not been shown to be an effective method of raising rates.

UP/MP/WP, 366 I.C.C. at 541. These issues are also discussed in *Metropolitan Edison Co. v. Conrail et al.*, 5 I.C.C.2d 385 (1989).

A number of utility parties have cases pending before us requesting prescription of a proportional rate over the destination bottleneck segment of their coal movements, and we are not prejudging those cases here. We note, however, that approval of this merger is not intended to foreclose any shipper's right to maximum rate relief.

The utilities present two types of evidence that they assert are inconsistent with the one lump theory. First, they allege that the rate setting strategies of Santa Fe are inconsistent with that theory. Second, they purport to show significant pass-throughs of reduced origin rates on baseload and incremental traffic.

A number of the utilities have asserted that Santa Fe's rate setting strategy as a destination bottleneck is inconsistent with the one lump theory. WRI's argument is representative:

> [A]s destination-only carrier, ATSF has a policy of indifference to the "upstream" competition between other railroads for the origins leg. It supplies the potential originating carriers with its revenue requirements, and leaves it to origin carriers to determine the rate for their segment.

WSTR-19 at 8.

We reject the argument that Santa Fe's rate setting strategy allows competitive reductions in revenue demands from origin carriers to flow through to the shipper. As Dr. Kalt explains, it is a perfectly rational strategy for a destination bottleneck carrier to name, and stick to, a revenue division that will allow it to extract substantially all of the economic profits that are available from a particular movement, letting connecting carriers set their divisions in response.[96]

A number of utilities have cited declines in rail through rates for baseload movements of coal that took place following the entry of UP (via WRPI) as a second carrier originating coal movements out of the PRB. Applicants, however, have shown that these reductions were due to a general decline in shippers' demand for PRB coal. The downward pressure on rail rates for coal was widespread, and extended to movements where the number of origin carriers did not increase. Dr. Kalt's Figure 9 (BN/SF-36 at 68) shows that after UP entered the PRB, rates declined similarly regardless of whether single-line rates were or were not available (by either BN or UP/CNW).[97]

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[96] The process remains the same even when the origin carriers offer their rate reductions in the form of "secret" refunds and discounts, because knowledge that secret side payments are possible permits the bottleneck carrier to anticipate and benefit from them.

[97] As Dr. Kalt explains, "the single-line carriers able to move PRB coal from minemouth to destination should have (within the commenters' theory of vertical foreclosure) prevented any benefits of the appearance of competition upstream from flowing through to shippers." BN/SF-36, Kalt V.S. at 75.

The utility parties also cite numerous instances of rates below those applicable to base-load transportation for "incremental" coal tonnages to certain plants. These reductions, the utility parties claim, resulted from the active bidding of origin carriers for the movements, with the destination bottleneck carrier appearing to pass through some part of these reductions to the shipper. In response, applicants have shown that these incremental tonnages are relatively price-sensitive movements because of the ability of utilities to shift electricity production, at the margin, to other plants or to purchase power from other utilities.[98] Some pass-through of origin competition for these demand-sensitive movements is consistent with the one lump theory. Utilities that have received this pass-through in the past will not be harmed by the merger because the competitive forces that made these lower rates possible pre-merger will still be present post-merger.

Four utilities (HL&P, SPS, AEPCO, and CP&L) have submitted empirical evidence in an attempt to show that the benefits of origin (or in some cases, bridge segment) competition have been passed along to them. None of these utilities has presented convincing evidence on this issue.

HL&P asserts that it has met our two-part test by showing competitive rail bid solicitations to BN and UP in 1990, 1991, and 1994, resulting in significant reductions from its baseload contract rate for movements of incremental coal tonnage. Applicants, however, have effectively rebutted HL&P by showing that BN's rate reductions since 1990 were not from origin competition, but were due to competition from alternative fuels, most notably natural gas, and HL&P's repeatedly stated intention to construct a spur that would connect its Parish plant to UP. Although HL&P contends that a spur would not be viable or played no significant role in the rate relief it enjoyed, more recently, it conceded that it might be able to introduce rail competition through construction of a new rail spur. HL&P-18 at 29.

SPS argues that significant rate reductions it received in 1985 on its existing long-term baseload coal transportation contract were the direct result of UP's entry into the PRB. (USDOT has indicated that there may be at least some merit in SPS' argument and it suggests a monitoring condition, not trackage rights, if we find potential merger-related harm at Tolk.) We believe, however, that

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[98] Applicants overstate the utilities' ability to shift electricity production to other plants or to purchase power from the grid. While this ability gives utilities increasing leverage over rail carriers and coal mines for incremental movements to certain plants, it certainly is not yet sufficient for us to drop our concerns over potential reductions in competition for the rail transportation of coal.

applicants' explanation for the rate relief SPS received for its existing baseload contract at Tolk is convincing. The 1985 Tolk contract was negotiated simultaneously with the Harrington contract. Any competitive benefit SPS obtained at Tolk reflected its leverage at Harrington, which was served by two carriers, not the effectiveness of origin competition. BN/SF-47 at 29. Our imposition of the NITL Paragraph 1 will ensure that SPS will continue to have two carriers serving Harrington.

AEPCO asserts that, after it bought out of its existing coal supply contract in 1986, it began to receive the benefits of competition from BN-originated coal in Wyoming and southern Colorado. Without reaching a finding as to whether AEPCO has benefitted from origin competition between BN and Santa Fe in the past, we note that, with our imposition of the SP agreement, AEPCO will continue to have a choice of independent coal originations. Its choices will include Colorado coal (SP single-line), New Mexico coal (BN/Santa Fe-Deming-SP, the existing movement), and PRB coal (BN/Santa Fe-Denver-SP or UP-Denver-SP).

CP&L concedes that the competition between BN and Santa Fe for the bridge portion of its coal movement "has had no tempering effect on SP's dominance over coal deliveries," but claims that some benefit from this competition flows through to the Coleto Creek facility, and that this would be eliminated by the merger. CP&L-7 at 3-4. We find this assertion doubtful because bridge carriers have virtually no economic leverage in negotiations with a carrier, such as SP, that controls both the origin and destination portion of a movement. Thus, any existing competition for the bridge movement most likely benefits SP, not CP&L. Further, with our imposition of the SP agreement, CP&L will continue to have two rail carriers (BN/Santa Fe and SP) capable of handling the bridge segment of the existing movement. And, if CP&L makes good on its public statements to shift a substantial portion of its coal purchases to PRB mines, it would have another alternative (i.e., UP-SP service from the PRB) to the bridge move that would involve neither applicant. BN/SF-35 at 41.

We have assessed the evidence presented by individual utilities, and we find that none has met the two-part test to show that a utility served by a single carrier at destination will sustain merger-related competitive harm of the "vertical effects" variety. *Soo/Milwaukee II*, 2 I.C.C.2d at 455; *UP/MKT*, 4 I.C.C.2d at 476. They will suffer no such harm because the merger will not significantly curtail such benefits as they may now receive from upstream competition. We will therefore deny all conditions sought in this proceeding by utilities and premised on the argument that the merger (or perhaps the merger combined with the rights provided for by NITL Paragraph 1) will have an anticompetitive vertical impact.[99]

Conditions Requested. For the reasons already discussed, we are denying most of the conditions that the electric utility interests have sought in this proceeding.[100]

WCTL. We will deny the conditions sought by WCTL. Because there will be no significant merger-related competitive harm in the market(s) addressed by WCTL, there is no need to impose the conditions it has proposed.

Chaco. We will deny the condition sought by Chaco. We find Chaco's claim of merger-related competitive harm to be unsubstantiated.

OG&E. We will impose a condition to protect the existing build-out option at Red Rock, but we will otherwise deny the conditions sought by OG&E. As respects the parallel (horizontal) effects of the merger, the trackage rights condition sought by OG&E would provide a remedy far in excess of the harm. As respects the end-to-end (vertical) effects of the merger, our conclusion with respect to OG&E is stated in the next paragraph.

HL&P, SPS, WFSC, OG&E, WRI, APS, CP&L, AEPCO, and TEP. Except as otherwise indicated, we will deny the conditions sought by HL&P, SPS, WFSC, OG&E, WRI, APS, CP&L, AEPCO, and TEP. These utilities have not demonstrated that they will sustain merger-related competitive harm of the "vertical effects" variety.[101] The evidence of record is conclusive that the merger will not significantly curtail such benefits as these parties may now receive from upstream competition.[102]

[99] The relief we are granting in favor of OG&E is premised on our conclusion that the merger, if not conditioned, would have an anticompetitive horizontal impact as respects Sooner Station.

[100] Later in this decision, we consider the argument advanced by the utility interests that the compensation arrangement provided for in the SP settlement agreement is such that SP will not be an effective competitor with BN/Santa Fe in the Pueblo-Fort Worth corridor (including Amarillo, Plainview, and Lubbock).

[101] Although BN and Santa Fe could be considered horizontal competitors with respect to the utilities served at destination by SP, offering alternative routings for an origin or bridge segment, the issues raised by protestants concern vertical impacts.

[102] We note, however, that by imposing as conditions the rights provided for in NITL Paragraph 1(b), we are effectively granting in part the conditions sought by SPS and TEP. The SP rights provided for in NITL Paragraph 1(b) will preserve the existing competitive situation at Harrington Station (SPS) and at Irvington Station (TEP).

Labor Impacts. Our public interest analysis includes consideration of the interests of carrier employees affected by the proposed transaction. 49 U.S.C. 11344(b)(1)(D); *Norfolk & Western v. American Train Dispatchers*, 499 U.S. 117, 120 (1991).[103]

Protective Conditions. Applicants, acknowledging that common control will have certain adverse consequences for Rail Labor, project that 2,918 jobs will be abolished and 390 jobs will be transferred. Rail Labor contends that these are "net" figures, and that many more employees will be affected as employees exercise their seniority rights. Applicants, we think, have submitted reasonable estimates of job dislocations from common control, though we recognize that Rail Labor's concern regarding net impacts is justified. The dislocations, however, do not pose a barrier to our approval of this transaction.

The basic framework for mitigating the labor impacts of rail consolidations is embodied in the *New York Dock* conditions. They provide *both* substantive benefits for affected employees (dismissal allowances, displacement allowances, and the like) *and* procedures (negotiation, if possible; arbitration, if necessary) for resolving disputes regarding implementation of particular transactions. *See New York Dock*, 360 I.C.C. at 84-90. We may tailor employee protective conditions to the special circumstances of a particular case. This is done, however, only if it has been shown that unusual circumstances require more stringent protection than the level mandated at 49 U.S.C. 11347. *Railroad Consolidation Procedures*, 363 I.C.C. at 793; 49 CFR 1180.1(f).

Rail Labor, voicing concerns regarding the magnitude and extent over time of the alteration in the work forces of a commonly controlled BN/Santa Fe, urges the imposition of attrition-type protection.

We find that the statutory protections *provided in New York Dock* are appropriate to protect employees affected by BN/Santa Fe common control, and we further find that approval of the application (subject to such protections) will be consistent with the public interest insofar as carrier employees are concerned.[104] These protections have been held to satisfy the statutory requirements of 49 U.S.C. 11347, *New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979), and no unusual circumstances have been shown in this case

[103] Later in this decision, we consider and reject ARU's alternative arguments that Santa Fe and GTWRY are in a common control relationship and that GTWRY's employees are joint employees of GTWRY and Santa Fe.

[104] The *New York Dock* protections will be available to adversely affected employees *whenever* they are adversely affected, and whether or not it was anticipated that their positions would be affected.

to justify additional protection. We stated in *Railroad Consolidation Procedures*, 363 I.C.C. at 793, that unless it can be shown that because of unusual circumstances more stringent protection is necessary, we will provide the protections mandated by 49 U.S.C. 11347. We have consistently rejected the modifications proposed here, or similar ones, in prior consolidation proceedings. *See, e.g., UP/CNW*, slip op. at 94-96; *DRGW/SP*, 4 I.C.C.2d at 951-958; *UP/MKT*, 4 I.C.C.2d at 511-514; *UP/MP/WP*, 366 I.C.C. at 618-622; *NS Control*, 366 I.C.C. at 229-231; and *CSX Control*, 363 I.C.C. at 588-592. We once again reject those modifications for the reasons set forth in more detail in prior cases. Attrition-type conditions are calculated to preserve unnecessary jobs, and unduly restrict a carrier's ability to establish economical operations. An adverse effect presumption, to the extent it is not a disguised attrition-type condition, is unnecessary; *New York Dock* places the burden of proof on the carrier.[105]

We will impose the *New York Dock* conditions in the lead docket (common control of BN and Santa Fe) and also in the Sub-No. 1 docket (BN/Santa Fe control of WUTR).[106] In accordance with our usual practice, we will impose the *Norfolk and Western* conditions in the lead docket with respect to the trackage rights provided for in NITL Paragraph 1 and at Red Rock and Borger, and we will also impose such conditions in the Sub-No. 15 docket with respect to the trackage rights to be granted to GNBC.[107] In the Sub-Nos. 2-12 construction dockets, however, we will impose no labor protective conditions. Labor protection is discretionary in construction cases processed under 49 U.S.C. 10901, and we have seen no justification for imposing labor protective conditions in the construction dockets. *See* 49 U.S.C. 10901(e).

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[105] Article I, Section 11(e) of *New York Dock* provides: "In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. *It shall then be the railroad's burden to prove* that factors other than a transaction affected the employee." *New York Dock*, 360 I.C.C. at 88 (emphasis added).

[106] The *New York Dock* conditions cover the claim raised by the Allied Rail Unions that one or another of the applicants have already instituted force reductions that appear to be related to the pending merger. Article I, Section 10 of the *New York Dock* conditions provides: "Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee." *New York Dock*, 360 I.C.C. at 87.

[107] *Norfolk and Western Ry. Co.--Trackage Rights--BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.--Lease and Operate*, 360 I.C.C. 653 (1980).

Prior Arrangements. Section 3 of Article I of *New York Dock* speaks for itself: "Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which any such employee may have under any existing job security or other protective conditions or arrangements; [etc.]." *New York Dock*, 360 I.C.C. at 84-85. Section 4 of Article I of *New York Dock*, however, also speaks for itself: "Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4." *New York Dock*, 360 I.C.C. at 85. Circumstances may arise in which BN/Santa Fe may argue that, notwithstanding Section 3, an arbitrator acting under Section 4 has the power to modify certain provisions of certain prior protective arrangements. Rail Labor, of course, is certain to argue in response that under no circumstances can an arbitrator acting under Section 4 modify any provision of any prior protective arrangement. This question may be resolved on a craft-by-craft basis, to the satisfaction of all concerned, in negotiations conducted under Section 4, or (if negotiations fail) it may be resolved by arbitrators appointed under Section 4. We believe, however, that it would be premature for us to decide this question now.

Though we do not think that BN/Santa Fe should be given carte blanche to modify the provisions of applicable prior protective arrangements, we are not now prepared to say that prior protective arrangements can never be modified in negotiations or arbitration conducted under Section 4. Some prior protective arrangements, by way of illustration, may not permit jobs to be moved; some such arrangements, by way of further illustration, may not require an employee to take an available job if taking the job would require the employee to relocate; and it may be that some terms of some prior protective arrangements may need to be modified to allow BN/Santa Fe to carry out the control transaction we are approving in this decision.

The Immunity Provision. An arbitrator acting under Section 4 may or may not have the authority to override certain provisions of prior protective arrangements; that question is left open by this decision. Such an arbitrator, however, clearly does have the authority to override CBAs and RLA rights, as necessary to effect the BN/Santa Fe control transaction. This authority derives ultimately from 49 U.S.C. 11341(a), the "immunity" provision.

The immunizing power of section 11341(a) is not limited to the financial and corporate aspects of the merger, but reaches all changes that logically flow from that transaction. The Commission, however, has never required control applicants to identify all anticipated changes that might affect rights under CBAs or the RLA. Such a requirement could negate many benefits from changes that only become apparent after consummation. Moreover, there is no legal requirement for identification because section 11341(a) is "self-executing," that is, its immunizing power is effective when necessary to permit the carrying out of a project. We will not limit the use of section 11341(a) by declaring that it is available only in circumstances identified prior to approval. *Cf. American Train Dispatchers Ass'n v. ICC*, 26 F.3d 1157 (D.C. Cir. 1994).[108]

SETTLEMENT AGREEMENTS. We are imposing as conditions the rights provided for in NITL Paragraph 1 (which give certain rights to UP and SP) and the two stipulations of NITL Paragraph 2 (which are broadly applicable to the settlement agreements applicants entered into with other railroads), but we are not otherwise imposing as conditions the various provisions of the railroad settlement agreements. Except as indicated in the next sentence, we are rejecting the challenges to the compensation arrangements worked out with UP and SP with respect to the rights provided for in NITL Paragraph 1. As regards the SP settlement agreement, however, we are disapproving the automatic increase feature of the section 9 proviso.[109]

Conditions Imposed. The settlement agreements entered into with UP, SP, KCS, Kyle, GTWRY, Cen-Tex, GTRR, and TP&W are pro-competitive. Seven of these agreements entail a grant of rights of one sort or another, and the eighth (the GTWRY agreement) involves the removal of a pre-existing restriction. Each of the eight railroad settlement agreements will necessarily increase, to a greater or lesser degree, direct rail-to-rail competition, and we have therefore

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[108] For the same reasons, SCRRA's Condition #6 will also be denied.

[109] In addition to the settlement agreements entered into with other railroads and with NITL, another settlement agreement was entered into with the Ports of Tacoma and Seattle. We have no occasion, however, to consider any aspect of the agreement entered into with the ports. No party has asked that this agreement be imposed as a condition; no party has sought approval of this agreement; and no party has asked us to disapprove any aspect of this agreement.

been urged to impose as conditions the operative provisions of each of the eight agreements.[110]

As discussed above, however, we have explained that we impose pro-competitive conditions in a railroad consolidation proceeding only upon a finding that the conditions will ameliorate what would otherwise be the anticompetitive impacts of the transaction. The practical effect is that, in general, we will impose as a condition an operative provision of a settlement agreement only if we would have imposed that condition (or a similar condition) even without the settlement agreement. This general rule, however, is subject to one general exception: we will generally accommodate a request made by the parties to a settlement agreement that we impose as a condition a pro-competitive provision it contains.

The operative provisions of the railroad settlement agreements entered into in this proceeding are indeed pro-competitive, but taken as a whole they go far beyond what is required to ameliorate the anticompetitive impacts of the merger. As we have discussed in this decision, an unconditioned merger would have anticompetitive impacts at Superior; in the Pueblo-Fort Worth corridor; at Amarillo, Plainview, and Lubbock; at Keokuk; at Fort Madison and Galesburg; at Red Rock; at Borger; and in the territory served by GNBC. The UP settlement agreement addresses the anticompetitive impacts at Superior; the SP settlement agreement addresses the anticompetitive impacts in the Pueblo-Fort Worth corridor, and at Amarillo, Plainview, Lubbock, Keokuk, Fort Madison, and Galesburg; beyond these matters, however, the railroad settlement agreements generally provide for increased competition at points and in corridors that would not be adversely affected by the merger.[111] The trackage rights BN/Santa Fe will receive under the SP settlement agreement provide compelling proof that much of the increased competition provided for in the several settlement agreements is not required to ameliorate anticompetitive impacts of the BN/Santa Fe transaction.

[110] The eight agreements contain various provisions. Some of these provisions are *operative provisions* (these are the provisions that grant rights or remove restrictions) and some are not (e.g., a provision that provides for arbitration of disputes arising under an agreement). A request that we impose as a condition a settlement agreement is for all practical purposes, we think, a request that we impose as a condition the operative provisions of such agreement.

[111] We note, however, that no settlement agreement addresses the anticompetitive impacts at Red Rock and Borger, and in the territory served by GNBC.

Of the many operative provisions in the eight railroad settlement agreements, the only ones that address (and that are required to ameliorate) anticompetitive impacts of BN/Santa Fe common control are those in the UP and SP settlement agreements that provide UP certain rights at Superior and that provide SP certain rights in the Pueblo-Fort Worth corridor and at Amarillo, Plainview, Lubbock, Keokuk,[112] Fort Madison, and Galesburg. Applicants apparently agree with this assessment because they have requested that we impose these operative provisions as conditions. Their request is embraced in NITL Paragraph 1.

NITL Paragraph 1. NITL Paragraph 1 provides that, effective with consummation of BN/Santa Fe common control, UP and SP are to receive certain rights. NITL Paragraph 1(a) provides that UP is to receive bridge trackage rights between Abilene and Superior, over Santa Fe's lines, with access to all facilities at Superior that are (when such rights become effective) open to service by both BN and Santa Fe (either directly, by reciprocal switching, or by any other means). NITL Paragraph 1(b) provides that SP is to receive bridge trackage rights between Pueblo and Stratford, over Santa Fe's lines, and between Dalhart and Fort Worth, over BN's lines; access to all industries served by BN and Santa Fe, directly or through reciprocal switching, at Amarillo; access to Plainview and Lubbock; and access to SWGR. NITL Paragraph 1(c) provides that SP is to receive access to TP&W at Bushnell. NITL Paragraph 1(d) provides that SP is to receive access to all industries served by BN or Santa Fe directly or by reciprocal switching at Fort Madison and Galesburg.

We will impose as conditions in this proceeding the operative provisions of the UP and SP settlement agreements that provide UP certain rights at Superior and that provide SP certain rights in the Pueblo-Fort Worth corridor and at Amarillo, Plainview, Lubbock, Bushnell, Fort Madison, and Galesburg. We are taking this action for two reasons: first, because we think that such conditions are required to ameliorate the anticompetitive consequences that would otherwise flow from an unconditioned merger; and, second, because applicants, having embraced the NITL settlement agreement, have requested that such

[112] The SP settlement agreement and NITL Paragraph 1 provide SP rights at Bushnell to ameliorate the anticompetitive consequences that would otherwise arise at Keokuk.

conditions be imposed, and neither UP nor SP has indicated any opposition to this request.[113]

In the next seven paragraphs, we clarify the precise conditions we are imposing pursuant to NITL Paragraph 1. The numbering/lettering scheme used in these seven paragraphs tracks the numbering/lettering scheme used in NITL Paragraph 1, but expands upon that scheme to facilitate comprehension of multifaceted NITL Paragraph 1(b). It is our intention that these conditions, and the rights provided therein, will be effective immediately upon consummation of BN/Santa Fe common control. It is our further intention that any reference in the next seven paragraphs to BN, Santa Fe, UP, or SP is to be understood as embracing any successor entity.

NITL ¶ 1(a): Superior, NE. Santa Fe shall grant UP bridge trackage rights over Santa Fe's line between Abilene, KS (MP 59+550) and Superior, NE (MP 154+1980), including all operating sidings used for the purpose of meeting and passing trains and including also the portions of existing connections owned by Santa Fe. BN shall grant UP trackage rights over BN's line in Superior, NE, between MP 169.7 and MP 171.0. UP, in using the trackage rights granted by Santa Fe and BN, shall have the right to serve all facilities at Superior that are, when such trackage rights become effective, open to service by both BN and Santa Fe (either directly, by reciprocal switching, or by any other means), and UP shall also have the right to build trackage for its use incidental to serving such facilities. UP, however, shall have the right to use the trackage rights granted by Santa Fe and BN only for the purposes indicated in the preceding sentence.

NITL ¶ 1(b)(i): Pueblo-Fort Worth. Santa Fe shall grant SP bridge trackage rights over Santa Fe's line between Pueblo, CO, and Stratford, TX, and BN shall grant SP trackage rights over BN's line between Dalhart, TX, and Fort Worth, TX (including both of BN's main lines through Amarillo, TX). The trackage rights to be granted by Santa Fe and BN under NITL ¶ 1(b)(i) are for the movement of overhead traffic only, except as otherwise indicated in NITL ¶¶ 1(b)(ii), 1(b)(iii), and 1(b)(iv). SP, in conducting operations under the NITL ¶ 1(b)(i) trackage rights, shall have the right to interchange between the trackage

[113] We realize that, as a technical matter, applicants have requested that we impose as conditions the rights embraced in NITL Paragraph 1, not the corresponding operative provisions of the UP and SP settlement agreements; however, NITL Paragraph 1 clearly contemplates that we will condition the merger by imposing the operative provisions of the UP settlement agreement and a portion of the operative provisions of the SP settlement agreement.

rights lines and its present line at both Stratford and Dalhart for movement in all directions. The NITL ¶ 1(b)(i) rights shall be for rail traffic of all kinds, carload and intermodal, for all commodities.

NITL ¶ 1(b)(ii): Amarillo, TX. SP shall be granted access to all industries which are served directly or by reciprocal switching by either BN or Santa Fe at Amarillo, TX. Santa Fe shall grant SP trackage rights over Santa Fe's line between Stratford, TX, and Amarillo, TX, solely for the purpose of serving industries located at Amarillo. Access to industries at Amarillo shall be by direct SP service or by reciprocal switch, at SP's election. The NITL ¶ 1(b)(ii) rights shall be for rail traffic of all kinds, carload and intermodal, for all commodities.

NITL ¶ 1(b)(iii): Plainview, TX, and Lubbock, TX. SP shall be granted access to all industries which are served directly or by reciprocal switching by either BN or Santa Fe at Plainview, TX, and Lubbock, TX. BN and Santa Fe shall provide haulage service between SP's operations on BN's trackage rights line at Amarillo and industries at Plainview and Lubbock. The NITL ¶ 1(b)(iii) rights shall be for rail traffic of all kinds, carload and intermodal, for all commodities.

NITL ¶ 1(b)(iv): SWGR. SP shall be granted access to SWGR at Lubbock, TX. BN and Santa Fe shall provide haulage service between SP's operations on BN's trackage rights line at Amarillo and SWGR at Lubbock. The NITL ¶ 1(b)(iv) rights shall be for rail traffic of all kinds, carload and intermodal, for all commodities.

NITL ¶ 1(c): TP&W. SP shall be granted access to TP&W at Bushnell, IL.

NITL ¶ 1(d): Fort Madison, IA, and Galesburg, IL. SP shall be granted access to all industries which are served directly or by reciprocal switching by either BN or Santa Fe at Fort Madison, IA, and Galesburg, IL. Santa Fe and BN shall provide haulage services on carload traffic for SP between Fort Madison and Galesburg on eastbound traffic and between Fort Madison and Kansas City on westbound traffic.[114]

NITL Paragraph 2. We are also imposing as conditions the two stipulations of NITL Paragraph 2. We realize that these two stipulations are not pro-competitive in any substantial way. The first stipulation (implementing agreements must be submitted) involves a procedural matter, and is in its nature

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[114] We intend that, for purposes of NITL ¶ 1(d), "eastbound" means traffic moving to or from points east of Fort Madison, and "westbound" means traffic moving to or from points west of Fort Madison.

neither pro-competitive nor anticompetitive. The second stipulation (operations are to be commenced) involves a substantive matter and is pro-competitive, but it is only marginally pro-competitive (because this stipulation does not require that operations, once commenced, must be continued). We are nevertheless imposing these stipulations as conditions for two reasons: because the two stipulations, considered together, are at least marginally pro-competitive, and neither stipulation, considered alone, is itself anticompetitive; and because applicants, having embraced the NITL settlement agreement, have requested that such stipulations be imposed as conditions, and no party to the railroad settlement agreements has opposed this request.

First Stipulation. Of the eight railroad settlement agreements, the four entered into with UP, SP, Cen-Tex, and TP&W provide that certain trackage rights will be granted to UP, SP, Cen-Tex, TP&W, and BN/Santa Fe. The trackage rights for UP, SP, Cen-Tex, and TP&W are provided for in the settlement agreements entered into with UP, SP, Cen-Tex, and TP&W, respectively. The trackage rights for BN/Santa Fe are provided for in the SP settlement agreement. The first stipulation in NITL Paragraph 2 is to the effect that implementing agreements to carry out the trackage rights granted to UP, SP, Cen-Tex, TP&W, and BN/Santa Fe will be submitted for consideration no later than November 22, 1995.

The trackage rights provided for in the settlement agreements fall into two categories. The first category consists of those trackage rights that are provided for in NITL Paragraph 1 and that will therefore be imposed as conditions in this proceeding (these are the UP trackage rights and a portion of the SP trackage rights). Pursuant to NITL Paragraph 1, trackage rights in the first category must be effective upon consummation of BN/Santa Fe common control. The second category consists of those trackage rights that are not provided for in NITL Paragraph 1 and that therefore will not be imposed as conditions in this proceeding (these are the Cen-Tex trackage rights, the TP&W trackage rights, the BN/Santa Fe trackage rights, and the remaining portion of the SP trackage rights). Trackage rights in this second category need not be effective upon consummation of BN/Santa Fe common control.

We will reconcile the partially conflicting imperatives of NITL Paragraph 1 and the first stipulation of NITL Paragraph 2 by requiring that implementing agreements respecting the trackage rights in the first category be submitted by the seventh calendar day prior to the effective date of this decision, and by further requiring that implementing agreements respecting the trackage rights in the second category be submitted by November 22, 1995. Trackage rights in the first category must be effective upon consummation of BN/Santa Fe common control, and therefore implementing agreements respecting such trackage rights cannot be postponed until November 22nd.

The trackage rights provided for in the settlement agreements generally require either approval, 49 U.S.C. 11343, or an exemption therefrom, 49 U.S.C. 10505. Trackage rights imposed as a condition in favor of a named railroad, however, would not ordinarily require any approval beyond the approval implicit in the imposition of the condition itself. We are nevertheless requiring the submission, by the seventh day prior to the effective date of this decision, of implementing agreements respecting the trackage rights in the first category (i.e., the trackage rights provided for in NITL Paragraph 1). We are imposing this requirement to carry out the manifest intention of the first stipulation of NITL Paragraph 2.

All concerned--NITL, applicants, and other signatories of the railroad settlement agreements--apparently understand that the "implementing agreements" referenced in the first stipulation of NITL Paragraph 2 will be submitted in separately docketed exemption proceedings. With respect to the trackage rights provided for Cen-Tex and SP, such proceedings have already commenced. *See Cen-Tex Rail Link, Ltd.--Trackage Rights Exemption--Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company*, Finance Docket No. 32715 (ICC served June 22, 1995), and *Rio Grande Industries, Inc., Southern Pacific Transportation Company, The Denver and Rio Grande Western Railroad Company, St. Louis Southwestern Railway Company, and SPCSL Corp.--Trackage Rights Exemption--Burlington Northern Railroad Company Lines Between Kansas City, MO, and Chicago, IL*, Finance Docket No. 31730 (Sub-No. 1) (and embraced proceedings) (ICC served July 13, 1995). The proceedings instituted by Cen-Tex and SP invoke the trackage rights class exemption codified at 49 CFR 1180.2(d)(7). The Cen-Tex exemption has been allowed to take effect because the Cen-Tex trackage rights are not contingent upon the final outcome of the instant proceeding, and because no party in the instant proceeding has expressed any objections with respect to such trackage rights. The SP exemptions, which are contingent and which have faced objections, have been held in abeyance pending the outcome of the instant proceeding.

We anticipate that UP, TP&W, and BN/Santa Fe will comply with the first stipulation of NITL Paragraph 2 by invoking, with respect to the trackage rights provided for them in the railroad settlement agreements, the 49 CFR 1180.2(d)(7) trackage rights class exemption. We anticipate that UP, whose trackage rights are provided for in NITL Paragraph 1, will invoke the class exemption by the seventh day prior to the effective date of this decision.[115] We anticipate that TP&W and BN/Santa Fe, whose trackage rights are not provided for in NITL Paragraph 1, will invoke the class exemption by November 22nd.[116]

Second Stipulation. We are also imposing as a condition the second stipulation in NITL Paragraph 2. The second stipulation, which deals with all operative provisions in the railroad settlement agreements that provide rights other than trackage rights, is to the effect that operations pursuant to such other provisions (including specifically all provisions for haulage rights) will be commenced promptly after consummation of BN/Santa Fe common control.[117]

Compensation Arrangements. DOJ, TEP, and certain other shippers have requested that we review and, as necessary, modify compensation terms of whatever settlement agreements we decide to impose as conditions to ameliorate merger-related competitive harm. DOJ has enunciated certain principles that it proposes we use to guide us in setting compensation, and it suggests that the rates agreed to here may be excessive. TEP has proposed a specific

[115] This deadline reflects the fact that the trackage rights class exemption is effective on notice of "at least one week." 49 CFR 1180.4(g)(1).

[116] An argument has been made, principally by Bunge, that the trackage rights class exemption cannot be invoked with respect to the trackage rights provided for in the railroad settlement agreements. This argument is premised upon the language of the class exemption, which is applicable only to trackage rights "not filed or sought in responsive applications in rail consolidation proceedings." 49 CFR 1180.2(d)(7)(ii). We would note, as a technical matter, that these trackage rights were not filed or sought in responsive applications. We would add that, because we are rejecting (elsewhere in this decision) the substantive arguments raised by Bunge, no purpose other than delay would be served by making the trackage rights class exemption unavailable here.

[117] We understand that this second stipulation requires that operations pursuant to such other provisions will be commenced promptly after consummation of common control, provided however that such operations do not conflict with applicable laws, contracts, etc. We are adding this proviso because there is an indication in the record that at least one such other provision (the provision respecting KCS haulage services between Dallas and New Orleans) entails a conflict with an applicable contract.

compensation formula that it urges us to impose in lieu of the privately negotiated compensation terms. Finally, UP requests that we delete a provision from the SP agreement providing for adjustment of compensation terms for particular segments if UP acquires a certain interest in SP.

In General. In past merger cases, we have made clear our preference for privately negotiated terms and conditions for the trackage rights we mandate, and have explained that "we will approve any reasonable terms agreed to by the parties." *See, e.g., UP/MP/WP*, 366 I.C.C. at 589. To facilitate the negotiation of such agreements, we set forth certain basic principles for setting trackage rights compensation absent agreement.

The situation in *UP/MKT* was very much like that now before us. Applicants had entered into a privately negotiated settlement agreement (with SP), and DOJ (and USDOT) argued that the negotiated compensation terms might be too high. DOJ and USDOT urged us to review the access price to ensure that it would allow the tenant carrier to offer competitive rates to shippers. We examined whether the agreement resolved the competitive problems we identified. We determined that it did so, and imposed the agreement as a condition; however, we rejected the argument that we review the compensation terms: "[W]here the opposing parties have reached a voluntary agreement on trackage rights in a rail consolidation proceeding, our role, as we stated earlier in this decision, is a limited one. In this context, we will approve any reasonable terms agreed to by the parties." *UP/MKT*, 4 I.C.C.2d at 468 (internal quotation marks and citation to *UP/MP/WP*, 366 I.C.C. at 589, omitted).

DOJ and TEP are implicitly asking us to reject two principles that have guided our imposition of trackage rights in previous merger cases. First, they are asking us, in essence, to reject our policy of approving any reasonable negotiated terms. Second, they are asking us to reject the method we use to set compensation where the parties cannot agree, the method set out in *SSW*

Compensation,[118] and replace it with a compensation scheme more favorable to the tenant.

As DOJ points out, carriers might theoretically set compensation rates collusively at a level so high that it results in a shared monopoly for the two carriers. Although we have awarded trackage rights to remedy competitive problems in numerous past mergers, it has not been our experience that landlord carriers have required tenants to pay excessive trackage rights fees to preclude effective competition. Nor do we see evidence that this is the case here. The specific compensation formula proposed by TEP, and the compensation guidelines proposed by DOJ--which form the only basis for the argument that compensation may be too high--depart substantially from the principles we stated in *UP/MP/WP* (and the particular application of those principles in *SSW Compensation*). We think that the *SSW* approach, which has been tested both before the Commission and the courts, is still valid and correct.

Our acceptance of the privately negotiated compensation terms also has the practical benefit that the new tenant carriers can begin to plan for and offer new, competitive service immediately after consummation, and can implement rate setting strategies reflecting compensation levels that are unlikely to be disturbed.

Finally, we note that shippers can always petition us to reopen this proceeding to reconsider the issue of trackage rights compensation if the new service offerings are not effectively replacing the competitive alternatives lost through the merger. We would require, however, that any such petitions would not rehash the arguments we are now rejecting with respect to the proper form of compensation, but would instead concentrate on unforeseen competitive

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[118] The *SSW Compensation* method embraces three analytically distinct components: (1) a variable cost component, representing the variable costs associated with the operations of the tenant; (2) a maintenance and operations (M&O) component, representing the tenant's share of M&O costs as well as taxes and assessments; and (3) a rental component, often referred to as an "interest rental" component, representing the tenant's share of opportunity costs.

We adopted a particular formula for determining compensation in instances in which the parties could not reach a negotiated agreement for the "interest rental" component. It entails two calculations: first, we multiply the value of the property by the railroad industry's cost of capital (to determine the total interest rental applicable to all railroads using the property); second, we multiply this total interest rental by the usage share of the trackage rights tenant (to determine the interest rental applicable to such tenant). The determination of the total interest rental represents the key calculation in this compensation method. And the great dispute with respect to this calculation has always focused on the figure used to represent the value of the property. We have insisted that this value must be *fair market value*, and we have rejected the argument that using fair market value makes the compensation payment so high as to defeat the purpose of the trackage rights.

harm, in the form of higher prices or deteriorating service, in the specific geographic areas where these trackage and haulage rights were intended to preserve competition.

The reason for imposing trackage rights as a condition to a merger is to preserve effective competition in markets that would otherwise experience a reduction in competition. As we have stated in cases involving disputes about compensation for trackage rights imposed in mergers, the tenant must be put on an equal footing with the landlord.

According to DOJ, if compensation terms for trackage rights provide for recovery of the opportunity cost of the capital invested in the line as well as for variable cost, the trackage rights are less effective in mitigating any losses in competition. DOJ contends that there is an inherent conflict between recovery of opportunity cost of the line for the landlord and ensuring effectively competitive entry by the te the most competitive freight movements.

The problem DOJ poses, that a greater portion of the tenant's costs are "variable," arises only because of the way rental charges are normally structured. The landlord experiences costs as a combination of constant and variable components, but rental charges to the tenant are conventionally expressed on a per-service-unit basis (e.g., per car-mile), so that all its rental costs are variable. Placing the tenant in the same economic position as the landlord suggests that it might be appropriate to break up the rental charge into similar constant and variable components, or to ask the tenant to make a lump sum contribution to capital. But potential tenants may have difficulty in making such capital contributions, and a 100% variable rental charge reduces risks for the tenant railroad, which may not have experience participating in that market, or may fear that traffic volume will fall short of the revenue required to cover the constant costs of the line.

DOJ argues that, because the rates originally agreed to by the railroads exceed the variable costs developed by witness Crowley, these rates must not be cost based.[119] DOJ states that there is not sufficient information in the record to set the compensation levels, but it believes they "may be too high" to allow the

[119] DOJ's main concern with the agreements reached here is the valuation of the rail properties. DOJ states that even if Mr. Crowley's book value of track assets were doubled to approximate replacement costs, the compensation would still be less than the agreed level. But, as discussed above, Mr. Crowley includes only the variable portion of the road property accounts, which is only 50 percent of the net book value. By doubling Mr. Crowley's rental component, DOJ has merely restated the road property accounts at 100% of depreciated book value. DOJ has not revalued those accounts at replacement levels, as it purports to do, and as we believe is necessary.

tenants to operate under conditions comparable to facing applicants. In essence, it urges us to articulate new compensation standards resulting in charges somewhere between purely variable costs and the compensation levels we have previously set, depending on the competitive situation between the landlord and the tenant. We reject that approach.

In *SSW Compensation*, we concluded that where we prescribe or set trackage rights as a merger condition, the terms should permit competitive entry by providing for a reasonable return on the fair market value of the property. Otherwise, we would be placing the tenant carrier at a competitive advantage by dispensing with any requirement of investing in the fixed facilities it is using. A firm contemplating entry would only do so if it expected to earn an adequate return on that investment.[120]

We continue to believe that we have correctly identified the relevant costs to put the tenant in the same economic position as the landlord: variable costs imposed on the landlord by the tenant's operations, and a share of opportunity costs of capital on the landlord's threshold investment,[121] which determine whether entry is sustainable.

Despite the fact that its existing rail alternatives will be maintained through NITL Paragraph 1(b), TEP, like DOJ, has expressed reservations about the compensation level in the SP settlement agreement. TEP's concern is that the negotiated charges may be too high to permit SP to offer competitive rates. TEP has recalculated the charges by applying the Uniform Railroad Costing System (URCS) to the combined 1993 BN/SF operating results. The costs developed through this application are the variable costs per gross ton-mile for expenses, including depreciation and leases, and return-on-road property. TEP's calculation of variable costs is not disputed. But the procedure developed by TEP does not account properly for fixed costs.[122] In this important respect, TEP's proposed compensation is inadequate to put the tenant in the same economic position as the landlord.

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[120] In determining fair market value we have preferred the "capitalized earnings" approach, and used it where circumstances allowed.

[121] The term "threshold" is used here to indicate an irreducible lump of (presumably mostly) capital costs necessary for even a minimal level of rail service between certain points. Long run marginal cost already accounts for additions to capital costs associated with additional output.

[122] Although TEP's procedure does increase the direct variable costs to include an allocation of the variable general overhead costs, this does not account for fixed costs as contemplated in trackage rights compensation.

We specified in *UP/MP/WP* that, where we are required to set compensation for trackage rights, our basis for valuing property would be the current fair market value, rather than book value, as TEP has used. Moreover, TEP has incorrectly applied URCS in developing the relevant costs. TEP has used an investment base that substantially understates the value of the property. The URCS account it has used includes only the variable portion (50 percent) of the net book value of the system total road property. TEP's analysis results in rates far below those that would be produced applying the principles we set forth in *UP/MP/WP*. We conclude that TEP has provided no reasonable basis for us to conclude that the compensation terms here are too high.

In sum, for trackage rights to be a competitive remedy, the terms must reflect all relevant costs. We have stated the principles underlying proper determination of compensation terms to carry out our merger conditions, and we expect the railroads to bring those principles to bear in their negotiations. If competitive harm results from the compensation terms arrived at, shippers would be within their rights to move for reopening those parts of the merger proceeding affected.

Section 9 Proviso. There is one compensation matter that we need to address now: a clause in the SP settlement agreement which states that if UP acquires a certain interest in SP, compensation to allow certain coal movements between Pueblo and Fort Worth automatically increases. This provision, section 9 (ii) of the SP settlement agreement, may impede the ability of SP to continue to provide competitive service, and we will order it removed.

If, as should be the case, the rentals that SP has negotiated reflect no less than the level necessary for competitive entry, then any increase in that level must work toward blocking competitive entry. This provision would result in a substantial automatic increase on rentals for this particular segment. Although applicants have argued that this provision is necessary to provide a fair return to them, and was actually a cost-based form of compensation, we are not convinced. It is true that section 9(i) of the SP settlement agreement permits renegotiation and readjustment of the compensation terms to take into account the cost basis of potential future changes in traffic volumes, and this is reasonable. In contrast, the section 9(ii) provision would lead not to renegotiation, but to an automatic rental increase that appears to be based not on any changes in costs, but simply on a change in ownership of the tenant.

Applicants, urging us not to strike down the section 9 proviso, have advanced two additional arguments. They contend that we have previously approved substantially more restrictive non-assignment clauses than subdivision (ii). BN/SF-49 at 7 n.5. They also contend that the section 9 proviso is a private settlement term that is unrelated to the BN/Santa Fe application, and that we therefore have no occasion to review it. BN-SF-49 at 2.

In *NS Control*, 366 I.C.C. at 281, 283, we considered settlement agreements that Southern Railway had entered into with Grand Trunk and Milwaukee Road providing for termination if those carriers were later acquired by carriers not parties to the agreements. At the request of the parties, we approved those agreements. In approving the settlement agreements in *NS Control* we did not explicitly consider or address the lawfulness of those conditions. More importantly, we did not explicitly consider the issue of whether the limitations on assignment would undermine the efficacy of those conditions in providing essential guarantees for competitive protections upon which that merger was predicated. Our approval of those agreements does not compel approval of this one.

In sharp contrast, here we have imposed as a condition NITL Paragraph 1(b), giving SP trackage rights between Pueblo and Fort Worth. The issue of whether the compensation for those rights is appropriate has been raised by UP. We find that the compensation arrangement at issue is directly related to the competition issues that have been raised in this proceeding, and that we have jurisdiction to address this compensation arrangement because unduly high rentals could undermine the efficacy of a trackage rights remedy that we think is essential to our approval of this merger. Accordingly, we direct applicants and SP to remove that provision from the SP settlement agreement.[123]

CONDITIONS REQUESTED. We are denying most of the conditions that have been sought in this proceeding.[124] We impose conditions only when we find that a railroad consolidation will harm the public interest, usually (though not invariably) by reducing competition in an affected market. If a proposed condition will lessen or eliminate such harm, if it is operationally feasible, and if it will produce public benefits, we will impose it. Our main concern with the

[123] To foreclose an issue that might otherwise remain open, we hold that subdivision (ii) of the section 9 proviso is null and void *ab initio*, and will not bind SP or any successor entity.

[124] We have discussed above the conditions sought by the utility interests and by Rail Labor. We consider here the conditions sought by the six railroad protestants and by all other parties.

majority of the conditions sought is that they are completely unrelated to the transaction we are considering, and therefore would not ameliorate or eliminate adverse effects *caused by the transaction at issue.* The fact that a requested condition pertains to or involves one of the applicants is not enough to classify it as relevant to the proposed common control transaction. There must be a nexus between the merger and the alleged harm for which the proposed condition would act as a remedy. The fact that a condition would benefit the party seeking it does not justify its imposition.[125]

Illinois Central Railroad Company. We will deny the conditions sought by IC. Because a Santa Fe/IC routing hardly exists, BN/Santa Fe common control will have little if any impact on IC or on traffic now handled by IC. IC more or less concedes this point (IC-25 at 12), but claims that common control will permit BN/Santa Fe to short-haul IC by rerouting traffic over the Memphis gateway. To the extent that BN has that ability, it derives from the BN/Frisco merger of 1980 and will not be increased to any appreciable degree by a merger of BN and Santa Fe. IC made a similar argument in the *BN/Frisco* proceeding, stating that we should protect the BN/IC Centralia interchange because BN would favor the single-system route to Memphis that would be created by the merger. Rejecting that argument, we denied IC's request, and we noted that, if the traffic warranted it, market forces would keep the Centralia interchange open. *BN/Frisco*, 360 I.C.C. at 957. There is no need to reconsider that decision here because the BN/Santa Fe transaction, unlike the BN/Frisco transaction, will not give BN any new access to IC points.

IC attempts to establish a nexus between the harm it articulates and the BN/Santa Fe merger by stating that the merger will extend BN's alleged short-hauling behavior to traffic interchanged by Santa Fe and IC in Chicago. BN/Santa Fe, so this argument runs, will prefer the Memphis interchange for that traffic. Although the record is unclear as to how much Santa Fe/IC traffic currently interchanged over Chicago originates or terminates in the states listed in IC's requested condition, IC itself admits that the amount of that traffic may

[125] One party, Mr. William S. Purdy, requests that we condition our approval of the merger to protect his right to be hired by Santa Fe. We will deny Mr. Purdy's request. The record does not indicate that he has the opportunity to be employed by Santa Fe, and in fact the record suggests that he does not (because the Railroad Retirement Board has determined that he is disabled). Moreover, it is not clear how we could craft a condition that would address his particular situation without intruding into Santa Fe's hiring decisions in an unwarranted fashion.

be insignificant. IC also admits that the harm it fears runs counter to the rational behavior predicted by economic theory.

The record does not indicate that this merger will have any significant effect on IC. The consolidation will not add any new single-line routes to IC points that could enable BN/Santa Fe to bypass IC. Furthermore, BN and Santa Fe do not currently compete for the origin or destination hauls of interline movements terminating or originating on IC, so IC cannot show that it will be deprived of the benefit of current competition between BN and Santa Fe.

If the problem complained of by IC actually exists, it is a pre-existing problem that will not be exacerbated by BN/Santa Fe common control. We therefore conclude that IC's requested conditions are unnecessary.

Grainbelt Corporation. We will impose two conditions respecting GNBC.

First. We will impose a condition requiring BN to adhere to the representations it has made that BN/Santa Fe common control will not give the blocking provision an expanded scope. The blocking provision stems from a pre-existing agreement, and as indicated above with respect to IC, we do not impose conditions merely to rectify pre-existing problems. By the same token, the merger should not result in expanding the agreement to block alternative service to points served directly by Santa Fe. This exacerbated effect provides a sufficient nexus to BN/Santa Fe common control. *Cf. UP/CNW*, slip op. at 89-91 (a comparable situation regarding Soo).

BN, having represented that it will not interpret the blocking provision to apply to traffic moving to or from current Santa Fe stations not presently served by BN, claims that GNBC's request is unnecessary, BN/SF-48 at 44, but we will impose a condition simply requiring BN to adhere to its representations.

Second. We will also impose a condition that will require that GNBC be allowed to interchange at Quanah with SP. Pre-merger, GNBC can interchange directly with BN, indirectly (via BN) with Santa Fe, and indirectly (via BN or a UP spinoff) with UP. Post-merger, GNBC will be able to interchange directly with BN/Santa Fe and indirectly (via BN or a UP spinoff) only with UP; and Santa Fe will no longer provide an independent competitive interchange for GNBC. We would not necessarily be concerned if GNBC faced a reduction in competitive alternatives from three unrestricted alternatives (BN, Santa Fe, and UP) to two unrestricted alternatives (BN/Santa Fe and UP). Two independent railroads, we think, can provide strong, effective competition provided that, among other things, neither is subject to any artificial restrictions. The problem here, though, is that the 3-to-2 reduction in competitive alternatives faced by GNBC is in reality more complicated than a simple 3-to-2 description would indicate. On account of the blocking provision, the reduction in competitive alternatives faced by GNBC can more accurately be described as being from three (two of which can handle only such traffic as BN itself cannot handle) to two (one of which can handle only such traffic as BN itself cannot handle). GNBC, that is to say, will not really be left with two unrestricted competitive alternatives.

We will rectify this matter by allowing SP to replace Santa Fe as a competitive alternative for GNBC. We realize that SP will not be an unrestricted alternative because traffic moving GNBC/SP will be subject to the blocking provision. This, however, will preserve the existing competitive situation. Santa Fe itself is not today an unrestricted alternative because traffic moving GNBC/Santa Fe is also subject to the blocking provision. We are using our conditioning power to preserve, not to expand, GNBC's existing competitive options. Santa Fe can today provide geographic competition vis-a-vis BN with respect to traffic carried by GNBC.[126] The condition we are imposing will allow SP to substitute for Santa Fe in providing geographic competition vis-a-vis BN for such traffic.

We will deny, however, the other trackage rights sought by GNBC (which would allow GNBC to interchange with FMRC at Altus, and to serve local industries at Altus). These other trackage rights would undoubtedly make GNBC's operations more efficient and allow GNBC access to an expanded traffic base, but they are not necessary to ameliorate any harm caused by BN/Santa Fe common control. GNBC today cannot interchange with FMRC at Altus, and it similarly cannot serve local industries at Altus. Common control of BN and Santa Fe, however, will have no impact at all as respects Altus.

Third. We will allow BN and GNBC an opportunity to reach an agreement respecting the precise details of the two conditions we are imposing. Because the 1987 GNBC/BN agreements provide for the blocking provision, and also because such agreements provide for limited GNBC trackage rights to Quanah,

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[126] Most of the traffic GNBC and its affiliate, FMRC, interchange with Santa Fe moves under a haulage agreement with Santa Fe that covers movements from FMRC origins and over GNBC's line from Clinton to Enid. GNBC notes that any anticompetitive impacts resulting from common control would affect this traffic (mostly wheat destined for points south of Altus). Some grain shippers in the area can truck to UP at Enid or use UP-associated shortlines further south. Shippers located on FMRC enjoy direct competition between BN and Santa Fe in both rates and equipment supply. Applicants argue that the agreed upon interpretation of the blocking provision removes any competitive harm attributable to common control, but they underestimate the effect on this specific movement of losing Santa Fe as an independent participant.

we think that BN and GNBC would prefer to incorporate our conditions into their existing agreements. We will require BN and GNBC to submit, within 10 days of the date of service of this decision, either (1) a copy of any amendments to their 1987 agreements, or a copy of any new agreements entered into with respect to our conditions, or (2) in the event and to the extent they are unable to reach an agreement, suggested drafts of the precise wording of what each believes any amendments or any new agreements should state.[127] We realize that 10 days is a short time frame, but it will enable us, if necessary, to choose the better of the offered alternatives, or some variation thereof, in time for the conditions to be effective when this decision is effective (30 days after service).[128]

Keokuk Junction Railway. We will deny the conditions sought by KJRY. The evidence indicates that the merger will not eliminate intramodal competition at Keokuk, and that KJRY itself will not experience any appreciable traffic diversions because NITL Paragraph 1(c) will effectively preserve the existing competitive situation. Pre-merger, Keokuk shippers have two alternative western routings: BN single-line and KJRY/TP&W/Santa Fe joint-line. Post-merger, Keokuk shippers will still have two alternative western routings: BN/Santa Fe single-line and KJRY/TP&W/SP joint-line; and the only real change is that SP will have replaced Santa Fe as part of the KJRY joint-line routing. The KJRY/TP&W joint-line routing will remain an important competitive factor in Keokuk and there will be no change at all as respects eastern routings.[129]

We have considered KJRY's contentions that the Bushnell interchange is operationally inadequate, that the KJRY/TP&W/SP routing will be excessively

[127] We already have copies of the 1987 agreements. *See* GNBC-3 and GNBC-4.

[128] If, on or before the 10th day after service of this decision, BN and GNBC jointly request an extension of the 10-day deadline, we will extend that deadline to any later date they can agree upon (whether before, on, or after the 30th day after the date of service of this decision). We note, however, that if the 10-day deadline is extended at all, we will not be able to issue a follow-up decision prior to the referenced 30th day. We note too that, even if the 10-day deadline is extended, the effective date of our decision approving BN/Santa Fe common control will continue to be the 30th day after the date of its service. We assume, though we certainly will not require, that any BN/GNBC agreement to extend the 10-day deadline will be accompanied by some interim arrangement providing GNBC with the benefits of the conditions we are imposing in its favor.

[129] Because KJRY will not suffer appreciable harm, its ability to provide essential services, if it provides them, will not be threatened either. We note, however, that because most shippers served by KJRY can also be served by BN, the services provided by KJRY may not be *essential services* as that phrase is used in our general policy statement.

circuitous, and that TP&W is likely to provide inadequate service over (and perhaps even to abandon) the La Harpe-Bushnell line. We see no merit in these contentions. The evidence does not indicate that the future TP&W/SP interchange at Bushnell will be appreciably inferior to the present TP&W/Santa Fe interchange at Fort Madison. TP&W has agreed with BN/Santa Fe to interchange at Galesburg post-merger, freeing Bushnell to handle SP interchange traffic. Further, if SP deems the Bushnell interchange to be inadequate, it may upgrade the facilities there.[130] We realize that, for traffic moving between Keokuk and Kansas City, the mileages involved in the future KJRY/TP&W/SP routing will be somewhat greater that the mileages involved in both the present KJRY/TP&W/Santa Fe routing and the future BN/Santa Fe routing. This, however, is misleading: very little Keokuk traffic actually originates or terminates in Kansas City; and, because most Keokuk western traffic handled by KJRY moves far beyond Kansas City, the mileage factor should have minimal impact. Furthermore, we see no reason to believe that the competitive alignments created by BN/Santa Fe common control are likely to lead TP&W to downgrade or abandon its line to Bushnell. And, regardless, existing remedies under the Interstate Commerce Act will be available in the event of any such occurrence. *See, e.g.*, 49 U.S.C. 10905 (if there is an abandonment, KJRY could buy the line).[131]

Seagraves, Whiteface and Lubbock Railroad. We will deny the conditions sought by SWGR. The evidence indicates that SWGR will not experience any reduction in its competitive options nor any appreciable traffic diversions because NITL Paragraph 1(b) preserves the existing competitive situation. Pre-merger, SWGR can interchange directly with Santa Fe and via reciprocal switching with BN. Post-merger, SWGR will be able to interchange directly with BN/Santa Fe and via haulage rights with SP. SWGR and its shippers will therefore continue to have access at Lubbock to two independent class I railroads. Although SWGR requested that it be granted trackage rights, SP haulage rights provide sufficient protection against merger-related competitive harm and could lead to improved service for SWGR and its shippers, especially given the light density of traffic. As a practical matter, we would note that

[130] Moreover, the new SP interchange will have advantages for some Keokuk shippers. For traffic originating or terminating on SP in the West, the new routing of KJRY/TPW/SP will eliminate one interconnecting carrier, as the previous routing was KJRY/TPW/SF/SP.

[131] Later in this decision, we consider and reject KJRY's claim that Santa Fe and TP&W are in a common control relationship.

SWGR/SP traffic will not be subject to the switching charge currently applicable to SWGR/BN traffic.[132]

Amtrak. We will deny the conditions sought by Amtrak because there is no reason to believe that Amtrak will experience *merger-related* harm, and because Amtrak already has ample remedies for any harms it may experience in its ongoing relationships with BN and Santa Fe. Increased traffic over existing rail lines, the essence of Amtrak's concerns, is a normal occurrence, with or without a merger. It would be very difficult, and, after a few years, it most likely would be impossible, to determine whether any particular traffic increases were or were not merger-related. In any event, Amtrak already has remedies under its court-enforceable contracts and under the Rail Passenger Service Act (RPSA) concerning on-time performance and other service issues. The RPSA includes requirements that Amtrak's trains shall have preference over freight traffic and that Amtrak's contracts with rail carriers shall include penalties for untimely performance.[133] These avenues of relief provide adequate alternatives to Amtrak's requested conditions. Furthermore, no railroad is subject to the kind of fixed on-time performance requirement that Amtrak would have us impose on BN/Santa Fe. We believe it would be inadvisable to impose such a high standard for Amtrak operations here, and nowhere else.

We would further note that, for essentially the same reasons indicated in the preceding paragraph, the complaints voiced by Amtrak provide no basis for barring or otherwise conditioning the SP trackage rights provided for in the SP settlement agreement.

Southern California Regional Rail Authority. We will deny SCRRA's Conditions #1, #2, #3, #4, and #5, which are akin to the conditions sought by Amtrak. As with Amtrak, so with SCRRA: increased traffic over existing rail lines is a normal occurrence with or without a merger, and there is no reliable way to ascertain whether any particular traffic increases are or are not merger-related. SCRRA's conditions address complications arising from increased traffic in general, not from increased *merger-related* traffic in particular. And it should also be noted that, although SCRRA does not have any remedies under

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[132] Again, given our belief that SWGR will not suffer any appreciable harm, the logical conclusion regarding SWGR's essential services argument is that its ability to provide services to its customers will not be threatened. As with KJRY, we need not decide whether SWGR actually provides essential services.

[133] We also note that Amtrak may file petitions regarding issues of priority with the Secretary of USDOT.

RPSA, it has detailed remedies under the comprehensive agreements it has entered into in recent years with Santa Fe.[134]

Phillips Petroleum Company. We will impose a condition to maintain PPC's current competitive situation as respects the prospective PNR build-out. Though evidence is conflicting, the build-out option may be feasible. If so, it would have given PPC leverage to negotiate with Santa Fe for lower rates. We realize as well that SP will receive, under NITL Paragraph 1(b), trackage rights on the BN lines through Amarillo and access to all industries served by BN at Amarillo. We will therefore require that SP be allowed access, via these trackage rights, to any new connection between the BN lines at or near Amarillo and the PNR line between Panhandle and Borger, provided only that such new connection has been constructed by some entity other than BN/Santa Fe.

We will allow the interested parties (BN, PPC, and SP) an opportunity to reach a negotiated settlement respecting the precise details of the condition we are imposing. Because time is not of the essence, we will allow the parties 120 days from the date of service of this decision to submit agreed-upon terms respecting implementation of this condition. If the parties are unable to agree to such terms, they shall submit, by such date, separate proposals respecting implementation, and we will establish the terms.

Otherwise, we will deny the conditions requested by PPC. For the most part, the arguments advanced by PPC are a variation of those advanced by the electric utilities (except that PPC is served by a single railroad at origin, and claims to benefit from "downstream" competition), and should be rejected for the same reason (the "one lump" theory). Except as respects the build-out option, common control of BN and Santa Fe will not adversely affect PPC's competitive situation.[135]

Montana Wheat & Barley Committee. We will deny the condition requested by MWBC, which largely duplicates the rate complaint in *McCarty Farms*. The complaints voiced by MWBC have nothing to do with the merger; Montana shippers' captivity to BN will not be exacerbated by the merger. We would add that MWBC's requested rate cap and its request that Montana shippers be guaranteed identical treatment with Nebraska shippers are unjustified and could delay implementation of the increased efficiencies which BN/Santa Fe common control is likely to yield. MWBC's conditions would not

[134] We also will deny SCRRA's Condition #6, as discussed earlier in this decision.

[135] Previously in this decision, we discussed the request made by PPC (and by various other parties) that we review trackage rights compensation matters.

ameliorate any anticompetitive effects of the merger because there will be no such effects in Montana.

MWBC's argument that merger-related financial burdens on BN will lead to rate increases for captive Montana shippers also lacks merit. As discussed below, we do not find that this transaction will create a financial burden on the applicants. Moreover, increases in fixed charges such as interest payments generally do not alter a firm's profit-maximizing prices.

Bunge Corporation. We will deny the condition requested by Bunge. We realize that the SP settlement agreement, by providing increased rail options for Bunge's competitors but not for Bunge, may work to Bunge's disadvantage. But that will not be the kind of harm that we should rectify under our conditioning power. We typically do not use our conditioning power to preserve the competitive balance among the industries served by rail carriers. Bunge, after all, is not concerned that it is losing a transportation option, but that its competitors are gaining one. Given this context, a condition requiring that a settlement agreement be changed to improve a particular shipper's competitive situation is not proper.

Furthermore, we are not convinced that Bunge will suffer appreciable harm as a result of the SP settlement agreement. If the competitive relationship between Bunge and its competitors is as intense as Bunge claims, rates and services probably will not change much. In cases where there is strong geographic competition for particular movements, it is in the interest of a railroad, even if it is the sole carrier serving one of the shippers, to publish rates that permit its shipper to compete.

We are unconvinced by Bunge's claim that the parties to the settlement agreements have decided what shippers will receive service under the various trackage rights as part of a collusive division of markets. Bunge notes that these rights usually permit the trackage rights tenant to provide bridge service only, and argues that tenant carriers have not pressed to get stop-over rights because of a tacit understanding that the landlord will reciprocate by being similarly uninvasive elsewhere. No evidence in the record supports this argument, and there is another, more plausible, explanation. The points along the lines at issue, where only bridge service is to be provided, are apt to be points without access to both BN and Santa Fe. Applicants, when negotiating these settlements, had more incentive to address problems at points suffering a loss of competitive service because those points were more likely to be the object of conditions imposed under our merger standards.[136]

The Society of the Plastics Industry, Inc. We will deny the conditions requested by SPI, which has not demonstrated any harm to its shipper members resulting from the merger. Its arguments are similar to those which WCTL advanced and which we refute above. Its first and second conditions, which would keep open existing junctions and mandate reciprocal switching or proportional rates at certain points, are overly intrusive and could delay, in certain respects, implementation of the increased efficiencies expected from the merger, and would deny BN/Santa Fe the freedom to adapt to new developments and to the competitive initiatives of its rivals. SPI's third and fourth conditions, which would require trackage rights grants and maximum rate restrictions, are not justified as remedies to any particular competitive harm. In general, the conditions requested by SPI have little nexus to the BN/Santa Fe transaction.

American Maize-Products Company. We will deny the condition requested by American Maize. American Maize seeks to have its Dimmitt plant included in the SP settlement agreement. But, because this plant is served exclusively by BN, it will experience no *merger-related* reduction in competitive options. The present competitive situation at Dimmitt will not be worsened by the merger.

Cargill, Incorporated. We will deny the conditions requested by Cargill, which has not demonstrated (indeed, which has hardly even attempted to demonstrate) that it will suffer any harm from the merger. Its conditions (1) and (2), respecting captive shippers, are directed to problems that are not merger-related; except at the points and in the corridors covered by the conditions imposed in this decision, BN/Santa Fe common control will not create or increase any shipper's captivity. Cargill's condition (3), respecting private rail cars, is certainly not merger-related. Cargill's conditions (4) and (5), respecting shortlines, are unnecessary because the Interstate Commerce Act already provides numerous protections regarding line sales. Cargill's condition (6), respecting the common carrier obligation, is not merger-related.

Chaparral Steel Company. We will deny the condition requested by Chaparral. Chaparral contends that BN/Santa Fe common control will allow the merged carrier to eliminate geographic competition respecting structural steel products. Chaparral itself, however, has and will continue to have options other than BN/Santa Fe for the transportation of its own structural steel products.

[136] What we have said with respect to the condition requested by Bunge is equally applicable with respect to the grievances voiced by certain interested parties in Arkansas City.

Besides use of trucking, Chaparral's ability to transload to SP (6 miles away from its Midlothian, TX, plant site), as well as to BN (up to 30 miles away) has been instrumental in keeping rates down and maintaining equipment supply.[137] Further, Chaparral offers no specific examples of BN/Santa Fe geographic rivalry over this traffic prior to the merger resulting in lower rates.

Chicago Board of Trade. We will deny CBOT's requested condition, which has only a limited nexus to BN/Santa Fe common control. Except as respects Keokuk, Fort Madison, and Galesburg, common control of BN and Santa Fe will have no anticompetitive impact in the Kansas City-Chicago corridor or at points in that corridor, and there is therefore only a limited merger-related justification for imposition of a condition requiring that SP retain its existing Kansas City-Chicago trackage rights over BN. We would note, however, that the rights provided for in NITL Paragraph 1(c) (access to Keokuk via the TP&W connection at Bushnell) and NITL Paragraph 1(d) (access to Fort Madison and Galesburg) envision that SP will continue to operate the Kansas City-Chicago trackage rights. If these trackage rights are ever terminated, alternative arrangements will have to be made respecting Keokuk, Fort Madison, and Galesburg.[138]

"K" Line America, Inc. We will deny the conditions requested by K Line. The requested conditions involve matters which have no nexus to BN/Santa Fe common control.

Kansas Shippers Association. We will deny the conditions requested by KSA. The conditions do not address any demonstrated competitive harm that will be caused by the proposed merger of BN and Santa Fe and are therefore inappropriate.

Owens-Corning Fiberglas Corporation. We will deny the condition requested by Owens-Corning except as it relates to the SP access rights provided for in NITL Paragraph 1. The other access rights provided for in the SP settlement agreement are not necessary to ameliorate any competitive harms caused by the BN/Santa Fe transaction. We note that we are actually imposing, via NITL Paragraph 1(b), the Amarillo access rights of interest to Owens-Corning.

California Public Utilities Commission. We will deny the conditions requested by CPUC. The trackage rights and haulage rights CPUC seeks in

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[137] Chaparral, Comments, 4/10/95; BN/SF-35, Ice V.S. and Kalt V.S.

[138] The likeliest alternative arrangement would entail succession by another carrier to the rights provided for in NITL Paragraphs 1(c) and 1(d).

Conditions (1) and (2) are simply not necessary to ameliorate a competitive harm caused or exacerbated by the merger. CPUC's other conditions (respecting abandonments, branch lines, and line sales) are unnecessary because the Act already provides numerous protections regarding abandonments and line sales.

Illinois Department of Transportation. We will not impose any conditions respecting the matters discussed by IDOT, which has sought specific conditions but which has not articulated a harm directly attributable to the merger. (1) We have considered the overall economic impacts of the transaction, and we believe that it will have a positive effect on the nation's economy. (2) We reiterate that the Act already provides numerous protections regarding abandonments. (3) We think that the labor-related impacts of any possible relocation of Santa Fe's corporate headquarters are best considered as an aspect of labor-related impacts generally. (4) Elsewhere in this decision we have considered the general labor-related impacts of the BN/Santa Fe transaction, and, to ameliorate them, we are imposing the standard labor protective conditions. (5) Elsewhere in this decision we have concluded that the BN/Santa Fe transaction will not have an adverse impact upon IC, and that such transaction as conditioned by NITL Paragraph 1(c) will not have an adverse impact upon KJRY.

Kansas Department of Transportation. We will deny the conditions requested by KDOT. Condition (1), respecting shortlines in the Wichita area, has no nexus to the proposed transaction. Condition (2), respecting WUTR, is not necessary to ameliorate any anticompetitive effects of the transaction, which will disadvantage neither SP nor the local shortlines in their relationships with WUTR. Condition (3), respecting branch lines, is better addressed by existing provisions of the Act. Conditions (4) and (6), respecting car supply, car allowances, and tariffs, have not been shown to be necessary to ameliorate any *merger-related* harms. Condition (5), respecting labor-related impacts, implicates a matter better dealt with under the labor protective conditions we have imposed in this proceeding.

Oklahoma Department of Transportation. We will not impose the conditions suggested by ODOT, which has not identified a specific anticompetitive effect of the merger that would be ameliorated by its unspecific conditions. Furthermore, the implicit abandonment problem is better addressed by the abandonment provisions of the Act, which offer many protections regarding abandonments.

COMMON CONTROL ISSUES. We consider here the Santa Fe/TP&W common control issue raised by KJRY and the Santa Fe/GTWRY common control issue raised by ARU.

Santa Fe/TP&W. As discussed above, we have indicated that the new KJRY/TP&W/SP routing via Bushnell, which has been provided for by NITL Paragraph 1(c), will replace the current KJRY/TP&W/Santa Fe routing via Fort Madison, and thus eliminate the anticompetitive impacts that unconditioned BN/Santa Fe common control would have created at Keokuk. KJRY, however, claims that the KJRY/TP&W/SP routing cannot really be competitive with the BN/Santa Fe routing because Santa Fe controls TP&W. KJRY contends that TP&W, because it is controlled by Santa Fe, will have no real interest in promoting a routing that will be competitive with the routing operated by Santa Fe.

TP&W is a Santa Fe spinoff, and the evidence indicates that the Santa Fe/TP&W relationship is much like that between many rail spinoffs and the class I railroads of which they were formerly a part. Santa Fe is, in its relationship with TP&W, both an important interchange partner and an important creditor. Other factors, however, demonstrate that the Santa Fe/TP&W relationship falls far short of common control. Santa Fe has no equity interest in TP&W; it has no officer or director who is also an officer or director of TP&W; TP&W does not rely on Santa Fe assets to operate; and Santa Fe has no right to succeed to TP&W's interest in its property. TP&W, furthermore, has interchange partners other than Santa Fe, and will have yet another when SP begins using the Bushnell interchange. The evidence demonstrates that Santa Fe does not "control" TP&W within the meaning of 49 U.S.C. 11343(a). And, because Santa Fe does not control TP&W, KJRY's argument that the KJRY/TP&W/SP routing will not be competitive with the BN/Santa Fe routing necessarily fails.

Santa Fe/GTWRY. The only matter that will directly turn upon the Santa Fe/GTWRY common control issue is labor protection. If Santa Fe and GTWRY are presently under common control (as ARU claims), then GTWRY employees will fall under the umbrella of the labor protective conditions that we must impose in the lead docket in this proceeding.

GTWRY provides Santa Fe access, via a haulage arrangement, to the St. Louis gateway. GTWRY, however, is not a Santa Fe spinoff; it is a remnant of a bankrupt carrier that was itself an IC spinoff. The circumstances surrounding the creation of GTWRY, however, were such, and the ongoing Santa Fe/GTWRY relationship has been such, that GTWRY's present position is what it would have been had GTWRY been a Santa Fe spinoff. Santa Fe, with the prospect of developing a market for haulage traffic, made a substantial financial commitment to rehabilitate GTWRY's line, and, to protect its investment, obtained a right to inspect and receive reports on the progress of the rehabilitation, and a right of first refusal and option to purchase GTWRY's line after a period of 4 years. Santa Fe also provides the locomotives, fuel, supplies for the haulage trains handled on its behalf, and is responsible for the payment of all switching, intermediate, and car hire charges on haulage traffic.

Other factors, however, demonstrate that the Santa Fe/GTWRY relationship falls far short of common control. Santa Fe does not have and has not exercised any power or ability to control GTWRY, and GTWRY has acted independently of Santa Fe with regard to financial and operational decisions. Santa Fe has no role or function in the handling of the haulage trains on GTWRY's tracks; all trains operating on GTWRY's tracks are operated by GTWRY crews and dispatched by GTWRY dispatchers. GTWRY pays all of its employees' labor costs, including the costs for the employees handling the Santa Fe haulage trains. Santa Fe does not participate in the hiring, supervision, or firing of GTWRY employees, and does not play a role in GTWRY's rail maintenance activities except to conduct periodic reviews. Furthermore, the GTWRY traffic base is not limited to the Santa Fe haulage traffic, but also includes traffic handled for other carriers and shippers. The evidence demonstrates that Santa Fe does not "control" GTWRY within the meaning of 49 U.S.C. 11343(a).[139]

FINANCIAL MATTERS. The evidence demonstrates that the entity resulting from the BNI/SFP merger will be financially sound, that BNI's assumption of the payment of SFP's fixed charges will be consistent with the public interest, that the terms of the BNI/SFP merger transaction are just and reasonable, and that the assumption by BN of the liabilities of Santa Fe will not impair the merged carrier's ability to provide service.

Financial Condition. The BNI/SFP merger transaction, because it will be effected by an exchange of stock (*either* an SFP/BNI exchange *or* both a

[139] ARU further contends that, even if Santa Fe does not control GTWRY, the Santa Fe/GTWRY relationship is so close that GTWRY employees must be considered joint employees of GTWRY and Santa Fe. The evidence of record, however, demonstrates that the Santa Fe/GTWRY relationship is an arm's length commercial relationship, akin in many respects to the relationships between many rail spinoffs and the class I railroads of which they were once a part. We conclude that GTWRY's employees are the employees of GTWRY alone, and cannot be considered joint employees of GTWRY and Santa Fe for purposes of 49 U.S.C. 11347.

BNI/BNSF exchange and an SFP/BNSF exchange), will not result in an increase in debt or fixed changes. We realize, however, that BNI and SFP, in connection with their tender offers for 63 million shares of SFP common stock at $20 net per share,[140] have already incurred long-term debt of $1.26 billion ($500 million by BNI, and $760 million by SFP). We believe that, despite this large increase in the debt structure of both BNI and SFP, the financial condition of a merged BNI/SFP should be favorable because the financial condition of each remains sound, and because substantial earnings gains will result from increased revenues and cost savings attributable to implementation of the post-merger BN/Santa Fe operating plan.

Applicants submitted pro forma financial statements showing consolidated data of a merged BNI/SFP, based upon 1993 data, for a base year and for each of the first three years after consummation of the merger. These statements reflect both the expected benefits that will be achieved and the non-recurring expenditures that will be incurred. Applicants also submitted financial statements for a "normal" year (a year after the third post-merger year) which reflect the following: (1) total benefits to be achieved after the operating plan has been fully implemented; (2) consolidation of BNI and SFP on a purchase accounting basis; and (3) the increased debt and fixed charges attributable to the consummation of the tender offers.

Applicants project total benefits of $560.1 million annually after their operating plan has been fully implemented. These benefits consist of: (1) traffic gains resulting in an increase in net revenues of $107.1 million, representing the difference between anticipated higher revenues of $306.5 million and a related increase in costs of $199.4 million; and (2) cost savings of $453 million (general and administrative costs of $346 million and operating costs of $107 million). Almost all of the $560.1 million of anticipated benefits is expected to be achieved during the first three years of merged operations, as follows: $336.1 million in the first year (60% of the expected total); a cumulative $476.1 million during the second year (85% of the expected total); and a cumulative $532.1 million during the third year (95% of the expected total). Applicants estimate that, in order to implement their operating plan, they will incur about $350 million of non-recurring cash expenditures ($287 million for employee separation, relocation and training; $63 million for capital expenditures).

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[140] These tender offers were entered into in an ultimately successful effort to defeat UP's attempt to acquire control of Santa Fe.

Expenditures during each of the first three years of merged operations are projected to be $275 million, $42.3 million, and $28.2 million, respectively.

Table 1 in Appendix C shows various financial ratios for a post-merger BNI/SFP, computed from applicants' pro forma financial statements and supplemental data (and reflecting the impacts of purchase accounting and the tender offers).[141] The following time periods are presented: the base year (consolidated 1993 data); each of the first three years after merger (implementation of the operating plan); and the normal year (reflecting operations after the operating plan has been fully implemented). An analysis of these data leads us to the following conclusions.

The consolidated pro forma income before fixed charges of a merged BNI/SFP, and before implementation of the operating plan, exceeded fixed charges (interest payments on long-term debt) by a margin of nearly 2.5 times. Applicants project a further substantial improvement in the coverage of fixed charges, from 2.8 times during the first year of merged operations to almost 4.7 times after full implementation of the operating plan.

The pro forma cash-throw-off to debt ratios are quite favorable. This ratio measures a company's ability to generate sufficient cash flow from operations to repay the principal on long-term debt maturing during the year. BNI/SFP's consolidated cash flow provided by operations (net income plus depreciation, amortization, deferred tax expense, gains or losses on property sales, etc.) exceeded maturing long-term debt during the pro forma base year by almost 2.2 times. Steady improvement in this ratio is projected each year during implementation of the operating plan, to a ratio of about 3.2 times after the plan has been fully implemented.

The operating ratio of a merged BNI/SFP (ratio of operating expenses to operating revenues), a measure of efficiency, is projected to improve (favorably decline) each year, from 87.4% during the base year to 80.4% after full implementation of the operating plan.

Applicants project a substantial increase in consolidated net income, from $315 million during the base year (before implementation of the operating plan) to $691 million during a normal year (a year after the plan has been fully implemented). As a result of this anticipated gain, BNI/SFP's capital structure ratio (the ratio of long-term debt to long-term debt plus shareholders' equity) is projected to improve significantly, declining from 47.2% to about 37%.

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[141] Purchase accounting requires adjustment, either up or down, of the book value of the acquired railroad's assets to take into account the total purchase price paid for the railroad's stock.

Applicants' pro forma data project impressive financial strength for BNI/SFP. Moreover, this financial strength could be considerably understated because applicants' assumptions do not reflect improvements above and beyond those directly anticipated from implementation of the merger operating plan, such as benefits from an improving economy, normal business growth, or cost savings not directly related to the merger. Applicants indicate that, if these items were reflected in the projections, the pro forma financial statements would show further improvements in operating income and the operating ratio.

Our analysis indicates that a merged BNI/SFP will be financially sound. In fact, the financial condition of BNI and SFP during the past three years has been strong. Both BNI and SFP have been highly profitable companies and have generated large increases in revenues during most of these years, as indicated by the following table.

Revenues and Earnings
(in millions)[142]

Operating Revenues

Year	BNI	SFP
1994	$4,995	$2,681
1993	4,699	2,409
1992	4,630	2,252

Net Income From Continuing Operations

Year	BNI	SFP
1994	$ 416	$ 199
1993	296	92
1992	278	94

[142] The net income shown for SFP in this table excludes large special items attributable to gains on sales of lines in California in 1993 and 1992 and a special charge in 1992 pertaining to the ratification of a crew consist agreement, operations centralization, and increased environmental accruals.

Fixed Charges. We are required to consider the total fixed charges resulting from the merger, 49 U.S.C. 11344(b)(1)(C), as well as BNI's assumption of the payment of SFP's fixed charges, 49 U.S.C. 11344(c). There will be no merger-related increase in fixed charges (because the BNI/SFP merger will be effected by exchanges of stock), and the evidence demonstrates that the merged entity will be financially sound, and thus well able to pay the fixed charges that without a merger would be the separate obligations of BNI and SFP. The financial soundness of the merged entity supports a finding that BNI's assumption of the payment of SFP's fixed charges will be consistent with the public interest.

Fairness Determination. The BNI/SFP merger will involve the exchange of all outstanding shares of SFP common stock[143] for BNI common stock at an exchange ratio ranging between (i) a minimum of 0.40 shares of BNI common stock for each share of SFP common stock and (ii) a maximum of 0.4347 shares of BNI common stock for each share of SFP common stock (the maximum will apply if SFP, as permitted by the merger agreement, repurchases a maximum of 10 million shares of its common stock prior to the merger). The alternative merger structure, under which the merger of SFP into BNI will be effected through the use of BNSF Corporation, will involve *both* the exchange of BNI common stock for BNSF common stock at an exchange ratio of 1:1 *and* the exchange of SFP common stock for BNSF common stock at an exchange ratio ranging between (i) a minimum of 0.40 shares of BNSF common stock for each share of SFP common stock and (ii) a maximum of 0.4347 shares of BNSF common stock for each share of SFP common stock.

These exchange ratios were derived by arm's-length negotiations between BNI and SFP and have been approved by the respective boards of directors unanimously and by substantial majorities of the stockholders of the two corporations. No stockholders have challenged the fairness of these exchange ratios. All persons directly affected by the exchange, having been afforded an opportunity to evaluate the proposal in light of their respective interests, are apparently satisfied with the result. We also find persuasive the evidence in support of the exchange ratios submitted by applicants' financial advisors (Lazard Frères & Co. for BNI; Goldman, Sachs & Co. for SFP), who have expertise in the valuation of businesses and their securities in connection with mergers and acquisitions. *See* BN/SF-25, SEC Form S4, Post-Effective

[143] Shares of SFP common stock held by SFP itself or by BNI will be canceled.

Amendment No. 4 at 42-49 & Apps. C & D. The evidence amply supports a finding that the terms of the BNI/SFP merger transaction, including without limitation the exchange ratios involved in both the original merger structure and the alternative merger structure, are just and reasonable.

Assumption of Liabilities. Applicants have requested authorization under 49 U.S.C. 11301 to the extent that provision may apply to BN's succession to Santa Fe's obligations. The requested authorization may not ultimately be necessary, but no party has opposed it and no harm would be done by granting it. Any assumption by BN of Santa Fe's liabilities fully satisfies the standards for approval, as it will be for the purpose of implementing a transaction we have found to be consistent with the public interest and will not impair the merged carrier's ability to provide service.

RELATED PROCEEDINGS (Sub-Nos. 1-12). In Finance Docket No. 32549 (Sub-Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12), applicants seek merger-related exemptions under 49 U.S.C. 10505 for control of WUTR and for 11 construction projects. Control of WUTR by BN and Santa Fe would ordinarily require approval under 49 U.S.C. 11344, and the construction projects planned by BN and Santa Fe would ordinarily require approval under 49 U.S.C. 10901. However, under 49 U.S.C. 10505, we must exempt these matters from regulation if we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Regulation under sections 11344 and 10901 is not necessary to carry out the rail transportation policy because the requested exemptions will promote that policy. Exemption will allow competition to establish reasonable rates, promote an efficient rail transportation system, foster sound economic conditions in transportation, and encourage honest and efficient railroad management. 49 U.S.C. 10101a(1), (3), (5), and (10). Other aspects of the rail transportation policy will not be adversely affected. We note too that the transactions sought to be exempted are of limited scope. WUTR conducts local operations only, and the construction projects involve fairly short connections facilitating combining the merging carriers' operations. Furthermore, regulation of these transactions is not necessary to protect shippers from the abuse of market power. These transactions are related to, and will facilitate, common control of BN and Santa Fe, which we have found to be pro-competitive (subject to the various conditions imposed in this decision). For these reasons, we will grant the requested exemptions.[144]

ENVIRONMENTAL IMPACTS. On June 6, 1995, our Section of Environmental Analysis (SEA) issued an environmental assessment (EA) analyzing the proposed BN/Santa Fe merger. The EA addressed the impacts of rail operational changes and constructions on safety, noise, energy, air, water resources, biological resources, land use, transportation systems, and historic and cultural resources. In the EA, SEA concluded that, based on its independent analysis of all available information, the merger of BN and Santa Fe should not significantly affect the quality of the human environment, provided that the recommended mitigation measures set forth in the EA are implemented.[145]

Over 600 parties received the EA for their review and comment. SEA gave parties 20 days (until June 26, 1995) to submit comments. Comments were submitted by the United Transportation Union, the Oklahoma Historical Society, the Anaheim/Santa Fe Neighborhood Safety Coalition, the Noble County (Oklahoma) Commissioners, the Memphis/Shelby County (Tennessee) Health Department, the Western Coal Traffic League, the Texas Parks and Wildlife Department, the Texas Natural Resource Conservation Commission, and the applicants. The comments largely addressed issues relating to impacts on land use, consideration of alternative locations for a proposed construction, impacts on historic resources, increases in noise levels, and air quality.[146]

On July 17, 1995, SEA submitted to the Commission a Post Environmental Assessment (Post EA) containing its final recommendations. The Post EA summarized the areas of potential environmental impacts, discussed alternatives, and summarized and addressed the comments to the EA. In the Post EA, SEA concluded, based on its independent analysis of all available information (including the comments received to the EA), that the BN/Santa Fe merger should not significantly affect the quality of the human environment, provided that the recommended mitigation measures set forth in the Post EA are

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[144] Elsewhere in this decision we discuss the environmental and labor implications of the requested exemptions.

[145] The mitigation measures recommended by SEA in the EA are located in the EA at Volume II, p. 3-1, and at Volume III, pp. 2-13, 3-15, 4-13, 5-18, 6-17, 7-16, and 8-16.

[146] The Texas Land Commission, in a late-filed comment, indicated that it has no coastal consistency program.

implemented.[147] The mitigation measures recommended in the Post EA are substantially similar to those recommended in the EA. *See* Post EA at pp. 42-44 (discussing the few changes in the two sets of recommendations).

We adopt both the EA and the Post EA, and, for the reasons set forth therein, we will impose as conditions the mitigation measures recommended in the Post EA. For the reasons set forth in the next three paragraphs, we will impose as a condition one additional mitigation measure. The environmental mitigating conditions we are imposing are set forth in Appendix D. A number of these conditions require the applicants to consult with various government agencies, and we expect that the applicants and the various agencies will develop appropriate mitigation measures, if warranted. Applicants shall advise SEA of the results of these consultations. If the consulting parties cannot agree, SEA will resolve any impasses and recommend to the Commission what mitigation measures, if any, should be implemented.

The additional mitigation measure we are imposing reflects concerns raised by the Anaheim/Santa Fe Neighborhood Safety Coalition (the Coalition). The Coalition requests that we review the noise levels on the rail line segment in Anaheim, CA (the San Bernardino to Los Angeles segment) and propose mitigation. The Coalition further requests that we reconsider the excessive noise in the Anaheim area and propose mitigation before exacerbating the problem.

The concerns raised by the Coalition regarding noise impacts stem from a preexisting condition that is not a result of the merger. Currently, 35 trains per day move over the San Bernardino to Los Angeles segment. It is expected that after the merger an additional four trains a day will move over that segment. Although the projected increase does not meet the environmental analysis threshold for noise found at 49 CFR 1105.7(e)(6), SEA nevertheless: (1) reviewed noise monitoring data for the rail line conducted by the Federal Railroad Administration (FRA); (2) consulted with FRA officials concerning noise monitoring on the rail line; (3) conducted a 12-hour, night-time analysis of rail operations on the Santa Fe rail line in the commenters' neighborhood to verify baseline conditions (the analysis included classification of trains and observations on changes in speed, ascent of grade, wheel condition, and use of horns); (4) conducted a field survey of the neighborhood; and (5) met with representatives of the Coalition.

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[147] The mitigation measures recommended by SEA in the Post EA are located in the Post EA at pp. 42-55. The Post EA can be found in the public record.

Based on this further review, we have determined that the community is subject to substantial noise impacts, but that these impacts are not associated with the merger. Instead, they are associated with the preexisting rail operations over the San Bernardino to Los Angeles segment. However, because the merger should result in four more trains per day above the currently high level of traffic moving over the segment, we are imposing an additional mitigating condition to assist the community in seeking ways to address its noise concerns. Condition 1.5(b) will require applicants to consult and meet with the specified parties and SEA concerning noise levels and possible measures to mitigate noise impacts in the affected community.

We conclude that, subject to the environmental mitigating conditions set forth in Appendix D, the transaction approved in Finance Docket No. 32549, the transaction exempted in Finance Docket No. 32549 (Sub-No. 1), and the construction projects exempted in Finance Docket No. 32549 (Sub-Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12) will not significantly affect either the quality of the human environment or the conservation of energy resources.

FINDINGS

In Finance Docket No. 32549, we find: (a) that the common control and merger of BN and Santa Fe through the proposed transaction is within the scope of 49 U.S.C. 11343 and is consistent with the public interest; (b) that the transaction will not adversely affect the adequacy of transportation to the public; (c) that no other railroad in the area involved in the transaction has requested inclusion in the transaction, and that failure to include any such railroad will not adversely affect the public interest; (d) that the transaction will not result in any guarantee or assumption of payment of dividends or of fixed charges, except as specifically approved herein, or any increase in fixed charges; (e) that the adverse effect on employees affected by the proposed transaction does not make such transaction inconsistent with the public interest but that any adverse effect will be adequately addressed by the conditions imposed herein; (f) that the transaction, as conditioned herein, will not significantly reduce rail competition in any market; and (g) that the terms of the transaction, including all issuances of securities incident thereto, are just, fair and reasonable. We further find that good cause has been demonstrated to join as applicants BNSF Corporation and its contemplated subsidiaries, and to waive with respect to such entities the requirements of 49 CFR Part 1180. We further find that the proposed assumptions of liabilities and securities obligations: (a) are consistent with the proper performance of transportation by the carriers to be controlled by BNI and BNSF; (b) will not impair the ability of the controlled carriers to provide public transportation; (c) are otherwise consistent with the public interest; and (d) are for objects within the lawful corporate purposes of the applicants involved and reasonably appropriate for those purposes. We further find that any rail employees of the applicants affected by the transaction authorized in Finance Docket No. 32549 should be protected by the conditions set forth in *New York Dock Ry.--Control--Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979), unless different conditions are provided for in a labor agreement entered into prior to consummation of common control, in which case protection shall be at the negotiated level, subject to our review to assure fair and equitable treatment of affected employees.

In Finance Docket No. 32549 (Sub-No. 1), we find that the acquisition and exercise of control of WUTR by applicants is exempt from prior Commission review and approval pursuant to 49 U.S.C. 10505(a) because such review is unnecessary to carry out the transportation policy of 49 U.S.C. 10101a or to protect shippers from the abuse of market power.

In Finance Docket No. 32549 (Sub-Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12), we find that the proposed construction projects are exempt from prior Commission review and approval pursuant to 49 U.S.C. 10505(a) because each such project is limited in scope, and because, in each instance, such review is unnecessary to carry out the transportation policy of 49 U.S.C. 10101a or to protect shippers from the abuse of market power.

In Finance Docket No. 32549 (Sub-No. 13), we find that the responsive application filed by HL&P is not consistent with the public interest.

In Finance Docket No. 32549 (Sub-No. 14), we find that the responsive application filed by SPS and TUCO is not consistent with the public interest.

In Finance Docket No. 32549 (Sub-No. 15), we find that the responsive application filed by GNBC is consistent with the public interest to the extent the application seeks (a) assurance that the blocking provision will not be accorded an expanded scope interpretation and (b) access to SP at Quanah. In all other respects, we find that the application filed by GNBC is not consistent with the public interest.

In Finance Docket No. 32549 (Sub-No. 16), we find that the responsive application filed by WFSC is not consistent with the public interest.

In Finance Docket No. 32549 (Sub-No. 17), we find that the responsive application filed by KJRY is not consistent with the public interest.

In Finance Docket No. 32549 (Sub-No. 18), we find that the responsive application filed by SWGR is not consistent with the public interest.

We further find that the competitive conditions imposed in Finance Docket No. 32549 and Finance Docket No. 32549 (Sub-No. 15) are consistent with the public interest. These conditions, which are more fully discussed above, embrace: (1) the rights provided for in NITL Paragraph 1; (2) the two stipulations of NITL Paragraph 2; (3) the rights provided with respect to OG&E's plant at Red Rock; (4) the rights provided with respect to PPC's plant at Borger; and (5) the rights provided with respect to GNBC.

We further find that any rail employees of applicants, or of WUTR affected by the transaction exempted in Finance Docket No. 32549 (Sub-No. 1), should be protected by the conditions set forth in *New York Dock Ry.--Control--Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979), unless different conditions are provided for in a labor agreement entered into prior to consummation of common control, in which case protection shall be at the negotiated level, subject to our review to assure fair and equitable treatment of affected employees.

We further find that any rail employees of the carriers involved in the trackage rights arrangements imposed as conditions in Finance Docket No. 32549 should be protected by the conditions set forth in *Norfolk and Western Ry. Co.--Trackage Rights--BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.--Lease and Operate*, 360 I.C.C. 653 (1980), unless different conditions are provided for in a labor agreement entered into prior to consummation of common control, in which case protection shall be at the negotiated level, subject to our review to assure fair and equitable treatment of affected employees. For purposes of this paragraph, the trackage rights arrangements imposed as conditions in Finance Docket No. 32549 are: the trackage rights described in NITL Paragraph 1; the trackage rights imposed with respect to OG&E's plant at Red Rock; the trackage rights imposed with respect to PPC's plant at Borger; and the trackage rights imposed with respect to GNBC.

We further find that all other conditions requested by any party to this proceeding are not consistent with the public interest. We further find that this action, as conditioned by the environmental mitigation measures set forth in Appendix D, will not significantly affect the quality of the human environment or the conservation of energy resources.

COMMISSIONER SIMMONS, commenting:

After a thorough examination of the evidence, I agree that the utilities have not met the test to show that, of those served by a single carrier at destination, they will sustain merger-related competitive harm. In past cases when I have found that a certain shipper had met that burden, I felt that the Commission was confronted with overwhelming evidence to support the shipper's claim that it benefitted from origin competition even though it had been served by a single carrier at destination. My position has been expressed in the following cases: *Union Pacific--Control--Missouri Pacific; Western Pacific*, 366 I.C.C. 462, 649-650 (1982); *Milwaukee--Reorganization--Acquisition by GTC*, 2 I.C.C.2d 427, 472-475 (1985); and *Union Pacific Corp. et al.--Cont.--MO-KS-TX Co. et al.*, 4 I.C.C.2d 409, 526 (1988).

Although rates have declined, it is difficult on this record to categorically state that the declines have been the result of origin competition. It is possible that several factors have played a role in the overall reduction of coal rates, including perhaps origin competition. In any event, the remedies proposed--trackage rights--would be overreaching, especially given the limited data available. I would remind the parties that this Commission maintains continuing oversight of this merger as well as a host of remedies to address any abuse of the market power that may have been created. As a result, if a utility currently served by two carriers at origin pre-merger, but only one post-merger, suddenly experiences significant rate increases in the absence of economic justifications, it may petition the Commission to reopen this proceeding. If, under the latter circumstances, rates do rise unreasonably, the Commission has the ability to craft an appropriate remedial response in connection with its continuing jurisdiction in this case. In addition, the Commission has, and will exercise if shown to be appropriate, the general powers it has to protect captive shippers and connecting railroads from the merged entity abusing its market power.

COMMISSIONER McDONALD, commenting:

With the conclusion of this case, I believe it's clear that our new, 6-month procedural schedule is a success. It did not hinder the development of the formal record or lead to an inferior Commission decision. Rather, it produced a more focused record and sharpened the debate. The parties deserve considerable credit for this result. In addition, the voluntary agreements reached between the applicants and various other parties also helped make the accelerated process feasible and successful.

A second aspect of this case was just as important, and as much of a success. While the contest between BN and UP for control of Santa Fe was unfolding, the Commission ruled five times over a short, 6-week period on the issue of a voting trust proposed by UP.[148] The availability of the voting trust mechanism in rail mergers means that initial financial transactions can be consummated quickly, with regulatory approval sought while the voting trust is in place. And, the risk of regulatory rejection or modification thus can be shifted to the party willing to bear it.

While Commission approval of voting trusts is not required under law or our regulations, our five prompt actions were required to reaffirm the availability of the voting trust mechanism in rail proceedings such as the acquisition of Santa Fe. These decisions received little attention from those not directly involved, because they rightly kept the Commission in the background. But our prompt rulings, guaranteeing the availability of the voting trust mechanism, ensured that the contest for Santa Fe would be decided by the participants and the capital markets, unhindered by needless regulatory rules or delays.

I believe that the success of the 6-month procedural schedule—together with the reaffirmation of the voting trust mechanism—shows conclusively that pursuing rail mergers under the legal framework of the Interstate Commerce Act, rather than under the nation's antitrust laws, remains a viable and efficient option for railroads operating in today's capital markets. Moreover, under this legal framework applicants have the opportunity to engage in one-stop shopping: they can obtain merger approval together with immunity from other antitrust, environmental, and labor challenges. This is not a trivial advantage for large rail mergers, since by their nature they involve wide-ranging geographical locations, many political jurisdictions, and many other interests.

* * *

[148] These decisions were a staff informal opinion and a Chairman's Order, both served November 28, 1994, and full Commission decisions served December 6 and December 20, 1994, and January 6, 1995, all in *Union Pacific Corporation, et al.—Request for Informal Opinion—Voting Trust Agreement*, Finance Docket No. 32619.

I will turn now to a number of the substantive disputes we address in this decision.

Trackage Rights Compensation. The one major difference between our decision in this case and the views of the Department of Justice is that we have rejected DOJ's recommendation that we prescribe with some specificity the compensation that will be paid for the access arrangements required as conditions to our merger approval. This is a longstanding disagreement; the Commission has rejected similar DOJ arguments in the past.

I do acknowledge and appreciate DOJ's theoretical arguments on the need for the ICC to prescribe appropriate compensation rates for access arrangements imposed as conditions. However, I believe the ICC's successful experience over many years with the policy of adopting voluntary compensation agreements trumps DOJ's legitimate theoretical concerns. And, should problems arise in this instance, parties may petition to have the proceeding reopened.

Given our policy of adopting reasonable voluntary agreements, I find that I do not have to reach the issue of the correctness of our *SSW Compensation* method in this proceeding. I do not reaffirm that stand-by method with this decision.

Vertical Competitive Effects. Regarding the alleged harms to electric utilities that have Santa Fe as a destination carrier, virtually all parties provided economic evidence and argument of high quality. These vertical economic issues are truly not free of doubt, and in this record there is sophisticated debate and good evidence on both sides. I would like to explain briefly where I have come out on this debate about vertical effects.

There are five electric utilities that have Santa Fe as their destination rail carrier and that have alleged vertical harm as their primary argument. I believe that these parties have shown that some competition between origin railways flows through to the utilities in some cases. And, I believe they have shown that these benefits can be expected to diminish or cease after the merger. [HL&P, SPS (regarding its Tolk facility), and WRI have made the strongest cases. And, I would not hold APS or WFSC to a strict showing that they are currently benefitting from origin competition, because PRB origin competition was not yet available when those utilities entered into their current long-term contracts.] However, it appears that the only available remedies for this harm are greatly over-reaching or unreasonably burdensome and intrusive. Granting trackage rights over Santa Fe to these generating plants, for example, would create two independent origin-to-destination options, more options than the utilities enjoy today.

The granting of over-reaching remedies in rail mergers would itself be harmful. It would have a chilling effect on future rail rationalization, for example. Therefore, I conclude that while there is some competitive harm, of uncertain magnitude, to these utilities, the available remedies are inappropriate and should not be imposed as conditions.

Geographic Competition. While most of the competitive analysis in this case focused on reductions in the number of railways in specific corridors or at specific points, the Western Coal Traffic League emphasized a broader focus, looking at the transaction's impact on geographic competition in the West. I agree that this is a useful and important perspective. A significant reduction in geographic competition could be a major concern.

The continuing presence of geographic competition can mean that a proposed merger will have no anticompetitive impact despite the fact that it eliminates point-to-point rail competition. But it is equally true that a proposed merger which eliminates geographic competition over a broad area may be objectionable for that reason alone, even if little or no reduction in point-to-point rail competition occurs.

I believe the BN/Santa Fe witnesses never fully acknowledged that the merger will totally eliminate whatever geographic and other indirect competition exists between BN and Santa Fe. On the other hand, I am not convinced by WCTL that the reduction from four to three originating railroads here constitutes harm to western coal transportation that must be addressed with conditions.

While a reduction from four to three railroads very likely would be of little concern in a point-to-point rail market, that is not necessarily so in the context of geographic competition. (Suppose, for example, that this proceeding involved the merger of BN and UP.) In this case, however, BN is combining with a relatively minor originator of western coal. Utilities do have increasing, though still imperfect, options such as shifting fuels and purchasing power. And, applicants have raised doubts about WCTL's quantitative measure of the increase in market concentration.

I do believe, nonetheless, that WCTL has identified an issue that may be important or decisive in future large rail consolidations, and an issue that may extend beyond coal to other markets as well.

It is ordered:

1. All late-tendered pleadings submitted by persons referred to in this decision as "additional parties" are accepted for filing and made part of the record in this proceeding.

2. The WSTR-17 petition filed by WRI and the alternative request made by applicants in BN/SF-41 are granted, and both the BN Report attached to WSTR-17 and the verified statement attached to BN/SF-41 are made part of the record in this proceeding.

3. Mr. John D. Fitzgerald's appeal from the Administrative Law Judge's decision served May 2, 1995, is denied.

4. The TPW-2 motion to strike filed by TP&W is denied. The verified statements of Gordon R. Fuller and Gary L. Towell attached to TPW-2 are made part of the record in this proceeding.

5. The TPW-4 motion to strike filed by TP&W is denied.

6. The UP-9 motion to strike filed by UP is denied.

7. In Finance Docket No. 32549, BNSF Corporation and the contemplated subsidiaries to be formed to effect the alternative merger structure are joined as applicants, and the requirements of 49 CFR Part 1180 are waived with respect to such corporation and such subsidiaries.

8. In Finance Docket No. 32549, the application filed by BNI, SFP, BN, Santa Fe, and BNSF and its contemplated subsidiaries is approved (subject to the imposition of certain conditions discussed in this decision). Common control of BN and Santa Fe may be effected using either the merger structure outlined in the application filed October 13, 1994, or the alternative merger structure outlined in the BN/SF-25 supplemental submission filed February 17, 1995.

9. In Finance Docket No. 32549, the assumptions of liabilities and securities obligations incident to common control of BN and Santa Fe are approved.

10. If applicants consummate the approved transaction, they shall confirm in writing to the Commission, within 15 days after consummation, the date of consummation. Where appropriate, applicants shall submit to the Commission three copies of the journal entries recording consummation of the transaction.

11. All notices to the Commission as a result of any authorization shall refer to this decision by date and docket number.

12. No change or modification shall be made in the terms and conditions approved in the authorized application without the prior approval of the Commission.

13. In Finance Docket No. 32549 (Sub-No. 1), the petition for exemption is granted.

14. In Finance Docket No. 32549 (Sub-No. 2), the petition for exemption is granted.

15. In Finance Docket No. 32549 (Sub-No. 3), the petition for exemption is granted.

16. In Finance Docket No. 32549 (Sub-No. 4), the petition for exemption is granted.

17. In Finance Docket No. 32549 (Sub-No. 5), the petition for exemption is granted.

18. In Finance Docket No. 32549 (Sub-No. 6), the petition for exemption is granted.

19. In Finance Docket No. 32549 (Sub-No. 7), the petition for exemption is granted.

20. In Finance Docket No. 32549 (Sub-No. 8), the petition for exemption is granted.

21. In Finance Docket No. 32549 (Sub-No. 9), the petition for exemption is granted.

22. In Finance Docket No. 32549 (Sub-No. 10), the petition for exemption is granted.

23. In Finance Docket No. 32549 (Sub-No. 11), the petition for exemption is granted.

24. In Finance Docket No. 32549 (Sub-No. 12), the petition for exemption is granted.

25. In Finance Docket No. 32549 (Sub-No. 13), HL&P's responsive application is denied.

26. In Finance Docket No. 32549 (Sub-No. 14), SPS/TUCO's responsive application is denied.

27. In Finance Docket No. 32549 (Sub-No. 16), WFSC's responsive application is denied.

28. In Finance Docket No. 32549 (Sub-No. 17), KJRY's responsive application is denied.

29. In Finance Docket No. 32549 (Sub-No. 18), SWGR's responsive application is denied.

30. Approval of the application in Finance Docket No. 32549 is subject to the conditions provided for in NITL Paragraph 1, summarized here and more fully discussed above: (a) that UP is to receive bridge trackage rights between Abilene and Superior, over Santa Fe's lines, with access to all facilities at

Superior that are (when such rights become effective) open to service by both BN and Santa Fe (either directly, by reciprocal switching, or by any other means); (b) that SP is to receive (i) bridge trackage rights between Pueblo and Stratford, over Santa Fe's lines, and between Dalhart and Fort Worth, over BN's lines, (ii) access to all industries served by BN and Santa Fe, directly or through reciprocal switching, at Amarillo, (iii) access to Plainview and Lubbock, and (iv) access to SWGR; (c) that SP is to receive access to TP&W at Bushnell; and (d) that SP is to receive access to all industries served by BN or Santa Fe directly or by reciprocal switching at Fort Madison and Galesburg. Applicants and SP are hereby directed to remove subdivision (ii) of the section 9 proviso from the SP settlement agreement, and approval of the application in Finance Docket No. 32549 is hereby made subject to compliance with this directive.

31. Approval of the application in Finance Docket No. 32549 is further subject to the first stipulation provided for in NITL Paragraph 2, summarized here and more fully discussed above: that implementing agreements respecting trackage rights provided for in NITL Paragraph 1 must be submitted by September 15, 1995; and that implementing agreements respecting any other trackage rights provided for in the various railroad settlement agreements must be submitted by November 22, 1995.

32. Approval of the application in Finance Docket No. 32549 is further subject to the second stipulation provided for in NITL Paragraph 2, summarized here and more fully discussed above: that operations pursuant to all operative provisions in the railroad settlement agreements that provide rights other than trackage rights (including specifically all provisions for haulage rights) must be commenced promptly after consummation of BN/Santa Fe common control.

33. Approval of the application in Finance Docket No. 32549 is further subject to the conditions imposed with respect to GNBC, as more fully discussed above. BN and GNBC shall, by September 2, 1995, jointly submit the agreed-upon details respecting the implementation of these conditions. In the event and to the extent these parties are unable to agree to such terms, they shall submit, by such date, separate proposals respecting implementation of such conditions. The Commission will then choose the better of the proposals, or some variation thereof, and make it effective on the date that this decision is effective.

34. In Finance Docket No. 32549 (Sub-No. 15), the responsive application filed by GNBC is denied, except as indicated in the preceding paragraph.

35. Approval of the application in Finance Docket No. 32549 is further subject to the condition imposed with respect to OG&E's plant at Red Rock, as more fully discussed above. BN, on the one side, and OG&E and either UP, SP,

or KCS, on the other side, shall, by December 21, 1995, jointly submit agreed-upon terms respecting implementation of this condition. In the event and to the extent these parties are unable to agree to such terms, they shall submit, by such date, separate proposals respecting implementation of such condition.

36. Approval of the application in Finance Docket No. 32549 is further subject to the condition imposed with respect to PPC's plant at Borger, as more fully discussed above. BN, on the one side, and PPC and SP, on the other side, shall, by December 21, 1995, jointly submit agreed-upon terms respecting implementation of this condition. In the event and to the extent these parties are unable to agree to such terms, they shall submit, by such date, separate proposals respecting implementation of such condition.

37. Approval of the application in Finance Docket No. 32549 is further subject to the labor protective conditions set out in *New York Dock Ry.--Control--Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979).

38. The authority granted in Finance Docket No. 32549 (Sub No. 1) is subject to the labor protective conditions set out in *New York Dock Ry.--Control--Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979).

39. The trackage rights imposed as conditions in Finance Docket No. 32549 are subject to the labor protective conditions set out in *Norfolk and Western Ry. Co.--Trackage Rights--BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.--Lease and Operate*, 360 I.C.C. 653 (1980). For purposes of this paragraph, the trackage rights imposed as conditions in Finance Docket No. 32549 are: the trackage rights described in NITL Paragraph 1; the trackage rights imposed with respect to OG&E's plant at Red Rock; the trackage rights imposed with respect to PPC's plant at Borger; and the trackage rights imposed with respect to GNBC.

40. Approval of the application in Finance Docket No. 32549 and the authority granted in Finance Docket No. 32549 (Sub-Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12) are subject to certain environmental conditions set forth in Appendix D.

41. All other conditions requested by any party to this proceeding are denied.

42. This decision shall be effective on September 22, 1995.

43. The requirement of an initial decision is waived pursuant to 49 U.SC. 11345(f). The decisions embraced herein are final decisions within the meaning of 49 U.S.C. 10327. Any administrative appeal will be entertained only under 49 U.S.C. 10327(g), which permits appeal only on the basis of material error, new evidence, or substantially changed circumstances.

By the Commission, Chairman Morgan, Vice Chairman Owen, and Commissioners Simmons and McDonald. Commissioners Simmons and McDonald commented with separate expressions.

APPENDIX A: ABBREVIATIONS

AAR	Association of American Railroads
ACL	American Commercial Lines, Inc.
AEPCO	Arizona Electric Power Cooperative, Inc.
ALJ	Administrative Law Judge
American Maize	American Maize-Products Company
Amtrak	National Railroad Passenger Corporation
APS	Arizona Public Service Company
ARU	Allied Rail Unions
ASARCO	ASARCO Incorporated
Atochem	Elf Atochem North America, Inc.
ATSF	The Atchison, Topeka and Santa Fe Railway Company
BEA	Business Economic Area
BLE	Brotherhood of Locomotive Engineers
BN	Burlington Northern Railroad Company
BNI	Burlington Northern Inc.
BNSF	BNSF Corporation
BRAC	Brotherhood of Railway Clerks
BRC	Brotherhood Railway Carmen
Bunge	Bunge Corporation
Cargill	Cargill, Incorporated
CBA	Collective Bargaining Agreement
CBOT	Chicago Board of Trade
CB&Q	Chicago, Burlington & Quincy Railroad Company
Cen-Tex	Cen-Tex Rail Link Ltd.
Chaco	Chaco Energy Company
Chaparral	Chaparral Steel Company
CKR	Central Kansas Railway
CM&W	Chicago, Missouri & Western Railway
CNW	Chicago and North Western Railway Company
Conrail	Consolidated Rail Corporation
CP&L	Central Power & Light Company
CPUC	California Public Utilities Commission
CSX	CSX Transportation, Inc.
CTC	Centralized Traffic Control
DOJ	United States Department of Justice
DRGW	Denver and Rio Grande Western Railroad Company
EA	Environmental Assessment
Farmrail	Farmrail System, Inc.
FEC	Florida East Coast Railway Company
FMRC	Farmrail Corporation
FRA	Federal Railroad Administration

Frisco	St. Louis-San Francisco Railway Company
FW&D	Fort Worth and Denver Railway Company
GN	Great Northern Railway Company
GNBC	Grainbelt Corporation
GTRR	Georgetown Railroad Company
GTWRY	Gateway Western Railway Company
H&E	Hollis & Eastern
HBT	Houston Belt & Terminal Railway Company
HHI	Herfindahl-Hirschman Index
HL&P	Houston Lighting & Power Company
IADOT	Iowa Department of Transportation
IAM	International Association of Machinists and Aerospace Workers
IC	Illinois Central Railroad Company
ICC	Interstate Commerce Commission
IDOT	Illinois Department of Transportation
K Line	"K" Line America, Inc.
KCS	Kansas City Southern Railway Company
KDOT	Kansas Department of Transportation
KG&E	Kansas Gas & Electric Company
KJRY	Keokuk Junction Railway
KPL	Kansas Power & Light Company
KSA	Kansas Shippers Association
KSW	Kansas Southwestern Railway
Kyle	Kyle Railroad Company
M&O	Maintenance and Operations
Milwaukee Road	Chicago, Milwaukee, St. Paul and Pacific Railroad Company
MKT	Missouri-Kansas-Texas Railroad Company
MPRR, MP	Missouri Pacific Railroad Company
MP	Milepost
MRL	Montana Rail Link
MWBC	Montana Wheat and Barley Committee
NAFTA	North American Free Trade Agreement
NAVL	North American Van Lines, Inc.
NITL	The National Industrial Transportation League
NP	Northern Pacific Railway Company
NS	Norfolk Southern Corporation
ODOT	Oklahoma Department of Transportation
OG&E	Oklahoma Gas and Electric Company
Owens-Corning	Owens-Corning Fiberglas Corporation
P&PU	Peoria & Pekin Union Railway Company
PC	Pacific Coast R. R. Co.

PNR	Panhandle Northern Railroad
Post EA	Post Environmental Assessment
PPC	Phillips Petroleum Company
PRB	Powder River Basin
RCAF	Rail Cost Adjustment Factor
RCAFA	RCAF, adjusted for productivity
RLA	Railway Labor Act
Rock Island	Chicago, Rock Island and Pacific Railroad Company
RSA	Rail Services Agreement
RTC	Rail Transportation Contract
Santa Fe, SF	The Atchison, Topeka and Santa Fe Railway Company
SCRRA	Southern California Regional Rail Authority
SEA	Section of Environmental Analysis
SFP	Santa Fe Pacific Corporation
SKOR	South Kansas & Oklahoma Railroad Inc.
Soo	Soo Line Railroad Company
SORR	South Orient Railroad
SP	SPT, DRGW, SSW, and SPCSL
SPCSL	SPCSL Corp.
SPI	The Society of the Plastics Industry, Inc.
SPLC	Standard Point Location Code
SPS	Southwestern Public Service Company
SP&S	Spokane, Portland and Seattle Railway Company
SPST	SPS and TUCO
SPT	Southern Pacific Transportation Company
SSW	St. Louis Southwestern Railway Company
STCC	Standard Transportation Commodity Code
SWGR	Seagraves, Whiteface and Lubbock Railroad Co.
TCU	Transportation•Communications Union
Telegraphers	Transportation Communication Employees' Union
TEP	Tucson Electric Power Company
TP&W	Toledo, Peoria & Western Railway Corporation
TUCO	TUCO INC.
UP	UPRR and MPRR
UPRR, UP	Union Pacific Railroad Company
URCS	Uniform Railroad Costing System
USDA	United States Department of Agriculture
USDOT	United States Department of Transportation
UTU	United Transportation Union
VCA	Voluntary Coordination Agreement
V.S.	Verified Statement
WCTL	Western Coal Traffic League
WFA	Western Fuels Association, Inc.

WFSC	Western Fuels Service Corp.
WJPA	Washington Job Protection Agreement of 1936
WPRR, WP	The Western Pacific Railroad Company
WRI, WSTR	Western Resources, Inc.
WRPI	Western Railroad Properties, Inc.
WT&J	Wichita, Tillman & Jackson
WUTR	The Wichita Union Terminal Railway Company

APPENDIX B: SETTLEMENT AGREEMENTS

UP Agreement. UP will receive overhead trackage rights over the Santa Fe line between Abilene, KS, and Superior, NE, allowing UP to serve all facilities at Superior that are, when the rights become effective, open to service by both BN and Santa Fe, either directly, by reciprocal switching, or by any other means.

SP Agreement. SP will receive trackage rights between Pueblo, CO, and Fort Worth, TX. For the most part, these trackage rights will be broken into two segments (over Santa Fe between Pueblo, CO, and Stratford, TX; over BN between Dalhart, TX, and Fort Worth, TX), which will be connected by SP's own line between Stratford and Dalhart. For the purpose of serving industries located at Amarillo, TX, however, these trackage rights will also allow SP to operate over Santa Fe between Stratford and Amarillo.

SP will have access: to all industries served directly or by reciprocal switching by either BN or Santa Fe at Amarillo, Plainview, and Lubbock; and to the SWGR at Lubbock. The access at Amarillo will be by direct physical switching. The access at Plainview and Lubbock will be by haulage service provided by BN/Santa Fe.

SP presently has overhead trackage rights over the BN line between Kansas City and Chicago. The SP settlement agreement, expanding these trackage rights, provides SP access to the TP&W at Bushnell, IL; and access to all industries served directly or by reciprocal switching by either BN or Santa Fe at Galesburg, IL, and Fort Madison, IA (and, because Fort Madison is not located on the BN line over which SP's trackage rights presently run, applicants will provide haulage services on carload traffic between Kansas City and Fort Madison on westbound traffic and between Fort Madison and Galesburg on eastbound traffic).

Between Hutchinson, KS, and Chicago, IL, SP will receive: new trackage rights to operate high speed automotive and intermodal trains over the Santa Fe main line; the right to connect with the TP&W at Lomax, IL, for such traffic; the right to interchange with other carriers at Streator, IL, for the purpose of movement to and from Chicago; and the right to connect with the IC at Joliet, IL, for the same purpose.

SP will receive the right to operate over the Santa Fe line between Topeka, KS, and Kansas City, KS.

SP will receive the right to operate over Santa Fe lines between Kansas City and Fort Worth (via Olathe and Cassoday, KS) and between Hutchinson and Winfield Junction, KS (via Wichita, KS). These will be overhead rights except for specified access to: the Central Kansas Railway (CKR) at Wichita; the South Kansas and Oklahoma Railroad (SKOR) at Winfield; industries served either directly or by reciprocal switching by BN or Santa Fe at Wichita; and certain industries at Hutchinson.

SP will grant BN/Santa Fe trackage rights over the SP line between El Paso, TX, and Hutchinson, KS, and between Hutchinson and Topeka (with access to all industries served by SP at Liberal and McPherson, KS, and at Hooker and Guymon, OK); and SP will provide haulage services to BN/Santa Fe between Caldwell, TX, and the Mexican gateway at Eagle Pass, TX, and between Caldwell and the City Public Service of San Antonio facilities at Elmendorf, TX.

KCS Agreement. BN/Santa Fe will furnish carload haulage services to KCS between Kansas City and: St. Joseph, MO; Lincoln, NE; and Council Bluffs, IA/Omaha, NE (excluding the Bayard Line, IA). The traffic that will move pursuant to these services: can be interchanged at St. Joseph, Lincoln, and Council Bluffs/Omaha; cannot originate or terminate at Kansas City; and cannot include coal.

BN/Santa Fe will furnish carload haulage services to KCS: between Neosho, MO, and connections with other carriers at East St. Louis, IL; between Neosho, MO, and Tupelo, MS; between Tupelo, MS, and connections with other carriers at Memphis, TN; and between Tupelo, MS, and East St. Louis, IL, connections. These services will be available for any carload commodity, except coal to any destination and except feed grains between Neosho and Tupelo. The KCS settlement agreement further provides that KCS will not cancel the existing BN/KCS rates and routes for the movement of feed grains between BN origins and the BN/KCS Tupelo interchange.

BN/Santa Fe will grant KCS the right to negotiate through transportation charges on BN's behalf on unit-train movements of coal between certain origins in the PRB and any of certain specified destinations. This traffic is to be interchanged between BN and KCS at Kansas City.

BN/Santa Fe will grant KCS access to all industries served directly by BN or Santa Fe at the time of consummation of common control, or open to BN and Santa Fe through reciprocal switching at the time of consummation of common control, at the following Texas locations: Fort Worth, North Fort Worth, Saginaw, Carrollton, and Irving. KCS will be able to use this access for traffic moving between any of the referenced points and points in Florida, Georgia, North Carolina, South Carolina, Tennessee, Mississippi, Alabama, and Louisiana (excluding DeRidder, LA), and Texarkana, AR/TX. The KCS settlement agreement further provides that BN/Santa Fe will grant KCS access at Houston to industries served by the Houston Belt and Terminal Railroad and the Port Terminal Railroad Association for traffic between such points and points in Florida, etc., upon the development of an acceptable means to implement such access with the concurrence of carriers with interests in those terminal entities.

KCS will furnish to BN/Santa Fe haulage services between Dallas, TX, and New Orleans, LA. Certain geographic limitations are applicable.

Kyle Agreement. The Kyle settlement agreement is a voluntary coordination agreement (VCA) that provides Kyle the right to quote through rates for the movement of specified commodities between certain points without additional concurrence from BN/Santa Fe.

Kyle will have the right to negotiate on behalf of BN/Santa Fe through transportation charges on shipments of grain and related commodities originating at Kyle origins and destined to Abilene, Atchison, Emporia, Newton, Kansas City, St. Joseph, Topeka, Wichita, Wellington, and Arkansas City. Traffic moving under this agreement will be interchanged at the present Kyle/Santa Fe interchange at Courtland, KS.

Kyle will have the right to name through transportation charges on shipments of nonmetallic minerals destined to any station on Kyle and originating at Ottawa, KS, Topeka, KS, or Kansas City, MO/KS.

BN/Santa Fe will have the right to negotiate through transportation rates on shipments of grain and related commodities moving from Kyle origins.

GTWRY Agreement. The existing Santa Fe/GTWRY Rail Services Agreement (RSA), under which GTWRY provides haulage services for Santa Fe between Kansas City and East St. Louis, was entered into in 1990 when GTWRY was created out of the bankrupt estate of the Chicago, Missouri and Western Railway (CM&W). The RSA includes, among other things, certain provisions affecting the ability of GTWRY to enter into haulage agreements with other carriers and to grant trackage rights to other carriers.

Those provisions of the RSA which bar GTWRY from entering into haulage agreements or granting trackage rights without the consent of Santa Fe will be of no further force and effect after January 1, 1997.

Cen-Tex Agreement. Cen-Tex now connects directly with Santa Fe and the Fort Worth and Western Railroad at Fort Worth, and can reach BN through contractual switching arrangements.

Cen-Tex (and its SORR affiliate) will now have access to all major carriers at Fort Worth. Cen-Tex will connect directly with UP and SP near Tower 55 at Fort Worth; it will connect with Santa Fe at a location north of Tower 55, and cars to be interchanged with KCS will be switched between that location and KCS at Alliance; it will have trackage rights to reach the Dallas Area Rapid Transit tracks north of Fort Worth; and it will also have rights to facilitate reaching RAILTRANS, another public transit agency in the Dallas-Fort Worth area.

GTRR Agreement. Santa Fe will furnish haulage services between interchanges at Temple or Caldwell, TX, and destinations on Santa Fe's present lines in Texas. GTRR will have the right to quote through rates via Santa Fe routing for shipments of broken or crushed stone, quarry stone, or rip rap, as long as the traffic is destined to points served by Santa Fe in the State of Texas as of May 3, 1995.

TP&W Agreement. BN will grant TP&W trackage rights over BN's line between Galesburg and Peoria, IL, for the purpose of connecting with BN and Santa Fe at Galesburg. The trackage rights will apply to traffic of all kinds, carload and intermodal, for all commodities except coal. TP&W will have the right to interchange between the trackage rights line and BN/Santa Fe at Galesburg and Peoria. TP&W will also have the right to interchange between the trackage rights line and the Peoria and Pekin Union Railway Company (P&PU). TP&W, however, will not have the right to access, for its own account, industries or facilities at Galesburg or on the line between Galesburg and Peoria.

TP&W will furnish haulage services to BN/Santa Fe between Galesburg and Peoria on carload and intermodal traffic, including interchange with the P&PU.

APPENDIX C: FINANCIAL RATIOS

Table 1

BNI/SFP
Various Pro Forma Financial Ratios
(Dollar Amounts in Millions)

	Base Year	Year 1	Year 2	Year 3	Normal Year
I. Pro Forma Fixed Charge Coverage Ratio					
1. Income Available For Fixed Charges	$ 921	$1,044	$1,353	$1,423	$1,480
2. Fixed Charges	374	374	365	343	316
3. Times Fixed Charge Coverage (L1/L2)	2.46	2.79	3.71	4.15	4.68
II. Pro Forma Cash Throw Off To Debt Ratio					
1. Net income	$315	$390	$584	$640	$691
2. Plus Depreciation & Amortization	618	619	620	620	620
3. Plus Deferred Income Taxes	166	166	166	166	166
4. Less Gain on Property Sales, Other, Etc.	(290)	(290)	(290)	(290)	(290)
5. Cash Flow Provided By Operations (L1+L2+L3-L4)	809	885	1,080	1,136	1,187
6. Long Term Debt Due Within One Year	370	370	370	370	370
7. Cash Throw Off To Debt (L5/L6)	2.19	2.39	2.92	3.07	3.21
III. Pro Forma Operating Ratio					
1. Operating Expenses	$6,212	$6,273	$6,041	$6,001	$5,960
2. Operating Revenues	7,108	7,292	7,369	7,399	7,415
3. Operating Ratio (L1/L2)	87.4%	86.0%	82.0%	81.1%	80.4%
IV. Pro Forma Debt to Debt Plus Equity Ratio					
1. Long Term Debt Due After One Year	$3,900	$3,929	$3,700	$3,415	$3,079
2. Tangible Shareholders' Equity	4,356	4,389	4,616	4,899	5,233
3. Total Debt Plus Equity (L1+L2)	8,256	8,318	8,316	8,314	8,312
4. Ratio of Debt to Debt Plus Equity (L1/L3)	47.2%	47.2%	44.5%	41.1%	37.0%

NOTES TO TABLE 1

SOURCES OF DATA

The data in this table were derived and computed from information included in the following submissions by applicants: (a) Volume 1 of the Application (pro forma financial statements for the base year, the first three years after the merger, and the normal year); and (b) Supplemental Verified Statement of Thomas N. Hund and Don S. Snyder (adjusted normal year financial statements which give effect to purchase accounting for the merger and the increase in debt and fixed charges from applicants' consummation of the tender offers for the acquisition of SFP common stock).

In compiling the data shown in the table for the base year and the first three years after the merger, we restated applicants' originally submitted data to reflect the revised data in the Hund/Snyder Supplemental Verified Statement, so that the data for all periods would be comparable and would give effect to purchase accounting and the tender offer transactions.

BASE YEAR DATA

The data shown in this table for the base year represent the 1993 consolidated data of both BNI and SFP, after adjustments made by applicants to exclude the following, as if they had occurred prior to 1993: (a) year-end 1993 assets and liabilities and 1993 income and expenses of SFP Gold Corp. (because SFP's 85% common stock interest in this affiliate was distributed to SFP's shareholders on September 30, 1994); (b) gain and related income tax effect from the sale of certain lines in California by SFP in March and June 1993; and (c) retroactive impact of a 1993 increase in federal corporate income tax rates.

DATA SUBSEQUENT TO BASE YEAR

Data subsequent to the base year (i.e., data for the first three years after the merger and the normal year) give effect to the estimated benefits from merged operations (increased revenues and traffic and cost savings), non-recurring expenditures necessary to implement the operating plan, increased dividends to shareholders based upon BNI's higher dividend rate, and the application of net increases in cash flow to the reduction of long-term debt payable after one year.

APPENDIX D: ENVIRONMENTAL MITIGATING CONDITIONS

The following environmental mitigating conditions have been imposed in Finance Docket No. 32549 and in Finance Docket No. 32549 (Sub-Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12).

1. Line Segment

1.1 Enid to Avard, OK (BN)

a. To minimize potential noise level impacts along the Enid to Avard, OK, rail line segment, the applicants shall consult with the appropriate state and local agencies to develop noise abatement plans. The applicants shall advise SEA[149] of the results of these consultations and provide SEA with a copy of any resulting noise abatement plans.

1.2 Perry to Enid, OK (BN)

a. To minimize potential noise level impacts along the Perry to Enid, OK, rail line segment, the applicants shall consult with the appropriate state and local agencies to develop noise abatement plans. The applicants shall advise SEA of the results of these consultations and provide SEA with a copy of any resulting noise abatement plans.

1.3 Dobbin to Houston, TX (BN)

a. To minimize potential noise level impacts along the Dobbin to Houston, TX, rail line segment, the applicants shall consult with the appropriate state and local agencies to develop noise abatement plans. The applicants shall advise SEA of the results of these consultations and provide SEA with a copy of any resulting noise abatement plans.

1.4 Barstow to San Bernardino, CA (Santa Fe)

a. The applicants shall consult with the appropriate Federal, state, and local agencies responsible for regulating air quality in Metro Los Angeles and Southeast Desert, CA, concerning any possible mitigation measures to reduce any potentially adverse emissions from the rail line segment in this ozone nonattainment area. The applicants shall advise SEA of the results of these consultations.

1.5 San Bernardino to Los Angeles, CA (Santa Fe)

a. The applicants shall consult with the appropriate Federal, state, and local agencies responsible for regulating air quality in Metro Los Angeles, CA, concerning any possible mitigation measures to reduce any potentially adverse emissions from the rail line segment in this ozone nonattainment area. The applicants shall advise SEA of the results of these consultations.

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[149] SEA is the Commission's Section of Environmental Analysis.

b. The applicants shall consult and meet with the Anaheim/Santa Fe Neighborhood Safety Coalition, the Southern California Regional Rail Authority, the Orange County Transportation Authority, the City of Anaheim, and SEA concerning noise levels and possible measures to mitigate noise impacts in the affected community. SEA will assist the parties in this consultation process.

1.6 Atwood to Los Angeles, CA (Santa Fe)

a. The applicants shall consult with the appropriate Federal, state, and local agencies responsible for regulating air quality in Metro Los Angeles, CA, concerning any possible mitigation measures to reduce any potentially adverse emissions from the rail line segment in this ozone nonattainment area. The applicants shall advise SEA of the results of these consultations.

1.7 Williams Jct., AZ, to Cadiz, CA (Santa Fe)

a. The applicants shall consult with the appropriate Federal, state, and local agencies responsible for regulating air quality in Southeast Desert, CA, concerning any possible mitigation measures to reduce any potentially adverse emissions from the rail line segment in this ozone nonattainment area. The applicants shall advise SEA of the results of these consultations.

1.8 Cadiz to Barstow, CA (Santa Fe)

a. The applicants shall consult with the appropriate Federal, state, and local agencies responsible for regulating air quality in Southeast Desert, CA, concerning any possible mitigation measures to reduce any potentially adverse emissions from the rail line segment in this ozone nonattainment area. The applicants shall advise SEA of the results of these consultations.

2. Rail Yards

2.1 North Houston Yard, TX (BN)

a. To minimize potential noise level impacts at the North Houston, TX, rail yard, the applicants shall consult with the appropriate state and local agencies to develop noise abatement plans. The applicants shall advise SEA of the results of these consultations and provide SEA with a copy of any resulting noise abatement plans. The applicants shall take measures to reduce nighttime operations at the west end of the yard in order to mitigate noise level impacts to affected residents.

3. Intermodal Facilities

3.1 Los Angeles, CA

a. The applicants shall consult with the appropriate Federal, state, and local agencies responsible for regulating air quality in Metro Los Angeles, CA, concerning any possible mitigation measures to reduce any potentially adverse emissions from the intermodal facility in this ozone nonattainment area. The applicants shall advise SEA of the results of these consultations.

b. The applicants shall conduct traffic studies to determine the impact on local traffic densities. The applicants shall make these traffic studies available to local jurisdictions, and shall advise SEA of the results of these traffic studies.

3.2 Fort Worth, TX

a. The applicants shall conduct traffic studies to determine the impact on local traffic densities. The applicants shall make these traffic studies available to local jurisdictions, and shall advise SEA of the results of these traffic studies.

3.3 Kansas City, KS

a. The applicants shall conduct traffic studies to determine the impact on local traffic densities. The applicants shall make these traffic studies available to local jurisdictions, and shall advise SEA of the results of these traffic studies.

3.4 Fresno, CA

a. The applicants shall conduct traffic studies to determine the impact on local traffic densities. The applicants shall make these traffic studies available to local jurisdictions, and shall advise SEA of the results of these traffic studies.

3.5 Richmond, CA

a. The applicants shall conduct traffic studies to determine the impact on local traffic densities. The applicants shall make these traffic studies available to local jurisdictions, and shall advise SEA of the results of these traffic studies.

4. All Rail Line Construction Sites

a. The applicants shall ensure that the construction contractor disposes of woody vegetation and other construction debris in a proper and legal manner and complies with all applicable state and local regulations.

b. The applicants shall use appropriate signs and barricades to control traffic disruptions during construction.

c. The applicants shall return roads used in the movement of construction equipment to a condition that is at least as good as the condition prior to construction.

d. The applicants shall comply with any Federal, state, and local laws and regulations relating to the movement of hazardous materials. In the case of a spill, the applicants shall follow appropriate emergency response procedures outlined in their Emergency Response Plans.
e. The applicants shall ensure that inspection and maintenance of the trackage and right-of-way are conducted in accordance with Federal Railroad Administration standards.
f. The applicants shall use Best Management Practices to control erosion, runoff, and surface instability during construction through the use of such measures as seeding, fiber mats, straw mulch, plastic liners, slope drains, and other erosion control devices. Once the track is constructed, the applicants shall establish vegetation on the embankment slope to provide permanent cover and to prevent potential erosion. If erosion problems develop, the applicants shall take steps to develop other appropriate erosion-control procedures.
g. The applicants shall use only qualified contractors for application of right-of-way maintenance herbicides and shall limit such application to the extent necessary for rail operations.
h. The applicants shall comply with all applicable Federal, state, and local requirements for the control of fugitive dust. The applicants shall control dust through applications of water spray or other appropriate measures. Following construction, the applicants shall seed new embankment slopes and disturbed slopes with native or introduced grasses to further reduce the effects of airborne dust agitated by wind and train operations.
i. The applicants shall control temporary noise from construction equipment by using work hour controls and maintenance of muffler systems on machinery.
j. If previously unsuspected archeological remains are uncovered during construction, the applicants shall consult with the State Historic Preservation Office.

5. Specific Rail Line Construction Sites

5.1 Cameron, IL

a. The applicants shall provide access to landowners whose property is crossed by the proposed rail line in accordance with the requirements of Illinois State law and execution of appropriate agreements with the relevant landowners.
b. The applicants shall apply to the Warren County Board of Appeals for a Special Use Exemption for railroad right-of-way and uses essential to railroad operations in Warren County, IL.
c. The applicants shall obtain and comply with a National Pollutant Discharge Elimination System stormwater permit for the rail line construction proposed in Cameron.

5.2 Enid, OK
   a. The applicants shall install standard and appropriate signals and warning devices, pursuant to consultations with state and local transportation agencies, at the points where the rail line construction crosses 10th and 16th Streets.
   b. The applicants shall consult with the Oklahoma Department of Environmental Quality to determine if a National Pollutant Discharge Elimination System permit is required or if they must submit plans to the Water Quality Programs Office if water and/or sewer lines are affected.

5.3 Fairmont, OK
   a. The applicants shall consult with the Oklahoma Department of Environmental Quality to determine if they must submit plans to the Water Quality Programs Office if water and/or sewer lines are affected.

5.4 Southern Portion of Perry, OK
   a. The applicants shall install standard and appropriate signals and warning devices, pursuant to consultations with state and local transportation agencies, at the point where the rail line construction in the southern portion of Perry crosses U.S. Highway 77.
   b. The applicants shall ensure that construction of the southern rail line is authorized under and shall comply with the provisions of Oklahoma General Permit Number OK00G2004, pursuant to Section 404 of the Clean Water Act, for the construction of the bridge over Calf Creek.
   c. The applicants shall minimize the clearing of vegetation along the Calf Creek channel and wetlands to reduce erosion in association with the construction of the rail line in the southern portion of Perry.
   d. The applicants shall keep heavy equipment out of the creek bed and wetlands to the extent possible for the rail line in the southern portion of Perry.
   e. The applicants shall ensure that all heavy equipment refueling and servicing at the rail line construction site in the southern portion of Perry is performed away from water courses to prevent accidental contamination of surface waters with petroleum products.
   f. The applicants shall consult with the Oklahoma Department of Environmental Quality to determine if they must submit plans to the Water Quality Programs Office if water and/or sewer lines are affected.
   g. The applicants shall ensure that any herbicides used for controlling right-of-way vegetation are approved by the U.S. Environmental Protection Agency for such purposes and minimize adverse effects on the aquatic environment.

5.5 Northeastern Portion of Perry, OK
   a. The applicants shall consult with the Oklahoma Department of Environmental Quality to determine if they must submit plans to the Water Quality Programs Office if water and/or sewer lines are affected.

5.6 Rail Line to ASARCO Spur Line, Amarillo, TX
   a. The applicants shall minimize the clearing of vegetation along the intermittent stream bed associated with the proposed rail line to the ASARCO spur line.
   b. The applicants shall keep heavy equipment out of the intermittent stream bed adjacent to the proposed rail line construction to the ASARCO spur line.
   c. The applicants shall ensure that all heavy equipment refueling and servicing is performed away from water courses to prevent accidental contamination of surface waters with petroleum products during construction of the rail line to the ASARCO spur line.
   d. The applicants shall ensure that any herbicides used for controlling right-of-way vegetation are approved by the U.S. Environmental Protection Agency for such purposes and minimize adverse effects on the aquatic environment around the rail line to the ASARCO spur line.
   e. The applicants shall quickly revegetate areas of the right-of-way that are not covered by tracks, using native plant species to reduce erosion.

5.7 Eastern Portion of Amarillo, TX
   a. None beyond recommended mitigation common to all rail line construction sites.

5.8 Southwest Quadrant, Dobbin, TX
   a. The applicants shall provide access to landowners at the proposed southwest construction segment whose property is crossed by the proposed rail line in accordance with the requirements of Texas law and execution of appropriate agreements with the relevant landowners.
   b. The applicants shall install standard and appropriate signals and warning devices, pursuant to consultations with state and local transportation agencies, at the points where the proposed southwest rail line construction crosses Route 1486.
   c. The applicants shall include construction measures for minimizing excavation of any existing creek channels.
   d. The applicants shall minimize the clearing of vegetation along the creek channel and wetlands to reduce erosion.
   e. The applicants shall ensure that all heavy equipment refueling and servicing is performed away from water courses to prevent accidental contamination of surface waters with petroleum products.
   f. The applicants shall ensure that any herbicides used for controlling right-of-way vegetation are approved by the U.S. Environmental Protection

Agency for such purposes and minimize adverse effects on the aquatic environment.

g. The applicants shall include construction measures for avoiding large trees with diameters greater than 12 inches. If avoidance of large trees is not possible, then the planting of a similar number of saplings of the same species is recommended on some available portion of railroad property as near as possible to the disturbed sites.

5.9 Southeast Quadrant, Dobbin, TX

a. The applicants shall include construction measures for minimizing excavation of any existing creek channels.

b. The applicants shall ensure that all heavy equipment refueling and servicing is performed away from water courses to prevent accidental contamination of surface waters with petroleum products.

c. The applicants shall ensure that any herbicides used for controlling right-of-way vegetation are approved by the U.S. Environmental Protection Agency for such purposes and minimize adverse effects on the aquatic environment.

d. The applicants shall include construction measures for avoiding large trees with diameters greater than 12 inches. If avoidance of large trees is not possible, then the planting of a similar number of saplings of the same species is recommended on some available portion of railroad property as near as possible to the disturbed sites.

5.10 North Side of Saginaw, TX

a. The applicants shall use cleared woody vegetation as brush piles to provide cover for wildlife rather than hauling or burning the cleared material.

b. The applicants shall ensure that the construction contractor disposes of other construction debris in a proper and legal manner and complies with all applicable state and local regulations.

c. The applicants shall provide access to landowners at the proposed rail line construction on the north side of Saginaw whose property is crossed by the proposed rail line in accordance with the requirements of Texas law and execution of appropriate agreements with the relevant landowners.

d. The applicants shall install standard and appropriate signals and warning devices, pursuant to consultations with state and local transportation agencies, at the point where the proposed rail line construction on the north side of Saginaw crosses Jarvis Road.

e. The applicants shall comply with the specifications and conditions set forth in the U.S. Army Corps of Engineers Nationwide Permit 26 for Headwaters and Isolated Water Discharges at the proposed rail line construction on the north side of Saginaw.

f. The applicants shall minimize the clearing of vegetation along the intermittent stream channel on the north side of Saginaw.
g. The applicants shall keep heavy equipment out of the intermittent stream channel to the extent possible.
h. The applicants shall ensure that all heavy equipment refueling and servicing is performed away from water courses to prevent accidental contamination of surface waters on the north side of Saginaw with petroleum products.
i. The applicants shall ensure that any herbicides used for controlling right-of-way vegetation are approved by the U.S. Environmental Protection Agency for such purposes and minimize adverse effects on the aquatic environment.

5.11 Center of Saginaw, TX

a. None beyond recommended mitigation common to all rail line construction sites.