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SERVICE DATE
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SURFACE TRANSPORTATION BOARD[1]

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY--CONTROL AND MERGER--SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

[Decision No. 61][2]

Decided: November 19, 1996

In Decision No. 44 (served August 12, 1996), we approved the common control and merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company)[3] and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company),[4] subject to various conditions. Common control was consummated on September 11, 1996.[5]

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[1] Proceedings before the Interstate Commerce Commission (ICC) that remained pending on January 1, 1996, must be decided under the law in effect prior to that date if they involve functions retained by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. This proceeding was pending with the ICC prior to January 1, 1996, and relates to functions retained under Surface Transportation Board (Board) jurisdiction pursuant to new 49 U.S.C. 11323-27. Citations are to the former sections of the statute, unless otherwise indicated.

[2] This decision embraces: Finance Docket No. 32760 (Sub-No. 1), Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Trackage Rights Exemption--Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company; Finance Docket No. 32760 (Sub-No. 2), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Petition for Exemption--Acquisition and Operation of Trackage in California, Texas, and Louisiana; and Finance Docket No. 32760 (Sub-No. 19), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Trackage Rights Exemption--Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., The Denver and Rio Grande Western Railroad Company, and The Southern Illinois & Missouri Bridge Company.

[3] Union Pacific Corporation is referred to as UPC. Union Pacific Railroad Company and Missouri Pacific Railroad Company are referred to collectively as UP.

[4] Southern Pacific Rail Corporation is referred to as SPR. Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp., and The Denver and Rio Grande Western Railroad Company are referred to collectively as SP.

[5] SPR was merged with and into UP Holding Company, Inc., a direct wholly owned subsidiary of UPC. See UP/SP-277 at 1. UPC, UP, SPR, and SP are referred to collectively as applicants. See Decision No. 44, slip op. at 7 n.3.

The *new facilities condition*, one of the several broad-based conditions we imposed in Decision No. 44, requires that BNSF[6] be granted the right to serve new facilities (including transload facilities, and specifically including transload facilities owned or operated by BNSF) on both SP-owned and UP-owned track over which BNSF receives trackage rights in the BNSF agreement. See Decision No. 44, slip op. at 106 (third paragraph) and 145-46 (the "new facilities and transloading facilities" requirement). See also Decision No. 44, slip op. at 12 n.15 (description of the BNSF agreement). Insofar as the new facilities condition concerns transload facilities, we shall refer to it as the *transload condition*.

UP/SP has filed a petition (UP/SF-275) seeking either clarification or reconsideration of the new facilities condition, including the transload condition. Replies[7] have been filed by: BNSF;[8] Geneva Steel Company (GSC);[9] Dow Chemical Company (Dow)[10]; the Chemical Manufacturers Association (CMA);[11] The National Industrial Transportation League (NITL);[12] The Society of the Plastics Industry, Inc. (SPI);[13] The Western Coal Traffic League (WCTL);[14] Sierra Pacific Power Company (SPP) and Idaho Power Company (IDPC);[15] Quantum Chemical Corporation (QCC);[16] Shintech Incorporated (Shintech);[17] The International Paper Company (IPC);[18] United States Gypsum Company (USG);[19] Champion International Corporation (CIC); and Kennecott Utah Copper Corporation (KUC).[20] Additional replies have been filed by:[21] UP/SP;[22] NITL;[23] BNSF;[24] and IPC.[25]

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[6] Burlington Northern Railroad Company (BN) and The Atchison, Topeka and Santa Fe Railway Company (SF) are referred to collectively as BNSF.

[7] We have also received a number of letters that oppose the UP/SP petition.

[8] BN/SF-68.

[9] GS-5.

[10] DOW-28.

[11] CMA-14.

[12] NITL-22.

[13] SPI-26.

[14] WCTL-24.

[15] The reply filed jointly by SPP and IDPC is designated SPP-18. SPP and IDPC are referred to collectively as SPP/IDPC.

[16] QCC-7.

[17] SHIN-3.

[18] IP-17.

[19] USG-4.

[20] KENN-22.

[21] So that we may decide in a fully informed manner the matters raised by the UP/SP-275 petition, we have accepted for (continued...)

We are denying the UP/SP-275 petition, both as initially filed and as modified by the UP/SP-285 reply.[26]

BACKGROUND

THE UP/SP-275 PETITION. UP/SP asks that we clarify or reconsider two aspects of the new facilities condition.[27]

Transload Facilities. UP/SP asks, in essence, that we clarify: (1) that BNSF cannot use its right to serve new transload facilities on UP lines to access exclusively-served shippers on UP lines; (2) that BNSF's right to serve new transload facilities on UP lines is only for the purpose of handling traffic transloaded to or from points on SP lines; (3) that BNSF cannot use its right to serve new transload facilities on SP lines to access exclusively-served shippers on SP lines; and (4) that BNSF's right to serve new transload facilities on SP lines is only for the purpose of handling traffic transloaded to or from points on UP lines. UP/SP contends that clarification is necessary because the transload condition, read literally, allows BNSF to serve, via new transload facilities on the lines where it will receive overhead trackage rights, not only traffic trucked to or from a point on the other merging railroad, but also traffic trucked to or from a point on the very line where the transload facility is located (or on a nearby branch line of that merging railroad).

UP/SP notes, by way of example, that a coal mine at Cameo, CO, on the SP mainline over which BNSF will receive overhead trackage rights, is served by only one railroad (SP), and that the nearest points on other railroads to or from which traffic

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[21](...continued)
filing the additional replies filed by UP/SP, NITL, BNSF, and IPC. We have also accepted for filing the TFI-3 reply filed by The Fertilizer Institute (TFI), wherein TFI supports the positions taken by NITL and certain other parties.

[22] UP/SP-285.

[23] NITL-24.

[24] BN/SF-71.

[25] IP-18.

[26] We will not address, in this decision, the matters raised by Utah Railway Company (URC) in its UTAH-7 pleading filed September 23, 1996. The UTAH-7 pleading, though it is styled a "response," seeks an altogether different clarification of BNSF's rights under the new facilities condition and the transload condition, and with respect to several specified shippers. We will address, in a subsequent decision, the matters that were raised by URC in its UTAH-7 pleading and that were discussed by BNSF in its BN/SF-72 reply thereto, including among others the argument raised by URC that the new facilities condition does not authorize BNSF to serve new facilities located on the Provo-Utah Railway Jct. line shared by URC and SP. Nothing said herein is intended to prejudge our decision on any of these matters.

[27] UP/SP also addresses certain additional details that, in its view, require clarification. See UP/SP-275 at 7 n.12. We address these details in the first four paragraphs of the "Additional Matters" section of this decision.

might be trucked (Denver, CO, served by BNSF and UP, and Creston, WY, served by UP) are over 225 highway miles away, so that trucking is not an economically feasible option. UP/SP further notes that, read literally, the transload condition permits BNSF to build and serve a new transload facility right at the mine, and to handle coal trucked a de minimis distance from the mine to that transload facility. Such an interpretation, UP/SP contends, would give the mine the very near equivalent of direct two-railroad service.

A literal reading of the transload condition, UP/SP insists, would come very close to opening all exclusively-served shippers on the overhead trackage rights lines to a second railroad. This result, UP/SP contends, would be unwarranted, because our purpose in imposing the transload condition was to preserve existing competitive options that shippers served by UP now have to truck their goods to or from transload facilities at points on SP, and vice versa. We crafted this condition, UP/SP argues, to preserve existing competitive alternatives, and we should therefore clarify that this condition should not be read to create new competition that did not exist prior to the merger.

Implicit in the clarification formula advanced by UP/SP is the contention that the transload condition does not allow BNSF to transload traffic moving from or to "off-rail" shippers, i.e., shippers located neither on UP nor on SP. UP/SP concedes that the transload condition could be interpreted as allowing BNSF to serve, via new transload facilities on the lines where it will receive overhead trackage rights, traffic trucked to or from a point not located on any UP/SP line. UP/SP would prefer that we not extend the transload condition to off-rail shippers, but adds that, if we do so, we should specify that the condition applies only if the distance from the shipper to a new BNSF-served transload facility on one of the merging railroads is at least as great as the distance from the shipper to the nearest point on the other merging railroad. This clarification, UP/SP insists, would avoid creating extensive new competition for off-rail shippers. UP/SP contends, by way of example, that, if an off-rail coal mine is located a mile from the SP mainline at Cameo and trucks to an SP transload facility at Cameo, with its closest theoretical transload options more than 225 miles away at Denver and Creston, it is not appropriate to allow BNSF to open its own new transload facility right next door to SP's transload facility at Cameo and to handle the mine's coal through that facility.

New Facilities On Certain UP Lines. UP/SP asks that we clarify that BNSF's right to serve new facilities on UP/SP lines over which it will have trackage rights does not apply to certain specific UP lines.

UP's Placedo-Harlingen Line. UP/SP asks that we clarify that BNSF's right to serve new facilities on UP/SP lines over which it will have trackage rights does not apply to UP's line between Placedo and Harlingen, TX. UP/SP notes that, prior to the merger, SP operated over this line via overhead trackage rights and had no local service rights, which necessarily meant that there was no pre-merger UP vs. SP competition for the location of new industries in this area. UP/SP contends that the purpose of our new facilities condition was the preservation of existing competition, and it therefore argues that the logic of that condition does not apply to the Placedo-Harlingen Line.

UP's Houston-Valley Junction and Fair Oaks-Bald Knob Lines. UP/SP notes that, pursuant to the CMA agreement,[28] the BNSF agreement was amended to give BNSF overhead trackage rights over UP's line between Houston, TX, and Valley Junction, IL (via Palestine, TX, and Little Rock, AR), and over UP's line between Fair Oaks and Bald Knob, AR. These rights, UP/SP insists, were granted to address claims that BNSF might encounter operating problems (i) running "against the flow" in the Houston-Memphis corridor, and (ii) operating into St. Louis over its own line. UP/SP contends that, because the sole purpose for these additional rights was operating convenience, the rationale for expanding BNSF's access to new facilities does not apply to them. UP/SP adds that BNSF's ability to serve new industries on the nearby SP line between Houston and Memphis fully preserves siting competition in this "2-to-1" corridor, and that BNSF itself has a line in the Memphis-St. Louis corridor where it can compete for new industry sitings.

UP's Line Between Craig Junction, TX, and SP Junction (Tower 112), TX. UP/SP and the City Public Service Board of San Antonio (CPSB), in negotiations respecting the CPSB conditions imposed in Decision No. 44,[29] have agreed that BNSF should be granted trackage rights over UP's "Track No. 2" line between Craig Junction and SP Junction (Tower 112). See Decision No. 52 (served September 10, 1996). UP/SP insists, however, that BNSF should not be allowed to serve "new industries or transloading facilities" on this line. See Decision No. 52, slip op. at 4. UP/SP contends that the new facilities condition we imposed in Decision No. 44 is not applicable to the BNSF trackage rights over Track No. 2 between Craig Junction and SP Junction (Tower 112) because these trackage rights were granted merely to provide BNSF an alternative route, solely for operating convenience, for CPSB traffic.[30]

THE UP/SP-285 REPLY. The UP/SP-285 reply is directed to certain arguments made by BNSF, DOW, NITL, WCTL, SPP/IDPC, QCC, and IPC in their replies to the UP/SP-275 petition.

Transload Condition. UP/SP initially asked us to clarify that the transload condition applies only to shippers trucking traffic between a point on one of the merging railroads and a new BNSF transloading facility at a point on the other merging railroad. UP/SP-275 at 5. See also UP/SP-275 at 6 n.10 (UP/SP would prefer that the transload condition not apply to "off-rail" shippers, but suggested that, if it did apply, it should apply only if the distance from the shipper to a new BNSF-served transload facility on one of the merging railroads is at least as

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[28] See Decision No. 44, slip op. at 18 (description of the CMA agreement). See also UP/SP-219 (CMA agreement is an attachment) and UP/SP-230 (same).

[29] See Decision No. 44, slip op. at 56-58 (relief requested by CPSB) and at 185-86 (relief granted to CPSB).

[30] In Decision No. 52, we reserved judgment on the Track No. 2 facilities restriction pending our review of the replies to the UP/SP-275 petition. See Decision No. 52, slip op. at 5. We incorporate herein by reference our discussion in Decision No. 52 respecting the relative merits of the Track No. 1 routing (which all agree is an inferior routing as respects CPSB traffic) and the Track No. 2 routing (which UP/SP has agreed that BNSF has the right to use for CPSB traffic; the only question is whether BNSF must also be allowed to serve new facilities located on Track No. 2).

great as the distance from the shipper to the nearest point on the other merging railroad). UP/SP now suggests that we might wish to clarify that the transload condition applies to "off-line" shippers if the distance between the shipper and the transload facility is at least as great as the distance between the shipper and the nearest point on the other merging railroad. An "off-line" shipper, as UP/SP is now using the term, is a shipper not located on the line of the merging railroad over which BNSF does not have trackage rights; and what this means is that an "off-line" shipper must be located *either* (i) at a point not on either UP or SP (in which instance it would be an "off-rail" shipper) *or* (ii) at a point on the line of the merging railroad over which BNSF does have trackage rights.

UP/SP contends that this new formulation of its request for clarification[31] addresses the argument that, where UP and SP have parallel lines and BNSF has trackage rights over only one of them, the clarification sought in the UP/SP-275 petition gives no remedy to a shipper located on the line over which BNSF has trackage rights. UP/SP contends that there is indeed a remedy: an off-line shipper in the second category (i.e., a shipper located at a point on the line of the merging railroad over which BNSF has trackage rights) would be allowed to truck its product to new transload sites at least as distant as sites it might have used pre-merger. The off-line shipper remedy, UP/SP insists, will be just as effective in preserving the existing level of competition occasioned by transloading opportunities for shippers located on the line over which BNSF has trackage rights as it is in preserving transloading options for shippers with no rail service at all.

New Facilities Condition. UP/SP initially asked us to clarify that the new facilities condition does not apply to certain UP lines, one of which is UP's Placedo-Harlingen line. UP/SP has now responded to arguments that its "requested clarification that the transloading condition does not apply to BNSF's trackage rights" over the Placedo-Harlingen line would eliminate the ability of shippers on adjacent SP lines, such as SP's Port Lavaca branch, to transload to UP on the Placedo-Harlingen segment. UP/SP-285, Reply at 6. UP/SP now indicates that it does not object to allowing shippers on SP lines adjacent to UP's Placedo-Harlingen segment to transload to BNSF facilities located on that segment. This limited transloading right, UP/SP claims, is consistent with the clarification it is seeking.

DISCUSSION AND CONCLUSIONS

APPLICABLE STANDARDS. A prior decision may be clarified whenever there appears to be a need for a more complete explanation of the action taken therein. See, e.g., FRVR Corporation--Exemption Acquisition and Operation--Certain Lines of Chicago and North Western Transportation Company--Petition For Clarification, Finance Docket No. 31205 (ICC served Jan. 29, 1988) (clarifying jurisdiction and other matters); St. Louis Southwestern Ry. Co. Compensation--Trackage Rights, 8 I.C.C.2d 80 (1991) (clarifying four technical issues not explicitly considered in the prior decisions in that proceeding). A decision clarifying a prior decision is, in many respects, the functional equivalent of a declaratory order.

A proceeding may be reopened, and reconsideration granted,

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[31] The second category of off-line shipper is not implicit in the UP/SP-275 petition; this aspect of the formulation is new.

upon a showing of material error, new evidence, or substantially changed circumstances. 49 CFR 1115.3(b) (1995). See also Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549 (ICC served Nov. 27, 1995) (Decision No. 43, slip op. at 2). Insofar as UP/SP seeks reconsideration, it has asserted material error and, to a limited degree, new evidence; it has not asserted substantially changed circumstances. As a practical matter, however, the UP/SP-275 petition, insofar as it seeks reconsideration, rests entirely upon the assertion of material error, because the new evidence that has been presented is only tenuously "new" and is certainly not material.

PRELIMINARY MATTER. We are not completely unsympathetic to the procedural arguments made by NITL in its NITL-24 reply, wherein it urges the denial of the UP/SP-285 motion for leave to file the reply attached thereto. The off-line concept is, as NITL suggests, entirely new; and it clearly should have been presented in the UP/SP-275 petition. We are nevertheless granting the UP/SP-285 motion for leave to file the reply attached thereto. The clarification sought in the UP/SP-285 reply, which would limit (vis-à-vis the clarification sought in the UP/SP-275 petition) *both* the loss of transload opportunities that were available prior to the merger *and* the loss of transload opportunities provided by the Decision No. 44 transload condition, does not really broaden the issues; as a practical matter, the clarification sought in the UP/SP-285 reply actually narrows the issues. There is no indication that UP/SP has acted in bad faith in presenting the off-line concept at a late date. The UP/SP-285 reply was likely prompted by UP/SP's assessment that the "all or nothing" approach of the UP/SP-275 petition might not be the best approach. Accepting the UP/SP-285 reply is not likely to be prejudicial to opposing parties. The UP/SP-285 pleading consisted of a motion to which was attached a reply; the contents of this pleading all but invited responses by parties such as NITL; and the responsive pleading, like NITL's, could easily have addressed the merits. The UP/SP-285 pleading has not resulted in a substantial delay in the issuance of this decision.

CLARIFICATION. Insofar as the UP/SP-275 petition seeks clarification, we are denying it. The new facilities condition should be read literally: BNSF may serve any new facility (except as otherwise indicated) located post-merger on any UP/SP line over which BNSF has received trackage rights in the BNSF agreement. The transload condition should likewise be read literally: BNSF may serve any new transload facility, including those owned or operated by BNSF itself, located post-merger on any UP/SP line over which BNSF has received trackage rights in the BNSF agreement; and BNSF's right to serve a new transload facility includes the right to handle all traffic transloaded at that facility.

The transloads envisioned by the transload condition are not limited to truck transloads. Truck is, of course, the predominant mode of transloading, so that it is only natural, when speaking of transloading, to make reference to truck transloads. See, e.g., Decision No. 44, slip op. at 106 ("Transloading also results in additional costs, as freight is first loaded into a truck, and then reloaded into a freight car, or the reverse."). Truck, however, is not the only mode of transloading. The transloads covered by the transload condition also include product transfers involving barges and intermodal containers and product transfers between rail cars, see SPI-26 at 13, as well as new transload technologies that may be developed in the future, see DOW-28 at 2 n.2

RECONSIDERATION. We are denying the UP/SP-275 petition to the extent it seeks reconsideration. The new facilities and transload conditions that we imposed were appropriately crafted and necessary to allow approval of this merger.

New Facilities & Transload Conditions: Origins. In Decision No. 44 we imposed "a number of broad-based conditions that augment the BNSF agreement to help ensure that the BNSF trackage rights will allow BNSF to replicate the competition that would otherwise be lost when SP is absorbed into UP." Decision No. 44, slip op. at 145. Because the UP/SP-275 petition concerns two of these broad-based conditions, we will briefly discuss the concerns that prompted these conditions.

Prior to the UP/SP merger, three Class I railroads operated throughout the Western United States: UP, SP, and BNSF. Their operations, however, were not uniform in geographical scope. All three operated at some points and in some corridors; at other points and in other corridors, only two operated; and, at still other points and in still other corridors, only one operated. Opponents of the merger argued that an unconditioned merger was certain to have an anticompetitive effect at all points and in all corridors that, as a consequence of the merger, would experience *either* a 3-to-2 reduction in competitive rail options *or* a 2-to-1 reduction in competitive rail options.

With respect to the 3-to-2 problem the applicants in the UP/SP proceeding countered with the argument that, throughout the Western United States, UP/SP vs. BNSF competition following the merger would be stronger and more intense, and certainly no weaker and no less intense, than the three-way competition that existed prior to the merger. We agreed with this argument. See, e.g., Decision No. 44, slip op. at 119: "We have examined in detail the nature of the 3-to-2 traffic at issue, and have determined that it presents little potential for significant, merger-related competitive harm."

This disposed of the 3-to-2 problem, but not the 2-to-1 problem. With a 2-to-1 reduction in competitive rail options, post-merger rail vs. rail competition would have been nonexistent. Applicants chose to address the 2-to-1 problem by working out a settlement that they argued would preserve 2-to-1 intramodal competition at all points and in all corridors that, prior to the merger, were served both by UP and by SP but by no other railroad. On September 25, 1995, only 7 weeks after the UP/SP merger had first been announced and 2 months prior to filing their application, applicants entered into a settlement with BNSF addressing the 2-to-1 problem. The BNSF agreement, applicants insisted, would allow BNSF to replicate the rail vs. rail competition that would otherwise be lost with the merger of SP into UP.

Many opponents of the merger, however, did not see in the BNSF agreement an entirely satisfactory resolution of the 2-to-1 problem, and two of the arguments the opponents made are of particular interest with respect to the new facilities condition and the transload condition.

(1) The BNSF agreement, certain opponents noted, allowed BNSF access only to 2-to-1 shippers at points served by UP and SP and no other railroad. Pre-merger UP vs. SP competition, these opponents insisted, was far broader than that, and included: potential build-outs or build-ins; the potential to truck transload; the potential to use joint truck/rail or barge/rail movements; the ability to shift production among numerous plants located on UP and SP; the ability to relocate plant facilities;

the ability to play UP and SP against each other in deciding where to locate new facilities; and source and product competition between shippers located on UP and shippers located on SP. See, e.g., Decision No. 44, slip op. at 27-28 (arguments of The Kansas City Southern Railway Company).

(2) The BNSF agreement, certain opponents added, was insufficient even with respect to the 2-to-1 shippers actually covered by the BNSF agreement. Allowing BNSF to carry only the traffic of these shippers, these opponents insisted, would be inadequate because the 2-to-1 traffic base would be too small to enable BNSF to achieve efficient operations. See, e.g., Decision No. 44, slip op. at 41 (arguments of SPI).

In the CMA agreement, applicants made certain commitments partially curing these and other deficiencies that certain opponents of the merger had identified in the BNSF agreement. CMA Paragraph 2, which is of particular concern here, provided that the BNSF agreement would be amended to grant BNSF the right to serve any new shipper facility (not including expansions of or additions to existing facilities or load-outs or transload facilities) located subsequent to the consummation of the merger on any SP-owned line over which BNSF received trackage rights in the BNSF agreement. CMA Paragraph 2, however, was an incomplete solution to the problems it purported to solve. In Decision No. 44, therefore, we expanded CMA Paragraph 2 in two respects: first, by requiring that BNSF be granted the right to serve new facilities on both SP-owned *and* UP-owned track over which BNSF would receive trackage rights; second, by requiring that the term "new facilities" was to include transload facilities, including those owned or operated by BNSF. Decision No. 44, slip op. at 145-46.

New Facilities & Transload Conditions: Purposes. Our new facilities and transload conditions were intended to serve two analytically distinct purposes. These conditions were imposed: (1) so that the post-merger competitive options provided by BNSF vs. UP/SP competition would replicate the pre-merger competitive options provided by UP vs. SP competition; and (2) so that BNSF could achieve sufficient traffic density on its trackage rights lines. See Decision No. 44, slip op. at 106: "[W]e have devised specific conditions [including, but not limited to, the new facilities condition and the transload condition] directly addressing both the competitive problems that have been raised with the BNSF agreement and the CMA agreement and concerns about whether BNSF will have sufficient traffic to compete effectively."

Replicating Pre-Merger Competitive Options. The BNSF agreement, which was intended to allow BNSF to replicate the competition provided by an independent SP at 2-to-1 points and with respect to 2-to-1 shippers, was initially hailed by applicants as preserving *all* of the pre-merger competitive options provided by UP vs. SP competition. We recognized, however, that the BNSF agreement, even as supplemented by the CMA agreement, did not preserve all pre-merger competitive options. We recognized that many shippers without direct access to both UP and SP nevertheless benefitted from UP vs. SP competition. A shipper with direct access only to one railroad might have a transload option to the other; a shipper, though it had no direct rail access at all, might have transload options to both railroads; and a shipper, though it had direct access only to one railroad, might benefit from UP vs. SP competition in connection with the siting of a new plant. See, e.g., Decision No. 44, slip op. at 124: "[W]hen UP or SP lines run near the plant of an exclusively served shipper, the ability of that shipper to

transload or build out to a second carrier can provide important leverage in rate and service negotiations with the carrier providing direct service to the plant . . . ." The BNSF agreement, even as supplemented by CMA Paragraph 2, did not entirely preserve these pre-merger competitive options.[32]

The new facilities and transload conditions were intended, in part, to preserve the indirect UP vs. SP competition provided by siting and transload options. By requiring that BNSF be allowed to serve any new facility (except as otherwise indicated) located post-merger on any UP/SP line over which BNSF received trackage rights in the BNSF agreement, we guaranteed that all pre-merger UP vs. SP siting competition would survive the merger. By requiring that BNSF be allowed to serve any new transload facility, including those owned or operated by BNSF itself, located post-merger on any UP/SP line over which BNSF received trackage rights in the BNSF agreement, we guaranteed that all pre-merger UP vs. SP transload competition would likewise survive the merger.

Achieving Sufficient Traffic Density. The trackage rights provided for in the BNSF agreement were not unprecedented; trackage rights have often been imposed as remedies in merger cases. These trackage rights, however, were unprecedented in scope: they extended over some 4,000 miles of UP/SP lines. The great distances spanned by the BNSF trackage rights prompted much concern, because these were, for the most part, overhead trackage rights authorizing local service only at the 2-to-1 points. BNSF would therefore be carrying only two categories of traffic over its trackage rights lines: traffic moving from or to the 2-to-1 points, which represented "only a fraction of the total traffic" on the trackage rights lines, Decision No. 44, slip op. at 133; and traffic generated on BNSF's own lines and routed over the trackage rights lines. Given the great distances involved, there was concern that BNSF might not be able to achieve sufficient traffic density to conduct effective operations on its trackage rights lines.

The new facilities and transload conditions were intended, in part, to enable BNSF to achieve sufficient traffic density on the trackage rights lines, not only in the near future but in the more distant future as well. We concluded that, with these and certain other conditions, BNSF would be able to compete efficiently for the 2-to-1 traffic opened up to it by the BNSF agreement. Decision No. 44, slip op. at 133 and 140.[33]

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[32] See, e.g., Decision No. 44, slip op. at 124: "Applicants, for example, address the loss of transloading options by allowing BNSF to locate transloading centers only at 2-to-1 points. Applicants maintain that truck movements to new BNSF transloading centers at 2-to-1 points or to centers on BNSF's own lines would be sufficient to ensure that no shipper previously enjoying such options would be hampered by this limitation. But today UP or SP may locate transloading facilities anywhere on their lines to reach shippers on the other carrier."

[33] See also Decision No. 44, slip op. at 132: "The dispatching protocol, additional trackage rights permitting BNSF to participate in directional running, the availability of additional SIT [storage-in-transit] facilities, and BNSF's ability to access additional traffic now under contract to UP or SP and to obtain transload and build-out traffic combine to ensure that these trackage rights will be a successful remedy."

UP/SP-275 Petition. The relief requested by UP/SP in the UP/SP-275 petition, even as scaled back in the UP/SP-285 reply, would be inconsistent with the purposes served by the new facilities condition and the transload condition.

New Facilities Condition. With respect to each of the lines discussed by UP/SP vis-à-vis the new facilities condition, the relief requested by UP/SP is inconsistent with one or the other of the purposes served by this condition.

(1) Prior to the merger, UP shippers located on the Placedo-Harlingen Line could have sited new facilities on the SP lines at both ends and at the middle of the Placedo-Harlingen Line, and SP shippers located on the SP lines at both ends and at the middle of the Placedo-Harlingen Line could have sited new facilities on the Placedo-Harlingen Line. The relief sought by UP/SP vis-à-vis the Placedo-Harlingen Line would result in the elimination of competitive siting options that existed prior to the merger, and, for this reason alone, is unacceptable.

(2) The original version of the BNSF agreement did not include the Houston-Valley Junction and Fair Oaks-Bald Knob Lines, and was therefore subject to the objection that BNSF would be handicapped in the Houston-Memphis-St. Louis corridor by UP/SP's anticipated "directional flow" operations. See, e.g., Decision No. 44, slip op. at 41 (arguments of SPI). These lines were later added to the BNSF agreement (pursuant to CMA Paragraph 1) to meet this and other related objections, and BNSF's trackage rights over these lines were not intended to rectify competitive problems of shippers on these lines. But the competitive justification was only one of two broad justifications underlying the new facilities and transload conditions; the traffic density justification was the second. The addition of the Houston-Valley Junction and Fair Oaks-Bald Knob Lines to the BNSF agreement solved one problem (the directional flow handicap) but did not solve, indeed it exacerbated, another (the insufficient traffic density problem). Because CMA Paragraph 1 expanded the scope of the BNSF trackage rights while providing no extra traffic on the Houston-Valley Junction and Fair Oaks-Bald Knob Lines, opponents of the merger argued that CMA Paragraph 1 would actually make the traffic density problem worse. See, e.g., Decision No. 44, slip op. at 39-40 (arguments of NITL).

The relief sought by UP/SP vis-à-vis the Houston-Valley Junction and Fair Oaks-Bald Knob Lines is inconsistent with the traffic density justification underlying the new facilities and transload conditions, and is, for this reason, unacceptable. We do not intend to jeopardize BNSF's ability to achieve sufficient traffic density on these lines.

(3) We are not persuaded by UP/SP's argument that the line between Craig Junction and SP Junction (Tower 112) was added to the BNSF agreement merely to provide BNSF an alternative route for handling CPSB's traffic: this "alternative" route is the only route that BNSF and CPSB ever contemplated for this traffic, and it is the route we would have required had the issue been put before us. The relief sought by UP/SP vis-à-vis this line is inconsistent with the traffic density justification underlying the new facilities and transload conditions, and is, for this reason, unacceptable.[34]

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[34] In Decision No. 52, we directed BNSF to accept, pending our review of the UP/SP-275 petition, the Track No. 2 facilities (continued...)

Transload Condition. This matter is best illustrated by an example. Suppose that BNSF has trackage rights over an SP line but not over a nearby UP line. Suppose also that a UP shipper is located on the UP line, an SP shipper is located on the SP line, and two off-rail shippers are located on neither line. Suppose also that off-rail shipper #1 is located closer to the SP line and at a greater distance from the UP line, and that off-rail shipper #2 is located closer to the UP line and at a greater distance from the SP line.

As respects shippers located on the SP line (our hypothetical SP shipper) and off-rail shippers located closer to the SP line and at a greater distance from the UP line (our hypothetical off-rail shipper #1), the relief requested in the UP/SP-275 petition, as scaled back in the UP/SP-285 reply, would impose a distance-based handicap on BNSF transload operations. With respect to these shippers, BNSF could not simply set up a transload facility at any convenient point on its SP trackage rights line; rather, BNSF could conduct transloads for the SP shipper and for off-rail shipper #1 if, but only if, the distance between the shipper and the BNSF transload point were greater than or equal to the distance between the shipper and the nearest UP point. The distance criterion would matter in any case in which the distance between the shipper and the most convenient BNSF transload location was less than the distance between the shipper and the nearest UP point. In any such situation, the revised formulation advocated by UP/SP would effectively prohibit a BNSF transload operation at the most convenient location. BNSF might still be able to conduct the transload operation, but the distance would necessarily have to be greater and the cost of the off-rail movement would necessarily have to be higher. And, in an indeterminate number of cases, the extra distance and the resulting extra cost would make a BNSF transload operation economically impractical.

The transload relief requested by applicants is thus inconsistent with the traffic density purpose served by the transload condition, and is therefore unacceptable. We do not intend to jeopardize BNSF's ability to achieve sufficient traffic density on the trackage rights lines provided for in the BNSF agreement.

We are not unsympathetic to UP/SP's concern that a literal reading of the transload condition will allow BNSF to operate as if it directly reached *all* exclusively served UP/SP shippers on the trackage rights lines. That was not our intent in imposing this condition. BNSF will be allowed to access exclusively served shippers only by a legitimate transload operation. By way of example, we do not expect that BNSF will construct a truck transload facility adjacent to an exclusively served coal mine, and then truck the coal a short distance (say, 100 feet) from the mine to the facility; that would not be acceptable. A legitimate transload operation will necessarily entail *both* the construction of a rail transload facility as that term is used in the industry *and* operating costs above and beyond the costs that would be incurred in providing direct rail service. The Board remains available to resolve controversies if applicants believe that

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[34] (...continued)
restriction agreed to by UP/SP and CPSB. See Decision No. 52, slip op. at 5. The action we are taking today effectively nullifies this facilities restriction. We therefore anticipate that the relevant parties (UP/SP, BNSF, and CPSB) will make conforming amendments to the BNSF agreement and the Sealy Trackage Rights Agreement.

BNSF is attempting to expand the transload condition beyond its intended purpose.

ADDITIONAL MATTERS. (1) In Decision No. 44, slip op. at 1-2, the first sentence of footnote 2 should be revised to read as follows: "The Finance Docket No. 32760 (Sub-No. 8) proceeding, wherein applicants seek an exemption from the trucking company acquisition requirements of old 49 U.S.C. 11343-44, involves a function that is not subject to our jurisdiction under the law in effect on and after January 1, 1996."

(2) In Decision No. 44, slip op. at 8, we indicated in footnote 5 that SSW was a 99.9%-owned subsidiary of SPR. This statement was correct. See UP/SP-22 at 66 (SSW was a 99.9%-owned *direct* subsidiary of SPT, which was itself a 100%-owned *direct* subsidiary of SPR; it was therefore correct to say that SSW was a 99.9%-owned "subsidiary" of SPR, because the word "subsidiary" is generally understood to embrace both a *direct* subsidiary and an *indirect* subsidiary).

(3) In Decision No. 44, slip op. at 63, we inadvertently omitted the period at the end of the page. The last paragraph on page 63, with the missing period included, was intended to read as follows: "LCRA/Austin adds, however, that the BNSF agreement should effectively preserve these trackage rights (section 4b allows BNSF to serve FPP), assuming that BNSF is able to operate efficiently and economically over the trackage rights lines."

(4) In Decision No. 44, slip op. at 198-99 and at 199 n.240, we indicated that applicants had represented that the Sierra Army Depot at Herlong, CA, was covered by Section 8i of the BNSF agreement (the omnibus clause), and we noted that we expected that applicants would adhere to this representation. We added, however, that although Herlong was listed as a 2-to-1 point in Section 8i of the BNSF agreement dated September 25, 1995, it was not listed as a 2-to-1 point in Section 8i as amended by Section 6c of the supplemental agreement dated November 18, 1995, and as further amended by Section 6a of the second supplemental agreement dated June 27, 1996. We now wish to note that Herlong: (i) is not covered by the Section 8i omnibus clause; but (ii) is covered by Section 1b of the BNSF agreement. See Section 1b of the BNSF agreement, as amended by Section 1b of the second supplemental agreement dated June 27, 1996 ("The trackage rights granted under this section shall be bridge rights for the movement of overhead traffic only, except for the local access specified herein. BNSF shall receive access on such lines . . . to . . . '2-to-1' shipper facilities at points listed on Exhibit A to this Agreement."). See also Section 9a of the supplemental agreement dated November 18, 1995 (inserting "Herlong, CA" in the "Points Referred to in Section 1b" category of Exhibit A).

(5) BNSF notes that UP/SP has apparently not challenged the applicability to UP's Placedo-Harlingen line of the build-in/build-out condition, Decision No. 44, slip op. at 146, but adds that if the UP/SP petition "can be read as doing so," we should clarify that BNSF can serve build-ins/build-outs on that line. BN/SF-68 at 11 n.8. We doubt that UP/SP has made any such challenge, but we think it best to note that the build-in/build-out condition is applicable *both* to shippers on the Placedo-Harlingen line that can build out to an SP line *and* to shippers on any SP line that can build out to the Placedo-Harlingen line. See CMA Paragraph 13, which applies to any situation in which a shipper has a facility that, pre-merger, was solely served by UP but could have had a build-in/build-out to a point on SP (and vice versa). Our own build-in/build-out

condition expands upon CMA Paragraph 13: by making it applicable to all shippers; by removing the time limit previously agreed to by UP/SP and CMA; and by clarifying that a shipper invoking this condition need not demonstrate economic feasibility. See Decision No. 44, slip op. at 146. But the build-in/build-out condition imposed in Decision No. 44 does not alter the basic framework established by CMA Paragraph 13.[35]

(6) WCTL asks, among other things, that we "expressly confirm that BNSF is entitled to use its trackage rights over the Placedo-Harlingen line to serve shippers who are presently served by SP and who may desire to obtain UP service at a point on that line via a new or transloading facility." WCTL-24 at 14. As explained elsewhere in this decision, we are denying the relief requested by UP/SP; we think it appropriate to observe that this denial constitutes the "express confirm[ation]" sought by WCTL; but we also think it appropriate to add that the new facilities condition (including the transload condition) provides that BNSF may use its trackage rights over the Placedo-Harlingen line to serve not only the shippers referenced in this paragraph but other shippers as well (e.g., any shipper that locates a "new facility" on the Placedo-Harlingen line).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The UP/SP-285 motion for leave to file the reply attached thereto is granted.

2. The TFI-2 motion for leave to file the TFI-3 reply is granted.

3. The IP-18 motion for leave to file the IP-18 reply is granted.

4. The UP/SP-275 petition, both as initially filed and as modified by the UP/SP-285 reply, is denied.

5. This decision shall be effective on the date of service.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams
Secretary

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[35] CMA Paragraph 13 provides that BNSF will be granted any trackage rights that may be necessary for BNSF to reach the build-in/build-out point. CMA is therefore wrong in suggesting, see CMA-14 at 5, that a build-in/build-out cannot run to a parallel line over which BNSF does not have trackage rights.

SERVICE LIST FOR: 26-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

P[illegible], K. BIBA, HOUSE COUNSEL
F[illegible]OSA PLASTICS CORP.
9 PEACH TREE HILL ROAD
LIVINGSTON NJ 07039 US

KEN WILSON
282 BALDWIN AVE
HASBROUCK HEIGHTS NJ 07604-2304 US

OSCAR J. ABELLO, PRESIDENT
"K" LINE AMERICA, INC.
535 MOUNTAIN AVENUE
MURRY HILL NJ 07974 US

TINA MASINGTON, PLAN. ANAL.
"K" LINE AMERICA, INC.
535 MOUNTAIN AVENUE
MURRAY HILL NJ 07974 US

GEORGE J. FRANCISCO, JR.
ELLIPSE SHIPPING CENTER
4201 CHURCH ROAD - SUITE 7
MT LAUREL NJ 08054 US

RONALD J. HENEFELD
PPG INDUSTRIES, INC.
ONE PPG PLACE - 35 EAST
PITTSBURGH PA 15272-0001 US

RICHARD J. RESSLER
UNION PACIFIC CORP.
EIGHTH AND EATON AVENUES, MARTIN TOWER
BETHLEHEM PA 18018 US

CARL W. VON BERNUTH
UNION PACIFIC CORP.
EIGHTH & EATON AVENUES
BETHLEHEM PA 18018 US

RICHARD H. GROSS
3801 WEST CHESTER PIKE
[illegible] TOWN SQUARE PA 19073 US

WILLIAM E HARVEY
3801 WEST CHESTER PIKE
NEWTON SQUARE PA 19073 US

LARRY T. JENKINS
ARCO CHEMICAL COMPANY
3801 WEST CHESTER PIKE
NEWTON SQUARE PA 19073-3280 US

ANNE E. TREADWAY
CONSOLIDATED RAIL CORP.
P O BOX 41416
2001 MARKET STREET
PHILADELPHIA PA 19101-1416 US

JONATHAN M BRODER
CONSOLIDATED RAIL CORP
PO BOX 41416
2001 MARKET STREET 16-A
PHILADELPHIA PA 19101-1416 US

CONSTANCE L. ABRAMS
CONSOLIDATED RAIL CORP.
2001 MARKET STREET 16-A, TWO COMMERCE SQUAR
PHILADELPHIA PA 19101-1416 US

EDWARD B. HYMSON
CONRAIL
2001 MARKET STREET 16-A
PHILADELPHIA PA 19101-1416 US

BRUCE B. WILSON
CONSOLIDATED RAIL CORP.
2001 MARKET STREET
PHILADELPHIA PA 19101-1417 US

JOHN L ABBOTT
FMC CORPORATION
1735 MARKET STREET
PHILADELPHIA PA 19103 US

ERIC M. HOCKY
GOLLATZ, GRIFFIN, EWING
213 WEST MINER STREET
WEST CHESTER PA 19381-0796 US

SERVICE LIST FOR: 26-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

CHARLES N. BEINKAMPEN
DUPONT SOURCING
1007 MARKET STREET, ROOM B-6236-A
WILMINGTON DE 19898 US

MARTIN W. BERCOVICI
KELLER & HECKMAN
1001 G ST NW SUITE 500 WEST
WASHINGTON DC 20001 US

TERRENCE D. JONES
KELLER AND HECKMAN
1001 G STREET NW STE 500 WEST
WASHINGTON DC 20001 US

LESLIE E. SILVERMAN
KELLER & HECKMAN
1001 G STREET NW STE 500 WEST
WASHINGTON DC 20001 US

DOUGLAS J. BEHR
KELLER & HECKMAN
1001 G STREET NW STE 500 WEST
WASHINGTON DC 20001 US

ROBERT L. MCGEORGE
U. S. DEPT. OF JUSTICE, ANTITRUST DIVISION
555 4TH STREET N W RM 9104
WASHINGTON DC 20001 US

EDWARD WYTKIND, EXECUTIVE DIRECTOR
TRANSP TRADES DEPT AFLCIO
400 N CAPITOL ST SW STE 861
WASHINGTON DC 20001 US

JOAN S HUGGLER
U. S. DEPT. OF JUSTICE, ANTITRUST DIVISION
555 4TH STREET N W RM 9104
WASHINGTON DC 20001 US

ROGER W. FONES
US DEPT. OF JUSTICE
555 4TH STREET NW
WASHINGTON DC 20001 US

RICHARD G SLATTERY
AMTRAK
60 MASSACHUSETTS AVENUE N E
WASHINGTON DC 20002 US

PAUL H. LAMBOLEY, ESQ.
KECK MAHIN & CATE
555 TWELFTH STREET NW SUITE 600
WASHINGTON DC 20004 US

JOSEPH GUERRIERI, JR.
GUERRIERI, EDMOND, ET. AL
1331 F STREET N W, 4TH FLOOR
WASHINGTON DC 20004 US

DEBRA L. WILLEN
GUERRIERI, EDMOND, ETAL
1331 F STREET N W, 4TH FLOOR
WASHINGTON DC 20004 US

DAVID A ASHMORE
ARNOLD & PORTER
555 TWELFTH STREET NW
WASHINGTON DC 20004 US

MICHAEL N. SOHN
555 TWELFTH STREET NW
WASHINGTON DC 20004 US

MARK SCHECTER
HOWREY & SIMON
1299 PENNSYLVANIA AVE N W
WASHINGTON DC 20004 US

ALAN E LUBEL
TROUTMAN SANDERS
601 PENNSYLVANIA AVE N W, NORTH BLDG SUITE 64
WASHINGTON DC 20004 US

ROBERT M. BRUSKIN, ESQ.
HOWREY & SIMON
1299 PENNSYLVANIA AVE NW
WASHINGTON DC 20004 US

SERVICE LIST FOR: 26-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

GEORGE W MAYO, JR.
HOGAN & HARTSON
5[illegible] THIRTEENTH STREET NW
W[illegible]INGTON DC 20004-1161 US

ERIC VON SALZEN
HOGAN & HARTSON
555 THIRTEENTH STREET N W
WASHINGTON DC 20004-1161 US

ROSEMARY H. MCENERY
HOWREY & SIMON
1299 PENNSYLVANIA AVE N W
WASHINGTON DC 20004-2402 US

MARK L JOSEPHS
HOWREY & SIMON
1299 PENNSYLVANIA AVE N W
WASHINGTON DC 20004-2402 US

CHARLES W. LINDERMAN
701 PENNSYLVANIA AVE NW, 5TH FLOOR
WASHINGTON DC 20004-2696 US

S WILLIAM LIVINGSTON JR
COVINGTON & BURLING
P O BOX 7566
1201 PENNSYLVANIA AVE NW
WASHINGTON DC 20004-7566 US

RICHARD H. STREETER
BARNES & THORNBURG
1401 I STREET NW SUITE 500
WASHINGTON DC 20005 US

MICHAEL MATTIA
INSTITUTE OF SCRAP RECY.
1325 G STREET NW STE 1000
WASHINGTON DC 20005 US

ALAN E. LUBEL
TROUTMAN SANDERS LLP
1300 I STREET NW SUITE 500 EAST
WASHINGTON DC 20005 US

MARK H. SIDMAN
WEINER, BRODSKY, SIDMAN
1350 NEW YORK AVE NW STE 800
WASHINGTON DC 20005 US

PAUL C. OAKLEY
WEINER, BRODSKY, SIDMAN
1350 NEW YORK AVENUE NW SUITE 800
WASHINGTON DC 20005 US

JOHN R. MOLM
TROUTMAN SANDERS LLP
1300 I STREET, N. W., SUITE 500 EAST
WASHINGTON DC 20005-3314 US

FRITZ R. KAHN
1100 NEW YORK AVENUE NW SUITE 750 WEST
WASHINGTON DC 20005-3934 US

JOHN K. MASER, III
DONELAN,CLEARY,WOOD,MASER
1100 NEW YORK AVE NW SUITE 750
WASHINGTON DC 20005-3934 US

THOMAS W. WILCOX
DONELAN, CLEARY, WOOD & MASER, P.C.
1100 NEW YORK AVE NW STE 750
WASHINGTON DC 20005-3934 US

JEFFREY O. MORENO
DONELAN CLEARY WOOD MASER
1100 NEW YORK AVENUE N W, SUITE 750
WASHINGTON DC 20005-3934 US

NICHOLAS J. DIMICHAEL
DONELAN, CLEARY, ET AL.
1100 NEW YORK AVENUE N W STE 750
WASHINGTON DC 20005-3934 US

FREDERIC L. WOOD
DONELAN, CLEARY, ET. AL
1100 NEW YORK AVE NW STE 750
WASHINGTON DC 20005-3934 US

SERVICE LIST FOR: 26-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

JO A DEROCHE
WEINER, BRODSKY, ET AL
1[illegible]0 NEW YORK AVE NW SUITE 800
W[illegible]HINGTON DC 20005-4797 US

ANDREW P. GOLDSTEIN
MCCARTHY, SWEENEY ET AL.
1750 PENNSYLVANIA AVE NW
WASHINGTON DC 20006 US

TERRY L. CLAASSEN
CORN REFINERS ASSOC, INC.
1701 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20006 US

CHARLES A. SPITULNIK
HOPKINS & SUTTER
888 16TH STREET N W
WASHINGTON DC 20006 US

ROBERT P. VOM EIGEN
HOPKINS AND SUTTER
888 16TH STREET N W
WASHINGTON DC 20006 US

ERIKA Z. JONES
MAYER, BROWN & PLATT
2000 PENNSYLVANIA AVE N W SUITE 6500
WASHINGTON DC 20006 US

ADRIAN L. STEEL, JR.
MAYER, BROWN & PLATT
2000 PENNSYLVANIA AVE N W SUITE 6500
WASHINGTON DC 20006 US

KRISTA L. EDWARDS
SIDLEY & AUSTIN
1722 EYE STREET N W
WASHINGTON DC 20006 US

MONICA J. PALKO
BRACEWELL & PATTERSON
2000 K STREET NW STE 500
WASHINGTON DC 20006 US

ANNE D. SMITH
WHITE & CASE
1747 PENNSYLVANIA AVENUE N W
WASHINGTON DC 20006 US

KATHRYN KUSSKE
MAYER, BROWN & PLATT
2000 PENNSYLVANIA AVE N W SUITE 6500
WASHINGTON DC 20006 US

ROY T. ENGLERT, JR
MAYER, BROWN & PLATT
2000 PENNSYLVANIA AVE N W SUITE 6500
WASHINGTON DC 20006 US

LAURENCE R. LATOURETTE
PRESTON GATES ELLIS ETAL
1735 NY AVE NW SUITE 500
WASHINGTON DC 20006 US

ALBERT B KRACHMAN
BRACEWELL & PATTERSON LLP
2000 K ST NW STE 500
WASHINGTON DC 20006-1872 US

JAMES A CALDERWOOD
ZUCKERT, SCOUTT & RASENBERGER, L.L. P.
888 17TH STREET NW, SUITE 600
WASHINGTON DC 20006-3939 US

ANDREW R PLUMP
ZUCKERT, SCOUTT, RASENBERGER
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

JENNIFER P OAKLEY
ZUCKERT, SCOUTT & RASENBERGER
888 SEVENTEENTH ST NW, STE 600
WASH DC 20006-3939 US

RICHARD A. ALLEN
ZUCKERT, SCOUT, RASENBERGER
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

SERVICE LIST FOR: 26-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

JOHN V. EDWARDS, ESQ
ZUCKERT, SCOUTT ET AL.
8[illegible] 17TH STREET N W STE 600
W[illegible]INGTON DC 20006-3939 US

ALICIA M SERFATY
HOPKINS & SUTTER
888 - 16TH STREET NW
WASHINGTON DC 20006-4103 US

STEVEN J. KALISH
MCARTHY, SWEENEY & HARKAWAY
1750 PENNSYLVANIA AVE NW
WASHINGTON DC 20006-4502 US

TERENCE M. HYNES
SIDLEY & AUSTIN
1722 EYE STREET NW
WASHINGTON DC 20006-5304 US

ANTHONY J MCMAHON
BASATIANELLI, BROWN ETAL
2828 PA AVE NW STE 203
WASHINGTON DC 20007 US

JOHN F C LUEDKE
GALLAND, KHARASCH, MORSE & GARFINKLE
1054 THIRTY-FIRST STREET NW
WASHINGTON DC 20007 US

VIRGINIA R METALLO
3050 K ST NW SUITE 400
WASHINGTON DC 20007 US

JAMES F RILL
COLLIER SHANNON RILL & SCOTT
3050 K STREET NW SUITE 400
WASHINGTON DC 20007 US

ANDREW T GOODSON
CANAL SQUARE
1054 THIRTY-FIRST ST NW
WASHINGTON DC 20007 US

EDWARD D. GREENBERG
GALLAND, KHARASCH, MORSE & GARFINKLE
1054 THIRTY-FIRST STREET NW
WASHINGTON DC 20007-4492 US

CHARLES H. WHITE, JR.
1054-THIRTY-FIRST STREET NW
WASHINGTON DC 20007-4492 US

MICHAEL F. MCBRIDE
LEBOEUF LAMB GREENE & MACRAE, L. L. P.
1875 CONNECTICUT AVE N W, STE 1200
WASHINGTON DC 20009 US

DANIEL ARONOWITZ
LEBOUEF, LAMB, GREENE
1875 CONNECTICUT AVE NWSTE 1200
WASHINGTON DC 20009-5728 US

LINDA K. BREGGIN, ESQ.
LEBOEUF, LAMB, GREENE, ET AL
1875 CONNECTICUT AVENUE N W
WASHINGTON DC 20009-5728 US

PAUL M. DONOVAN
LAROE, WINN, ETAL
3506 IDAHO AVE NW
WASHINGTON DC 20016 US

JOHN D. HEFFNER, ESQ.
REA, CROSS & AUCHINCLOSS
1920 N STREET NW SUITE 420
WASHINGTON DC 20036 US

JOHN M. CUTLER, JR.
MCCARTHY SWEENEY HARKAWAY
1750 PENNSYLVANIA AVE N W SUITE 1105
WASHINGTON DC 20036 US

GORDON P. MACDOUGALL
1025 CONNECTICUT AVE NW SUITE 410
WASHINGTON DC 20036 US

SERVICE LIST FOR: 26-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

PAUL A. CUNNINGHAM
HARKINS CUNNINGHAM
1300 19TH STREET NW SUITE 600
WASHINGTON DC 20036 US

MARC J. FINK
SHER & BLACKWELL
2000 L STREET N W , SUITE 612
WASHINGTON DC 20036 US

CHRISTOPHER A. MILLS
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036 US

ROBERT A. WIMBISH, ESQ.
REA, CROSS & AUCHINCLOSS
1920 N STREET NW SUITE 420
WASHINGTON DC 20036 US

GERALD P NORTON
HARKINS CUNNINGHAM
1300 19TH ST NW SUITE 600
WASHINGTON DC 20036 US

THOMAS LAWRENCE III
OPPENHEIMER WOLFF, ETC
1020 - 19TH STREET NW STE 400
WASHINGTON DC 20036 US

FRANK J. PERGOLIZZI
SLOVER & LOFTUS
1224 SEVENTEENTH ST NW
WASHINGTON DC 20036 US

DONALD F GRIFFIN
HIGHSAW MAHONEY CLARKE
1050 SEVENTEENTH STREET N W, STE 210
WASHINGTON DC 20036 US

RICHARD S. EDELMAN
HIGHSAW MAHONEY CLARKE
1050 SEVENTEENTH STREET N W, SUITE 210
WASHINGTON DC 20036 US

KELVIN J. DOWD
SLOVER & LOFTUS
1224 17TH STREET N W
WASHINGTON DC 20036 US

GERALD P. NORTON
HARKINS CUNNINGHAM
1300 NINETEENTH STREET, NW.,STE 600
WASHINGTON DC 20036 US

GERALD P. NORTON
HARKINS CUNNINGHAM
1300 NINETEENTH STREET , NW., STE. 600
WASHINGTON DC 20036 US

C MICHAEL LOFTUS
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036 US

PATRICIA E. (DIETRICH) KOLESAR
SLOVER & LOFTUS
1224 SEVENTEENTH ST NW
WASH DC 20036 US

SUSAN B GERSON
GRAHAM & JAMES, LLP
2000 M STREET NW STE 700
WASHINGTON DC 20036 US

WILLIAM G. MAHONEY
HIGHSAW, MAHONEY & CLARKE
1050 SEVENTEENTH STREET NW SUITE 210
WASHINGTON DC 20036 US

KEITH G. O'BRIEN
REA, CROSS & AUCHINCLOSS
1920 N STREET N W - SUITE 420
WASHINGTON DC 20036 US

RICHARD B HERZOG
HARKINS CUNNINGHAM
1300 19TH ST NW SUITE 600
WASHINGTON DC 20036-1609 US

SERVICE LIST FOR: 26-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

JOSEPH L LAKSHMANAN
1300 19TH STREET NW, SUITE 600
W UINGTON DC 20036-1609 US

JOEL A RABINOVITZ
HARKINS CUNNINGHAM
1300 19TH STREET NW SUITE 600
WASHINGTON DC 20036-1609 US

JAMES M. GUINIVAN
HARKINS CUNNINGHAM
1300 19TH ST NW SUITE 600
WASHINGTON DC 20036-1609 US

MARC D. MACHLIN
PEPPER, HAMILTON, ET AL
1300 19TH STREET N W
WASHINGTON DC 20036-1658 US

JOHN WILL ONGMAN
PEPPER HAMILTON SCHEETZ
1300 NINETEENTH STREET N W
WASHINGTON DC 20036-1685 US

MICHELLE J. MORRIS
PEPPER, HAMILTON, ETAL
1300 NINETEENTH ST NW
WASHINGTON DC 20036-1685 US

TIMOTHY M WALSH
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

SAMUEL M. SIPE, JR.
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

BETTY JO CHRISTIAN
STEPTOE & JOHNSON
1330 CONNECTICUT AVE NW
WASHINGTON DC 20036-1795 US

JOHN H. LESEUR
SLOVER & LOFTUS
1224 17TH STREET NW
WASHINGTON DC 20036-3081 US

KEVIN M SHEYS
OPPENHEIMER WOLFF ET AL.
1020 NINETEENTH STREET N W SUITE 400
WASHINGTON DC 20036-6105 US

A STEPHEN HUT JR
WILMER CUTLER & PICKERING
2445 M ST NW
WASHINGTON DC 20037 US

SCOTT N. STONE
PATTON BOGGS L.L.P.
2550 M STREET NW 7TH FLOOR
WASHINGTON DC 20037-1346 US

DANIEL K. MAYERS
WILMER CUTLER PICKERING
2445 M STREET N W
WASHINGTON DC 20037-1420 US

WILLIAM J KOLASKY JR
WILMER CUTLER & PICKERING
2445 M STREET NW
WASH DC 20037-1420 US

ALI M. STOEPPELWERTH
WILMER CUTLER PICKERING
2445 M STREET N W
WASHINGTON DC 20037-1420 US

MICHAEL BRESSMAN
WILMER CUTLER PICKERING
2445 M STREET N W
WASHINGTON DC 20037-1420 US

DAVID H. BAKER
HOLLAND & KNIGHT
2100 PENN AVE NW ST 400
WASHINGTON DC 20037-3202 US

SERVICE LIST FOR: 26-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

J. MICHAEL HEMMER
COVINGTON & BURLING
P O BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044 US

TIMOTHY C HESTER
P O BOX 7566
1201 PENNSYLVANIA AVENUE N W
WASHINGTON DC 20044 US

J MICHAEL HEMMER
COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20044 US

DAVID L. MEYER
COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE N W
WASHINGTON DC 20044-7566 US

MICHAEL ROSENTHAL
COVINGTON & BURLING
P O BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044-7566 US

MICHAEL A. LISTGARTEN
COVINGTON & BURLING
P O BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044-7566 US

ARVID E. ROACH II
COVINGTON & BURLING
P O BOX 7566
WASHINGTON DC 20044-7566 US

ARVID E. ROACH II
COVINGTON & BURLING
PO BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044-7566 US

EILEEN S. STOMMES
USDA
P. O. BOX 96456
WASHINGTON DC 20090-6456 US

HON. JEROME NELSON
FERC (LJ-2)
888 1ST STREET N E
WASHINGTON DC 20426 US

RICHARD SANDERSON
OFFICE OF FED ACTIV
US ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON DC 20460 US

HONORABLE JOHN GLENN
ATTN: SUSAN CARNOHAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE J. ROBERT KERRY
UNITED STATES SENATE
WASH DC 20510 US

HARRY REID
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON CONRAD BURNS
US SENATE
WASHINGTON DC 20510 US

HON BYRON DORGAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE J. BENNETT JOHNSTON
U. S. SENATE

WASHINGTON DC 20510 US

HON. PHIL GRAMM
UNITED STATES SENATE
WASHINGTON DC 20510 US

SERVICE LIST FOR: 26-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

HONORABLE RICHARD LUGAR
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE RICHARD BRYAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. CHRISTOPHER S. BOND
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. CHARLES E. GRASSLEY
U. S. SENATE
WASHINGTON DC 20510 US

HONORABLE GENE GREEN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. JAN MEYERS
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. DON NICKLES
UNITED STATES SENATE

WASHINGTON DC 20510 US

HONORABLE THAD COCHRAN
UNITED STATE SENATE
WASHINGTON DC 20510 US

HONORABLE WILLIAM COHEN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. MARK B. HATFIELD
U S SENATE
WASHINGTON DC 20510-0001 US

HONORABLE HARRY REID
UNITED STATES SENATE
WASHINGTON DC 20510-0001 US

HONORABLE TOM CAMPBELL
UNITED STATE SENATE
WASHINGTON DC 20510-0515 US

HON. HANK BROWN
UNITED STATES SENATE
WASHINGTON DC 20510-0604 US

HON. BEN N CAMPBELL
UNITED STATES SENATE
WASHINGTON DC 20510-0605 US

HONORABLE NANCY LANDON KASSENBAUM
UNITED STATES SENATE
WASHINGTON DC 20510-1602 US

HONORABLE JOHN BREAUX
UNITED STATES SENATE

WASHINGTON DC 20510-1803 US

HONORABLE J. JAMES EXON
ATTENTION: DENISE ARMSTRONG
UNITED S TATES SENATE
WASHINGTON DC 20510-2702 US

HON. TOM EWING
HOUSE OF REPRESENTATIVES

WASHINGTON DC 20515 US

SERVICE LIST FOR: 26-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

HON JOHN P. MURTHA
HOUSE OF REPRESENTATIVES

W IINGTON DC 20515 US

HONORABLE PAT ROBERTS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. KIKA DE LA GARZA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE GEORGE E. BROWN, JR.
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE FRANK TAJEDA
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LLOYD DOGGETT
U. S. HOUSE OF REPRESENTATAIVES
WASHINGTON DC 20515 US

HONORABLE BARBARA-ROSE COLLINS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON DAVID L HOBSON
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JOHN TANNER
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CLEO FIELDS
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TIM JOHNSON
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RON LEWIS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DAVID MINGE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JOHN HOSTETTLER
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JOE BARTON
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JACK FIELDS
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON TOM DELAY
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON PETE GREEN
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

SERVICE LIST FOR: 26-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

HONORABLE PAUL MCHALE
U. S. HOUSE OF REPRESENTATIVES
W' 'IINGTON DC 20515 US

HONORABLE TIM HOLDEN
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE MIKE DOYLE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE FRANK D. RIGGS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE CHARLES W. STENHOLM
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE ZOE LOEGREN
US HSE OF RESPRESENTATIVE
WASHINGTON DC 20515 US

HONORABLE XAVIER BECERRA
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LUCILLE ROYAL-ALLARD
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LYNN WOOLSEY
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PETE STARK
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE NANCY PELOSI
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TOM LANTOS
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RICHARD W. POMBO,
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE KEN CALVERT,
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE SONNY BONO,
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE CHRISTOPHER COX,
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE ANDREA H SEASTRAND
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RON PACKARD
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

SERVICE LIST FOR: 26-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

HONORABLE DANA ROHRABACHER
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BILL BAKER,
HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE HOWARD P. BUCK MCKEON,
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BRIAN P. RILBRAY,
US HSE OF REPRESENTATIVES
WASH DC 20515 US

HONORABLE EDWARD R. ROYCE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE KAREN MCCARTHY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE CHARLES WILSON
HOUSE OF REPRESENTATIVES

WASHINGTON DC 20515 US

HONORABLE JAY KIM
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PHIL ENGLISH
HOUSE OF REPRESENTATIVES

WASHINGTON DC 20515 US

HONORABLE JULIAN DIXON
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JAY DICKEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. WAYNE ALLARD
U S HOUSE REPRESENTATIVES
WASHINGTON DC 20515 US

HON. EARL POMEROY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE GEORGE GEKAS
ATTEN: TOM SANTANIELLO
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DONALD M. PAYNE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. PAUL KANJORSJI
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. HAROLD L. VOLKMER
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. BILL EMERSON
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

SERVICE LIST FOR: 26-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

HON. IKE SKELTON
U S HOUSE OF REPRESENTATIVES
W' 'INGTON DC 20515 US

HON. JAMES L. OBERSTAR
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. MARTIN OLAV SABO
ATTN: MICHAEL ERLANDSON
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. RICHARD J. DURBIN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. LANE EVANS
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. DAN COATS
ATTN: PATTIE DELOATCHE
US HSE OF REPRESENTATIVES-
WASHINGTON DC 20515 US

HON. CARLOS J. MOORHEAD
ATTN: DAVE JOERGENSON
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BOB CLEMENT
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ESTEBAN E TORRES
U S STATES HOUSE REPRESENTATIVES
WASHINGTON DC 20515 US

HON. HAROLD E. FORD
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. THOMAS C SAWYER
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE WALLY HERGER
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JAMES A. TRAFICANT, JR.
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. TIM JOHNSON
ANN SIMMONS
US HSE OF REP
WASHINGTON DC 20515 US

HON. JOHN BRYANT
US HOUSE OF REP.

WASHINGTON DC 20515 US

HON. ROBERT A. BORSKI
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. MICHAEL OXLEY
HOUSE OF REPRESENTATIVES

WASHINGTON DC 20515 US

HONORABLE RONALD V. DELLUMS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

SERVICE LIST FOR: 26-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

SHEILA JACKSON-LEE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JERRY LEWIS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. HENRY B. GONZALEZ
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. G. V. MONTGOMERY
ATTEN: ANDRE CLEMANDOT
US HOUSE OF REP
WASHINGTON DC 20515 US

HON TOM BEVILL
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-0104 US

HONORABLE FRANK D DIGGS
US HOUSE OF REPRESENTATIVES
WASH DC 20515-0501 US

HONORABLE RON PACKARD
U. S. HOUSE OF REPRESENTATIVES
WASH DC 20515-0548 US

HONORABLE SCOTT MCINNIS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-0603 US

HONORABLE TODD TIAHRT
HOUSE OF REPRESENTATIVE
WASHINGTON DC 20515-1004 US

HONORABLE SAM BROWNBACK
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-1602 US

HON. JIM MCCRERY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-1805 US

HONORABLE PETER BLUTE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2103 US

HONORABLE GEORGE MILLER
ATT: GARY BLAND
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2307 US

HON W J (BILLY) TAUZIN
ATTN: ROY WILLIS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2601 US

HONORABLE JOHN ENSIGN
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2801 US

HON. ROBERT E ANDREWS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3001 US

HONORABLE SHERROD BROWN
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3513 US

HON. FRANK D. LUCAS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3606 US

SERVICE LIST FOR: 26-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

HONORABLE THOMAS M. FOGLIETTA
U. S. HOUSE OF REPRESENTATIVES
W[illegible]INGTON DC 20515-3801 US

HONORABLE CHAKA FATTAH
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3803 US

HONORABLE CURT WELDON
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3807 US

HONORABLE FRANK MASCARA
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3820 US

HON. MARCY KAPTUR
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4146 US

HON. JON CHRISTENSEN
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4155 US

HON. JIM CHAPMAN
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4301 US

HONORABLE STEVE STOCKMAN
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4309 US

HONORABLE MAC THORNBERRY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4313 US

HONORABLE SHEILA JACKSON LEE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4318 US

HON. HENRY BONILLA
US HOUSE REPRESENTATIVES
WASHINGTON DC 20515-4323 US

HONORABLE EDDIE BERNICE JOHNSON
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4330 US

MICHAEL D BILLIEL
ANTITRUST DIV, DEPT OF JUSTICE
325 SEVENTH ST NW STE 500
WASHINGTON DC 20530 US

PAUL SAMUEL SMITH
U. S. DEPT OF TRANSP
400 7TH ST SW , ROOM 4102 C-30
WASHINGTON DC 20590 US

JOSEPH R. POMPONIO
FEDERAL RAILROAD ADMIN.
400 7TH ST SW RCC-20
WASHINGTON DC 20590 US

LARRY R. PRUDEN
TRANS. COMM. INTL UNION
3 RESEARCH PLACE
ROCKVILLE MD 20850 US

WILLIAM W. WHITEHURST, JR
12421 HAPPY HOLLOW ROAD
COCKEYSVILLE MD 21030-1711 US

CONSTANCE H. PIERCE
CONSTELLATION COMPANIES
250 WEST PRATT STREET
BALTIMORE MD 21201-2423 US

SERVICE LIST FOR: 26-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

J TUCKER
PO BOX 25181
ARLINGTON VA 22202 US

PETER Q. NYCE, JR.
U. S. DEPARTMENT OF THE ARMY
901 NORTH STUART STREET
ARLINGTON VA 22203 US

NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
1700 NORTH MOORE STREET, SUITE 1900
ARLINGTON VA 22209 US

THOMAS E. SCHICK
CHEMICAL MANUF. ASSOC.
1300 WILSON BOULEVARD
ARLINGTON VA 22209 US

WILLIAM P. JACKSON, JR.
JACKSON & JESSUP, P. C.
P O BOX 1240
3426 NORTH WASHINGTON BLVD
ARLINGTON VA 22210 US

GERALD W. FAUTH, III
G. W. FAUTH & ASSOCIATES INC.
P O BOX 2401
ALEXANDRIA VA 22301 US

JOHN T. ESTES
SUITE 400
1029 NORTH ROYAL STREET
ALEXANDRIA VA 22314 US

PETER J SHUDTZ
CSX CORPORATION
901 E CARY ST 1 JAMES CENTER
RICHMOND VA 23119 US

ROBERT J. COONEY
NORFOLK SOUTHERN CORP.
THREE COMMERCIAL PLACE
NORFOLK VA 23510-2191 US

ROBERT S. KOMPANTY
720 THIMBLE SHOALS BLVD, SUITE 130
NEWPORT NEWS VA 23608-2574 US

BOB THOMPSON
GEORGIA-PACIFIC CORP.
P O BOX 105605
ATLANTA GA 30348-5605 US

GREGORY M. VINCENT, VICE PRESIDENT
TENNESSEE VALLEY AUTH
LOOKOUT PLACE 1101 MARKET STREET
CHATTANOOGA TN 37402 US

E. CALVIN CASSELL
EASTMAN CHEMICAL COMPANY
P O BOX 1990
KINGSPORT TN 37662 US

EDWARD S. CHRISTENBURY
400 WEST SUMMIT HILL DRIVE
KNOXVILLE TN 37902 US

HONORABLE GILLESPIE V. MONTGOMERY
U. S. HOUSE OF REPRESENTATIVES
P. O. BOX 5618
MERIDAN MS 39208 US

R. L. YOUNG
P O BOX 700
ONE MEMORIAL DRIVE
LANCASTER OH 43130-0700 US

D. MICHAEL MILLER
AMERICAN ELECTRIC POWER
1 RIVERSIDE PLAZA
COLUMBUS OH 43215 US

HONORABLE JOHN GLENN
U. S. SENATE ATTN: ANISA BELL
200 N HIGH STREET S-600
COLUMBUS OH 43215-2408 US

SERVICE LIST FOR: 26-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

MICHAEL M. BRILEY
SHUMAKER, LOOP & KENDRICK
N COURTHOUSE SQUARE - 1000 JACKSON
TOLEDO OH 43624 US

CLINTON J MILLER, III, GENERAL COUNSEL
UNITED TRANSPORTATION UNION
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

RICHARD E. KERTH, TRANS. MGR.
CHAMPION INTERNAT'L CORP
101 KNIGHTSBRIDGE DRIVE
HAMILTON OH 45020-0001 US

BRUCE A. KLIMEK
INLAND STEEL
3210 WATLING STREET
EAST CHICAGO IN 46312 US

JAMES E. HANSON
DOW CHEMICAL COMPANY
2020 WILLARD H DOW CENTER
MIDLAND MI 48674 US

THOMAS F JACKSON
800 LINCOLN WAY
AMES IA 50010 US

HONORABLE CHARLES E. GRASSLEY
UNITED STATES SENATE
210 WALNUT STREET
DES MOINES IA 50309-2140 US

KENT M RAGSDALE
INTERSTATE POWER CO
PO BOX 769
DUBUQUE IA 52004 US

TOBIN LEE BRITT
IES UTILITIES, INC.
P O BOX 351
200 FIRST ST SE
CEDAR RAPIDS IA 52406-0351 US

DANIEL R. ELLIOTT III
UNITED TRANSP. UNION
14600 DETROIT AVENUE
CLEVELAND OH 44107 US

RONALD P MCLAUGHLIN
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
1370 ONTARIO ST STAN BLDG
CLEVELAND OH 44113-1702 US

MICHAEL P. FERRO
QUANTUM CHEMICAL CORP.
11500 NORTHLAKE DRIVE
CINCINNATI OH 45249 US

HON JEFF SMITH
CITY OF KENDALLVILLE
234 S MAIN STREET
KENDALLVILLE IN 46755-1795 US

LARRY B. KARNES
TRANSPORTATION BUILDING
PO BOX 30050
425 WEST OTTAWA
LANSING MI 48909 US

P. C. HENDRICKS
UTU, STATE LEG. DIR.
317 EAST 5TH STREET STE 11
DES MOINES IA 50309 US

EDWIN C JERTSON
INTERSTATE POWER CO
P O BOX 769
1000 MAIN STREET
DUBUQUE IA 52004 US

PHILIP D. WARD, ET AL.
P O BOX 351
200 FIRST STREET SE
CEDAR RAPIDS IA 52406-0351 US

WILLIAM R. KNIGHT
WISCONSIN POWER & LIGHT
P O BOX 192
222 WEST WASHINGTON AVENUE
MADISON WI 53701-0192 US

SERVICE LIST FOR: 26-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

ALLEN J VOGEL,
MINNESOTA DEPARTMENT OF TRANSPORTATION
395 JOHN IRELAND BLVD TRANSP BLDG, SUITE 925,
S AUL MN 55155 US

RONALD E HUNTER, LAW DEPARTMENT
CARGILL, INCORPORATED
15407 MCGINTY ROAD WEST
WAYZATA MN 55391 US

WAYNE C. SERKLAND, U S REGIONAL COUNSEL
CANADIAN PACIFIC LEG. SER
105 SOUTH FIFTH ST SUITE 1000
MINNEAPOLIS MN 55402 US

DOUGLAS M. HEAD
WEINER
120 SOUTH 6TH STREET STE 2400
MINNEAPOLIS MN 55402 US

BOB ZELENKA
852 GRAIN EXCHANGE
MINNEAPOLIS MN 55415 US

HON. WILLIAM J. JANKLOW
GOVERNOR, SD
500 EAST CAPITOL
PIERRE SD 57501-5070 US

TERRY C. WHITESIDE
RADERMACHER, WHITESIDE & ASSOCIATES
3203 3RD AVE N STE 301
BILLINGS MT 59101 US

HONORABLE MARC RACICOT
GOV'S OFFICE, STATE CAP.
P O BOX 200801
HELENA MT 59620-0801 US

J. FRED SIMPSON, EXECUTIVE VICE PRESIDENT
MONTANA RAIL LINK, INC.
101 INTERNATIONAL WAY
MISSOULA MT 59802 US

JANET H GILBERT
WISCONSIN CENTRAL LTD
6250 NORTH RIVER ROAD STE 9000
ROSEMONT IL 60018 US

RICHARD E. WEICHER
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY
1700 EAST GOLF ROAD, 6TH FLOOR
SCHAUMBURG IL 60173 US

JEFFREY R. MORELAND
SANTA FE PAC. CORP. ETAL
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173 US

JAMES A. SMALL
COMMONWEALTH EDISON CO.
1411 OPUS PL STE 200
DOWNERS GROVE IL 60515-5701 US

WILLIAM F. COTTRELL
ASST. ATTORNEY GENERAL
100 W RANDOLPH ST - 12TH FLOOR
CHICAGO IL 60601 US

THOMAS J. LITWILER
OPPENHEIMER WOLFF ETAL
180 N STETSON AVE 45TH FLOOR
CHICAGO IL 60601 US

WILLIAM C. SIPPEL
OPPENHEIMER WOLFF & DONNELLY
180 NORTH STETSON AVENUE-45TH FLOOR
CHICAGO IL 60601 US

CHRISTINE H. ROSSO
ASSISTANT ATTORNEY GENERAL
100 W RANDOLPH ST
CHICAGO IL 60601 US

THOMAS J HEALEY
OPPENHEIMER, WOLFF, ETAL
180 N STETSON AV 2 PRUDENTIAL PL
CHICAGO IL 60601 US

SERVICE LIST FOR: 26-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

THOMAS DEGNAN
UNITED STATES GYPSUM CO
1[illegible] SOUTH FRANKLIN STREET
C[illegible]AGO IL 60606 US

STEPHEN C. HERMAN
MCFARLAND & HERMAN
20 N WACKER DRIVE STE 1330
CHICAGO IL 60606-2902 US

THOMAS F. MCFARLAND, JR.
MCFARLAND & HERMAN
20 NORTH WACKER DRIVE, SUITE 1330
CHICAGO IL 60606-3101 US

RONALD A. LANE
ILLINOIS CENTRAL RR
455 N CITYFRONT PLAZA DR 20TH FL
CHICAGO IL 60611 US

MYLES L. TOBIN
ILLINOIS CENTRAL RAILROAD
455 NORTH CITYFRONT PLAZA DRIVE
CHICAGO IL 60611-5504 US

THOMAS ZWICA
121 WEST FIRST STREET
GENESEO IL 61254 US

GARY L TOWELL
TOLEDO, PEORIA & WESTERN
1990 EAST WASHINGTON STREET
EAST PEORIA IL 61611-2961 US

CLARENCE R. PONSLER
GENERAL CHAIRMAN, UTU
1017 W. MAIN STREET
BELLEVILLE IL 62220 US

SCOTT A. RONEY
P O BOX 1470
4666 FARIES PARKWAY
DECATUR IL 62525 US

JON FOY, DIRECTOR, RATES GRAIN
ARCHER DANIEL MIDLAND CO
P. O. BOX 1470
4666 FARIES PARKWAY
DECATUR IL 62525 US

MERRILL L. TRAVIS
ILLINOIS DEPT. OF TRANSP.
2300 SOUTH DIRKSEN PARKWAY
SPRINGFIELD IL 62703-4555 US

CAROL R DORIS
500 SOUTH SECOND STREET
SPRINGFIELD IL 62706 US

KIRK BROWN
2300 SOUTH DIRKSEN PARKWAY
SPRINGFIELD IL 62764 US

ROGER HERMANN
MALLINCKRODT CHEMICAL
16305 SWINGLEY RIDGE DRIVE
CHESTERFIELD MO 63017-1777 US

JEFFREY L. KLINGER
PEABODY HOLDING COMPANY
701 MARKET STREET STE 700
ST LOUIS MO 63101-1826 US

C. A. MENNELL
31 OAK TERRACE
WEBSTER GROVES MO 63119 US

DAVID A. PINS
THE CHEMICAL GROUP, MONSANTO
800 N LINDBERGH BOULEVARD
ST LOUIS MO 63167 US

D E THOMPSON
GENERAL CHAIRMAN-BLE
414 MISSOURI BOULEVARD
SCOTT CITY MO 63780 US

SERVICE LIST FOR: 26-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

HON IKE SKELTON
U. S. HOUSE OF REP.
5'' B N W 7 HIGHWAY
F . SPRINGS MO 64014 US

ROBERT K DREILING
K.C. SOUTHERN RWY CO.
114 WEST 11TH STREET
KANSAS CITY MO 64105 US

RICHARD P. BRUENING
114 WEST 11TH STREET
KANSAS CITY MO 64105 US

RICHARD P BRUENING
KANSAS CITY SOUTHERN RR
114 WEST ELEVENTH STREET
KANSAS CITY MO 64106 US

MEL CARNAHAN
OFFICE OF THE GOVERNOR
STATE CAPITOL ROOM 216
JEFFERSON CITY MO 65101 US

JACK HYNES, ADMINISTRATOR OF RAILROADS
PO BOX 270
CAPITOL AVE AT JEFFERSON ST
JEFFERSON CITY MO 65102 US

JOSEPH A. STINGER
IBBB
570 NEW BROTHERHOOD BUILDING
KANSAS CITY KS 66101 US

WILLIAM J. MCGINN
NORTH AMER. CHEM. CO.
8300 COLLEGE BOULEVARD
OVERLAND PARK KS 66210 US

BARRETT HATCHES
8300 COLLEGE BLVD
OVERLAND PARK KS 66210 US

T. L. GREEN
WESTERN RESOURCES, INC.
PO BOX 889
818 KANSAS AVE
TOPEKA KS 66601 US

JOHN JAY ROSACKER
KS, DEPT OF TRANSP
217 SE 4TH ST 2ND FLOOR
TOPEKA KS 66603 US

ALAN R. POST
1803 STEFKIN STREET
WICHITA KS 67208 US

JAMES J. IRLANDI
STB PRACTITIONER
1809 N BROADWAY/SUITE F
WICHITA KS 67214 US

WILLARD L STOCKWELL-CHIEF PLANNER
455 N MAIN ST 10TH FL CITY HALL
WICHITA KS 67216 US

JUNIOR STRECKER
123 NORTH MAIN ST
HOISINGTON KS 67544 US

ROBERT K. GLYNN
HOISINGTON CHAM. OF COMM.
123 NORTH MAIN STREET
HOISINGTON KS 67544-2594 US

JOHN F. LARKIN
P O BOX 31850
4814 DOUGLAS ST 68132
OMAHA NE 68132-0850 US

PAUL A. CONLEY, JR. ,LAW DEPARTMENT
UNION PACIFIC RR CO.
1416 DODGE STREET
OMAHA NE 68179 US

SERVICE LIST FOR: 26-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

LOUISE A. RINN
UNION PACIFIC RR CO.
1416 DODGE STREET ROOM 830
OMAHA NE 68179 US

JEANNA L REGIER
UNION PACIFIC RAILROAD COMPANY
1416 DODGE ST ROOM 830
OMAHA NE 68179 US

JAMES V. DOLAN, LAW DEPARTMENT
UNION PACIFIC RR CO.
1416 DODGE STREET #830
OMAHA NE 68179 US

ROBERT T. OPAL
UNION PACIFIC RR CO.
1416 DODGE STREET RM 830
OMAHA NE 68179-0001 US

KEN SIECKMEYER, MGR. TRANSP. PLANN. DIV.
NEBRASKA DEPT. OF ROADS
P O BOX 94759
LINCOLN NE 68509-4759 US

WAYNE ANDERSON
ENTERGY SERVICES, INC.
639 LOYOLA AVE MAIL L-ENT-26E
NEW ORLEANS LA 70113 US

W. F. CARTER
ALBEMARLE CORPORATION
451 FLORIDA STREET
BATON ROUGE LA 70801 US

DEAN L. WORLEY
HILBURN CALHOON HARPER
P O BOX 5551
ONE RIVERFRONT PLACE EIGHTH FL
NORTH LITTLE ROCK AR 72119 US

HONORABLE DAVID PRYOR
UNITED STATES SENATE
330 FEDERAL BLDG ATTN: CARMIE HENRY
LITTLE ROCK AR 72201 US

SCOTT MANATT
P. O. BOX 473
CORNING AR 72422 US

JOE N. HAMPTON
2309 NORTH TENTH, SUITE E
ENID OK 73701 US

THOMAS R. JACOBSEN
TU ELECTRIC
1601 BRYAN STREET STE 11-060
DALLAS TX 75201-3411 US

JOEL T WILLIAMS III
STE 350, LB-126
4809 COLE AVENUE
DALLAS TX 75205 US

LONNIE E. BLAYDES, JR., VICE PRESIDENT
DALLAS AREA RAPID TRANSIT
P O BOX 75266-7210
1401 PACIFIC AVENUE
DALLAS TX 75266-7210 US

STEVEN A BRIGANCE
LEBOEUF, LAMB, ETAL
4025 WOODLAND PARK BLVD STE 250
ARLINGTON TX 76013 US

EDMUND W. BURKE
BURLINGTON NORTHERN RR CO
777 MAIN STREET, 3800 CONTINENTAL PLAZA
FT WORTH TX 76102 US

MICHAEL E. ROPER
BURLINGTON NORTHERN RR
777 MAIN STREET, 3800 CONTINENTAL PL
FT WORTH TX 76102 US

DOUGLAS J. BABB
BURLINGTON NORTHERN RR CO
777 MAIN STREET, 3800 CONTINENTAL PLAZA
FT WORTH TX 76102-5384 US

SERVICE LIST FOR: 26-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

JANICE G BARBER
BURLINGTON NORTHERN RR CO
777 MAIN STREET, 3800 CONTINENTAL PLAZA
FORT WORTH TX 76102-5384 US

RICHARD SCHIEFELBEIN
7801 WOODHARBOR DRIVE
FORT WORTH TX 76179 US

W. DAVID TIDHOLM
HUTCHESEN & GRUNDY
1200 SMITH STREET (#3300)
HOUSTON TX 77002-4579 US

GEN. COMMITTEE OF ADJUST. GO-895
UNITED TRANS. UNION
2040 NORTH LOOP WEST STE 310
HOUSTON TX 77018 US

ROBERT J. ROSSI
UNITED TRANSPORTATION UNION
2040 NORTH LOOP WEST SUITE 310
HOUSTON TX 77018-8112 US

GEORGE T. WILLIAMSON
P O BOX 2562
111 E LOOP N
HOUSTON TX 77029 US

B KENNETH TOWSEND JR
EXXON CHEMICAL CO
13501 KATY FREEWAY
HOUSTON TX 77079-1398 US

B. C. GRAVES, JR.
EXXON COMPANY U.S.A.
PO BOX 4692
HOUSTON TX 77210-4692 US

SHELL CHEMICAL COMPANY
P O BOX 2463
ONE SHELL PLAZA
HOUSTON TX 77252 US

BRIAN P. FELKER
SHELL CHEMICAL COMPANY
P O BOX 2463
HOUSTON TX 77252-2463 US

ERIC W. TIBBETTS
P O BOX 3766
1301 MCKINNEY ST
HOUSTON TX 77253 US

ROY GIANGROSSO
ENTERGY SERVICES, INC.
350 PINE STREET
BEAUMONT TX 77701 US

TEXAS MEXICAN RAILWAY CO.
PO BOX 419
LAREDO TX 78042-0419 US

JOHN P. LARUE
P O BOX 1541
222 POWER STREET
CORPUS CHRISTI TX 78403 US

THOMAS A GRIEBEL
TEXAS DOT
125 E 11TH ST
AUSTIN TX 78701 US

JERRY L. MARTIN, DIRECTOR RAIL DIV.
RR COMM OF TEXAS
P O BOX 12967
1701 N CONGRESS
AUSTIN TX 78711 US

MARK TOBEY
P O BOX 12548
AUSTIN TX 78711-2548 US

REBECCA FISHER
ASST ATTY GENERAL
PO BOX 12548
AUSTIN TX 78711-2548 US

SERVICE LIST FOR: 26-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

HON. JOHN R. COOK,
TX HOUSE OF REPRESENTATIVES
P BOX 2910
AUSTIN TX 78768 US

HON. ROBERT JUNELL
TEXAS HOUSE OF REP.
PO BOX 2910
AUSTIN TX 78768 US

ROBERT M. SAUNDERS
P O BOX 2910
AUSTIN TX 78768-2910 US

ROBERT A. CUSHING, JR.
UNITED TRANS. UNION,
12401 HIDDEN SUN COURT
EL PASO TX 79938 US

DARRELL L. HANAVAN, EXECUTIVE DIRECTOR
COLORADO WHEAT ADMIN.
5500 SOUTH QUEBEC STREET STE 111
ENGLEWOOD CO 80111 US

THOMAS F. LINN
MOUNTAIN COAL COMPANY
555 17TH STREET 22ND FLOOR
DENVER CO 80202 US

STANLEY B. KONIZ, UNIT MANAGER
PUBLIC SERVICE COMPANY
1225 - 17TH STREET STE 1100
DENVER CO 80202 US

PATRICIA T. SMITH, SR. VICE PRESIDENT
PUBLIC SERVICE COMPANY
1225 - 17TH STREET STE 600
DENVER CO 80202 US

STEPHEN D ALFERS
ALFERS & CARVER
730 17TH STREET #340
DENVER CO 80202 US

RUSSELL S. JONES, III
MOUNTAIN COAL COMPANY
555 17TH STREET 22ND FLOOR
DENVER CO 80202 US

NANCY MANGONE, ENFORCEMENT ATTORNEY
U. S. EPA REGION VIII
999 18TH SST STE 500
DENVER CO 80202-2466 US

DAVID N. LAWSON, FUEL TRAFFIC COORDINATOR
PUBLIC SERVICE COMMISSION
1225 17TH ST STE 1100, SEVENTEENTH ST PLAZA
DENVER CO 80202-5533 US

JANE T. FELDMAN, ASST. ATTORNEY GENERAL
STATE OF COLORADO
1525 SHERMAN ST- 5TH FLOOR
DENVER CO 80203 US

HON. BEN N. CAMPBELL
UNITED STATES SENATE
1129 PENNSYLVANIA STREET
DENVER CO 80203 US

ROY ROMER
EXECUTIVE CHAMBERS
136 STATE CAPITOL
DENVER CO 80203 US

CHARLES R. BOMBERGER
PUBLIC SERV. OF COLORADO
5900 E 39TH AVENUE
DENVER CO 80207 US

SUE BALLENSKI, PHYSICAL RESOURCES
USDA FOREST SERVICE
P O BOX 25127
LAKEWOOD CO 80225 US

KENTON FORREST
NAT. RWY HISTOR. SOCIETY
P O BOX 480181 TA
TERMINAL ANNEX
DENVER CO 80248 US

SERVICE LIST FOR: 26-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

GERALD E. VANINETTI
RESOURCE DATA INT'L
1[illegible] PEARL STREET STE 300
B[illegible]DER CO 80302 US

JOE D. FORRESTER
C/O CO MTN COLLEGE, TIMBERLINE CAMPUS
901 S HWY 24
LEADVILLE CO 80461 US

THOMAS J. FLORCZAK
CITY OF PUEBLO
127 THATCHER BUILDING
PUEBLO CO 81003 US

HON. HANK BROWN
UNITED STATES SENATE
5TH & MAIN ST 411 THATCHER BLDG
PUEBLO CO 81003-3140 US

MAYOR LESTER WILLIAMS
TOWN OF EADS
PO BOX 8
110 W 13TH ST
EADS CO 81036 US

CARDON G. BERRY
KIOWA CO. COMMISSIONERS
PO BOX 591
1305 GOFF
EADS CO 81036 US

HON DELCARL EIKENBERG
TOWN OF HASWELL
P O BOX 206
HASWELL CO 81045-0206 US

JOHN R STULP
SECED
P O BOX 1600
LAMAR CO 81052 US

CLEDE WIDENER
BOARD OF COUNTY COMMISSIONERS
P.. O. BOX 1046
LAMAR CO 81052 US

LEROY E. MAUCH
BOARD OF COUNTY COMMISSIONERS
P. O. BOX 1046
LAMAR CO 81052 US

JOHN ROESCH
BENT COUNTY
PO BOX 350
LAS ANIMAS CO 81054 US

BLAINE ARBUTHNOT
CROWLEY COUNTY
601 MAIN ST
ORDWAY CO 81063 US

JANET PALMER
P O BOX 1268
13997 COUNTY ROAD 71
SHERIDAN LAKE CO 81071 US

BERNICE TUTTLE
KIOWA COUNTY WIFE, CHAPTER #124
13775 CR785
TOWNER CO 81071-9619 US

CHARLES WAIT
BACA COUNTY
PO BOX 116
SPRINGFIELD CO 81073 US

FRANK C MCMURRY
PO BOX 699
SALIDA CO 81201 US

E W WOTIPKA
6388 TERRACE LANE
SALIDA CO 81201 US

THOMAS W. FOSTER, CHAIRMAN
COM. TO PRESERVE PROPERTY
P O BOX 681
SALIDA CO 81201 US

SERVICE LIST FOR: 26-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

HON. NANCY SANGER, MAYOR
CITY OF SALIDA
P BOX 417
1 E STREET
SALIDA CO 81201 US

GREG TABUTEAU
ROYAL GORGE SCENIC RY
P O BOX 1387
CANON CITY CO 81215 US

JUDY LOHNES
UAACOG
P O BOX 510
CANON CITY CO 81215-0510 US

STEVE TUCKER
D&RG WEST. EMPLOYEES
2048 J ROAD
FRUITA CO 81521 US

GARY L. MCFARLEN,, DIRECTOR-TRANSP
KENNECOTT ENERGY COMPANY
505 SOUTH GILLETTE AVENUE
GILLETTE WY 82716 US

TIMM R. ADAMS
IDAHO BARLEY COMMISSION
1199 MAIN STREET, STE G
BOISE ID 83702-5630 US

ANN KNAPTON
IDAHO TIMBER CORPORATION
P O BOX 67
5401 KENDALL STREET
BOISE ID 83707-0067 US

RAY D. GARDNER
KENNECOTT UTAH COPP. CORP
P O BOX 6001
8315 WEST 3595 SOUTH
MAGNA UT 84044-6001 US

ALEXANDER H. JORDAN
WESTERN SHIPPERS COALIT.
136 SOUTH MAIN STREETSTE 1000
SALT LAKE CITY UT 84101-7612 US

MYRON F. SMITH
FREMONT COUNTY COMM.
615 MACON AVE ROOM #102
CANON CITY CO 81212 US

RUTH H. CARTER, MAYOR
CITY OF CANON CITY
P O BOX 1460
ATTN: STEVE THACKER CITY ADMIN
CANON CITY CO 81215 US

STEVEN G. RABE, CITY MANAGER
CITY OF FLORENCE
300 W MAIN STREET
FLORENCE CO 81226 US

JAMES R. FRITZE
EAGLE COUNTY ATTORNEY
P O BOX 850
EAGLE CO 81631 US

PATRICIA BRITTON, CHIEF LEGAL OFFICER
KENNECOTT ENERGY COMPANY
505 SOUTH GILLETTE AVENUE
GILLETTE WY 82716 US

JERRY R KRESS
ID, WHEAT COMMISSION
1109 MAIN ST STE 310
BOISE ID 83702-5642 US

WAYNE L. STOCKEBRAND
KENNECOTT UTAH COPP. CORP
P O BOX 6001
8315 WEST 3595 SOUTH
MAGNA UT 84044-6001 US

RONALD L. RENCHER
WESTERN SHIPPERS COAL.
136 SOUTH MAIN STREET STE 1000
SALT LAKE CITY UT 84101-1672 US

F MARK HANSEN
F MARK HANSEN, P.C.
624 NORTH 300 WEST SUITE 200
SALT LAKE CITY UT 84103 US

SERVICE LIST FOR: 26-nov-1996 IJC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

JEFFREY B. GROY
ONE UTAH CTR
20[illegible] SOUTH MAIN STREET, STE 1100
S[illegible] LAKE CITY UT 84111 US

CHRISTOPHER E. BRAMHALL
451 SOUTH STATE ST, ROOM 505
SALT LAKE CITY UT 84111 US

HON. DEEDEE CORRADINI
451 SOUTH STATE STREET, ROOM 306
SALT LAKE CITY UT 84111 US

MICHAEL O. LEAVITT
210 STATE CAPITOL
SALT LAKE CITY UT 84114 US

REED M. RICHARDS
STATE OF UTAH
236 STATE CAPITOL
SALT LAKE CITY UT 84114 US

ROBIN L. RIGGS, GENERAL COUNSEL TO GOVERNOR
STATE OF UTAH
210 STATE CAPITOL
SALT LAKE CITY UT 84114 US

LYNETTE W. THIRKILL, LOGISTICS MANAGER
GR. SALT LAKE MINERALS
P O BOX 1190
OGDEN UT 84402 US

KENNETH C. JOHNSEN, V PRES & GEN COUNSEL
GENEVA STEEL COMPANY
P O BOX 2500
PROVO UT 84603 US

CAROL HEATHINGTON
1300 W WASHINGTON
PHOENIX AZ 85007 US

HONORABLE BOB STUMP
U.S. HOUSE OF REPRESENTATIVES
230 N. 1ST AVE., VOOM 2001
PHOENIX AZ 85025 US

FRANK E. HANSON, JR
MAGMA METALS COMPANY
7400 NORTH ORACLE ROAD, SUITE 200
TUCSON AZ 85704 US

O. KENT MAHER
33 WEST FOURTH ST
PO BOX 351
WINNEMUCCA NV 89446 US

R. MICHAEL MCCORMICK
HUMBOLDT COUNTY DA
P O BOX 909
50 WEST FIFTH STREET
WINNEMUCCA NV 89446 US

MICHAEL E. HALLEY
CITY OF RENO
P O BOX 1900
RENO NV 89505 US

DORI OWEN, SPECIAL PROJECTS MANAGER
REDEVELOP LAND AGENCY
490 S CENTER STREET STE 203
RENO NV 89505 US

JEFFERY W. HILL
SIERRA PACIFIC POWER CO.
P O BOX 10100
6100 NEIL ROAD
RENO NV 89520 US

THOMAS J. FRONAPFEL
NEVADA, DEPT. OF TRANSPORTATION
1263 S STEWART STREET
CARSON CITY NV 89712 US

MICHAEL I. STOCKMAN, GENERAL COUNSEL
U. S. BORAX INC.
26877 TOURNEY ROAD
VALENCIA CA 91355 US

SERVICE LIST FOR: 26-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

JOHN E. BALLAS, AGENCY ENGINEER
INDUSTRY URBAN-DEV. AG.
P BOX 7089
15 .1 EAST STAFFPRD STREET
CITY OF INDUSTRY CA 91744 US

JOHN D BALLAS
P.O. BOX 7089
15651 EAST STAFFORD STREET
CITY OF INDUSTRY CA 91744 US

RICHARD CABANILLA, PLANNING DEPARTMENT
IMPERIAL COUNTY
939 MAIN STREET
EL CENTRO CA 92243-2856 US

SCOTT KESSLER
202 WEST FOURTH STREET
ALTURUS CA 94102 US

JAMES T. QUINN
CALIFORNIA PUBLIC UTILITIES COMM
505 VAN NESS AVENUE
SAN FRANCISCO CA 94102-3298 US

LOUIS P. WARCHOT
SOUTHRN PACIF. TRANS. CO.
ONE MARKET PLAZA
SOUTHERN PACIFIC BLDG RM 815
SAN FRANCISCO CA 94105 US

CANNON Y. HARVEY
SOUTHERN PAC. TRNS. CO.
ONE MARKET PLAZA
SAN FRANCISCO CA 94105 US

LINDSAY BOWER, DEPUTY ATTORNEY GENERAL
CALIFORNIA DEPT. OF JUSTICE
50 FREMONT STREET STE 300
SAN FRANCISCO CA 94105 US

CAROL A. HARRIS
SOUTHERN PAC. TRANS. CO.
ONE MARKET PLAZA
S N FRANCISCO CA 94105 US

LARRY W. TELFORD
SEVERSON & WERSON
ONE EMBARCADERO CENTER
SAN FRANCISCO CA 94111 US

DANIEL R. ARELLANO
CITY HALL
708 THIRD STREET
BRENTWOOD CA 94513-1396 US

ANN FINGARETTE HASSE
1111 BROADWAY
OAKLAND CA 94607 US

LEO R BRIEN
530 WARER STREET
OAKLAND CA 94607 US

PAUL C. ANDERSON
MCDONOUGH, HOLLAND, ETAL
1999 HARRISON STREET STE 1300
OAKLAND CA 94612 US

JEFFREY A. WALTER
WATERFALL TOWERS, 201-B
2455 BENNETT VALLEY ROAD
SANTA ROSA CA 95404 US

CHRISTOPHER J. NEARY
110 SOUTH MAIN STREET SUITE C
WILLITS CA 95490 US

DAVID N. MAGAW
YOLO SHORTLINE RR CO
3344 BRAEBURN STREET
SACRAMENTO CA 95821-4037 US

JOSEPH H. PETTUS
SUN VALLEY ENERGY INC
800 HOWE AVE, SUITE 270
SACRAMENTO CA 95825 US

SERVICE LIST FOR: 26-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

R. MARK ARMSTRONG
P O BOX 1051
ALTURAS CA 96101 US

KATHLEEN R. LAZARD
P O BOX 730
700 COURT STREET
SUSANVILLE CA 96130 US

MIKE THORNE, EXEC. DIR.
PORT OF PORTLAND
BOX 3529
PORTLAND OR 97208 US

FRED P. SWANSON
OREGON STEEL MILLS
P O BOX 2760
PORTLAND OR 97208-0363 US

RICK WILLIS, EXECUTIVE DIRECTOR
OREGON PUBLIC UTILITY COMM
550 CAPITOL ST NE
SALEM OR 97310-1380 US

ALLAN E. RUMBAUGH
P O BOX 1215
COOS BAY OR 97420 US

KAREN O'CONNOR
LAKE COUNTY COURTHOUSE
513 CENTER STREET
LAKEVIEW OR 97630 US

ANN DEKOSTER
P O BOX 1209
SEATTLE WA 98111 US

CHARLES H. MONTANGE
JPA AND EL DORADO COMPANY
426 NW 162ND STREET
SEATTLE WA 98177 US

DONALD G MEYER
P O BOX 1837
TACOMA WA 98401 US

MARCELLA M. SZEL
CP RAIL SYSTEM
910 PEEL STREET WINDSOR STATION RM 234
MONTREAL QUEBEC CD H3C 3E4 CD

Records: 497

STB FD 32760 11-27-96 C-62 21103

SERVICE DATE
NOV 27 1996

21103
EB

SURFACE TRANSPORTATION BOARD[1]

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY--CONTROL AND MERGER--SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

[Decision No. 62][2]

Decided: November 27, 1996

In Decision No. 44, we approved the common control and merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company)[3] and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and

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[1] Proceedings before the Interstate Commerce Commission (ICC) that remained pending on January 1, 1996, must be decided under the law in effect prior to that date if they involve functions retained by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. This proceeding was pending with the ICC prior to January 1, 1996, and relates to functions retained under Surface Transportation Board (Board) jurisdiction pursuant to new 49 U.S.C. 11102 and 11323-27. Citations are to the former sections of the statute, unless otherwise indicated.

[2] This decision embraces: Finance Docket No. 32760 (Sub-No. 1), Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Trackage Rights Exemption--Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company; Finance Docket No. 32760 (Sub-No. 2), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Petition for Exemption--Acquisition and Operation of Trackage in California, Texas, and Louisiana; Finance Docket No. 32760 (Sub-No. 13), Responsive Application--The Texas Mexican Railway Company; Finance Docket No. 32760 (Sub-No. 14), Application for Terminal Trackage Rights Over Lines of The Houston Belt & Terminal Railway Company--The Texas Mexican Railway Company; Finance Docket No. 32760 (Sub-No. 19), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Trackage Rights Exemption--Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., The Denver and Rio Grande Western Railroad Company, and The Southern Illinois & Missouri Bridge Company; and STB Finance Docket No. 32760 (Sub-No. 20), The Atchison, Topeka and Santa Fe Railway Company--Trackage Rights Exemption--Southern Pacific Transportation Company.

[3] Union Pacific Corporation is referred to as UPC. Union Pacific Railroad Company and Missouri Pacific Railroad Company are referred to collectively as UP.

The Denver and Rio Grande Western Railroad Company),[4] subject to various conditions.[5] Among the conditions we imposed was the *Tex Mex condition*, which requires that The Texas Mexican Railway Company (Tex Mex) be granted the Robstown/Corpus Christi-Houston-Beaumont trackage rights sought in its Sub-No. 13 responsive application and in its Sub-No. 14 terminal trackage rights application, subject, however, to the *prior/subsequent restriction* that provides that all freight handled by Tex Mex pursuant to such trackage rights must have a prior or subsequent movement on Tex Mex's Laredo-Robstown-Corpus Christi line.[6]

Tex Mex, which wants the prior/subsequent restriction removed, has filed a petition (TM-44) to reopen Decision No. 44. Replies have been filed by: UP/SP (UP/SP-283); BNSF (BN/SF-69);[7] the Railroad Commission of Texas (RCT-9); Dow Chemical Company (DOW-30); The National Industrial Transportation League (NITL-23);[8] and The Society of the Plastics Industry, Inc. (SPI-26). We have also received a number of letters supporting the Tex Mex petition. See also TM-46 and TM-47 (letters of shippers and public officials supporting the Tex Mex petition); BNSF's "Progress Report and Operating Plan" filed October 1, 1996 at 20-22 (more discussion of the matters raised in the TM-44 petition); and TM-48 at 8-10 (same).

BACKGROUND

Tex Mex contends that imposition of the prior/subsequent restriction was material error for several reasons.

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[4] Southern Pacific Rail Corporation is referred to as SPR. Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company are referred to collectively as SP.

[5] Common control was consummated on September 11, 1996, when SPR was merged with and into UP Holding Company, Inc., a direct wholly owned subsidiary of UPC. See UP/SP-277 at 1. UPC, UP, SPR, and SP are referred to collectively as applicants. See Decision No. 44, slip op. at 7 n.3.

[6] See Decision No. 44, slip op. at 30-33 and 147-51. See also Decision No. 47 (addressing certain details respecting the Tex Mex trackage rights).

[7] Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company are referred to collectively as BNSF. See also Decision No. 44, slip op. at 12 n.15 (description of the BNSF agreement, which we also imposed as a condition in Decision No. 44).

[8] See also the TFI-3 reply filed by The Fertilizer Institute.

First. Tex Mex contends that the prior/subsequent restriction leaves uncorrected a serious competitive harm that the merger will cause to many shippers, including particularly shippers located in Houston. Before the merger, Tex Mex notes, those shippers were served by three line-haul railroads; after the merger, they will be served by only two line-haul railroads (except with respect to traffic having a prior or subsequent movement on Tex Mex's own line). Unique aspects of the Houston rail market, Tex Mex claims, make the loss of a third competitive outlet in that rail market significantly more harmful than it would be in most other rail markets. Tex Mex claims: that very little of the 3-to-2 traffic to or from Houston is intermodal or automotive; that 50% of the Houston 3-to-2 traffic is chemical traffic; that, of the Houston 3-to-2 traffic, 75% moves more than 600 miles and 50% moves more than 1,200 miles; and that, for these reasons, very little of the 3-to-2 traffic in the Houston market is subject to substantial truck competition. Tex Mex further claims: that SP is a much more significant competitor in the Houston market than in most other 3-to-2 markets; that, for much of the traffic in Houston, BNSF has a small share; and that, for these reasons, the competitive situation in Houston is closer to 2-to-1 than to 3-to-2.[9]

Second. Tex Mex maintains that the prior/subsequent restriction will *both* impose unnecessary costs and operating inefficiencies *and* seriously impair Tex Mex's ability to compete effectively for the traffic it is permitted to carry. The principal difficulty presented by the prior/subsequent restriction, Tex Mex claims, arises from the fact that shippers (e.g., plastics manufacturers) often deliver cars to a railroad before the ultimate destination of the car is known. For example, if a Houston shipper initially routes a group of 100 cars to Tex Mex and later sells 90 of the carloads to buyers in Mexico and 10 of the carloads to buyers in Kansas City, Tex Mex notes that, in this situation, it could carry the 90 cars to Laredo but, even though it will be operating a regular train from Houston to Beaumont consisting of freight having a prior movement on Tex Mex's own line, it could not carry the 10 cars to Beaumont

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[9] Tex Mex adds that the competitive situation respecting traffic moving from/to Houston is analogous to the competitive situation respecting traffic moving across the U.S.-Mexico border: it may be a 3-to-2 situation in some theoretical way, but, on account of BNSF's "extremely limited" pre-merger presence, it is effectively a 2-to-1 situation. See Decision No. 44, slip op. at 148 & n.182.

for interchange with its KCS affiliate[10] and would have to switch these cars to UP/SP or BNSF in Houston. This switching, Tex Mex claims, will entail costs and additional transit times that would not be incurred by UP/SP or BNSF if the cars were delivered to them. Tex Mex adds that shippers will be discouraged from routing via Tex Mex *any* carloads whose ultimate destination is not known at the time of initial delivery, and that this will seriously impair Tex Mex's ability to compete even for traffic that would ultimately traverse its Laredo-Robstown-Corpus Christi line.

Third. Tex Mex contends that we were under a misimpression that Tex Mex conceded the correctness of UP/SP's objections to Tex Mex's carrying traffic not having a prior or subsequent movement on its own line. This argument concerns a concession Tex Mex made in its TM-34 rebuttal submission (filed May 14, 1996):

> An incidental competitive benefit of granting the rights Tex Mex seeks is that Tex Mex could carry some shipments between Beaumont and Houston that had no prior or subsequent rail movement south of Houston. This, however, would be a relatively minor benefit, and it was certainly not a central purpose of the application. Tex Mex submits that there is no reason to deny a remedy that is appropriate to mitigate anticompetitive effects of a merger merely because the remedy has other incidental competitive benefits, or to perform some Procrustean operation on that remedy just to prevent it from being too beneficial. *However, if the Board concludes that providing those shippers with this modicum of additional competition is not competitively justified, it could limit the rights granted to exclude Tex Mex from carrying shipments between Houston and Beaumont that have no prior or subsequent movement by rail south of Houston. Such a limitation would not undermine the purposes for which the rights are being sought.* Nor would it significantly affect Tex Mex's ability to provide essential services for customers local to its line.

TM-34 at 7 (emphasis added). Two days later, Tex Mex filed an "Errata By Way Of Clarification" arguing that it had made no concessions or amendments to its applications, and did not support or endorse any limitation of the trackage rights sought in those applications. TM-35 at 1-2 (filed May 16, 1996). Tex Mex insists that it has never conceded the correctness of UP/SP's arguments respecting Houston-Beaumont traffic, it has never

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[10] The Kansas City Southern Railway Company is referred to as KCS. See Decision No. 44, slip op. at 31 & n.41.

believed that the rights it has sought should be limited in any way, and it has never suggested that the right to carry traffic having no prior or subsequent movement south of Houston was unimportant to Tex Mex or was not justified.[11]

Fourth. Tex Mex contends that removal of the prior/subsequent restriction is extremely important to Tex Mex's ability to function as a viable competitor to a merged UP/SP. Approval of the Tex Mex applications in their entirety, Tex Mex claims, will produce $822,000 more in revenues and $250,000 more in net income to Tex Mex in the first year of operation than approval of such applications subject to the prior/subsequent restriction. The first year net income calculation, Tex Mex notes, is especially important--$269,000 net income with unrestricted rights, but only $19,000 net income with restricted rights. Tex Mex acknowledges that the $19,000 calculation represents net income and not net loss, but insists that it would provide Tex Mex with little margin for weathering business cycles and, more importantly, little incentive to compete aggressively. Tex Mex concedes that it can survive without the traffic made unavailable by the prior/subsequent restriction, TM-44 at 16, but claims that its survival without this traffic will be extremely tenuous.

DISCUSSION AND CONCLUSIONS

A proceeding may be reopened, and reconsideration granted, upon a showing of material error, new evidence, or substantially changed circumstances. 49 CFR 1115.3(b) (1995). See also Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549 (ICC served Nov. 27, 1995) (Decision No. 43, slip op. at 2). Tex Mex has asserted material error and, to a limited degree, new evidence; it has not asserted substantially changed circumstances. As a practical matter, however, the TM-44 petition rests entirely upon the assertion of material error, because the new evidence that has been presented is only tenuously "new" and is certainly not material.

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[11] We think it appropriate to observe that we did not ignore or misconstrue Tex Mex's argument that we should not restrict its access to Houston. Although we noted Tex Mex's TM-34 concession (Decision No. 44, slip op. at 149-50), we also explicitly noted its TM-35 "clarification" (Id., slip op. at 32 n.42).

The TM-44 petition will be denied. The merger, as presently conditioned, will have no significant adverse competitive effects on Houston traffic or at the Laredo border crossing into Mexico. Thus, there is no reason to grant Tex Mex unrestricted access to Houston traffic.

The purpose of the trackage rights given to Tex Mex was to address the possible loss of competition at the Laredo gateway into Mexico and to protect the essential services provided by Tex Mex to its shippers. There is no nexus between the potential difficulty we discerned with regard to Laredo, which we have ameliorated with our partial grant of the Tex Mex applications, and the Houston transportation market.

Our grant of trackage rights was premised on our concerns "that the merger will diminish [Tex Mex's] traffic base to the point where it is unable effectively to preserve a second competitive routing at Laredo, and that the merger might endanger the essential service it provides to the more than 30 shippers located on its line." Decision No. 44, slip op. at 148. Although BNSF's settlement agreement with applicants anticipated that BNSF would replace SP as an independent interline partner for Tex Mex traffic bound to and from Laredo, we explained that "[t]his does not mean that BNSF will be able to retain all the traffic now carried by SP." Id. at 148.

BNSF also received enhanced access to Mexico at Eagle Pass. This created an additional concern that BNSF might favor its new, efficient, single-line movement into Eagle Pass over its new interchange with Tex Mex into Laredo. Thus, our analysis led to the conclusion that only a partial grant of the Tex Mex applications was required to ensure the continuation of an effective competitive alternative to UP's routing into the border crossing at Laredo.

Our partial grant of the Tex Mex applications was not directed at mitigating any supposed competitive harm arising at Houston. Despite the continued assertions of Tex Mex, the 3-to-2 situation at Houston is not unique, and is much the same as at other 3-to-2 points. In addition, there is very little of the Houston traffic that was served by all three Class I railroads operating there prior to this merger.[12] The merger should actually strengthen competition in Houston by replacing SP with a

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[12] Tex Mex has measured 3-to-2 flows using BEAs (Business Economic Areas), which we have found to be an overly broad definition of origins and destinations. See Decision No. 44, slip op. at 106 n.102 and 123 n.130.

stronger BNSF.[13] BNSF has been granted additional routes into and out of Houston that preserve and will reinforce competition for Houston rail traffic.

A significant amount of the traffic at Houston points served directly or by reciprocal switching by three rail carriers before the merger, but by only two carriers after, is truck-competitive intermodal traffic. Intermodal shippers have broadly supported this merger, and we have found that this traffic will not suffer any merger-related harm. See, e.g., Decision No. 44, slip op. at 269. Further, as applicants have explained:

> Whereas Tex Mex's petition relies on the fact that much Houston traffic is chemicals rather than intermodal, the traffic gains that Tex Mex expects if the prior/subsequent movement limitation is removed relate almost entirely to intermodal traffic and not chemicals traffic. Of the 3,510 units of traffic that Tex Mex believes its [sic] would gain if the limitation were removed, over 88% (3,100 units) is intermodal. TM-44, p. 15.

UP/SP-283 at 11 n.4 (emphasis in original). We have carefully examined the role of rail transportation for chemicals and plastics shippers in the Gulf area, and determined that the merger, as we have conditioned it, is unlikely to have any significant adverse competitive effects. See Decision No. 44, slip op. at 151-54. And, the monitoring condition we have imposed will ensure that we can detect and remedy any unforeseen competitive harm.

In addition, Tex Mex offered a comparison of rates for certain Houston shippers that attempts to quantify the asserted harm when the number of carriers is reduced from three to two. This study purports to show that rates for three-carrier shippers are over 20% lower than those for two-carrier shippers at Houston. But applicants have shown certain fundamental flaws in this study, and it cannot support the conclusions Tex Mex has drawn from it. The most important of the flaws is linked to the significantly longer lengths of haul for the three-carrier traffic group. The study merely shows that route distance and revenue per ton-mile are inversely related. Average rail transport costs per mile decrease as the length of haul increases, and this has caused the rate differences observed in

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[13] "SP is a constrained, not a full competitor, with limited impact on the pricing actions of other western carriers." Decision No. 44, slip op. at 121.

the study, not the number of railroads serving the shippers. See UP/SP-283 at 12-13.

Finally, the circumstances surrounding the 3-to-2 situation at Houston are altogether different from those for the Mexican traffic. We determined that, absent our partial grant of the Tex Mex applications, the merger could lead to competitive problems at Laredo in part because BNSF would begin interlining with Tex Mex while also being able to use its own new, efficient, single-line routes to other Mexican gateways, in particular Eagle Pass. At Houston, BNSF will not face the impediments faced by Tex Mex at Laredo. We are confident that BNSF will emerge as a strong and effective replacement at Houston for the competition lost through the merger. BNSF will have its own single-line routes throughout the West and to all the major Eastern gateways. Thus, BNSF's position at Houston is completely different from the predicament that Tex Mex was facing at Laredo.

Restricting Tex Mex's use of these trackage rights to traffic having a prior or subsequent movement on Tex Mex's lines will not have the profound adverse effect alleged by Tex Mex on the efficiency of its trackage rights or on its ability to compete for traffic. Applicants have effectively rebutted Tex Mex's contention that the requirement of some plastics shippers that they be able to use storage-in-transit facilities will unduly limit Tex Mex's ability to compete for Houston traffic moving into Mexico. Plastics comprise only 3% of the Houston traffic bound for Mexico, and none of this traffic requires storage-in-transit. See UP/SP-283, Peterson V.S. at 11-12. The inefficiencies that are asserted by Tex Mex will, at worst, apply to a very small subset of the traffic that would be available to Tex Mex without the restrictions we have imposed. That this traffic might not be available, with restrictions, should not overly burden Tex Mex's use of its new trackage rights. And, our concern in granting those rights continues to rest solely on the ability of Tex Mex to be able to generate sufficient density and efficiencies on its own lines to remain a competitive force at Laredo, which is attainable through the trackage rights that have been granted to Tex Mex by the Board.

As to the financial effects of the restrictions, they also were argued previously by Tex Mex. No new information has been presented here. Tex Mex continues to project that it will earn a small profit of $19,000 if the restrictions on its trackage rights at Houston remain in place. TM-44 at 15. We are confident that Tex Mex is adequately positioned to be competitive for traffic flowing through Laredo. As is pointed out by

applicants, both applicants' and Tex Mex's traffic analyses were undertaken when U.S.-Mexican traffic levels were depressed due to the Mexican peso devaluation. In the interim, there has been a strong recovery in traffic volumes between the two countries. See UP/SP-283, Peterson V.S. at 12-14. Also, Tex Mex's analysis of its trackage rights gains focused only on existing traffic that could be diverted to Tex Mex. This ignores the traffic increases that should be generated by NAFTA (the North American Free Trade Agreement) and Tex Mex's prospect for new traffic as a result of its being able to connect with its affiliated carrier, KCS, via its trackage rights. Applicants note that the addition of a single additional grain train every other week would generate more additional net income for Tex Mex than the total net income it projects if we were to remove the restrictions on its trackage rights. See UP/SP-283 at 18.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The TFI-2 motion for leave to file the TFI-3 reply is granted.

2. The TM-44 petition is denied.

3. This decision shall be effective on November 27, 1996.

By the Board, Chairman Morgan, Vice Chairman Simmons and Commissioner Owen.

Vernon A. Williams
Secretary

SERVICE LIST FOR: 27-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

PA[redacted]K. BIBA, HOUSE COUNSEL
FO[redacted]SA PLASTICS CORP.
9 PEACH TREE HILL ROAD
LIVINGSTON NJ 07039 US

KEN WILSON
282 BALDWIN AVE
HASBROUCK HEIGHTS NJ 07604-2304 US

OSCAR J. ABELLO, PRESIDENT
"K" LINE AMERICA, INC.
535 MOUNTAIN AVENUE
MURRY HILL NJ 07974 US

TINA MASINGTON, PLAN. ANAL.
"K" LINE AMERICA, INC.
535 MOUNTAIN AVENUE
MURRAY HILL NJ 07974 US

GEORGE J. FRANCISCO, JR.
ELLIPSE SHIPPING CENTER
4201 CHURCH ROAD - SUITE 7
MT LAUREL NJ 08054 US

RONALD J. HENEFELD
PPG INDUSTRIES, INC.
ONE PPG PLACE - 35 EAST
PITTSBURGH PA 15272-0001 US

RICHARD J. RESSLER
UNION PACIFIC CORP.
EIGHTH AND EATON AVENUES, MARTIN TOWER
BETHLEHEM PA 18018 US

CARL W. VON BERNUTH
UNION PACIFIC CORP.
EIGHTH & EATON AVENUES
BETHLEHEM PA 18018 US

RICHARD H. GROSS
3801 WEST CHESTER PIKE
NE[redacted]OWN SQUARE PA 19073 US

WILLIAM E HARVEY
3801 WEST CHESTER PIKE
NEWTON SQUARE PA 19073 US

LARRY T. JENKINS
ARCO CHEMICAL COMPANY
3801 WEST CHESTER PIKE
NEWTON SQUARE PA 19073-3280 US

ANNE E. TREADWAY
CONSOLIDATED RAIL CORP.
P O BOX 41416
2001 MARKET STREET
PHILADELPHIA PA 19101-1416 US

JONATHAN M BRODER
CONSOLIDATED RAIL CORP
PO BOX 41416
2001 MARKET STREET 16-A
PHILADELPHIA PA 19101-1416 US

CONSTANCE L. ABRAMS
CONSOLIDATED RAIL CORP.
2001 MARKET STREET 16-A, TWO COMMERCE SQUAR
PHILADELPHIA PA 19101-1416 US

EDWARD B. HYMSON
CONRAIL
2001 MARKET STREET 16-A
PHILADELPHIA PA 19101-1416 US

BRUCE B. WILSON
CONSOLIDATED RAIL CORP.
2001 MARKET STREET
PHILADELPHIA PA 19101-1417 US

JOHN L ABBOTT
FMC CORPORATION
1735 MARKET STREET
PHILADELPHIA PA 19103 US

ERIC M. HOCKY
GOLLATZ, GRIFFIN, EWING
213 WEST MINER STREET
WEST CHESTER PA 19381-0796 US

SERVICE LIST FOR: 27-nov-1996 ICC FD 32760 .0 UNION PACIFIC CORPORATION, UNION PAC

CHARLES N. BEINKAMPEN
DUPONT SOURCING
1007 MARKET STREET, ROOM B-6236-A
WILMINGTON DE 19898 US

MARTIN W. BERCOVICI
KELLER & HECKMAN
1001 G ST NW SUITE 500 WEST
WASHINGTON DC 20001 US

TERRENCE D. JONES
KELLER AND HECKMAN
1001 G STREET NW STE 500 WEST
WASHINGTON DC 20001 US

LESLIE E. SILVERMAN
KELLER & HECKMAN
1001 G STREET NW STE 500 WEST
WASHINGTON DC 20001 US

DOUGLAS J. BEHR
KELLER & HECKMAN
1001 G STREET NW STE 500 WEST
WASHINGTON DC 20001 US

ROBERT L. MCGEORGE
U. S. DEPT. OF JUSTICE, ANTITRUST DIVISION
555 4TH STREET N W RM 9104
WASHINGTON DC 20001 US

EDWARD WYTKIND, EXECUTIVE DIRECTOR
TRANSP TRADES DEPT AFLCIO
400 N CAPITOL ST SW STE 861
WASHINGTON DC 20001 US

JOAN S HUGGLER
U. S. DEPT. OF JUSTICE, ANTITRUST DIVISION
555 4TH STREET N W RM 9104
WASHINGTON DC 20001 US

ROGER W. FONES
US DEPT. OF JUSTICE
555 4TH STREET NW
WASHINGTON DC 20001 US

RICHARD G SLATTERY
AMTRAK
60 MASSACHUSETTS AVENUE N E
WASHINGTON DC 20002 US

PAUL H. LAMBOLEY, ESQ.
KECK MAHIN & CATE
555 TWELFTH STREET NW SUITE 600
WASHINGTON DC 20004 US

JOSEPH GUERRIERI, JR.
GUERRIERI, EDMOND, ET. AL
1331 F STREET N W, 4TH FLOOR
WASHINGTON DC 20004 US

DEBRA L. WILLEN
GUERRIERI, EDMOND, ETAL
1331 F STREET N W, 4TH FLOOR
WASHINGTON DC 20004 US

DAVID A ASHMORE
ARNOLD & PORTER
555 TWELFTH STREET NW
WASHINGTON DC 20004 US

MICHAEL N. SOHN
555 TWELFTH STREET NW
WASHINGTON DC 20004 US

MARK SCHECTER
HOWREY & SIMON
1299 PENNSYLVANIA AVE N W
WASHINGTON DC 20004 US

ALAN E LUBEL
TROUTMAN SANDERS
601 PENNSYLVANIA AVE N W, NORTH BLDG SUITE 64
WASHINGTON DC 20004 US

ROBERT M. BRUSKIN, ESQ.
HOWREY & SIMON
1299 PENNSYLVANIA AVE NW
WASHINGTON DC 20004 US

SERVICE LIST FOR: 27-nov-1996 ICC FD 32760.0 UNION PACIFIC CORPORATION, UNION PAC

GEORGE W MAYO, JR.
HOGAN & HARTSON
555 THIRTEENTH STREET NW
WASHINGTON DC 20004-1161 US

ERIC VON SALZEN
HOGAN & HARTSON
555 THIRTEENTH STREET N W
WASHINGTON DC 20004-1161 US

ROSEMARY H. MCENERY
HOWREY & SIMON
1299 PENNSYLVANIA AVE N W
WASHINGTON DC 20004-2402 US

MARK L JOSEPHS
HOWREY & SIMON
1299 PENNSYLVANIA AVE N W
WASHINGTON DC 20004-2402 US

CHARLES W. LINDERMAN
701 PENNSYLVANIA AVE NW, 5TH FLOOR
WASHINGTON DC 20004-2696 US

S WILLIAM LIVINGSTON JR
COVINGTON & BURLING
P O BOX 7566
1201 PENNSYLVANIA AVE NW
WASHINGTON DC 20004-7566 US

RICHARD H. STREETER
BARNES & THORNBURG
1401 I STREET NW SUITE 500
WASHINGTON DC 20005 US

MICHAEL MATTIA
INSTITUTE OF SCRAP RECY.
1325 G STREET NW STE 1000
WASHINGTON DC 20005 US

ALAN E. LUBEL
TROUTMAN SANDERS LLP
1300 I STREET NW SUITE 500 EAST
WASHINGTON DC 20005 US

MARK H. SIDMAN
WEINER, BRODSKY, SIDMAN
1350 NEW YORK AVE NW STE 800
WASHINGTON DC 20005 US

PAUL C. OAKLEY
WEINER, BRODSKY, SIDMAN
1350 NEW YORK AVENUE NW SUITE 800
WASHINGTON DC 20005 US

JOHN R. MOLM
TROUTMAN SANDERS LLP
1300 I STREET, N. W., SUITE 500 EAST
WASHINGTON DC 20005-3314 US

FRITZ R. KAHN
1100 NEW YORK AVENUE NW SUITE 750 WEST
WASHINGTON DC 20005-3934 US

JOHN K. MASER, III
DONELAN,CLEARY,WOOD,MASER
1100 NEW YORK AVE NW SUITE 750
WASHINGTON DC 20005-3934 US

THOMAS W. WILCOX
DONELAN, CLEARY, WOOD & MASER, P.C.
1100 NEW YORK AVE NW STE 750
WASHINGTON DC 20005-3934 US

JEFFREY O. MORENO
DONELAN CLEARY WOOD MASER
1100 NEW YORK AVENUE N W, SUITE 750
WASHINGTON DC 20005-3934 US

NICHOLAS J. DIMICHAEL
DONELAN, CLEARY, ET AL.
1100 NEW YORK AVENUE N W STE 750
WASHINGTON DC 20005-3934 US

FREDERIC L. WOOD
DONELAN, CLEARY, ET. AL
1100 NEW YORK AVE NW STE 750
WASHINGTON DC 20005-3934 US

SERVICE LIST FOR: 27-nov-1996 ICC FD 32760.0 UNION PACIFIC CORPORATION, UNION PAC

JO A DEROCHE
WEINER, BRODSKY, ET AL
1350 NEW YORK AVE NW SUITE 800
WASHINGTON DC 20005-4797 US

ANDREW P. GOLDSTEIN
MCCARTHY, SWEENEY ET AL.
1750 PENNSYLVANIA AVE NW
WASHINGTON DC 20006 US

TERRY L. CLAASSEN
CORN REFINERS ASSOC, INC.
1701 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20006 US

CHARLES A. SPITULNIK
HOPKINS & SUTTER
888 16TH STREET N W
WASHINGTON DC 20006 US

ROBERT P. VOM EIGEN
HOPKINS AND SUTTER
888 16TH STREET N W
WASHINGTON DC 20006 US

ERIKA Z. JONES
MAYER, BROWN & PLATT
2000 PENNSYLVANIA AVE N W SUITE 6500
WASHINGTON DC 20006 US

ADRIAN L. STEEL, JR.
MAYER, BROWN & PLATT
2000 PENNSYLVANIA AVE N W SUITE 6500
WASHINGTON DC 20006 US

KRISTA L. EDWARDS
SIDLEY & AUSTIN
1722 EYE STREET N W
WASHINGTON DC 20006 US

MONICA J. PALKO
BRACEWELL & PATTERSON
2000 K STREET NW STE 500
WASHINGTON DC 20006 US

ANNE D. SMITH
WHITE & CASE
1747 PENNSYLVANIA AVENUE N W
WASHINGTON DC 20006 US

KATHRYN KUSSKE
MAYER, BROWN & PLATT
2000 PENNSYLVANIA AVE N W SUITE 6500
WASHINGTON DC 20006 US

ROY T. ENGLERT, JR
MAYER, BROWN & PLATT
2000 PENNSYLVANIA AVE N W SUITE 6500
WASHINGTON DC 20006 US

LAURENCE R. LATOURETTE
PRESTON GATES ELLIS ETAL
1735 NY AVE NW SUITE 500
WASHINGTON DC 20006 US

ALBERT B KRACHMAN
BRACEWELL & PATTERSON LLP
2000 K ST NW STE 500
WASHINGTON DC 20006-1872 US

JAMES A CALDERWOOD
ZUCKERT, SCOUTT & RASENBERGER, L.L. P.
888 17TH STREET NW, SUITE 600
WASHINGTON DC 20006-3939 US

ANDREW R PLUMP
ZUCKERT, SCOUTT, RASENBERGER
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

JENNIFER P OAKLEY
ZUCKERT, SCOUTT & RASENBERGER
888 SEVENTEENTH ST NW, STE 600
WASH DC 20006-3939 US

RICHARD A. ALLEN
ZUCKERT, SCOUT, RASENBERGER
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

SERVICE LIST FOR: 27-nov-1996 ICC FD 32760.0 UNION PACIFIC CORPORATION, UNION PAC

JOHN V. EDWARDS, ESQ
ZUCKERT, SCOUTT ET AL.
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

ALICIA M SERFATY
HOPKINS & SUTTER
888 - 16TH STREET NW
WASHINGTON DC 20006-4103 US

STEVEN J. KALISH
MCARTHY, SWEENEY & HARKAWAY
1750 PENNSYLVANIA AVE NW
WASHINGTON DC 20006-4502 US

TERENCE M. HYNES
SIDLEY & AUSTIN
1722 EYE STREET NW
WASHINGTON DC 20006-5304 US

ANTHONY J MCMAHON
BASATIANELLI, BROWN ETAL
2828 PA AVE NW STE 203
WASHINGTON DC 20007 US

JOHN F C LUEDKE
GALLAND, KHARASCH, MORSE & GARFINKLE
1054 THIRTY-FIRST STREET NW
WASHINGTON DC 20007 US

VIRGINIA R METALLO
3050 K ST NW SUITE 400
WASHINGTON DC 20007 US

JAMES F RILL
COLLIER SHANNON RILL & SCOTT
3050 K STREET NW SUITE 400
WASHINGTON DC 20007 US

ANDREW T GOODSON
CANAL SQUARE
1054 THIRTY-FIRST ST NW
WASHINGTON DC 20007 US

EDWARD D. GREENBERG
GALLAND, KHARASCH, MORSE & GARFINKLE
1054 THIRTY-FIRST STREET NW
WASHINGTON DC 20007-4492 US

CHARLES H. WHITE, JR.
1054-THIRTY-FIRST STREET NW
WASHINGTON DC 20007-4492 US

MICHAEL F. MCBRIDE
LEBOEUF LAMB GREENE & MACRAE, L. L. P.
1875 CONNECTICUT AVE N W, STE 1200
WASHINGTON DC 20009 US

DANIEL ARONOWITZ
LEBOUEF, LAMB, GREENE
1875 CONNECTICUT AVE NWSTE 1200
WASHINGTON DC 20009-5728 US

LINDA K. BREGGIN, ESQ.
LEBOEUF, LAMB, GREENE, ET AL
1875 CONNECTICUT AVENUE N W
WASHINGTON DC 20009-5728 US

PAUL M. DONOVAN
LAROE, WINN, ETAL
3506 IDAHO AVE NW
WASHINGTON DC 20016 US

JOHN D. HEFFNER, ESQ.
REA, CROSS & AUCHINCLOSS
1920 N STREET NW SUITE 420
WASHINGTON DC 20036 US

JOHN M. CUTLER, JR.
MCCARTHY SWEENEY HARKAWAY
1750 PENNSYLVANIA AVE N W SUITE 1105
WASHINGTON DC 20036 US

GORDON P. MACDOUGALL
1025 CONNECTICUT AVE NW SUITE 410
WASHINGTON DC 20036 US

SERVICE LIST FOR: 27-nov-1996 ICC FD 32760.0 UNION PACIFIC CORPORATION, UNION PAC

PAUL A. CUNNINGHAM
HARKINS CUNNINGHAM
1300 19TH STREET NW SUITE 600
WASHINGTON DC 20036 US

MARC J. FINK
SHER & BLACKWELL
2000 L STREET N W , SUITE 612
WASHINGTON DC 20036 US

CHRISTOPHER A. MILLS
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036 US

ROBERT A. WIMBISH, ESQ.
REA, CROSS & AUCHINCLOSS
1920 N STREET NW SUITE 420
WASHINGTON DC 20036 US

GERALD P NORTON
HARKINS CUNNINGHAM
1300 19TH ST NW SUITE 600
WASHINGTON DC 20036 US

THOMAS LAWRENCE III
OPPENHEIMER WOLFF, ETC
1020 - 19TH STREET NW STE 400
WASHINGTON DC 20036 US

FRANK J. PERGOLIZZI
SLOVER & LOFTUS
1224 SEVENTEENTH ST NW
WASHINGTON DC 20036 US

DONALD F GRIFFIN
HIGHSAW MAHONEY CLARKE
1050 SEVENTEENTH STREET N W, STE 210
WASHINGTON DC 20036 US

RICHARD S. EDELMAN
HIGHSAW MAHONEY CLARKE
1050 SEVENTEENTH STREET N W, SUITE 210
WASHINGTON DC 20036 US

KELVIN J. DOWD
SLOVER & LOFTUS
1224 17TH STREET N W
WASHINGTON DC 20036 US

GERALD P. NORTON
HARKINS CUNNINGHAM
1300 NINETEENTH STREET, NW.,STE 600
WASHINGTON DC 20036 US

GERALD P. NORTON
HARKINS CUNNINGHAM
1300 NINETEENTH STREET , NW., STE. 600
WASHINGTON DC 20036 US

C MICHAEL LOFTUS
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036 US

PATRICIA E. (DIETRICH) KOLESAR
SLOVER & LOFTUS
1224 SEVENTEENTH ST NW
WASH DC 20036 US

SUSAN B GERSON
GRAHAM & JAMES, LLP
2000 M STREET NW STE 700
WASHINGTON DC 20036 US

WILLIAM G. MAHONEY
HIGHSAW, MAHONEY & CLARKE
1050 SEVENTEENTH STREET NW SUITE 210
WASHINGTON DC 20036 US

KEITH G. O'BRIEN
REA, CROSS & AUCHINCLOSS
1920 N STREET N W - SUITE 420
WASHINGTON DC 20036 US

RICHARD B HERZOG
HARKINS CUNNINGHAM
1300 19TH ST NW SUITE 600
WASHINGTON DC 20036-1609 US

SERVICE LIST FOR: 27-nov-1996 ICC FD 32760.0 UNION PACIFIC CORPORATION, UNION PAC

JOSEPH L LAKSHMANAN
1300 19TH STREET NW, SUITE 600
WASHINGTON DC 20036-1609 US

JOEL A RABINOVITZ
HARKINS CUNNINGHAM
1300 19TH STREET NW SUITE 600
WASHINGTON DC 20036-1609 US

JAMES M. GUINIVAN
HARKINS CUNNINGHAM
1300 19TH ST NW SUITE 600
WASHINGTON DC 20036-1609 US

MARC D. MACHLIN
PEPPER, HAMILTON, ET AL
1300 19TH STREET N W
WASHINGTON DC 20036-1658 US

JOHN WILL ONGMAN
PEPPER HAMILTON SCHEETZ
1300 NINETEENTH STREET N W
WASHINGTON DC 20036-1685 US

MICHELLE J. MORRIS
PEPPER, HAMILTON, ETAL
1300 NINETEENTH ST NW
WASHINGTON DC 20036-1685 US

TIMOTHY M WALSH
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

SAMUEL M. SIPE, JR.
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

BETTY JO CHRISTIAN
STEPTOE & JOHNSON
1330 CONNECTICUT AVE NW
WASHINGTON DC 20036-1795 US

JOHN H. LESEUR
SLOVER & LOFTUS
1224 17TH STREET NW
WASHINGTON DC 20036-3081 US

KEVIN M SHEYS
OPPENHEIMER WOLFF ET AL.
1020 NINETEENTH STREET N W SUITE 400
WASHINGTON DC 20036-6105 US

A STEPHEN HUT JR
WILMER CUTLER & PICKERING
2445 M ST NW
WASHINGTON DC 20037 US

SCOTT N. STONE
PATTON BOGGS L.L.P.
2550 M STREET NW 7TH FLOOR
WASHINGTON DC 20037-1346 US

DANIEL K. MAYERS
WILMER CUTLER PICKERING
2445 M STREET N W
WASHINGTON DC 20037-1420 US

WILLIAM J KOLASKY JR
WILMER CUTLER & PICKERING
2445 M STREET NW
WASH DC 20037-1420 US

ALI M. STOEPPELWERTH
WILMER CUTLER PICKERING
2445 M STREET N W
WASHINGTON DC 20037-1420 US

MICHAEL BRESSMAN
WILMER CUTLER PICKERING
2445 M STREET N W
WASHINGTON DC 20037-1420 US

DAVID H. BAKER
HOLLAND & KNIGHT
2100 PENN AVE NW ST 400
WASHINGTON DC 20037-3202 US

SERVICE LIST FOR: 27-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

J. MICHAEL HEMMER
COVINGTON & BURLING
P O BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044 US

TIMOTHY C HESTER
P O BOX 7566
1201 PENNSYLVANIA AVENUE N W
WASHINGTON DC 20044 US

J MICHAEL HEMMER
COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20044 US

DAVID L. MEYER
COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE N W
WASHINGTON DC 20044-7566 US

MICHAEL ROSENTHAL
COVINGTON & BURLING
P O BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044-7566 US

MICHAEL A. LISTGARTEN
COVINGTON & BURLING
P O BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044-7566 US

ARVID E. ROACH II
COVINGTON & BURLING
P O BOX 7566
WASHINGTON DC 20044-7566 US

ARVID E. ROACH II
COVINGTON & BURLING
PO BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044-7566 US

EILEEN S. STOMMES
USDA
P. O. BOX 96456
WASHINGTON DC 20090-6456 US

HON. JEROME NELSON
FERC (LJ-2)
888 1ST STREET N E
WASHINGTON DC 20426 US

RICHARD SANDERSON
OFFICE OF FED ACTIV
US ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON DC 20460 US

HONORABLE JOHN GLENN
ATTN: SUSAN CARNOHAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE J. ROBERT KERRY
UNITED STATES SENATE
WASH DC 20510 US

HARRY REID
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON CONRAD BURNS
US SENATE
WASHINGTON DC 20510 US

HON BYRON DORGAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE J. BENNETT JOHNSTON
U. S. SENATE

WASHINGTON DC 20510 US

HON. PHIL GRAMM
UNITED STATES SENATE
WASHINGTON DC 20510 US

SERVICE LIST FOR: 27-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

HONORABLE RICHARD LUGAR
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE RICHARD BRYAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. CHRISTOPHER S. BOND
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. CHARLES E. GRASSLEY
U. S. SENATE
WASHINGTON DC 20510 US

HONORABLE GENE GREEN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. JAN MEYERS
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. DON NICKLES
UNITED STATES SENATE

WASHINGTON DC 20510 US

HONORABLE THAD COCHRAN
UNITED STATE SENATE
WASHINGTON DC 20510 US

HONORABLE WILLIAM COHEN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. MARK B. HATFIELD
U S SENATE
WASHINGTON DC 20510-0001 US

HONORABLE HARRY REID
UNITED STATES SENATE
WASHINGTON DC 20510-0001 US

HONORABLE TOM CAMPBELL
UNITED STATE SENATE
WASHINGTON DC 20510-0515 US

HON. HANK BROWN
UNITED STATES SENATE
WASHINGTON DC 20510-0604 US

HON. BEN N CAMPBELL
UNITED STATES SENATE
WASHINGTON DC 20510-0605 US

HONORABLE NANCY LANDON KASSENBAUM
UNITED STATES SENATE
WASHINGTON DC 20510-1602 US

HONORABLE JOHN BREAUX
UNITED STATES SENATE

WASHINGTON DC 20510-1803 US

HONORABLE J. JAMES EXON
ATTENTION: DENISE ARMSTRONG
UNITED S TATES SENATE
WASHINGTON DC 20510-2702 US

HON. TOM EWING
HOUSE OF REPRESENTATIVES

WASHINGTON DC 20515 US

SERVICE LIST FOR: 27-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

HON JOHN P. MURTHA
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PAT ROBERTS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. KIKA DE LA GARZA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE GEORGE E. BROWN, JR.
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE FRANK TAJEDA
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LLOYD DOGGETT
U. S. HOUSE OF REPRESENTATAIVES
WASHINGTON DC 20515 US

HONORABLE BARBARA-ROSE COLLINS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON DAVID L HOBSON
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JOHN TANNER
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CLEO FIELDS
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TIM JOHNSON
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RON LEWIS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DAVID MINGE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JOHN HOSTETTLER
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JOE BARTON
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JACK FIELDS
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON TOM DELAY
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON PETE GREEN
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

SERVICE LIST FOR: 27-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

HONORABLE PAUL MCHALE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TIM HOLDEN
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE MIKE DOYLE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE FRANK D. RIGGS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE CHARLES W. STENHOLM
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE ZOE LOEGREN
US HSE OF RESPRESENTATIVE
WASHINGTON DC 20515 US

HONORABLE XAVIER BECERRA
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LUCILLE ROYAL-ALLARD
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LYNN WOOLSEY
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PETE STARK
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE NANCY PELOSI
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TOM LANTOS
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RICHARD W. POMBO,
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE KEN CALVERT,
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE SONNY BONO,
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE CHRISTOPHER COX,
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE ANDREA H SEASTRAND
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RON PACKARD
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

SERVICE LIST FOR: 27-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

HONORABLE DANA ROHRABACHER
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BILL BAKER,
HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE HOWARD P. BUCK MCKEON,
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BRIAN P. RILBRAY,
US HSE OF REPRESENTATIVES
WASH DC 20515 US

HONORABLE EDWARD R. ROYCE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE KAREN MCCARTHY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE CHARLES WILSON
HOUSE OF REPRESENTATIVES

WASHINGTON DC 20515 US

HONORABLE JAY KIM
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PHIL ENGLISH
HOUSE OF REPRESENTATIVES

WASHINGTON DC 20515 US

HONORABLE JULIAN DIXON
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JAY DICKEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. WAYNE ALLARD
U S HOUSE REPRESENTATIVES
WASHINGTON DC 20515 US

HON. EARL POMEROY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE GEORGE GEKAS
ATTEN: TOM SANTANIELLO
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DONALD M. PAYNE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. PAUL KANJORSJI
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. HAROLD L. VOLKMER
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. BILL EMERSON
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

SERVICE LIST FOR: 27-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

HON. IKE SKELTON
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JAMES L. OBERSTAR
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. MARTIN OLAV SABO
ATTN: MICHAEL ERLANDSON
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. RICHARD J. DURBIN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. LANE EVANS
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. DAN COATS
ATTN: PATTIE DELOATCHE
US HSE OF REPRESENTATIVES-
WASHINGTON DC 20515 US

HON. CARLOS J. MOORHEAD
ATTN: DAVE JOERGENSON
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BOB CLEMENT
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ESTEBAN E TORRES
U S STATES HOUSE REPRESENTATIVES
WASHINGTON DC 20515 US

HON. HAROLD E. FORD
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. THOMAS C SAWYER
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE WALLY HERGER
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JAMES A. TRAFICANT, JR.
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. TIM JOHNSON
ANN SIMMONS
US HSE OF REP
WASHINGTON DC 20515 US

HON. JOHN BRYANT
US HOUSE OF REP.

WASHINGTON DC 20515 US

HON. ROBERT A. BORSKI
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. MICHAEL OXLEY
HOUSE OF REPRESENTATIVES

WASHINGTON DC 20515 US

HONORABLE RONALD V. DELLUMS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

SERVICE LIST FOR: 27-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

SHEILA JACKSON-LEE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JERRY LEWIS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. HENRY B. GONZALEZ
HOUSE OF REPRESENTATIVES

WASHINGTON DC 20515 US

HON. G. V. MONTGOMERY
ATTEN: ANDRE CLEMANDOT
US HOUSE OF REP
WASHINGTON DC 20515 US

HON TOM BEVILL
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-0104 US

HONORABLE FRANK D DIGGS
US HOUSE OF REPRESENTATIVES
WASH DC 20515-0501 US

HONORABLE RON PACKARD
U. S. HOUSE OF REPRESENTATIVES
WASH DC 20515-0548 US

HONORABLE SCOTT MCINNIS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-0603 US

HONORABLE TODD TIAHRT
HOUSE OF REPRESENTATIVE
WASHINGTON DC 20515-1004 US

HONORABLE SAM BROWNBACK
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-1602 US

HON. JIM MCCRERY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-1805 US

HONORABLE PETER BLUTE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2103 US

HONORABLE GEORGE MILLER
ATT: GARY BLAND
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2307 US

HON W J (BILLY) TAUZIN
ATTN: ROY WILLIS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2601 US

HONORABLE JOHN ENSIGN
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2801 US

HON. ROBERT E ANDREWS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3001 US

HONORABLE SHERROD BROWN
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3513 US

HON. FRANK D. LUCAS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3606 US

SERVICE LIST FOR: 27-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

HONORABLE THOMAS M. FOGLIETTA
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3801 US

HONORABLE CHAKA FATTAH
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3803 US

HONORABLE CURT WELDON
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3807 US

HONORABLE FRANK MASCARA
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3820 US

HON. MARCY KAPTUR
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4146 US

HON. JON CHRISTENSEN
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4155 US

HON. JIM CHAPMAN
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4301 US

HONORABLE STEVE STOCKMAN
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4309 US

HONORABLE MAC THORNBERRY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4313 US

HONORABLE SHEILA JACKSON LEE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4318 US

HON. HENRY BONILLA
US HOUSE REPRESENTATIVES
WASHINGTON DC 20515-4323 US

HONORABLE EDDIE BERNICE JOHNSON
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4330 US

MICHAEL D BILLIEL
ANTITRUST DIV, DEPT OF JUSTICE
325 SEVENTH ST NW STE 500
WASHINGTON DC 20530 US

PAUL SAMUEL SMITH
U. S. DEPT OF TRANSP
400 7TH ST SW , ROOM 4102 C-30
WASHINGTON DC 20590 US

JOSEPH R. POMPONIO
FEDERAL RAILROAD ADMIN.
400 7TH ST SW RCC-20
WASHINGTON DC 20590 US

LARRY R. PRUDEN
TRANS. COMM. INTL UNION
3 RESEARCH PLACE
ROCKVILLE MD 20850 US

WILLIAM W. WHITEHURST, JR
12421 HAPPY HOLLOW ROAD
COCKEYSVILLE MD 21030-1711 US

CONSTANCE H. PIERCE
CONSTELLATION COMPANIES
250 WEST PRATT STREET
BALTIMORE MD 21201-2423 US

SERVICE LIST FOR: 27-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

J TUCKER
PO BOX 25181
ARLINGTON VA 22202 US

PETER Q. NYCE, JR.
U. S. DEPARTMENT OF THE ARMY
901 NORTH STUART STREET
ARLINGTON VA 22203 US

NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
1700 NORTH MOORE STREET, SUITE 1900
ARLINGTON VA 22209 US

THOMAS E. SCHICK
CHEMICAL MANUF. ASSOC.
1300 WILSON BOULEVARD
ARLINGTON VA 22209 US

WILLIAM P. JACKSON, JR.
JACKSON & JESSUP, P. C.
P O BOX 1240
3426 NORTH WASHINGTON BLVD
ARLINGTON VA 22210 US

GERALD W. FAUTH, III
G. W. FAUTH & ASSOCIATES INC.
P O BOX 2401
ALEXANDRIA VA 22301 US

JOHN T. ESTES
SUITE 400
1029 NORTH ROYAL STREET
ALEXANDRIA VA 22314 US

PETER J SHUDTZ
CSX CORPORATION
901 E CARY ST 1 JAMES CENTER
RICHMOND VA 23119 US

ROBERT J. COONEY
NORFOLK SOUTHERN CORP.
THREE COMMERCIAL PLACE
NORFOLK VA 23510-2191 US

ROBERT S. KOMPANTY
720 THIMBLE SHOALS BLVD, SUITE 130
NEWPORT NEWS VA 23608-2574 US

BOB THOMPSON
GEORGIA-PACIFIC CORP.
P O BOX 105605
ATLANTA GA 30348-5605 US

GREGORY M. VINCENT, VICE PRESIDENT
TENNESSEE VALLEY AUTH
LOOKOUT PLACE 1101 MARKET STREET
CHATTANOOGA TN 37402 US

E. CALVIN CASSELL
EASTMAN CHEMICAL COMPANY
P O BOX 1990
KINGSPORT TN 37662 US

EDWARD S. CHRISTENBURY
400 WEST SUMMIT HILL DRIVE
KNOXVILLE TN 37902 US

HONORABLE GILLESPIE V. MONTGOMERY
U. S. HOUSE OF REPRESENTATIVES
P. O. BOX 5618
MERIDAN MS 39208 US

R. L. YOUNG
P O BOX 700
ONE MEMORIAL DRIVE
LANCASTER OH 43130-0700 US

D. MICHAEL MILLER
AMERICAN ELECTRIC POWER
1 RIVERSIDE PLAZA
COLUMBUS OH 43215 US

HONORABLE JOHN GLENN
U. S. SENATE ATTN: ANISA BELL
200 N HIGH STREET S-600
COLUMBUS OH 43215-2408 US

SERVICE LIST FOR: 27-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

MICHAEL M. BRILEY
SHUMAKER, LOOP & KENDRICK
N COURTHOUSE SQUARE - 1000 JACKSON
TOLEDO OH 43624 US

DANIEL R. ELLIOTT III
UNITED TRANSP. UNION
14600 DETROIT AVENUE
CLEVELAND OH 44107 US

CLINTON J MILLER, III, GENERAL COUNSEL
UNITED TRANSPORTATION UNION
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

RONALD P MCLAUGHLIN
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
1370 ONTARIO ST STAN BLDG
CLEVELAND OH 44113-1702 US

RICHARD E. KERTH, TRANS. MGR.
CHAMPION INTERNAT'L CORP
101 KNIGHTSBRIDGE DRIVE
HAMILTON OH 45020-0001 US

MICHAEL P. FERRO
QUANTUM CHEMICAL CORP.
11500 NORTHLAKE DRIVE
CINCINNATI OH 45249 US

BRUCE A. KLIMEK
INLAND STEEL
3210 WATLING STREET
EAST CHICAGO IN 46312 US

HON JEFF SMITH
CITY OF KENDALLVILLE
234 S MAIN STREET
KENDALLVILLE IN 46755-1795 US

JAMES E. HANSON
DOW CHEMICAL COMPANY
2020 WILLARD H DOW CENTER
MIDLAND MI 48674 US

LARRY B. KARNES
TRANSPORTATION BUILDING
PO BOX 30050
425 WEST OTTAWA
LANSING MI 48909 US

THOMAS F JACKSON
800 LINCOLN WAY
AMES IA 50010 US

P. C. HENDRICKS
UTU, STATE LEG. DIR.
317 EAST 5TH STREET STE 11
DES MOINES IA 50309 US

HONORABLE CHARLES E. GRASSLEY
UNITED STATES SENATE
210 WALNUT STREET
DES MOINES IA 50309-2140 US

EDWIN C JERTSON
INTERSTATE POWER CO
P O BOX 769
1000 MAIN STREET
DUBUQUE IA 52004 US

KENT M RAGSDALE
INTERSTATE POWER CO
PO BOX 769
DUBUQUE IA 52004 US

PHILIP D. WARD, ET AL.
P O BOX 351
200 FIRST STREET SE
CEDAR RAPIDS IA 52406-0351 US

TOBIN LEE BRITT
IES UTILITIES, INC.
P O BOX 351
200 FIRST ST SE
CEDAR RAPIDS IA 52406-0351 US

WILLIAM R. KNIGHT
WISCONSIN POWER & LIGHT
P O BOX 192
222 WEST WASHINGTON AVENUE
MADISON WI 53701-0192 US

SERVICE LIST FOR: 27-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

ALLEN J VOGEL,
MINNESOTA DEPARTMENT OF TRANSPORTATION
395 JOHN IRELAND BLVD TRANSP BLDG, SUITE 925,
ST PAUL MN 55155 US

RONALD E HUNTER, LAW DEPARTMENT
CARGILL, INCORPORATED
15407 MCGINTY ROAD WEST
WAYZATA MN 55391 US

WAYNE C. SERKLAND, U S REGIONAL COUNSEL
CANADIAN PACIFIC LEG. SER
105 SOUTH FIFTH ST SUITE 1000
MINNEAPOLIS MN 55402 US

DOUGLAS M. HEAD
WEINER
120 SOUTH 6TH STREET STE 2400
MINNEAPOLIS MN 55402 US

BOB ZELENKA
852 GRAIN EXCHANGE
MINNEAPOLIS MN 55415 US

HON. WILLIAM J. JANKLOW
GOVERNOR, SD
500 EAST CAPITOL
PIERRE SD 57501-5070 US

TERRY C. WHITESIDE
RADERMACHER, WHITESIDE & ASSOCIATES
3203 3RD AVE N STE 301
BILLINGS MT 59101 US

HONORABLE MARC RACICOT
GOV'S OFFICE, STATE CAP.
P O BOX 200801
HELENA MT 59620-0801 US

J. FRED SIMPSON, EXECUTIVE VICE PRESIDENT
MONTANA RAIL LINK, INC.
101 INTERNATIONAL WAY
MISSOULA MT 59802 US

JANET H GILBERT
WISCONSIN CENTRAL LTD
6250 NORTH RIVER ROAD STE 9000
ROSEMONT IL 60018 US

RICHARD E. WEICHER
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY
1700 EAST GOLF ROAD, 6TH FLOOR
SCHAUMBURG IL 60173 US

JEFFREY R. MORELAND
SANTA FE PAC. CORP. ETAL
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173 US

JAMES A. SMALL
COMMONWEALTH EDISON CO.
1411 OPUS PL STE 200
DOWNERS GROVE IL 60515-5701 US

WILLIAM F. COTTRELL
ASST. ATTORNEY GENERAL
100 W RANDOLPH ST - 12TH FLOOR
CHICAGO IL 60601 US

THOMAS J. LITWILER
OPPENHEIMER WOLFF ETAL
180 N STETSON AVE 45TH FLOOR
CHICAGO IL 60601 US

WILLIAM C. SIPPEL
OPPENHEIMER WOLFF & DONNELLY
180 NORTH STETSON AVENUE-45TH FLOOR
CHICAGO IL 60601 US

CHRISTINE H. ROSSO
ASSISTANT ATTORNEY GENERAL
100 W RANDOLPH ST
CHICAGO IL 60601 US

THOMAS J HEALEY
OPPENHEIMER, WOLFF, ETAL
180 N STETSON AV 2 PRUDENTIAL PL
CHICAGO IL 60601 US

SERVICE LIST FOR: 27-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

THOMAS DEGNAN
UNITED STATES GYPSUM CO
125 SOUTH FRANKLIN STREET
CHICAGO IL 60606 US

STEPHEN C. HERMAN
MCFARLAND & HERMAN
20 N WACKER DRIVE STE 1330
CHICAGO IL 60606-2902 US

THOMAS F. MCFARLAND, JR.
MCFARLAND & HERMAN
20 NORTH WACKER DRIVE, SUITE 1330
CHICAGO IL 60606-3101 US

RONALD A. LANE
ILLINOIS CENTRAL RR
455 N CITYFRONT PLAZA DR 20TH FL
CHICAGO IL 60611 US

MYLES L. TOBIN
ILLINOIS CENTRAL RAILROAD
455 NORTH CITYFRONT PLAZA DRIVE
CHICAGO IL 60611-5504 US

THOMAS ZWICA
121 WEST FIRST STREET
GENESEO IL 61254 US

GARY L TOWELL
TOLEDO, PEORIA & WESTERN
1990 EAST WASHINGTON STREET
EAST PEORIA IL 61611-2961 US

CLARENCE R. PONSLER
GENERAL CHAIRMAN, UTU
1017 W. MAIN STREET
BELLEVILLE IL 62220 US

SCOTT A. RONEY
P O BOX 1470
4666 FARIES PARKWAY
DECATUR IL 62525 US

JON FOY, DIRECTOR, RATES GRAIN
ARCHER DANIEL MIDLAND CO
P. O. BOX 1470
4666 FARIES PARKWAY
DECATUR IL 62525 US

MERRILL L. TRAVIS
ILLINOIS DEPT. OF TRANSP.
2300 SOUTH DIRKSEN PARKWAY
SPRINGFIELD IL 62703-4555 US

CAROL R DORIS
500 SOUTH SECOND STREET
SPRINGFIELD IL 62706 US

KIRK BROWN
2300 SOUTH DIRKSEN PARKWAY
SPRINGFIELD IL 62764 US

ROGER HERMANN
MALLINCKRODT CHEMICAL
16305 SWINGLEY RIDGE DRIVE
CHESTERFIELD MO 63017-1777 US

JEFFREY L. KLINGER
PEABODY HOLDING COMPANY
701 MARKET STREET STE 700
ST LOUIS MO 63101-1826 US

C. A. MENNELL
31 OAK TERRACE
WEBSTER GROVES MO 63119 US

DAVID A. PINS
THE CHEMICAL GROUP, MONSANTO
800 N LINDBERGH BOULEVARD
ST LOUIS MO 63167 US

D E THOMPSON
GENERAL CHAIRMAN-BLE
414 MISSOURI BOULEVARD
SCOTT CITY MO 63780 US

SERVICE LIST FOR: 27-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

HON IKE SKELTON
U. S. HOUSE OF REP.
514 B N W 7 HIGHWAY
BI[redacted] SPRINGS MO 64014 US

ROBERT K DREILING
K.C. SOUTHERN RWY CO.
114 WEST 11TH STREET
KANSAS CITY MO 64105 US

RICHARD P BRUENING
KANSAS CITY SOUTHERN RR
114 WEST ELEVENTH STREET
KANSAS CITY MO 64106 US

MEL CARNAHAN
OFFICE OF THE GOVERNOR
STATE CAPITOL ROOM 216
JEFFERSON CITY MO 65101 US

JACK HYNES, ADMINISTRATOR OF RAILROADS
PO BOX 270
CAPITOL AVE AT JEFFERSON ST
JEFFERSON CITY MO 65102 US

JOSEPH A. STINGER
IBBB
570 NEW BROTHERHOOD BUILDING
KANSAS CITY KS 66101 US

WILLIAM J. MCGINN
NORTH AMER. CHEM. CO.
8300 COLLEGE BOULEVARD
OVERLAND PARK KS 66210 US

BARRETT HATCHES
8300 COLLEGE BLVD
OVERLAND PARK KS 66210 US

T. L. GREEN
WESTERN RESOURCES, INC.
PO BOX 889
818 KANSAS AVE
TO[redacted]KA KS 66601 US

JOHN JAY ROSACKER
KS, DEPT OF TRANSP
217 SE 4TH ST 2ND FLOOR
TOPEKA KS 66603 US

ALAN R. POST
1803 STEFKIN STREET
WICHITA KS 67208 US

JAMES J. IRLANDI
STB PRACTITIONER
1809 N BROADWAY/SUITE F
WICHITA KS 67214 US

WILLARD L STOCKWELL-CHIEF PLANNER
455 N MAIN ST 10TH FL CITY HALL
WICHITA KS 67216 US

JUNIOR STRECKER
123 NORTH MAIN ST
HOISINGTON KS 67544 US

ROBERT K. GLYNN
HOISINGTON CHAM. OF COMM.
123 NORTH MAIN STREET
HOISINGTON KS 67544-2594 US

JOHN F. LARKIN
P O BOX 31850
4814 DOUGLAS ST 68132
OMAHA NE 68132-0850 US

PAUL A. CONLEY, JR. ,LAW DEPARTMENT
UNION PACIFIC RR CO.
1416 DODGE STREET
OMAHA NE 68179 US

LOUISE A. RINN
UNION PACIFIC RR CO.
1416 DODGE STREET ROOM 830
OMAHA NE 68179 US

SERVICE LIST FOR: 27-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

JEANNA L REGIER
UNION PACIFIC RAILROAD COMPANY
1416 DODGE ST ROOM 830
OMAHA NE 68179 US

JAMES V. DOLAN, LAW DEPARTMENT
UNION PACIFIC RR CO.
1416 DODGE STREET #830
OMAHA NE 68179 US

ROBERT T. OPAL
UNION PACIFIC RR CO.
1416 DODGE STREET RM 830
OMAHA NE 68179-0001 US

KEN SIECKMEYER, MGR. TRANSP. PLANN. DIV.
NEBRASKA DEPT. OF ROADS
P O BOX 94759
LINCOLN NE 68509-4759 US

WAYNE ANDERSON
ENTERGY SERVICES, INC.
639 LOYOLA AVE MAIL L-ENT-26E
NEW ORLEANS LA 70113 US

W. F. CARTER
ALBEMARLE CORPORATION
451 FLORIDA STREET
BATON ROUGE LA 70801 US

DEAN L. WORLEY
HILBURN CALHOON HARPER
P O BOX 5551
ONE RIVERFRONT PLACE EIGHTH FL
NORTH LITTLE ROCK AR 72119 US

HONORABLE DAVID PRYOR
UNITED STATES SENATE
330 FEDERAL BLDG ATTN: CARMIE HENRY
LITTLE ROCK AR 72201 US

SCOTT MANATT
P. O. BOX 473
CORNING AR 72422 US

JOE N. HAMPTON
2309 NORTH TENTH, SUITE E
ENID OK 73701 US

THOMAS R. JACOBSEN
TU ELECTRIC
1601 BRYAN STREET STE 11-060
DALLAS TX 75201-3411 US

JOEL T WILLIAMS III
STE 350, LB-126
4809 COLE AVENUE
DALLAS TX 75205 US

LONNIE E. BLAYDES, JR., VICE PRESIDENT
DALLAS AREA RAPID TRANSIT
P O BOX 75266-7210
1401 PACIFIC AVENUE
DALLAS TX 75266-7210 US

STEVEN A BRIGANCE
LEBOEUF, LAMB, ETAL
4025 WOODLAND PARK BLVD STE 250
ARLINGTON TX 76013 US

EDMUND W. BURKE
BURLINGTON NORTHERN RR CO
777 MAIN STREET, 3800 CONTINENTAL PLAZA
FT WORTH TX 76102 US

MICHAEL E. ROPER
BURLINGTON NORTHERN RR
777 MAIN STREET, 3800 CONTINENTAL PL
FT WORTH TX 76102 US

DOUGLAS J. BABB
BURLINGTON NORTHERN RR CO
777 MAIN STREET, 3800 CONTINENTAL PLAZA
FT WORTH TX 76102-5384 US

JANICE G BARBER
BURLINGTON NORTHERN RR CO
777 MAIN STREET, 3800 CONTINENTAL PLAZA
FT WORTH TX 76102-5384 US

SERVICE LIST FOR: 27-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

RICHARD SCHIEFELBEIN
7801 WOODHARBOR DRIVE
FORT WORTH TX 76179 US

W. DAVID TIDHOLM
HUTCHESEN & GRUNDY
1200 SMITH STREET (#3300)
HOUSTON TX 77002-4579 US

GEN. COMMITTEE OF ADJUST. GO-895
UNITED TRANS. UNION
2040 NORTH LOOP WEST STE 310
HOUSTON TX 77018 US

ROBERT J. ROSSI
UNITED TRANSPORTATION UNION
2040 NORTH LOOP WEST SUITE 310
HOUSTON TX 77018-8112 US

GEORGE T. WILLIAMSON
P O BOX 2562
111 E LOOP N
HOUSTON TX 77029 US

B KENNETH TOWSEND JR
EXXON CHEMICAL CO
13501 KATY FREEWAY
HOUSTON TX 77079-1398 US

B. C. GRAVES, JR.
EXXON COMPANY U.S.A.
PO BOX 4692
HOUSTON TX 77210-4692 US

SHELL CHEMICAL COMPANY
P O BOX 2463
ONE SHELL PLAZA
HOUSTON TX 77252 US

BRIAN P. FELKER
SHELL CHEMICAL COMPANY
P O BOX 2463
HOUSTON TX 77252-2463 US

ERIC W. TIBBETTS
P O BOX 3766
1301 MCKINNEY ST
HOUSTON TX 77253 US

ROY GIANGROSSO
ENTERGY SERVICES, INC.
350 PINE STREET
BEAUMONT TX 77701 US

TEXAS MEXICAN RAILWAY CO.
PO BOX 419
LAREDO TX 78042-0419 US

JOHN P. LARUE
P O BOX 1541
222 POWER STREET
CORPUS CHRISTI TX 78403 US

THOMAS A GRIEBEL
TEXAS DOT
125 E 11TH ST
AUSTIN TX 78701 US

JERRY L. MARTIN, DIRECTOR RAIL DIV.
RR COMM OF TEXAS
P O BOX 12967
1701 N CONGRESS
AUSTIN TX 78711 US

MARK TOBEY
P O BOX 12548
AUSTIN TX 78711-2548 US

REBECCA FISHER
ASST ATTY GENERAL
PO BOX 12548
AUSTIN TX 78711-2548 US

HON. JOHN R. COOK,
TX HOUSE OF REPRESENTATIVES
P O BOX 2910
AUSTIN TX 78768 US

SERVICE LIST FOR: 27-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

HON. ROBERT JUNELL
TEXAS HOUSE OF REP.
PO BOX 2910
AUSTIN TX 78768 US

ROBERT M. SAUNDERS
P O BOX 2910
AUSTIN TX 78768-2910 US

ROBERT A. CUSHING, JR.
UNITED TRANS. UNION,
12401 HIDDEN SUN COURT
EL PASO TX 79938 US

DARRELL L. HANAVAN, EXECUTIVE DIRECTOR
COLORADO WHEAT ADMIN.
5500 SOUTH QUEBEC STREET STE 111
ENGLEWOOD CO 80111 US

THOMAS F. LINN
MOUNTAIN COAL COMPANY
555 17TH STREET 22ND FLOOR
DENVER CO 80202 US

STANLEY B. KONIZ, UNIT MANAGER
PUBLIC SERVICE COMPANY
1225 - 17TH STREET STE 1100
DENVER CO 80202 US

PATRICIA T. SMITH, SR. VICE PRESIDENT
PUBLIC SERVICE COMPANY
1225 - 17TH STREET STE 600
DENVER CO 80202 US

STEPHEN D ALFERS
ALFERS & CARVER
730 17TH STREET #340
DENVER CO 80202 US

RUSSELL S. JONES, III
MOUNTAIN COAL COMPANY
555 17TH STREET 22ND FLOOR
DENVER CO 80202 US

NANCY MANGONE, ENFORCEMENT ATTORNEY
U. S. EPA REGION VIII
999 18TH SST STE 500
DENVER CO 80202-2466 US

DAVID N. LAWSON, FUEL TRAFFIC COORDINATOR
PUBLIC SERVICE COMMISSION
1225 17TH ST STE 1100, SEVENTEENTH ST PLAZA
DENVER CO 80202-5533 US

JANE T. FELDMAN, ASST. ATTORNEY GENERAL
STATE OF COLORADO
1525 SHERMAN ST- 5TH FLOOR
DENVER CO 80203 US

HON. BEN N. CAMPBELL
UNITED STATES SENATE
1129 PENNSYLVANIA STREET
DENVER CO 80203 US

ROY ROMER
EXECUTIVE CHAMBERS
136 STATE CAPITOL
DENVER CO 80203 US

CHARLES R. BOMBERGER
PUBLIC SERV. OF COLORADO
5900 E 39TH AVENUE
DENVER CO 80207 US

SUE BALLENSKI, PHYSICAL RESOURCES
USDA FOREST SERVICE
P O BOX 25127
LAKEWOOD CO 80225 US

KENTON FORREST
NAT. RWY HISTOR. SOCIETY
P O BOX 480181 TA
TERMINAL ANNEX
DENVER CO 80248 US

GERALD E. VANINETTI
RESOURCE DATA INT'L
1320 PEARL STREET STE 300
BOULDER CO 80302 US

SERVICE LIST FOR: 27-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

JOE D. FORRESTER
C/O CO MTN COLLEGE, TIMBERLINE CAMPUS
901 S HWY 24
LEADVILLE CO 80461 US

THOMAS J. FLORCZAK
CITY OF PUEBLO
127 THATCHER BUILDING
PUEBLO CO 81003 US

HON. HANK BROWN
UNITED STATES SENATE
5TH & MAIN ST 411 THATCHER BLDG
PUEBLO CO 81003-3140 US

MAYOR LESTER WILLIAMS
TOWN OF EADS
PO BOX 8
110 W 13TH ST
EADS CO 81036 US

CARDON G. BERRY
KIOWA CO. COMMISSIONERS
PO BOX 591
1305 GOFF
EADS CO 81036 US

HON DELCARL EIKENBERG
TOWN OF HASWELL
P O BOX 206
HASWELL CO 81045-0206 US

JOHN R STULP
SECED
P O BOX 1600
LAMAR CO 81052 US

CLEDE WIDENER
BOARD OF COUNTY COMMISSIONERS
P.. O. BOX 1046
LAMAR CO 81052 US

LEROY E. MAUCH
BOARD OF COUNTY COMMISSIONERS
P. O. BOX 1046
LAMAR CO 81052 US

JOHN ROESCH
BENT COUNTY
PO BOX 350
LAS ANIMAS CO 81054 US

BLAINE ARBUTHNOT
CROWLEY COUNTY
601 MAIN ST
ORDWAY CO 81063 US

JANET PALMER
P O BOX 1268
13997 COUNTY ROAD 71
SHERIDAN LAKE CO 81071 US

BERNICE TUTTLE
KIOWA COUNTY WIFE, CHAPTER #124
13775 CR785
TOWNER CO 81071-9619 US

CHARLES WAIT
BACA COUNTY
PO BOX 116
SPRINGFIELD CO 81073 US

FRANK C MCMURRY
PO BOX 699
SALIDA CO 81201 US

E W WOTIPKA
6388 TERRACE LANE
SALIDA CO 81201 US

THOMAS W. FOSTER, CHAIRMAN
COM. TO PRESERVE PROPERTY
P O BOX 681
SALIDA CO 81201 US

HON. NANCY SANGER, MAYOR
CITY OF SALIDA
P O BOX 417
124 E STREET
SALIDA CO 81201 US

SERVICE LIST FOR: 27-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

MYRON F. SMITH
FREMONT COUNTY COMM.
615 MACON AVE ROOM #102
CANON CITY CO 81212 US

GREG TABUTEAU
ROYAL GORGE SCENIC RY
P O BOX 1387
CANON CITY CO 81215 US

RUTH H. CARTER, MAYOR
CITY OF CANON CITY
P O BOX 1460
ATTN: STEVE THACKER CITY ADMIN
CANON CITY CO 81215 US

JUDY LOHNES
UAACOG
P O BOX 510
CANON CITY CO 81215-0510 US

STEVEN G. RABE, CITY MANAGER
CITY OF FLORENCE
300 W MAIN STREET
FLORENCE CO 81226 US

STEVE TUCKER
D&RG WEST. EMPLOYEES
2048 J ROAD
FRUITA CO 81521 US

JAMES R. FRITZE
EAGLE COUNTY ATTORNEY
P O BOX 850
EAGLE CO 81631 US

GARY L. MCFARLEN,, DIRECTOR-TRANSP
KENNECOTT ENERGY COMPANY
505 SOUTH GILLETTE AVENUE
GILLETTE WY 82716 US

PATRICIA BRITTON, CHIEF LEGAL OFFICER
KENNECOTT ENERGY COMPANY
505 SOUTH GILLETTE AVENUE
GILLETTE WY 82716 US

TIMM R. ADAMS
IDAHO BARLEY COMMISSION
1199 MAIN STREET, STE G
BOISE ID 83702-5630 US

JERRY R KRESS
ID, WHEAT COMMISSION
1109 MAIN ST STE 310
BOISE ID 83702-5642 US

ANN KNAPTON
IDAHO TIMBER CORPORATION
P O BOX 67
5401 KENDALL STREET
BOISE ID 83707-0067 US

WAYNE L. STOCKEBRAND
KENNECOTT UTAH COPP. CORP
P O BOX 6001
8315 WEST 3595 SOUTH
MAGNA UT 84044-6001 US

RAY D. GARDNER
KENNECOTT UTAH COPP. CORP
P O BOX 6001
8315 WEST 3595 SOUTH
MAGNA UT 84044-6001 US

RONALD L. RENCHER
WESTERN SHIPPERS COAL.
136 SOUTH MAIN STREET STE 1000
SALT LAKE CITY UT 84101-1672 US

ALEXANDER H. JORDAN
WESTERN SHIPPERS COALIT.
136 SOUTH MAIN STREETSTE 1000
SALT LAKE CITY UT 84101-7612 US

F MARK HANSEN
F MARK HANSEN, P.C.
624 NORTH 300 WEST SUITE 200
SALT LAKE CITY UT 84103 US

JEFFREY B. GROY
ONE UTAH CTR
201 SOUTH MAIN STREET, STE 1100
SALT LAKE CITY UT 84111 US

SERVICE LIST FOR: 27-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

CHRISTOPHER E. PRAMHALL
451 SOUTH STATE ST, ROOM 505
SALT LAKE CITY UT 84111 US

HON. DEEDEE CORRADINI
451 SOUTH STATE STREET, ROOM 306
SALT LAKE CITY UT 84111 US

MICHAEL O. LEAVITT
210 STATE CAPITOL
SALT LAKE CITY UT 84114 US

REED M. RICHARDS
STATE OF UTAH
236 STATE CAPITOL
SALT LAKE CITY UT 84114 US

ROBIN L. RIGGS, GENERAL COUNSEL TO GOVERNOR
STATE OF UTAH
210 STATE CAPITOL
SALT LAKE CITY UT 84114 US

LYNETTE W. THIRKILL, LOGISTICS MANAGER
GR. SALT LAKE MINERALS
P O BOX 1190
OGDEN UT 84402 US

KENNETH C. JOHNSEN, V PRES & GEN COUNSEL
GENEVA STEEL COMPANY
P O BOX 2500
PROVO UT 84603 US

CAROL HEATHINGTON
1300 W WASHINGTON
PHOENIX AZ 85007 US

HONORABLE BOB STUMP
U.S. HOUSE OF REPRESENTATIVES
230 N. 1ST AVE., VOOM 2001
PHOENIX AZ 85025 US

FRANK E. HANSON, JR
MAGMA METALS COMPANY
7400 NORTH ORACLE ROAD, SUITE 200
TUCSON AZ 85704 US

O. KENT MAHER
33 WEST FOURTH ST
PO BOX 351
WINNEMUCCA NV 89446 US

R. MICHAEL MCCORMICK
HUMBOLDT COUNTY DA
P O BOX 909
50 WEST FIFTH STREET
WINNEMUCCA NV 89446 US

MICHAEL E. HALLEY
CITY OF RENO
P O BOX 1900
RENO NV 89505 US

DORI OWEN, SPECIAL PROJECTS MANAGER
REDEVELOP LAND AGENCY
490 S CENTER STREET STE 203
RENO NV 89505 US

JEFFERY W. HILL
SIERRA PACIFIC POWER CO.
P O BOX 10100
6100 NEIL ROAD
RENO NV 89520 US

THOMAS J. FRONAPFEL
NEVADA, DEPT. OF TRANSPORTATION
1263 S STEWART STREET
CARSON CITY NV 89712 US

MICHAEL I. STOCKMAN, GENERAL COUNSEL
U. S. BORAX INC.
26877 TOURNEY ROAD
VALENCIA CA 91355 US

JOHN E. BALLAS, AGENCY ENGINEER
INDUSTRY URBAN-DEV. AG.
P O BOX 7089
15651 EAST STAFFPRD STREET
CITY OF INDUSTRY CA 91744 US

SERVICE LIST FOR: 27-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

JOHN D BALLAS
P.O. BOX 7089
15651 EAST STAFFORD STREET
CITY OF INDUSTRY CA 91744 US

RICHARD CABANILLA, PLANNING DEPARTMENT
IMPERIAL COUNTY
939 MAIN STREET
EL CENTRO CA 92243-2856 US

SCOTT KESSLER
202 WEST FOURTH STREET
ALTURUS CA 94102 US

JAMES T. QUINN
CALIFORNIA PUBLIC UTILITIES COMM
505 VAN NESS AVENUE
SAN FRANCISCO CA 94102-3298 US

LOUIS P. WARCHOT
SOUTHRN PACIF. TRANS. CO.
ONE MARKET PLAZA
SOUTHERN PACIFIC BLDG RM 815
SAN FRANCISCO CA 94105 US

CANNON Y. HARVEY
SOUTHERN PAC. TRNS. CO.
ONE MARKET PLAZA
SAN FRANCISCO CA 94105 US

LINDSAY BOWER, DEPUTY ATTORNEY GENERAL
CALIFORNIA DEPT. OF JUSTICE
50 FREMONT STREET STE 300
SAN FRANCISCO CA 94105 US

CAROL A. HARRIS
SOUTHERN PAC. TRANS. CO.
ONE MARKET PLAZA
SAN FRANCISCO CA 94105 US

LARRY W. TELFORD
SEVERSON & WERSON
ONE EMBARCADERO CENTER
SAN FRANCISCO CA 94111 US

DANIEL R. ARELLANO
CITY HALL
708 THIRD STREET
BRENTWOOD CA 94513-1396 US

ANN FINGARETTE HASSE
1111 BROADWAY
OAKLAND CA 94607 US

LEO R BRIEN
530 WARER STREET
OAKLAND CA 94607 US

PAUL C. ANDERSON
MCDONOUGH, HOLLAND, ETAL
1999 HARRISON STREET STE 1300
OAKLAND CA 94612 US

JEFFREY A. WALTER
WATERFALL TOWERS, 201-B
2455 BENNETT VALLEY ROAD
SANTA ROSA CA 95404 US

CHRISTOPHER J. NEARY
110 SOUTH MAIN STREET SUITE C
WILLITS CA 95490 US

DAVID N. MAGAW
YOLO SHORTLINE RR CO
3344 BRAEBURN STREET
SACRAMENTO CA 95821-4037 US

JOSEPH H. PETTUS
SUN VALLEY ENERGY INC
800 HOWE AVE, SUITE 270
SACRAMENTO CA 95825 US

R. MARK ARMSTRONG
P O BOX 1051
ALTURAS CA 96101 US

SERVICE LIST FOR: 27-nov-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

KATHLEEN R. LAZARD
P O BOX 730
700 COURT STREET
SUSANVILLE CA 96130 US

MIKE THORNE, EXEC. DIR.
PORT OF PORTLAND
BOX 3529
PORTLAND OR 97208 US

FRED P. SWANSON
OREGON STEEL MILLS
P O BOX 2760
PORTLAND OR 97208-0363 US

RICK WILLIS, EXECUTIVE DIRECTOR
OREGON PUBLIC UTILITY COMM
550 CAPITOL ST NE
SALEM OR 97310-1380 US

ALLAN E. RUMBAUGH
P O BOX 1215
COOS BAY OR 97420 US

KAREN O'CONNOR
LAKE COUNTY COURTHOUSE
513 CENTER STREET
LAKEVIEW OR 97630 US

ANN DEKOSTER
P O BOX 1209
SEATTLE WA 98111 US

CHARLES H. MONTANGE
JPA AND EL DORADO COMPANY
426 NW 162ND STREET
SEATTLE WA 98177 US

DONALD G MEYER
P O BOX 1837
TACOMA WA 98401 US

MARCELLA M. SZEL
CP RAIL SYSTEM
910 PEEL STREET WINDSOR STATION RM 234
MONTREAL QUEBEC CD H3C 3E4 CD

Records: 496

STB FD-32760 ID-281174 8-14-97 C-73

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SERVICE DATE - LATE RELEASE AUGUST 14, 1997

SURFACE TRANSPORTATION BOARD[1]

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY--CONTROL AND MERGER--SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

[Decision No. 73][2]

Decided: August 14, 1997

In Decision No. 44 (served August 12, 1996), we approved the common control and merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company) and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company)[3]

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[1] Proceedings before the Interstate Commerce Commission (ICC) that remained pending on January 1, 1996, must be decided under the law in effect prior to that date if they involve functions retained by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. This proceeding was pending with the ICC prior to January 1, 1996, and relates to functions retained under Surface Transportation Board (Board) jurisdiction pursuant to new 49 U.S.C. 11323-27. Citations are to the former sections of the statute, unless otherwise indicated.

[2] This decision embraces: Finance Docket No. 32760 (Sub-No. 1), Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Trackage Rights Exemption--Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company; Finance Docket No. 32760 (Sub-No. 2), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Petition for Exemption--Acquisition and Operation of Trackage in California, Texas, and Louisiana; Finance Docket No. 32760 (Sub-No. 19), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Trackage Rights Exemption--Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., The Denver and Rio Grande Western Railroad Company, and The Southern Illinois & Missouri Bridge Company; and STB Finance Docket No. 32760 (Sub-No. 20), The Atchison, Topeka and Santa Fe Railway Company--Trackage Rights Exemption--Southern Pacific Transportation Company.

[3] In Decision No. 44: Union Pacific Corporation was referred to as UPC; Union Pacific Railroad Company was referred to as UPRR; Missouri Pacific Railroad Company was referred to as MPRR; UPRR and MPRR were referred to collectively as UP; Southern Pacific Rail Corporation was referred to as SPR; Southern Pacific Transportation Company was referred to as SPT; St. Louis Southwestern Railway Company was referred to as SSW; SPCSL Corp. was referred to as SPCSL; The Denver and Rio Grande Western Railroad Company was referred to as DRGW; SPT, SSW, SPCSL, and DRGW were referred to collectively as SP; and UPC, UP, SPR, and SP were referred to collectively as "applicants."

MPRR, SPCSL, and DRGW were recently merged into UPRR (MPRR, on January 1, 1997; SPCSL and DRGW, on June 30, 1997). Accordingly, in this decision: with respect to the

(continued...)

subject to various conditions, including the terms of the BNSF agreement.[4] The common control authorized in Decision No. 44 was consummated on September 11, 1996.

In this decision, we address the BNSF access issue presented in the joint petition (designated "BN/SF-80, LCRA-11" but referred to herein as BN/SF-80) filed August 6, 1997, by BNSF and LCRA/Austin,[5] and in the reply thereto (designated UP/SP-309) filed August 12, 1997, by applicants.[6]

BACKGROUND

Decision No. 44. We noted, in Decision No. 44: that LCRA and the City of Austin were joint owners of the Fayette Power Project (FPP), a coal-fired station at Halsted, TX, that burns Powder River Basin (PRB) coal that, at the time Decision No. 44 was served, was transported by UP in a single-line haul; that, when it entered into its then present contract with UP, LCRA/Austin also entered into a separate trackage rights agreement with UP's Missouri-Kansas-Texas Railroad Company predecessor (hereinafter referred to as the MKT TRA) that provided future access over 18 miles of track between Halsted (the location of the FPP) and West Point, TX (the location of a nearby SP-UP junction); and that one of the purposes of the MKT TRA was to allow LCRA/Austin to receive coal from the PRB via a BN-SP routing. We further noted, in Decision No. 44: that LCRA/Austin's principal interest vis-à-vis the UP/SP merger arose from its concern that the merger might effectively nullify the trackage rights provided for in the MKT TRA; but that LCRA/Austin thought that the BNSF agreement would "effectively preserve these trackage rights (section 4b allows BNSF to serve FPP), assuming that BNSF is able to operate efficiently and economically over the trackage rights lines." See Decision No. 44, slip op. at 63. See also Decision No. 61 (served November 20, 1996), slip op. at 13, numbered paragraph 3 (where we observed that there was a missing period, but no missing text, in the last paragraph in Decision No. 44, slip op. at 63).[7]

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[3](...continued)
period prior to January 1, 1997, the term "applicants" has the meaning it had in Decision No. 44; with respect to the period beginning January 1, 1997, and ending June 30, 1997, the term "applicants" has reference to UPC, UPRR, SPR, SPT, SSW, SPCSL, and DRGW; with respect to the period beginning July 1, 1997, the term "applicants" has reference to UPC, UPRR, SPR, SPT, and SSW; and, with respect to the period beginning January 1, 1997, the acronym "UP" has reference to UPRR.

[4] In Decision No. 44, Burlington Northern Railroad Company (BN) and The Atchison, Topeka and Santa Fe Railway Company (SF) were referred to collectively as BNSF. On December 31, 1996, SF merged into BN, and the surviving corporation was renamed The Burlington Northern and Santa Fe Railway Company. Accordingly, in this decision: with respect to the period ending December 31, 1996, the acronym "BNSF" has the meaning it had in Decision No. 44; and, with respect to the period beginning January 1, 1997, the acronym "BNSF" has reference to The Burlington Northern and Santa Fe Railway Company. See also Decision No. 44, slip op. at 12 n.15 (description of the BNSF agreement).

[5] The Lower Colorado River Authority and the City of Austin, TX, are referred to collectively as LCRA/Austin.

[6] Applicants indicate that, although the BNSF agreement's mandatory arbitration provision may require that this dispute be submitted to arbitration, they have waived that provision as respects this dispute. See UP/SP-309 at 1 n.2. We therefore have no occasion to address, in this decision, the scope of the BNSF agreement's mandatory arbitration provision.

[7] See also UP/SP-303 (applicants' July 1, 1997, progress report), Exhibit B (the BNSF agreement, amended and restated as of June 30, 1997). Section 4a of the BNSF agreement
(continued...)

Decision No. 57. In Decision No. 44, we imposed, among many other conditions, a contract modification condition that required UP/SP to modify, immediately upon consummation of the merger, any contracts with shippers at 2-to-1 points incorporated within the BNSF agreement to allow BNSF access to at least 50% of the volume. See Decision No. 44, slip op. at 106 (third paragraph, last clause) and 146 (the "opening contracts at 2-to-1 points" requirement). In Decision No. 57 (served November 20, 1997), we considered, among other things, whether LCRA/Austin was entitled to 2-to-1 status for the purposes of the contract modification condition. We held that LCRA/Austin was not entitled to 2-to-1 status for such purposes because, immediately prior to the consummation of the merger, it had been served only by UP, with access only to UP and no access to SP. We acknowledged that LCRA/Austin would have become a 2-to-1 shipper at that future date on which its MKT TRA trackage rights were to have become effective, but we indicated that, when we imposed the contract modification condition, we had in mind that this condition would apply only to those shippers that had 2-to-1 status immediately prior to the consummation of the merger. See Decision No. 57, slip op. at 6.

The BN/SF-80 Petition. In the BN/SF-80 petition, which was filed pursuant to Decision Nos. 44 and 72,[8] BNSF and LCRA/Austin (hereinafter referred to collectively as petitioners) indicate: that LCRA/Austin has entered into a contract with BNSF for transportation of volumes of coal that (petitioners claim) are not subject to an existing contract between LCRA/Austin and UP; that BNSF, acting to fulfill its obligations under the new LCRA/Austin-BNSF contract, has scheduled a loaded coal train to depart from the PRB on or about August 15, 1997; but that UP, claiming that BNSF has no present right to use its trackage rights to access the Halsted plant, has advised that it will refuse to permit BNSF to use its trackage rights to handle traffic moving to that plant.[9] Petitioners have therefore sought "an order of enforcement," BN/SF-80 at 1, directing UP to allow BNSF to use its trackage rights to provide rail service to the FPP at Halsted under any contract covering volumes not committed to UP under the existing contract between LCRA/Austin and UP.

DISCUSSION AND CONCLUSIONS

We agree with petitioners that, under the terms of the BNSF agreement, BNSF has the right to conduct trackage rights operations to/from LCRA/Austin's Halsted plant. We imposed the terms of the BNSF agreement as a condition to the merger, see Decision No. 44, slip op. at 226 & n.277; that condition became effective on September 11, 1996, see Decision No. 44, slip op. at 238 (ordering paragraph 64); and, as noted above in footnote 7, that condition clearly

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[7](...continued)
provides that BNSF shall have trackage rights over certain UP lines in South Texas, including, among others, the UP line between Ajax, TX, and Sealy, TX (West Point and Halsted are on this line), although Section 4b also provides that such trackage rights "shall be bridge rights for the movement of overhead traffic only, except for the local access specified herein." Section 4b further provides, however, that BNSF shall receive access on the Section 4a lines to, among other facilities, "'2-to-1' shipper facilities at points listed on Exhibit A to this Agreement." Finally, the referenced Exhibit A includes "Halsted TX (LCRA plant)" among the "Points Referred to in Section 4b."

[8] "[A]ny beneficiary of the Decision No. 44 conditions has the right to seek relief from the Board if it believes that these conditions have not been implemented in a manner that achieves their competition-preserving objectives." See Decision No. 72 (served May 23, 1997), slip op. at 8 (footnotes omitted).

[9] Petitioners also contend that BNSF service under the LCRA/Austin-BNSF contract is important: because it will help to alleviate the impact of very high recent UP cycle times; and because of its implications for BNSF's future ability to compete more effectively for the bulk of LCRA/Austin's coal traffic.

provides that BNSF shall have trackage rights access to LCRA/Austin's Halsted plant. We therefore expect UP to comply with our merger condition and allow BNSF to run its trains to/from the Halsted plant, over the trackage rights lines provided for in the BNSF agreement.[10]

(1) As noted above in footnote 7, the BNSF agreement provides that BNSF shall receive trackage rights access to, among other facilities, the LCRA/Austin plant at Halsted. Section 11 of the BNSF agreement provides that the rights granted in Sections 1 through 8 shall be effective "upon UP's acquisition of control of SP," and, when we imposed the BNSF agreement as a condition to the merger, we intended that this condition would be effective on September 11, 1996. Neither in the BNSF agreement nor in Decision No. 44 is there any indication that the effective date of BNSF's trackage rights access to Halsted was ever intended to be some date later than September 11, 1996.

(2) The related "Sealy, Texas to Waco and Eagle Pass, Texas Trackage Rights Agreement" (hereinafter referred to as the Sealy TRA) is one of the many definitive implementing agreements dated June 1, 1996, that were entered into by applicants and BNSF in order to implement the trackage rights provided for in the BNSF agreement.[11] The Sealy TRA covers various lines in Texas, including, as pertinent, the UP line between Smithville, TX, and Sealy, TX (West Point and Halsted are on this line). The Sealy TRA, much like the BNSF agreement itself, was intended to be effective upon the acquisition by UP of control of SP. See Exhibit B to the Sealy TRA (the Sealy TRA is the "agreement," see Exhibit B, Section 1.1; and this agreement is to be effective upon the acquisition by UP of control of SP, see Exhibit B, Section 9.1). Nothing in the Sealy TRA gives any indication that the effective date of BNSF's trackage rights access to Halsted was ever intended to be some date later than September 11, 1996. BNSF's trackage rights access to Halsted is explicitly limited in one other respect,[12] but there is no explicit limitation in terms of a delayed effective date.

(3) It is true that, in applicants' April 29, 1996, rebuttal filings, their witness Mr. Peterson stated that "it was never intended" that BNSF would access the Halsted traffic prior to the expiration of the then current UP contract. See UP/SP-231, Part B at 193 n.63.[13] Mr. Peterson was explaining that a large share of the UP "2-to-1" traffic that BNSF would gain the right to handle upon consummation of the merger would be available to BNSF within no more than one year of consummation, despite rail transportation contracts. He added, in his footnote 63: that the Halsted traffic would not be "2-to-1" traffic until it became available to SP at the expiration of the then current UP contract; that "it was never intended" that BNSF would access the Halsted traffic prior to the expiration of the then current UP contract; and that this traffic "is thus not included in my figures." It does not appear that Mr. Peterson's footnote 63 was intended to express an opinion as to the scope of the BNSF trackage rights provided for in the BNSF agreement.[14]

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[10] We see no need to issue the injunctive-style "order of enforcement" requested by petitioners; clarification in the nature of a declaratory order should suffice.

[11] The Sealy TRA was filed in this proceeding on June 28, 1996, as one of numerous attachments to UP/SP-266.

[12] See Section 2(b) of the Sealy TRA, which provides that the rights granted to BNSF "on the line serving the LCRA plant at Halsted" shall be limited to the operation of loaded and empty unit coal trains destined to or returning from LCRA.

[13] The UP/SP-231 rebuttal was filed prior to our issuance of Decision No. 44.

[14] See also Decision No. 44, slip op. at 63 (in discussing LCRA/Austin's interests, we gave no indication that the scope of the BNSF trackage rights at Halsted had been raised as an issue).

(4) In any event, the implications of Mr. Peterson's footnote 63 must be balanced against the explicit deposition testimony of applicants' Mr. Rebensdorf. See BN/SF-80 at 8; see also LCRA-4 at 5-6 (filed September 23, 1996). At this deposition (taken January 23, 1996), Mr. Rebensdorf, upon being asked whether the Halsted trackage rights provided for in the BNSF agreement would be exercisable immediately upon consummation of the merger, advised that LCRA/Austin's counsel was correct in the belief that such rights would indeed be exercisable immediately upon consummation of the merger. Applicants have suggested that Mr. Rebensdorf's statement was merely "a sincere attempt to allay the concerns of LCRA's counsel regarding whether BNSF would obtain trackage rights to serve LCRA," see UP/SP-288 at 5 (filed October 11, 1996). However, applicants must be held to the representations made by their witnesses in the course of this proceeding. See Decision No. 44, slip op. at 12 n.14.[15] Applicants never explicitly disavowed Mr. Rebensdorf's deposition testimony, and Mr. Peterson, in his footnote 63, did not explicitly disavow (or even reference) Mr. Rebensdorf's deposition testimony. LCRA/Austin thus had a right to rely upon this testimony. If Mr. Peterson intended to disavow Mr. Rebensdorf's statement, Mr. Peterson's footnote 63 simply did not convey the message in a sufficiently explicit manner.[16]

(5) More importantly, applicants, in drawing up the BNSF agreement, could have made BNSF's Halsted trackage rights effective not immediately upon consummation of the merger but only at that future date at which SP's MKT TRA trackage rights would have become effective. Applicants, however, did not make BNSF's Halsted trackage rights subject to a delayed effective date. In their negotiations with BNSF, they made BNSF's Halsted trackage rights effective immediately upon consummation of the merger. As we noted in Decision No. 44, "the BNSF agreement includes, in addition to the rights which address competition at 2-to-1 points, an exchange of various other rights between UP/SP and BNSF." See Decision No. 44, slip op. at 17. Additional rights, such as BNSF's Halsted trackage rights for the period prior to the effective date of SP's MKT TRA trackage rights, have been granted and cannot now be withdrawn unilaterally.

(6) Our decision today neither rests upon, nor calls into question, the LCRA/Austin holding in Decision No. 57. Applicants' arguments to the contrary notwithstanding, see UP/SP-309 at 7-8, LCRA/Austin's lack of entitlement to the benefits of the contract modification condition has nothing at all to do with the issue addressed in today's decision.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

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[15] Applicants insist, in essence, that Mr. Rebensdorf never intended to mislead anyone about the status of the Halsted facility. See UP/SP-309 at 4-5. Nothing said in this decision should be taken as an indication that we believe that Mr. Rebensdorf had any intention to mislead anyone. Indeed, we accept applicants' entirely plausible explanation that, at the time of his deposition, Mr. Rebensdorf was not aware that some LCRA/Austin traffic was not committed to UP under the then current LCRA/Austin-UP contract. See UP/SP-309 at 5-6.

[16] Applicants insist that Mr. Peterson's footnote 63 was intended to eliminate any possible confusion that had been generated by Mr. Rebensdorf's deposition testimony. See UP/SP-309 at 6 n.5. There is, however, no explicit indication in Mr. Peterson's footnote 63 that such a result was intended.

It is ordered:

1. Treating the BN/SF-80 pleading as a petition for clarification, BNSF's Halsted trackage rights are clarified as indicated in this decision.

2. This decision shall be effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

SERVICE LIST FOR: 14-aug-1997 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

PAUL K. BIBA, HOUSE COUNSEL
FORMOSA PLASTICS CORP.
9 PEACH TREE HILL ROAD
LIVINGSTON NJ 07039 US

KEN WILSON
282 BALDWIN AVE
HASBROUCK HEIGHTS NJ 07604-2304 US

OSCAR J. ABELLO, PRESIDENT
"K" LINE AMERICA, INC.
535 MOUNTAIN AVENUE
MURRY HILL NJ 07974 US

TINA MASINGTON, PLAN. ANAL.
"K" LINE AMERICA, INC.
535 MOUNTAIN AVENUE
MURRAY HILL NJ 07974 US

GEORGE J. FRANCISCO, JR.
ELLIPSE SHIPPING CENTER
4201 CHURCH ROAD - SUITE 7
MT LAUREL NJ 08054 US

RONALD J. HENEFELD
PPG INDUSTRIES, INC.
ONE PPG PLACE - 35 EAST
PITTSBURGH PA 15272-0001 US

RICHARD J. RESSLER
UNION PACIFIC CORP.
EIGHTH AND EATON AVENUES, MARTIN TOWER
BETHLEHEM PA 18018 US

CARL W. VON BERNUTH
UNION PACIFIC CORP.
EIGHTH & EATON AVENUES
BETHLEHEM PA 18018 US

RICHARD H. GROSS
3801 WEST CHESTER PIKE
NEWTOWN SQUARE PA 19073 US

WILLIAM E HARVEY
3801 WEST CHESTER PIKE
NEWTON SQUARE PA 19073 US

LARRY T. JENKINS
ARCO CHEMICAL COMPANY
3801 WEST CHESTER PIKE
NEWTON SQUARE PA 19073-3280 US

ANNE E. TREADWAY
CONSOLIDATED RAIL CORP.
P O BOX 41416
2001 MARKET STREET
PHILADELPHIA PA 19101-1416 US

EDWARD B. HYMSON
CONRAIL
2001 MARKET STREET 16-A
PHILADELPHIA PA 19101-1416 US

JONATHAN M BRODER
CONSOLIDATED RAIL CORP
PO BOX 41416
2001 MARKET STREET 16-A
PHILADELPHIA PA 19101-1416 US

CONSTANCE L. ABRAMS
CONSOLIDATED RAIL CORP.
2001 MARKET STREET 16-A, TWO COMMERCE SQUARE
PHILADELPHIA PA 19101-1416 US

BRUCE B. WILSON
CONSOLIDATED RAIL CORP.
2001 MARKET STREET
PHILADELPHIA PA 19101-1417 US

JOHN L ABBOTT
FMC CORPORATION
1735 MARKET STREET
PHILADELPHIA PA 19103 US

ERIC M. HOCKY
GOLLATZ, GRIFFIN, EWING
213 WEST MINER STREET
WEST CHESTER PA 19381-0796 US

CHARLES N. BEINKAMPEN
DUPONT SOURCING
1007 MARKET STREET, ROOM B-6236-A
WILMINGTON DE 19898 US

TERRENCE D JONES
KELLER & HECKMAN
1001 G ST NW STE 500 WEST
WASHINGTON DC 20001 US

MARTIN W. BERCOVICI
KELLER & HECKMAN
1001 G ST NW SUITE 500 WEST
WASHINGTON DC 20001 US

DONALD F GRIFFIN
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
400 N CAPITOL ST NW SUITE 852
WASHINGTON DC 20001 US

LESLIE E. SILVERMAN
KELLER & HECKMAN
1001 G STREET NW STE 500 WEST
WASHINGTON DC 20001 US

DOUGLAS J. BEHR
KELLER & HECKMAN
1001 G STREET NW STE 500 WEST
WASHINGTON DC 20001 US

ROBERT L. MCGEORGE
U. S. DEPT. OF JUSTICE, ANTITRUST DIVISION
555 4TH STREET N W RM 9104
WASHINGTON DC 20001 US

EDWARD WYTKIND, EXECUTIVE DIRECTOR
TRANSP TRADES DEPT AFLCIO
400 N CAPITOL ST SW STE 861
WASHINGTON DC 20001 US

JOAN S HUGGLER
U. S. DEPT. OF JUSTICE, ANTITRUST DIVISION
555 4TH STREET N W RM 9104
WASHINGTON DC 20001 US

ROGER W. FONES
US DEPT. OF JUSTICE
555 4TH STREET NW
WASHINGTON DC 20001 US

RICHARD G SLATTERY
AMTRAK
60 MASSACHUSETTS AVENUE N E
WASHINGTON DC 20002 US

JOSEPH GUERRIERI, JR.
GUERRIERI, EDMOND, ET. AL
1331 F STREET N W, 4TH FLOOR
WASHINGTON DC 20004 US

DAVID A ASHMORE
ARNOLD & PORTER
555 TWELFTH STREET NW
WASHINGTON DC 20004 US

MARK SCHECTER
HOWREY & SIMON
1299 PENNSYLVANIA AVE N W
WASHINGTON DC 20004 US

ROBERT M. BRUSKIN, ESQ.
HOWREY & SIMON
1299 PENNSYLVANIA AVE NW
WASHINGTON DC 20004 US

DEBRA L. WILLEN
GUERRIERI, EDMOND & CLAYMAN PC
1331 F STREET N W, 4TH FLOOR
WASHINGTON DC 20004 US

GEORGE W MAYO, JR.
HOGAN & HARTSON
555 THIRTEENTH STREET NW
WASHINGTON DC 20004-1161 US

ERIC VON SALZEN
HOGAN & HARTSON
555 THIRTEENTH STREET N W
WASHINGTON DC 20004-1161 US

ROSEMARY H. MCENERY
HOWREY & SIMON
1299 PENNSYLVANIA AVE N W
WASHINGTON DC 20004-2402 US

MARK L JOSEPHS
HOWREY & SIMON
1299 PENNSYLVANIA AVE N W
WASHINGTON DC 20004-2402 US

CHARLES W. LINDERMAN
701 PENNSYLVANIA AVE NW, 5TH FLOOR
WASHINGTON DC 20004-2696 US

S WILLIAM LIVINGSTON JR
COVINGTON & BURLING
P O BOX 7566
1201 PENNSYLVANIA AVE NW
WASHINGTON DC 20004-7566 US

RICHARD H. STREETER
BARNES & THORNBURG
1401 I STREET NW SUITE 500
WASHINGTON DC 20005 US

PAUL C. OAKLEY
WEINER, BRODSKY, SIDMAN & KIDER
1350 NEW YORK AVENUE NW SUITE 800
WASHINGTON DC 20005 US

MARK H. SIDMAN
WEINER, BRODSKY, SIDMAN
1350 NEW YORK AVE NW STE 800
WASHINGTON DC 20005 US

MICHAEL MATTIA
INSTITUTE OF SCRAP RECY.
1325 G STREET NW STE 1000
WASHINGTON DC 20005 US

WILLIAM A. MULLINS
TROUTMAN SANDERS LLP
1300 I STREET NW SUITE 500 EAST
WASHINGTON DC 20005-3314 US

JOHN R. MOLM
TROUTMAN SANDERS LLP
1300 I STREET, N. W., SUITE 500 EAST
WASHINGTON DC 20005-3314 US

FRITZ R. KAHN
1100 NEW YORK AVENUE NW SUITE 750 WEST
WASHINGTON DC 20005-3934 US

FREDERIC L. WOOD
DONELAN, CLEARY, WOOD & MASER, P. C.
1100 NEW YORK AVE NW STE 750
WASHINGTON DC 20005-3934 US

JEFFREY O. MORENO
DONELAN CLEARY WOOD MASER
1100 NEW YORK AVENUE N W, SUITE 750
WASHINGTON DC 20005-3934 US

THOMAS W. WILCOX
DONELAN, CLEARY, WOOD & MASER, P.C.
1100 NEW YORK AVE NW STE 750
WASHINGTON DC 20005-3934 US

JOHN K. MASER, III
DONELAN,CLEARY,WOOD,MASER
1100 NEW YORK AVE NW SUITE 750
WASHINGTON DC 20005-3934 US

NICHOLAS J. DIMICHAEL
DONELAN, CLEARY, ET AL.
1100 NEW YORK AVENUE N W STE 750
WASHINGTON DC 20005-3934 US

JO A DEROCHE
WEINER, BRODSKY, ET AL
1350 NEW YORK AVE NW SUITE 800
WASHINGTON DC 20005-4797 US

ANDREW P. GOLDSTEIN
MCCARTHY, SWEENEY ET AL.
1750 PENNSYLVANIA AVE NW
WASHINGTON DC 20006 US

MONICA J. PALKO
BRACEWELL & PATTERSON
2000 K STREET NW STE 500
WASHINGTON DC 20006 US

ANNE D. SMITH
WHITE & CASE
1747 PENNSYLVANIA AVENUE N W
WASHINGTON DC 20006 US

KATHRYN KUSSKE
MAYER, BROWN & PLATT
2000 PENNSYLVANIA AVE N W SUITE 6500
WASHINGTON DC 20006 US

ROY T. ENGLERT, JR
MAYER, BROWN & PLATT
2000 PENNSYLVANIA AVE N W SUITE 6500
WASHINGTON DC 20006 US

LAURENCE R. LATOURETTE
PRESTON GATES ELLIS ETAL
1735 NY AVE NW SUITE 500
WASHINGTON DC 20006 US

ADRIAN L. STEEL, JR.
MAYER, BROWN & PLATT
2000 PENNSYLVANIA AVE N W SUITE 6500
WASHINGTON DC 20006 US

KRISTA L. EDWARDS
SIDLEY & AUSTIN
1722 EYE STREET N W
WASHINGTON DC 20006 US

ERIKA Z. JONES
MAYER, BROWN & PLATT
2000 PENNSYLVANIA AVE N W SUITE 6500
WASHINGTON DC 20006 US

TERRY L. CLAASSEN
CORN REFINERS ASSOC, INC.
1701 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20006 US

CHARLES A SPITULNIK
HOPKINS & SUTTER
888 SIXTEENTH STREET NW
WASHINGTON DC 20006 US

ROBERT P. VOM EIGEN
HOPKINS AND SUTTER
888 16TH STREET N W STE 700
WASHINGTON DC 20006 US

ALBERT B KRACHMAN
BRACEWELL & PATTERSON LLP
2000 K ST NW STE 500
WASHINGTON DC 20006-1872 US

JAMES A CALDERWOOD
ZUCKERT, SCOUTT & RASENBERGER, L.L. P.
888 17TH STREET NW, SUITE 600
WASHINGTON DC 20006-3939 US

JENNIFER P OAKLEY
ZUCKERT, SCOUTT & RASENBERGER
888 SEVENTEENTH ST NW, STE 600
WASH DC 20006-3939 US

RICHARD A. ALLEN
ZUCKERT, SCOUT, RASENBERGER
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

JOHN V. EDWARDS, ESQ
ZUCKERT, SCOUTT ET AL.
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

ANDREW R PLUMP
ZUCKERT, SCOUTT, RASENBERGER
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

ALICIA M SERFATY
HOPKINS & SUTTER
888 - 16TH STREET NW
WASHINGTON DC 20006-4103 US

STEVEN J. KALISH
MCARTHY, SWEENEY & HARKAWAY
1750 PENNSYLVANIA AVE NW
WASHINGTON DC 20006-4502 US

TERENCE M. HYNES
SIDLEY & AUSTIN
1722 EYE STREET NW
WASHINGTON DC 20006-5304 US

ANTHONY J MCMAHON
BASATIANELLI, BROWN ETAL
2828 PA AVE NW STE 203
WASHINGTON DC 20007 US

JAMES F RILL
COLLIER SHANNON RILL & SCOTT
3050 K STREET NW SUITE 400
WASHINGTON DC 20007 US

VIRGINIA R METALLO
3050 K ST NW SUITE 400
WASHINGTON DC 20007 US

JOHN F C LUEDKE
GALLAND, KHARASCH, MORSE & GARFINKLE
1054 THIRTY-FIRST STREET NW
WASHINGTON DC 20007 US

ANDREW T GOODSON
CANAL SQUARE
1054 THIRTY-FIRST ST NW
WASHINGTON DC 20007 US

EDWARD D. GREENBERG
GALLAND, KHARASCH, MORSE & GARFINKLE
1054 THIRTY-FIRST STREET NW
WASHINGTON DC 20007-4492 US

CHARLES H. WHITE, JR.
GALLAND, KHARASCH & GARFINKLE, P. C.
1054 THIRTY-FIRST STREET NW
WASHINGTON DC 20007-4492 US

MICHAEL F. MCBRIDE
LEBOEUF LAMB GREENE & MACRAE, L. L. P.
1875 CONNECTICUT AVE N W, STE 1200
WASHINGTON DC 20009 US

DANIEL ARONOWITZ
LEBOUEF, LAMB, GREENE
1875 CONNECTICUT AVE NWSTE 1200
WASHINGTON DC 20009-5728 US

LINDA K. BREGGIN, ESQ.
LEBOEUF, LAMB, GREENE, ET AL
1875 CONNECTICUT AVENUE N W
WASHINGTON DC 20009-5728 US

PAUL M. DONOVAN
LAROE, WINN, ETAL
3506 IDAHO AVE NW
WASHINGTON DC 20016 US

JOHN D. HEFFNER, ESQ.
REA, CROSS & AUCHINCLOSS
1920 N STREET NW-SUITE 420
WASHINGTON DC 20036 US

GORDON P. MACDOUGALL
1025 CONNECTICUT AVE NW SUITE 410
WASHINGTON DC 20036 US

KEITH G. O'BRIEN
REA, CROSS & AUCHINCLOSS
1920 N STREET N W - SUITE 420
WASHINGTON DC 20036 US

MARC J. FINK
SHER & BLACKWELL
2000 L STREET N W , SUITE 612
WASHINGTON DC 20036 US

WILLIAM G. MAHONEY
HIGHSAW, MAHONEY & CLARKE
1050 SEVENTEENTH STREET NW SUITE 210
WASHINGTON DC 20036 US

LINDA S. STEIN
STEPTOE & JOHNSON
1330 CONNECTICUT AVE NW
WASHINGTON DC 20036 US

GERALD P. NORTON
HARKINS CUNNINGHAM
1300 NINETEENTH STREET, NW.,STE 600
WASHINGTON DC 20036 US

GERALD P. NORTON
HARKINS CUNNINGHAM
1300 NINETEENTH STREET , NW., STE. 600
WASHINGTON DC 20036 US

C MICHAEL LOFTUS
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036 US

PATRICIA E. (DIETRICH) KOLESAR
SLOVER & LOFTUS
1224 SEVENTEENTH ST NW
WASH DC 20036 US

SUSAN B GERSON
GRAHAM & JAMES, LLP
2000 M STREET NW STE 700
WASHINGTON DC 20036 US

CHRISTOPHER A. MILLS
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036 US

ROBERT A. WIMBISH, ESQ.
REA, CROSS & AUCHINCLOSS
1920 N STREET NW SUITE 420
WASHINGTON DC 20036 US

GERALD P NORTON
HARKINS CUNNINGHAM
1300 19TH ST NW SUITE 600
WASHINGTON DC 20036 US

THOMAS LAWRENCE III
OPPENHEIMER WOLFF, ETC
1020 - 19TH STREET NW STE 400
WASHINGTON DC 20036 US

PAUL H. LAMBOLEY
OPPENHEIMER WOLFF & DONNELLY
1020 19TH STREET, N.W., SUITE 400
WASHINGTON DC 20036 US

FRANK J. PERGOLIZZI
SLOVER & LOFTUS
1224 SEVENTEENTH ST NW
WASHINGTON DC 20036 US

RICHARD S. EDELMAN
HIGHSAW MAHONEY CLARKE
1050 SEVENTEENTH STREET N W, SUITE 210
WASHINGTON DC 20036 US

KELVIN J. DOWD
SLOVER & LOFTUS
1224 17TH STREET N W
WASHINGTON DC 20036 US

PAUL A. CUNNINGHAM
HARKINS CUNNINGHAM
1300 19TH STREET NW SUITE 600
WASHINGTON DC 20036 US

JOHN M. CUTLER, JR.
MCCARTHY SWEENEY HARKAWAY
1750 PENNSYLVANIA AVE N W SUITE 1105
WASHINGTON DC 20036 US

RICHARD B HERZOG
HARKINS CUNNINGHAM
1300 19TH ST NW SUITE 600
WASHINGTON DC 20036-1609 US

JOEL A RABINOVITZ
HARKINS CUNNINGHAM
1300 19TH STREET NW SUITE 600
WASHINGTON DC 20036-1609 US

JOSEPH L LAKSHMANAN
1300 19TH STREET NW, SUITE 600
WASHINGTON DC 20036-1609 US

JAMES M. GUINIVAN
HARKINS CUNNINGHAM
1300 19TH ST NW SUITE 600
WASHINGTON DC 20036-1609 US

MARC D. MACHLIN
PEPPER, HAMILTON, ET AL
1300 19TH STREET N W
WASHINGTON DC 20036-1658 US

JOHN WILL ONGMAN
PEPPER HAMILTON SCHEETZ
1300 NINETEENTH STREET N W
WASHINGTON DC 20036-1685 US

MICHELLE J. MORRIS
PEPPER, HAMILTON, ETAL
1300 NINETEENTH ST NW
WASHINGTON DC 20036-1685 US

TIMOTHY M WALSH
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

BETTY JO CHRISTIAN
STEPTOE & JOHNSON
1330 CONNECTICUT AVE NW
WASHINGTON DC 20036-1795 US

SAMUEL M. SIPE, JR.
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

JOHN H. LESEUR
SLOVER & LOFTUS
1224 17TH STREET NW
WASHINGTON DC 20036-3081 US

KEVIN M SHEYS
OPPENHEIMER WOLFF ET AL.
1020 NINETEENTH STREET N W SUITE 400
WASHINGTON DC 20036-6105 US

A STEPHEN HUT JR
WILMER CUTLER & PICKERING
2445 M ST NW
WASHINGTON DC 20037 US

SCOTT N. STONE
PATTON BOGGS L.L.P.
2550 M STREET NW 7TH FLOOR
WASHINGTON DC 20037-1346 US

DANIEL K. MAYERS
WILMER CUTLER PICKERING
2445 M STREET N W
WASHINGTON DC 20037-1420 US

ALI M. STOEPPELWERTH
WILMER CUTLER PICKERING
2445 M STREET N W
WASHINGTON DC 20037-1420 US

WILLIAM J KOLASKY JR
WILMER CUTLER & PICKERING
2445 M STREET NW
WASH DC 20037-1420 US

MICHAEL BRESSMAN
WILMER CUTLER PICKERING
2445 M STREET N W
WASHINGTON DC 20037-1420 US

DAVID H. BAKER
HOLLAND & KNIGHT
2100 PENN AVE NW ST 400
WASHINGTON DC 20037-3202 US

TIMOTHY C HESTER
P O BOX 7566
1201 PENNSYLVANIA AVENUE N W
WASHINGTON DC 20044 US

J MICHAEL HEMMER
COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20044 US

DAVID L. MEYER
COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE N W
WASHINGTON DC 20044-7566 US

ARVID E. ROACH II
COVINGTON & BURLING
PO BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044-7566 US

MICHAEL A. LISTGARTEN
COVINGTON & BURLING
P O BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044-7566 US

MICHAEL ROSENTHAL
COVINGTON & BURLING
P O BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044-7566 US

EILEEN S. STOMMES, DIRECTOR, T&M DIVISION
AGRICULTURAL MARKETING SERVICE, USDA
P. O. BOX 96456
WASHINGTON DC 20090-6456 US

HON. JEROME NELSON
FERC (LJ-2)
888 1ST STREET N E
WASHINGTON DC 20426 US

RICHARD SANDERSON
OFFICE OF FED ACTIV
US ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON DC 20460 US

HON JOHN GLENN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE PAT ROBERTS
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. DON NICKLES
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE THAD COCHRAN
UNITED STATE SENATE
WASHINGTON DC 20510 US

HONORABLE RICHARD BRYAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE BYRON L DORGAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE J. ROBERT KERRY
UNITED STATES SENATE
WASH DC 20510 US

HON CONRAD BURNS
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE TIM JOHNSON
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. WAYNE ALLARD
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. PHIL GRAMM
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE RICHARD LUGAR
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. CHRISTOPHER S. BOND
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. DAN COATS
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE HARRY REID
UNITED STATES SENATE
WASHINGTON DC 20510-0001 US

HON. BEN N CAMPBELL
UNITED STATES SENATE
WASHINGTON DC 20510-0605 US

RICHARD J DURBIN
UNITED STATES SENATE
WASHINGTON DC 20510-1304 US

HONORABLE CHARLES E. GRASSLEY
UNITED STATES SENATE
WASHINGTON DC 20510-1501 US

HONORABLE JOHN BREAUX
UNITED STATES SENATE
WASHINGTON DC 20510-1803 US

HON. TOM EWING
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. MICHAEL OXLEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE GEORGE E. BROWN, JR.
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE FRANK MASCARA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JOHN MURTHA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MARCY KAPTUR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

SHEILA JACKSON-LEE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LLOYD DOGGETT
U. S. HOUSE OF REPRESENTATAIVES
WASHINGTON DC 20515 US

HON DAVID L HOBSON
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JOHN TANNER
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RON LEWIS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DAVID MINGE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JOHN HOSTETTLER
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON TOM DELAY
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PAUL MCHALE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TIM HOLDEN
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE FRANK D. RIGGS
U. S. HOUSE OF REPRESENTATIVES
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HONORABLE CHARLES W. STENHOLM
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE ZOE LOFGREN
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WASHINGTON DC 20515 US

HONORABLE XAVIER BECERRA
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LUCILLE ROYAL-ALLARD
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LYNN WOOLSEY
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PETE STARK
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE NANCY PELOSI
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TOM LANTOS
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RICHARD W. POMBO,
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE KEN CALVERT,
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE SONNY BONO,
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE CHRISTOPHER COX,
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RON PACKARD
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DANA ROHRABACHER
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE HOWARD P. BUCK MCKEON,
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BRIAN P. BILBRAY
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE EDWARD R. ROYCE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE KAREN MCCARTHY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JAY KIM
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PHIL ENGLISH
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JULIAN DIXON
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JAY DICKEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. EARL POMEROY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE GEORGE GEKAS
ATTEN: TOM SANTANIELLO
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. HAROLD E. FORD, JR
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DONALD M. PAYNE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. PAUL KANJORSKI
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. IKE SKELTON
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JAMES L. OBERSTAR
US HSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. LANE EVANS
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ESTEBAN E TORRES
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. THOMAS C SAWYER
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE WALLY HERGER
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE GENE GREEN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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U S HOUSE OF REPRESENTATIVES
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HON. ROBERT A. BORSKI
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RONALD V. DELLUMS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JERRY LEWIS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. HENRY B. GONZALEZ
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RON PACKARD
U. S. HOUSE OF REPRESENTATIVES
WASH DC 20515-0548 US

HONORABLE SCOTT MCINNIS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-0603 US

HONORABLE TODD TIAHRT
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-1004 US

HONORABLE SAM BROWNBACK
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-1602 US

HON. JIM MCCRERY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-1805 US

HONORABLE GEORGE MILLER
ATT: GARY BLAND
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2307 US

HON W J (BILLY) TAUZIN
ATTN: ROY WILLIS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2601 US

HONORABLE JOHN ENSIGN
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2801 US

HON. ROBERT E ANDREWS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3001 US

HONORABLE SHERROD BROWN
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3513 US

HON. FRANK D. LUCAS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3606 US

HONORABLE THOMAS M. FOGLIETTA
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3801 US

HONORABLE CHAKA FATTAH
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3803 US

HONORABLE CURT WELDON
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3807 US

HON. JON CHRISTENSEN
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4155 US

HONORABLE WILLIAM M (MAC) THORNBERRY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4313 US

HONORABLE SHEILA JACKSON LEE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4318 US

HON. HENRY BONILLA
US HOUSE REPRESENTATIVES
WASHINGTON DC 20515-4323 US

HONORABLE EDDIE BERNICE JOHNSON
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4330 US

MICHAEL D BILLIEL
ANTITRUST DIV, DEPT OF JUSTICE
325 SEVENTH ST NW STE 500
WASHINGTON DC 20530 US

PAUL SAMUEL SMITH
U. S. DEPT OF TRANSP
400 7TH ST SW , ROOM 4102 C-30
WASHINGTON DC 20590 US

JOSEPH R. POMPONIO
FEDERAL RAILROAD ADMIN.
400 7TH ST SW RCC-20
WASHINGTON DC 20590 US

LARRY R. PRUDEN
TRANS. COMM. INTL UNION
3 RESEARCH PLACE
ROCKVILLE MD 20850 US

WILLIAM W. WHITEHURST, JR
12421 HAPPY HOLLOW ROAD
COCKEYSVILLE MD 21030-1711 US

CONSTANCE H. PIERCE
CONSTELLATION COMPANIES
250 WEST PRATT STREET
BALTIMORE MD 21201-2423 US

J TUCKER
PO BOX 25181
ARLINGTON VA 22202 US

PETER Q. NYCE, JR.
U. S. DEPARTMENT OF THE ARMY
901 NORTH STUART STREET
ARLINGTON VA 22203 US

NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
1700 NORTH MOORE STREET, SUITE 1900
ARLINGTON VA 22209 US

THOMAS E. SCHICK
CHEMICAL MANUF. ASSOC.
1300 WILSON BOULEVARD
ARLINGTON VA 22209 US

WILLIAM P. JACKSON, JR.
JACKSON & JESSUP, P. C.
P O BOX 1240
3426 NORTH WASHINGTON BLVD
ARLINGTON VA 22210 US

GERALD W. FAUTH, III
G. W. FAUTH & ASSOCIATES INC.
P O BOX 2401
ALEXANDRIA VA 22301 US

JOHN T. ESTES
SUITE 400
1029 NORTH ROYAL STREET
ALEXANDRIA VA 22314 US

PETER J SHUDTZ
CSX CORPORATION
902 E CARY ST 1 JAMES CENTER
RICHMOND VA 23119 US

ROBERT J. COONEY
NORFOLK SOUTHERN CORP.
THREE COMMERCIAL PLACE
NORFOLK VA 23510-2191 US

ROBERT S. KOMPANTY
720 THIMBLE SHOALS BLVD, SUITE 130
NEWPORT NEWS VA 23608-2574 US

BOB THOMPSON
GEORGIA-PACIFIC CORP.
P O BOX 105605
ATLANTA GA 30348-5605 US

GARY LAAKSO
RAILAMERICA
301 YAMATO ROAD SUITE 1190
BOCA RATON FL 33431 US

GREGORY M. VINCENT, VICE PRESIDENT
TENNESSEE VALLEY AUTH
LOOKOUT PLACE 1101 MARKET STREET
CHATTANOOGA TN 37402 US

E. CALVIN CASSELL
EASTMAN CHEMICAL COMPANY
P O BOX 1990
KINGSPORT TN 37662 US

EDWARD S. CHRISTENBURY
400 WEST SUMMIT HILL DRIVE
KNOXVILLE TN 37902 US

HONORABLE GILLESPIE V. MONTGOMERY
U. S. HOUSE OF REPRESENTATIVES
P. O. BOX 5618
MERIDAN MS 39208 US

R. L. YOUNG
P O BOX 700
ONE MEMORIAL DRIVE
LANCASTER OH 43130-0700 US

D. MICHAEL MILLER
AMERICAN ELECTRIC POWER
1 RIVERSIDE PLAZA
COLUMBUS OH 43215 US

HONORABLE JOHN GLENN
U. S. SENATE ATTN: ANISA BELL
200 N HIGH STREET S-600
COLUMBUS OH 43215-2408 US

MICHAEL M. BRILEY
SHUMAKER, LOOP & KENDRICK
N COURTHOUSE SQUARE - 1000 JACKSON
TOLEDO OH 43624 US

DANIEL R. ELLIOTT III
UNITED TRANSP. UNION
14600 DETROIT AVENUE
CLEVELAND OH 44107 US

CLINTON J MILLER, III, GENERAL COUNSEL
UNITED TRANSPORTATION UNION
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

RONALD P MCLAUGHLIN
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
1370 ONTARIO ST STAN BLDG
CLEVELAND OH 44113-1702 US

RICHARD E. KERTH, TRANS. MGR.
CHAMPION INTERNAT'L CORP
101 KNIGHTSBRIDGE DRIVE
HAMILTON OH 45020-0001 US

MICHAEL P. FERRO
MILLENNIUM PETROCHEMICALS, INC.
11500 NORTHLAKE DRIVE
CINCINNATI OH 45249 US

BRUCE A. KLIMEK
INLAND STEEL
3210 WATLING STREET
EAST CHICAGO IN 46312 US

HON JEFF SMITH
CITY OF KENDALLVILLE
234 S MAIN STREET
KENDALLVILLE IN 46755-1795 US

JAMES E. HANSON
DOW CHEMICAL COMPANY
2020 WILLARD H DOW CENTER
MIDLAND MI 48674 US

LARRY B. KARNES
TRANSPORTATION BUILDING
PO BOX 30050
425 WEST OTTAWA
LANSING MI 48909 US

THOMAS F JACKSON
800 LINCOLN WAY
AMES IA 50010 US

P C HENDRICKS
STATE LEGISLATIVE DIRECTOR UTU
313 E 5TH STREET
DES MOINES IA 503[illegible]9 US

HONORABLE CHARLES E. GRASSLEY
UNITED STATES SENATE
210 WALNUT STREET
DES MOINES IA 50309-2140 US

EDWIN C JERTSON
INTERSTATE POWER CO
P O BOX 769
1000 MAIN STREET
DUBUQUE IA 52004 US

KENT M RAGSDALE
INTERSTATE POWER CO
PO BOX 769
DUBUQUE IA 52004 US

PHILIP D. WARD, ET AL.
P O BOX 351
200 FIRST STREET SE
CEDAR RAPIDS IA 52406-0351 US

TOBIN LEE BRITT
IES UTILITIES, INC.
P O BOX 351
200 FIRST ST SE
CEDAR RAPIDS IA 52406-0351 US

WILLIAM R. KNIGHT
WISCONSIN POWER & LIGHT
P O BOX 192
222 WEST WASHINGTON AVENUE
MADISON WI 53701-0192 US

ALLEN J VOGEL,
MINNESOTA DEPARTMENT OF TRANSPORTATION
395 JOHN IRELAND BLVD TRANSP BLDG, SUITE 925,
ST PAUL MN 55155 US

RONALD E HUNTER, LAW DEPARTMENT
CARGILL, INCORPORATED
15407 MCGINTY ROAD WEST
WAYZATA MN 55391 US

WAYNE C. SERKLAND, U S REGIONAL COUNSEL
CANADIAN PACIFIC LEG. SER
105 SOUTH FIFTH ST SUITE 1000
MINNEAPOLIS MN 55402 US

DOUGLAS M. HEAD
WEINER
120 SOUTH 6TH STREET STE 2400
MINNEAPOLIS MN 55402 US

BOB ZELENKA
852 GRAIN EXCHANGE
MINNEAPOLIS MN 55415 US

HON. WILLIAM J. JANKLOW
GOVERNOR, SD
500 EAST CAPITOL
PIERRE SD 57501-5070 US

TERRY C. WHITESIDE
RADERMACHER, WHITESIDE & ASSOCIATES
3203 3RD AVE N STE 301
BILLINGS MT 59101 US

HONORABLE MARC RACICOT
GOV'S OFFICE, STATE CAP.
P O BOX 200801
HELENA MT 59620-0801 US

J. FRED SIMPSON, EXECUTIVE VICE PRESIDENT
MONTANA RAIL LINK, INC.
101 INTERNATIONAL WAY
MISSOULA MT 59802 US

JANET H GILBERT
WISCONSIN CENTRAL LTD
6250 NORTH RIVER ROAD STE 9000
ROSEMONT IL 60018 US

RICHARD E. WEICHER
BURLINGTON NORTHERN SANTA FE CORPORATION
1700 EAST GOLF ROAD, 6TH FLOOR
SCHAUMBURG IL 60173 US

JEFFREY R. MORELAND
THE BURLINGTON NORTHERN SANTA FE CORPORATION
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173 US

JAMES A. SMALL
COMMONWEALTH EDISON CO.
1411 OPUS PL STE 200
DOWNERS GROVE IL 60515-5701 US

WILLIAM F. COTTRELL
ASST. ATTORNEY GENERAL
100 W RANDOLPH ST - 12TH FLOOR
CHICAGO IL 60601 US

THOMAS J HEALEY
OPPENHEIMER, WOLFF, ETAL
180 N STETSON AV 2 PRUDENTIAL PL
CHICAGO IL 60601 US

CHRISTINE H. ROSSO
ASSISTANT ATTORNEY GENERAL
100 W RANDOLPH ST
CHICAGO IL 60601 US

WILLIAM C SIPPEL
OPPENHEIMER WOLFF & DONNELLY
180 N STETSON AVE TWO PRUDENTIAL PLAZA 45TH F
CHICAGO IL 60601 US

THOMAS J. LITWILER
OPPENHEIMER WOLFF & DONNELLY
180 N STETSON AVE 45TH FLOOR
CHICAGO IL 60601 US

THOMAS DEGNAN
UNITED STATES GYPSUM CO.
125 SOUTH FRANKLIN STREET
CHICAGO IL 60606 US

STEPHEN C. HERMAN
MCFARLAND & HERMAN
20 N WACKER DRIVE STE 1330
CHICAGO IL 60606-2902 US

THOMAS F. MCFARLAND, JR.
MCFARLAND & HERMAN
20 NORTH WACKER DRIVE, SUITE 1330
CHICAGO IL 60606-3101 US

RONALD A. LANE
ILLINOIS CENTRAL RR
455 N CITYFRONT PLAZA DR 20TH FL
CHICAGO IL 60611 US

MYLES L. TOBIN
ILLINOIS CENTRAL RAILROAD
455 NORTH CITYFRONT PLAZA DRIVE
CHICAGO IL 60611-5504 US

THOMAS ZWICA
121 WEST FIRST STREET
GENESEO IL 61254 US

GARY L TOWELL
TOLEDO, PEORIA & WESTERN
1990 EAST WASHINGTON STREET
EAST PEORIA IL 61611-2961 US

CLARENCE R. PONSLER
GENERAL CHAIRMAN, UTU
1017 W. MAIN STREET
BELLEVILLE IL 62220 US

SCOTT A. KONEY
P O BOX 1470
4666 FARIES PARKWAY
DECATUR IL 62525 US

JON FOY, DIRECTOR, RATES GRAIN
ARCHER DANIEL MIDLAND CO
P. O. BOX 1470
4666 FARIES PARKWAY
DECATUR IL 62525 US

MERRILL L. TRAVIS
ILLINOIS DEPT. OF TRANSP.
2300 SOUTH DIRKSEN PARKWAY
SPRINGFIELD IL 62703-4555 US

CAROL R DORIS
500 SOUTH SECOND STREET
SPRINGFIELD IL 62706 US

KIRK BROWN
ILLINOIS DOT, OFFICE OF THE SECRETARY
2300 SOUTH DIRKSEN PARKWAY
SPRINGFIELD IL 62764 US

ROGER HERMANN
MALLINCKRODT CHEMICAL
16305 SWINGLEY RIDGE DRIVE
CHESTERFIELD MO 63017-1777 US

JEFFREY L. KLINGER
PEABODY HOLDING COMPANY
701 MARKET STREET STE 700
ST LOUIS MO 63101-1826 US

C A MENNELL, PRESIDENT
LACKLAND WESTERN RR CO
31 OAK TERRACE
WEBSTER GROVES MO 63119 US

DAVID A. PINS
THE CHEMICAL GROUP, MONSANTO
800 N LINDBERGH BOULEVARD
ST LOUIS MO 63167 US

D E THOMPSON
GENERAL CHAIRMAN-BLE
414 MISSOURI BOULEVARD
SCOTT CITY MO 63780 US

HON IKE SKELTON
U. S. HOUSE OF REP.
514 B N W 7 HIGHWAY
BLUE SPRINGS MO 64014 US

ROBERT K DREILING
KANSAS CITY SOUTHERN RWY CO.
114 WEST 11TH STREET
KANSAS CITY MO 64105 US

RICHARD P BRUENING
KANSAS CITY SOUTHERN RR
114 WEST ELEVENTH STREET
KANSAS CITY MO 64106 US

MEL CARNAHAN
OFFICE OF THE GOVERNOR
STATE CAPITOL ROOM 216
JEFFERSON CITY MO 65101 US

JACK HYNES, ADMINISTRATOR OF RAILROADS
MISSOURI DEPARTMENT OF TRANSPORTATION
PO BOX 270
105 WEST CAPITOL AVENUE
JEFFERSON CITY MO 65102 US

JOSEPH A. STINGER
IBBB
570 NEW BROTHERHOOD BUILDING
KANSAS CITY KS 66101 US

WILLIAM J. MCGINN
NORTH AMER. CHEM. CO.
8300 COLLEGE BOULEVARD
OVERLAND PARK KS 66210 US

BARRETT HATCHES
8300 COLLEGE BLVD
OVERLAND PARK KS 66210 US

T. L. GREEN
WESTERN RESOURCES, INC.
PO BOX 889
818 KANSAS AVE
TOPEKA KS 66601 US

JOHN JAY ROSACKER
KS, DEPT OF TRANSP
217 SE 4TH ST 2ND FLOOR
TOPEKA KS 66603 US

DWAYNE H SHANNON
PO BOX 1138
WICHITA KS 67201 US

ALAN R. POST
1803 STEFKIN STREET
WICHITA KS 67208 US

JAMES J. IRLANDI
STB PRACTITIONER
1809 N BROADWAY/SUITE F
WICHITA KS 67214 US

JUNIOR STRECKER, CHAIRMAN
MOUNTAIN-PLAINS COMMUNITIES & SHIPPERS COALIT
123 NORTH MAIN ST
HOISINGTON KS 67544 US

ROBERT K. GLYNN
HOISINGTON CHAM. OF COMM.
123 NORTH MAIN STREET
HOISINGTON KS 67544-2594 US

JOHN F. LARKIN
P O BOX 31850
4814 DOUGLAS ST 68132
OMAHA NE 68132-0850 US

PAUL A. CONLEY, JR. ,LAW DEPARTMENT
UNION PACIFIC RR CO.
1416 DODGE STREET
OMAHA NE 68179 US

LOUISE A. RINN
UNION PACIFIC RR CO.
1416 DODGE STREET ROOM 830
OMAHA NE 68179 US

JEANNA L REGIER
UNION PACIFIC RAILROAD COMPANY
1416 DODGE ST ROOM 830
OMAHA NE 68179 US

JAMES V. DOLAN, LAW DEPARTMENT
UNION PACIFIC RR CO.
1416 DODGE STREET #830
OMAHA NE 68179 US

JOSEPH D. ANTHOFER
UNION PACIFIC RR CO.
1416 DODGE STREET ROOM 830
OMAHA NE 68179-0001 US

ROBERT T. OPAL
UNION PACIFIC RAILROAD CO.
1416 DODGE STREET RM 830
OMAHA NE 68179-0001 US

KEN SIECKMEYER, MGR. TRANSP. PLANN. DIV.
NEBRASKA DEPT. OF ROADS
P O BOX 94759
LINCOLN NE 68509-4759 US

WAYNE ANDERSON
ENTERGY SERVICES, INC.
639 LOYOLA AVE MAIL L-ENT-26E
NEW ORLEANS LA 70113 US

W. F. CARTER
ALBEMARLE CORPORATION
451 FLORIDA STREET
BATON ROUGE LA 70801 US

DEAN L. WORLEY
HILBURN CALHOON HARPER
P O BOX 5551
ONE RIVERFRONT PLACE EIGHTH FL
NORTH LITTLE ROCK AR 72119 US

SCOTT MANATT
P. O. BOX 473
CORNING AR 72422 US

JOE N. HAMPTON
2309 NORTH TENTH, SUITE E
ENID OK 73701 US

THOMAS R. JACOBSEN
TU ELECTRIC
1601 BRYAN STREET STE 11-060
DALLAS TX 75201-3411 US

JOEL T WILLIAMS III
STE 350, LB-126
4809 COLE AVENUE
DALLAS TX 75205 US

STEVEN A BRIGANCE
LEBOEUF, LAMB, ETAL
4025 WOODLAND PARK BLVD STE 250
ARLINGTON TX 76013 US

EDMUND W. BURKE
BURLINGTON NORTHERN RR CO
777 MAIN STREET, 3800 CONTINENTAL PLAZA
FT WORTH TX 76102 US

DOUGLAS J. BABB
BURLINGTON NORTHERN RR CO
777 MAIN STREET, 3800 CONTINENTAL PLAZA
FT WORTH TX 76102-5384 US

MICHAEL E ROPER
BURLINGTON NORTHERN SANTA FE CORPORATION
3017 LOU MENK DRIVE
FT WORTH TX 76131 US

JANICE G BARBER
BURLINGTON NORTHERN SANTA FE CORPORATION
3017 LOU MENK DRIVE
FORT WORTH TX 76131 US

RICHARD SCHIEFELBEIN
7801 WOODHARBOR DRIVE
FORT WORTH TX 76179 US

W. DAVID TIDHOLM
HUTCHESEN & GRUNDY
1200 SMITH STREET (#3300)
HOUSTON TX 77002-4579 US

GEN. COMMITTEE OF ADJUST. GO-895
UNITED TRANS. UNION
2040 NORTH LOOP WEST STE 310
HOUSTON TX 77018 US

ROBERT J. ROSSI
UNITED TRANSPORTATION UNION
2040 NORTH LOOP WEST SUITE 310
HOUSTON TX 77018-8112 US

GEORGE T. WILLIAMSON
P O BOX 2562
111 E LOOP N
HOUSTON TX 77029 US

JOHN D. BURKE
GREATER HOUSTON PORT BUREAU, INC
111 EAST LOOP NORTH
HOUSTON TX 77029 US

JOHN D BURKE
111 EAST LOOP NORTH
HOUSTON TX 77029 US

B KENNETH TOWSEND JR
EXXON CHEMICAL CO
13501 KATY FREEWAY
HOUSTON TX 77079-1398 US

B. C. GRAVES, JR.
EXXON COMPANY U.S.A.
PO BOX 4692
HOUSTON TX 77210-4692 US

BRIAN P. FELKER
SHELL CHEMICAL COMPANY
P O BOX 2463
HOUSTON TX 77252-2463 US

ERIC W. TIBBETTS
P O BOX 3766
1301 MCKINNEY ST
HOUSTON TX 77253 US

ROY GIANGROSSO
ENTERGY SERVICES, INC.
350 PINE STREET
BEAUMONT TX 77701 US

TEXAS MEXICAN RAILWAY CO.
PO BOX 419
LAREDO TX 78042-0419 US

JOHN P. LARUE, EXECUTIVE DIRECTOR
THE PORT OF CORPUS CHRISTI
P O BOX 1541
222 POWER STREET
CORPUS CHRISTI TX 78403 US

THOMAS A GRIEBEL
TEXAS DOT
125 E 11TH ST
AUSTIN TX 78701 US

JERRY L. MARTIN, DIRECTOR RAIL DIV.
RR COMM OF TEXAS
P O BOX 12967
1701 N CONGRESS
AUSTIN TX 78711 US

MARK TOBEY
P O BOX 12548
AUSTIN TX 78711-2548 US

REBECCA FISHER
ASST ATTY GENERAL
PO BOX 12548
AUSTIN TX 78711-2548 US

DONALD T CHEATHAM
10220-E METROPOLITAN DR
AUSTIN TX 78758 US

HON. JOHN R. COOK,
TX HOUSE OF REPRESENTATIVES
P O BOX 2910
AUSTIN TX 78768 US

HON. ROBERT JUNELL
TEXAS HOUSE OF REP.
PO BOX 2910
AUSTIN TX 78768 US

ROBERT M. SAUNDERS
P O BOX 2910
AUSTIN TX 78768-2910 US

ROBERT A. CUSHING, JR.
UNITED TRANS. UNION,
12401 HIDDEN SUN COURT
EL PASO TX 79938 US

DARRELL L. HANAVAN, EXECUTIVE DIRECTOR
COLORADO WHEAT ADMIN.
5500 SOUTH QUEBEC STREET STE 111
ENGLEWOOD CO 80111 US

THOMAS F. LINN
MOUNTAIN COAL COMPANY
555 17TH STREET 22ND FLOOR
DENVER CO 80202 US

STEPHEN D ALFERS
ALFERS & CARVER
730 17TH STREET #340
DENVER CO 80202 US

STANLEY B. KONIZ, UNIT MANAGER
PUBLIC SERVICE COMPANY
1225 - 17TH STREET STE 1100
DENVER CO 80202 US

PATRICIA T. SMITH, SR. VICE PRESIDENT
PUBLIC SERVICE COMPANY
1225 - 17TH STREET STE 600
DENVER CO 80202 US

RUSSELL S. JONES, III
MOUNTAIN COAL COMPANY
555 17TH STREET 22ND FLOOR
DENVER CO 80202 US

NANCY MANGONE, ENFORCEMENT ATTORNEY
U. S. EPA REGION VIII
999 18TH SST STE 500
DENVER CO 80202-2466 US

DAVID N. LAWSON, FUEL TRAFFIC COORDINATOR
PUBLIC SERVICE COMMISSION
1225 17TH ST STE 1100, SEVENTEENTH ST PLAZA
DENVER CO 80202-5533 US

JANE T. FELDMAN, ASST. ATTORNEY GENERAL
STATE OF COLORADO
1525 SHERMAN ST- 5TH FLOOR
DENVER CO 80203 US

HON. BEN N. CAMPBELL
UNITED STATES SENATE
1129 PENNSYLVANIA STREET
DENVER CO 80203 US

HONORABLE ROY ROMER
GOVERNOR
136 STATE CAPITOL
DENVER CO 80203 US

SUE BALLENSKI, PHYSICAL RESOURCES
USDA FOREST SERVICE
P O BOX 25127
LAKEWOOD CO 80225 US

GERALD E. VANINETTI
RESOURCE DATA INT'L
1320 PEARL STREET STE 300
BOULDER CO 80302 US

JOE D. FORRESTER
C/O CO MTN COLLEGE, TIMBERLINE CAMPUS
901 S HWY 24
LEADVILLE CO 80461 US

THOMAS J. FLORCZAK
CITY OF PUEBLO
127 THATCHER BUILDING
PUEBLO CO 81003 US

MAYOR LESTER WILLIAMS
TOWN OF EADS
PO BOX 8
110 W 13TH ST
EADS CO 81036 US

CARDON G. BERRY
KIOWA CO. COMMISSIONERS
PO BOX 591
1305 GOFF
EADS CO 81036 US

HON DELCARL EIKENBERG
TOWN OF HASWELL
P O BOX 206
HASWELL CO 81045-0206 US

JOHN R STULP
SECED
P O BOX 1600
LAMAR CO 81052 US

LEROY E. MAUCH
BOARD OF COUNTY COMMISSIONERS
P. O. BOX 1046
LAMAR CO 81052 US

CLEDE WIDENER
BOARD OF COUNTY COMMISSIONERS
P.. O. BOX 1046
LAMAR CO 81052 US

JOHN ROESCH
BENT COUNTY
PO BOX 350
LAS ANIMAS CO 81054 US

BLAINE ARBUTHNOT
CROWLEY COUNTY
601 MAIN ST
ORDWAY CO 81063 US

JANET PALMER
P O BOX 1268
13997 COUNTY ROAD 71
SHERIDAN LAKE CO 81071 US

BERNICE TUTTLE
KIOWA COUNTY WIFE, CHAPTER #124
13775 CR785
TOWNER CO 81071-9619 US

CHARLES WAIT
BACA COUNTY
PO BOX 116
SPRINGFIELD CO 81073 US

FRANK C MCMURRY
PO BOX 699
SALIDA CO 81201 US

HON. NANCY SANGER, MAYOR
CITY OF SALIDA
P O BOX 417
124 E STREET
SALIDA CO 81201 US

THOMAS W. FOSTER, CHAIRMAN
COM. TO PRESERVE PROPERTY
P O BOX 681
SALIDA CO 81201 US

F W WOTIPKA
6388 TERRACE LANE
SALIDA CO 81201 US

MYRON F. SMITH
FREMONT COUNTY COMM.
615 MACON AVE ROOM #102
CANON CITY CO 81212 US

GREG TABUTEAU
ROYAL GORGE SCENIC RY
P O BOX 1387
CANON CITY CO 81215 US

RUTH H. CARTER, MAYOR
CITY OF CANON CITY
P O BOX 1460
ATTN: STEVE THACKER CITY ADMIN
CANON CITY CO 81215 US

JUDY LOHNES
UAACOG
P O BOX 510
CANON CITY CO 81215-0510 US

STEVEN G. RABE, CITY MANAGER
CITY OF FLORENCE
300 W MAIN STREET
FLORENCE CO 81226 US

STEVE TUCKER
D&RG WEST. EMPLOYEES
2048 J ROAD
FRUITA CO 81521 US

JAMES R. FRITZE
EAGLE COUNTY ATTORNEY
P O BOX 850
EAGLE CO 81631 US

GARY L. MCFARLEN,, DIRECTOR-TRANSP
KENNECOTT ENERGY COMPANY
505 SOUTH GILLETTE AVENUE
GILLETTE WY 82716 US

PATRICIA BRITTON, CHIEF LEGAL OFFICER
KENNECOTT ENERGY COMPANY
505 SOUTH GILLETTE AVENUE
GILLETTE WY 82716 US

TIMM R. ADAMS
IDAHO BARLEY COMMISSION
1199 MAIN STREET, STE G
BOISE ID 83702-5630 US

JERRY R KRESS
ID, WHEAT COMMISSION
1109 MAIN ST STE 310
BOISE ID 83702-5642 US

ANN KNAPTON
IDAHO TIMBER CORPORATION
P O BOX 67
5401 KENDALL STREET
BOISE ID 83707-0067 US

WAYNE L. STOCKEBRAND
KENNECOTT UTAH COPP. CORP
P O BOX 6001
8315 WEST 3595 SOUTH
MAGNA UT 84044-6001 US

RAY D. GARDNER
KENNECOTT UTAH COPP. CORP
P O BOX 6001
8315 WEST 3595 SOUTH
MAGNA UT 84044-6001 US

ALEXANDER H. JORDAN
WESTERN SHIPPERS COALITION
3118 ROUND VALLEY WAY
PARK CITY UT 84060-6842 US

RONALD L. RENCHER
WESTERN SHIPPERS COAL.
136 SOUTH MAIN STREET STE 1000
SALT LAKE CITY UT 84101-1672 US

F MARK HANSEN
F MARK HANSEN, P.C.
624 NORTH 300 WEST SUITE 200
SALT LAKE CITY UT 84103 US

JEFFREY B. GROY
ONE UTAH CTR
201 SOUTH MAIN STREET, STE 1100
SALT LAKE CITY UT 84111 US

CHRISTOPHER E. BRAMHALL
451 SOUTH STATE ST, ROOM 505
SALT LAKE CITY UT 84111 US

HON. DEEDEE CORRADINI
451 SOUTH STATE STREET, ROOM 306
SALT LAKE CITY UT 84111 US

HONORABLE MICHAEL O. LEAVITT
ATTN: ROBIN L. RIGGS, GC TO GOVERNOR
210 STATE CAPITOL
SALT LAKE CITY UT 84114 US

REED M. RICHARDS
STATE OF UTAH
236 STATE CAPITOL
SALT LAKE CITY UT 84114 US

LYNETTE W. THIRKILL, LOGISTICS MANAGER
GR. SALT LAKE MINERALS
P O BOX 1190
OGDEN UT 84402 US

KENNETH C. JOHNSEN, V PRES & GEN COUNSEL
GENEVA STEEL COMPANY
P O BOX 2500
PROVO UT 84603 US

RALPH RUPP
PO BOX 2500
PROVO UT 84603 US

CAROL HEATHINGTON
1300 W WASHINGTON
PHOENIX AZ 85007 US

HONORABLE BOB STUMP
U.S. HOUSE OF REPRESENTATIVES
230 N. 1ST AVE., VOOM 2001
PHOENIX AZ 85025 US

FRANK E. HANSON, JR
MAGMA METALS COMPANY
7400 NORTH ORACLE ROAD, SUITE 200
TUCSON AZ 85704 US

O. KENT MAHER
33 WEST FOURTH ST
PO BOX 351
WINNEMUCCA NV 89446 US

R. MICHAEL MCCORMICK
HUMBOLDT COUNTY DA
P O BOX 909
50 WEST FIFTH STREET
WINNEMUCCA NV 89446 US

FRANK D GAUS
805 KUENZIL ST # 149
RENO NV 89502 US

MICHAEL E. HALLEY
CITY OF RENO
P O BOX 1900
RENO NV 89505 US

DORI OWEN, SPECIAL PROJECTS MANAGER
REDEVELOP LAND AGENCY
490 S CENTER STREET STE 203
RENO NV 89505 US

STEVE VARELA
PO BOX 1900
RENO NV 89505 US

CHARLES E. MCNEELY
CITY OF RENO
P. O. BOX 1900
RENO NV 89505 US

SCOTT HUTCHERSON
EAGLE-PICHER MINERALS INC
6110 PLUMAS ST
RENO NV 89509 US

CHARLES A BRACHT
700 FOREST
RENO NV 89509 US

PHILLIP WENDT
PO BOX 11072
RENO NV 89510 US

JEFFERY W. HILL
SIERRA PACIFIC POWER CO.
P O BOX 10100
6100 NEIL ROAD
RENO NV 89520 US

THOMAS J. FRONAPFEL
NEVADA, DEPT. OF TRANSPORTATION
1263 S STEWART STREET
CARSON CITY NV 89712 US

MICHAEL I. STOCKMAN, GENERAL COUNSEL
U. S. BORAX INC.
26877 TOURNEY ROAD
VALENCIA CA 91355 US

JOHN E. BALLAS, AGENCY ENGINEER
INDUSTRY URBAN-DEV. AG.
P O BOX 7089
15651 EAST STAFFPRD STREET
CITY OF INDUSTRY CA 91744 US

JOHN D BALLAS
P.O. BOX 7089
15651 EAST STAFFORD STREET
CITY OF INDUSTRY CA 91744 US

RICHARD CABANILLA, PLANNING DEPARTMENT
IMPERIAL COUNTY
939 MAIN STREET
EL CENTRO CA 92243-2856 US

SCOTT KESSLER
202 WEST FOURTH STREET
ALTURUS CA 94102 US

JAMES T. QUINN
CALIFORNIA PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO CA 94102-3298 US

LOUIS P. WARCHOT
SOUTHRN PACIF. TRANS. CO.
ONE MARKET PLAZA
SOUTHERN PACIFIC BLDG RM 815
SAN FRANCISCO CA 94105 US

CANNON Y. HARVEY
SOUTHERN PAC. TRNS. CO.
ONE MARKET PLAZA
SAN FRANCISCO CA 94105 US

LINDSAY BOWER, DEPUTY ATTORNEY GENERAL
CALIFORNIA DEPT. OF JUSTICE
50 FREMONT STREET STE 300
SAN FRANCISCO CA 94105 US

CAROL A. HARRIS
SOUTHERN PAC. TRANS. CO.
ONE MARKET PLAZA
SAN FRANCISCO CA 94105 US

LARRY W. TELFORD
SEVERSON & WERSON
ONE EMBARCADERO CENTER
SAN FRANCISCO CA 94111 US

DANIEL R. ARELLANO
CITY HALL
708 THIRD STREET
BRENTWOOD CA 94513-1396 US

LEO R BRIEN
530 WARER STREET
OAKLAND CA 94607 US

PAUL C. ANDERSON
MCDONOUGH, HOLLAND, ETAL
1999 HARRISON STREET STE 1300
OAKLAND CA 94612 US

JEFFREY A. WALTER
WALTER & PISTOLE
670 W. NAPA STREET, SUITE "F"
SONOMA CA 95476 US

CHRISTOPHER J. NEARY
110 SOUTH MAIN STREET SUITE C
WILLITS CA 95490 US

JOSEPH H. PETTUS
SUN VALLEY ENERGY INC
800 HOWE AVE, SUITE 270
SACRAMENTO CA 95825 US

R. MARK ARMSTRONG
P O BOX 1051
ALTURAS CA 96101 US

KATHLEEN R. LAZARD
P O BOX 730
700 COURT STREET
SUSANVILLE CA 96130 US

MIKE THORNE, EXEC. DIR.
PORT OF PORTLAND
BOX 3529
PORTLAND OR 97208 US

FRED P. SWANSON
OREGON STEEL MILLS
P O BOX 2760
PORTLAND OR 97208-0363 US

RICK WILLIS, EXECUTIVE DIRECTOR
OREGON PUBLIC UTILITY COMM
550 CAPITOL ST NE
SALEM OR 97310-1380 US

ALLAN E. RUMBAUGH
P O BOX 1215
COOS BAY OR 97420 US

KAREN O'CONNOR
LAKE COUNTY COURTHOUSE
513 CENTER STREET
LAKEVIEW OR 97630 US

ANN DEKOSTER
P O BOX 1209
SEATTLE WA 98111 US

CHARLES H MONTANGE
426 NW 162ND STREET
SEATTLE WA 98177 US

DONALD G MEYER
P O BOX 1837
TACOMA WA 98401 US

MARCELLA M. SZEL
CP RAIL SYSTEM
910 PEEL STREET WINDSOR STATION RM 234
MONTREAL QUEBEC CD H3C 3E4 CD

Records: 467

STB FD 32760 8-29-97 C-74 28122

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SURFACE TRANSPORTATION BOARD[1]

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY--CONTROL AND MERGER--SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

[Decision No. 74][2]

Decided: August 25, 1997

In Decision No. 44 (served August 12, 1996), we approved the common control and merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company) and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company)[3]

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[1] Proceedings before the Interstate Commerce Commission (ICC) that remained pending on January 1, 1996, must be decided under the law in effect prior to that date if they involve functions retained by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. This proceeding was pending with the ICC prior to January 1, 1996, and relates to functions retained under Surface Transportation Board (Board) jurisdiction pursuant to new 49 U.S.C. 11323-27. Citations are to the former sections of the statute, unless otherwise indicated.

[2] This decision embraces: Finance Docket No. 32760 (Sub-No. 1), Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Trackage Rights Exemption--Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company; Finance Docket No. 32760 (Sub-No. 2), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Petition for Exemption--Acquisition and Operation of Trackage in California, Texas, and Louisiana; Finance Docket No. 32760 (Sub-No. 19), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Trackage Rights Exemption--Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., The Denver and Rio Grande Western Railroad Company, and The Southern Illinois & Missouri Bridge Company; and STB Finance Docket No. 32760 (Sub-No. 20), The Atchison, Topeka and Santa Fe Railway Company--Trackage Rights Exemption--Southern Pacific Transportation Company.

[3] In Decision No. 44: Union Pacific Corporation was referred to as UPC; Union Pacific Railroad Company was referred to as UPRR; Missouri Pacific Railroad Company was referred to as MPRR; UPRR and MPRR were referred to collectively as UP; Southern Pacific Rail Corporation was referred to as SPR; Southern Pacific Transportation Company was referred to as SPT; St. Louis Southwestern Railway Company was referred to as SSW; SPCSL Corp. was referred to as SPCSL; The Denver and Rio Grande Western Railroad Company was referred to as DRGW; SPT, SSW, SPCSL, and DRGW were referred to collectively as SP; and UPC, UP, SPR, and SP were referred to collectively as "applicants."

MPRR, SPCSL, and DRGW were recently merged into UPRR (MPRR, on January 1, 1997; SPCSL and DRGW, on June 30, 1997). Accordingly, in this decision: with respect to the

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subject to various conditions, including the terms of the BNSF agreement[4] and a condition (referred to as the contract modification condition) that required UP/SP to modify, immediately upon consummation of the merger, any contracts with shippers at 2-to-1 points incorporated within the BNSF agreement to allow BNSF access to at least 50% of the volume. See Decision No. 44, slip op. at 106 (third paragraph, last clause) and 146 (the "opening contracts at 2-to-1 points" requirement). The common control authorized in Decision No. 44 was consummated on September 11, 1996. See also Decision No. 57 (served November 20, 1996) (clarifying the contract modification condition).

In this decision, we address the 2-to-1 status issue presented in the MONT-13 petition filed on July 24, 1997, by Montell USA, Inc. (Montell),[5] and in the replies thereto filed by applicants (UP/SP-308, filed on August 11, 1997) and BNSF (BN/SF-82, filed on August 13, 1997).[6]

BACKGROUND

Decision No. 44; Montell's Interests. Montell, which operates a plant in the West Lake Charles, LA, area: produces primarily polypropylene and polyethylene; relies almost exclusively on rail to ship its products to market; relies on rail for the storage of its products; and relies on rail for the receipt of raw materials. Montell ships most of its outbound freight to points in the

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period prior to January 1, 1997, the term "applicants" has the meaning it had in Decision No. 44; with respect to the period beginning January 1, 1997, and ending June 30, 1997, the term "applicants" has reference to UPC, UPRR, SPR, SPT, SSW, SPCSL, and DRGW; with respect to the period beginning July 1, 1997, the term "applicants" has reference to UPC, UPRR, SPR, SPT, and SSW; and, with respect to the period beginning January 1, 1997, the acronym "UP" has reference to UPRR.

[4] In Decision No. 44, Burlington Northern Railroad Company (BN) and The Atchison, Topeka and Santa Fe Railway Company (SF) were referred to collectively as BNSF. On December 31, 1996, SF merged into BN, and the surviving corporation was renamed The Burlington Northern and Santa Fe Railway Company. Accordingly, in this decision: with respect to the period ending December 31, 1996, the acronym "BNSF" has the meaning it had in Decision No. 44; and, with respect to the period beginning January 1, 1997, the acronym "BNSF" has reference to The Burlington Northern and Santa Fe Railway Company. See also Decision No. 44, slip op. at 12 n.15 (description of the BNSF agreement).

[5] The MONT-13 petition, as initially filed on July 24, 1997, did not carry the "MONT-13" designation. That designation was supplied by a subsequent errata filing (MONT-14, filed on August 11, 1997).

[6] Montell served the MONT-13 and -14 filings on: applicants; BNSF; ARCO Chemical (the new owner of the Lake Charles area plant formerly owned by Olin Corporation, see Decision No. 44, slip op. at 66-67); PPG Industries, Inc. (another shipper with a plant in the Lake Charles area, see Decision No. 44, slip op. at 69); The Kansas City Southern Railway Company (KCS); and the United States Departments of Justice and Transportation. Montell, which has promised that any other party that may be interested in the MONT-13 petition may secure a copy upon request, has asked us to waive any requirement that it serve the petition upon any parties other than those named in the preceding sentence. This request is reasonable (this decision will be served on all parties of record in Finance Docket No. 32760), and we will therefore grant it. See, e.g., Decision No. 45 (served August 23, 1996), slip op. at 1 (granting a request to limit the service requirement otherwise applicable to a pleading because "[t]he service list in this proceeding includes numerous persons who have no particular interest in" the matters discussed in that pleading).

Eastern United States via four "Eastern Gateways" (Chicago, IL, St. Louis, MO, Memphis, TN, and New Orleans, LA). In addition, Montell ships some of its outbound freight to Houston, TX.

Prior to the UP/SP merger, Montell's plant was served by an SP single-line routing (to the Eastern Gateways and Houston) and a KCS-UP joint-line routing (via DeQuincy, LA, to Houston and New Orleans, and via Texarkana, TX/AR, to Chicago, St. Louis, and Memphis).[7] Montell was concerned that the UP vs. SP competition that existed prior to the merger for traffic moving from, to, or via the four Eastern Gateways and Houston would cease to exist post-merger, leaving Montell captive to UP/SP. Montell argued that the KCS-BNSF joint-line routings that existed pre-merger were too circuitous to provide effective competition to the single-line routings of a merged UP/SP; and Montell observed that the BNSF agreement, as originally drafted, simply did not provide for BNSF interchange line haul rights at West Lake Charles. Montell acknowledged that the CMA agreement[8] purported to address competitive problems in the Lake Charles area of Louisiana, but Montell insisted that the CMA solution was deficient in four respects: (a) BNSF was granted access to shippers at Lake Charles and Westlake,[9] but not to Montell at West Lake Charles; (b) BNSF was granted access only to facilities then open to three carriers (UP, SP, and KCS), whereas Montell's facility was then open only to two carriers (SP and KCS); (c) BNSF was allowed to handle traffic moving between the covered points, on the one hand, and, on the other, New Orleans or the Mexican border, but was not allowed to handle traffic that prior to the merger moved KCS-UP from/to Houston, Chicago, St. Louis, or Memphis; and (d) for some traffic, BNSF was subject to an "access fee" that amounted to a "phantom" charge that would apply even if BNSF were to provide direct service. See Decision No. 44, slip op. at 66-67.

Decision No. 44: Our Lake Charles Solution. We noted, in Decision No. 44, that the UP/SP merger, if not properly conditioned, was likely to have an anticompetitive impact vis-à-vis plastic and chemical shippers (such as Montell) that operated plants located at any of the three rail stations (Lake Charles, Westlake, and West Lake Charles) in the Lake Charles area. We noted: that, prior to the merger, these plants had access to SP and KCS, and some had access to UP as well via haulage or reciprocal switching; that, however, KCS had to interline with UP or SP to provide efficient routings to the New Orleans, Houston, and St. Louis gateways; and that, for these reasons, prior to the merger these shippers benefitted from direct rail competition, and unconditioned merger would place all their efficient rail routings under applicants' control.

We further noted, in Decision No. 44: that Paragraph 8 of the CMA agreement amended the original BNSF agreement to give BNSF the right to handle traffic of Lake Charles and Westlake shippers open to all of UP, SP, and KCS for traffic moving (a) from, to, and via New Orleans and (b) to or from points in Mexico via the Texas border crossings at Eagle Pass, Laredo, or Brownsville; and that, on brief, applicants had extended this relief to incorporate West Lake Charles traffic open to SP and KCS. We concluded, however, that the relief provided in CMA Paragraph 8, even as extended on brief, would be inadequate, primarily because any KCS routing from/to Chicago or St. Louis would still include a connection with applicants at Shreveport or Texarkana, thus giving applicants control of a "bottleneck" for these movements. We also noted that the key role of storage-in-transit facilities for plastics shippers further complicated this situation.

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[7] KCS itself could have provided single-line service to New Orleans, but the KCS single-line routing was too circuitous to be competitive with the SP single-line routing.

[8] The "CMA agreement" is the settlement agreement that applicants entered into on April 18, 1996, with BNSF and the Chemical Manufacturers Association (CMA). See Decision No. 44, slip op. at 18 (description of the CMA agreement).

[9] The point referred to in Decision No. 44 as "West Lake" (two words) is actually known as "Westlake" (one word). See Decision No. 63 (served December 4, 1996), slip op. at 2 n.8.

Accordingly, to preserve existing competitive alternatives for shippers in the Lake Charles area, we required applicants to modify the BNSF agreement: (1) to allow BNSF to use its Houston-to-Memphis trackage rights to interline with KCS at Shreveport, LA, and Texarkana, TX/AR (this was intended to permit the substitution of a post-merger KCS-BNSF joint-line routing via Texarkana and Shreveport for the pre-merger KCS-UP joint-line routing via Texarkana; (2) to remove the geographic restrictions on direct BNSF service to Lake Charles, Westlake, and West Lake Charles shippers (this was intended to permit BNSF to serve all destinations from these points); and (3) to eliminate the "phantom haulage fee" that applicants apparently intended to charge BNSF to access traffic at Westlake and West Lake Charles. See Decision No. 44, slip op. at 152-54.

Decision No. 44: The Contract Modification Condition. Paragraph 3 of the CMA agreement provided that, immediately upon consummation of the merger, applicants would have to modify any contracts with shippers at 2-to-1 points in Texas and Louisiana to allow BNSF access to at least 50% of the volume. In Decision No. 44, we ordered that this provision be extended to shippers at all 2-to-1 points incorporated within the BNSF agreement, not just 2-to-1 points in Texas and Louisiana. The extension of this provision to all 2-to-1 points, we noted, "will help ensure that BNSF has immediate access to a traffic base sufficient to support effective trackage rights operations." See Decision No. 44, slip op. at 146.

Montell's Petition For 2-to-1 Status. In the MONT-13 petition, which was filed pursuant to Decision No. 57,[10] Montell asks that we determine that Montell's West Lake Charles facility is a 2-to-1 point for purposes of the contract modification condition.[11]

DISCUSSION AND CONCLUSIONS

We hold that, because Montell (at West Lake Charles)[12] was not a 2-to-1 shipper immediately prior to the consummation of the merger, it will not be regarded as a 2-to-1 shipper for the purposes of the contract modification condition.[13]

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[10] See Decision No. 57, slip op. at 13-14 (although we suggested that disputes respecting implementation of the contract modification condition might best be resolved in arbitration, we affirmed that we were prepared to resolve such disputes if they were brought before us). See also Decision No. 72 (served May 23, 1997), slip op. at 8 (footnote omitted) ("[A]ny beneficiary of the Decision No. 44 conditions has the right to seek relief from the Board if it believes that these conditions have not been implemented in a manner that achieves their competition-preserving objectives."). Because Montell seeks only a determination that its West Lake Charles facility is a 2-to-1 point for purposes of the contract modification condition, we reject applicants' suggestion, see UP/SP-308 at 4-6, that the MONT-13 petition amounts to a late-filed reconsideration request.

[11] The MONT-13 request is a shipper-specific version of a broader request previously made by BNSF in its BNSF-PR#1 "Progress Report and Operating Plan" filed October 1, 1996, wherein BNSF asked that we clarify the 2-to-1 status of Lake Charles, Westlake, and West Lake Charles. See BNSF-PR#1 at 13 n.8. In Decision No. 57, we declined, on procedural grounds, to address this matter, which had been "included in [a] footnote[] in a lengthy pleading the title of which gives no indication that it contains a clarification request." See Decision No. 57, slip op. at 14.

[12] The UP letter attached to the MONT-13 petition as Exhibit A references two Montell locations: Bayport, TX, and West Lake Charles, LA. The MONT-13 petition itself, however, seeks clarification only with respect to the West Lake Charles facility. For this reason, this decision addresses the status of the West Lake Charles facility only.

[13] To avoid any confusion, we wish to make clear that, in denying the MONT-13 petition for a declaration of 2-to-1 status for the purposes of the Decision No. 44 contract modification

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We have previously made 2-to-1 shipper status determinations in several situations. See Decision No. 44, slip op. at 186 (first full paragraph) (held, CPSB is not a 2-to-1 shipper for purposes of the conditions imposed in Decision No. 44);[14] Decision No. 57, slip op. at 6-7 (held, LCRA/Austin is not a 2-to-1 shipper for purposes of the contract modification condition);[15] Decision No. 57, slip op. at 7-8 (held, Entergy is not a 2-to-1 shipper for purposes of the contract modification condition).[16] In each of these situations, we have interpreted our contract modification condition according to the plain language used in, and clear intent expressed for, imposing the condition. Requiring that UP's and SP's contracts at 2-to-1 points be reopened was an extraordinary condition we imposed to assure that UP/SP would not have so much of this traffic tied up in contracts as to prevent BNSF from obtaining sufficient traffic density to be an effective competitor in these markets.[17]

The fact patterns respecting CPSB, LCRA/Austin, and Entergy are not precisely the same as the fact pattern respecting Montell. But the principle established in making these prior 2-to-1 status determinations is applicable in the present context. For purposes of the contract modification condition (and also for purposes of CMA Paragraph 3), a shipper is entitled to 2-to-1 status only if, immediately prior to the merger, that shipper had access both to UP and to SP, and to no other railroad. Because Montell fails this test, it is not entitled to 2-to-1 status for purposes of the contract modification condition.

Montell and BNSF urge a "2-to-1 shipper" definition broader than the one we adopted in Decision No. 44 and adhered to in Decision No. 57. Their definition would encompass any shipper that would have lost competitive rail service had the merger not been conditioned. See MONT-13 at 3. See also BN/SF-82 at 5-6 (the definition urged by BNSF would encompass any shipper that was "functionally" 2-to-1, or that was 2-to-1 "for all practical purposes"). The arguments made by Montell and BNSF confuse anticompetitive impact with 2-to-1 status. We agree that a shipper like Montell at West Lake Charles would have suffered an anticompetitive impact had the merger not been conditioned in the manner in which we conditioned it; that is

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[13](...continued)
condition, we are also denying this petition insofar as it seeks a declaration of 2-to-1 status for the purposes of CMA Paragraph 3. See Decision No. 57, slip op. at 7 n.31.

[14] The City Public Service Board of San Antonio is referred to as CPSB. CPSB's relevant plants are located in Elmendorf, TX, and therefore come within the geographical coverage of *both* the Decision No. 44 contract modification condition *and* CMA Paragraph 3. As noted in Decision No. 57, however, aside from the difference in geographical scope (our contract modification condition applies across the entire UP/SP system, whereas CMA Paragraph 3 applies only in Texas and Louisiana), we have insisted upon a uniform application of our contract modification condition and CMA Paragraph 3. See Decision No. 57, slip op. at 7 n.31.

[15] The Lower Colorado River Authority and the City of Austin, TX, are referred to collectively as LCRA/Austin. LCRA/Austin's relevant plant is located in Halsted, TX.

[16] Entergy Services, Inc., and two of its affiliates are referred to collectively as Entergy. Entergy's relevant plant is located at White Bluff, AR.

[17] We imposed the contract modification condition in order to assure BNSF's traffic density. We therefore think it appropriate to note that neither BNSF nor Montell has given any meaningful indication that extension of the contract modification condition to Montell at West Lake Charles is necessary to "help ensure that BNSF has immediate access to a traffic base sufficient to support effective trackage rights operations." See Decision No. 44, slip op. at 146. In fact, as applicants note, there is reason to believe that the "BNSF trackage rights operations in the areas that would be impacted if Montell were able to exercise the contract modification condition -- the Houston-New Orleans and Houston-Memphis corridors -- are firmly established and providing highly competitive service today." UP/SP-308 at 8.

precisely the reason we conditioned it in that manner; but that does not make such a shipper a "2-to-1" shipper for purposes of the contract modification condition.

When we imposed the contract modification condition, we intended that this condition would apply only to those shippers that had 2-to-1 status immediately prior to the consummation of the merger.[18] And, as we said in Decision No. 57, "[w]e think it appropriate to note that, in taking this approach, we are not depriving any shipper of any right to which it is entitled; rather, we are merely denying a few shippers the windfall that a more elastic approach would have allowed." See Decision No. 57, slip op. at 6.[19]

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Montell's request regarding limited service of its MONT-13 and -14 filings is granted, subject to the condition that Montell serve copies of these filings upon any additional party requesting such service.

2. The MONT-13 petition is denied.

3. This decision shall be effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

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[18] In approving the UP/SP merger, we imposed, among other conditions, an oversight condition to allow us to examine whether the conditions we imposed have effectively addressed the competitive problems they were intended to remedy, see Decision No. 44, slip op. at 107 and 146. We expressly reserved jurisdiction over the merger proceeding and all embraced proceedings in order to implement the oversight condition and, if necessary, to impose further conditions or to take such other action as might be warranted, see Decision No. 44, slip op. at 231 (ordering paragraph 6). In Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company (Oversight), Finance Docket No. 32760 (Sub-No. 21) (STB served May 7, 1997), we instituted a proceeding to implement the oversight condition, and we have received comments from interested parties. One of the issues raised involves the functioning of the contract modification condition that we imposed in Decision No. 44 and clarified in Decision No. 57, and we will address that issue as part of our oversight proceeding. That is the appropriate forum now for considering fundamental changes in conditions imposed to remedy competitive harms.

[19] While such a shipper may be a 2-to-1 shipper, that shipper's traffic already has been committed either to UP or to SP under a contract that was formed when two-carrier competition was available." See Decision No. 57, slip op. at 6.

PAUL K. BIBA, HOUSE COUNSEL
FORMOSA PLASTICS CORP.
9 PEACH TREE HILL ROAD
LIVINGSTON NJ 07039 US

KEN WILSON
282 BALDWIN AVE
HASBROUCK HEIGHTS NJ 07604-2304 US

OSCAR J. ABELLO, PRESIDENT
"K" LINE AMERICA, INC.
535 MOUNTAIN AVENUE
MURRY HILL NJ 07974 US

TINA MASINGTON, PLAN. ANAL.
"K" LINE AMERICA, INC.
535 MOUNTAIN AVENUE
MURRAY HILL NJ 07974 US

GEORGE J. FRANCISCO, JR.
ELLIPSE SHIPPING CENTER
4201 CHURCH ROAD - SUITE 7
MT LAUREL NJ 08054 US

R J HENEFELD
PPG INDUSTRIES INC
ONE PPG PLACE
PITTSBURGH PA 15272 US

RICHARD J. RESSLER
UNION PACIFIC CORP.
EIGHTH AND EATON AVENUES, MARTIN TOWER
BETHLEHEM PA 18018 US

CARL W. VON BERNUTH
UNION PACIFIC CORP.
EIGHTH & EATON AVENUES
BETHLEHEM PA 18018 US

RICHARD H. GROSS
3801 WEST CHESTER PIKE
NEWTOWN SQUARE PA 19073 US

WILLIAM E HARVEY
3801 WEST CHESTER PIKE
NEWTON SQUARE PA 19073 US

LARRY T. JENKINS
ARCO CHEMICAL COMPANY
3801 WEST CHESTER PIKE
NEWTON SQUARE PA 19073-3280 US

ANNE E. TREADWAY
CONSOLIDATED RAIL CORP.
P O BOX 41416
2001 MARKET STREET
PHILADELPHIA PA 19101-1416 US

EDWARD B. HYMSON
CONRAIL
2001 MARKET STREET 16-A
PHILADELPHIA PA 19101-1416 US

CONSTANCE L. ABRAMS
CONSOLIDATED RAIL CORP.
2001 MARKET STREET 16-A, TWO COMMERCE SQUARE
PHILADELPHIA PA 19101-1416 US

JONATHAN M BRODER
CONSOLIDATED RAIL CORP
PO BOX 41416
2001 MARKET STREET 16-A
PHILADELPHIA PA 19101-1416 US

BRUCE B. WILSON
CONSOLIDATED RAIL CORP.
2001 MARKET STREET
PHILADELPHIA PA 19101-1417 US

JOHN L ABBOTT
FMC CORPORATION
1735 MARKET STREET
PHILADELPHIA PA 19103 US

ERIC M. HOCKY
GOLLATZ, GRIFFIN, EWING
213 WEST MINER STREET
WEST CHESTER PA 19381-0796 US

CHARLES N. BEINKAMPEN
DUPONT SOURCING
1007 MARKET STREET, ROOM B-6236-A
WILMINGTON DE 19898 US

TERRENCE D JONES
KELLER & HECKMAN
1001 G ST NW STE 500 WEST
WASHINGTON DC 20001 US

MARTIN W. BERCOVICI
KELLER & HECKMAN
1001 G ST NW SUITE 500 WEST
WASHINGTON DC 20001 US

DONALD F GRIFFIN
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
400 N CAPITOL ST NW SUITE 852
WASHINGTON DC 20001 US

LESLIE E. SILVERMAN
KELLER & HECKMAN
1001 G STREET NW STE 500 WEST
WASHINGTON DC 20001 US

DOUGLAS J. BEHR
KELLER & HECKMAN
1001 G STREET NW STE 500 WEST
WASHINGTON DC 20001 US

ROBERT L. MCGEORGE
U. S. DEPT. OF JUSTICE, ANTITRUST DIVISION
555 4TH STREET N W RM 9104
WASHINGTON DC 20001 US

EDWARD WYTKIND, EXECUTIVE DIRECTOR
TRANSP TRADES DEPT AFLCIO
400 N CAPITOL ST SW STE 861
WASHINGTON DC 20001 US

JOAN S HUGGLER
U. S. DEPT. OF JUSTICE, ANTITRUST DIVISION
555 4TH STREET N W RM 9104
WASHINGTON DC 20001 US

RICHARD G SLATTERY
AMTRAK
60 MASSACHUSETTS AVENUE N E
WASHINGTON DC 20002 US

JOSEPH GUERRIERI, JR.
GUERRIERI, EDMOND, ET. AL
1331 F STREET N W, 4TH FLOOR
WASHINGTON DC 20004 US

MARK SCHECTER
HOWREY & SIMON
1299 PENNSYLVANIA AVE N W
WASHINGTON DC 20004 US

ROBERT M. BRUSKIN, ESQ.
HOWREY & SIMON
1299 PENNSYLVANIA AVE NW
WASHINGTON DC 20004 US

DAVID A ASHMORE
ARNOLD & PORTER
555 TWELFTH STREET NW
WASHINGTON DC 20004 US

DEBRA L. WILLEN
GUERRIERI, EDMOND & CLAYMAN PC
1331 F STREET N W, 4TH FLOOR
WASHINGTON DC 20004 US

GEORGE W MAYO
HOGAN & HARTSON L.L.P.
555 THIRTEENTH STREET NW
WASHINGTON DC 20004-1109 US

ERIC VON SALZEN
HOGAN & HARTSON
555 THIRTEENTH STREET N W
WASHINGTON DC 20004-1161 US

ROSEMARY H. MCENERY
HOWREY & SIMON
1299 PENNSYLVANIA AVE N W
WASHINGTON DC 20004-2402 US

MARK L JOSEPHS
HOWREY & SIMON
1299 PENNSYLVANIA AVE N W
WASHINGTON DC 20004-2402 US

CHARLES W. LINDERMAN
701 PENNSYLVANIA AVE NW, 5TH FLOOR
WASHINGTON DC 20004-2696 US

S WILLIAM LIVINGSTON JR
COVINGTON & BURLING
P O BOX 7566
1201 PENNSYLVANIA AVE NW
WASHINGTON DC 20004-7566 US

RICHARD H. STREETER
BARNES & THORNBURG
1401 I STREET NW SUITE 500
WASHINGTON DC 20005 US

PAUL C. OAKLEY
WEINER, BRODSKY, SIDMAN & KIDER
1350 NEW YORK AVENUE NW SUITE 800
WASHINGTON DC 20005 US

MICHAEL MATTIA
INSTITUTE OF SCRAP RECYCLING INDUSTRIES, INC.
1325 G STREET NW STE 1000
WASHINGTON DC 20005 US

WILLIAM A. MULLINS
TROUTMAN SANDERS LLP
1300 I STREET NW SUITE 500 EAST
WASHINGTON DC 20005-3314 US

JOHN R. MOLM
TROUTMAN SANDERS LLP
1300 I STREET, N. W., SUITE 500 EAST
WASHINGTON DC 20005-3314 US

FRITZ R KAHN
1100 NEW YORK AVENUE NW SUITE 750 WEST
WASHINGTON DC 20005-3934 US

FREDERIC L. WOOD
DONELAN, CLEARY, WOOD & MASER, P. C.
1100 NEW YORK AVE NW STE 750
WASHINGTON DC 20005-3934 US

JEFFREY O. MORENO
DONELAN CLEARY WOOD MASER
1100 NEW YORK AVENUE N W, SUITE 750
WASHINGTON DC 20005-3934 US

THOMAS W WILCOX
DONELAN, CLEARY, WOOD & MASER, P.C.
1100 NEW YORK AVE NW STE 750
WASHINGTON DC 20005-3934 US

JOHN K. MASER, III
DONELAN,CLEARY,WOOD,MASER
1100 NEW YORK AVE NW SUITE 750
WASHINGTON DC 20005-3934 US

NICHOLAS J. DIMICHAEL
DONELAN, CLEARY, ET AL.
1100 NEW YORK AVENUE N W STE 750
WASHINGTON DC 20005-3934 US

JO A DEROCHE
WEINER, BRODSKY, ET AL
1350 NEW YORK AVE NW SUITE 800
WASHINGTON DC 20005-4797 US

JO A DEROCHE.
WEINER, BRODSKY, ET AL
1350 NEW YORK AVE NW SUITE 800
WASHINGTON DC 20005-4797 US

ANDREW P. GOLDSTEIN
MCCARTHY, SWEENEY ET AL.
1750 PENNSYLVANIA AVE NW
WASHINGTON DC 20006 US

MONICA J. PALKO
BRACEWELL & PATTERSON
2000 K STREET NW STE 500
WASHINGTON DC 20006 US

ANNE D. SMITH
WHITE & CASE
1747 PENNSYLVANIA AVENUE N W
WASHINGTON DC 20006 US

KATHRYN KUSSKE
MAYER, BROWN & PLATT
2000 PENNSYLVANIA AVE N W SUITE 6500
WASHINGTON DC 20006 US

ROY T. ENGLERT, JR
MAYER, BROWN & PLATT
2000 PENNSYLVANIA AVE N W SUITE 6500
WASHINGTON DC 20006 US

LAURENCE R. LATOURETTE
PRESTON GATES ELLIS ETAL
1735 NY AVE NW SUITE 500
WASHINGTON DC 20006 US

ADRIAN L. STEEL, JR.
MAYER, BROWN & PLATT
2000 PENNSYLVANIA AVE N W SUITE 6500
WASHINGTON DC 20006 US

KRISTA L. EDWARDS
SIDLEY & AUSTIN
1722 EYE STREET N W
WASHINGTON DC 20006 US

ERIKA Z. JONES
2000 PENNSYLVANIA AVE., N.W.
WASHINGTON DC 20006 US

TERRY L. CLAASSEN
CORN REFINERS ASSOC, INC.
1701 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20006 US

CHARLES A SPITULNIK
HOPKINS & SUTTER
888 SIXTEENTH STREET NW
WASHINGTON DC 20006 US

ROBERT P. VOM EIGEN
HOPKINS AND SUTTER
888 16TH STREET N W STE 700
WASHINGTON DC 20006 US

ALBERT B KRACHMAN
BRACEWELL & PATTERSON LLP
2000 K ST NW STE 500
WASHINGTON DC 20006-1872 US

JAMES A CALDERWOOD
ZUCKERT, SCOUTT & RASENBERGER, L.L. P.
888 17TH STREET NW, SUITE 600
WASHINGTON DC 20006-3939 US

JENNIFER P OAKLEY
ZUCKERT, SCOUTT & RASENBERGER
888 SEVENTEENTH ST NW, STE 600
WASH DC 20006-3939 US

RICHARD A. ALLEN
ZUCKERT, SCOUT, RASENBERGER
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

JOHN V. EDWARDS, ESQ
ZUCKERT, SCOUTT ET AL.
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

ANDREW R PLUMP
ZUCKERT, SCOUTT, RASENBERGER
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

ALICIA M SERFATY
HOPKINS & SUTTER
888 - 16TH STREET NW
WASHINGTON DC 20006-4103 JS

STEVEN J. KALISH
MCARTHY, SWEENEY & HARKAWAY
1750 PENNSYLVANIA AVE NW
WASHINGTON DC 20006-4502 US

TERENCE M. HYNES
SIDLEY & AUSTIN
1722 EYE STREET NW
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ANTHONY J MCMAHON
BASATIANELLI, BROWN ETAL
2828 PA AVE NW STE 203
WASHINGTON DC 20007 US

JAMES F RILL
COLLIER SHANNON RILL & SCOTT
3050 K STREET NW SUITE 400
WASHINGTON DC 20007 US

VIRGINIA R METALLO
3050 K ST NW SUITE 400
WASHINGTON DC 20007 US

JOHN F C LUEDKE
GALLAND, KHARASCH, MORSE & GARFINKLE
1054 THIRTY-FIRST STREET NW
WASHINGTON DC 20007 US

ANDREW T GOODSON
CANAL SQUARE
1054 THIRTY-FIRST ST NW
WASHINGTON DC 20007 US

EDWARD D. GREENBERG
GALLAND, KHARASCH, MORSE & GARFINKLE
1054 THIRTY-FIRST STREET NW
WASHINGTON DC 20007-4492 US

CHARLES H. WHITE, JR.
GALLAND, KHARASCH & GARFINKLE, P. C.
1054 THIRTY-FIRST STREET NW
WASHINGTON DC 20007-4492 US

MICHAEL F. MCBRIDE
LEBOEUF LAMB GREENE & MACRAE, L. L. P.
1875 CONNECTICUT AVE N W, STE 1200
WASHINGTON DC 20009 US

DANIEL ARONOWITZ
LEBOUEF, LAMB, GREENE
1875 CONNECTICUT AVE NWSTE 1200
WASHINGTON DC 20009-5728 US

LINDA K. BREGGIN, ESQ.
LEBOEUF, LAMB, GREENE, ET AL
1875 CONNECTICUT AVENUE N W
WASHINGTON DC 20009-5728 US

PAUL M. DONOVAN
LAROE, WINN, ETAL
3506 IDAHO AVE NW
WASHINGTON DC 20016 US

JOHN D. HEFFNER, ESQ.
REA, CROSS & AUCHINCLOSS
1920 N STREET NW SUITE 420
WASHINGTON DC 20036 US

GORDON P. MACDOUGALL
1025 CONNECTICUT AVE NW SUITE 410
WASHINGTON DC 20036 US

KEITH G. O'BRIEN
REA, CROSS & AUCHINCLOSS
1920 N STREET N W - SUITE 420
WASHINGTON DC 20036 US

MARC J. FINK
SHER & BLACKWELL
2000 L STREET N W , SUITE 612
WASHINGTON DC 20036 US

WILLIAM G. MAHONEY
HIGHSAW, MAHONEY & CLARKE
1050 SEVENTEENTH STREET NW SUITE 210
WASHINGTON DC 20036 US

GERALD P. NORTON
HARKINS CUNNINGHAM
1300 NINETEENTH STREET, NW.,STE 600
WASHINGTON DC 20036 US

GERALD P. NORTON
HARKINS CUNNINGHAM
1300 NINETEENTH STREET , NW., STE. 600
WASHINGTON DC 20036 US

C MICHAEL LOFTUS
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036 US

PATRICIA E. (DIETRICH) KOLESAR
SLOVER & LOFTUS
1224 SEVENTEENTH ST NW
WASH DC 20036 US

SUSAN B GERSON
GRAHAM & JAMES, LLP
2000 M STREET NW STE 700
WASHINGTON DC 20036 US

CHRISTOPHER A. MILLS
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036 US

ROBERT A. WIMBISH, ESQ.
REA, CROSS & AUCHINCLOSS
1920 N STREET NW SUITE 420
WASHINGTON DC 20036 US

GERALD P NORTON
HARKINS CUNNINGHAM
1300 19TH ST NW SUITE 600
WASHINGTON DC 20036 US

THOMAS LAWRENCE III
OPPENHEIMER WOLFF, ETC
1020 - 19TH STREET NW STE 400
WASHINGTON DC 20036 US

FRANK J. PERGOLIZZI
SLOVER & LOFTUS
1224 SEVENTEENTH ST NW
WASHINGTON DC 20036 US

RICHARD S. EDELMAN
HIGHSAW MAHONEY CLARKE
1050 SEVENTEENTH STREET N W, SUITE 210
WASHINGTON DC 20036 US

KELVIN J. DOWD
SLOVER & LOFTUS
1224 17TH STREET N W
WASHINGTON DC 20036 US

PAUL A. CUNNINGHAM
HARKINS CUNNINGHAM
1300 19TH STREET NW SUITE 600
WASHINGTON DC 20036 US

JOHN M. CUTLER, JR.
MCCARTHY SWEENEY HARKAWAY
1750 PENNSYLVANIA AVE N W SUITE 1105
WASHINGTON DC 20036 US

RICHARD B HERZOG
HARKINS CUNNINGHAM.
1300 19TH ST NW SUITE 600
WASHINGTON DC 20036-1609 US

JAMES M. GUINIVAN
HARKINS CUNNINGHAM
1300 19TH ST NW SUITE 600
WASHINGTON DC 20036-1609 US

JOEL A RABINOVITZ
HARKINS CUNNINGHAM
1300 19TH STREET NW SUITE 600
WASHINGTON DC 20036-1609 US

JOSEPH L LAKSHMANAN
1300 19TH STREET NW, SUITE 600
WASHINGTON DC 20036-1609 US

MARC D. MACHLIN
PEPPER, HAMILTON, ET AL
1300 19TH STREET N W
WASHINGTON DC 20036-1658 US

JOHN WILL ONGMAN
PEPPER HAMILTON SCHEETZ
1300 NINETEENTH STREET N W
WASHINGTON DC 20036-1685 US

MICHELLE J. MORRIS
PEPPER, HAMILTON, ETAL
1300 NINETEENTH ST NW
WASHINGTON DC 20036-1685 US

TIMOTHY M WALSH
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

BETTY JO CHRISTIAN
STEPTOE & JOHNSON
1330 CONNECTICUT AVE NW
WASHINGTON DC 20036-1795 US

SAMUEL M. SIPE, JR.
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

JOHN H. LESEUR
SLOVER & LOFTUS
1224 17TH STREET NW
WASHINGTON DC 20036-3081 US

PAUL H. LAMBOLEY
1020 NINETEENTH STREET, N.W., STE 400
WASHINGTON DC 20036-6105 US

KEVIN M SHEYS
OPPENHEIMER WOLFF ET AL.
1020 NINETEENTH STREET N W SUITE 400
WASHINGTON DC 20036-6105 US

A STEPHEN HUT JR
WILMER CUTLER & PICKERING
2445 M ST NW
WASHINGTON DC 20037 US

SCOTT N. STONE
PATTON BOGGS L.L.P.
2550 M STREET NW 7TH FLOOR
WASHINGTON DC 20037-1346 US

DANIEL K. MAYERS
WILMER CUTLER PICKERING
2445 M STREET N W
WASHINGTON DC 20037-1420 US

ALI M. STOEPPELWERTH
WILMER CUTLER PICKERING
2445 M STREET N W
WASHINGTON DC 20037-1420 US

MICHAEL BRESSMAN
WILMER CUTLER PICKERING
2445 M STREET N W
WASHINGTON DC 20037-1420 US

WILLIAM J KOLASKY JR
WILMER CUTLER & PICKERING
2445 M STREET NW
WASH DC 20037-1420 US

DAVID H. BAKER
HOLLAND & KNIGHT
2100 PENN AVE NW ST 400
WASHINGTON DC 20037-3202 US

TIMOTHY C HESTER
P O BOX 7566
1201 PENNSYLVANIA AVENUE N W
WASHINGTON DC 20044 US

J MICHAEL HEMMER
COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20044 US

DAVID L. MEYER
COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE N W
WASHINGTON DC 20044-7566 US

ARVID E. ROACH II
COVINGTON & BURLING
PO BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044-7566 US

MICHAEL A. LISTGARTEN
COVINGTON & BURLING
P O BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044-7566 US

MICHAEL ROSENTHAL
COVINGTON & BURLING
P O BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044-7566 US

EILEEN S. STOMMES, DIRECTOR, T&M DIVISION
AGRICULTURAL MARKETING SERVICE, USDA
P. O. BOX 96456
WASHINGTON DC 20090-6456 US

HON. JEROME NELSON
FERC (LJ-2)
888 1ST STREET N E
WASHINGTON DC 20426 US

RICHARD SANDERSON
OFFICE OF FED ACTIV
US ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON DC 20460 US

HON JOHN GLENN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE PAT ROBERTS
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE THAD COCHRAN
UNITED STATE SENATE
WASHINGTON DC 20510 US

HON. DAN COATS
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE BYRON L DORGAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE J. ROBERT KERRY
UNITED STATES SENATE
WASH DC 20510 US

HON CONRAD BURNS
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE TIM JOHNSON
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE DON NICKLES
U. S. SENATE
WASHINGTON DC 20510 US

HON. WAYNE ALLARD
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. PHIL GRAMM
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE RICHARD LUGAR
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE RICHARD BRYAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. CHRISTOPHER S. BOND
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE HARRY REID
UNITED STATES SENATE
WASHINGTON DC 20510-0001 US

HON. BEN N CAMPBELL
UNITED STATES SENATE
WASHINGTON DC 20510-0605 US

RICHARD J DURBIN
UNITED STATES SENATE
WASHINGTON DC 20510-1304 US

HONORABLE CHARLES E. GRASSLEY
UNITED STATES SENATE
WASHINGTON DC 20510-1501 US

HONORABLE JOHN BREAUX
UNITED STATES SENATE
WASHINGTON DC 20510-1803 US

HON. TOM EWING
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. MICHAEL OXLEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ROBERT A. BORSKI
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE GEORGE GEKAS
ATTEN: TOM SANTANIELLO
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. HAROLD E. FORD, JR
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DONALD M. PAYNE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. PAUL KANJORSKI
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. IKE SKELTON
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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WASHINGTON DC 20515 US

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WASHINGTON DC 20515 US

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US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ESTEBAN E TORRES
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BRIAN P. BILBRAY
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE KAREN MCCARTHY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JAY KIM
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. CLEO FIELDS
ATTN: PHILIP HENDERSON
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PHIL ENGLISH
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JULIAN DIXON
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JAY DICKEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE FRANK MASCARA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JOHN MURTHA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MARCY KAPTUR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JAMES TRAFICANT JR
U. S. HOUSE OF REPRESENTATIVES
WASH DC 20515 US

SHEILA JACKSON-LEE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE FRANK D. RIGGS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE CHARLES W. STENHOLM
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE ZOE LOFGREN
US HOUSE OF RESPRESENTATIVE
WASHINGTON DC 20515 US

HONORABLE XAVIER BECERRA
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LUCILLE ROYAL-ALLARD
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LYNN WOOLSEY
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PETE STARK
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE NANCY PELOSI
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LLOYD DOGGETT
U. S. HOUSE OF REPRESENTATAIVES
WASHINGTON DC 20515 US

HON DAVID L HOBSON
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JOHN TANNER
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RON LEWIS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DAVID MINGE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JOHN HOSTETTLER
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON TOM DELAY
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TIM HOLDEN
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE MIKE DOYLE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TOM LANTOS
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RICHARD W. POMBO,
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE KEN CALVERT,
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE SONNY BONO,
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE CHRISTOPHER COX,
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RON PACKARD
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DANA ROHRABACHER
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE HOWARD P. BUCK MCKEON,
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. EARL POMEROY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE GEORGE E. BROWN, JR.
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RONALD V. DELLUMS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JERRY LEWIS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. HENRY B. GONZALEZ
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RON PACKARD
U. S. HOUSE OF REPRESENTATIVES
WASH DC 20515-0548 US

HONORABLE SCOTT MCINNIS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-0603 US

HONORABLE TODD TIAHRT
HOUSE OF REPRESENTATIVE
WASHINGTON DC 20515-1004 US

HONORABLE SAM BROWNBACK
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-1602 US

HON. JIM MCCRERY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-1805 US

HONORABLE GEORGE MILLER
ATT: GARY BLAND
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2307 US

HON W J (BILLY) TAUZIN
ATTN: ROY WILLIS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2601 US

HONORABLE JOHN ENSIGN
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2801 US

HON. ROBERT E ANDREWS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3001 US

HONORABLE SHERROD BROWN
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3513 US

HON. FRANK D. LUCAS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3606 US

HONORABLE THOMAS M. FOGLIETTA
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3801 US

HONORABLE CHAKA FATTAH
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3803 US

HONORABLE CURT WELDON
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3807 US

HON. JON CHRISTENSEN
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4155 US

HONORABLE WILLIAM M (MAC) THORNBERRY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4313 US

HONORABLE SHEILA JACKSON LEE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4318 US

HON. HENRY BONILLA
US HOUSE REPRESENTATIVES
WASHINGTON DC 20515-4323 US

HONORABLE EDDIE BERNICE JOHNSON
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4330 US

ROGER W. FONES
US DEPT. OF JUSTICE
325 7TH STREET N W SUITE 500
WASHINGTON DC 20530 US

MICHAEL D BILLIEL
ANTITRUST DIV, DEPT OF JUSTICE
325 SEVENTH ST NW STE 500
WASHINGTON DC 20530 US

PAUL SAMUEL SMITH
U. S. DEPT OF TRANSP
400 7TH ST SW , ROOM 4102 C-30
WASHINGTON DC 20590 US

JOSEPH R. POMPONIO
FEDERAL RAILROAD ADMIN.
400 7TH ST SW RCC-20
WASHINGTON DC 20590 US

LARRY R. PRUDEN
TRANS. COMM. INTL UNION
3 RESEARCH PLACE
ROCKVILLE MD 20850 US

WILLIAM W., JR. WHITEHURST
W. W. WHITEHURST & ASSOCIATES, INC.
12421 HAPPY HOLLOW ROAD
COCKEYSVILLE MD 21030 US

CONSTANCE H. PIERCE
CONSTELLATION COMPANIES
250 WEST PRATT STREET
BALTIMORE MD 21201-2423 US

J TUCKER
PO BOX 25181
ARLINGTON VA 22202 US

PETER Q. NYCE, JR.
U. S. DEPARTMENT OF THE ARMY
901 NORTH STUART STREET
ARLINGTON VA 22203 US

NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
1700 NORTH MOORE STREET, SUITE 1900
ARLINGTON VA 22209 US

THOMAS E. SCHICK
CHEMICAL MANUF. ASSOC.
1300 WILSON BOULEVARD
ARLINGTON VA 22209 US

WILLIAM P. JACKSON, JR.
JACKSON & JESSUP, P. C.
P O BOX 1240
3426 NORTH WASHINGTON BLVD
ARLINGTON VA 22210 US

GERALD W. FAUTH, III
G. W. FAUTH & ASSOCIATES INC.
P O BOX 2401
ALEXANDRIA VA 22301 US

JOHN T. ESTES
SUITE 400
1029 NORTH ROYAL STREET
ALEXANDRIA VA 22314 US

PETER J SHUDTZ
CSX CORPORATION
902 E CARY ST 1 JAMES CENTER
RICHMOND VA 23119 US

ROBERT J. COONEY
NORFOLK SOUTHERN CORP.
THREE COMMERCIAL PLACE
NORFOLK VA 23510-2191 US

ROBERT S. KOMPANTY
720 THIMBLE SHOALS BLVD, SUITE 130
NEWPORT NEWS VA 23608-2574 US

BOB THOMPSON
GEORGIA-PACIFIC CORP.
P O BOX 105605
ATLANTA GA 30348-5605 US

GREGORY M. VINCENT, VICE PRESIDENT
TENNESSEE VALLEY AUTH
LOOKOUT PLACE 1101 MARKET STREET
CHATTANOOGA TN 37402 US

E. CALVIN CASSELL
EASTMAN CHEMICAL COMPANY
P O BOX 1990
KINGSPORT TN 37662 US

EDWARD S. CHRISTENBURY
400 WEST SUMMIT HILL DRIVE
KNOXVILLE TN 37902 US

HONORABLE GILLESPIE V. MONTGOMERY
U. S. HOUSE OF REPRESENTATIVES
P. O. BOX 5618
MERIDAN MS 39208 US

R. L. YOUNG
P O BOX 700
ONE MEMORIAL DRIVE
LANCASTER OH 43130-0700 US

D. MICHAEL MILLER
AMERICAN ELECTRIC POWER
1 RIVERSIDE PLAZA
COLUMBUS OH 43215 US

HONORABLE JOHN GLENN
U. S. SENATE ATTN: ANISA BELL
200 N HIGH STREET S-600
COLUMBUS OH 43215-2408 US

MICHAEL M. BRILEY
SHUMAKER, LOOP & KENDRICK
N COURTHOUSE SQUARE - 1000 JACKSON
TOLEDO OH 43624 US

DANIEL R. ELLIOTT III ASST GENERAL COUNSEL
UNITED TRANSPORTATION UNION
14600 DETROIT AVENUE
CLEVELAND OH 44107 US

CLINTON J MILLER, III, GENERAL COUNSEL
UNITED TRANSPORTATION UNION
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

RONALD P MCLAUGHLIN
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
1370 ONTARIO ST STAN BLDG
CLEVELAND OH 44113-1702 US

RICHARD E. KERTH, TRANS. MGR.
CHAMPION INTERNAT'L CORP
101 KNIGHTSBRIDGE DRIVE
HAMILTON OH 45020-0001 US

MICHAEL P. FERRO
MILLENNIUM PETROCHEMICALS, INC.
11500 NORTHLAKE DRIVE
CINCINNATI OH 45249 US

BRUCE A. KLIMEK
INLAND STEEL
3210 WATLING STREET
EAST CHICAGO IN 46312 US

HON JEFF SMITH
CITY OF KENDALLVILLE
234 S MAIN STREET
KENDALLVILLE IN 46755-1795 US

JAMES E. HANSON
DOW CHEMICAL COMPANY
2020 WILLARD H DOW CENTER
MIDLAND MI 48674 US

LARRY B. KARNES
TRANSPORTATION BUILDING
PO BOX 30050
425 WEST OTTAWA
LANSING MI 48909 US

THOMAS F JACKSON
800 LINCOLN WAY
AMES IA 50010 US

P C HENDRICKS
STATE LEGISLATIVE DIRECTOR UTU
313 E 9TH STREET
DES MOINES IA 50309 US

HONORABLE CHARLES E. GRASSLEY
UNITED STATES SENATE
210 WALNUT STREET
DES MOINES IA 50309-2140 US

EDWIN C JERTSON
INTERSTATE POWER CO
P O BOX 769
1000 MAIN STREET
DUBUQUE IA 52004 US

KENT M RAGSDALE
INTERSTATE POWER CO
PO BOX 769
DUBUQUE IA 52004 US

PHILIP D. WARD, ET AL.
P O BOX 351
200 FIRST STREET SE
CEDAR RAPIDS IA 52406-0351 US

TOBIN LEE BRITT
IES UTILITIES, INC.
P O BOX 351
200 FIRST ST SE
CEDAR RAPIDS IA 52406-0351 US

WILLIAM R. KNIGHT
WISCONSIN POWER & LIGHT
P O BOX 192
222 WEST WASHINGTON AVENUE
MADISON WI 53701-0192 US

ALLEN J VOGEL,
MINNESOTA DEPARTMENT OF TRANSPORTATION
395 JOHN IRELAND BLVD TRANSP BLDG, SUITE 925,
ST PAUL MN 55155 US

RONALD E HUNTER, LAW DEPARTMENT
CARGILL, INCORPORATED
15407 MCGINTY ROAD WEST
WAYZATA MN 55391 US

WAYNE C. SERKLAND, U S REGIONAL COUNSEL
CANADIAN PACIFIC LEG. SER
105 SOUTH FIFTH ST SUITE 1000
MINNEAPOLIS MN 55402 US

DOUGLAS M. HEAD
WEINER
120 SOUTH 6TH STREET STE 2400
MINNEAPOLIS MN 55402 US

BOB ZELENKA
852 GRAIN EXCHANGE
MINNEAPOLIS MN 55415 US

HON. WILLIAM J. JANKLOW
GOVERNOR, SD
500 EAST CAPITOL
PIERRE SD 57501-5070 US

TERRY C. WHITESIDE
RADERMACHER, WHITESIDE & ASSOCIATES
3203 3RD AVE N STE 301
BILLINGS MT 59101 US

HONORABLE MARC RACICOT
GOV'S OFFICE, STATE CAP.
P O BOX 200801
HELENA MT 59620-0801 US

J. FRED SIMPSON, EXECUTIVE VICE PRESIDENT
MONTANA RAIL LINK, INC.
101 INTERNATIONAL WAY
MISSOULA MT 59802 US

JANET H GILBERT
WISCONSIN CENTRAL LTD
6250 NORTH RIVER ROAD STE 9000
ROSEMONT IL 60018 US

RICHARD E. WEICHER
BURLINGTON NORTHERN SANTA FE CORPORATION
1700 EAST GOLF ROAD, 6TH FLOOR
SCHAUMBURG IL 60173 US

JEFFREY R. MORELAND
THE BURLINGTON NORTHERN SANTA FE CORPORATION
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173 US

JAMES A. SMALL
COMMONWEALTH EDISON CO.
1411 OPUS PL STE 200
DOWNERS GROVE IL 60515-5701 US

WILLIAM F. COTTRELL
ASST. ATTORNEY GENERAL
100 W RANDOLPH ST - 12TH FLOOR
CHICAGO IL 60601 US

THOMAS J HEALEY
OPPENHEIMER, WOLFF, ETAL
180 N STETSON AV 2 PRUDENTIAL PL
CHICAGO IL 60601 US

CHRISTINE H. ROSSO
IL ASSISTANT ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FLOOR
CHICAGO IL 60601 US

WILLIAM C SIPPEL
OPPENHEIMER WOLFF & DONNELLY
180 N STETSON AVE TWO PRUDENTIAL PLAZA 45TH F
CHICAGO IL 60601 US

THOMAS J. LITWILER
OPPENHEIMER WOLFF & DONNELLY
180 N STETSON AVE 45TH FLOOR
CHICAGO IL 60601 US

THOMAS DEGNAN
UNITED STATES GYPSUM CO
125 SOUTH FRANKLIN STREET
CHICAGO IL 60606 US

STEPHEN C. HERMAN
MCFARLAND & HERMAN
20 N WACKER DRIVE STE 1330
CHICAGO IL 60606-2902 US

THOMAS F. MCFARLAND, JR.
MCFARLAND & HERMAN
20 NORTH WACKER DRIVE, SUITE 1330
CHICAGO IL 60606-3101 US

RONALD A. LANE
ILLINOIS CENTRAL RR
455 N CITYFRONT PLAZA DR 20TH FL
CHICAGO IL 60611 US

MYLES L. TOBIN
ILLINOIS CENTRAL RAILROAD
455 NORTH CITYFRONT PLAZA DRIVE
CHICAGO IL 60611-5504 US

THOMAS ZWICA
121 WEST FIRST STREET
GENESEO IL 61254 US

GARY L TOWELL
TOLEDO, PEORIA & WESTERN
1990 EAST WASHINGTON STREET
EAST PEORIA IL 61611-2961 US

CLARENCE R. PONSLER
GENERAL CHAIRMAN, UTU
1017 W. MAIN STREET
BELLEVILLE IL 62220 US

SCOTT A. RONEY
P O BOX 1470
4666 FARIES PARKWAY
DECATUR IL 62525 US

JON FOY, DIRECTOR, RATES GRAIN
ARCHER DANIEL MIDLAND CO
P. O. BOX 1470
4666 FARIES PARKWAY
DECATUR IL 62525 US

MERRILL L. TRAVIS
ILLINOIS DEPT. OF TRANSP.
2300 SOUTH DIRKSEN PARKWAY ROOM 302
SPRINGFIELD IL 62703-4555 US

CAROL R DORIS
500 SOUTH SECOND STREET
SPRINGFIELD IL 62706 US

KIRK BROWN
ILLINOIS DOT, OFFICE OF THE SECRETARY
2300 SOUTH DIRKSEN PARKWAY
SPRINGFIELD IL 62764 US

ROGER HERMANN
MALLINCKRODT CHEMICAL
16305 SWINGLEY RIDGE DRIVE
CHESTERFIELD MO 63017-1777 US

JEFFREY L. KLINGER
PEABODY HOLDING COMPANY
701 MARKET STREET STE 700
ST LOUIS MO 63101-1826 US

C A MENNELL, PRESIDENT
LACKLAND WESTERN RR CO
31 OAK TERRACE
WEBSTER GROVES MO 63119 US

DAVID A. PINS
THE CHEMICAL GROUP, MONSANTO
800 N LINDBERGH BOULEVARD
ST LOUIS MO 63167 US

D E THOMPSON
GENERAL CHAIRMAN-BLE
414 MISSOURI BOULEVARD
SCOTT CITY MO 63780 US

HON IKE SKELTON
U. S. HOUSE OF REP.
514 B N W 7 HIGHWAY
BLUE SPRINGS MO 64014 US

ROBERT K DREILING
KANSAS CITY SOUTHERN RWY CO.
114 WEST 11TH STREET
KANSAS CITY MO 64105 US

RICHARD P BRUENING
KANSAS CITY SOUTHERN RR
114 WEST ELEVENTH STREET
KANSAS CITY MO 64106 US

MEL CARNAHAN
OFFICE OF THE GOVERNOR
STATE CAPITOL ROOM 216
JEFFERSON CITY MO 65101 US

JACK HYNES, ADMINISTRATOR OF RAILROADS
MISSOURI DEPARTMENT OF TRANSPORTATION
PO BOX 270
105 WEST CAPITOL AVENUE
JEFFERSON CITY MO 65102 US

JOSEPH A. STINGER
IBBB
570 NEW BROTHERHOOD BUILDING
KANSAS CITY KS 66101 US

WILLIAM J. MCGINN
NORTH AMER. CHEM. CO.
8300 COLLEGE BOULEVARD
OVERLAND PARK KS 66210 US

BARRETT HATCHES
8300 COLLEGE BLVD
OVERLAND PARK KS 66210 US

T. L. GREEN
WESTERN RESOURCES, INC.
PO BOX 889
818 KANSAS AVE
TOPEKA KS 66601 US

JOHN JAY ROSACKER
KS, DEPT OF TRANSP
217 SE 4TH ST 2ND FLOOR
TOPEKA KS 66603 US

NORMAN G MANLEY
CITY ATTORNEY, ANOVER CITY HALL
909 NORTH ANDOVER ROAD
ANDOVER KS 67002 US

DWAYNE H SHANNON
PO BOX 1138
WICHITA KS 67201 US

ALAN R. POST
1803 STEFKIN STREET
WICHITA KS 67208 US

JAMES J. IRLANDI
STB PRACTITIONER
1809 N BROADWAY/SUITE F
WICHITA KS 67214 US

JUNIOR STRECKER, CHAIRMAN
MOUNTAIN-PLAINS COMMUNITIES & SHIPPERS COALIT
123 NORTH MAIN ST
HOISINGTON KS 67544 US

ROBERT K. GLYNN
HOISINGTON CHAM. OF COMM.
123 NORTH MAIN STREET
HOISINGTON KS 67544-2594 US

JOHN F. LARKIN
P O BOX 31850
4814 DOUGLAS ST 68132
OMAHA NE 68132-0850 US

PAUL A. CONLEY, JR. ,LAW DEPARTMENT
UNION PACIFIC RR CO.
1416 DODGE STREET
OMAHA NE 68179 US

LOUISE A. RINN
UNION PACIFIC RR CO.
1416 DODGE STREET ROOM 830
OMAHA NE 68179 US

JEANNA L REGIER
UNION PACIFIC RAILROAD COMPANY
1416 DODGE ST ROOM 830
OMAHA NE 68179 US

JAMES V. DOLAN, LAW DEPARTMENT
UNION PACIFIC RR CO.
1416 DODGE STREET #830
OMAHA NE 68179 US

JOSEPH D. ANTHOFER
UNION PACIFIC RR CO.
1416 DODGE STREET ROOM 830
OMAHA NE 68179-0001 US

ROBERT T. OPAL
UNION PACIFIC RAILROAD CO.
1416 DODGE STREET RM 830
OMAHA NE 68179-0001 US

KEN SIECKMEYER, MGR. TRANSP. PLANN. DIV.
NEBRASKA DEPT. OF ROADS
P O BOX 94759
LINCOLN NE 68509-4759 US

WAYNE ANDERSON
ENTERGY SERVICES, INC.
639 LOYOLA AVE MAIL L-ENT-26E
NEW ORLEANS LA 70113 US

W. F. CARTER
ALBEMARLE CORPORATION
451 FLORIDA STREET
BATON ROUGE LA 70801 US

DEAN L. WORLEY
HILBURN CALHOON HARPER
P O BOX 5551
ONE RIVERFRONT PLACE EIGHTH FL
NORTH LITTLE ROCK AR 72119 US

SCOTT MANATT
P. O. BOX 473
CORNING AR 72422 US

JOE N. HAMPTON
2309 NORTH TENTH, SUITE E
ENID OK 73701 US

THOMAS R. JACOBSEN
TU ELECTRIC
1601 BRYAN STREET STE 11-060
DALLAS TX 75201-3411 US

JOEL T WILLIAMS III
STE 350, LB-126
4809 COLE AVENUE
DALLAS TX 75205 US

STEVEN A BRIGANCE
LEBOEUF, LAMB, ETAL
4025 WOODLAND PARK BLVD STE 250
ARLINGTON TX 76013 US

EDMUND W. BURKE
BURLINGTON NORTHERN RR CO
777 MAIN STREET, 3800 CONTINENTAL PLAZA
FT WORTH TX 76102 US

DOUGLAS J. BABB
BURLINGTON NORTHERN RR CO
777 MAIN STREET, 3800 CONTINENTAL PLAZA
FT WORTH TX 76102-5384 US

MICHAEL E ROPER
BURLINGTON NORTHERN SANTA FE CORPORATION
3017 LOU MENK DRIVE
FT WORTH TX 76131 US

JANICE G BARBER
BURLINGTON NORTHERN AND SANTA FE RAILWAY COMP
3017 LOU MENK DRIVE
FORT WORTH TX 76131 US

RICHARD SCHIEFELBEIN
7801 WOODHARBOR DRIVE
FORT WORTH TX 76179 US

W. DAVID TIDHOLM
HUTCHESEN & GRUNDY
1200 SMITH STREET (#3300)
HOUSTON TX 77002-4579 US

GEN. COMMITTEE OF ADJUST. GO-895
UNITED TRANS. UNION
2040 NORTH LOOP WEST STE 310
HOUSTON TX 77018 US

ROBERT J. ROSSI
UNITED TRANSPORTATION UNION
2040 NORTH LOOP WEST SUITE 310
HOUSTON TX 77018-8112 US

GEORGE T. WILLIAMSON
P O BOX 2562
111 E LOOP N
HOUSTON TX 77029 US

JOHN D. BURKE
GREATER HOUSTON PORT BUREAU, INC
111 EAST LOOP NORTH
HOUSTON TX 77029 US

B KENNETH TOWSEND JR
EXXON CHEMICAL CO
13501 KATY FREEWAY
HOUSTON TX 77079-1398 US

B. C. GRAVES, JR.
EXXON COMPANY U.S.A.
PO BOX 4692
HOUSTON TX 77210-4692 US

BRIAN P. FELKER
SHELL CHEMICAL COMPANY
P O BOX 2463
HOUSTON TX 77252-2463 US

ERIC W. TIBBETTS
P O BOX 3766
1301 MCKINNEY ST
HOUSTON TX 77253 US

ROY GIANGROSSO
ENTERGY SERVICES, INC.
350 PINE STREET
BEAUMONT TX 77701 US

TEXAS MEXICAN RAILWAY CO.
PO BOX 419
LAREDO TX 78042-0419 US

JOHN P. LARUE, EXECUTIVE DIRECTOR
THE PORT OF CORPUS CHRISTI
P O BOX 1541
222 POWER STREET
CORPUS CHRISTI TX 78403 US

THOMAS A GRIEBEL
TEXAS DOT
125 E 11TH ST
AUSTIN TX 78701 US

JERRY L. MARTIN, DIRECTOR RAIL DIV.
RR COMM OF TEXAS
P O BOX 12967
1701 N CONGRESS
AUSTIN TX 78711 US

MARK TOBEY
P O BOX 12548
AUSTIN TX 78711-2548 US

REBECCA FISHER
ASST ATTY GENERAL
PO BOX 12548
AUSTIN TX 78711-2548 US

DONALD T CHEATHAM
10220-E METROPOLITAN DR
AUSTIN TX 78758 US

HON. JOHN R. COOK,
TX HOUSE OF REPRESENTATIVES
P O BOX 2910
AUSTIN TX 78768 US

HON. ROBERT JUNELL
TEXAS HOUSE OF REP.
PO BOX 2910
AUSTIN TX 78768 US

ROBERT M. SAUNDERS
P O BOX 2910
AUSTIN TX 78768-2910 US

ROBERT A. CUSHING, JR.
UNITED TRANS. UNION,
12401 HIDDEN SUN COURT
EL PASO TX 79938 US

DARRELL L. HANAVAN, EXECUTIVE DIRECTOR
COLORADO WHEAT ADMIN.
5500 SOUTH QUEBEC STREET STE 111
ENGLEWOOD CO 80111 US

THOMAS F. LINN
MOUNTAIN COAL COMPANY
555 17TH STREET 22ND FLOOR
DENVER CO 80202 US

STEPHEN D ALFERS
ALFERS & CARVER
730 17TH STREET #340
DENVER CO 80202 US

STANLEY B. KONIZ, UNIT MANAGER
PUBLIC SERVICE COMPANY
1225 - 17TH STREET STE 1100
DENVER CO 80202 US

PATRICIA T. SMITH, SR. VICE PRESIDENT
PUBLIC SERVICE COMPANY
1225 - 17TH STREET STE 600
DENVER CO 80202 US

RUSSELL S. JONES, III
MOUNTAIN COAL COMPANY
555 17TH STREET 22ND FLOOR
DENVER CO 80202 US

NANCY MANGONE, ENFORCEMENT ATTORNEY
U. S. EPA REGION VIII
999 18TH SST STE 500
DENVER CO 80202-2466 US

DAVID N. LAWSON, FUEL TRAFFIC COORDINATOR
PUBLIC SERVICE COMMISSION
1225 17TH ST STE 1100, SEVENTEENTH ST PLAZA
DENVER CO 80202-5533 US

JANE T. FELDMAN, ASST. ATTORNEY GENERAL
STATE OF COLORADO
1525 SHERMAN ST- 5TH FLOOR
DENVER CO 80203 US

HON. BEN N. CAMPBELL
UNITED STATES SENATE
1129 PENNSYLVANIA STREET
DENVER CO 80203 US

HONORABLE ROY ROMER
GOVERNOR
136 STATE CAPITOL
DENVER CO 80203 US

SUE BALLENSKI, PHYSICAL RESOURCES
USDA FOREST SERVICE
P O BOX 25127
LAKEWOOD CO 80225 US

GERALD E. VANINETTI
RESOURCE DATA INT'L
1320 PEARL STREET STE 300
BOULDER CO 80302 US

JOE D. FORRESTER
C/O CO MTN COLLEGE, TIMBERLINE CAMPUS
901 S HWY 24
LEADVILLE CO 80461 US

THOMAS J. FLORCZAK
CITY OF PUEBLO
127 THATCHER BUILDING
PUEBLO CO 81003 US

MAYOR LESTER WILLIAMS
TOWN OF EADS
PO BOX 8
110 W 13TH ST
EADS CO 81036 US

CARDON G. BERRY
KIOWA CO. COMMISSIONERS
PO BOX 591
1305 GOFF
EADS CO 81036 US

HON DELCARL EIKENBERG
TOWN OF HASWELL
P O BOX 206
HASWELL CO 81045-0206 US

JOHN R STULP
SECED
P O BOX 1600
LAMAR CO 81052 US

LEROY E. MAUCH
BOARD OF COUNTY COMMISSIONERS
P. O. BOX 1046
LAMAR CO 81052 US

CLEDE WIDENER
BOARD OF COUNTY COMMISSIONERS
P.. O. BOX 1046
LAMAR CO 81052 US

JOHN ROESCH
BENT COUNTY
PO BOX 350
LAS ANIMAS CO 81054 US

BLAINE ARBUTHNOT
CROWLEY COUNTY
601 MAIN ST
ORDWAY CO 81063 US

JANET PALMER
P O BOX 1268
13997 COUNTY ROAD 71
SHERIDAN LAKE CO 81071 US

BERNICE TUTTLE
KIOWA COUNTY WIFE, CHAPTER #124
13775 CR785
TOWNER CO 81071-9619 US

CHARLES WAIT
BACA COUNTY
PO BOX 116
SPRINGFIELD CO 81073 US

FRANK C MCMURRY
PO BOX 699
SALIDA CO 81201 US

HON. NANCY SANGER, MAYOR
CITY OF SALIDA
P O BOX 417
124 E STREET
SALIDA CO 81201 US

THOMAS W. FOSTER, CHAIRMAN
COM. TO PRESERVE PROPERTY
P O BOX 681
SALIDA CO 81201 US

E W WOTIPKA
6388 TERRACE LANE
SALIDA CO 81201 US

MYRON F. SMITH
FREMONT COUNTY COMM.
615 MACON AVE ROOM #102
CANON CITY CO 81212 US

GREG TABUTEAU
ROYAL GORGE SCENIC RY
P O BOX 1387
CANON CITY CO 81215 US

RUTH H. CARTER, MAYOR
CITY OF CANON CITY
P O BOX 1460
ATTN: STEVE THACKER CITY ADMIN
CANON CITY CO 81215 US

JUDY LOHNES
UAACOG
P O BOX 510
CANON CITY CO 81215-0510 US

STEVEN G. RABE, CITY MANAGER
CITY OF FLORENCE
300 W MAIN STREET
FLORENCE CO 81226 US

STEVE TUCKER
D&RG WEST. EMPLOYEES
2048 J ROAD
FRUITA CO 81521 US

JAMES R. FRITZE
EAGLE COUNTY ATTORNEY
P O BOX 850
EAGLE CO 81631 US

GARY L. MCFARLEN,, DIRECTOR-TRANSP
KENNECOTT ENERGY COMPANY
505 SOUTH GILLETTE AVENUE
GILLETTE WY 82716 US

PATRICIA BRITTON, CHIEF LEGAL OFFICER
KENNECOTT ENERGY COMPANY
505 SOUTH GILLETTE AVENUE
GILLETTE WY 82716 US

TIMM R. ADAMS
IDAHO BARLEY COMMISSION
1199 MAIN STREET, STE G
BOISE ID 83702-5630 US

JERRY R KRESS
ID, WHEAT COMMISSION
1109 MAIN ST STE 310
BOISE ID 83702-5642 US

ANN KNAPTON
IDAHO TIMBER CORPORATION
P O BOX 67
5401 KENDALL STREET
BOISE ID 83707-0067 US

WAYNE L. STOCKEBRAND
KENNECOTT UTAH COPP. CORP
P O BOX 6001
8315 WEST 3595 SOUTH
MAGNA UT 84044-6001 US

RAY D. GARDNER
KENNECOTT UTAH COPP. CORP
P O BOX 6001
8315 WEST 3595 SOUTH
MAGNA UT 84044-6001 US

ALEXANDER H. JORDAN
WESTERN SHIPPERS COALITION
3118 ROUND VALLEY WAY
PARK CITY UT 84060-6842 US

RONALD L. RENCHER
WESTERN SHIPPERS COAL.
136 SOUTH MAIN STREET STE 1000
SALT LAKE CITY UT 84101-1672 US

F MARK HANSEN
F MARK HANSEN, P.C.
624 NORTH 300 WEST SUITE 200
SALT LAKE CITY UT 84103 US

JEFFREY B. GROY
ONE UTAH CTR
201 SOUTH MAIN STREET, STE 1100
SALT LAKE CITY UT 84111 US

CHRISTOPHER E. BRAMHALL
451 SOUTH STATE ST, ROOM 505
SALT LAKE CITY UT 84111 US

HON. DEEDEE CORRADINI
451 SOUTH STATE STREET, ROOM 306
SALT LAKE CITY UT 84111 US

HONORABLE MICHAEL O. LEAVITT
ATTN: ROBIN L. RIGGS, GC TO GOVERNOR
210 STATE CAPITOL
SALT LAKE CITY UT 84114 US

REED M. RICHARDS
STATE OF UTAH
236 STATE CAPITOL
SALT LAKE CITY UT 84114 US

LYNETTE W. THIRKILL, LOGISTICS MANAGER
GR. SALT LAKE MINERALS
P O BOX 1190
OGDEN UT 84402 US

KENNETH C. JOHNSEN, V PRES & GEN COUNSEL
GENEVA STEEL COMPANY
P O BOX 2500
PROVO UT 84603 US

RALPH RUPP
PO BOX 2500
PROVO UT 84603 US

CAROL HEATHINGTON
1300 W WASHINGTON
PHOENIX AZ 85007 US

HONORABLE BOB STUMP
U.S. HOUSE OF REPRESENTATIVES
230 N. 1ST AVE., VOOM 2001
PHOENIX AZ 85025 US

FRANK E. HANSON, JR
MAGMA METALS COMPANY
7400 NORTH ORACLE ROAD, SUITE 200
TUCSON AZ 85704 US

O. KENT MAHER
33 WEST FOURTH ST
PO BOX 351
WINNEMUCCA NV 89446 US

R. MICHAEL MCCORMICK
HUMBOLDT COUNTY DA
P O BOX 909
50 WEST FIFTH STREET
WINNEMUCCA NV 89446 US

FRANK D GAUS
805 KUENZIL ST # 149
RENO NV 89502 US

MICHAEL E. HALLEY
CITY OF RENO
P O BOX 1900
RENO NV 89505 US

DORI OWEN, SPECIAL PROJECTS MANAGER
REDEVELOP LAND AGENCY
490 S CENTER STREET STE 203
RENO NV 89505 US

STEVE VARELA
PO BOX 1900
RENO NV 89505 US

CHARLES E. MCNEELY
CITY OF RENO
P. O. BOX 1900
RENO NV 89505 US

SCOTT HUTCHERSON
EAGLE-PICHER MINERALS INC
6110 PLUMAS ST
RENO NV 89509 US

CHARLES A BRACHT
700 FOREST
RENO NV 89509 US

PHILLIP WENDT
PO BOX 11072
RENO NV 89510 US

JEFFERY W. HILL
SIERRA PACIFIC POWER CO.
P O BOX 10100
6100 NEIL ROAD
RENO NV 89520 US

THOMAS J. FRONAPFEL
NEVADA, DEPT. OF TRANSPORTATION
1263 S STEWART STREET
CARSON CITY NV 89712 US

MICHAEL I. STOCKMAN, GENERAL COUNSEL
U. S. BORAX INC.
26877 TOURNEY ROAD
VALENCIA CA 91355 US

JOHN E. BALLAS, AGENCY ENGINEER
INDUSTRY URBAN-DEV. AG.
P O BOX 7089
15651 EAST STAFFORD STREET
CITY OF INDUSTRY CA 91744 US

JOHN D BALLAS
P.O. BOX 7089
15651 EAST STAFFORD STREET
CITY OF INDUSTRY CA 91744 US

SCOTT KESSLER
202 WEST FOURTH STREET
ALTURUS CA 94102 US

LOUIS P. WARCHOT
SOUTHRN PACIF. TRANS. CO.
ONE MARKET PLAZA
SOUTHERN PACIFIC BLDG RM 815
SAN FRANCISCO CA 94105 US

LINDSAY BOWER, DEPUTY ATTORNEY GENERAL
CALIFORNIA DEPT. OF JUSTICE
50 FREMONT STREET STE 300
SAN FRANCISCO CA 94105 US

LARRY W. TELFORD
SEVERSON & WERSON
ONE EMBARCADERO CENTER
SAN FRANCISCO CA 94111 US

LEO R BRIEN
530 WARER STREET
OAKLAND CA 94607 US

JEFFREY A. WALTER
WALTER & PISTOLE
670 W. NAPA STREET, SUITE "F"
SONOMA CA 95476 US

JOSEPH H. PETTUS
SUN VALLEY ENERGY INC
800 HOWE AVE, SUITE 270
SACRAMENTO CA 95825 US

KATHLEEN R. LAZARD
P O BOX 730
700 COURT STREET
SUSANVILLE CA 96130 US

FRED P. SWANSON
OREGON STEEL MILLS
P O BOX 2760
PORTLAND OR 97208-0363 US

ALLAN E. RUMBAUGH
P O BOX 1215
COOS BAY OR 97420 US

ANN DEKOSTER
P O BOX 1209
SEATTLE WA 98111 US

DONALD G MEYER
P O BOX 1837
TACOMA WA 98401 US

RICHARD CABANILLA, PLANNING DEPARTMENT
IMPERIAL COUNTY
939 MAIN STREET
EL CENTRO CA 92243-2856 US

JAMES T. QUINN
CALIFORNIA PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO CA 94102-3298 US

CANNON Y. HARVEY
SOUTHERN PAC. TRNS. CO.
ONE MARKET PLAZA
SAN FRANCISCO CA 94105 US

CAROL A. HARRIS
SOUTHERN PAC. TRANS. CO.
ONE MARKET PLAZA
SAN FRANCISCO CA 94105 US

DANIEL R. ARELLANO
CITY HALL
708 THIRD STREET
BRENTWOOD CA 94513-1396 US

PAUL C. ANDERSON
MCDONOUGH, HOLLAND, ETAL
1999 HARRISON STREET STE 1300
OAKLAND CA 94612 US

CHRISTOPHER J. NEARY
110 SOUTH MAIN STREET SUITE C
WILLITS CA 95490 US

R. MARK ARMSTRONG
P O BOX 1051
ALTURAS CA 96101 US

MIKE THORNE, EXEC. DIR.
PORT OF PORTLAND
BOX 3529
PORTLAND OR 97208 US

RICK WILLIS, EXECUTIVE DIRECTOR
OREGON PUBLIC UTILITY COMM
550 CAPITOL ST NE
SALEM OR 97310-1380 US

KAREN O'CONNOR
LAKE COUNTY COURTHOUSE
513 CENTER STREET
LAKEVIEW OR 97630 US

CHARLES H MONTANGE
426 NW 162ND STREET
SEATTLE WA 98177 US

MARCELLA M. SZEL
CP RAIL SYSTEM
910 PEEL STREET WINDSOR STATION RM 234
MONTREAL QUEBEC CD H3C 3E4 CD

STB FD 32760 8-29-97 C-74 28122

28122
EB

SERVICE DATE - AUGUST 29, 1997

SURFACE TRANSPORTATION BOARD[1]

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY--CONTROL AND MERGER--SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

[Decision No. 74][2]

Decided: August 25, 1997

In Decision No. 44 (served August 12, 1996), we approved the common control and merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company) and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company)[3]

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[1] Proceedings before the Interstate Commerce Commission (ICC) that remained pending on January 1, 1996, must be decided under the law in effect prior to that date if they involve functions retained by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. This proceeding was pending with the ICC prior to January 1, 1996, and relates to functions retained under Surface Transportation Board (Board) jurisdiction pursuant to new 49 U.S.C. 11323-27. Citations are to the former sections of the statute, unless otherwise indicated.

[2] This decision embraces: Finance Docket No. 32760 (Sub-No. 1), Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company--Trackage Rights Exemption--Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company; Finance Docket No. 32760 (Sub-No. 2), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Petition for Exemption--Acquisition and Operation of Trackage in California, Texas, and Louisiana; Finance Docket No. 32760 (Sub-No. 19), Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company--Trackage Rights Exemption--Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., The Denver and Rio Grande Western Railroad Company, and The Southern Illinois & Missouri Bridge Company; and STB Finance Docket No. 32760 (Sub-No. 20), The Atchison, Topeka and Santa Fe Railway Company--Trackage Rights Exemption--Southern Pacific Transportation Company.

[3] In Decision No. 44: Union Pacific Corporation was referred to as UPC; Union Pacific Railroad Company was referred to as UPRR; Missouri Pacific Railroad Company was referred to as MPRR; UPRR and MPRR were referred to collectively as UP; Southern Pacific Rail Corporation was referred to as SPR; Southern Pacific Transportation Company was referred to as SPT; St. Louis Southwestern Railway Company was referred to as SSW; SPCSL Corp. was referred to as SPCSL; The Denver and Rio Grande Western Railroad Company was referred to as DRGW; SPT, SSW, SPCSL, and DRGW were referred to collectively as SP; and UPC, UP, SPR, and SP were referred to collectively as "applicants."

MPRR, SPCSL, and DRGW were recently merged into UPRR (MPRR, on January 1, 1997; SPCSL and DRGW, on June 30, 1997). Accordingly, in this decision: with respect to the

(continued...)

subject to various conditions, including the terms of the BNSF agreement[4] and a condition (referred to as the contract modification condition) that required UP/SP to modify, immediately upon consummation of the merger, any contracts with shippers at 2-to-1 points incorporated within the BNSF agreement to allow BNSF access to at least 50% of the volume. See Decision No. 44, slip op. at 106 (third paragraph, last clause) and 146 (the "opening contracts at 2-to-1 points" requirement). The common control authorized in Decision No. 44 was consummated on September 11, 1996. See also Decision No. 57 (served November 20, 1996) (clarifying the contract modification condition).

In this decision, we address the 2-to-1 status issue presented in the MONT-13 petition filed on July 24, 1997, by Montell USA, Inc. (Montell),[5] and in the replies thereto filed by applicants (UP/SP-308, filed on August 11, 1997) and BNSF (BN/SF-82, filed on August 13, 1997).[6]

BACKGROUND

Decision No. 44; Montell's Interests. Montell, which operates a plant in the West Lake Charles, LA, area: produces primarily polypropylene and polyethylene; relies almost exclusively on rail to ship its products to market; relies on rail for the storage of its products; and relies on rail for the receipt of raw materials. Montell ships most of its outbound freight to points in the

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[3](...continued)
period prior to January 1, 1997, the term "applicants" has the meaning it had in Decision No. 44; with respect to the period beginning January 1, 1997, and ending June 30, 1997, the term "applicants" has reference to UPC, UPRR, SPR, SPT, SSW, SPCSL, and DRGW; with respect to the period beginning July 1, 1997, the term "applicants" has reference to UPC, UPRR, SPR, SPT, and SSW; and, with respect to the period beginning January 1, 1997, the acronym "UP" has reference to UPRR.

[4] In Decision No. 44, Burlington Northern Railroad Company (BN) and The Atchison, Topeka and Santa Fe Railway Company (SF) were referred to collectively as BNSF. On December 31, 1996, SF merged into BN, and the surviving corporation was renamed The Burlington Northern and Santa Fe Railway Company. Accordingly, in this decision: with respect to the period ending December 31, 1996, the acronym "BNSF" has the meaning it had in Decision No. 44; and, with respect to the period beginning January 1, 1997, the acronym "BNSF" has reference to The Burlington Northern and Santa Fe Railway Company. See also Decision No. 44, slip op. at 12 n.15 (description of the BNSF agreement).

[5] The MONT-13 petition, as initially filed on July 24, 1997, did not carry the "MONT-13" designation. That designation was supplied by a subsequent errata filing (MONT-14, filed on August 11, 1997).

[6] Montell served the MONT-13 and -14 filings on: applicants; BNSF; ARCO Chemical (the new owner of the Lake Charles area plant formerly owned by Olin Corporation, see Decision No. 44, slip op. at 66-67); PPG Industries, Inc. (another shipper with a plant in the Lake Charles area, see Decision No. 44, slip op. at 69); The Kansas City Southern Railway Company (KCS); and the United States Departments of Justice and Transportation. Montell, which has promised that any other party that may be interested in the MONT-13 petition may secure a copy upon request, has asked us to waive any requirement that it serve the petition upon any parties other than those named in the preceding sentence. This request is reasonable (this decision will be served on all parties of record in Finance Docket No. 32760), and we will therefore grant it. See, e.g., Decision No. 45 (served August 23, 1996), slip op. at 1 (granting a request to limit the service requirement otherwise applicable to a pleading because "[t]he service list in this proceeding includes numerous persons who have no particular interest in" the matters discussed in that pleading).

Eastern United States via four "Eastern Gateways" (Chicago, IL, St. Louis, MO, Memphis, TN, and New Orleans, LA). In addition, Montell ships some of its outbound freight to Houston, TX.

Prior to the UP/SP merger, Montell's plant was served by an SP single-line routing (to the Eastern Gateways and Houston) and a KCS-UP joint-line routing (via DeQuincy, LA, to Houston and New Orleans, and via Texarkana, TX/AR, to Chicago, St. Louis, and Memphis).[7] Montell was concerned that the UP vs. SP competition that existed prior to the merger for traffic moving from, to, or via the four Eastern Gateways and Houston would cease to exist post-merger, leaving Montell captive to UP/SP. Montell argued that the KCS-BNSF joint-line routings that existed pre-merger were too circuitous to provide effective competition to the single-line routings of a merged UP/SP; and Montell observed that the BNSF agreement, as originally drafted, simply did not provide for BNSF interchange line haul rights at West Lake Charles. Montell acknowledged that the CMA agreement[8] purported to address competitive problems in the Lake Charles area of Louisiana, but Montell insisted that the CMA solution was deficient in four respects: (a) BNSF was granted access to shippers at Lake Charles and Westlake,[9] but not to Montell at West Lake Charles; (b) BNSF was granted access only to facilities then open to three carriers (UP, SP, and KCS), whereas Montell's facility was then open only to two carriers (SP and KCS); (c) BNSF was allowed to handle traffic moving between the covered points, on the one hand, and, on the other, New Orleans or the Mexican border, but was not allowed to handle traffic that prior to the merger moved KCS-UP from/to Houston, Chicago, St. Louis, or Memphis; and (d) for some traffic, BNSF was subject to an "access fee" that amounted to a "phantom" charge that would apply even if BNSF were to provide direct service. See Decision No. 44, slip op. at 66-67.

Decision No. 44: Our Lake Charles Solution. We noted, in Decision No. 44, that the UP/SP merger, if not properly conditioned, was likely to have an anticompetitive impact vis-à-vis plastic and chemical shippers (such as Montell) that operated plants located at any of the three rail stations (Lake Charles, Westlake, and West Lake Charles) in the Lake Charles area. We noted: that, prior to the merger, these plants had access to SP and KCS, and some had access to UP as well via haulage or reciprocal switching; that, however, KCS had to interline with UP or SP to provide efficient routings to the New Orleans, Houston, and St. Louis gateways; and that, for these reasons, prior to the merger these shippers benefitted from direct rail competition, and unconditioned merger would place all their efficient rail routings under applicants' control.

We further noted, in Decision No. 44: that Paragraph 8 of the CMA agreement amended the original BNSF agreement to give BNSF the right to handle traffic of Lake Charles and Westlake shippers open to all of UP, SP, and KCS for traffic moving (a) from, to, and via New Orleans and (b) to or from points in Mexico via the Texas border crossings at Eagle Pass, Laredo, or Brownsville; and that, on brief, applicants had extended this relief to incorporate West Lake Charles traffic open to SP and KCS. We concluded, however, that the relief provided in CMA Paragraph 8, even as extended on brief, would be inadequate, primarily because any KCS routing from/to Chicago or St. Louis would still include a connection with applicants at Shreveport or Texarkana, thus giving applicants control of a "bottleneck" for these movements. We also noted that the key role of storage-in-transit facilities for plastics shippers further complicated this situation.

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[7] KCS itself could have provided single-line service to New Orleans, but the KCS single-line routing was too circuitous to be competitive with the SP single-line routing.

[8] The "CMA agreement" is the settlement agreement that applicants entered into on April 18, 1996, with BNSF and the Chemical Manufacturers Association (CMA). See Decision No. 44, slip op. at 18 (description of the CMA agreement).

[9] The point referred to in Decision No. 44 as "West Lake" (two words) is actually known as "Westlake" (one word). See Decision No. 63 (served December 4, 1996), slip op. at 2 n.8.

Accordingly, to preserve existing competitive alternatives for shippers in the Lake Charles area, we required applicants to modify the BNSF agreement: (1) to allow BNSF to use its Houston-to-Memphis trackage rights to interline with KCS at Shreveport, LA, and Texarkana, TX/AR (this was intended to permit the substitution of a post-merger KCS-BNSF joint-line routing via Texarkana and Shreveport for the pre-merger KCS-UP joint-line routing via Texarkana; (2) to remove the geographic restrictions on direct BNSF service to Lake Charles, Westlake, and West Lake Charles shippers (this was intended to permit BNSF to serve all destinations from these points); and (3) to eliminate the "phantom haulage fee" that applicants apparently intended to charge BNSF to access traffic at Westlake and West Lake Charles. See Decision No. 44, slip op. at 152-54.

Decision No. 44: The Contract Modification Condition. Paragraph 3 of the CMA agreement provided that, immediately upon consummation of the merger, applicants would have to modify any contracts with shippers at 2-to-1 points in Texas and Louisiana to allow BNSF access to at least 50% of the volume. In Decision No. 44, we ordered that this provision be extended to shippers at all 2-to-1 points incorporated within the BNSF agreement, not just 2-to-1 points in Texas and Louisiana. The extension of this provision to all 2-to-1 points, we noted, "will help ensure that BNSF has immediate access to a traffic base sufficient to support effective trackage rights operations." See Decision No. 44, slip op. at 146.

Montell's Petition For 2-to-1 Status. In the MONT-13 petition, which was filed pursuant to Decision No. 57,[10] Montell asks that we determine that Montell's West Lake Charles facility is a 2-to-1 point for purposes of the contract modification condition.[11]

DISCUSSION AND CONCLUSIONS

We hold that, because Montell (at West Lake Charles)[12] was not a 2-to-1 shipper immediately prior to the consummation of the merger, it will not be regarded as a 2-to-1 shipper for the purposes of the contract modification condition.[13]

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[10] See Decision No. 57, slip op. at 13-14 (although we suggested that disputes respecting implementation of the contract modification condition might best be resolved in arbitration, we affirmed that we were prepared to resolve such disputes if they were brought before us). See also Decision No. 72 (served May 23, 1997), slip op. at 8 (footnote omitted) ("[A]ny beneficiary of the Decision No. 44 conditions has the right to seek relief from the Board if it believes that these conditions have not been implemented in a manner that achieves their competition-preserving objectives."). Because Montell seeks only a determination that its West Lake Charles facility is a 2-to-1 point for purposes of the contract modification condition, we reject applicants' suggestion, see UP/SP-308 at 4-6, that the MONT-13 petition amounts to a late-filed reconsideration request.

[11] The MONT-13 request is a shipper-specific version of a broader request previously made by BNSF in its BNSF-PR#1 "Progress Report and Operating Plan" filed October 1, 1996, wherein BNSF asked that we clarify the 2-to-1 status of Lake Charles, Westlake, and West Lake Charles. See BNSF-PR#1 at 13 n.8. In Decision No. 57, we declined, on procedural grounds, to address this matter, which had been "included in [a] footnote[] in a lengthy pleading the title of which gives no indication that it contains a clarification request." See Decision No. 57, slip op. at 14.

[12] The UP letter attached to the MONT-13 petition as Exhibit A references two Montell locations: Bayport, TX, and West Lake Charles, LA. The MONT-13 petition itself, however, seeks clarification only with respect to the West Lake Charles facility. For this reason, this decision addresses the status of the West Lake Charles facility only.

[13] To avoid any confusion, we wish to make clear that, in denying the MONT-13 petition for a declaration of 2-to-1 status for the purposes of the Decision No. 44 contract modification

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We have previously made 2-to-1 shipper status determinations in several situations. See Decision No. 44, slip op. at 186 (first full paragraph) (held, CPSB is not a 2-to-1 shipper for purposes of the conditions imposed in Decision No. 44);[14] Decision No. 57, slip op. at 6-7 (held, LCRA/Austin is not a 2-to-1 shipper for purposes of the contract modification condition);[15] Decision No. 57, slip op. at 7-8 (held, Entergy is not a 2-to-1 shipper for purposes of the contract modification condition).[16] In each of these situations, we have interpreted our contract modification condition according to the plain language used in, and clear intent expressed for, imposing the condition. Requiring that UP's and SP's contracts at 2-to-1 points be reopened was an extraordinary condition we imposed to assure that UP/SP would not have so much of this traffic tied up in contracts as to prevent BNSF from obtaining sufficient traffic density to be an effective competitor in these markets.[17]

The fact patterns respecting CPSB, LCRA/Austin, and Entergy are not precisely the same as the fact pattern respecting Montell. But the principle established in making these prior 2-to-1 status determinations is applicable in the present context. For purposes of the contract modification condition (and also for purposes of CMA Paragraph 3), a shipper is entitled to 2-to-1 status only if, immediately prior to the merger, that shipper had access both to UP and to SP, and to no other railroad. Because Montell fails this test, it is not entitled to 2-to-1 status for purposes of the contract modification condition.

Montell and BNSF urge a "2-to-1 shipper" definition broader than the one we adopted in Decision No. 44 and adhered to in Decision No. 57. Their definition would encompass any shipper that would have lost competitive rail service had the merger not been conditioned. See MONT-13 at 3. See also BN/SF-82 at 5-6 (the definition urged by BNSF would encompass any shipper that was "functionally" 2-to-1, or that was 2-to-1 "for all practical purposes"). The arguments made by Montell and BNSF confuse anticompetitive impact with 2-to-1 status. We agree that a shipper like Montell at West Lake Charles would have suffered an anticompetitive impact had the merger not been conditioned in the manner in which we conditioned it; that is

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[13](...continued)
condition, we are also denying this petition insofar as it seeks a declaration of 2-to-1 status for the purposes of CMA Paragraph 3. See Decision No. 57, slip op. at 7 n.31.

[14] The City Public Service Board of San Antonio is referred to as CPSB. CPSB's relevant plants are located in Elmendorf, TX, and therefore come within the geographical coverage of *both* the Decision No. 44 contract modification condition *and* CMA Paragraph 3. As noted in Decision No. 57, however, aside from the difference in geographical scope (our contract modification condition applies across the entire UP/SP system, whereas CMA Paragraph 3 applies only in Texas and Louisiana), we have insisted upon a uniform application of our contract modification condition and CMA Paragraph 3. See Decision No. 57, slip op. at 7 n.31.

[15] The Lower Colorado River Authority and the City of Austin, TX, are referred to collectively as LCRA/Austin. LCRA/Austin's relevant plant is located in Halsted, TX.

[16] Entergy Services, Inc., and two of its affiliates are referred to collectively as Entergy. Entergy's relevant plant is located at White Bluff, AR.

[17] We imposed the contract modification condition in order to assure BNSF's traffic density. We therefore think it appropriate to note that neither BNSF nor Montell has given any meaningful indication that extension of the contract modification condition to Montell at West Lake Charles is necessary to "help ensure that BNSF has immediate access to a traffic base sufficient to support effective trackage rights operations." See Decision No. 44, slip op. at 146. In fact, as applicants note, there is reason to believe that the "BNSF trackage rights operations in the areas that would be impacted if Montell were able to exercise the contract modification condition -- the Houston-New Orleans and Houston-Memphis corridors -- are firmly established and providing highly competitive service today." UP/SP-308 at 8.

precisely the reason we conditioned it in that manner; but that does not make such a shipper a "2-to-1" shipper for purposes of the contract modification condition.

When we imposed the contract modification condition, we intended that this condition would apply only to those shippers that had 2-to-1 status immediately prior to the consummation of the merger.[18] And, as we said in Decision No. 57, "[w]e think it appropriate to note that, in taking this approach, we are not depriving any shipper of any right to which it is entitled; rather, we are merely denying a few shippers the windfall that a more elastic approach would have allowed." See Decision No. 57, slip op. at 6.[19]

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Montell's request regarding limited service of its MONT-13 and -14 filings is granted, subject to the condition that Montell serve copies of these filings upon any additional party requesting such service.

2. The MONT-13 petition is denied.

3. This decision shall be effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

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[18] In approving the UP/SP merger, we imposed, among other conditions, an oversight condition to allow us to examine whether the conditions we imposed have effectively addressed the competitive problems they were intended to remedy, see Decision No. 44, slip op. at 107 and 146. We expressly reserved jurisdiction over the merger proceeding and all embraced proceedings in order to implement the oversight condition and, if necessary, to impose further conditions or to take such other action as might be warranted, see Decision No. 44, slip op. at 231 (ordering paragraph 6). In Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company (Oversight), Finance Docket No. 32760 (Sub-No. 21) (STB served May 7, 1997), we instituted a proceeding to implement the oversight condition, and we have received comments from interested parties. One of the issues raised involves the functioning of the contract modification condition that we imposed in Decision No. 44 and clarified in Decision No. 57, and we will address that issue as part of our oversight proceeding. That is the appropriate forum now for considering fundamental changes in conditions imposed to remedy competitive harms.

[19] While such a shipper may be a 2-to-1 shipper, that shipper's traffic already has been committed either to UP or to SP under a contract that was formed when two-carrier competition was available." See Decision No. 57, slip op. at 6.

SERVICE LIST FOR: 02-sep-1997 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

PAUL K. BIBA, HOUSE COUNSEL
FORMOSA PLASTICS CORP.
9 PEACH TREE HILL ROAD
LIVINGSTON NJ 07039 US

KEN WILSON
282 BALDWIN AVE
HASBROUCK HEIGHTS NJ 07604-2304 US

OSCAR J. ABELLO, PRESIDENT
"K" LINE AMERICA, INC.
535 MOUNTAIN AVENUE
MURRY HILL NJ 07974 US

TINA MASINGTON, PLAN. ANAL.
"K" LINE AMERICA, INC.
535 MOUNTAIN AVENUE
MURRAY HILL NJ 07974 US

GEORGE J. FRANCISCO, JR.
ELLIPSE SHIPPING CENTER
4201 CHURCH ROAD - SUITE 7
MT LAUREL NJ 08054 US

R J HENEFELD
PPG INDUSTRIES INC
ONE PPG PLACE
PITTSBURGH PA 15272 US

RICHARD J. RESSLER
UNION PACIFIC CORP
EIGHTH AND EATON AVENUES, MARTIN TOWER
BETHLEHEM PA 18018 US

CARL W. VON BERNUTH
UNION PACIFIC CORP.
EIGHTH & EATON AVENUES
BETHLEHEM PA 18018 US

RICHARD H. GROSS
3801 WEST CHESTER PIKE
NEWTOWN SQUARE PA 19073 US

WILLIAM E HARVEY
3801 WEST CHESTER PIKE
NEWTON SQUARE PA 19073 US

LARRY T. JENKINS
ARCO CHEMICAL COMPANY
3801 WEST CHESTER PIKE
NEWTON SQUARE PA 19073-3280 US

ANNE E. TREADWAY
CONSOLIDATED RAIL CORP.
P O BOX 41416
2001 MARKET STREET
PHILADELPHIA PA 19101-1416 US

EDWARD B. HYMSON
CONRAIL
2001 MARKET STREET 16-A
PHILADELPHIA PA 19101-1416 US

CONSTANCE L. ABRAMS
CONSOLIDATED RAIL CORP.
2001 MARKET STREET 16-A, TWO COMMERCE SQUARE
PHILADELPHIA PA 19101-1416 US

JONATHAN M BRODER
CONSOLIDATED RAIL CORP
PO BOX 41416
2001 MARKET STREET 16-A
PHILADELPHIA PA 19101-1416 US

BRUCE B. WILSON
CONSOLIDATED RAIL CORP.
2001 MARKET STREET
PHILADELPHIA PA 19101-1417 US

JOHN L ABBOTT
FMC CORPORATION
1735 MARKET STREET
PHILADELPHIA PA 19103 US

ERIC M. HOCKY
GOLLATZ, GRIFFIN, EWING
213 WEST MINER STREET
WEST CHESTER PA 19381-0796 US

CHARLES N. BEINKAMPEN
DUPONT SOURCING
1007 MARKET STREET, ROOM B-6236-A
WILMINGTON DE 19898 US

TERRENCE D JONES
KELLER & HECKMAN
1001 G ST NW STE 500 WEST
WASHINGTON DC 20001 US

MARTIN W. BERCOVICI
KELLER & HECKMAN
1001 G ST NW SUITE 500 WEST
WASHINGTON DC 20001 US

DONALD F GRIFFIN
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
400 N CAPITOL ST NW SUITE 852
WASHINGTON DC 20001 US

LESLIE E. SILVERMAN
KELLER & HECKMAN
1001 G STREET NW STE 500 WEST
WASHINGTON DC 20001 US

DOUGLAS J. BEHR
KELLER & HECKMAN
1001 G STREET NW STE 500 WEST
WASHINGTON DC 20001 US

ROBERT L. MCGEORGE
U. S. DEPT. OF JUSTICE, ANTITRUST DIVISION
555 4TH STREET N W RM 9104
WASHINGTON DC 20001 US

EDWARD WYTKIND, EXECUTIVE DIRECTOR
TRANSP TRADES DEPT AFLCIO
400 N CAPITOL ST SW STE 861
WASHINGTON DC 20001 US

JOAN S HUGGLER
U. S. DEPT. OF JUSTICE, ANTITRUST DIVISION
555 4TH STREET N W RM 9104
WASHINGTON DC 20001 US

RICHARD G SLATTERY
AMTRAK
60 MASSACHUSETTS AVENUE N E
WASHINGTON DC 20002 US

JOSEPH GUERRIERI, JR.
GUERRIERI, EDMOND, ET. AL
1331 F STREET N W, 4TH FLOOR
WASHINGTON DC 20004 US

MARK SCHECTER
HOWREY & SIMON
1299 PENNSYLVANIA AVE N W
WASHINGTON DC 20004 US

ROBERT M. BRUSKIN, ESQ.
HOWREY & SIMON
1299 PENNSYLVANIA AVE NW
WASHINGTON DC 20004 US

DAVID A ASHMORE
ARNOLD & PORTER
555 TWELFTH STREET NW
WASHINGTON DC 20004 US

DEBRA L. WILLEN
GUERRIERI, EDMOND & CLAYMAN PC
1331 F STREET N W, 4TH FLOOR
WASHINGTON DC 20004 US

GEORGE W MAYO
HOGAN & HARTSON L.L.P.
555 THIRTEENTH STREET NW
WASHINGTON DC 20004-1109 US

ERIC VON SALZEN
HOGAN & HARTSON
555 THIRTEENTH STREET N W
WASHINGTON DC 20004-1161 US

ROSEMARY H. MCENERY
HOWREY & SIMON
1299 PENNSYLVANIA AVE N W
WASHINGTON DC 20004-2402 US

MARK L JOSEPHS
HOWREY & SIMON
1299 PENNSYLVANIA AVE N W
WASHINGTON DC 20004-2402 US

CHARLES W. LINDERMAN
701 PENNSYLVANIA AVE NW, 5TH FLOOR
WASHINGTON DC 20004-2696 US

S WILLIAM LIVINGSTON JR
COVINGTON & BURLING
P O BOX 7566
1201 PENNSYLVANIA AVE NW
WASHINGTON DC 20004-7566 US

RICHARD H. STREETER
BARNES & THORNBURG
1401 I STREET NW SUITE 500
WASHINGTON DC 20005 US

PAUL C. OAKLEY
WEINER, BRODSKY, SIDMAN & KIDER
1350 NEW YORK AVENUE NW SUITE 800
WASHINGTON DC 20005 US

MICHAEL MATTIA
INSTITUTE OF SCRAP RECYCLING INDUSTRIES, INC.
1325 G STREET NW STE 1000
WASHINGTON DC 20005 US

WILLIAM A. MULLINS
TROUTMAN SANDERS LLP
1300 I STREET NW SUITE 500 EAST
WASHINGTON DC 20005-3314 US

JOHN R. MOLM
TROUTMAN SANDERS LLP
1300 I STREET, N. W., SUITE 500 EAST
WASHINGTON DC 20005-3314 US

FRITZ R KAHN
1100 NEW YORK AVENUE NW SUITE 750 WEST
WASHINGTON DC 20005-3934 US

FREDERIC L. WOOD
DONELAN, CLEARY, WOOD & MASER, P. C.
1100 NEW YORK AVE NW STE 750
WASHINGTON DC 20005-3934 US

JEFFREY O. MORENO
DONELAN CLEARY WOOD MASER
1100 NEW YORK AVENUE N W, SUITE 750
WASHINGTON DC 20005-3934 US

THOMAS W WILCOX
DONELAN, CLEARY, WOOD & MASER, P.C.
1100 NEW YORK AVE NW STE 750
WASHINGTON DC 20005-3934 US

JOHN K. MASER, III
DONELAN,CLEARY,WOOD,MASER
1100 NEW YORK AVE NW SUITE 750
WASHINGTON DC 20005-3934 US

NICHOLAS J. DIMICHAEL
DONELAN, CLEARY, ET AL.
1100 NEW YORK AVENUE N W STE 750
WASHINGTON DC 20005-3934 US

JO A DEROCHE
WEINER, BRODSKY, ET AL
1350 NEW YORK AVE NW SUITE 800
WASHINGTON DC 20005-4797 US

JO A DEROCHE
WEINER, BRODSKY, ET AL
1350 NEW YORK AVE NW SUITE 800
WASHINGTON DC 20005-4797 US

ANDREW P. GOLDSTEIN
MCCARTHY, SWEENEY ET AL.
1750 PENNSYLVANIA AVE NW
WASHINGTON DC 20006 US

MONICA J. PALKO
BRACEWELL & PATTERSON
2000 K STREET NW STE 500
WASHINGTON DC 20006 US

ANNE D. SMITH
WHITE & CASE
1747 PENNSYLVANIA AVENUE N W
WASHINGTON DC 20006 US

KATHRYN KUSSKE
MAYER, BROWN & PLATT
2000 PENNSYLVANIA AVE N W SUITE 6500
WASHINGTON DC 20006 US

ROY T. ENGLERT, JR
MAYER, BROWN & PLATT
2000 PENNSYLVANIA AVE N W SUITE 6500
WASHINGTON DC 20006 US

LAURENCE R. LATOURETTE
PRESTON GATES ELLIS ETAL
1735 NY AVE NW SUITE 500
WASHINGTON DC 20006 US

ADRIAN L. STEEL, JR.
MAYER, BROWN & PLATT
2000 PENNSYLVANIA AVE N W SUITE 6500
WASHINGTON DC 20006 US

KRISTA L. EDWARDS
SIDLEY & AUSTIN
1722 EYE STREET N W
WASHINGTON DC 20006 US

ERIKA Z. JONES
2000 PENNSYLVANIA AVE., N.W.
WASHINGTON DC 20006 US

TERRY L. CLAASSEN
CORN REFINERS ASSOC, INC.
1701 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20006 US

CHARLES A SPITULNIK
HOPKINS & SUTTER
888 SIXTEENTH STREET NW
WASHINGTON DC 20006 US

ROBERT P. VOM EIGEN
HOPKINS AND SUTTER
888 16TH STREET N W STE 700
WASHINGTON DC 20006 US

ALBERT B KRACHMAN
BRACEWELL & PATTERSON LLP
2000 K ST NW STE 500
WASHINGTON DC 20006-1872 US

JAMES A CALDERWOOD
ZUCKERT, SCOUTT & RASENBERGER, L.L. P.
888 17TH STREET NW, SUITE 600
WASHINGTON DC 20006-3939 US

JENNIFER P OAKLEY
ZUCKERT, SCOUTT & RASENBERGER
888 SEVENTEENTH ST NW, STE 600
WASH DC 20006-3939 US

RICHARD A. ALLEN
ZUCKERT, SCOUT, RASENBERGER
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

JOHN V. EDWARDS, ESQ
ZUCKERT, SCOUTT ET AL.
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

ANDREW R PLUMP
ZUCKERT, SCOUTT, RASENBERGER
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

ALICIA M SERFATY
HOPKINS & SUTTER
888 - 16TH STREET NW
WASHINGTON DC 20006-4103 US

STEVEN J. KALISH
MCARTHY, SWEENEY & HARKAWAY
1750 PENNSYLVANIA AVE NW
WASHINGTON DC 20006-4502 US

TERENCE M. HYNES
SIDLEY & AUSTIN
1722 EYE STREET NW
WASHINGTON DC 20006-5304 US

ANTHONY J MCMAHON
BASATIANELLI, BROWN ETAL
2828 PA AVE NW STE 203
WASHINGTON DC 20007 US

JAMES F RILL
COLLIER SHANNON RILL & SCOTT
3050 K STREET NW SUITE 400
WASHINGTON DC 20007 US

VIRGINIA R METALLO
3050 K ST NW SUITE 400
WASHINGTON DC 20007 US

JOHN F C LUEDKE
GALLAND, KHARASCH, MORSE & GARFINKLE
1054 THIRTY-FIRST STREET NW
WASHINGTON DC 20007 US

ANDREW T GOODSON
CANAL SQUARE
1054 THIRTY-FIRST ST NW
WASHINGTON DC 20007 US

EDWARD D. GREENBERG
GALLAND, KHARASCH, MORSE & GARFINKLE
1054 THIRTY-FIRST STREET NW
WASHINGTON DC 20007-4492 US

CHARLES H. WHITE, JR.
GALLAND, KHARASCH & GARFINKLE, P. C.
1054 THIRTY-FIRST STREET NW
WASHINGTON DC 20007-4492 US

MICHAEL F. MCBRIDE
LEBOEUF LAMB GREENE & MACRAE, L. L. P.
1875 CONNECTICUT AVE N W, STE 1200
WASHINGTON DC 20009 US

DANIEL ARONOWITZ
LEBOUEF, LAMB, GREENE
1875 CONNECTICUT AVE NWSTE 1200
WASHINGTON DC 20009-5728 US

LINDA K. BREGGIN, ESQ.
LEBOEUF, LAMB, GREENE, ET AL
1875 CONNECTICUT AVENUE N W
WASHINGTON DC 20009-5728 US

PAUL M. DONOVAN
LAROE, WINN, ETAL
3506 IDAHO AVE NW
WASHINGTON DC 20016 US

JOHN D. HEFFNER, ESQ.
REA, CROSS & AUCHINCLOSS
1920 N STREET NW SUITE 420
WASHINGTON DC 20036 US

GORDON P. MACDOUGALL
1025 CONNECTICUT AVE NW SUITE 410
WASHINGTON DC 20036 US

KEITH G. O'BRIEN
REA, CROSS & AUCHINCLOSS
1920 N STREET N W - SUITE 420
WASHINGTON DC 20036 US

MARC J. FINK
SHER & BLACKWELL
2000 L STREET N W , SUITE 612
WASHINGTON DC 20036 US

WILLIAM G. MAHONEY
HIGHSAW, MAHONEY & CLARKE
1050 SEVENTEENTH STREET NW SUITE 210
WASHINGTON DC 20036 US

GERALD P. NORTON
HARKINS CUNNINGHAM
1300 NINETEENTH STREET, NW.,STE 600
WASHINGTON DC 20036 US

GERALD P. NORTON
HARKINS CUNNINGHAM
1300 NINETEENTH STREET , NW., STE. 600
WASHINGTON DC 20036 US

C MICHAEL LOFTUS
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036 US

PATRICIA E. (DIETRICH) KOLESAR
SLOVER & LOFTUS
1224 SEVENTEENTH ST NW
WASH DC 20036 US

SUSAN B GERSON
GRAHAM & JAMES, LLP
2000 M STREET NW STE 700
WASHINGTON DC 20036 US

CHRISTOPHER A. MILLS
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036 US

ROBERT A. WIMBISH, ESQ.
REA, CROSS & AUCHINCLOSS
1920 N STREET NW SUITE 420
WASHINGTON DC 20036 US

GERALD P NORTON
HARKINS CUNNINGHAM
1300 19TH ST NW SUITE 600
WASHINGTON DC 20036 US

THOMAS LAWRENCE III
OPPENHEIMER WOLFF, ETC
1020 - 19TH STREET NW STE 400
WASHINGTON DC 20036 US

FRANK J. PERGOLIZZI
SLOVER & LOFTUS
1224 SEVENTEENTH ST NW
WASHINGTON DC 20036 US

RICHARD S. EDELMAN
HIGHSAW MAHONEY CLARKE
1050 SEVENTEENTH STREET N W, SUITE 210
WASHINGTON DC 20036 US

KELVIN J. DOWD
SLOVER & LOFTUS
1224 17TH STREET N W
WASHINGTON DC 20036 US

PAUL A. CUNNINGHAM
HARKINS CUNNINGHAM
1300 19TH STREET NW SUITE 600
WASHINGTON DC 20036 US

JOHN M. CUTLER, JR.
MCCARTHY SWEENEY HARKAWAY
1750 PENNSYLVANIA AVE N W SUITE 1105
WASHINGTON DC 20036 US

JAMES M. GUINIVAN
HARKINS CUNNINGHAM
1300 19TH ST NW SUITE 600
WASHINGTON DC 20036-1609 US

JOSEPH L LAKSHMANAN
1300 19TH STREET NW, SUITE 600
WASHINGTON DC 20036-1609 US

JOHN WILL ONGMAN
PEPPER HAMILTON SCHEETZ
1300 NINETEENTH STREET N W
WASHINGTON DC 20036-1685 US

TIMOTHY M WALSH
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

SAMUEL M. SIPE, JR.
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

PAUL H. LAMBOLEY
1020 NINETEENTH STREET, N.W., STE 400
WASHINGTON DC 20036-6105 US

A STEPHEN HUT JR
WILMER CUTLER & PICKERING
2445 M ST NW
WASHINGTON DC 20037 US

DANIEL K. MAYERS
WILMER CUTLER PICKERING
2445 M STREET N W
WASHINGTON DC 20037-1420 US

MICHAEL BRESSMAN
WILMER CUTLER PICKERING
2445 M STREET N W
WASHINGTON DC 20037-1420 US

DAVID H. BAKER
HOLLAND & KNIGHT
2100 PENN AVE NW ST 400
WASHINGTON DC 20037-3202 US

J MICHAEL HEMMER
COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20044 US

ARVID E. ROACH II
COVINGTON & BURLING
PO BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044-7566 US

RICHARD B HERZOG
HARKINS CUNNINGHAM
1300 19TH ST NW SUITE 600
WASHINGTON DC 20036-1609 US

JOEL A RABINOVITZ
HARKINS CUNNINGHAM
1300 19TH STREET NW SUITE 600
WASHINGTON DC 20036-1609 US

MARC D. MACHLIN
PEPPER, HAMILTON, ET AL
1300 19TH STREET N W
WASHINGTON DC 20036-1658 US

MICHELLE J. MORRIS
PEPPER, HAMILTON, ETAL
1300 NINETEENTH ST NW
WASHINGTON DC 20036-1685 US

BETTY JO CHRISTIAN
STEPTOE & JOHNSON
1330 CONNECTICUT AVE NW
WASHINGTON DC 20036-1795 US

JOHN H. LESEUR
SLOVER & LOFTUS
1224 17TH STREET NW
WASHINGTON DC 20036-3081 US

KEVIN M SHEYS
OPPENHEIMER WOLFF ET AL.
1020 NINETEENTH STREET N W SUITE 400
WASHINGTON DC 20036-6105 US

SCOTT N. STONE
PATTON BOGGS L.L.P.
2550 M STREET NW 7TH FLOOR
WASHINGTON DC 20037-1346 US

ALI M. STOEPPELWERTH
WILMER CUTLER PICKERING
2445 M STREET N W
WASHINGTON DC 20037-1420 US

WILLIAM J KOLASKY JR
WILMER CUTLER & PICKERING
2445 M STREET NW
WASH DC 20037-1420 US

TIMOTHY C HESTER
P O BOX 7566
1201 PENNSYLVANIA AVENUE N W
WASHINGTON DC 20044 US

DAVID L. MEYER
COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE N W
WASHINGTON DC 20044-7566 US

MICHAEL A. LISTGARTEN
COVINGTON & BURLING
P O BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044-7566 US

MICHAEL ROSENTHAL
COVINGTON & BURLING
P O BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044-7566 US

EILEEN S. STOMMES, DIRECTOR, T&M DIVISION
AGRICULTURAL MARKETING SERVICE, USDA
P. O. BOX 96456
WASHINGTON DC 20090-6456 US

HON. JEROME NELSON
FERC (LJ-2)
888 1ST STREET N E
WASHINGTON DC 20426 US

RICHARD SANDERSON
OFFICE OF FED ACTIV
US ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON DC 20460 US

HON JOHN GLENN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE PAT ROBERTS
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE THAD COCHRAN
UNITED STATE SENATE
WASHINGTON DC 20510 US

HON. DAN COATS
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE BYRON L DORGAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE J. ROBERT KERRY
UNITED STATES SENATE
WASH DC 20510 US

HON CONRAD BURNS
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE TIM JOHNSON
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE DON NICKLES
U. S. SENATE
WASHINGTON DC 20510 US

HON. WAYNE ALLARD
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. PHIL GRAMM
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE RICHARD LUGAR
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE RICHARD BRYAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. CHRISTOPHER S. BOND
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE HARRY REID
UNITED STATES SENATE
WASHINGTON DC 20510-0001 US

HON. BEN N CAMPBELL
UNITED STATES SENATE
WASHINGTON DC 20510-0605 US

RICHARD J DURBIN
UNITED STATES SENATE
WASHINGTON DC 20510-1304 US

HONORABLE CHARLES E. GRASSLEY
UNITED STATES SENATE
WASHINGTON DC 20510-1501 US

HONORABLE JOHN BREAUX
UNITED STATES SENATE
WASHINGTON DC 20510-1803 US

HON. TOM EWING
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. MICHAEL OXLEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ROBERT A. BORSKI
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE GEORGE GEKAS
ATTEN: TOM SANTANIELLO
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. HAROLD E. FORD, JR
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DONALD M. PAYNE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. PAUL KANJORSKI
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. IKE SKELTON
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JAMES L. OBERSTAR
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. MARTIN OLAV SABO
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. LANE EVANS
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JOE BARTON
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BOB CLEMENT
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ESTEBAN E TORRES
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. THOMAS C SAWYER
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE WALLY HERGER
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE GENE GREEN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BRIAN P. BILBRAY
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE EDWARD R. ROYCE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE KAREN MCCARTHY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JAY KIM
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. CLEO FIELDS
ATTN: PHILIP HENDERSON
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PHIL ENGLISH
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JULIAN DIXON
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JAY DICKEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE FRANK MASCARA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JOHN MURTHA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MARCY KAPTUR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JAMES TRAFICANT JR
U. S. HOUSE OF REPRESENTATIVES
WASH DC 20515 US

SHEILA JACKSON-LEE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE FRANK D. RIGGS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE CHARLES W. STENHOLM
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE ZOE LOFGREN
US HOUSE OF RESPRESENTATIVE
WASHINGTON DC 20515 US

HONORABLE XAVIER BECERRA
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LUCILLE ROYAL-ALLARD
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LYNN WOOLSEY
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PETE STARK
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE NANCY PELOSI
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LLOYD DOGGETT
U. S. HOUSE OF REPRESENTATAIVES
WASHINGTON DC 20515 US

HON DAVID L HOBSON
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JOHN TANNER
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RON LEWIS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DAVID MINGE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JOHN HOSTETTLER
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON TOM DELAY
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PAUL MCHALE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TIM HOLDEN
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE MIKE DOYLE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TOM LANTOS
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RICHARD W. POMBO,
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE KEN CALVERT,
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE SONNY BONO,
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE CHRISTOPHER COX,
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RON PACKARD
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DANA ROHRABACHER
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE HOWARD P. BUCK MCKEON,
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. EARL POMEROY
" S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE GEORGE E. BROWN, JR.
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RONALD V. DELLUMS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JERRY LEWIS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. HENRY B. GONZALEZ
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RON PACKARD
U. S. HOUSE OF REPRESENTATIVES
WASH DC 20515-0548 US

HONORABLE SCOTT MCINNIS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-0603 US

HONORABLE TODD TIAHRT
HOUSE OF REPRESENTATIVE
WASHINGTON DC 20515-1004 US

HONORABLE SAM BROWNBACK
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-1602 US

HON. JIM MCCRERY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-1805 US

HONORABLE GEORGE MILLER
ATT: GARY BLAND
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2307 US

HON W J (BILLY) TAUZIN
ATTN: ROY WILLIS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2601 US

HONORABLE JOHN ENSIGN
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2801 US

HON. ROBERT E ANDREWS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3001 US

HONORABLE SHERROD BROWN
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3513 US

HON. FRANK D. LUCAS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3606 US

HONORABLE THOMAS M. FOGLIETTA
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3801 US

HONORABLE CHAKA FATTAH
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3803 US

HONORABLE CURT WELDON
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3807 US

HON. JON CHRISTENSEN
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4155 US

HONORABLE WILLIAM M (MAC) THORNBERRY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4313 US

HONORABLE SHEILA JACKSON LEE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4318 US

HON. HENRY BONILLA
US HOUSE REPRESENTATIVES
WASHINGTON DC 20515-4323 US

HONORABLE EDDIE BERNICE JOHNSON
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4330 US

ROGER W. FONES
US DEPT. OF JUSTICE
325 7TH STREET N W SUITE 500
WASHINGTON DC 20530 US

MICHAEL D BILLIEL
ANTITRUST DIV, DEPT OF JUSTICE
325 SEVENTH ST NW STE 500
WASHINGTON DC 20530 US

PAUL SAMUEL SMITH
U. S. DEPT OF TRANSP
400 7TH ST SW , ROOM 4102 C-30
WASHINGTON DC 20590 US

JOSEPH R. POMPONIO
FEDERAL RAILROAD ADMIN.
400 7TH ST SW RCC-20
WASHINGTON DC 20590 US

LARRY R. PRUDEN
TRANS. COMM. INTL UNION
3 RESEARCH PLACE
ROCKVILLE MD 20850 US

WILLIAM W., JR. WHITEHURST
W. W. WHITEHURST & ASSOCIATES, INC.
12421 HAPPY HOLLOW ROAD
COCKEYSVILLE MD 21030 US

CONSTANCE H. PIERCE
CONSTELLATION COMPANIES
250 WEST PRATT STREET
BALTIMORE MD 21201-2423 US

J TUCKER
PO BOX 25181
ARLINGTON VA 22202 US

PETER Q. NYCE, JR.
U. S. DEPARTMENT OF THE ARMY
901 NORTH STUART STREET
ARLINGTON VA 22203 US

NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
1700 NORTH MOORE STREET, SUITE 1900
ARLINGTON VA 22209 US

THOMAS E. SCHICK
CHEMICAL MANUF. ASSOC.
1300 WILSON BOULEVARD
ARLINGTON VA 22209 US

WILLIAM P. JACKSON, JR.
JACKSON & JESSUP, P. C.
P O BOX 1240
3426 NORTH WASHINGTON BLVD
ARLINGTON VA 22210 US

GERALD W. FAUTH, III
G. W. FAUTH & ASSOCIATES INC.
P O BOX 2401
ALEXANDRIA VA 22301 US

JOHN T. ESTES
SUITE 400
1029 NORTH ROYAL STREET
ALEXANDRIA VA 22314 US

PETER J SHUDTZ
CSX CORPORATION
902 E CARY ST 1 JAMES CENTER
RICHMOND VA 23119 US

ROBERT J. COONEY
NORFOLK SOUTHERN CORP.
THREE COMMERCIAL PLACE
NORFOLK VA 23510-2191 US

ROBERT S. KOMPANTY
720 THIMBLE SHOALS BLVD, SUITE 130
NEWPORT NEWS VA 23608-2574 US

BOB THOMPSON
GEORGIA-PACIFIC CORP.
P O BOX 105605
ATLANTA GA 30348-5605 US

GREGORY M. VINCENT, VICE PRESIDENT
TENNESSEE VALLEY AUTH
LOOKOUT PLACE 1101 MARKET STREET
CHATTANOOGA TN 37402 US

E. CALVIN CASSELL
EASTMAN CHEMICAL COMPANY
P O BOX 1990
KINGSPORT TN 37662 US

EDWARD S. CHRISTENBURY
400 WEST SUMMIT HILL DRIVE
KNOXVILLE TN 37902 US

HONORABLE GILLESPIE V. MONTGOMERY
U. S. HOUSE OF REPRESENTATIVES
P. O. BOX 5618
MERIDAN MS 39208 US

R. L. YOUNG
P O BOX 700
ONE MEMORIAL DRIVE
LANCASTER OH 43130-0700 US

D. MICHAEL MILLER
AMERICAN ELECTRIC POWER
1 RIVERSIDE PLAZA
COLUMBUS OH 43215 US

HONORABLE JOHN GLENN
U. S. SENATE ATTN: ANISA BELL
200 N HIGH STREET S-600
COLUMBUS OH 43215-2408 US

MICHAEL M. BRILEY
SHUMAKER, LOOP & KENDRICK
N COURTHOUSE SQUARE - 1000 JACKSON
TOLEDO OH 43624 US

DANIEL R. ELLIOTT III ASST GENERAL COUNSEL
UNITED TRANSPORTATION UNION
14600 DETROIT AVENUE
CLEVELAND OH 44107 US

CLINTON J MILLER, III, GENERAL COUNSEL
UNITED TRANSPORTATION UNION
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

RONALD P MCLAUGHLIN
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
1370 ONTARIO ST STAN BLDG
CLEVELAND OH 44113-1702 US

RICHARD E. KERTH, TRANS. MGR.
CHAMPION INTERNAT'L CORP
101 KNIGHTSBRIDGE DRIVE
HAMILTON OH 45020-0001 US

MICHAEL P. FERRO
MILLENNIUM PETROCHEMICALS, INC.
11500 NORTHLAKE DRIVE
CINCINNATI OH 45249 US

BRUCE A. KLIMEK
INLAND STEEL
3210 WATLING STREET
EAST CHICAGO IN 46312 US

HON JEFF SMITH
CITY OF KENDALLVILLE
234 S MAIN STREET
KENDALLVILLE IN 46755-1795 US

JAMES E. HANSON
DOW CHEMICAL COMPANY
2020 WILLARD H DOW CENTER
MIDLAND MI 48674 US

LARRY B. KARNES
TRANSPORTATION BUILDING
PO BOX 30050
425 WEST OTTAWA
LANSING MI 48909 US

THOMAS F JACKSON
800 LINCOLN WAY
AMES IA 50010 US

P C HENDRICKS
STATE LEGISLATIVE DIRECTOR UTU
313 E 9TH STREET
DES MOINES IA 50309 US

HONORABLE CHARLES E. GRASSLEY
UNITED STATES SENATE
210 WALNUT STREET
DES MOINES IA 50309-2140 US

EDWIN C JERTSON
INTERSTATE POWER CO
P O BOX 769
1000 MAIN STREET
DUBUQUE IA 52004 US

KENT M RAGSDALE
INTERSTATE POWER CO
PO BOX 769
DUBUQUE IA 52004 US

PHILIP D. WARD, ET AL.
P O BOX 351
200 FIRST STREET SE
CEDAR RAPIDS IA 52406-0351 US

TOBIN LEE BRITT
IES UTILITIES, INC.
P O BOX 351
200 FIRST ST SE
CEDAR RAPIDS IA 52406-0351 US

WILLIAM R. KNIGHT
WISCONSIN POWER & LIGHT
P O BOX 192
222 WEST WASHINGTON AVENUE
MADISON WI 53701-0192 US

ALLEN J VOGEL,
MINNESOTA DEPARTMENT OF TRANSPORTATION
395 JOHN IRELAND BLVD TRANSP BLDG, SUITE 925,
ST PAUL MN 55155 US

RONALD E HUNTER, LAW DEPARTMENT
CARGILL, INCORPORATED
15407 MCGINTY ROAD WEST
WAYZATA MN 55391 US

WAYNE C. SERKLAND, U S REGIONAL COUNSEL
CANADIAN PACIFIC LEG. SER
105 SOUTH FIFTH ST SUITE 1000
MINNEAPOLIS MN 55402 US

DOUGLAS M. HEAD
WEINER
120 SOUTH 6TH STREET STE 2400
MINNEAPOLIS MN 55402 US

BOB ZELENKA
852 GRAIN EXCHANGE
MINNEAPOLIS MN 55415 US

HON. WILLIAM J. JANKLOW
GOVERNOR, SD
500 EAST CAPITOL
PIERRE SD 57501-5070 US

TERRY C. WHITESIDE
RADERMACHER, WHITESIDE & ASSOCIATES
3203 3RD AVE N STE 301
BILLINGS MT 59101 US

HONORABLE MARC RACICOT
GOV'S OFFICE, STATE CAP.
P O BOX 200801
HELENA MT 59620-0801 US

J. FRED SIMPSON, EXECUTIVE VICE PRESIDENT
MONTANA RAIL LINK, INC.
101 INTERNATIONAL WAY
MISSOULA MT 59802 US

JANET H GILBERT
WISCONSIN CENTRAL LTD
6250 NORTH RIVER ROAD STE 9000
ROSEMONT IL 60018 US

RICHARD E. WEICHER
BURLINGTON NORTHERN SANTA FE CORPORATION
1700 EAST GOLF ROAD, 6TH FLOOR
SCHAUMBURG IL 60173 US

JEFFREY R. MORELAND
THE BURLINGTON NORTHERN SANTA FE CORPORATION
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173 US

JAMES A. SMALL
COMMONWEALTH EDISON CO.
1411 OPUS PL STE 200
DOWNERS GROVE IL 60515-5701 US

WILLIAM F. COTTRELL
ASST. ATTORNEY GENERAL
100 W RANDOLPH ST - 12TH FLOOR
CHICAGO IL 60601 US

THOMAS J HEALEY
OPPENHEIMER, WOLFF, ETAL
180 N STETSON AV 2 PRUDENTIAL PL
CHICAGO IL 60601 US

CHRISTINE H. ROSSO
IL ASSISTANT ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FLOOR
CHICAGO IL 60601 US

WILLIAM C SIPPEL
OPPENHEIMER WOLFF & DONNELLY
180 N STETSON AVE TWO PRUDENTIAL PLAZA 45TH F
CHICAGO IL 60601 US

THOMAS J. LITWILER
OPPENHEIMER WOLFF & DONNELLY
180 N STETSON AVE 45TH FLOOR
CHICAGO IL 60601 US

THOMAS DEGNAN
UNITED STATES GYPSUM CO
125 SOUTH FRANKLIN STREET
CHICAGO IL 60606 US

STEPHEN C. HERMAN
MCFARLAND & HERMAN
20 N WACKER DRIVE STE 1330
CHICAGO IL 60606-2902 US

THOMAS F. MCFARLAND, JR.
MCFARLAND & HERMAN
20 NORTH WACKER DRIVE, SUITE 1330
CHICAGO IL 60606-3101 US

RONALD A. LANE
ILLINOIS CENTRAL RR
455 N CITYFRONT PLAZA DR 20TH FL
CHICAGO IL 60611 US

MYLES L. TOBIN
ILLINOIS CENTRAL RAILROAD
455 NORTH CITYFRONT PLAZA DRIVE
CHICAGO IL 60611-5504 US

THOMAS ZWICA
121 WEST FIRST STREET
GENESEO IL 61254 US

GARY L TOWELL
TOLEDO, PEORIA & WESTERN
1990 EAST WASHINGTON STREET
EAST PEORIA IL 61611-2961 US

CLARENCE R. PONSLER
GENERAL CHAIRMAN, UTU
1017 W. MAIN STREET
BELLEVILLE IL 62220 US

SCOTT A. RONEY
P O BOX 1470
4666 FARIES PARKWAY
DECATUR IL 62525 US

JON FOY, DIRECTOR, RATES GRAIN
ARCHER DANIEL MIDLAND CO
P. O. BOX 1470
4666 FARIES PARKWAY
DECATUR IL 62525 US

MERRILL L. TRAVIS
ILLINOIS DEPT. OF TRANSP.
2300 SOUTH DIRKSEN PARKWAY ROOM 302
SPRINGFIELD IL 62703-4555 US

CAROL R DORIS
500 SOUTH SECOND STREET
SPRINGFIELD IL 62706 US

KIRK BROWN
ILLINOIS DOT, OFFICE OF THE SECRETARY
2300 SOUTH DIRKSEN PARKWAY
SPRINGFIELD IL 62764 US

ROGER HERMANN
MALLINCKRODT CHEMICAL
16305 SWINGLEY RIDGE DRIVE
CHESTERFIELD MO 63017-1777 US

JEFFREY L. KLINGER
PEABODY HOLDING COMPANY
701 MARKET STREET STE 700
ST LOUIS MO 63101-1826 US

C A MENNELL, PRESIDENT
LACKLAND WESTERN RR CO
31 OAK TERRACE
WEBSTER GROVES MO 63119 US

DAVID A. PINS
THE CHEMICAL GROUP, MONSANTO
800 N LINDBERGH BOULEVARD
ST LOUIS MO 63167 US

D E THOMPSON
GENERAL CHAIRMAN-BLE
414 MISSOURI BOULEVARD
SCOTT CITY MO 63780 US

HON IKE SKELTON
U. S. HOUSE OF REP.
514 B N W 7 HIGHWAY
BLUE SPRINGS MO 64014 US

ROBERT K DREILING
KANSAS CITY SOUTHERN RWY CO.
114 WEST 11TH STREET
KANSAS CITY MO 64105 US

RICHARD P BRUENING
KANSAS CITY SOUTHERN RR
114 WEST ELEVENTH STREET
KANSAS CITY MO 64106 US

MEL CARNAHAN
OFFICE OF THE GOVERNOR
STATE CAPITOL ROOM 216
JEFFERSON CITY MO 65101 US

JACK HYNES, ADMINISTRATOR OF RAILROADS
MISSOURI DEPARTMENT OF TRANSPORTATION
PO BOX 270
105 WEST CAPITOL AVENUE
JEFFERSON CITY MO 65102 US

JOSEPH A. STINGER
IBBB
570 NEW BROTHERHOOD BUILDING
KANSAS CITY KS 66101 US

WILLIAM J. MCGINN
NORTH AMER. CHEM. CO.
8300 COLLEGE BOULEVARD
OVERLAND PARK KS 66210 US

BARRETT HATCHES
8300 COLLEGE BLVD
OVERLAND PARK KS 66210 US

T. L. GREEN
WESTERN RESOURCES, INC.
PO BOX 889
818 KANSAS AVE
TOPEKA KS 66601 US

JOHN JAY ROSACKER
KS, DEPT OF TRANSP
217 SE 4TH ST 2ND FLOOR
TOPEKA KS 66603 US

NORMAN G MANLEY
CITY ATTORNEY, ANOVER CITY HALL
909 NORTH ANDOVER ROAD
ANDOVER KS 67002 US

DWAYNE H SHANNON
PO BOX 1138
WICHITA KS 67201 US

ALAN R. POST
1803 STEFKIN STREET
WICHITA KS 67208 US

JAMES J. IRLANDI
STB PRACTITIONER
1809 N BROADWAY/SUITE F
WICHITA KS 67214 US

JUNIOR STRECKER, CHAIRMAN
MOUNTAIN-PLAINS COMMUNITIES & SHIPPERS COALIT
123 NORTH MAIN ST
HOISINGTON KS 67544 US

ROBERT K. GLYNN
HOISINGTON CHAM. OF COMM.
123 NORTH MAIN STREET
HOISINGTON KS 67544-2594 US

JOHN F. LARKIN
P O BOX 31850
4814 DOUGLAS ST 68132
OMAHA NE 68132-0850 US

PAUL A. CONLEY, JR. ,LAW DEPARTMENT
UNION PACIFIC RR CO.
1416 DODGE STREET
OMAHA NE 68179 US

LOUISE A. RINN
UNION PACIFIC RR CO.
1416 DODGE STREET ROOM 830
OMAHA NE 68179 US

JEANNA L REGIER
UNION PACIFIC RAILROAD COMPANY
1416 DODGE ST ROOM 830
OMAHA NE 68179 US

JAMES V. DOLAN, LAW DEPARTMENT
UNION PACIFIC RR CO.
1416 DODGE STREET #830
OMAHA NE 68179 US

JOSEPH D. ANTHOFER
UNION PACIFIC RR CO.
1416 DODGE STREET ROOM 830
OMAHA NE 68179-0001 US

ROBERT T. OPAL
UNION PACIFIC RAILROAD CO.
1416 DODGE STREET RM 830
OMAHA NE 68179-0001 US

KEN SIECKMEYER, MGR. TRANSP. PLANN. DIV.
NEBRASKA DEPT. OF ROADS
P O BOX 94759
LINCOLN NE 68509-4759 US

WAYNE ANDERSON
ENTERGY SERVICES, INC.
639 LOYOLA AVE MAIL L-ENT-26E
NEW ORLEANS LA 70113 US

W. F. CARTER
ALBEMARLE CORPORATION
451 FLORIDA STREET
BATON ROUGE LA 70801 US

DEAN L. WORLEY
HILBURN CALHOON HARPER
P O BOX 5551
ONE RIVERFRONT PLACE EIGHTH FL
NORTH LITTLE ROCK AR 72119 US

SCOTT MANATT
P. O. BOX 473
CORNING AR 72422 US

JOE N. HAMPTON
2309 NORTH TENTH, SUITE E
ENID OK 73701 US

THOMAS R. JACOBSEN
TU ELECTRIC
1601 BRYAN STREET STE 11-060
DALLAS TX 75201-3411 US

JOEL T WILLIAMS III
STE 350, LB-126
4809 COLE AVENUE
DALLAS TX 75205 US

STEVEN A BRIGANCE
LEBOEUF, LAMB, ETAL
4025 WOODLAND PARK BLVD STE 250
ARLINGTON TX 76013 US

EDMUND W. BURKE
BURLINGTON NORTHERN RR CO
777 MAIN STREET, 3800 CONTINENTAL PLAZA
FT WORTH TX 76102 US

DOUGLAS J. BABB
BURLINGTON NORTHERN RR CO
777 MAIN STREET, 3800 CONTINENTAL PLAZA
FT WORTH TX 76102-5384 US

MICHAEL E ROPER
BURLINGTON NORTHERN SANTA FE CORPORATION
3017 LOU MENK DRIVE
FT WORTH TX 76131 US

JANICE G BARBER
BURLINGTON NORTHERN AND SANTA FE RAILWAY COMP
3017 LOU MENK DRIVE
FORT WORTH TX 76131 US

RICHARD SCHIEFELBEIN
7801 WOODHARBOR DRIVE
FORT WORTH TX 76179 US

W. DAVID TIDHOLM
HUTCHESEN & GRUNDY
1200 SMITH STREET (#3300)
HOUSTON TX 77002-4579 US

GEN. COMMITTEE OF ADJUST. GO-895
UNITED TRANS. UNION
2040 NORTH LOOP WEST STE 310
HOUSTON TX 77018 US

ROBERT J. ROSSI
UNITED TRANSPORTATION UNION
2040 NORTH LOOP WEST SUITE 310
HOUSTON TX 77018-8112 US

GEORGE T. WILLIAMSON
P O BOX 2562
111 E LOOP N
HOUSTON TX 77029 US

JOHN D. BURKE
GREATER HOUSTON PORT BUREAU, INC
111 EAST LOOP NORTH
HOUSTON TX 77029 US

B KENNETH TOWSEND JR
EXXON CHEMICAL CO
13501 KATY FREEWAY
HOUSTON TX 77079-1398 US

B. C. GRAVES, JR.
EXXON COMPANY U.S.A.
PO BOX 4692
HOUSTON TX 77210-4692 US

BRIAN P. FELKER
SHELL CHEMICAL COMPANY
P O BOX 2463
HOUSTON TX 77252-2463 US

ERIC W. TIBBETTS
P O BOX 3766
1301 MCKINNEY ST
HOUSTON TX 77253 US

ROY GIANGROSSO
ENTERGY SERVICES, INC.
350 PINE STREET
BEAUMONT TX 77701 US

TEXAS MEXICAN RAILWAY CO.
PO BOX 419
LAREDO TX 78042-0419 US

JOHN P. LARUE, EXECUTIVE DIRECTOR
THE PORT OF CORPUS CHRISTI
P O BOX 1541
222 POWER STREET
CORPUS CHRISTI TX 78403 US

THOMAS A GRIEBEL
TEXAS DOT
125 E 11TH ST
AUSTIN TX 78701 US

JERRY L. MARTIN, DIRECTOR RAIL DIV.
RR COMM OF TEXAS
P O BOX 12967
1701 N CONGRESS
AUSTIN TX 78711 US

MARK TOBEY
P O BOX 12548
AUSTIN TX 78711-2548 US

REBECCA FISHER
ASST ATTY GENERAL
PO BOX 12548
AUSTIN TX 78711-2548 US

DONALD T CHEATHAM
10220-E METROPOLITAN DR
AUSTIN TX 78758 US

HON. JOHN R. COOK,
TX HOUSE OF REPRESENTATIVES
P O BOX 2910
AUSTIN TX 78768 US

HON. ROBERT JUNELL
TEXAS HOUSE OF REP.
PO BOX 2910
AUSTIN TX 78768 US

ROBERT M. SAUNDERS
P O BOX 2910
AUSTIN TX 78768-2910 US

ROBERT A. CUSHING, JR.
UNITED TRANS. UNION,
12401 HIDDEN SUN COURT
EL PASO TX 79938 US

DARRELL L. HANAVAN, EXECUTIVE DIRECTOR
COLORADO WHEAT ADMIN.
5500 SOUTH QUEBEC STREET STE 111
ENGLEWOOD CO 80111 US

THOMAS F. LINN
MOUNTAIN COAL COMPANY
555 17TH STREET 22ND FLOOR
DENVER CO 80202 US

STEPHEN D ALFERS
ALFERS & CARVER
730 17TH STREET #340
DENVER CO 80202 US

STANLEY B. KONIZ, UNIT MANAGER
PUBLIC SERVICE COMPANY
1225 - 17TH STREET STE 1100
DENVER CO 80202 US

PATRICIA T. SMITH, SR. VICE PRESIDENT
PUBLIC SERVICE COMPANY
1225 - 17TH STREET STE 600
DENVER CO 80202 US

RUSSELL S. JONES, III
MOUNTAIN COAL COMPANY
555 17TH STREET 22ND FLOOR
DENVER CO 80202 US

NANCY MANGONE, ENFORCEMENT ATTORNEY
U. S. EPA REGION VIII
999 18TH SST STE 500
DENVER CO 80202-2466 US

DAVID N. LAWSON, FUEL TRAFFIC COORDINATOR
PUBLIC SERVICE COMMISSION
1225 17TH ST STE 1100, SEVENTEENTH ST PLAZA
DENVER CO 80202-5533 US

JANE T. FELDMAN, ASST. ATTORNEY GENERAL
STATE OF COLORADO
1525 SHERMAN ST- 5TH FLOOR
DENVER CO 80203 US

HON. BEN N. CAMPBELL
UNITED STATES SENATE
1129 PENNSYLVANIA STREET
DENVER CO 80203 US

HONORABLE ROY ROMER
GOVERNOR
136 STATE CAPITOL
DENVER CO 80203 US

SUE BALLENSKI, PHYSICAL RESOURCES
USDA FOREST SERVICE
P O BOX 25127
LAKEWOOD CO 80225 US

GERALD E. VANINETTI
RESOURCE DATA INT'L
1320 PEARL STREET STE 300
BOULDER CO 80302 US

JOE D. FORRESTER
C/O CO MTN COLLEGE, TIMBERLINE CAMPUS
901 S HWY 24
LEADVILLE CO 80461 US

THOMAS J. FLORCZAK
CITY OF PUEBLO
127 THATCHER BUILDING
PUEBLO CO 81003 US

MAYOR LESTER WILLIAMS
TOWN OF EADS
PO BOX 8
110 W 13TH ST
EADS CO 81036 US

CARDON G. BERRY
KIOWA CO. COMMISSIONERS
PO BOX 591
1305 GOFF
EADS CO 81036 US

HON DELCARL EIKENBERG
TOWN OF HASWELL
P O BOX 206
HASWELL CO 81045-0206 US

JOHN R STULP
SECED
P O BOX 1600
LAMAR CO 81052 US

LEROY E. MAUCH
BOARD OF COUNTY COMMISSIONERS
P. O. BOX 1046
LAMAR CO 81052 US

CLEDE WIDENER
BOARD OF COUNTY COMMISSIONERS
P.. O. BOX 1046
LAMAR CO 81052 US

JOHN ROESCH
BENT COUNTY
PO BOX 350
LAS ANIMAS CO 81054 US

BLAINE ARBUTHNOT
CROWLEY COUNTY
601 MAIN ST
ORDWAY CO 81063 US

JANET PALMER
P O BOX 1268
13997 COUNTY ROAD 71
SHERIDAN LAKE CO 81071 US

BERNICE TUTTLE
KIOWA COUNTY WIFE, CHAPTER #124
13775 CR785
TOWNER CO 81071-9619 US

CHARLES WAIT
BACA COUNTY
PO BOX 116
SPRINGFIELD CO 81073 US

FRANK C MCMURRY
PO BOX 699
SALIDA CO 81201 US

HON. NANCY SANGER, MAYOR
CITY OF SALIDA
P O BOX 417
124 E STREET
SALIDA CO 81201 US

THOMAS W. FOSTER, CHAIRMAN
COM. TO PRESERVE PROPERTY
P O BOX 681
SALIDA CO 81201 US

E W WOTIPKA
6388 TERRACE LANE
SALIDA CO 81201 US

MYRON F. SMITH
FREMONT COUNTY COMM.
615 MACON AVE ROOM #102
CANON CITY CO 81212 US

GREG TABUTEAU
ROYAL GORGE SCENIC RY
P O BOX 1387
CANON CITY CO 81215 US

RUTH H. CARTER, MAYOR
CITY OF CANON CITY
P O BOX 1460
ATTN: STEVE THACKER CITY ADMIN
CANON CITY CO 81215 US

JUDY LOHNES
UAACOG
P O BOX 510
CANON CITY CO 81215-0510 US

STEVEN G. RABE, CITY MANAGER
CITY OF FLORENCE
300 W MAIN STREET
FLORENCE CO 81226 US

STEVE TUCKER
D&RG WEST. EMPLOYEES
2048 J ROAD
FRUITA CO 81521 US

JAMES R. FRITZE
EAGLE COUNTY ATTORNEY
P O BOX 850
EAGLE CO 81631 US

GARY L. MCFARLEN,, DIRECTOR-TRANSP
KENNECOTT ENERGY COMPANY
505 SOUTH GILLETTE AVENUE
GILLETTE WY 82716 US

PATRICIA BRITTON, CHIEF LEGAL OFFICER
KENNECOTT ENERGY COMPANY
505 SOUTH GILLETTE AVENUE
GILLETTE WY 82716 US

TIMM R. ADAMS
IDAHO BARLEY COMMISSION
1199 MAIN STREET, STE G
BOISE ID 83702-5630 US

JERRY R KRESS
ID, WHEAT COMMISSION
1109 MAIN ST STE 310
BOISE ID 83702-5642 US

ANN KNAPTON
IDAHO TIMBER CORPORATION
P O BOX 67
5401 KENDALL STREET
BOISE ID 83707-0067 US

WAYNE L. STOCKEBRAND
KENNECOTT UTAH COPP. CORP
P O BOX 6001
8315 WEST 3595 SOUTH
MAGNA UT 84044-6001 US

RAY D. GARDNER
KENNECOTT UTAH COPP. CORP
P O BOX 6001
8315 WEST 3595 SOUTH
MAGNA UT 84044-6001 US

ALEXANDER H. JORDAN
WESTERN SHIPPERS COALITION
3118 ROUND VALLEY WAY
PARK CITY UT 84060-6842 US

RONALD L. RENCHER
WESTERN SHIPPERS COAL.
136 SOUTH MAIN STREET STE 1000
SALT LAKE CITY UT 84101-1672 US

F MARK HANSEN
F MARK HANSEN, P.C.
624 NORTH 300 WEST SUITE 200
SALT LAKE CITY UT 84103 US

JEFFREY B. GROY
ONE UTAH CTR
201 SOUTH MAIN STREET, STE 1100
SALT LAKE CITY UT 84111 US

CHRISTOPHER E. BRAMHALL
451 SOUTH STATE ST, ROOM 505
SALT LAKE CITY UT 84111 US

HON. DEEDEE CORRADINI
451 SOUTH STATE STREET, ROOM 306
SALT LAKE CITY UT 84111 US

HONORABLE MICHAEL O. LEAVITT
ATTN: ROBIN L. RIGGS, GC TO GOVERNOR
210 STATE CAPITOL
SALT LAKE CITY UT 84114 US

REED M. RICHARDS
STATE OF UTAH
236 STATE CAPITOL
SALT LAKE CITY UT 84114 US

LYNETTE W. THIRKILL, LOGISTICS MANAGER
GR. SALT LAKE MINERALS
P O BOX 1190
OGDEN UT 84402 US

KENNETH C. JOHNSEN, V PRES & GEN COUNSEL
GENEVA STEEL COMPANY
P O BOX 2500
PROVO UT 84603 US

RALPH RUPP
PO BOX 2500
PROVO UT 84603 US

CAROL HEATHINGTON
1300 W WASHINGTON
PHOENIX AZ 85007 US

HONORABLE BOB STUMP
U.S. HOUSE OF REPRESENTATIVES
230 N. 1ST AVE., VOOM 2001
PHOENIX AZ 85025 US

FRANK E. HANSON, JR
MAGMA METALS COMPANY
7400 NORTH ORACLE ROAD, SUITE 200
TUCSON AZ 85704 US

O. KENT MAHER
33 WEST FOURTH ST
PO BOX 351
WINNEMUCCA NV 89446 US

R. MICHAEL MCCORMICK
HUMBOLDT COUNTY DA
P O BOX 909
50 WEST FIFTH STREET
WINNEMUCCA NV 89446 US

FRANK D GAUS
805 KUENZIL ST # 149
RENO NV 89502 US

MICHAEL E. HALLEY
CITY OF RENO
P O BOX 1900
RENO NV 89505 US

DORI OWEN, SPECIAL PROJECTS MANAGER
REDEVELOP LAND AGENCY
490 S CENTER STREET STE 203
RENO NV 89505 US

STEVE VARELA
PO BOX 1900
RENO NV 89505 US

CHARLES E. MCNEELY
CITY OF RENO
P. O. BOX 1900
RENO NV 89505 US

SCOTT HUTCHERSON
EAGLE-PICHER MINERALS INC
6110 PLUMAS ST
RENO NV 89509 US

CHARLES A BRACHT
700 FOREST
RENO NV 89509 US

PHILLIP WENDT
PO BOX 11072
RENO NV 89510 US

JEFFERY W. HILL
SIERRA PACIFIC POWER CO.
P O BOX 10100
6100 NEIL ROAD
RENO NV 89520 US

THOMAS J. FRONAPFEL
NEVADA, DEPT. OF TRANSPORTATION
1263 S STEWART STREET
CARSON CITY NV 89712 US

MICHAEL I. STOCKMAN, GENERAL COUNSEL
U. S. BORAX INC.
26877 TOURNEY ROAD
VALENCIA CA 91355 US

JOHN E. BALLAS, AGENCY ENGINEER
INDUSTRY URBAN-DEV. AG.
P O BOX 7089
15651 EAST STAFFORD STREET
CITY OF INDUSTRY CA 91744 US

JOHN D BALLAS
P.O. BOX 7089
15651 EAST STAFFORD STREET
CITY OF INDUSTRY CA 91744 US

RICHARD CABANILLA, PLANNING DEPARTMENT
IMPERIAL COUNTY
939 MAIN STREET
EL CENTRO CA 92243-2856 US

SCOTT KESSLER
202 WEST FOURTH STREET
ALTURUS CA 94102 US

JAMES T. QUINN
CALIFORNIA PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO CA 94102-3298 US

LOUIS P. WARCHOT
SOUTHRN PACIF. TRANS. CO.
ONE MARKET PLAZA
SOUTHERN PACIFIC BLDG RM 815
SAN FRANCISCO CA 94105 US

CANNON Y. HARVEY
SOUTHERN PAC. TRNS. CO.
ONE MARKET PLAZA
SAN FRANCISCO CA 94105 US

LINDSAY BOWER, DEPUTY ATTORNEY GENERAL
CALIFORNIA DEPT. OF JUSTICE
50 FREMONT STREET STE 300
SAN FRANCISCO CA 94105 US

CAROL A. HARRIS
SOUTHERN PAC. TRANS. CO.
ONE MARKET PLAZA
SAN FRANCISCO CA 94105 US

LARRY W. TELFORD
SEVERSON & WERSON
ONE EMBARCADERO CENTER
SAN FRANCISCO CA 94111 US

DANIEL R. ARELLANO
CITY HALL
708 THIRD STREET
BRENTWOOD CA 94513-1396 US

LEO R BRIEN
530 WARER STREET
OAKLAND CA 94607 US

PAUL C. ANDERSON
MCDONOUGH, HOLLAND, ETAL
1999 HARRISON STREET STE 1300
OAKLAND CA 94612 US

JEFFREY A. WALTER
WALTER & PISTOLE
670 W. NAPA STREET, SUITE "F"
SONOMA CA 95476 US

CHRISTOPHER J. NEARY
110 SOUTH MAIN STREET SUITE C
WILLITS CA 95490 US

JOSEPH H. PETTUS
SUN VALLEY ENERGY INC
800 HOWE AVE, SUITE 270
SACRAMENTO CA 95825 US

R. MARK ARMSTRONG
P O BOX 1051
ALTURAS CA 96101 US

KATHLEEN R. LAZARD
P O BOX 730
700 COURT STREET
SUSANVILLE CA 96130 US

MIKE THORNE, EXEC. DIR.
PORT OF PORTLAND
BOX 3529
PORTLAND OR 97208 US

FRED P. SWANSON
OREGON STEEL MILLS
P O BOX 2760
PORTLAND OR 97208-0363 US

RICK WILLIS, EXECUTIVE DIRECTOR
OREGON PUBLIC UTILITY COMM
550 CAPITOL ST NE
SALEM OR 97310-1380 US

ALLAN E. RUMBAUGH
P O BOX 1215
COOS BAY OR 97420 US

KAREN O'CONNOR
LAKE COUNTY COURTHOUSE
513 CENTER STREET
LAKEVIEW OR 97630 US

ANN DEKOSTER
P O BOX 1209
SEATTLE WA 98111 US

CHARLES H MONTANGE
426 NW 162ND STREET
SEATTLE WA 98177 US

DONALD G MEYER
P O BOX 1837
TACOMA WA 98401 US

MARCELLA M. SZEL
CP RAIL SYSTEM
910 PEEL STREET WINDSOR STATION RM 234
MONTREAL QUEBEC CD H3C 3E4 CD

STB FD 32760 12-12-97 C-76 28710

28710 SERVICE DATE - LATE RELEASE DECEMBER 12, 1997
EB

SURFACE TRANSPORTATION BOARD

DECISION

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY—CONTROL AND MERGER—SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

[Decision No. 76]

Decided: December 11, 1997

In Decision No. 44 (served August 12, 1996), we approved the common control and merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company) and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and the Denver and Rio Grande Western Railroad company)(collectively UP/SP), subject to various conditions including numerous environmental mitigation conditions. As pertinent here, the environmental conditions imposed in Decision No. 44 called for further, more focused mitigation studies to arrive at specifically tailored mitigation plans for Wichita, KS, and Reno, NV, in addition to the environmental mitigation already imposed, to assure that localized environmental issues unique to those communities are effectively addressed. The mitigation studies were to be completed within 18 months of the consummation of the merger.

On September 15, 1997, the Board's Section of Environmental Analysis (SEA), issued the Preliminary Mitigation Plan (PMP) for Wichita, KS. Comments on the PMP were due October 15, 1997. SEA then began preparation of a Final Mitigation Plan (FMP) for Wichita, Kansas/Sedgwick County, Kansas (Wichita/Sedgwick), as contemplated by Decision No. 44.

By a letter dated November 25, 1997, however, counsel for Union Pacific Railroad Company (UP) and Wichita/Sedgwick jointly requested that we toll all proceedings in the on-going 18-month mitigation study for Wichita/Sedgwick. In support of their request, UP and Wichita/Sedgwick state that they are engaged in good faith negotiations concerning the matters to be addressed by the Wichita/Sedgwick mitigation study and that such negotiations, while not complete, may obviate the need for SEA to issue an FMP.

In addition, to maintain the status quo during the pendency of the negotiations, UP states that it will adhere to the train count limitations set forth in paragraph 23a of Appendix G of Decision No. 44 until we either (1) issue a decision imposing final localized mitigation for Wichita/Sedgwick, as contemplated by paragraph 23a of Appendix G, or (2) take other action as contemplated by paragraph 23d.

We will grant UP and Wichita/Sedgwick's joint request and toll the time for undertaking further proceedings in the mitigation study being conducted for Wichita/Sedgwick. Should UP and Wichita/Sedgwick reach agreement on a final mitigation plan, both parties shall immediately notify SEA, as required by paragraph 23d of Appendix G to Decision 44. In addition, should either UP or Wichita/Sedgwick believe that a continuation of the tolling period is no longer appropriate, it shall inform us. SEA would then resume preparation of the FMP, and the mitigation study process for Wichita/Sedgwick outlined in Decision No. 44 would proceed under the schedule originally established, as extended by the period during which further proceedings have been tolled.

This action will not significantly affect either the quality of the human environment or conservation of energy resources.

It is ordered:

1. Further proceedings on the 18-month mitigation study ordered for Wichita/Sedgwick in Decision No. 44, Appendix G, 23a-23d, are tolled.

2. This decision is effective on the date of its service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

SERVICE LIST FOR: 15-dec-1997 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

PAUL K. BIBA, HOUSE COUNSEL
FORMOSA PLASTICS CORP.
9 PEACH TREE HILL ROAD
LIVINGSTON NJ 07039 US

KEN WILSON
282 BALDWIN AVE
HASBROUCK HEIGHTS NJ 07604-2304 US

OSCAR J. ABELLO, PRESIDENT
"K" LINE AMERICA, INC.
535 MOUNTAIN AVENUE
MURRY HILL NJ 07974 US

TINA MASINGTON, PLAN. ANAL.
"K" LINE AMERICA, INC.
535 MOUNTAIN AVENUE
MURRAY HILL NJ 07974 US

GEORGE J. FRANCISCO, JR.
ELLIPSE SHIPPING CENTER
4201 CHURCH ROAD - SUITE 7
MT LAUREL NJ 08054 US

JOHN F. MCHUGH
MCHUGH & SHERMAN
20 EXCHANGE PLACE 51ST FLOOR
NEW YORK NY 10005 US

R J HENEFELD
PPG INDUSTRIES INC
ONE PPG PLACE
PITTSBURGH PA 15272 US

RICHARD J. RESSLER
UNION PACIFIC CORP.
EIGHTH AND EATON AVENUES, MARTIN TOWER
BETHLEHEM PA 18018 US

CARL W. VON BERNUTH
UNION PACIFIC CORP.
EIGHTH & EATON AVENUES
BETHLEHEM PA 18018 US

RICHARD H. GROSS
3801 WEST CHESTER PIKE
NEWTOWN SQUARE PA 19073 US

WILLIAM E HARVEY
3801 WEST CHESTER PIKE
NEWTON SQUARE PA 19073 US

LARRY T. JENKINS
ARCO CHEMICAL COMPANY
3801 WEST CHESTER PIKE
NEWTON SQUARE PA 19073-3280 US

ANNE E. TREADWAY
CONSOLIDATED RAIL CORP.
P O BOX 41416
2001 MARKET STREET
PHILADELPHIA PA 19101-1416 US

EDWARD B. HYMSON
CONRAIL
2001 MARKET STREET 16-A
PHILADELPHIA PA 19101-1416 US

JONATHAN M BRODER
CONSOLIDATED RAIL CORP
PO BOX 41416
2001 MARKET STREET 16-A
PHILADELPHIA PA 19101-1416 US

CONSTANCE L. ABRAMS
CONSOLIDATED RAIL CORP.
2001 MARKET STREET 16-A, TWO COMMERCE SQUARE
PHILADELPHIA PA 19101-1416 US

BRUCE B. WILSON
CONSOLIDATED RAIL CORP.
2001 MARKET STREET
PHILADELPHIA PA 19101-1417 US

JOHN L ABBOTT
FMC CORPORATION
1735 MARKET STREET
PHILADELPHIA PA 19103 US

ERIC M. HOCKY
GOLLATZ, GRIFFIN, EWING
213 WEST MINER STREET
WEST CHESTER PA 19381-0796 US

CHARLES N. BEINKAMPEN
DUPONT SOURCING
1007 MARKET STREET, ROOM B-6236-A
WILMINGTON DE 19898 US

TERRENCE D JONES
KELLER & HECKMAN
1001 G ST NW STE 500 WEST
WASHINGTON DC 20001 US

MARTIN W. BERCOVICI
KELLER & HECKMAN
1001 G ST NW SUITE 500 WEST
WASHINGTON DC 20001 US

DOUGLAS J. BEHR
KELLER & HECKMAN
1001 G STREET NW STE 500 WEST
WASHINGTON DC 20001 US

ROBERT L. MCGEORGE
U. S. DEPT. OF JUSTICE, ANTITRUST DIVISION
555 4TH STREET N W RM 9104
WASHINGTON DC 20001 US

JOAN S HUGGLER
U. S. DEPT. OF JUSTICE, ANTITRUST DIVISION
555 4TH STREET N W RM 9104
WASHINGTON DC 20001 US

LOUIS P WARCHOT
ASSOCIATION OF AMERICAN RAILROADS
50 F STREET NW
WASHINGTON DC 20001 US

RICHARD G SLATTERY
AMTRAK
60 MASSACHUSETTS AVENUE N E
WASHINGTON DC 20002 US

DONALD F GRIFFIN
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
10 G STREET NE STE 460
WASH DC 20002 US

JOSEPH GUERRIERI, JR.
GUERRIERI, EDMOND, ET. AL
1331 F STREET N W, 4TH FLOOR
WASHINGTON DC 20004 US

MARK SCHECTER
HOWREY & SIMON
1299 PENNSYLVANIA AVE N W
WASHINGTON DC 20004 US

DAVID A ASHMORE
ARNOLD & PORTER
555 TWELFTH STREET NW
WASHINGTON DC 20004 US

ROBERT M. BRUSKIN, ESQ.
HOWREY & SIMON
1299 PENNSYLVANIA AVE NW
WASHINGTON DC 20004 US

DEBRA L. WILLEN
GUERRIERI, EDMOND & CLAYMAN PC
1331 F STREET N W, 4TH FLOOR
WASHINGTON DC 20004 US

GEORGE W MAYO JR
HOGAN & HARTSON L.L.P.
555 THIRTEENTH STREET NW
WASHINGTON DC 20004-1109 US

ERIC VON SALZEN
HOGAN & HARTSON
555 THIRTEENTH STREET N W
WASHINGTON DC 20004-1161 US

ROSEMARY H. MCENERY
HOWREY & SIMON
1299 PENNSYLVANIA AVE N W
WASHINGTON DC 20004-2402 US

MARK L JOSEPHS
HOWREY & SIMON
1299 PENNSYLVANIA AVE N W
WASHINGTON DC 20004-2402 US

CHARLES W. LINDERMAN
701 PENNSYLVANIA AVE NW, 5TH FLOOR
WASHINGTON DC 20004-2696 US

S WILLIAM LIVINGSTON JR
COVINGTON & BURLING
P O BOX 7566
1201 PENNSYLVANIA AVE NW
WASHINGTON DC 20004-7566 US

RICHARD H. STREETER
BARNES & THORNBURG
1401 I STREET NW SUITE 500
WASHINGTON DC 20005 US

MICHAEL MATTIA
INSTITUTE OF SCRAP RECYCLING INDUSTRIES, INC.
1325 G STREET NW STE 1000
WASHINGTON DC 20005 US

PAUL C. OAKLEY
WEINER, BRODSKY, SIDMAN & KIDER
1350 NEW YORK AVENUE NW SUITE 800
WASHINGTON DC 20005 US

EDWARD WYTKIND, EXECUTIVE DIRECTOR
LARRY J WILLIS ESQ TRANSP TRADES DEPT AFLCI
1000 VERMONT AVENUE, NW STE 900
WASHINGTON DC 20005 US

WILLIAM A. MULLINS
TROUTMAN SANDERS LLP
1300 I STREET NW SUITE 500 EAST
WASHINGTON DC 20005-3314 US

JOHN R. MOLM
TROUTMAN SANDERS LLP
1300 I STREET, N. W., SUITE 500 EAST
WASHINGTON DC 20005-3314 US

FRITZ R KAHN
1100 NEW YORK AVENUE NW SUITE 750 WEST
WASHINGTON DC 20005-3934 US

JEFFREY O. MORENO
DONELAN CLEARY WOOD MASER
1100 NEW YORK AVENUE N W, SUITE 750
WASHINGTON DC 20005-3934 US

NICHOLAS J. DIMICHAEL
DONELAN, CLEARY, WOOD & MASER, PC
1100 NEW YORK AVENUE N W STE 750
WASHINGTON DC 20005-3934 US

THOMAS W. WILCOX
DONELAN, CLEARY,WOOD & MASER , P.C.
1100 NEW YORK AVENUE, NW., STE. 200
WASHINGTON DC 20005-3934 US

JOHN K MASER III
DONELAN,CLEARY,WOOD,MASER
1100 NEW YORK AVE NW SUITE 750
WASHINGTON DC 20005-3934 US

JO A DEROCHE
WEINER, BRODSKY, ET AL
1350 NEW YORK AVE NW SUITE 800
WASHINGTON DC 20005-4797 US

ANDREW P. GOLDSTEIN
MCCARTHY, SWEENEY ET AL.
1750 PENNSYLVANIA AVE NW
WASHINGTON DC 20006 US

MONICA J. PALKO
BRACEWELL & PATTERSON
2000 K STREET NW STE 500
WASHINGTON DC 20006 US

ANNE D. SMITH
WHITE & CASE
1747 PENNSYLVANIA AVENUE N W
WASHINGTON DC 20006 US

KATHRYN KUSSKE
MAYER, BROWN & PLATT
2000 PENNSYLVANIA AVE N W SUITE 6500
WASHINGTON DC 20006 US

ROY T. ENGLERT, JR
MAYER, BROWN & PLATT
2000 PENNSYLVANIA AVE N W SUITE 6500
WASHINGTON DC 20006 US

LAURENCE R. LATOURETTE
PRESTON GATES ELLIS ETAL
1735 NY AVE NW SUITE 500
WASHINGTON DC 20006 US

ADRIAN L. STEEL, JR.
MAYER, BROWN & PLATT
2000 PENNSYLVANIA AVE N W SUITE 6500
WASHINGTON DC 20006 US

KRISTA L. EDWARDS
SIDLEY & AUSTIN
1722 EYE STREET N W
WASHINGTON DC 20006 US

TERRY L. CLAASSEN
CORN REFINERS ASSOC, INC.
1701 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20006 US

ANDREW R. PLUMP
ZUCKERT, SCOUTT & RASENBERGER. LLP
888 17TH ST., NW, STE. 600
WASHINGTON DC 20006 US

JAMIE PALTER RENNERT
HOPKINS & SUTTER
888 SIXTEENTH STREET NW
WASHINGTON DC 20006 US

JANICE G BARBER
MAYER BROWN & PLATT
2000 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20006 US

ROBERT P. VOM EIGEN
HOPKINS AND SUTTER
888 16TH STREET N W STE 700
WASHINGTON DC 20006 US

ALBERT B KRACHMAN
BRACEWELL & PATTERSON LLP
2000 K ST NW STE 500
WASHINGTON DC 20006-1872 US

ERIKA Z JONES
MAYER BROWN & PLATT
2000 PA AV NW
WASH DC 20006-1882 US

JAMES A CALDERWOOD
ZUCKERT, SCOUTT & RASENBERGER, L.L. P.
888 17TH STREET NW, SUITE 600
WASHINGTON DC 20006-3939 US

JENNIFER P OAKLEY
ZUCKERT, SCOUTT & RASENBERGER
888 SEVENTEENTH ST NW, STE 600
WASH DC 20006-3939 US

RICHARD A. ALLEN
ZUCKERT, SCOUT, RASENBERGER
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

JOHN V. EDWARDS, ESQ
ZUCKERT, SCOUTT ET AL.
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

ALICIA M SERFATY
HOPKINS & SUTTER
888 - 16TH STREET NW
WASHINGTON DC 20006-4103 US

CHARLES A SPITULNIK
HOPKINS & SUTTER
888 SIXTEENTH ST NW
WASH DC 20006-4103 US

STEVEN J. KALISH
MCARTHY, SWEENEY & HARKAWAY
1750 PENNSYLVANIA AVE NW
WASHINGTON DC 20006-4502 US

TERENCE M. HYNES
SIDLEY & AUSTIN
1722 EYE STREET NW
WASHINGTON DC 20006-5304 US

ANTHONY J MCMAHON
BASATIANELLI, BROWN ETAL
2828 PA AVE NW STE 203
WASHINGTON DC 20007 US

JAMES F RILL
COLLIER SHANNON RILL & SCOTT
3050 K STREET NW SUITE 400
WASHINGTON DC 20007 US

VIRGINIA R METALLO
3050 K ST NW SUITE 400
WASHINGTON DC 20007 US

EDWARD D. GREENBERG
GALLAND KHARASCH & GARFINKLE P C
1054 THIRTY-FIRST STREET NW
WASHINGTON DC 20007-4492 US

CHARLES H. WHITE, JR.
GALLAND, KHARASCH & GARFINKLE, P. C.
1054 THIRTY-FIRST STREET NW
WASHINGTON DC 20007-4492 US

MICHAEL F MCBRIDE
LEBOEUF LAMB GREENE & MACRAE
1875 CONNECTICUT AVENUE NW
WASHINGTON DC 20009 US

DANIEL ARONOWITZ
LEBOUEF, LAMB, GREENE
1875 CONNECTICUT AVE NWSTE 1200
WASHINGTON DC 20009-5728 US

LINDA K. BREGGIN, ESQ.
LEBOEUF, LAMB, GREENE, ET AL
1875 CONNECTICUT AVENUE N W
WASHINGTON DC 20009-5728 US

PAUL M. DONOVAN
LAROE, WINN, ETAL
3506 IDAHO AVE NW
WASHINGTON DC 20016 US

JOHN D. HEFFNER, ESQ.
REA, CROSS & AUCHINCLOSS
1920 N STREET NW SUITE 420
WASHINGTON DC 20036 US

KEITH G. O'BRIEN
REA, CROSS & AUCHINCLOSS
1920 N STREET N W - SUITE 420
WASHINGTON DC 20036 US

JOHN M. CUTLER, JR.
MCCARTHY SWEENEY HARKAWAY
1750 PENNSYLVANIA AVE N W SUITE 1105
WASHINGTON DC 20036 US

MARC J. FINK
SHER & BLACKWELL
1850 M STREET NW STE 900
WASHINGTON DC 20036 US

GERALD P. NORTON
HARKINS CUNNINGHAM
1300 NINETEENTH STREET, NW STE. 600
WASHINGTON DC 20036 US

C MICHAEL LOFTUS
SLOVER & LOFTUS
1224 SEVENTEENTH STREET N W
WASHINGTON DC 20036 US

PATRICIA E. (DIETRICH) KOLESAR
SLOVER & LOFTUS
1224 SEVENTEENTH ST NW
WASH DC 20036 US

SUSAN B GERSON
GRAHAM & JAMES, LLP
2000 M STREET NW STE 700
WASHINGTON DC 20036 US

CHRISTOPHER A. MILLS
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036 US

ROBERT A. WIMBISH, ESQ.
REA, CROSS & AUCHINCLOSS
1920 N STREET NW SUITE 420
WASHINGTON DC 20036 US

THOMAS LAWRENCE III
OPPENHEIMER WOLFF, ETC
1020 - 19TH STREET NW STE 400
WASHINGTON DC 20036 US

FRANK J. PERGOLIZZI
SLOVER & LOFTUS
1224 SEVENTEENTH ST NW
WASHINGTON DC 20036 US

RICHARD S. EDELMAN
HIGHSAW MAHONEY CLARKE
1050 SEVENTEENTH STREET N W, SUITE 210
WASHINGTON DC 20036 US

KELVIN J. DOWD
SLOVER & LOFTUS
1224 17TH STREET N W
WASHINGTON DC 20036 US

PAUL CUNNINGHAM
HARKINS CUNNINGHAM
1300 NINETEENTH STREET, NW STE. 600
WASHINGTON DC 20036 US

RICHARD B HERZOG
HARKINS CUNNINGHAM
1300 19TH ST NW SUITE 600
WASHINGTON DC 20036-1609 US

JAMES M. GUINIVAN
HARKINS CUNNINGHAM
1300 19TH ST NW SUITE 600
WASHINGTON DC 20036-1609 US

MARC D. MACHLIN
PEPPER, HAMILTON, ET AL
1300 19TH STREET N W
WASHINGTON DC 20036-1658 US

MICHELLE J. MORRIS
PEPPER, HAMILTON, ETAL
1300 NINETEENTH ST NW
WASHINGTON DC 20036-1685 US

SAMUEL M. SIPE, JR.
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

JOHN H. LESEUR
SLOVER & LOFTUS
1224 17TH STREET NW
WASHINGTON DC 20036-3081 US

KEVIN M SHEYS
OPPENHEIMER WOLFF & DONNELLY
1020 NINETEENTH STREET N W SUITE 400
WASHINGTON DC 20036-6105 US

SCOTT N. STONE
PATTON BOGGS L.L.P.
2550 M STREET NW 7TH FLOOR
WASHINGTON DC 20037-1346 US

MICHAEL BRESSMAN
WILMER CUTLER PICKERING
2445 M STREET N W
WASHINGTON DC 20037-1420 US

WILLIAM J KOLASKY JR
WILMER CUTLER & PICKERING
2445 M STREET NW
WASH DC 20037-1420 US

WILLIAM G. MAHONEY
HIGHSAW, MAHONEY & CLARKE
1050 SEVENTEENTH STREET NW SUITE 210
WASHINGTON DC 20036 US

GORDON P. MACDOUGALL
1025 CONNECTICUT AVE NW SUITE 410
WASHINGTON DC 20036 US

JOEL A RABINOVITZ
HARKINS CUNNINGHAM
1300 19TH STREET NW SUITE 600
WASHINGTON DC 20036-1609 US

JOSEPH L LAKSHMANAN
1300 19TH STREET NW, SUITE 600
WASHINGTON DC 20036-1609 US

JOHN WILL ONGMAN
PEPPER HAMILTON SCHEETZ
1300 NINETEENTH STREET N W
WASHINGTON DC 20036-1685 US

TIMOTHY M WALSH
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

BETTY JO CHRISTIAN
STEPTOE & JOHNSON
1330 CONNECTICUT AVE NW
WASHINGTON DC 20036-1795 US

PAUL H. LAMBOLEY
1020 NINETEENTH STREET, N.W., STE 400
WASHINGTON DC 20036-6105 US

A STEPHEN HUT JR
WILMER CUTLER & PICKERING
2445 M ST NW
WASHINGTON DC 20037 US

DANIEL K. MAYERS
WILMER CUTLER PICKERING
2445 M STREET N W
WASHINGTON DC 20037-1420 US

ALI M. STOEPPELWERTH
WILMER CUTLER PICKERING
2445 M STREET N W
WASHINGTON DC 20037-1420 US

DAVID H. BAKER
HOLLAND & KNIGHT
2100 PENN AVE NW ST 400
WASHINGTON DC 20037-3202 US

TIMOTHY C HESTER
P O BOX 7566
1201 PENNSYLVANIA AVENUE N W
WASHINGTON DC 20044 US

J MICHAEL HEMMER
COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20044 US

DAVID L. MEYER
COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE N W
WASHINGTON DC 20044-7566 US

ARVID E ROACH II
COVINGTON & BURLING
PO BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044-7566 US

MICHAEL A. LISTGARTEN
COVINGTON & BURLING
P O BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044-7566 US

MICHAEL ROSENTHAL
COVINGTON & BURLING
P O BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044 7566 US

EILEEN S. STOMMES, DIRECTOR, T&M DIVISION
AGRICULTURAL MARKETING SERVICE, USDA
P. O. BOX 96456
WASHINGTON DC 20090-6456 US

ELAINE KAISER
SURFACE TRANSPORTATION BOARD
1925 K STREET NW
WASH DC 20423 US

HON. JEROME NELSON
FERC (LJ-2)
888 1ST STREET N E
WASHINGTON DC 20426 US

RICHARD SANDERSON
OFFICE OF FED ACTIV
US ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON DC 20460 US

HON JOHN GLENN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE THAD COCHRAN
UNITED STATE SENATE
WASHINGTON DC 20510 US

HON. DAN COATS
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE J. ROBERT KERRY
UNITED STATES SENATE
WASH DC 20510 US

HON CONRAD BURNS
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE TIM JOHNSON
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE DON NICKLES
U. S. SENATE
WASHINGTON DC 20510 US

HON. WAYNE ALLARD
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. PHIL GRAMM
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE RICHARD LUGAR
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE RICHARD BRYAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE BYRON L DORGAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. CHRISTOPHER S. BOND
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE PAT ROBERTS
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE HARRY REID
UNITED STATES SENATE
WASHINGTON DC 20510-0001 US

HON. BEN N CAMPBELL
UNITED STATES SENATE
WASHINGTON DC 20510-0605 US

HONORABLE RICHARD J DURBIN
UNITED STATES SENATE
WASHINGTON DC 20510-1304 US

HONORABLE CHARLES E. GRASSLEY
UNITED STATES SENATE
WASHINGTON DC 20510-1501 US

HONORABLE JOHN BREAUX
UNITED STATES SENATE
WASHINGTON DC 20510-1803 US

HARRY REID
UNITED STATES SENATE
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20510-2804 US

HON. TOM EWING
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ROBERT A. BORSKI
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE FRANK MASCARA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JOHN MURTHA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MARCY KAPTUR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JAMES TRAFICANT JR
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LLOYD DOGGETT
U. S. HOUSE OF REPRESENTATAIVES
WASHINGTON DC 20515 US

HON DAVID L HOBSON
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JOHN TANNER
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RON LEWIS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DAVID MINGE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JOHN HOSTETTLER
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON TOM DELAY
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PAUL MCHALE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TIM HOLDEN
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE MIKE DOYLE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE FRANK D. RIGGS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE CHARLES W. STENHOLM
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE ZOE LOFGREN
US HOUSE OF RESPRESENTATIVE
WASHINGTON DC 20515 US

HONORABLE XAVIER BECERRA
US HOUSE OF REPRESENTATIVES
WASHINGTOM DC 20515 US

HONORABLE LUCILLE ROYAL-ALLARD
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LYNN WOOLSEY
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PETE STARK
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE NANCY PELOSI
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TOM LANTOS
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RICHARD W. POMBO,
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE KEN CALVERT,
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE SONNY BONO,
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE CHRISTOPHER COX,
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RON PACKARD
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DANA ROHRABACHER
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE HOWARD P. BUCK MCKEON,
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BRIAN P. BILBRAY
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE EDWARD R. ROYCE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE KAREN MCCARTHY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JAY KIM
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PHIL ENGLISH
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JULIAN DIXON
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JAY DICKEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. EARL POMEROY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE GEORGE GEKAS
ATTEN: TOM SANTANIELLO
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. HAROLD E. FORD, JR
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DONALD M. PAYNE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. PAUL KANJORSKI
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. MARTIN OLAV SABO
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. LANE EVANS
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JOE BARTON
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BOB CLEMENT
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ESTEBAN E TORRES
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. THOMAS C SAWYER
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE WALLY HERGER
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE GENE GREEN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. IKE SKELTON
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JAMES L. OBERSTAR
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. HENRY B. GONZALEZ
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JERRY LEWIS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE GEORGE E. BROWN, JR.
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. MICHAEL OXLEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RONALD V. DELLUMS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RON PACKARD
U. S. HOUSE OF REPRESENTATIVES
WASH DC 20515-0548 US

HONORABLE SCOTT MCINNIS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-0603 US

HONORABLE TODD TIAHRT
HOUSE OF REPRESENTATIVE
WASHINGTON DC 20515-1004 US

HONORABLE SAM BROWNBACK
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-1602 US

HON. JIM MCCRERY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-1805 US

HONORABLE GEORGE MILLER
ATT: GARY BLAND
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2307 US

HON W J (BILLY) TAUZIN
ATTN: ROY WILLIS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2601 US

HONORABLE JOHN ENSIGN
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2801 US

HON. ROBERT E ANDREWS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3001 US

HONORABLE SHERROD BROWN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3513 US

HON. FRANK D. LUCAS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3606 US

HONORABLE THOMAS M. FOGLIETTA
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3801 US

HONORABLE CHAKA FATTAH
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3803 US

HONORABLE CURT WELDON
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3807 US

HON. JON CHRISTENSEN
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4155 US

HONORABLE WILLIAM M (MAC) THORNBERRY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4313 US

HONORABLE SHEILA JACKSON LEE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4318 US

HON. HENRY BONILLA
US HOUSE REPRESENTATIVES
WASHINGTON DC 20515-4323 US

HONORABLE EDDIE BERNICE JOHNSON
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4330 US

ROGER W. FONES
US DEPT. OF JUSTICE
325 7TH STREET N W SUITE 500
WASHINGTON DC 20530 US

MICHAEL D BILLIEL
ANTITRUST DIV, DEPT OF JUSTICE
325 SEVENTH ST NW STE 500
WASHINGTON DC 20530 US

PAUL SAMUEL SMITH
US DEPARTMENT OF TRANSPORTATION
400 SEVENTH STREET SW
WASHINGTON DC 20590 US

JOSEPH R. POMPONIO
FEDERAL RAILROAD ADMIN.
400 7TH ST SW RCC-20
WASHINGTON DC 20590 US

MITCHELL M. KRAUS
TRANSPORTATION -COMMUNICATIONS INTERNATIONAL
3 RESEARCH PLACE
ROCKVILLE MD 20850 US

WILLIAM W WHITEHURST JR.
W. W. WHITEHURST & ASSOCIATES, INC.
12421 HAPPY HOLLOW ROAD
COCKEYSVILLE MD 21030 US

CONSTANCE H. PIERCE
CONSTELLATION COMPANIES
250 WEST PRATT STREET
BALTIMORE MD 21201-2423 US

J TUCKER
PO BOX 25181
ARLINGTON VA 22202 US

PETER Q. NYCE, JR.
U. S. DEPARTMENT OF THE ARMY
901 NORTH STUART STREET
ARLINGTON VA 22203 US

NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
1700 NORTH MOORE STREET, SUITE 1900
ARLINGTON VA 22209 US

THOMAS E. SCHICK
CHEMICAL MANUF. ASSOC.
1300 WILSON BOULEVARD
ARLINGTON VA 22209 US

WILLIAM P. JACKSON, JR.
JACKSON & JESSUP, P. C.
P O BOX 1240
3426 NORTH WASHINGTON BLVD
ARLINGTON VA 22210 US

GERALD W. FAUTH, III
G. W. FAUTH & ASSOCIATES INC.
116 SOUTH ROYAL STREET
ALEXANDRIA VA 22314 US

JOHN T ESTES
1029 NORTH ROYAL STREET SUITE 400
ALEXANDRIA VA 22314 US

PETER J SHUDTZ
CSX CORPORATION
902 E CARY ST 1 JAMES CENTER
RICHMOND VA 23119 US

ROBERT J. COONEY
NORFOLK SOUTHERN CORP.
THREE COMMERCIAL PLACE
NORFOLK VA 23510-2191 US

ROBERT S. KOMPANTY
720 THIMBLE SHOALS BLVD, SUITE 130
NEWPORT NEWS VA 23608-2574 US

BOB THOMPSON
GEORGIA-PACIFIC CORP.
P O BOX 105605
ATLANTA GA 30348-5605 US

GREGORY M. VINCENT, VICE PRESIDENT
TENNESSEE VALLEY AUTH
LOOKOUT PLACE 1101 MARKET STREET
CHATTANOOGA TN 37402 US

E. CALVIN CASSELL
EASTMAN CHEMICAL COMPANY
P O BOX 1990
KINGSPORT TN 37662 US

EDWARD S. CHRISTENBURY
400 WEST SUMMIT HILL DRIVE
KNOXVILLE TN 37902 US

HONORABLE GILLESPIE V. MONTGOMERY
U. S. HOUSE OF REPRESENTATIVES
P. O. BOX 5618
MERIDAN MS 39208 US

R. L. YOUNG
P O BOX 700
ONE MEMORIAL DRIVE
LANCASTER OH 43130-0700 US

D. MICHAEL MILLER
AMERICAN ELECTRIC POWER
1 RIVERSIDE PLAZA
COLUMBUS OH 43215 US

HONORABLE JOHN GLENN
U. S. SENATE ATTN: ANISA BELL
200 N HIGH STREET S-600
COLUMBUS OH 43215-2408 US

MICHAEL M. BRILEY
SHUMAKER, LOOP & KENDRICK
N COURTHOUSE SQUARE - 1000 JACKSON
TOLEDO OH 43624 US

DANIEL R ELLIOTT III
UNITED TRANSPORTATION UNION
14600 DETROIT AVENUE
CLEVELAND OH 44107 US

CLINTON J MILLER, III, GENERAL COUNSEL
UNITED TRANSPORTATION UNION
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

RONALD P MCLAUGHLIN
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
1370 ONTARIO ST STAN BLDG
CLEVELAND OH 44113-1702 US

RICHARD E. KERTH, TRANS. MGR.
CHAMPION INTERNAT'L CORP
101 KNIGHTSBRIDGE DRIVE
HAMILTON OH 45020-0001 US

MICHAEL P. FERRO
MILLENNIUM PETROCHEMICALS, INC.
11500 NORTHLAKE DRIVE
CINCINNATI OH 45249 US

BRUCE A. KLIMEK
INLAND STEEL
3210 WATLING STREET
EAST CHICAGO IN 46312 US

HON JEFF SMITH
CITY OF KENDALLVILLE
234 S MAIN STREET
KENDALLVILLE IN 46755-1795 US

JAMES E. HANSON
DOW CHEMICAL COMPANY
2020 WILLARD H DOW CENTER
MIDLAND MI 48674 US

LARRY B. KARNES
TRANSPORTATION BUILDING
PO BOX 30050
425 WEST OTTAWA
LANSING MI 48909 US

THOMAS F JACKSON
800 LINCOLN WAY
AMES IA 50010 US

P C HENDRICKS
STATE LEGISLATIVE DIRECTOR UTU
313 E 5TH STREET
DES MOINES IA 50309 US

HONORABLE CHARLES E. GRASSLEY
UNITED STATES SENATE
210 WALNUT STREET
DES MOINES IA 50309-2140 US

EDWIN C JERTSON
INTERSTATE POWER CO
P O BOX 769
1000 MAIN STREET
DUBUQUE IA 52004 US

KENT M RAGSDALE
INTERSTATE POWER CO
PO BOX 769
DUBUQUE IA 52004 US

PHILIP D. WARD, ET AL.
P O BOX 351
200 FIRST STREET SE
CEDAR RAPIDS IA 52406-0351 US

TOBIN LEE BRITT
IES UTILITIES, INC.
P O BOX 351
200 FIRST ST SE
CEDAR RAPIDS IA 52406-0351 US

WILLIAM R. KNIGHT
WISCONSIN POWER & LIGHT
P O BOX 192
222 WEST WASHINGTON AVENUE
MADISON WI 53701-0192 US

ALLEN J VOGEL,
MINNESOTA DEPARTMENT OF TRANSPORTATION
395 JOHN IRELAND BLVD TRANSP BLDG, SUITE 925,
ST PAUL MN 55155 US

RONALD E HUNTER, LAW DEPARTMENT
CARGILL, INCORPORATED
15407 MCGINTY ROAD WEST
WAYZATA MN 55391 US

WAYNE C. SERKLAND, U S REGIONAL COUNSEL
CANADIAN PACIFIC LEG. SER
105 SOUTH FIFTH ST SUITE 1000
MINNEAPOLIS MN 55402 US

DOUGLAS M. HEAD
WEINER
120 SOUTH 6TH STREET STE 2400
MINNEAPOLIS MN 55402 US

BOB ZELENKA
852 GRAIN EXCHANGE, 400 SOUTH FOURTH STREET
MINNEAPOLIS MN 55415 US

HON. WILLIAM J. JANKLOW
GOVERNOR, SD
500 EAST CAPITOL
PIERRE SD 57501-5070 US

TERRY C. WHITESIDE
RADERMACHER, WHITESIDE & ASSOCIATES
3203 3RD AVE N STE 301
BILLINGS MT 59101 US

HONORABLE MARC RACICOT
GOV'S OFFICE, STATE CAP.
P O BOX 200801
HELENA MT 59620-0801 US

J. FRED SIMPSON, EXECUTIVE VICE PRESIDENT
MONTANA RAIL LINK, INC.
101 INTERNATIONAL WAY
MISSOULA MT 59802 US

JANET H GILBERT
WISCONSIN CENTRAL LTD
6250 NORTH RIVER ROAD STE 9000
ROSEMONT IL 60018 US

RICHARD E. WEICHER
BURLINGTON NORTHERN SANTA FE CORPORATION
1700 EAST GOLF ROAD, 6TH FLOOR
SCHAUMBURG IL 60173 US

JEFFREY [illegible]. MORELAND
THE BURLINGTON NORTHERN SANTA FE CORPORATION
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173 US

JAMES A. SMALL
COMMONWEALTH EDISON CO.
1411 OPUS PL STE 200
DOWNERS GROVE IL 60515-5701 US

WILLIAM F. COTTRELL
ASST. ATTORNEY GENERAL
100 W RANDOLPH ST - 12TH FLOOR
CHICAGO IL 60601 US

WILLIAM C SIPPEL
OPPENHEIMER WOLFF & DONNELLY
180 N STETSON AVE TWO PRUDENTIAL PLAZA 45TH F
CHICAGO IL 60601 US

THOMAS J. LITWILER
OPPENHEIMER WOLFF & DONNELLY
180 N STETSON AVE 45TH FLOOR
CHICAGO IL 60601 US

THOMAS J HEALEY
OPPENHEIMER, WOLFF, ETAL
180 N STETSON AV 2 PRUDENTIAL PL
CHICAGO IL 60601 US

CHRISTINE H. ROSSO
IL ASSISTANT ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FLOOR
CHICAGO IL 60601 US

RODMAN KOBER
CONTINENTAL GRAIN CO
222 S RIVERSIDE PLAZA - STE 1100
CHICAGO IL 60606 US

THOMAS DEGNAN
UNITED STATES GYPSUM CO
125 SOUTH FRANKLIN STREET
CHICAGO IL 60606 US

STEPHEN C. HERMAN
MCFARLAND & HERMAN
20 N WACKER DRIVE STE 1330
CHICAGO IL 60606-2902 US

THOMAS F. MCFARLAND, JR.
MCFARLAND & HERMAN
20 NORTH WACKER DRIVE, SUITE 1330
CHICAGO IL 60606-3101 US

RONALD A. LANE
ILLINOIS CENTRAL RR
455 N CITYFRONT PLAZA DR 20TH FL
CHICAGO IL 60611 US

MYLES L. TOBIN
ILLINOIS CENTRAL RAILROAD
455 NORTH CITYFRONT PLAZA DRIVE
CHICAGO IL 60611-5504 US

GARY L TOWELL
TOLEDO, PEORIA & WESTERN
1990 EAST WASHINGTON STREET
EAST PEORIA IL 61611-2961 US

CLARENCE R. PONSLER
GENERAL CHAIRMAN, UTU
1017 W. MAIN STREET
BELLEVILLE IL 62220 US

SCOTT A RONEY
ARCHER DANIELS MIDLAND COMPANY
P O BOX 1470
4666 FARIES PARKWAY
DECATUR IL 62525 US

JON FOY, DIRECTOR, RATES GRAIN
ARCHER DANIEL MIDLAND CO
P. O. BOX 1470
4666 FARIES PARKWAY
DECATUR IL 62525 US

CAROL R DORIS
500 SOUTH SECOND STREET
SPRINGFIELD IL 62706 US

KIRK BROWN
ILLINOIS DOT, OFFICE OF THE SECRETARY
2300 SOUTH DIRKSEN PARKWAY
SPRINGFIELD IL 62764 US

ROGER HERMANN
MALLINCKRODT CHEMICAL
16305 SWINGLEY RIDGE DRIVE
CHESTERFIELD MO 63017-1777 US

JEFFREY L. KLINGER
PEABODY HOLDING COMPANY
701 MARKET STREET STE 700
ST LOUIS MO 63101-1826 US

C A MENNELL, PRESIDENT
LACKLAND WESTERN RR CO
31 OAK TERRACE
WEBSTER GROVES MO 63119 US

DAVID A. PINS
THE CHEMICAL GROUP, MONSANTO
800 N LINDBERGH BOULEVARD
ST LOUIS MO 63167 US

D E THOMPSON
GENERAL CHAIRMAN-BLE
414 MISSOURI BOULEVARD
SCOTT CITY MO 63780 US

HON IKE SKELTON
U. S. HOUSE OF REP.
514 B N W 7 HIGHWAY
BLUE SPRINGS MO 64014 US

ROBERT K DREILING
KANSAS CITY SOUTHERN RWY CO.
114 WEST 11TH STREET
KANSAS CITY MO 64105 US

RICHARD P BRUENING
KANSAS CITY SOUTHERN RR
114 WEST ELEVENTH STREET
KANSAS CITY MO 64106 US

MEL CARNAHAN
OFFICE OF THE GOVERNOR
STATE CAPITOL ROOM 216
JEFFERSON CITY MO 65101 US

JACK HYNES, ADMINISTRATOR OF RAILROADS
MISSOURI DEPARTMENT OF TRANSPORTATION
PO BOX 270
105 WEST CAPITOL AVENUE
JEFFERSON CITY MO 65102 US

JOSEPH A. STINGER
IBBB
570 NEW BROTHERHOOD BUILDING
KANSAS CITY KS 66101 US

WILLIAM J. MCGINN
NORTH AMER. CHEM. CO.
8300 COLLEGE BOULEVARD
OVERLAND PARK KS 66210 US

BARRETT HATCHES
8300 COLLEGE BLVD
OVERLAND PARK KS 66210 US

T. L. GREEN
WESTERN RESOURCES, INC.
PO BOX 889
818 KANSAS AVE
TOPEKA KS 66601 US

JOHN JAY ROSACKER
KS, DEPT OF TRANSP
217 SE 4TH ST 2ND FLOOR
TOPEKA KS 66603 US

NORMAN G MANLEY
CITY ATTORNEY, ANOVER CITY HALL
909 NORTH ANDOVER ROAD
ANDOVER KS 67002 US

TIM NORTON
CITY OF HAYSVILLE
PO BOX
200 WEST GRAND
HAYSVILLE KS 67060 US

DWAYNE H SHANNON
PO BOX 1138
WICHITA KS 67201 US

ALAN R. POST
1803 STEFKIN STREET
WICHITA KS 67208-1758 US

JAMES J. IRLANDI
STB PRACTITIONER
1809 N BROADWAY/SUITE F
WICHITA KS 67214 US

JUNIOR STRECKER, CHAIRMAN
MOUNTAIN-PLAINS COMMUNITIES & SHIPPERS COALIT
123 NORTH MAIN ST
HOISINGTON KS 67544 US

ROBERT K. GLYNN
HOISINGTON CHAM. OF COMM.
123 NORTH MAIN STREET
HOISINGTON KS 67544-2594 US

JOHN F. LARKIN
P O BOX 31850
4814 DOUGLAS ST 68132
OMAHA NE 68132-0850 US

PAUL A. CONLEY, JR. ,LAW DEPARTMENT
UNION PACIFIC RR CO.
1416 DODGE STREET
OMAHA NE 68179 US

LOUISE A. RINN
UNION PACIFIC RR CO.
1416 DODGE STREET ROOM 830
OMAHA NE 68179 US

JEANNA L REGIER
UNION PACIFIC RAILROAD COMPANY
1416 DODGE ST ROOM 830
OMAHA NE 68179 US

JAMES V. DOLAN, LAW DEPARTMENT
UNION PACIFIC RR CO.
1416 DODGE STREET #830
OMAHA NE 68179 US

JOSEPH D. ANTHOFER
UNION PACIFIC RR CO.
1416 DODGE STREET ROOM 830
OMAHA NE 68179-0001 US

ROBERT T. OPAL
UNION PACIFIC RAILROAD CO.
1416 DODGE STRFET RM 830
OMAHA NE 68179-0001 US

KEN SIECKMEYER, MGR. TRANSP. PLANN. DIV.
NEBRASKA DEPT. OF ROADS
P O BOX 94759
LINCOLN NE 68509-4759 US

WAYNE ANDERSON
ENTERGY SERVICES, INC.
639 LOYOLA AVE MAIL L-ENT-26E
NEW ORLEANS LA 70113 US

W. F. CARTER
ALBEMARLE CORPORATION
451 FLORIDA STREET
BATON ROUGE LA 70801 US

DEAN L. WORLEY
HILBURN CALHOON HARPER
P O BOX 5551
ONE RIVERFRONT PLACE EIGHTH FL
NORTH LITTLE ROCK AR 72119 US

SCOTT MANATT
P. O. BOX 473
CORNING AR 72422 US

JOE N. HAMPTON
2309 NORTH TENTH, SUITE E
ENID OK 73701 US

THOMAS R. JACOBSEN
TU ELECTRIC
1601 BRYAN STREET STE 11-060
DALLAS TX 75201-3411 US

JOEL T WILLIAMS III
STE 350, LB-126
4809 COLE AVENUE
DALLAS TX 75205 US

STEVEN A BRIGANCE
LEBOEUF, LAMB, ETAL
4025 WOODLAND PARK BLVD STE 250
ARLINGTON TX 76013 US

EDMUND W. BURKE
BURLINGTON NORTHERN RR CO
777 MAIN STREET, 3800 CONTINENTAL PLAZA
FT WORTH TX 76102 US

DOUGLAS J. BABB
BURLINGTON NORTHERN RR CO
777 MAIN STREET, 3800 CONTINENTAL PLAZA
FT WORTH TX 76102-5384 US

MICHAEL E ROPER
BURLINGTON NORTHERN SANTA FE CORPORATION
3017 LOU MENK DRIVE
FT WORTH TX 76131 US

RICHARD J SCHIEFELBEIN
WOODHARBOR ASSOCIATES
7801 WOODHARBOR DRIVE
FORT WORTH TX 76179 US

W. DAVID TIDHOLM
HUTCHESEN & GRUNDY
1200 SMITH STREET (#3300)
HOUSTON TX 77002-4579 US

GEN. COMMITTEE OF ADJUST. GO-895
UNITED TRANS. UNION
2040 NORTH LOOP WEST STE 310
HOUSTON TX 77018 US

ROBERT J. ROSSI
UNITED TRANSPORTATION UNION
2040 NORTH LOOP WEST SUITE 310
HOUSTON TX 77018-8112 US

GEORGE T. WILLIAMSON
P O BOX 2562
111 E LOOP N
HOUSTON TX 77029 US

JOHN D. BURKE
GREATER HOUSTON PORT BUREAU, INC
111 EAST LOOP NORTH
HOUSTON TX 77029 US

B KENNETH TOWSEND JR
EXXON CHEMICAL CO
13501 KATY FREEWAY
HOUSTON TX 77079-1398 US

B. C. GRAVES, JR.
EXXON COMPANY U.S.A.
PO BOX 4692
HOUSTON TX 77210-4692 US

BRIAN P. FELKER
SHELL CHEMICAL COMPANY
P O BOX 2463
HOUSTON TX 77252-2463 US

ERIC W. TIBBETTS
P O BOX 3766
1301 MCKINNEY ST
HOUSTON TX 77253 US

ROY GIANGROSSO
ENTERGY SERVICES, INC.
350 PINE STREET
BEAUMONT TX 77701 US

TEXAS MEXICAN RAILWAY CO.
PO BOX 419
LAREDO TX 78042-0419 US

JOHN P. LARUE, EXECUTIVE DIRECTOR
THE PORT OF CORPUS CHRISTI
P O BOX 1541
222 POWER STREET
CORPUS CHRISTI TX 78403 US

THOMAS A GRIEBEL
TEXAS DOT
125 E 11TH ST
AUSTIN TX 78701 US

JERRY L. MARTIN, DIRECTOR RAIL DIV.
RR COMM OF TEXAS
P O BOX 12967
1701 N CONGRESS
AUSTIN TX 78711 US

MARK TOBEY
P O BOX 12548
AUSTIN TX 78711-2548 US

REBECCA FISHER
ASST ATTY GENERAL
PO BOX 12548
AUSTIN TX 78711-2548 US

DONALD T CHEATHAM
10220-E METROPOLITAN DR
AUSTIN TX 78758 US

HON. JOHN R. COOK,
TX HOUSE OF REPRESENTATIVES
P O BOX 2910
AUSTIN TX 78768 US

HON. ROBERT JUNELL
TEXAS HOUSE OF REP.
PO BOX 2910
AUSTIN TX 78768 US

ROBERT M. SAUNDERS
P O BOX 2910
AUSTIN TX 78768-2910 US

ROBERT A. CUSHING, JR.
UNITED TRANS. UNION,
12401 HIDDEN SUN COURT
EL PASO TX 79938 US

DARRELL L. HANAVAN, EXECUTIVE DIRECTOR
COLORADO WHEAT ADMIN.
5500 SOUTH QUEBEC STREET STE 111
ENGLEWOOD CO 80111 US

THOMAS F. LINN
MOUNTAIN COAL COMPANY
555 17TH STREET 22ND FLOOR
DENVER CO 80202 US

STEPHEN D ALFERS
ALFERS & CARVER
730 17TH STREET #340
DENVER CO 80202 US

RUSSELL S. JONES, III
MOUNTAIN COAL COMPANY
555 17TH STREET 22ND FLOOR
DENVER CO 80202 US

PATRICIA T. SMITH, SR. VICE PRESIDENT
PUBLIC SERVICE COMPANY
1225 - 17TH STREET STE 600
DENVER CO 80202 US

NANCY MANGONE, ENFORCEMENT ATTORNEY
U. S. EPA REGION VIII
999 18TH SST STE 500
DENVER CO 80202-2466 US

DAVID N. LAWSON, FUEL TRAFFIC COORDINATOR
PUBLIC SERVICE COMMISSION
1225 17TH ST STE 1100, SEVENTEENTH ST PLAZA
DENVER CO 80202-5533 US

JANE T. FELDMAN, ASST. ATTORNEY GENERAL
STATE OF COLORADO
1525 SHERMAN ST- 5TH FLOOR
DENVER CO 80203 US

HONORABLE ROY ROMER
GOVERNOR
136 STATE CAPITOL
DENVER CO 80203 US

HON. BEN N. CAMPBELL
UNITED STATES SENATE
1129 PENNSYLVANIA STREET
DENVER CO 80203 US

SUE BALLENSKI, PHYSICAL RESOURCES
USDA FOREST SERVICE
P O BOX 25127
LAKEWOOD CO 80225 US

GERALD E. VANINETTI
RESOURCE DATA INT'L
1320 PEARL STREET STE 300
BOULDER CO 80302 US

JOE D. FORRESTER
C/O CO MTN COLLEGE, TIMBERLINE CAMPUS
901 S HWY 24
LEADVILLE CO 80461 US

THOMAS J. FLORCZAK
CITY OF PUEBLO
127 THATCHER BUILDING
PUEBLO CO 81003 US

MAYOR LESTER WILLIAMS
TOWN OF EADS
PO BOX 8
110 W 13TH ST
EADS CO 81036 US

CARDON G. BERRY
KIOWA CO. COMMISSIONERS
PO BOX 591
1305 GOFF
EADS CO 81036 US

HON DELCARL EIKENBERG
TOWN OF HASWELL
P O BOX 206
HASWELL CO 81045-0206 US

JOHN R STULP
SECED
P O BOX 1600
LAMAR CO 81052 US

LEROY E. MAUCH
BOARD OF COUNTY COMMISSIONERS
P. O. BOX 1046
LAMAR CO 81052 US

CLEDE WIDENER
BOARD OF COUNTY COMMISSIONERS
P.. O. BOX 1046
LAMAR CO 81052 US

JOHN ROESCH
BENT COUNTY
PO BOX 350
LAS ANIMAS CO 81054 US

BLAINE ARBUTHNOT
CROWLEY COUNTY
601 MAIN ST
ORDWAY CO 81063 US

JANET PALMER
P O BOX 1268
13997 COUNTY ROAD 71
SHERIDAN LAKE CO 81071 US

BERNICE TUTTLE
KIOWA COUNTY WIFE, CHAPTER #124
13775 CR785
TOWNER CO 81071-9619 US

CHARLES WAIT
BACA COUNTY
PO BOX 116
SPRINGFIELD CO 81073 US

FRANK C MCMURRY
PO BOX 699
SALIDA CO 81201 US

THOMAS W. FOSTER, CHAIRMAN
COM. TO PRESERVE PROPERTY
P O BOX 681
SALIDA CO 81201 US

E W WOTIPKA
6388 TERRACE LANE
SALIDA CO 81201 US

HON. NANCY SANGER, MAYOR
CITY OF SALIDA
P O BOX 417
124 E STREET
SALIDA CO 81201 US

MYRON F. SMITH
FREMONT COUNTY COMM.
615 MACON AVE ROOM #102
CANON CITY CO 81212 US

GREG TABUTEAU
ROYAL GORGE SCENIC RY
P O BOX 1387
CANON CITY CO 81215 US

RUTH H. CARTER, MAYOR
CITY OF CANON CITY ATTN: STEVE THACKER CITY A
P O BOX 1460
CANON CITY CO 81215 US

JUDY LOHNES
UAACOG
P O BOX 510
CANON CITY CO 81215-0510 US

STEVEN G. RABE, CITY MANAGER
CITY OF FLORENCE
300 W MAIN STREET
FLORENCE CO 81226 US

STEVE TUCKER
D&RG WEST. EMPLOYEES
2043 J ROAD
FRUITA CO 81521 US

JAMES R. FRITZE
EAGLE COUNTY ATTORNEY
P O BOX 850
EAGLE CO 81631 US

GARY L. MCFARLEN,, DIRECTOR-TRANSP
KENNECOTT ENERGY COMPANY
BOX 3009
505 SOUTH GILLETTE AVENUE
GILLETTE WY 82716 US

PATRICIA BRITTON, CHIEF LEGAL OFFICER
KENNECOTT ENERGY COMPANY
505 SOUTH GILLETTE AVENUE
GILLETTE WY 82716 US

TIMM R. ADAMS
IDAHO BARLEY COMMISSION
1199 MAIN STREET, STE G
BOISE ID 83702-5630 US

JERRY R KRESS
ID, WHEAT COMMISSION
1109 MAIN ST STE 310
BOISE ID 83702-5642 US

ANN KNAPTON
IDAHO TIMBER CORPORATION
P O BOX 67
5401 KENDALL STREET
BOISE ID 83707-0067 US

WAYNE L. STOCKEBRAND
KENNECOTT UTAH COPP. CORP
P O BOX 6001
8315 WEST 3595 SOUTH
MAGNA UT 84044-6001 US

RAY D. GARDNER
KENNECOTT UTAH COPP. CORP
P O BOX 6001
8315 WEST 3595 SOUTH
MAGNA UT 84044-6001 US

ALEXANDER H. JORDAN
WESTERN SHIPPERS COALITION
3118 ROUND VALLEY WAY
PARK CITY UT 84060-6842 US

RONALD L. RENCHER
WESTERN SHIPPERS COAL.
136 SOUTH MAIN STREET STE 1000
SALT LAKE CITY UT 84101-1672 US

F MARK HANSEN
404 EAST 4500 SOUTH SUITE B-34
SALT LAKE CITY UT 84107 US

JEFFREY B. GROY
ONE UTAH CTR
201 SOUTH MAIN STREET, STE 1100
SALT LAKE CITY UT 84111 US

HON. DEEDEE CORRADINI
451 SOUTH STATE STREET, ROOM 306
SALT LAKE CITY UT 84111 US

CHRISTOPHER E. BRAMHALL
451 SOUTH STATE ST, ROOM 505
SALT LAKE CITY UT 84111 US

HONORABLE MICHAEL O. LEAVITT
ATTN: ROBIN L. RIGGS, GC TO GOVERNOR
210 STATE CAPITOL
SALT LAKE CITY UT 84114 US

REED M. RICHARDS
STATE OF UTAH
236 STATE CAPITOL
SALT LAKE CITY UT 84114 US

LYNETTE W. THIRKILL, LOGISTICS MANAGER
GR. SALT LAKE MINERALS
P O BOX 1190
OGDEN UT 84402 US

KENNETH C. JOHNSEN, V PRES & GEN COUNSEL
GENEVA STEEL COMPANY
P O BOX 2500
PROVO UT 84603 US

RALPH RUPP
PO BOX 2500
PROVO UT 84603 US

CAROL HEATHINGTON
1300 W WASHINGTON
PHOENIX AZ 85007 US

HONORABLE BOB STUMP
U.S. HOUSE OF REPRESENTATIVES
230 N. 1ST AVE., VOOM 2001
PHOENIX AZ 85025 US

FRANK E. HANSON, JR
MAGMA METALS COMPANY
7400 NORTH ORACLE ROAD, SUITE 200
TUCSON AZ 85704 US

CARA BROWN
FITZGERALDS GAMING CORPORTATION
P O BIX 7600
301 FREMONT STREET
LAS VEGAS NV 89101 US

O. KENT MAHER
33 WEST FOURTH ST
PO BOX 351
WINNEMUCCA NV 89446 US

R. MICHAEL MCCORMICK
HUMBOLDT COUNTY DA
P O BOX 909
50 WEST FIFTH STREET
WINNEMUCCA NV 89446 US

FRANK D GAUS
805 KUENZIL ST # 149
RENO NV 89502 US

MICHAEL E. HALLEY
CITY OF RENO
P O BOX 1900
RENO NV 89505 US

STEVE VARELA
PO BOX 1900
RENO NV 89505 US

DORI OWEN, SPECIAL PROJECTS MANAGER
REDEVELOP LAND AGENCY
490 S CENTER STREET STE 203
RENO NV 89505 US

CHARLES E. MCNEELY
CITY OF RENO
P. O. BOX 1900
RENO NV 89505 US

JOHN FRANKOVICH
P O BOX 2670
241 RIDGE STREET, 4TH FLOOR
RENO NV 89505-2670 US

BILL STAAB
RR DONNELLEY & SONS CO
14100 LEAR BOULEVARD
RENO NV 89506 US

SCOTT HUTCHERSON
EAGLE-PICHER MINERALS INC
6110 PLUMAS ST
RENO NV 89509 US

CHARLES A BRACHT
700 FOREST
RENO NV 89509 US

PHILLIP WENDT
PO BOX 11072
RENO NV 89510 US

JEFFERY W. HILL
SIERRA PACIFIC POWER CO.
P O BOX 10100
6100 NEIL ROAD
RENO NV 89520 US

GREGORY KRAUSE
REGIONAL TRANSPORTATION COMMISSION
P O BOX 30002
RENO NV 89520-3002 US

BOB MILLER
STATE OF NEVADA
CAPITOL COMPLEX EXECUTIVE CHAMBER
CARSON CITY NV 89710 US

THOMAS J. FRONAPFEL
NEVADA, DEPT. OF TRANSPORTATION
1263 S STEWART STREET
CARSON CITY NV 89712 US

MICHAEL I. STOCKMAN, GENERAL COUNSEL
U. S. BORAX INC.
26877 TOURNEY ROAD
VALENCIA CA 91355 US

JOHN E. BALLAS, AGENCY ENGINEER
INDUSTRY URBAN-DEV. AG.
P O BOX 7089
15651 EAST STAFFPRD STREET
CITY OF INDUSTRY CA 91744 US

JOHN D BALLAS
P.O. BOX 7089
15651 EAST STAFFORD STREET
CITY OF INDUSTRY CA 91744 US

RICHARD CABANILLA, PLANNING DEPARTMENT
IMPERIAL COUNTY
939 MAIN STREET
EL CENTRO CA 92243-2856 US

SCOTT KESSLER
202 WEST FOURTH STREET
ALTURUS CA 94102 US

JAMES T. QUINN
CALIFORNIA PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO CA 94102-3298 US

CAROL A. HARRIS
SOUTHERN PAC. TRANS. CO.
ONE MARKET PLAZA
SAN FRANCISCO CA 94105 US

LINDSAY BOWER, DEPUTY ATTORNEY GENERAL
CALIFORNIA DEPT. OF JUSTICE
50 FREMONT STREET STE 300
SAN FRANCISCO CA 94105 US

CANNON Y. HARVEY
SOUTHERN PAC. TRNS. CO.
ONE MARKET PLAZA
SAN FRANCISCO CA 94105 US

LARRY W. TELFORD
SEVERSON & WERSON
ONE EMBARCADERO CENTER
SAN FRANCISCO CA 94111 US

DANIEL R. ARELLANO
CITY HALL
708 THIRD STREET
BRENTWOOD CA 94513-1396 US

LEO R BRIEN
530 WARER STREET
OAKLAND CA 94607 US

PAUL C. ANDERSON
MCDONOUGH, HOLLAND, ETAL
1999 HARRISON STREET STE 1300
OAKLAND CA 94612 US

JEFFREY A. WALTER
WALTER & PISTOLE
670 W. NAPA STREET, SUITE "F"
SONOMA CA 95476 US

CHRISTOPHER J. NEARY
110 SOUTH MAIN STREET SUITE C
WILLITS CA 95490 US

JOSEPH H. PETTUS
SUN VALLEY ENERGY INC
800 HOWE AVE, SUITE 270
SACRAMENTO CA 95825 US

R. MARK ARMSTRONG
P O BOX 1051
ALTURAS CA 96101 US

KATHLEEN R. LAZARD
P O BOX 730
700 COURT STREET
SUSANVILLE CA 96130 US

FRED P. SWANSON
OREGON STEEL MILLS
1000 SW BROADWAY STE. 2200
PORTLAND OR 97205 US

MIKE THORNE, EXEC. DIR.
PORT OF PORTLAND
BOX 3529
PORTLAND OR 97208 US

RICK WILLIS, EXECUTIVE DIRECTOR
OREGON PUBLIC UTILITY COMM
550 CAPITOL ST NE
SALEM OR 97310-1380 US

ALLAN E. RUMBAUGH
P O BOX 1215
COOS BAY OR 97420 US

KAREN O'CONNOR
LAKE COUNTY COURTHOUSE
513 CENTER STREET
LAKEVIEW OR 97630 US

ANN DEKOSTER
P O BOX 1209
SEATTLE WA 98111 US

CHARLES H MONTANGE
426 NW 162ND STREET
SEATTLE WA 98177 US

DONALD G MEYER
P O BOX 1837
TACOMA WA 98401 US

MARCELLA M. SZEL
CP RAIL SYSTEM
910 PEEL STREET WINDSOR STATION RM 234
MONTREAL QUEBEC CD H3C 3E4 CD

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SERVICE DATE - JANUARY 7, 1998

SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY—CONTROL AND MERGER— SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

[Decision No. 77]

Decided: January 2, 1998

In Decision No. 44, we approved, subject to various conditions, the common control and merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company) and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company).[1] The conditions we imposed included, among many others, the terms of the UP/SP-BNSF settlement

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[1] We gave authority for merger and common control of all carriers controlled by Union Pacific Corporation and by Southern Pacific Rail Corporation. Where we are discussing pre-merger service, references to "UP" include only service by carriers controlled by Union Pacific Corporation. Otherwise, "UP" refers to all of the carriers to which we gave merger authority. "SP" refers to all of the railroads formerly controlled by Southern Pacific Rail Corporation.

agreement.[2] With respect to the UP/SP-BNSF agreement, we concluded that the agreement was sufficient (with certain modifications) to address the competitive harms of an unconditioned UP/SP merger because "the BNSF agreement will permit BNSF to replace, to a large extent, the competitive service that is lost when SP is absorbed into UP." See Decision No. 44, slip op. at 103. The common control authorized in Decision No. 44 was consummated on September 11, 1996.

In this decision, we address: the petition for clarification filed November 14, 1997, by BNSF with respect to that carrier's access to New Orleans, LA; and the reply filed December 4, 1997, by UP.[3]

BACKGROUND

The UP/SP-BNSF settlement agreement gave BNSF trackage rights to serve 2-to-1 shippers in the New Orleans area. As part of the settlement agreement, BNSF also obtained an option to purchase the SP line between Iowa Junction and Avondale, LA, and related facilities. BNSF exercised this option, and purchased

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[2] In Decision No. 44, Burlington Northern Railroad Company (BN) and The Atchison, Topeka and Santa Fe Railway Company (SF) were referred to collectively as BNSF. On December 31, 1996, SF merged into BN, and the surviving corporation was renamed The Burlington Northern and Santa Fe Railway Company. Accordingly, in this decision: with respect to the period ending December 31, 1996, the acronym "BNSF" has the meaning it had in Decision No. 44; and, with respect to the period beginning January 1, 1997, the acronym "BNSF" has reference to The Burlington Northern and Santa Fe Railway Company. See also Decision No. 44, slip op. at 12 n.15 (description of the BNSF agreement).

[3] The petition for clarification is designated and referred to herein as BN/SF-83. The reply is designated UP/SP-330.

this line on December 11, 1996.[4] In addition, the settlement agreement gave BNSF trackage rights over SP's line between Houston, TX, and UP's Westwego intermodal facility, including a connection to lines serving New Orleans terminal facilities, permitting interchange with the other rail carriers serving New Orleans. Prior to the agreement and merger, BNSF did not have access to New Orleans or the shippers located on the Iowa Junction-Avondale line. UP indicates that, in September 1996, over two months prior to selling the Avondale line, it modified its switching arrangements for the New Orleans switching district so as not to include BNSF. UP states that this action was taken to ensure that it would continue to provide reciprocal switching only for those carriers with which it previously had a switching relationship in New Orleans, which did not include BNSF.[5]

BNSF now asks that we require UP to restore the language of its prior switching agreement, which would enable BNSF to access applicants' shippers in New Orleans pursuant to that switching agreement, which it was not able to do under the agreement before the merger. Specifically, petitioner requests that, with respect to traffic moving to or from western points, including Mexico, UP be directed to open via reciprocal switching any UP or SP shipper location in the New Orleans switching district that could have received service pre-merger from both UP and SP via direct service or reciprocal switching. BNSF argues that, although UP's New Orleans shippers could receive service from more than two carriers before the merger, BNSF's lack of access deprives these shippers of any effective competitive alternative to UP's service with respect to origins or destinations in the western United States or Mexico. BNSF contends that UP's switching amendments

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[4] After BNSF's purchase, UP retained trackage rights permitting it to serve all local industries on that line. See UP/SP-BNSF settlement agreement §5(g).

[5] UP explains that the switching arrangements at issue reflect mutually beneficial agreements among all of the railroads serving New Orleans shippers to serve each others shippers.

defeat these shippers' expectations that BNSF would have access to their facilities as SP had prior to its merger with UP.

UP maintains that BNSF's petition must be viewed either as an untimely, unjustified request to reopen the merger proceeding to impose a new condition, or as an attempt to place an issue before us that the parties' settlement agreement commits to arbitration.[6] UP indicates that, although more than a year has passed since it amended its switching arrangements to make clear that BNSF does not have access to UP shippers in the New Orleans area, BNSF has not presented any evidence that such shippers or the area have suffered competitive harm as a result of the merger. UP contends that BNSF has not demonstrated any merger-related justification for obtaining access to UP's shippers.

DISCUSSION AND CONCLUSIONS

BNSF's petition will be denied to the extent it seeks clarification of Decision No. 44. There we conditioned our approval of the UP/SP merger on applicants' granting BNSF access to "2-to-1" shippers, by which we meant "shippers who [prior to the merger had] rail service from UP and SP and no other railroad." See Decision No. 44, slip op. at 16. As BNSF itself acknowledges (BN/SF-83, Rickershauser V.S. at 9), New Orleans-area shippers are "not technically . . . '2-to-1' customers as defined in the BNSF Settlement Agreement." A shipper is only a 2-to-1 shipper "[w]hen no third carrier is present . . .," which is clearly not the case here. Decision No. 44, slip op. at 121.

Nevertheless, BNSF relies on the fact that, in addition to conditioning merger approval on BNSF's access to 2-to-1 shippers, we required UP to grant BNSF access to Lake Charles-area shippers and interchange rights relating to the Martin Lake plant of Texas Utilities Electric Company near Henderson, TX. BNSF argues (BN/SF-83 at 7-8) that these other conditions show that we have

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[6] UP notes that, in this one instance, it is willing to waive the arbitration requirement of the BNSF settlement agreement.

granted relief to shippers where route circuity or other service impediments effectively limit their competitive opportunities, and that we should grant relief for New Orleans-area shippers for similar reasons, which allegedly would make them 2-to-1 shippers.

BNSF's argument is misplaced. Although we have granted relief for shippers other than 2-to-1 shippers in appropriate circumstances, that does not make them 2-to-1 shippers. Indeed, we specifically ruled that Lake Charles-area shippers are not 2-to-1 shippers as that term is used in Decision No. 44. See Decision No. 74, served August 29, 1997, slip op. at 5.[7]

But moving beyond the specific issue of whether a shipper is a 2-to-1 shipper, we also find that the petition has not demonstrated that the merger has caused any competitive problem for New Orleans area shippers that requires corrective action. Thus, we will also deny BNSF's petition to the extent that it could be construed to request reopening of Decision No. 44 and imposition of a new condition on the merger. BNSF filed its petition for relief almost one year after UP amended its New Orleans switching arrangements. Yet no shipper has shown that the inability to reach BNSF through reciprocal switching has caused it competitive harm.

The shippers in New Orleans that are served by UP/SP and open to reciprocal switching are open to four other railroads.

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[7] We clarify that it was not our intent in Decision No. 44 that BNSF be given access to New Orleans shippers. In discussing the competitive benefits of the settlement agreement, we noted that, in addition to 2-to-1 shippers, the agreement had identified a number of 2-to-1 corridors, including the Houston-New Orleans corridor. "BNSF would be given overhead trackage rights over those corridors, but it would only have authority to serve shippers at 2-to-1 points." Id. at 122 (emphasis added). Thus, BNSF was given access to New Orleans to enable it to interchange with eastern carriers, but not to serve all New Orleans shippers served by UP/SP.

These shippers do not appear to have lost any significant rail competition as a result of the merger. BNSF submitted supporting statements from nine shippers, four of which have facilities in New Orleans.[8] But a review of these statements demonstrates that none of the nine shippers claims to have yet suffered any competitive harm as a result of the merger. No shipper indicates on this record that its rates have risen or that its service has suffered as a result of any merger-related market power exercised by UP/SP. Moreover, no shipper provides evidence of any delayed or time sensitive traffic discussed by BNSF in its petition. As mentioned by these shippers, many of the shipments at issue move to or from New Orleans by water; such shipments could be rerouted to other ports if rail rates to New Orleans do not remain competitive.

UP has shown that very little of its pre-transaction New Orleans traffic moved from or to points where UP or SP provided the only efficient routings. For most of this traffic, competitive routings can be still be constructed using BNSF connections with Kansas City Southern Railway Company (KCS), Illinois Central Railroad Company (IC), Norfolk Southern Railway Company, and CSX Transportation, Inc., which are all available to originate or terminate traffic of these shippers moving to or from New Orleans through direct service or reciprocal switching. There may be minor exceptions for routings to nearby Lake Charles and Houston, and the Mexican gateways, traffic that represents

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[8] Continental Grain Company filed a separate supporting statement on December 8, 1997. Applicants replied to Continental's statement on December 12, 1997.

only about 370 total carloads a year.[9] BNSF, however, has not demonstrated that, given the very high switching fee of $495 that existed between UP and SP before the merger, service made possible by reciprocal switching was a meaningful competitive consideration for these relatively short movements.

In any event, in Decision No. 44 we imposed a coherent set of conditions that seems to be working well to date in preserving competition. One of those conditions was that we would exercise 5 years of oversight to ensure that merger-related competitive problems do not develop. At this point, we are disinclined to reopen the merger to impose an additional condition such as what is sought by BNSF in the absence of a showing of competitive harm. Although considerable time has passed since the merger was implemented, since UP modified its switching arrangements, and since BNSF exercised its purchase option, no New Orleans shipper has shown that its inability to reach BNSF through reciprocal switching has caused competitive harm. If a reciprocal switching arrangement would be beneficial to its operations, BNSF should negotiate with UP/SP and seek to obtain one in exchange for granting UP considerations, such as access to other BNSF shippers. We see no reason to interfere with that process under these circumstances. We will continue, however, to monitor this situation and others as part of our oversight program.

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[9] UP has demonstrated that only a small amount of traffic moves between its New Orleans shippers and points such as Lake Charles, LA, Houston, TX, or Mexican ports of entry – locations where, pre-merger, UP and SP provided the only efficient routing and where, post merger, BNSF interchange with IC or KCS might result in a circuitous routing. UP indicates that, although 33,936 cars of traffic moved in the year ending September 1997 to and from the New Orleans-area shippers served directly by UP (including SP) and open to reciprocal switching, only about 370 cars moved to or from points in western Louisiana and southern Texas that were served prior to the merger by both UP and SP. UP indicates that these traffic data have been verified by John H. Ransom, UP/SP's manager for interline marketing.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The BN/SF-83 petition is denied.

2. This decision shall be effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

SERVICE LIST FOR: 07-jan-1998 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

PAUL K. BIBA, HOUSE COUNSEL
FORMOSA PLASTICS CORP.
9 PEACH TREE HILL ROAD
LIVINGSTON NJ 07039 US

KEN WILSON
282 BALDWIN AVE
HASBROUCK HEIGHTS NJ 07604-2304 US

OSCAR J. ABELLO, PRESIDENT
"K" LINE AMERICA, INC.
535 MOUNTAIN AVENUE
MURRY HILL NJ 07974 US

TINA MASINGTON, PLAN. ANAL.
"K" LINE AMERICA, INC.
535 MOUNTAIN AVENUE
MURRAY HILL NJ 07974 US

GEORGE J. FRANCISCO, JR.
ELLIPSE SHIPPING CENTER
4201 CHURCH ROAD - SUITE 7
MT LAUREL NJ 08054 US

JOHN F. MCHUGH
MCHUGH & SHERMAN
20 EXCHANGE PLACE 51ST FLOOR
NEW YORK NY 10005 US

R J HENEFELD
PPG INDUSTRIES INC
ONE PPG PLACE
PITTSBURGH PA 15272 US

RICHARD J. RESSLER
UNION PACIFIC CORP.
EIGHTH AND EATON AVENUES, MARTIN TOWER
BETHLEHEM PA 18018 US

CARL W. VON BERNUTH
UNION PACIFIC CORP.
EIGHTH & EATON AVENUES
BETHLEHEM PA 18018 US

RICHARD H. GROSS
3801 WEST CHESTER PIKE
NEWTOWN SQUARE PA 19073 US

WILLIAM E HARVEY
3801 WEST CHESTER PIKE
NEWTON SQUARE PA 19073 US

LARRY T. JENKINS
ARCO CHEMICAL COMPANY
3801 WEST CHESTER PIKE
NEWTON SQUARE PA 19073-3280 US

ANNE E. TREADWAY
CONSOLIDATED RAIL CORP.
P O BOX 41416
2001 MARKET STREET
PHILADELPHIA PA 19101-1416 US

EDWARD B. HYMSON
CONRAIL
2001 MARKET STREET 16-A
PHILADELPHIA PA 19101-1416 US

JONATHAN M BRODER
CONSOLIDATED RAIL CORP
PO BOX 41416
2001 MARKET STREET 16-A
PHILADELPHIA PA 19101-1416 US

CONSTANCE L. ABRAMS
CONSOLIDATED RAIL CORP.
2001 MARKET STREET 16-A, TWO COMMERCE SQUARE
PHILADELPHIA PA 19101-1416 US

BRUCE B. WILSON
CONSOLIDATED RAIL CORP.
2001 MARKET STREET
PHILADELPHIA PA 19101-1417 US

JOHN L ABBOTT
FMC CORPORATION
1735 MARKET STREET
PHILADELPHIA PA 19103 US

ERIC M. HOCKY
GOLLATZ, GRIFFIN, EWING
213 WEST MINER STREET
WEST CHESTER PA 19381-0796 US

CHARLES N. BEINKAMPEN
DUPONT SOURCING
1007 MARKET STREET, ROOM B-6236-A
WILMINGTON DE 19898 US

TERRENCE D JONES
KELLER & HECKMAN
1001 G ST NW STE 500 WEST
WASHINGTON DC 20001 US

MARTIN W. BERCOVICI
KELLER & HECKMAN
1001 G ST NW SUITE 500 WEST
WASHINGTON DC 20001 US

DOUGLAS J. BEHR
KELLER & HECKMAN
1001 G STREET NW STE 500 WEST
WASHINGTON DC 20001 US

ROBERT L. MCGEORGE
U. S. DEPT. OF JUSTICE, ANTITRUST DIVISION
555 4TH STREET N W RM 9104
WASHINGTON DC 20001 US

JOAN S HUGGLER
U. S. DEPT. OF JUSTICE, ANTITRUST DIVISION
555 4TH STREET N W RM 9104
WASHINGTON DC 20001 US

LOUIS P WARCHOT
ASSOCIATION OF AMERICAN RAILROADS
50 F STREET NW
WASHINGTON DC 20001 US

RICHARD G SLATTERY
AMTRAK
60 MASSACHUSETTS AVENUE N E
WASHINGTON DC 20002 US

DONALD F GRIFFIN
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
10 G STREET NE STE 460
WASH DC 20002 US

JOSEPH GUERRIERI, JR.
GUERRIERI, EDMOND, ET. AL
1331 F STREET N W, 4TH FLOOR
WASHINGTON DC 20004 US

MARK SCHECTER
HOWREY & SIMON
1299 PENNSYLVANIA AVE N W
WASHINGTON DC 20004 US

DAVID A ASHMORE
ARNOLD & PORTER
555 TWELFTH STREET NW
WASHINGTON DC 20004 US

ROBERT M. BRUSKIN, ESQ.
HOWREY & SIMON
1299 PENNSYLVANIA AVE NW
WASHINGTON DC 20004 US

DEBRA L. WILLEN
GUERRIERI, EDMOND & CLAYMAN PC
1331 F STREET N W, 4TH FLOOR
WASHINGTON DC 20004 US

GEORGE W MAYO JR
HOGAN & HARTSON L.L.P.
555 THIRTEENTH STREET NW
WASHINGTON DC 20004-1109 US

ERIC VON SALZEN
HOGAN & HARTSON
555 THIRTEENTH STREET N W
WASHINGTON DC 20004-1161 US

ROSEMARY H. MCENERY
HOWREY & SIMON
1299 PENNSYLVANIA AVE N W
WASHINGTON DC 20004-2402 US

MARK L JOSEPHS
HOWREY & SIMON
1299 PENNSYLVANIA AVE N W
WASHINGTON DC 20004-2402 US

CHARLES W. LINDERMAN
701 PENNSYLVANIA AVE NW, 5TH FLOOR
WASHINGTON DC 20004-2696 US

S WILLIAM LIVINGSTON JR
COVINGTON & BURLING
P O BOX 7566
1201 PENNSYLVANIA AVE NW
WASHINGTON DC 20004-7566 US

RICHARD H. STREETER
BARNES & THORNBURG
1401 I STREET NW SUITE 500
WASHINGTON DC 20005 US

MICHAEL MATTIA
INSTITUTE OF SCRAP RECYCLING INDUSTRIES, INC.
1325 G STREET NW STE 1000
WASHINGTON DC 20005 US

PAUL C. OAKLEY
WEINER, BRODSKY, SIDMAN & KIDER
1350 NEW YORK AVENUE NW SUITE 800
WASHINGTON DC 20005 US

EDWARD WYTKIND, EXECUTIVE DIRECTOR
LARRY J WILLIS ESQ TRANSP TRADES DEPT AFLCI
1000 VERMONT AVENUE, NW STE 900
WASHINGTON DC 20005 US

WILLIAM A. MULLINS
TROUTMAN SANDERS LLP
1300 I STREET NW SUITE 500 EAST
WASHINGTON DC 20005-3314 US

JOHN R. MOLM
TROUTMAN SANDERS LLP
1300 I STREET, N. W., SUITE 500 EAST
WASHINGTON DC 20005-3314 US

FRITZ R KAHN
1100 NEW YORK AVENUE NW SUITE 750 WEST
WASHINGTON DC 20005-3934 US

JEFFREY O. MORENO
DONELAN CLEARY WOOD MASER
1100 NEW YORK AVENUE N W, SUITE 750
WASHINGTON DC 20005-3934 US

NICHOLAS J. DIMICHAEL
DONELAN, CLEARY, WOOD & MASER, PC
1100 NEW YORK AVENUE N W STE 750
WASHINGTON DC 20005-3934 US

THOMAS W. WILCOX
DONELAN, CLEARY,WOOD & MASER , P.C.
1100 NEW YORK AVENUE, NW., STE. 200
WASHINGTON DC 20005-3934 US

JOHN K MASER III
DONELAN,CLEARY,WOOD,MASER
1100 NEW YORK AVE NW SUITE 750
WASHINGTON DC 20005-3934 US

JO A DEROCHE
WEINER, BRODSKY, ET AL
1350 NEW YORK AVE NW SUITE 800
WASHINGTON DC 20005-4797 US

ANDREW P. GOLDSTEIN
MCCARTHY, SWEENEY ET AL.
1750 PENNSYLVANIA AVE NW
WASHINGTON DC 20006 US

MONICA J. PALKO
BRACEWELL & PATTERSON
2000 K STREET NW STE 500
WASHINGTON DC 20006 US

ANNE D. SMITH
WHITE & CASE
1747 PENNSYLVANIA AVENUE N W
WASHINGTON DC 20006 US

KATHRYN KUSSKE
MAYER, BROWN & PLATT
2000 PENNSYLVANIA AVE N W SUITE 6500
WASHINGTON DC 20006 US

ROY T. ENGLERT, JR
MAYER, BROWN & PLATT
2000 PENNSYLVANIA AVE N W SUITE 6500
WASHINGTON DC 20006 US

LAURENCE R. LATOURETTE
PRESTON GATES ELLIS ETAL
1735 NY AVE NW SUITE 500
WASHINGTON DC 20006 US

ADRIAN L. STEEL, JR.
MAYER, BROWN & PLATT
2000 PENNSYLVANIA AVE N W SUITE 6500
WASHINGTON DC 20006 US

KRISTA L. EDWARDS
SIDLEY & AUSTIN
1722 EYE STREET N W
WASHINGTON DC 20006 US

TERRY L. CLAASSEN
CORN REFINERS ASSOC, INC.
1701 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20006 US

ANDREW R. PLUMP
ZUCKERT, SCOUTT & RASENBERGER. LLP
888 17TH ST., NW, STE. 600
WASHINGTON DC 20006 US

JAMIE PALTER RENNERT
HOPKINS & SUTTER
888 SIXTEENTH STREET NW
WASHINGTON DC 20006 US

JANICE G BARBER
MAYER BROWN & PLATT
2000 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20006 US

ROBERT P. VOM EIGEN
HOPKINS AND SUTTER
888 16TH STREET N W STE 700
WASHINGTON DC 20006 US

ALBERT B KRACHMAN
BRACEWELL & PATTERSON LLP
2000 K ST NW STE 500
WASHINGTON DC 20006-1872 US

ERIKA Z JONES
MAYER BROWN & PLATT
2000 PA AV NW
WASH DC 20006-1882 US

JAMES A CALDERWOOD
ZUCKERT, SCOUTT & RASENBERGER, L.L. P.
888 17TH STREET NW, SUITE 600
WASHINGTON DC 20006-3939 US

JENNIFER P OAKLEY
ZUCKERT, SCOUTT & RASENBERGER
888 SEVENTEENTH ST NW, STE 600
WASH DC 20006-3939 US

RICHARD A. ALLEN
ZUCKERT, SCOUT, RASENBERGER
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

JOHN V. EDWARDS, ESQ
ZUCKERT, SCOUTT ET AL.
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

ALICIA M SERFATY
HOPKINS & SUTTER
888 - 16TH STREET NW
WASHINGTON DC 20006-4103 US

CHARLES A SPITULNIK
HOPKINS & SUTTER
888 SIXTEENTH ST NW
WASH DC 20006-4103 US

STEVEN J. KALISH
MCARTHY, SWEENEY & HARKAWAY
1750 PENNSYLVANIA AVE NW
WASHINGTON DC 20006-4502 US

TERENCE M. HYNES
SIDLEY & AUSTIN
1722 EYE STREET NW
WASHINGTON DC 20006-5304 US

ANTHONY J MCMAHON
BASATIANELLI, BROWN ETAL
2828 PA AVE NW STE 203
WASHINGTON DC 20007 US

JAMES F RILL
COLLIER SHANNON RILL & SCOTT
3050 K STREET NW SUITE 400
WASHINGTON DC 20007 US

VIRGINIA R METALLO
3050 K ST NW SUITE 400
WASHINGTON DC 20007 US

EDWARD D. GREENBERG
GALLAND KHARASCH & GARFINKLE P C
1054 THIRTY-FIRST STREET NW
WASHINGTON DC 20007-4492 US

CHARLES H. WHITE, JR.
GALLAND, KHARASCH & GARFINKLE, P. C.
1054 THIRTY-FIRST STREET NW
WASHINGTON DC 20007-4492 US

MICHAEL F MCBRIDE
LEBOEUF LAMB GREENE & MACRAE
1875 CONNECTICUT AVENUE NW
WASHINGTON DC 20009 US

DANIEL ARONOWITZ
LEBOUEF, LAMB, GREENE
1875 CONNECTICUT AVE NWSTE 1200
WASHINGTON DC 20009-5728 US

LINDA K. BREGGIN, ESQ.
LEBOEUF, LAMB, GREENE, ET AL
1875 CONNECTICUT AVENUE N W
WASHINGTON DC 20009-5728 US

PAUL M. DONOVAN
LAROE, WINN, ETAL
3506 IDAHO AVE NW
WASHINGTON DC 20016 US

JOHN D. HEFFNER, ESQ.
REA, CROSS & AUCHINCLOSS
1920 N STREET NW SUITE 420
WASHINGTON DC 20036 US

KEITH G. O'BRIEN
REA, CROSS & AUCHINCLOSS
1920 N STREET N W - SUITE 420
WASHINGTON DC 20036 US

JOHN M. CUTLER, JR.
MCCARTHY SWEENEY HARKAWAY
1750 PENNSYLVANIA AVE N W SUITE 1105
WASHINGTON DC 20036 US

MARC J. FINK
SHER & BLACKWELL
1850 M STREET NW STE 900
WASHINGTON DC 20036 US

GERALD P. NORTON
HARKINS CUNNINGHAM
1300 NINETEENTH STREET, NW STE. 600
WASHINGTON DC 20036 US

C MICHAEL LOFTUS
SLOVER & LOFTUS
1224 SEVENTEENTH STREET N W
WASHINGTON DC 20036 US

PATRICIA E. (DIETRICH) KOLESAR
SLOVER & LOFTUS
1224 SEVENTEENTH ST NW
WASH DC 20036 US

SUSAN B GERSON
GRAHAM & JAMES, LLP
2000 M STREET NW STE 700
WASHINGTON DC 20036 US

CHRISTOPHER A. MILLS
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036 US

ROBERT A. WIMBISH, ESQ.
REA, CROSS & AUCHINCLOSS
1920 N STREET NW SUITE 420
WASHINGTON DC 20036 US

THOMAS LAWRENCE III
OPPENHEIMER WOLFF, ETC
1020 - 19TH STREET NW STE 400
WASHINGTON DC 20036 US

FRANK J. PERGOLIZZI
SLOVER & LOFTUS
1224 SEVENTEENTH ST NW
WASHINGTON DC 20036 US

RICHARD S. EDELMAN
HIGHSAW MAHONEY CLARKE
1050 SEVENTEENTH STREET N W, SUITE 210
WASHINGTON DC 20036 US

KELVIN J. DOWD
SLOVER & LOFTUS
1224 17TH STREET N W
WASHINGTON DC 20036 US

PAUL CUNNINGHAM
HARKINS CUNNINGHAM
1300 NINETEENTH STREET, NW STE. 600
WASHINGTON DC 20036 US

RICHARD B HERZOG
HARKINS CUNNINGHAM
1300 19TH ST NW SUITE 600
WASHINGTON DC 20036-1609 US

JAMES M. GUINIVAN
HARKINS CUNNINGHAM
1300 19TH ST NW SUITE 600
WASHINGTON DC 20036-1609 US

MARC D. MACHLIN
PEPPER, HAMILTON, ET AL
1300 19TH STREET N W
WASHINGTON DC 20036-1658 US

MICHELLE J. MORRIS
PEPPER, HAMILTON, ETAL
1300 NINETEENTH ST NW
WASHINGTON DC 20036-1685 US

SAMUEL M. SIPE, JR.
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

JOHN H. LESEUR
SLOVER & LOFTUS
1224 17TH STREET NW
WASHINGTON DC 20036-3081 US

KEVIN M SHEYS
OPPENHEIMER WOLFF & DONNELLY
1020 NINETEENTH STREET N W SUITE 400
WASHINGTON DC 20036-6105 US

SCOTT N. STONE
PATTON BOGGS L.L.P.
2550 M STREET NW 7TH FLOOR
WASHINGTON DC 20037-1346 US

MICHAEL BRESSMAN
WILMER CUTLER PICKERING
2445 M STREET N W
WASHINGTON DC 20037-1420 US

WILLIAM J KOLASKY JR
WILMER CUTLER & PICKERING
2445 M STREET NW
WASH DC 20037-1420 US

WILLIAM G. MAHONEY
HIGHSAW, MAHONEY & CLARKE
1050 SEVENTEENTH STREET NW SUITE 210
WASHINGTON DC 20036 US

GORDON P. MACDOUGALL
1025 CONNECTICUT AVE NW SUITE 410
WASHINGTON DC 20036 US

JOEL A RABINOVITZ
HARKINS CUNNINGHAM
1300 19TH STREET NW SUITE 600
WASHINGTON DC 20036-1609 US

JOSEPH L LAKSHMANAN
1300 19TH STREET NW, SUITE 600
WASHINGTON DC 20036-1609 US

JOHN WILL ONGMAN
PEPPER HAMILTON SCHEETZ
1300 NINETEENTH STREET N W
WASHINGTON DC 20036-1685 US

TIMOTHY M WALSH
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

BETTY JO CHRISTIAN
STEPTOE & JOHNSON
1330 CONNECTICUT AVE NW
WASHINGTON DC 20036-1795 US

PAUL H. LAMBOLEY
1020 NINETEENTH STREET, N.W., STE 400
WASHINGTON DC 20036-6105 US

A STEPHEN HUT JR
WILMER CUTLER & PICKERING
2445 M ST NW
WASHINGTON DC 20037 US

DANIEL K. MAYERS
WILMER CUTLER PICKERING
2445 M STREET N W
WASHINGTON DC 20037-1420 US

ALI M. STOEPPELWERTH
WILMER CUTLER PICKERING
2445 M STREET N W
WASHINGTON DC 20037-1420 US

DAVID H. BAKER
HOLLAND & KNIGHT
2100 PENN AVE NW ST 400
WASHINGTON DC 20037-3202 US

TIMOTHY C HESTER
P O BOX 7566
1201 PENNSYLVANIA AVENUE N W
WASHINGTON DC 20044 US

J MICHAEL HEMMER
COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20044 US

DAVID L. MEYER
COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE N W
WASHINGTON DC 20044-7566 US

ARVID E ROACH II
COVINGTON & BURLING
PO BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044-7566 US

MICHAEL A. LISTGARTEN
COVINGTON & BURLING
P O BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044-7566 US

MICHAEL ROSENTHAL
COVINGTON & BURLING
P O BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044-7566 US

EILEEN S. STOMMES, DIRECTOR, T&M DIVISION
AGRICULTURAL MARKETING SERVICE, USDA
P. O. BOX 96456
WASHINGTON DC 20090-6456 US

HON. JEROME NELSON
FERC (LJ-2)
888 1ST STREET N E
WASHINGTON DC 20426 US

RICHARD SANDERSON
OFFICE OF FED ACTIV
US ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON DC 20460 US

HON JOHN GLENN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE THAD COCHRAN
UNITED STATE SENATE
WASHINGTON DC 20510 US

HON. DAN COATS
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE J. ROBERT KERRY
UNITED STATES SENATE
WASH DC 20510 US

HON CONRAD BURNS
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE TIM JOHNSON
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE DON NICKLES
U. S. SENATE
WASHINGTON DC 20510 US

HON. WAYNE ALLARD
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. PHIL GRAMM
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE RICHARD LUGAR
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE RICHARD BRYAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE BYRON L DORGAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. CHRISTOPHER S. BOND
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE PAT ROBERTS
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE HARRY REID
UNITED STATES SENATE
WASHINGTON DC 20510-0001 US

HON. BEN N CAMPBELL
UNITED STATES SENATE
WASHINGTON DC 20510-0605 US

HONORABLE RICHARD J DURBIN
UNITED STATES SENATE
WASHINGTON DC 20510-1304 US

HONORABLE CHARLES E. GRASSLEY
UNITED STATES SENATE
WASHINGTON DC 20510-1501 US

HONORABLE JOHN BREAUX
UNITED STATES SENATE
WASHINGTON DC 20510-1803 US

HARRY REID
UNITED STATES SENATE
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20510-2804 US

HON. TOM EWING
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ROBERT A. BORSKI
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE FRANK MASCARA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JOHN MURTHA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MARCY KAPTUR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JAMES TRAFICANT JR
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LLOYD DOGGETT
U. S. HOUSE OF REPRESENTATAIVES
WASHINGTON DC 20515 US

HON DAVID L HOBSON
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JOHN TANNER
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RON LEWIS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DAVID MINGE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JOHN HOSTETTLER
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON TOM DELAY
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PAUL MCHALE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TIM HOLDEN
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE MIKE DOYLE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE FRANK D. RIGGS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE CHARLES W. STENHOLM
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE ZOE LOFGREN
US HOUSE OF RESPRESENTATIVE
WASHINGTON DC 20515 US

HONORABLE XAVIER BECERRA
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LUCILLE ROYAL-ALLARD
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LYNN WOOLSEY
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PETE STARK
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE NANCY PELOSI
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TOM LANTOS
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RICHARD W. POMBO,
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE KEN CALVERT,
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE SONNY BONO,
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE CHRISTOPHER COX,
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RON PACKARD
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DANA ROHRABACHER
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE HOWARD P. BUCK MCKEON,
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BRIAN P. BILBRAY
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE EDWARD R. ROYCE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE KAREN MCCARTHY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JAY KIM
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PHIL ENGLISH
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JULIAN DIXON
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JAY DICKEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. EARL POMEROY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE GEORGE GEKAS
ATTEN: TOM SANTANIELLO
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. HAROLD E. FORD, JR
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DONALD M. PAYNE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. PAUL KANJORSKI
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. MARTIN OLAV SABO
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. LANE EVANS
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JOE BARTON
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BOB CLEMENT
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ESTEBAN E TORRES
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. THOMAS C SAWYER
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE WALLY HERGER
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE GENE GREEN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. IKE SKELTON
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JAMES L. OBERSTAR
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. HENRY B. GONZALEZ
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JERRY LEWIS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE GEORGE E. BROWN, JR.
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. MICHAEL OXLEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RONALD V. DELLUMS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RON PACKARD
U. S. HOUSE OF REPRESENTATIVES
WASH DC 20515-0548 US

HONORABLE SCOTT MCINNIS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-0603 US

HONORABLE TODD TIAHRT
HOUSE OF REPRESENTATIVE
WASHINGTON DC 20515-1004 US

HONORABLE SAM BROWNBACK
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-1602 US

HON. JIM MCCRERY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-1805 US

HONORABLE GEORGE MILLER
ATT: GARY BLAND
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2307 US

HON W J (BILLY) TAUZIN
ATTN: ROY WILLIS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2601 US

HONORABLE JOHN ENSIGN
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2801 US

HON. ROBERT E ANDREWS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3001 US

HONORABLE SHERROD BROWN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3513 US

HON. FRANK D. LUCAS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3606 US

HONORABLE THOMAS M. FOGLIETTA
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3801 US

HONORABLE CHAKA FATTAH
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3803 US

HONORABLE CURT WELDON
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3807 US

HON. JON CHRISTENSEN
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4155 US

HONORABLE WILLIAM M (MAC) THORNBERRY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4313 US

HONORABLE SHEILA JACKSON LEE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4318 US

HON. HENRY BONILLA
US HOUSE REPRESENTATIVES
WASHINGTON DC 20515-4323 US

HONORABLE EDDIE BERNICE JOHNSON
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4330 US

ROGER W. FONES
US DEPT. OF JUSTICE
325 7TH STREET N W SUITE 500
WASHINGTON DC 20530 US

MICHAEL D BILLIEL
ANTITRUST DIV, DEPT OF JUSTICE
325 SEVENTH ST NW STE 500
WASHINGTON DC 20530 US

PAUL SAMUEL SMITH
US DEPARTMENT OF TRANSPORTATION
400 SEVENTH STREET SW
WASHINGTON DC 20590 US

JOSEPH R. POMPONIO
FEDERAL RAILROAD ADMIN.
400 7TH ST SW RCC-20
WASHINGTON DC 20590 US

MITCHELL M. KRAUS
TRANSPORTATION -COMMUNICATIONS INTERNATIONAL
3 RESEARCH PLACE
ROCKVILLE MD 20850 US

WILLIAM W WHITEHURST JR.
W. W. WHITEHURST & ASSOCIATES, INC.
12421 HAPPY HOLLOW ROAD
COCKEYSVILLE MD 21030 US

CONSTANCE H. PIERCE
CONSTELLATION COMPANIES
250 WEST PRATT STREET
BALTIMORE MD 21201-2423 US

J TUCKER
PO BOX 25181
ARLINGTON VA 22202 US

PETER Q. NYCE, JR.
U. S. DEPARTMENT OF THE ARMY
901 NORTH STUART STREET
ARLINGTON VA 22203 US

NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
1700 NORTH MOORE STREET, SUITE 1900
ARLINGTON VA 22209 US

THOMAS E. SCHICK
CHEMICAL MANUF. ASSOC.
1300 WILSON BOULEVARD
ARLINGTON VA 22209 US

WILLIAM P. JACKSON, JR.
JACKSON & JESSUP, P. C.
P O BOX 1240
3426 NORTH WASHINGTON BLVD
ARLINGTON VA 22210 US

GERALD W. FAUTH, III
G. W. FAUTH & ASSOCIATES INC.
116 SOUTH ROYAL STREET
ALEXANDRIA VA 22314 US

JOHN T ESTES
1029 NORTH ROYAL STREET SUITE 400
ALEXANDRIA VA 22314 US

PETER J SHUDTZ
CSX CORPORATION
902 E CARY ST 1 JAMES CENTER
RICHMOND VA 23119 US

ROBERT J. COONEY
NORFOLK SOUTHERN CORP.
THREE COMMERCIAL PLACE
NORFOLK VA 23510-2191 US

ROBERT S. KOMPANTY
720 THIMBLE SHOALS BLVD, SUITE 130
NEWPORT NEWS VA 23608-2574 US

BOB THOMPSON
GEORGIA-PACIFIC CORP.
P O BOX 105605
ATLANTA GA 30348-5605 US

GREGORY M. VINCENT, VICE PRESIDENT
TENNESSEE VALLEY AUTH
LOOKOUT PLACE 1101 MARKET STREET
CHATTANOOGA TN 37402 US

E. CALVIN CASSELL
EASTMAN CHEMICAL COMPANY
P O BOX 1990
KINGSPORT TN 37662 US

EDWARD S. CHRISTENBURY
400 WEST SUMMIT HILL DRIVE
KNOXVILLE TN 37902 US

HONORABLE GILLESPIE V. MONTGOMERY
U. S. HOUSE OF REPRESENTATIVES
P. O. BOX 5618
MERIDAN MS 39208 US

R. L. YOUNG
P O BOX 700
ONE MEMORIAL DRIVE
LANCASTER OH 43130-0700 US

D. MICHAEL MILLER
AMERICAN ELECTRIC POWER
1 RIVERSIDE PLAZA
COLUMBUS OH 43215 US

HONORABLE JOHN GLENN
U. S. SENATE ATTN: ANISA BELL
200 N HIGH STREET S-600
COLUMBUS OH 43215-2408 US

MICHAEL M. BRILEY
SHUMAKER, LOOP & KENDRICK
N COURTHOUSE SQUARE - 1000 JACKSON
TOLEDO OH 43624 US

DANIEL R ELLIOTT III
UNITED TRANSPORTATION UNION
14600 DETROIT AVENUE
CLEVELAND OH 44107 US

CLINTON J MILLER, III, GENERAL COUNSEL
UNITED TRANSPORTATION UNION
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

RONALD P MCLAUGHLIN
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
1370 ONTARIO ST STAN BLDG
CLEVELAND OH 44113-1702 US

RICHARD E. KERTH, TRANS. MGR.
CHAMPION INTERNAT'L CORP
101 KNIGHTSBRIDGE DRIVE
HAMILTON OH 45020-0001 US

MICHAEL P. FERRO
MILLENNIUM PETROCHEMICALS, INC.
11500 NORTHLAKE DRIVE
CINCINNATI OH 45249 US

BRUCE A. KLIMEK
INLAND STEEL
3210 WATLING STREET
EAST CHICAGO IN 46312 US

HON JEFF SMITH
CITY OF KENDALLVILLE
234 S MAIN STREET
KENDALLVILLE IN 46755-1795 US

JAMES E. HANSON
DOW CHEMICAL COMPANY
2020 WILLARD H DOW CENTER
MIDLAND MI 48674 US

LARRY B. KARNES
TRANSPORTATION BUILDING
PO BOX 30050
425 WEST OTTAWA
LANSING MI 48909 US

THOMAS F JACKSON
800 LINCOLN WAY
AMES IA 50010 US

P C HENDRICKS
STATE LEGISLATIVE DIRECTOR UTU
313 E 5TH STREET
DES MOINES IA 50309 US

HONORABLE CHARLES E. GRASSLEY
UNITED STATES SENATE
210 WALNUT STREET
DES MOINES IA 50309-2140 US

KENT M RAGSDALE
INTERSTATE POWER CO
PO BOX 769
DUBUQUE IA 52004 US

TOBIN LEE BRITT
IES UTILITIES, INC.
P O BOX 351
200 FIRST ST SE
CEDAR RAPIDS IA 52406-0351 US

ALLEN J VOGEL,
MINNESOTA DEPARTMENT OF TRANSPORTATION
395 JOHN IRELAND BLVD TRANSP BLDG, SUITE 925,
ST PAUL MN 55155 US

WAYNE C. SERKLAND, U S REGIONAL COUNSEL
CANADIAN PACIFIC LEG. SER
105 SOUTH FIFTH ST SUITE 1000
MINNEAPOLIS MN 55402 US

BOB ZELENKA
852 GRAIN EXCHANGE, 400 SOUTH FOURTH STREET
MINNEAPOLIS MN 55415 US

TERRY C. WHITESIDE
RADERMACHER, WHITESIDE & ASSOCIATES
3203 3RD AVE N STE 301
BILLINGS MT 59101 US

J. FRED SIMPSON, EXECUTIVE VICE PRESIDENT
MONTANA RAIL LINK, INC.
101 INTERNATIONAL WAY
MISSOULA MT 59802 US

RICHARD E. WEICHER
BURLINGTON NORTHERN SANTA FE CORPORATION
1700 EAST GOLF ROAD, 6TH FLOOR
SCHAUMBURG IL 60173 US

JAMES A. SMALL
COMMONWEALTH EDISON CO.
1411 OPUS PL STE 200
DOWNERS GROVE IL 60515-5701 US

WILLIAM C SIPPEL
OPPENHEIMER WOLFF & DONNELLY
180 N STETSON AVE TWO PRUDENTIAL PLAZA 45TH F
CHICAGO IL 60601 US

THOMAS J HEALEY
OPPENHEIMER, WOLFF, ETAL
180 N STETSON AV 2 PRUDENTIAL PL
CHICAGO IL 60601 US

EDWIN C JERTSON
INTERSTATE POWER CO
P O BOX 769
1000 MAIN STREET
DUBUQUE IA 52004 US

PHILIP D. WARD, ET AL.
P O BOX 351
200 FIRST STREET SE
CEDAR RAPIDS IA 52406-0351 US

WILLIAM R. KNIGHT
WISCONSIN POWER & LIGHT
P O BOX 192
222 WEST WASHINGTON AVENUE
MADISON WI 53701-0192 US

RONALD E HUNTER, LAW DEPARTMENT
CARGILL, INCORPORATED
15407 MCGINTY ROAD WEST
WAYZATA MN 55391 US

DOUGLAS M. HEAD
WEINER
120 SOUTH 6TH STREET STE 2400
MINNEAPOLIS MN 55402 US

HON. WILLIAM J. JANKLOW
GOVERNOR, SD
500 EAST CAPITOL
PIERRE SD 57501-5070 US

HONORABLE MARC RACICOT
GOV'S OFFICE, STATE CAP.
P O BOX 200801
HELENA MT 59620-0801 US

JANET H GILBERT
WISCONSIN CENTRAL LTD
6250 NORTH RIVER ROAD STE 9000
ROSEMONT IL 60018 US

JEFFREY R. MORELAND
THE BURLINGTON NORTHERN SANTA FE CORPORATION
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173 US

WILLIAM F. COTTRELL
ASST. ATTORNEY GENERAL
100 W RANDOLPH ST - 12TH FLOOR
CHICAGO IL 60601 US

THOMAS J. LITWILER
OPPENHEIMER WOLFF & DONNELLY
180 N STETSON AVE 45TH FLOOR
CHICAGO IL 60601 US

CHRISTINE H. ROSSO
IL ASSISTANT ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FLOOR
CHICAGO IL 60601 US

RODMAN KOBER
CONTINENTAL GRAIN CO
222 S RIVERSIDE PLAZA - STE 1100
CHICAGO IL 60606 US

THOMAS DEGNAN
UNITED STATES GYPSUM CO
125 SOUTH FRANKLIN STREET
CHICAGO IL 60606 US

STEPHEN C. HERMAN
MCFARLAND & HERMAN
20 N WACKER DRIVE STE 1330
CHICAGO IL 60606-2902 US

THOMAS F. MCFARLAND, JR.
MCFARLAND & HERMAN
20 NORTH WACKER DRIVE, SUITE 1330
CHICAGO IL 60606-3101 US

RONALD A. LANE
ILLINOIS CENTRAL RR
455 N CITYFRONT PLAZA DR 20TH FL
CHICAGO IL 60611 US

MYLES L. TOBIN
ILLINOIS CENTRAL RAILROAD
455 NORTH CITYFRONT PLAZA DRIVE
CHICAGO IL 60611-5504 US

GARY L TOWELL
TOLEDO, PEORIA & WESTERN
1990 EAST WASHINGTON STREET
EAST PEORIA IL 61611-2961 US

CLARENCE R. PONSLER
GENERAL CHAIRMAN, UTU
1017 W. MAIN STREET
BELLEVILLE IL 62220 US

SCOTT A RONEY
ARCHER DANIELS MIDLAND COMPANY
P O BOX 1470
4666 FARIES PARKWAY
DECATUR IL 62525 US

JON FOY, DIRECTOR, RATES GRAIN
ARCHER DANIEL MIDLAND CO
P. O. BOX 1470
4666 FARIES PARKWAY
DECATUR IL 62525 US

CAROL R DORIS
500 SOUTH SECOND STREET
SPRINGFIELD IL 62706 US

KIRK BROWN
ILLINOIS DOT, OFFICE OF THE SECRETARY
2300 SOUTH DIRKSEN PARKWAY
SPRINGFIELD IL 62764 US

ROGER HERMANN
MALLINCKRODT CHEMICAL
16305 SWINGLEY RIDGE DRIVE
CHESTERFIELD MO 63017-1777 US

JEFFREY L. KLINGER
PEABODY HOLDING COMPANY
701 MARKET STREET STE 700
ST LOUIS MO 63101-1826 US

C A MENNELL, PRESIDENT
LACKLAND WESTERN RR CO
31 OAK TERRACE
WEBSTER GROVES MO 63119 US

DAVID A. PINS
THE CHEMICAL GROUP, MONSANTO
800 N LINDBERGH BOULEVARD
ST LOUIS MO 63167 US

D E THOMPSON
GENERAL CHAIRMAN-BLE
414 MISSOURI BOULEVARD
SCOTT CITY MO 63780 US

HON IKE SKELTON
U. S. HOUSE OF REP.
514 B N W 7 HIGHWAY
BLUE SPRINGS MO 64014 US

ROBERT K DREILING
KANSAS CITY SOUTHERN RWY CO.
114 WEST 11TH STREET
KANSAS CITY MO 64105 US

RICHARD P BRUENING
KANSAS CITY SOUTHERN RR
114 WEST ELEVENTH STREET
KANSAS CITY MO 64106 US

MEL CARNAHAN
OFFICE OF THE GOVERNOR
STATE CAPITOL ROOM 216
JEFFERSON CITY MO 65101 US

JACK HYNES, ADMINISTRATOR OF RAILROADS
MISSOURI DEPARTMENT OF TRANSPORTATION
PO BOX 270
105 WEST CAPITOL AVENUE
JEFFERSON CITY MO 65102 US

JOSEPH A. STINGER
IBBB
570 NEW BROTHERHOOD BUILDING
KANSAS CITY KS 66101 US

WILLIAM J. MCGINN
NORTH AMER. CHEM. CO.
8300 COLLEGE BOULEVARD
OVERLAND PARK KS 66210 US

BARRETT HATCHES
8300 COLLEGE BLVD
OVERLAND PARK KS 66210 US

T. L. GREEN
WESTERN RESOURCES, INC.
PO BOX 889
818 KANSAS AVE
TOPEKA KS 66601 US

JOHN JAY ROSACKER
KS, DEPT OF TRANSP
217 SE 4TH ST 2ND FLOOR
TOPEKA KS 66603 US

NORMAN G MANLEY
CITY ATTORNEY, ANOVER CITY HALL
909 NORTH ANDOVER ROAD
ANDOVER KS 67002 US

TIM NORTON
CITY OF HAYSVILLE
PO BOX
200 WEST GRAND
HAYSVILLE KS 67060 US

DWAYNE H SHANNON
PO BOX 1138
WICHITA KS 67201 US

ALAN R. POST
1803 STEFKIN STREET
WICHITA KS 67208-1758 US

JAMES J. IRLANDI
STB PRACTITIONER
1809 N BROADWAY/SUITE F
WICHITA KS 67214 US

JUNIOR STRECKER, CHAIRMAN
MOUNTAIN-PLAINS COMMUNITIES & SHIPPERS COALIT
123 NORTH MAIN ST
HOISINGTON KS 67544 US

ROBERT K. GLYNN
HOISINGTON CHAM. OF COMM.
123 NORTH MAIN STREET
HOISINGTON KS 67544-2594 US

JOHN F. LARKIN
P O BOX 31850
4814 DOUGLAS ST 68132
OMAHA NE 68132-0850 US

PAUL A. CONLEY, JR. ,LAW DEPARTMENT
UNION PACIFIC RR CO.
1416 DODGE STREET
OMAHA NE 68179 US

LOUISE A. RINN
UNION PACIFIC RR CO.
1416 DODGE STREET ROOM 830
OMAHA NE 68179 US

JEANNA L REGIER
UNION PACIFIC RAILROAD COMPANY
1416 DODGE ST ROOM 830
OMAHA NE 68179 US

JAMES V. DOLAN, LAW DEPARTMENT
UNION PACIFIC RR CO.
1416 DODGE STREET #830
OMAHA NE 68179 US

JOSEPH D. ANTHOFER
UNION PACIFIC RR CO.
1416 DODGE STREET ROOM 830
OMAHA NE 68179-0001 US

ROBERT T. OPAL
UNION PACIFIC RAILROAD CO.
1416 DODGE STREET RM 830
OMAHA NE 68179-0001 US

KEN SIECKMEYER, MGR. TRANSP. PLANN. DIV.
NEBRASKA DEPT. OF ROADS
P O BOX 94759
LINCOLN NE 68509-4759 US

WAYNE ANDERSON
ENTERGY SERVICES, INC.
639 LOYOLA AVE MAIL L-ENT-26E
NEW ORLEANS LA 70113 US

W. F. CARTER
ALBEMARLE CORPORATION
451 FLORIDA STREET
BATON ROUGE LA 70801 US

DEAN L. WORLEY
HILBURN CALHOON HARPER
P O BOX 5551
ONE RIVERFRONT PLACE EIGHTH FL
NORTH LITTLE ROCK AR 72119 US

SCOTT MANATT
P. O. BOX 473
CORNING AR 72422 US

JOE N. HAMPTON
2309 NORTH TENTH, SUITE E
ENID OK 73701 US

THOMAS R. JACOBSEN
TU ELECTRIC
1601 BRYAN STREET STE 11-060
DALLAS TX 75201-3411 US

JOEL T WILLIAMS III
STE 350, LB-126
4809 COLE AVENUE
DALLAS TX 75205 US

STEVEN A BRIGANCE
LEBOEUF, LAMB, ETAL
4025 WOODLAND PARK BLVD STE 250
ARLINGTON TX 76013 US

EDMUND W. BURKE
BURLINGTON NORTHERN RR CO
777 MAIN STREET, 3800 CONTINENTAL PLAZA
FT WORTH TX 76102 US

DOUGLAS J. BABB
BURLINGTON NORTHERN RR CO
777 MAIN STREET, 3800 CONTINENTAL PLAZA
FT WORTH TX 76102-5384 US

MICHAEL E ROPER
BURLINGTON NORTHERN SANTA FE CORPORATION
3017 LOU MENK DRIVE
FT WORTH TX 76131 US

RICHARD J SCHIEFELBEIN
WOODHARBOR ASSOCIATES
7801 WOODHARBOR DRIVE
FORT WORTH TX 76179 US

W. DAVID TIDHOLM
HUTCHESEN & GRUNDY
1200 SMITH STREET (#3300)
HOUSTON TX 77002-4579 US

GEN. COMMITTEE OF ADJUST. GO-895
UNITED TRANS. UNION
2040 NORTH LOOP WEST STE 310
HOUSTON TX 77018 US

ROBERT J. ROSSI
UNITED TRANSPORTATION UNION
2040 NORTH LOOP WEST SUITE 310
HOUSTON TX 77018-8112 US

GEORGE T. WILLIAMSON
P O BOX 2562
111 E LOOP N
HOUSTON TX 77029 US

JOHN D. BURKE
GREATER HOUSTON PORT BUREAU, INC
111 EAST LOOP NORTH
HOUSTON TX 77029 US

B KENNETH TOWSEND JR
EXXON CHEMICAL CO
13501 KATY FREEWAY
HOUSTON TX 77079-1398 US

B. C. GRAVES, JR.
EXXON COMPANY U.S.A.
PO BOX 4692
HOUSTON TX 77210-4692 US

BRIAN P. FELKER
SHELL CHEMICAL COMPANY
P O BOX 2463
HOUSTON TX 77252-2463 US

ERIC W. TIBBETTS
P O BOX 3766
1301 MCKINNEY ST
HOUSTON TX 77253 US

ROY GIANGROSSO
ENTERGY SERVICES, INC.
350 PINE STREET
BEAUMONT TX 77701 US

TEXAS MEXICAN RAILWAY CO.
PO BOX 419
LAREDO TX 78042-0419 US

JOHN P. LARUE, EXECUTIVE DIRECTOR
THE PORT OF CORPUS CHRISTI
P O BOX 1541
222 POWER STREET
CORPUS CHRISTI TX 78403 US

THOMAS A GRIEBEL
TEXAS DOT
125 E 11TH ST
AUSTIN TX 78701 US

JERRY L. MARTIN, DIRECTOR RAIL DIV.
RR COMM OF TEXAS
P O BOX 12967
1701 N CONGRESS
AUSTIN TX 78711 US

MARK TOBEY
P O BOX 12548
AUSTIN TX 78711-2548 US

REBECCA FISHER
ASST ATTY GENERAL
PO BOX 12548
AUSTIN TX 78711-2548 US

DONALD T CHEATHAM
10220-E METROPOLITAN DR
AUSTIN TX 78758 US

HON. JOHN R. COOK,
TX HOUSE OF REPRESENTATIVES
P O BOX 2910
AUSTIN TX 78768 US

HON. ROBERT JUNELL
TEXAS HOUSE OF REP.
PO BOX 2910
AUSTIN TX 78768 US

ROBERT M. SAUNDERS
P O BOX 2910
AUSTIN TX 78768-2910 US

ROBERT A. CUSHING, JR.
UNITED TRANS. UNION,
12401 HIDDEN SUN COURT
EL PASO TX 79938 US

DARRELL L. HANAVAN, EXECUTIVE DIRECTOR
COLORADO WHEAT ADMIN.
5500 SOUTH QUEBEC STREET STE 111
ENGLEWOOD CO 80111 US

THOMAS F. LINN
MOUNTAIN COAL COMPANY
555 17TH STREET 22ND FLOOR
DENVER CO 80202 US

STEPHEN D ALFERS
ALFERS & CARVER
730 17TH STREET #340
DENVER CO 80202 US

RUSSELL S. JONES, III
MOUNTAIN COAL COMPANY
555 17TH STREET 22ND FLOOR
DENVER CO 80202 US

PATRICIA T. SMITH, SR. VICE PRESIDENT
PUBLIC SERVICE COMPANY
1225 - 17TH STREET STE 600
DENVER CO 80202 US

NANCY MANGONE, ENFORCEMENT ATTORNEY
U. S. EPA REGION VIII
999 18TH SST STE 500
DENVER CO 80202-2466 US

DAVID N. LAWSON, FUEL TRAFFIC COORDINATOR
PUBLIC SERVICE COMMISSION
1225 17TH ST STE 1100, SEVENTEENTH ST PLAZA
DENVER CO 80202-5533 US

JANE T. FELDMAN, ASST. ATTORNEY GENERAL
STATE OF COLORADO
1525 SHERMAN ST- 5TH FLOOR
DENVER CO 80203 US

HONORABLE ROY ROMER
GOVERNOR
136 STATE CAPITOL
DENVER CO 80203 US

HON. BEN N. CAMPBELL
UNITED STATES SENATE
1129 PENNSYLVANIA STREET
DENVER CO 80203 US

SUE BALLENSKI, PHYSICAL RESOURCES
USDA FOREST SERVICE
P O BOX 25127
LAKEWOOD CO 80225 US

GERALD E. VANINETTI
RESOURCE DATA INT'L
1320 PEARL STREET STE 300
BOULDER CO 80302 US

JOE D. FORRESTER
C/O CO MTN COLLEGE, TIMBERLINE CAMPUS
901 S HWY 24
LEADVILLE CO 80461 US

THOMAS J. FLORCZAK
CITY OF PUEBLO
127 THATCHER BUILDING
PUEBLO CO 81003 US

MAYOR LESTER WILLIAMS
TOWN OF EADS
PO BOX 8
110 W 13TH ST
EADS CO 81036 US

CARDON G. BERRY
KIOWA CO. COMMISSIONERS
PO BOX 591
1305 GOFF
EADS CO 81036 US

HON DELCARL EIKENBERG
TOWN OF HASWELL
P O BOX 206
HASWELL CO 81045-0206 US

JOHN R STULP
SECED
P O BOX 1600
LAMAR CO 81052 US

LEROY E. MAUCH
BOARD OF COUNTY COMMISSIONERS
P. O. BOX 1046
LAMAR CO 81052 US

CLEDE WIDENER
BOARD OF COUNTY COMMISSIONERS
P.. O. BOX 1046
LAMAR CO 81052 US

JOHN ROESCH
BENT COUNTY
PO BOX 350
LAS ANIMAS CO 81054 US

BLAINE ARBUTHNOT
CROWLEY COUNTY
601 MAIN ST
ORDWAY CO 81063 US

BERNICE TUTTLE
KIOWA COUNTY WIFE, CHAPTER #124
13775 CR785
TOWNER CO 81071-9619 US

FRANK C MCMURRY
PO BOX 699
SALIDA CO 81201 US

E W WOTIPKA
6388 TERRACE LANE
SALIDA CO 81201 US

MYRON F. SMITH
FREMONT COUNTY COMM.
615 MACON AVE ROOM #102
CANON CITY CO 81212 US

RUTH H. CARTER, MAYOR
CITY OF CANON CITY ATTN: STEVE THACKER CITY A
P O BOX 1460
CANON CITY CO 81215 US

STEVEN G. RABE, CITY MANAGER
CITY OF FLORENCE
300 W MAIN STREET
FLORENCE CO 81226 US

JAMES R. FRITZE
EAGLE COUNTY ATTORNEY
P O BOX 850
EAGLE CO 81631 US

PATRICIA BRITTON, CHIEF LEGAL OFFICER
KENNECOTT ENERGY COMPANY
505 SOUTH GILLETTE AVENUE
GILLETTE WY 82716 US

JERRY R KRESS
ID, WHEAT COMMISSION
1109 MAIN ST STE 310
BOISE ID 83702-5642 US

WAYNE L. STOCKEBRAND
KENNECOTT UTAH COPP. CORP
P O BOX 6001
8315 WEST 3595 SOUTH
MAGNA UT 84044-6001 US

ALEXANDER H. JORDAN
WESTERN SHIPPERS COALITION
3118 ROUND VALLEY WAY
PARK CITY UT 84060-6842 US

JANET PALMER
P O BOX 1268
13997 COUNTY ROAD 71
SHERIDAN LAKE CO 81071 US

CHARLES WAIT
BACA COUNTY
PO BOX 116
SPRINGFIELD CO 81073 US

THOMAS W. FOSTER, CHAIRMAN
COM. TO PRESERVE PROPERTY
P O BOX 681
SALIDA CO 81201 US

HON. NANCY SANGER, MAYOR
CITY OF SALIDA
P O BOX 417
124 E STREET
SALIDA CO 81201 US

GREG TABUTEAU
ROYAL GORGE SCENIC RY
P O BOX 1387
CANON CITY CO 81215 US

JUDY LOHNES
UAACOG
P O BOX 510
CANON CITY CO 81215-0510 US

STEVE TUCKER
D&RG WEST. EMPLOYEES
2048 J ROAD
FRUITA CO 81521 US

GARY L. MCFARLEN,, DIRECTOR-TRANSP
KENNECOTT ENERGY COMPANY
BOX 3009
505 SOUTH GILLETTE AVENUE
GILLETTE WY 82716 US

TIMM R. ADAMS
IDAHO BARLEY COMMISSION
1199 MAIN STREET, STE G
BOISE ID 83702-5630 US

ANN KNAPTON
IDAHO TIMBER CORPORATION
P O BOX 67
5401 KENDALL STREET
BOISE ID 83707-0067 US

RAY D. GARDNER
KENNECOTT UTAH COPP. CORP
P O BOX 6001
8315 WEST 3595 SOUTH
MAGNA UT 84044-6001 US

RONALD L. RENCHER
WESTERN SHIPPERS COAL.
136 SOUTH MAIN STREET STE 1000
SALT LAKE CITY UT 84101-1672 US

F MARK HANSEN
404 EAST 4500 SOUTH SUITE B-34
SALT LAKE CITY UT 84107 US

JEFFREY B. GROY
ONE UTAH CTR
201 SOUTH MAIN STREET, STE 1100
SALT LAKE CITY UT 84111 US

HON. DEEDEE CORRADINI
451 SOUTH STATE STREET, ROOM 306
SALT LAKE CITY UT 84111 US

CHRISTOPHER E. BRAMHALL
451 SOUTH STATE ST, ROOM 505
SALT LAKE CITY UT 84111 US

HONORABLE MICHAEL O. LEAVITT
ATTN: ROBIN L. RIGGS, GC TO GOVERNOR
210 STATE CAPITOL
SALT LAKE CITY UT 84114 US

REED M. RICHARDS
STATE OF UTAH
236 STATE CAPITOL
SALT LAKE CITY UT 84114 US

LYNETTE W. THIRKILL, LOGISTICS MANAGER
GR. SALT LAKE MINERALS
P O BOX 1190
OGDEN UT 84402 US

KENNETH C. JOHNSEN, V PRES & GEN COUNSEL
GENEVA STEEL COMPANY
P O BOX 2500
PROVO UT 84603 US

RALPH RUPP
PO BOX 2500
PROVO UT 84603 US

CAROL HEATHINGTON
1300 W WASHINGTON
PHOENIX AZ 85007 US

HONORABLE BOB STUMP
U.S. HOUSE OF REPRESENTATIVES
230 N. 1ST AVE., VOOM 2001
PHOENIX AZ 85025 US

FRANK E. HANSON, JR
MAGMA METALS COMPANY
7400 NORTH ORACLE ROAD, SUITE 200
TUCSON AZ 85704 US

CARA BROWN
FITZGERALDS GAMING CORPORTATION
P O BIX 7600
301 FREMONT STREET
LAS VEGAS NV 89101 US

O. KENT MAHER
33 WEST FOURTH ST
PO BOX 351
WINNEMUCCA NV 89446 US

R. MICHAEL MCCORMICK
HUMBOLDT COUNTY DA
P O BOX 909
50 WEST FIFTH STREET
WINNEMUCCA NV 89446 US

FRANK D GAUS
805 KUENZIL ST # 149
RENO NV 89502 US

MICHAEL E. HALLEY
CITY OF RENO
P O BOX 1900
RENO NV 89505 US

STEVE VARELA
PO BOX 1900
RENO NV 89505 US

DORI OWEN, SPECIAL PROJECTS MANAGER
REDEVELOP LAND AGENCY
490 S CENTER STREET STE 203
RENO NV 89505 US

CHARLES E. MCNEELY
CITY OF RENO
P. O. BOX 1900
RENO NV 89505 US

JOHN FRANKOVICH
P O BOX 2670
241 RIDGE STREET, 4TH FLOOR
RENO NV 89505-2670 US

BILL STAAB
RR DONNELLEY & SONS CO
14100 LEAR BOULEVARD
RENO NV 89506 US

SCOTT HUTCHERSON
EAGLE-PICHER MINERALS INC
6110 PLUMAS ST
RENO NV 89509 US

CHARLES A BRACHT
700 FOREST
RENO NV 89509 US

PHILLIP WENDT
PO BOX 11072
RENO NV 89510 US

JEFFERY W. HILL
SIERRA PACIFIC POWER CO.
P O BOX 10100
6100 NEIL ROAD
RENO NV 89520 US

GREGORY KRAUSE
REGIONAL TRANSPORTATION COMMISSION
P O BOX 30002
RENO NV 89520-3002 US

BOB MILLER
STATE OF NEVADA
CAPITOL COMPLEX EXECUTIVE CHAMBER
CARSON CITY NV 89710 US

THOMAS J. FRONAPFEL
NEVADA, DEPT. OF TRANSPORTATION
1263 S STEWART STREET
CARSON CITY NV 89712 US

MICHAEL I. STOCKMAN, GENERAL COUNSEL
U. S. BORAX INC.
26877 TOURNEY ROAD
VALENCIA CA 91355 US

JOHN E. BALLAS, AGENCY ENGINEER
INDUSTRY URBAN-DEV. AG.
P O BOX 7089
15651 EAST STAFFPRD STREET
CITY OF INDUSTRY CA 91744 US

JOHN D BALLAS
P.O. BOX 7089
15651 EAST STAFFORD STREET
CITY OF INDUSTRY CA 91744 US

RICHARD CABANILLA, PLANNING DEPARTMENT
IMPERIAL COUNTY
939 MAIN STREET
EL CENTRO CA 92243-2856 US

SCOTT KESSLER
202 WEST FOURTH STREET
ALTURUS CA 94102 US

JAMES T. QUINN
CALIFORNIA PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO CA 94102-3298 US

CAROL A. HARRIS
SOUTHERN PAC. TRANS. CO.
ONE MARKET PLAZA
SAN FRANCISCO CA 94105 US

LINDSAY BOWER, DEPUTY ATTORNEY GENERAL
CALIFORNIA DEPT. OF JUSTICE
50 FREMONT STREET STE 300
SAN FRANCISCO CA 94105 US

CANNON Y. HARVEY
SOUTHERN PAC. TRNS. CO.
ONE MARKET PLAZA
SAN FRANCISCO CA 94105 US

LARRY W. TELFORD
SEVERSON & WERSON
ONE EMBARCADERO CENTER
SAN FRANCISCO CA 94111 US

DANIEL R. ARELLANO
CITY HALL
708 THIRD STREET
BRENTWOOD CA 94513-1396 US

LEO R BRIEN
530 WARER STREET
OAKLAND CA 94607 US

PAUL C. ANDERSON
MCDONOUGH, HOLLAND, ETAL
1999 HARRISON STREET STE 1300
OAKLAND CA 94612 US

JEFFREY A. WALTER
WALTER & PISTOLE
670 W. NAPA STREET, SUITE "F"
SONOMA CA 95476 US

CHRISTOPHER J. NEARY
110 SOUTH MAIN STREET SUITE C
WILLITS CA 95490 US

JOSEPH H. PETTUS
SUN VALLEY ENERGY INC
800 HOWE AVE, SUITE 270
SACRAMENTO CA 95825 US

R. MARK ARMSTRONG
P O BOX 1051
ALTURAS CA 96101 US

KATHLEEN R. LAZARD
P O BOX 730
700 COURT STREET
SUSANVILLE CA 96130 US

FRED P. SWANSON
OREGON STEEL MILLS
1000 SW BROADWAY STE. 2200
PORTLAND OR 97205 US

MIKE THORNE, EXEC. DIR.
PORT OF PORTLAND
BOX 3529
PORTLAND OR 97208 US

RICK WILLIS, EXECUTIVE DIRECTOR
OREGON PUBLIC UTILITY COMM
550 CAPITOL ST NE
SALEM OR 97310-1380 US

ALLAN E. RUMBAUGH
P O BOX 1215
COOS BAY OR 97420 US

KAREN O'CONNOR
LAKE COUNTY COURTHOUSE
513 CENTER STREET
LAKEVIEW OR 97630 US

ANN DEKOSTER
P O BOX 1209
SEATTLE WA 98111 US

CHARLES H MONTANGE
426 NW 162ND STREET
SEATTLE WA 98177 US

DONALD G MEYER
P O BOX 1837
TACOMA WA 98401 US

MARCELLA M. SZEL
CP RAIL SYSTEM
910 PEEL STREET WINDSOR STATION RM 234
MONTREAL QUEBEC CD H3C 3E4 CD

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[Decision No. 78]

Dated: January 7, 1998

NOTICE TO PARTIES:

A decision served today in the above proceeding contained a typographical error. On page 6, the first full paragraph, line 4 should read as follows:

"competitive routings can still be constructed using BNSF".

Please correct your copy accordingly.

Vernon A. Williams
Secretary

PAUL K. BIBA, HOUSE COUNSEL
FORMOSA PLASTICS CORP.
9 PEACH TREE HILL ROAD
LIVINGSTON NJ 07039 US

KEN WILSON
282 BALDWIN AVE
HASBROUCK HEIGHTS NJ 07604-2304 US

OSCAR J. ABELLO, PRESIDENT
"K" LINE AMERICA, INC.
535 MOUNTAIN AVENUE
MURRY HILL NJ 07974 US

TINA MASINGTON, PLAN. ANAL.
"K" LINE AMERICA, INC.
535 MOUNTAIN AVENUE
MURRAY HILL NJ 07974 US

GEORGE J. FRANCISCO, JR.
ELLIPSE SHIPPING CENTER
4201 CHURCH ROAD - SUITE 7
MT LAUREL NJ 08054 US

JOHN F. MCHUGH
MCHUGH & SHERMAN
20 EXCHANGE PLACE 51ST FLOOR
NEW YORK NY 10005 US

R J HENEFELD
PPG INDUSTRIES INC
ONE PPG PLACE
PITTSBURGH PA 15272 US

RICHARD J. RESSLER
UNION PACIFIC CORP.
EIGHTH AND EATON AVENUES, MARTIN TOWER
BETHLEHEM PA 18018 US

CARL W. VON BERNUTH
UNION PACIFIC CORP.
EIGHTH & EATON AVENUES
BETHLEHEM PA 18018 US

RICHARD H. GROSS
3801 WEST CHESTER PIKE
NEWTOWN SQUARE PA 19073 US

WILLIAM E HARVEY
3801 WEST CHESTER PIKE
NEWTON SQUARE PA 19073 US

LARRY T. JENKINS
ARCO CHEMICAL COMPANY
3801 WEST CHESTER PIKE
NEWTON SQUARE PA 19073-3280 US

ANNE E. TREADWAY
CONSOLIDATED RAIL CORP.
P O BOX 41416
2001 MARKET STREET
PHILADELPHIA PA 19101-1416 US

EDWARD B. HYMSON
CONRAIL
2001 MARKET STREET 16-A
PHILADELPHIA PA 19101-1416 US

JONATHAN M BRODER
CONSOLIDATED RAIL CORP
PO BOX 41416
2001 MARKET STREET 16-A
PHILADELPHIA PA 19101-1416 US

CONSTANCE L. ABRAMS
CONSOLIDATED RAIL CORP.
2001 MARKET STREET 16-A, TWO COMMERCE SQUARE
PHILADELPHIA PA 19101-1416 US

BRUCE B. WILSON
CONSOLIDATED RAIL CORP.
2001 MARKET STREET
PHILADELPHIA PA 19101-1417 US

JOHN L ABBOTT
FMC CORPORATION
1735 MARKET STREET
PHILADELPHIA PA 19103 US

ERIC M. HOCKY
GOLLATZ, GRIFFIN, EWING
213 WEST MINER STREET
WEST CHESTER PA 19381-0796 US

CHARLES N. BEINKAMPEN
DUPONT SOURCING
1007 MARKET STREET, ROOM B-6236-A
WILMINGTON DE 19898 US

TERRENCE D JONES
KELLER & HECKMAN
1001 G ST NW STE 500 WEST
WASHINGTON DC 20001 US

MARTIN W. BERCOVICI
KELLER & HECKMAN
1001 G ST NW SUITE 500 WEST
WASHINGTON DC 20001 US

DOUGLAS J. BEHR
KELLER & HECKMAN
1001 G STREET NW STE 500 WEST
WASHINGTON DC 20001 US

ROBERT L. MCGEORGE
U. S. DEPT. OF JUSTICE, ANTITRUST DIVISION
555 4TH STREET N W RM 9104
WASHINGTON DC 20001 US

JOAN S HUGGLER
U. S. DEPT. OF JUSTICE, ANTITRUST DIVISION
555 4TH STREET N W RM 9104
WASHINGTON DC 20001 US

LOUIS P WARCHOT
ASSOCIATION OF AMERICAN RAILROADS
50 F STREET NW
WASHINGTON DC 20001 US

RICHARD G SLATTERY
AMTRAK
60 MASSACHUSETTS AVENUE N E
WASHINGTON DC 20002 US

DONALD F GRIFFIN
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
10 G STREET NE STE 460
WASH DC 20002 US

JOSEPH GUERRIERI, JR.
GUERRIERI, EDMOND, ET. AL
1331 F STREET N W, 4TH FLOOR
WASHINGTON DC 20004 US

MARK SCHECTER
HOWREY & SIMON
1299 PENNSYLVANIA AVE N W
WASHINGTON DC 20004 US

DAVID A ASHMORE
ARNOLD & PORTER
555 TWELFTH STREET NW
WASHINGTON DC 20004 US

ROBERT M. BRUSKIN, ESQ.
HOWREY & SIMON
1299 PENNSYLVANIA AVE NW
WASHINGTON DC 20004 US

DEBRA L. WILLEN
GUERRIERI, EDMOND & CLAYMAN PC
1331 F STREET N W, 4TH FLOOR
WASHINGTON DC 20004 US

GEORGE W MAYO JR
HOGAN & HARTSON L.L.P.
555 THIRTEENTH STREET NW
WASHINGTON DC 20004-1109 US

ERIC VON SALZEN
HOGAN & HARTSON
555 THIRTEENTH STREET N W
WASHINGTON DC 20004-1161 US

ROSEMARY H. MCENERY
HOWREY & SIMON
1299 PENNSYLVANIA AVE N W
WASHINGTON DC 20004-2402 US

MARK L JOSEPHS
HOWREY & SIMON
1299 PENNSYLVANIA AVE N W
WASHINGTON DC 20004-2402 US

CHARLES W. LINDERMAN
701 PENNSYLVANIA AVE NW, 5TH FLOOR
WASHINGTON DC 20004-2696 US

S WILLIAM LIVINGSTON JR
COVINGTON & BURLING
P O BOX 7566
1201 PENNSYLVANIA AVE NW
WASHINGTON DC 20004-7566 US

RICHARD H. STREETER
BARNES & THORNBURG
1401 I STREET NW SUITE 500
WASHINGTON DC 20005 US

MICHAEL MATTIA
INSTITUTE OF SCRAP RECYCLING INDUSTRIES, INC.
1325 G STREET NW STE 1000
WASHINGTON DC 20005 US

PAUL C. OAKLEY
WEINER, BRODSKY, SIDMAN & KIDER
1350 NEW YORK AVENUE NW SUITE 800
WASHINGTON DC 20005 US

EDWARD WYTKIND, EXECUTIVE DIRECTOR
LARRY J WILLIS ESQ TRANSP TRADES DEPT AFLCI
1000 VERMONT AVENUE, NW STE 900
WASHINGTON DC 20005 US

WILLIAM A. MULLINS
TROUTMAN SANDERS LLP
1300 I STREET NW SUITE 500 EAST
WASHINGTON DC 20005-3314 US

JOHN R. MOLM
TROUTMAN SANDERS LLP
1300 I STREET, N. W., SUITE 500 EAST
WASHINGTON DC 20005-3314 US

FRITZ R KAHN
1100 NEW YORK AVENUE NW SUITE 750 WEST
WASHINGTON DC 20005-3934 US

JEFFREY O. MORENO
DONELAN CLEARY WOOD MASER
1100 NEW YORK AVENUE N W, SUITE 750
WASHINGTON DC 20005-3934 US

NICHOLAS J. DIMICHAEL
DONELAN, CLEARY, WOOD & MASER, PC
1100 NEW YORK AVENUE N W STE 750
WASHINGTON DC 20005-3934 US

THOMAS W. WILCOX
DONELAN, CLEARY,WOOD & MASER , P.C.
1100 NEW YORK AVENUE, NW., STE. 200
WASHINGTON DC 20005-3934 US

JOHN K MASER III
DONELAN,CLEARY,WOOD,MASER
1100 NEW YORK AVE NW SUITE 750
WASHINGTON DC 20005-3934 US

JO A DEROCHE
WEINER, BRODSKY, ET AL
1350 NEW YORK AVE NW SUITE 800
WASHINGTON DC 20005-4797 US

ANDREW P. GOLDSTEIN
MCCARTHY, SWEENEY ET AL.
1750 PENNSYLVANIA AVE NW
WASHINGTON DC 20006 US

MONICA J. PALKO
BRACEWELL & PATTERSON
2000 K STREET NW STE 500
WASHINGTON DC 20006 US

ANNE D. SMITH
WHITE & CASE
1747 PENNSYLVANIA AVENUE N W
WASHINGTON DC 20006 US

KATHRYN KUSSKE
MAYER, BROWN & PLATT
2000 PENNSYLVANIA AVE N W SUITE 6500
WASHINGTON DC 20006 US

ROY T. ENGLERT, JR
MAYER, BROWN & PLATT
2000 PENNSYLVANIA AVE N W SUITE 6500
WASHINGTON DC 20006 US

LAURENCE R. LATOURETTE
PRESTON GATES ELLIS ETAL
1735 NY AVE NW SUITE 500
WASHINGTON DC 20006 US

ADRIAN L. STEEL, JR.
MAYER, BROWN & PLATT
2000 PENNSYLVANIA AVE N W SUITE 6500
WASHINGTON DC 20006 US

KRISTA L. EDWARDS
SIDLEY & AUSTIN
1722 EYE STREET N W
WASHINGTON DC 20006 US

TERRY L. CLAASSEN
CORN REFINERS ASSOC, INC.
1701 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20006 US

ANDREW R. PLUMP
ZUCKERT, SCOUTT & RASENBERGER. LLP
888 17TH ST., NW, STE. 600
WASHINGTON DC 20006 US

JAMIE PALTER RENNERT
HOPKINS & SUTTER
888 SIXTEENTH STREET NW
WASHINGTON DC 20006 US

JANICE G BARBER
MAYER BROWN & PLATT
2000 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20006 US

ROBERT P. VOM EIGEN
HOPKINS AND SUTTER
888 16TH STREET N W STE 700
WASHINGTON DC 20006 US

ALBERT B KRACHMAN
BRACEWELL & PATTERSON LLP
2000 K ST NW STE 500
WASHINGTON DC 20006-1872 US

ERIKA Z JONES
MAYER BROWN & PLATT
2000 PA AV NW
WASH DC 20006-1882 US

JAMES A CALDERWOOD
ZUCKERT, SCOUTT & RASENBERGER, L.L. P.
888 17TH STREET NW, SUITE 600
WASHINGTON DC 20006-3939 US

JENNIFER P OAKLEY
ZUCKERT, SCOUTT & RASENBERGER
888 SEVENTEENTH ST NW, STE 600
WASH DC 20006-3939 US

RICHARD A. ALLEN
ZUCKERT, SCOUT, RASENBERGER
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

JOHN V. EDWARDS, ESQ
ZUCKERT, SCOUTT ET AL.
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

ALICIA M SERFATY
HOPKINS & SUTTER
888 - 16TH STREET NW
WASHINGTON DC 20006-4103 US

CHARLES A SPITULNIK
HOPKINS & SUTTER
888 SIXTEENTH ST NW
WASH DC 20006-4103 US

STEVEN J. KALISH
MCARTHY, SWEENEY & HARKAWAY
1750 PENNSYLVANIA AVE NW
WASHINGTON DC 20006-4502 US

TERENCE M. HYNES
SIDLEY & AUSTIN
1722 EYE STREET NW
WASHINGTON DC 20006-5304 US

ANTHONY J MCMAHON
BASATIANELLI, BROWN ETAL
2828 PA AVE NW STE 203
WASHINGTON DC 20007 US

JAMES F RILL
COLLIER SHANNON RILL & SCOTT
3050 K STREET NW SUITE 400
WASHINGTON DC 20007 US

VIRGINIA R METALLO
3050 K ST NW SUITE 400
WASHINGTON DC 20007 US

EDWARD D. GREENBERG
GALLAND KHARASCH & GARFINKLE P C
1054 THIRTY-FIRST STREET NW
WASHINGTON DC 20007-4492 US

CHARLES H. WHITE, JR.
GALLAND, KHARASCH & GARFINKLE, P. C.
1054 THIRTY-FIRST STREET NW
WASHINGTON DC 20007-4492 US

MICHAEL F MCBRIDE
LEBOEUF LAMB GREENE & MACRAE
1875 CONNECTICUT AVENUE NW
WASHINGTON DC 20009 US

DANIEL ARONOWITZ
LEBOUEF, LAMB, GREENE
1875 CONNECTICUT AVE NWSTE 1200
WASHINGTON DC 20009-5728 US

LINDA K. BREGGIN, ESQ.
LEBOEUF, LAMB, GREENE, ET AL
1875 CONNECTICUT AVENUE N W
WASHINGTON DC 20009-5728 US

PAUL M. DONOVAN
LAROE, WINN, ETAL
3506 IDAHO AVE NW
WASHINGTON DC 20016 US

JOHN D. HEFFNER, ESQ.
REA, CROSS & AUCHINCLOSS
1920 N STREET NW SUITE 420
WASHINGTON DC 20036 US

KEITH G. O'BRIEN
REA, CROSS & AUCHINCLOSS
1920 N STREET N W - SUITE 420
WASHINGTON DC 20036 US

JOHN M. CUTLER, JR.
MCCARTHY SWEENEY HARKAWAY
1750 PENNSYLVANIA AVE N W SUITE 1105
WASHINGTON DC 20036 US

MARC J. FINK
SHER & BLACKWELL
1850 M STREET NW STE 900
WASHINGTON DC 20036 US

GERALD P. NORTON
HARKINS CUNNINGHAM
1300 NINETEENTH STREET, NW STE. 600
WASHINGTON DC 20036 US

C MICHAEL LOFTUS
SLOVER & LOFTUS
1224 SEVENTEENTH STREET N W
WASHINGTON DC 20036 US

PATRICIA E. (DIETRICH) KOLESAR
SLOVER & LOFTUS
1224 SEVENTEENTH ST NW
WASH DC 20036 US

SUSAN P GERSON
GRAHAM & JAMES, LLP
2000 M STREET NW STE 700
WASHINGTON DC 20036 US

CHRISTOPHER A. MILLS
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036 US

ROBERT A. WIMBISH, ESQ.
REA, CROSS & AUCHINCLOSS
1920 N STREET NW SUITE 420
WASHINGTON DC 20036 US

THOMAS LAWRENCE III
OPPENHEIMER WOLFF, ETC
1020 - 19TH STREET NW STE 400
WASHINGTON DC 20036 US

FRANK J. PERGOLIZZI
SLOVER & LOFTUS
1224 SEVENTEENTH ST NW
WASHINGTON DC 20036 US

RICHARD S. EDELMAN
HIGHSAW MAHONEY CLARKE
1050 SEVENTEENTH STREET N W, SUITE 210
WASHINGTON DC 20036 US

KELVIN J. DOWD
SLOVER & LOFTUS
1224 17TH STREET N W
WASHINGTON DC 20036 US

WILLIAM G. MAHONEY
HIGHSAW, MAHONEY & CLARKE
1050 SEVENTEENTH STREET NW SUITE 210
WASHINGTON DC 20036 US

PAUL CUNNINGHAM
HARKINS CUNNINGHAM
1300 NINETEENTH STREET, NW STE. 600
WASHINGTON DC 20036 US

GORDON P. MACDOUGALL
1025 CONNECTICUT AVE NW SUITE 410
WASHINGTON DC 20036 US

RICHARD B HERZOG
HARKINS CUNNINGHAM
1300 19TH ST NW SUITE 600
WASHINGTON DC 20036-1609 US

JOEL A RABINOVITZ
HARKINS CUNNINGHAM
1300 19TH STREET NW SUITE 600
WASHINGTON DC 20036-1609 US

JAMES M. GUINIVAN
HARKINS CUNNINGHAM
1300 19TH ST NW SUITE 600
WASHINGTON DC 20036-1609 US

JOSEPH L LAKSHMANAN
1300 19TH STREET NW, SUITE 600
WASHINGTON DC 20036-1609 US

MARC D. MACHLIN
PEPPER, HAMILTON, ET AL
1300 19TH STREET N W
WASHINGTON DC 20036-1658 US

JOHN WILL ONGMAN
PEPPER HAMILTON SCHEETZ
1300 NINETEENTH STREET N W
WASHINGTON DC 20036-1685 US

MICHELLE J. MORRIS
PEPPER, HAMILTON, ETAL
1300 NINETEENTH ST NW
WASHINGTON DC 20036-1685 US

TIMOTHY M WALSH
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

SAMUEL M. SIPE, JR.
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

BETTY JO CHRISTIAN
STEPTOE & JOHNSON
1330 CONNECTICUT AVE NW
WASHINGTON DC 20036-1795 US

JOHN H. LESEUR
SLOVER & LOFTUS
1224 17TH STREET NW
WASHINGTON DC 20036-3081 US

PAUL H. LAMBOLEY
1020 NINETEENTH STREET, N.W., STE 400
WASHINGTON DC 20036-6105 US

KEVIN M SHEYS
OPPENHEIMER WOLFF & DONNELLY
1020 NINETEENTH STREET N W SUITE 400
WASHINGTON DC 20036-6105 US

A STEPHEN HUT JR
WILMER CUTLER & PICKERING
2445 M ST NW
WASHINGTON DC 20037 US

SCOTT N. STONE
PATTON BOGGS L.L.P.
2550 M STREET NW 7TH FLOOR
WASHINGTON DC 20037-1346 US

DANIEL K. MAYERS
WILMER CUTLER PICKERING
2445 M STREET N W
WASHINGTON DC 20037-1420 US

MICHAEL BRESSMAN
WILMER CUTLER PICKERING
2445 M STREET N W
WASHINGTON DC 20037-1420 US

ALI M. STOEPPELWERTH
WILMER CUTLER PICKERING
2445 M STREET N W
WASHINGTON DC 20037-1420 US

WILLIAM J KOLASKY JR
WILMER CUTLER & PICKERING
2445 M STREET NW
WASH DC 20037-1420 US

DAVID H. BAKER
HOLLAND & KNIGHT
2100 PENN AVE NW ST 400
WASHINGTON DC 20037-3202 US

TIMOTHY C HESTER
P O BOX 7566
1201 PENNSYLVANIA AVENUE N W
WASHINGTON DC 20044 US

J MICHAEL HEMMER
COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20044 US

DAVID L. MEYER
COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE N W
WASHINGTON DC 20044-7566 US

ARVID E ROACH II
COVINGTON & BURLING
PO BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044-7566 US

MICHAEL A. LISTGARTEN
COVINGTON & BURLING
P O BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044-7566 US

MICHAEL ROSENTHAL
COVINGTON & BURLING
P O BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044-7566 US

EILEEN S. STOMMES, DIRECTOR, T&M DIVISION
AGRICULTURAL MARKETING SERVICE, USDA
P. O. BOX 96456
WASHINGTON DC 20090-6456 US

HON. JEROME NELSON
FERC (LJ-2)
888 1ST STREET N E
WASHINGTON DC 20426 US

RICHARD SANDERSON
OFFICE OF FED ACTIV
US ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON DC 20460 US

HON JOHN GLENN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE THAD COCHRAN
UNITED STATE SENATE
WASHINGTON DC 20510 US

HON. DAN COATS
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE J. ROBERT KERRY
UNITED STATES SENATE
WASH DC 20510 US

HON CONRAD BURNS
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE TIM JOHNSON
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE DON NICKLES
U. S. SENATE
WASHINGTON DC 20510 US

HON. WAYNE ALLARD
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. PHIL GRAMM
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE RICHARD LUGAR
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE RICHARD BRYAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE BYRON L DORGAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. CHRISTOPHER S. BOND
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE PAT ROBERTS
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE HARRY REID
UNITED STATES SENATE
WASHINGTON DC 20510-0001 US

HON. BEN N CAMPBELL
UNITED STATES SENATE
WASHINGTON DC 20510-0605 US

HONORABLE RICHARD J DURBIN
UNITED STATES SENATE
WASHINGTON DC 20510-1304 US

HONORABLE CHARLES E. GRASSLEY
UNITED STATES SENATE
WASHINGTON DC 20510-1501 US

HONORABLE JOHN BREAUX
UNITED STATES SENATE
WASHINGTON DC 20510-1803 US

HARRY REID
UNITED STATES SENATE
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20510-2804 US

HON. TOM EWING
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ROBERT A. BORSKI
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE FRANK MASCARA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JOHN MURTHA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MARCY KAPTUR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JAMES TRAFICANT JR
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LLOYD DOGGETT
U. S. HOUSE OF REPRESENTATAIVES
WASHINGTON DC 20515 US

HON DAVID L HOBSON
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JOHN TANNER
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RON LEWIS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DAVID MINGE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JOHN HOSTETTLER
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON TOM DELAY
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PAUL MCHALE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TIM HOLDEN
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE MIKE DOYLE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE FRANK D. RIGGS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE CHARLES W. STENHOLM
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE ZOE LOFGREN
US HOUSE OF RESPRESENTATIVE
WASHINGTON DC 20515 US

HONORABLE XAVIER BECERRA
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LUCILLE ROYAL-ALLARD
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LYNN WOOLSEY
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PETE STARK
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE NANCY PELOSI
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TOM LANTOS
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RICHARD W. POMBO,
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE KEN CALVERT,
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE SONNY BONO,
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE CHRISTOPHER COX,
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RON PACKARD
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DANA ROHRABACHER
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE HOWARD P. BUCK MCKEON,
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BRIAN P. BILBRAY
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE EDWARD R. ROYCE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE KAREN MCCARTHY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JAY KIM
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PHIL ENGLISH
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JULIAN DIXON
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JAY DICKEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. EARL POMEROY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE GEORGE GEKAS
ATTEN: TOM SANTANIELLO
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. HAROLD E. FORD, JR
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DONALD M. PAYNE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. MARTIN OLAV SABO
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. LANE EVANS
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20513 US

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UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ESTEBAN E TORRES
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE GENE GREEN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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UNITED STATES HOUSE OF REPRESENTATIVES
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U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RON PACKARD
U. S. HOUSE OF REPRESENTATIVES
WASH DC 20515-0548 US

HONORABLE SCOTT MCINNIS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-0603 US

HONORABLE TODD TIAHRT
HOUSE OF REPRESENTATIVE
WASHINGTON DC 20515-1004 US

HONORABLE SAM BROWNBACK
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-1602 US

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U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-1805 US

HONORABLE GEORGE MILLER
ATT: GARY BLAND
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2307 US

HON W J (BILLY) TAUZIN
ATTN: ROY WILLIS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2601 US

HONORABLE JOHN ENSIGN
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2801 US

HON. ROBERT E ANDREWS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3001 US

HONORABLE SHERROD BROWN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3513 US

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U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3606 US

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U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3801 US

HONORABLE CHAKA FATTAH
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3803 US

HONORABLE CURT WELDON
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3807 US

HON. JON CHRISTENSEN
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4155 US

HONORABLE WILLIAM M (MAC) THORNBERRY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4313 US

HONORABLE SHEILA JACKSON LEE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4318 US

HON. HENRY BONILLA
US HOUSE REPRESENTATIVES
WASHINGTON DC 20515-4323 US

HONORABLE EDDIE BERNICE JOHNSON
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4330 US

ROGER W. FONES
US DEPT. OF JUSTICE
325 7TH STREET N W SUITE 500
WASHINGTON DC 20530 US

MICHAEL D BILLIEL
ANTITRUST DIV, DEPT OF JUSTICE
325 SEVENTH ST NW STE 500
WASHINGTON DC 20530 US

PAUL SAMUEL SMITH
US DEPARTMENT OF TRANSPORTATION
400 SEVENTH STREET SW
WASHINGTON DC 20590 US

JOSEPH R. POMPONIO
FEDERAL RAILROAD ADMIN.
400 7TH ST SW RCC-20
WASHINGTON DC 20590 US

MITCHELL M. KRAUS
TRANSPORTATION -COMMUNICATIONS INTERNATIONAL
3 RESEARCH PLACE
ROCKVILLE MD 20850 US

WILLIAM W WHITEHURST JR.
W. W. WHITEHURST & ASSOCIATES, INC.
12421 HAPPY HOLLOW ROAD
COCKEYSVILLE MD 21030 US

CONSTANCE H. PIERCE
CONSTELLATION COMPANIES
250 WEST PRATT STREET
BALTIMORE MD 21201-2423 US

J TUCKER
PO BOX 25181
ARLINGTON VA 22202 US

PETER Q. NYCE, JR.
U. S. DEPARTMENT OF THE ARMY
901 NORTH STUART STREET
ARLINGTON VA 22203 US

NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
1700 NORTH MOORE STREET, SUITE 1900
ARLINGTON VA 22209 US

THOMAS E. SCHICK
CHEMICAL MANUF. ASSOC.
1300 WILSON BOULEVARD
ARLINGTON VA 22209 US

WILLIAM P. JACKSON, JR.
JACKSON & JESSUP, P. C.
P O BOX 1240
3426 NORTH WASHINGTON BLVD
ARLINGTON VA 22210 US

GERALD W. FAUTH, III
G. W. FAUTH & ASSOCIATES INC.
116 SOUTH ROYAL STREET
ALEXANDRIA VA 22314 US

JOHN T ESTES
1029 NORTH ROYAL STREET SUITE 400
ALEXANDRIA VA 22314 US

PETER J SHUDTZ
CSX CORPORATION
902 E CARY ST 1 JAMES CENTER
RICHMOND VA 23119 US

ROBERT J. COONEY
NORFOLK SOUTHERN CORP.
THREE COMMERCIAL PLACE
NORFOLK VA 23510-2191 US

ROBERT S. KOMPANTY
720 THIMBLE SHOALS BLVD, SUITE 130
NEWPORT NEWS VA 23608-2574 US

BOB THOMPSON
GEORGIA-PACIFIC CORP.
P O BOX 105605
ATLANTA GA 30348-5605 US

GREGORY M. VINCENT, VICE PRESIDENT
TENNESSEE VALLEY AUTH
LOOKOUT PLACE 1101 MARKET STREET
CHATTANOOGA TN 37402 US

E. CALVIN CASSELL
EASTMAN CHEMICAL COMPANY
P O BOX 1990
KINGSPORT TN 37662 US

EDWARD S. CHRISTENBURY
400 WEST SUMMIT HILL DRIVE
KNOXVILLE TN 37902 US

HONORABLE GILLESPIE V. MONTGOMERY
U. S. HOUSE OF REPRESENTATIVES
P. O. BOX 5618
MERIDAN MS 39208 US

R. L. YOUNG
P O BOX 700
ONE MEMORIAL DRIVE
LANCASTER OH 43130-0700 US

D. MICHAEL MILLER
AMERICAN ELECTRIC POWER
1 RIVERSIDE PLAZA
COLUMBUS OH 43215 US

HONORABLE JOHN GLENN
U. S. SENATE ATTN: ANISA BELL
200 N HIGH STREET S-600
COLUMBUS OH 43215-2408 US

MICHAEL M. BRILEY
SHUMAKER, LOOP & KENDRICK
N COURTHOUSE SQUARE - 1000 JACKSON
TOLEDO OH 43624 US

DANIEL R ELLIOTT III
UNITED TRANSPORTATION UNION
14600 DETROIT AVENUE
CLEVELAND OH 44107 US

CLINTON J MILLER, III, GENERAL COUNSEL
UNITED TRANSPORTATION UNION
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

RONALD P MCLAUGHLIN
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
1370 ONTARIO ST STAN BLDG
CLEVELAND OH 44113-1702 US

RICHARD E. KERTH, TRANS. MGR.
CHAMPION INTERNAT'L CORP
101 KNIGHTSBRIDGE DRIVE
HAMILTON OH 45020-0001 US

MICHAEL P. FERRO
MILLENNIUM PETROCHEMICALS, INC.
11500 NORTHLAKE DRIVE
CINCINNATI OH 45249 US

BRUCE A. KLIMEK
INLAND STEEL
3210 WATLING STREET
EAST CHICAGO IN 46312 US

HON JEFF SMITH
CITY OF KENDALLVILLE
234 S MAIN STREET
KENDALLVILLE IN 46755-1795 US

JAMES E. HANSON
DOW CHEMICAL COMPANY
2020 WILLARD H DOW CENTER
MIDLAND MI 48674 US

LARRY B. KARNES
TRANSPORTATION BUILDING
PO BOX 30050
425 WEST OTTAWA
LANSING MI 48909 US

THOMAS F JACKSON
800 LINCOLN WAY
AMES IA 50010 US

P C HENDRICKS
STATE LEGISLATIVE DIRECTOR UTU
313 E 5TH STREET
DES MOINES IA 50309 US

HONORABLE CHARLES E. GRASSLEY
UNITED STATES SENATE
210 WALNUT STREET
DES MOINES IA 50309-2140 US

EDWIN C JERTSON
INTERSTATE POWER CO
P O BOX 769
1000 MAIN STREET
DUBUQUE IA 52004 US

KENT M RAGSDALE
INTERSTATE POWER CO
PO BOX 769
DUBUQUE IA 52004 US

PHILIP D. WARD, ET AL.
P O BOX 351
200 FIRST STREET SE
CEDAR RAPIDS IA 52406-0351 US

TOBIN LEE BRITT
IES UTILITIES, INC.
P O BOX 351
200 FIRST ST SE
CEDAR RAPIDS IA 52406-0351 US

WILLIAM R. KNIGHT
WISCONSIN POWER & LIGHT
P O BOX 192
222 WEST WASHINGTON AVENUE
MADISON WI 53701-0192 US

ALLEN J VOGEL,
MINNESOTA DEPARTMENT OF TRANSPORTATION
395 JOHN IRELAND BLVD TRANSP BLDG, SUITE 925,
ST PAUL MN 55155 US

RONALD E HUNTER, LAW DEPARTMENT
CARGILL, INCORPORATED
15407 MCGINTY ROAD WEST
WAYZATA MN 55391 US

WAYNE C. SERKLAND, U S REGIONAL COUNSEL
CANADIAN PACIFIC LEG. SER
105 SOUTH FIFTH ST SUITE 1000
MINNEAPOLIS MN 55402 US

DOUGLAS M. HEAD
WEINER
120 SOUTH 6TH STREET STE 2400
MINNEAPOLIS MN 55402 US

BOB ZELENKA
852 GRAIN EXCHANGE, 400 SOUTH FOURTH STREET
MINNEAPOLIS MN 55415 US

HON. WILLIAM J. JANKLOW
GOVERNOR, SD
500 EAST CAPITOL
PIERRE SD 57501-5070 US

TERRY C. WHITESIDE
RADERMACHER, WHITESIDE & ASSOCIATES
3203 3RD AVE N STE 301
BILLINGS MT 59101 US

HONORABLE MARC RACICOT
GOV'S OFFICE, STATE CAP.
P O BOX 200801
HELENA MT 59620-0801 US

J. FRED GIMPSON, EXECUTIVE VICE PRESIDENT
MONTANA RAIL LINK, INC.
101 INTERNATIONAL WAY
MISSOULA MT 59802 US

JANET H GILBERT
WISCONSIN CENTRAL LTD
6250 NORTH RIVER ROAD STE 9000
ROSEMONT IL 60018 US

RICHARD E. WEICHER
BURLINGTON NORTHERN SANTA FE CORPORATION
1700 EAST GOLF ROAD, 6TH FLOOR
SCHAUMBURG IL 60173 US

JEFFREY R. MORELAND
THE BURLINGTON NORTHERN SANTA FE CORPORATION
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173 US

JAMES A. SMALL
COMMONWEALTH EDISON CO.
1411 OPUS PL STE 200
DOWNERS GROVE IL 60515-5701 US

WILLIAM F. COTTRELL
ASST. ATTORNEY GENERAL
100 W RANDOLPH ST - 12TH FLOOR
CHICAGO IL 60601 US

WILLIAM C SIPPEL
OPPENHEIMER WOLFF & DONNELLY
180 N STETSON AVE TWO PRUDENTIAL PLAZA 45TH F
CHICAGO IL 60601 US

THOMAS J. LITWILER
OPPENHEIMER WOLFF & DONNELLY
180 N STETSON AVE 45TH FLOOR
CHICAGO IL 60601 US

THOMAS J HEALEY
OPPENHEIMER, WOLFF, ETAL
180 N STETSON AV 2 PRUDENTIAL PL
CHICAGO IL 60601 US

CHRISTINE H. ROSSO
IL ASSISTANT ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FLOOR
CHICAGO IL 60601 US

RODMAN KOBER
CONTINENTAL GRAIN CO
222 S RIVERSIDE PLAZA - STE 1100
CHICAGO IL 60606 US

THOMAS DEGNAN
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125 SOUTH FRANKLIN STREET
CHICAGO IL 60606 US

STEPHEN C. HERMAN
MCFARLAND & HERMAN
20 N WACKER DRIVE STE 1330
CHICAGO IL 60606-2902 US

THOMAS F. MCFARLAND, JR.
MCFARLAND & HERMAN
20 NORTH WACKER DRIVE, SUITE 1330
CHICAGO IL 60606-3101 US

RONALD A. LANE
ILLINOIS CENTRAL RR
455 N CITYFRONT PLAZA DR 20TH FL
CHICAGO IL 60611 US

MYLES L. TOBIN
ILLINOIS CENTRAL RAILROAD
455 NORTH CITYFRONT PLAZA DRIVE
CHICAGO IL 60611-5504 US

GARY L TOWELL
TOLEDO, PEORIA & WESTERN
1990 EAST WASHINGTON STREET
EAST PEORIA IL 61611-2961 US

CLARENCE R. PONSLER
GENERAL CHAIRMAN, UTU
1017 W. MAIN STREET
BELLEVILLE IL 62220 US

SCOTT A RONEY
ARCHER DANIELS MIDLAND COMPANY
P O BOX 1470
4666 FARIES PARKWAY
DECATUR IL 62525 US

JON FOY, DIRECTOR, RATES GRAIN
ARCHER DANIEL MIDLAND CO
P. O. BOX 1470
4666 FARIES PARKWAY
DECATUR IL 62525 US

CAROL R DORIS
500 SOUTH SECOND STREET
SPRINGFIELD IL 62706 US

KIRK BROWN
ILLINOIS DOT, OFFICE OF THE SECRETARY
2300 SOUTH DIRKSEN PARKWAY
SPRINGFIELD IL 62764 US

ROGER HERMANN
MALLINCKRODT CHEMICAL
16305 SWINGLEY RIDGE DRIVE
CHESTERFIELD MO 63017-1777 US

JEFFREY L. KLINGER
PEABODY HOLDING COMPANY
701 MARKET STREET STE 700
ST LOUIS MO 63101-1826 US

C A MENNELL, PRESIDENT
LACKLAND WESTERN RR CO
31 OAK TERRACE
WEBSTER GROVES MO 63119 US

DAVID A. PINS
THE CHEMICAL GROUP, MONSANTO
800 N LINDBERGH BOULEVARD
ST LOUIS MO 63167 US

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414 MISSOURI BOULEVARD
SCOTT CITY MO 63780 US

HON IKE SKELTON
U. S. HOUSE OF REP.
514 B N W 7 HIGHWAY
BLUE SPRINGS MO 64014 US

ROBERT K DREILING
KANSAS CITY SOUTHERN RWY CO.
114 WEST 11TH STREET
KANSAS CITY MO 64105 US

RICHARD P BRUENING
KANSAS CITY SOUTHERN RR
114 WEST ELEVENTH STREET
KANSAS CITY MO 64106 US

MEL CARNAHAN
OFFICE OF THE GOVERNOR
STATE CAPITOL ROOM 216
JEFFERSON CITY MO 65101 US

JACK HYNES, ADMINISTRATOR OF RAILROADS
MISSOURI DEPARTMENT OF TRANSPORTATION
PO BOX 270
105 WEST CAPITOL AVENUE
JEFFERSON CITY MO 65102 US

JOSEPH A. STINGER
IBBB
570 NEW BROTHERHOOD BUILDING
KANSAS CITY KS 66101 US

WILLIAM J. MCGINN
NORTH AMER. CHEM. CO.
8300 COLLEGE BOULEVARD
OVERLAND PARK KS 66210 US

BARRETT HATCHES
8300 COLLEGE BLVD
OVERLAND PARK KS 66210 US

T. L. GREEN
WESTERN RESOURCES, INC.
PO BOX 889
818 KANSAS AVE
TOPEKA KS 66601 US

JOHN JAY ROSACKER
KS, DEPT OF TRANSP
217 SE 4TH ST 2ND FLOOR
TOPEKA KS 66603 US

NORMAN G MANLEY
CITY ATTORNEY, ANOVER CITY HALL
909 NORTH ANDOVER ROAD
ANDOVER KS 67002 US

TIM NORTON
CITY OF HAYSVILLE
PO BOX
200 WEST GRAND
HAYSVILLE KS 67060 US

DWAYNE H SHANNON
PO BOX 1138
WICHITA KS 67201 US

ALAN R. POST
1803 STEFKIN STREET
WICHITA KS 67208-1758 US

JAMES J. IRLANDI
STB PRACTITIONER
1809 N BROADWAY/SUITE F
WICHITA KS 67214 US

JUNIOR STRECKER, CHAIRMAN
MOUNTAIN-PLAINS COMMUNITIES & SHIPPERS COALIT
123 NORTH MAIN ST
HOISINGTON KS 67544 US

ROBERT K. GLYNN
HOISINGTON CHAM. OF COMM.
123 NORTH MAIN STREET
HOISINGTON KS 67544-2594 US

JOHN F. LARKIN
P O BOX 31850
4814 DOUGLAS ST 68132
OMAHA NE 68132-0850 US

PAUL A. CONLEY, JR. ,LAW DEPARTMENT
UNION PACIFIC RR CO.
1416 DODGE STREET
OMAHA NE 68179 US

LOUISE A. RINN
UNION PACIFIC RR CO.
1416 DODGE STREET ROOM 830
OMAHA NE 68179 US

JEANNA L REGIER
UNION PACIFIC RAILROAD COMPANY
1416 DODGE ST ROOM 830
OMAHA NE 68179 US

JAMES V. DOLAN, LAW DEPARTMENT
UNION PACIFIC RR CO.
1416 DODGE STREET #830
OMAHA NE 68179 US

JOSEPH D. ANTHOFER
UNION PACIFIC RR CO.
1416 DODGE STREET ROOM 830
OMAHA NE 68179-0001 US

ROBERT T. OPAL
UNION PACIFIC RAILROAD CO.
1416 DODGE STREET RM 830
OMAHA NE 68179-0001 US

KEN SIECKMEYER, MGR. TRANSP. PLANN. DIV.
NEBRASKA DEPT. OF ROADS
P O BOX 94759
LINCOLN NE 68509-4759 US

WAYNE ANDERSON
ENTERGY SERVICES, INC.
639 LOYOLA AVE MAIL L-ENT-26E
NEW ORLEANS LA 70113 US

W. F. CARTER
ALBEMARLE CORPORATION
451 FLORIDA STREET
BATON ROUGE LA 70801 US

DEAN L. WORLEY
HILBURN CALHOON HARPER
P O BOX 5551
ONE RIVERFRONT PLACE EIGHTH FL
NORTH LITTLE ROCK AR 72119 US

SCOTT MANATT
P. O. BOX 473
CORNING AR 72422 US

JOE N. HAMPTON
2309 NORTH TENTH, SUITE E
ENID OK 73701 US

THOMAS R. JACOBSEN
TU ELECTRIC
1601 BRYAN STREET STE 11-060
DALLAS TX 75201-3411 US

JOEL T WILLIAMS III
STE 350, LB-126
4809 COLE AVENUE
DALLAS TX 75205 US

STEVEN A BRIGANCE
LEBOEUF, LAMB, ETAL
4025 WOODLAND PARK BLVD STE 250
ARLINGTON TX 76013 US

EDMUND W. BURKE
BURLINGTON NORTHERN RR CO
777 MAIN STREET, 3800 CONTINENTAL PLAZA
FT WORTH TX 76102 US

DOUGLAS J. BABB
BURLINGTON NORTHERN RR CO
777 MAIN STREET, 3800 CONTINENTAL PLAZA
FT WORTH TX 76102-5384 US

MICHAEL E ROPER
BURLINGTON NORTHERN SANTA FE CORPORATION
3017 LOU MENK DRIVE
FT WORTH TX 76131 US

RICHARD J SCHIEFELBEIN
WOODHARBOR ASSOCIATES
7801 WOODHARBOR DRIVE
FORT WORTH TX 76179 US

W. DAVID TIDHOLM
HUTCHESEN & GRUNDY
1200 SMITH STREET (#3300)
HOUSTON TX 77002-4579 US

GEN. COMMITTEE OF ADJUST. GO-895
UNITED TRANS. UNION
2040 NORTH LOOP WEST STE 310
HOUSTON TX 77018 US

ROBERT J. ROSSI
UNITED TRANSPORTATION UNION
2040 NORTH LOOP WEST SUITE 310
HOUSTON TX 77018-8112 US

GEORGE T. WILLIAMSON
P O BOX 2562
111 E LOOP N
HOUSTON TX 77029 US

JOHN D. BURKE
GREATER HOUSTON PORT BUREAU, INC
111 EAST LOOP NORTH
HOUSTON TX 77029 US

B KENNETH TOWSEND JR
EXXON CHEMICAL CO
13501 KATY FREEWAY
HOUSTON TX 77079-1398 US

B. C. GRAVES, JR.
EXXON COMPANY U.S.A.
PO BOX 4692
HOUSTON TX 77210-4692 US

BRIAN P. FELKER
SHELL CHEMICAL COMPANY
P O BOX 2463
HOUSTON TX 77252-2463 US

ERIC W. TIBBETTS
P O BOX 3766
1301 MCKINNEY ST
HOUSTON TX 77253 US

ROY GIANGROSSO
ENTERGY SERVICES, INC.
350 PINE STREET
BEAUMONT TX 77701 US

TEXAS MEXICAN RAILWAY CO.
PO BOX 419
LAREDO TX 78042-0419 US

JOHN P. LARUE, EXECUTIVE DIRECTOR
THE PORT OF CORPUS CHRISTI
P O BOX 1541
222 POWER STREET
CORPUS CHRISTI TX 78403 US

THOMAS A GRIEBEL
TEXAS DOT
125 E 11TH ST
AUSTIN TX 78701 US

JERRY L. MARTIN, DIRECTOR RAIL DIV.
RR COMM OF TEXAS
P O BOX 12967
1701 N CONGRESS
AUSTIN TX 78711 US

MARK TOBEY
P O BOX 12548
AUSTIN TX 78711-2548 US

REBECCA FISHER
ASST ATTY GENERAL
PO BOX 12548
AUSTIN TX 78711-2548 US

DONALD T CHEATHAM
10220-E METROPOLITAN DR
AUSTIN TX 78758 US

HON. JOHN R. COOK,
TX HOUSE OF REPRESENTATIVES
P O BOX 2910
AUSTIN TX 78768 US

HON. ROBERT JUNELL
TEXAS HOUSE OF REP.
PO BOX 2910
AUSTIN TX 78768 US

ROBERT M. SAUNDERS
P O BOX 2910
AUSTIN TX 78768-2910 US

ROBERT A. CUSHING, JR.
UNITED TRANS. UNION,
12401 HIDDEN SUN COURT
EL PASO TX 79938 US

DARRELL L. HANAVAN, EXECUTIVE DIRECTOR
COLORADO WHEAT ADMIN.
5500 SOUTH QUEBEC STREET STE 111
ENGLEWOOD CO 80111 US

THOMAS F. LINN
MOUNTAIN COAL COMPANY
555 17TH STREET 22ND FLOOR
DENVER CO 80202 US

STEPHEN D ALFERS
ALFERS & CARVER
730 17TH STREET #340
DENVER CO 80202 US

RUSSELL S. JONES, III
MOUNTAIN COAL COMPANY
555 17TH STREET 22ND FLOOR
DENVER CO 80202 US

PATRICIA T. SMITH, SR. VICE PRESIDENT
PUBLIC SERVICE COMPANY
1225 - 17TH STREET STE 600
DENVER CO 80202 US

NANCY MANGONE, ENFORCEMENT ATTORNEY
U. S. EPA REGION VIII
999 18TH SST STE 500
DENVER CO 80202-2466 US

DAVID N. LAWSON, FUEL TRAFFIC COORDINATOR
PUBLIC SERVICE COMMISSION
1225 17TH ST STE 1100, SEVENTEENTH ST PLAZA
DENVER CO 80202-5533 US

JANE T. FELDMAN, ASST. ATTORNEY GENERAL
STATE OF COLORADO
1525 SHERMAN ST- 5TH FLOOR
DENVER CO 80203 US

HONORABLE ROY ROMER
GOVERNOR
136 STATE CAPITOL
DENVER CO 80203 US

HON. BEN N. CAMPBELL
UNITED STATES SENATE
1129 PENNSYLVANIA STREET
DENVER CO 80203 US

SUE BALLENSKI, PHYSICAL RESOURCES
USDA FOREST SERVICE
P O BOX 25127
LAKEWOOD CO 80225 US

GERALD E. VANINETTI
RESOURCE DATA INT'L
1320 PEARL STREET STE 300
BOULDER CO 80302 US

JOE D. FORRESTER
C/O CO MTN COLLEGE, TIMBERLINE CAMPUS
901 S HWY 24
LEADVILLE CO 80461 US

THOMAS J. FLORCZAK
CITY OF PUEBLO
127 THATCHER BUILDING
PUEBLO CO 81003 US

MAYOR LESTER WILLIAMS
TOWN OF EADS
PO BOX 8
110 W 13TH ST
EADS CO 81036 US

CARDON G. BERRY
KIOWA CO. COMMISSIONERS
PO BOX 591
1305 GOFF
EADS CO 81036 US

HON DELCARL EIKENBERG
TOWN OF HASWELL
P O BOX 206
HASWELL CO 81045-0206 US

JOHN R STULP
SECED
P O BOX 1300
LAMAR CO 81052 US

LEROY E. MAUCH
BOARD OF COUNTY COMMISSIONERS
P. O. BOX 1046
LAMAR CO 81052 US

CLEDE WIDENER
BOARD OF COUNTY COMMISSIONERS
P. O. BOX 1046
LAMAR CO 81052 US

JOHN ROESCH
BENT COUNTY
PO BOX 350
LAS ANIMAS CO 81054 US

BLAINE ARBUTHNOT
CROWLEY COUNTY
601 MAIN ST
ORDWAY CO 81063 US

JANET PALMER
P O BOX 1268
13997 COUNTY ROAD 71
SHERIDAN LAKE CO 81071 US

BERNICE TUTTLE
KIOWA COUNTY WIFE, CHAPTER #124
13775 CR785
TOWNER CO 81071-9619 US

CHARLES WAIT
BACA COUNTY
PO BOX 116
SPRINGFIELD CO 81073 US

FRANK C MCMURRY
PO BOX 699
SALIDA CO 81201 US

THOMAS W. FOSTER, CHAIRMAN
COM. TO PRESERVE PROPERTY
P O BOX 681
SALIDA CO 81201 US

E W WOTIPKA
6388 TERRACE LANE
SALIDA CO 81201 US

HON. NANCY SANGER, MAYOR
CITY OF SALIDA
P O BOX 417
124 E STREET
SALIDA CO 81201 US

MYRON F. SMITH
FREMONT COUNTY COMM.
615 MACON AVE ROOM #102
CANON CITY CO 81212 US

GREG TABUTEAU
ROYAL GORGE SCENIC RY
P O BOX 1387
CANON CITY CO 81215 US

RUTH H. CARTER, MAYOR
CITY OF CANON CITY ATTN: STEVE THACKER CITY A
P O BOX 1460
CANON CITY CO 81215 US

JUDY LOHNES
UAACOG
P O BOX 510
CANON CITY CO 81215-0510 US

STEVEN G. RABE, CITY MANAGER
CITY OF FLORENCE
300 W MAIN STREET
FLORENCE CO 81226 US

STEVE TUCKER
D&RG WEST. EMPLOYEES
2048 J ROAD
FRUITA CO 81521 US

JAMES R. FRITZE
EAGLE COUNTY ATTORNEY
P O BOX 850
EAGLE CO 81631 US

GARY L. MCFARLEN,, DIRECTOR-TRANSP
KENNECOTT ENERGY COMPANY
BOX 3009
505 SOUTH GILLETTE AVENUE
GILLETTE WY 82716 US

PATRICIA BRITTON, CHIEF LEGAL OFFICER
KENNECOTT ENERGY COMPANY
505 SOUTH GILLETTE AVENUE
GILLETTE WY 82716 US

TIMM R. ADAMS
IDAHO BARLEY COMMISSION
1199 MAIN STREET, STE G
BOISE ID 83702-5630 US

JERRY R KRESS
ID, WHEAT COMMISSION
1109 MAIN ST STE 310
BOISE ID 83702-5642 US

ANN KNAPTON
IDAHO TIMBER CORPORATION
P O BOX 67
5401 KENDALL STREET
BOISE ID 83707-0067 US

WAYNE L. STOCKEBRAND
KENNECOTT UTAH COPP. CORP
P O BOX 6001
8315 WEST 3595 SOUTH
MAGNA UT 84044-6001 US

RAY D. GARDNER
KENNECOTT UTAH COPP. CORP
P O BOX 6001
8315 WEST 3595 SOUTH
MAGNA UT 84044-6001 US

ALEXANDER H. JORDAN
WESTERN SHIPPERS COALITION
3118 ROUND VALLEY WAY
PARK CITY UT 84060-6842 US

RONALD L. RENCHER
WESTERN SHIPPERS COAL.
136 SOUTH MAIN STREET STE 1000
SALT LAKE CITY UT 84101-1672 US

F MARK HANSEN
404 EAST 4500 SOUTH SUITE B-34
SALT LAKE CITY UT 84107 US

JEFFREY B. GROY
ONE UTAH CTR •
201 SOUTH MAIN STREET, STE 1100
SALT LAKE CITY UT 84111 US

HON. DEEDEE CORRADINI
451 SOUTH STATE STREET, ROOM 306
SALT LAKE CITY UT 84111 US

CHRISTOPHER E. BRAMHALL
451 SOUTH STATE ST, ROOM 505
SALT LAKE CITY UT 84111 US

HONORABLE MICHAEL O. LEAVITT
ATTN: ROBIN L. RIGGS, GC TO GOVERNOR
210 STATE CAPITOL
SALT LAKE CITY UT 84114 US

REED M. RICHARDS
STATE OF UTAH
236 STATE CAPITOL
SALT LAKE CITY UT 84114 US

LYNETTE W. THIRKILL, LOGISTICS MANAGER
GR. SALT LAKE MINERALS
P O BOX 1190
OGDEN UT 84402 US

KENNETH C. JOHNSEN, V PRES & GEN COUNSEL
GENEVA STEEL COMPANY
P O BOX 2500
PROVO UT 84603 US

RALPH RUPP
PO BOX 2500
PROVO UT 84603 US

CAROL HEATHINGTON
1300 W WASHINGTON
PHOENIX AZ 85007 US

HONORABLE BOB STUMP
U.S. HOUSE OF REPRESENTATIVES
230 N. 1ST AVE., VOOM 2001
PHOENIX AZ 85025 US

FRANK E. HANSON, JR
MAGMA METALS COMPANY
7400 NORTH ORACLE ROAD, SUITE 200
TUCSON AZ 85704 US

CARA BROWN
FITZGERALDS GAMING CORPORTATION
P O BIX 7600
301 FREMONT STREET
LAS VEGAS NV 89101 US

O. KENT MAHER
33 WEST FOURTH ST
PO BOX 351
WINNEMUCCA NV 89446 US

R. MICHAEL MCCORMICK
HUMBOLDT COUNTY DA
P O BOX 909
50 WEST FIFTH STREET
WINNEMUCCA NV 89446 US

FRANK D GAUS
805 KUENZIL ST # 149
RENO NV 89502 US

MICHAEL E. HALLEY
CITY OF RENO
P O BOX 1900
RENO NV 89505 US

STEVE VARELA
PO BOX 1900
RENO NV 89505 US

DORI OWEN, SPECIAL PROJECTS MANAGER
REDEVELOP LAND AGENCY
490 S CENTER STREET STE 203
RENO NV 89505 US

CHARLES E. MCNEELY
CITY OF RENO
P. O. BOX 1900
RENO NV 89505 US

JOHN FRANKOVICH
P O BOX 2670
241 RIDGE STREET, 4TH FLOOR
RENO NV 89505-2670 US

BILL STAAB
RR DONNELLEY & SONS CO
14100 LEAR BOULEVARD
RENO NV 89506 US

SCOTT HUTCHERSON
EAGLE-PICHER MINERALS INC
6110 PLUMAS ST
RENO NV 89509 US

CHARLES A BRACHT
700 FOREST
RENO NV 89509 US

PHILLIP WENDT
PO BOX 11072
RENO NV 89510 US

JEFFERY W. HILL
SIERRA PACIFIC POWER CO.
P O BOX 10100
6100 NEIL ROAD
RENO NV 89520 US

GREGORY KRAUSE
REGIONAL TRANSPORTATION COMMISSION
P O BOX 30002
RENO NV 89520-3002 US

BOB MILLER
STATE OF NEVADA
CAPITOL COMPLEX EXECUTIVE CHAMBER
CARSON CITY NV 89710 US

THOMAS J. FRONAPFEL
NEVADA, DEPT. OF TRANSPORTATION
1263 S STEWART STREET
CARSON CITY NV 89712 US

MICHAEL I. STOCKMAN, GENERAL COUNSEL
U. S. BORAX INC.
26877 TOURNEY ROAD
VALENCIA CA 91355 US

JOHN E. BALLAS, AGENCY ENGINEER
INDUSTRY URBAN-DEV. AG.
P O BOX 7089
15651 EAST STAFFPRD STREET
CITY OF INDUSTRY CA 91744 US

JOHN D BALLAS
P.O. BOX 7089
15651 EAST STAFFORD STREET
CITY OF INDUSTRY CA 91744 US

RICHARD CABANILLA, PLANNING DEPARTMENT
IMPERIAL COUNTY
939 MAIN STREET
EL CENTRO CA 92243-2856 US

SCOTT KESSLER
202 WEST FOURTH STREET
ALTURUS CA 94102 US

JAMES T. QUINN
CALIFORNIA PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO CA 94102-3298 US

CAROL A. HARRIS
SOUTHERN PAC. TRANS. CO.
ONE MARKET PLAZA
SAN FRANCISCO CA 94105 US

LINDSAY BOWER, DEPUTY ATTORNEY GENERAL
CALIFORNIA DEPT. OF JUSTICE
50 FREMONT STREET STE 300
SAN FRANCISCO CA 94105 US

CANNON Y. HARVEY
SOUTHERN PAC. TRNS. CO.
ONE MARKET PLAZA
SAN FRANCISCO CA 94105 US

LARRY W. TELFORD
SEVERSON & WERSON
ONE EMBARCADERO CENTER
SAN FRANCISCO CA 94111 US

DANIEL R. ARELLANO
CITY HALL
708 THIRD STREET
BRENTWOOD CA 94513-1396 US

LEO R BRIEN
530 WARER STREET
OAKLAND CA 94607 US

PAUL C. ANDERSON
MCDONOUGH, HOLLAND, ETAL
1999 HARRISON STREET STE 1300
OAKLAND CA 94612 US

JEFFREY A. WALTER
WALTER & PISTOLE
670 W. NAPA STREET, SUITE "F"
SONOMA CA 95476 US

CHRISTOPHER J. NEARY
110 SOUTH MAIN STREET SUITE C
WILLITS CA 95490 US

JOSEPH H. PETTUS
SUN VALLEY ENERGY INC
800 HOWE AVE, SUITE 270
SACRAMENTO CA 95825 US

R. MARK ARMSTRONG
P O BOX 1051
ALTURAS CA 96101 US

KATHLEEN R. LAZARD
P O BOX 730
700 COURT STREET
SUSANVILLE CA 96130 US

FRED P. SWANSON
OREGON STEEL MILLS
1000 SW BROADWAY STE. 2200
PORTLAND OR 97205 US

MIKE THORNE, EXEC. DIR.
PORT OF PORTLAND
BOX 3529
PORTLAND OR 97208 US

RICK WILLIS, EXECUTIVE DIRECTOR
OREGON PUBLIC UTILITY COMM
550 CAPITOL ST NE
SALEM OR 97310-1380 US

ALLAN E. RUMBAUGH
P O BOX 1215
COOS BAY OR 97420 US

KAREN O'CONNOR
LAKE COUNTY COURTHOUSE
513 CENTER STREET
LAKEVIEW OR 97630 US

ANN DEKOSTER
P O BOX 1209
SEATTLE WA 98111 US

CHARLES H MONTANGE
426 NW 162ND STREET
SEATTLE WA 98177 US

DONALD G MEYER
P O BOX 1837
TACOMA WA 98401 US

MARCELLA M. SZEL
CP RAIL SYSTEM
910 PEEL STREET WINDSOR STATION RM 234
MONTREAL QUEBEC CD H3C 3E4 CD

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SERVICE DATE - LATE RELEASE MARCH 2, 1998

SURFACE TRANSPORTATION BOARD

DECISION

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY. AND MISSOURI PACIFIC RAILROAD COMPANY—CONTROL AND MERGER—SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

[Decision No. 79]

Decided: February 27, 1998

In Decision No. 44 (served August 12, 1996), we approved the common control and merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company) and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and the Denver and Rio Grande Western Railroad company)(collectively UP/SP), subject to various conditions including numerous environmental mitigation conditions. As pertinent here, the environmental conditions imposed in Decision No. 44 called for further, more focused mitigation studies to arrive at specifically tailored mitigation plans for Reno, NV, and Wichita, KS, in addition to the environmental mitigation already imposed, to assure that localized environmental issues unique to those communities are effectively addressed. The mitigation studies were to be completed within 18 months of the consummation of the merger.

On September 15, 1997, the Board's Section of Environmental Analysis (SEA) issued the Preliminary Mitigation Plan (PMP) for Reno, NV, and Washoe County.[1] After comments on the PMP were received, a Final Mitigation Plan (FMP) for Reno was issued February 11, 1998, as contemplated by Decision No. 44. Comments on the FMP are due to be filed March 12, 1998.

By a letter dated February 24, 1998, however, counsel for Reno requests that we toll all proceedings in the ongoing Reno mitigation study for a period of 8 months. Specifically, Reno asks that we toll both the current comment period on the FMP and completion of the ongoing mitigation study process (i.e., the preparation of SEA's final recommendations and the issuance of a final

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[1] SEA also issued a PMP for Wichita and Sedgwick County. In Decision No. 76 (served December 12, 1997), however, the Board granted a joint request that further proceedings on the 18-month mitigation study ordered for Wichita and Sedgwick County be tolled.

decision imposing additional localized mitigation measures we find appropriate, based on our consideration of the PMP, FMP, all public comments, and SEA's final recommendations). In support of its request, Reno states that it is actively pursuing a funding plan to implement a depressed trainway project through downtown Reno and is also engaged in good faith negotiations with UP/SP. By letter dated February 25, 1998, the Union Pacific Railroad Company (UP) has advised us that it concurs with Reno's tolling request. UP also agrees to adhere to the train count limitations and reporting requirements set forth in paragraph 22a and 22b of Appendix G of Decision No. 44 during the period that the Reno mitigation study process is tolled.

We will grant Reno's request and toll for an 8-month period the time for filing comments on the FMP and the undertaking of further proceedings in the Reno mitigation study.[2] Should UP and Reno reach agreement on a final mitigation plan, both parties shall immediately notify SEA, as required by paragraph 22d of Appendix G to Decision 44. Otherwise, a new 30-day comment period on the FMP will commence at the expiration of the 8-month period during which proceedings have been tolled.

This action will not significantly affect either the quality of the human environment or conservation of energy resources.

It is ordered:

1. Further proceedings on the 18-month mitigation study ordered for Reno in Decision No. 44, Appendix G, 22a-22d, are tolled for 8 months from the date of service of this decision.

2. This decision is effective on the date served.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

[2] The Board will accept and file in the public record any comments on the FMP that are filed by the preexisting March 12, 1998 deadline. SEA, however, will defer consideration of any such comments during the period that the Reno mitigation study is tolled.

PAUL K. BIBA, HOUSE COUNSEL
FORMOSA PLASTICS CORP.
9 PEACH TREE HILL ROAD
LIVINGSTON NJ 07039 US

KEN WILSON
282 BALDWIN AVE
HASBROUCK HEIGHTS NJ 07604-2304 US

OSCAR J. ABELLO, PRESIDENT
"K" LINE AMERICA, INC.
535 MOUNTAIN AVENUE
MURRY HILL NJ 07974 US

TINA MASINGTON, PLAN. ANAL.
"K" LINE AMERICA, INC.
535 MOUNTAIN AVENUE
MURRAY HILL NJ 07974 US

GEORGE J. FRANCISCO, JR.
ELLIPSE SHIPPING CENTER
4201 CHURCH ROAD - SUITE 7
MT LAUREL NJ 08054 US

JOHN F. MCHUGH
MCHUGH & SHERMAN
20 EXCHANGE PLACE 51ST FLOOR
NEW YORK NY 10005 US

R J HENEFELD
PPG INDUSTRIES INC
ONE PPG PLACE
PITTSBURGH PA 15272 US

RICHARD J. RESSLER
UNION PACIFIC CORP.
EIGHTH AND EATON AVENUES, MARTIN TOWER
BETHLEHEM PA 18018 US

CARL W. VON BERNUTH
UNION PACIFIC CORP.
EIGHTH & EATON AVENUES
BETHLEHEM PA 18018 US

RICHARD H. GROSS
3801 WEST CHESTER PIKE
NEWTOWN SQUARE PA 19073 US

WILLIAM E HARVEY
3801 WEST CHESTER PIKE
NEWTON SQUARE PA 19073 US

LARRY T. JENKINS
ARCO CHEMICAL COMPANY
3801 WEST CHESTER PIKE
NEWTON SQUARE PA 19073-3280 US

ANNE E. TREADWAY
CONSOLIDATED RAIL CORP.
P O BOX 41416
2001 MARKET STREET
PHILADELPHIA PA 19101-1416 US

EDWARD B. HYMSON
CONRAIL
2001 MARKET STREET 16-A
PHILADELPHIA PA 19101-1416 US

JONATHAN M BRODER
CONSOLIDATED RAIL CORP
PO BOX 41416
2001 MARKET STREET 16-A
PHILADELPHIA PA 19101-1416 US

CONSTANCE L. ABRAMS
CONSOLIDATED RAIL CORP.
2001 MARKET STREET 16-A, TWO COMMERCE SQUARE
PHILADELPHIA PA 19101-1416 US

BRUCE B. WILSON
CONSOLIDATED RAIL CORP.
2001 MARKET STREET
PHILADELPHIA PA 19101-1417 US

JOHN L ABBOTT
FMC CORPORATION
1735 MARKET STREET
PHILADELPHIA PA 19103 US

ERIC M. HOCKY
GOLLATZ, GRIFFIN, EWING
213 WEST MINER STREET
WEST CHESTER PA 19381-0796 US

CHARLES N. BEINKAMPEN
DUPONT SOURCING
1007 MARKET STREET, ROOM B-6236-A
WILMINGTON DE 19898 US

TERRENCE D JONES
KELLER & HECKMAN
1001 G ST NW STE 500 WEST
WASHINGTON DC 20001 US

MARTIN W BERCOVICI
KELLER & HECKMAN
1001 G ST NW SUITE 500 WEST
WASHINGTON DC 20001 US

DOUGLAS J. BEHR
KELLER & HECKMAN
1001 G STREET NW STE 500 WEST
WASHINGTON DC 20001 US

ROBERT L. MCGEORGE
U. S. DEPT. OF JUSTICE, ANTITRUST DIVISION
555 4TH STREET N W RM 9104
WASHINGTON DC 20001 US

JOAN S HUGGLER
U. S. DEPT. OF JUSTICE, ANTITRUST DIVISION
555 4TH STREET N W RM 9104
WASHINGTON DC 20001 US

LOUIS P WARCHOT
ASSOCIATION OF AMERICAN RAILROADS
50 F STREET NW
WASHINGTON DC 20001 US

RICHARD G SLATTERY
AMTRAK
60 MASSACHUSETTS AVENUE N E
WASHINGTON DC 20002 US

DONALD F GRIFFIN
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
10 G STREET NE STE 460
WASH DC 20002 US

JOSEPH GUERRIERI, JR.
GUERRIERI, EDMOND, ET. AL
1331 F STREET N W, 4TH FLOOR
WASHINGTON DC 20004 US

MARK SCHECTER
HOWREY & SIMON
1299 PENNSYLVANIA AVE N W
WASHINGTON DC 20004 US

DAVID A ASHMORE
ARNOLD & PORTER
555 TWELFTH STREET NW
WASHINGTON DC 20004 US

ROBERT M. BRUSKIN, ESQ.
HOWREY & SIMON
1299 PENNSYLVANIA AVE NW
WASHINGTON DC 20004 US

DEBRA L. WILLEN
GUERRIERI, EDMOND & CLAYMAN PC
1331 F STREET N W, 4TH FLOOR
WASHINGTON DC 20004 US

GEORGE W MAYO JR
HOGAN & HARTSON L.L.P.
555 THIRTEENTH STREET NW
WASHINGTON DC 20004-1109 US

ERIC VON SALZEN
HOGAN & HARTSON
555 THIRTEENTH STREET N W
WASHINGTON DC 20004-1161 US

ROSEMARY H. MCENERY
HOWREY & SIMON
1299 PENNSYLVANIA AVE N W
WASHINGTON DC 20004-2402 US

MARK L JOSEPHS
HOWREY & SIMON
1299 PENNSYLVANIA AVE N W
WASHINGTON DC 20004-2402 US

CHARLES W. LINDERMAN
701 PENNSYLVANIA AVE NW, 5TH FLOOR
WASHINGTON DC 20004-2696 US

S WILLIAM LIVINGSTON JR
COVINGTON & BURLING
P O BOX 7566
1201 PENNSYLVANIA AVE NW
WASHINGTON DC 20004-7566 US

RICHARD H. STREETER
BARNES & THORNBURG
1401 I STREET NW SUITE 500
WASHINGTON DC 20005 US

MICHAEL MATTIA
INSTITUTE OF SCRAP RECYCLING INDUSTRIES, INC.
1325 G STREET NW STE 1000
WASHINGTON DC 20005 US

EDWARD WYTKIND, EXECUTIVE DIRECTOR
LARRY J WILLIS ESQ TRANSP TRADES DEPT AFLCI
1000 VERMONT AVENUE, NW STE 900
WASHINGTON DC 20005 US

WILLIAM A MULLINS
TROUTMAN SANDERS LLP
1300 I STREET NW SUITE 500 EAST
WASHINGTON DC 20005-3314 US

JOHN R. MOLM
TROUTMAN SANDERS LLP
1300 I STREET, N. W., SUITE 500 EAST
WASHINGTON DC 20005-3314 US

FRITZ R KAHN
1100 NEW YORK AVENUE NW SUITE 750 WEST
WASHINGTON DC 20005-3934 US

JEFFREY O. MORENO
DONELAN CLEARY WOOD MASER
1100 NEW YORK AVENUE N W, SUITE 750
WASHINGTON DC 20005-3934 US

NICHOLAS J. DIMICHAEL
DONELAN, CLEARY, WOOD & MASER, PC
1100 NEW YORK AVENUE N W STE 750
WASHINGTON DC 20005-3934 US

THOMAS W. WILCOX
DONELAN, CLEARY,WOOD & MASER , P.C.
1100 NEW YORK AVENUE, NW., STE. 200
WASHINGTON DC 20005-3934 US

JOHN K MASER III
DONELAN,CLEARY,WOOD,MASER
1100 NEW YORK AVE NW SUITE 750
WASHINGTON DC 20005-3934 US

JO A DEROCHE
WEINER, BRODSKY, ET AL
1350 NEW YORK AVE NW SUITE 800
WASHINGTON DC 20005-4797 US

ANDREW P. GOLDSTEIN
MCCARTHY, SWEENEY ET AL.
1750 PENNSYLVANIA AVE NW
WASHINGTON DC 20006 US

JANICE G BARBER
MAYER BROWN & PLATT
2000 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20006 US

MONICA J. PALKO
BRACEWELL & PATTERSON
2000 K STREET NW STE 500
WASHINGTON DC 20006 US

ANNE D. SMITH
WHITE & CASE
1747 PENNSYLVANIA AVENUE N W
WASHINGTON DC 20006 US

KATHRYN KUSSKE
MAYER, BROWN & PLATT
2000 PENNSYLVANIA AVE N W SUITE 6500
WASHINGTON DC 20006 US

ROY T. ENGLERT, JR
MAYER, BROWN & PLATT
2000 PENNSYLVANIA AVE N W SUITE 6500
WASHINGTON DC 20006 US

LAURENCE R. LATOURETTE
PRESTON GATES ELLIS ETAL
1735 NY AVE NW SUITE 500
WASHINGTON DC 20006 US

ADRIAN L. STEEL, JR.
MAYER, BROWN & PLATT
2000 PENNSYLVANIA AVE N W SUITE 6500
WASHINGTON DC 20006 US

KRISTA L. EDWARDS
SIDLEY & AUSTIN
1722 EYE STREET N W
WASHINGTON DC 20006 US

ANDREW R. PLUMP
ZUCKERT, SCOUTT & RASENBERGER. LLP
888 17TH ST., NW, STE. 600
WASHINGTON DC 20006 US

JAMIE PALTER RENNERT
HOPKINS & SUTTER
888 SIXTEENTH STREET NW
WASHINGTON DC 20006 US

TERRY L. CLAASSEN
CORN REFINERS ASSOC, INC.
1701 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20006 US

ALBERT B KRACHMAN
BRACEWELL & PATTERSON LLP
2000 K ST NW STE 500
WASHINGTON DC 20006-1872 US

ERIKA Z JONES
MAYER BROWN & PLATT
2000 PA AV NW
WASH DC 20006-1882 US

JAMES A CALDERWOOD
ZUCKERT, SCOUTT & RASENBERGER, L.L. P.
888 17TH STREET NW, SUITE 600
WASHINGTON DC 20006-3939 US

RICHARD A ALLEN
ZUCKERT, SCOUT, RASENBERGER
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

JENNIFER P OAKLEY
ZUCKERT, SCOUTT & RASENBERGER
888 SEVENTEENTH ST NW, STE 600
WASH DC 20006-3939 US

JOHN V. EDWARDS, ESQ
ZUCKERT, SCOUTT ET AL.
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

ALICIA M SERFATY
HOPKINS & SUTTER
888 - 16TH STREET NW
WASHINGTON DC 20006-4103 US

CHARLES A SPITULNIK
HOPKINS & SUTTER
888 SIXTEENTH ST NW
WASH DC 20006-4103 US

STEVEN J. KALISH
MCARTHY, SWEENEY & HARKAWAY
1750 PENNSYLVANIA AVE NW
WASHINGTON DC 20006-4502 US

TERENCE M. HYNES
SIDLEY & AUSTIN
1722 EYE STREET NW
WASHINGTON DC 20006-5304 US

JAMES F RILL
COLLIER SHANNON RILL & SCOTT
3050 K STREET NW SUITE 400
WASHINGTON DC 20007 US

VIRGINIA R METALLO
3050 K ST NW SUITE 400
WASHINGTON DC 20007 US

EDWARD D. GREENBERG
GALLAND KHARASCH & GARFINKLE P C
1054 THIRTY-FIRST STREET NW
WASHINGTON DC 20007-4492 US

CHARLES H. WHITE, JR.
GALLAND, KHARASCH & GARFINKLE, P. C.
1054 THIRTY-FIRST STREET NW
WASHINGTON DC 20007-4492 US

MICHAEL F MCBRIDE
LEBOEUF LAMB GREENE & MACRAE
1875 CONNECTICUT AVENUE NW
WASHINGTON DC 20009 US

DANIEL ARONOWITZ
LEBOUEF, LAMB, GREENE
1875 CONNECTICUT AVE NWSTE 1200
WASHINGTON DC 20009-5728 US

LINDA K. BREGGIN, ESQ.
LEBOEUF, LAMB, GREENE, ET AL
1875 CONNECTICUT AVENUE N W
WASHINGTON DC 20009-5728 US

PAUL M. DONOVAN
LAROE, WINN, ETAL
3506 IDAHO AVE NW
WASHINGTON DC 20016 US

JOHN D HEFFNER ESQ
REA CROSS & AUCHINCLOSS
1707 L STREET, NW, STE 570
WASHINGTON DC 20036 US

GORDON P. MACDOUGALL
1025 CONNECTICUT AVE NW SUITE 410
WASHINGTON DC 20036 US

JOHN M CUTLER JR
MCCARTHY SWEENEY HARKAWAY
1750 PENNSYLVANIA AVE N W SUITE 1105
WASHINGTON DC 20036 US

MARC J. FINK
SHER & BLACKWELL
1850 M STREET NW STE 900
WASHINGTON DC 20036 US

C MICHAEL LOFTUS
SLOVER & LOFTUS
1224 SEVENTEENTH STREET, NW
WASHINGTON DC 20036 US

GERALD P. NORTON
HARKINS CUNNINGHAM
1300 NINETEENTH STREET, NW STE. 600
WASHINGTON DC 20036 US

PATRICIA E. (DIETRICH) KOLESAR
SLOVER & LOFTUS
1224 SEVENTEENTH ST NW
WASH DC 20036 US

SUSAN B GERSON
GRAHAM & JAMES, LLP
2000 M STREET NW STE 700
WASHINGTON DC 20036 US

CHRISTOPHER A. MILLS
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036 US

ROBERT A. WIMBISH, ESQ.
REA, CROSS & AUCHINCLOSS
1920 N STREET, NW, STE 420
WASHINGTON DC 20036 US

THOMAS LAWRENCE III
OPPENHEIMER WOLFF, ETC
1020 - 19TH STREET NW STE 400
WASHINGTON DC 20036 US

FRANK J. PERGOLIZZI
SLOVER & LOFTUS
1224 SEVENTEENTH ST NW
WASHINGTON DC 20036 US

RICHARD S. EDELMAN
HIGHSAW MAHONEY CLARKE
1050 SEVENTEENTH STREET N W, SUITE 210
WASHINGTON DC 20036 US

KELVIN J. DOWD
SLOVER & LOFTUS
1224 17TH STREET N W
WASHINGTON DC 20036 US

WILLIAM G. MAHONEY
HIGHSAW, MAHONEY & CLARKE
1050 SEVENTEENTH STREET NW SUITE 210
WASHINGTON DC 20036 US

PAUL CUNNINGHAM
HARKINS CUNNINGHAM
1300 NINETEENTH STREET, NW STE. 600
WASHINGTON DC 20036 US

KEITH G. O'BRIEN
REA, CROSS & AUCHINCLOSS
1920 N STREET N W - SUITE 420
WASHINGTON DC 20036 US

RICHARD B HERZOG
HARKINS CUNNINGHAM
1300 19TH ST NW SUITE 600
WASHINGTON DC 20036-1609 US

JOEL A RABINOVITZ
HARKINS CUNNINGHAM
1300 19TH STREET NW SUITE 600
WASHINGTON DC 20036-1609 US

JAMES M. GUINIVAN
HARKINS CUNNINGHAM
1300 19TH ST NW SUITE 600
WASHINGTON DC 20036-1609 US

JOSEPH L LAKSHMANAN
1300 19TH STREET NW, SUITE 600
WASHINGTON DC 20036-1609 US

MARC D. MACHLIN
PEPPER, HAMILTON, ET AL
1300 19TH STREET N W
WASHINGTON DC 20036-1659 US

JOHN WILL ONGMAN
PEPPER HAMILTON SCHEETZ
1300 NINETEENTH STREET N W
WASHINGTON DC 20036-1685 US

MICHELLE J. MORRIS
PEPPER, HAMILTON, ETAL
1300 NINETEENTH ST NW
WASHINGTON DC 20036-1685 US

TIMOTHY M WALSH
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

SAMUEL M SIPE JR
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

BETTY JO CHRISTIAN
STEPTOE & JOHNSON
1330 CONNECTICUT AVE NW
WASHINGTON DC 20036-1795 US

JOHN H. LESEUR
SLOVER & LOFTUS
1224 17TH STREET NW
WASHINGTON DC 20036-3081 US

PAUL H LAMBOLEY
1020 NINETEENTH STREET, N.W., STE 400
WASHINGTON DC 20036-6105 US

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OPPENHEIMER WOLFF & DONNELLY
1020 NINETEENTH STREET N W SUITE 400
WASHINGTON DC 20036-6105 US

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WILMER CUTLER & PICKERING
2445 M ST NW
WASHINGTON DC 20037 US

SCOTT N. STONE
PATTON BOGGS L.L.P.
2550 M STREET NW 7TH FLOOR
WASHINGTON DC 20037-1346 US

DANIEL K. MAYERS
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2445 M STREET N W
WASHINGTON DC 20037-1420 US

MICHAEL BRESSMAN
WILMER CUTLER PICKERING
2445 M STREET N W
WASHINGTON DC 20037-1420 US

ALI M. STOEPPELWERTH
WILMER CUTLER PICKERING
2445 M STREET N W
WASHINGTON DC 20037-1420 US

WILLIAM J KOLASKY JR
WILMER CUTLER & PICKERING
2445 M STREET NW
WASH DC 20037-1420 US

DAVID H. BAKER
HOLLAND & KNIGHT
2100 PENN AVE NW ST 400
WASHINGTON DC 20037-3202 US

TIMOTHY C HESTER
P O BOX 7566
1201 PENNSYLVANIA AVENUE N W
WASHINGTON DC 20044 US

J MICHAEL HEMMER
COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20044 US

DAVID L. MEYER
COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE N W
WASHINGTON DC 20044-7566 US

ARVID E ROACH II
COVINGTON & BURLING
PO BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044-7566 US

MICHAEL A. LISTGARTEN
COVINGTON & BURLING
P O BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044-7566 US

MICHAEL ROSENTHAL
COVINGTON & BURLING
P O BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044-7566 US

EILEEN S. STOMMES, DIRECTOR, T&M DIVISION
AGRICULTURAL MARKETING SERVICE, USDA
P. O. BOX 96456
WASHINGTON DC 20090-6456 US

HON. JEROME NELSON
FERC (LJ-2)
888 1ST STREET N E
WASHINGTON DC 20426 US

RICHARD E SANDERSON
OFFICE OF FEDERAL ACTIVITIES
US ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON DC 20460 US

HON JOHN GLENN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE THAD COCHRAN
UNITED STATE SENATE
WASHINGTON DC 20510 US

HON. DAN COATS
UNITED STATES SENATE
WASHINGTON DC 20510 US

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UNITED STATES SENATE
WASH DC 20510 US

HON CONRAD BURNS
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE TIM JOHNSON
UNITED STATES SENATE
WASHINGTON DC 20510 US

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U. S. SENATE
WASHINGTON DC 20510 US

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UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. PHIL GRAMM
UNITED STATES SENATE
WASHINGTON DC 20510 US

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UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE RICHARD BRYAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

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UNITED STATES SENATE
WASHINGTON DC 20510 US

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UNITED STATES SENATE
WASHINGTON DC 20510 US

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UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE HARRY REID
UNITED STATES SENATE
WASHINGTON DC 20510-0001 US

HON. BEN N CAMPBELL
UNITED STATES SENATE
WASHINGTON DC 20510-0605 US

HONORABLE RICHARD J DURBIN
UNITED STATES SENATE
WASHINGTON DC 20510-1304 US

HONORABLE CHARLES E. GRASSLEY
UNITED STATES SENATE
WASHINGTON DC 20510-1501 US

HONORABLE JOHN BREAUX
UNITED STATES SENATE
WASHINGTON DC 20510-1803 US

HARRY REID
UNITED STATES SENATE
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20510-2804 US

HON. TOM EWING
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ROBERT A. BORSKI
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE FRANK MASCARA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LLOYD DOGGETT
U. S. HOUSE OF REPRESENTATAIVES
WASHINGTON DC 20515 US

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US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TIM HOLDEN
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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WASHINGTON DC 20515 US

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WASHINGTON DC 20515 US

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WASHINGTON DC 20515 US

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US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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US HOUSE OF REPRESENTATIVES
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US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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WASHINGTON DC 20515 US

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WASHINGTON DC 20515 US

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WASHINGTON DC 20515 US

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US HOUSE OF REPRESENTATIVES
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WASHINGTON DC 20515 US

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WASHINGTON DC 20515 US

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WASHINGTON DC 20515 US

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HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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WASHINGTON DC 20515 US

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U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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WASHINGTON DC 20515 US

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U S HOUSE OF REPRESENTATIVES
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WASHINGTON DC 20515 US

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WASHINGTON DC 20515 US

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U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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U. S. HOUSE OF REPRESENTATIVES
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U. S. HOUSE OF REPRESENTATIVES
WASH DC 20515-0548 US

HONORABLE SCOTT MCINNIS
U. S. HOUSE OF REPRESENTATIVES
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HOUSE OF REPRESENTATIVE
WASHINGTON DC 20515-1004 US

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U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-1602 US

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U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-1805 US

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ATT: GARY BLAND
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2307 US

HON W J (BILLY) TAUZIN
ATTN: ROY WILLIS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2601 US

HONORABLE JOHN ENSIGN
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2801 US

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U S HOUSE OF REPRESENTATIVES
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U. S. HOUSE OF REPRESENTATIVES
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HONORABLE CHAKA FATTAH
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3803 US

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U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3807 US

HON. JON CHRISTENSEN
U.S. HOUSE OF REPRESENTATIVES
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HONORABLE WILLIAM M (MAC) THORNBERRY
U. S. HOUSE OF REPRESENTATIVES
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HONORABLE SHEILA JACKSON LEE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4318 US

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US HOUSE REPRESENTATIVES
WASHINGTON DC 20515-4323 US

HONORABLE EDDIE BERNICE JOHNSON
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4330 US

ROGER W. FONES
US DEPT. OF JUSTICE
325 7TH STREET N W SUITE 500
WASHINGTON DC 20530 US

MICHAEL D BILLIEL
ANTITRUST DIV, DEPT OF JUSTICE
325 SEVENTH ST NW STE 500
WASHINGTON DC 20530 US

PAUL SAMUEL SMITH
US DEPARTMENT OF TRANSPORTATION
400 SEVENTH STREET SW
WASHINGTON DC 20590 US

JOSEPH R. POMPONIO
FEDERAL RAILROAD ADMIN.
400 7TH ST SW RCC-20
WASHINGTON DC 20590 US

MITCHELL M. KRAUS
TRANSPORTATION -COMMUNICATIONS INTERNATIONAL
3 RESEARCH PLACE
ROCKVILLE MD 20850 US

WILLIAM W WHITEHURST JR
W W WHITEHURST & ASSOCIATES INC
12421 HAPPY HOLLOW ROAD
COCKEYSVILLE MD 21030 US

CONSTANCE H. PIERCE
CONSTELLATION COMPANIES
250 WEST PRATT STREET
BALTIMORE MD 21201-2423 US

J TUCKER
PO BOX 25181
ARLINGTON VA 22202 US

PETER Q. NYCE, JR.
U. S. DEPARTMENT OF THE ARMY
901 NORTH STUART STREET
ARLINGTON VA 22203 US

NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
1700 NORTH MOORE STREET, SUITE 1900
ARLINGTON VA 22209 US

THOMAS E. SCHICK
CHEMICAL MANUF. ASSOC.
1300 WILSON BOULEVARD
ARLINGTON VA 22209 US

WILLIAM P. JACKSON, JR.
JACKSON & JESSUP, P. C.
P O BOX 1240
3426 NORTH WASHINGTON BLVD
ARLINGTON VA 22210 US

GERALD W. FAUTH, III
G. W. FAUTH & ASSOCIATES INC.
116 SOUTH ROYAL STREET
ALEXANDRIA VA 22314 US

JOHN T ESTES
1029 NORTH ROYAL STREET SUITE 400
ALEXANDRIA VA 22314 US

PETER J SHUDTZ
CSX CORPORATION
902 E CARY ST 1 JAMES CENTER
RICHMOND VA 23119 US

ROBERT J. COONEY
NORFOLK SOUTHERN CORP.
THREE COMMERCIAL PLACE
NORFOLK VA 23510-2191 US

ROBERT S. KOMPANTY
720 THIMBLE SHOALS BLVD, SUITE 130
NEWPORT NEWS VA 23608-2574 US

BOB THOMPSON
GEORGIA-PACIFIC CORP.
P O BOX 105605
ATLANTA GA 30348-5605 US

GREGORY M. VINCENT, VICE PRESIDENT
TENNESSEE VALLEY AUTH
LOOKOUT PLACE 1101 MARKET STREET
CHATTANOOGA TN 37402 US

E. CALVIN CASSELL
EASTMAN CHEMICAL COMPANY
P O BOX 1990
KINGSPORT TN 37662 US

EDWARD S. CHRISTENBURY
400 WEST SUMMIT HILL DRIVE
KNOXVILLE TN 37902 US

HONORABLE GILLESPIE V. MONTGOMERY
U. S. HOUSE OF REPRESENTATIVES
P. O. BOX 5618
MERIDAN MS 39208 US

R. L. YOUNG
P O BOX 700
ONE MEMORIAL DRIVE
LANCASTER OH 43130-0700 US

D. MICHAEL MILLER
AMERICAN ELECTRIC POWER
1 RIVERSIDE PLAZA
COLUMBUS OH 43215 US

HONORABLE JOHN GLENN
U. S. SENATE ATTN: ANISA BELL
200 N HIGH STREET S-600
COLUMBUS OH 43215-2408 US

MICHAEL M. BRILEY
SHUMAKER, LOOP & KENDRICK
N COURTHOUSE SQUARE - 1000 JACKSON
TOLEDO OH 43624 US

DANIEL R ELLIOTT III
UNITED TRANSPORTATION UNION
14600 DETROIT AVENUE
CLEVELAND OH 44107 US

CLINTON J MILLER, III, GENERAL COUNSEL
UNITED TRANSPORTATION UNION
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

RONALD P MCLAUGHLIN
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
1370 ONTARIO ST STAN BLDG
CLEVELAND OH 44113-1702 US

RICHARD E. KERTH, TRANS. MGR.
CHAMPION INTERNAT'L CORP
101 KNIGHTSBRIDGE DRIVE
HAMILTON OH 45020-0001 US

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11500 NORTHLAKE DRIVE
CINCINNATI OH 45249 US

BRUCE A. KLIMEK
INLAND STEEL
3210 WATLING STREET
EAST CHICAGO IN 46312 US

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CITY OF KENDALLVILLE
234 S MAIN STREET
KENDALLVILLE IN 46755-1795 US

JAMES E. HANSON
DOW CHEMICAL COMPANY
2020 WILLARD H DOW CENTER
MIDLAND MI 48674 US

LARRY B. KARNES
TRANSPORTATION BUILDING
PO BOX 30050
425 WEST OTTAWA
LANSING MI 48909 US

THOMAS F JACKSON
800 LINCOLN WAY
AMES IA 50010 US

P C HENDRICKS
STATE LEGISLATIVE DIRECTOR UTU
313 E 5TH STREET
DES MOINES IA 50309 US

HONORABLE CHARLES E. GRASSLEY
UNITED STATES SENATE
210 WALNUT STREET
DES MOINES IA 50309-2140 US

EDWIN C JERTSON
INTERSTATE POWER CO
P O BOX 769
1000 MAIN STREET
DUBUQUE IA 52004 US

KENT M RAGSDALE
INTERSTATE POWER CO
PO BOX 769
DUBUQUE IA 52004 US

PHILIP D. WARD, ET AL.
P O BOX 351
200 FIRST STREET SE
CEDAR RAPIDS IA 52406-0351 US

TOBIN LEE BRATT
IES UTILITIES, INC.
P O BOX 351
200 FIRST ST SE
CEDAR RAPIDS IA 52406-0351 US

WILLIAM R. MUDD
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P O BOX 6647
1417 EXCHANGE STREET
KEOKUK IA 52632-6647 US

WILLIAM R. KNIGHT
WISCONSIN POWER & LIGHT
P O BOX 192
222 WEST WASHINGTON AVENUE
MADISON WI 53701-0192 US

ALLEN J VOGEL,
MINNESOTA DEPARTMENT OF TRANSPORTATION
395 JOHN IRELAND BLVD TRANSP BLDG, SUITE 925,
ST PAUL MN 55155 US

RONALD E HUNTER, LAW DEPARTMENT
CARGILL, INCORPORATED
15407 MCGINTY ROAD WEST
WAYZATA MN 55391 US

WAYNE C. SERKLAND, U S REGIONAL COUNSEL
CANADIAN PACIFIC LEG. SER
105 SOUTH FIFTH ST SUITE 1000
MINNEAPOLIS MN 55402 US

DOUGLAS M. HEAD
WEINER
120 SOUTH 6TH STREET STE 2400
MINNEAPOLIS MN 55402 US

BOB ZELENKA
852 GRAIN EXCHANGE, 400 SOUTH FOURTH STREET
MINNEAPOLIS MN 55415 US

HON. WILLIAM J. JANKLOW
GOVERNOR, SD
500 EAST CAPITOL
PIERRE SD 57501-5070 US

TERRY C. WHITESIDE
RADERMACHER, WHITESIDE & ASSOCIATES
3203 3RD AVE N STE 301
BILLINGS MT 59101 US

HONORABLE MARC RACICOT
GOV'S OFFICE, STATE CAP.
P O BOX 200801
HELENA MT 59620-0801 US

J. FRED SIMPSON, EXECUTIVE VICE PRESIDENT
MONTANA RAIL LINK, INC.
101 INTERNATIONAL WAY
MISSOULA MT 59802 US

JANET H GILBERT
WISCONSIN CENTRAL LTD
6250 NORTH RIVER ROAD STE 9000
ROSEMONT IL 60018 US

RICHARD E. WEICHER
BURLINGTON NORTHERN SANTA FE CORPORATION
1700 EAST GOLF ROAD, 6TH FLOOR
SCHAUMBURG IL 60173 US

JEFFREY R. MORELAND
THE BURLINGTON NORTHERN SANTA FE CORPORATION
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173 US

JAMES A. SMALL
COMMONWEALTH EDISON CO.
1411 OPUS PL STE 200
DOWNERS GROVE IL 60515-5701 US

WILLIAM F. COTTRELL
ASST. ATTORNEY GENERAL
100 W RANDOLPH ST - 12TH FLOOR
CHICAGO IL 60601 US

WILLIAM C SIPPEL
OPPENHEIMER WOLFF & DONNELLY
180 N STETSON AVE TWO PRUDENTIAL PLAZA 45TH F
CHICAGO IL 60601 US

CHRISTINE H. ROSSO
IL ASSISTANT ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FLOOR
CHICAGO IL 60601 US

THOMAS J. LITWILER
OPPENHEIMER WOLFF & DONNELLY
180 N STETSON AVE 45TH FLOOR
CHICAGO IL 60601 US

THOMAS J HEALEY
OPPENHEIMER WOLFF & DONNELLY
180 NORTH STETSON AVE 45TH FL
CHICAGO IL 60601-6710 US

RODMAN KOBER
CONTINENTAL GRAIN CO
222 S RIVERSIDE PLAZA - STE 1100
CHICAGO IL 60606 US

THOMAS DEGNAN
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125 SOUTH FRANKLIN STREET
CHICAGO IL 60606 US

STEPHEN C HERMAN
MCFARLAND & HERMAN
20 N WACKER DRIVE STE 1330
CHICAGO IL 60606-2902 US

THOMAS F MCFARLAND JR
MCFARLAND & HERMAN
20 NORTH WACKER DRIVE, SUITE 1330
CHICAGO IL 60606-3101 US

RONALD A. LANE
ILLINOIS CENTRAL RR
455 N CITYFRONT PLAZA DR 20TH FL
CHICAGO IL 60611 US

MYLES L. TOBIN
ILLINOIS CENTRAL RAILROAD
455 NORTH CITYFRONT PLAZA DRIVE
CHICAGO IL 60611-5504 US

GARY L TOWELL
TOLEDO, PEORIA & WESTERN
1990 EAST WASHINGTON STREET
EAST PEORIA IL 61611-2961 US

CLARENCE R. PONSLER
GENERAL CHAIRMAN, UTU
1400 20TH ST.
GRANITE CITY IL 62040-4607 US

SCOTT A RONEY
ARCHER DANIELS MIDLAND COMPANY
P O BOX 1470
4666 FARIES PARKWAY
DECATUR IL 62525 US

JON FOY, DIRECTOR, RATES GRAIN
ARCHER DANIEL MIDLAND CO
P. O. BOX 1470
4666 FARIES PARKWAY
DECATUR IL 62525 US

CAROL R DORIS
500 SOUTH SECOND STREET
SPRINGFIELD IL 62706 US

KIRK BROWN
ILLINOIS DOT, OFFICE OF THE SECRETARY
2300 SOUTH DIRKSEN PARKWAY
SPRINGFIELD IL 62764 US

ROGER HERMANN
MALLINCKRODT CHEMICAL
16305 SWINGLEY RIDGE DRIVE
CHESTERFIELD MO 63017-1777 US

JEFFREY L. KLINGER
PEABODY HOLDING COMPANY
701 MARKET STREET STE 700
ST LOUIS MO 63101-1826 US

C A MENNELL, PRESIDENT
LACKLAND WESTERN RR CO
31 OAK TERRACE
WEBSTER GROVES MO 63119 US

DAVID A. PINS
THE CHEMICAL GROUP, MONSANTO
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ST LOUIS MO 63167 US

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SCOTT CITY MO 63780 US

HON IKE SKELTON
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514 B N W 7 HIGHWAY
BLUE SPRINGS MO 64014 US

ROBERT K DREILING
KANSAS CITY SOUTHERN RWY CO.
114 WEST 11TH STREET
KANSAS CITY MO 64105 US

RICHARD P BRUENING
KANSAS CITY SOUTHERN RR
114 WEST ELEVENTH STREET
KANSAS CITY MO 64106 US

MEL CARNAHAN
OFFICE OF THE GOVERNOR
STATE CAPITOL ROOM 216
JEFFERSON CITY MO 65101 US

JACK HYNES, ADMINISTRATOR OF RAILROADS
MISSOURI DEPARTMENT OF TRANSPORTATION
PO BOX 270
105 WEST CAPITOL AVENUE
JEFFERSON CITY MO 65102 US

JOSEPH A. STINGER
IBBB
570 NEW BROTHERHOOD BUILDING
KANSAS CITY KS 66101 US

WILLIAM J. MCGINN
NORTH AMER. CHEM. CO.
8300 COLLEGE BOULEVARD
OVERLAND PARK KS 66210 US

BARRETT HATCHES
8300 COLLEGE BLVD
OVERLAND PARK KS 66210 US

T. L. GREEN
WESTERN RESOURCES, INC.
PO BOX 889
818 KANSAS AVE
TOPEKA KS 66601 US

JOHN JAY ROSACKER
KS, DEPT OF TRANSP
217 SE 4TH ST 2ND FLOOR
TOPEKA KS 66603 US

NORMAN G MANLEY
CITY ATTORNEY, ANOVER CITY HALL
909 NORTH ANDOVER ROAD
ANDOVER KS 67002 US

TIM NORTON
CITY OF HAYSVILLE
PO BOX
200 WEST GRAND
HAYSVILLE KS 67060 US

DWAYNE H SHANNON
PO BOX 1138
WICHITA KS 67201 US

ALAN R. POST
1803 STEFKIN STREET
WICHITA KS 67208-1758 US

JAMES J. IRLANDI
STB PRACTITIONER
1809 N BROADWAY/SUITE F
WICHITA KS 67214 US

JUNIOR STRECKER, CHAIRMAN
MOUNTAIN-PLAINS COMMUNITIES & SHIPPERS COALIT
123 NORTH MAIN ST
HOISINGTON KS 67544 US

ROBERT K. GLYNN
HOISINGTON CHAM. OF COMM.
123 NORTH MAIN STREET
HOISINGTON KS 67544-2594 US

JOHN F. LARKIN
4814 DOUGLAS ST
OMAHA NE 68132-0850 US

PAUL A. CONLEY, JR. ,LAW DEPARTMENT
UNION PACIFIC RR CO.
1416 DODGE STREET
OMAHA NE 68179 US

JAMES V. DOLAN, LAW DEPARTMENT
UNION PACIFIC RR CO.
1416 DODGE STREET #830
OMAHA NE 68179 US

JEANNA L REGIER
UNION PACIFIC RAILROAD COMPANY
1416 DODGE ST ROOM 830
OMAHA NE 68179 US

ROBERT T. OPAL
UNION PACIFIC RAILROAD CO.
1416 DODGE STREET RM 830
OMAHA NE 68179-0001 US

KEN SIECKMEYER, MGR. TRANSP. PLANN. DIV.
NEBRASKA DEPT. OF ROADS
P O BOX 94759
LINCOLN NE 68509-4759 US

WAYNE ANDERSON
ENTERGY SERVICES, INC.
639 LOYOLA AVE MAIL L-ENT-26E
NEW ORLEANS LA 70113 US

W. F. CARTER
ALBEMARLE CORPORATION
451 FLORIDA STREET
BATON ROUGE LA 70801 US

DEAN L. WORLEY
HILBURN CALHOON HARPER
P O BOX 5551
ONE RIVERFRONT PLACE EIGHTH FL
NORTH LITTLE ROCK AR 72119 US

SCOTT MANATT
P. O. BOX 473
CORNING AR 72422 US

JOE N. HAMPTON
2309 NORTH TENTH, SUITE E
ENID OK 73701 US

THOMAS R. JACOBSEN
TU ELECTRIC
1601 BRYAN STREET STE 11-060
DALLAS TX 75201-3411 US

JOEL T WILLIAMS III
STE 350, LB-126
4809 COLE AVENUE
DALLAS TX 75205 US

STEVEN A BRIGANCE
LEBOEUF, LAMB, ETAL
4025 WOODLAND PARK BLVD STE 250
ARLINGTON TX 76013 US

EDMUND W. BURKE
BURLINGTON NORTHERN RR CO
777 MAIN STREET, 3800 CONTINENTAL PLAZA
FT WORTH TX 76102 US

DOUGLAS J. BABB
BURLINGTON NORTHERN RR CO
777 MAIN STREET, 3800 CONTINENTAL PLAZA
FT WORTH TX 76102-5384 US

MICHAEL E ROPER
BURLINGTON NORTHERN SANTA FE CORPORATION
3017 LOU MENK DRIVE
FT WORTH TX 76131 US

RICHARD J SCHIEFELBEIN
WOODHARBOR ASSOCIATES
7801 WOODHARBOR DRIVE
FORT WORTH TX 76179 US

W. DAVID TIDHOLM
HUTCHESEN & GRUNDY
1200 SMITH STREET (#3300)
HOUSTON TX 77002-4579 US

GEN. COMMITTEE OF ADJUST. GO-895
UNITED TRANS. UNION
2040 NORTH LOOP WEST STE 310
HOUSTON TX 77018 US

ROBERT J. ROSSI
UNITED TRANSPORTATION UNION
2040 NORTH LOOP WEST SUITE 310
HOUSTON TX 77018-8112 US

GEORGE T. WILLIAMSON
P O BOX 2562
111 E LOOP N
HOUSTON TX 77029 US

JOHN D. BURKE
GREATER HOUSTON PORT BUREAU, INC
111 EAST LOOP NORTH
HOUSTON TX 77029 US

B KENNETH TOWSEND JR
EXXON CHEMICAL CO
13501 KATY FREEWAY
HOUSTON TX 77079-1398 US

B. C. GRAVES, JR.
EXXON COMPANY U.S.A.
PO BOX 4692
HOUSTON TX 77210-4692 US

BRIAN P FELKER
SHELL CHEMICAL COMPANY
P O BOX 2463
HOUSTON TX 77252-2463 US

ERIC W. TIBBETTS
P O BOX 3766
1301 MCKINNEY ST
HOUSTON TX 77253 US

ROY GIANGROSSO
ENTERGY SERVICES, INC.
350 PINE STREET
BEAUMONT TX 77701 US

TEXAS MEXICAN RAILWAY CO.
PO BOX 419
LAREDO TX 78042-0419 US

JOHN P. LARUE, EXECUTIVE DIRECTOR
THE PORT OF CORPUS CHRISTI
P O BOX 1541
222 POWER STREET
CORPUS CHRISTI TX 78403 US

THOMAS A GRIEBEL
TEXAS DOT
125 E 11TH ST
AUSTIN TX 78701 US

JERRY L. MARTIN, DIRECTOR RAIL DIV.
RR COMM OF TEXAS
P O BOX 12967
1701 N CONGRESS
AUSTIN TX 78711 US

MARK TOBEY
P O BOX 12548
AUSTIN TX 78711-2548 US

REBECCA FISHER
ASST ATTY GENERAL
PO BOX 12548
AUSTIN TX 78711-2548 US

DONALD T CHEATHAM
10220-E METROPOLITAN DR
AUSTIN TX 78758 US

HON. JOHN R. COOK,
TX HOUSE OF REPRESENTATIVES
P O BOX 2910
AUSTIN TX 78768 US

HON. ROBERT JUNELL
TEXAS HOUSE OF REP.
PO BOX 2910
AUSTIN TX 78768 US

ROBERT M. SAUNDERS
P O BOX 2910
AUSTIN TX 78768-2910 US

ROBERT A. CUSHING, JR.
UNITED TRANS. UNION,
12401 HIDDEN SUN COURT
EL PASO TX 79938 US

DARRELL L. HANAVAN, EXECUTIVE DIRECTOR
COLORADO WHEAT ADMIN.
5500 SOUTH QUEBEC STREET STE 111
ENGLEWOOD CO 80111 US

THOMAS F. LINN
MOUNTAIN COAL COMPANY
555 17TH STREET 22ND FLOOR
DENVER CO 80202 US

PATRICIA T. SMITH, SR. VICE PRESIDENT
PUBLIC SERVICE COMPANY
1225 - 17TH STREET STE 600
DENVER CO 80202 US

RUSSELL S. JONES, III
MOUNTAIN COAL COMPANY
555 17TH STREET 22ND FLOOR
DENVER CO 80202 US

STEPHEN D ALFERS
ALFERS & CARVER
730 17TH STREET #340
DENVER CO 80202 US

NANCY MANGONE, ENFORCEMENT ATTORNEY
U. S. EPA REGION VIII
999 18TH SST STE 500
DENVER CO 80202-2466 US

DAVID N. LAWSON, FUEL TRAFFIC COORDINATOR
PUBLIC SERVICE COMMISSION
1225 17TH ST STE 1100, SEVENTEENTH ST PLAZA
DENVER CO 80202-5533 US

JANE T. FELDMAN, ASST. ATTORNEY GENERAL
STATE OF COLORADO
1525 SHERMAN ST- 5TH FLOOR
DENVER CO 80203 US

HON. BEN N. CAMPBELL
UNITED STATES SENATE
1129 PENNSYLVANIA STREET
DENVER CO 80203 US

HONORABLE ROY ROMER
GOVERNOR
136 STATE CAPITOL
DENVER CO 80203 US

SUE BALLENSKI, PHYSICAL RESOURCES
USDA FOREST SERVICE
P O BOX 25127
LAKEWOOD CO 80225 US

GERALD E. VANINETTI
RESOURCE DATA INT'L
1320 PEARL STREET STE 300
BOULDER CO 80302 US

JOE D. FORRESTER
C/O CO MTN COLLEGE, TIMBERLINE CAMPUS
901 S HWY 24
LEADVILLE CO 80461 US

THOMAS J. FLORCZAK
CITY OF PUEBLO
127 THATCHER BUILDING
PUEBLO CO 81003 US

MAYOR LESTER WILLIAMS
TOWN OF EADS
PO BOX 8
110 W 13TH ST
EADS CO 81036 US

CARDON G. BERRY
KIOWA CO. COMMISSIONERS
PO BOX 591
1305 GOFF
EADS CO 81036 US

HON DELCARL EIKENBERG
TOWN OF HASWELL
P O BOX 206
HASWELL CO 81045-0206 US

JOHN R STULP
SECED
P O BOX 1600
LAMAR CO 81052 US

LEROY E. MAUCH
BOARD OF COUNTY COMMISSIONERS
P. O. BOX 1046
LAMAR CO 81052 US

CLEDE WIDENER
BOARD OF COUNTY COMMISSIONERS
P.. O. BOX 1046
LAMAR CO 81052 US

JOHN ROESCH
BENT COUNTY
PO BOX 350
LAS ANIMAS CO 81054 US

BLAINE ARBUTHNOT
CROWLEY COUNTY
601 MAIN ST
ORDWAY CO 81063 US

JANET PALMER
P O BOX 1268
13997 COUNTY ROAD 71
SHERIDAN LAKE CO 81071 US

BERNICE TUTTLE
KIOWA COUNTY WIFE, CHAPTER #124
13775 CR785
TOWNER CO 81071-9619 US

CHARLES WAIT
BACA COUNTY
PO BOX 116
SPRINGFIELD CO 81073 US

FRANK C MCMURRY
PO BOX 699
SALIDA CO 81201 US

HON. NANCY SANGER, MAYOR
CITY OF SALIDA
P O BOX 417
124 E STREET
SALIDA CO 81201 US

THOMAS W. FOSTER, CHAIRMAN
COM. TO PRESERVE PROPERTY
P O BOX 681
SALIDA CO 81201 US

E W WOTIPKA
6388 TERRACE LANE
SALIDA CO 81201 US

MYRON F. SMITH
FREMONT COUNTY COMM.
615 MACON AVE ROOM #102
CANON CITY CO 81212 US

GREG TABUTEAU
ROYAL GORGE SCENIC RY
P O BOX 1387
CANON CITY CO 81215 US

RUTH H. CARTER, MAYOR
CITY OF CANON CITY ATTN: STEVE THACKER CITY A
P O BOX 1460
CANON CITY CO 81215 US

JUDY LOHNES
UAACOG
P O BOX 510
CANON CITY CO 81215-0510 US

STEVEN G. RABE, CITY MANAGER
CITY OF FLORENCE
300 W MAIN STREET
FLORENCE CO 81226 US

STEVE TUCKER
D&RG WEST. EMPLOYEES
2048 J ROAD
FRUITA CO 81521 US

JAMES R. FRITZE
EAGLE COUNTY ATTORNEY
P O BOX 850
EAGLE CO 81631 US

GARY L. MCFARLEN,, DIRECTOR-TRANSP
KENNECOTT ENERGY COMPANY
BOX 3009
505 SOUTH GILLETTE AVENUE
GILLETTE WY 82716 US

PATRICIA BRITTON, CHIEF LEGAL OFFICER
KENNECOTT ENERGY COMPANY
505 SOUTH GILLETTE AVENUE
GILLETTE WY 82716 US

TIMM R. ADAMS
IDAHO BARLEY COMMISSION
1199 MAIN STREET, STE G
BOISE ID 83702-5630 US

JERRY R KRESS
ID, WHEAT COMMISSION
1109 MAIN ST STE 310
BOISE ID 83702-5642 US

ANN KNAPTON
IDAHO TIMBER CORPORATION
P O BOX 67
5401 KENDALL STREET
BOISE ID 83707-0067 US

WAYNE L. STOCKEBRAND
KENNECOTT UTAH COPP. CORP
P O BOX 6001
8315 WEST 3595 SOUTH
MAGNA UT 84044-6001 US

RAY D. GARDNER
KENNECOTT UTAH COPP. CORP
P O BOX 6001
8315 WEST 3595 SOUTH
MAGNA UT 84044-6001 US

ALEXANDER H. JORDAN
WESTERN SHIPPERS COALITION
3118 ROUND VALLEY WAY
PARK CITY UT 84060-6842 US

RONALD L. RENCHER
WESTERN SHIPPERS COAL.
136 SOUTH MAIN STREET STE 1000
SALT LAKE CITY UT 84101-1672 US

F MARK HANSEN
404 EAST 4500 SOUTH SUITE B-34
SALT LAKE CITY UT 84107 US

JEFFREY B. GROY
ONE UTAH CTR
201 SOUTH MAIN STREET, STE 1100
SALT LAKE CITY UT 84111 US

HON. DEEDEE CORRADINI
451 SOUTH STATE STREET, ROOM 306
SALT LAKE CITY UT 84111 US

CHRISTOPHER E. BRAMHALL
451 SOUTH STATE ST, ROOM 505
SALT LAKE CITY UT 84111 US

HONORABLE MICHAEL O. LEAVITT
ATTN: ROBIN L. RIGGS, GC TO GOVERNOR
210 STATE CAPITOL
SALT LAKE CITY UT 84114 US

REED M. RICHARDS
STATE OF UTAH
236 STATE CAPITOL
SALT LAKE CITY UT 84114 US

LYNETTE W. THIRKILL, LOGISTICS MANAGER
GR. SALT LAKE MINERALS
P O BOX 1190
OGDEN UT 84402 US

KENNETH C. JOHNSEN, V PRES & GEN COUNSEL
GENEVA STEEL COMPANY
P O BOX 2500
PROVO UT 84603 US

RALPH RUPP
PO BOX 2500
PROVO UT 84603 US

CAROL HEATHINGTON
1300 W WASHINGTON
PHOENIX AZ 85007 US

HONORABLE BOB STUMP
U.S. HOUSE OF REPRESENTATIVES
230 N. 1ST AVE., VOOM 2001
PHOENIX AZ 85025 US

FRANK E. HANSON, JR'
MAGMA METALS COMPANY
7400 NORTH ORACLE ROAD, SUITE 200
TUCSON AZ 85704 US

CARA BROWN
FITZGERALDS GAMING CORPORTATION
P O BIX 7600
301 FREMONT STREET
LAS VEGAS NV 89101 US

O. KENT MAHER
33 WEST FOURTH ST
PO BOX 351
WINNEMUCCA NV 89446 US

R. MICHAEL MCCORMICK
HUMBOLDT COUNTY DA
P O BOX 909
50 WEST FIFTH STREET
WINNEMUCCA NV 89446 US

FRANK D GAUS
805 KUENZIL ST # 149
RENO NV 89502 US

MICHAEL E. HALLEY
CITY OF RENO
P O BOX 1900
RENO NV 89505 US

STEVE VARELA
PO BOX 1900
RENO NV 89505 US

CHARLES E. MCNEELY
CITY OF RENO
P. O. BOX 1900
RENO NV 89505 US

DORI OWEN, SPECIAL PROJECTS MANAGER
REDEVELOP LAND AGENCY
490 S CENTER STREET STE 203
RENO NV 89505 US

JOHN FRANKOVICH
P O BOX 2670
241 RIDGE STREET, 4TH FLOOR
RENO NV 89505-2670 US

BILL STAAB
RR DONNELLEY & SONS CO
14100 LEAR BOULEVARD
RENO NV 89506 US

SCOTT HUTCHERSON
EAGLE-PICHER MINERALS INC
6110 PLUMAS ST
RENO NV 89509 US

CHARLES A BRACHT
700 FOREST
RENO NV 89509 US

PHILLIP WENDT
PO BOX 11072
RENO NV 89510 US

JEFFERY W. HILL
SIERRA PACIFIC POWER CO.
P O BOX 10100
6100 NEIL ROAD
RENO NV 89520 US

GREGORY KRAUSE
REGIONAL TRANSPORTATION COMMISSION
P O BOX 30002
RENO NV 89520-3002 US

BOB MILLER
STATE OF NEVADA
CAPITOL COMPLEX EXECU .E CHAMBER
CARSON CITY NV 89710 US

THOMAS J. FRONAPFEL
NEVADA, DEPT. OF TRANSPORTATION
1263 S STEWART STREET
CARSON CITY NV 89712 US

MICHAEL I. STOCKMAN, GENERAL COUNSEL
U. S. BORAX INC.
26877 TOURNEY ROAD
VALENCIA CA 91355 US

JOHN E. BALLAS, AGENCY ENGINEER
INDUSTRY URBAN-DEV. AG.
P O BOX 7089
15651 EAST STAFFPRD STREET
CITY OF INDUSTRY CA 91744 US

JOHN D BALLAS
P.O. BOX 7089
15651 EAST STAFFORD STREET
CITY OF INDUSTRY CA 91744 US

RICHARD CABANILLA, PLANNING DEPARTMENT
IMPERIAL COUNTY
939 MAIN STREET
EL CENTRO CA 92243-2856 US

SCOTT KESSLER
202 WEST FOURTH STREET
ALTURUS CA 94102 US

JAMES T. QUINN
CALIFORNIA PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO CA 94102-3298 US

CAROL A. HARRIS
SOUTHERN PAC. TRANS. CO.
ONE MARKET PLAZA
SAN FRANCISCO CA 94105 US

CANNON Y. HARVEY
SOUTHERN PAC. TRNS. CO.
ONE MARKET PLAZA
SAN FRANCISCO CA 94105 US

LINDSAY BOWER, DEPUTY ATTORNEY GENERAL
CALIFORNIA DEPT. OF JUSTICE
50 FREMONT STREET STE 300
SAN FRANCISCO CA 94105 US

LARRY W. TELFORD
SEVERSON & WERSON
ONE EMBARCADERO CENTER
SAN FRANCISCO CA 94111 US

DANIEL R. ARELLANO
CITY HALL
703 THIRD STREET
BRENTWOOD CA 94513-1396 US

LEO R BRIEN
530 WARER STREET
OAKLAND CA 94607 US

PAUL C. ANDERSON
MCDONOUGH, HOLLAND, ETAL
1999 HARRISON STREET STE 1300
OAKLAND CA 94612 US

JEFFREY A. WALTER
WALTER & PISTOLE
670 W. NAPA STREET, SUITE "F"
SONOMA CA 95476 US

CHRISTOPHER J. NEARY
110 SOUTH MAIN STREET SUITE C
WILLITS CA 95490 US

JOSEPH H. PETTUS
SUN VALLEY ENERGY INC
800 HOWE AVE, SUITE 270
SACRAMENTO CA 95825 US

R. MARK ARMSTRONG
P O BOX 1051
ALTURAS CA 96101 US

KATHLEEN R. LAZARD
P O BOX 730
700 COURT STREET
SUSANVILLE CA 96130 US

FRED P. SWANSON
OREGON STEEL MILLS
1000 SW BROADWAY STE. 2200
PORTLAND OR 97205 US

MIKE THORNE, EXEC. DIR.
PORT OF PORTLAND
BOX 3529
PORTLAND OR 97208 US

RICK WILLIS, EXECUTIVE DIRECTOR
OREGON PUBLIC UTILITY COMM
550 CAPITOL ST NE
SALEM OR 97310-1380 US

ALLAN E. RUMBAUGH
P O BOX 1215
COOS BAY OR 97420 US

KAREN O'CONNOR
LAKE COUNTY COURTHOUSE
513 CENTER STREET
LAKEVIEW OR 97630 US

ANN DEKOSTER
P O BOX 1209
SEATTLE WA 98111 US

CHARLES H MONTANGE
426 NW 162ND STREET
SEATTLE WA 98177 US

DONALD G MEYER
P O BOX 1837
TACOMA WA 98401 US

MARCELLA M. SZEL
CP RAIL SYSTEM
910 PEEL STREET WINDSOR STATION RM 234
MONTREAL QUEBEC CD H3C 3E4 CD

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