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SERVICE DATE - LATE RELEASE JULY 31, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB SERVICE ORDER NO. 1518 (SUB-NO. 1)

JOINT PETITION FOR A FURTHER SERVICE ORDER

STB EX PARTE NO. 573

RAIL SERVICE IN THE WESTERN UNITED STATES

FINANCE DOCKET NO. ~~36720~~ 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

Decided: July 30, 1998

In an emergency service order issued on October 31, 1997,[1] we took a number of actions in response to railroad service problems in the West. As most pertinent here, we augmented the data collection activities that we had initiated pursuant to our orders in Rail Service in the Western United States, Ex Parte No. 573, and we temporarily ordered certain changes in the way in which rail service is provided in and around the Houston area. Among its other provisions, the service order, as modified in subsequent orders,[2] authorized the Texas Mexican Railway (Tex Mex) to provide expanded service in and around Houston; it directed Union Pacific Railroad Company (UP) to release certain UP shippers from their contracts so that they could be served by Tex Mex or by Burlington Northern and Santa Fe Railway Company (BNSF), which had existing authority to serve Houston; and it provided that certain operations could be modified to help route traffic around Houston. The service order, which has been extended for the maximum period permitted under section 11123 (so that it will have been in effect for a total of 270 days), is now set to expire on

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[1] Joint Petition for Service Order, STB Service Order No. 1518.

[2] Orders issued December 4, 1997, and February 17 and 25, 1998. These decisions, among other things, expanded the amount of data that UP was required to file, and also required data filing by BNSF.

August 2, 1998.

On July 17, 1998, three shipper groups that had been involved with the issuance of the original service order — the Society of the Plastics Industry, Inc. (SPI), the National Industrial Transportation League (NITL), and the Chemical Manufacturers Association (CMA) (collectively SPI petitioners) -- filed a petition asking us to issue a further emergency service order. Citing language from the Board's decision initiating a review of proposals to restructure UP's network and operations in the Houston/Gulf Coast area,[3] and the data that we have been receiving as part of our monitoring of the situation, the SPI petitioners allege that the service emergency has not ended, and that therefore the service order should be continued, or a new one established, until the Board issues a final decision in the Houston/Gulf Coast Oversight proceeding. United States Congressmen Nick Lampson (D-TX), Gene Green (D-TX), and Max Sandlin (D-TX) filed a letter urging the Board to consider continuing the service order, but in any event to monitor the situation and take further action immediately should rail service deteriorate. United States Congressman Bill Archer (R-TX) filed a letter expressing concern that a recurrence of serious rail congestion in Houston be prevented. The Greater Houston Partnership filed a letter in support of the SPI/NITL/CMA proposal. The Western Coal Traffic League filed a letter in support of both the SPI/NITL/CMA proposal and the Entergy petition.[4]

On July 28, 1998, a further petition for a continuing service order was filed by Entergy Services, Inc. and Entergy Arkansas, Inc. (Entergy). Entergy, an electric utility with a coal-fired generating plant near Redfield, Arkansas (the White Bluff plant), asserts that UP's coal transportation services to its plant are seriously deficient, and have put its continued generation operations at risk. In its petition, Entergy notes that it has, on three separate occasions in the past 8 months, asked the Board to grant BNSF, which has overhead trackage rights over a nearby UP line, direct access to the White Bluff plant, but that the Board has not acted on its requests. It states that the Board should continue the entire service order for 6 months, and should expand it so as to permit BNSF access to the White Bluff plant as well.

On July 29, 1998, a petition was filed by Southern California Regional Rail Authority

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[3] Union Pacific Corp. -- Control and Merger -- Southern Pacific Rail Corp., STB Finance Docket No. 32760 (Sub-No. 26), Decision No. 1 (Houston/Gulf Coast Oversight) (STB served May 19, 1998) at 3-4.

[4] On July 30, 1998, a reply in support of the SPI/NITL/CMA petition (actually a rebuttal to UP's response) was filed by the Texas Mexican Railway Company and the Kansas City Southern Railway Company (Tex Mex reply). While challenging UP's assertion that service to the Houston area has improved substantially, the Tex Mex reply asserts that the improvements in service to the Houston area resulted from the service order, and that service levels will deteriorate if the service order lapses.

(SCRRA). SCRRA asked the Board to address delays in commuter service operations in Southern California by augmenting UP's data filing requirements to include, for all lines that UP shares with SCRRA, the following information: blocked sidings; blocked main lines; and number of crews unable to complete scheduled operations due to expiration of permitted work periods. SCRRA also asked the Board to require UP to undertake certain specified capital projects that it concludes would increase the capacity of the lines UP shares with SCRRA, in the event that commuter service operations do not reach certain levels.

UP responded in opposition to the SPI/NITL/CMA proposal and to the Entergy petition, and it filed a letter indicating that it would respond to the SCRRA petition shortly. In its extensive response to the SPI/NITL/CMA petition, UP states that its service is vastly improved, generally and in Houston, and that, because there is no longer a service emergency in the area primarily affected by the service order, we have no authority to impose the requested relief. UP also notes that, at a time when UP has suffered three consecutive quarters of extensive losses, continued diversion of its traffic base to the far more profitable BNSF, and to Tex Mex, will weaken its ability to be a strong competitor to BNSF, which it notes is rapidly becoming the dominant railroad in the West.

United States Senator J. Robert Kerrey (D-NE) filed a letter in support of UP's position, noting the improved service in the Houston area and the importance of allowing UP to prove itself under normal operating conditions. United States Senator Chuck Hagel (R-NE) filed a letter expressing concern that extending the service order could hinder UP's efforts to provide good service and its ability to invest in its infrastructure. United States House Transportation and Infrastructure Committee Chairman Bud Shuster (R-PA) filed a letter urging the Board to weigh carefully the impact that diversion of UP traffic to other carriers will have on UP's financial condition. Charles L. Little, International President of the United Transportation Union (UTU), which represents many of UP's employees working in the Houston area, filed a letter stating that Houston area rail lines are close to normal, and asking that the order not be extended, because UP is now prepared to move additional traffic given the marked improvement in the Houston/Gulf Coast rail situation.

DISCUSSION AND CONCLUSIONS

The SPI petitioners do not differentiate between the data filing requirements that our service order and our Ex Parte No. 573 order imposed on UP, on the one hand, and the requirement that UP give other carriers access to its lines and traffic base, on the other. In our view, however, while both requirements were important and necessary responses to the service emergency, circumstances have changed. As things stand today, continued data reporting by UP and BNSF is necessary and appropriate, but given the significant improvements in Houston area rail service, there is no longer any basis on which we could issue an emergency service order requiring UP to give up traffic to other carriers in that region. We will address data filing first. We will then respond to the request that we continue to provide for expanded service by BNSF and Tex Mex. Finally, we will address the petitions filed by Entergy and SCRRA.

A. **Operational Monitoring - Data Filing**. Throughout the service emergency, the data

that we have been receiving from UP and BNSF have been extremely helpful to us in evaluating the progress of the service recovery, the location and severity of service problems, and the appropriate Board response, if any, to concerns about service. Although service has improved throughout the West in general, and on the UP system in particular, as railroads have made necessary investments in equipment, personnel, and infrastructure, it is still not at uniformly improved levels, as reflected by the recent congestion in Southern California.[5] We intend to be vigilant, and to intervene as appropriate to ensure reasonable service levels throughout the West, particularly in view of the impending need to move grain and seasonal traffic. Because informational filings will be helpful to us in monitoring continued improvement in service levels, or in the event that action on our part is necessary to respond to future emergency situations, as part of our ongoing Ex Parte No. 573 proceeding, we will direct UP and BNSF to continue filing information.

We recognize, however, that information filing can be burdensome, particularly as it is currently configured, and that it can divert resources away from the transportation issues that face UP and BNSF. Therefore, after reviewing our prior data requirements, and consistent with the approach we are following in the Conrail acquisition proceeding,[6] we have decided to reconfigure the reporting by (a) reducing the reporting frequency to bi-weekly; (b) eliminating the requirement that copies of the reports be served on all parties to the service order proceeding; (c) revising individual reports to eliminate superfluous information; (d) requiring that the filing of future monitoring reports be made directly with the Director of the Board's Office of Compliance and Enforcement, who will place the non-confidential information (all of the information except for that covered by items 10 and 13 of the Appendix to this decision) in the docket in the Ex Parte No. 573 proceeding. These data filing requirements are what is necessary to continue to give us a thorough picture of the service situation in the West, reflecting the need to protect commercially sensitive information. Our specific data requirements are set forth in detail in the Appendix to this decision.

B. **Service in Houston**. The provisions of 49 U.S.C. 11123 authorize us to issue emergency service orders, but only when we determine that a "failure of traffic movement exists which creates an emergency situation of such magnitude as to have substantial adverse effects on shippers, or on rail service in a region of the United States." The statute, on its face, does not give us *carte blanche* to direct service simply because a party would prefer to be served one way rather than another; rather, Congress intended that the power be used sparingly and in a focused way. Late last year, we issued our unprecedented emergency service order, but only because we found that there was a transportation emergency affecting service throughout the West, and that we could help

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[5] In its most recent weekly data filing, UP states that the congestion in Southern California has lessened. Our staff, which is currently on site in Southern California, confirms UP's statement in this regard.

[6] CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company— Control and Operating Leases/Agreements— Conrail Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33388.

mitigate the emergency by adding service options in and around Houston, which we found was the source of the crisis.

Here, notwithstanding the SPI petitioners' perfunctory assertion that the service emergency persists, we see no basis on which we could lawfully extend the Houston provisions of the service order. The SPI petitioners have, as we noted, cited data that show that, on a systemwide basis, UP service has not returned to the levels it was at before the emergency began, and they and the Tex Mex reply have cited remarks disparaging to UP service made by some of the parties to the Houston/Gulf Coast Oversight proceeding that have asked for additional transportation options for the Houston area on a permanent basis. But viewed objectively, it is inescapable that service to Houston has improved significantly, and that continuation of the operations provided by BNSF and TexMex under the service order is not necessary to address a service emergency.

Indeed, the Houston area is fluid, and has been for several weeks. UP points out (response at 15-18, and Duffy Verified Statement) that transit times for UP's major shippers from the Houston/Gulf area to midcontinent gateways have been reduced by 50% and are near or better than pre-emergency levels; switching is timely in most instances; car inventory in Texas and Louisiana, and trains held south of Kansas City, are at their lowest reported levels since the current reporting was instituted, and within normal ranges; blocked sidings have been significantly reduced and are within normal ranges; train speeds on Houston corridors have improved by from 50 to nearly 100%; dwell times at yards such as Englewood and Settegast have been reduced;[7] and cross-border traffic at Laredo is moving normally.[8] Notwithstanding Tex Mex's position that the improvements are overstated, the information that UP reports in its reply is consistent with the data that we have received and the observations of our staff during site visits made to the Houston area on various occasions throughout the period of the emergency order.

In short, it is clear to us that service in the Houston/Gulf Coast area has shown significant improvement, and we believe that this improvement has promoted, and will continue to promote, service improvements throughout the UP system. Any service problems that may exist elsewhere on the UP system will not be remedied further by continuing the service order provisions for the Houston area. If circumstances in Houston change, as the Tex Mex reply predicts, we can and will intervene, to the extent it is appropriate to do so. But there is no basis for continuing to do so now.[9]

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[7] As UP points out, and as our staff observed during site visits to the Houston area, dwell times at Settegast are inflated by the substantial number of empty shipper-owned cars being stored at the owners' request.

[8] UP points out (reply at 19-22) that the measurements submitted by the SPI petitioners are either not current, not based on a valid "baseline," or systemwide rather than Houston/Gulf Coast-related.

[9] Moreover, many actions taken during the term of the service order that have proven particularly helpful, including directional running and joint dispatching, will continue in effect

Indeed, had the current situation in Houston been in effect last Fall, we would not have ordered the additional transportation options as part of the service order proceeding.

We are, of course, aware that, in the Houston/Gulf Coast Oversight proceeding, the Board received several substantial pleadings suggesting, on competitive grounds, permanent changes to the ownership and operation of the rail facilities in and around the Houston area. Some of those pleadings request that the operations authorized under the service order be made permanent and indeed expanded. We are receiving public comment on those pleadings through the middle of October 1998, and we expect to rule on the matter by the end of the year. Implicit in the SPI/NITL/CMA petition is a suggestion that, even if we do not find a continued transportation emergency in Houston, we should use our injunctive authority to continue the remedies provided in the service order until we complete the Houston/Gulf Coast Oversight proceeding.[10]

We do not believe that such relief would be appropriate. We are not in a position to prejudge the outcome of the Houston/Gulf Coast Oversight proceeding, and yet, requiring continuation of the operations under the service order in the absence of a service-based reason would appear to do just that. Moreover, given the current improved level of UP service in the area, there is no reason to believe that the carrier will not respond adequately to all Houston area shippers that make reasonable requests for service. Finally, there is some basis for UP's concern over the effect that continuation of the service order could have on its financial condition, particularly after three quarters of significant losses. Although the traffic and revenue diversion associated with the service order, in and of itself, might not be financially devastating, it is not trivial either in light of the UP's current weakened state. Absent a service emergency, we must be mindful of the risk that continued government intervention into the business of an important going concern, such as UP, could impede the company's ability to raise the capital needed to continue to make the kinds of infrastructure investments that the West needs and that UP has pledged to make.

Our conclusion to deny further emergency relief given the improved state of service in the Houston area should not be taken as indifference to the harms that shippers have suffered as a result of the service problems in the West, or as a lack of will to remain vigilant and to address any significant service issues that may arise. Indeed, we are continuing to require reporting, and we are keeping the Rail Service in the Western United States proceeding open so that we can take appropriate action as needed. The statute, however, requires specific findings before we can issue emergency service orders, and we simply cannot defensibly make those findings here insofar as the

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regardless of whether we extend the order.

[10] Noting that the SPI petitioners tie the duration of their proposed service order to completion of the Houston/Gulf Coast Oversight proceeding, rather than improvements in service to Houston, UP suggests in its reply that the SPI petition is really motivated more by litigation strategy than by service issues. Our decision here is based on the merits of the request for emergency relief; it has nothing to do with the merits of the Houston/Gulf Coast Oversight proceeding.

Houston area is concerned.[11]

For all of these reasons, we deny the request that the emergency service order be continued, or that a new one be issued. Particularly in light of the rail service instability that has existed in the West, however, we recognize that shippers may need some time to reorganize their transportation arrangements in a way that will minimize disruption and re-establish service expectations. Accordingly, we will provide a 45-day "wind-down" period. Thus, pursuant to the provisions of 49 U.S.C. 11327, we authorize Tex Mex, until September 17, 1998, to continue providing the type of service authorized in the Service Order No. 1518 proceeding, and we direct UP, also until that date, to continue to release Houston shippers that are switched by the Houston Belt Terminal Railroad (HBT) and the Port Terminal Railroad Association (PTRA) from their contracts so that they can be served by Tex Mex and BNSF.[12]

C. **Entergy**. Entergy has not shown that it is entitled to emergency relief. Like the SPI petitioners, it asks the Board to impose a systemwide service order. Its petition, however, provides no basis for continuing the Houston-based relief in the existing service order, nor does it request anything other than giving BNSF access to Entergy's White Bluff plant for a period of 6 months.[13] Thus, in effect, it is a request for a new service order centered on Entergy's facility alone.

As we noted in responding to the SPI petitioners' request, and in a decision issued today in Rail Service in the Western United States, STB Ex Parte No. 573 (STB served July 31, 1998), our authority to issue an emergency service order is limited to emergency situations. Throughout the emergency service order proceedings, we have viewed the service emergency broadly, and have fashioned relief in a way that would benefit all shippers the Houston area, and, ultimately, the West. We have not, however, found circumstances appropriate for relief on a shipper-by-shipper basis.

In this case, service may not be at the levels that Entergy would prefer, but that does not entitle it to an emergency service order. UP states that it has delivered more trains to Entergy's power plants during the first five months of 1998 than it did during the comparable months of 1997 when there were no service problems on the UP system. Moreover, unlike other utilities, Entergy has apparently refused to support operational changes to minimize congestion or pursue other UP-suggested transport alternatives that would have increased its coal deliveries. Finally, as UP notes,

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[11] The SPI petitioners cite BNSF's comments about service concerns that were made in the context of oversight of the UP/SP merger. But there is a difference between ongoing service issues and a transportation emergency, and BNSF's comments, although they reflect some differences between BNSF and UP, do not indicate a transportation emergency in the Houston area.

[12] Data filing, of course, will continue until further notice.

[13] We will consider Entergy's request for a condition affording BNSF permanent access to White Bluff, filed October 23, 1997, in the upcoming UP/SP general oversight proceeding, Finance Docket No. 32760 (Sub-No. 21), but we will not award it emergency service relief now.

the imminent completion of its $400 million track improvements and capacity expansion in the Central Corridor over routes used for Entergy shipments will reduce cycle times and provide the increased capacity that Entergy seeks.

D. **SCRRA**. As UP notes, SCRRA's request for augmented data reporting and a requirement that UP commit to specific capital projects at some time in the future does not require immediate action. As UP has not had an opportunity to review the situation, we will await UP's response and defer action on SCRRA's filing at this time.

It is ordered:

1. STB Ex Parte No. 573 is continued.

2. UP and BNSF shall provide bi-weekly reports according to the terms of this decision.

3. Until September 17, 1998, Tex Mex may continue to accept traffic routed to it by Houston shippers that are switched by HBT and PTRA, and to continue providing the type of service authorized under the Service Order No. 1518 proceeding.

4. Also until September 17, 1998, UP shall continue to release Houston shippers that are switched by HBT and PTRA from their contracts so that they can be served by Tex Mex and BNSF.

5. The petitions of SPI/NITL/CMA and Entergy are denied.

6. Action on SCRRA's request is deferred at this time.

7. This decision is effective on July 31, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

APPENDIX: OPERATIONAL MONITORING - DATA REQUIREMENTS

UNION PACIFIC:

1. **On Line Rail Car Inventory** - System, Foreign, Private
2. **System Car Terminal Dwell Time**
3. **System Train Speed**
4. **System Coal Cycle Days**
5. **Sidings Blocked** - System, Kansas City South, Tucson to West Colton
5. **Multiple Mains Blocked**
7. **Trains Held By Cause** - Power, Crews
8. **Locomotive Fleet Size / Productivity** - Gross Ton Miles Per Horse Power Day
9. **USDA Report** - Grain Cars Loaded By State / **System Velocity** - Loaded Cars
10. * **Terminal Processing Report** - [12 Terminals] - Cars On Hand, Switched, Dwell
11. **Port Terminal Condition Report** - ICTF, East Los Angeles, Houston
12. **Interchange Activity** - Laredo
13. * **Powder River Basin Coal Cycle Days** - Northern Tier/Southern Tier

BURLINGTON NORTHERN/SANTA FE:

USDA Report - Grain Cars Loaded By State / **System Velocity** - Loaded Cars

Note: data restricted from web site publication or docket inclusion are marked with an asterisk.

JACK WELCH
GENERAL ELECTRIC
3135 EASTON TURNPIKE
FAIRFIELD CT 06431 US

PAUL K. BIBA, HOUSE COUNSEL
FORMOSA PLASTICS CORP.
9 PEACH TREE HILL ROAD
LIVINGSTON NJ 07039 US

KARL L SHETLER
GENERAL CHEMICAL CORPORATION
90 EAST HALSEY ROAD
PARSIPPANY NJ 07054 US

RONALD SCHLEY, PRESIDENT
DSR-SENATOR LINES
50 CRAIGWOOD ROAD
SOUTH PLAINFIELD NJ 07080-2481 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

SUSANNA CHANG
DUFERCO STEEL, INC.
100 METRO PARK SOUTH
LAURENCE HARBOR NJ 08879 US

JOHN F. MCHUGH
MCHUGH & SHERMAN
20 EXCHANGE PLACE 51ST FLOOR
NEW YORK NY 10005 US

DAVID ADKINS
MINERA MEXICO INTERNACIONAL INC
712 5TH AVE 39TH FL
NEW YORK NY 10019 US

DAVID C KANE
SPECIALLY MINERALSS INC
405 LEXINGTON AVENUE
NEW YORK NY 10174-1901 US

JAMES J HUNT
D M ROTHMAN CO INC
N Y C TERMINAL MKT ROW A-109
HUNTS POINT & E BAY AVES
BRONKS NY 10474 US

ALEXANDER H. JORDAN
WESTERN SHIPPERS COALITION
210 NORTH AVE
NEW ROCHELLE NY 10801-6402 US

ANDREW GOODMAN
SHERWOOD LUMBER CORP
300 CORPORATE PLAZA
ISLANDIA NY 11722 US

GUY PORTELLO
P O BOX 888
270 SOUTH SERVICE ROAD
MELVILLE NY 11747 US

GENE M. PERETZ
NYCO MINERALS, INC.
BOX 368
124 MOUNTAIN VIEW DRIVE
WILLSBORO NY 12996-0368 US

WILLIAM GREENE
P O BOX 44
TONAWANDA NY 14150-7891 US

RODNEY L. DUTTON
CANANDAIGUA WINE COMPANY
116 BUFFALO STREET
CANANDAIGUA NY 14424-1086 US

ROBERT E. BERGIA
TUBE CITY, INC.
P. O. BOX 2000
GLASSPORT PA 15045 US

MICHAEL J CHUTZ
ARROW TERMINALS
601 BROAD STREET
SEWICKLEY PA 15143 US

THOMAS DAVIS
KOPPERS INDUSTRIES INC
436 SEVENTH AVENUE
PITTSBURGH PA 15219-1800 US

DAVID H. STEINGRABER
L. B. FOSTER CO
415 HOLIDAY DRIVE
PITTSBURGH PA 15220-2793 US

R J HENEFELD
PPG INDUSTRIES INC
ONE PPG PLACE
PITTSBURGH PA 15272 US

M E PETRUCCELLI
PPG INDUSTRIES INC
ONE PPG PLACE
PITTSBURGH PA 15272 US

DENNIS W DEGOL
SEVEN D WHOLESALE
302 ST THOMAS STREET
GALLITZIN PA 16641-0067 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

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 SQUARE
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

RICHARD NARDELLA
NARDELLA INC
3301 SOUTH GALLOWAY ST
PHILADELPHIA PA 19148 US

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

WILLIAM A MCCURDY JR
LEGAL DEPARTMENT D-8098-1
1007 MARKET STREET
WILMINGTON DE 19898 US

SARAH C. BERG
E. I. DU PONT DE NEMOURS AND COMPANY ,INC
1007 MARKET STREET
WILMINGTON DE 19898 US

TERRENCE D JONES
KELLER & HECKMAN
1001 G ST NW STE 500 WEST
WASHINGTON DC 20001 US

JAMES M BRUNKENHOEFER
UNTED TRANSPORTATION UNION
400 NORTH CAPITOL ST NW STE 856
WASH DC 20001 US

BARTLETT NAYLOR
INTERNATIONAL BROTHERHOOD OF TEAMSTERS
25 LOUISIANA AVENUE NW
WASHINGTON DC 20001 US

MARTIN UGGERUD, CHAIRMAN
ALLIANCE FOR RAIL COMPETITION
1000 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

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

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

LOUIS P WARCHOT
ASSOCIATION OF AMERICAN RAILROADS
50 F STREET NW
WASHINGTON DC 20001 US

RYLAND UTLAUT
NATIONAL CORN GROWERS ASSOCIATION
122 C ST NW SUITE 510
WASHINGTON DC 20001-2109 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
WASHINGTON DC 20002 US

JIM MILLER
NATIONAL ASSOCIATION OF WHEAT GROWERS
415 SECOND STREET, NE, SUITE 300
WASHINGTON DC 20002 US

LEROY D JONES
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
10 G STREET NE STE 480
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

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

ERIC VON SALZEN
HOGAN & HARTSON
555 THIRTEENTH STREET N W
WASHINGTON DC 20004-1109 US

GEORGE W MAYO JR
HOGAN & HARTSON L L P
555 THIRTEENTH STREET NW COLUMBIA SQUARE
WASHINGTON DC 20004-1109 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

ANDREW H. CARD JR
AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION
1401 H STREET,NW STE 900
WASHINGTON DC 20005 US

THOMAS LAWRENCE III
OPPENHEIMER WOLFF DONNELLY & BAYH LLP
1350 EYE STREET, N.W., STE 200
WASHINGTON DC 20005 US

ALICE C SAYLOR
THE AMERICAN SHORT LINE RAILROAD ASSOCIATION
1120 G STREET, N. W., SUITE 520
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

KEVIN M SHEYS
OPPENHEIMER WOLFF & DONNELLY & BAYH LLP
1350 EYE STREET, N.W., STE 200
WASHINGTON DC 20005 US

DAVID C BARRETT JR
NAT'L GRAIN & FEED ASSN
1201 NEW YORK AVE NW STE 830
WASHINGTON DC 20005 US

WILLIAM W HANNA
KOCH INDUSTRIES INC
1450 G STREET NW STE 445
WASHINGTON DC 20005-2001 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

PAUL H LAMBOLEY
1350 EYE STREET, N.W., STE 200
WASHINGTON DC 20005-3324 US

NICHOLAS J DIMICHAEL
DONELAN CLEARY WOOD & MASER PC
1100 NEW YORK AVENUE N W 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

JOHN K MASER III
DONELAN CLEARY WOOD & MASER P C
1100 NEW YORK AVE NW SUITE 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

FRITZ R KAHN
1100 NEW YORK AVENUE NW SUITE 750 WEST
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 HARKAWAY, PC
1750 PENNSYLVANIA AVE NW, STE 1105
WASHINGTON DC 20006 US

ROBERT P VOM EIGEN
HOPKINS AND SUTTER
888 16TH STREET N W STE 700
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

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

MAUREEN A. HEALEY
THE SOCIETY OF THE PLASTICS INDUSTRY INC
1801 K STREET NW SUITE 600K
WASHINGTON DC 20006-1301 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

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

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

MATTHEW A. GRAVES, JR.
6120 29TH STREET NW
WASHINGTON DC 20015-1508 US

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

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

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

PETER A GREENE
THOMPSON HINE FLORY
1920 N STREET N W, SUITE 800
WASHINGTON DC 20036 US

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

MARC J. FINK
SHER & BLACKWELL
1850 M STREET NW STE 900
WASHINGTON DC 20036 US

DAVID B HERSHEY
AMERICAN FOREST & PAPER ASSOCIATION
1111 19TH ST NW
WASHINGTON DC 20036 US

HAROLD P QUINN, JR
NATIONAL MINING ASSOCIATON
1130 17TH STREET NW
WASHINGTON DC 20036 US

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

ANDREW B KOLESAR III
SLOVER & LOFTUS
1224 17TH ST NW
WASHINGTON DC 20036 US

KEITH G O'BRIEN
REA, CROSS AND AUCHINCLOSS
1707 L STREET, N.W., STE 570
WASH 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
1707 L STREET NW STE 570
WASHINGTON DC 20036 US

RICHARD S EDELMAN
O'DONNELL SCHWARTZ & ANDERSON PC
1900 L STREET NW SUITE 707
WASHINGTON DC 20036 US

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

PAUL A CUNNINGHAM
HARKINS CUNNINGHAM
1300 NINETEENTH STREET, NW STE. 600
WASHINGTON DC 20036 US

DANIEL G KUEHN
WESTERN COAL TRAFFIC LEAGUE
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036 US

JOHN D HEFFNER ESQ
REA CROSS & AUCHINCLOSS
1707 L STREET, NW, STE 570
WASHINGTON DC 20036 US

DAVID H BAKER
THOMPSON HINE & FLORY LLP
1920 N STREET NW
WASHINGTON DC 20036-1601 US

RICHARD B HERZOG
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

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

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

JOSEPH E LEMA
NATIONAL MINING ASSOCIATION
1130 17TH ST NW
WASHINGTON DC 20036-4604 US

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

JERRY W COX
CEMEX USA MANAGEMENT INC
1250 24TH STREET NW 7TH FLOOR
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

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

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

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

PAMELA L MILES
COVINGTON & BURLING
P O BOX 7566
1201 PENNSYLVANIA AVENUE NW
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

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

DAVID SHERMAN, CHIEF OF FOREST SERVICE
US DEPT OF AGRICULTURE
PO BO 96090
WASHINGTON DC 20090-6090 US

EILEEN S STOMMES DIRECTOR T&M DIVISION
AGRICULTURAL MARKETING SERVICE USDA
P O BOX 96456
WASHINGTON DC 20090-6456 US

MICHAEL V DUNN, ASSISTANT SECRETARY
US DEPARTMENT OF AGRICULTURE, MARKETING AND R

WASHINGTON DC 20250 US

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

HON JOHN GLENN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE THAD COCHRAN
UNITED STATE SENATE
WASHINGTON DC 20510 US

HON. HERBERT KOHL
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. DAN COATS
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE PAT ROBERTS
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. CHRISTOPHER S. BOND
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

CHRISTOPHER S & JO ANN BOND & EMERSON
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. BARBARA BOXER
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. WAYNE ALLARD
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. DIANNE FEINSTEIN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE THOMAS A. DASCHLE
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. PHIL GRAMM
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE JERRY MORAN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20510 US

HONORABLE LUCILLE ROYBALL-ALLARD
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20510 US

HONORABLE LORETTA SANCHEZ
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20510 US

HONORABLE MATTHEW G MARTINEZ
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20510 US

HONORABLE JULIAN C DIXION
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20510 US

SAM BROWNBACK
UNITED STATES SENTATE
WSHINGTON DC 20510 US

BARBARA BOXER
UNITED STATES SENATE
HART SENATE OFFICE BUILDING SUITE 112
WASINGTON DC 20510 US

HON. ROBERT KERREY
UNITED STATES SENATE
WASHINGTON DC 20510 US

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

DIANNE FEINSTEIN
UNITED STATES SENATE
WASNINGTON DC 20510-0504 US

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

HONORABLE PAT ROBERTS
UNITED STATES SENATE
WASHINGTON DC 20510-1065 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

J ROBERT KERREY
UNITED STATES SENATE
WASHIGTON DC 20510-2704 US

KAY BAILEY HUTCHISON
UNITED STATES SENATE

WASHINGTON DC 20510-4304 US

HON. TOM EWING
UNITED STATES 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 RONALD V. DELLUMS
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

HON. HENRY A. WAXMAN
ATTN: PAT DELGADO
US 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 HOWARD L. BERMAN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON SHERROD BROWN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE GEORGE E BROWN JR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

KENNY HULSHOF
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

IKE SKELTON
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

PAT DUNNER
US STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

CHRISTINA MUEDEKING
UNITED STATES HOUSE OF REPRESENTATIVE
1415 LONGWORTH BUILDING
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 KEN BENTSEN
UNITED STATES HOUSE OF RESPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PHIL ENGLISH
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE STEPHEN HORN
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JULIAN DIXON
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TIM HUTCHINSON
U. S. 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

HON BOB FILNER
UNITED STATES 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

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. LARRY COMBEST
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. DAVID DREIER
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ROBERT A. BORSKI
U S 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

VIC SNYDER
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-0402 US

HON. JANE HARMAN
U S HOUSE OF RERRESENTATIVES
WASHINGTON DC 20515-0536 US

JERRY LEWIS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-0540 US

JAY KIM
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-0541 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

DAVID DREIER
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2305 US

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

HONORABLE JO ANN EMERSON
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2508 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

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

HONORABLE PETER A. DEFAZIO
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3704 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

CHET EDWARDS
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2459 RAYBURN BUILDING
WASHINGTON DC 20515-4311 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

LARRY COMBEST
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20525 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, ROOM 4102 C-30
WASHINGTON DC 20590 US

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

JOLENE M MOLITORIS
U S DEPT OF TRANSPORTATION FEDERAL RAILROAD A
400 SEVENTH ST SW
WASHINGTON DC 20590 US

JOLENE MOLITORIS, ADMN.
FEDERAL RAILROAD ADMNS.
400 7TH STREET SW
WASHINGTON DC 20590 US

THOMAS E RAHLL
EDWARD G RAHLL & SONS INC
7460 CONOWINGO AVE
JESSUP MD 20794 US

WILLIAM D CLASS III
P O BOX 2002
JESSUP MD 20794 US

JONATHAN C CLASS
P O BOX 2003
JESSUP MD 20794-2003 US

ROBERT C CLASS
P O BOX 2004
JESSUP MD 20794-2004 US

J WILLIAM HUDSON
7315 WISCONSIN AVE SUITE 1200 NORTH
BETHESDA MD 20814 US

MITCHELL M. KRAUS
TRANSPORTATION -COMMUNICATIONS INTERNATIONAL
3 RESEARCH PLACE
ROCKVILLE MD 20850 US

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

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W W WHITEHURST & ASSOCIATES INC
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COCKEYSVILLE MD 21030 US

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CONSTELLATION COMPANIES
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BALTIMORE MD 21201-2423 US

ROBERT TOTH
ISP MINERAL PRODUCTS INC
34 CHARLES ST
HAGERTOWN MD 21740 US

PHILIP H KIMBALL
NATIONAL DRY BEAN COUNCIL
6707 OLD DOMINION DRIVE, SUITE 315
MCLEAN VA 22101-4503 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

DOROTHY M MERCER
4500 S 4 MILE RUN DRIVE, NO 728
ARLINGTON VA 22204 US

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

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

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

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

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116 SOUTH ROYAL STREET
ALEXANDERIA VA 22314 US

HONORABLE GILLESPIE V. MONTGOMERY
U. S. HOUSE OF REPRESENTATIVES
11 CANAL CENTER PLZ. STE. 104
ALEXANDRIA VA 22314-1595 US

THEODORE PRINCE
K LINE AMERICA INC
301 CONCOURSE BOULEVARD SUITE 300
GLEN ALLEN VA 23058-6270 US

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CSX CORPORATION
902 E CARY ST 1 JAMES CENTER
RICHMOND VA 23119 US

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THREE COMMERCIAL PLACE
NORFOLK VA 23510-2191 US

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720 THIMBLE SHOALS BLVD, SUITE 130
NEWPORT NEWS VA 23608-2574 US

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SEA-LAND SERVICE INC
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CHARLOTTE NC 28209-4637 US

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P.O. BOX 47
GREENVILLE SC 29602 US

GREOGORY A STRASMA
MAMILLAN BLOEDEL BUILDING MATERIALS
5859 WINWARD PARKWAY SUITE 200
ALPHARETTA GA 30005 US

H WAYNE KINARD
PAPER RECYCLING INTERNATIONAL
3350 HOLCOMB BRIDGE ROAD BUILDING 100 SUITE 1
NORCROSS, GA 30092 US

BOB THOMPSON
INNVOATIVE LOGISTICS INC
787 KARINGWAY LANE NW
KENNESAW GA 30152-3892 US

ARTHUR T. SMITH
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6600 PEACHTREE DUNWOODY RD
ATLANTA GA 30328 US

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

RANDALL C COLLINS
DIXIE PLYWOOD COMPANY
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SAVANNAH GA 31402-2328 US

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CSX INTERMODAL INC
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JACKSONVILLE FL 32202-4434 US

LAWRENCE HJERSTED
316 BARTOW MUNICIPAL AIRPORT
BARTOW FL 33830 US

DAVID J PUTMAN
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P O BOX 2625 14N-163
BIRMINGHAM AL 35202 US

BOB GRACE
PROGRESS RAIL SERVICES CORPORATION
PO BOX 1037
1600 PROGRESS DRIVE
ALBERTVILLE AL 35950 US

MARSHALL MINKIN
1849 CRESTWOOD BLVD
IRONDALE AL 36210 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

ROBERT G. UFFELMAN
1250 RIVERVIEW TOWER
900 SOUTH GAY STREET
KNOXVILLE TN 37902 US

FRANKY HOSFORD
PO BOX 820
PARIS TN 38242 US

GARY R ADAMS
P O BOX 849
GRENADA MS 38901 US

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P O DRAWER 1217
201 COMMERCE STREET
WEST POINT MS 39773 US

ALBERT C HORTON
HORTON FRUIT CO INC
4701 JENNINGS LANE
LOUISVILLE KY 40218-2967 US

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301 BILL BRYAN BOULEVARD
HOPKINSVILLE KY 42240-6800 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: DAN EMERINE
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

DONALD R KRAUSE
1000 JACKSON STREET
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

WOODROW W. BAN
1550 STONINGTON
HUDSON OH 44236 US

JOHN CARNEY
WCI STEEL INC
1040 PINE AVENUE S E
WARREN OH 44483 US

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

JOSEPH PICHLER
1014 VINE STREET
CINCINNATI OH 45202 US

ROBERT RISBERG
P O BOX 429550
CINCINNATI OH 45249 US

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

JOSEPH C EKAITIS
NATIONAL STEEL CORPORATION
4100 EDISON LAKES PARKWAY
MISHAWAKA IN 46545-3440 US

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

PHILLIP R BEDWELL
1610 NORTH CAKHOUN STREET
FORT WAYNE IN 46808 US

GARY J ROGERS
ERB LUMBER COMPANY
375 S ETON ROAD
BIRMINGHAM MI 48009-6569 US

HAROLD KUNTER
GENERAL MOTORS CORPORATION
BOX 9015
30400 MOUND ROAD 1-8
WARREN MI 48090 US

STORMY T W HICKS
FORD MOTOR COMPANY
17101 ROUNDA DRIVE MD 1522A
DEARBORN MI 48121 US

DUANE KUZAK
RAVEN LOGISTICS INC
3080 ORCHARD LAKE RD SUITE E
KEEGO HARBOR MI 48320 US

EDWARD KRAJCA
CHRYSLER CORPORATION
800 CHRYSLER DRIVE
AUBURN HILL MI 48326-2757 US

JAMES S HANSON
DOW CHEMICAL COMPANY
2020 DOW CHEMICAL CENTER
MIDLAND MI 48674 US

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

MARGE VOLK
UNIVERSAL FOREST PRODUCTS, INC
2801 EAST BELTLINE, NE
GRAND RAPIDS MI 49505-9736 US

THOMAS F JACKSON
800 LINCOLN WAY
AMES IA 50010 US

DOUG GERVICH
M GERVICH & SONS
P O BOX 67
MARSHALLTOWN IA 50158 US

DONALD B STRATER
ROBERTS & DYBDDAHL
P O BOX 19908
DES MOINES IA 50306 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

JOHN BONNSTETTER
NEW COOPERATIVE INC
P O BOX 818
FT DODGE, IA 50501 US

AL STRUTHERS
NORTH CENTRAL COOPERATIVE
P O BOX 313
CLARION IA 50525 US

RANDY DUNN
FIRST COOPERATIVE ASSOCIATION
212 N AGORA
MARATHON IA 50565 US

HARRY BORMANN
WEST BEND ELEVATOR COMPANY
P. O. BOX 49
WEST BEND IA 50597 US

MICHAEL A. POTASH
SIOUX CITY COMPRESSED STEEL CO
P.O.BOX 3262
214 COURT STREET
SIOUX CITY IA 51102 US

DAVE REINDIN
NORTHWEST IOWA CORP
P O BOX 67
GEORGE IA 51237 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

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ROQUETTE AMERICA, INC.
P O BOX 6647
1417 EXCHANGE STREET
KEOKUK IA 52632-6647 US

ROBERT RIVAS
PRESIDENT TEXPAR ENERGY INC
P O BOX 587
WAUKESHA WI 53187 US

ALAN P JENSEN
MILLER COMPRESSING COMPANY
P O BOX 369
MILWAUKEE WI 53201 US

TODD ADAMS
P O BOX 661
MILWAUKEE WI 53201-0661 US

TODD ADAMS
MILWAUKEE JOURNAL SENTINEL
333 WEST STATE STREET
WILWAUKEE WI 53201-0661 US

JOE SAINI
3586 HIGHWAY 23 NORTH
DODGEVILLE WI 53533 US

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

JOHN A. DULIN
SAMUELS RECYCLING COMPANY
P. O. BOX 8800
MADISON WI 53706 US

ARAL EATON
P O BOX 1138
240 W ARNDT ST
FOND DU LAC WI 54936-1138 US

BILL WENZEL
JD ROGERS GROUPS INC
P O BOX 877
LAKE ELMO MN 55042 US

MILTON J. EVENSON
H.B. FULLER
3530 NORTH LEXINGTON AVENUE
ST PAUL MN 55126-8002 US

PATRICK L. GONDA
3M LOGISTICS TRANSPORTATION
3M CENTER BLDG 225-5N-07
ST. PAUL MN 55144-1000 US

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

ROBERT W J MORTENSON
FARMERS COMMODITIES TRANSPORTATION CO.
11000 W 78TH ST, STE 50
EDEN PRAIRIE MN 55344 US

THOMAS D PERDUE
C H ROBINSON COMPANY
8100 MITCHELL ROAD
EDEN PRAIRIE MN 55344-2248 US

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

WILLIAM J. BURNS
CARGILL INCORPORATED
P. O.BOX 9300
15407 MMCGINTY ROAD WEST
WAYZATA MN 55391-2399 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

ROBERT ZELENKA
FARMERS ELEVATOR ASSOC OF MN
400 4TH ST SUITE 852 852GRAIN EXCHANGE
MINNEAPOLIS MN 55415 US

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VIKING FOREST PRODUCTS INC
P O BOX 39811
MINNEAPOLIS MN 55439 US

PATRICK DALY
GOPHER STATE SCRAP & METAL INC
3401 3RD AVE
MANKATO MN 56001 US

THOMAS E CASHMAN
P O BOX 698
303 LUNDIN BLVD
MANKATO MN 56002-0698 US

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

STEVEN D STREGE
N. DAKOTA GRAIN DEALERS
212 BLACK BUILDING
FARGO ND 58102 US

JARVIS HAUGEBERG
PO BOX 158
CHURCHS FERRY ND 58325 US

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

GEORGE T DORE
PACIFIC STEEL & RECYCLING
P O BOX 1549
GREAT FALLS MT 59403 US

HON MARC RACICOT
GOVERNOR STATE OF MONTANA
STATE CAPITOL
HELENA MT 59620 US

JACK LYNCH
BUTTE-SILVER BOW
CITY COUNTY GOVERMENT
BUTTE MT 59701 US

WILLIAM J FORGARTY
PORT OF MONTANA
P O BOX 3641
BUTTE MT 59702 US

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

RAYMOND L SANFORD
PLUM CREEK
P O BOX 1990
COLUMBIA FALLS MT 59912-1900 US

STEPHEN L GRAFRATH
PHOENIX TRADING OF CHICAGO INC
822 GOLF LANE
BARRINGTON IL 60010 US

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

JOHN JOHNSON
MINN COMMERICIAL RWY
14047 PETRONELLA DR STE 201
LIBERTYVILLE IL 60048 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

GORDON D GUSTAFSON
935 WEST 175TH ST
HOMEWOOD IL 60430-2028 US

DOUGLAS R. ROUSSE
8938 SOUTH RIDGELAND AVE
OAK LAWN IL 60453-1000 US

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

TOM MITROPOULOS
FAIRMONT MINERALS, LTD
P. O. BOX 119
SOUTH OLIVE ROAD
WEDRON IL 60557 US

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

RICHARD H DORSEY
150 NORTH MICHIGAN SUITE 3210
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

WILLIAM C SIPPEL
OPPENHEIMER WOLFF & DONNELLY
180 N STETSON AVE TWO PRUDENTIAL PLAZA 45TH F
CHICAGO IL 60601 US

ROBERT A SIEFFERT
141 WEST JACKSON BOULEVARD SUITE 3900
CHICAGO IL 60604 US

RODMAN KOBER
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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

RICHARD B. BADEUSZ
COZZI IRON & METAL INC
2232 SOUTH BLUE ISLAND AVENUE
CHICAGO IL 60608 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

MARILYN LABKON
PRICE-WATSON GENERAL IRON INDUSTRIES INC
1909 N CLIFTON AVE
CHICAGO IL 60614-4893 US

RICHARD STOWERS
INDUSTRIAL STORAGE WAREHOUSE CORPORATION
4343 W OHIO ST
CHICAGO IL 60624 US

E GORDON ELLICOTT JR
KEYWELL L L C
11900 SOUTH COTTAGE GROVE AVENUE
CHICAGO IL 60628 US

JOHN S. ALBERT
WELDED TUBE COMPANY
1855 EAST 122ND STREET
CHICAGO IL 60633 US

DONALD E WERNER
LEAVITT TUBE COMPANY INC
1717 WEST 115TH STREET
CHICAGO IL 60643 US

WILLIAM H HILLPOT
NORTHWESTERN STEEL AND WIRE COMPANY
P O BOX 618
121 WALLACE ST
STERLING IL 61081-0618 US

WILLIAM J BREMNER
BEHR IRON AND STEEL, INC.
P.O. BOX 740
1100 SEMINARY ST
ROCKFORD IL 61105 US

E.F. STANDACIT
DEERE & COMPANY
400 19TH STREET
MOLINE IL 61265-1359 US

PAUL SALT
MANLEY BROS OF INDIANA INC
P O BOX 80
300 S VERMILLION ST
TROY GROVE IL 61372-0080 US

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

ELMER H, OELKERS
KEYSTONE STEEL & WIRE
7000 S.W. ADAMS STREET
PEORIA IL 61641-0002 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

E. R. KOEBBE
PEA RIDGE
ROUTE HC 65, BOX 110
SULLIVAN MO 63080 US

MARK GUEMPEL
LOBORGE PIPE STEEL
901 NORTH TENTH STREET
ST LOUIS MO 63101 US

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PEABODY HOLDING COMPANY
701 MARKET STREET STE 700
ST LOUIS MO 63101-1826 US

G R AVERY
LACLEDE STEEL COMPANY
ONE METROPOLITAN SQUARE
ST LOUIS MO 63102-2738 US

J F LAMM
ANHEUSER-BUSH COMPANIES
ONE BUSCH PLACE
ST LOUIS MO 63118-1852 US

C A MENNELL, PRESIDENT
LACKLAND WESTERN RR CO
31 OAK TERRACE
WEBSTER GROVES MO 63119 US

PATRICK O SINCLAIR
FOREST PRODUCTS SUPPLY CO
9264 MANCHESTER ROAD
ST LOUIS MO 63144 US

CHARLES G CROSS
MCKINLEY IRON INC
P O BOX 5410
ST LOUIS MO 63147-0315 US

M. I ALLGEIER
PURINA MILLS, INC
P.O.BOX 66812
ST. LOUIS MO 63166 US

M J ALLGEIER
PURINA MILLS INC
P O BOX 66812
ST LOUIS MO 63166-6812 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

ROBERT P ERWIN JR
4800 MAIN ST SUITE 600
KANSAS CITY MO 64112 US

DAVID P KERSCHBAUM
GS STEEL COMPANY
7000 ROBERTS ST
KANSAS CITY MO 64125 US

CHRISTOPHER AADNESEN
T F M MONTERREY
AVE MANUEL L BARRAGAN #4850 NTE
MONTERREY N L MX 64420 MX

ALLEN RICE
RICES FEED SERVICE INC
P O BOX 275
201 F STREET
GOLDEN CITY MO 64748 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

GARY D MARSHALL
3702 W TRUMAN BOULEVARD #120
JEFFERSON CITY MO 65109 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

RALPH NOWELL
YELLOW FREIGHT SYSTEM INC
P O BOX 7270/66207
10990 ROE AVENUE/66211
OVERLAND PARK KS 66211 US

JIM WILSON
SCOTWOOD INDUSTRIS INC
12980 METCALF AVE
OVERLAND PARK KS 66213 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

ALICE DEVINE, SECRETARY
KANSAS DEPARTMENT OF AGRICULTURE
901 S. KANSAS AVENUE
TOPEKA KS 66612-1280 US

HONORABLE BILL GRAVES
STATE OF KANSAS OFFICE OF THE GOVERNOR
STATE CAPITOL 2ND FLOOR
TOPEKA KS 66612-1590 US

K VIN MAULER
KANSAS SOYBEAN ASSOCIATION
1930 S W WANAMAKER DRIVE
TOPEKA KS 66614 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

M D KEENER
P O BOX 36
KANOPOLIS KS 67454 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

KARL MATTSON
KANSAS FEEDS INC
POBOX 1555
1110 E TRAIL ST
DODGE CITY KS 67801-1555 US

DAVE STALEY
AARON FERER & SONS CO
909 ABBOTT DRIVE
OMAHA NE 68102 US

TERRY J VOSS - VICE PRESIDENT
AG PROCESSING, INC.
PO BOX 2047
OMAHA NE 68103-2047 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

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
UNION PACIFIC RR CO. LAW DEPAARTMENT
1416 DODGE STREET #830
OMAHA NE 68179 US

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

PAT PTACEK
NEBRASKA GRAIN & FEED ASSOC
1233 LINCOLN MALLS STE 200
LINCOLN NE 68508-3911 US

DAN ROSENTHAL, PUBLIC, TRANSP. ENGINEER
NEBRASKA DEPT. OF ROADS
P O BOX 94759
LINCOLN NE 68509-4759 US

SAM JACOBS
COLUMBUS METAL INDUSTRIES, INC.
P.O.BOX 292
3440 15TH ST. EAST
COLUMBUS NE 68602 US

MICHAEL PEERY
CENTRAL MARKETING COOP
P O BOX 128
150 EAST PARK
SHELBY NE 68662 US

STEVEN D SCHAAL ESQ
IBP INC LEGAL DEPT #141
P O BOX 515
DAKOTA CITY NE 68731-0515 US

E J WEBBER
TRIANGLE METALS CORP
P O BOX 325
421 EAST 20TH
KEARNEY NE 68848 US

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

GEORGE MURPHY
WESTWAY TRADING CORPORATION
365 CANAL STREET SUITE 2200
NEW ORLEANS LA 70130 US

GLENWOOD W. WISEMAN
LAKE CHARLES HARBOR & TERMINAL DISTRICT
P.O.BOX 3753
LAKE CHARLES LA 70602 US

JAMES W WARSHAW
FARMERS RICE MILLING COMPANY
P J BOX 3704
LAKE CHARLES LA 70602 US

NANCY C WEASE
CERTAINTEED CORPORATION
PO BOX 253
SULPHUR LA 70664 US

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

JAMES J CONNER
BIG RIVER INDUSTRIES INC
POBOX 66377
BATON ROUGE LA 70896 US

STEVE NAPPER
HUNT PLYWOOD CO., INC.
P O BOX 1263
RUSTON LA 71273-1263 US

JONATHAN E MARTIN
P O BOX 1110
ALEXANDRIA LA 71309 US

JACK BURCHAM
GRANITE MOUNTAIN QUARRIES
P O BOX 7008
PINE BLUFF AR 71611 US

TYNDALL H DICKINSON
MCGERORGE CONTRACTING COMPANY INC
P O BOX 7008
PINE BLUFF AR 71611-7008 US

MARY VICKER
POTLATCHCYPRESS BEND MILL
P O BOX 727
MCGEHEE AR 71664 US

FLOYD E WILSON
MID-STATE CONSTRUCTION AND MATERIALS INC
P O BOX 339
MALVERN AR 72104 US

JOSEPH W REARDON, VICE PRESIDENT OF SALES
ARKANSAS STEEL ASSOCIATES
2803 VAN DYKE ROAD
NEWPORT AR 72112 US

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

LARRY ALMAN
SOL ALMAN COMPANY
P. O. BOX 1111
1300 EAST NINTH STREET
LITTLE ROCK AR 72203 US

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

STEVEN H. PALADINO
NULYNE, INCORPORATED
P.O. BOX 39
KNOXVILLE AR 72845 US

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

DON NICKLES
UNITED STATES SENATE
409 SOUTH BOSTON
TULSA OK 74103-4007 US

VERNE L MCCABE
MCCABE INDUSTRIAL MINERALS INC
7225 SOUTH 85TH EAST AVENUE STE 400
TULSA OK 74133 US

KENNETH R TREIBER
BEN-TREI LTD
7060 SOUTH YALE SUITE 999
TULSA OK 74136 US

STAN GOODELL
WILLARD GRAIN AND FEED INC
104 ASH STREET
CELINA TX 75009 US

STAN GROODELL
WILLARD GRAIN & FEED INC
104 ASH ST
CELINA TX 75009 US

KEITH WOLFE
WESTERN ROAD RAIL SYSTEM USA
P O BOX 170351
IRVING TX 75017-0351 US

PHIL GRAMM
UNITED STATES SENATE
2323 BRYAN STREET #1500
DALLAS TX 75201 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

JAMES D. ABLOWICH
GIFFORD-HILL & COMPANY
3500 MAPLE AVENUE
DALLAS TX 75219 US

DAVID L. GREEN
DIRECTOR OF TRANSPORTATION
5301 LBJ FREEWAY, SUITE 1200
DALLAS TX 75240 US

CHRISTY CARROLL
METHANEX METHANOL COMPANY
12377 MERIT DRIVE STE 490
DALLAS TX 75251 US

DENNIS C OPFERMAN
1720 GREEN OAKS BLVD NE #205
ARLINGTON TX 76006 US

BRIAN COTTON
521200 DOVE LANE
MIMIDLOTHIAN TX 76065 US

CHRIS SALEK
TRANSLOAD DISTRIBUTION ASSOCIATION
901 LAKE STREET SUITE A
FORTH 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

JIM C KOLLAER
GREATER HOUSTON PARTNERSHIP
1200 SMITH STE 700
HOUSTON TX 77002-4309 US

GARY HENNEKE
8600 PARK PLACE BLVD
HOUSTON TX 77017 US

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

SHIRLEY J JONES
2929 ALLEN PARKWAY SUITE 2222
HOUSTON TX 77019 US

MIKE SPAHIS
FINA OIL & CHEMICAL CO.
8350 NORTH CENTRAL EXPRESSWAY, STE. 1620
DALLAS TX 75206 US

RONALD W BIRD
COMMERCIAL METALS COMPANY
P O BOX 1046
DALLAS TX 75221-1046 US

CELTYN J HUGHES
TXI
1341 WEST MOCKINGF BOARD LANE
DALLAS TX 75247 US

SYDNEY M. RICHEY
M. HANNA CONSTRUCTION COMPANY, INC.
P. O. BOX 2170
HENDERSON TX 75653 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

DOUG W. RICHARDS
201 MAIN STREET
FORT WORTH TX 76102-3131 US

THOMAS R BLANK
UNION PACIFIC RESOURCES
801 CHERRY STREET
FORT WORTH TX 76102-6803 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

JOE ALDERMAN
TEXAS PETROCHEMICAL CORPORATION
8600 PARK PLACE BLVD
HOUSTON TX 77017 US

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

CARY HOFFMAN
SCHOENMANN PRODUCE CO TX
3173 PRODUCE ROW
HOUSTON TX 77023 US

BILL DEBES
PIONEER CONCRETE OF TEXAS
800 GESSNER STE 1100
HOUSTON TX 77024 US

DEAN THORNTON
VISTA FIBERS
1200 BRITTMOORE RD
HOUSTON TX 77043 US

EDWIN E VIGNEAUX
REAGENT CHEMICAL & RESEARCH INC
1300 POST OAK BLVD STE 680
HOUSTON TX 77056 US

DAVID PARKIN
HUNTSMAN CORP
3040 POST OAK BLVD
HOUSTON TX 77056 US

PETER WITTICH
NESTE TRIFINERY
11757 KATY FREEWAY STE 930
HOUSTON TX 77079-1723 US

MICHAEL SCHERM
SOLVAY POLYMERS INC
3333 RICHMOND AVENUE
HOUSTON TX 77098 US

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

RICHARD DODD
M-I
P O BOX 42842
HOUSTON TX 77242-2842 US

MAYOR LEE P BROWN
P O BOX 1562
HOUSTON TX 77251-1562 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

RICHARD J WELU
BAKER HUGES INTEQ
P O BOX 670968
HOUSTON TX 77267-0968 US

GENE SMITH
PAVERS SUPPLY CO
P O BOX 2671
CONROE TX 77305 US

JOHN D. BURKE
GREATER HOUSTON PORT BUREAU, INC
111 EAST LOOP NORTH
HOUSTON TX 77029 US

SHARON ELLSWORTH
INTER-COMMERCE ENTERPRISES
P O BOX 53294
HOUSTON TX 77052-1294 US

GARY BURNS
CEMEX USA MANAGEMENT INC
ONE RIVERWAY SUITE 2200
HOUSTON TX 77056 US

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

JAMES J HALL
CONDEA VISTA COMPANY
900 THREADNEEDLE
HOUSTON TX 77079-2990 US

STEVEN KIRKLAND
TEXACO REFINING AND MARKETING INC
P O BOX 4596
HOUSTON TX 77210-4596 US

SANDY CUMBERLAND
HOLLAND SOUTHWEST INTERNATIONAL INC
P O BOX 330249
HOUSTON TX 77233 US

ALBERT E HAINES
HOUSTON ADMINISTRATIVE OFFICER
P O BOX 1652
HOUSTON TX 77251 US

TERRY L NICKENS
RIVIANA FOODS INC
P O BOX 2636
HOUSTON TX 77252 US

MICHAEL P. FERRO
MILLENNIUM PETROCHEMICALS, INC.
P O BOX 2583
1221 MCKINNEY STREET SUITE 1600
HOUSTON TX 77252-2583 US

H THOMAS KORNEGAY
PORT OF HOUSTON AUTHORITY
PO BOX 2562
111 EAST LOOP NORTH
HOUSTON TX 77253 US

CAMERON C GOODWIN, PRESIDENT
FOUR WAY TRANSPORTATION INC.
PO BOX 750458
HOUSTON TX 77275-0458 US

JAMES F. JUNDZILO
TETRA CHEMICALS
25025 I -45 NORTH
WOODLANDS TX 77380 US

RON MOORE, PRESIDENT
TIMCO SCRAP PROCESSING INC
P. O. BOX 243
CHANNELVIEW TX 77530 US

CHARLES R MILLER
GULF PERFORMANCE POLYMERS INC
P O BOX 638
1515 S SHELDON RD
CHANNELVIEW TX 77530 US

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

NICK GILLEZ
SHERMAN WIRE
P O BOX 879
401 NAGEL DR
CALDWELL TX 77836 US

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

LEONARD NEEPER
CAPITOL CEMENT
P O BOX 33240
SAN ANTONIO TX 78205 US

LARRY J ROBERT
REDLAND AND STONE PRODUCTS COMPANY
17910TH 10 WEST
SAN ANTONIO TX 78257 US

TOM R RANSDEL
VULCAN MATERIALS COMPANY
P.O. BOX 791550
SAN ANTONIO TX 78279-1550 US

JOHN P. LARUE, EXECUTIVE DIRECTOR
THE PORT OF CORPUS CHRISTI
P O BOX 1541
222 POWER STREET
CORPUS CHRISTI TX 78403 US

JON L MOON
AMERICAN CHROME & CHEMICAL L P
P O BOX 9912
CORPUS CHRISTI TX 78469 US

GERALD J ESSL
TEXAS LEHIGH CEMENT COMPANY
P.O.BOX 610
BUDA TX 78610 US

J E ROBINSON
P O BOX 529
5300 SOUTH IH-35
GEORGETOWN TX 78627 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

KENNETH W NORDEMAN
RAILROAD COMMISSION TX
PO BOX 12967
1701 NORTH CONGRESS AVENUE
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

DAN MORALES
OFFICE OF ATTORNEY GENERAL STATE OF TEXAS
P O BOX 12548
AUSTIN TX 78711-2548 US

CAROLE KEETON RYLANDER
RAILROAD COMMISSION OF TEXAS
POB 12967
AUSTIN TX 78711-2967 US

JAMES C GRIMM
TEXAS POULTRY FEDERATIOIN
8140 BURNET ROAD
AUSTIN TX 78757-7799 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

DAVE BODEWIN
COW FEED COMPANY
151 T ANCHOR VIEW
CANYON TX 79015 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

RICHARD J ELSTON
CYPRUS AMAX COAL COMPANY
9100 EAST MINERAL CIRCLE
ENGLEWOOD CO 80112 US

THOMAS C CANTER
WESTERN COAL TRANSPORTATION ASSOCIATION
4 MEADOW LARK LANE STE 100
LITTLETON CO 80127-5718 US

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

RICHARD L JONES
BENTONITE CORPORATION
410 SEVENTEENTH STREET SUITE 800
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

HUGH K WILSON
83 S FIELD STREET
LAKEWOOD CO 80226 US

HANK BOOTZ
BOOTZ DISTRIBUTION
4850 JOLIET ST
DENVER CO 80239 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

JD WILSON
KIOWA COUNTY COMMISSIONER
P O BOX 591
EADS CO 81036 US

CARDON BERRY
KIOWA COUNTY COMMISSIONER
P O BOX 591
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

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

LARRY H FOX
1013 EAST BOXELDER ROAD
GILLETTE WY 82717 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

BRUCE BERGQUIST
J & H FOREST PRODUCTS INC
P O BOX 8166
BOISE ID 83707 US

RONALD N GRAVES
J R SIMPLOT COMPANY
ONE CAPITAL CENTER 999 MAIN ST SUITE 1300
BOISE ID 83707-0027 US

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

BRAD PURDY
ID PUBLIC UTILTIES COMM
P O BOX 83720
417 WEST WASH STREET
BOISE ID 83720 US

JAMES W. WARREN
MERRITT BROS LBR. CO INC
P. O. BOX 190
ATHOL ID 83801-0190 US

JAMES D. SCHARNHORST
IDAHO FOREST INDUSTRIES, INC
BOX 6600
COEUR D'ALENE ID 83816-1933 US

KEN NAIL
EASTPORT INDUSTRIES INC
P O BOX 26
EASPORT ID 83826-0026 US

GARY BENNETT
RILEY CREEK LUMBER COMPANY
P O BOX 220
RILEY CREEK ROAD
LACLEDE ID 83841-0220 US

DAVID SLAUGHTER
JD LUMBER INC
P O BOX 55-BODIE CANYON ROAD
PRIEST RIVER ID 83856 US

GARY V. TRAGESSER
BENNETT LUMBER PRODUCTS INC
BOX 49
3 MILES EAST HIGHWAY 6
PRINCETON ID 83857-0049 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

R STEVE CREAMER
CEO ECDC ENVIRONMENTAL INC
127 SOUTH 500 EAST
SALT LAKE CITY UT 84102 US

F MARK HANSEN
404 EAST 4500 SOUTH SUITE B-34
SALT LAKE CITY UT 84107 US

W.E. DODGE
CONTINENTAL LIME, INC.
3950 SOUTH 700 EAST, STE. 301
SALT LAKE CITY UT 84107 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

RICHARD R. COWAN
SINCLAIR OIL
P.O. BOX 30825
550 E. SOUTH TEMPLE
SALT LAKE CITY UT 84130-0825 US

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

DENNIS DURBANO
DURBANO METALS
BOX 1556
OGDEN UT 84402 US

JOHN R. LEMKE
THE AMALGAMATED SUGAR COMPANY LLC
P.O.BOX 1520
2427 LINCOLN AVENUE
OGDEN UT 84402 US

DENNIS J TAYLOR
ANDERSON LUMBER CO
P O BOX 9459
OGDEN UT 84409 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

TRUDY C MCCLEARY
SOUTHWEST FREEPORT WAREHOUSE INC
P O BOX 6628
PHOENIX AZ 85005-6628 US

CAROL HEATHINGTON
1300 W WASHINGTON
PHOENIX AZ 85007 US

HAL OWENS
1820 SO. 35TH AVE.
PHOENIX AZ 85009 US

JOHN C ANZELMO
SALT RIVER RECYCLING
3640 SOUTH 35TH AVE
PHOENIX AZ 85009 US

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

JOHN D MCMULLAN
CHEMICAL LIME
6263 NORTH SCOTTSDALE ROAD SUITE 280
SCOTTSDALE AZ 85250-5402 US

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

HOWARD MCCANDLESS
17 KITTY HAWK BOULEVARD
SANTA TERESA NM 88008 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

CHARLES E. MCNEELY
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

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

BRETT ARNOLD
EAGLE-PICHER MINERALS INC
P O BOX 12130
6110 PLUMAS ST
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

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

GREG TELLIER
ALPERT & ALPERT IRON & METAL INC
PO BOX 23961
1815 SOUTH SOTO STREET
LOS ANGELES CA 90023-4268 US

BRAD HILTSCHER
METRO WATER DIST OF SOUTHERN CA
350 SOUTH GRAND AV
LOS ANGELES CA 90054 US

DAVID T JONES
CITY FIBERS INC
2500 S SANTA FE AVENUE
LOS ANGELES CA 90058 US

ALEX CLIFFORD
METROLIND
P O BOX 86425
LOS ANGELES CA 90086-0425 US

ROBERT A FRIMIER
NISSAN NORTH AMERICA, INC.
P.O. BOX 2814
TORRANCE CA 90509-2814 US

ROBERT C DALY, VICE PRESIDENT & GENERAL MANAG
TOYOTA LOGISTICS SERVICES, INC.
P. O. BOX 2991
TORRENCE CA 90509-2991 US

MONTE MONTERO
2300 PELLISSIER PLACE
WHITTIER CA 90601-1587 US

CHARLES W CARRY
PO BOX 4998
WHITTIER CA 90607-4998 US

BOB MIELE
COUNTY SANITATION DISTRICTS
PO BOX 4998
WHITTIER CA 90607-4998 US

KATY BREMER
P O BOX 6400
CYPRESS CA 90630-0084 US

LARRY D WILLETT
CALIFORNIA DISTRIBUTION
14407 ALONDRA BOULEVARD
LA MIRADA CA 90638-5504 US

JOE FRANCO
POTENTIAL INDUSTRIES INC
922 EAST E ST
WILMINGTON CA 90744 US

ANN T GOODALE
ANCON TRANSPORTATION
POBOX 908
WILMINGTON CA 90748 US

JOHN R HART
CRW WAREHOUSE & DISTRIBUTION
20500 S ALAMEDA
CARSON CA 90810 US

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

TORI RIOS
ALLAN WAY
14618 ARROW HIGHWAY
BALDWIN PARK CA 91706 US

JAMES R RISSC
CALIFORNIA PORTLAND CEMENT COMPANY
2025 E FINANCIAL WAY
GLENDORA CA 91741 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

TOM VAN DIXHORN
C & F FOODS INC
15620 E VALLEY BLVD
CITY OF INDUSTRY CA 91744 US

MURREL L DEAN, PRESIDENT
DISTRIBUTION & LOGISTICS MANAGEMENT, INC
3401 ETIWANDA AVENUE, BUILDING 831-D
MIRA LOMA CA 91752 US

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

DELTON L BRITTON
OB'S INDUSTRIES INC
PO BOX 559
COLTON CA 92324 US

RICHARD D GOODIN
WESTWINDS WAREHOUSING & DISTRIBUTION INC
1576 OMAHA CT
RIVERSIDE CA 92507 US

RICH ROBERTSON
ROBERTSON'S
6830 VAN BUREN BLVD
RIVERSIDE CA 92509 US

RALPH BISHOP
3400 AVE OF THE ARTS STE F 309
COSTA MESA CA 92626 US

STUAART H FEATHERSTONE
INTER EXPORT TRADING CORPORATION
30788 CALLE CHUECA
SAN JUAN CAPISTRANO CA 92675-1604 US

JAMES P HICKS
JIM HICKS AND COMPANY
661 MERCURY AVE STE A
BREA CA 92821 US

JOHN PADILLA JR
376 SOUTH VALENCIA ABENUE E-1 BLDG
BREA CA 92823 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

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

LYNNE FILSON
CITY HALL
708 THIRD STREET
BRENTWOOD CA 94513-1396 US

ROSS C SMILEY
PACIFIC CARGO INC DBA CAL CARGO
2378 DAVIS AVENUE
HAYWARD CA 94548 US

RAYMOND A BOYLE
PORT OF OAKLAND
530 WATER STREET-JACK LONDON SQUARE
OAKLAND CA 94606-2064 US

RAYMOND A BOYLE
DIRECTOR OF MARITIME PORT OF OAKLAND
530 WARER STREET
OAKLAND CA 94607 US

TIM RHEIN
APL LIMITED
1111 BROADWAY
OAKLAND CA 94607-5500 US

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

STEVEN C CHILDERS
CLOROX SALES COMPANY
P O BOX 24305
OAKLAND CA 94623-1305 US

MICHAEL CUNHA
SIMSMETAL AMERICA
600 SOUTH 4TH STREET
RICHMOND CA 94804-3504 US

NANCY J BUNTING
PROFLAME INC
P O BOX 5069
NOVATO CA 94948 US

GARY MINARDI
567 CINNABAR STREET
SAN JOSE CA 95110 US

MARVIN FOX
MARKOVITS & FOX
BOX 611420
SAN JOSE CA 95161-1420 US

GARY D MILLIMAN
CALIFORNIA WESTERN RAILRAOD
P O BOX 907
FORT BRAGG CA 95437 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

J H PETTUS
SUN VALLEY ENERGY INC
11470 SUNRISE GOLD CIRCLE #7
RANCHO CORDOVA CA 95742 US

R L MATTEIS
1521 I STREET
SACRAMENTO CA 95814 US

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

REX PETERSON
HYDRA WAREHOUSING & CONSOLIDATION INC
6300 S WATT AVE
SACRAMENTO CA 95829 US

MILLER MARK
WESTERN BUYERS
P O BOX 255749
SACRAMENTO CA 95865 US

TIM DE CORTO
BIG VALLEY LUMBER CO
P O BOX 617
BOEBER CA 96009 US

GORDON K VOGET
HI-RIDGE LUMBER CO
P O BOX 458
YREKA CA 96097 US

R. MARK ARMSTRONG
P O BOX 490
CEDARVILLE CA 96104-0490 US

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

EARL ELLIS
15455 NW GREENBRIER PKWY, SUITE 125
BEAVERTON OR 97006 US

TIMOTHY TODD
P.O. BOX 100
CASCADE LOCKS OR 97014 US

JAMES E. ALLEN
MFP OF OREGON, INC.
P. O. BOX 2404
LAKE OSWEGO OR 97035 US

DONNA R KOHLER
P O BOX 1726
LAKE OSWEGO OR 97035 US

TIM H LEE
CRYO-TRANS
5665 SW MEADOWS RD SUITE 330 KRUSE WOODS FOUR
LAKE OSWEGO OR 97035-3292 US

JOHN S COWAN
WEST LINN PAPER COMPANY
4800 MILL STREEI
WEST LINN OR 97068 US

ROBERT L WALTON
PO BOX 725
25260 SW PARKWAY
WILSONVILLE OR 97070-0725 US

KURT C. ZETZSCHE
CASCADE STEEL ROLLING MILLS, INC.
P. O. BOX 687
3200 NORTH HIGHWAY 99W
MCMINNVILLE OR 97128-9399 US

R. WADE MOSBY
COLLINS PINE COMPANY
1618 SW FIRST AVENUE, STE. 300
PORTLAND OR 97201 US

MITCH MITCHENER
222 S W COLUMBIA SUITE 1575
PORTLAND OR 97201 US

MARIA GRIFFITH
STE.1500
121 SW MORRISON ST
PORTLAND OR 97204 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

MERL N RICHMOND
WESTERN INTERNATIONAL FOREST PRODUCTS INC
P O BOX 3070
PORTLAND OR 97208 US

ELIZABETH A. MYZAK
FOREST CITY TRADING GROUP, INC.
P. O. BOX 4209
PORTLAND OR 97208 US

JAY PARKER
SAVAGE INDUSTRIES INC
2500 N GOING ST
PORTLAND OR 97217 US

DAVID R. BENSON
HAMPTON LUMBER SALES CO
9400 SW BARNES - SUITE 400
PORTLAND OR 97225-6698 US

JOHN C STERNBRIDGE
TREE SOURCE
P O BOX 6316
PORTLAND OR 97228-6316 US

GREG CARRIER
NORTHWEST PIPE COMPANY
POBOX 83149
12005 N BURGARD
PORTLAND OR 97283-0149 US

HOWARD MCLAUGHLIN
AGRIPAC
P O BOX 5346
SALEM OR 97304 US

CLAUDIA L. HOWELLS
OREGON DEPARTMENT OF TRANSPORTATION
555 13TH STREET N E MILL CREEK OFFICE BLDG
SALEM OR 97310-1333 US

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

JAMES D MORGAN
P O BOX 377
MILL CITY OR 97360 US

LARRY SHEPARD
NORPAC FOODS INC
P O BOX 458
STAYTON OR 97383-0458 US

GREG GAMBEE
SHAMROCK LUMBER COMPANY
P. O. BOX 23208
EUGENE OR 97402 US

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

PETE REYNEKE
P.O. BOX 66
RIDDL[illegible]ER 97469 US

BETTY WOODS
P O BOX 109
SPRINGFIELD OR 97477 US

GARY QUIMBY
TIMBER PRODUCTS COMPANY
P O BOX 269
305 SOUTH 4TH STREET
SPRINGFIELD OR 97477-0055 US

JOHN MURPHY
MURPHY PLYWOOD COMPANY
P.O. BOX 799
SUTHERLIN OR 97479 US

LARRY SULLIVAN
P-M-L FOREST PRODUCTS
P O BOX 311
GRANTS PASS OR 97526 US

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

MIKE MACKIN
P O BOX 810
WARM SPRINGS OR 97761 US

ANN DEKOSTER
P O BOX 1209
SEATTLE WA 98111 US

ROBERT L SPENCE
PACIFIC LUMBER & SHIPPING CO
P O BOX 21785
1301 5TH AVE SUITE 3131
SEATTLE WA 98111 US

DIANE LORD
IDEAL PAPER NW
14310 GREENWOOD AVE N
SEATTLE WA 98133 US

CHARLES H MONTANGE
426 NW 162ND STREET
SEATTLE WA 98177 US

DONALD G MEYER
P O BOX 1837
TACOMA WA 98401 US

STEPHEN KALLBERG
MANKE LUMBER CO INC
1717 MARINE VIEW DRIVE
TACOMA WA 98422 US

JAMES E SENNER, MANAGER TRAFFIC SERVICES
SIMPSON TIMBER COMPANY
PO BOX 460
SHELTON WA 98584 US

THOMAS J. ROSS
ROSS LOGISTICS, INC.
2311 S.E. PARK CREST AVE.
VANCOUVER WA 98683 US

PAUL E NAGY
NESTLE BRANDS FOODSERVICE COMPANY
P O BOX 1459
MOSES LAKE WA 98837 US

STEVE L BROWN
NESTLE USA
13184 WHEELER ROAD NE
MOSES LAKE WA 98837 US

JOHN P HURSON
SUN COUNTRY TRANSPORTATION INC
PO BOX 10326
YAKIMA WA 98909 US

R A HOESLY
TRUMARK INDUSTRIES
E 4020 MAIN AVE
SPOKANE WA 99202 US

BOB KNAPP
SPOKANE RELOAD
P O BOX 40118
E 4315 SPRANGUE AVE
SPOKANE WA 99220 US

JEFF WALTERS
ALLIANCE FOREST PRODUCTS, INC.
1000 DE LA GAUCHETIERE STREET WEST, STE. 820
MONTREAL, QUEBEC CD H3B 4W5 CD

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

JACQUES RANCOURT
KRUGER INC
3285 CHEMIN BEFORD
MONTREALQUEBEC PQ H8S 1G8 CD

GORD JOHNSON
NORBORD INDUSTRIES, INC
1 TORONTO STREET
TORONTO,ONTARIO CD M5C 2W4 CD

JOSEPH F RICHICHI
ST MARYS PAPER LTD
75 HURON STREET
SAULT STE MARIE, ONTARIO CD P6A 5P4 CD

BRYAN BURGESS
CRESTBROOK FOREST INDUSTRIES LTD
P O BOX 4600
CRANBROOK BRITISH COLUMBI CD V1C 4J7 CD

J LITTLEJOHN
CANTOR WOOD PRODUCTS MARKETING
301 1700 WEST 75TH AVENUE
VANCOUVER BRITISH COLUMBI CD V6P 6G2 CD

SEAN MULLANY
AINSWORTH LUMBER CO LTD
3194 BENTALL FOUR P O BOX 49307
VANCOVER BC CD V7X1L3 CD

Records: 836

STB FD 32760 5-19-98 C 29222

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EB

SERVICE DATE - MAY 19, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 32760 (Sub-No. 26[1])[2]

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

[HOUSTON/GULF COAST OVERSIGHT]

AGENCY: Surface Transportation Board

ACTION: Corrected Decision; Decision No. 1; Notice of Houston/Gulf Coast Oversight Proceeding. Requests for Additional Conditions to the UP/SP Merger for the Houston, Texas/Gulf Coast Area.

SUMMARY: Pursuant to a petition filed February 12, 1998, by the Texas Mexican Railway Company and the Kansas City Southern Railway Company (Tex Mex/KCS) and a request filed March 6, 1998, by the Greater Houston Partnership (GHP), the Board is instituting a proceeding as part of the 5-year oversight condition that it imposed 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, SCPSL Corp., and The Denver and Rio Grande Western Railroad Company,* Finance Docket No. 32760 (UP/SP Merger), Decision No. 44 (STB served Aug. 12, 1996), to examine their requests, and others that may be made, for additional remedial conditions to the UP/SP merger as they pertain to rail service in the Houston, Texas/Gulf Coast region. The Board is

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[1] This decision corrects the decision served March 31, 1998, and published in the Federal Register on April 3, 1998 (63 FD 16628) by designating the docket number for this, the Houston/Gulf Coast Oversight proceeding, as Finance Docket No. 32760 (Sub-No. 26), rather than (Sub-No. 21); designating this decision as Decision No. 1; and designating the short name of this proceeding as HOUSTON/GULF COAST OVERSIGHT. All other aspects of the corrected decision remain unchanged, including the procedural schedule.

[2] This decision embraces the proceeding in 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.*

establishing a procedural schedule (attached) for the submission of evidence, replies, and rebuttal. The Board requests that persons intending to participate in this oversight proceeding notify the agency of that intent. A separate service list will be issued based on the notices of intent to participate that the Board receives.

DATES: The proceeding will commence on June 8, 1998. On that date, all interested parties must file requests for new remedial conditions to the UP/SP merger regarding the Houston/Gulf Coast area, along with all supporting evidence. The Board will publish a notice of acceptance of requests for new conditions in the Federal Register by July 8, 1998. Notices of intent to participate in the oversight proceeding are due July 22, 1998. All comments, evidence, and argument opposing the requested new conditions are due August 10, 1998. Rebuttal in support of the requested conditions is due September 8, 1998. The full procedural schedule is set forth at the end of this decision.

ADDRESSES: An original plus 25 copies[3] of all documents, referring to STB Finance Docket No. 32760 (Sub-No. 26), must be sent to the Office of the Secretary, Case Control Unit, ATTN: STB Finance Docket No. 32760 (Sub-No. 26), Surface Transportation Board, 1925 K Street, N.W., Washington, DC 20423-0001.

Electronic Submissions. In addition to an original and 25 copies of all paper documents filed with the Board, the parties shall also submit, on 3.5 inch IBM-compatible diskettes or compact discs, copies all textual materials, electronic workpapers, data bases and spreadsheets used to develop quantitative evidence. Textual material must be in, or convertible by and into, WordPerfect 7.0. Electronic spreadsheets must be in, or convertible by and into, Lotus 1-2-3 97 Edition, Excel Version 7.0, or Quattro Pro Version 7.0.

The data contained on the diskettes or compact discs submitted to the Board may be submitted under seal (to the extent that the corresponding paper copies are submitted under seal), and will be for the exclusive use of Board employees reviewing substantive and/or procedural matters in this proceeding. The flexibility provided by such computer data is necessary for efficient review of these materials by the Board and its staff. The electronic submission requirements set forth in this decision supersede, for the purposes of this proceeding, the otherwise applicable electronic submission requirements set forth in our regulations. See 49 CFR 1104.3(a), as amended in *Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation*

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[3] In order for a document to be considered a formal filing, the Board must receive an original plus 25 copies of the document, which must show that it has been properly served. As in the past, documents transmitted by facsimile (FAX) will not be considered formal filings and thus are not acceptable.

Proceedings, STB Ex Parte No. 527, 61 FR 52710, 711 (Oct. 8, 1996), 61 FR 58490, 58491 (Nov. 15, 1996).[4]

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 565-1600. [TDD for the hearing impaired: (202) 565-1695.]

SUPPLEMENTARY INFORMATION: In UP/SP Merger, Decision No. 44, served August 12, 1996, the Board 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. Common control was consummated on September 11, 1996. The Board imposed a 5-year oversight condition to examine whether the conditions imposed on the merger effectively addressed the competitive concerns they were intended to remedy, and retained jurisdiction to impose, as necessary, additional remedial conditions if the Board determined that the conditions already imposed were shown to be insufficient. In its initial oversight proceeding, the Board concluded that, while it was still too early to tell, there was no evidence at the time that the merger, with the conditions that the agency had imposed, had caused any adverse competitive consequences.[5] Nevertheless, the Board indicated that its oversight would be ongoing, and that it would continue vigilant monitoring.[6]

UP/SP has experienced serious service difficulties since the merger, and the Board has issued a series of orders under 49 U.S.C. 11123, effective through August 2, 1998, to mitigate a rail service crisis in the western United States caused, in large measure, by severely congested UP/SP lines in the Houston/Gulf Coast region.[7] In acting to relieve some of the congestion, the Board made

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[4] A copy of each diskette or compact disc submitted to the Board should be provided to any other party upon request.

[5] *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*, Finance Docket No. 32760 (Sub-No. 21), Decision No. 10 (STB served Oct. 27, 1997) (UP/SP Oversight).

[6] UP/SP Oversight, Decision No. 10, at 2-3.

[7] STB Service Order No. 1518, *Joint Petition for Service Order* (Service Order No. 1518) (STB served Oct. 31 and Dec. 4, 1997, and Feb. 17 and 25, 1998).

substantial temporary changes to the way in which service is provided in and around Houston.[8] The Board found that, although merger implementation issues were involved, a key factor in bringing about the service emergency was the inadequate rail facilities and infrastructure in the region, and, as such, also ordered UP/SP, BNSF, and other involved railroads to submit to the Board their plans to remedy these inadequacies.[9]

Recognizing the limitations on its authority under the emergency service provisions of the law, the Board rejected proposals offered by certain shipper, carrier, and governmental interests in the Service Order No. 1518 proceeding to force UP/SP to transfer some of its lines to other rail carriers and effect a permanent alteration of the competitive situation in the Houston region; it adopted instead only those measures designed to facilitate short-term solutions to the crisis that did not further aggravate congestion in the area or create additional service disruptions. The Board declared, however, that interested persons could present proposals for longer-term solutions to the service situation — including those seeking structural industry changes based on perceived competitive inadequacies — in formal proceedings outside of section 11123, particularly in the UP/SP merger oversight process.[10] Tex Mex/KCS has now requested that we invoke our oversight jurisdiction over the merger for the purpose of considering such proposals, including the transfer to it of various UP/SP lines and yards in Texas.[11] GHP has also requested the Board's intervention to provide for Houston's long-term rail service needs, including the establishment of a neutral switching operation.

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[8] The Board directed UP/SP to release shippers switched by the Houston Belt & Terminal Railway Company (HB&T) or the Port Terminal Railroad Association (PTRA) from their contracts so that they could immediately route traffic over the Burlington Northern and Santa Fe Railway Company (BNSF) or Tex Mex, in addition to UP/SP. The agency also directed UP/SP to permit BNSF and Tex Mex to modify their operations over UP/SP lines to minimize congestion over UP/SP's "Sunset Line," to move traffic around Houston rather than going through it, and to have full access to UP/SP's Spring, TX dispatching facility as neutral observers. More generally, the Board required UP/SP to cooperate with other railroads and to accept assistance from other railroads able to handle UP/SP traffic.

UP/SP and BNSF recently have agreed to make other changes designed to improve service. In particular, the carriers have agreed to joint ownership of the Sunset Line between Avondale (New Orleans), LA and Houston; joint dispatching in the Houston area; and overhead trackage rights for UP/SP over the BNSF line between Beaumont and Navasota, TX.

[9] Service Order No. 1518, Feb. 17, 1998 decision, at 5-7; Feb. 25, 1998 decision, at 5. The railroads' plans are due May 1, 1998; replies are due June 1.

[10] Service Order No. 1518, Feb. 17, 1998 decision, at 8; see also Feb. 25, 1998 decision, at 4.

[11] The Railroad Commission of Texas (RCT) has previously announced its intent to seek similar relief. See Service Order No. 1518, Feb. 17, 1998 decision, at 8.

That the service emergency in the Houston/Gulf Coast region remains ongoing is well known.[12] Given these circumstances, the Board will invoke its oversight jurisdiction over the UP/SP merger to consider new conditions to the merger of the kind proposed here, and others that may be made. We note that no party as yet has seriously suggested that SP's inadequate infrastructure would not have produced severe service problems in the Houston/Gulf Coast area even if there had been no merger. Nonetheless, the Board believes that, given the gravity of the service situation, it should thoroughly explore anew the legitimacy and viability of longer-term proposals for new conditions to the merger as they pertain to service and competition in that region.

UP/SP and BNSF argue that Tex Mex/KCS' request for conditions that have been previously rejected, without any new evidentiary justification, is insufficient grounds for the Board to begin a new oversight proceeding. We disagree. Our 5-year oversight of the UP/SP merger is not a static process, but a continuing one, so that the Board's prior rejection of Tex Mex/KCS' or any other party's requested conditions — whether in the Board's approval of the merger or in a subsequent oversight proceeding — does not preclude their fresh consideration now. Through our oversight condition, we have retained jurisdiction to monitor the competitive consequences of this merger; to re-examine whether our imposed conditions have effectively addressed the consequences they were intended to remedy; and to impose additional remedial conditions if those previously afforded prove insufficient, including, if necessary, divestiture of certain of the merged carriers' property.

The virtual shutdown of rail service in the Houston/Gulf Coast area that occurred after the UP/SP merger — and which, after many months, has yet to be normalized — is unprecedented. In our judgment, those circumstances alone are sufficient for the Board to commence this proceeding now. Clearly, our 5-year oversight jurisdiction permits us to examine — and, if necessary, re-examine at any time during this period — whether there is any relationship between the market power gained by UP/SP through the merger and the failure of service that has occurred here, and, if so, whether the situation should be addressed through additional remedial conditions. UP/SP Merger, Decision No. 44, at 100.

We caution, however, that we will not impose conditions requiring UP/SP to divest property that would substantially change the configuration and operations of its existing network in the region in the absence of the type of presentation and evidence required for "inconsistent applications" in a merger proceeding; *i.e.*, parties must present probative evidence that discloses "the full effects of their proposals." UP/SP Merger, Decision No. 44, at 157. Divestiture is only available "when no other

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[12] In its progress report of March 9, 1998, UP/SP announced that it would take drastic action in 30 days — including the refusal of new business and the transfer of existing business to its competitors — if the steps it has taken to deal with the emergency are not successful. On March 24, 1998, the carrier announced an embargo of a significant portion of its southbound traffic destined for the Laredo, TX gateway to clear a backlog of 5,500 cars waiting to cross into Mexico.

less intrusive remedy would suffice," and we will impose it only upon sufficient evidentiary justification. *Id.*

The Board will confine this proceeding under its continuing oversight jurisdiction to examining requests for new conditions to the merger relating to rail service in the Houston/Gulf Coast area. As we have noted, the service crisis in this region, and its significant impact on the regional economy, clearly warrant our discrete treatment of these matters now. As a result, the procedures set forth here will be separate from those in the more general oversight proceeding that, pursuant to UP/SP Oversight, Decision No. 10, will begin July 1, 1998.[13]

As set forth in the attached schedule, parties that wish to request new remedial conditions to the UP/SP merger as they pertain to the Houston/Gulf Coast region must file them, along with their supporting evidence, by June 8, 1998.[14] The Board will publish a notice in the Federal Register accepting such requests by July 8, 1998. Any person who intends to participate actively in this facet of oversight as a "party of record" (POR) must notify us of this intent by July 22, 1998. In order to be designated a POR, a person must satisfy the filing requirements discussed above in the ADDRESSES section. We will then compile and issue a final service list.

Copies of decisions, orders, and notices will be served only on those persons designated as POR, MOC (Members of Congress), and GOV (Governors) on the official service list. Copies of filings must be served on all persons who are designated as POR. We note that Members of the United States Congress and Governors who are designated MOC and GOV are *not* parties of record and they need *not* be served with copies of filings; however, those who are designated as a POR

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[13] In Decision No. 10, at 18-19, the Board provided that general oversight would commence July 1 upon the filing by UP/SP and BNSF of their quarterly merger progress reports accompanied by comprehensive summary presentations. We provided that, as part of that proceeding, UP/SP and BNSF must make their 100% traffic tapes available by July 15, 1998; that comments of interested parties concerning oversight issues are due August 14, 1998; and that replies are due September 1, 1998. The general oversight proceeding will continue as planned.

[14] Tex Mex/KCS stated that it would file its supporting evidence 45 days after its petition. Petition at 5. If it does so, it need not file its evidence anew on June 8th, although it may supplement its filing as appropriate. We decline, however, petitioner's request (Petition at 11 n.6) to incorporate by reference its pleadings in Finance Docket Nos. 33507, 33461, 33462, and 33463 (titles omitted). In those proceedings, Tex Mex/KCS has complained that, after the merger, UP/SP (either singly or jointly with BNSF) unlawfully acquired control of HB&T in violation of 49 U.S.C. 11323, and has petitioned that a series of exemptions the carriers filed to restructure HB&T's operations leading to that control should be voided and/or revoked. We will proceed to consider the discrete matters in those cases — including Tex Mex/KCS' petition for consolidation and motion to compel discovery, and UP/SP's motion to dismiss — separately from our consideration in this oversight proceeding of requests by Tex Mex/KCS and others for new remedial conditions to the merger.

must be served with copies of filings. All other interested persons are encouraged to make advance arrangements with the Board's copy contractor, DC News & Data, Inc. (DC News), to receive copies of Board decisions, orders, and notices served in this proceeding. DC News will handle the collection of charges and the mailing and/or faxing of decisions to persons who request this service. The telephone number for DC News is: (202) 289-4357.

A copy of this decision is being served on all persons designated as POR, MOC, or GOV on the service list in Finance Docket No. 32760 (Sub-No. 21). This decision will serve as notice that persons who were parties of record in the previous oversight proceeding (leading to Decision No. 10) will not automatically be placed on the service list as parties of record for this facet of oversight unless they notify us of their intent to participate further.

Finally, while the requested remedial conditions (and those reasonably anticipated from other parties) could, if imposed, result in a transfer of ownership of certain UP/SP rail property or changes in the way that such properties are operated, they appear unlikely to produce the kind of significant operational changes that, under 49 CFR 1105.6(b)(4), requires the filing of a preliminary draft environmental assessment (PDEA).

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

Decided: March 30, 1998.

By the Board , Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

PROCEDURAL SCHEDULE

June 8, 1998	Requests for new remedial conditions (with supporting evidence) filed.
July 8, 1998	Board notice of acceptance of requests for new conditions published in the Federal Register.
July 22, 1998	Notice of intent to participate in proceeding due.
August 10, 1998	All comments, evidence, and argument opposing requests for new remedial conditions to the merger due. Comments by U.S. Department of Justice and U.S. Department of Transportation due.
September 8, 1998	Rebuttal evidence and argument in support of requests for new conditions due.

The necessity of briefing, oral argument, and voting conference will be determined after the Board's review of the pleadings.

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

ALEXANDER H. JORDAN
WESTERN SHIPPERS COALITION
210 NORTH AVE
NEW ROCHELLE NY 10801-6402 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

DEBRA L. WILLEN
GUERRIERI, EDMOND & CLAYMAN PC
1331 F STREET N W, 4TH FLOOR
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

MARK SCHECTER
HOWREY & SIMON
1299 PENNSYLVANIA AVE N W
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

EDWARD WYTKIND, EXECUTIVE DIRECTOR
LARRY J WILLIS ESQ TRANSP TRADES DEPT AFLCI
1000 VERMONT AVENUE, NW STE 900
WASHINGTON DC 20005 US

KEVIN M SHEYS
OPPENHEIMER WOLFF & DONNELLY & BAYH LLP
1350 EYE STREET, N.W., STE 200
WASHINGTON DC 20005 US

THOMAS LAWRENCE III
OPPENHEIMER WOLFF DONNELLY & BAYH LLP
1350 EYE STREET, N.W., STE 200
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

PAUL H LAMBOLEY
1350 EYE STREET, N.W., STE 200
WASHINGTON DC 20005-3324 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 P C
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 HARKAWAY, PC
1750 PENNSYLVANIA AVE NW, STE 1105
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

MONICA J. PALKO
BRACEWELL & PATTERSON
2000 K STREET NW STE 500
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

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

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

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

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

PAUL A CUNNINGHAM
HARKINS CUNNINGHAM
1300 NINETEENTH STREET, NW STE. 600
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

KEITH G O'BRIEN
REA, CROSS AND AUCHINCLOSS
1707 L STREET, N.W., STE 570
WASH 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
1707 L STREET NW STE 570
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

GORDON F 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

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

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 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

HONORABLE PAT ROBERTS
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. PHIL GRAMM
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

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

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

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

HON SHERROD BROWN
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
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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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U. S. HOUSE OF REPRESENTATAIVES
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US HOUSE OF REPRESENTATIVES
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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 DAVID MINGE
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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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

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US HOUSE OF REPRESENTATIVES
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US HOUSE OF REPRESENTATIVES
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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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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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US HOUSE OF REPRESENTATIVES
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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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

HONORABLE JAY KIM
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PHIL ENGLISH
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

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

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ATTEN: TOM SANTANIELLO
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. HAROLD E. FORD, JR
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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U. S. HOUSE OF REPRESENTATIVES
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HOUSE OF REPRESENTATIVES
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UNITED STATES HOUSE OF REPRESENTATIVES
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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
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U S HOUSE OF REPRESENTATIVES
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U S 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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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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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

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

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, ROOM 4102 C-30
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
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

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

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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 SCUTH 6TH STREET STE 2400
MINNEAPOLIS MN 55402 US

ROBERT ZELENKA
FARMERS ELEVATOR ASSOC OF MN
400 4TH ST SUITE 852 852GRAIN EXCHANGE
MINNEAPOLIS MN 55415 US

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

TERRY C WHITESIDE
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 SIEGEL
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
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180 NORTH STETSON AVE 45TH FL
CHICAGO IL 60601-6710 US

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CHICAGO IL 60606 US

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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

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ST LOUIS MO 63167 US

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SCOTT CITY MO 63780 US

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KANSAS CITY MO 64105 US

RICHARD P BRUENING
KANSAS CITY SOUTHERN RR
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KANSAS CITY MO 64106 US

ROBERT P ERWIN JR
4800 MAIN ST SUITE 600
KANSAS CITY MO 64112 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
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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
UNION PACIFIC RR CO. LAW DEPAARTMENT
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

MICHAEL P. FERRO
MILLENNIUM PETROCHEMICALS, INC.
P O BOX 2583
1221 MCKINNEY STREET SUITE 1600
HOUSTON TX 77252-2583 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

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

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

FRANK D GAUS
805 KUENZIL ST # 149
RENO NV 89502 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

BILL STAAB
RR DONNELLEY & SONS CO
14100 LEAR BOULEVARD
RENO NV 89506 US

CHARLES A BRACHT
700 FOREST
RENO NV 89509 US

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

BOB MILLER
STATE OF NEVADA
CAPITOL COMPLEX EXECUTIVE CHAMBER
CARSON CITY NV 89710 US

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

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

CARA BROWN
FITZGERALDS GAMING CORPORTATION
P O BIX 7600
301 FREMONT STREET
LAS VEGAS NV 89101 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

STEVE VARELA
PO BOX 1900
RENO NV 89505 US

JOHN FRANKOVICH
P O BOX 2670
241 RIDGE STREET, 4TH FLOOR
RENO NV 89505-2670 US

SCOTT HUTCHERSON
EAGLE-PICHER MINERALS INC
6110 PLUMAS ST
RENO NV 89509 US

PHILLIP WENDT
PO BOX 11072
RENO NV 89510 US

GREGORY KRAUSE
REGIONAL TRANSPORTATION COMMISSION
P O BOX 30002
RENO NV 89520-3002 US

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

JOHN E. BALLAS, AGENCY ENGINEER
INDUSTRY URBAN-DEV. AG.
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

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

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
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 490
CEDARVILLE CA 96104-0490 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

Records: 459

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Washington, D.C. 20423

December 27, 1996

Finance Docket No. 32760 [1/]

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

NOTICE

A court action, entitled as shown below, was instituted on or about December 10, 1996, involving the above-entitled proceeding:

No. 96-1470

Union Pacific Corporation, et al.,

v.

Surface Transportation Board

United States of America

before the

United States Court of Appeals for the District of Columbia Circuit

Vernon A. Williams

VERNON A. WILLIAMS
Secretary

[1/] Embraces Sub-Nos. 1, 2, and 19.

SERVICE LIST FOR: 12/31/1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

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

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

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

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

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

TERRENCE D. JONES
KELLER AND 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

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

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

LAURA L. WILLEN
GUERRIERI, EDMOND, ETAL
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

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

FREDERIC L. WOOD
DONELAN, CLEARY, ET. AL
1100 NEW YORK AVE NW STE 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

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

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

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

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

LAURENCE R. LATOURETTE
PRESTON GATES ELLIS ETAL
1735 NY AVE NW SUITE 500
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

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

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

JOHN V. EDWARDS, ESQ
ZUCKERT, SCOUTT ET AL.
888 17TH STREET N W STE 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

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

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

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

LINDA S. STEIN
STEPTOE & JOHNSON
1330 CONNECTICUT AVE NW
WASHINGTON DC 20036 US

LINDA S. STEIN
STEPTOE & JOHNSON
1330 CONNECTICUT AVE NW
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

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

[illegible] 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

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

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

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

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

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

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

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

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

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

HON. DON NICKLES
UNITED STATES SENATE

WASHINGTON DC 20510 US

HON. JAN MEYERS
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

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
WAS NGTON DC 20510 US

HONORABLE J. BENNETT JOHNSTON
U. S. 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 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

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

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

HON. MICHAEL OXLEY
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 RONALD V. DELLUMS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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

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

HON JOHN P. MURTHA
HOUSE OF REPRESENTATIVES

WASHINGTON DC 20515 US

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

HONORABLE DANA ROHRABACHER
US HSE OF REPRESENTATIVES
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 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

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

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

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

H. .ORABLE LLOYD DOGGETT
U. S. HOUSE OF REPRESENTATAIVES
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

HON. HAROLD E. FORD
US HSE 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

HONORABLE JULIAN DIXON
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JAY DICKEY
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

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. JOE BARTON
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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

HONORABLE BOB CLEMENT
US 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

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. HENRY B. GONZALEZ
HOUSE OF REPRESENTATIVES

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

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

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

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

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
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 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 NORTH STETSON AVENUE-45TH FLOOR
CHICAGO IL 60601 US

THOMAS J. LITWILER
OPPENHEIMER WOLFF ETAL
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
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

HON IKE SKELTON
U. S. HOUSE OF REP.
514 B N W 7 HIGHWAY
BLUE 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
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

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

[illegible] 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 SANTA FE CORPORATION
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 SANTA FE CORPORATION
777 MAIN STREET, 3800 CONTINENTAL PLAZA
FT 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

[illegible] 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

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

[illegible] 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

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

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

C G 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
2802 HOLIDAY RANCH ROAD
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

MICHAEL O. LEAVITT
210 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

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

ETTE 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

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

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

GARY A. LAAKSO
SOUTHERN PACIFIC TRANSPORTATION COMPANY
ONE MARKET PLAZA, SOUTHERN PACIFIC BLDG
SAN FRANCISCO CA 94105 US

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

[illegible]RY 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
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

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

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: 494

This decision will be included in the bound volumes of printed reports at a later date.

SERVICE DATE

SEP 10 1996

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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. 52]

Decided: September 9, 1996

This decision concerns the conditions respecting the City Public Service Board of San Antonio (CPSB) that we imposed in Decision No. 44.

Decision No. 44. 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)[2] 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] subject to various conditions. Among other things, we imposed certain conditions respecting CPSB. See Decision No. 44, slip op. at 56-58 (relief requested by CPSB) and at 185-86 (relief granted to CPSB). With respect to the precise details of the CPSB conditions, we directed UP/SP, CPSB, and BNSF[4] to submit, by August 22, 1996, either agreed-upon terms or separate proposals. See Decision No. 44, slip op. at 233 (ordering paragraph 30).[5]

Pleadings Submitted. UP/SP, CPSB, and BNSF have now submitted several pleadings: one by UP/SP and CPSB jointly (designated "UP/SP-273/CPSB-9", but hereinafter referred to for convenience as "UP/SP-273"); one by BNSF separately (designated

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[1] Proceedings pending before the Interstate Commerce Commission (ICC) 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] Union Pacific Railroad Company (UPRR) and Missouri Pacific Railroad Company (MPRR) are referred to collectively as UP.

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

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

[5] The submission deadline was subsequently extended to August 30, 1996. See Decision No. 45 (served August 23, 1996) and Decision No. 46 (served August 26, 1996).

BN/SF-63); one by UP/SP separately (designated UP/SP-276); and one by CPSB separately (designated CPSB-11).[6]

DISCUSSION AND CONCLUSIONS

Amendments Related to CPSB Conditions. CPSB's two coal-burning plants at Elmendorf, TX, are served by a single rail line (SP's Elmendorf Line) that runs approximately 12 miles between a UP-SP junction known as "SP Junction (Tower 112)" and Elmendorf. See Decision No. 44, slip op. at 56. In Decision No. 44, we imposed two conditions respecting CPSB's Elmendorf plants. See Decision No. 44, slip op. at 185-86. In Paragraph (i), we indicated that we would hold UP/SP to its representation that the BNSF agreement[7] would be amended to clarify that Elmendorf is a covered point. We noted that Section 4a of the BNSF agreement, as amended by Section 3a of the second supplemental agreement dated June 27, 1996, already provided that BNSF could operate on SP's Elmendorf Line between MP 0 and MP 12.6 for the sole purpose of serving the CPSB plants at Elmendorf;[8] but we further noted that we were unable to ascertain whether BNSF had also received trackage rights over the appropriate UP line between San Antonio and Ajax. In Paragraph (iii), we indicated that we would impose a condition that would have the effect of allowing BNSF to operate over SP's Elmendorf Line, at CPSB's option, pursuant to trackage rights derived from an existing CPSB-SP trackage rights agreement.[9]

Section 4a of the BNSF agreement dated September 25, 1995, as amended by the supplemental agreement dated November 18, 1995, and as further amended by the second supplemental agreement dated June 27, 1996, provides, among other things, that BNSF shall receive trackage rights on UP's line between San Antonio and Ajax.[10] Section 4a of the BNSF agreement dated September 25, 1995, as amended by the second supplemental agreement dated June 27, 1996, further provides that BNSF shall receive trackage rights over SP's Elmendorf Line. Because UP has two lines between San Antonio and Craig Junction (a point west/southwest of

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[6] We will grant: UP/SP's unopposed UP/SP-276 motion for leave to file UP/SP-276; and CPSB's unopposed CPSB-10 motion for leave to file CPSB-11.

[7] The contents of the BNSF agreement are described in Decision No. 44, slip op. at 12 n.15.

[8] MP 0 is located at SP Junction (Tower 112). MP 12.6 is located at Elmendorf.

[9] As a practical matter, the conditions we imposed in Decision No. 44 will allow BNSF to operate via trackage rights over UP/SP lines from connections with BNSF's own lines to CPSB's Elmendorf plants. From the connections with BNSF's own lines to SP Junction (Tower 112), the trackage rights will be those provided for in the BNSF agreement. But, over the Elmendorf Line--i.e., from SP Junction (Tower 112) to CPSB's Elmendorf plants--the trackage rights will be those provided for *both* in the BNSF agreement *and* in the existing CPSB-SP trackage rights agreement. BNSF, that is to say, will be able to operate over the Elmendorf Line using *either* the trackage rights provided for in the BNSF agreement *or* (at CPSB's option) the trackage rights provided for in the CPSB-SP trackage rights agreement.

[10] Ajax appears to be located at or immediately adjacent to San Marcos.

Ajax),[11] and the maps provided by UP/SP suggested *both* that BNSF was to receive trackage rights over only one of these lines[12] *and* that SP Junction (Tower 112) was located on the line over which BNSF would not be receiving trackage rights,[13] we noted in Decision No. 44 that we were unable to ascertain whether BNSF had received trackage rights over the appropriate line between San Antonio and Ajax.

UP/SP and CPSB have now agreed on amendments to the BNSF agreement that, in their opinion, satisfy the CPSB conditions imposed in Decision No. 44. See UP/SP-273, Exhibit A at 1. The amendments include: an amendment to Section 4a to the effect that BNSF will receive trackage rights between Craig Junction and SP Junction (Tower 112) via Track No. 2, as an alternative route, "for the sole purpose" of handling CPSB traffic via SP Junction (Tower 112), but provided that "such rights do not include the right to serve new industries or transloading facilities on this line"; an amendment to Section 4a to the effect that BNSF will receive trackage rights over SP's line between SP Junction (Tower 112) and Elmendorf; various conforming amendments; and an amendment to Section 91 to the effect that BNSF shall also have the right, at CPSB's option, to operate over the Elmendorf Line using the trackage rights provided for in the CPSB-SP trackage rights agreement.

UP/SP and CPSB have also agreed on corresponding amendments to the related "Sealy, Texas to Waco and Eagle Pass, Texas" trackage rights agreement (hereinafter referred to as the Sealy TRA) dated June 1, 1996. See UP/SP-273, Exhibit A at 2.[14]

We accept CPSB's judgment that the amendments agreed to by UP/SP and CPSB (both the amendments to the BNSF agreement and the corresponding amendments to the Sealy TRA) satisfy the CPSB conditions imposed in Decision No. 44.[15]

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[11] We will refer to the two lines as Track No. 1 and Track No. 2. Track No. 1 is the western line; it runs through Adams; it was and is operated by MPRR; and it is sometimes referred to as the MPRR line. Track No. 2 is the eastern line; it runs through Fratt; it is now operated by MPRR but was formerly operated by the Missouri-Kansas-Texas Railroad Company (MKT); and it is sometimes referred to as the MKT line.

[12] The maps suggested that BNSF was to receive trackage rights over Track No. 1 only.

[13] SP Junction (Tower 112) is located on, or immediately adjacent to, Track No. 2.

[14] The Sealy TRA was filed in this proceeding on June 28, 1996, as one of numerous attachments to UP/SP-266.

[15] The Sealy TRA, as initially drafted, did not include the segment of track that runs between: (i) SP Tower 105, which is located in San Antonio adjacent to Track No. 1; and (ii) SP Junction (Tower 112), which is located in San Antonio at the junction of the Elmendorf Line and Track No. 2. See the Sealy TRA, pp. 1-2 (the material following the colon in the final subparagraph of the first "whereas" clause). Without this segment, BNSF could not have provided service to CPSB because Track No. 1 (over which BNSF received trackage rights) does not have a direct connection with the Elmendorf Line. The inadvertent omission of this segment has now been corrected. See UP/SP-273, Exhibit A at 2 (the second amendment).

Certain Restrictions. BNSF concedes, in essence, that the amendments agreed to by UP/SP and CPSB satisfy the CPSB conditions we imposed in Decision No. 44. BNSF notes, however, that the amendments to the BNSF agreement agreed to by UP/SP and CPSB include a restriction to the effect that BNSF, although it can operate over Track No. 2, cannot serve "new industries or transloading facilities" on that line. BNSF insists that this restriction (hereinafter referred to as the Track No. 2 facilities restriction) is inconsistent with the condition we imposed in Decision No. 44 that requires that BNSF be granted the right to serve new facilities (including transload facilities) on all UP/SP lines over which BNSF receives trackage rights in the BNSF agreement. See Decision No. 44, slip op. at 145-46.[16]

BNSF, CPSB, and UP/SP all agree that, for various operational reasons, the Track No. 2 routing (which happens to be the routing currently used by UP) is preferable to the Track No. 1 routing as respects traffic moving to CPSB's Elmendorf facilities. These parties, however, differ in their assessments of just how preferable the Track No. 2 routing really is.

BNSF contends that the Track No. 2 routing is absolutely essential. The Track No. 1 routing, BNSF claims, requires complex switching, multiple railroad clearances, and the backing of trains several miles on mainlines through an urban area of San Antonio. These Track No. 1 operational problems, BNSF adds, prompted UP and CPSB to develop a Track No. 2 routing that would enable UP to deliver unit coal trains to Elmendorf. The Track No. 2 routing, BNSF contends, is the only viable routing to Elmendorf.

CPSB agrees with BNSF's assessment of the relative merits of the Track No. 1 routing vis-à-vis the Track No. 2 routing. See CPSB-11 at 3. UP, CPSB argues, had extensive operating problems in moving CPSB coal trains via the Track No. 1 routing, and, CPSB claims, it was these problems that led UP to develop the Track No. 2 routing (and, CPSB adds, UP developed the Track No. 2 routing with substantial financial assistance from CPSB). The Track No. 2 routing, CPSB notes, is now used by UP to deliver virtually all of CPSB's unit train coal traffic to Elmendorf, although an occasional empty train may still use the Track No. 1 routing.

UP/SP concedes that the Track No. 2 routing is operationally preferable to the Track No. 1 routing as the Track No. 1 routing is presently configured, see UP/SP-276, V.S. Searle at 2-3, but maintains that the Track No. 1 routing is nevertheless a viable routing for Elmendorf traffic. UP/SP notes: that the Track No. 1 routing was in fact used by UP to deliver unit coal trains to Elmendorf from the time UP won the CPSB contract in 1985 until it obtained trackage rights over the Track No. 2 routing (then owned by MKT) in 1987; and that the original terms of the Sealy TRA dated June 1, 1996, anticipated that BNSF would use the Track No. 1 routing to serve Elmendorf.[17] UP/SP adds that, merely as a courtesy to CPSB, it agreed to allow BNSF to

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[16] BNSF indicates that it agrees with all of the other amendments agreed to by UP/SP and CPSB. See BN/SF-63 at 3 n.4.

[17] As noted above, however, the lines included in the original terms of the Sealy TRA did not include the line between Tower 105 and SP Junction (Tower 112) that connects Track No. 1 with the Elmendorf Line.

use the Track No. 2 routing purely for operating convenience, as a second, alternative route to reach CPSB's Elmendorf facilities.

BNSF and UP/SP differ in their views as to the action we should take with respect to the Track No. 2 facilities restriction agreed to by UP/SP and CPSB.[18]

BNSF argues that, because the Track No. 2 facilities restriction is inconsistent with the Decision No. 44 facilities condition, the Track No. 2 facilities restriction must be eliminated. The Track No. 2 routing is (in BNSF's view) the only viable routing, which necessarily means (again, in BNSF's view) that the trackage rights we granted to BNSF must run via the Track No. 2 routing. There is, BNSF insists, no reason why it should not receive (and there is similarly no reason why shippers along the Track No. 2 routing should not benefit from) the right to serve new facilities (including transload facilities) that accompanies all other trackage rights provided for in the BNSF agreement.[19]

UP/SP, which contends that BNSF has been granted access over two viable routes to reach CPSB's Elmendorf facilities, argues that BNSF's claim that it should be entitled to serve new industries and new transloading facilities on both routes is a case of pure overreaching. The Decision No. 44 facilities condition, UP/SP contends, is designed to preserve competition, and has no relevance to a facilities restriction on an alternative routing that has been provided for operating convenience only.

Our Analysis. We think that the amendments agreed to by UP/SP and CPSB should be allowed to take effect on September 11, 1996 (the effective date of Decision No. 44). These amendments are acceptable to UP/SP and CPSB, of course, and, aside from the Track No. 2 facilities restriction, these amendments are likewise acceptable to BNSF. We will therefore direct BNSF to accept these amendments, although its acceptance will not be taken to compromise its continuing objection to the Track No. 2 facilities restriction.

We will reserve judgment on the Track No. 2 facilities restriction to which UP/SP has agreed but to which BNSF has objected. We think that this issue would be better examined in the context of the UP/SP-275 petition for clarification filed August 29, 1996, which asks, among other things, that we clarify that the Decision No. 44 facilities condition does not apply to certain UP lines, including the line referred to herein as Track No. 2. See UP/SP-275 at 6-7. We think it would be best to defer judgment on the Track No. 2 facilities restriction pending our consideration of the replies to the UP/SP-275 petition (replies are due no later than September 23, 1996). Given the lead time involved in providing service to new facilities (including transload facilities), the brief delay we envision in reaching a decision with respect to the Track No. 2 facilities

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[18] CPSB indicates that it has no objection to the relief sought by BNSF.

[19] BNSF adds that, in Paragraph (ii) of our discussion of the relief sought by CPSB, we specifically noted that one of the conditions "we have imposed in this decision confirms that BNSF will be allowed to serve all new facilities (not including expansions of or additions to existing facilities) located along the SP (and UP) lines over which BNSF receives trackage rights." See Decision No. 44, slip op. at 185.

restriction should not impose serious burdens either on BNSF or on any shipper.

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

It is ordered:

1. UP/SP-276 and CPSB-11 are accepted for filing and made part of the record in this proceeding.

2. BNSF is directed to accept the UP/SP-273 amendments agreed to by UP/SP and CPSB. Such acceptance will be without prejudice to BNSF's right to continue to object to the Track No. 2 facilities restriction.

3. UP/SP, CPSB, and BNSF may at any time vary, upon agreement of all three parties, the UP/SP-273 amendments agreed to by UP/SP and CPSB.

4. Except insofar as UP/SP, CPSB, and BNSF mutually agree otherwise, the CPSB conditions imposed in Decision No. 44 and reflected in the UP/SP-273 amendments agreed to by UP/SP and CPSB will become effective on September 11, 1996.

5. This decision shall be effective on September 11, 1996.

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

Vernon A. Williams

Vernon A. Williams
Secretary

SERVICE LIST FOR: 12-sep-1996 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
3001 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 NWSUITE 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

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

SERVICE LIST FOR: 12-Sep-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

ALAN E LUBEL
TROUTMAN SANDERS
601 PENNSYLVANIA AVE N W, NORTH BLDG SUITE 64
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

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

JOSEPH GUERRIERI, JR.
GUERRIERI, EDMOND, ET. AL
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
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
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, ET. AL
1100 NEW YORK AVE NW STE 750
WASHINGTON DC 20005-3934 US

THOMAS W. WILCOX
DONELAN, CLEARY, WOOD
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

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

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

SERVICE LIST FOR: 12-sep-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

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 16TH STREET N W
WASHINGTON DC 20006 US

ROBERT P. VOM EIGEN
HOPKINS AND SUTTER
888 16TH 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

JOHN M. CUTLER, JR.
MCCARTHY SWEENEY HARKAWAY
1750 PENNSYLVANIA AVE N W SUITE 1105
WASHINGTON DC 20006 US

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

JAMES A CALDERWOOD
SUITE 600
888 17TH STREET NW
WASHINGTON DC 20006-3939 US

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

ANDREW R PLUMP
ZUCKERT, SCOUTT, 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

RICHARD A. ALLEN
ZUCKERT, SCOUT, 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

ANDREW T GOODSON
CANAL SQUARE
1054 THIRTY-FIRST ST NW
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

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, ETAL
1875 CONNECTICUT AVE N W
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

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

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

SERVICE LIST FOR: 12-sep-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

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, STC
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

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

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

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 20036-1658 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

GORDON P. MACDOUGALL
1025 CONNECTICUT AVENUE N W, ROOM 410
WASHINGTON DC 20036-5405 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

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

SERVICE LIST FOR: 12-sep-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

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

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

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

ARVID E. ROACH II
COVINGTON & BURLING
1201 PENNSYLVANIA AVE NW
WASHINGTON DC 20044 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

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 WILLIAM COHEN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. DON NICKLES
UNITED STATES SENATE

WASHINGTON DC 20510 US

HON. JAN MEYERS
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE GENE GREEN
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 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 TOM DASCHLE
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

HONORABLE RICHARD LUGAR
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE RICHARD BRYAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE THAD COCHRAN
UNITED STATE 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

SERVICE LIST FOR: 12-sep-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

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

HON JAMES EXON
US SENATE
WASHINGTON DC 20510-2702 US

HON. TOM EWING
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE RONALD V. DELLUMS
U. S. 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

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

SERVICE LIST FOR: 12-sep-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

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

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. BILBRAY,
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

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

HON. JAMES L. OBERSTAR
US HSE OF REPRESENTATIVES-2209 RHOB
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

SERVICE LIST FOR: 12-sep-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

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

HON. BILL EMERSON
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. 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

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

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

HONORABLE PAT ROBERTS
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 JOHN P. MURTHA
HOUSE OF REPRESENTATIVES

WASHINGTON DC 20515 US

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

HON. JAY DICKEY
HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-0404 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

SERVICE LIST FOR: 12-sep-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

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

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

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, ASST. GENERAL COUNSEL
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

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

SERVICE LIST FOR: 12-sep-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

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

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

MAYOR 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

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, LAB 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

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

SERVICE LIST FOR: 12-sep-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

TERRY C WHITESIDE
3203 THIRD AVENUE NORTH, SUITE 301 MTN BLDG
BILLINGS MT 59101-1945 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
SANTA FE PAC. CORP. ETAL.
1700 EAST GOLF ROAD
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 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

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

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 STE 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

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

HON IKE SKELTON
U. S. HOUSE OF REP.
514 B N W 7 HIGHWAY
BLUE SPRINGS MO 64014 US

SERVICE LIST FOR: 12-Sep-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

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

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

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

JEANNA L. REGIER
UNION PACIFIC RR CO.
1416 DODGE STREET RM 830
OMAHA NE 68179-0001 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. BORLEY
WILBURN 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 N 10TH
ENID OK 73702 US

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

SERVICE LIST FOR: 12-sep-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

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

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

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

BRIAN P. FELKER
SHELL CHEMICAL COMPANY
P O BOX 2463
ONE SHELL PLAZA
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

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

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

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

SERVICE LIST FOR: 12-sep-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

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

JARED BOIGON
OFFICE OF THE GOVERNOR
STATE CAPITOL RM 136
DENVER CO 80203-1792 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

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

MAYOR 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

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

JEANNE M FOSTER
UPPER ARKANSAS VALLEY RTB
P O BOX 837
SALIDA CO 81201 US

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

E W WOTIPKA
6300 TERRACE LANE
SALIDA CO 81201 US

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

FRANK C MCMURRY
PO BOX 699
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

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

SERVICE LIST FOR: 12-sep-1996 ICC FD 32760 0 UNION PACIFIC CORPORATION, UNION PAC

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

STEVE TUCKER, PRESIDENT
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, TRANSP. MGR.
IDAHO TIMBER CORPORATION
P O BOX 67
5401 KENDALL STREET
BOISE ID 83707-0067 US

WAYNE L. STOCKBRAND
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

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

DESDEE 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

ROBIN L. RIGGS, GENERAL COUNSEL TO GOVERNOR
STATE OF UTAH
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

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

FRANK E. MANSON, 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 STAFFORD STREET
CITY OF INDUSTRY CA 91744 US

SERVICE LIST FOR: 12-sep-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

SCOTT KESSLER
202 WEST FOURTH STREET
ALTURUS CA 96102 US

LOUIS P. WARCHOT
SOUTHERN 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

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

ANN FINGARETTE HASSE
1111 BROADWAY
OAKLAND CA 94607 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

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
CA, PUBLIC UTILITIES COMM
505 VAN NESS AVENUE
SAN FRANCISCO CA 94102-3298 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

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

LEO R BRIEN
530 WARER STREET
OAKLAND CA 94607 US

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

DAVID N. MAGAN
YOLO SHORTLINE RR CO
3344 BRAEBURN STREET
SACRAMENTO CA 95821-4037 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
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
JPA AND EL DORADO COMPANY
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

Records: 478

STB FD 32760 09-05-95 C DEC3

SERVICE DATE
SEP 5 1995

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INTERSTATE COMMERCE COMMISSION

Finance Docket No. 32760

LATE RELEASE

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. 3

Decided: September 1, 1995

On August 4, 1995, Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR), Southern Pacific Rail Corporation (SPR), Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW) (collectively, applicants)[1] filed a notice of intent (UP/SP-1) to file an application seeking Commission authorization under 49 U.S.C. 11343-45 for: (1) the acquisition of control of SPR by UP Acquisition Corporation (Acquisition), an indirect wholly owned subsidiary of UPC; (2) the merger of SPR into UPRR; and (3) the resulting common control of UP and SP by UPC.[2] Applicants expect to file the primary application on or before December 1, 1995.

On September 1, 1995, we served, and published in the Federal Register, a notice under 49 CFR 1180.4(b) of the pre-filing notification.[3] In the notice, we found that the proposal is a "major transaction" and sought comments from interested persons on an accelerated procedural schedule which applicants proposed.[4] Comments on the proposed schedule are due on September 18, 1995.

In a petition also filed August 4, 1995, applicants seek waiver or clarification under 49 CFR 1180.4(f) of certain railroad consolidation procedures to facilitate the preparation and processing of the primary application (UP/SP-3). We will consider applicants' specific waiver requests and, to the extent set forth below, grant those requests.

1. Definition of "applicant." 49 CFR 1180.3(a) defines "applicant" as "[t]he parties initiating a transaction." Applicants seek clarification or waiver of 49 CFR 1180.3(a) to provide that the term "applicant" excludes Acquisition, Union

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[1] UPRR and MPRR are referred to collectively as UP. SPT, SSW, SPCSL, and DRGW are referred to collectively as SP.

[2] Applicants state that Chicago and North Western Transportation Company (CNWT), Chicago and North Western Railway Company (CNW), and Western Railroad Properties Incorporated (WRPI) will not join in filing the application. CNWT and CNW are scheduled to be merged into UPRR on October 1, 1995; WRPI was merged into UPRR on August 1, 1995. In this decision, we will address applicants' petition for clarification that they need not include these entities as applicants in this proceeding.

[3] A petition filed by applicants on August 4, 1995, seeking issuance of a protective order (UP/SP-2) was granted by decision served September 1, 1995.

[4] Applicants also filed a petition to establish a procedural schedule on August 4, 1995 (UP/SP-4).

Pacific Holdings Corp. (Holdings), and Chicago and North Western Railway Company (CNW). According to applicants, Acquisition is an indirect wholly owned subsidiary of UPC with the sole function of holding stock in SPR. Therefore, applicants assert that it is unnecessary for Acquisition to be a formal applicant. Similarly, applicants state that Holdings is an intermediate subsidiary between UPC and UPRR/MPRR in the corporate structure, and that there is no need for it to be a formal applicant. As mentioned, applicants allege that CNW is scheduled to be merged into UPRR on October 1, 1995, and that its operations and finances will be represented in the application. It is applicants' position, therefore, that CNW will have no separate role in the present transaction and should not be an applicant.

Applicants also seek clarification or waiver that they need not classify either Philip F. Anschutz or The Anschutz Corporation (TAC) as applicants. Applicants note that neither entity is a carrier; Mr. Anschutz controls TAC, which holds approximately 32% of the outstanding common stock of SPR. In applicants' view, characterizing these entities as applicants would be burdensome and would not enhance the Commission's ability to evaluate the proposed merger.

We have granted similar clarifications or waivers in the past,[5] and we will grant the sought waiver. We agree that the inclusion of Acquisition, Holdings, CNW, Mr. Philip F. Anschutz, and TAC as "applicants" in connection with the primary application is unnecessary. Thus, for this proceeding, we will not include these noncarrier entities as "applicants." The term will refer only to UPC, UPRR, MPRR, SPR, SPT, SSW, SPCSL, and DRGW.

2. Definition of "applicant carriers." Our regulations, at 49 CFR 1180.3(b), define "applicant carriers" to include "*all carriers related to the applicant*, and all other carriers involved in the transaction" (italics in original). Applicants seek clarification of this definition to confirm that it does not include railroads in which UP and SP have interests of 50% or less. Applicants state that there are a number of such railroads, and that all of those railroads are operated independently of UP and SP, and maintain their own records (e.g., terminal, switching, or shortline railroads owned jointly with other railroads).[6] Applicants seek confirmation that, in the context of the application, the reference to "all carriers related to the applicant" refers to UP, SP, and the rail

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[5] See 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 April 20, 1995) at 2 (BN/Santa Fe No. 16). See also Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control--Chicago and North Western Holdings Corp. and Chicago and North Western Transportation Company, Finance Docket No. 32133 (ICC served June 8, 1993) at 1 (UP/CNW No. 7).

[6] Applicants confirm that they will identify all railroads in which either UP or SP owns an interest of 50% or less for the Commission either in the corporate chart which they will include in the primary application pursuant to our regulations at 49 CFR 1180.6(b)(6), or in the statement of direct or indirect intercorporate or financial relationships pursuant to 49 CFR 1180.6(b)(8).

subsidiaries in which either has a majority interest. We have previously granted waivers or clarifications to exclude from the definition of "applicant carriers" rail carriers in which applicants possess an interest of 50% or less.[7] Applicants have established that such a waiver is appropriate here and, accordingly, we will grant their request.

Applicants also seek waiver or clarification that the term "applicant carriers" does not include any of the following carriers in which UP and SP each hold 50% or less interests: The Ogden Union Railway & Depot Company (OUR&D), Portland Traction Company (PTRC), The Alton & Southern Railway Company (ASR), Portland Terminal Railway Company (PTRR), and Central California Traction Company (CCT).[8] Applicants assert that, as to these terminal and switching carriers (as well as terminal and switching carriers in which UP or SP already holds a majority interest), the application will fully describe any effects of the control transaction on operations. Furthermore, applicants allege that they will file, as related applications to the primary application, petitions for exemption authorizing control of each of these terminal or switching carriers. It is applicants' position that including financial and other data for these carriers throughout the primary application would be burdensome, and would not contribute to the evaluation of the primary application. Therefore, applicants request waiver or clarification that they need not treat these entities as "applicant carriers." We agree with applicants that separate financial and other data for these carriers is unnecessary. We have previously granted similar waivers or clarifications to exclude from the definition of "applicant carriers" rail carriers in which no applicant presently owns more than a 50% interest, even though those applicants together would own more than a 50% interest following our approval of the transaction. In accordance with that practice, we will grant the sought waiver.[9]

Similarly, applicants request waiver or clarification of the definition of "applicant carriers" to exclude UPC's trucking subsidiary, Overnite Transportation Company (Overnite), and SPT's licensed motor carrier subsidiaries, Pacific Motor Transport Company (PMT) and Southern Pacific Motor Trucking Company (SPMT). Applicants assert that they do not anticipate that the operations of the trucking firms will be affected significantly by the common control of UP and SP, and state that there is no need for them to be included as formal applicants in this proceeding. This request is reasonable and is similar to others we have granted in the past. Accordingly, in the context of this proceeding, we will not require Overnite, PMT, and SPMT to be

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[7] See 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 Oct. 3, 1994) at 2 (BN/Santa Fe No. 3). See also Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control--Chicago and North Western Holdings Corp. and Chicago and North Western Transportation Company, Finance Docket No. 32133 (ICC served Oct. 26, 1992) at 2 (UP/CNW No. 3).

[8] UP and SP each have interests of less than 50% in PTRR and CCT, but would have an interest of more than 50% following consummation of the proposed transaction. Applicants added PTRR and CCT to this list in a supplement to UP/SP-3, filed August 22, 1995 (UP/SP-8).

[9] See BN/Santa Fe No. 3 at 2-3; Santa Fe Southern Pacific Corporation--Control--Southern Pacific Transportation Company, Finance Docket No. 30400 (ICC served Feb. 3, 1984) at 1.

treated as "applicant carriers" under 49 CFR 1180.3(b) for the purposes of this proceeding.[10]

3. Submission of Consolidated Data. Applicants seek clarification that they may submit information and data pertaining to UP or SP that are required by the Commission's Railroad Consolidation Procedures on a consolidated basis (i.e., with consolidated data for each applicant including that applicant's majority-controlled rail subsidiaries). It is applicants' position that separate information and data pertaining to each of the individual majority-owned subsidiaries of UP and SP are not pertinent to the Commission's disposition of the common control application. Certain record-keeping systems which applicants have in place allow them to generate information and data pertaining to UP and SP and their majority-owned subsidiaries on a consolidated basis, and applicants maintain that using these systems will eliminate the burden and redundancy of preparing the information on a carrier-by-carrier basis. We agree with applicants, and consistent with our past practice, we will permit the filing of information pertaining to each of the applicant carriers (including their controlled subsidiary railroads) on a consolidated basis.[11]

4. Classification and Format of Employee Impact Data. Under our regulations at 49 CFR 1180.6(a)(2)(v), applicants must discuss the "effect of the proposed transaction upon applicant carriers' employees (by class or craft), the geographic points where the impact will occur, the time frame of the impact (for at least 3 years after consolidation), and whether any employee protection agreements have been reached." Applicants seek confirmation that they may use the system of classification shown in attached Appendix A and that, in presenting the required employee impact data, they may use the format presented in attached Appendix B.

On August 25, 1995, Transportation·Communications International Union (TCU) and United Transportation Union filed a petition to clarify information required pursuant to 49 CFR 1180.6(a)(2)(v) (TCU/UTU-1). TCU and UTU petitioned the Commission to require applicants to provide additional information under applicants' proposed Appendix B category designated as "Current Location." TCU and UTU note that there are a number of locations involved in the proposed merger where more than one of the applicant carriers maintain facilities where employees may be affected. Therefore, TCU and UTU argue, the Commission should require applicants to further sub-categorize the "Current Location" information to reflect on which applicant carrier(s) (UPRR, MPRR, SPT, SSW, SPCSL, or DRGW) employees in each classification of jobs anticipated to be affected are now working, where that information is readily available. TCU and UTU allege that, without this information, it will be impossible for rail labor representatives or the Commission to make a knowledgeable assessment of the proposed transaction's effect on rail labor.

By reply filed August 31, 1995, applicants assert that the TCU/UTU filing was improper, because our regulations do not permit replies to petitions for waiver or clarification (UP/SP-11). See 49 CFR 1180.4(f)(3). Further, applicants argue that we should reject TCU/UTU's request on its face. It is applicants' position that TCU and UTU are requesting information that

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[10] See BN/Santa Fe No. 3 at 3; UP/CNW No. 3 at 2-3; UP/CNW No. 7 at 2.

[11] See BN/Santa Fe No. 3 at 3-4, and UP/CNW No. 3 at 2 and n.3.

applicants cannot know until after the Commission decides this case. Specifically, applicants claim that they can only determine carrier-specific labor impacts at common points through the process called for in New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock). Applicants maintain that the New York Dock process resolves issues such as the integration of seniority at affected locations, and other labor contract issues, that will eventually determine how many employees of each carrier the transaction will affect. Further, applicants contend, TCU/UTU's request is contrary to Commission precedent. Applicants have proposed to submit labor impact information in a form similar to that used in prior rail merger proceedings. According to applicants, the Commission has not required previously that labor impact information be presented in the form that TCU and UTU request.

We believe the applicants' arguments are persuasive. While the information sought by TCU and UTU might be helpful, applicants have shown that this data cannot be produced at this time. Moreover, applicants' proposal is adequate to provide the information we need, and is consistent with our past practices; therefore, we will approve it.[12]

5. Form 10-K's, Form S-14's and Annual Reports. According to our regulations at 49 CFR 1180.6(b)(1), (2), and (4), applicant carriers must submit their most recent Form 10-K and Form S-14 (now S-4) filings with the Securities and Exchange Commission (SEC) as Exhibits 6 and 7, respectively, and their two most recent annual reports as Exhibit 9. Furthermore, they are also to submit any Form 10-K's, Form S-4's, and annual or quarterly reports to stockholders issued during the pendency of the proceeding. Applicants request a waiver or clarification of these requirements as follows:

a. Applicants state that, though MPRR and SPT continue to file Form 10-K's, UPRR, DRGW and SSW have not filed such forms for many years and SPCSL has never filed one. In addition to submitting the most recent Form 10-K for MPRR and SPT, applicants request permission to submit, in lieu of the most recent Form 10-K's for UPRR, DRGW and SSW, the most recent Form 10-K's for UPC and SPR. Applicants state that they will also submit any Form 10-K's issued by any of applicants during the course of the proceeding. This request is reasonable, and we will grant it.[13]

b. Applicants request that we waive the requirement that applicant carriers file past Form S-4's. According to applicants, no applicant carrier has filed a Form S-4 for at least 15 years. Applicants indicate financial information relevant to this proceeding will be contained in the various Form 10-K's and annual reports, as well as the SEC Schedule 14D-9 that SPR will file relating to the tender offer, and the UPC Form S-4 and proxy material relating to shareholder approval of the parties' merger agreement, copies of which applicants propose to submit with the application. Applicants state that they will also submit any Form S-4's filed by any of applicants during the pendency of this proceeding. Given the circumstances, we conclude that the requested waivers will not have a significant impact on our review of the proposed transaction. Therefore, we will grant the requested waivers and require that applicants submit any Form S-4's issued during the pendency of this proceeding.[14]

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[12] See BN/Santa Fe No. 3 at 4; UP/CNW No. 3 at 3.

[13] See BN/Santa Fe No. 16 at 5; UP/CNW No. 3 at 3-4.

[14] See BN/Santa Fe No. 3 at 5; UP/CNW No. 3 at 4.

c. Applicants state that none of the applicant carriers issues annual reports to stockholders, and none has done so for a number of years. Therefore, applicants propose instead to submit (and update as appropriate) the two most recent annual reports to stockholders of UPC and SPR. This request is reasonable, and we will grant it.[15]

6. Corporate Information and Reports. 49 CFR 1180.6(b) requires applicants to submit information on their corporate structure, and a number of related documents. Applicants request that we authorize the omission or modification of the following items:

a. Section 1180.6(b)(3) requires applicants to list any change in officers not indicated on the most recent Form R-1. Applicants note that applicant railroads and their subsidiaries have hundreds of officer positions that might be within the scope of this requirement, and that compiling such a list would be burdensome and of little or no value to this proceeding. Therefore, applicants ask that we require them to list only the principal six officers of UP, SP and their majority-owned subsidiaries. This request is reasonable, and we believe that the proposed submissions would provide sufficient information.[16] Therefore, we will grant the request.

b. Section 1180.6(b)(6) requires applicants to submit a corporate chart which includes, for each company identified in the chart, a statement indicating any directors or officers which that company has in common with any other company on the chart. Applicants seek a partial waiver or clarification of this requirement. For conciseness and clarity, applicants ask that the Commission allow them to list only those officers and directors who are (i) common to both UP (including majority-owned subsidiaries) and SP (including majority-owned subsidiaries), or (ii) common to UP, SP, or any of their majority-owned subsidiaries and any carrier outside the UP or SP corporate families. Our primary interest concerns the relationship between the transportation activities of the applicants, and our immediate informational needs will be met by the information applicants propose to file. Therefore, this request appears reasonable, and we will permit applicants to indicate common officers or directors as they propose.[17]

c. Section 1180.6(b)(8) requires applicants to disclose intercorporate relationships between applicant carriers or affiliated persons and other carriers or any persons affiliated with them. Applicants request clarification that this requirement pertains only to significant intercorporate or financial relationships. Applicants propose to describe only those relationships involving ownership by applicants or their affiliates of more than 5% of a non-affiliated carrier's stock, including those relationships in which a group of people affiliated with applicants own more than 5% of a non-affiliated carrier's stock. This proposal will not impede our review of the financial and competitive impacts of this transaction.[18] Accordingly, we will grant it.

7. Filing Requirements for Directly Related Applications.

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[15] See BN/Santa Fe No. 3 at 4-5; UP/CNW No. 3 at 4.

[16] See BN/Santa Fe No. 3 at 5; BN/Santa Fe No. 16 at 5; UP/CNW No. 3 at 4; UP/CNW No. 7 at 4.

[17] See BN/Santa Fe No. 3 at 5; UP/CNW No. 3 at 4.

[18] See BN/Santa Fe No. 3 at 5; UP/CNW No. 3 at 4-5.

A. Merger-Related Construction Applications. Applicants state that they may have certain modest merger-related construction projects, probably involving the construction of connections, for which they will wish to seek approval or exemption in applications submitted together with the primary application. According to applicants, they will be identifying these projects as they progress in their preparation of the application. 49 CFR 1150.1(b) requires consultation with the Commission's Section of Environmental Analysis (SEA) at least 6 months before the filing of a construction application, and 49 CFR 1105.10(a) requires submission of written notice to SEA at least 6 months before the filing of a construction application if the proposed construction might require preparation of an environmental impact statement (EIS). Applicants note that we have previously recognized that such requirements need not be applied to merger-related construction projects.[19]

Applicants anticipate that any merger-related construction projects for which they will seek approval or exemption in this proceeding will have minor, if any, adverse environmental impacts, and that preparation of an EIS will not be required. Applicants state that they have begun the process of consulting with SEA with regard to the primary application and all related applications, and that they will advise SEA as soon as they identify specific merger-related construction projects and will provide SEA with any required information regarding those projects. Applicants assert that they will identify all such projects by no later than September 18, 1995, which will provide at least 2 months in advance of the filing of the application for SEA to progress on its environmental analysis of these projects. According to applicants, they will also be filing their own detailed environmental report with the application. See 49 CFR 1180.6(a)(8). Therefore, applicants request that we waive or clarify the merger-related, pre-filing notice provisions of 49 CFR 1180.4(b) to provide that their advance notice to SEA of merger-related construction projects will be satisfactory, and that applicants need not comply with the 6-month requirements in 49 CFR 1105.10(a) and 1150.1(b).

In view of applicants' previous consultation with SEA and on the condition that the consultation with SEA continues, waiver of the 6-month time periods required in both 49 CFR 1150.1(b) and 1105.10(a) will be granted. However, we emphasize that any speculation regarding the appropriate level of environmental review of any merger-related construction projects is premature at this time. When SEA has obtained and analyzed the relevant information on the individual construction projects, and when it has consulted with other Federal, state, and local agencies, it will determine the type of environmental document that should be prepared.

B. Merger-Related Abandonment Applications.

1. Filing Requirements. Applicants state that they anticipate that there may be some merger-related abandonments for which they will seek either exemption or approval in connection with the control application. However, applicants assert that it will not be possible to identify these abandonments and the extent to which approvals, as distinguished from exemptions, will be sought for them until preparation of the merger application progresses. Therefore, applicants claim, it will not be possible, if they are to file the abandonment applications with

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[19] UP/SP-3 at 14, citing Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company -- Control -- Missouri-Kansas-Texas Railroad Company, Finance Docket No. 30800 (ICC served Oct. 24, 1986) at 3 (UP/MKT No. 6).

the control application on or before December 1, to comply with the requirements of 49 U.S.C. 10904(e) and 49 CFR 1152.13(d) that a line for which abandonment approval is sought be identified in Category 1 on the abandoning railroad's System Diagram Map at least 4 months prior to the filing of the abandonment application.

Consequently, applicants request that we modify this requirement in either of two ways. Applicants suggest that we grant a waiver or clarification of 49 CFR 1180.4(b), as suggested above with regard to merger-related construction projects, or through an exemption pursuant to 49 U.S.C. 10505 and waiver pursuant to 49 CFR 1152.24(e)(5). It is applicants' position that a Section 10505 exemption is appropriate because the 4-month requirement of 49 U.S.C. 10904(e) and 49 CFR 1152.13(d) will interfere unnecessarily with the expeditious processing of this proceeding. Applicants maintain that the rail transportation policy will be furthered by establishing a timely procedure for this proceeding, and the 4-month requirement is of limited scope in the context of this proceeding.

Applicants state that they are prepared to identify and include in Category 1 on their System Diagram Maps by no later than September 18, 1995, all proposed merger-related abandonments for which approval will be sought. Applicants note that this will give at least 2-months' notice[20] of these proposed abandonments before the filing of the control application, and, combined with applicants' previously referenced proposed procedural schedule, will give affected shippers opportunity to formulate and submit comments on any proposed abandonments as part of the principal proceeding.

We find applicants' request reasonable. We will grant applicants a waiver of the 49 CFR 1180.4(b) prefiling notification requirement; further, we will grant applicants a 49 U.S.C. 10505 exemption from the procedural requirements of 49 U.S.C. 10904. As applicants point out, application of 10904 is not necessary here to carry out the transportation policy of 49 U.S.C. 10101a, and, indeed, applying that provision here would preclude expeditious handling of these directly related applications without cognizable concomitant public benefit. Furthermore, the procedures we are modifying are of limited scope within the meaning of 49 U.S.C. 10505. The procedures set out in Section 10904 specify that parties have 30 days after a carrier files an abandonment application with the Commission to file a protest. The statute states what procedure the Commission and parties must follow in the event that protests are filed by concerned parties. Exempting applicants from technical compliance with 10904 does not contravene those provisions, and the procedural schedule we ultimately establish will provide interested parties with a full and fair opportunity to present their cases.

If applicants identify and include in Category 1 on their System Diagram Maps by September 18, 1995, all lines targeted for merger-related abandonments, interested parties would have ample time to identify problems and prepare submissions to the Commission. Assuming that applicants file the primary application on or about December 1, 1995, and include applications for merger-related abandonments, under the proposed procedural schedule, concerned parties would have 90 days from

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[20] As discussed more fully below, on August 29, 1995, applicants represented in a pleading filed with the Commission that they have now determined that they will file amended System Diagram Maps with the Commission on or about Friday, September 1, 1995, thereby providing more notice to interested parties.

the date the primary application is filed to protest any abandonments. This is in addition to the time period between September 18, 1995, and the date applicants file the primary application. Interested parties would have even more notice of merger-related abandonments if applicants identify the targeted lines by September 1, 1995. If any parties are disadvantaged by applicants' proposal it is the applicants themselves, because parties protesting abandonments would actually have a longer time to prepare their submissions than they would have under the schedule required by 49 U.S.C. 10904.[21]

On August 24, 1995, Save the Rock Island Committee, Inc. (STRICT) filed a pleading in opposition to applicants' petition for exemption from 49 U.S.C. 10904(e)(3) and 49 CFR 1152.13(d)(STRC-1). STRICT's basic position is that the Commission should not grant this exemption because its scope is undefined at this time--applicants have not identified the lines targeted for abandonment. STRICT points out that applicants have stated that they may seek to abandon mainline track, and notes that the 4-month requirement of Section 10904(e)(3) is designed to provide adequate public notice of abandonment applications and give concerned parties ample time to act to preserve rail service on a line proposed for abandonment. In STRICT's view, the length of the lines that could be affected by applicants' request precludes us from allowing an exemption under 49 U.S.C. 10505, because an abandonment of a line hundreds of miles in length is not a transaction of "limited scope."[22]

STRICT argues that there is no requirement that parties file merger-related abandonment applications simultaneously with the merger applications, or that the Commission decide the applications simultaneously. Furthermore, STRICT contends, if applicants amend their System Diagram Maps on September 18, 1995, they could comply with the 4-month requirement and still file merger-related abandonment applications by January 18, 1996. STRICT suggests that it would then be possible for the Commission to still issue simultaneous merger and abandonment decisions.[23]

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[21] We note that in Decision No. 1, served (and published in the Federal Register) on September 1, 1995, we asked for public comment on a variation of the proposed schedule. Under that variation, comments, protests, inconsistent and responsive applications, as well as all other opposition evidence, would be due 60 days after the filing of the primary application. This would still give parties protesting abandonments sufficient time to prepare their submissions.

[22] We reiterate that applicants have at present identified no lines targeted for abandonment. STRICT's prediction of a line "hundreds of miles in length" is not based on any information in the public record developed thus far in this proceeding.

[23] STRICT makes other requests in STRC-1. It is STRICT's position that what applicants may propose in the way of abandonments is unprecedented, and STRICT argues that we should impose the following additional requirements with respect to those abandonments: (1) a requirement that applicants file their respective amended System Diagram Maps in this proceeding, and make them available to all parties that request them; (2) a prohibition on applicants' requesting an exemption for abandonment of any main line in this proceeding because such an abandonment would not be of "limited scope;" and (3) a requirement that applicants show on the System Diagram Maps that they file in advance of their merger and abandonment applications not only those lines for which abandonment applications will be filed, but also those lines for which abandonment exemptions will

(continued...)

Applicants filed a reply to STRICT's opposition to the petition for waiver or clarification on August 30, 1995 (UP/SP-9). Applicants state that they have now determined that they will file amended System Diagram Maps with the Commission on or about Friday, September 1, 1995, thereby providing more notice to interested parties. Further, they allege that newspaper publication of notice regarding revisions to the System Diagram Maps will begin the week of September 3. Applicants state that this is true regardless of whether they intend to seek abandonment through application or exemption. Therefore, applicants argue, if the Commission grants the modification applicants seek, interested parties will have approximately 3 months' notice of the proposed abandonments prior to the filing of the control application, and applicants will be able to file their merger-related abandonment applications with their control application on or before December 1. Applicants allege that the former Rock Island line running between Kansas City and St. Louis, MO, which is of interest to STRICT, will not be on applicants' list of merger-related abandonments.[24]

Contrary to STRICT's interpretation, our rules do require applicants to file concurrently with their application all directly related applications, specifically including those seeking authority to abandon rail lines. 49 CFR 1180.4(c)(2)(vi). For the reasons given in our discussion of why we are granting applicants an exemption from the procedural requirements of 49 U.S.C. 10904, we are unpersuaded by STRICT's arguments. While we are not committing at this time to deciding all merger-related abandonments concurrently with our resolution of the primary application,[25] we believe applicants' request for exemption from the 4-month requirement is reasonable and gives interested parties ample notice. We will give due consideration to all abandonment applications, no matter how complex, and make sure that the public may adequately address its concerns.

2. Information Requirements. Applicants state that they intend to file any abandonment applications in accord with our regulations at 49 CFR Part 1152, subpart C. However, applicants assert that certain information normally required for abandonment applications is unnecessary in the context of merger-related

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[23](...continued)
be sought. We are unpersuaded that these extraordinary measures are necessary at this time, and again believe that all interested persons will have a full and fair opportunity to make their cases under the procedural schedule that we ultimately adopt.

[24] Applicants also make the following additional arguments: (1) that their proposal will not deprive any shippers of sufficient notice of merger-related abandonments; (2) that it is not necessary for us to consider this exemption under 49 U.S.C. 10505 -- the Commission could modify the notice requirement pursuant to our authority to regulate the procedures in railroad control cases; (3) that a Section 10505 exemption would, in fact, be appropriate here; (4) that applicants' proposed modification is consistent with the Commission's rule that merger-related abandonment applications be filed at the same time as the primary application; and (5) that we should reject for various reasons STRICT's requests that we impose special requirements on applicants' abandonment applications.

[25] Indeed, because applicants have not yet identified the abandonments nor provided any information regarding their potential environmental impacts, we do not have enough information at this time to determine with certainty whether we can process related abandonments on the same schedule as the primary application.

abandonments, and seek waivers of certain abandonment regulations pursuant to 49 CFR 1152.24(e)(5).

a. Section 1152.22(c) requires an applicant for abandonment authority to file detailed information with respect to the level of service the applicant has provided over the line. Applicants request that, where the consolidated system will retain the overhead traffic on the line to be abandoned, the Commission waive this requirement to the extent that it calls for information on other than local train service provided for traffic originating and/or terminating on the line. Applicants state that any abandonment applications that they file will be directly related to the control application, which will include an operating plan for the consolidated lines. According to applicants, in many or all cases the combined system will continue to provide service for overhead or bridge traffic currently moving over the lines applicants will seek to abandon. Therefore, applicants ask that we relieve them of the 49 CFR 1152.22(c)(5) requirement of including information on overhead or bridge traffic moving over the line, if the consolidated system will retain the traffic. Applicants also request that we excuse them from supplying any information pertaining to service for that traffic--number of trains and average crew size, for example.

Applicants further request waiver of Section 1152.22(c)(8), which requires information on any important changes in train service during the 5 years preceding the abandonment application. Applicants note that much of the trackage that could be the subject of their abandonment applications is mainline track, and argue that numerous changes in train service undoubtedly occurred without any relation to the local traffic on the line segments to be abandoned. Applicants contend that the requirement in Section 1152.22(c) would result in the burdensome accumulation of data which would be of little or no value. Therefore, they ask that we limit subparagraph (8) to important changes in local train service.

These requests appear reasonable and are consistent with our past practices. Therefore, we will grant these requests.[26]

b. Section 1152.22(d) requires abandonment applicants to submit detailed revenue and cost data relating to the line to be abandoned. Applicants request that, where the combined system will retain overhead traffic, we grant a waiver permitting them to exclude data on revenues and costs associated with overhead traffic and to prepare cost data on a pro forma basis reflecting the exclusion of overhead traffic. Applicants state that, because overhead traffic currently moving over the UP or SP lines to be abandoned will in many or all cases continue to be served by the consolidated system on other mainline tracks, revenue and costs from that traffic are not germane to an abandonment application.

Applicants argue that accumulation and submission of financial data on overhead traffic would merely impose an unnecessary burden and serve no useful purpose. Applicants assert that pro forma costing is appropriate where historical train operations and maintenance cost data are affected by overhead operations, as where local traffic has been handled in through trains or maintenance practices have been geared to overhead traffic. Again, this request appears reasonable and is

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[26] See UP/MKT No. 6 at 4.

consistent with our past practices. Accordingly, we will grant the request.[27]

Section 1152.22(d) also requires that abandonment applications include information about costs attributable to traffic on the line to be abandoned for a "forecast" year, for a "base" year, and for the two most recent historical years. Applicants seek clarification (or, if necessary, a waiver) that they may report costs on a pro forma consolidated post-merger basis, using the same consolidated cost data that they will use in the operating plan and in other parts of the application.

In applicants' view, the purpose of the cost data in an application for a merger-related abandonment is to allow an assessment of the traffic that might remain on the line after the merger and of the cost of handling that traffic. Applicants maintain that for this purpose the relevant cost data are those of the merged system, and that it thus makes sense for the "forecast" year in the application to be based on the consolidated cost data of the merged system. In applicants' opinion, it also makes sense to use the same consolidated cost data for the "base" year and other historical years so that interested persons can make comparisons on a common basis between those years and the forecast year. Also, state applicants, use of the same consolidated data for the abandonment applications as will be used in the merger application will simplify the process of preparing the abandonment applications.[28] We find applicants' request reasonable, and believe the information they propose to submit will be sufficient for our purposes. Accordingly, we will grant the request.

c. Section 1152.22(f) requires abandonment applicants to submit information regarding the environmental impact of a proposed abandonment in compliance with Section 1105.7. Applicants request waiver or clarification to ensure that they need not submit environmental information relating to the overhead traffic covered by the preceding waivers. Applicants note that we have previously waived submission of environmental data relating to overhead traffic that would be retained over other rail routings.[29]

The request is reasonable and, accordingly, we will grant it. It is, as applicants note, consistent with our past practices to allow applicants in an abandonment proceeding to forgo submission of environmental data relating to overhead traffic on a line segment to be abandoned if that traffic will be retained over other lines or routings in the applicant carrier's system. However, regarding this requested waiver, we have some concern that, if applicants divert the overhead traffic to other lines of the combined system, the increase in traffic on those lines would result in environmental impacts that we may need to analyze as part of our analysis of the environmental impacts of the overall transaction. We wish to clarify that this waiver does not extend to environmental data on those line segments.

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[27] See UP/MKT No. 6 at 4.

[28] Applicants make this request in UP/SP-8.

[29] See, e.g., Chicago & North Western Transportation Co.--Abandonment--Between Norfolk & Chadron, NE, Docket No. AB-1 (Sub-No. 230) (ICC served Oct. 9, 1991); Chicago and North Western Transportation Co.--Abandonment--Between Steamboat Rock & Hampton, IA, Docket No. AB-1 (Sub-No. 217) (ICC served July 20, 1988).

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

It is ordered:

1. The petition for waiver or clarification is granted to the extent set forth in this decision.

2. This decision is effective on the date of service.

By the Commission, Chairman Morgan, Vice Chairman Owen, and Commissioners Simmons and McDonald.

Vernon A. Williams

(SEAL)

Vernon A. Williams
Secretary

APPENDIX A

CLASSIFICATION OF JOBS SHOWN IN
LABOR IMPACT DATA, SECTION 1180.6(a)(2)(v)

Blacksmiths

Boilermakers

Carmen

Clerks

Dispatchers

Electricians

Enginemen

Laborers

Machinists

Maintenance of Way

Nonagreement

Railway Supervisors

Sheet Metal Workers

Signalmen

Trainmen

Yardmasters

APPENDIX B

SECTION 1180.6(a)(2)(v)
EFFECTS ON APPLICANT CARRIERS' EMPLOYEES

(Applicant Carrier)

Current Location	Classification	Jobs Transferred to	Jobs Abolished	Jobs Created	Year

STB FD 32760 09-01-95 C DEC2

SERVICE DATE
SEP 1 1995

EC

INTERSTATE COMMERCE COMMISSION

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. 2

PETITION FOR PROTECTIVE ORDER

Decided: August 28, 1995

On August 4, 1995, Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR), Southern Pacific Rail Corporation (SPR), Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW) (collectively, applicants) filed a notice of intent (UP/SP-1) to file an application seeking Commission authorization under 49 U.S.C. 11343-45 for: (1) the acquisition of control of SPR by UP Acquisition Corporation (Acquisition), an indirect wholly owned subsidiary of UPC; (2) the merger of SPR into UPRR; and (3) the resulting common control of UP and SP by UPC.

In a petition filed concurrently with the notice, applicants request that the Commission enter a protective order (UP/SP-2). Applicants explain that a protective order is necessary for two reasons: (1) to protect confidential information, such as shipper-specific material contained in traffic data and tapes, and to facilitate compliance with 49 U.S.C. 11343 and 11910; and (2) to facilitate any necessary discovery during later stages of the proceeding by protecting the confidentiality of materials reflecting the terms of contracts, shipper-specific traffic data, and other confidential and proprietary information in the event that parties produce such materials. Applicants propose to include in the protective order a provision governing the production of highly confidential competitive information in discovery, and restricting that information to use by outside counsel or outside consultants for the parties. The provision is similar to provisions approved in protective orders in other control cases. See 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 July 15, 1994) (BN/Santa Fe). On August 14, 1995, The Kansas City Southern Railway Company (KCS) filed its opposition to the proposed protective order (KCS-2). Applicants filed a reply on August 18, 1995 (UP/SP-7).

KCS appears primarily concerned with the provision designating certain material as "highly confidential" and restricting its use to outside counsel or outside consultants for the parties. KCS argues that 49 CFR 1104.14 provides sufficient procedures for the protection of confidential materials, and that there is no need to create a separate category of "highly confidential" information to deny access to certain in-house counsel of opposition parties. KCS argues that the Commission should adopt a protective order similar to that adopted in other proceedings, such as in Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control--Chicago and North Western Holdings Corp. and Chicago and North Western Transportation Company, Finance Docket No. 32133 (ICC served Aug. 24, 1992) (UP/CNW), which did not create a separate

category for "highly confidential" material. Applicants argue, however, that when KCS had to produce its own documents for discovery in UP/CNW, KCS insisted on a distinction like the one it challenges here. An order entered on December 16, 1993, by the Administrative Law Judge in UP/CNW provided that KCS could stamp documents CONFIDENTIAL--OUTSIDE COUNSEL/EXPERTS ONLY, and thus restrict access to those documents.

KCS further argues that, under the proposed protective order, applicants can violate the restriction on in-house counsel and employees of competitors seeing "highly confidential material" and can review each others' "highly confidential" materials in preparation of the application and other materials; however, similarly situated in-house personnel of opposing parties cannot review the same material in preparing their arguments. KCS maintains that this results in non-merging parties' in-house counsel and employees having a "second-class status."

In their reply, applicants note that KCS's complaint disregards the "essential difference between adversaries and co-applicants" in a consolidation proceeding. Applicants explain that they must remain competitors until the Commission approves the application, but that they have a compelling need to share certain confidential data to prepare the application, and collusion of the type KCS fears would risk Commission disapproval of the transaction and would subject the applicants to severe legal sanctions. As applicants point out, however, in-house counsel for non-applicant parties have no compelling need for access to competitively sensitive data, and that outside counsel for these parties can adequately protect their clients' interests in these proceedings without expanding competitors' potential access to commercially sensitive data.

The proposed protective order is substantially similar to the one entered in BN/Santa Fe, which adequately served the intended purpose of restricting disclosure of material which is particularly sensitive.[1] The modifications to the protective order in BN/Santa Fe were relatively minor and addressed

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[1] It is also substantially similar to the protective order entered in Illinois Central Corporation--Common Control--Illinois Central Railroad Company and The Kansas City Southern Railway Company, Finance Docket No. 32556 (ICC served Aug. 12, 1994) (IC/KCS). In IC/KCS, the Commission entered a protective order at the request of the applicants in that proceeding substantially similar to that proposed by the applicants in this proceeding regarding the designation of some material as "highly confidential." The following similarities are particularly noteworthy: (1) personnel of Illinois Central Corporation (IC), Illinois Central Railroad Company (ICR), and their affiliates (collectively, IC), and of Kansas City Southern Industries, Inc. (KCSI), The Kansas City Southern Railway Company (KCSR) and their affiliates (collectively, KCS) were allowed to exchange confidential material for the purpose of the IC/KCS proceeding and any related proceedings (Paragraph 1); (2) parties producing materials in response to requests for discovery by a party to the IC/KCS proceeding or any related proceeding were allowed to stamp particular competitively sensitive materials as "HIGHLY CONFIDENTIAL -- OUTSIDE COUNSEL/OUTSIDE CONSULTANTS ONLY" (Paragraph 5); (3) material designated as highly confidential was not to be disclosed except to outside counsel or outside consultants of the requesting party (Paragraph 5); and (4) the restriction of highly confidential material to outside counsel and consultants did not apply to exchanges of information pursuant to Paragraph 1 of the protective order.

circumstances wherein parties argued persuasively that a modification was appropriate and necessary.[2] KCS, and any other parties, would have the same opportunity to petition for modification of the protective order. In instances where parties argue that there is a necessity for lifting the restriction of highly confidential material to outside counsel and consultants, the Commission will consider the merits of the argument and determine whether to modify the protective order.

Good cause exists to grant the petition. Unrestricted disclosure of confidential, proprietary or commercially sensitive information and data could cause serious competitive injury to the parties. Issuance of the requested protective order ensures that such information and data produced by any party in response to a discovery request or otherwise will be used solely for purposes of this proceeding and not for any other business or commercial use. The requested protective order will facilitate the prompt and efficient resolution of this proceeding.

It is ordered:

1. The petition for a protective order is granted and the parties to this proceeding must comply with the protective order in the Appendix.[3]

2. This decision is effective on the service date.

By the Commission, Chairman Morgan, Vice Chairman Owen, and Commissioners Simmons and McDonald.

(SEAL)

Vernon A. Williams
Secretary

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[2] See BN/Santa Fe, Finance Docket No. 32549 (ICC served March 13 and June 20, 1995).

[3] This decision protects the information, materials, and data set forth in the attached Appendix whether it is contained on printed material or in computer-derived memory devices (i.e., floppy diskettes).

APPENDIX A

PROTECTIVE ORDER

1. For purposes of this Protective Order, "confidential information and data" means traffic data (including but not limited to waybills, abstracts, study movement sheets and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets and cost workpapers), the identification of shippers and receivers in conjunction with shipper-specific traffic data, the confidential terms of contracts with shippers, confidential financial and cost data, and other confidential or proprietary business information. Personnel of Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR) and their affiliates, (collectively, Union Pacific), and of Southern Pacific Rail Corporation (SPR), Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW) and their affiliates, (collectively, Southern Pacific), including outside consultants and attorneys, may exchange confidential information and data for the purpose of this and any related proceedings, but not for any other business, commercial or other competitive purpose, unless and until their joint application is approved.

2. To the extent that any meetings, conferences, exchanges of data or other cooperative efforts between representatives of Union Pacific and Southern Pacific or their affiliates are held and carried out for purposes of this and any related proceedings, such meetings, conferences, exchanges of data and other cooperative efforts are deemed essential for the disposition of such proceedings and will not be deemed a violation of 49 U.S.C. 11343 or 11910.

3. If the control application is ultimately denied, or if control is not effected, or if no application is filed, all confidential information and data exchanged by Union Pacific with Southern Pacific, or by their representatives, in preparing the application for filing and in the course of this and any related proceedings will be returned to the originating party or destroyed. However, outside counsel for a party are permitted to retain file copies of all pleadings filed with the Commission.

4. To the extent that materials reflecting the terms of contracts, shipper-specific traffic data, other traffic data or other confidential or proprietary information are produced pursuant to a request for discovery by any party to this or any related proceedings, or are submitted in pleadings, such materials must be treated as confidential. Such materials, any copies, and any data derived therefrom:

(a) Shall be designated and stamped as "CONFIDENTIAL" and shall be used solely for the purpose of this and any related proceedings, and any judicial review proceeding arising therefrom, and not for any other business, commercial or competitive purpose.

(b) Shall not be disclosed in any way or to any person without the written consent of the party producing the materials or an order of the Commission or the Administrative Law Judge presiding in this and any related proceedings, except: (i) to employees, counsel or agents of the party requesting such materials, solely for use in connection with this and any related proceedings, and any judicial review proceeding arising therefrom, provided that such employee, counsel or agent has been

given and has read a copy of this Protective Order and agrees to be bound by its terms prior to receiving access to such materials; and (ii) to any participant in this or any related proceedings who is not an employee, counsel or agent of the requesting party, only in the course of public hearings in such proceedings.

(c) If produced through discovery, must be destroyed, and notice of such destruction served on the Commission and the presiding Administrative Law Judge and the party producing the materials, at such time as the party receiving the materials withdraws from this or any related proceedings, or at the completion of this and any related proceedings and any judicial review proceeding arising therefrom, whichever comes first. However, outside counsel for a party are permitted to retain file copies of all pleadings filed with the Commission.

(d) If contained in any pleading filed with the Commission, shall, in order to be kept confidential, be filed only in pleadings submitted in a package clearly marked on the outside "Confidential Materials Subject to Protective Order." See 49 CFR 1104.14.

5. Any party producing material in discovery to another party to this or any related proceedings, or submitting material in pleadings, may in good faith designate and stamp particular material, such as material containing shipper-specific rate or cost data or other competitively sensitive information, as "HIGHLY CONFIDENTIAL -- OUTSIDE COUNSEL/OUTSIDE CONSULTANTS ONLY." If any party wishes to challenge such designation, the party may bring such matter to the attention of the Administrative Law Judge presiding in this and any related proceedings. Material that is so designated shall not be disclosed except to outside counsel or outside consultants of the party requesting such materials, solely for use in connection with this and any related proceedings, and any judicial review proceeding arising therefrom, provided that such outside counsel or outside consultants have been given and have read a copy of this Protective Order and agree to be bound by its terms prior to receiving access to such materials. Material designated as "HIGHLY CONFIDENTIAL" and produced in discovery under this provision shall be subject to all of the other provisions of this Protective Order, including without limitation paragraph 4. However, this paragraph shall not apply to exchanges of information pursuant to paragraph 1 of this Protective Order.

6. If any party intends to use "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material at hearings in this or any related proceedings, or in any judicial review proceeding arising therefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material to the Administrative Law Judge, the Commission or the reviewing court, as appropriate, under seal, and shall accompany such submission with a written request to the Administrative Law Judge, the Commission or the court to (a) restrict attendance at the hearings during discussion of such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material, and (b) restrict access to the portion of the record or briefs reflecting discussion of such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material in accordance with this Protective Order.

7. If any party intends to use "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material in the course of any deposition in this or any related proceedings, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent and all other counsel attending the deposition, and

all portions of the deposition at which any such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material is used shall be restricted to persons who may review that material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material shall be kept under seal and treated as "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material in accordance with the terms of this Protective Order.

8. To the extent that materials reflecting the terms of contracts, shipper-specific traffic data, other traffic data or other proprietary information are produced by a party in this or any related proceedings and held and used by the receiving person in compliance with paragraphs 1, 2 or 4 above, such production, disclosure and use of the materials and of the data that the materials contain are deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. 11343 or 11910.

9. All parties must comply with all of the provisions stated in this Protective Order unless good cause, as determined by the Commission, is shown by any party to warrant suspension of any of the provisions herein.

UNDERTAKING
[CONFIDENTIAL MATERIAL]

I, _____, have read the Protective Order served on _____, 1995 governing the production of confidential documents in ICC Finance Docket No. 32760, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than the preparation and presentation of evidence and argument in Finance Docket No. 32760 or any judicial review proceedings taken or filed in connection therewith. I further agree not to disclose any data or information obtained under this Protective Order to any person who is not also bound by the terms of the Order and has not executed an Undertaking in the form hereof.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that Applicants or other parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

_____

Dated:_____

UNDERTAKING

[HIGHLY CONFIDENTIAL MATERIAL]

As outside [counsel] [consultant] for _____, for which I am acting in this proceeding, I have read the Protective Order served on _____, 1995 governing the production of confidential documents in ICC Finance Docket No. 32760, understand the same, and agree to be bound by its terms. I also understand and agree that, as a condition precedent to my receiving, reviewing, or using copies of any documents designated "HIGHLY CONFIDENTIAL -- OUTSIDE COUNSEL/OUTSIDE CONSULTANTS ONLY," I will limit my use of those documents and the information they contain to this proceeding and any judicial review thereof, that I will take all necessary steps to assure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners, that at the conclusion of this proceeding, I will promptly return or destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me to counsel for the originating party, provided, however, that outside counsel may retain file copies of pleadings filed with the Commission. I further understand that I must destroy all other notes or other documents containing such highly confidential information in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated "HIGHLY CONFIDENTIAL -- OUTSIDE COUNSEL/OUTSIDE CONSULTANTS ONLY" by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that Applicants or other parties producing confidential documents

shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

_____

OUTSIDE [COUNSEL] [CONSULTANT]

Dated: _____

STB FD 32760 09-01-95 C DEC1

EC

SERVICE DATE
SEP 1 1995

INTERSTATE COMMERCE COMMISSION

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

AGENCY: Interstate Commerce Commission.

ACTION: Decision No. 1; Notice of prefiling notification and request for comments.

SUMMARY: Pursuant to 49 CFR 1180.4(b), Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR), Southern Pacific Rail Corporation (SPR), Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW)[1] have notified the Commission of their intent to file an application seeking authority under 49 U.S.C. 11343-45 for: (1) the acquisition of control of SPR by UP Acquisition Corporation (Acquisition), an indirect wholly owned subsidiary of UPC; (2) the merger of SPR into UPRR; and (3) the resulting common control of UP and SP by UPC. The Commission finds this to be a major transaction as defined in 49 CFR Part 1180. The applicants have proposed a procedural schedule, on which the Commission invites comments by interested persons.

DATES: Written comments on the proposed schedule must be filed with the Interstate Commerce Commission no later than September 18, 1995. The applicants' reply is due by September 28, 1995.

ADDRESSES: An original and 20 copies of all documents must refer to Finance Docket No. 32760 and must be sent to the Office of the Secretary, Case Control Branch, Attn: Finance Docket No. 32760, Interstate Commerce Commission, 1201 Constitution Avenue, N.W., Washington, DC 20423. In addition, one copy of all documents in this proceeding must be sent to each of the applicants' representatives: (1) Arvid E. Roach II, Esq., Covington & Burling, 1201 Pennsylvania Avenue,

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[1] UPC, UPRR, and MPRR are referred to collectively as Union Pacific. UPRR and MPRR are referred to collectively as UP.

SPR, SPT, SSW, SPCSL, and DRGW are referred to collectively as Southern Pacific. SPT, SSW, SPCSL, and DRGW are referred to collectively as SP.

UPC, UPRR, MPRR, SPR, SPT, SSW, SPCSL, and DRGW are referred to collectively as applicants or petitioners.

Applicants have petitioned for waiver or clarification of the definition of applicants so as to exclude Chicago and North Western Transportation Company (CNWT), Chicago and North Western Railway Company (CNW), and Western Railroad Properties Incorporated (WRPI), thus eliminating the necessity of their joining in the filing of the application. CNWT and CNW are scheduled to be merged into UPRR on October 1, 1995; WRPI was merged into UPRR on August 1, 1995.

N.W., P.O. Box 7566, Washington, DC 20044; and (2) Paul A. Cunningham, Esq., Harkins Cunningham, 1300 Nineteenth Street, N.W., Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT:

Beryl Gordon, (202) 927-5610.

[TDD for the hearing impaired: (202) 927-5721.]

SUPPLEMENTARY INFORMATION: In the notice of intent filed August 4, 1995, the applicants state that under an Agreement and Plan of Merger dated August 3, 1995, UPC, Acquisition, UPRR and SPR have agreed that Acquisition will acquire all of the common stock of SPR. Acquisition plans first to acquire 25% of the stock of SPR for cash in a tender offer and place that stock in a voting trust pending review of the merger by the Commission.[2] Upon the satisfaction of certain conditions, including approval of the merger by the Commission, the remainder of the SPR stock will then be acquired for a combination of UPC stock and cash, and SPR will be merged into UPRR. The UP and SP railroads will then be consolidated.

The applicants state that they will use the year 1993 for purposes of their impact analyses to be filed in the application, and that they anticipate filing their application on or before December 1, 1995. On August 11, 1995, Santa Fe Pacific Corporation and The Atchison, Topeka, and Santa Fe Railway Company (collectively, Santa Fe) filed a partial objection to the notice of intent, objecting to the use of 1993 data in this proceeding (SF-2).[3] Also on August 11, 1995, the applicants filed a modification of their notice of intent (UP/SP-5). The applicants state that, if the 1994 ICC Waybill Sample is available by September 1, 1995, they will use 1994 as the base year, and that, if it is not, they will use 1993. Consultation with the Commission's Office of Economics and Environmental Analysis (OEEA) indicates that the 1994 data will be available by September 5, 1995. That being the case, we will require the applicants to use the 1994 data. If, for some reason, the data are not available on that date, we will reconsider this issue at that time.

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[2] On August 4, 1995, the applicants filed a copy of the voting trust agreement proposed to be entered into by and between UPC, Acquisition, and Southwest Bank of St. Louis, an institutional trustee. The applicants state that they believe that Acquisition's planned purchase of 25% of the outstanding voting stock of SPR will not give UPC and its affiliates the power to exercise control of SPR and its affiliates. However, the applicants request that Commission staff issue an informal, non-binding opinion stating whether the voting trust agreement and the arrangements contained therein will effectively insulate UPC and its affiliates from any violation of the Interstate Commerce Act and Commission policy against unauthorized acquisition of control of SPR's carrier subsidiaries.

[3] Santa Fe essentially argues that, for a transaction as significant as this one, the Commission should have available the most relevant information necessary to assess changes in railroad operations and competitive impacts that will result from the proposed transaction. It is Santa Fe's position that more recent data would provide the Commission with the most relevant information, and that 1994 data will be available in ample time for use in this proceeding.

The Commission finds that this is a major transaction, as defined at 49 CFR 1180.2(a), as it is a control and merger transaction involving two or more class I railroads. The application must conform to the regulations set forth at 49 CFR Part 1180 and must contain all information required therein for major transactions, except as modified by any advance waiver. The carriers are also required to submit maps with overlays that show the existing routes of both carriers and their competitors.

By petition also filed August 4, 1995, the applicants seek a protective order to protect confidential, highly confidential, and proprietary information, including contract terms, shipper-specific traffic data, and other traffic data to be submitted in connection with the control application (UP/SP-2). A protective order will be entered in a subsequent decision.

Also on August 4, 1995, the applicants filed a petition to establish a proposed procedural schedule (UP/SP-4). The Commission seeks comments now on the applicants' proposed procedural schedule, which is as follows:

PROPOSED PROCEDURAL SCHEDULE

F	Primary application and related applications filed.
F + 30	Commission notice of acceptance of primary application and related applications published.
F + 60	Description of anticipated inconsistent and responsive applications due; petitions for waiver or clarification with regard to such applications due.
F + 90	Inconsistent and responsive applications due. All comments, protests, requests for conditions, and any other opposition evidence and arguments due. DOJ and DOT comments due.
F + 105	Notice of acceptance (if required) of inconsistent and responsive applications published in the Federal Register.
F + 120	Response to inconsistent and responsive applications due. Response to comments, protests, requested conditions, and other opposition due. Rebuttal in support of primary application and related applications due.
F + 130	Rebuttal in support of inconsistent and responsive applications due.
F + 140	Briefs due, all parties (not to exceed 50 pages).
F + 155	Oral argument.
F + 156	Voting conference.
F + 195	Date for service of final decision.

Under the applicants' proposal, immediately upon each evidentiary filing, the filing party shall place all documents relevant to the filing (other than documents that are privileged or otherwise protected from discovery) in a depository open to all parties, and shall make its witnesses available for discovery depositions. Access to documents subject to the protective order shall be appropriately restricted. Parties seeking discovery depositions may proceed by agreement. Relevant excerpts of transcripts will be received in lieu of cross-examination at the hearing, unless cross-examination is needed to resolve material

issues of disputed fact.[4] Discovery on responsive and inconsistent applications, comments, protests, and requests for conditions shall begin immediately upon their filing.

The proposed schedule is substantially similar to that adopted recently in 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 March 7, 1995) (BN/Santa Fe).

We would also like comments from the public on a variation of the proposed procedural schedule.[5] Based on our recent experience in BN/Santa Fe, we believe that parties filing inconsistent and responsive applications, comments, protests, requests for conditions, and other opposition evidence and arguments, may not need 90 days from the date the primary application is filed to prepare their submissions. We seek comments on the feasibility of parties filing descriptions of anticipated inconsistent and responsive applications, and petitions for waiver or clarification with regard to such applications, 10 days after the publication of the notice accepting the primary application. All inconsistent and responsive applications, comments, protests, requested conditions, and other opposition evidence and argument would be due 30 days after the acceptance of the primary application. Comments from the United States Department of Justice (DOJ) and the United States Department of Transportation (USDOT) would also be due on that day. The 30 days taken from the segment of time in which protesting parties would prepare their submissions would be inserted later in the schedule.

The applicants are proposing that any applications for authority for, or for exemption of, merger-related abandonments, and any supporting verified statements, be filed with the primary application, and be treated as related applications. The applicants filed, on August 4, 1995, a petition for waiver or clarification of the Railroad Consolidation Procedures, and for related relief (UP/SP-3), in which they ask for a waiver under 49 CFR 1152.24(e)(5) to permit modifications to the procedures and timetables prescribed in our rules at 49 CFR 1152.25(d)(6) and (7), and other relief, seeking to ensure that they are able to make the referenced filings pertaining to merger-related abandonments with the primary application. Consequently, the applicants desire that all opposition evidence, comments, rebuttal, and briefing on those applications be submitted under the same schedule as the primary application. We will discuss

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[4] It is not clear to what hearing the applicants are referring. Their proposed schedule provides for no evidentiary hearing, and we see no need for one at this time.

[5] On August 14, 1995, The Kansas City Southern Railway Company (KCS) filed comments on the proposed procedural schedule (KCS-1). KCS claims that the applicants have not presented any justification for expediting the schedule in this proceeding without first seeking public comments on the proposed schedule. KCS alleges that it has concerns regarding its ability to conduct discovery and sufficiently analyze the competitive concerns within the time frame applicants propose. KCS would like time to develop an alternative procedural schedule. Because we are, in fact, asking for comments regarding the applicants' proposed schedule, KCS will have the opportunity to submit further comments on the schedule in response to this notice. The applicants filed a reply to KCS's comments on the proposed procedural schedule and discovery guidelines on August 18, 1995 (UP/SP-6).

the applicants' request for relief with regard to merger-related abandonments in a subsequent decision addressing all of the requests in UP/SP-3.

The applicants also request that the Commission establish certain guidelines to govern discovery in this proceeding. The applicants note that their proposed guidelines are similar to those developed by the parties and the presiding Administrative Law Judge in BN/Santa Fe, and assert that the guidelines were central to the progress of that proceeding. In the applicants' view, the guidelines provided all of the parties in BN/Santa Fe with a fair opportunity to conduct discovery and curtailed abusive practices that had caused delays in prior control proceedings. The applicants assert that similar early establishment of discovery guidelines at the outset of this proceeding will provide guidance to all parties and will promote an efficient and orderly proceeding. The process of assigning an Administrative Law Judge (ALJ) to this proceeding is underway. While we think the BN/Santa Fe discovery guidelines worked exceedingly well, we will leave all discovery matters, including the adoption of any guidelines governing discovery initially, to the discretion of the ALJ.[6] A decision naming that judge will be issued as soon as possible.

We invite interested persons to submit written comments on the proposed procedural schedule. Comments must be filed by September 18, 1995. The applicants may reply by September 28, 1995.[7]

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[6] KCS also raises concerns about the applicants' proposed discovery guidelines in KCS-1, stating that the applicants have not established any reason why this proceeding cannot be conducted under the Commission's normal rules of discovery found at 49 CFR 1114. KCS notes that, in BN/Santa Fe, the Commission did not rule on discovery guidelines and instead deferred that decision to the ALJ. The ALJ conducted a conference where all parties could comment, and then issued discovery guidelines. KCS recommends that we follow the same procedure here, rather than simply adopting the same guidelines used in BN/Santa Fe. Because we are initially turning all discovery matters over to an ALJ, nothing more need be said regarding KCS's concerns at this time. KCS also filed a pleading in opposition to the applicants' proposed protective order (KCS-2). That pleading will be addressed in a separate decision entering the protective order.

[7] In addition to submitting an original and 20 copies of all documents filed with the Commission, the parties are encouraged to submit all pleadings and attachments as computer data contained on a 3.5-inch floppy diskette which is formatted for WordPerfect 5.1 (or formatted so that it can be converted by WordPerfect 5.1). The computer data contained on the computer diskettes submitted will be subject to the protective order to be entered shortly in this proceeding, and is for the exclusive use of Commission employees reviewing substantive matters in this proceeding. The flexibility provided by such computer file data will facilitate expedited review by the Commission and its staff.

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

Decided: August 24, 1995.

By the Commission, Chairman Morgan, Vice Chairman Owen, and Commissioners Simmons and McDonald.

(SEAL)

Vernon A. Williams
Secretary

21272
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SERVICE DATE
DEC 3 1 1996
LATE RELEASE

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. 66][2]

Decided: December 30, 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. 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. 18), Utah Railway Company--Trackage Rights Exemption--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; 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 (UPRR) and Missouri Pacific Railroad Company (MPRR) are referred to collectively as UP.

The Denver and Rio Grande Western Railroad Company)[4] subject to various conditions, including the terms of the BNSF agreement,[5] the terms of the URC agreement,[6] the new facilities and transload conditions,[7] and the build-in/build-out condition.[8] Common control was consummated on September 11, 1996.[9]

In Decision No. 61, we affirmed that the new facilities and transload conditions should be read literally: BNSF may serve any new facility (except as otherwise indicated), including but not limited to any new transload facility (even 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. See Decision No. 61, slip op. at 7.

In this decision, we address matters respecting the new facilities condition, the transload condition, and the build-in/build-out condition that have been discussed in the UTAH-7 pleading filed September 23, 1996, by URC, and in the BN/SF-72 reply filed October 15, 1996, by BNSF. We also address the matters discussed in the pleading styled "Railco, Inc.'s Reply in Support of Its Request for Clarification or Modification," filed September 23, 1996, by Railco, Inc. (Railco), and in the UP/SP-287 reply filed October 10, 1996, by UP/SP.

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

[5] 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).

[6] Utah Railway Company is referred to as URC. See also Decision No. 44, slip op. at 18-19 (description of the URC agreement).

[7] See Decision No. 44, slip op. at 145-46. Insofar as the new facilities condition concerns transload facilities, it is referred to as the transload condition. See Decision No. 61, slip op. at 2.

[8] See Decision No. 44, slip op. at 146.

[9] UPC, UP, SPR, and SP are referred to collectively as applicants. See Decision No. 44, slip op. at 7 n.3.

BACKGROUND

URC: Pre-Merger Status. Prior to the merger, URC operated in Utah on 98 miles of track between Provo and Mohrland. This consisted of 73 miles of track between Provo and Utah Railway Jct., and 25 miles of track between Utah Railway Jct. and Mohrland. See UTAH-3, V.S. West, Appendix A (maps).

The 25 miles of track between Utah Railway Jct. and Mohrland, which consisted of two segments (a 22.3-mile segment between Utah Railway Jct. and Hiawatha, and a 3.5-mile segment between Hiawatha and Mohrland), constituted URC's "proprietary" line. UTAH-6 at 8 & n.1. This proprietary line was owned and operated exclusively by URC.

The 73 miles of track between Provo and Utah Railway Jct. also consisted of two segments: a 21-mile Provo-Thistle segment; and a 52-mile Thistle-Utah Railway Jct. segment. UTAH-6 at 10. The Provo-Utah Railway Jct. line was not owned and operated exclusively by URC; rather, it constituted a part of the SP (formerly the DRGW) Central Corridor mainline. The Provo-Thistle segment consisted of two tracks, one owned by URC and one owned by SP (formerly DRGW); the Thistle-Utah Railway Jct. segment also consisted of two tracks, both owned by SP (formerly DRGW). Operations by both URC and SP on both segments were governed by a 1913 URC/DRGW Operating and Trackage Agreement (the 1913 URC/DRGW Agreement), see UTAH-3, V.S. Barker, Appendix A, that has created what URC refers to as "an intertwined ownership and trackage rights relationship with SP," UTAH-7 at 3. URC claims that its and SP's "ownerships and cross-rights [in the two segments] are purposely intertwined and made inseparable without the written consent of each party." UTAH-6 at 4.[10]

URC: Rights Received In Connection With The Merger. The BNSF agreement entered into on September 25, 1995, included extensive grants of trackage rights by UP/SP to BNSF. The trackage rights lines included, among others, the Provo-Utah Railway Jct. line. The terms of the 1913 URC/DRGW Agreement, however, apparently created some doubt respecting UP/SP's ability to grant such trackage rights to BNSF without URC's consent; and, to resolve this matter, UP/SP and URC entered

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[10] See also Rio Grande Industries, et al.--Control--SPT Co., et al., 4 I.C.C.2d 834, 927-28 (1988) (DRGW/SP) (noting, among other things, that URC's trackage rights over the then DRGW-owned Provo-Thistle track and the then DRGW-owned Thistle-Utah Railway Jct. segment were overhead rights that did not allow URC to originate traffic at any DRGW points).

into a settlement agreement (referred to as the URC agreement) under which: (i) URC authorized UP/SP to grant BNSF the right to use the Provo-Utah Railway Jct. line; and (ii) UP/SP granted to URC *both* access to additional coal sources *and* certain overhead trackage rights. Decision No. 44, slip op. at 18-19. The access to the additional coal sources provided by the URC agreement consisted of: rights in common with UP/SP to serve the Savage Coal Terminal coal loading facility on the CV Spur near Price, UT;[11] and exclusive rights to serve the Cyprus Amax Willow Creek mine adjacent to the SP mainline near Castle Gate, UT.[12] The overhead trackage rights received by URC under the URC agreement run approximately 179 miles between Utah Railway Jct. and Grand Junction, CO. UTAH-5 at 4-5; UTAH-7, V.S. West at 2.

In addition to the rights provided for by the URC agreement, URC also received, in merger-related agreements entered into outside the scope of the URC agreement: rights to serve a solid waste transload facility to be operated by East Carbon Development Company/Laidlaw (ECDC) on the CV Spur near the Savage Coal facility;[13] and rights to serve the Moroni Feed Transfer (MFT) facility at Spanish Fork near Provo, UT.[14] UTAH-5, V.S. Blaydon at 5.[15]

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[11] The Savage Coal facility is not located on the Provo-Utah Railway Jct. line.

[12] The Willow Creek mine is located on the Provo-Utah Railway Jct. line. The Willow Creek mine is apparently a new mine. See UTAH-6 at 16 (URC indicates that it will have access to "a significant new coal loading facility to be created by Cyprus Amax") and at 24 (URC indicates that it will have access to "the important new facility now being built for the Cyprus Amax Willow Creek Mine with a projected annual output of 5 million tons by mid-1998").

[13] The ECDC facility is not located on the Provo-Utah Railway Jct. line.

[14] The MFT facility is not located on the Provo-Utah Railway Jct. line.

[15] URC contends that these rights transformed the status of MFT and ECDC from 1-to-1 to 2-to-1. UTAH-7 at 4. URC apparently means to say: (i) that UP/SP had previously argued that MFT and ECDC were 1-to-1 shippers and therefore would not be adversely affected by the merger; but (ii) that the merger-related agreements opening these shippers to URC amounted to an implicit concession by UP/SP that these shippers were really 2-to-1 shippers that would have been adversely affected by the merger had not relief, in the form of URC access, been arranged. URC indicates that although each of these shippers was exclusively served, prior to the merger, by a single carrier (either UP or SP), each had claimed 2-to-1 status by virtue of the fact that it had other facilities located on the other carrier (SP or UP, respectively). UTAH-7 at 4 n.1.

URC's Grievance. URC contends that, in Decision No. 44, we effected an "inadvertent dilution," UTAH-7, V.S. West at 1, of URC's rights[16] when we extended the scope of the BNSF and CMA agreements.[17] (1) CMA Paragraph 2 had provided that the BNSF agreement would be amended to grant BNSF the right to serve new shipper facilities on SP-owned lines over which BNSF received trackage rights, but had further provided that this right would not apply to load-outs or transload facilities. In Decision No. 44, we extended CMA Paragraph 2 by requiring, among other things, that the term "new facilities" include transload facilities, including those owned or operated by BNSF. Decision No. 44, slip op. at 145-46. See also Decision No. 61 (affirming this aspect of Decision No. 44). (2) CMA Paragraph 13 had provided that CMA members solely served either by UP or by SP would receive certain build-in/build-out rights. In Decision No. 44, we extended CMA Paragraph 13 to all shippers (not just CMA members), which necessarily includes shippers located in the Central Corridor. Decision No. 44, slip op. at 146 (our build-in/build-out condition).

Relief Sought By URC. (1) *Transload Condition*. URC asks, in essence, that we clarify the transload condition as sought by UP/SP in the UP/SP-275 petition, and make clear that a BNSF transload facility located on the Provo-Utah Railway Jct. line can serve only shippers located on a UP line. See Decision No. 61, slip op. at 3-4 (description of the transload clarification sought in the UP/SP-275 petition). URC adds, however, that, in view of the 1913 URC/DRGW Agreement, there would still be a question whether BNSF could serve a transload facility located on the Provo-Utah Railway Jct. line; and, in any event, the clarification sought by URC in the next paragraph would effectively moot the matter discussed in this paragraph.

(2) *New Facilities Condition*. URC asks that we clarify that the new facilities condition does not authorize BNSF to serve new facilities located on the Provo-Utah Railway Jct. line. The new facilities condition, URC suggests, applies to UP/SP lines over which trackage rights have been granted to BNSF by UP/SP; it does

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[16] URC, citing both the URC agreement and the agreements entered into with respect to MFT and ECDC, insists that it had "extended its reach and broadened [its] shipper access" *before* we issued Decision No. 44. UTAH-7 at 4.

[17] The Chemical Manufacturers Association is referred to as CMA. See also Decision No. 44, slip op. at 18 (description of the CMA agreement).

not apply to an SP/URC line over which trackage rights have been granted to BNSF by URC.[18]

(3) *Specific Shipper Access*. URC notes that, under the URC agreement, it received the exclusive right to serve the Willow Creek mine, and that, in additional agreements not made part of the URC agreement, it received the right to serve both the MFT facility and the ECDC facility. URC contends that the agreements referred to in the preceding sentence "protect and insulate UTAH's rights from BNSF/CMA access." UTAH-7 at 6. These agreements, URC claims, will not interfere with the UP/SP merger, and thus, URC hints, these agreements cannot be overridden under 49 U.S.C. 11341(a); and therefore, URC apparently means to say, we cannot authorize BNSF to access these shippers. URC adds that our rationale for imposing the CMA-enhanced BNSF agreement is not applicable to MFT and ECDC (which URC considers to be 2-to-1 shippers); BNSF access to these shippers, URC maintains, is not required to provide an effective replacement for a no-longer independent SP.

Alternative Relief Sought By URC. URC suggests that, if we choose to make BNSF's trackage rights on the Provo-Utah Railway Jct. line "subject to CMA enhancement," we should similarly make URC's rights subject to CMA enhancement *both* on the Provo-Utah Railway Jct. line previously operated over by URC *and* on the Utah Railway Jct.-Grand Junction line opened up to URC under the URC agreement. UTAH-7 at 7; see also UTAH-7, V.S. West at 2-3. URC claims that this balancing approach would be equitable and logical, but adds that it continues to believe (and it apparently asks us to declare) that, even if URC's rights are made subject to CMA enhancement, BNSF still should not have access to the Willow Creek mine, the MFT facility, and the ECDC facility.

Railco. Railco, like Savage Coal, owns and operates a coal loadout facility on the CV Spur; the Railco facility is located in the immediate vicinity of the Savage Coal facility; and, at the two facilities, coal hauled by truck from coal producers in Carbon and Emery Counties is loaded on trains for shipment by rail to coal purchasers. Prior to the merger, both facilities

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[18] In the URC agreement, at Paragraph 3, URC "authorize[d] UP/SP to grant BN/Santa Fe the right to use, in common with UTAH and UP/SP and subject to the November 1, 1913 Agreement, the trackage of UTAH covered by the November 1, 1913 Agreement." Although a literal reading of URC Paragraph 3 would tend to indicate that BNSF's Provo-Utah Railway Jct. trackage rights were granted by UP/SP, URC claims that it was URC that "granted BNSF trackage rights" on URC's property. UTAH-7 at 5.

were rail-served exclusively by SP. In connection with the merger, however, URC obtained, in the URC agreement, access to the Savage Coal facility, but not to the Railco facility. Therefore, post-merger, Savage Coal now has access to two rail carriers (UP/SP and URC), but Railco has access only to one (UP/SP). Railco, which fears that it will be competitively disadvantaged by its lack of access to URC, asks that the URC agreement be clarified or amended to require that URC be granted the same access to the Railco facility that it has already been granted to the Savage Coal facility.

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 proceeding may be reopened 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).

UTAH RAILWAY COMPANY. The UTAH-7 pleading, styled "Response of Utah Railway Company to Applicants' and BNSF's Petitions for Clarification," referred to the UP/SP-275 petition and the BN/SF-65 petition. In the UP/SP-275 petition, which we addressed in Decision No. 61, UP/SP sought clarification or reconsideration of the new facilities condition and the transload condition. In the BN/SF-65 petition, which we addressed in Decision No. 57, BNSF sought clarification of the contract modification condition. Although the UTAH-7 pleading expresses support for the clarification sought in the UP/SP-275 petition as respects the transload condition, the UTAH-7 pleading is, as a practical matter, a petition in its own right seeking relief premised upon an entirely new argument respecting our authority to impose the new facilities, transload, and build-in/build-out conditions. We

will therefore treat the UTAH-7 pleading as if it were a petition for clarification or reopening.[19]

URC's Jurisdictional Argument. URC argues, in essence: (i) that we lack the authority to authorize BNSF to serve new facilities (including transload facilities) on the Provo-Utah Railway Jct. line; (ii) that we lack the authority to authorize BNSF to serve new build-in/build-out lines that may connect with the Provo-Utah Railway Jct. line; and (iii) that we lack the authority to allow BNSF the opportunity to access traffic moving from/to the Willow Creek mine, the MFT facility, and the ECDC facility.

The Three Specified Shippers. Insofar as the UTAH-7 pleading seeks clarification or reopening respecting the three specified shippers, URC's request will be denied.

We have not explicitly authorized BNSF to access traffic moving from/to the Willow Creek mine, the MFT facility, or the ECDC facility. BNSF, however, may be able to access such traffic via new facilities (and, in particular, new transload facilities) established on the Provo-Utah Railway Jct. line under the auspices of the new facilities and transload conditions. BNSF *may* also be able to access traffic moving from/to the Willow Creek mine and the ECDC facility via new facilities (and, in particular, new transload facilities) established on the Utah Railway Jct.-Grand Junction line under the auspices of the new facilities and transload conditions.[20] BNSF may also be

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[19] Petitions seeking reconsideration of Decision No. 44 were due September 3, 1996. Thus, we will treat the UTAH-7 pleading as if it were a petition for clarification or reopening.

[20] We note that, with reference to the Willow Creek mine, we are not saying that BNSF *will* be able to access such traffic, only that BNSF *may* be able to access such traffic, via facilities established under the auspices of such conditions. Cf. Decision No. 61, slip op. at 12 (noting, under the transload condition, BNSF will be allowed to access exclusively served shippers only by a legitimate transload operation, which 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). We realize that the Willow Creek mine is exclusively served by URC and not by UP/SP, but we wish to make clear that, as with shippers exclusively served by UP/SP, BNSF, if it acts under the auspices of the transload condition, can access this mine only via a legitimate transload operation.

able to access the MFT facility via a connection constructed under the auspices of the build-in/build-out condition.[21]

URC contends, in essence, that even assuming that we have the authority to impose the new facilities condition, the transload condition, and the build-in/build-out condition on the Provo-Utah Railway Jct. line and on the Utah Railway Jct.-Grand Junction line, we still have no authority to allow BNSF to access, via facilities established or connections constructed under the auspices of such conditions, traffic moving from/to the Willow Creek mine, the MFT facility, and the ECDC facility. We disagree. We think that we have, under the conditioning power provided by 49 U.S.C. 11344(c), ample authority to impose these conditions on these lines, and to allow BNSF to handle all traffic moving through facilities established under the auspices of the new facilities and transload conditions or moving over connections constructed under the auspices of the build-in/build-out condition.

What URC is really arguing is that we are violating its "rights" by allowing BNSF to access, via facilities established or connections constructed under the auspices of these conditions, traffic moving from/to the Willow Creek mine, the MFT facility, and the ECDC facility. For various reasons, we disagree. (1) URC's rights vis-à-vis these shippers are derived from the contracts it entered into with UP/SP in anticipation of our approval of the merger. We reject URC's implicit argument that merger applicants, by contracts entered into with third parties in connection with a pending merger, can restrict the scope of the conditioning power conferred upon this Board by 49 U.S.C. 11344(c) (now 49 U.S.C. 11324(c)). (2) URC's contract-derived rights vis-à-vis the MFT and ECDC facilities allow URC to exclude other railroads (except UP/SP) from direct rail access to these facilities, and URC's contract-derived rights vis-à-vis the Willow Creek mine allow URC to exclude all other railroads (UP/SP included) from direct rail access to this mine. We have not violated URC's contract-derived rights vis-à-vis these shippers: (a) because BNSF will not have, under the auspices of the transload condition, direct rail access to these shippers; (b) because BNSF will not have, under the auspices of the new facilities condition, direct rail access to any facilities

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[21] BNSF will not be able to access the Willow Creek mine or the ECDC facility via connections constructed under the auspices of the build-in/build-out condition. That condition applies only if 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).

currently operated by these shippers; and (c) because BNSF will not have, under the auspices of the build-in/build-out condition, direct rail access to the MFT facility via a connection constructed by UP/SP.[22]

New Facilities and Transload Conditions: Applicability to The SP-Owned Provo-Thistle Track and the SP-Owned Thistle-Utah Railway Jct. Segment. We will not interpret the applicability of the new facilities and transload conditions to the Provo-Thistle track owned by SP and the Thistle-Utah Railway Jct. segment owned by SP in the manner requested by URC.

We will assume, for present purposes only, that, under the terms of the 1913 URC/DRGW Agreement, UP/SP can admit another railroad to the SP-owned Provo-Thistle track and to the SP-owned Thistle-Utah Railway Jct. segment only with the consent of URC.[23] We will further assume, for present purposes only, that, under the terms of the URC agreement negotiated in anticipation of the UP/SP merger, this consent was forthcoming only as respects the overhead (not local) trackage rights that UP/SP intended to grant to BNSF.[24] We are therefore assuming, in essence, that, under the terms of the 1913 URC/DRGW Agreement, UP/SP, acting on its own initiative and without URC's consent,

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[22] Even if our conditions could be deemed to contravene URC's contract rights, those rights have been preempted under 49 U.S.C. 11341(a). See Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117 (1991) (Dispatchers).

URC has not explicitly argued that we lack the authority to allow BNSF the opportunity to access traffic moving from/to the Savage Coal facility, but its arguments about the ECDC facility are equally applicable to the Savage Coal facility. Our analysis of the ECDC facility is also equally applicable to the Savage Coal facility.

[23] See the 1913 URC/DRGW Agreement at 22-23 ("neither party hereto shall have the right to sell, assign, transfer, set over or convey to any other railroad company any interest in this agreement or any right, privilege or benefit arising under or by virtue of this agreement, without the written consent thereto of the other party hereto").

[24] See the URC agreement, Paragraph 3 ("UTAH hereby authorizes UP/SP to grant BN/Santa Fe the right to use, in common with UTAH and UP/SP and subject to the November 1, 1913 Agreement, the trackage of UTAH covered by the November 1, 1913 Agreement, subject to the entry of a Final Order [of the Surface Transportation Board, etc.]."). Although this authorization is worded broadly, it is preceded by a reference to the first two versions of the BNSF agreement (the versions dated September 25, 1995, and November 18, 1995). Because these two versions indicated that BNSF would have only overhead trackage rights on the Provo-Utah Railway Jct. line, it is at least arguable that, in URC Paragraph 3, URC authorized UP/SP to grant BNSF only overhead (and not local) trackage rights on that line.

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

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

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

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

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

JAMES A. SMAIL
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 NORTH STETSON AVENUE-45TH FLOOR
CHICAGO IL 60601 US

THOMAS J. LITWILER
OPPENHEIMER WOLFF ETAL
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
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

HON IKE SKELTON
U. S. HOUSE OF REP.
514 B N W 7 HIGHWAY
BLUE 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
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

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

[redacted] 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 SANTA FE CORPORATION
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 SANTA FE CORPORATION
777 MAIN STREET, 3800 CONTINENTAL PLAZA
FT 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

[redacted] 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

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

[redacted] 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

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

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

[redacted] 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

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

JEFFREY B. GROY
ONE UTAH CTR
201 SOUTH MAIN STREET, STE 1100
SALT LAKE CITY UT 84111 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
2802 HOLIDAY RANCH ROAD
PARK CITY UT 84060-6842 US

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

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

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

[illegible]ETTE 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

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

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

GARY A. LAAKSO
SOUTHERN PACIFIC TRANSPORTATION COMPANY
ONE MARKET PLAZA, SOUTHERN PACIFIC BLDG
SAN FRANCISCO CA 94105 US

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

[redacted]RY 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
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

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

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: 494

could not have allowed BNSF to serve new facilities (including new transload facilities) located either on the SP-owned Provo-Thistle track or on the SP-owned Thistle-Utah Railway Jct. segment.

We have said that the immunity provision can effect an override of a consent requirement in a joint facility agreement as "necessary" to implement a transaction (49 U.S.C. 11341(a)), but that an override cannot be considered "necessary" if a terminal trackage rights remedy is available to achieve the same result under 49 U.S.C. 11103(a). See Decision No. 44, slip op. at 170. In the circumstances applicable to the SP-owned Provo-Thistle track and the SP-owned Thistle-Utah Railway Jct. segment, a terminal trackage rights remedy is not available because we find that a 73-mile line in the mountains of Utah cannot possibly be, in its entirety, a "terminal facilit[y]" within the meaning of 49 U.S.C. 11103(a). An override of the URC consent requirement is therefore necessary,[25] and is hereby effected under 49 U.S.C. 11341(a). See Decision No. 44, slip op. at 170 n.217.

New Facilities and Transload Conditions: Applicability to The Provo-Thistle Track Owned By URC. Insofar as the UTAH-7 pleading seeks clarification respecting the applicability of the new facilities and transload conditions to the Provo-Thistle track owned by URC, URC's request will be granted.

As with the SP-owned Provo-Thistle track and the SP-owned Thistle-Utah Railway Jct. segment, we assume that, under the terms of the 1913 URC/DRGW Agreement, UP/SP can admit another railroad to the URC-owned Provo-Thistle track only with the consent of URC. There is, however, a crucial difference. With respect to the SP-owned Provo-Thistle track and the SP-owned Thistle-Utah Railway Jct. segment, on the one hand, URC's veto power vis-à-vis UP/SP is derived from the 1913 URC/DRGW Agreement, and URC's rights vis-à-vis UP/SP are therefore rooted in contract. With respect to the URC-owned Provo-Thistle track, on the other hand, URC's veto power vis-à-vis UP/SP may be reflected in the 1913 URC/DRGW Agreement but is ultimately derived from URC's ownership of, or easement in, the underlying real estate. We do not think that an override of these interests in the URC-owned Provo-Thistle track is "necessary" under

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[25] The override is necessary if the new facilities and transload conditions are to fulfill, on the Provo-Utah Railway Jct. line, the purposes they were intended to serve. See Decision No. 44, slip op. at 106 (explanation of the purposes served by these conditions).

49 U.S.C. 11341(a). The new facilities and transload 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. Decision No. 44, slip op. at 106. The two purposes served by the new facilities and transload conditions are adequately served, with respect to the Provo-Thistle segment of the Provo-Utah Railway Jct. line, by BNSF's rights vis-à-vis new facilities (including new transload facilities) established on the Provo-Thistle track owned by SP. Thus, the new facilities and transload conditions will not apply to the Provo-Thistle track owned by URC.

Build-In/Build-Out Condition. Insofar as the UTAH-7 pleading seeks clarification respecting the applicability of the build-in/build-out condition to the Provo-Utah Railway Jct. line, URC's request will be granted in part and denied in part. As with the new facilities and transload conditions and for essentially the same reasons, the build-in/build-out condition: (i) applies both to the Provo-Thistle track owned by SP and to the Thistle-Utah Railway Jct. segment owned by SP; but (ii) does not apply to the Provo-Thistle track owned by URC.

Build-In/Build-Out Condition: Additional Clarification. Both URC and BNSF are under certain misimpressions concerning the reach of the build-in/build-out condition. URC has suggested that the build-in/build-out condition might be applicable to a new facility constructed on the Provo-Utah Railway Jct. line. See UTAH-7, V.S. West at 2 (URC fears that, under "the build-in and build-out conditions for transloading . . . ECDC could choose to locate a new facility somewhere along the SP mainline where both UTAH and BNSF have trackage rights but only BNSF would have the option to build-in or build-out," which, URC fears, would leave URC at a competitive disadvantage). URC's concerns in this regard implicate the new facilities condition and the transload condition, not the build-in/build-out condition. The build-in/build-out condition has no relevance to a facility to which BNSF will have direct rail access even without a build-in or a build-out.

BNSF has suggested that the build-in/build-out condition will allow BNSF to serve build-ins/build-outs linking the Provo-Utah Railway Jct. line with any shipper located nearby that, prior to the merger, had the option of building out to SP. See BN/SF-72 at 6 (lines 8-14). This suggestion is accurate only if the hypothetical nearby shipper is located on a UP line and,

prior to the merger, was solely served by UP (and only if the connection with BNSF will be at a point on the SP-owned Provo-Thistle track or the SP-owned Thistle-Utah Railway Jct. segment). CMA Paragraph 13, from which our own build-in/build-out condition is derived, 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, not just CMA members; 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. Decision No. 44, slip op. at 146; Decision No. 61, slip op. at 13-14 (¶ 5). But neither CMA Paragraph 13 nor our build-in/build-out condition applies to a shipper that, prior to the merger, was not located on any rail line.

RAILCO. Although the Railco pleading filed September 23rd is styled a "reply" and purports to be in support of a previously filed request, it is, for all practical purposes, a petition seeking relief that had not previously been requested in a formal pleading. We will therefore treat the Railco pleading as if it had been designated by Railco as a petition for clarification. The relief sought will be denied both on procedural grounds and on the merits.[26]

Procedural Aspects. Railco did not properly seek, in the evidentiary phase of this proceeding, the relief it seeks now, and its pleading was filed several weeks after the applicable deadline for petitions for reconsideration. The relief sought should therefore be denied on procedural grounds alone. (1) In the evidentiary phase, Railco, though it indicated that it opposed the merger, did not seek any specific protective conditions. See Railco's "Notice Of Opposition To Merger And Intent To Participate In Proceedings," dated March 21, 1996. In Decision No. 44, we noted that the merger had been opposed by numerous parties (Railco was but one of many) not specifically mentioned in that decision, see Decision No. 44, slip op. at 11 (last paragraph); and no further discussion with respect to Railco was then required. (2) After our voting conference but before we issued Decision No. 44, Railco requested, by letter dated July 29, 1996, the relief it seeks now. We indicated, in

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[26] We will grant Railco's request, filed October 15, 1996, for a waiver of the otherwise applicable service requirements. Aside from UP/SP, BNSF, and URC, other parties on the service list are not likely to have any interest in the matters raised by Railco.

Decision No. 44, that several parties had submitted post-voting conference requests seeking clarification of determinations made at the conference, but we noted that nothing in the procedural schedule, our regulations, or our precedents authorized parties to submit such requests. We therefore indicated that we would not address the clarification requests that had previously been submitted, and we noted that parties would have to await our written decision before seeking clarification or other forms of appellate relief. See Decision No. 44, slip op. at 13 n.18. (3) After we issued Decision No. 44, Railco requested, by letter dated August 21, 1996 (to which was attached a copy of its letter dated July 29, 1996), "written confirmation" that the merger would not affect Railco's access to coal markets. Railco's August 21st letter would have been timely filed had it been a petition; but it was merely an item of correspondence, and we treated it as such. (4) Finally, by pleading filed September 23rd, Railco sought reconsideration or clarification of Decision No. 44. The due date for seeking such relief, however, was September 3, 1996. See 49 CFR 1115.3(e).

The Merits. The relief sought would be denied even if we were to reach the merits. We realize that the URC agreement, by providing an increased rail option for one shipper but not for another, may disadvantage the one for whom the increased option has not been provided. That, however, is not the kind of harm that should be rectified under the 49 U.S.C. 11344(c) conditioning power, which was not used by the ICC and will not be used by us to equalize rates and service among competing shippers. Railco is not concerned that it is losing a transportation option, but only that its competitor is gaining one. Given this context, a requirement that a settlement agreement be changed to improve the competitive situation of a particular shipper is not proper. See Decision No. 44, slip op. at 183 (Montana Wheat and Barley Committee, Montana Farmers Union, and Governor Racicot), 189-90 (Formosa Plastics Corporation), 191 (International Paper Company and United States Gypsum Company), and 193 (Weyerhaeuser Company). 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 Aug. 23, 1995) (Decision No. 38, slip op. at 99) (Bunge Corporation).

Misrepresentation Allegation. In pleadings filed in the evidentiary phase of this proceeding, URC stated that the Savage Coal facility was "the only public [i.e., not controlled by a producer] truck transfer unit train facility" in the region.

UTAH-5, V.S. Blaydon at 9-10 (footnote omitted); UTAH-6 at 24. Railco insists that it is independently owned and not directly affiliated with any coal producer, and that its loadout facility is therefore as "independent" as Savage Coal's; and Railco therefore maintains that the referenced statements were false. The dispute apparently centers around the proper meaning, in this context, of the word "public," but we see no need to resolve it. The URC statements, which were not cited in Decision No. 44, were not material to the matters at issue in this proceeding. We would have imposed the terms of the URC agreement as a condition, and denied the condition request embraced in Railco's September 23rd pleading, even if URC had indicated that the Savage Coal facility was one of two public truck transfer unit train facilities in the immediate vicinity (and even if the condition request embraced in Railco's September 23rd pleading had been requested in a timely fashion during the evidentiary phase).

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

It is ordered:

1. Treating the UTAH-7 pleading as a petition for clarification or reopening, the petition is granted in part and denied in part, as indicated in this decision.

2. The new facilities condition, the transload condition, and the build-in/build-out condition are clarified as indicated in this decision.

3. Railco's request for a waiver of the otherwise applicable service requirement is granted.

4. The relief sought by Railco is denied because its pleading was untimely, and because its arguments are without merit.

5. This decision shall be effective on December 31, 1996.

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

Vernon A. Williams
Secretary

SERVICE LIST FOR: 12/31/1996 ICC FD 32760 0 .UNION PACIFIC CORPORATION, UNION PAC

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

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

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

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

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

TERRENCE D. JONES
KELLER AND 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

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

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

DEBRA L. WILLEN
GUERRIERI, EDMOND, ETAL
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

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

FREDERIC L. WOOD
DONELAN, CLEARY, ET. AL
1100 NEW YORK AVE NW STE 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

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

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

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

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

LAURENCE R. LATOURETTE
PRESTON GATES ELLIS ETAL
1735 NY AVE NW SUITE 500
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

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

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

JOHN V. EDWARDS, ESQ
ZUCKERT, SCOUTT ET AL.
888 17TH STREET N W STE 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

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

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

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

LINDA S. STEIN
STEPTOE & JOHNSON
1330 CONNECTICUT AVE NW
WASHINGTON DC 20036 US

LINDA S. STEIN
STEPTOE & JOHNSON
1330 CONNECTICUT AVE NW
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

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

[redacted] 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

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

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

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

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

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

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

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

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

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

HON. DON NICKLES
UNITED STATES SENATE

WASHINGTON DC 20510 US

HON. JAN MEYERS
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

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

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 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

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

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

HON. MICHAEL OXLEY
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 RONALD V. DELLUMS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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

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

HON JOHN P. MURTHA
HOUSE OF REPRESENTATIVES

WASHINGTON DC 20515 US

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

HONORABLE DANA ROHRABACHER
US HSE OF REPRESENTATIVES
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 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

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

SHEILA JACKSON-LEE
U. S. 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

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

HON. HAROLD E. FORD
US HSE 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

HONORABLE JULIAN DIXON
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JAY DICKEY
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

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. JOE BARTON
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

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

HONORABLE BOB CLEMENT
US 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

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. HENRY B. GONZALEZ
HOUSE OF REPRESENTATIVES

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

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EB

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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. 60][2]

Decided: November 15, 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 pending before the Interstate Commerce Commission (ICC) 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 Railroad Company (UPRR) and Missouri Pacific Railroad Company (MPRR) are referred to collectively as UP.

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

[5] Southern Pacific Rail Corporation (SPR) was merged with and into UP Holding Company, Inc., a direct wholly owned subsidiary of Union Pacific Corporation (UPC). See UP/SP-277

(continued...)

In this decision, we address the matters discussed: (i) by Mr. Charles W. Downey in his CWD-3 petition to reopen filed September 3, 1996; and (ii) by UP/SP in its UP/SP-282 reply filed September 23, 1996.

BACKGROUND

We noted, in Decision No. 44, that the settlement agreements entered into by UP/SP included one entered into with Gateway Western Railway Company (GWWR). Decision No. 44, slip op. at 9 & n.8. We also noted that Mr. Downey, a general chairman of the United Transportation Union (UTU) for lines of GWWR and SPCSL, had argued: that the agreement entered into with GWWR would alter the work arrangements applicable to GWWR and SPCSL operations, and impair the rights of persons employed by GWWR and SPCSL in the Chicago-St. Louis territory of the former Chicago, Missouri & Western Railway Company (CMW); and that fairness to employees of both GWWR and SPCSL required that an implementing agreement be arrived at for the GWWR agreement prior to consummation of the UP/SP merger, and that the GWWR agreement be subject to the full reach of the New York Dock conditions.[6] Decision No. 44, slip op. at 88. In denying Mr. Downey's requests, we explained: that the arrangements provided for in the GWWR agreement did not require our approval, which necessarily meant that there was no basis for imposing labor protection with respect to GWWR employees; and that the New York Dock conditions we had imposed upon the UP/SP merger itself would adequately protect SPCSL employees from any merger-related adverse impacts. Decision No. 44, slip op. at 175.

The CWD-3 Petition. Mr. Downey advances two arguments in his CWD-3 petition.[7]

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[5](...continued)
at 1. UPC, UP, SPR, and SP are referred to collectively as applicants. See Decision No. 44, slip op. at 7 n.3.

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

[7] Mr. Downey also contends that the Board's Secretary has denied him access to the transcript of the oral argument we held on July 1, 1996, and has advised him that the transcript can be purchased from the reporter. He maintains that this practice is contrary to the availability mandated by the Administrative Procedure Act and has prejudiced him in the preparation of his petition. CWD-3 at 3 n.3. Mr. Downey, however, has not been denied access to the oral argument paper transcript. In fact, the Secretary's Office has allowed Mr. Downey's counsel, Mr. Gordon MacDougall, to inspect the paper transcript. As we explained in Expedited Procedures For Processing Rail Rate Reasonableness, Exemption And Revocation Proceedings, STB Ex Parte No. 527 (STB served Nov. 15, 1996), slip op. at 4,

> the Board's contract with the court reporter prohibits the copying of the draft or final paper transcript. . . . The individual can inspect, but not copy, the transcript at the Board; alternatively, the individual can purchase the transcript from the court reporter. Finally, individuals may obtain for free a copy of the microfilm version of the transcript when it becomes available.

(continued...)

(1) Mr. Downey contends that *all* employees affected by the transaction, including those employed by carriers that entered into settlement agreements with applicants, should be protected. CWD-3 at 2. Mr. Downey concedes that the GWWR agreement, standing alone, may be non-jurisdictional; he notes, however, that the GWWR agreement was intended to facilitate the UP/SP merger, and that accordingly we should impose the New York Dock conditions to protect any employees affected by the settlement between UP/SP and GWWR.

(2) Mr. Downey contends that our approval of the merger rests partially upon our "finding" that railroad competition has thrived despite the mergers of the past decade and a half, "with the average rate per ton declining more than 37% from 1981 through 1993." CWD-3 at 2, citing Decision No. 44, slip op. at 104 & n.99, 119, and 245. Mr. Downey argues that the 1995 staff study we cited in Decision No. 44[8] has never been formally "announced" either by the ICC or by the Board. Furthermore, Mr. Downey insists that rail rates have not declined over the past decade and a half. Mr. Downey argues that rail rates have increased 44% between 1980 and 1991. Mr. Downey therefore urges that we find the 1995 staff study to be invalid and that we disclaim reliance upon declining rail rates.

The UP/SP-282 Reply. UP/SP insists that Mr. Downey has offered no basis for imposing either mandatory or discretionary labor protective conditions on the GWWR agreement. The fact that the GWWR agreement might have "facilitated" the UP/SP merger, UP/SP contends, is not enough; our merger jurisdiction does not extend to a settlement that merely "facilitates" a merger; and this particular settlement, UP/SP adds, does not come within our pooling jurisdiction (see 49 U.S.C. 11342). The general rule, UP/SP notes, is that labor protection is not provided to employees of a non-applicant carrier. UP/SP concedes that an exception to this rule applies where the non-applicant employees qualify as "joint employees" of an applicant carrier and a non-applicant carrier, which they argue is not the situation here. With respect to Mr. Downey's claim that rail rates have increased over the past decade and a half, UP/SP contends, first, that our rejection of Mr. Downey's request for labor protection had nothing at all to do with that issue. And UP/SP insists

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[7](...continued)
The transcript referred to by Mr. Downey is the "raw" version, not the final official transcript. When the Board receives the final official transcript from the reporter, that document will be placed in the public docket and be available on microfilm. See also 49 CFR 1001.1 (1995) (transcripts and other files and records in the custody of the Secretary are available to the public and may be inspected at our Washington office upon reasonable request during business hours); 49 CFR 1002.1(h) (1995) (transcript of testimony and of oral argument, or extracts therefrom, may be purchased by the public from the official reporter); 49 CFR 1113.17(d) (1995) (free copies of the transcript will not be furnished to any party to any proceeding); and Expedited Procedures For Processing Rail Rate Reasonableness, Exemption And Revocation Proceedings, STB Ex Parte No. 527 (STB served Oct. 1, 1996), slip op. at 2 n.3.

[8] ICC, Office of Economic and Environmental Analysis, Rail Rates Continue Multi-Year Decline, 1995 (herein referred to as the 1995 staff study). See Decision No. 44, slip op. at 104 n.99. See also CWD-3, Appendix 1 (a copy of this 2-page study).

that, in any event, our finding that rail rates have fallen since 1980 is correct and is confirmed by all reliable studies. See UP/SP-282 at 5-8.[9]

DISCUSSION AND CONCLUSIONS

Applicable Standards. 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). Mr. Downey has neither presented new evidence nor alleged substantially changed circumstances; and his petition therefore rests upon an assertion of material error. We did not err as claimed by Mr. Downey, and we are therefore denying his CWD-3 petition.

Protective Conditions. We addressed this aspect of Mr. Downey's argument in our prior decision. See Decision No. 44, slip op. at 175 (footnote omitted): "The arrangements provided for in the GWWR agreement are non-jurisdictional, which necessarily means that there is no basis for imposing labor protection with respect to GWWR employees; and the New York Dock conditions will adequately protect SPCSL employees from any merger-related adverse impacts." See also Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control--Chicago and North Western Transportation Company and Chicago and North Western Railway Company, Finance Docket No. 32133, Decision No. 25 (ICC served Mar. 7, 1995) (UP/CNW) (slip op. at 96) ("Protection for employees of carriers other than the primary applicants is unwarranted, because labor protective conditions are designed to protect only employees of railroads participating in transactions."). See also Rio Grande Industries, et al.--Control--SPT Co., et al., 4 I.C.C.2d 834, 955 (1988) (DRGW/SP) ("Labor protection conditions are designed to protect only employees of railroads participating in transactions.").

We are not persuaded by the various arguments advanced by Mr. Downey in support of an extension of labor protection to GWWR employees.

(i) Mr. Downey notes that the UP/SP merger itself requires our approval (i.e., is "jurisdictional"), and he insists that the GWWR agreement has facilitated the UP/SP merger. We may assume,

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[9] We will deny Mr. Downey's CWD-4 motion to strike portions of the UP/SP-282 reply. Mr. Downey contends that UP/SP has mischaracterized his arguments, but this contention, whether true or false, is of no consequence because our denial of the CWD-3 petition does not turn upon the alleged mischaracterizations; rather, we are denying the CWD-3 petition because the arrangements provided for in the GWWR agreement are non-jurisdictional, and because the employees of GWWR are employees of a non-applicant carrier. Mr. Downey further contends that a 1994 Association of American Railroads (AAR) study cited by UP/SP rests primarily upon an earlier version of our own discredited (in Mr. Downey's view) 1995 staff study; and, Mr. Downey adds, the 1994 AAR study is not only "new evidence," it is new evidence that was privately produced and is largely unavailable. Our denial of the CWD-3 petition, however, does not turn upon the merits and availability, or lack thereof, of the AAR study.

for present purposes, that the GWWR agreement did facilitate the merger. The fact remains, however, that the arrangements provided for in the GWWR agreement are still non-jurisdictional. We cannot assert jurisdiction over a settlement merely because it satisfies the concerns of a carrier that might otherwise have been a merger opponent.

(ii) Mr. Downey cites various cases, including Kansas City Southern Industries, Inc., The Kansas City Southern Railway Company and K&M Newco, Inc.--Control--MidSouth Corporation, MidSouth Rail Corporation, MidLouisiana Rail Corporation, SouthRail Corporation and TennRail Corporation, Finance Docket No. 32167 (ICC served May 4, 1994) (KCS/MidSouth), for the proposition that employees of a non-applicant carrier can receive labor protection in certain situations. This, however, "has typically involved a situation where the non-applicant employees became joint or common employees of the applicant and non-applicant carriers." KCS/MidSouth, slip op. at 3 (footnote omitted). See also DRGW/SP, 4 I.C.C.2d at 956-57 (certain employees were "joint employees" of an applicant carrier and two non-applicant carriers). There is, however, no evidence of record in the present proceeding that GWWR employees are "joint or common employees" of GWWR and SPCSL.

(iii) Mr. Downey cites Union Pacific--Control--Missouri Pacific; Western Pacific, 366 I.C.C. 462, 618 (1982) (UP/MP/WP) for the proposition that, where a settlement agreement is involved, labor protective conditions may be imposed in favor of employees of a non-applicant carrier. The UP/MP/WP settlement agreement referenced by Mr. Downey, however, involved a pooling arrangement, which was subject to ICC jurisdiction under 49 U.S.C. 11342. "Because the pooling arrangement [was] intended as a substitute for the trackage rights originally sought," the applicants voluntarily accepted the labor protective conditions applicable to trackage rights. UP/MP/WP, 366 I.C.C. at 618. In the present case, however, the arrangements provided for in the GWWR agreement are not subject to our jurisdiction, under either 49 U.S.C. 11342 or 49 U.S.C. 11343.

Rate Studies. Mr. Downey has, at best, offered only a tenuous nexus between the relief he seeks and our use of the most recent in a series of ICC studies of rail freight rates. He states:

> The Board's use of the "Rate Decline" report for February 1995 impacts the tenor of Decision 44 in all its phases, including employee conditions and oversight to commence October 1.

CWD-3 at 7. Nonetheless, we will address his arguments with respect to our use of this study.

ICC staff had prepared five studies showing a continuing decline in rail rates since passage of the Staggers Rail Act of 1980, as measured by inflation-adjusted revenue per ton.[10] Each

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[10] The average rate was calculated using a "Tornqvist" index. Rate changes for nine (inclusive) rail commodity groups were aggregated by weighting each by its annual share of rail revenue. The underlying data came from the annual railroad Freight Commodity Statistics.

was issued with a press release and noted in the ICC's annual reports to Congress and in ICC Congressional testimony.[11]

A sixth ICC staff study (the 1995 staff study) found that the average rail rate per ton had declined more than 37% on an inflation adjusted basis from its peak in 1981 through 1993, as compared to the 33% decline through 1991 found in the next most recent study. While not accompanied by a press release, this study was made available to any party who inquired about its availability, and was referenced approvingly by the United States Department of Transportation in its brief. See DOT-4 at 23. In Decision No. 44, it is referred to twice (at 104 and 119) to show that rail rates have continued to decline since 1980 even as the number of Class I railroads has decreased, primarily through numerous mergers, from 26 to 10.

Mr. Downey's concern that it is somehow improper to adjust rail revenues using the GDP implicit price deflator is misplaced, and his cite of the use by the Federal Energy Regulatory Commission (FERC) of another deflator in an entirely different context is misleading. See CWD-3 at 7. In fact, using data from electric utilities regulated by FERC, and applying, as the ICC did, implicit GDP price deflators to adjust for the effects of inflation, the Energy Information Administration of the United States Department of Energy (DOE) found that "the average transportation cost for contract coal shipped by railroads fell by 19 percent, from $11.08 per ton in 1988 to $8.93 in 1993," and that, due to increases in lengths of haul, "the average rate per ton-mile (i.e., the average rate per ton, per mile shipped) fell by 28 percent between 1988 and 1993."[12]

Finally, the data Mr. Downey presents in an attempt to discredit an AAR rate study referenced by applicants[13] (to corroborate our assessment that rail rates have declined) only emphasizes how conservative the series of ICC studies was in measuring the competitive gains to rail shippers since enactment of the Staggers Rail Act of 1980. Mr. Downey notes that the average rail length of haul increased by almost one-third from 1980 to 1994 (from 615.8 to 816.8 miles) and that rail rates often taper with distance. Mr. Downey asserts that this means the AAR study is flawed, because it tracks rail revenues per ton-mile over time. He believes that a part of the decrease it measures must be related to the distance taper. But the ICC studies are based on a scientifically weighted index of rail revenues per ton, and these indices have actually understated the post-Staggers decline in rail rates to the extent they have not taken into account the increase in rail revenues per ton brought about by increases in the average length of haul. This effect can be seen in the DOE study noted above because it provided measures of both revenue per ton and per ton-mile.

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[11] As noted by applicants, these ICC studies have been accepted and/or corroborated, in whole or for important rail commodities such as coal and grain, by the Association of American Railroads, the Energy Information Administration of the United States Department of Energy, the United States General Accounting Office, and the Economic Research Service of the United States Department of Agriculture. See UP/SP-282 at 5-8.

[12] Energy Policy Act Transportation Rate Study: Interim Report on Coal Transportation, October 1995, at ix.

[13] The 1994 AAR study, Railroad Freight Rates Since Deregulation, is discussed by applicants in UP/SP-282 at 5, and by Mr. Downey in CWD-4 at 3-4.

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

It is ordered:

1. The CWD-4 motion to strike is denied.

2. The CWD-3 petition is denied.

3. This decision shall be effective on November 20, 1996.

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

Vernon A. Williams
Secretary

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
N[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. PEINKAMPEN
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
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: 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' 'IINGTON 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
W' 'INGTON 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. HINGTON 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' "INGTON 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. BILBRAY,
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: PA.TIE 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 URTHOUSE 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: 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,
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: 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[illegible] B N W 7 HIGHWAY
F[illegible] 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.
1[illegible] DODGE STREET ROOM 830
O[illegible]A 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

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

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
1[illegible]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 F[illegible]GARETTE HASSE
1111 [illegible]ROADWAY
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