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SERVICE DATE
AUG 12 1996

SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

Decision No. 44[1]

Decided: August 6, 1996

The Board approves, with certain conditions, the common control and merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company) and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company).[2]

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[1] This decision covers the Finance Docket No. 32760 lead proceeding and the embraced proceedings listed in Appendix A.

[2] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the Act), enacted December 29, 1995, and effective January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC at the time of its termination that involve functions transferred to the Board pursuant to the Act shall be decided (1) by the Board, and (2) under the law in effect prior to January 1, 1996. The Finance Docket No. 32760 lead proceeding, the Finance Docket No. 32760 (Sub-Nos. 1 to 9) embraced proceedings, and the 17 embraced abandonment and 4 embraced discontinuance proceedings were pending with the ICC at the time of its termination. The Finance Docket No. 32760 (Sub-Nos. 10, 11, 12, 13, 14, 16, and 17) embraced proceedings were not then pending but will be considered as if they had been because responsive applications that seek to invoke the conditioning power of old 49 U.S.C. 11344(c) have never been regarded as independent applications. <u>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</u>, Finance Docket No. 32549, Decision No. 38 (ICC served Aug. 23, 1995) (<u>BN/SF</u>) (slip op. at 55 n.76). Except as noted in the next two paragraphs, all of the proceedings addressed in this decision involve functions that are subject to our jurisdiction pursuant to new 49 U.S.C. 11323-27 (control/merger transactions), new 49 U.S.C. 11102 (terminal facilities), and new 49 U.S.C. 10903-05 (abandonments), and we will therefore decide these proceedings under the law in effect prior to January 1, 1996.

The Finance Docket No. 32760 (Sub-No. 8) proceeding, wherein applicants seek an exemption from the trucking company acquisition requirements of old 49 U.S.C. 11343-44, involves a

(continued...)

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[2](...continued)
effect on and after January 1, 1996. We will nevertheless decide this proceeding, and decide it under the law in effect prior to January 1, 1996, in accordance with the special transition rule provided by section 204(b)(3)(C) of the Act (any proceeding involving the "merger" of a motor carrier of property, that was pending before the ICC at the time of its termination, shall be decided by the Board under the law in effect prior to January 1, 1996). The transactions at issue in Finance Docket No. 32760 (Sub-No. 8) are not, in the technical sense, mergers, but prior practice suggests that the word "merger," as used in section 204(b)(3)(C), should be read broadly. See, e.g., 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 56 n.52) (in the context of old 49 U.S.C. 11343-44, the words "merger" and "transaction" have been used almost interchangeably).

Section 204(b)(3)(A) of the Act provides, in general, that in the case of a proceeding under a provision of law repealed and not reenacted by the Act, such proceeding shall be terminated. The Finance Docket No. 32760 lead proceeding includes, among other things, a request that certain securities matters be approved under or exempted from the requirements of old 49 U.S.C. 11301. Because the referenced securities requirements were repealed and not reenacted, the described portion of the Finance Docket No. 32760 lead proceeding was terminated, by force of law, effective January 1, 1996.

As used in this decision, the term "new law" refers to the law in effect on and after January 1, 1996, and the term "old law" refers to the law in effect prior to January 1, 1996. All further references in this decision, except as otherwise specifically indicated, will be to the applicable provisions of the old law.

INTRODUCTION

Applicants. By application filed November 30, 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)[3] seek approval under 49 U.S.C. 11343-45 for:[4] the

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[3] UPC, UPRR, MPRR, SPR, SPT, SSW, SPCSL, and DRGW are referred to collectively as applicants. 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. These and other abbreviations frequently used in this decision are listed in Appendix B.

[4] The application filed November 30, 1995 (UP/SP-22, -23, -24, -25, -26, -27, and -28), as supplemented on December 21, 1995 (UP/SP-36), March 26, 1996 (UP/SP-188), and March 29, 1996 (UP/SP-194 and -195), consists of the primary application (which seeks approval for the common control and merger of UP and SP, and which was filed in Finance Docket No. 32760) and various (continued...)

acquisition of control of SPR by a wholly owned UPC subsidiary; the resulting common control of UP and SP by UPC; and the consolidation of the rail operations of UP and SP.[5]

The UPC/SPR Merger Agreement, dated August 3, 1995, provides that, upon the satisfaction of certain conditions, including regulatory approval, a wholly owned UPC subsidiary will acquire all of SPR's common stock and SPR will be merged into UPRR. Applicants note, however, that UP/SP common control may be effected by other means, including, for example, the merger of SPR into MPRR or the lease of all SP properties to UPRR and/or MPRR. Applicants add that they intend to merge SPT, SSW, SPCSL, and DRGW into UPRR, although they also add that these SPR subsidiaries may retain their separate existence for some time and that other means may be used to consolidate these subsidiaries into the merged system. Applicants ask, citing Schwabacher v. United States, 334 U.S. 192 (1948), that we determine that the Merger Agreement's terms for the purchase of the SPR common stock are fair both to the stockholders of UPC and to the stockholders of SPR.[6]

Applicants also have filed related applications, petitions, and notices. These include a notice of exemption for settlement-

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[4](...continued)
ancillary applications, petitions, and notices (which seek approval for or exemption of various merger-related matters).

[5] UPRR and MPRR are wholly owned subsidiaries of UPC. SPT, SPCSL, and DRGW are wholly owned subsidiaries of SPR; SSW is a 99.9%-owned subsidiary of SPR.

[6] On August 9, 1995, UP Acquisition Corporation (Acquisition), a wholly owned UPC subsidiary that was later merged into UPRR, see UP/SP-269, tendered for up to 25% of SPR common stock at $25.00 per share in cash; on September 7, 1995, the tender offer was completed for 39,034,471 shares; and, on September 15, 1995, Acquisition purchased these shares for approximately $976 million (the shares are being held in a voting trust pending approval of the merger). Applicants indicate that, upon satisfaction of all conditions to the merger, each of SPR's stockholders will have the right to specify the number of shares that such stockholder wishes to have converted into (a) 0.4065 shares of UPC common stock per share, and (b) the right to receive $25.00 per share in cash, without interest. The aggregate number of shares to be converted into cash at the time of the merger, together with shares tendered in the tender offer, will be equal as nearly as practicable to 40% of all shares outstanding as of the date immediately prior to the date on which the merger becomes effective. To the extent that SPR stockholders elect in the aggregate to receive either cash consideration in excess of 40% or stock consideration in excess of 60%, the Merger Agreement requires the cash or stock component to be prorated in order to achieve the specified proportions.

Applicants note that SSW has a small number of minority equity holders, and that the Federal Railroad Administration also holds certain SSW redeemable preference shares. Applicants indicate that they are not now requesting a Schwabacher determination with respect to the compensation that might be paid to SSW security holders in connection with a merger of SSW into UPRR or MPRR. Applicants add that, should they determine to carry out such a merger, they will request either a Schwabacher determination respecting the terms or a declaratory order that no such determination is required.

related trackage rights, a petition for exemption for settlement-related line sales, five petitions for exemption for control of terminal railroads, a petition for exemption for control of three motor carriers, an application for terminal trackage rights, and several abandonment and discontinuance applications, petitions, and notices.

Settlement Agreements: In General. Settlement agreements have been entered into by applicants and: Burlington Northern Railroad Company (BN) and The Atchison, Topeka and Santa Fe Railway Company (SF);[7] Utah Railway Company (URC); Illinois Central Railroad Company (IC); Wisconsin Central Ltd. (WC); The Brownsville and Rio Grande International Railroad (BRGI); Gateway Western Railway Company (GWWR); and CSX Corporation, CSX Transportation, Inc., CSX Intermodal, Inc., and Sea-Land Service, Inc. (collectively, CSX).[8] Applicants acknowledge that the BNSF agreement is intended (in large measure, though not in its entirety) to address competitive issues raised by the merger, and they have therefore requested that the terms of this agreement be imposed as a condition to approval of the merger. Applicants maintain, however, that the agreements entered into with URC, IC, WC, BRGI, GWWR, and CSX are not intended to address merger-related competitive issues, and they have therefore not requested the imposition of the terms of these agreements.

BNSF Agreement. At the time the primary application was filed (November 30, 1995), the agreement that applicants entered into with BNSF consisted of an agreement dated September 25, 1995 (UP/SP-22 at 318-347) and a supplemental agreement dated November 18, 1995 (UP/SP-22 at 348-359), and these two agreements were generally referred to in the singular as the BNSF agreement. On April 18, 1996, applicants entered into an additional settlement agreement with BNSF and the Chemical Manufacturers Association (CMA), referred to as the CMA agreement, requiring, among other things, that certain amendments be made to the BNSF agreement. See UP/SP-219. On April 29, 1996, applicants, in their rebuttal filings, represented that they would make various clarifications and amendments to the BNSF agreement. See UP/SP-230 at 12-21; UP/SP-231, Part C, Tab 18 at 5-11. See also UP/SP-260 at 8-9 (summary of clarifications and amendments). On June 3, 1996, applicants, in their brief, represented that they would make an additional amendment to the BNSF agreement. See UP/SP-260 at 23 n.9 (referencing West Lake Charles, LA). On June 27, 1996, applicants and BNSF entered into a second supplemental agreement to the BNSF agreement. See UP/SP-266, Exhibit A. This second supplemental agreement purports to reflect the various commitments made subsequent to execution of the agreement dated September 25, 1995 and the supplemental agreement dated November 18, 1995. See UP/SP-266, Exhibit A at 1 (3rd and 4th paragraphs). On June 28, 1996, applicants, in the filing that accompanied the second supplemental agreement, made at least one additional commitment. See UP/SP-266 at 3 (referencing UP/SP-BNSF reciprocal switch charges at points other than 2-to-1 points).

Protestants: Railroads. Submissions opposing the merger and/or urging the imposition of conditions have been filed by Consolidated Rail Corporation (Conrail), The Kansas City Southern Railway Company (KCS), Montana Rail Link, Inc. (MRL), The Texas

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[7] BN and SF are referred to collectively as BNSF.

[8] See UP/SP-74 (URC and IC agreements), UP/SP-204 (WC and GWWR agreements), BRGI-3 (BRGI agreement), and UP/SP-238 (CSX agreement).

Mexican Railway Company (Tex Mex), Capital Metropolitan Transportation Authority (CMTA), The Magma Arizona Railroad Company (MAA), the San Manuel Arizona Railroad Company (SMA),[9] and The Yolo Shortline Railroad Company (Yolo). Other submissions have been filed by Keokuk Junction Railway (KJRY) and its corporate parent, Pioneer Railcorp (PRC), by Toledo, Peoria & Western Railway Corporation (TP&W), by the Southern California Regional Rail Authority (SCRRA), and by Georgetown Railroad Company (GTRR) and its corporate affiliate, Texas Crushed Stone Company (TCSC).[10] A submission also has been filed by the San Diego & Imperial Valley Railroad (SDIV) (in opposition to one of the conditions requested by United States Gypsum Company).

Protestants: Shipper Organizations. Submissions opposing the merger and/or urging the imposition of conditions have been filed by The National Industrial Transportation League (NITL), The Society of the Plastics Industry, Inc. (SPI), The Western Coal Traffic League (WCTL), the Western Shippers Coalition (WSC), the Mountain-Plains Communities & Shippers Coalition (MPCSC), the Coalition for Competitive Rail Transportation (CCRT), The Corn Refiners Association, Inc. (CRA), the National Corn Growers Association (NCGA), the Montana Wheat and Barley Committee (MWBC), the Montana Farmers Union (MFU), Save the Rock Island Committee, Inc. (STRICT), the Colorado Wheat Administrative Committee (CWAC), the Hoisington Chamber of Commerce (HCC), The Enid Board of Trade (EBT), the Kansas-Colorado-Oklahoma Shippers Association (KCOSA), the Farmers Elevator Association of Minnesota (FEAM), and the South San Antonio Chamber of Commerce (SSACC). A submission also has been filed by The Institute of Scrap Recycling Industries, Inc. (ISRI).

Protestants: Coal Shippers. Submissions opposing the merger and/or urging the imposition of conditions have been filed by Wisconsin Power & Light Company (WP&L), Wisconsin Public Service Corporation (WPS), Entergy Services, Inc. (ESI), Arkansas Power & Light Company (AP&L), Gulf States Utilities Company (GSU),[11] the City Public Service Board of San Antonio (CPSB), Texas Utilities Electric Company (TUE), Sierra Pacific Power Company (SPP), Idaho Power Company (IDPC),[12] Arizona Electric Power Cooperative (AEPCO), Wisconsin Electric Power Company (WEPCO), Public Service Company of Colorado (PSCo), Illinois Power Company (ILP), Central Power & Light Company (CP&L), Intermountain Power Agency (IPA), Lower Colorado River Authority and the City of Austin, TX (referred to collectively as

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[9] MAA and SMA are wholly owned rail subsidiaries of Magma Copper Company (MCC).

[10] Affiliated carriers Cen-Tex Rail Link, Ltd., and South Orient Railroad Company, Ltd. (referred to collectively as Cen-Tex) filed a request for conditions opposing the merger unless approval thereof was conditioned by requiring applicants to negotiate certain trackage rights. Because Cen-Tex docketed its request for conditions in the manner of a responsive application, we treated it as a responsive application, and we rejected it as incomplete. See Decision No. 29 (served Apr. 12, 1996). Because Cen-Tex also had failed to comply with the discovery obligations to which it was subject, we ordered that its request for conditions be stricken from the record. See Decision No. 30 (served Apr. 18, 1996).

[11] ESI, AP&L, and GSU are referred to collectively as Entergy.

[12] SPP and IDPC are referred to collectively as SPP/IDPC.

LCRA/Austin), Rio Bravo Poso and Rio Bravo Jasmin (referred to collectively as Rio Bravo), and IES Utilities (IES).

Protestants: Plastic and Chemical Shippers. Submissions opposing the merger and/or urging the imposition of conditions have been filed by The Dow Chemical Company (Dow), Montell USA Inc. (Montell), Olin Corporation (Olin), Quantum Chemical Corporation (QCC), Union Carbide Corporation (UCC), Enterprise Products Company (EPC), Formosa Plastics Corporation, USA (FPC), The Geon Company (Geon), PPG Industries, Inc. (PPG), Huntsman Corporation (HC), Arizona Chemical Company (ACC), Monsanto Company (Monsanto), and Shell Chemical Company (SCC). A submission also has been filed by Springfield Plastics, Inc. and Brandt Consolidated, Inc. (collectively, SPBC) (in opposition to the Barr-Girard abandonment).

Protestants: Other Shippers. Submissions opposing the merger and/or urging the imposition of conditions have been filed by The International Paper Company (IPC), United States Gypsum Company (USG), North American Logistic Services (NALS), ASARCO Incorporated (ASARCO), Champion International Corporation (CIC), Weyerhaeuser Company (Weyerhaeuser), Cargill, Incorporated (Cargill), IBP, Inc. (IBP), Oregon Steel Mills (OSM), and Stimson Lumber Company (SLC).

State/Local Governments and Related Interests. Submissions respecting the merger have been filed by various state and local governments and related interests, including the Railroad Commission of Texas (RCT), the Public Utilities Commission of the State of California (CPUC), the Oregon Department of Transportation (Or/DOT), the Idaho Barley Commission and the Idaho Wheat Commission (IBC/IWC), the Public Service Commission of the State of Nevada (PSCN), the Kansas Department of Transportation (Ka/DOT), the Minnesota Department of Transportation (Mn/DOT), and the Iowa Department of Transportation (Ia/DOT).

Labor Parties. Submissions respecting the merger have been filed by various labor parties, including the Allied Rail Unions (ARU), the International Brotherhood of Teamsters (IBT), the Transportation•Communications International Union (TCU), the Transportation Trades Department (TTD), the United Transportation Union (UTU), and the Brotherhood of Locomotive Engineers (BLE).[13]

Federal Parties. Submissions also have been filed by the United States Department of Justice (DOJ), the United States Department of Transportation (DOT), the United States Department of Defense (DOD), the United States Department of Agriculture (USDA), and the United States Department of Labor (DOL).

Additional Parties. Numerous additional parties, including elected officials, government agencies, shippers, shortline railroads, and labor organizations, have participated in this proceeding. Their submissions have generally been limited to expressions of either support for or opposition to: the UP/SP merger; the trackage rights and line sales provided for in the BNSF agreement; the conditions requested by one or more of the parties urging the imposition of conditions upon any approval of the merger; and/or the abandonment/discontinuance authorizations sought by applicants.

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[13] TTD is a department of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO).

Summary of Decision. In this decision, we are taking the following action: (1) we are approving common control and merger of UP and SP as proposed in the primary application;[14] (2) we are exempting the transactions at issue in the Sub-Nos. 1, 2, 3, 4, 5, 6, 7, and 8 dockets; (3) we are granting the terminal trackage rights application in the Sub-No. 9 docket; (4) we are directing that class exemption notices covering the trackage rights provided for in the CMA and URC agreements be filed, no later than 7 calendar days prior to the effective date of this decision, (a) by applicants and BNSF, and (b) by applicants and URC, respectively; (5) we are imposing as conditions (a) the terms of the BNSF agreement,[15] (b) the terms of the CMA agreement, and (c) the terms of the URC agreement;[16] (6) we are requiring certain modifications to the terms of the BNSF and CMA agreements, particularly respecting new facilities, transloading facilities, build-out/build-in options, contracts at 2-to-1 points, and storage-in-transit (SIT) facilities; (7) we are expanding BNSF's access to certain traffic moving from and to Lake Charles, West Lake Charles, and West Lake, both in single-line service (by removing a proviso restricting BNSF to traffic moving from, to, and via New Orleans, and from and to points in Mexico via certain border crossings, and by eliminating a fee

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[14] During the course of this proceeding, applicants have made numerous representations to the effect that certain points will be covered, certain services will be provided, and so on. Some of these representations relate to the terms of the BNSF agreement; others do not. Applicants must adhere to all of their representations.

[15] By BNSF agreement, we mean the agreement dated September 25, 1995 (UP/SP-22 at 318-347), as modified by the supplemental agreement dated November 18, 1995 (UP/SP-22 at 348-359), and as further modified by the second supplemental agreement dated June 27, 1996 (UP/SP-266, Exhibit A). We wish to clarify, however, that in imposing the BNSF agreement as a condition to this merger, we will require applicants to honor <u>all</u> of the amendments, clarifications, modifications, and extensions thereof described in: (1) the April 18th CMA agreement (UP/SP-219); (2) the April 29th rebuttal filings (UP/SP-230 at 12-21; UP/SP-231, Part C, Tab 18 at 5-11; <u>see also</u> UP/SP-260 at 8-9, summarizing the clarifications and amendments described in the April 29th rebuttal filings); (3) the June 3rd brief (UP/SP-260 at 23 n.9); and (4) the June 28th filing that accompanied the second supplemental agreement (UP/SP-266 at 3).

Section 17 of the BNSF agreement appears to be a standard "no third party beneficiaries" provision; it provides that nothing in the BNSF agreement is intended to give any person other than the signatories any legal or equitable right, remedy or claim. This provision may be standard but it is clearly at odds with the logic of the BNSF agreement, and we therefore wish to clarify that we understand that the BNSF agreement does provide rights and claims (and, by implication, remedies) to persons other than the signatories. We note, by way of illustration, that a shipper at a point opened up to BNSF under the BNSF agreement is such a person; a subsequent UP/SP-BNSF arrangement restricting BNSF's ability to serve that shipper would, among other things, violate that shipper's rights under the BNSF agreement.

[16] What we have said with respect to the "no third party beneficiaries" provision contained in the BNSF agreement applies with equal force to the similar provision set forth in Section 9 of the URC agreement.

that BNSF otherwise would have had to pay to gain access to much of this traffic) and in joint-line service (by allowing BNSF to interchange this traffic at Shreveport and Texarkana with KCS); (8) we are granting Tex Mex the trackage rights sought in its Sub-No. 13 responsive application and the terminal trackage rights sought in its Sub-No. 14 terminal trackage rights application, but we are restricting these trackage rights to traffic having a prior or subsequent movement on the Laredo-Robstown-Corpus Christi line; (9) we are imposing certain conditions with respect to CMTA, Entergy, CPSB, TUE, Dow, and UCC; (10) we are imposing upon BNSF a common carrier obligation with respect to the traffic opened up to it by the BNSF agreement, and we are requiring that BNSF submit a progress report and an operating plan on or before October 1, 1996, and further progress reports on a quarterly basis thereafter; (11) we are requiring that applicants submit a progress report and an implementing plan on or before October 1, 1996, and further progress reports on a quarterly basis thereafter; (12) we are establishing oversight for 5 years to examine whether the various conditions we have imposed have effectively addressed the competitive issues they were intended to address, and we are retaining jurisdiction to impose additional remedial conditions if, and to the extent, we determine that the conditions already imposed have not effectively addressed the competitive harms caused by the merger; (13) with respect to the abandonment/discontinuance requests vis-à-vis the two segments of the Tennessee Pass Line, we are denying the abandonments but granting the discontinuances; (14) we are approving all other abandonment/discontinuance requests filed by applicants; (15) we are imposing the standard labor protective conditions;[17] (16) we are imposing certain environmental mitigating conditions; and (17) we are denying all other conditions sought by the various parties in this proceeding.[18]

Preliminary Matter: UP/SP-262. In UP/SP-262, applicants move to strike (and, in one instance, seek other sanctions respecting) material that they regard as "new evidence" that was submitted by certain parties in their briefs. The parties

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[17] With respect to the merger, the line sales, and the terminal railroad control transactions, the standard labor protective conditions are those established in New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979) (New York Dock). With respect to the trackage rights provided for in the BNSF, CMA, and URC agreements, and with respect to any additional trackage rights imposed as conditions, the standard labor protective conditions are those established in Norfolk and Western Ry. Co.--Trackage Rights--BN, 354 I.C.C. 605, 610-615 (1978), as modified in Mendocino Coast Ry., Inc.--Lease and Operate, 360 I.C.C. 653, 664 (1980) (Norfolk and Western). With respect to the abandonments and the discontinuances, the standard labor protective conditions are those established in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91, 98-103 (1979).

[18] Several parties submitted, after the voting conference held July 3, 1996, requests seeking "clarification" of determinations made at that conference. Nothing in our schedule for this proceeding, our procedural regulations, or our precedents authorizes parties to submit post-voting conference requests for clarification with respect to matters that will or may be discussed in our written decision. We therefore will not address the post-voting conference clarification requests heretofore submitted in this proceeding. Parties must await our written decision before seeking clarification or other forms of appellate relief.

(Conrail, KCS, SPP/IDPC, QCC, and DOJ) have replied to the motion (CR-43, KCS-63, SPP-17, QCC-7, and DOJ-16, respectively). We will deny the motion to strike and the request for sanctions. We find no basis for sanctions, and if any of the material assailed by applicants is new evidence, we consider it to be of *de minimis* effect against the background of the enormous evidentiary record previously compiled.

Preliminary Matter: BN/SF-61. In BN/SF-61, BNSF moves to strike from the transcript of the oral argument held July 1, 1996, certain allegedly inflammatory comments made by counsel for SPI to the effect that BNSF (or its officers or executives) "lied" (in written or deposition testimony, public statements, or written discovery) about BNSF's ongoing implementation process with respect to SIT facilities. SPI (SPI-25) stands by the comments of its counsel, and insists that a certain statement made by BNSF in its discovery submission served February 20, 1996, was "erroneous," SPI-25 at 3. We will deny the motion to strike, but we wish to emphasize that we are not deciding the truth or falsity of the subject of the comments made by SPI's counsel.

THE RECORD

The evidence and arguments submitted in this proceeding are extensive, and are summarized for the most part in the briefs. Apart from setting forth the basic aspects of applicants' position, we have chosen not to summarize or otherwise address in this part of our decision the extensive evidence submitted by parties urging approval of the UP/SP merger application. Instead, we have chosen to summarize the essential aspects of the evidence, arguments, and any related requests for affirmative relief submitted primarily by parties opposed in whole or in part to the proposed merger.[19]

APPLICANTS. *UPRR/MPRR.* (1) UPRR operates approximately 13,646 miles of main line and branch line in the West. The main lines run from the Pacific Coast ports/terminals of Seattle, WA, Portland, OR, Oakland, CA, and Los Angeles, CA, to Chicago, IL, and Missouri River gateways including Kansas City, MO, and Omaha, NE/Council Bluffs, IA. Routes over main lines extend from the Pacific Northwest through Washington, Oregon, Idaho, and Utah to Ogden/Salt Lake City, UT, from Northern California through Nevada and Utah to Ogden/Salt Lake City, and from Southern California through Nevada and Utah to Ogden/Salt Lake City. UPRR's double-track main line connects Ogden/Salt Lake City at the west with Omaha/Council Bluffs at the east, and runs through Utah, Wyoming, Colorado, and Nebraska. With the recent merger of the Chicago and North Western Railway Company (CNW) into UPRR, UPRR's lines also run from Chicago to Milwaukee, WI, and then to Winona, WI, and (via trackage rights over WC) to Duluth, MN/Superior, WI, and (via trackage rights over BN) from Duluth/Superior to Minneapolis/St. Paul, MN, and then to Des Moines, IA, and Kansas City. In addition, from the Southern Powder River Basin in Wyoming (PRB and SPRB are the acronyms for the Powder River Basin and the Southern Powder River Basin, respectively), UPRR transports low-sulfur coal principally to

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[19] Thus, for example, our summary of the record does not include UTU's strong support for the merger, and sets forth at length the affirmative relief sought by California parties while merely noting their support in passing. In addition, applicants list the numerous shippers, public officials, railroads, unions and others that have submitted support statements in Appendix C to their brief. <u>See</u> UP/SP-260, Appendix C, at 1-103.

electric generating plants in the Southwest and Midwest. A UPRR line extends from a point near Green Bay, WI, to Ishpeming and Escanaba, MI, while UPRR's Milwaukee-to-St. Louis line passes through Chicago. UPRR also has a network of branch lines in Iowa and Southern Minnesota. (2) MPRR operates approximately 8,361 miles of main line and branch line in the Midwest and the Southwest. While UPRR's lines principally form east-west routes, MPRR's lines principally form north-south routes. MPRR's lines connect the major midwest gateways of Chicago, Omaha, St. Louis, MO, Memphis, TN, and Kansas City with the principal ports and the terminals of New Orleans and Lake Charles, LA, and Galveston, Houston, Beaumont, Corpus Christi, Brownsville, and Laredo, TX. MPRR also serves interior Texas points, including Dallas, Fort Worth, San Antonio, Austin, Midland/Odessa, and El Paso. Its lines extend into the grain producing regions of Kansas and Nebraska and as far west as Pueblo, CO.

SPT/SSW/SPCSL/DRGW. (1) SPT operates approximately 11,000 miles of main line and branch line in the West. The main lines run from Portland via Oakland to Los Angeles, and then to San Antonio, Houston, and New Orleans, including physical interchanges at five gateways to Mexico. SPT lines extend from San Antonio and Houston to Fort Worth, with operations over trackage rights from Fort Worth to Pueblo and Kansas City. The Fort Worth-Pueblo line connects with SSW at Stratford and Dalhart, TX, and with DRGW at Pueblo. The Fort Worth-Kansas City line connects with SSW at Kansas City and Hutchinson, KS. SPT's Central Corridor main line runs from Northern California to Ogden, where it connects with DRGW. (2) SSW operates approximately 2,200 miles of main line and branch line in the Central United States. SSW's main line runs from Santa Rosa, NM, to Kansas City and St. Louis. Operations between Topeka, KS, and St. Louis are over trackage rights on UP. SSW main lines extend from St. Louis south to Shreveport, LA, and Corsicana, TX. SSW's lines connect with SPT in Corsicana, Dalhart, and Stratford, TX, Hutchinson and Kansas City, KS, Shreveport, LA, and Santa Rosa, NM, with DRGW at Herington, KS, and with SPCSL at Kansas City, MO, and East St. Louis, IL. At East St. Louis, Memphis, and Kansas City, SSW connects with major eastern rail carriers. (3) SPCSL, SP's link to Chicago, operates roughly 1,200 miles of main line in Illinois, Iowa, and Missouri, between St. Louis, Chicago, and Kansas City; this mileage includes trackage rights between Kansas City and Chicago on BNSF. (4) DRGW operates roughly 2,300 miles of main line and branch line in Colorado, Utah, and Kansas. The main line runs from Ogden, where it connects with SPT, eastward through Denver and Pueblo, CO, and on to Herington, KS, where it connects with SSW. DRGW has rights to operate between Herington and Kansas City over SSW and UP; and operations between Pueblo and Herington are over UP. DRGW also connects with SPT at Pueblo.

Public Interest Justifications. Applicants claim that the merger will generate annual quantified public benefits in excess of $750 million, and that a merged UP/SP will be more competitive and efficient, and better able to compete with BNSF. Applicants indicate that the merger will allow UP/SP: to combine the separate routes of UP and SP and to create new routes;[20] to

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[20] Applicants plan to offer UP/SP combined routes between Chicago and Oakland, between Chicago and Los Angeles, and between Memphis and the West Coast via Dallas/Ft. Worth. Applicants plan to form the first direct single-line route between Seattle and Los Angeles, and have agreed to grant BNSF the rights necessary to create a second such route. Applicants indicate that UP/SP (continued...)

improve operations through terminals, and to avoid delay by eliminating interchanges and combining traffic volumes into new trains and new blocks; to improve service, particularly SP service, through technological support and access to capital; to improve equipment utilization and availability; and to consolidate yards and functions. Applicants expect annual benefits, in a normal year, of $659.1 million, as a result of new traffic ($76.0 million) and efficiencies and cost reductions ($583.1 million). Applicants also expect annual shipper logistics savings of $93.1 million.

Applicants claim that the merger, as conditioned by the BNSF agreement, will greatly intensify rail competition in the West; the BNSF agreement, applicants contend, will substitute a stronger competitor (BNSF) for a weaker one (SP), and will create, in some markets, entirely new competition; and only with a merger, applicants insist, will UP and SP be able to provide genuine competition to BNSF. Applicants add that a merger will increase SP's competitiveness by overcoming its service problems and capital constraints and by assuring long-term, high-quality rail service. After the merger, applicants maintain, competition will be stronger not only for shippers who now have rail service from UP and SP and no other railroad (2-to-1 shippers) but also for all other shippers, especially those who go from three serving railroads to two as a result of the merger (3-to-2 shippers).

Labor Impact. Applicants project that the total labor impact of the merger will be 4,909 jobs abolished, 2,132 jobs transferred, and 1,522 jobs created. See UP/SP-22 at 34-35; UP/SP-24 at 407-422. Applicants add that other jobs in Denver, Omaha, and St. Louis may be transferred, but that no decision has yet been made regarding these transfers. See UP/SP-24 at 422 (these contingent transfers affect 387 non-agreement dispatchers, 1,823 clerks, and 2,637 non-agreement personnel other than dispatchers).

BNSF Agreement. Applicants claim that their basic purpose in entering into the BNSF agreement was to preserve competitive rail service for all 2-to-1 customers of UP and SP. Applicants indicate that, to preserve competitive options for such shippers, they identified all 2-to-1 points (i.e., all points at which service is provided by UP and by SP, but by no other railroad) and then negotiated trackage rights and line sales with BNSF that would provide service to as many of these shippers as possible. Applicants concede that a few 2-to-1 points are not covered by the trackage rights and line sales provided for in the BNSF agreement, but they insist that these points are covered by the agreement's "omnibus" clause (Section 8i), which, they maintain, represents a commitment by UP/SP to enter into arrangements with BNSF under which, "through trackage rights, haulage, ratemaking authority or other mutually acceptable means," BNSF will be able to provide competitive service to all 2-to-1 shippers not covered by the trackage rights and line sales provided for in the agreement. Applicants indicate that the BNSF agreement, in addition to preserving competition for all 2-to-1 customers, also preserves a two-railroad interchange with all shortlines that interchanged with both UP and SP and no other railroad prior to

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[20](...continued)
will institute directional running on parallel routes in Arkansas and Texas, and will assign most intermodal traffic to one Chicago-Southern California route and most manifest traffic (i.e., traffic in a scheduled train, usually of manufactured commodities) to another, thereby improving the handling of both.

the merger. Applicants note that the BNSF agreement includes, in addition to the rights which address competition at 2-to-1 points, an exchange of various other rights between UP/SP and BNSF. The exchange of these rights, applicants claim, resulted from demands by BNSF that, in the view of applicants, were not justified by competitive concerns. In those instances, applicants suggest, they negotiated on a quid pro quo basis for something in return. Applicants contend, however, that these "trades" will improve the competitiveness and efficiency of both carriers and will therefore create even more intense competition than exists today.

Trackage Rights. Under the BNSF agreement, BNSF will receive approximately 3,968 miles of trackage rights over UP/SP (1,727 miles on UP and 2,241 miles on SP)[21] and UP/SP will receive or retain approximately 376 miles of trackage rights over BNSF. The trackage rights that BNSF will receive include rights extending between Oakland, CA, and Denver, CO, between Houston (Algoa), TX, and Brownsville, TX, between Houston, TX, and Iowa Junction, LA, and between Houston, TX, and Bridge Jct., AR (just west of Memphis, TN). The trackage rights that UP/SP will receive or retain include rights extending between Bend, OR, and Chemult, OR, between Mojave, CA, and Barstow, CA, and between Iowa Jct., LA, and Avondale, LA. The trackage rights that BNSF will receive and that UP/SP will receive or retain are more fully described in Appendix C.[22]

Line Sales. Under the BNSF agreement, BNSF will purchase: (1) UP's Keddie Line (in California) between Keddie, CA, at MP 0 and Bieber, CA, at MP 111.8, including both legs of the wye at Keddie; (2) UP's Dallas Line (in Texas) between Dallas, TX, at MP 768.9 and Waxahachie, TX, at MP 798.03; and (3) SP's Avondale Line (in Louisiana) between Avondale, LA, at MP 16.9 and Iowa Junction, LA, at MP 205.3.[23]

Proportional Rate Agreement. The BNSF agreement includes, among other things, a proportional rate agreement over the Portland gateway (hereinafter referred to as the BNSF PRA) that will allow UP/SP to participate in joint rates with BNSF for traffic moving between points in an area north of Portland, OR, and west of Billings and Havre, MT, on the one hand, and, on the other, points in an area extending from Oregon to West Texas. The points in the area north of Portland and west of Billings and Havre are more particularly described as: Canadian interchanges in the Vancouver area; points north of Seattle and west of the Cascades; points south of and including Seattle and west of the Cascades; Washington points east of the Cascades and west of and including Spokane; and points east of Spokane and west of Billings and Havre. The points in the area from Oregon to West Texas are more particularly described as: points in Oregon, California, Nevada, Utah, Colorado, Arizona, and New Mexico;

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[21] These mileage calculations do not include the additional trackage rights provided for in the CMA agreement.

[22] In Finance Docket No. 32760 (Sub-No. 1), applicants have filed a notice of exemption that covers the trackage rights provided for in the BNSF agreement (not including the additional trackage rights provided for in the CMA agreement). This notice invokes the trackage rights class exemption codified at 49 CFR 1180.2(d)(7).

[23] In Finance Docket No. 32760 (Sub-No. 2), applicants have filed a petition for exemption that covers the three line sales provided for in the BNSF agreement.

points in Texas west of Monahans and Sanderson; and connections to Mexico at El Paso and to the west.

CMA Agreement. The CMA agreement provides, among other things, that the BNSF agreement shall be subject to certain amendments, including amendments: (1) to give BNSF overhead trackage rights (for traffic moving from/to points south of Bald Knob and Brinkley, AR) (a) over UP's line between Houston, TX, and Valley Junction, IL, via Palestine, TX, (b) over SP's line between Fair Oaks, AR, and Valley Junction, IL, and (c) over UP's line between Fair Oaks and Bald Knob, AR; (2) to grant BNSF access to any new facilities (not including expansions of or additions to existing facilities or load-outs or transload facilities) located post-merger on any SP-owned line over which BNSF receives trackage rights; (3) to provide BNSF equal access to SP's Dayton Yard (near Baytown, TX) for storage in transit of traffic handled pursuant to the BNSF agreement; (4) to provide that BNSF's trackage rights fees shall be adjusted each year by the difference between that year and the preceding year in UP/SP's system average Uniform Railroad Costing System (URCS) costs for the maintenance and operating costs categories; (5) to give BNSF the right to serve shippers at Lake Charles and West Lake, LA, open to all of UP, SP, and KCS[24] (a) to, from, and via New Orleans, and (b) to and from points in Mexico, with routings via Eagle Pass, Laredo (through interchange with Tex Mex at Corpus Christi or Robstown), or Brownsville, TX; and (6) to specify that, in the Houston-Memphis-St. Louis corridor, BNSF can utilize either the UP line or the SP line, at its discretion, for operating convenience. The CMA agreement further provides, among other things, that applicants will state, in a submission to the Board, that they are agreeable to annual Board oversight proceedings for 5 years, with the Board to examine whether the BNSF agreement has effectively addressed the competitive issues it was intended to address.[25]

URC Agreement. Under the URC agreement, URC will receive access to additional coal sources in Utah and overhead trackage rights between Utah Railway Junction, UT, and Grand Junction, CO. The expanded access to Utah coal consists of joint access with UP/SP to the Savage Coal Terminal coal loading facility located on the CV spur near Price, UT (this is a loadout facility, UP/SP-230 at 166), and exclusive access to the Willow Creek Mine located adjacent to the SP main line near Castle Gate, UT; and this expanded access, combined with URC's present access to coal mines on its own line between Utah Railway Junction and Mohrland, will give URC access to nearly a third of total Utah/Colorado coal production, UP/SP-260 at 39. Applicants insist that they entered into the URC agreement merely to resolve a dispute respecting their ability to grant trackage rights to BNSF over the joint SP/URC track that forms a portion of the SP main line between Salt Lake City and Denver, but they add that the URC agreement will enhance competition by expanding the coal sources

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[24] Applicants have further indicated that this aspect of the CMA agreement will be extended to shippers at West Lake Charles, LA, served by SP and KCS. UP/SP-260 at 23 n.9.

[25] Applicants have made the required submission, see UP/SP-230 at 21, and CMA has withdrawn its opposition to the merger in reliance upon (1) our adoption of the BNSF and CMA agreements, (2) BNSF's assurances that it will enter the markets opened up under the BNSF agreement, and compete vigorously for the traffic of CMA members, and (3) our agreement to institute annual oversight proceedings to examine the effects of the merger on competition, see CMA-12 at 4-5.

available to BNSF through interchange with URC (under the BNSF agreement, BNSF, which will have the right to interchange with URC at Provo, Utah Railway Junction, and Grand Junction, will be able to move URC-originated coal both to end markets west of Provo and also to end markets east of Grand Junction).

Terminal/Switching Railroads. A combined UP/SP will control five terminal and/or switching railroads in which UP and SP presently have non-controlling interests: The Alton & Southern Railway Company (A&S), Central California Traction Company (CCT), The Ogden Union Railway & Depot Company (OURD), Portland Terminal Railroad Company (PTRR), and Portland Traction Company (PTRC). In Finance Docket No. 32760 (Sub-Nos. 3, 4, 5, 6, and 7), applicants have filed petitions to exempt their control of A&S, CCT, OURD, PTRR, and PTRC, respectively.[26]

Motor Carriers. UPC holds a 100% stock interest in motor carrier Overnite Transportation Company (Overnite); SPT holds a 100% stock interest in both Pacific Motor Transport Company (PMT) and Southern Pacific Motor Trucking Company (SPMT); and a UP/SP merger will therefore result in (1) common control of SP and Overnite and (2) common control of UP and PMT/SPMT. In Finance Docket No. 32760 (Sub-No. 8), applicants have filed a petition to exempt this common control.

Terminal Trackage Rights. In Finance Docket No. 32760 (Sub-No. 9), applicants and BNSF have filed an application for an order under 49 U.S.C. 11103 permitting BNSF to use two segments of KCS track in Shreveport, LA, and one segment of KCS track in Beaumont, TX. Applicants contend that the use of these segments is necessary for BNSF to provide, under the BNSF agreement, stronger competition to UP/SP in the Houston-Memphis and Houston-New Orleans corridors. Applicants indicate that, although SP has trackage rights over the three segments and MPRR has trackage rights over the Beaumont segment, they have filed their Sub-No. 9 application because the underlying trackage rights agreements "arguably" require consent by KCS to the use of the trackage rights by BNSF.[27] The Shreveport trackage (two segments totaling 3.52 miles in length) is a portion of SP's Houston-Memphis route, and applicants claim that the two segments are used also for interchange with connecting railroads and for

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[26] A&S, which owns some 33 miles of main line track and 108 miles of yard track in the St. Louis area, is owned by MPRR and SSW, each holding a 50% stock interest therein. CCT, which owns some 45 miles of track between Stockton and Polk, CA, and between Lodi and Lodi Junction, CA, is owned by UPRR, SPT, and BNSF, each holding a one-third stock interest therein. OURD, a terminal carrier located in Ogden, is owned by UPRR and SPT, each holding a 50% stock interest therein. PTRR, which operates over some 58 miles of track in Portland, is owned by UPRR (40% stock interest), SPT (20% stock interest), and BNSF (40% stock interest), each of which has two members on PTRR's six-member board. PTRC, an inactive entity with neither employees nor facilities, is owned by UPRR and SPT, each holding a 50% stock interest therein.

[27] Applicants, citing 49 U.S.C. 11341(a), claim that approval of the merger, conditioned by the BNSF agreement, should give BNSF authority to use the subject tracks with or without the consent of KCS. Applicants indicate, however, that they have filed their Sub-No. 9 application because there is ICC precedent to the effect that 49 U.S.C. 11341(a) might not achieve an override of a consent requirement in a joint facility agreement. See UP/SP-26 at 123 n.2.

access to a nearby industrial area jointly served by SP, UP, and KCS.[28] The Beaumont trackage (roughly 1.8 miles between KCS MP's 764.9 and 766.7, including the Neches River Bridge, KCS-32 at 1) is a portion of separate UP and SP Houston-New Orleans routes, and applicants claim that this trackage also is used for switching and interchange purposes and for access to facilities of the Port of Beaumont.[29]

Abandonments And Discontinuances. Applicants seek authorization to abandon, or to abandon and to discontinue operations over, 17 line segments that total approximately 584 miles. Authorization is sought by application, by petition, and by notice.[30]

The Towner-NA Junction Line (Colorado). In Docket Nos. AB-3 (Sub-No. 130) and AB-8 (Sub-No. 38), respectively, MPRR seeks by application approval to abandon, and DRGW seeks by application approval to discontinue its overhead trackage rights operations over, MPRR's Towner-NA Junction Line, which extends between MP 747.0 near Towner, CO, and MP 869.4 near NA (North Avondale) Junction, CO, a distance of approximately 122.4 miles in Pueblo, Crowley, and Kiowa Counties, CO. The abandonment/discontinuance does not include active industries at NA Junction or at Towner.

The Sage-Malta-Leadville Line (Colorado). In Docket Nos. AB-8 (Sub-No. 36X) and AB-12 (Sub-No. 189X), respectively, DRGW seeks by petition to exempt its discontinuance of operations over, and SPT seeks by petition to exempt its abandonment of, SP's Sage-Malta-Leadville Line, which extends a distance of approximately 69.1 miles in Eagle and Lake Counties, CO, (1) between MP 335.0 near Sage, CO, and MP 271.0 near Malta, CO, and (2) between MP 271.0 near Malta, CO, and MP 276.1 near Leadville, CO.

The Malta-Cañon City Line (Colorado). In Docket Nos. AB-8 (Sub-No. 39) and AB-12 (Sub-No. 188), respectively, DRGW seeks by application approval to discontinue its operations over, and SPT seeks by application approval to abandon, SP's Malta-Cañon City Line, which extends between MP 271.0 near Malta, CO, and MP 162.0 near Cañon City, CO, a distance of approximately 109.0 miles in Lake, Chaffee, and Fremont Counties, CO.[31]

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[28] SP has rights to use this trackage under agreements with KCS and a predecessor dated May 8, 1933, and December 17, 1980. The 1933 agreement covers a 1.32-mile segment of track between engineering stations 8872+81 and 8941+24 (no mileposts have been assigned). The 1980 agreement covers approximately 2.2 miles of track between KCS MP's 559 and 671.2 (or, by KCS' calculations, approximately 2.1 miles of track between KCS MP's 559 and 561.2, see KCS-32 at 1).

[29] MPRR and SP obtained rights to use this trackage pursuant to an agreement dated July 1, 1965, among KCS, MPRR, SP, SF, and the City of Beaumont. SF, however, did not acquire, under the 1965 agreement, the rights sought in the Sub-No. 9 application.

[30] Of the 17 lines for which abandonment authorizations are sought, 4 lines involve both abandonment by one carrier (either MPRR or SPT) and discontinuance by another carrier (DRGW).

[31] The Sage-Malta-Leadville Line connects with the Malta-Cañon City Line at Malta. We shall on occasion refer to the two lines collectively as the Tennessee Pass Line.

The Hope-Bridgeport Line (Kansas). In Docket Nos. AB-3 (Sub-No. 131) and AB-8 (Sub-No. 37), respectively, MPRR seeks by application approval to abandon, and DRGW seeks by application approval to discontinue its overhead trackage rights operations over MPRR's Hope-Bridgeport Line, which extends between MP 459.20 near Hope, KS, and MP 491.20 near Bridgeport, KS, a distance of approximately 31.24 miles in Dickinson and Saline Counties, KS (MP 478.05 = MP 478.81; see UP/SP-26 at 208). The abandonment and discontinuance do not include active industries at Hope and Bridgeport.

The Barr-Girard Line (Illinois). In Docket No. AB-33 (Sub-No. 96), UPRR seeks by application approval to abandon its Barr-Girard Line, which extends between MP 51.0 near Barr, IL, and MP 89.4 near Girard, IL, a distance of approximately 38.4 miles in Menard, Sangamon, and Macoupin Counties, IL. The abandonment does not include active industries at Barr and Girard. UPRR indicates that a superior post-merger route will be achieved by exiting this line at Barr, operating over the Illinois & Midland line (formerly the Chicago & Illinois Midland line) from Barr to Springfield, and then operating over the SP line from Springfield to St. Louis; and UPRR therefore notes that this abandonment is contingent upon acquisition of trackage rights over the Illinois & Midland (I&M) line.

The Gurdon-Camden Line (Arkansas). In Docket No. AB-3 (Sub-No. 129X), MPRR seeks by petition to exempt the abandonment of its Gurdon-Camden Line between MP 428.3 near Gurdon, AR, and MP 457.0 near Camden, AR, a distance of approximately 28.7 miles in Clark, Nevada, and Ouachita Counties, AR. The abandonment does not include active industries at Gurdon or Camden.

The Iowa Junction-Manchester Line (Louisiana). In Docket No. AB-3 (Sub-No. 133X), MPRR seeks by petition to exempt the abandonment of its Iowa Junction-Manchester Line between MP 680.0 near Iowa Junction, LA, and MP 688.5 near Manchester, LA, a distance of approximately 8.5 miles in Jefferson Davis and Calcasieu Parishes, LA.

The Wendel-Alturas Line (California). In Docket No. AB-12 (Sub-No. 184X), SPT seeks by petition to exempt the abandonment of its Wendel-Alturas Line between MP 360.1 near Wendel, CA, and MP 445.6 near Alturas, CA, a distance of approximately 85.5 miles in Modoc and Lassen Counties, CA.

The Suman-Bryan Line (a portion) (Texas). In Docket No. AB-12 (Sub-No. 185X), SPT seeks by petition to exempt the abandonment of the portion of its Suman-Bryan Line that lies between MP 117.6 near Suman, TX, and MP 105.07 near Benchley, TX, a distance of approximately 12.53 miles in Robertson County, TX.[32]

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[32] SPT originally petitioned to abandon the entire Suman-Bryan Line, between MP 117.6 near Suman, TX, and MP 101.4 near Bryan, TX, a distance of approximately 16.2 miles in Brazos and Robertson Counties, TX. See UP/SP-26 at 362-371. SPT later modified the petition by excluding the segment between MP 101.4 and MP 105.07 from the scope of the abandonment, noting that VTI Industries, the sole shipper on the line (located near MP 104.5), will continue to be served by UP/SP. SPT now seeks to abandon only the portion of the line between MP 117.6 near Suman and MP 105.07 near Benchley, which it calculated to be a distance of approximately 13.1 miles. See UP/SP-57. The distance between MP's 117.6 and 104.5 (where VTI Industries is located) is (continued...)

The Edwardsville-Madison Line (Illinois). In Docket No. AB-33 (Sub-No. 98X), UPRR seeks by petition to exempt the abandonment of its Edwardsville-Madison Line between MP 133.8 near Edwardsville, IL, and MP 148.78 near Madison, IL, a distance of approximately 14.98 miles in Madison County, IL. The abandonment does not include active industries at Madison.

The Newton-Whitewater Line (Kansas). In Docket No. AB-3 (Sub-No. 132X), MPRR seeks by notice to exempt the abandonment of its Newton-Whitewater Line between MP 485.0 near Newton, KS, and MP 476.0 near Whitewater, KS, a distance of approximately 9.0 miles in Butler and Harvey Counties, KS. The abandonment does not include active industries at Newton or Whitewater.

The Troup-Whitehouse Line (Texas). In Docket No. AB-3 (Sub-No. 134X), MPRR seeks by notice to exempt the abandonment of its Troup-Whitehouse Line between MP 0.50 near Troup, TX, and MP 8.0 near Whitehouse, TX, a distance of approximately 7.5 miles in Smith County, TX. The abandonment does not include active industries at Troup or Whitehouse.

The Seabrook-San Leon Line (Texas). In Docket No. AB-12 (Sub-No. 187X), SPT seeks by notice to exempt the abandonment of its Seabrook-San Leon Line between MP 30.0 near Seabrook, TX, and MP 40.5 near San Leon, TX, a distance of approximately 10.5 miles in Galveston and Harris Counties, TX.

The Whittier Junction-Colima Junction Line (California). In Docket No. AB-33 (Sub-No. 93X), UPRR seeks by notice to exempt the abandonment of its Whittier Junction-Colima Junction Line between MP 0.0 near Whittier Junction, CA, and MP 5.18 near Colima Junction, CA, a distance of approximately 5.18 miles in Los Angeles County, CA. The abandonment does not include active industries at Whittier Junction or Colima Junction.

The Magnolia Tower-Melrose Line (California). In Docket No. AB-33 (Sub-No. 94X), UPRR seeks by notice to exempt the abandonment of its Magnolia Tower-Melrose Line between MP 5.8 near Magnolia Tower, CA, and MP 10.7 near Melrose, CA, a distance of approximately 4.9 miles in Alameda County, CA. The abandonment does not include active industries at Magnolia Tower or Melrose.

The DeCamp-Edwardsville Line (Illinois). In Docket No. AB-33 (Sub-No. 97X), UPRR seeks by notice to exempt the abandonment of its DeCamp-Edwardsville Line between MP 119.2 near DeCamp, IL, and MP 133.8 near Edwardsville, IL, a distance of approximately 14.6 miles in Madison County, IL. The abandonment does not include active industries at DeCamp or Edwardsville.

The Little Mountain Junction-Little Mountain Line (Utah). In Docket No. AB-33 (Sub-No. 99X), UPRR seeks by notice to exempt the abandonment of its Little Mountain Junction-Little Mountain Line between MP 0.0 near Little Mountain Junction, UT, and MP 12.0 near Little Mountain, UT, a distance of approximately 12.0 miles in Box Elder and Weber Counties, UT. The abandonment does not include active industries at Little Mountain Junction or Little Mountain.

BNSF. BNSF takes no position on the merger, but insists that it is the only railroad that can ensure strong competition

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[32](...continued)
13.1 miles; however, by our calculations, the distance between MP's 117.6 and 105.07 is approximately 12.53 miles.

to a merged UP/SP because no other railroad has the financial strength, operational capabilities, marketing expertise, and range of origins and destinations to serve the long routes in the Western United States. The BNSF agreement, BNSF contends, will preserve effective competition for shippers served only by UP and SP today, and BNSF therefore argues that, if the merger is approved, the BNSF agreement must be imposed as a condition. BNSF insists that it will receive, under the BNSF agreement, adequate access to regions, routes, and stations on appropriate terms and conditions, including compensation levels, that will allow it to compete vigorously. Recognizing that most of its operations under the agreement will be conducted pursuant to trackage rights, BNSF notes that the agreement requires that BNSF's trains be given equal dispatch without any discrimination in favor of comparable UP/SP trains, and BNSF insists that it will accept nothing less.

RAILROAD PROTESTANTS. Concerns that a UP/SP merger would have anticompetitive impacts in the transportation marketplace have been expressed by several railroad protestants.

Consolidated Rail Corporation. Conrail urges us to deny the merger unless conditioned on divestiture of what Conrail calls the "SP East":[33] (1) SP's lines from Chicago and St. Louis to Galveston, TX, and Brownsville, TX, and from New Orleans to Spofford, TX, Eagle Pass, TX, and El Paso, TX, including all connecting trackage and spur lines serving Alton, IL, New Madrid, MO, Memphis, TN, Little Rock, AR, Indiana, AR, Breaux Bridge, LA, and all intermediate Texas points; (2) all trackage, haulage, and access rights associated with these lines and SP's ownership of, and rights in, the jointly used UP-SP line extending from East St. Louis to Jonesboro, AR; (3) SP's interest in the A&S, the Terminal Railroad Association of St. Louis (TRRA), and any other terminal railroad serving traffic originating/terminating on the acquired lines; (4) SP's interest in various bridge companies necessary to the effective operation of the acquired lines; and (5) all other assets (including yards, storage facilities, and sidings), options for same, or other facilities used or held by SP or its affiliates for the maintenance, operation, and efficient use of the acquired lines and assets. Conrail also asks that the Finance Docket No. 32760 (Sub-No. 1) class exemption be revoked (the request for revocation is referred to as a "petition," CR-21 at 10-11), and that the Finance Docket No. 32760 (Sub-No. 2) petition for exemption be denied. The trackage rights and line sales provided for in the BNSF agreement, Conrail insists, require a responsive application to allow us to determine whether these trackage rights and line sales cure the anticompetitive harms threatened by the merger.[34]

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[33] Conrail uses the terms "SP East" or "SP East lines" to mean SP's properties in Texas, Louisiana, and Arkansas, SP's eastern main line in Missouri and Illinois, all access rights associated with these lines, and all other assets held by SP or its affiliates that are used or useful for the maintenance and operation of these lines. Conrail uses the terms "SP West" or "SP West lines" to mean all other SP lines and facilities. As Conrail uses these terms, the region where SP East operates is the SP East region and the region where SP West operates is the SP West region.

[34] In its BN/SF-53 reply to Conrail's "petition" for revocation of the Sub-No. 1 class exemption, BNSF contends that Conrail's "petition" is premature (because the class exemption has not yet become effective with respect to the trackage

(continued...)

Competitive Harm in the SP East Region. Conrail claims that, in the SP East region, the trackage rights provided in the BNSF agreement will not avert the anticompetitive harms threatened by what is essentially a parallel merger. The problems with these trackage rights, Conrail asserts, cannot be remedied; their flaws relate primarily to the physical route structure and infrastructure available to BNSF in the SP East region. By Conrail's calculations, BNSF would capture only a trivial share (less than 4%) of new traffic originating or terminating in Texas, Louisiana, and Arkansas and moving over major SP East corridors from/to the North or Northeast or Mexico, and Conrail insists that this small market share would prevent BNSF from attaining economies of density and scale comparable to UP/SP's. Conrail concedes that the BNSF agreement attempts to address competition at 2-to-1 points (i.e., points at which shippers now have access to both UP and SP and to no other railroad), but claims that the agreement does not address either the loss of potential competition provided by build-ins or transloads or the loss of source competition. And Conrail insists that SP could continue to compete effectively as an independent railroad; SP, Conrail argues, has the financial resources to make the investments that would enable it to keep pace with the other western railroads.

Houston. In Houston, Conrail claims, BNSF would generally be required to use one (and sometimes two) terminal carriers, thereby adding cost and time to a BNSF haul as compared to a pre-merger SP haul and a post-merger UP/SP haul. All BNSF traffic to the East and Northeast, Conrail indicates, would be delivered to the New South Yard of the Houston Belt & Terminal Railway (HB&T), and would exit the Houston switching district via the HB&T. Some BNSF traffic, Conrail adds, also would be switched via the Port Terminal Railway Association (PTRA).

South Texas/Gulf Coast-St. Louis. Conrail claims that, for 2-to-1 shippers in the SP East region, most traffic goes north to the St. Louis gateway (or gateways in Southern Illinois) for a further haul by an eastern railroad to its ultimate destination. BNSF, Conrail contends, would face obstacles that SP generally does not face pre-merger and that UP/SP would not face post-merger; and this, Conrail adds, would be true whether this traffic is routed (1) via BNSF's Houston-Memphis trackage rights, and then via BNSF's own Memphis-St. Louis track, or (2) via BNSF's own Houston-Tulsa-St. Louis track. Conrail notes, with respect to the routing via Memphis, that SP's Houston-Shreveport "Rabbit" line is single-track, undulates, lacks Centralized Traffic Control (CTC), has a 49 mile-per-hour speed limit, and has few sidings. Conrail concedes that SP offers service on this line but notes that SP developed that service over a long history, and argues that BNSF would lack SP's knowledge of the line and its customer base. And, Conrail asserts, BNSF service on the Houston-Memphis line also would be disadvantaged by UP/SP's "primarily directional" southbound routings. The routing via Tulsa, Conrail concedes, would fix these problems, but only at the expense of added circuity. Besides, Conrail argues, via either routing BNSF would have to travel across the Mississippi River and through St. Louis from the west to connect with eastern railroads in East St. Louis or farther east in Southern Illinois; and, in St. Louis, BNSF would require switching service from TRRA.

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[34](...continued)
rights), at odds with our regulations (because the trackage rights have not been sought in a responsive application), and inconsistent with ICC practice. BN/SF, slip op. at 87 n.116.

Houston-New Orleans. Conrail claims that BNSF recognizes that the Houston-New Orleans corridor is the one corridor provided for in the BNSF agreement in which traffic density may increase, and this, Conrail adds, may explain why BNSF has proposed to provide service in this corridor through a combination of trackage rights and, at its election, acquisition of a portion of the line. Conrail indicates, however, that BNSF has not analyzed the cost of required capacity-related improvements or the lead time needed to construct such improvements.

Mexican Gateway Traffic. Conrail notes that UP and SP currently compete head-to-head at El Paso, Laredo, and Brownsville, the principal eastern gateways into Mexico. The BNSF agreement purports to allow BNSF to replicate this competition, with access to Eagle Pass (via trackage rights that would replace the haulage rights it has now), to Laredo (via trackage rights to Robstown, and via a junction at Robstown with Tex Mex), and to Brownsville (via trackage rights).[35] Conrail contends that shippers fear that BNSF will not be able to use these trackage rights effectively, and that BNSF's actions suggest that it is not interested in developing Mexican traffic.

BNSF Options. Under the BNSF agreement, Conrail notes, BNSF must choose whether to provide service by means of direct service, switching, or use of a third carrier for local service; and, under the agreement, once it makes that election, it can change only once, and then cannot change for 5 years. Therefore, Conrail asserts, if BNSF, a newcomer to the 2-to-1 shippers, makes a choice that is uneconomic, operationally infeasible, or competitively unattractive, 5 years would pass before its competitive disadvantage could be rectified.

BNSF Access to Necessary Facilities. Conrail asserts that, after the merger, BNSF would have access to only 12% of the switching and classification yard facilities in the Texas-Louisiana Gulf Coast. And, Conrail adds, BNSF would have access to only 16% of SIT capacity in the Texas-Louisiana Gulf Coast; but SIT capacity, Conrail notes, is vital to providing competitive rail service to plastics shippers.

Other Considerations. Conrail contends that the BNSF agreement does not embody an enforceable commitment to provide competitive service, although Conrail concedes that the imposition of the agreement as a condition will create a common carrier obligation. Conrail claims, however, that there would still be uncertainties as to the extent of BNSF's obligations because, among other things, BNSF has not provided: details about local service; the costs of providing such service, whether direct, by switch, or by third carrier; specific schedules for through trains; specific information about yard capacity available for BNSF operations; details about costs, delays, and extra handlings involved in relying on terminal carriers; specific plans for capacity improvements on the trackage rights lines; and specific plans for provision of SIT capacity.

Benefits of the Proposed Merger. Conrail insists that the primary efficiencies claimed for the merger, including line consolidations, reduced circuity, and increased direct and single-line service, are in the West; the SP East region accounts for less than 5% of the total projected merger-related route mile savings. Conrail further insists that the public benefits of the

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[35] Conrail notes that BNSF already has access to El Paso, but from the north and west, not from the east.

merger (an improved competitive posture vis-à-vis BNSF) and the principal investments that would be made by UP/SP after the merger (corridor upgrades, terminal improvements, improved track connections, and intermodal terminals) are likewise in the West. And, Conrail asserts, the claimed public benefits in the SP East region (e.g., alleviation of capacity constraints through directional routing and increased blocking and classifying) could be achieved without a merger.

Benefits of Divestiture. Divestiture, Conrail argues, would solve the anticompetitive harms threatened by the merger, and would be, for various reasons, preferable to trackage rights. An owner, Conrail insists, has economic incentives that a tenant lacks; trackage rights do not always assure the tenant access to the yards, storage facilities, and infrastructure necessary to assure on-time, consistent, and reliable service; a landlord may discriminate against a tenant; and, when the landlord's operations encounter problems, the tenant's operations go awry as well. Conrail envisions that divestiture would be accomplished in an auction-like process. Each bid would reflect the value of the lines to the bidder (Conrail has stated in the record that it is willing to pay $1.5 billion for the SP East properties);[36] each carrier would attempt to demonstrate how its bid would maximize the public benefits of the divestiture operation; and each also could demonstrate how its bid would allow the benefits of the UP/SP West consolidation to be realized. And, Conrail contends, there would be a substantial benefit in the divestiture of SP East lines to an eastern railroad; a Conrail-SP East system, by way of example, would be an end-to-end combination yielding new single-line opportunities, faster transit times, lower costs, fewer handlings, and generally better service.

CMA Agreement. The CMA agreement, Conrail insists, does not remedy merger-related competitive harms in the SP East region. Conrail claims that the BNSF agreement, even as modified by the amendments required by the CMA agreement, still does not address the service problems that will impede BNSF's operations in Houston; still does not address the problems created by BNSF's access to a mere 12% of the switching and classification yard facilities in the Texas-Louisiana Gulf Coast; does not meaningfully address the problems created by BNSF's access to a mere 16% of SIT capacity in the Texas-Louisiana Gulf Coast; and does nothing to alter the traffic predicted to be available to BNSF. Conrail concedes that the BNSF agreement, as modified by the amendments required by the CMA agreement, provides BNSF access to any new facility located on any SP-owned line over which BNSF receives trackage rights. Conrail claims, however, that this is largely illusory because "new facility" is narrowly defined to exclude "expansions of or additions to existing facilities," and also because BNSF, if it elects to serve a new facility, is required to share equally "in any capital investment necessary to provide rail service to the facility" (irrespective of the amount of traffic it may be able to capture).

Kansas City Southern Railway Company. KCS contends that the merger will cause unprecedented competitive harm and should therefore be denied, and asks, in the alternative, that we order divestiture of parallel lines and duplicate facilities, including: (1) lines between St. Louis and Memphis, on the one hand, and, on the other, Houston; (2) SP's Houston-New Orleans

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[36] We note that press reports have indicated that Conrail has increased the amount it is willing to pay to $1.9 billion. Wall Street Journal, June 6, 1996, at B10; Traffic World, June 17, 1996, at 40.

line; and (3) SP's Houston-Brownsville line. KCS adds that, where UP and SP now share lines and facilities, divestiture should consist of a grant of trackage rights over such lines and access rights to such facilities. KCS adds that, to remedy cumulative effects of the BN/SF merger and the proposed merger, a third carrier should be given access to the Central Kansas rights granted to SP in connection with the BN/SF merger, including access to Wichita, Topeka, and Hutchinson, and the trackage rights over BNSF to Ft. Worth. And, KCS concludes, we should order a Central Corridor divestiture similar to the one proposed by MRL.

The BNSF Agreement; Discovery; Due Process; and the First Amendment. KCS contends that the BNSF agreement will not solve the competitive problems the proposed merger would cause, and that we cannot fully evaluate the agreement's competitive impact because applicants have refused to disclose critical aspects of its negotiation. KCS also contends that applicants have abused the discovery process, and it maintains that their abuse of that process should not be condoned. KCS-33 at 117-124. KCS further contends that applicants, by their overuse of the "Highly Confidential" designation, have hindered participation in this proceeding by opponents of the merger, have violated opponents' procedural due process rights (because certain matters could not be discussed with inside counsel), and have even violated opponents' First Amendment right to "petition the government for a redress of grievances" (because opponents and inside counsel, were unable to look at material stamped "Highly Confidential"). KCS also contends, among other things, that because the merger involves commerce to and through Mexico and would have a substantial impact on American foreign policy, there is some doubt as to our jurisdiction in this matter. KCS-33 at 83-84.

2-to-1 Shippers. KCS notes that, under the BNSF agreement, only 2-to-1 shippers at points served by UP and SP and no other carrier will gain access to BNSF. KCS argues, however, that there are other 2-to-1 shippers as well. (1) Applicants, KCS claims, did not consider a shipper to be a 2-to-1 shipper if that shipper had access, either directly or via reciprocal switching, to two carriers, the first being either UP or SP and the second being another Class I carrier (such as KCS or BNSF). KCS maintains, however, that any such shipper should qualify as a 2-to-1 shipper if, by way of example, it can presently route a shipment either joint-line by KCS-UP or single-line by SP; post-merger, KCS asserts, there will no longer be two independent routing alternatives. (2) KCS also asserts that the BNSF agreement provides no relief to a shipper that has a plant served both by UP and SP, either directly or via reciprocal switching, and also by another Class I carrier (such as KCS). KCS claims, however, that any such shipper should qualify as a 2-to-1 shipper if that shipper can presently route either single-line by UP or single-line by SP, but cannot route single-line by KCS because KCS does not serve the destination. (3) KCS further asserts that the BNSF agreement provides no relief to a shipper that has a plant served exclusively by SP, where the shipper can route a shipment either single-line by SP or joint-line by SP-UP. That shipper, KCS claims, may have sufficient leverage to "short haul" SP by using SP as a switch carrier to switch the traffic to UP.

2-to-1 Corridors. KCS warns that shippers located in 2-to-1 corridors will suffer reduced competition because, for most UP or SP shippers in a given corridor who are not directly served by both carriers, the presence of the other carrier nevertheless provides a competitive restraint. That restraint, which would be eliminated by the merger, takes many forms: potential build-outs or build-ins; the potential to truck transload; the potential to use joint truck/rail or barge/rail movements; the ability to shift production among numerous plants located on UP and SP; the ability to relocate plant facilities; the ability to play UP and SP against each other in deciding where to locate new facilities; the use of package bidding; and source and product competition between shippers located on UP and shippers located on SP.

Trackage Rights; Package Deal; Operating Costs. Trackage rights, KCS claims, inherently present many problems involving labor, equipment, dispatching, maintenance, and derailments; a landlord, KCS contends, has no incentive to provide essential maintenance to tracks used primarily by a tenant. The BNSF agreement, KCS further contends, was a package deal, and BNSF had to accept trackage rights it did not want in order to obtain those that it did, primarily in the West.[37] BNSF's lack of interest, KCS claims, is reflected in its failure to provide operating details, management plans, diversion studies, market analyses, financial information, or environmental documentation with respect to the line sales and trackage rights provided for in the BNSF agreement. KCS argues that BNSF's operating costs will be significantly higher than UP/SP's and, as a result, BNSF will not be an effective competitor. KCS therefore argues that the trackage rights fees provided for in the agreement must be adjusted to provide competitive relief.

Antitrust Violations. KCS, arguing that, in recent years, BN, SF, UP, and SP may have cooperated in violation of the antitrust laws and that this cooperation may have produced the BNSF agreement, requests that we "establish" that our rulings in this proceeding neither condone nor insulate violations of the antitrust laws. KCS-33 at 82. KCS adds that, because some form of anticompetitive behavior may have occurred between BN, SF, UP, and SP during the BN/SF merger proceeding, we should consider reopening the record in that proceeding in order to fully analyze the trackage rights given in that proceeding. KCS-33 at 82 n.41.

Terminal Trackage Rights. KCS claims that, even if we impose the BNSF agreement as a condition, BNSF will not be able to implement its trackage rights absent approval of the Finance Docket No. 32760 (Sub-No. 9) terminal trackage rights application. KCS, urging denial of that application, contends that the relevant rail segments are not terminal facilities within the meaning of 49 U.S.C. 11103(a). KCS claims that the two agreements applicable to the Shreveport trackage are standard trackage rights agreements, confining SP's use of the trackage to main-line, through-train operations, and that the agreement applicable to the Beaumont trackage prohibits terminal activities on the trackage. And, KCS contends, the requested trackage rights are not practicable and would interfere with the operations of the current users of the lines.

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[37] KCS, citing a document submitted under seal, claims, among other things, that BNSF, despite its lack of interest in Mexico, had no choice but to accept South Texas trackage rights as part of a package. KCS-33 at 72. BNSF insists that the confidential document upon which KCS has relied lacks probative value, is not admissible in evidence, and should be stricken from the record. BN/SF-54 at 32-33. KCS, responding to BNSF's request to strike, maintains that there is no basis not to consider this document, which, KCS adds, provides a glimpse at the motivations of applicants and BNSF in regard to South Texas. KCS-52 at 2. We think that the document relied upon by KCS has been properly introduced into evidence, and we will therefore deny BNSF's request that it be stricken.

Montana Rail Link. MRL, a regional carrier that has filed a responsive application in Finance Docket No. 32760 (Sub-No. 11), operates a 632-mile main line between Laurel, MT, and Sandpoint, ID, with trackage rights on BN between Sandpoint, ID, and Spokane, WA, and with 200 miles of branch lines in Montana. MRL insists that the trackage rights provided for in the BNSF agreement will not preserve or promote competition in the Central Corridor because: BNSF will have no investment in that corridor, and will pay fees for the trackage rights only to the extent that it uses them; BNSF does not need these trackage rights to protect any of its existing long-haul traffic, or to enhance service to its existing customers; the trackage rights do not provide BNSF with access to any significant new markets, given the narrow definition of 2-to-1 shippers; the requirement that BNSF share Central Corridor capital expenditures, based upon its relative use of that route, will operate as a disincentive to BNSF usage of the trackage rights; and it is unlikely that BNSF would make much use of a lengthy route over which it would be subject to the dispatching and operational priorities of UP/SP.

Coal. Bituminous coal, MRL notes, is mined in Southern Wyoming, the Central Rockies, Four Corners, and Raton; subbituminous coal is mined in the PRB. The four bituminous reserves are served predominantly by three railroads: Southern Wyoming by UP, the Central Rockies by SP, and Four Corners and Raton by BNSF; UP handles 21% of the rail transportation market for western bituminous coal, SP handles 42%, and BNSF handles 25% (and URC handles the remaining 12%). The PRB subbituminous coal reserves are served by two railroads: UP and BNSF. SP's share of the transportation market for shipments to traditional customers of western bituminous coal, MRL indicates, has held steady at about 45% since 1989. MRL adds, however, that, as to new markets, SP's share has grown from 7% in 1989 to 64% in 1995, due to aggressive pricing and innovative marketing practices. UP's market share for emerging and new markets of bituminous coal, MRL claims, has declined to 18%, and MRL claims that the decline in UP's share of the emerging markets for western bituminous coal may reflect UP's dedication to developing the growth of PRB coal. MRL notes that SP, with no access to PRB coal, has had to focus its efforts on developing western bituminous coal, particularly from the SP-served Central Rockies mines; and MRL fears that a combined UP/SP will neglect bituminous coal in favor of PRB coal.

Relief Requested: In General. MRL suggests that, to mitigate the adverse consequences of the merger in the Central Corridor, we should authorize a to-be-formed affiliate (Acquisition Company, hereinafter referred to as MRLAC) to acquire certain Central Corridor rail lines and incidental trackage rights. MRLAC, MRL insists, would compete vigorously for traffic (overhead and local) in the Central Corridor because the value of its franchise would depend on its capturing a share of this market. MRLAC, MRL adds, would grant overhead trackage rights to UP/SP and BNSF over the lines it acquires, to address capacity concerns that may arise in the future and to allow UP/SP to achieve many of the operating efficiencies tied to the merger. And, MRL adds, the proposed acquisitions would advance the public interest by preserving existing routes in the Central Corridor, thereby forestalling five of the abandonments proposed by applicants (respecting the Wendel-Alturas Line, the Sage-Malta-

Leadville Line, the Malta-Cañon City Line, the Towner-NA Junction Line, and the Hope-Bridgeport Line).[38]

Relief Requested: Line Sales. MRLAC would acquire: (1) the UP lines in California from Stockton through Sacramento to Marysville, along with the branch lines to Read and Sutter, north through Keddie, CA, to Flanigan, NV, including the branch line from Reno Junction, CA, south to Reno, NV, and the branch line from Hawley, CA, to Loyalton, CA; (2) the SP line running north from Flanigan, NV, to Alturas, CA, and then northwest to Klamath Falls, OR (the Modoc Line); (3) the UP route from Flanigan, NV, to Winnemucca, NV, and the SP route from Winnemucca, NV, to Wells, NV, and Ogden, UT; (4) from Ogden, all of the DRGW lines, and their contiguous branches, to Salt Lake City, UT, and on to Provo, UT, and then east on DRGW to Denver, CO, including the branches to Potash, Sunnyside, Clear Creek, Copperton, and Garfield, UT; (5) all of the DRGW lines in Colorado, from the Utah border east to Dotsero, including the branches to Montrose, Oliver, and Woody Creek, and, from Dotsero, the line northeast to Denver (including the branches to Craig and Energy Fuels via Steamboat Springs) and the line southeast to Pueblo (the Tennessee Pass Line); (6) the DRGW line between Denver and Pueblo, extending south of Pueblo to Antonito, CO, including the branch line to Creede, CO, and DRGW's rights, if any, to Trinidad, CO; (7) east of Pueblo, the rights and ownership of the former MPRR line between Pueblo, CO, and Herington, KS; (8) SP's ownership in and access to the Kansas City Terminal; and (9) the UP line from Silver Bow, MT, to Pocatello, ID, and the contiguous branches to Arco, Aberdeen, and Gay, ID.

Relief Requested: Equipment; Trackage Rights; Interchange Rights; Proportional Rate Agreement. MRLAC also would acquire all the rolling stock and equipment owned and leased by UP/SP, including locomotives, cars, cabooses and equipment, roadway maintenance equipment, and other vehicles currently used on the subject lines. MRLAC also would acquire certain trackage rights: (1) overhead trackage rights on the UP line between Pocatello, ID, and Ogden, UT; (2) overhead trackage rights on the UP line between Lindsborg, KS, and Salina, KS, and between Salina and Solomon, KS, with access to a direct interchange with Kyle Railways at Solomon; (3) local trackage rights on the SSW line between Herington, KS, and Topeka, KS; (4) overhead trackage rights on the UP line between Topeka and Kansas City; and (5) SP's rights on the BNSF line between Topeka and Kansas City. MRLAC would be entitled to full access to interchange with connecting carriers (including shortlines) at all common points, and would be entitled also to quote rates to and from SP stations in California and Oregon for traffic moving, respectively, via Stockton, CA, and Klamath Falls, OR.

Texas Mexican Railway Company. Tex Mex, which operates over its 157-mile Laredo-Robstown-Corpus Christi line, indicates that Laredo, the principal gateway for rail traffic between Mexico and the United States, is served by two railroads on the American side of the International Bridge (UP via its Laredo-San Antonio line, and Tex Mex via its Laredo-Robstown-Corpus Christi

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[38] MRLAC would be controlled by MRL's majority shareholder. MRL indicates that it has proposed to pay $615,115,059 for the property to be acquired by MRLAC.

line).[39] Tex Mex adds that UP's Brownsville line runs along the Gulf of Mexico from Algoa (just south of Houston) to Brownsville (another, but less important, gateway into Mexico); that UP connects with Tex Mex at Robstown (on the Brownsville line) and at Corpus Christi (on the Odem-Corpus Christi branch line); that SP connects with Tex Mex at Corpus Christi, via trackage rights over portions of UP's Brownsville line and the related Odem-Corpus Christi branch line; but that, although Tex Mex can interchange traffic with both UP and SP, very little traffic has been interchanged with UP either at Robstown or at Corpus Christi, and nearly all of the traffic that Tex Mex has interchanged at either point has been interchanged at Corpus Christi with SP. Tex Mex asserts that, for international rail traffic moving over the Laredo gateway, the SP-Tex Mex routing via Corpus Christi has provided the alternative to UP's San Antonio-Laredo routing.

The BNSF agreement, Tex Mex claims, does not preserve the existing competition for rail movements between the United States and Mexico. Tex Mex insists that, even if BNSF would be as effective a competitor for that traffic as SP is today, a 3-to-2 reduction in the number of Class I carriers providing rail service to Mexican gateways would amount to an unacceptable reduction in competition. Tex Mex asserts that, in any event, BNSF's probable share of the market for U.S.-Mexico traffic would be so small that BNSF would not devote the resources necessary to compete effectively, so that most shippers would end up having no choice but to ship via the UP/SP routing. The loss of competition for U.S.-Mexico traffic, Tex Mex warns, will undermine the anticipated benefits of the North American Free Trade Agreement (NAFTA), and also may undermine Mexico's efforts to make its rail system more efficient and competitive through privatization.[40] Tex Mex also argues that the merger, minus the conditions sought by Tex Mex, will thwart the efforts that Tex Mex's ultimate parent, Transportacion Maritima Mexicana (TMM), is making, in partnership with Kansas City Southern Industries, Inc. (KCSI), to create a rail network between central Mexico and the Central United States that will provide a strong alternative to a merged UP/SP for rail traffic between Mexico and the United States and between Mexico and Canada.[41]

Tex Mex also claims that it simply cannot survive the merger as currently structured. Tex Mex alleges that the merger, even as conditioned by the BNSF agreement, would result in a 34% decline in Tex Mex's revenues. Tex Mex insists that it currently is operating at close to maximum efficiency and that revenue losses of the projected magnitude could not be absorbed

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[39] On the Mexican side of the International Bridge, service is provided by the state-owned railroad, Ferrocarriles Nacionale de Mexico (FNM). Tex Mex insists, however, that FNM sets its rates for the Mexican portion of an international movement without regard to the rates for the American portion, and that, in consequence, the vigorous competition that now exists for the American portion of the movement directly benefits shippers.

[40] Efforts are underway to privatize FNM. See TM-23 at 148-150.

[41] Tex Mex is a wholly owned subsidiary of Mexrail, Inc., which is itself owned 51% by TMM (a Mexican company that intends to participate in the Mexican rail privatization process) and 49% by KCSI (the corporate parent of KCS). The strong competitive alternative that Tex Mex has in mind would involve a TMM-Tex Mex-KCS routing.

without significant service reductions; Tex Mex is adamant that it could not survive solely on the traffic of its local shippers; and Tex Mex adds that, if it were unable to continue operating, a number of its shippers would be significantly harmed because they are dependent on Tex Mex for their transportation needs and cannot practically use other modes of transport.

Relief Requested: In General. Tex Mex requests certain rights that it insists are necessary both to address the competitive problems not remedied by the BNSF agreement and to permit Tex Mex to survive and to provide shippers on its line access to the essential services that would otherwise be lost. In Finance Docket No. 32760 (Sub-No. 13), Tex Mex seeks trackage rights over UP/SP lines from Robstown and Corpus Christi to Houston, and on to a connection with KCS at Beaumont. The sought trackage rights would allow Tex Mex both to transport overhead traffic and to serve all local shippers currently capable of receiving service from both UP and SP, directly or through reciprocal switching.[42] The sought trackage rights also would include full rights to interchange traffic at Houston (with UP/SP, BNSF, HB&T, and PTRA) and at Beaumont (with UP/SP, BNSF, and KCS). In Finance Docket No. 32760 (Sub-No. 14), Tex Mex, invoking 49 U.S.C. 11103, seeks related terminal trackage rights on HB&T. Tex Mex claims that the rights it seeks would free it from dependence on a doubtful connection with BNSF, and would enable Tex Mex, in conjunction with KCS, to offer shippers served by KCS or KCS' eastern connections a third alternative for traffic from/to Mexico and southeast Texas.[43]

Relief Requested: Main Line Trackage Rights. Tex Mex requests trackage rights over: (1) the UP line between Robstown and Placedo; (2) the UP line between Corpus Christi and Odem, via Savage Lane to Viola Yard; (3) the SP line between Placedo and Victoria;[44] (4) the SP line between Victoria and Flatonia; (5) the SP line between Flatonia and West Junction; (6) either (a) the UP line from Gulf Coast Junction through Settegast Junction to Amelia (the "UP main line option"), or (b) the SP line from Tower 87 to Amelia (the "SP main line option");[45] and (7) the joint UP/SP line from Amelia to Beaumont, and the connection with KCS at the Neches River Draw Bridge in Beaumont.[46]

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[42] Tex Mex concedes that, in certain markets, the local trackage rights it seeks would introduce added competition. TM-34 at 7. Tex Mex insists, however, that it does not support or endorse any limitation of the trackage rights sought in its responsive application. TM-35 at 1-2.

[43] Tex Mex indicates that, if we approve its Sub-No. 13 responsive application and its Sub-No. 14 terminal trackage rights application, it will file a construction application seeking the right to construct improved connections at Robstown and Flatonia.

[44] Tex Mex seeks, in the alternative, to purchase the Placedo-Victoria line, if (a) we approve its responsive application, but (b) UP/SP chooses to divest the Placedo-Victoria line and retain the Bloomington-Victoria line.

[45] Tex Mex requests that UP/SP be required to elect which option it would prefer Tex Mex to operate.

[46] All points referenced in this paragraph are in Texas.

Relief Requested: Houston Trackage Rights On SP. Tex Mex requests trackage rights in Houston over: (1) the SP line from West Junction through Bellaire Junction to Eureka at SP MP 5.37 (Chaney Junction); (2) the SP line from SP MP 5.37 to SP MP 360.7 near Tower 26 via the Houston Passenger station; (3) the SP line from SP MP 5.37 to SP MP 360.7 near Tower 26 via the Hardy Street yard; (4) if the UP main line option is elected, the SP line from SP MP 360.7 near Tower 26 to the connection with HB&T at Quitman Street near SP MP 1.5; (5) if the SP main line option is elected, the SP line from Tower 26 through Tower 87 to the SP main line to Amelia; and (6) the SP line from West Junction to the connection with PTRA at Katy Neck (GH&H Junction), by way of Pierce Junction.

Relief Requested: Terminal Trackage Rights On HB&T. In Finance Docket No. 32760 (Sub-No. 14), Tex Mex requests terminal trackage rights over the following terminal tracks of HB&T in Houston: (1) if the UP main line option is elected, the HB&T line from the Quitman Street connection with SP to the Gulf Coast Junction connection with UP, a distance of 2.1 miles; and (2) the HB&T line from its connection with SP at T. & N.O. Junction (Tower 81) to its connection with UP at Settegast Junction, a distance of 13.4 miles. Tex Mex indicates that the sought rights: (a) will bridge a gap between the Corpus Christi/Robstown-Houston trackage rights and the Houston-Beaumont trackage rights; (b) will provide an alternative route through Houston in the event of congestion on the main east-west SP route through Houston (over which Tex Mex is seeking trackage rights); and (c) will permit Tex Mex to utilize HB&T as its switching carrier in Houston and to gain access to HB&T's New South yard.[47]

Relief Requested: Terminal Facilities In Houston. Tex Mex requests the right to use the following yards and other terminal facilities of SP, UP, and HB&T: (1) SP's Glidden Yard; (2) interchanges with PTRA at the North Yard, Manchester Yard, and Pasadena Yard; and (3) interchanges with HB&T at HB&T's New South Yard.

Relief Requested: Trackage Rights Compensation. Tex Mex requests that the sought trackage rights be granted at the compensation level provided for in the BNSF agreement, with one exception: that compensation level, Tex Mex insists, should be subject to quarterly adjustments for changes in railroad productivity. Tex Mex further notes that, although 49 U.S.C. 11103 provides that compensation is to be paid or secured before terminal trackage rights operations start, it is asking that we not require that the compensation terms be established before Tex Mex begins use of the HB&T track; such a requirement, Tex Mex claims, would simply delay the pro-competitive public benefits of the conditions Tex Mex seeks. Tex Mex agrees, however, that any compensation later established either by agreement of the parties or by order of the Board will accrue from the initiation of operations over the terminal trackage, and will be payable after final determination of the terms thereof. TM-24 at 5-6.

Capital Metropolitan Transportation Authority. CMTA holds a mass transit easement over a segment of the 162-mile Giddings-Llano line, which runs in a generally east-west direction from

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[47] Tex Mex, which claims that, under 49 U.S.C. 11341, approval of its responsive application should enable it to use the described HB&T tracks with or without the consent of HB&T, indicates that it filed its Sub-No. 14 terminal trackage rights application out of an abundance of caution. TM-24 at 2-3.

Llano (in the west) to Giddings (in the east).[48] The line, which in 1986 was acquired by the City of Austin from SPT (SPT retained a 20-year trackage rights option over the Manor-Giddings portion), is currently divided into three segments: a western segment between Llano and Scobee; a middle segment between Scobee and Smoot; and an eastern segment between Smoot and Giddings (included within which is the Manor-Giddings portion). The former operator of the line, Austin Railroad Company d/b/a Austin Northwest Railroad (AUNW), discontinued service on the Llano-Scobee and Smoot-Giddings segments in February 1994 and May 1995, respectively; service has continued to be provided on the Scobee-Smoot segment; and, in April 1996, we granted a new operator, Central of Tennessee Railway & Navigation Company Incorporated, d/b/a The Longhorn Railway Company (Longhorn), an exemption from the prior approval requirements otherwise applicable to its operation of the line. CMTA, which plans to purchase the line by year's end, anticipates that service will soon be restored by Longhorn on the two segments over which service was discontinued by AUNW.

Because the line has two Class I connections (UP at McNeil and Elgin, and SP at Giddings), the proposed merger will effect a 2-to-1 reduction in the line's "potential" Class I connections. At the present time, the line's only Class I connection is with UP at McNeil; Elgin and Giddings are located on the Smoot-Giddings segment over which service has been discontinued.[49] CMTA contends that we should nevertheless regard this as a 2-to-1 situation, (a) because shippers on the line have traditionally had access to both UP and SP, (b) because SP has an option to exercise trackage rights on the Manor-Giddings portion, and (c) because Longhorn plans to reopen the Smoot-Giddings segment as soon as reasonably practicable. CMTA notes that the BNSF trackage rights provided for in the BNSF agreement (to Kerr, via Round Rock; and to Elgin) will not enable BNSF to access the Giddings-Llano line. Round Rock, CMTA notes, is located 4.4 miles north of McNeil; and Elgin is located on the Smoot-Giddings segment over which service has been discontinued (and, CMTA adds, the BNSF agreement does not grant interchange rights for BNSF at Elgin). And CMTA's interests are not limited to freight service but include passenger service as well; CMTA notes that its plans include passenger operations over much of the Scobee-Smoot segment, and that the most active segment of its planned passenger rail system will be east of McNeil.

Relief Requested. In Finance Docket No. 32760 (Sub-No. 10), CMTA seeks, on behalf of an unnamed rail carrier unaffiliated with applicants, trackage rights over UP's track between McNeil and Kerr, with interchange rights with BNSF either at McNeil or at Kerr, as appropriate. CMTA also requests that we direct applicants to cooperate in good faith with CMTA in all phases of the development of its passenger rail service, with particular emphasis on accommodating freight and passenger traffic at the McNeil interchange, and that we retain jurisdiction over these matters (CMTA envisions that we would exercise this retained

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[48] All points referenced in connection with the Giddings-Llano line are in Texas.

[49] SP, as previously noted, also has a trackage rights option on the Manor-Giddings portion, which would allow SP to move its connection as far west as Manor; but SP has not exercised this option.

jurisdiction in the event CMTA and UP/SP were unable to resolve these matters on their own).[50]

CMTA intends that the recipient of the trackage rights would be either BNSF, Longhorn, or Georgetown Railroad (GTRR). BNSF could extend its Taylor-Kerr trackage rights south from Round Rock to McNeil (a distance of 4.4 miles); Longhorn could obtain rights from McNeil north to Kerr (a distance of 6.4 miles), with an interchange with BNSF at Kerr (a Round Rock interchange would not be practical); and GTRR, which operates between Kerr and Granger, could obtain trackage rights between Kerr and McNeil, and could interchange with Giddings-Llano shippers at McNeil and with BNSF at Kerr. CMTA emphasizes that the competitive alternative it seeks should be provided at McNeil, not at Elgin or Giddings. The McNeil interchange, CMTA contends, would provide an adequate competitive alternative, and, more to the point, would restrict most freight traffic on the line to the portion of the line west of McNeil. CMTA indicates that, to minimize the interactions between freight trains and passenger trains, it is important to minimize the mileage that freight traffic must travel on the Giddings-Llano line. And, CMTA adds, because 80% of Giddings-Llano freight traffic originates west of McNeil whereas the most active segment of CMTA's planned passenger rail system will be east of McNeil, the best approach would be to route freight traffic north at McNeil.

Response by Georgetown Railroad Company and Texas Crushed Stone Company. GTRR originates crushed stone shipments, most of which are produced by its corporate affiliate, TCSC. GTRR and TCSC contend that CMTA's responsive application should be denied because, among other reasons, no matter where the interchange occurs, the additional traffic generated by the Giddings-Llano line would impose an intolerable burden on the already taxed track between McNeil and Round Rock and would occasion delays for the traffic entering or leaving Kerr.

Magma Copper Company's Rail Affiliates. The Magma Arizona Railroad Company (MAA) and the San Manuel Arizona Railroad Company (SMA) are rail subsidiaries of Magma Copper Company (MCC). MAA operates a line between Superior, AZ, and Magma, AZ; this line serves one of MCC's mines, apparently located in the vicinity of Superior; and traffic moving from this mine is routed MAA-SP (the MAA-SP junction is at Magma). SMA operates a line between San Manuel, AZ, and Hayden, AZ; this line serves MCC's only plant, which is located at San Manuel; and traffic moving from/to this plant is routed SMA-CBRY-SP (CBRY, the Copper Basin Railway Company, is a switching carrier for SP and operates a line between Hayden and Magma; the SMA-CBRY junction is at Hayden, and the CBRY-SP junction is at Magma). MCC indicates that its MAA-served mine and its SMA-served plant are currently captive to SP; no railroad other than SP (other than its switching carrier, CBRY) connects with MAA or SMA; and MCC is therefore dependent on SP for its transportation needs respecting bulk commodities. MCC contends that SP has taken advantage of MCC's captivity: (a) by holding on to all shipments which it was capable of handling, either all the way to destination (if the destinations were SP stations) or to the most distant junctions

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[50] CMTA insists that its negotiations with UP are currently at a standstill, perhaps because UP has an interest in offering its own commuter operations in the Austin metropolitan area. And, CMTA adds, if a contract to operate a passenger rail service is ever put out for bidding, the merger of UP and SP will mean that UP/SP will submit only one bid (and not the two competitive bids that might well have been submitted absent the merger).

with connecting carriers (if delivery of the shipments required interlining); and (b) by allowing service to deteriorate. MCC fears that the merger will exacerbate this situation. MCC indicates that shipments moving beyond Portland and Denver can be routed either SP-UP or SP-BNSF; but MCC fears that this choice will disappear with the merger, and that its shipments will then be captive to UP/SP from origin to destination. MCC also fears that UP/SP pricing practices will continue to be a problem because UP/SP will have even less incentive than SP to price its services aggressively.

Relief Requested. MCC seeks overhead trackage rights over SP lines: (1) for MAA, between Magma, on the one hand, and, on the other, Phoenix and Nogales, AZ; and (2) for SMA, between Hayden, on the one hand, and, on the other, Phoenix and Nogales. MCC indicates that the trackage rights would be for a distance of approximately 36 miles to Phoenix and approximately 142 miles to Nogales. The requested trackage rights, MCC notes, would give MAA and SMA direct access to BNSF at Phoenix and to Ferrocarriles Nacionales de Mexico - Region Pacifico (FCP) at Nogales; and MAA and SMA would continue to have access to SP (now UP/SP) at Magma.

Yolo Shortline Railroad Company. Yolo, a shortline located near Sacramento, CA, with two branch lines that it purchased from UP, interchanges all of its traffic with UP in UP's West Sacramento yard; although it shares trackage rights in the yard with SP, its agreement with UP prevents Yolo from interchanging directly with SP; thus, to use SP routes, Yolo must, at a minimum, use a UP switch to move cars within the yard from the Yolo track to the SP track, and must pay the corresponding switch fee; and this, Yolo alleges, has been uneconomic and inefficient. Yolo, noting that SP has superior routes to various points, supports the merger, but adds that the benefits of the merger would be enhanced by granting BNSF access to Yolo, which, Yolo indicates, would place Yolo in the same position as other West Sacramento customers that provide carloads to UP and that will gain access to BNSF under the BNSF agreement. Yolo further adds that, to increase efficiencies and cut costs, it has offered to provide service on branch lines in areas jointly served by UP and SP, but it claims that UP and SP could never agree on how to arrange for the transfer of the trackage and service. Yolo alleges that it could provide better service to West Sacramento switching area customers while interchanging with the Class I carriers at convenient points on their main lines; and, Yolo believes that this would alleviate congestion in the yard and switching area. Yolo therefore requests that we impose these conditions: (1) to provide Yolo and its customers competitive access to alternative carriers, a condition granting Yolo the right to interchange with UP/SP, BNSF, and any other carrier that has access to customers in the West Sacramento area; and (2) to create a safer, more efficient, and more economical means of serving customers in the West Sacramento area, a condition requiring UP/SP and BNSF (and any other carrier with access to that area as a result of the merger) to enter into good faith negotiations with Yolo with the object of allowing Yolo to operate the West Sacramento area.

Keokuk Junction Railway and Pioneer Railcorp. KJRY operates between Keokuk, IA, where KJRY connects with BNSF, and La Harpe, IL, where KJRY connects with the Toledo, Peoria & Western Railway (TP&W). TP&W's line, as relevant, extends from Lomax, IL, on the west (the connection with the former SF Chicago-Kansas City main line), southeast to La Harpe, and then east to Bushnell, IL (the connection with the former BN Chicago-Kansas City main line); and, at Bushnell, TP&W can interchange with SP, which conducts trackage rights operations over the former BN Chicago-Kansas City main line.[51] Prior to the BN/SF merger, shippers in the Keokuk area had access to two Class I carriers: BN (via BN's line through Keokuk); and SF (via a KJRY-TP&W-SF routing; KJRY moved the traffic from Keokuk to La Harpe, and TP&W moved the traffic from La Harpe to Lomax on its own line and then from Lomax to Fort Madison, IA, via trackage rights on the SF line; the TP&W-SF connection was at Fort Madison). In the BN/SF merger proceeding, the ICC, in denying certain condition sought by KJRY, indicated that, because TP&W was gaining the right to interchange with SP at Bushnell, the BN/SF merger would not eliminate intramodal competition at Keokuk, and KJRY would not experience any appreciable traffic diversions; the existing competitive situation, the ICC found, would be preserved. Post-merger, the ICC indicated, Keokuk shippers would still have two alternative western routings: BNSF single-line and KJRY-TP&W-SP joint-line. SP, the ICC reasoned, would simply replace SF as part of the KJRY joint-line routing, and the KJRY-TP&W joint-line routing would remain an important competitive factor in Keokuk.

In its comments filed in the UP/SP proceeding, KJRY, now joined by its corporate parent, Pioneer Railcorp (PRC), which recently acquired control of KJRY, indicates that it would still be pessimistic but for three recent developments: (1) the acquisition of KJRY by PRC because PRC, the owner of nine shortlines, has bargaining power with the Class I railroads; (2) the acquisition of TP&W by Delaware Otsego Corp. (DO) because this acquisition will likewise give TP&W strengths it did not have as an independent railroad; and (3) the proposed UP/SP merger, which, by providing SP with resources it currently lacks, changes the prospects for competitive rail service in many markets, perhaps including Keokuk. KJRY insists, however, that UP must assume SP's obligations to serve the Bushnell interchange with TP&W, must continue to use the SP trackage rights through Bushnell to interchange with TP&W (and KJRY), and must aggressively price and market Keokuk traffic. KJRY and PRC therefore request that we condition the UP/SP merger: (1) upon UP/SP's acceptance of the terms of the settlement agreement entered into by SP in the BN/SF merger proceeding; (2) upon continued use by UP/SP of the SP trackage rights through Bushnell for the purpose of interchange with TP&W (and KJRY); and (3) upon UP/SP's willingness to price and market a competitive service to Keokuk area shippers.

Toledo, Peoria, & Western Railway Corporation. TP&W, a regional railroad of 284 route miles extending from Fort Madison, IA, in the west, to Logansport, IN, in the east, interchanges with BNSF, UP, SP, IC, Conrail, CSX, and Norfolk Southern Corporation (NS), and with regional carriers as well, and thereby provides traffic moving between the western and eastern regions of the country a way to bypass Chicago and St. Louis. TP&W indicates that the recent UP/CNW and BN/SF mergers, and the proposed UP/SP merger, have affected the future of its connections with applicants. Before the BN/SF merger, TP&W's only interchange with SP was with SP's Chicago-St. Louis line at Chenoa, IL. In the BN/SF proceeding, however, TP&W gained

[51] Prior to the BN/SF merger, SP held only overhead trackage rights through Bushnell over the former BN Chicago-Kansas City main line; but, in agreements BNSF entered into with NITL and SP in connection with the BN/SF merger proceeding, SP gained the right to interchange traffic at Bushnell with TP&W.

connections with SP at Bushnell, IL, and Lomax, IL,[52] to offset the anticompetitive consequences that would have resulted from an unconditioned merger. TP&W claims, however, that the anticipated competitive benefits of the Bushnell interchange have not been realized. TP&W expected that the Bushnell interchange would enable it to continue, and even to increase, its participation in traffic originating at Keokuk and destined to Kansas City and beyond. TP&W reports, however, that Bushnell is not a priority stop for SP's fast, heavy tonnage trains; for operational reasons, these trains usually make only a single stop in the area, and this is normally at Galesburg, IL; and thus, TP&W states, for traffic moving from/to Keokuk, the KJRY-TP&W-SP routing is simply not competitive with the BNSF routing. The UP/SP merger, TP&W adds, comes at a time when TP&W is beginning to experience traffic losses to BNSF that cannot be offset by the competitive options created by the agreements endorsed in the BN/SF proceeding. TP&W indicates that it has arranged to confer with UP so that it might propose areas where TP&W's ability to offer cooperative routing would be enhanced by minor commitments from UP; and TP&W further indicates that it supports the UP/SP merger based on its expectation that applicants will negotiate in good faith to achieve the cooperative arrangements that will enable TP&W to maintain its role as an effective participant in joint routes with UP/SP and its competitors.

Southern California Regional Rail Authority. SCRRA, a joint powers authority comprised of five members (each member is an agency of a local county), administers the "Metrolink" rail passenger service in Southern California. SCRRA indicates that, in the early 1990s, its member agencies acquired property or rights to use property from UP, SP, and SF; that these carriers (now UP, SP, and BNSF) and SCRRA's member agencies now operate jointly over specific lines; and that agreements with each carrier govern the operations and priorities of freight and passenger service over each line. SCRRA indicates that the merger will affect freight traffic moving over lines now operated jointly by SCRRA's member agencies, on the one hand, and, on the other, UP or SP; and, for this reason, SCRRA is concerned that the merger may have an adverse impact on the commuter operations SCRRA administers. SCRRA also indicates, however, that, although applicants have been forthcoming in providing details on their post-merger operations, SCRRA does not now have sufficient information to conclude that its operations will not be adversely impacted by the merger. SCRRA therefore indicates that it reserves the right to reopen this proceeding to request conditions or other appropriate relief if and when it determines that the UP/SP merger is adversely impacting the provision of commuter service in Southern California.

SHIPPER ORGANIZATIONS. Concerns that a UP/SP merger would have anticompetitive impacts in the transportation marketplace have been expressed by several shipper organizations.

National Industrial Transportation League. NITL, an organization of shippers conducting industrial and/or commercial enterprises, fears that a UP/SP merger would have broad anticompetitive effects. UP and SP, NITL relates, compete across important corridors (particularly the corridor between southern Texas/Louisiana and key Midwest gateways, and the California-Kansas Central Corridor), and NITL warns that, post-merger, many points served by both carriers will be captive to the merged

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[52] The TP&W-SP interchange at Lomax applies only to high speed automotive and intermodal trains, BN/SF, slip op. at 121, and therefore does not allow a KJRY-TP&W-SP routing via Lomax.

carrier, and numerous competitive rail routings will disappear. And the "problem areas," NITL adds, involve many commodities that are clearly rail-dependent (such commodities as bituminous coal, plastic resins, lumber, and crushed stone).

BNSF Agreement. NITL contends that the BNSF agreement simply will not permit BNSF to be an effective competitor. NITL claims that BNSF, in conducting operations over UP/SP's lines, will incur costs significantly higher than those incurred by UP/SP in conducting its own operations over these lines. By NITL's calculations: on the Houston-Memphis route, BNSF's cost will be \$13.69 per ton, whereas UP/SP's cost will be only \$11.57 per ton; and, in the Central Corridor, BNSF's cost will be \$23.62 per ton, whereas UP/SP's cost will be only \$20.09 per ton.[53] NITL further claims that BNSF will be unable to achieve the traffic densities required for competitive operations. BNSF, NITL calculates, will have competitive access to a mere \$258 million in traffic (NITL-10 at 35), not the "well over \$1 billion" in traffic asserted by applicants (UP/SP-22 at 20), and certainly not the \$1.8 billion in traffic asserted by BNSF itself (BN/SF-1, VS Lawrence, at 3-5). NITL also claims that BNSF's competitive efforts will be seriously impaired by various operational barriers, including UP/SP's directional routing on its Houston-Memphis lines. NITL asserts that BNSF's competitive efforts will be further impaired by a need for substantial investment in infrastructure that the traffic densities will be unable to justify. By NITL's calculations, BNSF would have to make a \$97,500,000 infrastructure investment to operate over the Houston-Memphis route, and an additional \$183,000,000 infrastructure investment to operate over the Central Corridor. The traffic levels available to BNSF, NITL insists, are simply not sufficient to justify infrastructure investments of these magnitudes. NITL further argues that a merger conditioned by that agreement alone would allow UP/SP and BNSF to dominate the market for rail transportation in the Western United States.

2-to-1 Shippers. NITL claims that the 2-to-1 shipper concept, as provided for in the BNSF agreement, is exceedingly narrow; even though the merger might cause a 2-to-1 reduction in the number of rail carriers at a particular point (e.g., San Antonio), the 2-to-1 shippers protected by the BNSF agreement include only those shippers presently receiving service from both UP and SP (and no other carrier). NITL further claims that, although the agreement was supposedly intended to preserve two-railroad competition for all 2-to-1 customers, there are 25 stations listed in the Standard Point Location Code (SPLC) data that were not specifically addressed in the agreement. NITL adds that the agreement identifies 23 rail stations which are 2-to-1 locations for which BNSF is not provided trackage rights.[54]

CMA Agreement. The CMA agreement, NITL argues, fails to cure the problems inherent in the BNSF agreement. (1) NITL

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[53] NITL adds that these cost handicaps will be exacerbated as time goes by because the adjustment procedures provided for in the BNSF agreement (which are based on 70% of the Rail Cost Adjustment Factor, unadjusted for productivity) fail to track the gains in productivity that will be experienced by UP/SP.

[54] NITL concedes that the agreement indicates that UP/SP and BNSF will provide for customers located at 2-to-1 points that are not specifically referred to, and that "alternative arrangements" will be provided at the 23 stations. NITL contends, however, that UP/SP and BNSF should be required to address these matters now.

concedes that the CMA agreement, by granting BNSF the right to operate with the primary traffic flows in the Houston-Memphis corridor, solves the key operational problem previously inherent in the BNSF agreement. NITL claims, however, that this solution exacerbates the problem created by BNSF's lack of access to sufficient traffic. Under the CMA agreement, NITL contends, BNSF's traffic will be divided between two lines, necessitating increased investments on both lines (e.g., fueling facilities on both lines) for the same amount of traffic. (2) NITL claims that the CMA agreement, by allowing BNSF access to St. Louis via trackage rights over the UP line, will require BNSF to incur additional infrastructure costs at St. Louis; all of BNSF's existing terminal facilities in St. Louis, NITL contends, are on the west side of the Mississippi River, whereas the trackage rights line lies on the east side of the river. (3) NITL insists that the provision in the CMA Agreement requiring UP/SP to modify contracts with 2-to-1 chemical shippers in Texas and Louisiana so that at least 50% of the volume is open to BNSF does nothing to cure the cost disadvantage under which BNSF will operate as a result of the trackage rights fee. (4) NITL claims that several provisions in the CMA agreement accomplish little or nothing of substance. The provision requiring applicants to accept oversight, NITL claims, is meaningless, because the Board has, as a matter of law, continuing jurisdiction over its decisions approving or conditioning a merger. And, NITL adds, with or without the provision requiring that the trackage rights fees be placed in segregated funds, such fees will still be excessive.

Relief Requested. NITL contends that the merger should be denied, and asks that any approval be conditioned by requiring: (A) the divestiture of SP's lines (1) between Houston and New Orleans (including the Iowa Jct.-Avondale segment, and also including access to related terminal facilities in the New Orleans area), (2) between Houston and St. Louis (this would include SP's Houston-Memphis and Brinkley-North Jct. lines, and its North Jct.-East St. Louis trackage rights), and (3) between Houston and Brownsville (this would include SP's Houston-Placedo line via Flatonia, its Placedo-Brownsville trackage rights, and its Flatonia-Eagle Pass line, with BNSF retaining its haulage rights to Eagle Pass); (B) the divestiture of SP's lines between Stockton/Oakland and Denver/Pueblo, including its Kansas City-Pueblo (via Herington) track or trackage rights; and (C) the retention by UP/SP of (1) overhead trackage rights over all divested lines, and (2) full service trackage rights at any point where UP or SP and the acquiring carrier both can serve existing shippers or could serve new shippers.

Society Of The Plastics Industry. SPI, the major trade association of the plastics industry, claims that plastics resins[55] are transported mainly by rail for several reasons: the integration of the hopper car with the shipper's production feeding lines; the volume of resin production (36 billion pounds in 1994); the average length of haul (approximately 1,000 miles); the cost advantage of rail vs. truck; and the need to maintain product integrity. The proposed merger, SPI maintains, is of great interest to the plastics industry because a large majority of plastics resins production occurs in the Texas/Louisiana Gulf Coast "petrochemical belt" between Galveston, TX, and Baton Rouge/New Orleans, LA, and because UP and SP, which operate parallel lines throughout the belt, are the main railroads

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[55] Plastics resins (STCC 28211), as SPI uses the term, means polyethylene (PE) and polypropylene (PP), the two resins that constitute the majority of the production of plastics resins, other than liquid.

connecting production facilities in the belt with markets in the Northeast, Midwest, and Southeast through the Chicago, St. Louis, Memphis, and New Orleans gateways.

SPI asserts that UP and SP dominate the plastics resins transportation market today. According to SPI, in excess of 92% of all domestic PE and PP production occurs in the Texas Gulf Coast region; UP and SP have access to nearly 90% of Gulf Coast plastics resins production capability; 64% of the plastics resins market for PE and PP is served exclusively by UP and/or SP, and no other carrier; the combined shares of UP and SP of the Gulf Coast PE/PP markets are 71% and 74%, respectively; and UP and SP dominate the principal transportation corridors for plastics traffic (Houston-Memphis/St. Louis and Houston-New Orleans). SPI claims that, even with the BNSF agreement, a combined UP/SP, by virtue of pre-merger exclusive service arrangements, would control almost 40% of plastics resins production capacity without facing potential BNSF competition. The BNSF agreement, SPI notes, gives BNSF access to specified plants only (increasing its market access from 23% to 47% of Gulf Coast producers), but does not reduce UP/SP's access. The merger, SPI warns, would result in a loss of existing competition at currently served 2-to-1 points; it would result in a loss of the potential competition posed by build-in/build-out opportunities; and it would result in the loss of geographic or source competition (to the extent that UP and SP now serve different customers). And BNSF, SPI argues, would not be an effective competitor in any event: BNSF would lack the necessary physical capacity (i.e., infrastructure); it would face material market barriers (including long-term contracts, renewal options, and tying arrangements) in competing for plastics traffic, and particularly in competing for traffic newly opened by virtue of the agreement; and it would not have a corporate commitment to compete. SPI adds that BNSF also would suffer additional handicaps: the traffic base available to BNSF under the agreement would be inadequate to enable BNSF to achieve a critical mass for efficient operations; BNSF would be handicapped in the Houston-Memphis/St. Louis corridor by virtue of UP/SP's intentions with respect to directional flow in that corridor; and the trackage rights fee provided for in the agreement will place BNSF at a cost disadvantage as compared to UP/SP. SPI adds that, to the extent BNSF elects to utilize UP/SP for switching or haulage, it will have relegated itself to second class status by yielding both operational and economic control over its customer service.

Relief Requested. SPI asks that the merger be denied, and that any approval be conditioned by requiring that UP/SP divest one of the two parallel networks serving Texas and Louisiana industries, which SPI takes to mean the UP/SP tracks running from the border points at Eagle Pass, Laredo, and Brownsville, through Houston and Ft. Worth, to New Orleans, Memphis, St. Louis, and Chicago. All extant trackage rights, SPI adds, should be preserved and either honored or transferred. The railroad acquiring this network, SPI suggests, should be either Conrail, KCS, IC, or BNSF.[56] SPI adds that a less desirable alternative would be to condition the merger on a strengthening of BNSF's rights under the BNSF agreement, including: (1) increasing BNSF's service opportunities by opening additional points, and (2) rendering voidable, at the shipper's option, any contractually based market foreclosure tactics (such as long-term

[56] SPI indicates that divestiture would resolve the deficiencies in the BNSF agreement because divestiture would entail storage tracks and other infrastructure and would make the purchaser an owner rather than a tenant.

contracts) employed by applicants. SPI suggests, however, that we should adopt this alternative only if we are presented with evidence that BNSF will in fact undertake the necessary capital investments and commit to full and vigorous competition.

CMA Agreement. SPI insists that plastics and chemicals are separate product groups, that the constituencies represented by SPI and CMA overlap only in part, and that, for the shippers represented by SPI, the CMA agreement does not change the basic anticompetitive implications of the merger. The CMA agreement, SPI argues, contains provisions that appear to be beneficial but that are largely illusory. (1) The CMA agreement provides that UP/SP shall modify contracts with shippers at Texas/Louisiana 2-to-1 points so that at least 50% of the volume is open to BNSF. SPI insists, however, that the extent to which this will provide BNSF with market opportunities is unknown. (2) The CMA agreement provides that BNSF shall have equal access to SP's Dayton Yard for storage in transit of traffic handled by BNSF. SPI notes, however, that whereas UP/SP will have access to six Gulf Coast storage locations, BNSF will have access only to one. (3) The CMA agreement allows BNSF to move its traffic in the Houston-Memphis-St. Louis corridor over either the UP line or the SP line. SPI insists, however, that the impact on BNSF of dual track operations and the effects on fueling, maintenance, crewing and other facilities, training, etc., have not been evaluated. (4) The CMA agreement provides that UP/SP shall place the fees received with respect to lines in Texas, Louisiana, Arkansas, and Missouri in a segregated fund, and also provides that BNSF's trackage rights fees shall be adjusted each year by the difference between that year and the preceding year in UP/SP's system average URCS maintenance/operating costs. SPI insists, however, that a segregated fund changes nothing, and that, besides, the fund would accrue to UP/SP to the extent used to offset depreciation costs. And the change in the escalation feature, SPI adds, does not change the fee itself. (5) The CMA agreement provides a limited cure respecting build-out options that might otherwise be lost with the merger. SPI insists, however, that this cure is quite limited because, among other things, it applies to CMA members only.

Western Coal Traffic League. WCTL, an association of shippers and receivers of coal mined west of the Mississippi River, contends that the UP/SP merger must be considered in the context of the recent BN/SF merger. The BN/SF merger reduced the number of western coal railroads from four to three; a UP/SP merger would reduce that number to two; and the cumulative effects, WCTL warns, would threaten the foundations of the competitive forces affecting western coal transportation. The pre-merger western coal transportation market, WCTL argues, is extremely concentrated: three railroads originate 96.4% of all coal moved in that market (BNSF, 57.7%; UP, 30.3%; SP, 8.4%), and the pre-merger Herfindahl-Hirschman Index (HHI) is 4322. The post-merger market, WCTL notes, would be even more concentrated (two railroads would control 96.4% of all western coal traffic), and the post-merger HHI would be 4831 (an increase of 509 index points). Such an enormous increase in concentration in an already highly concentrated market, WCTL contends, is a matter of great concern because increases in concentration in highly concentrated markets are likely to lead to anticompetitive price increases. WCTL fears that, after the merger, UP/SP and BNSF will reduce the level of competition between them in order to extract the maximum possible profit, and that each will be comfortable in the knowledge that the lack of competitive alternatives assures their mutual success. WCTL maintains that, because so much information regarding electric utilities is publicly available at the Federal Energy Regulatory Commission

(FERC), coal-hauling railroads like UP/SP and BNSF can engage in something akin to parallel pricing. They can do this, WCTL continues, by "market-probing" (raising rates on a case-by-case basis, to see what the market will bear).

Source Competition. SP, WCTL claims, controls most of the coal originating in Utah and Colorado; UP controls at least half (with BNSF controlling the other half) of the coal originating at jointly-served mines in the SPRB of Wyoming; but, because many utilities are capable of burning either Utah/Colorado coal or SPRB coal, UP and SP have been forced to compete, to the benefit of utilities able to burn both Utah/Colorado coal and SPRB coal. WCTL further asserts that SP has aggressively pursued its Utah/Colorado coal traffic opportunities, and has even established a "reload" or "backhaul" program in order to keep its rates for Utah/Colorado coal transportation competitive with SPRB rates. The benefits of this source competition, WCTL argues, will disappear post-merger because UP/SP would lack the incentive to replicate the UP vs. SP competition between Utah/Colorado coals and SPRB coals, and, to maximize its revenues, would favor SPRB coal origins over Utah/Colorado coal origins because transportation costs for SPRB coal origins are lower.

SP's Aggressive Pricing; Its Financial Soundness; UP's Service Problems. WCTL claims that SPRB vs. Utah/Colorado source competition has fostered aggressive pricing by SP for the transportation of Utah/Colorado coals, and has thereby served to regulate rail rates for western coal traffic. WCTL claims that SP is viable, competitive, and financially sound; that, in recent years, SP's competitive strength has been increasing; that, in future years, an independent SP would be a viable competitor for western coal traffic; and that an independent SP could survive. WCTL also fears that the merger, in addition to eliminating Utah/Colorado vs. SPRB source competition, will increase UP's Central Corridor service and operating problems. That corridor, WCTL contends, is already congested, and more traffic can only make matters worse.

BNSF Agreement. WCTL contends that the BNSF agreement is deficient in at least two respects: the trackage rights compensation for unit-train coal traffic is excessive; and shippers who currently are served by either UP or SP and are in a position to build out to the other, but whose potential build-outs are not "active" or "on-going," are not afforded protected 2-to-1 status. (1) WCTL contends that the trackage rights compensation level set in the BNSF agreement does not ensure that the anticompetitive effects of the merger will be alleviated. WCTL argues that, because the trackage rights fee is so high, and because UP/SP will have knowledge of BNSF's costs for the traffic, UP/SP will be able to raise its rates for the traffic to a level which reflects the resulting higher cost of the service for BNSF. Trackage rights fees intended to enable a tenant railroad to compete on equal terms, WCTL contends, should cover the landlord carrier's "below-the-wheel" costs (i.e., maintenance of way, dispatching, and return on road investment), and WCTL insists that the unit-train coal fee provided for in the agreement (3.0 mills per gross ton-mile, or 5.0 mills per revenue or net ton-mile) is far in excess of UP/SP's below-the-wheel costs. WCTL adds that, in addition to the excessive base fee for the trackage rights, the adjustment mechanism will increase UP/SP's profits over time. (2) WCTL claims that, in general, the BNSF agreement does not protect shippers who, absent the UP/SP merger, could build out to either UP or SP to obtain competitive rail options. WCTL maintains that 2-to-1 status has been conferred only on a very limited subset of shippers with build-out options.

Relief Requested. WCTL urges the denial of the merger, but asks, in the alternative, that any approval be subject to these conditions: (1) divestiture (to a railroad other than BNSF) of SP's lines from Provo, serving coal mines in Utah and Colorado, through Pueblo to Kansas City, and either its lines from Kansas City through St. Louis to Chicago, or its trackage rights over BNSF from Kansas City to Chicago; (2) in lieu of divestiture of these lines, a grant of unrestricted trackage rights in favor of a railroad such as WC or MRL; (3) a prohibition against the integration of UP and SP Central Corridor rail operations until UP can certify that it has been in full compliance, for a period of 12 consecutive months, with its service commitments under its coal transportation contracts; (4) the imposition of a trackage rights compensation fee for unit-train coal traffic under the BNSF agreement in the amount of 1.48 mills per gross ton-mile (or, in the alternative, 1.8 mills per ton-mile);[57] (5) the inclusion of shippers with build-out options as protected 2-to-1 shippers under the BNSF agreement; and (6) the extension of the CMA agreement's arbitration remedy to non-CMA members with build-out options, provided that a shipper need make only a reasonable prima facie showing of feasibility.

Western Shippers' Coalition. WSC, a coalition of shippers on UP and SP lines in Nevada, Utah, Colorado, and other Western States, fears that the proposed merger will allow UP/SP to dominate the Central Corridor (effectively controlling nearly 80% of the traffic in Nevada, Utah, and Colorado), and will eliminate the competition that has developed between SP- and UP-origin coals, competition that (in WSC's view) has placed a cap on the price UP can charge for coal from its PRB origins in Wyoming. WSC therefore opposes the merger unless MRL or another carrier not affiliated with applicants is awarded divestiture of (or, though less preferable, trackage rights over) (a) one of UP/SP's lines between Oakland/Stockton and Ogden/Salt Lake City, (b) all of DRGW's lines, and (c) one of UP/SP's lines between Denver/Pueblo and Kansas City. WSC claims that divestiture (or, to a lesser extent, trackage rights) would maintain the balance between SP- and UP-origin coals and would eliminate the detrimental impact of the merger in the Central Corridor. In the event we impose neither of these conditions, WSC asks that we alter the terms of the BNSF agreement (a) to allow BNSF additional access points (perhaps by expanding the concept of a 2-to-1 shipper), (b) to reduce the trackage rights fee to 2.0 mills or less per gross ton-mile, and (c) to adopt certain other conditions, including a requirement that BNSF pay an annual upfront fee for use of the Central Corridor, a mechanism for imposing penalties on UP/SP upon failure to maintain appropriate service standards, and a reduction in the trackage rights fees provided for in the URC agreement.

Western coal, WSC notes, involves two major types of low-sulfur coal: subbituminous (8,000 to 9,500 BTU/lb.) and bituminous (in excess of 10,000 BTU/lb.). WSC indicates that subbituminous coal is mined mostly in the PRB, which is served by both UP and BNSF, and that bituminous coal is mined mostly in four regions: the Southern Wyoming region, served by UP; the

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[57] WCTL indicates that its calculations rely upon a fair market valuation of SP road property investment derived from UP's acquisition cost. WCTL suggests that, because there is no comparable basis for estimating fair market value for the UP lines covered by the agreement, 1.8 mills per gross ton-mile should be applied to all the trackage rights lines, although WCTL would permit UP to challenge this calculation with evidence as to its actual costs and fair market value.

Utah/Colorado Uinta Basin, served largely by SP; the Raton Basin in Southeast Colorado and Northeast New Mexico, served by BNSF; and the Four Corners region in Southwest Colorado and Northern Arizona, served by BNSF. WSC maintains that the heating value, ash, and sulfur content of coal largely determines its value (coals with high heat content and low ash and sulfur contents command the highest value), and that, in general, Raton Basin coal is the most highly valued, followed in order by Uinta Basin coal, Southern Wyoming coal, and Four Corners coal. WSC insists, however, that all western coal constitutes one integrated product market because the different coals can be used interchangeably, to a greater or lesser extent, by many electric utilities. A UP/SP merger, in WSC's view, would allow UP/SP to dominate the western bituminous coal industry (the UP/SP market share for western bituminous coal would exceed 63%, but UP/SP's effective control would be even greater, due to limitations in URC's trackage and interconnection options and in the production capacity of BNSF-served mines). WSC claims that BNSF will not be an effective competitor in the Central Corridor because its access to shippers in that corridor will be severely limited, it will have no investment or presence in that corridor, its trackage rights fees will be too high, it would lack control over dispatching and switching, and, in any event, operational changes envisioned by applicants will alter the economics of east-bound coal shipments in such a way as to make it impossible for BNSF to offer the competitive rates offered by an independent SP.

Mountain-Plains Communities & Shippers Coalition. MPCSC, an association of shippers, counties, municipalities, and others located in the area of MPRR's Pueblo-Herington Line, opposes the proposed merger unless conditioned as requested by MRL. MPCSC, claiming that the proposed BNSF Oakland-Denver trackage rights do not resolve the threatened anticompetitive impacts, contends: that BNSF's interests would best be served by routing traffic onto its own Southern Corridor and Northern Corridor routes; that BNSF would be more likely to join with UP/SP in exploiting their duopoly, and less likely to compete with UP/SP for Central Corridor traffic; and that even if BNSF were motivated to compete, the cost and service impediments associated with trackage rights would prevent it from doing so. MPCSC argues that, to alleviate the threatened anticompetitive impacts, an independent carrier like MRL should be allowed to provide a competitive alternative in the Central Corridor. MPCSC adds that another public interest benefit favoring MRL is the superior local service that MRL would provide for shippers located on, or in the territory adjacent to, MPRR's Pueblo-Herington Line. MRL's independent status and route structure, MPCSC claims, would provide maximum opportunity for grain to flow freely either (1) west to Stockton, or to Pacific Northwest ports for export via Klamath Falls, or (2) south to Gulf ports for export via coordinated service with KCS, or (3) east to Kansas flour mills or to points beyond Kansas City via other friendly connections. MPCSC also opposes the abandonment of any segment of the old WPRR/DRGW/MPRR transcontinental route via Salt Lake City and Pueblo (this has reference to the Tennessee Pass Line west of Pueblo and the Towner-NA Junction and Hope-Bridgeport Lines east of Pueblo). This route, MPCSC argues, should be preserved, not broken up by abandonments; and the acquisition sought by MRL would preserve the route and moot the abandonments. MPCSC adds that such factors as operating losses or opportunity costs that might warrant abandonment of a branch line should not be dispositive of abandonment of segments of a transcontinental main line.

WSC/MPCSC Joint Shippers' Statement. A pleading referred to as the "joint shippers' statement" was submitted jointly by

Western Shippers' Coalition, Mountain-Plains Communities & Shippers Coalition, the South Dakota Wheat Growers Association, and nine individual shippers, all of whom shall be referred to collectively as the Joint Shippers Coalition (JSC). JSC contends that there is a broad public consensus that the proposed merger should be denied as anticompetitive in the Central Corridor unless it is conditioned as proposed by MRL. JSC adds that it also supports the conditions sought by KCS that would further the effectiveness of competition via the Central Corridor.

Coalition For Competitive Rail Transportation. CCRT, a shipper organization created to oppose the merger, claims that shippers throughout the country fear that a UP/SP merger will have anticompetitive effects. A UP/SP merger, CCRT indicates, would occur in an environment already characterized by shrinking shipping alternatives and a narrow concentration of economic power. Shippers large and small, CCRT contends, benefit from competition between UP and SP, and CCRT warns that, if the merger is approved, shippers will no longer experience UP vs. SP competition, which will inevitably lead to increased costs and decreased service quality. CCRT therefore urges that the merger be denied, and that any approval be conditioned by divestiture of lines in the Houston-St. Louis, Houston-New Orleans, Houston-Brownsville, and Stockton/Oakland-Denver/Pueblo corridors, and by providing for a third independent line in the Oklahoma region.

Adverse Impacts. The anticompetitive impact feared by CCRT is clear enough for 2-to-1 shippers, but, in CCRT's view, 3-to-2 shippers and even 1-to-1 shippers also will experience such impacts. With respect to 3-to-2 shippers, CCRT contends that, in many cases, UP, SP, and BNSF compete for shipper traffic, and that the elimination of SP (which, in CCRT's view, is usually the low cost competitor) will make prices increase and service quality decline. With respect to 1-to-1 shippers, CCRT contends that even though a shipper may be captive to either UP or SP, the shipper may be able to transload (or threaten to transload) or build out (or threaten to build out) to the other railroad, and a multi-facility shipper may be able to switch production (or threaten to switch production) from a UP-served facility to an SP-served facility. CCRT also fears that many localities will lose millions in tax revenues, both directly (abandoned lines) and indirectly (shippers whose operations decline because a loss of rail competition makes their products less competitive). CCRT warns that job losses among UP/SP employees will run in the thousands, and that, in future years, a merged UP/SP will abandon many redundant local lines. CCRT adds that, in certain areas where rail tracks cross highways at grade level, rail traffic increases will disrupt highway traffic.

BNSF Agreement; Duopoly. CCRT claims that a trackage rights tenant cannot be a true competitor of the trackage rights landlord. The landlord, by discriminating in favor of itself, will guarantee that its own cars receive priority in movement; the landlord can set the trackage rights fee so high that the tenant cannot compete effectively; the tenant is not always given full access to service shippers and industries; and, because trackage rights must actually be exercised in order to provide a second carrier, disinterest or inability on the part of the tenant means that the trackage rights will do little to preserve competition. CCRT fears that, as a practical matter, UP/SP and BNSF will be less likely to compete effectively against each other and more likely to work together to divide up all rail traffic in the Western United States (and thereby to reap the benefits of a duopoly).

Corn Refiners Association. CRA, the national trade association for the corn wet milling industry, indicates that this industry's inbound corn and outbound processed corn products travel mostly by rail to/from the 25 plants operated by CRA's members. CRA asserts that, with the proposed merger, competitive rail service will be lost by 2-to-1 shippers in various areas, including the San Francisco Bay area and the Los Angeles area. CRA argues that the trackage rights provided for in the BNSF agreement may not provide an adequate solution because BNSF may be unwilling and/or unable to provide competitive service at some locations. CRA accordingly requests: (1) that we compel UP/SP and the recipients of trackage rights over UP/SP to justify the economic viability of their trackage rights arrangements; (2) that we retain jurisdiction to ensure the competitiveness of trackage rights service through regular periodic oversight of the rates the trackage rights tenants must pay; and (3) in instances where the number of carriers available to a shipper would drop from two to one, either directly (if no trackage rights are provided for) or indirectly (if the rental rate charged the trackage rights tenant is too high), (a) that we grant reciprocal switching rights to the nearest available competitor, or (b) alternatively, wherever another competitor has requested trackage rights, that we grant such additional trackage rights, or (c) alternatively, that we impose special rate caps to offset the harm caused by such a significant reduction in competition.

National Corn Growers Association. NCGA, which fears that the increasing consolidation of America's railroads has resulted in higher shipping prices and decreased availability of adequate service to grain producing areas, asks that we closely examine the repercussions that the proposed merger and any future mergers will have on the economics of the agricultural sector and on that sector's ability to meet global market demands for high-quality American agricultural products.

Institute of Scrap Recycling Industries. ISRI, whose member companies process, broker, and consume recyclable materials, warns that SP's ability to compete effectively has declined drastically over the last few years. Its services, ISRI claims, have become unreliable; its ability to supply rail equipment has been questionable; and its responsiveness to needed capital improvements on its system has been ineffective. The decline, ISRI claims, has become more noticeable in the wake of the BN/SF merger, and ISRI has concluded that something must be done before SP suffers a total collapse. ISRI therefore supports the proposed UP/SP merger as conditioned by the BNSF agreement. ISRI adds, however, that its support for the merger is contingent upon a determination (which ISRI has asked us to make) that BNSF will be allowed to compete freely and effectively with UP/SP in all regions and markets opened to BNSF under the BNSF agreement.

Montana Wheat and Barley Committee. Montana wheat and barley producers, MWBC claims, are today captive to BNSF (BNSF and MRL, MWBC notes, move more than 98% of all Montana wheat shipments),[58] and the proposed merger, MWBC warns, will further exacerbate the captive shipper status of Montana farmers. MWBC's concern, however, is focused less on the merger itself (UP has only a limited presence in Montana, and SP has no presence at all) and more on the BNSF PRA that, MWBC fears, by altering

[58] MRL is included in this calculation, MWBC indicates, in view of MRL's inability to reach any market for Montana grain without BNSF participation. UP, MWBC concedes, can provide some competition via the Pocatello-Silver Bow Line, but this competition, MWBC adds, benefits only a limited region.

existing competitive relationships between Montana and nearby jurisdictions, could further increase BNSF's monopoly power in Montana. Montana grain, MWBC indicates, is marketed entirely to the west or the south (and, because Montana grain is marketed principally to the Pacific Northwest markets, its pricing is determined on the Portland Grain Exchange), and MWBC warns that the BNSF PRA, because it does not apply to points east of Billings and Havre, will have an anticompetitive impact on Montana farmers located east of the Billings-Havre line. Farmers with access to BNSF stations located in or west of Billings and Havre (including such farmers in Western Montana, Northern Idaho, Washington, and Western Canada) will have access to UP/SP service under the BNSF PRA; but farmers located too far to the east of Billings and Havre will have no such access to UP/SP service, and they will therefore be, as MWBC sees matters, relatively worse off than they are today. The BNSF PRA, MWBC adds, has other defects as well. The establishment of Portland as the only gateway, MWBC insists, is artificial because it requires excessive circuity for Montana traffic; for traffic originating in Montana, the Silver Bow gateway provides, to destinations in California and Arizona, much shorter distances, which are more in line with the distances for traffic originating in Washington and Northern Idaho. MWBC asserts that Montana farmers should be allowed to utilize the Portland gateway for grain moving to Portland itself, and that access to local markets might offset the anticompetitive impact of the excessive circuity required by the Portland gateway. The BNSF PRA, MWBC further contends, should be extended to all agricultural commodities; an arbitrary commodity limitation, MWBC warns, would disrupt established traffic patterns.[59]

Relief Requested. MWBC requests that the BNSF PRA be modified by adding Silver Bow as an alternative gateway (in addition to Portland) and by requiring UP/SP to guarantee its service intentions on the Pocatello-Silver Bow Line for 20 years. MWBC also requests that we retain oversight of the UP/SP merger for 20 years, in order to protect the last vestiges of intramodal competition in Montana. MWBC further requests, as an alternative to the two previous requests, that the Pocatello-Silver Bow Line be sold to MRL, subject to an MRL-BNSF PRA (similar to the UP/SP-BNSF PRA) for all traffic moving over Silver Bow from all Montana origins to Portland and to points south of Portland. MWBC further requests that the BNSF PRA be modified: to allow UP/SP access to all traffic (not limited by commodity description) originating in Montana; to allow UP/SP access to traffic originating at all points in Montana (not just points west of Billings and Havre); and to allow UP/SP access to traffic originating in Montana and destined to Portland.

Montana Farmers Union. MFU, which represents agricultural producers and other rural residents of Montana, argues that the merger will further exacerbate the captive shipper status of Montana farm producers. In Montana today, MFU contends, there is one major railroad (BNSF) that monopolizes the transportation of bulk commodities, and the BNSF PRA will further disadvantage Montana producers vis-à-vis producers in Oregon, Western Canada,

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[59] MWBC is under the impression that the BNSF PRA does not apply: (1) to traffic moving from points in Western Montana to Portland; and (2) to certain commodities. These impressions, however, may not even be correct. <u>See</u>, <u>e.g.</u>, UP/SP-22 at 343 (indicating that the traffic covered by the PRA includes traffic moving between points in Western Montana, on the one hand, and, on the other, points in Oregon; and all commodities (carload, intermodal, and bulk) moving both southbound and northbound).

Washington, and Northern Idaho. MFU indicates that, by artificially establishing Portland as the only gateway, and by requiring Montana shipments to travel 40+% more mileage than is necessary, the BNSF PRA will effectively preclude Montana producers from participating in the markets they participate in today. MFU therefore urges that we consider the development of an alternative gateway at Silver Bow, both to shorten the distances to California and Arizona markets for Montana farm producers and to equalize farm producers in Montana vis-à-vis farm producers in Washington and Northern Idaho. MFU requests conditions similar to those requested by MWBC, with two notable exceptions: MFU requests that the Salt Lake City-Silver Bow Line (not merely the Pocatello-Silver Bow Line) be sold to MRL; and MFU further requests that the Stockton-Kansas City Line also be sold to MRL.

Save The Rock Island Committee. STRICT, which represents rail shippers, potential rail shippers, and local governments located in central Missouri in the Kansas City-St. Louis corridor, has an interest in the Kansas City-St. Louis line (hereinafter referred to as the Rock Island line) now owned by SSW but formerly owned by the now defunct Chicago, Rock Island and Pacific Railroad Company (Rock Island). The Rock Island line was the eastern segment of Rock Island's Tucumcari line, which extended from Santa Rosa, NM, through Kansas City to St. Louis; the ICC, in approving (in 1980) SSW's acquisition of the Tucumcari line, noted that this acquisition would enable affiliated carriers SSW and SPT to provide single-system service from Southern California to Kansas City and St. Louis; SP, however, never upgraded the Rock Island line to operating condition; and when the ICC, in approving (in 1982) the UP/SP/MP merger, awarded SSW trackage rights over MPRR's parallel Kansas City-St. Louis line, SP lost all interest in rehabilitating the Rock Island line. STRICT claims, however, that SP, though it has had no interest in operating the line itself, has been determined to prevent operation by anyone else, and has therefore engaged in a scheme to segment the line, providing service over short segments at both ends (or at least over a short segment at the eastern end) but discontinuing service over the middle segment.[60] The proposed merger will adversely affect competition in the Kansas City-St. Louis corridor, STRICT maintains, because UP and SP have parallel lines in that corridor. UP (i.e., MPRR) has a line between Kansas City and St. Louis, and SP conducts its overhead trackage rights operations over this line. But SP, STRICT notes, also has a line of its own between Kansas City and St. Louis (the Rock Island line), and, in STRICT's view, it is the common ownership of the MPRR line and the Rock Island line that would adversely affect competition. STRICT proposes to restore competition in the Kansas City-St. Louis corridor by transferring the Rock Island line to a new operator.[61]

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[60] Related matters, which have been held in abeyance pending negotiations between STRICT and SP, are pending in Finance Docket No. 30000 (Sub-No. 16) (STRICT's petition to revoke SSW's trackage rights over MPRR's Kansas City-St. Louis line), Docket No. AB-39 (Sub-No. 18X) (SSW's petition to exempt the abandonment of a portion of the Rock Island line), and Nos. 41195 and 41195 (Sub-No. 1) (STRICT's bifurcated complaint respecting SP's failure to operate the Rock Island line).

[61] Common ownership of the two parallel Kansas City-St. Louis lines, STRICT maintains, would be blatantly anticompetitive and would therefore require divestiture of one (continued...)

Relief Requested. STRICT asks that any approval of the merger be conditioned upon divestiture of the entire Rock Island line, including appurtenant real estate, between Leeds Junction (at or near MP 288.3) and Rock Island Junction (at or near MP 10.3), at a price to be mutually agreed, failing which it will be set by the Board; that divestiture must be to a single entity unaffiliated with applicants which certifies in writing that it intends to reactivate rail service with a single operator providing local service over the entire line within 3 years of taking possession, and that, prior to an abandonment or sale (except in connection with a financing transaction) of less than the entire line, it will attempt for a reasonable period of time to sell the entire line as a single unit and assign to the purchaser thereof any trackage rights acquired in connection with ownership of the line; and that divestiture must include an assignment of all of SSW's rights under agreements granting to SSW or any predecessor trackage and similar rights that have been, are, or could be used by a rail carrier in connection with the operation of any part of the line.

Colorado Wheat Administrative Committee. CWAC, a marketing order representing Colorado wheat producers, opposes the proposed merger unless conditioned upon a divestiture to a major carrier (such as MRL) qualified to provide for Central Corridor transcontinental traffic. CWAC warns that the proposed merger and the incidental abandonment of the Towner-NA Junction Line would reduce the options available to Colorado wheat producers for transporting their product to market. The impact, CWAC adds, would be substantial, both for Colorado wheat producers and for the State's diversified economy; CWAC calculates that 12.6 million bushels of wheat are potentially affected by the closure of the Towner-NA Junction Line. The Tennessee Pass Line and the Towner-NA Junction Line, CWAC insists, do not need to be abandoned; there is a much higher demand for local shipping services on these lines than current traffic indicates;[62]

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[61](...continued)
line or the other. And STRICT contends that, because this very issue has already been decided by the ICC, the doctrines of res judicata and collateral estoppel are applicable. STRICT cites the ICC's 1980 decision approving SSW's Tucumcari purchase, in the course of which the ICC, in denying MPRR's inconsistent application to purchase the Rock Island line, noted:

> MP's proposal is clearly anticompetitive. MP already has excellent lines between Kansas City and St. Louis. MP's lines, along with those of BN and Norfolk & Western Railway Company (N&W), are the best lines between those cities. The corridor also is served by four other carriers (excluding RI), but their routes are more circuitous and less competitive. The removal of a rehabilitated RI route would thus result in the elimination of a potentially competitive route.

St. Louis S. W. Ry.--Pur.--Rock Island (Tucumcari), 363 I.C.C. 323, 327 (1980).

[62] By CWAC's calculations: on the NA Junction-Towner Line, potential revenue per year over and above operating costs is $435,500; on the Haswell-Towner segment of the NA Junction-Towner Line (Haswell lies about half way between NA Junction and Towner), potential revenue per year over and above operating costs is $928,000; and, on the Tennessee Pass (Sage-Malta-Cañon City) Line, potential revenue per year over and above
(continued...)

traffic on the Towner-NA Junction Line, CWAC claims, is low because UP has chosen to keep it that way. CWAC adds that the interest shown by potential carriers seeking to operate in the Central Corridor is strong testimony to the economic viability and potential of the Towner-NA Junction Line.[63]

Hoisington Chamber of Commerce. HCC contends that the proposed merger will have a dramatic impact on the Hoisington community, particularly given the cumulative impact and crossover effects of the 1982 UP/MP/WP merger. In that merger, HCC notes, the ICC, seeking to preserve competition in the Central Corridor, awarded DRGW trackage rights over MPRR's Pueblo-Kansas City Line. It was anticipated at the time, HCC indicates, that DRGW would implement these trackage rights in the usual manner, using its own crews and its own equipment. Such implementation, by HCC's calculations, would have created 108 positions in Hoisington and 70 positions in Osawatomie (and HCC claims that the jobs that would have been created in Hoisington would have generated between $40,000,000 and $50,000,000 to the local economy). These jobs, however, were never created because DRGW and UP entered into an agreement that lasted until 1995 pursuant to which DRGW used UP crews and UP equipment between Pueblo and Kansas City. In June 1995, HCC continues, it was announced that DRGW would finally commence its own trackage rights operations on the Pueblo-Herington Line.

HCC warns that the adverse consequences of the merger and the related Colorado/Kansas abandonments will be staggering. The long-awaited utilization of DRGW crews and DRGW equipment in the DRGW trackage rights operations will never occur; all of the crew positions used to perform the DRGW trackage rights operations will be abolished; Hoisington will lose 70 jobs, with an annual payroll of approximately $3,000,000; the school district will sustain an annual loss of approximately $300,000; farmers will find their transportation options reduced; local communities on the Pueblo-Herington Line will experience losses in property tax revenues and sales tax revenues; and the Central Corridor will be obliterated by selective abandonments. HCC therefore opposes the merger, and supports KCS, MRL, WSC, and MPCSC in their efforts to retain a competitive third carrier in the Central Corridor and elsewhere. HCC further insists that, to preclude any sweetheart deals, any transactions necessary to implement divestiture and trackage rights requirements should be entered into openly and at arm's length. HCC also asks that all MPRR employee positions, that were used for 13 years to carry out the DRGW trackage rights across the MPRR line, be integrated into the UP system.

Enid Board of Trade. EBT is concerned with the lack of rail-to-rail competition that exists in Oklahoma today, and fears that the proposed merger can only make matters worse. The service provided by BNSF, EBT claims, has deteriorated since the BN/SF merger, and EBT fears that the service provided by UP/SP will deteriorate in the wake of the proposed merger. A big railroad, EBT maintains, gives priority to coal and intermodal,

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[62](...continued) operating costs is $2,993,000. And these revenue estimates, CWAC notes, do not include possible income from bridge traffic, scenic rail, or commuter rail.

[63] The arguments advanced by CWAC are supported by the Colorado Farm Bureau, the Rocky Mountain Farmers Union, the Colorado Association of Wheat Growers, the Colorado Corn Administrative Committee, and the Kiowa County Farm Service Agency, and by several wheat producers, farmers, and ranchers.

but takes grain for granted. EBT opposes the merger, and urges that any approval thereof be conditioned by allowing KCS to operate: over BNSF's Fort Worth-Herington line; over BNSF's Enid-Perry line (Perry is on the Fort Worth-Herington line); and over the Geneseo-Wichita line (in Kansas). Operation by KCS over these lines, EBT indicates, would provide additional competition in both Kansas and Oklahoma.

Kansas-Colorado-Oklahoma Shippers Association. KCOSA is concerned by, among other things, the grant of extensive trackage rights to BNSF; its members, KCOSA notes, opposed the BN/SF merger; and KCOSA fears that the BNSF trackage rights provided for in the BNSF agreement will narrow the competitiveness of KCOSA's members (by broadening the competitiveness of the shippers that can benefit from the BNSF trackage rights). KCOSA adds that its members located on UP or SSW are opposed to the UP car ordering system, and fear the loss of local service. Its members located on shortlines, KCOSA indicates, are concerned that the UP/SP merger, like the BN/SF merger before it, will lead to equipment shortages. KCS, KCOSA contends, should be allowed to operate in the North-South Corridor (as a replacement for SP). KCOSA also would support alternative purchase plans, including the purchase by KCS of BNSF's line between Wichita, KS, and Joplin, MO. KCOSA is particularly concerned by the 3-to-2 reduction in the number of railroads at Hutchinson and Wichita, and it adds that, at Enid, the problem is that two railroads can provide service but that only one railroad actually does. KCOSA urges that we either provide for added competition in Kansas, Colorado, and Oklahoma, or, in the alternative, deny the merger.[64]

Farmers Elevator Association of Minnesota. FEAM, which indicates that its misgivings respecting the proposed merger reflect the difficulties its members experienced in the wake of the UP/CNW merger, suggests that UP should be required (1) to demonstrate its ability to operate the system it already has before it is allowed to expand, and (2) to develop an operating plan to address service problems on the former CNW.

South San Antonio Chamber of Commerce. SSACC, to further San Antonio's development, seeks commitments addressing: the construction of an intermodal facility with emphasis on its connection to the redevelopment of Kelly Air Force Base; the development of an enhanced commuter/freight rail linkage in the San Antonio-Austin corridor; the removal of existing rail lines from the central business district; the relocation of the staging area to San Antonio to facilitate an efficient flow of traffic between Mexico and the United States; and a grant to BNSF of trackage rights from San Antonio to the CPS plant at Calaveras Lake, to allow for future competition in the transportation of coal.

***SHIPPERS:* COAL.** Denial of the merger and/or the imposition of conditions have been sought by a number of coal shippers.

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[64] By joint motion dated May 10, 1996, EBT and KCOSA ask that we accept as new evidence Central Kansas Railway Tariff 8000-A and Santa Fe Rate Book 4100-B. The new evidence, EBT and KCOSA indicate, substantiates their argument that merged railroads like UP/SP and BNSF control the destiny of small shippers located on shortlines by publishing non-competitive through rates. Applicants, in their UP/SP-248 reply, contend that the tendered new evidence is, at best, cumulative, and, in any event, has no probative value. We will grant the motion filed by EBT and KCOSA, and accept the tendered new evidence.

Wisconsin Power & Light/Wisconsin Public Service Corp. WP&L and WPS contend that the merger should be disapproved, and that any approval should be subject to: (1) divestiture of SP's lines from Provo, serving coal mines in Colorado and Utah, to Kansas City, and either its lines from Kansas City through St. Louis to Chicago, or its trackage rights over BNSF from Kansas City to Chicago, to a carrier other than BNSF, or, alternatively, a requirement that applicants grant unrestricted trackage rights over such lines to such a carrier; and (2) a prohibition of UP/SP's consolidation of or changes in the present UP and SP rail operations over their central east-west lines until they have certified their full compliance, for a period of 12 consecutive months, with all service standards or similar provisions contained in contracts to which either is a party that apply to the transportation of coal for the account of an electric utility or seller of coal.

Wisconsin Power & Light Company. WP&L operates four coal-fired power plants: the Rock River Station near Beloit, WI; the Columbia Energy Center at Portage, WI; the Edgewater Station near Sheboygan, WI; and the Nelson Dewey Station at Cassville, WI. (1) Since 1993, Rock River Station has blended compliance sulphur subbituminous western coals (secured from a mine in Montana) with low fusion, higher BTU bituminous coals from midwestern and western sources (secured from various sources, including mines in Illinois, Indiana, and Utah). The coal is originated by BNSF, IC, UP, and SP, depending on the source; it is interchanged to CP[65] at various points; and it is delivered by CP (only CP serves Rock River Station).[66] (2) Units 1 and 2 of the Columbia Energy Center burn low sulphur, subbituminous PRB coal originated in Montana (by BNSF) and Wyoming (by BNSF or UP), and delivered by CP (only CP serves Columbia Energy Center). (3) Edgewater Station includes three coal-fired units, two running on blends of bituminous and subbituminous coals, and one running on low sulphur subbituminous coal only. Bituminous coal sources include mines in Illinois, Indiana, Utah, and the Hanna Basin in Wyoming; subbituminous coal sources are located in the SPRB of Wyoming. Edgewater Station coal is originated by UP (in the SPRB), CP (in Indiana), IC (in Illinois), and SP (in Utah), and is delivered by UP (only UP serves Edgewater Station). (4) Nelson Dewey Station, which burns a blend of bituminous and subbituminous coals, receives coal via barge, usually transloaded through East Dubuque, IA, or Kellogg, IL. Montana PRB coal is hauled by BNSF to Omaha, for movement by CC&P to the river. Wyoming PRB coal is hauled either via the BNSF-CC&P routing (over Omaha) or via a UP-CC&P routing (over Council Bluffs), which is used also for Hanna Basin blend coals. Midwestern bituminous coal also is hauled by UP to the river for transloading.

Impacts of UP/SP Merger. WP&L fears that the loss of an independent SP will reduce competition in the bituminous coal market, and may reduce the competitive pressure otherwise felt by all participants in the utility coal market. WP&L argues that, although Utah and Colorado are farther from Wisconsin than

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[65] Canadian Pacific Limited and its subsidiaries, including Soo Line Railroad Company (Soo), are referred to collectively as CP.

[66] The Rock River Station coal originated by SP is Utah coal that is hauled in cars that otherwise would move empty eastbound, after unloading iron ore at Geneva Steel's facility near Provo. WP&L indicates that this backhaul arrangement has allowed SP to establish eastbound rates which make Utah bituminous coals competitive with midwestern bituminous coals.

Illinois is, SP's backhaul rates have made these sources competitive with midwestern coal. WP&L indicates that, in contrast to SP, UP coal sources include not only the subbituminous reserves in the SPRB but also higher BTU coals in Wyoming's Hanna Basin. WP&L contends that these latter coals compete directly with Utah and midwestern bituminous coals in meeting WP&L's needs for Rock River Station and Edgewater Station, and WP&L fears that a combined UP/SP will favor the sources in which it has the largest investments. WP&L is skeptical that the BNSF trackage rights will alleviate coal source competition problems. These rights, WP&L notes, do not give BNSF direct access to any SP-served mines in Utah and Colorado; BNSF would be able to carry that coal only after an origin movement over either UP/SP or URC. Besides, WP&L adds, even if BNSF could reach the SP mines, it, much like UP, has large investments in facilities serving other coal sources; and WP&L also questions whether the trackage rights compensation levels provided for in the BNSF agreement will allow BNSF to offer competitive rates. WP&L also fears that the operating changes envisioned by applicants (in particular, the shift of some SP coal traffic to the UP main line) will worsen service problems that have already affected operations at Columbia Energy Center and Edgewater Station.

Wisconsin Public Service Corporation. WPS has two multi-unit electric generating stations: the Weston Generating Station near Wausau, WI, and the Pulliam Station in Green Bay, WI. (1) Weston Generating Station has three coal-fired generating units. The two older units have converted from midwestern bituminous coal to western low-sulphur subbituminous coal; Unit No. 3 has always burned 100% PRB coal. Coal delivered to Weston Generating Station can be originated either by UP or by BNSF, although the preponderance of this coal has been hauled either UP-WC or UP-CP. (2) By 1995, Pulliam Station had been converted entirely to western subbituminous coal, which is (WPS indicates) the current and forecasted fuel of choice. Depending upon price and quality factors, however, Pulliam Station remains capable of using coal from several different producing regions, including Appalachia, the Illinois Basin, and the Uinta and Raton Basins. In 1995, all Pulliam Station coal was obtained from sources in the Wyoming SPRB, and was hauled UP-WC.

Impacts of UP/SP Merger. WPS alleges that during the past 18-24 months the service provided by UP has not allowed WPS to move all of its scheduled tonnage with its existing railcar fleet, and that WPS has therefore been forced to lease additional trainsets to meet its coal inventory targets. Further, according to WPS, UP has not shown signs of significant improvement in 1996. WPS fears that, if the post-merger traffic routing shifts envisioned by applicants are implemented, WPS will suffer continued or additional slowdowns and service quality reductions along the UP east-west corridor.

Entergy/Arkansas P&L/Gulf States Utilities. Entergy Services, Inc. (ESI) and its affiliates Arkansas Power & Light Company (AP&L) and Gulf States Utilities Company (GSU)[67] fear that the merger will eliminate UP vs. SP competition for the movement of coal to AP&L's White Bluff Steam Electric Station near Redfield, AR (White Bluff) and to GSU's Roy S. Nelson

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[67] ESI is a fuel procurement company; AP&L and GSU are electric utilities; and ESI, AP&L, and GSU are referred to collectively as Entergy. AP&L's and GSU's names have recently been changed, but, to avoid confusion, we will use the old names.

Generating Station near Mossville, LA (Nelson), both of which use coal originated at SPRB mines served by both UP and BNSF.

White Bluff Station. White Bluff, located on UP's line between North Little Rock and Pine Bluff, is presently served exclusively by UP, which hauls coal to White Bluff via a single-line routing from the SPRB. Entergy insists, however, that White Bluff is a 2-to-1 point because a build-out to a nearby SP line, located about 21 miles away at Pine Bluff, would enable White Bluff to enjoy a BNSF-SP routing from the SPRB.

Nelson Station. Nelson, located on a KCS line about 6 miles northwest of Lake Charles, is presently served exclusively by KCS, which hauls SPRB coal to Nelson in a joint-line BNSF-KCS routing (via Kansas City). Entergy insists, however, that Nelson will soon not be captive to KCS because a build-out to a nearby SP line, located about 4 miles away, is now under construction; and completion of the "Nelson spur" build-out by the Southern Gulf Railway Company (SGR), a GSU subsidiary, is scheduled for October 1996. With the Nelson spur, Entergy notes, Nelson hoped to enjoy both the origin competition that already existed (between UP and BN in the SPRB) and the destination competition that had not previously existed (between SP and KCS at Mossville). Entergy concedes that, even with the merger, the Nelson spur will allow Nelson to enjoy destination competition (between UP/SP and KCS), but Nelson fears that most of the competitive benefits it would have obtained from the Nelson spur will vanish with the merger. Entergy notes that, rather than having four routings (four, because both UP and BNSF can reach both Fort Worth and Kansas City), it will have only two routings (BNSF-KCS via Kansas City and UP/SP single-line via Fort Worth). These will be the only practicable routings, Entergy maintains, because UP/SP will favor a UP/SP single-line routing in preference to an interline routing either with BNSF via Fort Worth (with UP/SP the destination carrier) or with KCS via Kansas City (with UP/SP the originating carrier).

Relief Requested: White Bluff. Entergy insists that the pre-merger status quo at White Bluff can be preserved only by granting trackage rights to BNSF (or another independent carrier) over SP's line between Pine Bluff (the point of connection with a White Bluff build-out) and West Memphis, AR (the point of connection with BNSF's own line), limited to the transportation of coal trains to/from White Bluff via the White Bluff-Pine Bluff build-out line.

Relief Requested: Nelson. Entergy insists that, because the pre-merger status quo at Nelson cannot survive a UP/SP merger, Entergy's interests can best be protected by granting trackage rights to BNSF (or another independent carrier) over SP's line between Beaumont and the point of connection with SGR near Lake Charles, limited to the movement of coal trains to/from Nelson via the SGR line. The pre-merger status quo cannot be preserved, Entergy claims, because the merger will effectively eliminate the BNSF-SP routing (via Fort Worth) and the UP-KCS routing (via Kansas City). The trackage rights sought by Entergy, would, in Entergy's view, level the playing field and preserve the efficient BNSF-SP (via Fort Worth) routing by creating a BNSF single-line routing to match the UP/SP single-line routing. And, Entergy notes, even with these trackage rights there would still be only two practicable routings, apparently because, in Entergy's view, the trackage rights it seeks would effectively eliminate the BNSF-KCS joint-line routing. Entergy adds that a less preferable alternative for the trackage rights it seeks would be a requirement that UP/SP establish a Fort Worth-Nelson proportional rate (at an initial

level set by a bid made by SP in August 1995) that could be used in conjunction with any future BNSF rate from the SPRB to Fort Worth. Entergy suggests that another alternative would be a requirement that UP/SP offer the same rate per ton-mile from Fort Worth to Nelson that it offers for its single-line route.

Relief Requested: BNSF Agreement. The BNSF agreement, Entergy suggests, is the best vehicle for the trackage rights Entergy seeks because the agreement provides BNSF with overhead trackage rights over the very lines that Entergy's trackage rights would run over. Entergy therefore suggests that we require that the BNSF agreement be amended to permit BNSF to serve White Bluff and Nelson via their respective build-outs (if and when completed) rather than requiring the negotiation of separate trackage rights agreements. Entergy adds, however, that we should require the compensation terms of the BNSF agreement to be amended, insofar as they would apply to Entergy's traffic, to approximate more closely UP/SP's relevant costs incurred with respect to BNSF operations over the relevant line segments. Entergy argues that, to put the tenant in the same position as the landlord, trackage rights compensation should reflect the landlord's variable costs, and, as respects Entergy's traffic, should be set at 1.48 mills per gross ton-mile. Entergy adds that, if we set compensation by reference to the fair market value of the SP roadway assets, the compensation respecting Entergy's traffic should be set at 1.8 mills per gross ton-mile.

The City Public Service Board of San Antonio. CPSB's two plants in Elmendorf, TX, are served by a single rail line, owned by SP. CPSB began receiving coal at Elmendorf in 1975, and, for some years thereafter, all Elmendorf coal was originated by BN and delivered by SP. In the mid-1980s, following the entry of CNW into the PRB, CPSB solicited competitive bids from two carrier pairs: CNW and UP, on the one hand; and BN and SP, on the other hand. CNW and UP won the competition, and CPSB then executed a long-term (through 2004) contract with CNW and UP covering transportation of most (though not all) of its coal receipts at Elmendorf. As noted, however, the line into Elmendorf is owned by SP, and CPSB therefore found it necessary to enter into an agreement with SP, pursuant to which SP granted CPSB trackage rights over SP's Elmendorf Line (approximately 12 miles in length) between Elmendorf and a nearby UP-SP junction known as "SP Junction (Tower 112);" and the agreement also provides that CPSB can permit UP and other third-party carriers to use the Elmendorf Line provided that CPSB makes specified payments to SP. CPSB notes that, as a result of these trackage rights, CPSB now has destination competition at Elmendorf: SP can deliver coal via the SP-owned Elmendorf Line; and UP can deliver coal via CPSB's trackage rights over the SP-owned Elmendorf Line.

CPSB adds that, in the SP settlement agreement entered into in connection with the BN/SF merger, SP agreed to provide haulage services to BNSF (1) between Caldwell, TX, and Eagle Pass, and (2) between Caldwell and Elmendorf. CPSB suggests that the Elmendorf haulage rights, which have never been used by BNSF, were designed to permit BNSF to transport coal to Elmendorf (moving via BNSF's own lines to Caldwell, and then via BNSF's haulage rights over SP's lines to Elmendorf). CPSB notes that, in the BNSF agreement entered into in connection with the UP/SP proceeding, section 4a provides BNSF with trackage rights over SP's line between San Antonio and Eagle Pass, and section 4h provides that upon the effectiveness of those trackage rights the Eagle Pass haulage rights granted to BNSF in the BN/SF proceeding shall no longer apply. CPSB alleges that it has been advised by applicants that section 4a is intended to allow BNSF to serve

CPSB's Elmendorf Station. The BNSF trackage rights envisioned by applicants, CPSB indicates, will originate at the BNSF-UP interchange at Temple, TX, and will terminate on SP's line at Elmendorf. CPSB further alleges that applicants have represented that BNSF will be entitled to serve the Elmendorf facilities directly, using its own trains, and subject to the compensation terms set forth in the agreement.

BNSF Agreement: Its Deficiencies. CPSB claims that, whatever applicants may intend, the trackage rights provided for in the BNSF agreement will not permit BNSF to access Elmendorf because two line segments are missing: (1) UP's line from Ajax to SP Junction (Tower 112);[68] and (2) SP's line from SP Junction (Tower 112) to Elmendorf. CPSB also claims that the BNSF agreement contains trackage rights fee payments that vastly exceed UP/SP's service costs. CPSB further claims that the BNSF agreement does not even preserve CPSB's existing trackage rights over the Elmendorf Line, which, in CPSB's view, is critical because CPSB predicts that the fees required by CPSB's existing trackage rights should be lower than the fees required by the BNSF agreement. CPSB notes, in addition, that its agreement with SP allows third-party carriers to serve other CPSB facilities that may be built along the Elmendorf Line, a right which BNSF does not receive under the BNSF agreement.

Relief Requested. CPSB requests that, if the merger is approved, we require that UP/SP provide, either by amendments to the BNSF agreement or otherwise: (i) that BNSF can serve CPSB's Elmendorf Station via trackage rights over UP/SP lines between Temple and Elmendorf; (ii) that BNSF can serve any new CPSB facilities located along SP lines over which BNSF obtains trackage rights in this proceeding;[69] (iii) that BNSF can serve CPSB's Elmendorf Station, at CPSB's option, via CPSB's existing trackage rights agreement with SP;[70] (iv) that CPSB shall be deemed a "2-to-1" shipper;[71] and (v) that the trackage rights

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[68] The trackage rights provided for in the BNSF agreement include trackage rights over UP's line between San Antonio and Ajax. It so happens, however, that UP has two lines between San Antonio and Ajax, and the trackage rights provided for in the agreement appear to run over the wrong (from CPSB's view) line.

[69] The context indicates that the only SP line referenced in condition (ii) is the Elmendorf Line.

[70] CPSB envisions that conditions (i) and (iii), taken together, will allow BNSF to operate between Elmendorf and SP Junction (Tower 112) using either its own trackage rights (provided for in this proceeding) or CPSB's trackage rights (provided for in CPSB's 1985 agreement with SP). Between Temple and SP Junction (Tower 112), however, BNSF would operate pursuant to the trackage rights provided for in this proceeding.

[71] CPSB claims that it has 2-to-1 status because it can now be served by both UP and SP. Applicants have suggested that CPSB also has access to BNSF, which can access Elmendorf via the haulage rights acquired in the BN/SF merger proceeding. The three-carrier approach might make CPSB a 3-to-1 shipper (because the haulage rights are being terminated), but CPSB, which notes that it is "presently served by both UP and SP and no other railroad" (BNSF agreement, section 8i) and that the haulage rights have never been exercised, insists that it should be accorded 2-to-1 status for purposes of, among other things, paragraph 3 of the CMA agreement (which provides that, effective
(continued...)

compensation BNSF must pay UP/SP shall be set at the levels requested by WCTL. CPSB further requests that we order that these conditions be implemented under the 10/30-days implementation procedure provided for in BN/SF, slip op. at 95 and 95 n.128.

Texas Utilities Electric Company. The generating units at TUE's Martin Lake Station near Henderson, TX, are currently fueled by lignite mined nearby and hauled to Martin Lake over a private rail line operated by an affiliate, Texas Utilities Mining Company (TUMC), and the merger will have no impact on the transportation of this lignite. TUE notes, however, that, in the year 2000, it will begin to supplement lignite receipts with Wyoming PRB coal receipts, with Wyoming PRB coal receipts to continue over the remaining 20-year life of Martin Lake. TUE envisions that this coal will be delivered to Martin Lake by BNSF (which can access Martin Lake today) and by UP (which will be able to access Martin Lake with the construction of a 6-mile connection between the UP line at Henderson and the TUMC line), and TUE claims to have identified two efficient routings: a 1,510-mile UP single-line routing (via Kansas City and Little Rock); and a 1,480-mile BNSF-KCS-SP-BNSF joint-line routing (with a BNSF-KCS junction at Kansas City, a KCS-SP junction at Shreveport, and an SP-BNSF junction at Tenaha). TUE fears, however, that the merger will eliminate the BNSF-KCS-SP-BNSF joint-line routing as a competitive alternative because UP/SP will exercise bottleneck power over the Shreveport-Tenaha segment. TUE concedes that there are two other possible routings (a 1,749-mile BNSF single-line routing via Denver, Fort Worth, Silsbee, and Tenaha, and a 1,721-mile BNSF-SP-BNSF joint-line routing via Memphis and Tenaha), but maintains that these routings are extremely circuitous and, therefore, substantially more expensive. And, TUE adds, the merger will in any event effectively eliminate the BNSF-SP-BNSF joint-line routing as a competitive alternative because UP/SP will exercise bottleneck power over the Memphis-Tenaha segment. TUE therefore concludes that, post-merger, its only real competitive options will be the 1,510-mile UP single-line routing and the substantially more expensive 1,749-mile BNSF single-line routing.

Relief Requested. TUE contends that the merger should be denied unless the following conditions are imposed: (1) the BNSF agreement, as amended in the manner requested by TUE, should be imposed as a condition; (2) the BNSF agreement should be amended to permit KCS to interchange TUE trains at Shreveport with BNSF, for movement by BNSF over SP's line between Shreveport and Tenaha; and (3) the trackage rights compensation provided for in the BNSF agreement should be reduced to the 1.48 mills per gross ton-mile level advocated by WCTL.

Sierra Pacific Power/Idaho Power Company. SPP and IDPC (referred to collectively as SPP/IDPC) jointly own the North Valmy Station (NVS), a generating plant located between the UP and SP lines between Winnemucca and Battle Mountain, NV. NVS, SPP/IDPC notes, has access to mines in the Colorado/Utah Uinta Basin (low-sulphur high-BTU coal is the primary fuel burned at NVS) and also to mines in the southern Wyoming Hanna Basin (Hanna Basin coal is also within the design parameters of the boilers at NVS). Coal from New Mexico and PRB mines, SPP/IDPC further notes, is incompatible with the NVS boilers, and, in any event,

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[71](...continued)
upon consummation of the merger, UP/SP shall modify any contracts with shippers at 2-to-1 points in Texas and Louisiana so that at least 50% of the volume is open to BNSF).

the distance from those mines makes use of their coal impracticable. The merger, SPP/IDPC warns, will eliminate the intramodal competition on which it has long relied.

The BNSF Agreement. SPP/IDPC contends that the BNSF agreement will not preserve UP vs. SP competition at NVS. SPP/IDPC concedes that the agreement allows BNSF to serve NVS via trackage rights, but notes that the agreement does not grant BNSF access to the SP-served mines in the Uinta Basin. SPP/IDPC concedes that, under the agreement, it will have access to a URC-BNSF joint-line routing, but maintains that this routing, which will be limited to the few mines directly served by URC and which will entail a two-carrier haul, will not amount to a meaningful option. SPP/IDPC concedes that BNSF can itself originate coal, but maintains that BNSF's own coal origins are too far away to allow BNSF to provide competitive service to NVS, and notes that, in any event, the quality of most coal originated by BNSF is incompatible with the NVS boilers. SPP/IDPC also argues: that the Central Corridor traffic available to BNSF (less than one loaded train per day, by SPP/IDPC's calculations) is too limited to support a viable operation; that BNSF will be disadvantaged by UP/SP's ability to control operations over the trackage rights line, and will lack the infrastructure to operate successfully over the Central Corridor; and that the excessive trackage rights compensation provided for in the BNSF agreement will raise the floor for establishing rates.

The URC Agreement. SPP/IDPC also maintains that the rail competition available to NVS will not be preserved by the URC agreement, the benefits of which, SPP/IDPC contends, are limited in three respects. First, a URC-BNSF routing is only as good as its weakest link, and the weak link here, SPP/IDPC maintains, is BNSF (not enough traffic and not enough infrastructure). Second, whereas NVS currently can obtain coal from 25 mines in the Uinta and Hanna Basins,[72] a URC-BNSF routing would access only 5 mines not under the exclusive control of UP/SP;[73] and this, SPP/IDPC insists, would be devastating to its ability to transport competitive coal to NVS. Third, because the rates for a URC-BNSF routing would necessarily reflect the cost/profit expectations of URC and BNSF, the rates required by a URC-BNSF routing would likely be higher than the rates required by a UP/SP single-line routing, which would almost guarantee that the rates presently available to SPP/IDPC will be increased.

Relief Requested. SPP/IDPC requests that we require UP/SP to provide another rail carrier (to be selected by SPP/IDPC) with trackage rights enabling that carrier to transport coal to NVS in single-line service from all mines in Colorado and Utah now served by SP for compensation no greater than 1.48 mills per gross ton-mile, adjusted quarterly beginning in the first quarter of 1996 based on changes in the Rail Cost Adjustment Factor (RCAF), adjusted for productivity, from and after that time.

Arizona Electric Power Cooperative. The coal burned by AEPCO at its SP-served Apache Generating Station near Cochise,

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[72] A few of these mines are actually located in the Wyoming/Colorado Green River Basin. SPP-10, VS Crowley, at 45.

[73] SPP/IDPC insists that a URC-BNSF routing would have access only to five mines not under the exclusive control of UP/SP. <u>See</u> SPP-10 at 21; SPP-10, VS Hill, at 16; and SPP-10, VS Crowley, at 45. <u>But see</u> SPP-10, VS Hill, at 5 n.5 (URC presently has exclusive access to three mines, and, under the URC agreement, will receive access to four additional mines).

AZ, is currently purchased from the BNSF-served McKinley Mine near Gallup, NM, and is transported via a BNSF-SP routing that is captive to BNSF at origin and to SP at destination. AEPCO contends, however, that Apache Station could be modified to burn coal originated at other sources (including Colorado, Utah, and, especially, the PRB), and AEPCO insists that, in spite of SP's destination monopoly, competition between coal suppliers and/or rail carriers can have some impact on AEPCO's delivered cost. AEPCO fears, however, that a merged UP/SP, as a destination monopolist able to originate PRB coal, would be able to exclude BNSF from participating in PRB movements to AEPCO. Currently, either UP or BNSF could originate PRB coal for AEPCO (UP-SP via Denver; BNSF-SP via Deming, NM), but AEPCO fears that a merged UP/SP would decline to accept traffic in interchange with BNSF at Deming. Rate reasonableness litigation, AEPCO notes, is a key part of its efforts to obtain the benefits of competition, but the prospects for such litigation are clearer when SP cannot originate the traffic. With the merger, AEPCO notes, AEPCO's existing destination monopolist would gain the ability to originate PRB traffic, potentially affecting the outcome of rate reasonableness litigation (because UP/SP, AEPCO fears, would raise "short-haul" arguments to thwart any complaint seeking a rate for the movement of coal between Deming and Apache Station).

AEPCO also fears that, with the merger, it will lose the benefit of source competition between Uinta Basin coal (originated by SP) and PRB coal (originated by UP and BNSF). A combined UP/SP, AEPCO warns, would have direct control over Uinta Basin coal (because only UP/SP could originate that coal) and indirect control over PRB coal (because UP/SP could use its destination monopoly to exclude BNSF from originating PRB coal bound to AEPCO), and AEPCO fears that UP/SP would be able to appropriate the savings generated by producer competition in a way that SP alone cannot. AEPCO also fears that approval of the merger will lead to excessive congestion on the Moffat Tunnel Line through Colorado, which provides the routing for a large portion of coal from western Colorado mines. Traffic over the Moffat Tunnel Line, AEPCO warns, will double if the merger is approved (because UP/SP will abandon the Tennessee Pass Line and divert traffic to the Moffat Tunnel Line, and because BNSF will add its own trains to the Moffat Tunnel Line), but applicants have not committed to add capacity to the line, and the terrain in the area may render such improvements infeasible.

Relief Requested. AEPCO, which adopts WCTL's comments, requests that the merger not be approved. If the merger is approved, AEPCO recommends: (1) that we impose a condition granting AEPCO the right to obtain, and to contest the reasonableness of, a UP/SP rate for the movement of unit trains from Deming to Apache Station, for coal originated on another carrier; (2) that we require the divestiture of most of SP's Colorado lines (Grand Junction-Dotsero; Dotsero-Denver; Dotsero-Pueblo; Denver-Pueblo; and the branch lines to the Craig and Montrose coal areas) or, in the alternative, that we require a grant of trackage rights over those lines to an independent carrier; (3) that we disapprove the abandonment of the Tennessee Pass Line; and (4) that we clarify that the "short-haul" defense neither removes a carrier's obligation to quote rates over bottleneck segments nor prohibits rate reasonableness litigation pertaining to such rates.

Wisconsin Electric Power Company. WEPCO contends that bituminous coal from Uinta Basin mines served by SP is competitive with subbituminous coal from PRB mines jointly served by UP and BNSF; WEPCO alleges that it has benefitted from Uinta Basin vs. PRB competition by virtue of actual receipt of Uinta

Basin coal or its prominence in the bidding process; and WEPCO therefore fears that the merger will have an adverse impact at WEPCO's UP-served Oak Creek Power Plant at Oak Creek, WI. WEPCO concedes that it has most recently burned bituminous coal from the BNSF-served Raton Basin in New Mexico, but alleges that this coal is virtually the same quality as Uinta Basin coal, and that Uinta and Raton coals compete directly on a delivered price basis into midwestern and eastern markets. WEPCO warns that a combined UP/SP would control virtually all western low-sulfur bituminous coal and about 50% of all western subbituminous coal, and therefore would control about 75% of the coals that are the probable future sources for Oak Creek. UP/SP, WEPCO argues, would be the dominant rail carrier at origin and the sole rail carrier at destination, and would therefore be able to use its market power to determine the origin from which WEPCO would be able to receive coal.

Relief Requested. As a condition to merger approval, WEPCO seeks a grant of overhead trackage rights on behalf of WC or CP over UP's lines: (1) between Chicago, IL, Milwaukee, WI, and Cleveland, WI, on the one hand, and on the other, WEPCO's Oak Creek Power Plant at Oak Creek, WI;[74] (2) between the Oak Creek Power Plant and Cudahy Shop, Inc., a railcar repair facility located at Cudahy, WI; and (3) in the terminal areas of Chicago and Milwaukee, as may be necessary or desirable to implement the operations described in (1) and (2) above. WEPCO indicates that these trackage rights would offset the 2-to-1 reduction in rail carrier competition at the origin coal mines with a 1-to-2 increase in rail carrier competition at the destination power plant, by allowing WC or CP, in addition to UP, to provide rail service to the Oak Creek Power Plant and to the Cudahy car repair shop. WEPCO emphasizes that, because it is requesting a trackage rights carrier that does not serve origin coal mines, UP would continue to be the only carrier that could transport coal to Oak Creek in single-line service.

Public Service Company of Colorado. Three coal-fired power plants (Cherokee, Arapaho, and Valmont) operated by PSCo in the Denver area presently burn SP-originated Colorado coal hauled over SP's Moffat Tunnel Line. Cherokee is served exclusively by SP; Arapaho is served exclusively by BNSF, but is within the Denver switching limits; and Valmont is served by UP and BNSF. PSCo notes that, although the three plants now burn only Uinta Basin coal, they were designed to burn a variety of coals, and PSCo adds that it has already begun evaluating PRB coal, which can be originated either by UP or by BNSF. PSCo maintains that an independent SP has a strong incentive to promote the use of Uinta Basin coal, the only coal that SP can originate, and PSCo therefore fears that the merger could reduce competition between Uinta Basin coal originated by SP and PRB coal originated by UP and BNSF. A combined UP/SP, PSCo fears, would prefer to increase business for its more profitable PRB service, thus causing PSCo to lose the benefits of source competition between the two coal regions. PSCo also fears that the merger will result in a deterioration in the quality of the service it receives for the movement of western Colorado coal to Denver via SP's Moffat Tunnel Line. PSCo fears a merger-related doubling of daily train movements over this line, and insists that the Moffat Tunnel Line lacks the capacity to absorb this increased traffic volume.

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[74] WEPCO indicates that it has requested trackage rights from Chicago, Milwaukee, and Cleveland because it does not know the precise routing that WC or CP would utilize.

Relief Requested. PSCo argues that, if the merger is approved, it should be conditioned either upon divestiture to an independent carrier of the SP lines necessary to transport western Colorado coal to the Denver/Pueblo area (Grand Junction-Dotsero, Dotsero-Denver, Dotsero-Pueblo, Denver-Pueblo, and the Craig and Montrose/Oliver branch lines) or upon a grant to an independent carrier of trackage rights over these lines. Either such condition, PSCo claims, would maintain existing competitive options for the transportation of Colorado coal. PSCo suggests, alternatively, two conditions designed to ensure that coal shippers do not suffer a merger-related deterioration in the level of service provided by SP: (1) that UP/SP be prohibited from abandoning, or discontinuing service on, any portion of the Tennessee Pass Line (Dotsero-Pueblo); or (2) that, for 3 years after the merger is consummated, UP/SP be permitted to discontinue service on, but not to abandon, the Tennessee Pass Line. The second alternative, PSCo adds, would provide shippers an opportunity to determine whether UP/SP is able to provide, using the Moffat Tunnel Line only, the level of service that SP provided in 1995 with respect to Colorado coal tonnage.

Illinois Power Company. The high-BTU, low-sulphur coal burned at ILP's Wood River and Havana power plants is transported by SP from Uinta Basin mines to Illinois, and, at each plant, the final leg of the haul is made either by another railroad or by barge. ILP indicates that the coal it currently purchases is transported by SP as part of a backhaul arrangement whereby SP transports taconite from the midwest to Geneva Steel and then backhauls coal to ILP. Destination competition, ILP notes, is not now a problem because each plant can receive coal both by barge and by rail; and origin competition, ILP adds, is not now a problem either because coal with the characteristics ILP requires can be originated both in the Uinta Basin (served by SP and URC) and in the Hanna Basin (served by UP). ILP fears, however, that the merger threatens this origin competition, which, ILP insists, cannot be replaced by competition from other origins: PRB coal cannot be used by ILP because the lower BTU content would require expensive plant modifications; and eastern coal cannot be used either because, at current prices, it is not an option. And, though URC has access to some Uinta Basin mines, ILP notes: that coal from these mines may not be available, or, if available, may not be competitively priced; that, under the terms of the BNSF agreement, BNSF cannot offer competitive rates; and that BNSF, without access to appropriate backhaul shippers, may not be able to offer competitive backhaul rates.

Relief Requested. ILP requests that the merger be denied unless conditions are imposed to maintain effective competition for the movement of coal from western mines to ILP's plants. ILP suggests three conditions: (1) a grant to BNSF of trackage rights to appropriate western mines currently served directly by UP and/or SP, with compensation set at a level that would enable BNSF to offer competitive rates for coal moving to ILP and for any traffic moving to Geneva Steel or any other backhaul shipper; (2) a grant to another carrier of ownership of, or trackage rights over, Central Corridor lines from the appropriate mines to the current SP destinations, with access to a suitable backhaul shipper and with compensation set at a level that would enable the new carrier to offer competitive rates for coal moving to ILP; and (3) a grant to ILP of an option, exercisable at ILP's discretion, to have coal move at current backhaul rates (adjusted by a suitable index and with the same service provisions) for the years 2000-2020 (the current SP contract goes through 1999; the useful lives of the two relevant plants will end about 2020).

Central Power & Light Company. CP&L's SP-served Coleto Creek Station near Fannin, TX, has historically burned Colorado coal originated by SP but can now burn PRB coal originated by UP or by BNSF. CP&L notes that it supports WCTL's comments, but adds that its principal interest vis-à-vis the UP/SP merger arises from its concern that the merger might impact, in a negative way, its pending rate litigation, wherein it is seeking the prescription of a maximum reasonable rate for the 16-mile SP movement between Victoria (an SPT/MPRR junction) and Coleto Creek. See Central Power & Light Company v. Southern Pacific Transportation Company, No. 41242 (ICC served Apr. 21, 1994) (notice of complaint). CP&L anticipates that, if the outcome of the litigation is favorable, it will have two options for PRB coal movements: a UP-SP routing, with the SP move between Victoria and Coleto Creek subject to the prescribed rate; and a BNSF-SP routing. CP&L indicates that its concerns relative to the No. 41242 litigation have been addressed by applicants, who have agreed that the merger will neither moot the litigation, nor allow applicants to assert therein defenses that would not exist in the absence of the merger, nor otherwise influence the outcome of the litigation; and CP&L adds that it has been assured by applicants that, if the litigation results in a Victoria-Coleto Creek rate, CP&L will be regarded, under the BNSF agreement, as a 2-to-1 shipper.

Intermountain Power Agency. IPA's plant at Lynndyl, UT, burns Utah coal transported by three carriers: DRGW, which transports coal from DRGW sources to Provo; URC, which transports coal from URC sources to Provo; and UP, which transports coal from Provo to Lynndyl. The merger, IPA warns, will impact its present arrangements: pre-merger, neither DRGW nor URC can provide single-line service; post-merger, however, DRGW (i.e., UP/SP) will be able to provide single-line service; and this, IPA fears, will tilt the balance in favor of UP/SP, and will give UP/SP an incentive to price movements from DRGW coal sources more favorably than movements from URC coal sources. IPA indicates, however, that, because the URC agreement resolves some of IPA's competitive concerns (by providing URC access to additional sources of coal), IPA will not object to the merger, provided that the URC agreement is not challenged and that the rights granted to URC thereunder are not adversely affected by a grant of any of the responsive applications. IPA adds, however, that it reserves the right to reopen this proceeding and to request conditions if and when it determines that the merger is adversely impacting competition and that the URC agreement has failed to ameliorate IPA's competitive concerns.

Lower Colorado River Authority/City of Austin. LCRA and the City of Austin (referred to collectively as LCRA/Austin) are joint owners of the Fayette Power Project (FPP), a coal-fired station at Halsted, TX, that burns PRB coal transported by UP in a single-line haul. When it entered into its present contract with UP, LCRA/Austin also entered into a separate trackage rights agreement (TRA) with UP's MKT predecessor that provides future access over 18 miles of track between Halsted (the location of the FPP) and West Point (the location of a nearby SP-UP junction). One of the purposes of the TRA, LCRA/Austin indicates, was to allow LCRA/Austin to receive coal from the PRB via a BN-SP routing. LCRA/Austin notes that it supports WCTL's comments, but adds that its principal interest vis-à-vis the UP/SP merger arises from its concern that the merger might effectively nullify the trackage rights provided for in the TRA. LCRA/Austin adds, however, that the BNSF agreement should effectively preserve these trackage rights (section 4b allows BNSF to serve FPP), assuming that BNSF is able to operate efficiently and economically over the trackage rights lines

Rio Bravo Poso/Rio Bravo Jasmin. The coal burned at Rio Bravo's two cogeneration plants near Bakersfield, CA, is originated in Utah and transported by rail to an unloading facility in Wasco, CA. The coal can be originated by SP and URC; from Provo, the coal can be routed either UP-BNSF (via Barstow, CA) or SP-BNSF (via Stockton, CA); and, although BNSF is a necessary part of each routing (apparently because only BNSF has access to the Wasco unloading facility), Rio Bravo insists that the existence of UP vs. SP competitive alternatives keeps rail rates down. Rio Bravo, warning that UP vs. SP competition will cease with the merger, and fearing that the current level of competition will not be preserved by the BNSF and URC agreements, opposes the merger unless the current level of rail competition at its two plants can be maintained.

IES Utilities. IES, an Iowa utility company with interests in five coal-fired generating stations, opposes the merger. IES indicates that roughly 90% of the fossil fuel it burns originates in the PRB, and that its two primary carriers are therefore UP and BNSF. IES further indicates, however, that it is potentially interested in coal originated by SP in Utah and Colorado, and IES fears that a combined UP/SP will favor coal originated by UP in the PRB and the Hanna River Basin. IES adds that its three UP-served coal-fired stations suffered significant increases in cycle times during 1995, and IES fears that, if Utah/Colorado coal is shifted to UP's main west-east corridor, service to these plants will continue to deteriorate.

SHIPPERS: PLASTICS AND CHEMICALS. Denial of the merger and/or the imposition of conditions have been sought by a number of plastic and chemical shippers.

Dow Chemical Company. Dow, which manufactures chemicals, plastics, and hydrocarbons, fears that the merger will adversely impact competition along the Texas Gulf Coast and, in particular, will eliminate a build-in opportunity currently available to Dow at its chemical/plastics production facility at Freeport, TX. The Freeport facility is rail-served solely by UP, which accesses the facility via a 10-mile branch line that connects with the UP main line at Angleton, TX. Dow notes, however, that both BNSF and SP operate lines between Houston and Galveston; that these lines pass through Texas City; that, at their closest points, these lines are only 35-40 miles from Freeport; and that the merger will therefore eliminate horizontal competition (a prospective build-in from SP) for Dow traffic at Freeport.[75]

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[75] Information respecting a potential connection between Dow at Freeport and either BNSF or SP at Texas City was submitted, for the most part, under seal. By and large, this information relates to confidential business matters and therefore was properly redacted from the public record. We find, however, that at least some of this information should have been submitted on the public record, and, in discussing this information, we have had to put on the public record certain details that were submitted under seal. We see no justification for redacting from the public record the facts that BNSF and SP operate lines between Houston and Galveston via Texas City, and that these lines, at their closest points, are only 35-40 miles from Freeport. DOW-12 (Tab A) at 5. Although Dow may have been trying to keep confidential the fact that it has contemplated a Freeport-Texas City connection, we cannot both discuss, in a comprehensible manner, the conditions requested by Dow and keep this particular fact out of our discussion.

Freeport, Dow concedes, has the appearance of a 3-to-2 situation because a UP/SP merger, though it would eliminate the SP build-in option, would appear to leave the BNSF build-in option intact. Dow argues, however, that, as a practical matter, Freeport is more akin to a 2-to-1 situation. Economic research, Dow claims, teaches that a 3-to-2 reduction in the number of competitors often represents the threshold at which the surviving firms can exercise market power; and Dow adds that, in any event, of the three carriers that can now compete for chemicals/plastics traffic on the Texas Gulf Coast, the two most aggressive competitors have been UP and SP, and, as between SP and BNSF, the carrier that could conceivably terminate more Dow traffic and obtain more Dow long-hauls is SP. Intermodal competition, Dow contends, cannot replace the competitive constraint now provided by SP (trucks, Dow insists, cannot compete for the majority of Dow traffic; barge and ocean transport can impact only a small fraction of Dow's rail traffic lanes; and a roll-on, roll-off barge service is simply not a competitive option at Freeport). Source competition, Dow adds, is likewise not an effective substitute for intramodal competition. A fundamental lack of fungibility, Dow contends, renders a seven digit Standard Transportation Commodity Code (STCC) analysis meaningless; a further limitation upon source competition is production capacity constraints because chemicals/plastics producers generally operate close to capacity; and product swapping among competitors raises significant concerns (including the need for long term commitments, the need to agree on contractual liability issues, and the need to resolve potential antitrust implications) that make it a less than ideal competitive alternative.

Relief Requested. To ameliorate the anticompetitive effects of the merger upon Dow's Freeport facility (effects, Dow claims, that are not ameliorated at all by the arrangements provided for in the CMA agreement), Dow asks that we impose either the conditions contained in its Primary Request or, in the alternative and at the very least, the conditions contained in its Alternative Request.[76]

Relief Requested: Primary Request. Dow seeks trackage rights: (1) for BNSF, over UP's line between Algoa and Angleton, with the right to connect to new line construction to serve Dow at Freeport and any other shippers located along the new line; and (2) for a second carrier (to be determined by Dow) (a) over SP's line between Houston and New Orleans, (b) over SP's line between Houston and Memphis, (c) over UP's line between Houston and Algoa (including the portion of the BNSF line over which UP now operates pursuant to trackage rights), and (d) over UP's line between Algoa and Angleton, with the right to connect to new line construction to serve Dow at Freeport and any other shippers located along the new line. The new line referenced in this paragraph would run between Freeport and a point, not yet determined, on UP's Angleton-Algoa line. Dow contends that the conditions contained in its Primary Request would simply restore the pre-merger status quo. Dow now has potential build-in options to BNSF and SP; with these conditions, Dow would still have potential build-in options to BNSF and a second carrier (e.g., IC or KCS); and, because the benefits of a Texas City build-in to SP exceed the benefits of a Texas City build-in to

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[76] Certain aspects of these conditions, which we have put on the public record, were submitted under seal. See DOW-12 (Tab A) at 3-4 and at 36-37. Dow also has requested, with respect to potential industry-wide and region-wide anticompetitive effects, the divestiture of parallel lines in Texas and Louisiana and parallel lines to the Midwest.

any other carrier, the status quo can best be preserved by minimizing the costs of the build-in, which can be done by moving the build-in connection southwest towards Angleton.

Relief Requested: Alternative Request. Dow seeks trackage rights for a carrier other than BNSF, to be named by Dow, (a) over SP's line between Houston and New Orleans, (b) over SP's line between Houston and Memphis, and (c) over UP's line between Houston and Texas City, with the right to connect to new line construction in the vicinity of Texas City in order to serve Dow at Freeport and any other shippers located along the new line. The new line referenced in this paragraph would run between Freeport and a point in the vicinity of Texas City. Dow contends that, at the very least, it is entitled to the conditions contained in its Alternative Request, which will allow a second carrier to connect to a build-in in exactly the same area as the formerly possible SP build-in. The only variation is that trackage rights are requested over UP's Houston-Texas City line in view of the proposed abandonment of a portion of SP's Houston-Texas City line.

Montell USA Inc./Olin Corporation. At separate plants in the West Lake Charles, LA, area, Montell produces primarily polypropylene and polyethylene, and Olin produces a variety of chemical products. Both companies rely almost exclusively on rail to ship their products to market, both rely on rail for the storage of their products, and both rely on rail for the receipt of raw materials. Both ship most of their outbound freight to points in the Eastern United States via four "Eastern Gateways" (Chicago, St. Louis, Memphis, and New Orleans). In addition, Montell ships some of its outbound freight to Houston, and Olin expects that it will have shipments to Mexico as business develops in response to NAFTA.

Montell's plant is currently served by an SP single-line routing (to the Eastern Gateways and Houston) and a KCS-UP joint-line routing (KCS offers single-line service to New Orleans by an indirect route, but can provide competitive routings to the Eastern Gateways and Houston with a KCS-UP joint-line routing via DeQuincy to Houston and New Orleans, and via Texarkana to Chicago, St. Louis, and Memphis). Olin's plant is currently served by UP (via KCS tracks, under a long-standing contractual agreement) and SP; both UP and SP offer single-line competitive service to New Orleans and St. Louis; and KCS (which offers single-line service to New Orleans by an indirect route, and which, due to contractual limitations, cannot interchange Olin's freight with UP) is simply not a significant competitive factor. Both Montell and Olin fear that the UP vs. SP competition that exists today for traffic moving to, from, or via the four Eastern Gateways and Houston (including traffic moving to Mexico) will cease to exist post-merger, leaving them captive to UP/SP. They note that the BNSF agreement does not provide for BNSF interchange line haul rights at West Lake Charles, and they add that the KCS-BNSF joint-line routings that exist today are too circuitous to provide effective competition to the single-line routings of a merged UP/SP.

Montell and Olin therefore request that we condition the merger by requiring UP/SP (1) to grant interchange rights at West Lake Charles to BNSF (or to whichever carrier obtains trackage rights over SP's Houston-New Orleans line),[77] and

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[77] Montell indicates that the interchange line haul traffic rights it seeks at West Lake Charles would allow a "KCS/BNSF interline interexchange at Lake Charles." MONT-9 at 2.

(2) to grant interchange rights with KCS at Shreveport to BNSF (or to whichever carrier obtains trackage rights over SP's Houston-Memphis line). The first condition would allow BNSF (or the alternate carrier) to compete with UP/SP for Montell's and Olin's traffic moving in the Houston-New Orleans corridor. The second condition, which has reference to traffic moving to, from, or via Chicago, St. Louis, and Memphis, would allow BNSF (or the alternate carrier) and KCS to create joint-line routings via Shreveport that would replace the present KCS-UP joint-line routings via Texarkana.

Montell notes that the CMA agreement purports to address competitive problems in the Lake Charles area, but insists that the CMA solution is deficient: (a) BNSF is granted access to shippers at Lake Charles and West Lake, but not to Montell at West Lake Charles; (b) BNSF is granted access only to facilities now open to three carriers (UP, SP, and KCS), whereas Montell's facility is now open only to two carriers (SP and KCS); (c) BNSF is allowed to handle traffic moving between the covered points, on the one hand, and, on the other, New Orleans or the Mexican border, but is not allowed to handle traffic that now moves KCS-UP from/to Houston, Chicago, St. Louis, or Memphis; and (d) for some traffic (traffic at West Lake), BNSF is subject to an "access fee" that appears to amount to a "phantom" charge that would apply even if BNSF were to provide direct service. Montell adds, in its brief, that we should at the very least condition the merger by granting BNSF a right of access to Montell's West Lake Charles plant similar to that offered shippers in West Lake and Lake Charles, with the further condition that BNSF be allowed to deliver Montell's traffic to Houston.

Quantum Chemical Corporation. QCC, which manufactures polyolefin resins and petrochemicals, fears that the proposed merger will have negative effects (not fully addressed by the CMA agreement) with respect to traffic at Chocolate Bayou, Williams, Baytown, and Strang, TX. (1) QCC's Chocolate Bayou plant is served solely by UP, but QCC indicates that prior to the announcement of the merger it had discussed with SP a Galveston-Chocolate Bayou build-out, which would have served the Chocolate Bayou facilities of QCC and Amoco as well as the Freeport facilities of Dow. QCC fears that the competition represented by the build-out will vanish with the merger because BNSF sees exercise of its trackage rights under the BNSF agreement as a cost-effective alternative to the construction of new rail lines. (2) QCC's Chocolate Bayou plant, which produces polyethylene products, is served solely by UP; its Williams plant, which produces similar products, is served solely by SP; and QCC indicates that, by leveraging its ability to swing production capacity between the two plants, it has been able to take advantage of UP vs. SP competition, which, of course, will cease with the merger. (3) QCC indicates that certain facilities at Baytown now have access both to UP (which serves these facilities directly) and SP (which serves these facilities via Econorail, a captive switching carrier). One such Baytown facility is Seapac, a commercial warehouse used by QCC. QCC notes that the UP vs. SP competition now available to QCC's Seapac traffic will end with the merger, and QCC fears that Seapac (in essence, a 2-to-1 point) may not be covered by the BNSF agreement. (4) Prior to 1995, QCC's Strang facility (in the Houston area) had access to four Class I railroads: BN, SF, UP, and SP. The BN/SF merger, QCC notes, reduced the number of railroads to three, and the UP/SP merger will reduce the number to two. QCC claims that, in the wake of the BN/SF merger, BNSF's rates tended to increase, and it fears that UP/SP's rates will likewise tend to increase in the wake of a UP/SP merger.

Requested Relief. QCC suggests four conditions: (1) that Chocolate Bayou be opened to access by a competing Class I rail carrier (e.g., BNSF or IC), or, in the alternative, that the BNSF agreement be modified to allow BNSF trackage rights access to Chocolate Bayou; (2) that Williams be opened to access by a competing Class I rail carrier; (3) that Baytown industries, specifically Seapac, be opened to access by another Class I carrier, or, in the alternative, that the BNSF agreement be clarified with respect to granting access rights to BNSF for service to Seapac and Econorail; and (4) that another Class I rail carrier (such as IC) be granted access to Strang.

Union Carbide Corporation. UCC's chemicals/plastics plant at Seadrift, TX, is rail-served solely by UP, but UCC claims that it determined in the late 1980s that a build-out to SP's Victoria-Port Lavaca line at Kamey (within 10 miles of the plant) would be feasible. UCC indicates that SP agreed and, in 1989, offered UCC attractive discounts off of its standard rates (contingent upon construction of the build-out); and UCC claims that, with this build-out threat, it was able to negotiate its current contract with UP. The merger, UCC warns, would eliminate its build-out potential, and would thereby eliminate present competition by reducing UCC's rail options from two to one. The effects might not be felt during the life of the present UCC-UP contract, but the important point, UCC claims, is that the leverage provided by the build-out would be gone, and UCC would be captive to UP. UCC therefore requests that we preserve the status quo by requiring UP/SP to allow BNSF to serve UCC's Seadrift plant either (1) by trackage rights at competitive costs over UP's Bloomington-Seadrift line (this would allow BNSF to serve Seadrift via the existing UP line), or (2) by trackage rights (and concomitant stop-off rights) at competitive costs over SP's Victoria-Port Lavaca line between the UP main line and a point near Kamey (this would allow BNSF to serve Seadrift via the potential build-out route).

Enterprise Products Company. EPC, which produces hydrocarbon products at its Mont Belvieu, TX, facilities, concedes that Mont Belvieu has heretofore been rail-served solely by SP (via its Baytown Branch), but notes that, in 1995, UP announced the construction of a new Mont Belvieu Branch, which would extend 10½ miles from the UP line at McNair and would directly serve several major plastics and petrochemicals plants on SP's Baytown Branch. EPC concedes that the Mont Belvieu Branch was not proposed to serve EPC initially, but maintains that, because the Exxon plant that the Mont Belvieu Branch would serve is less than a mile from EPC's facilities, the short extension that would be needed to reach EPC could be justified on economic grounds at an early date. EPC contends that the merger should be denied because the merger will eliminate the competitive option that the Mont Belvieu Branch would have created. EPC further contends that, if the merger is approved, it should be conditioned by requiring that UP/SP either (1) build the Mont Belvieu Branch as proposed and grant trackage rights upon it to a competing carrier (BNSF) with no limitations on providing service to additional customers at Mont Belvieu, or (2) authorize a shortline to operate the Baytown Branch and grant trackage rights for multiple railroads to access it at Dayton along the SP Houston-New Orleans main line and through the interchange point with the UP line at the southern terminus.

Formosa Plastics Corporation, USA. At its facility at Point Comfort, TX (rail-served only by UP, off of UP's Houston-Brownsville line), FPC manufactures plastics components for shipment to various western points, including three California points (Stockton, City of Commerce, and Lindsay) served by three carriers (UP, SP, and BNSF). FPC concedes that it is captive to UP at origin, but claims that the existence of competitive routes to California enables FPC to bargain more effectively for rates (because FPC can deny UP its long-haul). The merger, FPC fears, will eliminate the competition that exists today because the merged system will control FPC's traffic at origin and/or at destination. FPC concedes that its Baton Rouge facility is served by three railroads (UP, IC, and KCS), but claims that Baton Rouge is not a competitive alternative to Point Comfort on plastics components moving to California, either because most such components are not manufactured in Baton Rouge or because only limited quantities of the one that is manufactured are available for shipment to points west. FPC notes that several of its competitors (Dow at Freeport, QCC at Chocolate Bayou, and UCC at Seadrift) are, like FPC, captive to UP's Houston-Brownsville line, and FPC supports the pro-competitive solutions urged by its competitors. FPC adds, however, that pro-competitive relief should not be granted selectively, and it contends that, if we condition the merger by requiring new competitive service at points in Texas originating or terminating plastics/chemical traffic, we should do so evenhandedly with respect to all shippers in the same industries.

The Geon Company. Geon, which produces vinyl products, fears that the merger would adversely impact its facilities at LaPorte, TX (served by PTRA and accessible by SP), at Deer Park, TX (served only by PTRA), at Plaquemine, LA (served only by UP), and at Long Beach, CA (served only by SP). Two years ago, Geon notes, four railroads (BN, SF, UP, and SP) were available to it at LaPorte and Deer Park (either directly or via PTRA). Approval of the pending merger, Geon adds, will reduce that number to two, and Geon fears that, as the number of competitors decreases, rates rise and service deteriorates. Geon argues that an SP break-up solution dictated by the marketplace would be preferable to the anticompetitive consequences of the merger, and Geon therefore urges the denial of the merger.

PPG Industries Inc. PPG, which manufactures chemicals, fears that the proposed merger would adversely impact its Westlake, LA, facility, which is served by three railroads (SP and KCS directly, and UP by reciprocal switch). Post-merger, PPG warns, only UP/SP and KCS would serve Westlake, but, due to the limitations of the KCS route structure, much traffic at Westlake would be captive to UP/SP. The BNSF agreement, PPG adds, is not a satisfactory solution to this problem (PPG claims to have heard that BNSF will not serve PPG's Westlake plant). Shipments from/to Mexico, PPG also warns, would be monopolized by a merged UP/SP, thus jeopardizing the existence of the Tex Mex. PPG therefore suggests that the merger should be denied, or, alternatively, that we should order a divestiture of parallel lines in Texas and Louisiana and allow Tex Mex to connect with other railroads. PPG also asks that we consider requiring additional interchanges at certain other points. In Texas, PPG mentions its plant at Bacon, which is currently served by the Wichita, Tillman & Jackson Railway (WT&J). Service to that plant, PPG indicates, is restricted to a WT&J-UP interchange, even though BNSF has a physical connection with the WT&J. In Oregon, PPG mentions two customers, one located at Lebanon and served by the Willamette Valley Railroad (WVRR), and the other located at Corvallis and served by the Willamette Pacific Railroad (WLPRR). Service to the two customers, PPG indicates, is limited to a WVRR-SP interchange and a WLPRR-SP interchange, respectively, even though BNSF has physical connections with WVRR and WLPRR.

Huntsman Corporation. HC, which produces chemicals and plastics, fears that the merger will result in a loss of rail-to-rail competition at three of its Texas facilities: its Longview facility, which is now served by a UP single-line routing and a BNSF-SP joint-line routing (via a junction at Tenaha); its Laredo facility, which can now access both a UP single-line routing and a Tex Mex-SP joint-line routing; and its Brownsville facility, which now has access to both UP and SP. HC recommends: (1) that DOJ conduct a complete review of the anticompetitive impacts of the merger; (2) that UP/SP be required to divest itself of rail segments over which it would have sole supplier status or unacceptable market power; and (3) that the merger review process provide ample time for all shippers, state governments, and the Congress to determine fully the impact of this merger.

Arizona Chemical Company. ACC, which operates a chemical plant in Springhill, LA, served exclusively by KCS, fears that the merger will eliminate UP vs. SP competition it now enjoys. ACC notes that, for traffic moving to Houston, Mexico, and the Western United States, KCS interchanges with both UP and SP at Shreveport; ACC adds that it now has annual contracts with both UP and SP for the portion of the haul beyond Shreveport; and ACC fears that the merger will end the competition now provided by UP and SP at Shreveport. ACC insists, for this reason, that it is a 2-to-1 shipper, but it notes that its interests have not been provided for in the BNSF agreement and, for the most part, have not been provided for in the CMA agreement either. ACC therefore asks that the BNSF agreement be modified as urged by CMA prior to execution of the CMA agreement, by: (1) giving BNSF access to all 2-to-1 points regardless of whether any traffic has moved from/to these points in the past; (2) giving BNSF access to all 3-to-2 points for which, on a "defined" route to/from a particular destination/origin, there would be no alternative other than UP/SP; (3) giving BNSF access to Brownsville/Laredo on the same terms that SP currently has; (4) giving BNSF access to all new (post-merger) facilities built on the lines over which BNSF will have trackage rights; (5) providing detailed assurances and supporting operating and capital investment plans for the services that BNSF will provide under its trackage rights; (6) providing a detailed plan to ensure equal dispatching of trains; (7) renegotiating (lower) the trackage rights fees or establishing a trust fund to provide for shared maintenance costs, rather than subsidization of UP/SP's operations; and (8) providing BNSF the right to operate its trains in the same direction as UP/SP's trains over UP/SP tracks wherever UP/SP has or may have instituted directional operations (for the same length of time provided for in the agreement).

Monsanto Company. Monsanto, which produces chemicals, fibers, and food additives, fears that the merger will have serious anticompetitive effects. Monsanto notes, by way of example, that its Luling, LA, facility is served by both UP and SP, and Monsanto claims that the BNSF agreement will not cure the loss of competition if BNSF chooses not to operate or is slow to start up its operations. Monsanto therefore supports certain conditions: (1) the conditions formerly requested by CMA; (2) a condition that would require a sale of UP/SP's Houston-St. Louis, Houston-New Orleans, and Houston-Eagle Pass lines if BNSF fails to exercise its trackage rights within 90 days; (3) a condition that would require a divestiture of UP/SP's Oakland-Pueblo Central Corridor; and (4) a condition that would require the adoption of a non-coal rate reasonableness methodology prior to any granting of track sales or trackage rights, or any additional mergers.

Shell Chemical Company. SCC fears that the merger would reduce its rail alternatives because UP/SP would control over 70% of Gulf Coast petrochemical shipments, over 85% of Gulf Coast plastics shipments, and over 90% of shipments from/to Mexico. The BNSF agreement, SCC claims, does not resolve SCC's concerns; with trackage rights, SCC notes, the owning railroad establishes the charges and controls track access and dispatching, which hampers the tenant's ability to compete. SCC therefore urges that we reject the merger or, in the alternative, impose a market dominance condition (SCC seeks a finding of market dominance for all locations served only by UP/SP and/or BNSF) and/or a divestiture condition (SCC seeks the divestiture to a third carrier of SP's Chicago-St. Louis, Houston-St. Louis, Houston-Memphis, Houston-New Orleans, and Houston-Corpus Christi lines).

Springfield Plastics/Brandt Consolidated. The only shippers located on the Barr-Girard Line are two affiliates, Springfield Plastics, Inc. and Brandt Consolidated, Inc. (collectively, SPBC), which receive inbound rail shipments of plastic pellets and fertilizer at their Compro, IL, facilities, and which fear added annual transportation costs of more than $110,000 if they must utilize substitute truck-rail service. SPBC urges that the Barr-Girard abandonment be denied in its entirety, or, in the alternative, that the abandonment be denied as to the 26.7-mile Barr-Compro segment. (1) *Procedural Argument*. SPBC contends that the abandonment must be denied because there is no evidence of record, and none has been made available in discovery, that UP has acquired trackage rights over I&M between Barr and Springfield (and because, without such trackage rights, UP cannot divert overhead traffic off the Barr-Girard Line). Because evidence of such trackage rights, SPBC adds, should have been submitted as part of UP's case-in-chief, the time for submitting such evidence has come and gone. (2) *Alternative Approach*. SPBC contends that the Barr-Girard Line should be segmented, and that the 26.7-mile Barr-Compro segment should be kept in service. Aside from the procedural argument respecting the I&M trackage rights, SPBC does not contest the abandonment of the 11.7-mile Compro-Girard segment.[78] (3) *SPBC's Calculations*. With respect to the Barr-Compro segment, SPBC claims: that forecast year operation would result in an operating profit greater than $20,334 (the exact amount would depend on UP's trackage rights payment for the Barr-Springfield operation over I&M); that no track rehabilitation cost is required (because the line is in much better condition than required by the forecast year traffic volume); and that no opportunity cost would be involved in continued operation (because the cost to upgrade track connections with I&M exceeds the value of track materials in the line, and because the land is not entitled to valuation due to UP's failure to prove marketable title or to independently establish any value assuming good title).

SHIPPERS: OTHER. Shippers of a wide range of commodities, including grain, forest products, food products, and minerals, have asked that we either deny the merger or impose conditions.

International Paper Company. IPC, which manufactures paper and paper products, fears that the merger would adversely affect

[78] The Barr-Compro segment is more than twice as long as the Compro-Girard segment. Nevertheless, because UP has proposed to abandon other tracks south of Girard (in particular, the DeCamp-Edwardsville and Edwardsville-Madison Lines), SPBC would prefer to be served from the 26.7-mile Barr-Compro segment to the north, and would not dispute UP's abandonment of the 11.7-mile Compro-Girard segment to the south.

competition at eight of its plants. Seven of these plants, located in the Arkansas/Louisiana/East Texas "southwest" region, are the plants at Pine Bluff and Camden, AR, Mansfield, Pineville, and Bastrop, LA, and S. Texarkana and Nacogdoches, TX. The Pine Bluff plant is served by UP and SP; the Camden plant is likewise served by UP and SP; the Mansfield plant is served by UP and KCS; the Pineville plant is served by UP (via reciprocal switch) and KCS; the Bastrop plant is served by UP and the Alabama, Louisiana and Mississippi Railroad (AL&M); the S. Texarkana plant is served by UP and KCS; and the Nacogdoches plant is served by SP. IPC indicates that the Pine Bluff and Camden plants benefit from head-to-head competition between UP and SP in the Houston-Memphis corridor, and that the Mansfield, Pineville, Bastrop, S. Texarkana, and Nacogdoches plants also benefit from competition because, in each instance, either UP or SP is an essential part of the rail movement; SP, IPC notes, is today a friendly connection for KCS for traffic at Mansfield, Pineville, and S. Texarkana, and for AL&M for traffic at Bastrop. IPC's eighth plant, located at Gardiner, OR, is served by the Longview, Portland & Northern Railroad (LP&N), an IPC-owned shortline that connects with the Central Oregon & Pacific Railroad (CO&PR), which in turn connects with SP. This, IPC claims, is not entirely satisfactory: at Gardiner, all traffic originating or terminating beyond CO&PR moves at SP's whim.

Adverse Impacts Post-Merger: Trackage Rights Compensation. IPC contends that the compensation arrangement applicable to the trackage rights provided for in the BNSF agreement would defeat any competitive alternative that BNSF might otherwise present. The trackage rights compensation level, IPC claims, would be a serious and immediate impediment to rate competition from BNSF, and this problem, IPC adds, would be compounded in future years.

Adverse Impacts Post-Merger: Pine Bluff and Camden. IPC fears that its plants in Arkansas, Louisiana and Texas will lose the benefits now provided by two strong competing railroads, and will have to rely on competition between a merged UP/SP and a disadvantaged BNSF, which would be hamstrung by operational difficulties, inadequate traffic volumes, and arbitrarily high operating costs. Competition at points opened to BNSF will be weaker than it is today, IPC contends, because there will not be sufficient volume available at the few points that BNSF will be permitted to serve to warrant it doing anything more than moving through traffic over the corridor. And, IPC adds, even if there were sufficient volumes at these points, any BNSF operation on SP's Houston-Memphis line would suffer from an absence of rail facilities, an overwhelming directional flow of UP/SP's traffic, a lack of adequate sidings, a lack of storage facilities required for plastic and chemical traffic, a lack of computerized traffic control, a lack of facilities for crew changes, a lack of car repair facilities, a lack of boxcars, and so on. IPC maintains that, at best, BNSF service at Pine Bluff and Camden will be provided via haulage agreements; and this, IPC claims, would amount to UP/SP service at higher rates.

Adverse Impacts Post-Merger: Mansfield, Pineville, Bastrop, S. Texarkana, and Nacogdoches. IPC indicates that, because SP is today a friendly connection for KCS and AL&M, SP has no incentive to treat KCS and AL&M less favorably than UP. The merger, IPC fears, will alter this incentive; a merged UP/SP will have an incentive to treat KCS and AL&M less favorably than itself. Traffic at Mansfield, Pineville, S. Texarkana, and Bastrop, IPC warns, will therefore lose the benefit of UP vs. SP competition. IPC, which recognizes that the vertical market foreclosure it fears is at odds with the "one-lump" approach long accepted by the ICC, insists that the one-lump approach is simply wrong (or at the very least inapplicable here). That theory, IPC contends, does not address the issue of the fixed or sunk costs of the serving carriers, and ignores the fact that a bottleneck carrier's pricing and service practices may be constrained by outside factors, which necessarily means that a bottleneck rail carrier will not always be able to capture the preponderance of the economic rents of any given move. There is no evidence, IPC argues, that SP has ever exercised "one-lump" power on its connections.

Adverse Impacts Post-Merger: Gardiner. The BNSF agreement, IPC notes, will allow both UP/SP and BNSF to provide new service alternatives in the I-5 corridor. The problem here, from IPC's perspective, is that although some shippers (including certain IPC competitors) currently local either to BNSF or UP will have access to these new alternatives, IPC (which is captive at Gardiner to SP, via CO&PR) will not.

Relief Requested. IPC opposes the merger and urges that any approval be conditioned by requirements: (1) that UP/SP divest (to a neutral carrier) SP's Houston-St. Louis lines and related facilities; (2) that UP/SP keep open all routes, at competitive rates with service no less favorable than will be accorded UP/SP traffic, via the existing KCS-SP junctions at Beaumont, Houston, Dallas, and Shreveport, on traffic to/from competitively served points (including AL&M originations/terminations at Bastrop), so as to maintain the friendly connection on traffic destined to or originated at SP-served points; (3) that UP/SP grant Tex Mex "trackage" between Corpus Christi and Beaumont, or, in the alternative, grant KCS the opportunity to acquire trackage to Corpus Christi; (4) that UP/SP permit a direct interchange between BNSF and CO&PR at Eugene; and, to allow BNSF to handle IPC's southbound traffic, that UP/SP either grant BNSF trackage rights between Eugene and Chemult or allow a free interchange between SP and BNSF at Chemult; (5) that UP/SP ensure that a viable, competitive routing exists over the Central Corridor; and (6) that UP/SP grant BNSF trackage rights to Turlock, CA (a major destination for IPC paper products) from either Stockton or Merced, CA.

United States Gypsum Company. USG, which produces gypsum wallboard products, gypsum rock and plasters, joint compounds, and gypsum board paper, fears that the merger will have serious impacts with respect to traffic involving its plants at Empire, NV, Plaster City, CA, Southard, OK, and Fort Dodge, IA.

Empire, NV. USG's Empire plant manufactures gypsum wallboard, etc., for shipment by rail to various points, one of which is USG's Fremont, CA, wallboard plant. Traffic moving outbound from the Empire plant is handled by UP from its Gerlach, NV, station, but service, USG reports, has been poor, and, on occasion, delays in the Gerlach-Fremont haul have forced the Fremont plant to shut down. The problem, in USG's view, is that UP's westbound manifest trains ordinarily "fill up" prior to reaching Gerlach, forcing USG's shipments to wait while full UP trains run past Gerlach. The merger, USG asserts, will only make matters worse if UP/SP implements its plans to run fewer trains past Gerlach and/or if BNSF uses UP/SP crews to move its own trains past Gerlach. USG therefore urges us to require that the BNSF agreement be amended to allow BNSF access to serve and switch USG's rail movements from and to the Gerlach station.

Plaster City, CA. USG's Plaster City plant (served and switched solely by SP) manufactures gypsum wallboard, etc., for shipment by rail to various points, one of which is USG's Santa Fe Springs, CA, plant (served by SP's Los Nietos station).

SP service. USG reports, has been poor; delayed shipments have resulted in shutdowns and slowdowns at Santa Fe Springs. There is presently no rail competition at Plaster City (only SP provides service). Although a line, which is now operated by the San Diego & Imperial Valley Railroad (SDIV), runs west from Plaster City and (after passing through Mexico between Division, CA, and San Ysidro, CA) connects with BNSF in the San Diego area, since 1976 this line has been out of service for some distance west of Plaster City, and it will not return to service until certain repairs can be made. USG fears that, lacking rail-to-rail competition, UP/SP service at Plaster City can only get worse, as new traffic flows result in even greater congestion on SP lines. The merger, USG adds, also threatens to worsen USG's standing vis-à-vis its competitors in current Plaster City rail-served markets, due to the opening of single-line rail routings from multiple competitor locations. USG therefore urges us to require (1) that BNSF be granted haulage rights to serve and switch USG's rail movements (a) between Plaster City and Santa Fe Springs, on SP's route via Niland, City of Industry, Bartolo, and Los Nietos, and (b) between Plaster City and the UP/SP-BNSF junction at West Colton, on SP's route via Niland, and (2) that BNSF be granted trackage rights over SDIV between Plaster City and the BNSF-SDIV interchange in San Diego.[79]

Southard, OK. USG's Southard plant manufactures gypsum wallboard, etc., for shipment by rail throughout the United States. Rail service at Southard is provided by Grainbelt Corporation (GNBC), which accesses BNSF and UP (at Enid, OK) and SP (at Quanah, TX). USG notes that, prior to the BN/SF merger, GNBC had access to BN, SF, and UP, and that the ICC, in its decision approving the BN/SF merger, granted GNBC access to SP at Quanah so that GNBC would continue to have three Class I connections. The merger would reduce GNBC's Class I connections from three to two, and USG maintains that we should follow the ICC's lead and impose a condition granting GNBC a third Class I connection. USG therefore urges us to require that CSX be granted overhead trackage rights, terminal trackage rights, and/or reciprocal switching trackage rights over UP/SP between Enid and St. Louis, for USG's loaded or empty rail movements originating or terminating on GNBC.

Fort Dodge, IA. USG's Fort Dodge plant manufactures gypsum wallboard, etc., for shipment by rail to various destinations, and receives by rail limestone from Illinois. Fort Dodge is switched and served by UP (formerly CNW) and by the Chicago Central & Pacific Railroad Company (CC&P). USG indicates that, prior to the UP/CNW merger, Fort Dodge could access BN, SF, and UP, and all other Class I railroads via both CNW and CC&P. The UP/CNW merger, USG contends, changed matters for the worse. The service provided by UP has been poor, and the balance of rail competition has been skewed by having UP single-line routings in competition with CC&P-BNSF joint-line routings; a two-line haul, USG suggests, is necessarily inferior to a single-line haul. USG is particularly concerned by the settlement agreement entered into by applicants and IC (the IC agreement). For one thing, references in the IC agreement to IC, USG suggests, may mean either IC or IC/CC&P (we recently approved an IC/CC&P merger), and USG indicates that this uncertainty clouds its ability to

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[79] SDIV urges the denial of USG's second Plaster City condition. SDIV notes, among other things, that we lack authority to impose conditions on a non-applicant carrier (except in connection with terminal trackage, which SDIV's 129.61-mile line, SDIV insists, is not) and that we likewise lack authority to impose conditions respecting track located in Mexico.

analyze the combined impact of the UP/SP merger, the IC/CC&P merger, and the IC agreement. For another thing, USG is alarmed by the provision in the IC agreement that makes IC UP/SP's first negotiating partner respecting imposed conditions in addition to or in lieu of the BNSF agreement. This provision, USG claims, effectively limits rail competition at Fort Dodge, and would reduce rail access at Fort Dodge from two railroads (UP and CC&P) to one (UP). USG therefore urges us to require that BNSF be granted haulage rights to serve and switch USG's freight from/to Fort Dodge over the UP and former CNW track between USG's Fort Dodge plant, on the one hand, and, on the other, the BNSF yards in Minneapolis, MN (via Mason City, IA), Council Bluffs, IA, and Sioux City, IA. USG further urges us to require that the IC agreement be clarified with respect to USG's Fort Dodge plant, and that the IC agreement's anticompetitive impact vis-à-vis competitive rail access at Fort Dodge be eliminated.

North American Logistic Services. NALS, a Division of Mars, Incorporated (Mars), arranges transportation at various Mars production units, one of which (Kal Kan Foods, Inc., known as Kal Kan) will begin operations at a new SP-served plant at Wunotoo, NV, later this year. The pet food produced at this plant will be trucked outbound, but the grain and animal by-products used at this plant will be hauled inbound by rail. NALS notes that, although its inbound traffic can be terminated only by SP, it can be originated by other railroads (in particular, UP and BNSF), and NALS intends that, at least initially, its grain will be originated either by UP or by BNSF. And, NALS adds, although only SP can serve the plant, UP can serve Reno (30 miles away), and inbound freight can be trucked from Reno to the plant. The merger, NALS warns, will destroy competition both at destination (because there will no longer be a UP/truck option) and at origin (because, once any existing contracts expire, a merged UP/SP is unlikely to participate with BNSF in a joint rate that would allow a BNSF-UP/SP joint-line haul to compete with a UP/SP single-line haul). NALS insists that the 2-to-1 provisions of the BNSF agreement will not protect Kal Kan: although Kal Kan is clearly (as NALS sees matters) a 2-to-1 shipper, nothing in the agreement would allow BNSF to handle traffic destined to Wunotoo. Reno, NALS indicates, is provided for in the agreement, but the rights granted to BNSF at Reno, NALS insists, will not allow BNSF to provide the rail/motor service required to serve Kal Kan. NALS therefore asks that UP/SP be required to grant BNSF trackage rights either (1) over the SP line serving the Kal Kan plant (along with all necessary stop-off and switching rights), or (2) over the UP line at Reno (and, if trackage rights are granted over the UP line at Reno and if the Kal Kan plant is included within the Reno switching district, NALS also asks that UP/SP be required to grant BNSF reciprocal switching rights into the plant).

ASARCO Incorporated. ASARCO, which produces nonferrous and precious metals, opposes the merger out of fear that there will be serious anticompetitive impacts at its facilities at El Paso, TX, Hayden, AZ, Corpus Christi, TX, and Leadville, CO, and also with respect to traffic moving from/to Mexico. (1) ASARCO's El Paso copper smelter is currently served by three carriers: SP; BNSF; and UP (via a reciprocal switch over BNSF). ASARCO indicates, however, that, due to the nature of ASARCO's customer base and the circuity of a BNSF haul, two carriers (SP and UP) handle almost all of ASARCO's El Paso traffic. The merger, ASARCO therefore fears, will effectively leave ASARCO with but a single carrier at El Paso. (2) ASARCO's Hayden copper smelter is captive to SP, which accesses Hayden via CBRY (the Copper Basin Railway Company). ASARCO claims, however, that it has packaged its captive Hayden traffic with its competitive El Paso traffic to secure competitive rates for both, and ASARCO therefore fears that the 3-to-2 reduction at El Paso will impact its competitive options at Hayden. (3) At Corpus Christi, ASARCO's Encycle subsidiary is served by UP but is open to reciprocal switching by SP, and ASARCO therefore fears that Encycle will experience a 2-to-1 reduction in competitive options; and, ASARCO adds, the Port of Corpus Christi, through which ASARCO imports on a spot basis, also will experience a 2-to-1 competitive reduction. ASARCO recognizes that these impacts might be alleviated by the BNSF agreement, but claims that the charges provided for in that agreement are such that BNSF will not be competitive. (4) ASARCO's Leadville lead/zinc mine is served by SP at Malta (via a 7-mile truck haul), which means that the Tennessee Pass abandonment will force ASARCO to set up another loading site, probably over 100 miles from the mine. Applicants, ASARCO claims, have given no indication how ASARCO's increased costs might be handled. (5) ASARCO, which has in the past bid its Mexican traffic between the different border crossings, warns that the impacts of the merger include a reduction in the number of railroads serving these border crossings.

CIC International Corporation. CIC, which produces paper, plywood, lumber, and forest products, has four East Texas plants (at Corrigan, Sheldon, Camden, and Herty) that rely, either directly or via a shortline connection, on SP's Houston, TX-Fair Oaks, AR line. In recent years, CIC indicates, SP's service has been inadequate, and CIC allows that the merger may result in improved service. CIC adds, however, that the merger may also cause certain problems: service on the Houston-Fair Oaks line may deteriorate further, if applicants use that line for south-bound traffic and if BNSF puts its own overhead trains on that line; and the merger also endangers intramodal competition now provided via both a UP reload at Palestine, TX (which will clearly be eliminated as a post-merger alternative) and a BNSF reload at Cleveland, TX (which may be eliminated as a post-merger alternative in the wake of the various realignments triggered by the BNSF agreement). CIC therefore requests that we condition the merger (1) by granting BNSF access to all Class III railroads and their customers who are dependent on the Houston-Fair Oaks line (to counterbalance the service problems that will accrue from added traffic), and (2) by preserving the pre-merger competitive status quo vis-à-vis CIC's customers in Arizona, California, Colorado, Missouri, Nebraska, New Mexico, Nevada, Oregon, Washington, and Wyoming (to ensure that the competitive alternatives created by existing reload operations are not eliminated by the merger).

Weyerhaeuser Company. Weyerhaeuser, a forest products company, fears that the merger will adversely impact the transportation of all goods across North America, and it therefore urges denial; healthy competition, Weyerhaeuser claims, requires a minimum of three rail carriers. Weyerhaeuser adds that, in any event, because the trackage rights provided for in the BNSF agreement will not give BNSF a real competitive opportunity, BNSF will be unable to provide a real competitive choice even in the limited 2-to-1 context. Weyerhaeuser urges that we condition any approval of the merger on: (1) divestiture to create a three-railroad option in the Central Corridor; (2) divestiture to create a three-railroad option in the Texas Gulf Coast region (from the Gulf Coast to Memphis and St. Louis); (3) trackage rights to provide a third rail carrier option from/to Mexico; (4) trackage rights (or a similar arrangement) that would allow MRL to access the Eugene, OR, market by operating between Klamath Falls and Eugene, OR, and open interchange with the Central Oregon and Pacific Railroad (CO&PR, which serves two Weyerhaeuser facilities in Oregon); and

(5) competitive conditions in the Pacific Coast Corridor (Weyerhaeuser supports the provisions in the BNSF agreement that enhance rail-to-rail competition in that corridor).

Cargill. Cargill, which merchandises agricultural and other bulk commodities, contends that the merger threatens to create significant competitive pitfalls, and therefore urges that if we approve the merger: (1) to ensure that the trackage rights provided for in the BNSF agreement will allow effective competition, we should examine the costs that BNSF will incur; (2) to ensure reasonable access to competitive rail options, we should require that all UP/SP stations/junctions be open to reciprocal switching; (3) to preserve pre-merger joint-line movements, we should establish a rate guideline making presumptively unreasonable the increase of any UP/SP segment of a joint movement to a rate (revenue-variable cost) exceeding 180%; (4) to ensure that gateways now open remain open, we should order that no gateways now open can be closed by UP/SP post-merger; and (5) to ensure that UP/SP does not unreasonably refuse access to privately owned cars, we should require that UP/SP maintain the present status of private cars on UP and SP.

IBP, Inc. IBP, a meat packing company with shipping origins in Iowa and Nebraska formerly served by CNW, claims that service declined and rates increased after the UP/CNW merger. The CNW lines serving these points, IBP claims, have been marginalized by UP; these lines, IBP suggests, were significant to CNW but are not significant to UP given UP's emphasis on long-haul, bulk-loading, multiple-car traffic. IBP fears that, because similar problems will follow a UP/SP merger, that merger will lessen the adequacy of transportation to the public at IBP shipping origins in Iowa and Nebraska. IBP therefore requests that we grant CC&P reciprocal switching rights at six IBP shipping origins in Iowa and Nebraska located on former CNW lines.

Oregon Steel Mills, Inc. OSM, which contends that, due to inadequate infrastructure and the way reciprocal switching charges are structured, Portland, OR, is a railroad interchange nightmare, urges that we require (1) that all rail interchanges in Portland be open to all shippers (including shippers located on shortlines) and (2) that all reciprocal switching charges be reasonable between all carriers.

Stimson Lumber Company. SLC, which manufactures lumber, plywood, and hardboard products in Oregon and Montana, seeks to establish a competitive rail environment that will benefit the forest products industry and the Pacific Northwest, and therefore urges us to require: (1) that UP/SP ensure the competitive posture of Portland area (north of Eugene) shippers relative to pricing; (2) that UP/SP not immediately abandon or downsize any yard that currently offers a means of flexibility; (3) that the BNSF agreement be expanded to include open interchange for traffic moving from origins served by SP (either directly or via a shortline) to destinations served by BNSF; and (4) that UP/SP continue UP's reasonable switching agreement with BNSF.

STATE & LOCAL GOVERNMENTS AND RELATED INTERESTS. Pleadings have been filed by a number of state and local governments and related interests.

Texas. *Attorney General Morales* requests that the merger be denied, and contends: that only three Class I railroads serve the majority of Texas, which has more shippers captive to rail than any other state affected by the merger, and also has more shippers served exclusively by either UP or SP; and that the merger would reduce (either 3-to-2 or 2-to-1) Class I railroad competition for a significant volume of traffic involving origins and destinations in Texas and at the Texas-Mexico gateways. Texas, the Attorney General claims, has more 2-to-1 customers than any other state, and the Attorney General insists that applicants' definition of 2-to-1 shippers, using points rather than areas, is too restrictive. The Attorney General asserts, however, that economic studies suggest that competitive harm exists even in 3-to-2 markets. The Attorney General argues that combining the monopoly customers of SP with those of UP will eliminate the potential competition that often exists between nearby railroads, and he also argues that intermodal and source competition are unlikely to be effective checks on a merged UP/SP. The Attorney General contends that the BNSF agreement does not address the competitive problems that the merger will create, and he suggests that BNSF, as a tenant railroad, would be at a competitive disadvantage and would be further hampered by operational difficulties.

The Railroad Commission of Texas (RCT), which claims that the BNSF agreement does not protect competition in parallel UP/SP Texas markets, recommends that we deny the merger and asks that, if the merger is approved, we: (1) grant to Tex Mex Corpus Christi-Beaumont trackage rights to allow it to connect with KCS; (2) order (a) the divestiture of SP lines in the Houston to Chicago, St. Louis, and Memphis corridor, the Dallas/Fort Worth to Chicago, St. Louis, and Memphis corridor, the Dallas/Fort Worth to Houston and South Texas corridor, and the New Orleans to Houston, San Antonio, and Eagle Pass corridor, and (b) the divestiture of related SP terminals, yards, and other facilities; (3) require that UP/SP agree to the creation of neutral terminal railroads serving Houston, Corpus Christi, Beaumont/Port Arthur/Orange, Dallas/Fort Worth, El Paso, and the Rio Grande Valley; and (4) require that UP/SP, if it proposes a post-merger Texas abandonment, include all trackage necessary to ensure the acquiring entity access to rail junction points. RCT, which also is concerned that increases in rail traffic may impact public safety, requests that a merged UP/SP be required (5) to confer with law enforcement officials, traffic engineers, and public officials in cities and counties that experience a substantial increase in the number of daily trains, and (6) to install flashers, bells, and gates at all grade crossings where the maximum train speed is great enough to present a hazard to motorists.

The Port of Corpus Christi, noting that UP and SP account for 80% of the Port's rail business and that the SP-Tex Mex routing (via Corpus Christi) is competitive with the UP single-line routing for traffic moving over the Laredo gateway, supports the merger but requests: (1) that we impose the BNSF agreement as a condition; and (2) that, if we determine that the BNSF agreement does not adequately resolve competitive issues, we grant a third Class I carrier access to Corpus Christi, including access to Tex Mex and the Port.

Texas State Representatives Robert Junell, John R. Cook, and Robert Saunders, believing that the merger will reduce rail competition in Texas and fearing that the BNSF agreement does not adequately address this competitive harm, oppose the merger unless certain conditions are imposed: (1) divestiture, to an unnamed rail carrier(s) unaffiliated with applicants, of numerous SP lines, including SP's Houston-Memphis, Houston-New Orleans, Houston-Eagle Pass, and Fort Worth-Galveston lines; (2) trackage rights, marketing rights, and divestiture of certain UP/SP Corpus Christi-Beaumont lines on behalf of Tex Mex; (3) trackage rights on certain UP lines on behalf of South Orient Railroad Company; and (4) the conditions requested by RCT.

Texas State Representative John R. Cook, claiming that UP has ignored a recently enacted Texas statute limiting certain liabilities that might arise in connection with excursion train operations, requests that we: (1) affirm that Texas has jurisdiction to limit the liability of railroads operating in Texas; and (2) require UP, SP, and BNSF to remove, from any trackage rights agreement with an excursion train operator certified under Texas law, any provision requiring the maintenance of liability insurance in excess of the amount specified by Texas law.

California. *The Public Utilities Commission of the State of California (CPUC)* supports the merger but asks that we require: (1a) that the term of the BNSF agreement be perpetual; (1b) that, upon a finding that BNSF has provided inadequate competition in any corridor or at any California station, the Board will be empowered to order appropriate corrective action; (2) that BNSF receive access to all future industries located on the lines which the BNSF agreement permits it to serve; (3) that there be either a finding that BNSF is committed to providing adequate competition in the Central Corridor, or an order requiring UP/SP to divest a Central Corridor route, facilities, trackage, and traffic base to a carrier other than BNSF (although CPUC, in its brief, appears to have withdrawn its divestiture alternative); (4) that BNSF be granted a perpetual option to acquire UP's Keddie-Stockton Line, exercisable upon a finding that UP has failed to provide on that line either (a) nondiscriminatory dispatching or (b) adequate roadway maintenance or capital improvements; (5) that UP/SP (or, at UP/SP's option, another operator) be required to operate the entire Modoc Line (Klamath Falls, OR, to Flanigan, NV) for at least 5 years, without any traffic surcharges, with any financial losses paid for by UP/SP, and with full and unrestricted interchange rights with BNSF at Klamath Falls, at Flanigan, and at such other locations as the carrier may elect (CPUC, though it concedes that local traffic on the Wendel-Alturas portion of the Modoc Line is presently negligible, claims that the line serves as an important resource for attracting new industry, and therefore opposes the Wendel-Alturas abandonment); and (6) that the North Coast Railroad Authority (NCRA), which now operates the 160-mile North Coast Railroad between the Eureka-Arcata-Korbel area and Willits and which has recently negotiated the purchase of an additional 140-mile line between Willits and Lombard, be granted competitive access to BNSF via bridge trackage rights over UP/SP lines between Lombard and either Suisun-Fairfield or Richmond, under terms identical to those in the BNSF agreement. CPUC further requests: (7) that we require UP/SP to assume SP's obligations respecting (a) rail passenger service in the Capitol Corridor between San Jose and Sacramento, and (b) the construction and operation of the Alameda Corridor between the Ports of Los Angeles and Long Beach; (8) that we stress the importance of developing the Calexico-Mexicali gateway to its fullest potential, and urge UP/SP either to develop this gateway or to divest it to another carrier; and (9) that we require UP/SP (a) to offer fair settlement amounts to employees who choose not to relocate, and (b) to provide job training and outplacement programs for employees whose jobs are abolished or transferred.

The City of Industry, through the Industry Urban-Development Agency (IUDA), claiming that two contiguous parcels owned by IUDA and located between UP and SP main line tracks should have 2-to-1 status, requests that we condition the merger by requiring (1) that the two parcels be regarded as a 2-to-1 customer, or, alternatively. (2) that, within 90 days after approval of the merger, UP/SP grant BNSF trackage rights to the two parcels.

The City of Susanville (Susanville) and the County of Lassen (Lassen) oppose the merger and the Wendel-Alturas abandonment and support the MRL responsive application, and contend that the Modoc Line (of which the Wendel-Alturas Line is a portion), though underused, is an important part of the national rail system. Susanville and Lassen indicate that, after the Base Realignment and Closure Commission realigned (in 1995) the Sierra Army Depot, which is located in Herlong (in Lassen County), by removing one of its missions, a local reuse committee was established to investigate potential reuses for the depot. Susanville and Lassen fear that the work of the reuse committee could be hindered by the proposed abandonment.

The County of Modoc (Modoc) and the City of Alturas (Alturas) also oppose the merger and the Wendel-Alturas abandonment. They state that Modoc and Alturas are currently under consideration as a location for several plants, but that the plants will be located elsewhere if rail service is discontinued. Further, Modoc and Alturas state that, in 1917, Alturas "gifted" several blocks of land in the center of the city to the N.C.O. railroad, subsequently SP. Noting that the site was used as a maintenance/repair facility and is now on California's hazardous sites list, Modoc and Alturas request that, if the Modoc Line is abandoned, the land be remediated for hazardous waste and returned to the city for redevelopment.

The County of Placer (Placer), which is concerned that increased train traffic on the Roseville-Sparks and Roseville-Marysville routes will generate various adverse impacts (including at-grade crossing delays, air pollution, increased transport of hazardous materials, and an increase in the number of "transient" criminals), asks that we consider these impacts and require mitigating conditions on any approval of the merger.

The East Bay Regional Park District (East Bay District), which maintains parks and trails within Alameda and Contra Costa Counties, fears that increased train traffic on adjacent UP/SP lines will generate various adverse impacts (including increased obstructions at crossings, increased noise, and increased air pollution), and asks that we impose conditions requiring: a grade separation at Ferry Street (Martinez), and the implementation of dispatching procedures to reduce obstructions at the Ferry Street crossing; overhead crossings at Wilson Point (Pinole), Gately (Pinole), Lone Tree Point (Rodeo), and City Cemetery/Nejedly Staging Area (Martinez), and at-grade crossings at Eckley, White's Resort, and Port Costa; an at-grade trail crossing for Neroly Road (Oakley); appropriate conditions such as crossings (either grade separated or at-grade) and/or lateral encroachments, if any of the District's paved trails are affected by the merger; and noise abatement conditions, particularly in the Pinole area.

The City of Sacramento (Sacramento) has indicated concern respecting UP's 19th Street Line, which bisects Sacramento and which will be opened up to BNSF under the BNSF agreement. Sacramento, which alleges that UP's heavy use of the line has impacted daily traffic movements and has forced the city to maintain emergency services on both sides of the line, and which therefore wishes to transfer UP (and BNSF) freight trains to alternative trackage, has an alternative in mind: SP's Elvas Line, which, Sacramento indicates, runs parallel to the 19th Street Line but is more removed from the central part of the city. Sacramento therefore requests that we impose a condition that will assure that Sacramento will be able to conduct negotiations with UP/SP and BNSF regarding the abatement of traffic on the 19th Street Line.

Oregon. *The Oregon Department of Transportation (Or/DOT)* supports the merger but asks that we monitor Central Corridor competition, and suggests that, at the end of this proceeding, we commence an investigation respecting open access (Or/DOT has in mind that all Oregon shippers should have access to both BNSF and UP/SP). Or/DOT apparently continues to oppose the Wendel-Alturas abandonment, which, Or/DOT fears, may harm Southern Oregon shippers by reducing their ability to compete effectively in eastern markets (Or/DOT fears that the alternative route, via Roseville, CA, may not be a competitive alternative for many Southern Oregon shippers). Or/DOT adds that the Wendel-Alturas Line should be retained at least until UP/SP has had a chance to implement infrastructure and operating improvements needed to serve all customers in a competitive manner.

Montana. *Governor Racicot*, noting that BNSF monopolizes the transportation of bulk commodities from Montana farms to market, fears that the BNSF PRA, which will be limited to traffic moving from/to points west of the Billings-Havre line, will have an anticompetitive impact on farmers located east of the Billings-Havre line (who account for 45% of all Montana grain). Governor Racicot therefore requests: (1) the modification of the BNSF PRA to allow UP to handle (a) all commodities originating in Montana, and not just a limited number of commodities, and (b) traffic moving from/to all points in Montana, and not just points in the western half of the state; (2) the expansion of the BNSF PRA, as thus modified, to allow UP to handle all Montana traffic via the Silver Bow gateway (which provides a much shorter route to the Southwest and the Central West), and not just via the Portland gateway; and (3) either (a) a guarantee by UP of the continued integrity and operation of the Butte-Pocatello Line, with 20-year Board oversight to ensure that the guarantee is honored and that UP's competitive position is adequately maintained, or (b) the sale of the Silver Bow-Pocatello line to MRL, together with a PRA (similar to the BNSF PRA) for all traffic moving over Silver Bow from all Montana origins, with the same guarantee of continued service.

Idaho. *The Idaho Barley Commission and the Idaho Wheat Commission (IBC/IWC)*, noting that UP handles the major portion of outbound Idaho rail freight, fears that the merger will worsen the captive shipper status of Idaho farmers by increasing the monopolistic control UP already has in Southern Idaho. IBC/IWC asserts that, under the BNSF PRA, grain producers in other states will receive access to competitive rail service, but most Idaho grain producers will not (the BNSF PRA will benefit only those Idaho grain producers with access to BNSF points in Northern Idaho). IBC/IWC asserts that the BNSF PRA will create a more competitive rate structure for Canadian grain moving to Portland than is available for Southern Idaho grain moving to Portland, and may result in increased north-south traffic to the detriment of Idaho's east-west traffic. IBC/IWC adds that, because Idaho grain shippers have no alternative rail options, UP/SP may switch hopper cars to accommodate north-south grain movements at the expense of Idaho's traditional east-west grain movements. IBC/IWC therefore urges: (1) that we grant the MRL responsive application, including the sale of the Pocatello-Silver Bow line, and impose a PRA (similar to the BNSF PRA) for all traffic moving from all Idaho origins to Portland and points south of Portland; (2) that we grant BNSF trackage rights to haul, under a competitive PRA, all traffic originated in Idaho; and (3) that, to monitor long-term anticompetitive effects on captive shippers, particularly regarding car supply and rates, we retain oversight of the merger, and require UP/SP to report grain movements from/to Canada and Mexico, for 20 years.

Colorado. *Governor Romer* supports the merger, and indicates that UP has made commitments respecting: employee impact; the timing for actual discontinuance of service on Colorado lines targeted for abandonment; the timing for removal of abandoned track; the sale, to Colorado or its designee, of part or all of the abandoned track for its net liquidation value within the first 12 months after the merger; the possible conversion of abandoned corridors to trails; and the identification of environmental issues in the corridors targeted for abandonment.

The City of Pueblo (Pueblo) opposes the three proposed Colorado abandonments (Sage-Malta-Leadville, Malta-Cañon City, and Towner-NA Junction) which, it fears, would deprive Pueblo of access to transcontinental rail service, would increase truck traffic on roads serving Pueblo and neighboring communities, would result in the elimination or transfer of 139 full-time jobs in the Pueblo area, and could place Pueblo at a disadvantage in competing for future industrial development projects because of the loss of access to direct east-west service via SP's line. Pueblo asks that we condition any approval of the merger by requiring UP/SP to sell SP's east-west route to MRL for continued freight operations.

The Associated Governments of Northwest Colorado (AGNC), composed of Moffat, Routt, Rio Blanco, Garfield, and Mesa Counties, fears that the merger, by allowing UP/SP to favor PRB coal vis-à-vis Northwest Colorado coal, will jeopardize the economic underpinnings of Northwest Colorado. AGNC therefore opposes the merger unless UP/SP makes a commitment to maintain competitive coal hauling rates for Colorado coal.

Nevada. *The Public Service Commission of the State of Nevada (PSCN),* concerned that Nevada utilities will not benefit from, and indeed may be negatively impacted by, the merger and the related BNSF and URC agreements, contends that the merger should be conditioned (1) with "open access" provisions that would require UP/SP to grant to third-party railroads such as URC trackage rights to provide single-line service to existing and new utility stations. PSCN, noting that the BNSF agreement will allow BNSF to interchange with the Nevada Northern Railway near Shafter, insists (2) that UP/SP should not be allowed to charge trackage rights compensation fees that would inhibit competition for the interchange traffic. PSCN maintains that Nevada shippers on lines served by both UP/SP and BNSF should be able to access either railroad, and PSCN therefore suggests (3) that, after operating experience has been gained with the BNSF agreement, but in no more than 3 years, we examine the competitive access issue to ascertain the level of shipper interest and evaluate the prospect of expanding competitive opportunities through trackage rights agreements. PSCN also suggests (4) that UP/SP should be required (a) to establish systems to provide timely responses to inquiries from shippers, local governments, and the general public, and (b) to provide, to local governments and local emergency response agencies, information and response plans pertaining to hazardous materials incidents. PSCN also requests (5) that we impose conditions to mitigate the impact of increased rail traffic through Reno, Lovelock, Winnemucca, Carlin, Elko, and Wells.

The City of Reno (Reno), which fears that the merger will result in a substantial increase in traffic on the SP line through Reno and will therefore have substantial adverse impacts on Reno (including highway delays, noise pollution, effects on air and water quality, and increased potential for pedestrian accidents), contends that, without specific conditions to mitigate adverse environmental impacts, the merger should be denied.

The Town of Fernley (Fernley), which notes that the SP line runs the length of the town and that there are only two crossings in the town, indicates that it would like to be included in consultations and negotiations involving the UP/SP merger.

The City of Winnemucca (Winnemucca) and the County of Humboldt (Humboldt), which fear that the anticipated increase in train movements on the SP line through Winnemucca will result in increased delays at crossing gates, increased potential for pedestrian injury, increased air pollution, and increased noise pollution, have suggested two mitigation alternatives: (1) construction of a grade separation at Bridge Street, the street that intersects with SP in downtown Winnemucca; or (2) rerouting of traffic from the SP line (which bisects the central core of Winnemucca) to the UP line (which skirts the northern edge of the city), which would require a new UP-SP connection near Rose Creek.

Kansas. *The Kansas Department of Transportation (Ka/DOT)* supports the merger, provided that certain problems can be resolved. (1) To ensure that rail service will remain available on the Pueblo-Herington line, Ka/DOT would support a lease or sale of this line to another Class I railroad. In the event the line is sold or leased to a shortline, Ka/DOT asks that we ensure that the new operator has a good operating history and that it has competitive access to Class I connections and markets in Salina, Hutchinson, and Wichita. (2) Because Wichita will suffer a 3-to-2 reduction in rail competition, Ka/DOT requests that a third Class I railroad be brought into the Wichita market. (3) Ka/DOT, which fears that increased UP/SP traffic density will worsen historic problems with rail crossings in Wichita, requests that we attempt to craft a solution to this problem.

Sedgwick County (Sedgwick) and the City of Wichita (Wichita) fear that UP/SP will reroute trains via the north-south line through Sedgwick/Wichita, thus increasing the occasions on which highway traffic is blocked at 26 grade crossings on busy arterial streets in Sedgwick County, and particularly in Furley, Kechi, Wichita, and Haysville. Sedgwick/Wichita, which claims that the cost of constructing over/under-passes is prohibitive and which asks that we impose a condition barring any increase in the number of trains operating daily through Sedgwick/Wichita, suggests two alternative routings that UP/SP could utilize. One alternative would require UP/SP to secure trackage rights over BNSF's Topeka-Wellington (via Emporia, Ellinor, El Dorado, and Mulvane) line, which connects with UP at Topeka and Wellington but which bypasses Furley, Kechi, Wichita, and Haysville. A second alternative would require UP/SP to continue to route UP's trains via Kansas City, thereby avoiding Sedgwick/Wichita altogether.

The City of Abilene (Abilene) is concerned that it will be negatively impacted by an anticipated post-merger increase in UP train traffic passing through Abilene.

Minnesota. *The Minnesota Department of Transportation (Mn/DOT)* supports the merger provided that UP provides assurances: (1) that the car supply to shippers on UP lines and shortlines in Minnesota will be improved and given special consideration during each harvest season; (2) that switching at Winona, MN, will be improved, preferably by giving DM&E switching rights or the right to buy the trackage to serve the Winona grain elevators; (3) that certain geographic restrictions on traffic in the Roseport Terminal will be lifted; (4) that, to alleviate competitive problems in Minnesota, the Southwest, and the West, and on routes to Mexico, additional agreements, including agreements respecting joint track ownership with other carriers, will be negotiated; and (5) that UP will honor its commitments regarding line sales, abandonments, and employment in Minnesota.

Arkansas. *Attorney General Bryant* is concerned that Arkansas will experience competitive problems due to a 2-to-1 reduction in the number of Class I railroads serving the vast majority of the state, and also will lose jobs on account of the shutdown of redundant lines, reductions in service on other lines, and the closing of machine shops, yards, and car and locomotive facilities. The Attorney General, arguing that the BNSF agreement does not solve the competitive problems that the merger would create, contends that UP/SP should be required either to divest certain lines, particularly the line between Chicago and Texas, or to reach another arrangement whereby a competing Class I railroad will have access to those lines.

Washington. *The Washington Department of Transportation (Wa/DOT)* is skeptical that BNSF will be a viable competitor in the Central Corridor, and contends that acquisition of a Central Corridor line by a regional or a shortline may produce more effective competition, prevent abandonments, and offer Washington shippers an alternative route. Wa/DOT therefore suggests that we consider a conditional grant of the BNSF agreement's Central Corridor trackage rights, and that we retain jurisdiction to order divestiture, joint ownership, or third carrier trackage rights if BNSF fails to provide adequate competition.

Iowa. *The Iowa Department of Transportation (Ia/DOT)* fears that there will be a reduction in competition in the corridor connecting Iowa to Gulf Coast ports and Mexican gateways, and claims that, even with the BNSF and IC agreements, UP/SP will still dominate the corridor for many types of freight movements important to Iowa. Ia/DOT therefore supports the merger provided that conditions are imposed requiring the grant of further trackage rights or line sales to a third Class I carrier to reduce potential UP/SP market dominance in that corridor.

Utah. *Governor Leavitt* supports the merger but seeks certain conditions: (1) to create a competitive environment, a reduction in the BNSF trackage rights fee from 3.0 mills to 2.5 mills; (2) to emulate (or provide a surrogate for) a competitive environment, a requirement that there be an annual audit, paid for by UP/SP, of rail rates in similar rail markets that enjoy the benefits of intramodal competition (it being understood that, if the audit reveals that rates charged shippers in similar markets are higher than UP/SP rates charged Utah shippers, UP/SP would be required to provide refunds to affected Utah shippers); and (3) to preserve our jurisdiction in this matter, the establishment of oversight for at least 15 years.

LABOR PARTIES. Statements respecting the proposed merger have been filed by various labor parties.

Allied Rail Unions. The American Train Dispatchers Department (ATDD),[80] the Brotherhood of Maintenance of Way Employees (BMWE), and the Brotherhood of Railroad Signalmen (BRS), participating collectively as the Allied Rail Unions (ARU), contend that the merger should be rejected for a variety

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[80] ATDD is a Department of the Brotherhood of Locomotive Engineers (BLE).

of reasons: because thousands of jobs will be lost; because applicants intend to abrogate or modify existing collective bargaining agreements (CBAs), and thereby to effect massive changes in the rules and working conditions of UP/SP employees, by bypassing the procedures required by the Railway Labor Act (RLA); because the merger will reduce competition, and allow UP/SP and BNSF to engage in collusive behavior, throughout the West; and because, given the impact on workers and on competition, SP's financial problems do not justify approval. ARU asks that we condition any approval of the merger by imposing both the conditions set forth in New York Dock, 360 I.C.C. at 84-90, and the additional conditions described below.

Conditions Requested: Scope of 49 U.S.C. 11341(a). ARU asks us to hold that the scope of the immunity applicable to the merger is limited to actions taken to actually consummate the financial aspects of the merger (the acquisition of control of SP, the common control of UP and SP, and the merger of UP and SP), and that Article I, Section 2 of the New York Dock conditions will prevent UP/SP from using 49 U.S.C. 11341(a) to abrogate, modify, or "rationalize" existing CBAs. Alternatively, ARU asks us to hold that the scope of the immunity applicable to the merger is limited to actions specifically set forth in the application and the proposed operating plan. In either instance, ARU also asks us to state specifically that approval of the merger does not amount to approval of applicants' plans to abrogate, modify, or "rationalize" existing CBAs.

Conditions Requested: Cherry-Picking. ARU suggests that, if we believe that "rationalization" of CBAs is inherently a part of our approval of the merger, we should order that any such "rationalization" should be accomplished by allowing UP/SP's unions to "cherry-pick" from existing UP or SP agreements (i.e., by allowing the unions to select from among the provisions in the CBAs now in effect on the railroads involved in the merger).

Conditions Requested: Reimbursements To SP Employees. ARU, noting that between 1991 and 1995 various SP unions made wage concessions in connection with SP's financial difficulties, and further noting that SP wages did not return to the national levels until after 1995, maintains that, if shareholders are to be rewarded for their investments in SP, it is only fair that union members should similarly benefit from the merger at least to the extent of repayment of their investments (their forgone lump sum payments and their deferred wage increases).

Conditions Requested: Pre-Implementation Agreement. ARU, viewing the BNSF agreement as a part of the merger, contends that we should require BNSF to be made a co-applicant in the Finance Docket No. 32760 lead proceeding, or, in the alternative, that we should impose the New York Dock conditions on the trackage rights provided for in the BNSF agreement. ARU insists that only imposition of the New York Dock conditions on the trackage rights provided for in the BNSF agreement will provide full protection for employees, by allowing for a comprehensive implementing arrangement prior to implementation of the trackage rights.[81]

Conditions Requested: Hiring Preference. ARU suggests that, if we do not impose the New York Dock conditions on the

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[81] In Decision No. 30 (served Apr. 18, 1996), we denied ARU's ARU-8 motion seeking the designation of BNSF as a co-applicant, but without prejudice to ARU's right to continue to argue that the New York Dock conditions should be imposed on the trackage rights provided for in the BNSF agreement.

trackage rights provided for in the BNSF agreement, we should at least modify the hiring preference provision in the BNSF agreement (which provides for a form of hiring preference for work on, or related to, the trackage rights lines and the acquired lines). The modifications ARU has in mind would be patterned upon the New York Dock conditions, and would make the preference mandatory and subject to negotiations with the unions.

Conditions Requested: Contracting Out. ARU also asks that we require UP/SP and BNSF to utilize bargaining unit maintenance of way employees and signalmen for all merger-related track, right-of-way, and signal construction and rehabilitation work. This is work, ARU claims, that employees represented by BMWE and BRS historically have done and that they are fully capable of doing; but ARU fears that, although such work is required to be done by such employees under their scope rules and past practice, applicants may nevertheless attempt to contract out such work.

Conditions Requested: Annual Reports. ARU, noting that applicants claim that the merger will generate public benefits, asks that we require UP/SP to submit annual reports demonstrating how the forecast benefits in the area of cost-savings (including labor costs) are utilized, and how much is either (a) passed on to shippers through rate reductions or deferred rate increases, (b) reinvested, (c) distributed to shareholders, (d) paid in executive salaries and bonuses, or (e) shared with employees.

International Brotherhood of Teamsters. IBT requests that any approval of the merger be conditioned by requiring UP/SP to divest three subsidiaries, to grant New York Dock protection to the employees of a fourth subsidiary, and to file semi-annual reports regarding diversion of truck cargoes.

Overnite Transportation Company, Pacific Motor Transport Company, and Southern Pacific Motor Trucking Company. IBT notes that 49 U.S.C. 11344(c) provides, in part, that we can approve a 49 U.S.C. 11343 transaction in which a railroad or an affiliate is an applicant and in which a motor carrier is involved only if, among other things, the transaction will enable the rail carrier to use motor carrier transportation to public advantage in its operations. IBT therefore contends that we cannot approve common control of UP/SP and the three motor carrier subsidiaries because applicants, having indicated that they intend to keep Overnite and PMT independent and SPMT inactive, have made clear that they will not use these motor carriers in furtherance of UP/SP's rail operations. IBT adds that, because such common control cannot be approved under 49 U.S.C. 11344, it certainly cannot be exempted under 49 U.S.C. 10505; 49 U.S.C. 10505(g), IBT notes, provides that the 49 U.S.C. 10505 exemption authority cannot be used to authorize intermodal ownership that is otherwise prohibited. IBT therefore concludes that we must either disapprove the UP/SP merger or order the pre-merger divestiture of the three motor carriers (although IBT allows that, inasmuch as SPMT is currently inactive, we could condition UP/SPMT common control by requiring that any future SPMT operations be auxiliary to UP/SP rail operations).

Union Pacific Motor Freight Corporation. IBT, noting that applicants have not sought authorization for common control of SP and Union Pacific Motor Freight Corporation (UPMF, an MPRR subsidiary), concludes that applicants must believe that UPMF is a railroad company rather than a motor carrier company, which would mean (IBT indicates) that UPMF employees would be entitled to mandatory labor protection under 49 U.S.C. 11347. UPMF employees, IBT adds, should be entitled to mandatory labor protection because they are engaged almost exclusively in supporting rail operations within rail yards, and they are therefore "rail employees" for the purposes of 49 U.S.C. 11347. The tasks performed by these employees, IBT maintains, fall into three basic categories: (1) ramp drivers ("hostlers") and groundmen who move trailers and containers within rail yards and assist with such movements; (2) crane operators who load and unload containers from trains; and (3) mechanics who repair trailers and other UP equipment. IBT insists that, because the jobs currently performed by UPMF employees are unique to the railroad industry, these employees (unlike over-the-road truck drivers) possess skills that are not generally marketable outside the railroad industry and would therefore have difficulty finding comparable employment elsewhere. Recognizing that we may determine that UPMF employees are not entitled to mandatory New York Dock labor protection under 49 U.S.C. 11347, IBT asks in the alternative that we impose New York Dock protection in favor of UPMF employees as an exercise of our discretionary power under 49 U.S.C. 11344(c).

Diversion Reports. Applicants, IBT notes, claim that UP/SP will divert significant volumes of cargo from over-the-road truck carriage to rail. These diversions, IBT insists, may harm the public interest because they may be obtained in part by non-compensatory pricing, and because, even if not so obtained, they will result in significant job losses in the motor carrier industry. To provide a mechanism for monitoring competitive impacts on the rail and motor carrier industries and on services to shippers, IBT requests that we condition any merger approval by requiring UP/SP to file semi-annual public reports indicating the volume of traffic diverted from truck carriage and the rate of return (ratio of revenue to fixed costs) for such cargo.

Transportation•Communications International Union. TCU fears that the merger will have broad anticompetitive effects; a merged UP/SP, TCU claims, will monopolize rail traffic in much of the West, will control virtually all traffic to and from Mexico, and will dominate the transportation of particular products including coal, plastics, and petrochemicals. The claim that SP will fail without the merger, TCU insists, is not valid; SP, in TCU's view, simply does not face the distinct likelihood of insolvency. With respect to labor impacts, TCU contends that the merger should be denied on account of the disproportionate impact it will have on employees who either work in certain crafts (especially the clerical craft) or reside in certain states (in particular, California). And experience teaches, TCU adds, that the actual number of jobs lost will far exceed the estimates provided by applicants. TCU insists that, if the merger is approved, it should be made subject to the standard New York Dock conditions.

Transportation Trades Department. The Transportation Trades Department (TTD) opposes the merger, which it asserts: threatens competition, represents an unnecessary consolidation of market power, and will result in significant job losses and dislocation within and outside the rail and motor carrier industries. The merger, TTD adds, will not only combine the rail components of UP and SP, it also will combine their motor subsidiaries, which will lead to the overall consolidation of the motor carrier industry in the West as well as possible collusive behavior by and between UP/SP rail and trucking interests. TTD, which supports the conditions requested by ARU, IBT, and TCU, insists that we should condition any approval of the merger with adequate labor protections. In many instances, TTD adds, New York Dock benefits are not sufficient (TTD mentions in particular the case where an employee chooses not to accept a transfer assignment), and TTD therefore contends that we should award UP/SP's rail and motor employees protective conditions that go beyond New York Dock. And, TTD adds, we should not allow applicants to abrogate or modify CBAs through the misapplication of 49 U.S.C. 11341(a). That, TTD maintains, would amount to a seizure of private contract rights under the pretense that CBAs are an impediment to the successful consummation of an approved railroad transaction.

Union Locals. *John D. Fitzgerald*, a United Transportation Union (UTU) general chairman for certain BN lines, opposes the merger movement in the Western District (the consolidation of the four major carriers into two, BNSF and UP/SP), and urges us to consider the UP/SP merger on a consolidated basis with a reopened BN/SF merger proceeding. Mr. Fitzgerald also opposes the provision in the BNSF agreement in the present proceeding that involves the grant to UP/SP of trackage rights between Saunders, WI, and Superior, WI (overhead rights only, with access to MERC Dock in Superior), and over the Pokegama connection at Saunders. These rights, Mr. Fitzgerald fears, will enable UP/SP to divert traffic from BNSF, and will therefore adversely affect BN employees; and he therefore requests that BN employees adversely affected by the Sub-No. 1 trackage rights receive full New York Dock protection, including an implementing agreement with UP/SP and its employee organizations.

Charles W. Downey, a UTU general chairman for lines of SPCSL and GWWR,[82] fears that the agreement applicants entered into with GWWR, by altering radically the present work arrangements applicable to SPCSL and GWWR operations, will wreak havoc upon the rights of persons employed by SPCSL and GWWR in the Chicago-St. Louis territory of the former Chicago, Missouri & Western Railway Company (CMW).[83] Mr. Downey, fearing that certain work now performed by SPCSL employees will be transferred to GWWR, insists that fairness to employees of both carriers requires 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.[84]

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[82] Mr. Downey's late-filed statement was accompanied by his CWD-1 petition for leave to intervene and to become a party of record. The petition will be granted.

[83] Mr. Downey contends, among other things, that the present work arrangements were "passed upon" by the ICC in its decision in Rio Grande Industries, Inc. et al.--Purchase and Trackage Rights--Chicago, Missouri & Western Railway Company Line Between St. Louis, MO and Chicago, IL, Finance Docket No. 31522 (ICC served Oct. 31, 1989) (slip op. at 2-3). "Passed upon" is not an accurate characterization; the ICC simply noted that certain arrangements were consistent with the conditions it had imposed in approving the acquisition, by SPCSL, of CMW's Chicago-St. Louis line.

[84] In their UP/SP-250 response to Mr. Downey's comments, applicants contend: that nothing in the GWWR agreement alters the allocation of switching responsibility between GWWR and SPCSL in the Granite City, IL, area; that the GWWR agreement does not transfer to GWWR responsibility for serving the Alton Branch, but merely commits the parties to evaluate such a transfer, and that SPCSL personnel affected by any such future transfer will receive labor protection; and that the GWWR agreement merely preserves the status quo by nullifying a provision of the 1989 GWWR/SPCSL arrangement under which operating responsibilities would change if GWWR were acquired by a Class I railroad. With respect to (continued...)

Clarence R. Ponsler, a UTU general chairman for the Alton & Southern, fearing that the operations envisioned by applicants would create havoc for personnel employed by the A&S, urges the denial of the merger and the Sub-No. 3 petition.

Joseph C. Szabo, UTU's Illinois legislative director, urges denial of the three proposed Illinois abandonments.

Dan Potoshnik, the secretary of BLE's Division 892 (UP lines in the Seattle area), fears that, in connection with the merger, work that could be done by Division 892's members will be diverted to BNSF.

FEDERAL PARTIES. DOJ, DOT, DOD, USDA, and DOL have submitted comments in this proceeding.

United States Department of Justice. DOJ contends that the merger would have 3-to-2 or 2-to-1 impacts in hundreds of traffic corridors throughout the West, involving such commodities as wood products, intermodal freight, agricultural products, iron and steel, and plastics. The BNSF agreement, DOJ notes, will not remedy the loss of competition in any 3-to-2 market, and, DOJ adds, for various reasons (including an excessive compensation rate, inadequate guarantees to ensure service quality, and other factors that reduce BNSF's incentive to compete using the trackage rights provided for in the BNSF agreement), BNSF is unlikely to be an effective competitor even in the 2-to-1 corridors. The BNSF agreement, DOJ insists, is simply an inadequate remedy, and its flaws cannot be corrected by imposing oversight conditions or monitoring. And the merger-related efficiencies claimed by applicants, DOJ adds, are vastly overstated, and, in any event, are not enough to outweigh the probable anticompetitive effects of the merger. The claims that an independent SP would not be a viable competitor, DOJ argues, are unfounded. SP, DOJ claims, is not a failing firm within the well-established antitrust definition; it has successfully raised capital in recent years; its operations have already shown some improvement; and, absent a merger, it is likely to have other sources of funding for capital expenditures, including improved cash flow from operations, potential additional borrowing and lease financing, and additional real estate sales proceeds. And, DOJ adds, there are alternatives to the proposed merger that SP has not even explored, including a sale of itself in whole or in pieces to a company other than UP. DOJ therefore concludes that the merger should be denied.

DOJ asserts that, if the merger is approved, the competitive problems that will result can be adequately remedied only with extensive divestitures that will allow a new competitor access to markets where shippers would otherwise face a monopoly or a duopoly. DOJ insists that the divestitures must include, at the very least: (1) one of the two parallel north/south routes from

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[84] (...continued)
Mr. Downey's request that we require that an implementing agreement be arrived at for the GWWR agreement prior to consummation of the UP/SP merger, applicants contend that no implementing agreement is needed at all because nothing in the GWWR agreement will change existing operations. And, with respect to Mr. Downey's request that <u>New York Dock</u> be applied to the GWWR agreement, applicants contend that, if any of the operating changes that concern Mr. Downey are ever implemented, adversely affected SPCSL employees will be fully covered pursuant to the standard labor protective conditions that applicants expect will be imposed in this proceeding.

the Gulf Coast to the eastern gateways, specifically the routes radiating from Houston, north through Little Rock and Memphis to St. Louis; east to New Orleans; west to San Antonio; and south to Brownsville; (2) one of the two Central Corridor routes from Oakland through Salt Lake City and Denver to Kansas City; and (3) sufficient lines to preserve a third independent competitor between Los Angeles and the eastern gateways, particularly Chicago. And, DOJ adds, all of these divestitures must be to a carrier other than BNSF, which otherwise would be the only competitor of the merged UP/SP throughout the West.

United States Department of Transportation. DOT believes that the largely "parallel" UP/SP merger will substantially reduce competition in large regions of the country. DOT's concern, however, is not with anticompetitive harms of the 3-to-2 variety; two independent railroads, DOT believes, are usually sufficient to maintain vigorous competition. DOT's concern, rather, is with anticompetitive harms of the 2-to-1 variety. The BNSF agreement, DOT concedes, addresses such harms, but DOT contends that the agreement is flawed because the trackage rights provided for in the agreement will not allow BNSF to conduct a completely independent operation on an equal footing. Trackage rights, DOT acknowledges, may allow for two-railroad competition in other circumstances (if traffic volumes are lower and distances are shorter, and if there are, ultimately, other suitable railroads), but DOT insists that, in the circumstances of this case (where the traffic volumes are huge and the distances involved are enormous, and where there is no other remotely comparable railroad in the West), the trackage rights provided for in the BNSF agreement are simply inadequate. And, DOT adds, BNSF's stance in this proceeding raises questions about the seriousness of its intentions to compete aggressively. DOT therefore opposes the merger unless we impose conditions to require: in the Texas Corridors (from Houston west to Eagle Pass, north to Memphis, east to New Orleans, and south to Brownsville; and from Dallas south to San Antonio), that one of the parallel lines be divested.[85] DOT's preferred solution in the Central Corridor (from the Bay Area to west of Denver) is to strengthen the BNSF trackage rights rather than requiring divestiture of one of the parallel lines.[86]

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[85] The divestiture DOT envisions will require that UP/SP retain access from San Antonio to Eagle Pass through haulage or trackage rights and, on the Placedo-Brownsville segment, will require only the transfer of SP's trackage rights.

[86] DOT contends that divestiture is not the optimal solution in the Central Corridor principally because the segment from the Bay Area to Salt Lake City generates relatively little traffic of its own, and is thus dependent on overhead freight. DOT argues that only applicants and BNSF, and not MRL, have sufficient gathering lines to operate as effective Central Corridor competitors. DOT therefore argues against Central Corridor divestiture and urges that, if the merger is approved, the BNSF Central Corridor trackage rights be strengthened in a fashion that will make BNSF less of a "tenant" and more of a "landlord." DOT suggests, in particular, that the BNSF trackage rights be modified by: establishing a two-tier trackage rights fee, with both an up-front "fixed fee" (for fixed costs) and a usage fee (for variable costs); preserving build-in/build-out and transloading options along the entire stretch of trackage rights without time limit; and requiring UP/SP to open its contracts with Central Corridor shippers at 2-to-1 points until BNSF has access to 50% of the traffic. DOT also suggests that we should (continued...)

United States Department of Defense. DOD notes that the American rail network is an important element of the national defense transportation infrastructure, and that UP and SP (which together serve 46 DOD facilities) are two of the railroads whose lines have been included in the Strategic Rail Corridor Network (the network of commercial rail lines that have been deemed important to national defense). DOD, noting that UP/SP would continue to provide rail service to these DOD facilities, indicates that the merger would therefore be compatible with a strong national defense transportation infrastructure. DOD further indicates that the proposed abandonments would not adversely impact either specific DOD installations or the Strategic Rail Corridor Network. DOD, however, is concerned about the 2-to-1 impact at six DOD installations: Pine Bluff Arsenal, at Pine Bluff, AR; Red River Army Depot, at Defense, TX; Lone Star Army Ammunition Plant, at Defense, TX; Sierra Army Depot, at Herlong, CA; Sharpe Army Depot, at Lyoth, CA; and Defense Depot Tracy, at Lathrop, CA. DOD concedes that the BNSF agreement provides that BNSF will be able to provide competitive service to all 2-to-1 customers, via either trackage rights, haulage, ratemaking authority, or other mutually acceptable means, and DOD further concedes that the BNSF agreement allows BNSF to serve the Pine Bluff Arsenal. DOD claims, however, that the BNSF agreement specifically precludes BNSF access via trackage rights to Defense, TX, and Herlong, CA, and that the agreement appears not to include the trackage rights necessary for BNSF to serve Sharpe Army Depot and Defense Depot Tracy. DOD adds that it has not yet worked out with UP/SP the specifics of how BNSF (or another railroad) will actually provide competitive access at the five installations not provided for in the BNSF agreement. Such specifics, DOD insists, should be in place prior to approval of the merger.

United States Department of Agriculture. USDA is concerned that the merger will allow UP/SP and BNSF to dominate the West, and is concerned in particular that these two railroads will control all movements of wheat from the Lower Plains States (Kansas, Oklahoma, and Texas) to Gulf ports and Mexican gateways. The BN/SF merger, USDA claims, reduced competition for many shippers in the Lower Plains, and USDA fears that a UP/SP merger also will reduce competitive options and alternatives for many shippers in this region. A UP/SP merger, USDA adds, also has the potential to affect adversely U.S. competitiveness in foreign trade, particularly to export points on the Gulf, Pacific Coast, and Mexican gateways. USDA therefore opposes the merger.

United States Department of Labor. Preserving competition in the already concentrated rail industry, DOL indicates, is vital to businesses and communities and ensures continued job opportunities for railroad employees, and DOL therefore urges us to examine the impact that the merger will have on rail, motor, and other employees and on the communities in which they live.

ABANDONMENT FILINGS NOT PREVIOUSLY REFERENCED. We turn now to filings not previously referenced respecting the 17 line segments for which applicants seek abandonment (in some instances, abandonment and discontinuance) authorization.

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[86](...continued)
establish in advance formal annual procedures to review the effectiveness of the trackage rights so modified, and be prepared to order divestiture or transfer of the modified trackage rights to another railroad.

General Comments: RTC. Rails to Trails Conservancy (RTC) asks that we impose: conditions to maximize opportunities to preserve rail corridors for rail banking, interim trail use, and other compatible public uses; and appropriate public interest, public use, environmental, and historic preservation conditions as well. Without such conditions, RTC warns, approval of the merger would constitute a major federal action with significant adverse environmental impacts, and would therefore require the preparation of an environmental impact statement (EIS). RTC also suggests that, because operations are likely to continue for some time on many of the lines for which abandonment authorization has been sought, it would be prudent to issue CITUs and NITUs (Certificates and Notices of Interim Trail Use or Abandonment) not for the customary 180 days (subject to extension) but instead for a 2-year period. RTC therefore requests that we impose on all merger-related abandonments two conditions, each effective for a period of 180 days following the date UP/SP actually ceases to use the relevant line and otherwise consummates an abandonment: (1) a condition preserving our jurisdiction to issue rail banking or other appropriate orders; and (2) a condition barring UP/SP from disposing of or otherwise transferring (other than for public use) any real estate interests, bridges, culverts, or similar structures.[87]

General Comments: Applicants. With respect to the Colorado abandonments, applicants state that they are willing to negotiate trail use (i) with the State of Colorado or its designees, and (ii) with any other parties that have filed trail use requests, so long as the State of Colorado is agreeable to negotiations with such parties. With respect to the non-Colorado abandonments, applicants state that they are willing to negotiate trail use for all of the lines covered by trail use requests with any or all of the parties that have made the requests.

Colorado Abandonments. Statements respecting the Towner-NA Junction, Sage-Malta-Leadville, and Malta-Cañon City abandonments have been submitted by various parties. The City of Florence, the Transportation Committee of Colorado Counties, Inc., and CLUB 20 (a Western Colorado coalition of counties, communities, businesses, and individuals) claim that these abandonments would have a devastating impact in an area that relies heavily on rail. The City of Florence therefore requests that we condition any approval of the merger by requiring: (1) that the transcontinental main line through this corridor be retained (perhaps by divestiture to another railroad); (2) that UP/SP provide a 24-month period following final merger approval to allow state, local, and private entities to formulate a plan for the corridor and to secure financing for the purchase of the track and improvements; and (3) that UP/SP grant the State of Colorado or its subdivisions a right of first refusal for the purchase of the corridor. The City of Fruita, which is concerned that the abandonments will result in a massive loss of railroad and related jobs now based out of Grand Junction, asks that we reject the merger unless UP/SP retains all existing jobs and rail service in the Mesa County/Grand Junction area. The Colorado Rail Passenger Association supports the merger but opposes the Colorado abandonments, and asks that we require UP/SP to sell the abandonment lines to interested buyers.

A statement respecting the three Colorado abandonments was submitted jointly by the U.S. Department of Agriculture, Rocky Mountain Region, and the U.S. Department of the Interior, Bureau

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[87] Madison County Transit (MCT) supports the two public interest conditions requested by RTC.

of Land Management, Colorado State Office (collectively, the Agencies). The Agencies note that, upon abandonment, the United States will acquire, by reversion, much of the right-of-way of the three Colorado lines. The Agencies therefore request that we impose on these abandonments certain conditions requiring the Railroad: (1) to resolve title encumbrances (i.e., clouds on title) unacceptable to the United States; (2) to inventory all utilities, fiber optic cables, and other linear uses within the rights-of-way, and to notify the owners/managers of these uses that they must apply for authorization for any portion of the right-of-way crossing National Forest System lands or Public Lands; (3) to assess and remediate hazardous materials and toxic spills along the three corridors, as necessary; (4) to clear the rights-of-way of any trash and discarded or abandoned equipment, including railroad ties, lights, and switches; (5) to inventory and classify, in consultation with the Agencies, all bridges, crossings, and culverts for retention for public use or removal by the Railroad; (6) to include a statement in any deed or transfer of property to a salvage operator or entity, that the transfer does not include any lands or interest in lands owned by the United States; and (7) to obtain concurrence from the State Historic Preservation Officer or provide a formal Determination of Eligibility for historic site evaluation.

Towner-NA Junction Line (Colorado). Of all the abandonments proposed in this proceeding, the Towner-NA Junction abandonment has generated by far the most intense opposition, and the intensity of this opposition has been greatest in Kiowa County. Statements protesting the Towner-NA Junction abandonment have been filed by, among others, the Kiowa County Board of County Commissioners, Kiowa School District No. Re-2, the Town of Eads, the Town of Haswell, and numerous individuals, including, but by no means limited to, many members of Kiowa County WIFE (Women Involved in Farm Economics) Chapter #124. The abandonment, it is argued, will have a devastating effect on economic activity in Kiowa County because farmers and grain elevators rely entirely upon this line for shipment of grain to market. The direct loss of tax revenue, it is further argued, will severely cripple all local government operations, including the schools (Plainview School, for example, which is one of only two schools in Kiowa County and which has an enrollment, for kindergarten through 12th grade, of approximately 86 students, stands to lose $75,288 annually if the Towner-NA Junction Line is abandoned). Roughly 20% of Kiowa County's tax revenue is derived from the rail line and rail usage, and other local governments within the County also are funded, in some measure, by the rail line (the Town of Haswell, for example, which has an annual budget of $35,000, fears the loss of its $1,000 annual rail assessment). Parties in Kiowa County generally urge the denial of both the merger and the abandonment, although a few ask, in the alternative, that the abandonment, if approved, be delayed to allow local communities time to respond to the loss of rail service and tax revenue.

Opposition to the Towner-NA Junction abandonment also has been expressed by parties based in Crowley County, including the Crowley County Board of County Commissioners and the Towns of Crowley and Olney Springs. These parties argue that the abandonment will have a devastating economic impact in Crowley County, both in terms of rail service (because local feedyards depend on rail) and in terms of tax revenue (Crowley County fears the loss of the roughly 15% of its tax revenue that is derived from this line; the Town of Crowley fears the loss of 36% of its own tax base). Opposition to the Towner-NA Junction abandonment also has been expressed by parties based outside of Kiowa and Crowley Counties, including the Prowers County Board of County Commissioners, which maintains that the rail line is a vital economic link for all of Southeast Colorado. The abandonment of the line, it is argued, will lead to a decline in economic activity, which will cause at least some local businesses to close and some local residents to leave, and the loss of even a part of the tax base may cause a deterioration of the services provided by local governments at all levels.

Trails Act statements[88] respecting the Towner-NA Junction Line have been filed by RTC and by the State of Colorado, acting by and through its Parks and Recreation Department.

Tennessee Pass Line (Colorado). Applicants generally address the Sage-Malta-Leadville and Malta-Cañon City Lines separately (and have filed a petition respecting the former and an application respecting the latter), but numerous parties have addressed them as a package. As previously noted, we refer to the two lines collectively as the Tennessee Pass Line.

The Town of Avon insists: that the Tennessee Pass Line is a single continuous line; that segmentation of the administrative process into a petition and an application is artificial and serves only to subject the Sage-Malta-Leadville abandonment to less vigorous scrutiny than the Malta-Cañon City abandonment; and that less vigorous scrutiny of the former is not in the public interest because that segment is the more environmentally sensitive of the two. The Town of Avon further insists that parties: should be permitted to produce evidence concerning the impact on state and local highways and roads that will result from rail-to-truck diversions caused by the Sage-Malta-Leadville abandonment; and should be afforded the opportunity to contravene the claims made by SPT and DRGW that the Sage-Malta-Leadville Line is economically non-viable. The Town of Avon therefore urges that the Sage-Malta-Leadville petition be denied, that the Tennessee Pass Line be treated as the single entity that it is, and that the entire line be the subject of the application heretofore filed with respect to the Malta-Cañon City segment.

The Upper Arkansas Area Council of Governments, composed of Chaffee, Lake, Fremont, and Custer Counties and all local municipalities, opposes the Tennessee Pass abandonment and asks that we condition any approval thereof by requiring UP/SP: to offer the entire line for sale as a unit; if negotiations for sale are unsuccessful, to rail bank the line; and to leave the track in place (on the Tennessee Pass Line and also on the Towner-NA Junction Line) for 24 months after approval of the merger. Similar positions have been taken separately by Fremont and Chaffee Counties, although Chaffee County also has requested: if the Tennessee Pass Line is either abandoned or rail banked, that UP/SP be required to perform an Environmental Assessment and to implement a plan for removal of all hazardous waste, and that bonding be required in connection therewith; and, in order to replace lost property taxes, that UP/SP be required to establish a trust fund of not less than $1,750,000, with the revenue therefrom to be apportioned to Chaffee County, the Town of Buena Vista, the City of Salida, and all affected special districts.

Abandonment of the Tennessee Pass Line is opposed also by various additional parties, including E.R. Jacobson (co-owner of the family ranching enterprise known as Deep Creek Ranch) and AA#1 Limited Liability Company, who contend that local traffic does in fact move on the Tennessee Pass Line and that an

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[88] A "Trails Act statement" is a 49 CFR 1152.29 statement of willingness to assume financial responsibility for interim trail use.

abandonment will therefore hurt local shippers. The Tennessee Pass abandonment is opposed also by E.W. Wotipka, who concedes that local traffic is probably insufficient to justify the line's continued existence but who contends that it is unwise to destroy a viable alternative main line on short-term grounds in the face of rapidly changing and unpredictable economic conditions. The Tennessee Pass Line, he argues, is a well-maintained, fully-signalled, CTC controlled main line that has operated, 3% grade and all, in competition with UPRR for more than a century. Eagle County, Lake County, and the Towns of Red Cliff, Minturn, Vail, Avon, Eagle, and Gypsum state that they will make an Offer of Financial Assistance (OFA) to purchase the Tennessee Pass Line.

RTC notes that there are two Superfund sites along or near the Sage-Malta-Leadville Line (the California Gulch Superfund Site in Leadville, and the Eagle Mine Superfund Site in Minturn) and another Superfund site along or near the Malta-Cañon City Line (the Smeltertown Superfund Site in Salida). RTC further notes that UP/SP will own an interest in certain slag piles at Leadville which may contain toxic material, and that some material from the slag piles may have been used as ballast on the line. RTC maintains that, because the presence of Superfund sites or known toxic contamination can be detrimental (in terms of the legal implications) to all parties in the context of an abandonment proceeding, some baseline information is vital to ensure that a timely rail banking arrangement can be reached. RTC therefore requests the issuance of a condition to require that UP/SP, within 180 days of abandonment authorization, provide the State of Colorado and RTC a Phase I environmental survey (prepared by an independent third entity) identifying all possible toxic contamination on the corridor. RTC adds that, should the Phase I survey report indicate potential problems, further site-specific sampling may be necessary to characterize such problems as exist or to verify that no problems exist.

The Colorado Department of Public Health and Environment (CDPHE) and the United States Environmental Protection Agency, Region VIII (Region VIII or EPA Region VIII), which, like RTC, are interested in Tennessee Pass environmental matters, request that UP/SP be required to perform, prior to approval of the abandonment, a "remedial investigation" to determine the nature and extent of contamination at and emanating from the line along the entire Tennessee Pass corridor.

The Leadville Coalition, representing the Lake County Board of Commissioners, the City of Leadville, and various other local interests, has indicated its concerns regarding the California Gulch Superfund Site and other sites as well. The Coalition, believing that further risk assessment addressing contemplated uses of the Tennessee Pass Line is necessary, asks that we defer a decision on the merger and the abandonments until a complete Consent Decree and a Final Record of Decision are entered by the Environmental Protection Agency (EPA).

Sage-Malta-Leadville Line (Colorado). Trails Act statements respecting the Sage-Malta-Leadville Line have been filed by RTC and by the State of Colorado, acting by and through its Parks and Recreation Department. Vail Associates, Inc. (Vail), which operates ski resorts in the vicinity of the Sage-Malta-Leadville Line, envisions that the line might be used, in whole or in part, for passenger service and/or as a trail; and, to this end, Vail has filed a Trails Act statement and also has indicated an intent to acquire the line, in whole or in part, under OFA procedures.

Viacom International Inc. (Viacom) indicates that it is performing an environmental cleanup at the Eagle Mine site, several portions of which are adjacent to the Sage-Malta-Leadville Line. Because of the proximity of the line to the site, and Viacom's need to use and/or cross DRGW/SPT property to access the site, Viacom requests that certain conditions be imposed on any abandonment or discontinuance (and also on any divestiture or sale to another railroad). (1) Viacom indicates that any action we take must be conditioned to preserve Viacom's access to the Eagle Mine site as well as its ability to perform required sampling and monitoring. Viacom also requests the opportunity to participate in any discussions concerning the final disposition of the railroad property in the area of the Eagle Mine site. (2) Viacom believes that any trail use in the Eagle Mine site area must be conditioned so that the remedial actions that have been accomplished at that site are protected from public interference. There are, Viacom notes, numerous pumps, culverts, and other water management facilities located in the Eagle River Canyon in and near Belden, and it is critically important that these facilities not be disturbed or interfered with by curious hikers. The most practical solution, Viacom indicates, would be to avoid placing a public access trail along the right-of-way in the canyon.

Malta-Cañon City Line (Colorado). The Malta-Cañon City abandonment has been protested by Colorado State Rep. Ken Chlouber, who fears that this abandonment will have an adverse impact on the economy in the region as well as in the State of Colorado as a whole. Rep. Chlouber indicates that the rail line provides the only practical means for transporting ore out of the mountains; the local two-lane highway, he adds, is not large enough to accommodate truckloads of ore; and the abandonment of this line will thus cripple the local mining industry. Royal Gorge Scenic Railway, a narrow gauge tourist railway, has indicated its interest in running a tourist railroad along the 10-mile route from Cañon City through the Royal Gorge to the Parkdale Siding. Trails Act statements respecting the Malta-Cañon City Line have been filed by RTC and by the State of Colorado, acting by and through its Parks and Recreation Department.

Hope-Bridgeport Line (Kansas). The Hope-Bridgeport abandonment has been protested by William Schwarz, who asks that a public hearing be held in the Salina area, and who notes that, if the line is abandoned, farmers will no longer be able to ship by rail from the local elevator. Trails Act statements respecting the Hope-Bridgeport Line have been filed by RTC and by the Serenata Farms Equestrian Therapy Foundation (SFETF).

Barr-Girard Line (Illinois). The Barr-Girard abandonment has been protested by COGA Industries, L.L.C. (COGA), the Economic Development Council for Greater Springfield (EDC), Central Illinois Public Service Company (CIPSC), and Freeman United Coal Mining Company (Freeman). COGA indicates that it is developing a coal gasification agricultural chemical processing facility on the line, in the Girard area; that the facility will create 1,300 permanent jobs; that, although the area is served also by another railroad, the two railroads are not redundant for COGA's purposes; and that the continued operation of the line may well be critical in encouraging the introduction of coal gasification/chemicals technology to the region. EDC claims that the abandonment would cause negative economic impacts for any business that relies heavily on rail service, and would have a negative impact on future economic growth; and EDC suggests that, if rail service is discontinued, UP/SP should compensate firms which are affected negatively, and should allow other rail service providers a chance to operate the line economically. CIPSC contends that abandonment of the Barr-Girard Line would potentially affect the employment base in the territory adjacent to the line. The Illinois Department of Transportation, which also has addressed the Barr-Girard abandonment, concedes that traffic volumes are probably not large enough to warrant continued operation of the line. A 180-day public use condition respecting the Barr-Girard Line has been requested by the City of Springfield. Trails Act statements respecting the Barr-Girard Line have been filed by the City of Springfield and by RTC.

Gurdon-Camden Line (Arkansas). The Gurdon-Camden abandonment has been protested by Reader Industries, Inc., which indicates that it is served by Reader Railroad, which connects to the line at Reader, AR, between MPs 435 and 436. Reader Industries notes that, on or about June 30, 1995, it received a shipment over this line, and adds that it expects to continue to use this line on a more frequent basis in the future.

Iowa Junction-Manchester Line (Louisiana). The Calcasieu Parish Police Jury has requested a 180-day public use condition and also has filed a Trails Act statement.

Wendel-Alturas Line (California). The Feather River Rail Society submitted a statement indicating that it favors retention of the track and roadbed on this historically significant and scenic line, which has the potential to be developed into an operation for tourism, directly benefitting the cities of Alturas and Susanville as well as Lassen and Modoc Counties. A 180-day public use condition respecting the Wendel-Alturas Line has been requested by the United States Department of the Interior, Bureau of Land Management, Eagle Lake Resource Area (the Bureau of Land Management, or simply the Bureau). Trails Act statements respecting the Wendel-Alturas Line have been filed by the Bureau and by RTC.

Suman-Bryan Line (a portion) (Texas). The City of College Station submitted a statement indicating that the Suman-Bryan abandonment will have a negative impact on economic activity in Brazos County. A 90-day public use condition respecting the Suman-Bryan Line has been requested by the Texas Department of Transportation and the Texas Parks and Wildlife Department.

Edwardsville-Madison Line (Illinois). A 180-day public use condition respecting the Edwardsville-Madison Line has been requested by the Village of Glen Carbon. Trails Act statements respecting the Edwardsville-Madison Line have been filed by the Village of Glen Carbon and by Madison County Transit (MCT, a local government agency in Madison County). RTC filed a statement indicating that it supports the issuance of a NITU to MCT.

Newton-Whitewater Line (Kansas). The Newton-Whitewater abandonment between MP 485.0 near Newton (in Harvey County) and MP 476.0 near Whitewater (in Butler County) has been protested (in part) by the Harvey County Board of County Commissioners, which indicates that: at MP 485.0 near Newton, the line ends in an industrial area; that the Greater Newton Chamber of Commerce is marketing an industrial park in this area; that this park is already partially occupied, and that rail spur access is an important tool in developing the remaining sites; that the park would have no rail access if the line were abandoned; that growth is expected to extend at least to MP 482, which is near a road that connects to a nearby interstate highway interchange; and that the line should therefore be kept intact at least to MP 483. The Harvey County Board, which refers to MP 483 and MP 482 almost interchangeably, protests the abandonment of the line between MP 485 and MP 482. The Newton-Whitewater abandonment also has been protested by the Harvey County Jobs Development Council, Inc. (HCJDC) and by Kansas State Rep. Garry Boston, for reasons much the same as those advanced by the Harvey County Board. HCJDC protests the abandonment of the line between MP 485 and MP 482. Rep. Boston, without specifying a milepost, suggests that the park should be allowed leeway for future growth.[89]

Troup-Whitehouse Line (Texas). A 90-day public use condition respecting the Troup-Whitehouse Line has been requested by the Texas Department of Transportation and the Texas Parks and Wildlife Department.

Seabrook-San Leon Line (Texas). A 90-day public use condition respecting the Seabrook-San Leon Line has been requested by the Texas Department of Transportation and the Texas Parks and Wildlife Department.

Magnolia Tower-Melrose Line (California). Respecting that portion of the Magnolia Tower-Melrose Line that lies between MPs 7.6 and 7.1 (this portion, which is roughly 2,400 feet in length, extends between 5th Avenue and Oak Street in the City of Oakland, and includes the rail bridge crossing the Lake Merritt Channel), a 180-day public use condition has been requested by the City of Oakland and the San Francisco Bay Trail Project, and a Trails Act statement has been filed by the City of Oakland.

DeCamp-Edwardsville Line (Illinois). A Trails Act statement respecting the DeCamp-Edwardsville Line has been filed by Madison County Transit (MCT). RTC filed a statement indicating that it supports the issuance of a NITU to MCT.

Little Mountain Junction-Little Mountain Line (Utah). The Weber County Commission has requested a 180-day public use condition and also has filed a Trails Act statement.

APPLICABLE STANDARDS

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

PUBLIC INTEREST STANDARD. The applicable statutory provisions are codified at 49 U.S.C. 11341-51.[90] "The Act's single and essential standard of approval is that the [Board] find the [transaction] to be 'consistent with the public interest.'" Missouri-Kansas-Texas R. Co. v. United States, 632 F.2d 392, 395 (5th Cir. 1980), cert. denied, 451 U.S. 1017 (1981). Accord Penn-Central Merger and N & W Inclusion Cases, 389 U.S. 486, 498-99 (1968) (Penn-Central Merger Cases). To determine the public interest, we balance the benefits of the

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[89] The milepost references used by HCJDC suggest that the Harvey County Board's references to MP 483 were meant to be references to MP 482.

[90] These provisions have been recodified as 49 U.S.C. 11321-27. A new factor has been added requiring us to consider whether the transaction will have an adverse impact upon competition "in the national rail system." 49 U.S.C. 11324(b)(5). Although this post-application amendment technically does not apply to this case, the ICC long considered this issue to be an important part of its analysis in consolidation cases, and the Board continues to apply the legal precedents of the ICC consistent with the Act.

merger against any competitive harm that cannot be mitigated by conditions.

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

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

Public benefits may be defined as efficiency gains such as cost reductions, cost savings, and service improvements. Cost reductions are public benefits because they permit a railroad to provide the same level of rail services with fewer resources or a greater level of rail services with the same resources. An integrated railroad can realize additional benefits by capitalizing on the economies of scale, scope, and density which stem from expanded operations. Cost savings in rail consolidations can come from a variety of sources, including elimination of interchanges, internal reroutes, more efficient movements between the two merging parties, reduced overhead, and elimination of redundant facilities. These benefits, in varying degrees depending on competitive conditions, are passed on to most shippers as reduced rates and/or improved services. When cost reductions from the merger are passed on to shippers, public benefits are extended and shipper benefits are increased. Benefits to the combining carriers that are the result of increased market power, such as the ability to increase rates at the same or reduced service levels, are exclusively private benefits that detract from any public benefits associated with a control transaction. See CSX Corp.--Control--Chessie and Seaboard C.L.I., 363 I.C.C. 518, 551-52 (1980) (CSX Control); Union Pacific--Control--Missouri Pacific; Western Pacific, 366 I.C.C. 462, 487-89 (1982) (UP/MP/WP); Union Pacific Corp. et al.--Cont.--MO-KS-TX Co. et al., 4 I.C.C.2d 409, 428-29 (1988) (UP/MKT); and Rio Grande Industries, et al.--Control--SPT Co., et al., 4 I.C.C.2d 834, 875 (1988) (DRGW/SP).

Competitive Effects. Section 11344(b)(1)(E), dealing with competitive effects on other railroads, was added by section 228(a)(2) of the Staggers Rail Act of 1980, Pub. L. No. 96-448 (Staggers Act). In evaluating "whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region," 49 U.S.C. 11344(b)(1)(E), we do not limit our consideration of competition to rail carriers alone, but examine the total transportation market(s).[91]

We are also guided by the rail transportation policy, 49 U.S.C. 10101a, added by the Staggers Act. See Norfolk Southern Corp.--Control--Norfolk & W. Ry Co., 366 I.C.C. 171, 190 (1982)

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[91] See Central Vermont Ry. v. ICC, 711 F.2d 331, 335-37 (D.C. Cir. 1983).

(NS Control). The 15 elements of that policy set forth in section 10101a, taken as a whole, emphasize reliance on competitive forces, not government regulation, to modernize railroad operations and to promote efficiency. H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 88 (1980), reprinted in 1980 U.S.C.C.A.N. 4110, 4119.

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

We examine several criteria in assessing whether markets served by the merging parties will suffer competitive harm. The commodity in question and length of haul provide an indication of the effectiveness of truck competition. The reduction in independent rail routings or the increase in concentration or shares of relevant traffic flows indicate to some extent the likelihood of adverse change in post-merger market power. Where most or all of the firms in the market have sufficient capacity to serve a significant amount of the total market without any significant disadvantage, the analysis considers the number of competitors rather than their market shares. The determination of competitive harm is more evident where the possible routing options on a rail-bound commodity drop from two originating or terminating railroads to one. Even in these situations, geographic or product competition may be sufficient to act as a constraint to prevent competitive harm.

We evaluate whether effects are horizontal or vertical in nature or whether both types of effects are present. Horizontal effects occur where applicant carriers currently offer competing service within a defined market. These effects can range from loss of direct, head-to-head competition between two railroads serving the same origin/destination pair to loss of geographic competition between railroads, as would occur if each of the merging parties exclusively serves a different competing port from the same origin. Vertical effects occur where the merging parties connect end-to-end or form alternative routings for interline movements in which a single railroad controls a "bottleneck" at origin or destination.[92] The key test for competitive harm remains the same for both horizontal and vertical effects: will the merger result in increased rates or deteriorated service or both?

Special Public Interest Factors. The Board is also required by 49 U.S.C. 11344(c) to make special, narrowly focused public interest findings (where applicable) on the following aspects of any major rail consolidation: (1) a guaranty or assumption of the payment of dividends or of fixed charges, or an increase of total fixed charges (the transaction may be approved only if we find that the guaranty, assumption, or increase is consistent with the public interest); (2) rail acquisitions of motor carriers (the transaction may be approved only if we find, among other things, that the transaction will enable the rail carrier to use motor carrier transportation to public advantage in its

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

operations); and (3) inclusion of other rail carriers located in the area (we may require inclusion of such other rail carriers in the transaction if they apply for inclusion and we find their inclusion to be consistent with the public interest). The assumption of fixed charges and increase of total fixed charges are discussed elsewhere in the decision. Applicants' request that certain trucking company acquisitions be exempted from the requirements of 49 U.S.C. 11343-44 is also discussed below. No other rail carriers have sought inclusion in the transaction.

GENERAL POLICY STATEMENT. The ICC's general policy statement on rail consolidations was issued in Railroad Consolidation Procedures, 363 I.C.C. 784 (1981), and codified at 49 CFR 1180.1, in regulations adopted by the ICC and applicable to this proceeding. It indicates how we incorporate the numerous elements of the public interest in evaluating specific consolidation proposals. In essence, we perform a balancing test, weighing "the potential benefits to applicants and the public against the potential harm to the public." 49 CFR 1180.1(c).

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

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

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

ANTITRUST CONSIDERATIONS. Our statutory mandate, which requires us to balance efficiency gains against competitive harm, sharply contrasts with the approach to mergers taken by DOJ and the Federal Trade Commission (FTC).[93] The policies embodied in

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[93] The FTC has recently issued a report that recommends revising the merger guidelines used by FTC and DOJ that would make their antitrust enforcement more consistent with our approach to judging rail mergers. See Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace, a report by the Federal Trade Commission Staff (May 1996) (FTC 1996 Staff Report). The FTC has proposed that (continued...)

the antitrust laws provide guidance, but are not determinative. As the Supreme Court noted in McLean Trucking Co. v. United States, 321 U.S. 67, 87-88 (1944):

> In short, the [Board] must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operations, lower costs, etc., to determine whether the consolidation will assist in effectuating the overall transportation policy . . . . "The wisdom and experience of that [Board]," not of the courts, must determine whether the proposed consolidation is "consistent with the public interest."[94]

Thus, we can disapprove transactions that would not violate the antitrust laws and approve transactions even if they otherwise would violate the antitrust laws. Northern Lines Merger Cases, 396 U.S. at 511-14. Moreover, because of our broad conditioning power and our continuing oversight, it is possible for us to approve transactions with conditions in cases where the antitrust enforcement agencies would either disapprove or approve only following substantial divestiture.

DISCUSSION AND CONCLUSIONS

OVERVIEW. By purchasing approximately $1 billion of SPR common stock,[95] UP Acquisition Corporation initiated this transaction that will result in the nation's largest rail merger in geographic scope, encompassing the western two-thirds of the United States. Like the SF/SP merger that the ICC disapproved in 1986,[96] this merger contains areas where the service provided by one of the merging carriers, UP, now overlaps with that provided by the other, SP. Unlike that case, where those applicants had initially maintained that imposition of any substantial

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[93](...continued)
antitrust enforcers be required to give greater weight to arguments that cost savings justify mergers that otherwise might be viewed as anticompetitive. Under this proposal, companies would have more incentive to seek combinations that offer production, distribution, promotion, and other efficiencies that reduce prices to consumers.

FTC Chairman Robert Pitofsky said, in an interview, that antitrust enforcers must be more willing to consider when the cost savings of a merger, even in a highly concentrated industry, can increase competition and benefit consumers. Wall Street Journal, June 3, 1996, at A3.

[94] Accord Minneapolis & St. L. Ry. Co. v. United States, 361 U.S. 173 (1959); Bowman Transportation v. Arkansas-Best Freight, 419 U.S. 281, 298 (1974); Port of Portland v. United States, 408 U.S. 811, 841 (1972); United States v. Interstate Commerce Comm'n, 396 U.S. 491, 514 (1970) (Northern Lines Merger Cases); Denver & R.G.W.R. Co. v. United States, 387 U.S. 485 (1967).

[95] The stock is being held in a voting trust.

[96] Santa Fe Southern Pacific Corp.--Control--SPT Co., 2 I.C.C.2d 709 (1986), and 3 I.C.C.2d 926 (1987) (reopening denied) (SF/SP).

conditions aimed at mitigating competitive harm would frustrate the transaction, applicants here have offered approximately 4,000 miles of trackage rights, and will sell about 330 miles of trackage, to their most able and aggressive competitor, BNSF, in an attempt to redress competitive problem areas. In a nutshell, this includes trackage rights over the Central Corridor in the West; Houston to St. Louis via Memphis; Houston to New Orleans; and Houston to Brownsville.

A number of parties have presented evidence and arguments as to those rail movements that this merger might subject to competitive harm. Only DOJ has attempted to quantify the overall harm, claiming that the merger will result in over $800 million per year in harm to shippers due to increased rail rates for shippers who depend solely on UP and SP for actual or potential rail service (2-to-1 shippers) and shippers who depend on UP, SP, and one other rail carrier for actual or potential rail service (3-to-2 shippers). DOJ's claim of harm is totally without foundation, as we will explain.

Harm to 2-to-1 shippers from the merger as conditioned will be negligible. The BNSF agreement permits BNSF to serve all shippers who would otherwise go from two directly serving carriers to one. In essence, the BNSF agreement will permit BNSF to replace, to a large extent, the competitive service that is lost when SP is absorbed into UP. DOJ's projection of harm for 2-to-1 shippers is based on the premise that BNSF will not have <u>any</u> competitive impact on rates charged these shippers. But, with certain exceptions that we have remedied with additional conditions, the BNSF agreement will effectively replace the competition that would otherwise be lost.[97]

As many parties have noted, the BNSF agreement does not address competition lost by 3-to-2 shippers. We find, however, that parties have greatly overstated the harm that would be experienced by shippers in 3-to-2 markets.[98] For example, by DOJ's calculation, over half of the 3-to-2 traffic affected by this merger is intermodal, while almost a quarter of it is automotive traffic. Shippers moving this intermodal and automotive traffic, for which there is strong motor competition, have universally supported the merger. They believe that competition will be stronger after the merger, and that service will be better. In addition, DOJ's primary economic study, on which it bases its estimate of harm to 3-to-2 shippers, is deeply flawed. DOJ's study is based solely on grain traffic even though

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[97] Some of the key issues that we have examined in reaching our conclusion include whether the BNSF agreement really allows BNSF to serve all shippers whose direct access to rail service has gone from two railroads to one; whether competition is lost by shippers that now have only a direct connection with either UP or SP, but who benefit from having the other carrier nearby to provide the potential for transloading, build-ins, or build-outs; whether shippers suffer a significant loss of geographic or source competition due to the loss of SP as an independent carrier; and whether any other party has offered a solution that better serves the public interest.

[98] Some of the key issues that we have examined in reaching our conclusion include whether shippers at points that go from three to two directly serving railroads suffer a substantial loss of competition as a result of losing their SP option; and whether the public interest is harmed by the fact that there would be only two major Class I railroads, rather than three, serving the western half of the country.

grain represents only a tiny portion of the 3-to-2 traffic at issue. Because grain has unique transportation characteristics, we find that DOJ's application of its "grain" study to other commodities is inappropriate. Moreover, we also find that the study is not reliable even for grain traffic because, as explained below, it is based in part upon a crucial, incorrect assumption that there tend to be fewer rail carriers near navigable waterways.

Any competitive harms will be heavily outweighed by the broad-based, positive effects of the merger as conditioned. Many of these benefits will be passed through to shippers in terms of lower rates and better service. The merger will achieve quantifiable cost savings of approximately $627 million per year. There are also other major public interest benefits, which, although not so readily quantifiable, are just as important. Some of the more significant benefits include substantially shorter and more efficient, single-line routes between many city pairs for major traffic flows, especially over the Central Corridor; increased capacity and capital investment to upgrade facilities, more direct routes, new terminals and yards, and improved service; directional running of the lines between Houston and Memphis/St. Louis; two new single-line routes on the west coast I-5 Corridor from Canada to Mexico; access for BNSF to New Orleans, and reduced mileage between major points that BNSF serves in single-line service; and a solution for the problem long posed to the public interest by the service decline and capital inadequacy of SP.

With regard to SP, we agree with applicants that western rail service is a rapidly evolving market, not a static one. As detailed below, SP has been declining for over a decade; it is not able to generate sufficient capital to invest in the quality service desired by many of its shippers. UP and SP face increasing pressure from a newly merged, more efficient BNSF, which has been investing substantial capital into improving its service. We think that a revitalized UP/SP will be in a much improved position to compete aggressively with BNSF to provide better, more efficient service to shippers in the West. See Guilford Transportation Industries, Inc.--Control--Delaware and Hudson Railway Company, 366 I.C.C. 396, 411 (1982) (D&H); NS Control, 366 I.C.C. at 233. Although the number of major carriers will be lower, sufficient competitive pressure will remain to ensure that the quality of service they provide will be improved. D&H, 366 I.C.C. at 400-01, 410.

The efficiency savings of the merger are very substantial, and the clear trend since 1980 has been that when railroads have reduced their costs through mergers or otherwise, those savings have largely been passed on to their shippers in terms of lower rates and improved service. Rail rates have decreased remarkably since 1980, despite the fact that most shippers are served by a single rail carrier, and few are served by three. Because of the several major mergers since that time, and due to the formation of Conrail as the single Class I carrier in the Northeast, large regions of the country are now served by a single major rail carrier or by two such carriers. Even with this structure, rail competition has thrived, and shippers have continued to enjoy increasingly lower rates. Since 1980, the number of Class I railroads has decreased from 26 to 10, while the average rail rate per ton has declined more than 37% on an inflation-adjusted basis from its peak in 1981 through 1993.[99]

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[99] ICC, Office of Economic and Environmental Analysis, Rail Rates Continue Multi-Year Decline, 1995.

Several parties, including NITL, SPI, KCS, Conrail, DOJ, DOT, and USDA, have expressed concerns regarding alleged problems with the BNSF trackage rights agreement as it was originally proposed in the application. These parties claim that the terms of the trackage rights agreement will not permit BNSF to compete effectively; that BNSF will lack sufficient traffic density and face other operational obstacles that will keep it from competing effectively; that trackage rights are inherently inferior to outright ownership; that BNSF is not really interested in providing service in these markets; that the agreement is not broad enough to remedy all competitive harms.

We have carefully reviewed each of these allegations, and, after analyzing the record and hearing the parties' oral arguments presented on July 1, 1996, we believe that the proposed merger, subject to certain mitigating conditions that we are imposing, will be in the public interest, and that any competitive harm will be heavily outweighed by the positive effects and benefits of the merger as conditioned. Contrary to the assertions of these parties, trackage rights have been a widely used and time-tested means of assuring against a threatened loss of competition in rail merger proceedings. Moreover, a trackage rights remedy seems particularly appropriate here to preserve competition now being offered by SP that, in many instances, has been made possible through trackage rights, not outright ownership, in the first place.[100]

Applicants have effectively addressed many of the particular problems raised by protestants in their settlement agreement with CMA, and additional concessions made in their rebuttal statement and brief. These modifications have substantially improved the original BNSF settlement agreement, and have removed many problems that might otherwise have hindered the effectiveness of these trackage rights. For example, trackage rights have been granted over both UP and SP lines between Houston and St. Louis, permitting BNSF to operate with the primarily unidirectional flow of UP/SP traffic; an arbitration procedure has been devised for CMA members to permit build-outs under the same principles we applied in the BN/SF merger; a dispatching protocol has been arranged to protect BNSF's service; BNSF has been given the right to serve all new industries on the SP segments over which it is obtaining trackage rights; half of the volume of shipments under contract at 2-to-1 points in Louisiana and Texas will be opened up to BNSF; BNSF has been given the option to pay compensation under a formula similar to the method set out in <u>SSW Compensation</u>,[101] only more favorable to it; SP reciprocal switching charges have been reduced substantially to $130 per car to ensure that shippers who reach BNSF at 2-to-1 points by reciprocal switching will have meaningful access; and applicants have consented to 5 years of oversight by the Board to ensure that these trackage rights work, and have conceded that we will retain authority to impose additional remedial conditions, including divestiture.

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[100] SP now operates over trackage rights from Fort Worth to Pueblo and Kansas City, between Topeka and St. Louis, between Kansas City and Chicago, and between Pueblo and Kansas City.

[101] <u>St. Louis Southwestern Ry. Co. Compensation--Trackage Rights</u>, 1 I.C.C.2d 776 (1984), 4 I.C.C.2d 668 (1988), 5 I.C.C.2d 525 (1989), 8 I.C.C.2d 80 (1991), 8 I.C.C.2d 213 (1991), <u>aff'd without opinion</u>, 978 F.2d 745 (D.C. Cir. 1992), <u>cert. denied</u>, 508 U.S. 951 (1993) (the <u>SSW Compensation</u> cases).

But, even though applicants have met many of their critics' objections in the CMA Agreement, we recognize that some areas of objection remain. As DOJ and DOT correctly point out, BNSF's trackage rights will permit it to serve only certain specified points, those at which a shipper goes from two to one directly serving carrier. The merger would reduce competition where a shipper, at what applicants call a "1-to-1" point, had a competitive option of building out or building in to or from either SP or UP to put pressure on the single carrier serving it. Similarly, where a shipper served only by UP or SP could have transloaded shipments to the other carrier, that option would not be replaced by the terms of the CMA agreement.

The potential for exercising such options does give shippers competitive leverage, though clearly not as much as if they had two carriers serving them directly. After all, a shipper would have to undergo some additional cost to take advantage of these options before the merger. A build-in or build-out could cost millions of dollars even for a relatively short segment, as testimony in both this case and in BN/SF demonstrates. Transloading also results in additional costs, as freight is first loaded into a truck, and then reloaded into a freight car, or the reverse. Nonetheless, we believe that maintaining these options is important to shippers who use them as leverage in their negotiations with carriers.

Rather than redefining 2-to-1 points as those within some arbitrary proximity to two rail carriers (a BEA or 4-digit SPLC),[102] and thus treating direct and indirect rail competition as equivalent, as DOJ, KCS, and others have suggested, we have devised specific conditions directly addressing both the competitive problems that have been raised with the BNSF agreement and the CMA agreement and concerns about whether BNSF will have sufficient traffic to compete effectively. We will require as conditions, which we will discuss in detail below, that the "new facility" provision of the CMA agreement be extended to require applicants to permit BNSF to serve any new facility at any point on any SP or UP segment over which it has been granted trackage rights; that the term "new facility" include new transload facilities, and that applicants make available all points on their lines (over which BNSF receives trackage rights) to transload facilities, wherever BNSF or some third party chooses to establish them; that applicants extend the build-out and build-in provision contained in the CMA agreement to all shippers with physically feasible connections and remove the time limitation contained in the provision; and that applicants expand Paragraph 3 of the CMA agreement to make immediately available to BNSF at least 50% of the volume under contract at 2-to-1 points on all of the BNSF trackage rights corridors (not limited to just Texas and Louisiana).

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[102] "BEA" refers to Business Economic Area, a location grouping established by the Bureau of Economic Analysis of the U.S. Department of Commerce for statistical reporting of regional economic activity. BEAs are collections of counties that may be as large as two-thirds or more of the area of some western states.

"SPLC" refers to the Standard Point Location Code, a code used on all interline freight accounting forms to identify all U.S. points served by rail or motor carriers. It may have up to six position numbers, identifying a geographic area in the first position, the state in the second position, the county in the third and fourth positions, and the station in the city or town in the fifth and sixth positions.

We also will impose as a condition the 5-year oversight period to examine whether the conditions we have imposed have effectively addressed the competitive issues they were intended to remedy. We will impose a common carrier obligation on BNSF to provide service to the shippers to which it has been given access under the BNSF agreement. Applicants and BNSF will be required to submit progress reports and implementing/operating plans, as discussed in more detail later in this decision. Unless circumstances warrant otherwise, we will plan to initiate a proceeding on or about October 1,, 1997, to seek comments from interested parties on the effects of the merger and implementation of the conditions.

In addition to the broad remedies, we have also crafted specific remedies addressing particular problems raised by various parties. In the South Central/Gulf Coast region, these remedies include trackage rights for the Tex Mex from Corpus Christi to Beaumont to ensure that this small carrier can continue to play its important role in international service. We also have expanded BNSF's access to SIT facilities necessary to serve plastics shippers, have removed restrictions on the service BNSF can provide to shippers in the Lake Charles area and eliminated a fee that BNSF otherwise would have had to pay to gain access to this traffic, and have confirmed the availability of build-out options for Dow and UCC, and the continued availability of two independent and efficient PRB routings for TUE. In the Central Corridor, these remedies include imposing the URC agreement which would give Utah coal producers important new rail access to midwestern and eastern markets, and retaining the Tennessee Pass Line as an alternative to the Moffat Tunnel Line to ensure that this route does not become overly congested.

Although certain protestants have also claimed that the merger will create a rail transportation duopoly in the West, leading to tacit collusion and higher prices, we do not believe this will be the case. As DOT explains, "the competitive outcome of duopoly is indeterminate. In principle, competition can lead to a wide range of outcomes from prices that maximize the joint profits of the duopolists to a competitive equilibrium." DOT-4 at 22. Experience with rail mergers since 1980 indicates that carriers have not colluded in two-railroad markets. After carefully examining this issue, we have determined that rivalry, not tacit collusion, is the likely outcome here. Moreover, we will be carefully monitoring the situation to ensure that this is so.

Some opponents contend that, even with the remedies offered by applicants, trackage rights are simply not enough, and that divestiture is required. We disagree. Ordering divestiture of any of the major components of SP that have been sought by the various parties would be a substantial overreach and would destroy important efficiency benefits of the merger. As we explain below, only part of the traffic on these routes would be directly affected by the merger even if BNSF were not given any trackage rights. This is so because most of the shippers are now either solely served by UP or solely served by SP. Giving another carrier direct access to this traffic would unnecessarily affect a great deal of traffic not harmed by the merger.

Divestiture of the "offending assets" is promoted by DOJ and others as a neat and clean solution that does not require the setting of trackage rights compensation or oversight to ensure that shippers are effectively protected from competitive harm.[103] Although divestiture may have a surface appeal, it also entails substantial regulatory intervention in supervising the sale of rail lines,[104] and it would likely lead to serious additional problems here. Divestiture could destroy major parts of the efficiency benefits of the merger, especially a Central Corridor divestiture. Moreover, divestitures could cause this deal to become uneconomical for UP and destroy the merger After all, the corridors that form the central focus of divestiture proposals generate a very substantial volume of traffic. Frustration of the merger would leave the SP problem unresolved, leading to the breakup of that company, or a substantial retrenching of its service. It might ultimately preclude the solution that we have before us, one that allows the network efficiencies of the SP system to be preserved, with tremendous public interest benefits. If SP were sold in pieces, shippers, labor, and SP shareholders would all be adversely affected. Substantial divestitures would almost surely destroy the BNSF agreement, which has its own substantial pro-competitive features and efficiency gains.

In sum, the merger benefits here outweigh any competitive harms of the transaction, and the public interest requires that we approve it. The conditions we are imposing will effectively mitigate the competitive harms of the merger, while preserving its benefits. We will turn now to a more detailed discussion of the various merger benefits and competitive issues that we have examined in carrying out our balancing of interests under the statute.

PUBLIC BENEFITS OF THE MERGER. Despite significant parallel aspects examined below, the merger as conditioned clearly will be pro-competitive in the sense that it will stimulate price and service competition in markets served by the merged carriers. The merger will create a more efficient and competitive UP/SP system competing head-to-head throughout the West with BNSF, whose efficiency was greatly enhanced by its recent merger. UP/SP customers will benefit from tremendous service improvements brought about by reductions in route mileage, extended single-line service, enhanced equipment supply, better service reliability, and new operating efficiencies. Similarly, BNSF shippers will receive substantial benefits from the improved service efficiency of that carrier as a result of the merger conditions that we are imposing. Shippers now served by SP, whose service is threatened by that carrier's decline, will now be assured of quality service by UP/SP or BNSF.

Quantifiable Public Benefits. Applicants argue that the merger will yield about $752 million in quantifiable public benefits in a normal year, including just over $580 million in operating efficiencies and cost savings,[105] $76 million in net revenues from diverted traffic, and $93 million in shipper logistics savings. We have excluded the $76 million related to net diversion gains and $47.2 million in net trackage rights proceeds from BNSF that should not be included as quantifiable public interest gains. This still leaves $627 million of quantifiable benefits per year, as follows:

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[103] Unlike DOJ, we have the capacity for continuing regulatory oversight under the statute we administer.

[104] DOJ also recognizes this problem. See DOJ-14 at 3.

[105] Applicants have withdrawn a benefit claim of $1.7 million in the procurement area. See UP/SP-230 at 69 n.25.

<u>STB's Restatement of</u>
<u>Applicants' Projected Annual Efficiencies and Cost Savings</u>
<u>(in $ millions)</u>

OPERATING BENEFITS	
Labor Savings	261.2
Non-Labor Savings	
Car Use	12.7
Communications/Computers	14.2
Operations	116.5
General/Administrative	129.7
Subtotal (Operating Benefits)	**$ 534.3**
SHIPPER LOGISTICS SAVINGS	**$ 93.1**
TOTAL BENEFITS	**$ 627.4**

Thus, we find that applicants should realize public benefits from more efficient operations of $534.3 million per year. These savings would reduce the combined UP/SP operating ratio by four or five points. BNSF's costs will fall further as well, as a result of the trackage rights. UP/SP will: (a) streamline and consolidate operations at major common terminals; (b) combine terminal and station facilities at a number of common points; (c) establish new blocks and new trains to improve service and efficiency; and (d) pursue numerous coordinations and consolidations of transportation, mechanical, engineering, information, purchasing, customer service, and other operating and marketing functions and activities. In addition, traffic will be handled more efficiently, in many instances by using shorter, faster routes. The combined car fleet will be managed on a coordinated basis to reduce empty movements and improve equipment use. Economies will also be achieved in applicant carriers' administrative functions by combining SP and UP departments to permit more efficient use of existing personnel and reduce overall staff and office space.

Several parties, notably DOJ and KCS, challenge applicants' calculation of quantifiable benefits. However, we find, in particular, the testimony of DOJ's witness Christensen to lack credibility. In the recently completed BN/SF merger proceeding, only one expert witness, Christensen, mounted a detailed challenge to the cost savings estimates in the application. Christensen, then representing selected utilities, claimed that the BN/SF merger would produce few quantifiable efficiency benefits. He asserted that the economic literature contained no evidence indicating efficiency gains through end-to-end mergers. Because that merger was largely end-to-end, he argued that it could not plausibly be expected to yield significant cost savings.[106] The ICC rejected that position,[107] and subsequent

[106] This pessimistic vision was not shared by Woodward, DOJ's economic witness in that proceeding, who explained:

> It is likely a merger of two railroads having combined revenues of $7 billion would create significant efficiencies . . . . In general, efficiencies could have a downward effect on the prices charged by the merging railroads.

<u>BN/SF</u>, DOJ-2, VS Woodward, at 1 n.1.

events confirm that the ICC's decision in BN/SF was correct and that Christensen significantly erred in his predictions. BNSF's originally projected merger-related savings were too low, and not, as Christensen had alleged in that proceeding, too high.[108]

The UP/SP merger is of the same order of magnitude as BN/SF, and with far more overlapping routes that presumably would permit applicants to take full advantage of the economies of scale, scope and density commonly found in railroading. Nevertheless, Christensen testifies that this merger will produce quantifiable public benefits as low as $73 million,[109] which we simply do not find credible.

Christensen's critique is not based on objections to applicants' detailed operating plan, which he admits that he has not examined,[110] but rather upon largely theoretical concerns. Christensen makes three broad-based claims: (1) many of the operational efficiencies projected by applicants could be achieved by voluntary cooperation short of merger and should not be considered merger-related benefits; (2) much of applicants' projected benefits will actually result, whether or not the merger takes place, from ongoing, favorable industry productivity trends brought about by Staggers Act deregulation; and (3) certain of the public benefits claimed by applicants are actually transfers from various parties to applicants and, as

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[107] (...continued)

[107] BNSF, slip op. at 65-66.

[108] At the July 1, 1996 oral argument in this proceeding, BNSF's counsel confirmed that annual benefits, which BNSF had projected would be $560 million, are now believed to exceed a billion dollars a year. She explained that some of the unanticipated savings resulted from combined management having the ability to apply "best practices" from each railroad to the new operations. Jones, Oral Arg. TR at 118-19.

This is consistent with a recent trade press article published subsequent to the consummation of the BN/SF merger, which reported that:

> BNSF president and CEO Robert Krebs told analysts in New York last Tuesday that the company had identified $400 million to $500 million in annual savings on top of the $560 million in annual savings projected in their 1994 merger application. That disclosure, plus the banner earnings, helped push BNSF stock up $5.875 for the day to close at $32.75 in heavy trading. That price, a 52-week high, represents a $20 per-share gain since July 1.

Traffic World, October 30, 1995, at 37.

[109] Christensen concedes that the quantifiable benefits may be as high as $500 million, but he (and DOJ) focus their assessments on the lower end ($73 million) of his projected range.

[110] See UP/SP-230 at 61 (citing Christensen Dep., Apr. 23, 1996, at 27).

such, represent private, not public, benefits of the merger.[111] We will discuss each of these arguments in turn.

One of the major problems with Christensen's analysis is that he assumes that major service coordinations of the scale that will take place here can be accomplished through voluntary trackage rights and other joint agreements without the stimulus of a merger.[112] Indeed, DOJ has even gone so far as to suggest that applicants have the burden of proving the negative proposition that the merger benefits cannot be obtained through any means short of merger.[113] DOJ cites no precedent or statutory basis for this novel approach. Moreover, DOJ's approach goes against the grain of our statute, which assumes that carriers will take the initiative in proposing rail consolidations that permit railroads to create superior networks, to provide better service, and to operate more efficiently. The ICC consistently rejected claims that coordination of benefits can be achieved voluntarily on the grounds that it is up to rail management, not the agency, to determine how such efficiencies can be achieved. For example, in SF/SP, a merger proposal that was ultimately denied because of competitive concerns, the ICC explained:

> Applicants sought to neutralize the assertion that many of the claimed merger benefits could be achieved by SPT and ATSF by cooperative efforts short of merger. Applicants explored in detail the non-merger mechanisms suggested by DOJ in a manner which convinces us that there are practical, legal and competitive problems which would substantially lessen the effectiveness of such arrangements. It seems clear to us that without the unified management resulting from the merger, few if any of the operating economies projected under the Operating Plan are attainable.

SF/SP, 2 I.C.C. at 872. We continue to believe this is a correct analysis, and one that fits the facts of this case just as well. Moreover, Christensen's premise is not only unproven, it is implausible; if UP and SP have not yet been able to coordinate the core operations of their competing systems outside of the merger context, it is not realistic to suppose that they could

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[111] Christensen also disputes applicants' claim that SP's service problems will be remedied by the merger. He suggests that UP's admittedly rocky experience in initially absorbing CNW demonstrates that, at least in the short term, SP's service may worsen.

Applicants have shown that they have overcome their problems integrating CNW into UP. And the record here shows that many shippers located on SP lines expect to see improvements in SP's deteriorating system quickly because of UP's plans to invest $1.3 billion, which in large part would go toward upgrading that system.

[112] This sharply contrasts with DOJ witness Majure's assumption that trackage rights are essentially worthless.

[113] Contra FTC 1996 Staff Report, Chapter 2, Section E, "Efficiencies Should Be Merger-Specific But Parties Need Not Prove That The Merger Is The Least Restrictive Way Of Achieving Efficiencies," pp. 29-31. Moreover, as we already have noted, the FTC recommends revising the merger guidelines used by FTC and DOJ in a manner that would make their antitrust enforcement more consistent with our approach to judging rail mergers.

easily do so, especially without the antitrust immunity that our approval confers.

Christensen also asserts that many of applicants' projected benefits, whatever they are, would actually be the result of ongoing, favorable industry productivity trends brought about by Staggers Act deregulation.[114] Christensen explains his basis for reducing applicants' projected labor savings by stating:

> The ability to achieve labor savings without merger is borne out in the statistics for class 1 railroads over the five-year period 1989-1994, when merger activity was relatively quiet.

DOJ-8 at 9. Applicants have effectively rebutted this by explaining that the UP/MKT and the SP/DRGW mergers were implemented in their entirety in 1989 and later, and that efficiency enhancing effects of earlier rail mergers (UP/MP/WP, NS, CSX, and probably the formation of Conrail) continued into the 1989-1994 period. Thus, Christensen's rail productivity study necessarily includes, rather than excludes, merger-related productivity gains.[115] More importantly, applicants' efficiency benefits are not based upon the expected yields from industry-wide trends, but on particular savings made possible under their detailed post-merger operating plan. Christensen has presented no reason for us to doubt these particular savings, which would be over and above any savings yielded by general non-merger-related productivity trends.

Applicants have included two items that we believe should be excluded from quantifiable benefits. Applicants have included $76 million in projected net revenue gains from traffic shifts in their calculation of merger-related public benefits, as well as $47.2 million in net trackage rights fees from BNSF. The ICC has explained that many merger-related traffic gains just represent neutral revenue transfers from other carriers:

> Traffic diversions, as such, are not public benefits; only the service improvements and cost savings associated with traffic diversions can be counted as public benefits.

UP/CNW, slip op. at 67. Applicants acknowledge that the ICC did not agree that rail-to-rail traffic shifts should be viewed as public benefits. Nonetheless, they claim that the net revenue gains they have projected here serve as a reasonable proxy for the public benefits. Although we have eliminated the $76 million in net traffic diversions in our restatement of applicants' projections of quantifiable public benefits, we have recognized the important efficiencies leading to these traffic shifts below. Similarly, our restatement excludes applicants' projected receipt of $47.2 million in net trackage rights fees from BNSF. The

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[114] While Christensen's testimony appears to apply this analysis only to applicants' projected $261 million in labor savings, DOJ in its Brief takes the concept a step farther in an effort to dispute all of applicants' benefit claims. DOJ-14 at 43-44.

[115] Christensen makes one other claim with respect to labor savings that we summarily reject. He claims that applicants' projected savings in this area should be reduced by at least 8%, the minimal amount that he asserts unionized rail employees are overpaid relative to their next best alternative. See DOJ-8, VS Christensen, at 11-12.

largest portion of this is simply a transfer from BNSF resulting from the grant of trackage rights to preserve the competitive status quo.

Finally, we reject Christensen's assertion that applicants' projected $102.9 million in procurement savings (from combined purchasing) is a private transfer from suppliers to UP/SP because applicants have not shown that these savings will result from efficiencies achieved by suppliers, rather than by UP/SP's combined purchasing power. Applicants explain that the ICC regularly accepted as public benefits "lower materials costs resulting from purchasing efficiencies." BN/SF, slip op. at 64. In accepting these, the ICC never required merger applicants to audit the production activities and pricing decisions of their suppliers, and this proprietary information would generally not have been available. We accept applicants' projected procurement savings and incorporate them in our restatement of quantifiable public benefits.

KCS witnesses O'Connor and Darling claim that past rail mergers have produced few efficiency gains or other cost savings. Nonetheless, they conclude that there are $434.8 million in supportable normal year recurrent savings. See KCS-33 (Vol. 1), VS O'Connor/Darling, at 343.

Applicants explain that O'Connor and Darling are in error in concentrating on the huge decline in UP performance in 1983, the first year after the UP/MP/WP merger, in judging that merger a failure. For all practical purposes, that merger was not implemented in 1983, but in 1984-86, after labor agreements were reached and the WP rebuilding project was completed. Applicants also have shown numerous other errors in the O'Connor/Darling statement, and have effectively rebutted claims by the KCS witnesses that applicants have improperly calculated merger benefits in those benefit categories that we have accepted. See UP/SP-230 at 70-73.

Unquantified Benefits.

More Efficient Routes/Single-Line Service. In prior mergers, the ICC placed substantial weight on evidence that a proposal presented "opportunities for significantly improved routings." See, e.g., NS Control, 366 I.C.C. at 173, 175, 196-200. The ICC also consistently recognized the substantial public benefits that can be derived through creating new single-line services. CSX Control, 363 I.C.C. at 553.

Applicants have shown evidence of unprecedented opportunities for improved routings and new single-line routes here. A combined UP/SP system will provide shippers with shorter, more efficient routes throughout the West. Similarly, the trackage rights and line sales provided in the BNSF agreement will greatly improve BNSF's western route system. A brief summary of these improvements is set forth in Appendix D at 1 (Improved Routings).

As a result of this merger, every shipper served by UP, but not by SP, will gain single-line service to all SP points, and vice versa. More than 350,000 cars, trailers, and containers, carrying 26 million tons of freight, will gain single-line service each year. The BNSF agreement will add single-line service for another 120,000 cars a year. See Appendix D at 2 (Expanded Single-Line Service).

Moreover, the expanded coverage that common control promises will have numerous beneficial impacts on many markets--international, intermodal, food products, forest products, autos, chemicals, grain, coal, metal and minerals. See Appendix D at 3 (Expanded Market Coverage).

Applicants will reduce SP's high reciprocal switching charges of almost $500 per car. SP's charges have been criticized by many shippers as reducing their competitive options at commonly served points, and have prompted SP's interchange partners to increase their switching charges when dealing with SP. Applicants will reduce these charges pursuant to the CMA agreement,[116] making available to shippers many routings that were previously uneconomical.

Increased Capacity and Capital Investment. UP/SP plans to spend approximately $1.3 billion over the next 4 years to upgrade SP facilities, assemble more direct routes, build new terminals and yards, and improve service. These merger-related investments will improve rail service and strengthen competition. Many of these investments will go toward updating the inadequate SP system, investments that SP does not have the capital to make on its own.[117]

These improvements will include more than a quarter of a billion dollars in new intermodal facilities. UP/SP will build a new intermodal terminal in the "Inland Empire," the east end of the Los Angeles Basin where BNSF's state-of-the-art facility at San Bernardino gives it an advantage today. It will build a new facility at Kansas City, and others at points in Texas; expand intermodal facilities such as SP's Long Beach intermodal facility and UP's Chicago facilities; and add substantial capacity to intermodal terminals at Seattle, Portland, Salt Lake City, Denver, and St. Louis. UP/SP also will invest millions of dollars in new and improved freight yards, repair shops, and other facilities.[118]

Improvement of the Declining SP Service. A major benefit of the merger is that it would permit the financially weak SP to become a part of a large, healthy rail system with the financial wherewithal to sustain efficient operations and maintain a viable

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[116] In UP/SP-266, applicants acknowledge their modified agreement to provide reciprocal switching charges to BNSF at 2-to-1 points as well as non-2-to-1 points at a rate no higher than $130 per car, adjusted over time for costs. At other points, UP/SP will cap its reciprocal switching charges with all other railroads at $150 per car, subject to the same adjustments, with further reductions possible through bilateral negotiation.

[117] For instance, UP/SP will invest: $221.4 million, adding over 100 miles of double track to the Sunset Route to improve train speeds and reliability; $145.8 million to make the SP Tucumcari Line a high-speed intermodal link between the Midwest and Southern California; and $125.4 million to upgrade UP's Texas & Pacific line to connect with the Sunset Route to provide direct service between Memphis and California. The merged system will clear tunnel restrictions that block SP from competing for most doublestack traffic in the I-5 and Central Corridors. Shippers will benefit from all of these investments.

[118] One such project will be to restore SP's deteriorated Roseville Yard. UP/SP's $38.2 million commitment will allow Roseville to reduce transit times and improve blocking for traffic from Los Angeles to Seattle, and as far east as Chicago. Further south in California, UP/SP will build a new $24 million repair facility at West Colton, which will complement $40 million of other investments to ensure equipment reliability.

plant investment. There may be theoretical alternatives for SP to explore a merger with some company other than UP, but no such buyer has come forward with an offer to buy the whole SP system, even though the filing of this merger application was public notice that prospective offerors needed to file such an inconsistent application under the timeframes established for this proceeding. And, the retention of the SP system in one piece permits network efficiencies (efficient single-line service for numerous shippers) that are clearly in the public interest.

DOJ, KCS, and Conrail contend that SP is, and can continue to be, an effective competitor, but the facts suggest otherwise. DOJ's witness Zimmer contends that SP has begun to be profitable since its new management took over in 1993, and she contends that a positive income of $61 million would have resulted in the absence of special charges during 1995. Zimmer also notes that SP's operating income and net income improved substantially in 1994 over 1993. During that period, SP raised $886 million through the sale of common stock and $375 million through issuance of senior notes. Zimmer argues that SP can generate funds from operations to support additional capital investments as well as using other financing options. She assumes the availability of a $300 million credit line, and SP's continuing ability to sell real estate as a means of financing what she accepts would be SP's necessary capital expenditures of $1 billion over the next 4 years.

Applicants, the State of California,[119] and UTU, however, have submitted convincing evidence that SP's competitive position is eroding, and will continue to do so, because of its inability to generate sufficient capital to provide quality service. Other than in one unrepresentative year, 1994, SP has historically been financially weak and unprofitable, relying heavily on large real estate sales to generate necessary cash flows. SP cannot continue to generate funds from this source, however, because it has a dwindling amount of marketable real estate available for sale.[120] As applicants note, SP's unsecured credit now has "junk bond status," and it is unable to secure additional funds from its lenders because it cannot meet the earnings tests of its loan covenants. Issuance of additional stock does not seem to be an option because it would further dilute the low value of existing shares without yielding any substantial additional

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[119] Many government and shipper parties from the State of California appear in this record in support of applicants' proposed merger. Their statements stress the benefits that will result from a financially revived SP, and strongly dispute protestants' claims of competitive harm for traffic moving into or out of the State. See, e.g., Conlon, Oral Arg. Tr. at 468-478.

[120] SP notes that most of its more valuable property has previously been sold; in 1995, it took 400 separate transactions to sell $49 million worth of property. UP/SP-230, VS Yarberry, at 3.

UTU has corroborated this, explaining:

> As far as UTU is concerned, there just isn't enough real estate left . . . for the SP to continue to offset its net operating losses from rail operations by selling the real estate that it does have left. That has been . . . the modus operandi of SP for quite some time.

Miller, Oral Arg. TR at 507-08.

funds. Thus, even if the optimistic income projections of Zimmer are borne out, and we think that is unlikely,[121] SP would still lack the funds to halt its competitive slide.

Based on our examination of the record, and SP's Annual Reports, we conclude that SP is, and will continue to be, weaker than its principal competitors in the West (BNSF and UP). Although SP could remain in operation as an independent carrier for some time absent the merger, its inability to generate adequate cash flow from operations, and limitations on its ability to borrow or to sell stock, will preclude it from being a strong competitor to UP or BNSF. The level of service now offered by SP is below that offered by its competitors, and declining; it is essentially a single-track, low-density, high-cost railroad.

Further, if SP continues to operate as an independent carrier, its relative position will worsen. Absent a merger, SP projects that it would spend less than $100 million a year for improvements, while BNSF and UP each plan to invest billions of dollars in maintaining existing facilities and upgrading plant and equipment. With the merger, however, it is undisputed that UP will have adequate financial resources to supply the SP system the capital that it needs to provide truly competitive service over SP's routes.

COMPETITIVE HARM. The Staggers Act granted railroads freedom from an overly restrictive and burdensome regulatory regime, enabling them to compete more effectively with each other and with other transportation modes, most notably motor carriers and barge lines. This competition has provided an important spur to more efficient operations, including efficiencies gained through merger and consolidation, while ensuring that these efficiency gains have been equitably shared by railroads and their customers. The competitive process unleashed by the Staggers Act has been one of the most significant public policy successes of this century. One of our most important roles is to ensure that this process continues.

As with our determination of the merger's expected public benefits, our assessment of the potential for merger-related competitive harms takes into account the effects of the BNSF agreement. As explained below, subject to that agreement and certain conditions that we are imposing, we find that the merger as conditioned is unlikely to lead to any significant competitive harms. The BNSF agreement is intended to permit BNSF to replace the competition that will be lost when SP is absorbed into UP. Our assessment of the effectiveness of the agreement at preserving this competition begins with an examination of the manner in which UP/SP and BNSF will compete after the merger.

Merger Will Result in Rivalry, Not Collusion. DOJ and others have argued that, because the settlement agreement here results in trackage rights for BNSF, already UP's largest rival in the West, it is inherently flawed. These parties claim that duopoly in the West will lead to market splitting and collusion between these two major carriers.[122] When the ICC turned down

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[121] Indeed, SP incurred a net operating loss of $24 million in 1995.

[122] Not all parties calling for some form of divestiture base their requests on fear of market splitting and collusion among BNSF and applicants. For example, DOT and SPI state that (continued...)

an eleventh hour effort to formulate ameliorative conditions in the SF/SP merger it expressed similar concerns:

> We are disinclined to risk the possibility of collusion and market splitting that might result from such an artificial, settlement induced rationalization of the western rail system.

SF/SP, 3 I.C.C.2d at 935.

In refusing to reopen the record there to permit examination of the remedies that were proposed, the ICC expressed dissatisfaction that applicants in that case were dilatory in bringing forth their proposal for conditions and disingenuous in agreeing to accept conditions that they had categorized for well over a year as "deal breakers":

> We choose not to allow merger applicants an opportunity to, in effect, seek consolidation twice: first by taking a hard-line preliminary approach toward the issues of competition and acceptable conditions, then falling back on a more conciliatory approach if the initial approach is unsuccessful.

Id. at 933. Here, in contrast, applicants presented their plan for addressing competitive harms at the outset. This permitted us to examine the plan in detail in light of numerous comments. The agency also has the benefit of nine years of additional experience with decreasing rates in two-carrier rail markets under Staggers Act deregulation. We now believe that rail carriers can and do compete effectively with each other in two-carrier markets. We also think that the fact that applicants and BNSF have granted access to each other's markets is not a splitting of markets, but a pro-competitive action that promotes the public interest.

As DOT has pointed out, the outcome where just two companies offer the only significant competitive alternatives in a market may range all the way from intense rivalry to collusion, depending on the circumstances of the industry.[123] After thoroughly examining the economic analyses submitted by various parties, we have concluded that tacit collusion is an unlikely outcome here.[124]

DOJ and others define tacit collusion as a situation where firms in a market have a mutual understanding, not directly communicated, permitting rate or service offerings to be set at non-competitive levels. DOJ correctly notes that, as the number of firms declines, it becomes easier to understand and to follow the actions of the other firms. Conversely, additional participants in a market cloud the picture, and possible reactions of different parties to a rate or service offering become harder to predict.

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[122](...continued)
BNSF would be an acceptable purchaser of the lines they request that we order applicants to divest.

[123] DOT-4 at 22.

[124] Our analyses of the economic witnesses' testimonies concerning this issue are set forth in Appendix E. We agree with DOT that these studies are inconclusive.

In prior mergers, the ICC often permitted the number of railroads offering service in a given market to decrease to two railroads. Indeed, it approved mergers resulting in only two major railroads serving large portions of the East. The two railroads, CSX and NS, have competed effectively in these markets. As has been true for the nation's rail system as a whole since the Staggers Act, competitive pressures have been sufficient to spur railroads to enhance productivity by adopting efficient operating and management systems, and their costs have gone down each year because of significant productivity gains. Competitive pressures have ensured that the preponderance of those gains have been passed along to shippers in the form of lower rates and better and more responsive service. There is no evidence that railroads have colluded, overtly or tacitly, to maintain inefficient operations, unresponsive service, or above-market rate levels.

Another example of effective competition in a two-carrier market is in the Powder River Basin, where BNSF and UP offer vigorous competition to PRB coal shippers who have seen rates continuously decline. At oral argument, DOJ stated:

> . . . the Powder River Basin precedent is too small, and too narrow, and too recent to be applied to the facts of this case. I am not actually familiar with the prices in the East . . . .

Bingaman, Oral Arg. TR at 143. In response to being asked whether DOJ could provide any evidence of collusive behavior between railroads in two-railroad markets in the past, DOJ responded:

> We have evidence of collusive behavior in many industries. . . . I don't know if there is a railroad case specifically, but it is a fundamental tenet of merger law that collusion, where there are only two parties, is much more possible.

Id. at 144. However, at oral argument, DOT argued that two-railroad markets result in rivalry rather than collusion, and that the conclusions of DOJ and other protesting parties concerning 3-to-2 competitive harm were incorrect:

> . . . industry concentration has not led to increased rail rates at all. Your own precedent in the BN/Santa Fe and UP/Katy indicate your belief that two independent, unconstrained railroads can and do supply vigorous competition. . . . [W]e concluded that is indeed the case.

Smith, Oral Arg. TR at 173-74. Based on our experience with railroad mergers, and the lack of railroad-specific evidence presented by DOJ in support of its position, we find DOJ's arguments to be unconvincing.

We conclude that steps taken by applicants here to avert anticompetitive impacts (through the BNSF agreement), combined with the additional conditions we are imposing, will safeguard against tacit collusion. We believe that BNSF will aggressively compete with UP/SP where it can obtain profitable traffic under the BNSF agreement. Further, the monitoring condition we are imposing will deter collusion and enable us to take any necessary corrective action. We note that the antitrust immunity incorporated in our approval of the merger in no way extends to any collusive pricing action.

Competition at 3-to-2 Points Not Diminished. We have examined in detail the nature of the 3-to-2 traffic at issue, and have determined that it presents little potential for significant, merger-related competitive harm. Most of this traffic is either intermodal or automotive traffic that enjoys vigorous motor carrier competition.[125]

As we have previously explained, numerous mergers since 1980 have sharply reduced the number of major railroads. During that time, the ICC's policy focused usually on preserving two-railroad competition, not on preserving three-railroad competition. Overall, however, railroad costs and rates have declined a great deal, with the average inflation-adjusted rail rate per ton declining by 37.7% from its 1981 peak to year-end 1993. Even so, because pervasive reduction of the major rail carriers across the West from three to two carriers could be grounds for concern, we have carefully examined the circumstances surrounding this case. We have concluded that no corrective action beyond the conditions we are imposing here is necessary.

Our analysis of the various empirical studies in this record attempting to measure 3-to-2 rail pricing effects is set forth in Appendix E. Studies from the academic literature[126] and from original or updated work done for this proceeding were presented by various witnesses, including MacDonald and Grimm for KCS, Majure for DOJ, Kwoka for Dow, Ploth for KCS, and Peterson and Bernheim for applicants. We agree with DOT's overall assessment that these studies are inconclusive. According to DOT:

> Opponents' positions on the instant merger are drawn from theory and models of firm behavior that lack empirical support. They support their statements with reference to a body of literature on industrial organization, showing that concentration at some point leads to higher prices. However, only a very few of these studies address the railroad industry, and their credibility has been seriously challenged . . . .

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[125] Applicants and DOJ agree that the largest 3-to-2 traffic flow is Los Angeles-Chicago intermodal traffic. DOJ's numbers confirm that BNSF's premium service currently dominates these movements. BNSF's share of intermodal rail traffic in this corridor is over 50%. We believe applicants' plan to assign most expedited, service sensitive intermodal and automotive traffic to SP's Tucumcari Line and most slower manifest traffic to UP's Central Corridor Line will provide more effective competition to BNSF for all traffic moving between Los Angeles and the St. Louis and Chicago gateways. Shippers and numerous other affected California parties agree. Remarkably, DOJ, alone among the major parties, has concluded that competitive harm to this traffic is so significant that it can only be cured by divestiture of one of applicants' Los Angeles to Chicago routings. We strongly disagree.

[126] C. Grimm, "Horizontal Competitive Effects in Railroad Mergers," Research in Transportation Economics, Vol. 2, T. Keeler (ed.), JAI Press, 1985, pp. 27-53; J.M. MacDonald, "Competition and Rail Rates for the Shipment of Corn, Soybeans, and Wheat," Rand Journal of Economics 18:1 (Spring 1987); J.M. MacDonald, "Railroad Deregulation, Innovation, and Competition: Effects of the Staggers Act on Grain Transportation," Journal of Law and Economics 32:2 (April 1989); and C. Winston, T. Corsi, C. Grimm and C. Evans, The Economic Effects of Surface Freight Deregulation, Brookings, 1990.

DOT-4 at 22. After briefly discussing the various studies, DOT concludes that:

> [None] of the foregoing analyses, examining both sides of the duopoly issue, leads to a firm conclusion on the competitive outcome in markets in which the number of railroads goes from three to two . . . . DOT recommends that the Board refrain from remedial action to maintain three railroad service in these markets.

Id. at 24.

A number of protestants' studies do specifically address railroad pricing. They attempt to estimate any enhanced ability of railroads to raise rates above costs by taking advantage of the reduction, by one, in the number of post-merger rail carriers. The studies compare rates in markets served by three railroads with rates in markets served by two. One common problem with these studies is the use of a static context to project rate increases in rail markets after the merger. Protestants neglect to account for a key dynamic element of this merger, the dramatic cost reductions it will make possible. They generally fail to acknowledge that any limited ability this merger creates to raise rates over costs will be offset to the extent that the merger results in significant reductions in applicants' costs. Another dynamic element of this merger is the deteriorating condition of SP, and the effect this would have on rail pricing.

Majure's study for DOJ is particularly flawed. His study estimates that the merger will result in a rate increase of 10.9% for $4.751 billion in 3-to-2 traffic flows. Majure's large pricing effects are derived entirely from studies of grain, a commodity with very different transportation characteristics from the commodities that make up most of the 3-to-2 traffic here. We do not think it is valid to apply rate projections based on grain traffic to other categories of 3-to-2 traffic that have markedly different transportation characteristics, as Majure has done. This is especially true because more than 70% of the 3-to-2 traffic is made up of commodities that are clearly much more truck-competitive than grain, and whose shippers strongly support the merger.

Moreover, as detailed in Appendix E, Majure's study is not even valid for grain because he fails to include a variable to account for the distance of the shipper from nearby waterways. Barges, where they are available, are a particularly important factor in grain transport. Further, the nearer a shipper is to a waterway, the more likely that more than one rail carrier will be available, rather than less likely, as Majure speculates.

Finally, Majure's study is suspect to the extent that he uses one geographic definition, a 6-digit SPLC, in estimating 2-to-1 and 3-to-2 rate impacts, while using much broader geographic definitions, BEAs or 4-digit SPLC's, to define the universe of traffic that supposedly would suffer the rate increases he predicts. This mix-and-match approach is inherently suspect and thus cannot be given substantial weight.

In summary, Majure's use of BEAs and SPLCs to measure traffic flows leads to an overestimate of the amount of traffic that would face the loss of one of three direct rail competitors. His use of grain rate data makes it inappropriate to apply his results to other commodities that do not share grain's unique transportation characteristics. His data limitations and measurement errors significantly increase the upward bias in his estimates of merger-related competitive harm. And he has failed to account for any offsetting effects from the dramatic merger-related reduction in applicants' costs.

Nonetheless, we have used his study to provide an upper bound to the potential competitive harm faced by 3-to-2 shippers. Even if DOJ's estimate of $1.4 billion of non-intermodal, non-automotive 3-to-2 traffic were accurate, which we do not believe it is, and its projected post-merger rate increase for that traffic of 10.9% were valid as well, which we believe is overstated, it would produce a rate increase of $152 million for that traffic. We consider this at best an outside estimate of harm for shippers in 3-to-2 markets. Even if this assessment of harm were accurate, this amount is heavily outweighed by the substantial public benefits that will result from this merger as conditioned.

Another key factor in our analysis is the limited role now played by SP as the third carrier in these markets. As we explain elsewhere in this decision, SP's poor financial condition has limited its access to capital necessary to renovate its plant and equipment so as to match the service quality and cost of service of its competitors. Thus, SP is a constrained, not a full competitor, with limited impact on the pricing actions of other western carriers.

As a result, SP's role, particularly with regard to the very service-sensitive automotive and intermodal traffic that makes up a large part of the 3-to-2 traffic, has diminished. (According to applicants, SP now handles only 20% of 3-to-2 traffic.) Two decades ago, for example, SP was the dominant automotive carrier in the West, with direct service to and from four automobile assembly plants in California. Since then, as a result of the closure of three of these four plants and SP's decline in service, SP has fallen to a very small share (less than 10% in 1994) of the automobile business handled by the western railroads. SP has been unable to make necessary investments in new automobile facilities and auto-handling freight cars.

For all of these reasons, we believe that protestants have overstated harm in 3-to-2 markets and that corrective action in 3-to-2 markets is not required.

Competition at 2-to-1 Points Not Diminished. UP and SP directly compete for the business of a small number of shippers whose plants have direct access to both railroads. They also compete for the traffic of a larger group of shippers with plants located on the line of one of the two railroads, but who can reach a nearby line of the other through a reciprocal switching arrangement. When no third carrier is present, applicants have designated plants with access to both UP and SP, either directly or through reciprocal switching, as 2-to-1 points, and have granted BNSF access to those plants via trackage rights, as a replacement carrier for SP. Applicants have also agreed to continue to offer reciprocal switching at these plants vis-à-vis BNSF at a charge not to exceed $130 per car, adjusted upward or downward each year on the basis of 50% of the RCAF, unadjusted for productivity.

To identify points to be covered by corrective trackage rights, applicants have identified 2-to-1 points as those that can be served directly, or through reciprocal switching, by UP

<u>and</u> SP but by no other Class I railroad.[127] Applicants have also identified a category of 2-to-1 <u>corridor</u> flows, where only UP and SP offer competitive alternatives: Houston-New Orleans; Houston-Memphis; Lake Charles/West Lake-New Orleans/Mexico; Texarkana-Memphis; and Shreveport-Memphis.[128] Under the BNSF agreement, BNSF would be given overhead trackage rights over those corridors, but it would only have authority to serve shippers at 2-to-1 points.

Protestants argue that applicants' approach is too restrictive because many shippers benefit from UP-SP competition in ways other than having both of those carriers physically reach their sidings. Protestants argue that other forms of competition--transloading, build-ins or build-outs, close market competition and plant switching, and location of new sites--can all be effective in bringing pressure on each carrier's rates.[129]

Protestants argue that the correct measure of competitive impact must center around flows between origin-destination pairs, and they evaluate origin-destination flows by commodity. They also use broader geographic areas than "points" in an attempt to estimate the potential for such options as build-ins and transloading that result from carriers being near each other. They argue that all shippers who have such competitive options before the merger need to be protected with direct access to another carrier.

Protestants use various geographic units to estimate situations where rail carriers are close enough together that loss of one of the two merging carriers should be considered a full 2-to-1 impact. Under this approach, the broader the geographic unit chosen, the greater the likelihood that points applicants treat as 1-to-1 will be identified by protestants as 2-to-1, 3-to-2, or even 4-to-3. This accounts for much of the discrepancy in the parties' estimates of the volume of traffic that will be affected by the merger. Applicants' analysis translates readily into conclusions as to what points trackage rights must serve. In contrast, protestants' analysis leads to differentiation at each point depending on the commodity and origin-destination flow.

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[127] Applicants contend that they carefully checked actual accessibility. They added points on shortline railroads reachable by connections to UP <u>and</u> SP, but by no other Class I railroad. Further, they added any point that had what they considered to be a bona fide build-in, build-out, or transload option prior to the merger.

[128] The ultimate eastern origins or destinations for interterritorial traffic are not considered, only the eastern gateways for such traffic.

[129] KCS-33 (Vol. 1), VS Grimm, at 163-180.

KCS studied flows between BEAs,[130] based on a commodity breakdown at the 5-digit STCC level.[131] KCS estimates total revenues for 2-to-1 traffic, based on this broad definition and using the 1994 100% traffic data base, to be $2.04 billion. DOJ, in its study, uses various broad geographic units depending on the type of commodity to estimate the volume of affected traffic [i.e., BEAs for manufactured products; and 4-digit SPLCs for "low-valued" (per weight unit) freight, for which it alleges that extensive truck hauls to a reload point would not be feasible[132]], and excludes all traffic it considers truck competitive for the entire movement from origin to destination based on distance (up to 500 miles for BEA commodities and 100 miles for 4-digit SPLC commodities). Using the 1994 Waybill Sample, DOJ estimates revenues for 2-to-1 markets at $1.5 billion. NITL's study, using 1994 Waybill Sample data at a 6-digit SPLC level,[133] estimates revenues for 2-to-1 traffic to be $2.58 billion. Applicants identify $1,002 million of traffic at 2-to-1 points.[134] Protestants imply that the BNSF trackage rights are inadequate to the extent that they do not serve all shippers that experience some competitive harm, however indirect.

In essence, the problem with protestants' 2-to-1 analysis is that they aggregate traffic that will experience various types of competitive problems that we think are readily susceptible to different types of remedies. Although divestiture of parallel lines could address harms discussed here, there are less intrusive ways and more focused ways of achieving that result, which are adopted here.

We agree with protestants that applicants have not gone far enough in addressing certain adverse competitive effects.

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[130] The ICC has found that BEA-to-BEA rail traffic flows are often far too broad to measure accurately potential merger-related competitive harm:

> [t]he traffic flows between BEA areas in some instances, such as the Los Angeles BEA, include rail traffic not affected by changes in the levels of competition resulting from the proposed merger. For example, in the Los Angeles BEA, traffic terminated at Needles, CA, on the ATSF would not be affected because it is a point exclusive to ATSF at the present time and, in fact, is near the Arizona border.

SF/SP, 2 I.C.C.2d at 768.

[131] "STCC" refers to the Standard Transportation Commodity Code developed by the Association of American Railroads (AAR) in the early 1960s. This code, adopted for reporting commodity statistics to the ICC, was patterned after the U.S. Government's Standard Industrial Classification Code.

[132] Inexplicably, as noted earlier, Majure uses 6-digit SPLCs to perform his rate study.

[133] As we have explained, 6-digit SPLCs are the equivalent of freight stations. By using that level, NITL approximates applicants' standard of seeking points with direct access to UP and SP. Applicants, however, note that NITL did not check actual access.

[134] The number would be $795 million if applicants were to leave out 2-to-1 traffic solely served by UP or SP at one end of the movement.

Applicants, for example, address the loss of transloading options by allowing BNSF to locate transloading centers only at 2-to-1 points. Applicants maintain that truck movements to new BNSF transloading centers at 2-to-1 points or to centers on BNSF's own lines, would be sufficient to ensure that no shipper previously enjoying such options would be hampered by this limitation. But today UP or SP may locate transloading facilities anywhere on their lines to reach shippers on the other carrier. We believe that allowing BNSF or third parties to locate transloading facilities anywhere on the lines where BNSF will receive trackage rights will preserve that competition.

The same is true with respect to accommodating build-in or build-out options. If a UP shipper undertakes a build-out option, for example, to reach SP, SP need not subject the shipper to a feasibility test. It can simply negotiate a contract rate with that shipper that goes into effect if the shipper or the carrier that wants to obtain its business actually constructs a connection. Allowing BNSF to do the same is a more appropriate means of rectifying what would otherwise be adverse competitive impacts brought about by loss of build-out options.

Shippers of chemicals and plastics that are served by just one railroad have noted that they also benefit from pressure brought on by competitive rates that nearby competing shippers having access to two rail carriers can obtain. These shippers will continue to benefit from ample geographic competition of this type, as we explain elsewhere in this decision.

Location of new facilities provides competitive pressure, and this issue was partially resolved in the CMA agreement, as BNSF will be authorized to serve all new shippers that choose to locate on the SP lines over which BNSF is obtaining trackage rights. We will broaden that provision also to permit BNSF to serve new facilities that locate on UP lines over which BNSF has been given trackage rights.

With the conditions we are imposing, we find that BNSF will be an effective replacement for SP at these 2-to-1 points and affected 1-to-1 points. Although various protestants have argued that the compensation terms and other conditions of the trackage rights arrangement may not allow BNSF to replace the competition that will be lost when SP is absorbed into UP, those arguments are without merit, as discussed in detail below.

Source And Other Indirect Competition Not Impaired. A number of parties (particularly DOJ, DOT, and KCS) note that UP and SP often restrain each other's rates and service levels even where the shipper has access to only one rail carrier. This indirect competition can take two forms. First, as discussed in detail above, when UP or SP lines run near the plant of an exclusively served shipper, the ability of that shipper to transload or build out to a second carrier can provide important leverage in rate and service negotiations with the carrier providing direct service to the plant, and the conditions which we are imposing reflect the importance of this arrangement.

Second, UP and SP can compete indirectly through source or geographic competition when their exclusively served shippers are transporting relatively homogeneous products. We explain below why the merger will not diminish source competition for the main products for which this issue has been raised: plastic and chemical products moving out of the Gulf area; coal moving out of the (SP-served) Uinta Basin and (UP-served) PRB and Hanna Basin; and for grain and lumber moving throughout the West.

Plastics and Other Chemicals. Protestants express concern that the merger will permit UP/SP to exercise increased market power over shippers of plastics and other chemicals. We find that, with the addition of certain conditions discussed below, these concerns have been shown to be groundless. Applicants' studies of Gulf Coast plastic and chemical traffic have shown that source competition will remain powerful, and in some respects will be magnified, following the merger. Applicants have demonstrated that a combined UP/SP will be unable to exercise any additional market power over shipments of any plastic or chemical commodity because the overwhelming percentage of shipments will continue to be available to non-UP/SP rail and non-rail transport alternatives.

The settlements that UP/SP have crafted with BNSF and CMA will enhance competition for the large number of plastic and chemical shippers whose plants are now served by UP, SP, and no other railroad. Indeed, CMA, which accounts for 90% of the nation's basic industrial chemical productive capacity, has withdrawn its opposition to the merger in response to important steps taken by applicants to meet the concerns of its members.[135]

BNSF will now be able to serve every plastic and chemical shipper currently served by UP and SP and no other railroad. For those 2-to-1 shippers, competition will be expanded to the extent that BNSF will provide a more effective alternative than SP has been able to provide at those points. The prospects for BNSF being able to improve service options for a particular shipper are good because it can provide direct, single-line service to much of the West, and can provide efficient access to major gateways for movements to the rest of North America. Moreover, various other shippers will continue to have extensive access to carriers other than UP/SP, including BNSF, KCS, and IC.

For plants served by a single railroad, source competition can be an effective competitive restraint on rail rates when sources of supply are numerous, cost conditions of alternative sources of supply are homogeneous, transport costs from alternative sources are similar, delivered products are close substitutes, and the share of transport costs in the delivered price of the product is high. Especially for plastics, as SPI admits in its comments, each of these factors is present now. SPI-11 at 14; VS Ruple at 9; and VS Bowles at 2. We note that these factors will continue after the merger. The record shows that there are approximately 40 plants producing substantially identical plastic resins in the Gulf region alone.[136] Transportation costs for plastics are approximately 20% of delivered costs. The railroads are well aware that, if plastics shippers do not receive transportation rates comparable to those received by their nearby competitors, they will be hindered in their ability to compete in marketing their products, and the serving carrier will lose traffic.

SPI asserts that UP/SP would have access to 90% of the plastics movements, with a post-merger market share of about 63%. SPI's concern is that the merger would permit UP/SP to dominate the transportation of plastics, but we think that is unlikely to

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[135] CMA-12 at 4-5.

[136] Capacity, although primarily located in the Gulf Coast, is sufficiently dispersed throughout Texas and Louisiana, so as not to be under the control of any one railroad. Other plants are located in the Midwest, East, and Canada.

occur because many plastics shippers continue to have rail transport options with carriers other than UP or SP, and about 15% of the plastics traffic is shipped by truck and intermodal transport. After accounting for the BNSF agreement, UP/SP's exclusive originations will remain less than 40% of plastics production in the Gulf. Even at points where UP/SP is the only serving rail carrier, it will not be able to increase its rates without weighing the possibility that the shipper will lose its business to one of its many nearby competitors served by other carriers. We conclude that there will continue to be sufficient source competition to suppress UP/SP's exercise of additional market power at plants where it is the only rail carrier.

Further, applicants explain that most chemical traffic, other than plastics, moves predominately by truck and barge,[137] in addition to moving by rail. The preconditions for source competition will continue to be present for these nonplastic chemicals as well. The customers producing these products are large firms, many of which are multinational, and all of which are sophisticated in effective negotiations with carriers. Continued source competition should preclude the exercise of market power at nonplastic chemical plants served by a single carrier.

Despite these facts indicating that effective source competition will continue, merger opponents continue to allege that UP/SP will be able to exercise new-found market power and thus "control" a large portion of the Gulf Coast shipments of plastics and chemicals. Protestants argue that UP/SP will have "control" over large percentages of Gulf Coast plastic and chemical originations. They also argue that the amount of plastic and chemical traffic that will go from 2-to-1 or 3-to-2 is far larger than applicants concede.

We agree, however, with applicants' witnesses Barber, Spero, and Peterman that protestants' contentions are flawed because of the continued availability of source competition to prevent the abuse of market power. Moreover, applicants show that protestants have overstated the traffic that will be exclusively served by UP/SP. They show that half of the shipments of any specific plastic or chemical commodity moved in volume would be available to non-UP/SP rail or other non-rail transport alternatives.[138] Protestants originally asserted that UP/SP would control 63% of Gulf Coast originations for plastic resins, but the settlement agreement with CMA will reduce UP/SP exclusive service to less than 40% of production capacity in the Gulf. In addition, any new plants producing these products will be able to receive service from both UP/SP and BNSF, depending on where they locate.

Coal. A number of utilities and some shipper organizations have submitted comments addressing coal issues. These parties primarily argue that the merger will diminish existing source competition among different coal origins served by UP and SP. Most notably, opponents allege that UP/SP will not have the incentive to promote SP's Colorado/Utah coal business, and will suppress that business in order to favor UP's PRB coal origins. This allegation is also the focus of MRL's responsive application.

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[137] UP/SP-23 (Vol. 2), VS Barber, at 487.

[138] The only exception is adipic acid.

But, as explained below, applicants demonstrate that there is little meaningful source competition between UP and SP for coal because each originates coal that typically serves different markets. UP's coal competition is BNSF, not SP.

UP's coal business is based overwhelmingly on movements out of the PRB in Wyoming, whereas SP originates coal only out of the Uinta Basin in Colorado and Utah. Those coals are fundamentally distinct in terms of price and physical characteristics. PRB coal is lower-cost, lower-BTU coal that invariably offers a lower delivered cost than Colorado/Utah coal, with the exception of minemouth coal-burning operations or for utilities with significantly shorter rail hauls from the Uinta Basin than the PRB. This means that plants that can burn PRB coal will typically not burn Colorado/Utah coal except if needed for blending purposes or other technical requirements not related to the relative prices of the two coals. On the other hand, those plants (especially in the Midwest and East) that cannot burn lower-BTU PRB coal will instead look to Colorado/Utah coal and other higher-BTU coals in the East and West, and <u>not</u> PRB coal, as their competing alternative sources.

Thus, UP competes intensively, head-to-head, against BNSF for originations of PRB coal, and not against SP movements of higher-priced Colorado/Utah coal. In contrast, SP's competition for Colorado/Utah coal movements is with other high-BTU coals, especially from the Appalachian and midwestern coal regions that supply high-BTU coal to eastern and midwestern utilities.

In addition to its heavy volume of PRB originations, UP also moves a small amount of coal from the Hanna Basin and other coal regions in Southern Wyoming. The demand for Hanna Basin and other Southern Wyoming coal has declined because, while it is lower in BTU content than the high-BTU coals, it is significantly higher in price than the low-BTU coal of the PRB. Most of the coal opponents do not even mention Hanna Basin coal as a significant competitive factor. Applicants have shown that Hanna Basin coal has deficiencies in both BTU content and price, in a way that makes it largely non-competitive for new coal business.

Once the proper marketplace dynamics are taken into account, it becomes clear that the coal opponents have predicated their opposition to this merger on a fundamentally mistaken premise. Virtually every coal opponent claims that there is extensive, head-to-head competition between UP and SP that will be "extinguished" or "lost" or "destroyed" as a result of the merger. <u>See</u>, <u>e.g.</u>, WSC-11 at 1-3, 22; WCTL-11 at 21; WPL-5 at 6. But, drawing on aggregate industry trends as well as plant-by-plant detail, applicants' witnesses Sharp and Sansom show that there is little meaningful competition today between PRB and Colorado/Utah coals.

As a result, we find that there is no substance to the coal opponents' arguments based on a supposed "western coal market." <u>See</u>, <u>e.g.</u>, WCTL-11 at 11. Various experts engage in market share or concentration analyses of this "market."[139] But, all of this falls apart once it is recognized that there is no single "western coal market." SP's Colorado and Utah coals are

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[139] <u>See</u>, <u>e.g.</u>, WPL-5, VS Crowley, at 7-9; WCTL-11, VS Weishaar, at 14-23. WCTL asserts that three railroads now originate 96.4% of all rail movements in the western coal market: BNSF (57.7%); UP (30.3%); and SP (8.4%). Others talk about "collusive behavior" or a "duopoly" in this supposed "market." <u>See</u>, <u>e.g.</u>, WCTL-11, VS Borts, at 3-16; WPL-5, VS Weishaar, at 15.

competing principally against eastern and midwestern coals, for the business of utilities that need to buy high-BTU coal for at least a portion of their coal burn. Opponents err by defining a "market" for SP's Uinta Basin coal originations that incorrectly includes UP's PRB coal originations and incorrectly excludes originations from high-BTU eastern and midwestern coal regions. This misses the real competition for SP's Colorado/Utah coal business.[140]

Many of the coal opponents assert that UP will suppress rather than build SP's Colorado/Utah business, or that UP will lack "incentive" to build upon SP's coal business. For example, MRL asserts:

> The potential for neglect of Western Bituminous coal transportation initiatives following the UP/SP merger is high. . . . UP/SP would be able to effectively choke off Western Bituminous coal growth in favor of its preferred PRB mines.

MRL-10 at 30 and 36.

We reject the notion that UP is likely deliberately to undermine and weaken the Colorado/Utah coal business, rather than developing it. We find applicants' claim far more credible: that UP would not ignore a core element of SP's rail franchise, forgoing the benefits that will flow to the merged system from greater efficiencies and operational capabilities. Applicants explain that a central benefit of this merger is market expansion--building on the strengths of the separate railroads by delivering rail services more efficiently than either UP or SP can accomplish separately.

UP's PRB business and SP's Colorado/Utah business are complementary. Both businesses can grow at the same time. The coal opponents are simply wrong in claiming that UP would "compete against itself," WSC-11 at 42, if it sought to build the Colorado/Utah business.

Applicants' witness Nock explains why the Colorado/Utah business is a major new business opportunity for UP. For the first time, UP will have access to extensive originations of high-BTU coal--originations that present <u>new</u> market opportunities for UP in competing against eastern and midwestern high-BTU coals, and in competing for export business. UP states its firm intentions to build the Colorado/Utah coal business aggressively. RVS Nock at 9. Precisely because the merged system will be more efficient and cost-effective, UP/SP plans to expand the market reach for SP's Colorado/Utah business. Single-line access to more destinations, upgrading of key routes, the availability of

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[140] Certain utilities whose coal fired generating plants are served exclusively at destination by UP or SP have requested that we grant trackage rights for a second carrier to serve the plant to make up for any lost source competition between SP-served Uinta Basin mines and UP-served PRB mines. For example, this argument forms the basis for WEPCO's requested relief at its Oak Creek Power Plant. These parties have not met the ICC's standard for relief under these circumstances, which we affirm and apply here. The record must clearly show, first, that prior to the merger the benefits of origin competition flowed through to the utility and were not captured by the destination monopoly carrier, and, second, that the competitive flow through will be significantly curtailed by the merger. <u>See</u> <u>BN/SF</u>, slip op. at 70.

shorter routes, and operating efficiencies will all sharpen the competitiveness of Colorado/Utah coal. This directly contradicts the suggestion of various coal opponents that UP will downplay SP's Colorado/Utah business.

UP has competed aggressively to build its coal business, not just its PRB coal business, but also its Hanna Basin and other Southern Wyoming coal business. RVS Nock at 5-8. This has included "backhauls" and "aggressive pricing." RVS Sansom at 67-69; RVS Sharp at 56-65. In the aggregate, UP's coal rates have been lower than SP's. RVS Sharp at 58-60; RVS Nock at 18.[141]

A number of opponents point to the declining presence of Hanna Basin coal as supposed evidence that UP will not pay adequate attention to SP's Colorado/Utah business. But, as noted, Hanna Basin coal has confronted fundamental problems in the marketplace, such as significantly higher cost than PRB coal, but lower quality than Colorado/Utah coal. Applicants' witness Sansom explains why these marketplace dynamics--and not any inattention by UP--have caused the relative demise of Hanna Basin coal. UP/SP-230, RVS Sansom, at 12-17. Nock notes that UP has sought for years to build the Hanna Basin business through aggressive rates and other marketing efforts that have not borne fruit. UP/SP-230, RVS Nock, at 7-8.

In contrast, Nock's statement addresses the reasons that the merged system will be able to expand SP's Colorado/Utah coal business significantly. Unlike Hanna Basin coal, which has not responded to UP's best efforts, Colorado/Utah coal is well-positioned to intensify competition against other high-BTU coals, particularly eastern and midwestern coals where Hanna Basin coal has not proven to be competitive.

We also find that competition among high-BTU coals will be stimulated by applicants' settlements with the URC and BNSF. Utah producers will gain important new rail access to midwestern and eastern markets, which will add a further stimulus to competition between UP and BNSF. RVS Nock at 18-20.

While we have explained why we find little credibility in opponents' claims that UP will deliberately choose to neglect or otherwise degrade SP's Colorado/Utah coal business, we note that opponents' concerns will be monitored through the oversight process.

MRL has asserted that, even if there is limited Uinta Basin versus PRB competition for coal movements to utilities' existing power generating plants, the merger presents a threat to <u>ex ante</u> source competition for coal. This refers to competition that derives from a utility's ability to choose from among various alternatives while selecting a site for a new plant or rebuilding an existing one.[142] Our assessment is that this argument also lacks merit. As MRL acknowledges, before a utility plant has been sited and designed, competition takes place between coal sources, transportation modes, boiler designs, and individual carriers. Utilities at this stage--before they have sited a plant, chosen a boiler design and coal source, or negotiated with coal mines and transportation firms--will not be competitively harmed because they will retain adequate transportation and coal

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[141] We agree with applicants that the rate comparisons presented by WCTL (WCTL-11, VS Crowley, at 16-19) are not reliable. RVS Sansom at 78-79; 89-91.

[142] <u>See</u> MRL-26 at 18.

sourcing options. After the merger, shippers will generally be able to site or configure new plant investments in such a way as to take advantage of several transportation options, including several major railroads, barge transport, or some combination of these.

Grain and Lumber. Grain and lumber are among the most important commodities carried by western railroads. Although submissions by states, shipper associations, and community groups[143] allege competitive problems associated with grain and lumber, they afford no comprehensive market analysis and the evidence presented on their behalf is quite limited. Grain and lumber are rail-oriented commodities, especially beyond certain distances, and both are marked by very strong geographic competition.

Shippers of both commodities raise concerns, recapitulated by USDA, about the vulnerability of small, rural shippers and shortline railroads to merger-related rate restructuring and car supply actions of the major railroads. As we will explain, these and other concerns raised by protestants are misplaced here. To begin with, SP now plays only a minor role in grain transportation.[144] Over recent decades the number of primary grain-hauling railroads in the West declined both because of mergers and bankruptcy. Except for areas served by the CP Rail System/Soo Line Railroad Company and KCS, the competitive battleground for western grain has come to be occupied almost entirely by BNSF and UP.

Montana grain interests and Oregon lumber interests, among others, essentially have complained that they are unable to take advantage of the PRA between UP and BNSF for Pacific Northwest traffic routed over the Portland gateway. This agreement opens California for the first time to single-line competition between UP and BNSF from origins to the north and to the west of Portland--a remarkably pro-competitive development. As a result of this agreement, shippers in this corridor will now experience more intense geographic competition than before.

Nevertheless, Montana interests claim they are harmed because the BNSF PRA does not extend to the eastern part of Montana. See MWBC-4 at 13. We will not impose a condition just because one group of shippers obtains pro-competitive merger benefits that other shippers do not enjoy.[145] In any event, to the extent that some shippers benefit by receiving improved competitive options, the more intensive geographic competition that results should keep rates for other shippers in check.

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[143] Among the shipper associations concerned with grain are Mountain-Plains Communities & Shippers Coalition, Montana Wheat and Barley Committee, Montana Farmers Union, and Colorado Wheat Administrative Committee. The State of Montana underscored grain issues, while Or/DOT underscored lumber.

[144] According to the AAR's 1995 Annual Summaries of Weekly Railroad Traffic, SP handled only approximately 4% of all western grain carloads in 1995.

[145] See BN/SF, slip op. at 99: "We realize that the SP settlement agreement, by providing increased rail options for [the shipper's] competitors but not for [the shipper], may work to [the shipper's] disadvantage. But that is not the kind of harm that we should rectify under our conditioning power."

Colorado wheat growers' concerns center around abandonment of part of the Dotsero to Towner line. They argue the abandonment is an attempt by applicants to ensure that no one else uses the assets in question. They claim that the current dearth of rail traffic on the line results from poor car service and disadvantageous rates, and argue that farmers expend greater resources driving trucks, especially during critical harvest times, when they are delayed for long periods of time awaiting unloading. But applicants correctly explain that the use of semi-trailers to haul grain long distances, which did not begin in earnest until the late 1980s, now provides effective truck competition directly from farm to market or to terminal points served by several railroads via unit trains. And, if the shippers desire to keep this line open, they can purchase it under 49 U.S.C. 10905 (now 49 U.S.C. 10904).[146]

Arguments by other Kansas growers, and KCS, center on the Wichita to Fort Worth corridor, over which SP, as a result of a voluntary settlement agreement with BNSF in the BN/SF proceeding, gained rights to provide service (which we note are rights that the ICC did not impose as a condition of approval of the BN/SF merger). The current merger would reduce the number of carriers serving that corridor to two, UP/SP and BNSF. Although USDA joins in the request to restore a third carrier to replace SP, it acknowledges SP's minor role in this market so far.[147] SP uses a shortline operator, SKOL, to exercise the trackage rights, and it is not expected to improve on the service BN provided over this corridor prior to its merger, using a fragile branch line from eastern Kansas. UP/SP-23, VS Peterson, at 219-220. In sum, SP's presence has been minimal here, and the presence of two strong competitors here makes it unnecessary for us to impose a third.[148]

The most direct competitive effect of the merger on lumber concerns the aggressive transloading program UP has conducted reaching into SP's southern Oregon area to draw freight to Portland from shippers located on lines served exclusively by SP.[149] Comments of Or/DOT, Mar. 29, 1995, at 13. Because BN also conducts transloading operations directed at SP below Portland, this situation can be regarded as 3-to-2, although BN was less active in this regard. Oregon lumber interests seek to expand the BNSF PRA to open Eugene for lumber traffic flowing east and to open SP-restricted short lines to interchange with BNSF. Id. at 4 (Boise Cascade letter).

The new competitive options that these shippers seek have nothing to do with competitive harm caused by the merger, and

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[146] Arguments raised by Kansas wheat growers on the Pueblo-Herington line are similarly without merit.

[147] Comments of USDA, Mar. 29, 1996, at 5.

[148] In any event, as applicants indicate, the relevant wheat market is broader, including such options as barge transportation from Kansas City to the Gulf. Applicants also expect added competition from upgrading of the OKT line and use of combined UP and SP lines in Texas to move heavier-loading cars of wheat for export.

[149] It is not surprising that, with SP's transit times on lumber from Pacific Northwest to Chicago running an average of 11.8 days compared with UP's average of 7.5 days, SP's traffic was vulnerable to competitive inroads through transloading. UP/SP-22, VS Gray, at 216.

competition in this market will remain strong after the merger. Lumber shippers in Oregon are subject to both source competition and destination competition. When Oregon lumber moves to eastern markets it faces competition from Canadian, other Pacific Northwest, and Southeast origins. UP/SP-23, VS Peterson, at 101-102. When Oregon lumber moves south to California, competition from origins to the north has been limited because access to California required interline arrangement with SP. The BNSF PRA opens that access, thereby intensifying source competition. From the standpoint of destination competition, an Oregon shipper has the choice of directing lumber either to eastern markets or to California depending on product market conditions and transportation options. These forms of geographic competition were highly effective pre-merger and, with the BNSF PRA, will improve post-merger.

TRACKAGE RIGHTS ISSUES AND ALTERNATIVES.

Trackage Rights Are Operationally Feasible. Several parties, most notably Conrail and KCS, have argued that BNSF will face crippling operational obstacles in providing service over these trackage rights. They argue that BNSF's service will be subject to dispatching discrimination by applicants, that it will be hampered by going against the flow of the directional running of certain lines, that BNSF will lack sufficient SIT and other facilities to provide quality service, and that BNSF will lack the traffic density or sufficient incentive to operate these lines competitively. We believe that the CMA settlement agreement and other conditions that we have devised have effectively addressed the objections raised by those parties. The dispatching protocol, additional trackage rights permitting BNSF to participate in directional running, the availability of additional SIT facilities, and BNSF's ability to access additional traffic now under contract to UP or SP and to obtain transload and build-out traffic combine to ensure that these trackage rights will be a successful remedy.

We agree that the landlord's power to control dispatching is an important one, and we might have been reluctant to rely on trackage rights to solve a competitive problem over such a large area without assurances that dispatching would be conducted without discrimination against the tenant carrier. Applicants and BNSF, however, have agreed upon a detailed written trackage rights protocol that should ensure equal treatment of all trains without regard to ownership. Applicants note that the protocol ensures that each railroad can monitor in real time the handling of its trains by the other; stations tenant supervisory employees at the landlord's dispatching center; and, if a dispute arises, provides for dispute resolution procedures, prompt arbitration and sanctions. This protocol, together with our continuing oversight, should ensure that dispatching discrimination does not occur.

Concerns raised by KCS, Conrail and others that BNSF service will be going "against the flow" and will be using an inferior route from Houston to St. Louis are now moot due to applicants' agreement to give BNSF additional trackage rights to permit it to take advantage of the same directional running that applicants plan to use on parallel UP and SP lines between these points. Applicants have partially addressed concerns about the sufficiency of BNSF's SIT facilities by making available a large facility near Baytown, TX, and by agreeing to make other facilities available as necessary. We will impose an additional condition, discussed in detail below, requiring applicants to give BNSF access to all facilities formerly used by SP. BNSF also will have its own SIT facilities at Lafayette Yard in Louisiana, and at Cleveland and Silsbee, TX. Further, we note that BNSF has an outstanding rail network in the West, which fits very well with the additional service it will provide under these trackage rights. BNSF should be able to provide the necessary infrastructure to provide quality service--terminals, repair facilities, and information systems--at a reasonable cost.

Several parties have argued that BNSF will not be able to achieve sufficient traffic density to make these operations efficient, in part, because BNSF is only obtaining authority to serve 2-to-1 points, which, as we have explained, provide only a fraction of the total traffic on these lines. Despite this limitation, however, applicants have demonstrated that BNSF will be in a position to compete for a substantial amount of traffic, and BNSF has corroborated this. Overall, the BNSF agreement will permit BNSF to compete for $1.9 billion worth of traffic, much of which is unrelated to the particular competitive problems at issue. Of this total, BNSF will be able to compete for $795 million of traffic at points applicants identify as 2-to-1.

Given all of the protections set forth in the BNSF agreement (particularly the terms of the CMA agreement) and the additional conditions we are imposing, we believe that BNSF will be able to compete efficiently for this traffic.[150] As discussed elsewhere, some of these additional conditions expand the terms of the CMA agreement. For example, the CMA agreement requires applicants to open at least 50% of existing contract volume at 2-to-1 points in Texas and Louisiana to BNSF, and we will require that UP/SP similarly open at least 50% of existing contract volume at all other 2-to-1 points served by BNSF's trackage rights. Likewise, we are expanding the new facilities and transloading provisions. Even without our new conditions, applicants estimate that BNSF will be able to compete for nearly three-fourths of the 2-to-1 traffic now, and nine-tenths of it within a year of consummation. UP/SP-231, RVS Peterson, at 191-94.

As applicants note, BNSF has no sunk cost in these lines, and will share in the cost only to the extent of its usage. In this regard, the structure of the trackage rights fees is advantageous to a carrier attempting to gain a foothold in a new market. Also, where BNSF is replacing service formerly provided by UP or SP via reciprocal switching, it will only have to pay $130 per switch, or, if it prefers, it can provide the switching service itself. We conclude that all of these factors taken together should result in BNSF having sufficient traffic to make these operations run efficiently.

Many protestants have claimed that BNSF is generally unwilling or otherwise uninterested in providing all the service contemplated in the trackage rights arrangement. BNSF's counsel addressed this issue at oral argument, saying that "we also want to assure you that BN/Santa Fe is willing, able, and anxious to compete for this traffic to which it will gain access under these rights." Jones, Oral Arg. TR at 99. BNSF's counsel also explained that:

> [W]e put in substantial evidence showing that we think the densities are sufficient to permit the building of

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[150] Conrail's attempt to use the ALK diversion model to prove that BNSF will not have adequate traffic density is inherently flawed. Conrail applied an arbitrary penalty to traffic moving under trackage rights, which naturally resulted in less traffic being shown as divertible to BNSF. That study can be given no weight here.

> trains that will meet the customers' needs . . . The operating problems are actually quite manageable, and we are confident that we can compete for this traffic and that we can do so with very strong, vigorous competition. Id. at 106.

We agree with BNSF that it should have sufficient traffic for efficient operations and that it should have every incentive to take advantage of this new opportunity.

Nevertheless, as parties such as DOJ, DOT, and RCT[151] have pointed out, because so much depends upon BNSF's performance, we are imposing special conditions directed to this issue. As an initial matter, we expect BNSF to compete vigorously for the traffic opened up to it in this proceeding. Indeed, we will impose upon BNSF a common carrier obligation with respect to this traffic, including traffic that is handled under haulage rights rather than trackage rights.

Various parties have expressed concerns that BNSF may not immediately commence the trackage rights operations at issue. There are some indications that a start-up of all of these trackage rights operations on the date of consummation may not be physically possible. Nonetheless, we expect that as soon as reasonably practicable BNSF will begin trackage rights operations over the key corridors between Houston and New Orleans, between Houston and Memphis, and in the Central Corridor. A failure to conduct trackage rights operations in these corridors could result in termination of BNSF's trackage rights, and substitution of another carrier, or in divestiture.[152] BNSF will be required to submit a report on its progress in meeting these requirements and an operating plan on or before October 1, 1996, and further progress reports on a quarterly basis thereafter.

DOJ has predicted that our course of imposing trackage rights with monitoring rather than requiring divestiture will involve the Board deeply in further regulation of this matter. We are confident, however, that this will not be the case, and we are imposing these monitoring conditions to ensure that the conditions we are imposing to address competitive harm do so effectively. Moreover, as discussed elsewhere in our decision, divestiture certainly would involve the Board and the parties in further extensive regulatory proceedings.

We have examined the various major corridors over which BNSF will be providing service as a replacement for SP. As noted below, the operations that BNSF will undertake appear reasonable to meet its common carrier obligations. It also appears that BNSF should be able to attract sufficient traffic to provide efficient operations.

Houston to New Orleans. In the Houston-New Orleans corridor, BNSF plans to operate by exercising its option to acquire from applicants the line between Iowa Junction and

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[151] RCT's representative noted at oral argument that "[i]f BNSF fails to seriously and immediately compete on any of these trackage routes in Texas, damaging loss of competition will result." Williamson, Oral Arg. TR at 464.

[152] As applicants noted at oral argument, the Board "will have unrestricted power to impose additional conditions if appropriate" and "[t]hat would include divestiture . . . ." Roach, Oral Arg. TR at 59-60.

Avondale, LA,[153] and by using trackage rights between Iowa Junction and Houston and within the New Orleans Terminal. BNSF intends to provide new service for overhead expedited traffic, as well as for manifest traffic originating and terminating on the acquired segments. BNSF proposes to schedule and operate eight regular trains (four in each direction). One intermodal train pair will operate between California and New Orleans, accessing BNSF's newly acquired route near Beaumont. BNSF also will extend to New Orleans its existing train service that now terminates at Houston.

One daily manifest train pair will be scheduled between Temple, TX, and New Orleans handling through California traffic in both directions and bypassing the Houston terminal by using BNSF's Conroe Subdivision. This train also will connect with other trains handling Intermountain and Pacific Northwest traffic via the Fort Worth, TX, gateway.

BNSF's new route between New Orleans and West Coast locations, of which the New Orleans to Houston segment will be a vital link, will provide service that is competitive with the routes of UP/SP. In addition, these through trains will provide a significant benefit by enabling traffic originating or terminating at numerous points in Texas to receive this competitive service alternative.

A second manifest train will operate between Houston and New Orleans, allowing interchange of South Texas/Mexican traffic at Houston. In addition, BNSF will handle traffic to and from Lafayette, LA, and other intermediate points. Extra manifest and unit trains will be operated as needed, including trains that will be assembled at BNSF's yards at Temple and Teague, TX. RCT and other parties, relying on analysis by Crowley, allege that BNSF will be unable to attract sufficient traffic for efficient operations in the Houston/Gulf Coast area. Those computations ignore BNSF's current traffic base in the region. Where BNSF has had access to plastic and chemical shippers in the Houston region, it has been able to develop a 50% share of this business. BN/SF-54, VS Rose, at 4. But BNSF has been limited in its ability to attract a larger share of traffic in the area due to its absence of direct and efficient routes to key interchange points with the eastern railroads. With the trackage rights and purchase agreements included as part of this merger, BNSF now possesses the necessary direct routes to the eastern connections to allow it to be competitive for an even larger share of this market. Overall, the operations contemplated by BNSF should be sufficient to meet the needs of the shippers it will be serving in this corridor.

Houston to Memphis/St. Louis. BNSF will operate trackage rights over the Houston to Memphis/St. Louis route. The CMA agreement permitted two major improvements in BNSF's operations by allowing for BNSF trackage rights over applicants' lines between Houston and East St. Louis, and by permitting BNSF trains to operate along the same directional lines as applicants'

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[153] In UP/SP-266, applicants indicate that BNSF has concerns about this line it will purchase, and that applicants and BNSF will inspect the line prior to the closing of the sale and, if necessary, place $10.5 million of the purchase price in escrow pending arbitration regarding the condition of the line. The funds will be used to improve the line, if necessary, to bring it into compliance. UP/SP-266 at 7.

trains.[154] Thus, BNSF will be able to route its northbound trains over the UP lines, and its southbound trains over the SP lines.[155]

BNSF plans to run four trains daily (two in each direction) between Houston and Memphis/St. Louis. One pair would be scheduled between St. Louis and Houston for carload traffic. A second train pair would operate between Memphis and Houston for that traffic. These trains would connect with existing BNSF service at intermediate points such as Cleveland, TX, and Tenaha, TX, and to new service at Pine Bluff, AR.

Crowley (for NITL and other protestants) calculates that BNSF will have a market share of only 17.3% of the traffic at the 2-to-1 points that it will serve in this corridor, which we believe grossly understates the traffic that BNSF will attract. Crowley's calculation is based upon the unsupported and erroneous assumption that all traffic that originates and terminates on the new UP/SP merged system is simply "unavailable" to BNSF. Consequently, Crowley eliminates from consideration over two-thirds of the traffic at these 2-to-1 points. There is no reason for us to think that BNSF is going to be able only to compete for less than a third of the available traffic, when it has a route structure in the West comparable to UP/SP's, and when it has improved and comparable routings for connections to eastern railroads. Where BNSF has had access to markets in the Gulf region, it has been able to carve out a significant share of the available traffic, and we think that it will continue to do so under the broad trackage rights granted here.

Evidence of the importance placed by shippers on the quality of service in selecting a railroad is offered by IPC. IPC-10, VS McHugh, at 11-14. IPC states that reliability of service is equal to, if not more important than, the rate. Elements of service such as percentage of freight cars rejected for loading, provision of adequate freight cars, and variances from promised delivery dates are used by shippers to evaluate the quality of a railroad's service. The trackage rights and routes opened to BNSF will permit that carrier to provide quality service competition in these markets.

IPC has raised concerns that trains carrying its products would have to travel over an extremely circuitous route due to the directional running of the Houston-Memphis lines. This is incorrect. BNSF will have access to IPC at Camden and Pine Bluff through haulage agreements with applicants, permitting efficient movement of northbound BNSF traffic from these points to North

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[154] Originally, the BNSF settlement agreement provided that BNSF would operate all of its trains on the SP line between Fair Oaks, AR, and Houston. This arrangement would have caused northbound BNSF trains to meet applicants' southbound flow of 23 daily trains, which would have caused substantial delays to BNSF traffic. Extending BNSF's trackage rights from Memphis to East St. Louis has eased concerns of certain protestants over ensuring BNSF an efficient connection with Conrail at St. Louis.

[155] By obtaining these trackage rights between Houston and Memphis, BNSF will shorten that route by 462 miles, and its route between Houston and St. Louis by 125 miles. BN/SF-1, VS Owen, at 19.

Little Rock for placement in BNSF trains for movements to eastern connections as well as to other points on the BNSF system.[156]

Houston to Brownsville. BNSF will operate its Houston to Brownsville trackage rights to maintain competitive service to important stations such as Corpus Christi, Harlingen, and Brownsville, including interchange with Mexican carriers at Brownsville and interchange at Robstown with Tex Mex, for Mexican traffic via the Laredo gateway.

BNSF proposes to operate one through train daily between Houston and Robstown with a run-through block of Mexican traffic via Laredo, and a block of traffic to and from Corpus Christi. To effect efficient interchange with Tex Mex, a new connection will be required at Robstown. For traffic between Houston and Brownsville, BNSF will initially move traffic via haulage rights on UP/SP trains as provided for in the BNSF agreement.

KCS and Tex Mex have alleged that BNSF is uninterested in, or will be incapable of, providing competitive interline service for movements into Mexico over the Laredo gateway. Laredo is the principal rail gateway between the United States and Mexico. In 1994, 55% of the total U.S.-Mexican rail tonnage moved through Laredo.[157] This is due to its superior infrastructure, especially customs inspection facilities, and its location on the shortest route between many U.S. and Mexican origins and destinations.

Significant volumes of grain and other agricultural products, minerals, woodpulp, paper products, automobiles and auto parts, and other metals all move through the Laredo gateway. Much of this is bulk traffic moving long distances, and thus dependent on rail for competitive transport options.

Laredo is served directly by UP and by Tex Mex, a small railroad operator originally chartered in 1875. Tex Mex's 157-mile line runs from Laredo to Corpus Christi, where it connects with SP.[158] Tex Mex and SP together now provide the only competition to UP for traffic moving through Laredo. While UP has recently been carrying more than 75% of the Laredo traffic, the record shows that Tex Mex's presence has been effective in constraining UP's rates and service through this important international gateway.

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[156] See, generally, UP/SP-266.

As applicants explained at oral argument, this traffic would move promptly to North Little Rock in local trains. Roach, Oral Arg. TR at 74. The record shows that the routes between Camden and Pine Bluff and between Pine Bluff and North Little Rock are both in good condition, both have centralized traffic control, and both have ample sidings that will allow for efficient and timely movements for this shipper even in the face of train meets from the predominantly southbound traffic flow.

[157] Tex Mex states that the seven other gateways are at Calexico, Naco, Nogales, El Paso, Presidio, Eagle Pass, and Brownsville. Brownsville, Eagle Pass, and El Paso together handled over 40% of 1994 U.S.-Mexican rail tonnage.

[158] According to Tex Mex, almost three-quarters of its traffic in 1994 was bridge traffic (26,240 carloads) between points in the U.S. and Mexico handled through its connection with SP, and the remainder was derived from service provided to more than 30 shippers located on its line.

One element of the BNSF agreement is to preserve the competition to UP now offered by the Tex Mex/SP connection at Corpus Christi. BNSF's trackage and haulage rights over the UP line running from Houston to Brownsville will permit BNSF to serve all 2-to-1 points along that line, including a connection with Tex Mex near Corpus Christi (at Robstown).

While we have some reservations about BNSF's willingness and ability to attract sufficient traffic over the Laredo gateway, we have remedied this problem by giving Tex Mex trackage rights to permit it to gain additional traffic, as discussed below.

Houston to San Antonio/Eagle Pass. The BNSF agreement provides BNSF with trackage rights over UP's line between Waco and Smithville, TX (with a connection to the GTRR at Kerr, TX), connecting at Smithville with trackage rights over UP's line between Sealy and San Antonio. This upgrades BNSF's access to Eagle Pass, which has been via haulage rights on the SP route from San Antonio, obtained in a settlement in the BN/SF merger.

BNSF proposes to operate four through trains daily (two in each direction) in this corridor. One expedited train pair would be scheduled between Kansas City, MO, and Eagle Pass using trackage rights south of Temple, TX, handling traffic to and from San Antonio. A second train pair would be scheduled to operate between Houston and San Antonio carrying Eagle Pass traffic to connect with the Kansas City-Eagle Pass train at Smithville (or at an alternate location between Smithville and San Antonio). Unit trains, including GTRR aggregate trains and Lower Colorado River Authority (LCRA) coal trains would operate also over these lines as traffic develops.

Overall, this operating proposal appears reasonable, although some concerns have been raised about whether there will be sufficient traffic density to allow efficient service. This depends largely on whether shippers will be willing to use a Mexican gateway other than Laredo or Brownsville to move significant volumes of Mexican import/export traffic.

Central Corridor. Several parties have expressed concerns about the competitive effectiveness of BNSF service under the BNSF agreement over the Central Corridor. They argue that BNSF will lack the incentive to provide effective competition, and will not have sufficient traffic density to provide efficient service over this line. Specifically, these parties argue that, because BNSF already has its own transcontinental routes (the Northern and Southern Corridors) BNSF will lack the incentive to provide vigorous competition with UP/SP in the Central Corridor. They also contend that BNSF's route will be an inferior one. None of these arguments has merit. As we will explain, the BNSF agreement makes possible a very efficient and much improved route for BNSF, and with the additional conditions that we are imposing, BNSF should have more than enough traffic to provide efficient service.

Although BNSF does have other transcontinental routes, this new route will provide it important new efficiency advantages. BNSF's new route, the well-maintained Amtrak route from Chicago to Oakland, will be substantially better than the SP route it replaces. It includes: (1) BNSF's high-speed mainline from Chicago to Denver; (2) the SP (DRGW) Moffat Tunnel route through the Rockies, which is much faster than SP's Tennessee Pass route; and (3) the most direct route from Salt Lake City to Oakland. BNSF will easily improve on SP's current transit times, while providing essential competitive service to intermediate points such as URC coal interchanges, Provo, Salt Lake City, and Reno.

Despite these efficiencies, Crowley argues that BNSF will move only 29,699 loaded cars a year, enough to justify only 1.08 loaded trains per day. We believe, however, that BNSF's estimate of 90,619 loaded cars a year and two to five through trains per day is more accurate. As BNSF explains, its traffic will be made up of several different components, including traffic at 2-to-1 points, existing BNSF traffic that will be shifted to improved routings made possible by the trackage rights segments, and new overhead business made possible by these routes as well. Applicants point out that Crowley's diversion estimates exclude substantial amounts of 2-to-1 traffic that will in fact be available to BNSF, while ignoring new traffic opportunities made possible by these new routes or BNSF's recent merger.

A basic deficiency in Crowley's study is that he treated much of applicants' existing traffic as captive and not available to BNSF, even though it moves to competitive points. Applicants explain that Crowley fails to adjust for the fact that the Waybill Sample reflects certain traffic to be originated or terminated by UP or SP when it was actually rebilled over a gateway or moving to a transit point. Applicants note that BNSF will be able to compete for all of this traffic.[159]

Applicants correctly note that Crowley failed to consider BNSF's opportunities to capture traffic that moves to or from points that both BNSF and UP or SP serve today. Protestants also left out large volumes of Chicago-Bay Area conventional intermodal traffic that BNSF will handle over its Denver-Oakland rights (BNSF already runs two trains per day of this traffic from Chicago to Denver, and will extend those trains to Oakland).

Protestants also understate the effects of BNSF's rerouting and new marketing opportunities. Crowley predicts only 2,864 loaded cars per year, but applicants' estimate of 6,676 seems more plausible.[160] BNSF also will be able to compete for $994 million of new traffic.[161]

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[159] Some of the biggest movements originating and terminating at 2-to-1 points in the Central Corridor involve traffic where eastern and western carriers separately bill their customers. Because the Waybill Sample divides these movements, Crowley mistakenly reflects these highly competitive movements to and from the Northeast as originated or terminated by UP and SP at gateways such as Chicago, and not divertible to BNSF.

[160] BNSF will be able to improve routings for substantial traffic flows to and from Omaha, Denver, and the Twin Cities, and for Western Nebraska grain, and South Dakota bentonite. BNSF will save substantial mileage on movements of forest products from Northern California and Southern Oregon to the Midwest, on movements of beer from its exclusively served Coors facility in Golden, CO, to California distributors, and for movements of wine from Modesto to the Twin Cities. BNSF will save approximately 350 miles for numerous Northern California movements to and from Colorado and nearby states now moving via BNSF's Southern Corridor mainline.

[161] This includes Nebraska grain moving to feedlots in California; South Dakota and Wyoming bentonite moving to the West Coast; Southern California-New Orleans intermodal traffic and intermodal traffic moving between points like Omaha or the Twin Cities and Northern California. For example, UP grain marketing personnel projected that BNSF would be able to ship 1,500 cars per year of Nebraska grain to Central California receivers. BNSF

(continued...)

In sum, BNSF will gain a very efficient and much improved route in the Central Corridor and, along with conditions we are imposing, should have the incentive to compete vigorously with UP/SP. Moreover, BNSF's operations should have sufficient density to permit effective competition in the Central Corridor. Protestants have vastly understated the traffic for which BNSF will be able to compete, and have overlooked BNSF's ability to integrate the new routes into its existing system. A realistic view of the markets at issue makes it apparent that BNSF will be able to bid for more than enough traffic to justify aggressive operations in the new corridors to which the BNSF agreement would give it access. Finally, the 5-year annual oversight by the Board will provide an orderly mechanism for shippers to raise any concerns.

Trackage Rights Compensation Is Reasonable. Numerous protestants have argued that the trackage rights compensation to be paid by BNSF to UP/SP is too high to allow BNSF effectively to replace the competition that will be lost at 2-to-1 points after SP is absorbed into UP. After thoroughly examining these rates, we find that applicants' fees of 3.0 to 3.1 mills[162] per gross ton-mile are well within a reasonable level.[163] DOJ's argument that the compensation should be restructured so that part of it is paid by BNSF as a capital contribution, rather than a return on value, is also without merit.

The Level of the Payments. We will not disapprove trackage rights agreements negotiated in the merger settlement context unless their terms are shown to be unreasonable. Where compensation terms are seriously challenged, as here, we will examine them in light of the principles in SSW Compensation. Trackage rights fees set under that method have included three components: (1) the variable costs to the landlord resulting from the tenant's use of the track; (2) a portion of the maintenance and operating costs on the relevant rail properties based on usage; and (3) a return element on the value of the rail properties based on usage. We have thoroughly examined the trackage rights compensation levels challenged here, and we conclude that, because the agreed levels are lower than we would set under SSW Compensation, they are reasonable.

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[161](...continued)
has numerous grain unit-train loading sites in Nebraska, often near UP's lines. Given that all grain is trucked to rail loading points, and at destination is trucked from unloading points to poultry feedlots, UP projected that BNSF will be able to develop a presence in this market, even though the 1994 Waybill Sample shows similar grain movements as moving between exclusively-served UP/SP points at both ends.

[162] A fee of 3.48 mills will apply to one high-maintenance cost segment between Keddie/Stockton and Richmond, CA, for intermodal and carload traffic.

[163] Under new 49 U.S.C. 11324(c), the Board is required to approve the operating terms and level of compensation for trackage rights imposed in the merger context. Although that post-application statutory amendment is not technically applicable here, it would not change the outcome because the operating terms and fees here are clearly reasonable.

As a threshold matter, Crowley[164] argues that a trackage rights tenant should not have to pay any return element on the rail property used, but should be charged no more than the landlord's "below the wheel" variable costs. He calculates this level to be 1.48 mills per gross ton-mile. We will adhere to the ICC's consistent position in SSW Compensation, which has been affirmed by the D.C. Circuit Court of Appeals, that trackage rights fees will allow landlord and tenant to compete on an equal basis only where the tenant is allocated an appropriate share, based on usage, of the total costs. See, e.g., BN/Santa Fe, slip op. at 90-91.

Recognizing that our well-established standards require inclusion of a return element based on market value, Crowley also develops a fee of 1.8 mills per gross ton-mile based on the fair market value of SP's roadway assets. Although Crowley's method is similar to our capitalized earnings method, there are several significant errors in his approach that make his calculation totally unreliable.[165] Because there is no recent purchase price to establish UP's market value, he has used the purchase price of SP alone to calculate a value for both UP's and SP's lines. But this significantly understates the value of the investment base because a substantial portion of the trackage rights at issue run over UP's lines,[166] which tend to be in much better-maintained condition, and of higher value, than SP's lines. Next, Crowley computes the present value of the track investment base as depreciated to zero over 32 years. This too understates the real costs because UP/SP will be required constantly to replace capital as its lines deteriorate. Finally, Crowley uses the wrong interest rate, an after-tax cost of capital, despite the fact that the ICC consistently found that the pre-tax cost of capital should be used to reflect the cost of income taxes. These errors result in a substantial understatement of the investment base, and thus of the return element.

Applicants demonstrate that, if Crowley's errors (other than his use of just SP property) were corrected, the capitalized earnings method would yield a rate of 3.84 mills per gross ton-mile. This includes a return element of 2.40 mills per gross ton-mile, which would be the correct number if all the properties were the less expensive SP properties, rather than a mix of SP and UP properties. Applicants correctly use URCS to develop UP/SP's system average operating and maintenance costs, which they calculate to be 1.44 mills per gross ton-mile.[167] This would yield total compensation of 3.84 mills (2.40 mills + 1.44

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[164] Although for convenience we will refer to Crowley's testimony on behalf of WCTL, our discussion responds to comments he has submitted on behalf of numerous parties.

[165] Crowley's computation of the operating and maintenance cost portion of the formula is also wrong because Crowley includes only the tenant's share of the variable portion of operating and maintenance costs rather than its share of those full costs.

[166] Under the original BNSF agreement, BNSF would operate over approximately 1,727 miles of trackage rights over UP lines, and 2,241 miles over SP lines.

[167] URCS costs will understate the actual maintenance expenses UP/SP will incur on the SP lines. Because URCS is derived from historical costs for 1990 through 1994, it reflects the relatively lower maintenance activity by SP.

mills) per gross ton-mile, which is substantially higher than the 1.8 mills Crowley developed, and, more importantly, much higher than the 3.0 to 3.1 mills per gross ton-mile that BNSF has agreed to pay.[168]

In addition, UP/SP has agreed to allow BNSF an option to elect to use, a formula under which BNSF would pay a share, based on usage, of UP/SP's actual total maintenance and operating expenses, taxes, and an interest rental based on depreciated book value of the segment used times the current pre-tax cost of capital.[169] That alternative approach, which is similar to SSW Compensation, though more generous to the tenant, may result in even lower fees to BNSF. The availability of this option provides additional assurance that the fees are not unreasonably high, and that they will permit BNSF to compete effectively.[170]

Structure of the Payments. DOJ again argues, as it did in BN/SF, that, because the fees are 100% variable, BNSF will be constrained in its ability to compete with UP/SP.[171] DOJ claims

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[168] WCTL and WSC attempt to show that the fees agreed to by BNSF are excessive when compared to those in other agreements between UP and SP. We agree with applicants that none of these agreements is comparable. See UP/SP 231, RVS Rebensdorf, at 14-30. For example, one of the compared agreements required a capital contribution by the tenant, which this one does not. Others pertained to switching and terminal operations and industrial spurs, operations generally unlike those at issue here.

Applicants' witness Kauders also demonstrates that total compensation per gross ton-mile would be 8.32 mills under the annuity method and 9.05 mills under the replacement cost new less depreciation method, the two alternatives to capitalized earnings under the SSW Compensation standard that are used when fair market value is not available.

[169] Applicants have also improved the method by which the charges are updated each year. Originally, the index was to be 70% of the RCAF, unadjusted for productivity. Certain protestants wanted to use the RCAF, adjusted for productivity. UP/SP has agreed to use actual maintenance related expenses, rather than using an index at all. This reflects costs more accurately.

[170] KCS argues that BNSF will have to pay reciprocal switching charges at certain origin or destination points for SP-served shippers. But the number of situations where switching is required will not increase, and may decrease. Moreover, SP's level of reciprocal switching charges will fall significantly. Amendments to the operating agreements now allow BNSF to select: (1) switching by UP at a maximum switching charge of $130 (reduced from approximately $495) at both 2-to-1 points and non-2-to-1 points; or (2) direct service by BNSF, or a third party with UP/SP's concurrence.

KCS also argues that BNSF's costs should be increased by 77% for "additional charges" it assumes will be assessed by UP/SP, but applicants have shown that there will be no additional charges to BNSF other than those specified in the BNSF agreement. We note that these charges pertain to the first of the three components of trackage rights fees discussed in SSW Compensation.

[171] DOT and MRL also raise this argument, although to a lesser extent.

that competition will force rates down to variable cost levels, and that, because UP/SP's variable costs will always be much lower than BNSF's, it will always be able to offer lower rates and obtain all of the traffic. DOJ's argument reflects a basic misunderstanding of the relative importance of trackage rights fees in BNSF's overall cost of service, and of rail pricing in general.

As the ICC explained in rejecting DOJ's approach in BN/SF, slip op. at 90-91:

> Placing the tenant in the same economic position as the landlord suggests that it might be appropriate to break up the rental charge into similar constant and variable components, or to ask the tenant to make a lump sum contribution to capital. But potential tenants may have difficulty in making such capital contributions, and a 100% variable rental charge reduces risks for the tenant railroad, which may not have experience participating in that market . . . .

As is true of any investment, no prospective trackage rights tenant would agree to make a capital contribution unless it believed it could recover that cost through the rates it charges to shippers on that line. No railroad would invest in rail properties, through trackage rights or through purchase of divested rail lines, if it anticipated revenue that only covered its variable costs.[172] Only by pricing above their variable (or marginal) costs can railroads recover all their costs and achieve adequate revenues.[173]

The only markets in which railroads tend to price their services down to their total variable costs are those where motor carriage is extremely competitive. Those markets are not of concern in the rail merger context because rail competition is relatively unimportant in such markets in comparison to the overall competitive picture. And because railroads need to return their joint and common costs to replace their road bed and track structure as these items deteriorate, they cannot long continue to provide service in such markets. The issue of how the fees are structured is ultimately a red herring because railroads generally must price significantly above their variable costs in order to return their joint and common costs and continue to compete.

Even if we were to assume that variable cost is the only relevant cost for rail ratemaking purposes, protestants still have not shown that BNSF would be at a disadvantage here. Protestants compare BNSF's trackage rights fee with the lower "below the wheel" variable costs that UP/SP will experience, and they argue this proves BNSF will have a substantial variable cost disadvantage. This comparison is extremely misleading because the costs protestants focus on are just a small portion of the total variable costs that BNSF will experience for any particular movement. Overall, BNSF's variable costs are likely to be lower

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[172] Railroading exhibits economies of scale, scope, and density that lead to declining average cost levels, so that costs attributable to any movement are below average costs.

[173] See, generally, Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 526-528 (1985), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3rd Cir. 1987).

than were SP's, and certainly low enough to allow it to compete effectively with UP/SP.[174]

Conditions Imposed.

Criteria for Imposing Conditions. The various conditions requested by parties involve the exercise of our conditioning power under section 11344(c) as part of any approval of the application.[175] Section 11344(c) gives us broad authority to impose conditions governing railroad consolidations. Because conditions generally tend to reduce the benefits of a consolidation, they will be imposed only where certain criteria are met. UP/MKT, 4 I.C.C.2d at 437.

We will adhere to the criteria for imposing conditions set out in UP/MP/WP, 366 I.C.C. at 562-65. Conditions will not be imposed unless the merger produces effects harmful to the public interest (such as a significant loss of competition) that a condition will ameliorate or eliminate. A condition must also be operationally feasible, and produce net public benefits. We are also disinclined to impose conditions that would broadly restructure the competitive balance among railroads with unpredictable effects. See, e.g., SF/SP, 2 I.C.C.2d at 827, 3 I.C.C.2d at 928; and UP/MKT, 4 I.C.C.2d at 437.

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[174] The "below the wheel" variable costs included in the trackage rights fees relate only to the expense of ownership and maintenance of running track and structures. These costs account, on average, for only about 17% of the total variable costs of western railroads. Thus, at most, a small component of BNSF's total variable costs will be higher than SP's for the trackage rights portion of a given movement. But BNSF is a very efficient carrier, and its remaining variable costs of operating its trains over the trackage rights segment should be lower than SP's comparable costs.

Moreover, BNSF will be operating over its own lines for a substantial portion of any given movement from origin to destination, and for that portion of the movement, trackage rights fees are irrelevant. For those portions of the movements, BNSF's variable costs will also tend to be lower than were SP's. We conclude that, even if we viewed this issue from the perspective of variable costs alone, BNSF would likely be in a better position to compete than was SP. See UP/SP-260 at 26-27.

DOJ asserts that applicants' focus on a comparison of BNSF's and SP's total operating costs is misplaced, claiming:

> In effect, Applicants argue that the Board may impose a tax --in the form of higher trackage rights fees than necessary to reimburse the landlord for the trackage costs-- on any replacement railroad whose current operating costs are lower than SP's current operating costs.

DOJ-14 at 31. "Imposing a tax" is an odd phrase to use to describe a compensation arrangement that has been mutually agreed to by applicants and BNSF, and which we have found to be lower than the compensation we would have set if the parties had not come to an agreement. This beneficial arrangement can hardly be called a tax on BNSF's efficiency.

[175] The responsive applications filed by CMTA, MRL, Entergy, Tex Mex, WEPCO, and MCC's rail affiliates are not independent applications.

A condition must address an effect of the transaction. We will not impose conditions "to ameliorate longstanding problems which were not created by the merger," nor will we impose conditions that "are in no way related either directly or indirectly to the involved merger." Burlington Northern, Inc.--Control & Merger--St. L., 360 I.C.C. 788, 952 (footnote omitted) (BN/Frisco); see also UP/CNW, slip op. at 97.

While showing that a condition addresses adverse effects of the transaction is necessary to gain our approval for imposition of a condition, it is by no means sufficient. The condition must also be narrowly tailored to remedy those effects. We will not ordinarily impose a condition that would put its proponent in a better position than it occupied before the consolidation. See UP/CNW, slip. op. at 97; Milwaukee--Reorganization--Acquisition by GTC, 2 I.C.C.2d 427, 455 (1985) (Soo/Milwaukee II).[176]

BNSF agreement. For many shippers throughout the West, the various rights provided for in the BNSF agreement will ameliorate the competitive harms that would be generated by an unconditioned merger. We therefore impose as a condition the terms of the BNSF agreement, by which we mean the agreement dated September 25, 1995, as modified by the supplemental agreement dated November 18, 1995, and as further modified by the second supplemental agreement dated June 27, 1996.[177]

CMA agreement. Although applicants have not asked that approval of the merger be made subject to the CMA agreement, because we find that the CMA agreement is largely tied to the BNSF agreement and its provisions are necessary to ameliorate competitive harm, we impose as a condition the terms of the CMA agreement. Many of the pro-competitive provisions of the CMA agreement require amendments to the BNSF agreement, and are reflected in the second supplemental agreement dated June 27th; other such provisions do not require amendments to the BNSF agreement.

Broad-based Conditions. As we have previously discussed, we are imposing a number of broad-based conditions that augment the BNSF agreement to help ensure that the BNSF trackage rights will allow BNSF to replicate the competition that would otherwise be lost when SP is absorbed into UP.

New facilities and transloading facilities. The BNSF agreement, as amended by the CMA agreement, grants BNSF the right to serve any new facilities located post-merger on any SP-owned

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[176] If, for example, the harm to be remedied consists of the loss of a rail option, any conditions should be confined to restoring that option rather than creating new ones. See Soo/Milwaukee II, 2 I.C.C.2d at 455; UP/MP/WP, 366 I.C.C. at 564. Moreover, conditions are not warranted to offset competitors' revenue losses. BN/Frisco, 360 I.C.C. at 951.

[177] As we already have discussed, in imposing the BNSF agreement as a condition to this merger, we will require applicants to honor *all* of the amendments, clarifications, modifications, and extensions thereof described in: (1) the April 18th CMA agreement (UP/SP-219); (2) the April 29th rebuttal filings (UP/SP-230 at 12-21; UP/SP-231, Part C, Tab 18 at 5-11; see also UP/SP-260 at 8-9, summarizing the clarifications and amendments described in the April 29th rebuttal filings); (3) the June 3rd brief (UP/SP-260 at 23 n.9); and (4) the June 28th filing that accompanied the second supplemental agreement (UP/SP-266 at 3).

line over which BNSF receives trackage rights in the BNSF agreement. The BNSF agreement further provides, however, that the term "new facilities" does not include expansions of or additions to existing facilities or load-outs or transload facilities. We require as a condition that this provision be modified in two respects: first, by requiring that BNSF be granted the right to serve new facilities on both SP-owned and UP-owned track over which BNSF will receive trackage rights; second, by requiring that the term "new facilities" shall include transload facilities, including those owned or operated by BNSF.

Build-in/build-out options. The CMA agreement provides a post-merger procedure by which a CMA member can raise a claim that the merger deprived it of a build-in/build-out option. We require as a condition that this procedure be modified in two ways: first, by making this procedure applicable to all shippers; second, by removing the time limit to which this procedure is subject. These modifications will allow BNSF to replicate the competitive options now provided by the independent operations of UP and SP. We further clarify that a shipper invoking this procedure need not demonstrate economic feasibility; the only test of feasibility is whether the line is actually constructed. Any technical disputes with respect to the implementation of this build-in/build-out remedy may be resolved either by arbitration or by the Board.

Opening contracts at 2-to-1 points. The CMA agreement provides that, immediately upon consummation of the merger, applicants must modify any contracts with shippers at 2-to-1 points in Texas and Louisiana to allow BNSF access to at least 50% of the volume. We require as a condition that this provision be modified by extending it to shippers at all 2-to-1 points incorporated within the BNSF agreement, not just 2-to-1 points in Texas and Louisiana. The extension of this provision to all 2-to-1 points will help ensure that BNSF has immediate access to a traffic base sufficient to support effective trackage rights operations.

Oversight. We impose as a condition to approval of this merger oversight for 5 years to examine whether the conditions we have imposed have effectively addressed the competitive issues they were intended to remedy. We retain jurisdiction to impose additional remedial conditions if, and to the extent, we determine that the conditions already imposed have *not* effectively addressed the competitive harms caused by the merger.

We require as a condition that applicants submit on or before October 1, 1996, a progress report and implementing plan regarding their compliance with the conditions to this merger, and further progress reports on a quarterly basis.

As we have discussed earlier, we expect that BNSF will compete vigorously for the traffic opened up to it by the BNSF agreement and have imposed upon BNSF a common carrier obligation with respect to this traffic.[178] We further require that BNSF submit a progress report and an operating plan on or before

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[178] Again, we emphasize that BNSF, as soon as reasonably practicable, must begin trackage rights operations over the key corridors between Houston and New Orleans, between Houston and Memphis, and in the Central Corridor. A failure to conduct trackage rights operations in these corridors could result in termination of BNSF's trackage rights, and substitution of another carrier, or in divestiture.

October 1st of this year, and further progress reports on a quarterly basis thereafter.

We plan to initiate a proceeding at the end of the first year, on or about October 1 1997, seeking comments from interested parties on the effects of the merger and implementation of the conditions. The competition provided by BNSF will be one of the key matters to be considered in the oversight proceeding. If circumstances warrant, a proceeding may be held prior to October 1, 1997. Subsequent proceedings will be scheduled as needed.

South Central Lines/SP East.

NAFTA/Grain: Tex Mex. We are particularly sensitive to our responsibility to ensure that this merger will foster the goal of North American economic integration embodied in NAFTA. After all, our regulatory powers are derived from the "Commerce Clause" of our nation's constitution,[179] which, in a very real sense, has resulted in the creation of a "free trade zone" within these United States, leading to our emergence in this century as an economic superpower.

NAFTA now has the potential to contribute to the economic growth and prosperity of the United States, Mexico, and Canada. Mexico, in particular, holds great promise as a market for our agricultural and other products. As USDA explained, "[u]nder NAFTA, Mexico is expected to be an important growth market, especially for grains and oil seeds produced in the midwest and plains states. Affordable rail rates and access to service are critical."[180]

The BNSF agreement should preserve shippers' competitive alternatives at the Brownsville border crossing, and should enhance them at Eagle Pass by upgrading BNSF's access from haulage to trackage rights. But Tex Mex and its supporters have raised legitimate concerns that, absent a grant of Tex Mex's responsive application, the merger could result in a reduction in competition at Laredo, the most important U.S.-Mexican rail gateway.

Specifically, Tex Mex has proposed that we grant it trackage rights that would permit it to connect with KCS at Beaumont via Houston. Tex Mex notes that, except for a small segment of UP track running from Robstown to Placedo, the routing proposed by Tex Mex would not overlap with BNSF's trackage and haulage rights from Houston to Brownsville, and thus it would not unduly interfere with BNSF's new operations. Tex Mex envisions its proposed trackage rights as an addition to those competitive safeguards contained in the BNSF agreement, and not as a replacement.

Tex Mex has offered a number of arguments in favor of its proposal. First, it suggests that all the U.S.-Mexican gateways should be viewed as a single market now served by UP, SP, and BNSF, and that the reduction from three railroads to two brought about by the merger is an unacceptable loss of competition that

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[179] Article I, Section 8, states in part:

> The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . . .

[180] Dunn, Oral Arg. TR at 240.

cannot be remedied through any condition relying on BNSF, which is one of the three.

We must reject this argument. In SF/SP, the ICC determined that there was no all-Mexican-gateway market, and that Laredo clearly occupied a position of separate and surpassing economic significance. SF/SP, 2 I.C.C.2d at 797. We reaffirm that finding here, but also acknowledge that, as BNSF has explained, this does not mean that the Mexican gateways are completely independent. BN/SF-59 at 31 n.12.

Further, Tex Mex acknowledges that, in 1994, BNSF handled only 3% of all U.S.-Mexican rail traffic at the border.[181] TM-39 at 36. Even if there were a single market for U.S.-Mexican movements by rail, BNSF's extremely limited presence prior to this merger would hardly make this a 3-to-2 situation, much less one that calls for remedial conditions.[182]

Tex Mex has raised other arguments that we find more persuasive. It is concerned that the merger will diminish its traffic base to the point where it is unable effectively to preserve a second competitive routing at Laredo, and that the merger might endanger the essential service it provides to the more than 30 shippers located on its line.

The 8.8% of current Tex Mex traffic originated at points served exclusively by SP is likely to shift to the new and efficient UP/SP single-line route into Laredo created by this merger. Another 31% of Tex Mex traffic now originates at or moves through 2-to-1 points on SP. BNSF will have access to this traffic via the BNSF agreement. Applicants' traffic study shows all this traffic moving via a BNSF/Tex Mex routing into Laredo. As we have explained elsewhere, the BNSF agreement will permit BNSF effectively to replace the competition that will be lost when SP is absorbed into UP, and thus protect shippers at 2-to-1 points from facing higher prices or deteriorated service. This does not mean that BNSF will be able to retain all the traffic now carried by SP when BNSF's competition is the newly merged and more efficient UP/SP, which may choose to offer shippers lower rates or better service than offered by either UP or SP today.

Further, for this 2-to-1 traffic, and for the 34.2% of 1994 Tex Mex traffic carried via a Tex Mex/SP/BN or SF interline

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[181] This market share will likely rise. The BNSF agreement will extend BNSF's presence for handling Mexican traffic. Its haulage rights to Eagle Pass will be converted into trackage rights, and, as noted previously, it will have new trackage and haulage rights over the UP line into Brownsville.

[182] Our finding that this is not a 3-to-2 situation is corroborated by the testimony of Tex Mex's own witness, Grimm, who argues that this would remain a 2-to-1 situation even after implementation of the BNSF agreement:

> In the market for rail transportation between the United States and Mexico, therefore, the effects of the merger will be much closer to a 2-to-1 reduction than a 3-to-2 reduction. Although BNSF will be a theoretical competitor, it will be a very minor and ineffective one.

TM-23 at 122.

movement,[183] the BNSF agreement has created a new potential single-line movement for BNSF into Mexico via Eagle Pass. As RCT explains:

> [W]ere it not for the fact that Laredo currently enjoys a competitive advantage over the other gateways to Mexico because there is a larger infrastructure of customs brokers located at Laredo than at the other gateways, there would be little or no incentive for BN/SF to route traffic via TexMex. Certainly, there is no reason to assume that BN/SF would deliberately route unit trains of grain in joint-line service with TexMex via Laredo when it will have a comparatively direct shot in single-line service at Eagle Pass. Given the admitted concentration of BN/SF's traffic from the grain belt and the Pacific Northwest and the industrial Midwest, it is only logical to assume that BN/SF would favor the less circuitous, single-line routing via Eagle Pass.

RCT-7 at 22-23.

We are persuaded that a partial grant of Tex Mex's responsive application is required to ensure the continuation of an effective competitive alternative to UP's routing into the border crossing at Laredo. Further, as noted by Volkswagen of America:

> [E]conomical access to international trade routes should not be jeopardized when the future prosperity of both countries depends so strongly on international trade.

TM-39 at 15.

Tex Mex has offered an effective rebuttal to applicants' and BNSF's claims that the BNSF agreement is sufficient to preserve competition at Laredo:

> If Applicants are right that BNSF will be better for Tex Mex than SP and that the route Tex Mex seeks will be inferior to BNSF's route, then granting Tex Mex's application would have little adverse impact on Applicants or BNSF, because little traffic would move over Tex Mex's trackage rights.

TM-39 at 5.

Finally, we note that applicants and BNSF have raised legitimate concerns over Tex Mex's request that it have unrestricted access to interline with other carriers along its trackage rights route. Tex Mex has conceded this point, explaining:

> An incidental competitive benefit of granting the rights Tex Mex seeks is that Tex Mex could carry some

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[183] Tex Mex notes that nearly all of the 1994 traffic it received in interline movements with BN or SF has disappeared because of a $300 per car surcharge imposed by BN and SF (and continued by BNSF) on all grain cars originating on BNSF destined for Laredo. TM-39 at 9. BNSF has explained that this was due to service problems and poor turnaround times for these cars by SP, which would be eliminated with the rights it receives under the BNSF agreement.

> shipments between Beaumont and Houston that had no prior or subsequent rail movement south of Houston. This, however, would be a relatively minor benefit, and it was certainly not a central purpose of the application . . . . [The Board] could limit the rights granted to exclude Tex Mex from carrying shipments between Houston and Beaumont that have no prior or subsequent movement by rail south of Houston.

TM-34 at 7. Although we have accepted Tex Mex's arguments that it may need to replace traffic it will lose via the merger in order to preserve competition at Laredo, the trackage rights we are granting here may only be used in conjunction with traffic that moves on the Tex Mex.

We are therefore granting Tex Mex the trackage rights sought in its Sub-No. 13 responsive application and in its Sub-No. 14 terminal trackage rights application, restricted in both instances to the transportation of freight having a prior or subsequent movement on the Laredo-Robstown-Corpus Christi line. These trackage rights will be effective on the effective date of this decision.[184]

With respect to the precise details of the Sub-No. 13 trackage rights, we will allow Tex Mex and UP/SP an opportunity to reach an agreement, and we will require these parties to submit, within 10 days of the date of service of this decision, either agreed-upon terms respecting implementation of the Sub-No. 13 trackage rights or separate proposals respecting such implementation. We realize that 10 days is a short time frame, but it will enable us, if necessary, to choose the better of the offered alternatives, or some variation thereof, prior to the effective date of this decision. We wish, however, to emphasize that, even if certain details respecting the Sub-No. 13 trackage rights cannot be resolved prior to the effective date of this decision, these trackage rights will nevertheless become effective on that date. If the terms of compensation have not been resolved prior to the effective date, compensation will accrue from the actual date of the start of trackage rights operations, and will be payable after terms have been established. We note that, if we are required to prescribe the Sub-No. 13 compensation terms, we will look to the terms and conditions in the BNSF agreement as well as to the principles announced in the SSW Compensation cases.

With respect to the precise details of the Sub-No. 14 trackage rights, we will allow Tex Mex and HB&T an opportunity to reach an agreement, and we will require these parties to submit, within 10 days of the date of service of this decision, either agreed-upon terms respecting implementation of the Sub-No. 14 trackage rights or separate proposals respecting such implementation. The 10-day time frame, as previously noted, will enable us, if necessary, to choose the better of the offered alternatives, or some variation thereof, prior to the effective date of this decision. We wish, however, to emphasize that, even if certain details respecting the Sub-No. 14 trackage rights cannot be resolved prior to the effective date of this decision, these trackage rights will nevertheless become effective on that

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[184] The Sub-No. 14 application is unopposed, and an extended discussion with respect thereto is therefore unnecessary. We find that the use by Tex Mex of the HB&T terminal facilities at issue in the Sub-No. 14 docket is practicable and in the public interest, and will not substantially impair HB&T's ability to handle its own traffic. See 49 U.S.C. 11103(a).

date. If the terms of compensation have not been resolved prior to the effective date, compensation will accrue from the actual date of the start of trackage rights operations, and will be payable after terms have been established. We note that, if we are required to prescribe compensation terms, we will apply the principles for compensation in condemnation proceedings. 49 U.S.C. 11103(a) (third sentence); UP/MP/WP, 366 I.C.C. at 576 n.114.[185]

Plastics/Chemicals: SIT/Lake Charles/Dow/UCC. Plastic and chemical shippers located in the Gulf Coast area have raised a number of legitimate concerns over merger-related competitive harm that would not be effectively remedied by the BNSF agreement. Accordingly, we are imposing additional conditions to address these concerns. For example, we are imposing a condition that will broaden BNSF's access to SIT facilities in the area. For shippers located near Lake Charles, LA, we have crafted conditions that will permit KCS to offer an interline routing into St. Louis independent of applicants, and that will eliminate the restrictive destination conditions and "phantom" haulage charges that together would have unduly inhibited BNSF's ability to offer direct, competitive service to those shippers. Finally, we have ensured the continued availability of competitive build-out options for Dow at Freeport, TX, and UCC at Seadrift, TX, which are discussed in detail below under conditions requested by individual parties. Preserving the Dow build-out opportunity also will benefit numerous plastic and chemical shippers located along the Gulf Coast between Freeport and Texas City, TX, such as Quantum's plant at Chocolate Bayou.

Storage-in-Transit (SIT) Facilities. There is widespread agreement among the parties that SIT capacity is a critical element in service to the plastics industry. The use of railcars for storage allows plants to run at capacity and product to be readily available for prompt movement to various markets as market price and demand changes.[186] It has also proven to be a cost effective alternative to [illegible]cing in multiple silos as a means of storing up to 50 products while avoiding any possible problems with contamination. SPI's witness Ruple notes that "(w)hile the percentage of resins utilizing storage varies, in general between 30% and 50% require storage." Id.

Prior to the merger, SP undertook a comprehensive analysis of storage requirements for plastics shippers in the Gulf Coast. According to SP:

> Plastic storage in the Gulf Coast impacts operations more than any other normal operating condition, with the only possible exceptions being locomotive/crew availability and scheduled track maintenance.

See SPI-11, Exhibit 14. Two-thirds of the plastics hopper cars require storage, and the mean storage duration at the time of the analysis was 45 days. Id.

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[185] Our pledge to apply condemnation principles in setting compensation fulfills the alternative requirement in the fourth sentence of 49 U.S.C. 11103(a) that compensation be "adequately secured" before commencement of terminal trackage rights operations.

[186] See, e.g., SPI-11, VS Bowles, at 3-4; and SPI-11, VS Ruple, at 15-17.

UP and SP currently enjoy 84% of the plastics hopper car storage capacity in the Gulf Coast.[187] To meet customer needs, SP committed to a new 3,000-car storage yard at Dayton, TX, strategically located near plastics resins production facilities.[188] The CMA settlement has made provision for BNSF access to Dayton Yard to supply some of the needed additional storage capacity. That agreement indicates that BNSF will have equal access to that facility. It also states that applicants will work with BNSF to locate additional facilities on the trackage rights lines as necessary.

These provisions are somewhat ambiguous, and various parties have criticized them as inadequate. We think that these provisions should be clarified and strengthened. We are therefore imposing the additional condition that the BNSF agreement be modified to require that BNSF shall have access to all SP Gulf Coast SIT facilities on economic terms no less favorable than the terms of UP/SP's access, for storage in transit of traffic handled by BNSF under the terms of the BNSF agreement.

Lake Charles, LA. A number of plastic and chemical shippers, including Montell, Olin, and PPG, operate plants located at three rail stations (Lake Charles, West Lake, and West Lake Charles) in the Lake Charles area of Louisiana. These plants have access to SP and KCS, and some have access to UP as well via haulage or reciprocal switching. But KCS must interline with UP or SP to provide efficient routings to the New Orleans, Houston, and St. Louis gateways. Thus, while these shippers now benefit from direct rail competition, an unconditioned merger would place all their efficient rail routings under applicants' control.

Paragraph 8 of the CMA Agreement amended the original BNSF settlement agreement to give BNSF the right to handle traffic of Lake Charles and West Lake shippers open to all of UP, SP, and KCS for traffic moving (a) from, to, and via New Orleans and (b) to or from points in Mexico via the Texas border crossings at Eagle Pass, Laredo, or Brownsville. On brief, applicants extended this relief to incorporate West Lake Charles traffic open to SP and KCS.[189]

We believe this to be an inadequate solution for these shippers. Any KCS routing to and from St. Louis or Chicago must still include a connection with applicants at Shreveport or Texarkana, giving applicants control of a "bottleneck" for these movements. Moreover, the key role of SIT facilities for plastics shippers further complicates this situation:

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[187] SPI witness Ruple identifies the following Gulf Coast SIT sites of UP, SP, and BNSF, respectively: UP, in Spring, TX (1520 spots), in Addis, TX (550 spots), and in Avondale, LA (350 spots); SP, in Dayton, TX (3000 spots), in East Baytown, TX (1200 spots), and in Beaumont, TX (250 spots); and BNSF, in Casey, TX (720 spots), and in Teague, TX (550 spots). In addition, he identifies the following non-Gulf SIT facilities: UP, in McGehee, AR (380 spots), and in Dupo, IL (350 spots); SP, in Pine Bluff, AR (250 spots), and in East St. Louis, IL (100 spots). See SPI-11, VS Ruple and Exhibits 7-9.

[188] See SPI-11, VS Ruple, at 15, and Exhibits 8, 14, and 18.

[189] See UP/SP-260 at 23, n.9.

> As much as 70% of a plant's output may be assigned initially to storage. . . Generally, it is only after the car has been in storage that its contents are sold and a delivery destination determined.

MONT-9 at 12. Because BNSF would only be able to handle shipments routed to certain destinations, and because the destinations are not known when the product moves to the storage point, a shipper could be forced to order a rail car returned from a storage point to its facility so that it could be transported by a different carrier.

To preserve existing competitive alternatives for shippers in the Lake Charles area, we will require applicants to modify the BNSF agreement in two ways. First, BNSF must be able to use its Houston-to-Memphis trackage rights to interline with KCS at Shreveport and Texarkana. This will have the principal effect of substituting a KCS-BNSF joint-line routing via Texarkana and Shreveport for the existing KCS-UP joint-line movement via Texarkana. Second, applicants must remove the (New Orleans and Mexico) geographic restrictions on direct BNSF service to Lake Charles, West Lake, and West Lake Charles shippers and permit BNSF to serve all destinations from these points. This will permit BNSF to offer SIT facilities for a full range of destinations, without which shippers might be hesitant to use BNSF services for any shipments requiring SIT.

Furthermore, we have one additional concern with the arrangements under which BNSF service will preserve competition for Lake Charles area shippers. Section 5b of the original BNSF settlement agreement, as amended by Section 4b of the second supplemental agreement dated June 27, 1996, reads in part as follows:

> In addition to all other charges to be paid by BNSF to UP/SP herein, at West Lake and West Lake Charles, BNSF shall also be required to pay a fee to UP/SP equal to the fee that UP pays KCS as of the date of this Agreement to access the traffic at West Lake, adjusted upwards or downwards in accordance with Section 12 of this Agreement.

Protestants have referred to this as a "phantom haulage fee." It appears to us that applicants are intending to charge BNSF a fee to access traffic at West Lake Charles, even though this location is not presently open to UP under haulage or switching and is served only by KCS and SP via jointly owned track. Further, the fee that UP currently pays to KCS at West Lake is compensation for reciprocal switching or haulage service performed by KCS. Elsewhere in the BNSF agreement, the parties have made arrangements for reciprocal switching and haulage charges. If applicants perform any switching or haulage in the Lake Charles region, then these are appropriate charges that should be assessed BNSF. It appears, however, that BNSF will have direct access to West Lake shippers when it begins to operate under its trackage rights arrangement, so that UP/SP may not be performing any switching or haulage service for BNSF in this area. Under these circumstances, we find it is unreasonable for applicants to impose any charge to BNSF at West Lake over and above the compensation for trackage rights unless they are performing an additional service. It is even more unreasonable for applicants to expand the scope of this fee to include West Lake Charles, which represents 93% of the Lake Charles area's rail traffic,[190] and where no switching or haulage is now performed and no fee is assessed. We will require applicants to modify the BNSF agreement to remove this fee.

Coal: Entergy/CPSB/TUE. We are imposing specific conditions crafted to preserve existing competitive alternatives for three coal shippers located along applicants' South Central lines. The details of each are discussed elsewhere under conditions requested by individual parties.

First, we have ensured the continued availability of a competitive build-out option for Entergy's White Bluff plant near Redfield, AR, which is now served exclusively by UP. BNSF will be permitted to substitute for SP if a connection is ever built linking the plant to a nearby SP line at Pine Bluff. (BNSF will be operating over this SP line via the trackage rights it will receive under the BNSF agreement.) Entergy will thus continue to have the option of building out to an independent carrier and will continue to be able to use this option in its negotiations with applicants.

Second, we are imposing a condition to maintain the pre-merger competitive status quo at CPSB's two plants at Elmendorf, TX. While these plants receive rail service at destination via a line owned by SP, UP is permitted to deliver coal to CPSB under trackage rights that have been granted by SP to CPSB. BNSF will be permitted to substitute for UP by using the CPSB trackage rights to deliver shipments to the plants.

Finally, we are imposing a condition to maintain the availability of two independent and efficient PRB routings to TUE's Martin Lake plant near Henderson, TX. This plant is now exclusively served by BNSF, and its most efficient PRB route is an interline movement involving both KCS and a short SP line segment. (Interline movements do not significantly detract from the efficiencies of run-through coal unit trains.) TUE has plans, however, to build a 6-mile spur to connect to UP and gain a second independent routing into the plant. We will require that the BNSF agreement be amended to permit BNSF and KCS to provide an efficient PRB joint-line movement into Martin Lake as an independent competitive alternative to the UP/SP single-line routing it will gain access to once the spur is completed.

Central Corridor.

Coal: URC agreement/Tennessee Pass. As we explain below, we are imposing two conditions to ensure that this merger does not result in competitive harm to Central Corridor coal shippers. First, we are imposing the URC agreement to preserve the existing level of rail competition for those few western coal shippers dependent on originations of Utah/Colorado coal. Second, we are granting discontinuance authority rather than full abandonment authority for applicants' Tennessee Pass Line to ensure that the merger does not result in service degradation for Central Corridor coal (and other) movements.[191]

URC agreement. Under the URC agreement, URC will receive access to additional coal sources in Utah and overhead trackage

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[190] See SPI-21 at 25.

[191] We have viewed the concerns raised over potential degradation of Central Corridor service as concerns over potential competitive harm. As noted above, merger-related competitive harm results when the merging parties gain sufficient market power profitably to raise rates and/or reduce service.

rights between Utah Railway Junction, UT, and Grand Junction, CO. BNSF, via the trackage rights it will receive under the BNSF agreement, will be able to move URC-originated coal to destination points west of Provo, UT, and east of Grand Junction. URC has explained that its agreement with applicants "will provide the market discipline to assure competitive rates for coal customers in the western region by means of its cost efficient operations and access to Utah coal acting either in conjunction with the BNSF or with UPSP."[192] As discussed elsewhere in this decision, the URC agreement is an especially important competitive safeguard for those few western coal shippers, such as the SPP/IDPC jointly owned North Valmy Station plant, that are dependent on originations of Utah/Colorado coal. We therefore impose as a condition the terms of the URC agreement.

Tennessee Pass Line. Applicants seek to abandon a portion of the Tennessee Pass Line between Malta and Cañon City, CO,[193] and to route traffic over more efficient routes post-merger. Several parties have raised concerns that the Moffat Tunnel Line between Dotsero and Denver, CO, will lack the capacity to handle overhead traffic rerouted from the Tennessee Pass Line.

Parties have requested that we consider alternative conditions designed to ensure that shippers do not suffer a degradation of the level of service now provided by SP as a result of the merger. One such condition would require UP/SP to maintain service on SP's (DRGW's) Tennessee Pass Line between Dotsero and Pueblo, Colorado. An alternative condition would permit UP/SP to discontinue service on, but not physically abandon, the Tennessee Pass Line. If the Moffat Tunnel Line cannot handle the increased traffic, we could then take steps necessary to enable UP/SP to restore the prior level of service over the Tennessee Pass Line. In addition, opponents argue that the Tennessee Pass Line is an important alternate route in the event of a derailment or congestion on the Moffat Tunnel Line.

Applicants assert that, in the 1970s, DRGW operated as many as 25 to 30 trains per day through the Moffat Tunnel, which indicates that this line should be able to handle the projected increase in traffic volume, and that additional capacity improvements on this line could be made if they prove necessary. Nevertheless, opponents point out that the traffic mix has changed considerably since the 1970s. DRGW's operations consisted mostly of short mixed-freight trains, whereas today SP operates longer trains, including heavy unit trains transporting coal. Opponents are concerned that, if SP has difficulty meeting contracted delivery schedules now, shifting more traffic to the Moffat Tunnel Line will cause additional capacity and service problems. Such a degradation in service could increase cycle times for unit trains of shipper-owned cars, and thus require shippers to purchase more cars to receive the same level of service.

Applicants assert that the Tennessee Pass Line is the least efficient link for an overhead route across the Central Corridor;

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[192] UTAH-6 at 19.

[193] Specifically, applicants seek by petitions for exemption in Docket Nos. AB-8 (Sub-No. 36X) and AB-12 (Sub-No. 189X) for SPT to abandon, and DRGW to discontinue operations over, SP's Sage-Malta-Leadville line; and by applications in Docket Nos. AB-8 (Sub-No. 39) and AB-12 (Sub-No. 188) for SPT to abandon, and DRGW to discontinue operations over, SP's Malta-Cañon City line.

and that the merger will open new, more efficient routes for the present traffic flows. Given the UP/SP and BNSF options that will become available after the merger, applicants claim that routing via Pueblo and the Tennessee Pass Line is an inferior choice.[194]

We acknowledge that applicants have taken the railroad capacity concern seriously and recognize that the inefficient Tennessee Pass Line might need to be retained just in case the Moffat Tunnel Line is overwhelmed. Applicants provided assurances that no action will be taken precipitously to abandon the line, and that overhead traffic flows will leave that line only as their new routes become fully prepared to take them efficiently.[195] Notwithstanding these reassurances, we will grant discontinuance authority rather than full abandonment authority because of the crucial nature of this through route. This will preserve the line intact until applicants demonstrate that overhead traffic over the Tennessee Pass Line has been successfully rerouted.

Related procedural aspects. Consistent with the Board's policy to promote private-sector solutions to disputes, we encourage parties to this proceeding to make their best efforts to resolve among themselves any disputes that may arise concerning the meaning or applicability of any of the terms or conditions imposed or approved before resorting to the Board for resolution. Use of arbitration to resolve disputes can result in resource and time savings for all concerned. If parties choose to use arbitration in the first instance, the Board will entertain appeals from arbitral decisions using the standards in Lace Curtain[196] set forth for review of arbitral decisions under our labor conditions, unless the parties agree otherwise.

No Divestiture Needed. A number of parties have called on us to impose certain broad-based remedies to supplement or replace the BNSF agreement. Most notably, a number of parties request that we impose some version of MRL's plan for divestiture of certain Central Corridor lines and/or some version of KCS' and Conrail's plans for divestiture of certain lines running from St. Louis to the Gulf Coast region.

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[194] Applicants note that double-stack traffic is transcontinental traffic that can easily be rerouted to shorter routes through Wyoming or New Mexico and by-pass Colorado completely. Applicants state that the Tennessee Pass Line would be the shorter post-merger route only for coal moving to West Texas, New Mexico, and Arizona. The volume of this coal, applicants assert, currently amounts to about one train per week. UP/SP-232 (Vol. 3), VS Ongerth, at 47-48.

[195] According to applicants, existing service to overhead shippers will be protected until superior options are in place, and the track itself will be left in place for a set period of time in accordance with assurances made to the Governor of Colorado. These include a commitment to maintain service on the line for at least 6 months following consummation of the merger, and to leave track in place until upgrades are completed on the new routes and at Roseville Yard in California, which could take several years. UP/SP-232 (Vol. 3), VS Ongerth, at 49.

[196] Chicago & N.W. Transp. Co.--Abandonment, 3 I.C.C.2d 729 (1987) (Lace Curtain), aff'd, International Bhd. of Elec. Workers v. ICC, 862 F.2d 330 (D.C. Cir. 1988).

As we have explained above, the merger, subject to the conditions we are imposing, including an oversight condition, will be consistent with the public interest. These conditions are narrowly tailored to ensure that they effectively remedy all significant merger-related competitive harms without unduly limiting the merger's substantial public benefits. Therefore, no other broad-based remedy is required for our approval. Further, as we explain below, while divestiture of certain of applicants' lines may have a surface appeal, it also entails its own very substantial problems in this proceeding.

South Central Lines/SP East. Various parties, including Conrail, KCS, NITL, RCT, the Arkansas Attorney General, DOT, and DOJ argue for a condition requiring divestiture of extensive UP or SP lines in the South Central region. Conrail and KCS put forth requests involving forced divestiture of specific SP line segments. While these proposals all differ somewhat in their particulars, they are all quite similar. The Conrail proposal envisions a larger divestiture of SP's assets than the KCS plan, but both these and the others would entail removing the core of what would be the UP/SP South Central network.

Divestiture in the rail industry, with its network economies, is a requirement, to be imposed only under extreme conditions, when no other less intrusive remedy would suffice. Here, divestiture would be greatly inferior to the remedy we have chosen. Divestiture would be an over-reaching solution, especially in light of the agreements that applicants have reached with various parties and the additional conditions we are imposing. Because the competitive justifications that would be the basis for compelling divestiture have been mooted, we will deny the requested conditions calling for divestiture of South Central lines.

As we already have discussed, BNSF, through the agreements applicants have arranged and the additional conditions we are imposing, will be more than sufficient as a replacement competitor in these corridors. All the parties' competitive concerns have been effectively addressed. In these circumstances, we need not resort to the significantly more intrusive divestiture remedy. As for potential purchasers, both Conrail and KCS suffer from deficiencies. Despite their attacks on the adequacy of BNSF's service plans, neither Conrail nor KCS utilized existing Board procedures to submit responsive applications in support of their sweeping proposals. They have provided no traffic studies, no operating plans, and no pro forma financial statements to reveal the full effects of their proposals.[197] As previously noted, we will not impose conditions that will restructure the competitive balance among

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[197] NITL's divestiture proposal (NITL-9 at 5-6, 56-57) is equally unsupported. It offers no justification to support its request for additional requirements that (a) SP's Houston-Flatonia-Placedo line be sold, yielding a Houston-Corpus Christi-Brownsville route distinctly inferior to the one BNSF would have under the BNSF agreement, and (b) SP's Flatonia-Eagle Pass line be sold subject to BNSF's present haulage rights, thus yielding weaker competition at Eagle Pass than would the BNSF agreement.

The proposal of the Arkansas Attorney General to turn SP lines into public highways is vague, unprecedented, and unpredictable, and thus we cannot judge its impacts. RCT suggests a specific overreaching addition to the Conrail and KCS proposals that would require the insertion of a second railroad at CP&L's Coleto Creek plant. RCT-4 at 17.

railroads with unpredictable effects, which is what divestiture to KCS or Conrail would result in here.

Divestiture would introduce a distinctly weaker competitor than BNSF at 2-to-1 points and a distinctly weaker competitor than UP/SP at exclusively served (1-to-1) points. Neither KCS nor Conrail (nor any other purchaser other than BNSF, for that matter) could offer the array of service and single-line coverage that both the merged system and BNSF will offer to their shippers. A KCS purchase would raise the most new competitive concerns, as the KCS system itself is mostly within these corridors. As such, there would be many of the same problems with parallelism as with the UP/SP merger, but without the competitive solutions we now have before us. There is evidence that Conrail is a much higher cost railroad than BNSF, and thus there are serious questions as to its ability to be a competitive force in these corridors. UP/SP-231, RVS Whitehurst, at 21.

At points that will continue to be served by multiple railroads after the merger, such as Dallas (which will be served by BNSF, UP/SP, KCS, South Orient Railroad Company as well as other shortlines) and Houston (which will be served by BNSF, UP/SP, KCS for grain, and Tex Mex for Mexican traffic over the trackage rights we are granting here, and neutral terminal roads), divestiture would add an additional railroad, reducing volume efficiencies, despite the fact that the merger as conditioned will not result in competitive harm. And divestiture will be a significant overreach because it would transfer large volumes of business at exclusively served points to the acquirer, without any competitive justification.[198]

These divestiture proposals would also take the railroad system backwards by destroying, rather than creating, single-line service.[199] Many shippers who would have received new single-line service, or who would see existing single-line service eliminated, would no longer share in the merger's benefits. It is true that the loss of new UP/SP single-line routings could be reduced somewhat by a grant back of trackage rights from the carrier chosen for divestiture to UP/SP, as variously suggested by NITL and MRL. But many shippers on the divested segments would lose single-line service because the overhead trackage rights would not permit local service. Nonetheless, single-line service over BNSF in the South Central Corridor, to and from the Pacific Northwest, to and from the Upper Midwest, and to and from

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[198] For example, applicants' witness Peterson shows that the Conrail proposal would compel the merged system to convey lines to Conrail that accounted for 265,000 carloads of exclusively served SP traffic in 1994, compared to only 90,000 carloads of 2-to-1 traffic. UP/SP-231, RVS Peterson, at 195.

Peterson details how the Conrail and KCS divestiture proposals would cause very large and unnecessary traffic losses to UP/SP (i.e., $924 million in annual gross revenues in the case of the Conrail proposal and $874 million in annual gross revenues in the case of the KCS proposal). Such losses would adversely affect the economics of the merger. <u>Id.</u> at 196-201.

[199] Peterson also shows that the Conrail and KCS divestiture proposals would eliminate single-line service for 357,000 units of traffic per year--even more than the volume of traffic that will gain new single-line service as a result of the merger. Offsetting this in the case of Conrail (but not KCS) would be the creation of new single-line service for a smaller volume of traffic that moves to Conrail points. <u>Id.</u> at 201-08.

the PRB for major coal utilities, would all be adversely affected.

Further, the quality of UP/SP service in the Chicago-St. Louis-Memphis-Texas corridor would be adversely affected by these proposals. Applicants note that a study performed for Conrail graphically demonstrates the improved transit times that will result from directional running. UP/SP-232, RVS Salzman, at 23. Even more seriously, loss of SP's Pine Bluff Yard would destroy the UP/SP blocking plan, overload UP's North Little Rock Yard, and require extra switching throughout the South Central UP/SP region. Id. at 17-20. UP/SP would lose the ability to make many blocks at Arkansas yards, requiring additional switching at other congested yards. Id. Conrail points out in detail how each additional switch increases transit time, increases damages, and increases safety risks. CR-22, VS Carey/Ratcliffe/Shepard, at 13-15. We note that these problems are inherent in Conrail's own proposal.

UP/SP would lose the ability to build run-through trains for NS via St. Louis. It would be unable to block for Conrail's Buckeye Yard. Blocking for many smaller yards in Texas and Louisiana would be eliminated. UP/SP-232, RVS Salzman, at 17-19. Almost every new block proposed in the UP/SP Operating Plan for the South Central corridor would have to be eliminated, and those that remain would displace existing blocks. Id.

In exchange, shippers would gain no discernable service benefits. Conrail witnesses acknowledge that the service plan to which Conrail is committed calls for no changes in SP's existing train schedules. UP/SP-232, RVS King, at 26-27. KCS has not disclosed its plans, but we assess that KCS could not offer significantly improved train schedules because its route network is too constrained.

Applicants' witness King asserts that the UP-Conrail "Salem Gateway" service, which provides the best service between the Northeast and the South Central region, would be degraded if Conrail were to acquire the SP lines it seeks. If Conrail is the acquirer, applicants assert it will have no incentive to help its competitor, UP/SP, maintain that gateway, or vice versa. As a result, service would decline and cars would likely be rerouted via urban St. Louis, absorbing additional delay. UP/SP-232, RVS King, at 29-30. UP/SP also asserts that there is a significant risk that current SP-NS and SP-CSX services would also be undermined because Conrail would have sharply reduced incentives to work with its competitors in the East, and vice versa. Id. at 30-31.

The economic benefits of the merger would also be undermined by these divestiture proposals. Applicants have shown that claims by some parties, especially Conrail, that the UP/SP savings are all in the West are erroneous. UP/SP-232, RVS Salzman, at 14 & Ex. DWS-1. Although many of the benefits from the merger accrue in other areas, divestiture would mean that the new system would still lose well over $100 million per year of labor, operating, and other benefits of the merger.

UP/SP would also be forced to spend huge sums for increased capacity without the use of its parallel lines for directional running. Applicants have explained that the increased burden caused by focusing more traffic on the UP lines in Arkansas and Texas would require UP to invest over $220 million to create new capacity on UP segments, and to implement capacity-enhancement plans that the merger would have avoided. UP/SP-232, RVS King, at 31. KCS, Conrail, and RCT all recognize that UP/SP probably would have to incur the tremendous expense of double-tracking the UP Houston-Memphis route, and a number of UP lines in Texas would also be affected. KCS-33 (Vol. 2), VS Rees, at 228; CR-22, VS Carey/Ratcliffe/Sheppard, at 78-79; RCT-4 at 15, 40-41. Increased switching burdens on already-taxed UP yards would likely require UP/SP to construct a new switching yard at a cost of up to $100 million, although no location would be as well suited as the existing Pine Bluff and Little Rock facilities. UP/SP-232, RVS King, at 32.

Applicants explain that the expenditures would be vastly greater, with even greater loss of service quality and efficiency, if Conrail were to acquire SP's El Paso line. Id. at 33-34. The net effect of this further Conrail overreach would be to divert transcontinental traffic between California and New Orleans/Houston/San Antonio/Laredo from an SP line that has excess capacity to UP lines that have no extra capacity. Again, UP/SP would be forced to spend $160 million, if not more, and service quality would still decline as most traffic flows would be concentrated on a single, overburdened line and forced through the congested Ft. Worth terminal. Id. Applicants assert that these unnecessary capital outlays would make it impossible for it to make other vital investments, such as developing new intermodal terminals and services. See Comments of Riss Intermodal, Mar. 29, 1996.

A forced South Central divestiture is incompatible with the trackage rights and line sales provided for in the BNSF agreement, and could cause the entire agreement to collapse. Nothing remotely comparable in its benefits would be available. Even if some other competitive agreement or agreements could be pieced together, shippers would lose the intense, comprehensive competition offered by the BNSF agreement, and all the added competition that agreement brings. For example, instead of gaining access to two railroads in place of one and single-line service to points all across both the UP/SP and BNSF networks, shippers on SP's Southern Louisiana line would be exclusively served by the forced acquirer and would lack single-line service to any UP/SP or BNSF point.

We also believe that a divestiture requirement along the lines advocated by Conrail and KCS might dissolve the merger, leaving SP to retrench its services or possibly to dismember itself.[200] We do not believe that dismemberment of SP through forced divestiture is in the best interest of shippers and the public. Essential services would irretrievably be lost, the quality of services that are preserved would be greatly degraded, and the significant benefits of the UP/SP merger and the BNSF agreement would likely be lost.

Central Corridor. Several parties, including DOJ and MRL, argue that competition in the Central Corridor can be preserved only through divestiture. DOT states that circumstances unique to the Central Corridor militate against divestiture of that line, but it urges conditions to strengthen significantly the trackage rights proposed in the Central Corridor. MRL, acting on behalf of its owner, Dennis Washington, seeks the divestiture of all DRGW lines; extensive UP and SP lines in Nevada, California, and Oregon; UP's line to Silver Bow, MT, with trackage rights to

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[200] This would be the result both because of the reduction in merger benefits, which KCS and Conrail could not replicate, and because, as can be seen from Conrail's bidding and from KCS' claim that UP overpaid for SP, the price that would be offered is likely to be inadequate. UP/SP-231, RVS Rebensdorf, at 30-32.

connect it to the Central Corridor; trackage rights on UP in Kansas to reach a variety of grain gathering points; and unilateral authority to set rates to and from all SP points in California and Oregon, with revenues pro-rated by mileage.

We have rejected already the arguments that form the basis for this extraordinary relief. We believe BNSF will be an effective competitor as a tenant over UP/SP lines,[201] as discussed more fully above. We also have rejected the argument that, given the high-quality, low-cost routes that BNSF operates between the Midwest and the West Coast, BNSF will have no incentive to operate via its trackage rights in the Central Corridor.

Even if we were to find that there was some predicate for divestiture, we would have serious reservations concerning the ability of MRL's newly formed affiliate to provide adequate, competitive service. As noted by DOT, MRL itself does not appear to possess an adequate network, particularly in California, to gather traffic that would flow over the corridor.[202] MRL may also be disadvantaged in competing against two carriers in the West that could offer single-line service to the major midwestern gateways. A probable result would be the rerouting of the overhead traffic on the Central Corridor to the other single-line carriers, jeopardizing the viability of competitive service on that corridor.

MRL's divestiture proposal would eliminate significant amounts of existing single-line service, as well as the new single-line service and improved routings created by the merger. MRL proposes to purchase approximately 350 miles of UP's lines north of Pocatello, ID, including the mainline to Silver Bow, a number of connecting branch lines, and an important connection to UP's spin-off, Eastern Idaho Railroad, at Idaho Falls, ID, which will affect over 40,000 annual carloads of UP traffic and $90 million in annual UP revenues. While a grant back of overhead trackage rights to UP/SP and BNSF, as MRL proposes, could ameliorate these losses somewhat, they would still be substantial.[203] As a result of MRL's proposal, numerous shippers located on this trackage in Idaho would no longer have access to UP's single-line routes to important UP points such as

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[201] As counsel for CPUC explained at the oral argument:

> [T]he proposed divestiture of one of the two lines in the Central Corridor is not a good idea for California. . . . We concluded that the BN/Santa Fe, through its trackage rights, will provide the kind of Central Corridor service and competition that will be best for California.

Conlon, Oral Arg. Tr. at 470.

[202] As DOT's counsel explained at the oral argument:

> [O]ther than the applicants, only the BN/Santa Fe has the gathering lines that can supply the volume of overhead traffic necessary to maintain competition throughout the Central Corridor between the West Coast and the Midwestern gateways.

Smith, Oral Arg. Tr. at 156.

[203] It is not clear whether three railroads could operate efficiently over this segment.

Chicago, St. Louis, Memphis and Dallas. These shippers would be left either with a very inefficient route over the new MRL affiliate via Salt Lake City to Kansas City, or with having to move their traffic north to the Montana Western Railway, which would hand it off to MRL, and then to BNSF.

Large volumes of agricultural commodities, such as potatoes and grain, would be adversely affected by a divestiture to MRL. This business is intensely truck competitive and diversion to the highways will occur as transit times deteriorate under the MRL proposal. Potatoes originate on this UP Northern Idaho network, destined to the population centers of the South and East; grain, primarily wheat, barley, and malt, moves mainly east and to the Portland area for export. Grain and lumber is trucked from origins on BNSF and MRL to Silver Bow for handling by UP to a variety of markets. MRL's purchase of this line could make rail service uncompetitive in these markets.

Under the BNSF agreement, intermodal and automotive customers at Salt Lake City and Reno will gain new single-line access from the numerous and substantial intermodal terminals throughout the BNSF system, especially in the East (Chicago, Twin Cities, Memphis, Kansas City, Denver, St. Louis, Omaha and Dallas) and the West (Richmond, Stockton, Modesto and Fresno). MRL would only reach Kansas City and Denver on the east and Stockton on the west. Moreover, even at these few locations, intermodal shippers would not have access to BNSF's facilities. MRL's new affiliate would only possess facilities initially at Denver that it would acquire as part of the divestiture. Most of the existing intermodal and automotive volumes to or from Salt Lake City and Reno would lose the benefit of a second competitive single-line route.

As part of the BNSF agreement, UP/SP will obtain new, shorter routes by gaining trackage rights over BNSF from Bend to Chemult, OR, and between Barstow and Mojave, CA. The MRL proposal could undermine the BNSF agreement, and with it the significant mileage savings associated with these trackage rights.

As already discussed, both UP and SP now operate over more circuitous routes than the efficient single-line routes the merger will create. The merger will reduce UP's mileage between Oakland and Chicago by 189 miles and SP's by 388 miles. From Oakland to Kansas City and St. Louis, the reductions will be 189 miles for UP and 143 miles for SP. Between Los Angeles and Memphis, the savings will be 283 miles over SP's present route and 580 miles over UP's non-competitive Central Corridor route. These mileage reductions will make the merged system more competitive with BNSF, the service leader for Bay Area-Midwest traffic.[204]

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[204] Upon merger, UP/SP will gain route and terminal flexibility in several major corridors including Los Angeles-Chicago, Bay Area-Utah, and San Antonio-Houston-Dallas-Memphis-St. Louis-Chicago. Between Los Angeles and Chicago, expedited intermodal and auto traffic will be concentrated on the Tucumcari line and slower manifest traffic on UP's Central Corridor line, adding to the total capacity of both. Between the Bay Area and Utah, expedited traffic will move via SP's Donner Pass line, and slower bulk traffic will move via UP's Feather River line. The merger will also alleviate congestion in Utah by eliminating the conflicting and inefficient movements of UP and SP traffic between Salt Lake City and Ogden which add unnecessary miles and (continued...)

Divestiture would jeopardize the ability of the merged company to ensure long-term, high-quality rail service to shippers who are dependent presently on SP throughout the West.[205] SP's transcontinental service time will be reduced from weeks to days; service in coal, automobile, and other markets will similarly improve; reliability will be vastly increased; and cars will be available. This improvement in competition will mean that, for the first time in many years, rail transportation will be a real competitor for these shippers' business.

Divestiture would also impede applicants from using the combined facilities of UP and SP in this corridor, and thus limit the merged company's ability to resolve problems of route congestion (particularly between Ogden and Salt Lake City, and between Pueblo and Herington), circuity and altitude, which have contributed to the irregularities that make SP's services less competitive.[206] The new plan will avoid or cure tunnel clearance problems on SP's routes through the Rockies (Moffat Tunnel) and the Sierras. Yard expansion or pre-blocking of larger volumes of combined traffic to bypass yards will alleviate delays for traffic that moves through the Roseville yard and other rehandling yards in California, as well as at Kansas City. The resulting service improvements will provide consistent transit times--better by many days than what SP offers now--that can more effectively compete with the offerings of BNSF for food products, forest products and coal moving in this corridor.

In sum, we believe that the service that will be provided by BNSF over trackage rights is an appropriate replacement for the service formerly provided by SP. Divestiture to another carrier would not replace the competitive single-line and routing options that shippers will lose when SP merges with UP. No railroad other than BNSF so nearly duplicates the SP and UP networks. Likewise, no other railroad has the financial strength, operational capabilities, and marketing expertise to serve the long routes in the Western United States. The BNSF agreement grants BNSF trackage rights between Denver and Oakland, with

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[204](...continued) hours to every UP and SP train that crosses the Central Corridor. Most UP/SP Northern California trains will be operated straight through at Ogden, and BNSF trains will be operated straight through at Salt Lake City.

[205] SP has hundreds of carload lumber and food products shippers local to its lines in California and Oregon who have endured 2- or 3-week delivery times to the Midwest, cars lost and untraceable in terminals, inaccurate bills, and unavailable equipment. Some have limited or eliminated their carload rail shipments and are paying more to move their goods by truck or BNSF intermodal or transload service--and would return their traffic to rail if SP could provide adequate service.

[206] SP has two transcontinental routes, the Central Corridor and the Southern Corridor, both of which are largely single-track, difficult to operate, and costly to maintain. The distribution of its traffic is such that it cannot eliminate either of those routes without losing more than it would gain. Clearance problems and mountainous operating conditions across the Central Corridor route cause SP to move even more traffic over its Tucumcari route, notwithstanding congestion. SP's yards are clogged and need capital investments that SP has not been able to fit within its constrained capital budgets.

access to all 2-to-1 shippers in Utah, Nevada, and Northern California (there are no 2-to-1 points in Colorado).

We find that divestiture in the Central Corridor lacks competitive justification, and that MRL's proposed divestiture is overbroad and overreaching. Divestiture of the Central Corridor would eliminate single-line service, degrade service quality, increase transit times, restrain efficiencies, and undermine the merged system's ability to fund new capital projects as proposed by applicants. The MRL proposal would force a sale of lines accounting for approximately 350,000 carloads of exclusively served traffic in 1994, compared to only 75,000 carloads of SP's 2-to-1 traffic. Applicants predict that MRL's divestiture proposal would result in $631.3 million in annual revenue losses to UP/SP, involving five areas: carload diversions, losses resulting from MRL's proposed PRA, intermodal traffic, automotive traffic, and losses of new UP/SP marketing opportunities for carload traffic. UP/SP-231, RVS Peterson, at 210-213.

A Central Corridor divestiture is not in the best interest of shippers or the public. We believe that BNSF will be an effective competitor as a tenant over UP/SP lines. We believe that the broad-based conditions that we are imposing will sufficiently augment the BNSF trackage rights agreement to preserve competition over the Central Corridor.[207]

EMBRACED CASES AND RELATED MATTERS. We are exempting, in the Sub-No. 1 docket, the trackage rights provided for in the BNSF agreement and included in the Sub-No. 1 notice filed November 30, 1995, but we are requiring the filing of additional notices covering both the BNSF trackage rights provided for in the CMA agreement and the URC trackage rights provided for in the URC agreement. We are exempting, in the Sub-No. 2 docket, the line sales provided for in the BNSF agreement. We are exempting, in the Sub-No. 3, 4, 5, 6, and 7 dockets, the terminal railroad control transactions proposed therein. We are exempting, in the Sub-No. 8 docket, common control of UP and the two motor carriers controlled by SP, and common control of SP and the one motor carrier controlled by UP. Finally, we are granting, in the Sub-No. 9 docket, the terminal trackage rights application filed therein.

Trackage Rights. We are exempting, in the Sub-No. 1 docket, the trackage rights provided for in the BNSF agreement and included in the Sub-No. 1 notice filed November 30, 1995. These trackage rights are essential to the competitive service that BNSF will provide under the BNSF agreement, and we believe that the trackage rights class exemption codified at 49 CFR 1180.2(d)(7) (1995) can be invoked with respect to trackage rights provided for in a settlement agreement.[208]

We are directing applicants and BNSF to file, no later than 7 calendar days prior to the effective date of this decision, an additional class exemption notice covering the trackage rights added to the BNSF agreement in accordance with the amendments required by the CMA agreement. These trackage rights are also

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[207] As noted, DOT advocates augmented trackage rights as the preferred remedy in the Central Corridor. DOT-4 at 39. DOT's recommendations have been addressed elsewhere.

[208] We will not publish the Sub-No. 1 notice in the Federal Register. Sufficient notice of the Sub-No. 1 trackage rights was provided in the notice of acceptance of the primary application published at 60 FR 66988 (Dec. 27, 1995).

vital to the competitive service that BNSF will provide under the BNSF agreement, but were not included in the Sub-No. 1 notice filed November 30th.[209]

We are directing applicants and URC to file, no later than 7 calendar days prior to the effective date of this decision, a class exemption notice covering the trackage rights provided for in the URC agreement. As explained elsewhere in this decision we are imposing the URC agreement as a condition to approval of the merger; and the URC trackage rights are vital to the competitive service that URC will provide under the URC agreement. Trackage rights imposed as a condition in favor of a named railroad do not ordinarily require any approval beyond the approval implicit in the imposition of the condition itself, BN/SF, slip op. at 86-7 (carryover paragraph), and therefore do not ordinarily require a filing seeking approval; but, to provide for consistent treatment for all trackage rights imposed as conditions in this proceeding, we are directing applicants and URC to invoke the trackage rights class exemption.[210]

Line Sales. We are exempting, in the Sub-No. 2 docket, the three line sales provided for in the BNSF agreement. These line sales would ordinarily require approval under 49 U.S.C. 11344; but, under 49 U.S.C. 10505, we must exempt these sales from regulation if we find that (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a, and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power. We are of the opinion that regulation is not necessary to carry out the rail transportation policy; the Sub-No. 2 exemption will allow competition and the demand for services to establish reasonable rates for rail transportation, 49 U.S.C. 10101a(1), will minimize the need for regulatory control, 49 U.S.C. 10101a(2), will ensure the continuation of a sound rail transportation system with effective competition among rail carriers, 49 U.S.C. 10101a(4), and will ensure effective competition between rail carriers, 49 U.S.C. 10101a(5); and other aspects of the rail transportation policy will not be adversely affected. We are also of the opinion that regulation is not necessary to protect shippers from the abuse of market power. The very purpose of most of the arrangements provided for in the BNSF agreement, including the Sub-No. 2 line sales, is the preservation of competitive options that would otherwise be lost with the merger.[211]

Terminal Railroad Control Transactions. We are exempting, in the Sub-No. 3, 4, 5, 6, and 7 dockets, control by UP/SP of five terminal and/or switching railroads (A&S, CCT, OURD, PTRR,

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[209] The notice with respect to the additional BNSF trackage rights will be published in the Federal Register in due course. Notice of the additional BNSF trackage rights was not provided in the notice of acceptance of the primary application published at 60 FR 66988 (Dec. 27, 1995).

[210] The notice with respect to the URC trackage rights will be published in the Federal Register in due course. Notice of the URC trackage rights was not provided in the notice of acceptance of the primary application published at 60 FR 66988 (Dec. 27, 1995).

[211] We will not publish notice of the Sub-No. 2 exemption in the Federal Register. Sufficient notice of the Sub-No. 2 line sales was provided in the notice of acceptance of the primary application published at 60 FR 66988 (Dec. 27, 1995).

and PTRC, respectively) in which UP and SP presently have non-controlling interests. Control of these railroads by UP/SP would ordinarily require approval under 49 U.S.C. 11344; but, under 49 U.S.C. 10505, we must exempt these control transactions from regulation if we find that (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a, and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power. We are of the opinion that regulation is not necessary to carry out the rail transportation policy. The sought exemptions will allow competition to establish reasonable rates, promote an efficient rail transportation system, foster sound economic conditions in transportation, and encourage honest and efficient railroad management, 49 U.S.C. 10101a(1), (3), (5), and (10); and other aspects of the rail transportation policy will not be adversely affected. We are also of the opinion that the A&S, CCT, OURD, PTRR, and PTRC control transactions are of limited scope, because four of these railroads conduct local operations only and because the fifth is currently inactive. We are of the further opinion that regulation is not necessary to protect shippers from abuse of market power, because these control transactions are related to, and will facilitate, common control of UP and SP, which we have found to be consistent with the public interest.[212]

Motor Carrier Control Transactions. We are exempting, in the Sub-No. 8 docket, (i) common control of UP and the two motor carriers controlled by SP (PMT and SPMT), and (ii) common control of SP and the one motor carrier controlled by UP (Overnite).

Overnite, which provides both less-than-truckload and truckload service on a nationwide basis, is operated independently of UP, and applicants have indicated that they have no plans to eliminate that independence or otherwise incorporate Overnite into UP/SP's operations. PMT, which provides nationwide general commodity trucking service and which specializes in truckload freight movement, both over-the-highway and via TOFC, is operated independently of SP, and applicants have indicated that they have no plans to eliminate that independence or otherwise incorporate PMT into UP/SP's operations. SPMT, which formerly transported motor vehicles and also formerly specialized in the ramping and deramping of TOFC and COFC for SPT, has not conducted operations for more than 2 years, and applicants have indicated that they have no plans to resume SPMT's operations.

The Sub-No. 8 motor carrier control transactions would ordinarily require approval under 49 U.S.C. 11344; but, under 49 U.S.C. 10505, we must exempt these transactions from regulation if we find that (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a, and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power. We are of the opinion that regulation is not necessary to carry out the rail transportation policy. The sought exemption will further the goals of ensuring an efficient, economical, and competitive rail transportation system, thereby meeting the needs of shippers, 49 U.S.C. 10101a(4) and (5); and other aspects of the rail transportation policy will not be adversely affected. We are

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[212] We will not publish notice of the Sub-No. 3, 4, 5, 6, and 7 exemptions in the Federal Register. Sufficient notice of the A&S, CCT, OURD, PTRR, and PTRC control transactions was provided in the notice of acceptance of the primary application published at 60 FR 66988 (Dec. 27, 1995).

also of the opinion that the Sub-No. 8 control transactions are of limited scope, because they involve merely changes in formal ownership and control, rather than substantive changes that might affect the operations and service provided by the motor carriers. We are of the further opinion that regulation is not necessary to protect shippers from the abuse of market power, because the operations of Overnite and PMT will not change as a consequence of the common control for which the Sub-No. 8 exemption is sought, and because SPMT has no operations. Shippers have pre-merger, and will continue to have post-merger, numerous motor carriage services available to them at all locations served by Overnite and PMT.

IBT contends that the exemption sought in the Sub-No. 8 docket is barred by the interplay of 49 U.S.C. 11344(c) (fourth sentence) and 49 U.S.C. 10505(g)(1). The fourth sentence of 49 U.S.C. 11344(c) provides that a railroad can be authorized to acquire control of a motor carrier only if the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition; 49 U.S.C. 10505(g)(1) provides that a 49 U.S.C. 10505 exemption cannot authorize intermodal ownership that is otherwise prohibited under 49 U.S.C., Subtitle IV (wherein 49 U.S.C. 11344 is located); and IBT therefore contends that we cannot grant the Sub-No. 8 exemption because applicants, having indicated that they intend to keep Overnite and PMT independent and SPMT inactive, have made clear that they will not use these motor carriers in furtherance of UP/SP's rail operations. The fourth sentence of 49 U.S.C. 11344(c), however, is not applicable to a transaction that involves only a change of form, not of substance, in the transportation service. DRGW/SP, 4 I.C.C.2d at 949-51; UP/MKT, 4 I.C.C.2d at 485. Here, the common control (i) of UP and PMT and SPMT, and (ii) of SP and Overnite, is merely an incidental change in ownership resulting from the primary merger transaction. Each of the motor carriers is today commonly controlled with a rail company, so the Sub-No. 8 transactions will not create intermodal ownership where there was none. And, because motor carrier operations will not change as a result of the common control, the Sub-No. 8 transactions will merely serve to bring the motor carriers under a broader corporate umbrella.[213]

Terminal Trackage Rights. We are granting, in the Sub-No. 9 docket, the application filed by applicants and BNSF for an order permitting BNSF to use two small segments of KCS track in Shreveport and one small segment of KCS track in Beaumont. These rights are important to BNSF's ability to conduct operations over the segments between Houston and Memphis and between Houston and New Orleans because KCS solely owns certain rail lines through Shreveport and Beaumont, which form essential parts of those routes. KCS has longstanding trackage rights agreements over the relevant segments with SP at Shreveport, and with SP and UP at Beaumont, but KCS is unwilling to grant trackage rights to BNSF. Under applicants' and BNSF's proposal, BNSF would be able to avail itself of similar trackage rights arrangements.

Under 49 U.S.C. 11103, we may require terminal facilities owned by one railroad to be used by another if the use is practicable and in the public interest, and will not

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[213] We will not publish notice of the Sub-No. 8 exemption in the Federal Register. Sufficient notice of the Sub-No. 8 transactions was provided in the notice of acceptance of the primary application published at 60 FR 66988 (Dec. 27, 1995).

substantially impair the ability of the owning carrier to handle its own traffic. We find that the three KCS segments at issue are terminal facilities, that use of such segments by BNSF is practicable and in the public interest, and that use of such segments by BNSF will not substantially impair KCS' ability to handle its own traffic.

Terminal Facilities. The three KCS segments are "terminal facilities" under 49 U.S.C. 11103 because each lies in the middle of a city, and each is used for switching and interchange movements as well as for line-haul movements through the terminal. The precise use to be made of these segments by BNSF is not crucial; 49 U.S.C. 11103 "is not necessarily limited to benefitting the rail service in the relevant terminal area." Southern Pacific Transp. Co. v. ICC, 736 F.2d 708, 723 (D.C. Cir. 1984) (SPT v. ICC) (citing with approval ICC decisions ordering "bridge the gap" terminal trackage rights under 49 U.S.C. 11103).

Owner Not Substantially Impaired. Use by BNSF of the three KCS segments will not substantially impair KCS' ability to handle its own traffic. For the most part, BNSF trains will be using track capacity freed up by UP/SP, so that KCS' track will not be subjected to greater use by other railroads than it was previously. We believe that the traffic handled by BNSF will replace traffic now handled by SP, although various parties, including KCS, have argued that BNSF will not be able to achieve even those traffic levels.

Use Is Practicable. Use by BNSF of the three KCS segments is practicable. We realize that the terminal trackage rights we are approving may make operations at Shreveport slightly more complicated than they are now because three carriers will be operating over them rather than two, but this will simply "require coordination of operations between the parties." UP/MP/WP, 366 I.C.C. at 576. Moreover, applicants' directional running plan, which will be available to BNSF for its new Houston-Memphis movement, could result in less interference with KCS' traffic at Shreveport. At Beaumont, BNSF service is merely replacing that now provided over trackage rights by SP, and thus it will clearly be practicable.

A Grant is in the Public Interest. To ameliorate certain anticompetitive consequences of the 1982 UP/MP/WP merger, the ICC imposed a condition granting DRGW trackage rights over a line between Pueblo and Kansas City, part of which was owned by a non-applicant, SF. UP/MP/WP, 366 I.C.C. at 572. The ICC used its 49 U.S.C. 11103 power to grant terminal trackage rights. Applying this provision, the ICC determined that granting access to this line to make the agency's overall merger conditions effective would be in the public interest. UP/MP/WP, 366 I.C.C. at 574-76. The Court of Appeals affirmed. SPT v. ICC, 736 F.2d at 722-24. We think that the terminal trackage rights sought here fall squarely within that precedent.

Use by BNSF of the three KCS segments is in the public interest because it is essential to the merger conditions permitting BNSF to provide a competitive alternative in the Houston-Memphis and Houston-New Orleans corridors. See UP/MP/WP, 366 I.C.C. at 576. See also SPT v. ICC, 736 F.2d at 723 (approving determination that terminal trackage rights were in public interest because they allowed ICC to create Central Corridor competitive alternative to the merged carrier).

Nevertheless, KCS contends that the terminal trackage rights here cannot be considered to be in the public interest as construed in Midtec Paper Corporation v. CNW et al., 3 I.C.C.2d

171 (1986) (Midtec). In Midtec, the ICC said that it would not grant terminal trackage rights under section 11103 unless they were necessary to remedy or prevent an anticompetitive act by the owning carrier. KCS is arguing that in Midtec the ICC replaced the flexible public interest standard of UP/MP/WP with a much narrower standard.

Whether the ICC ever applied its relatively exacting Midtec precedent in the context of a merger is a matter of some debate.[214] In any event, we believe that it is inappropriate to do so here, and, to the extent that ICC cases suggest otherwise, we specifically overrule them. Instead, we will apply the broad "public interest" standard that is in section 11103(a) itself. Congress gave us broad authority in both the public interest standard in section 11103 and in the public interest standard of section 11343. Thus, we believe that it is appropriate for us to retain the flexibility to use the terminal trackage rights provision to prevent carriers opposing a merger from blocking our ability to craft merger conditions that are clearly in the public interest as the ICC did in the past.

Conditions and Compensation. Section 11103(a) provides that the carriers are responsible for establishing the conditions and compensation applicable to terminal trackage rights awarded under 49 U.S.C. 11103, and we will therefore allow BNSF and KCS an opportunity to reach an agreement respecting such matters. Because the terminal trackage rights are crucial to the competitive role that BNSF will play in the Houston-Memphis and Houston-New Orleans corridors, we will make them effective on the effective date of this decision. To resolve as many details as possible prior to that date, we will require BNSF and KCS to submit, within 10 days of the date of service of this decision, *either* agreed-upon terms respecting implementation *or* separate proposals respecting such implementation. We realize that 10 days is a short time frame, but it will enable us promptly to set the terms. Even if certain compensations details have not yet been resolved, the Sub-No. 9 terminal trackage rights will become effective on the effective date of this decision.[215]

49 U.S.C. 11341(a). The underlying contractual agreements pursuant to which SP has trackage rights over the two Shreveport segments, and pursuant to which MPRR (UP) and SP have trackage rights over the one Beaumont segment, arguably preclude

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[214] See, e.g., Denver and Rio Grande Western RR Co. and Missouri-Kansas-Texas RR Co. v. St. Louis SW Ry. Co., Finance Docket No. 30759 (ICC served Jan. 9, 1987) (not applying Midtec); Rio Grande Industries, Inc., et al.--Pur. & Track.--CMW Ry. Co., 5 I.C.C.2d 952 (1989) (SP/CMW) (not applying Midtec); Rio Grande Industries, et al.--Purchase and Related Trackage Rights--Soo Line Railroad Company Line Between Kansas City, MO and Chicago, IL, Finance Docket No. 31505 (ICC served Nov. 15, 1989) (SP/Soo Decision No. 6) (indicating that the Midtec standard would apply if applicant were to be given terminal trackage rights).

[215] Compensation will accrue from the actual date of the start of trackage rights operations, and will be payable after the terms have been established. We realize that 49 U.S.C. 11103(a) provides that the compensation for terminal trackage rights "shall be paid or adequately secured" before a carrier may begin to use trackage rights awarded under 49 U.S.C. 11103. We therefore pledge that, if BNSF and KCS cannot reach agreement respecting compensation terms, we will set appropriate terms under condemnation principles. See UP/MP/WP, 366 I.C.C. at 576 n.114; SPT v. ICC, 736 F.2d at 723.

conveyance of such rights to other carriers without KCS' consent. The 49 U.S.C. 11341(a) immunity provision provides that a carrier, corporation, or person participating in a transaction approved under 49 U.S.C. 11344 is "exempt from the antitrust laws *and from all other law*, including state and municipal law, as necessary to let that person carry out the transaction . . ." (emphasis added). In Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117 (1991) (Dispatchers), the Supreme Court held that the immunity provision extends not only to laws but also to contracts.

Applicants have requested that we hold that, under the circumstances of this case, the immunity provision permits BNSF to use the three line segments at issue. UP/SP-26 at 123; UP/SP-232, Tab F at 12. KCS' affiliate, Tex Mex, has acknowledged that we would have the authority to override an identical anti-substitution provision in its own terminal trackage rights application over HB&T in this proceeding.[216] We think that an override of the restrictions in KCS' trackage rights agreements would be necessary to carry out the merger here if section 11103 were unavailable.[217] (Similarly, an override for Tex Mex to permit it to operate over HB&T's trackage in the Houston terminal would be necessary to carry out the merger as well.) Because we are granting the section 11103 application, however, no override of these contractual provisions is necessary.

LABOR IMPACTS. Our public interest analysis includes consideration of the interests of carrier employees affected by the proposed transaction. 49 U.S.C. 11344(b)(1)(D); Dispatchers, 499 U.S. at 120.

Union Support. The merger is supported by seven unions representing approximately 55% of the union-represented employees on the combined UP and SP systems: the United Transportation Union; the Brotherhood of Locomotive Engineers; the International Association of Machinists and Aerospace Workers; the International Brotherhood of Electrical Workers; the International Brotherhood of Boilermakers and Blacksmiths; the Sheet and Metal Workers International Association; and the International Brotherhood of Firemen and Oilers. The UP/SP merger is the first major merger since the Staggers Act that has received widespread union support, and applicants are correct in their assessment that such extensive "labor support in a major rail merger case is unheard of in recent years, and stands as a testament to the compelling benefits of this merger." UP/SP-232, Tab D at 1.

Applicants indicate that UP did not execute written agreements with the seven unions; rather, UP exchanged with each

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[216] KCS also acknowledges (KCS-60 at 43) that we have the authority under section 11341(a) to override contractual provisions prohibiting substitution of carriers in a trackage rights agreement if the criteria of section 11103 are met.

[217] We realize that there are ICC precedents indicating that the immunity provision cannot override a consent requirement in a joint facility contract. See SP/CMW, 5 I.C.C.2d at 9[illegible]9 (ICC held that it could not compel the assignment of trackage rights); and SP/Soo Decision No. 6, slip op. at 8 (ICC indicated that there were "substantial questions" as to its power to override a trackage rights contract). These precedents, however, did not survive the Supreme Court's 1991 Dispatchers decision, which made clear that the immunity provision may override contractual obligations.

of these unions, in writing, certain commitments that form the basis of a partnership within which the parties commit to cooperate in implementing the merger. UP, applicants indicate, has gone beyond New York Dock conditions by committing to processes, more advantageous to the employees, by which the New York Dock conditions will be administered; these processes, applicants claim, give assurances to unions and employees alike that application of the protective benefits will not be fraught with delays and adversarial proceedings, and that the protective benefits will be administered fairly and expeditiously. The unions, applicants add, have committed to reach, voluntarily, agreements implementing the operating plan accompanying the primary application.

UTU, the largest union in the rail industry, indicates, in its comments dated March 29, 1996, that it supports the merger for two reasons: first, because UP has agreed to a number of conditions that will help mitigate the impact of job loss on UTU's members; and second, because UTU believes that the merger, by allowing UP and SP to form a strong competitor to BNSF, is in the best interest of rail labor in the future. UTU adds that UP's commitments include the following: (1a) that automatic certification as adversely affected by the merger will be accorded (i) to the 1,409 train service employees, the 85 UTU-represented yardmasters, and the 17 UTU-represented hostlers projected to be adversely affected in applicants' Labor Impact Study, (ii) to all other train service employees and UTU-represented yardmasters and hostlers identified in any merger notice served after Board approval, and (iii) to any engineers adversely affected by the merger who are working on properties where engineers are represented by UTU; (1b) that UP will supply UTU with the names and test period averages of such employees as soon as possible upon implementation of the merger; (2) that, in any merger notice served after Board approval, applicants will seek only those changes in existing CBAs that are necessary to implement the approved transaction, meaning such changes that produce a public transportation benefit not based solely on savings achieved by agreement change(s); (3) that, in the event that UTU contends that UP's application of New York Dock is inconsistent with the above-mentioned conditions, UTU and UP personnel will meet within 5 days of notice from the UTU International President or his designated representative and agree to expedited arbitration with a written agreement within 10 days after the initial meeting if the matter is not resolved, which will contain, among other things, the full description for neutral selection, timing of hearing, and time for issuance of the award(s); and (4) that, in the event UP uses a lease arrangement to complete the merger of the various SP properties into MPRR or UPRR, the New York Dock conditions will nevertheless be applicable.[218]

Protective Conditions: New York Dock. Applicants, as previously noted, project that the total labor impact of the merger will be 4,909 jobs abolished, 2,132 jobs transferred, and 1,522 jobs created. ARU and TCU, which regard these projections as a minimum, estimate that the number of UP/SP employees furloughed or transferred will be far greater than applicants have projected; and TCU warns that these job impacts will fall most heavily on certain crafts and in certain geographic locations. We believe that applicants have submitted reasonable

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[218] UTU, in its comments dated March 29, 1996, asked that we approve the merger and note the commitments that UP had made. Furthermore, while we are not imposing these commitments as an actual condition, we expect UP to abide by its commitments here.

estimates of job dislocations from common control, although actual job dislocations could end up being greater than projected by applicants. Neither the dislocations themselves, however, nor their concentration by craft or location, pose a barrier to our approval of the UP/SP merger transaction. Mergers of necessity involve employee dislocations, and the labor protective conditions that we impose are to mitigate these dislocations.

The basic framework for mitigating the labor impacts of rail mergers is embodied in the New York Dock conditions, which have been held to satisfy the statutory requirements of 49 U.S.C. 11347, New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979). See New York Dock, 360 I.C.C. at 84-90. The New York Dock conditions provide both substantive benefits for affected employees (dismissal allowances, displacement allowances, and the like) and procedures (negotiation, if possible; arbitration, if necessary) for resolving disputes regarding implementation of particular transactions. We may tailor employee protective conditions to the special circumstances of a particular case; but we will adhere to the practice which the ICC adopted in Railroad Consolidation Procedures, 363 I.C.C. at 793, and to which it consistently adhered, see, e.g., BN/SF, slip op. at 79-81; UP/CNW, slip op. at 94-96, that employees are to be provided the protections mandated by 49 U.S.C. 11347 unless it can be shown that, because of unusual circumstances, more stringent protection is necessary.

We find that the statutory protections provided in New York Dock are appropriate to protect employees affected by the merger, the lines sales, and the terminal railroad control transactions, and we further find that, subject to such protections, approval of the merger (in the lead docket), the lines sales (in the Sub-No. 2 docket), and the terminal railroad control transactions (in the Sub-No. 3, 4, 5, 6, and 7 dockets) will be consistent with the public interest insofar as carrier employees are concerned. No unusual circumstances have been shown in this case to justify additional protection.[219]

Protective Conditions: Norfolk and Western. In accordance with the "usual practice" followed by the ICC, BN/SF, slip op. at 81, we will impose the Norfolk and Western conditions in the Sub-No. 1 docket with respect to the trackage rights provided for in the BNSF agreement.[220]

We will deny the requests made by ARU and Mr. Fitzgerald that we impose the New York Dock conditions, and not the Norfolk and Western conditions, on the trackage rights provided for in the BNSF agreement. The Norfolk and Western conditions, which have traditionally provided the basic framework for mitigating the labor impacts of trackage rights transactions, have been held to satisfy the statutory requirements of 49 U.S.C. 11347 in that context. RLEA v. ICC, 675 F.2d 1248 (D.C. Cir. 1982). The benefits provided by the Norfolk and Western conditions are identical to the benefits provided by the New York Dock conditions; the two sets of conditions differ only in matters of procedure. The Norfolk and Western conditions, on the one hand,

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

[220] We will also impose the Norfolk and Western conditions in the Sub-No. 13 docket with respect to the Tex Mex trackage rights approved therein.

allow implementation immediately upon completion of a defined negotiation period, even if management and labor have not yet achieved an agreement or gone to arbitration; the New York Dock conditions, on the other hand, require agreement or arbitration prior to implementation; and, for this reason, application of the New York Dock conditions to the BNSF trackage rights would have a severe short-term impact on BNSF's ability to provide competitive service under the trackage rights provided for in the BNSF agreement.

Protective Conditions: Oregon Short Line. We will impose the Oregon Short Line conditions on each of the authorized abandonments and discontinuances. The Oregon Short Line conditions are similar to the New York Dock conditions, but are applied in the abandonment/discontinuance context. The imposition of the Oregon Short Line conditions here is a matter of consistency but has little practical significance, because all affected employees will also be covered by the New York Dock conditions imposed on the merger. See UP/MKT, 4 I.C.C.2d at 513.

The Immunity Provision. An arbitrator acting under Article I, Section 4 of the New York Dock conditions imposed in the lead docket, the Sub-No. 2 docket, and the Sub-No. 3, 4, 5, 6, and 7 dockets will have the authority to override CBAs and RLA rights, as necessary to effect, respectively, the merger in the lead docket, the line sales in the Sub-No. 2 docket, and the terminal railroad control transactions in the Sub-No. 3, 4, 5, 6, and 7 dockets. This authority derives ultimately from 49 U.S.C. 11341(a), the "immunity" provision.

An arbitrator acting under Article I, Section 4 of the Norfolk and Western conditions imposed in the Sub-No. 1 docket will likewise have the authority to override CBAs and RLA rights, as necessary to effect the Sub-No. 1 trackage rights. This authority, like its New York Dock counterpart, also derives ultimately from 49 U.S.C. 11341(a).

The immunizing power of section 11341(a) is not limited to the financial and corporate aspects of an approved transaction but reaches, in addition to the financial and corporate aspects, all changes that logically flow from the transaction. Parties seeking approval of a transaction, whether by application or by exemption, have never been required to identify all anticipated changes that might affect CBAs or RLA rights. Such a requirement could negate many benefits from changes whose necessity only becomes apparent after consummation. Moreover, there is no legal requirement for identification because 49 U.S.C. 11341(a) is "self-executing," that is, its immunizing power is effective when necessary to permit the carrying out of a project. American Train Dispatchers Ass'n v. ICC, 26 F.3d 1157 (D.C. Cir. 1994); UP/CNW, slip op. at 101; BN/SF, slip op. at 82. Thus, it would be inappropriate and inconsistent with the statutory scheme to limit the use of the 49 U.S.C. 11341(a) immunity provision by declaring that it is available only in circumstances identified prior to approval.[221]

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[221] Although the literal terms of the 49 U.S.C. 11341(a) immunity provision indicate that it is applicable to any transaction approved or exempted "under this subchapter" (i.e., under Subchapter III of Chapter 113 of Subtitle IV of Title 49, United States Code), we believe that the immunity provision also applies in the 49 U.S.C. 10505 exemption context. See, e.g., UP/CNW, slip op. at 63-64, citing Delaware and Hudson Railway Co. -- Lease and Trackage Rights -- Springfield Terminal Ry. Company, (continued...)

Certain Requests Denied. We will not impose several additional labor-related conditions that have been requested by parties to this proceeding.

Cherry-Picking. We will deny ARU's request that we order that any CBA "rationalization" be accomplished by allowing UP/SP's unions to "cherry-pick" from existing UP or SP agreements. This is a matter committed to the implementing agreement procedures established by the New York Dock conditions. See New York Dock, 360 I.C.C. at 85 (Article I, Section 4).

Reimbursements. We will deny ARU's request that we require UP/SP to repay SP employees their forgone lump sum payments and their deferred wage increases. SP has already "paid" its employees for their wage concessions by giving up productivity concessions achieved by the nation's other railroads. UP/SP-230 at 316-17; UP/SP-232, Tab D at 8-9.

Hiring Preference. We will deny ARU's request that we modify the hiring preference provision in the BNSF agreement. This is a matter committed to the Article I, Section 4 implementing agreement procedures both with respect to UP/SP (see New York Dock, 360 I.C.C. at 85) and also with respect to BNSF (see Norfolk and Western, 354 I.C.C. at 610-11).

Contracting Out. We will deny ARU's request that we require UP/SP and BNSF to use bargaining unit maintenance of way employees and signalmen for all merger-related track, right-of-way, and signal construction and rehabilitation work, including items mentioned in the application, the operating plan, and the BNSF agreement. This is a matter committed to the Article I, Section 4 implementing agreement procedures both with respect to UP/SP (see New York Dock, 360 I.C.C. at 85) and also with respect to BNSF (see Norfolk and Western, 354 I.C.C. at 610-11). We would also observe that "contracting out" is a matter that may be covered by provisions of existing CBAs. See UP/SP-230 at 315.

Annual Reports. We will deny ARU's request that we require UP/SP to submit annual reports demonstrating how the forecast benefits in the area of cost-savings have been used. Isolating merger benefits from other changes as they are experienced would be inordinately costly, and there is no reason to saddle UP/SP with reporting obligations that have been imposed on no prior merger.

Diversion Reports. We will deny IBT's request that we require UP/SP to file semi-annual reports indicating the volume of traffic diverted from truck carriage and the rate of return for such cargo. The merger-related diversion of traffic from motor to rail is properly regarded as a benefit that weighs in favor of approval of the merger, not a harm that must be mitigated or monitored. And IBT's suggestion that motor-to-rail diversions may reflect predatory rail pricing makes no sense at all. Indeed, as the recently enacted ICC Termination Act of 1995 (Pub. L. No. 104-88) demonstrates, Congress was obviously not persuaded by arguments of this type because it went so far as to eliminate regulatory jurisdiction over the issue of whether rail rates are too low.

Union Pacific Motor Freight Corporation. We will deny IBT's request that we impose New York Dock protection in favor of UPMF

[221](...continued)
Finance Docket No. 30965 (Sub-Nos. 1 and 2) (ICC served Apr. 21, 1993) (at 2 n.4).

employees. Mandatory labor protection for UPMF employees is not warranted. See Gary W. McPherson v. Union Pacific Motor Freight Company, et al., Finance Docket No. 30000 (Sub-No. 45) (ICC served Apr. 20, 1989) ("Only individuals directly employed by a rail carrier are entitled to protection under section 11347. This excludes the complainants, who were employed by non-rail subsidiaries of the rail carrier.") (slip op. at 3; footnote omitted), aff'd Rives v. ICC, 934 F.2d 1171 (10th Cir. 1991). Discretionary labor protection is not warranted either; IBT has not demonstrated that UPMF employees possess skills that are not generally marketable outside the railroad industry, and that they would therefore have difficulty finding comparable employment elsewhere.

Takings Claims. TTD's contention that a CBA override effected under the auspices of the immunity provision amounts to a "seizure" of private contract rights appears to be a variation on the familiar argument that any such CBA override amounts to a "taking" of private property in violation of the Fifth Amendment. A definitive answer to this argument cannot be provided in this proceeding or by this Board. See RLEA v. United States, 987 F.2d 806, 815-16 (D.C. Cir. 1993) (takings claims can be adjudicated only in the Federal Claims Court or, in certain limited circumstances, in a Federal District Court). We would note, however, that this statutory scheme is longstanding, and predates the relevant contracts. We think that a finding of a taking under the circumstances would be extremely unlikely.

Consolidated Proceedings. We will deny the request made by Mr. Fitzgerald that we consider the UP/SP merger on a consolidated basis with a reopened BN/SF proceeding. The evidence of record does not warrant the reopening of the BN/SF proceeding.

GWWR Agreement. We will deny the requests made by Mr. Downey. 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.[222]

Alton & Southern. We think it appropriate to note, with respect to the concerns raised by Mr. Ponsler, that A&S employees adversely affected by the Sub-No. 3 control transaction will be adequately protected by the New York Dock conditions imposed in the Sub-No. 3 docket.

Division 892 Diversions. We think it appropriate to note, with respect to the concerns raised by Mr. Potoshnik, that UP employees adversely affected by the UP/SP merger will be adequately protected by the New York Dock conditions imposed in the lead docket.

FINANCIAL MATTERS. The evidence demonstrates that the entity resulting from the UPC/SPR merger will be financially sound, that UP's assumption of the payment of SP's fixed charges

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[222] When we say that the arrangements provided for in the GWWR agreement are "non-jurisdictional," we mean that such arrangements do not require our approval. Labor protection benefits are intended to protect only employees of the carriers participating in the 49 U.S.C. 11343 transaction, and are not intended to protect employees of carriers not participating in that transaction. See, e.g., UP/CNW, slip op. at 96.

and the increase in total fixed charges will be consistent with the public interest, and that the terms of the UPC/SPR merger transaction are just and reasonable.

Financial Condition. We believe that, despite acquisition expenditures of approximately $1.576 billion,[223] the financial condition of the merged entity will be favorable, because substantial earnings gains will result from increased revenues and cost savings attributable to implementation of the post-merger UP/SP operating plan.

Applicants submitted pro forma financial statements showing consolidated data of the merged UPC/SPR, based on 1994 data (for a base year) and for each of the first 5 years after consummation of the merger. These statements reflect the anticipated benefits of the merger and resulting changes in various revenue and expense accounts. Applicants also submitted financial statements for a "normal" year (a year after the fifth post-merger year) depicting the total benefits of the merger and any normalized additional debt and interest expenses that will be incurred.[224]

Applicants expect the merger to produce in a normal year, giving effect to full implementation of their operating plan, $76 million in net revenue gains from diverted traffic and $583.1 million in operating efficiencies and cost savings. Net revenue gains are expected to total $22.8 million in the first year, growing to $60.8 million in the third year, and reaching $76 million in the fifth year. Almost all of the anticipated normalized annual operating benefits of $583.1 million are expected to be realized by the end of the third year, with benefits of $235 million in the first year (40% of the normalized amount), $449.1 million during the second year (77% of the normalized amount), and $546.2 million by the third year (94% of the normalized amount). The $583.1 million annual savings are anticipated to be reached by year five. Thus, over the first 5 years, operating benefits of well over $2 billion are anticipated.

Table 1 in Appendix F shows various financial data for a post-merger UPC/SPR. These data include balance sheet and income statement figures from applicants' pro forma financial statements and selected financial ratios developed from these statements for the base year (1994 data), each of the first 5 years after the merger, and a normal year. We have reached the following conclusions based on an analysis of these data.

The consolidated pro forma income before fixed charges exceeds fixed charges (interest payments for long-term debt) by margins that gradually rise from a low of 2.6 times during the first year after the merger to 3.1 times during the fifth year.

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[223] UPC acquired, on September 15, 1995, an approximately 25% interest in SPR at a cost of approximately $976 million, and will, if the merger is consummated, acquire an additional approximately 15% interest in SPR at a cost of an additional approximately $600 million. It should be noted that, if the merger is consummated, UPC will also acquire the remaining approximately 60% interest in SPR, but that such acquisition will entail an exchange of stock, not a cash expenditure.

[224] Applicants' financial statements reflect, among other things, merger-related private benefits, including net revenues from diverted traffic and net receipts from trackage rights, which, as noted elsewhere in this decision, are properly counted as transfers but not recognized as public benefits.

The fixed charge coverage for the base year is 3.0 times and for the normal year is projected to be 3.2 times.

The pro forma cash throw-off-to-debt ratios, which measure the ability to generate sufficient cash flows from operations to repay long-term debt maturing during the year, are favorable. During the base year, cash flow from operations exceeds maturing long-term debt by 3.2 times. The pro forma ratios show a steady improvement from 3.1 times during the first year to 3.8 times by the fifth year (as well as for the normal year).

The operating ratio (the ratio of operating expenses to operating revenues) for the consolidated company is projected to improve (i.e., favorably decline) each year, moving from 82.9% during the base year to 78.9% for the fifth year and normal year. This signifies a steady improvement in operating efficiency as a result of the merger.

Consolidated net income is projected to increase significantly, from $704 million during the first year to over $967 million for the normal year. As a result of this anticipated improvement in net income, UPC/SPR's return on equity is projected to improve from 9.5% for the first year to 11.8% for years 3, 4, and 5, as well as for the normal year. Also, because of these gains in net income, along with repayment of long-term debt, the ratio of long-term debt to debt plus shareholders' equity is projected to improve from over 51% in the first year to less than 46% by the normal year.

The pro forma data indicate that a combined UPC/SPR will possess considerable financial strength and earning power. Furthermore, the merged system's income projections may be understated because they do not take into account revenue and income growth beyond what is directly anticipated from the merger, such as normal business growth, increased traffic from an improved economy, and cost savings resulting from improved technology. We conclude that a merged UPC/SPR will be financially sound. Taking into account projected revenue gains and cost savings resulting from the merger, UPC/SPR should generate sufficient cash flow to service its debt and make necessary capital outlays to maintain its plant investment.

Fixed Charges. We are required to consider the total fixed charges resulting from the merger, 49 U.S.C. 11344(b)(1)(C), as well as any assumption of payment of fixed charges and any increase of total fixed charges, 49 U.S.C. 11344(c). There will be a manageable merger-related increase in fixed charges due to the issuance of additional debt and the assumption of obligations. The evidence demonstrates, however, that this increase will not have a significant impact on the financial condition of the merged entity. The financial soundness of the merged entity supports a finding that UP's assumption of SP's fixed charges and the increase in total fixed charges will be consistent with the public interest.

Fairness Determination. Section 11344(c) directs us to approve any transaction referred to in 49 U.S.C. 11343 when we find that the transaction is consistent with the public interest, provided that the terms and conditions thereof are just and reasonable. The "just and reasonable" standard requires, among other things, that we determine, in an appropriate case, that the transaction is just and reasonable with respect to minority stockholders. See Schwabacher, 334 U.S. at 198-99; and UP/MKT, 4 I.C.C.2d at 515-16.

UPC already owns approximately 25% of the SPR common stock; these shares, which have been held in a voting trust pending the outcome of this proceeding, were acquired on September 15, 1995, for a cash price of $25.00 per share. The UPC/SPR Merger Agreement provides that, upon the satisfaction of certain conditions, including regulatory approval, a wholly owned UPC subsidiary will acquire the approximately 75% of SPR common stock not held in the voting trust (the stock not held in the voting trust is hereinafter referred to as the outstanding stock). The Merger Agreement further provides that approximately one-fifth of the outstanding stock will be acquired for cash (at a cash price of $25.00 per share) and that approximately four-fifths of the outstanding stock will be acquired in exchange for UPC common stock (at a ratio of 0.4065 shares of UPC common stock per share).

The cash price and the exchange ratio were derived by arm's-length negotiations between UPC and SPR and have been approved by the respective boards of directors and by substantial majorities of the stockholders of the two corporations. No stockholder of either company has challenged the fairness of either the cash price or the exchange ratio. All parties directly affected, having been afforded an opportunity to evaluate the Merger Agreement in light of their respective interests, are apparently satisfied with its terms, which is a strong indication that the terms are just and reasonable to the stockholders of UPC and also to the stockholders of SPR. We also find persuasive the evidence submitted by applicants' financial advisors (CS First Boston Corporation for UPC; Morgan Stanley & Co. Incorporated for SPR), who have expertise in the valuation of businesses and their securities in connection with mergers and acquisitions. See UP/SP-22 at 487-517. The evidence amply supports a finding that the terms of the Merger Agreement, including without limitation both the cash price ($25.00 per share) and the exchange ratio (0.4065 shares of UPC common stock per share), are just and reasonable both to the stockholders of UPC and to the stockholders of SPR.[225]

CONDITIONS REQUESTED. We impose conditions only when we find both that a rail merger will harm the public interest and that a proposed condition will lessen or eliminate such harm, is operationally feasible, and will produce public benefits. The fact that a requested condition pertains to or involves one of the applicants is not enough to classify it as relevant to the proposed common control transaction. There must be a nexus between the merger and the alleged harm for which the proposed condition would act as a remedy. The fact that a condition would benefit the party seeking it does not justify its imposition.

We will discuss in this part of the decision all the conditions that have been requested in this proceeding, except the following which are discussed elsewhere: the conditions

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[225] KCS claims that the terms of the transaction are not fair to the minority stockholders of SPR because SP's value would increase if it were broken up and sold in pieces. KCS-60 at 47-48. We are doubtful that KCS has standing to assert a Schwabacher interest. In any event, the fact that KCS' Schwabacher claim has not been made by any bona fide SPR stockholder is a good indication that the argument is wrong. There is no reason to believe that the sum of the values of the parts exceeds the value of the whole. Indeed, there is good reason to believe that the solution proposed by the parties is likely to be the one that will produce the greatest value to SPR's stockholders.

sought by Tex Mex; the conditions sought by labor interests; the conditions sought with respect to the proposed abandonments;[226] and the environmental conditions sought by various parties.

Broad Conditions Requested. We will discuss first the various broad conditions that have been requested by multiple parties.

South Central/SP East Divestiture Conditions. Several parties have asked that we condition the merger by requiring the divestiture of parallel lines in the South Central/SP East region. The many South Central/SP East divestiture conditions almost uniformly envision the divestiture of parallel lines in the Houston-Eagle Pass, Houston-Brownsville, Houston-New Orleans, and Houston-Memphis corridors, but differ widely with respect to various details. We are denying all South Central/SP East divestiture conditions because, as explained in greater detail above, we believe that the conditions we have imposed (primarily the BNSF and CMA agreements, and the various conditions designed to strengthen the BNSF trackage rights) will adequately preserve existing rail competition in the South Central/SP East region.[227]

Central Corridor Divestiture Conditions. Several parties have asked that we condition the merger by requiring the divestiture of parallel lines in the Central Corridor. The many Central Corridor divestiture conditions differ in various respects, but generally envision (1) the divestiture of UP and/or SP lines between the San Francisco Bay area in the West and the Salt Lake City area in the East, and/or (2)(a) the divestiture of SP lines between the Salt Lake City area in the West and Denver and Pueblo in the East, and (b) if the divested lines are acquired by a carrier other than BNSF, the divestiture of SP lines and/or trackage rights between Pueblo and Kansas City. Some parties seeking a Central Corridor divestiture seek, in the alternative, a grant of unrestricted Central Corridor trackage rights in favor of an independent railroad such as WC or MRL. We are denying all Central Corridor divestiture conditions because, as explained in greater detail above, we believe that the conditions we have imposed (primarily the BNSF and CMA agreements, and the various conditions designed to strengthen the BNSF trackage rights) will adequately preserve rail competition in the Central Corridor.[228]

Central Kansas-To-Texas Conditions. Several parties have asked that we condition the merger by inserting a third carrier into the Lower Plains States. The conditions sought by these parties differ in various details, but generally envision that a third carrier (such as KCS) would be given access to the

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[226] We are discussing in this part of the decision, however, one abandonment matter: with respect to the Barr-Girard abandonment in Docket No. AB-33 (Sub-No. 96), SPBC's procedural argument respecting lack of evidence of I&M trackage rights.

[227] South Central/SP East divestiture conditions have been sought by Conrail, KCS, NITL, SPI, CCRT, HCC, Dow, PPG, Monsanto, SCC, IPC, Weyerhaeuser, RCT, Texas State Rep. Junell, Texas State Rep. Cook, Texas State Rep. Saunders, Arkansas Attorney General Bryant, Ia/DOT, DOJ, and DOT.

[228] Central Corridor divestiture conditions have been sought by KCS, MRL, NITL, WCTL, WSC, MPCSC, JSC, CCRT, MFU, CWAC, HCC, KCOSA, WP&L, WPS, AEPCO, PSCo, ILP, Monsanto, IPC, Weyerhaeuser, IBC/IWC, and DOJ.

Central Kansas-to-Texas rights that SP obtained in a settlement agreement in connection with the BN/SF merger. We did not impose those rights as a condition to the merger. We will deny the various Central Kansas-to-Texas conditions because we believe that the conditions we have imposed will adequately preserve, and that the merger itself should enhance, rail competition in the Lower Plains States in general and for wheat traffic moving from Central Kansas to Texas in particular. BNSF and UP are currently the main competitors for this wheat flow, while SP plays a small role. A post-merger UP/SP will be a stronger competitor vis-à-vis BNSF because the merger will allow UP/SP to upgrade lines and to use combined UP and SP lines in Texas to move heavier-loading cars of wheat to the export market.[229]

Strengthen BNSF Trackage Rights Conditions. Several parties have asked, generally in the alternative, that we condition the merger by strengthening the trackage rights provided for in the BNSF agreement. We have strengthened the BNSF trackage rights in several important ways, and we believe that the conditions we have imposed will adequately preserve rail competition throughout the West. We are therefore denying any conditions that would strengthen the BNSF and URC trackage rights to any greater degree.[230]

Uinta Basin vs. PRB/Hanna Basin Conditions. Several parties, fearful that the merger will eliminate source competition between coal originated by UP (in the PRB and the Hanna Basin) and coal originated by SP (in the Uinta Basin), have asked that we impose conditions protecting this source competition. We are denying all such conditions because, as explained in greater detail above, we believe that: (1) the asserted source competition does not exist to any appreciable degree; (2) a merged UP/SP will take advantage of all reasonable opportunities to market the transportation of Uinta Basin coal; and (3) the conditions we have imposed (primarily the URC and BNSF agreements, and the various conditions designed to strengthen the BNSF trackage rights) should intensify competitive options for Uinta Basin coal shippers.[231]

Trackage Rights Compensation Conditions. Several parties, fearful that the trackage rights compensation arrangements provided for in the BNSF and URC agreements will restrict BNSF and URC in their efforts to provide competitive operations, have asked that we require either that the trackage rights fee be reduced or that the compensation arrangements be restructured. We are denying all trackage rights compensation conditions because, as explained in greater detail above, we believe that the compensation arrangements provided for in the BNSF and URC agreements are reasonable and will permit BNSF to compete effectively.[232]

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[229] Central Kansas-to-Texas conditions have been sought by KCS, JSC, CCRT, HCC, EBT, KCOSA, and Ka/DOT.

[230] Conditions designed to strengthen the BNSF trackage rights further have been sought, generally in the alternative, by SPI, WCTL, WSC, Cargill, CRA, and DOT.

[231] Uinta Basin vs. PRB/Hanna Basin conditions have been sought by WCTL, WSC, WP&L, WPS, AEPCO, WEPCO, PSCo, ILP, PSCN, AGNC, and MRL.

[232] Trackage rights compensation conditions have been sought by WCTL, WSC, Entergy, CPSB, TUE, IPC, Cargill, CRA, PSCN, Governor Leavitt, DOT, and DOJ.

UP/SP Integration Prohibition Conditions. Several parties have asked that we condition the merger with a prohibition against the integration of UP and SP Central Corridor rail operations until UP can certify that it has been in full compliance, for a period of 12 months, with its service commitments under its coal transportation contracts. We will deny these conditions because they would require, in essence, that we monitor UP's compliance with its contractual service commitments. We do not believe that it would be appropriate for us to do so. Under the statute, the exclusive remedy for an alleged breach of a coal transportation contract is an action in an appropriate state court or United States district court, unless the parties have agreed otherwise. Old 49 U.S.C. 10713(i)(2); new 49 U.S.C. 10709(c)(2). We do not think that hampering the merged carriers' ability to realize merger gains through consolidation of operations is a logical or correct way to enforce contract commitments.[233]

Conditions Requested By Individual Parties. We will now discuss any additional conditions and arguments of various individual parties not discussed elsewhere.[234]

Railroad Parties.

Consolidated Rail Corporation. We will deny Conrail's request that the Finance Docket No. 32760 (Sub-No. 1) class exemption be revoked because we believe, as did the ICC, that the trackage rights class exemption can be invoked in connection with trackage rights provided for in merger-related settlement agreements. See BN/SF, slip op. at 87 n.116. We will similarly deny Conrail's related request that the Finance Docket No. 32760 (Sub-No. 2) petition for exemption be denied; exemption by petition of the Sub-No. 2 line sales is no more inappropriate than exemption by notice of the Sub-No. 1 trackage rights.

Kansas City Southern Railway Company. We reject KCS' various challenges to our jurisdiction and to the manner in which this proceeding has been conducted. Our jurisdiction extends to rail traffic moving in foreign commerce. See old 49 U.S.C. 10501(a)(2)(G) (jurisdiction extends to transportation in the United States between a place in the United States and a place in a foreign country) and new 49 U.S.C. 10501(a)(2)(F) (same). KCS' basic arguments respecting the protective order have already been answered. See Decision No. 2 (served Sept. 1, 1995).[235] KCS had the right to challenge applicants' use of the "highly confidential" designation with respect to any particular item so designated; the challenge would have been heard first by the Administrative Law Judge (ALJ) and, on appeal, by us; and the fact that KCS made such challenges only rarely suggests that the "highly confidential" designation did not much impede KCS' ability to litigate this case.[236] KCS' constitutional

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[233] UP/SP integration prohibition conditions have been sought by WCTL, WP&L, and WPS.

[234] We will not discuss the arguments raised by those parties not requesting conditions, including: TP&W, SCRRA, NCGA, ISRI, CP&L, IPA, LCRA/Austin, IES, Geon, USDA, and DOL.

[235] See also Decision No. 5 (served Oct. 27, 1995) (upholding the "highly confidential" provision of the protective order against challenges made by other parties).

[236] Cf. Decision No. 39 (served May 31, 1996) (the ALJ, on KCS' request, ordered public release of a passage from a UPC (continued...)

arguments, to the effect that the "highly confidential" provision of the protective order worked a violation of due process rights under the Fifth Amendment and/or the right to petition for a redress of grievances under the First Amendment, are close to frivolous. As to KCS' arguments to the effect that applicants have not provided sufficient discovery, we note that KCS has not raised these arguments in the proper fashion (these arguments should have been raised first with the ALJ and, upon an unfavorable order, should have been brought to us).

We agree with KCS that the present decision has no retroactive effect, and therefore cannot insulate any pre-merger antitrust violations; but we will decline KCS' invitation to reopen the record in the BN/SF merger proceeding because KCS has presented no evidence that such proceeding was tainted by anticompetitive behavior.

CMTA. We will deny the conditions requested by CMTA. Because Longhorn does not have, and because its predecessors never had, two-carrier competition at the McNeil interchange, the merger will have no impact on the present or future competitive options available to Longhorn or to Giddings-Llano shippers. Pre-merger, their only Class I connection is UP at McNeil; post-merger, their only Class I connection will be UP/SP at McNeil; nothing will have changed. And the passenger service conditions sought by CMTA are not necessary to mitigate merger-related impacts because the merger will have no impact at all on CMTA's future passenger operations; any disruption to CMTA's future passenger operations will be caused by the revival at Giddings (or at Elgin) of the additional Class I connection formerly provided at Giddings by SP.

We will, however, preserve the existing potential competition by providing Giddings-Llano shippers a Class I connection at Giddings. Pre-merger, Longhorn, by reactivating operations over the Smoot-Giddings segment, could achieve a second Class I connection (SP at Giddings). We will preserve this potential competition by providing that the operator of the Giddings-Llano line is to be regarded as a 2-to-1 shortline for purposes of Section 8i of the BNSF agreement (which provides, among other things, that BNSF shall have the right to interchange with any shortline which, prior to September 25, 1995, could interchange with both UP and SP and no other railroad).

Section 4b of the BNSF agreement, as amended by Section 3b of the second supplemental agreement dated June 27, 1996, provides that BNSF shall have the right to interchange at Elgin with the operator of the Giddings-Llano line, should service be reinstituted on that line to Elgin. CMTA has disparaged a connection at Elgin vis-à-vis a connection at McNeil (CMTA's brief at 19-22), but CMTA might prefer a connection at Elgin vis-à-vis a connection at Giddings. CMTA has a right to a connection with BNSF either at Giddings (because we will require such a connection) or at Elgin (because we will hold applicants to their representation that they will allow such a connection); but CMTA has no right to have two such connections because the potential competition that we seek to preserve is based upon a single connection. CMTA will therefore be required to choose between Giddings and Elgin, unless the parties agree otherwise.

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[236] (...continued)
Board of Directors' presentation that applicants had designated "highly confidential"; applicants appealed; we upheld the ALJ's order).

We will allow the interested parties (CMTA, Longhorn, UP/SP, and BNSF) an opportunity to reach a negotiated settlement respecting the precise details of the condition we are imposing. We note, however, that one such detail (the choice between Giddings and Elgin) can be decided unilaterally by CMTA. Because time is not of the essence, we will allow the parties 120 days from the date of service of this decision to submit agreed-upon terms respecting implementation of the condition we have imposed. If the parties are unable to agree to such terms, they shall submit, by such date, separate proposals respecting implementation, and we will establish the terms.

Magma Copper Company's Rail Affiliates. We will deny the conditions sought by MCC. MCC is captive to SP; that captivity predates the merger and will not be exacerbated by it; and MCC's end-to-end foreclosure argument (to the effect that the merger will eliminate potential competition in the form of interline alternatives) has no evidentiary support.

Yolo Shortline Railroad Company. We will deny the conditions sought by Yolo. Pre-merger, Yolo has only one meaningful Class I connection (UP) and no prospect that it will ever have a second meaningful Class I connection (SP). Post-merger, Yolo will have only one meaningful Class I connection (UP/SP) and no prospect that it will ever have a second meaningful Class I connection (BNSF). The conditions sought by Yolo will not rectify any merger-related competitive harms because the merger will inflict no such harms upon Yolo. Nor will the conditions sought by Yolo rectify any operational harms attributable either to the merger or to the BNSF agreement because neither the merger nor the agreement will reduce the efficiency of operations in the West Sacramento area.

KJRY and PRC. We will not impose the conditions requested by KJRY and PRC because we think that the purposes that would be served thereby can be better served by holding applicants to their representation that UP/SP will accept the terms of the settlement agreement entered into by SP in the BN/SF merger proceeding. <u>See</u> UP/SP-230 at 291.

Shipper Organizations.

Corn Refiners Association. We will deny the conditions sought by CRA because we believe that the conditions we have imposed will adequately preserve the rail competition that exists today in areas served by UP and SP. We note, however, that an element of CRA's second condition is reflected in our oversight condition.

MWBC, MFU, and Governor Racicot. We will deny the various conditions sought by MWBC, MFU, and Governor Racicot, most of which seek to broaden the reach, in one fashion or another, of the competitive options created by the BNSF PRA. We realize that the BNSF PRA, by providing increased rail options for some shippers but not for all, may work to the disadvantage of those for whom increased options have not been provided. That, however, is not be the kind of harm that should be rectified under the conditioning power, which was not used by the ICC and will not be used by us to equalize rates and service among competing shippers. MWBC, MFU, and Governor Racicot are not concerned that certain shippers are losing a transportation option, but that their competitors are gaining one. Given this context, a condition requiring that a settlement agreement be changed to improve the competitive situation of particular shippers is not proper. <u>See</u> <u>BN/SF</u>, slip op. at 99 (Bunge). We also add that there is no reason to believe that the BNSF PRA will undermine use of the Silver Bow gateway for movements for which it provides the shortest and most efficient route, that there is no merger-related justification for requiring UP/SP to guarantee its service intentions on the Pocatello-Silver Bow Line for 20 years, that there is likewise no merger-related justification for requiring that the Pocatello-Silver Bow Line be sold to MRL, and that the oversight condition we have imposed is not intended to protect "the last vestiges of intramodal competition in Montana" because neither the UP/SP merger, nor the BNSF agreement in general, nor the BNSF PRA in particular, will adversely affect UP vs. BN (or UP/SP vs. BNSF) competition in Montana.[237] Rather, they will improve it.

Save The Rock Island Committee. We will deny the condition sought by STRICT. It is true, as STRICT alleges, that the ICC, in its 1980 decision allowing SP to acquire the Rock Island line, intended that SP would rehabilitate that line; and it is true that the ICC intended that a rehabilitated Rock Island line would provide competition to MPRR's parallel Kansas City-St. Louis line. Tucumcari, 363 I.C.C. at 327. STRICT neglects to mention, however, that the ICC, in its 1982 decision granting SP trackage rights over MPRR's parallel line, intended that these trackage rights would allow SP not to rehabilitate the Rock Island line. UP/MP/WP, 366 I.C.C. at 547 and 588 (approval of the trackage rights was intended to save SP the $100 million cost of rehabilitation). The 1980 Tucumcari decision was reversed by the 1982 UP/MP/WP decision (the ICC, upon examining a new and updated record, changed its mind). The UP/SP merger will not harm competition between the MPRR line and the Rock Island line; no such competition has existed for almost two decades, and there is no reasonable prospect that such competition will ever exist again. Nor will the merger harm competition in the corridor linking Kansas City and St. Louis; BNSF, NS, and GWWR also operate in that corridor.

Hoisington Chamber of Commerce. We will deny the labor protection conditions sought by HCC. The standard labor protection conditions that we have imposed fully satisfy the statutory requirements of 49 U.S.C. 11347.

Farmers Elevator Association of Minnesota. We will deny the conditions sought by FEAM. The first condition (that UP demonstrate its ability to operate its existing system) is fulfilled; after an admittedly problematic start, UP has demonstrated its ability to operate the UP/CNW system. The second condition (that UP develop an operating plan to address service problems on the former CNW) has no connection to the UP/SP merger.

South San Antonio Chamber of Commerce. We will deny the various conditions sought by SSACC; these conditions are not directed to any problems even arguably caused by the UP/SP merger.

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[237] The conditions sought by MWBC, MFU, and Governor Racicot will not alleviate competitive harms caused by the merger because the merger will not cause competitive harms in Montana; UP, as previously noted, has only a limited presence in Montana, and SP has no presence at all. The sought conditions are designed, for the most part, to alleviate the indirect effects of the BNSF PRA, but such indirect effects (in essence, the creation of new competitive options for some but not all shippers) are not among the kinds of competitive harms that our conditioning power is used to alleviate.

Shippers: Coal.

Entergy/Arkansas P&L/Gulf States Utilities. We will grant the build-out relief sought by Entergy vis-à-vis its White Bluff plant, and thereby preserve the White Bluff build-out status quo, by requiring that the BNSF agreement be amended to allow BNSF to transport coal trains to and from White Bluff via the White Bluff-Pine Bluff build-out line, if and when that line is ever constructed by any entity other than UP/SP. See BN/SF, slip op. at 68 (OG&E) and 98 (PPC). Because applicants have made the BNSF agreement the vehicle for resolving merger-related competitive harms, there is no reason to require the negotiation of a separate trackage rights agreement for the White Bluff build-out. We note, however, that we are not imposing the trackage rights compensation terms advocated by Entergy; we believe that the compensation arrangements provided for in the BNSF agreement will allow for sufficient competition.

We will deny the relief sought by Entergy vis-à-vis its Nelson plant. Pre-merger (but taking the soon-to-be-completed SGR line into account), Nelson has two destination carriers (SP and KCS), neither of which can offer single-line service from the PRB. Post-merger (and also taking the soon-to-be-completed SGR line into account), Nelson will still have two destination carriers (UP/SP and KCS), but one of them will be able to offer single-line service from the PRB. Post-merger, Nelson will have two entirely practicable routings (UP/SP single-line and BNSF-KCS joint-line). While Nelson will be losing the pre-merger BNSF vs. UP competition between the PRB and Fort Worth and also between the PRB and Kansas City, Nelson will be gaining a UP/SP single-line option; and there is no reason to conclude that the loss will be appreciably greater than the gain.

City Public Service Board of San Antonio. (i) We will hold applicants to their representation that the BNSF agreement will be amended to clarify that Elmendorf is a covered point. See UP/SP-230 at 257. See also Section 4a of the BNSF agreement, as amended by Section 3a of the second supplemental agreement dated June 27, 1996 (providing that BNSF can serve SP's line between MP 0 and MP 12.6 for the sole purpose of serving the CPSB plants at Elmendorf; we are unable to ascertain, however, whether BNSF has also received trackage rights over the appropriate UP line between San Antonio and Ajax).

(ii) 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.

(iii) We will impose a condition to the effect that BNSF will be allowed to serve CPSB's Elmendorf Station, at CPSB's option, via CPSB's existing trackage rights agreement with SP. Pre-merger: SP owns the Elmendorf Line and can thereby provide service; CPSB has trackage rights over the Elmendorf Line, and UP can thereby provide service; and BNSF has haulage rights. Post-merger, but without CPSB's third condition: UP/SP will own the Elmendorf Line, and will thereby be able to provide service; BNSF will have, by virtue of the BNSF agreement, trackage rights over the Elmendorf Line, and it too will be able to provide service; but CPSB will have effectively lost its own trackage rights over the line, and, for this reason, BNSF will not be able to use the CPSB trackage rights in its operations over the line. It is not entirely clear why the CPSB trackage rights are important to CPSB, but to preserve the pre-merger status quo vis-à-vis these trackage rights we will require that BNSF be allowed to operate under such trackage rights over the 12-mile segment between SP Junction (Tower 112) and Elmendorf.

(iv) We conclude that CPSB is not a "2-to-1" shipper for purposes of the conditions imposed in this proceeding. We realize that an argument can be made that CPSB is really a 3-to-1 shipper because the BNSF agreement provides for the termination of the haulage rights by which the third carrier (BNSF) can now serve CPSB; and one could reasonably conclude that a 3-to-1 shipper ought to have access to the remedies available to a 2-to-1 shipper. But we think that CPSB is best regarded as a 3-to-2 shipper because the BNSF agreement replaces BNSF's haulage rights with trackage rights.

(v) We will not impose the compensation terms advocated by CPSB. We believe that the compensation arrangements provided for in the BNSF agreement will allow for sufficient competition.

(vi) Because we are not certain whether anything more needs to be done with respect to condition (i) or whether time is of the essence with respect to conditions (i) and (iii), we think that the best course would be to assume, unless told otherwise, that more needs to be done and that time is of the essence. We will therefore require the interested parties (CPSB, UP/SP, and BNSF) to submit, within 10 days of the date of service of this decision, either agreed-upon terms respecting implementation of conditions (i) and (iii) or separate proposals respecting such implementation. We realize that 10 days is a short time frame, but it will enable us, if necessary, to choose the better of the offered alternatives, or some variation thereof, in time for conditions (i) and (iii) to be effective when this decision is effective (on the 30th day after the date of service).[238]

Texas Utilities Electric Company. We will require that the BNSF agreement be amended to permit KCS and BNSF to interchange TUE coal trains: (a) at Shreveport, for movement by BNSF over SP's line between Shreveport and Tenaha; and (b) at Texarkana, for movement by BNSF over UP's line between Texarkana and Longview. Without this condition, all but one of TUE's PRB routings would involve UP/SP, and the one that would not would be excessively circuitous. We add that, although TUE sought only a Shreveport interchange, we are allowing a Texarkana interchange as well, to allow BNSF's routings of TUE coal trains to connect with the additional BNSF trackage rights provided for in the CMA agreement. This also will facilitate BNSF's directional running of these trains. We note, however, that we are not imposing the compensation terms advocated by TUE because the terms of the BNSF agreement will allow BNSF to compete effectively.

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

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[238] If nothing more needs to be done with respect to condition (i) and time is not of the essence with respect to conditions (i) and (iii), on or before the 10th day after the date of service of this decision, UP/SP and CPSB may jointly request an extension of the 10-day deadline, and we will extend that deadline to a later date.

Sierra Pacific Power/Idaho Power Company. We will deny the condition sought by SPP/IDPC. Post-merger, NVS will have, in addition to a UP/SP single-line option, two BNSF options: (1) a URC-BNSF joint-line haul, sourced from mines open to URC; and (2) a truck-BNSF joint-line haul, sourced from load-outs either at Provo or at other Utah points opened to BNSF under the transloading condition we have imposed. It is true, of course, that, post-merger, SPP/IDPC will have only one single-line option (UP/SP) whereas now it has two (UP and SP); but the difference between single-line service and joint-line service is less important in the coal unit train context; and the URC-BNSF joint-line routing should be quite competitive, especially in consideration of the new coal sources opened to URC under the URC agreement.

Arizona Electric Power Cooperative. We will deny AEPCO's condition #1 (the request that AEPCO be given the right to obtain, and to contest the reasonableness of, a UP/SP rate for the Deming-Cochise segment) and its condition #4 (the request for clarification of the implications of the short-haul defense). AEPCO's basic problem is that, at Cochise, it is captive to SP pre-merger and will be captive to UP/SP post-merger; but this problem is not a consequence of the merger and will not be exacerbated thereby. AEPCO's preferred solution, of course, is the prescription of a proportional rate over the Deming-Cochise segment; but this proceeding is not the proper forum for considering the merits of that solution. We affirm what the ICC said in this regard in the BN/SF decision: "A number of utility parties have cases pending before us requesting prescription of a proportional rate over the destination bottleneck segment of their coal movements, and we are not prejudging those cases here. We note, however, that approval of this merger is not intended to foreclose any shipper's right to maximum rate relief." BN/SF, slip op. at 76. We think it appropriate to add that, should we choose, we could eventually grant the relief requested by AEPCO by reopening the UP/SP merger proceeding and imposing that relief as a condition, even if the statutory long-haul/short-haul provision or other statutory provisions would otherwise preclude such relief.

We note, with respect to the other conditions requested by AEPCO: that AEPCO's condition #2 (either divest SP's Colorado lines or grant trackage rights over such lines) is both a Central Corridor divestiture condition and a Uinta Basin vs. PRB condition, and will therefore be denied for reasons previously discussed; and that AEPCO's condition #3 (disapprove the Tennessee Pass abandonments) will be granted in part (we are disapproving the abandonments but approving the discontinuances) for reasons also previously discussed.

Public Service Company of Colorado. PSCo's bifurcated condition respecting divestiture and trackage rights is both a Central Corridor divestiture condition and a Uinta Basin vs. PRB condition, and will therefore be denied for reasons previously discussed. PSCo's alternative conditions respecting the Tennessee Pass Line will be granted in part (we are disapproving the Tennessee Pass abandonments but are approving the discontinuances) for reasons also previously discussed.

Rio Bravo Poso/Rio Bravo Jasmin. We will deny the conditions sought by Rio Bravo. Rio Bravo is either captive to BNSF at destination (insofar as Rio Bravo's coal simply must be unloaded at the Wasco facility) or it is not (insofar as Rio Bravo's coal can be unloaded at a facility on the nearby SP line). If, on the one hand, Rio Bravo is captive to BNSF today, the merger will have no effect at all on Rio Bravo's competitive options. See BN/SF, slip op. at 70-78 (extensive discussion of vertical effects). If, on the other hand, Rio Bravo is not captive to BNSF today, the merger, as conditioned by the BNSF and URC agreements, will preserve Rio Bravo's competitive options; post-merger, Rio Bravo will have access to a UP/SP single-line haul and a URC-BNSF joint-line haul.

Shippers: Plastics and Chemicals.

Dow Chemical Company. Dow is located on a UP line, but claims to have pre-merger build-out/build-in options to both BNSF and SP. The BNSF option will survive the merger; the SP option will not.

Dow's primary request has a familiar flaw: it would move the build-out point (both for BNSF and for the SP substitute) much closer to Dow (from a point in the vicinity of Texas City to a point in the vicinity of Angleton). This would greatly improve, rather than preserve, the pre-merger build-out/build-in status quo vis-à-vis both BNSF and the SP substitute; and Dow's claim that the benefits of a Texas City build-out to SP exceed the benefits of a Texas City build-out to any other carrier is not justified by the evidence of record. We will therefore deny Dow's primary request.

Dow's alternative request cures the familiar flaw by keeping the build-out point for the SP substitute in the vicinity of Texas City, but overreaches by asking that the SP substitute be given trackage rights to New Orleans and Memphis. The preservation of Dow's SP build-out option requires only that trackage rights run from the build-out point to a connection with an independent Class I carrier. We will therefore grant a modified version of Dow's alternative request, and condition the merger, by requiring that UP/SP grant trackage rights to a carrier to be named by Dow, subject to our approval, over UP's line from Texas City to Houston and over UP's or SP's line from Houston to connections with KCS and BNSF at Beaumont, with the right to connect to the build-out line in the vicinity of Texas City in order to serve Dow at Freeport and any other shippers located on the build-out line.

Montell USA Inc./Olin Corporation. The fourth and fifth sentences of Section 5b of the BNSF agreement, as amended by Section 4b of the second supplemental agreement dated June 27, 1996, read as follows (italics and underlining added):

> BNSF shall also have the right to handle traffic of shippers open to all of UP, SP and KCS at Lake Charles and West Lake, LA, and traffic of shippers open to SP and KCS at West Lake Charles, LA; *the foregoing rights at Lake Charles, West Lake, and West Lake Charles, LA shall be limited to traffic (x) to, from and via New Orleans, and (y) to and from points in Mexico, with routings via Eagle Pass, Laredo (through interchange with Tex-Mex at Corpus Christi or Robstown), or Brownsville, TX.* In addition to all other charges to be paid by BNSF to UP/SP herein, at West Lake and West Lake Charles, BNSF shall also be required to pay a fee to UP/SP equal to the fee that UP pays KCS as of the date of this Agreement to access the traffic at West Lake, adjusted upwards or downwards in accordance with Section 12 of this Agreement.

Elsewhere in this decision we have effectively granted all of the conditions requested by Montell and Olin by requiring: (1) that the italicized limitations in the fourth sentence be disregarded (the principal effect will be to allow BNSF to handle, via single-line service, traffic moving to Houston and to other points on BNSF); (2) that KCS be allowed to interchange with BNSF, at Shreveport and Texarkana, traffic that was originated by KCS at or that will be delivered by KCS to shippers at Lake Charles, West Lake, or West Lake Charles (the principal effect will be to substitute a post-merger KCS-BNSF joint-line routing via Texarkana and Shreveport for the pre-merger KCS-UP joint-line routing via Texarkana); and (3) that the BNSF agreement be modified to eliminate the underlined fee in the fifth sentence.

Quantum Chemical Corporation. (1) We will deny QCC's Chocolate Bayou conditions because these conditions would give QCC competitive options far in excess of those it has today. We note, however, that this denial is without prejudice to QCC's assertion of its rights under the build-out/build-in condition we are imposing upon the merger. (2) We will deny QCC's Williams' condition. QCC's claim that relief is necessary to preserve competition between its UP-exclusive Chocolate Bayou facility and its SP-exclusive Williams facility is misleading because QCC has neglected to mention that its La Porte, TX, facility (served by BNSF) has more than twice the polyethylene capacity of its Chocolate Bayou facility, and that its Morris, IL, facility (served by CSX and EJE) has even greater capacity than its La Porte facility. See UP/SP-230 at 159. (3) QCC's Baytown condition has been satisfied by applicants' representation, which is consistent with our reading of Section 5b of the BNSF agreement, that the Seapac facility at Baytown will be served by BNSF. See UP/SP-230 at 136. (4) We will deny QCC's Strang condition. The two-railroad post-merger competition that will exist at Strang should suffice for QCC's purposes.

Union Carbide Corporation. We will deny UCC's first condition because BNSF trackage rights over the UP line would vastly improve (and not merely preserve) the build-out status quo.

We will grant UCC's second condition because BNSF trackage rights over the SP line will preserve the build-out status quo, as applicants themselves now appear to recognize. See UP/SP-230 at 19-20. See also Section 4a of the BNSF agreement, as amended by Section 3a of the second supplemental agreement dated June 27, 1996 (providing that BNSF will have trackage rights over SP's Port Lavaca Branch).

Enterprise Products Company. We will deny EPC's condition #1, but without prejudice to EPC's right to invoke the build-out/build-in condition we have imposed on the merger. Condition #1 would require UP/SP to build the Mont Belvieu Branch proposed by UP; any such requirement would far exceed the relief heretofore afforded in the build-out context; and the excess is underscored by the fact that, as EPC itself concedes, the Mont Belvieu Branch, as initially proposed by UP, would not even have reached EPC.

We will also deny EPC's condition #2 (in essence, the insertion of a second carrier on SP's Baytown Branch). Condition #2 is not necessary to alleviate merger-caused competitive harms and would vastly improve EPC's competitive options. Pre-merger, EPC is rail-served solely by SP; post-merger, EPC will be rail-served solely by UP/SP; the merger will not result in a reduction of EPC's competitive alternatives.

Formosa Plastics Corporation, USA. We will deny FPC's "evenhandedness" condition. We realize that the conditions we have imposed, which may enable Dow, QCC, and UCC (and perhaps others) to attain increased competitive options via build-outs, may work to FPC's disadvantage. But that provides no "evenhanded" justification either for denying the relief awarded to Dow, QCC, and UCC or for granting matching relief to FPC. The harm that may befall FPC is not the kind of harm that the conditioning power was meant to rectify; we do not have a mandate to equalize the competitive situation among the industries served by rail carriers. FPC, after all, is not concerned that it is losing a transportation option, but that its competitors may be gaining one. Cf. BN/SF, slip op. at 99 (Bunge).

PPG Industries Inc. We will deny PPG's requests respecting the WT&J, the WVRR, and the WLPRR; the competitive situations at Bacon, Lebanon, and Corvallis, respectively, will not be affected by the merger.

Huntsman Corporation. As HC believed was required, DOJ has conducted a complete review of the impacts of the merger and we carefully have considered its comments. The conditions we have imposed ensure that UP/SP will not achieve, by virtue of the merger, sole supplier status or unacceptable market power at any significant point or in any significant corridor. Moreover, the procedural schedule under which this proceeding has been handled has allowed ample time for all concerned.

Arizona Chemical Company. We will deny the conditions sought by ACC. ACC is not a 2-to-1 shipper (its Springhill plant is served solely by KCS); and the competition formerly provided by UP and SP past Shreveport will henceforth be provided by UP/SP and BNSF past various gateways.

Monsanto Company. We will deny Monsanto's condition #1. Monsanto has specifically referenced only two of its plants: its plant at Luling (served by both UP and SP); and its plant at Chocolate Bayou (served only by UP, but with access to SP via either barge or a truck transload). Monsanto's competitive options at Luling will not be affected by the merger because the Luling plant is on the Avondale Line to be sold to BNSF (over which UP/SP will retain local trackage rights). Monsanto's competitive options at Chocolate Bayou will not be affected either because BNSF will have (under the transload condition we have imposed) the right to operate new transload facilities on the nearby SP line.

We will also deny Monsanto's condition #4, which is not justified as a remedy to any particular competitive harm. Cf. new 49 U.S.C. 10701(d)(3) (directing us to complete the non-coal rate guidelines proceeding by January 1, 1997).[239]

Shell Chemical Company. We will deny the conditions sought by SCC. The market dominance condition has no particular connection to the merger; and, in any event, we note that a shipper with access to two railroads is not captive to either, and that many shippers served by UP/SP or BNSF exclusively are adequately protected by intermodal or geographic competition. The divestiture condition is a variation on the South Central/SP East divestiture theme.

Springfield Plastics/Brandt Consolidated. We reject SPBC's procedural argument respecting lack of evidence of the I&M trackage rights. As discussed elsewhere in this decision we are

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[239] We are also denying Monsanto's conditions #2 and #3 (South Central/SP East and Central Corridor divestitures, respectively).

approving the Barr-Girard abandonment in its entirety; but we do so with the understanding that the line will be abandoned only if UP/SP first acquires the related trackage rights over I&M. The fact that such trackage rights have not yet been acquired (this appears to be the reason that evidence respecting such trackage rights has not been entered into the record) is not important; the fact that evidence respecting such trackage rights has not been entered into the record is likewise not important; what is important is that, as a very practical matter, the Barr-Girard abandonment cannot be consummated unless UP/SP has first acquired trackage rights over I&M.

Shippers: Other.

International Paper Company. (1) We will deny IPC's condition #1 (a variation on the South Central/SP East divestiture theme). (2) We will deny IPC's condition #2. Conditions intended to keep open existing junctions are overly intrusive and could delay, in certain respects, implementation of the increased efficiencies expected from the merger, and would deny UP/SP the freedom to adapt to new developments. See Traffic Protective Conditions, 366 I.C.C. 112 (1982), aff'd in relevant part Detroit, T. & I.R.R. v. United States, 725 F.2d 47 (6th Cir. 1984). (3) Our action with respect to the conditions requested by Tex Mex largely satisfies IPC's condition #3. (4) We will deny IPC's condition #4. IPC is alleging (a) that CO&PR is captive to SP pre-merger and will be captive to UP/SP post-merger, and (b) that IPC's CO&PR-served (via LP&N) Gardiner plant will not benefit from the pro-competitive provisions of the BNSF agreement. We note, however, (a) that the CO&PR problem predates the merger and will not be exacerbated thereby, and (b) that IPC's claim of competitive harm does not warrant regulatory relief. See BN/SF, slip op. at 99 (Bunge). (5) We will deny IPC's condition #5 (a variation on the Central Corridor divestiture theme). (6) We note that Turlock is a 2-to-1 point explicitly provided for in Section 8i of the BNSF agreement (the omnibus clause), and that applicants have represented that BNSF will serve 2-to-1 shippers at Turlock via haulage from Stockton. UP/SP-230 at 136 n.53; UP/SP-231, Part B, Tab 17 at 29.

United States Gypsum Company. *Empire, NV*. We will deny USG's Empire condition because the merger will have no appreciable impact at Empire. Pre-merger, USG is rail-served solely by UP; post-merger, USG will be rail-served solely by UP/SP; nothing will have changed. We add that the service problems of concern to USG are not really merger-related, but that, in any event, UP has made a commitment to stop one of its trains daily to pick up USG cars. UP/SP-230 at 307-08; UP/SP-232, Tab A at 39-40.

Plaster City, CA. We will deny USG's Plaster City condition #1 because the merger will have no appreciable impact at Plaster City. Pre-merger, USG is rail-served solely by SP; post-merger, USG will be rail-served solely by UP/SP; nothing will have changed. We add that the pre-existing service problems of concern to USG are not merger-related, that there is no reason to expect that service will deteriorate post-merger, and that USG's claim of competitive harm (vis-à-vis its Nevada-based competitors) does not warrant regulatory relief. See BN/SF, slip op. at 99 (Bunge). We will also deny USG's Plaster City condition #2, both for the reasons prompting our denial of its Plaster City condition #1 and also because we have no authority to impose conditions (a) on non-terminal trackage of a nonapplicant carrier, and (b) on a carrier with respect to track located in Mexico.

Southard, OK. We will deny USG's Southard condition, which is an attempt to solve a variation of a problem that surfaced last year in BN/SF, slip op. at 94-95; this time, however, a feasible solution cannot be found. Once again, the 3-to-2 reduction in competitive alternatives faced by GNBC (BNSF, UP, and SP, pre-merger; BNSF and UP/SP, post-merger) is in reality more complicated than a simple 3-to-2 description would indicate. Because of the blocking provision, the reduction in competitive alternatives faced by GNBC can more accurately be described as going from three (two of which can handle only such traffic as BN itself could not have handled) to two (one of which can handle only such traffic as BN itself could not have handled). GNBC, that is to say, will not really be left with two unrestricted competitive alternatives. BN/SF, slip op. at 94. In BN/SF, the ICC solved the problem by allowing SP to replace SF as a competitive alternative for GNBC. This time, however, the problem cannot be solved because the suggested substitute (CSX) is some 425 miles away; and we cannot imagine that the traffic available to GNBC will suffice to lure CSX into establishing an 850-mile round-trip connection. We generally resolve feasibility questions (as in the build-out context) by assuming feasibility and allowing the market to make the final determination; but this is not necessary when our clear assessment is that the condition sought (here, a GNBC-CSX routing) is utterly impractical.

Fort Dodge, IA. We will deny USG's Fort Dodge conditions because the merger will have no appreciable impact at Fort Dodge. Pre-merger, Fort Dodge is served by UP (formerly CNW) and IC (formerly CC&P); post-merger, Fort Dodge will be served by UP/SP and IC; and the competition that existed pre-merger will continue to exist post-merger. We add that, although UP admits that its service at Fort Dodge has been inadequate (UP/SP-232, Tab A at 39), this service problem is not merger-related.

North American Logistic Services. Section 1b of the BNSF agreement as amended by Section 1b of the second supplemental agreement dated June 27, 1996, provides that BNSF shall receive access to any existing or future transloading facility at points listed on Exhibit A to the BNSF agreement. Reno (this has reference to the point on the SP line) is listed in Exhibit A, but, prior to the second supplemental agreement, the Reno listing was qualified by the phrase "intermodal and automotive only." Section 10a of the second supplemental agreement dated June 27, 1996, changes the Reno listing in Exhibit A; the Reno listing is now qualified by the phrase "only intermodal, automotive, [BNSF must establish its own automobile facility], transloading, and new shipper facilities located on the SP line." We interpret this to mean that, even aside from the transloading condition we have imposed on the merger, Section 1b of the BNSF agreement allows BNSF to establish a transloading operation at Reno (on the SP line). Applicants apparently agree: "BNSF will be entitled under the agreement to set up a transload and serve new industries at Reno, Nevada." UP/SP-230 at 294.

We add that we understand that BNSF will have, at Reno, the reciprocal switching rights (if any) that UP had prior to the merger. Because, for Kal Kan's purposes, BNSF is replacing UP as a competitive possibility at Reno, it only makes sense that BNSF should be given, to the maximum extent possible, the rights formerly held at Reno by UP.

We will otherwise deny the conditions requested by NALS. The first condition (granting BNSF local trackage rights access to Wunotoo) is not necessary to preserve existing competition because UP presently has no such access to Wunotoo. The second condition (granting BNSF local trackage rights access to Reno over the UP line) is unnecessary in view of BNSF's local trackage rights access to Reno over the SP line; there is no indication that the UP line is in any way superior to the SP line for that purpose.

ASARCO. The merger will not have the competitive impacts feared by ASARCO. ASARCO's El Paso copper smelter will have access to two carriers (UP/SP and BNSF); ASARCO's Hayden copper smelter will be no more captive to UP/SP than it now is to SP; Section 4b of the BNSF agreement, as amended by Section 3b of the second supplemental agreement dated June 27, 1996, provides that BNSF's access and interchange rights at Corpus Christi shall be at least as favorable as the rights SP has currently; and competition for traffic moving from/to Mexico will remain vigorous.

CIC International Corporation. We will deny the conditions sought by CIC. (1) Class III railroads and their customers that rely on the Houston-Fair Oaks line are rail-served exclusively by SP pre-merger, and will be rail-served exclusively by UP/SP post-merger; the merger will change nothing in this respect, and there is no reason to believe that new post-merger traffic flows will cause service problems. Direct access to BNSF, as sought by CIC, would vastly improve, not merely preserve, the competitive status quo. (2) CIC now has two reload options (UP at Palestine; BNSF at Cleveland), but the BNSF reload at Cleveland has clearly been the preferred option. See UP/SP-230 at 287 (the BNSF reload received 93.4% of CIC's reload business between January and October 1995). CIC's claim that the BNSF reload may be eliminated as a post-merger competitive alternative in the wake of the various realignments triggered by the BNSF agreement is unjustified; if anything, this reload operation will be strengthened because of BNSF's ability to route reload traffic over UP/SP's Houston-Memphis lines.

Weyerhaeuser Company. We will deny Weyerhaeuser's conditions #1 and #2 (variations on the Central Corridor and South Central/SP East divestiture themes, respectively). We note, however, that, with our grant of trackage rights to Tex Mex, we have effectively granted Weyerhaeuser's condition #3.

We will deny Weyerhaeuser's condition #4, which is akin to IPC's condition #4 (discussed above). Weyerhaeuser is not alleging merger-related competitive harms; what Weyerhaeuser is alleging is either (a) that CO&PR is captive to SP pre-merger and will be captive to UP/SP post-merger, and/or (b) that Weyerhaeuser's CO&PR-served plants will not benefit from the pro-competitive provisions of the BNSF agreement. We note, however, (a) that the CO&PR problem predates the merger and will not be exacerbated thereby, and (b) that Weyerhaeuser's claim of competitive harm does not warrant regulatory relief. See BN/SF, slip op. at 99 (Bunge).

With respect to Weyerhaeuser's condition #5, we note that, in approving the merger, we have imposed several conditions, included among which are the provisions in the BNSF agreement that enhance rail-to-rail competition in the Pacific Coast Corridor.

Cargill. We will deny the conditions sought by Cargill: the compensation arrangements provided for in the BNSF agreement will allow for sufficient competition; the reciprocal switching, rate guidelines, and open gateways conditions are, for the most part, not even merger-related, are overly intrusive, and could delay, in certain respects, implementation of the increased efficiencies expected from the merger, and would deny UP/SP the freedom to adapt to new developments; and the condition respecting private rail cars "is certainly not merger-related." BN/SF, slip op. at 100.

IBP, Inc. The conditions sought by IBP are directed to harms assertedly caused by the UP/CNW merger, not to harms that might be caused by the UP/SP merger. We will therefore deny the conditions sought by IBP.

Oregon Steel Mills, Inc. We will deny the conditions requested by OSM. These conditions are, by and large, directed to problems not caused by the merger, and, furthermore, are overly intrusive and could delay, in certain respects, implementation of the increased efficiencies expected from the merger, and would deny UP/SP the freedom to adapt to new developments.

Stimson Lumber Company. We will deny the conditions sought by SLC. Conditions #1 and #3 do not address merger-related competitive harms because SLC will not experience a merger-related reduction in competitive options. See UP/SP-230 at 297 (SLC's relevant facilities are located on a shortline that connects only to SP). Condition #2 is overly intrusive, and, besides, UP/SP will have every incentive to use its yards so as to maximize its competitiveness in moving Pacific Northwest lumber. Condition #4 is also overly intrusive, and, in any event, addresses a "problem" that is not merger-related; and, besides, applicants have committed to reducing the high reciprocal switch charges now imposed by SP. See UP/SP-230 at 19.

State and Local Interests.

Texas: RCT. (1) We note, with respect to RCT's Condition #1, that Tex Mex is being granted Corpus Christi-Beaumont trackage rights, and will therefore have a connection with KCS. (2) We will deny RCT's condition #2 (a variation on the South Central/SP East divestiture theme). (3) We will deny RCT's condition #3. The neutral terminal railroad proposal is a solution either to a problem that does not exist (because the conditions we have imposed will adequately preserve the rail competition that exists today in Texas) or to a problem that is not a consequence of the merger (because these neutral terminal railroads would create new rail competition far beyond that which exists today). (4) We will deny RCT's condition #4. This condition is unnecessary because the law we administer already provides numerous protections regarding abandonments. UP/CNW, slip op. at 99; BN/SF, slip op. at 101.

We note, with respect to RCT's conditions #5 and #6, that we are imposing the following environmental mitigation conditions indicated in Appendix G: mitigation conditions #3, #4, #5, #6, #7, #15, #16, and #18.

Texas: Other Parties. *The Port of Corpus Christi*. (1) We are imposing the BNSF agreement as a condition. (2) We note that the trackage rights granted to Tex Mex will, as a practical matter, allow KCS' affiliate, Tex Mex, to access Corpus Christi.

Texas State Representatives Robert Junell, John R. Cook, and Robert Saunders. (1) We will deny condition #1 (a variation on the South Central/SP East divestiture theme). (2) We are granting Tex Mex most of the rights sought in condition #2. (3) We note that the responsive application filed by Cen-Tex (the South Orient affiliate) was rejected as incomplete, and that its request for conditions was stricken from the record on account of its failure to comply with its discovery obligations. We add that the conditions we have imposed will adequately preserve the rail competition that exists today in Texas. (4) Condition #4 has been addressed in our discussion of the conditions sought by RCT.

Texas State Representative John R. Cook. We will deny Rep. Cook's request for a declaratory order respecting excursion trains. Whatever the merits of Rep. Cook's arguments respecting excursion train liability law, the subject has no connection at all to the merger.

California: CPUC. (1a) We will deny CPUC's "perpetual term" condition. The 99-year term provided by Section 8i of the BNSF agreement should suffice; a perpetual term hardly seems necessary. We note also that, under current law, a carrier conducting trackage rights operations that are subject to our jurisdiction can discontinue such operations only with our approval, see new 49 U.S.C. 10903(a)(1), even if the agreement providing for such trackage rights contains an expiration date. See Arkansas & Missouri R. Co. v. Missouri Pacific R. Co., 6 I.C.C.2d 619, 622 (1990). See also Dallas Area Rapid Transit Property Acquisition Corporation--Acquisition and Operation Exemption--Rail Lines of Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, and Dallas Terminal Railway and Union Depot Company, Finance Docket No. 31786 (ICC served Feb. 20, 1991) (similar holding); Thompson v. Texas Mexican Ry., 328 U.S. 134 (1946) (ICC can impose terms to ensure that existing trackage rights agreements are not frustrated).

(1b) We note that, by virtue of the oversight condition we have imposed, we will have sufficient power to take corrective action if we conclude that the BNSF agreement has not effectively addressed the competitive issues it was intended to address.

(2) We think it appropriate to note that, pursuant to the conditions we have imposed on the merger, BNSF will have access to all new facilities (including transload facilities) located post-merger on any UP/SP-owned line over which BNSF receives trackage rights in the BNSF agreement.

(3) We believe that BNSF is committed to providing adequate competition in the Central Corridor.

(4) We will deny CPUC's condition #4. The Keddie-Stockton Line is the trackage rights segment of BNSF's new I-5 Corridor route (i.e., the segment over which BNSF will operate pursuant to trackage rights provided for in the BNSF agreement), and condition #4 is apparently intended to ensure that BNSF will have the wherewithal to operate that route even in the teeth of UP/SP recalcitrance. The conditions we have imposed, however, address discrimination (Paragraph 9 of the CMA agreement provides that UP/SP shall agree with BNSF on a dispatching protocol) and maintenance (Section 9d of the BNSF agreement provides that the trackage rights lines shall be maintained at no less than a certain level), and applicants have represented that BNSF has the power under the settlement agreement to obtain any capital improvements it wants. UP/SP-230 at 270.

(5) We will deny CPUC's Modoc Line condition. A requirement of continued operation of the Modoc Line would be inconsistent with our approval of the abandonment of the Wendel-Alturas segment thereof.

(6) We will deny CPUC's NCRA condition. With or without the 140-mile Willits-Lombard line, NCRA connects solely to SP pre-merger and will connect solely to UP/SP post-merger; and

CPUC's NCRA condition is therefore unrelated to any merger-caused harm.

(7) We note that, as a matter of general corporate law, UP/SP will succeed to SP's obligations respecting the Capitol Corridor and the Alameda Corridor. See UP/SP-230 at 271-72 (acknowledgment that UP/SP will succeed to "all valid contractual obligations of SP").

(8) We note that UP/SP has indicated that it intends to develop the Calexico gateway. UP/SP-230 at 272.

(9) We will deny CPUC's labor protection proposal, which "implicates a matter better dealt with under the labor protective conditions" imposed in this proceeding. BN/SF, slip op. at 101.

California: Other Parties. The City of Industry. We will deny the conditions requested by IUDA. Although IUDA's two parcels are "2-to-1" in an academic sense, the record does not indicate that there are any shippers on these parcels currently benefiting from direct competition between UP and SP.

County of Modoc and City of Alturas. With respect to the environmental issue raised by Modoc and Alturas, we will impose the various environmental mitigation conditions indicated in Appendix G, including specific mitigation condition #45 (an abandonment-specific condition relative to the Wendel-Alturas abandonment). With respect to the "return the gift" issue raised by Modoc and Alturas, we note that real property ownership questions are generally a matter of state law.

County of Placer. With respect to the concerns raised by Placer, we will impose the various environmental mitigation conditions indicated in Appendix G, including the specific mitigation condition relative to Placer (mitigation condition #21).

East Bay District. With respect to the concerns raised by East Bay District, we will impose the various environmental mitigation conditions indicated in Appendix G, including the specific mitigation condition relative to East Bay District (mitigation condition #19).

City of Sacramento. With respect to the concerns raised by Sacramento, we will impose the various environmental mitigation conditions indicated in Appendix G.

Oregon: Or/DOT. With respect to Or/DOT's first condition (monitor competition in the Central Corridor), we note that the oversight condition we have imposed will allow us to do just that. With respect to Or/DOT's second condition (commence an investigation respecting open access), we note that this is not a merger-related issue.

Idaho: IBC/IWC. Pre-merger, much of Idaho is rail-served exclusively by UP; post-merger, much of Idaho will be rail-served exclusively by UP/SP. We are therefore confident that the merger will not cause competitive harms in Idaho. The BNSF PRA, we realize, may cause indirect harms to those Idaho shippers now rail-served exclusively by UP; but such indirect harms (in essence, the creation of new competitive options for shippers now rail-served exclusively by BNSF but not for shippers now rail-served exclusively by UP) are not among the kinds of competitive harms that our conditioning power is intended to alleviate. We will therefore deny IBC/IWC's conditions #1 and #2 (condition #1 would require approval of the MRL application and related relief; condition #2 would require that BNSF be granted access to shippers now rail-served exclusively by UP). We will also deny IBC/IWC's condition #3 (long-term oversight vis-à-vis captive shippers and UP/SP grain movements). The problems that condition #3 are intended to remedy (in essence, the problems of shippers now captive to UP) are not merger-related; neither the merger nor the BNSF agreement in general nor the BNSF PRA in particular will deprive any shipper of competitive options available to that shipper today.

Nevada. We will deny PSCN's conditions #1 and #3; these "open access" conditions provide a solution either to a problem that does not exist (because the conditions we have imposed will adequately preserve the rail competition that exists today in Nevada) or to a problem that is not a consequence of the merger (because these conditions would create new rail competition far beyond that which exists today). We will deny PSCN's condition #2; the compensation arrangements provided for in the BNSF agreement will allow for sufficient competition. We will deny PSCN's condition #4a; providing timely responses to inquiries might be a good business practice, but it has no connection to the merger.

With respect to PSCN's conditions #4b and #5, and also with respect to the concerns raised by Reno, Fernley, and Winnemucca/Humboldt, we will impose the following environmental mitigation conditions indicated in Appendix G: mitigation conditions #3, #4, #5, #7, #8, #12, #15, #16, #17, #18, and #22.

Kansas. We note, with respect to Ka/DOT's condition #1, that UP has represented that it may lease, but does not intend to sell, the Pueblo line, and that, if either a lease or a sale is considered, it will work with Kansas to ensure quality service. UP/SP-230 at 273.

We will deny Ka/DOT's condition #2. Post-merger, Wichita will benefit from vigorous competition between UP/SP and BNSF.

With respect to Ka/DOT's condition #3, and also with respect to the concerns raised by Sedgwick/Wichita, we will impose the following environmental mitigation conditions indicated in Appendix G: mitigation conditions #18 and #23.

With respect to the concerns raised by Abilene, we will impose the following environmental mitigation conditions indicated in Appendix G: mitigation condition #18.

Minnesota: Mn/DOT. We will deny Mn/DOT's conditions #1, #2 and #3; the problems these conditions seek to solve are not merger-related. We will deny Mn/DOT's condition #4; we believe that the conditions we have imposed (which will strengthen, to some extent, the BNSF trackage rights) will adequately preserve the rail competition that exists today in the South Central/SP East region and in the Central Corridor, and throughout the West. We will also deny Mn/DOT's condition #5; the applicable law "already provides numerous protections regarding abandonments and line sales," BN/SF, slip op. at 101; and condition #5, insofar as it relates to labor protection, implicates a matter better dealt with under the labor protective conditions imposed in this proceeding.

Washington: Wa/DOT. We think it appropriate to note that the oversight condition we have imposed is akin to the condition sought by Wa/DOT.

Utah. We will deny the conditions sought by Governor Leavitt. Condition #1 (a reduction in the BNSF trackage rights fees) is unnecessary; we believe that the compensation arrangements provided for in the BNSF agreement will allow for sufficient competition. Condition #2 (in essence, that UP/SP rates in Utah be linked to rates in "competitive" markets) is likewise unnecessary because the merger will not reduce competitive options for any Utah shipper; and condition #2 is overbroad and not merger-related insofar as it is intended to apply to shippers now rail-served exclusively either by UP or by SP. Condition #3 (establish oversight for at least 15 years) envisions an oversight regime lasting far longer than we hope will be necessary.

Federal Parties.

United States Department of Justice. We are denying, for reasons provided elsewhere in this decision, DOJ's conditions #1 and #2 (South Central/SP East and Central Corridor divestitures, respectively). We are also denying DOJ's condition #3 that we require applicants to divest sufficient lines to preserve a third independent competitor between Los Angeles and the eastern gateways, particularly Chicago. Applicants and DOJ agree that the largest 3-to-2 traffic flow is Los Angeles-Chicago intermodal traffic. DOJ's numbers confirm that BNSF's premium service currently dominates these movements. BNSF's share of intermodal rail traffic in this corridor is over 50%. We believe applicants' plan to assign most expedited, service sensitive intermodal and automotive traffic to SP's Tucumcari Line and most slower manifest traffic to UP's Central Corridor Line will provide more effective competition to BNSF for all traffic moving between Los Angeles and the St. Louis and Chicago gateways. Shippers and numerous other affected California parties agree. Remarkably, DOJ, alone among the major parties, has concluded that competitive harm to this traffic is so significant that it can only be cured by divestiture of one of applicants' Los Angeles to Chicago routings. We strongly disagree.

United States Department of Transportation. DOT seeks: in the South Central/SP East region, a divestiture; and, in the Central Corridor, either a strengthening of the BNSF trackage rights (DOT's preferred condition) or a divestiture (DOT's back-up condition). With respect to the South Central/SP East region, we are denying, for reasons provided elsewhere in this decision, DOT's divestiture condition. With respect to the Central Corridor, we are conditioning the merger by strengthening the BNSF trackage rights much in the fashion that DOT has suggested: we are preserving build-in/build-out and transloading options along the entire stretch of trackage rights without time limit; we are requiring UP/SP to open its contracts with shippers at all 2-to-1 points to allow BNSF access to 50% of the volume; and we are establishing an oversight procedure that, if future events require, may result in a divestiture or a transfer of trackage rights to another railroad, as necessary.

United States Department of Defense. DOD's concerns are limited to the 2-to-1 impact at five installations: Red River Army Depot and Lone Star Army Ammunition Plant, both at Defense, TX; Sierra Army Depot, at Herlong, CA; Sharpe Army Depot, at Lyoth, CA; and Defense Depot Tracy, at Lathrop, CA. With respect to Red River Army Depot and Lone Star Army Ammunition Plant, we note: that Defense, TX, is listed as a 2-to-1 point in Section 8i of the BNSF agreement (the omnibus clause); and that applicants have indicated that BNSF traffic moving from/to these two facilities will be moved by UP/SP between Defense and Texarkana. UP/SP-230 at 136. With respect to Sierra Army Depot, we note: that applicants have represented that this facility is covered by Section 8i of the BNSF agreement (the omnibus clause);[240] and that applicants have indicated that BNSF plans to serve Herlong via trackage rights, directly picking up and setting out Herlong traffic as an adjunct to its Oakland-Denver operations. UP/SP-230 at 136. With respect to Sharpe Army Depot and Defense Depot Tracy, we note that Lyoth and Lathrop, respectively, are listed in Section 8i of the BNSF agreement (the omnibus clause) as amended by Section 6a of the second supplemental agreement dated June 27, 1996.

ABANDONMENTS AND DISCONTINUANCES. As indicated earlier, applicants seek authorization to abandon, or to abandon and to discontinue operations over, 17 line segments that total approximately 584 miles. MPRR seeks to abandon 122.4 miles in Colorado, 40.24 miles in Kansas, 28.7 miles in Arkansas, 8.5 miles in Louisiana, and 7.5 miles in Texas. UPRR seeks to abandon 67.98 miles in Illinois, 12 miles in Utah, and 10.08 miles in California. SPT seeks to abandon 178.1 miles in Colorado, 85.5 miles in California, and 23.03 miles in Texas.

Public notice was properly given and, in Decision No. 9, served December 27, 1995, the ICC accepted the abandonment requests for consideration and adopted a procedural schedule in this proceeding.[241] Because the abandonment proposals were conditioned on consummation of the merger, the ICC stated in Decision No. 9 that the abandonment requests would be processed in accordance with the overall merger procedural schedule rather than the deadlines established in section 10904 and in our regulations. Decision No. 9, slip op. at 9-10; <u>see</u> <u>UP/MKT</u>, 4 I.C.C.2d at 486 n.73. The records are complete and we will now consider the merits of each proposal under the applicable standards. Labor and environmental conditions are discussed elsewhere in the decision.

Applicants contend that the lines sought to be abandoned are presently used primarily (in a few instances, exclusively) for overhead traffic, and applicants insist, with respect to each line, that this overhead traffic will be rerouted by a commonly controlled UP/SP. Applicants add that the local traffic generated by these lines is minimal (in a few instances, non-existent), and they maintain that these lines simply cannot be sustained by the limited amounts of local traffic they generate.

As described below, we will publish all seven notices of exemption, grant all four requests for discontinuance, and grant five of six abandonment petitions and three of four abandonment applications. We are denying the petition and application relating to the abandonment of the Tennessee Pass Line for the reasons stated earlier in our discussion of conditions imposed directed to the Central Corridor and as set forth in our

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[240] Herlong was listed as a 2-to-1 point in Section 8i of the BNSF agreement dated Sept. 25, 1995, but is not listed as a 2-to-1 point in Section 8i, as amended by Section 6c of the supplemental agreement dated Nov. 18, 1995, and as further amended by Section 6a of the second supplemental agreement dated June 27, 1996. We expect, however, that applicants will adhere to their representation that Sierra Army Depot is covered by Section 8i.

[241] To the extent necessary, these abandonment proceedings are deemed to be investigations under 49 U.S.C. 10904 and 49 CFR 1152, or exemption proceedings under 49 U.S.C. 10505 and 49 CFR 1121 or 1152, as applicable.

following discussion of specific abandonment authority being sought by applicants.

Notices of Exemption. As noted, applicants have filed seven abandonment notices of exemption[242] under 49 CFR 1152 Subpart F. The notices seek to invoke the 2-year out-of-service class exemption codified at 49 CFR 1152.50, pursuant to which an abandonment or discontinuance of service or trackage rights is exempt if the carrier certifies that no local traffic has moved over the line for at least 2 years, that any overhead traffic on the line can be rerouted over other lines, and that no formal complaint filed by a user of rail service on the line (or a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Board or any U.S. District Court or has been decided in favor of the complainant within the 2-year period.

No individual findings under 49 U.S.C. 10505 are necessary as to these seven notices because these lines fall within the class of lines exempted by 49 CFR 1152 Subpart F. According to applicants, there has been no local traffic on the lines for 2 years and any overhead traffic on the line can be rerouted over other lines.

Only one of the notices, Docket No. AB-3 (Sub-No. 132X), has received any protests. The Harvey County Board of Commissioners, the HCJDC, and Rep. Boston submitted comments in opposition, alleging that the abandonment of the Whitewater-Newton line in Kansas will have adverse economic consequences. Protestants did not contradict MPRR's contention that the line has had no local traffic for 2 years and that the line in all other respects qualifies for the class exemption. Nor did they address the revocation criteria in section 10505.

These exemptions will be effective on September 11, 1996 (unless stayed pending reconsideration). Petitions to stay and formal expressions of intent to file an offer of financial assistance under 49 CFR 1152.27(c)(2) must be filed by August 22, 1996, and petitions to reopen must be filed by September 3, 1996. Because the notices were previously conditioned on the merger, which has now been approved, we will, consistent with our regulations, publish notice in the Federal Register.

Petitions for Exemption. As noted, applicants have filed six abandonment petitions for exemption.[243] Our denial of the

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[242] MPRR has filed two notices of exemption: Docket Nos. AB-3 (Sub-No. 132X) (Newton-Whitewater, KS); and AB-3 (Sub-No. 134X) (Troupe-Whitehouse, TX). UPRR has filed four notices of exemption: Docket Nos. AB-33 (Sub-No. 93X) (Whittier Junction-Colima Junction, CA); AB-33 (Sub-No. 94X) (Magnolia Tower-Melrose, CA); AB-33 (Sub-No. 97X) (DeCamp-Edwardsville, IL); and AB-33 (Sub-No. 99X) (Little Mountain Junction-Little Mountain, UT). SPT has filed one notice of exemption: Docket No. AB-12 (Sub-No. 187X) (Seabrook-San Leon, TX).

[243] MPRR has filed two abandonment petitions: Docket No. AB-3 (Sub-No. 129X) (Gurdon-Camden, AR); and Docket No. AB-3 (Sub-No. 133X) (Iowa Junction-Manchester, LA). SPT has filed three abandonment petitions: Docket No. AB-12 (Sub-No. 189X) (Sage-Leadville, CO) and Docket No. AB-8 (Sub-No. 36X) (related discontinuance); Docket No. AB-12 (Sub-No. 184X) (Wendel-Alturas, CA); and Docket No. AB-12 (Sub-No. 185X) (Suman-Bryan (Benchley), TX). UPRR has filed one abandonment petition: Docket No. AB-33 (Sub-No. 98X) (Edwardsville-Madison, IL).

petition in Docket No. AB-12 (Sub-No. 189X) will be addressed in our discussion with the abandonment application below regarding the Tennessee Pass Line. We will grant the other five abandonment petitions for exemptions.

Under 49 U.S.C. 10903-04, a rail line may not be abandoned without prior approval. Under 49 U.S.C. 10505, however, we must exempt a transaction from regulation when we find that: (1) application of the statutory abandonment provisions is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a; and (2) either (a) the particular abandonment or discontinuance is of limited scope, or (b) the application of the statutory abandonment provisions is not needed to protect shippers from the abuse of market power.

Detailed scrutiny is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of filing abandonment applications, these exemptions will expedite regulatory decisions and reduce regulatory barriers to exit. 49 U.S.C. 10101a(2) and (7). By allowing applicants to avoid the expense of retaining and maintaining lines that generate little or no traffic and to apply their assets more productively elsewhere on the system, these exemptions will foster sound economic conditions and encourage efficient management. 49 U.S.C. 10101a(3), (5), and (10). Other aspects of the rail transportation policy are not affected adversely.

Regulation is not necessary to protect shippers from an abuse of market power because all overhead traffic will be rerouted, and recurring traffic will have viable alternative transportation options available. Only one of these proceedings, Docket No. AB-3 (Sub-No. 129X), received a protest, which was filed by a shipper who had made only one shipment in the last 5 years, and who, applicants contend, has a transportation alternative available to it.[244] No shippers are opposing the other abandonment petitions.[245]

Given our findings regarding the probable effect of the transactions on market power, we need not determine whether the transactions are of limited scope. Nevertheless, we note that four of these five proposed abandonments involve rail lines ranging from 8.5 miles to 28.7 miles in a single state with

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[244] The Reader Railroad, a noncommon carrier tourist railroad, objected to the abandonment. According to applicants, however, it has made only one shipment (a steam locomotive on a flatcar) in the last 5 years; and this is the only local traffic that moved on the line. Applicants submit that such occasional movements of railroad equipment can be handled by "lowboy" trucks.

[245] In Docket No. AB-12 (Sub-No. 185X), the City of College Station raised concerns about negative impacts the proposed abandonment could have on northwestern Brazos County and the City of Bryan. Its opposition focuses only on general allegations of possible harm to the local area.

In Docket No. AB-12 (Sub-No. 184X), CPUC, Or/DOT, Lassen, Susanville, Modoc, and Alturas oppose the proposed abandonment of the Modoc Line. As applicants point out, however, no shippers that use this line to originate or terminate traffic have opposed the abandonment. Also, applicants are not proposing to abandon in Alturas (the abandonment limit is about 10 miles south of the area) and the concerns about the Sierra Army Depot at Herlong are unfounded because Herlong is not within the abandonment limits.

little local traffic, and the fifth one involves 85.5 miles of rail line in a single state with no recurring local traffic.

These exemptions will be effective on September 11, 1996 (unless stayed pending reconsideration). Petitions to stay and formal expressions of intent to file an offer of financial assistance under 49 CFR 1152.27(c)(2) must be filed by August 22, 1996, and petitions to reopen must be filed by September 3, 1996.

Applications. Four formal abandonment applications have been filed to become effective contingent upon approval of the merger. Three have been filed by UP[246] and one has been filed by SP.[247] Our denial of the application in Docket No. AB-12 (Sub-No. 188) will be discussed in the Tennessee Pass Line section, below. We will grant the other three abandonment applications, each of which has received some form of opposition.

The statutory standard governing an abandonment, under 49 U.S.C. 10903, is whether the present or future public convenience and necessity require or permit the proposed abandonment. If the abandonment is unopposed, 49 U.S.C. 10904(b) requires that we make an affirmative finding and issue a certificate permitting the abandonment. Otherwise, we must weigh the potential harm to affected shippers and communities against the present and future burden that continued operation could impose on the railroad and on interstate commerce. Colorado v. United States, 271 U.S. 153 (1926). Essentially, this involves a question of whether, and to what degree, the shippers will be harmed if rail service is no longer available. For an abandonment application to be denied, protestants must show that the harm to shippers and communities outweighs the demonstrated harm to applicants and interstate commerce by continued operation of the line. Cartersville Elevator, Inc. v. ICC, 724 F.2d 668, aff'd on reh'g en banc, 735 F.2d 1059 (8th Cir. 1984).

In determining whether to grant or deny an abandonment application, we consider a number of factors, including operating profit or loss, other costs the carrier may experience (including opportunity/economic cost), and the effect on shippers and communities. No one factor is conclusive. Id.

Hope-Bridgeport Line (Kansas). In Docket No. AB-3 (Sub-No. 131), MPRR seeks by application to abandon its 31.25-mile Hope-Bridgeport Line. In the embraced Docket No. AB-8 (Sub-No. 37), DRGW seeks to discontinue its trackage rights operations over the line. We will grant the abandonment and the discontinuance. We will issue a certificate of interim trail use if no offer of financial assistance is timely made.

Train operations. Prior to October 16, 1995, the Hope-Bridgeport Line had local train service, including three cycles (six one-way trips) per week. The train originated at Herington,

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[246] MPRR and DRGW filed two applications to abandon and discontinue service, respectively, in Docket No. AB-3 (Sub-No. 130) (Towner-NA Junction, CO) and Docket No. AB-8 (Sub-No. 38) (related discontinuance); and Docket No. AB-3 (Sub-No. 131) (Hope-Bridgeport, KS) and Docket No. AB-8 (Sub-No. 37) (related discontinuance). UPRR filed an abandonment application in Docket No. AB-33 (Sub-No. 96) (Barr-Girard, IL).

[247] SPT and DRGW filed an application to abandon and discontinue service, respectively, in Docket No. AB-12 (Sub-No. 188) (Malta-Cañon City, CO) and Docket No. AB-8 (Sub-No. 39) (related discontinuance).

KS, operated over the subject line to Hoisington, KS, and returned to Herington the following day. Effective October 16, 1995, MPRR replaced this operation with a local train assignment operating three cycles a week from Hoisington to Bridgeport to Salina and return, with Bridgeport-Hope side trips as required.

In accordance with a waiver granted in Decision No. 3, served on September 5, 1995, applicants provided information relating only to local train service by MPRR. DRGW does not originate or terminate traffic on the line. Farm products are the principal commodities shipped over the line. For the three significant shippers/receivers on the subject line, 77 carloads were shipped in 1993 and 220 carloads in 1994. For the most current partial year available (January 1, 1995, through June 30, 1995), a total of only five carloads were shipped. Applicants' projected forecast year traffic of 190 carloads is not challenged.

Revenue and cost data. As shown in the following table, applicants estimate that, for the forecast year November 1, 1995, through October 31, 1996, local traffic on the line will generate avoidable losses that can be avoided by abandonment and cessation of operations. Applicants' revenue and cost estimates, including return on value, are not contested. We summarize them as follows:

		(Forecast Year)
Total Revenue		$187,384
Total On-Branch Costs	$219,915	
Total Off-Branch Costs	110,495	
Total Avoidable Costs		330,410
Avoidable Loss, Excluding Return on Value		143,026
Return on Value		581,921
Avoidable Loss, Including Return on Value		$724,947

Revenues. Total revenues for the forecast year are projected to be $187,384. This is based on the movement of 190 carloads.

Avoidable Costs. Applicants' revenue and cost estimates are based on a service frequency averaging one cycle per week. Total on-branch costs are estimated to be $219,915, consisting primarily of maintenance-of-way and structure costs of $185,890. With respect to track maintenance costs, applicants estimate a normalized annual expenditure of $5,950 per main track mile to maintain the track at Federal Railroad Administration (FRA) class 1 standards, excluding maintenance costs associated with overhead traffic.

Opportunity Costs. Return on value is the opportunity cost of the resources committed by the railroad to provide service over the line subject to abandonment. Opportunity costs are estimated to be $581,921, computed by multiplying the average rail pre-tax cost of capital rate for 1994 of 18.3% by the valuation of road property ($3,044,544) dedicated to the train operations conducted over the line and adjusting for a holding loss of $24,769.[248]

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[248] A restatement of these numbers to take into account the Board's 1995 cost of capital determination, which results in a (continued...)

Projected Losses. Applicants project an avoidable loss, excluding opportunity costs, of $143,026. Including opportunity costs, losses are projected to be approximately $700,000 in the forecast year.

Alternative transportation. Applicants indicate that there is adequate alternative rail and motor transportation available to shippers after abandonment. There are other BNSF and UP/SP lines in the area. According to applicants, the principal shipper on the line, Agri-Producers, indicated in its discovery responses that the trucking companies it has used are too numerous to list.

Shipper and community interests. Applicants contend that this line is an insignificant part of the transportation network in the area. According to applicants, wheat is the only agricultural commodity produced in the area that moves on the line, and only about 4% or 5% of the area's wheat is transported on this line. The line's principal shipper, Agri-Producers, filed a notice of intent to participate without expressing a position on the abandonment, and it filed no evidence. The other shipper on the line, North Central Kansas Coop, did not file an individual statement, but it is a member of the Mountain-Plains Communities and Shippers Coalition which opposes the abandonment. Only one individual, Mr. Schwarz, alleges that crops would no longer be shipped by rail from his local elevator but would be moved at higher costs by motor carriers.

Discussion and conclusions. The applicable criteria weigh heavily in favor of abandonment and discontinuance. The line is unprofitable and is incurring substantial opportunity costs. There is an allegation of increased shipping costs, but shippers are using truck transport now, suggesting it is economical. Even if shippers incur some inconvenience and added expense, that by itself would be insufficient to outweigh the detriment to the public interest of uneconomic and excess facilities. We find that, on balance, the burden of operating this unprofitable line outweighs any inconvenience and the unspecified additional expense to shippers for using alternative transportation.

Towner-NA Junction Line (Colorado). In Docket No. AB-3 (Sub-No. 130), MPRR seeks to abandon its 122.4-mile Towner-NA Junction Line. In the embraced Docket No. AB-8 (Sub-No. 38), DRGW seeks to discontinue its overhead trackage rights operations over the line. As noted earlier, this abandonment generated intense opposition, although relatively few of the opponents, applicants point out, are shippers who actually use the line. We will grant the abandonment and the discontinuance. We will issue a certificate of interim trail use if no offer of financial assistance is timely made.

Train operations. For the past 2 years, local train service on the Towner-NA Junction Line has consisted of local trains operating three cycles (six one-way trips) per week. The trains originated at Pueblo, operated over the subject line to Horace, KS, and returned to Pueblo the following day. Local service trains are operated with one locomotive, a practice applicants anticipate will continue. In accordance with Decision No. 3, applicants provided the revenue and cost information in the application relating only to local train service by MPRR. DRGW does not originate or terminate traffic on the line.

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[248](...continued) pre-tax cost of capital of 17.5%, produces a return on value of $557,564.

Wheat and barley are the principal commodities shipped over the line. The total carloads shipped, for the five shippers on the subject line, in 1993 and 1994 were 164 and 142 carloads, respectively. For the most current partial year available (January 1, 1995, through June 30, 1995), a total of only 30 carloads of wheat were shipped by MPRR. Applicants' projected forecast year traffic is 238 cars.

Revenue and cost data. As shown in the following table, applicants estimate that for the forecast year November 1, 1995, through October 31, 1996, local traffic on the line will generate avoidable losses that can be avoided by abandonment and cessation of operations. Applicants' cost estimates, including return on value, are not contested. We summarize them as follows:

		(Forecast Year)
Total Revenue		$237,676
Total On-Branch Costs	$922,012	
Total Off-Branch Costs	127,068	
Total Avoidable Costs		1,049,080
Avoidable Loss, Excluding Return on Value		811,404
Return on Value		1,867,795
Avoidable Loss, Including Return on Value		$2,679,199

Revenues. Total revenues for the forecast year are projected at $237,676 based on the movement of 238 cars. Protestants argue that there is a much higher demand for local services than current traffic indicates. Citing a Colorado Department of Transportation study, protestants aver that potential traffic on the line could exceed 4,000 cars per year compared to the 238 cars projected. Absent specific commitments from other shippers for traffic over the line, we believe the higher 4,000 car estimate to be speculative. Applicants' revenue estimate is reasonable, and we have no basis on which to restate it.

Avoidable Costs. Applicants' cost estimates are based on a service frequency averaging one cycle per week. Total on-branch costs are estimated to be $922,012, consisting primarily of maintenance-of-way and structure costs of $613,650 and property taxes of $195,578. Because the line is classified at a level higher than FRA class 1, the line requires no rehabilitation.

Opportunity Costs. Opportunity costs are estimated to be $1,867,795, computed by multiplying the average rail pre-tax cost of capital rate for 1994 of 18.3% by the valuation of road property ($10,177,042) dedicated to the train operations conducted over the line and adjusting for a holding loss of $5,396.[249] The greater part of the property value committed to the operation of the line is the net salvage value of track structure, which is estimated to be $9,811,169. Land is valued at $450,955.

Projected Losses. Applicants project an avoidable loss, excluding return on value, of $811,404. Including return on

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[249] A restatement of these numbers to take into account the Board's 1995 cost of capital determination, which results in a pre-tax cost of capital of 17.5%, produces an opportunity cost of $1,786,378.

value, losses are projected to be approximately $2.6 million in the forecast year.

Alternative transportation. Applicants indicate that there is adequate alternative rail and motor transportation available to shippers after abandonment. An alternate UP line (the "Kansas-Pacific" line) runs parallel to this line to the north. Running parallel to the line to the south is the BNSF line through Prowers County. According to applicants, shippers who responded to discovery requests indicated that the motor carriers they were using were too numerous to list.

Shipper and community interests. As described previously, this application was vigorously opposed by shippers, individuals, and communities. Opponents argue that the abandonment of the line would have a devastating economic effect based on lost rail service and lost tax revenues.

Applicants argue, preliminarily, that the concerns of shipper and community interests have been addressed in an agreement between the State of Colorado and UP. As we have noted earlier, a letter of intent was signed by Governor Roy Romer of Colorado and Richard K. Davidson, Chairman of UP, in which UP agreed to serve active shippers on both the Tennessee Pass and Towner-NA Junction Lines for at least 6 months after the merger, and, in any case, until improvements described in the Operating Plan are completed on UP's "KP" line east of Denver to avoid congestion on the Moffat Tunnel line. Rail lines will be left in place for at least a year after the merger while other rail options are explored. This schedule can be modified by mutual agreement between Colorado and UP. For a year after merger, UP will sell the route to a new entity at net liquidation value if a viable rail option develops.

Applicants also argue that the abandonment will have little impact on shippers served by the line. They contend that most of the elevators mentioned in the submissions by farmers are not on the line, and, in any event, abandonment will cause no elevator to close.

Applicants contend that there will be only a 0.75% increase in heavy truck traffic. Finally, applicants argue that most of the tax revenue losses are not tax savings to UP because UP will be reallocating tax payments to other Colorado counties and other states. In any event, the ICC has held that the loss of taxes otherwise collectible from a line proposed for abandonment has no bearing on the public need for the line. See Burlington Northern Railroad Company - Abandonment - In Fergus, Judith Basin and Chouteau Counties, MT, Docket No. AB-6 (Sub-No. 175) (ICC served July 30, 1984).

Discussion and conclusions. The line is incurring substantial losses and opportunity costs. We conclude that the burden on shippers and communities resulting from the abandonment is outweighed by the burden imposed on MPRR and DRGW and on interstate commerce by the financial losses that would result if the carriers were required to continue to operate this line. Given the magnitude of these losses, we conclude that the line is a burden on interstate commerce, and we will grant the abandonment.

Barr-Girard Line (Illinois). In Docket No. AB-33 (Sub-No. 96), UPRR seeks to abandon its 38.4-mile Barr-Girard Line. As noted, protestants request that this abandonment be denied in its entirety, or, in the alternative, that the abandonment be denied as to the 26.7-mile Barr-Compro segment. According to protestants, by using the Barr-Compro segment a carrier could obtain 100% of the traffic and revenues on the Barr-Girard Line while maintaining and operating only about 70% of the line. We will deny SPBC's alternative request for a partial abandonment, and we will grant applicants' abandonment application. We will impose the requested 180-day public use condition. We will issue a certificate of interim trail use if no offer of financial assistance is timely made.

Train operations. The Barr-Girard Line is part of the former CNW's route from Chicago to St. Louis. As a result of the UP/CNW consolidation and the UP/SP consolidation, the merged system will have three Chicago-St. Louis through routes. As noted, the proposed abandonment results from a decision to reroute all Chicago-St. Louis traffic from the former CNW route to an allegedly superior UP/SP north-south route. Once this through traffic is rerouted, applicants believe that continued operation of the Barr-Girard Line for only local traffic would be uneconomical. Rerouting will be effected by exiting at Barr and operating under a trackage rights agreement over the I&M line from Barr to Springfield, then operating over the SP line from Springfield to St. Louis.

Local train service on the Barr-Girard Line over the past 2 years has been provided by through trains operating daily in both directions. Due to the very low volume of local traffic generated by the line, applicants believe a service frequency of one cycle per week would be adequate if the line were operated solely for local traffic. In accordance with Decision No. 3, applicants provided the revenue and cost information in the application relating only to local train service by UPRR.

A joint protest by Springfield Plastic, Inc. (SpPl) and Brandt Consolidated, Inc. (BCI) (again, collectively, SPBC) contests applicants' forecast year traffic estimates. Applicants claim that forecast year traffic will be the same as 1994 traffic on the line: 40 carloads of polyethylene received by SpPl and 3 carloads of anhydrous ammonia received by Brandt. SpPl claims forecast year traffic will amount to 46 carloads, and BCI submits that traffic will amount to 7 carloads. In applicants' rebuttal statement, UP revises its forecast to accept BCI's claim of 7 carloads, but UP maintains its projection of 40 carloads for SpPl. SpPl states that 18 carloads have been received in the first 4 months of the forecast year for an average of 4 carloads per month. Applying that average to the final 8 months of the forecast year, skipping a month to account for an inventory buildup, SpPl adds an additional projected 28 carloads to the 18 already received to arrive at 46 carloads. UP contends that inventory buildup periods are followed by downturns in activity that are more substantial than calculated by SpPl. UP examined SpPl's traffic statistics for the period 1994 through February 1996 to determine if there were other 7-month periods in which waybilled traffic totaled at least 28 cars (the amount projected by SpPl). For each of the 8-month periods following those examined, waybillings totaled just 20 cars. Therefore UP added the projected 20 carloads to the 18 already received to arrive at 38, substantiating their original projection of 40 carloads for SpPl. We accept UP's analysis because it more accurately reflects actual carload volume in the recent past.

Revenue and cost data. The following table reflects operations over the Barr-Compro segment, the scenario most favorable to protestants. Applicants' estimates are shown in the first column of figures. Our restatement, based on arguments raised by protestants, is shown in the second column of figures. Applicants estimate that for the forecast year November 1, 1995, through October 31, 1996, local traffic on the subject line will generate loses which can be avoided by abandonment and cessation of operations. Applicants' cost estimates are based on a service frequency of only 40 cycles per year from South Pekin-Compro and return, producing total revenues for the forecast year of $180,074. Total avoidable costs are estimated at $289,076 (including off-branch costs of $50,446). Total return on value is estimated at $803,300.

	Applicants' Estimates for Forecast Year	STB's Restated Forecast Year
Total Revenue	$180,074	$191,676
Total On-Branch Costs	$238,630	$170,075
Total Off-Branch Costs	50,446	54,790
Total Avoidable Costs	289,076	224,865
Avoidable Loss, Excluding Return on Value	109,002	33,189
Return on Value	803,300	543,383
Avoidable Loss, Including Return on Value	$912,302	$576,572

As discussed below, applicants' estimates of revenues and costs for the forecast year require restatement in light of arguments raised by protestants.

Revenues. Protestants claim that total SpPl revenues, based on 95-ton minimum rates, were understated for the forecast year by $2,040. Applicants agree with protestants but believe, on further analysis, that the understatement in revenue is $2,358.

For the additional traffic (10 carloads--6 for SpPl and 4 for BCI) that protestants estimate will be moved over the line, protestants calculate additional revenues of $42,270, based on average revenues per car of $4,227. As indicated above, we do not accept the additional 6 carloads for SpPl, and believe applicants' 40 carload figure is appropriate. While accepting the additional 4 carloads for BCI, applicants contend that, by using an average for both commodities instead of an average for each commodity, protestants' per-car revenues are erroneously high. Applicants' analysis represents a more refined approach than SpPl-BCI's use of broad averages. Applicants have developed a rate for fertilizer shipped for BCI from Lawrence, KS, of $29.63/ton. Applying the additional traffic of four BCI carloads at $29.63/ton, applicants computed additional revenues of $9,244. We agree with applicants' analysis of the additional revenues. The forecast year revenues would then be $191,676 ($180,074 original estimate + $9,244 additional revenues from increased traffic + $2,358 adjustment for SpPl traffic based on 95-ton minimum rates), as reflected in the second column of figures in the above table.

Avoidable Costs. Applicants' cost estimates are based on a service frequency averaging 40 cycles per year. Total on-branch costs are estimated to be $238,630, consisting primarily of maintenance-of-way and structure costs of $202,581 and transportation costs of $30,192. Protestants argue that transportation costs have been overstated because of an incorrect assumption by applicants that UPRR will operate the subject line at the FRA class 1 speed limit of 10 mph. Protestants contend that the appropriate speed is that permitted for FRA class 3 track (40 mph). Applicants have presented no evidence that the subject line cannot be operated at the higher speed. It is also unreasonable to assume that the crews would be required to operate at less than optimum operating speeds. We agree with protestants. At the higher speed, locomotive hours of operation would decrease from 228 hours to 72 locomotive hours. This would decrease transportation costs by $5,794, maintenance costs by $750, and return on investment (ROI) expense for locomotives by $2,088.

With respect to track maintenance costs, applicants' estimate of $202,581 is comprised of $119,936 for nonprogram maintenance for the Barr-Compro segment, $69,263 for program maintenance for the Barr-Compro segment, and $13,382 for nonprogram maintenance on the Compro-Girard segment. Protestants argue that the Compro-Girard maintenance ($13,382) should be eliminated because that segment would be abandoned even if abandonment of the Barr-Compro segment were denied. Also, the protestants contend the Barr-Compro program maintenance ($69,263) should be eliminated since the line is now classified at the FRA class 3 level and should be allowed to evolve to FRA class 1 by eliminating maintenance. The nonprogram maintenance costs of $119,936 are not contested and appear to be reasonable. We agree with protestants that the Compro-Girard nonprogram maintenance ($13,382) should be eliminated. In their rebuttal statement, applicants contend that UPRR would incur an absolute minimum of $22,722 for program maintenance on the Barr-Compro segment (versus applicants' program maintenance estimate of $69,263). We agree with applicants' revised lower maintenance cost estimate. Accordingly, the revised maintenance cost for the Barr-Compro segment would be $142,658 annually ($119,936 for nonprogram maintenance and $22,722 for program maintenance). This would be $5,343 per mile, which is reasonable for FRA class 1 track. Because the line is classified at a level higher than FRA class 1, the line requires no rehabilitation.

Protestants argue that trackage rights payments to I&M should be treated as an offset to avoidable costs because such payments reduce the amount that would be saved as a result of the abandonment. Trackage rights compensation to I&M, however, concerns the movement of rerouted overhead traffic, which is irrelevant to our analysis. As we have discussed, in Decision No. 3 we waived the filing of revenues and costs associated with overhead traffic. Even if we were to consider the trackage rights payment, for a complete analysis we would also have to consider the revenues generated by the overhead traffic and other costs incurred in moving this traffic, such as fuel and crew wages. In other words, the amount saved by abandonment might not be reduced if both the revenues and costs associated with overhead traffic and trackage rights were considered.

We have restated total avoidable costs to reflect the adjustments to transportation costs and maintenance-of-way costs discussed above. These adjustments reduce forecast year on-branch avoidable costs from $238,630 to $170,075. Off-branch avoidable costs are increased to $54,790 for the forecast year to reflect costs associated with the forecasted additional carloads.

Opportunity Costs. Opportunity costs are estimated by applicants to be $803,300, computed by multiplying the average rail pre-tax cost of capital rate for 1994 of 18.3% by the valuation of road property ($4,155,986) dedicated to the train operations conducted over the line and adjusting for a holding loss of $42,755.[250] The greater part of the property value

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[250] Applicants used the ICC's 1994 cost of capital because it was the most current return when the application was prepared.
(continued...)

committed to the operation of the line is the net salvage value of track structure, which UPRR estimates to be $2,761,100. Another component is land, which applicants value at $1,490,000. Below we discuss these two components.

Net salvage - Protestants argue that the net salvage value of almost $2 million for the Barr-Compro segment would be more than offset by the $2.6 million cost UPRR would incur to upgrade existing connections and crossings to allow implementation of UPRR trackage rights from Barr to Springfield as a result of the abandonment. If this offset is not applied, SPBC argues that net salvage for the Barr-Compro segment should be calculated by multiplying applicants' net salvage value for the line by 0.6953 (26.7 miles from Barr to Compro ÷ 38.4 miles from Barr to Girard). We believe that costs associated with upgrading existing connections should not be included in the net salvage calculations because the through traffic will be rerouted regardless of whether the line is abandoned. Moreover, if we were to consider construction costs for rerouting through traffic, it would also be necessary to consider the savings achieved by rerouting. We agree with protestants that net salvage should be prorated to take into account that no maintenance is required for the line segment between Compro and Girard. The resulting restated net salvage for the Barr-Compro line segment is $1,919,827 ($2,761,100 x 0.6953).

Land value - Applicants estimate land value for the Barr-Girard Line to be $1,490,000. Protestants argue that, because UPRR did not furnish property deeds, it has failed to prove the quality of its title. Furthermore, protestants say that, if land value is not set at zero, it should be prorated using mileage, as was done for net salvage. Protestants failed to identify specific deeds to which UPRR incorrectly claimed fee title or to provide alternative property values. Because applicants' acreage calculations and unit values appear to be reasonable, we accept applicants' land value. Furthermore, we accept protestants' method of prorating the Barr-Compro land value because applicants did not provide a separate land value for that segment. The Barr-Compro segment will be valued at $1,036,016 ($1,490,000 x 0.6953).

The sum of the restated net salvage value and land value is net liquidation value ($2,955,843). Total valuation of property is the sum of working capital ($3,998), income tax consequences (negative $99,112) and net liquidation value. Based on this total property valuation ($2,860,729), the nominal return on value is $500,628 (computed by multiplying property valuation by the 1995 pre-tax cost of capital rate of 17.5%). This is adjusted by a holding loss of $42,755 to produce a total return on value shown in the second column of the table of $543,383.

Projected Losses. Applicants project an avoidable loss, excluding return on value, of $109,002. Including return on value, losses are projected to be $912,302 in the forecast year. A restatement of these numbers using the Board's 1995 cost of capital determination and changes resulting from arguments raised by protestants produces the following numbers: an avoidable loss, excluding opportunity costs, of $33,189 and losses, including opportunity costs, of $576,572 in the forecast year.

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[250](...continued)
Since that time, the Board has made its 1995 cost of capital determination.

Alternative transportation. Protestants are located at Compro, which, according to applicants, is about 6 miles from Interstate 55, a major Chicago-Springfield-St. Louis truck route. SpPl claims that, if the line were abandoned, it would incur at least $100,000 in added freight and handling charges. BCI's cost of receiving shipments would allegedly increase $10,000 per year if the line were abandoned. Applicants respond that, if SpPl used a rail-to-truck transfer operation in the St. Louis area, the additional cost would be $66,480, which is allegedly a very small portion of the company's profits. SpPl replies that the increased costs would reduce SpPl's yearly profit by 3.8%, while the line's claimed operating loss is less than 0.02% of UP's net income.

Shipper and community interests. Protestants argue that the $110,000 increase in costs for SpPl and BCI indicates that there would be substantial harm to local interests caused by an abandonment. The Economic Development Council for Greater Springfield contends that the abandonment will cause negative economic impacts for any business that relies heavily on rail service. Applicants contend that abandonment will not have a significant effect on shipper and community interests because the only shippers on the line will not incur significant additional transportation charges.

Discussion and conclusions. The applicable criteria weigh in favor of granting the abandonment and denying the request for a partial abandonment. We have restated the revenue and cost evidence based on the Barr-Compro segment in the scenario most favorable to protestants. Under our restatement, the avoidable loss is $33,189 based on revenues of $191,676. When opportunity costs are included, the total loss is $576,572. Although the avoidable losses are relatively low, they amount to over $700 a carload. Moreover, there are large opportunity costs. There is no evidence that there will be a significant increase in traffic in the future.

We recognize, and applicants concede, that the shippers will experience increased costs. Both the ICC and the Board have held, however, that the fact that shippers are likely to incur some inconvenience and added expense is insufficient by itself to outweigh the detriment to the public interest of continued operation of uneconomic and excess facilities. The situation in this proceeding is unusual because the loss to shippers is approximately twice as great as the avoidable loss of $33,189. As noted, however, when opportunity costs are included, the economic loss is over $575,000. Moreover, in considering the fact that only 47 cars are projected for the forecast year, applicants' avoidable loss amounts to over $700 a car, a significant subsidy by the carrier.

We therefore conclude that the burden on shippers and communities resulting from abandonment is outweighed by the burden imposed on UPRR and on interstate commerce by the financial losses that would result if UPRR were required to continue to operate this line. Given these losses, we must conclude that the line is a burden on interstate commerce, and we will grant the abandonment.

<u>Tennessee Pass Line Abandonments</u>. SPT seeks to abandon and discontinue operations over, and DRGW seeks to discontinue

operations over, two segments of the Tennessee Pass Line.[251] We will grant the applications and petitions for exemption to the extent to allow for discontinuance, but will deny the application and petition for abandonment authority. Because we are granting discontinuance authority, we will not consider trail use requests or impose public use conditions. We will discuss the discontinuance issues before addressing the abandonment requests.

Discontinuances granted: 10505 petitions. To the extent that SPT seeks to discontinue service in Docket No. AB-12 (Sub-No. 189X) and DRGW seeks to discontinue service in AB-8 (Sub-No. 36X), we find that SPT and DRGW have met the criteria for discontinuance exemptions.

Detailed scrutiny is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of filing discontinuance applications, these exemptions will expedite regulatory decisions and reduce regulatory barriers to exit. 49 U.S.C. 10101a(2) and (7). These exemptions will foster sound economic conditions and encourage efficient management by allowing the carriers to discontinue uneconomic service on the line. 49 U.S.C. 10101a(3), (5), and (10). Other aspects of the rail transportation policy are not affected adversely.

Regulation is not necessary to protect shippers from an abuse of market power. No shipper that actually uses the line to originate or terminate traffic has opposed the discontinuances. Applicants claim that the major recurring source of local traffic on the line has been salvaged rolling stock and cargo from train accidents. No local traffic is expected to be generated on the line in the future.

Given our findings regarding the probable effect of the transactions on market power, we need not determine whether the transactions are of limited scope. Nevertheless, we note that the transactions involve 69.1 miles of line in a single state. Under 49 U.S.C. 10505, we will exempt from the prior approval requirements of 49 U.S.C. 10903-04, the discontinuance by both SP and DRGW of operations on the Sage-Malta-Leadville Line.

Discontinuances granted: applications. To the extent that SPT seeks to discontinue service in Docket No. AB-12 (Sub-No. 188) and DRGW seeks to discontinue service in AB-8 (Sub-No. 39), we find that SPT and DRGW have met the criteria for discontinuance. Most of the opposition to the abandonment and discontinuance applications for the Malta-Cañon City Line are from interested parties concerned about the rerouting of traffic. Also, the major shipper on the line, ASARCO, has expressed concern about the applications.

The statutory standard governing a discontinuance under 49 U.S.C. 10903 is whether the present or future public convenience and necessity require or permit the proposed discontinuance. As in abandonment proceedings, we must weigh the potential harm to affected shippers and communities against the present or future burden that continued operation could impose on the railroad and on interstate commerce. Colorado v. United

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[251] SPT and DRGW, respectively, filed applications in Docket Nos. AB-12 (Sub-No. 188) and AB-8 (Sub-No. 39), for the abandonment and discontinuance of service over the 109-mile Malta-Cañon City, CO line; and petitions for exemptions in Docket Nos. AB-12 (Sub-No. 189X) and AB-8 (Sub-No. 36X), for the abandonment and discontinuance of service over the 69.1-mile Sage-Malta-Leadville, CO line.

States, 271 U.S. 153 (1926). In this proceeding, the record indicates that the Malta-Cañon City Line is incurring significant losses, described below.

Train operations. Pursuant to Decision No. 3, applicants provided information relating only to local train service. Service to shippers is usually provided by through trains operating 7 days per week. Minerals, chemicals, and scrap metal are the principal commodities shipped over the line.

Due to the very low volume of local traffic generated by the line, a service frequency of one cycle per week would be adequate if the line were operated solely for local traffic. The total carloads shipped for the nine significant shipper/receivers on the subject line in 1993 and 1994 were 574 and 528, respectively. For the most current partial year available (January 1, 1995, through June 30, 1995), a total of 258 carloads (predominantly minerals) were shipped. Applicants' projected forecast year traffic of 492 cars is not challenged.

Revenue and cost data. As shown in the following table, applicants estimate that for the forecast year November 1, 1995, through October 31, 1996, local traffic on the line will generate avoidable losses that can be avoided by abandonment and cessation of operations. Applicants' cost estimates, including return on value, are not contested. We summarize them as follows:

		(Forecast Year)
Total Revenue		$1,286,649
Total On-Branch Costs	$891,239	
Total Off-Branch Costs	915,777	
Total Avoidable Costs		1,807,016
Avoidable Loss, Excluding Return on Value		520,367
Return on Value		1,259,808
Avoidable Loss, Including Return on Value		$1,780,175

Revenues. Total revenues for the forecast year are projected to be $1,286,649. This is based on the movement of 492 cars.

Avoidable Costs. Total on-branch costs are estimated to be $891,239, consisting largely of maintenance-of-way and structure costs, estimated by applicants to be $555,114. With respect to these track maintenance costs, applicants estimate a normalized annual expenditure of $5,093 per main track mile to maintain the track at FRA class 1 standards, excluding maintenance costs associated with overhead traffic. Because the line is classified at a level higher than FRA class 1, no rehabilitation is required. Review of applicants' calculations indicates that the maintenance estimate of $555,114, and the quantities and unit costs used to develop the estimate, appear to be reasonable.

Opportunity Costs. Opportunity costs are estimated to be $1,259,808, computed by multiplying the average rail pre-tax cost of capital rate for 1994 of 18.3% by the valuation of road property ($6,809,017) dedicated to the train operations conducted over the line, and adjusting for a holding loss of $13,758. The majority of the property value committed to the operation of the line is the net salvage value of track structure, which is estimated to be $7,079,625. Land is valued at $378,000.

Projected Losses and Estimated Subsidy. Applicants project an avoidable loss, excluding opportunity costs, of $520,367. Including opportunity costs, losses are projected to be almost $1.8 million in the forecast year. A restatement of these numbers to take into account our 1995 cost of capital determination, which results in a pre-tax cost of capital of 17.5%, produces opportunity costs of $1,205,336. Losses, including opportunity costs, would be approximately $1.73 million.

Alternative transportation. The main shipper served by the line is ASARCO, whose traffic accounts for 477 of the 492 carloads of lead and zinc ore projected for the forecast year. ASARCO and SPT have discussed building a new transload facility at a site in the Cañon City area where ASARCO could truck the ore following an abandonment or discontinuance of service. ASARCO does not claim transloading is infeasible or that its mine would not be able to operate. It does suggest, however, that the new arrangements would not be as satisfactory as the current one. No other customers who receive or ship traffic on the line filed comments. Applicants contend that trucking of ore was common when the area was much more heavily mined, and that it should not be difficult to build a transloading facility in Cañon City comparable to the one in Malta.

Shipper and community interests. As noted, no shippers besides ASARCO filed comments. CWAC argues that there is a much higher demand for local shipping than current traffic indicates. Applicants claim that the projected traffic is unrealistic, arguing that some of the movements are being shipped by truck and that some of the movements originate or terminate at Florence, CO, which is not on the line.

Discussion and conclusions. The applicable criteria weigh in favor of discontinuance. The line is incurring heavy operating losses and claims of significantly increased traffic have not been substantiated. Accordingly, the potential harm to shippers and communities from discontinuance of service is outweighed by the burden on the carriers and on interstate commerce from continued operations. Both SPT and DRGW may discontinue service over the subject line.

Abandonments not granted. In most situations, the lack of shipper opposition, little local traffic, and significant losses over the Malta-Cañon City Line, discussed above, would also support a grant of the petition and the application to allow for abandonment. Here, however, there is a significant factor that militates against granting abandonment: indications in the record that the Moffat Tunnel Line may lack the capacity to handle overhead traffic rerouted from the Tennessee Pass Line.

We have discussed this issue earlier. It is clear that, because of the importance of this through route, permitting abandonment now would be inconsistent with the rail transportation policy. We will accordingly deny the petition for exemption to the extent it seeks abandonment authority. Moreover, because of questions raised about the ability of the Moffat Tunnel Line to handle the rerouted overhead traffic, we cannot find that the present or future public convenience and necessity permit the abandonment of the Malta-Cañon City Line. We will therefore deny the abandonment application to the extent it seeks abandonment authority.

Public Interest Conditions.

Trail Use. Requests for issuance of certificates or notices of interim trail use (CITUs or NITUs) to acquire rights-of-way under the National Trails System Act, 16 U.S.C. 1247(d), were filed in 10 proceedings: Docket Nos. AB-3 (Sub-No. 130, 131, and 133X), AB-33 (Sub-Nos. 96, 97X, 98X, and 99X), and AB-12 (Sub-No. 184X, 188, and 189X). We will not issue a CITU or NITU in the two Tennessee Pass Line proceedings, Docket Nos. AB-12 (Sub-Nos. 188 and 189X), because we are denying the requested abandonments and are issuing only discontinuance authority. No trail use or public use conditions may be imposed where only discontinuances are being granted. Southern Pacific Transportation Company--Discontinuance of Service Exemption--In Ventura County, CA, Docket No. AB-12 (Sub-No. 143X) (ICC served Nov. 20, 1992).

We will issue a CITU or NITU in the other eight proceedings.[252] The criteria for imposing trail use and rail banking have been met. The parties have submitted statements of willingness to assume financial responsibility for the rights-of-way and acknowledged that use of the rights-of-way are subject to future reactivation for rail service in compliance with 49 CFR 1152.29. Applicants have indicated their willingness to negotiate trail use agreements.[253]

The parties may negotiate an agreement during the 180-period prescribed below. If the parties reach a mutually acceptable final agreement, further Board approval is not necessary. If no agreement is reached within 180 days, applicants may fully abandon the line, provided the conditions imposed in the applicable proceeding are met. 49 CFR 1152.29(c) and (d). Use of the rights-of-way for trail purposes is subject to restoration for railroad purposes.

Our issuance of the NITUs does not preclude other parties from filing interim trail use requests within 10 days after publication of the notice of exemption in the Federal Register. If, within the 10-day period following publication of the notices of exemption, additional trail use requests are filed, applicants are directed to respond to them within 10 days.

The parties should note that operation of the trail use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10905. As stated in Rail Abandonments--Use of Rights-of-Ways as Trails, 2 I.C.C.2d 591 (1986) (Trails), offers of financial assistance (OFAs) to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking and

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[252] The CITUs will be issued within 45 days of the service of this decision if no offer of financial assistance is timely made. The NITUs are being issued as part of this decision.

[253] Applicants state that, for non-Colorado lines proposed for abandonment, they are willing to negotiate trail use with any or all of the parties that have made requests. For Colorado abandonments, applicants are willing to negotiate trail use with the State or any of its designees. They are also willing to negotiate with other parties requesting trail use for Colorado abandonments so long as the State of Colorado is agreeable. Applicants have also submitted letters in various proceedings indicating their willingness to negotiate trail use.

public use.[254] Accordingly, the effective date of the decisions may be postponed during the OFA process. See 49 CFR 1152.27(c), (e) and (f). Finally, if the line is sold under the OFA procedures, the abandonment application or the petition for abandonment exemption will be dismissed and trail use precluded. Alternatively, if a sale under the OFA procedures does not occur, trail use may proceed.

Public Use. Various parties in eight proceedings have sought public use conditions under 49 U.S.C. 10906. They have met the criteria for imposing a public use condition by specifying: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification for the time period. 49 CFR 1152.28(a)(2). Accordingly, a 180-day public use condition will be imposed in Docket Nos. AB-3 (Sub-No. 133X), AB-12 (Sub-Nos. 184X), and AB-33 (Sub-Nos. 96, 98X, and 99X). A 90-day public use condition, as parties have requested, will be issued in Docket Nos. AB-3 (Sub-No. 134X) and AB-12 (Sub-Nos. 185X and 187X).

Madison County Transit and RTC ask that we impose Trails Act and public use conditions for a period of 180 days after the carrier consummates the abandonment. We will deny these requests. In issuing the NITUs and CITUs and imposing the public use conditions, we will follow our usual practice and have the 180-day Trails Act period run from the service date of the decision, while the public use condition will run from the effective date of the decision.

Continued operation of the line will not preclude the negotiation of an agreement for interim trail use. Our jurisdiction to issue rail banking or other appropriate orders will not terminate until an abandonment has finally been consummated. The maximum period that a public use condition can extend under 49 U.S.C. 10906 is 180 days from the effective date of the order authorizing abandonment. Even if applicants continue to operate during that 180-day period, this will not preclude a public use agreement from being negotiated and finalized during that statutory period.

Persons may file for both trail use and public use conditions. If a trail use agreement is reached on a portion of the right-of-way, applicants must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, we note that a public use condition is not imposed for the benefit of any one potential purchaser, but rather to provide an opportunity for any interested person to acquire a right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, applicants are not required to deal exclusively with parties who have filed requests but may engage in negotiations with other interested persons. Additional public use requests are unnecessary where the full 180-day period has been imposed.

Other Conditions Requested. We now turn to other conditions requested in the various abandonments proceedings.

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[254] The statement in Trails that section 10905 does not apply to abandonment exemptions has since been superseded by adoption of rules allowing for the use of OFAs in exemption proceedings. See 49 CFR 1152.27.

The City of Florence, CO. We are denying the requested conditions. The first condition sought by the City of Florence is a variation on the Central Corridor divestiture theme. We believe that the conditions we are imposing will adequately preserve the rail competition that exists today in the Central Corridor. Concerning the other two conditions Florence seeks, there is no statutory authority for imposition of a 24-month stand-still condition or a right-of-first-refusal condition. In any event, UP has made various commitments to the State of Colorado that address at least some of the concerns expressed by the City of Florence. See UP/SP-232, Tab G at 7-8.

The City of Fruita, CO. We are denying the requested condition as it pertains to labor-related impacts because it "implicates a matter better dealt with under the labor protective conditions" imposed in this proceeding. BN/SF, slip op. at 101. Insofar as it pertains to continued rail service, it fails because the City of Fruita has demonstrated neither (a) that the merger will cause competitive harms that should be ameliorated, nor (b) that local traffic on the Colorado lines targeted for abandonment is sufficient to sustain these lines once overhead traffic has been rerouted.

The U.S. Department of Agriculture, Rocky Mountain Region, and the U.S. Department of the Interior, Bureau of Land Management, Colorado State Office. With respect to conditions (1), (2), and (6), we are denying the conditions because there is no statutory authority for their imposition. Environmental conditions (3), (4), (5), and (7), insofar as they pertain to the Sage-Malta-Leadville and Malta-Cañon City Lines, are moot because we are denying the abandonments. With respect to conditions (3), (4), (5), and (7), insofar as they pertain to the Towner-NA Junction Line, we are imposing environmental mitigation conditions that should alleviate concerns expressed. These are indicated in Appendix G: general environmental mitigation conditions #26, #27, #28, #32, and #37, and specific environmental mitigation conditions #47 and #48.

Towner-NA Junction Parties. We are denying the condition sought because there is no statutory authority for a stand-still condition. We note, however, that the concerns raised by these parties have been addressed, to some extent, by the various commitments UP has made to the State of Colorado. See UP/SP-232, Tab G at 7-8.

The Town of Avon. We note that, as a practical matter, the two segments of the Tennessee Pass Line have been treated as a single entity in this proceeding, and that there is no reason to believe that the outcome of this proceeding would have been in any way different had applicants filed a single application with respect to the entire Tennessee Pass Line.

The Upper Arkansas Area Council of Governments. We are denying these conditions, and note that many of these conditions have been mooted by the denial of the Tennessee Pass abandonments. Moreover, there is no statutory authority for imposition of a 24-month stand-still condition or a replace-lost-taxes trust fund condition, although commitments UP has made to the State of Colorado address at least some of the concerns to which these conditions are directed, see UP/SP-232, Tab G at 7-8.

The Colorado Department of Public Health and Environment and the United States Environmental Protection Agency, Region VIII; RTC; and the Leadville Coalition. With the denial of the Tennessee Pass abandonments, these various Tennessee Pass environmental conditions are moot.

Viacom International Inc. (1) We are imposing, as indicated in Appendix G, specific environmental mitigation condition #46 to provide continued access for Viacom to the Eagle Mine site.

(2) Viacom's second condition has been mooted by the denial of the Tennessee Pass abandonments.

ENVIRONMENTAL CONSIDERATIONS.

Extensive Environmental Review Process. Under the National Environmental Policy Act (NEPA) and related environmental laws, the environmental effects of the merger and the ancillary abandonment and construction projects that were proposed by applicants must be considered, and we have thoroughly done so. Our environmental staff, the Section of Environmental Analysis (SEA), conducted various public outreach activities to inform the public about the proposed merger and to encourage and facilitate public participation in the environmental review process.[255]

As part of its environmental review, SEA prepared detailed analyses not only of the systemwide effects of the proposed merger, but also of particular merger-related activities that would affect individual rail line segments, rail yards, and intermodal facilities to a degree that would meet or exceed our thresholds[256] for environmental analysis. See 49 CFR 1105.7(e)(5)(i) and (ii).[257] SEA conducted a thorough independent analysis, which included verifying projected rail operations; verifying and estimating noise level impacts; estimating increases in air emissions; assessing potential impacts on safety; and performing land use, habitat, surface water and wetlands surveys, ground water analyses, and historic and cultural resource surveys.

Based on the information provided by the parties and other agencies, SEA issued a comprehensive Environmental Assessment (EA) on April 12, 1996. SEA received approximately 160 comments following issuance of the EA. To address those comments and the other environmental comments received throughout the environmental review process (approximately 400 in total), SEA undertook additional environmental analysis, which culminated in the issuance of a detailed Post Environmental Assessment (Post EA) on June 24, 1996, refining some of the discussion and mitigation recommended in the EA.

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[255] SEA sent approximately 400 consultation letters to various agencies seeking their comments. In addition, SEA consulted with federal, state, and local agencies, affected communities, UP and SP, and UP/SP's environmental consultants to gather and disseminate information about the proposal, identify potential environmental impacts, and develop appropriate mitigation measures.

[256] These thresholds ensure that those rail line segments and facilities that would experience a substantial increase in traffic as a result of the transaction are thoroughly analyzed for potential air quality, noise, transportation, and safety impacts.

[257] SEA and its independent third-party consultant conducted approximately 150 site visits. They also analyzed UP/SP's Environmental Report, operating plan, Preliminary Draft Environmental Assessment and other pleadings, all of the settlement agreements entered into during the environmental review process, and technical studies.

As a result of its investigation, SEA concluded that the merger would result in several environmental benefits, including a systemwide net reduction of 35 million gallons of diesel fuel consumption (based on 1994 figures) from rail operations and truck-to-rail operations, systemwide improvements to air quality from reduced fuel use, and a reduction in long-haul truck miles, highway congestion and maintenance, and motor vehicle accidents.

SEA also concluded that the merger and related rail abandonments and constructions could have potential environmental effects regarding safety, air quality, noise, and transportation, including the transportation of hazardous materials, and, in the EA, SEA proposed mitigation measures addressing the environmental concerns that were raised. In the Post EA, based on further analysis and review of the environmental comments, SEA developed more comprehensive and specifically tailored mitigation recommendations. As a result of consultations with SEA, UP/SP agreed to undertake particular mitigation measures. In addition, several local communities negotiated memoranda of understanding with UP/SP to implement mitigation measures and take other appropriate actions to address their particular environmental concerns.

SEA concluded that, with the Post EA mitigation measures, the proposed merger would not significantly affect the quality of the human environment on a systemwide, regional, or local basis. We agree that the conditions recommended in the Post EA will adequately mitigate the potential environmental impacts identified during the course of the environmental review, and we will impose those conditions here (see Appendix G).[258] We also adopt SEA's environmental analysis and the conclusions reached in the EA and the Post EA.

No Need for Environmental Impact Statement. We have considered the arguments of some parties that an environmental impact statement (EIS) is required here, but do not believe that one is needed. An EIS is required only for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C).[259] Under our environmental rules, 49 CFR 1105.6(b)(4), an EA is normally sufficient environmental documentation in rail merger cases to allow us to take the requisite "hard look" at the proposed action.[260]

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[258] We note that the mitigation recommended in the Post EA for two proposed abandonments in Colorado (Sage to Leadville and Malta to Cañon City) has been modified to reflect our decision to permit only discontinuance of rail service, and not abandonment, at this time. Other clarifying changes have been made as well.

[259] The identification of such actions is a matter for the agency to determine, as long as the determination is not arbitrary or capricious. See Goos v. ICC, 911 F.2d 1283, 1292 (8th Cir. 1990), citing Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 377 (1989).

[260] While this merger involves somewhat more trackage than other merger proposals that have come before our predecessor agency, the ICC, that does not mean that the qualitative environmental effects of this merger are greater (or different) than those of the other railroad mergers that have been considered. Similarly, the extensive trackage rights that we are granting in this decision to preserve competition generally will not create additional traffic (or potentially significant environmental impacts). Traffic that can be efficiently handled (continued...)

Moreover, interested parties received essentially the same benefits they would have received with an EIS. As the EA and Post EA show, SEA conducted a thorough and comprehensive environmental review. There was extensive notice and opportunity for input from the public and appropriate agencies throughout the process. In addition to the EA, SEA issued a detailed Post EA which contains SEA's individual responses to the comments on the EA and thus reflects not only the work of SEA but also the critical views of interested parties and agencies.

Finally, the environmental mitigation we are imposing here is far reaching and comprehensive.[261] As appropriate, it addresses impacts on a variety of levels: systemwide, rail corridor-specific, and local. There is mitigation for particular rail line segments, rail yards, intermodal facilities, and rail abandonments and constructions. In short, no EIS is required because our environmental mitigation conditions specifically address the potential environmental impacts associated with the merger and ensure there will be no significant environmental effects.[262]

Reno and Wichita. As discussed in the Post EA, in developing mitigation for two cities, Reno, NV, and Wichita, KS, SEA concluded that further, more focused mitigation studies are warranted, notwithstanding the extensive analysis (including site visits and meetings with city officials, emergency response representatives and business interests) that already has been done to identify environmental concerns and arrive at appropriate mitigation for these two communities. Nothing in the record here, however, suggests that the potential environmental effects of the merger in Reno or Wichita are so severe that implementation of the merger should not proceed prior to the completion of the studies.[263] To the contrary, in both Reno and

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[260] (...continued)
by train would be handled by train whether or not the trackage rights at issue here were granted.

[261] For example, with respect to safety, our mitigation includes more frequent track and train car inspections, signs on grade crossings identifying toll free numbers to call in the event of a signal malfunction, and a requirement that UP/SP provide emergency response personnel with information regarding anticipated train movements and work with communities to develop plans to deal with the transportation of hazardous materials, emergencies, and the upgrading of grade crossing signals. In addition, UP/SP will be required to equip certain trains carrying hazardous materials with two-way end-of-train devices to enhance braking capabilities on particular line segments. In response to concerns involving air pollution, UP/SP will have to reduce idling of locomotives, close box car doors on empty cars, and use more efficient locomotives when the equipment becomes available.

[262] See, e.g., Sierra Club v. DOT, 753 F.2d 120, 127 (D.C. Cir. 1985); Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 682 (D.C. Cir. 1982).

[263] We note that the Supreme Court has rejected arguments that NEPA demands the formulation and adoption of a plan that will fully mitigate environmental harm before an agency can act. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352-53 (1989). Rather, the deferral of a decision on specific mitigation steps until more detailed information is available is embraced in the procedures promulgated under NEPA. See Public
(continued...)