STB FD 32760 3-29-96 D 62232 2/3

The rail distance from the current UP served mines to Valmy range between 456 and 618 miles while the simple average rail distance from the SP served Uinta and Green River coal basins to Valmy ranges from 486 to 899 miles.

A. TRANSPORTATION RATES FROM UP'S UINTA AND GREEN RIVER ORIGINS

Table 5 below illustrates this point by comparing the rates (on a mills per ton-mile basis[5]) that UP receives from Sierra/Idaho to the rates UP receives for coal originating at Uinta Basin, Utah, Hanna Basin, Wyoming and Green River Basin, Wyoming.

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5 The UP rates on a per ton basis were converted to a mills per ton-mile basis by dividing the rate per ton by the loaded direction rail miles. Rates expressed on a mills per ton-mile basis eliminate the impact distance has on a rate per ton, i.e., the longer the distance the higher the rate per ton, all other things being equal. It should be noted that the rates developed from the ICC 1994 Costed Waybill for coal shipped to Valmy are higher than the actual rates paid by Sierra/Idaho. For consistency reasons, all of the rates used in my analyses were based on UP, SP and UTAH records included in the ICC 1994 Costed Waybill Sample.

B. TRANSPORTATION RATES FROM SP'S UINTA AND GREEN RIVER BASIN ORIGINS

As noted earlier, Sierra/Idaho have existing transportation and coal supply contracts that currently preclude them from utilizing SP as their transportation carrier of coal. However, when those contracts expire, Sierra/Idaho would once again utilize the competitive situation it enjoys to obtain transportation prices and conditions from either UP or SP, assuming the pending merger between those railroads is not approved.

In order to demonstrate that SP transportation rates from the Green River and Uinta Basins are equal to or better than the existing contract rates to Valmy, I have developed the comparison summarized in Table 6 below. Table 6 first shows the rates UP currently is charging Sierra/Idaho to move coal to Valmy (Lines 1 and 2). Next, Table 6 summarizes the average rates on a mills per revenue ton-mile basis that SP realizes for coal SP originates in the Green River and Uinta Basins (Lines 3 through 6).

The Table 5 and Table 6 analyses, therefore, demonstrate that UP and SP are strong competitors for the transportation of coal from the basins adjacent to Valmy that produce coal comparable to coal currently burned at Valmy to generate electricity.

C. EXAMPLES OF UP AND SP HEAD-TO-HEAD COMPETITION

I have identified three movements of coal from the basins adjacent to Valmy, where coal was transported by both UP and SP to the same destination in 1994. These three movements are summarized in Table 7 below and are examples of the pricing practices of the SP and UP in "head-to-head" competitive situations.

The three Table 7 examples demonstrate that UP and SP compete for coal traffic originating in the Green River, Hanna and Uinta basins. Notably this is the same rail competition that Sierra/Idaho has historically relied upon to obtain transportation for their coal to Valmy.

D. SUMMARY OF TRANSPORTATION AND COAL SUPPLY COMPETITION TO VALMY

In order to provide competitive service to Valmy both the UP and SP must have access to coal mines that can supply the type of coal that can be burned at Valmy. As shown above, there are a number of origins in the coal fields adjacent to Valmy that fit this profile.

Table 8 below summarizes the number of origin mines by coal basin and by serving railroad that produce coal compatible with the coals burned at Valmy. Seven (7) mines are currently served by UP and sixteen (16) mines are currently served by SP.

Table 8
Summary Of Coal Mines By Basin And Railroad Adjacent To Valmy – 1994

	Coal Basin (1)	Serving Railroad (2)	Number Of Mines (3)	Heat Content Of Coal BTU/lb (4)	Sulfur Content) (%) (5)	Miles To Valmy (6)
1.	Uinta Basin, Utah	SP	7	11,820	0.5%	486
2.	Uinta Basin, Utah	UP	1	11,340	0.4%	456
3.	Uinta Basin, Colorado	SP	4	11,693	0.5%	725
4.	Green River, Colorado	SP	5	10,543	0.4%	899
5.	Green River, Wyoming	UP	4	9,859	0.7%	605
6.	Hanna, Wyoming	UP	2	10,842	0.5%	754

Source: Exhibit_(TDC-6).

A schematic of the mine locations, the routing of the coal to Valmy and the quality of coal from each of these mines is presented in Exhibit_(TDC-6). As shown, the current level of origin competition available to Valmy provides Sierra/Idaho with the ability to maximize its competitive advantage because it currently has access to twenty-three (23) mines served by the UP and SP directly that produce a comparable product. Seven (7) of the 23 mines are served by UP and sixteen (16) are served by SP. After the merger, unless Sierra/Idaho's requested conditions are granted, all of Sierra/Idaho's transportation and coal supply competitive options will either be lost or diminished.

V. UP/SP'S AGREEMENTS WITH OTHER RAILROADS DO NOT PRESERVE COMPETITION TO VALMY

In their merger application, UP/SP recognized that competition exists between UP and SP at Valmy. This is evident by the fact that the UP/SP named Valmy a "2 to 1" location and offered BNSF access to Valmy as a means of rectifying the loss of competition, assuming the merger is approved. In this section of my testimony I will discuss each of the agreements UP and SP entered into with other railroads as they effect the competitive movement of coal to Sierra/Idaho's Valmy Power Plant. The focus of my discussion will be to summarize the results of my research that shows that UP/SP have not accomplished their objective but rather have placed Sierra/Idaho at a competitive disadvantage for any future acquisition of transportation services.

A. THE UP/SP-BNSF AGREEMENT DOES NOT PRESERVE THE EXISTING UP AND SP COMPETITION TO VALMY

As part of their merger application, UP/SP included an agreement with BNSF which provides BNSF with access to a number of locations currently served by both UP and SP. This agreement potentially impacts rail service to Valmy in three ways. First, the UP/SP-BNSF agreement provides BNSF with bridge rights for the movement of overhead traffic only on:

1. SP's line between Denver, CO and Salt Lake City, UT,
2. UP's line between Salt Lake City, UT and Alazon, NV; and,
3. UP's and SP's lines between Alazon and Weso, NV.

Second, BNSF received local access to specific points identified in their agreement with UP/SP[6] that are presently served by only UP and SP. Valmy is located on the "Points on paired tracks from Weso, NV to Alazon, NV".[7] Finally, BNSF also received the right to interchange with the Utah Railway Company ("UTAH") at Utah Railway Junction and Provo.

My critique of the UP/SP-BNSF agreement as it potentially impacts the existing competitive transportation environment realized by Sierra/Idaho is summarized below under the following headings:

1. BNSF Does Not Have Access To All The Mines On SP's Lines
2. There Is Limited Traffic Available To BNSF For Movement Across The Central Corridor
3. BNSF Does Not Have An Operating Plan Or Infrastructure In Place To Operate Effectively In The Central Corridor
4. The Economic Rents That BNSF Will Have To Pay UP/SP To Operate On The Central Corridor Will Place Them At An Economic Disadvantage
5. BNSF Served Origin Coals Fields Are Too Far Away From Valmy To Be Competitive

1. BNSF Does Not Have Access To All The Mines On SP's Lines

The UP/SP-BNSF agreement provides BNSF with overhead trackage rights only over SP's line from Denver, CO through Salt Lake City, UT to California. The agreement does not provide BNSF direct access to any of the mines currently served by SP. Without access to the

[6] Application, Volume I, pp 318 and 319
[7] Application, Volume I, pp 358

SP mines, BNSF cannot be a competitive alternative to UP/SP. As will be discussed subsequently, the level of traffic, the lack of an operating infrastructure and the trackage rights compensation UP/SP plan to charge BNSF preclude BNSF from becoming an effective competitor in the Central Corridor.

2. There Is Limited Traffic Available To BNSF For Movement Across The Central Corridor

An integral part of determining if Sierra/Idaho will maintain the same competitive position after the merger that it enjoys prior to the merger, is the ability of BNSF to be an effective replacement for either of the two railroads, UP and SP, which currently compete to handle Sierra/Idaho's coal traffic. In making this determination, three initial questions have to be answered:

1. Is there enough traffic in the Central Corridor for BNSF to compete for?
2. What will it cost BNSF in operating and capital costs to put the necessary infrastructure in place in order to compete with UP/SP?
3. Are the trackage rights fees that BNSF will be required to pay going to allow BNSF to be competitive with UP/SP?

In this section of my testimony, I will address the first question which I will follow in the next two sections with answers to the last two questions.

My analysis of the UP/SP-BNSF Settlement Agreement, as it impacts the Central Corridor and therefore Sierra/Idaho, reveals that the traffic available to BNSF would not be at a level which would support a viable operation by BNSF. In performing this analysis I have used UP/SP's criteria to determine the amount of traffic that could be diverted to BNSF for movement over the Central Corridor. The UP/SP criteria was presented in the Verified Statement of UP/SP Witness Richard B. Peterson.[8]

First, I identified the amount of UP/SP traffic at "2 to 1" locations where UP/SP controls both origin and destination of the individual movements. I conclude that none of this traffic would be diverted to BNSF.

Next, I identified the amount of UP/SP traffic at "2 to 1" locations where BNSF controls the other terminal and assumed BNSF would capture 90% of that traffic if it operated on the Central Corridor, e.g., if the current move originates on UP/SP and terminates on BNSF, then after the merger BNSF would handle 90% of that traffic from origin to destination. Based on Mr. Peterson's criteria, the remaining traffic at the "2 to 1" locations would be split evenly between UP/SP and BNSF.

Table 9 below summarizes the traffic that BNSF would probably obtain using the criteria proposed by Mr. Peterson

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[8] Application, Volume II, Page 292

Finally, I identified the BNSF traffic that BNSF would likely divert or reroute over the Central Corridor. I also identified traffic where a short line railroad controls one terminal which potentially could become BNSF traffic via trackage rights access.

Combining the traffic which BNSF would probably obtain from the UP/SP, the traffic BNSF could reroute over the Central Corridor and the traffic from Shortlines which BNSF would have access to, I estimated that the total annual traffic available to BNSF for movements over the Central Corridor equal to 2,224,458 tons.[9] Assuming an average load of 74.9 net tons per railcar and an average train of 75 loaded railcars, this traffic level would equate to an average of approximately one loaded train per day.[10]

The Central Corridor spans approximately 1,400 miles from Denver to California and 926 miles from Denver to Valmy. A traffic base considerably larger than 2.2 million tons per year which translates to only one (1) train per day, is required to sustain a viable, competitive operation on the Central Corridor. Without a sound, substantial traffic base, BNSF will not serve the Central Corridor and, when Sierra/Idaho's existing contracts expire, they will be captive to UP/SP.

3. BNSF Does Not Have An Operating Plan Or Infrastructure In Place To Operate In the Central Corridor

In addition to the lack of traffic required to support viable operations by the BNSF over the Central Corridor, the UP/SP and BNSF have failed to consider how BNSF would service the traffic that BNSF would access. First, any traffic available to BNSF would be limited because of UP/SP's control of dispatching trains over the Central Corridor and the ability of UP/SP to prioritize its trains over BNSF trains. This operational problem associated with operating over trackage rights is well known but seldom quantified.

BN's Chairman Gerald Grinstein agrees. In a recent article appearing in Forbes,[11] Mr. Grinstein, "admitted that trackage rights do not necessarily insure unfettered competition. 'It's

[10] 2,224,458 tons ÷ 74.9 tons per railcar ÷ 75 railcars per train ÷ 365 days per year.
[11] Forbes, December 18, 1995, pp 52 - 64

service with some disability,' he says. 'You've got track maintenance issues and dispatch issues. It's quite different from owning your own track.'"

Further evidence that the landlord can manipulate operations over a trackage rights line is seen in a White Paper issued by the Chicago and Northern Western Railway Company ("CNW") on January 27, 1995. The CNW White Paper discussed a series of problems in the Joint Line Agreement ("JLA") with BNSF for the rail line both railroads operate in the Powder River Basin, Wyoming. CNW claimed it was being unreasonably disadvantaged because of BNSF's operating control of the rail line, including dispatching services. Specifically, the CNW White Paper states:

> " Under the JLA, BN is exclusively and perpetually authorized to control day-to-day operations over the Joint Line, including the dispatching of BN and CNW trains, both loaded and empty. The JLA contains no standards to govern the dispatching of trains, other than a general requirement that it be done "without discrimination". This is the competitive equivalent of having United Airlines and American Airlines operating out of the same busy airport, but giving United exclusive authority over the control tower!
>
> In 1994, BN exercised its exclusive authority over the "control tower" by instituting a "slotting system" on the Joint Line. CNW needs a "slot" just to operate a train onto the Joint Line. But *BN decides* how many slots are available each day. And *BN decides* how the slots will be allocated. Finally, BN has decided, for purposes of the slotting system, *not to count its own trains* entering and leaving the Joint Line via BN's separate and exclusive access at the north end of the line. This is not a fair system for allocating limited Joint Line capacity, but BN has imposed it in the exercise of its authority, under the JLA, as the exclusive operator of the line." (White Paper, pp. 7-8)

Operationally, the net result is scheduling problems and reduced performance on the part of BNSF, which would affect customer service and potential future traffic. Locomotive service requirements will also limit BNSF's effectiveness to operate over the Central Corridor. Power assignment and locomotive maintenance and fueling facility requirements have not been addressed by BNSF but will require either direct investment by BNSF to maintain the necessary power requirements along the route or an additional agreement with the UP/SP to provide the required support. Crew assignments and requirements will also limit BNSF's operating effectiveness over the Central Corridor. Crew requirements for operating over 1,400 miles and the frequency of the required service limits the efficient utilization and management of crews. In order to remedy these deficiencies BNSF would have to make substantial investments before it could support the limited traffic volumes available to BNSF through their agreement with UP/SP.

BNSF and/or UP/SP have not quantified or presented any evidence that suggests how these operating problems will be addressed for the traffic that BNSF is likely to capture. The lack of a BNSF operating plan and the lack of a commitment by BNSF to invest the monies, time and manpower required to make such a plan operational, strongly suggests that BNSF will not be an effective competitor in the Central Corridor. I have included as Exhibit__(TDC-13), a more detailed explanation of the operating and cost problems BNSF must solve prior to becoming a viable competitor in the Central Corridor

4. The Economic Rents That BNSF Will Have To Pay UP/SP To Operate On The Central Corridor Will Place Them At An Economic Disadvantage

The next issue that must be addressed in order to determine BNSF's ability to compete for coal traffic to Valmy under the agreement BNSF has signed with UP/SP is the compensation BNSF is required to pay UP/SP for trackage rights over the SP and UP's line between Denver, Colorado and Valmy assuming single line BNSF alternative service. Since the trackage rights provided to BNSF are theoretically designed to maintain the competitive status quo between UP and SP that is currently enjoyed by shippers with access to both railroads, the trackage rights compensation should equal the "below-the-wheel" costs UP or SP would incur if they moved the traffic. For example, if SP were to move coal on behalf of Sierra/Idaho from Denver, Colorado to Valmy, SP would consume a portion of the roadway investment and should therefore be compensated for return of and return on the investment in the consumed asset. In this hypothetical move, SP would also incur additional maintenance expense associated with traversing the rail facilities. SP should be compensated for the added maintenance expense. Additionally, SP would incur a dispatching expense associated with the movement of Sierra/Idaho's train from Denver to Valmy. In setting the trackage rights compensation, all three components should be included in the trackage rights charge. Anything more would result in an economic rent to the landlord, which in turn would raise the floor for rate making purposes.

Compensation to the merged UP/SP entity should be limited to the reimbursement of UP/SP's costs, including a return on investment based on the current cost of capital for the assets being consumed by the traffic.[12] Also, the proper adjustment mechanism for the compensation should be based on actual cost changes or a method that approximates, as closely as possible, the cost changes. Each issue is discussed below.

a. **Compensation In The UP/SP-BNSF Agreements** -- The compensation included in the UP/SP agreement with BNSF provides a substantial profit[13] to UP/SP when the BNSF operates over the UP/SP's line segments. Compensation at this level provides UP/SP a monopoly rent. Stated differently, the compensation level in the agreements, if approved, would reward UP/SP for the problems created by UP's and SP's decision to merge. In order to avoid providing UP/SP a monopoly rent, compensation should be based on the original investment cost less depreciation of the railroads' assets, plus an allocated share of actual roadway maintenance and dispatching expense. Without specific investment, maintenance and dispatching expenses[14], the proper way to determine compensation is to utilize the combined UP/SP URCS costs for 1994 indexed to fourth quarter 1995 ("4Q95") wage and price levels.

Trackage rights compensation in the UP/SP-BNSF Agreement is based on a payment per gross ton-mile. The payment reflects all gross ton-miles generated by the tenant, loaded and empty, plus the gross ton-miles generated by the locomotives of the tenant. For bulk traffic such

12/ For instances where the BNSF will utilize haulage services, those charges should also be based on variable cost of service (including return based on the current cost of capital).

13/ For purposes of this analysis, profit refers to compensation in excess of UP/SP's operating costs, depreciation, rents, and a return on investment at the current cost of capital.

14/ UP/SP refused to provide the investment and expense data required to make the actual cost calculations.

as Sierra/Idaho's coal, the compensation in the UP/SP-BNSF Agreement equals 3.0 mills per gross ton-mile.

Based on data provided by UP/SP as part of their Application, I have developed the compensation level which covers the UP/SP's costs incurred (including a return on investment).

The detailed procedures developing the variable costs caused by BNSF running over UP/SP's tracks are shown on Exhibit__(TDC-7). Because the costs are generated on a gross ton-mile basis, the costs are equal for all line segments and train sizes. The trackage rights charge as shown in UP/SP-BNSF's agreement, as restated to reflect UP/SP's costs incurred, equals 1.48 mills per gross ton-mile at 4Q95 levels.

Based on the costs incurred by UP/SP, the STB should impose, as a condition of the merger, a trackage rights payment equal to 1.48 mills per gross ton-mile.

b. Adjustment Mechanism -- The UP/SP agreement with BNSF also provides for the future adjustment to the trackage rights charges. The agreement calls for charges to be adjusted based on 70 percent of the change in the STB's Rail Cost Adjustment Factor, excluding productivity ("70% RCAFU")

The use of 70% RCAFU to adjust trackage rights charges will increase the UP/SP profits over time because the UP/SP's cost of service will not increase by that amount. The Interstate Commerce Commission ("ICC") recognized in Ex Parte 290 (Sub-No. 4), Railroad Cost

Recovery Procedures - Productivity Adjustment that productivity must be part of the index to adjust rates and charges if cost changes are to be recognized. Specifically the ICC stated:

> We will implement this decision by use of two indices, the RCAF (Unadjusted), an index reflecting input prices which will continue to be filed by the AAR, and the RCAF (Adjusted), an index that reflects output (productivity-adjusted) costs. 5 I.C.C.2d 434,437

The ICC's decision recognized the shippers' view on productivity, which the ICC summarized as follows:

> These shippers argue that, even during the periods when wages or material prices have been rising, their rise has been moderated or offset by increasing productivity, and that by ignoring the productivity gains, the present input index allows rates to rise faster than the actual cost of providing service. (Decision served November 17, 1988, Unprinted).

To demonstrate how an adjustment mechanism based on 70% RCAFU will overstate cost changes, I have compared the cumulative change in 70% RCAFU with UP and SP's actual cost changes for the 1990-1994 time period.[15] In addition, I have compared the actual cost changes to the change in the ICC's Rail Cost Adjustment Factor, including productivity ("RCAFA") over the same 1990-1994 time period.

The changes in the indexes and cost are graphically shown in Exhibit__(TDC-8) and summarized in Table 10 below:

[15] The cost changes measured here reflect the same components shown in Exhibit__(TDC-7), i.e., the below-the-wheel costs.

The proper measure of trackage rights compensation is the railroad's variable cost of service. The proper measure for the adjustment mechanism is cost changes. The adjustment mechanism, which is calculated annually, should be based on the change in costs following the procedures shown in Exhibit__(TDC-7). The adjustment should reflect a 1-year lag so that the 1997 adjustment would be based on the change in costs between 1995 and 1996. Alternatively, if actual URCS costs are not used, then the adjustment should be based on the changes in the RCAFA.

Finally, the recognition of actual cost changes is not uncommon to trackage rights agreements and, in fact, is reflected in the UP/SP-BNSF agreement. Section 12 of the agreement provides that the parties can "review the operations of the adjustment mechanism and renegotiate its application "every fifth year." The UP/SP and BNSF agreed that the restated trackage rights charges reflect he same "relationship to operating costs as upon execution" of the agreement. In my opinion, this shows that <u>cost changes</u> are the proper measure of the adjustment mechanism, not <u>price index changes</u>, which results in an economic rent to the landlord.

Compensation at a level any higher than a pro-rata share of the costs incurred as a result of BNSF's traffic rewards the UP/SP for diminishing or eliminating the shippers' competitive rail alternative. The current agreed to rate of 3.0 mills per gross ton-mile in the agreement between UP/SP and BNSF overcompensates UP/SP for use of its lines and establishes a rate floor.

c. **<u>Other UP/SP Trackage Rights Agreements</u>** -- Another way to test the reasonableness of the UP/SP's proposed trackage rights fee for coal traffic of 3.0 mills per gross ton-mile is to compare the proposed fee to trackage rights fees in other existing UP/SP trackage rights agreements. As part of the discovery process, UP/SP provided me with access to a number of their trackage rights agreements. I have reviewed these agreements and identified the parties to the joint facility and the level of compensation. For those agreements where compensation is determined by the costs over the line segment, I have developed the mills per gross ton-mile, based on 1994 UP and SP URCS, for those components of the costs related to the trackage rights payments.[16]

[16] The UP/SP did not provide any of the actual bills upon which the costs are divided.

d. **ICC/DOJ's Concerns In BNSF Merger** -- In a decision served August 23, 1995, the ICC approved the BNSF merger. In reaching their decision, the ICC declined to address the level of trackage rights compensation that the parties had agreed to pay each other because "...the opposing parties have reached a voluntary agreement...". (Decision Unprinted, page 88).

However, a number of parties, including the Department of Justice ("DOJ"), filed evidence supporting the position that the trackage rights compensation agreed to by the parties provided the landlord a substantial economic rent to the competitive detriment of the tenant (and, thereby, the shippers).

The preference of both the ICC and DOJ was to use fair market value for the return on and return of investment[17] and variable (marginal) costs for roadway maintenance and operating costs when calculating the trackage rights compensation that the tenant should pay the landlord. (Decision Unprinted, pages 90-91)

My opinion is that the variable costs incurred by the tenant is the proper trackage rights compensation level if the objective is to place the tenant in the same economic position as the landlord. However, in order to address the concerns raised by ICC/DOJ in the BNSF merger I have estimated trackage rights compensation in the proposed UP/SP merger based on the fair market value of the SP roadway assets that are being acquired by UP. In making these calculations, I performed the following analytical steps:

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[17] Return of investment equals depreciation.

e. <u>UP And SP Trackage Rights Agreement On Track Serving Valmy</u> -- A 1991 trackage rights agreement between UP/SP for track between Alazon and Weso, NV bases compensation on the procedures outlined below and generally supports the fair market value

[18] Inflation was measured by the change in the Rail Cost Adjustment Factor, unadjusted for productivity. The real cost of capital (current cost of capital less inflation) was used because the resulting trackage rights payment will be adjusted prospectively to account for inflation.

approach developed above.

5. BNSF Served Origin Coal Fields Are Too Far Away From Valmy To Be Competitive

BNSF is one of the largest rail transporters of coal in the United States, originating coal in the Powder River Basin mines located in Wyoming and Montana and the San Juan and Raton Basins located in Southeastern Colorado and New Mexico.

However, any BNSF originated coal destined to Valmy would have to travel distances 2 to 3 times greater in each direction to reach Valmy than coal traveling from the mines that currently serve Sierra/Idaho. For most of the mines served by BNSF, the heating value of the coal (as measured by BTU's per pound) is considerably less. Table 12 below compares the line haul miles associated with the movement of coal to Valmy from the current mines (Lines 1 through 3, Column (2)) to the line-haul miles from origin coal basins served by BNSF (Lines 3 through 6, Column (2)). Table 12 also compares the heating value of Sierra/Idaho's existing coals (Lines 1 through 3, Column (4)) to the heating value of coals from BNSF served basins (Lines 4 through 6, Column (4)).

Table 12
Comparison Of Rail Miles And BTU Values To Valmy
From Sierra/Idaho's Current Mines Versus BNSF Served Mines

Mine (1)	Rail Distance To Valmy (2)	% Distance Exceeds Miles From Existing Mines[1] (3)	BTU's Value Of Coal (4)	% BTU's Exceeds BTU's From Existing Mines[2] (5)
Existing Mines				
1. SUFCO	456	xxx	11,340	xxx
2. Black Butte	618	xxx	9,679	xxx
3. Simple Average	537	xxx	10,510	xxx
Simple Average From BNSF Served Basins				
4. Raton Basin, CO (3 mines)	1,149	114%	12,029	14%
5. San Juan Basin, NM (2 mines)	1,572	193%	9,560	(9)%
6. Powder River Basin, WY (14 mines)	1,366	154%	8,514	(19)%

Source: Exhibit__(TDC-6) and Exhibit__(TDC-9).
[1] ((Column (2) ÷ Line 3, Column (2)) - 1) x 100.
[2] ((Column (4) ÷ Line 3, Column (4)) - 1) x 100.

From Raton Basin origins, BNSF mileage is over 2 times further to Valmy than the existing UP moves to Valmy. From San Juan Basin origins the BNSF mileage is approximately 3 times further to Valmy and from Powder River Basin origins the BNSF mileage is 2.5 times greater.

But the Table 13 above comparison is not the appropriate comparison of what BNSF would have to offer Sierra/Idaho in order to be a competitive substitute for either the UP or SP. Rather, the proper comparison would be the rate levels anticipated by Sierra/Idaho from the SP, when Sierra/Idaho returns to the market.

Table 14 below identifies the matching rate levels that BNSF would have to offer Sierra/Idaho to equal the anticipated rate levels from completing UP and SP railroads.

When evaluating whether or not BNSF is an effective replacement for UP or SP for the movement of coal to Valmy, the rate levels from Table 14 above have to be used. Without considering the impact of the lack of traffic available to BNSF, the operating problems BNSF will incur, and the additional costs BNSF will have to pay UP associated with the trackage rights compensation, it is my opinion that BNSF will not offer Sierra/Idaho the rate levels summarized in Table 14 above.

B. THE UP/SP-UTAH AGREEMENT IS DEPENDENT UPON BNSF SERVICE AND THEREFORE DOES NOT EFFECTIVELY PRESERVE EXISTING UP AND SP COMPETITION TO VALMY

Since the filing of their merger application, UP/SP has entered into another agreement with the Utah Railway ("UTAH"), which potentially impacts Valmy if the merger is approved. The agreement between UP/SP and UTAH provides the UTAH with overhead traffic trackage rights across the SP's line between Utah Railway Junction, UT and Grand Junction, CO. In addition, Utah Railway gained access to the Savage Coal Terminal near, Price, UT and Cyprus AMAX's proposed Willow Creek Mine near Castle Gate, UT.

By combining the UP/SP-BNSF agreement with the UP/SP UTAH agreement, Sierra/Idaho theoretically has access to five (5) mines not under the exclusive control of UP/SP[21], i.e., Pinnacle & Aberdeen and Crandall Canyon on the UTAH and Cottonwood, Trail Mountain and Deer Creek on the CV Spur.[22] As shown in Exhibit__(TDC-10), the quality characteristics of the five (5) mines are comparable to the quality characteristics of coal currently burned at Valmy. In addition, Exhibit__(TDC-10) identifies the average distance from the five (5) mines to Valmy at 490.1 miles.

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[21] BNSF and UTAH also will have access to the Willow Creek mine when it opens.

[22] Savage Trucking operates the loadout on the CV Spur. It is possible that other mines could loadout via the CV Spur if it is economically viable.

The UP/SP-UTAH agreement, however, does not solve Sierra/Idaho's loss of rail competition at Valmy. There are three specific reasons why the UP/SP-UTAH agreement fails to provide effective competition and each is discussed below under the following headings.

1. The UP/SP-BNSF Agreement Does Not Allow BNSF To Operate Effectively Over The Central Corridor

2. After The Merger The Universe Of Available Mines With Rail Competition Is Reduced From 25 To Five

3. Two Railroad Profits Versus One Railroad Profit Must Be Considered

1. The UP/SP-BNSF Agreement Does Not Allow BNSF To Operate <u>Effectively Over The Central Corridor</u>

Previously, I explained in detail the problems with the UP/SP-BNSF agreement. The net result of my analysis was that BNSF will not be an effective competitor on the central corridor. Specifically, BNSF cannot operate effectively because:

1. There Is Limited Traffic Available to BNSF for Movement Across the Central Corridor

2. BNSF Does Not Have An Operating Plan or Infrastructure In Place To Operate Effectively In The Central Corridor

3. The Economic Rents That BNSF Will Have To Pay UP/SP To Operate On The Central Corridor Will Place Them At An Economic Disadvantage

The UP/SP-UTAH agreement is meaningless unless the BNSF is a viable, effective rail competitor on the central corridor Without BNSF, UTAH interchanges its coal traffic with only the merged UP/SP. From Sierra/Idaho's perspective for coal moving to Valmy, the UP/SP-UTAH agreement offers no competitive relief and places Valmy at the mercy of UP/SP.

2. After The Merger The Universe Of Available Mines With Rail <u>Competition Is Reduced From 25 To Five</u>

As shown above, the SP has access to 11 mines in the Uinta Basin and 5 mines in the Green River Basin plus access to the mines on the UTAH. The UP has access to 7 mines in the Uinta, Hanna and Green River basins plus access to the mines on the UTAH. This constitutes a universe of 25 mines where Sierra/Idaho can purchase coal comparable to coal currently burned at Valmy and maintain competitive rail transportation.

If the merger is approved, and if BNSF is considered a viable competitive rail alternative, Sierra/Idaho will have access only to the five (5) mines served by the UTAH, i.e., Pinnacle & Aberdeen, Crandall Canyon, Cottonwood, Trail Mountain and Deer Creek.[23] A change in a universe of available mines from 25 to 5 is devastating to Sierra/Idaho's long term ability to purchase and transport competitive coals to Valmy.

3. Two Railroad Profits <u>Versus One Railroad Profit</u>

Another economic disadvantage to Sierra/Idaho of having the UTAH-BNSF as the rail competitive alternative to UP or SP is the fact that two railroads cost and profit expectations must be considered when setting the rate.

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[23] See Exhibit__(TDC-10) for the location of each of these mines.

As shown in Table 13 above.

VI. REQUEST FOR CONDITIONS

A. TRACKAGE RIGHTS

As I discussed in the foregoing testimony, Sierra/Idaho had, prior to the advent of the proposed merger, devoted a substantial effort to utilize the rail leverage it had to obtain coal transportation rates to Valmy. Unconditional approval of the UP/SP merger would deprive Sierra/Idaho of the competitive rail leverage it has in the origin coal fields and at Valmy, which ultimately benefits its rate payers through low costs of producing electricity. Because Valmy is a coal burning facility, and will remain so for the life of the plant, I fully expect that the removal of competitive constraints on the rail rates will result in rate increases on the movement from origin(s) to destination and foreclosure of certain origin mines which Sierra/Idaho presently may use.

As a result of my analyses of Sierra/Idaho's post merger status, I conclude that the only feasible and equitable condition under which Sierra/Idaho will retain its existing competitive options, is for the STB to impose trackage rights. Such trackage rights should be granted to Sierra/Idaho as a condition of the merger. Sierra/Idaho would then negotiate a separate agreement with a railroad that provides the most competitive access and movement package. Such trackage rights should provide access over the current SP lines to all existing SP served coal loadout facilities. An identification of the SP origins and schematic of the proposed SP trackage rights are shown in Exhibit__(TDC-3).

1. Compensation

Since the trackage rights condition is designed to simply maintain Sierra/Idaho's competitive status quo, it should be designed as an arm's length agreement. Equitable compensation to UP/SP should be limited to a pro-rata share of investment in the trackage rights line, Sierra/Idaho's pro-rata share of annual maintenance expenses and a pro-rata return on investment according to the relative volume of Sierra/Idaho's traffic over the line. Compensation at a level any higher than a pro-rata share of the costs incurred would reward UP/SP for eliminating Sierra/Idaho's competitive rail alternatives to Valmy.

Specifically, I propose that the STB set trackage rights compensation at 1.48 mills per gross ton-mile for movement by any viable rail carrier over SP trackage from all existing coal loadout facilities to Valmy.

In addition, the 1.48 mills per gross ton-mile trackage rights fee should be adjusted quarterly beginning 1Q96 based on the change in the ICC's Rail Cost Adjustment Factor including consideration of productivity, i.e., the RCAF-A.

VERIFICATION

COMMONWEALTH OF VIRGINIA)
)
CITY OF ALEXANDRIA)

THOMAS D. CROWLEY, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof and that the same are true as stated.

Thomas D. Crowley

Thomas D. Crowley

Sworn to and subscribed
before me this 27th day
of March, 1996.

Witness my hand and official seal.

Kimberly D. Carroll / Baugh
My Commission Expires July 31. 1996

STATEMENT OF QUALIFICATIONS

My name is Thomas D. Crowley. I am an economist and President of the economic consulting firm of L. E. Peabody & Associates, Inc. The firm's offices are located at 1321 Cameron Street, Alexandria, Virginia 22314.

I am a graduate of the University of Maine from which I obtained a Bachelor of Science degree in Economics. I have also taken graduate courses in transportation at George Washington University in Washington, D.C. I spent three years in the United States Army and since February 1971 have been employed by L. E. Peabody & Associates, Inc.

I am a member of the American Economic Association, the Transportation Research Forum, and the American Railway Engineering Association.

The firm of L. E. Peabody & Associates, Inc. specializes in solving economic, marketing and transportation problems. As an economic consultant, I have organized and directed economic studies and prepared reports for railroads, freight forwarders and other carriers, for shippers, for associations and for state governments and other public bodies dealing with transportation and related economic problems. Examples of studies I have participated in include organizing and directing traffic, operational and cost analyses in connection with multiple car movements, unit train operations for coal and other commodities, freight forwarder facilities, TOFC/COFC rail facilities, divisions of through rail rates, operating commuter passenger service, and other studies dealing with markets and the transportation by different modes of various commodities from both eastern and western origins to various destinations in the United

STATEMENT OF QUALIFICATIONS

States. The nature of these studies enabled me to become familiar with the operating and accounting procedures utilized by railroads in the normal course of business.

Additionally, I have inspected both railroad terminal and line-haul facilities used in handling various commodities, and in particular unit train coal movements from the Powder River Basin to various utility destinations in the midwestern and western portion of the United States. These field trips were used as a basis for the determination of the traffic and operating characteristics for specific movements of coal, both inbound raw materials and outbound paper products to and from paper mills, crushed stone, soda ash, aluminum, fresh fruits and vegetables, TOFC/COFC traffic and numerous other commodities handled by rail.

I have presented evidence before the Interstate Commerce Commission ("ICC") in Ex Parte No. 347 (Sub-No. 1), Coal Rate Guidelines - Nationwide which is the proceeding that established the methodology for developing a maximum rail rate based on stand-alone costs. I have submitted evidence applying the ICC's stand-alone cost procedures in "Coal Trading,"[1] "DP&L,"[2] and "Westmoreland"[3] along with other proceedings before the ICC.[4]

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[1] ICC Docket No. 38301S, Coal Trading Corporation v. Baltimore & Ohio Railroad, et al., ("Coal Trading").

[2] ICC Docket No. 38025S, The Dayton Power and Light Company v. Louisville and Nashville Railroad Company ("DP&L").

[3] ICC Docket No. 38301S (Sub-No. 1), Westmoreland Coal Sales Company v. Denver and Rio Grande Western Railroad Company, et al., ("Westmoreland")

[4] ICC Docket No. 40224, Iowa Public Power and Light Company v. Burlington Northern Railroad Company; ICC Docket No. 37029, Iowa Public Service Company v. Burlington Northern, Inc.; ICC Docket No. 39386, The Kansas Power and Light Company v. Burlington Northern Railroad Company and Union Pacific Railroad Company; ICC Docket No. 38783, Omaha Public Power District v. Burlington Northern Railroad Company; Docket No. 36180, San Antonio, Texas, Acting By and Through Its City Public Service Board v. Burlington Northern Railroad Company, et al.

STATEMENT OF QUALIFICATIONS

Moreover, I have developed numerous variable cost calculations utilizing the various formulas employed by the ICC for the development of variable costs for common carriers, including Burlington Northern Railroad Company,[5] with particular emphasis on the basis and use of Rail Form A. I have utilized Rail Form A costing principles since the beginning of my career with L. E. Peabody & Associates Inc. in 1971.[6]

I have also analyzed in detail, the Uniform Railroad Costing System ("URCS") and presented the results of my findings to the ICC in Ex Parte No. 431, *Adoption of the Uniform Railroad Costing System for Determining Variable Costs for the Purposes of Surcharge and Jurisdictional Threshold Calculations*. I have been involved in the URCS process, either directly

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[5] The following two (2) cases are examples of litigation before the ICC where I developed and presented Burlington Northern Railroad Company's variable costs of handling unit coal trains. These two cases involve the most detailed examination of the variable cost of moving coal in unit train service of any proceeding thus far brought before the ICC. The first example involved the variable cost of service evidence I presented on behalf of the City of San Antonio, Texas in ICC Docket No 36180, *San Antonio, Texas, Acting By and Through its City Public Service Board v. Burlington Northern Railroad Company, et al.*, 1 I.C.C. 2d 561 (1986) ("San Antonio"). In that case, the ICC extensively analyzed the variable costs for a unit train movement of coal on the Burlington Northern Railroad Company from the Powder River Basin, Wyoming to San Antonio, Texas. Also I presented the variable cost of service evidence in ICC Docket No 38783, *Omaha Public Power District v. Burlington Northern Railroad Company* 3 I.C.C. 2d 123 (1986) ("OPPD"), in which the ICC developed the variable costs for the unit train movement of coal from the Powder River Basin, Wyoming to Arbor, Nebraska on the Burlington Northern Railroad Company. In San Antonio, the ICC found that the variable cost of service as of the first quarter of 1984 was $12.62 per ton, just 46 cents higher than my cost calculation of $12.16 per ton and substantially lower than Burlington Northern Railroad Company's calculation of $17.54 per ton. In OPPD, the ICC determined variable cost for the first quarter of 1985 was $5.31 per ton, just 11 cents higher than my calculation of $5.20 per ton, and substantially lower than Burlington Northern Railroad Company's calculations of $6.53 per ton.

[6] Rail cost finding has been the cornerstone of this firm. Dr. Ford K. Edwards the senior partner of the firm Edwards & Peabody*, was the major architect in the development of Rail Form A. Mr. Peabody carried on this tradition of innovative cost finding until his retirement in 1983. Mr. Peabody's work included participation in the Tennessee Valley Authority's ("TVA") computerization of Rail Form A. Mr. Peabody was a member of a committee of transportation consultants which was organized to assess the TVA procedure in order to make available more complete and simplified input data for the Rail Form A computer program.

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* Subsequent to the retirement of Dr Edwards in 1965, the firm name was changed to L. E. Peabody & Associates, Inc

STATEMENT OF QUALIFICATIONS

or indirectly, since the first interim report of the contractors was released. Throughout this process, I have consistently asked for and reviewed the support and workpapers underlying the different developmental stages of the formula. I received and presented comments in February 1982 on the ICC's *Preliminary 1979 Rail Cost Study*. In December 1982, the ICC released the *Uniform Rail Costing System, 1980 Railroad Cost Study* which I reviewed along with the workpapers supporting that study and the entire developmental stage of URCS which was the basis for my Ex Parte No. 431 comments.

I have frequently presented both oral and written testimony before the Interstate Commerce Commission, Federal Energy Regulatory Commission, Railroad Accounting Principles Board, Postal Rate Commission and numerous state regulatory commissions, federal courts and state courts. This testimony was generally related to the development of variable cost of service calculations, fuel supply economics, contract interpretations, economic principles concerning the maximum level of rates, implementation of maximum rate principles, and calculation of reparations, including interest. I have also presented testimony in a number of court and arbitration proceedings concerning the level of rates and rate adjustment procedures in specific contracts.

I have participated in every major ICC rulemaking proceeding since the mid-seventies, including each phase of Ex Parte 290 (Sub-No. 2), (Sub-No. 4), (Sub-No. 5) and (Sub-No. 7). On a number of occasions my predecessor, L. E. Peabody, Jr., and I have submitted evidence

STATEMENT OF QUALIFICATIONS

to the Commission concerning the determination of the Rail Cost Adjustment Factor ("RCAF") and the need for a productivity adjustment to properly reflect the change in railroad costs.[7]

Since the implementation of the *Staggers Rail Act of 1980*, which clarified that rail carriers could enter into transportation contracts with shippers, I have been actively involved in negotiating transportation contracts on behalf of coal shippers. Specifically, I have advised utilities concerning coal transportation rates based on market conditions and carrier competition, movement specific service commitments, specific cost-based rate adjustment provisions, contract reopeners that recognize changes in productivity and cost-based ancillary charges. In particular,

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[7] L. E. Peabody, Jr.'s Verified Statement, Ex Parte No. 290 (Sub-No. 2), Railroad Cost Recovery Procedures, July 17, 1980; L. E. Peabody, Jr.'s Verified Statement, Ex Parte No. 290 (Sub-No.-2), Railroad Cost Recovery Procedures, August 20, 1980, Thomas D. Crowley's Verified Statement, Ex Parte No. 290 (Sub-No. 2), Railroad Cost Recovery Procedures, January 9, 1981; Thomas D. Crowley's Verified Statement, Ex Parte No. 290 (Sub-No. 2), Railroad Cost Recovery Procedures, July 9, 1982; L. E. Peabody, Jr.'s Verified Statement, Ex Parte No. 290 (Sub-No.4), Railroad Cost Recovery Procedures -- Productivity Adjustment, October 25, 1982; Thomas D. Crowley's Verified Statement, Ex Parte No. 290 (Sub-No. 4), Railroad Cost Recovery Procedures -- Productivity Adjustment, February 11, 1985; Thomas D Crowley's Verified Statement, Ex Parte No. 290 (Sub-No. 4), Railroad Cost Recovery Procedures -- Productivity Adjustment, March 28, 1985; Thomas D. Crowley's Verified Statement, Ex Parte No. 290 (Sub-No. 2) Railroad Cost Recovery Procedures, March 12, 1986; Thomas D. Crowley's Verified Statement, Ex Parte No. 290 (Sub-No. 2) Railroad Cost Recovery Procedures, March 12, 1987; Thomas D. Crowley's Verified Statement, Ex Parte No 290 (Sub-No. 4), Railroad Cost Recovery Procedures -- Productivity Adjustment, December 16, 1988. Thomas D Crowley's Verified Statement, Ex Parte No. 290 (Sub-No. 4), Railroad Cost Recovery Procedures -- Productivity Adjustment, January 17, 1989; Thomas D. Crowley's Verified Statement, Ex Parte No. 290 (Sub-No 7), Productivity Adjustment-Implementation, May 26, 1989; Thomas D. Crowley's Verified Statement, Ex Parte No 290 (Sub-No. 4) and Ex Parte No. 290 (Sub-No. 7), Railroad Cost Recovery Procedures -- Productivity Adjustment, June 1, 1989; Thomas D. Crowley's Verified Statement, Ex parte No. 290 (Sub-No. 5) (89-3), Quarterly Rail Cost Adjustment Factor, June 13, 1989; Thomas D. Crowley's Verified Statement, Ex Parte No. 290 (Sub-No 7), Productivity Adjustment -Implementation, June 26, 1989; Thomas D. Crowley's Verified Statement, Ex Parte No 290 (Sub-No.4), Railroad Cost Recovery Procedures - Productivity Adjustment, August 14, 1989, Thomas D Crowley's Verified Statement, Ex Parte No. 290 (Sub-No.4), Railroad Cost Recovery Procedures - Productivity Adjustment, August 29, 1989; Thomas D. Crowley's Verified Statement, Ex Parte No. 290 (Sub-No. 5) Quarterly Rail Cost Adjustment Factor, September 18, 1989; Thomas D. Crowley's Verified Statement, Ex Parte No. 290 (Sub-No 7), Productivity Adjustment Implementation, April 5, 1991; Thomas D. Crowley's Verified Statement, Ex Parte 290 (Sub-No. 2) Railroad Cost Recovery Procedures, November 9, 1992; Thomas D. Crowley's Verified Statement, Ex Parte No. 290 (Sub-No. 2), Railroad Cost Recovery Procedures, November 30, 1992, and, Thomas D. Crowley's Verified Statement, Ex Parte No. 290 (Sub-No. 7) Productivity Adjustment - Implementation, January 7, 1994.

STATEMENT OF QUALIFICATIONS

I have advised utilities on the theory and application of different types of rate adjustment mechanisms for inclusion in coal transportation contracts.

I have been actively engaged in negotiating coal supply contracts for various users throughout the United States. In addition, I have analyzed the economic impact of buying out, brokering, and modifying existing coal supply agreements. My coal supply assignments have encompassed analyzing alternative coals to determine the impact on the delivered price of operating and maintenance costs, unloading costs, shrinkage factor and by-product savings.

I have been, or am currently, involved in the negotiation of transportation or coal supply contracts for over forty (40) utilities which burn coal or lignite produced in the west. These utilities purchase coal or lignite produced in Colorado, Illinois, Missouri, Montana, New Mexico, North Dakota, Oklahoma, Texas, Utah and Wyoming. Generating stations operated by these utilities are located in the following nineteen (19) states: Arizona, Arkansas, California, Colorado, Illinois, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, Nevada, North Dakota, Oklahoma, Oregon, Texas, Wisconsin, and Wyoming.

As a result of assisting coal users in the eastern and western portions of the United States, I have become familiar with operations and practices of the rail carriers that move coal over the major coal routes in the United States as well as their cost and pricing practices.

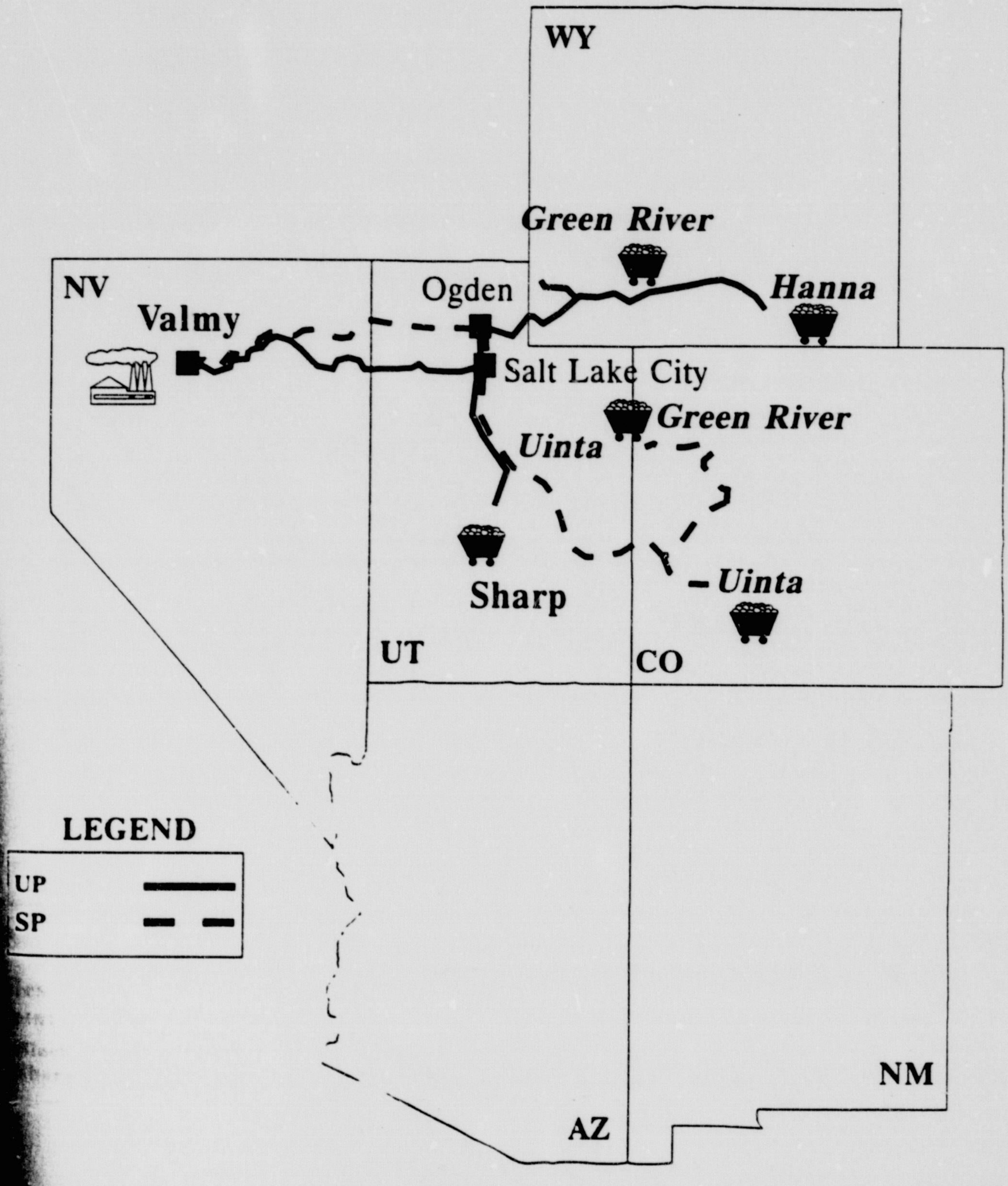
I have developed different economic analyses for over sixty (60) electric utility companies located in all parts of the United States, and for major associations, including American Paper Institute, American Petroleum Institute, Chemical Manufacturers Association, Coal Exporters

STATEMENT OF QUALIFICATIONS

Association, Edison Electric Institute, Mail Order Association of America, National Coal Association, National Industrial Transportation League, the Fertilizer Institute and Western Coal Traffic League. In addition, I have assisted numerous government agencies, major industries and major railroad companies in solving various economic problems.

I have participated in various proceedings involved with the division of through rates. For example, I participated in ICC Docket No. 35585, *Akron, Canton & Youngstown Railroad Company, et al. v. Aberdeen and Rockfish Railroad Company, et al.* which was a complaint filed by the northern and midwestern rail lines to change the primary north-south divisions. I was personally involved in all traffic, operating and cost aspects of this proceeding on behalf of the northern and midwestern rail lines. I was the lead witness on behalf of the Long Island Rail Road in ICC Docket No. 36874, *Notice of Intent to File Division Complaint by the Long Island Rail Road Company*.

Schematic Of Current Rail Access Via UP And SP To Valmy



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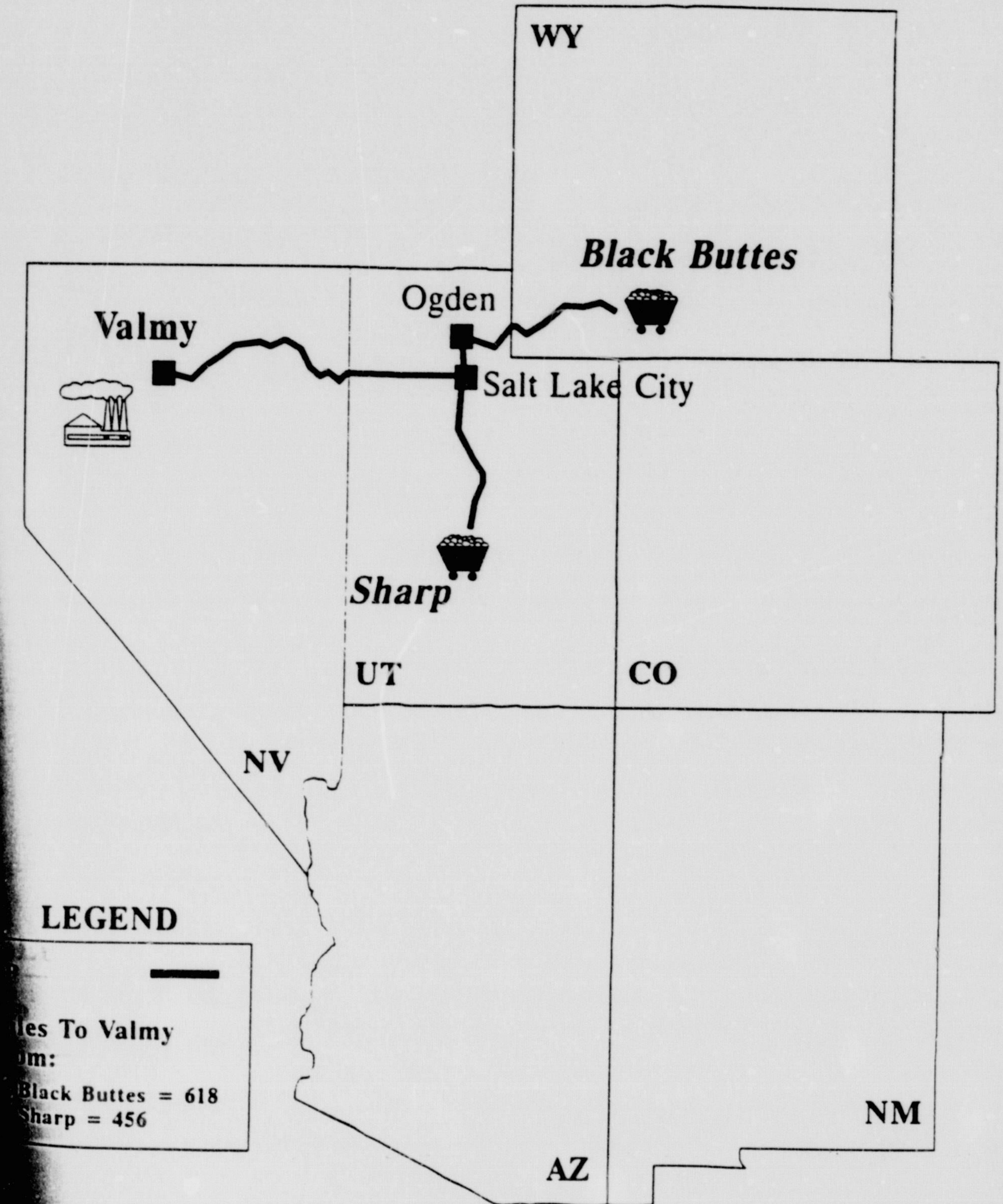
Valmy's Current Coal Supply Via UP



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SP Origins Used To Constrain Rail And Coal Prices For Valmy

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SP Origins Used To Constrain Rail And Coal Prices For Valmy

Basin / Mine (1)	Heat Content (Btu/Lb.) 1/ (2)	Ash Content (%) 1/ (3)	Sulfur Content (%) 1/ (4)	Sulfur Dioxide Content (Lbs./MMBtu) 2/ (5)	Miles To Valmy 3/ (6)
A. Uinta (UT)					
1. Deer Creek	11,702	10.09%	0.46%	0.79	487.3
2. Trail Mountain	12,272	8.47%	0.51%	0.83	487.3
3. Soldier Canyon	12,029	10.76%	0.42%	0.70	503.5
4. Bear Canyon No. 1	12,225	9.92%	0.55%	0.90	482.3
5. Skyline 1 & 3	11,618	9.00%	0.42%	0.72	476.9
6. Belina No. 1 & 2	11,684	7.20%	0.54%	0.92	474.9
7. Cottonwood	11,207	12.35%	0.49%	0.87	487.3
8. Willow Creek	4/	4/	4/	4/	4/
9. **Simple Average**	**11,820**	**9.68%**	**0.48%**	**0.82**	**485.6**
B. Uinta (CO)					
1. Orchard Valley	11,419	8.10%	0.40%	0.70	737.1
2. Sanborn Creek	12,287	8.67%	0.63%	1.03	745.4
3. Roadside	11,322	9.05%	0.58%	1.02	669.1
4. West Elk	11,743	9.38%	0.51%	0.87	746.7
5. **Simple Average**	**11,693**	**8.80%**	**0.53%**	**0.91**	**724.6**
C. Green River (CO)					
1. Colowyo	10,489	5.56%	0.37%	0.71	924.0
2. Eagle 5 & 6	10,584	8.22%	0.41%	0.77	906.7
3. Foidel Creek	11,123	10.11%	0.43%	0.77	881.8
4. Seneca	10,614	9.32%	0.43%	0.81	883.8
5. Trapper	9,907	6.69%	0.49%	0.99	900.4
6. **Simple Average**	**10,543**	**7.98%**	**0.43%**	**0.81**	**899.3**

1/ 1994 FERC 423 Data
2/ (Column (4) ÷ Column (2)) x 2,000,000
3/ 1994 Southern Pacific Timetable
1995 Union Pacific Timetable
4/ Proposed mine not currently open.

Transportation Rates For UP Movements From Uinta, Hanna (WY) And Green River (WY/CO) Basins - 1994

Transportation Rates For UP Movements From Uinta, Hanna (WY) And Green River (WY/CO) Basins - 1994

Transportation Rates For SP Movements From The Uinta (UT/CO) and Green River (CO) Basins - 1994

Transportation Rates For SP Movements From The Uinta (UT/CO) and Green River (CO) Basins - 1994

Transportation Rates For SP Movements From The Uinta (UT/CO) and Green River (CO) Basins - 1994

UP And SP Origins Capable Of Serving Valmy

UP And SP Origins Capable Of Serving Valmy

Basin / Mine (1)	Heat Content (Btu/Lb.) 1/ (2)	Ash Content (%) 1/ (3)	Sulfur Content (%) 1/ (4)	Sulfur Dioxide Content (Lbs./MMBtu) 2/ (5)	Miles To Valmy 3/ (6)
A. Uinta (UT)					
SP Origins					
1. Deer Creek	11,702	10.09%	0.46%	0.79	487.3
2. Trail Mountain	12,272	8.47%	0.51%	0.83	487.3
3. Soldier Canyon	12,029	10.76%	0.42%	0.70	503.5
4. Bear Canyon No. 1	12,225	9.92%	0.55%	0.90	482.3
5. Skyline 1 & 3	11,618	9.00%	0.42%	0.72	476.9
6. Belina No. 1 & 2	11,684	7.20%	0.54%	0.92	474.9
7. Cottonwood	11,207	12.35%	0.49%	0.87	487.3
8. Willow Creek	4/	4/	4/	4/	4/
9. **Simple Average**	**11,820**	**9.68%**	**0.48%**	**0.82**	**485.6**
UP Origin					
1. SUFCO	11,340	8.37%	0.38%	0.67	456.3
2. **Simple Average**	**11,340**	**8.37%**	**0.38%**	**0.67**	**456.3**
B. Uinta (CO)					
SP Origins					
1. Orchard Valley	11,419	8.10%	0.40%	0.70	737.1
2. Sanborn Creek	12,287	8.67%	0.63%	1.03	745.4
3. Roadside	11,322	9.05%	0.58%	1.02	669.1
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5. Trapper	9,907	6.69%	0.49%	0.99	900.4
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UP And SP Origins Capable Of Serving Valmy

Basin / Mine (1)	Heat Content (Btu/Lb.) 1/ (2)	Ash Content (%) 1/ (3)	Sulfur Content (%) 1/ (4)	Sulfur Dioxide Content (Lbs./MMBtu) 2/ (5)	Miles To Valmy 3/ (6)
F. Green River (WY)					
UP Origins					
1. Black Butte	9,679	7.67%	0.50%	1.03	617.5
2. Leucite Hills	9,825	9.22%	0.59%	1.20	617.5
3. Pilot Butte	10,595	5.60%	0.91%	1.72	569.1
4. Jim Bridger	9,338	11.40%	0.62%	1.33	614.9
5. **Simple Average**	**9,859**	**8.47%**	**0.66%**	**1.33**	**604.8**
G. Hanna (WY)					
UP Origins					
1. Medicine Bow	10,472	7.16%	0.42%	0.80	759.7
2. Shoshone No.1	11,212	6.08%	0.59%	1.05	747.4
3. **Simple Average**	**10,842**	**6.62%**	**0.51%**	**0.93**	**753.6**

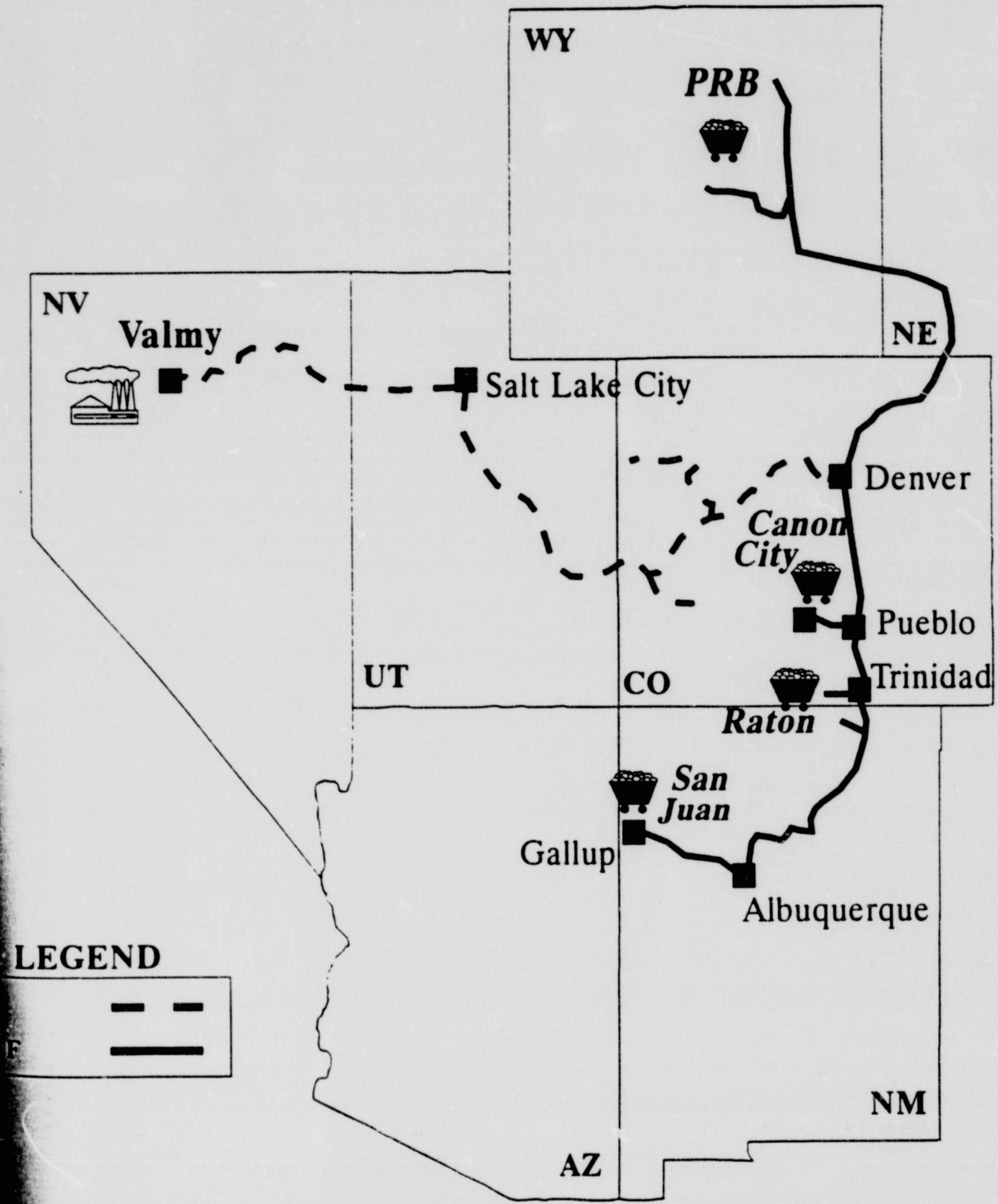
1/ 1994 FERC 423 Data
2/ (Column (4) ÷ Column (2)) x 2,000,000
3/ 1994 Southern Pacific Timetable
1995 Union Pacific Timetable
4/ Proposed mine not currently open.

Variable Costs Caused By BNSF Running Over UP / SP Tracks

COMPARISON OF CUMULATIVE PERCENT CHANGE IN RCAF WITH URCS VARIABLE COSTS PER GTM RELATED TO TRACKAGE RIGHTS

Exhibit _ (TDC-8)
Page 1 of 1

Closest BNSF Coal Origins To Valmy



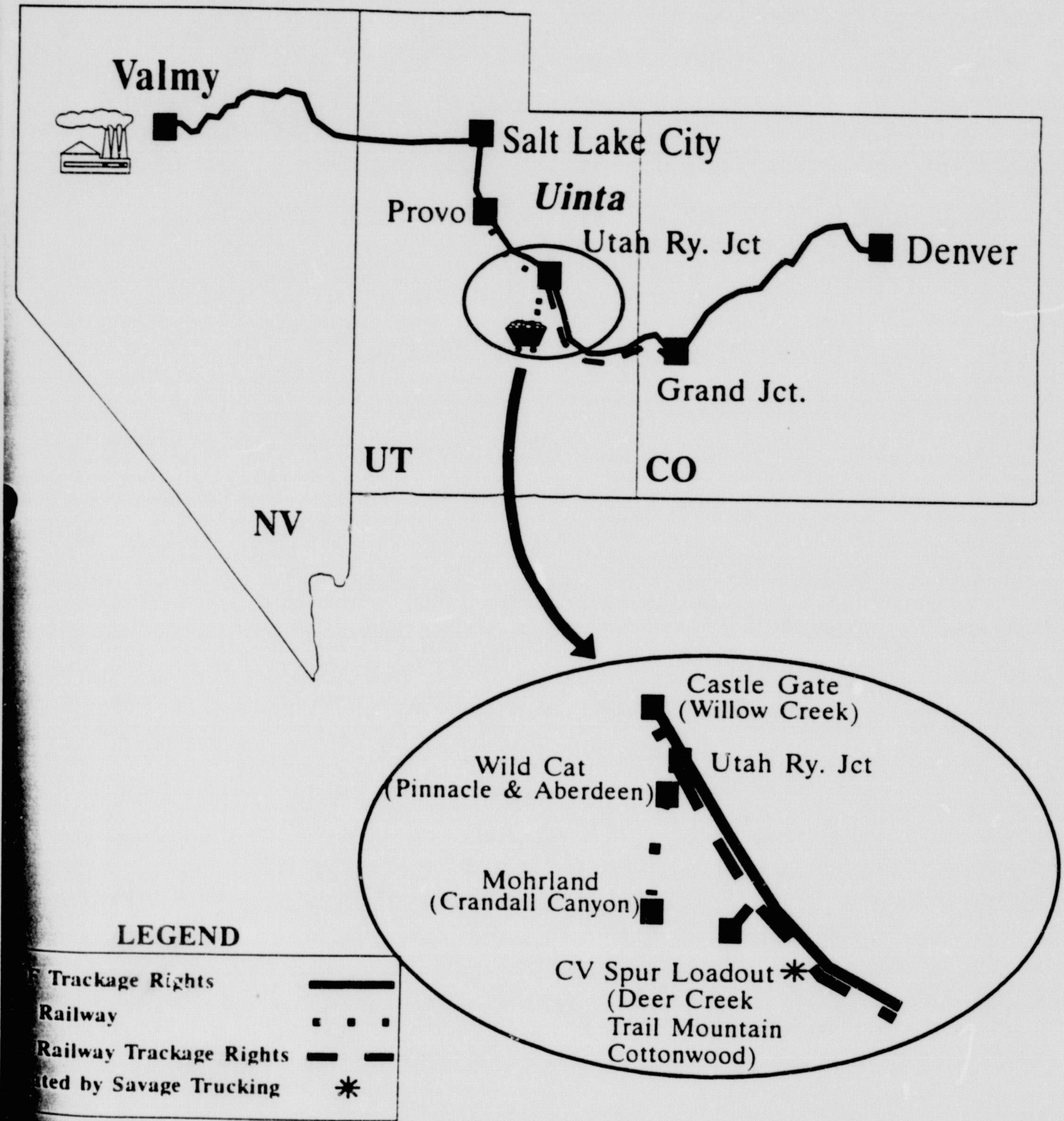
L. E. PEABODY & ASSOCIATES, INC.
ECONOMIC CONSULTANTS

Closest BNSF Coal Origins to Valmy

Basin / Mine (1)	Heat Content (BTU/Lb.) (2)	Ash Content (%) (3)	Sulfur Content (%) (4)	Sulfur Dioxide Content (Lbs./MMBTU) (5)	Miles To Valmy (6)
A. Raton (CO)					
1. Southfield	11,000	10.00%	0.60%	1.09	1,086.3
2. Basin Resources	12,748	10.55%	0.45%	0.71	1,137.0
3. York Canyon	12,339	12.21%	0.47%	0.76	1,222.7
4. **Simple Average**	**12,029**	**10.92%**	**0.51%**	**0.84**	**1,148.7**
B. San Juan (NM)					
1. Lee Ranch	9,106	17.97%	0.70%	1.54	1,557.2
2. McKinley	10,014	12.56%	0.43%	0.86	1,586.5
3. **Simple Average**	**9,560**	**15.27%**	**0.57%**	**1.18**	**1,571.9**
C. Powder River Basin (WY)					
1 Antelope	8,845	5.22%	0.28%	0.63	1,325.5
2. Belle Ayr	8,532	4.54%	0.29%	0.68	1,374.5
3 Black Thunder	8,743	5.25%	0.33%	0.75	1,350.1
4. Buckskin	8,423	5.25%	0.41%	0.97	1,398.9
5. Caballo	8,499	5.14%	0.37%	0.87	1,374.6
6 Caballo Rojo	8,444	5.16%	0.33%	0.78	1,372.4
7 Coal Creek	8,315	5.72%	0.34%	0.82	1,365.0
8 Cordero	8,378	5.44%	0.35%	0.84	1,367.5
9 Dry Fork	8,212	4.79%	0.38%	0.93	1,391.5
10 Eagle Butte	8,233	4.61%	0.36%	0.87	1,396.8
11 Jacobs Ranch	8,667	5.64%	0.45%	1.04	1,352.8
12 North Antelope	8,851	4.59%	0.23%	0.52	1,331.4
13 Rawhide	8,308	5.08%	0.36%	0.87	1,394.0
14 Rochelle	8,740	4.52%	0.21%	0.48	1,331.4
15 **Simple Average**	**8,514**	**5.07%**	**0.34%**	**0.79**	**1,366.2**

1/ 1994 FERC 423 Data
2/ (Column (4) ÷ Column (2)) x 2,000,000
3/ 1994 Southern Pacific Timetable
1995 Union Pacific Timetable
1995 Atchison, Topeka and Santa Fe Timetable
1991 Burlington Northern Timetable

Utah Railway Coal Origins Accessible By BNSF



L. E. PEABODY & ASSOCIATES, INC.
ECONOMIC CONSULTANTS

Utah Railway Coal Origins Accessible By BNSF

Basin / Mine (1)	Heat Content (Btu/Lb.) 1/ (2)	Ash Content (%) 1/ (3)	Sulfur Content (%) 1/ (4)	Sulfur Dioxide Content (Lbs./MMBtu) 2/ (5)	Miles To Valmy 3/ (6)
A. Uinta Basin (UT)					
1. Pinnacle & Aberdeen	11.817	10.45%	0.54%	0.91	479.3
2. Cottonwood	11.207	12.35%	0.49%	0.87	487.3
3. Trail Mountain	12.272	8.47%	0.51%	0.83	487
4. Deer Creek	11.702	10.09%	0.46%	0.79	498.4
5. Crandall Cany n	12.516	8.26%	0.52%	0.83	498.4
6. Willow Creek	4/	4/	4/	4/	4/
7. **Simple Average**	**11,903**	**9.92%**	**0.50%**	**0.85**	**490.1**

1/ 1994 FERC 423 Data
2/ (Column (4) ÷ Column (2)) x 2.000.000
3/ 1994 Southern Pacific Timetable
1995 Union Pacific Timetable
4/ Proposed mine not currently open.

STB FD 32760 3-29-96 D 62232 3/3

Transportation Rates For Utah Railway Movements From The Uinta (UT) Basin - 1994

BNSF SEGMENT - UTAH RAILWAY JCT TO VALMY
CALCULATION OF VARIABLE COST OVER TRACKAGE
RIGHTS TO VALMY 1/

BNSF OPERATIONS AND COSTS -- CENTRAL CORRIDOR

Several factors impact the effective operation of BNSF over UP/SP lines under the terms of the UP/SP-BNSF Settlement Agreement. When these factors are investigated in detail it becomes evident that BNSF can not provide a viable competitive option which the parties contend would be preserved under the terms of the UP/SP-BNSF Settlement Agreement. A major, and perhaps overriding, impediment to successful BNSF participation under the trackage rights provision of the settlement agreement involves the volume of traffic that BNSF will realistically be able to capture, should the merger be approved. Another factor weighing against successful BNSF competition involves the cost of operating over the Central Corridor. The Central Corridor stretches from Denver, CO to the West Coast. A schematic of the route is included as Attachment No. 1 to this Exhibit__(TDC-13). This exhibit also identifies BNSF's current route to the west coast via Arizona and New Mexico.

My analysis of the BNSF operations and costs for the Central Corridor are addressed under the following topics:

A. Traffic Volume Available to BNSF

B. Operational Issues

C. BNSF Cost to Install Infrastructure

D. BNSF Cost Disadvantage

BNSF OPERATIONS AND COSTS -- CENTRAL CORRIDOR

A. TRAFFIC VOLUME AVAILABLE TO BNSF

According to UP/SP, the anti-competition aspects of the merger would be cured through the granting of trackage rights to BNSF for "2 to 1" shipper locations. This section identifies the traffic volumes over the Central Corridor that could actually be captured by BNSF under the terms of the Settlement Agreement. Volume and consequent train frequencies are obviously important elements in the determination of the eventual viability of BNSF as a competing entity in the Central Corridor. Capturable volume will be a major determinant of BNSF's infrastructural requirements, operating expenses, and most significantly, its ability to price competitively.

BNSF OPERATIONS AND COSTS -- CENTRAL CORRIDOR

These analytical deficiencies, if corrected, would reduce substantially Mr. Peterson's projection of the volume of UP/SP traffic actually available to BNSF. However, even without correction of the deficiencies, and adhering to Mr. Peterson's diversion formula, divertable traffic volumes over many trackage rights lines are substantially below volumes required to justify the infrastructure investment and operational expenses.

I have employed a conservative approach in order to determine traffic volume diversion and resulting train frequencies for the Central Corridor. Using Mr. Peterson's methodology, the results of my analysis indicate very low BNSF trackage rights volume densities over the route.

In order to determine the eligibility of traffic for BNSF transport over the Central Corridor, I analyzed <u>each movement</u> from the 1994 ICC Costed Waybill Tape originating or terminating in areas that BNSF can divert to the Central Corridor. In instances where rerouting over trackage rights would reduce the mileage involved in the current BNSF movement that traffic was diverted to the trackage rights line. The results of this analysis is shown as the "Reroute of BNSF to Trackage Rights".

In order to determine eligible diversions of UP/SP traffic to BNSF trackage rights transport over the Corridor, I identified all traffic originating or terminating at 2-to-1 locations. I then separated the traffic into three groups:

a. Traffic where UP/SP controls the originating and terminating location,

BNSF OPERATIONS AND COSTS -- CENTRAL CORRIDOR

b. Traffic where UP/SP controls the 2-to-1 location and BNSF controls the other terminal, and;

c. Traffic where UP/SP controls the 2-to-1 location and a carrier other than UP/SP or BNSF controls the other terminal.

Table 1 below summarizes the traffic available to BNSF at "2 to 1" locations on the Central Corridor.

BNSF OPERATIONS AND COSTS -- CENTRAL CORRIDOR

BNSF OPERATIONS AND COSTS -- CENTRAL CORRIDOR

BNSF OPERATIONS AND COSTS -- CENTRAL CORRIDOR

BNSF OPERATIONS AND COSTS -- CENTRAL CORRIDOR

2. Management and Crew Manning

The proposed BNSF trackage rights operations over the Central Corridor would require BNSF to control and implement movements that would be hundreds of miles distant from the nearest existing BNSF facilities. (The approximate mid-point on the Central Corridor trackage rights line is some 700 miles from the nearest BNSF interchange point). BNSF would be required to install a substantial number of facilities and undertake a substantial management, control, maintenance and train manning project in order to implement even the minimal 1.08 loaded trains per day service, which our traffic studies indicate BNSF could capture.

BNSF's witness Owen projects that each one way transit of the Central Corridor will require six crews. No explanation is provided regarding either the source of this manpower requirement or the control and commensurations that must be in place in order to manage the crews.

3. Moffat Tunnel

The Moffat Tunnel is located on the current SP line west of Denver. According to the SP Denver Division Timetable[1] operation through and in proximity to the tunnel involves a number of procedures that would slow and otherwise impede train movements. Only one train at a time is permitted to occupy track in the tunnel. Trains may not proceed into the tunnel unless a ventilation gate is raised. If the gate is closed, the dispatcher must be notified immediately.

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[1] Southern Pacific Lines, Denver Division Tatable 1, Effective April 10, 1994, page 18.

BNSF OPERATIONS AND COSTS -- CENTRAL CORRIDOR

The potential exhaust problem in the tunnel is sufficient to require a number of refuges throughout it.

SP has long recognized that the Moffat Tunnel requires special locomotives. In ICC Docket No. 37226, Incentive Rate on Coal - Axial, Colorado to Coleto Creek, Texas, Denver and Rio Grande Western Railroad Company witness Adolph H. Nance states that: "In addition to its tonnage handling capabilities, the tunnel modification on this locomotive type has made it possible to operate over heavy grades and through tunnels on these grades without overheating of the locomotive cooling system (Nance, page 31). And further, "[t]he SD-40-T-2 modifications are relatively trouble free and essential to locomotive cooling for the Moffat Tunnel (Nance, page 32).

To the best of my knowledge, BNSF does not have any locomotives appropriate for use in the Moffat tunnel. BNSF cannot operate through the tunnel because of overheating problems with standard locomotives. Instead, specially designed or retrofitted units must be used. Thus, trackage rights operations over the SP route would require that BNSF acquire such locomotives.

C. BNSF COST TO INSTALL INFRASTRUCTURE

BNSF OPERATIONS AND COSTS -- CENTRAL CORRIDOR

BNSF's tenant status under trackage rights operations provisions of the UP/SP-BNSF settlement agreement would necessitate a substantial investment in infrastructure before any BNSF trackage rights traffic moves over the Corridor. The trackage rights provisions of the settlement agreement account for only those "below the wheel" costs which are considered under the compensation terms of the agreement. Provision of the "above the track" infrastructure investments and operating expenses necessary to implement the trackage rights operations is entirely incumbent upon BNSF. As I discuss subsequently, BNSF has not only failed to quantify infrastructural and expense requirements, by its own admission it has also failed to analyze them. In the absence of this data I have estimated the infrastructure and expense requirements for BNSF's above-the-track operations over the Central Corridor in the following section.

1. __Identification of Infrastructure Required__ -- As a guide for the identification of infrastructure and expense requirements I have employed those elements which are analyzed by UP and SP in the merger application. The items which I identify were considered by UP and SP to be crucial to the coordination, successful operation and integration of two previously independent rail systems.

   With the exception of limited track construction, such as that required for junction point connections, all of the items which I have identified involve above-the-track operations. Although I have tailored my estimates to reflect the actual projected train frequencies over the line, several of the infrastructure items identified

BNSF OPERATIONS AND COSTS -- CENTRAL CORRIDOR

require full implementation to service even minimal train frequency. Stated simply, a number of significant infrastructural requirements must be met even before the first BNSF train moves over UP/SP lines. Table 3 below identifies infrastructural additions and/or expansions and associated values provided by UP/SP in this proceeding (where stated) which are required for minimal implementation of BNSF's trackage rights for the subject route.

BNSF OPERATIONS AND COSTS -- CENTRAL CORRIDOR

2. Cost of Infrastructure Required For BNSF Trackage Rights -- In developing the estimates of BNSF's minimal infrastructure requirements, I have taken into account BNSF Witness Owen's limited outline of projected BNSF operations, proximity and availability of current BNSF operational support facilities and the length of the route. I have also considered the reduction in through train frequencies as determined in the preceding Section of this statement.

The infrastructural investments summarized in Table 4 below were estimated on the following bases:

2/ 1.08 trains per day x 3.3 locomotives per train x 2.0 loaded/empty ratio x 58.7 hours ÷ 24 hours per day x 1.10 spare margin factor.

BNSF OPERATIONS AND COSTS -- CENTRAL CORRIDOR

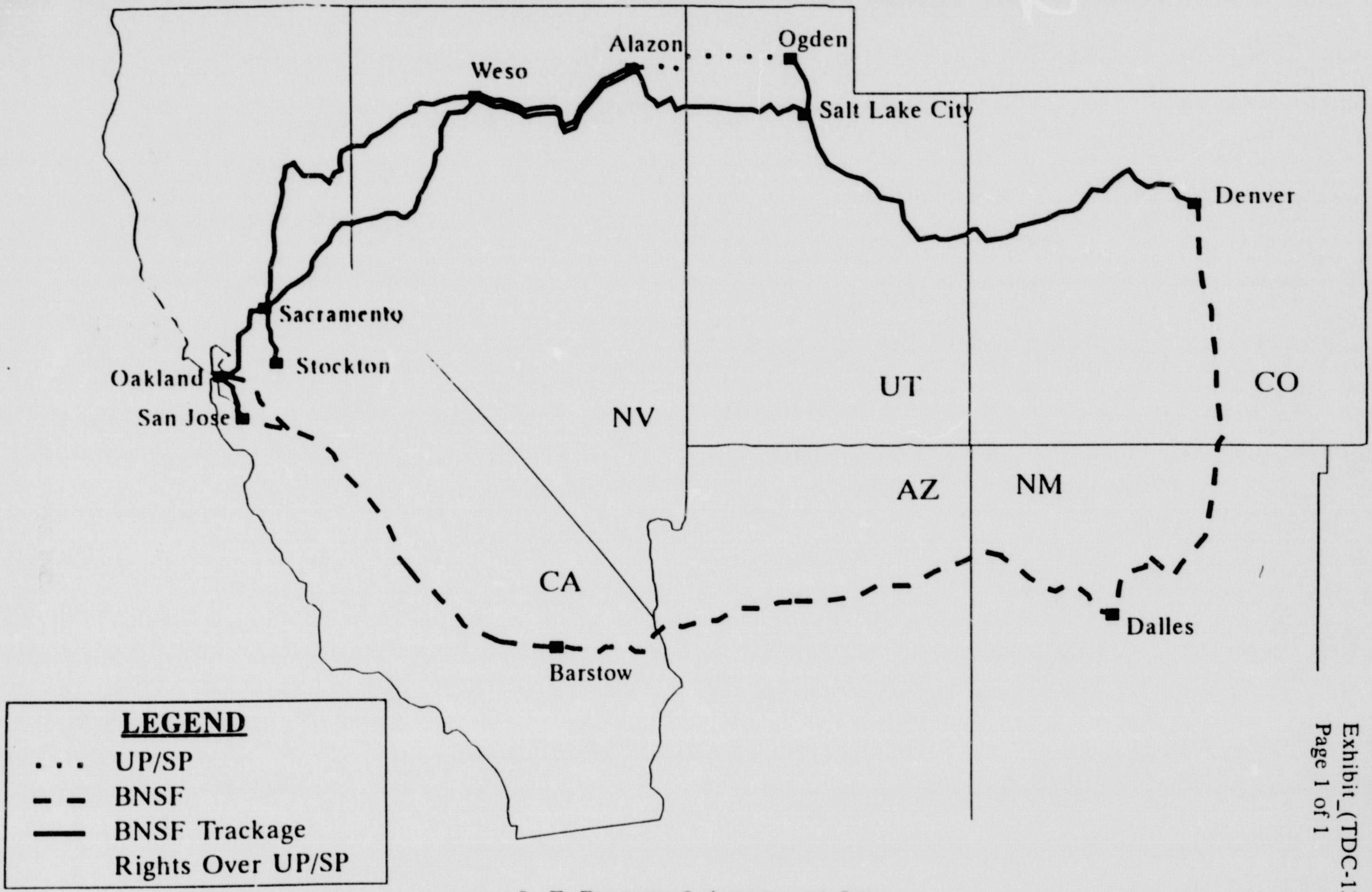
BNSF OPERATIONS AND COSTS -- CENTRAL CORRIDOR

BNSF OPERATIONS AND COSTS -- CENTRAL CORRIDOR

D. BNSF COST DISADVANTAGE

The BNSF will not enjoy operating costs that are as low as those of the UP. I have analyzed the costs for each carrier over the Central Corridor route. The BNSF costs are based on the mileage over the UP/SP trackage rights (1,376.4). For UP, I have costed the movement over UP's lines over the Central Corridor, which follow the UP's current route through Cheyenne, Wyoming (1,535.4 miles). My development of variable costs are shown in Attachment No. 2 to this Exhibit__(TDC-13) and summarized in Table 5 below:

Schematic of BNSF Routing
Between Denver, CO and Oakland, CA



Attachement No. 1 To
Exhibit_(TDC-13)
Page 1 of 1

L. E. PEABODY & ASSOCIATES, INC.
ECONOMIC CONSULTANTS

CALCULATION OF VARIABLE COST OVER TRACKAGE
RIGHTS -- DENVER - OAKLAND 1/
(BNSF TRACKAGE RIGHTS)

CALCULATION OF VARIABLE COST OVER TRACKAGE
RIGHTS – DENVER - OAKLAND 1/
(UP OPERATION)

Trackage Rights Compensation Using Fair Market Value

CERTIFICATE OF SERVICE

I certify that I have served a conformed copy of the foregoing Request for Conditions and Comments of Sierra Pacific Power Company and Idaho Power Company in Finance Docket No. 32760, by first class mail, postage prepaid, or by more expeditious manner of delivery, upon all persons required to be served as set forth in 49 C.F.R. § 1180.4(c)(5), namely all persons on the official service list published by the Surface Transportation Board in Decision No. 15 (served February 15, 1996), as modified by Decision No. 17 (served March 7, 1996), and as further modified by Decision No. 26 (served March 25, 1996). Dated this 29th day of March, 1996.

Jennifer P. Oakley

Jennifer P. Oakley

ZUCKERT, SCOUTT & RASENBERGER LLP
888 Seventeenth Street, N.W.
Washington, D.C. 20006-3939
(202) 298-8660

STB FD 32760 3-29-96 D 62228

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Item No.

Page Count 7

Mar #708

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Counsel

March 29, 1996

RECEIVED
MAR 29 1996
MAIL MANAGEMENT
I.C.C.

Vernon A. Williams, Esq.
Secretary
Surface Transportation Board
Room 1324
12th & Constitution Avenue N.W.
Washington DC 20423

Re: 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

Dear Secretary Williams:

Enclosed for filing are an original and 20 copies of Comments on Behalf of Formosa Plastics Corporation, USA (FPC-1). We also enclose a floppy disc in WordPerfect 5.1 which contains the same document.

ENTERED
Office of the Secretary
MAR 30 1996
4 Part of Public Record

Sincerely,

Andrew P. Goldstein
Attorney for
Formosa Plastics Corporation, USA

Enclosures

APG/rmm

ORIGINAL

FPC-1

BEFORE THE

SURFACE TRANSPORTATION BOARD

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I.C.C.

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

COMMENTS OF FORMOSA PLASTICS CORPORATION, USA

ENTERED
Office of the Secretary
MAR 30 1996
4 Part of Public Record

Andrew P. Goldstein
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Suite 1105
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(202) 393-5710

Attorney for
Formosa Plastics Corporation, USA

Dated: March 29, 1996

FORMOSA PLASTICS CORPORATION, USA
9 PEACH TREE HILL ROAD • LIVINGSTON, NJ 07039-5702 • TEL: (201) 992-2090

STATEMENT OF PAUL HUANG

ON BEHALF OF

FORMOSA PLASTICS CORPORATION, USA

My name is Paul Huang. I am Vice President - Olefins/Polyolefins Business of Formosa Plastics Corporation, USA ("FPC"). My business address is 9 Peach Tree Hill Road, Livingston, New Jersey, 07039.

FPC is a manufacturer of chemicals and plastics components. It operates a manufacturing facility at Point Comfort, Texas which is connected by a private industrial spur to the line of the Union Pacific Railroad Company ("UP") at Formosa, TX. UP is the only railroad serving Formosa.

FPC believes that the proposed merger of UP and Southern Pacific Transportation Company ("SP") will reduce competition to important markets served by FPC in California. Those markets presently account for approximately 25% of FPC's plastics components shipments from Point Comfort. The California markets involved have the potential to grow significantly and are expected to account for larger volumes of components shipped by FPC from Point Comfort.

FPC is heavily dependent on rail service to domestically market its plastics components, consisting of polypropelene, polyethylene, low density polyethylene, and polyvinyl chloride. Ninety percent of FPC's shipments of these commodities from Point Comfort move to

- continued -

domestic destinations by rail; truck is used only to meet our customers' emergency needs. The Point Comfort facility makes shipments of these four plastics components to customers located west of the Mississippi River. FPC has a smaller facility in Baton Rouge, LA, but that facility does not manufacture polypropelene, polyethylene or low density polyethylene. To the extent the Baton Rouge facility produces polyvinyl chloride, it mainly serves markets in the east. Due to property and other physical constraints, there is no room to expand production of polyvinyl chloride at FPC's Baton Rouge facility. Accordingly, although the FPC's Baton Rouge facility is served by UP and two other railroads (Illinois Central and Kansas City Southern), it 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 polyvinyl chloride, which is manufactured there, is available only in a very limited quantity for shipment to points west.

FPC's shipments of plastics components to California reach three points where there presently is multi-carrier competition; City of Commerce, Stockton,. and Lindsay, all of which receive service from UP, SP, and Burlington Northern Santa Fe ("BNSF"). Even though FPC is captive to UP at Point Comfort, the existence of competitive routes to the California destinations enables FPC to bargain more effectively for contract and common carrier rates to those points. UP, for example, is desirous of retaining its long-haul. With alternative routings via SP or BNSF, FPC need not necessarily give UP that long-haul. SP has, in fact, been a vigorous and effective competitor for traffic moving to California destinations, and actually handles plastics components shipped by FPC from Point Comfort with UP as the originating carrier. The merger

- continued -

P.3 (continued) -

of SP and UP will eliminate that competition became the merged system will control that traffic at origin, at destination, or both. Consequently, FPC's transportation costs to California points are likely to rise as a result of the merger.

Paul Huang, Vice President
Olefins/Polyolefins Business
Formosa Plastics Corporation, USA

SMAR28.WPD

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct. Executed this 28th day of March, 1996.

Paul Huang

CERTIFICATE OF SERVICE

I hereby that I have, this 29th day of March, 1996, served a copy of the foregoing Comments of Formosa Plastics Corporation, U.S.A. upon all parties of record, by first class mail, postage prepaid.

Andrew P. Goldstein

Andrew P. Goldstein

STB FD 32760 3-29-96 D 62209

Item No.

Page Count 13

Mar #689

62709

TRANSPORTATION•COMMUNICATIONS INTERNATIONAL UNION

LEGAL DEPARTMENT

ROBERT A. SCARDELLETTI
International President

MITCHELL M. KRAUS
General Counsel

LARRY R. PRUDEN
Assistant General Counsel

March 29, 1996

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MAR 29 1996

VIA HAND DELIVERY

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
12th & Constitution Avenue, NW, Room 1324
Washington, DC 20423

Re: Finance Docket No. 32760

Dear Mr. Williams:

Enclosed please find an original and twenty (20) copies of the Comments of the Transportation•Communications International Union in the above-referenced matter. Copies have been served on all parties of record as indicated in the Certificate of Service.

I am enclosing an additional copy to be date stamped and returned to our messenger.

Thank you for your attention to this matter.

Very truly yours,

Larry R. Pruden

Larry R. Pruden
Assistant General Counsel

LRP:fm
Enclosures

3 Research Place • Rockville, MD 20850 • (301) 948-4910 • FAX (301) 330-7662

TCU-4

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 32760

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

TRANSPORTATION•COMMUNICATIONS INTERNATIONAL UNION'S COMMENTS TO PROPOSED RAILROAD CONTROL AND MERGER APPLICATION

I. Introduction

The Transportation•Communications International Union (TCU) offers these Comments with respect to labor protective issues and the anti-competitive aspects of the proposed UP/SP merger. TCU opposes the merger.

TCU represents employees of the two carriers in five crafts, a total of 11,600 rail employees: carmen, clerks, patrolmen, supervisors and yardmasters.

II. The Anti-Competitive Aspects of this Merger Require That It Not Be Approved.

TCU is strongly opposed to this merger and believes it will result in a dangerous and unacceptable anti-competitive rail transportation system, primarily in the western United States. TCU joins other unions, shippers, other railroads and state and local governmental entities allied in opposition to this merger. TCU incorporates into our Comments the analysis of these parties with respect to the anti-competitive problems posed by this merger, which will create the largest railroad in this country,[1] and will likely dominate the western states, particularly California.[2] These two carriers "have several roughly parallel routes and control most of the huge base of chemical traffic in Texas and Louisiana."[3] This is direct evidence of the anti-competitive nature of this merger. Dow Chemical, in a letter dated March 15, 1996, and PPG Industries, in a Verified Statement dated March 26, 1996, to the Chairman of the STB, opposes the merger because of this fact.

In particular, the Railroad Commission of Texas is strongly opposed to the merger as it is proposed, and bases this opposition on an independent economic study by the University of North Texas showing anti-competitive problems for Texas if the merger is approved.[4]

A. <u>The UP/SP Merger Is Not in the Public Interest.</u>

Rail mergers will only be approved if it is determined that the transaction is consistent with the public interest. 49 U.S.C. § 11344(b)(c). In making this determination, a number of factors will be examined, including "whether the proposed transaction would

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[1] <u>The Wall Street Journal</u>, Friday, August 4, 1995.

[2] <u>The Washington Post</u>, Friday, August 4, 1995.

[3] <u>The Washington Post</u>, Friday, August 4, 1995.

[4] It is interesting to note that Applicants' March 26, 1996, Comments of Governors, Shippers and Others in Support of the Primary Application lists Governors of only four states -- Colorado, Illinois, Tennessee and Wisconsin -- that support the Primary Application. In none of these states will the anti-competitive effect of only having one carrier serve certain communities be felt.

have an adverse effect on competition among rail carriers in the affected region." 49 U.S.C. § 11344(b)(1)(E). Since rail mergers are immune from anti-trust review, 49 U.S.C. § 11341(a), this last provision gives the STB jurisdiction to reject mergers that are so anti-competitive that they are not in the public interest.[5]

While anti-trust laws and the public interest standard are not identical, it has been held that anti-trust laws "give understandable content to the broad statutory concept of the public interest." EMC v. Aktiebolaget Svenska Amerika Linien, 309 U.S. 238, 244 (1968). The National Association of Attorneys General (NAAG) has adopted guidelines that articulate the general enforcement policy of state attorneys general in regards to mergers that are subject to Section 7 of the Clayton Act and to Sections 1 and 2 of the Sherman Act.[6] These guidelines were adopted in 1993 -- without a dissenting vote -- and provide an objective criteria for determining when it is appropriate for state attorneys general to participate in federal anti-trust review. TCU believes these criteria show the clear anti-competitive nature of the proposed UP/SP merger and should be considered by the STB.

Shippers in some western communities currently have a choice of only two Class I railroads: UP and SP. While this limited competition demonstrates the already dramatic consolidation in the rail industry, shippers still have some choice of which carrier to

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[5]See Santa Fe Southern Pacific Corp.-Control-Southern Pacific Transportation Company, 2 I.C.C. 2d 709 (1986).

[6]Horizontal Merger Guidelines of the National Association of Attorneys General (March 30, 1993).

contract with; therefore, some semblance of competition remains. However, if this merger is approved, it will create the largest railroad this nation has ever seen, and competition between the two railroads will cease. As the National Association of Attorneys General recognizes, "when two firms...cease competing and merge, the inevitable consequence is the elimination of the competition between them. More significantly, however, the merged entity may now possess market power, an anti-competitive outcome."[7]

The merger of UP and SP will create a monopoly railroad in many western states. There is simply no other way to describe what this transaction will mean to shippers who will have one, and only one, rail carrier to choose from. A UP/SP railroad will control virtually all traffic to and from Mexico[8] and dominate in the transport of particular products including coal, plastics and petrochemicals. This anti-competitive situation has inspired companies shipping those commodities or their various associations to oppose or raise serious questions about the UP/SP transaction.[9] In markets throughout the West, shippers will be in no position to negotiate favorable transportation conditions and will have to pay whatever is demanded. This is the very definition of a monopoly and is exactly what the Applicants are asking this Board to

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[7]Guidelines at S-4.

[8]UP currently control 49% of all rail traffic to Mexico and SP handles another 41%.

[9]A number of individual shippers and groups have come out against this merger including the Coalition for Competitive Rail Transportation, The Western Shippers Coalition, The Texas Farm Bureau and the National Industrial Transportation League.

approve. Even UP recognizes that this merger raises serious anti-competitive questions and, in a misleading attempt to remove these questions, has entered into a trackage rights agreement with the Burlington Northern Santa Fe Railroad (BNSF). However, the result of the agreement only serves to create a duopoly of railroads, an unhealthy proposition for rail competition.

Under the trackage agreement, BNSF will have limited rights to operate on UP/SP lines in order to service customers that would otherwise only be able to ship via UP/SP. UP is essentially asking for the opportunity to decide how and when its only competitor (BNSF) will operate. This is not real competition and does not change the monopolistic characteristics that this merger represents.

The very nature of this trackage rights agreement is that of a landlord-tenant relationship. The landlord railroad, UP/SP, will essentially be able to dictate how the tenant, BNSF, will operate and how it will compete. In deciding how to deal with BNSF, UP/SP will be driven by its commercial interests and not by any real desire to foster competition. As the landlord, UP/SP will be in a position to stifle competition and maintain and grow market share to reap the financial benefits of being a monopolist. Of particular concern is the routes and conditions that UP/SP is imposing on BNSF in the Central Corridor. BNSF will be a competitive disadvantage as to routing and frequency of service and thus will not be able to offer true and vigorous competition. Simply put, the argument that this situation constitutes real competition is a fraud.

The Department of Justice commented that the "agreement with BNSF does not and cannot remedy the competitive harm arising from the reduction in the number of carriers in the western U.S. ..."[10] Furthermore, a study commissioned by the Texas Farm Bureau determined that "trackage rights are rarely sufficient to achieve appropriate levels of competition." As is well known and extensively discussed in the study, "a market structure of this nature encourages tacit collusion for joint profit maximization. The occurrence of this phenomenon reduces or eliminates the competitive gains from the trackage rights agreement, with any efficiency increases flowing to UP/SP and BNSF as 'monopoly rents.'"[11]

James J. Rakowski, Associate Professor of Economics at Notre Dame, recently concluded that the "merger proposal raises profound concerns of concentrates power and control which are not adequately addressed by what is now an all-too-cozy and unrealistically

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[10]DOJ-3; Additional Comments by the Department of Justice on Proposed Procedural Schedule at 3.

[11]<u>The Impact of the Proposed Union Pacific-Southern Pacific Merger on Business Activity in Texas</u>, The Perryman Group, Jan. 1996 at 2-3.

optimistic agreement between UP and BNSF."[12] Commenting on the trackage rights agreement, the most recent report released on this merger states, "we find it difficult to assume that they [BNSF] will provide effective rail competition."[13] The report went on to detail three major problems with the agreement and concluded that "we can see no argument that would justify calling a haulage agreement the equivalent of a competitor with its own tracks...."[14] It is clear that the trackage rights agreement does not solve the anti-competitive problems inherent in this merger and may, in fact, create additional ones. The Board must, therefore, not rely on this back-room deal as a basis for approving what is clearly an unduly anti-competitive transaction.

B. The Contention of the Merging Carriers That SP Will Fail Without the Merger Is Not Valid.

The combined forces of UP/SP are also trying to defend this merger on that grounds that, without it, SP will not be able to effectively operate. It would appear that the applicants are attempting to invoke the "failing firm" doctrine which provides that a merging company's imminent failure may serve as a basis for approving an otherwise anti-competitive arrangement. See Citizen Publishing Co. v. United States, 394 U.S. 131 (1969). This

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[12]James J. Rakowski, "Economic Professor See faults in UP-SP Competitive ARguments On Planned Merger, Traffic World, Jan. 22, 1996, at 44.

[13]The UP/SP Merger, An Assessment of the Impacts on State of Texas, Bernard Weinstein, PhD for the Texas Railroad Commission, March 1996 at 4-10.

[14]Id. at 11-14.

doctrine is not a valid defense to allow an anti-competitive rail merger to proceed. In fact, the ICC specifically refused to adopt it when it rejected the Santa Fe/Southern Pacific merger on anti-competitive grounds in 1986 (2 ICC 2d 709). The STB should apply the same criteria and reject the UP/SP merger.

Even if the so-called "failing firm" doctrine were to be considered by the STB, it would still not be a valid defense since the requirements are not met in this situation. SP, by all objective accounts, does not face "the distinct likelihood of insolvency." Citizen Publishing, 394 U.S. 131, 137 (1969). Just six months before the merger was announced, SP told shareholders that it had "set new records for earnings, gross freight revenues and total carload volume."[15] Jerry R. Davis, President and CEO of SP, lauded the strengths of his company and the promise of continued success. "In 1994, the Company's unmatched route structure was a major reason that it achieved a higher percentage of volume increase than any other Class I railroad...Our franchise is strong, and we will continue to utilize it efficiently to achieve higher levels of customer satisfaction."[16] Mr. Davis never asserted that the SP was facing the distinct likelihood of insolvency.

The ultimate victim of transactions that eliminate all competition and create a monopoly (or duopoly given the BNSF

[15]Southern Pacific Rail Corporation, 1994 Annual Report at 2 (March 10, 1995).

[16]Id. at 3, 4.

trackage rights agreement) is the consumer. The National Association of Attorneys General concluded "that firms possessing such [monopoly] power can raise prices to consumers above competitive levels, thereby effecting a transfer of wealth from consumers to such firms."[17] A UP/SP merger will be no different. Rail carriers transport a large percentage of goods that are directly or indirectly used by consumers -- farm products, coal, lumber and chemicals. The ramifications of a rail monopoly would be felt in almost every sector of the economy and, once created, would be extremely difficult, if not impossible, to break up. Therefore, the STB should reject the UP/SP merger on the grounds that the anti-competitive environment that will result is not in the public interest.

III. Under a Public Interest Analysis, the Harm to be Done to the Employees Requires That Merger Approval Be Denied.

The disproportionate impact of the merger, as set forth in the Labor Impact Statement, on employees of certain crafts, especially the clerical craft, as well as the disproportionate impact on those employees residing in California, will have an unsettling effect upon rail transportation.

Just and reasonable treatment of rail employees is not only an essential aid to maintenance of a service uninterrupted by labor disputes, but promotes efficiency, which suffers through loss of employee morale when demands of justice are ignored. United States v. Lowden, 308 US 225, 238 (1939). The Supreme Court in Lowden

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[17] Guidelines at S-3.

recognized that the effect upon rail employees is part and parcel of the analysis to be made in determining whether rail mergers are in the public interest.

As identified in Applicants' Labor Impact Statement (Application - Volume 3, Ex. 13, pp. 407-422), 17.5% of clerical positions will be abolished. Furthermore, as shown on page 422, Applicants do not know where 2,174 clerks, now working in Denver, Omaha and St. Louis, will be working after the merger. This is because "...once the merger has been approved, Applicants will be able to negotiate with various states to obtain economic incentives in exchange for locating or creating jobs within a particular state's jurisdiction. Until the negotiations have been completed, the economics surrounding the location of the key facilities cannot be adequately analyzed." (Labor Impact Statement at 422). TCU submits that it is not in the public interest for Applicants to conduct a bidding war among states to sell rail employees over to the highest bidder.

As experience has shown, the loss of jobs due to rail mergers always exceeds the modest estimates made by carriers. Unfortunately, nothing in current law binds UP/SP to the initial predictions contained in the operating plan, and, thus, additional job cuts are not only a possibility, but a likelihood. The Board must take this fact into account when it evaluates this element of the public interest. For example, in the BN-SLSF merger, Applicants stated that a BN-SLSF merger would increase the number of positions on the merged system.[18] That increase of jobs never materialized. More recently, in the UP-CNW merger (FD 32133), original job loss estimate was under 100 (Effects of Applicant Carriers' Employees, pp. 77-85). It was only at the Applicants' oral presentation before the ICC that this number of job losses was "adjusted." The ICC's February 21, 1995, decision (page 95) stated "..with the full integration that awaits 100% control, 891 jobs will be abolished and 788 will be transferred." (underscoring added). Clearly, the STB must take a closer look at the estimated effect upon employees in the UP-SP merger and conclude that the total numbers of jobs to be abolished and/or transferred will so far exceed those set forth in the Labor Impact Statement that the public interest will be ill-served by approval of the merger.

IV. In the Event that the Pending Application Is Approved, the STB Should Impose the New York Dock Protective Conditions.

The Applicants have acknowledged that the proposed control and merger transaction is subject to the employee protective conditions set forth in New York Dock Railway--Control--Brooklyn Eastern District, 360 I.C.C. 60, aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2nd Cir. 1979). Application, Vol. 3, at 401. Pursuant to 49 U.S.C. § 11347, approval by the STB of the subject application should be conditioned upon the standard New York Dock protections.

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[18] Finance Docket 28583, 360 I.C.C. 946. The April 17, 1980, decision of the ICC stated, "This merger will provide a long-term benefit to employees of BN and Frisco by increasing the number of positions on the merged system."

V. Conclusion

The proposed UP/SP merger will have devastating anti-competitive effects upon the rail transportation industry, as well as visiting a disproportionate loss of jobs upon rail employees. By any analysis -- anti-trust or public interest -- the merger should be denied by the Surface Transportation Board. In the event that the application is approved, however, approval should be conditioned upon the New York Dock protective provisions.

Respectfully submitted,

Larry R Pruden

Mitchell M. Kraus
General Counsel
Larry R. Pruden
Assistant General Counsel
Transportation•Communications
International Union
3 Research Place
Rockville, MD 20850
(301) 948-4910

March 29, 1996

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing on all parties of record via first-class mail, postage prepaid, this 29th day of March, 1996.

Larry R Pruden

62308

Item No. ________________

Page Count 33

Mar #614

BEFORE THE
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

COMMENTS OF THE
COUNTY OF PLACER

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BEFORE THE
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

COMMENTS OF THE
COUNTY OF PLACER

The County of Placer hereby submits its Comments on the above-described proceeding whereby Union Pacific Railway Company seeks to take control of and merge with the Southern Pacific Railroad Company. The County of Placer is a political subdivision of the State of California. The proposed Union Pacific and Southern Pacific merger will result in a considerable increase in train activity in the post-merger environment. Rail traffic is expected to increase substantially on the Roseville to Sparks route (Donner Route) and the Roseville to Marysville Route (Marysville route). This increase in rail activity along these routes has the potential to create significant impact on the County and various jurisdictions within the County.

The impacts of the Union Pacific and Southern Pacific

Railroad merger include the following:

1) **IMPACTS ON THE LOCAL AND REGIONAL TRANSPORTATION SYSTEMS**

Thirty-eight at-grade rail crossings exist along the Donner and Marysville Routes. Fifteen of these occur on routes which are considered to be regionally significant. For most, no parallel roadways exist which would offer residents and businesses a way to avoid delays caused by increased train traffic.

Increased delays at these crossings would affect both regional and local road traffic. Based on the data made available to us, total delay at grade crossings could increase by as much as 1,527 hours -- an increase more than twenty-three (23) times the observed pre-merger delay. We estimate that 18,350 more vehicles (approximately 26,400 more people) would experience delays at crossings. This means that ten percent (10%) of the total population of Placer County would experience delays at rail crossings at some time of the day. The documentation supporting these impacts and potential mitigation measures are attached as **Exhibit A**, and by this reference, incorporated herein.

2) **AIR EMISSIONS AND AMBIENT AIR QUALITY CONDITIONS**

Most of Placer County falls within the federal and State ozone nonattainment boundaries. Portions of the County are also designated by the State as nonattainment for PM-10. Increased train activity would lead to an increase in PM-10 emissions and an increase in ozone precursor emissions. Increased on-road delay at grade crossings would result in increased vehicular emissions. The documentation supporting these impacts and potential mitigation measures are attached as **Exhibit B**, and by this reference, incorporated herein.

3) **PUBLIC HEALTH AND SAFETY**

Many of the at-grade crossings occur on roadways that provide the only access to large rural and forested areas of Placer County. Delays at these crossings may prevent fire, police, and medical vehicles from reaching an emergency in a timely manner. Where minutes can mean the difference between life and death, this represents a major public health and safety concern. Increased transport of flammable and hazardous materials also poses a potential public health hazard due to spillage from accidents. The documentation supporting these impacts and potential mitigation measures are attached as **Exhibit C**, and by this reference, incorporated herein.

4) **TRANSIENT CRIME PROBLEM**

Transients who use trains as transportation into Placer County pose a major problem for residents and businesses in the City of Roseville. Forty percent of the individuals using local free meal programs have arrived in Roseville using rail. The City's Police Department has the equivalent of 1.5 police officers assigned to deal with transient-related crimes and disturbances. Union Pacific's plan to establish the Roseville yard as a hub will have the potential to substantially increase the number of transients in Placer County. The documentation supporting these impacts and potential mitigation measures are attached as **Exhibit D**, and by this reference, incorporated herein.

5) **URBAN COMMUTER AND INTERCITY RAIL SERVICE**

Southern Pacific Rail Corporation has been working with the Placer County Transportation Planning Agency (PCTPA) and Placer jurisdictions to develop a long-term solution to deliver rail service to the fast-growing Placer area. Caltrans and Placer County have identified four intercity rail station sites (Colfax, Auburn, Rocklin, and Roseville) and four additional commuter rail station sites (Bowman, Newcastle, Penryn, and Loomis). Intercity service to Colfax may begin as soon as 1997. Although rail improvements proposed by Union Pacific as part of the merger may improve service in the long term, the merger itself may delay implementation of station improvements and, thereby, extension of service to the County. The documentation supporting these impacts and potential mitigation measures are attached as **Exhibit E**, and by this reference, incorporated herein.

6) **WATER QUALITY CONDITIONS**

Increased train activity could increase the risk of the contamination of the Placer regional water system. Many of the water system delivery and storage facilities between the community of Alta and the City of Rocklin are located below the Donner rail route and are especially vulnerable to toxic spills. The documentation supporting these impacts and potential mitigation measures are attached as **Exhibit F**, and by this reference, incorporated herein.

7) **NOISE**

Increased train activity will lead to an increase in noise in the vicinity of at-grade crossings from engine noise, and whistles or horns which provide advance warning. The documentation supporting these impacts and potential mitigation measures are attached as **Exhibit G**, and by this reference, incorporated herein.

The County of Placer requests that the Board consider these impacts and require conditions of mitigation on any approval of the application.

Dated: 3/28/96

Respectfully Submitted,

PLACER COUNTY COUNSEL

Gerald O. Carden

Gerald O. Carden,
Chief Deputy

CERTIFICATE OF SERVICE

Pursuant to 49 CFR Section 1104.12, I certify that I have this day served copies of the foregoing "Comments of the County of Placer" upon all parties of record in this proceeding by first class postage prepaid U.S. mail.

Dated: 3/28/96

Gerald O. Carden

Gerald O. Carden, Chief Deputy
Placer County Counsel

IMPACTS ON THE LOCAL AND REGIONAL TRANSPORTATION SYSTEMS

BACKGROUND

Three railroad lines run throughout Placer County. These lines run through all major cities and population centers. The Marysville Route begins at the Roseville Rail Yard and travels along State Route 65. This line runs through the City of Lincoln and the Community of Sheridan to the City of Marysville and beyond. This line crosses seventeen roads. Ten of these roads are at-grade crossing.

Two rail lines run from Roseville, California to Sparks, Nevada. These are referred to as the eastbound and westbound Donner Routes. The westbound Donner Route track was built in 1865 as part of the first Transcontinental Railroad. This track crosses seventeen roads. Nine of these crossings are at-grade and present the possibility of traffic delay.
The eastbound Donner Route track was built in the 1920's. It includes fourteen individual crossings; two of these crossing are at-grade. Twenty-seven roads cross both the eastbound and westbound Donner rail routes. Of these, seventeen road crossings are at grade. The at-grade crossings for both routes are listed in Tables One and Two.

TRAFFIC IMPACT ANALYSIS

A number of factors affect delays at the at-grade crossings described above, including: (1) traffic volume; (2) the number of trains; and (3) the time each train closes a crossing. Due to the lack of information on the post-merger operational plan, it has been difficult to estimate the impact of increased rail service that may result from the proposed Union Pacific merger. Key assumptions have been made about how rail service will operate along routes in Placer County to calculate traffic impacts.

Traffic volume varies by time of day. More traffic occurs during the morning and evening peakhours. For purposes of this analysis, train traffic has been distributed evenly across the day. Traffic counts have been made at fifteen at-grade crossings. These are the regionally significant crossings. The delay at twenty-three at-grade crossings have been estimated as part of this analysis. Observed traffic volumes for the significant fifteen at-grade crossings are shown in Table Three.

The locations of the major at-grade crossings are depicted on the four attached maps. Map One shows the at-grade crossings located in the Lincoln and Sheridan areas. Map Two shows at-grade railroad crossings in the City of Roseville. Map Three shows at-grade crossings in the City of Rocklin and the Town of Loomis. Map Four shows at-grade railroad crossings in the Auburn and Newcastle Area.

EXHIBIT A

TABLE ONE
PLACER AT-GRADE RAILROAD CROSSINGS
SINGLE TRACK CROSSING

Road at Point of Crossing	County or City	Regionally significant	Rail Road Line
Athens Road	County	YES	Roseville - Marysville Line
Moore Road	Lincoln	YES	Roseville - Marysville Line
1st Street	Lincoln	NO	Roseville - Marysville Line
3rd Street	Lincoln	YES	Roseville - Marysville Line
5th Street	Lincoln	NO	Roseville - Marysville Line
6th Street	Lincoln	NO	Roseville - Marysville Line
7th Street	Lincoln	YES	Roseville - Marysville Line
Wise Road	County	NO	Roseville - Marysville Line
Chamberlain Road	County	NO	Roseville - Marysville Line
HWY 65	County Sheridan	YES	Roseville - Marysville Line
Luther Road	County	YES	Donner Westbound Line
Auburn Ravine Road	County	YES	Donner Westbound Line
Agard Street	Auburn	NO	Donner Westbound Line
Pacific Avenue	Auburn	NO	Donner Westbound Line
Sacramento Street	Auburn	NO	Donner Westbound Line
King Road	Loomis	YES	Donner Westbound Line
Webb Street	Loomis	NO	Donner Westbound Line
Sierra College Blvd	Loomis	YES	Donner Westbound Line
Delmar Avenue.	Rocklin	NO	Donner Westbound Line
Rodgers Lane.	County	NO	Donner Eastbound Line
Blocker Drive	Auburn	NO	Donner Eastbound Line
Weimar Cross Rd.	County	NO	Donner Westbound Line
English Colony Rd.	County	NO	Donner Westbound Line
Clipper Gap Rd.	County	NO	Donner Westbound Line

TABLE TWO
PLACER AT-GRADE RAILROAD CROSSINGS
EASTBOUND AND WESTBOUND LINES

Road at Point of Crossing	County or City	Regionally Significant	Rail Road Line
Yosemite Street	Roseville	YES	Donner East & West Bound Line
Berry Street	Roseville	NO	Donner East & West Bound Line
Farron Street	Rocklin	YES	Donner East & West Bound Line
Rocklin Road	Rocklin	YES	Donner East & West Bound Line
East Midas Street	Rocklin	YES	Donner East & West Bound Line
Yankee Hill Road	Rocklin	NO	Donner East & West Bound Line
Main Street	County Newcastle	NO	Donner East & West Bound Line
Chubb Road	County Bowman	NO	Donner East & West Bound Line
Ponderosa Way	County Weimar	NO	Donner East & West Bound Line
Auburn Street	Colfax	NO	Donner East & West Bound Line
Gearhart Street	Colfax	NO	Donner East & West Bound Line
Grass Valley Road	Colfax	YES	Donner East & West Bound Line
East Cape Horn Rd..	County	NO	Donner East & West Bound Line
Lincoln Road.	County	NO	Donner East & West Bound Line
Sacramento Street.	County	NO	Donner East & West Bound Line
Main Street	County	NO	Donner East & West Bound Line
Alta Bonny Nook Rd..	County	NO	Donner East & West Bound Line

TABLE THREE
TRAFFIC VOLUMES AND MAXIMUM QUEUE PER CROSSING

CROSS STREET	MAXIMUM VEHICLES IN QUEUE	ROUTE	ESTIMATED DAILY VOLUME AT CROSSING
Yosemite	31	Donner	9170
Fallon	5	Donner	1594
Rocklin Road	11	Donner	3344
Midas	27	Donner	7996
Sierra College Blvd.	24	Donner	7180
King	26	Donner	7810
Callison	1	Donner	358
Auburn Ravine Road	17	Donner	5201
Luther	22	Donner	6739
Grass Valley Road	32	Donner	9531
Other Donner Crossings	*	Donner	11785
Athens Road	5	Marysville	1,478
Moore Road	8	Marysville	2,260
Third Street	12	Marysville	3,570
Seventh Street	7	Marysville	2,110
SR 65	36	Marysville	10,900
Other Marysville Crossings	*	Marysville	4,063

* estimated based upon total system volume.

Fourteen trains currently run on the Donner and Marysville routes. Two sources of information have been used to estimate the number of additional trains on the respective rail lines. The merger document estimates that twenty-one trains will run on both routes after the merger. However, this does not include either additional Santa Fe trains expected on the routes or increased traffic that could result from improvements in the Port of Oakland. After taking these factors into consideration, Nolte and Associates estimate that a total of thirty-six additional trains will run along both routes.

Different average gate-time estimates have also been provided. The merger document assumes an average gate-time wait of four minutes. However, monitoring data indicates that 7.5 minutes constitutes a more appropriate average wait time. Given that post-merger trains will be longer on both routes, we have suggested a 12-minute gate-time as a worst case scenario.

ESTIMATED TRAFFIC IMPACTS

Table Four summarizes total vehicle hours of daily delay on at-grade crossings along both routes using different train volume and gate-time scenarios. Under the worst case scenario, an additional 1,593 hours of daily vehicle delay will occur for both routes-- over twenty-three times as much as current operating conditions at almost 66 hours of delay (fourteen trains with four-minute gate times).

TABLE FOUR
TOTAL DAILY DELAY AT THE PLACER AT-GRADE CROSSINGS ON BOTH ROUTES
(VEHICLE HOURS OF DELAY

Number of Trains Per Day	Average Gate Time Per Train 4 minutes	7.5 minutes	12 minutes
14	65.9	231.4	592.3
21	106.7	375.2	960.6
36	177.0	622.2	1592.9

Table Five shows the estimated number of vehicles affected by additional train crossings. Under the worst case scenario, 18,354 vehicles would be affected by increased train traffic. The total number of persons affected by this daily delay is included in Table Six. Here, the worst case scenario shows approximately 26,430 people, or 12.6 percent of the total Placer population (210,000), will be affected each day by the increased rail activity. Residents of every jurisdiction in the County will be affected. This is a substantial impact for a small suburban and rural county like Placer.

TABLE FIVE
TOTAL VEHICLES AFFECTED BY DAILY DELAY AT ALL AT-GRADE CROSSINGS BY TRAIN AND GATE TIME SCENARIOS
(VEHICLES PER DAY)

Number of Add'l Trains Per Day	Average Gate Time Per Train 4 minutes	7.5 minutes	12 minutes
7	2238	4196	6714
22	6118	11470	18354

TABLE SIX
TOTAL PERSONS AFFECTED BY DAILY DELAY AT ALL PLACER AT-GRADE CROSSINGS
BY TRAIN & GATE TIME SCENARIOS
(PERSONS PER DAY)

Number of Add'l Trains Per Day	Average Gate Time Per Train 4 minutes	7.5 minutes	12 minutes
7	2,746	6,043	9,668
22	8,809	16,518	26,430

The railroads have indicated the intensified rail traffic will increase the number of "piggy back" containers significantly, and this in turn will increase truck traffic from their current loading/off-loading areas. No analysis of the impacts of the increase of truck traffic from State Highway 65 and Interstate 60 to the loading/off-loading areas has been performed.

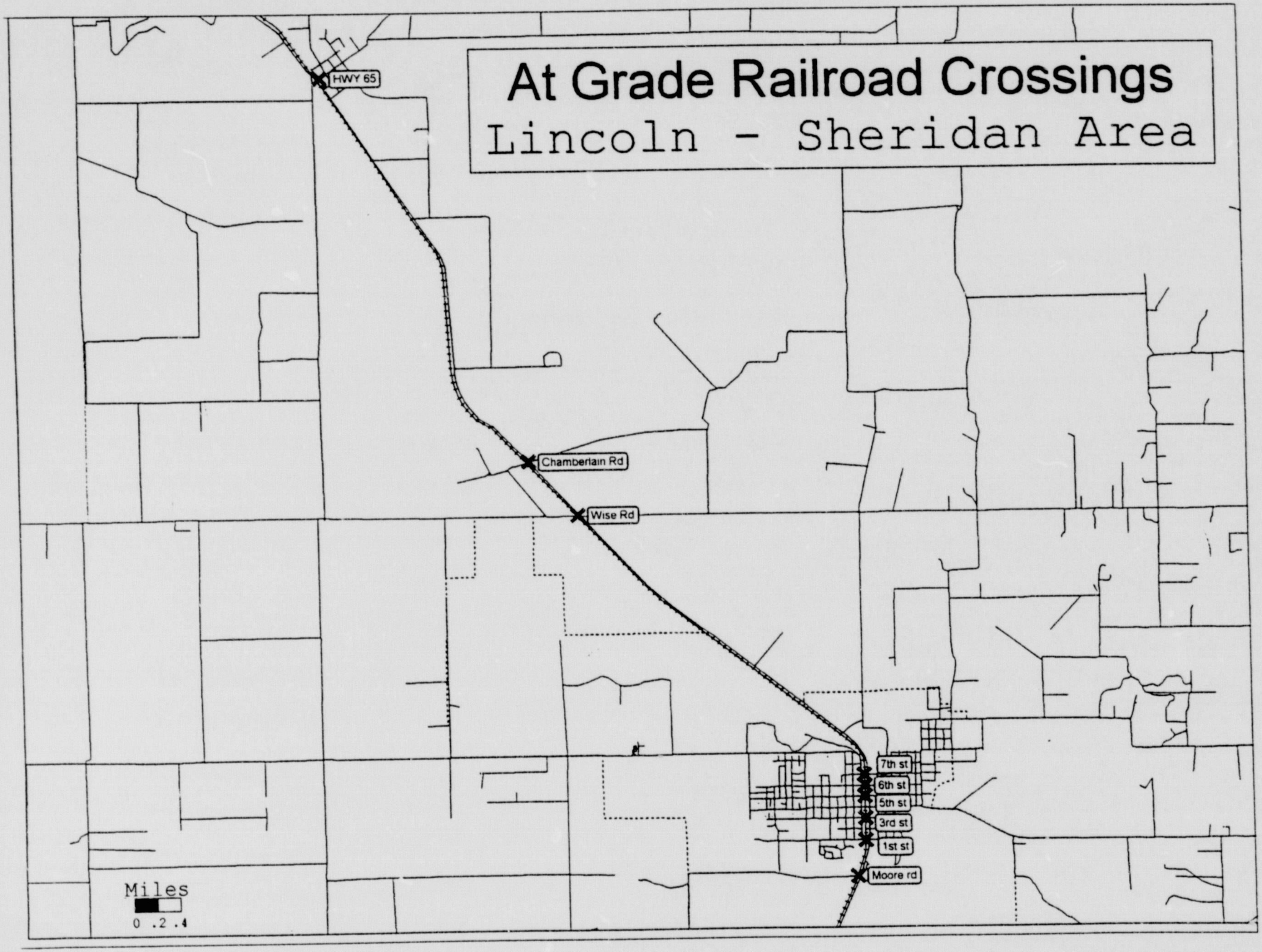
POTENTIAL MITIGATION MEASURES

Three of the at-grade crossings have been identified as candidates for grade separations by the local jurisdictions. These candidates include Third Street (Lincoln), East Midas Street (Rocklin), and Sierra College Boulevard (Loomis). These were suggested as candidates primarily for public safety reasons rather than to address delay at grade crossings. Each of these overpasses would cost a[illegible] t six million dollars. These improve[illegible] its could be paid for through the existing 103 Program, if local funds are available, or may be proposed as Intermodal Surface Transportation Efficiency Acts Demonstration Projects by Placer County jurisdictions and Union Pacific.

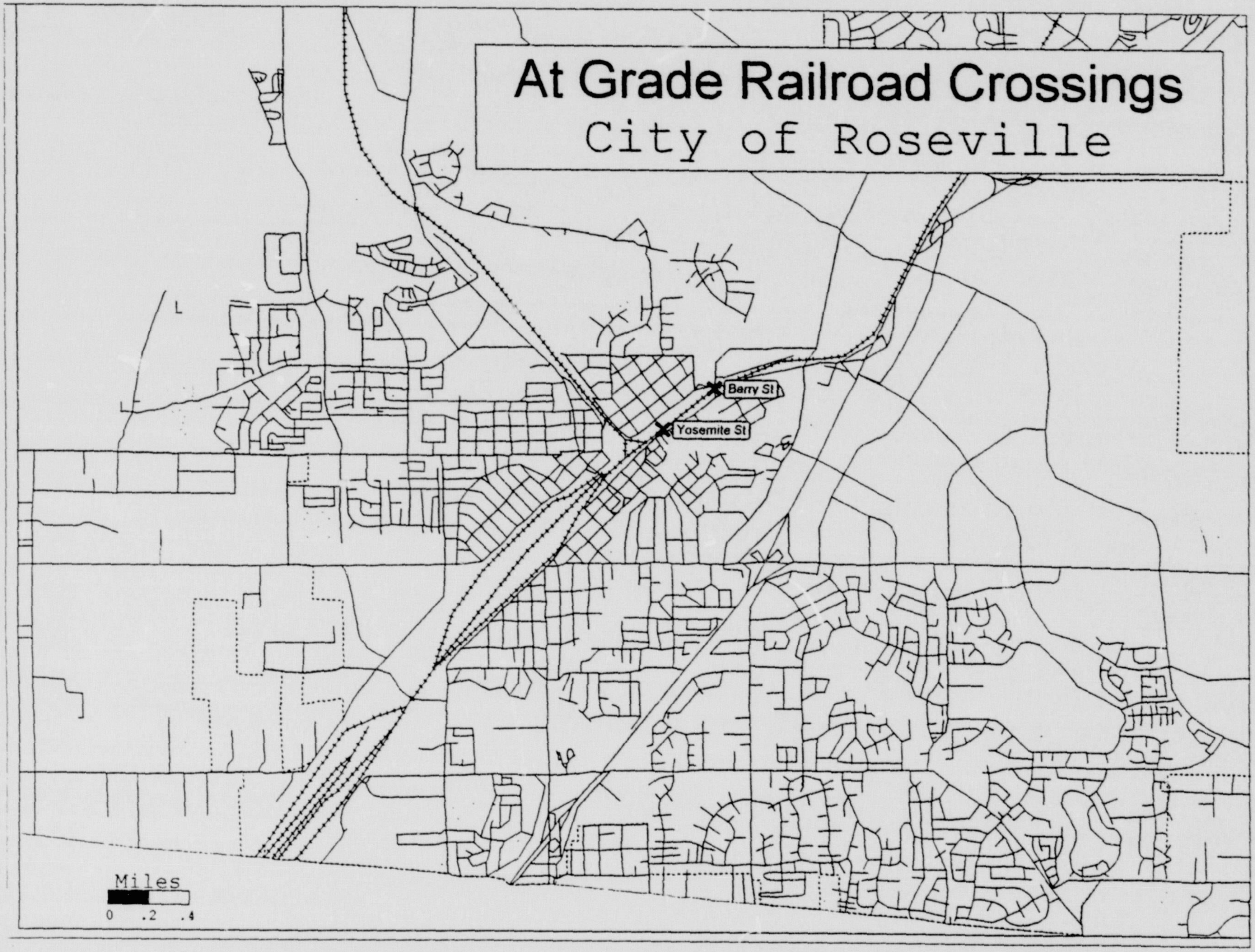
Most other locations do not have sufficient traffic volumes, delays, or congestion to merit the expense of grade separation. However, there are measures which are readily available that could be implemented to mitigate the impacts to some degree. On the Donner Route, impacts could be alleviated completely at the Luther Road and the Auburn Ravine at-grade crossing by removing trains from the westbound track. This could be accomplished by using only the eastbound tracks, an operational measure that was being pursued by the Southern Pacific Railroad before the proposed merger. If this operational measure was implemented between the City of Rocklin and the community of Bowman, it would partially alleviate traffic impacts at Del Mar Avenue (Rocklin), Sierra College Boulevard (Loomis), King Road (Loomis), Webb Street (Loomis), English Colony Road (County), Calison Road (County), Sacramento Street (Auburn), Pleasant Avenue (Auburn), Agard Street (Auburn), and Tennis Way (Auburn).

Another measure that would help to mitigate some of the delay and congestion impacts is the construction of geometric improvements at railroad crossings.

Specific recommendations for each at-grade crossing will be compiled after the Union Pacific engineers visit on Wednesday, March 27, 1996.

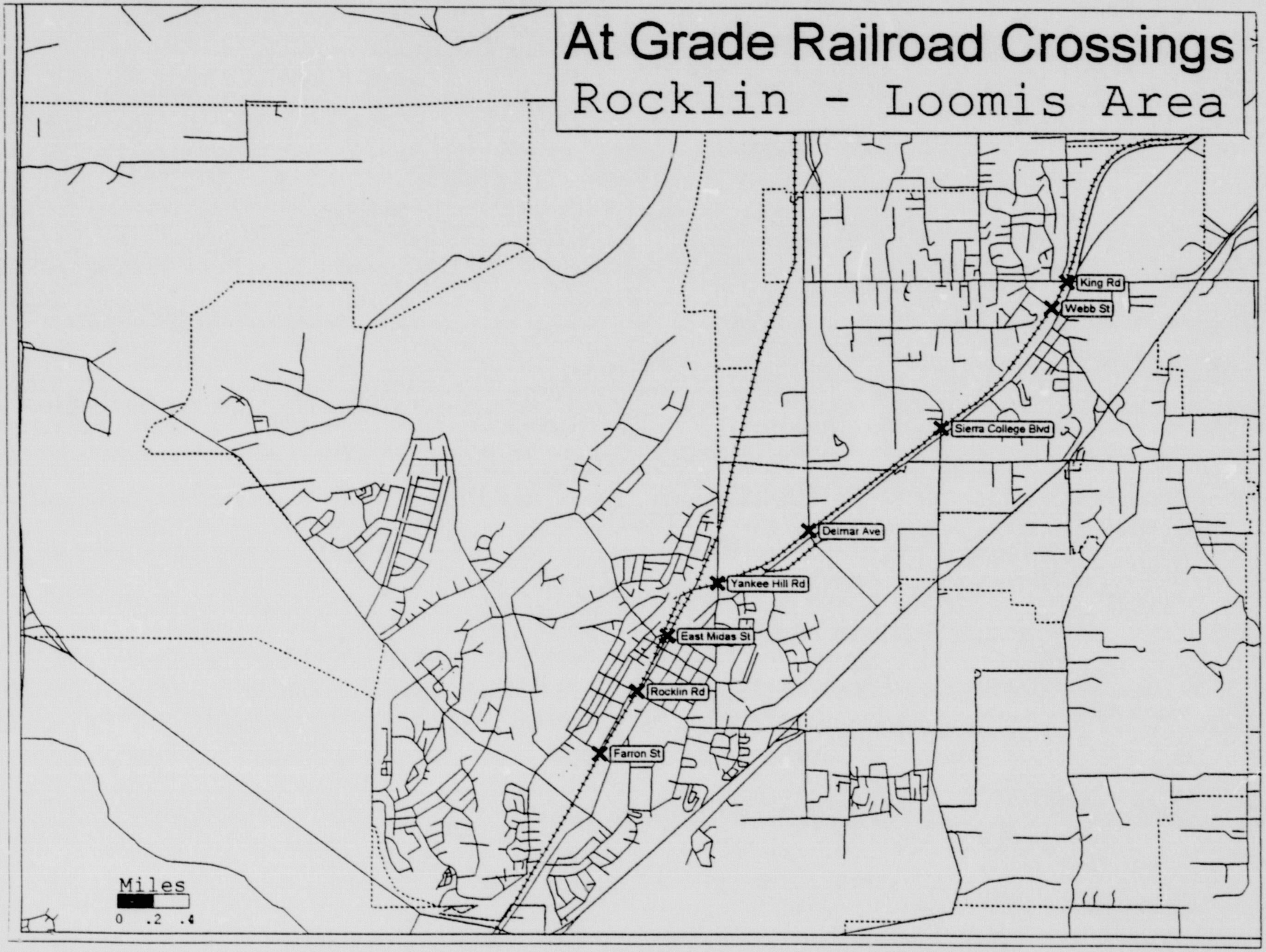

At Grade Railroad Crossings
Lincoln - Sheridan Area
HWY 65
Chamberlain Rd
Wise Rd
7th st
6th st
5th st
3rd st
1st st
Moore rd
Miles
0 .2 .4

MAP ONE



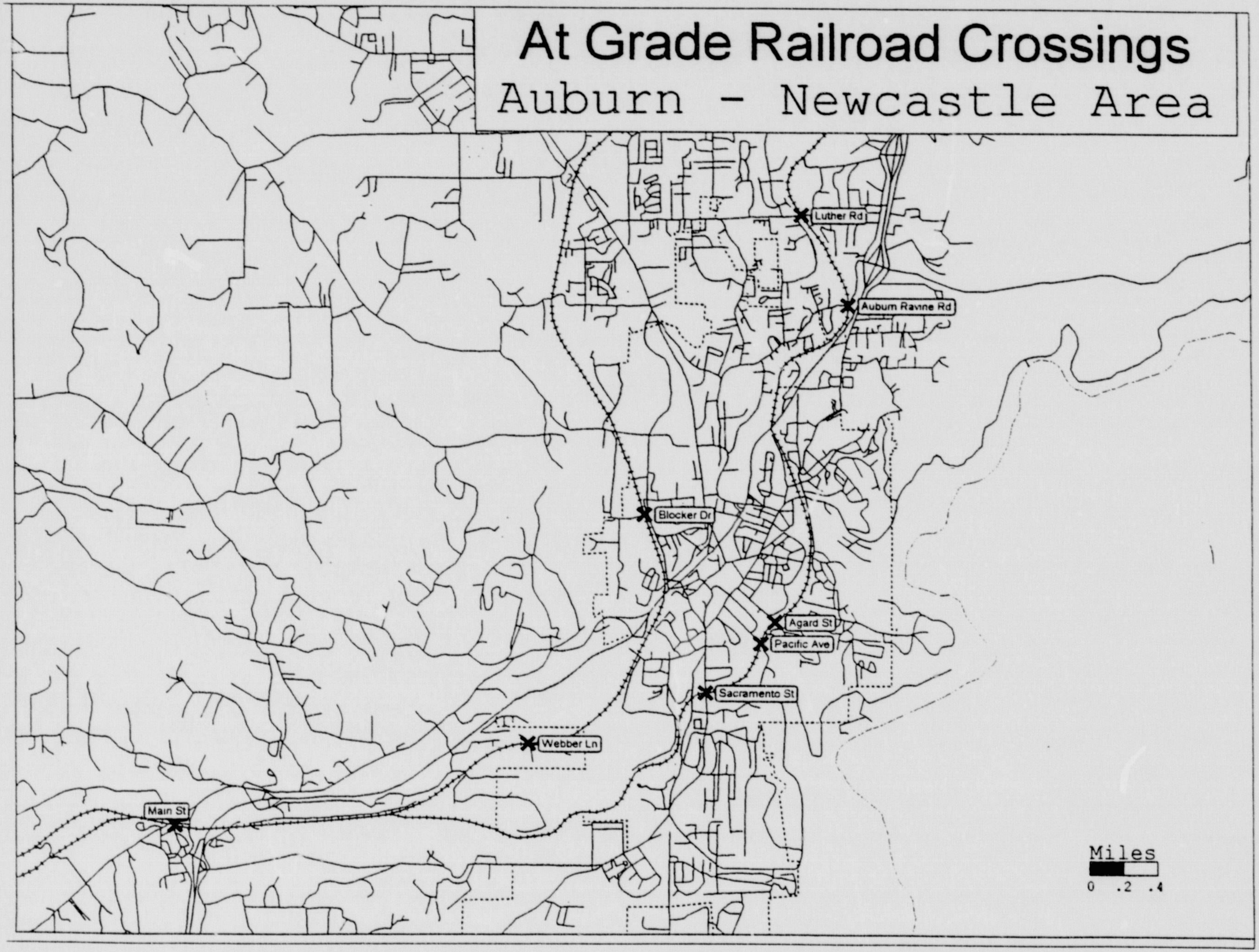
At Grade Railroad Crossings
City of Roseville
Berry St
Yosemite St
Miles
0 .2 .4

MAP TWO



At Grade Railroad Crossings
Rocklin - Loomis Area
King Rd
Webb St
Sierra College Blvd
Delmar Ave
Yankee Hill Rd
East Midas St
Rocklin Rd
Farron St
Miles
0 .2 .4

MAP THREE


At Grade Railroad Crossings
Auburn - Newcastle Area
Luther Rd
Auburn Ravine Rd
Blocker Dr
Agard St
Pacific Ave
Sacramento St
Webber Ln
Main St
Miles
0 .2 .4

MAP FOUR

AIR EMISSIONS AND AMBIENT AIR QUALITY CONDITIONS

The majority of Placer County is located in a federal ozone nonattainment area and portions of the County are designated nonattainment for State PM-10 standards. Increased train activity could lead to an increase in PM-10 emissions and an increase in the emission of ozone precursors. In addition, increased delays to vehicular traffic on at-grade crossings could also adversely impact air quality.

The impact of vehicles waiting at at-grade crossings during the passage of trains can be calculated using standard factors developed by the California Air Resource Board (ARB). The impact of idling vehicles on at-grade crossings are provided in Table Six.

TABLE SIX
CHANGE IN VEHICLE EMISSIONS DUE TO DELAY ON AT-GRADE CROSSINGS
(TONS / YEAR)

Number of Add'l Trains Per Day	Average Gate Time Per Train 4 minutes	7.5 minutes	12 minutes
7	2.19	7.30	18.62
22	5.475	19.71	50.37

The ARB standard method used to identify idling emissions for vehicles delayed on at-grade crossings produces a worst-case scenario of 50.37 tons of emissions annually. These emissions can be separated into: (1) 1.76 tons of PM-10; (2) 36.71 tons of Carbon Monoxide; (3) 4.88 tons of Oxides of Nitrogen; and (4) 7.01 tons of Reactive Organic Compounds. (Oxides of Nitrogen and Reactive Organic Compounds are precursors of Ozone formation.)

Table Seven summarizes the changes in emissions expected through increased locomotive activity and associated rail yard activities. It is expected that this will have a severe impact on the ability of Placer County to meet federal and state air quality standards.

EXHIBIT B

TABLE SEVEN
CHANGE IN LOCOMOTIVE EMISSION DUE TO AN INCREASE IN SERVICE & YARD ACTIVITY BY THE NUMBER OF DAILY TRAINS
(ANNUAL TONS)

Number of Trains Per Day	ANNUAL TON HC	CO	NOx	PM10	SOx
14	78.33	250.33	2016.18	43.09	160.25
21	117.5	375.5	3024.12	64.64	240.38
36	218.21	518.5	5616.22	120.04	446.41

Potential Mitigation Measures

It will be difficult to mitigate the air emissions and ambient air quality conditions resulting from increased post-merger locomotive activity. In the long term, implementation of federal standards for locomotives by Union Pacific will help to mitigate the air quality impacts of vehicle-related emissions. Yard operation improvements and support of passenger rail service may be the most appropriate short-term mitigation measures.

PUBLIC HEALTH AND SAFETY

The proposed mergér of the Union Pacific and Southern Pacific Railroads calls for a significant increase in the number of trains and tonnage of freight, including the transportation and storage of hazardous materials transiting Placer County. Unmitigated, these additional operations will have negative Countywide impacts to public health and safety in three principal areas. First, the increased length of time that at-grade crossings are blocked will cause delays in all types of emergencies. Second, the increased number of trains and tonnage will increase the likelihood of accidents, including hazardous material spills. Third, the overall existing emergency response system will be strained due to the increased likelihood of incidents coupled with increased response times. In addition, these issues are particularly troublesome given the severe winter weather of this region.

It is essential that these vital public safety impacts be mitigated to preserve public health and safety. With regard to the first concern, increased emergency response is a core safety issue and crosses all public safety disciplines. In the particular case of emergency medical services, lengthy delays will have two consequences. First, the interval for effective Emergency Medical Services (EMS) treatment is extremely brief and longer response times will in certain cases result in higher patient mortality and morbidity rates. Second, the transport time to definite hospital care will also increase.

The second major concern, hazardous materials emergencies require highly specialized emergency management resources. Effective response is primarily determined by incident needs and available resources. Significant increases in the number of trains and in the amount of hazardous materials transported will result in more frequent responses by local agencies.

Public health and safety issues related to grade crossing delay caused by increased post-merger rail activity will have different effects on different emergency services:

> **FIRES:** Blocked at-grade crossings will significantly increase the response time to structure fires, wildfires, and other emergencies. This will result in potentially greater human and property losses.
>
> **EMERGENCY MEDICAL SERVICES (EMS):** Extended response times and transport delays caused by crossing delays will have a negative effect on the morbidity and mortality of certain EMS patients.
>
> **RESOURCE STATUS OF ALL SERVICES**: The amount of time emergency services (such as fire apparatus, rescue units, and ambulances) are committed to specific rail-impacted incidents will lengthen due to delays. A strain will be placed on the overall system which will degrade its ability to provide response to simultaneous events.

EXHIBIT C

The proposed increased rail operations in Placer County will increase the amount of hazardous materials shipments and risk of hazardous materials incidents, requiring emergency and/or disaster response, both at the Roseville Rail Yard and on the Donner and Marysville train routes.

There will be an overall strain on Emergency Response Systems as result of the post-merger rail activity increase. More time, personnel, and materials will be expended dealing with rail related incidents. The potential for major incidents will increase as rail traffic increases.

POTENTIAL MITIGATION MEASURES

Potential at-crossing delays can be mitigated by: (1) using operational procedures proposed above; (2) constructing or relocating emergency facilities; and (3) devising a "NO BLOCKAGE" protocol unless alternative routes are opened. Crossing upgrades are needed in Western Placer at either Lincoln City, Moore or Athens, and Highway 65 at Sheridan.

The response to hazardous materials emergencies must address training, equipment, and infrastructure issues. Hazardous materials emergencies can be addressed, in part, by the maintenance of existing Southern Pacific response capability at the Roseville facility for immediate local response and to other areas of the County. The impacts can be further mitigated by providing and maintaining transportable coaches, containers, or vehicle-based response equipment for Donner Summit and North Tahoe/Truckee based emergency incidents. Union Pacific could also provide foam trailers and nozzles for tank car emergencies to address this issue.

It may be necessary to augment the three existing hazardous materials response teams by providing and maintaining rail emergency response equipment including: dome kits, plugging/patching equipment, gaskets/discs, booms, and other heavy equipment. Union Pacific may be required to provide an annual financial contribution to each hazardous materials response team to acquire rail car emergency response equipment and continued training.

Hazardous response could be streamlined if Union Pacific designates a locally-available Placer-based employee with authority to represent the company to participate in emergency operations at the command post or emergency operations center. In cooperation with Placer jurisdictions, Union Pacific should provide a year-round improved site on the Donner Route between Alta and Truckee for rail incident activities including staging areas, equipment storage, casualty collection points, and command posts.

IMPACT OF RAILROAD TRANSIENTS ON ROSEVILLE

The vast majority of homeless or transient persons in Roseville arrive on the railroad. It is reasonable to assume that an increase in rail traffic will result in a proportionate increase in the number of transients. Transients have been identified as the largest single crime problem in Roseville by the City Council, the Roseville Police Department, and local newspapers. Their presence has a very negative impact, not only on the actual community safety, but the community's perception of its safety.

Although it is difficult to accurately track transients and the crimes that they commit, the Roseville Police Department maintains statistics on what they refer to as "transient-related" calls for service. These include routine calls for service as well as homicides. A transient was recently arrested in Roseville as a self-proclaimed serial killer of between seventeen and sixty victims throughout the United States.

Police calls in Roseville are at 120 to 159 calls per month, or 1,440 to 1,800 calls for service each year. Responding to these calls diverts a substantial percentage of our law enforcement resources. The arrest, processing, and subsequent incarceration of transients creates a sizable burden upon the residents of Roseville and the other Placer jurisdictions.

Potential Mitigation Measures

In conjunction with the Roseville Police Department, Union Pacific should develop a plan to ensure adequate yard security to reduce and to prevent trespassing and the transient use of trains. Points of this agreement would ideally be finalized before the merger agreement is approved.

EXHIBIT D

PLACER PASSENGER RAIL ISSUES

Over the last four years, the Southern Pacific Transportation Company has worked with Placer County jurisdictions to implement a passenger rail program. They have made long-term commitments to the County, and we are concerned that the proposed merge will have an adverse impacts on this program.

Caltrans, Amtrak, and the Southern Pacific Transportation Company have repeatedly told Placer jurisdictions that service would be provided as part of Proposition 116 and ACR 132 service, popularly known as the "Capitol Corridor". Capital Corridor intercity rail service is already serving Roseville, with one round-trip per day, and an extension of that service to Colfax is imminent. In anticipation of this service extension, Placer jurisdictions have invested heavily in passenger rail infrastructure such as right-of-way acquisition, park-and-ride lots, passenger depots, passenger platforms, ADA compliance, and other necessary infrastructure improvements. Placer jurisdictions have used their flexible State and federal funds to prepare for this long-promised arrival of passenger service. Local funding commitments have been made prior to initiation of service, as a "down payment" on the investments to be made by Caltrans (the State) and the owner/ operator railroad (SP/UP).

It is a very high priority among Placer elected officials to ensure that this local investment is matched with complementary investment by the railroad, whether it is to be Southern Pacific or Union Pacific. Therefore, it is necessary to ensure that appropriate capacity is made available for planned levels of passenger rail service. Also, access and service fees charged by the railroad should be reasonable and agreed to in advance to simplify arrangements for passenger rail service.

Roseville is currently served by one round-trip train per day; within the next few years, this will be expanded to three round-trip trains per day. The Roseville rail yard and facilities must be designed to accommodate this level of passenger service. Increased freight traffic must not eliminate this level of capacity for passenger service. Also, passenger trains serving the northern Sacramento Valley Cities of Lincoln, Marysville, Chico, and Redding may need to access the Roseville yard and station. The Union Pacific yard redesign should accommodate northern passenger rail service.

POTENTIAL MITIGATION MEASURES

To mitigate the conflict that additional freight traffic will bring, passenger rail service extensions to Rocklin, Auburn, and Colfax, and a CTC (reverse direction) signaling system will be required. Some additional upgrades to track and signal infrastructure from Roseville to Colfax, such as crossovers and sidings, will also be needed to mitigate the additional rail activity and to reduce the impact on passenger rail service. Colfax and Auburn may also require new sidings and signals.

EXHIBIT E

Additional right-of-way may be required to complete the Roseville, Rocklin, Auburn, and Colfax passenger rail stations. Agreements to transfer right-of-way should be reasonable and agreed to in advance to benefit the establishment of passenger rail service. Rail transit operators and public transportation agencies should have a first right-of-refusal from the railroad to acquire excess railroad right-of-way on a standard evaluation basis to simplify passenger rail acquisition arrangements.

WATER QUALITY CONDITIONS

Background
The Placer County Water Agency is the primary domestic water purveyor for western Placer County. Many of the PCWA water delivery and storage facilities between Alta and Roseville/Rocklin are located adjacent to, above, or below the existing Southern Pacific tracks. Due to the increase in train traffic there will be an increased risk of toxic spills that could contaminate the water system , particularly in key locations cited below.

Potential Hazards
Lake Alta: The railroad cross the PCWA Tail Race Canal which feeds Lake Alta. Lake Alta is a storage facility to numerous other water companies in Placer County. There is an increased risk to Lake Alta due to increased traffic and due to the current practice of plowing snow from the tracks into PCWA is still awaiting a Southern Pacific's review on a plan to mitigate the potentially hazardous site at Main St. above the PCWA canal.

Canals between Ridge/Taylor Rds. To Sunset Water Treatment Plant in Rocklin: There are a series of open canals connecting a PG&E buy point at Ridge and Taylor Rds. In Newcastle and the Sunset Water Treatment Plan in Rocklin. The current and increased train traffic pose a threat to the quality of this water.

Lake Theodore and Clover Valley Reservoir: These reservoirs are crossed by SP tracks. These reservoirs along with the aforementioned Lake Alta supply water to water treatment plants, households, and growers.

Tunnel Modifications: PCWA is concerned about the raising of tunnels. PCWA canals run immediately above tunnels in several locations. At some sites the canal was in existence before the railroad tracks and has prior rights. Blasting could weaken the canals.

Pipelines under tracks: Increased vibration and weight due to increased and larger traffic could increase maintenance costs of crossings of underground pipelines.

Response to Emergencies As stated in previous sections, there is a lack of grade separated crossings that will cause increased delay in PCWA personnel responding to water facility emergencies.

Mitigation
- Union Pacific should participate in the implementation of plans for piping in the Alta area.
- Inlets and outlets for canals crossing under railroad tracks should be piped for approximately 25', with drainage sloped away from the canal.
- Convert the affected flumes and canals into siphons
- Divert any runoff or spills from the tracks away from PCWA reservoirs and canals.

EXHIBIT F

NOISE IMPACTS

Rocklin: It is common for locomotives and trains to be stored on the tracks in Rocklin near the Midas Ave. crossing. These trains will idle at this location for several hours at a time during the day and night.

Colfax: In the center of Colfax, trains will sit idling for several hours at a time. In addition, trains sets are often assembled on the sets of tracks in the center of town. This activity will cause excessive noise and vibration along with irritating fumes.

Roseville: The majority of the switching activity for the Southern Pacific is conducted at the Roseville Yard. It is expected that additional train traffic will intensify the noise currently generated by the Roseville Yard operations.

Train Horns: For safety reasons, train engineers will sound their horns on approach to at grade road crossings. There have been complains of trains sounding horns pre-maturely and disturbing residential areas at all hours of the day and night. The sounding of safety horns will, of course, increase with additional train traffic.

Train Noise: The noise generated by existing train traffic is significant in most every populated community in Western Placer County. The additional train traffic will add more noise related to train traffic through the county.

Mitigation

- All switching and train storage activities currently taking place in Rocklin should be moved to the Roseville Yard.
- All switching and train activity in Colfax should be moved away from the center of the City.
- Trains should not be allowed to idle for excessive periods of time.
- Sounding of train horns should be conducted within applicable guidelines.

EXHIBIT L

STB FD 32760 3-29-96 D 62183

OP ... LY

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March 29, 1996

VIA HAND DELIVERY

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
12th Street & Constitution Avenue, N.W.
Washington, DC 20423

Re: **Finance Docket No. 32760**
Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company -- Control and Merger -- Southern Pacific Rail Corp., Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and The Denver and Rio Grande Western Railroad Company

Dear Secretary Williams:

Enclosed for filing with the Board in the above-captioned proceeding are an original and twenty copies of the **Comments of Wisconsin Central Ltd. in Support of Railroad Merger Application** (WC-6), dated March 29, 1996.

Copies of this filing have been served on all parties of record in this proceeding, as shown on the certificate of service.

Please feel free to contact me should any questions arise regarding this filing. Thank you for your assistance on this matter.

Respectfully submitted,

Thomas J. Litwiler
Attorney for Wisconsin Central Ltd.

TJL:tl

Enclosures

cc: Parties of Record

ORIGINAL

WC-6

BEFORE THE
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

COMMENTS OF WISCONSIN CENTRAL LTD. IN
SUPPORT OF RAILROAD MERGER APPLICATION

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ATTORNEYS FOR WISCONSIN CENTRAL LTD.

Dated: March 29, 1996

BEFORE THE
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

COMMENTS OF WISCONSIN CENTRAL LTD. IN SUPPORT OF RAILROAD MERGER APPLICATION

Wisconsin Central Ltd. ("WCL") hereby submits these comments in support of the Railroad Merger Application filed by the Primary Applicants[1] herein. WCL believes that the proposed merger of the Union Pacific and Southern Pacific rail systems will result in transportation efficiencies and public interest benefits and as presented by Applicants should be approved by the Board.

On January 29, 1996, WCL filed a Description of Anticipated Inconsistent or Responsive Application (WCL-2) outlining potential acquisitions or operating rights between Kansas City, Missouri and California which WCL contemplated seeking in response to the Primary Application. At that time, WCL expressly noted that the company had not had an opportunity to analyze fully the effects of the transaction.

---

1. Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and The Denver and Rio Grande Western Railroad Company.

WCL has since reviewed more completely the Railroad Merger Application, the Supplement to that Application, the settlement agreement which Applicants reached with Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company (collectively, "BN/Santa Fe") and other materials relevant to the proposed merger, and now believes that inconsistent applications by WCL are not necessary.

WCL has reached agreement with Applicants regarding items of interest to WCL in this proceeding. WCL understands that Applicants will separately file a copy of the agreement between WCL and Applicants for the record in this proceeding. In light of that agreement and WCL's views of the transaction as outlined above, WCL withdraws its prior notice of intent to file a responsive application herein and states its support for the proposed UP/SP merger as presented to the Board and conditioned by Applicants' agreement with BN/Santa Fe.

WHEREFORE, WCL respectfully requests that its comments supporting the Railroad Merger Application herein be accepted into the record.

Respectfully submitted,

By: Robert H. Wheeler
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ATTORNEYS FOR
WISCONSIN CENTRAL LTD.

Dated: March 29, 1996

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 1996, a copy of the foregoing **Comments of Wisconsin Central Ltd. in Support of Railroad Merger Application** (WC-6) was served by overnight delivery upon:

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Janice G. Barber
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3800 Continental Plaza
777 Main Street
Fort Worth, TX 76102-5384

and by first class mail, postage prepaid, upon all other parties of record in this proceeding, as identified in Decision Nos. 15 and 17 herein.

Thomas J. Litwiler

STB FD 32760 3-29-96 D 62173

62173

Item No.____________

Page Count 1

Mar #653

E OF ALL

...EEDINGS

UNITED TRANSPORTATION UNION (953)

D.J. Bludau, Local Chairman
632 Basswood, Victoria, Texas 77904
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RECEIVED
MAR 29 1996
MAIL MANAGEMENT
I.C.C.

File:Ref. Finance Docket 32760

March 26, 1996

The Honorable Vernon A. Williams, Secretary
Surface Transportation Board
12th St., & Constitution Avenue
Washington, D.C. 20423

Dear Secretary Williams:

My name is David J. Bludau, and currently employed as Conductor for the Southern Pacific Railroad out of home terminal located in Victoria Tx. I was twenty years old when I hired on the railroad on April 11, 1974, as a brakeman. I will have twenty-two (22) years of service for Southern Pacific this year. I currently hold position as extra board conductor and work out of Victoria and protect job assignments in Corpus Christi, Brownsville, Harlingen and Gregory, Texas, in addition to operating trains into Houston, Hearne and San Antonio Texas.

All of the cities mentioned have Union Pacific Railroad operating facilities. If the merger is allowed as proposed the terminal in Victoria will be eliminated and half of the employees will lose jobs and all of the cities mentioned will have job loses in addition to having only one Class I Railroad.

Secretary Williams, I ask you to oppose the UP/SP Merger as proposed and take into consideration the number of jobs that will be eliminated if the merger is approved. In addition to the monopoly that will be created in the Sate of Texas and in particular the Gulf Coast and South Texas.

Texas needs to keep the healthy competition and more than one major Class I Railroad operating in Mexiço.

Thanking you for your time, I remain fraternally yours,

David J Bludau

David J. Bludau

cc: Texas Railroad Commission

ENTERED
Office of the Secretary
MAR 30 1996
4 Part of Public Record

STB FD 32760 3-28-96 D 62219 1/4

62219 ORIGINAL

Before the
SURFACE TRANSPORTATION BOARD

RCT-4

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

COMMENTS IN OPPOSITION TO MERGER
EVIDENCE AND ARGUMENT
SUBMITTED BY THE RAILROAD COMMISSION OF TEXAS
ON BEHALF OF THE STATE OF TEXAS

RECEIVED
MAR 29 1996
I.C.C. BUILDING
GUARD DESK

ENTERED
Office of the Secretary
MAR 30 1996
Part of
Public Record

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COUNSEL FOR THE
RAILROAD COMMISSION OF TEXAS

CAROLE KEETON RYLANDER, CHAIRMAN
BARRY WILLIAMSON, COMMISSIONER
CHARLES R. MATTHEWS, COMMISSIONER

DATED: MARCH 29, 1996

Item No.____________

Page Count 200

B. Mar #649

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March 29, 1996

ENTERED
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Part of
Public Record

Vernon Williams, Secretary
Office of the Secretary
Case Control Branch
Attn: Finance Docket No. 32760
Surface Transportation Board
1201 Constitution Avenue, N.W.
Washington, D.C. 20423

Re: Finance Docket No. 32760 - Union Pacific Corporation, et al.--Control--Southern Pacific Rail Corporation, et al.

Dear Secretary Williams:

Enclosed is the original and 20 copies of Comments In Opposition to Merger Evidence and Argument Submitted by the Railroad Commission of Texas on Behalf of the State of Texas along with two additional copies to be date-stamped and returned to the undersigned in the envelope provided.

It is hereby certified that all parties of record have been served on this date. Counsel for applicants with offices in Washington, D.C. have been served by hand, while applicants' counsel outside the D.C. area have been served by over-night courier. All other parties have been served by first-class mail, postage prepaid. Thank you for your consideration in this matter.

Very truly yours,

Richard H. Streeter

Richard H. Streeter

RHS:pmt
Enclosure

RHS 10622

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Exhibit 1 - The UP/SP Merger: An Assessment of the Impacts on the State of Texas

Exhibit 2 - Texas Based Individuals and Organizations Who Submitted Letters of Support as Part of the UP/SP Merger Application

Exhibit 3 - Summary of Letters in Opposition and Expressing Concern Received by Railroad Commission of Texas

Before the
SURFACE TRANSPORTATION BOARD

RCT-4

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

COMMENTS IN OPPOSITION TO MERGER
EVIDENCE AND ARGUMENT
SUBMITTED BY THE RAILROAD COMMISSION OF TEXAS
ON BEHALF OF THE STATE OF TEXAS

The Railroad Commission of Texas (hereinafter "Commission"), in response to the directive of the Honorable George W. Bush, Governor of the State of Texas, that it examine the potential impacts of the proposed merger on Texas businesses and citizens, hereby submits its Comments on behalf of the State of Texas in Opposition to the merger of the Union Pacific Corporation, *et al.* (collectively "UP"), with Southern Pacific Rail Corporation, *et al.* (collectively "SP") (hereinafter the "Merger"). It is the Commission's conclusion, based on the extensive information which it has developed, that the Merger should be disapproved because it is anticompetitive and would be harmful to Texas and the significant international trade which moves through the State as a result of the North American Free Trade Agreement. It is also the Commission's conclusion that the Agreement entered into on September 25, 1995 by the UP and the Burlington Northern Railroad Company and the

Atchison, Topeka and Santa Fe Railway Company (hereinafter collectively the "BN/Santa Fe"), as supplemented November 18, 1995 (the "Agreement"), fails to alleviate the anticompetitive effects of the Merger. **Therefore, the Commission recommends that authorization for the Merger, as proposed, must be denied.**

Background and Summary

In response to Governor Bush's request, the Commission has engaged in an extensive investigation in order to evaluate the impact of the Merger on the State of Texas. The investigation included a series of public hearings which were held before the Commission on January 9-11, 1996 in Fort Worth, Corpus Christi and Houston, Texas. By holding these hearings in different locations throughout the State, the Commission was able to obtain information from the applicants, other affected railroads, elected officials, governmental agencies and shippers which, although located in widely divergent geographical areas and markets, will be impacted by the Merger. These public hearings elicited comments, both written and oral, from affected witnesses regarding their views on the advantages and disadvantages of the Merger. Most importantly, they gave the individual members of the Commission a first-hand opportunity to hear the concerns expressed by the public about the potential competitive impact the Merger would have on the State of Texas.

The Commission also hired the Center for Economic Development and Research at the University of North Texas ("Center") to work with Commission staff and other interested state agencies, including the Texas Department of Transportation, to review the Merger's impact on various sectors of the Texas economy, including electric utilities, the chemical and plastics industries, intermodal shipments and international trade with Mexico. In its report, entitled "The UP/SP Merger: An Assessment of the Impacts on the State" (the "Report"), the Center has concluded that the Merger is likely to have a detrimental effect on Texas.[1] As explained therein, the detrimental impacts can be attributed specifically to market consolidation resulting from the extensive parallel routes that are operated by UP and SP in Texas and beyond. The Report further concludes that the UP/BN/Santa Fe Agreement does not alleviate the anticompetitive impacts of the Merger. On March 21, 1996, the Commission held a further public meeting in Austin, Texas to discuss the contents of the draft Report with its authors and the contributing economists in a public forum.

After thoroughly considering the comments made during the course of the public hearings, and after further review and deliberation of the Report and the recommendation of the Texas Department of Transportation, the Commission has concluded that the Merger is anticompetitive and would have a detrimental impact on major portions of the Texas economy, particularly petrochemical and plastics industries along the Gulf Coast, and on many smaller shippers throughout East and South Texas.

Adverse Impacts on South Texas and Mexico Trade.

First of all, the Merger could adversely impact the growing trade with Mexico. Following the Merger, UP would control all gateways into Mexico with the exception of El Paso, Texas, which is also served by BN/Santa Fe, and the little-used gateway at Presidio, Texas which is served by the South Orient Railroad. Because this will seriously reduce the number of competitive rail options at Mexican border crossings, the concentration created

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[1] The final draft of the Report is attached hereto as Exhibit 1 for consideration by the Board.

by the proposed merger poses a serious threat to commerce with Mexico, especially on movements to the East.

The serious anticompetitive impact on the South Texas region is further intensified by the Merger's adverse impact on the Texas Mexican Railway Company ("TexMex"). As the Board is aware, since the merger of UP and the Missouri Pacific Railroad Company ("MP"), the TexMex has been heavily dependent upon traffic from SP.[2] By this Merger, SP would be totally eliminated as a friendly connection. In addition, the proposed UP/BN/Santa Fe Agreement would further undermine TexMex by encouraging BN/Santa Fe to route traffic from the northern part of the country over the Eagle Pass gateway, rather than over TexMex at Laredo. Furthermore, because BN/Santa Fe is given the option in the UP/BN/Santa Fe Agreement to have its business between Houston, Corpus Christi, Harlingen and Brownsville handled by UP on a "haulage" basis (see section 4f), BN/Santa Fe would have little incentive to exercise the trackage rights over the UP's lines to interchange with TexMex. If this happens, TexMex's traffic would be further diminished.

During the course of the Commission's hearings in Corpus Christi, the Commission was advised that UP and SP have repeatedly refused to accept traffic moving from South Texas over the Laredo gateway into Mexico. As a result, South Texas shippers are dependent upon TexMex for rail transportation into Mexico at Laredo. Not only would the further erosion of TexMex's traffic base have serious adverse consequences on these local shippers, but it would intensify the flood of trucks across the International Boundary, thereby further congesting highways throughout South Texas.

---

[2] See Santa Fe Southern Pacific Corp.--Control--SPT Co., 2 I.C.C.2d 709, 797 (1986).

Competition is <u>Not</u> Protected in Parallel UP/SP Markets.

The Commission also is convinced that the harmful effects of elimination of rail competition in the massively parallel markets where UP and SP are the only remaining railroads far outweigh the benefits which UP has identified in its application. The Commission is mindful that SP appears to be in financial difficulty and may not at some point in the future be able to satisfy fully the needs of those Texas shippers which are dependent upon it for rail service. The Commission is also aware that certain of the efficiencies touted by UP in support of its application would likely allow the UP to provide more reliable, efficient service over less circuitous routes on behalf of North Texas shippers for movements between Texas, on the one hand, and, on the other, California and the Pacific Northwest. While the Merger will eliminate the circuity in the routes which UP presently utilizes to compete with BN/Santa Fe in the transportation of intermodal and automotive traffic between points in California and the Mississippi gateways, thereby allowing UP to operate multiple scheduled high-speed services between those points, those benefits are of marginal utility to thousands of shippers in Texas whose competitive options will be reduced from two Class I railroads to one, or from three Class I railroads to two.

Given these marginal benefits, the Commission is convinced that, on balance, the harm far outweighs the benefits. Furthermore, while SP may be characterized as a financially weak railroad when compared with UP and with BN/Santa Fe, there is substantial evidence that SP has offered very effective competition in multiple Texas markets by offering rates which are substantially lower than those of either UP or BN/Santa Fe. As such, SP prevents its larger competitors from exercising unrestrained duopoly market power.

Multiple Defects in UP/BN/Santa Fe Agreement.

As discussed in greater detail *infra*, the Commission is also concerned that the applicants have not carried their burden of showing that the UP/BN/Santa Fe Agreement actually cures the reduction in competition in the massively parallel markets in Texas. The applicants' repeated assurances that they will vigorously compete does not take the place of hard evidence. As of this date, significant questions remain unanswered about the ability of the BN/Santa Fe to offer effective competition to UP should the UP/BN/Santa Fe Agreement actually be implemented.

The Commission is extremely concerned that the Agreement does not provide adequate assurances that BN/Santa Fe will be able to provide a competitive service that would be operationally and economically practicable. By limiting BN/Santa Fe's access to only those shippers which are currently served by both UP and SP, the Agreement on its face fails to address those situations where only UP and BN/Santa Fe will remain as competitors following the Merger. Second, it appears that the Agreement may do nothing to preserve competition by the two remaining Class I railroads in Houston and Dallas/Fort Worth, the two largest industrial areas in the State of Texas. Third, by limiting BN/Santa Fe to those shippers which are currently served both by UP and SP, the Agreement bars BN/Santa Fe from obtaining the right to serve new industries which may seek to locate their facilities in Texas at points which are just beyond existing switching terminals. Because Texas is one of the fastest growing areas in the United States, any private agreements between duopolist rail carriers which create impediments to development must be viewed with suspicion, if not outright hostility, as they are contrary to the public interest. The

Commission is also concerned by revelations in the deposition testimony that BN/Santa Fe has conducted no traffic studies of its own to identify those customers which would be served under the limited bridge rights which it has been granted.

The Commission is also concerned that the Agreement does not create any obligation, contractual or otherwise, on BN/Santa Fe to provide service over any of the designated routes in the Agreement. A prime example is the route between Houston and Brownsville, Texas where the Agreement allows BN/Santa Fe to opt for haulage rights, rather than performing actual rail operations. In addition, in some markets the Agreement requires BN/Santa Fe to choose haulage agreements for providing the claimed competitive access. These markets include Tyler, Defense, College Station, Great Southwest, Victoria, Sundown and Sugarland, Texas. The Commission does not accept the applicants' arguments that such haulage arrangements can be viewed as a means of preserving effective competition.

The Commission is concerned as well by several elements of the UP/BN/Santa Fe Agreement which could limit BN/Santa Fe's ability to compete effectively from an operational point of view. A primary concern is the fact that the route assigned to BN/Santa Fe from Houston to Memphis is over the SP line which UP has designated for its southbound "directional traffic" from St. Louis to Houston. The Commission's fears in this respect are intensified by UP's candid admission with respect to lines in the eastern half of Texas (Vol. 3, V.S. King and Ongerth, at p. 42) that:

> The SP lines and most of the UP lines are single-track railroads. As all railroaders know, the primary cause of train delay on single track is meets between trains. In fact, the delay associated with train meets is such an unavoidable part of rail

> operations that it usually is not even classified as "delay," although movements of shippers' products and costly and scarce rail equipment are slowed. As additional trains are added, the number of meets and the amount of congestion increases geometrically.

Given the fact that BN/Santa Fe witnesses have admitted during the course of depositions that they first became aware in early December 1995 that UP's proposed directional operation would force the BN/Santa Fe's trains to be moving against the flow of UP trains (see, e.g., Dep. Owen at 26, 130, 146; Dep. Lawrence at 25) and that the BN/Santa Fe never "consider[ed] the possibility that UP might run the Cotton Belt directionally" (Dep. Ice at 89), the Commission is not convinced that the proposed BN/Santa Fe operation over this line is operationally feasible.

The Commission is also concerned by the UP's further testimony with regard to this particular line (Vol. 3, V.S. King and Ongerth at 44) that:

> Directional operation is especially important for SP's "Rabbit," the single-track line segment running from Houston to Lewisville via Shreveport. . . . It is a heavy-duty line handling high volumes of chemicals traffic, but it lacks CTC, or even block signals on portions of the line. Manual dispatching, coupled with long intervals between sidings (many ranging from 17 to 25 miles) severely limits the "Rabbit's" capacity when operated bi-directionally.

If the line is dysfunctional when operated bi-directionally by only one carrier, it is extremely doubtful that BN/Santa Fe would be capable of conducting efficient northbound operations against the heavy volume of southbound trains which UP is predicting. Plainly, without detailed operating plans, which are noticeably absent, an assessment of the BN/Santa Fe's ability to compete effectively is simply not possible.

Also missing is any information regarding switching charges which BN/Santa Fe must pay in order to gain access to those shippers who qualify for access through the proposed trackage rights agreements **which have yet to be negotiated**. The level of such charges, and the impact on the economic feasibility of BN/Santa Fe's proposed operations, are matters of grave concern for the Commission, especially in the large industrial areas where BN/Santa Fe would be totally dependent on switching operations to provide service.

In conclusion, the Commission has determined that the UP/BN/Santa Fe proposal wholly fails to lay to rest the concerns expressed by numerous witnesses who appeared before the Commission. Because the applicants have not yet addressed, much less resolved those concerns, the Agreement must be rejected on the grounds that it is per se unreasonable and lacks a proper foundation which would allow the Board to conclude that it would ameliorate the anticompetitive aspects of the Merger.

As noted above, the above concerns will be addressed in detail *infra*. However, before such details are provided, the Commission will propose essential conditions which would offset certain extremely anticompetitive aspects of the proposed Merger that threaten Texas. In proposing these conditions, the Commission emphasizes its conclusion that the massively parallel markets in Texas are not capable of being addressed without providing for the introduction of an additional Class I railroad into these markets, and allowing that railroad to control its own operations through ownership of the tracks.

Proposed Conditions in the Event that the Board Approves the Merger

In the geographically distinct regions of East and South Texas, the proposed Merger would exert severely anticompetitive effects as previously discussed. At the same time, few of the anticipated public benefits of the Merger would be applicable in those regions Under these circumstances, the Commission submits that specific conditions must be imposed to preserve future competition along the parallel UP and SP routes before the Board can possibly find that public benefits outweigh anticompetitive impacts of the Merger in East and South Texas.

As the ICC has heretofore noted, former section 11344 provides "broad authority to impose conditions governing railroad conditions." Union Pacific Corp. et al.--Cont.--MO-KS-TX CO. et al., 4 I.C.C.2d 409, 437 (1988). As was further explained (id.):

> we will not impose public interest conditions on a railroad consolidation unless we find that the consolidation may produce effects harmful to the public interest (such as a significant reduction of competition in an affected market), that the conditions to be imposed will ameliorate or eliminate the harmful effects, that the conditions will be operationally feasible, *and* that the conditions will produce public benefits (through reduction or elimination of the possible harm) outweighing any reduction to the public benefits produced by the merger.

It is respectfully submitted that the conditions proposed herein faithfully comply with the above. In the first place, the multiple economic studies which have been commissioned by the State of Texas confirm that the consolidation may produce effects harmful to the public interest in East and South Texas. Not only has the economic study performed by the Center reached this conclusion, but a further study commissioned by the State of Texas, as well as other studies prepared by other parties of record, reach the same identical conclusion.

These other studies, which employ different methodologies than that used by the Center, including analysis of the carload waybill tapes and application of the Horizontal Merger Guidelines of the Department of Justice, corroborate the existence of the substantial anticompetitive impacts which the Center has identified.

In response to the concerns raised by Texas shippers and verified by the Report, the Commission has attempted to define conditions which will ameliorate the anticompetitive effects, while simultaneously preserving any legitimate benefits which the Merger would enhance. Such "legitimate" benefits do not, by definition, include the ability to exact monopoly profits from Texas shippers. As the Board will note, the trackage rights and divestiture conditions are designed to address the parallel routes in East and South Texas. By requiring divestiture of SP's eastern lines, while granting UP trackage rights over those lines, UP will still be able to realize most of the economic benefits which its Application identifies. For example, UP's acquisition of much of SP's western routes would enable it to close the gaps in its routes in the so-called I-5 corridor and the southern corridor. Second, it will be able to reduce circuity and improve the speed of its intermodal and automotive operations between California and the Mississippi River gateways. Third, it will be able to harvest the revenues derived from providing single-line service for shippers which are located on the SP lines.

While UP admittedly would be constrained in its ability to exact monopoly profits from Texas shippers by the existence of a second, formidable Class I competitor in addition to BN/Santa Fe, the slight reduction in profits is not unreasonable under the circumstances.

Surely, the restraint on UP's ability to exact monopoly profits must be viewed as being consistent with the public interest.

While the proposed divestitures would effectively divide the SP into two separate geographic units, it does not follow that such bifurcation would be an irrational Balkanization of the SP system. In fact, the proposed divestitures mirror well-established rail corridors which have long carried significant, but separate traffic flows, between points in Texas and the west coast, on the one hand, and Texas and the Mississippi River gateways on the other. Given the major geographic distinctions between the former Cotton Belt lines and the transcontinental SP lines, as well as their distinct commodity mixes, one may question whether the two portions of the SP were ever successfully integrated into an efficient unified operation. If there were no synergies to be captured in the SP-Cotton Belt merger, the proposed divestiture will not destroy such synergies and may actually result in two healthy "right-sized" systems in place of the allegedly "chronically ailing" SP.

Having weighed several options, and having considered the UP/BN/Santa Fe Agreement, the Commission has concluded that there are four conditions which will preserve and advance the goals of the free market and provide shippers with a measure of protection from reduced levels of rail service along with monopoly gouging. One condition would be to grant the TexMex trackage rights between Beaumont and Corpus Christi. Rather than suggest a particular route, the Commission will leave it to the TexMex to define the actual route. A second condition would require the divestiture of several SP lines and their sale to a Class I railroad. The Commission's only criteria is that the sale of the lines cure the potential anticompetitive impact of the duopoly which would result from this

Merger. Furthermore, any such sale must assure the Port of Corpus Christi competitive access to its markets west of the Mississippi River. A third condition is the creation of neutral terminal railroads in all major industrial markets which, by virtue of what is likely to be the final railroad merger in Texas, would otherwise be dominated by UP. The fourth condition would require UP and BN/Santa Fe, if they propose to abandon tracks in Texas following the Merger, to include all trackage necessary to ensure that a purchasing carrier, rural rail district or other acquiring entity, have unfettered access to rail junction points. In short, any line abandonments filed by merger applicants must be junction to junction, or industry to junction in the case of abandoning an industrial lead.

In addition to the economic conditions, the Commission is extremely concerned that the anticipated increase in rail traffic in certain areas, especially in West Texas, may potentially impact public safety. In order to ensure the safety of motorists, the Commission requests imposition of a condition that would require the merged railroad to agree (1) to confer with law enforcement officials, traffic engineers, and public officials in cities and counties on the merged railroad's routes where there will be a substantial increase in the number of daily trains attributable to implementation of the merged railroad's operating plan, and (2) to install flashers, bells and gates at all grade crossings where authorized maximum train speed is great enough to present a hazard to motorists and there is a sufficient number of automobiles per day at the crossing to warrant installation of electronic warning devices.

Trackage Rights for the TexMex

It is understood that the TexMex is seeking trackage rights which would allow it to connect with its corporate affiliate, the KCS. Because the Commission is convinced that TexMex provides an essential transportation service in the South Texas market that is not being provided by UP or SP, the Commission supports the TexMex's request. It would be contrary to the public interest to fail to protect TexMex by ensuring that it will have at least one friendly connection within the United States.

Divestiture of Specific SP Lines

To preserve competition in the high volume traffic lanes extending from major Texas cities and the primary Mexican gateways along the Texas border to points in the Midwest, Northeast and Southeast, as well as points in Eastern Canada, it is vital to ensure that a third Class I railroad be allowed to acquire SP's routes in four important corridors (plus connecting trackage to secondary markets and ancillary trackage in urban areas). The four corridors are as follows:

Houston to Chicago, St. Louis and Memphis

Dallas/Fort Worth to Chicago, St. Louis and Memphis

Dallas/Fort Worth to Houston and South Texas

New Orleans to Houston, San Antonio and Eagle Pass

The specific routes to be divested are as follows:

(1) *Southern Pacific - Houston to Chicago, St. Louis and Memphis*

Trackage currently owned by the Southern Pacific from Joliet, Illinois to East St. Louis and from the Mississippi River Bridge at Illmo, Missouri south through

Lewisville, Arkansas, and Shreveport, Louisiana, to Houston, plus trackage from Memphis, Tennessee to Brinkley, Arkansas. The divestiture should include all necessary yard facilities currently owned by the SP in support of this route. SP's trackage rights over Illinois Central from Chicago to Joliet and over Union Pacific from East St. Louis to Illmo should be transferred to the carrier acquiring the previously listed SP trackage.

This divestiture addresses competitive and operational issues while enabling UP to improve and upgrade its route from St. Louis through Texarkana to Houston. While UP's proposal for directional operations between Houston and St. Louis would be nullified, the capital obtained through the divestiture of these lines would allow UP to continue its current efforts to build double tracks within existing right-of-ways and thereby operate directionally on a single, high capacity line.

(2) *Southern Pacific - Lewisville, AR, to Corsicana, TX*

Trackage owned by SP from Lewisville, Arkansas, through Texarkana, Mt Pleasant, Big Sandy and Tyler to Corsicana should be divested.

Communities along this route that are currently served by SP need to have reasonable guarantees that competition for rail service will continue. Neither the applicants' operating and marketing plans, nor the UP/BN/Santa Fe Agreement, designates any specific level of service that would be provided to these communities, especially with regard to shipments which are destined to points which would require rail operations in the opposite direction of the southbound directional flow which UP is proposing for this line. See Vol. 3, V.S. King and Ongerth at 42 and map at 43. As a result, it is unclear how the proposed directional operating plan would impact service to these intermediary communities. Furthermore, if the directional operating plan is dropped, there is a possibility that this line would be deemed redundant and subject to abandonment.

(3) *Southern Pacific - Dallas/Fort Worth to Houston*

Trackage owned by the Southern Pacific from Dallas and from Fort Worth to Houston should be divested.

The Commission believes that for Texas to maintain the best possible competition for its businesses, service by three Class I railroads should be maintained in the busiest corridors. The Commission also feels the proposed directional operating plan will present service difficulties for shippers located on these lines. In the event that the directional operating plan were ever canceled, this trackage would be very redundant and possibly subject to abandonment.

(4) *Southern Pacific - Houston to New Orleans*

Trackage owned by the Southern Pacific between Houston and New Orleans should be divested to address competition concerns relating to parallel tracks.

The Union Pacific has already agreed to divesting part of this line from Avondale, Louisiana, to Iowa Junction, Louisiana. This divestiture should be extended from Iowa Junction to Houston. The Commission does not endorse a particular purchaser for this, or any of the other segments.

(5) *Southern Pacific - Houston to Eagle Pass*

In order to enhance competition for cross border traffic, and to address problems created by parallel routes, the SP lines from Houston through San Antonio to Eagle Pass should be divested. This would include the SP yard and terminal facilities in San Antonio. Trackage rights given to BN/Santa Fe from Temple to Eagle Pass under the Agreement would be retained.

By granting UP trackage rights over the divested trackage between Iowa Jct. and San Antonio, potential service advantages to Texas shippers would be preserved. At the same time, this would also maintain three Class I competitors for cross-border traffic, as well as the TexMex at Laredo.

(6) *Southern Pacific - Hearne to Placedo*

To address market consolidation concerns and to provide competitive access to deep south Texas shippers, the divestiture of trackage from Hearne through Flatonia to Placedo, including the Coleto Creek industrial lead, is required.[3] This proposal also includes assigning the trackage rights currently held by the Southern Pacific from Placedo to Brownsville to the purchasing carrier. The Union Pacific should also be granted competitive access to facilities on the Coleto Creek industrial lead.

(7) *Southern Pacific - Houston to Galveston, Beaumont to Port Arthur, and McAllen/Edinburg to Brownsville.*

These lines are important generators of traffic that should be accessible to all line haul railroads serving the end point cities. They should be sold to the port authorities mentioned in the following section, which discusses the importance of establishing neutral terminal

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[3]An industrial lead is the rail equivalent of an access road to a specific plant site.

companies in urban areas and certain regional areas of the state in order to combat market abuses.

(8) *Southern Pacific terminals, yards, and other support facilities should be divested to the railroads and port facilities acquiring other trackage to be divested.* Rail operations require terminals, yards, and other support facilities to be used efficiently to provide competitive rail service. The third Class I railroad acquiring the previously listed SP routes in Texas should be allowed to acquire SP's classification and storage yards at all points on the acquired SP trackage, including SP's Englewood Yard and its satellite yards in Houston, Avondale Yard in New Orleans, East Yard in San Antonio, Pine Bluff Yard in Pine Bluff, Valley Yard in East St. Louis, plus yards and facilities in Beaumont, Victoria, Shreveport, Brownsville, Fort Worth, and other "on line" cities.

In order to support the operation of the Houston to Galveston trackage to be acquired from the SP, the Port of Houston should be allowed to acquire SP's storage-in-transit yard at Dayton, its storage and classification yard at LaPorte (Strang Yard), and its intermodal facility at Barbours Cut, plus the Clinton docks, Clinton industrial lead, and Galena Park automotive facility near the Houston Turning Basin.

Because the Commission recognizes that shippers located on the divested lines are likely to have continuing contractual and other relationships with SP which would be assumed by UP following the Merger, the Commission recommends, if the Merger is approved, that UP be given trackage rights over the divested lines for the duration of the contracts in order to meet the needs of such shippers. Given UP's repeated assurances in the record that trackage rights are sufficient for effective railroad operations, it should not be greatly inconvenienced by operating under such rights.

Neutral Terminal Railroads -- The Means to Ensure Rail Competition in the Twenty-First Century

The Commission further recommends that the Merger be conditioned by an agreement by UP to the creation of neutral terminal railroads serving Houston, Beaumont/Port Arthur/Orange, Dallas/Ft. Worth, Corpus Christi, El Paso and the Rio Grande Valley. These neutral terminal companies could be patterned after the terminal companies that have successfully operated for years in Chicago, St. Louis, and other major cities in the United States, e.g., the Belt Railway Company of Chicago, Indiana Harbor Belt, and the Chicago, Joliet & Eastern. But it is most likely that Texas would take as its model the highly respected Port Terminal Railroad in Houston, which provides high quality switching service at low costs to hundreds of important industries along the Houston Ship Channel (and would expand its operations under the proposal here).

The Commission's position is that neutral terminal railroads are the ultimate means for ensuring competition between railroads, especially in important rail markets that are served by two strong, highly competitive Class I carriers. Neutral terminal railroads make it possible for captive shippers to break the monopolistic control that railroads have when there is no direct connection to other rail carriers. By establishing such carriers, it should be possible to mitigate many of the anticompetitive impacts of the Merger that also has some positive dimensions for Texas.

UP has thoroughly described the essential elements of rail competition in its application submitted to the Board. In its application, UP has correctly identified transit time, frequency, and reliability as primary factors in service competition. And it has shown how service improvements can be made by shortening routes (through linking the better segments of each railroad's lines), increasing permissible track speeds (through facility improvement and better maintenance), and operating more trains on select routes (through concentrating traffic). It is likely that UP's acquisition of SP would allow those objectives to be achieved on a scale that would produce operating cost savings.

What UP has not admitted in its application is that real competition cannot exist in Texas and other western states, whether it be service competition or price competition, unless all carload rail shippers have equal access to line-haul railroads, without the service or cost penalties associated with prohibitive switching charges or poor interchange service. What is the value of any railroad being highly efficient in its line-haul operations and highly efficient in its switching operations if it is denied access to the manufacturing plants, processing facilities, warehouses, and distribution centers that generate rail traffic? Equal and fair access to all shippers by all line-haul roads serving an urban area is going to be the basic requirement for genuine competition.

Captive Shippers in Texas

In acquiring SP, UP is going to transfer to itself very large numbers of captive shippers, i.e., companies whose facilities are not covered by reciprocal switching agreements between UP and BN/Santa Fe or companies whose facilities are covered by reciprocal switching agreements, but those agreements levy prohibitively expensive switching charges on carriers other than UP. Most of those shippers are in the Houston and Beaumont/Port Arthur areas, but there are many such shippers in the Dallas/Fort Worth area, and other parts of the state. Practically speaking, those shippers will never have access to any other Class I railroad, and will therefore be guaranteed sources of revenue for UP as long as its service is minimally acceptable and its pricing policies do not become so excessive as to invite source, product, or intermodal competition. Those captive shippers will pay higher rates and will experience lower levels of service than would exist under a scenario of equal and fair access.

The solution to the problem of shipper captivity is the creation of neutral terminal railroads that would provide high quality and reasonably priced switching services to all industries located within major urban areas served by two or more Class I railroads. The terminal railroads proposed herein would operate on publicly owned trackage belonging to port authorities, transit authorities, and special rail districts and privately owned trackage belonging to the Class I railroads, shortlines and industrial parks. The terminal railroads could be for-profit companies, nonprofit associations, or public entities, depending on the circumstances in a given urban area, the preferences of the Class I railroads, and the desires of the shippers.

The DFW Terminal

There is an opportunity to dramatically improve rail service in the Dallas/Fort Worth Metroplex on publicly owned rail lines, where UP, SP, BN/Santa Fe and KCS now provide switching services to local industries. Those rail lines are owned by Dallas Area Rapid Transit (DART) and RailTran, which acquired them several years ago for the development of light rail service and commuter service. The principal lines in question are:

Dallas to Garland

Dallas to Lewisville

Dallas to Ft. Worth

Wylie to Ft. Worth

Freight service to shippers on those lines has deteriorated in recent years for several reasons. UP closed its downtown Dallas yard and began moving inbound Dallas area traffic over to Fort Worth before bringing it back to Dallas for local distribution. That action has seriously impacted service to shippers located in the Garland area and along the Denton branch line (northwest of Love Field). SP service to shippers at Piano, Addison, and Grapevine seriously deteriorated when SP agreed with DART to take its former line from Tennison Park to Plano out of service, thereby forcing SP trains to use the congested Denton branch from downtown to Carrollton.

The instant merger provides the opportunity to create a large terminal railroad for the Dallas/Fort Worth Metroplex by establishing the Dallas/Fort Worth Terminal Railroad (DFW Terminal). DFW Terminal could be patterned after the Port Terminal Railroad in Houston, where trackage owned by the Port of Houston is operated by the Port Terminal Railroad Association. Membership in the DFW Terminal Railroad Association would be open to all Class I railroads and shortlines entering the greater Dallas/Ft. Worth area.

DFW Terminal would pay a user charge to DART and RailTran for the use of their trackage and a similar charge to the railroads for the use of their trackage. Every railroad interchanging traffic with DFW Terminal would pay a switching charge to have rail cars spotted at industries located on that trackage. DFW Terminal could contract with a highly qualified shortline operator to manage the DFW operation and provide the needed locomotives and crews.

The Initial DFW Network

DFW Terminal would integrate all publicly owned trackage and all non-main line trackage owned by the railroads into a comprehensive network of lines where a single switching operation could provide quality, low cost service. Included in the DFW Terminal's network would be the four DART lines listed above and the RailTran line between Dallas and Fort Worth. With the cooperation and support of UP, SP, BN/Santa Fe and KCS, the network also would include the Great Southwest Industrial Park's trackage in the Arlington/Grand Prairie area, Santa Fe's line from the south side of Dallas to Midlothian, and BN/Santa Fe's lines from Carrollton to Irving and Fort Worth to Saginaw. In addition, there would be numerous industrial leads in both Dallas and Fort Worth.

The success of the DFW Terminal in operating the initial network could lead to the first new construction of rail lines in the Dallas/Fort Worth area since Santa Fe built its new line from Dalton Junction (northwest of Denton) to Garland in 1954, thereby providing a shortcut into Dallas for the Texas Chief, then Santa Fe's premier passenger train from Chicago to Texas. The principal new line (the "DFW Belt Line") would probably be a large ellipse around the Metroplex, much like a circumferential expressway. By combining the Belt Line with a new outer belt highway (possibly a toll road), it would be possible to ensure both rail and highway access to thousands of new acres of strategically located industrial parks. And by combining the rail line and highway, it would be possible to cut construction costs, while eliminating rail/street crossings at grade.

Yards and Terminals

DFW Terminal would acquire UP's Peach Yard on the north side of Fort Worth and SP's Miller Yard on the southeast side of Dallas. Those two yards, which would be expanded and improved by DFW Terminal, would serve as the two primary classification yards for DFW Terminal. DFW Terminal also would acquire and upgrade several satellite yards in downtown Fort Worth (near Tower 55) adjacent to the BN/Santa Fe and UP main lines, allowing DFW to spot blocks of cars for pickup by UP and BN/Santa Fe road trains.

Similar satellite yards in downtown Dallas near the Sears warehouse on Lamar St. would provide storage space for blocks of Dallas area cars waiting to be picked up.

Financing for Improvements

The DFW operation would be contracted out to a highly qualified shortline operator with demonstrated ability to provide cost-effective service. The operator would be responsible for providing working capital, but long-term financing would be arranged by the DFW Terminal Association, using both private and public sources of funds.

Expansion of Houston Port Terminal Railroad

The Port of Houston owns extensive railroad trackage along the Houston ship channel serving wharfs, warehouses, bulk loading facilities, refineries, chemical plants, and other industrial facilities. The trackage is operated by the Port Terminal Railroad Association (PTRA). Historically, PTRA had a membership consisting of six Class I railroads. But because of railroad mergers over the past fifteen years, UP, SP and BN/Santa Fe are PTRA's only remaining members. If UP and SP are allowed to merge, there will be only two members.

The Port Terminal Railroad provides switching services to industries located at and near the port, and charges its members a flat amount per car for that service, without reference to the amount that is being charged for the line haul between origin and destination. Presently, port area shippers have the benefit of being able to negotiate with the three Class I railroads for line haul service to most points in the U.S., but that will cease if SP is acquired by UP.

The Port Terminal trackage is principally in the older areas of the port. SP, which also serves some of the Port Terminal served industries in the vicinity of Pasadena, has exclusive access to all of the newer industries in the Bayport area near LaPorte. Also, SP alone has access to large amounts of undeveloped land in that part of the Houston area petrochemical complex, and has sole access to the Bayport turning basin with its loading/unloading facilities for chemical tankers. SP is reported to generate over $350 million per year in revenue from traffic moving through Strang Yard, the support facility for its industrial trackage in that area.

SP shippers in the Pasadena/LaPorte/Bayport area have repeatedly complained about their captive status. Although they have requested that the Port Terminal be given access to their facilities so that they might be able to ship by any of the Class I railroads serving Houston, SP has steadfastly resisted open access. With the announcement of the proposed UP/SP merger, the Port of Houston tried to persuade UP to agree to allow the Port Terminal to switch those industries after consummation of UP's acquisition of SP, but UP rejected the proposal.

Real competition between railroads in the Houston/Gulf Coast area can only be maintained following the UP/SP merger if the Port of Houston is provided the opportunity to purchase all of the SP's trackage between SP's Englewood Yard in Houston and Galveston (via Pasadena, Bayport, Seabrook, and Texas City), including trackage into the Port of Houston's huge containership terminal at Barbours Cut (near LaPorte). The new owner would construct a new bridge at Clear Lake to replace the SP bridge which is currently out of service.

The Port of Houston's acquisition of SP's Houston-Galveston line would also serve to ameliorate the anticompetitive consequences of the merger by consolidation of the Port of Galveston with the Port of Houston. It also would allow the Port of Houston to develop additional Port facilities along the west side of Galveston Bay, all the way from Morgan's Point to Texas City.

Expansion of the Port Terminal's operating area by acquisition of SP's port trackage should be followed by UP's sale of its trackage on the north side of the Houston ship channel to the Port of Houston. That trackage extends to Channelview and Baytown, and connects at Baytown with SP's trackage to Mont Belvieu and Dayton, all of which should also be brought under ownership of the Port of Houston. Lastly, divestiture of the Houston Belt & Terminal's trackage and yard facilities should be required so that the Port Terminal Railroad would control the support facilities needed for efficient classification and storage of cars.

The ultimate goals should be (1) to bring all industrial trackage in the greater Houston/Galveston area (not part of the Class I railroads' main lines) under common ownership by the Port of Houston and to provide high quality, low cost switching service to all shippers on that trackage on an equal and fair basis and (2) to provide similar terminal switching services to all Houston area shippers located on the main lines of the Class I railroads (ownership and control of which would remain with those railroads). If this is not done, the greatest concentration of petrochemical production in the United States will be subjected to the potential anticompetitive consequences of this massively parallel merger.

Golden Triangle Terminal Railroad

The Beaumont/Port Arthur/Orange area ("the Golden Triangle") is currently served by four Class I railroads: SP, UP, BN/Santa Fe, and KCS. The four railroads take turns switching the trackage at the Port of Beaumont, while KCS alone does the wharf switching at Port Arthur and Port Neches. Most of the trackage in the Beaumont/Port Arthur area is served by KCS, but SP has an important branch line from Beaumont to Port Arthur that provides access to several large chemical plants.

SP's main line, which goes east-west through downtown Beaumont, reaches a number of chemical plants in the vicinity of Orange. UP's access to Orange is on a branch line that extends down from the KCS main line at Mauriceville. KCS does not serve Orange.

SP's recent decision to close its industries in the Beaumont/Port Arthur area to reciprocal switching prompted KCS to respond by closing its industries, leaving many shippers without access to multiple line haul carriers. KCS has indicated a willingness to reopen its industries if the larger railroads will reciprocate.

It should be possible to establish a terminal railroad serving the Golden Triangle, if KCS is willing to relinquish its dominant position in the area by allowing equal and fair access to BN/Santa Fe and UP. And that willingness might come about if the Board were to give KCS the opportunity to enter the Houston market by acquiring duplicate UP/SP trackage.

A Golden Triangle Terminal Railroad would most likely have to follow the pattern of the Houston Belt & Terminal Railroad Company. HB&T has trackage rights over both BN/Santa Fe and Union Pacific lines in the Houston area for the purpose of switching local industries. Switching runs operated by HB&T intermingle with main line trains of UP and BN/Santa Fe on trackage that is jointly utilized.

To achieve coordination, it might be necessary for the Golden Triangle Terminal Railroad to dispatch all trackage in the vicinity of Beaumont, Port Arthur, and Orange, just as HB&T dispatches much of the trackage in the Houston area. If the Golden Triangle Terminal Railroad was operated under the authority of the Ports of Beaumont, Port Arthur, and Orange, it might be possible to contract out the operation to a low cost carrier that is free of the restrictive work rules that are typical of most contracts in the railroad industry.

Brownsville and Corpus Christi

Both Brownsville and Corpus Christi could have neutral terminal railroads like those suggested for Dallas/Fort Worth, Houston, and the Golden Triangle. But the best option for the Rio Grande Valley area would be for UP to sell its line from Placedo (near Victoria) to Brownsville to the Port of Brownsville, which would then operate it in conjunction with the Brownsville and Rio Grande International ("BRGI"), its present switching company that directly serves the port. BRGI could then provide trackage rights to Placedo for the Corpus Christi Terminal Railroad ("CCT") that would serve the Port of Corpus Christi. Both BRGI and CCT would interchange with UP at Odem and Placedo, and with BN/Santa Fe at Placedo. In addition, TexMex would be given trackage rights from Robstown to Placedo, where it would connect with both BN/Santa Fe and UP.

El Paso Terminal

El Paso, which is served by SP, UP and BN/Santa Fe, is the primary western gateway to Northern Mexico. El Paso is not a major source of local carload traffic for any of the railroads, but Fort Bliss does generate a fair amount of rail traffic. By establishing a neutral terminal company at El Paso, it would be possible to construct new industrial trackage in the undeveloped areas to the east of the city with the opportunity to have full access to line-haul railroads. The terminal railroad could serve the industries on trackage that it owns, plus existing customers located primarily on the SP's downtown trackage and BN/Santa Fe's trackage on the west side of town (in New Mexico).

Panhandle Terminal

Although not directly affected by the UP/SP merger, a regional terminal is also proposed for the Amarillo-Plainview-Lubbock area. The main line of this terminal would extend from Amarillo to Lubbock (through Plainview), and would include branch lines from Lubbock to Lamesa, Seagraves and Whiteface; from Plainview to Dimmitt; from Amarillo to Stafford; from Etter to Morse; and from Panhandle to Borger. The trackage would be acquired from BN/Santa Fe and several shortlines by the High Plains Regional Rail Authority, a super-rail district consisting of sixteen contiguous counties. It is the Commission's intent that the Authority would contract out the operation to a new company, the High Plains Terminal Railroad.

Neutral Terminal Railroads - What is the Alternative?

The neutral terminal railroads which the Commission is proposing for Texas would guarantee the level of competition, featuring maximum service at the lowest rates possible, which is essential if Texas shippers are to compete in the global economy of the Twenty-First Century. There is no real alternative that is truly competitive.

Abandonment Conditions

Although the BN/Santa Fe's application was silent with respect to merger-related abandonments, that railroad has announced the proposed abandonment of approximately 4,000 miles of track. In this case, UP/SP has identified a few lines as being merger-related abandonment candidates. The Commission is concerned, however, that UP may follow the precedent set by BN/Santa Fe, especially if it determines that the directional movement concept is not working and that there is no continuing need to maintain parallel lines of track through East Texas, as well as connecting tracks between the primary routes. Were that to happen, the Commission seeks to foreclose the possibility that UP will continue the practice, as described in the Report (TRC-4, Exhibit 1 at 7-2), of not including the entire line between junction points. As noted in that example, SP's Suman to Bryan line abandonment does not encompass the entire line between junction points. At both the north and south end of that line, UP intends to retain a small portion of track. As a result, any short-line railroad, rural rail district, developer or industrial rail user that purchases this track would be forced to pay switching charges and trackage-use fees to the UP for any traffic moving into the rail junction -- virtually capturing any potential shippers who may ever want to locate along this line.

SHIPPER SUPPORT IS MINISCULE COMPARED TO IMPACT ON TEXAS

Much has been said by UP about the raw number of shipper support statements which it has filed with its application. Without denigrating the support of any shipper, the Commission would note that the majority of the supporting shipper letters were elicited prior to shippers' being given an opportunity to review the actual merger application. Furthermore, there is reason to believe that some letters were obtained only after the individual shipper negotiated its own deal in order to protect itself from perceived adverse consequences. In addition, many of the letters, especially those which have been received by the Commission, express support for the Merger only if it is properly conditioned so as to minimize the harsh anticompetitive impacts which many shippers have forecast. Judging from the recent series of letters which the Commission has received following its public hearings, opposition to the merger is gaining momentum as shippers have begun to clearly focus on the actual impact of the Merger. Indeed, the preponderance of written and oral communications regarding the Merger received by the Commission since its public hearings have been in opposition to the Merger. See Exhibit 3.

A review of the 172 individuals or organizations from Texas who submitted letters of support as part of the Merger application further demonstrates the shallow support for the Merger from significant elements of the Texas economy. Of the 172 letters of support, 28 (or 16%) provide a rail-related transportation service such as warehousing, terminal services, intermodal marketing or other related service. Another 46 letters (or 27%) were tendered by public officials, community groups, such as local Chambers of Commerce, or local governments. In sum, only 102 shippers based in Texas supported the merger with letters of support for UP. How many of those shippers are captive to UP is unknown.

Given the tremendous impact that the Merger will have on Texas, with an estimated $850 million in traffic at stake, the minimal support from Texas shippers for the Merger should be carefully weighed in order that it not be overstated. In addition, the letters should be carefully scrutinized to ensure that full consideration be given to requests for divestitures and other conditions which shippers requested as part of their support.

It also appears that many of the letters parrot the professed need for the UP and SP to be able to compete with BN/Santa Fe. While some concern may be expressed for SP, UP today already surpasses the BN/Santa Fe in terms of several major economic indicators, including the number of BEA's served and the percentage of total U.S. population, personal income, mining income and manufacturing income represented by those BEA's. See RCT-4, Ex. 1, Report at 11-2. The only major sector in which BN/Santa Fe has a dominant position is agricultural income in BEA's served.

As is further noted (id.), these indicators also demonstrate that the Merger:

gains very little market over pre-merger coverage. While any major rail merger will have vertical and horizontal elements, concerns are raised about anti-competitive effects when the service territory is not substantially increased. The Union Pacific/Southern Pacific merger appears to be more about market consolidation than market extension--especially in the Texas-Louisiana, Texas-Midwest corridors.

In Texas, BN/Santa Fe is the largest rail carrier. Based on 1994 statistics, had the BN/Santa Fe been merged at that time, it would have been the largest Class I railroad in the state accounting for nearly 35 percent of the total traffic carried in the state. UP and SP would have separately accounted for 29.6 percent and 26.9 percent of traffic respectively. With the instant Merger, UP/SP would not only become the largest carrier in the state, but, would have accounted for 56.5 percent of all traffic carried by Class 1 railroads in the state in 1994. This is not parity with BN/Santa Fe, it is economic overkill!

The UP's potential dominance becomes even more pronounced when individual commodities are considered. Based on 1994 figures compiled from the Commission's records, UP would control 76.8 percent of Texas traffic in nonmetallic minerals, 70.2 percent of chemicals and allied products, 56.7 percent of food and kindred products and 50.3 percent of agricultural commodities. UP would lag behind BN/Santa Fe only in the transportation of lignite coal and forest products.

Given the significant number of locations in Texas which will find rail service reduced from three carriers to two, coupled with the UP's unquestioned post-merger dominance, it is crystal clear that the potential anti-competitive effects of the Merger will affect a significant part of the Texas economy. By any measure, of the twenty-one states potentially affected by the Merger, Texas has the largest amount of traffic at stake. Moreover, it has the greatest concentration of parallel lines.

With that in mind, it is respectfully submitted that the number of Texas shippers which have unconditionally supported the Merger is minuscule. The lack of depth of support from major Texas shippers is also reflected by the fact that only two of the top 12 Texas plastics materials and resins manufactures (SIC 2821) supported the merger.[4] These two manufactures represent only 6% of the total sales for this SIC group of manufacturers.

Only one of the top petroleum refining companies (SIC 2911) in Texas submitted a letter of support with the Merger application. That company represents 1.3% of the $190,227,000,000 in total sales for this group of companies.

Of the four Texas paper mills ranked by *Ward's Business Directory*, none submitted a letter of support. This includes Kimberly-Clark Corporation which has sales of $7,346,000,000 and is ranked the 10th largest publicly held company in Texas by Ward's Business Directory. While Champion International Corporation ("Champion") submitted comments, those comments conditionally supported the merger. Furthermore, in its Comments filed with the Board, Champion has testified that UP's directional movements on the parallel lines in East Texas would be detrimental to Champion and other industries on those lines. As Champion has explained (V.S. Kerth at 4-5):

> UPRR and SPR have indicated traffic between the Gulf Coast and the East will be separated by direction, using former SPR (Cotton Belt) route through Arkansas and Texas primarily as the southbound corridor and the parallel UPRR route as the northbound corridor. This solution will be detrimental to Champion and other industries on this line. Our shipments from Lufkin, Camden, and Corrigan will incur additional transit time in route travelling southwest to Houston before they can travel toward their ultimate destination(s) in the midwest, western, or eastern United States.

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[4] Texas rankings cited herein are taken from *Ward's Business Directory of U.S. Private and Public Companies, State Rankings by Sales within 4-digit SIC Codes.*

Because of the perceived operational difficulties, Champion ultimately hedged its "support" for the Merger as follows (id. at 9):

> For all of the foregoing reasons, the common control and merger of the Union Pacific Co. (UPRR) and the Southern Pacific Railroad Co. (SPR) would be contrary to industry and third party rail operations in east Texas located on the SPR line between Houston, TX and Fair Oaks, AR. We urge the Commission to approve the merger subject to imposition of conditions necessary to ameliorate the effect of this merger in east Texas and which provide shippers with reasonable options for rail freight services in the region affected by this transaction.

Champion is not alone in its concern for the fate of shippers on the parallel lines in East Texas. In recent Comments filed with the Board, Proctor & Gamble ("P&G"), Phillips Petroleum Company ("Phillips") and PPG Industries, Inc. ("PPG") have announced that they favor divestiture of parallel lines in the Texas and Louisiana region served by SP. See V.S. Petruccelli for PPG at p. 4; V.S. Feldman for P&G; V.S. Watson for Phillips. In its statement, P&G, after taking the position that the Merger "runs contrary to the competitive marketplace which deregulation has brought us," reasons as follows:

> The overall reduction from 3 to 2 carriers for our Sacramento, CA, Kansas City, KS and St. Louis, MO operations, as well as our numerous raw material supply points in the Texas Gulf region, will escalate cost effecting our competitiveness. Our experience has shown the Southern Pacific presence in these traffic lanes has helped maintain a competitive price structure. Industries served today by a single carrier have the opportunity to load truck and transload to rail at nearby SP stations. This is a competitive alternative we have used which will be eliminated by the merger.
>
> The Mexico market provides great potential for the expansion of Proctor and Gamble's products. Again, the reduction in available carriers into and out of Mexico does not fit with this emerging opportunity. We therefore recommend the Surface Transportation Board reject the Union Pacific's acquisition request stated in Docket #32760.

> In the event the Surface Transportation Board finds it appropriate to grant the Union Pacific's proposal, we would strongly recommend to include in your ruling a divestiture for lines currently in operation from Chicago to Houston, Laredo, and along the Texas Gulf Coast. While not the total answer, this action would substantially reestablish a true competitive environment in the Texas Gulf region and into Mexico. Establishing an ownership position versus trackage rights provides us a long term competitive option in this vital and expanding business area.

PPG's recently filed comments echo the concerns with respect to Mexico. As stated therein (V.S. Petruccelli at 5):

> Shipments from and to Mexico could also be monopolized by the merged railroad. Both the SP and UP provide competitive service into Mexico. In conjunction with the Tex-Mex Railroad ("Tex-Mex") the SP provided a viable competitor to the UP at Laredo, TX. Approval of the merger would surely jeopardize the Tex-Mex's existence. PPG exports goods into Mexico, and is building a new facility in Mexico that could be exporting to the United States. It is imperative that competition be retained. We believe Tex-Mex should be granted authority to extend their operation to connect with other railroads. Further a physical interchange should be required and maintained between the Tex-Mex and the new railroad.

In concluding, PPG also echoes the Commission's proposed conditions by endorsing "divestiture of track segments to other carriers with competitive access, [and] maintaining interchanges."

The comments filed on behalf of Phillips lend further support for the Commission's conditions. As Phillips has indicated in the Verified Statement of Fred E.Watson:

> Our concerns are particularly concentrated on that portion of the SP system that runs east of El Paso, TX, to the Mississippi River. All this track is essentially parallel track coverage with the present UP system. Phillips believes it should be the <u>exception</u>, not the rule, that allows two Class I railroads to consolidate parallel portions of their systems into one gigantic railroad.

Phillips also indicated its concern with the fact that the Merger would result in UP's having "over 85% of the plastics storage capacity in the Texas/Louisiana Gulf Region" (id.) and that UP would control the "terminal switching railroads in Houston and St. Louis" (id.). In addition, after calling attention to the alarming level of rates which BN/Santa Fe has offered, "contingent upon the SP/UP deal being approved," Phillips has endorsed the acquisition by Conrail of the lines which are designated by the Commission as candidates for divestiture in order to preserve competition between Mexico, the Texas Gulf Coast and the Mississippi River gateways. Id.

The Commission is well aware of the mounting criticism of the merger. In recent days, The Society of The Plastics Industry, whose members provide 75,000 jobs in Texas alone while bringing over $25 billion a year to the Texas economy, and the National Industrial Transportation League, a group with over 1,400 members, have announced their opposition to the Merger. Moreover, they agree with the Commission that if the Merger were to be approved, divestiture of the SP's parallel lines is essential. As this opposition clearly indicates, the Commission's conclusion that the Merger is not in the best interest of Texas is echoed by many shippers who have taken the time to thoroughly analyze the Merger and carefully weigh the adverse consequences of allowing a single railroad to exercise near monopoly control of rail facilities which are crucial to important components of the Texas economy.

THE UP/SP MERGER IS INCURABLY ANTICOMPETITIVE IN EAST AND SOUTH TEXAS

Ten years ago, the Interstate Commerce Commission ("ICC") was faced with the proposed merger of the Santa Fe and the Southern Pacific, a merger that is remarkably similar to the current merger. Then, as now, SP was portrayed as a "failing firm" which needed to be rescued from the follies of its poor management. As the Board is well aware, the merger was denied on the grounds that it was anticompetitive and inconsistent with the public interest. As the ICC ultimately concluded, "we cannot justify overriding the confessed anticompetitive effects of this merger in the absence of demonstrably effective mitigating conditions. . . . Parallel mergers are not favored where there are no other competing railroads." Santa Fe Southern Pacific Corp.--Control--SPT Co., 2 I.C.C.2d 709, 833 (1986).

Today, the Board is, in effect, requested to approve a parallel merger that presents many of the same problems as that earlier merger. The major difference is that ten years ago, the competitive options were far greater. Not only was the Missouri-Kansas-Texas Railroad still in existence, but the UP, BN and KCS were also available to provide potential relief. Today, UP would have but one major competitor if the merger were to be approved, and that would-be competitor's ability to compete would be severely constrained by an Agreement which limits BN/Santa Fe to the provision of service which its past Chairman aptly described as "service with some disability."

There is no question but that the Applicants were well aware of the parallel nature of the UP and SP lines in East and South Texas, as well as the virtual monopolistic control which UP would achieve over the gateways between Texas and Mexico. Indeed, UP President Dick Davidson was quoted in the Wall Street Journal during UP's pursuit of the

Santa Fe as stating that a merger of the UP and SP would result in the monopolization of Gulf Coast chemical traffic. Dep. Davidson at 25-27, 74-76 and Ex. 1.

To combat the anticipated attacks on the merger's unavoidable, anticompetitive aspects and ward off expected requests for divestiture of parallel routes, the Applicants have undertaken two preemptive measures. Neither of these will survive close scrutiny from the Board. The first measure is the "plan" to institute directional running on the parallel UP and SP lines, while the second is the Agreement that allows "competition" from UP's only rival on terms that are **guaranteed to prevent the emergence of genuine competition** for impacted shippers, both present and future.

Under UP's cleverly contrived proposal for directional running, the UP and SP lines from Dexter Junction to Texas would be paired so as to create a southbound route and a northbound route. Specifically, SP's lines from Dexter Junction to Houston (via Shreveport) and Lewisville, AR to Corsicana, TX would be used primarily by southbound trains, while UP's lines from Taylor, TX to Palestine, TX and Houston to Dexter Junction would be used primarily for northbound trains.

The application claims that directional running on paired single tracks will increase track capacity by greatly reducing the number of meets between opposing trains. Theoretically, that is correct. However, it is also correct that double tracking select segments of UP's existing main lines between St. Louis and major points in Texas would provide even more track capacity, while helping to solve the very serious problems of attempting to perform track maintenance on a single track line under a heavy flow of traffic. Given the option of directional running on paired single track lines spread as much as fifty to eighty miles apart (as UP proposes in its merger application) or directional running on a double track line on a single right-of-way, the choice should be obvious -- concentrate operations on a single right-of-way on UP's excellent line through Little Rock and Texarkana.

This would, of course, respond to the concerns of multiple shippers in East Texas, such as Champion International, which find themselves with northbound traffic on a line which has been designated as southbound, or vice versa. Given UP's extensive documentation of the importance of avoiding 100 miles of circuity, one must question the rationale behind routing a railcar over UP's southbound route to a point where the car will be worked through a switching yard, only to then add it to a northbound train which will pass within a few miles of its point of origin a day or two later. By way of illustration, if a car of lumber from a forest products company at Lufkin, Texas located on the SP was forced to go all the way to Houston on the SP's Shreveport-Houston line and then northbound on the UP from Houston to Palestine, Texarkana and Little Rock on its way to an interchange with CSX at Memphis, the distance would be 711.2 miles. But if the car was routed directly north from Lufkin to Memphis over the SP's 438.6 mile route through Shreveport and Pine Bluff, there would be a significant mileage savings of 272.6 miles.

A similar problem would be encountered by BN/Santa Fe. During the course of his deposition, Mr. Owen opined that BN/Santa Fe would use its yard at Teague, Texas to store carloads of plastic products. See Owen Deposition, 191-194. When asked whether BN/Santa Fe would first route the cars south to Houston in order to then move over the proposed trackage rights to East St. Louis, Mr. Owen finally admitted that BN/Santa Fe would not use the trackage rights for these movements. Instead it would route the cars over its own line to "Tulsa and on to St. Louis." Id. at 194. Since the direct mileage to East St.

Louis from Teague is 807.9 miles, whereas the mileage from Teague to East St. Louis via Houston is 1032.9 miles, BN/Santa Fe would add 225 miles or 22% circuity to the movement if the cars were routed via Houston so that they could move over the trackage which UP assigned to BN/Santa Fe in the Agreement.

In evaluating the directional flows, the Board should carefully examine the above and contrast these examples with UP's testimony concerning the importance of eliminating circuity and excess mileage. When that is done, the touted efficiencies of directional flow for many shippers on the parallel lines are non-existent.

Given the questionable value and probable technical impracticability of directional running, it must be suggested that double tracking UP's existing lines in Arkansas and Texas is a far more viable option and would create a higher capacity route with greater operating efficiencies than are possible with paired single track lines. An examination of Union Pacific's System Timetable No. 1 indicates that UP already has a substantial amount of double track between East St. Louis and Texarkana, including 61.0 continuous miles on the Chester Subdivision between East St. Louis and Menard Jct. and 83.6 continuous miles on the Hoxie and Little Rock subdivisions (through Little Rock), plus many additional shorter segments of five to twenty-five miles in length spread over the five hundred mile route. And there are thirty-five long passing sidings between East St. Louis and Texarkana.

Given so many segments of double track and so many long passing sidings, it must be suggested that the task of double tracking UP's entire East St. Louis-Texarkana route would not be overly costly, and would not present any significant engineering or environmental problems. In fact, it should be possible to expeditiously double track the remaining segments of UP single track by connecting the thirty-five existing sidings at a cost of between \$1.3 million to \$1.5 million per mile (based on the construction budgets of recent such projects undertaken by UP and other railroads). In this regard, it is highly likely that the proceeds to be realized from the divestiture of the SP's parallel lines would more than offset the cost of double-tracking UP's existing lines.

When all is said and done, it appears that "directional movement" concept over the parallel lines is but a device which is actually a further means of stifling competition. By dangling the possibility of directional service over the parallel routes, the Applicants are no doubt hoping to avoid the divestiture of the SP lines to a third Class I railroad which could provide a competitive option to UP and BN/Santa Fe. The Board should not allow itself to be misled by this transparent effort to tie up these lines in order to avoid future competition.

THE UP/BN/SANTA FE AGREEMENT DOES NOT RESOLVE THE ANTICOMPETITIVE CONCERNS

The second preemptive measure in the application to prevent the emergence of future competition is the deal which UP cut with the BN and the Santa Fe railroads which is memorialized in their September 25, 1995 Agreement.[5] On the surface, the Agreement purports to preserve "service by two competing railroad companies" for all shippers who will find themselves served by only one railroad following the merger. Viewed in a slightly different light, however, the Agreement appears to formalize an underlying intent to restrain future competition by eliminating the possibility that another Class I railroad would be able

[5] A Supplemental Agreement between the same parties, dated November 18, 1995, modifies and expands the original September 25 Agreement. Hereinafter, the term "Agreement" shall be used to collectively define the Agreement and Supplemental Agreement.

to acquire the SP's eastern routes and thereby provide single-line service across the Mississippi River in competition with UP and BN/Santa Fe.

The Agreement purports to address competitive concerns through a series of proposed trackage rights, line sales and other related transactions between UP and BN/Santa Fe.[6] There are three broadly worded groups of trackage rights which directly impact Texas. As designated by UP/BN/Santa Fe, they are as follows:

South Texas Trackage Rights and Purchase

Eastern Texas - Louisiana Trackage Rights and Purchase

Houston - Memphis Trackage Rights

See Vol. 1, Application at 323-328. In each instance, BN/Santa Fe is granted:

> bridge rights for movement of overhead traffic only, except for the local access specified herein. BNSF shall receive access on such lines only to industries which are presently served (either directly or by reciprocal switch) only by both UP and SP and by no other railroad at points listed on Exhibit A to this Agreement.

Id. at 323-324, 325, 327 (emphasis added).

The Agreement further provides that:

> Access to industries at points open to BNSF shall be direct or through reciprocal switch. New customers locating at points open to BNSF under this Agreement shall be open to both UP/SP and BNSF. The geographic limits within which new industries shall be open to BNSF service shall generally correspond to the territory within which, prior to the merger of UP and SP, a new customer could have constructed a facility that would have been open to service by both UP and SP,either directly or through reciprocal switch. In negotiating the

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[6] The Agreement is not the functional equivalent of a trackage rights agreement. Noticeably absent are any operational details. Furthermore, a close examination of the Agreement fails to reveal a commitment on BN/Santa Fe's part to commence operations over any of the proposed routes at any time in the future.

> trackage rights agreements pursuant to Section 9f of this Agreement the parties shall define mileposts defining these geographic limitations. Where switching districts have been established they shall be presumed to establish these geographic limitations.

Id. 324, 325-326, 327.

A final portion of the Agreement which is of crucial import relates to BN/Santa Fe's election concerning how it will provide service. As modified by the Supplemental Agreement of November 18, BN/Santa Fe agreed to the following:

> Forty-five (45) days before initiating service to a customer, BNSF must elect whether its service shall be (i) direct, (ii) through reciprocal switch, or (iii) with UP/SP's prior agreement, using a third party contractor to perform switching for itself or both railroads. BNSF shall have the right, upon 180 days prior written notice to UP/SP, to change its election; provided, however, that BNSF shall (x) not change its election more often than once every five years and (y) shall reimburse UP/SP for any costs incurred by UP/SP in connection with such changed election.

Id. 350, 351, 352.

As is readily apparent from the above, the Agreement does absolutely nothing for shippers which find themselves in a situation where the merger has reduced the available rail competitors from three to two. A graphic description of the consequences of such a reduction, especially when the "eliminated" carrier is an aggressive competitor in terms of rates, is found in the unique study which has been prepared by I. W. Ploth for the Board's consideration. In that study, which has been submitted by KCS, Mr. Ploth has analyzed data from actual bids received by the United States Department of Defense. His analysis leaves no room for doubt with respect to the importance of a third railroad when it comes to competition. As such, his study not only rebuts the testimony of Dr. Willig which UP has introduced, but it corroborates the testimony of Dr. Tye and Dr. McFarland on behalf of the State of Texas regarding the significant anticompetitive effect of reducing the number of serving railroads from 3 to 2. For a summary of Dr. Tye's conclusions, the Board's attention is invited to the following table:

Overall Assessment of Competitive Consequences of the Merger

Facts, Claims, and Issues		Responses and Comments	
a.	The merger is end-to-end for UP for the El Paso-LA-Bay Area-Portland segment, and Tucumcari Line components of the SP system.	a.	To the extent that the merger allows UP to "fill in" its route network via these extensions, this seems to fall into the category of mergers the Interstate Commerce Commission has previously approved.
b.	The merger is "massively parallel" for the Central Corridor (St. Louis to Bay Area) and Gulf (TX and LA) to St. Louis via AR, Corridor.	b.	Applicants' expected route-strengthening, (quasi-) failing firm, and operating efficiency arguments ignore the substantial reduction in competition in the "massively parallel" geographic markets that make up preponderance of the SP system.
c.	The Agreement with BN/SF is designed to solve parallel problems by granting overhead traffic rights to BN/SF for these latter two corridors, plus local rights to serve all "two-to-one" shippers.	c.	The choice of BN/SF for the trackage rights has the effect of reducing the major rail systems in the West from three to two; the need for traffic density and the particular limitation to a very small subset of the traffic in the "massively parallel" corridors effectively prohibit BN/SF from replacing the competition lost by SP (*i.e.*, BN/SF will be even more handicapped competitively in these markets than SP).
d.	A large number of city pairs will have competitors reduced from three to two in markets where the merger is "massively parallel."	d.	Defining relevant markets to be service to an individual shipper's facility (rather than larger relevant markets such as BEA, county, state, region, O-D corridor, Western U.S., *etc.*) for the purpose of attaching pro-competitive conditions obscures the loss of "regional rail competition," the relevant market cited by the *Interstate Commerce Act*.

e. Applicants have advanced the following claims to address the "massively parallel problem: ■ Academic studies showing that the reduction from three to two is meaningful cannot be relied upon;	e. Each of the five arguments about the "massively parallel" issue has problems: ■ The Department of Justice (DOJ) guidelines, the academic literature on railroads, and the academic literature on concentration generally are contrary to these expected claims. Concentration indeed matters.
■ Not much traffic is affected by the three-to-two problem;	■ One must be wary of using an "accordion" in the definition of the relevant market: Under the accordion theory, (1) when discussing the benefits of extended single-line service, and the difficulties of SP, the relevant market is the entire West or the rail corridors where all three carriers compete; (2) when looking at the reduction in competition between SP and UP, the relevant market is the lowest possible level of aggregation (direct service, possibly by reciprocal switching, to the facilities of a single shipper's plant).
■ Competition by SP is redundant: stronger against strong is better than strong against strong and weak;	■ One must also be careful not to apply a "stealth (or quasi-) failing firm" defense without meeting the DOJ/FTC Guideline tests; SP has been the "weak runt of the litter" for as long as anyone can remember (SF also unsuccessfully invoked the failing firm defense for SP in the SF/SP merger); once again, one must be careful not to use the accordion (SP competes in large relevant geographic markets where it is allegedly being crushed by BN/SF when SP is being made to look weak, but SP competes in very narrowly defined markets--*i.e.*, its shippers are closed to switching--when it is alleged to compete with UP); again, one should not confuse the end-to-end markets (where the principal competitor is BN/SF) with the "massively parallel" markets (where the principal competition is between UP and SP).
■ Shippers seem to care more about extended single-line service than competition, especially by a weak carrier;	■ The benefits of route extensions in the end-to-end markets should not obscure the reduction in competition in the "massively parallel" markets.

▪ The Commission has frequently ruled that only two carriers are needed to achieve effective competition; and	▪ The Commission has never before considered a merger with such "massively parallel" dimensions; the closest thing to it is the proposed SF/SP merger, which the Commission rejected.
▪ Coordination and collusion are unlikely in rail transportation markets.	▪ Claims of lack of railroads' ability to coordinate are contradicted by the rail industry's history of antitrust offenses and by the kinds of benefit claims applicants tried to make (when discussing the prospects for collusion and coordination, applicants tend to characterize themselves as having excess capacity and large fixed costs that create incentives for price competition; when they discuss merger benefits, applicants tend to describe themselves as hobbled by capacity constraints and inadequate investment).
f. UP will be alleged to get stronger because of: ▪ Extended routes and more single-line service (applies chiefly to end-to-end part of merger); ▪ Operating efficiencies (applies to extended single-line service, via extended routes) and reduced route circuity and other operating efficiencies.	f. The reduced circuitry argument makes the Williamsonian Welfare Tradeoff" (efficiency gains must more than compensate for reduced competition) clearest in the three-to-two corridors.
g. SP will be alleged to get stronger chiefly because UP is able to fix SP's main problems: ▪ Service problems (inadequate management?). ▪ Capital constraints.	g. The STB should be careful not to reward alleged mismanagement and unwillingness by SP's owner to commit capital with a competition-reducing merger. Even if these claims are true, the real issue is: Are there any less anticompetitive ways to replace SP's management, get access to capital markets, and achieve the claimed efficiency gains?
h. The merger has the additional benefit of filling BN/SF's route system and, in particular, creating two single-line carriers along the entire Pacific coast.	h. These are the types of merger benefits the ICC tended to encourage.

i. Fairness dictates that the STB approve this merger as a competitive response to the BN/SF merger.	i. BN/SF was much more an end-to-end merger than UP/SP. This is evidenced by the fact that Applicants have agreed that extensive trackage and/or haulage rights are required to cure the anticompetitive consequences of the merger. The conditions imposed by the BN/SF merger, to the contrary, were rather limited. Indeed, most of the complaints by shippers addressed concerns over route foreclosure resulting from the end-to-end dimensions. Fairness dictates only that UP be allowed the end-to-end component of the merger, and does not go to the issue of the parallel dimensions.

In the course of the Commission's public hearings, a number of witnesses expressed concerns about the efficacy of the UP/BN/Santa Fe Agreement. These witnesses raised multiple concerns that the Agreement is not only operationally impracticable, but that it embodies a tacit agreement between UP and BN/Santa Fe to further restrict rail competition, thereby allowing them to divide the spoils.

The very existence of the Agreement is, of course, an explicit acknowledgment that UP, SP and BN/Santa Fe recognize that the UP/SP merger is anticompetitive. The real issue is whether the Agreement is a cure or whether it is the culmination of the process whereby UP and BN/SF have literally divided the Western two-thirds of the country between themselves. If the latter, the Agreement serves as the means of destroying any possibility that a third Class I railroad would be given full access to all SP shippers in order to reduce the possibility of future rate collusion between the UP/BN/Santa Fe duopoly.

The Agreement Is Devoid of Operational Detail

While UP has vigorously characterized the Agreement as being a simple trackage rights agreement, that suggestion is extremely misleading. As plainly revealed by a review of the Application, the BN/Santa Fe's Comments and the depositions of BN/SF's witnesses, the Agreement is lacking in operational and economic substance. In fact, the BN/Santa Fe's witnesses have revealed an abysmal lack of knowledge regarding essential details, including the identity of the shippers who would be available to BN/Santa Fe.

It is true that the BN/Santa merger had not yet been consummated when the invitation was received to negotiate an Agreement. As a result, it may be presumed that BN/Santa Fe entered into the Agreement on the spur of the moment without giving adequate consideration to detail. What cannot be explained, however, is why BN/Santa Fe, a full six months later, has not been able to provide any significant details about its proposed operations. What we have here is nothing more than an "agreement to agree."

BN/Santa Fe supported the Agreement with Verified Statements submitted by two outside consultants, Larry M. Lawrence and Neal Owen. While Mr. Lawrence touts the benefits of the Agreement throughout his Verified Statement, during the course of his deposition he acknowledged that he had not analyzed any rate data or calculated any costs. Lawrence Dep. at 25. Nor had he analyzed operational conditions on any line segments to see whether BN/Santa Fe's operations would be affected by UP's operating plans for those segments. Id. As he further admitted, he was "not offering a point of view on the prices that the BN/Santa Fe will be able to offer" to shippers by virtue of having the physical ability to offer single-line service. Id. at 29. Nor was he aware of BN/Santa Fe's operating plan. Id. at 47-48. Mr. Lawrence also admitted he had not looked at the issue of whether source competition operated to restrain rail rates (id. at 77), or whether geographic competition could restrain rail rates (id. at 78).

He further testified that he had not attempted to estimate how much traffic BN/Santa Fe would actually get under the individual trackage rights agreements that have yet to be negotiated. Id. at 86. In addition, he admitted that he had not made an effort to try to project how BN/SF would really be able to price its service and whether it would be able to undercut the newly formed UP/SP. Id.

Although he has projected (id. at 86) that BN/Santa Fe may get up to $1.8 billion in traffic under the trackage rights provided for in the Agreement, he also acknowledged that not only did he not know what percentage of rail traffic moves under contract (id. at 99), but his estimate assumed that BN/Santa Fe could compete for traffic that SP had locked up with a 98-year contract. Id. at 98.

The oral testimony of Mr. Owen further undermines the UP's repeated suggestion that the trackage rights which UP and BN/Santa Fe may negotiate pursuant to the Agreement will allow BN/Santa Fe to offer effective competition to UP. To place his testimony in proper context, it should be noted that Mr. Owen developed the BN/Santa Fe's only operating plan. However, as he readily admitted during his deposition, the plan "was not designed to be from its outset an operating plan per se in the context of ICC regulations." Owen Dep. at 24. More importantly, he readily conceded that BN/Santa Fe is not obligated "to institute the entire service" which is spelled out in his plan. Id. at 27.

Mr. Owen also testified that he was not aware of the UP's operating plan with its directional component until December 2 or 3, a date that was well after BN/Santa Fe's agreement to operate over the SP's line between Houston and Memphis in the face of the flood of UP southbound trains. Id. at 26. He later testified that he does not know "the reason why that route was chosen" (id. at 139), but that he is aware that the line is a low capacity line which lacks CTC and undulates extensively. Id. at 141. He further admitted that he had not done any study or analysis that shows how proposed northbound traffic would mesh with the primarily directional southbound traffic on the Cotton Belt. Id.

While Mr. Owen has offered generalized testimony concerning his opinion that two-to-one shippers would not experience any degradation in their service levels, he admitted that he had not contacted any specific shippers. Id. 37.

Like Mr. Lawrence, he also testified that he had made no cost analysis (id. 48) and that he "made no study or effort in regard to the pricing area." Id. at 49. He also testified that "we conducted no traffic study for this transaction. And to my knowledge they have no estimate prepared other than what UP/SP developed in their documentation." Id. at 278.

Although he attempted to convey the impression that BN/Santa Fe has adopted his proposal, he ultimately agreed that he had not been involved in any follow-on implementation planning with BN/Santa Fe and that he was not aware of any such activity being underway at BN/Santa Fe. Id. at 209.

Finally, Mr. Owen concluded his deposition by admitting that to his knowledge, BN/Santa Fe has not met or spoken with any shipper to discuss the types of service the shippers desire; that no commitments have been made to provide any type of service to any 2 to 1 plants or customers; that BN/Santa Fe has not entered into any contracts with shippers; and that he was not aware of any rate quotations. Id. 312-313.

The Agreement Will Not Work

While the Commission received multiple verbal assurances from the Applicants that the Agreement relieves the competitive concerns created by the underlying merger, the Commission, based on its own long history of railroad regulation, has reached a different conclusion. In the Commission's view, the deposition testimony set forth above, as well as common sense, raises multiple questions about whether BN/Santa Fe would be able to provide effective competition, especially when BN/Santa Fe's northbound trains will be swimming upstream on SP's line from Houston to St. Louis. In the absence of any detailed trackage rights agreements containing bona fide commitments to provide service at specified service levels, as well as the cost to be borne by BN/Santa Fe for switching charges and the like, the Commission cannot blindly accept the verbal assurances that the proposed trackage rights will work. The Commission urges the Board to view the unsupported assurances of the BN/Santa Fe and UP in the same fashion.

Finally, significant questions have been raised whether the true purpose of the Agreement is to prevent another Class I railroad -- KCS, Conrail, CSX or NS -- from entering the market for rail services west of the Mississippi River. There is little doubt that, if approved by the Board, the Agreement would prevent a third, well capitalized Class I railroad from providing competitive rail service in Texas, Louisiana, Arkansas and Missouri. Because rail service through these States provides the backbone for NAFTA by linking the industrial portions of the northeastern United States and Canada, on the one hand, with Mexico, on the other, the Agreement further intensifies the concerns arising from the UP's control of most of the gateways into Mexico.

The Consequences Of An Ill Advised Approval Of The Merger Are Not Easily Remedied

The Board must also view the Agreement and the merger against the backdrop of current statutory and regulatory policies which favor the free market with a minimum of interference from regulatory agencies. Simply stated, the UP/BN/Santa Fe duopoly is being created at a time when there are few effective, regulatory restraints which might otherwise constrain the anticompetitive behavior of the participating carriers. As a result, all that this Commission, the Board and the captive shippers have is the "bare assurance" that UP and BN/Santa Fe will vigorously compete. While they no doubt will vigorously compete for certain types of traffic (intermodal and automotive) in certain high-speed corridors,[7] there is no assurance whatsoever that the "competition" will extend to East and South Texas and

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[7] The UP/SP merger application reveals a heavy concentration on the need to improve the high speed traffic moving between California and the Pacific Northwest and the Mississippi gateways. Rather ironically, the justification given for the BN/SF merger was that it "would improve the ability of the BN/Santa Fe to compete against the UP and the SP in providing high-quality single-line service between the midwestern and western regions, and between the Southeast and the Southwest." Page 460-61, BN Application in FD No. 32549, Burlington Northern Inc and Burlington Northern Railroad Company-Control and Merger-Santa Fe Pacific Corporation and the Atchison, Topeka and Santa Fe Railway Company. As further explained:

> the service improvements offered by the BN/Santa Fe relative to the UP and the SP will be particularly effective in attracting customers with demands for transportation between the industrial center of the country and California--primarily by introducing expanded single-line service to and from the West Coast. Figure 7 shows a very similar pattern of the emergence of the BN/Santa Fe as a more effective competitor vis-à-vis the UP and the SP in the carriage of motor vehicles. This primarily arises because of the ability of the BN system to reach into auto manufacturing centers in locations such as Kentucky and Tennessee and, after the merger, to provide single-line service over the Santa Fe system into the California market. Figure 8 illustrates the value to consumers of enhanced single-line service between BN's southeastern anchors and the West Coast, where the demand for intermodal service is strong.

Now the story is that the merger would allow UP and SP to compete against BN/Santa Fe. This intricate sleight of hand is more than intriguing as it illustrates the manner in which the administrative process has been manipulated in order to advance the private interests of the applicants.

protect the free market for shippers located in those areas. This being the case, the Board must exercise extreme care in reviewing the long-term competitive impact of the merger.

If the merger creates a situation where the two players do not vigorously compete with one another, what are the consequences? At the outset, UP and BN/SF can invoke the statutory immunity which they are given from antitrust laws, both federal and state, by virtue of the Board's approval of the merger and the Agreement. As now provided at 49 U.S.C. § 11321(a) (formerly 49 U.S.C. § 11341(a)):

> A rail carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation, or person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

Equally important, recent ICC precedent has weakened many of the administrative remedies which shippers have heretofore enjoyed, such as competitive access,[8] the feeder line provisions,[9] and the common carrier obligation.[10] Even when a remedy exists, the

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[8] Midtec Paper Corporation v. Chicago & Northwestern Transportation Company (Use of Terminal Facilities and Reciprocal Switching Agreement), 1 I.C.C.2d 362 (ICC 1985). Although Midtec was captive to CCN, ICC overruled ALJ and Review Board decisions and held that reciprocal switching, at least in that case, was not in the public interest and was not shown to be necessary to provide competitive rail service; and that use of terminal facilities by competitive carrier not shown to be in the public interest.

[9] Caddo Antoine and Little Missouri Railroad--Feeder Line Acquisition--Arkansas Midland R.R. Line Between Gurdon and Birds Mill, AR., __ ICC2d ___ (1995), appeal pending sub nom., Caddo Antoine and Little Missouri Railroad Company, GS Roofing Products Company, Beazer West, Inc. d/b/a Gifford-Hill & Company, Bean Lumber Company and Barksdale Lumber Company, Inc., (8th Cir. 1995) (No. 95-2006).

[10] B.J. Alan Company v. UPS, 5 I.C.C.2d 704, 713 (1989) (the common carrier obligation is to be determined on the basis of whether the service is "operationally and economically impracticable" under the prevailing circumstances, including the prevailing transportation conditions. Moreover, it is the carrier's assessment of the marketplace and its resources which controls the obligation to serve and not the reasonableness of the shipper's request for service.)

prolonged battles which the railroads can be expected to wage effectively prevents any but the biggest shippers from taking them on.

Two quick examples are revealed by the City of San Antonio's multi-year battle with the Burlington Northern and by the McCarty Farms litigation. In F.D. No. 36180, San Antonio, Texas v. Burlington Northern Railroad Company, San Antonio filed its original complaint in 1975 challenging the reasonableness of the BN's coal rates. The complaint spawned litigation that lasted over ten years, with multiple decisions being rendered by the ICC, multiple appeals to various U.S. Courts of Appeal and the Supreme Court. The McCarty case is a class action brought by Montana shippers against the BN which began in 1980 and is still ongoing. Although the ICC found that BN exerts market dominance as early as 1987, the battle continues with regard to the reasonableness of the BN's rates.[11] Without question, few small Texas shippers will be able to afford to contest the reasonableness of any rate which UP and BN/Santa Fe may demand once they are firmly in control with no outside competitive pressures. With regard to rate reasonableness, it should be remembered that a rail carrier's rates "cannot be considered 'unreasonable' short of market dominance, and rates below the market dominant threshold cannot be regarded as anticompetitive or contrary to the competition policies of the Staggers Act." Midtec Paper Corporation v. U.S., 857 F.2d 1487 (D.C.Cir. 1988).

While it may be that the recently enacted provisions of new 49 U.S.C. § 10704(d) will expedite the handling of challenges to the reasonableness of railroad rates, the new

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[11] The Commission notes that the application filed by the Coleto Creek power plant, which seeks a short-haul tariff in order to obtain competitive rates to its generating station located near Victoria, Texas, has now been pending before the Board and the ICC for over two years.

procedures are not yet in place for handling such challenges. In addition, while the "Board is required to decide the reasonableness of a challenged rate within 9 months after the close of the record,"[12] it would be premature to suggest that the process will involve a substantially lessened time frame, especially when considerations such as judicial review are introduced into the equation.

Finally, with the elimination of tariff filing requirements and the proliferation of rail contracts, the ability of the railroads to discriminate between shippers is practically unfettered. While these policy choices reflect a determination to let the marketplace prevail -- a determination with which the Railroad Commission of Texas fully agrees -- how well is the marketplace likely to function in the face of the vast concentration of economic power which would result from the UP/SP and BN/Santa Fe mergers and the Agreement which they have reached to divide up the spoils? Given the ability of these massive rail systems to control rates and services throughout two-thirds of the United States, with ripple effects extending into Canada and Mexico, the Board is urged to deny the requested UP/SP merger on the grounds that it is anticompetitive and repugnant to the goals of the free market.

Hence, should the Board conclude that the Agreement fails to ameliorate the anticompetitive impact of the underlying merger of UP's and SP's massively parallel lines in East and South Texas, the Board should follow its past precedent in Santa Fe Southern Pacific Corp.--Control--SPT Co., 2 I.C.C.2d 709 (1986) and deny the merger application.

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[12] Advance Notice of Proposed Rulemaking, STB Ex Parte No. 527, Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, served March 22, 1996, at p. 2.

What Were The Options To The Designated Routes?

Unfortunately, the answer to this fundamental question in unknown. Even though it is the applicants' burden to prove that the Merger and the Agreement are in the public interest, they have deliberately chosen to shroud the answer in utmost secrecy and have refused to disclose how the particular corridors were chosen. This is vividly illustrated by the following exchange at p. 66 of the Ice Deposition:

> Q: Did you identify, before that first meeting, areas where there might be potential competitive problems as a result of the merger?
>
> A: Yes.
>
> Q: Are those areas reflected in the executive summary on page 2 of Exhibit 1?
>
> A: Yes. That may not be all of them.
>
> Q: Can you elaborate on other areas?
>
> MR. WEICHER: I'm going to direct the witness not to respond insofar as giving a list of areas that you were looking for in the negotiating process.
>
> MR. GOODSON: I'm sorry, what's the basis for that objection?
>
> MR. WEICHER: His position in settlement negotiations that he initially asked UP for, we are objecting to responding to on the basis of settlement negotiations privilege.

While the applicants repeatedly claim that they "negotiated aggressively," when asked to "give some example to show that in fact it was aggressive negotiations," (Tr. 207, Ice Deposition), the witness was instructed "not to answer based on the settlement privilege." Because the settlement privilege was repeatedly invoked, it is impossible to determine the basis for including, or excluding, any particular routes or other options in the Agreement.

The prime example is the route from Houston to Memphis and St. Louis. As each of the BN/SF witnesses has confirmed, they were not made aware that SP's "Rabbit" route would be a southbound directional route so that the BN trains, assuming they would be run over this route, would be meeting the flood of southbound UP trains. Furthermore, after finding that to be the case, it does not appear that BN made any attempt to question the operational feasibility of performing its operations under those conditions or to seek a different route from UP.

Because of the above, concerns must be expressed about the Applicants' litigation tactics which, by claiming the "settlement privilege" with respect to the UP/BN/Santa Fe negotiations, have prevented the Board from properly exploring and evaluating the motives and alternative strategies which accompanied the alleged arms' length negotiations between UP and BN/Santa Fe.[13] While such a tactic may be condoned in circumstances of a criminal investigation, it is respectfully suggested that when the Applicants have the burden of proving that the Agreement is in the public interest, a full disclosure of alternatives, as well as reasons for rejecting them, is in order. There is no alternative to full disclosure when, as here, the Agreement not only follows closely on the heels of the elimination of an effective competitor, but also involves the entrenchment of a duopoly which has no fear of additional competition in the relevant market.

Although the applicants have subsequently designated the Agreement as being a "Settlement" Agreement, such designation is but a cleverly contrived misnomer. As Carl R. Ice, the lead negotiator for BN/Santa Fe admitted during the course of being deposed, neither the BN nor the Santa Fe had decided to oppose the UP/SP merger when they were contacted by UP. Ice Deposition at 65. Simply stated, if no decision had been made to oppose, what is the basis for claiming a settlement privilege?

Based on the adamant refusal to allow witnesses to discuss the course of negotiations, it appears that the misdesignation of the Agreement as a "settlement" is a litigation strategy which was designed to avoid exploration by opposing parties of possible alternatives to the "package deal" to which the parties agreed during the course of their brief negotiations. It is respectfully submitted that full disclosure of any alternative solutions considered by the negotiators would have assisted the Board in reaching a determination about the efficacy of the Agreement in ameliorating the anticompetitive impact of the merger. Such disclosure would have also allowed the Board to reach a considered determination concerning whether the negotiations were driven by the public interest, or whether the negotiations amounted to little more than the final stages of an elaborate plot to divide the West between themselves.

The Commission is mindful that the Board encourages applicants to enter into voluntary, privately negotiated settlement agreements, such as trackage rights agreements. See, e.g., Burlington Northern, Inc. -- Control and Merger -- Santa Fe Pacific Corporation, 1995 WL 528184, 74 (ICC). That policy, however, does not relieve the Board of the responsibility to carefully scrutinize the reasonableness of the voluntary agreements in order to ensure that they do not stifle competition. In this case, there is little remaining doubt that the Agreement falls into the anticompetitive category.

CONCLUSION

In response to the increasing consolidation of parallel railroads in Texas and the abuse of power by expansionist railroad magnates such as Jay Gould and C.P. Huntington, the Railroad Commission of Texas was established in 1891 as the agency responsible for regulating railroad operations within the state. One hundred and four years later, the Railroad Commission was asked by Governor George W. Bush to review Union Pacific Corporation's proposed acquisition of Southern Pacific Rail Corporation to determine whether it would be in the best interests of the State of Texas.

The Railroad Commission has responded to the Governor's request by thoroughly analyzing all of the issues surrounding the proposed acquisition and by systematically exploring the viewpoints of a host of parties, including the applicants, shippers and public officials. The Railroad Commission's carefully formulated position is that Texas shippers and the Texas economy will be negatively impacted by the Merger because it will lead to a significant reduction in competition on the most important rail routes in Texas. These are the routes over which the UP and SP have long competed from Houston, Dallas/Fort Worth and South Texas to the New Orleans, Memphis, St. Louis and Chicago gateways.

It is respectfully submitted that no state has more at risk in this proposed Merger than Texas. However, UP's acquisition of SP would provide only a slight improvement in rail service in Texas, and that would be primarily for a limited number of intermodal shippers in North Texas who would experience a reduction of just six to eight hours in transit times to the West Coast because of a shorter route to El Paso. The overwhelming majority of Texas rail traffic moves over the Mississippi River to major cities in the Southeast, Midwest and Northeast. In these important traffic lanes, Texas shippers will experience a reduction in competition leading to higher rates. To protect Texas shippers from UP's calculated attempt to dominate and control rail transportation within Texas and surrounding states, and to prevent UP's hegemony over the rail gateways to Mexico, the Railroad Commission of Texas respectfully requests that the Surface Transportation Board deny UP's application to acquire SP. Should the Board determine that the Merger should be approved, the Railroad Commission of Texas requests that the Board impose the various conditions set forth herein.

Respectfully submitted,

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Barry Williamson, Commissioner
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Dated: March 29, 1996

Exhibit 1