STB FD 32760 6-14-96 84269

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Item No. 84269

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JUNE, 1996 # 145

ORIGINAL

U.S. Department of Transportation

Office of the Secretary of Transportation

GENERAL COUNSEL

400 Seventh St., S.W.
Washington, D.C. 20590

June 13, 1996

Vernon A. Williams, Secretary
Room 2223
Surface Transportation Board
1201 Constitution Ave., N.W.
Washington, D.C. 20423

RECEIVED JUN 14 1996 MAIL MANAGEMENT I.C.C.

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

ERRATA TO DOT BRIEF

Dear Mr. Williams:

The United States Department of Transportation ("DOT") would like to correct certain errors contained in its brief in the above-referenced proceeding:

1. - Page 23 of the DOT brief now refers to page "1341" of the deposition testimony of Dr. Bernheim; the reference should be to pages "13-41" of that testimony.

2. - The DOT brief (mistakenly) identifies parallel UP or SP lines from "Waco to San Antonio" as part of the "Texas Corridors" that the Applicants should be ordered to divest. See page 20 note 20 and page 38. The proper extent of the UP or SP lines that should be divested is from Dallas to San Antonio.

3. - The DOT brief now advocates the divestiture of the UP or SP line to Eagle Pass in order to maintain intramodal competition. See pages 5, 20, and 38. DOT inadvertently failed to state that the purchaser of this line should be required to maintain Applicants' access from San Antonio to Eagle Pass through haulage or trackage rights. Cf. DOT-4 at 38 note 39.

Respectfully submitted,

Paul Samuel Smith

Paul Samuel Smith
Senior Trial Attorney

cc: Counsel for Applicants
All Parties of Record

STB FD 32760 6-8-96 E 83976

83776

Item No. ______

Page Count 6

JUNE, 1996 #42

LAW OFFICES
McCARTHY, SWEENEY & HARKAWAY, P.
1750 PENNSYLVANIA AVE., N. W.
WASHINGTON, D. C. 20006
TELEPHONE (202) 393-5710
TELECOPIER (202) 393-5721

DOUGLAS M. CANTER
JOHN M. CUTLER, JR.
WILLIAM I. HARKAWAY
STEVEN J. KALISH
HARVEY L. REITER
DANIEL J. SWEENEY
KATHLEEN L. MAZURE

ANDREW P. GOLDSTEIN
Counsel

CHARLES J. McCARTHY
Counsel

June 3, 1996

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

By Hand Delivery

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 Grand Western Railroad Company

Dear Secretary Williams:

Enclosed for filing are a signed original and 10 copies of Brief of Formosa Plastics Corporation, U.S.A. in the above-captioned case. We also enclose a floppy disc in WordPerfect 5.1 which contains the same document.

Sincerely,

Andrew P. Goldstein

Andrew P. Goldstein
Attorney for
Formosa Plastics Corporation, U.S.A.

Enclosures

APG/rmm

ORIGINAL

FPC-3

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

BRIEF OF
FORMOSA PLASTICS CORPORATION, U.S.A.

Andrew P. Goldstein
McCarthy, Sweeney & Harkaway, PC
Suite 1105
1750 Pennsylvania Avenue, N.W.
Washington, DC 20006

Attorney for
Formosa Plastics Corporation, U.S.A.

Dated: June 3, 1996

FPC-3

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

BRIEF OF
FORMOSA PLASTICS CORPORATION, USA

This brief is filed on behalf of Formosa Plastics Corporation, U.S.A. ("FPC"). FPC operates a manufacturing facility at Point Comfort, TX, linked by private, industrial rail trackage to the line of the Union Pacific Railroad Company ("UP") at Formosa, TX. Formosa is on the UP main line between Houston and Brownsville, TX. See FPC-1 and FPC-2.

FPC is a manufacturer of chemicals and plastics components. Ninety percent of its production at Point Comfort is shipped by rail -- all via UP, the only carrier serving Formosa. Although FPC operates another, considerably smaller, facility at Baton Rouge, LA, which is served by UP and two other railroads (Illinois Central and Kansas City Southern), the Baton Rouge facility for the most part manufactures products which do not duplicate those produced at

Point Comfort and is not a competitive alternative to Point Comfort on plastics components moving to California markets. Ibid.

Although FPC believes generally that the marketplace tends to function more efficiently with greater levels of rail transportation competition, FPC's specific purpose in participating in this proceeding is with respect to California markets, which account for approximately 25 percent of FPC's plastics components shipments from Point Comfort. These markets have the potential to grow significantly and are expected to account for larger volumes of components shipped by FPC from Point Comfort.

FPC shipments of plastics components to California markets reach three points where there presently is multi-carrier competition; City of Commerce, Stockton, and Lindsay, all of which receive service from UP, Southern Pacific Transportation Company ("SP"), and Burlington Northern Santa Fe ("BNSF"). SP has been a vigorous and effective competitor for this traffic, although UP is the originating carrier. The loss of SP as a competitive carrier is bound to drive up transportation prices and reduce marketplace incentives for service competition.

Faced with similar concerns in prior merger proceedings, the Interstate Commerce Commission ("ICC") generally declined to intercede, reasoning that two competitive routes sufficed to provide adequate competition. See, e.g., Finance Docket No. 32549, Burlington Northern Inc., et al. -- Control and Merger -- Santa Fe Pacific Corporation, ___ I.C.C. 2d ___ (August 1995). Here, however, there is not only a massive record compiled by public bodies, such as the United States Department of Justice, which detail the harmful effects on competition which are likely to flow from this particular merger proposal, but, also, it is SP, the carrier poised to lose its independence, which has provided vigorous competition to FPC's California destinations.

Various solutions have been suggested to cure the heightened control which the proposed merger will give UP over chemicals and plastics components originating in south Texas, at points such as Formosa. FPC is not promoting any one such alternative to the exclusion of others. However, it must be observed that, pursuant to the settlement agreement between the applicants, on the one hand, and BNSF, on the other, BNSF is to be granted trackage rights which pass through Formosa, TX, but do not permit BN to serve FPC's interchange because Formosa is not a "two-to-one" point.

The most obvious solution to concerns regarding diminished competition in the plastics and chemical industries would be to condition merger approval upon the ability of BNSF to serve all such industries, such as FPC, who stand to suffer any diminution of competitive rail options as a result of the merger. The Board should bear clearly in mind that most industries, including the chemical and plastics components industries of which FPC is a part, are intensely competitive, and any solutions adopted by the Board in this proceeding to preserve and enhance competition should treat all such industries evenhandedly, so that if conditions are imposed to preserve or enhance competition for some industries now captive to a single railroad, like conditions should be imposed to protect competition among other industries similarly served by a single one of the applicants.

Respectfully submitted,

Andrew P. Goldstein

Andrew P. Goldstein
McCarthy, Sweeney & Harkaway, P.C.
Suite 1105
1750 Pennsylvania Avenue, N.W.
Washington, DC 20006
(202) 393-5710

Attorney for
Formosa Plastics Corporation, U.S.A.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Formosa Plastics Corporation U.S.A. has, this 3rd day of June, 1996, been served upon all parties of record, by first class mail, postage prepaid.

Andrew P. Goldstein

Andrew P. Goldstein

STB FD 32760 6-8-96 E 83915

83905

CHARLES L. LITTLE
International President

BYRON A. BOYD, JR.
Assistant President

ROGER D. GRIFFETH
General Secretary and Treasurer

united transportation union

14600 DETROIT AVENUE
CLEVELAND OHIO 44107-4250
PHONE: 216-228-9400
FAX: 216-228-0937

LEGAL DEPARTMENT

CLINTON J. MILLER, III • General Counsel
KEVIN C. BRODAR • Associate General Counsel
ROBERT L. McCARTY • Associate General Counsel
DANIEL R. ELLIOTT, III • Assistant General Counsel
MICHAEL W. PIOTROWSKI • Assistant General Counsel

May 31, 1996

Item No. ____________

Page Count 14

JUNE 1996 #85

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MAIL MANAGEMENT
I.C.C.

Vernon A. Williams, Secretary
Surface Transportation Board
Room 2215
12th Street & Constitution Ave., N.W.
Washington, D.C. 20423
(202) 939-3470

Re: Finance Docket No. 32760
UP/SP Merger

Dear Secretary Williams:

Please find enclosed the original and ten (10) copies of the Brief Submitted On Behalf Of United Transportation Union In Conditional Support Of The Application for filing in the above-captioned matter. In accordance with prior Board orders, we are also providing a diskette with this document in WordPerfect 5.1 format.

Very truly yours,

Daniel R. Elliott

Daniel R. Elliott, III
Assistant General Counsel

Enclosure

ENTERED
Office of the Secretary

JUN - 3 1996

5 Part of Public Record

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

BRIEF
SUBMITTED ON BEHALF OF
UNITED TRANSPORTATION UNION
IN CONDITIONAL SUPPORT OF THE APPLICATION

Clinton J. Miller, III
General Counsel
Daniel R. Elliott, III
Assistant General Counsel
United Transportation Union
14600 Detroit Avenue
Cleveland, Ohio 44107-4250
(216) 228-9400
FAX (216) 228-0937

Attorneys for
United Transportation Union

Dated: May 31, 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

BRIEF

SUBMITTED ON BEHALF OF

UNITED TRANSPORTATION UNION

IN CONDITIONAL SUPPORT OF THE APPLICATION

United Transportation Union ("UTU"), pursuant to the procedural schedule adopted by the Surface Transportation Board ("STB" or "Board") in this proceeding, and the Board's regulations, hereby submits the following evidence and argument in support of UTU's position herein in conditional support of the merger application.

I. INTRODUCTION AND SUMMARY

The UTU is the duly authorized representative for the purposes of the Railway Labor Act ("RLA") (45 U.S.C. §§ 151, et seq.)of various crafts or classes of operating employees employed by Applicants. The UTU and Applicants are parties to various collective bargaining agreements covering those employees. The UTU is headquartered at 14600 Detroit Avenue, Cleveland, Ohio

44107. While UTU is in support of the proposed merger as discussed herein, UTU respectfully requests the Board, pursuant to its authority under 49 U.S.C. § 11324(c) of the Interstate Commerce Act, to note that UTU's support of the merger is contingent upon the agreement(s) of the Applicants to conditions that will help mitigate the impact of job loss on its members, and UTU asks the Board to so condition any approval of the Control and Merger Application upon said agreements, pursuant to its authority under 49 U.S.C. § 11324(c).

The Verified Statement of UTU International President Charles L. Little (a copy of which is attached hereto, and the original of which was attached to the UTU's Notation of Conditions and Comments submitted in this proceeding on March 29, 1996), details these conditions in the form of commitments in applying the New York Dock protective conditions, which is the basis for UTU's conditional support of the proposed merger.

II. RELIEF REQUESTED

Pursuant to 49 U.S.C. § 11324(c), the Board's regulations at 49 C.F.R. Part 1180, the procedural orders issued in this docket by the Board, and decisions of the Board in rail mergers, UTU notes the UP has voluntarily agreed with UTU to the conditions referred to hereinabove. (See attachments to Verified Statement of Charles L. Little, copy attached hereto). Those conditions include:

(1) The automatic certification as adversely affected by the merger to the 1409 train service employees, the 85 UTU represented yardmasters, and the 17 UTU represented hostlers projected to be adversely affected in the Labor Impact Study, and to all other train service employees and UTU-represented yardmasters and hostlers identified in any Merger Notice served after Surface Transportation Board approval, and automatic certification to any engineers

adversely affected by the merger who are working on properties where engineers are represented by the UTU. Moreover, UP will supply UTU with the names and TPA's of such employees as soon as possible upon implementation of the approved merger. UP has voluntarily agreed with the UTU to these conditions.

(2) In any Merger Notice served after Board approval, Applicants will only seek those changes in existing collective bargaining agreements that are necessary to implement the approved transaction, meaning such changes that produce a public transportation benefit not based solely on savings achieved by agreement change(s). UP has also voluntarily agreed to this condition.

(3) In the event any differences between UP and UTU arise with regard to UP's application of the New York Dock conditions being inconsistent with the above-mentioned conditions (committed to by UP), UTU and UP personnel will meet within five (5) days of notice from the UTU International President or his designated representative and agree to expedited arbitration with a written agreement within ten (10) days after the initial meeting if the matter is not resolved, which will contain, among other things, the full description for neutral selection, timing of hearing, and time for issuance of Award(s). UP has voluntarily agreed with UTU to this condition.

(4) In the event UP uses a lease arrangement to complete the merger of the various SP properties into MP or UP, these New York Dock conditions would, nevertheless, be applicable. UP has also voluntarily agreed with UTU to this condition.

In view of UP's agreement to the above conditions, UTU agreed to support this merger.

III. COMMENTS IN SUPPORT OF THE MERGER

The UTU has as members more than 79,000 transportation industry workers. The UTU represents a significant percentage of the unionized work force of the Union Pacific and the Southern Pacific. UTU submits these comments in conditional support of the proposed merger of UP and SP, as described hereinabove.

UTU is the largest labor organization in the rail industry. As such, its chief responsibility is to protect the economic interests of the UTU members, whose work makes possible the efficient functioning of the nation's transportation system. As the Board is aware, labor has been very concerned about, and very critical of, rail mergers because of the significant job loss that they entail. In that connection, it should be noted that UTU supports the proposed UP/SP merger only because UP has agreed to a number of conditions in applying the New York Dock conditions, described hereinabove, that will help mitigate the impact of job loss on its members.

IV. CONCLUSION

For the foregoing reasons, UTU urges the Surface Transportation Board to approve the UP/SP merger with the conditions UP has agreed to with UTU described hereinabove imposed on the transaction.

Respectfully submitted,

Clinton J. Miller, III
General Counsel
Daniel R. Elliott, III
Assistant General Counsel
United Transportation Union
14600 Detroit Avenue
Cleveland, Ohio 44107-4250
(216) 228-9400
FAX (216) 228-0937

CERTIFICATE OF SERVICE

I, Daniel R. Elliott, III, certify that, on this 31st day of May, 1996, I caused a copy of the foregoing Brief Submitted On Behalf Of United Transportation Union to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery, on all parties of record.

D. R. Elliott

Daniel R. Elliott, III

VERIFIED STATEMENT
OF
CHARLES L. LITTLE

My name is Charles L. Little. I am the International President of the United Transportation Union ("UTU"). I have approximately 40 years of service in the railroad industry and 24 years in the rail labor movement as a union officer.

The UTU has as members more than 79,000 transportation industry workers. The UTU represents a significant percentage of the unionized work force of the Union Pacific and the Southern Pacific. I am submitting this verified statement on behalf of myself and the UTU's respective membership in support of the proposed merger of UP and SP.

I have the honor to preside over the largest labor organization in the rail industry. As such, my chief responsibility is to protect the economic interests of the UTU members, whose work makes possible the efficient functioning of the nation's transportation system. As the Board is aware, labor has been very concerned about, and very critical of, rail mergers because of the significant job loss that they entail. A recent newspaper article stated that no rail merger in the past 25 years has proceeded with major union support.

But I support the proposed UP/SP merger, and I do so for two key reasons: First, UP has agreed to a number of conditions that will help mitigate the impact of job loss on our members. Second, I am convinced that the combination of SP and UP to form a strong competitor to BN/Santa Fe is in the best interest of rail labor in the future. UP's commitments, which relate to the application of the New York Dock labor protective provisions, are attached hereto.

The second reason that I support the merger is that, in the current circumstances of rail competition in the West, it is in the long-run best interest of rail labor that SP and UP combine to form a strong, efficient competitor to BN/Santa Fe. The Board will recall that in 1995 UTU strenuously opposed the BN/Santa Fe merger. As I anticipated, that combination has resulted in significant job loss. I believe that without a merger, UP alone would lose market share to BN/Santa Fe, resulting in further job loss at that railroad. This loss of employment would __likely__ occur without any labor protection.

An independent SP likely would result in even more dire consequences for workers. The evidence submitted so far in this proceeding overwhelmingly demonstrates that SP is financially and competitively a very weak railroad. SP has failed to generate sufficient cash flow from rail operations to fund its operating expenses, capital expenditures and fixed charges in all but three years since the late 1970's, and it is still losing money. I know that SP has kept itself afloat over the last 13 years only by selling off huge amounts of real estate and investing the proceeds in rail operations. In fact in the last 13 years, SP generated close to $3 billion in cash asset sales while losing $2.4 billion in cash from rail operations.

I have first-hand experience with the consequences of SP's financial distress. In 1991, Congress acknowledged the severity of SP's problems by permitting SP to bargain with labor separately from the rest of the industry with respect to wages. As a result, most SP employees already have endured years of below-industry wages on account of SP's financial weakness.

If the UP/SP merger is not approved, the jobs of thousands of additional SP employees would be placed at risk. It is doubtful that SP would be able to compete in the future against UP and particularly against BN/Santa Fe. Rather, it is more likely that SP would be forced to discontinue operations on certain lines or even be broken up and sold off in pieces, with no labor protection for the many SP employees who would lose their jobs in this process.

Overall, it is my opinion that the job loss that UTU members will experience through the UP/SP merger would be much less than the job loss that would occur if UP and SP are left to stand alone against BN/Santa Fe.

For all of these reasons, I and the UTU membership strongly urge the Surface Transportation Board to approve speedily the UP/SP merger.

VERIFICATION

STATE OF OHIO)
) ss.
COUNTY OF CUYAHOGA)

I, Charles L. Little, being duly sworn, state that I have read the foregoing statement, that I know its contents, and that those contents are true as stated.

Charles L. Little
CHARLES L. LITTLE

SUBSCRIBED and sworn to before me this 28th day of March, 1996.

D. R. Elliott
Notary Public

DANIEL R. ELLIOTT, ATTORNEY AT LAW
Notary Public-State of Ohio
My Commission Has No Expiration Date
Section 147.03 R.C.

J. J. MARCHANT
SR. ASST. VICE PRESIDENT
LABOR RELATIONS

UNION PACIFIC RAILROAD COMPANY

1416 DODGE STREET
OMAHA, NEBRASKA 68179

February 26, 1996

Mr. Charles Little
President UTU
14600 Detroit Ave
Cleveland OH 44107

Dear Sir:

This refers to our earlier conversation concerning the issues of New York Dock protection and the certification of adversely affected UTU employees.

As you know, Union Pacific, in its SP Merger Application, stipulated to the imposition of the New York Dock conditions. The Labor Impact Study which UP filed with the Merger Application reported that 328 trainmen would transfer, that 1081 trainmen jobs (net) would be abolished, that 85 UTU represented yardmaster jobs and 17 hostler positions would be affected because of the implementation of the Operating Plan. The Labor Impact Study also indicates that a number of engineer positions will be affected but does not indicate how many, if any, of those are working on properties where engineers are represented by the UTU.

Within the New York Dock conditions, Section 11 addresses disputes and controversies regarding the interpretation, application or enforcement of the New York Dock conditions (except for Sections 4 and 12). Under Section 11, perhaps the two most serious areas for potential disputes involve whether an employee was adversely affected by a transaction and what will be such employee's protected rate of pay.

In an effort to eliminate as many of these disputes as possible, Union Pacific makes the following commitment regarding the issue of whether an employee was adversely affected by a transaction: UP will grant automatic certification as adversely affected by the merger to the 1409 train service employees, the 85 UTU-represented yardmasters and the 17 UTU represented hostlers projected to be adversely affected in the Labor Impact Study and to all other train service employees and UTU represented yardmasters and hostlers identified in any Merger Notice served after Board approval. UP will also grant automatic certification to any engineers adversely affected by the merger who are working on properties where engineers are represented by the UTU. UP will supply UTU with the names and TPA's of such employees as soon as possible upon implementation of approved merger.

Union Pacific commits to the foregoing on the basis of UTU's agreement, after merger approval, to voluntarily reach agreement for implementation of the Operating Plan accompanying the Merger Application. UP also commits that, in any Merger Notice served after Board approval, it will only seek those changes in existing collective bargaining agreements that are necessary to implement the approved transaction, meaning such changes that produce a public transportation benefit not based solely on savings achieved by agreement change(s).

Even with these commitments, differences of opinion are bound to occur. In order to ensure that any such differences are dealt with promptly and fairly, Union Pacific makes this final commitment: If at any time the International President of the UTU (or his designated representative) believes Union Pacific's application of the New York Dock conditions is inconsistent with our commitments, UTU and UP personnel will meet within five (5) days of notice from the UTU International President or his designated representative and agree to expedited arbitration with a written agreement within ten (10) days after the initial meeting if the matter is not resolved, which will contain, among other things, the full description for neutral selection, timing of hearing, and time for issuance of Award(s).

In view of Union Pacific's position regarding the issues of New York Dock protection and the certification of employees, I understand that the UTU will now support the UP/SP merger.

Sincerely,

cc: B. A. Boyd, Jr.
Asst. President UTU

UNION PACIFIC RAILROAD COMPANY

J. J. MARCHANT
[illegible] VICE PRESIDENT
[illegible] RELATIONS

1416 DODGE STREET
OMAHA, NEBRASKA 68179

February 26, 1996

Mr. Charles Little
President UTU
14600 Detroit Avenue
Cleveland, OH 44107

Dear Mr. Little:

This refers to our earlier discussions concerning UTU's support of the UP/SP Merger.

During those discussions, you inquired whether as a part of the UP/SP Merger, some or all of the DRGW, SSW, SPCSL or SPT might be leased to the MP or UP. If so, you asked what UP's position would be with regard to the applicability of the New York Dock protective conditions to such a lease.

Currently, we do not intend to use a lease arrangement to complete the merger of the various SP properties into MP or UP. However, if our plans were to change and one or more of the SP properties was leased to MP or UP, the New York Dock conditions would, nevertheless, be applicable. This would be consistent with the fact that UP has agreed to accept imposition of the New York Dock protective conditions in this proceeding.

I trust this accurately reflects our discussions.

Sincerely,

[signature]

STB FD 32760 6-7-96 E 84106

Item No. ________

Page Count 3

June 1996 #124

84166

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

BRIEF OF THE PORT OF TACOMA

The Port of Tacoma ("POT") submits this brief in support of the merger proposed by Union Pacific and Southern Pacific.

1. POT is a port district and municipal corporation of the State of Washington. POT and the Port of Seattle ("POS") together enjoy the ranking of second largest container load center in North America. A recent study projects that container traffic (20 foot equivalents) moving through both ports will double by 2015 to 4.6 million, and Midwest corn exports through Washington State ports could grow 66 percent, exceeding 10 million metric tons by 2015. Thus, POT is, and will increasingly be, dependent upon rail service to ensure competitiveness.

2. POT plays an important part in assuring the region's economic vitality and depends heavily on the ability to move rail freight through the region quickly, economically, and efficiently. The maintenance and enhancement of the region's freight railroads play an important role in maintaining the competitive position of the region's ports in relation to other West Coast ports.

3. POT supports the UP/SP merger, POT, POS, and UP share a common concern over the quality of rail service to and from the Pacific Northwest and mutually desire to ensure long term reliable service and access between intermodal

rail terminals over the main lines of UP and SP in order to accommodate future increases in demand for rail freight service.

4. POT, POS, and UP have entered into a cooperative agreement that, among other things, assures that UP will respond to market demands by increasing capacity for rail traffic between Puget Sound and Chicago and along UP's new single line route in the I-5 Corridor through appropriate investments and operating improvements as described in the UP/SP merger application. (A copy of the agreement was previously submitted by POT with its verified statement.) POT and POS will actively support such improvements to help assure all governmental approvals are obtained quickly.

5. Jointly and cooperatively, POT, POS, and UP will address such issues as, mainline capacity, port access, grade separation, intermodal service, potential diversion, passenger rail issues, etc. This cooperative effort demonstrates the mutual commitment POT, POS, and UP have made to ensure that the Puget Sound region maintains a viable, competitive rail system in relation to other West Coast ports, and illustrates how well the ports can work with the private railroad sector to ensure economic health for the region.

6. The Burlington Northern/Santa Fe merger, which POT also supported, created a much larger and more efficient railroad than either UP or SP. The UP/SP merger, as conditioned on the agreement with BN/Santa Fe, will not only restore competitive balance in the western United States, but it will also enhance competition. The UP/SP merger will create single line service along the West Coast for the first time. The UP/SP agreement with BN/Santa Fe will add competition to that new single line service. POT and the entire Pacific Northwest will receive the direct and immediate benefits of those and many other improvements to be produced by the UP/SP merger.

7. For all the reasons set forth above, POT requests that this Board approve the UP/SP merger and the BN/Santa Fe agreement.

Respectfully submitted,

Donald A Meyer

Donald G. Meyer
Deputy Executive Director
Port of Tacoma
PO Box 1837
Tacoma WA 98401
206-383-9410

Dated this 3rd day of June, 1996.

CERTIFICATE OF SERVICE

I certify that on this June 3rd, 1996, copies of the Petition of the Port of Tacoma to Intervene, for Leave to File Brief and to Become Party of Record and the Brief of the Port of Tacoma, were served on all parties of record by first class mail, postage prepaid.

Donald G. Meyer

Donald G. Meyer
Deputy Executive Director
Port of Tacoma
PO Box 1837
Tacoma WA 98401
206-383-9410

UPSPBrie

STB FD 32760 6-6-96 E 83929

83729

ORIGINAL

LAW OFFICES
FRITZ R. KAHN, P.C.
SUITE 750 WEST
1100 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-3934

(202) 371-8037
FAX (202) 371-0900

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JUN 3 1996
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I.C.C.

VIA HAND DELIVERY

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
Washington, DC 20423

Item No. ____________

Page Count 6

JUNE, 1996 # 14

Dear Secretary Williams:

Enclosed for filing in Finance Docket No. 32760, Union Pacific Corp., et al.--Control and Merger--Southern Pacific Rail Corp., et al., are the original and twenty copies of the Brief of Shell Chemical Company.

Extra copies of the Brief and of this letter are enclosed for you to stamp to acknowledge your receipt of them and to return to me in the enclosed self-addressed, stamped envelope.

By copy of this letter, service is being effected upon counsel for each of the parties.

If you have any question concerning this filing or if I otherwise can be of assistance, please let me know.

Sincerely yours,

Fritz R. Kahn

enc.
cc: Judge Jerome Nelson
All parties
Mr. Brian P. Felker

ENTERED
Office of the Secretary

JUN - 4 1996

5 Part of Public Record

ORIGINAL

SHL-6

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MANAGEMENT
I.C.C.

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C. 20423

Finance Docket No. 32760

UNION PACIFIC CORPORATION, *et al.*,

--CONTROL AND MERGER--

SOUTHERN PACIFIC RAIL CORPORATION, *et al.*

BRIEF
OF
SHELL CHEMICAL COMPANY

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Fritz R. Kahn
Fritz R. Kahn, P.C.
Suite 750 West
1100 New York Avenue, NW
Washington, DC 20005-3934
Tel.: (202) 371-8037

Attorney for
Shell Chemical Company

Dated: June 3, 1996

SHL-6

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C. 20423

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Finance Docket No. 32760

UNION PACIFIC CORPORATION, et al.,
--CONTROL AND MERGER--
SOUTHERN PACIFIC RAIL CORPORATION, et al.

BRIEF
OF
SHELL CHEMICAL COMPANY

Pursuant to the decision of the Interstate Commerce Commission, served December 27, 1995, Decision No. 9, Shell Chemical Company submits the attached Statement of Mr. Brian P. Felker, Manager - Products Transportation, dated this day, as its Brief herein.

Respectfully submitted,

SHELL CHEMICAL COMPANY

By its attorney,

Fritz R. Kahn

Fritz R. Kahn
Fritz R. Kahn, P.C.
Suite 750 West
1100 New York Avenue, NW
Washington, DC 20005-3934
Tel.: (202) 371-8037

Dated: June 3, 1996

Shell Chemical Company

One Shell Plaza
PO Box 2463
Houston TX 77252

STATEMENT
OF
BRIAN P. FELKER

Now that we have seen much to-ing and fro-ing from various interested parties including, but not limited to, other railroads, shippers and shipper groups, the following is to clarify our position as well as redefine our role in these proceedings.

1. It should be clear that there are grave concerns from a huge multitude of shippers, shipper groups and government bodies, that this merger presents an unprecedented number of noncompetitive situations throughout all of the Western United States. These can only be addressed by having a mechanism, mandated by condition of merger, which gives shippers a chance to seek rate relief if necessary. Declaring the combined territories of BNSF and UPSP as market dominant is the only true balance against abuse of market power. In the cases where competition may exist, but only as decided by the two players involved, this requirement becomes moot.

2. The CMA Agreement, while directionally correct, only scratches the surface of the potential for relief for chemical shippers. Furthermore, this was achieved with such a small percentage of CMA membership that it certainly does not represent the industry.

3. We feel that some remedy as requested in No. 1 will eventually come to pass over time via governmental intervention, but, until that happens, divestiture of parallel lines in Texas, Louisiana and up to St. Louis is required to ensure <u>true</u> competition in these corridors.

We implore The Board to act <u>NOW</u> to bring reason to this matter. Without these safeguards, future abuse of market power will require a return to a greater degree of regulation which neither shippers nor railroads want.

Brian P. Felker, being duly sworn, deposes and says he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

Brian P. Felker

Brian P. Felker

Subscribed and sworn to before me this 3rd day of June, 1996.

W. W. Schilling

W. W. Schilling

My commission expires: 8-2-97

y:\felker\upspcomp.doc

W. W. SCHILLING
Notary Public, State of Texas
My Commission Expires 8-2-97

CERTIFICATE OF SERVICE

Copies of the foregoing Brief this day were served by me by mailing copies thereof, with first-class postage prepaid, to counsel for each of the parties.

Dated at Washington, DC, this 3rd day of June 1996.

Fritz R. Kahn

Fritz R. Kahn

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GALLAND, KHARASCH, MORSE & GARFINKLE, P.C.
ATTORNEYS AT LAW

CHARLES H. WHITE, JR.
DIRECT LINE: (202) 342-6789
FACSIMILE: (202) 342-5219

CANAL SQUARE
1054 THIRTY-FIRST STREET, N.W.
WASHINGTON, D.C. 20007-4492
TELEPHONE: (202) 342-5200

June 3, 1996

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The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Interstate Commerce Commission Building
12th Street and Constitution Avenue, N.W.
Washington, D.C. 20423

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

Dear Mr. Williams:

Enclosed for filing please find an original and twenty copies of Brief on Behalf of Utah Railway Company.

I have served counsel for applicants by hand, and have mailed true copies of the foregoing to counsel for parties of record by first-class mail, postage prepaid.

Will you kindly stamp and return the enclosed copy of this service letter when the documents are filed.

Very truly yours,

Charles H. White, Jr.
Counsel for Utah Railway Company

ENTERED
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Enclosures

Item No.

Page Count 49
JUNE, 1996 #53

XINJIYUAN-GKMG LAW OFFICE
AFFILIATED FIRM
NO. 535-538, FENGYUAN CRESTWOOD HOTEL
NO. 23, DONG JIAO MIN XIANG
BEIJING 100006 PEOPLE'S REPUBLIC OF CHINA
TEL: 011-86-1-523-5567 FAX: 011-86-1-523-5569

CERTIFICATE OF SERVICE

I, Charles H. White, Jr. certify that on this the 3rd day of June, 1996 I served true copies of BRIEF ON BEHALF OF UTAH RAILWAY on counsel for applicants by hand delivery, and on counsel for parties of record by first-class mail, postage prepaid.

Charles H. White, Jr.
Counsel for Utah Railway Company

UTAH-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 CORPORATION AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

BRIEF ON BEHALF OF UTAH RAILWAY COMPANY

Charles H. White, Jr.
Galland, Kharasch, Morse & Garfinkle
1054 31st Street, N.W.
Washington, D.C. 20007
(202) 342-6789

Counsel for Utah Railway Company

June 3, 1996

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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 CORPORATION, AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

BRIEF ON BEHALF OF UTAH RAILWAY COMPANY

I.

INTRODUCTION

In a case as massive, multi-partied, and time-constrained as this, we believe it appropriate for each party to focus narrowly on, and specifically identify, its position. At the outset, therefore, we will briefly state Utah Railway's ("UTAH") position and viewpoint.

A. Utah Railway's Position

UTAH strongly supports its Settlement Agreement as being both pro-competitive on the Central Corridor and necessary should the Board decide to approve the Primary Application. As a natural corollary, UTAH opposes Montana Rail Link's ("MRL") Inconsistent Application as an opportunistic "remedy" for a non-existent problem, which, ironically, would significantly lower the level of rail competition along and beyond the Corridor. Moreover, as a co-owner of significant segments of the Central Corridor -- which are the subject of the UTAH Settlement Agreement, the Inconsistent Application and the 1913 Operating Agreement -- UTAH also strongly protests MRL's proposal as undoing the careful property rights accommodation made both by the UTAH Settlement Agreement, and the historic 1913 Operating Agreement which originally brought competition to the Central Corridor.

B. Utah Railway's Viewpoint

As pointed out in UTAH's Response in Support of the Utah Railway Company's Settlement Agreement, UTAH-3, p. 1, its views are limited to its area of concern and interest . . ." the preservation of vigorous competition on the Central Corridor. UTAH feels that it is in no position to opine on the competitive impact of the proposed merger across the broad expanse of territory served by the Primary Applicants."

However, we can, and do, offer our view as to coal traffic originating on, and moving beyond, the Central Corridor. UTAH's long experience both competing and cooperating with the Primary Applicants (and one of their predecessors, the Denver & Rio Grande Western) in the movement of Utah coals qualifies us to make a meaningful contribution to the record in this area.

C. Utah Railway's Significance on the Central Corridor

UTAH is a relatively small railroad, operating almost a hundred miles in Carbon and Emery Counties, Utah -- in the heart of the Central Corridor's coal producing area. (See maps attached as Appendix A to First West, V.S., UTAH-3) However, its competitive significance vastly transcends its present limited mileage. "Since December 1, 1917, when the first train load of twenty-eight cars left Hiawatha for Provo, Utah Railway Company has hauled nearly 130 million tons of coal or approximately twenty-five percent of the commercial coal mined in Utah." Dr. A. K. Powell, "Utah Railway Company -- An Abridged History," UTAH-3, p. 12. Astonishingly, "Today more than 55 percent of Western U.S. coal moving to the countries on the Pacific Rim through Long Beach and Los Angeles harbors is originated by UTAH." Second West V.S., UTAH-5, p. 2.

UTAH is a major competitor in the movement of high quality Utah coal. It stands to become a more important competitive force should the Board approve the UP/SP merger subject to the BNSF and UTAH Settlement Agreements. Moreover, the clean burning, high Btu Utah coal itself will become competitively more important as the next phase of the Clean Air Act comes into effect, and the implications of the Federal Energy Regulatory

Commission's actions opening the nation's electricity grid to all suppliers of electricity become known. See Second West V.S., supra, fn.1, p. 3.

In sum, UTAH is a strong, well established railroad. If the merger, with its Settlement Agreements, is approved, it will become a bigger competitive force on the Corridor.

D. Utah Railway's Ownership Interests on the Central Corridor

An important foundation for the UTAH Settlement Agreement -- and an element thus far ignored by Inconsistent Applicant MRL -- is the fact that UTAH enjoys important co-ownership rights with SP (as DRGW's successor) on key trackage through the coal producing heart of the Central Corridor. UTAH does not operate and compete on the Central Corridor by virtue of mere trackage rights suffrage, nor is its ownership interest easily severed from SP's (DRGW's) so as to accommodate an ordered divestiture of SP. UTAH's and SP's ownerships and cross-rights are purposely intertwined and made inseparable without the written consent of each party. Embodied in a court-tested and approved operating agreement (see UTAH-3 Barker V.S., App. A), UTAH's property rights on the Central Corridor have allowed it to become a meaningful competitive force over the years. As stated in "Utah Railway Company -- An Abridged History," UTAH-3, p. 9:

> While service has been the key to Utah Railway's long-term and ongoing success, also of vital importance has been the joint operating and trackage agreement. Still in effect after more than 82 years, the agreement has required cooperation between the two railroads [UTAH, and now SP], especially in the face of outside challenges and natural disasters. The agreement has allowed two railroads to compete on a comparable footing much to the benefit of the public.

Inconsistent Applicant's attempt to unilaterally displace SP without concern for, much less acknowledgment of, the operating and property rights agreement jeopardizes, indeed negates, the careful accommodation which supported rail competition on the Central Corridor coal fields for over 80 years. It cuts not only at the Primary Application and the UTAH Settlement Agreement, but also at the heart of Utah Railway's operations which have benefited the coal producers and users for so long. UTAH must, and will, oppose MRL's opportunistic maneuver in this and in all appropriate forums, in order to protect both its time-tested competitive service, and its very viability.

* * *

In summary, UTAH's interests are defined primarily by its view of rail competition for coal moving on and beyond the Central Corridor. UTAH is today a significant and competitive originator of coal moving in joint line service with both Primary Applicants, UP and SP.

While protecting its property rights in careful negotiations with UP/SP, UTAH reached an accommodation which will enhance its competitive position on the Central Corridor. It will here argue to protect its competitive operating position on the Corridor, and its competition-enhancing Settlement Agreement both as being in the public interest and necessary should the Board decide to grant the Primary Application. UTAH, however, does not take a position beyond these considerations.

In order to put UTAH's unique position in perspective, we commissioned a professional historian to briefly outline UTAH's genesis and operations. UTAH-3. We will now summarize the highlights of that study to put this brief in sharper focus.

II.

HISTORY OF UTAH RAILWAY OPERATIONS ON THE CENTRAL CORRIDOR

A. Origins of Shared Ownership of the Central Corridor

Utah Railway was created specifically to bring competition to what we now call the Central Corridor. By 1883 the Denver & Rio Grande ("D&RG") had crested the Wasatch Mountains and linked Denver to Salt Lake City. But while the D&RG's high mountain line traversed Utah's rich coal fields, it did not provide the opportunity to fully develop those fields. For almost three decades after the line's completion, all the commercial coal mined in eastern Utah came from mines owned by D&RG's subsidiary companies assembled under the Utah Fuel Company.

Even after this monopoly was broken by legal action, the practical anticompetitive fact of the D&RG rail monopoly remained. Independent mines still had to rely on the Denver & Rio Grande rail service for access to Salt Lake City, and that carrier's subsidiary, Utah Fuel Company, remained their "most ardent competitor." "Utah Railway Company -- An Abridged History," supra at 2. Independent mines were developed and built their own rail connections to D&RG, but the D&RG/Utah Fuel combination continued to hold a strong grip on the market.

United States Smelting Refining and Mining Company sought to break the D&RG/Utah Fuel stranglehold on Utah's coal fields. It formed United States Fuel Company to develop new mining operations, and Utah Railway, to move that, and the independent mines', coal out of the mountains in competition with the D&RG. See "Abridged History" supra p. 3.

Utah Railway management began to survey the most appropriate routing to follow in order to reach the eastern Utah coal fields in Carbon and Emery Counties. After much expensive exploration and survey work, the new carrier planned to build along a Thistle-Soldier Summit-Helper route, *i.e.*, to essentially parallel the D&RG trans-mountain route -- on today's "Central Corridor." Id. at 6; see also maps attached to West V.S., UTAH-3, Appendix A.

While its trans-summit route was being planned, UTAH in 1912 began construction on a line from Hiawatha, Utah to Utah Railway Junction, a distance of 22.3 miles. This was completed in 1914.[1/] Similarly, UTAH began building its line between Thistle and Provo, Utah on September 1, 1913. This line was completed one year later. (See map at First West V.S., supra for a depiction of these proprietary lines).

Meanwhile D&RG had undertaken a project both to double track and improve the grade on its trans-mountain "Central Corridor" main line which UTAH intended to parallel. Now recognizing that UTAH was serious in its undertaking to reach the coal fields, and further that duplicative building of mountain railroads is inherently wasteful, D&RG approached UTAH's parent to propose a joint trackage agreement between Helper and Provo, Utah on the Central Corridor. After extensive negotiations, D&RG offered UTAH use of its

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1/ A line from Mohrland to Hiawatha of some 3.5 miles was previously built by an independent coal company. It was purchased by UTAH in 1914.

double tracked route over Soldier Summit in return for use of UTAH's Provo to Thistle line and its participation in maintenance of the extended shared-use line.

The resulting "Operating and Trackage Agreement between the Denver and Rio Grande Railroad Company and Utah Railway Company" became effective on November 1, 1913. See Appendix A to Larker, V.S. UTAH-3.

As Dr. Powell states in the "Abridged History," UTAH-3, p. 9:

> The agreement was a calculated gamble for both railroads. For the Denver and Rio Grande it offered help in completing a long-needed double track across the mountain and reducing the power needed to haul coal by improving the grade on line. Utah Railway would help pay the construction and maintenance costs.

Given the critical importance of the joint venture and shared ownership of the crucial segment of the Central Corridor to both railroads, each agreed to be perpetually bound by the 1913 Agreement, and to require express written consent from the other party before any benefit of the agreement could be transferred to a third party.[2]

The Agreement also called for D&RG to operate UTAH's trains for the initial three years of the new carrier's existence. As Dr. Powell stated, "Abridged History," supra p. 9: ". . . Denver & Rio Grande officials reasoned that Utah Railway would operate only a short time before it would be dissolved and sole possession of the trackage would be in their hands." UTAH management had very different ideas. It gave notice of its intent to begin its

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[2] The original draft of this language did not apparently require UTAH's written consent for D&RG action. UTAH, however, successfully demanded such a right and mutual obligation. See Dr. Powell's parenthetical comment at "Abridged History," supra at 9.

own operations as soon as it could under the Agreement. UTAH began physical operations on its own in 1917.

In addition to the joint use Central Corridor trackage between Utah Railway Junction and Provo, UTAH also operates its proprietary line to Mohrland, Utah (see maps at First West V.S., supra). Thus, the carrier is both a Central Corridor operator and as an originator of coal on its proprietary line. This aspect has important consequences in light of the Applicants' "two-to-one" offer which we will discuss below.

UTAH today operates 98 miles of trackage: 73 on the Central Corridor (52 between Utah Railway Junction and Thistle, and 21 between Thistle and Provo); and 25 on its proprietary line between Utah Railway Junction and Mohrland.

In short UTAH is present on the Central Corridor both as a segment owner and participant in a court-approved operating agreement[3/] by which cross-rights and obligations were created for both UTAH and SP's predecessor. Moreover, UTAH's joint facilities in Provo, constructed with UP's predecessor, the San Pedro, Los Angeles & Salt Lake Railroad further underscore the intertwined nature of UTAH's presence on the Central Corridor.

That presence is substantial. UTAH has handled 25 percent of all the commercial coal mined in Utah since it began operations in 1917. It also has been of crucial importance

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[3/] See, e.g., The Denver and Rio Grande Western R.R. v. Utah Ry., Civil No. C-83-1130J, U.S.D.C., D. Utah 1985.

in opening Utah's coal fields. As summarized by Sutton in Centennial History of Utah (quoted by Dr. Powell at UTAH-3, p. 16):

> [Utah Railway] provided rail connections to many of the Carbon coal mines, and undoubtedly influenced to a great degree the decision of the Rio Grande to improve its own line over the mountains. It hastened the development of the Utah coal industry, as the Rio Grande, being deluged with coal traffic, was not particularly desirous of extending trackage to additional mines at that time; and had it not been for the impetus provided by the presence of the new line, a number of years may have passed before the Rio Grande made the necessary improvements in its system, although the wisdom of such a move should have been apparent (footnote omitted).

See also "Brief of Utah Railway Company" in ICC No. 12964, In the Matter of Consolidation of Railroad Properties of the United States Into a Limited Number of Systems, for a brief history of Utah Railway and the 1913 Agreement.

In summary, UTAH is, and has long been, a substantial competitor on the Central Corridor both in its own right, and by virtue of the 1913 Operating Agreement.

B. Cooperation and Competition on the Corridor: The "Two-to-One" Test

The Operating Agreement, which placed UTAH on the Central Corridor in the role of co-owner and joint operator, also set the stage for effective competition. "The agreement has allowed two railroads [UTAH and D&RG, now SP] to compete on a comparable footing much to the benefit of the public." "Abridged History," supra at 9. Along with the joint facility agreement with UP's predecessor at Provo, the 1913 Agreement allowed UTAH to provide real competition on the Corridor -- to the extent of 25 percent of the coal mined in eastern Utah since 1917. Id. at 12.

The bulk of UTAH's tonnage over the years has been interchanged with UP at Provo for furtherance on that carrier's extensive system. Today, however, an important exception is in place. As Utah Railway's John West explains, "Today more than 55 percent of Western U.S. coal moving to the Pacific Rim through Long Beach and Los Angeles harbors is originated by UTAH." Twice as much of this tonnage moves in joint line service with SP than in UP joint line service. Second West V.S., p. 2, UTAH-5.

In short, UTAH cooperates and competes with both Primary Applicants on the Central Corridor. With respect to coal moving off its proprietary line in eastern Utah, UTAH can connect only with the Joint Applicants UP or SP.

In its dual capacity as a short line originator of coal moving from its proprietary line (the Mohrland-Utah Railway Junction line) - and, thus, as a surrogate for those on-line mines, and as a co-owner and co-operator of a critical segment of the Central Corridor, with access only to UP and SP in either case, UTAH management believed it had standing to protect its interests under what became UP's "two-to-one" formula. In that light, rather than a legalistic demand based on the 1913 Operating Agreement, UTAH management began negotiations with UP early in the process.

UP management was very positive and professional in those early negotiations. As UTAH's President, Gary Barker, explained, Barker, V.S., p. 3, UTAH-3: "The UP staff showed serious concern for the competitive situations that could evolve for UTAH and our shippers." Mr. Barker and his staff also "gained hope from UP's initiative to restore competition in the so-called 2-to-1 areas." Id. UTAH management felt that its more than 80 years' experience in moving coal out of the mountains in partnership with UP entitled UTAH to a careful consideration of its competitive needs.

Of course, on the other hand, UTAH management simultaneously felt "extreme peril for the future of UTAH" if it could not negotiate an agreement with its only two interchange partners, the merging UP and SP. Id. at 2.

Akin to the dual cooperative/competitive position which has long characterized UTAH's position on the Central Corridor, Utah Railway's management approached negotiations with UP with mixed optimism and a sense of disaster should the negotiations fail. In a very real sense, history was repeating itself. As in 1913, UTAH had to find a way to continue to exist as a competitive force on the Central Corridor. But instead of needing to find a way to be a co-operator of the important segment of the Corridor, UTAH now had to find a way to continue to compete in the face of the merger of its two heretofore competitive connection options.

III.

NEGOTIATION OF THE UTAH RAILWAY SETTLEMENT AGREEMENT

A. Prelude to the BNSF Global Settlement

As UTAH President Gary Barker pointed out, UTAH management began its dialog with the UP negotiating staff on the basis of its belief that UTAH's unique position on the Central Corridor -- an originating carrier having competitive connections only with the merger partners, UP and SP -- entitled it to be considered under the "two-to-one" test. "We argued and UP agreed that UTAH should be afforded a continuance, or preservation, of competition under the '2-to-1' formula." Barker V.S., at 3. Moreover, UTAH's 80-year history of cooperation with UP, along with UP management's serious concern for the competitive welfare of UTAH and its shippers (Id.) gave UTAH some hope that a competitive solution would be found to preserve UTAH's competitive position on the Central Corridor.

Since the results of UP's various settlement negotiations are now a matter of public record, we can report that the scope of UTAH's initial negotiations ranged far beyond its ultimate Agreement. This is in no way raised to fault UP's negotiating staff, but rather to emphasize UTAH's surprise when, after a period of silence from Omaha, the BNSF global settlement agreement was announced.

To the credit of UP and UTAH's managements, however, the dialog did not end with the announcement of the BNSF Settlement Agreement. UP remained willing to try to find a solution for its old mountain railroad ally and the UTAH shippers. See Barker V.S., at pp. 3-4; and First West V.S., at p. 3. By virtue of this continued effort, such a solution was found.

B. Negotiating to Remove an Impediment

Only after the BNSF Settlement Agreement was announced did UTAH raise the issue of the 1913 Operating Agreement's prohibitions on the transfer of operating rights on the shared Central Corridor property. UTAH President Barker decided to directly notify BNSF's President in light of BNSF's position under its Agreement. As Mr. Barker reports, he ". . . felt it appropriate to inform BNSF of the technical difficulties raised by BNSF's unapproved access to our joint facilities, and wrote to Mr. Krebs in that regard (Appendix B)." Barker V.S., at p. 3.

Again, it is important to note that negotiations with UP continued on a positive and business-like manner during this period, and, further, that a new constructive dialog began with BNSF. Id. at 4. These discussions quickly transcended the operational and technical obstacles presented by the 1913 Operating Agreement and sought a constructive, pro-competitive solution to UTAH's and its shippers' vulnerabilities. Such a solution was found and embodied in the Utah Railway Settlement Agreement, Barker V.S., Appendix C.

C. Achieving a Pro-Competitive Accommodation

The Utah Railway Settlement Agreement, which grants BNSF access to UTAH property on the Central Corridor (Barker, V.S., App. C, par. 3, p. 4), is necessarily linked with the BNSF Settlement Agreement. Both adopt the same millage rate for trackage rights operations, and UTAH expects to be able to adjust and "fine tune" that rate in tandem with BNSF's rate. See Open Letter to Utah Governor and Legislature at Barker, V.S., App. E, p. 2.

Not only does the Utah Railway Settlement Agreement remove the operational impediment for BNSF access under the two-to-one formula, it also assures UTAH's continued competitiveness on the Corridor should the Board approve the Primary Application. The Agreement grants UTAH trackage rights to Grand Junction, Colorado. "The 178-mile reach to Grand Junction is well within [UTAH's] skill and manpower resources and is a natural extension of UTAH's current operations. First West V.S., at p. 6.

Importantly, the Settlement Agreement also provides UTAH with exclusive access to a significant new coal loading facility to be created by Cyprus Amax. Agreement, supra at par. 2, p. 3. The shipper willingly agreed to this access. Barker V.S., App. D. The shipper's acceptance of this provision is "the best evidence of [its] confidence in [UTAH's] operations." First West V.S., at 4.

In addition to the Cyprus Amax access, the Agreement provides UTAH with competitive access to the Savage Coal Terminal loading facility on CV Spur. Agreement, par. 1, p. 1.

After the Utah Railway Settlement Agreement was negotiated, the Primary Applicants' negotiations with third parties resulted in additional grants of UTAH access. A major waste receiver, ECDC Laidlaw, negotiated and received access by UTAH. Similarly Moroni Feed, a cooperative of approximately 100 independent family farms in Central Utah, sought and received access by UTAH. Second, West V.S., at 4.

As we will show below, the ECDC access will provide important opportunities for developing "backhaul" marketing initiatives both east and west-bound. Moreover, UTAH's exclusive access to (as agreed by the shipper) the important new Cyprus Amax facility will allow UTAH "to be an 'honest broker' carrier of a significant amount of joint-line traffic moving in conjunction with either BNSF or UP/SP lines." Id. at pp. 9-10.

In summary, UTAH management believes its Settlement Agreement represents a pro-competitive accommodation. It has the willingness and wherewithal to effectuate the Agreement immediately should the Board decide to approve the Primary Application. First West V.S., pp. 6-7; Hensley V.S., UTAH-3, p. 2.

IV.

THE UTAH RAILWAY SETTLEMENT AGREEMENT IS PRO-COMPETITIVE

A. Overview of the Utah Railway Settlement Agreement

It is easy to understand why UTAH's management views its Settlement Agreement as providing new competitive opportunities. It extends the railroad's reach in a meaningful and manageable way. It provides access to important new supplies of coal to move on the Central Corridor. It allows UTAH to continue to compete on the Central Corridor as a joint line partner with, or "honest broker" between, UP/SP and BNSF. And its very existence has incited other parties to negotiate further extensions of UTAH service. Second West V.S., at p. 4. This management enthusiasm is even easier to understand given the dire consequences posed for UTAH by an unconditioned (or non-settlement agreement burdened) merger of UP and SP. See Barker V.S., at p. 2; Hensley V.S., p. 1. An eminent public policy expert, however, came to the same conclusions as did UTAH's management.

Dr. Colin Blaydon, Dean Emeritus and Professor at the Amos Tuck Graduate School of Business Administration at Dartmouth College, viewed the Settlement Agreement from the perspective of Utah Railway's position on the Central Corridor and succinctly reached the following conclusions, Blaydon V.S. UTAH-5, pp. 17-18:

> The conclusions that I reach regarding the competitive impact of the UTAH Settlement Agreement with the merged UPSP are that:

- UTAH will be able to offer expanded and more efficient service over an extended service area due to expanded trackage rights;
- UTAH will be able to expand westward coal shipments due to;
  - More efficient combined routes on the merged UPSP;
  - Expanded customer access to potential west coast customers through the BNSF network;
  - More efficient backhaul opportunities on the UPSP and expanded backhaul customer access on the BNSF;
- UTAH will provide the market discipline to assure competitive rates for coal customers in the western region by means of its cost efficient operations and access to Utah coal acting either in conjunction with the BNSF or with the UPSP;
- UTAH will be able to extend coal markets east of Utah through a more efficient hand off at Grand Junction and expanded direct customer access on

the BNSF system. For this reason the BNSF agreement with UPSP is preferable to a single entity operating only along the Central Corridor, e.g. Montana Rail Link

- BNSF connections are important to UTAH because BNSF coverage offers substantial opportunity for two line service to many markets for Utah customers (coal and waste);
- UTAH will be able to develop expanded incoming traffic from both the west and the east from more efficient routes of the combined UPSP and the extended reach of BNSF; and
- In summary, UTAH will provide the competitive nexus to assure effective competition to a key part of the Central Corridor, particularly the Utah coal fields. This is possible because of its own expanding trackage, access to additional customers, more efficient use of combined UPSP routes and efficient access to the extensive BNSF systems to reach new customers with two line service.

Dr. Blaydon's, and UTAH management's, conclusions, of course, focus on the Central Corridor from UTAH's perspective.

As we pointed out above, the UTAH and BNSF Settlement Agreements are effectively linked in terms of operations on the Corridor, and on trackage rights rates charged for these operations insofar as they are conducted on the Primary Applicants' property. BNSF similarly views the competitive potential raised by the linked Settlement Agreements. UTAH's John West explained, "My colleagues and I have begun a series of encouraging discussions with BNSF concerning new joint line initiatives for the future. We have received the collaborative attention at the highest level of BNSF's management and marketing staffs." First West, V.S., at p. 9.

In addition to this best evidence of BNSF's interest, that carrier's President Krebs stated that his system is committed to vigorously pursuing the market opportunities presented by the Agreements. Krebs V.S. BN/SF-54, p. 3. The BNSF trackage rights "provided in the Agreements [will] fill in the gaps in BN/Santa Fe's western route system, providing a new trunk line traversing the Central Corridor between Northern California and Denver, and giving us access to western natural resources industries and shippers to and from Nevada and Utah." Id. at 5. And, from a perspective obviously broader than UTAH's, Mr. Krebs reviewed the two-to-one formula in the context of replacing SP's competitive service. ". . . I believe that shippers potentially affected by the loss of two-carrier service from UP and SP should enjoy replacement service options that are, in general, at least as strong as the service options they previously enjoyed from the Southern Pacific. Only BN/SF has both the resources and the rail network large enough to provide full, vigorous competition to the benefit of these potentially affected shippers." Id. at 6.

UP/SP's principal management coal witness is no less sanguine concerning UTAH's opportunities under the Settlement Agreements, Nock V.S., UP/SP 231, p. 19: "We have to recognize that SP's Colorado/Utah coal franchise will in fact face intensified competition following the merger. This is a direct result of our settlement agreements with BN/Santa Fe and the Utah Railway, which will open up important new market opportunities for Utah coal in the Midwest and East" (emphasis in the original).

In short, the linked BNSF and UTAH Settlement Agreements fully warrant Professor Blaydon's overview that, if the merger is approved subject to the Settlement Agreement, "UTAH will provide the competitive nexus to assure effective competition to a key part of the Central Corridor, particularly the Utah coal fields." Blaydon V.S., at p. 18.

B. Utah Coals -- West

Utah Railway's recent history has been marked by very significant increases in the volume of its originated coal moving westward. After years of relatively stable traffic volumes (see "Abridged History," supra, at p. 13), UTAH has recently experienced sustained periods of record growth in volume and revenue. First West V.S., p. 7. Dr. Blaydon explained both UTAH's market position and the reason for this sustained growth. Blaydon V.S., p. 6: "In 1995 UTAH originated 5.5 million tons or 30.1 percent of all coal moved by rail from Utah mines. The 5.5 million tons originated by UTAH represented an increase of

68 percent since 1992, compared to an increase in total coal production in all of Utah of only 19 percent for the same period. UTAH's accelerated growth is tangible evidence of its ability to meet the needs of coal producers and their customers as an originating carrier dependent upon effective relationships with connecting roads."

UTAH's present operations embrace export and the western U.S. regional markets. "The coal originated by UTAH currently is divided between export through Long Beach/Los Angeles terminals and consumers in the west ranging from Northwest Washington to Southern California. UTAH export tonnage was 2.4 million tons in 1995, which represented 57.2 percent of the 4.2 million tons exported in Taiwan/Japan/Korea in that year through Long Beach/Los Angeles ports." Id. at 7. This export tonnage represented 43 percent of UTAH's total volume in 1995. First West V.S., at 9.

1. Export Coal

As John West describes, today the significant majority of UTAH's export coal, 1.7 million tons in 1995, moves via joint line service over SP's more circuitous route, as compared to 0.7 million tons moving via UP. Second West V.S., p. 2. Professor Blaydon explained the basis for this split, Blaydon V.S., at 9: "The current split results from an aggressive price and service combination with SP which offers both improved service and competitive pricing. Service performance is critical for export movements in order to avoid costly vessel demurrage charges and the UTAH-SP combination offered guaranteed service with penalties in the form of demurrage absorption by the rail carriers. The service was begun early in 1995 and no such penalties have been incurred thus far."

Mr. West is convinced that UTAH, working with BNSF's marketing staff, can be equally aggressive in maintaining a robust competition for export coal. Second West V.S., at p. 2. Dr. Blaydon concurs citing three reasons. First, UTAH will enjoy exclusive access to the important new facility now being built for the Cyprus Amax Willow Creek Mine with a projected annual output of 5 million tons by mid-1998. This mine will replace the Cyprus Amax Plateau mine, which now produces 3 million tons, thus holding the potential of increasing UTAH's present volume by almost 40 percent. As stated earlier, exclusive access to the Willow Creek facility is granted by the UTAH Settlement Agreement with the full concurrence of Cyprus Amax. Barker V.S., App. D.[4] Second, UTAH will also have access to the only public truck transfer unit train facility in the region not controlled by a coal producer, the Savage Coal Terminal at CV Spur. Savage is the largest coal trucking operator in the United States. Finally, UTAH will have three potential routing options: UPSP Las Vegas and Reno routes; BNSF's former SP/Reno route. Dr. Blaydon summarizes: "Taken together, the UPSP merger and the agreements with UTAH and BNSF should provide the opportunity for UTAH to maintain and improve its price-service offerings to Utah coal producers for export markets." Blaydon V.S., at 10-11.

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[4] It is widely recognized that the high quality coal coming on line from the Willow Creek Mine will be an excellent candidate for export to the Pacific Rim, the fastest growing steam coal market in the world. See Vann Deposition, pp. 39-40.

2. Western Region Destinations

The balance of UTAH's non-export coal (3.1 million tons in 1995) moved to Western U.S. destinations for utilities, cogeneration plants and industrial users. Blaydon V.S., at 11. Currently, UTAH originates no coal to midwestern or eastern customers. Id. at 13.

As the superior Willow Creek coal (see, e.g., Vann Deposition, p. 35) comes on line, this higher Btu coal, coupled with UTAH's "low cost, high quality service," (Blaydon V.S., at 12) presents an attractive scenario for the future of UTAH's competition both on the Central Corridor, and to western region destinations.

In addition to UTAH's traditional joint line connection with UP at Provo, UTAH, under the Settlement Agreement, "will have the opportunity to connect with BNSF at Provo and thus serve all BNSF points with two line service." Id. This two line reach extension is obviously a pro-competitive development, especially given UTAH's new access to the high quality coal from the Willow Creek facility.

An example of a potential new service within this two carrier competitive reach is the Sierra Pacific Power Station at North Valmy, Nevada. Although that user pushed for UTAH single line access, UTAH is convinced that it can effectively compete for this service in a two line haul basis with BNSF. "The post-merger operating environment will permit UTAH to work with BNSF to develop alternative routing and sourcing combinations to those currently available at North Valmy." Id. at 12. And this competitive pressure has not been overlooked by UP. It plans to work with UTAH to develop a viable UTAH/UPSP service in light of this potential. The following colloquy occurred between UP counsel and UP's principal management coal witness at Nock Deposition, p. 80:

> Q. Is there another option as well that Valmy would have postmerger in terms of receiving Utah coal?
>
> A. One I would add if I were writing this again would be a Utah origin interchange at Provo with merged UP/SP.
>
> Q. And could you expand on that. Does UP/SP intend to continue to work with Utah Railway origins?
>
> A. Yes. Our plan is to try to work with Utah Railway as Union Pacific has in the past. In other words, in addition to the single line origins, promote Utah Railway origin business as well.
>
> Q. And are there some particular mines that Utah Railway would have access to that might make those origins attractive to the merged system in particular?
>
> A. Yes, there are several mines that Utah Railway currently has access to, and an additional mine as a result of our agreement, a new mine being developed that they would have access to.

In summary, given UTAH's recognized low-cost quality service, and its potential exclusive access to a new superior coal supply coupled with the full reach of the BNSF system, Dr. Blaydon was fully warranted in concluding that: "UTAH will provide the market discipline to assure competitive rates for coal customers in the western region by means of its cost efficient operations and access to Utah coal acting either in conjunction with the BNSF or with the UPSP." Blaydon, p. 17.

C. Utah Coals -- East

Because of its history and the competitive posture of its present connections, Utah Railway is today a westward-leaning railroad. It does not presently originate any coal moving to midwestern or eastern customers. Blaydon at p. 13. That, however, will change if the merger, with the Settlement Agreement, is approved. With new access to superior coals at the Willow Creek facility, and with a reasonable extension east to Grand Junction and a new connection with BNSF (and, thus, its extensive system) UTAH plans to market vigorously in its "new" territory. As John West, UTAH's chief marketing official states, UTAH will "increase competition between the rail giants UP/SP and BNSF for all the traffic we handle in Utah", (First West V.S., at 9.) and will do so by "provid[ing] competition in areas as well as in ways not available to [us] without the Agreement." Id. at 8.

Indeed, the Primary Applicants already anticipate that competition. As UP coal witness Nock states, the Settlement Agreement with UTAH and BNSF will open new markets for UTAH in the midwest and east resulting in increased competition on the Central Corridor, and against the high-Btu coals of the midwestern and eastern coal regions that are today the predominant sources of coal for utilities in the midwest and east. Nock V.S., supra.

Dr. Blaydon concurs. As a result of expanded origins (especially the high Btu Willow Creek coal), longer local eastbound hauls, potential innovative backhaul initiatives, "and the ability to offer two line service to all UPSP and BNSF points", he expects that the developing midwestern markets for Utah coal present an attractive opportunity for UTAH. Blaydon V.S. at 16.

The development of a midwestern market for Utah coals is, indeed, a [illegible] new phenomenon. While virtually no coal from Utah moved to these markets in 1990, 5.2 million tons were shipped in 1995. Id. at 14. See also Vann V.S., UTAH-5 at 5. Drs. Blaydon and Vann attribute this new movement to the advent of the Clean Air Act. Particularly because of these environmental considerations, low sulfur, high Btu western coals have succeeded in displacing eastern and midwestern coals. Sansom V.S., UP/SP-231 at 24-34. But whatever the reason, there appears to be a unanimous view that eastward expansion, and a new connection with the BNSF system, present important market opportunities which John West and his counterparts at BNSF intend to capture. First West V.S., at 9. Professor Blaydon was well grounded in concluding that, "UTAH will be able to extend to coal markets east of Utah through a more efficient hand off at Grand Junction and expanded direct customer access on the BNSF system." Blaydon V.S., p. 17.

UTAH used Dr. Barry Vann to help identify and quantify the range of market opportunities in the carrier's new eastward focus. Dr. Vann, a railroad costing expert, was originally retained to help UTAH fashion strategic responses in face of the dire consequences presented by an unconditioned UP/SP merger. Dr. Vann did not claim specific expertise in the coal industry (Vann Deposition at p. 111), nor was he retained by UTAH on that basis (Id. at 115).

After the Settlement Agreement was negotiated, Dr. Vann's assignment shifted from providing strategic advice in the face of the impending merger of UTAH's only two joint line partners to a competitive analysis of the opportunities presented by the Settlement Agreement. Id. For purposes of the instant proceeding, Dr. Vann was asked to assess the range of those market potentials. He did so in a sensible way. Dr. Vann devised a model based on the economics of delivered Btus as an appropriate measure of potential coal competition. This, indeed, is the same approach used by the utilities in selecting their coal supplies. As recognized by the Primary Applicants, "A utility's decision about which coal it burns is driven by delivered cost economics, and specifically by delivered cost per million Btu." Nock V.S., supra, at 19. Dr. Vann then proceeded to provide examples of delivered Btus measured under various assumptions.[5] He did not, nor was he requested to, undertake an empirical study of the coal market. He did not study the competitive characteristics of Powder River Basin coal vis-à-vis Utah/Colorado or other coals. Vann Deposition, p. 122. He did not, therefore, reach any conclusion that there is in fact competition today between PRB coal and Utah coal because that was not the purpose of his analysis. He did not study actual market prices, and his analysis rested purely on hypothetical assumptions. Id., pp. 15-38, 78-95. Rather, he was asked to develop a methodology which would help identify a range of potential competitive market opportunities. Id., p. 116.

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[5] Vann's models were dependent on assumptions, not actual market data. They, therefore, did not purport to evaluate competition for any actual coal moves (Id. at 122).

The purpose of the Vann statement was to show that Utah coal could be competitive in the midwest and east, in competition against similar coals. Indeed, an important shipper of Colorado coal to the midwest already feels the pressure of anticipated competition from UTAH to the extent of asking this Board for relief. See Argument IV.E., below.

Dr. Vann's approach complements Dr. Blaydon's conclusion: "The delivered cost per Btu is an important determinant of fuel selection but combustion properties also must be considered." Blaydon V.S., at 15. Of course, combustion properties are highly relevant to burn requirements of the receiving utilities. UTAH can market its services only to those customers designed to use the type and quality of coal it carries. Moreover, we recognize that those plants specifically designed to burn PRB coal present a difficult threshold cost test. Nock V.S., supra, at 28. To the extent that design characteristics and requirements limit market opportunities, we acknowledge that coal markets may be circumscribed. Utah coal cannot expect to displace PRB coal at plants designed to burn PRB coal, but it can and will be an important source of high-Btu coal for those utilities burning a high-Btu coal.

UTAH's eastward expansion certainly creates significant market opportunities. Its superior coal -- especially that to come on line from the new Willow Creek facility -- can, indeed, compete head-to-head with Colorado and eastern coals of similar characteristics now moving to the midwestern utilities on the basis of the cost of delivered Btus. Argument IV.E., infra.

Finally, we would note that "competition" is sometimes a relative concept. UTAH has succeeded over the years in the west by providing quality service to a limited number of significant shippers. The addition of the first coal contract to the east would represent an important competitive step at UTAH given the carrier's present lack of eastbound business. Mr. West and the UTAH marketing staff intend to make every effort to achieve that breakthrough, and to bring the benefits of UTAH's competitive service to the midwest and beyond. First West V.S., at 8.

D. Backhaul Moves: A Competition - Enhancing Tool

From UTAH's marketing perspective, one of the most important events that occurred after its Settlement Agreement was negotiated, was ECDC-Laidlaw's separate negotiation of UTAH access. As Mr. West explains, "UTAH [ ] abided by its Settlement Agreement not to initiate further demands on the applicants. . ." Second West V.S., at 4. However, ECDC-Laidlaw -- owner of a major waste materials dump site in Utah -- separately negotiated access by UTAH. That access, combined with UTAH's new eastern connection at Grand Junction, will allow the carrier to move unit waste trains from either eastern or western origins. Id.

The implications of this new service go far beyond the movement of waste. Dr. Vann, who developed BN's highly successful unit waste train service in the Pacific Northwest sees great potential in balancing coal movements with the ECDC waste moves. Vann V.S., p. 1. Mr. West outlined the marketing opportunity for creative backhaul service: "ECDC owns or leases six open top hopper train sets (as well as many sets of container and other equipment). Use of these sets in outbound coal and inbound waste presents excellent opportunities for creative two-way moves -- both west for export and east for utility service." Second West V.S., at 7. Mr. West succinctly summarized the marketing advantage: "In short, our ECDC access is an important marketing tool for coal moves" (Id. - emphasis in the original).

Dr. Blaydon saw the potential of backhaul marketing opportunities both with respect to export coal, and the development of a new midwest market by UTAH. Concerning export coal/waste balancing, Dr. Blaydon stated that "UTAH, in conjunction with either UPSP or BNSF will have the opportunity to combine those eastbound [waste] movements with export coal movements. Much of the inbound waste is expected to move in train sets of open top hopper cars dedicated to this service which could be used for coal on the return trip." He then emphasized that the new connection with BNSF at Provo would further expand UTAH's market potential "since BNSF directly serves many potential sources of solid waste not served by either UP or SP." Blaydon V.S., p. 10. And, of course, Dr. Vann, who formerly developed BN's unit waste train service in the Pacific Northwest, is similarly enthusiastic about the potential raised by ECDC's initiative. Vann V.S., p. 1.

Dr. Blaydon also stresses the value of ECDC access as a marketing tool for developing coal traffic to the midwest." . . . [A]ccess to the ECDC solid waste transfer facility. . . provides the basis for developing backhaul movement of coal with solid waste from midwestern sources near potential coal customers such as St. Louis and Houston." Blaydon V.S., p. 16.

In sum, the ECDC initiative has developed an important marketing tool for UTAH.

E. Third-Party Affirmation of the Settlement Agreement's Pro-Competitive Impact

We earlier argued that, pursuant to the Settlement Agreement, UTAH will be able to mount new competition against Colorado coal moving to the midwest. That argument is confirmed in the most effective way: by an important Colorado mine seeking protection from this competition. While we do not here argue for or against that requested relief, we do think it appropriate to bring it to the Board's attention in the context of the instant argument.

In the Comments of Kennecott Energy Company, KENN-10, that party requests trackage rights access for a second rail carrier to its Colowyo mine in Colorado in order to maintain the situation prior to the UTAH Settlement Agreement. Id. at 3. As witness McFarlen put it, the new access to the Colowyo mine is necessary " in order to keep Kennecott competitive with Utah mines that have gained direct rail competition as a result of the Utah Railway settlement". McFarlen V.S., KENN-10, p. 15. According to Mr. McFarlen, the UTAH Settlement Agreement will upset the competitive status quo, by giving the Utah mines a "new direct two carrier service" via Grand Junction. Id. at 14-15, and thus present a new competitive force on the eastward marketing of Utah/Colorado coals.[6]

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[6] Mr. McFarlen further elaborated his competitive fears on deposition: McFarlen Deposition pp. 80-81.

Q: [by UP counsel] Mr. McFarlen, let me switch gears a little bit and talk about your testimony on the impact of the Utah Railway settlement. You make the point in your testimony that you believe that certain mines in Utah are going to become more effective competitors against the Colowyo mine as a result of the Utah Railway settlement; is that right?
A: Yes.
Q: Which mines are you thinking of in particular? Are these the ones that you discuss on page 14 of your testimony?
A: With the arrangement that the UP and Utah Railway as I've seen it, I can't think of any mine that couldn't truck to the Utah Railway and have two-for-one access, whereas before they had single access.
Q: And you're saying any Utah mine could truck to the Utah Railway?
A: There or the CV Spur.

Mr. McFarlen also confirmed his fears of Utah coals becoming competitive with Colorado coals moving to the midwest. Id. at 82.

Q: But I still don't understand why that's going to affect Colowyo. What is the impact on Colowyo from that?
A: The mines in Utah will now have competitive access. Prior to that they did not have competitive access.
Q: And what specific customers or areas of customers do you think are going to be affected by that?
A: I would say customers in the Midwest.
Q: Do you think these Utah mines are going to be more effective in selling into the Midwest than they are today?
A: They have the opportunity to with competitive access.
Q: And do you think these Utah mines will be able to sell more effectively into areas other than the Midwest such as Texas?
A: They have the opportunity to do it.

Again, neither arguing for or against Kennecott's requested condition, we would note that a request for protection is the surest sign of a new competitive environment.[7]

F. Changes in the Clean Air Act and FERC Regulations Potentiate the Pro-Competitive Settlement Agreement

Drs. Blaydon and Vann credit the Clean Air Act for the creation of a market for Utah coal in the midwest which grew from virtually nothing in 1990 to 3.2 million tons in 1995. Blaydon V.S., p. 14; Vann V.S., p. 3. Dr. Blaydon also a Director and Senior Advisor to Putnam, Hayes & Bartlett, a leading consulting firm in the energy field, explained why he though the use of low sulfur coal would now increase in the midwest, after a slower than anticipated start. The "slow", 0 to 3.2 million ton growth over five years" . . . is due in part to the limited number of facilities affected in Phase I [of the Clean Air Act] -- only 110 -- compared to requirements for sulfur reductions by nearly all plants in excess of 25MW in Phase II (2000). Blaydon V.S., at 14. Dr. Blaydon predicted that "the demand for Utah coal is certain to increase as the requirements of Phase II come in force in 2000. The higher BTU content of Utah coal, along with its other favorable combustion properties, make it a very desirable fuel for a large number of plants -- virtually all with the possible exception of those built specifically for low BTU Powder River Basin coals." Id. His conclusion i encouraging for UTAH: "Thus, even in the face of the significantly higher price for Utah

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[7] However, the competitive access to the Savage Coal terminal was designed to preserve the ability of Utah mines to truck to a loadout on either UTAH (for interchange with UP) or SP.

coal its usage by midwestern and eastern plants will increase, in turn increasing the demand for competitive rail service to meet those needs." Id.

Dr. Vann outlined the various strategies that utilities can use to be in compliance with Phase II including installation of scrubbers, substitution of low sulfur western and eastern coals, coal blending and purchasing allowances. While utilities can employ a combination of these compliance strategies, Dr. Vann concludes that the UTAH Settlement Agreement "can play an important role in assisting utilities to meet the new standards." Vann V.S., p. 4.

In addition to the Clean Air Act, John West also identified another institutional change which holds the potential to significantly alter the economics of electricity production -- the Federal Energy Regulatory Commission's new regulations apparently opening the nation's electricity grid to all suppliers of electricity. See Second West V.S., fn. 1, p. 3. While, as Mr. West states, it is too early to tell what cumulative impact this will have on the coal industry, it is probably safe to predict that such an open supply system will reward the most efficient suppliers. The benefits of Utah's high Btu/low sulfur coals may well be valued in the evolving coal/electricity generating calculus.

In short, the Clean Air Act will, and the FERC regulations may, place an economic premium on Utah's high quality coal. This, in turn, will make UTAH's service under the Settlement Agreement competitive in a wider segment of the nation.

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In summary, the combination of: access to an important new source of high quality coal; an eastward extension and new connection with the BNSF system; the marketing flexibility of backhaul balancing; and, the environmental imperatives of the Clean Air Act all point to an expanded competitive position for Utah Railway pursuant to the Settlement Agreement.

V.

THE UTAH SETTLEMENT AGREEMENT NEGATES ANY NEED FOR THE INCONSISTENT APPLICANT'S INTRUSION INTO THE CENTRAL CORRIDOR

A. Forced Divestiture is the Most Drastic of the Board's Options

As we tried to succinctly say at the outset of Utah Railway Company's Response To Inconsistent Application And in Support Of Utah Railway Company's Settlement Agreement, UTAH-5, an Inconsistent Application represents a request for the most profound intrusion by the Board into the marketplace. "An Inconsistent Application is a request for the most drastic remedy within the Board's arsenal. This atavism from the ICC's pre-Staggers plenary powers is both politically and philosophically out of phase with today's market orientation. Coerced divestiture, in whatever guise and however named, must be a course of last resort. We submit that an exercise of the Board's powers to force an unwanted sale must be based on at least a clear and unambiguous demonstration that competition will be destroyed absent this governmental intrusion into the marketplace." Id. at 1.

As Professor Kalt of the John F. Kennedy School of Government, Harvard University strongly stated, the coerced divestiture by means of an Inconsistent Application in a "network" industry such as railroads is especially troubling. Kalt V.S., BN/SF 55, p. 98: "Particularly in a network industry, divestiture remedies can have a spillover effects, as de-integration and balkanization of one divested segment of a system adversely affect the efficiency and performance of portions of the network to which it is connected. The ability of a policy of divestiture to disrupt the functioning of an industry and the difficulty the regulatory process faces in trying to outperform the voluntary choices of the marketplace in determining efficient boundaries of ownership, integration, contract, and de-integration makes divestiture a policy of last resort." (emphasis added)

"It seems clear in any event that divestiture will be granted only if no other form of preventative relief will fit the exigencies of the situation."[8]

The ICC's jurisprudence which now guides this Board recognizes this principle. This is not a case like Chicago, Milwaukee, St. Paul and Pacific Railroad Co. -- Reorganization -- Acquisition by Grand Trunk Corp., 2 I.C.C. 2d, 164 (1984) where the Bankruptcy Code gave right to file plans of reorganization to all parties, thus forcing comparative consideration of control applications onto the Commission as the court's co-ordinate forum. Rather, this case is akin to Norfolk & Western Ry. --Control-- Detroit, Toledo & Ironton Ry, 360 ICC 498, 514 (1979) where the Commission first found the primary application to be anticompetitive before it approached its balancing with the inconsistent application.

Here, the Board should not even address the issue of divestiture without first considering the lesser "remedy" already embodied in the negotiated BNSF and UTAH Settlement Agreements. Not only do these obviate the need for recourse to the remedy of last resort -- divestiture in a network industry -- but, as we have shown, they have already created a competitive solution which will actually enhance competition on Inconsistent Applicants' coveted line.

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[8] Kalinowski, J. O. Antitrust Laws and Trade Regulation (Vol. 161, Business Organizations), Vol. 10, Matthew Bender, 1995 at 114-16; quoted in Kalt V.S., at 91.

The Inconsistent Application should be denied as not only being unnecessary, but as being positively harmful to the integrity of the intended UP/SP system, and the competitive BNSF system operating under the Settlement Agreement. See Krebs V.S., supra, at p. 5.

B. MRL Offers an Inferior Operating Plan as a "Solution" for a Non-Existent Problem

A corollary to the maxim that forced divestiture is the remedy of last resort, is that adequate intermediate relief should dispel the need for the ultimate sanction. The "intermediate" relief is already in place -- the BNSF and UTAH Settlement Agreements. And they are far superior to MRL's self-anointed solution.

As we have shown, the Settlement Agreements will introduce robust competition into the Central Corridor, indeed, they will allow for more competition than exists today. Not only will UTAH join with BNSF to provide a whole new level of competitive offerings (First West V.S., p. 8) this level of anticipated competition has already excited an established shipper to ask for protection (Argument IV. E, supra), and has forced the Applicants themselves to begin to plan their own competitive response. (See Nock Deposition, supra, at Argument IV, B.2.). Not only will the Corridor's "2-to-1" shippers enjoy the benefit of the BNSF system "replacement" of SP (Krebs V.S., supra, at 6), they will retain SP destinations as part of the larger UP/SP system. All will benefit from the combined reach of the UP/SP and BNSF systems.[9]

To remedy this "problem" MRL's owner proposes to create a new railroad to bring competition to the Corridor (and, presumably, financial gain to himself). But what this new entrant would bring to the rail market is decidedly inferior to the pro-competitive agreements already negotiated. The new carrier, however ambitious its wish, will never be able to match the reach brought to Corridor shippers by BNSF and UP/SP. Thus on-line shippers will be forced to forego the benefits of extended single or two line service in exchange for placing a "competitive" intermediate carrier -- MRL -- into the mix. As John West stated, (Second West V.S., at 6): "A recreated (and somewhat expanded DRGW flying the colors of MRL simply does not reach enough destinations to be competitively equivalent to, much less a more competitive inconsistent alternative to, the UTAH and BNSF under the 'two-to-one' formula. Creating a 'new' carrier with far fewer options than SP or BNSF under its settlement agreement certainly cannot be a solution to anything." Mr. West then looked at MRL's proposal from the vantage of a long distance shipper or a joint line carrier (Id.): "Representing an originating joint-line carrier, I would much prefer to interline with BNSF in terms of market reach, especially with respect to targeted utilities in the Midwest. A MRL presence on the Central Corridor would only be an intermediate link to the same market, actually reducing rail competition and increasing rates." Moreover, introduction of MRL as

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[9] See e.g., the statements of White Oak Mining & Construction Company of Helper, Utah and of Representative Peter C. Knudson of the Utah House of Representatives at UP/SP 233.

an interim link/owner of the Central Corridor, while reducing UP/SP and BNSF to the role of overhead trackage rights rent payers would sharply lessen, or eliminate, those large carriers' incentives to route traffic over the mountainous line. "This would greatly reduce traffic density and could potentially harm UTAH and all shippers in the Central Corridor dependent on UTAH service." Id. at 7.[10] Mr. West then stated the most basic reason why the Board should not take the drastic remedial step of forced divestiture in order to let a new railroad experiment on the Central Corridor. "It is important to keep major railroads operating across this line. In the long run, the more tonnage put on the line, the more shippers will win. The lower internal cost per ton ultimately works for the benefit of the shippers." Id.

C. The Inconsistent Application Would Undo the Careful Accommodation Embodied Both in the Settlement Agreement and the 1913 Operating Agreement

We end where we began -- with the 1913 Operating Agreement. This Agreement has allowed UTAH to both compete and cooperate on the Central Corridor for over 80 years. The Agreement, which purposely makes UTAH's interest interdependent and inseparable from SP's provides the foundation for UTAH's co-ownership of a critical segment of the Central Corridor (see Section II, A, supra).

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[10] Under the 1913 Operating Agreement, UTAH pays a proportional share of maintenance and operating costs in joint track territory. A reduction in other carrier's overhead traffic would significantly increase UTAH's percentage of unavoidable maintenance costs.

Exercise of UTAH's rights under the 1913 Agreement provided the essential key to open BNSF's access under its Settlement Agreement. In turn, UTAH's competitive future has been linked with BNSF's operations under its Settlement Agreement. In short, UTAH's Settlement Agreement represents a careful accommodation of its rights which have been an integral part of service on the Central Corridor for so long.

MRL's new sister company ignores both the history and operating realities of the line it now covets. In its opportunistic rush, it neither sought UTAH's advice or consent. In its pleadings before this tribunal it has ignored UTAH's critical property rights which are intertwined with SP's.

The Primary Applicants, however, recognized UTAH's legitimate concerns and made time for the small carrier despite the overwhelming pressures of this gigantic case. In negotiating the UTAH Settlement Agreement, they have accommodated UTAH's property rights which have been so important in bringing competition to the Central Corridor, and in developing the Utah coal fields. See "Abridged History," supra.

UTAH's rights must be protected by this Board. They should not be trampled by an exercise of a remedy which should be used only as a "last resort." Kalt V.S., supra.

VI.

CONCLUSION

For all of the above reasons, the Board should affirm the Utah Railway Settlement Agreement if it approves the Primary Application. In any event, the Board should deny MRL's Inconsistent Application as being unnecessary, competitively inferior to the Settlement Agreements already in place, and insufficient to cause the Board to order divestiture.

Respectfully submitted,

Charles H. White, Jr.
Galland, Kharasch, Morse & Garfinkle, P.C.
1054 Thirty-First Street, N.W.
Washington, D.C. 20007
(202) 342-6789

Counsel for Utah Railway Company

June 3, 1996

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84007

(1)

SLOVER & LOFTUS
ATTORNEYS AT LAW
1224 SEVENTEENTH STREET, N. W.
WASHINGTON, D. C. 20036

WILLIAM L. SLOVER
C. MICHAEL LOFTUS
DONALD G. AVERY
JOHN H. LE SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
CHRISTOPHER A. MILLS
FRANK J. PERGOLIZZI
ANDREW B. KOLESAR III
PATRICIA E. KOLESAR
EDWARD J. McANDREW*

*ADMITTED IN PENNSYLVANIA ONLY

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JUNE, 1996 #55

BY HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Branch
12th Street & Constitution Avenue, N.W.
Washington, D.C. 20423

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

Dear Mr. Secretary:

Enclosed please find an original and twenty (20) copies of the Brief of Texas Utilities Electric Company (**TUE-17**). This document is being served upon parties of record in the manner described in the Certificate of Service attached to each. In accordance with prior orders in this proceeding, we have also enclosed a Wordperfect 5.1 diskette containing the Brief.

An extra copy of this filing is enclosed. Kindly indicate receipt and filing by time-stamping this copy and returning it to the bearer of this letter.

Thank you for your attention to this matter.

Sincerely,

John H. LeSeur

John H. LeSeur
An Attorney for Texas
Utilities Electric Company

Enclosures
cc: Arvid E. Roach II, Esq.
Paul A. Cunningham, Esq.
The Honorable Jerome Nelson

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BEFORE THE
SURFACE TRANSPORTATION BOARD

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY -- CONTROL AND MERGER -- SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY	Finance Docket No. 32760

BRIEF OF
TEXAS UTILITIES ELECTRIC COMPANY

By: John W. McReynolds
Worsham, Forsythe & Wooldridge
1601 Bryan Street
30th Floor
Dallas, Texas 75201
(214) 979-3000

John H. LeSeur
Frank J. Pergolizzi
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys for Texas Utilities Electric Company

OF COUNSEL:

WORSHAM, FORSYTHE & WOOLDRIDGE
1601 Bryan Street
30th Floor
Dallas, Texas 75201

SLOVER & LOFTUS
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: June 3, 1996

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UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY -- CONTROL AND MERGER -- SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY	Finance Docket No. 32760

BRIEF OF
<u>TEXAS UTILITIES ELECTRIC COMPANY</u>

<u>COUNSEL'S INTRODUCTION AND SUMMARY</u>

Texas Utilities Electric Company ("TU Electric") requests that the Surface Transportation Board ("STB")[1] <u>DENY</u> the proposed merger of the Union Pacific Railroad Company ("UP") and the Southern Pacific Transportation Company ("SP"), unless the STB adopts the following requested conditions:

- The Settlement Agreement between Burlington Northern Railroad Company ("BN"), The Atchison, Topeka and Santa Fe Railway Company ("SF"), UP and SP ("UP/SP-BN/SF Settlement Agreement") (dated September 25, 1995, as supplemented on November 18, 1995), <u>AS AMENDED IN THE MANNER HERE REQUESTED BY TU ELECTRIC</u>, be imposed as a condition of the merger.

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[1] References herein to the STB are intended to encompass the STB's predecessor agency, the Interstate Commerce Commission.

- The parties to the UP/SP-BN/SF Settlement Agreement be ordered to amend the Agreement to (i) permit BN/SF and the Kansas City Southern Railway Company ("KCS") to interchange TU Electric trains at Shreveport for movement by BN/SF over SP's line between Shreveport and Tenaha, and (ii) set the trackage rights fees that BN/SF must pay UP/SP at the levels advocated by the Western Coal Traffic League ("WCTL") in the Comments WCTL filed in this proceeding on March 29, 1996 ("WCTL Comments").

TU Electric's principal concern in this proceeding is easily summarized. TU Electric is committed to utilizing Powder River Basin ("PRB") coal at its Martin Lake Station commencing in the year 2000. TU Electric has identified two efficient unit train routings from the PRB to Martin Lake: a UP-direct route (1510 miles) and a BNSF/KCS/SP route (1480 miles). The appended schematic (Attachment 1) shows these two routings. The merger of the UP and the SP will eliminate the competition between these two parallel routes, because a single carrier -- UP/SP -- will participate in, and effectively control, the pricing on both routings.

To remedy this significant anti-competitive impact, TU Electric first requests that the STB order that BN/SF be permitted to interchange TU Electric trains with KCS at Shreveport for BN/SF's transportation via trackage rights over SP's line between Shreveport and Tenaha (see Attachment 2).[2] As the STB can ob-

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[2] Attachments 1 and 2 were exhibits to TU Electric's Comments filed in this proceeding on March 29, 1996. References herein to Verified Statements ("V.S.") of TU Electric's Witnesses Jenkins, Crowley and Johnson are to their statements presented as

serve, TU Electric's first requested condition is indeed a modest one. The distance between Shreveport and Tenaha is only 54 miles, and UP/SP have already agreed to grant BN/SF certain overhead trackage rights on this line. TU Electric is asking for very limited relief to preserve its pre-merger competitive transportation routings to Martin Lake.

TU Electric's second requested condition involves the excessive levels of compensation BN/SF has agreed to pay UP/SP for trackage rights granted to BN/SF, pursuant to the UP/SP-BN/SF Settlement Agreement. TU Electric requests that the STB prescribe the lower cost-based trackage rights fee conditions advocated in the Western Coal Traffic League ("WCTL") Comments.

BACKGROUND FACTS

TU Electric is one of the largest electric utilities in the State of Texas. TU Electric operates 24 generating stations, three of which have traditionally utilized Texas lignite as their baseload fuel. These plants are Monticello, Big Brown and Martin Lake. (Jenkins V.S. at 2-3).

Due to changing delivered cost fuel economics, TU Electric has recently decided to add western coal as a supplemental fuel at Monticello, Big Brown and Martin Lake. Earlier this year, TU Electric signed a three-year contract for deliveries of Powder River Basin ("PRB") coal to its Monticello Station. These

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part of TU Electric's Comments.

deliveries began in April of this year. (Jenkins V.S. at 7-9). TU Electric also recently announced its plans to utilize western coal at its Big Brown Station.

TU Electric has focused its comments in this proceeding on its Martin Lake Station. TU plans to begin receiving western coal at Martin Lake in the year 2000. TU projects that its annual receipts of western coal at Martin Lake will be in the three to seven million ton range, with overall western coal receipts at Martin Lake through the year 2020 projected at 100 million tons. (Jenkins V.S. at 3).

TU Electric's present plans call for its western coal receipts to originate in the PRB of Wyoming. TU Electric has identified its two best competitive routings as follows:

> <u>UP Direct Route</u>. This route originates in the PRB of Wyoming and proceeds via UP lines through Kansas City and Little Rock to Henderson, Texas and thence via a to-be-constructed six-mile TU Electric line to TU Electric's Martin Lake Station.
>
> <u>BNSF/KCS/SP Route</u>. This route originates in the PRB of Wyoming on BNSF and proceeds as follows: BNSF to Kansas City; KCS, Kansas City to Shreveport; SP, Shreveport to Tenaha; BN, Tenaha to Martin Lake.

(Crowley V.S. at 2-3).

Evidence submitted by TU Electric in this proceeding (which evidence is unrebutted) presents the following additional material transportation facts and circumstances concerning the two Martin Lake routings:

Routing	Mileage From PRB to to Martin Lake	Variable Cost Per Ton
UP-Direct	1510	$ 7.45
BNSF/KCS/SP	1480	$ 8.34

(Crowley V.S. at 4-5).

The proposed merger of UP and SP will eliminate the existing competition between the UP Direct and BNSF/KCS/SP routings because, after the merger, the UP/SP will participate in both routings. Accordingly, to preserve the pre-merger competition between these two routings, TU Electric has requested that the STB grant BN/SF interchange and trackage rights over the SP portion of the BNSF/KCS/SP routing, which portion runs from Shreveport to Tenaha, a distance of 54 miles. (Crowley V.S. at Exh.___(TDC-6)).

ARGUMENT

The proposed merger of UP and SP will cause significant anti-competitive impacts on rail transportation to TU Electric's Martin Lake Station. The modest trackage rights condition sought by TU Electric will ameliorate these anti-competitive results in a manner that fully complies with governing STB precedent. Applicants oppose TU Electric's condition request, but have presented no credible evidence or arguments in support of their opposition. Accordingly, the STB should grant TU Electric's requested conditions.

I.

THE STB SHOULD GRANT TU ELECTRIC'S TRACKAGE RIGHTS CONDITION REQUEST

The STB has "broad authority" to impose conditions in rail merger cases. The legal standards governing the STB's imposition of conditions were most recently summarized by the STB in the BN/SF decision,[3] as follows:

> Criteria for imposing conditions to remedy anticompetitive effects were set out in our UP/MP/WP decision, 366 I.C.C. at 562-565. There, we stated that we will not impose conditions unless we find that the consolidation may produce effects harmful to the public interest (such as a significant reduction of competition in an affected market), and that the conditions will ameliorate or eliminate the harmful effects, will be operationally feasible, and will produce public benefits (through reduction or elimination of the possible harm) outweighing any reduction to the public benefits produced by the merger. We are also disinclined to impose conditions that would broadly restructure the competitive balance among railroads with unpredictable effects. See, e.g., Santa Fe Southern Pacific Corp. -- Control -- SPT Co., 2 I.C.C.2d 709, 827 (1986), 3 I.C.C.2d 926, 928 (1987) (SF/SP); and UP/MKT, 4 I.C.C.2d at 437. To be granted, a condition must first address an effect of the transaction. We will not impose conditions "to ameliorate longstanding problems which were not created by the merger," nor will we impose conditions that "are in no way related either directly or indirectly to the involved merger." BN/Frisco, 360 I.C.C. at 952 (footnote omitted); see also UP/CNW, slip op. at 97.

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[3] Finance Docket No. 32549, Burlington Northern, Inc. and Burlington Northern R.R. -- Control and Merger -- Santa Fe Pacific Corp. and The Atchison, Topeka and Santa Fe Ry. (decision served Aug. 23, 1995) (unprinted) ("BN/SF").

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

BN/SF at 55-56.

TU Electric's proposed trackage rights condition meets all of the legal criteria cited in the BN/SF decision.

A. The Consolidation of UP and SP Will Significantly Reduce Competition for TU Electric's Coal Transportation Requirements at Its Martin Lake Station.

TU Electric has two principal competitive routings to haul coal to its Martin Lake Station -- the UP Direct Route and the BNSF/KCS/SP Route. Prior to the merger of UP and SP, TU Electric could obtain competitive bids for its Martin Lake transportation from these two independent carrier sets. Competition of this type is vitally important to unit train coal shippers because, as the STB has acknowledged on numerous occasions, the ability of a unit train shipper to play off competing rail carrier sets over efficient routings is critical to that shipper's ability to obtain the lowest available competitive rail transportation market rates. See, e.g., Burlington Northern R.R. -- Construction and Operation Exemption -- Macon and Randolph Counties, MO, 9 I.C.C.2d 1161, 1167-69 (1993), aff'd sub nom. Missouri Mining, Inc. v. I.C.C., 33 F.3d 980 (8th Cir. 1994); No. 32607, WFEC R.R. -- Construction and Operation Exemption -- Choctaw and McCurtain Counties, OK, at 5-7 (decision served Sept. 1, 1995) (unprinted) ("WFEC R.R.").

Following the merger of UP and SP, the competition between the UP Direct Route and the BNSF/KCS/SP Route will be eliminated since UP/SP will be participants in both routings and thus will be able to control pricing over both routings. As observed by TU Electric Witness Jenkins:

> Q. What impact will the merger of UP and SP, if approved, have on these two routing alternatives?
>
> A. They will no longer be competitive. These two routings are competitive today because UP and SP are separate, competing carriers. If the UP merger with the SP is approved, however, the combined UP/SP will not compete against itself. The ultimate result, as Mr. Crowley explains, is that TU Electric, and our customers, will have to pay substantially higher transportation charges.

Jenkins V.S. at 5-6. Similarly, TU Electric Witness Crowley testifies:

> The merger will have a major adverse impact on TU Electric: it will eliminate TU Electric's ability to pit the UP Direct Route against the BNSF/KCS/SP Route. The reason for this is clear -- the merged UP and SP will no longer compete with one another.

> Thus, the effect of the UP/SP merger will be to eliminate TU Electric's lowest cost competitive alternative route to the UP Direct Route. Elimination of this low cost alternative will translate into significantly higher transportation prices for TU Electric as UP/SP will not be required to compete against the pre-merger low cost alternative . . . .

Crowley V.S. at 7.

The elimination of competition between the UP Direct and BNSF/KCS/SP routing, post-merger, is so obvious that it is reflected in the STB's merger guidelines. Those guidelines provide in pertinent part:

> If two carriers serving the same market consolidate, the result would be the elimination of competition between the two.

49 C.F.R. § 1180.1(c)(i). Here, the pertinent market is the transportation of coals from the PRB to TU Electric's Martin Lake Station -- a market that UP and SP now can serve. Combining UP and SP will, as the STB's merger guidelines emphasize, "eliminate" competition between these two routes.

The elimination of competition between the UP Direct and BNSF/KCS/SP routing is also extremely significant. Unrebutted evidence tendered by TU Electric demonstrates that western coal will be utilized at the Martin Lake Station commencing in the year 2000 (Jenkins V.S. at 3); that the only feasible way to transport this coal from the PRB to Martin Lake is by railroad unit train (Jenkins V.S. at 5); and that, without the benefits of the BNSF/KCS/SP route competition, TU Electric will end up paying significantly higher rail transportation charges

(Crowley V.S. at 7), which charges will ultimately be paid by TU Electric's customers as part of their monthly electric bills (Jenkins V.S. at 9).

B. <u>The Requested Trackage Rights Condition Will Ameliorate the Anti-Competitive Impacts of the Merger, and Otherwise Complies with the STB's Condition Criteria.</u>

TU Electric requests, as a condition of the merger, that KCS and BN/SF be granted the right to interchange TU Electric trains at Shreveport and that BN/SF be further granted trackage rights to haul TU Electric's trains over the SP portion of the current BN/KCS/SP haul -- a distance of 54 miles between Shreveport, Louisiana and Tenaha, Texas. This request meets all of the conditions criteria set forth in the <u>BN/SF</u> decision.

First, the requested condition will "eliminate the harmful effects"[4] of the merger on TU Electric's Martin Lake transportation. The grant of trackage rights to BN/SF from Shreveport to Tenaha (and the associated interchange rights at Shreveport) will permit TU Electric to eliminate UP/SP's post-merger control over pricing on the BNSF/KCS/SP routing as BN/SF will take SP's place in the routing.

Second, the post-merger BNSF/KCS routing also meets the STB's "operational feasibility"[5] standard. The only difference between the pre-merger BNSF/KCS/SP routing and the post-merger

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[4] <u>BN/SF</u> at 55.

[5] <u>Id.</u> at 56.

BNSF/KCS routing is that BN/SF, not SP, will handle TU Electric coal trains between Shreveport and Tenaha. It should also be emphasized that UP/SP have already agreed to overhead trackage rights to BN/SF over the SP line between Houston and Memphis, which line includes the segment of concern to TU -- Shreveport to Tenaha.[6]

Third, the proposed condition will also not "broadly restructure the competitive balance among railroads," nor does it create any "new" post-merger transportation options for TU Electric.[7] Instead, the proposed condition includes only a very small line segment (in a case involving thousands of miles of rail track) and simply preserves TU Electric's pre-merger ability to pit the UP Direct Route against the next most efficient routing -- the BNSF/KCS/SP routing.

Finally, the proposed condition is "narrowly tailored."[8] TU Electric's proposed condition is tailored specifically to eliminate the substantial loss of competition that will arise if UP gains control of the 54-mile SP line between Shreveport and Tenaha by permitting BN/SF trackage rights over

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[6] Section 6 of the UP/SP-BN/SF Settlement Agreement provides BN/SF with overhead trackage rights on SP's lines between Houston and Memphis. Shreveport and Tenaha are intermediate points on the Houston-to-Memphis SP lines. These rights are contingent upon the STB's suitable approval of the UP/SP merger.

[7] <u>BN/SF</u> at 56.

[8] <u>Id.</u>

this line segment for the sole and limited purpose of transporting TU Electric coal trains between Shreveport and Tenaha.

II.

THE APPLICANTS' OPPOSITION TO TU ELECTRIC'S REQUESTED TRACKAGE RIGHTS CONDITION IS BOTH UNSUPPORTED AND WRONG

The Applicants oppose TU Electric's trackage rights condition. The assorted contentions submitted by Applicants' counsel and Applicants' witnesses provide no basis for denying TU Electric's requested trackage rights condition.

A. The Efficiency Argument.

Applicants' principal contention is that the BNSF/KCS/SP routing is not a viable, pre-merger routing because it purportedly involves four (4) carriers[9] -- BN, KCS, SP and SF, and three interchanges, and therefore is so "inefficient" as to be a non-viable competitive threat. (R.V.S. Nock at 52; Rebuttal Narrative at 266).

Applicants' efficiency contentions are frivolous. TU Electric will receive coal at Martin Lake via unit train service. The number of carriers participating in a unit train movement, and the number of interchanges involved, has little or no impact

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[9] It should also be noted at the outset that since BN and SF recently merged, the BNSF/KCS/SP route would involve only three carriers prior to the UP/SP merger, and two thereafter.

on the "efficiency" of the routing. Unit trains in the west typically consist of shipper cars and carrier power, travelling as a unit between origin and destination. In addition, virtually all unit train movements involve run-through power arrangements where the involved carriers agree that locomotive units will "run" with the trains, rather than being separated from the trains at interchange points. See, e.g., WFEC R.R., at 6-7; Bituminous Coal -- Hiawatha, Utah to Moapa, Nevada, 6 I.C.C.2d 1, 32 (1989); Incentive Rate on Coal -- Hayden, Colorado to Kings Mill, Texas, 359 I.C.C. 749, 757 (1979). As a result of these operational features, the number of interchanges between carrier lines has no significant impact on the "efficiencies" or costs of unit train service. See, e.g., Potomac Elec. Power Co. v. Consolidated Rail Corp., 362 I.C.C. 170, 179 (1980) ("unit train service is the most efficient way to move coal" (emphasis in original)); Assigned Cars For Bituminous Coal Mines, 346 I.C.C. 327, 334-35 (1974) (same); Increased Freight Rates and Charges, 1974, Nationwide, 349 I.C.C. 862, 903 (1975) (noting that run-through service is accomplished with no delays greater than those associated with single line crew changes).[10]

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[10] Evidence submitted by other parties in this proceeding is to the same effect. For example, WCTL Witness David G. Weishaar, an expert on coal unit train matters with over 30 years' experience as a rail industry executive, testifies in this proceeding:

> Interline unit-train coal movements can be highly efficient, and customarily involve run-through locomotive power agreements as well as cycling the equipment intact from

The STB recently addressed a similar "efficiency" argument in the WFEC R.R. case. In that case, a shortline railroad (WFEC) proposed to build a new 14-mile rail line to a captive electric utility coal-fired plant owned by Western Farmers Electric Cooperative, Inc. ("Western Farmers"). The new line would permit Western Farmers to receive coal transportation service via a new five-carrier haul (UP, KCS and three shortlines). Opponents of the rail line construction argued, as Applicants do here, that the multiple-carrier unit train haul would be "inefficient" and would not provide a viable transportation alternative to Western Farmers' existing two-carrier haul (BN and a shortline). The STB rejected the opponents' five-carrier "efficiency" argument, holding that the five-carrier route clearly could be an efficient, viable competitor to Western Farmers' existing two-carrier haul:

> WFEC expects to operate efficiently, consistent with 49 U.S.C. 10101a(3), and will be the final link in a [five-carrier] unit train movement of coal, which in itself is efficient due to the use of "run through" service. The routing will be 57 miles shorter than the existing route.

WFEC R.R. at 6-7.

Here, as in WFEC R.R., the BNSF/KCS/SP route is shorter than the UP Direct Route (by 30 miles). Thus, the BNSF/KCS/SP is the most efficient routing for TU Electric trains in terms of

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origin to destination and return.

WCTL Comments, Weishaar V.S. at 23.

distance. TU Electric has also calculated the variable costs forthe BNSF/KCS/SP route. As discussed in more detail, infra, this cost evidence shows that the BNSF/KCS/SP route is the most efficient alternative, on a cost-of-service basis, to the UP Direct Route.

B. The BN-Direct Routing Argument.

As a subsidiary argument to their efficiency contention, Applicants contend that TU Electric will not be injured by the loss of the BNSF/KCS/SP routing because following the UP/SP merger, TU Electric will have two remaining competitive rail options: the UP Direct routing and a BN/SF Direct routing. (R.V.S. Sharp, at 17; R.V.S. Nock, at 52; Rebuttal Narrative at 266).

TU Electric demonstrated in its Comments that the BN/SF Direct routing is not a viable alternative to the BNSF/KCS/SP routing. Applicants reluctantly admit that the BN Direct routing is a substantially circuitous one as it is 270 miles longer than the BN/KCS/SP routing on a one-way direct basis. (Rebuttal Narrative at 265). Applicants also submit no evidence disputing TU Electric's calculation of the substantially higher service costs on the circuitous BN Direct routing, as compared to the shorter, more efficient BNSF/KCS/SP routing:

Route	One-Way Mileage from PRB to Martin Lake	Variable Cost Per Ton
UP Direct	1510	$ 7.45
BNSF/KCS/SP	1480	$ 8.34
BNSF Direct	1749	$ 9.49

(Crowley V.S. at 4-5).

UP would no doubt prefer to lessen competition by eliminating the BNSF/KCS/SP routing and thus have to face "competition" only from the circuitous, high-cost BNSF Direct route. Of course, without the BNSF/KCS/SP routing, UP would be able to extract significant price increases from TU Electric. (Crowley V.S. at 7).[11] The following single example is illustrative.

Assume that UP believes that BNSF/KCS/SP would bid an 8 mill rate for TU Electric's Martin Lake traffic. That rate equals $11.84 per ton. To beat such a rate, UP would have to offer rates less than $11.84 per ton. Assume further that the BNSF/KCS/SP route is commercially eliminated, and that UP believes that BNSF would bid an 8 mill rate over its Direct Route. That rate equals $13.99 per ton. To beat such a rate, UP would have to offer rates less than $13.99 per ton -- i.e., rates that are over $2.00 per ton higher than the 8 mill BNSF/KCS/SP rates.

TU Electric has presented substantial, unrebutted evidence clearly demonstrating that elimination of the BN/KCS/SP route would lessen rail competition for its Martin Lake coal traffic and, therefore, would increase TU Electric's coal trans-

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[11] TU Electric will also incur substantial additional car fleet costs associated with the longer, circuitous BNSF Direct hauls. (Crowley V.S. at 6).

portation prices, which prices, as discussed above, are ultimately paid by TU Electric's customers.

C. Bidding Arguments.

Applicants contend that if the UP/SP merger is approved, TU Electric can "force" UP/SP to present bids on the post-merger BNSF/KCS/SP routing, as well as the UP Direct routing. This argument is a strawman.

Following the UP/SP merger, the combined UP/SP will naturally favor its long-haul, low-cost routing alternative -- the UP Direct route. As observed by the STB in UP/CNW:

> A commonly controlled UP/CNW, acting in its own best interests, will use the most efficient routing available.

Finance Docket No. 32133, Union Pacific Corp., Union Pacific R.R. and Missouri Pacific R.R. -- Control -- Chicago and North Western Transportation Co. and Chicago and North Western Ry., at 88 (decision served Mar. 7, 1995) ("UP/CNW") (unprinted).

Thus, even if UP/SP somehow can be "forced" to present a bid over the BNSF/KCS/SP routing, it will have an irresistible self-interest in high-balling the SP portion of the BNSF/KCS/SP routing to price this routing out of the market.[12] Conversely,

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[12] As the STB has observed elsewhere:

> Simply having a selection of routings does not ensure competitive pricing where one or more carriers participate in all the routings.

Metropolitan Edison Co. v. Conrail, 5 I.C.C.2d 385, 413 (1989).

if UP and SP do not merge, SP will have extremely strong commercial incentives to make the BNSF/KCS/SP routing work from a competitive pricing standpoint, as this is the only way it can participate in TU Electric's Martin Lake coal transportation business.

D. Product Competition Arguments.

Applicants' Witness Sansom argues that TU Electric may not utilize western coal at Martin Lake, but instead will continue to utilize lignite at that Station. In support of this position, Dr. Sansom maintains that TU Electric recently studied the use of western coal at its Big Brown plant and decided not to use western coal at that plant as a supplement to existing lignite operations. (Sansom R.V.S. at 50-51).

Dr. Sansom is wrong in his Big Brown testimony. TU Electric announced in April of this year (1996) that it planned to obtain western coal at Big Brown. In post-rebuttal discovery, Applicants reluctantly admitted Dr. Sansom's mistaken statements about TU Electric's Big Brown plans. See Attachment 3.

Dr. Sansom also makes a half-hearted attempt to discredit TU Electric's comprehensive Martin Lake Fuel Study. That Study, appended to TU Electric's Witness Jenkins' Verified Statement, demonstrates that western coal will be TU Electric's low-cost fuel alternative at the Martin Lake Station (assuming competitive delivered coal prices) between the years 2000 and 2020. Dr. Sansom's criticism of this exhaustive study is limited to two sentences wherein Dr. Sansom asserts "there are substantial margins of error in many estimates of the study." (Sansom R.V.S. at 50). This criticism is simply incorrect as TU Electric properly took into account estimate margins in its Study.[13]

TU Electric's Martin Lake Fuel Study constitutes not only the best, but the only evidence of record on the viability of product competition, and that Study shows that competitively priced western coal deliveries will be substantially less expensive than utilizing natural gas or new lignite reserves as a "product alternative" to western coal receipts at the Martin Lake Station. Accordingly, TU Electric's only viable means of obtaining competitively priced coal transportation is to condition the merger in the manner requested by TU Electric (or deny the merger altogether).

E. Build-Out Evidence.

TU Electric explained in its Comments that both the UP Direct Route and the BNSF/KCS/SP Route would require TU Electric (and/or the involved carriers) to expend monies for capital improvements. Specifically, to access the UP Direct Route, TU Electric (or UP) will have to build a new six-mile UP access line. Similarly, TU Electric (and/or the involved carriers) will

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[13] As discussed at page 8 of the Study, a "sensitivity analysis" was incorporated into the Study "whereby each variable is used in the Study at its reasonable maximum and minimum values, while keeping all other variables at their base conditions . . . ." (Jenkins V.S. at Ex. No.___(CWJ-2) at 8).

have to make specified capital investments in lines and switches to obtain service over the BNSF/KCS/SP routing.

Significantly, Applicants did not present any evidence that TU Electric's calculation of these "build-out" and related capital expenditures were wrong, nor did Applicants make any claims that the two routing options would not be viable due to the involved construction expenses. Thus, unlike the contentions raised by BN/SF in BN/SF concerning the alleged non-viability of certain "build-out" options,[14] in the instant case TU Electric's substantial evidence concerning the economic viability of the necessary build-out/ capital expenditures is unrebutted and effectively conceded by Applicants.

III.

TU ELECTRIC'S TRACKAGE RIGHTS COMPENSATION CONDITION REQUEST ALSO SHOULD BE GRANTED

TU Electric's Comments support the trackage rights fee compensation condition proposed by WCTL in this proceeding. That condition is:

> The imposition of a trackage rights compensation fee for unit-train coal traffic under the UP/SP-BNSF September 25, 1995 Settlement Agreement, in the amount of 1.48 mills per gross ton-mile (or, in the alternative, 1.8 mills per ton-mile), in lieu of the 3.0 mills per gross ton-mile contained in the BNSF Settlement Agreement; . . .

WCTL Comments at 39.

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[14] See, e.g., BN/SF at 98 (discussion of dispute over viability of Phillips Petroleum Company build-out options).

TU Electric will not repeat the extensive evidence and argument WCTL has presented in support of its trackage rights fee request. TU Electric joins WCTL, and the numerous other shipper groups and governmental entities, in urging the STB to adopt a meaningful, cost-based trackage rights fee compensation standard. Fees at the levels "negotiated" by UP/SP and BN/SF simply will not produce effective competition between these two carriers over the routes where BNSF will obtain trackage rights.

IV.

THE STATE OF TEXAS' SUBMISSION PROVIDES ADDITIONAL SUPPORT FOR TU ELECTRIC'S REQUESTED CONDITIONS

The State of Texas, acting by and through its Attorney General, filed comments in this proceeding on March 29, 1996. Significantly, the State of Texas concurs with TU Electric that the proposed merger of UP and SP will be significantly detrimental to TU Electric.

TU Electric's merger-related harm at Martin Lake is discussed as follows in the Verified Statement of Texas' expert transportation witness, Dr. Henry B. McFarland:

> Another example of potential competition that might be lost due to this merger is competition for future coal deliveries to the Martin Lake Station of Texas Utilities Company (TU Electric). The Martin Lake plant now burns lignite that is mined on site. TU Electric, however, plans to begin burning coal from the Powder River Basin at the plant in approximately 4 years. TU Electric will

have a choice of two routings to bring coal to the plant: a routing that is entirely over the Union Pacific, and a routing involving the BNSF as origin and destination carrier in which the UP does not participate. The latter routing, however, involves the SP as a bridge carrier. Thus, after the merger, competition between the two routings could be eliminated.[28]

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[28] . . . . There is a third routing that is completely over the lines of the BNSF, but that routing is too circuitous to be effectively competitive.

(McFarland V.S. at 13).[15]

The evidence submitted by the State of Texas provides additional support for TU Electric's requested relief.

CONCLUSION

For the reasons set forth herein, TU Electric requests that the Board deny Applicants' proposed merger, unless approval of the merger is conditioned in the manner herein requested.

---

[15] This quoted material is submitted for the public record with the consent of the Texas Attorney General's Office.

Respectfully submitted,

By: John W. McReynolds
Worsham, Forsythe & Wooldridge
1601 Bryan Street
30th Floor
Dallas, Texas 75201
(214) 979-3000

John H. LeSeur John LeSeur
Frank J. Pergolizzi
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys for Texas Utilities Electric Company

OF COUNSEL:

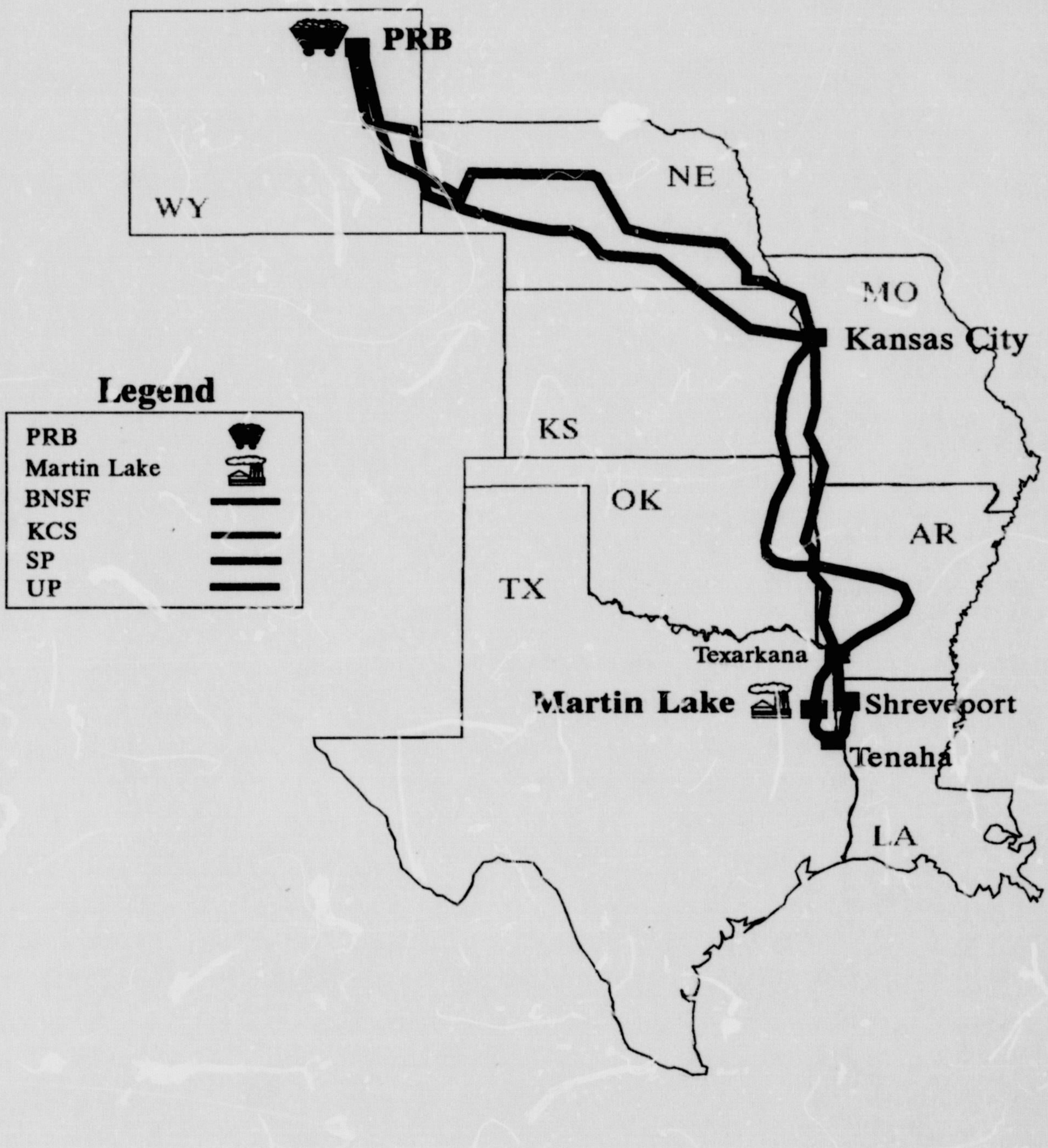
WORSHAM, FORSYTHE & WOOLDRIDGE
1601 Bryan Street
30th Floor
Dallas, Texas 75201

SLOVER & LOFTUS
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

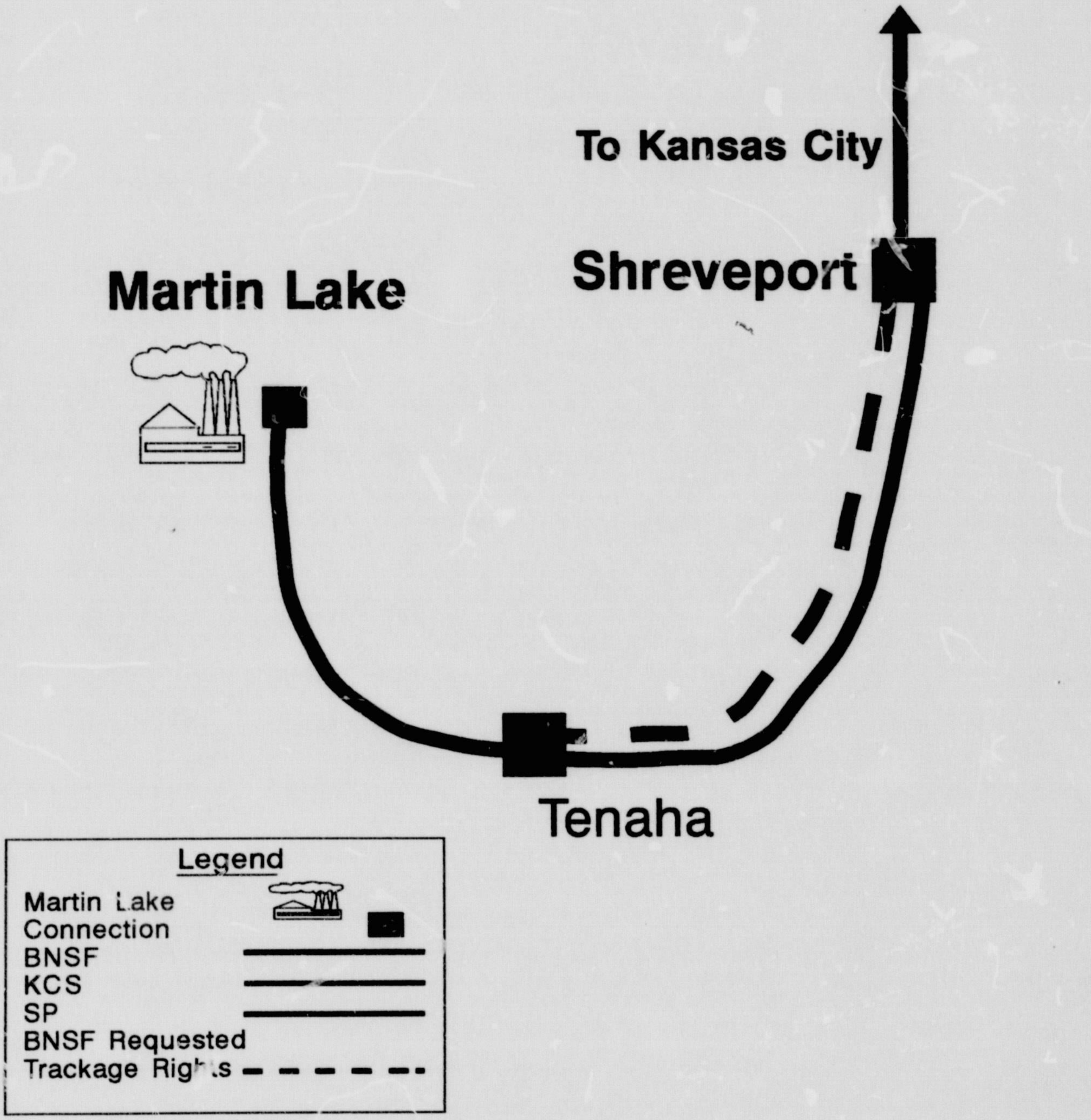
Dated: June 3, 1996

Attachment

Schematic of UP Direct and BNSF/KCS/SP Routes to Martin Lake



Schematic of Requested Trackage Rights



Attachment 3

UP/SP-247

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

APPLICANTS' RESPONSES TO TEXAS UTILITIES ELECTRIC COMPANY'S SECOND SET OF INTERROGATORIES AND DOCUMENT PRODUCTION REQUESTS

CANNON Y. HARVEY
LOUIS P. WARCHOT
CAROL A. HARRIS
Southern Pacific
Transportation Company
One Market Plaza
San Francisco, California 94105
(415) 541-1000

PAUL A. CUNNINGHAM
RICHARD B. HERZOG
JAMES M. GUINIVAN
Harkins Cunningham
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 973-7601

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

CARL W. VON BERNUTH
RICHARD J. RESSLER
Union Pacific Corporation
Martin Tower
Eighth and Eaton Avenues
Bethlehem, Pennsylvania 18018
(610) 861-3290

JAMES V. DOLAN
PAUL A. CONLEY, JR.
LOUISE A. RINN
Law Department
Union Pacific Railroad Company
Missouri Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-5000

ARVID E. ROACH II
S. WILLIAM LIVINGSTON, JR.
MICHAEL L. ROSENTHAL
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044-7566
(202) 662-5388

Attorneys for Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company

May 13, 1996

railroad consolidation proceedings, such documents have been treated by all parties as protected from production.

SPECIFIC RESPONSES AND ADDITIONAL OBJECTIONS

Interrogatory No. 1

1. The testimony of Robert L. Sansom states at page 50 that "[a]fter all this, TUE decided to use TUE Mining to develop a new lignite source for Big Brown rather than use PRB coal." Please identify the basis for this statement, including but not limited to identification of all sources of information and/or identification of all documents reviewed by Witness Sansom in reaching the above conclusion.

Response

The basis for Mr. Sansom's statement is TUE's December 1994 solicitation, "Big Brown Third Party Lignite Requests for Proposals," his discussions with parties responding to or considering responding to this RFP, and his familiarity with unmined lignite deposits in the vicinity of Freestone County, Texas.

Interrogatory No. 2

2. Please state whether Witness Sansom was aware of the news release issued by TUE on April 1, 1996 (copy attached hereto as Exhibit A) stating that TUE intends to construct a 30 mile rail line to its Big Brown generating plant and that this line "will carry Western coal to the plant to supplement locally-mined lignite"?

Response

Applicants object to this interrogatory on the basis that TUE refused to respond to Applicants' document request for public statements, such as this TUE news release, relating to TUE's substitution between coal and lignite. (See Applicants' Twelfth Set of Discovery Requests, No. 1. Applicants ultimately withdrew this request in a compromise effort to secure discovery responses from TUE.) Applicants further respond as follows:

No. However, this news release does not alter Mr. Sansom's view that TUE retains a lignite option at Big Brown, as an alternative to Western coals, with or without TU Mining as the operator.

Document Request No. 1

1. Produce all documents identified in response to Interrogatory No. 1, herein.

Response

All responsive documents are being placed in Applicants' document depository.

Werner
VS here

CERTIFICATE OF SERVICE

I hereby certify that I have this 3rd day of June, 1996, served copies of the foregoing Brief of Texas Utilities Electric Company by hand upon Applicants' counsel:

Arvid E. Roach II, Esq.
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044

Paul A. Cunningham, Esq.
Harkins Cunningham
1300 Nineteenth Street, N.W.
Washington, D.C. 20036

and by hand upon:

Michael D. Billiel, Esq.
Joan S. Huggler, Esq.
U.S. Department of Justice
Antitrust Division, Suite 500
325 Seventh Street, N.W.
Washington, D.C. 20530

I further certify that copies of the foregoing Brief of Texas Utilities Electric Company were served by first class mail, postage prepaid, on

The Honorable Federico Pena
Secretary
U.S. Department of Transportation
400 7th Street, S.W., Suite 10200
Washington, D.C. 20590

The Honorable Janet Reno
Attorney General of the United States
U.S. Department of Justice
10th & Constitution Avenue, N.W., Room 4400
Washington, D.C. 20530

and on all other parties of record in Finance Docket No. 32760.

John LeSeur

John H. LeSeur

STB FD 32760 6-3-96 E 84006

5 4006

SLOVER & LOFTUS

ATTORNEYS AT LAW

1224 SEVENTEENTH STREET, N. W.

WASHINGTON, D. C. 20036

WILLIAM L. SLOVER
C. MICHAEL LOFTUS
DONALD G. AVERY
JOHN H. LE SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
CHRISTOPHER A. MILLS
FRANK J. PERGOLIZZI
ANDREW B. KOLESAR III
PATRICIA E. KOLESAR
EDWARD J. McANDREW*

*ADMITTED IN PENNSYLVANIA ONLY

202 347-7170

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June 3, 1996

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Office of the Secretary
JUN 04 1996
5 Part of Public Record

BY HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Branch
12th Street & Constitution Avenue, N.W.
Washington, D.C. 20423

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

Dear Mr. Secretary:

Enclosed for filing in the above-referenced proceeding please find an original and twenty (20) copies of the Brief of Public Service Company of Colorado (PSC-6). In accordance with prior orders in this proceeding, we have also enclosed a Wordperfect 5.1 diskette containing this Brief.

We have also enclosed an extra copy of this document. Kindly indicate receipt and filing by time-stamping this copy and returning it to the bearer of this letter.

Thank you for your attention to this matter.

Sincerely,

Christopher A. Mills

Christopher A. Mills

An Attorney for Public Service Company of Colorado

Item No.__________

Page Count 14

JUNE, 1996 # 43

CAM:mfw
Enclosures

cc: Arvid E. Roach II, Esq.
Paul A. Cunningham, Esq.
The Honorable Jerome Nelson

BEFORE THE
SURFACE TRANSPORTATION BOARD

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY -- CONTROL AND MERGER -- SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY	Finance Docket No. 32760

BRIEF OF
PUBLIC SERVICE COMPANY OF COLORADO

PUBLIC SERVICE COMPANY OF COLORADO

By: Lisa A. Lett
Associate General Counsel
Public Service Company of Colorado
1225 17th Street, Suite 600
Denver, CO 80201-0840

C. Michael Loftus
Christopher A. Mills
Andrew B. Kolesar III
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys for Public Service Company of Colorado

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: June 3, 1996

BEFORE THE
SURFACE TRANSPORTATION BOARD

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY -- CONTROL AND MERGER -- SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY	Finance Docket No. 32760

BRIEF OF
<u>PUBLIC SERVICE COMPANY OF COLORADO</u>

In accordance with prior orders of the Surface Transportation Board ("Board") in this proceeding, Public Service Company of Colorado ("PSCo") submits this brief outlining its concerns with respect to the Railroad Merger Application filed by Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCL Corp., and The Denver and Rio Grande Western Railroad Company (collectively, "Applicants").[1]

[1] Union Pacific Railroad Company is referred to herein as "UP". Southern Pacific Transportaton Company and The Denver & Rio Grande Western Railroad Company ("DRGW") are collectively referred to herein as "SP".

I. SUMMARY OF PSCO'S POSITION.

PSCo neither supports nor opposes the proposed UP/SP merger. However, it has several concerns as to the merger's potential impact on the movement of coal to its three power plants in the Denver area (the Cherokee, Arapahoe and Valmont Generating Stations). These concerns are described in detail in PSCo's Comments (PSC-3) which were filed in this proceeding on March 29, 1996.

PSCo's Denver area plants presently burn a total of 3.1 million tons per year of SP-originated coal produced in western Colorado. They are potential future users of coal produced in the southern part of the Wyoming Powder River Basin ("PRB") that can be originated by either UP or Burlington Northern/Santa Fe ("BNSF").

PSCo is concerned about the possible effect of the merger on source competition for the future supply of coal to these plants when its current supply and rail transportation contracts for Colorado coal expire. Such competition could be reduced as a result of the merger because SP would no longer be an independent carrier with an incentive to market Colorado/Utah coal (which is the only coal it originates) aggressively. After its acquisition of SP, UP may discontinue SP's current aggressive pricing of service from Colorado origins in order to increase business for its more profitable PRB service. If this were to happen, PSCo would lose the benefits of existing source competition between the two coal regions.

In addition, PSCo is concerned that the UP/SP merger could result in deterioration in the quality of rail service it receives for the movement of western Colorado coal to its Denver area plants. This coal moves over SP's Moffat Tunnel line between Dotsero and Denver, Colorado. This line is presently congested, and appears to lack the capacity to handle the substantial post-merger increases in traffic volume projected by Applicants as a result of the proposed abandonment of SP's Tennessee Pass line between Dotsero and Pueblo, Colorado.

In its March 29 Comments, PSCo suggested that, if the Board decides to approve the merger notwithstanding its possible effects on source competition between Colorado and PRB coal, it should consider conditioning its grant of merger authority upon either divestiture of SP's lines necessary to transport western Colorado coal to the Denver/Pueblo area to an independent rail carrier, such as Montana Rail Link, or a grant of trackage rights over these lines to an independent carrier. Such a condition would maintain existing competitive options for the rail transportation of Colorado coal.

PSCo also suggested that, if the Board is not inclined to consider a divestiture or trackage rights condition, it should consider alternative conditions designed to ensure that Colorado coal shippers do not suffer a degradation of the level of service provided by SP as a result of the merger. PSCo suggested two such conditions for the Board's consideration, either of which would help to preserve the present level of rail service for the transportation of Colorado coal to PSCo's Denver area plants. One such condition would require UP/SP to maintain service on SP's Tennessee Pass line between Dotsero and Pueblo, Colorado. An alternative condition would permit UP/SP to discontinue service on (but not physically abandon) the Tennessee Pass line for a period of three years after the merger is consummated. This condition would provide Colorado coal shippers such as PSCo the opportunity to determine whether, during such three-year period, UP/SP is able to provide the level of service (in terms of average round-trip train cycle times) that SP provided in 1995 with respect to their Colorado coal tonnage. If it cannot, the Board could then take steps necessary to enable UP/SP to achieve the 1995 level of service (such as possible restoration of service over the Tennessee Pass line).

PSCo has reviewed Applicants' response to its concerns, as set forth in their Rebuttal filing on April 29, 1996. Applicants' response has not alleviated these concerns, and PSCo renews its request that the Board consider them in determining whether the public interest warrants approval of the proposed merger. If the Board concludes that, on balance, the merger should be approved, PSCo requests it to consider whether conditions such as those described above are appropriate to ameliorate the possible impacts of the merger on Colorado coal shippers such as PSCo.

II. RESPONSE TO APPLICANTS' STATEMENTS CONCERNING SOURCE COMPETITION.

In its March 29 Comments, PSCo indicated that because the Unita Basin region of western Colorado and eastern Utah is the only coal-producing region SP serves, SP has a strong interest in promoting the use of this coal by electric utilities such as PSCo, and has recently been marketing its Colorado-origin coal transportation service in an aggressive and customer-oriented fashion.[2] After a UP/SP merger, UP would very likely not have the same incentive since it will also serve PRB mines and would have the ability to charge higher rates (and earn more money) for transporting PRB coal to PSCo's Denver area plants than it could for transporting western Colorado coal to these plants. Accordingly, PSCo is concerned that it will see an increase in the rail rates available for future coal movements to its Denver area plants -- regardless of whether its future source of supply is Colorado or the PRB. (Bomberger at 11-12.)

In their April 29 Rebuttal filing, Applicants did not address this concern to PSCo's satisfaction. They did address, at length, the issue whether Colorado/Utah coal competes with PRB coal in midwestern and eastern markets -- but that issue is not relevant to PSCo's concerns. Initial testing has indicated that PSCo can burn either Colorado or PRB coal in its Denver area plants (although additional testing is necessary to determine the extent of plant modifications that may be required to burn PRB

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[2] PSCo Comments, Verified Statement of Charles R. Bomberger ("Bomberger") at 11.

coal without taking a significant boiler derate). The only issue relevant to PSCo is the comparative delivered cost of these coals in cents per million Btu's.

Applicants assert in their Rebuttal filing that the merged UP/SP system will continue to have every incentive to move coal to PSCo's Denver area plants. They also argue that PSCo would be better off burning PRB coal at these plants than it is burning Colorado coal because its 1995 test burn of PRB coal produced delivered costs that were 10-17¢/MMBTU less than those for SP-origin coal.[3]

The fact that UP would have an incentive to continue to move coal to the Denver area plants after the merger is beside the point. The question is whether the loss of the existing source competition provided by an independent, aggressive SP would result in higher transportation costs for <u>either</u> PRB or Colorado coal than PSCo would otherwise pay. PSCo believes this is a definite possibility because UP can charge a higher transportation rate for PRB coal to produce a delivered cost equivalent to that for Colorado coal due to the significantly lower minemouth prices for PRB coal. (Bomberger at 11-12.)

Applicants have also overstated the delivered-cost advantage PRB coal may have over western Colorado coal. In particular, Witness Sansom's delivered-cost comparison appears to use above-market coal prices and transportation rates for

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[3] Applicants' Rebuttal, Volume 2, Part C (Sansom V.S. at 47); <u>see</u>, <u>also</u>, Volume 1 at 262-263.

Colorado coal. PSCo's present base coal supply and transportation contracts with western Colorado producers and SP were entered into more than five years ago, and PSCo would expect lower prices for both elements of delivered cost in today's market environment.

In addition, the delivered costs for PRB coal used by Dr. Sansom include only the coal price and the transportation rate for a small 1995 test movement. They do not take into account the BTU penalty that must be assigned to PRB coal in comparing its delivered cost to that of Colorado coal on a long-term basis.[4] Nor has Dr. Sansom included anything for the cost of boiler and/or other modifications that will likely be necessary to enable PRB coal to be burned at the Denver area plants on a sustained basis. Extensive additional testing will be required to determine the extent of such modifications -- and the cost thereof would have to be included in making a proper delivered-cost comparison between PRB and Colorado coal.

In any event, to the extent that PRB coal does have a delivered-cost advantage over Colorado coal in today's circumstances, UP would appear to have the ability to absorb most of this advantage for itself rather than passing the savings on to customers such as PSCo. This is particularly true with respect

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[4] PRB coal capable of origination by UP contains 8300 to 8800 BTU/pound; western Colorado coal contains 11,000-11,500 BTU/pound. This means more PRB coal than Colorado coal must be burned to produce the same amount of heat. Accordingly, PRB coal must be assigned a delivered-cost penalty to account for the difference in heat value compared with Colorado coal.

to the Cherokee Station, which is the largest of the three Denver area plants, and which presently is served exclusively by SP. (Bomberger at 4.) Because of Cherokee's destination captivity, BNSF would not be able to compete effectively with UP to move PRB coal to this plant after the merger.[5]

In short, UP has not contradicted PSCo's belief that an independent SP provides effective source competition for its coal supply, and it has presented nothing to alleviate PSCo's concern that such source competition may be reduced as a result of the proposed merger.

III. RESPONSE TO APPLICANTS' STATEMENTS CONCERNING THE MERGER'S POSSIBLE IMPACTS ON SERVICE.

All of the Colorado coal used at the Denver area plants moves over SP's Moffat Tunnel line. This is basically a single-track line, and PSCo is presently experiencing service problems (in the form of delayed coal deliveries at the plants) as a result of congestion on this line.[6] If the proposed merger is approved, the number of daily train movements over the Moffat

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[5] The Board recently recognized that a bottleneck destination carrier can price its portion of a possible interline coal movement at a high enough level to preclude effective competition. Docket No. 41191, West Texas Utilities company v. Burlington Northern Railroad Company, Decision served May 3, 1996, at 11.

[6] Bomberger V.S. at 13. It would be difficult to increase the capacity of this line significantly due to the very mountainous terrain involved -- including a crossing of the Continental Divide via the six-mile Moffat Tunnel. Id. at 14.

Tunnel line will nearly double, from 11 to 20.[7] This doubled traffic level would hamper PSCo's ability to receive an acceptable level of service for its Colorado coal shipments.

In their Rebuttal filing, Applicants state that in the 1970's DRGW operated as many as 25 to 30 trains per day through the Moffat Tunnel, which indicates that this line should be able to handle the projected increase in traffic volume, and that Applicants can make some additional capacity improvements on this line if necessary. (Ongerth R.V.S. at 45.) However, the traffic mix has changed considerably since the 1970's. DRGW's operations consisted mostly of short mixed-freight trains, whereas today SP operates longer trains, including heavy, slow unit coal trains. SP presently has difficulty meeting contracted delivery schedules for PSCo's Colorado-origin coal, so it is likely that the shifting of more coal trains to the Moffat Tunnel line would, in fact, cause additional capacity and service problems.

Moreover, although the Tennessee Pass line has more severe grades than the Moffat Tunnel line for eastbound traffic, DRGW, and more recently SP, has operated this line successfully for many years. At the very least it is an important alternate route in the event of a derailment or congestion on the Moffat

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[7] See Ongerth Verified Statement in Volume 3 of Applicants' Rebuttal ("Ongerth R.V.S.") at 44-45. The proposed abandonment of SP's Tennessee Pass line, which is the primary route for SP-origin coal moving to points east and south of Denver, will cause traffic that presently moves over this line to be shifted to the Moffat Tunnel line. Also, six daily BNSF trains will be added to the Moffat Tunnel line as a result of the "Central Corridor" trackage rights granted under the BNSF-UP/SP "settlement agreement".

Tunnel line. In this regard, we note that Montana Rail Link has filed a responsive application in this proceeding in which it proposes to purchase all of the former DRGW lines in Colorado and Utah, and which indicates that it will maintain service on the Tennessee Pass line. PSCo supports the preservation of service on the Tennessee Pass line, by whatever means are available.

Applicants' Witness Ongerth states that no action will be taken "precipitously" to abandon Tennessee Pass, and that "[e]xisting service to overhead shippers will be protected until superior options are in place." (Ongerth R.V.S. at 48-49.) However, it is clear that Applicants' ultimate intention is to abandon the Tennessee Pass line, and if the merger is approved without service-preservation conditions, Applicants will be under no obligation to keep the Tennessee Pass line in service for any particular period after consummation of the merger.

Applicants' desire to achieve merger-related cost savings may well outweigh today's unenforceable promises. Accordingly, PSCo continues to believe that service-preservation conditions such as those suggested in its Comments (and described at pages 3-4, <u>ante</u>) may be appropriate to ensure that the merger does not result in a harmful deterioration in service quality for Colorado coal shippers.

IV. <u>CONCLUSION</u>.

If the Board determines that the UP/SP merger should be approved, PSCo requests that it impose protective conditions addressing PSCo's concerns. This will ensure that the public benefits of the merger are not reduced by a loss of source competition for Colorado coal shippers or by a diminution of the level of service necessary to ensure steady and timely delivery of coal for use at power plants operated by shippers such as PSCo.

PSCo has suggested several such conditions. It respectfully requests The Board to select the condition or conditions that, in the Board's judgment, would best balance the public benefits of the merger with the need to preserve source competition and adequate service for Colorado coal shippers.

Respectfully submitted,

PUBLIC SERVICE COMPANY OF COLORADO

By: Lisa A. Lett
Associate General Counsel
Public Service Company of Colorado
1225 17th Street, Suite 600
Denver, CO 80201-0840

C. Michael Loftus
Christopher A. Mills
Andrew B. Kolesar III
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys for Public Service Company of Colorado

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: June 3, 1996

CERTIFICATE OF SERVICE

I hereby certify that I have this 3rd day of June, 1996, served copies of the foregoing Brief of Public Service Company of Colorado by hand upon Applicants' counsel:

Arvid E. Roach II, Esq.
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044

Paul A. Cunningham, Esq.
Harkins Cunningham
1300 Nineteenth Street, N.W.
Washington, D.C. 20036

and by first class mail, postage prepaid, on all other parties of record in Finance Docket No. 32760.

Christopher A. Mills

STB FD 32760 6-3-96 E 84005 1/2

Item No. 84005

Page Count 71

June, 1996 #48

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REDACTED, PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

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UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY -- CONTROL AND MERGER -- SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY	Finance Docket No. 32760
- AND -	
RESPONSIVE APPLICATION -- ENTERGY SERVICES, INC., ARKANSAS POWER & LIGHT COMPANY, AND GULF STATES UTILITIES COMPANY	Finance Docket No. 32760 (Sub-No. 12)

BRIEF OF ENTERGY SERVICES, INC., ARKANSAS POWER & LIGHT COMPANY AND GULF STATES UTILITIES COMPANY IN OPPOSITION TO PROPOSED MERGER AND IN SUPPORT OF RESPONSIVE APPLICATION FOR TRACKAGE RIGHTS

ENTERGY SERVICES, INC. and its affiliates ARKANSAS POWER & LIGHT COMPANY and GULF STATES UTILITIES COMPANY

ENTERED
Office of the Secretary
JUN 0 4 1996
Part of Public Record

By: Wayne Anderson
General Attorney-Regulatory
Entergy Services, Inc.
631 Loyola Avenue
New Orleans, LA 70013

C. Michael Loftus
Christopher A. Mills
Andrew B. Kolesar III
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys and Practitioners

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

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BEFORE THE
SURFACE TRANSPORTATION BOARD

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY -- CONTROL AND MERGER -- SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY	Finance Docket No. 32760
- AND -	
RESPONSIVE APPLICATION -- ENTERGY SERVICES, INC., ARKANSAS POWER & LIGHT COMPANY AND GULF STATES UTILITIES COMPANY	Finance Docket No. 32760 (Sub-No. 12)

BRIEF OF ENTERGY SERVICES, INC., ARKANSAS POWER & LIGHT COMPANY AND GULF STATES UTILITIES COMPANY IN OPPOSITION TO THE PROPOSED MERGER AND IN SUPPORT OF RESPONSIVE APPLICATION FOR TRACKAGE RIGHTS

Pursuant to the Board's procedural orders in this proceeding, Entergy Services, Inc. ("ESI") and its affiliates Arkansas Power & Light Company ("AP&L") and Gulf States Utilities Company ("GSU") (collectively, "Entergy")[1] hereby submit their brief in opposition to the proposed merger and in support of their Responsive Application for trackage rights over Southern Pacific's lines between West Memphis and Pine Bluff, AR and between Beaumont, TX and Lake Charles, LA.

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[1] AP&L's name recently was changed to Entergy Arkansas, Inc., and GSU's name recently was changed to Entergy Gulf States, Inc. The former names are used herein for consistency with prior pleadings.

SUMMARY

The evidence in this proceeding establishes that the proposed merger will eliminate existing and potential competition for coal shipments to AP&L's White Bluff Steam Electric Station in Arkansas and GSU's Roy S. Nelson Generating Station in Louisiana unless the Board imposes the trackage rights conditions sought in Entergy's Responsive Application.

The White Bluff and Nelson power plants both burn southern Powder River Basin ("SPRB") coal that can be originated by either Union Pacific Railroad Company ("UP") or Burlington Northern Railroad Company ("BN").[2] In the case of White Bluff, which is presently captive to UP at destination, the merger would render meaningless a potential 21-mile build-out to a connection with SP[3] at Pine Bluff, AR. This build-out provides a competitive alternative for the movement of SPRB coal to White Bluff via BNSF-SP that Entergy would otherwise pursue vigorously when its present contractual commitments to UP expire.

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[2] BN is under common control with The Atchison, Topeka and Santa Fe Railway Company ("ATSF") as a result of authority granted by the Interstate Commerce Commission ("ICC") last year in Finance Docket No. 32549, Burlington Northern Railroad Company -- Control and Merger -- The Atchison, Topeka and Santa Fe Railway Company, Decision served August 23, 1995 ("BN/Santa Fe"). BN and/or ATSF are hereinafter referred to as "BNSF".

[3] The connection would actually be with St. Louis Southwestern Railroad Company ("SSW"), an affiliate of Southern Pacific Transportation Company ("SP"). Both SSW and SP are referred to herein as "SP". UP, SP and the other Primary Applicants in the lead docket are referred to herein as "Applicants".

In the case of Nelson, which is presently captive to the Kansas City Southern Railway Company ("KCS") at destination, the merger would nullify most of the benefits of a 4-mile build-out, known as the Nelson spur, presently under construction from the plant to a connection with SP near Lake Charles, LA.[4] Absent the merger, the Nelson spur would create competition among four interline routes for the transportation of this plant's SPRB coal requirements. By converting one of these interline routes (UP-SP) to a single-line route, the merger would effectively reduce the routing options to two, and Entergy would be worse off from a competitive standpoint with one single-line route and one ineffective interline route (BNSF-KCS) than it is today, with four interline routes including the highly effective BNSF-SP route.

To ameliorate the adverse competitive effects of the merger on the movement of coal to the White Bluff and Nelson plants, Entergy seeks conditions imposing trackage rights in favor of BNSF (or another rail carrier unaffiliated with Applicants) that would enable it to serve these plants via the build-outs described above. Specifically, trackage rights are sought over (1) the 127-mile portion of SP's Memphis-Houston line between West Memphis, AR (the closest practicable point where this line connects with an existing BNSF line) and Pine Bluff, AR (the point where this line would connect with the White Bluff

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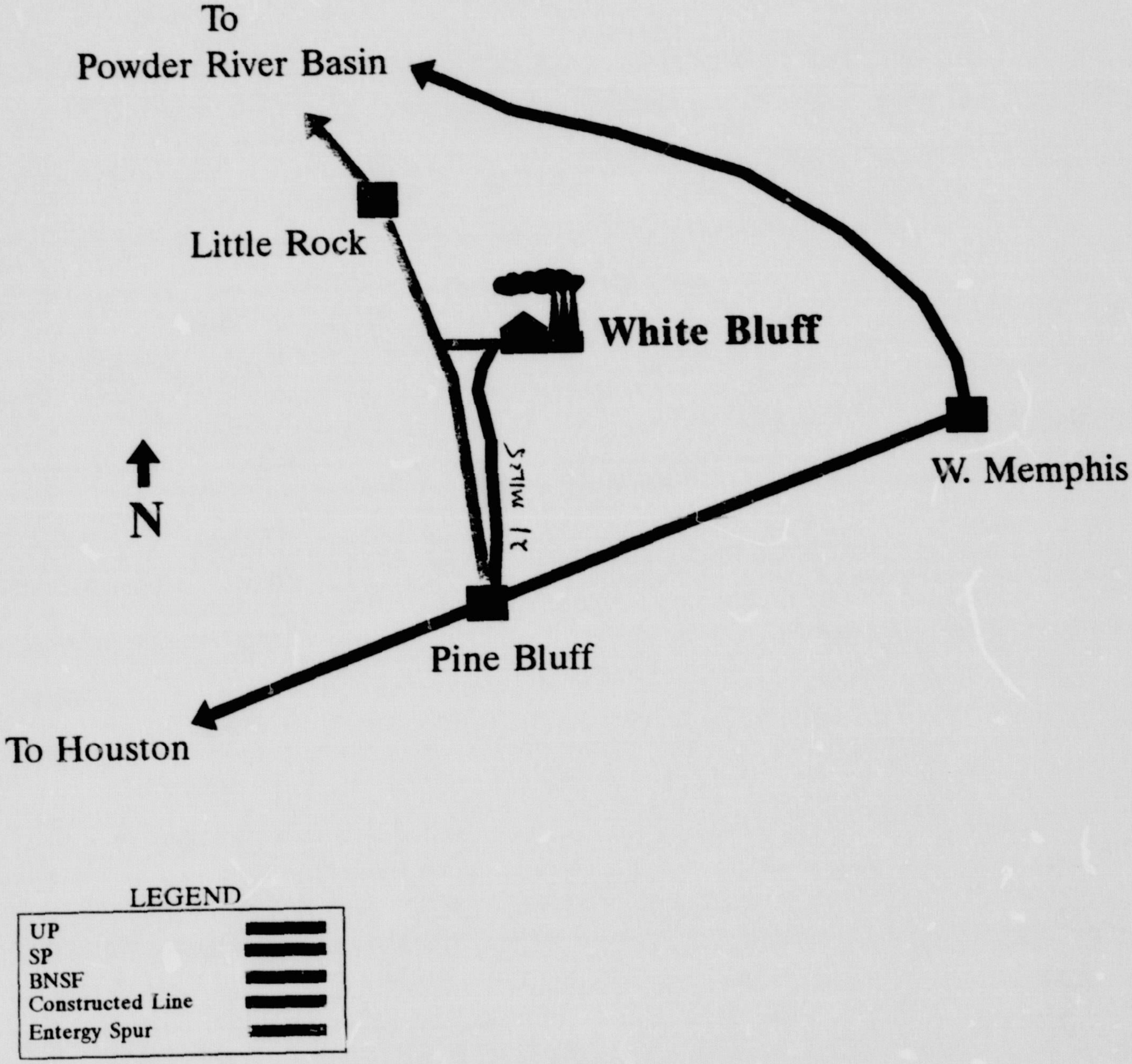
[4] Construction of the Nelson spur began in December 1995. Completion is scheduled for October 1996.

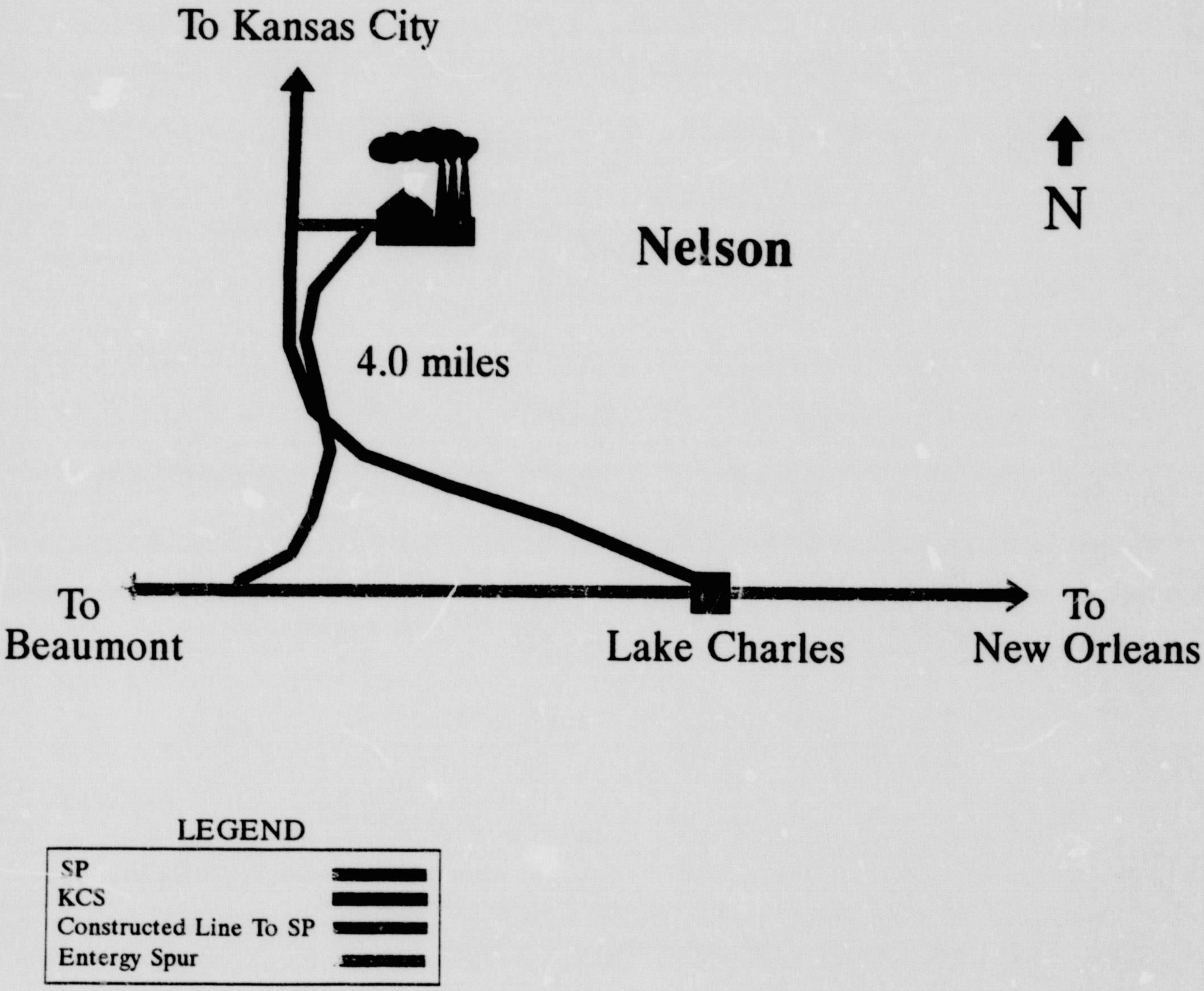
build-out); and (2) the 60-mile portion of SP's Houston-New Orleans line between Beaumont, TX (the closest practicable point where this line connects with an existing BNSF line) and Lake Charles, LA (the point where this line will connect with the Nelson spur).

To assist the Board in evaluating Entergy's present competitive situation in relation to the White Bluff and Nelson build-outs, schematics showing these build-outs in relation to existing rail lines, including the SP lines over which BNSF would operate if Entergy's proposed trackage rights conditions are granted, are set forth on the next two pages of this brief.

Schematic Of Line Construction
& Trackage Rights From White Bluff To SP



Schematic Of Line Construction & Trackage Rights From Nelson To SP



The requested trackage rights could be used by BNSF to access the White Bluff and Nelson plants only via build-outs, and will not become effective unless the build-outs are actually constructed. Thus, the relief sought by Entergy is squarely consistent with the relief granted by the ICC to certain shippers with build-out options in order to maintain their competitive position in <u>BN/Santa Fe</u>.

There is no question that these trackage rights are operationally feasible. Under the September 25, 1995 "settlement agreement" between Applicants and BNSF, as amended ("BNSF Settlement Agreement"), BNSF will receive overhead trackage rights over the very same SP lines if the merger is approved. BNSF will also have the ability to serve certain "2-to-1" shippers at intermediate points on these lines -- including Pine Bluff, AR and Lake Charles, LA, which are the very points where the White Bluff and Nelson build-outs will connect with these lines. Thus, the BNSF Settlement Agreement provides a convenient vehicle for the conditions requested by Entergy, as BNSF would already have trackage rights on the very same lines over which Entergy seeks trackage rights on behalf of BNSF. It would be a simple matter to require the BNSF Settlement Agreement to be amended to include the White Bluff and Nelson plants as additional 2-to-1 points that BNSF could serve if and when the build-outs are completed.[5]

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[5] If (as Applicants request) the BNSF Settlement Agreement is imposed as a condition, simplicity makes this approach preferable to imposing new trackage rights over these same lines.

If, as a condition to the merger, the Board requires that the BNSF Settlement Agreement be amended as suggested above, Entergy further requests that the Board reduce the compensation BNSF must pay UP/SP for use of the trackage rights to transport coal traffic from $3.00 per gross ton-mile to $1.48 per gross ton-mile, in order to approximate more closely UP/SP's relevant costs incurred as a result of such BNSF use.

FACTS

Entergy's identity and interest are set forth in its Comments filed in this proceeding on March 29, 1996 (**ESI-12**) ("Entergy Comments"). Briefly, ESI, AP&L and GSU are subsidiaries of Entergy Corporation, an investor-owned public utility holding company. ESI is a fuel procurement agent for Entergy Corporation's public utility operating company subsidiaries, which include AP&L, GSU, Louisiana Power & Light Company, Mississippi Power & Light Company and New Orleans Public Service Inc.[6] These operating companies provide retail and wholesale electric service to customers in Arkansas, Louisiana, Mississippi, and eastern Texas. (Entergy Comments, Giangrosso Verified Statement ["V.S."] at 3-4.)

Entergy Corporation's electric utility subsidiaries operate three baseload electric generating stations, all of which burn coal produced in the SPRB that can be originated by either

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6 The names of these companies were recently changed to, respectively, Entergy Louisiana, Inc., Entergy Mississippi, Inc., and Entergy New Orleans, Inc. Again, the former names are used here for consistency with prior pleadings.

UP or BNSF. AP&L operates the White Bluff Station near Redfield, AR and the Independence Station near Newark, AR.[7] GSU operates the Nelson Station near Mossville, LA. (Id. at 4-5.)

1. White Bluff.

The White Bluff Station, which is served exclusively by UP, consumes approximately 6.5 million tons of coal annually. Currently, UP transports all of this coal from origin to destination. This situation will continue through as a result of existing contractual commitments. Thereafter, tons of the SPRB coal moving to this plant can be diverted to alternative carriers and routes. (Id. at 4, 6-8.)

Entergy has identified a feasible competitive alternative to UP for the .3 million tons of White Bluff coal tonnage that will become available for bidding in 1999. This alternative involves the construction of a 21-mile build-out from the plant to a connection with SP's Memphis-Houston line at Pine Bluff, AR. (See the schematic on page 5, ante.) This SP line connects with BNSF at West Memphis, AR, and the build-out would provide a competitive route for SPRB coal moving to White Bluff via BNSF-SP.[8] Entergy submitted undisputed evidence showing

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[7] The Independence Station does not appear to be affected by the proposed merger.

[8] In their Rebuttal filing on April 29, 1996, Applicants claim that because the White Bluff plant is near the Arkansas River, a rail-barge routing provides a better competitive option than the rail build-out. However, Entergy investigated a possible rail-barge movement of coal to White Bluff in 1994, when UP was having severe service problems and could not deliver all the coal AP&L needed. The investigation showed that the rail-

that introduction of intramodal competition through access to White Bluff by a second rail carrier would result in a rate reduction of at least $2.00 per ton. (Entergy Comments, Weishaar V.S. at 9.)

The proposed merger of UP and SP would eliminate a BNSF-SP routing as a meaningful competitive option because, after the merger, UP would participate in both routings and would prefer its single-line route. Accordingly, to preserve the pre-merger competition between the existing UP route and the BNSF-SP route that would be created by the build-out when that option becomes available, Entergy has requested that the Board grant BNSF trackage rights, contingent on Entergy's construction of the build-out, over the portion of SP's Memphis-Houston line between West Memphis and Pine Bluff, AR, a distance of 127 miles, which BNSF would be able to use to access the White Bluff plant via the build-out.

2. Nelson.

The Nelson Station is presently served exclusively by KCS. It burns about 2.3 million tons of SPRB coal annually. This coal presently moves via BNSF-Kansas City-SP under a rail transportation contract between GSU and those carriers. This

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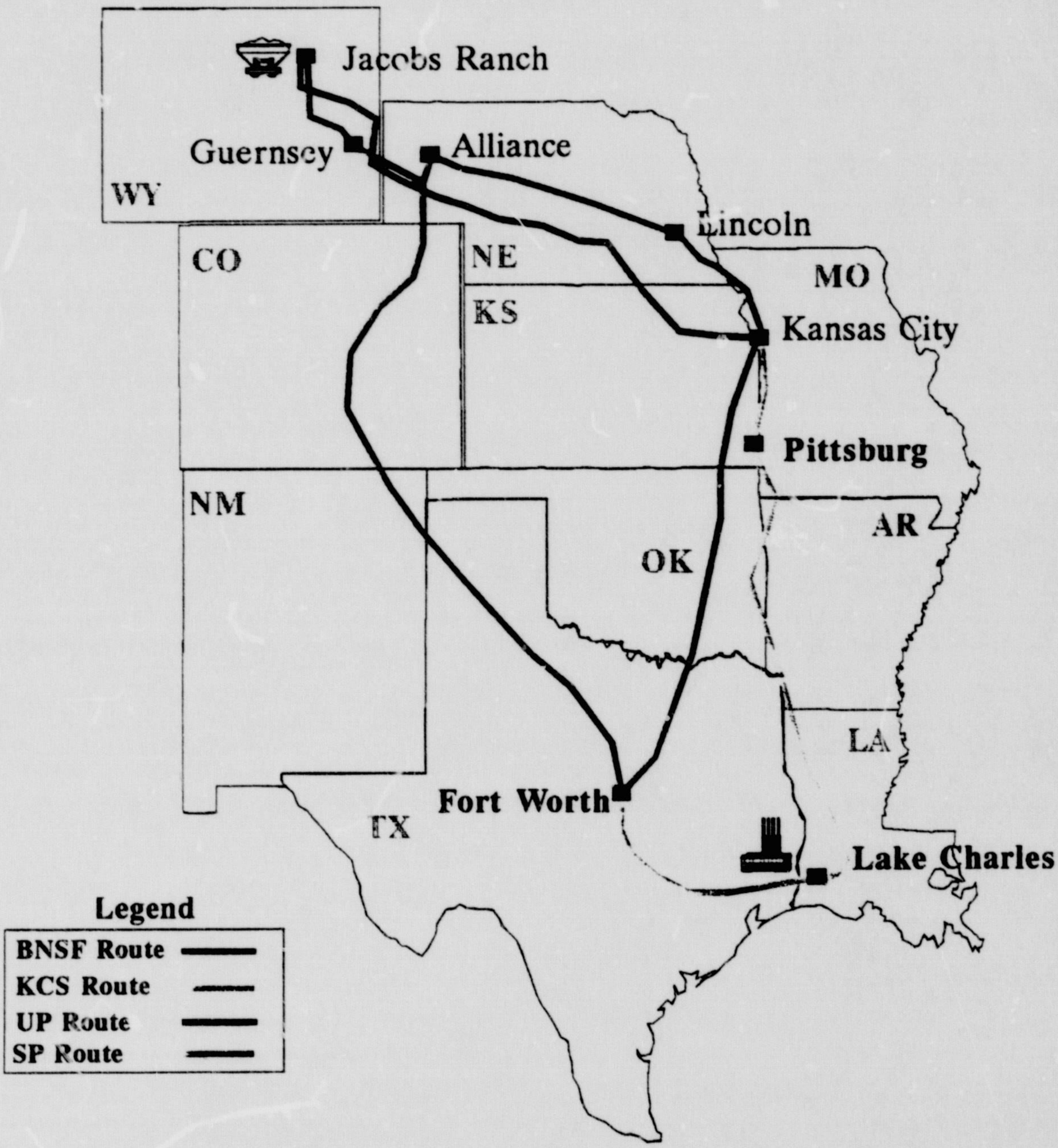
barge option was not competitive, and would result in higher delivered costs than those resulting from the present contractual arrangement with UP even on a long-term basis. See Entergy's Rebuttal in Support of Responsive Application for Trackage Rights filed May 14, 1996 (ESI-20) ("Entergy Rebuttal"), Giangrosso Rebuttal Verified Statement ("R.V.S.") at 11-13. The R.V.S. of Thomas D. Crowley in the Entergy Rebuttal demonstrates the economic inferiority of a possible rail-barge option compared with the rail build-out option.

contract, which expires on , contains a minimum annual volume requirement of tons. Thus, tons annually can be moved via other carriers and routes now, and the entire 2.3 million tons will be "in competition" by . (Entergy Comments, Giangrosso V.S. at 4, 8-9.)

In order to obtain two-carrier access to Nelson, Entergy is constructing the Nelson spur build-out from the plant to a connection with SP's Houston-New Orleans line near Lake Charles, LA. A schematic showing the Nelson spur in relation to the KCS and SP lines in the area is shown on page 6, ante.

In the summer of 1995, Entergy conducted bidding for the Nelson coal tonnage not committed to BNSF-KCS. The bidding was predicated on completion of the Nelson spur in October of 1996, and direct SP access to the plant via the spur. All four carriers that could participate in the movement of SPRB coal to Nelson after completion of the spur (BNSF, UP, KCS and SP) were requested to submit bids for their individual portions of the movement to or from the gateways of Kansas City and Fort Worth. All four carriers submitted responsive bids, which gave Entergy four competitive routing options for the Nelson coal tonnage: BNSF-Kansas City-KCS, UP-Kansas City-KCS, BNSF-Fort Worth-SP, and UP-Fort Worth-SP. These route alternatives are shown in the schematic on the following page.

Schematic Of Routing Options For Movement Of PRB Coal To Nelson



The lowest through rate resulting from the July/August 1995 bidding was via UP-Fort Worth-SP; the highest through rate was via BNSF-KCS. SP's bid from Fort Worth to the plant (which could be combined with either UP's or BNSF's bid from the mines to Fort Worth) was KCS's bid from Kansas City to the plant -- notwithstanding that SP's length of haul is 300 miles less than KCS'.[9]

The proposed merger would convert the UP-Fort Worth-SP interline route into a single-line UP route. However, it would effectively eliminate two of the other three interline routes: UP-Kansas City-KCS and BNSF-Fort Worth-SP. The reason is that it would be contrary to UP's best interests to short-haul itself by offering competitive rates for its portion of the interline routes involving KCS and BNSF. UP would participate in both of these routes in addition to its preferred single-line route, which would enable it to control the outcome. (Entergy Rebuttal, Giangrosso R.V.S. at 17-18, Weishaar R.V.S. at 11-12.)

The BNSF-Fort Worth-SP route is a more effective competitive alternative than the BNSF-Kansas City-KCS route because BNSF's long haul is via Fort Worth, and because KCS

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[9] <u>Id.</u> at 17-19.

.[10] In order to preserve the BNSF-SP route as an effective competitive alternative to the single-line UP route that would result from the merger, Entergy requests imposition of a trackage rights condition that gives BNSF access to the Nelson plant via the 60-mile portion of SP's Houston-New Orleans line between Beaumont, TX and the connection with the Nelson spur near Lake Charles, LA. This will preserve two competitive routes for the movement of SPRB coal to the Nelson plant.

ARGUMENT

The Board has broad authority to impose conditions, including trackage rights, to remedy the anti-competitive effects of rail mergers that are otherwise consistent with the public interest. The legal standards governing the imposition of conditions are well-established. As recently summarized in the BN/Santa Fe decision, conditions will be imposed if the Board finds them necessary to ameliorate or eliminate harmful effects of a merger such as a significant reduction of competition in an affected market, they are operationally feasible, and they produce public benefits (through reduction or elimination of the possible harm) outweighing any reduction of the public benefits produced by the merger. BN/Santa Fe at 55-56.

In addition, a condition will not be imposed unless it is narrowly tailored to remedy the adverse effects it is intended

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[10] Entergy Comments, Giangrosso V.S. at 21-22; Giangrosso May 30 Dep. Tr. at 61, 64.

to address. Finally, a condition should not put its proponent in a better position than it occupied before the merger, and if the harm to be remedied consists of a loss of a rail option, the condition should be confined to restoring that option rather than creating new ones. Id.

As we demonstrate below, Entergy's proposed trackage rights conditions meet all of the legal criteria set forth in the BN/Santa Fe decision.

I. TRACKAGE RIGHTS ARE NECESSARY TO PRESERVE ENTERGY'S WHITE BLUFF BUILD-OUT OPTION

Entergy's requested White Bluff trackage rights condition is squarely consistent with similar conditions imposed in favor of two shippers in BN/Santa Fe. The only issue raised by Applicants is whether the White Bluff build-out is feasible. However, consistent with BN/Santa Fe, the Board need not resolve definitively the question of feasibility, but should simply preserve the existing build-out option by granting the requested condition. This will allow the market to be the final arbiter of the feasibility issue -- just as it would be in the absence of the merger.

A. The Requested Condition is Consistent With Conditions Imposed in BN/Santa Fe to Preserve Build-out Options.

In BN/Santa Fe, the ICC granted trackage rights conditions in favor of two shippers, Oklahoma Gas & Electric Company ("OGE") and Phillips Petroleum Company ("PPC"), with facilities captive to ATSF but with potential build-outs to BN.

The ICC concluded that the merger would reduce these shippers' competitive options by negating their ability to build out to a neutral carrier, and trackage rights were deemed an appropriate remedy to maintain the competitive status quo. BN/Santa Fe at 37-38, 68, 98.[11] The conditions were carefully crafted to permit these shippers to maintain their existing build-out options, but not improve their pre-merger competitive situation. This was accomplished in each case by granting trackage rights in favor of a neutral carrier only to a point to which the shipper would retain the ability to build out, rather than to the shipper's plant. Id. at 68 (OGE), 98 (PPC).

The trackage rights condition requested by Entergy to preserve its existing White Bluff build-out option is functionally identical to the conditions granted in favor of OGE and PPC in BN/Santa Fe. BNSF, a neutral carrier, would receive trackage rights over the 127-mile portion of SP's Memphis-Houston line between West Memphis and Pine Bluff, AR, which is the point at which the build-out would connect with SP. BNSF would be able to use the trackage rights to access the White Bluff plant only via the build-out since the trackage rights would be conditioned upon Entergy's completing the build-out.

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[11] The ICC also held that while OGE had other possible options such as the ability to switch generation between plants and between fuels, only the build-out option could effectively constrain rates for base-load movements. Id. at 68. The White Bluff plant is also a baseload plant serving AP&L customers in Arkansas, and it is not geographically sensitive to generation elsewhere in the Entergy Corporation system. See Transcript of Mr. Giangrosso's April 10, 1996 deposition ("Giangrosso April 10 Dep. Tr.") at 10-11.

The BNSF Settlement Agreement acknowledges that "2-to-1" shippers (those presently served by both UP and SP) will suffer a loss of competition as a result of the merger; indeed, the primary purpose of this Settlement Agreement is to preserve two-carrier access for such shippers by granting extensive trackage rights to BNSF. Certain shippers served exclusively by UP who have build-out options to obtain service from SP (or vice versa) are also treated as 2-to-1 shippers that can be served (via the build-outs) by BNSF pursuant to the Settlement Agreement. Thus, Applicants have essentially conceded that if a shipper in Entergy's position has a viable build-out, it will be adversely affected by the merger and is entitled to preservation of its build-out option. Applicants have also recognized that, in accordance with BN/Santa Fe, an appropriate "fix" for the anti-competitive effects of the merger on such a shipper is trackage rights in favor of an independent carrier (i.e., BNSF) to the point of connection with the build-out.[12]

One of the requirements for imposition of conditions is that they produce public benefits outweighing any reduction of the public benefits produced by the merger. BN/Santa Fe at 56. This requirement clearly is met by the proposed trackage rights condition requested by Entergy. The condition would produce

[12] The BNSF Settlement Agreement also eliminates any question as to the operational feasibility of such trackage rights. In fact, Pine Bluff, AR -- the point where the White Bluff build-out would connect with SP's Memphis-Houston line -- is one of the "2-to-1" points listed in Appendix A to the BNSF Settlement Agreement.

public benefits by preserving the White Bluff build-out option -- an option that exists today, but that unquestionably would be lost if UP and SP merge. On the other hand, the condition would not cause any reduction whatsoever in the public benefits otherwise resulting from the merger, because it would not increase Entergy's existing competitive options. Just as SP today cannot access the White Bluff plant unless the build-out is constructed, so BNSF would not be able to use the trackage rights to access the White Bluff unless the build-out is constructed. If the build-out is not constructed, BNSF will not be able to serve the plant and Applicants will suffer no competitive harm.

In short, the condition meets all of the legal criteria of the BN/Santa Fe decision, and it is squarely consistent with the trackage rights conditions imposed in that case in favor of OGE and PPC.

B. Entergy has Made a Sufficient Showing of Build-Out Feasibility to Warrant Imposition of the Requested Condition.

Entergy has presented evidence demonstrating that the build-out is physically feasible, that the rate reductions likely to result from introducing service to the White Bluff plant by a second rail carrier are more than sufficient to justify the cost of constructing the build-out, and that, in the absence of the proposed merger, Entergy would pursue the build-out option when its current contractual commitments to UP expire.[13] This

[13] Entergy Comments, Giangrosso V.S. at 13-14; Weishaar V.S. at 6-10; Crowley V.S. at 9-11.

showing is clearly sufficient to demonstrate that the build-out is a competitive option that should be preserved by means of a trackage rights condition.

In their April 29 Rebuttal, Applicants oppose Entergy's requested trackage rights condition on the ground that the White Bluff build-out is not feasible. However, given Entergy's <u>prima facie</u> showing, the Board simply need not resolve the feasibility question definitively at this time. Absent the merger (or if the requested trackage rights condition is imposed), Entergy will investigate the build-out option thoroughly at the appropriate time: 1999, when its present contractual commitment of 100% of the White Bluff coal tonnage to UP expires. The market conditions that exist at that time will determine whether the build-out is economically feasible, and if so, it will be pursued vigorously by Entergy. Regardless of whether it is ultimately constructed, the build-out clearly is an existing competitive option for Entergy. This option will be lost forever if UP and SP are allowed to merge without imposition of a condition that preserves it.[14]

Applicants' attempt to dispute the feasibility of the White Bluff build-out is not surprising; they have stonewalled almost every build-out option from the inception of this proceeding. Prior to the filing of comments by various parties on March 29, 1996, Applicants regarded only two build-outs or build-ins as warranting 2-to-1 coverage in the BNSF Settlement

[14] Giangrosso May 30 Dep. Tr. at 8, 23-24, 37-38.

Agreement. One was a ten-mile build-out to serve three petrochemical facilities at Mont Belvieu, TX, and the other was a much shorter build-out to serve a Bayer facility at Eldon, TX.[15] As a result of the March 29 comments, two additional build-outs were included. One is a potential 8-mile build-out from a Union Carbide plant at North Seadrift, TX, and the other is a 2.7-mile build-out from two facilities at Channelview, TX. Thus, Applicants have conceded "feasibility" for only four very short build-outs on all of the 3,800 miles of UP and SP lines over which BNSF is being granted trackage rights under the BNSF Settlement Agreement.[16]

Applicants purport to have applied the criteria of the BN/Santa Fe decision in assessing the feasibility of potential build-outs for purposes of determining whether the involved facilities warrant inclusion as "2-to-1" points BNSF will be able to serve under the BNSF Settlement Agreement. Applicants summarize these criteria as follows at pp. 148-49 of **UP/SP-230**:

> [A] remedy is appropriate where the shipper seeking the condition presents evidence that demonstrates (1) either (a) that a shipper had successfully used the threat of a build-in as negotiating leverage, or (b) that a build-in was physically viable and economically feasible and thus could have given the shipper leverage to negotiate for lower rates; (2) that

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[15] According to Applicants' Witness Peterson, "not much track" was required for the Bayer build-out, and Applicants' counsel represented that it was a matter of "reestablishing an industrial lead." See Transcript of UP Witness Peterson's deposition on May 8, 1996 ("Peterson Dep. Tr.") at 188-89.

[16] Applicants' Rebuttal, Vol. 1 (**UP/SP-230**) at 19-20; Peterson Dep. Tr. at 56, 260.

the leverage provided by the build-in opportunity will disappear as a result of the merger; and (3) that other constraints available to the shipper are not as effective as the build-in opportunity.

This is an overly narrow reading of the criteria used in assessing the OGE and PPC build-out options. OGE had used the build-out threat in negotiations with ATSF that resulted in reduced rates (BN/Santa Fe at 36), but PPC had not. The applicants in BN/Santa Fe contended that the PPC build-out was not feasible, and that neither ATSF nor PPC had ever factored the threat of a build-out into any rate negotiations. Id. at 38 n.52. In imposing a trackage rights condition "to maintain PPC's current competitive situation as respects the prospective PNR build-out", the ICC did not resolve the parties' dispute over feasibility. Instead, it held as follows (Id. at 98):

> Though evidence is conflicting, the build-out option may be feasible. If so, it would have given PPC leverage to negotiate with Santa Fe for lower rates.

Thus, to meet the criteria used by the ICC in granting relief to preserve PPC's prospective build-out, a shipper need only show that it has a potential build-out option that provides potential negotiating leverage; that the merger would negate the competitive benefits of the build-out; and that the build-out may be feasible.

Entergy has clearly met these criteria with respect to the White Bluff build-out. It has indicated that it plans to pursue the build-out option to obtain a competitive alternative to UP in , when its current contractual commitments to UP will expire and coal tonnage will become available for bidding. It has also presented evidence that the build-out is both physically feasible and economically justified by the likely (and undisputed) rate reductions that would result from two-carrier access to White Bluff.

In reality, although Applicants pay lip service to the BN/Santa Fe build-out criteria, they have used only two factors in determining whether a potential build-out or build-in is "feasible": its length and whether the shipper has recently used the threat of the build-out in rate negotiations with UP or SP. This was confirmed by UP's Witness Peterson; see Peterson Dep. Tr. at 56-57, 191-194. Mr. Peterson stated that UP regarded as a "long" build-out or build-in anything over two or three miles (Id. at 193-194.) The Mont Belvieu build-in is 10 miles in length but will serve three shippers.[17] The Bayer/Eldon build-out is eight miles in length, and Mr. Peterson stated that it is "a long build-out" that "could be built" although it would be "expensive". (Id. at 192-193.) The Channelview, TX build-out was deemed feasible because the facilities "could be accessed by SP with a relatively minor amount of construction and expense." (Peterson Verified Statement in UP/SP-231 at 52.)

It is clear from Mr. Peterson's deposition testimony that Applicants regard 10 miles as the absolute limit for a

[17] Applicants could hardly claim the Mont Belvieu build-in was not feasible, since UP had already requested and received authority to construct the line from the ICC. Peterson Dep. Tr. at 186.

build-out to be considered feasible. This is completely at odds with the *BN/Santa Fe* decision, in which a 13-mile potential build-out by OGE and a 32.5-mile potential build-out by PPC were both determined to be feasible for purposes of imposing trackage rights conditions.[18] Moreover, other build-outs from utility power plants in excess of 10 miles in length have recently occurred -- e.g., the 14-mile build-out by Western Farmers Electric Company in Oklahoma and the 17-mile construction and rehabilitation build-out by Associated Electric Cooperative in Missouri. (Entergy Comments, Weishaar V.S. at 7 n.5.)

Applicants also dispute feasibility unless the threat of the build-out has actually been used in rate negotiations within the recent past. (Peterson Dep. Tr. at 191-192, 255.) While successful use of the threat of a build-out in rate negotiations is indeed persuasive evidence of feasibility, the lack of such use is not evidence of non-feasibility.

There are several reasons why a shipper who has a feasible build-out option may not have used the threat of it in rate negotiations. The most obvious reason is that the shipper's traffic that potentially could move over a build-out is contractually committed to the serving carrier on a long-term basis. A shipper simply has no reason to use the threat of a build-out until traffic is available that will justify it.

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[18] PPC proposed a build-out 11.5 miles longer than the 21-mile White Bluff build-out proposed by Entergy.

Q. But that's a contract negotiation you'll have up coming, right?

A. We certainly will.

Q. So I take it, if I step you through the various parts on this map, your answer would be the same as to all, that you just haven't looked at any of these specific issues about what the routing would be?

A. I think we've agreed that we have not made a detailed study, that our preliminary analysis indicates that this is a project worth pursuing, and one that Entergy deserves the opportunity to take advantage of at whatever moment in time it is appropriate.

Q. But if I were to try and go through and ask you about specific obstacles or problems along the potential routing, you wouldn't be able to answer any of those questions.

A. That's correct.

Q. Okay. Well, you'll be glad to know then I won't do it.

talking about a single-line UP versus interline BN/KCS?

BY MR. HESTER:

Q. Right.

A. Yes.

Q. And is that in part reflected because it's a longer haul?

A. Longer haul and a single carrier.

Q. Right. And both of those would in fact -- let me strike that and ask you another question. Compared to the situation where you would have four interchange options, if you think about your current situation at Nelson, would you also expect that a single-line haul all the way from the Powder River Basin to Nelson would be able to beat any of those interchange options?

A. I'm not so sure of that. What you have is four possible competitive routes, competitive routing situations. And to say that a single-line carrier will always beat the balance of having four people competing for service, I'm not willing to concede.

Q. Well, I wasn't asking necessarily whether it would always be true. I was asking what you would expect, and wouldn't you expect that the single-line carrier running for that much longer distance would be able to offer a rate that is likely to beat any of the interchange options?

A. No, I wouldn't expect that. I would expect that the single-line carrier would have the lowest cost. Whether or not he would share that cost with me as opposed to the competing -- the premerged competitive situation, I simply am not prepared to acknowledge that.

Q. Well, if he's got the lowest cost, he's got the most room to be aggressive on rates?

A. He's got the most room to be aggressive on rates, but he has no incentive to share the rates with me if he doesn't want to.

Q. Well, if we think now about post merger, the UP/SP single-line haul would be facing a BN/KCS routing as a competitive alternative.

A. As a competitive alternative, but at a cost much greater than his, and therefore he does not have to give up as much of his savings.

Q. But you would expect that UP/SP single line would beat a BN/KCS interchange?

A. I would expect that to be the case, but

I wouldn't necessarily agree that a BN/SP route might not yield a lower cost than a post merged UP single-line rate.

Q. Is the real problem with the BN/KCS routing that BN/KCS is not aggressive in competing for the business?

A.

Q. When you say that, you mean the --

A. KCS.

Q. Yeah, because you would expect, wouldn't you, that a BN/KCS routing, which is about 170 miles shorter than a UP/SP routing over Fort Worth, could be a quite competitive option, wouldn't you?

A. If it were a single-line carrier it would be more competitive than a single-line UP carrier via Fort Worth, if it were single line.

Q. And in fact, in your recent bidding experience, you found that SP bid more the KCS leg. So that has influence on it although, it's not controlling.

Q. Now, you said

A.

Q.

A. Certainly in our limited case here of taking bids on a competitive situation, we found that the SP was more aggressive than was the KCS.

Q. Now, would you agree with me that post merger, if you had two single-line routings to the Nelson plant, that you would be better off than if you had four interline routings?

A. Well, I would agree that I would have balanced competition if I had two single-line routings versus one single-line and one double-line routing.

Q. Well, I was really asking about if you think about your situation today, you've got four interline combinations, right?

A. Yes.

Q. And my question is would you agree with me that if you had two single-line routings, a BN single-line routing to the PRB or from the PRB to Nelson, and a UP single-line routing, that's more effective competition for you than the four interchange options?

A. No, I'm not sure I would agree with that. I mean --

Q. They are both lower cost than the interchange options, right?

A. Well, they are lower cost than the interchange options, but what would that do to my delivered cost? What's important to me is my cost, not their cost. It's what they charge me, and the more competitors you have in the marketplace, the greater pressure that puts on price.

And so if -- arguably, two is less competition than four. To conclude that I've got the same or better price advantage with two than I do with four, I don't know that I agree with. I don't know that I'm better, I don't know that I'm worse. But I will not agree that I'm better. I may be indifferent, but I don't know.

Q. You would agree that you would end up with two single-line carriers that would likely be able to provide the service at a lower cost to them than any of the interchange options you're dealing with today?

A. At a lower cost to them, yes. I would agree with that.

MR. HESTER: Why don't we take a break for a minute. I may be done.

(Recess.)

BY MR. HESTER:

Q. Two more questions. Do you have your statement there, page 13? The final sentence of the first paragraph is discussing a Memphis barge estimate, and you say that when Mr. Gray received the estimate, he noted that it was, "meaningless, because there is no barge transfer facility at Memphis capable of handling barge coal movements." Do you see that?

A. Yes.

Q. And is it fair to say that what made the quote meaningless during the summer of 1994 was that you needed to move the coal immediately?

A. Yes.

Q. Over some longer term, it might well be possible to construct a large-scale unloading route versus a single-line route. That's why it's less competitive.

Q. So your point is that the single-line route is more competitive because it has lower costs?

A. Because -- yes, because it has lower costs, and therefore can out -- likely, outbid, more times than not, unless they guess wrong, get too greedy, to -- would outbid an interline route. They are capable of doing it.

Q. And in your Footnote 14 at the bottom of the page, you say KCS has never been an aggressive competitor for Entergy's coal traffic. Do you see that?

A. Yes.

Q. And that's the point we were discussing before, that you just haven't seen aggressive bidding from KCS?

A. Yes.

MR. HESTER: Thank you, Mr. Giangrosso. Those are all the questions I have.

MR. MILLS: I have a few on redirect.

EXAMINATION BY COUNSEL FOR

WESTERN COAL TRAFFIC LEAGUE, ET AL.

1994 of bringing coal to White Bluff via rail/barge and the bids you received from the Burlington Northern and the barge companies at that time, and also based on the preliminary analysis that you have done of the White Bluff spur, do you have an opinion at this time as to which of those two options would be the least -- would be the most economical for Entergy when the current interim contract with UP expires ?

A. The view right now is that the single-line rail movement would be more cost-effective than the combined rail/barge movement of coal to plant.

Q. By single-line rail, you mean including the construction of the spur?

A. Including the construction of the spur. Single mode, if you will, versus a dual mode.

Q. Why do you say that?

A. Well, largely because, I think, if I look by comparison at Cajun Electric, a big user of coal, on the Mississippi River, their delivered cost of -- transportation cost of coal exceeds the transportation costs at similarly situated plants that are single mode transportation methods. And moreover -- and I think that's largely because when you've got a single mode carrier, a single-line carrier, that, just, they have less cost, and they are more cost efficient than is a double haul move.

MR. MILLS: I have nothing further.

FURTHER EXAMINATION BY COUNSEL FOR
UNION PACIFIC CORPORATION

BY MR. HESTER:

Q. Let me ask you a few questions. This judgment you made about Cajun Electric, is that based on the delivered price you've seen for Cajun Electric?

A. It's based on Cajun Electric's transportation costs.

Q. And how do you know what it is?

A. It's on file with the Louisiana Public Service Commission.

Q. And where does it source its coal?

A. Out of Powder River Basin.

Q. BN origin?

A. BN origin to St. Louis, Hall Street terminal St. Louis and barge, river tows to New Roads, Louisiana.

Q. Does BN have an interest in that Hall

CERTIFIED COPY

BEFORE THE

SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY

-- CONTROL 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

HIGHLY CONFIDENTIAL

Washington, D.C.

Wednesday, May 8, 1996

Deposition of RICHARD B. PETERSON, a witness herein, called for examination by counsel for the Parties in the above-entitled matter, pursuant to agreement, the witness being duly sworn by JAN A. WILLIAMS, a Notary Public in and for the District of Columbia, taken at the offices of Covington & Burling, 1201 Pennsylvania Avenue, N.W., Washington, D.C., 20044, at 10:05 a.m., Wednesday, May 8, 1996, and the proceedings being taken down by Stenotype by JAN A. WILLIAMS, RPR, and transcribed under her direction.

situations, industrial site No. 2 and industrial site No. -- let's say industrial site No. 2 has a hypothetical build-out to the SP line.

A. Okay.

Q. Now, I know you all have tried to diligently find out those situations where that existed and where it did exist you gave BN/Santa Fe access; is that correct?

A. Yes, we searched for all those locations and we've agreed to open up I believe four locations.

Q. Four on top of the how many did you open up before that, do you remember?

A. Well, it's two on top of -- two on top of two.

Q. So you searched all of UP and SP's system, entire systems, and you found only four places that there's potential build-outs that you're going to give BN/Santa Fe access to?

A. That's a long complicated issue here and that's too simplistic. I mean we searched the entire UP/SP system, we looked at each build-out opportunity that we were aware of, and then determined those where the shipper had successfully used the threat of a build-out to get -- to successfully negotiate better rates and have, in fact, a physically feasible build-out.

And we identified -- when you said two initially, I was referring to the Mont Belvieu-Bayer situation, it's all in the same area over east of Houston. And then subsequently we have agreed that we would allow two more build-outs even though the conditions that I just described really in my view weren't met. But we did it to put this issue to rest once and for all.

Q. So you've got four locations where you're going to give BN/Santa Fe access due to build-out possibilities?

A. Yes.

Q. Okay. Now, under the CMA agreement I believe is that, if a shipper felt that he is losing a build-out opportunity, he can bring an arbitration claim; is that correct?

A. I would have to go back and read the CMA agreement which I'm not as intimately familiar with as I should have been because of as I say all our application work here in the last few weeks. So I might need to refer back to that. But I mean it allows for negotiations

I mean the first paragraph I think gives a good start to the description in that we -- without just reading this, I mean I'll paraphrase it and indicate that, you know, our efforts started with identifying all shippers with physically viable and economically feasible build-in or build-out options that would be eliminated as a result of the merger.

Q. Can I interrupt?

A. Sure.

Q. I really didn't want a general discourse, I was talking specifically about Mont Belvieu and Bayer. Let's focus on those two. Mont Belvieu, of course, the UP had gone to the Interstate Commerce Commission and had received authority to construct additional line into the Mont Belvieu area; is that not correct?

A. That is correct.

Q. Had you signed contracts with any of the shippers at Mont Belvieu at the time of the decision to merge, the agreement to merge?

A. I believe that we had, yes.

Q. Some of the shippers there or all of the shippers?

A. I don't know. I know that -- if you

Q. Had any construction begun?
A Not to my knowledge.
Q. Turning to the Bayer --
A. A lot of engineering design work had been done.
Q. Turning to the Bayer facility at I believe it's Eldon, Texas; is that correct?
A. Yes.
Q. Had UP gone to the Interstate Commerce Commission for authority to construct a line to the Bayer facility?
A. I think -- I don't believe we had done that, no. I don't think that was necessary. I think we were talking about a much shorter distance of track here.
Q. And you don t believe it was necessary to get authority from the commission to extend line by virtue of the shorter distance? I read your statement in the rebuttal, it's page 65, you talked about Mont Belvieu, 65 to 66.
A. That's what I'm rereading now.
Q. That's why I'm asking about it, because I didn't see the substance in there.
A. I frankly don't know whether we've acquired any property in association with the

Bayer situation or not.

Q. That was my next question, property. I was asking about operating authority from the Interstate Commerce Commission. And I take it your answer to that is you don't know whether or not you obtained any operating authority either?

A. No. I'm aware that negotiations with Bayer had gone forward. They were very active last winter and, in fact, I'm not really sure much track was required there at Bayer.

Q. Maybe your counsel can enlighten us as to whether or not there was any proceeding before -- application filed with the commission.

MR. ROACH: Subject to check I will represent to you that this was a matter of reestablishing an industrial lead and that there was not a requirement of ICC approval. And I think it's in the work papers from the original application.

THE WITNESS: We talked about it in the original application.

MR. ROACH: The contract document is in the work papers and I believe it adverts to what I just said. But in any case that's my representation to you and I'll check it.

percent or 20 percent to keep the business or whatever.

Q. I believe you have testified that, in the totality of the build-in situations or build-out situations that you looked at in trying to determine what were the appropriate two-to-one places at which the BN/SF would have rights of access of various kinds, that you ultimately have as of now come up with four locations where access to those locations by BN/SF in the realm of a build-out or a build-in has now been determined to be part of the transaction. I refer to Mont Belvieu, Eldon, North Seadrift for Union Carbide, and the place where ARCO and Lyondell are located whose name I can't quite remember?

A. Channelview.

Q. Channelview. So those four places as I understand it are the four places that you all have now agreed would be accessible to BN/SF to serve through a build-out were such a situation to arise; in other words, they have the right under your agreement with them to participate in a build-out; is that correct?

A. Well, I don't believe that's precisely competitive standpoint.

MR. ROACH: You said Chevron, you meant ARCO.

THE WITNESS: Oh, at Channelview? I'm sorry, did I say Lyondell and Chevron at Channelview. It should be ARCO, I'm sorry. I do that a lot.

BY MS. HUGGLER:

Q. But, given that you think the likelihood that there actually could be a build-out at that location involving those two shippers, that is essentially a costless activity then; is that not right? If you don't really believe that this is likely to happen, it does not raise a big risk for UP to have granted that particular right to the BN/SF; is that correct?

A. A big risk as far as the build-out ever happening? My personal view is that I doubt that either build-in would be -- would ever happen. Probably it will give the customers some additional agenda item to have in future meetings and it could work to their advantage, probably will work to their advantage over time.

So I don't know that it's costless to UP. I think it is going to cost us some money over time one way or another. I just don't think it was necessary from a competitive standpoint to do that.

Q. Now, again I'd like to shift, if I may, to page 84 of your testimony, where there is a heading called short hauling. In that discussion, in meeting comments of Dr. Grimm, you say in the second sentence of the last full paragraph on that page, all railroads have taken steps to prevent their being involuntarily short hauled, that's in quotes, where this would yield inefficient routes. Do you see that?

A. Yes.

Q. Could you explain for me how a railroad can be involuntarily short hauled?

A. Well, it is an unusual situation and frankly that was sort of part of our criticism of this section of Mr. Grimm's work. He cited some situations back in the days of tariff routes and regulations and so on where, you know, some very clever rate person in a chemical company was able to find a rate to a short hauled junction or even a short haul destination that was maybe put in to compete with truck and then you move the car to there and then you rebill it and ship it from

The timing of any such threat is necessarily related to the opportunity to use it.[19]

In addition, the use of build-outs to obtain rail competition for captive facilities is a relatively recent phenomenon, dating only from the mid-1980s. For example, GSU (which at that time was not affiliated with Entergy Corporation) began consideration of the Nelson spur in late 1985, but did not even mention it to the railroads involved until 1989, and did not start construction until 1995. As Entergy's Witness Giangrosso noted at his April 10 deposition:

> This was rather new territory for an electric utility back then [in 1985], to be considering building a rail spur, a build-out; and, as utilities are want [sic] to do, a rather conservative bunch. And the first time you step out into some new venture like this, you try to gather all the information you can. And I think that's what this demonstrates they're doing.

(Giangrosso April 10 Dep. Tr. at 30.)

Because numerous factors may affect a shipper's timing with respect to active consideration of a build-out opportunity, it is wholly inappropriate to penalize a shipper who has a potential build-out option but who, for legitimate reasons, has

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[19] Entergy itself has had no occasion to use the threat of the White build-out in any recent rate negotiations with UP because all of the White Bluff coal tonnage is contractually committed to UP . Entergy will pursue the build-out option vigorously when the opportunity arises to put White Bluff coal tonnage up for bid. (Giangrosso May 30 Dep. Tr. at 23-24, 37-38.)

not yet revealed that option in rate negotiations.[20] Yet, this is exactly what Applicants' approach would do.

The third factor affecting feasibility, according to Applicants' reading of BN/Santa Fe, is whether other available competitive constraints are more effective than the build-out opportunity. Entergy has demonstrated clearly that a build-out is the most effective competitive option for the transportation of SPRB coal to White Bluff. White Bluff is a baseload plant, the operation of which is not sensitive to generation elsewhere on the Entergy system. (Giangrosso April 10 Dep. Tr. at 9-11.) As the ICC held in BN/Santa Fe with respect to OGE, only intra-modal rail competition (introduced in this case by means of a build-out) can be effective in constraining the level of railroad coal rates for a baseload power plant. BN/Santa Fe at 68.

Applicants have argued that rail-barge transportation is a more effective means of introducing competition for SPRB coal moving to the White Bluff plant than a build-out. However, Entergy's rebuttal evidence demonstrated that a rail-barge movement of coal to White Bluff would result in substantially higher delivered costs than those likely to result from the introduction of intramodal rail competition via the proposed build-out. See Entergy Rebuttal, Giangrosso R.V.S. at 7-8, 11-

[20] Entergy began consideration of the White Bluff build-out in early 1995 (nearly   years before it could be used), and began discussing it with SP before the announcement of the UP/SP merger. (Entergy Comments, Giangrosso V.S. at 13-14; Entergy Rebuttal, Giangrosso R.V.S. at 4-5.)

13; Weishaar R.V.S. at 3-5; Crowley R.V.S. at 2-8. See, also, Giangrosso May 30 Dep. Tr. at 74-75.

Applicants' extremely narrow view of what constitutes a "feasible" build-out must be rejected by the Board as inconsistent with applicable precedent in BN/Santa Fe. The Board should reaffirm the criteria it used in granting a trackage rights condition to preserve PPC's build-out in BN/Santa Fe, i.e., when a shipper presents a prima facie case of feasibility, as Entergy has in this case, the Board should impose a trackage rights condition designed to preserve the competitive status quo with respect to the build-out.

As a matter of policy, this approach is preferable to requiring absolute proof of economic feasibility unless the shipper has successfully used the threat of a build-out in recent rate negotiations, as proposed by Applicants. Merging railroads always have an incentive to define feasibility as narrowly as possible in order to avoid the imposition of trackage rights conditions to preserve any build-out options. Entergy's suggested approach makes the market, rather than regulation, the ultimate arbiter of feasibility. If the condition requested by Entergy is imposed, and UP is really convinced that a White Bluff build-out is not feasible, it will not be influenced by any attempt by Entergy to use the build-out threat in future rate negotiations, and Entergy will receive no benefit from the build-out option unless it proceeds with actual construction. If conditions change and the build-out ultimately is not economically feasible, it will not be built, BNSF will not gain access to the White Bluff plant, and UP will not be harmed by the condition.[21] Thus, a balancing of the competition-preserving benefits to Entergy against the potential harm to Applicants requires that the condition be granted.

C. The CMA Agreement's Arbitration Provision, Even If Extended to Non-CMA Members, Is Not an Adequate Remedy for Entergy.

Applicants' recent settlement agreement with BNSF and the Chemical Manufacturers Association ("CMA") ("CMA Agreement") contains a provision under which CMA members who have facilities exclusively served by UP and who seek the right to build out from such facilities to a point on the SP (or vice versa) to which BNSF will have trackage rights under the BNSF Settlement Agreement in order to obtain two-carrier service may seek arbitration of the feasibility of their build-out claim by the Board.[22] Such arbitration may be sought within one year following consummation of the UP/SP merger, or one year following

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[21] In his recent deposition, UP Witness Peterson was asked by counsel for the Department of Justice to confirm that granting conditional trackage rights to BNSF to preserve a shipper's build-out option would be essentially costless, and would not subject UP to significant risk. Mr. Peterson essentially confirmed this, although he made a lame attempt to argue that such a condition would not be totally costless: "Probably it will give the customers some additional agenda item to have in future meetings and it could work to their advantage, probably will work to their advantage over time." (Peterson Dep. Tr. at 264-65.)

[22] The CMA Agreement is appended to Volume 1 of Applicants' Rebuttal. The build-out arbitration provision appears in Section 13, on pages 4-5 of the CMA Agreement.

the expiration of a contract covering the traffic in issue that was in effect on the date of the CMA Agreement (April 18, 1996). The legal standard to be applied by the Board in any such arbitration is stated as follows in Section 13 of the CMA:

> The standard for relief shall be the principles with regard to build-ins articulated by the Interstate Commerce Commission in Finance Docket No. 32549, Decision served Aug. 23, 1995, or, if more favorable to the Shipper, any principles with regard to build-ins articulated by the STB in the Control Case [Finance Docket No. 32760].

Although this arbitration provision is limited to CMA members, Applicants have stated that they are prepared to extend the same remedy to other shippers should the Board "find cause to do so". (Applicants Rebuttal, Volume 1 at 20.)

As articulated by BNSF Witness Kalt, the purpose of the CMA Agreement's arbitration provision is to provide a neutral mechanism to resolve disputes over whether a shipper with a build-out option should be treated as a 2-to-1 shipper to which BNSF has access in order to preserve competition.[23] Indeed, Dr. Kalt lauds the arbitration provision as being consistent with the essential purpose of the BNSF Settlement Agreement:

> In the event of disputes, public policy considerations over the protection of competition imply that settings which, economically, satisfy the criteria of a 2-1 location should be protected with replacement service from BN/Santa Fe. (Id. at 9.)

These policy considerations clearly mandate that the CMA Agreement's arbitration remedy be extended to cover non-CMA

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[23] See BNSF's April 29, 1996 Response to Inconsistent and Responsive Applications, etc. (**BNSF-55**), Kalt V.S. at 8-9.

members. A shipper such as Entergy, who has made a prima facie showing that it has a feasible build-out opportunity to a point on one of the lines over which BNSF will receive trackage rights under the BNSF Agreement, is entitled, at a minimum, to have its claim for relief decided by an independent forum at the appropriate time (when its present contractual commitments to UP expire).

If the Board extends the CMA Agreement's arbitration provision to cover non-CMA members, Entergy submits that the arbitration standard needs further definition. Consistent with the relief accorded to PPC in BN/Santa Fe, a shipper should be required only to make a credible prima facie showing of feasibility in order to prevail. This would involve a basic cost-benefit analysis of the kind Entergy has submitted with respect to the White Bluff build-out, and a reasonable explanation as to why the build-out has not previously been pursued or used in rate negotiations with UP or SP (as the case may be).

Because Entergy has already made this kind of prima facie showing of feasibility, it should not be required to go through an arbitration process. There is no need for further regulatory involvement to resolve the feasibility dispute with respect to the White Bluff build-out. Having already made at least as strong a showing of feasibility as PPC made in BN/Santa Fe, Entergy is now entitled to the same kind of trackage rights condition. Consistent with the National Transportation Policy, in particular 49 U.S.C. § 10101a(1),[24] this will allow market forces to determine the ultimate extent to which Entergy will benefit competitively from its White Bluff build-out option.

II. A BEAUMONT-LAKE CHARLES TRACKAGE RIGHTS CONDITION IS NECESSARY TO PRESERVE EXISTING COMPETITIVE ROUTING OPTIONS FOR NELSON COAL.

Entergy committed substantial capital funds to construction of the Nelson spur in the expectation that it would have four competitive routing options for the SPRB coal:

Route	Rail Mileage
• UP-Kansas City-KCS	1,537
• BNSF-Kansas City-KCS	1,576
• BNSF-Fort Worth-SP	1,654
• UP-Fort Worth-SP	1,747

A schematic of these routes is shown on page 12, ante.

The proposed merger would convert the interline UP-SP route via Fort Worth to a single-line UP route. Because UP would not willingly shorthaul its own single-line route, the merger would effectively deprive Entergy of two of the four routes listed above: the UP-KCS route via Kansas City, and the BNSF-SP route via Fort Worth. The BNSF-SP route is likely to be the most competitive interline route, because it would give BNSF its long haul and because KCS is a high-cost carrier. Thus, the loss of

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[24] This paragraph directs the Board to "[a]llow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail."

this route would result in the loss of the most effective competition for UP's single-line route.

The bidding in the summer of 1995 for incremental Nelson coal tonnage confirmed that the least competitive of the four current interline routing options for Nelson coal is the BNSF-Kansas City-KCS route. The winning bid was UP-Fort Worth-SP. The availability of a neutral SP as a second destination carrier obviously caused UP to compete vigorously for the Nelson business over the Fort Worth gateway.

From a competitive standpoint, Entergy is better off with the four interline routes it has available today for Nelson coal tonnage than it would be after a UP/SP merger, when it would have available one single-line route and, as a practical matter, one ineffective interline route (BNSF-KCS). The four interline routes create a competitive balance that would not exist after the merger.[25] SP would then no longer be neutral, and only two effective routes would remain. One would be UP's single-line route, and the other would be the interline route that produced the highest through rate of the four routing combinations involved in 1995 Nelson bidding (BNSF-KCS). In future bidding for Nelson coal tonnage, UP would not have to compete vigorously with a BNSF-SP route. Its only competition would be the BNSF-KCS route, which, as previously noted, is a high-cost route. Despite the cost advantages of UP's single-line route, UP will only bid what it has to in order to beat an inefficient interline route.

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[25] Giangrosso May 30 Dep. Tr. at 64.

Because UP would no longer have to take a BNSF-SP routing via Fort Worth seriously as a competitive threat, the likely result is that Entergy's through rates will be higher than they would have been absent of the merger.

Applicants argue that because the BNSF-KCS interline route via Kansas City is 170 miles shorter than the post-merger UP single-line route via Fort Worth, UP would risk losing the business to BNSF-KCS unless it offers Entergy a competitive rate from the Fort Worth gateway that Entergy could combine with a BNSF rate from the mines to Fort Worth if so requested by Entergy. This argument is fallacious for several reasons.

First, as we have previously shown, the BNSF-KCS route is not likely to provide vigorous competition for UP's single-line route. Moreover, there is no rational reason why UP would choose an interline routing with BNSF over its own 1700-mile single-line route as its primary vehicle for competing with the BNSF-KCS route. Nor is there any rational reason why Entergy would request a bid from UP only via an interline routing -- and even if it did, UP would certainly submit a bid via its single-line routing. UP may well give Entergy a bid from the Fort Worth gateway if asked, but it would certainly also submit a single-line bid which it would view as its best opportunity to capture (or retain) the Nelson business.

Finally, given the 1700-mile total distance from the PRB mines to the Nelson plants, 170 miles is not a significant differential. Applicants' own in-house coal marketing witness, Mr. Nock, has acknowledged this; he testified with that for long-haul coal movements from SPRB origins, routes differing in length by "only 239 miles . . . can be competitive with one another" (Emphasis supplied).[26]

Because the merger would create a new single-line route for the transportation of SPRB coal to Nelson where only interline routes exist today, it is impossible to craft a condition that would exactly preserve the pre-merger competitive status quo. However, the next best thing would be to restore a measure of balance between post-merger competitive options by imposing a trackage rights condition in favor of BNSF, thereby preserving at least two competitive routes.[27]

III. THE BOARD SHOULD REQUIRE A REDUCTION OF THE TRACKAGE RIGHTS FEES SET FORTH IN THE BNSF SETTLEMENT AGREEMENT.

Assuming the Board agrees that the BNSF Settlement Agreement is an appropriate vehicle for implementing Entergy's requested trackage rights conditions, the Board should also

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[26] Applicants' Rebuttal (**UP/SP-231**), Verified Statement of William E. Nock at 52 (testimony concerning conditions requested by Texas Utilities Electric Company).

[27] Another way to preserve something aproximating the present competitive situation would be to impose a condition requiring UP to maintain a competitive proportional rate for the former SP portion of the movement from Fort Worth to the plant. (Entergy Rebuttal, Giangrosso R.V.S. at 19.) However, a trackage rights condition is preferable because it would approximate Nelson's present competitive circumstances, yet allow future competitive forces to determine Nelson rate levels.

require the compensation terms of the Settlement Agreement to be amended, insofar as they would apply to BNSF coal trains moving over the trackage rights to and from the connections with the White Bluff and Nelson build-outs, to approximate more closely UP/SP's relevant costs incurred with respect to such BNSF operations. Otherwise, BNSF will be inhibited unnecessarily in its ability to compete effectively for Entergy's coal traffic.

The compensation payable by BNSF under the Settlement Agreement for bulk traffic (which includes coal trains) is 3.0 mills per gross ton-mile -- which is the equivalent of mills per net or revenue ton-mile in the case of trains handling White Bluff coal tonnage, and mills per revenue ton-mile in the case of trains handling Nelson coal tonnage. As indicated in the Entergy Comments, payment of trackage rights compensation at this level would over-compensate UP/SP for the relevant costs caused by BNSF's operations on these lines, and thus would give the merged entity an undue advantage in competing for movements to the White Bluff and nelson plants.[28]

The appropriate compensation level for unit-train coal traffic, as developed by Entergy's Witness Crowley, is 1.48 per gross ton-mile which is equals UP/SP's variable cost (including a return on investment) caused by BNSF's use of the relevant SP line segments to reach the White Bluff and Nelson build-outs. Alternatively, Mr. Crowley has estimated BNSF trackage rights

[28] See Entergy Comments; Crowley V.S. at 19-20, Weishaar V.S. at 21-23; Argument at 23-25.

compensation based on the fair market value of the SP roadway assets that would be acquired by UP as a result of the merger. This results in a slightly higher compensation level of 1.8 mills per gross ton-mile.[29]

Mr. Crowley presented similar testimony on behalf of several other shippers and shipper organizations in addition to Entergy. In their April 29 Rebuttal filing, Applicants disputed the basis for Mr. Crowley's calculation of the appropriate level of compensation BNSF should pay under the BNSF Settlement Agreement. Entergy will not separately respond to Applicants' arguments here, but rather adopts the response made by the Western Coal Traffic League ("WCTL") in its brief in this proceeding.

Entergy joins WCTL and the numerous other shipper groups and government entities in urging the Board to adopt a meaningful cost-based trackage rights compensation standard. Fees that are not based on costs, such as those "negotiated" by BNSF and UP/SP in their Settlement Agreement, simply will not produce the kind of effective intramodal competition Entergy seeks for the movement of coal to the White Bluff and Nelson plants.

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[29] Entergy Comments, Crowley V.S. at 20, 24-27 and Exhibits __TDC-4) and __(TDC-6). The alternative method of compensation was developed to address the ICC's preference for the use of fair market value for return on investment, depreciation, and variable costs for roadway maintenance and operating costs when calculating trackage rights compensation. <u>See</u> <u>BN/Santa Fe</u> at 88-91.

CONCLUSION

Entergy seeks nothing more than the preservation of its existing competitive options for the movement of SPRB coal to the White Bluff and Nelson power plants. Because the proposed UP/SP merger would eliminate these options, it is inconsistent with the public interest.

If the Board determines that the proposed UP/SP merger should be approved, the Board should exercise its discretion and afford Entergy relief from the anti-competitive effects of the merger through the imposition of trackage rights conditions (or the imposition of appropriate amendments to the BNSF Settlement Agreement) that would enable BNSF to access the White Bluff and Nelson plants via the build-outs described in this brief.

Respectfully submitted,

ENTERGY SERVICES, INC. and its affiliates ARKANSAS POWER & LIGHT COMPANY AND GULF STATES UTILITIES COMPANY

By: Wayne Anderson
General Attorney-Regulatory
Entergy Services, Inc.
Mail Unit L-ENT-26E
631 Loyola Avenue
New Orleans, LA 70013

C. Michael Loftus
Christopher A. Mills
Andrew B. Kolesar III
Patricia E. Kolesar
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Their Attorneys

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: May 14, 1996

CERTIFICATE OF SERVICE

I hereby certify that I have this 3rd day of June, 1996, served Highly Confidential copies of the foregoing Brief of Entergy Services, Inc., Arkansas Power & Light Company and Gulf States Utilities Company In Opposition to Proposed Merger and In Support of Responsive Application for Trackage Rights by hand upon Applicants' counsel:

Arvid E. Roach II, Esq.
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044

Paul A. Cunningham, Esq.
Harkins Cunningham
1300 Nineteenth Street, N.W.
Washington, D.C. 20036

and by hand upon:

Michael D. Billiel, Esq.
Joan S. Huggler, Esq.
U.S. Department of Justice
Antitrust Division, Suite 500
325 Seventh Street, N.W.
Washington, D.C. 20530

I further certify that copies of a Redacted, Public Version of the foregoing document were served by first class mail, postage prepaid, on

The Honorable Federico Pena
Secretary
U.S. Department of Transportation
400 7th Street, S.W., Suite 10200
Washington, D.C. 20590

The Honorable Janet Reno
Attorney General of the United States
U.S. Department of Justice
10th & Constitution Avenue, N.W., Room 4400
Washington, D.C. 20530

and on all other parties of record in Finance Docket No. 32760.

Christopher A. Mills

APPENDIX

Excerpts from the Transcripts of the following Depositions Referenced in Entergy's Brief:

Roy A. Giangrosso (April 10, 1996)

Roy A. Giangrosso (May 30, 1996)

Richard B. Peterson (May 8, 1996)

BEFORE THE

SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY

-- CONTROL 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

HIGHLY CONFIDENTIAL

Washington, D.C.

Wednesday, April 10, 1996

Deposition of ROY A. GIANGROSSO, a witness herein, called for examination by counsel for the Applicants in the above-entitled matter, pursuant to agreement, the witness being duly sworn by JAN A. WILLIAMS, a Notary Public in and for the District of Columbia, taken at the offices of Slover & Loftus, 1224 Seventeenth Street, N.W., Washington, D.C., 20036, at 2:05 p.m., Wednesday, April 10, 1996, and the proceedings being taken down by Stenotype by JAN A. WILLIAMS, RPR, and transcribed under her direction.

subsidiaries?

Q. Yes.

A. The generating system of Entergy is dispatched on an economic basis. And the energy is used then to supply the various needs of the total system. And energy can be -- within constraints, within several different constraints, it's economically dispatched.

But there are certain conditions of reliability and transmission line constraints which affect the ability to move electricity fluidly throughout the system, throughout the whole geographical area served by the Entergy Corporation.

Q. And actually your question to me exposed something to me I didn't know and I should. Can you tell me the states in which the Entergy system has facilities?

A. Entergy operates in Arkansas, Mississippi, Louisiana, and the Eastern part of Texas. It serves parts of all of those four states.

Q. And roughly how many nuclear units does it have?

A. Let's see, there are two units in

Arkansas, one in Mississippi, and two in Louisiana.

Q. And then roughly how many gas and oil fired units does it have?

A. Many. I really -- on the order of 30, 30 to 40, somewhere in that range.

Q. And, when you say that the electricity is economically dispatched, what do you mean by that phrase?

A. Meaning the lowest cost energy -- the lowest cost fuel is burned first to produce electricity. When I say the lowest cost fuel, in the most efficient unit. I mean unit efficiency is a function, subject to the constraints that I talked about earlier meaning system reliability and transmission line configurations.

Q. So let's think again about the facility at White Bluff. Would there be occasions when Entergy might bring in electricity from other parts of its system into the local area that's served by the White Bluff plant?

A. You're getting very geographically constrained when you say that. I mean White Bluff is out in the countryside.

Q. What do you think of as the geographic area that White Bluff serves?

A. White Bluff is a generating -- a major generating facility, a baseload generating facility of Arkansas Power & Light Company. And it's available to serve fundamentally all of Arkansas Power & Light Company's electric needs, it's not geographically sensitive other than as I've just described.

Q. And does Arkansas Power & Light operate in more than one state in the area?

A. No. Arkansas Power & Light operates in the state of Arkansas.

Q. Okay. And does the White Bluff facility also from time to time serve as a source of electricity that goes outside the state of Arkansas?

A. From time to time, that can happen.

Q. And are there also times when the Entergy system will bring electricity into Arkansas that's being generated from other facilities outside of Arkansas?

A. That can happen.

Q. And is that an ongoing phenomenon?

A. Generally speaking -- well, it's hard to say. It can happen either way.

available until 1995. What was the reason that consideration began as early as 1985 of what you were going to do with this spur?

A. This was rather new territory for an electric utility back then, to be considering building a rail spur, a build-out; and, as utilities are want to do, a rather conservative bunch. And the first time you step out into some new venture like this, you try to gather all the information you can. And I think that's what this demonstrates they're doing.

Q. Now, in retrospect does it end up taking Gulf States longer than you would have liked to get this spur in place?

A. No. I think Gulf States suspended the need for constructing this spur once they reached what they believed to be a satisfactory interim agreement, if you will, with Burlington Northern. And, once that occurred in 1992 or once it became obvious that they were going to get a concession from the BN that was satisfactory to them, they backed off and delayed the construction for awhile, until it became evident that it could be done and done economically.

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engineering issues.

A. That's correct.

Q. And so at this point, whether or not this merger goes forward, Entergy has not made a decision as to whether or not it would go forward with the build-out?

A. That's correct, because it's not even within a time horizon with which we would proceed with obtaining corporate funds for a project which is several years down the road. And we've pointed out on many occasions before, we would wait for the economics and let the market determine what we would do.

Q. And at this point, you're not sure whether the economics would support a buildout?

A. Based upon what we think we know at the moment, I think the economics would support a buildout.

Q. And when you say what you know at the moment, are you referring to the exhibit that we marked as Exhibit 2 to your first deposition?

A. I don't remember what we marked as Exhibit 2, but based upon the preliminary work that we've done to date, we have reason to believe that it would be economic. Certainly it

BEFORE THE

SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY

-- CONTROL 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

HIGHLY CONFIDENTIAL

Washington, D.C.

Thursday, May 30, 1996

Deposition of ROY A. GIANGROSSO, a witness herein, called for examination by counsel for the Parties in the above-entitled matter, pursuant to agreement, the witness being duly sworn by TRACY E. PETTY, a Notary Public in and for the District of Columbia, taken at the offices of Slover & Loftus, 1224 Seventeenth Street, N.W., Washington, D.C., 20044, at 1:10 p.m., Thursday, May 30, 1996, and the proceedings being taken down by Stenotype by TRACY E. PETTY, RPR, and transcribed under her direction.

A. That's correct, but Mr. Hester, I don't know that it really matters, whether it's a million a mile or 5 million a mile. I don't know what that matter is to this whole issue. The issue is one of opportunity. It's not one of cost.

Q. What if it was 5 million a mile? It would be less feasible, wouldn't it?

A. If it were 5 million dollars a mile, it probably wouldn't get built, but the economics would determine it wouldn't get built, not the whim of the railroad.

Q. I'm not going to debate with you the broader issues, but I do want to establish the factual proportion. If it costs you $2 million a mile, that's a less attractive opportunity for you than if it costs $1 million a mile?

A. It depends on what the potential savings might be in . If it produced twice the savings that a million dollar a mile project would produce, it might be just as economical. That's the issue, Mr. Hester. The issue is the value at the time the project would move forward and the decision were being made. Entergy is simply asking for the opportunity to be able to make that decision.

Q. Right. And you don't know how much it would cost, do you?

A. And I don't know how much the savings would be, either.

Q. But you don't know how much it would cost.

A. But I don't know how much the savings would be.

Q. Answer my question. You don't know how much it would cost.

A. Neither do I know how much it would cost nor do I know what the savings would be.

Q. Answer the question, please. So you don't know how much it would cost?

A. I answered that.

Q. What was the answer.

A. Neither do I know how much it would cost nor how much the savings would be.

Q. Okay, okay. And both of those things would have to be determined before you would know if it made sense to build it out?

A. That's correct, and it never will be built if Entergy does not have the opportunity to reach that point.

A. And you're saying that there are no other facilities available? I mean, I'm not aware of what you're saying, but I'm saying so what?

Q. You haven't studied it one way or the other?

A. I think we've already established that we've not made a detailed analysis of the project, that the issue is one of opportunity.

Q. And the costs would just have to be figured out later?

A. The costs and savings would have to be weighed one against the other to determine if the savings are positive or negative. But without the opportunity, the customers of the state of Arkansas are the ones that are going to be disadvantaged.

Q. Well, you do have a contract term with Union Pacific that provides for

at the expiration of the interim contract, right?

A. There is some great question about that, Mr. Hester, because there seems to be, as we discussed earlier, considerable disagreement as to

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1) 84003

LAW OFFICES

KELLER AND HECKMAN LLP

1001 G STREET, N.W.
SUITE 500 WEST
WASHINGTON, D.C. 20001
TELEPHONE (202) 434-4100
FACSIMILE (202) 434-4646

BOULEVARD LOUIS SCHMIDT 87
B-1040 BRUSSELS
TELEPHONE 32(2) 732 52 60
FACSIMILE 32(2) 732 53 92

WRITER'S DIRECT DIAL NUMBER

(202) 434-4144

June 3, 1996

Item No.______________

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~~JUNE, 1996 #23~~ #46

Vernon A. Williams
Secretary
Surface Transportation Board
Room 2215
1201 Constitution Avenue, NW
Washington, DC 20423

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

Dear Mr. Williams:

Enclosed for filing in the above-captioned docket proceeding, please find the original and twenty (20) copies of The Society of the Plastics Industry, Inc.'s Brief (SPI-21). This Brief is being filed in two versions, one designated Highly Confidential to be filed under seal and also a public version. Also enclosed is a 3.5" disk for each version containing the text of the Brief in Word Perfect 5.1.

Copies of the enclosed Brief are being served on the parties shown below.

Cordially yours,

Martin Bercovici

Martin W. Bercovici

Enclosures

cc: Arvid E. Roach II, Esquire (By Hand)
Paul E. Cunningham, Esquire (By Hand)
All Parties of Record (By Mail)

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REDACTED - TO BE FILED ON THE PUBLIC RECORD

SPI-21

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

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BRIEF OF
THE SOCIETY OF THE PLASTICS INDUSTRY, INC.

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JUN 0 4 1996
4 Part of Public Record

Martin W. Bercovici
Douglas J. Behr
Elliot Belilos
KELLER AND HECKMAN LLP
1001 G Street, NW
Suite 500 West
Washington, DC 20001
(202) 434-4100
(202) 434-4646 (FAX)

Attorneys for The Society of the Plastics Industry, Inc.

June 3, 1996

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COMPANY, SPCSL CORP. AND THE DENVER AND
RIO GRANDE WESTERN RAILROAD COMPANY

BRIEF OF
THE SOCIETY OF THE PLASTICS INDUSTRY, INC.

I. INTRODUCTION

The Society of the Plastics Industry, Inc. (hereinafter generally referred to as "SPI"), respectfully submits its Brief in opposition to the application of the Union Pacific Corporation (UP), et al., and the Southern Pacific Rail Corporation (SP), et al., seeking approval of the Surface Transportation Board for authority to merge. As an alternative to denial of merger authority, SPI respectfully urges the Board to require divestiture of one set of the parallel tracks and related facilities running from the Mexican border to the eastern gateways of Chicago, Memphis, St. Louis and New Orleans in order to ameliorate the adverse effects on competition between and among rail carriers which otherwise would flow from the proposed merger. SPI submits this Brief in accordance with 49 U.S.C. §§ 11341, et seq., the regulations promulgated at 49 C.F.R. Part

1180, and the decisions governing this proceeding issued by the Interstate Commerce Commission and this Board.[1]

SPI respectfully submits that the record amply demonstrates that (i) the transportation of plastics resins is an important market which warrants Board consideration and protection in this proceeding; (ii) UP and SP dominate the plastics resins market; (iii) a merger of Applicants would yield increased market power in the merged carrier adverse to the plastics industry; (iv) the agreement between Applicants and BNSF will not preserve rail competition in the Gulf Coast plastics market, but rather will reduce competition by making the BNSF dependent upon UP/SP for service to points accessed under the agreement; and (v) divestiture of the Texas/Louisiana Gulf Coast lines would eliminate any anticompetitive impact on the plastics industry, while maintaining the substantial majority of purported benefits of the proposed merger.

SPI incorporates herein its evidence and arguments submitted in SPI-11, as corrected in SPI-12 and SPI-15, and its comments on

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This pleading relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to sections 11323-27 of the Act. Therefore, this pleading cites to the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

the CMA settlement which amended the BNSF agreement, SPI-16 and SPI-18 (errata). SPI endeavors in this Brief to refrain from repetition of matter which appears in its prior submissions, except in summary fashion as appropriate, and specifically incorporates by reference SPI's citation to the applicable legal standard, SPI-11 at 6-13.[2] In this Brief, SPI addresses the issues in contention as framed by the application, SPI's Comments, and the rebuttal and other submissions.

II. SPI'S INTEREST IN THE MERGER

A. <u>Identification of SPI and Products of Interest</u>

SPI is the major trade association of the plastics industry. Its members consist of more than 2,000 companies which supply raw materials, process or manufacture plastics and plastics products, and engage in the manufacture of machinery used to make plastic products or materials of all types. The plastics industry is one of the leading economic sectors of the United States, SPI-11 at ii-iii; and SPI's members are responsible for an estimated 75% of total sales of plastics materials and plastic products in this country.[3]

Plastics resins, STCC 28211, the primary material of interest to SPI in this proceeding, constitute approximately 52

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[2] In general, citations to SPI's principal submission of March 29, 1996 refer to SPI's Comments, SPI-11, by page number, which in turn cite to the evidentiary record.

[3] The standing of an industry association to represent its members on matters of common interest is well recognized, particularly in regulatory proceedings. <u>See, e.g.</u>, <u>Warth v. Seldin</u>, 422 U.S. 490, 511 (1975); <u>Hunt v. Washington State Apple Advertising Comm'n</u>, 432 U.S. 333, 343 (1977).

billion pounds of railroad traffic, amounting to almost 300,000 carloads of traffic in 1994. See Crowley, SPI-11, V.S.-4 at 6. The overwhelming majority of plastics resins production (70% of rail originations, Id.) occurs in the Texas/Louisiana Gulf Coast region, and the two primary railroads which handle plastics resins at origin are the Union Pacific and the Southern Pacific. Moreover, transportation is second only to raw materials among the cost elements for plastics resins, amounting to approximately 20% of the delivered costs. See Bowles, SPI-11, V.S.-2 at 2. SPI, on behalf of its member companies, thereby has a substantial interest in the proposed merger of the UP and SP.

SPI specifically addresses the impact of the proposed merger on producers of polyethylene (PE) and polypropylene (PP). At over 33 billion pounds of production, these resins constitute the majority of the production of plastics resins, other than liquid, which are the building blocks for the fabrication of thousands of products utilized by industry and consumers in countless applications. See Lippincott, SPI-11, V.S.-1 at 4 and Table VIII.

PE and PP also are extremely important to Applicants. They are the two highest volume commodities handled by the UP (if not both Applicants) in the Gulf Coast, SPI-11 at 13; and by volume, these materials constitute nearly half of the Gulf Coast chemicals group traffic meeting the Applicants' "50/10 screen"[4/]

[4/] The 50/10 screen entails commodities for which UP and SP each accounted for at least 10% of Texas/Louisiana rail (continued...)

to identify commodities for which the merger raises concentration concerns. Peterson UP/SP-23 at 233-235. Consequently, the application itself extensively addresses the impact of the merger on the PE and PP industries, (see e.g., verified statements of Peterson, Barber and Spero, UP/SP-23).

Considering that PE and PP constitute the major plastics resins, that they are major commodities handled by Applicants, and that Applicants have viewed the impact of the merger on producers of these materials as significant, the Board must consider the transportation of PE and PP as a major transportation market important to this proceeding. Unless otherwise stated, reference herein to "plastics resins" means polyethylene and polypropylene.[5]

B. Settlement By Applicants With CMA Does Not Address Or Resolve SPI's Concerns

In their rebuttal submission, Applicants tout a settlement agreement entered into with the Chemical Manufacturers

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[4](...continued) originations and UP and SP together accounted for more than 50% of those originations. Peterson, UP/SP-23 at 233.

[5] For analytical purposes of this Brief, SPI has combined data for PE and PP on a weighted basis in proportion to production volumes (71.3% for PE and 28.7% for PP, according to data set forth by witness Lippincott, SPI-11, V.S.-1 at Table VIII; accord Ruple, SPI-11, V.S.-3 at 5-7). Combining PE and PP was accepted by Applicants' witnesses Spero, UP/SP-231, R.V.S.-23 at 22, and Peterman, UP/SP-231, R.V.S.-16 at 4-5. SPI continues to utilize the 1994 capacity and production data, as contained in SPI-11, since 1994 is the base year for traffic analysis and the SPI 1994 data has been unchallenged by Applicants. (Peterman, UP/SP-231, R.V.S.-16, utilizes 1995 data. That data is consistent with the 1994 data, subject to minor variances based upon source and the different year.)

Association (CMA), pursuant to which Applicants amended their trackage rights agreement with the Burlington Northern/Santa Fe (BNSF) and CMA agreed to withdraw from the merger proceeding, UP/SP-219, as resolving competitive concerns. UP/SP-230 at 215. To allay possible confusion due to some overlap in membership between the two organizations and a common interest in the Texas and Louisiana Gulf Coast production area, SPI in Further Comments submitted April 29, 1996, detailed to the Board that the chemicals industry and the plastics industry are not synonymous, and that the settlement by CMA does not address or resolve the competitive problems which would be caused by a merger of the UP and SP as identified in the Comments of SPI. See SPI-16. SPI also noted that the remedial points identified in CMA's comments (its "UP-SP Merger Concerns & Remedies"), by its own admission, did "not address all of the likely anti-competitive effects of the merger," Id. at 12, citing CMA-7 at 4. SPI also furnished the Board with a detailed analysis demonstrating that the CMA settlement fails to resolve ten (10), and part of the eleventh, of the 13 ways identified by CMA in which the proposed merger would reduce competition, SPI-16 at 9-11.

CMA member reaction to the settlement has been dramatic. The settlement has been repudiated by a number of individual members of CMA, all with plants in the Gulf Coast, as reflected in the statements associated with SPI-16 from CertainTeed Corporation, CONDEA Vista Company, Fina Oil and Chemical Company, The GEON Company, Huntsman Corporation, Montell USA, Inc., Phillips Petroleum Company and Union Carbide Corporation. Additionally, a number of plastics and chemical industry members independently filed with the Board to renounce the CMA settlement, including Arizona Chemical Company, The Dow Chemical Company (DOW-20), Formosa Plastics Corporation (FOR-2), Montell USA, Inc. (MONT-5), Quantum Chemical Corporation (QCC-4) and Shell Chemical Company (SHL-5). Within the past few days, the Louisiana Chemical Association (LCA), the chemical industry's state association, advised the Board that it too is troubled by the proposed merger and the UP/SP-BNSF trackage rights agreement, and that LCA supports a divestiture remedy. See Appendix 1.

Without intending to belabor the issue, in consideration of the reliance placed by Applicants on the CMA settlement, SPI believes it may assist the Board to appreciate why the industry finds the CMA settlement to be so deficient to have an understanding of the process by which the settlement was reached. Information concerning the CMA process was developed through deposition of George R. Speight, Jr., Staff Executive to the CMA Distribution Committee.

In brief, the origin of the settlement is found in the approval of the CMA Executive Committee of the eight points of "concern" to associate with the CMA comments, CMA-7, and its authorization to the CMA Distribution Committee to respond to any settlement offers. Speight Dep. at 23-24.[6] The CMA

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[6] Deposition extracts are associated herewith in Appendix 3 to this Brief.

Distribution Committee is limited to 16 members, less than 10% of the CMA membership. Id. at 88-89. Members are selected to represent the various segments of the chemical industry by size, geographic location, products, "new members versus experienced members," etc. Id. at 89-90. Notwithstanding that participation in the CMA Distribution Committee membership is limited, the members are not charged to represent the industry, but rather may vote their own commercial interests. Id. at 90-91. Accordingly, if members had entered into long-term contracts with either of Applicants in anticipation of the merger and therefore believed themselves advantaged post-merger in comparison with competing producers, or alternatively if they have no Gulf Coast facilities and so would not be materially affected by the proposed merger, they were free to vote their own commercial interests under CMA's processes.

When approached by the UP with a settlement offer, the Distribution Committee undertook evaluation on its own, without seeking review and analysis by L.E. Peabody & Associates, its transportation consultants who submitted testimony on behalf of CMA to the Board. Id. at 51. CMA had made no dissemination to its members concerning the factual submissions and positions of other parties, including the findings of the Department of Justice; and the Distribution Committee was "told in reviewing the settlement decision that the only thing that they could compare it with [were] the eight points that were handed down by the Executive Committee." (Id. at 104, 119-120). Moreover, CMA made no effort to advise members of the industry beyond the Distribution Committee of the consideration of settlement in this proceeding, and it did not invite any other members to attend its meeting to consider the settlement offer. (Id. at 80-81.)

In considering the settlement offer, one member of the Distribution Committee did not vote; others abstained, and the decision to accept the UP settlement offer was based upon a majority of those members who voted "yea" or "nay." (Id. at 74-75, 95-98.) Thus, the CMA decision may have been made by fewer than eight members, some with little or no interest in the merger and others possibly seeking a commercial advantage, each reflecting their own company's commercial interests.

Considering the process used, it is clear that the settlement reflects nothing more than the views of a very small number of CMA members, functioning with very limited information and under very confining instructions. It is thus very understandable that CMA has had communications from members who "don't agree [with the settlement] and feel that their competitive position may be somewhat lessened," Id. at 83, and why a sizable number of significant members of the industry have publicly repudiated the CMA settlement agreement. At best, the CMA settlement agreement satisfied "CMA's concerns," as an organization, and not necessarily the concerns of the CMA members. (Id. at 77-78.) Whatever it may represent, the CMA settlement is not dispositive of Texas/Louisiana producer concerns of the plastics industry, nor apparently those of the chemicals industry, as Applicants argue.

III. STATEMENT OF ARGUMENT

A. Overview

The proposed merger of the UP and SP entails two dimensions. One dimension, emphasized by Applicants, entails economies through consolidation of staff and routing efficiencies through consolidation of the complimentary elements of the two railroad networks, e.g., the SP southern route from Texas to Los Angeles. The second dimension of the merger concerns the proposed combination of parallel route systems serving the Texas/Louisiana petrochemical industry, of primary interest to SPI, and serving the Central Corridor. The horizontal effects of the proposed merger are well recognized by Applicants, and are broadly addressed in the application; and these effects are sought to be rectified through the Applicants' agreement with the BNSF. That agreement, as originally structured together with the amendment pursuant to the CMA settlement, grants the BNSF trackage rights over approximately 4,600 miles of UP and SP track[7] for overhead operations, with local access only at those points or facilities presently served only by the UP and SP and no other rail carrier (the so-called 2-to-1 points).

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[7] The trackage rights consist of 3,800 miles in the original agreement plus 800 miles in the CMA settlement, the latter consisting of the UP Houston-Memphis UP route plus the Memphis-St. Louis route.

The concentration of power resulting from the effort to combine the Applicants' already dominant positions in the Gulf Coast[8] has generated the opposition not only of SPI, numerous individual Gulf Coast shippers and the National Industrial Transportation League, but also the opposition of the Governors of Louisiana and Missouri (among others), the Attorney General and Railroad Commission of Texas, and the United States Department of Justice. As evidenced in "UP+SP: In Whose Interest?," Mark W. Hemphill, Trains, May, 1996 (reproduced at SPI-16, Exhibit 4 and SPI-18), industry opposition to the merger arises from those who would be adversely impacted by the increased concentration, while support comes from those intermodal shippers, California parties, and others who could benefit from system efficiencies resulting from the joining together of the complimentary elements of the UP and SP on an end-to-end basis without being subject to enhanced market power. Indeed, the "once in a lifetime opportunities" described by Applicants, UP/SP-230 at 52-53, consisting of the Pacific northwest to California direct, single-line route, a second single-line service between New Orleans and California, and the Chicago/Kansas City-California route for intermodal traffic can be realized notwithstanding divestiture of the parallel Gulf

[8] While SPI is cognizant that the Central Corridor raises similar issues to the Gulf Coast, SPI is knowledgeable concerning and impacted by the proposed horizontal combination in the Gulf Coast, and so addresses the effects of the merger in the Gulf Coast region. Other parties are addressing the effects in the Central Corridor region.

Coast routes objected to by the Gulf Coast shippers and the involved governmental authorities.[9] Applicants, however, are intent upon having it all, and consequently achieving domination of the Gulf Coast petrochemicals market. Their rebuttal on these issues is as hollow as their arguments in the original application.

B. Merger of the UP and SP Would Increase <u>Domination of the Plastics Resins Market</u>

Applicants are schizophrenic in their arguments with regard to the market for transportation of plastics resins. On the one hand, Applicants concede, as demonstrated by SPI's HHI calculations, SPI-11 at 23 and V.S.-4 at 21-28, "that the 'market' for transporting plastics is <u>already</u> grossly overconcentrated ..." UP/SP-230 at 178, n.69 (emphasis in original),[10] while on the other hand they argue that claims of UP/SP domination are wrong. UP/SP-230 at 26-27.

There is no dispute concerning the facts presented by SPI regarding plastics production and the railroads serving the

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[9] The route objectives identified by management

<u>see</u> SPI-11 at III, Exhibit 7, p. 000004, similarly could be realized with divestiture of the parallel lines.

[10] Applicants argue that SPI inconsistently claimed that competition among railroads that serve different producers "is very effective in placing a cap on rail rates." UP/SP-230 at 178, n.69. SPI made no such claim. Rather, SPI argued that Applicants conceded that source competition occurs, SPI-11 at 50-51 and, consequently, that <u>increased</u> concentration which would diminish such source competition as exists should not be permitted.

production points. Nor do Applicants take issue with SPI's traffic analysis, including the Crowley analysis that truck movements constitute only 6% of polyethylene and polypropylene.[11]

The UP/SP domination of the plastics industry, both present and consequential should the merger be approved, is demonstrated by Table 1 following, which shows the manner in which plastics

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[11] SPI-11 at 17. Consistent with n.5, supra, the 6% is a weighted average, based upon the relative truck shares of PE and PP as determined by the Crowley traffic study, weighted by relative production volumes of the two materials. In contrast, instead of evaluating aggregate numbers, Spero argues that truck "fosters vibrant competition" based upon citation to data relating to two individual producers, one of whose testimony he cites but conveniently ignores the assertion that trucks are not competitive except for short hauls and that longer truck movements reflect a variety of particular transportation conditions, e.g., a failure to timely effect rail delivery. Spero, UP/SP-231, R.V.S.-23 at 9; compare DOW-11, Gebo at 18-19. See also SPI-11 at 17. Spero, whose direct testimony was thoroughly discredited on deposition, see SPI-11 at 3-4, not only ignores the record evidence demonstrating that truck is non-competitive with rail, SPI-11 at 17, but further contradicts Applicants' witness Barber. Barber testified that PE moves long haul by rail, with truck transportation confined to distances of up to a couple of hundred miles. Id. Spero also infers transloading provides competitive opportunities, Spero supra, at 8-9, citing to a Hoechst-Celanese situation, and even cites Hoechst-Celanese as supporting the merger, ignoring the fact that Hoechst-Celanese no longer owns the plastics plant in question. In citing to the transload situation, Spero further ignores one of the Applicant carrier's own memorandum reciting that

thereby evidencing that transload while having

is more of a theoretical than practical approach for plastics resins. See SPI-11 at III, Exhibit 9.

resins producers in Texas and Louisiana currently are served by rail, calculated on the basis of plant capacity.[12]

TABLE 1

Plastics Resins
Railroad Access to Texas - Louisiana Production Facilities

	Pre-Merger				Post-Merger		
	UP	SP	BNSF	IC/KCS	UP/SP	BNSF	IC/KCS
Closed Points	32.3%	10.4%	3.0%	5.7%	42.7%	3.0%	5.7%
PTRA	15.6%	15.6%	15.6%		15.6%	15.6%	
Joint UP/SP	23.1%	23.1%			23.1%	23.1%*	
Other Joint Service	4.0%	5.9%	4.0%	5.9%	9.9%	4.0%	5.9%
TOTAL	75.0%	55.0%	22.6%	11.6%	91.3%	45.7%	11.6%

* 2-to-1 points open post-merger to BNSF.

As Table 1 demonstrates, the merger would impose the following changes in the Gulf Coast transportation market for plastics resins production:

- Plastics industry access by one carrier would increase from 75.0% of capacity to 91.3%.

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[12] The source of this data is the Ruple review of the plastics market, SPI-11, V.S.-3 at 5-7. Table 1 addresses only Gulf Coast capacity inasmuch as non-Gulf Coast plastics production capacity amounts only to approximately 7% of total industry capacity, and therefore is insignificant. (This 7% of the U.S. total is served by Conrail--2.1%, and CSXT--4.8%, each on an exclusive basis. Four of the five facilities they serve are among the smallest plastics production facilities in the industry.) This fact of minor production capacity outside the Gulf Coast directly contravenes the unsubstantiated conclusion of Applicants' witness Peterman that "Large volumes are produced outside the Gulf Coast." UP/SP-231, Peterman R.V.S. 16 at 7. Peterman also cites to imports as a competitive element, Id., again without any factual substantiation, and directly contrary to SPI's witness Lippincott who quantifies imports at less than an 8% factor and, based upon his extensive knowledge of the industry, characterizes imports as not being a significant influence on the U.S. market. SPI-11, V.S.-1 at 7.

- Single-carrier control would increase from 32.3% to 42.7% of production capacity.[13]

- Second-carrier access would reduce from 55.0% to 45.7%, i.e., from a second carrier which has 73% of the market access of the first carrier to a second carrier which has 50% of the access of the first carrier.

- Third-carrier competition for 15.6% of the traffic would be eliminated.

Applicants claim the merger will improve competition for plastics and chemicals traffic, see e.g., UP/SP-230 at 208-215, Spero, UP/SP-231, R.V.S.-23 at 25, and that there would be no increase in market share due to the merger, Barber, UP/SP-231, R.V.S.-3 at 59. As Table 1 demonstrates, these claims are simply false. Single-carrier domination would increase, both absolutely and from a relative standpoint vis-a-vis the second carrier in the market. With a combined UP/SP holding 42.7% of the market captive, an increase of ten+ points over the UP's current share, and with the BNSF having only a single plant captive, reflecting only 3% of market share, the UP/SP would be in a stronger position than the UP and SP are individually today to leverage

[13] Barber deceivingly argues that the merger and settlement will "reduce the UP/SP share of chemicals traffic moving from points they will exclusively serve ..." Barber, UP/SP-231, R.V.S.-3 at 59. He reaches this result by considering UP and SP together, rather than as competitors, pre-merger. Thus, he argues that pre-merger UP and SP account for 64% of PE and PP from plants only they serve, aggregating the closed points for both carriers plus the shared service for both carriers; and since the shared service consists of the 2-to-1 points which would be open to BNSF, he therefore concludes that the UP/SP market influence would be reduced. Barber, Id. at 58 and 64. While UP and SP are the dominant carriers for Gulf Coast plastics resins, as shown by Table 1 above, Barber's argument wrongly considers them as one carrier. The single-carrier market influence in fact increases, as shown in Table 1, and its market share vis-a-vis the second carrier also substantially increases.

producers having both captive and competitively served plants, see SPI-11, V.S.-3 at 8-10, as well as to sharp-shoot from a pricing standpoint, to preclude BNSF from market penetration.

Contrary to Applicants' arguments, the increased BNSF market access of 23.1% would not represent any new competition.[14] Rather, producers today which have UP and SP competing for traffic from their plants would continue to have two-carrier access to their plants, but with the BNSF--with its inadequate infrastructure and weak market position in the Gulf Coast--substituted for a very competitive SP. There is no net gain for the producers; rather, there is a net loss as the combined UP/SP would enjoy a strengthened market position while facing a competitor which has a weak Gulf Coast operation to provide support, is distracted with its own merger implementation, has poor infrastructure, and must rely upon UP/SP for essential facilities and services while seeking to compete with the UP/SP.

Applicants also have failed to refute SPI's evidence

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[14] Applicants claim in rebuttal that the BN/SF settlement "will reduce the number of chemicals and plastics shippers that only UP and/or SP serve because BN/Santa Fe will newly serve every chemicals and plastics shipper now served by UP and SP and no other railroad." UP/SP-230 at 209. This, as Barber misleadingly argues, UP/SP-231, V.S.-3 at 64, equates UP and SP on a pre-merger basis, rather than viewing them separately, and wrongly treats the access provided BNSF as an increase in competition rather than as, at best, a substitution, and more likely a diminution due to the BNSF's weakened market position in the Gulf Coast. Similarly, Spero's argument that there will be intensified competition, UP/SP-231, R.V.S.-23 at 25 ignores not only the carrier substitution factor, but mixes analysis based upon plant access with analysis involving traffic which may be actually handled by other railroads or other modes. One can analyze either market access or actual market share; mixing the two is meaningless.

regarding tying arrangements, whereby Applicants leverage captive points to serve competitively-served facilities, an opportunity that will be enhanced as the percentage of production subject to single-carrier service increases through combination of the UP and SP exclusively-served points and interjection of a weakened competitor as the second carrier in the market. See SPI-11 at 25-28; see also, Simpson and Turner, KCS-33 at 93, 98. This concern is not academic: Applicants' (ab)use of their leverage power is dramatically demonstrated by a UP memorandum demonstrating that in response to loss of competitively-served traffic, the UP has imposed higher than customary rates on the involved shipper's traffic from captive points in an effort to make up as much of the revenue loss as possible.[15]

Applicants further neglect any discussion of their contract tactic of insisting upon a "right of last refusal" and its foreclosure effect upon BNSF's entry into the market. As to Applicants tying up traffic long term by contract, Peterson in his rebuttal testimony ignores any contracts that expire beyond the year 2000. Compare Peterson, UP/SP-231, R.V.S.-17 at 191-194 with Peterson Rebuttal Dep. at 204-208. The record definitively establishes Applicants' policy of tying up traffic via long-term contracts, and that such long-term contracts exist. See SPI-11 at 24-25. Matthew Rose, BNSF's senior marketing executive for chemicals, who views a contract greater than three years as long-term, testified that he has been told by customers that UP and SP

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[15] See HC50-200091, at Appendix 4 to this Brief.

have attempted to tie up traffic with long-term contracts before or during the merger proceeding. Rose Rebuttal Dep. at 125. As to the provision in the CMA settlement regarding the release of traffic at 2-to-1 points from contract obligations, the nature and meaning of this is unclear--not only to SPI but also to BNSF, including the effect of volume incentives on the shippers' ability to rebid the volumes opened. Rose Rebuttal Dep. at 119-120.

C. BNSF Is Providing Merely an <u>Appearance of Competition To A Merged UP/SP</u>

BNSF has played a strange role in this merger proceeding. Notwithstanding that its recent merger makes it the largest carrier in the West, and thus potentially the railroad with the most at risk from a combined UP/SP, BNSF nonetheless is playing the role of savior by accepting the trackage rights offer by Applicants to maintain second-carrier presence at the 2-to-1 points. Does BNSF really intend to be a competitive force, or is BNSF simply providing cover for ulterior purposes?

The evidence is not encouraging. While seemingly in a strong position to negotiate concessions on the trackage rights agreement, particularly in that UP sought out BNSF for this purpose, the record instead establishes that BNSF has been a mere spectator, accepting the trackage rights arrangement as a "package deal." <u>See</u> SPI-11 at 28-29. Notwithstanding criticism of its passive role, BNSF then continued to act as a supplicant, accepting amendments to the trackage rights agreement negotiated between Applicants and CMA. <u>See</u> Ice, BNSF-54, R.V.S. at 1; Rose Rebuttal Dep. at 65, 69, 107-108.

During the five months following entry into the trackage rights agreement with Applicants, BNSF apparently took no action toward possible implementation. Such planning was not initiated until March. <u>See</u> Clifton, BNSF-54, R.V.S. at 3-4. Such planning is essential since, as Applicants concede, mere physical presence alone does not establish a competitive substitute. UP/SP-230 at 145. Moreover, BNSF has not expressed embarrassment at having been caught misrepresenting that it was engaged in planning for implementation of its trackage rights agreement.[16]

Moreover, BNSF has acknowledged that it has made no commitment to, and sees no need for, a meaningful capital investment to implement the trackage rights arrangement. Rose, BNSF-54, R.V.S. at 4-5.[17] The reason for this may lie in the numbers. In the overall scheme, the volume of 2-to-1 traffic available to BNSF is not overwhelming. BNSF's Rose testifies the 2-to-1 traffic amounts to 30,000-40,000 carloads, of which he

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[16] In response to discovery, BNSF admitted that it did not have any plans regarding storage, operations or facilities to serve the plastics industry under the trackage rights agreement, but asserted "that it is currently in the process of developing such plans." On deposition, BNSF Vice President Carl Ice, the "mentor" of the implementing team, admitted to no knowledge of any such work in progress. <u>See</u>, SPI-11 at 34.

[17] BNSF mentioned investment in new locomotives as evidence of its capital investment plans in its letter to CMA in support of the CMA settlement. <u>See</u> SPI-16 at Exhibit 3. Such investment, however, is not related to the trackage rights agreement; rather, said investment is simply part and parcel of BNSF's capital investment in its system generally. Rose Rebuttal Dep. at 60-61.

suggests they may capture 50% over time. Id. at 3-4. His workpapers, however, identify a lesser volume of 2-to-1 traffic,[18] and further that said traffic constitutes only a small share of the Gulf Coast petrochemical traffic. Thus, the trackage rights agreement positions, but does not commit, BNSF to compete for this traffic, which it will do as the traffic fits into its capacity and operational scheme (e.g., to compensate for a loss of a PTRA served customer to the UP/SP).

With no capital investment at stake, is it realistic to believe that BNSF will devote substantial time and attention to the Gulf Coast, an area of "severe service disability" as admitted by its former chairman Gerald Grinstein? See SPI-11 at 32. BNSF's Vice President-Transportation has acknowledged that the time of top management and the resources of the railroad are fully occupied in implementing the Burlington Northern/Santa Fe merger. SPI-11 at 36. With those activities in progress, BNSF has now turned its sights eastward, and is looking toward a possible merger with the Norfolk Southern. See Exhibit 2. While the press report mentions the UP/SP merger, conspicuously absent is any reference to the trackage rights opportunities that BNSF would receive if the UP/SP merger is approved, particularly including either traffic opportunities or any resource impacts that the UP/SP merger trackage rights would have on the BNSF and the implications with regard to pursuing and implementing a transcontinental merger.

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[18] See BN/SF 24562, associated at Appendix 4 to this Brief.

The foregoing evidence casts severe doubt on whether the BNSF intends to be a material force in the Gulf Coast marketplace. Acceptance of the trackage rights from the UP/SP provides other advantages, however, including (i) foreclosure of western access by another carrier, (ii) ridding the railroad industry of the aggressive competition posed by the SP, if the merger is approved (and thereby allowing rates on PTRA-served traffic to rise), (iii) foreclosure of the potential that with three western railroads, there could be three transcontinental railroads, if mergers of eastern and western railroads will be the next wave, and/or (iv) achieving a duopoly in the West that would provide a long-term, stable environment in which each of the two western carriers could operate to their own market strengths and thereby maximize profits at the expense of the shipper community.

D. At Best, BNSF Will Be A Weak Competitor Under The Trackage Rights Agreement

SPI identified a number of factors, in addition to BNSF's weak ability to achieve market penetration, evidencing that BNSF cannot provide effective competition to a combined UP/SP in the Gulf Coast corridor. This begins with BNSF's current weakness, as recognized by BNSF past chairman Gerard Grinstein. SPI-11 at 32. Most significant is BNSF's lack of infrastructure, including its small relative portion of operational yard capacity, explained by the fact that BNSF essentially is a destination carrier for coal, fertilizer and grain moving in unit train or other multi-car loads, rather than a heavy handler of manifest traffic, SPI-11 at 40, and its lack of necessary storage-in-transit (SIT) capacity for plastics, SPI-11 at 36-40.

The CMA settlement makes putative provision for BNSF access to SP's Dayton Yard for storage; however, the terms of that access are unclear on the face of the document. Neither witnesses for Applicants, Peterson Rebuttal Dep. at 208-211, nor for BNSF, Rose Rebuttal Dep. at 99-107, could describe the terms, timing, or limitations concerning implementation of that provision. Indeed, Applicants' witness Peterson had no knowledge of whether SP has commitments to customers which may impact upon the opening of storage capacity to BNSF, or even whether the Dayton commitment pertains to the current yard or whether it simply means that the yard could be physically expanded to accommodate BNSF's usage.[19] With a plastics industry five-year growth rate of 6+%, SPI-11, V.S.-1 at 4, and with storage requirements floating with the industry business cycle, Rose Rebuttal Dep. at 88-89, the vague commitment contained in the CMA settlement does not resolve the BNSF's lack of storage necessary to expand its plastics business.

SPI's concern is reinforced by BNSF's treatment of the SIT capacity issue as having been resolved, notwithstanding the vagueness of the CMA settlement provision. BNSF-54, Ice R.V.S.

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[19] The CMA settlement, unlike those with CSX, Illinois Central and Utah Railway, is signed only by counsel and not by corporate officers. There is no evidence that anyone other than counsel played a role in the negotiation of the CMA agreement.

at 3, Clifton R.V.S. at 10.[20] BNSF further suggests that, if needed, it would make $10-15 million available for SIT expansion, BNSF-54, Rose R.V.S. at 5; however, there is no commitment to such an investment in the BNSF capital outlay plan. Rose Rebuttal Dep. at 127-128.

SPI identified other operational limitations, of substantial but subsidiary import to the foregoing, as limitations upon BNSF serving as an effective replacement competitor, including the high cost of the fees for operation under the trackage rights, whether the traffic available to BNSF practically would support competitive train operations, and the effect of the UP/SP's proposed directional flow of traffic in the Houston-Memphis corridor as imposing operational impediments to BNSF train operations on the SP's line. Neither the CMA settlement nor the rebuttal comments resolves the operational cost issue. Placing the trackage rights fees in a fund which may be utilized to reimburse Applicants for depreciation does nothing to address the level of the trackage rights fee or the economics of BNSF's

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[20] Applicants graciously suggest that BNSF has adequate storage capacity already, identifying eight locations, all but one on the BNSF route from Houston-Ft. Worth-Springfield. Peterson UP/SP-231, R.V.S. at 159-160. These locations, however, are out-of-route of the trackage rights between Houston and St. Louis, Peterson Rebuttal Dep. at 213-217, Rose Rebuttal Dep. at 99. Curiously, BNSF did not believe these locations sufficiently important to warrant identification in its April 29 rebuttal comments. Rather, after SPI witness Ruple analyzed suitability of the yards identified by BNSF in discovery as available for storage, SPI-11, V.S.-3 at Notes to Exhibit 9, BNSF refrained from suggesting those yards in its rebuttal.

operations. As a depreciation reimb[illegible], the monies would flow directly to the bottom line of the UP/SP.[21]

Effectively conceding that the trackage rights fee places BNSF at a competitive disadvantage, SPI-11 at 44, BNSF argues that comparison of BNSF's costs with those of the UP/SP is inappropriate.[22] For example, BNSF argues that it is not the cost of the trackage rights in comparison to UP/SP's costs which matter, but rather whether BNSF's marginal or variable cost is less than SP's existing rate levels. BNSF-54, Response to comments at 6-8. This comparison makes no sense for two reasons. First, BNSF attempts a comparison with the carrier which would disappear, rather than comparing itself with the surviving entity, which is dominated by the UP. Secondly, it attempts to compare its *costs* with the SP's *rates*. Unless BNSF intends to offer service at its variable cost level, a suggestion which does not appear in its comments or testimony in this case, the appropriate measure of comparison must be BNSF's costs versus the costs of the surviving carrier (as measured by the dominant party

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[21] This provision simply appears to be another illustration of the UP imposing its plan, for its benefit, on compliant parties to this proceeding. Compare, UP refusing BNSF the option to use a contractor on the Houston-Brownsville corridor and BNSF's acceptance of the trackage rights as a package, SPI-11 at 28-29.

[22] Applicants argue the fee is appropriate as having been "arrived at in arm's-length negotiations ..." UP/SP-230 at 118. Whether the fee was willfully accepted by BNSF, or whether it was another element of the "package deal," is unknown. Both Applicants and BNSF invoked "settlement privilege" repeatedly during discovery to preclude examination of the substance of the negotiations.

in the merger) in order to evaluate whether BNSF will be able to price competitively with a merged UP/SP in the event that the market drives rates toward variable cost as occurs in *truly* competitive markets.

The CMA settlement does appear to address impediments to be faced by BNSF resulting from the directional operational plan of the UP/SP.[23] However, increasing the trackage rights lines open to the BNSF necessarily imposes additional operational requirements on BNSF, including fueling, maintenance, crewing, training, etc. The effect of such additional costs on pricing and whether the densities of traffic warrant such costs have not been evaluated.

Substantial attention in the rebuttal comments is directed to the issue of whether the traffic available to BNSF warrants competitive train operations over the trackage rights lines, particularly Houston-Memphis. Both Applicants and BNSF agree that the CMA settlement provides no basis for anticipating any additional traffic diversion to the BNSF. Peterson Rebuttal Dep. at 180, 295-296; Rose Rebuttal Dep. at 18-19. While Applicants criticize the Crowley analysis of traffic practically available to the BNSF, his attribution of available traffic is based upon appropriate judgments. <u>See</u> Crowley Dep. at 64-72. Moreover, considering Applicants' argument that BNSF would utilize storage for plastics along the Houston-Ft. Worth-Springfield routing,

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[23] Industries local on the directional flow lines may be faced with service problems individually. Such issues are beyond the scope of SPI's comments.

Peterson, UP/SP-231, R.V.S. at 159-160, and considering that the 2-to-1 locations predominantly consist of plastics production points,[24] to the extent BNSF would utilize storage at such locations it would not employ the trackage rights for car movements, Rose Rebuttal Dep. at 99. This factor was not taken into consideration by Applicants in attempting to demonstrate that the BNSF would have sufficient traffic for multiple train operations along the trackage rights lines, Peterson Rebuttal Dep. at 219. Accordingly, the amount of traffic practically available to BNSF for operations along the trackage rights lines remains in serious question.[25]

Perversely, while Applicants have proposed to grant BNSF trackage rights and other concessions in an effort to replace competition which would be lost by the merger, effectively the concessions UP/SP grant to BNSF would result in an inherently non-competitive environment. For the 2-to-1 traffic, and

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[24] The 2-to-1 points in Texas, pursuant to ¶ 5(b) of the BNSF agreement, are Baytown, Amelia, Orange, Mont Belview (Amoco, Exxon, Chevron plants) and Exxon (Bayer plant). UP/SP-22 at 325, 359. Except for Eldon, plastics production facilities are located at each of those locations. Compare SPI-11 at V.S.-3, Exhibit 5; see also Peterson, UP/SP-23 at 312, 316.

[25] Even assuming BNSF realized a 50% share to gateway points of the traffic at the off-line 2-to-1 points which was not taken into account by Crowley, that traffic amounts to only cars, or less than cars/day. See Peterson Rebuttal Dep. at 168 and Exhibit 10. Utilizing the figure of 75 cars per average train, SPI-11, V.S.-4 at 57, the Houston-Memphis flow available to BNSF still would be less than one train per day.

particularly that moving to the critical St. Louis gateway,[26] BNSF would have virtually no control over a substantial element of its costs.

Applicants argue that trackage rights are common in the railroad industry; but they qualify that argument by noting that joint use facilities commonly constitute only "portions of [the Western railroads] competitive mainline routes." Peterson, UP/SP-231, R.V.S.-17 at 141; UP/SP-230 at 101. Under the trackage rights agreement, however, BNSF would operate in the Houston-St. Louis Corridor 100% over UP/SP's lines.[27]

Moreover, BNSF will be dependent on UP/SP for other critical services as well. For example, the trackage rights agreement gives the BNSF the right to elect whether to provide switching service itself, operate through reciprocal switching, or, with UP/SP's consent, utilize a third-party switcher. Ideally, BNSF will make the decision of which option to use based upon traffic

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[26] Traffic moving to the east, predominantly through St. Louis, represents approximately 40% of the plastics traffic. SPI-11, V.S.-1 at 7 and Table VII. St. Louis is the primary eastern gateway. Peterson Rebuttal Dep. at 203-204. (The volume moving to the east may even be substantially higher, according to the UP. <u>See</u> HC13-000358, appearing at CR-22, Finizio Attachment 2.)

[27] To the extent BNSF would utilize its own routing via Ft. Worth, it faces substantial circuity, and thus higher cost and slower service, as recognized by Applicants in treating Houston-Memphis as a 2-to-1 corridor. To the extent BNSF would utilize trackage rights only from Houston to Memphis and operate on its own line from Memphis to St. Louis, the latter route segment allegedly is poor in quality and high in cost as compared with the Applicants' routing. Peterson Rebuttal Dep. at 177-178. Thus, BNSF faces the Hobson's choice of higher cost and a slower, poorer route or complete route dependence on the UP/SP.

available and track congestion. Rose Rebuttal Dep. at 11-12, 14. In some cases, BNSF already has made the decision to utilize UP/SP's switching service, BNSF-54, Clifton R.V.S. at 9-10 (and to purchase service from the Houston Belt and Terminal Railroad for pre-blocking of cars, Id.). At other locations, BNSF's desire to use a third-party switcher has encountered UP/SP's veto, consequentially leaving BNSF to the default position of using UP/SP for switching service. Id. Considering the uncertainties of the achievable traffic levels and the problems of congestion in the branch lines serving the plastics and chemicals plants around Houston, purchasing switching service from UP/SP is the apparent choice.[28] In addition, UP may make crewing and other facilities along the trackage rights lines also available to the BNSF.

BNSF's operation under the conditions described above will not amount to competitive service. To the contrary, BNSF will be so dependent upon the UP/SP as to be operating the same service, over the same facilities, at costs determined by and paid to the UP/SP, or a third party contractor which itself may be controlled in part by or shared with the UP/SP. The critical Houston-St. Louis corridor would consist virtually of 100% trackage rights and other dependent operations, Peterson Rebuttal Dep. at 203-204. In no other circumstance does BNSF operate over

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[28] Once made, this election is binding for five years. See e.g., UP/SP-22 at 327, ¶ 6e, and p. 352, ¶ 5. Thus, BNSF will be locked into its initial election to have UP/SP provide switching service even if a change in traffic levels may dictate a different approach.

trackage rights for the entire route of movement. Rose Rebuttal Dep. at 84-85. This certainly does not qualify as competition; and when evaluated in daylight, it loses even the appearance of competition.

E. Merger of the UP and SP Would Lead To Loss of Competition and Increased Rates

As set forth at III.B. above, merger of the UP and SP would lead to increased market concentration. Combining the UP and SP would materially change the balance of economic power over the plastics industry achieved through access to production capacity by (i) increasing single-carrier access by 22%, (ii) increasing the single-carrier captive portion of traffic by 32% (from 32.3% to 42.7%), (iii) increasing the ratio of single-carrier service between the top two carriers from a factor of 300% (32.3% vs. 10.4%) to a factor of 1,400% (42.7% vs. 3%), (iv) reducing second-carrier market share access by 17%, and (v) increasing the ratio of first-carrier to second-carrier market share from 135% to 200%. While BNSF theoretically may be strengthened, the position of the second carrier in the marketplace is materially weakened in comparison to that of the SP. This, in and of itself, reduces both direct competition and such source competition as currently exists. Compounding the loss of competition is the BNSF's weak position in the marketplace due to its proportionately small infrastructure and due to its operational dependence upon UP/SP under their trackage rights agreement.

SPI also noted that potential build-out opportunities would be lost through merger of the UP and SP, basing that analysis inherently upon Applicants' own files. SPI-11 at 47-49. While Applicants have attempted to denigrate the build-out potential, including Bayport, Chocolate Bayou, Freeport and Strang, Texas and Lake Charles, Louisiana, UP/SP-230 at 146 et seq., BNSF independently confirms that such opportunities in fact exist, specifically including Chocolate Bayou and Freeport. Rose Rebuttal Dep. at 123-124. Under the CMA settlement, arbitration to secure build-out is available; however, that right is time-limited (one year after merger approval, or one year after expiration of an individual, existing contract). Moreover, this option is limited only to CMA members;[29] and the phasing of such options, based upon contract expiration dates, may prevent the aggregation of such options and the ability of a trackage rights operator to capitalize on a multi-plant scenario.

It is evident that merger of the UP and SP will lead to price increases for the plastics industry and others. On the one hand, Applicants offer glib explanations that they have "no expectation" of being able to raise rates post-merger, UP/SP-230 at 179; Davidson UP/SP-231, R.V.S.-1 at 9, and that efficiency benefits generally are passed on to shippers, UP/SP-230 at

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[29] Not all of the potential build-in customers identified by BNSF are CMA members. Rose Rebuttal Dep. at 123. Furthermore, BNSF is not entitled to invoke the arbitration clause.

180.[30] Applicants stop short, however, at committing, as a condition of the merger, not to use their enhanced market power to increase rates, or committing to pass along any portion of the efficiency gains. Indeed, they explain that it is only "strong post-merger competition" that drives railroads to share their productivity gains. UP/SP-230 at 194. As detailed above, and in the Comments of DOJ, NITL, the Texas Attorney General, Texas Railroad Commission and numerous other parties, there is no reasonable expectation that post-merger competition in the Gulf Coast will in fact be strong. Thus, if Applicants succeed and create only the appearance of competition but not real competition, there will be no "strong post-merger competition" to constrain the UP/SP's market power.

Applicants' witness Peterson confirms that the merged railroad is going to price as high as it can, Peterson Rebuttal Dep. at 68, as contrasted with the SP which prices aggressively to increase business levels and to utilize its capacity. Gray,

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[30] Applicants do not deny that there are legitimate concerns about the effect of a merged UP and SP, but offer only that they are committed to addressing them. UP/SP-230 at 214. Post-merger, of course, shippers are left at the mercy, and effectively unfettered discretion, of the merged carrier. This suggestion is on a par with the provision in the CMA settlement that Applicants will accept post-merger STB oversight. Of course they will: the Board already has that power. See (former) 49 U.S.C. § 11351. As a condition in lieu of a meaningful remedy such as divestiture, however, that suggestion is ludicrous. With many shippers fearful of retaliation for sharing their views and concerns in this proceeding, see Department of Justice letter to Honorable Jerome Nelson, March 4 1996, KCS-33 at 1067, it would be a truly heroic gesture for shippers to complain when faced with the combined power of the UP and SP. Post-merger annual review would be merely a symbolic gesture. See also SPI-16 at 15-16.

UP/SP-231, R.V.S.-9 at 4-9. UP President Davidson so forewarned the industry of the UP's intent to increase SP and SP-driven prices, SPI-11 at 53-54;[31] and the record bears witness to their inherent inclination to do so. Applicants attempt to minimize the significance of

, Peterson UP/SP-231, R.V.S.-17 at 21, n.2; however, they do not, and cannot, deny that their own document demonstrates that

. See SPI-11 at 54 and Exhibit 24.

Applicants' true view toward competition is demonstrated in Applicants' approach to individual shipper situations, as contrasted with the rhetoric concerning the marketplace generally. Several illustrative situations are documented on this record. First, as previously cited, a recent internal UP document cites to making up revenue lost to competition at a competitively-served point through imposing higher rates on the shipper who dared to move traffic via another carrier at that shipper's captive locations. Additionally, it was recommended

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[31] Mr. Davidson felt compelled to attempt to explain away his comment at a CMA dinner that upon achieving control of the SP, the UP would terminate the SP's "cash flow pricing." See SPI-11 at V.S.-5. Undoubtedly, UP and its counsel would like to recall this statement, and also many internal memos and documents. Just as the law recognizes spontaneous utterances as an exception to the hearsay rule and treats them as probative, so UP cannot deny the normal and explicit connotation of this statement and of the numerous documents they attempt to belittle or explain.

. See Exhibit 4 at HC50-200091.

The second illustration concerns protection of Union Carbide Corporation's build-out potential in this proceeding. Notwithstanding recognition by both UP and SP that Union Carbide enjoyed a viable build-out opportunity to the SP, and Applicants' recognition that Union Carbide had utilized the build-out potential in its rate negotiations with the UP, UP/SP-230 at 151, Applicants declined to protect Union Carbide's Seadrift plant as a 2-to-1 point until pressed by Union Carbide through its participation in this proceeding. Even at that, Applicants' witness Peterson sought to deny that Union Carbide qualified as a 2-to-1 point, Peterson Rebuttal Dep. at 56-57. Instead, UP would have relegated Union Carbide to reliance upon the UP's good faith based upon the UP/Union Carbide relationship and source competition to provide Union Carbide with negotiating position at such time as the current contract expires. Id. at 191-193, 195-196.[32]

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[32] As a general proposition, if the build-in opportunities discussed by parties are as infeasible as Applicants claim, UP/SP-230 at 152 et seq., why have Applicants gone to such lengths to defend their decision to deny BNSF the opportunity to serve such points via the trackage rights lines? If all "feasible" build-ins have been recognized, why not open the trackage rights to any build-in?

An even more cynical situation is reflected in the Applicant's treatment of the Lake Charles area shippers. Applicants graciously conceded in the CMA agreement to provide BNSF rights to serve traffic originating at Lake Charles and West Lake, Louisiana, but only for that traffic going to the New Orleans and Mexican gateways. These points are served by UP, SP and KCS; however, they recognize that the KCS routing is circuitous and therefore does not offer an effective, competitive route to New Orleans and the Mexico border points. Rebensdorf, UP/SP-231, R.V.S.-18 at 6. Conveniently omitted from BNSF access is traffic destined to points other than New Orleans and the Mexico gateways. For example, Houston is excluded notwithstanding that traffic to Brownsville and the other border points must move through Houston, Peterson Rebuttal Dep. at 234. It is obvious, accordingly, that the deficiency of alternative routes due to circuity necessarily must exist between Lake Charles/West Lake and Houston; however, such traffic is not available to BNSF.

Also excluded from BNSF access is the traffic originating at West Lake Charles. West Lake Charles is served by the SP and KCS; however, due to KCS circuity/route limitations, the only effective route out of West Lake Charles to Houston and the gateway points, other than the SP, is via KCS/UP joint-line service. Indeed, the branch line serving West Lake Charles, operated jointly by the KCS and SP, passes through West Lake and is open at West Lake to the UP under reciprocal switching; and

BNSF considers West Lake Charles shippers to be similarly situated to the Lake Charles and West Lake shippers. Rose Rebuttal Dep. at 116. Applicants' witness Peterson, however, conveniently abandoned his principle that routes in excess of 150% circuity, as compared with the most direct route, are not competitive in defending the decision not to treat West Lake Charles as a 2-to-1 point, Peterson Rebuttal Dep., see also MONT-9 at 6-8.

The issue naturally arises why Applicants seek to distinguish West Lake Charles from Lake Charles and West Lake in terms of BNSF access, as well as the reason for limiting BNSF to handling traffic at the open points only to New Orleans and the Mexican border points. Was the Lake Charles/West Lake concession in the CMA settlement intended to resolve a problem, or was it simply a sop intended as a cosmetic response to the CMA "concern" about 3-to-2 points where the UP and SP have the only effective serving routes? The answer lies in the numbers. According to BNSF's chemicals marketing executive Rose, the Lake Charles and West Lake traffic represents only approximately 7% of the total available from the three shipping points; and at that, the traffic destined to the New Orleans and Mexico border points actually opened to BNSF service is a small fraction of the 7%. Rose Rebuttal Dep. at 116. Thus, while pretending to recognize a de facto 2-to-1 situation, Applicants actually concede virtually nothing to the BNSF--or to the Lake Charles area shippers--in terms of preserving competitive opportunity.

As exemplified above, when examined in detail it is abundantly clear that Applicants do not desire or intend real competition. While giving lip service and token access through the BNSF trackage rights agreement, in fact Applicants have imposed every barrier conceivable to real competition; and if the merger is approved, it can only be anticipated that the implementing and operational details will be administered in such a fashion as to restrain the BNSF, just as the UP's reaction to real competition is to plan

, just as Applicants seek to limit access to the Lake Charles area market, and just as Applicants denied BNSF the option under the trackage rights agreement to utilize a contractor on the Houston-Brownsville route due to concerns about BNSF's efficiency through such means of operation. SPI-11 at 29, n.28. As explained by management to the UP Board of Directors, acquisition of the SP will serve to "Maintain Dominance in the West."[33]

And how does the BNSF view its competitive role? We already have seen examples of BNSF's pricing being substantially above the levels driven by UP-SP competition. SPI-11, V.S.-6 (Errata, SPI-12.) See also IP-10, McHugh p. 32.[34] Indeed, in contrast

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[33] See SPI-11 at III, Exhibit 7, p. 000004.

[34] UP attempts to downplay BNSF's lack of competitive pricing by characterizing BNSF's bids to Phillips Petroleum and International Paper as "opening proposals and negotiations," UP/SP-230 at 131. Applicants' efforts to undermine the significance of these quotations is contradicted by BNSF's witness Rose, who indicated that their quotation constituted (continued...)

to SP's aggressive pricing, BNSF will price based upon truck, water, other rail and intermodal competition. Rose Rebuttal Dep. at 29-30, 39-40. In a market such as plastics where truck, water and intermodal are not material factors, BNSF's only benchmark for pricing will be UP/SP's prices. With the UP/SP controlling BNSF's costs to a substantial extent for the 2-to-1 traffic, the result will be a symbiotic relationship, with the UP and SP living in a close, cooperative relationship in which each feeds off the other. BNSF witness Rose stated that BNSF's entry into the marketplace should not be expected to drive prices down, Rose Rebuttal Dep. at 35-36, a natural consequence of BNSF basing its pricing decisions on those of the UP/SP and being dependent upon UP/SP for switching and operational services.[35]

It is clear that the limited substitution of BNSF for the Southern Pacific at the 2-to-1 points will not serve to constrain the Applicants' pricing power.

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[34] (...continued) their competitive price offering and were not in any sense preliminary in nature. Rose Rebuttal Dep. at 129-131. Applicants' purported knowledge of BNSF's negotiations with potential shippers is most troubling: either UP already is "too familiar" with BNSF's marketing, or Applicants are willing to deceive the Board in seeking approval of the merger.

[35] As previously noted at p. 21, supra, one effect of the disappearance of the SP would be an increase in rates on PTRA-served traffic. Not only is this a product of the difference in pricing philosophies of the SP with those of the UP and BNSF, but also mainstream economic theory, backed by experience, demonstrates that prices increase as competition shrinks in highly concentrated markets. See Shepherd, SPI-11, V.S.-7 at 13-17; DOJ-8, Majure V.S. at 28 et seq.

IV. DIVESTITURE IS THE ONLY EFFECTIVE REMEDY IF THE MERGER IS TO BE APPROVED

Applicants challenge divestiture as an effective remedy to preserve the competition posture status quo ante if the merger is approved. Applicants characterize divestiture as "re-balkanization" of the rail network; and that same description, undoubtedly coincidentally, also is recited by BNSF. UP/SP-230 at 29; BNSF-54 at 2.

Applicants' attack upon divestiture is without merit. Since the UP and SP exist as separate systems today, to exclude the Texas/Louisiana network (and possibly also the Central Corridor) from a merger of the UP and SP would not lead to re-anything, but merely would preserve the status quo. Indeed, division of the SP into component parts of the Gulf Coast/Cotton Belt, Central Corridor and the Texas-Southern California route segment was envisioned by McKenzie & Company in a study undertaken for the Santa Fe at the beginning of this decade. Krebs Rebuttal Dep. at 73-74, 83, 85-87, 95-96. Thus, according to one of the foremost railroad industry consultants, such a division of routes would be a rational disposition of the SP, if the SP were not to be operated as a stand-alone carrier[36]. As suggested by the McKenzie report, the segment which would be of greatest apparent benefit to enhance the UP's route structure would be the southern route from Texas to California, Id. at 85-86, precisely the

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[36] BNSF has assiduously resisted production of the McKenzie Report during discovery in this proceeding.

result (plus the I-5 corridor) if the proposed merger were to be approved with divestiture of the parallel route systems.[37]

As to divestiture depriving Applicants of the traffic from exclusively-served points along the divested lines, UP/SP-230 at 29, no one has suggested that the routes and attendant facilities subject to divestiture be *given* to another party. Divestiture in a merger situation entails sale of the divested assets. Five parties have expressed active interest in the Texas/Louisiana routes, namely, Conrail, CSXT, Illinois Central, Kansas City Southern and Norfolk Southern; and it is presumed that there would be active and vigorous competitive bidding for those routes. While feigning staunch opposition to divestiture, Applicants have prepared for this eventuality by entering into agreements with both the Illinois Central and CSXT, UP/SP-74 and 238; and Applicants even concede that the re-route benefits flowing from the merger tend to be in areas other than the Gulf Coast. UP/SP-230 at 239. Considering that the major merger benefits accrue to traffic flows other than those involved in the Gulf Coast corridor, and considering that the price for the divested lines would offset the purchase price paid by the UP for the SP, based upon the value of those lines and the traffic served by those lines, divestiture should not serve to undermine the merger benefits to the UP.[38]

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[37] See also n.9, supra.

[38] If the captive traffic in fact is driving the economics of the merger, then it is apparent that one of the true purposes of (continued...)

As compared with the trackage rights agreement and the joint or coordinated operations contemplated by Applicants and BNSF, divestiture is a simple, clean and surgically efficient remedy. As set forth above, the trackage rights arrangement would lead, effectively, to joint operation by the UP/SP and BNSF over critical Gulf Coast routes. Moreover, the trackage rights arrangement entails coordination in some 200 separate points, see Rebensdorf, UP/SP-231, R.V.S.-18 at JHR-1, and would lead to a BNSF employee being permanently stationed at the UP/SP operational headquarters, with the cost to be paid by the UP/SP. UP/SP-219, CMA Agreement at Attachment A. These joint arrangements will continue, minimally, for 99 years, and will destroy any semblance of independent rail operations in the western United States. Such a working relationship would be akin, in a hypothetical merger in the plastics industry (which is nowhere as concentrated as the Western railroads, with more than 12 producers of both PE and PP), to Exxon sponsoring a Chevron representative being stationed in its control room at the Mont Belview polyethylene plant, where product formulation and production are managed, and for both to sell product flowing from the same reactor spigot, with the only difference being whether

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[38] (...continued)
the merger is to dominate the plastics and chemicals traffic in the Gulf Coast. Additionally, such a position would conclusively validate the testimony of John J. Grucki, Executive Vice President of GRA, Inc. that the generous 67% premium offered by UP for the SP ($25/share versus a $15/share market price at the time of the merger agreement in August 1995) can only be justified by increasing rates on the UP/SP system. See KCS-33 at 324, 349.

the product is loaded into an Exxon hopper car or a Chevron hopper car. Such an arrangement no more would constitute competitive operations than those contemplated under the UP/SP-BNSF agreement, nor would such joint operation be more competitive than divestiture to an independent party completely in control of its own pricing and operations.[39]

Finally, in the absence of convincing the Board that the merger would not be anticompetitive, Applicants attempt to intimidate the Board into approval through threatening that they would walk away if divestiture is ordered, UP/SP-230 at 242, and in that case the SP would react by focusing its operations on its most efficient routes and profitable services. Those prospects, if realistic, do not intimidate SPI and its members, and should not be of concern to the Board. The Board is not faced with a failing railroad, whereby merger is the only prospect for retaining routes and services to captive customers. Rather, after years of neglect in voting trust while the SF/SP merger was being considered, the Southern Pacific has been on a course of

[39] The Railroad Commission of Texas has suggested as an alternative remedy the establishment of neutral terminal railroads to serve the major industrial districts in Texas, RCT-4 at 19-29. As noted in SPI's comments, SPI supports open access within the railroad industry, SPI-11 at 61, n.52; however, SPI is not convinced that such a remedy would, in fact, ameliorate the effects of a merger of the UP and SP and the joint operations under the BNSF agreement. Nonetheless, SPI applauds the Railroad Commission for advancing this idea. Neutral terminal railroads have worked well in Houston, Chicago and other industrial areas; the Canadian open access system has served all stakeholders extremely well, and SPI understands neutral terminal railroads are planned for Mexico City and Monterrey when the Mexican railroad system is privatized.

improvement throughout the early 1990s. The SP has a valuable route structure. If the merger of the BN and SF in fact warrants consequential realignment of the western railroads, that realignment should be accomplished without effecting single-carrier domination in the Texas/Louisiana petrochemical corridor. With the BN looking to a transcontinental merger, an independent UP and SP would leave open the potential for three transcontinental carriers. Whether such a realignment would be in the public interest need not be determined in this proceeding; however, merger of the UP and SP would foreclose that possibility.

It is not the Board's role to envision and implement, or even to endorse, a master plan for the railroad industry in the United States. The Board's function is to determine whether this merger, at this time, is in the public interest. To reach that determination, the Board must find that this merger will not have an adverse effect upon competition. Since the merger would have an adverse impact upon competition, and since the merger benefits can be realized in a manner which excludes that adverse impact, the consequences threatened by Applicants if the merger is not approved without conditions other than those they endorse are not of decisional consequence.

WHEREFORE, THE PREMISES CONSIDERED, The Society of the Plastics Industry, Inc., respectfully urges the Surface Transportation Board to find that a merger of the Union Pacific Corporation, et al. and the Southern Pacific Rail Corporation, et al., would substantially and adversely impact upon the polyethylene and polypropylene resins industries, that a merger of the UP and SP as proposed would not be in the public interest, and to deny authority to merge, or minimally to condition any authority on divestiture of one of the two sets of the parallel networks (e.g., lines, yards, facilities, and trackage rights) serving Texas and Louisiana industries running from the Eagle Pass/Laredo/Brownsville border points through Houston and Ft. Worth to New Orleans, Memphis, St. Louis and Chicago.

Respectfully submitted,

Martin W. Bercovici
Douglas J. Behr
Elliot Belilos
KELLER AND HECKMAN
1001 G Street, NW
Suite 500 West
Washington, DC 20001
Tel: (202) 434-4100
Fax: (202) 434-4646

Attorneys for The Society of the Plastics Industry, Inc.

June 3, 1996

APPENDIX 1

LCA LOUISIANA CHEMICAL ASSOCIATION

DAN S. BORNÉ
PRESIDENT

May 28, 1996

Ms. Linda J. Morgan
Chairman
Surface Transportation Board
Department of Transportation
12th and Constitution Avenue, NW
Washington, DC 20423

Dear Ms. Morgan:

This letter is with respect to the proposed merger of the Union Pacific and Southern Pacific railroads and the effect this merger could have on the state of Louisiana.

No doubt many factors go into such an assessment. However, you should know that the member companies of the Louisiana Chemical Association are deeply concerned about the potential anti-competitive implications of this merger. This concern is driven by our belief that price and service competition for the movement of our products could be severely diminished if the merger is approved as currently proposed.

It is our view that there are alternatives which would foster competition. For example, consideration should be given to the concept advanced by Conrail which involves divestiture of Southern Pacific's lines connecting the Gulf States and the Midwest to an owning railroad. The UP/SP proposal to offer Burlington Northern Sante Fe a series of trackage rights and the purchase of some lines in Louisiana is probably not an effective alternative to a second owning railroad as a competitor from end to end.

It is LCA's position that the SurfaceTransportation Board should condition any approval of the UP/SP merger on assuring a continuing competitive environment for rail traffic into and out of Louisiana. While there may be alternatives other than the one above which will adequately address our concern, without significant competitive relief Louisiana's chemical manufacturing industry, which produces $20 billion worth of products annually and directly employs over 30,000 people, could be seriously impacted.

Sincerely,

Dan S Borné

ONE AMERICAN PLACE, SUITE 2040 BATON ROUGE, LOUISIANA 70825 PHONE (504) 344-2609 FAX (504) 343-1007

APPENDIX 1

APPENDIX 2

THE WASHINGTON POST, Business, B1, Friday, May 3, 1996

Man With a One-Track Mind

Burlington Northern-Santa Fe President Hopes to Engineer First Transcontinental Line

By Don Phillips
Washington Post Staff Writer

FORT WORTH

When Robert D. Krebs looks east these days, his gaze seems to linger at Norfolk.

The president of the newly merged Burlington Northern-Santa Fe Corp., now the country's largest railroad, has made no secret of his desire to create the country's first transcontinental railroad by linking up with a major eastern line. According to railroad and financial sources, he is looking harder at Norfolk Southern Corp. than at the other two possibilities, Conrail and CSX Transportation Inc.

Preliminary contacts have been made between managers of the two railroads, the sources said, but it is unclear where they will lead. Some sources speculated that Krebs will make a move sooner than might be expected given the challenge he faces combining his old railroad, the Atchison, Topeka & Santa Fe, with the much larger Burlington Northern. The two merged on Sept. 22, 1995.

Norfolk Southern's vice president for public relations, Magda Ratajski, said the railroad would not comment on any merger matters.

Krebs said in an interview that he would like to have a little more time before making any new merger move, but will be ready if the opportunity arises.

"I think you have to be [ready to go in] an instant if all the stars get lined up and grow and the opportunity presents itself," he said. "The fact that we're working on putting these properties [Burlington Northern and Santa Fe] together doesn't stop us from doing something else.

"If I had my druthers, would I wait till 1998? Yes, you bet your sweet life. But whatever happens, happens. You've got to walk and chew gum at the same time."

Through 165 years of U.S. railroad history, there has never been a true transcontinental railroad. The Mississippi River has been a symbolic hurdle. It is clear that the first railroader to breach that barrier from Pacific to Atlantic will become a railroad legend alongside such names as Harriman, Pullman and Gould.

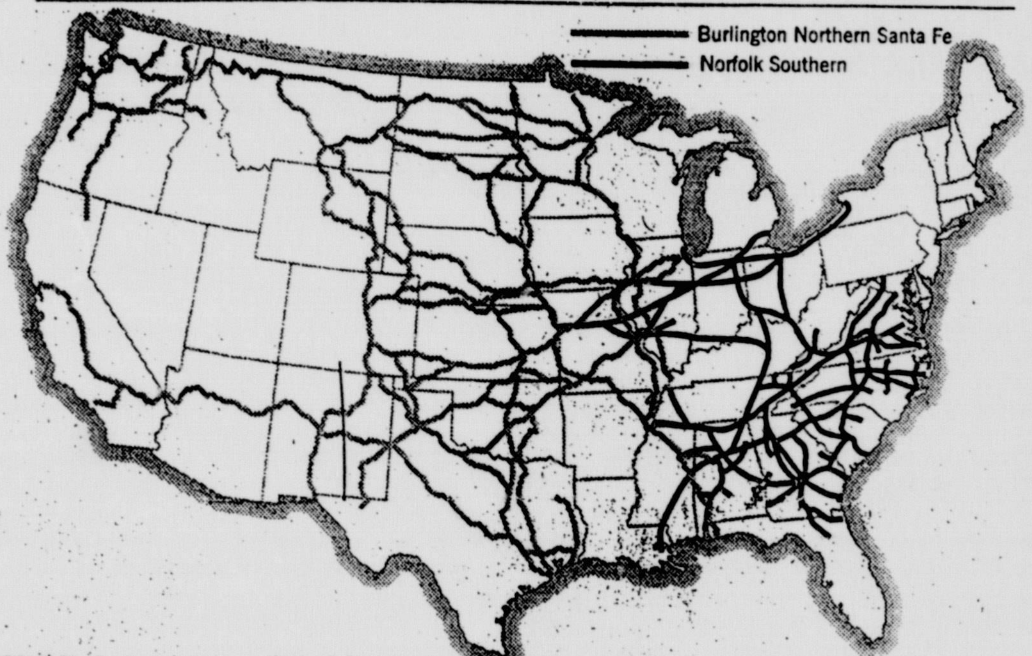
But there are practical business reasons for a transcontinental merger, the main one being the opportunity to provide seamless service across the Mississippi. Because of problems that defy solution, there always are delays where railroads meet, giving trucks a big edge for time-sensitive freight. There also are personnel savings in abandoning one railroad headquarters when two lines merge.

Shippers along the 14,500-mile Norfolk Southern would benefit from better service to western destinations, and the port of Norfolk could boom with new traffic from the west that now connects from Burlington Northern-Santa Fe to northeastern

See RAILROADS, B8, Col. 1

EYES EASTWARD

A MERGER WITH NORFOLK SOUTHERN WOULD PROVIDE BURLINGTON AN ENTREE INTO THE EAST COAST



SOURCE: Burlington Northern Santa Fe Railroad

THE WASHINGTON POS

WORKING ON THE RAILROAD

A PROFILE OF ROBERT D. KREBS

- **Job:** President of Burlington Northern-Santa Fe Railroad.
- **Assignment:** Managing a railroad that handles 5.7 million shipments, 31,000 route miles and 46,000 employees.
- **Other work experience:** President of Santa Fe Southern Pacific; chairman of Atchison, Topeka & Santa Fe Railway.
- **Age:** 54.
- **Education:** Stanford University and Harvard Business School.

-Robert D. Krebs

- **Personal:** Married, three children.

Krebs Seeking to Engineer Rail Merger

RAILROADS, From B1

ports such as Baltimore and New York.

The 1990s have seen merger activity pick up in the railroad industry, but Burlington Northern-Santa Fe is the only successful combination so far. Earlier in the decade, Norfolk Southern failed for a third time to buy Conrail, while a proposed acquisition of the Southern Pacific Railroad by the Union Pacific Railroad has sparked a donnybrook involving rail unions, other railroads and Congress.

The Surface Transportation Board (STB), the successor to the Interstate Commerce Commission (ICC), is scheduled to decide July 3 whether to allow the UP-SP merger.

The conventional wisdom has been that either Burlington Northern-Santa Fe or the new Union Pacific—if its merger with the Southern Pacific goes through—would make a run for Conrail. Philadelphia-based Conrail dominates freight traffic from New York and other East Coast cities to Chicago and St. Louis.

But as Norfolk Southern discovered, Conrail Chairman David LeVan is determined to remain independent, and is ready to use Pennsylvania's tough anti-takeover laws to make a raid an expensive and destructive battle.

"I take companies at their word," Krebs said. "Conrail doesn't want to do a merger. . . . It's pretty hard to do a hostile merger in the railroad industry, especially in Pennsylvania. And we're just not interested in doing it."

If Krebs should go for Norfolk Southern and succeed, Union Pacific and CSX likely would be forced to form a transcontinental link in defense. Analysts question whether Conrail could then hold out as a much smaller regional railroad, and say its lines likely would be divided between the two giants.

A number of railroad experts said Norfolk Southern and Burlington Northern-Santa Fe would be a good fit. Both railroads are highly disciplined operations, and likely would combine relatively easily, they said.

The opposite was true when Krebs began to combine the large but sluggish Burlington Northern with the small but tightly run Santa Fe. Although Krebs retained many Burlington Northern managers in such areas as law, he largely wiped out the top BN operating managers in favor of his own managers.

Both Burlington Northern-Santa Fe and Norfolk Southern also have the same maintenance philosophy: Spend whatever is necessary to produce a first-class physical plant.

Norfolk Southern also would provide Krebs with lots of cash, which he needs for high-cost capital projects to add badly needed capacity to crowded main lines.

> *"If I had my druthers, would I wait till 1998? Yes, you bet your sweet life. But whatever happens, happens. You've got to walk and chew gum at the same time."*
>
> — Robert D. Krebs, president, Burlington Northern-Santa Fe Corp.

Sources cautioned that a BNSF-Norfolk Southern deal may not be in the cards.

For one thing, Norfolk Southern Chairman David R. Goode is about Krebs's age, which could make it more difficult for negotiators to resolve the question of who would be in charge. (Often in such mergers the younger executive takes the second spot with the promise of succession.)

Krebs, 54, entered railroading as a golden boy almost from the beginning.

He graduated from Stanford University and Harvard Business School and went to work for Southern Pacific in 1966 on special assignment in the railroad's San Francisco executive department. He was promoted through a series of operating positions of increasing responsibility, achieving the presidency 16 years after he first walked through the door.

Then came a blow. The proposed merger of the Southern Pacific and the Santa Fe was rejected by the ICC in 1986. For a while, Krebs's career appeared to be on hold. But in 1989, he was named president of the Santa Fe, and helped lead the effort to merge with the Burlington Northern.

Krebs has a reputation as a driven, demanding boss with a capacity to absorb enormous amounts of detail. The stories of his inch-by-inch knowledge of his railroad have become legend. Some Wall Street analysts, while praising Krebs, say his love of detail could get in the way as he runs larger and larger railroads.

"There's nothing wrong with Krebs except he's a micro-manager in a larger system," said Anthony Hatch of Natwest Securities Corp.

He drives his subordinates hard, but he commands fierce loyalty from those who fit his do-it-now management style. The Journal of Commerce observed in a Krebs profile in January 1995 that few top managers voluntarily leave a Krebs-run railroad.

"He has difficulty masking his feelings," said David J. DeBoer, who was once promoted by Krebs to a top job at Southern Pacific. "He's a straight-ahead kind of guy. He's a non-duplicitous type."

Krebs said he understands he can't run his 31,000-mile railroad by himself, and spoke of the frustration of trying to persuade his employees to take responsibility for helping expand the company.

"Part of our problem here is we have this old militaristic tradition that everybody waits for orders," he said. "And if somebody issues one it must be God speaking to them.

"If there's any frustration I have, it's trying to break this syndrome," he said.

APPENDIX 3

DEPOSITION EXTRACTS

1. Richard B. Peterson (Redacted)
2. Matthew K. Rose
3. George R. Speight, Jr. (Redacted)
4. Robert D. Krebs
5. Thomas D. Crowley

BEFORE THE

SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY

-- CONTROL 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

HIGHLY CONFIDENTIAL

Washington, D.C.

Monday, February 5, 1996

Deposition of RICHARD L. PETERSON, a witness herein, called for examination by counsel for the Parties in the above-entitled matter, pursuant to agreement, the witness being duly sworn by JAN A. WILLIAMS, RPR, a Notary Public in and for the District of Columbia, taken at the offices of Covington & Burling, 1201 Pennsylvania Avenue, N.W., Washington, D.C., 20044, at 10:10 a.m., Monday, February 5, 1996, and the proceedings being taken down by Stenotype by JAN A. WILLIAMS, RPR, and transcribed under her direction.

for an extended distance and the speeds are about 20 miles an hour through there because of the narrow canyon and the curves. And that hurts us a lot, in a lot of ways. And we can't find a way to get that remedied because of the topography out there.

Q. In this particular corridor, do you have more market share than SP or does SP have it?

A. It depends what segment you're looking at. If you are looking at competing with the Santa Fe at sort of the middle to upper end of the intermodal market, we've got a much greater share. If you're looking at the low end of the intermodal traffic scale, steamship business, for certain accounts that aren't interested in service, they're not moving let's say apparel from Hong Kong to New York that is very service sensitive, they're moving something that's -- you know, that's a very low value commodity, SP probably does a little better than we do.

Where they really increase their share, however, is in their coverage of carload industries, they have a much greater network of traffic in Southern California that aren't accessible to us and they obviously handle that business. And you can go to Appendix A, if you like, and look at this to answer your question.

Q. You're not saying, are you, that UP and SP are not effective competitors?

A. Well, I am --

MR. ROACH: Object to the form of the question.

THE WITNESS: What I'm saying is that Santa Fe -- I'm saying that we are acknowledging in our analysis here, and there's a lot of analysis, that there are three competitors in that market. We call it a three-to-two market. Now, does that mean that there are three effective competitors for all segments of it? I would say our analysis concluded that that's not the case.

Take the automotive business. SP has been totally knocked out of that business because of its service and other problems. You take the segments I mentioned like the LTL truck lines and others, neither we nor SP can compete at that level. You know, on other traffic, yes, we handle some carload business, so does SP, so does Santa Fe, we handle intermodal traffic.

regarding over a billion dollars of our traffic is our estimate, it's not precise, because this is a very complicated thing. But it's highly conservative I believe that the traffic at the two-to-one points, traffic at Salt Lake City, Utah, for example, that will be available for BN/Santa Fe to compete for will be such that, when added with all the other two-to-one points, would be well in excess of a billion dollars of our current business.

Now, that was actually -- that also includes I believe the New Orleans-Houston corridor which is a two-to-one corridor and probably the Houston-Memphis corridor. But it's primarily the two-to-one points that generate that.

Just to try to move things along and to be cooperative, in our traffic study we predicted different percentages that BN/Santa Fe would get of that business which in some cases were 50 percent, where in many cases were where they were going to be a head-to-head competitor.

BY MR. MOLM:

Q. Let me move on to a new area. Would you say that a diversion of revenue, for example, reliability, whether BN's operations over the Southern Pacific track between Houston and Memphis are likely to be able to fully compete with the Union Pacific's directional operations between Houston and Memphis?

A. I certainly expect them to fully compete. They will be using the same tracks. As I said BN/Santa Fe now that they're merged have an extensive network and gathering structure in the Gulf. On the Memphis train, they will be able to go into the Tennessee yard and block there for destinations throughout the Southeast.

BN also has a big advantage in that they go from Memphis to Birmingham unlike us or SP. And so they can move the traffic straight through to Birmingham, interchange with the Southeastern railroads there. So, as far as the Southeast market, BN/Santa Fe will be a formidable competitor in my opinion and my assumption is that they will provide fully competitive service with us.

Q. You just said that BN would be using the same track. It's correct, is it not, that BN would not be using the northbound UP track between Houston and Memphis for any of its to Meridian, Mississippi. And they are becoming a formidable competitor into the Southeast after their acquisition of the mid-south route.

Q. I'd like to direct you to page 243 of your testimony. And I'll direct your attention to the last paragraph at the bottom of the page, beginning furthermore. If I could just quote your testimony here for the record, you say, furthermore, many of the chemicals that we studied are generic commodities, and UP/SP Gulf Coast chemical originations must compete with other sources to supply the needs of receivers, close quote. Is that an accurate reading of your testimony, Mr. Peterson?

A. Yes.

Q. Now, when you say that many of the chemicals that you studied are generic, can you tell me which chemicals are and which chemicals are not generic commodities?

A. I believe that the large volume commodities here are what I would term generic commodities, polyethylene, polypropylene, vinylchloride, chlorine, ethylene glycol certainly, and also the STCC 29's are generic things such as asphalt, we've got carbon black in here which is a 28, 29 petroleum oil, and so forth. Urea, I would say urea. I would say most of those are generic. Regarding some of the other smaller volume ones, I guess I can't say whether they're generic or not or to what degree.

Q. Regardless of the fact that you can't say to what extent those smaller chemicals are generic, your statement in this proceeding assumed that they were generic, did it not?

A. Well, as you said we used the word many.

Q. Did not your analysis of source competition assume that all of the chemicals that you studied were generic?

A. They were generic within a seven digit commodity description which is the finest description where data is available. I guess the reason we didn't say all was that possibly there is a large degree of substitution that can take place in some of these smaller commodities.

Q. I believe you just said that a large degree of substitutability can take place in these smaller commodities. And I am curious how you can reconcile that with your statement that three different general types of polyethylene that are produced in the United States?

A. Yes.

Q. Okay. And are you aware of whether those three different general types of polyethylene are substitutable for one another?

A. Yes, I've got some knowledge of that.

Q. Can you tell me whether in general they are substitutable for each other?

A. I think that to a large degree -- well, let's start with polypropylene. I mean to some extent polyethylene is substitutable with polypropylene. And then, within the various couple hundred formulas of polyethylene, there can be a great degree of substitution on the end use.

For example, if you're looking at polyethylene, the primary use is for film packaging. It's probably -- not probably, I believe the data will show that that's the largest single use for both low density and low density linear polyethylene. Those products are produced by generally the same producers at the same plants.

Sure, you've got density as a factor,

to -- equivalent to the --

Q. Page 39 perhaps?

A. No, we've got to go to the corridor, we've got to go to the Pacific Northwest to Texas corridor. This one is probably in the nature of 250 miles I think. But we might as well check. That one. Well, let's see, it's that part of it. Let me estimate about -- then you save even more by going to Laredo. Probably I'm saying about 300 miles probably.

Q. And, for the benefit of the record, could you give me the page number of the map that you're referring to? I'm just asking this for my understanding. And I wanted to ask you whether the difference in the route is what comprises the mileage savings?

A. On page 34. The savings comes by utilizing our new route from Green River, Wyoming, and then down through Denver and down through Fort Worth, Texas, and then we would go down to Laredo instead of going over to Kansas City, Missouri, and then down. And I think that's somewhere in the neighborhood of two to 300 mile savings. That's right. It's red versus new. 250. I was a little too far off.

(Discussion off the record.)

BY MR. STONE:

Q. Directing your attention to page 111,

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customers, input from SP's marketing and other people, and the view of our own chemical people.

Q. Have you had any shippers tell you or anyone else at UP that you're aware of that SP's service is improving?

A. In a general sense or a specific sense?

Q. In any sense.

A. In any sense I've heard that, as a result of their settlement with BN/Santa Fe, that their service between Chicago and Southern California may -- is more reliable, it has improved somewhat. Beyond that I haven't -- I have not heard of any significant changes recently.

MR. STONE: Let's stop for the day.

(Whereupon, at 5:45 p.m., the deposition was adjourned, to reconvene at 10:00 a.m., Tuesday, February 6, 1996.)

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Signature of the Witness

SUBSCRIBED AND SWORN to before me this _______ day of

______________________, 19__.

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NOTARY PUBLIC

My Commission Expires