shippers in the western United States.

USDA therefore opposes the proposed merger
and asks that the Surface Transportation Board deny
the merger.

CHAIRPERSON MORGAN: You mentioned a
particular market of concern, which is movements into
Mexico under NAFTA. Is there a particular point or
market that we should be looking at in response to
that particular concern of the department’s?

MR. DUNN: A particular area of concern?

CHAIRPERSON MORGAN: Yes.

MR. DUNN: As I outlined in my proposal,
there is the potential for shift in grain operations
in that area. Presently there is a number of cattle
going into the Mexico market area which could provide
us with new opportunities for shipping grain into
Mexico.

COMMISSIONER OWEN: There seems to be an
awful lot of agricultural interests that are
supporting the merger. And how many agricultural
interests are you -- are behind you, are you
representing -- I guess I’d phrase it that way. Is it

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just the Department?

MR. DUNN: We have virtually -- we have received concern from American Farm Bureau American Bankers Association, American Corn Growers Association, American Soy Bean Association, National Association of Wheat Growers, National Grain Sorghum Producers, National Grain, National Oil Seed Processor Association, U.S. Rice Federation.

COMMISSIONER OWEN: Those are letters of concern or opposition? See, because we’ve also received an awful lot of letters in here from agricultural interest in support of it. So it’s kind of confusing to us to say okay, here’s the Department and they had a preponderance of letters coming in from different associations saying we support this merger.

MR. DUNN: Commissioner, the positioning of the merger as we go through these other two factors of NAFTA and new GATT agreements plus the 1996 Farm Bill which gives farmers greater flexibility -- we will see a tremendous shift here in the next few years on what is planted and where. And whether or not we have the infrastructure to move that transportation
gives us great concern.

And that is the types of letters that we received from many of these organizations that they have a real concern is there is not a divestiture, if there is not competition out there that can react swiftly to these new market signals and where grain is being produced and how.

COMMISSIONER OWEN: In other words, by the new agriculture -- well, new bill that’s come out and everything or the proposal you’re working on here, that means that deregulation is coming down the line for farmers and the subsidies as a whole. So by doing that and deregulating them and eliminating the subsidies, then you’re freeing up the market so it will really grow.

And yet, on the other hand, you’re proposing that we continue to regulate with a tight hand on the transportation system. And as they have indicated in a number of other sources that based upon the inflationary factor since 1980 that transportation costs have gone down 38%.

I talked to my family on a farm back in
Oklahoma this morning, and they don’t notice a
difference. They don’t even know we’re doing this
today. I thought it was the most important event in
the world. They were worried about getting the beans
in or getting the corn or the alfalfa. So --

MR. DUNN: When it comes time to get the
crops in or out of the field, that is the most
important time for our producers. What is of concern
to them is that there is the availability to move that
grain. The farmer feels that it’s their job to
produce it.

The great deal of concern that I had, the
Secretary had as we went -- traveled through the upper
midwest this last year on the inability to have grain
cars come and take that grain to market on a timely
basis -- ended up with grain being stored on the
ground with a tremendous loss, tremendous cost of
interest cost to grain elevators to keep that grain
there because of the lack of availability of grain
cars.

This sends a shock to the producer out
der. If I produce it, can I sell it? They are
looking for Ag. Marketing Service, Foreign Ag. Market Service to find foreign markets and internal markets for what they produce out there. We have to be assured that we have the infrastructure there to move that grain.

COMMISSIONER OWEN: I share your concerns very much so, but I don’t know if we’ll ever have that remedied because crops come in at a particular time of the year. We don’t have enough grain car hoppers, we don’t have enough locomotives. We have -- to get them all to the market where everybody with the highest yield per bushel or whatever it is.

One of the questions, and I’ll not bother you anymore, but I do have very much concern about the farmers of our country. Doesn’t the USDA marketing orders reduce competition among growers? And why do you focus on railroads and not marketing orders? I guess that would be the double part of it.

MR. DUNN: We see the use of marketing orders in agriculture as an orderly way to provide marketing access to ensure that there is quality and quantity available for the producer, which is also a
constituency of the Department of Agriculture.

CHAIRPERSON MORGAN: Might there be some efficiencies from this merger that could benefit the agricultural community -- single line service, certain areas?

MR. DUNN: Madame Chairman, --

CHAIRPERSON MORGAN: Is that something you've looked at?

MR. DUNN: -- if there are those type of efficiencies, originally what the Department's position was with some divestitures that we did not oppose the merger. But as we -- as your proceedings went on and we got more and more information and more and more concern for producers out there without allowing that type of divestiture, we do feel that there is not a gain for agriculture producers.

COMMISSIONER OWEN: I would just like to say thank you and good luck on getting all the crops to the market in time.

MR. DUNN: Thank you, and I wish you the best in making this decision.

CHAIRPERSON MORGAN: Thank you, Mr. Dunn.
Moving on to the Shipper Organizations, we will hear from Nicholas Di Michael who will represent the National Industrial Transportation League, and you have ten minutes.

MR. Di MICHAEL: Thank you, Madame Chairman. The League believes that there is an anti-competitive effect of this merger in two specific corridors, the Texas corridors and in the Central corridor. And League is asking that a condition be imposed on this merger that would require the applicants to divest in those specific corridors, the parallel lines.

VICE CHAIRPERSON SIMMONS: Then would you be happy?

MR. Di MICHAEL: Yes.

VICE CHAIRPERSON SIMMONS: Okay.

(Laughter.)

MR. Di MICHAEL: It’s a simple answer to a direct, quick question. Instead of going through my prepared remarks here, what I’d like to do is to kind of focus -- sort of jump right away into some of the questions that have come up this morning. And the
first one of these things is perhaps the matter of shipper support.

If the sole issue facing you were to say yea or nay, up or down, and there was nothing else you could do, the question of 1,300 shipper support letters stacked up over here would be a relevant one. But that’s not the question that you have before you. Rather, it’s a question of the anti-competitive effect in particular markets, the Central corridor and in the Texas corridors.

And so what you have to ask yourself about the 1,300 shipper support letters is what do they have to say about the Texas corridor and the Central corridor? Now, if you take a look at those -- I think if you have a candid examination of those, you’d find a number of things.

First of all, a lot of those shipper support letters are dealing -- are from people who have competitive options -- who have non-rail options or other options. And those, by their very nature, can’t go to the question of the anti-competitive effects in particular corridors. Some of them are
from shippers who might be captive but in other places.

And they might be getting, for example, extended hauls, and so the merger might be good for them. But again, that by its very nature doesn’t go to anti-competitive effect in the Central corridor or in the Texas corridor. So you’ve got to take a look at those from the point of view of what is before you and what choices you have.

Your choice is not just to say yes or no, but your choice is also to say we can let this merger go forward if we fix the problem. And that’s what the League is asking you to do. Now, I guess I can’t go past the issue of shipper support without at least saying one thing. Mr. Roach this morning indicated that hundreds of NIT League members support, I think, even by -- if you would think about that, that is an exaggeration by a whole lot.

And even the ones that he has, you would need to know that the NIT League has two kinds of membership. One kind of member is actual shippers, and then there is an associate category where carriers
or their affiliates -- and I would say that -- just point out that of the list of NIT League members, the applicants have identified such shippers as Yellow Freight, CSX, Intermodal, and organizations like that, and that just kind of shows that for the shippers who have options like Intermodal Carriers, for example, that is fine.

But that doesn’t go to shippers who don’t in the corridors who are affected here. The second issue that has come up -- what is the anti-competitive effect? Commissioner Owen, before you talked about $100 million dollars being real money, I guess. The applicants, by their own admission here, have indicated that there is $800 million dollars of traffic at two to one points, eight times I guess what you talked about as a threshold of money.

And that -- and the effectiveness of the competition at those two points, even if you just look at that problem -- at just the two to one point problem -- the effectiveness of the competition depends upon the effectiveness of the Burlington Northern/Santa Fe agreement.
Will that provide effective competition? And the League believes it won’t. Or at least there’s a real serious problem, a real serious doubt if it will or not. And we’re down to two carriers if this merger goes forward.

VICE CHAIRPERSON SIMMONS: So it doesn’t help?

MR. DI MICHAEL: It doesn’t help. We don’t think it does.

VICE CHAIRPERSON SIMMONS: The CMA agreement doesn’t help?

MR. DI MICHAEL: Well, I can tell you the CMA agreement is a marginal improvement over what was there before. But if you’re talking about -- and what we want is real competition here. We don’t want marginal things. We want real competition.

VICE CHAIRPERSON SIMMONS: How many members do you have? You’ve got two categories now. How many do you have?

MR. DI MICHAEL: There are about 1,200 shipper members.

VICE CHAIRPERSON SIMMONS: I see. And out
of that 1,200, who are against and who are for -- how many?

MR. Di MICHAEL: We -- well, like CMA, we did not take a poll. But what we did do is we had a meeting and we -- announced to the whole membership that could come and debate the question and discuss the question. And that's what we did.

VICE CHAIRPERSON SIMMONS: Well, if I read the papers -- and I realize you can't rely on everything you see, but in the papers, it sounds like you are against the merger.

MR. Di MICHAEL: We are. We want the merger to be conditioned upon divestiture.

VICE CHAIRPERSON SIMMONS: I see.

MR. Di MICHAEL: So the merger can go forward as long as there's divestiture to cure the anti-competitive effect in the Central corridor and in the Texas corridor.

COMMISSIONER OWEN: Everybody keeps talking about divestiture here, but nobody is really specific about -- you say Central corridor or the Texas corridor -- you say city to city and where and

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which track you're really looking at. And when you speak about it in general terms, we say okay, are you talking about Chicago to Los Angeles or --

MR. Di MICHAEL: You know, in our papers, Mr. Owen, we have identified the specific lines. And basically what you have is lines going from Houston west and Houston east and then Houston north to --

COMMISSIONER OWEN: I apologize. I read most of those and I can't keep them all straight.

MR. Di MICHAEL: Well, this is a massive record here. The applicants are proposing -- kind of to get back to the CMA agreement -- a cure for potential future anti-competitive problems in this five year oversight condition. We really think this is not the way to go. A five year oversight involves -- or would involve a potentially minute examination into rates and costs and contracts and service practices, basically a reexamination, a reregulation for five years of the practices not only of UP/SP, but also of the BNSF, the only two remaining competitors presumably in that market.

We are looking at that as almost a
reregulation of the rail industry in the western United States. It will leave the market unsettled for five years, and it will get this board involved in very, very difficult problems. And it is not creating what we think the Staggers Act said should be created, and that is structural competition, real competition by people -- by two carriers who own railroads and who can do what they need to do to make those railroads run the most efficiently possible can.

CHAIRPERSON MORGAN: Now in following up on that, in talking about structural competition, I mean, one of the things that the NIT League has supported in the past is the notion of competitive access of trackage rights -- more universal trackage rights. Here you are not in favor of the BN/Santa Fe trackage rights agreement as modified because of your concern about trackage rights and the fact that in your mind they do not create the competitive alternative that you feel is needed here.

How do you square the position in this case that you have taken with the overall position of the NIT League regarding competitive access on...
MR. Di MICHAEL: The League definitely believes there should be more competitive access. And certainly there is no secret, but that the League, for example, disagrees with certain of the competitive access decisions in the past. But here, we are in a sense trying to avoid the need to have a broader competitive access.

What we're trying to do is to get two railroads who can really compete on a structural basis so we don't need to have the regulatory solutions that the competitive access provisions of the statute would require. If we don't get that, then what is likely to happen is there would likely be an increase emphasis by shippers upon competitive access as their competitive options become less and less and less.

So here we're talking about a structural solution that will avoid the need for much regulatory involvement in the marketplace and will cure the problem at the outset and final.

CHAIRPERSON MORGAN: But if -- just a hypothetical, if one feels that this merger has
efficiencies, that you want to make sure are not undercut, there is an argument to be made that an oversight process allows you to realize the efficiencies and then to continue to monitor very carefully what is the after effect.

MR. DI MICHAEL: Well, I think that is a very good point. But it seems to me that the real point here is that we really strongly believe that the efficiencies in this merger are created in areas other than the lines that we seek to be divested. That you can get, it seems to me, virtually all of the efficiencies of this merger and all of the public benefits of this merger and still divest the lines that we seek in the Texas Gulf -- in the Texas corridors and in the Central corridor.

There are a number of parties in this case and -- who have made that point very, very strongly, and I'm sure some of them will be following me and they'll make that point again. But we really believe that you can get the efficiencies, get the public benefits, but avoid the anti-competitive effects.

Divestiture -- let me sum up since I see
my time is over. This merger will create unprecedented, we think, competitive problems in two specific corridors, and the League strongly believes that competition should be the regulator, and that failure to correct the anti-competitive effects here finally and fully and firmly would call into question the very underpinnings of the Staggers Act as a pro-competitive model that the Leagues believes has worked very, very well.

And we think that divestiture is the remedy so that we can create the structural competition that would best serve the shipping --

VICE CHAIRPERSON SIMMONS: So the League wants divestiture, is that what you’re telling me?

MR. Di MICHAEL: That’s correct.

VICE CHAIRPERSON SIMMONS: I’m trying to get you to speak --

MR. Di MICHAEL: That is exactly the point.

VICE CHAIRPERSON SIMMONS: -- for the League, but I haven’t been able to find out what the League is first. We’re back to where we started.
MR. Di MICHAEL: Okay.

CHAIRPERSON MORGAN: In terms of divestiture, and this is a question I've asked others before today, if the Board were to pursue a divestiture route, how would you envision -- as representative of a shipper organization, how would you envision that process working?

MR. Di MICHAEL: I think from what I heard here today and what I would add to, there is fairly strong agreement, I guess, on how that would go. It seems to me that the Board would order a divestiture condition in the decision it will issue in this case. The applicants would then go forward to implement that, to have an auction or sale of the lines that are identified by the Board.

And then the carrier to whom the sale is to be made would come before this Board again to seek approval of that. And I think that's what a number of --

CHAIRPERSON MORGAN: That process would take --

MR. Di MICHAEL: I don't see that process
as an extremely lengthy one. I believe that Ms. Jones for the BN talked about months. And I think that process could move forward fairly quickly because the person -- or the railroad to whom the sale would be made would presumably have a whole lot less anti-competitive problems than the current one.

So I think a divestiture remedy could be completed in a fairly short time.

CHAIRPERSON MORGAN: Now let's talk a little bit about the CMA agreement which you mentioned. Now I realize the position of the NIT League is divestiture.

MR. DI MICHAEL: Yes.

CHAIRPERSON MORGAN: But if we were looking at the BN/Santa Fe agreement as amended by CMA, your view is CMA nibbles around the edges in terms of concerns but does not fully address some of the competitive concerns that have been raised. How would you broaden the CMA agreement to address some of those concerns?

Obviously we've got provisions in there about contracts, provisions in there about build outs,
build ins, new facilities and so on.

MR. Di MICHAEL: I think the problem is that the CMA agreement accepts the underlying premise here, and that is that a railroad in the position of a trackage rights tenant can be as good a competitor as a railroad in the position as a -- can be as good a competitor as a railroad that is in an ownership position in these extensive areas involved here.

Certainly there are problems with the trackage rights as terms, for example, of the cost of the trackage rights fees and all of those things. But I think fundamentally it’s the thing that has been identified by the League, has been identified by DOT that a trackage rights tenant simply is not in the same position as a trackage rights owner.

It can’t and does not have the same control, the same ability, for example to cut costs on its line, the same ability to manage.

CHAIRPERSON MORGAN: But I understand that in theory, but are there specific instances where trackage rights has been a problem in this respect?

MR. Di MICHAEL: In the past, it seems to
trackage rights in the context of a merger proceeding have been used to solve anti-competitive problems at very specific points. And the League was involved, for example, in the Burlington Northern/Santa Fe merger. And the League entered into a settlement with the Burlington Northern/Santa Fe that had a trackage rights arrangement in it.

But there we had very much smaller --

VICE CHAIRPERSON SIMMONS: How much smaller?

MR. DI MICHAEL: A lot smaller. A lot smaller.

VICE CHAIRPERSON SIMMONS: How much?

MR. DI MICHAEL: Well, I don’t have the figures right here, but I can tell you what you had was you had very specific points --

VICE CHAIRPERSON SIMMONS: In miles, that’s what I’m talking about.

MR. DI MICHAEL: Here you have 4,000 miles of trackage rights.

VICE CHAIRPERSON SIMMONS: Okay, I know how many.
MR. Di MICHAEL: It was probably 1/5th of that perhaps.

VICE CHAIRPERSON SIMMONS: It was more.

MR. Di MICHAEL: What I'm saying is there was -- although the trackage rights extended for more, the anti-competitive problems were at discreet points. Whereas here, the anti-competitive problems are all over.

VICE CHAIRPERSON SIMMONS: So at some particular -- too much is too much or too little is too little then?

MR. Di MICHAEL: There is obviously --

VICE CHAIRPERSON SIMMONS: I think the important thing is how it works.

MR. Di MICHAEL: And we have some strong, very strong doubts that when you have trackage rights over this extensive an area where there is this many problems for such a long time, they are not going to work. You need something surer than that.

CHAIRPERSON MORGAN: And I think there are provisions, as I understand it, in the CMA agreement that do try to address some of those concerns,
specifically money set aside for investment, dispatching, protocols and so on.

MR. Di MICHAEL: I would say that those are after the fact solutions that are not going to -- I mean, markets work immediately. And markets, you have to make a sale today tomorrow. It is impossible to really say well, I have a problem, therefore I'm going to go to a court or going to go back to a board and try to get a solution then. It just simply won't work.

CHAIPPERSON MORGAN: And I presume that the NIT League does not agree with the DOT's position as it relates to the Central corridor because DOT has spoken today about pursuing trackage rights in that corridor. I presume you are not in agreement with that.

MR. Di MICHAEL: If I could speak to that just for a minute, because DOT has certainly been a thoughtful -- has made a thoughtful presentation and submission here. But I think in the Central corridor we do have some problems with that. There's two or three things. First of all, DOT seems to indicate
that the problem is the lack of gathering lines.

And that to me is not necessarily a significant problem. This Board has for many, many decisions, for example, stated that a railroad will not prefer its own single line route if a joint line route would provide efficiencies. The fact that it -- that the purchaser of a Central corridor line may not have gathering lines shouldn't under that theory make any difference.

There are persons out there who are -- who have sought to purchase the Central corridor lines -- short line railroads who traditionally have made very creative operations even without extensive gathering line systems. The other thing is that we're very concerned that the solution proposed by DOT simply doesn't go far enough and would not remedy the real managerial problems here.

And frankly, you know, they are -- DOT has suggested, for example, an up front payment by the Burlington Northern. I mean, no one has asked the Burlington Northern about that and whether they believe, for example, that if they would put up $300
million dollars in an up front payment, they could
beat the brains out of the UP.

So it is a solution that may be a little
too fine, a little too careful for the serious anti-
competitive problems we have here.

Thank you very much.

CHAIRPERSON MORGAN: Thank you very much.
We will next hear from William Jackson on behalf of
Save The Rock Island Committee, Inc. Mr. Jackson, you
have four minutes.

MR. JACKSON: May it please the Board, I
do represent the Save The Rock Island Committee, which
in this context refers not to the old Rock Island in
its entirety, but only the section between St. Louis
and Kansas City. As STRIC has requested in its
pleadings in this case, it would like to have a
condition imposed on approval of the merger for sale
of the line between St. Louis/Kansas City currently
owned by the St. Louis Southwestern subsidiary of
Southern Pacific.

Of course, with the pertinent property and
trackage rights, to a carrier not affiliated in any
way with Union Pacific or Southern Pacific and to have
the sale occur at a fair price, if the parties cannot
agree on the price, then the Board should set it upon
the request of the purchaser. Sale of the entire
Kansas City St. Louis line as a unit is necessary if
there is to be any reasonable chance of admitting a
successfully operated line.

Studies by potential purchasers have shown
that if it is not operated as a unit, the line will
fail. Operating the line with the eastern and western
parts amputated would leave a cripple that no company
in its right mind would want to buy. UP as late as
last week flatly refused if this merger were approved
to ever consider selling the entire line, and has
instead basically demanded impossible conditions from
a would be purchaser.

I think this shows the need for the
Board's intervention in this matter. We've attempted
negotiation. It simply has not been possible.
Divestiture would be in the public interest. It would
also promote competition by putting the Kansas
City/St. Louis line in the hands of someone interested
in rehabilitating and operating it rather than killing it.

Rail service would again be made available to shippers in economically depressed central Missouri. Governor Carnahan of Missouri has called for this action due to its importance to the Missouri economy. And as we heard this morning, Senator Bond likewise supports the divestiture of parallel lines in this particular case.

And certainly this is a parallel line without any question. Ordering the divestiture would not harm the merger, nor the merger parties. All but a small amount of traffic now moving over the line would be entirely diverted to the existing Missouri Pacific line, which is of course a Union Pacific subsidiary which runs between Kansas City and St. Louis after the merger is approved.

The exact details of this traffic and its diversion are confidential, but they are contained in STRIC's unredacted brief, and I would simply cite that to you. At the present time, STRIC is aware of at least two companies that are actively interested in

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acquiring and rehabilitating the old Rock Island line
between St. Louis and Kansas City, including one
company that's publicly traded and one which is
private held, and obviously there may be more
interested if the line is actually put up for sale.

Because up to this point, there's been a
flat refusal to consider selling the entire line as a
unit, which STRIC believes is necessary if it's going
to have a chance of success. You've got to be able to
get to both the gateway of St. Louis and the gateway
of Kansas City, and you've got to be able to do it
without having impossible conditions put on the
ownership or the operation of the line, and that's
basically what we're seeking to have happen, a sale
under economically viable conditions at a fair price.

If the line is put up for sale and
purchased, that will authoritatively prove that there
is a market for the line and for the service that can
be provided over it. But if no one steps forward to
buy the line, then that of course would be the end of
it. STRIC is asking for a chance to be given for the
sale of the line.
And frankly, this Board is STRIC’s last chance to get service to its area revived as a result of the line being sold to someone who will operate it after it is rehabilitated. To prevent a sham purchaser from entering the picture, STRIC is also asking that the condition be imposed that the purchaser must commit to rehabilitate and operate the entire unit as a line and as a unit within three years of its purchase.

Most of the line in question has been embargoed on a year to year basis since it was acquired by the St. Louis Southwestern. Many members of STRIC were misled into supporting the St. Louis Southwestern acquisition of the Rock Island’s Tucumcari line with a promise that operations would be resumed over the entire line, but that has never happened.

Members of STRIC are located across -- along the entire line and have been hurt to varying degrees over the years by the failure to resume rail service. Now is the time in this merger case to address this issue. No serious reasons have been
advanced by the applicants why this should not be done and why divestiture should not be ordered as a condition to merger.

And I would certainly request the Board to consider very strongly imposing the divestiture condition if this merger is approved. STRIC does not oppose the merger if the condition is imposed if the divestiture is required.

CHAIRPERSON MORGAN: Now what does this have to do with the merger, this particular condition that you're --

MR. JACKSON: The line involved is a parallel line, and therefore there's a competitive aspect here. If the line is divested, it will be a competitively operated line. And so it's definitely related to the merger.

Thank you.

CHAIRPERSON MORGAN: Thank you. Next we will hear from John Estes on behalf of the Coalition for Competitive Rail Transportation.

MR. ESTES: Thank you, Madame Chair, commissioners. At Gettysburg on November 19, 1863
where the nation's future had hung in the balance, President Lincoln in 272 words established a precedent that a presentation need not be long to be effective and enduring. The President accomplished his mission in two minutes. I have the luxury of three.

Like the President, I represent individuals and organizations who are also deeply troubled. In our case, the nation's life does not hang in the balance. But depending on your decision, the businesses and farms of shippers does. Our coalition represents shippers who, like Lincoln, also believe in equality -- equal access to rail competition.

Shippers will never forget what happens here today if they are forced out of business because of rising rates and inadequate or no rail service resulting from this duopoly. We believe millions of Americans directly or indirectly have expressed opposition or concern about this merger. And our government of, by and for the people must take notice of that fact.

How can any merger possibly be in the
public interest when that many people believe it is harmful? Applicants are wrong. Most oppose this merger. In an applicants presentation to you this morning, almost no mention was made of agriculture except when Commissioner Simmons brought it up.

How about grain? How about the Central corridor? How about the American Farm Bureau, the Colorado Farm Bureau, the Idaho Wheat Commission, the Kansas Farm Bureau, the Montana Farmer's Union, the Oklahoma Grain and Feed Association, the Texas Farm Bureau, the Texas Wheat Producers and others, all who have gone on record against the merger.

We have submitted that documentation for your file, and I believe some of them may have contacted you directly. Lincoln got his message across in two minutes and dedicated a cemetery. Our mission is to convince you in three minutes not to dedicate an economic graveyard for thousands of shippers by approving this merger. We are a coalition of, by and for shippers, particularly small shippers.

Our shippers agree the merger should be rejected. Let me just say one quick thing about
oversight. Oversight in our judgement of an approved merger would be a disaster for a small shipper. The market moves fast; they have to move fast. They have to get the products out right away. They are not Exxon or Monsanto or a large company that can ship from another plant or another location. They have to move now, and that's why oversight, and an investigation, and the time it would take to look into and prosecute those types of incidents would hurt the small shipper who we represent.

In conclusion, on behalf of our shipper members, many of whom are small organizations, and on behalf of the millions of Americans whose representatives have joined with us in fearing the merger, we urge that it be rejected.

CHAIRPERSON MORGAN: Thank you. Now, in terms of the coalition -- you've got three minutes to speak, but then you get a few questions.

(Laughter.)

MR. ESTES: That wasn't part of the deal.

(Laughter.)

CHAIRPERSON MORGAN: In terms of your
coalition, I just wanted to get some idea of who your membership is, how do you become a member, and also what other issues the coalition is involved in as well, so I can get some idea of the shipper --

MR. ESTES: Sure. Right. We are also an Inc. We are incorporated in Virginia. We started just for this purpose, regarding this particular issue. We have 200 and some members, most of them small shippers and corporations, although there are a few larger shippers in there, but most of them are small. Most of them are located in the Mississippi corridor and then west. We charge membership dues, and that's how we finance our operations.

VICE CHAIRPERSON SIMMONS: So you just formed during the pendency of this merger?

MR. ESTES: Yes, sir. Commissioner, we formed last September.

VICE CHAIRPERSON SIMMONS: You couldn't get heard in NIT League?

MR. ESTES: Pardon me? We work with NIT League and with other shipper groups, right.

VICE CHAIRPERSON SIMMONS: Okay.
CHAIRPERSON MORGAN: And the 200 shippers represent, I presume, various commodity groups. I heard you speak of agriculture. Of the 200, for example, how many members are agricultural members?

MR. ESTES: Yes.

CHAIRPERSON MORGAN: How many are --

MR. ESTES: Yes, it's a mixed bag of industrial, agriculture. We have, for example, seven organizations out of Oklahoma. We have a number out of Texas. We have a few in the central corridor.

The agricultural organizations that I mentioned are not members of our coalition. We work with them. The Farm Bureau, with its 4.5 million farm families, is not a member of our coalition, but we work with them. That's where I got the figure millions of Americans, because when you add up all of those, even if you discount 50 percent of them or more, you still have a large number of people whose authorized representatives have expressed concern about the merger.

VICE CHAIRPERSON SIMMONS: And what do you suggest we do now?
MR. ESTES: We agree with Senator Bond's recommendation to you for divestiture.

VICE CHAIRPERSON SIMMONS: Okay.

MR. ESTES: And we also strongly urge, once again, that you look carefully at Mr. Oberstarr's letter to you regarding oversight and its problems, particularly with respect to the small shipper.

COMMISSIONER OWEN: Do you have any railroads that are members or did financing of --

MR. ESTES: No, we have no railroad members. We have a board of directors of shippers only for shippers. We have -- most of our contributions come from shipper organizations.

We did enter into a stipulation and discovery that roughly six percent of our income over and above our cost would be financed by others than shippers. And so --

COMMISSIONER OWEN: Fascinating.

MR. ESTES: Yes.

CHAIRPERSON MORGAN: Are they other transportation companies?

MR. ESTES: Yes. Right.
CHAIRPERSON MORGAN: Any railroads in that?

MR. ESTES: There is no direct railroads, no one a party to this proceeding. But there are organizations that are not shipper related.

COMMISSIONER OWEN: That's what I was shooting for. Thank you.

MR. ESTES: Okay.

CHAIRPERSON MORGAN: Thank you, Mr. Estes.

Okay. We will now move to the coal shippers. First, we will hear from Michael Loftus, who will be representing Western Coal Traffic League, Wisconsin Power & Light Company, Wisconsin Public Service Corp.

MR. LOFTUS: Chairman Morgan, Vice Chairman Simmons, Commissioner Owen, my name is Michael Loftus. I'm appearing on behalf of the Western Coal Traffic League, Wisconsin Power & Light Company, and Wisconsin Public Service Corporation.

WCTL's members ship about 95 million tons of coal each year at a delivered cost in excess of $2 billion. Wisconsin Power & Light and Wisconsin
Public Service each rely heavily on western coal to fuel their generating facilities.

WCTL is opposed to the proposed merger and requests that the application be denied. Its reasons are simple and straightforward. First, the market for western coal transportation is already dangerously concentrated as a result of the BN/Santa Fe merger. Eliminating the SP, the third largest originator of western coal, would leave UP/SP and BNSF in control of 96 percent of all western coal traffic.

This level of concentration will lead to a substantial relaxation of competition and increasing rate levels as each of the two remaining systems finds it more profitable to raise rates on its share of the market than to go after the other’s share.

Second, the merger would eliminate source competition between SP-served coal mines in Colorado and Utah, and UP-served coal mines in Wyoming. Aggressive SP pricing of rail transportation has made Colorado and Utah coals increasingly competitive with other western coals for many utilities. This competition has constrained costs for coal

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transportation from Wyoming mines.

The merger would end this source competition and the associated benefits, as UP is likely to favor the Wyoming coal origins that would yield it the greatest profits.

There is a great deal of testimony in the record about the extent to which SP origin coals compete with UP origin coals. Our time permits us to emphasize only one point with regard to that issue. None of the applicant’s witnesses, who say that these coals do not compete, are actually involved in buying or selling coal.

On the other side are the actual coal users, like Wisconsin Power & Light Company, and the many other utilities identified in WCTL’s evidence, who have either actually used coals from both regions or have actively considered doing so. We submit the latter group is inherently more believable.

Third, the merger would cause substantial deterioration of coal service in the central corridor.

And, Commissioner Owen, we are one of those guilty of perhaps confusion about central
We are talking from Provo, Utah, east to Chicago, when we talk about the central corridor.

The UP/CNW merger caused tremendous problems for UP coal shippers, particularly in the midwest. Wisconsin Public Service experienced additional rail car lease costs in excess of $2 million in 1995 alone, as a result of those UP service problems. The operating plan for the proposed merger is inadequate to deal with coal traffic demands on the central corridor.

The BNSF agreement and CMA agreement will not offset the anti-competitive effects of the merger, even in two to one situations, due to the high level of the trackage rights compensation and to other factors which have been noted by others.

If the Board decides to approve this merger, WCTL requests the imposition of the following protective conditions. One, divestiture or additional trackage rights in the central corridor to an independent carrier, other than BNSF, as reflected on the map at Tab 1A of our handout.

Two, a limitation on integration of UP and
SP operations in certain defined areas until UP demonstrates that it has complied with its service commitments under coal contracts.

Three, a reduced trackage rights fee under the BNSF agreement.

Four, inclusion of all shippers with buildout options as protected two to one shippers.

And, five, application to two to one coal shippers of Section 3 of the CMA agreement, which would relieve certain contractual commitments.

As shown at Tab 1B of our handout, applicants have attempted to carve the Lower Colorado River Authority and the city of Austin, Texas, out of this provision, even though they have acknowledged elsewhere they are a two to one shipper.

Thank you very much for your attention. I'd be pleased to respond to any questions.

CHAIRPERSON MORGAN: The one condition that you just mentioned regarding commitments under contracts. Now, how is it that we would get into that type of issue, given that a contract is essentially an agreement that is upheld in court? How would we
interject ourselves into that? I just need to understand the condition a little bit more.

MR. LOFTUS: When one looks at the statutory obligations of the Board in a rail merger proceeding, one of the first listed, if not the first, is to examine the adequacy of rail transportation. The UP and CNW recently merged, and despite the glowing predictions of what would occur as a result of that merger, the fact is -- and there has been some acknowledgement of this -- that there were serious service problems that resulted from the integration of the UP and the CNW.

Coal shippers felt those problems severely. Those coal shippers have coal transportation contracts, almost invariably, that have frequently service commitments in them. The condition we're suggesting to you would be self-policing. You just tell the UP that they're not going to be permitted to integrate operations over the lines we've identified until they can certify to you that they are in compliance with their service commitments under those existing contracts.
CHAIRPERSON MORGAN: And these are existing --

MR. LOFTUS: Existing.

CHAIRPERSON MORGAN: -- as SP contracts?

MR. LOFTUS: UP contracts.

CHAIRPERSON MORGAN: UP? Okay. UP. So if we were not to impose this condition, and their service problems ensued under the contract, would you then go to court to try to correct the problem?

MR. LOFTUS: It's possible, Madam Chairman, to go to court. The history has been that these shippers are very reluctant to take these carriers to court over these issues, and I would imagine that that reluctance would continue for very good reason.

CHAIRPERSON MORGAN: But it does relate to an issue of provisions in the contract that you want to make sure are fulfilled.

MR. LOFTUS: It does, indeed.

VICE CHAIRPERSON SIMMONS: Did the settlement agreements allay any of your fears at all between Utah Railway and the Burlington Northern Santa
MR. LOFTUS: Vice Chairman Simmons, the Utah Railway settlement did not address the concerns we had. The concerns we had with regard to source competition from SP origin coals is very simply that the SP didn’t have other coals to market. And, therefore, in order to grow its volumes it had to be an aggressive pricer to get that product moving. And that made those coals competitive.

The Utah settlement does not affect most of those coal mines that we’re concerned about.

VICE CHAIRPERSON SIMMONS: I see.

MR. LOFTUS: The BN Santa Fe settlement we have major problems with by virtue of the landlord tenant situation that has been described, by reference to the high trackage rights compensation level that’s been described. And if I might, I’d like --

VICE CHAIRPERSON SIMMONS: So you don’t think the Burlington Northern would be a competitor, then, is that what you’re saying? Because of the high price?

MR. LOFTUS: We think that their ability
to compete would be severely constricted.

VICE CHAIRPERSON SIMMONS: Okay.

MR. LOFTUS: I would like to contrast the Powder River Basin where what happened there was you had a new entrant that had a zero market share going in. It put up big dollars to buy in, and then it had to go after market share aggressively to justify that investment that it had made.

VICE CHAIRPERSON SIMMONS: And they did.

MR. LOFTUS: And they did. And they’re up to about 50 percent of the market share now. But our concern from the duopoly perspective is they now have a mature market, and they’re better off just both sitting back and raising rates than going --

VICE CHAIRPERSON SIMMONS: That’s not happening. That’s not happening.

MR. LOFTUS: Well, I’d say that the impacts of the Burlington Northern Santa Fe merger in that regard remain to be seen.

VICE CHAIRPERSON SIMMONS: Well, I mean time, you mean, but I’m talking about what’s happening right now.

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CHAIRPERSON MORGAN: Regarding the Colorado Utah coal, as I understand your concern, it is that the competitiveness of that coal after the merger would not be as strong as it is now. SP serves that coal market, as I understand it.

MR. LOFTUS: They do.

CHAIRPERSON MORGAN: And the loss of a separate SP is of concern to you from a geographic competition perspective.

Now, what I am confused about is that if I'm UP, and I'm acquiring this new market of coal from SP now that I've taken over SP, why would I not pursue markets where Colorado Utah coal would be needed?

MR. LOFTUS: You would. But you would follow the opportunity that yielded you the greatest profits for the available business. There are really two separate concerns with the UP. One is the fact that the -- I'm sorry -- with regard to the SP as a coal originator.

One was that it was more aggressive because it had to be. That's all they had. That's clearly not the case with the UP, nor is it the case...
with the BN. And the second concern is that where the
two coals compete the carrier is in the position to
determine which coal will get the business, and it is
in a position to ensure that it is the coal that
yields it the greatest profit.

CHAIRPERSON MORGAN: But Colorado Utah
coal right now is a viable commodity, right?

MR. LOFTUS: It is a viable commodity.
And what we're talking about is in the areas where
this competition exists, there are certain markets
where the Colorado Utah coal clearly will continue to
do well.

CHAIRPERSON MORGAN: Now, the other thing
that you mentioned in your brief was a discussion of
efficiency gains related to this merger, indicating
that because unit coal trains are efficient enough
there is no additional benefit, as you see it, to the
coal community from this merger in terms of
efficiencies.

Given that this merger will create single-
line service, longer lines to certain markets, so on,
isn't there some benefit to the coal community by

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being connected with a system that goes to new
markets, different distances, different markets? Is
there no efficiency gained from that at all? No
benefit to the coal community with that new network?

MR. LOFTUS: Madam Chairman, the point
with regard to efficiencies is that unit train service
is already very efficiency by the nature of the
operation. And, therefore, the benefits from single-
line service, as opposed to joint line service, are
not as great when you’re talking about unit train coal
service.

We’re not suggesting that there would be
no situations in which coal shippers might not be
advantaged as a result of the merger. We would not
make a categorical statement like that. It would
depend on the individual facts.

CHAIRPERSON MORGAN: Because there may be
new markets perhaps that you would be getting into as
a result of a new network of connected lines.

MR. LOFTUS: That’s possible. But our
point is that the dangers associated with this merger
far outweigh any such benefits.

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COMMISSIONER OWEN: I think the dangers
might be inherent in having a coal mine in an isolated
place like that where it has to be serviced by any
mean of transportation. But I would question if the
transportation industry would price itself out of the
market at the local market, or at the international
market, by moving coal, or grain as we've heard all
day here, that everybody is fearful that prices are
going to go through the ceiling. That could be the
case, but it hasn't happened in years past.

And so I think that as we see that --
also, the competition from the wheeling of electricity
now will be very severe as we get the grid system
going a little bit more so and people are able to buy
cheaper power -- hydropower -- in different parts of
the country. So coal will have another competitor
there.

And so I don't think that someone that has
made a major investment in building a line to the
Powder River Basin, or putting a few hundred million
dollars into Utah, are going to abandon that just
because they want to raise the ton mile another mill.
or another penny. It's not a sound business proposition to me, as I see it, to continue to raise price where you price a product out of the market.

And since history hasn't proven you right in that, nor any of the other people here protesting today, I kind of question -- you know, I know you should have concern, but the concern was there when you built the coal mine as to how you are going to get it to the market, because that was a captive position then.

MR. LOFTUS: Commissioner Owen, I certainly agree that the railroads, I don't think, are bent on pricing the service to the point where they lose the business. I don't suggest that's what is going to occur, but there is a big difference between that and the type of competition that will force the carriers to pass through the benefits of productivity gains, and so on, as they have been doing in the past.

Whether that will continue, whether you will have strong competition, or rather, you will settle back into comfortable duopoly, that is what we're talking about. And we think this merger will
help make the latter the reality.

COMMISSIONER OWEN: I have concerns also, but we haven't seen it yet. Thank you.

CHAIRPERSON MORGAN: Thank you very much.

MR. LOFTUS: Thank you.

CHAIRPERSON MORGAN: Next, we will hear from Christopher Mills, who will be speaking on behalf of Entergy Services, Inc., Arkansas Power & Light Company, Gulf States Utilities Company.

MR. MILLS: Good afternoon. I think that Vice Chairman Simmons will be delighted to hear I'm the first -- or my client is the first opponent of the merger who is not seeking divestiture of any lines.

VICE CHAIRPERSON SIMMONS: Good. None of the rest have told us how to do it. They've all suggested it, though.

MR. MILLS: Entergy operates two large coal fire power plants -- the White Bluff plant in Arkansas and the Nelson plant in Louisiana -- that burn Powder River Basin coal. And what Entergy does want is a trackage rights condition in favor of the BN Santa Fe that will enable it to preserve existing
The two plants have slightly different competitive situations, so I'll talk about them in turn. The first one is the White Bluff plant, which is shown on the schematic to your right, and also in Tab 2 to the books that you have. This plant involves a buildout opportunity of exactly the kind that you said should be preserved in the BN Santa Fe merger case.

The buildout is shown in light blue on the schematic. It's a buildout to the SP at Pine Bluff, Arkansas, which is one of the two to one points covered by the BN Santa Fe settlement agreement with the applicants, and Entergy seeks trackage rights to enable the BN Santa Fe just to get to the buildout point over the Southern Pacific. This buildout ought to be covered as a two to one point under the settlement agreement, but it is not.

And the relief that is sought is identical to the relief that the ICC granted in the BN Santa Fe case.
merger case to preserve buildout options for two shippers -- Oklahoma Gas & Electric and Phillips Petroleum Company. This White Bluff situation fits squarely within the precedents set by the BN Santa Fe case.

Entergy has presented evidence showing that the buildout is a feasible competitive option that it will pursue vigorously when its present contractual commitments to UP expire. And this kind of showing is all that is required to justify imposition of a trackage rights condition to preserve an existing buildout option under the BN Santa Fe decision, which is all that Entergy is asking for here.

This kind of relief is also supported by both the Department of Justice and the Department of Transportation in this case, at least in concept.

The Nelson plant involves a slightly different situation. This plant will lose competitive routing options as a result of the merger, and those options are shown on the second map, which also is in Tab B. The Nelson plant is now served by the Kansas
City Southern, but Entergy is constructing a four-mile line from the plant to the SP at Lake Charles, Louisiana. This buildout will give Entergy four competitive routing options for Nelson coal, as shown on the map. The options involve the UP and the BN Santa Fe as competing origin carriers from the Powder River Basin mines to the gateways of Kansas City and Fort Worth, and SP and KCS as competing destination carriers.

The merger will nullify the competitive balance between these four interline routes, because SP will no longer be a neutral destination carrier. The UP will now have a single line route, and it will participate in all of the other routes except the BN/KCS route via Kansas City.

UP’s control of the other routes will enable it to make sure that the most effective alternative to the single line route it will obtain as a result of the merger, which is the BN/SP route via Fort Worth, is not competitive. The end result, in Entergy’s view, will be higher rates than if SP
remained independent and had four interline routing options available to it.

If the merger is approved, the only way to preserve the kind of competitively balanced routing options that exist today for Nelson coal is to enable BN Santa Fe to use SP’s 60-mile line between Pine Bluff and Beaumont, Texas, where it now has a connection with that line, in order to access the Nelson plant.

This would result in a single line BN Santa Fe route that would counterbalance the single line UP route that will be created by the merger, and thus preserve balance between the competitive options that the Nelson plant now has.

I thank you for your attention, and I’d be happy to answer any questions.

CHAIRPERSON MORGAN: And that BN Santa Fe route would then hook up with --

MR. MILLS: That BN Santa Fe route for Nelson would then be a single line route, because the BN Santa Fe would operate over the SP to get to the connection with this buildout that is now under
construction to get to the Nelson plant. And it would
create a balance between two single line routes,
whereas absent the merger there would be balance
between four interline routes.

VICE CHAIRPERSON SIMMONS: I don’t have
any questions.

CHAIRPERSON MORGAN: Thank you very much.

MR. MILLS: Thank you.

CHAIRPERSON MORGAN: We will next hear
from John Le Seur, who will speak on behalf of the
Texas Utilities Electric Company, and then will speak
on behalf of City Public Service Board of San Antonio.

MR. Le SEUR: Right. It will be
sequential, because they filed separate comments.

CHAIRPERSON MORGAN: Yes.

MR. Le SEUR: May it please the Board, my
name is John Le Seur. My first argument is on behalf
of Texas Utilities Company of Dallas, Texas.

TU Electric opposes the proposed merger of
UP and SP because of the significant anti-competitive
impacts the merger would have on the transportation of
Powder River Basin coals to TU Electric’s Martin Lake

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Electric Generating Station. We've put together a schematic, which is also in our evidence, that illustrates TU Electric's concerns.

The Martin Lake Generating Station is situated in northeastern Texas. Starting in the year 2000, that station will begin to receive approximately five million tons of Powder River Basin coal per year.

TU Electric has identified two efficient routings to transport that coal. The first, which is shown in red, is a UP direct routing of approximately 1,510 miles. The second is a three-carrier routing, originating on the BN, with the KCS and SP as intermediate carriers, and it also ends on the BN.

Before the merger of UP and SP, TU Electric can play off these two competitive routings in order to obtain the lowest available transportation prices. Following the merger, if it goes through as presently conditioned, TU Electric will lose the competition because the little SP piece between Shreveport and Tenaha would be in control of the UP and the SP. The UP and SP will control both of these routings, and, therefore, we will have no competition.
What TU Electric asks if the merger of the
UP and SP is approved are trackage rights in favor of
the BN Santa Fe between Shreveport and Tenaha. If we
have BN Santa in there as opposed to the SP, we again
have competition. The trackage rights are very narrow
in scope. It's only 54 miles.

The Shreveport to Tenaha line is part of
a longer line between Houston and Memphis, and UP/SP
has already accorded overhead trackage rights to BN on
that line. So we're involved in -- we're a short
distance on a line that is already going to be subject
to trackage rights.

The applicants oppose our request,
principally on grounds that, following the merger of
the UP and the SP, TU Electric will have a BN direct
routing. And it is true that we will, but the routing
is extremely circuitous. It's 540 miles longer on a
round trip basis than the three carrier routings.

It's also, as our evidence shows,
substantially more costly to operate over. So the BN
direct routing is not a viable substitute for the
three carrier route.
I can entertain questions at this time, or go on to San Antonio.

CHAIRPERSON MORGAN: Please proceed.

VICE CHAIRPERSON SIMMONS: Better go while you're ahead.

MR. Le SEUR: Good. My second argument this morning -- this afternoon is on behalf of City Public Service Board of San Antonio, Texas. San Antonio opposes the proposed merger of UP and SP unless BN Santa Fe access to San Antonio's Elmendorf, Texas, generating facilities is properly perfected. And we have a schematic up here showing CPSB's historic coal routes to its Elmendorf, Texas, facilities.

As shown in the circle, CPSB is served exclusively by an SP line. However, in 1985, San Antonio acquired trackage rights from the SP, and after that time we've been able to get the UP into Elmendorf over San Antonio's trackage rights. So we're served at destination by the UP and the SP. Obviously, the merger of these two carriers eliminates our destination competition.
Last December we brought this issue to the attention of the UP, and it was only last Friday that they finally got around to amending their settlement agreement to include BNSF service to Elmendorf. However, that service has some significant restrictions that we would like to see lifted.

We'd be happy if the condition was crafted that ordered the applicants to negotiate with them. But if the Board doesn't want to do that, the Board can move forward, and based upon the record that's before it now make the following findings, which would be included in a San Antonio condition.

First, as the applicants have structured their condition, it applies only to coal transportation. If San Antonio wants to move a generator down to Elmendorf, under the arrangements the applicants and BN have put together, we're stuck with the UP. And we would like to, for service of that type, have BN access as well.

Also, the way the deal has been structured we cannot utilize our trackage rights, "our" being San Antonio's trackage rights, to move BNSF trains. The