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price that San Antonio will pay in the near future for those trackage rights is significantly less than what the applicants have agreed with BNSF. And so since San Antonio ultimately will be picking up the chart, we would like to see these arrangements set up so that San Antonio can also use its trackage rights to get in BNSF trains.

Finally, the applicants have taken the position that CPSB is not a two to one shipper. We think, clearly, we are. To the extent that the CMA accords about opening up UP traffic to two to one shippers are fulfilled, we would like to be able to take advantage of that.

And one final point -- CPSB is very concerned about the level of compensation in the trackage rights arrangements between BNSF and UP/SP. San Antonio, in all probability, will have 200 miles where BN trains will have to go over UP track, and five mills. on a revenue basis. That's extremely high.

CHAIRPERSON MORGAN: So it sounds like, then, that you have gotten some of what you are interested in, but not all --

MR. Le SEUR: That's correct. Last Friday was the first formal iteration on fairness to the UP. They said they would do something for us. They simply hadn't done it, and we hadn't seen it.

But it's a little bit different now. As of last Friday, they have codified some BNSF service into Elmendorf for the first time.

CHAIRPERSON MORGAN: And then does the CMA agreement in any way help you?

MR. Le SEUR: If we're -- as I understand it, if CPSB is determined to be a two to one shipper, then with CPSB's concurrence 50 percent of our traffic which is now under contract with the UP would be opened up to BN service.

COMMISSIONER OWEN: The FERC has just recently allowed the electric companies throughout the nation to wheel power and going to grid systems throughout the nation. In some ways, it's a confiscation of property, and in other ways they've set up commissions to establish rates, and so forth. And so this is going to be competitive with movement of coal and power throughout the nation.

Do you believe that similar rail open access -- that is, giving all railroads access to each other's tracks -- could eliminate the need for most economic regulation of railroads?

MR. Le SEUR: Well, I think on here they're representing the city of San Antonio, Texas, and Texas Utilities Electric Company. I think neither company has taken a position on those issues. I'd be happy to give you my personal opinion, but that's not why I'm here today.

COMMISSIONER OWEN: That seems to be what everybody is advocating, that we open up all of the railroads to everybody so everybody can run their train up and down it, whatever. So I was just wondering.

MR. Le SEUR: Well, I think on behalf of the two clients that we're representing today that we've asked for very narrow, tailored relief, simply involving trackage rights. Or in the case of San Antonio, simply tweaking the trackage rights so they meet our concerns.

VICE CHAIRPERSON SIMMONS: Except for the lawyer's fees, San Antonio hasn't been bad over the years.

(Laughter.)

MR. Le SEUR: San Antonio has been the beneficiary of --

CHAIRPERSON MORGAN: Another non-lawyer over here.

(Laughter.)

MR. Le SEUR: -- the decisions of this commission, and we worked very hard in 1985 to perfect --

VICE CHAIRPERSON SIMMONS: I was here.

MR. Le SEUR: -- our trackage rights. And what we're trying to do today is basically preserve what we have.

VICE CHAIRPERSON SIMMONS: Yes, okay.

MR. Le SEUR: Thank you.

CHAIRPERSON MORGAN: Thank you very much.

Next we have James Calderwood, who will speak on behalf of Sierra Pacific Power Company and Idaho Power Company.

MR. CALDERWOOD: Thank you very much. We present a very -- what I believe to be a very unique problem. I'm James Calderwood, representing the Sierra Pacific Power Company and the Idaho Power Company, and jointly they own a coal burning electric power generating facility at Valmy, Nevada.

Since this plant at Valmy first came on line in 1981, they have been served by at least two railroads. They are today served by two railroads -- the Union Pacific and the Southern Pacific. It is undisputed in the record in this case that should this merger be approved that they would then be faced with a monopoly rail situation.

The site at Valmy was originally chosen in 1978 by Sierra Pacific Power in large part because it did have competitive rail service at that geographic location.

Currently, the plant at Valmy obtains its coal, Sierra Pacific obtains the coal for the Valmy plant from two locations -- one in the Uenta Basin in Utah and the other at the Hannah Basin in Wyoming.

The issue, then, is -- the unique issue I think presented here with the Valmy plant is, what does it do if it's faced with the monopoly rail situation?

The applicants have presented two alternatives in answer to that issue. The one -- the first I think is factually simply impossible. They have suggested that they could utilize a loadout at Provo, Utah, where from the Uenta Basin coal could be hauled to Provo and put on a loadout and then utilize the BN.

The problem with that is there is no loadout in Provo, Utah. The feasibility of it is unknown. We know of no plans of anyone to build one there. How much would it cost? Could the land be acquired? What about environmental and other permitting problems? How long would it take to build? None of these have been answered.

More importantly is that the loadout would involve trucking coal over a 7,000-foot mountain range. And I'm sorry the Governor of Utah isn't here right now, because he could probably promote, as the State of Utah does, a scheme in this region. And their reason would be trying to get those trucks fully loaded with coal over a 7,000-foot mountain range in the middle of winter would certainly present some unique obstacles.

VICE CHAIRPERSON SIMMONS: How much coal are you receiving from the two lines, each?

MR. CALDERWOOD: It --

VICE CHAIRPERSON SIMMONS: What is the percentage?

MR. CALDERWOOD: From the --

VICE CHAIRPERSON SIMMONS: The UP and the SP.

MR. CALDERWOOD: It varies between one to two million tons a year.

VICE CHAIRPERSON SIMMONS: How much does the UP get?

MR. CALDERWOOD: Well, the UP gets it all.

VICE CHAIRPERSON SIMMONS: Percentagewise.

MR. CALDERWOOD: 100 percent right now, because they're under a contract. The Southern Pacific has hauled the coal in the past.

VICE CHAIRPERSON SIMMONS: Okay.

MR. CALDERWOOD: But right now they're under contract to UP.

VICE CHAIRPERSON SIMMONS: I see.

MR. CALDERWOOD: The second reason put forth is that the Powder River Basin coal could be utilized. The problem with that for the Valmy plant is that Powder River Basin is a 1,600-mile rail versus a rail now of 500 to 700 miles. In addition, the Powder River Basin coal is not nearly as high in BTU and has a higher sulfur content.

The point there is, as demonstrated in the record by our experts, is it would cost considerably -- they would have to reconstruct the boilers at Valmy at a cost of millions of dollars in order to burn coal from the Powder River. And so for these reasons they are faced with the unique situation at Valmy, going from the two railroads to the one railroad in order to get the -- from the sites, the coal sites.

VICE CHAIRPERSON SIMMONS: Is there that much difference between the sulfur content?

MR. CALDERWOOD: There is considerable difference, Vice Chairman Simmons, and the record shows that. The boiler, specifically in 1981 and then in 1986 when they added a second one at Valmy, specifically it's done in order to burn this low sulfur/high BTU coal. They cannot burn those as a continuing fuel source. They would have to reconstruct those boilers at considerable cost in order to utilize the Powder River coal.

And I think what this presents to the Board is a unique situation that is certainly in the public interest to address what is that particular problem for Sierra Pacific Power Company and Valmy being able to present the kind of relief that we ask, and that is giving the ability of Sierra Pacific to negotiate traffic rights with a second railroad, so that it could continue to receive competitive access.

Thank you very much.

CHAIRPERSON MORGAN: Thank you.

Next we will hear from Tom McFarland, Wisconsin Electric Power Company.

MR. McFARLAND: May it please the Board, good afternoon.

Wisconsin Electric Power Company owns an electric generating station at Oak Creek, Wisconsin, which is about 15 miles south of Milwaukee, at which it receives approximately two million tons of coal per year. Some of that coal has come from SP origins and some from the UP origins.

As Mr. Loftus said a few minutes ago, we're going to lose the benefit of that competition, that origin competition, between SP and UP. And Wisconsin Electric proposes to replace that competition with destination trackage rights for either Wisconsin Central or Soo Line between Chicago or Milwaukee and the Oak Creek power plant.

The specific carriers to provide that trackage rights were very carefully chosen. We intentionally chose carriers that do not serve coal mines, so that we would not better our own position as a result of the condition that we week, nor would we better the position -- or worsen the position of the Union Pacific. So we think we've got a condition that is very carefully tailored to meet the specific circumstances of the case, yet does not -- that does neither penalize the carrier nor better our own position.

We also believe that the condition is a very measured moderate condition, and it's designed to meet the specific loss of competition.

The only thing I would add to what Mr. Loftus said about the fact that the people -- the actual people that use coal are the ones that testify to that competition is that the Southern Pacific itself, in a non-merger context when it was not a self-serving statement, in a 10(k) statement, admitted itself that Southern Pacific coal competes with Union Pacific coal. I don't think there's any doubt about it.

That's all I really have. Thank you.

CHAIRPERSON MORGAN: Now, does your facility benefit, I presume, from Powder River Basin coal and --

MR. McFARLAND: Well, it has. It currently is not an active user of SP origin coal, but it has received the bids on that coal as recently as 1995. So -- and two of those bids were very good bids that went down to the -- our final considerations.

VICE CHAIRPERSON SIMMONS: Can you burn Powder River Basin coal?

MR. McFARLAND: We can, and we are at the moment. Yes, sir.

VICE CHAIRPERSON SIMMONS: Okay.

CHAIRPERSON MORGAN: Thank you.

Now we will turn to the Gulf Coast shippers. We will first hear from Marty Bercovici. Did I get that right?

MR. BERCOVICI: Got that exactly right.

CHAIRPERSON MORGAN: You will speak on behalf of the Society of Plastics, Inc., United (sic) Carbide Corporation, Montell USA, Inc., and The Geon Company.

MR. BERCOVICI: That's correct. Union Carbide Corporation.

CHAIRPERSON MORGAN: And I got all of those pronunciations correct. I don't know -- at this hour --

MR. BERCOVICI: Thank you.

Madam Chair, members of the Board, people laughed 30 years ago when Mr. McGuire offered his one word of advice "plastics" to Dustin Hoffman in the movie The Graduate. They're not laughing any longer. Plastics accounts for more than $300 billion worth of trade and 2.1 million jobs, almost two percent of the U.S. workforce.

The key component of the plastics industry is plastic resin, the pellets from which products and component parts are fabricated. Plastics resins also are a key element to this merger. The heart of the plastics industry is located in Texas and Louisiana.

The two largest resins -- polyethylene and polypropylene -- almost 60 percent of the total plastic resin output, are the two highest volume commodities handled by applicants on the Gulf Coast, and these materials constitute almost 50 percent of the commodities identified by applicants as meeting their screen for commodities subject to potential merger impact.

I am here today to tell you that the plastics industry, represented by SPI, its national trade association, and the industry members -- The Geon Company, Montell USA, and Union Carbide

Corporation -- are greatly concerned about the consequences of the proposed combination of the UP and the SP.

The applicants tell you that this merger will result in more competition for every shipper, every commodity, every location, every corridor, and every other quantifiable factor they can identify.

As Chairman Morgan asked applicant's counsel this morning, if the benefits are so apparent, why have my clients spent hundreds of thousands of dollars for analysis and participation in this proceeding? Because of their fears that have been confirmed upon the analysis that this merger will lead to increased concentration, indeed domination over the plastics resins industry.

This is illustrated by the table that we have just put up. You can see from the table pre-merger, the UP, the number one carrier, Gulf Coast, has access to 75 percent of plant capacity. I believe this chart also should be on the podium for your convenient reference. Post-merger the UP/SP would have access to 91.3 percent of the polyethylene and polypropylene, and these resins -- 93 percent of these resins are produced in the Gulf.

The second carrier currently is the SP. The SP has market reach to about 55 percent of production. With the elimination of the SP, and the BN getting access at the two to one points, second carrier access goes down to less than 46 percent. This change in the relationship, as shown in the bar graphs, is from a number 2 carrier which has about 75 percent of the market reach of the first carrier to a second carrier that has 50 percent of the market reach of the first carrier.

Furthermore, third carrier competition for 15.6 percent, traffic coming off the PTRA, would be eliminated. This has particular impact on commodity traffic such as plastics, where contract duration is generally short -- typically, two to three years -- and destinations during that contract time vary in terms of both quantities delivered and even customers served.

Pre-merger we also see that the UP has single carrier access at closed points at 32 percent of the industry's production. The SP has about 10 percent. If you combine those two and post-merger, the UP/SP would control 42 percent of the industry's capacity. This single carrier control of almost 43 percent of industry capacity would increase the controlling carrier's ability to leverage closed point traffic in order to deny BNSF traffic at competitive points.

Bottom line -- these changes in market relationship between carriers and the elimination of the SP as an independent force in the Gulf Coast would eliminate, virtually eliminate, source competition and would create a UP/SP domination over the plastics industry.

CHAIRPERSON MORGAN: Let me just stop you there for a minute. I believe in one of your submissions you listed perhaps 40 plants that are located in this Gulf Coast area. Is that correct?

MR. BERCOVICI: That's right.

CHAIRPERSON MORGAN: And where are most of them located? They are aggregated, I presume, in certain pieces -- near Houston or --

MR. BERCOVICI: They're mostly --

CHAIRPERSON MORGAN: -- New Orleans or --

MR. BERCOVICI: They're mostly located in the Houston corridor. There are some over in the Louisiana sector, starting at the west Lake Charles area, Lake Charles area, and going on to the western side of New Orleans. But most of the production comes out of Texas.

CHAIRPERSON MORGAN: And some of these plants that you're obviously accounting for in the statistics that you've just walked through, pre-merger and post-merger, those plants are each served right now by one railroad. It's just some of them are served by UP, and some of them are served by SP.

MR. BERCOVICI: I've aggregated that in this table.

CHAIRPERSON MORGAN: Right.

MR. BERCOVICI: To show you the percentage of production capacity, yes. They are served by either the UP or the SP. There are several plants that are in very small -- it's about seven percent of the capacity -- that are served by the IC or the KCS.

But 93 percent of the -- or 91 percent I guess it is of the capacity is served by the UP or the SP.

VICE CHAIRPERSON SIMMONS: What evidence do you have that the Burlington Northern Santa Fe will not be an aggressive competitor?

MR. BERCOVICI: Commissioner Simmons, we have seen -- we've got several elements. Can I get to that in a minute? I have another table I'd like to share with you, and then I'll get to that.

VICE CHAIRPERSON SIMMONS: I hope I don't forget it.

MR. BERCOVICI: I won't forget it.

COMMISSIONER OWEN: Could I ask you a question about -- oh, you're going to show the --

MR. BERCOVICI: Yes.

COMMISSIONER OWEN: Okay. I'll wait on that.

MR. BERCOVICI: Yes. We also can see the change in market power through our chart showing how the traffic actually flows today. And today the UP has, in fact, about 40 percent market share, the SP about 31.9 percent, and the BN less than 15 percent.

Post-merger, attributing some of the two to one traffic to the BN, according to witness Peterson's theory, that we would end up with the UP/SP controlling almost 63 percent of the plastics traffic, and BN hauling about 24 percent. So today the number two carrier hauls about 80 percent of the number one carrier's market share. Post-merger, the number two carrier would haul less than 40 percent of the number one carrier's market share.

COMMISSIONER OWEN: If we could go back to the bar chart, and you don't need to move that one over there. Just briefly, you show Burlington Northern here with 45.7 percent, and they have -- on your pie shape you have 24 percent of the market there. Then you have also that you have 13.3 percent other.

And so if you add the 45.7 and 13.3, then you -- I think you're looking at about 49 percent of the market share there, and maybe even more if you add in a couple of other things. So Burlington Northern being an aggressive competitor and just getting into this marketplace down there I guess, or being competing against some of the SP's marketplace there, or competing for it, it seems like they will pick up a little bit more of that 24 percent there and UP/SP might slide a little bit.

MR. BERCOVICI: Well, Commissioner Owen, this is the formula that was -- that the applicant's witness Pearson had a formula that he used, which was that at the two to one points, that the BN would pick up 50 percent of the traffic going to open points, such as the gateways, and 90 percent of the traffic going to closed BNSF points. And that's the formula that was applied here to get this BN picking up the market share.

But even in the application, the applicants project that they are going to pick up traffic from the BN. They had in the application that they would pick up a sizeable amount of traffic because of their new market power from the BN. That was one of their charts in the application that showed where their improved efficiencies and their improved market power would put them. So this increase in the BNSF share is a theoretical increase that has been, in fact, disclaimed in the applicant's own analysis of how they will do post-merger.

This gets us to Commissioner Simmons' question, and I'm sure you weren't going to forget it.

CHAIRPERSON MORGAN: You did not forget it.

MR. BERCOVICI: And I would not forget it -- about the BN and whether or not they're going to be an aggressive competitor. We've detailed in our comments multiple concerns about the BN and their competitive posture, and I don't have time to get into all of them. But I do want to talk about two of them, and one of them is a point that is raised this morning with regard to storage and transit capability.

Mr. Grenstein has acknowledged the BN is weak in the Gulf, and one of the areas that -- one of the consequences of that weakness is that they're weak in terms of storage and transit for the plastics industry. Their storage and transit share, their share of the storage and transit capacity, is about the size of their current market share -- 14.8 percent. They don't have a lot of margin to handle plastics customers that need storage and transit capability.

The CMA agreement speaks in terms of access to SP's Dayton yard, which is one of 10 yards used by the UP and SP for plastics storage, and those are identified in our comments. But this provision is so vague that when we asked the UP representatives, and when the -- and we asked the BN representatives on cross examination at their hearings about this, they couldn't define what that means and what that access provided for.

Yet BN, with this vague provision, they didn't know if that meant that they could build out more storage at Dayton or if they got access to Dayton. Nobody knew. And UP couldn't even tell us whether or not there were contracts, SP shipper contracts, that committed Dayton storage to particular shippers.

But BN, notwithstanding, is content to rely upon that provision as saying they don't need anything more. They are not going to put in any more capacity. When we asked them what their plans were in terms of serving the plastics industry, they had no plans. They sat on their hands for five months. But in discovery, when we asked them about it, they lied to us and told us that there were plans in progress.

When I asked Mr. Owen -- Mr. Ice, I'm sorry -- their vice president was a mentor of the implementation process, Mr. Ice said that there was nothing in progress. How can we rely upon them when --

VICE CHAIRPERSON SIMMONS: So you really did try to resolve the differences with the Burlington Northern Santa Fe?

MR. BERCOVICI: We've addressed it with them.

VICE CHAIRPERSON SIMMONS: And they didn't respond?

MR. BERCOVICI: They've been absolutely unresponsive during this whole period of time, and they've shrugged it off and they've said, "Trust me." How can we trust them, and how can you trust them, when they've sat on their hands and then they lied to us about the implementation plans.

VICE CHAIRPERSON SIMMONS: I'm sure --

CHAIRPERSON MORGAN: Well, let me take that one step further. Obviously, the storage and transit facilities are important to your industry.

MR. BERCOVICI: They are critical to our industry.

CHAIRPERSON MORGAN: I've asked the question about this --

MR. BERCOVICI: Yes.

CHAIRPERSON MORGAN: -- to several other speakers today.

MR. BERCOVICI: And everyone acknowledges that. That's not an issue of contention.

CHAIRPERSON MORGAN: Now, putting aside your position for a moment on the merger, and divestiture, and so on, looking at the CMA agreement and the provisions associated with storage and transit, how could you improve that provision in such a way that you would get the kind of access that you needed? Because, clearly, SP is the one that has the storage and transit facilities down there now. Am I right about that? They have --

MR. BERCOVICI: SP --

CHAIRPERSON MORGAN: How many do they have in that area?

MR. BERCOVICI: I forget what the number is, but they -- UP have -- I think they -- I forget what the number is, but there are 10 of them I counted between the two of them. But the SP has storage and transit yards, and the UP has storage and transit yards, and BN has a couple that are out of route on the route generally going up towards Fort Worth.

CHAIRPERSON MORGAN: But your key is that you would like BN Santa Fe to have access to those storage and transit facilities.

MR. BERCOVICI: If --

CHAIRPERSON MORGAN: In a more competitive way than --

MR. BERCOVICI: If they are going to be able to serve our industry, they need to have adequate storage and transit facilities. Whether that's building their own, which they have no plans to do, or whether that's getting access -- and certainly, if there were divestiture, the storage and transit yards would be part of the facilities that would be transferred in the divestiture.

COMMISSIONER OWEN: If the CMA agreement were extended to cover all of the shippers at the Gulf Coast points there, would that resolve your problems with reference to the merger?

MR. BERCOVICI: I'm not sure that the CMA agreement does cover all of the points in the Gulf Coast. As Chairman Morgan said this morning, it nibbles around the edges. It doesn't get to the problem of the concentration, and it doesn't get to the problem, frankly, of the BNSF's lackadaisical attitude in this whole merger proceeding, and whether or not, you know, they are going to be an aggressive competitor, which they've shown us that they haven't.

One of our members, Phillips Petroleum, asked them for rate quotes. They're no stranger. They've got 15 percent access to the industry and about 15 percent of the traffic, which you've seen up here. They're no stranger to our industry. I mean, you know, they are -- have a presence. They gave them a rate quote that was so far off the page that

Phillips was motivated to write you a letter themselves and say on their own initiative that if they -- you know, if that's the future, they are very concerned. They are scared what that future brings.

CHAIRPERSON MORGAN: And let me just correct the record, if I might, on the CMA agreement. I haven't concluded myself about the CMA agreement. I was characterizing what I understood the NIT League presenter to be saying. So --

MR. BERCOVICI: Well, that's --

CHAIRPERSON MORGAN: -- I've made no decisions --

MR. BERCOVICI: I understand.

CHAIRPERSON MORGAN: -- today about anything.

MR. BERCOVICI: I understand.

CHAIRPERSON MORGAN: That's why I'm here to listen.

MR. BERCOVICI: I understand, but we concur with that assessment.

Could you indulge me for another minute or two? I do have two other clients that I'm here speaking for. One is Montell and one is Union Carbide, and I haven't had a chance to talk about their particular plant situations.

Montell, west Lake Charles, is a two to one point. Currently, it has competitive service via SP direct to the various gateways, and also it's served by the KCS with a UP friendly connection, which gets it to equivalent and comparable service. After ignoring -- of course, with the merger, that friendly connection with the KCS is going to go away.

They ignored us for six months, and on brief they indicated that they would amend the CMA agreement, which we received on Friday, to provide for BNSF access to west Lake Charles, but that's only to get them to New Orleans and the Mexican gateways. They then say that this moots our problem.

This is absolute nonsense. This provision does absolutely nothing for Montell. This affects only about five percent of Montell's traffic. Moreover, rather than allowing BN to substitute for the UP as the KCS interchange, it allows the BN direct access but only upon payment to the UP of an additional fee over and above the trackage rights fee of a phantom haulage fee that will make the BNSF non-competitive from the start.

Most importantly, if the BN can only serve traffic going to New Orleans and going to the Mexican gateways, Montell cannot have a relationship with the carrier, with the alternate carriers, because they can't enter into one because the traffic generally goes -- the product goes into storage. It's only after it's sat in storage for days or weeks or maybe months that they identify where the cars are going.

What Montell needs, if the merger is to be approved without divestiture, is they need to -- you must order that the BN be allowed to interchange with KCS at Shreveport and at Lake Charles, to replace the current KCS/UP friendly connection.

We also have a situation with regard to Union Carbide at Sea Drift. This, too, is a two to one point. In this we see applicant's real perspective on competition. After five months, they proclaim themselves generous by conceding access to Carbide at Sea Drift via buildin.

But they continue in doing so to argue that it doesn't qualify for buildin protection, notwithstanding that both the UP and the SP documentation clearly evidence that they recognize that both the UP, as the serving carrier, and SP, as the would-be carrier, both recognize that there is a viable buildin to the Sea Drift situation.

Putting back on my SPI hat for a minute, we were talking about the CMA settlement. When they sit there and argue, when their own documents acknowledge the feasibility of the buildin and the competitive threat, and they sit there and argue in this proceeding, after acknowledging that, yes, the buildin has influenced rates, yes, they can do it, yes, it's only 10 miles, yes, the land options are in place, yes, there are no engineering, but you don't qualify, what kind of treatment are shippers under that arbitration clause going to enjoy if they have to go to that arbitration proceeding. We think that that arbitration clause is another problem that simply doesn't give anyone any meaningful relief, but is simply grounds for a new argument.

CHAIRPERSON MORGAN: What would you replace? Would you just take that out altogether?

MR. BERCOVICI: Direct buildin. Anybody that's got a -- anybody -- there is no limitation on buildin. I mean, if there is going to be the -- if you're going to approve without divestiture, BN would have the right to build in at any point, any time, with no time limits and no conditions. They can build in -- if it's economically feasible and physically feasible, that's all that it takes and they can build in.

But our point with regard to Sea Drift is that there is no justification for distinguishing access to Sea Drift between that given by applicants to the Eldon and Mount Bellevue facilities. That is, direct access. The only distinctions of the Eldon and Mount Bellevue were SP customers being wooed by the SP, who of course is the dominant party -- being wooed by the UP, I'm sorry, who of course is the dominant party in this proceeding, whereas Sea Drift is the sole served point, which is being wooed by the SP.

Moreover, the shippers at Eldon and Mount

Bellevue did grant the applicants support statements for the merger. We don't believe that this purchase of support should be allowed to serve as a distinguishing factor in the manner in which remedies are provided for loss of buildin to similarly situated and even competing shipper facilities.

In conclusion, on behalf of SPI, Union Carbide, Geon, and Montell, we ask that you preserve competition in the Texas and Louisiana transportation markets.

I'd be happy to answer any other questions you may have about our position.

CHAIRPERSON MORGAN: Dow has a request in for a buildout condition. To what extent does that address any needs associated with some of your membership in that area?

MR. BERCOVICI: Well, Dow, of course, is our member, and their counsel is going to be speaking in a few minutes.

CHAIRPERSON MORGAN: Right. But I was just -- because, obviously, that buildout would have some effect on Dow, but it could have an effect on that whole area there.

MR. BERCOVICI: Well, if there were buildin to the Dow facility at Freeport, there would be benefits along the way because that buildout would go right through Chocolate Bayou, and there are several facilities at Chocolate Bayou that would benefit from having that service, and that would probably all be packaged in one deal.

In fact, that's one of the things I would think, and I don't want to speak for Dow -- my good colleague, Mr. Di Michael, will speak for Dow -- but I think that's -- from my understanding, that's one of the things that would make that buildout feasible is the ability to get access to the three or four or five plants in that general area.

COMMISSIONER OWEN: What percentage of the delivered cost of your client's products is rail transportation, roughly?

MR. BERCOVICI: I'm glad you asked that question, Commissioner Owen. Twenty percent.

COMMISSIONER OWEN: Twenty percent?

MR. BERCOVICI: Twenty percent is

transportation cost.

COMMISSIONER OWEN: And what other economic regulations do you have within your industry there that would impact in such a fashion also?

MR. BERCOVICI: We have no other economic impact, or economic regulation I should say. But we use derivatives of the petrochemical refining process, but that is not a regulated process. The only thing that affects us is our marketplace and what the marketplace will stand in terms of cost. And the power of buyers, such as the Wal-Marts, and so forth, are very, very sensitive in terms of the costs of the products that come through their doors that they have to sell to the American public.

COMMISSIONER OWEN: Thank you.

CHAIRPERSON MORGAN: Anything else?

COMMISSIONER OWEN: No.

CHAIRPERSON MORGAN: Thank you very much.

MR. BERCOVICI: Thank you.

CHAIRPERSON MORGAN: Next we will hear from Nicolas Di Michael again. You will be speaking on behalf of Dow Chemical, and I didn't mean to preempt your presentation. But it seemed like the right thing to ask at the time.

MR. Di MICHAEL: That's quite all right.

I am speaking on behalf of the Dow Chemical Company, and you will see I have distributed to you a very thin book of oral argument exhibits that has three documents in it that I think would be useful here.

This matter concerns Dow's plant at Freeport, Texas, and the issue is that the proposed -- it is -- that plant right now is solely served by the UP. The issue here is that the proposed transaction, the merger, will eliminate potential competition represented by a buildin from the lines of the SP to the Dow plant.

Dow seeks trackage rights to preserve the buildin option, and this is very similar, then, to both the problem and the solution that the agency dealt with last year in the Burlington Northern Santa Fe merger concerning OG&E and Phillips, which was similarly losing a buildin option there.

Now, the applicants have said that there are two reasons why no trackage rights should be given to preserve this buildin option. First, they say the buildin is not a feasible one. Well, this really gets to the three documents that I have given you here.

The SP did a study of this buildin, and, in fact, their own engineers, as you'll see from Tab B there, concluded that the buildin appears to be a viable project, so that, first of all, SP's own engineering people concluded that.

Secondly, three or four months later after the study was given to Dow with that conclusion there, a letter came from the SP, from the very highest management level of the SP, to Dow which said that SP is interested in working with Dow and that it is prepared to move forward with the project immediately. That's in Tab A of the documents you see there. That doesn't sound like anything is infeasible.

In fact, it sounds exactly the opposite. The buildin by the engineers, they say, is feasible. And the highest levels of management, including the president of the company, who was copied on the letter, the letter comes and says that SP is prepared to move forward immediately.

The third thing is even after the merger was announced and the inevitable letter comes saying, "Well, we're not going to do this now," even that letter doesn't say that the project is infeasible. It just simply says we are going to stop studying this for the present. Obviously, the implication is even if the merger somehow falls part, SP would move right along again.

Nothing in the record shows that this buildout is infeasible. In fact, everything shows precisely the opposite.

The second thing that the applicants have said here why you should not preserve a buildin option here is that they say, well, the BNSF is also in the area. And that's true; it is also in the area. The problem is the BNSF is not the equal of the SP here, because just in terms of the facts the BN was always sort of a reluctant bribe. And when the SP and the UP announced the merger, the BNSF was never heard from again, but there are some reasons for that.

The reasons are SP had and has more to

gain from a buildin than the BNSF does. It has more to gain in two ways. First of all, its net gain in carloads is more. Because of the track and the routings that the SP has, if it would buildin, it had X number of carloads before and it will have Y number of carloads after. That difference is more for the SP than it is for the BNSF. So, first of all, the SP had more to gain in terms of the number of carloads.

The other thing is that SP had more to gain in terms of the length of carloads. The SP, before the buildin, would carry traffic just that far, and after the buildin would carry traffic that far. The BNSF was carrying traffic before the buildin a long way, and after the buildin would carry it just a little bit more.

So, in this case, although the BNSF is sort of in the area, it is not the equal. It's not the equal, and, therefore, we need to replace the buildin as best we can.

And that comes to the issue of relief here. We are asking the Board to approve trackage rights, as stated in our March 29th comments, that would provide trackage rights to a third carrier, to a buildin point, slightly closer than the buildin point that they presently have, because right now there is no carrier at all that can really replace the SP and we've got to make the buildin cost a little bit less to make the thing all even out.

So what we're asking for is we're asking for trackage rights to a buildin point that will replace the lost buildin point from the merger.

Thank you.

VICE CHAIRPERSON SIMMONS: You think that will lower the rate?

MR. Di MICHAEL: Excuse me?

VICE CHAIRPERSON SIMMONS: That will lower the rate?

MR. Di MICHAEL: We definitely believe -- in fact, there is evidence in the record that if we can get two carrier competition in there it will lower the rates.

CHAIRPERSON MORGAN: And, presumably, the CMA agreement extended would not help.

MR. Di MICHAEL: It just simply doesn't

help. We need an action from this Board.

Thank you.

CHAIRPERSON MORGAN: Thank you.

Next we will hear from Edward Greenberg, representing International Paper Company.

MR. GREENBERG: Madam Chairman, Vice Chairman Simmons, Commissioner Owen, I wonder if you might indulge me for a moment. There is one issue that came up, and I was hoping that perhaps given the short amount of time I have, if I could just mention one point, we'd like to have it clarified.

We received on Friday a submission from the applicants of their final settlement agreement and implemented agreements with BN Santa Fe. And there was one point to which International Paper ships a great deal of freight, and that is to Turlock, California. Turlock, California is a two to one point, and it was so identified in the original settlement agreement with BN Santa Fe.

We do not see this point covered in terms of the implementing agreements. We don't know how it's going to be served. We've asked this question repeatedly and have received no answer. We're concerned that we don't see anything in terms of trackage rights or haulage or anything for it, and wondered when my friend from the applicants gets up perhaps you might ask the clarifying question, whether or not it will, in fact, be covered. And I would appreciate that. We'd like to have it on the record.

CHAIRPERSON MORGAN: Mr. Roach is taking notes, I'm sure.

MR. GREENBERG: As we only have four minutes, I will attempt to highlight at least one of the issues -- only one -- that I think we'll have time for that -- we've covered many more things in our detailed presentation.

The major point that I want to talk about is that International Paper essentially is the poster child of the -- at the two to one points in the Houston-Memphis corridor. I believe you should have on your table a copy of that Figure 2 that appeared in our brief. Mr. Roach alluded to that this morning and wishes -- and he sought to explain that we had no problem. We were silly to think that we had to go all the way around the horn for traffic moving between Pine Bluff and Memphis. Mr. Roach misconceives our concern.

Rail carrier service, unlike price, is very difficult to quantify or measure. It is, nonetheless, vitally important to paper companies who have to be assured of a vital supply, a reliable supply of clean and serviceable cars, reliable switching service, reliable on-time pick up and delivery of cargo, and reliable and consistent transit times.

For that reason, International Paper gives the issue of service two-thirds of the weight in evaluating the bids it receives from the railroads that are serving its facility. It is a very important issue. Of course, price is a much easier concept to get a handle on. If a carrier is truly competitive, its rate quote will be in a market range. If it's not competitive, its pricing will tell you that rather clearly.

With these considerations in mind, IP met repeatedly with officials from all three railroads during the past 10 months to see whether BNSF could effectively compete for and handle this business. It is now evident that the answer is no.

We have submitted an abundant quantity of evidence demonstrating that the BNSF could not efficiently or effectively serve this corridor via trackage rights. And the most recent evidence of this was received last Friday, again with the implementing agreements.

This document constitutes the applicant's eleventh hour concession that BNSF will not provide competitive service in the Gulf -- excuse me, in the Gulf Coast at Pine Bluff and Camden, because they are going to do -- whatever service they are going to provide they're going to provide by haulage.

Now, haulage necessarily means several things. The first is it means that service is going to be cut in half. BNSF will not be providing cars, origin services, or at least the initial leg of the through movement. Indeed, under the terms of the agreement, the services that are provided at Pine Bluff and Camden will be at the whim of the Union

Pacific. This means that service improvements over which -- for which IP has worked over the past several years are going to disappear.

Now, what is particularly interesting to note is that the haulage agreements are kind of odd, and that is that they're going to provide haulage for traffic that originates at Camden, and the haulage would run between Camden and Pine Bluff, and then there's a separate agreement that provides for bridge traffic to move, again by haulage, from Pine Bluff to North Little Rock. And it is that that the applicants would tell you that International Paper's traffic is going to move northbound to ConRail or through St. Louis.

Now, that might work -- that might work for Camden. But the haulage agreements very specifically provide that they only have bridge rights between Pine Bluff and North Little Rock. That means that the Pine Bluff traffic can't move to North Little Rock. Instead, it will go around the horn. If it's going to go north, it's either going to fight its way upstream against the flow somehow, up to Memphis, or it's going to go all the way around the horn.

Now, we have very grave concerns about the whole issue of service. We don't think that it can work. We've had lots of submissions in the brief about why we think there isn't available traffic, but I want to get off that.

I want to talk about price, and there is extensive comments in our brief about the pricing proposals of the BNSF. Someone before me mentioned that the BNSF appears to be the reluctant bride. Very definitely. She doesn't want to come to the altar.

You've seen the degree of the price increases. They're confidential. We're not going to talk about that on the record, but you've seen them. They are unrebutted. The BNSF is just not serious about serving International Paper. If they're not going to serve International Paper, I submit they're not going to serve a lot of shippers in this corridor.

Thank you. If you have any questions, I'd be pleased to answer.

CHAIRPERSON MORGAN: It's pretty clear. Thank you. Thank you very much.

Next we will hear from Michael McBride, representing Farmland Industries, Inc., Mountain-Plains Communities & Shippers Coalition, and Colorado Wheat Administrative Committee.

MR. McBRIDE: Thank you, Madam Chairman, members of the Board. I am the only spokesman for farmers here today. The Department of Agriculture, of course, was here, but I brought with me a real shipper. This is Mr. Frederick Shrote, the Vice President, Transportation, of Farmland Industries, Inc., and I also speak, as you say, for a large number of other shippers.

Mr. Shrote alone -- his company is owned by 1,400 farm cooperatives from Ohio on the east to Idaho on the west to Texas on the south, concentrated in the midwest, Kansas, and Nebraska. And over 500,000 farmers are represented by the gentleman to my left.

There are well over 10C additional parties in the Mountain-Plains communities and Shippers Coalition, and about the same number in the Colorado Wheat Administrative Committee. Most of the farm community -- and this is true, Commissioner Owen, so far as I know. I haven't seen the letters that you referred to. They haven't been served on the parties. Most of the farm community opposes this merger unless you cure the competitive problems with it.

I have in my hands a letter that was sent to the Congress opposing this merger by the American Farm Bureau Federation, American Corn Growers Association, Agricultural Retailers Association, Interstate Agricultural Grain Marketing Commission, National Association of Wheat Growers, National Farmers Union, National Grain, National Cotton Council of America, and USA Rice Federation.

Now --

VICE CHAIRPERSON SIMMONS: So they've been assured that they won't get service. Is that what you're saying?

MR. McBRIDE: That's part of the problem. And Mr. Shrote swore to it. It's in the record. It's with the Western Shippers Coalition filing. It's Exhibit 4.

Mr. Shrote explained that just since the

UP/CNW merger was consummated on October 1, his members have lost $100 million in damages.

VICE CHAIRPERSON SIMMONS: Because of the lack of service?

MR. McBRIDE: Because of the lack of service by the Union Pacific Railroad.

Now, also I will tell you that there may be some shippers whose rates are going down, although costs have been going down in many cases even faster. Mr. Shrote will tell you that his rates are going up, they're not going down. Since the time of his statement, his rail freight bill is now $170 million a year instead of 145.

So, you know, all of these mergers haven't been of any value to many people in the farm community. I'm not going to say the whole country. I'm not trying to overgeneralize here. But in Kansas and Colorado -- and this is on the map that we've provided to you and the applicants, and it was part of our joint shippers statement filing at the end of March -- we are concerned about two corridors, particularly in Kansas and Colorado and going south from Kansas.

We are concerned about the wheat growers, particularly in Colorado and Kansas, because the Union Pacific Railroad proposes to buy the Southern Pacific central corridor and sever it in four places. It is a main line. We're not talking about branch lines here. East and west of Pueblo, the Tennessee Pass Line you see on there, they ask you to abandon that. They ask you to abandon from east of Pueblo to the Kansas border, thereby severing that line, making it flow only east, and they don't care to serve the grain shippers as it is.

They took that line in the NP transaction in '82, and the evidence of the Mountain-Plains Communities & Shippers Coalition and the Colorado Wheat Administrative Committee has been that ever since Union Pacific has been indifferent to them. Even though the tracks are in good shape, they can't get service. It's even more basic than competition.

That's why the joint shippers stated, that's why the farm community supports Montana Rail Link in the central corridor. Why? Because they came forward with over $600 million. They put their application on the table.

Ms. Jones told you this morning that there aren't any competing applications here. She is wrong. Montana Rail Link filed one. They want to run the central corridor. They want to serve the shippers, and we'd like to be served.

We'd like divestiture, even if you don't grant that application. Throw it open to all of the carriers -- Wisconsin Central, Illinois Central, Kansas City Southern.

Now, on the southern corridor, running out of the central corridor to the south, to the Texas Gulf Coast where Mr. Shrote exports his grain, we need the competition we have today. As a result of the BNSF merger, we got the SP in there. Now we're going to lose it.

Mr. Roach told you at page 35 of his brief that wheat is of trivial importance to this case. How wrong he is. That's why all of the people I speak for are here today -- they need that service. They need that competition you guaranteed them in that transaction and now they're going to lose it.

We've tried to approach the Union Pacific and the Southern Pacific Railroad about this. We haven't gotten to first base. They won't deal with us. They don't think the problems of the grain farmers are their problem. That's why they want to abandon it.

VICE CHAIRPERSON SIMMONS: So they won't talk to you, is that what you're saying?

MR. McBRIDE: They won't talk to us. They don't care.

CHAIRPERSON MORGAN: And you're trying to talk to them about service in general?

MR. McBRIDE: Sure. If I may, if I could ask my good friend, the Secretary, to hand you some additional copies of Mr. Shrote's four-page verified statement -- four pages -- if you could read that before Wednesday morning, you'll find out that since October 1 he can't get service, by and large, on the Union Pacific Railroad.

Oh, it's gotten a little better in recent months, with all of the squawking. But they promise all of these efficiencies, and then what it turns out to be is a disaster.

Now, let me tell you about DOT's comments in the central corridor, and we appreciate DOT's concerns here, because note that on page 41 of DOT's brief they say that if you can't fix the competitive problems in the central corridor you ought to divest. That's DOT's position.

But DOT is confused, if I may say so, on the trackage rights. They say Montana Rail Link -- and Mr. Brodsky over there can't bring the business together to make a go of it on the central corridor. Well, I don't know too many people who are willing to put more than $600 million on the table without concluding they can make a go of it.

But in any event, let's assume that their criticism of MRL is right for the moment, when MRL would get access to all of the shippers. And he has the lowest operating ratio of any railroad in the room -- 60, I think it is. He can sure compete with that.

But let's say they're right for a moment, even though they're not. Then how in the world is

Burlington Northern Santa Fe ever going to make a go of it with access to only a few shippers? You keep the corridor intact from -- and, Commissioner Simmons, I'm going to tell you exactly where it is. We show you in red on the map -- Kansas City to Pueblo and Denver, to Ogden and Salt Lake City, and west to Stockton, California. That's what we want.

Now, a couple of pages of history. Oliver Wendell Holmes once said, "A page of history is worth a volume of logic." You've got a lot of volumes of logic over here, a couple of pages of history.

First, the west was built up around the railroads. Two of you gentlemen are from Oklahoma. I think you know that. There is testimony in this record -- the town of Tribune, Colorado, was moved to the NP line. A lot of those other communities have put in sworn testimony that they have not rebutted that if you sever that main line and let them do that, those communities are going to blow away. Those grain elevators aren't going to have any business. We need service.

Second page of history -- when SP acquired control of CP in 1923, your predecessor, and again in 1982 in the UP/NPW merger, and again in 1986 in the FS/SP merger, and again in 1986 when it refused to lift the condition, and again in 1988 in the Rio Grande/SP control proceeding, said, "The central corridor of the Rio Grande, and now the SP, is special. It's got a problem." You heard it today from the Governor of Utah. It can't compete against these long haul carriers. That's why you gave them trackage rights from Pueblo to Kansas City.

But now, with a carrier that is interested in service, and you said we're entitled to service -- that's why you gave us trackage rights. The Union Pacific Railroad doesn't want to serve us. All we want is to take one of those two central corridors and have you give them to a carrier who is willing to serve us.

Question?

VICE CHAIRPERSON SIMMONS: Is your name Mr. Groten (phonetic)?

MR. SHROTE: I'm Shrote.

VICE CHAIRPERSON SIMMONS: Shrote.

MR. SHROTE: Shrote.

VICE CHAIRPERSON SIMMONS: Do you belong to the National Grain Car Council?

MR. SHROTE: No, we do not.

VICE CHAIRPERSON SIMMONS: Farmland Industries does not belong?

MR. SHROTE: Not to the NIT League.

VICE CHAIRPERSON SIMMONS: Okay.

MR. McBRIDE: Mr. Anshutz testified in deposition that you have one essential function -- that's to protect the shippers. Mr. Anshutz testified to that.

Mr. Shrote, by the way, is in NIT League. He voted for the position of NIT League, as did that overwhelming number of people who you heard from Mr. di Michael on today.

May the farmers have another minute or two, Madam Chairman?

CHAIRPERSON MORGAN: That's fine.

MR. McBRIDE: Thank you.

Now, I want to tell you that Kansas and Colorado produce more wheat than anywhere else in the world, so we're focused on a very specific competitive problem. We're not trying to turn down this whole transaction. It can go through, if you solve those two competitive problems we're talking about.

Now, finally, let me tick off the problems with the BNSF agreement. Here's why BNSF won't be there, even putting aside my argument earlier. They don't have enough access to shippers. They can't get to a single coal mine in Utah or Colorado. Mr. Knock admitted it in his deposition.

The fee is too high. There is no penalty if they don't serve. They have no investment in the lines. They have no relationships with customers in the central corridors. They have no facilities, equipment, or crews, among other reasons. And you heard the Governor tell you today when he said, "Why won't you be there? I've been waiting for you for months," they said, "Oh, we've got $2 billion to invest, but we want to invest it somewhere else." They don't want to serve.

CHAIRPERSON MORGAN: Now, let me just stop you there. Listening to your position, are you not in favor of trackage rights as a general matter, or you're not in favor of it in this particular circumstance? You would -- you feel you would get better service from another carrier?

MR. McBRIDE: I'm going to give it to you straight up. We want competition. If trackage rights worked, it would be fine. But they don't work. They don't work under this agreement for the several reasons that I just gave you. They don't work over the long haul when you're talking about local trackage rights.

And here is why they won't work for that business from the west coast. The theory is that BN is going to get all of this business on the California and Oregon coast, and they're going to send it across the central corridor. It's crazy. You don't run a railroad that way. They have their own two transcontinental corridors -- south and north. They'll run their business over their own line, instead of paying Union Pacific an exorbitant fee to run it 2,000 miles over Union Pacific's line.

COMMISSIONER OWEN: If we could kind of

make it short and just go to the point.

MR. McBRIDE: Sure.

COMMISSIONER OWEN: Are you looking for the divestiture in it --

MR. McBRIDE: Yes.

VICE CHAIRPERSON SIMMONS: -- Mr. McBride?

MR. McBRIDE: Yes, because there are parallel lines in each of the two corridors I'm talking about, and we've identified for you a railroad with an application on the table who wants to serve us. If you don't want to grant that, I've got three others in line who I know will compete for it. It's a market-based solution.

Now, let me talk about oversight. I think I've got 126 --

CHAIRPERSON MORGAN: Your minute or two is getting about up.

MR. McBRIDE: I'm sorry.

CHAIRPERSON MORGAN: Your minute or two is getting --

MR. McBRIDE: May I just comment on oversight? Thanks.

I've got a lot of friends here, but they are only 126 of them in addition to the three of you. And if you're going to have us come in here every year on oversight, this proceeding has been a wrecking ball for business relationships, for people, for cost. Shippers do not believe that most of their problems can be solved in Washington, and I say that with all due respect.

We can't keep filing complaints and motions and everything else, and get heard, and have our rates decided, and our service problems decided, and everything else here. There just isn't the staff, the ability to do it.

What we want is a market-based solution. We want a carrier that wants to serve. And then we'll go away and solve our own problems. They want to acquire all of those lines, and all we want to do is have you say, "You can have all but a couple of them."

Thank you very much.

COMMISSIONER OWEN: I agree with you that you can't solve the problems in the beltway here. But I would also like to concur that you probably have the loudest tie of the day today, Mr. McBride.

(Laughter.)

So you probably got that out of --

MR. McBRIDE: Well, I brought this because Union Pacific has the monopoly over a lot of things, Commissioner Owen, but not over the old red, white, and blue.

(Laughter.)

COMMISSIONER OWEN: Thank you.

CHAIRPERSON MORGAN: Thank you very much.

I think what I'd like to do now is to take a short 10-minute break. You do not need to exit the hearing room if you choose not to. We will reconvene in about 10 minutes.

(Whereupon, the proceedings were off the record from 5:05 p.m. until 5:18 p.m.)

CHAIRPERSON MORGAN: Okay. Why don't we proceed next to Steve Hut, who will be representing Consolidated Rail Corporation.

MR. HUT: Thank you, Madam Chairman, members of the Board. I think I am the first counsel who can say to you good evening. My name is Steven