Approved June 18, 1987
Date

MINUTES OF THE House COMMITTEE ON Transportation.

The meeting was called to order by Representative Rex Crowell at
Chairperson

1:30 ~~a.m.~~/p.m. on March 25, 1987 in room 519-S of the Capitol.

All members were present ~~except~~

Committee staff present:

Bruce Kinzie, Revisor of Statutes
Hank Avila, Legislative Research
Donna Mulligan, Committee Secretary

Conferees appearing before the committee:

Representative Bill Brady
Senator Michael Johnston
Mr. Richard Dearth, Parsons, Kansas
Representative Jack Lacey
Mr. Leroy Jones, Brotherhood of Locomotive Engineers
Mr. Ron Calbert, United Transportation Union
Representative Jane Aylward
Mr. Stan Sexton, Oklahoma, Kansas and Texas Rail Users Assn.
Mr. Pat Hubbell, Kansas Railroad Association
Mr. Mike Roper, Missouri-Kansas-Texas Railroad
Mr. Jeff Asay, Union Pacific Railway Company

The meeting was called to order by Chairman Crowell and the first order of business was a hearing on HR-6028 opposing the merger of the Union Pacific Railroad and the MKT Railroad.

Representative Bill Brady, co-sponsor of the bill, briefed the Committee concerning HR-6028. (See Attachment 1) He said there is no doubt that Southeast Kansas will be hurt immensely if the merger between the Union Pacific and MKT Railroads is allowed to take place. Representative Brady said that it is his opinion the Union Pacific is simply buying the MKT to eliminate competition and get complete control over desirable trackage rights in Texas.

Representative Brady distributed a letter to the Committee from Mr. Gary March, Whitmar Transportation Services, Inc., concerning how the merger of MKT into the Union Pacific System could affect rates or transportation charges. (See Attachment 2)

Senator Michael Johnston testified in support of HR-6028. (See Attachment 3) He said the citizens of Parsons, Kansas, and particularly those employed by the MKT Railroad are extremely frustrated by events surrounding the possible merger of the MKT and Union Pacific Railroads. Senator Johnston told the Committee that initially MKT employees were assured that Union Pacific would try to transfer employees and give them severance pay, but now they are told less than a third of the MKT employees will be transferred.

Senator Johnston said that Senators Dole and Kassebaum, as well as Congressman Whittaker have all filed letters with the ICC in opposition to this merger proposal. He also said that Kansas Secretary of Transportation Horace Edwards filed a statement opposing the merger.

MINUTES OF THE House COMMITTEE ON Transportation,

room 519-S, Statehouse, at 1:30 xxx./p.m. on March 25, 1987

Mr. Richard Dearth, City Attorney, Parsons, Kansas, testified in support of HR-6028. (See Attachments 4, 5 and 6) He said the City of Parsons is against the merger of the MKT and Union Pacific Railroads as there would be a substantial reduction in jobs and payroll.

Representative Jack Lacey testified in support of HR-6028. (See Attachment 7) He said he strongly opposes the merger because of the adverse effect it will have on the economy of Kansas, especially that area of Southeast Kansas where unemployment is already highest in the state.

Mr. Leroy Jones, Brotherhood of Locomotive Engineers, testified in support of HR-6028. (See Attachment 8) He said that mergers usually are not meant to help anyone except the stockholders and the corporate officers, and, in this instance, the Union Pacific will eliminate a competitor in this region which will eventually prove to make profits for the corporation.

Mr. Ron Calbert, United Transportation Union, gave favorable testimony concerning HR-6028. (See Attachment 9) He said that he supports HR-6028 which speaks to the adverse effect the Union Pacific and Missouri-Kansas-Texas merger will have on the city of Parsons, Kansas.

Representative Jane Aylward spoke in opposition to HR-6028. She said she can understand the concerns of the people of Parsons, however, there has been a great deal of study on this issue, and it is believed that without the merger the MKT Railroad would not be able to continue operating.

Mr. Stan Sexton, Oklahoma, Kansas and Texas Rail Users Association, Salina, Kansas, testified in opposition to HR-6028. (See Attachment 10)

He presented testimony on behalf of Mr. James K. Smith, President, Oklahoma, Kansas and Texas Rail Users Association. Mr. Smith was unable to be in attendance because of medical problems.

Mr. Pat Hubbell, Kansas Railroad Association, testified concerning HR-6028, and said the Association does not take positions in mergers and acquisitions involving members. Mr. Hubbell said he believes the state of Kansas should take a consistent point of view all the way through when it comes to mergers and acquisitions.

Mr. Mike Roper said the MKT believes that merger with the UP system is the only viable alternative it has to maintain high quality service to the shippers it serves.

Mr. Roper pointed out that Kansas has taken diametrically opposed positions with regard to MKT in the Santa Fe merger proceeding (ICC Finance Docket No. 30400) and in the merger proceeding (ICC Finance Docket No. 30800). He said they are at a loss to know how the State of Kansas views the Katy.

Mr. Jeff Asay, Attorney, Union Pacific Railway Company, Kansas City, Missouri, testified in opposition to HR-6028. He said that after the merger there will be additional jobs in Coffeyville, Kansas, because the present division point on the MKT at McAlister, Oklahoma will be closed, and will be moved to Coffeyville. He said employees being laid off or not given another job to go to will have "New York Dock Protection" rights.

The hearing on HR-6028 ended.

The meeting was adjourned at 3:20 p.m.

Rex Crowell

Rex Crowell, Chairman

COMMITTEE: Transportation DATE: 3-[illegible] 87

PLEASE PRINT

NAME	ADDRESS	COMPANY/ORGANIZATION
JEFF ASAY	Kansas City, MO	UPRR
Mike Roper	Dallas, TX	MKT RR
STAN SEXTON	Salina Ks	OKT Rail Users Assn
[illegible]	Kcmo	UPRR
Mike Germann	Topeka	Ks Railroad Ass'N.
[illegible]	Topeka	Kansas Railroad Assn
CHARLES BELT	WICHITA	WICHITA AUTO DEALERS ASSOC.
Charles Grauer	Wilson	
KARLA CROWL	PAOLA, KS	GIA to the B of LE
Carol Stuber	Osawatomie Ks.	" "
Martha L. Lewin	Osawatomie Ks.	GIA - BLE
Ruby Law	Osawatomie Ks.	" "
Margaret Jones	Osawatomie, Ks.	GIA of B of L. E.
Don Gragg	Topeka, Ks	Dept of Commerce
~~Deb~~ Debbie Keele	Paola, KS	G.I.A. to the B.L.E.
HELEN BRAND	OSAWATOMIE, Ks.	GIA to the B. of L.E.
Stephanie BRAND	OSAWATOMIE, Ks.	GIA to the B of L. E.
Joyce Bumgarner	Osawatomie, Ks.	GIA of BLE & BRAC
Kathy Trimmer	PAOLA, KS	GIA of BLE

BILL BRADY
REPRESENTATIVE, SIXTH DISTRICT
LABETTE, MONTGOMERY COUNTIES
1328 GRAND
PARSONS, KANSAS 67357
(316) 421-6281

STATE OF KANSAS

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
RANKING MINORITY MEMBER: PENSIONS, INVESTMENTS AND BENEFITS
MEMBER: EDUCATION
JOINT COMMITTEE ON SPECIAL CLAIMS AGAINST THE STATE
JOINT COMMITTEE ON LEGISLATIVE EDUCATIONAL PLANNING

Mr. Chairman and members of the House Transportation Committee

I appreciate the opportunity to speak in support of HR 6028. People in Southeast Kansas are anxious to have your support in our effort to oppose the parallel merger of the Union Pacific and the MKT Railroads. Much has happened since this resolution was introduced and referred to your committee. Senator Bob Dole in a letter of opposition sent to the ICC called the Merger's proposed effect on Parsons and the surrounding communities "inconsciousable." Just recently the Hayden administration revised its filing from a "no position" to a position of opposition to the merger. Many of the concerns addressed in this resolution were used by Governor Hayden in announcing his opposition.

There is no doubt that Southeast Kansas will be hurt immensely if this merger is allowed to take place. Yet you must realize that our loss in Southeast Kansas is not offset by any correspong-ing gains in other areas of the state. The few employees offered transfers, and I stress a few, will locate in Arkansas, Oklahoma and Nebraska. You will probably hear from a few shippers who will say this merger is the only way they can be guaranteed access to rail services. This testimony is based on the assumption that the MKT cannot survive without this merger. I certainly am not in a position to decide whether the MKT can survive without this

Attach. 1

merger. I can however, tell you that the MKT has the shortest route to the Gulf of Mexico from the central sector of this country. If MKT cannot make it, which I hope is not true, then I believe it is reasonable to believe that this highly desirable line would be deemed important to some other companies. Perhaps another company might come up with a plan to utilize more of the existing resources the MKT already has in place. In my opinion the Union Pacific is simply buying the MKT to eliminate competition and get complete control over desirable trackage rights in Texas. They will not maintain any significant railroad operation in the state of Kansas if this merger is approved.

WHITMAR TRANSPORTATION SERVICES

GARY P. MARCH
5725 S.W. 27th
Topeka, KS 66614
(913) 273-3134

THEODORE C. WHITE
1004 N. Buhler Road
Hutchinson, KS 67502
(316) 662-3303

March 24, 1987

Representative Bill Brady
Kansas House of Representatives
State House
Topeka, Kansas 66612

Dear Representative Brady:

This has reference to our previous conversation regarding the pending application before the Interstate Commerce Commission requesting approval to merge the Missouri-Kansas-Texas Railroad Co. (MKT) into the Union Pacific Railroad Co. (UP).

Although WHITMAR Transportation Services, Inc., has not taken a position regarding this merger application, we wanted to take this opportunity to answer, in letter form, some of the questions that you have presented to us.

You asked about a single line vs. joint line carrier movement and how that could affect rates or transportation charges. There is no question that when a single carrier (single line) is involved in the handling of rail traffic between two points, the transportation costs associated with same should be cheaper than when two carriers (joint line) are involved. Reasons for this include additional switching costs between the two carriers at their junction point; however the concept of single line movement does not guarantee that lower freight rates will result. In our opinion, lower freight rates result because of competition, whether the competition be in the form of another competing rail carrier or carriers of other modes (motor vehicles). The absence of competing modes/carriers will most likely result in higher freight rates. This can happen as a result of two carriers merging, as well.

It is our opinion that the merger of MKT into the Union Pacific System will eliminate competition in the State of Kansas and rail freight rates would increase.

Should you have any additional questions regarding the proposed merger, please advise.

Sincerely yours,

Gary P. March

WHITMAR Transportation Services, Inc.
Gary P. March
Ted C. White

Attach. 2

State of Kansas

Senate Chamber

MICHAEL L. JOHNSTON
SENATE MINORITY LEADER
SENATOR, FOURTEENTH DISTRICT
LABETTE COUNTY AND PARTS OF
CRAWFORD, MONTGOMERY AND
NEOSHO COUNTIES
P.O. BOX A
PARSONS, KANSAS 67357-0040

COMMITTEE ASSIGNMENTS
MEMBER ELECTIONS
GOVERNMENTAL ORGANIZATION
INTERSTATE COOPERATION
LEGISLATIVE BUDGET
LEGISLATIVE AND CONGRESSIONAL APPORTIONMENT
LEGISLATIVE COORDINATING COUNCIL
WAYS AND MEANS

Office of Minority Leader

STATE CAPITOL
TOPEKA, KANSAS 66612-1565
913-296-3245

House Transportation Committee

House Resolution 6028 - Opposing the merger of the Union Pacific Railroad and the MKT Railroad

March 25, 1987

Statement by Senator Michael L. Johnston

Thank you, Mr. Chairman, and members of the Committee, for this opportunity to appear in support of House Resolution 6028.

The citizens of Parsons and particularly those employed by the MKT Railroad are extremely frustrated by the events surrounding the possible merger of the MKT and Union Pacific Railroads. Clearly, the City of Parsons will be the big loser if this merger takes place. Initially, MKT employees were given assurances that this was a business decision and that Union Pacific would work with the City of Parsons to try to transfer employees and give them severance pay. Now we are told that less than a third of the MKT employees will be transferred. Our already high unemployment rate in Southeast Kansas could increase by 2% as a result of this merger. While the entire state continues to face a bleak economic picture, Southeast Kansas

Attach. 3

continues to remain one of the areas of the state that is suffering most. My senatorial district is probably the only one in the entire country which has had 6 out of 13 banks closed in the past 4 years. This merger would be devastating to Southeast Kansas. We cannot stand another economic blow such as this to our already fragile economy.

Senators Dole and Kassebaum and Congressman Whittaker have all filed letters with the ICC in opposition to this merger proposal. Last week, our Kansas Secretary of Transportation filed a statement of opposition to the merger on behalf of the State. That statement concludes, "After reviewing the merger proposal, Secretary Edwards has determnied that the negative impacts of the merger would be so great that it should be opposed in its present form. Governor Hayden has concurred with Secretary Edwards in this conclusion."

I urge you to support House Resolution 6028 and thereby join with our Governor, Senators and Congressman in opposing this proposed merger.

PARSONS CHAMBER OF COMMERCE
P.O. BOX 737, PARSONS, KANSAS 67357, (316) 421-6500

March 25, 1987

Representative Rex Crowel, Chairman
House Transportation Committee
House Resolution 6028

Dear Chairman Crowel and Committee Members:

The Parsons Chamber of Commerce urges your support of House Resolution 6028, opposing the merger of the Union Pacific and Missouri-Kansas-Texas Railroads.

The most immediate and devastating effect of the proposed merger will be the severe loss of jobs that Parsons will suffer.

Currently the MKT Railroad employs approximately 400 people in Parsons, with an annual payroll of about 12 million dollars. According to the merger application, only 50 employees would remain. This would mean a loss of payroll to Parsons of approximately 10 million dollars annually.

When the loss of payroll is coupled with the loss in property taxes, a major increase in unemployment and the impact on public schools; the loss to Parsons and the State of Kansas will be of major magnitude.

The most alarming long term effect of the proposed merger will be the "Ripple Effect" that it will have on the small businesses.

We urge you to consider these points and to oppose this merger.

Sincerely,

Jack Groves
Executive Vice President

JG/tf

Attach. 4

BOARD OF COMMISSIONERS
LABETTE COUNTY
OSWEGO, KANSAS 67356
316/795-4522

LONIE R. ADDIS
640 Iowa
Oswego, Kansas 67356

WOODROW BURNETT
Box 70
Edna, Kansas 67342

J. D. BAUMGARDNER
611 S. 32nd
Parsons, Kansas 67357

March 24, 1987

Rep. Bill Brady
House of Representatives
Topeka, Kansas

Re: Union Pacific/Katy Merger
HR 6028

Dear Rep. Brady:

On behalf of the Board of Labette County Commissioners, I want to voice our solidarity in support of House Resolution 6028 in opposing the merger of the Union Pacific/Katy Railroad merger.

Because the economic problems caused by the merger are not solely problems belonging to the City of Parsons but area problems, we encourage your continued support in opposition to this merger.

The economic well being of the State of Kansas depends on the continued growth and expansion of the economy, Southeast Kansas has long been denied its share of potential growth.

Inadequate highways and now the proposed merger will put us at a continued disadvantage for any possible growth for many years to come.

As Kansans, we are not naive as to the political process and constraints for effective legislative action on matters of this magnitude. Nevertheless, current negative economic trends require bold initiatives for Kansas to address our changing economic structure. Passage of HR 6028 represents such a bold step. However, we firmly believe this action is a crucial factor to reach long range economic recovery, stability and growth for Kansas.

Sincerely,

J D Baumgardner

J. D. Baumgardner, Chairman
Labette County Board of Commissioners

Attach. 5

BEFORE THE

INTERSTATE COMMERCE COMMISSION

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY -- CONTROL -- MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

Finance Docket Nos. 30800, et al

RESPONSIVE APPLICATION OF THE CITY OF PARSONS, KANSAS

Anthony A. Anderson
G. Kent Woodman
Eckert, Seamans, Cherin
& Mellott
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Date: March 17, 1987

Attach. 6

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BEFORE THE

INTERSTATE COMMERCE COMMISSION

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY -- CONTROL -- MISSOURI-KANSAS-TEXAS RAILROAD COMPANY	Finance Docket Nos. 30800, et al

RESPONSIVE APPLICATION OF
THE CITY OF PARSONS, KANSAS

I. INTRODUCTION

On February 1, 1987, the City of Parsons, Kansas filed comments with the Interstate Commerce Commission ("Commission") setting forth the City's strong opposition to the application of the Union Pacific Corporation and its railroad subsidiaries ("UP") for approval by the Commission of the proposed acquisition and control by UP of the Missouri-Kansas-Texas Railroad Company ("MKT").

In its comments, Parsons carefully documented how the proposed acquisition of MKT by UP, and the accompanying wholesale withdrawal by MKT from the Parsons area, would have a quick and deadly impact on the economic health of the community.[1] These comments detailed the enormous cost of approval of this merger: the large number of jobs to be lost by the closing of the Parsons Yards, the immediate and significant jump in the local unemployment rate, and the devastating impact on city and county property taxes, public school financing, and the local goods and

1. Comments of the City of Parsons, Kansas on the UP-MKT merger application, Finance Docket No. 30800 (February 1, 1987).

services economy.[2]

The Parsons Comments also pointed out that the proposed combination involves parallel and overlapping traffic corridors in which UP and MKT currently compete. The combination of these two carriers would therefore be anticompetitive because it would result in the elimination or reduction of competition in many markets and in the creation of a combined system that would be able to exert unchecked market power and dictate traffic patterns for significant amounts of rail transportation in the midwest and southwest United States. (See Part IV, infra.)

Finally, the Parsons Comments explained how the proposed merger would have a negative effect on the adequacy of transportation service to the public, particularly due to the reduction in the level of rail service and the effective closing of the St. Louis market to Parsons rail shippers.

After stating its strong opposition to the merger, Parsons requested that, if the Commission granted its approval, specific protective conditions be imposed on UP and MKT. As clarified in its March 2, 1987 submission, Parsons requested two protective conditions:

(1) Require UP-MKT to retain the current level of rail service between St. Louis and Parsons and points south, and retain access for Parsons area shippers to Coffeyville; and

(2) Require UP-MKT to maintain the current level of employment and to maintain all rail related activities at Parsons Yard and its subyards.[3]

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2. Id. at 2-10.
3. Protective Conditions Requested by the City of Parsons, Kansas, Finance Docket No. 30800 (March 2, 1987).

II. THE PROPOSED MERGER WOULD HAVE AN ADVERSE IMPACT ON THE CITY OF PARSONS

It is an undeniable feature of our economic system that, *within the parameters of the law, individuals and businesses are* free to make choices about the most fundamental aspects of their behavior -- where they will buy their products, where they will locate their plants, who they will hire and retain as employees. This economic free will is a powerful engine for growth, for creativity, and for the overall health of the nation's economy. It has the capacity, however, for leaving considerable destruction and damage in its wake. Businesses are closed because buyers shift to other goods or services, plants are relocated, employees are displaced from their jobs. All these events, obviously, have a dramatic human consequence, affecting the lives and fortunes of individuals and the vitality of communities. Under our system, however, these consequences are in effect a cost of the freedom to make these basic choices without interference.

The choices made in this case by the UP -- first to acquire MKT, then to take specific actions in the consolidation such as closing Parsons Yard -- are a clear example of the exercise of economic free will. There is, however, one fundamental and overriding difference in this case: the UP has come before a Federal agency to obtain its approval on the grounds that UP's particular choices are in the public interest. Accordingly, actions that would be unfettered in the free market may legitimately be restrained if found to be contrary to sound public policy. The harm caused to individuals and communities as a result of a proposed action, instead of simply being accepted as a cost of free enterprise, must be carefully evaluated for purposes of determining where the public interest resides.

The harm caused to Parsons by the UP-MKT merger would be devastating, as documented in detail in the Parsons Comments.

-The UP-MKT merger would result in the rail work force in Parsons decreasing from 400 employees to only 50 employees.

-The merger would result in much of Parsons Yard being "retired". This means that the diesel locomotive repair shop, the track maintenance machine repair shop, the three-track rip facility, the East Yard, and the West Yard would all be closed and sold for salvage.

-Parsons' role as a gateway for rail and intermodal traffic would be eliminated and its ability to grow and become a major hub for future transcontinental traffic flows would be permanently lost.

-The unemployment rate in Parsons and Labette County, already higher than most of the State, would jump 2.3 points (from 8.3 percent to 10.6 percent).

-The MKT shops, facilities, and other rail properties to be sold or abandoned have an assessed valuation in Parsons and Labette County of over $1,000,000. Since property taxes are the primary revenue source for the City and County, the loss or devaluation of this property tax base would have a devastating impact on the ability to finance essential public services.

-The public schools in the Parsons area would lose about 150 students, thereby decreasing the amount of formula based financial assistance received from the State. In addition, the loss of property tax revenues would have a substantial adverse impact on the school system's financial viability.

-The ripple effect of MKT's withdrawal from Parsons would be felt throughout the local economy. The loss of 350 relatively high paying jobs in the Parsons area would result in the loss of about $7,000,000 from the local economy each year. This $7,000,000 decrease in purchasing power would be debilitating for the local goods and services economy, and would have a long term harmful impact on all local commercial enterprises.

As clear and demonstrable as these adverse economic impacts may be, the tangible but perhaps most disturbing effect of UP's proposed acquisition is the effect on the people of Parsons and the day-to-day life of the community. As eloquently stated by the Parsons Ministerial Alliance, the impacts on family and the community would include "loss of economic security, displacement, pressure on the inner-structure of the family, possible extreme psychological adjustments, and disruption of basic social relationships . . . stripping away of the presently developed support systems of the community, traumatic re-adjustments in the school systems, churches, and organizations."[4]

As the ministers point out "the disregard for people reflects an unacceptable callousness" on the part of UP.[5] They further state their belief that "the unnecessary suffering which would be brought on by the proposed merger to be antithetical to the Judeo Christian ethic".[6]

The question must be asked: How can a transaction with these significant adverse impacts be found to be in the public interest? The Commission should look long and hard at what would happen to Parsons if this merger is approved, and determine whether the public interest isn't better served by either rejecting the Application or requiring protective conditions that would avoid or reduce the enormous costs to Parsons and its citizens.

In light of the obvious problems created for Parsons by the proposed merger, it is interesting to consider the response of UP

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4. Letter from the Parsons Ministerial Alliance, attached to the Parsons Comments.
5. Id.
6. Id.

to the City's concerns. The most direct assessment of UP's posture comes from the Resolutions from the Kansas counties surrounding Labette, which state "the Union Pacific . . . has offered no definite plans to help the area or soften the severe blow to the economy caused by this operating plan."[7] While UP has made some effort recently to address future industrial development in Parsons, it has yet to come forward with any plan that would truly ameliorate the impacts of the proposed merger. Other than these recent discussions, UP has acted in the almost classic manner of a large and powerful company dealing with a small opponent that lacks any real leverage -- UP appears confident that the merger application will be approved, it is not overly concerned about Parsons' opposition or solicitous of Parsons' support, and its primary interest in the Parsons community is the savings to be derived from MKT's wholesale withdrawal from the area. Moreover, in its discussions with concerned Parsons' residents, UP has gone beyond simply refusing to offer any meaningful plan for softening the blow of the merger; it now has resorted to dire predictions regarding the future of Parsons Yard if the MKT is left as an independent carrier. Apparently UP does not believe the admonition of the Parsons Ministerial Alliance that "[n]o company can long succeed which disregards its impact on people."[8]

There is an important additional issue which is relevant to the Commission's deliberations on the public interest question.

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7. See Parsons Comments at 6.
8. Supra note 4.

As pointed out by the State of Kansas in its comments,[9] the environmental impact analysis required of all major Federal actions by the National Environmental Policy Act of 1969 (NEPA)[10] includes an assessment of the socioeconomic impacts upon communities, such as unemployment, employee relocation, blight, and urban decay and disintegration.[11] In particular, in complying with NEPA in this case the Commission should consider the economies of the impacted communities and the economic effects upon the individuals who live in those communities. The court in Jackson County, Mo. v. Jones, after considering the impact of proposed Federal action on school districts in the affected area, on the unemployment rate, and on small businesses, concluded that it had serious doubts as to whether the savings to be generated by the proposed action would be sufficient to offset the adverse economic impacts incurred by communities, businesses, and individuals in the area.[12] The Commission should seriously evaluate these same issues in the UP application.

Due to the significance of the socioeconomic impacts of the proposed action in this case, the City of Parsons urges the Commission to prepare a full environmental impact statement (EIS) evaluating the consequences of approval of the UP Application. Preparation by the Commission of a lesser environmental study,

9. Initial Comments of the State of Kansas, as represented by its Secretary of Transportation, on the UP-MKT merger application, Finance Docket No. 30800 (January 30, 1987).
10. 42 U.S.C. §4321 et seq.
11. See, e.g. Jackson County, Mo. v. Jones, 571 F.2d 1004 (8th Cir. 1978); City of Rochester v. United States Postal Service, 541 F.2d 967 (2nd Cir. 1976).
12. 571 F.2d at 1015.

such as an environment assessment (EA), will not be sufficient to explore fully the socioeconomic consequences of this merger.

III. THE PROPOSED MERGER WOULD HAVE AN ADVERSE IMPACT ON EMPLOYEES

In determining whether a proposed merger or consolidation of two Class I rail carriers is in the public interest, the Commission is required, under section 11344(b)(1) of title 49, United States Code, to consider "the interest of carrier employees affected by the proposed transaction."[13]

As described in the Parsons Comments and in Part II, infra, the proposed UP-MKT consolidation would result in the Labette County MKT work force decreasing from approximately 400 employees to about 50 employees, with approximately 100 individuals having the opportunity to transfer to positions outside the County. This amounts to a wholesale disruption of the MKT work force in Labette County.

In other merger proceedings, the Commission has considered whether specific harmful impacts on employees resulting from the consolidation would be offset by an overall net increase in existing and future employment opportunities and by increased job security of present employees.[14] For example, although the UP-MP merger was estimated to result in the loss of about 870 jobs, it was also estimated to result in the creation of over 1,100 new

13. 49 U.S.C. §11344(b)(1)(D).
14. See Union Pacific Corporation, Pacific Rail System, Inc., and Union Pacific Railroad Company--Control--Missouri Pacific Corporation and Missouri Pacific Railroad Company, 366 I.C.C. 459 (1982) ("UP-MP Control").

jobs.[15] Accordingly, the Commission in UP-MP Control found that the Applicants had demonstrated that the proposed transaction would directly benefit employees.[16]

The contrast with the UP application now before the Commission could not be more stark. The Applicants offer no convincing evidence that the transaction will be beneficial, or even have a neutral effect, as to the interests of carrier employees. In particular, the job loss and job creation numbers projected by UP are abysmal -- approximately 1130 jobs to be abolished, one (repeat "one") job to be created.[17] Clearly, a primary source of economic savings to be enjoyed by UP management if this merger is approved is borne directly by employees in the most damaging way possible -- through the loss of their jobs.

In short, the wholesale decimation of the rail work force in the Parsons area and throughout the UP-MKT System that would result from this merger, with no countervailing benefits to employees, leads to the inevitable conclusion that this application is contrary to the public interest because of the magnitude of the harm visited upon the carrier employees.

IV. THE PROPOSED MERGER WOULD HAVE AN ADVERSE IMPACT ON COMPETITION

A. Standards for Commission Review

In determining whether a proposed merger or consolidation of two Class I rail carriers is in the public interest, the

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15. 366 I.C.C. at 619.
16. Id.
17. See UP Control Application, Vol. I, Appendix B.

Commission is required, under section 11344(b)(1) of title 49, United States Code, to consider "whether the proposed transaction would have an adverse impact on competition among rail carriers in the affected region".[18]

The Commission's analysis of the competitive impact of a rail merger has become increasingly significant as railroads have progressed, largely due to Federal legislative initiative,[19] from an industry heavily subjected to Government regulation to an industry more dependent upon the discipline of the marketplace. In merger proceedings since the enactment of the Staggers Act, the Commission has clearly recognized the relationship between rail deregulation and competitive analysis. For example, in <u>UP-MP Control</u>, the Commission stated:

> The new policy favoring increased reliance on competition to regulate activities will govern the environment in which the new [railroad transportation] system will operate. The ability of the railroads to take various actions free of regulatory restraints will make it easier to exert or abuse market power gained as a result of consolidation. For these reasons we must take even greater care to identify harmful competitive effects and to mitigate those effects when possible.[20]

The Commission has further articulated this position in its rail consolidation regulations, which provide "our analysis of the competitive impacts of a consolidation is especially critical in light of the Congressionally mandated commitment to give

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18. 49 U.S.C. §11344(b)(1)(E).
19. <u>See</u> Railroad Revitalization and Regulatory Reform Act of 1976, Pub L. No. 94-210, 90 Stat. 31 (codified as amended in scattered sections of 45, 49, 31 and 15 U.S.C.); Staggers Rail Act of 1980, Pub L. No. 96-448, 94 Stat. 1895 (codified as amended in scattered sections of 45, 49 and 11 U.S.C. ("Staggers Act").
20. 366 I.C.C. at 502.

railroads greater freedom to price without regulatory interference".[21]

In its analysis of rail mergers, the Commission recognizes that the principles of the antitrust laws provide important guidance on its assessment of the competitive impact of a proposed merger and on the overall consideration of the public interest.[22] As the Supreme Court noted in FMC v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238 (1968), the antitrust laws give "understandable content to the broad statutory concept of the public interest".[23] In addition, the Commission has recognized that the Department of Justice Merger Guidelines[24] are relevant to an analysis of the competitive effects of a rail merger and provide guidance in weighing the predicted benefits of a merger against the adverse competitive effects.[25]

B. Market Power Theory

It is essential in any merger analysis, regardless of the industry involved, to keep in mind the fundamental policy objectives of the antitrust laws: maintaining free and open competition in the marketplace as the most efficient means for allocating resources, and avoiding undue concentrations of power in any single firm or combination of firms. The basic risk to

21. 49 C.F.R. §1180.1(a).
22. See UP-MP Control, supra at 503; Santa Fe Southern Pacific Corporation--Control--Southern Pacific Transportation Company, _____ I.C.C. _____ (1986) (p. 13 of printed decision) ("Santa Fe - SP Control").
23. 390 U.S. at 244.
24. 49 Fed. Reg. 26,824 reprinted in 2 Trade Reg. Rep. (CCH) §4490 (1984) ("Merger Guidelines").
25. See Chicago, Milwaukee, St. Paul and Pacific Railroad Company -- Reorganization -- Acquisition by Grand Trunk Corporation, Finance Docket No. 28640 (Sub No. 9) (Sept. 1984).

competition arising from a merger is that the combination will create or enhance the exercise of "market power" and thereby directly harm competition. As commonly understood, "market power" is the power of a firm or group of firms to raise the price of a product or service in a specific market above a competitive level for a significant period of time, without fear that existing competitors or new entrants will make such a price increase unprofitable by expanding their output or charging a lower price.[26] The creation or enhancement of market power deserves particular scrutiny in cases where the proposed merger would eliminate a significant competitor in a market that is highly concentrated and difficult for new firms to enter.

From an economic perspective, the harm to the economy caused by the exercise of market power is relatively straightforward -- the ability to price services above the level that would prevail if the market were competitive results in the transfer of wealth from buyers to sellers and in the misallocation of resources.[27]

C. Analytical Framework

The first step in determining whether a merger will create or enhance the market power of the combined firm is to identify the economically relevant markets.[28] The relevant market is the

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26. Letter from J. Paul McGrath, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, to Elizabeth H. Dole, Secretary of Transportation, January 29, 1985 (regarding the competitive implications of the proposed sale of the Consolidated Rail Corporation to Norfolk Southern Corporation). ("McGrath letter").
27. See Merger Guidelines, §1, McGrath letter.
28. See, e.g. UP-MP Control, supra note 14 at 503; Merger Guidelines, §1.

"area of effective competition"[29] between the combining firms, and consists of two dimensions, product and geographic. Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962). Under the Merger Guidelines, a market consists of the narrowest set of products or services within a geographic area in which a hypothetical monopolist -- a sole seller -- could profitably impose a significant and non-transitory price increase.[30] More specifically, the Merger Guidelines define a market as:

> A product or group of products and a geographic area in which it is sold such that a hypothetical, profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products in that area would impose a 'small but significant and non-transitory' increase in price above prevailing or likely future levels.[31]

The Commission has relied on the Merger Guidelines as a tool in defining what is and is not a relevant market.[32]

Product Market

In determining the relevant product market, the guiding principle under antitrust analysis is that the products involved must be "reasonably interchangeable". United States v. E.I. duPont de Nemours & Co., 357 U.S. 377, 395 (1956). The product provided by railroads is the transportation of freight. The central question in product market analysis in rail merger cases is whether motor carrier or water carrier transportation should be included for purposes of determining the competitive effects of a transaction. The test used by the Commission is whether the

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29. Standard Oil Co. v. United States, 337 U.S. 293, 299-300 n.5 (1949).
30. Merger Guidelines, §2.
31. Id.
32. Santa Fe-SP Control, _____ I.C.C. at _____ (1986) (pg. 25 of printed decision).

rates and/or services of motor or water carriers can be found to reliably constrain the applicant's behavior, most notably the exercise of its post-merger market power. In order for motor or water carriers to be included in the product market, the applicant must demonstrate that the rates and service provided by those other modes are sufficiently close to and substitutable for those provided by the applicant so as to cause the applicant to be unwilling or unable to risk abusing its increased market power because of the fear of the resulting loss of market share. Discussing this issue in UP-MP Control, the Commission stated:

> [A]t the margin, motor carriers are unlikely to be direct substitutes for rail transportation in the markets affected by the proposed transactions. In such circumstances, a rise in rail rates would not necessarily result in a significant amount of traffic shifting between modes and the railroad could effectively increase its profit by raising its rates absent other competitive factors.[33]

Geographic Market

The relevant geographic market for purposes of antitrust analysis, as stated by the Supreme Court in Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961), is the area in which providers of a particular product or service operate and to which purchasers can turn for those products or services. In rail merger cases, geographic market analysis focuses on transportation between specific origin and destination points, often addressed in terms of rail corridors. The origins and destinations are normally identified by either business economic area classifications (BEA's) or standard point location codes (SPLC's). Traffic moving between origin and destination points

33. 366 I.C.C. at 504.

or along rail corridors is then broken down into movements of specific commodities, which are identified using the 5-digit standard transportation commodity codes (STCC's).

Applying this origin-destination/commodity analysis to specific data regarding rail traffic movements, the competitive impact of the consolidation of two carriers which have parallel systems, such as UP and MKT, can be identified with some precision. One traditional method for identifying origin-destination/commodity markets in which a consolidation may have an adverse competitive impact is the use of the "50/10 screen". This involves identifying the origin-destination/commodity markets where in the previous calendar year each applicant carrier participated (independently of one another) in at least 10 percent of the rail movements and where together the two carriers accounted for at least 50 percent of all rail movements. Using this screening procedure, it is possible to identify the markets in which it appears that a merger between the applicant carriers could have a significant anticompetitive effect. Identified movements are then subject to further screening if sufficient intermodal competition, source competition, or significant intramodal competition is present.

An analysis of origin and destination pairs and commodity movements involved in this merger as identified in the Waybill Sample provided by UP in its Application follows.

D. <u>Analysis of Rail Corridors and Markets</u>

For purposes of analyzing the impact of the proposed consolidation on competition, the Commission should consider the movement of commodities along corridors in which both MKT and UP participate. In Appendix A to the Verified Statement of the Applicants' witness Richard D. Spero, he provides information, based on the 1985 Carload Waybill Sample, on traffic movements between origin and destination points of commodities identified by the five digit STCC. Mr. Spero maintains that the information provided includes every movement in which both UP and MKT participate and all movements in which MKT participates. The use of BEA origin and destination pairs to examine potential competition effects is consistent with the analysis undertaken by the U.S. Department of Justice in Santa Fe-SP Control.[34]

As set forth in this Appendix, ten commodities account for 51.4 million tons, or 80 percent, of the 64.2 million tons of traffic moved between the identified BEA points.[35] These commodities are bituminous coal; wheat; broken or crushed stone; trailer on flat car (TOFC) traffic; plastic materials; lumber; sorghum grains; hydraulic cement; industrial sand; and fiberboard, paperboard or pulpboard. The data provided by Mr. Spero for the movement of these commodities enables the Commission to identify as likely competitive problems the markets where intramodal competition would be significantly reduced by the proposed merger. The 1985 Waybill Sample data provided as Appendix A to Mr. Spero's Verified Statement include the percentage share of rail tons in each BEA pair handled by each

34. Post-Hearing Brief of the U.S. Department of Justice, Santa Fe-SP Control, at 21.
35. Verified Statement of R. D. Spero, Figure 1, UP Control Application, Vol. 3.

Applicant carrier either through single-line service or through interline service with a non-Applicant carrier.[36] The Appendix also indicates the percentage share of traffic handled by the Applicant carriers through interline service with one another. As a result of the data format, the percentage market shares set forth in the Appendix may include traffic that originates or terminates on a non-Applicant carrier. Because the Applicants' ability to exercise market power is enhanced by traffic handled both through single-line and interline service, an accurate analysis of market share should include interline and single-line traffic.

Identification of those markets where UP and MKT together carry at least 50 percent of the rail tonnage and each carries at least 10 percent of the rail tonnage (or application of the "50/10 screen") <u>indicates likely competitive problems between approximately 79 pairs of BEA origin and destination points involving approximately 29.6 million tons of traffic</u>. The problem BEA pairs roughly correspond to the following corridors: Kansas City -- Dallas-Fort Worth; Kansas City -- Houston; Kansas City -- San Antonio; St. Louis -- Dallas-Fort Worth; St. Louis -- Houston; St. Louis -- San Antonio; and Salina/Wichita -- Dallas-Fort Worth/Houston.

<u>Kansas City -- Dallas-Fort Worth</u>

<u>Coal</u>

The shipment of coal accounts for 18.1 tons or 28 percent of

36. Verified Statement of R. D. Spero, p. 4.

the Waybill Sample traffic.[37] An analysis of traffic flows between three of the 13 BEA pairs involving coal raises likely competitive problems. Two of those pairs -- Cheyenne-Casper, Wyoming to Tulsa, Oklahoma and Fort Smith, Arkansas to Dallas-Fort Worth, Texas -- concern movements along the Kansas City -- Dallas-Fort Worth Corridor or along significant portions thereof.[38] According to the data provided by Mr. Spero, UP and MKT collectively account for 76.1 percent of the coal movement between Cheyenne-Casper and Tulsa, and 94.6 percent of the coal movement between Fort Smith and Dallas-Fort Worth.

The traffic from Cheyenne to Tulsa totals 12 million tons and represents 67 percent of all identified coal traffic. Mr. Spero argues that since all of this Tulsa destination traffic originates on the Burlington Northern (BN) and moves to exclusively-served power plants, the merger of UP and MKT will not affect the flow of this traffic.[39] Mr. Spero, however, completely ignores source competition for coal. While BN currently originates all of the movement to Tulsa, there is no reason to believe that BN would continue to enjoy such a favorable position once the MKT and UP systems have been merged. UP originates coal traffic from the Billings, Montana BEA. A combined UP-MKT system would likely favor UP originated coal, a result which could exclude BN from participation in this

37. Id. Appendix A.
38. Mr. Spero asserts that line 2 of Appendix A of the Waybill Sample incorrectly identifies coal movements between Cheyenne-Casper and Dallas-Fort Worth. Based on MKT data, he indicates that the correct BEA destination point for this traffic is the Houston BEA.
39. Id. at p. 6.

commodity movement and would leave the utilities served with fewer competitive options.

The second troublesome coal movement on the Kansas City to Dallas-Fort Worth corridor involves traffic from Fort Smith to Dallas-Fort Worth. At 365,444 tons, the movement of coal between these BEA points is much smaller than the Wyoming-Tulsa movement. However, UP-MKT, by controlling 94.6 percent of the market share, would play a significantly more dominant role in this movement.

Grain

Grain movements in the UP-MKT service area also present serious anticompetitive issues along the Kansas City -- Dallas-Fort Worth corridor. The State of Kansas generally leads all other States in the production of wheat, much of which travels for export from Kansas to Gulf ports. The Waybill Sample data provided by Mr. Spero reflect this southern traffic flow.

The consolidation would permit UP and MKT to significantly increase their market share of wheat movements in seven of the 54 BEA pairs involving the shipment of wheat. Six of the movements likely to cause competitive problems involve Kansas wheat. The Kansas City to Dallas-Fort Worth corridor would witness a reduction of competition in wheat movements between Springfield, Missouri and Dallas-Fort Worth. Because Parsons is located in the Springfield BEA, this movement is particularly important to the City. MKT and UP currently have approximately one third each of that market. After the consolidation, the Applicants would control 67.4 percent of the Springfield-Dallas movement. UP and

MKT would also have a combined market share of 83.6 percent for the 48,580 tons of sorghum grain moved between Kansas City and Dallas-Fort Worth.[40]

Lumber

The single largest movement of lumber identified in Appendix A of Mr. Spero's Verified Statement is between Canada and Dallas-Fort Worth.[41] Because the 1985 Waybill Sample does not distinguish among locations in Canada, it is not possible to trace accurately the flow of lumber from Canada. Notwithstanding that difficulty, it is reasonable to assume, given MKT's dominance in this movement (51.2 percent of market share) that some of this lumber travels along the Kansas City to Dallas-Fort Worth Corridor. The proposed merger would give the combined railroad 63.8 percent of the market.[42] While there may be some merit in Mr. Spero's suggestion that domestic sources of lumber could play a role in determining the ability of the Applicants to exercise market power, Mr. Spero ignores the lower cost of international sources in the lumber supply market.

Fiberboard

Finally, with regard to the Kansas City to Dallas-Fort Worth corridor, data for the largest flow of fiberboard, paperboard or pulpboard identified in Appendix A to Mr. Spero's Verified Statement indicate that UP and MKT collectively move 74.3 percent of these products between Fort Smith, Arkansas and Dallas-Fort Worth.

40. Id. Appendix A, line 247.
41. Id. Appendix A, line 195.
42. Id.

In summary, as the 1985 Waybill Sample data demonstrate, the movement of coal, grain, lumber and fiberboard along the Kansas City to Dallas corridor would suffer from a serious loss of competition due to significant increases in UP-MKT's market power. This loss of competition is an inevitable result given the extent to which the UP and MKT lines parallel one another between these two points.

Kansas City -- Houston

As previously discussed, two of the three BEA pairs involving coal that raise competitive problems are located in the Kansas City -- Dallas-Fort Worth corridor. The remaining BEA pair is Cheyenne-Casper, Wyoming to Houston. The competitive impact of the proposed merger upon the movement of coal traffic between these points is inescapable. Together UP and MKT would control 100 percent of the identified movement of coal between Kansas City and Houston. Mr. Spero addresses this problem by suggesting that it presents no problem since the MKT contracts to deliver this coal terminate this month and the facility which receives the coal is "contemplating a build out to SP." The fact of the matter is that the facility is currently captive to UP and MKT, and competitive options that are merely "contemplated" are irrelevant. The consolidation would enable these railroads to exercise an unreasonable amount of market power.

Turning to grain, the proposed merger presents significant competitive problems for both wheat and sorghum grain moving in the Kansas City to Houston corridor. Slightly more than one million tons of wheat moves by rail between Kansas City and

Houston. The combined market share of MKT and UP for wheat along this corridor is 64.4 percent.[43] In addition, the Applicants' collective market share of the movement of sorghum grain from Lincoln, Nebraska to Houston, and Topeka, Kansas to Houston would amount to 78.7 percent and 60.6 percent, respectively.

While source competition for grain at both the origin and destination points cannot be ignored, the Applicants have failed to demonstrate that such competition would adequately protect shippers along the parallel MKT and UP routes from the exercise of market power and the resulting rate increases. Shippers along the Kansas City -- Houston corridor which now have access to both carriers would have access to one less rail carrier. While the availability of wheat from other sources may restrain an exercise of market power by UP and MKT, the proposed merger would greatly reduce horizontal competition and enable the combined carrier to raise rates to grain shippers. These increased rates would, in turn, either reduce the margin of profit currently enjoyed by those shippers or be passed on as higher costs to ultimate consumers.

The Applicants may argue that trucks provide sufficient intermodal competition for grain movements to afford shippers reasonable transportation alternatives. As noted above, the test is whether trucks are an effective substitute to rail service. The answer is that trucks cannot adequately compete in the Kansas to Texas grain market and thus are not an effective substitute. In a Commission Report to Congress, L. Orlo Sorenson in analyzing

43. Id. Appendix A, line 18.

the Kansas grain market determined:

> Trucks are readily substituted for rail on many intra-state movements when railroad rates or limited availability of rail service cause truck movement to be profitable. However, because of limited short-run supply of trucks and elevator congestion, if many trucks are loaded a peak grain movement periods, trucking is characteristically a supplement to rail transportation of wheat at harvest time rather than a substitute.[44]

The impact on TOFC traffic, like that on grain and coal, underscores the loss of horizontal competition that would result from this merger. TOFC traffic presents the greatest number of BEA pairs in which the merger of UP and MKT would be anticompetitive. Four such movements roughly coincide with traffic in the Kansas City -- Houston corridor. These pairs are Houston to Kansas City, Kansas City to Houston, Houston to Minneapolis, and Milwaukee to Houston. Combined these movements account for 68,760 tons of TOFC traffic.[45] The combined UP and MKT market share for these BEA pairs is: Houston to Kansas City, 79.4 percent; Kansas City to Houston, 93.1 percent; Houston to Minneapolis, 78.1 percent; and Milwaukee to Houston, 100 percent.[46]

Although TOFC traffic is sensitive to truck competition, the distances involved in these movements suggest that the Commission should focus its attention on rail-to-rail competition.[47] The

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44. Commission Report to Congress, Contract Rate Competitive Impact Report - Grain Shippers, Appendix III, "Competitive Impacts of Railroad Rate Contracts on Grain Shippers in Kansas." p. 4.
45. Verified Statement of R. D. Spero, Appendix A, lines 86, 94, 103, and 137.
46. Id.
47. The approximate highway distances between these points are Kansas City to Houston -- 739 miles, Houston to Minneapolis -- 1,196 miles; and Milwaukee to Houston -- 1,142 miles.

anticompetitive effect of the proposed merger between these BEA origin and destination points for TOFC traffic is clear and undeniable. Between Milwaukee and Houston rail competition would be completely eliminated. UP and MKT's market share would increase to a monopoly. Although the impact between the other three pairs is less drastic, the increase market share between these points nevertheless presents cause for concern.

The loss of horizontal competition becomes more obvious upon examination of traffic flows in plastic materials and industrial sand. Two of the 21 BEA pairs of plastic materials traffic identified in the 1985 Waybill Sample provided by Mr. Spero, Houston to Tulsa and Beaumont to Tulsa, indicate a significant loss of rail competition. Between the Houston and Tulsa BEA's, UP and MKT's market share for the 79,480 tons of plastics shipped by rail totals 100 percent. Similarly, the market share for the smaller volume of 7,600 tons shipped between Beaumont and Tulsa totals 100 percent. The combined market share for industrial sand which originates in La Crosse, Wisconsin and terminates in Houston and which could travel in the Kansas City -- Houston corridor would be 96.2 percent. Again, as in the movement of TOFC traffic, rail competition is either completely or virtually eliminated.

Finally, the Kansas City to Houston corridor would witness a reduction in rail competition for lumber traveling to Houston from Spokane, Washington. Together MKT and UP would have a market share of 75.7 percent.[48]

48. Verified Statement of R. D. Spero, Appendix A at line 215.

Kansas City -- San Antonio

The competitive problems along the Kansas -- San Antonio corridor involve for the most part movements of TOFC traffic, lumber and industrial sand. The proposed merger would completely eliminate rail competition for TOFC traffic along the Kansas City -- San Antonio corridor between BEA points Kansas City and San Antonio, San Antonio and Kansas City, and Kansas City and Austin. According to the 1985 Waybill Sample, UP and MKT move all 30,160 tons of the TOFC traffic between those BEA origin and destination pairs.[49]

As previously discussed, although TOFC traffic is sensitive to intermodal competition from trucks, the near complete loss of rail competition along the Kansas -- Texas corridors cannot be ignored. Currently, TOFC traffic in the Kansas City -- San Antonio corridor is reasonably divided between the two competing railroads. Post-consolidation, shippers in the corridor would be captive to one railroad. Similarly, the proposed merger would eliminate rail competition for movement of 228,800 tons of industrial sand between BEA pairs Minneapolis and San Antonio, and La Crosse, Wisconsin and San Antonio.[50]

While shippers of lumber would retain some rail competition, the loss of competition in the Kansas City -- San Antonio corridor resulting from the proposed merger is still troublesome. Movements of lumber between two BEA pairs indicate that the merger would reduce intramodal competition. In the

49. Id. at lines 96, 100 and 154.
50. Id. at lines 286 and 287.

larger of the two, from Canada to San Antonio, UP and MKT would have a 60.1 percent market share for the 69,320 tons of traffic.[51] For the smaller movement between Missoula, Montana and Austin, Texas, a merger of MKT and UP would eliminate rail competition.

Finally, the merger would eliminate competition for rail movements of sorghum grains between Austin and Fort Smith, Arkansas.[52]

St. Louis -- Dallas-Fort Worth

The St. Louis -- Texas corridors, like the Kansas City -- Texas corridors, would experience serious losses of rail competition if the merger is approved. The commodities traveling in the St. Louis -- Dallas-Fort Worth corridor most affected by the proposed merger are TOFC traffic, plastic materials and industrial sand.

UP and MKT have a collective market share of approximately 87.5 percent of the 302,960 tons of TOFC traffic that moves from St. Louis to Dallas-Fort Worth and from Dallas-Fort Worth to St. Louis. This market share would enable the consolidated railroad to exert market power despite the possible availability of intermodal competition.

As is the case with many commodities moving within the Kansas City -- Texas corridors, the proposed merger will eliminate all rail competition for movements of plastic materials and industrial sand. All 6,000 tons of the plastic materials that

51. Id. at line 201.
52. Id. at line 264.

flow by rail between Detroit and Dallas-Fort Worth currently move on either UP or MKT.[53] UP and MKT would also control all 114,232 tons of industrial sand traffic between St. Louis and Tulsa.[54]

St. Louis -- Houston

Most of the loss of competition in the St. Louis -- Houston corridor involves TOFC traffic. In four BEA pairs for TOFC traffic, UP and MKT would realize a substantial increase in market power. These BEA pairs are as follows: Houston to Chicago; Houston to St. Louis; St. Louis to Houston; and Cincinnati to Houston. Together they account for 454,632 tons of TOFC traffic.[55] For TOFC traffic moving from Houston to Chicago, a combined UP and MKT would have a market share of 90.1 percent.[56] For the remaining BEA pairs the merged railroad would have even greater market shares: 98 percent from Houston to St. Louis; 98.3 percent from St. Louis to Houston; and 100 percent from Cincinnati to Houston.[57] Again, as noted for TOFC traffic with respect to the Kansas City -- Houston corridor, an increased market share of this magnitude raises serious anticompetitive problems and should be of concern to the Commission.

Finally, for the 31,200 tons of plastic materials traveling by rail between Chicago and Houston, UP and MKT would have a combined market share of 86.3 percent.

St. Louis -- San Antonio

The major competitive problem in the St. Louis -- San Antonio

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53. Verified Statement of R. D. Spero, Appendix A, line 183.
54. Id. at line 287.
55. Id. at lines 72, 73, 76 and 132.
56. Id. at line 72.
57. Id. at lines 73, 76 and 132.

corridor, like the St. Louis -- Houston corridor, is TOFC traffic. The three BEA pairs identified as likely competitive problems are: San Antonio to Chicago; San Antonio to St. Louis; and St. Louis to San Antonio. The traffic in these BEA pairs totals 315,340 tons.[58] The combined UP and MKT market share for these BEA pairs would be: San Antonio to Chicago, 100 percent; San Antonio to St. Louis, 96.3 percent; and St. Louis to San Antonio, 96.8 percent.

Salina/Wichita --Dallas-Fort Worth/Houston

The final major corridor that merits serious Commission consideration is the Wichita to Dallas-Fort Worth/Houston corridor. Almost all of the movements identified as causing a potential competitive problem in this corridor are grain movements. The BEA pairs involved are, for wheat, Salina to Houston, and Wichita to Dallas-Fort Worth, and for sorghum grains Lincoln to Houston, Salina to Dallas-Fort Worth, Topeka to Houston and Wichita to Dallas-Fort Worth. The total amount of wheat moved by rail between the wheat BEA's pairs is 870,687 tons. The total amount for the sorghum BEA pairs is 365,384 tons. The market shares for the Applicants between these BEA pairs range from 78.7 percent for the Lincoln to Houston sorghum movement to 100 percent for the Wichita to Dallas-Fort Worth sorghum movement. With these market shares, the Applicant could exert substantial market power. As noted previously, given the distance of these grain movements, trucks should not be considered by the Commission as a significant competitive factor.

58. Id. at lines 75, 77 and 84.

Texas Corridors and Crushed Stone Traffic

In addition to the major north-south corridors discussed above, the UP-MKT merger would have a severe anticompetitive impact on rail traffic moving between Austin and San Antonio and other Texas locations. In particular, rail-to-rail competition would be eliminated for several movements of crushed stone in these markets.

According to the data provided in the UP Application, the consolidation of UP and MKT would create a monopoly for the merged carrier for crushed stone traffic in three BEA pairs: Austin to Houston (97.6 percent market share); Austin to Beaumont (100 percent); and Austin to Tyler-Longview (100 percent). In addition, the merged carrier would gain the dominant share of the market (66 percent) for San Antonio to Beaumont traffic.[59]

The severe anticompetitive impact of the proposed merger is clearly illustrated in the comments of the Texas Crushed Stone Company (TCS),[60] operator of the nation's largest limestone quarry and the largest supplier of aggregate products to the Houston and Gulf Coast areas. TCS currently enjoys two competitive rail options, UP and MKT, and is able to select the price and service levels that are most advantageous to it as a shipper. The consolidation of UP and MKT would make TCS a captive shipper, totally dependent for access to critical markets upon one railroad with monopoly power.

If this consolidation is approved, a similar dilemma would

59. Id. at lines 52, 54, 55, and 58.
60. Comments of Texas Crushed Stone Company on Primary Application, Finance Docket No. 30800 (February 2, 1987).

face other crushed stone and aggregate shippers and receivers in the State of Texas. In addition, two other facts are critical regarding the merged carrier's monopoly power: the chief customers of crushed stone suppliers include State and local highway agencies, and transportation costs are more than 80 percent of the delivered price of crushed stone.[61] This means that the inevitable exercise of monopoly pricing by the merged carrier would largely be passed on in the product price, and this higher product price will be an increased cost of doing business by the public sector at both the State and local level.

Furthermore, truck competition is not a viable substitute in these markets and thus would have no ability to restrain the market power of the merged rail carrier. Transportation of aggregates by truck for distances in excess of 75 miles is prohibitively expensive, due to the weight and bulk of aggregates. Since the markets for TCS and other aggregate shippers are in East Texas, Houston, and the Gulf Coast, which are all more than 75 miles from the origins, truck transportation is not a viable competitive alternative.[62]

Finally, it should be noted that the Department of Justice, in its preliminary comments on the proposed merger, identified as the two principal areas of competitive concern:

> movements of bulk commodities originating in the Austin and San Antonio BEA's and terminating at other Texas locations; and
>
> movements of bulk and non-bulk commodities moving in both directions between the Austin and San Antonio BEA's and a

61. Id. at 3.
62. Id.

variety of more distant locations, especially locations in the Midwest.[63]

Summary

An analysis of the competitive impact of this merger on 80 percent (54.1 million tons) of the identified traffic in the Waybill Sample yields dramatic results: the consolidated UP-MKT could exercise market power over 29.6 million tons of freight moving between approximately 79 BEA pairs. Moreover, for the remaining 20 percent of the traffic, the UP-MKT merger would eliminate rail-to-rail competition for 48 different commodity movements between 33 BEA pairs.

In summary, the competitive problems identified in the corridors discussed above are direct, severe, and non-speculative. In these corridors, the number of rail competitors would be reduced by the merger, in many cases creating captive shippers that would be left with only one rail alternative. As discussed further below, motor and water carriers are not viable alternatives for rail shippers in these markets, nor are other sources or origins for the commodities involved. Entry by another rail carrier that would constrain the market power of the merged UP-MKT is not a realistic possibility. As a result of all these factors, the merged carrier would become a pure monopolist in some markets -- the only rail carrier providing viable service -- and would have the predominant market share in others. Accordingly, the merger would give UP-MKT, throughout the markets

63. Preliminary Comments of the Attorney General, United States Department of Justice, Finance Docket No. 30800 (February 17, 1987).

where the carriers now compete, the ability to engage in monopoly pricing or enhance substantially its ability to collude.

E. Traffic Diversions and Vertical Effects

In determining whether the UP-MKT proposed consolidation is consistent with the public interest, the Commission is required to consider whether the transaction would have an adverse effect on competition among rail carriers in the affected region. The Commission's determination must look to the rail transportation policy, which seeks to avoid undue concentration of market power and to ensure the development and continuation of a rail transportation system with effective competition among rail carriers and other modes. The emphasis Congress placed on retaining competition among rail carriers is critical to the Commission's analysis, particularly as the Federal regulatory role diminishes. As mentioned above, the Commission's railroad consolidation regulations regard the competitive impacts of a consolidation to be "especially critical" in light of reduced regulatory constraints on rail pricing.[64]

The competitive impacts of a proposed consolidation are not limited to the reduction of competition resulting from a parallel merger. Although the elimination of direct competition in the same market between the consolidating carriers is critical, particularly in the UP-MKT context, the Commission recognizes that "[e]ven if the consolidating carriers do not serve the same market, there may be a lessening of potential competition in other markets. While the reduction in the number of competitors

64. 49 C.F.R. §1180.1(a).

serving a market is not in and of itself harmful, a lessening of competition resulting from the elimination of a competitor may be contrary to the public interest."[65] To the extent that a proposed consolidation enhances the market power of the merged carrier, the ability to increase shipper rates or reduce services is similarly enhanced. The use of market power to divert traffic flows away from other rail carriers can result in a lessening of competition and harm to essential transportation services.

The end-to-end effects of a merger can result in a loss of competition if one of the consolidating carriers that formerly interchanged traffic with other carriers providing joint line service through a gateway reroutes that traffic over the combined system, foreclosing other carriers from competing in the market it previously served.[66] The consolidated system will be able to exert market power through redirecting traffic over its own lines. As the Commission recognized in UP-MP Control, such market power diversions can lead to the reduced ability of carriers to be effective competitors and to discipline the rates and services offered by the consolidated system. This "vertical foreclosure" of markets occurs at gateways served by the merging carriers. In the context of the UP-MKT consolidation, examples of these gateways are Kansas City, St. Louis and Dallas-Fort. Worth.

The competitive harm occasioned by vertical foreclosure was recognized by the Commission in its analysis of the UP and MP

65. 49 C.F.R. §1180.1(c)(2)(i).
66. UP-MP Control, 366 I.C.C. at 529 (1982).

merger. The decision expressed concern over the loss of competition particularly for grain traffic in the corridor extending between Kansas City and Texas destinations in which MKT participated. It was determined that UP would be unlikely to continue its interchange of originated traffic with MKT at Kansas City and would instead favor MP to transport those commodities to southwestern destinations. At the time, UP handed off twice as much traffic to MKT than to MP. To help offset the loss of UP as a "friendly" connection at Kansas City, MKT was granted trackage rights north to grain origins in Topeka, Atkinson, Lincoln, Omaha, and Council Bluffs, providing shippers an effective competitive alternative.[67]

Clearly, the merger of the UP and MKT systems will unravel any competitive fix designed by the Commission for this corridor of traffic, leaving shippers with less competitive options and foreclosing participation in interlined traffic by other connecting carriers. More important is the recognition by the Commission of the impact "occasioned by the merger" on traffic traveling in this corridor through the Kansas City gateway.

There are numerous examples to illustrate the competitive problems posed by the UP-MKT merger on connecting carriers. According to the comments filed by the Soo Line Railroad Company (Soo), MKT is the last remaining connection for the Soo at Kansas City for traffic destined to and from the southwest. Kansas City is a significant midwestern gateway for movement of bulk

67. UP-MP Control, 366 I.C.C. at 567 (1982).

commodities, primarily grain, coal and lumber.[68] Not only would there be a dramatic reduction in competition in this corridor between UP and MKT due to the virtual parallelism of their track, but MKT would no longer act as an independent connection for traffic interchanges at this gateway with other carriers. A consolidated UP-MKT system would favor its own routes for traffic between the upper midwest and the southwest, foreclosing the Soo from competitive access to southern destinations. The traffic study prepared by the Applicants estimate that the Soo would suffer diversions of $3.2 million in revenues in 1985 alone.

Substantial interchange at Kansas City also exists for grain origins in Iowa and Nebraska that are served by the Chicago Northwestern Transportation Co. (CNW), and the Illinois Central Gulf Railroad (ICG). The loss of MKT's ability to interline this traffic is estimated by the Applicants to cause aggregate diversions of close to $1 million for ICG and CNW in 1985. Likewise, traffic that is interchanged with the Burlington Northern at Kansas City and Dallas-Fort Worth for termination in Oklahoma and Texas would be diverted, estimated to total $1.9 million in 1985.

Southern Pacific (SP) serves Texas and Mexico destinations for grain traffic in joint movements with MKT. SP does not reach grain origins in northern markets, such as Nebraska and Iowa, and presently interlines this MKT originated traffic for transport to Corpus Christi and Laredo, Texas. The Texas Mexican Railway

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68. See Verified Statement of R. B. Peterson, UP Control Application, Vol. 3.

Company (TexMex) interchanges this traffic with the SP at Laredo for movements to Mexican destinations. In Santa Fe-SP Control, the Commission recognized that MKT's access to grain destinations is highly dependent on the SP. A table of MKT's traffic for 1983 expressed in carloads, at page 77 of the Commission's decision, vividly illustrates this point:

Grain Carloads to Laredo, Texas:

via SP	2551
via MP	0

Grain Carloads to Eagle Pass, Texas:

via SP	1150
via MP	0

Grain Carloads to Corpus Christi, Texas

via SP	559
via MP	0

The Commission noted that since the UP-MP merger, UP has interchanged very little traffic to TexMex, leaving TexMex dependent on SP for interchange. One can conclude then that in the context of a UP-MKT consolidation, MKT would reduce the amount of traffic it "fed" to SP for subsequent interchange with TexMex. Consequently, the diversions SP will suffer as a result of the UP-MKT consolidation are estimated by the Applicants to be $3.8 million. For TexMex diversions are estimated at $0.5 million.

It is for this reason that TexMex has urged the Commission in their comments to "fashion a policy accommodating the needs of the nation's small, but important regional railroads" particularly as the nation's rail system is increasingly characterized by consolidations and the "inevitable unilateral breaking of long-standing intercarriers through route arrangements."[69]

As determined by the Commission in UP-MP Control, the Kansas City Southern Railway Company (KCS) competes for traffic between Kansas City and the Texas Gulf ports, but does not have direct access into the wheat producing regions west, north and east of Kansas City. Accordingly, it must rely on its connections at Kansas City.[70] As a result of the consolidation, KCS will lose its "friendly" connection for access to export wheat origins. The estimated diversions of traffic from KCS are significant - $3.2 million in 1985. KCS's route between Kansas City and Texas destinations is more circuitous and is limited in actual points served, further hampering its ability to compete for traffic in this corridor. Post-consolidation, UP-MKT will enjoy the most direct route extending between Kansas City and Dallas, Houston and San Antonio.[71] Trucks are not competitive for bulk commodities traveling this length of haul, which is over 500 miles to Dallas and over 700 miles to Houston.[72]

As a result, UP-MKT would enjoy substantial market power at origins in Nebraska, Kansas, Oklahoma, and Missouri for shipment to Texas destinations. The Verified Statement of Barber indicates that in this five state region UP presently has the largest traffic share by a significant margin. In 1985, UP originated 34 percent and terminated 28.7 percent of all rail

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69. Initial Comments of Texas Mexican Railway Company, Finance Docket No. 30800 (February 2, 1987), at 2-3.
70. UP-MP Control, 366 I.C.C. at 594 (1982).
71. Verified Statement of Peterson, p. 37.
72. Verified Statement of Spero, p. 17, figure 2.

traffic in the region.[73] According to the same table, the carrier with the second largest percent share is ATSF - originating 18.2 percent and terminating 20.4 percent of traffic in the region. Consolidation would only increase the existing margin between UP and its competitors. Post-consolidation, UP and MKT would enjoy a combined market share of 41.3 percent of originated traffic and 39.6 percent of terminated traffic. This combined share would be nearly double that ATSF presently enjoys.

The loss of MKT as an independent connection for traffic moving to points in Texas is further demonstrated by the comments of PPG Industries. Movements of liquid caustic soda from Lake Charles, Louisiana are presently originated by KCS and delivered to PPG's plant in Wichita Falls, Texas, exclusively served by MKT. Post-consolidation, the UP-MKT system would control both origin and destination and would likely refuse to enter into rates with MKT for a competitive, joint line movement.

In summary, in a merger with UP, the MKT would be eliminated as an independent connection for other competing rail carriers in the region. Given the duplicative or parallel nature of the consolidating systems, there would be a direct loss of competition and a diversion of traffic into the system away from other carriers. While the consolidation may produce some efficiencies in routing, it will augment the substantial traffic share that UP and MKT already possess, particularly in export grain flows and movements of other bulk commodities. The

73. Verified Statement of R. J. Barber, p. 29, UP Control Application, Vol. 3.

competitive impact on other carriers, including regional carriers, and the shipping community is substantial.

F. Role of MKT in UP-MP Merger

The Commission has explicitly recognized the pivotal role MKT plays as an independent competitor in the region it serves. In UP-MP Control, the Commission identified a substantial loss in competition for grain shipments between the midwest and Gulf ports via the Kansas City gateway. The magnitude of the impact found was such that if left unconditioned might have threatened the ability of MKT to provide essential services. In the Commission's words:

> In combination with the elimination of UP-MP parallel competition between Kansas City and Omaha/Council Bluffs this vertical foreclosure of MKT at Kansas City represents a substantial lessening of competition for traffic, especially grain, moving from the area between Omaha/Council Bluffs and Kansas City to the Gulf. Service from Omaha to the Gulf is provided by MP direct, BN direct and UP with interchange at Kansas City, primarily with MKT . . . The potential diversion of over 73 percent of the UP-MKT interchange at Kansas City substantially limits MKT as a competitive factor south of Kansas City. After the consolidation the Omaha-Gulf market, which now has three competitive routes, will only have two (UP and BN).
>
> We conclude that this combination of effects results in a substantial lessening of competition which must be ameliorated as a condition to approval of the consolidation.[74]

MKT was given trackage rights into grain gathering areas between Kansas City and Omaha, Council Bluffs, Lincoln, and Topeka. The trackage rights were specifically designed to ameliorate identified anticompetitive effects from the foreclosure of joint service with UP as well as UP-MP overlap,

74. UP-MP Control, 366 I.C.C. at 531 (1982).

permitting MKT to provide competitive service in this corridor. By virtue of this increased access, both the UP and MKT systems are able to serve large grain producing areas in competition with one another from origins in Nebraska, Kansas, Missouri, and Oklahoma to Gulf destinations. Shippers presently benefit from the level of competition for this traffic, in terms of rates and service options.

The proposed consolidation between UP and MKT will significantly reduce competition in this corridor, for transportation of grain and other bulk commodities, through the elimination of a competitor in this market. Although Applicants argue that there is adequate source competition for grain traffic in the export market, grain producers of domestically consumed feed grains and wheat are not subject to such indirect, competitive pressures. Further, the direct loss of rail-to-rail competition only increases the "captivity" of shippers and their susceptibility to unilateral rail pricing. Direct intramodal competition among railroads effectively constrains rates -- a result which is particularly important in a deregulated environment.

Not only did the Commission identify anticompetitive parallel effects in UP-MP Control, but it also specifically found the interchange of traffic at the Kansas City gateway to be affected. Retaining and expanding the reach of the MKT into grain producing areas was designed to ensure the presence of MKT as an independent connection for through traffic. In the instant proceeding, this is yet again problematic, and a consolidation of these competing carriers would further aggravate the vulnerable position of grain shippers. Moreover, intermodal competition, particularly motor carriers, would not provide an adequate constraint on pricing behavior. Trucks are not direct substitutes for rail carriers, particularly for transportation of bulk commodities moving the distances envisioned in Gulf port market, exceeding 500 miles from origins. According to Appendix D, Table 1 of Santa Fe-SP Control, on movements of farm products of over 500 miles, trucks only possess a 11 percent market share.

The remedial effects contemplated by the Commission in the context of the UP-MP merger proceeding for movements through the Kansas City gateway and the corridor extending to Texas destinations would be eliminated if the proposed consolidation is approved. Further, the competitive problem identified in the former proceeding would again arise and be further exacerbated. The market power that would be amassed by a consolidated UP-MKT system would not be effectively constrained by intramodal competition given the length of hauls, or by intermodal competition given the circuity of alternate routes.

G. Intermodal Competition

In determining whether the proposed merger creates or enhances market power in the consolidated system, the Commission must assess the effect of intermodal competition. As detailed in the Commission's regulations:

> In some markets the Commission's focus will be on the preservation of effective intermodal competition, while in other markets (such as long-haul movements of bulk commodities) effective intramodal competition may also

be important.[75]

Implicit in this statement is that lengthy movements of bulk commodities, such as grain, coal, and lumber, are not particularly sensitive to truck competition. The Commission's recent decision in Santa Fe-SP Control confirms that large volumes of grain moving substantial distances in the midwest, north-south corridor are not truck divertible:

> Trucks are generally regarded as effective competition for grain movements for distances of 250 miles or less, while movements of 500 miles or more are clearly rail dominant.[76]

The post-hearing brief of the Department of Justice (DOJ) in Santa Fe-SP Control is of a similar view stating that:

> The economics literature in the record shows that as to the movement of certain commodities under certain conditions, particularly large volumes of low-value commodities for long distances, truck is not an economic substitute for rail. As a result, the rail share for transport of these commodities is high and the demand relatively inelastic, which means that a small increase in rail rates would not lead to a significant decrease in rail shipments. (footnotes omitted)[77]

As discussed above, the Commission's February, 1987 Report to Congress also confirms that trucking is characteristically a supplement to rail transportion of wheat originating in Kansas at harvest time rather than a substitute. The same document reveals that in 1984, 79 percent of all wheat moved from Kansas elevators was shipped by rail.[78] Barge transportation is characterized to

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75. 49 C.F.R. §1180.1(c)(2)(i).
76. Santa Fe-SP Control, ____ I.C.C. ____ (1986). (p. 72 of printed decision).
77. Post-Hearing Brief of the U.S. Department of Justice, at 35 (October, 1985).
78. Commission Report to Congress, Contract Rate Competitive Impact Report - Grain Shippers, Appendix III, p. 2 (February, 1987).

be of "marginal significance", accounting for less than 0.5 percent of Kansas grain shipments in 1984.

The traffic hauled in the corridors in which UP and MKT presently compete includes a substantial amount of bulk commodities. Evidence submitted by the applicants indicates that 29.3 percent of MKT's total tonnage is coal, 20.9 percent is crushed stone, and 11.2 percent is grain.[79] Competition that presently exists for freight to and from Kansas, Texas, Nebraska, Missouri and Oklahoma would be eliminated by the consolidation. The diversion of grain traffic alone estimated by the Applicants would be $2 million in revenues, largely from Kansas origins and destined for Texas points.[80] The larger percentages of grain traffic originate in Iowa, Nebraska, and Missouri.[81] The Commission found in Santa Fe-SP Control that 80 percent of MKT's grain traffic terminated in Houston or Galveston,[82] evidencing that grain movements predominately travel long hauls. As previously discussed, highway mileages from Kansas City to Houston exceed 700 miles and from Kansas City and Dallas-Fort. Worth exceed 500 miles. Distances from St. Louis to southwestern destinations are even greater. Given the length of haul and nature of the commodities involved, it appears that truck competition would not be a significant factor present in these markets to restrain rail pricing. This is particularly evident in the crushed stone market in which, as mentioned above, trucks

79. Verified Statement of Barber, p. 33.
80. See Attachment 12-6 and 12-8 of Applicant's Traffic Study.
81. See MKT traffic table, p. 78.
82. Santa Fe-SP Control, ____ I.C.C. ____ (1986) (p. 76 of printed decision).

are not competitive for distances over 75 miles, due to the weight involved.[83]

The Commission's consideration of truck competition in the UP-MP merger, in the context of defining the product market for purposes of their competitive analysis, recognized that while major carriers do present some competitive contraints on rail carriers' market power, trucks are unlikely to be direct substitutes for rail transportation in the relevant markets.[84] As the Commission concluded, this is consistent with the statute's admonition to consider the proposed consolidations impact "among rail carriers in the affected region."[85] A similar analysis in the UP-MKT proceeding should likewise conclude that intermodal competition, while present, would not effectively restrain the exercise of market power by the combined system.

V. THE PROPOSED MERGER WOULD HAVE AN ADVERSE IMPACT ON THE ADEQUACY OF TRANSPORTATION SERVICE

A criterion the Commission must consider in determining whether the proposed consolidation is in the public interest is the effect of the merger on the adequacy of transportation service to the public. The City of Parsons would suffer a reduction in rail service as a direct result of abandonments of particular lines and rerouting of traffic contemplated by the proposed consolidation.

The Applicants' Operating Plan assumes the abandonment of

83. See Comments of Texas Crushed Stone Company, supra note 61.
84. UP-MP Control, 366 I.C.C. at 504 (1982).
85. Id. See 49 U.S.C. §11344(b)(1)(E).

MKT's line to St. Louis, over which Parsons would obtain direct service to this market and access to a significant traffic gateway.[86] The closing of this route will reduce transportation options for Parsons, in terms of receipt as well as origination of traffic for transport to this market. Traffic that previously traveled through St. Louis will be rerouted through Kansas City, a more circuitous and less efficient route for access to Parsons, Kansas. Similar concerns have been raised by the City of Clinton, Missouri in comments filed in this proceeding. According to its filing, Clinton will lose all rail service, leaving at least three grain elevators without direct access to rail transportation and cutting off access to local coal sources for Kanass City Power and Light's Montrose plant. At least two grain cooperatives (Bartlett Coop and Edna Coop) will face a similar loss of rail service, if the UP Chetopa to Coffeyville, Kansas track is abandoned, as is envisioned in the Applicants' Operating Plan.[87] Withdrawal from this market through line abandonments undeniably jeopardizes the adequacy of transportation service to the public. The effect of these contemplated abandonments is further aggravated by the proposed withdrawal of BN from the Parsons area. Shippers, including Beachner Seed Company of St. Paul, Kansas, would be left without any direct rail service as a result of withdrawal by rail

86. The Applicants' Operating Plan assumes the abandonment of the MKT line from Sedalia to North Clinton, Missouri and from Parsons to Fort Scott, Kansas <u>See</u> Table 13-3.3, p. 44. The abandonment of the remaining segment of MKT's St. Louis line is categorized as a "non merger related abandonment". <u>See</u> Figure 13-3.9 of Applicants' Operating Plan.
87. <u>See</u> Table 13-3.3, p. 44.

carriers in the region.

The Commission's regulations recognize that harm to the public would result from consolidations that harm essential services.[88] Specific recognition is given to shifts in market patterns which threaten the presence of essential services. Services are considered essential by the Commission if there is sufficient public need for the service and adequate alternative transportation is not available. The abandonments proposed by the Applicants, coupled with the withdrawal of rail service by BN, would jeopardize the continuation of adequate rail service to the Parsons area - service which is essential to the area's economic stability.

The anticipated severity of these abandonments causes Parsons to join in the comments of the Kansas Corporation Commission, which urges the Commission to consider the appropriateness of proposed abandonments in a separate proceeding. Unless independently evaluated, the interests of the impacted commodity and shippers will not be adequately focused on in the midst of the overall merger proceeding. As noted by the Kansas Corporation Commission, the merger application:

> [D]eals with the system-wide effect of the merger, while abandonment proceedings are branch line specific. A merger is concerned with anticompetitiveness nature of the transaction, while an abandonment weighs the public's need for service versus the railroads' economic losses. If the abandonments are considered in the merger they may not be given the consideration the Commission normally affords abandonment applications due to the overriding merger issue.[89]

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88. 49 C.F.R. §1180.1(c)(2).
89. Initial Comments of the Kansas Corporation Commission, Finance Docket 30800 (January 29, 1987).

Another issue necessarily arises in the Commission's consideration of whether the proposed consolidation jeopardizes the adequacy of transportation service to the public - that being whether the combined effect of diversions and traffic rerouting so negatively impacts other carriers' market share as to threaten their survival. While the Commission's concern is not the continued presence of particular carriers but rather the preservation of essential services, an analysis should be made of the impact of the proposed merger on carriers, particularly those regional carriers which relied on the presence of MKT as an independent connecting carrier.[90] The critical role that MKT plays in interlining traffic, received or interchanged with other rail carriers in the north-south corridor should not be overlooked. At a time when the nation's rail system is increasingly characterized by consolidations and accumulations of market power, the needs of the public for competitive rail service and the pivotal function that regional carriers play in fulfilling that role merits close scrutiny.

VI. THE COMMISSION SHOULD CONSIDER THE RELATIONSHIP OF THIS APPLICATION TO THE SANTA FE RAILWAY AND SOUTHERN PACIFIC TRANSPORTATION COMPANY MERGER

As raised in the Parsons Comments, it is particularly difficult to assess fully the competitive impacts of the proposed UP-MKT merger when another substantial rail consolidation, affecting many of the same corridors and markets, is still

90. See 49 C.F.R. §1180.1(c)(2)(ii).

pending consideration at the Commission. The proposed Santa Fe-SP merger remains a viable possibility, given the fact that the Commission is presently entertaining a petition to reopen the proceeding and reconsider its merits. The Commission has recognized this interrelationship in noting that taken together the two consolidations "would significantly restructure the rail system in the western United States."[91] In the context of the proposed Santa Fe-SP merger, numerous agreements have been reached with competing carriers in an effort to remedy the anticompetitive effects identified by the Commission. According to the Santa Fe Southern Pacific Corporation's Supplement to its Petition to Reopen, filed with the Commission on March 5, 1987, UP would gain increased access to enable it to provide single line service in the Southern Corridor. Both UP and MKT would obtain access to Texas destinations. The result would be changed traffic flows in the region. The effect on UP and MKT current and future traffic patterns is difficult, if not impossible, to assess.

The Applicants in the instant proceeding made no assumptions with respect to the Santa Fe-SP proposed consolidation. Accordingly, the traffic studies, diversions and attendant impacts of a consolidation do not reflect the possibility of a combined Santa Fe-SP, nor does it reflect the agreements reached with UP and MKT. Moreover, as articulated by the Denver and Rio Grande Western Railroad Company, if the Santa Fe-SP merger is not reopened or is reopened and is subsequently denied, the

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91. UP-MKT Control, Finance Docket No. 30800, Decision No. 8.

divestiture of rail properties will affect the competitive rail network as it presently exists, with uncertain effects on traffic flows and involved carriers.

This uncertainty is further exacerbated by the impact of UP's proposed acquisition of Overnite Transportation Company ("Overnite") on the rail and intermodal transportation market. The Commission has determined this acquisition to be of "regional and national significance and represents a major market extension by UPC".[92] The MKT presently has TOFC facilities in the Parsons Yard, which will be retained by UP. The abandonments and traffic diversions that are likely to occur in a UP-MKT consolidation, would force Parsons' area shippers to rely on trucking and intermodal services. It is certainly possible that competition would be even further reduced in the intermodal transportation market as a result of UP's acquisition of Overnite. This issue needs to be developed in the instant proceeding, so as to enable participants to assess the full and combined impacts of these transactions.

VII. CONCLUSION

At the core of all the foregoing detailed analysis lies one single and compelling fact: the proposed UP-MKT merger is not in the public interest. This consolidation totally fails to meet the public interest test for a number of reasons that are troublesome standing alone, but when viewed in combination, yield

92. UPC and BTMC Corp. - Control - Overnite, Finance Docket No. 31000, Notice of Intent.

an overwhelming case for why the Application should not be approved.

- The impact of the merger on the City of Parsons would be disastrous, causing permanent damage to the socioeconomic health of the community.

- The proposed merger is contrary to the interest of rail employees. It would cut a wide swath through the UP-MKT work force, displacing over 1,000 employees and offering no countervailing benefits or job security.

- The consolidation would have a severe anticompetitive impact in the markets where UP and MKT now compete. For a substantial volume of traffic, the combined carrier would have the ability to exercise significant market power, and in many cases rail-to-rail competition would be eliminated in markets where the carriers now compete.

- The consolidation would result in "vertical foreclosure" at gateways served by competing carriers. The merger would eliminate MKT as an independent connection for competing rail carriers in the region, causing a direct loss of competition and a diversion of traffic away from those other carriers.

- The merger would unravel the competitive fix fashioned by the Commission in UP-MP Control, where the pivotal role of MKT as an independent competitor in the Midwest was both recognized and protected.

- The merger would have an adverse impact on the adequacy of transportation service, particularly in the Parsons area due to the abandonment of particular lines and the rerouting of traffic.

- Any benefits that would be produced by the merger are clearly outweighed by adverse competitive and economic effects. Moreover, those minimal benefits could be achieved in a less anticompetitive fashion through an alternative acquisition of MKT or through increased access for an independent MKT.

Accordingly, the City of Parsons submits that the proposed UP-MKT merger does not meet the public interest standard set forth in section 11344 of title 49, U.S. Code, and urges that the Application be denied.

Should the Commission approve the proposed merger despite these obvious and overwhelming shortcomings, the City of Parsons requests that the Commission impose the protective conditions set forth on page 2 of this document.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Responsive Application has been served this 17th day of March 1987, by first class mail, postage prepaid, on the following:

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STATE OF KANSAS

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
MEMBER: AGRICULTURE AND SMALL BUSINESS
ENERGY AND NATURAL RESOURCES
TRANSPORTATION

March 25, 1987

House Resolution No. 6028

Testimony before House Transportation Committee

Chairman Crowell and fellow members of the committee. House Resolution No. 6028 is a resolution opposing the merger of the Union Pacific Railroad and the M.K.T. Railroad.

I strongly oppose the merger because of the adverse effect it will have on the economy of Kansas, especially that area of Southeast Kansas where unemployment is already highest in the state.

This merger will not have a positive effect anywhere in Kansas. Other means of keeping M.K.T. lines operating are being explored and I feel they may prove to be more beneficial to everyone.

There are others here who will testify in more detail, but I will be glad to try to answer any question.

Jack

Attach. 7

Brotherhood of Locomotive Engineers

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STATEMENT OF THE
BROTHERHOOD OF LOCOMOTIVE ENGINEERS

PRESENTATED TO THE HOUSE COMMITTEE
ON TRANSPORTATION

THE HONORABLE REX CROWELL, CHAIRMAN

STATEHOUSE
TOPEKA, KANSAS
MARCH 24, 1987

Mr. Chairman and Members of the Committee, I am Leroy Jones, Chairman of the Kansas Legislative Board for the Brotherhood of Locomotive Engineers. I am here today to testify in favor of House Resolution 6028.

I would like to thank Representative Brady and Representative Lacey for introducing this resolution which openly expresses the negative aspects of the proposed merger of the Union Pacific Railroad and the MKT Railroad. I would like to thank Senator Johnston for introducing Senate Resolution 1825 on the Senate side opposing this merger.

I can see no positive aspects of this merger for the citizens of Kansas. In Kansas we are trying to do everything possible to create jobs and attract new businesses. If allowed, this merger will do just the opposite. In the city of Parsons alone there

Attach. 8

will be a loss of approximately 350 high paying jobs. The loss of close to $10 million in payroll and the increase of 2% unemployment in Labette County is not what we are trying to achieve in Kansas.

Recently, Governor Mike Hayden and the Kansas Department of Transportation have filed a formal statement with the Interstate Commerce Commission opposing this merger. In a statement announcing the filing with the ICC, Governor Hayden said," The hardship that would be inflicted upon the Parsons community and surrounding area outweighs any potential benefits to the applicants and the public."

Mergers usually are not meant to help anyone except the stockholders and the corporate officers. In this instance, the Union Pacific will eliminate a competitor in this region, which will eventually prove to make profits for the corporation.

You will probably hear from the Union Pacific of all the shippers on the Katy route that supports this merger. They support it because the Union Pacific has told them of better shipping rates, if the railroads are allowed to merge. This reminds me about the testimony during the "Caboose Bill" hearings a couple of years ago in this committee. Most all of the farm organizations testified before this committee that they were told by the railroads that if the cabooses were taken off the end of the trains, they would have cheaper shipping rates for their grain, thus making farmers more profits. Members of the committee, I have yet to see the farmers getting their promise.

In the best interest of our state, I urge you to pass House Resolution 6028. Thank you for allowing me this opportunity to testify before your committee.

R. E. (RON) CALBERT
DIRECTOR/CHAIRMAN

united transportation union

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KANSAS STATE LEGISLATIVE BOARD

Statement Re: House Resolution No. 6028

Presented to: House Transportation Committee

March 25, 1987

Mr. Chairman and members of the Committee, I am Ron Calbert, Director/Chairman, Kansas State Legislative Board, **United Transportation Union.**

I appear today in support of House Resolution No. 6028, which speaks to the adverse effect the Union Pacific and Missouri-Kansas-Texas merger will have on the City of Parsons, Kansas.

We are not here today debating whether the merger is good for Kansas or not, but here today supporting the fact of the loss of jobs to the City of Parsons, Kansas as stated in House Resolution No. 6028. H.R. 6028 is a good Resolution and should be adopted by the Kansas House.

As Director of the Kansas State Legislative Board of the **United Transportation Union**, I am advised of all proceedings to this merger and other railroad mergers that have occurred in Kansas. The Union Pacific and Missouri-Kansas-Texas merger hasn't the support of:

Governor Mike Hayden

Kansas Corporation Commission

Kansas Department of Transportation

Burlington Northern Railroad

Austin Northwestern Railroad

Soo Line Railroad

City of Parsons

City of Irving, Texas

Attach. 9

Some of the argument is that the Interstate Commerce Commission should pursue with the final decision of the Santa Fe - Southern Pacific merger before considering a merger between the Union Pacific and Missouri-Kansas-Texas Railroads.

The Kansas State Legislative Board, **United Transportation Union** strongly supports this Resolution because of the adverse effect the merger would have on Parsons, Kansas.

Thank you, Mr. Chairman, for furnishing me the opportunity to appear before your Committee and express the concerns of the Kansans I represent.

BEFORE THE TRANSPORTATION COMMITTEE

KANSAS HOUSE OF REPRESENTATIVES

1987 SESSION, KANSAS LEGISLATURE

Written Testimony

of

J. Stan Sexton, Counsel for

Oklahoma, Kansas and Texas Rail Users Association

Date March 25, 1987

Prepared by

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Attach. 10

WRITTEN TESTIMONY

OF

J. STAN SEXTON

ON BEHALF OF

OKLAHOMA, KANSAS AND TEXAS RAIL USERS ASSOCIATION

My names is J. Stan Sexton. I am a partner in the Salina, Kansas, law firm of Hampton, Royce, Engleman & Nelson, with offices located on the Ninth Floor of the United Building in Salina, Kansas 67401. Since 1981, the firm of Hampton, Royce, Engleman & Nelson has been general counsel for the Oklahoma, Kansas and Texas Rail Users Association.

I am testifying before the Transportation Committee of the Kansas House of Representatives today in my representative capacity as counsel for the Oklahoma, Kansas and Texas Rail Users Association ("Association"). The Association President, James K. Smith, who had been scheduled to testify is unable to do so because of medical problems. At Mr. Smith's request, and with the concurrence of your committee chairman, I have been permitted to testify on behalf of the Association.

The Association is a non-stock non-profit Kansas corporation comprised of members of the public at large, shippers, agricultural cooperatives, chambers of commerce, banks and other interested parties located in communities along the line of railroad from Salina, Kansas south through Fort Worth-Dallas, Texas.

The Association was formed in May, 1980 and formally incorporated on June 2, 1980 for the specific and express purpose of restoring and providing for the continuation of rail freight service along this former Rock Island railroad line. While the Association has 52 formal members, because many of its members are rail user groups, chambers of commerce and cooperatives, the Association and its members actually represent the interests of approximately 400 rail users located on this old Rock Island line, which we now refer to as the OKT line, which runs from Salina, Kansas, to Fort Worth, Texas.

I am attaching to this written testimony, the text of written testimony delivered by Mr. Smith on March 2, 1987 to the Transportation Committee of the Kansas Senate. In my oral remarks, I intend to establish the same points made by Mr. Smith in his testimony before the Senate. Specifically, you should be informed that the Association is a proponent of the merger after studying this issue for in excess of one year. It is entirely possible, if not probable, that rail freight service on the OKT line from Salina, Kansas, to Fort Worth, Texas, could be jeopardized by a future bankruptcy of the MKT/OKT system if the proposed merger is not approved. Moreover, the Kansas Legislature, as well as the Governor and Department of Transportation, should look at the long-term impact of this merger, whether it is approved or disproved, on all of the citizens of the State of

Kansas, and not just measure the impact on one region, county or community.

On behalf of Mr. Smith and the Oklahoma, Kansas and Texas Rail Users Association, I would like to thank the Committee for the opportunity to address you and to present testimony in opposition to the pending resolution. I would be happy to answer any questions that you may have, either now or at a later date should questions occur to you.

DATED March 25, 1987.

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BEFORE THE TRANSPORTATION COMMITTEE

KANSAS SENATE

1987 SESSION, KANSAS LEGISLATURE

Written Testimony

of

James K. Smith, President

Oklahoma, Kansas and Texas Rail Users Association

Date March 2, 1987

Prepared by

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WRITTEN TESTIMONY

OF

JAMES K. SMITH, PRESIDENT

ON BEHALF OF

OKLAHOMA, KANSAS AND TEXAS RAIL USERS ASSOCIATION

My name is James K. Smith. I am President and Chairman of the Board of Directors of the First National Bank of Herington, Kansas with offices located at 191 South Broadway, Herington, Kansas 67449.

I am testifying before the Transportation Committee of the Kansas Senate today in my representative capacity as President of the Oklahoma, Kansas and Texas Rail Users Association ("Association"). The Association is a non-stock non-profit Kansas corporation comprised of members of the public at large, shippers, agricultural cooperatives, chambers of commerce, banks and other interested parties located in communities located along the line of railroad from Salina, Kansas south through Fort Worth-Dallas, Texas.

The Association was formed in May, 1980 and formally incorporated on June 2, 1980 for the specific and express purpose of restoring and providing for the continuation of rail freight service along this former Rock Island railroad line. While the Association has 52 formal members, because many of its members are rail user groups, chambers of commerce and cooperatives, the Association and its members actually represent the interests of approximately 400 rail users located on this old Rock Island line.

IDENTITY OF INTEREST

In addition to representing the interests of substantially all of the rail users located on the old Rock Island line, the Association is also the record title owner of the rail line itself located in the states of Kansas and Texas. On October 21, 1982, the Association, in cooperation with the state of Oklahoma, purchased all of the former Rock Island line located in the states of Kansas and Texas from Salina to Dallas-Fort Worth, Texas. The state of Oklahoma purchased the rail trackage in the state of Oklahoma. Both the Association and the State of Oklahoma in turn conditionally sold or leased this rail line to the Missouri-Kansas-Texas Railroad Company's ("MKT") subsidiary corporation, the Oklahoma, Kansas & Texas Railroad Company ("OKT").

Since the fall of 1982, rail freight service has been continuously provided on this OKT line by the OKT and MKT system. The Association therefore has a direct and immediate stake in the merger of the MKT/OKT system into the Union Pacific system. As owner of some 300 miles of rail line located in the states of Kansas and Texas, which the Association acquired with a $25 million dollar loan from the Federal Railroad Administration, the Association desires to have a financially strong and viable rail carrier as its contract operator, to provide for the continuation of rail freight service on the rail system and to make payments necessary to retire the Association's acquisition indebtedness. As a representative of the interests of shippers located along the line, the Association also has an interest in maintaining rail freight service on the line for the benefit of its members, and the public at large, who are heavily dependent upon rail transportation for their economic viability.

POSITION REGARDING PROPOSED MERGER

The Association, after more than one year of study and deliberation, and upon the unanimous vote of both its membership and its Board of Directors, has taken a position in support of the merger of the MKT/OKT system into the Union Pacific system. The Association is one of 380 shippers and shipper groups whose verified statements in support of the merger application are included in the merger application itself. For the sake of completeness, I am appending a copy of the Verified Statement given by the Association in support of the merger to the Interstate Commerce Commission to this testimony.

The Association's support for the merger application is based upon the judgment of its management and membership that the merger will insure the continuation of rail freight service on the OKT line well into the future, as well as their determination that the benefits of the merger outweigh any detriments.

DISCUSSION

I urge the Committee not to favorably report the resolution in opposition to the merger for two reasons. First, I truly believe that the benefits of the merger far outweigh the detriments or adverse impact that the merger will have to the state, as a whole. Secondly, I truly believe that the legislature is ill-equipped, at least at this time, to deal with such an issue as complex as this merger, and that any action taken at this time would be premature and without sufficient study.

Let me first direct my comments to the merits of the merger. By way of background on this issue, let me remind you that my community, Herington, Kansas, has had first hand experience in dealing with the adverse impact that a total cessation of rail freight service can have, not only upon the local economy, but upon shippers who are dependent upon rail freight service for their livelihood. Herington had always been a division point of the Chicago, Pacific & Rock Island Railroad Company ("Rock Island"). Prior to the last in a series of bankruptcies of the Rock Island in 1977, Herington occupied much the same position in the Rock Island system, as the City of Parsons has had in the MKT/OKT system. Approximately 350 persons in Herington, a community of 2500, were employed by the Rock Island. Moreover, there were many trains per day running both and east and west and north and south through Herington.

In 1980, after 3 unsuccessful years of attempting to reorganize itself in bankruptcy, the Rock Island ceased providing rail freight service on its rail lines and specifically, on what we now call the OKT line. Both rail freight service and associated jobs were non-existent for approximately one year. Through the efforts of the Association, which was formed when rail freight service was discontinued, we were able to restore some rail transportation service, and associated jobs, at least on a temporary basis for approximately one year during 1981. However, because of legal maneuvering on the Rock Island bankruptcy and other reasons, rail freight service was again totally eliminated for a 10 month period between December, 1981 and October, 1982. It was not until the Association acquired this Rock Island line, that jobs and rail freight service could be restored.

The greatest single benefit of the proposed merger, from my prospective, is that this merger will insure, that in the future, another bankruptcy, with a concomitant loss of rail transportation service and jobs, can be avoided. The Union Pacific system is a financially strong and viable rail carrier. There is substantial question about the MKT's ability to survive as a small regional carrier in the current deregulated rail environment. The MKT/OKT system is indebted to the Rail Users Association for $25 million dollars, the original acquisition loan. The ability of the MKT/OKT to retire this indebtedness is not without some question, especially in light of past operating losses on the rail line and the lack of any significant market turnaround given the state of the agricultural economy in the mid-west.

While I have empathy for the City of Parsons in light of the projected impact that the merger will have on that community, I have seen, first hand, what happens when a rail carrier ceases operations altogether due to bankruptcy. The impact of a total loss of jobs and a total loss of rail freight service is a total degree of magnitude greater than the impact that Parsons will face with the proposed merger. It is entirely possible, and in fact argued by many quite likely, that the MKT/OKT system can not survive in the future without this merger. If that is true, the City of Parsons, together with all other Kansas MKT/OKT communities and shippers face a rather dismal future, if the merger is disapproved. Therefore, I suggest that on the merits, this merger is truly in the best interests of all Kansans, and that the alternative to this merger may well be a future bankruptcy of the MKT/OKT system, and total loss of not only jobs, but rail transportation service itself.

Secondly, I would like to direct the balance of my remarks to make a second point; namely, that at least at this time, the legislature is ill-equipped to make the type of decision that is implicit in the resolution. Given the press of other business before the legislature, and the numerous factors and considerations that must be analyzed in the proposed merger, I submit that the Kansas legislature should defer a decision on the merits of the merger, pending further development of an evidentiary record before the Interstate Commerce Commission.

As a beginning proposition, you should understand that the merger application process before the Interstate Commerce Commission can last as long as 31 months from the date the merger application was accepted in December, 1986. All interested parties are permitted the opportunity to participate in the merger proceeding and to present evidence either in favor or against the proposed merger. Indeed, the City of Parsons, Kansas, which is advocating the present resolution, is a participant in the merger proceeding and is represented by counsel therein. The Commission is bound to take into consideration the impact and effect of the merger upon local economies and the extent to which the public interest would be affected by the merger. The Commission is tasked with the primary responsibility for making such determinations and that process has just begun.

In addition, action by the legislature could well pre-empt the position taken and to be taken in this merger proceeding by the state of Kansas. Indeed, the state of Kansas, as represented by its Secretary of Transportation, has filed initial comments in the merger proceeding in which the state has taken an undetermined position on the merger application "while reserving the right to amend its position at a later time to support or oppose the applications, and to offer verified statements in support or opposition to these applications and any other issues that may be raised in these proceedings." In his filing, the Secretary of

Transportation has noted that the Commission must give consideration to the MKT's present and future financial condition. The Secretary has noted that the state of Kansas has experienced bankruptcy and liquidation of the Rock Island Railroad and that the public interest would not be served by taking an action that would permit the MKT to meet a similar fate. Moreover, the Secretary has also noted that approximately 271 job positions at Parsons, Kansas would be eliminated as a result of the merger. However, the Secretary has noted that the Commission should also look at the broader public interest "to determine whether the adverse impact at Parsons, Kansas would be offset by any long term benefits to communities, or by other public benefits of the proposed merger." (KANS-1 at 5).

Indeed, the other three states in which UP/MKT trackage is located have likewise taken undetermined positions, pending the development of the evidentiary record in this case. The Missouri Highway and Transportation Commission has expressed no opposition to the merger, but seeks to separately consider the proposed merger-related abandonment of 37.7 miles of MKT line between Sedalia, Missouri and North Clinton, Missouri. The State of Oklahoma Transportation and Oklahoma Corporation Commission has taken an undetermined position at this time but has noted that the "State may be inclined to support the control and other authority requested by Applicants subject to the development of a record which is sufficient to assure the State that the benefits of the proposed control outweigh any negative impacts." (OKLA-1 at 1). The state of Oklahoma owns 350.9 miles of the rail line that is subject to the control application; has the largest merger-related line abandonment proposed by the UP/MKT, a distance of 169.4 miles of former Missouri Pacific mainline track between Muskogee and Durant, Oklahoma; and also stands to suffer job impacts of $37.5 million dollars in eliminated wages affecting 1,158 positions. These immediate and tangible detriments notwithstanding, the state of Oklahoma indicates that on balance, the public benefit may well be served by the merger, if the evidentiary record developed during the proceeding demonstrates long term viability and maintenance of rail freight service.

Finally, the Railroad Commission of Texas has taken an undetermined position, pending development of an evidentiary record regarding any adverse impact upon local Texas communities such as Dennison, Waco and Garland.

I submit that our new Governor, Mike Hayden, together with his new Secretary of Transportation, Horace B. Edwards, who only took office one month ago, on February 2, 1987, must not have their hands tied in developing the state of Kansas' eventual position on this merger proceeding. Indeed, it could well be that the state may eventually support the merger application itself, but move to sever for separate consideration or independently object to merger-related abandonments in the state of Kansas. The Kansas Corporation Commission, by separate filing in the merger proceeding, has already indicated its intent to oppose merger-related abandonments, while taking an undetermined position on the control application itself.

CONCLUSION

I want to thank the Committee for the opportunity to address you and to present testimony in opposition to the pending resolution. I would like to reiterate both points that I have sought to make clear in my testimony. First, I believe that the merger application, taken as a whole, is in the public interest for the general shipping public, for the state of Kansas, and indeed, for the 400 members of the Oklahoma, Kansas and Texas Rail Users Association who have voted unanimously to support the merger. The driving consideration for me is the very real and substantial possibility that the MKT/OKT system cannot survive in this deregulated rail environment and that ultimately, in the absence of this merger, we may be facing another bankruptcy situation like we faced when the Rock Island filed for bankruptcy. In that kind of scenario, we will have not only a total loss of jobs and employment, but a cessation of rail freight service. I have had first hand experience with this type of situation in Herington, Kansas. I recognize that the loss of some jobs and transfer of others in southeast Kansas may be a bitter pill to swallow. However, I submit that this impact is much more palatable than a total loss of jobs and cessation of rail freight service should the merger be denied and should the MKT/OKT system declare bankruptcy in the near future.

Secondly, I submit that the legislature is ill-equipped to properly consider and take action on this resolution at this time. The state of Kansas, acting through the Secretary of Transportation and the Kansas Corporation Commission, are better equipped to evaluate the impacts of rail mergers upon the citizens of the state. Within the last 8 years, these agencies have developed positions for the state in the Union Pacific-Missouri Pacific and Santa Fe-Southern Pacific merger cases. The positions taken by the state in these applications were based upon detailed study and analysis on the impact of the merger on the state as a whole, not simply isolated impacts on one or two communities or a specific geographical region. The legislature should not take any action that would tie the hands of the Governor and entire executive branch of state government in developing a position in this merger case that is in the best interests of all of the people of the state of Kansas. Given the fact that the Kansas executive branch is just now developing and analyzing its position on this merger case, and in further recognition that these state agencies, and not the legislature have expertise in this area, the current push to commit to a position in opposition to the merger is at best premature, and at worst not in the best interests of all Kansans.

Mr. Chairman, I again thank you for the opportunity to testify.

James K. Smith, President
Oklahoma, Kansas and Texas Rail
Users Association