

FINANCE DOCKET NO. 32549

BURLINGTON NORTHERN INC. AND
 BURLINGTON NORTHERN RAILROAD COMPANY
 --CONTROL AND MERGER--
 SANTA FE PACIFIC CORPORATION AND
 THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

Decision No. 48¹

 Decided December 19, 1996

The Board imposed a condition to the BN/Santa Fe control and merger transaction approved in *Decision No. 38* and denied the request for clarification.

BY THE BOARD:²

In *Burlington Northern et al. -- Merger -- Santa Fe Pacific et al. (Decision No. 38)*, 10 I.C.C.2d 661 (1995), the ICC approved the common control and merger of the Burlington Northern Railroad Company (BN) and The Atchison, Topeka and Santa Fe Railway Company (Santa Fe),³ subject to certain

¹ This decision embraces: Finance Docket No. 32549 (Sub No. 15), *Grainbelt Corporation--Trackage Rights Over Burlington Northern Railroad Company Between Snyder, OK, and Ouanah, TX*.

² Proceedings before the Interstate Commerce Commission (ICC) that remained pending on January 1, 1996, must be decided under the law in effect prior to that date if they involve functions retained by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. This proceeding was pending with the ICC prior to January 1, 1996, and relates to functions retained under Surface Transportation Board (Board) jurisdiction pursuant to new 49 U.S.C. 11323-27. Citations are to the former sections of the statute, unless otherwise indicated.

³ BN and Santa Fe, together with their holding company parents Burlington Northern Inc. (BNI) and Santa Fe Pacific Corporation (SFP), respectively, are referred to collectively as applicants. See *Decision No. 38*, 10 I.C.C.2d at 665. Applicants indicate that, on September 22, 1995, they consummated the BN/Santa Fe control transaction using the alternative merger structure approved in *Decision No. 38*. Pursuant to that structure, BNI and SFP have become direct or indirect wholly owned subsidiaries of Burlington Northern Santa Fe Corporation (formerly known (continued...))

conditions, including those respecting Grainbelt Corporation (GNBC), Phillips Petroleum Company (PPC), and Oklahoma Gas and Electric Company (OG&E).

Grainbelt Corporation. In *Decision No. 38*, 10 I.C.C.2d at 776-777, the ICC imposed two GNBC conditions:⁴ (1) requiring BN to adhere to certain representations it had made that BN/Santa Fe common control would not give the so-called "blocking provision" an expanded scope; and (2) requiring that GNBC be allowed to interchange at Quanah, TX, with SP.⁵

In *Decision No. 40* (served September 21, 1995), the ICC directed that, except insofar as GNBC and BN mutually agreed otherwise, GNBC and BN were to enter into, no later than the BN/Santa Fe common control consummation date, the agreement referred to as Amendment No. 1 to the 1987 GNBC/BN Purchase and Sale Agreement, as set forth in Appendix A to *Decision No. 40*. The ICC further directed that GNBC and BN were to continue negotiations respecting the second GNBC condition (interchange with SP at Quanah). *Decision No. 40*, slip op. at 11.

On March 13, 1996, GNBC and applicants filed a Joint Notice of submission of a trackage rights amendment agreement between BN and GNBC. This agreement, GNBC and applicants indicate, implements the terms and conditions relative to the second GNBC condition. The agreement itself, stamped "HIGHLY CONFIDENTIAL" and referred to as Amendment Agreement No. 1 to the August 20, 1987 Trackage Rights Agreement between BN and GNBC, is attached to the Joint Notice.

GNBC and applicants indicate that, with Amendment No. 1 to the 1987 GNBC/BN Purchase and Sale Agreement (set forth in Appendix A to *Decision No. 40*) and Amendment Agreement No. I to the August 20, 1987 GNBC/BN Trackage Rights Agreement (attached to the Joint Notice), both of the GNBC

³(...continued)
as BNSF Corporation), while BN and Santa Fe remain controlled by BNI and SFP, respectively. See, BN/SF-55 at 1.

⁴ In *Decision No. 43* (served November 27, 1995), the ICC denied reconsideration petitions filed by a GNBC affiliate and the Oklahoma Department of Transportation.

⁵ Southern Pacific Transportation Company (SPT), The Denver and Rio Grande Western Railroad Company (DRGW), St. Louis Southwestern Railway Company (SSW), and SPCSL Corp. (SPCSL) are referred to collectively as SP.

conditions imposed in *Decision No. 38* have now been fully implemented. Joint Notice at 2-3.

We have, at this juncture, no reason to take any action with respect to either of the two GNBC conditions. Neither applicants nor GNBC nor any other party has asked us to take any action, and there is, given the context, no basis for taking any action on our own initiative.

Phillips Petroleum Company. In *Decision No. 38*, 10 I.C.C.2d at 781, the ICC imposed a condition to maintain PPC's competitive posture at its-Borger, TX, facility vis-à-vis a prospective build-out that would connect the Borger-Panhandle, TX, line of the Panhandle Northern Railroad (PNR, a Santa Fe spinoff) with the Amarillo, TX, lines of the BN. The condition requires that SP, which will be operating via trackage rights on the BN lines through Amarillo, be allowed access, via these trackage rights, to any new connection between the BN lines at or near Amarillo and the PNR line between Borger and Panhandle, provided only that such new connection is constructed by some entity other than BN/Santa Fe. *See also*, *Decision No. 42* (served November 16, 1995) (denying PPC's request for clarification or reopening).

On April 2, 1996, PPC submitted a pleading styled "Final Agreement Of Negotiated Settlement For The Implementation Of Merger Conditions." Attached to the pleading as Attachment A is an "Interconnection Agreement" dated March 18, 1996, by and between BN, Santa Fe, SPT, SSW, DRGW, SPCSL, and PPC. The Interconnection Agreement authorizes the construction, by a financially responsible entity to be designated by PPC, of a new rail connection "between the lines of BNSF and the PNR responsive to the aforesaid condition imposed by the ICC." Interconnection Agreement at 2. PPC asks that we adopt the Interconnection Agreement as the vehicle for implementation of the PPC condition imposed in *Decision No. 38*. Final Agreement at 2.

The Interconnection Agreement is the "negotiated settlement respecting the precise details of the" PPC condition imposed by the ICC. *Decision No. 38*, 10 I.C.C.2d at 781. Because PPC can be relied upon as the guardian of its own interests, we think it reasonable to assume that the Interconnection Agreement is an appropriate refinement of the ICC's PPC condition. Because PPC has requested that we adopt the Interconnection Agreement, and because no party has opposed that request, we will impose the Interconnection Agreement as a condition.

Oklahoma Gas and Electric Company. In *Decision No. 38*, 10 I.C.C.2d at 744, the ICC imposed a condition to maintain OG&E's competitive posture at its Santa Fe-served Sooner Station (at Red Rock, OK) vis-à-vis a prospective build-out that would permit OG&E to reach a BN line approximately 13 miles to the south at Morrison, OK. The condition requires applicants to grant trackage rights to SP, UP,⁶ or KCS⁷ (the grantee to be chosen by OG&E) over the BN line to a convenient-point of connection with the prospective build-out line.

On February 12, 1996, OG&E submitted a pleading (OGE-20) that contains both the agreed-upon terms respecting the OG&E condition and a request for clarification. See also, BN/SF-57, filed March 4, 1996 (applicants' reply to the clarification request), and OG&E's letter to the Director of the Office of Proceedings, dated September 23, 1996 (urging prompt action on the clarification request).⁸

Agreed-Upon Terms. Attached to OGE-20 is an Agreement granting to UP (the trackage rights carrier chosen by OG&E) trackage rights over certain BN track under the terms and conditions set forth therein. The Agreement recites that "BN, OG&E, and UP have mutually determined that the grant of trackage rights to UP over the [Joint Trackage], under the terms and conditions agreed to by the parties, is sufficient to preserve the competitive status quo at Sooner in accordance with Decision No. 38." Agreement at 2.⁹

We have, at this juncture, no reason to take any action with respect to the Agreement. Neither OG&E, nor BN, nor UP, nor any other party, has asked us to take any action, and there is, given the context, no basis for taking any action on our own initiative.

⁶ UP is the collective acronym for Union Pacific Railroad Company and Missouri Pacific Railroad Company.

⁷ KCS is the acronym for the Kansas City Southern Railway Company.

⁸ The entire OGE-20 pleading has been stamped "CONFIDENTIAL." This wholesale resort to the protective order heretofore adopted in this proceeding not only makes our discussion of the matters at hand more difficult, but also is, in large part, unnecessary, because a great deal of the OGE-20 pleading concerns matters that are neither proprietary nor commercially sensitive, and that hardly require treatment as confidential. See, e.g., OGE-20 at 5-6 (excerpt from the transcript of the ICC's public voting conference held July 20, 1995). We will therefore follow the ICC's practice of disregarding the seal insofar as necessary for the conduct of the agency's business. See Decision No. 37 (served July 11, 1995), slip op. at 2 ("If the Commission needs to refer to confidential information at the voting conference or in its final decision in this proceeding to explain rationally its decision, the Commission will do so to the extent necessary.")

⁹ The Agreement is a *draft* of the agreement which is to be executed by UP and BN. See, OGE-20 at 2 & n.2.

Request for Clarification. OG&E requests that we clarify the extent to which the ICC retained jurisdiction over the implementation of the OG&E condition. OG&B argues, in essence, that, because the OG&E condition is intended to be effective into the indefinite future, the ICC must have intended to retain jurisdiction vis-à-vis that condition for as long as is necessary to ensure that the condition effectively preserves the pre-merger competitive status quo at Sooner Station.

OG&E contends that the record in this proceeding is "somewhat ambiguous." on the extent of the oversight jurisdiction the ICC intended to retain over the implementation of the OG&E condition. OG&E cites, in this regard: (1) remarks made by Members of the ICC at the oral argument held July 19, 1995, and at the voting conference held July 20, 1995; (2) remarks made by staff attorneys at the voting conference held July 20, 1995; and (3) remarks in the separate expression of a Member of the ICC in *Decision No. 38* (separate expression of Commissioner Simmons, *Decision No. 38*, 10 I.C.C.2d at 798: the ICC has "continuing oversight of this merger" and "continuing jurisdiction in this case").

The remarks cited by OG&E are simply not controlling. The remarks of the Members at the oral argument and the voting conference are not the "decision" of the agency; the "decision" of the agency is the written decision. The remarks of the staff attorneys at the voting conference are the personal opinions of the staff attorneys. Likewise, Commissioner Simmons' remarks in his separate expression reflect his individual rationale for joining with the other Members of the ICC in voting to approve the written decision.

Nothing in the text of *Decision No. 38* indicates that the majority of the ICC intended to retain more than the usual level of authority to assure that the OG&E condition is carried out. Because the ICC imposed a specific condition concerning OG&E, it is unnecessary for us to render an opinion about the reach of our general authority to reopen mergers under old 49 U.S.C. 11351 and now 49 U.S.C. 11327.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The Interconnection Agreement attached to the PPC pleading filed April 2, 1996, is hereby imposed as a condition to the BN/Santa Fe control and merger transaction approved in *Decision No. 38*.
2. The request for clarification embraced in the OGE-20 pleading is denied.
3. This decision shall be effective on December 30, 1996.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.