FD- 30400

This decision will be printed in the bound volumes of the I.C.C.2d series at a later date.

EC

3392

INTERSTATE COMMERCE COMMISSION

SERVICE DATE
AUG 4 1987

Finance Docket No. 30400[1]/

SANTA FE SOUTHERN PACIFIC CORPORATION -- CONTROL -- SOUTHERN PACIFIC TRANSPORTATION COMPANY

Decided: July 30, 1987

Petition to reopen proceeding denied. Divestiture process discussed. Trustee's responsibilities under divestiture discussed.

Appearances as shown in prior decision, and in addition Betty Jo Christian and Douglas J. Babb, for the Burlington Northern Railroad Company.

DECISION NO. 32

BY THE COMMISSION:

By decision served October 10, 1986, the Commission denied the application for proposed consolidation of the Santa Fe Southern Pacific Corporation (SFSP), parent of The Atchison, Topeka and Santa Fe Railway Company (ATSF), and the Southern Pacific Transportation Company (SPT). Santa Fe Southern Pacific Corp. - Con. - Southern Pacific Transp. Co., 2 I.C.C.2d 709 (1986) initial decision. Applicants asked us to reopen the proceeding because of changed circumstances resulting in new evidence concerning competitive impact, public benefits, and the financial condition of the railroad that would justify the proposed merger. We decline to reopen this proceeding.[2]/

BACKGROUND

The scope and history of this case are well known and will be repeated here only to the extent necessary for a proper understanding of the issues. The primary applications seek authority for SFSP to control SPT and certain SPT subsidiaries,[3]/ with a view to the ultimate merger of these

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1/ Embraces also the subnumbered proceedings indicated in Santa Fe Southern Pacific Corp. - Con. - Southern Pacific Transp. Co., 2 I.C.C.2d 709, n. 1 and n. 4.

2/ This decision reflects the vote taken at the June 30, 1987 open conference.

3/ On March 22, 1984, SFSP filed an application pursuant to 49 U.S.C. 11343 for authority to control SPT and its transportation subsidiaries. SFSP currently controls Santa Fe Industries (SFI), which owns and controls ATSF, Santa Fe Trail Transportation Company (a motor carrier), and other rail and non-rail companies. SFSP also controls the Southern Pacific Company (SPCo), which controls SPT and other companies. SPT controls, through ownership of 99.8 percent of its stock, the St. Louis Southwestern Railway Company (SSW), owns or controls three motor carriers, and controls or has an interest in other rail carriers. Authority is also sought to merge ATSF and SPT into a newly-formed corporation, the Southern Pacific and Santa Fe Railway Company (SPSF Railway), a wholly-owned subsidiary of SFSP. Also filed on March 22, 1984, was a related motor carrier application, MC-F-15628, Santa Fe Southern Pacific Corporation - Pacific Motor Trucking Company, Pacific Motor Transport Company and Louis Keller Incorporated.

companies with ATSF. The new carrier would be named the Southern Pacific and Santa Fe Railway Company (SPSF Railway). SPT stock and assets have been held in a Commission-approved voting trust.[4] SPT's former parent, SPCo and SFI were previously merged to form SFSP. The non-rail merged entities and assets are not involved in these proceedings.

Responsive applications seeking various conditions were filed by several protesting railroads. These carriers are: Denver & Rio Grande Western Railroad Company (DRGW), Kansas City Southern Railroad Company (KCS), Missouri-Kansas-Texas Railroad Company (MKT), Texas-Mexican Railroad Company (TM), and Union Pacific Railroad Company-Missouri Pacific Railroad Company (UP/MP). Burlington Northern Railroad Company (BN) did not oppose the original merger plan but reserved its right to oppose the transaction if it were materially modified to accommodate opposing parties. The United States Department of Justice (DOJ) opposed the merger, while the United States Department of Transportation (DOT) supported it. Other State and Federal agencies, labor organizations, shippers, and other railroads also participated in the proceedings.

In an open conference held on July 24, 1986, the Commission voted to deny the merger, because the transaction's anticompetitive effects outweighed its potential public benefits. The Commission also voted to require applicants to submit a plan of divestiture.

On September 6, 1986, subsequent to the conference but prior to the issuance of the written decision, applicants requested that we: (1) reopen the proceeding for the purpose of considering new evidence and; (2) defer issuance of a written decision implementing the vote at the July 24 conference until the new evidence had been received and considered. In Decision No. 26, (not printed), served October 9, 1986, the Commission denied the petition to the extent it requested a deferral of the issuance of a decision. However, it held in abeyance the request to reopen, noting that applicants were attempting to negotiate voluntary agreements to resolve the anticompetitive aspects of the merger. The Commission indicated that it would be receptive to reopening the proceedings to consider changed circumstances materially affecting our decision in initial decision. Finally, the Commission suspended the requirement that applicants submit a divestiture plan until a final ruling was made on the petition to reopen.[5]

On October 10, 1986, the Commission issued its written decision denying the application and embraced proceedings. It recognized the substantial public benefits the merger would produce through reduced transportation costs and improved service for shippers. However, the harmful effects of the transaction were found to be greater, particularly on the West Coast and in the Central and Southern Corridors.[6]

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[4] Subject to certain conditions, the Commission approved the terms of the voting trust agreement in a decision in this proceeding (not printed), served December 23, 1983. Questions of compliance with the terms of the trust were reviewed in a decision in this proceeding (not printed), served February 27, 1987.

[5] The Commission also rejected as premature a petition to reopen and reconsider filed by the National Industrial Transportation League.

[6] For example, the Commission found that SPSF Railway would have had a market share of Pacific Coast rail traffic in excess of 30 percent. In the Southern Corridor, SPSF Railway would have had "nearly an absolute monopoly" over rail transportation. For rail traffic originating or terminating in the San Francisco Bay Area, SPSF Railway would have held more than an 85 percent market share.

The Commission considered whether conditions could be fashioned to provide adequate mitigation for the loss of competition. It concluded that the proposed conditions were not shown to be effective remedies.[7] As here pertinent, the Commission did find that the extensive trackage rights proposed by UP/MP to operate over the Southern Corridor and into California and by DRGW to operate over the Central Corridor and into California would apparently alleviate some of the anticompetitive effects in those areas. The Commission declined to approve the merger subject to those conditions (and certain other minor conditions), because they could create other anticompetitive effects and would result in a major restructuring of the transaction which could have significant unforeseen consequences.

We were reluctant to impose the UP/MP and DRGW conditions in light of the economic burden they might place on the newly created system. We concluded that it would not be in the public interest simultaneously to create a consolidated railroad and to place it under such pressures that its chances for success were seriously compromised. Throughout this proceeding, applicants characterized each of these sets of conditions individually, not to mention in combination, as "deal-breakers." We noted that imposing the conditions would risk diluting the traffic base for all the competitors and jeopardizing the success of the merged system. We had refused to indulge in this sort of restructuring in the past, and we affirmed that position in the prior decision. We felt compelled to deny the merger proposal in the absence of a solution that would both resolve the identified anticompetitive problems and furnish us with a basis to expect that the merged carrier would become and remain a strong and effective competitor.

The Commission also ruled that SFSP would have to divest either SPT or ATSF,[8] required that a divestiture plan be submitted within 90 days (which was stayed by Decision No. 26, supra), and reserved jurisdiction for the purpose of overseeing the divestiture process which was given a two year period for completion. Reporting requirements were imposed to assure orderly divestiture.

On December 9, 1986, applicants filed a supplement to their earlier petition to reopen. Applicants did not challenge our prior findings that the merger itself is anticompetitive but rather offered to show that the agreements they had entered into would sufficiently ameliorate these anticompetitive effects so as to make the proposed transaction approvable. In Decision No. 27 (not printed),served December 16, 1986, we permitted other parties to reply by addressing whether applicants had satisfied our regulations for reopening. Replicants were also requested to suggest an appropriate procedural schedule if the proceeding were reopened.

After considering the supplement and the replies, in a decision in this proceeding (not printed), served February 3, 1987, the Commission concluded that applicants had not submitted a comprehensive proposal, as previously directed. They were given 30 days further to supplement their petition. We reminded applicants that "they have the burden to show changed circumstances," and "[t]hat test is not satisfied simply by an expression of their new willingness to accept conditions." The

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7/ In addition, the Commission found that certain other conditions sought were not warranted, because there was no harm to competition in the areas they addressed.

8/ Section 7(c) of the Voting Trust Agreement committed SFSP to sell the SPT, but we recognized in our October 10 decision that sale of SPT was not a Commission condition, and that divestiture may in the alternative be satisfied by sale of ATSF.

Commission stated that the petition to reopen would be granted only if applicants described their proposal in sufficient detail and satisfactorily addressed all of the problems that had been found to be present in the merger. Applicants were required to indicate the evidence they would submit and how that evidence would address the effects of the merger, including the harm and the benefits. Other parties were allowed an opportunity to comment on whether applicants had complied with the criteria for reopening.

Applicants have made a timely submission in response to that decision, and several replies have been received.[9] On May 14, 1987, we heard oral argument from the parties on whether our requirements for reopening had been met.

## STANDARD FOR REOPENING AND POSITIONS OF THE PARTIES

The Commission may reopen a proceeding because of material error, new evidence, or substantially changed circumstances. 49 U.S.C. 10327(g)(1). Under our regulations, a petition to reopen must state in detail the material error or indicate that the prior action will be affected materially because of new evidence or changed circumstances. 49 CFR 1115.3. When a party seeks to introduce new evidence, the evidence must be stated briefly, must not appear to be cumulative, and explanation must be given as to why it was not previously adduced.

Applicants have now presented a proposal of broad scope that they allege addresses the problems identified in the initial decision. They state that changed circumstances result from the availability of evidence concerning the cumulative effects of agreements they have reached with other railroads on traffic projections, public benefits, the financial viability of the railroads, and the consequent competitive impact. They urge that the agreements they have reached are tailored to meet their concerns and those of the Commission; that implementation of these agreements as part of consolidation would alleviate the anticompetitive problems that we identified; and that, because the agreements resulted from arms-length negotiations, there is some assurance that the operations are practical. In the supplement to their petition to reopen, applicants included copies of the agreements. They are summarized briefly here for convenience.[10]

1. Applicants would grant UP/MP overhead trackage rights between El Paso, TX, and Colton, CA (via Yuma, AZ), with a right to serve Phoenix, AZ, by means of trackage rights over branch lines. They would also grant UP/MP overhead trackage rights between Colton and Lathrop, CA (via Mojave, Tulare, and Merced, CA). Finally, applicants would provide a competitive pricing authority for UP/MP at Richmond, CA, and at SPT-ATSF common points between: (a) Colton and Lathrop, CA; and (b) Antioch and Martinez, CA.

In return, UP/MP would grant SPSF Railway overhead trackage rights between: (a) Sierra Blanca and Big Sandy, TX, with a right to pick up or set out cars at Dallas, Fort Worth, Pecos, and Sweetwater, TX; (b) St. Louis, MO, and Chicago, IL; (c) Bay City and Placedo, TX; and (d) Wichita and Benedict, KS (via Durand, KS).

2. Applicants would enter into a long-term exclusive lease with DRGW for SPT's lines: (a) between Ogden, UT, and Roseville, CA; (b) between Weso, NV, and Klamath Falls, OR; and (c) over certain branch lines. They would also provide DRGW with trackage

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9/ While we have considered all the submissions, this decision does not specifically address all of them.

10/ The agreements negotiated with DRGW are further supplemented by agreements DRGW submitted on March 26, 1987.

rights over most of SPT's other lines in Oregon and over lines in California to the Bay area and through the San Joaquin Valley to Bakersfield, connecting with the leased lines at Klamath Falls and Roseville, respectively. Finally, they would provide DRGW with rate access on Central Corridor traffic to and from SPT-ATSF common points and ports in the Los Angeles area through a Voluntary Cooperation Agreement.

3. Applicants would grant MKT overhead trackage rights: (a) between Dallas and Midlothian, TX, with a right to construct access track to the Mazda facility at Midlothian; and (b) over SPT's line between San Antonio and Sinton, TX, with the right to connect with the MP track between Sinton and Corpus Christi, TX, and access track to the SPT-TM yard at Corpus Christi. MKT would also be guaranteed reciprocal switching access to a named facility at Houston, TX.

4. Applicants would cooperate with TM to preserve existing traffic and operating relationships on all Mexican traffic moving via the Laredo, TX, gateway. They would keep open all routes with TM via Corpus Christi and would establish through rates with TM comparable to SPSF Railway's rates via the Eagle Pass, TX, gateway.

5. Applicants would also cooperate with the Chicago and North Western Railway Company (CNW) to preserve existing traffic and operating relationships on traffic interchanged at Kansas City, St. Louis, and Chicago. They would keep open all through routes and adopt existing joint rates via those gateways and provide nondiscriminatory service on CNW traffic. These parties have reached an agreement on divisions of joint rates.

Arguing against reopening, DOJ urges that, although the agreements geographically cover most of the traffic subject to loss of competition, they would not maintain existing price and service competition. This is because of the lack of direct service in certain areas provided for in the agreements (the San Joaquin Valley and other California points). Further, it argues that problems with the compensation terms may result in monopoly pricing, collusion, and additional regulation. DOJ also alleges that applicants' efficiency claims do not outweigh the potential harms of merger, because they are speculative, inconsistent with applicants' earlier position, and achievable without merger.

KCS urges that, rather than reopen the proceeding, we should deny reopening and begin a divestiture proceeding. KCS states that, once it has had an opportunity to examine SPT's accounts and properties, it will make an offer to acquire SPT that will be clearly in the public interest.[11/]

KCS argues that the extraordinary relief sought by applicants runs counter to the presumption of finality, and that an alternative is available to applicants, namely, to file a new application for merger under 49 U.S.C. §11343. KCS further argues that applicants failed to meet the requirements of our February 3 decision because their statement of benefits is conclusory, and their contentions are not credible and are irreconcilable with their earlier position. KCS states that, if this proposal overcomes the problems named by the Commission, as urged by applicants, then it is a new and different transaction requiring

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11/ At the oral argument, KCS requested the Commission, whether we reopen or not, to require that parties interested in purchasing SPT be allowed access to books and records, properties, etc. so that they can formulate an offer. It also asked us to direct the trustee to select a purchaser and to join in an application (if the purchaser is a carrier) or to conclude the sale (if the purchaser is a non-carrier). KCS also announced that, if it were selected as the purchaser, it would seek an exemption under section 10505 for temporary authority to manage and operate SPT.

new data and a more lengthy procedural schedule than that proposed by applicants.

BN argues against reopening on the basis that there are no changed circumstances, just a new willingness on the part of applicants to accept previously rejected conditions. BN also argues that the evidence characterized as new by applicants was previously available. BN states that our February 3 decision has not been satisfied because applicants' evidence has not been identified, there are unresolved compensation issues, and there will be a lack of service competition in the San Joaquin Valley. BN also argues that applicants' new estimate of benefits is implausible,12/ and that reopening is not a proper vehicle for analyzing this major restucturing. BN urges that the proposal be treated, if at all, as a new application, and that the Commission accord other parties the full procedural rights that would apply in a new case.

## DISCUSSION AND CONCLUSIONS

Applicants have sought reopening solely on the ground of changed circumstances and new evidence associated with those changed circumstances. Applicants have stated they accept all of the findings and conclusions in our initial decision as correct, including those relating to the anticompetitive effect of the transaction as originally proposed, as the law of the case. Moreover, applicants have expressly abandoned the "failing firm" theory as a supporting basis for merger. They acknowledge that both ATSF and SPT can stand alone. Because of these positions now taken by applicants, material error is not at issue.

Applicants' petition and supplemental evidence fail to convince us that this proceeding should be reopened. Applicants have negotiated several agreements with other railroads. While purporting to solve the anticompetitive problems we identified in our initial decision, these agreements contain very little that is truly new or changed. Indeed, much of the "new evidence" can be deemed merely cumulative.

Nearly all of the arrangements for trackage rights, lease of lines, or other operations by railroads previously opposing this merger were within the scope of the conditions previously proposed by these railroads, resisted by applicants, and rejected in our initial decision. For example, the Southern Corridor trackage rights granted to UP/MP by applicants are largely the same as those UP/MP originally sought. The same is true of the DRGW trackage rights. Its proposal to lease SPT's Central Corridor lines east of Klamath Falls and Roseville is of substantially the same nature as the purchase/trackage rights DRGW originally sought.

The fashioning of such conditions has been largely within applicant's control during the entire course of this proceeding. The circumstances which have already changed are, in essence, merely changes of position rather than external occurrences. In our decision served February 3, 1987, we admonished applicants that the changed circumstances test would not be satisfied simply by an expression of their new willingness to accept conditions, yet this shift in attitude from resistance to acquiescence is the primary circumstance that has changed. We choose not to allow merger applicants an opportunity to, in effect, seek consolidation twice: first by taking a hard-line preliminary approach toward the issues of competition and acceptable conditions, then falling back on a more conciliatory approach if the initial approach is unsuccessful. Throughout this proceeding, applicants stated that the major conditions under

12/ For example, it states that applicants previously characterized the conditions as predatory demands that threaten the viability and purpose of the merger and interfere with the service improvements envisioned. BN also takes issue with many of the premises and with part of the methodology used in calculating the benefits.

consideration were "deal breakers" and/or were operationally not feasible. We do not think that permitting reopening to accommodate changes in litigation strategies is in the public interest, nor is it consistent with the strict deadlines that Congress has mandated for handling mergers. See 49 USC 11345(c).13/

While not an element of our statutory or regulatory criteria, we are not unmindful of the practical concern for time. A substantial amount of time has already been spent in entertaining the original application and more time would have to be spent in considering the revised proposal. While Congress has not established procedural deadlines for our consideration of a consolidation proceeding on reopening, the statute clearly reflects a Congressional mandate for expeditious disposition of merger proposals. 49 U.S.C. 11345(b). To allow reopening and extend this proceeding largely in order to accommodate applicants' new positions on the competitive effects of their proposal and on the conditions they are now willing to accept would not be in harmony with this Congressional purpose.

In addition, reopening would effect an unlimited extension of the voting trust arrangement under which SPT has been held so as to insulate SFSP, ATSF and SPT from violation of unlawful common control provisions of the Interstate Commerce Act. We do not believe it to be in the public interest to continue this temporary arrangement with no assurance that we would ultimately approve the transaction. It is essential to reopening on the basis of new evidence and changed circumstances that any such information, taken as presented, would so materially alter or change the case that one might now reasonably reach conclusions different from the original conclusion. On the evidence presented, we do not now believe the initial decision would change. In fact, the nature and scope of the transactions then and now proposed may increase competitive harm rather than adequately remedy such concerns.

Furthermore, the agreements, on their face, fail to alleviate all of the anticompetitive effects we identified. In particular, we indicated that the merger could not be permitted to eliminate rail competition in the San Joaquin Valley. In rejecting the independent ratemaking authority proposed by KCS, we made it clear that shippers were to be afforded the benefits of both rate and service competition. Yet the SFSP-UP/MP agreement would not permit UP/MP to provide its own local service in the San Joaquin Valley. The pricing authority granted UP/MP is not substantially different from KCS' proposal and would not provide service competition for traffic moving to and from San Joaquin Valley points via the Southern Corridor. We also indicated that traffic originating or terminating at SPT exclusively-served West Coast points would have to be assured of

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13/ The situation here is different from Great Northern Pac. - Merger - Great Northern, 331 I.C.C. 228 (1967) (Northern Lines), where the Commission reopened the proceeding after initially denying the merger application. Although the standard for reopening was not as clearly defined as it is today, when applying the present statutory criteria it is clear that the Northern Lines proceeding was reopened for material error as well as changed circumstances and new evidence. On reopening, we recognized that the earlier decision had erroneously interpreted the statute and that erroneous interpretation had materially affected the agency's analysis. Northern Lines, 331 I.C.C. at 269. Moreover, the changed circumstances in Northern Lines involved applicants' agreement to specific conditions the Commission had identified as necessary to enable existing railroads to compete against the new company. Here, in contrast, we were unable to state what conditions would resolve the competitive problems identified in our initial decision. Applicants' attempt to do so now is not a mere response to a specific finding, but a complex web of conditions that would have a drastic impact on the western railroad system.

an available Central Corridor routing in a post-merger environment. However, the SFSP-DRGW agreement does not grant DRGW access, either direct or through SPSF gathering operations, to all such SPT points in California. These flaws are an additional indication that the expenditure of more time on this application would not be in the public interest.

Even overlooking these gaps between our evaluation of the anticompetitive effects and applicants' present attempts to address them, we are confronted with a complex set of agreements that promise to alter significantly the relationships between major western railroads. In our initial decision, we emphasized our reluctance to engage in major railroad restructuring and to rearrange traffic patterns in ways that might have unforeseen consequences. We do not find that SFSP's negotiation of these agreements makes us substantially less concerned about the possible consequences of this rearrangement. The UP/MP and DRGW agreements are interrelated, and the failure of any significant provision of either might render the entire revised competitive structure ineffective. For example, one major impetus for this new proposal appears to be approximately 1,000 miles of SFSP trackage rights over UP lines that were not a part of the previous proposal. While we encourage cooperative efforts between railroads, we are dealing here with a complicated set of arrangements made by several western railroads now in competition with each other across two rail corridors. We are disinclined to risk the possibility of collusion and market splitting that might result from such an artificial, settlement induced rationalization of the western rail system.

In combination, these concerns have persuaded us to exercise our well recognized discretion in this area to deny reopening. Bowman Transp. v. Arkansas Best Freight System, 419 U.S. 281, 294-96 (1974); United States v. Pierce Auto Freight Lines, Inc., 327 U.S. 515, 534-535 (1946); ICC v. Jersey City, 322 U.S. 503, 514-17 (1944); ICC v. Brotherhood of Locomotive Engineers, No. 85-792, et al., slip op. at 5 (U.S., June 8, 1987). In indicating in our October 9, 1986 decision that we were willing to consider reopening, we meant to give applicants every reasonable opportunity to perfect their initial proposal. We did not wish prematurely to reject agreements that were being negotiated and that we had not had the chance to evaluate. Instead we chose at that point to be receptive to any modified proposal that explained in detail how it would be consistent with the public interest. Having had the opportunity to examine the complete package that applicants have presented, we think it continues to pose considerable problems. Applicants have not, in our opinion, demonstrated that reopening and further hearings are warranted. Fairness to all parties and to the public requires prompt termination of our consideration of applicants' proposal in light of our view that the initial decision would not be changed by that evidence.

During the Commission's consideration of reopening, KCS requested that the Trustee be ordered to make SPT information available to prospective buyers. We understand the KCS request to be one for immediate release of information to buyers in advance of formulation or submission of a divestiture plan by SFSP. We decline to grant the KCS request. SFSP is under an obligation imposed by this Commission to present a plan to this agency. Likewise we have directed the trustee to facilitate and assist the divestiture process. As the prospective seller of SPT stock and assets, SFSP may wish to instruct the Trustee to make certain SPT information available to prospective buyers. However, our requiring release of SPT data to potential buyers now might very well disrupt the divestiture process and interfere with SFSP's Commission-imposed duties as well as the trustee's duties. Should it be necessary at any time, the Trustee may seek guidance from the Commission regarding its duties to facilitate and assist the divestiture process.[4/]

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4/ Our order served February 27, 1986, regarding the trustee's role in communication and information sharing remains in operative guide.

We are instructing our Office of Compliance and Consumer Assistance to continue monitoring operation of SPT under the voting trust agreement during the course of the divestiture. The Trustee and applicants are referred to ordering paragraph number two in our decision in this proceeding served June 30, 1987 (as modified on July 2, 1987), for a description of their initial responsibilities with respect to the divestiture.

In our June 30, 1987 order, we directed SFSP to submit a divestiture plan within 90 days, and thereafter quarterly reports. We will not direct SFSP to serve copies of the divestiture plan on parties to this proceeding. To do so would be an unnecessary action in the divestiture process and entail additional expense and administrative burden for SFSP. Instead, the plan will be made a part of the public record and interested persons may review it at the Commission or they may contact SFSP for a copy of the plan.

As to the divestiture plan itself, we do not wish to impose requirements or restrictions that might hamper the parties in arriving at an expeditious and sound solution. We do expect the plan to describe in sufficient detail the anticipated approach and procedures to accomplish divestiture.

We also ordered that interested parties could file comments within 20 days from the date of filing of reports. We wish to make clear that the purpose of the directive requiring a divestiture plan is to allow us to oversee the process to ensure: (1) that an orderly divestiture is completed, and (2) that the divestiture is consistent with the public interest. Although we intend to see that viable competition remains in the areas served by the two railroads, we do not intend to direct SFSP regarding the sale of its property so long as these concerns are met. We do not anticipate any formal action on our part unless and until (1) there is action taken contrary to these guidelines, or (2) the divestiture process leads to the filing for approval of a transaction subject to our jurisdiction. At that time, of course, the formal proceedings contemplated in our statute and regulations would again be effective.

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

It is ordered.

1. Applicants' petition to reopen this proceeding is denied.

2. Applicants must submit a plan for divestiture by September 28, 1987.

3. Ordering paragraph number 6, of our initial decision, and ordering paragraph 4 of Decision No. 31 in this proceeding, are deleted.

4. This decision will be effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons. Chairman Gradison and Commissioner Simmons dissented in part with separate expressions.

(SEAL)

Noreta R. McGee
Secretary

CHAIRMAN GRADISON, dissenting in part:

One year ago, this Commission denied the proposed merger of the Southern Pacific and the Santa Fe, apparently due to a feared loss of rail competition. I said then and continue to maintain that potential competitive problems were few and solvable in light of significant motor carrier competition and in light of the Commission's authority to fashion conditions upon its approval. Because the Commission would not recognize the potency of motor carrier competition and was reluctant to establish conditions to mitigate perceived competitive harms, the applicants were permitted to pursue reopening and to offer the Commission solutions to concerns the agency had enumerated.

In the days following, the merger applicants worked to arrive at a series of agreements designed to solve all of the possible problems highlighted by the Commission and even additional matters (environmental) not addressed by the Commission. Despite these efforts and despite the fact that the parties have put forth solutions to competitive problems (solutions that would be thoroughly examined by the Commission on reopening), the Commission has decided to give the merger proposal no further consideration.

I find the rationale offered for denial of reopening to be disingenuous. The majority merely makes conclusory statements about what it would find if the proceeding were reopened and further evidence examined. Particularly troubling is the discussion of competition where "competitive problems" are blamed but only generally identified.

The majority's decisions in this proceeding continue to be perplexing. The latest decision sends sometimes conflicting, sometimes circular messages. According to the decision, there were competitive problems before, those problems have not been solved and could turn out to be worse than before. The decision concludes that the effects of the current proposal are too broad and unknown to be explored. The aplicants are criticized for presenting non-solutions but also chastised for not offering them sooner.

With those "explanations," the merger application is denied with finality. If the proponents of the merger and members of the public do not understand, they are not alone.

The Commission is wrong to deny reopening. Careful review on reopening and ultimate approval of the merger would have, I believe, resulted in a strong competitive rail service in the West, one which could avail itself of one-time and annual savings both totaling in the hundreds of millions of dollars. Expected efficiency gains would have benefited both private and public interests. Instead, we face a situation where the SFSP must divest one railroad and might conceivably divest itself of both. This process could take several more years. In the meantime, the uncertainty continues.

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COMMISSIONER SIMMONS, dissenting in part:

I join fully in that part of today's decision which addresses the petition to reopen and states our reasons for denying this petition. I cannot, however, join in the majority's discussion of the divestiture process.

Any divestiture proposal must be consistent with the public interest, and the Commission is responsible for determining the public interest in this matter. But today's decision indicates that the Commission will assume an essentially passive role in the divestiture. It also actively discourages the filing of comments by

interested parties, even to the extent of deleting references to these comments in prior decisions. Given the level of interest previously generated by the merger proposal, it is unrealistic to suggest that comments should not, and will not, be filed. Responsible comments will greatly assist the Commission in determining where the public interest lies.

In acknowledging that comments will be filed, I do not intend to encourage any unnecessary delay in accomplishment of the divestiture. Continuing uncertainty over the future makeup of the western rail system must be brought to an end, and dilatory tactics by any party should not be tolerated. Nevertheless, the majority's haste in setting parameters for the divestiture process can only be termed unseemly. The Commission's General Counsel is currently addressing numerous issues involved in the divestiture, including applicable statutory provisions and the appropriate role of the SPT Trustee. His analysis of these issues will be entitled to careful consideration.

In summary, applicants and other parties should be aware that not all members of this Commission view the divestiture process as narrowly as set out in today's decision.