

[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**

**AGENCY:** Interstate Commerce Commission.

**ACTION:** Decision No. 10; notice of issuance of new procedural schedule.

**SUMMARY:** The Commission is issuing a new procedural schedule, which follows the Santa Fe Pacific Corporation (SFP) shareholders' and Burlington Northern Inc. (BNI) shareholders' vote on February 7, 1995, to approve the proposed BNI/SFP merger. This schedule will provide for issuance of a final decision no later than August 23, 1995. The Commission also is setting a 50-page limitation for briefs, which must be filed in accordance with the requirements at 49 CFR 1104.2. In addition, the Commission is requiring that a Preliminary Draft Environmental Assessment (PDEA) be submitted, where applicable, with each inconsistent and responsive application.

**EFFECTIVE DATE:** The effective date of this decision is March 9, 1995. All comments, protests, requests for conditions, and any other opposition evidence and argument are due on May 10, 1995. For further information, see the attached procedural schedule.

**ADDRESSES:** An original and 20 copies of all documents must refer to Finance Docket No. 32549 and be sent to the Office of the Secretary, Case Control Branch, Attn: Finance Docket No. 32549, Interstate Commerce Commission, 1201 Constitution Ave., N.W., Washington, DC 20423. Parties are encouraged also to submit all pleadings and attachments on a 3.5-inch diskette in WordPerfect 5.1 format.

In addition, one copy of all documents in this proceeding must be sent to Administrative Law Judge Stephen L. Grossman, Federal Energy Regulatory Commission, Office of Hearings, 825 North Capitol Street, N.E., Washington, DC 20426 and to each of applicants' representatives: (1) Betty Jo Christian, Esq., Steptoe & Johnson, 1330 Connecticut Avenue, N.W., Washington, DC 20036-1795; and (2) Erika Z. Jones, Esq., Mayer, Brown & Platt, 2000 Pennsylvania Avenue, N.W., Suite 6500, Washington, DC 20006.

**FOR FURTHER INFORMATION CONTACT:** Julia Farr or Dugie Standeford, (202) 927-7513. (TDD for hearing impaired: (202) 927-5721.)

**SUPPLEMENTARY INFORMATION:** On October 13, 1994, an application was filed for approval of BNI's acquisition of, control of, and merger with SFP, the resulting common control of Burlington Northern Railroad Company (BN) and The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) by the merged company, the consolidation of BN and Santa Fe railroad operations, and the merger of BN and Santa Fe. Applicants also seek exemption from regulation for the merged holding company and merged railroad to control The Wichita Union Terminal Railway Company [Finance Docket No. 32549 (Sub-No. 1)] and for 11 construction projects related to the primary application [Finance Docket No. 32549 (Sub-No. 2 through Sub-No. 12)]. We accepted the application in our Decision No. 5, served and published in the **Federal Register** (59 FR 56089) on November 10, 1994, and we set certain filing dates under the procedural schedule previously adopted in our Decision No. 4, served October 5, 1994.<sup>1</sup>

In Decision No. 7, served December 5, 1994, we granted the requests of several parties and postponed the procedural schedule set forth in Decision Nos. 4 and 5 pending the outcome of an SFP shareholder vote. In Decision No. 7, we stated that upon approval of the proposed BNI/SFP merger by the shareholders, we would immediately issue a new schedule.<sup>2</sup> On February 7, 1995, the shareholders approved the proposed BNI/SFP merger.

By petition filed January 27, 1995, BNI, BN, SFP, and Santa Fe requested that we adopt a modified, expedited procedural schedule which tracks the schedule proposed by the Commission for public comment in Ex Parte No. 282 (Sub-No. 19).<sup>3</sup> In Decision No. 9 in this

<sup>1</sup> SP contends that the Supplemental Materials filed by applicants on February 17, 1995 (BN/SF-25) contain certain deficient information about the additional debt that applicants will incur in order to consummate their tender offers for SFP common stock. SP's concern relates to form rather than substance. Adequate information about this financing and its possible effects on applicants' pro forma projections of merged operations is ascertainable from information contained in the application filed October 13, 1994, and in the Supplemental Materials, primarily the Supplemental Verified Statement of Thomas N. Hund and Don S. Snyder and the Amendments to SEC Form S-4, filed by BNI and BNSF Corporation.

<sup>2</sup> In Decision No. 7, we stated that the new schedule would require comments to be filed 30 days later and adjust other schedule dates accordingly. As explained later in this decision, comments will not be due until 62 days from the date of publication of this decision.

<sup>3</sup> In New Procedures in Rail Acquisitions, Mergers and Consolidations, Ex Parte No. 282 (Sub-No. 19) (ICC served Jan. 26, 1995 and published at 60 FR 5890, January 31, 1995), we requested comments, due March 2, 1995, on our proposed establishment of more timely procedures for

proceeding, served February 3, 1995, we requested public comments on the applicants' proposal to revise the procedural schedule to provide for the service of a final decision no later than 165 days from the date the Commission publishes its decision restarting the schedule for processing the proceeding. Additionally, we requested public comments on proposed page limitations on certain filings, on whether a preliminary scoping order should be issued, and on the feasibility of meeting all environmental review requirements within the proposed compressed schedule. Public comments on these issues were due on February 21, 1995.

Over 170 public comments were received in response to Decision No. 9. The vast majority of these comments were from shippers; however, comments were also filed by several Members of Congress, government parties, railroads, electric utilities, other shipper interests, and rail labor unions. In addition, the applicants responded to Decision No. 9.

Approximately 55 commenters specifically supported the applicants' proposed 165-day procedural schedule. There were a number of statements in support of a 180-day schedule as proposed by the Commission in New Procedures in Rail Acquisitions, Mergers and Consolidations, Ex Parte No. 282 (Sub-No. 19) (ICC served Jan. 26, 1995), and several parties suggested alternative 180-day schedules. Over 25 shippers approved an expedited merger process, but suggested no time limits.

By contrast, approximately 65 commenters stated their opposition to the proposed 165-day schedule, although not all of these entities specifically objected to the total time of 165 days; rather, some were more concerned with having only 30 days to comment on the application. Many of the opposing commenters asked the Commission to lengthen the review process to at least 9 months.

We have determined after review of all the comments that a 165-day procedural schedule will allow us time to consider fully all of the issues in this proceeding and to ensure that all parties are accorded due process.<sup>4</sup> We will agree, however, to giving additional time to interested parties, including the

processing applications for major and significant rail combinations. We also served a copy of the notice on all parties on the service list in this merger proceeding and asked for comments on whether this case should be governed by the schedule originally adopted or the schedule proposed in Ex Parte No. 282 (Sub-No. 19).

<sup>4</sup> Technically, Appendix A to this decision envisions a 167-day procedural schedule. We found it necessary to add two additional days to the schedule so that no date on the schedule would fall on a Saturday, a Sunday, or a legal holiday.

Department of Justice (DOJ) and the Department of Transportation (DOT), in which to file written comments and protests on the primary application (including any comments in opposition to the primary application), as well as requested conditions. These filings will be due 62 days after publication of this notice, which is the same date that inconsistent and responsive applications are due. All descriptions of anticipated inconsistent or responsive applications, as well as petitions for waiver or clarification, will be due 32 days after publication of this notice.

There were a few comments on the proposed page limitations. Most commenters were generally opposed, but were willing to accept some page limitations on briefs. To facilitate meeting the expedited deadline set out in this notice, the Commission will limit briefs to 50 pages, but will impose no page limitations on evidentiary submissions. Briefs must be filed in accordance with the requirements at 49 CFR 1104.2. Because reply briefs appear to be unnecessary to complete our review of a merger, we do not anticipate granting any requests to file reply briefs. Based on the lack of response to our proposed preliminary scoping order, we do not anticipate issuing such an order at this time. However, in pursuing discovery and in preparing pleadings, we encourage the parties (and will instruct the Administrative Law Judge) to focus strictly on relevant issues, as identified by the applicable statutory standards and our control regulations, including our merger policy statement (49 CFR 1180.1). For example, arguments that the transaction will cause competitive harm should be accompanied by a clear statement of how rates will be raised, service degraded, or both, in some identifiable market. Responses countering such competitive arguments should explain clearly why those adverse impacts will not occur.

In order for us to fulfill our responsibilities under the National Environmental Policy Act and other environmental laws, inconsistent applications and responsive applications must contain certain environmental information. Anyone desiring to file an inconsistent or a responsive application involving significant operational changes or an action such as a rail line abandonment or construction under 49 CFR 1105.6(b)(4) of our environmental rules must include, with its application, a preliminary draft environmental assessment (PDEA). Generally, these types of actions require an environmental report under 49 CFR

1105.6(b)(4) which would form the basis of a subsequent environmental assessment (or environmental impact statement, if warranted). Here, because of the accelerated time frames, a PDEA is necessary at the outset.

The preparation of a PDEA should not be burdensome. Although the information would be presented in a somewhat different format, the PDEA should address essentially the same environmental issues that would have been covered by an environmental report. The PDEA, like the environmental report, should be based on consultations with the Section of Environmental Analysis (SEA) and the various agencies set forth in 49 CFR 1105.7(b). SEA will be available to provide assistance as needed.

SEA will use the PDEA to expedite the environmental review process. If a PDEA is not submitted or is insufficient, we will not process the inconsistent or responsive application.

If an inconsistent or responsive application does not involve significant operational changes or an action such as an abandonment or construction, it generally is exempt from environmental review. The applicant must certify, however, that the proposal meets the exemption criteria under 49 CFR 1105.6(c)(2).

Anyone desiring to file an inconsistent application or responsive application should consult with SEA as early as possible regarding the appropriate environmental documentation.

If the parties wish to engage in any discovery or establish any discovery guidelines (see, e.g., the proposed discovery guidelines in BN/SF-24; see also the proposed discovery guidelines in KCS-3, Ex. D, pp. 4-7), they are directed to consult with Stephen L. Grossman, Administrative Law Judge. Judge Grossman is authorized to convene a discovery conference, if necessary and as appropriate, in Washington, DC, and to establish such discovery guidelines, if any, as he deems appropriate. However, Judge Grossman is not authorized to make adjustments to, or to modify, the dates in the procedural schedule. We believe the schedule as adopted allows sufficient time for meaningful discovery. Any interlocutory appeal to a decision issued by Judge Grossman will be governed by the stringent standard of 49 CFR 1115.1(c): "Such appeals are not favored; they will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice." See *Union Pacific Corporation, Union Pacific Railroad Company And Missouri Pacific Railroad*

*Company—Control—Chicago And North Western Transportation Company And Chicago And North Western Railway Company, Finance Docket No. 32133, Decision No. 17, at 9 (ICC served July 11, 1994) (applying the "stringent standard" of 49 CFR 1115.1(c) to an appeal of an interlocutory decision issued by former Chief Administrative Law Judge Paul S. Cross).<sup>5</sup>*

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

Decided: March 3, 1995.

By the Commission, Chairman McDonald, Vice Chairman Morgan, and Commissioners Simmons and Owen.

**Vernon A. Williams,**  
*Secretary.*

#### **Appendix A—Final Procedural Schedule**

- April 10, 1995—Description of anticipated inconsistent and responsive applications due; petitions for waiver or clarification due.
- May 10, 1995—Inconsistent and responsive applications due. All comments, protests, requests for conditions, and any other opposition evidence and argument due. DOJ and DOT comments due.
- May 25, 1995—Notice of acceptance (if required) of inconsistent and responsive applications published in the **Federal Register**.
- June 9, 1995—Response to inconsistent and responsive applications due. Response to comments, protests, requested conditions, and other opposition due. Rebuttal in support of primary application due.
- June 19, 1995—Rebuttal in support of inconsistent and responsive applications due.
- June 29, 1995—Briefs due, all parties (not to exceed 50 pages).
- July 14, 1995—Oral argument (at Commission's discretion).
- July 24, 1995—Voting Conference (at Commission's discretion).
- August 23, 1995—Date for service of final decision.

**Notes:** Immediately upon each evidentiary filing, the filing party will place all documents relevant to the filing (other than documents that are privileged or otherwise

<sup>5</sup> For the purposes of the present proceeding, we think it appropriate to tighten the deadlines provided by 49 CFR 1115.1(c). Accordingly, the provisions of the second sentence of 49 CFR 1115.1(c) to the contrary notwithstanding, any appeal to a decision issued by Judge Grossman must be filed within 3 working days of the service date of his decision, and any response to any such appeal must be filed within 3 working days thereafter. Likewise, any reply to any procedural motion filed with the Commission itself in the first instance must also be filed within 3 working days.

protected from discovery) in a depository open to all parties, and will make its witnesses available for discovery depositions. Access to documents subject to protective order will be appropriately restricted. Parties seeking discovery depositions may proceed by agreement. Relevant excerpts of transcripts will be received in lieu of cross-examination, unless cross-examination is needed to resolve material issues of disputed fact. Discovery on responsive and inconsistent applications will begin immediately upon their filing. The Administrative Law Judge assigned to this proceeding will have the authority initially to resolve any discovery disputes.

[FR Doc. 95-5799 Filed 3-8-95; 8:45 am]

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**[Finance Docket No. 32624]**

**Northern Nevada Railroad Corporation—Modified Rail Certificate—Between Cobre and McGill Junction, NV**

On December 2, 1994, Northern Nevada Railroad Corporation (NNRC), filed a notice for a modified certificate of public convenience and necessity under 49 CFR part 1150, subpart C—*Modified Certificate of Public Convenience and Necessity*, to operate over a line of railroad owned by the Department of Water and Power of the City of Los Angeles (Los Angeles) between Cobre, Elko County NV (milepost 0.0) and McGill Junction, White Pine County, NV (milepost 128.0), a total distance of 128.0 miles.

Prior to Los Angeles acquiring the line, the line was formerly owned and operated by Nevada Northern Railway Company. Department of Water and Power of the City of Los Angeles—Acquisition and Operation Exemption—The Nevada Northern Railway Company, Finance Docket No. 31030 (ICC served June 8, 1987). Subsequently, in Los Angeles Department of Water and Power D/B/A Nevada Northern Railway Company—Abandonment Exemption—Line in Nevada, Docket No. AB-285 (Sub-No. 1X) (ICC served Oct. 3, 1988), the line was authorized to be abandoned.

NNRC's notice indicates that the line will connect with the Southern Pacific Transportation Company at Cobre (milepost 0.0); with the Union Pacific Railroad Company at Shafter, NV (milepost 18.8); and with NNRC at McGill Junction (milepost 128.0). Los Angeles has entered into an operating agreement with NNRC which planned to begin operation during January 1995. Operations consist of moving about one train per week over the line in each direction. Operations will increase to

daily service once NNRC's connecting line is constructed.<sup>1</sup>

The Commission's Section of Environmental Analysis (SEA), reviewed the proposed start up operations that are the subject of the modified certificate. Specifically, by letter dated January 13, 1995, NNRC sought clarification under 49 CFR 1105.6(d) that the start up operations under the modified certificate do not require environmental review. NNRC provided supporting data concerning commodities and the nature of the proposed operations. By letter dated January 27, 1995, based on the information available at that time, SEA notified NNRC that the modified certificate operations had independent utility and that no environmental review would be required to transport the commodities NNRC had identified. Accordingly, this modified certificate is issued only as to those identified commodities and, under the certificate, NNRC may conduct those operations prior to completion of the construction exemption proceedings in Finance Docket No. 32476.

The Commission will serve a copy of this notice on the Association of American Railroads (Car Service Division), as agent of all railroads subscribing to the car-service and car-hire agreement, 50 F Street NW., Washington, DC 20001, and on the American Short Line Railroad Association, 1120 G Street NW., Suite 520, Washington, DC 20005.

Decided: March 1, 1995.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

**Vernon A. Williams,**  
*Secretary.*

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**[Finance Docket No. 32623]**

**Northern Nevada Railroad Corporation—Modified Rail Certificate—Between McGill Junction and Keystone, NV**

On December 2, 1994, Northern Nevada Railroad Corporation (NNRC), filed a notice for a modified certificate of public convenience and necessity under 49 CFR part 1150, subpart C—*Modified Certificate of Public Convenience and Necessity*, to operate a line of railroad owned by the City of Ely between McGill Junction, NV, (milepost 128.0) and Keystone, NV, (milepost

146.152), a total distance of 18.152 miles. The line will connect at each end with another line operated by NNRC. NNRC planned to begin operation during January 1995. Operations consist of moving about one train per week over the line in each direction. Operations will increase to daily service once NNRC's connecting line is constructed.<sup>1</sup>

Prior to the City of Ely acquiring the line, the line was owned and operated by Nevada Northern Railway Company, a subsidiary of Kennecott Copper Corporation. In Nevada Northern Railway Company—Abandonment Exemption in White (Pine) County, NV, Docket No. AB-285X (ICC served July 6, 1987), the Commission authorized Nevada Northern Railway Company to abandon the line. Since that time, the line has been operated for the City of Ely by the White Pine Historical Railroad Foundation (WPHRR). WPHRR has entered into an operating agreement with NNRC.

The Commission's Section of Environmental Analysis (SEA), reviewed the proposed start up operations that are the subject of this modified certificate. Specifically, by letter dated January 13, 1995, NNRC sought clarification under 49 CFR 1105.6(d) that the start up operations under the modified certificate do not require environmental review. NNRC provided supporting data concerning commodities and the nature of the proposed operations. By letter dated January 27, 1995, based on the information available at that time, SEA notified NNRC that the modified certificate operations had independent utility and that no environmental review would be required to transport the commodities NNRC had identified. Accordingly, this modified certificate is issued only as to those identified commodities, and, under the certificate, NNRC may conduct those operations prior to completion of the construction exemption proceedings in Finance Docket No. 32476.

The Commission will serve a copy of this notice on the Association of American Railroads (Car Service Division), as agent of all railroads subscribing to the car-service and car-hire agreement, 50 F Street NW., Washington, DC 20001, and on the American Short Line Railroad Association, 1120 G Street NW., Suite 520, Washington, DC 20005.

Decided: March 1, 1995.

<sup>1</sup> Northern Nevada Railroad Corporation—Construction and Operation Exemption—White Pine County, NV, Finance Docket No. 32476 (ICC served Feb. 24, 1995).

<sup>1</sup> Northern Nevada Railroad Corporation—Construction and Operation Exemption—White Pine County, NV, Finance Docket No. 32476 (ICC served Feb. 24, 1995).