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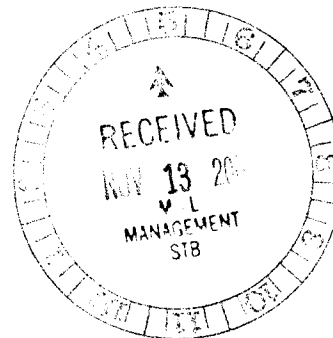
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EXPEDITED CONSIDERATION REQUESTED

November 13, 2000

VIA HAND DELIVERY

The Honorable Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W., 7th Floor
Washington, D.C. 20423



Re: Finance Docket No. 33407, Dakota, Minnesota & Eastern
Railroad Corporation; Preliminary Comments

Dear Secretary Williams:

As counsel for Edison Electric Institute ("EEI"), we hereby submit preliminary comments on the draft Environmental Impact ("DEIS") served on all parties on September 27, 2000, concerning DM&E's proposed Powder River Basin Expansion Project (the "PRB Expansion Project" or "the Project").¹ EEI reserves the right to submit further comments on or before the due date for such comments, January 5, 2001.

EEI is a strong supporter of the Project, because many of its members may become customers of DM&E for transportation of PRB coal if the Project is brought to fruition. Accordingly, the purpose of these preliminary comments is to call the Board's and the parties' attention to the fact that, although the DEIS does discuss Project benefits, it only does so in the "no action alternative" section. EEI will advocate that those benefits -- which EEI has addressed in prior testimony submitted by DM&E and in EEI's own prior submission -- should be addressed in a separate section of the FEIS. We also call to the Board's and the parties' attention a more significant legal issue that is raised by the DEIS. Because of the nature of these preliminary comments, we have filed them as early as possible to allow the Board and other parties to the

¹ Notice of the availability of the DEIS was published in the Federal Register on October 6, 2000.

proceeding the maximum amount of time possible to address them and so that no party could claim lack of notice of EEI's position on these matters. Also, EEI will oppose any request for extension of time to submit comments on the DEIS, as some persons requested at the STB's local hearings.

Project Benefits. NEPA requires an evaluation of the benefits as well as the harm that a project may cause, so that its overall costs and benefits may be evaluated. City of Des Plaines v. The Metropolitan Sanitary District of Chicago, 552 F.2d 736, 737 (7th Cir. 1977); Sierra Club v. Froehlke, 534 F.2d 1289, 1299 (8th Cir. 1976); NRDC v. TVA, 502 F.2d 852, 853 (6th Cir. 1974); NRDC v. Morton, 458 F.2d 827, 833 (D.C. Cir. 1972). However, there is no section in the DEIS summarizing the PRB Expansion Project's benefits.

To be sure, there is, in the "no action alternative" section, a brief description of the benefits of the proposed PRB Expansion Project, thus putting parties on notice of those benefits. But the description is brief, and is now found in a section, the "no action alternative" section, that could be overlooked by commenting parties.

Accordingly, EEI urges the Board to include a new section in the Final Environmental Impact Statement ("FEIS") setting forth in detail the Project benefits that are currently asserted in the "no action alternative" section. EEI intends to advocate in its comments submitted on or before January 5, 2001, that the STB include in the FEIS a section setting forth the PRB Expansion Project's benefits and intends to provide a proposed textual insert in that regard.

Legal Issue. Although the DEIS admits that the Board lacks authority over track rehabilitation (DEIS, Executive Summary at ES-48 ("Railroads are not required to seek the Board's authority to rehabilitate or improve their existing systems")), and although that legal position has been upheld in court², the DEIS appears to indicate that the Board is considering

² City of Auburn v. U.S. Government, 154 F.3d 1025 (9th Cir. 1998); Detroit/Wayne County Port Authority v. ICC, 59 F.3d 1314 (D.C. Cir. 1995). EEI does not dispute that the Board clearly has authority over the construction of the new line proposed by DM&E in western South Dakota and Wyoming. EEI also does not dispute that the Board also has authority over any request by DM&E for authority to construct any other new line or line segment outside DM&E's existing right-of-way.

requiring new rail construction of bypasses as mitigation³ of perceived environmental impacts of the rehabilitation of the existing DM&E line, as a condition of approval of the PRB Expansion Project. See, e.g., DEIS Sections 6.2 and 7.1.

EEL vigorously contends that the STB lacks authority to adopt a condition on its approval of the PRB Expansion Project that would assert the obligation on the part of DM&E to construct bypasses or other alterations of the existing line for which approval has not been requested by DM&E. The language quoted above from the DEIS appears to support EEL's position.

The courts have consistently held, since NEPA was enacted, that it does not enlarge an agency's authority under its organic statute. E.g., NRDC v. EPA, 859 F.2d 156, 169 (D.C. Cir. 1988); NRDC v. EPA, 822 F.2d 104, 129 (D.C. Cir. 1987); Cape May Greene, Inc. v. Warren, 698 F.2d 179, 188-89 (3rd Cir. 1983). Rather, the courts have held that NEPA merely requires the agency to consider the environmental impacts of a proposed major federal action in deciding whether to approve it, and that any authority to impose conditions on its approval must depend on the agency's substantive authority found in statutes other than NEPA. Id. Therefore, if the STB were to require a bypass along DM&E's existing route, it would require statutory authority other than NEPA to require that.

Agencies, of course, have only such authority as Congress gives them. E.g., American Petroleum Inst. v. EPA, 52 F.3d 1113, 1119 (D.C. Cir. 1995), citing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988). To be sure, the Board has authority under 49 U.S.C. § 10901(c) to adopt conditions to "a certificate authorizing activities for which such authority is requested," but as to routing that can only mean conditions with respect to the activity over which the Board has authority, or the statutory language would have no meaning. Here, that statutory authority means that the Board clearly has authority to adopt routing conditions with respect to the new line DM&E proposes to build into the PRB, or in Mankato, Minnesota with respect to the line DM&E proposes to construct there, but it does not mean that the Board can adopt routing conditions with respect to the rehabilitation of the existing line over which it concedes it lacks authority. E.g., NRDC v. EPA, 822 F.2d 104, 130 (D.C. Cir. 1987); Altamont Gas Transmission Co. v. FERC, 92 F.3d 1239 (D.C. Cir. 1996)(undisputed authority to certificate interstate gas pipeline project did not give FERC authority over intrastate ratemaking matters not entrusted to it). The statute does not provide for sua sponte grants of authority from the STB.

³ Although the DEIS analysis of the bypasses refers to them as "alternatives," it is unclear whether the proposed bypasses are actually "mitigation" or a separate action. But in this case, there is no proposed action to which bypasses would be an alternative. DM&E's rehabilitation of its existing line is not, from a jurisdictional standpoint, a "proposed action" over which the Board has any authority.

Since a permit requires an applicant, and there is no applicant before the Board as to bypasses, it follows that there can be no "proposed action" for which alternatives need be considered.

Moreover, the Section of Environmental Analysis ("SEA") has

"stated that in deciding whether bypass proposals were reasonable and feasible, it would take into account DM&E's goal of creating a more efficient route by which to transport coal. SEA noted that 'a circuitous route that bypasses numerous communities could add so many additional miles that it would be unlikely to allow Applicant to achieve its goal of providing efficient transportation' (see Notice to Parties, at page 2, in Appendix A to this Draft EIS)."

DEIS, Executive Summary at ES-54. Thus, the SEA, at least, has already acknowledged that the scope of the PRB Expansion Project does not include the various bypasses proposed by other parties. The Board certainly was not required to consider such bypasses, and certainly lacks the authority to require them. Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190 (D.C. Cir. 1991)(project defined by applicant; federal agency need not consider alternatives not within project's purposes as defined by applicant), and the authorities cited supra.⁴

However, notwithstanding these jurisdictional concerns, EEI commends the Board for attempting to evaluate all of the environmental impacts of the PRB Expansion Project, including possible bypasses, especially if there is any possibility that such a bypass may be agreed to by DM&E and other parties. Federal agencies are certainly encouraged to consider all reasonably possible effects on the environment of the proposed action, including alternatives logically within its scope. EEI's purpose in submitting these preliminary comments, rather, is simply to ensure that parties do not misunderstand the limits on the Board's statutory authority.

⁴ Even assuming arguendo that the Board claims authority to adopt bypass conditions, such conditions would have a chilling effect on competition. If the STB requires such unprecedented, extraordinary mitigation in areas hundreds of miles from the proposed action, such new precedent would create so much uncertainty as to chill any future initiatives to build new rail capacity. In any event, bypass routes must be alternatives to what the Applicant has proposed under 49 U.S.C. § 10901. Here, DM&E has not applied for line construction authority in the areas where bypasses have been proposed. Therefore, those proposed bypasses are not reasonably related to the Project for which DM&E has sought line construction authority. Moreover, under the Staggers Rail Act, even if DM&E were required to build a bypass, DM&E could not be prevented from operating over its existing line. For all of these reasons, EEI believes that it would be unwise public policy for the STB to adopt bypass conditions.

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Conclusion

EEI hereby puts the parties on notice that it will urge the Board, in its subsequent comments, to expand its findings of PRB Expansion Project benefits by including them in a separate section of the FEIS. EEI also urges the Board to clarify that it lacks authority to require that a bypass be built along the existing route of the DM&E at any location at which DM&E itself is not seeking authority from the STB to engage in such existing line reconstruction activity. EEI will oppose any request for extension of time to file comments on the DEIS.

Respectfully submitted,



Michael F. McBride
John W. Lawrence

Attorneys for Edison Electric Institute

• cc: Honorable Linda J. Morgan
Honorable Wayne O. Burkes
Honorable William Clyburn, Jr.
All Persons on the Service List