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BEFORE THE
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 33407

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION

CONSTRUCTION INTO THE POWDER RIVER BASIN

COMMENTS OF THE CITY OF PIERRE, SD
ON THE DRAFT ENVIRONMENTAL IMPACT STATEMENT

John D. Heffner
Rea, Cross & Auchincloss
Suite 570
1707 L Street, N.W.
Washington, DC 20036
(202) 785-3700

Attorney for the City of
Pierre, SD

DATED: March 6, 2001

ORIGINAL

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I. INTRODUCTION

On December 14, 2001, the Board's Section of Environmental Assessment ("SEA") served an order extending until March 6, 2001, the deadline for filing public comments on the Draft Environmental Impact Statement ("DEIS") issued in this proceeding on September 27, 2000. The City of Pierre, SD (hereinafter "the City" or "Pierre") files these comments in response to that order.

II. BACKGROUND

AND STATEMENT OF FACTS

By application filed February 20, 1998, the Dakota, Minnesota & Eastern Railroad Corporation ("DM&E") asked the Board for authority to construct and operate a new rail line linking

its existing rail system with a network of rail lines serving the Powder River Basin ("PRB") coal fields in Wyoming. As currently proposed, DM&E would rebuild its existing but deteriorated rail line connecting Winona, MN, with Wall, SD, a distance of roughly 600 miles, and would then construct a new railroad linking Wall with access to the PRB over any of several alternative routings. To the best of Pierre's knowledge, DM&E's plan represents a case of first impression.¹ DM&E's proposal would transform this predominantly agricultural, light density railroad into a major artery for moving Wyoming coal to Midwestern electric utilities. Traffic volumes would increase dramatically from roughly three trains per day over many segments to as many as 37 daily trains.

On December 10, 1998, the Board approved DM&E's application, finding that it satisfied the transportation-related requirements of 49 U.S.C. 10901. However, the Board postponed the issuance of a final decision on the merits until completion of the environmental review process. Towards that end, the Board solicited initial comments on the environmental issues raised by DM&E's proposal including the filing of bypass proposals and served a DEIS on September 27, 2000 (published in the Federal Register on October 6, 2000) to which the present comments are addressed.

¹ Although there have been a few instances where abandoned or lightly used rail lines have been rebuilt and restored to service -- many for commuter or intercity passenger service -- none involves the frequencies, tonnage, and train lengths which this line would handle.

Pierre is a city of 12,906 people² in the center of South Dakota located along DM&E's right of way. Aside from being the capital of South Dakota, Pierre is a regional commercial center, the location of a major South Dakota hospital, and a major tourist and convention center. Pierre has participated actively in the environmental permitting phase of this proceeding since this project would have far reaching impacts on the City and its citizens. The City filed a timely bypass proposal on May 27, 1999, and has participated in the scoping meetings and the on-line environmental field hearing conducted on November 13, 2000, in Pierre.

Pierre is literally a City "split down the middle by the railroad" which passes through the downtown area before going around a six degree curve, crossing over the Missouri River, and entering the city of Fort Pierre (1990 population of 1,854).³ While inside the city limits, DM&E's track crosses ten streets -- including several major thoroughfares --- all but one at grade. One of these, State Highway 34, a major east-west highway, crosses the railroad at an "S" curve at the location one of the City's busiest intersections (where Sioux, East Wells, and Capital Avenues meet). With an ADT⁴ of 19,755 and a Current Exposure Index of 59,265, this crossing is the most heavily trafficked rail-highway crossing in the State. Because of the

² According to the 1990 census. DEIS at page 4.1-42.

³ According to the 1990 census. See, DEIS at 4.1-42.

⁴ Average daily traffic count.

street configuration, Pierre does not believe it feasible to construct a grade separation structure at this location. See, Banner Report, infra, at 9-10. There is only one grade separated street, a secondary artery, which traverses the railroad by means of an underpass.

DM&E's track passes next to many residences, industrial and commercial establishments, eight motels, hotels, and a convention center, two schools, an assisted living center, several shopping centers, three auto dealerships, and a golf course.⁵ It lies within a block or two of the City's only hospital (St. Mary's Health Care Center), City Hall, numerous state and local offices, the Federal Building, and the State Capitol. Because of how the DM&E splits the City, substantial automotive and pedestrian traffic continually traverses the rail line.⁶

⁵ The statement of city engineer Kevin King submitted at the November 13 environmental hearing identifies no fewer than 23 hotels and motels, apartments, medical facilities, convenience stores, government buildings, and school buildings and facilities located anywhere from 50 to 700 feet from the railroad. Kevin King statement at 2.

⁶ According to City Engineer Kevin King, the City's ambulance service receives an average of two emergency calls per day. Most calls involve crossing DM&E's track. Mr. King also estimates that over 57,000 total motor vehicles cross DM&E's tracks per day inside the city limits. While he is unaware of any reported car/train accidents at any of these crossings, additional train speeds and frequencies will increase that likelihood exponentially.

Mr. King further advises that a highly trafficked pedestrian/rail crossing is located at the Georgia Morse Middle School, located 300' north of the track. Many of the school's 450 students use that crossing to reach fast food restaurants such as Pizza Hut and Taco Johns located on the south side of the

The proposed project's impact on Pierre's tourist and convention related economy cannot be overemphasized. The City's central location in the State makes it a natural site for holding business and professional meetings. In the year 2000, the City's Convention and Tourism Bureau serviced 218 conventions with 29,000 delegates.⁷ The economic impact of these conventions was \$7.3 million dollars which, using a two and one half times multiplier, makes the economic impact \$18.5 million. During the Summer months sporting and recreational events⁸ replace conventions and meetings as a major source of business for motels and restaurants in Pierre. The Bureau expects the up and coming Lewis & Clark Bicentennial Commemoration to attract a significant number of the 10 to 25 million people who will follow the trail between the years 2003 and 2006. These visitors will spend a substantial amount of money in Pierre and Fort Pierre and local businesses depend upon this money for their continued existence. The simple fact of the matter is that the proximity of motels and other tourist related establishments to a heavy density rail line will seriously undermine the City's ability to continue to attract and service tourism in the future.

track. Finally, Mr. King also notes the steady stream of pedestrian traffic between the Iron Horse Inn [a motel] 75 feet north of the track and Dakotamart [a convenience and food store] located 80' south of the track.

⁷ This figure does not include conventions and meetings which the City's bureau did not assist.

⁸ Nearby Lake Oahe and Lake Sharpe attracts many visitors looking for outdoor recreation to the City.

DM&E's proposal would have similar adverse impacts on the city of Fort Pierre located directly across the Missouri River from Pierre. Fort Pierre is the location of a major intersection between highways 14 and 34, which has a daily vehicle count of about 15,000. Many Fort Pierre residents commute daily to their jobs in that city and in Pierre using highways 14 and/or 34 and crossing the railroad tracks at least twice per day. While delays for commuters represent an inconvenience, delays for emergency vehicles can be fatal. Because the rail line splits the City of Fort Pierre and separates the City's only fire station from the other half of the City, the railroad's impact on the protection of life and property is a major concern. Inasmuch as Fort Pierre lacks any major medical facilities, it must rely on Pierre for these needs. Frequent, long train traffic would inhibit Fort Pierre's access to emergency medical care.⁹ Finally, as with Pierre, school access is a major concern. Approximately, 150 students must cross the tracks daily at either of two grade crossings (one block apart) to reach school. Frequent train movements and slow moving or stopped trains (approaching the Missouri River bridge) would block that access and present safety problems.

⁹ Several years ago a train derailment blocked street access preventing an ambulance from reaching a medical emergency. Fortunately, the person survived. Subsequently, the city and the DM&E established an emergency route using a highway trestle close to the river; however, this route is impassable whenever there is flooding or heavy snow.

III. PIERRE'S RAILROAD BYPASS STUDY

In order to analyze the impact of the proposed railroad construction on the City, Pierre retained the engineering consulting firm of Banner & Associates ("Banner").¹⁰ Banner concluded that the impact of 37 high speed trains per day upon the public safety, emergency services, vehicular traffic, noise, vibration, property values, environmental quality, economic issues and general way of life are major concerns for Pierre. Banner Report, Executive Summary at 1 (hereafter "the Banner Report"). Accordingly, the study proposed a feasibility-level engineering, environmental and construction cost analysis of DM&E's proposed alignment along with alternate routes to bypass Pierre. The study examined six possible bypass route alignments and found two of them to be feasible and reasonable.¹¹ The study

¹⁰ In conjunction with Short Elliot Hendrickson Inc. of St. Paul, MN.

¹¹ **Bypass alternative 3** would start at approximately MP 470.6 (station 0+00) of the existing DM&E Railroad and proceed in a southwesterly direction and cross the Missouri River at elevation 1,450 at approximately station 116+00. Once across the Missouri River, the alignment proceeds in a westerly direction while climbing at 0.84% grade to reach station 244+00. The grade is changed to 0.96% to reach an elevation of 1,706 feet at station 408+26. The alignment then crosses through the area between Antelope Creek and the Bad River south of the Missouri River and north of the Antelope Creek Road in a westerly direction. After reaching a maximum elevation of 1,706, the grade begins to decline at a slope of -.35% to station 487+00. The grade continues at 0.0% to station 545+00 and declines at -0.96% to station 770+90. At station 770+90, the bypass would match the existing railroad alignment at approximately MP 487.5.

Bypass alternative 6 leaves the existing railroad alignment at approximately MP 470.6 (station 0+00). The route would travel

concluded that the proposed upgrade will have a

significant negative impact upon [Pierre and Fort Pierre]...[i]ncreasing rail traffic from 3 trains travelling at 10 miles per hour to 37 trains traveling at 45 to 49 miles per hour (or even the more likely 30 to 35 miles per hour due to the current horizontal alignment) will expose vehicles and pedestrians to serious safety hazards in the vicinity of the railroad track. Exposure indexes would increase from a present range of 150 to 59,265 to a projected range of 1,850 to 730,935. The exposure index is based upon current vehicle counts, which will continue to increase every year.

...[h]owever, the increase in rail traffic will mean an almost six fold increase in the total time the intersections are blocked during a 24-hour period. Banner Report at 36-7.

The report also found that the bypass alternatives would eliminate the City's concerns about the construction project and that the selected bypass routes can be feasible and reasonable alternatives to the reconstruction of the railroad through Pierre. Id. at 37-38.

IV. THE DRAFT ENVIRONMENTAL IMPACT STATEMENT

The DEIS notes that it evaluated all information for four bypass proposals submitted by four cities (Rochester and Owatonna, MN, and Brookings and Pierre/Ft. Pierre, SD). The SEA stated that it

first determined whether, from an engineering and

in a southwesterly direction and cross the Missouri River at elevation 1,450. Once across the Missouri River, the alignment changes direction to a more westerly course while climbing a 0.90% grade to station 244+00 where the grade increases to 0.96%. The maximum elevation along Bypass Alternate 6 is 1,754.83 at station 450+21. The elevation begins to decline at -0.82% to station 474+00, and then at a rate of -.96% until the bypass matches with the existing railroad alignment at station 774+07 (MP 487.5). Banner Report at 25.

environmental standpoint, the proposals were reasonable and feasible [emphasis supplied] alternatives to DM&E's proposal to reconstruct and operate its existing rail line. If determined to be reasonable and feasible, SEA then determined whether the proposal would reduce the environmental impact [emphasis supplied] of DM&E's proposal, or simply shift [emphasis supplied] the impacts to other locations. Those proposals determined to reduce environmental impacts were then evaluated taking into account DM&E's project goal of creating an efficient [emphasis supplied] route for PRB coal. Those bypass proposals determined to meet these criteria were retained for evaluation in the Draft EIS. See, DEIS at page 2-62.

The DEIS contains favorable evaluations for Rochester and Brookings. It did not evaluate the Owatonna bypass because that city withdrew its proposal. As to Pierre/Ft. Pierre, the DEIS states that it evaluated this proposed bypass and determined it to be "unreasonable" in a short paragraph just barely over two inches long. The SEA justified its rejection on the grounds that the bypass would have "significant environmental and engineering constraints," the topography would require "extensive cuts and fills" to establish "a safe and suitable grade" for the operation of unit coal trains, the bypass would require the construction of a major new bridge at a new location over the Missouri River and Lake Sharpe creating "an additional navigation hazard to watercraft," and the bypass would likely have "severe impacts on a substantial amount of significant cultural resources." Id. at 2-65.

By contrast, in approving the Rochester bypass, the SEA found that it would be approximately 10.8 miles longer than DM&E's existing, reconstructed rail line and would result in "substantial" environmental impacts (primarily on natural

resources such as land use, wetlands, and wildlife).¹² The SEA stated that no engineering or environmental issues would make the bypass unreasonable or unfeasible. Id. at 2-63. As to Brookings, the SEA approved that bypass finding that the bypass would be approximately 1.8 miles longer than the existing, reconstructed rail line and that adverse impacts would primarily affect agricultural land use, wildlife, vegetation, wetlands and rail service to one local shipper. The SEA concluded that none of these impacts would be unreasonable or infeasible and would not shift similar impacts to a new area. Id. at 2-64 and 65.

V.

THE PUBLIC HEARING

Over 65 people (in a community of only 12,906) appeared and spoke at the SEA's public hearing on the DEIS conducted on November 13, 2000 in Pierre. Most of those testifying expressed a desire for the STB to approve DM&E's construction proposal subject to the condition that the railroad be required to build a bypass around Pierre/Fort Pierre. T. at 75-6, 117, 205. The City of Pierre appeared through its Mayor, Gary Drewes, and its Chief Engineer, Kevin King. T. at 79-83. In addition, city councilman Stan Schwellenpach testified. Mayor Drewes and Mr. King submitted written copies of their remarks as well.

Generally, witnesses appearing at the Pierre hearing testified about the same community and environmental impacts

¹² Instead of adverse impacts on noise levels, traffic flow, and safety including emergency vehicle access. Id. at 2-63.

voiced at other hearing locations along the DM&E route as well as comments expressed in recent STB railroad merger proceedings. Significant concerns included impacts on pedestrian (especially students attending school) and grade crossing safety,¹³ train related noise and vibration, grade crossing related traffic congestion,¹⁴ emergency vehicle access,¹⁵ adverse impacts on property values,¹⁶ and adverse impacts on the nearby St. Mary's Health Care Center.¹⁷

Witnesses highlighted several adverse impacts unique to Pierre. At one time the right of way had been much wider than it is today. DM&E's predecessor railroad -- the Chicago & North Western -- had sold off extensive segments of right of way to various parties in the expectation that the railroad would not be experiencing any significant increase in business in the future.¹⁸ Some of those purchasers built motels, fast food establishments, retail stores, and other facilities next to the tracks. Because Pierre is the state capital, it attracts a substantial number of out of town visitors who patronize these establishments along the right of way. These witnesses fear that increased train traffic will discourage patronage, thereby

¹³ T. at 112, 115,

¹⁴ T. at 80, 104-5.

¹⁵ T. at 111, 114-6, 224-6; Drewes statement at 3.

¹⁶ Banner Report at 15.

¹⁷ T. at 111.

¹⁸ T. at 79, 118; Drewes statement at 2.

depressing local sales taxes important to the City's treasury.¹⁹

Another issue concerns the fact that the only not at grade railroad highway crossing is narrow railroad bridge over a secondary street unsuitable for passage of trucks, fire engines, or other larger vehicles. Pierre fears that passage of frequent, long coal trains through the City will tend to concentrate vehicular traffic on this street making it more difficult for police cars and ambulances to respond to emergency calls by using this street.²⁰

Finally, several witnesses noted that DM&E's rail line has a very sharp six degree curve on the west side of the City before it crosses the Missouri River bridge heading in the direction of Fort Pierre and points west. As a result, DM&E trains operating over a rebuilt line through the City would have to slow down before crossing the bridge and resuming normal speeds. This operating problem would merely exacerbate the congestion, safety, and similar problems identified above.²¹

VI. THE STB'S BYPASS EVALUATION STANDARD

The Board has previously stated that the National Environmental Policy Act ("NEPA") requires that it take environmental considerations into account in decisionmaking,

¹⁹ T. at 130. Drewes statement at 2. See, King statement at 2.

²⁰ T. at 225-7. Based upon an informal poll of his officers, Pierre police chief Allen Aden stated that his officers cross the rail line anywhere from 20 to 50 times per eight hour shift. Id. at 224-5.

²¹ T. at 80-1.

considering the significant potential and adverse environmental impacts in deciding whether to approve or deny a proposed transaction, or grant the transaction with conditions including environmental conditions. The STB is not required to adopt one course of action over another. Rather, in the words of pertinent court decisions, it must take a "hard look" at the environmental consequences of all available alternatives and clearly explain the basis for accepting or rejecting specific alternatives. See, e.g., Robertson v. Methow, 490 U.S. 342, 350-1 (1989) cited in FD No. 33388, CSX Corporation And CSX Transportation, Inc., Norfolk Southern Corporation And Norfolk Southern Railway Company - Control And Operating Leases/Agreements-Conrail Inc. and Consolidated Rail Corporation, __ S.T.B. __ (slip op. served July 23, 1998).

At page 2-62 of the DEIS, the SEA articulated a three part standard for determining whether a bypass proposal should be retained for evaluation in this proceeding. That test appears to be (1) is it reasonable and feasible from an engineering and environmental standpoint, (2) does it reduce adverse environment impacts, and (3) does it create an efficient route for PRB coal? Pierre has carefully examined that standard and evaluated its bypass proposal as well as those of Rochester and Brookings -- which the SEA found acceptable -- against that standard. A comparison between the Pierre proposal and those of the other two cities compels the conclusion that the SEA erred when it failed to accept the Pierre bypass proposal.

VII. THE SEA'S FAILURE TO ACCEPT PIERRE'S
BYPASS PROPOSAL WAS CONTRARY TO NEPA

To the City's amazement, the SEA removed the Pierre/Fort Pierre bypass from further consideration because the SEA determined it to be "unreasonable" in a conclusory opinion just a tad over two inches long. DEIS at page 2-65. Pierre submits this discussion is not the sort of "hard look" the courts expect administrative agencies to conduct when reviewing environmental alternatives.

Insofar as Pierre is concerned, the City believes the DEIS is deficient in several respects. First, while the DEIS cited the many adverse impacts that a reconstruction of the existing DM&E route through Pierre would present,²² it did not discuss any alternatives. For example, the SEA obviously knows that there is a former Milwaukee Road east-west route from Rapid City to eastern South Dakota, located about 30 miles due south of Pierre. The SEA considered a part of this route as one of the seven options it studied for access from South Dakota across Wyoming to the PRB. The SEA examined the feasibility of building a connection from a point on the existing DM&E line east of Pierre called Alto on the former Milwaukee Road right of way and then using the Milwaukee line from there to Draper, SD. DEIS at 2-48. But the SEA apparently never considered using this right of way from Rapid City across the State to either Mitchell or

²² DEIS at 4.3-8 through 4.3-12, 4.3-15, and 4.3-1 through 4.3-120 generally.

Canton, SD, where the line connects with trackage operated by the Burlington Northern And Santa Fe Railway ("BNSF"). Had the SEA contacted the South Dakota Department of Transportation, it would have learned that the former Milwaukee Road right of way is now owned intact by the State, that the portion from Chamberlain to Mitchell has track on it (albeit the line is in very poor shape and is not being operated), and that BNSF is operating the trackage east (and also south) of Mitchell as a contractor for the State. The only discussion of this route is found at page 2-48 of the DEIS where the SEA declined to accept that alternative.

Second, the DEIS is replete with factual errors. The most egregious of these is the SEA's conclusion that the new bridge the bypass would require would "create an additional navigational hazard to watercraft." Id. at 2-65. Obviously, the SEA and/or its consultants never measured the depth of the Missouri River at Pierre. The river has not been a navigable waterway in at least 60 years. In fact, the only watercraft plying the river's waters at Pierre have been pleasure boats used by fisherman and hunters.²³

Third, the DEIS stated that Pierre's bypass proposal would "likely have severe impacts on a substantial amount of significant cultural resources." DEIS at 2-65. Nowhere does the DEIS identify what those impacts might be.

Fourth, the DEIS appears to have used a different standard to evaluate the proposals of Rochester and Brookings

²³ T. at 200; Drewes statement at 2.

than it used for Pierre. The SEA found that the Rochester proposal involved substantially more mileage (10.8 miles) than the retention of the existing line while the Brookings proposal involved slightly more mileage (1.8 miles) than the existing line. By comparison, the Pierre bypass is actually shorter (by approximately 2.3 miles) than the existing route and eliminates the six degree curve approaching the Missouri River bridge. Moreover, DM&E itself has admitted that the Pierre bypass is more efficient and cheaper to operate than the existing route and either of the other bypasses. See, correspondence from DM&E President and CEO Kevin Schieffer dated March 16, 1999, attached as Exhibit A. The SEA also found that the other bypasses would have substantial environmental impacts. In Rochester's case, these impacts would involve noise levels, traffic flows, and safety, including emergency vehicle impacts, whereas the bypass would primarily result in natural resource impacts. DEIS at 2-63. The SEA found that the Brookings impact would likewise affect natural resources and habitats. Id. at 2-64. Pierre's bypass study indicates that the new route would have significant benefits for the community with only minimal impacts on the sparsely populated agricultural grazing lands it would traverse. Banner Report at 23-4, 28.

To buttress its rejection, the SEA cites several additional unexplained and unsupported reasons. It characterizes Pierre's two bypass alternatives as having "significant environmental and engineering constraints." It stated that the

topography along the bypass route would require "extensive cuts and fills" to establish a suitable grade and that the new bridge required to cross the Missouri River and Lake Sharpe would be 1.5 miles long or longer. DEIS at 2-65. The SEA's analysis conveniently forgets its own statements elsewhere in the report that the existing DM&E bridge may not be able to handle the coal traffic and that a new bridge to be constructed adjacent to the existing one would pose significant environmental issues. DEIS at 2-81, 4.3-5, and 4.3-8. To the extent that the SEA bases its rejection on DM&E's representation that Pierre's bypass proposal underestimates the cost, Banner developed that proposal using DM&E's own costs and DM&E's engineering requirements of a 1% maximum grade and a one degree maximum curvature for new rail construction.²⁴ If DM&E's requirements could be relaxed, the City believes those costs could be significantly reduced. The simple fact is that many great railroad structures today such as the Hell Gate Bridge which carries Amtrak's New York-Boston mainline east of New York City over wetlands at the confluence of the East River, the Harlem River, and Long Island Sound, Norfolk Southern's long bridge which carries its Atlanta-New Orleans mainline over Lake Ponchartrain near New Orleans, and Camas Prairie RailNet's spectacular Second Subdivision in Idaho with

²⁴ The DM&E has studied various bypasses and found them more costly and involving potential problems, specifically high bluffs on the west, poor river crossing alternatives, and a wide range of very significant environmental issues. See, letter dated April 8, 1999, from Kevin Schieffer to Mayor Gary Drewes attached as Exhibit B. Compare, Applicant's comments to STB on bypass proposals dated July 12, 1999, attached as Exhibit C, infra.

its many bridges, trestles, and tunnels would never have been built if the SEA had existed years ago.

Perhaps the most telling analysis of the several bypass proposals are the observations and criticisms of the DM&E itself. On March 16, 1999,²⁵ DM&E's Kevin Schieffer wrote, "I know the city has a preference for a bypass. I wish we could make this one work. It would have benefitted both of us" On July 12, in its comments to the STB on various bypass proposals, Kevin Schieffer wrote, "[t]o its lasting credit, Pierre's approach to this issue was far more realistic than any of the others presented...[a]dditionally, Pierre is the one bypass that could possibly result in a more efficient operation because of shorter distances and improved track geometry...[u]nfortunately, the capital cost required to achieve this bypass...is astronomical in comparison to the best case operating savings. [i]n short, it is unreasonable to spend millions in capital to save pennies in operations, which is what the result here would be. [a]dditionally, the environmental and regulatory issues involved in cuts over 100 feet deep and approaching 1,000 feet wide on Corps of Engineers land prior to crossing the Missouri River in a highly sensitive place this proposal beyond the realm of reality from an engineering standpoint."²⁶ Ironically, Kevin Schieffer has now rejected Rochester's bypass proposal. See, report from

²⁵ A copy of Mr. Schieffer's letter is attached as Exhibit A.

²⁶ Mr. Schieffer's letter is attached here as Exhibit C.

the St. Paul Pioneer Press posted on the Brotherhood of Locomotive Engineers website and attached here as Exhibit D.

VIII. PIERRE'S PROPOSED CONDITION

Cost appears to be the primary sticking point between Pierre and the DM&E. Pierre recognizes that its bypass proposal is expensive. But the adverse impacts of DM&E's proposed rail operations would likewise be very costly. Pierre's bypass study indicates that the additional costs associated with the City's alternatives would range anywhere from \$43,535,535 more for Alternate Route 6 to \$47,943,979 for Alternative Route 3. A significant portion of this cost (about \$35,000,000) is associated with the cost of the new bridge. Banner Report at 33-5.

DM&E has advised Pierre that it would be willing to contribute the greater of either \$40 million or an amount equal to the cost of rebuilding that portion of its existing line through the City and the present value of operational savings realized by DM&E's utilization of the bypass route for the estimated life of the project.²⁷ The City is presently exploring the possibility of locating government funding to pay the incremental costs of the bypass over and above what the DM&E would contribute. Accordingly, Pierre asks that the SEA take a "fresh look" at its bypass proposals by issuing a supplemental

²⁷ See, correspondence from Kevin Schieffer to City Attorney John L. Brown dated November 10, 2000, and attached draft of Bypass Agreement submitted here as Exhibit E.

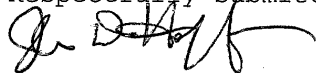
EIS. Pierre would ask the SEA to find its proposals reasonable and feasible and would condition any grant of construction approval for the DM&E on the condition that DM&E construct a bypass around Pierre to be funded jointly by the DM&E (to the extent of funding needed to rebuild the existing rail line and DM&E's proposed operational savings) and the City (in conjunction with any available government funding).

IX.

CONCLUSION

Pierre supports DM&E's plans to build its PRB extension. But DM&E should not ask the City to participate in funding this massive project by asking its citizens to subsidize the environmental and social impact costs. The SEA must take a "hard look" at the serious environmental impacts which the Banner Report has found -- and which DM&E itself does not challenge -- as well as the substantial outpouring of public comment. Pierre urges the STB to do the "right thing" by approving the extension conditioned on the need to build a bypass route around the cities of Pierre and Fort Pierre.

Respectfully submitted,



John D. Heffner
Rea, Cross & Auchincloss
Suite 570
1707 L Street, N.W.
Washington, D.C. 20036
(202) 785-3700

Attorney for the
City of Pierre, SD

Dated: March 6, 2001



DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION

337 TWENTY-SECOND AVENUE S
POST OFFICE B
BROOKINGS, SOUTH DAKOTA
(605) 65
FAX: (605) 65

KEVIN V. SCHIEFFER • President &

March 16, 1999

The Honorable Gary Drewes
Mayor of Pierre
City Hall
222 E Dakota
PO Box 1253
Pierre SD 57501-1253

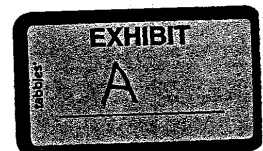
Dear Gary:

Enclosed is a copy of the letter from our Project Engineer on the various by-pass options we looked at near the city of Pierre. Unfortunately, it appears there is nothing within that vicinity that works as an alternative.

In my mind this really leaves us with two remaining options, as we have discussed in some of our previous meetings. The first is developing the existing alignment in a manner most conducive to the city of Pierre. We have been doing some additional work on what options we might have to decrease any traffic congestion by improving train speed and safety performance. That is an area we are going to continue to explore as the engineering goes forward, but that is probably the single most important component we can think of as it relates to the existing community plan at Pierre, other than the issues already addressed (e.g., whistle free, overpass, et cetera).

The other option is the Antelope Creek/Twin Bridges alternative we discussed utilizing the former Milwaukee Road right-of-way. As I explained previously, for public policy and other reasons, we do not anticipate that will be an acceptable solution for the current customers and communities we serve who have been so very supportive of this railroad over the years. Also, it is a very important part of our existing customer base.

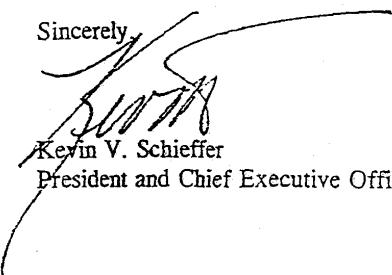
I know the city has a preference to a by-pass. I wish we could make this one work. It would have benefitted both of us. This was the one community where, because of the geometry and the landowner profile, it would have made a great deal of sense to re-route if we could have found a workable solution. I am afraid, however, that somebody must have struggled with this long and hard a hundred years ago and came to the same conclusion. I want to emphasize our appreciation for your thoughtful approach to this issue. I do believe there are an awful lot of improvements we can make to the existing corridor that will substantially mitigate the impact of train traffic. That is an area I would encourage that we focus considerable efforts. However,



The Honorable Gary Drewes
March 16, 1999
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if anyone sees any other reasonable by-pass alternatives out there that we have not considered, I also want you to understand we have an open mind to any suggestions. But I do think we have exhausted the potentials. After you have had a chance to review this, I will follow up with you personally. In the meantime, should you have any questions, do not hesitate to call.

Sincerely,



Kevin V. Schieffer
President and Chief Executive Officer

KVS:jeh(krstwp51gdrewes)

Enclosure

W/ copy of K. King ltr + map

MAR-01-2001 15:13 FROM: CITY OF PIERRE

605 773 7406

TO: 202 659 4934

P. 002/006

DM&E

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION

137 TWENTY-SECOND AVENUE SOUTH
POST OFFICE BOX 178
BROOKINGS, SOUTH DAKOTA 57006
(605) 697-2400
FAX: (605) 697-2499

KEVIN V. SCHIEFFER • President & CEO

April 8, 1999

The Honorable Gary Drewes
Mayor of Pierre
City Hall
222 E Dakota
PO Box 1253
Pierre SD 57501-1253

Dear Gary:

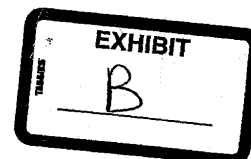
This follows our conversation of today, wherein you advised of your interest in focusing in on the La Frambois Island bypass option. I thought it would be helpful to outline some of the issues in writing prior to the council meeting next week so that you and others on the Council had some opportunity to consult with others before we begin another discussion on the bypass issue next Tuesday. I would appreciate it if you could have this letter circulated to other council members and any others you deem appropriate.

I think you and Kevin King are familiar with the background of this issue, but I will review some of the history for the benefit of others.

First, let me say from an operational standpoint I think we both have very similar goals in that, unlike almost every other community on our line, a "bypass" of Pierre would actually shorten our route and improve our operations. If you can find a workable plan that we could not, it would be viewed as a positive improvement from our standpoint.

However, as I mentioned in my most recent letter to you (copy of letter and map attached), our analysis of the "near Pierre" bypass leads us to the conclusion that there is not a reasonable alternative out there. Fundamentally, the problems are (1) high bluffs on the west, (2) poor river crossing alternatives (particularly at La Frambois Island), and (3) a wide range of very significant environmental issues. Also, there is a great deal of uncertainty attached to this option even if, theoretically, these other obstacles are overcome.

This letter is a brief synopsis of our conclusions. As I have mentioned earlier, because of the fairly obvious "fatal flaw" conclusions that we have reached with respect to every alignment, the "near Pierre" bypass has not been engineered to any great detail on such things as specific yardage earth quantities, detailed cost estimates, et cetera. But I do believe the attached outline gives you a flavor for why that level of engineering detail is not necessary in



The Honorable Gary Drewes
Mayor of Pierre
April 8, 1999
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this case. I apologize for its cursory treatment of this very significant issue, but I asked our engineer to develop something quickly in the interests of getting an "executive summary" outline to you and the Council as soon as possible. Because of the "fatal flaw" conclusions as to the alignments considered, we finally reached the point that it simply did not make sense to spend additional money on developing detailed answers that seem clearly beyond the realm of reason - even without considering the environmental impacts, project delays, and uncertainty.

Most of our time and effort as we have looked at the Pierre bypass issue has been spent in looking for other alignments that would pass a "fatal flaw" analysis so that the very significant costs of developing the kind of engineering detail required for jobs like these would be justifiable. In that regard, we have reviewed topographical maps, we have flown the area and developed detailed aerial photography which, if you wanted to seriously explore this option, we would be happy to make available for you at no cost (though there is additional expense in having this data base digitized). This would be a very valuable aid to any engineering firm looking at the La Frambois option. It not only provides a good, geo-referenced aerial photographic view, but also enables you to extract topographical details to within one foot contours and allows for computerized earthwork analysis on an instantaneous basis. We had the La Frambois alignment and other Pierre bypass alignments flown approximately eight months ago in anticipation in developing it to the next level. Since we have concluded that was not reasonable, and have not further developed this resource. But it is a very useful tool if, in fact, you decide to pursue this in a serious way.

I do look forward to a good discussion on the pros and cons of the bypass issue at the meeting next Tuesday. I also hope we can spend some time visiting about the existing track improvement options, as identified in the Pierre Community Plan and Partnership Agreement draft earlier submitted to you. Hopefully the Council members have had a chance to review that document in recent months.

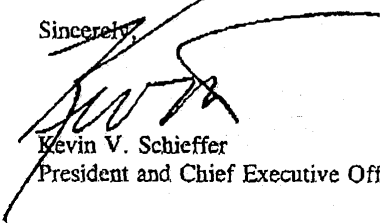
As I mentioned last week, we have been pursuing the feasibility of building a replacement bridge in the same area if it would significantly improve track speed. That would be a very beneficial thing from a traffic and safety impact standpoint. I think that also is an issue that would be good to explore at the meeting for everyone to gain an understanding of its impacts and the pros and cons associated with that.

While further project delay to re-analyze the bypass issue is obviously not a positive thing for the project, it is to my mind perhaps less detrimental to the project than us trying to push something through without consensus. If you are not comfortable that we have done a reasonable analysis of the bypass issue or think our conclusions are not justified, then an independent opportunity for you to make an attempt at this may be better than degenerating into a confrontational approach. But that review at this stage comes at considerable cost and delay

The Honorable Gary Drewes
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Page 3

which we have been trying to avoid through additional Community Plan spending. I would just hope that we can come to some reasonably prompt decisions. We are not trying to duck any issues or take any shortcuts but we are trying to get to some definitive decisions. This project and the bypass issue have analyzed for well over a year already. We have made a serious effort, and welcome any independent confirmation (or solutions we missed). Hopefully, however, we can come to closure in a reasonable time frame that satisfies the legitimate questions relative to this project generally, and the bypass specifically. We are committed to working with you to develop the project reasonably.

Sincerely,



Kevin V. Schieffer
President and Chief Executive Officer

KVS:jeh(kvsawp51@gdmccs.1)

Enclosures (previous letter and Pierre Bypass Fatal Flaw outline)

**PIERRE BYPASS
FATAL FLAW ANALYSIS
LA FRAMBOIS ISLAND OPTION**

We conducted an analysis of the La Frambois Island option for the Pierre bypass.

In order to maintain a grade line from the departure point west of Ft. Pierre to the point the bypass would again intersect the existing rail line is no small task. First, a river crossing of the Bad River is necessary, which would require a channel change. This line would then need to gain elevation in order to reduce the cut through the bluff at the Missouri River. Gaining elevation, however, forces the intersection with Highway 83 to result in a grade separation. This would require a significant alteration of the profile of Highway 83. The cut through the bluff between Highway 83 and the Missouri River would need to be 100 feet deep and approximately 650 feet wide.

A very large expense would result from the work necessary to stabilize the foundation of the soils immediately adjacent to the Missouri River where deep seated slope failures are actively failing. The bridges across the Missouri River and the bay behind La Frambois Island would approximate 3,615 feet and 1,110 feet respectively. Bridges of this length would also require a fill of approximately 35 feet in height across La Frambois Island (and approximately 300 feet wide). This would result in a footprint of 15.2 acres on La Frambois including the resulting loss of hardwood trees within that corridor. Additionally, a temporary fill of the river or some other means of getting the fill to the island which has not been developed. The nature of the unstable shale to be "cut" from the bluff may be unsuitable for reuse as fill. Most certainly this material could not be economically hauled through downtown Pierre to be used for fill on the east side. Therefore, there will be extraordinary "borrow" and "waste" costs associated with this option and will involve thousands of truckloads traveling considerable distances on your local roads.

This fill height would continue on the east bank of the Missouri River with a height of approximately 30 feet high and 250 feet wide, the profile of which would gradually decline so that it would eventually match with the existing railroad. This embankment would be quite large and a definite obstruction for access to the Issac Walton League Park, agricultural field access, and future city expansion. In any event, this embankment would alter the viewscape of the river and southern tip of La Frambois Island. The Indian School and the golf course would be impacted as would the residential housing.

This analysis does not address the environmental, archeological, landownership (including CoE issues), or other major obstacles to the La Frambois Island option. These issues are very cursory "executive summary" treatment of some of the engineering obstacles.

These reasons led us to discard this option.

DM&E

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION

July 12, 1999

Office of the Secretary
Case Control Unit
STB Finance Docket No. 33-407
Surface Transportation Board
1925 K Street, N.W.
Washington DC 20423-0001

ATTENTION: Ms. Elaine K. Kaiser
Chief, Section of Environmental Analysis
Environmental Filing

RE: APPLICANT COMMENTS ON VARIOUS COMMUNITY BYPASS PROPOSALS

Dear Ms. Kaiser:

On or about June 9 and 10, 1999, bypass alternatives for three additional communities were submitted for your consideration pursuant to the Board's Order dated April 14, 1999. Those three additional proposals related to the communities of Pierre, SD; Brookings, SD and Owatonna, MN. In addition, the city of Rochester, MN submitted supplemental information to its earlier submission. This is to provide Applicant DM&E's response to all those proposals. In doing so, we will outline overall policy and legal issues common to all of the proposals. In addition, we will address in some detail the specific additional proposals.

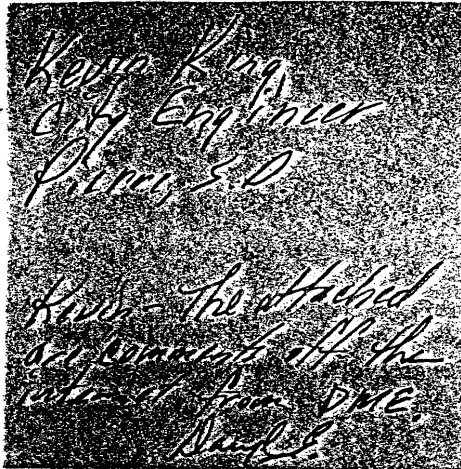
For the reasons stated below, we strongly object to each of the proposed bypass proposals as unreasonable and contrary to the purpose and needs of this project. Additionally, they raise serious legal questions and extraordinary policy considerations, some of which are discussed below and some of which already were discussed in some detail in our April 9, 1999, filing responding to the Rochester bypass proposal. This submission should be read in conjunction with that filing.

For policy, legal, environmental and engineering reasons, each of the four alignments submitted is impractical and unreasonable, and should not be included for further consideration in the EIS.

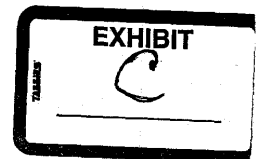
I. POLICY AND LEGAL ISSUES COMMON TO EACH PROPOSAL

Policy Issues. Almost by definition, a "forced" bypass construction is doomed for failure unless the STB is prepared to initiate a radical departure in law and policy. For any of these proposals to be effective would require either that (a) the STB order that the present alignment through town (which the communities seek to have bypassed) be abandoned or otherwise prevent non-jurisdictional improvements from being made on that line, or (b) the STB must regulate and precisely dictate what traffic the railroad can or cannot move on its existing line through town, notwithstanding the fact that the railroad meets all existing legal requirements to move traffic.

Based on our preliminary analysis, even if the STB ordered that a bypass must be built, the most rational railroad operating decision likely would be to let the new bypass stand idle and rust away while the existing alignment (which is far more efficient) is refurbished to an acceptable level (which may be to a lesser standard than that which was originally proposed) and utilized for the majority of the traffic (coal and non-coal). The only way to ensure that such a logical business decision is not made is to introduce an artificial regulatory mandate to the contrary (for both the newly ordered bypass and for the existing track segment being bypassed), which we believe likely would be



*www.dmerail.com/
stbdoc.htm*



Operational modelling, the bypass proponents make incredible assumptions with no empirical support. This is a common theme underlying the verified statement of Mr. Otter (Attachment A) based on very detailed and expensive scientific modelling based on actual track charts, grades and track data. The second Rochester filing, in particular, simply assumes away scientific practicalities with sweeping unsupported (and insupportable) conclusory statements. The technical credibility of proponents' statements can only be judged by the credibility of their methodology (or lack thereof). Our methodology is delineated in considerable detail.

The engineering assumptions and inconsistencies of bypass proponents are equally glaring, and addressed in more detail in the verified statement of Mr. Giegear (Attachment B). For example, for Rochester to simply assume at-grade crossings at Highways 14 and 63 while the gradeline used would be 6 feet below Highway 14 or 24 feet above Highway 63 is a waste of everyone's time. This allows for no meaningful review of cost or safety or any of the other very real problems that are repeatedly and consistently assumed away. If this is to be a real world proposal, it requires real world concepts that can be realistically analyzed.

Specifics. This section briefly touches on the big picture issues associated with each new community bypass proposal:

1. **Pierre, SD** -- To its lasting credit, Pierre's approach to this issue was far more realistic than any of the others presented. The ultimate proposal significantly understates costs, but this is not the result of artificial direction or unrealistic assumptions directed by the City -- as was the case with virtually all three other communities.

Additionally, Pierre is the one bypass that could possibly result in a more efficient operation because of shorter distances and improved track geometry (although the extent of increased grade profile problems, which is unknowable without resolving basic earthwork requirement issues, may overwhelm those improvements). Unfortunately, the capital cost required to achieve this bypass -- even using the most optimistic assumptions -- is astronomical in comparison to the best case operating savings. In short, it is unreasonable to spend millions in capital to save pennies in operations, which is what the result here would be. Additionally, the environmental and regulatory issues involved in cuts over 100 feet deep and approaching 1,000 feet wide on Corps of Engineers land prior to crossing the Missouri river in a highly sensitive area place this proposal beyond the realm of reality from an engineering standpoint.

2. **Brookings, SD** -- The state of South Dakota earlier developed a bypass proposal one-half the length of that which was ultimately developed by Brookings and is now before the Board. The length was doubled as an arbitrary determination made by the city. This is typical of the lack of reasonableness associated with this proposal. From a technical engineering standpoint, Brookings as a city has the best chance to develop a bypass proposal if it can be done in a manner which solves more problems than it creates. Whether or not that can be done will of necessity have to include more parties than the city acting in isolation, specifically precluding meaningful input on an unrealistic proposal. There may or may not be a bypass which can reasonably be developed around Brookings. But the alignment submitted for STB consideration and the subject of this comment is ridiculous.

3. **Owatonna, MN** -- Owatonna proposes a bypass through an already highly developed area. The assumptions are unrealistic and inconsistent, as detailed in the attached verified statements. This is not a credible proposal. Neither the alignment submitted, nor any other identified alignment in the area presents a realistic opportunity to develop a reasonable bypass proposal from an engineering standpoint, even with significant participation by third parties (though that is not suggested in any submission).

VI. CONCLUSION

None of the bypass alignments submitted (either Rochester or the subsequent proposals) present a reasonable or practicable bypass alternative.

Sincerely,

Subject: DM&E president rejects Rochester bypass - Brotherhood of Locomotive Engineers

Date: Tue, 27 Feb 2001 09:50:36 -0500

From: Bill Newman <wbnewmanjr@hotmail.com>

Organization: William B. Newman, Jr., LLC

To: Gary.Drewes@state.sd.us, rcalaw@erols.com

Gary and John,

FYI,

Bill Newman

<http://www.ble.org/pr/news/headline022701d.asp>

--

WBNewmanJr

202-835-0740

wbnewmanjr@hotmail.com



Brotherhood of Locomotive Engineers

INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS

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DM&E president rejects Rochester bypass

ROCHESTER, Minn. -- The president of the Dakota, Minnesota & Eastern Railroad rejected a city proposal to bypass high-speed coal trains around the southeast Minnesota city, the St. Paul Pioneer Press reports.

Last week, Rochester officials announced they would support the railroad's \$1 expansion plan if the railroad agreed to reroute the track through farmland.

But DM&E President Kevin Schieffer told a Rochester crowd Tuesday that the bypass proposal would kill the rail expansion plan.

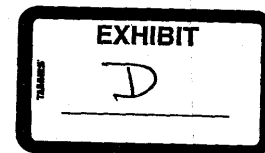
"Our project is not to build a new railroad through somebody else's property in Rochester," Schieffer said. "Our project is to fix our railroad. . . ."

A Rochester bypass carries an estimated price tag of \$100 million and has left rural residents fearful of losing farmland and homes.

The expansion project calls for hauling coal from Wyoming through South Dakota to Minnesota for use in eastern power plants.

Rochester officials will present a financial outline to the federal agency responsible for approving the rail project by March 6, the deadline for public comment.

(Next Story)



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February 27, 2001

bentley@ble.org

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Part 13

Name: wbnewmanjr.vcf
Type: text/x-vcard
Encoding: 7bit
Description: Card for Bill Newman

**DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION**337 TWENTY-SECOND AVENUE SOUTH
POST OFFICE BOX 178
BROOKINGS, SOUTH DAKOTA 57006
(605) 697-2400
FAX: (605) 697-2499

KEVIN V. SCHIEFFER • President & CEO

November 10, 2000

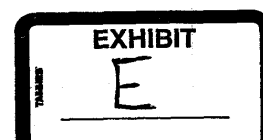
Mr. John L. Brown
Stanley County State's Attorney
319 S. Coreau
P.O. Box 280
Pierre, SD 57501-0280VIA FACSIMILE (605) 224-7102
AND U.S. MAIL

Dear John:

This follows our previous conversation concerning your November 1, 2000 letter. I have tried to call Mayor Drewes but have not been able to reach him.

With respect to your suggested changes, let me address them individually:

1. To include "and any safety structures" in Section 2 is agreeable. As I discussed, we would also be agreeable to the operations cost concept. Your suggestion as to allowing that to be addressed in the future is agreeable. However, if you wish to address this issue, we think it only fair that if there are operating costs (rather than the savings your language assumes) over and above what would be expected on the existing line, that those should be credited against the overall amount contributed. In short, we are happy to either include the concept of operational costs/savings, or leave it out of the agreement entirely. But if we do include it, it should be a two way street. As a footnote to this issue, the assumption as to operational cost savings I believe originated with my observation to Mayor Drewes a couple of years ago when we were reviewing the "Farm Island" option. I honestly do not know whether the alignment Pierre ultimately submitted to the STB will increase or decrease operating costs. I do know it would involved a significantly greater grade than the existing line.
2. As we discussed, your suggestion with respect to Section 3 does not work. Obviously, we are not going to put ourselves in a position where we have to spend \$40 million rebuilding our existing line, and then turn around and spend another \$40 million building a redundant bypass line. You and I discussed various options, including some sort of offset as money is spent on the design or construction of the existing line, and that we would hold off that work as long as reasonably practical so as to allow the City as much time as possible to obtain the



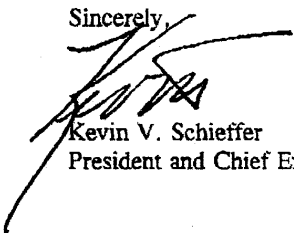
Letter to Mr. John Brown
November 10, 2000
Page 2

authority required. If you want to propose language along those lines we would be happy to consider it. But the suggested change in Section 3 does not work.

3. Your proposed change to Section 4 obviously is agreeable, and we apologize for the typographical error.
4. Your suggestion to paragraph 15 appears to be acceptable in large part. However, if there is landowner opposition, we would reserve the right to at least switch to a position of neutrality. But so long as there is not landowner opposition, we would have no problem supporting your application. In either event, we will not oppose it and will cooperate in every way.
5. With respect to your suggested changes in Section 18, for reasons we discussed, we believe it makes the most sense to stay consistent with the arbitration approach we have used elsewhere. Based on our discussions, I do not get the sense that that is a big issue.

I think this addresses all your proposed revisions. We do have a significant timing concern. I have communicated that to you and Mayor Drewes. We have resisted establishing hard and fast deadlines, but made it very clear that time is of the essence. Most specifically, we emphasized that it was important to resolve this prior to the STB hearings. It appears that is not part of the City's plan, and we really do not know what the City's plan is. But I do want to reiterate from our perspective that our offer remains open up to that time. After that, we remain open to any suggestions you wish to offer but please understand the value of entering into a negotiated settlement diminishes significantly as time goes on. In any event, some definitive direction from the City as to your decision would be appreciated.

Sincerely,



Kevin V. Schieffer
President and Chief Executive Officer

KVS:cld(cvs:brown)

cc: The Honorable Gary Drewes

BYPASS AGREEMENT

This Agreement is entered into by and between the City of Pierre (hereinafter the "Authority") and the Dakota, Minnesota and Eastern Railroad (hereinafter "DM&E").

BACKGROUND

The DM&E has pending an application for authority to construct and operate approximately 280 miles of new rail line (STB Finance Docket No. 33407), hereinafter referred to as the PRB Project.

The PRB Project contemplates the rehabilitation of approximately 600 miles of its existing line, portions of which are included within the city limits of Pierre, SD.

The PRB Project contemplates significant benefits including improved rail service, jobs, tax revenues, and other benefits, which the parties seek to realize as soon as practicable.

The PRB also contemplates increased train traffic levels which has resulted in uncertainty and concern with respect to the quality of life impacts relating thereto, which the parties seek to resolve as soon as practicable.

Providing an option to pursue the development of certain bypasses around the city of Pierre alleviates a significant amount of the concern.

The Authority intends to assign its rights and responsibilities hereunder to a regional rail authority duly authorized under the laws of South Dakota, which rail authority would have the option to develop a bypass based in significant part upon the financial commitment from DM&E provided for hereby.

THEREFORE, THE PARTIES AGREE AS FOLLOWS:

1. Definitions.

- A. "Bypass Plan(s)" defined: The bypass plan set forth in Appendix A, as described therein and further refined elsewhere in the Agreement – as may be modified from time to time – shall be referred to as the Bypass Plan. Appendix A is hereby incorporated and made part of this Agreement.

Appendix A shall at a minimum include:

A.1 – The Pierre Alignment

A-2 – Design Standards & Specifications for the Pierre Alignment

B. "Bypass Line" defined: The completed physical rail line resulting from the Bypass Plan (as that term is defined by the Agreement) shall be referred to as the "Bypass Line".

2. Upon completion of the conditions set forth in this Agreement, and as per the procedures provided for herein, DM&E shall contribute toward the construction of the Bypass Line the greater of either (a) Forty Million Dollars (\$40,000,000), or (b) an amount equal to the cost of rebuilding that portion of DM&E's existing line identified in Appendix A to be bypassed by the Bypass Line (including bridges and any safety structures), and the present value of operational savings realized by DM&E's utilization of the Bypass Line for the estimated life of the project. In the event the parties cannot mutually agree as to the reasonable cost of rebuilding DM&E's existing line to reasonable heavy haul standards, and the cost savings as identified above, such amount shall be determined by arbitration as set forth herein.

3. Such obligation shall become effective when and if (a) DM&E gets all necessary regulatory approvals and financing to build the PRB Project, (b) Authority receives all necessary regulatory approvals and financing to build a Bypass line designed in accordance with the terms and specifications set forth in this Agreement, (c) notification of commencement of construction of the Bypass Line (as set forth herein); and (d) the Authority's compliance with the terms and conditions of this Agreement. ~~In the event Authority has not achieved the requirement milestone set forth in subsection 3(b) of this Section 3 prior to DM&E achieving the requirement milestones set forth in subsection 3(a) hereof, DM&E's obligation under paragraph 2 shall be reduced to Twenty Million Dollars (\$20,000,000).~~

4. When the Authority determines that it is prepared to commence construction of a Bypass Line, it shall so notify DM&E. Such notification shall include a budget for the Bypass Line, which budget shall include a Bypass Line construction completion cost, bonded and guaranteed by a qualified contractor(s), certified by Authority to be inclusive of all design and construction costs necessary to complete said Bypass Line, and any other costs required to build the Bypass Line. The budget shall specify the sources of proceeds along with their relative contributions toward such costs, with all non-DM&E-funded costs being defined as "Authority Costs". Prior to sending such notice, the Authority shall establish a Construction Account at a FDIC insured financial institution for the purpose of disbursing funds reasonable and necessary to build the Bypass Line, which account shall be legally limited to that purpose. Upon (a) notification from the Authority to DM&E of its intent to commence construction, and (b) presentment of verification and documentation required by this Agreement, and (c) certification that all funds necessary to pay all Authority Costs shall be transferred into the Construction Account on or before the date that DM&E contribution is due (or if such Authority Costs are federally funded, an irrevocable and specific commitment of such federal funds to the Bypass Line construction in question), DM&E shall —within 180 days of such

notification and upon verification by the parties that the terms and conditions required pursuant to this Agreement have been satisfied -- deposit into the Construction Account its share of costs associated with the Bypass Plan budget. In the event DM&E fails to deposit such sums within said 180 days, its obligation shall be increased at the greater of either 10% compounded annually or at a rate equal to 400 basis points over U.S. Treasury bonds having a maturity of ten years, compounded annually. In the event that DM&E is in default of its contribution obligation for more than 12 months, Authority shall have the right to treble damages.

5. After the parties certify that the Bypass Line has been completed consistent with the terms and conditions of this Agreement and certified as commissioned for full operations, DM&E shall preference the Bypass Line so as to utilize it for all Wyoming Power River Basin (PRB) unit coal trains (loaded and empty) originating and terminating in the Wyoming PRB so long as the Authority continues to fulfill its obligations under this Agreement, provided that such trains' utilization of said Bypass Line will not denigrate or interfere with DM&E operations. Interference with DM&E operations shall not mean that DM&E may use a line other than the Bypass Line for PRB coal traffic simply because the Bypass Line route may cost more to maintain or operate. Material interference shall, however, include avoidance of traffic congestion, service to local shippers who may locate on the Bypass Line, maintenance work on the Bypass Line, and similar operating or maintenance needs. In short, it is the Parties' intention that the Bypass Line should be utilized to its reasonable maximum extent for PRB coal, preferencing it over any other DM&E line when there is no articulable reason to use another DM&E line. However, if there is a need (other than simply saving costs), any other DM&E line can serve as a backup to the Bypass Line for PRB coal traffic. DM&E shall make an affirmative report to the Authority each year certifying its compliance with this section as it relates to the previous calendar year. For purposes of compliance verification relating to this provision, Authority shall have access to relevant Wyoming PRB loading and routing information and other documents reasonably related to PRB unit coal train traffic traversing South Dakota, and shall permit Authority to install reasonable monitoring devices keyed to Wyoming PRB movements on reasonable terms and conditions so as not to interfere with DM&E operations. In the event that it is acknowledged or adjudicated that DM&E violated this utilization commitment, DM&E shall pay to the Authority liquidated damages in the amount of \$500 per PRB coal trail that utilizes the existing line within the City of ~~Brookings~~ Pierre rather than the Bypass Line contemplated by this Agreement, if such utilization is in excess of reasonable allowances for operating purposes. For purposes of this Agreement, any period during which the Bypass Line incapacitated because of an Act of God or emergency outage beyond the reasonable control of DM&E shall not be included in the calculation of utilization requirements or damages relating thereto.

6. DM&E shall be responsible for 100% of the maintenance costs of the Bypass Line in perpetuity after it is completed, unless specifically agreed to the contrary in writing signed by the parties.

7. DM&E shall have exclusive access to and use of the Bypass Line in perpetuity, unless specifically agreed to the contrary in writing signed by the parties.

8. Neither the design of the Bypass Plan nor the construction of the Bypass Line shall materially interfere with DM&E's ability to serve its local area customers, unless specifically agreed to the contrary in writing signed by the parties.

9. Any Bypass Line constructed pursuant to this Agreement shall be consistent with the Bypass Plan – as may be modified from time to time pursuant to this Agreement – and subject to the terms and conditions set forth in this Agreement. The Final Bypass Plan on which the bonded completion costs described in paragraph numbered 4 of this Agreement is based shall be subject to the approval of the parties for the limited purpose of ensuring compliance with the terms of this Agreement, which approval shall not be unreasonably withheld.

10. The parties acknowledge that the Bypass Plan is preliminary in nature and may require pre-construction modifications to comply with technical design standards or criteria. In such event, such modification shall be incorporated into the Bypass Plan.

11. In the event that the Authority determines that a Bypass Plan be modified to accommodate some non-technical design related concern (e.g., political), the parties shall meet to address the issue or concern. Subject to paragraph 13, reasonable changes for good cause shall be accommodated whenever reasonably practicable so long as it does not adversely affect the operation or performance of the line, provided however that no DM&E costs or contributions will be increased as a result thereof.

12. The Bypass Line shall be constructed to be functionally compatible with a CBTB traffic control system (or other traffic control system) specified by DM&E such that the Bypass Line would be compatible with the planned DM&E train control system without further costs to or modification required by DM&E.

13. Landowners affected by any Bypass Plan or resulting Bypass Line shall be fairly and adequately compensated. At a minimum, prior to filing for regulatory approval for building a Bypass Line, the Authority shall have offered landowners the opportunity to participate in a process substantially consistent with the "Landowners Program", set forth in Appendix B to this Agreement, and for those landowners choosing to participate in such program the Authority shall have made a definitive offer for the acquisition of land required.

14. As a condition precedent to any DM&E obligation hereunder, the City of Pierre shall within one week of the execution of this notify the Surface Transportation Board of its resolution of the bypass issue and its unqualified support for the DM&E project as proposed in STB Finance Docket No. 33407 (i.e., DM&E's application to construct and operate certain lines in the western South Dakota and Wyoming, etc.). On a going forward basis, the City of Pierre shall undertake reasonable best efforts to support and help secure PRB Project approval as soon as reasonably practicable.

15. Authority shall be responsible for development and obtaining regulatory approval for construction and operation of the Bypass Line, and shall take all reasonable steps necessary to ensure that any proceeding relating thereto shall be kept separate and distinct from the PRB Project and any regulatory filing relating to the PRB Project. DM&E shall, however, render to the authority its support and assistance in securing whatever regulatory approval is necessary for the Bypass Line and shall undertake reasonable best efforts to support and help secure the Bypass Line approval as soon as reasonably practicable.

16. DM&E shall have the right to inspect and verify Bypass Line construction to ensure that such construction is completed consistent with the terms and conditions of this Agreement, and the Authority shall undertake best efforts to cooperate with DM&E in that regard.

17. This Agreement is binding upon and inures to the benefit of both parties, their assigns and DM&E's successors in interest. The Authority may assign its rights and responsibilities to a duly qualified rail authority established pursuant to the laws of South Dakota.

18. In the event of any disagreement between the parties as to the meaning or interpretation of any part of this Agreement, or certification or verification required hereby, or the satisfaction of any term or condition hereof, or resolution of any dispute arising herefrom, such matter shall may, with the written approval of the parties, be resolved by arbitration administered through the American Arbitration Association ("AAA"), which arbitrator determination shall substitute for any certification, verification, satisfaction or resolution required hereby. Such arbitrator shall be appointed by the AAA, and shall have qualifications and expertise in railroad matters. Arbitration as set forth herein shall be employed as to any dispute which may arise under paragraph 2 of this agreement.

19. Authority shall undertake best efforts to keep DM&E informed of the status of and details relating to the Bypass Plan and its developments, and shall make available all reasonable records and documentation relating to the same. DM&E shall cooperate in good faith with the Authority's efforts to obtain any regulatory permits necessary for constructing the bypass contemplated by this Agreement in the event the Authority files for such permits.

20. In the event that the City ultimately opts to not exercise the option provided under this agreement to build a bypass, DM&E shall at a minimum provide whistle free protection for major in-city crossings on or before the later of either (a) 6 months from the date by which 20 million net tons of PRB coal is transported on the DM&E line, or (b) within one calendar year of notification from the city that it has determined not to exercise its option to develop a bypass, consistent with the whistle free standards as generally provided for in other community partnership agreements executed by DM&E.

Agreed to this _____ day of _____, 2000.

Authority

by: _____

its: _____

DM&E

by: _____

its: _____