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May 11, 2006

ENTERED
Office of Proceedings

MAY 12 2006

Part of
Public Record

VIA FEDERAL EXPRESS

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 700
Washington, DC 20006

Re: **Finance Docket No. 34177**
Iowa, Chicago & Eastern Railroad Corporation -- Acquisition
and Operation Exemption -- Lines of I&M Rail Link, LLC

Finance Docket No. 34178
Dakota, Minnesota & Eastern Railroad Corporation
and Cedar American Rail Holdings, Inc. -- Control --
Iowa, Chicago & Eastern Railroad Corporation

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceedings are an original and ten copies of the **Petition of Iowa, Chicago & Eastern Railroad Corporation and Dakota, Minnesota & Eastern Railroad Corporation to Reopen and Partially Modify Conditions**, dated May 11, 2006. A check in the amount of \$200, representing the appropriate fee for this filing, is attached.

A computer diskette containing the text of the Petition in MS Word 2000 format also is enclosed. Note that the Petition includes two color maps, which are located at sequential page numbers 46 and 47 of the filing.

Finally, one extra copy of the Petition and this letter are enclosed. I would request that you date-stamp those items to show receipt of this filing and return them to me in the provided envelope.

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FLETCHER & SIPPEL LLC

Mr. Vernon A. Williams
May 11, 2006
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If you have any questions regarding this filing, please feel free to contact me.
Thank you for your assistance on this matter.

Respectfully submitted,



William C. Sippel
Attorney for Iowa, Chicago & Eastern Railroad
Corporation and Dakota, Minnesota & Eastern
Railroad Corporation

WCS:tjl

Enclosures

cc: Parties of Record
Ms. Victoria J. Rutson, SEA

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings

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Public Record

FINANCE DOCKET NO. 34177

IOWA, CHICAGO & EASTERN RAILROAD CORPORATION
-- ACQUISITION AND OPERATION EXEMPTION --
LINES OF I&M RAIL LINK, LLC

FINANCE DOCKET NO. 34178

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION
AND CEDAR AMERICAN RAIL HOLDINGS, INC.
-- CONTROL --
IOWA, CHICAGO & EASTERN RAILROAD CORPORATION

**PETITION OF IOWA, CHICAGO & EASTERN RAILROAD
CORPORATION AND DAKOTA, MINNESOTA & EASTERN
RAILROAD CORPORATION TO REOPEN AND
PARTIALLY MODIFY CONDITIONS**

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**SURFACE
TRANSPORTATION BOARD**

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**ATTORNEYS FOR IOWA, CHICAGO &
EASTERN RAILROAD CORPORATION
AND DAKOTA, MINNESOTA & EASTERN
RAILROAD CORPORATION**

Dated: May 11, 2006

BEFORE THE
SURFACE TRANSPORTATION BOARD

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IOWA, CHICAGO & EASTERN RAILROAD CORPORATION
-- ACQUISITION AND OPERATION EXEMPTION --
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FINANCE DOCKET NO. 34178

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AND CEDAR AMERICAN RAIL HOLDINGS, INC.
-- CONTROL --
IOWA, CHICAGO & EASTERN RAILROAD CORPORATION

**PETITION OF IOWA, CHICAGO & EASTERN RAILROAD
CORPORATION AND DAKOTA, MINNESOTA & EASTERN
RAILROAD CORPORATION TO REOPEN AND
PARTIALLY MODIFY CONDITIONS**

Iowa, Chicago & Eastern Railroad Corporation ("IC&E") and Dakota, Minnesota & Eastern Railroad Corporation ("DM&E") hereby petition the Board pursuant to 49 C.F.R. §§ 1115.4 and 1117.1 to partially reopen the decision served July 22, 2002 in Finance Docket No. 34177 ("IC&E Acquisition"), modify the housekeeping conditions imposed in ordering paragraphs 2 and 3 of that decision, and accept for consideration information regarding coal traffic from DM&E's new line into the Powder River Basin of northeastern Wyoming (the "PRB") that may be diverted onto the former rail lines of I&M Rail Link, LLC ("IMRL") as a result of IC&E's acquisition of IMRL's assets and DM&E's control of IC&E. The Board previously requested the latter information to determine what, if any, environmental review is necessary to address the cumulative impacts of the PRB construction project and the IC&E acquisition and control transactions.

The prior housekeeping conditions imposed by the Board preclude IC&E from handling any trains that originate or terminate on DM&E's proposed new rail line into the Powder River Basin region of Wyoming (the "PRB Line") until certain environmental matters are reviewed, and indicate that IC&E may initiate such a review "if and when" DM&E begins construction of its new line. The relief sought here would simply confirm that, given the advanced and bona fide nature of DM&E's PRB Line proposal, IC&E may begin the process contemplated by IC&E Acquisition now without waiting for a needlessly artificial or technical event of "construction" to occur. DM&E and IC&E have, since the Board's housekeeping condition, been able to assess the relative advantages and disadvantages of the various routing options available to different markets in light of the IC&E acquisition and control transactions. There are no circumstances relative to that traffic analysis that are expected to change between now and commencement of construction.

The requested relief would also address the prior IC&E routing restriction, which prohibits the handling of any PRB Line coal over the former IMRL lines pending further environmental review -- regardless of whether the routing of such trains is related to or affected by the transactions approved in these regulatory proceedings. That artificial routing prohibition essentially closed an existing gateway that had long been an important component of DM&E's PRB Line proposal, and as a practical matter has come to serve as a significant (and, we expect, unintended) impediment to PRB project financing efforts. Given that DM&E and IC&E are initiating the further environmental review previously requested by the Board and that construction of the PRB project will take three years from an anticipated 2007 start date, any necessary consideration of environmental matters here will be completed by the time actual train movements would occur. As such, there is no longer a practical need for the housekeeping

restriction. DM&E and IC&E formally represent that no PRB Line coal trains will operate via an IC&E routing prior to calendar year 2009 in any event, and agree that such representation be considered a predicate for lifting the routing condition.

Finally, DM&E and IC&E are providing herewith information regarding potential cumulative environmental effects as directed in IC&E Acquisition. As discussed in Section III below and in the attached joint verified statement of Lynn Anderson and John Brooks, IC&E's purchase of the IMRL rail lines and the common control of DM&E and IC&E are not expected to result in any material change in routings for PRB coal traffic or in the amount of such traffic that would move via the former IMRL rail lines. Given the absence of any meaningful cumulative impacts, DM&E and IC&E do not believe that further environmental review in these proceedings is warranted, consistent with STB common control precedent.

BACKGROUND

On June 7, 2002, IC&E filed a notice of exemption in Finance Docket No. 34177 to acquire from IMRL and operate approximately 1400 miles of rail line and trackage rights in Illinois, Iowa, Kansas, Missouri, Minnesota and Wisconsin. After a housekeeping stay, the Board by decision served July 22, 2002 ("IC&E Acquisition") allowed the transaction to proceed, and IC&E consummated the acquisition of IMRL's assets on July 29, 2002.¹ Pending receipt of authority for DM&E to control IC&E, the stock of IC&E was placed in an independent voting trust.

On August 29, 2002, DM&E and Cedar American Rail Holdings, Inc. ("CARH") filed an application in Finance Docket No. 34178 for authority under 49 U.S.C. § 11323, et seq.

¹ The Board subsequently denied petitions to revoke IC&E's acquisition exemption. Iowa, Chicago & Eastern R. -- Acquire & Operate -- I&M Rail Link, 6 S.T.B. 499 (2003).

to control IC&E.² In a related docket, DM&E sought terminal trackage rights over Union Pacific Railroad Company ("UP") at Owatonna, Minnesota, where the lines of DM&E and IMRL/IC&E intersected but no interchange was possible because of pre-existing paper barriers at that location. DM&E predicted that relatively modest amounts of DM&E traffic could be diverted from other gateways to DM&E-IC&E routings via Owatonna as a result of common control.

By decision served February 3, 2003, the Board approved DM&E's control of IC&E, but denied the terminal trackage rights application. Dakota, MN & Eastern et. al. -- Control -- Iowa, Chicago & Eastern, 6 S.T.B. 511 (2003) ("DM&E-IC&E Control"). The IC&E voting trust was dissolved and DM&E assumed control of IC&E on March 5, 2003. Later in 2003, DM&E reached a negotiated arrangement with UP that effectively removed the Owatonna paper barriers and allowed direct interchange between DM&E and IC&E at Owatonna to commence.

Four years before the IC&E acquisition proceedings had begun or before IMRL was even available for acquisition, DM&E had through a separate and unrelated STB proceeding initiated the approval process under 49 U.S.C. § 10901 for the extension of its rail line into the PRB. The Board granted initial and final approval for DM&E's construction and operation of the PRB Line in 1998 and early 2002, respectively. Dakota, MN & Eastern R. -- Construction -- Powder River Basin, 3 S.T.B. 847 (1998) ("PRB Construction I"); 6 S.T.B. 8 (2002) ("PRB Construction II"); Dakota, Minnesota & Eastern Railroad Corporation Construction into the Powder River Basin, Finance Docket No. 33407 (STB served February 15, 2006) ("PRB Construction III").

² IC&E is a wholly-owned subsidiary of CARH, which in turn is a wholly-owned subsidiary of DM&E. Despite its placement in the middle, rather than atop, the DM&E corporate chain, CARH functions as a non-carrier holding company for IC&E and DM&E.

As part of the PRB construction project, the STB also specifically approved the construction of a 1.7-mile connecting track between DM&E and IMRL at Owatonna that would bypass the UP paper barriers and effectuate a DM&E-IMRL interchange. PRB Construction I, 3 S.T.B. at 849; PRB Construction II, 6 S.T.B. at 25-26. Thus, a DME-Owatonna-IMRL routing for PRB coal traffic from DM&E's new line was already in place before the separate acquisition of IMRL's lines by IC&E was ever presented to the Board.

In considering the relationship between the PRB project and the IC&E acquisition and control transactions, the Board recognized that "[t]he DME construction project is an independent project that has its own utility and benefits whether or not the instant acquisition goes forward" and that "the acquisition transaction and the construction project are separate and distinct -- not 'two links of a single chain'" IC&E Acquisition at 16, n.34. In response to environmental comments from several parties, the Board decided that it would wait to "address the likely cumulative impacts of the DME Construction authority together with the proposed [IC&E-IMRL] acquisition and [DM&E-IC&E] common control" IC&E Acquisition at 17. Instead, the Board indicated that it would "consider in this proceeding the cumulative impacts of those actions together with our approval of the new line in DME Construction [] if and when DME has obtained authority to control IC&E and is prepared to exercise the construction authority that we issued in DME Construction." IC&E Acquisition at 16 (footnotes omitted). The Board noted that "as DME has not yet obtained any specific contracts to handle Powder River Basin coal, how the carrier intends to route the traffic coming from or moving to the new line is not known at this time[,] and indicated that it was appropriate to defer any further environmental review until a better sense of traffic volumes and routings was available. IC&E Acquisition at 15-16, 16-17.

In connection with the anticipated future review of cumulative impacts, the Board imposed conditions on IC&E providing that:

2. IC&E is precluded from handling any trains moving to or from the line approved for new construction in DME Construction over what are now IMRL lines until we have conducted any appropriate environmental review and issued a further decision permitting such operations.

3. If DME is subsequently authorized to control IC&E, to allow the Board to meet its obligations under the environmental laws, the Board must be notified if and when DME starts construction of the new line, and the Board must be provided with information regarding anticipated additional trains handling traffic on the new line that would move on the IMRL lines.

IC&E Acquisition at 19 (ordering paragraphs two and three). After DM&E and IC&E provided the requested information, interested parties would be able to suggest "what level of environmental review, if any" would be appropriate. IC&E Acquisition at 17-18.

The Board referenced the IC&E Acquisition conditions when it subsequently approved the common control of DM&E and IC&E, although it did not appear to separately impose the conditions in the control proceeding. See DM&E-IC&E Control, 6 S.T.B. at 532-533. While cumulative impacts or other effects, if any, relating to PRB coal traffic would seem to relate to the control relationship between IC&E and DM&E -- rather than the sale transaction between IC&E and IMRL -- this petition is being filed in both Finance Docket No. 34177 (the IC&E/IMRL acquisition docket) and Finance Docket No. 34178 (the DM&E/IC&E control docket), and DM&E has joined as a petitioner.

DISCUSSION

I. Commencement of Environmental Review

As indicated above, the Board in IC&E Acquisition indicated that it would not consider what further environmental review, if any, was needed to consider the cumulative environmental impacts of IC&E's acquisition of the IMRL lines and DM&E's PRB Line proposal

until DM&E "starts construction of the new line" IC&E Acquisition at 19. That particular triggering point was selected by the Board, rather than being suggested by any commenting party, and reflected the Board's desire that such a review not proceed until and unless completion of the PRB Line project was seen as sufficiently realistic and probable. DM&E and IC&E believe that time has arrived, and ask the Board to clarify that the environmental review contemplated by IC&E Acquisition can begin now without waiting for a technical incident of "construction."

A number of the uncertainties that existed in 2002 about the PRB Line construction project and the cumulative effects of that project with the IC&E acquisition and DM&E control transactions have now been resolved. Petitions to revoke IC&E's acquisition exemption have been denied, and DM&E's control of IC&E has been approved and implemented. The STB's decision approving construction of the PRB Line has been largely affirmed on appeal, and the few discrete issues remanded to the Board have now been fully addressed and considered. DM&E currently is pursuing financing aspects of the PRB project in order to begin construction as soon as practicable.

As the same time, the Board condition that implies prohibition in absolute and unqualified terms of an entire category of traffic over IC&E that otherwise would have been allowed over IMRL has created understandable uncertainty. Construction commencement is not achievable without financing. And financing is materially complicated by an implication that the Board's order precluding coal traffic over the former IMRL lines dramatically changed the existing circumstances and was intended to actually implement a substantive prohibition of future traffic. Since the order theoretically could be read that way, this most conservative reading creates a "catch 22." That problem is readily resolvable by initiating the requisite

environmental consideration now, and (as is discussed further below) by lifting the routing restriction, which was apparently imposed simply to provide assurance that any necessary environmental review would be conducted when appropriate. See Verified Statement of Kevin V. Schieffer, attached hereto as Exhibit 1 ("Schieffer V.S.").

DM&E believes that the environmental analysis contemplated by IC&E Acquisition can be commenced now without being unduly hypothetical, and without undue risk that the matters addressed will become moot or that the resources of the Board and interested parties will be wasted. Requiring DM&E and IC&E to wait until the proverbial "first spade of dirt" is turned would not serve a tangible public interest and could risk unwarranted delays or theoretically termination of what has -- with respect to the PRB Line construction project -- already been a nine-year process. The substance of the Board's timing condition in IC&E Acquisition has been met, and should not be subjugated to the particular form of that condition.

While the Board has implied in several instances that transportation contracts for PRB coal would need to be in place before potential traffic routings over IC&E via the Owatonna gateway could be determined, that is a relatively unrealistic "chicken or the egg" scenario. The existing conditions in IC&E Acquisition preclude DM&E-Owatonna-IC&E routings for PRB coal, and it is unlikely that transportation contracts for that routing would be executed as long as such conditions are in place. Other sufficiently reliable data is available for an analysis of IC&E coal routings, however, and indeed much of the underlying information for such an analysis is already of record in the PRB Construction proceeding. As discussed further below, adequate information is available for DM&E/IC&E, other interested parties and the Board to consider how coal routings via Owatonna and the former IMRL lines have been

affected by the IC&E-IMRL acquisition and DM&E-IC&E control transactions -- the primary focus of the "cumulative effects" analysis to be undertaken here.

DM&E and IC&E thus ask the Board to clarify that, under ordering paragraph 3 of IC&E Acquisition, they can begin the process contemplated by that decision with respect to cumulative environmental effects now, regardless of whether "construction" of the PRB Line has actually begun. Subject to this request, DM&E and IC&E has submitted in Section III the traffic and routing data contemplated by ordering paragraph 3.

II. IC&E Coal Routing Ban

As explained in Mr. Schieffer's attached verified statement, the language of the existing housekeeping ban on the handling of any DM&E-originated PRB coal on IC&E routings via Owatonna materially and unnecessarily complicates commercial discussions on routings and related financing discussions with lenders. As is discussed further in Section III below, the interchange of coal traffic at Owatonna with what was then IMRL has always been an important component of DM&E's PRB Line proposal, and has been consistently and clearly presented as such to the Board since long before any acquisition of IMRL's lines was considered or undertaken. A newly-constructed connection between DM&E and IMRL at Owatonna was part of DM&E's initial 1998 application to the STB in the PRB Construction proceeding, and had already been approved by the Board at the time of the IC&E Acquisition decision. The movement of coal traffic via that Owatonna gateway was a predicate not only for the Board's decision approving the PRB build-in project, but for DM&E's business model supporting that project.

Thus, when the Board in its 2002 decision in IC&E Acquisition barred DM&E-Owatonna-IC&E routings for PRB coal, it did not maintain the status quo -- it significantly

altered it. Cf. IC&E Acquisition at 18 ("[T]he environmental status quo will essentially be preserved . . ."). Coal movements via the IMRL at Owatonna which previously had been not only permissible but contemplated in connection with DM&E's PRB Line project were now prohibited, simply because IMRL's lines had been subsequently purchased by IC&E in what the Board itself found was a separate and distinct transaction. We believe that the Board did indeed intend to maintain the status quo. The issue at hand is what cumulative impact IC&E acquisition and control have on that status quo, if any. Having effectively opened the Owatonna gateway through its decisions in PRB I and PRB II, the Board's blanket closing of that gateway in IC&E Acquisition undercuts, almost by definition, the rationale and bases for the PRB Line project that DM&E proposed and the Board approved. That inconsistency is an issue that has been raised in the ongoing financing and commercial aspects of the project. Schieffer V.S. at 2-3.

Of course, to the extent that IC&E's acquisition of the IMRL lines and DM&E's control of IC&E would increase or change the amount of PRB coal traffic that would have otherwise moved via an Owatonna interchange and IC&E's lines as a result of DM&E's PRB Line proposal, that is a cumulative environmental effect appropriately considered in the proceedings initiated by the information filed in Section III below. But the blanket restriction on all coal traffic movements via the Owatonna gateway -- a gateway routing specifically considered and approved by the Board in PRB Construction I and PRB Construction II -- is unduly broad, unwarranted under NEPA, and ultimately contradictory to the Board's decisions in the earlier construction proceedings.

DM&E and IC&E acknowledge that there may be differing views on what potential PRB coal traffic moving via an Owatonna gateway and IC&E's line is "pre-existing" traffic arising solely from DM&E's PRB Line construction proposal and the accompanying new

connection to IMRL at Owatonna, and which such movements are "new" traffic resulting from re-routings associated with the IC&E-IMRL acquisition and DM&E-IC&E control transactions. DM&E and IC&E address that subject in Section III below. Resolution of those questions is not required to rule on this request, however, since in no circumstance will DM&E route any coal traffic from its new PRB Line via IC&E's lines prior to 2009. Mr. Schieffer makes an express representation in that regard in his verified statement, and DM&E agrees to be bound by that representation. Schieffer V.S. at 4. By that time, the environmental review (if any) undertaken in connection with the directive in IC&E Acquisition should be completed, and any appropriate and legal mitigation conditions will be in place prior to the movement of any DM&E PRB coal traffic over IC&E's lines. In the highly unlikely event that such a review is not completed, DM&E would be required to send a notice and status report to the Board by September 1, 2008, which would allow the Board ample time to develop an alternative solution. In the meantime, however, removing the housekeeping condition against any IC&E coal routings will remove the contradiction with the Board's own decisions in PRB Construction I and PRB Construction II and prevent unintended and artificial frustration of commercial and financing efforts for the PRB Line project that was submitted to and approved by the Board.

III. Cumulative Impacts Review

The Board's IC&E Acquisition decision directed DM&E and IC&E to file "information regarding anticipated additional trains handling traffic on the new line [i.e., the PRB Line] that would move on the IMRL lines," and to indicate "what level of environmental review, if any" would be appropriate to address the cumulative effects of such traffic. IC&E Acquisition at 17-19. DM&E and IC&E submit the following information in accordance with the Board's directive.

Pre-Control IMRL Coal Routings

As the Board is well aware, the interchange of PRB coal with IMRL at Owatonna was always a critical component of DM&E's PRB build-in project, and it was always planned and expected that PRB coal would be routed via IMRL and handled by IMRL on its own lines.

DM&E's application in the PRB construction proceeding (Finance Docket No. 33407) sought formal authority for the proposed construction of a direct DM&E-IMRL connection at Owatonna, and dealt specifically with IMRL's important role as an interchange partner via the Owatonna gateway for PRB coal traffic. Finance Docket No. 33407, DM&E Application for Construction and Operation Authority, February 20, 1998 ("DM&E Construction App."), Vol. 1 at 4, 63; Exhibit C-3; Exhibit D (Operating Plan) at 17, 24. IMRL's plans to upgrade its line were discussed, and DM&E believed that IMRL "will give DM&E an effective north-south connection, with access to Chicago and the Twin Cities, as well as to various Mississippi River ports." DM&E Construction App., Vol. 1 at 63.

While the availability of many other potential interchanges along DM&E's line for PRB-originated coal was and remains an important attribute of the project, an IMRL/Owatonna routing was a significant component of DM&E's presentation of interchange and routing options for nearly every target market. DM&E Construction App., Vol. 1 at 16-18, 32, 62-69; Exhibit D (Operating Plan) at 24. Certain interchanges with other railroads would also have required construction of new connecting tracks, but it was only for the IMRL connection at Owatonna that DM&E sought regulatory authority at the time of its 1998 application. DM&E Construction App., Vol. 1 at 64, n.32.

IMRL itself was an active supporter of DM&E's PRB build-in project, and submitted a support statement with DM&E's initial construction application. DM&E Construction App., Vol. 2, Appendix 7 at 158. As IMRL explained in its filing, "[w]e have

discussed with officers of DM&E their plans to extend their rail lines to the Powder River Basin, and have agreed to handle coal that may flow to our lines via an Owatonna interchange." Id.

Subsequently, DM&E and IMRL negotiated for a wide range of arrangements relating to the movement of PRB coal -- not simply interchange and rate divisional agreements, but also a power of attorney for rate-making purposes and trackage and haulage rights that would allow DM&E coal traffic to effectively reach other rail carriers via IMRL's lines. Deposition Transcript of Kevin Schieffer, Finance Docket No. 33407, August 14, 1998 ("Schieffer Dep.") at 137-148.³ Upgrades to IMRL's lines would be closely coordinated between the two carriers, to allow for the efficient handling of coal traffic. Schieffer Dep. at 149-151. As DM&E's president explained at the time:

The architecture of this agreement [with IMRL] is based on being able to serve all of our target market areas. This route -- this agreement would give us access to all of the target market areas, that being the Great Lakes, the Minnesota/Wisconsin power plant rail based utility plants, third the Mississippi River and fourth, the Chicago gateway east and south.

Schieffer Dep. at 147.

As Lynn A. Anderson and John K. Brooks, Senior Vice President - Marketing and Assistant Vice President - General Merchandise, respectively, for DM&E and IC&E explain in their joint verified statement attached hereto as Exhibit 2 ("Anderson/Brooks J.V.S."), IMRL was an aggressive new Class II carrier with lower operating costs and revenue requirements than would be expected from a Class I railroad. It was a neutral carrier, largely without competing economic interests that would inhibit its desire and willingness to work with DM&E in developing new PRB coal service often in competition with UP and BNSF. It had available capacity and the market flexibility of a regional carrier. Anderson/Brooks J.V.S. at 8. The

³ Relevant excerpts attached at Exhibit 3.

expectation and intention in the PRB construction proceeding that traffic would be interchanged to IMRL at Owatonna is reflected in these factors as well.

In approving the PRB construction project, the Board explained that:

DM&E's Plan depends on its ability to interchange cars with other railroads. The application identifies three primary interchange points with other railroads: (1) UP at Mankato, MN; (2) I&M Rail Link at Owatonna, MN; and (3) UP, CP, and I&M at Winona/Minnesota City, MN.

PRB Construction I, 3 S.T.B. at 900. The Board's decision granted DM&E authority to construct the Owatonna connection specifically so that the second of these critical interchanges -- with IMRL -- could occur. PRB Construction I, 3 S.T.B. at 849; PRB Construction II, 6 S.T.B. at 25-26. The uninhibited and preferred movement of DM&E-originated PRB coal traffic through the Owatonna interchange and over IMRL's rail lines was thus a plainly contemplated and expected result of the Board's action in Finance Docket No. 33407. DM&E-IC&E common control did not change that preference for traffic that could reasonably be expected to flow via the Owatonna interchange.

Post-Control IC&E Coal Routings

IC&E's 2002 acquisition of the IMRL rail lines (and the related common control of DM&E and IC&E) was a stand-alone transaction, separate from and unrelated to the PRB line construction project and of independent utility and potential profitability for the company. DM&E Railroad Control Application, Finance Docket No. 34178, August 28, 2002 ("DM&E Control App.") at 56 (interest in IC&E lines "predates and is independent of DM&E's plan to construct a rail line into the [PRB] . . . and developed from a freestanding desire to reach new markets and develop enhanced competitive independence for a significant new rail carrier in the Midwest.").

The STB similarly recognized that IC&E acquisition and control and the PRB construction project were not directly related. See IC&E Acquisition at 16, n.34 ("The DME construction project is an independent project that has its own utility and benefits whether or not the instant acquisition goes forward . . . the acquisition transaction and the construction project are separate and distinct -- not 'two links of a single chain'"); PRB Construction III at 19 ("While it is possible that the PRB construction project and the IMRL acquisition may also each benefit from the other, each project could exist in the absence of the other project."). DM&E sought and the Board granted authority for DM&E-IC&E common control not because of any dependence or effect on the PRB project, but because "common control will produce a stronger rail system that will be better able to offer improved services to their existing shippers." DM&E-IC&E Control, 6 S.T.B. at 526.

The IC&E acquisition and control transactions were thus never predicated on nor did they contemplate the diversion of DM&E-originated PRB coal from interline routes over other rail carriers to routings via IC&E. Anderson/Brooks J.V.S. at 11. As DM&E and IC&E explained at the time, particularly given the extensive arrangements that had already been pursued with IMRL for its efficient interline handling of PRB coal, the transfer of the IMRL lines into DM&E's "camp" was simply not planned or expected to affect routings for that traffic:

Whatever those traffic opportunities [for routing PRB coal traffic to interline connections on DM&E's line] are to be, we do not anticipate that they would be materially impacted by IC&E's acquisition of the IMRL lines or the common control of IC&E and DM&E. The original modeling done on the PRB Project contemplated an agreed upon power of attorney authority for DM&E to quote rates over the IMRL, and trackage rights that would have allowed DM&E to run on IMRL tracks. Any additional control provided by ownership or common control would not materially change the degree of flexibility and marketing authority we initially assumed relative to the PRB Project in our initial PRB planning as set forth before the STB. In short, while the PRB Project economics may be enhanced by common control due to capturing additional linehaul revenue,

the traffic flows resulting from the PRB Project (on or off the IC&E line) are not expected to be materially affected by either IC&E's acquisition of the IMRL lines or the common control of IC&E and DM&E.

DM&E Control App. at 63 (Schieffer V.S. at 8).

In connection with this submission, Mr. Anderson and Mr. Brooks have conducted an in-depth review to determine to what extent IC&E's ownership of the IMRL lines and DM&E's ownership of IC&E will in fact be expected to divert DM&E-originated PRB coal from interline routings with other carriers to routings over IC&E via Owatonna. Their conclusions are presented in Exhibit 2.

Mr. Anderson and Mr. Brooks divided PRB coal traffic into seven interchange categories, and in each instance carefully analyzed whether the IC&E acquisition and control transactions gave rise to changes in marketing, operating or service considerations that would cause PRB coal traffic to flow over IC&E in ways different than originally contemplated with IMRL. Except for occasional and inconsequential spot movements of coal or other exceptional circumstances, Mr. Anderson and Mr. Brooks determined there would be no likely increase in the routing and movement of DM&E-originated PRB coal over the former IMRL lines as a result of the IC&E transactions.

The findings of Mr. Anderson and Mr. Brooks are consistent with the long-standing evidence in the PRB construction proceeding discussed above, and with the Board's own understanding of what DM&E-IC&E common control would, and would not, do. Mr. Anderson and Mr. Brooks' conclusion that, for example, PRB coal moving to the Chicago gateway for movement beyond would have been handled on IMRL's lines in any event -- and thus is not subject to routing diversion as a result of IC&E acquisition and control -- is broadly consistent with the evidence six years earlier in the PRB construction proceeding regarding the advantages and attractiveness of IMRL routings for such traffic. Anderson/Brooks J.V.S. at 8-9.

Similarly, the Anderson-Brooks conclusion that a combined DM&E-IC&E system would not divert Twin Cities and Wisconsin coal traffic from a CP-Minnesota City gateway routing to a less efficient DM&E-Owatonna-IC&E-Chicago gateway routing was directly echoed by the STB in its DM&E-IC&E Control decision. CP had specifically argued in the control proceeding that, "[a]s respects PRB coal moving to plants in the Twin Cities and central and northern Wisconsin, CPR fears that DM&E will divert this traffic from its most natural routing (the DM&E/CPR routing via Minnesota City and the Twin Cities) and force it onto a more circuitous routing (the DM&E/IC&E routing via Owatonna and Chicago)." DM&E-IC&E Control, 6 S.T.B. at 546. The Board rejected this contention:

We do not share CPR's apparent concern that a combined DM&E/IC&E will tend to favor a "long-haul" DM&E-IC&E routing that is less efficient than a "short-haul" DM&E-CPR routing. The competitive pressures that DM&E/IC&E will face from, among others, BNSF and UP will be such that any effort to use an inefficient "long-haul" routing will risk the competitive loss of the traffic.

DM&E-IC&E Control, 6 S.T.B. at 527; cf. Anderson/Brooks J.V.S. at 9-10. This is particularly true for PRB coal traffic, as DM&E seeks to break into a new market previously dominated by UP and BNSF. As the Board recognized, in such cases the controlling factor is not whether DM&E can obtain a long-haul through an inefficient IC&E routing, but whether DM&E can obtain the business in the first place through the most competitive and efficient routing available. The common ownership of DM&E and IC&E does not substantially change that equation.

DM&E and IC&E have acknowledged that the IC&E acquisition and control transactions may have benefits for the PRB construction project. IC&E, rather than IMRL, will now receive the revenue for PRB coal traffic that would have moved via the former IMRL lines. And given the critical importance of independent IMRL routings for DM&E-originated coal, ownership of the IMRL lines minimized the risk that IMRL or its lines would be acquired by

another carrier with less neutral economic interests. But to the extent there were previously any close calls relative to traffic efficiency, the routing preference pre-IC&E would have gone to IMRL because of more aggressive shortline pricing and a highly favorable agreement structure intended to effectively give DM&E marketing and routing control for movements over IMRL. The routing preference post-IC&E remains the same, with similar, albeit more direct, control and pricing advantages. The IC&E-IMRL acquisition and DM&E-IC&E common control transactions did not substantially change the operating and marketing metrics for the routing of DM&E-originated PRB coal, and will not result in any likely shift of additional PRB coal trains onto the former IMRL lines.

NEPA Considerations

The Board indicated in the IC&E Acquisition proceeding that it intended to examine here "the cumulative impacts of those actions [*i.e.*, IC&E's acquisition of the IMRL assets and DM&E-IC&E common control] together with our approval of the new line in DME Construction . . ." IC&E Acquisition at 16; *see also id.* at 17. The regulations of the Council of Environmental Quality ("CEQ")⁴ define "cumulative impacts" as:

the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

49 C.F.R. § 1508.7.

The Supreme Court has recently and directly addressed the meaning and operation of the cumulative impact provision:

⁴ 40 C.F.R. §§ 1500-1508. The CEQ regulations implement the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370(f) ("NEPA"). The Board has similarly adopted regulations in compliance with NEPA. *See* 49 C.F.R. § 1105.

The "cumulative impact" regulation required FMCSA to consider the "incremental impact" of the safety rules themselves [i.e., the pending action], in the context of the President's lifting of the moratorium [i.e., the prior action] and other relevant circumstances. But this is exactly what FMCSA did in its EA. FMCSA appropriately and reasonably examined the incremental impact of its safety rules assuming the President's modification of the moratorium (and, hence, assuming the increase in cross-border operations of Mexican motor carriers). The "cumulative impact" regulation does not require FMCSA to treat the lifting of the moratorium itself, or consequences from the lifting of the moratorium, as an effect of its promulgation of its Application and Safety Monitoring Rules.

Department of Transportation v. Public Citizen, 541 U.S. 572, 769-770 (2004).

As the Supreme Court's holding makes clear, the proper focus here is on to what extent, if any, the IC&E acquisition and control transactions themselves will result in routing changes for DM&E-originated PRB coal, thus leading to an additional increment of coal trains on the lines of the former IMRL.⁵ As discussed above, the evidence indicates that IC&E acquisition and control will not result in any meaningful diversions of PRB coal to IC&E/Owatonna routings from the routings they otherwise would have been expected to traverse. The Board's review should thus conclude that there are no cumulative impacts to address under the relevant regulatory criteria.

In the absence of any such cumulative impacts, it is clear that the IC&E acquisition and control transactions otherwise have nothing to do with the movement of PRB coal over the former IMRL lines via an Owatonna interchange, which instead arises out of and was contemplated in the PRB Construction proceedings -- including the Board's specific approval for the construction of a connection between DM&E and IMRL at Owatonna to allow such an interchange. It is equally clear that no environmental review is required in the absence of that type of direct relationship with routings via the former IMRL lines:

⁵ Phrased differently, cumulative impacts are caused jointly by the action under review and the other past, present or future condition -- not one or the other.

Under the NEPA process, SEA will evaluate only the potential environmental impacts of operational and physical changes that are directly related to the proposed transaction. SEA will not consider environmental impacts relating to existing rail operations and existing railroad facilities.

....

In merger and control cases, the Board's practice consistently has been to mitigate only those environmental impacts that result directly from the transaction. The Board, like its predecessor, the Interstate Commerce Commission, has not imposed mitigation to remedy preexisting conditions such as those that might make the quality of life in a particular community better, but are not a direct result of the merger (i.e., congestion associated with the existing rail line traffic, or the traffic of other railroads).

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, Finance Docket No. 33388 (STB served July 3, 1997) at 2 & n.1; see also, e.g., Norfolk Southern Railway Company -- Trackage Rights Exemption -- Meridian Speedway LLC, Finance Docket No. 34821, et al. (STB served March 7, 2006) at 4, n.5; PRB Construction II, 6 S.T.B. at 32, n.59 ("Our general practice, which we follow here, is to mitigate only those environmental impacts that would result directly from an approved transaction, and not existing conditions and existing railroad operations."); DOT v. Public Citizen, 541 U.S. 752 (no environmental review required where subject action is not proximate or relevant cause of alleged impact).⁶ To the extent any PRB traffic routing was to occur over IMRL absent DM&E

⁶ Here, of course, there are not "existing" train movements of PRB coal via the Owatonna gateway and over the former IMRL lines. Cf. CSX/NS-Conrail at 2 ("Existing rail operations are the baseline from which the potential environmental impacts of the proposed transactions will be evaluated."). That, however, is simply a happenstance of timing -- final approval of the PRB construction project was issued before IC&E undertook the IMRL acquisition, and it is undisputed that the subsequent IC&E acquisition and control transactions were independent of and unrelated to the PRB project. The authority to construct and operate the PRB build-in -- and the concomitant anticipated routing of significant coal via IMRL's lines -- was plainly an "existing condition" in the context of the IC&E acquisition and control proceedings.

control, it was a pre-existing condition. The inquiry here should be limited to marginal traffic impacts, over and above those pre-existing conditions, that are likely to occur as a result of the IC&E acquisition and control transactions. As outlined above, there is no material PRB traffic impact on these lines that would result from those transactions.

The Board's IC&E Acquisition decision included language indicating that the Board would later consider "the prospect of adding at least a portion of that substantial traffic [i.e., traffic from the PRB Line] to the traffic that now moves over what are now IMRL lines" and would be provided with "information regarding anticipated additional trains handling traffic on the new line [i.e., the PRB Line] that would move on the IMRL lines. IC&E Acquisition at 16, 17. One construction of that language might suggest the Board was contemplating looking beyond the relevant IC&E acquisition and control transactions, and incorporating into these proceedings underlying traffic impacts from the PRB Construction proceeding. Such a reading would of necessity pre-suppose that no coal traffic movements over IMRL would have resulted solely from construction of the PRB Line, and that it was only because of IC&E acquisition and control that any PRB coal routings would occur via the IMRL lines. However, as demonstrated by the well-developed record in the PRB Construction proceeding -- a record not previously and squarely before the Board in these proceedings -- that is clearly not the case here.

It would be venturing onto a dangerous and slippery slope to reconsider underlying traffic impacts from the PRB construction project simply because of subsequent, unrelated transactions that do not themselves affect those traffic impacts. This is particularly true given that the PRB Construction proceeding has been pending at the STB for eight years, and that it is virtually inevitable that an applicant may be involved in other, unrelated transactions over such a long time period. Under such an approach, major line construction

proceedings would never be completed. As other portions of the Board's IC&E Acquisition decision indicate, that was likely not the intended outcome here. E.g., IC&E Acquisition at 15 ("[I]t is possible that construction and operation of that new line [i.e. the PRB Line] could result in substantial additional traffic on what are now the IMRL lines as a result of this acquisition." (emphasis added)).

Of course, if commenting parties were somehow to demonstrate that PRB Construction traffic flows would in fact be impacted by the IC&E acquisition and control transactions, those cumulative traffic impacts would be appropriate for consideration here. As outlined above, the evidence does not indicate that such is the case here.

It is axiomatic that environmental matters do not by themselves confer regulatory authority on the Board. E.g., Friends of the Aquifer, et al. -- Petition for Declaratory Order, 5 S.T.B. 880, 888 (2001). The Board determined that it did not have a basis to impose environmental mitigation in the PRB Construction proceeding at off-line locations on CP and IMRL, PRB Construction III at 27 and DEIS at 8-5, and IC&E's subsequent and unrelated acquisition of the former IMRL lines does not change that. Even where the lines are owned by the same rail carrier, the Board has previously held that it would not consider environmental impacts at locations off of the line being constructed or upgraded. Burlington Northern Santa Fe Corporation -- Control -- Washington Central Railroad Company, Inc., Finance Docket No. 32974 (STB EA served September 4, 1996) at I-3 ("Kent is not located directly on the Stampede Pass line. See Figure 1-1. Accordingly, any environmental impacts on Kent would not result directly from this transaction. In these circumstances, we do not believe it is appropriate to assess potential environmental impacts to Kent in the EA.").

More fundamentally, essentially extending the PRB Construction environmental review to the former IMRL rail lines -- simply because those lines were subsequently purchased by IC&E -- would collapse the two unrelated transactions into one. Yet that is precisely what the Board has said is not the case here. PRB Construction III at 19 ("[T]he acquisition transaction and the construction project are not 'two links of a single chain,' and the precedent setting forth the proposition that connected actions should be evaluated together is thus inapposite." (citation omitted)); IC&E Acquisition at 16, n.34. If the Board had no basis previously to address off-line environmental impacts, it does not gain that authority simply by virtue of a subsequent, unrelated transaction that has no effect on those impacts. Once it starts down that path, opponents inevitably will argue that the Board cannot revisit this issue in isolation, which in turn would inevitably lead to arguments here and on appeal that the Board must back up and start the eight-year process all over again.

Particularly given that PRB coal routings via IMRL's lines were an integral component of the PRB project considered and approved by the Board, subjecting those routings to a further environmental review now solely on the basis of a transaction several years later with no proximate relationship to such routings threatens not only to extend the PRB Construction proceeding, already over eight years old, even further -- the logical conclusion of the argument would be to redo it in its entirety. That is exactly the kind of problematic and circular result that NEPA protects against, and the Board should not allow it to happen. E.g., Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 373 (1989) (to require reconsideration of environmental matters for every new circumstance "would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made."); TOMAC v. Norton, 433 F.3d 852, 863 (D.C. Cir. 2006)

(reassessments must end at some point or NEPA simply becomes tool to stall new projects indefinitely).

Because the IC&E acquisition and control transactions will not directly or cumulatively affect the routing of PRB coal traffic via the former IMRL lines, it remains the case, as the Board previously found, that IC&E's acquisition of IMRL's assets and DM&E's control of IC&E qualify under the categorical exclusions of 49 C.F.R. §§ 1105.6(c)(2)(i) and 1105.7(e) and do not require further environmental review. DM&E-IC&E Control, 6 S.T.B. at 531-532. DM&E and IC&E respectfully request that the Board extend that categorical exclusion finding to this final aspect of the case, pursuant to the evidence submitted herewith.

IV. Procedural Schedule

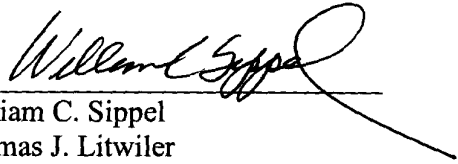
The Board previously indicated that, once it received the information provided by DM&E and IC&E in Section III above, "[i]nterested members of the public would then have an opportunity to suggest what level of environmental review, if any, they believe may be necessary, and why." IC&E Acquisition at 17. The Board's Section of Environmental Analysis recently issued a notice seeking public comment in an analogous matter. Norfolk Southern Railway Company -- Trackage Rights Exemption -- Meridian Speedway LLC, Finance Docket No. 34821, et al. (STB served March 7, 2006). DM&E and IC&E would suggest a similar process here, with a notice seeking public comment issued by the Board, 20 days for interested parties to comment, a short period of time for DM&E and IC&E to reply, and a decision by the SEA and Board in as expeditious a manner as possible.

In the meantime, after the initial 20-day period for replies to this petition, the Board should immediately grant DM&E/IC&E's requests in Sections I and II above to partially modify the conditions previously imposed in IC&E Acquisition, allow the supplemental

environmental review process here to begin, and lift the housekeeping restriction against IC&E routings for PRB coal traffic. Such action could be taken concurrently with the public comment notice issued by the Board regarding the appropriate level of environmental review. Of course, if for any reason the Board subsequently determined that there was a need to re-impose the IC&E coal routing prohibition, it would retain jurisdiction to do so until final disposition of this case.

WHEREFORE, DM&E and IC&E respectfully request that the Board partially reopen its decision in IC&E Acquisition and 1) clarify that the process identified in IC&E Acquisition to address further environmental matters may be commenced immediately; 2) lift the housekeeping routing restriction in ordering paragraph two of IC&E Acquisition, subject to DM&E's compliance with its representation that no coal trains from origins on DM&E's new PRB Line will be routed to or handling on IC&E's line at any time prior to January 1, 2009; and 3) find that IC&E's acquisition of the IMRL assets and DM&E's control of IC&E does not result in any cumulative environmental impacts relating to the PRB construction project and does not require further environmental review.

Respectfully submitted,

By: 

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**ATTORNEYS FOR IOWA, CHICAGO &
EASTERN RAILROAD CORPORATION
AND DAKOTA, MINNESOTA & EASTERN
RAILROAD CORPORATION**

Dated: May 11, 2006

**VERIFIED STATEMENT
OF
KEVIN V. SCHIEFFER**

My name is Kevin V. Schieffer. I am President and Chief Executive Officer of the Dakota, Minnesota & Eastern Railroad Corporation ("DM&E") and its subsidiary Iowa, Chicago & Eastern Railroad Corporation ("IC&E"). I have previously submitted verified statements in these proceedings.

Nearly four years ago, when the STB approved the IC&E's acquisition of substantially all of the assets of I&M Rail Link, LLC ("IMRL"), the Board imposed a housekeeping condition on the transaction that prevented IC&E from handling any DM&E-originated coal via the Owatonna, Minnesota gateway until an "appropriate environmental review" had been conducted. In imposing the condition, the Board believed that its action would essentially preserve the "environmental status quo" while such a review was pending. In fact, however, the condition has had the unforeseen and unintended effect of complicating and inhibiting DM&E's current efforts to obtain financing for the PRB project. As I explain below, the existence of the routing ban in the condition -- even though no coal trains will operate for several years -- is inhibiting DM&E's efforts today to secure financing and any resultant delay could jeopardize the entire project.

The interchange of DM&E-originated coal traffic at Owatonna with what was then IMRL was an important component of DM&E's PRB line proposal from day one, long before any acquisition of IMRL's lines was conceived or undertaken. DM&E's Construction Application and Rebuttal Evidence filed in 1998 in the PRB proceeding, more than four years before the IC&E transaction, expressly contemplated that DM&E-originated PRB coal would be interchanged to IMRL at Owatonna. Reflecting the expected importance of that interchange,

DM&E in its Construction Application in 1998 proposed to construct a new 1.7-mile connection between the DM&E and IMRL lines at Owatonna in order to establish that interchange. The connection had already been approved by the Board at the time of the Board's approval of the IC&E acquisition in July, 2002. The movement of coal traffic via the Owatonna gateway was a predicate not only of the Board's decision approving the PRB build-in project, but for DM&E's business model supporting that project as well.

The Board's 2002 condition barring all DM&E coal routings via Owatonna did not maintain the status quo. It significantly altered it. Coal routings via the IMRL at Owatonna that had been expressly contemplated in DM&E's PRB project in 1998 were now prohibited simply because IMRL's lines had been subsequently purchased by IC&E in what the Board itself agreed was a separate and distinct transaction. At the time, the Board's condition did not raise immediate problems because operation of the PRB line and interchange of DM&E coal trains at Owatonna was years away. It has become an issue in marketing and financing considerations, however, because on its face the STB prohibition goes to the substance of regulating what types of traffic can be moved on our line rather than providing a mere housekeeping assurance that an environmental consideration occurs.

The resulting issue is fairly straightforward. It is difficult to market or finance without viable, confirmed routing options. Customers need assurances not just that we can reach a market -- particularly in markets like Chicago where bottlenecks are a constant issue, they need to know we have multiple means of reaching them if there is a problem on one route. And in order to secure financing, any lending institution or authority requires a reasonable degree of assurance that the business model works. Financial consultants and lawyers asked to opine on the strict language of the STB sometimes tend to interpret what we believe the Board intended as

a simple "housekeeping" prohibition as an absolute and permanent prohibition on moving one type of traffic. Accordingly, this can be viewed as limiting our routing options to the Chicago market, which is particularly significant because the Chicago gateway is indeed notorious for traffic congestion and it is important to demonstrate that we have multiple Chicago routing options to overcome inevitable and unpredictable bottleneck or other problems in that market.

Thus, even though our original PRB construction application relied heavily on routing Chicago traffic via IMRL, we have the very odd situation today that simply because we subsequently acquired this line, we have suddenly been barred from using it for the movement of an important commodity. We of course are confident that the Board would not prohibit the movement of important traffic on any rail line. But technically, that is how the order reads. And it makes it difficult for finance lawyers to write an opinion to the contrary. This undercuts DM&E's ability today to secure the financing necessary to commence PRB construction. I do not believe that the Board intended that the condition it imposed nearly four years ago would have this "catch 22" effect. We assume, rather, that the Board simply wanted to ensure as a matter of regulatory "housekeeping" that any cumulative environmental impacts were not overlooked, and to make certain we filed the documentation necessary for the Board to initiate proceedings in that regard. With the filing of the petition and information accompanying this statement, we are hopefully satisfying that objective.

With that filing, the process has started and there is no longer need for the housekeeping prohibition. Well before traffic commences following a multi-year PRB construction process, any potential legal mitigation conditions the Board might think relevant would be considered and, if appropriate, ordered. If for any reason that could not happen in a reasonably timely way, the Board could revisit the issue and determine appropriate action later to

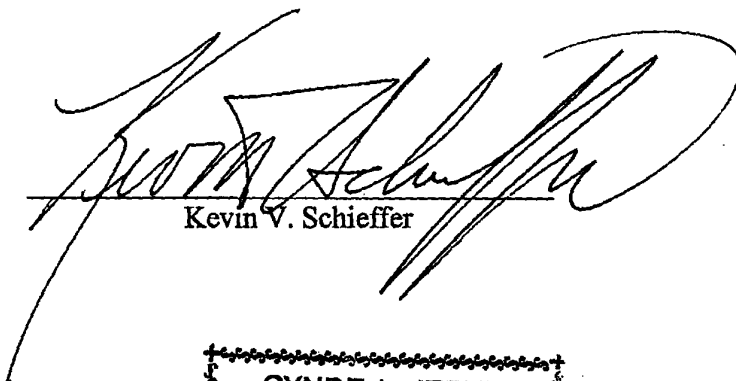
fulfill its obligations -- short of arbitrarily precluding the movement of an extraordinarily important commodity in interstate commerce. To provide added comfort for the Board that there will be adequate time to consider this matter, I hereby formally represent to the Board that no DM&E-originated PRB coal traffic will be moved by IC&E until January 1, 2009 or until the Board completes its review and comment period in this matter. In the unlikely event that any environmental review has not been completed by September 1, 2008, DM&E would provide a report to the Board by that date advising the Board of the status of the project and the expected commencement date of coal train operations. In the meantime, lifting of the ban would remove this artificial obstacle to obtaining the financing with which to begin construction of the PRB line.

I urge the Board to remove the routing ban in its condition in the IC&E acquisition transaction, expressly subject to DM&E's compliance with its representation that no DM&E coal trains will operate over IC&E lines prior to January 1, 2009.

VERIFICATION

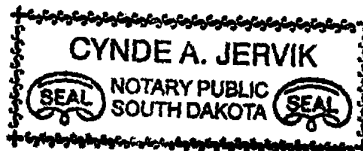
State of South Dakota)
)
County of Minnehaha) SS:

Kevin V. Schieffer, being duly sworn, deposes and says that he is President and Chief Executive Officer of Dakota, Minnesota & Eastern Railroad Corporation and Iowa, Chicago & Eastern Railroad Corporation, that he has read the foregoing statement and knows the facts asserted therein, and that the same are true as stated.


Kevin V. Schieffer

SUBSCRIBED AND SWORN TO
before me this 11 day
of May, 2006.


Notary Public



My Commission expires:

CYNDE JERVIK
My Commission Expires
June 15, 2006

**JOINT VERIFIED STATEMENT
OF
LYNN A. ANDERSON AND JOHN K. BROOKS**

Our names are Lynn A. Anderson and John K. Brooks. We are, respectively, Senior Vice President - Marketing and Assistant Vice President - General Merchandise for the Dakota, Minnesota & Eastern Railroad Corporation ("DM&E") and its subsidiary Iowa, Chicago & Eastern Railroad Corporation ("IC&E").

Anderson Qualifications:

As Senior Vice President - Marketing, my primary duties include the marketing, pricing and sales areas of DM&E and IC&E. I have nearly 35 years of experience in the rail industry, including more than 15 years with the Chicago and North Western Transportation Company in a variety of marketing and pricing positions. I was directly involved in the formation of the DM&E, which began operations on September 5, 1986. I am a graduate of Iowa State University and past president of the Minnesota Regional Railroad Association. I am a registered practitioner before the Surface Transportation Board. I also serve on the Board's National Grain Car Council and on the Secretary of Energy's National Coal Council. I personally performed the analysis of the impact on non-coal traffic routings that would result from the common control of DM&E and IC&E, submitted as part of the Railroad Control Application filed in Finance Docket No. 34178 in August of 2002.

Brooks Qualifications:

As Assistant Vice President - General Merchandise, my responsibilities include marketing and sales functions relating to coal, chemicals, hazardous materials, petroleum products, metal and scrap metal products and forest products. I have 11 years of railroad experience in marketing and sales, including three years with Union Pacific Railroad Company

("UP") and five years with I&M Rail Link, LLC ("IMRL") where as General Manager - Marketing and Sales, I was responsible for various marketing and sales functions across all commodity lines. I joined IC&E in 2002 at the time that IC&E acquired IMRL's lines. I have been involved with the marketing and sales aspects of DM&E's Powder River Basin ("PRB") coal project since 2004. I hold a B.A. in Finance from the University of Northern Iowa.

Together, we analyzed the potential traffic flows of coal from DM&E's proposed PRB line to its target markets (discussed and analyzed by the Board's Section of Environmental Analysis in the Environmental Impact Statement for the PRB project) and determined whether there would be any changes in those flows as a result of IC&E's 2002 acquisition of the assets of IMRL and DM&E's 2003 acquisition of control of IC&E (the "acquisition and control transactions"). Specifically, our objective was to determine what, if any, increase there would be in DM&E PRB coal movements over IC&E lines as a result of the acquisition and control transactions. As discussed in detail below, we determined that, except for an occasional and inconsequential spot movement or other exceptional circumstance, there would be no increase in the movement of DM&E-originated PRB coal over IC&E lines as a result of these transactions.

In performing this analysis, we examined potential DM&E PRB coal traffic flows to target markets via all of the interchanges and gateways on DM&E. Maps showing the relevant rail lines are attached as Figure 1. To achieve the most detailed look that we could, we divided the potential traffic flows into seven subcategories and analyzed the potential for traffic flow changes in each one. Our analysis and conclusions with respect to each of the seven subcategories are as follows:

1. DM&E Routings to Destinations Served by UP and BNSF.

DM&E has interchanges with UP at Mankato, Minnesota, Mason City, Iowa and Winona, Minnesota and with BNSF Railway Company ("BNSF") at Huron, Aberdeen and Wolsey, South Dakota, Florence, Minnesota and Crawford, Nebraska. Because westbound movements of DM&E-originated PRB coal via these carriers have no realistic potential for movement over IC&E lines, we confined our analysis to potential traffic flows via the interchanges with these carriers used for eastbound traffic. Included in this analysis is the potential movement of coal to UP via DM&E's Waseca-Hartland-Albert Lea, Minnesota line to Mason City, Iowa (which potentially could be diverted to a DME-Owatonna-ICE-Mason City-UP routing). Because both UP and BNSF each have single line routings of their own from the PRB in direct competition with DM&E, we concluded that, with two possible exceptions, it is unlikely that any DM&E-originated PRB coal traffic would move via such routings.

One exception is the potential movement of DM&E PRB coal to the Twin Cities or the Head of the Lakes at Duluth/Superior via interchange with UP at Mankato, Minnesota. A DM&E-UP routing via Mankato is substantially shorter than UP's own single line route from the PRB to the Twin Cities or the Head of the Lakes and competitive with BNSF's single line route to the same area. However, such movements via Mankato would not involve the movement of any PRB coal over IC&E lines.

The second exception is the potential movement of DM&E PRB coal to destinations on BNSF in Minnesota and Northern Wisconsin via the interchange with BNSF at Florence, Minnesota. A DM&E-BNSF routing via Florence is substantially shorter than BNSF's single line route to the same destinations. However, again, such a movement would not involve the handling of any PRB coal over IC&E lines. Nor is there any viable route via IC&E that

could be used in lieu of such routings. Accordingly, there would be no coal traffic that could be diverted from these routings to a DM&E-IC&E routing.

Therefore, for this subcategory of PRB coal traffic, we concluded that there would be no increase in the movement of DM&E PRB coal over IC&E lines as a result of the acquisition and control transactions.

2. DM&E Routings to IC&E On-Line Destinations.

This subcategory consists of all DM&E PRB coal traffic flows to destinations on IC&E lines, such as on-line power plants and water transfer terminals. Once the PRB line has been completed and current contracts expire, this traffic is expected to move DM&E-IC&E. Prior to the acquisition and control transactions, any DM&E-originated PRB coal moving to these points would have moved DME-Owatonna-IMRL. There simply was no other alternative route with IMRL. As part of its PRB application, DM&E applied for and obtained authorization from the STB to construct a 1.7-mile connection between DM&E and IMRL in Owatonna to establish an interchange there. Absent construction of such connection, the traffic could not have moved DM&E-IMRL due to certain paper barrier restrictions in DM&E's trackage rights over UP through Owatonna and in IMRL's trackage rights over Canadian Pacific Railway ("CP") through Winona and Minnesota City, Minnesota that prohibited any interchange of traffic between DM&E and IMRL at those locations. Subsequent to the Board's authorization of the new Owatonna connection, DM&E reached an agreement with UP to use the existing UP track connection at Owatonna to effect the interchange, thus obviating the need for the new connection. Owatonna would have been the only direct interchange between DM&E and IMRL and is the only direct interchange between DM&E and IC&E today (the trackage rights restrictions that prohibit IC&E from interchanging traffic with DM&E at Winona and Minnesota

City, Minnesota are still in effect). Accordingly, the route via Owatonna is the only route over which DM&E-originated coal could have moved to IMRL.

Once DM&E had begun serving the PRB and existing contracts had expired, the PRB traffic moving to these on-line IMRL destinations logically would have moved DM&E-IMRL via Owatonna. Such a routing is more efficient (between two regional railroad operators with a seamless connection) and provides the longest haul for IMRL compared to IMRL joint line routes via UP or BNSF. IMRL would have had the incentive to prefer this routing. Therefore, we concluded that any DM&E-originated PRB coal moving to destinations on IMRL would have moved via Owatonna, and that comparable volumes to these destinations would move that way on IC&E today regardless of the acquisition and control transactions. Thus, for this subcategory of PRB coal traffic, there would be no increase in the movement of DM&E PRB coal over IC&E's lines as a result of those transactions.

3. Routings to Minnesota Destinations on CP.

This subcategory consists of potential DM&E PRB coal traffic flows that would move to destinations on CP in Minnesota (such as the Twin Cities or the Head of the Lakes), via the interchange with CP at Minnesota City or the potential interchanges with CP at Comus, Northfield or Rosemount, Minnesota (the latter three "the potential northern CP interchanges"). In the time of IMRL, the likely route for such traffic would have been DME-Minnesota City-CP. Although coal traffic to the Twin Cities or the Head of the Lakes could have moved via the shorter DME-Owatonna-IMRL route over IMRL's line north of Owatonna to the potential northern CP interchanges, in our judgment, it is not likely that such traffic would have moved over IMRL. The IMRL (now IC&E) line north of Owatonna, Minnesota is in very poor condition. Significant capital investment would be needed to restore it to the level of service

required for handling heavy coal trains. Furthermore, the existing track connection at Owatonna is oriented toward the movement of southbound trains off of the DM&E from the west. To facilitate a northbound movement of coal off of the DM&E would require significant capital investment for the construction of a long passing siding south of Owatonna to permit a run-around move. Though a routing to the Twin Cities and the Head of the Lakes via IMRL's line north of Owatonna and any of the potential northern CP interchanges would have been shorter than via Minnesota City, in our judgment, that advantage would be more than offset by the operating inefficiencies and capital investment requirements of that route. For these reasons, we concluded that any PRB traffic to CP destinations in Minnesota would have moved via Minnesota City in the time of IMRL and for the same reasons would move that way today. Accordingly, for this subcategory of PRB coal traffic, we concluded that there will be no increase in the movement of DM&E PRB coal over IC&E lines as a result of the acquisition and control transactions.

4. Routings to Interchanges with CN, IAIS and IANR.

This subcategory consists of potential flows of DM&E-originated coal moving to an interchange with Canadian National Railway ("CN") in Iowa or Illinois, the interchange with Iowa Northern Railroad ("IANR") at Plymouth Jct./Nora Springs, Iowa, or the interchange with Iowa Interstate Railroad System ("IAIS") at Davenport, Iowa, for points on CN and points on IANR or IAIS and beyond. Before the acquisition and control transactions, such coal likely would have moved via IMRL between Owatonna and those interchanges as DM&E did not have a direct interchange with CN, IANR or IAIS. While a relatively short haul bridge movement for IMRL, IMRL could be expected to be more receptive to such moves than UP, BNSF or CP. In fact, IMRL had expressed to DM&E its interest in working with DM&E on such routings and

had agreed to certain commercial arrangements that would have facilitated such movements. Accordingly, any PRB coal moving to an interchange with CN, or to IAIS at Davenport, or to IANR at Plymouth Jct./Nora Springs would have moved over IMRL to those interchanges.

The IC&E routes to those interchanges are exactly the same today. In the event that CN would have accepted a Chicago routing with IMRL, presumably it would be willing to do so with IC&E today. However the traffic would have been routed in the time of IMRL, in our judgment it would likely be routed the same way today. Accordingly, we concluded that, for this subcategory of PRB coal traffic, the acquisition and control transactions would not result in any increase in DM&E PRB coal moving over IC&E's lines.

5. Routings to River Transfer Terminals.

DM&E has always lacked direct access to coal transfer facilities on the Mississippi River that could handle the transload of unit trains of PRB coal into barges. Accordingly, before IC&E, DM&E-originated PRB coal moving to the River would have been interchanged to IMRL, CP, UP or BNSF for movement to existing river coal transfer terminals on those railroads. For the reasons previously stated, UP and BNSF would not likely be cooperative. Although CP would theoretically be considered a friendly connection to DM&E on such movements, the movement of coal by CP from the interchange with DM&E at Minnesota City to a CP-served river coal transfer terminal would be an extremely short haul for CP. By far, the most logical routing would have been via IMRL at Owatonna. IMRL had access to existing river coal transfer terminals at Dubuque, Camanche, Davenport, Buffalo and Muscatine, Iowa and, as a regional railroad with lower operating costs than the Class I carriers, could be expected to be interested in handling the traffic. IC&E today has access to the same river terminals as IMRL. For these reasons, we concluded that all of the DM&E's coal traffic moving to the river

would have moved via routings over IMRL to river terminals on its lines and would move via IC&E to such terminals via the exact same routes and over the exact same lines today. Accordingly, we concluded that for PRB coal traffic moving to coal transfer terminals on the Mississippi River, the acquisition and control transactions would not result in any increase in DM&E PRB coal traffic over IC&E's lines.

6. Chicago Gateway Traffic.

This subcategory involves all DM&E-originated PRB coal traffic moving to, and east and south of, Chicago (the "Chicago Gateway"). Unlike routings to CP destinations in Wisconsin (discussed in the next section), DM&E-IMRL routings to the Chicago Gateway via Owatonna would have been highly competitive with routings to the Chicago Gateway via CP over Minnesota City or via UP or BNSF. In our judgment, whatever coal could have moved via IMRL, given its capacity and operating bottleneck issues at Chicago, would likely have moved via that route, and the same will be true of IC&E. Again, UP and BNSF would not likely be cooperative on such a movement. Although CP possesses an efficient route between Minnesota City and the Chicago Gateway, IMRL's lower operating costs and lower revenue requirements, its aggressiveness in seeking new traffic, its neutrality, its available capacity (particularly in light of the fact that the CP route to Chicago would be handling the CP-Minnesota and CP-Wisconsin routings discussed elsewhere herein), and its ability as a regional railroad to respond quickly to traffic opportunities, all make it likely that, except in the occasional exceptional circumstance, DM&E-originated PRB coal traffic moving to the Chicago Gateway would have moved via IMRL when possible, subject to the significant traffic and operational bottleneck problems IMRL would have had in Chicago.

There are many options to move trains to and through the Chicago Gateway. There are also many potential limitations or congestion issues associated with moving coal trains through Chicago, which can frequently change and for which we must be prepared to adapt. The Chicago terminal is extremely congested due to the sheer volume of rail carloads moving through it, the amount of local industry to be served, potential weather disruptions, track work interferences, blocked rail crossings, commuter train issues, etc. The point is that the capacity and bottleneck issues at Chicago that IMRL would have faced, IC&E will face to the same extent. The acquisition and control transactions did not alter that fact. Whatever coal could have moved via IMRL's route to the Chicago Gateway, in our judgment, would likely have moved via that route and will likely move via IC&E.

As discussed in the next section, routings via CP to CP destinations in Wisconsin would have moved -- and will continue to move -- via a Minnesota City interchange and for the reasons stated are not likely to be divertible to a DM&E-IC&E-CP routing via Chicago. The mileage and congestion advantages discussed there, however, are not present with respect to Chicago Gateway traffic. Accordingly, we concluded that DM&E PRB coal traffic to the Chicago Gateway that would have moved via IMRL's lines, will likely move via IC&E lines to the same extent, and that the acquisition and control transactions will not result in any increase in PRB coal traffic over IC&E's lines.

7. Routings to Destinations on CP in Wisconsin.

We separately looked at whether there were any DM&E PRB coal traffic flows moving to CP-served points in Wisconsin via DM&E's interchange with CP at Minnesota City that would likely be divertible to a DM&E-IC&E linehaul route to Chicago for interchange with CP there. We concluded that there were none. For traffic moving to CP destinations in

Wisconsin, the DM&E-IC&E route via Chicago is simply too circuitous and subject to delay at Chicago to be competitive with the more direct DM&E-CP route via Minnesota City. Moreover, the competitive pressures from UP and BNSF will be such that any attempt by DM&E/IC&E to use an inefficient long haul routing risks losing the entire movement to those carriers.

For example, we looked at routings to CP-served coal destinations in Wisconsin such as Wausau, Portage and Milwaukee and compared the mileage of a DM&E-CP route via Minnesota City with the mileage of a DM&E-IC&E-CP route via Owatonna and Chicago. The routes with CP via Minnesota City to those CP destinations were anywhere from 161 miles to more than 400 miles shorter to those destinations than the DME-Owatonna-ICE-Chicago-CP route. In addition, just getting through Chicago to go north would involve potentially significant delay compared to the more direct route via Minnesota City.

For these reasons, we concluded that DM&E would not realistically be able to divert any coal traffic moving to CP points in Wisconsin via Minnesota City to a DM&E-IC&E routing with CP via Chicago. The routing via Chicago might work for spot movements of coal or in other exceptional circumstances (such as a derailment, flood or congestion on the Minnesota City route) but, in our judgment, it is not competitive on a regular basis. Accordingly, we concluded that for this subcategory of PRB coal traffic, the acquisition and control transactions will not result in any increase in PRB coal traffic over IC&E's lines.

There is one final point that we would like to make. That the acquisition and control transactions will not result in any material diversion of DM&E PRB coal traffic from other routes to routes via IC&E lines should not be surprising.

First, DM&E had contemplated that PRB traffic would move over IMRL lines via the interchange at Owatonna. The application and the record in the PRB case are replete with references to the connection with IMRL and the expectation that substantial quantities of DM&E-originated PRB coal would move on IMRL via that interchange. That is why, early on, DM&E negotiated for commercial arrangements with IMRL to facilitate the movement of DM&E-originated coal traffic via IMRL lines. That is why DM&E was willing to spend more than three million dollars to construct a new connection at Owatonna in order to establish a direct interchange with IMRL. That is why IMRL was a strong supporter of the PRB project. That no DM&E PRB traffic will be diverted to the former IMRL (now IC&E) lines as a result of the acquisition and control transactions is simply because some traffic would have moved via those lines anyway. If the PRB lines had already been built, and the IC&E transactions had never occurred, the traffic would be moving that way today. Also, as discussed above, for those movements, such as movements to CP destinations in Wisconsin, where factors such as substantially shorter distance and avoidance of Chicago terminal delays would have favored a Minnesota City routing over a routing via IMRL, those movements will likely still move via the Minnesota City routing in the post-IMRL environment.

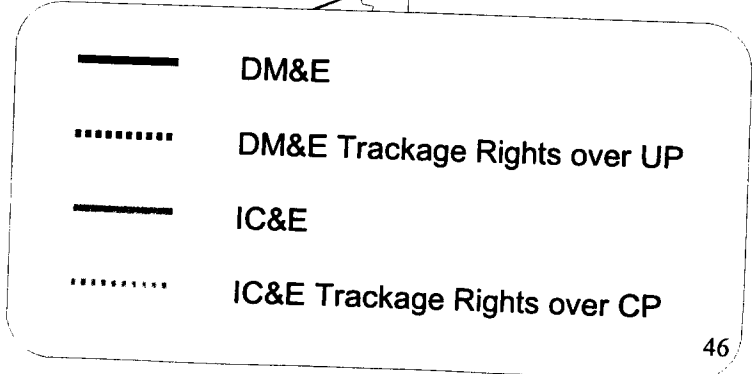
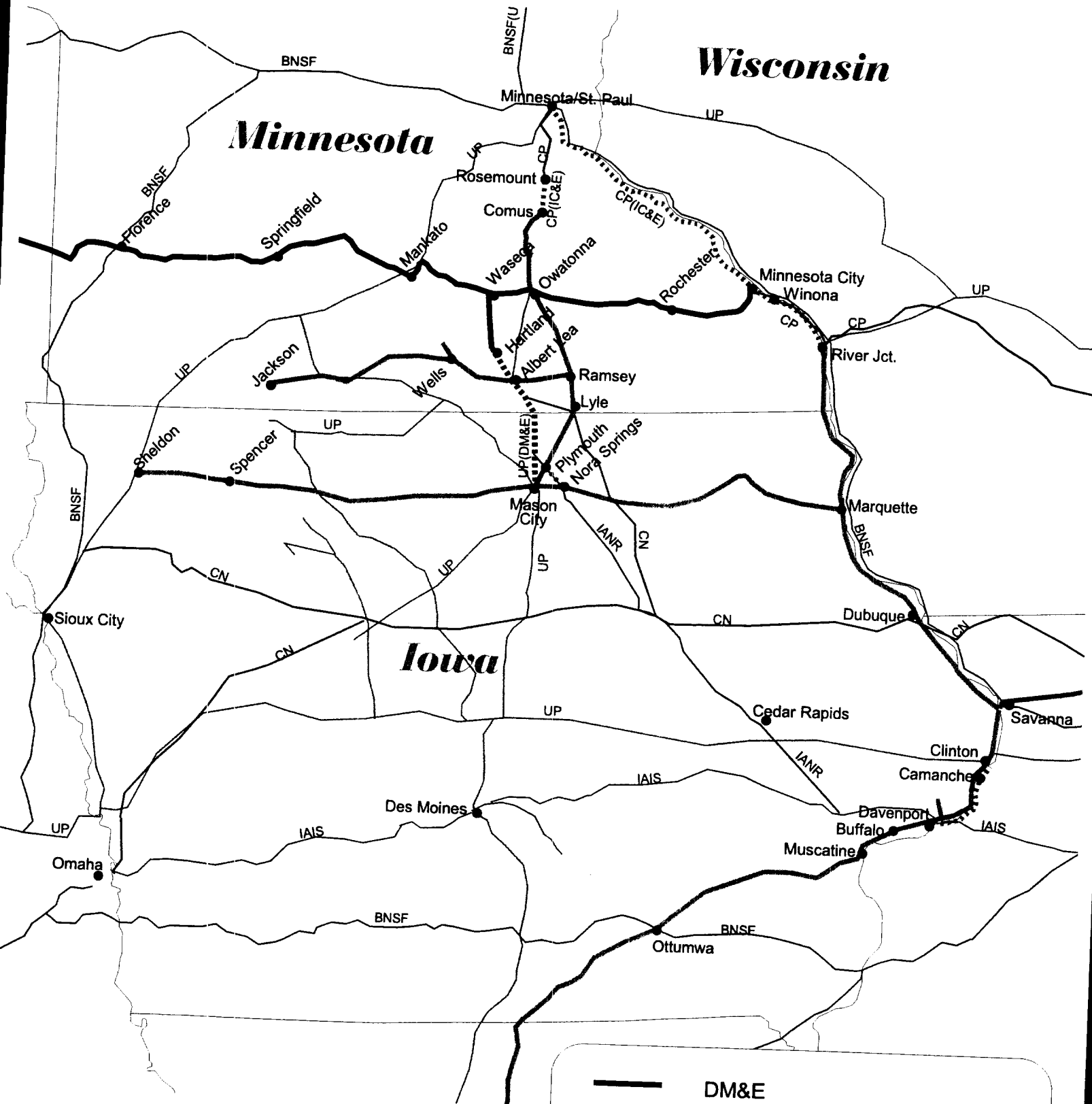
Second, the acquisition and control transactions were never predicated on diverting PRB coal from other routes to routes over the lines of IC&E. The 2002 Control Application described in detail the benefits of the IC&E transactions to movements of non-coal traffic. From a PRB coal perspective, what DM&E expected to get from the acquisition and control transactions was the ability to retain the revenue on DM&E-originated PRB coal traffic that would otherwise have gone to IMRL and the assurance that its primary connection on PRB traffic would not be acquired by or merged into a PRB competitor. As Kevin V. Schieffer,

President and Chief Executive Officer of DM&E, testified in his verified statement submitted with the Control Application:

"Whatever those [PRB] traffic opportunities are to be, we do not anticipate that they would be materially impacted by IC&E's acquisition of the IMRL lines or the common control of IC&E and DM&E. The original modeling done on the PRB Project contemplated an agreed upon power of attorney authority for DM&E to quote rates over the IMRL, and trackage rights that would have allowed DM&E to run on IMRL tracks. Any additional control provided by ownership or common control would not materially change the degree of flexibility and marketing authority we initially assumed relative to the PRB Project in our initial PRB planning as set forth before the STB. In short, while the PRB project economics may be enhanced by common control due to capturing added line haul revenue, the traffic flows resulting from the PRB project (on or off the IC&E line) are not expected to be materially affected by either IC&E's acquisition of the IMRL lines or the common control of IC&E and DM&E."

Our analysis, conducted more than three and a half years later, confirms that this is the case.

Figure 1



North Dakota

South Dakota

Minnesota

Wisconsin

Nebraska

Iowa

Missouri

Illinois

Kansas

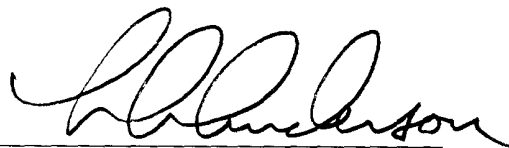
- DM&E
- DM&E Trackage Rights
- IC&E
- IC&E Trackage Rights

Figure 1

VERIFICATION

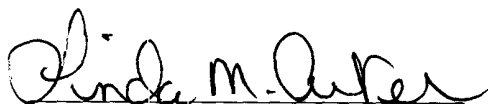
State of South Dakota)
)
County of Minnehaha) SS:

Lynn A. Anderson, being duly sworn, deposes and says that he is Senior Vice President - Marketing of Dakota, Minnesota & Eastern Railroad Corporation and Iowa, Chicago & Eastern Railroad Corporation, that he has read the foregoing statement and knows the facts asserted therein, and that the same are true as stated.

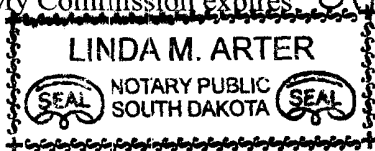


Lynn A. Anderson

SUBSCRIBED AND SWORN TO
before me this 1st day
of April, 2006.


Notary Public

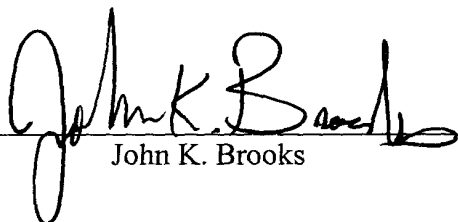
My Commission expires: 04/09



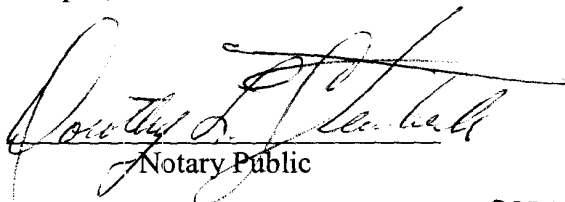
VERIFICATION

State of Iowa)
)
County of Scott) SS:

John K. Brooks, being duly sworn, deposes and says that he is Assistant Vice President - General Merchandise of Dakota, Minnesota & Eastern Railroad Corporation and Iowa, Chicago & Eastern Railroad Corporation, that he has read the foregoing statement and knows the facts asserted therein, and that the same are true as stated.


John K. Brooks

SUBSCRIBED AND SWORN TO
before me this 6th day
of April, 2006.


Notary Public

My Commission expires:

DOROTHY L. STEINBECK
Notary Seal - State of Iowa
Commission Number 189394
My Commission Expires March 26, 2009

Kevin Schieffer August 14, 1998

Brookings, South Dakota

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FAX: 1-800-367-3310

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- (1) MR. MAYO: Okay, so these were instances
(2) of documents you withheld in confidentiality.
(3) THE WITNESS: These are exactly the ones
(4) I'm thinking of anyway. We've had this
(5) discussion.
(6) MR. HIRSH: I'll get the correspondence
(7) relating to discovery. You will see that this
(8) was explicitly raised and dealt with there.
(9) MR. MAYO: Yeah, I remember that now.
(10) Q. (BY MR. MAYO) Looking at the reference
(11) to IC in the interchange at Hartland, has DM&E
(12) and IC - have DM&E and IC discussed construction
(13) in the line that is referred to in footnote 28
(14) there?
(15) A. I'm sorry?
(16) Q. I'm talking about the potential
(17) interchange between DM&E and IC.
(18) A. Oh, okay, I'm sorry, go ahead then.
(19) Q. And the question is has DM&E had
(20) discussions with IC in regard to construction of
(21) the line that is referenced in footnote 28?
(22) A. I - yes.
(23) Q. Is - has IC agreed in concept to
(24) construct that line?
(25) A. No.

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- (1) Q. Is DM&E proposing itself to construct
(2) the line?
(3) A. No.
(4) Q. Did DM&E ask IC to file a statement in
(5) support of the DM&E application in this case?
(6) MR. HIRSH: I think I will object to the
(7) extent you're asking beyond the witness' own
(8) knowledge.
(9) A. I don't know that we did but - because
(10) IC - I don't know that we did.
(11) Q. (BY MR. MAYO) You were going to say
(12) something, that's fine. I was going to ask
(13) another question.
(14) A. Go ahead.
(15) Q. In regard to the discussions with
(16) Owatonna - strike that. In regard to
(17) discussions with I&M relating to the interchange
(18) of traffic south of Owatonna, has DM&E
(19) established with I&M what a division would be for
(20) that interchange with coal traffic?
(21) A. No.
(22) Q. Have you had those negotiations?
(23) A. Yes.
(24) Q. And what's the current status of those
(25) negotiations?

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- (1) MR. HIRSH: Well, I think we're starting
(2) to cross the lines, immediate back and forth of
(3) the commercial negotiations rather than the fact
(4) of them and frankly I just do not see the
(5) materiality. You're trying to get into something
(6) that's not a final deal that's still being
(7) discussed, so I guess that's the place where we
(8) would probably draw the line and the objection
(9) unless Mr. Schieffer has a different view.
(10) A. Yeah, let's see, the very
(11) confidential - I'll ask the question of my
(12) counsel on the record if I could.
(13) Q. (BY MR. MAYO) If you want to do it off
(14) the record I would be glad to leave.
(15) THE WITNESS: I just want to make sure I
(16) understand the designation of area of
(17) confidential, is that something that there is a
(18) comfort level, David, that will not become public
(19) knowledge?
(20) MR. HIRSH: We've had this conversation
(21) off the record. I guess I would just ask to
(22) consult for a moment.
(23) THE WITNESS: Okay.
(24) (WHEREUPON, a discussion was had off the
(25) record, not reported by the Court

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- (1) Reporter.)
(2) MR. MAYO: I forgot where we were when
(3) we last spoke.
(4) MR. HIRSH: I just asked about I&M and
(5) the status of those discussions.
(6) MR. MAYO: Right.
(7) MR. HIRSH: Sandy, I think in this case
(8) we may have a situation where the discussions
(9) have reached a point where there's a level of
(10) certainty that does make the terms; although,
(11) this is not a final and announced agreement but
(12) it may make the terms - the actual terms rather
(13) than the facts and the negotiations and
(14) identities of parties sufficiently material and
(15) also the discussions may be advanced enough that
(16) it's somewhat less of a threat of the agreement
(17) for the discussions collapsing in the event that
(18) there was any breach of the highly confidential
(19) protective order that in this instance we are
(20) willing to discuss perhaps some of the status of
(21) the negotiations that you've just requested.
(22) Q. (BY MR. MAYO) Okay, then let me - let
(23) me pursue that. What is the current status of
(24) those negotiations?
(25) A. The current status of those negotiations

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- (1) is that we have a - in my estimation a couple of
(2) weeks away from - let me rephrase that. We are
(3) in the documentation stage.
(4) Q. And that's documentation of what type or
(5) types of agreement?
(6) A. That would be documentation of a
(7) purchase agreement, an asset purchase agreement,
(8) a trackage rights agreement, a haulage agreement,
(9) divisions agreement, the power of attorney
(10) agreement to quote rates, overhead traffic
(11) agreement, things of that nature.
(12) Q. As to the asset purchase agreement, can
(13) you tell me what assets that pertains to?
(14) A. Yes, that is an interchange facility
(15) called the airport siding north of Owatonna and
(16) main line track to get access to that siding.
(17) Q. DM&E would be acquiring this from I&M?
(18) A. Correct.
(19) Q. And has that been priced?
(20) A. That has not been finalized. That's not
(21) particularly a material part of this.
(22) Q. Are you in a position to give me what
(23) the general range of what the price is expected
(24) to be?
(25) A. Probably net liquidation value or below

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- (1) for approximately four miles of track and I
(2) haven't calculated that out. It's just not a
(3) huge number.
(4) Q. You made reference to a trackage rights
(5) agreement, what is that?
(6) A. That would be an agreement to give us
(7) trackage rights to have direct access to other
(8) carriers for a single line move to carriers like
(9) CP, like Wisconsin Central, like Illinois
(10) Central, and others.
(11) Q. Would these be trackage rights that
(12) would accommodate movements of DM&E traffic
(13) northward off of your main line?
(14) A. It would accommodate traffic northward
(15) off of our main line.
(16) Q. And would these be overhead trackage
(17) rights?
(18) A. These would be overhead trackage rights,
(19) correct.
(20) Q. In terms of the haulage agreement, what
(21) is that?
(22) A. Let me - you asked about the northbound
(23) traffic. There would also be trackage rights to
(24) the south to carriers to the south.
(25) Q. Which carriers would be to the south?

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- (1) A. Oh, IC would be the primary southern
(2) connection.
(3) Q. Are there any limitations in those
(4) trackage rights apart from the fact that they're
(5) overhead in terms of the type of traffic that
(6) would be moved?
(7) A. Yes, there are some limitations.
(8) Q. What -- what are those limitations?
(9) A. Oh, there's some limitations with
(10) respect to grain traffic movements, which is
(11) something we've been trying to figure out a way
(12) to do a long time. For example, there may be
(13) limitations on -- they'll give us trackage rights
(14) to move grain to connect to another carrier but
(15) not if it takes away from their market. When
(16) it's competitive they're not going to cut their
(17) nose on those kinds of markets. Limitations with
(18) respect to coal traffic that would go to IC, for
(19) example, it has to be customers that IC would
(20) serve directly where it's not a realistic access
(21) for the I&M. If we can get there via I&M we use
(22) I&M but if we can't we get to go to IC, for
(23) example. Those are examples.
(24) Q. On the grain side you were describing a
(25) limitation which I don't think I fully

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- (1) that it would be in place?
(2) A. Yes, there would be different terms for
(3) different parts of the agreement.
(4) Q. What are the terms that you're currently
(5) discussing?
(6) A. The clarification when you say terms --
(7) Q. Length of time.
(8) A. -- you mean length of the contract?
(9) Q. Yeah.
(10) A. Some of the terms would be in decades.
(11) Some would be in years. I don't know if that
(12) gives you --
(13) Q. Can you characterize the element of the
(14) agreement that would have the more long-term
(15) agreement in place, that is the decades?
(16) A. Those would be the ones that would
(17) require the bigger investments and you need a
(18) comfort level on both sides' part to know that
(19) they're going to be there. That would be the
(20) coal portion of it.
(21) Q. Does the agreement include a commitment
(22) by DM&E to route certain tonnage of coal over
(23) this line?
(24) A. No.
(25) Q. Does it include a commitment by I&M to

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- (1) understood. What's the nature of the grain?
(2) MR. HIRSH: I want to raise a point at
(3) this -- at this stage to just make clear so
(4) there's no confusion that this is not an
(5) absolutely final agreement and, therefore, the
(6) questions and answers you're getting will not
(7) necessarily reflect the very final agreement,
(8) which is one of the reasons that we have objected
(9) in the past to giving the back and forth of
(10) nonfinal deals. So I think it should be clear on
(11) the record that Mr. Schleffer's responses to some
(12) of these very specific questions is reflecting
(13) his current understanding of the state of that
(14) agreement and its documentation.
(15) MR. MAYO: Fine, I understand that.
(16) Q. (BY MR. MAYO) What was -- what is the
(17) nature of the limitation as it pertains to grain
(18) leased as the arrangement is currently being
(19) discussed?
(20) A. Let me try to describe it in a market
(21) context that hopefully will help you. Today
(22) technically we have access -- a huge market we've
(23) been trying to tap forever is get to the Iowa
(24) grain processors. For the shippers on our line
(25) that would dramatically affect market. If we

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- (1) make available the line for any tonnage or train
(2) count relating to coal?
(3) A. There are references to that. Whether
(4) it is a commitment or not, it's more in terms of
(5) if there is ex tonnage they will have tracks to
(6) certain standards and so forth for service
(7) reliability and all that sort of thing.
(8) Q. Will IM dispatch the line?
(9) A. Yes, there are issues there right at the
(10) connection there.
(11) Q. The connection south of Owatonna?
(12) A. No, the connection where -- the
(13) connection is north of Owatonna for this traffic.
(14) The southern connection that's listed in the
(15) application would be a -- another kind of
(16) connection. This immediate connection does not
(17) relate to a significant amount of coal traffic.
(18) It relates to grain and other traffic. The
(19) immediate -- the siding acquisition I was talking
(20) about does not relate to coal traffic. That's a
(21) grain issue. This is a grain -- the immediate
(22) agreement is a grain and other commodities based
(23) on our existing operations. It's unrelated to
(24) the coal from that standpoint from the physical
(25) layout.

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- (1) could get access to the big grain processors in
(2) Iowa, that grain would come off of our line for
(3) our customers and they would have access to a
(4) market -- a huge market they don't have access to
(5) today. We cannot get there today because UP is
(6) the only connection we have to those markets.
(7) They serve them directly, so obviously they're
(8) not going to give us a great rate. This allows
(9) us to access those markets via I&M. Now, I&M in
(10) turn is not going to give us access to another
(11) carrier that would allow us to access those
(12) markets via Iowa Northern Railway, for example,
(13) so limitation.
(14) Q. That would take I&M out of the haul?
(15) A. That would take I&M out of the haul. It
(16) would be using their railroad to cut them out of
(17) business and it's a very standard kind of
(18) trackage limitation. Having said that, there are
(19) other grain markets we may get to that does not
(20) take anything out of I&M's market base and we
(21) could get to those grain customers maybe in
(22) Chicago or somewhere else. It would be another
(23) line.
(24) Q. Is there a term that you expect to have
(25) associated with this agreement the length of time

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- (1) Q. But the trackage rights thing you're
(2) talking about does relate to coal?
(3) A. Yes.
(4) Q. And for the trackage rights movement,
(5) what would the routing be for the DM&E trains
(6) that wanted to go north of the DM&E system? Let
(7) me make that more specific. I can see I confused
(8) you. Would you take the new line south of
(9) Owatonna and then go up the I&M route?
(10) A. No, for the agreements on -- you're
(11) talking about the coal traffic did you say?
(12) Q. I'm talking about the coal traffic and
(13) the traffic rights movement.
(14) A. No, we would go on the route as listed
(15) in the application.
(16) Q. Now you confused me. I thought that
(17) that routing was going to be off the main line
(18) south on your new connection. --
(19) A. Oh, I'm --
(20) Q. -- and then north again?
(21) A. I thought you meant down Owatonna.
(22) There's -- I understand what you're saying. It
(23) would go on our route. There is a line that goes
(24) through Owatonna to the south. It would not go
(25) on that line. It would go on the newly

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- (1) constructed line and then come through.
 (2) Q. Come back up again?
 (3) A. Right, what traffic went north.
 (4) Q. And obviously the coal traffic that went
 (5) south would just proceed south on the I&M line,
 (6) is that right?
 (7) A. Correct.
 (8) Q. You mentioned a haulage agreement,
 (9) what's - what's that?
 (10) A. Where in lieu of trackage rights which
 (11) is DM&E running its train over somebody else's
 (12) line it would be I&M hauling our trains, hauling
 (13) our traffic, if you will, by contract as we do
 (14) with UP today, for example, on some commodities.
 (15) Q. Would that in essence give you the
 (16) option of using the trackage rights for yourself
 (17) to move your own trains or using the haulage
 (18) agreement for I&M to move your trains for you?
 (19) A. That is correct.
 (20) Q. Do you expect there to be a term in
 (21) terms of number of years associated with the
 (22) haulage agreement, does it mirror the trackage
 (23) rights agreement?
 (24) MR. HIRSH: I couldn't hear the end of
 (25) your question.

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- (1) Q. (BY MR. MAYO) The question is does it
 (2) mirror the trackage rights agreement?
 (3) A. I believe it does.
 (4) Q. You stated that there's going to be a
 (5) division agreement. I take it the division
 (6) agreement would only control - would only govern
 (7) that traffic which is actually interchanged with
 (8) I&M, is that right?
 (9) A. Correct.
 (10) Q. As to coal traffic moving out of the
 (11) Powder River Basin, is there any movement of -
 (12) of that coal that would actually be interchanged
 (13) with I&M as opposed to moving by the trackage
 (14) rights or hauling arrangements?
 (15) A. Say that again.
 (16) Q. As to the coal movements out of the
 (17) Powder River Basin where you're going to have
 (18) that movement go onto the I&M line in one way or
 (19) another, the question is are there particular
 (20) movements that couldn't move by trackage rights
 (21) or haulage and instead would have to be
 (22) interchanged and would have to go under the
 (23) general arrangement that you're talking about?
 (24) A. I apologize, I just don't understand the
 (25) question.

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- (1) Q. Well, I'm trying to figure out why if
 (2) you got trackage rights and haulage arrangements
 (3) why you need an interchange arrangement as well
 (4) and so I'm asking whether there's a universal
 (5) traffic which you're not going to be carry by a
 (6) trackage rights of haulage and hence you'll have
 (7) to interchange if you want to use the I&M route?
 (8) A. The architecture of this agreement is
 (9) based on being able to serve all of our target
 (10) market areas. This route - this agreement would
 (11) give us access to all of the target market areas,
 (12) that being the Great Lakes, the
 (13) Minnesota/Wisconsin power plant rail based
 (14) utility plants, third the Mississippi River and,
 (15) fourth, the Chicago gateway east and south. Some
 (16) of those destinations I&M serves directly.
 (17) Those would be the interline agreements
 (18) where the traffic is interchanged with I&M.
 (19) There are other markets served by the Illinois
 (20) Central and the Canadian National that could be
 (21) served either via trackage rights for the
 (22) efficient moves of where either or both of those
 (23) serve a customer directly. We could do it with a
 (24) two railroad move. For other movements it could
 (25) be a three railroad move where it would go DM&E

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- (1) to Owatonna, I&M would take it then to its
 (2) connection point near Chicago, and then a third
 (3) carrier taking it forward is another option.
 (4) That would be an interline example.
 (5) Then there are examples where instead of
 (6) I&M taking it to Chicago we would - I&M would
 (7) not be in the interline at all. It would be DM&E
 (8) taking it as far as, oh, I'm pointing it out on
 (9) this map on Exhibit C-4 generally about - I'm
 (10) trying to remember the distance - about 50 miles
 (11) south of Owatonna and we would have trackage
 (12) rights to do that. IC has a connection there and
 (13) it would be a two line move to the Illinois
 (14) Central. That would be an example where you'd
 (15) use trackage rights. You use trackage rights in
 (16) lieu of the interchange agreement. The
 (17) architecture of this is to make sure the seams -
 (18) the normal seams that the big railroads have
 (19) problems with are eliminated as much as possible.
 (20) Q. I think you testified earlier that I&M
 (21) is in the process of upgrading its line which
 (22) runs from the south of Owatonna up towards the
 (23) Twin Cities at its own pass and that a certain
 (24) level of work is going to be required to put that
 (25) line into service for reasons totally independent

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- (1) of DM&E, do you remember that?
 (2) A. Yes.
 (3) Q. I take it that - and I think you also
 (4) made reference -
 (5) A. Oh, excuse me a second, not totally
 (6) independent of DM&E. I said totally independent
 (7) of the coal project -
 (8) Q. Right.
 (9) A. - because we have this grain thing
 (10) that - the holy grain instead of the holy Grail
 (11) that we've been pursuing for some time.
 (12) Q. And I take it that DM&E's proposal to
 (13) service the Powder River Basin is now going to
 (14) acquire I&M under the arrangements you've been
 (15) describing to further upgrade its line in order
 (16) to serve that track, is that right?
 (17) A. I guess I take a little exception to the
 (18) characterization.
 (19) MR. HIRSH: I guess I'm going to object
 (20) to the form of the question as vague and
 (21) confusing. You talk about it's going to require.
 (22) It's unclear if you're talking about a legal term
 (23) or what that's supposed to mean.
 (24) MR. MAYO: Meaning if they want to carry
 (25) the traffic they're going to have to increase or

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- (1) rehab the line.
 (2) MR. HIRSH: Which traffic?
 (3) Q. (BY MR. MAYO) The coal traffic.
 (4) A. Well, my only concern about the wording
 (5) is from your perspective you might look at it as
 (6) the coal traffic would require them to upgrade
 (7) the line. I think from their perspective and
 (8) from their shipper's perspective the coal traffic
 (9) allows - allows them to upgrade their line and
 (10) provide the kind of service that they would
 (11) really like to provide. What they will have in
 (12) this initial get it open is a limp along railroad.
 (13) like ours and their customers will get some
 (14) service but you won't see the kind of activity in
 (15) the grain area and elsewhere along their existing
 (16) line. The elevators won't be coming back in
 (17) droves until there's a real railroad there that
 (18) they can count on, so from my standpoint it does
 (19) not require them to upgrade. It provides the
 (20) opportunity for them to upgrade, and I think the
 (21) shippers north and south of there look at it that
 (22) way.
 (23) Q. But in order for them to be able to
 (24) handle the coal traffic they're going to have to
 (25) substantially upgrade their line beyond a limp

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- (1) along railroad when it first opens up?
 (2) MR. HIRSH: I'll object as to form,
 (3) again, if you're trying to establish some
 (4) cause-effect relationship that I think Mr.
 (5) Schlieffer has already addressed rather than just
 (6) the fact the quality of line issue.
 (7) A. They are going to, I'm very safe in
 (8) saying, follow all the regulatory requirements.
 (9) FRA has all kinds of standards there. They will
 (10) follow them. That will be a function of the
 (11) traffic that goes on that line whether it's coal
 (12) or grain or lumber or cement or anything else and
 (13) I do expect all of those things to happen.
 (14) Q. (BY MR. MAYO) You suggested that at
 (15) least one of the agreements you were describing
 (16) was going to have a requirement that -- that
 (17) and -- and I may interpret this -- a requirement
 (18) that I&M upgrade their lines so as to accommodate
 (19) certain kinds of traffic, is that right?
 (20) MR. HIRSH: I could not hear that
 (21) certain kinds of what?
 (22) Q. (BY MR. MAYO) Certain kinds of traffic.
 (23) MR. HIRSH: Object to the
 (24) characterization.
 (25) A. As I understand the question, that is

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- (1) Q. You're doing a pretty good job. The
 (2) connections that DM&E would have with other
 (3) carriers by virtue of the arrangements that you
 (4) described relating to the I&M, has DM&E had
 (5) negotiations with those other carriers in regard
 (6) to handling the traffic coming off the I&M under
 (7) these various arrangements that you've described?
 (8) A. In a general sense the answer is yes to
 (9) all of the above.
 (10) Q. Have those discussions progressed to the
 (11) point of there being an agreement with any of
 (12) those carriers?
 (13) A. When we were talking before about your
 (14) definition of agreement and I said there was one
 (15) that was sort of in the terms sheet or in the
 (16) documentation stage and others conceptual, that
 (17) would be in the conceptual category and I guess
 (18) also in the category I would describe as when
 (19) you're there at their doorstep it doesn't require
 (20) a particularly complicated agreement and I would
 (21) say if the traffic's there it will move and the
 (22) question to that that you need an agreement to
 (23) resolve probably surprise a lot of folks in the
 (24) railroad. The traffic will move when it's there
 (25) and there have been discussions about is there

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- (1) correct.
 (2) Q. (BY MR. MAYO) And what is the nature of
 (3) that requirement or those requirements?
 (4) A. Basically that if we bring in the
 (5) traffic whatever it is they're going to make sure
 (6) it can be handled, sidings, things of that nature
 (7) basically driven by customer service issues.
 (8) Q. The power of attorney to quote rates you
 (9) mentioned, is that associated with the haulage
 (10) arrangements?
 (11) A. That's for overhead trackage -- for
 (12) overhead traffic, excuse me.
 (13) Q. Would that traffic move in DM&E's
 (14) account or move in I&M's account?
 (15) A. Let me think through this. I may have
 (16) misspoke.
 (17) Q. The reason I think of trackage rights
 (18) being you moving in your own account, with your
 (19) own trains, your own crews, etc.
 (20) A. That's right.
 (21) Q. Haulage arrangements I think of it being
 (22) traffic that moves in your trains, perhaps with
 (23) your crews, perhaps not, perhaps your
 (24) locomotives, perhaps not but it's -- and even
 (25) though it stays in your account they have

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- (1) even a need to enter into an agreement is one
 (2) of the questions that is not real obvious.
 (3) MR. HIRSH: Could you please speak up.
 (4) Is he finished with his answer?
 (5) MR. MAYO: Yes, he's finished with his
 (6) answer.
 (7) MR. HIRSH: Kevin, could you please
 (8) speak up when you're finishing your answer.
 (9) THE WITNESS: Yes, sir.
 (10) Q. (BY MR. MAYO) Looking at the
 (11) interchange carriers which are rated on the chart
 (12) on page 64, putting aside I&M which you just
 (13) described as to the discussions that have been
 (14) ongoing between DM&E and I&M, which sounds like
 (15) they're quite advanced, does -- are the
 (16) discussions that DM&E has been having with CP in
 (17) regard to Winona/Minnesota City, are they as
 (18) advanced as the discussions you are having with
 (19) I&M?
 (20) A. No.
 (21) Q. Putting aside I&M and what you have just
 (22) described as it relates to I&M, I take it I'm
 (23) correct that you don't have a binding agreement
 (24) relating to interchange or other movement of coal
 (25) traffic off of the DM&E to any of the carriers

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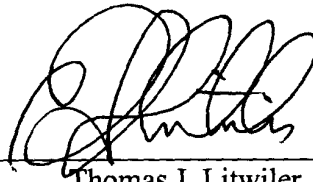
- (1) control, it's not trackage rights and what I was
 (2) trying to figure out what the power of attorney
 (3) relates to?
 (4) A. And when I said I think I misspoke I
 (5) think I used the word overhead which may have
 (6) triggered trackage rights in your mind. It is
 (7) what I&M is in the line, so it would be
 (8) interchange traffic.
 (9) Q. Oh, I see. So what that permits is when
 (10) you interchange traffic with I&M you can quote a
 (11) rate for the portion of movement over the I&M, is
 (12) that right?
 (13) A. Yes.
 (14) Q. And in the last thing you mentioned,
 (15) which I may have misunderstood and maybe it's
 (16) what we were just talking about, is the overhead
 (17) traffic or trackage, you said something to that
 (18) overhead, is that what we just talked about that
 (19) is your ability to quote rates on overhead
 (20) movement after you do the interchange?
 (21) A. No, I misspoke when I used the word
 (22) overhead. I should have said interchange.
 (23) Q. Okay.
 (24) A. I'm a recovering attorney trying to be a
 (25) railroad and I don't remember the terms.

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- (1) that are identified on page 64 at this point?
 (2) MR. HIRSH: I'll object to that as to
 (3) form in terms of the ambiguity and the confusion
 (4) and the assumption that there's some formal
 (5) agreement necessary to interchange traffic
 (6) between common carriers.
 (7) Q. (BY MR. MAYO) I'm just not -- I'm
 (8) trying to put all that baggage in my agreement.
 (9) My only question is whether there's a definitive
 (10) agreement with any of those carriers putting
 (11) aside I&M?
 (12) A. The answer to that is, no, I might have
 (13) to back up to the CP question to the extent there
 (14) already is an agreement in place and there
 (15) already is an interchange in place with CP at
 (16) Winona.
 (17) Q. But you're in conversations with CP in
 (18) regard to refining that agreement as it relates
 (19) to coal interchange, is that right?
 (20) A. There have been discussions about that.
 (21) Again, that falls in the category of -- of is
 (22) there a need for a -- the I&M deal is fairly
 (23) complex in that it involves all these access
 (24) issues to other carriers and things of that
 (25) nature. CP you're there. Once you have the I&M

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of May, 2006, a copy of the foregoing **Petition of Iowa, Chicago & Eastern Railroad Corporation and Dakota, Minnesota & Eastern Railroad Corporation to Reopen and Partially Modify Conditions** was served by first class mail, postage prepaid, upon all parties of record in Finance Docket Nos. 34177 and 34178.

A handwritten signature in black ink, appearing to read 'T. Litwiler', is written over a horizontal line.

Thomas J. Litwiler