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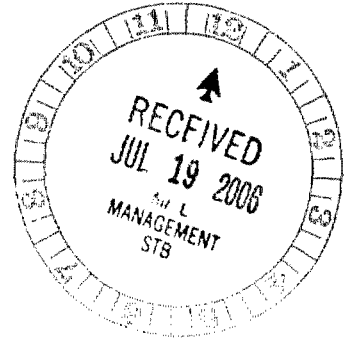
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July 18, 2006

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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** *217085*
**Iowa, Chicago & Eastern Railroad Corporation -- Acquisition
and Operation Exemption -- Lines of I&M Rail Link, LLC**

Finance Docket No. 34178 *217086*
**Dakota, Minnesota & Eastern Railroad Corporation
and Cedar American Rail Holdings, Inc. -- Control --
Iowa, Chicago & Eastern Railroad Corporation**

ENTERED
Office of Proceedings

JUL 19 2006

Part of
Public Record

Dear Secretary Williams:

Dakota, Minnesota & Eastern Railroad Corporation ("DM&E") and Iowa, Chicago & Eastern Railroad Corporation ("IC&E") hereby respond to the July 14, 2006 letter filing of the U.S. Department of Transportation ("DOT") in these proceedings. Two months after DM&E and IC&E filed their petition to reopen herein,¹ DOT now claims that IC&E's acquisition of the rail lines of I&M Rail Link, LLC ("IMRL") and DM&E's related control of IC&E (the subject matters of Finance Docket Nos. 34177 and 34178, respectively) should effectuate a change in the scope of the exhaustive environmental review previously conducted in the PRB Construction proceeding.² What DOT seeks is not an environmental analysis in the IC&E acquisition and control proceedings that would address the substance and effect of those transactions, but rather what amounts to a revisiting and expansion of the PRB Construction environmental review more than eight years after the commencement of that process.

¹ DOT seems to imply that it was not served with DM&E/IC&E's May 11th petition to reopen. DOT letter at 1 ("It has come to the attention of [DOT] that there is a petition before the [Board] . . ."). In fact, that petition was served on both DOT representatives appearing as parties of record on the Board's official service lists in these proceedings, including the DOT General Counsel's Office.

² 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").

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DOT cites no precedent or authority in statute, STB regulations, or case law for the extraordinary measures it asks the Board to take in this case. That is for good reason. None exists. Other than an opportunistic desire to pursue additional environmental reviews whenever possible, there is no legal or logical basis for the approach that DOT advocates. Not only would such unprecedented action be bad policy, it would turn back the clock in both practical and legalistic ways on a nearly nine-year-old case, and subject it to further (and endless) challenge. If a traffic community impact analysis must be done in this instance to further address "off-line" PRB Construction impacts, what about air quality impacts? What about wetlands? The list will go on and on demanding answers to questions that are prospective and self-perpetuating. If and when the traffic materializes, relevant issues will be addressed here by DM&E/IC&E and local communities, as DM&E has repeatedly and effectively done elsewhere. The Board does not need to create extraordinary new case law and effectively reopen (or at least reopen for further legal challenges beyond the STB's control) the PRB construction case to do it here.

It is worth noting what is not the basis for DOT's position. DOT does not dispute that, as the Board has previously and explicitly found, "the [IC&E] acquisition transaction and the [PRB] construction project are separate and distinct -- not 'two links of a single chain'" and that the PRB build-in "is an independent project that has its own utility and benefits whether or not the instant acquisition goes forward." Finance Docket No. 34177, decision served July 22, 2002 ("IC&E Acquisition") at 16, n.34. DOT does not claim that IC&E's acquisition of the IMRL line and DM&E's control of IC&E will alter the routing of coal traffic from the new PRB line, does not challenge the extensive evidence that DM&E and IC&E submitted on that subject with their petition to reopen, and does not allege that there will be any "cumulative environmental impacts" that would be properly cognizable in these proceedings. See 49 C.F.R. § 1508.7. Indeed, DOT does not assert that the IC&E acquisition and control transactions will themselves result in any actual effects or impacts on communities with respect to coal train movements.

The sole "changed circumstance" that DOT points to as warranting a reopening and expanded re-review of environmental matters in the PRB Construction proceeding is that DM&E now indirectly controls the former IMRL lines and that, allegedly, the Board's rationale for not extending the PRB Construction environmental review to off-line traffic is thus moot. DOT letter at 2. This argument fails for any number of reasons.

First, it misapprehends the reasons why the Board in PRB Construction conducted any environmental review beyond the construction of the new PRB line itself and operations on that new line -- which as the Board repeatedly found were the only proposed actions that fell within the Board's regulatory jurisdiction. The Board went on to analyze the effect of increased rail traffic on DM&E's existing rail line only because that line was to be reconstructed in connection with the PRB line project, and because other federal agencies would be conducting a review of that reconstruction such that it would be (the Board believed) expeditious and efficient

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to include those "downstream" matters in the Board's NEPA review. PRB I, 3 S.T.B. at 862; PRB II, 6 S.T.B. at 12-13, n.10. The Board does not normally consider environmental traffic impacts at locations beyond the line being constructed or upgraded, even if those distant locations are on other lines owned by the applicant rail carrier. E.g., 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."). And there is no other agency conducting an environmental analysis of the IC&E acquisition and control transactions that would be helpfully and efficiently subsumed into the wide-ranging new environmental review that DOT seeks to create in the PRB Construction proceeding.

The Board stretched to include the reconstruction of and increased operations on DM&E's existing line in the underlying PRB Construction environmental review. To bootstrap that extended review into a tertiary environmental analysis of the former IMRL lines would change the rules in the middle -- indeed, at the very end -- of the process. The Board previously determined that it would not impose environmental mitigation at points off of DM&E's own lines, PRB II, 6 S.T.B. at 34, and to reverse that decision now would be destructive of any sense of regulatory fairness and integrity.

It would also ignore related assumptions of the Board in conducting the environmental review in PRB Construction. The Board acknowledged there that it was speculative to try to identify how coal traffic from the new PRB line would actually flow, even though all agreed that it would flow off-line at various locations. The result was that the Section of Environmental Analysis assumed that all 100 million tons of coal traffic at the most optimistic upper levels -- traffic volumes that DM&E's opponents insisted it could never reach -- would move over DM&E's entire existing rail line, resulting in mitigation windfalls for locations at the east end of DM&E's system such as Rochester, Minnesota that all commenting parties (including opponents) acknowledged would never experience that level of traffic. DOT now apparently wants to rely on potential coal train movements via Owatonna and the former IMRL lines to obviate the Board's prior decision not to look at off-line traffic impacts, but says nothing about obviating the Board's prior decision to analyze maximum coal train movements over DM&E's entire line -- even though under DOT's rationale the latter basis for the PRB Construction environmental review would now be moot as well.

Ultimately, DOT insists that the Board must treat this matter as if DM&E had acquired the IMRL's lines before it undertook the PRB construction. DOT letter at 3 & n.5. DM&E and IC&E, of course, have argued just the opposite: that the PRB line build-in and its related contemplated traffic flows were a pre-existing environmental condition not subject to

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mitigation in the IC&E acquisition and control proceedings.³ The difference between the two approaches is that DM&E/IC&E's leads to rational regulatory outcomes, while DOT's leads to regulatory purgatory. Presumably, if the new extension of the PRB Construction environmental review to the former IMRL lines took 3-4 years and DM&E or IC&E were, in that time, to engage in any further line acquisition or other transactions, DOT's position would result in yet another re-review of the PRB Construction environmental analysis. DOT provides no basis or precedent supporting such an outcome. See 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).

DOT would have the environmental tail wag the regulatory dog. If there are environmental impacts actually arising from the IC&E acquisition and control transactions, they can and will be analyzed by the Board here. A desire to rewrite the scope and substance of the STB's environmental review in PRB Construction has no place in that process.

Ten copies of this letter are enclosed for filing at the Board. One extra copy also is enclosed, and I would request that you date-stamp that copy to show receipt of this filing and return it to me in the provided envelope. 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: Commenting Parties

³ While such pre-existing conditions often involve current train movements, precedent is clear that such movements are simply one of many types of conditions that can fall within the category. 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 ("In imposing environmental mitigation conditions, the Board has consistently focused on the potential environmental impacts that would result directly from the transaction before the agency. The Board typically does not require mitigation for pre-existing environmental conditions, such as the effects of current railroad operations." (emphasis added)).