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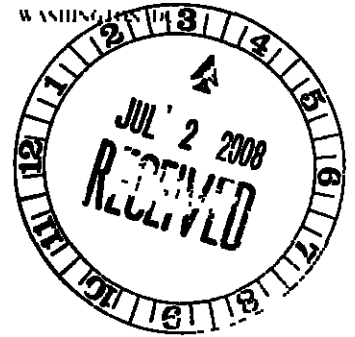
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July 2, 2008

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E. Street, S.W.
Washington, DC 20423

Re. Finance Docket No. 35081, *Canadian Pacific Railway Company, et al --
Control -- Dakota, Minnesota & Eastern Railroad Corp. et al*

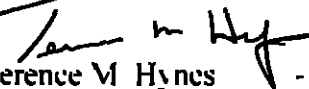
Dear Secretary Quinlan:

Enclosed for filing in the above-referenced matter are the following

1. Original and ten copies of the Highly Confidential Version of the Applicants' Brief to be filed under seal pursuant to the terms of the Protective Order issued by the Board in this proceeding; and
2. Original and ten copies of the Public Version of the Applicants' Brief, along with a disk containing an electronic version in Word format

Please acknowledge receipt of the enclosed filings by date-stamping the extra copies and returning them to our messenger. If you have any questions, please contact the undersigned counsel.

Sincerely,


Terence M. Hynes

TMH:aat
Enclosures

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Canadian Pacific Railway Company, *et al.* – Control –
Dakota, Minnesota & Eastern Railroad Corp., *et al.*

)
) Finance Docket No. 35081
)
)



APPLICANTS' BRIEF

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Dated: July 2, 2008

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Pursuant to *Decision Nos. 4 and 10* in the above-captioned proceeding, Canadian Pacific Railway Company ("CPRC"); Soo Line Holding Company ("SOO Holding"); Dakota, Minnesota & Eastern Railroad Corporation ("DM&E"); and Iowa, Chicago & Eastern Railroad Corporation ("IC&E") (collectively "Applicants") respectfully submit this Brief in support of their Application seeking authorization pursuant to 49 U.S.C. §§ 11323-25 for SOO Holding (and, indirectly, CPR) to acquire control of DM&E and IC&E.¹

GOVERNING STANDARDS

The proposed transaction does not involve the merger or control of two or more Class I railroads. Accordingly, the Board's analysis in this proceeding is governed by 49 U.S.C. § 11324(d). Under § 11324(d), the Board must approve the transaction unless it finds both: (1) that the transaction is likely to result in a substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and (2) that the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs. The Board must grant the application unless the adverse competitive impacts of the transaction are both "likely" and "substantial." Fin. Docket No. 34783, *Ind. R.R. Co. – Acquisition – Soo Line R.R. Co.* (Decision served April 6, 2006) at 4.

Even if the proposed transaction is "likely" to produce "substantial" anticompetitive effects, the Board may not disapprove the transaction "unless the anticompetitive impacts outweigh the benefits and cannot be mitigated through conditions (which the Board has broad authority to impose under 49 U.S.C. 11324(c))." Fin. Docket No. 34424, *Canadian Nat'l Ry. Co. and Grand Trunk Corp. – Control – Duluth, Missabe and Iron Range Ry. Co., Bessemer and Lake Erie R.R. Co., and the Pittsburgh and Conneaut Dock Co.* ("CN/DMIR"), Decision served April 9, 2004, 2004 WL 761305, at *9. Because conditions tend to reduce the benefits of a consolidation, the Board has long maintained a policy against burdening transactions with conditions unless they are necessary to ameliorate demonstrated anticompetitive impacts or to preserve essential services. *See Grainbelt Corp. v. STB*, 109 F.3d 794, 796 (D.C. Cir. 1997);

¹ CPRC and SOO Holding are referred to collectively herein as "CPR." DM&E and IC&E are referred to collectively as "DME."

Lamoille Valley R R. Co. v ICC, 711 F.2d 295, 302 & n.8 (D.C. Cir. 1983). The Board will impose a condition only where: (1) a transaction threatens harm to the public interest, such as a significant reduction in competition, (2) the requested condition would ameliorate or eliminate that harm, (3) it is operationally feasible, and (4) the condition would result in greater benefit to the public than detriment to the transaction. *Grainbelt Corp.*, 109 F.3d at 796; *Union Pac. Corp. – Control – Mo. Pac. Corp.*, 366 I.C.C. 462, 562-65 (1982).

I. THE TRANSACTION WOULD NOT HAVE ANTICOMPETITIVE EFFECTS, AND WOULD PRODUCE SUBSTANTIAL PUBLIC BENEFITS.

The record demonstrates that the proposed transaction would not have any anticompetitive effects, and would produce substantial public benefits. The competitive analyses submitted by Applicants demonstrate that no shipper that currently has access to competitive rail service will be left without at least two competitive rail options as a result of the proposed transaction. Likewise, none of the fourteen short line carriers that presently connect with DME would be without competitive routing options involving carriers other than Applicants following the proposed transaction, nor would the transaction eliminate source or destination competition for the traffic in which Applicants participate today. See CPR-2/DME-2, V.S. Williams; CPR-14/DME-14, Reply V S. Williams. No party – including KCS – rebutted this evidence. See CPR-14/DME-14, App. S, Grimm Tr. at 157-159. Nevertheless, in order to eliminate any question about the competitive effects of the proposed transaction, Applicants have pledged to keep open all gateways affected by the transaction on commercially reasonable terms. Applicants have also agreed to bring IC&E’s “Corn Lines” in southern Iowa and northern Minnesota up to a 25 MPH service standard by the end of 2013 (provided that future traffic volume on those lines economically supports such investment). Applicants are willing to accept conditions on the Board’s approval of the proposed transaction requiring them to adhere to these pledges.

Based upon its analysis of the proposed transaction, the United States Department of Transportation (“USDOT”) concluded that “[t]here will be no significant loss of rail competition because there is minimal overlap between CP and DM&E” (USDOT Comments at 10), and that “there is no basis to impose other conditions” than those Applicants have already agreed to (*id.* at 2). The United States Department of Justice (“USDOJ”) did not file comments or otherwise

participate in this proceeding. Based upon its review of the Application (including witness Williams' testimony), USDOJ advised Applicants in February 2008 that it did not have competitive concerns regarding the proposed transaction and did not intend to participate as a party to this proceeding. CPR-14/DME-14, App. P, Williams Tr. at P3 – P5.²

Because the proposed transaction would not have anticompetitive effects, the Board need not find that it would generate significant public benefits. *Rio Grande Industries – Purchase – Soo Line Railroad Line Between Kansas City, Mo. and Chicago, IL*, 6 I.C.C.2d 854, 889 (1990). Nevertheless, the record demonstrates that the transaction will produce substantial benefits for shippers and communities served by the CPR/DME system. The transaction will create new single-system rail service options where none currently exist, and will make DME shippers more competitive in end markets for their products.³ The transaction will restore CPR's direct access to the Kansas City gateway, enhancing its ability to compete for rail traffic moving between CPR's current network and points in the Southwestern United States and Mexico. *Id.*, V.S. Green at 3. The transaction will promote safety on DME by introducing CPR's safety practices and culture on that carrier, and by giving DME access to capital to undertake track maintenance and infrastructure investments that will improve its system fluidity and safety performance. *Id.*, V.S. Green at 5. Specifically, CPR will make an additional \$300 million in capital available to DME over the next several years for improvements to DME's track, bridges and other rail facilities and systems. The enhanced ability of DME to make safety-related capital investments is a key public benefit of the proposed transaction. Based upon its analysis of Applicants' Safety Integration Plan ("SIP") and the comments regarding the SIP filed by other parties on March 4, 2008, USDOT – whose component agencies (including FRA and PHMSA) have primary responsibility for rail safety and security – concluded that the transaction "meets the statutory standard for approval" and that, aside from a recommendation that Applicants accelerate the timing of emergency response

² KCS' assertion that Applicants "ignored or have purposely avoided the more sophisticated and comprehensive market structure approaches commonly used by the Department of Justice" (KCS Reb. Comments at 50) is belied by USDOJ's decision not to challenge witness Williams' analyses or to otherwise participate in this proceeding.

³ See, e.g. CPR-2/DME-2, V.S. Foot at 3-7, Comments of the S. Minn. & N. Iowa Shippers Assoc. at 2; V.S. Mack on behalf of CHS, Inc., Shippers at 1, 2, V.S. Rieke on behalf of S. Grainbelt Shippers Assoc., Shippers at 22, V.S. Maimondal on behalf of IPSCO Inc., Shippers at 11.

exercises in the city of Rochester, MN, "all other safety-related concerns are already properly addressed by existing or proposed Federal programs and regulations." USDOT Comments at 15.

II. THE REMAINING REQUESTS FOR CONDITIONS DO NOT SATISFY THE BOARD'S STANDARDS AND SHOULD BE REJECTED.

Although several carriers initially raised issues about the proposed transaction, the concerns of all but one of those carriers have been resolved through private negotiations and Applicants' pledge to keep affected gateways open on commercially reasonable terms. Kansas City Southern Railway Company ("KCS") is the only freight railroad that continues to seek Board-imposed conditions. Requests by several non-carrier parties also remain pending.

Most of the remaining conditions requests ask the Board to modify or expand the terms of contractual arrangements that were voluntarily negotiated between one of the Applicants and the party seeking the condition. The Board's prior decisions make clear, however, that it will not impose conditions "designed simply to put its proponent in a better position than it occupied before the consolidation." *Canadian Nat'l Ry. – Control – Ill Cent. Corp* ("CN/IC"), 4 S.T.B. 122, 141 (1999). In particular, the Board has declined to impose conditions where "parties seek material changes to, or extensions of, existing contracts, or to compel new contractual commitments" *CSX Corp., Norfolk Southern Corp. – Control & Operating Leases – Conrail, Inc.*, 3 S.T.B. 196, 1998 WL 456510 at *62 (July 23, 1998) ("CSX/NS/Conrail"). A voluntary agreement that "manifests an equality of bargaining positions and a mutuality of interests" should not be reformed by the Board; rather any disagreements should be resolved by the parties under the terms of their agreement. *St Louis Sw Ry. Co. – Purchase (Portion) – Rock Island & Pac R R Co*, 363 I.C.C. 323, 367-68 (1980). Mayo Clinic and certain state government parties seek conditions that would impose upon Applicants operating practices and obligations in addition to (and inconsistent with) those established by existing federal safety regulations

Applicants' Response to Comments and Requests for Conditions (CPR-14/DME-14) ("Applicants' Response") demonstrated that none of the remaining parties has satisfied the Board's standards for imposing the conditions they seek. Applicants incorporate by reference herein the discussion of those conditions set forth in Applicants' Response. In this Brief,

Applicants respond principally to arguments raised for the first time on rebuttal by KCS, Arkansas Electric Cooperative Corporation (“AECC”), Muscatine Power & Water (“MPW”), the Mayo Clinic (“Mayo”) and Metra

A. Kansas City Southern (“KCS”)

As Applicants’ Response demonstrated, KCS’ request that the Board make permanent, and modify the terms of, two existing commercial agreements between KCS and IC&E is based upon a fundamental premise – *i.e.*, that CPR and UP are, in effect, a single carrier – that is sheer fantasy. CPR-14/DME-14 at 18-24. As CPR witness Milloy showed, while CPR and UP have worked successfully together to improve the efficiency of their interline service offerings, CPR’s commercial relationship with UP is not exclusive. Rather, CPR regularly collaborates with BNSF and other connecting carriers when it is in CPR’s commercial interest to do so. *Id.*, V.S. Milloy. In any event, KCS’ concern that CPR’s relationship with UP could motivate CPR to engage in vertical foreclosure of KCS at Kansas City is fully addressed by Applicants’ pledge to keep that gateway open on commercially reasonable terms.⁴

KCS advances several new arguments on rebuttal, all of which are meritless:

For example, KCS proffered for the first time on rebuttal various charts and exhibits intended to support its claim that CPR’s alleged “alliance” with UP has led CPR to refrain from working cooperatively with other railroads. This “evidence” is, at best, disingenuous. For example, KCS witness Woodward presented a chart purporting to show that, between 2001 and 2006, UP-CPR interline traffic grew at a higher rate than CPR’s interline traffic with other carriers. KCSR-3, Rcb. V.S. Woodward at 5, Exh. 1. However, Mr. Woodward’s Exhibit 1 does not even remotely demonstrate that CPR and UP have an exclusive strategic relationship, or that CPR does not interchange traffic with other railroads. To the contrary, Exhibit 1 shows that, while CPR’s interline traffic with UP grew during the 2001-2006 period, CPR’s interline traffic with BNSF and NS also grew substantially. Indeed, CPR interchanges nearly as many cars with

⁴ KCS’ claim that the proposed transaction would have adverse horizontal competitive effects on the transportation of corn to the Pacific Northwest is meritless. Applicants’ combined participation in interline shipments of corn to Pacific Northwest ports is only 23%. The transportation of corn for export via PNW ports is dominated by BNSF, which handles 72% of such shipments on a single-line basis. CPR-14/DME-14, V. S. Williams at 4-6.

UP's western rival, BNSF (more than [] carloads during 2006) as it does with UP (just over [] carloads in 2006). CPR also interchanged more than [] carloads with each of NS and CSX in that year. Moreover, witness Woodward fails to acknowledge that the growth in CPR-UP interline traffic during the time period reflected on Exhibit 1 is attributable in significant part to the introduction of an improved CPR-UP interline service offering for corn shipments to the PNW (which enhanced competition by creating an alternative to BNSF single-line service for corn originating in North Dakota and northern Minnesota).

KCS also implies that CPR handles traffic in conjunction with UP via circuitous routings while eschewing participation in more direct interline routes with other carriers. KCS Rebuttal Comments at 36. Mr. Woodward's Exhibit 4a, which purports to depict such an "Example of Circuity" in the CPR-UP interline route between [], is utterly fallacious. As Mr. Woodward's own testimony shows, CPR-UP interline traffic between Alberta and El Paso/Mexico is routed via [], not via [] and the UP lines depicted in Exhibit 4a. *See* Reb V.S. Woodward, Exh 2. Moreover, as KCS acknowledges elsewhere in its rebuttal filing, nearly 90% of the rail traffic to and from Mexico in which CPR participates moves via the Laredo gateway, not El Paso. KCS Reb. Comments at 37. Indeed, the Board's *Carload Waybill Sample* indicates that CPR and UP moved only [] cars in the manner suggested by witness Woodward during 2006. Mr. Woodward's Exhibit 4b, which suggests that CPR works exclusively with UP for traffic moving between Alberta and U.S. points such as [], [], is similarly misleading. As even a cursory review of the rail map shows, UP "dominates" traffic movements to/from the points depicted in Mr. Woodward's Exhibit 4b for the simple reason that BNSF does not serve those points. *See* Application, Exh. 1; Professional Railroad Atlas of North America (Third Ed 2004) at 40, 47. Mr. Woodward's assertions regarding UP's alleged dominance of traffic originating in Alberta also ignores the testimony of CPR witness Milloy, who demonstrated that CPR interchanges a variety of traffic originating in Alberta with BNSF at Coutts, AB rather than with UP at Kingsgate. CPR does so because the CPR-BNSF routing for such shipments is in CPR's economic self-interest. Milloy Reply V.S. at 7-8.

Perhaps the most deceptive of witness Woodward's "visual aids" is his Exhibit 5, which indicates that [] of the [] carloads of corn traffic that CPR originated in 2005 were interlined with UP for export via the PNW, and that CPR interchanged [] export corn shipments with BNSF in that year. Based upon this Exhibit, Mr. Woodward argues that "the CPR-UP alliance clearly shapes the manner in which CPR/SOO corn is routed to PNW markets." KCSR-3, Reb. V.S. Woodward at 9. What Mr. Woodward ignores is that, during 2005, BNSF moved more than five times that volume of corn — over [] carloads — to the PNW via its own single-line routes. CPR-14/DME-14, Reply V.S. Williams, Att. JHW-13. Given its ability to handle corn traffic destined to the PNW in single-line service, BNSF has no need (or incentive) to collaborate with CPR on movements of corn to PNW ports. Indeed, as the Board learned in *Ex Parte No. 665*, the CPR-UP interline route was developed to provide shippers in northern Minnesota and North Dakota with a competitive alternative to BNSF single-line service to the PNW. In sum, none of the "examples" offered by KCS on rebuttal supports its ludicrous assertions that CPR is "[]" or that "[]" [] See CPR-14/DME-14, App. R, Lawrence Tr. at 36-37, 73.

Witness Woodward also purported on rebuttal to update his "contribution analysis" of routings involving IC&E-KCS (to the South Central States via Kansas City), DM&E-BNSF (to the PNW via Florence, MN) and CPR-UP (to the PNW via Canada and Kingsgate). According to Mr. Woodward, this analysis shows that it would be substantially more profitable for CPR to divert corn traffic from IC&E origins to a "long haul" IC&E-DM&E-CPR-UP route to the PNW ports.⁵ KCSR-2, V.S. Woodward at 18, Exh. 7; KCSR-3, Reb. V.S. Woodward at 10-24. As Applicants' Response demonstrated, Mr. Woodward's original "contribution analysis" was fatally flawed for a variety of reasons, not the least of which was his application of URCS costs to the Canadian portion of the hypothetical CPR-UP movement (which resulted in a substantial

⁵ A handful of KCS-served corn receivers submitted letters claiming — in identical language — that the "loss of those IC&E Iowa or Minnesota origins . . . would result in [the shipper] having to pay more for its grain." Compare *OK Industries V.S. at 2*, *Tyson Foods, Inc. Supplemental V S at 1-2*; *J.W. Nutt Company V S at 2*; see also *MFA Incorporated V S at 2-3*

understatement of the costs associated with such a routing). On Rebuttal, witness Woodward maintains that it was “inappropriate” for Applicants’ witness Williams to cost the Canadian segment using the Agency Regulatory Cost Model (“ARCM”) maintained by the Canadian Transportation Agency. KCSR-3, Reb. V.S Woodward at 17. Mr. Woodward is incorrect. Unlike URCS, the ARCM is based upon the actual costs experienced by CPR in its Canadian operations. ARCM costs for CPR – not URCS costs for Soo Line, which operates a largely “flat ground” railroad in the Upper Midwest – represent the best evidence of the cost of moving grain trains over CPR’s line through the Canadian Rockies. Mr. Woodward also erred in relying solely upon URCS costs for 100-car unit trains in calculating the potential contribution for corn shipments to the PNW from IC&E origins. As Applicants’ witness Anderson explained, most of the elevators on the Corn Lines can load only 25 cars at a time. CPR-14/DME-14, V.S. Anderson at 6. Mr. Woodward’s calculations fail to account for the increased costs that Applicants would incur by either moving IC&E-origin corn in smaller trains or by gathering and switching cars from multiple origins into unit trains for shipment to the PNW.

Indeed, the credibility of Mr. Woodward’s analysis is undercut by (1) the substantial difference between the contribution estimates set forth in Mr. Woodward’s March 2008 testimony and the revised estimates that he presented just two months later; and (2) the wide variance between the contribution that Mr. Woodward estimates Applicants could earn on projected movements to the PNW from IC&E origins and the contribution that he calculates BNSF and DM&E’s currently earn on actual shipments to the PNW today. As Table 1 shows, even taking into account the substantial adjustments that Mr. Woodward made in his calculations on rebuttal, Mr. Woodward’s estimated contribution for projected export corn moves from IC&E origins to Seattle via a CPR-UP routing was nearly double the contribution that Mr. Woodward indicates DM&E and BNSF are earning today on corn traffic that actually moved from DM&E origins during 2005. The proposition that, in a competitive market, CPR and UP would be able to earn twice as much contribution on corn shipments from IC&E origins to the PNW as DM&E and BNSF realize on actual moves over their route via Florence, MN (which route is 400 miles shorter than the hypothetical CPR-UP route) is, on its face, not credible.

Table 1 George Woodward Contribution Calculations ⁶		
	March 2008 Contribution Calculations (USD\$/Car)	May 2008 Contribution Calculations (USD\$/Car)
ICE Grain to KCS Domestic Destinations	ICE: \$[] KCS: \$[] Total \$[]	ICE: \$[] KCS: \$[] Total \$[]
DME Grain to BNSF Seattle (Export)	DME: \$[] BNSF: \$[] Total: \$[]	DME: \$[] BNSF: \$[] Total: \$[]
Projected ICE Corn to UP Seattle (Export)		ICE: \$[] UP: \$[] Total: \$[]

Finally, KCS continues to insist that the IC&E/KCS Chicago Haulage Agreement is a critical factor in the competition for NAFTA rail traffic. Although KCS concedes that the IC&E/KCS Chicago Haulage Agreement has never actually been used, KCS maintains that the Agreement somehow constrains rates for NAFTA traffic by “provid[ing] a basic framework, from both a price and service standpoint, by which DME and KCSR negotiate joint-line service between the Kansas City gateway and Chicago.” KCS Reb. Comments at 30.⁷ KCS’ claim is belied by KCS’ own discovery responses in which KCS did not identify a single specific instance in which that dormant Agreement was, in fact, used as a benchmark in rate or divisions negotiations with DME. KCS Response to Applicants’ Interrogatory No. 3 (served Mar 27, 2003). Moreover, any suggestion that the IC&E-KCS interline route between Chicago and Kansas City plays a substantial competitive role with respect to NAFTA traffic today is spurious. In 2005, only [] cars – or less than two hundredths of one percent of NAFTA traffic – moved via the IC&E-KCS interline route. CPR-14/DME-14, V.S. Williams at 26. In 2007, the volume of NAFTA traffic handled jointly by IC&E and KCS was even lower ([] cars). *Id.*, V.S. Anderson at 13.⁸

⁶ Source: March 2008 Contribution Calculations from KCSR-2, V.S. Woodward V.S. at 18, Exh. 7; May 2008 Contribution Calculations from KCSR-3, Reb. V.S. Woodward at Exh. 7a.

⁷ As an initial matter, the IC&E/KCS Chicago Haulage Agreement does not apply to intermodal traffic, and therefore cannot possibly be a competitive factor for intermodal shipments, which account for []% of all NAFTA traffic. CPR-14/DME-14, V.S. Williams at 25-26.

⁸ KCS witness Grimm’s rebuttal testimony buttresses the conclusion that the proposed transaction would not have a material impact on traffic moving between Chicago and Laredo. Dr. Grimm’s data show that IC&E and CPR collectively participated in only []% of the traffic moving northbound, and only []% of the traffic moving southbound, between Laredo and Chicago during 2005. KCSR-3, Reb. V.S. Grimm, Tables 1, 2.

Even if KCS' arguments on these factual issues had merit – and they do not – KCS' rebuttal submission failed to address (much less rebut) certain fundamental facts that are fatal to its claim that the transaction would substantially reduce competition for corn traffic:

First, the harm about which KCS speculates – that KCS might be denied access to corn from IC&E origins – is precluded by the terms of the Grain Agreement. As KCS itself acknowledges, it will continue to enjoy pricing authority for shipments of corn from IC&E origins to KCS-served poultry feed mills until at least December 31, 2017. KCSR-2, Comments at 17, V.S. Bilovesky at 9. Moreover, the Grain Agreement already contains both service standards and significant penalties for failure by IC&E to comply with them. CPR-14/DME-14, V.S. Anderson at 4-5. KCS' request that the Board extend the term of the agreement in perpetuity, and mandate stiffer penalties for service failures, is a blatant attempt by KCS to improve its commercial position under an agreement that it freely negotiated with IC&E.

Second, KCS's arguments regarding CPR's supposed incentive to divert IC&E-origin corn to alternate destinations ignores the fact that grain shippers – not rail carriers – determine the destinations to which their product is transported. As the Board's prior decisions and USDOT's comments in this case make clear, even if grain shippers on the Corn Lines – who have unanimously supported the proposed transaction – diverted their corn to other end markets, such diversions would not constitute harm to "competition."⁹ Rather, the selection of alternate destinations by Corn Lines shippers would be the product of the efficient functioning of the North American (and world) grain markets.

Third, corn is a ubiquitous commodity, and corn markets are intensely competitive. Applicants' combined share of U.S. corn originations is only []%, and their combined share of corn terminations is only []%. CPR-14/DME-14, V. S. Williams at 4-6. The CPR-DME system will face vigorous modal and geographic competition for corn traffic to all destinations. At the same time, the proposed transaction will enhance competition in grain markets by giving

⁹ See Fin. Docket No. 32133, *Union Pac. Corp. – Control – Chicago & North Western Transp. Co.* ("UP/CNW"), Decision served March 7, 1995, 1995 WL 141757, at * 63, 69, USDOT Reply Comments at 11.

DME-served grain shippers (for the first time) single-system rail access to additional destinations for their product. CPR-2/DME-2, V.S. Foot at 3-4.

Fourth, KCS' claim that the diversion of IC&E-originated corn from KCS-served points to alternate destinations would inflict substantial harm on South Central poultry feeders is belied by current developments in the marketplace. As Applicants Response demonstrated, ethanol traffic originating on DME's lines more than tripled between 2003 and 2007. This trend is continuing, with ethanol production in DME's service territory now projected to increase by about 250% between 2007 and 2009. CPR-14/DME-14, V.S. Anderson at 8 and Table 1. The rapid increase in ethanol production has been accompanied by a precipitous decline in corn shipments from IC&E-served origins to KCS-served feed mills, as Corn Lines shippers increasingly choose to sell their product to local ethanol producers. As Applicants' witness Anderson testified, corn shipments from IC&E origins to KCS-served destinations declined by []% from approximately [] cars in 2006 (and prior years) to only [] cars in 2007. *Id.* at 11. That trend is continuing – corn shipments from IC&E-served origins to KCS-served destinations during the first five months of 2008 have declined by an additional []% compared to the first five months of 2007. Yet, the “loss” of Iowa corn to ethanol producers has not deprived South Central poultry producers of access to an adequate supply of corn. To the contrary, in its Annual Report SEC Form 10-K filed November 21, 2007 (at 4), Tyson Foods (one of the handful of receivers that filed a statement in support of KCS' proposed conditions) acknowledged that its supply of feed stocks is “adequate for our present needs and we do not anticipate any difficulty in acquiring these materials in the future.” (Emphasis added) Indeed, the growth in demand for corn fueled by increasing ethanol production has generated a massive increase in local corn production in the South Central States.¹⁰ Because of the much shorter rail

¹⁰ Corn plantings in Mississippi almost tripled, from 340,000 acres to 960,000 acres, from 2006 to 2007, with a corresponding increase in production from 105 million bushels to 141 million bushels. During the same period, Arkansas corn acreage nearly quadrupled from 190,000 acres to 610,000 acres, with an increase in production from 73 million bushels to 99 million bushels; Louisiana increased its corn acreage from 300,000 acres to 740,000 acres, with production growing by almost 80 million bushels to 120.5 million bushels, and Oklahoma corn plantings grew from 270,000 acres to 320,000 acres, increasing that state's production by 16 million bushels to more than 39 million bushels. See CPR-14/DME-14, V.S. Williams at 18 (citing USDA National Agricultural Statistics Service, *Prospective Plantings* 4, 27 (March 31, 2008))

hauls for corn grown in the South Central States to feeder mills in those states, transportation charges are significantly lower than for corn originating on the Corn Lines. For example, in 2005, the rail rate for a carload of corn to Mississippi was \$[] from IC&E-served origins in Iowa and \$[] from IC&E-served origins in Minnesota. By comparison, the rail rates for corn shipments originating in Louisiana and Alabama to destinations in Mississippi were only \$[] and \$[], respectively. CPR-14/DME-14, V.S. Williams, Attachment JHW-8. In short, while it is possible (if not likely) that South Central feeder mills will be required to obtain increasing volumes of corn from origins other than Iowa – regardless of whether the proposed transaction takes place – the dynamic nature of the corn market makes it highly unlikely that they will be unable to obtain adequate supplies of corn from alternate sources.

Fifth, KCS did not even attempt to respond to Applicants' showing (based upon documents obtained in discovery, and the deposition of KCS' Mr. Lawrence) that KCS' proposed conditions represent a transparent attempt by KCS to obtain the principal benefits - permanent control over pricing of both IC&E-origin corn and shipments between Mexico and the Chicago gateway – of KCS' own failed attempt to acquire DME. See CPR-14/DME-14 at 37-39; Appendices M and R.

Finally, KCS' concerns are fully addressed by Applicants' pledge to keep open all gateways affected by the proposed transaction on commercially reasonable terms. The ICC and Board have accepted virtually identical pledges as sufficient to address concerns about vertical foreclosure in prior control proceedings. See, e.g., *CN/IC*, 4 S.T.B. at 158-59; *CN/WC*, 5 S.T.B. at 902; *KCS/TexMex*, 2004 WL 2700648, at *13. Although KCS complains that the phrase "commercially reasonable terms" is not sufficiently defined, this identical language was approved by the ICC and the Board in prior cases, including KCS' acquisition of control of TexMex. *KCS/TexMex*, 2004 WL 2700648, at *13; *CN/WC*, 5 S.T.B. at 902; *CSX/NS/Conrail*, 3 S.T.B. at 255, 450. Nor has KCS explained why it is necessary to give KCS permanent pricing authority over IC&E-origin corn traffic, rather than simply requiring Applicants to interline traffic with KCS at Kansas City on commercially reasonable terms, in order to protect the public interest.

B. Arkansas Electric Cooperative Corporation ("AECC")

AECC asserts that the proposed transaction makes it less likely that the PRB Project will be built, and could undermine future efforts to create a hypothetical PRB rail line to Kansas City. AECC Comments at 8-10; V.S. Nelson at 12-18. AECC's comments ignore the Board's explicit decision not to address the PRB Project in this proceeding. *See Decision No. 2* (served November 2, 2007) at 7, n 3. The Board rejected similar efforts by AECC to relitigate issues related to the PRB Project in connection with DM&E's acquisition of IC&E. *DM&E/IC&E*, 6 S.T.B. at 525-26.

On rebuttal, AECC erroneously asserts that Applicants contend that the PRB Project "is not important to the public interest." AECC Reb. Comments at 3. AECC's argument mischaracterizes Applicants' point. The Board has already determined that the PRB Project is consistent with the public interest.¹¹ If CPR's acquisition of control of DME is approved here, CPR will simply step into the shoes of DM&E with respect to the PRB Project. The Board has correctly declined to revisit the merits or viability of the PRB Project in this proceeding.¹²

AECC's claim (Reb. Comments at 7) that CPR's acquisition of DME would not enhance the prospects of the PRB Project being completed is both factually incorrect and legally irrelevant. AECC's suggestion that CPR has no greater financial capability than DME to undertake the PRB Project (AECC Reb Comments at 8) is frivolous. In fiscal year 2006, CPR had revenues of \$4.4 billion, while DME generated \$263 million (Application (CPR-2 DME-2) at 1-2.). CPR paid \$1.48 billion in cash for DME (*id.* at 7); in connection with the closing of the transaction, DM&E's outstanding \$250 million obligation to FRA was repaid by CPR (*id.* at 13). Moreover, the standard governing this case is not whether the transaction would enhance competition (although as shown above, it clearly will), but whether "the transaction is likely to

¹¹ See Fin. Docket No. 33407, *Dakota, Minnesota & Eastern RR Corp Construction Into The Powder River Basin*, (served Jan 28, 2002), *reversed and remanded* in *Mid-States Coalition for Progress v STB*, 345 F.3d 520 (8th Cir 2003); Fin. Docket No. 33407, *Dakota, Minnesota & Eastern RR Corp Construction Into The Powder River Basin*, (served Feb. 13, 2006), *upheld* in *Mayo Foundation v STB*, 472 F.3d 545 (8th Cir. 2006) (herein collectively "*DM&E PRB Construction*")

¹² The cases cited by AECC (Rebuttal Comments at 4-5) are readily distinguishable. All of those cases involved mergers or other combinations between a railroad and a potential competitor for specific traffic. Here, by contrast, absent its acquisition of DME, CPR is not a potential competitor to originate PRB coal.

result in a substantial lessening of competition.” Applicants have clearly demonstrated that the transaction will not have anticompetitive effects.

Equally absurd are AECC’s attacks upon CPR’s expertise in hauling coal and building railroad lines. In 2005, CPR hauled [] million tons of coal, representing more than []% of its system-wide tonnage. CPR-2/DME-2, V.S. Williams, Attachment H. AECC’s claim that CPR’s most recent significant experience “in building new rail lines” occurred in the 1980’s ignores the testimony of CPR President, Fred Green, who described the recent major expansion of CPR’s rail corridor serving western Canada and its recently-approved plan to construct new rail lines to serve the growing oil sands production industry in Alberta. CPR-2/DME-2, V.S. Green at 2-3.

C. Muscatine Power and Water (“MP&W”)

Simply put, there is no nexus between the proposed transaction and the issues raised by MPW. To the contrary, MPW itself acknowledges that “[its] competitive concerns originated with DME’s acquisition of the Iowa, Chicago & Eastern Railroad (“ICE”) in 2003.” MPW Reb. Comments at 2. Specifically, MPW lost eligibility for the “contract exception” articulated in the Board’s *Bottleneck* decisions as a result of DM&E’s acquisition of IC&E *Id.* at 2-3. In order to resolve MPW’s concerns, DM&E and IC&E entered into two agreements with MPW in conjunction with the *DM&E/IC&E* proceeding: a settlement agreement and a proportional rate contract covering IC&E service between Ottumwa and Muscatine Station, IA. That agreement will continue in effect until 2012. Following the proposed transaction, DM&E and IC&E will continue to be parties to, and will be bound by the terms of, both of those agreements.

The proposed transaction will not change MPW’s position under its agreements with DM&E/IC&E, nor will it inflict any other competitive harm on MPW. As MPW admits, it lost eligibility to invoke the “contract exception” not as a result of the current transaction but from DM&E’s acquisition of IC&E. MPW chose to address that issue by entering into its current agreements with DM&E and IC&E. CPR’s acquisition of DME will not change MPW’s competitive circumstances, nor will it alter the terms of the agreements that MPW bargained for with DM&E/IC&E. MPW’s vague assertion that CPR might “interpret” the agreements differently than DM&E/IC&E provides no basis for imposing the condition it seeks. The Board

should not attempt to resolve hypothetical disputes regarding the interpretation of MPW's agreements with DME in this proceeding, nor should it impose any condition that would alter the positions of the parties under those agreements. Accordingly, there is no justification for imposing the conditions sought by MPW. *CN/DMIR, supra*, 2004 WL 761305, at *9, *13; *CN/IC, supra*, 4 S.T.B. at 141-42 & n.72. USDOT has concluded that "there is no basis for the Board to act" on MPW's request for conditions. USDOT Comments at 13-14.

D. Mayo Clinic

Applicants believe that they have developed a constructive working relationship with Mayo and the City of Rochester, MN. CPR will continue to engage Mayo/Rochester (and other communities) in discussions regarding cooperative efforts to enhance the safety of rail operations through those communities. In addition as discussed below and in Applicants' Response (at 76-77), Applicants have already made certain voluntary commitments that will improve the safety of train movements through Rochester and Owatonna, MN. Mayo's requests for further conditions that would accord Rochester special treatment are unwarranted, for several reasons:

First, Mayo's conditions requests are premised largely on existing circumstances rather than impacts of the proposed transaction. For example, Mayo complains that DM&E currently operates over substandard track and that its safety record has been poor. Mayo Comments at 4-5, 8, 12-13. However, the Board only imposes conditions to address harms or conditions that are caused by the transaction, not to address pre-existing conditions that are unrelated to the transaction. *CN/DMIR, supra*, 2004 WL 761305, at *9, *13; *CN/IC, supra*, 4 S.T.B. at 141-42 & n.72. The proposed transaction will not cause any safety problems on DME's lines; to the contrary, it is likely to result in a marked improvement in the safety and fluidity of DME's operations through Rochester (and other communities) ¹³

¹³ The principle that the Board will not impose conditions to address pre-existing circumstances that are unrelated to the transaction clearly applies to Mayo's arguments about the continuing transportation of anhydrous ammonia through Rochester. Mayo Rebuttal Comments at 7. In each of the last two years, four carloads of anhydrous ammonia was the sum total of all hazardous materials that DM&E moved through Rochester. Reply V S Graham at 4. No additional anhydrous ammonia (or other TIH traffic) is projected to move through Rochester as a result of the transaction. Given Applicants' planned upgrade of the track through Rochester, the proposed transaction will improve safety with respect to the continued movement of the very limited carloads of anhydrous ammonia.

Second, Mayo attempts to relitigate safety and environmental issues related to the PRB Project. The Board has already addressed those issues fully, and it imposed a variety of conditions in *DM&E PRB Construction* to mitigate potential impacts of PRB coal traffic on Rochester. There is no need to reimpose those conditions, nor is there any basis to modify them in this proceeding. *See Decision No 9* at 6-7. Mayo's complaint that those conditions "will not do anyone any good if CP decides it would not be rational to build into the PRB" (Mayo Reb. Comments at 14) misses the point – if the PRB Project is not constructed, then the predicate for those conditions will not exist. Alternatively, Mayo claims that even if the PRB line is never built, Mayo faces safety risks from "increased shipments of ethanol" that require similar mitigation in this case. *Id.* However, as discussed below, the potential for future ethanol traffic through Rochester (amounting at most to little more than one train per week) does not justify Mayo's request for conditions mandating special train speed limits and other operating restrictions for Rochester that are different from (and inconsistent with) those already prescribed by federal and state law.

Third, to the very limited degree that Mayo raises new safety concerns, Applicants' SIP, and their ongoing obligation to comply with the extensive scheme of existing federal and state safety and security regulations, fully and appropriately address all safety issues and concerns related to the proposed transaction. Applicants' Response at 70-71, 81-85. Nor has Mayo demonstrated any persuasive reason for the Board to interject itself into safety and security issues that are currently the subject of multiple proceedings before other federal agencies that have primary jurisdiction over such matters. Attempting to address in this individual control proceeding the same issues that are already the subject of safety and security rulemaking proceedings before other federal agencies (as Mayo would have the Board do) could produce outcomes inconsistent with the policy choices made by those agencies based upon their assessment of the effects of such regulations on the rail system as a whole.¹⁴ Indeed, USDOT

¹⁴ For example, in one pending rulemaking cited by Mayo, PHMSA is considering a speed limit of 30 MPH for trains carrying PIH shipments over unsignaled rail lines, and a 50 MPH speed limit for PIH shipments generally. *See Proposed Rule, "Hazardous Materials Improving the Safety of Railroad Tank Car Transportation of Hazardous Materials,"* 73 Fed. Reg. 17818 (April 1, 2008) Mayo's request that the Board impose a condition in this

has expressed the view that “[s]pecial rules for the Rochester area that differ from nationally uniform rules would tend to impair rail safety and security, because no one locale can be isolated from the overall flow of hazardous materials traffic and such rules would distort the analyses on which the new rules depend.” USDOT Comments at 5.¹⁵

Fourth, the small number of ethanol trains that might move through Rochester following the transaction is not sufficient to support Mayo’s requested conditions. In response to the continuing growth in ethanol production in DME’s service territory, Applicants updated their projections of potential future ethanol traffic volumes and the destinations to which that traffic may move.¹⁶ Applicants now project that they may move as many as 6,355 carloads of new ethanol traffic from origins on DM&E to the Chicago gateway by 2009-2010. CPR-14/DME-14, V.S. Anderson at 9-10, V.S. Graham at 4-6. Some of this new ethanol traffic may eventually move in unit trains routed via Owatonna, Rochester and CPR’s line at Minnesota City, MN. However, even if the projected volumes were fully realized, and all of the additional ethanol trains to Chicago were routed in this manner, the resulting increase in train activity through Rochester would amount to little more than one ethanol train per week. However, Applicants have stated that they do not plan to reroute the new ethanol trains in this manner until after they have completed certain improvements to DM&E’s Waseca Subdivision. Specifically, Applicants have included in their capital plans for 2009-2010 funds to rehabilitate and upgrade DM&E’s line between Owatonna and Rochester to FRA Class 3 track. This project will include, among other improvements, the installation of approximately 30 miles of continuous welded rail (“CWR”) in the vicinity of Rochester and 10 miles of CWR in and around Owatonna, as well as

proceeding setting a 10 MPH speed limit for ethanol shipments moving through Rochester, MN is fundamentally inconsistent with the rule under consideration by PHMSA

¹⁵ USDOT does propose one modification to the SIP; namely, that Applicants work with USDOT to accelerate the timing of emergency preparedness and response training and exercises for local responders in the Rochester area. USDOT Comments at 4, 6. Applicants agree with this recommendation. Indeed, Applicants have already offered to provide hazardous materials emergency response training, upon request, to Rochester officials and emergency response personnel. See CPR-14/DME-14 at 85, V.S. Graham at 11.

¹⁶ Mayo’s suggestion that the updated traffic projections impugn the integrity of Applicants’ earlier evidence is meritless. Mayo Reb. Comments at 2. As Applicants’ Response showed, the increase in projected post-transaction ethanol traffic since the original Application was filed is attributable to the ongoing growth in ethanol production in DM&E’s service territory generated by the market and public policy, not to the proposed transaction. See CPR-14/DME-14, V.S. Anderson at 7-10. Applicants promptly updated their traffic projections when those projections changed, and did so in time to afford Mayo and other parties to comment on those changes.

the installation of enhanced detection systems on that line. CPR-14/DME-14, V.S. Graham at 6-7. Given the safety enhancements likely to result from these track improvements, and the relatively low number of new ethanol trains even if Applicants' current projections are fully realized, Mayo's demand for additional conditions that would, among other things, mandate a 10 MPH speed limit for ethanol trains, require advance notification of all ethanol train movements through Rochester, and limit the total number of ethanol trains that could be operated over the Rochester line, are unwarranted.

Indeed, even if the projected maximum growth in ethanol traffic to Chicago is realized, and all of the trains carrying that traffic are routed over the Wascca Subdivision, the post-transaction increase in train movements would be well below the thresholds requiring preparation of an environmental report set forth in the Board's environmental regulations. *See* 49 C.F.R. § 11507(e)(5); Application (CPR-2 DME-2) at 20-24. If the potential traffic increases projected to occur in the vicinity of Rochester as a result of the proposed transaction are insufficient even to justify further scrutiny of environmental impacts under the Board's rules, they clearly do not support imposition of the extensive mitigating conditions requested by Mayo, especially given the fact that DM&E is already subject to pervasive regulation concerning the "transportation safety, security, and handling of hazardous materials on its existing line, which goes through Rochester." *Decision No. 9* at 7.

Finally, Mayo's claim that Applicants' testimony in this proceeding concerning the status of the PRB Project is contradicted by testimony in the pending condemnation proceedings in Wyoming is incorrect. Mayo's assertions obfuscate the design/developmental phase and the construction phase of the PRB Project. The condemnation proceedings are a necessary part of DM&E's ongoing efforts to acquire the land upon which the PRB Line would be built. As CPR President Green made clear, securing the ability to acquire that land is but one of several prerequisites to any decision by CPR to proceed with construction of the line. CPR-2/DME-2, V.S. Green at 5-6. As of the present time, Applicants have not satisfied any of those prerequisites (which include reaching access agreements with PRB mines and securing sufficient

traffic commitments from coal shippers to justify construction of the line), nor has CPR made a decision to begin construction.¹⁷

E. Metra

Metra has failed to satisfy the standards for obtaining any of the seven conditions it requests in this proceeding. Applicants' Response at 88-101. Metra does not claim that the proposed transaction would produce anticompetitive effects. Rather, it suggests that, absent the conditions it seeks, its ability to provide "essential services" might be diminished. However, Metra does not identify with particularity what "essential services" might be affected, nor does it demonstrate how the proposed transaction would, in fact, threaten the continuation of such services.

Metra's opening comments focused primarily upon complaints about the on-time performance of Metra trains that operate over two lines dispatched by CPR. Metra Comments at 4. After Applicants showed that Metra's complaints were unfounded (CPR-14/DME-14, V.S. Graham at 13-20), Metra stated on rebuttal that it had not "offered the on-time performance data . . . to justify the imposition of conditions." Metra Reb. Comments at 9. Instead, Metra argued that the potential "rerouting" of DM&E/IC&E traffic from the West Line to the North Line may "deprive Metra of sorely needed revenues to provide its essential services." Metra Reb. Comments at 11. In other words, Metra contends that it will collect less trackage rights revenue from CPR/DME if such "rerouting" occurs. However, Metra proffered no evidence regarding its current financial position, no evidence concerning how much revenue it currently collects from IC&E for traffic on the West Line, and no evidence concerning how much IC&E traffic might be rerouted or how much revenue Metra might "lose" if such rerouting occurs. Most importantly, Metra presented no proof whatsoever that such an (unquantified) reduction in its income as

¹⁷The testimony in the Wyoming condemnation case is not inconsistent with the verified statements of Mr. Green and Mr. Schieffer in this proceeding. In the Wyoming case, several DM&E officers testified that DM&E is diligently pursuing various development and design tasks, and that CPR is aware of DM&E's activities. Mayo Comments Attachment A. In his testimony, Mr. Schieffer clearly "distinguished the development efforts [which DM&E is currently pursuing] from the construction effort" and that the status of CPR's decision to build into the PRB is "really a question for CP." *Id.* at 208. As to whether CPR has made any decision about whether it will build into the PRB, Mr. Schieffer stated, "[i]n terms of a final decision to commit construction, I would say most definitely they haven't." *Id.* at 237.

trackage rights landlord would threaten the continued operation of any passenger service that Metra provides today. Rather, Metra states that “[t]he challenge for Metra is to find funding to provide more service” (Metra Reb. Comments at 7 (emphasis added)), and it suggests that it would be better off financially if the Board rewrote Metra’s agreements with CPR to increase payments for use of the North Line. Metra also asks the Board to “confirm” Metra’s interpretation of provisions in the agreements governing the admission of third parties. Metra Reb. Comments at 3.

Metra’s proposed conditions, which ask the Board to interpret – and, in important respects, to rewrite – its agreements with CPR are not related to any impact of the proposed control transaction. Nor do Metra’s unsupported assertions establish that any essential services are threatened by the transaction. Accordingly, Metra’s request for conditions should be rejected.

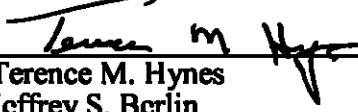
CONCLUSION

For the reasons set forth herein, in the Application and in Applicants’ Response, Applicants respectfully request that the Board approve, pursuant to 49 U.S.C. §§ 11323 *et seq.*, the transaction contemplated by the Application, without conditions other than (1) the customary *New York Dock* labor protective conditions; (2) conditions requiring Applicants to adhere to their pledges to keep open gateways affected by the transaction on commercially reasonable terms and to bring the Corn Lines to a 25 MPH standard, and (3) a condition requiring Applicants to adhere to the terms of their Safety Integration Plan.

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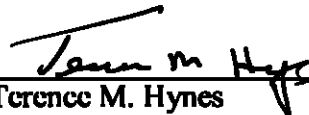
Dated. July 2, 2008

CERTIFICATE OF SERVICE

I hereby certify that I have caused the Public Version of the Applicants' Brief to be served by first class mail, postage prepaid, this 2nd day of July 2008, on all parties of record and the following persons:

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