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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

CANADIAN PACIFIC RAILWAY COMPANY,)	
ET AL. – CONTROL – DAKOTA, MINNESOTA)	Finance Docket No. 35081
& EASTERN RAILROAD CORP., ET AL.)	(Sub-No. 2)
)	

**SECOND SUPPLEMENT TO THE PETITION OF THE STATE OF SOUTH
DAKOTA ACTING BY AND THROUGH ITS DEPARTMENT OF
TRANSPORTATION TO ENFORCE CANADIAN PACIFIC RAILWAY
COMPANY’S INVESTMENT REPRESENTATIONS**

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The State of South Dakota acting by and through its Department of Transportation (“South Dakota” or “State”) files this Second Supplement to the Petition the State filed on August 8, 2013 (“State’s Petition”), as supplemented on September 20, 2013 (“First Supplement”), requesting that the Surface Transportation Board (“STB” or “Board”) enforce the investment representations made by the Canadian Pacific Railway Company (“CP” or “CPR”)¹ in this proceeding.

¹ Unless otherwise noted, references to CP and CPR include affiliated corporate entities during the referenced time period.

PREFACE AND SUMMARY

The State has now completed – with the Board’s assistance – its investigation of whether CP has adhered to the investment representations it made in *CP/DME*.² The State finds:

(1) CP did not adhere to its representation that it would invest \$300 million in engineering capital dollars in the first three post-acquisition years: 2009, 2010, and 2011 (including monies previously budgeted by DME).³ CP invested only \$226.8 million during this three-year period – 25% less than the amount CP represented it would spend.

(2) CP did not adhere to its representation that it would invest \$300 million in additional engineering capital dollars (over and above monies previously budgeted by DME) over the next several years following CP’s acquisition of DME. Through the end of 2013, CP had invested only \$ { } in additional capital dollars – { }% less than the amount CP represented it would spend.

(3) CP sat idly by while the Board approved its acquisition of DME based on information that CP has known for years was false: CP’s asserted commitment to upgrade all DME track to Class 3 standards.

The State requests that the Board find that CP has not adhered to its investment representations and that CP breached its obligations of candor to this agency. To remedy these wrongs, the State requests that the Board order CP to pay \$22.0 million to

² *Canadian Pac. Ry. – Control – Dakota, Minn. & E. R.R. Corp., et al.*, STB Docket No. FD 35081 (“*CP/DME*” or “Acquisition Case”). The instant proceeding, which the STB has docketed as No. FD 35081 (Sub-No. 2), shall be referred to as “*CP/DME 2*.”

³ DME, as used herein, includes the former Dakota, Minnesota & Eastern R.R. (“DM&E”) and the former Iowa, Chicago & Eastern R.R. (“IC&E”), which were acquired by CP in *CP/DME*.

the State, which equals a pro-rata share of the engineering capital investments CP promised, but has failed, to make in DME.

As the Board is aware, there is an ongoing service crisis in South Dakota. CP's failure to adhere to its investment representations is a material contributing factor to this crisis. The State represents that it will use the award it seeks to make desperately needed investments to improve rail service for South Dakota shippers. The State also asks the Board to award it its reasonably incurred attorneys' fees and expert witness costs.

BACKGROUND

The State provided a detailed discussion of background events in its Petition. This background is briefly recapped below along with developments that have taken place since the State's Petition was filed in August 2013.

In December 2012, CP announced plans to sell the DME lines west of Tracy, Minnesota ("DME West" line).⁴ The proposed sale was of great concern to South Dakota because the DME West line is the only east-west rail line traversing the entire State.⁵ Of particular concern was whether CP had adhered to the investment representations it made when it acquired DME in 2008.⁶

⁴ State's Petition at 17.

⁵ *Id.* at 17-18.

⁶ *Id.* at 18.

The State attempted to get the information it needed to assess CP's compliance from CP, but was unsuccessful.⁷ The State then turned to the Board and filed its Petition on August 8, 2013. In its Petition, the State identified CP's investment representations and asked the Board to order CP to provide information and data concerning these representations.⁸

The State's Petition was supported by the United States Department of Agriculture,⁹ the United States Department of Transportation,¹⁰ the South Dakota Congressional Delegation,¹¹ Wyoming Governor Matthew Mead,¹² Wyoming Rep. Cynthia Lummis,¹³ and thirty-two shippers/shipper associations/local communities.¹⁴

⁷ *Id.* at 18-19.

⁸ *Id.* at 18-30.

⁹ Letter from Thomas J. Vilsack, Sec'y, U.S. Dep't of Agric. to the Hon. Daniel R. Elliott III, Chairman, STB, *CP/DME 2* (filed Sept. 20, 2013).

¹⁰ Letter from Kathryn B. Thompson, Acting Gen. Counsel, U.S. Dep't of Transp. to the Hon. Daniel R. Elliott III, Chairman, STB, *CP/DME 2* (filed Sept. 30, 2013) ("DOT Sept. 2013 Letter").

¹¹ Letter from Sen. John Thune, Sen. Tim Johnson and Rep. Kristi Noem to the Hon. Daniel R. Elliott III, Chairman STB, Hon. Ann D. Begeman, Vice Chairman, STB, and Hon. Francis P. Mulvey, Comm'r, STB, *CP/DME 2* (filed Sept. 20, 2013).

¹² Letter from the Hon. Matthew H. Mead, Governor of Wyo. to Ms. Cynthia Brown, Chief, Section of Admin., STB (dated Sept. 18, 2013).

¹³ Letter from Rep. Cynthia M. Lummis to the Hon. Daniel R. Elliott III, Chairman STB, Hon. Ann D. Begeman, Vice Chairman, STB, and Hon. Francis P. Mulvey, Comm'r, STB, *CP/DME 2* (filed Nov. 5, 2013).

¹⁴ *See* letters and comments filed in *CP/DME 2* by the S.D. Wheat Comm'n (filed Sept. 3, 2013) ("South Dakota Wheat Commission Letter"); City of Brookings, S.D. (filed Sept. 4, 2013); Pennington Cnty. Comm'rs (filed Sept. 4, 2013); Bentonite Performance Minerals LLC (filed Sept. 4, 2013) ("Bentonite Performance Minerals LLC Letter"); S.D.

In its Reply to the State’s Petition, CP provided some incomplete information and requested that the Petition be dismissed.¹⁵ The State opposed CP’s dismissal request.¹⁶ The State pointed out CP’s Reply, while incomplete, did provide new evidence that CP had not adhered to its investment representations and asked that the Board direct CP to provide complete responses to the State’s data requests.¹⁷

In its decision served on December 20, 2013, the Board ruled the State could seek investment data and information from CP via the Board’s discovery process and, following discovery, file a second supplement to its Petition.¹⁸ The State proceeded as the Board directed: it tendered formal discovery requests to CP. CP refused to answer most of

Corn Growers Ass’n (filed Sept. 4, 2013); Dakota Mill & Grain, Inc. (filed Sept. 10, 2013) (“Dakota Mill & Grain, Inc. Letter”); Brown Cnty. S.D. Bd. of Comm’rs (filed Sept. 10, 2013); N. Cent. Farmers Elevator (filed Sept. 10, 2013); City of Sturgis, S.D. (filed Sept. 10, 2013); Brookings Area Chamber of Commerce (filed Sept. 10, 2013); AMCOL Int’l Corp. (filed Sept. 11, 2013); City of Huron, S.D. (filed Sept. 13, 2013); Oahe Grain Corp. (filed Sept. 17, 2013); S.D. Soybean Ass’n (filed Sept. 17, 2013); S.D. Grain & Feed Ass’n (filed Sept. 17, 2013); City of Pierre, S.D. (filed Sept. 19, 2013); GCC of Am. (filed Sept. 20, 2013); City of Philip, S.D. (filed Sept. 20, 2013); S.D. Wheat Inc. (filed Sept. 23, 2013); City of Onida, S.D. (filed Sept. 24, 2013); City of Dubuque, Iowa (filed Sept. 25, 2013); City of Redfield, S.D. (filed Sept. 30, 2013); Belle Fourche City Council (filed Oct. 17, 2013); Bryan Knaeplea (filed Oct. 18, 2013); Koeck Bros. P’ship (filed Oct. 25, 2013); Kent Kinkler (filed Oct. 25, 2013); Edward Eller (filed Oct. 25, 2013); S.D. Farmers Union (filed Oct. 25, 2013); Ronald Spaid (filed Oct. 25, 2013); Mark Barber (filed Oct. 25, 2013); Lyle Ebert (filed Oct. 25, 2013); Waupaca Foundry, Inc. (filed Nov. 15, 2013). The S.D. Dep’t of Agric. also filed a letter of support on Sept. 17, 2013.

¹⁵ See *Canadian Pac. Ry.’s Reply to the Petition of South Dakota to Enforce Investment Representations, CP/DME 2* (filed Aug. 28, 2013) (“CP 2013 Reply”).

¹⁶ First Supplement at 8.

¹⁷ *Id.* at 2-3.

¹⁸ See *CP/DME 2*, slip op. at 2 (STB served Dec. 20, 2013).

these requests, leaving the State with no choice but to file a motion to compel,¹⁹ which the Board granted in its decision served on March 26, 2014.²⁰

CP completed its discovery responses in July 2014. These responses consist of supplemental interrogatory responses, documents, and a privilege log. CP designated most of the documents it produced “Highly Confidential” under the governing protective order. The State is filing this Second Supplement on the due date called for under the current procedural schedule (August 22, 2014).²¹ CP’s reply to the State’s Second Supplement is due on September 25, 2014.²²

Two other major developments have occurred since the State filed its Petition. First, CP has completed the sale of the DME West line to a new regional railroad called the Rapid City, Pierre & Eastern Railroad (“RCP&E”).²³ RCP&E is owned by

¹⁹ *Mot. to Compel of South Dakota Acting by & Through its Dep’t of Transp., CP/DME 2* (filed Feb. 14, 2014).

²⁰ *See CP/DME 2*, slip op. at 4 (STB served Mar. 26, 2014).

²¹ *See CP/DME 2* (STB served June 13, 2014) (STB approved *Joint Mot. to Modify the Procedural Schedule, CP/DME 2* (filed June 9, 2014)).

²² *Id.*

²³ *See Rapid City, Pierre & E. R.R. – Acquisition and Operation Exemption Including Interchange Commitment – Dakota, Minn. & E. Corp.*, STB Docket No. FD 35799 (“*RCP&E Acquisition Case*”), Letter from Eric M. Hocky on behalf of RCP&E to Cynthia T. Brown, Chief, Section of Admin. at 1 (filed June 2, 2014) (“*Hocky Letter*”).

Genesee & Wyoming Inc., a large short-line and regional railroad holding company.²⁴

RCP&E took over operational control of the DME West line on May 31, 2014.²⁵

Second, South Dakota is in the midst of an unprecedented service crisis.²⁶

Many of the current service problems find their root causes in service delays occurring before CP sold the DME West line to RCP&E,²⁷ but, unfortunately the sale of this line, and the introduction of a new operator, have exacerbated the crisis.²⁸ The Board is very much aware of these problems and has taken a number of steps to address them, including holding a formal hearing in Washington,²⁹ facilitating field meetings and hearings,³⁰ and issuing remedial orders.³¹

²⁴ *RCP&E Acquisition Case*, slip op. at 1 n.1 (STB served Mar. 27, 2014).

²⁵ Hocky Letter at 1.

²⁶ *See, e.g., U.S. Rail Serv. Issues*, Docket No. EP 724 (Sub-No. 1) (“*Rail Serv. Issues*”), Letter from the Hon. Dennis Daugaard, Governor of S.D. to Members of the STB at 1 (filed Apr. 8, 2014) (directing the Board’s “attention to the dire railroad service challenges facing farmers, grain elevators, ethanol plants, and other shippers throughout the Midwest.”).

²⁷ *See, e.g., id.* at 1 (discussing extensive service problems in South Dakota pre-dating RCP&E’s commencement of operations on the DME West line); *Rail Serv. Issues*, Statement of Hal Clemensen, Farmer and President of the Bd. of Directors of S.D. Wheat Growers at 3 (filed Apr. 10, 2014) (emphasizing that CP service in S.D. is “dramatically poor”); Letter from Jerry Cope, President, S.D. Grain & Feed Ass’n at 1 (filed Apr. 25, 2014) (emphasizing “poor state of rail service” by CP that has “severely impacted” grain elevators in South Dakota).

²⁸ *See, e.g., Rail Serv. Issues*, Letter from Sen. John Thune to the Hon. Daniel R. Elliott III, Chairman, STB, the Hon. Debra Miller, Vice Chairman, STB and the Hon. Ann D. Begeman (filed July 25, 2014) (discussing service problems caused as a result of CP’s sale of the DME West Lines to RCP&E).

²⁹ *See Rail Serv. Issues*, slip op. at 1-2 (STB served Apr. 1, 2014) (announcing Apr. 10, 2014 hearing to address “service problems that have been occurring across significant

ARGUMENT

I. CP DID NOT ADHERE TO ITS REPRESENTATION TO INVEST \$300 MILLION (INCLUDING PREVIOUSLY BUDGETED DME MONIES) IN THE FIRST THREE POST-ACQUISITION YEARS

CP promised a quick capital infusion of \$300 million to fund capital engineering projects for DME in 2009, 2010, and 2011. This amount represented the sum of DME's pre-acquisition capital budget for years 2009 to 2011 plus additional monies CP committed to provide DME. CP failed to comply with this representation.

A. CP's Record Representations

CP represented in its Application³² that it would invest \$300 million in DME road facilities in the first three years following its acquisition of DME:

- “Following Board approval of the transaction, CPR intends to invest approximately \$300 million in capital in DME over the next three years to upgrade and improve the condition of DME's infrastructure, reduce deferred maintenance, and substantially enhance DME safety performance.”³³

portions of the nation's rail network, particularly on the Canadian Pacific Railway Company . . . systems.”).

³⁰ *Id.* at 2.

³¹ *See Rail Serv. Issues*, slip op. at 1-2 (STB served Apr. 15, 2014) (directing CP to provide weekly status reports on fertilizer shipments needed for spring planting in South Dakota and other states); *U.S. Rail Serv. Issues*, EP 724 (Sub-No. 2), slip op. at 3-4 (STB served June 20, 2014) (directing CP to file its plan to address backlog of grain cars and file weekly status reports on its grain car service).

³² *Application by Canadian Pac. Ry. for Approval of Control of Dakota, Minn. & E. R.R., CP/DME* (filed Oct. 5, 2007) (“CP Application”).

³³ CP Application, Exhibit 13 at 2.

- “Applicants expect to increase the fluidity of DME’s operations through capital investments designed to increase velocity and compress schedules on DME’s lines. For example, CPR plans to invest approximately \$300 million for improvements to DME’s infrastructure (rail, ties, ballast, bridges and other facilities) in the first three years following approval of the transaction.”³⁴

- “CPR projects that it will make available to DME approximately \$300 million in capital for improvements to DME’s track, bridges and other rail facilities in the first three years following approval of the transaction.”³⁵

- “Importantly, in the first three years following Board approval of the transaction, CPR plans to invest \$300 million in DME’s track, facilities and structures.”³⁶

- “An important element of the CPR/DME operating plan is CPR’s plan to make available to DME \$300 million in capital for needed improvements to DME’s track, bridges and other facilities. Approximately \$100 million would be dedicated to this effort in each of the three years following approval of the transaction.”³⁷

CP’s Application provided detailed “[e]stimates of the types of capital expenditures CPR projects it will make on the DME system in those three years”³⁸ (which approximated \$100 million annually) as well as a detailed a breakdown of its proposed investments between DM&E and IC&E properties.³⁹ This breakdown showed that CP

³⁴ *Id.* at 30.

³⁵ *Id.* at 36.

³⁶ *Id.* at 40.

³⁷ CP Application, Verified Statement of Vern Graham at 4 (“Graham V.S.”).

³⁸ CP Application, Exhibit 13 at 36.

³⁹ CP Application, Exhibit 13 at Appendix L.

planned to devote approximately 60% of its engineering capital investments to DM&E and 40% to IC&E.⁴⁰

In its Response, CP explained that the \$100 million it committed to invest annually in the first three post-acquisition years consisted of “previously planned DME capital spending plus additional CPR capital spending”⁴¹

B. CP’s Failure to Comply

CP did not come close to expending \$300 million in the first three post-acquisition years. CP’s records show that CP spent only \$226.8 million.⁴²

Comparison of CP Representations to Actual Capital Investment (\$ millions)			
<u>Year</u>	<u>Promised</u>	<u>Actual</u>	<u>Shortfall</u>
2009	\$100.7	\$78.5	\$22.2
2010	\$100.7	\$62.2	\$38.5
2011	<u>\$100.7</u>	<u>\$86.1</u>	<u>\$14.6</u>
TOTAL	\$302.1	\$226.8	\$75.3

The State’s accounting and engineering experts have reviewed CP’s figures. They agree that CP’s actual investments fell \$75.3 million short of its promised \$302.1 million of capital investments in the first three post-acquisition years.⁴³

⁴⁰ *Id.*

⁴¹ *See Applicants’ Response to Comments & Requests for Conditions & Rebuttal In Support of Application, CP/DME* at 75 (filed Apr. 18, 2008) (“CP Response”).

⁴² The \$226.8 million figure includes a credit of \$13.5 million CP advanced to DME in 2008. *See Verified Statement of Michael P. Emmert* at 7-8 (“Emmert V.S.”).

⁴³ *See id.*; *Verified Statement of John M. Ludwig and Douglas J. Ellison* at 4 (“Ludwig/Ellison V.S.”).

CP also { } to its plan to allocate 60% of its investments on DM&E. The State’s engineering experts found that { }, a result which “demonstrates that CP { } DM&E facilities, a large portion of which CP sold in 2014 after announcing its intention to sell those facilities in late 2012.”⁴⁴

C. CP’s Failure is Not Excused

CP offers a number of excuses for its failure to expend the \$300 million in the first three post-acquisition years, but the bottom line is that CP simply chose not to do so – and did not let the Board or the public know of its changed plans until the State began its investigation:

- CP claims it never represented it would make \$300 million in engineering capital expenditures in the first three post-acquisition years.⁴⁵ This is not what CP represented in the Acquisition Case. CP repeatedly represented it would invest \$300 million in engineering capital in the next “three years” following the Board’s approval of its Application.⁴⁶

- CP claims its failure to expend \$300 million in the first three post-acquisition years is excused due to economic conditions, specifically the recession in

⁴⁴ { }

⁴⁵ CP’s position appears to be that its only commitment was to expend \$300 million (including DME budgeted funds) over an unlimited time period following its acquisition of DME. *See Canadian Pac. Ry. Reply to the Petition of South Dakota to Enforce Inv. Representations, CP/DME 2* at 10, 17 (filed Aug. 28, 2013) (“CP 2013 Reply”).

⁴⁶ CP Application Exhibit 13 at 2, 30, 36, 40, Graham V.S. at 4; CP Response at 75.

2009.⁴⁷ CP never explains why or how the recession impacted its capital investment plans, nor did CP ever inform its shippers, or the Board, that its capital investment representations were subject to undisclosed caveats.

In addition, the State learned during the course of its investigation that CP had secretly informed the Federal Railroad Administration (“FRA”) in 2009 that CP had unilaterally decided to reduce its three-year investment commitments by \$9.5 million “in response to economic conditions.”⁴⁸ This information came in the form of a proposed Safety Implementation Plan (“SIP”) amendment, an amendment that CP did not publicly disclose until the State began its investigation.

Moreover, even assuming that CP was entitled to secretly reduce its three-year investment commitment “in response to economic conditions,”⁴⁹ CP itself quantified the impact at only \$9.5 million,⁵⁰ leaving the remainder of its \$75.3 million shortfall unaccounted for.

⁴⁷ Letter from Douglas N. McFarlane, Senior Vice President, U.S. Operations CP to the Hon. Dennis Daugaard, et al. at 1 (dated Feb. 21, 2013) (copy reproduced in the State’s Petition, Verified Statement of Hon. Dennis M. Daugaard (“Daugaard V.S.”), Exhibit DMD-2) (“McFarlane 2013 Letter”).

⁴⁸ See Letter from Vern Graham, President DM&E to FRA (dated Mar. 25, 2009) at 1 (copy reproduced in CP 2013 Reply, Attachment 6).

⁴⁹ *Id.*

⁵⁰ *Id.*

- CP claims its three-year investment commitments “were made by different corporate management.”⁵¹ CP’s management did change after CP acquired DME, but CP’s new management was clearly bound to honor the investment commitments made by prior CP management on the record in the Acquisition Case. If a changed management excuse is permitted, the Board’s authority to hold carriers to their investment representations would turn on the whims of the carrier’s shareholders. Such an excuse has never been permitted by the Board, nor should it be.

- CP also argues that it did not comply with its three-year investment representation because it unilaterally decided to “delay[] some projects” and “modif[ied] others to save money.”⁵² This is just another way of saying CP simply decided not to do what it represented it would do: invest \$300 million in engineering capital projects between 2009 and 2011.

- CP claims that the State should have no complaints because CP invested more than \$300 million in DME road property between 2008 and 2013.⁵³ DME’s investments in 2008, as well as CP’s investments following 2011, are not relevant in determining if CP did what it represented it would do: expend \$300 million (consisting of previously budgeted DME monies and additional CP funds) over the first three post-acquisition years. Indeed, it appears that CP added in the 2008 and post-2011 figures

⁵¹ McFarlane 2013 Letter at 1.

⁵² McFarlane 2013 Letter at 2.

⁵³ *See* CP 2013 Reply at 17.

to obfuscate what it did not do: expend \$100 million in each of the first three post-acquisition years.

- Similarly, CP argues that the State should have no complaints because “CP has invested heavily in DME’s lines serving South Dakota.”⁵⁴ In fact, following its acquisition of DME, CP spent { } in South Dakota on a route-mile basis than the average amounts it expended in the other states served by DME.⁵⁵ And, it remains undisputed that DME track west of Pierre remains in very poor shape⁵⁶ – a fact that is most disconcerting to South Dakota shippers who believed CP had committed to upgrade this track to Class 3 standards.⁵⁷

⁵⁴ See CP 2013 Reply, Verified Statement of Glen Wilson at 7 (“Wilson V.S.”).

⁵⁵ See Ludwig/Ellison V.S. at 6.

⁵⁶ See Ludwig/Ellison V.S. at 7 (most track west of Pierre is “still Excepted Track, which limits speeds to no more than 10 MPH”).

⁵⁷ See, e.g., S.D. Wheat Comm’n Letter at 2 (observing that “[r]ehabilitation of the western rail portion [of DME] to Class III status has not been completed.”); Bentonite Performance Minerals LLC Letter at 2 (“The line between Rapid City, South Dakota and Pierre, South Dakota is in such bad shape that the track is under speed restrictions We have seen no improvements to this line since the CP acquired it.”); Dakota Mill & Grain Letter at 1 (“after five years of operation [the DME line west of Pierre] remains in very poor shape . . . and has the same amount of excepted track as existed before the CP’s purchase”).

II. CP DID NOT ADHERE TO ITS REPRESENTATION TO INVEST \$300 MILLION IN ADDITIONAL CAPITAL (EXCLUDING PREVIOUSLY BUDGETED DME MONIES)

CP also promised that it would expend \$300 million in additional engineering capital (not including previously budgeted DME monies). CP failed to comply with this representation.

A. CP's Record Representations

In its Application, CP represented that it would make an “additional” \$300 million investment in engineering capital in DME “over the next several years.”⁵⁸

- “CPR’s plan to make \$300 million of additional capital available to DME over the next several years will allow it to upgrade its track, bridges and other rail facilities”⁵⁹

- “CPR’s plan to make \$300 million of additional capital available over the next several years to upgrade DME’s track, bridges and other rail facilities will enable DME to provide safer, more fluid rail service.”⁶⁰

- “CPR’s plan to make approximately \$300 million of additional capital available to DM&E over the next several years to rehabilitate our core rail lines represents a major benefit of this transaction, and one that addresses an issue of real importance to . . . our shippers, our employees, and the communities in which we operate.”⁶¹

⁵⁸ CP Application at 9.

⁵⁹ *Id.*

⁶⁰ *Id.* at 13-14.

⁶¹ *Id.*, Verified Statement of Kevin V. Schieffer at 3.

In its Response, CP represented that its commitment to spend “\$300 million in additional capital” was a commitment to “invest at least \$300 million in additional capital (over and above DME’s projected capital budget) over the next several years”⁶² CP also represented in its record filings that DME’s pre-acquisition budget for engineering projects was approximately \$172.9 million in total for years 2009, 2010, and 2011.⁶³

B. CP’s Failure to Comply

CP did not come close to expending \$300 million in additional engineering capital dollars “over and above” DME’s pre-acquisition capital budget. CP’s own records show that between January 1, 2009 and July 1, 2013, CP has expended only \$170.8 million in addition to monies DME had already budgeted:

<u>CP Capital Investments Above DME Budget</u>		
<u>Year</u>	<u>DME Budgeted Cap</u>	<u>Additional CP Capital</u>
2009	\$ 57.5	\$ 21.0
2010	\$ 56.6	\$ 5.6
2011	\$ 58.8	\$ 27.3
2012	N/A	\$ 84.1
2013 ¹	<u>N/A</u>	<u>\$ 32.4</u>
TOTAL	\$172.9	\$170.4

¹Through July 2013

The State’s experts have reviewed CP’s figures and they concur that CP’s additional investments (excluding those previously budgeted by DME) as of July 2013

⁶² CP Response at 75.

⁶³ *Applicants’ Safety Integration Plan Submitted to FRA, CP/DME* at 89 (filed Feb. 4, 2008) (citing DME’s pre-acquisition budget for engineering projects as \$57,547,000 in 2009, \$56,555,000 in 2010, and \$58,817,000 in 2011).

equaled \$170.4 million – some \$129.6 million less than its commitment to expend \$300 million in additional capital dollars “over and above” DME’s previously budgeted sums.⁶⁴

C. CP’s Failure is Not Excused

- CP claims that it never represented it would expend more than \$300 million in capital projects on DME.⁶⁵ However, that is not what CP represented in the Application proceedings. CP very clearly stated in its Application that it would make “\$300 million of additional capital available to DME over the next several years”⁶⁶ and explained in its Response that the “additional capital” meant “additional capital (over and above DME’s projected capital budget)”⁶⁷

- CP claims that the State is relying on a “snippet” from the record and is taking CP’s additional investment representation out of context.⁶⁸ In fact, the State is referencing the relevant portion of the record in context.

In its Application, CP repeatedly said it would invest an additional \$300 million in DME properties. In its Comments responding to CP’s Application, the Mayo Clinic (“Mayo”) argued that CP’s representation was misleading because DME had already budgeted approximately \$172 million for engineering capital projects, so CP was

⁶⁴ See Emmert V.S. at 7-8 (the shortfall through the end of 2013 was { }).

⁶⁵ CP 2013 Reply at 17.

⁶⁶ CP Application at 9.

⁶⁷ CP Response at 75.

⁶⁸ CP 2013 Reply at 18.

really only offering to make an additional \$128 million available to CP, not an additional \$300 million:

[B]ased on the projected expenditure of Engineering Capital it appears that DME, without consideration of the current proposed transaction, was going to spend \$57.6 million in 2009, \$56.6 million in 2010, and \$58.8 million in 2011 for Engineering Capital. Following CP's acquisition of DME, those figures increase to \$100 million in 2009, \$101 million in 2010, and \$100.3 million in 2011. In other words, CP's acquisition of DME will apparently result in *additional* capital expenditures of approximately \$128 million over that three-year span.⁶⁹

In its Response, CP disputed Mayo's contentions. CP explained that its total commitment to invest \$300 million in additional CP funds excluded DME's previously budgeted sums, whereas its commitment to invest \$100 million annually in the first three post-acquisition years included previously budgeted DME monies:

With respect to Mayo's concern about DME track conditions, CPR has committed to invest at least \$300 million in additional capital (over and above DME's projected capital budget) over the next several years to upgrade DME's track and structures. This capital investment will be used to make significant improvements to DME infrastructure, which in turn will improve the efficiency of DME operations and the safety of the DME system, all in a relatively short period of time. One effect of this additional investment will be to increase total capital spending on improvements to the DME system (previously planned DME capital spending plus additional CPR capital spending) to approximately \$100 million annually in each of the first three years following approval of the transaction.⁷⁰

⁶⁹ Mayo Clinic's *Argument & Request for Conditions*, CP/DME at 14-15 (filed Mar. 4, 2008) (emphasis in original) (internal citations omitted).

⁷⁰ CP Response at 75 (internal citations omitted).

Thus, CP made it clear that its commitment to expend \$300 million in additional CP funds was a commitment to expend \$300 million “over and above DME’s projected capital budget”⁷¹

- CP argues that the State is misconstruing what CP said in response to Mayo’s comments. According to CP, it was not responding to Mayo’s statements about the scope of CP’s additional investment representations.⁷² That’s nonsense. Mayo claimed CP was not committed to investing \$300 million in additional funds if DME’s previously budgeted amount was counted. CP responded that Mayo was wrong because its intent was to invest \$300 million “over and above” DME’s previously budgeted amount.

- CP argues that even if it was responding to Mayo’s criticisms, all it promised to do was to make a total investment of \$300 million, including capital monies DME had budgeted prior to the acquisition.⁷³ This argument ignores what CP said: it said it would invest \$300 million “over and above” DME’s pre-acquisition budgeted sums, and that “[o]ne effect” of this overall commitment was CP’s related commitment to expend \$100 million in each of the first three post-acquisition years, amounts that included monies CP had previously budgeted plus additional CP capital.

⁷¹ *Id.*

⁷² CP 2013 Reply at 18.

⁷³ CP 2013 Reply at 18-19.

- CP claims that shippers understood that CP was committing only to spend \$300 million (including previously budgeted DME monies).⁷⁴ However, not one of the shipper statements it cites suggests such an understanding. Mayo was the only shipper that specifically questioned the scope of CP’s investment commitment, and CP provided the answers to Mayo’s questions on the record in the Acquisition Case – answers CP now tries to disavow.

- CP’s general sales pitch to shippers in 2007/2008 was that it was going to invest a lot more capital in DME than DME was investing at the time. It was certainly reasonable for shippers to assume that when CP was talking about investing \$300 million in “additional dollars,” CP meant dollars in addition to what DME was already spending, not zero dollars, which is CP’s current position.⁷⁵

- The State tendered discovery requests to CP concerning the scope of its investment representations. CP withheld all communications concerning the scope of its representation to invest \$300 million “over and above” CP’s previously budgeted sums on grounds that the requested communications were subject to the attorney-client privilege.⁷⁶ Thus, CP produced no documentation that CP’s representation was anything other than what it plainly states: CP has “committed to invest at least \$300 million in

⁷⁴ CP 2013 Reply at 19-20.

⁷⁵ *See, e.g.*, S.D. Wheat Comm’n Letter at 1 (“in its application the CP committed to expend a total of \$300 million (including DME’s previously budgeted sums) in the first three post-acquisition years and a further commitment to expend a total of \$300 million over and above DME’s projected capital budget over the next several years.”).

⁷⁶ *See* CP’s Privilege Log Entries 40-42.

additional capital (over and above DME’s projected capital budget) over the next several years”⁷⁷

III. CP PERMITTED FRA AND THE BOARD TO RELY ON A REPRESENTATION IT KNEW WAS FALSE

CP sat idly by while the Board relied on a representation that FRA made which CP knew was false: CP had committed to upgrade all of DM&E track to Class 3 standards.

A. The Record Representations and Board Reliance

The FRA wrote a letter to the Board dated July 14, 2008, which was posted on the STB’s website.⁷⁸ In the letter, FRA informed the Board that as part of the SIP process, CP had “committed to investing approximately \$300 million over the next four years to upgrade all DM&E track to FRA Class III standards.”⁷⁹

In its September 2008 decision approving CP’s acquisition of DME, the Board repeatedly cited CP’s Class 3 line upgrade commitments,⁸⁰ and expressly relied on this commitment in denying all “specific conditions:”

Several entities, including [the City of] Owatonna, have cited concern about DM&E’s track record regarding safety and what CPRC’s plans are with regard to improving the DM&E’s lines. *We note that the SIP outlines CPRC’s commitment to*

⁷⁷ Response at 75.

⁷⁸ Letter from Joseph H. Boardman, Adm’r, FRA to the Hon. Charles D. Nottingham, Chairman, STB, *CP/DME* (filed July 14, 2008) (“FRA July 2008 Letter”)

⁷⁹ *Id.* at 1.

⁸⁰ *CP/DME*, slip op. at 20 n.33, 21 n.35, 56 (STB served Sept. 30, 2008) (“*CP/DME Sept. 2008 Decision*”).

*improving the safety record of DM&E and the FRA has specifically stated it will monitor CPRC's commitment to upgrade all of DM&E's track to FRA Class 3 standards. Therefore, we find it unnecessary to impose any specific conditions on the transaction*⁸¹

B. CP's Failure to Correct the Record

FRA's statement that CP had committed to upgrade all DM&E track was very important to the State because significant portions of the former DM&E track in South Dakota do not meet Class 3 track standards.⁸² Most of this track is located west of Pierre, SD.

During the course of the State's investigation, CP admitted that it had never told FRA it would upgrade its entire track to Class 3 standards.⁸³ FRA agreed with CP's admission.⁸⁴ The State's investigation then took a different turn: whether CP had gamed the system by allowing the Board (and South Dakota shippers) to rely on information CP knew was false. To answer this question, the State tendered discovery requests to CP.

The State's discovery requests asked when CP first became aware that FRA had mistakenly told the STB that CP had committed to upgrading all DM&E track to Class 3 standards and, after it became aware of FRA's mistake, what steps it took to correct the

⁸¹ *Id.*, slip op. at 21 n.35 (emphasis added).

⁸² *See* Ludwig/Ellison at 7; State's Petition, Daugaard V.S. at 3.

⁸³ CP Reply, Wilson V.S. at 10 ("I can state unequivocally that CP never made such a representation to FRA.").

⁸⁴ DOT Sept. 2013 Letter at 2.

record in light of the Board's reliance on this false statement in approving CP's Application.⁸⁵

CP initially objected to answering these requests but, following the Board's grant of the State's motion to compel,⁸⁶ CP responded. While CP's responses reflect heavy lawyering, CP knew well in advance of the State's initiation of its investigation that the Board had relied on false information and that CP took no actions to correct the record until after the State's investigation forced its hand.

Specifically, CP stated in response to the State's discovery requests:

- *“Certain CP officers were generally aware that after CP and other parties filed their final briefs in STB Finance Docket 35081 the FRA submitted a letter that updated the STB regarding FRA's work on the [SIP].”*⁸⁷ FRA submitted the letter to the STB in July 2008, so CP was clearly “aware” of the letter prior to the STB's issuance of its final decision approving CP's acquisition of DME in September 2008.

- *“But CP does not know of any CP employee, officer, or outside counsel or consultant who became aware that this letter misstated CP's investment commitment during the short period between the letter's filing on July 14, 2008 and the STB's final decision on September 29, 2008.”*⁸⁸ If this is in fact true, it must mean that no CP employee, officer, outside counsel, or consultant who was familiar with CP's investment representations read the letter, or if they read it, understood its

⁸⁵ See *CP/DME 2*, slip op. at 3 (STB served Mar. 26, 2014).

⁸⁶ *Id.*

⁸⁷ *Canadian Pac, Ry.'s Amended Responses to the State of South Dakota's Interrogatories 3,4,5, and 6* at 1-2 (dated June 4, 2014) (“Amended Interrogatory Responses”).

⁸⁸ *Id.* at 2.

contents, a position which strains credulity. It also does not address whether any CP employee, officer, outside counsel, or consultant who was familiar with CP's investment representations read the Board's final decision approving CP's acquisition of DME, another position that strains credulity.

- *“While it is impossible to precisely identify the date upon which ‘CP’ became aware of the FRA’s misstatement, CP has produced several documents that indicate when CP personnel became aware of the FRA’s misstatement.”*⁸⁹ CP produced documents in discovery that {

}.⁹⁰

- *“After CP became aware that the State interpreted FRA’s July 2008 letter to mean that CP had committed to upgrade all DM&E track to FRA Class 3 standards, CP corrected that misinterpretation in [2013].”* The State did not “interpret” FRA’s July 2008 letter; that letter clearly states that “CP had committed . . . to upgrade all DM&E track to Class 3 standards,” but putting that issue to one side, CP admits that it did not start to take any corrective actions until the State launched its investigation in 2013.

⁸⁹ *Id.*

⁹⁰ *See* {

}

C. CP's Failure is Not Excused

CP offers several reasons for its failure to inform the Board in a timely manner that it had not told FRA it would upgrade all DM&E track to Class 3 standards. None of these reasons legally excuses CP's inaction.

- CP argues that it has no obligation “to correct misstatements made by other parties about its commitments”⁹¹ Of course, this is not a correct statement of the law. The Board’s “regulatory process relies on the honest and truthful production of information held by the carriers we regulate.”⁹² In this case, CP failed to produce honest and truthful information for years, and then only did so when the State’s investigation forced its hand.

Moreover, the party making the misstatement was the FRA, an agency with independent regulatory authority over CP. And the misrepresentation involved statements that FRA said CP had made to FRA. Under these circumstances, both the Board and South Dakota shippers reasonably assumed that the statements were in fact made by CP.⁹³ The only two parties that could have corrected this misstatement were CP or FRA. FRA did not know that it had made a mistake until 2013 and then did what the law requires: it took

⁹¹ See *Canadian Pac. Ry.’s Reply to South Dakota’s Motion to Compel, CP/DME 2* at 7 (filed Mar. 6, 2014).

⁹² See *Canadian Nat’l Ry. & Grand Trunk Corp. – Control – EJ&E W. Co.*, FD 35087, slip op. at 8 (STB served Dec. 21, 2010) (“*CN/EJ&E West*”).

⁹³ Cf. *Duty to Correct: A Suggested Framework*, 46 Md. L. Rev. 1250, 1258 (1987) (under federal securities laws, securities issuers are required to “correct statements not made by them but which they know are misleading” (*id.* at 1253) if the statements are ones “the public reasonably believes the issuer has made.” *Id.* at 1258.

prompt action to correct the record.⁹⁴ CP chose a different path. It decided to remain silent after it learned of FRA's mistake, a course of action that impugned the integrity of the administrative process.

- CP appears to believe that it had no obligation to take any corrective action because CP did not “bec[o]me aware” of FRA’s misstatement “between the letter’s filing on July 14, 2008 and the STB’s final decision [in the Acquisition Case] on September 29, 2008.”⁹⁵ Even assuming this to be the case, CP either knew, or should have known, after reviewing the final decision that FRA had misstated CP’s Class 3 upgrade commitment, but took no action. CP’s failure to be aware of FRA’s misstatement before the Board issued its final decision (even if true) provides no excuse for CP not to voluntarily correct the record in a timely manner after the decision was issued.⁹⁶ And, correcting the record years later after a third-party audit has been initiated is not “fully voluntary or an adequate correction.”⁹⁷

⁹⁴ See DOT Sept. 2013 Letter.

⁹⁵ Amended Interrogatory Responses at 2.

⁹⁶ *Accord Jones v. Derwinski*, 1 Vet. App. 596, 606 (Vet. App. 1991) (“the Court must be able to rely upon the representations of those who practice before it . . . Here, the major breach was the failure to correct the statement once it was learned that it was inaccurate, a failure which was compounded by the fact that no effort was made to correct the misstatement after it specifically was relied on by the Court in its decision.”).

⁹⁷ *CN/EJ&E West*, slip op. at 6.

- CP argues that it cannot be held responsible for a representation it did not make.⁹⁸ Under CP’s worldview, CP is free to reap the benefits of the Board’s reliance on the false statement that CP planned to upgrade its entire track to Class 3 standards because the false statement came from FRA, not CP. However, as the State pointed out in its First Supplement, that position offends basic notions of fairness that lie at the heart of the administrative process.⁹⁹

- CP argues that it is “ludicrous” to argue that CP should upgrade all DME track to Class 3 standards.¹⁰⁰ But that is not the point the State is making. The State has not requested that CP upgrade all DME track to Class 3 standards and, in any event, the measure of relief is for the Board to decide. The State submits what is “ludicrous” here is for CP to argue that the law, and the Board’s administrative processes, permit CP to sit idly by while its Application is approved based on material information that CP knew for years was false.

⁹⁸ CP 2013 Reply at 20-21.

⁹⁹ First Supplement at 5, *citing Kaneb Servs., Inc. v. Fed. Sav. & Loan Ins. Corp.*, 650 F.2d 78, 81 (5th Cir. 1981) (“a party with full knowledge of the facts, which accepts the benefits of a transaction . . . or order may not subsequently take an inconsistent position to avoid the corresponding obligations or effects”). CP claims *Kaneb* involved different facts. *See Canadian Pac. Ry.’s Reply to the Supplement to the Petition of South Dakota Acting by & Through its Dep’t of Transp. to Enforce Inv. Representations, CP/DME 2* at 4 (filed Oct. 18, 2013) (“CP Second 2013 Reply”). *Kaneb* holds that the principles of equitable estoppel cited by the State apply in administrative proceedings and those principles apply regardless of the specific facts in individual cases.

¹⁰⁰ CP Second 2013 Reply at 3.

- CP argues that it “is simply not true” that the Board relied on CP’s commitment (communicated through FRA) as the basis for finding it unnecessary to impose any specific conditions on the transaction.¹⁰¹ Of course, the Board’s September 2008 Decision says exactly the opposite. The Decision clearly states that “several entities . . . have cited concern about DM&E’s . . . plans [] with regard to improving DM&E’s lines” and that the Board found “it unnecessary to impose any specific conditions” responding to these concerns based on CP’s “commitment to upgrade all of DM&E’s track to FRA Class 3 standards.”¹⁰²

IV. REQUESTED FINDINGS AND REMEDIAL RELIEF

The State requests that the Board enter specific findings and order specific remedial relief.

A. Requested Findings

The State requests that the Board find that: (i) CP failed to adhere to its representation to invest \$300 million in DME engineering capital projects in 2009, 2010 and 2011 (including monies previously budgeted by DME); (ii) CP failed to adhere to its representation to invest \$300 million in DME engineering capital projects (over and above DME’s previously budgeted sums) in the next several years following its acquisition of DME; and (iii) CP failed to timely inform the Board that it had relied on a material

¹⁰¹ CP 2013 Reply at 23.

¹⁰² *CP/DME Sept. 2008 Decision*, slip op. at 21 n.35.

misrepresentation in approving CP's acquisition of DME; namely, FRA's assertion that CP had informed it that CP would upgrade all DM&E track to Class 3 standards.

B. Requested Remedial Relief

The Board has broad remedial authority to “ensure that representations made by parties to our proceedings are actually honored.”¹⁰³ The Board also has broad remedial authority to protect the integrity of its administrative processes.¹⁰⁴ The State respectfully requests that the Board exercise this broad remedial authority in two ways.

1. Award \$22.0 Million in Dedicated Investment Dollars

First, the State requests that the Board direct CP to pay the State of South Dakota the sum of \$21,982,515 as compensation for CP's failure to adhere to its investment representations. This sum equals South Dakota's pro-rata share of the difference between the monies CP represented it would expend on engineering capital projects in DME and the amounts it has actually expended. The supporting calculations are set forth in Attachment 1.

The State is seeking a monetary award because CP no longer operates in South Dakota, so the Board cannot order CP to specifically comply with its investment

¹⁰³ See *CSX Corp. – Control & Operating Leases/Agreements – Conrail, Inc.*, FD 33388, slip op. at 7 (STB served May 21, 2001); State's Petition at 26 (citing pertinent cases and statutes).

¹⁰⁴ See, e.g., *W. Coal Traffic League – Petition for Declaratory Order*, FD 35506, slip op. at 28 (STB served July 25, 2013) (the Board has “broad discretion to fashion appropriate equitable remedies for violations of [49 U.S.C.] § 11323.”) (“*WCTL*”); *CN/EJ&E West*, slip op. at 8 (imposing fine on a carrier to deter carrier conduct that “undermine[s] the basic integrity of the Board's entire process.”).

representations in a manner that would directly benefit South Dakota shippers.¹⁰⁵

However, the State pledges to the Board, and is willing to accept as a condition to its receipt of a monetary award, that it will dedicate the funds for rail-related investments that will benefit South Dakota rail shippers.

2. Litigation Cost Reimbursement

Second, the State requests that the Board direct CP to pay the State's reasonably incurred attorneys' fees and expert fees in this proceeding. The State launched its investigation in order to protect the interests of South Dakota shippers. The State's investigation revealed, among other things, that CP knew the Board relied on materially false information in its decision approving CP's acquisition of DME but sat idly by for years without taking any corrective actions. An award of attorneys' fees would send a strong signal to the shipping public that the Board does not condone this type of behavior from regulated carriers.¹⁰⁶

The State understands that the Board does not ordinarily grant attorneys' fees as damages. However, the State is not seeking fees as part of a damages award. Instead, the State is asking the Board to exercise its broad equitable powers to issue relief designed

¹⁰⁵ The State notes that {

}

¹⁰⁶ *Accord WCTL*, slip op. at 28 (Board orders case-specific remedy “to encourage full [carrier] compliance with the requirements of the Interstate Commerce Act and to deter similar non-compliance in the future.”).

to protect the sanctity of its administrative processes. That broad power includes the power to award attorneys' fees.¹⁰⁷

CONCLUSION

The State respectfully requests that the Board make the findings described herein, and award the relief requested in its Petition, as supplemented.

Respectfully submitted,

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Dated: August 29, 2014

Attorneys for Petitioner

¹⁰⁷ See, e.g., 49 C.F.R. § 1114.31(b)(iv) (if a party to a Board proceeding does not comply with a Board discovery order, the Board may award “reasonable expenses, including attorney’s fees, caused by the failure . . .”).

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 2014, I served copies of the foregoing on counsel for Canadian Pacific Railway Company as follows:

Terence M. Hynes
Matthew J. Warren
Hanna M. Chouest
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
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Daniel M. Jaffe

Attachment 1

Calculation of South Dakota Award Request

<u>Description</u>	<u>Value</u>
1. CP Capital Investment 2009-2013	\${ }
2. CP Capital Advances from 2009 Budget	<u>\$13,500,000</u>
3. Total Capital Investment (L1+L2)	\${ }
4. CP Capital Investment Representation	\$472,900,000
5. Capital Investment Shortfall (L4-L3)	\${ }
6. { }	{ }
7. { }	\${ }
8. { }	{ }
9. South Dakota Pro Rata Shortfall (L7*L8)	\$21,982,515

VERIFIED STATEMENT OF
MICHAEL P. EMMERT

STB Docket No. 35081 (Sub-No. 2)
Canadian Pacific Railway Co., et al. – Control – Dakota,
Minnesota & Eastern Railroad, Corp., et al.

My name is Michael P. Emmert. I am a Managing Director in the Global Disputes and Investigations practice of Navigant Consulting, Inc. (“Navigant”), and I am the Managing Director leading that practice’s central operating region. My offices are located at 30 South Wacker Drive, Chicago, Illinois 60606. Navigant is an accounting, business, economic and financial consulting firm with over 2,400 professionals in 42 offices worldwide. Our clients range from Fortune 10 corporations to smaller companies, partnerships and governmental agencies in a variety of industries, including financial services, real estate, healthcare, energy, telecommunications, manufacturing, defense, construction, transportation, and entertainment, among others. In addition to providing general business and financial consulting, Navigant also assists clients with the analytical and informational elements of business disputes and litigation, including forensic accounting.

I have been asked by counsel for the State of South Dakota acting by and through its Department of Transportation (“South Dakota”) to analyze certain capital investment data provided by the Canadian Pacific Railway Company (“CP”) in this proceeding and report my findings with respect to that analysis.

I. Summary

With the limitations described herein, I determined that CP reported the following capital investments: \$78.5 million in 2009,¹ \$62.2 million in 2010, and \$86.1 in 2011 for the Dakota, Minnesota and Eastern Railroad Corporation and their wholly owned subsidiary, the Iowa, Chicago & Eastern Railroad Corporation, (collectively “DME”).² The total capital investment for the three year period was \$226.8 million. CP represented to the Surface Transportation Board (“STB”) that it would spend \$302.1 million in capital investments for the period 2009-2011 on the DME system.³ CP’s capital investment fell short of the \$302.1 million figure by \$75.3 million (\$302.1 million - \$226.8 million).

CP also represented that it would invest \$300 million over and above the \$172.9 million budgeted by DME “over the next several years.”⁴ I determined that CP has made capital investments of \$[] million from 2009-2013.⁵ This figure includes investments for projects that are not yet in service.⁶ This figure

¹ This figure includes \$13.5 million that CP claims it advanced from the 2009 budget for expenditures in 2008.

² These totals only include fixed assets categorized such as Engineering and not Mechanical. This is consistent with the calculation method used by CP Witness Glen Wilson.

³ Application by CP for Control of DME, Exhibit 13 at 36, filed October 5, 2007.

⁴ CP’s Response to the Mayo Clinic at 75, filed April 18, 2008.

⁵ This figure includes \$13.5 million that CP claims it advanced from the 2009 budget for expenditures in 2008. The figure also includes fixed assets categorized as Engineering in the July 2013 file (DM&E Road Property Cap adds Nov 2008 - July 2013 8-23-2013.xls) and then re-categorized as Facilities in the December 2013 file (DM&E Road Property Cap adds Jan 2008 - Dec 2013.xls).

⁶ For purposes of this analysis, I have included all assets with a capitalization date after the acquisition. These assets include assets placed into service as well as capitalized costs for assets under construction (“AUC”). This results in an overstatement of capitalized investments after the acquisition because the information on which my analysis was completed includes AUC at or before the time of acquisition as well as AUC as of July 31, 2013.

falls short of the additional \$300 million in capital investments that CP indicated it would make by \$ { } million (\$472.9 million - \$ { } million).

II. Qualifications

I am a Certified Public Accountant (“CPA”) in the State of Illinois and a member of the American Institute of Certified Public Accountants (“AICPA”) and the Illinois Society of Certified Public Accountants Society. I am also Certified in Financial Forensics (“CFF”). Over my nearly forty year career, I have provided accounting, auditing, financial and dispute resolution related services to a wide variety of organizations. I began my career in 1975 as an auditor with Arthur Anderson. Throughout my career, I have been involved in the financial reporting and auditing issues faced by companies and accounting firms involving the application of U.S. Generally Accepted Accounting Principles (“GAAP”) and Generally Accepted Audit Standards (“GAAS”). I have also been involved in regulatory investigations performed under the governmental auditing standards. In addition to financial reporting investigations, I have worked on fraud and/or forensic investigations.

I have testified in federal and state courts, arbitration proceedings and before regulatory boards and have been qualified as an expert on a variety of financial, damages, accounting and related issues, including different types of claims and quantification methodologies. Furthermore, I have served as an arbitrator in several matters that involved the application of GAAP in the preparation of financial statements.

I have written and spoken on the subjects of financial statement reporting, forensic investigations, damages, insurance loss recovery, project management and stranded costs, among others. Prior to joining Navigant, I held positions at several consulting firms and was the Managing Partner of Ernst & Young LLP's Global Investigations & Dispute Advisory Practice. Details of my qualifications are included as Exhibit 1 to this Verified Statement.

III. CP Capital Investment Data

I reviewed several spreadsheets that were provided by CP in response to discovery requests made by South Dakota. In addition, I reviewed CP's capitalization policy and CP's response to an interrogatory propounded by South Dakota concerning CP's capitalization policies. The critical spreadsheets for my analysis herein were:

1. DM&E Road Property Cap adds Nov 2008 - July 2013 8-23-2013.xls;
2. DM&E Road Property Cap adds Jan 2008 - Dec 2013.xls; and
3. DM&E Road Property Cap adds Nov 2008 - Dec 2013.xls

I was asked to analyze these spreadsheets to determine if any differences existed and explain the cause of such differences based upon and limited to the documents provided.

My initial analysis revealed that there were substantial differences between two of the three spreadsheets despite the fact that the spreadsheets overlapped each other in time and contained much of the same information regarding the alleged capital investments. Moreover, the initial source of the capital investment data was not apparent. It was also unclear whether and how

the capital investments were included in CP's financial records kept in the normal course of business, such as the CP general ledger.

On March 24, 2014, South Dakota sought further explanation of the three spreadsheets in a follow-up letter to CP, a copy of which is attached hereto as Exhibit 2. Of particular interest here, South Dakota sought:

1. The "source of the Investment Data, including the specific DM&E or CP accounting system and related records from which the information contained in the Investment Data was developed."
2. An explanation for the "reasons for the differences in the amounts, asset count and asset descriptions" between two of the spreadsheets.
3. Confirmation that the "assets listed in the Investment Data are presented in the CP general ledger and corresponding financial statements by providing a reconciliation of the assets identified in the two workbooks to the CP general ledger and financial statements for capital assets, if such a reconciliation exists."

On April 4, 2014, CP responded to South Dakota's follow-up letter (Exhibit 3). CP explained that the data had been derived from CP's SAP system (a common commercial business and accounting software system) – specifically the asset capitalization data kept in that system. CP also noted that certain capitalized assets were recorded in its legacy accounting system and that information was transferred from that legacy system to the SAP system. Likewise, CP explained the differences in two of the spreadsheets by noting that the differences in the spreadsheets were attributable to the changes in the status of certain AUC. Finally, CP did not provide information reconciling the capital investment data to CP's general ledger. With the significant limitations in the capital investment data noted above, especially CP's failure to demonstrate how the information in the various spreadsheets was recorded in CP's actual accounting balances (the general ledger), I could not perform a complete review

and reconciliation of the data to verify the completeness of what was provided by CP. Thus, my analysis is necessarily limited to the information provided by CP in these spreadsheets.

The primary area of concern that I have identified is that the capitalization dates of assets in { } are anomalous. Specifically, \${ } million in capital investments, representing { } asset entries, were given a capitalization date of { },⁷ which should represent the date in which the assets were placed into service. Given that CP had represented that it had transferred a large number of older fixed assets from its prior accounting system, and that the in-service dates for most of the investments were { }, coupled with the relatively large amount of assets placed into service {

}. Thus, CP and/or DM&E likely did not place all of these assets into service or incur these capital costs after the transaction date.

The second area of concern is that the information in the spreadsheets includes one date, the capitalization date, for each asset. This is generally the date the asset was placed into service but may not be the date when the costs were incurred. There are generally two types of assets detailed in the spreadsheet, assets placed into service and AUC. Because the spreadsheets were generated in 2013, most of the AUC at or before the time of acquisition were completed and the capitalization date is reflected as post-acquisition. Thus,

⁷ Fixed assets categorized as Engineering only.

costs incurred prior to the acquisition may be included in post-acquisition capital investments. In addition, AUC are also included in the spreadsheets and predominantly these costs were incurred in { } and { }. Thus, it appears CP included costs for AUC in its capital investment calculations for those years resulting in an overstatement of capital investments for the years after the acquisition. The AUC expenditures that CP included exceeded \$ { }.

III. CP's Representation to Spend \$302.1 Million in Capital Investments from 2009-2011

The data anomalies I identify above did not, however, significantly impact the capital expenditures that CP presented in its SAP-derived spreadsheet for the years 2009-2011 – the three calendar years immediately following the acquisition of the DME by CP. South Dakota specifically requested that I focus on these three years because CP had represented to the Board that it would spend at least \$302.1 million over that time period in equal increments of \$100.7 million each year.

My analysis of 2009, 2010, and 2011 data indicates that CP made capital investments of \$65,019,899 in 2009 (not including the \$13.5 million advanced for work in 2008), \$62,160,150 in 2010, and \$86,112,521 in 2011, which is based on the spreadsheet DM&E Road Property Cap adds Nov 2008 - July 2013 8-23-2013.xls.⁸ These three annual amounts are identical to those presented by CP's witness Glen Wilson in Attachment 4 of his Verified Statement filed in this case

⁸ Fixed assets categorized as Engineering.

on August 28, 2013. Likewise, the other two spreadsheets analyzed⁹ present identical figures for 2009-2011, and those figures vary only slightly from those in the third spreadsheet referenced above. Specifically, those spreadsheets indicate that CP made capital investments of \${ } in 2009 (not including the \$13.5 million advanced for work in 2008), \${ } in 2010, and \${ } in 2011.¹⁰ The difference in the figures arises as a result of the timing of when AUC are placed into service.

As is self-evident from the figures presented above, CP did not spend \$302.1 million in the period covering 2009-2011. CP's capital investment was only \$213,292,569, which is \$88,807,431 short of \$302.1 million. Alternatively, CP invested \$226,792,569 (when including the \$13.5 million advanced for work in 2008), which is \$75,307,431 less than the \$302.1 million representation

IV. CP's Representation to Invest \$300 million above the \$172 million that DME had Budgeted.

As referenced in the Summary above, CP represented that it would make an additional \$300 million in capital investments above the \$172.9 million that DME had budgeted for such investments over the next several years. Thus, if CP had fulfilled this representation, it would have made capital investments of \$472.9 million (\$172.9 million + \$300 million). At the request of counsel, I have analyzed CP's capital expenditures on the DME system from 2009 through 2013,

⁹ DM&E Road Property Cap adds Jan 2008 - Dec 2013.xls and DM&E Road Property Cap adds Nov 2008 - Dec 2013.xls.

¹⁰ These figures include fixed assets categorized as Engineering in the July 2013 file and then re-categorized as Facilities in the December 2013 file. South Dakota has not been provided any information as to why the amounts were changed from one asset category to another.

assuming that this time period sufficiently met the criteria of “next several years.”

The capital expenditures are shown in the table below:

<u>Year</u>	<u>Capital Investment</u> ¹¹
2009	\$()
2010	\$()
2011	\$()
2012	\$()
2013	\$()
Total	\$()

CP fell short of spending an additional \$300 million over the next several years above the \$172.9 million budgeted by DME by \$() (\$472,900,000 - \$()). For comparison, CP’s capital expenditures from 2009 through July 2013 were \$343,348,076, which is \$129.6 million short of \$472,900,000.

¹¹ Source: DM&E Road Property Cap adds Jan 2008 - Dec 2013.xls. These figures include fixed assets categorized as Engineering in the July 2013 file and then re-categorized as Facilities in the December 2013 file. The \$() figure also includes \$() of AUC.

VERIFICATION

I, Michael P. Emmert., verify that I have read the foregoing Verified Statement, know the contents thereof, and that the same are true as stated to the best of my knowledge, information and belief. Further, I certify that I am qualified and authorized to file this Statement.

Michael P. Emmert

Michael P. Emmert

Executed on August 8, 2014.

Michael P. Emmert
Curriculum Vitae
August 2014

POSITION	Managing Director Navigant Consulting, Inc.
EDUCATION	B.S., Accounting, Illinois State University (1975)
PROFESSIONAL AFFILIATIONS	Member, American Institute of Certified Public Accountants Member, Illinois Society of CPA's Member, Vanderbilt University Masters in Accountancy Advisory Board Member, Illinois State University College of Business Advisory Committee Member, Economic Club of Chicago Associate Member, American Bar Association Trustee and Treasurer, Chicago Zoological Society
RANGE OF EXPERIENCE	Michael, a CPA and CFF, has spent over 38 years assisting clients with the accounting, financial and business aspects of complex business conflicts. He has provided expert witness testimony in federal and state courts, arbitrations and regulatory hearings where he has been qualified as an expert on a number of different subjects, including damages methodologies and damages claims. He has completed numerous loss of profits, loss of use and increased cost damages studies in a variety of industries. He has worked on false claims act matters (qui tam), fraud investigations, financial reporting investigations and other forensic matters, and has broad experience in merger and acquisition disputes, including acting as an arbitrator and damages expert. Michael has also worked on numerous claims for business interruption, business loss, increased costs, changed conditions and other issues in the construction, environmental, government contracting, insurance, manufacturing, mining, and utility industries. For regulatory and litigation proceedings, Mike has directed billions of dollars of cost justification studies, primarily in the electric utility industry. He has also assisted clients with litigation document, information and discovery management systems.
PROFESSIONAL AND BUSINESS HISTORY	Mesirow Financial Consulting, Senior Managing Director and Executive Vice President October 2005 to May 2007
PROFESSIONAL AND BUSINESS HISTORY (Cont'd)	LECG LLC, Director April 2004 to September 2005 Ernst & Young, LLP Managing Partner of Global Investigations and Dispute Advisory Services March 1996 to December 2003 Partner October 1994 to April 2004 Peterson Consulting Limited Partnership November 1980 to September 1994

Michael P. Emmert
Curriculum Vitae
August 2014

Arthur Andersen & Co.
June 1975 to November 1980

SELECTED SPEECHES

“Expert Life After Changes to Rule 26: Should Experts Be Required to Comply with ABA Ethical Standards for Experts?” (Panel Discussion), 2011 American Bar Association Annual Meeting, Toronto Canada, August 5, 2011

“Digital Forensics” (Panel Presentation), 2009 Annual Information Integrity Conference, Northern Illinois University, Naperville, IL

“Corporate Governance Failures – The Case of Stock Options” (Panel Presentation), 2008, University of Dayton R.I.S.E. VIII, Global Student Investment Forum, Dayton, OH

“Forensic Accounting Investigations Workshop” (Panel Presentation), 2008, University of Dayton R.I.S.E. VIII, Global Student Investment Forum, Dayton, OH

“Practice Management”, 2006, AICPA National Conference on Fraud and Litigation Services, Las Vegas, NV

“Can Your Business Handle Claims in Post-Katrina, Post EnronWorld?”, 2006 Business Interruption Seminar, Chicago, IL

“Fraud and International Auditing: Key Characteristics for Effective Fraud Detection”, 2005 The Institute of Internal Auditors Chicago Chapter, Chicago, IL

**EXPERT TESTIMONY
AND REPORTS**

Clorox Consumer Litigation, United States District Court – Northern District of California, expert report issued and deposition testimony.

Devi Khoday and Danise Townsend, et. al. v. Symantec Corp. and Digital River, Inc., 11-CV-00180 (Minnesota), expert report issued and deposition testimony.

SFPP, LP v. Tesoro Refining and Marketing Company, California Public Utility Commission, 12-01-015; expert testimony filed and regulatory hearing testimony.

Energy Northwest v. The United States of America, Court of Federal Claims, 11-447C; expert reports issued and deposition testimonies.

Minera San Cristobal, S.A. and Sumitomo Corporation, v. Washington Group Bolivia S.R.L. and URS Energy Construction, Inc., International Chamber of Commerce Court of Arbitration, NO 180081 VRO; expert reports issued and expert witness testimony.

BP Pipelines (Alaska) Inc. et al., Federal Energy Regulatory Commission, IS09-348-004, et. al; expert direct testimony filed.

**Michael P. Emmert
Curriculum Vitae
August 2014**

**EXPERT TESTIMONY
AND REPORTS (Cont'd)**

Point Lisas Nitrogen Limited v. American Life and General Insurance Company Limited, JAMS Arbitration; expert report issued and deposition testimony.

Gila River, LP and Union Power Partners L.P. v. General Electric Co., American Arbitration Association; expert reports issued, deposition and arbitration hearing testimony.

Pacer International Inc., American President Lines, Ltd., and APL Co. v. Union Pacific Railroad Company, American Arbitration Association; expert report issued.

Energy Northwest v. The United States of America, Court of Federal Claims, 04-00100, expert reports issued, deposition testimonies and trial testimony.

**VERIFIED STATEMENT OF
JOHN M. LUDWIG AND DOUGLAS J. ELLISON**

Canadian Pacific Railway Co. – Control – Dakota, Minnesota & Eastern Railroad Corp.
STB Docket No. 35081 (Sub-No. 2)

We are John M. Ludwig, P.E. and Douglas J. Ellison. We are Vice Presidents of Stone Consulting, Inc., with offices at 324 Pennsylvania Avenue West, Warren, PA 16365. Stone Consulting provides comprehensive engineering design services to railroads and other industries on a nationwide basis. Mr. Ludwig has previously submitted a verified statement in this proceeding with Harvey H. Stone of Stone Consulting. Stone Consulting's engineers, including Messrs. Ludwig and Ellison, have also provided expert testimony in maximum reasonable rate proceedings before the Surface Transportation Board (Board). We are familiar with most of the rail lines in South Dakota through consulting assignments we have performed in the State.

We have been asked by counsel for the State of South Dakota acting by and through its Department of Transportation (South Dakota) to review and address certain elements of the capital investment representations made by Canadian Pacific Railway (CP) in this proceeding, including the original proceeding in FD No. 35081, before the Board.

A. Summary of Analysis

CP represented that it would spend \$302.1 million on capital investments in the period 2009-2011. CP also represented that it would spend \$300 million "over the next few years" above the \$172.9 million that the Dakota, Minnesota & Eastern Railroad (DM&E) had budgeted for the combined DM&E and the Iowa, Chicago & Eastern Railroad

(IC&E) (collectively DME). Furthermore, CP's Safety Integration Plan (SIP) represented that the DME would upgrade all track to FRA Class 3 standards.

Our analysis of CP's capital investment shows that CP did not make the capital investments it said it would, nor did CP make investments in the locations it said it would. Likewise, CP has already admitted that it did not upgrade all of its track to Class 3 standards.

B. Qualifications

Mr. Ludwig has been with Stone Consulting, Inc. since 2003. During this time, Mr. Ludwig has participated in a wide range of bridge and structure projects for many railroads. Mr. Ludwig is a registered Professional Engineer in 25 states, including South Dakota. A copy of his credentials was included as Exhibit 2 to his verified statement of August 8, 2013.

Mr. Ellison has over thirty years of experience in the railroad industry in mechanical, operations, maintenance-of-way, and management. He has held positions with the Alaska Railroad, OmniTrax, Freight Management System, Rome Locomotive Works, and the Adirondack Railway Preservation Society. Throughout his career, Mr. Ellison has performed studies involving rail operations feasibility, profitability and marketing analysis. He was involved in the conceptual planning of transportation systems and intermodal interfacing. Mr. Ellison developed business plans for technical projects, mechanical studies, and engineering applications for user specific motive power for freight and commuter applications. In addition, Mr. Ellison's experience includes working directly with vendors and suppliers and performing equipment inspections and appraisals. Mr. Ellison was also

involved in writing FRA-approved engineer training programs and operational rulebooks, and supervised construction and engineering projects including over 85 signal department/grade crossing installations throughout Western New York and Pennsylvania. Mr. Ellison is also a designated FRA track inspector and held a locomotive engineer license for 18 years with over 25 years' experience as an engineer and over 30 years in train service. Details of Mr. Ellison's qualifications are included as Exhibit 1.

C. CP's Investment Representations for 2009-2011

CP represented that it would make capital investments of just over \$300 million in the three years following its acquisition of DME (2009-2011).¹ CP's annual spending plan for those years was broken down as follows:

<u>Item</u>	<u>Annual Capital Investment in \$ millions</u>
Rail	11.268
Ballast	2.385
Ties	16.394
Other Track Maintenance	\$5.756
Structures	60.700
Signals & Communications	2.168
Work Equipment	1.354
Other	<u>0.697</u>
TOTAL	100.722

CP's actual capital investments for the 2009-2011 period did not match CP's represented figures. As the table below demonstrates, CP invested far less than \$100 million per year, and the categories of investment also shifted significantly. The \$100 million estimated budget categories have been altered/consolidated to match the categories that CP has used in its Reply to South Dakota's Petition:

¹ CP's Application, Exhibit 13 at 2, 30, 36 and 40.

<u>Item</u>	<u>Planned Annual Capital Investment in \$ millions</u>	<u>Actual 2009²</u>	<u>Actual 2010</u>	<u>Actual 2011</u>
Rail	35.803	{ }	{ }	{ }
Structures (Bridge, Culverts, Office, etc.)	60.700	{ }	{ }	{ }
Signals & Communications	2.168	{ }	{ }	{ }
Work Equipment	1.354	{ }	{ }	{ }
Other	<u>0.697</u>	{ }	{ }	{ }
2009 Monies Spent in 2008		<u>13.500</u>		
TOTAL	100.722	78.520 ³	62.160	86.112

Plainly, CP did not make \$100 million in capital investments during 2009-2011. More importantly, one of the areas where the least money was invested was bridges. CP has explained that its further examination of the bridges on the DME “indicated that the life of many DME bridges could be extended by performing more limited repairs, thereby avoiding the need for immediate replacement.”⁴ However, we are familiar with the conditions in parts of South Dakota, particularly between Rapid City and Sturgis (Black Hills Subdivision) and Huron to DeSmet (Huron Subdivision). Considering the large quantity of high maintenance timber bridges and overall conditions throughout, the bridge repair investment is very low. It appears CP directed only \$ { } million in bridge-related investment to the western end (Black Hills and PRC Subdivisions) of the system between 2009-2011.⁵

CP’s determination that bridge repairs could wait caused CP to place more emphasis on track repairs. However, as the above table demonstrates, while CP did provide additional funds for track repair in 2009 and 2010, that commitment did not even last into the third year. Moreover, CP’s underspending on structures was not redirected for the most

² Source: DM&E Road Property Cap adds Nov 2008 - July 2013 8-23-2013.xls.

³ This figure includes \$13.5 million that CP budgeted for 2009, but advanced for projects in 2008.

⁴ CP’s Reply, Glen Wilson VS at 5 (Aug. 8, 2014).

⁵ The bridge-related investment directed at the western end of the DM&E system declined in 2012-2013 to { }. Source: DM&E Road Property Cap adds Nov 2008 - Dec 2013.xls.

part to other capital improvements. Instead, the money was never invested in the first three years, and, as shown below, CP did not meet its other investment representation in the years that followed (\$300 million above the \$172.9 million budgeted by DM&E).

CP also changed the locations where it planned to make capital investments. CP represented that its capital investments would be split roughly 60/40 between the DM&E and the IC&E systems. Specifically, in CP operating plan it indicated that it would invest \$59.3 million per year on DM&E lines and \$41.5 million per year on IC&E lines.⁶ As the table below shows, CP’s actual investments were not consistent with the operating plan.

<u>Railroad</u>	<u>Planned Annual</u>	<u>Actual</u>	<u>% of</u>	<u>Actual</u>	<u>% of</u>	<u>Actual</u>	<u>% of</u>
	<u>Capital Investment in \$</u>						
	<u>millions</u>						
DM&E	59.3	{ }	{ }%	{ }	{ }%	{ }	{ }%
IC&E	41.5	{ }	{ }%	{ }	{ }%	{ }	{ }%
System	<u>0.0</u>	<u>{ }</u>	<u>{ }%</u>	<u>{ }</u>	<u>{ }%</u>	<u>{ }</u>	<u>{ }%</u>
TOTAL	100.8	65.0 ⁸	100%	62.160	100%	86.112	100%

The above table also demonstrates that CP {
 }DM&E facilities, a large portion of which CP sold in 2014 after announcing its intention to sell those facilities in late 2012.⁹

The investment per route mile presents a similar divergence from CP’s operating plan.

⁶ CP’s Application, Exhibit 13, Appendix L.

⁷ Source: DM&E Road Property Cap adds Nov 2008 - July 2013 8-23-2013.xls.

⁸ This figure does not include \$13.5 million that CP budgeted for 2009, but advanced for projects in 2008.

⁹ The percentage of investment directed towards the DM&E did not change significantly. In 2012 and 2013 (through July), CP committed { }% and { }%, respectively, of its total DME capital investment to DM&E facilities.

<u>Railroad</u>	<u>Planned Investment Per Route Mile</u>	<u>Actual 2009¹⁰</u>	<u>Actual 2010</u>	<u>Actual 2011</u>
DM&E (987 Route Miles)	\$60,081	#{ }	#{ }	#{ }
IC&E (1,106 Route Miles)	\$37,523	#{ }	#{ }	#{ }

CP has also suggested that it has invested significant sums in South Dakota (\$65.8 million from 2008 through July 2013).¹¹ However, from 2009 through July 2013, CP made { } million in South Dakota.¹² DME owned 586 route miles in South Dakota. Investment per route mile was, therefore, \${{ }} in total over 4 ½ years. By comparison, on the balance of the DME system, the investment per route mile over the same period was \${{ }}, not including non-attributable “System” investments.¹³

D. CP’s Representation to Invest \$300 million above DME Budgeted Amounts

CP also represented that it would spend \$300 million “over the next few years” above the \$172.9 million that the DM&E had budgeted or \$472.9 million.¹⁴ CP did not invest this amount. CP invested \${{ }} million from 2009-2013,¹⁵ which is \${{ }} million short of the investments that CP represented it would make. South Dakota’s { } share of the \${{ }} million shortfall, { }, is \$22.0 million.

¹⁰ Source: DM&E Road Property Cap adds Nov 2008 - July 2013 8-23-2013.xls.

¹¹ Wilson VS at 7.

¹² Source: DM&E Road Property Cap adds Nov 2008 - July 2013 8-23-2013.xls.

¹³ Id.

¹⁴ CP’s Response, Vol. 1 at 75 (April 18, 2008).

¹⁵ Source: DM&E Road Property Cap adds Nov. 2008 – Dec 2013.xls

E. CP Did Not Upgrade All Track to FRA Class 3 Standards

CP's SIP plan, as represented to the Board by the FRA, indicated that CP would upgrade all DME track to Class 3 standards,¹⁶ which would permit trains to operate at speeds up to 40 MPH.¹⁷ CP admits that it has not made such upgrades.¹⁸ While certain lines in South Dakota were upgraded, particularly on the Huron Subdivision, most of the PRC and Black Hills Subdivisions are still Excepted Track,¹⁹ which limits speeds to no more than 10 MPH.²⁰ Indeed, there is less Class 3 standard track on those subdivisions now than there was in 2007.²¹

Overall fluidity of a rail system is dependent in large part on the speeds the trains can reasonably operate. Without the promised upgrades, rail operations in large portions of South Dakota, and ultimately the economy of the State, continue to be hampered because less than Class 3 track, and particularly Excepted Track, is still the norm.

¹⁶ FRA Letter to the Board, July 14, 2008.

¹⁷ 49 CFR 213.9.

¹⁸ Wilson VS at 10-11.

¹⁹ The changes in FRA Class of track from 2007 to 2013 are shown in Exhibit DMD-2 of South Dakota's Aug. 8, 2013 Petition.

²⁰ 49 CFR 213.9.

²¹ South Dakota's Petition of August 8, 2013, Exhibit DMD-2.

VERIFICATION

I, John M. Ludwig, verify that I have read the foregoing Verified Statement, know the contents thereof, and that the same are true as stated to the best of my knowledge, information and belief. Further, I certify that I am qualified and authorized to file this Statement.

John M. Ludwig

Executed on August 7, 2014.

VERIFICATION

I, Douglas J. Ellison., verify that I have read the foregoing Verified Statement, know the contents thereof, and that the same are true as stated to the best of my knowledge, information and belief. Further, I certify that I am qualified and authorized to file this Statement.

Douglas J. Ellison

Executed on August 7, 2014.