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SERVICE DATE - MAY 7, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33407

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION CONSTRUCTION
INTO THE POWDER RIVER BASIN¹

AGENCY: Surface Transportation Board.

ACTION: Notice of Issuance of Procedural Schedule.

SUMMARY: The Board has received public comments on the proposed procedural schedule for issuing a decision on the transportation merits of the application and applicant's reply to those comments, and the Board is issuing a final procedural schedule. This schedule provides for issuance of a decision within 180 days of the effective date of this decision that will address the transportation issues relating to this construction application and whether the proposal satisfies the criteria of 49 U.S.C. 10901. Any approval would be conditioned upon completion of the environmental review process and consideration of environmental issues, which would be considered in a final decision on whether to authorize the construction.

DATES: The effective date of this decision is May 7, 1998. Pleadings must be filed in accordance with the attached schedule. All filings, except notices of intent to participate, must be concurrently served on all parties of record and must be accompanied by a certificate of service.

ADDRESSES: Send an original and 10 copies of all pleadings referring to STB Finance Docket No. 33407 to: Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, N.W., Washington, DC 20423. To permit concurrent service of pleadings on all parties of record, a service list containing the names and addresses of all parties of record will be issued by the Board in a subsequent notice.

FOR FURTHER INFORMATION CONTACT: Joseph H . Dettmar, (202) 565-1600. [TDD for the hearing impaired: (202) 565-1695.]

¹ This case was formerly entitled Dakota, Minnesota & Eastern Railroad Corporation--Construction and Operation--in Campbell, Converse, Niobrara, and Weston Counties, WY, Custer, Fall River, Jackson, and Pennington Counties, SD, and Blue Earth, Nicollet, and Steele Counties, MN. We have shortened the title for the sake of simplicity.

SUPPLEMENTARY INFORMATION: By decision served March 11, 1998, as corrected, the Board published notice of a construction and operation application filed by the Dakota, Minnesota & Eastern Railroad Corporation (DM&E)² and requested comments on a procedural schedule based on one proposed by DM&E for consideration of the transportation issues regarding the application.³ That decision also required DM&E to cause to be published notices: (1) advising that comments would not be due until the Board establishes a procedural schedule; and (2) after a schedule has been adopted by the Board, setting forth the schedule, including the due date for comments on the merits of the proposed transaction.

We received over two hundred comments on the proposed procedural schedule. Comments were filed by landowners, environmental groups, shipper organizations, shippers and receivers (including electric utilities), railroads, government entities, and rail labor unions. We have reviewed all of these comments but, in light of their number, will not mention each comment individually here.

For the most part, the parties opposing the proposed schedule state that the original 35-day comment period is insufficient. One group of similar letters⁴ (over 50) asks that we allow comments throughout the EIS process. The other time period mentioned most frequently is an increase in the initial public comment period to 180 days. There are also a few suggestions for comment periods of up to 400 days.

The rationale for extending the time period for submitting comments is, generally, that the proposal is extensive and that more time is needed to study it and to seek help in asserting the parties' positions in opposition. These parties argue that copies of the application are not readily available to many landowners, and that the application set out on the Internet is incomplete.⁵ These parties also claim that DM&E has had years to prepare its arguments and that they deserve time to

² DM&E seeks authority to construct and operate 280.09 miles of new railroad line, which would extend DM&E's existing rail lines into the Powder River Basin coal fields in northeastern Wyoming, and DM&E also plans several related projects. Notice of the application was published in the Federal Register on March 13, 1998 (63 FR 12576).

³ DM&E's proposed schedule also would have covered the carrying out of the environmental review process. Our March 11, 1998 decision found that it would be premature to establish any sort of environmental review schedule, but directed our Section of Environmental Analysis (SEA) to initiate the environmental review process. On March 27, 1998, SEA published a notice of intent to prepare an Environmental Impact Statement (EIS), scheduling agency and public scoping meetings between April 29 and June 30, 1998.

⁴ The second largest group of similar letters (over 30) does not specifically address the procedural schedule; rather, these letters argue against conditional approval.

⁵ DM&E placed a copy of the application on the Internet at "WWW.DMERAIL.COM."

counter these arguments and fully understand the public convenience and necessity claims of DM&E. There are also numerous requests for local hearings, contentions that consideration of the transportation criteria in 49 U.S.C. 10901 prior to completion of the analysis of the potential environmental impacts is not appropriate, and assertions that there is no public need for another rail line to serve the Powder River Basin.

There is one specific proposal for an alternative procedural schedule. It is offered by the 777 Ranch.⁶ This proposal would significantly extend the due dates for the various pleadings⁷ and ultimately postpone the issuance of a decision on transportation issues by slightly more than 9 months, for a total of approximately 15 months until the decision on the transportation issues is made.

Numerous parties support the 180 day schedule⁸. These parties emphasize that this schedule is reasonable and provides adequate time for submitting evidence and for informed decision making by the Board.

In support of the proposed schedule, DM&E argues that many of the opposing comments appear to be from parties “implacably” against the project who see delay as a desirable end in itself. DM&E also claims that many of the opposing comments are directed to environmental concerns, while others address the merits of the proposal rather than the amount of time needed to provide adequate opportunity for public participation and for development of a sufficient record on the transportation merits of the application. DM&E adds that it has attempted to ensure the broad availability of the application and that it went well beyond Board regulations in this regard.

Turning to the specific requests for lengthening the proposed schedule, DM&E notes that the commenters apparently did not take into account that, after the initial 35-day comment period, there would be a further 80-day period in which to submit transportation evidence and argument in opposition. In addition, DM&E points out that, even before a specific schedule is adopted, interested parties will have already had nearly 2 months since the application was filed to begin preparation of their transportation comments.

⁶ The 777 Ranch and the Mid-States Coalition for Progress list the same PO box and phone number, and their pleadings are quite similar. The SMS Ranch Partnership also submitted essentially identical comments.

⁷ The 777 Ranch would make these changes to the proposed schedule (where P signifies the date of this decision): comments due from P + 35 to P + 180; STB decision setting modified procedure/oral hearing from P + 70 to P + 215; opposing evidence and argument from P + 115 to P + 395; and STB decision from P + 180 to P + 460.

⁸ These parties also frequently mention their support for the construction project and request expedited consideration of the environmental issues.

We have reviewed all the comments received on the proposed procedural schedule and are aware of the concerns parties have raised regarding the amount of time necessary to prepare their cases as well as the desire of DM&E to have an expedited schedule. Balancing these competing concerns, and with fairness to all parties in mind, we have decided to adopt the proposed 180-day procedural schedule for consideration of transportation issues. This schedule will ensure that all parties are accorded due process. It will allow for adequate public participation and the development of a sufficient record on which to consider the transportation implications of applicant's construction proposal under 49 U.S.C. 10901. As we explained in our previous decision, any approval granted would be conditioned upon consideration of the environmental impacts of the proposed construction. Thus, we will issue a subsequent decision after completion of the EIS process, and only at that point would we allow construction to begin, if appropriate, based on a consideration of the potential environmental impacts of the proposed transaction. The courts have found that it does not violate the environmental laws for an agency to conditionally approve an action before the completion of environmental review. City of Grapevine v. DOT, 17 F.3d 1502 (D.C. Cir. 1984). See generally Missouri Mining Inc. v. ICC, 33 F.3d 980 (8th Cir. 1994) (affirming construction authorization that had first been conditionally granted).

Although numerous parties have requested that we extend the various time periods set forth in the proposed schedule, none of these requests shows any specific need for additional time in order to address transportation issues under the statutory standards of section 10901. We believe the proposed schedule, which allows almost 4 months (a total of 115 days) in addition to the time already elapsed since the application was filed, affords ample opportunity to file evidence and argument in opposition to the application.

In addition, we note that many of the pleadings we received in response to our request for comments on the procedural schedule for consideration of transportation issues instead raise concerns with environmental issues. As noted, we will separately address environmental issues in a subsequent decision after completion of the EIS process. Other comments are directed more to the transportation merits of the application than the procedural schedule.

As mentioned, our previous decision required DM&E to cause to be published new notices setting forth the schedule we are adopting here and certifying to us that it has done so. We are reiterating that requirement here.

In addition to setting forth the procedural schedule, the new notices must clearly set forth the filing requirements we established here, which we are modifying slightly from those originally contemplated. These filing requirements are: first, anyone who intends to file comments in this proceeding and to participate fully as a party of record (POR) must file with the Secretary of the Board an original and 10 copies of a notice of intent to participate in the proceeding by May 27, 1998. The Board will then issue a list of those persons who have given notice of their intent to

participate.⁹ All documents (including comments) filed under the procedural schedule must be served on each person identified on this service list as a POR and each person making a filing must certify to the Secretary of the Board that he or she has done so. Persons not participating as a POR may obtain copies of pleadings through the Board's copy contractor, DC News & Data, Inc., 1925 K Street, N.W., Suite 210, Washington, DC 20006. Telephone: (202) 289-4357. [Assistance for the hearing impaired is available through TDD Services (202) 565-1695.] Second, so that all PORs may have the benefit of receiving all comments, we are requiring that, in order to be considered, any previously submitted comments addressing the transportation merits of the proposed construction must be resubmitted and properly served on all PORs once we issue the service list. Previously submitted transportation comments will not be considered unless resubmitted and served. We recognize that this will create duplicate pleadings in some circumstances, but feel it is necessary to ensure complete dissemination of all comments.¹⁰

Board decisions and notices are available on our website at "WWW.STB.DOT.GOV."

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Decided: April 30, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

⁹ The Office of the Secretary will start compiling the official service list in this proceeding after service of this decision adopting a procedural schedule. Persons named on any earlier service list will not automatically be placed on the official service list for this proceeding. Therefore, any person who wishes to be a POR must file a notice of intent to participate by May 27, 1998.

¹⁰ We emphasize that interested persons that do not wish to participate formally in this phase of the proceeding addressing the transportation merits of the application need not become a POR to participate fully in the environmental phase of the proceeding. We note that cross service of comments is not ordinarily required in the environmental review process.

PROCEDURAL SCHEDULE

In the following schedule, the term "P" designates the date that the Board issues this procedural schedule and "P + n" means "n" days following that date.

P	Procedural schedule established by the Board.
P + 7	Due date for publication by DM&E of newspaper notice announcing the procedural schedule.
P + 20	Due date for notices of intent to participate as a party of record
P + 35	Due date for written comments on transportation aspects of the Application.
P + 40	Due date for DM&E's replies to written comments on transportation aspects of the Application.
P + 70	Board decision ordering hearing under modified procedures.
P + 115	Due date for evidence and argument in opposition to the transportation aspects of the Application.
P + 135	Due date for DM&E's reply evidence and argument in support of the transportation aspects of the Application.
P + 180 (or earlier)	Service of preliminary decision on whether the transportation criteria of section 10901 have been met.