

BEFORE THE
SURFACE TRANSPORTATION BOARD



FINANCE DOCKET NO 35081

CANADIAN PACIFIC RAILWAY COMPANY, ET AL
- CONTROL -
DAKOTA, MINNESOTA & EASTERN RAILROAD CORP., ET AL

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**ARKANSAS ELECTRIC COOPERATIVE CORPORATION'S
PETITION FOR RECONSIDERATION**

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Dated October 20, 2008

PUBLIC VERSION

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PREFACE AND SUMMARY OF ARGUMENT

Arkansas Electric Cooperative Corporation ("AECC") 1/ petitions the Board for reconsideration of its Decision No 10 (the "Decision"), served in this proceeding on September 30, 2008, to the extent that the Board refused to impose the conditions requested by AECC 2/.

As shown below:

- The Board erred in holding that it is not pertinent to the decision in this case that CP control of DME would eliminate potential competition for rail transportation of PRB coal

1/ AECC is a membership-based generation and transmission cooperative, whose members serve approximately 460,000 customers throughout the State of Arkansas. Further information about AECC and its interest in this proceeding is provided in Opposition Evidence And Argument And Request For Conditions Of Arkansas Electric Cooperative Corporation (AECC-3) ("AECC's Opposition"), at pp. 1-2.

2/ In this Petition, railroads are referred to by customary acronyms, e.g., Canadian Pacific Railway and affiliates as "CP", Dakota, Minnesota & Eastern Railroad and affiliates as "DME", etc. The coal producing area of the Wyoming Powder River Basin is referred to as the "PRB". DME's proposed extension into the PRB, approved by the Board in Finance Docket No 33407, is referred to as the "DME Project" or the "Project".

- **The Board disregarded substantial and unrefuted evidence that the “milestone payments” in the CP/DME merger agreement would prevent CP from building DME’s planned line into the PRB**
- **The Board disregarded substantial and unrefuted evidence that CP would not risk its economic interests by entering into the PRB rail market in competition with UP and BNSF**
- **The evidence shows that CP ownership of the land rights acquired by DME for its entry into the PRB market would interfere with access to the PRB by any new entrant. AECC’s proposed conditions would remove that interference without harming CP’s legitimate interests.**

Each of these grounds is discussed in greater detail in the Petition that follows

For these reasons, AECC respectfully requests that this Board reconsider its Decision and impose AECC’s proposed Conditions B, C, and D, described in AECC Opposition, at pp 11-12

DISCUSSION

I It Is “Particularly Pertinent” That CP Control Of DME Will Make It Unlikely That The Extension Into The PRB, Previously Approved By The Board, Will Ever Be Built

Explaining why it was denying the conditions sought by AECC, the Board states in the Decision that “it is not ‘particularly pertinent’ in a control proceeding whether the change of control makes the PRB line construction more or less likely ” Decision at p 16 ^{1/} We respectfully submit that the Board’s comment misapprehends the legal standard in this case

The Board has determined that this is a “significant” case Decision at p 3-4 Under 49 CFR § 1180.2 (b), this means that the Board could not determine at the outset that the transaction “clearly will not have any anticompetitive effects” or that such anticompetitive effects “will clearly be outweighed by the transaction’s anticipated contribution to the public interest”. Thus, a central focus of these proceedings must be to determine whether the transaction will have any anticompetitive effects, and if so whether benefits of the transaction outweigh such effects Moreover, because CP’s U S affiliates have been found revenue adequate for several years, no argument can be made by Applicants here that the Board must acquiesce in losses of competition in order to improve carrier financial performance. Rather, in accordance with the Rail

^{1/} The phrase “particularly pertinent” is from Dakota, M & E R R – Control – Iowa, C & E R R, 6 S T B 511, 525-26 (2003), where the Board was addressing an argument (as the Board characterized it) that “we may have erred when we authorized DM&E to build” the Project Id, at p. 25 AECC is making no such argument in this case On the contrary, AECC is proposing conditions to prevent the CP acquisition of DME from interfering with the construction of a PRB line by another railroad if CP decides not to build the Project

Transportation Policy, 49 USC § 10101, the Board must place particular emphasis on the preservation of competition

In this case, AECC has identified and documented that CP control of DME would have the anticompetitive effect of undermining or preventing construction of a new rail line to serve the PRB in competition with UP and BNSF (The evidence is discussed in Parts II and III of this Petition) Thus, the anticompetitive effect of this transaction involves loss of potential competition Does the fact that the anticompetitive effect of the transaction relates to potential competition mean that this effect is not “particularly pertinent”? Certainly not

The potential ability of new firms to enter a market is a primary source of the benefits of a competitive marketplace As a standard textbook (P Samuelson and W Nordhaus, Economics (18th Ed , 2005)), explains

[I]n the long run, when firms are free to enter and leave the industry . . . competition will eliminate any excess profits earned by existing firms. . . So, just as free exit implies that price cannot fall below the zero-profit point, free entry implies that price cannot exceed long-run average cost in long-run equilibrium [p 163]

In a highly concentrated industry like the rail industry, potential competition – i.e., the prospect that a new firm will enter to serve a particular market – is often the most effective competitive factor in that market Again quoting Samuelson and Nordhaus

[B]arriers to entry . . . can prevent effective competition When barriers are high, an industry may have few firms and limited pressure to compete [p 172]

Consistent with these economic principles, it is the policy of the United States and this Board “to reduce regulatory barriers to entry into and exit from the [rail] industry”
49 USC § 10101 (7)

As discussed in greater detail in AECC's Brief, the Board frequently considers potential competition as well as actual current competition in control cases, and where a transaction threatens potential competition the Board imposes conditions to preserve or replace that competition. See Brief Of Arkansas Electric Cooperative Corporation (AECC-5) ("AECC Brief"), at pp 12—13, and cases cited.

When the Board approved DME's application for authority to construct a new line into the PRB, it explicitly found that the Project had the potential to produce a broad range of substantial public and private benefits, including increased competition. The Board said that:

[T]he public interest would be well served by the construction project due to the potential for increased competition for PRB coal to meet increased energy demand, lower costs (due to DM&E's geographic advantage to certain generation facilities in the midwest), and improved service to DM&E's existing shippers

Dakota, M & E R R Construction Into The Powder River Basin, STB Fin Dkt. 33407, served Feb 15, 2006, at 17, 2006 WL 383507 (S T B.), *13

If, as AECC's evidence demonstrates (see below), CP control of DME would effectively prevent the DME Project from being built, the potential competition that the Board's decision created would be lost. That anticompetitive effect is "particularly pertinent" to the Board's decision whether to approve this significant transaction, and whether to impose conditions on it.

Thus, we turn in Parts II and III to the evidence presented by AECC that establishes that this transaction would cause this anticompetitive harm.

II AECC'S Evidence Shows That The Contingent Payment Provisions In The CP-DME Merger Agreement Would Make It Economically Impossible For CP To Build Any Line Into The Powder River Basin

The first reason identified by AECC why the proposed transaction would prevent CP from building the DME Project is that the terms of the merger agreement require CP to make huge "milestone payments" to DME's investors if CP builds a line into the PRB. See Agreement and Plan of Merger, Section 3.05 (b), Exh. 2 to the Application (CPR-2, DME-2), Vol. 1. As the Board observed in its Decision No. 4, at p. 3, these payments could exceed \$1 billion, and CP just starting to build the line would trigger a payment of \$350 million. Such payments are huge in the context of a Project with capital costs of approximately \$3 billion and would make the Project economically nonviable.

The Board says in its Decision that AECC "does not provide evidence that contingency payment arrangements have had a negative effect on the PRB line prospects or adequately explain why CP would want to terminate the effort." Decision at p. 16. On the contrary, AECC submitted irrefutable and unrefuted evidence that the contingent payments would make it economically impossible for CP to build a line into the PRB.

For the Project to be viable, CP would have to be confident that it would earn enough from the PRB business to amortize the construction cost of the line and the milestone payments of \$350 million to \$1.057 billion (plus escalation). AECC's expert witness, Michael A. Nelson, submitted a detailed economic analysis of the effect of the contingent payments on the viability of the Project, which shows that the Project could not possibly generate enough money to be viable after paying these milestone payments. See Rebuttal Verified Statement of Michael A. Nelson ("R v S Nelson"), in Rebuttal In Support Of Request For Conditions By Arkansas Electric Cooperative Corporation.

(AECC-4) (“AECC Rebuttal”) The analysis shows that this conclusion is true whether the Project were moderately successful, so that CP was required to pay only the minimum milestone payment of \$350 million, R V S Nelson at pp 3-5, or whether the Project were wildly successful and CP had to pay a greater milestone payment Id , at pp 2-3

The milestone payments do not simply “allocate risks” between CP and the DME investors, as the Board suggests, the evidence shows that they constitute a “poison pill” that would prevent CP from exercising the right, conferred by this Board on DME, to construct a line into the PRB

Applicants have not submitted a shred of evidence in response to the viability issue raised by AECC or made the slightest attempt to show that it would be economically feasible for CP to build the DME Project under the terms imposed by the merger agreement On the contrary, CP has made very clear that it is not committed to building the Project “Applicants state that they have not yet determined whether they would proceed with the construction of [the PRB] line if this merger is approved ” Canadian Pacific Rwy —Control—Dakota, M & E R R , Finance Docket No 35081, Decision No 2, Nov 2, 2007, at p. 7 n 3 See, also Verified Statement of Fred Green, at pp 5-6, in Application (CPR-2, DME-2), Vol II

Thus, not only has AECC “provide[d] evidence” that the milestone payments have a “negative effect” on the prospects for the PRB line, and not only has AECC “explain[ed]” why CP would be compelled to “terminate [DME’s] effort”, AECC has shown that the conclusion is inescapable that the milestone payments will prevent the construction of the Project if this Application is approved without conditions

* * *

AECC's evidence also shows that CP would not build the Project because it would not be in CP's economic interest to do so, on account of commercial concerns. This second reason might be regarded as superfluous because the milestone payments in themselves make it economically infeasible for CP to build a line into the PRB, even if CP had no commercial concerns. However, the commercial concerns may explain why CP was willing to accept the "poison pill" in the merger agreement. CP knew that it was never going to build a line into the PRB anyway, because doing so would be detrimental to its commercial interests. The commercial concerns also provide an additional and independent reason for concluding that CP control of DMF dooms the PRB Project. We therefore turn next to a discussion of those commercial concerns.

III AECC's Evidence Shows That It Would Not Be In CP's Economic Interest To Build A Line Into The PRB Because CP's Existing And Potential Business Relationships With UP And BNSF Are More Certain And More Valuable Than Any Likely Benefit To CP From Such A Line

The Decision says that "AECC argues that CPRC risks a loss of cooperation with UP and BNSF on traffic flows for goods other than coal [if it were to enter the PRB coal market]. We believe that AECC's argument does not fully acknowledge that all railroads are interdependent with other railroads", and that "this fact alone does not mean that CPRC would refrain from entering into a new market to compete when it is in its economic interest to do so." Decision at p. 16.

AECC, however, did not rely on the mere fact that railroads are interdependent to prove that CP will not enter the PRB market. AECC presented evidence, including evidence from CP's own witnesses, that it would not be in CP's "economic interest" to build a line into the PRB.

The evidence shows that CP has invested a great deal of money and effort into cooperative ventures with UP and, to a lesser extent, BNSF, and does a lot of business as a result. Much of this evidence comes from CP itself. See, in particular, in Applicants' Response To Comments And Requests For Conditions And Rebuttal In Support Of Application (CPR-14, DME-14) ("Applicants' Response"), Vol I Reply Verified Statement of Bob Milloy, Reply Verified Statement of Don Smith, and in Vol II Appendix C at p C-2, Appendix B at p B-12, Appendix O at pp O-15-16 CP's relationships with UP and BNSF are discussed in more detail in AECC Brief, at pp 7-10

Because of these cooperative ventures with UP and BNSF, CP has a legitimate business concern that its existing relationships with UP and BNSF would be impaired if CP were to intrude into the PRB coal market, which UP and BNSF regard as their own. For example, {

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The critical importance of this concept in the context of the PRB Project was highlighted in the due diligence assessment conducted by Applicant reply witness Don Smith (CP's Senior Account Manager - U S Grain), which concluded as follows

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2/ CPR-14 DME-14 (Highly Confidential), Volume 2, Appendix I at p I-16 { }
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The evidence leaves no room for doubt that CP's management is keenly aware that CP entry into the PRB would put at risk CP's substantial cooperative relationships with the western railroads

Applicants presented no evidence whatsoever that CP had resolved or dismissed these concerns or was prepared to run the risk of entering the PRB market

Whenever an enterprise considers making a change in its business strategy, it has to take into account not only the new business opportunities it might gain, but also the possibility of losing existing desirable business. The evidence shows that in the case of CP, the risk to its existing business with UP and BNSF would outweigh the prospects of new business from entry into the PRB. 4/ Thus, it is not "in [CP's] economic interest" to pursue the DME Project. This is not mere speculation by AECC based on the interdependence of railroads. It is a fact established by unrefuted evidence, including evidence provided by Applicants

3/ CPR-14 DME-14 (Highly Confidential), Volume 2, Appendix I at p 1-9. Witness Smith's authorship of this document is established in Reply VS Smith at p 4

4/ Extension into the PRB would be a risky proposition for CP at best. A representative of Moody's Investment Services said that the acquisition of DME will place downward pressure on CP's credit ratings, but that CP will remain investment grade as long as the PRB expansion project is not undertaken. This was echoed by a representative of UBS Investment Research, who highlighted the remote probability that the economics of the expansion project would be favorable. "Canadian Pacific's \$1.48B Purchase of DM&E May Cause Headache for U.S. Railways", by Judy Monchuk, Sept 5, 2007. Originally reported at www.canadacast.com/rss/article/66461, now archived at www.dmetraintruth.com/pdf/headache_9_5.pdf

IV The Conditions Proposed By AECC Would Preserve The Possibility Of A New PRB Line, Without Interfering With CP's Legitimate Interests

AECC's proposed Conditions B, C, and D (see AECC Opposition, at pp 11-12) are intended to preserve the STB-approved route into the PRB for use by another railroad if, but only if, CP decides not to build it. These conditions would not interfere in any way with the claimed public benefits of CP control of DME, nor with CP's ability to build a PRB line if it were to decide to do so.

The Board asserts that if CP does not decide to use the land rights that DME has obtained through State eminent domain proceedings, "presumably an action could be brought in state court" Decision at 16. Frankly, we do not know on what basis such an action could be brought, or what relief could be obtained. DME was able to exercise the sovereign power of eminent domain because of the authority granted to DME by this Board. It is the Board's responsibility, under federal law, to protect the public interest with respect to railroad competition and market entry. If DME – or its successor CP – decides not to exercise the authority granted by the Board to build the approved PRB line, the Board, not any other tribunal, has the responsibility for preserving the land for the use that the Board has found would serve the public interest.

The Board says that AECC has provided "no reason to conclude that the route for which DM&E has obtained construction approval is the only route into the PRB from Kansas City." Decision at p. 16. It is of course true, as Mr. Nelson testified, that "[a]t the current time, it is not possible to specify exactly what land a new line to Kansas City would need to in order to serve the PRB. Further analysis is required to determine a preferred alignment from among several feasible options." V.S. Nelson at p. 17, in AECC's Opposition. However, the evidence does show that the line for which

the Board granted construction approval to DME is likely to include the best route to the PRB

Any new rail line intended to serve the large flow of PRB coal in the corridor to/through Kansas City would have to be able to originate coal from the same southern PRB mines that the DME Project was also designed to serve, and would have similar infrastructure needs. As Mr. Nelson testified, such a new line would need track to reach individual mines, and a yard from which to stage its origin operations. See V.S. Nelson at p. 17. From the mines, a line toward Kansas City would head southeastward out of the Basin. That is exactly the orientation of the portion of new construction the Board approved for DME northwest of Edgemont, SD. Id.

In the challenging terrain of Wyoming, identifying feasible alignments for this type of heavy haul line is not easy. The efficiency of heavy haul operations is quite sensitive to the profile of the route, so hypothetical routes frequently are not viable due to engineering considerations, the capital costs associated with the creation of a given profile, and/or the operating cost structure that would result.

The Board's approval of a route also requires detailed consideration of environmental impacts. The Board's environmental review of the new construction portion of the DME Project involved "an extensive and detailed evaluation of a variety of potential alternative alignments to extend DM&E's existing system westward into the PRB." Dakota, M. & E. R.R. Construction Into The Powder River Basin, 6 S.T.B. 8, 20 (2002). The Board explained

In identifying feasible alternatives for the construction proposal in general, and more specific routing alternatives for portions of the project, SEA considered factors such as rail line design and

engineering constraints, operation and maintenance costs, and potential environmental impacts [Id]

After considering such factors as safety, soils, paleontological resources, land use, wetlands, air quality, cultural resources, geology, water resources, vegetation, aesthetics, threatened and endangered species, and potentially problematic geologic areas, the route the Board approved was “the environmentally preferable alternative for extending DM&E’s existing system westward into the PRB ” Id at p 21 and n 35 As for routes to the Black Thunder Mine, id at p 89, and the North Antelope Mine, id at p. 90, and for siting the “West Yard”, id at p 97, the Board found there were few alternatives to the routes it approved Thus, the STB-approved routes are certainly the best, and may be the only, routes for a new entrant into the PRB rail market

If the Board permits CP to retain land and other assets assembled by DME (pursuant to its construction authority) even though CP decides not to construct the project, CP would be able to prevent a new entrant into the PRB rail market from using the best alignment If this were allowed to happen, the new entrant would be required to use alternative alignments that are more costly, operationally inferior, and/or environmentally intrusive, compared to the alignment approved for DME. The Board granted DME authority to build a rail line into the PRB If DME, or its successor, chooses not to build such a line, the Board did not grant it the perpetual right to use land acquired under that authority to impede another railroad from doing so

As the Board observed in approving the DME Project originally, the federal policy is “to facilitate rail construction”, and “ ‘there is now a presumption that construction projects will be approved ’ ” Dakota, M & E R R Construction Into The Powder River Basin, 3 S T.B 847, 864 (1998) (quoting Class Exemption For The

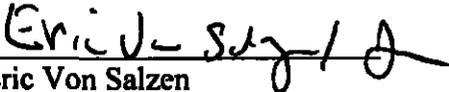
Construction Of Connecting Track, 75, 79 (1996)) It would be entirely contrary to that policy to allow CP to use land rights, which were granted to DME by this Board for a rail construction project, in order to block another railroad's construction project. If CP does not use the land for the approved purpose, another railroad should be able to obtain that land, at a fair market value price, to use it for that purpose.

V Conclusion

If CP acquires control of DME, it will not build the DME Project previously approved by this Board, for the reasons discussed in this Petition. This is bad enough, but worse is the fact that land rights acquired by DME for the Project would become a barrier to another entrant seeking to build a new line into the PRB, unless appropriate conditions are imposed by the Board. AECC's proposed Conditions B, C, and D would preserve the possibility that a new entrant could build a line into the PRB, but would not interfere with the proposed merger or any of its public benefits.

Accordingly, AECC requests that the Board reconsider its Decision and grant these three conditions proposed by AECC.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Arkansas Electric Cooperative Corporation's Petition for Reconsideration to be served by first-class mail, postage pre-paid, this 20th day of October, 2008, on all parties of record and the following persons specified in the Board's Decision dated December 27, 2007

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