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November 22, 2002



Via Messenger

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

RE: STB Finance Docket No. 34178, *Dakota, Minnesota & Eastern Railroad Corporation and Cedar American Rail Holdings, Inc.—Control—Iowa, Chicago & Eastern Railroad Corporation.*

Dear Secretary Williams:

Enclosed please find an original and twenty-five (25) copies of the "Comments and Request for Conditions" (MPW-3) of Muscatine Power and Water Company ("Muscatine") to be filed in the above-referenced docket, in compliance with Decision No. 5 in the above-referenced docket. In compliance with the Board's decision in this docket served September 26, 2002, Muscatine also encloses a 3.5-inch IBM compatible floppy diskette containing an electronic copy of the foregoing pleadings compatible with WordPerfect 9.0.

Also enclosed is one additional copy of the pleading for stamp and return. Kindly date-stamp the additional copy for return to this office by messenger.

If you have any questions, please do not hesitate to contact me. My office telephone number is (202) 331-8800.

Sincerely,

Jeffrey O. Moreno
Michael H. Higgins

*Attorneys for
Muscatine Power and Water Company*

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MPW-3

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 34178



**DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION
AND CEDAR AMERICAN RAIL HOLDINGS, INC.**

—CONTROL—

IOWA, CHICAGO & EASTERN RAILROAD CORPORATION

**COMMENTS AND REQUEST FOR CONDITIONS
OF
MUSCATINE POWER AND WATER COMPANY**

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**COMMENTS AND REQUEST FOR CONDITIONS
OF
MUSCATINE POWER AND WATER COMPANY**

Muscatine Power and Water Company (“Muscatine”), pursuant to Decision No. 5 of the Surface Transportation Board (“STB” or “Board”), served in this docket on November 15, 2002, hereby submits these “Comments and Request for Conditions” on the proposed acquisition of the Iowa, Chicago & Eastern Railroad Corporation (“ICE”) by the Dakota, Minnesota & Eastern Railroad Corporation and Cedar American Rail Holdings, Inc. (“DME”). Concurrently, Muscatine also is filing a “Petition for Leave to Intervene” in compliance with Decision No. 5.

Statement of Interest

Muscatine is a customer-driven, municipal utility, headquartered in Muscatine, Iowa. It is the largest municipal electric utility in Iowa in terms of sales and generation, providing electricity to 10,839 customers. Muscatine owns and operates four coal fired electric generating facilities with a combined capacity of 293.55 MW. Three of those facilities are located at the Muscatine Electric Generating Station (“Muscatine Station”) in Muscatine, Iowa.

The Muscatine Station burns approximately 1.1 million tons of coal annually. Currently, Muscatine acquires this coal from the Buckskin Mine in the Powder River Basin of Wyoming

("PRB"). The coal moves by rail on The Burlington Northern and Santa Fe Railroad ("BNSF") to Ottumwa, Iowa, where BNSF interchanges the coal with ICE for delivery to the Muscatine Station. This rail transportation is provided in accordance with two separate proportional rate contracts between Muscatine and each rail carrier. Upon expiration of its coal supply and transportation contracts, Muscatine has the option to originate coal at any PRB mine on BNSF or the Union Pacific Railroad ("UP"), or the DME once its proposed build-in to the PRB has been completed. Muscatine also has alternative rail routings via ICE interchanges at Kansas City, Missouri with UP and BNSF; at Ottumwa, Iowa with BNSF; at Clinton, Iowa with UP; and at Owatonna, Minnesota with UP.

Request for Conditions

As a general matter, Muscatine supports the proposed acquisition of ICE by DME. However, Muscatine requests certain conditions to preserve its current competitive options post-merger. More specifically, Muscatine seeks to preserve the four existing points where ICE interchanges traffic with UP and BNSF and all regulatory rate remedies that currently are available to Muscatine.

Currently, the Muscatine Station is rail-served only by ICE, which is a neutral bottleneck carrier for coal originating in the PRB. Muscatine has competitive rail options at PRB origins from either UP or BNSF, which both interchange with ICE at several locations. In addition, DME has obtained authority from the Board to extend its rail line into the PRB to become a third competitive rail option for the origination of PRB coal.¹ The proposed acquisition of ICE by DME, however, would destroy ICE's status as a neutral bottleneck carrier for coal originating in the PRB, once DME initiates rail service from the PRB.

The loss of ICE as a neutral bottleneck carrier will be anti-competitive because the combined DME/ICE will have strong incentives to favor their new single-line route from the PRB to Muscatine Station over a two-carrier joint line haul with BNSF or UP. As a

¹ STB Finance Docket No. 33407, *Dakota, Minnesota & Eastern R.R. Corp. Construction into the Powder River Basin* (served Jan 30, 2002).

consequence, DME/ICE is unlikely to offer a proportional rate contract at all for the bottleneck segment of the route, much less a competitive bottleneck segment rate, similar to the proportional rate contract pursuant to which the coal currently moves from the Ottumwa, Iowa interchange with BNSF to the Muscatine Station.

In the “Bottleneck Decisions,”² the STB held, as a general matter, that a shipper is entitled to challenge the reasonableness of rates only on a through basis (*i.e.*, from origin to destination). *Bottleneck I* at *27-30. In reaching that conclusion, the STB denied relief to shippers who sought to challenge only the reasonableness of the rate over the bottleneck portion of a route, while relying upon competition to establish a reasonable rate over the non-bottleneck segments. The STB, however, also recognized a “contract exception” to this policy.³ It determined that, where a bottleneck carrier cannot serve both the origin and destination, and where a shipper secures a separately negotiated contract for the non-bottleneck segment of the route, the shipper may separately challenge a common carriage bottleneck rate. *Id.* at *30-31. Moreover, in *Bottleneck II* at *20.21, the Board stated that, if necessary, it would compel the bottleneck carrier to establish a separately challengeable rate.

Although, currently, Muscatine could require ICE to publish a common carrier proportional bottleneck rate and challenge an unreasonable rate before the Board, that regulatory protection will be lost as a consequence of the merger. That is because, in order for Muscatine to benefit from the contract exception, both the PRB origin and the Muscatine Station cannot be served by the same carrier. That requirement is satisfied today because ICE does not serve the PRB. Post-merger, however, the combined DME/ICE will serve both the origin and destination once DME completes its build-in to the PRB. Thus, the DME’s acquisition of ICE will adversely affect competition at the Muscatine Station, since it would deprive Muscatine of an existing regulatory remedy.

² *Central Power & Light Co. v. Union Pac. R.R. Co.*, Nos. 41242 et al., 1996 STB LEXIS 358 (served Dec. 31, 1996) (“*Bottleneck I*”), clarified 1997 STB LEXIS 91 (served May 1, 1997) (“*Bottleneck II*”), *aff’d in part*, *MidAmerican Energy Co. v. STB*, 169 F. 3d 1099 (8th Cir. 1999).

³ The “contract exception” was affirmed in *Union Pac. R.R. Co. v. STB* 202 F. 3d 337 (D.C. Cir. 2000).

Muscatine, therefore, asks the Board to condition its approval of the proposed transaction by requiring the combined DME/ICE (1) to maintain existing ICE interchange points at Kansas City, Missouri with UP and BNSF; at Ottumwa, Iowa with BNSF; at Clinton, Iowa with UP; and at Owatonna, Minnesota with UP; (2) to provide separately challengeable common carrier rates, upon request, from these four interchanges to the Muscatine Station; and (3) to waive all defenses to the "contract exception" based upon its service to both a PRB coal origin and the Muscatine Station.

Respectfully submitted,

Muscatine Power and Water Company

By its Attorneys,



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November 22, 2002

CERTIFICATE OF SERVICE

I hereby certify that I have served on this 22nd day of November, 2002, a copy of the foregoing "Comments and Request for Conditions" of Muscatine Power and Water Company by first-class mail on all parties of record in this proceeding.



Aimee L. DePew