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March 4, 2008

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BY HAND

The Honorable Anne K. Quinlan, Esq.
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

Re: STB Finance Docket No. 35081
Canadian Pacific Railway Co., et al. – Control –
Dakota, Minnesota & Eastern Railroad Corp., et al

Dear Secretary Quinlan:

Enclosed for filing in the above-referenced proceeding are an original and ten copies of the following: Arkansas Electric Cooperative Corporation Opposition Evidence and Argument and Request for Conditions (Public Version), and Arkansas Electric Cooperative Corporation Opposition Evidence and Argument and Request for Conditions (Highly Confidential Version) Also enclosed are three CD's, each containing a copy of these submissions.

If you have any questions or I can be of any assistance, please let me know.

Respectfully,


George W Mayo, Jr

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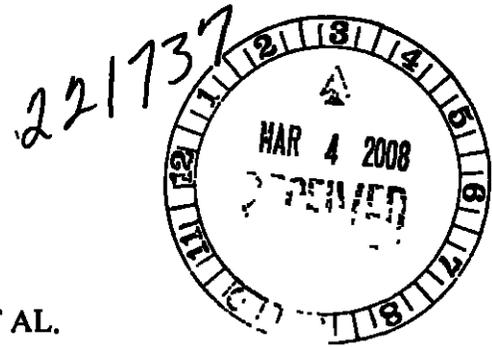


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Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD



FINANCE DOCKET NO. 35081

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

**ARKANSAS ELECTRIC COOPERATIVE CORPORATION
OPPOSITION EVIDENCE AND ARGUMENT AND
REQUEST FOR CONDITIONS**

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Dated March 4, 2008

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PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD



FINANCE DOCKET NO. 35081

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

ARKANSAS ELECTRIC COOPERATIVE CORPORATION
OPPOSITION EVIDENCE AND ARGUMENT AND
REQUEST FOR CONDITIONS

I. INTRODUCTION

Pursuant to the procedural schedule established in the Board's December 27, 2007 Decision, Arkansas Electric Cooperative Corporation (AECC) submits its opposition evidence and argument and request for conditions in response to the proposed control by Canadian Pacific Railway Company, et al. of the Dakota, Minnesota & Eastern Railroad Corporation, et al.

AECC is a membership-based generation and transmission cooperative that provides wholesale electric power to electric cooperatives, which in turn serve approximately 460,000 customers located in each of the 75 counties in Arkansas. In order to serve its member distribution cooperatives, AECC has entered into arrangements with other utilities within the state to share generation and transmission facilities. The largest of AECC's generation assets are its ownership interests in the White Bluff plant at Redfield, AR and the Independence plant at Newark, AR, each of which typically burns in excess of 6 million tons of Powder River Basin (PRB) coal annually. AECC holds a 35 percent interest in each of these plants (for which Entergy is the operator and majority

owner). In addition, AECC holds a 50 percent interest (with AEP) in the Flint Creek plant, which is located in Gentry, AR. This plant normally burns in excess of 2 million tons of PRB coal annually.

Because of the large volume of coal used by these plants, and the need for long-distance rail transportation to transport this coal, AECC has a direct interest in issues related to railroad competition, particularly as it relates to PRB rail capacity, infrastructure investments, and price/service options available to shippers. This interest has been heightened by AECC's repeated experiences with rail delivery shortfalls and the resulting imposition of costly burn restrictions at our plants. 1/

II. SUMMARY OF OPPOSITION EVIDENCE AND ARGUMENT

AECC neither supports nor opposes CP control of DME as such. 2/

Although the Applicants make a plausible case that such control will benefit the public and will not cause a significant reduction in railroad competition, critics of the proposal may raise equally plausible objections. AECC's concern is that the transaction as proposed could have unintended adverse effects on competition for the transportation of PRB coal. AECC proposes conditions that would eliminate these anti-competitive effects, without affecting other aspects of the transaction.

The anti-competitive effects of the proposed control of DME by CP arise from the chilling effects of the transaction on the (already tenuous) prospects that the

1/ A description of these experiences was presented in AECC's written submission dated July 5, 2007 in STB Ex Parte No. 672, Rail Transportation of Resources Critical to the Nation's Energy Supply.

2/ Canadian Pacific Railway Company and its affiliates are referred to herein as "CP". Dakota, Minnesota & Eastern Railroad Corporation and its affiliates are referred to herein as "DME". CP and DME are referred to jointly as the "Applicants".

DME Project will ever be constructed, and its prospective interference with the establishment of an independent rail outlet for PRB coal. DME has been engaged in a decade-long effort to construct such an independent rail outlet (the “DME Project”), so far without success. Although Applicants suggest that CP control of DME “will lend credibility to DM&E’s ongoing efforts to bring the [DME] PRB project to fruition” (Application [CPR-2, DME-2], at 10), the following two important aspects of the proposed transaction would make it less likely that the DME Project will be built if this application is approved:

- the imposition of up to \$1 billion (or more) in option payments if the DME Project were constructed; and
- CP’s interdependence with the incumbent PRB rail carriers, Union Pacific Railroad (UP) and BNSF Railway (BNSF).

Moreover, if CP does not build the DME Project, it would nevertheless own the right-of-way land for the project, which DME has acquired or is in the process of acquiring. This would artificially and unnecessarily impede the development of another route into the PRB that would have significant economic, environmental and public interest benefits.

These issues are described in detail in the accompanying Verified Statement of Michael A. Nelson (hereafter, “V.S. Nelson”)

Mr. Nelson is the transportation consultant who first informed the Board (and coal users) of the economic viability problems associated with the DME Project. His work reliably anticipated the difficulties DME would face in obtaining financing for the project, including changes over time in the competitive capabilities of the incumbent PRB carriers. See Dakota, Minnesota & Eastern Railroad Corporation Construction Into The Powder River Basin (scrved Dec. 10, 1998) (“DME Construction Decision”),

at 6 n. 9, 24-36. In combination with his extensive experience in the analysis of competitive issues associated with railroad mergers, Mr. Nelson brings unique qualifications and perspectives to which the Board should give considerable weight in its deliberations.

The following sections address the statutory and regulatory framework surrounding the Board's consideration of these adverse impacts and the remedial conditions that should be imposed.

III. ADVERSE IMPACTS ON LIKELIHOOD OF DME PROJECT CONSTRUCTION

As detailed further in V.S. Nelson, the DME Project from the outset has experienced difficulties associated with its lack of economic viability and the resulting unavailability of funding sources. While the Project's market and financial prospects have been promoted aggressively by DME, the 10 years that have passed since DME originally filed for construction authority have yielded neither strategic partners nor a viable financing plan. During this time the Project's original financial advisor developed and distributed a Project volume (tonnage) estimate far lower than that advanced by DME, and cautioned investors against assuming the Project was viable. ^{3/} More recently, the Federal Railroad Administration (FRA) echoed this conclusion in its rejection of DME's application for a federal loan under the RRIF program. ^{4/}

CP's President and CEO, Fred Green, acknowledged some of these problems in his Verified Statement (V.S. Green [CPR-2, DME-2]):

^{3/} See *Coal Week*, November 12, 2001.

^{4/} See letter from FRA Administrator Joseph H. Boardman to DME President Kevin Schieffer dated February 26, 2007, copy attached to V.S. Nelson

. DME still faces a number of significant hurdles before it can implement the PRB line project. DME has not completed the process of acquiring (through purchase, easement or condemnation proceedings) all of the right-of-way it needs to build the proposed PRB line. Nor has it executed agreement with PRB mines to connect with, and to operate over, their loading tracks and facilities. Most importantly, DME has not secured sufficient commitments from prospective coal shippers to route their traffic over the proposed PRB line to justify the very large investment required to build it. Finally, to date, DME has not been successful in arranging financing for the project.

The proposed acquisition of DME by CPR would not, in and of itself, eliminate all of these obstacles. [V.S. Green, at 5-6]

Although CP represents that it will “work diligently with DME to satisfy these preconditions to construction of the proposed PRB line” (Id., at 6), CP is not committed to building the PRB line, and argues that its acquisition of DME will be beneficial to its proponents “[r]egardless of whether the PRB line is ultimately built”. Id. The CP/DME transaction is carefully structured so as not to impose on CP any obligation to undertake the Project; CP would have the right, but not the duty, to build. This clearly reflects CP’s realization that a viable economic framework for the DME Project has not been established. 5/

Therefore, the Board has ruled that:

We do not consider the potential for introduction of another competitor into the PRB as one of [the anticipated] benefits [of the transaction]. Applicants state that they have not yet determined whether they would proceed with the construction of that line if this merger is approved. [Decision No. 2 in this Docket, served Nov. 2, 2007, at 7, n. 3.]

5/ At the time that CP announced its purchase of DME, CP’s Fred Green was quoted in the press as saying that “hopefully it won’t take as long as 36” months for CP to conclude its analysis and decide whether to proceed with the PRB extension. See www.winonadailynews.com/articles/2007/09/06/news/00lead.txt.

Thus, approval of the proposed acquisition of DME by CP would not assure that the DME extension would be built

While AECC is a long-time proponent of railroad competition, and has actively supported the DME Project, AECC accepts that the acquisition of DME by CP may not remedy the Project's viability problems. Moreover, AECC accepts the Board's position that the introduction of another competitor to the PRB should not be considered as a benefit of the proposed transaction. Nevertheless, the Board has an obligation to ensure that the proposed merger does not hinder whatever degree of viability the Project may otherwise possess (i.e., absent the transaction)

In this regard, there are two aspects of the proposed transaction that raise competitive concerns sufficient to warrant remedial action by the Board.

- the imposition of up to \$1 billion (or more) in option payments if the DME Project were constructed; and
- CP's interdependence with the incumbent PRB rail carriers, UP and BNSF.

Each of these is addressed below.

A. Option Payments

Under the terms of the proposed transaction, CP will need to make an additional payment of \$350 million if it commences construction of the Project before the end of 2025. Further additional payments of up to \$707 million would become due contingent upon the Project volume levels achieved.

These contingency payments would arise solely as a result of the merger, and act as an artificial deterrent to any decision by CP to proceed with the Project, any time in the next 17+ years. Before the proposed transaction, DME at present has no obligation to make any payments of this type. The Board's findings related to the DME

Project's financial viability and the public convenience and necessity did not contemplate or approve the payment of up to \$1 billion or more in fixed costs above and beyond the construction costs of the Project. See, DME Construction Decision.

Especially in light of the Project's demonstrated financial weakness, CP's obligation to make contingent payments in any significant amount – let alone \$1 billion or more – inevitably detracts from CP's willingness and ability to build the DME Project relative to the current situation under DME.

B. Interdependence with UP and BNSF

As discussed further in V.S. Nelson, CP possesses a degree of interdependence with UP and BNSF that DME does not. That is, if DME were to build its proposed line into the PRB to compete with UP and BNSF, it would be largely immune to threats of economic retaliation from UP and BNSF, e.g., through reduction or elimination of existing interline traffic with DME. If DME were hypothetically to succeed in attracting enough PRB coal traffic to undertake the Project, that volume of traffic would dwarf the entire current traffic base of DME, and no possibility of diversion of existing traffic by UP or BNSF could dissuade DME from competing with them for PRB coal business.

For CP, however, the exposure to losses of cooperation on flows other than PRB coal is comparatively much more significant. Virtually any flow handled by CP between points in the western U.S. and any competitively-served point would be subject to diversion away from CP if CP were to undertake the Project 6/

6/ CP's interline business with UP and BNSF was discussed by CP's Vice President-Marketing & Sales (Merchandise), Ray Foot, in his deposition. See Deposition of Ray Foot, Feb. 28, 2008, at 112-13; see also Id., at 21, 24-27, 35-37 (Appended as Attachment

The importance of interdependence with the western railroads was summarized succinctly by Canadian National CEO E. Hunter Harrison:

If I was in a position to get to the Powder River Basin, I would not be thrilled about driving into town after making a huge investment and meeting up with UP or BN in the alley ^{7/}

This factor adds an additional disincentive to CP proceeding with the DME Project if it controls DME, on top of the financial disincentive discussed in Part II. The new revenues from coal traffic that CP might expect to gain by building the extension into the PRB would to some extent be offset by losses of contribution from existing traffic interlined with UP and BNSF, undermining the chance of the Project achieving economic viability.

IV. OTHER PRB ACCESS INITIATIVES

Moreover, the adverse effect of the proposed transaction on potential rail competition for PRB coal goes beyond the DME Project. Not only would the transaction make it less likely that the DME Project would be built, but it would also substantially interfere with efforts to create another viable rail outlet for coal from the PRB, a line directly to Kansas City and points beyond.

As planned, the proposed DME Project would run almost due east to the upper Mississippi valley, and is oriented to serve markets in the upper midwest and eastward. As described in detail in V.S. Nelson, another route for coal from the PRB

A). Although Mr. Foot was presented by CP as its marketing witness in support of the Application, he was unable to say how much traffic CP interchanges with UP or BNSF.

^{7/} National Bank Financial advisory on Canadian Pacific Railway (November 6, 2007) at page 31, quoting a statement made by Mr. Harrison in May 2007, copy attached to V.S. Nelson.

could be constructed running southeast from the PRB towards Kansas City and St. Louis. Mr. Nelson shows that such a route would serve the high-volume core of the PRB market, and could be constructed with a profile that produces significant efficiency improvements in comparison with the operations of UP and BNSF. Such a route would be of great benefit to coal users in the lower Mississippi valley, the southeast and the entire south-central region of the U.S.

However, the western end of this Kansas City route would necessarily overlap and generally parallel portions of planned DME Project lines in Wyoming, particularly those portions associated with establishing access to the mines from the east. Therein lies the problem.

Although DME lacks the ability to build the Project, for the reasons summarized in Mr. Green's testimony, and others, it has been busily engaged in assembling land rights that would be needed for Project construction. As a result, if CP acquires control of DME it will thereby acquire some or all of the real estate needed to construct new rail connections to the PRB mines from the east. However, for the reasons described in Sections II and III (above), CP is likely to conclude that it is not in its interests to proceed with the Project.

Under these circumstances, CP might be able to block a new PRB-Kansas City route from connecting with the PRB mines. Although the proponent of a PRB-Kansas City line could use the power of eminent domain to acquire needed real estate interests from non-railroad landowners (as DME has been doing), the Board's recent

HolRail decision, 8/ raises substantial doubt that the proponent would be able to do so with respect to right of way owned – but not used – by CP for the DME Project.

Although 49 U.S. Code § 10901 (d) prohibits an incumbent carrier from blocking the construction of a Board-authorized line by refusing to permit the constructing carrier to cross its property (absent interference with the operation of the crossed line, and provided fair compensation is paid), in HolRail the Board held that the incumbent could block access to its right of way where the applicant sought to use it to construct a significant portion of its proposed line.

We are not suggesting that DME's current land acquisition program is intended to block access to the PRB by such a new Kansas City route. However, if CP's interdependency with UP and BNSF caused it not to construct the DME line-extension into the PRB, the same interdependency considerations could encourage CP to block access to the PRB via a new Kansas City line, which, if built, would compete with UP and BNSF. In this instance, nothing would compel CP to divest the right-of-way. Also, nothing would stop CP from pursuing non-rail uses of the land that would increase costs and otherwise impede prospective future rail use.

If CP/DME determines that it does not have the ability – or even the intention – to construct the Project, it would be contrary to the public interest for CP/DME to make non-rail use of the corridors assembled pursuant to rail construction authority, or to use possession of those corridors to obstruct development of a viable new line.

8/ HolRail LLC – Construction and Operation Exemption – In Orangeburg & Dorchester Counties, S.C., Fin. Dkt. No. 34421, served Feb. 12, 2007.

V. REQUESTED CONDITIONS

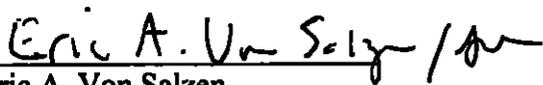
In light of the foregoing considerations, AECC requests that the Board place the following conditions on any approval of the proposed merger:

- A. Disallow contingency payments associated with CP proceeding with the DME Project; the parties should be required to report to the Board within six (6) months whether they have renegotiated their agreement to eliminate contingent payments, and any Board approval of the CP control of DME should be subject to Board approval of the renegotiated terms;
- B. Require CP to report to the Board by no later than September 1, 2009 its decision whether or not to undertake the Project,
- C. If CP reports to the Board that it is electing not to undertake the Project, or if it elects to undertake the Project but does not commence construction of the DME Project within five (5) years of the date of the Board order approving this transaction, or if CP fails to proceed with reasonable expedition to complete the construction of the Project, the real estate interests acquired by DME or CP for the project should be made available for purchase by any person (other than UP or BNSF, or any affiliate of either of them) that obtains Board authority to construct a rail line into the Powder River Basin coal fields; if the parties are unable to agree on the price for such interests, the Board should determine a price equal to the fair market value of the assets, and

D. Require that, until otherwise directed by the Board, CP preserve for rail use any real estate, easements or other forms of land access acquired by CP and/or DME for construction of the DME Project

These conditions are required to prevent the occurrence of competitive problems that can reasonably be anticipated as a result of the transaction as proposed.

Respectfully submitted,


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COUNSEL FOR ARKANSAS ELECTRIC
COOPERATIVE CORPORATION

Dated: March 4, 2008

ATTACHMENT A

**SELECTED PAGES FROM THE FEBRUARY 28, 2008
DEPOSITION OF RAY FOOT, DESIGNATED AS
"HIGHLY CONFIDENTIAL"**

**[The “Highly Confidential” Deposition Testimony
of Ray Foot is Redacted from this
“Public Version” of the Submission.]**

**VERIFIED STATEMENT
OF
MICHAEL A. NELSON**

1. Qualifications

My name is Michael A. Nelson. I am an independent transportation systems analyst with 28 years of experience in railroad competition and coal transportation. My office is in Dalton, Massachusetts. Prior to February 1984, I was a Senior Research Associate at Charles River Associates, an economic consulting firm in Boston, Massachusetts.

I have directed or participated in numerous consulting assignments and research projects in the general field of transportation. My work typically involves developing and applying methodologies based on operations research, microeconomics, statistics and/or econometrics to solve specialized analytical problems.

A considerable portion of my work has involved the analysis of competitive issues in railroad merger cases. On behalf of The Denver and Rio Grande Western Railroad (DRGW), Rio Grande Industries (RGI) and the merged SP/DRGW system, I performed such analyses in many of the western merger proceedings of the 1980's and early 1990's, including SP/ATSF, UP/MKT, SP/DRGW, UP/CNW and RGI's acquisition of the former CP/Soo (now ICE) line between Kansas City and Chicago (ICC Finance Docket No. 31505). I subsequently advised CP regarding competitive issues associated with the Conrail breakup transaction (STB Finance Docket No. 33888), and provided analytical support for CP in its settlement with NS and CSX. I provided testimony regarding competitive issues on behalf of the Committee to Improve American Coal Transportation (a coal shipper group) in the proceeding that defined the Board's current

merger rules, and on behalf of Arkansas Electric Cooperative Corporation (AECC) in DME's acquisition of IMRL/ICE.

A second major focus of my work has been the study of issues related to the creation of a new rail access to the Powder River Basin (PRB). In 1998, I provided testimony to this Board on behalf of the Mid-States Coalition for Progress regarding the proposal for such a line submitted by the Dakota, Minnesota & Eastern Railroad (DME) in Finance Docket No. 33407. Since that time, I have advised coal users individually and in groups regarding the viability and competitive implications of the DME proposal, as well as several alternative options I have identified that would avoid the difficulties associated with the DME proposal. In the final year of Board oversight of the UP/SP merger, I provided testimony on behalf of the Cowboy Railroad Development Company (CRDC), a group of utilities pursuing development of a new PRB outlet via Kansas City. More recently, I have worked on the development of technically and economically feasible options for an ultra-efficient, "World Class" line in the corridor between the PRB and Kansas City. Portions of this work were presented in September 2006 at the conference and annual meeting of the National Coal Transportation Association. Also, I am a consultant in the condemnation cases DME has initiated to acquire land in Wyoming.

This work has provided me with perspectives on competitive issues pertaining to a new PRB access that arise as a result of CP's proposed acquisition of DME.

I have also consulted to a number of shippers, railroads (U.S., Canadian and Mexican) and governmental bodies on various other railroad issues. Outside of my rail experience, I have analyzed the cost structure of the U.S. Postal Service in five dockets

before the Postal Rate Commission. In addition, I have assisted in the preparation of numerous other verified statements presented before various regulatory and legal bodies, and authored many technical reports and articles in transportation journals.

I received a bachelor's degree from the Massachusetts Institute of Technology in 1977. In 1978, I received two master's degrees from MIT, one in Civil Engineering (Transportation Systems) and one from the Alfred P. Sloan School of Management (Public Sector Management), with concentrations in economics, operations research and transportation systems analysis. My curriculum vitae is attached as Exhibit A.

2. Subjects Covered in This Statement

I have been asked by AECC to analyze and comment on the effects of the proposed CP/DME transaction on the likelihood that a new rail access to the PRB will be constructed. In responding to this request, I have considered the effects of the transaction on the likelihood that the DME Project will be constructed, as well as its effects on other prospectively viable initiatives for new PRB rail service. My analyses and comments in both of these areas are presented below.

3. Effects of Proposed Transaction on DME Project

A. Background Issues – Project Viability

Proper assessment of the effects of the proposed transaction on the DME Project must take into account the lack of economic viability that the Project has demonstrated to date. While the Project's market and financial prospects have been promoted aggressively by DME, the 10 years that have passed since DME originally filed for construction authority have yielded neither strategic partners nor a viable financing plan.

Major parameters affecting the viability of a major rail project of this type include the capital cost, attainable rates and the volume of traffic moved. In approving the transportation aspects of the Project, the Board adopted estimates for these parameters based primarily on information submitted by DME in its original application. In adopting DME's estimates, the Board explicitly stated that it was "(g)iving DME every reasonable benefit of the doubt", that the financial markets would determine whether the Project was worthy of investment, and that there was "...no reason... to deny DM&E the opportunity to take its proposal to the financial markets."¹

In the ten years that have elapsed since DME filed its application, many developments have shed light on the validity of the assumptions upon which the asserted economic viability of the Project was premised. A brief review of these developments helps to clarify the current status of the Project and the reasons why it has not been undertaken.

Capital Cost - The project was initially assumed to entail capital costs of \$532 million for approximately 280 miles of new line construction, plus \$876 million for approximately 598 miles of rehabilitation of existing DME main line, for a total of \$1.408 billion. As a result of some combination of price inflation, environmental mitigation costs and possible over-optimism in DME's original estimate, the current estimate of Project capital costs provided by CP is \$3.0 billion. Put another way, to be viable the Project would now need to yield a contribution sufficient to amortize an amount more than double the original estimate.

¹ STB Finance Docket No. 33407, Dakota, Minnesota & Eastern Railroad Corporation Construction into the Powder River Basin, Decision served December 10, 1998 (hereafter, "1998 Decision")

Rates - The project was premised on the achievement of “netback” rates that were estimated based on an assumed competitive rate level that initially was 8.25 mills per ton-mile and increased each year after 2002. Holding aside issues related to infirmities in the details of the netback computation procedures,² and the fact that the Board itself was unable to verify all of DME’s computations,³ history has shown that the underlying premise of increasing competitive rates was simply incorrect. As shown in a recent report prepared by the Congressional Research Service, competitive rates on new PRB rail transportation contracts declined consistently from 1998 through 2004.⁴ This decline corresponded quite closely to the competitive rate projection provided to the Board in 1998 by the Mid-States Coalition for Progress (reprinted here for convenience as Table 1).

PRB rail rates undoubtedly increased during 2005 and 2006. However, this corresponds to the time when UP operated under an embargo on new traffic as a result of the PRB Joint Line infrastructure breakdown, leaving BNSF in a position to engage in de facto monopoly pricing. The Joint Line has been repaired and the embargo has now been lifted. Even though more recent pricing information is not yet available, there is no reason to anticipate that the monopoly pricing and rate increases observed in 2005 and 2006 will continue into the future. This is particularly true in a scenario where, as here, entry by a new competitor is being assumed.

Volume – It was assumed that the Project would attract coal volumes increasing from 40 million tons in Year 1 of operation to 100 million tons in Year 6. The projection

² These were discussed extensively in the record of Finance Docket No. 33407

³ 1998 Decision at page 38, footnote 92.

⁴ See CRS (Congressional Research Service) Report for Congress, Rail Transportation of Coal to Power Plants Reliability Issues (September 26, 2007) Order Code RL34186 at page 55, Figure 19.

that DME would be able to achieve an annual coal volume of 100 million tons was based on a methodology supplied by DME that assumed the low cost of Wyoming PRB coal would basically drive other coals from the marketplace.

The passage of time has confirmed that this assumption is fundamentally incorrect. Despite its low cost, Wyoming PRB coal has not dislodged other coals from the marketplace, and is not expected to do so in the foreseeable future. As shown in DOE's "Annual Energy Outlook (AEO)", most sources of coal outside Central Appalachia have been basically stable or increasing production and are expected to continue to do so over the next 20 years. While the Wyoming PRB coal that the Project would move is certainly a large and growing segment of the market, the evidence does not support the proposition that such coal will dominate the market in the manner and to the degree assumed in the original DME projection. As a result, that forecast materially overstated the volumes for which DME may compete within the universe of plants included in the original study.

Partially offsetting this overstatement is the fact that, contrary to the situation that existed in 1998, there are now several new coal-fired generating stations that have come on-line or are in advanced stages of development or construction. While some of this capacity will use non-PRB coals, the original study did not contemplate the addition of any such capacity. In this respect, it may have omitted consideration of some volumes that may move in future years.

Nevertheless, DOE data completely refute the proposition that the DME Project could be expected to attract a volume even close to 100 million tons. As shown in Table 2, only about 19.4% of Wyoming coal moves to markets that the Project is geographically oriented to serve. Put another way, a little over 80% of Wyoming coal

moves in flows that the Project could not effectively serve. Applying the 19.4% figure to the total volume of Wyoming coal production in 2015 (as estimated by the U.S. Department of Energy in the 2007 Annual Energy Outlook - Table 112) yields a total of approximately 98 million tons of Wyoming coal that is expected to move to markets the Project is geographically oriented to serve.

For the Project to move 100 million tons would represent a 102% share of the relevant market indicated by DOE data. Above and beyond the logical impossibility that DME would capture the entire market (and then some), a high share of any type is completely inconsistent with the competitive capabilities of UP and BNSF, the fact that many plants in the target markets are served exclusively by UP and/or BNSF, and the reliance of many plants on other western coals originated only by UP and BNSF.

In 1998, without fully taking into account all of the factors that might limit DME's ability to attract traffic, I estimated a volume of 42 million tons in my testimony on behalf of the Mid-States Coalition for Progress. In 2005, taking such factors into account, and incorporating relevant new information (including the planned closure of large coal-fired plants operated by Ontario Power Generation [OPG] in the Project's core "Great Lakes" market segment), I estimated a volume of 29 million tons. In 2007, I updated the 2005 analysis, and estimated a volume of 30 million tons, which would increase to 37 million tons if CP ownership of DME were assumed.

The 2005 and 2007 estimates are corroborated by press reports in 2001 of a "most likely" volume estimate of 25 million tons per year developed by Morgan Stanley, the

Project's original financial advisor.⁵ Morgan Stanley reportedly advised its clients not to interpret news regarding the DME Project as implying that the Project would proceed.

While my studies have indicated that CP might be able to effect a modest increase in Project volumes through its position as the destination carrier for a small number of plants that the Project might serve, the overwhelming preponderance of evidence indicates that the original cost, rate and volume assumptions used to justify the Project are inoperative, and that the Project is not economically viable under foreseeable circumstances. This is consistent with (a) the inability of DME to supply a financing plan with its original construction application; (b) the inability of the Project to attract commitments from any railroads or other potential strategic partners; (c) the findings of FRA in its rejection of DME's request for a loan to finance the Project under the RRIF program⁶; (d) the fact that the proposed merger provides CP with an option, but no obligation, to undertake the Project; and, (e) the adverse reactions of the investment community to the proposition that CP would elect to proceed with the Project.

B. The Public Interest Dilemma

From a public interest perspective, this situation creates a substantial dilemma for the Board. On the one hand, if the Board concludes from the preponderance of the evidence that the Project is not viable, it would not be consistent with the public interest for CP/DME to retain the construction authority it was granted or any assets or rights it obtained pursuant to that authority. On the other hand, if the Board leaves open the theoretical prospect that, despite the evidence, the Project still might somehow be built, it

⁵ See Coal Week, November 12, 2001.

⁶ See letter from FRA Administrator Joseph H. Boardman to DME President Kevin Schieffer dated February 26, 2007, attached as Exhibit B.

is appropriate and necessary for the Board to consider and address any adverse impacts the proposed transaction may have on the Project.

Conceptually, the Board could resolve this situation by rescinding the construction authority and taking steps to restore the pre-application situation. However, in light of CP's representations that it is continuing to explore the viability of the Project, the Board may choose not to preclude that exploration. The remainder of this statement assumes that the Board does not elect to rescind the construction authority, but instead permits it to remain in effect in CP's acquisition of DME.

C. Competitive Problems

There are two aspects of the proposed transaction that materially impede whatever degree of viability the Project is assumed to have. These issues raise competitive concerns sufficient to warrant remedial action by the Board, and include the following:

- the imposition of up to \$1 billion (or more) in option payments if the DME Project were constructed; and
- CP's interdependence with the incumbent PRB rail carriers, UP and BNSF.

Each of these is addressed below.

i. Option Payments

Under the terms of the proposed transaction, CP will need to make an additional payment of \$350 million if it commences construction of the Project before the end of 2025. Further additional payments of up to \$707 million would become due contingent upon the Project volume levels achieved.

These contingency payments would arise solely as a result of the merger, and act as an artificial deterrent to any decision by CP to proceed with the Project in the

foreseeable future. Before the proposed transaction, DME at present has no obligation to make any payments of this type. The Board's findings related to the DME Project's financial viability and the public convenience and necessity did not contemplate or approve the payment of up to \$1 billion or more in fixed costs above and beyond the construction costs of the Project. Such contingency payments would effectively increase by one-third the construction costs faced by CP, and raise the capital requirement to approximately 2.5 times the level envisioned in the Board's approval of the Project.

Especially in light of the Project's demonstrated financial weakness, CP's obligation to make contingent payments in any significant amount – let alone \$1 billion or more - inevitably detracts from CP's willingness and ability to build the DME Project relative to the current situation under DME. Pursuant to the Board's mandate to prevent economically unsound conditions in transportation, and the public benefits the Project would have if it were viable, it would be inconsistent with the public interest for the Board to permit substantial contingency payments to be made on the basis of a decision by CP to exercise an approved construction authority.

ii. Interdependence with UP and BNSF

As one of very few Class I railroads in North America, CP possesses a degree of interdependence with UP and BNSF that DME does not. Even if it were assumed that capital cost, revenue and volume considerations would support Project construction, such interdependence would likely impede any decision by CP to proceed with the project.

If DME were to build its proposed line into the PRB to compete with UP and BNSF, it would be largely immune to threats of economic retaliation from UP and BNSF, e.g., through reduction or elimination of existing interline traffic with DME. If DME

were hypothetically to succeed in attracting enough PRB coal traffic to undertake the Project, that volume of traffic would dwarf the entire current traffic base of DME, and no possibility of diversion of existing traffic by UP or BNSF could dissuade DME from competing with them for PRB coal business.

For CP, however, the exposure to losses of cooperation on flows other than PRB coal is comparatively much more significant. Virtually any flow handled by CP between points in the western U.S. and any competitively-served point would be subject to diversion away from CP if CP were to undertake the Project. While the Project would obviously protect CP against losses of PRB coal traffic, and CP's direct connection with KCS at Kansas City could mitigate problems on traffic to/from Mexico, CP would have no place to hide for the universe of traffic that moves between basically any point in the western US and (a) any common point CP has with CN; (b) any common point CP has with any other carrier that can offer even a loosely-viable route in cooperation with UP or BNSF; and (c) any point in Canada CN can serve through interswitching. It is also reasonable to expect that even for traffic to/from CP's exclusively-served points, UP and BNSF would tend to favor sourcing from other carriers for virtually any fungible commodity.⁷

The importance of interdependence with the western railroads has been summarized succinctly by Canadian National CEO E. Hunter Harrison:

⁷ The Board's new merger rules explicitly recognize the significance of source competition and the market power held by the major rail systems over patterns of commodity flows.

“If I was in a position to get to the Powder River Basin, I would not be thrilled about driving into town after making a huge investment and meeting up with UP or BN in the alley.”⁸

While CP management professes to be unconcerned about this risk, and unaware of the volume of traffic potentially affected by it, the Board should apply its expertise to ensure that this issue is properly taken into account in the imposition of any conditions. In particular, the Board should ensure that any decision by CP to shelve the Project does not entomb authorities, real estate, easements, rights and other assets that prospectively could be used by other parties not burdened by interdependency considerations. A specific situation of this type is described in the following section.

4. Effects of the Proposed Transaction on Other Initiatives

If CP’s application to control DME is approved by this Board, CP will own the real estate, easements and other rights and assets that DME has acquired or is in the process of acquiring for the DME Project, plus any such assets that CP acquires post-merger, even though CP is not committed to building the DME Project. Though it is virtually certain that CP will not pursue construction of the Project (for the reasons discussed above), CP will nevertheless control right-of-way that would be essential to the creation of an alternative route for PRB coal movements.

As discussed in Section A, below, there is such an alternative route available that would address effectively the basic problems that have prevented the DME Project from achieving economic viability.

⁸ National Bank Financial advisory on Canadian Pacific Railway (November 6, 2007) at page 31, attached as Exhibit C

As discussed in Section B, below, CP's ownership of such right of way would artificially and unnecessarily interfere with efforts to create such an alternative rail outlet for coal from the PRB.

A. The PRB - Kansas City Alternative

The fundamental economic problem of the DME Project has been that it would not serve a large enough volume of traffic with enough of an advantage to justify its considerable costs. The \$3.0 billion investment in the DME Project would create a route of approximately 810 miles to a primary outlet at Winona, MN. As discussed in Section 3.A, the geographical orientation of the DME Project leaves it able to effectively serve only about 20 percent of the PRB market. Within this limited segment of the market, DME would hold a mileage advantage over UP and BNSF routes for only a small amount of traffic. At the same time, DME would be operating with a cost structure that is, at best, on par with UP and BNSF's past operations, but is already behind current and planned future productivity levels. In particular, DME's planned operations were based on train lengths of 115- to 135-cars. However, UP has already begun operations using trains in excess of 140 cars, and has announced plans to establish a capability to move 150-car trains, at least in major corridors. All else equal, moving more coal with one train slot, one crew, etc. translates to higher productivity and lower unit costs.

These same fundamentals provide the foundation for economic viability that would be enjoyed by a new, direct route from the PRB to Kansas City. First, the PRB is closer to Kansas City than it is to Winona. Compared to the 810 mile rail distance from the PRB to Winona via DME, feasible alignments for a new route to Kansas City would provide for rail distances in the 710-720 mile range. While the DME Project achieves

some cost savings relative to new construction through its use of existing right-of-way, the shorter overall length of the Kansas City line leads, all else equal, to an approximate parity of capital cost.

For roughly the same cost as the DME Project, a direct line to Kansas City would be geographically oriented to serve the core of the PRB market. As shown in Table 3, a new line serving the Kansas City corridor would be geographically oriented to serve nearly 60 percent of the PRB market.

While for many flows an incumbent railroad may have a position of strength relative to a new entrant by virtue of having had the first opportunity to pick the route that is best suited to the movement, this does not apply to PRB flows in the corridor to Kansas City. In fact, aside from the PRB Joint Line and the Connector Line, virtually all of the lines used by UP and BNSF to move PRB coal in this corridor were designed and constructed without any awareness or consideration of the need that now exists for such volume movements. Though they move high volumes of coal, UP and BNSF's lines in the PRB-Kansas City corridor were not designed for this task, and generate an operating cost structure that is inferior to that which can be achieved by incorporating this high volume, heavy-haul requirement into the design.

There are several ways a new line from the PRB to Kansas City would be able to "design in" systematic operating cost advantages in comparison with UP and BNSF. First, the new line would operate with a substantial mileage advantage for movements to/through Kansas City. Using the Black Thunder Mine as a point of reference, a new route to Kansas City in the 710-720 mile range would compare to a UP route of approximately 767 miles and a BNSF route of approximately 828 miles.

While such mileage savings alone are considerable, especially for high volumes of heavy-haul traffic, a new route from the PRB to Kansas City would also have the opportunity to incorporate additional design characteristics that would provide lower operating costs in comparison with UP and BNSF. The principal way in which the design of a new, purpose-built line to Kansas City could create an improved cost structure compared to the cost structure of the incumbents is through the “ruling grade against loads” possessed by the route’s profile. With a ruling grade of approximately 1.0%, UP and BNSF are theoretically capable of moving a 150-car PRB coal train under normal conditions with four 4400 hp AC locomotives. However, by taking advantage of the favorable terrain and elevation change between the PRB and Kansas City, a new line could, without extraordinary effort, achieve a ruling grade of 0.5 percent. On such a line, the same 4 locomotives and crew that could move a 150-car train on UP or BNSF could move a train containing 300 cars. This translates to a formidable advantage in the productivity of crew and locomotive resources.

Trains of such lengths are not common in the U.S., but have been used successfully elsewhere in the world where they are consistent with traffic volume and topography considerations:

- The company known until 2007 as CVRD historically hauled iron ore in 240-car trains about 800 km from the interior of Brazil to the coast for export, and has plans for 340-car trains;
- Hamersley Iron in Australia hauls 226-car trains of iron ore (23,500 net tons per train), normally with 3 locomotives;

- The Sishen-Saldanha Railway in South Africa, the Mt. Newman Railway in Australia, and the QNSL in Quebec are understood to have analogous capabilities.

For this reason, I refer to a heavy-haul line designed to provide low ruling grades and support ultra-efficient operation of long trains as a “World Class” line.

A new route also produces opportunities to make more efficient use of fuel. First, by minimizing “total rise” (i.e., the sum across uphill segments of elevation changes) a new route can minimize unnecessary fuel consumption associated with lifting the train against the force of gravity. Second, at projected volume levels, the terrain in the vicinity of the Basin may justify partial electrification of the line. This would enable the ascent of trains out of the Basin to be powered at least in part by energy captured through regenerative braking on the substantial descent experienced by loaded trains southeast of the Basin.⁹

A new World Class line to Kansas City provides a realistic opportunity to achieve a broad range of public benefits. With more productive use of crews, locomotives and fuel in comparison with the incumbent railroads, a new World Class line to Kansas City would produce significant reductions in resource consumption. At the same time, lower fuel use equates to lower emissions of diesel combustion by-products. Also, by locating the line away from developed areas, it may produce significant reductions in the community impacts associated with unit train movements.

⁹ Traversing similar terrain, the Milwaukee Road between Avery, ID and Harlowton, MT was electrified in the early 1900's.

B. Blocking The World Class Line's Access To The PRB

Attainment of the benefits of a new World Class line to Kansas City is jeopardized by a future scenario in which CP controls the land that such a line would need to reach the mines, but decides (for the reasons outlined above) not to construct the DME Project. Because of CP's interdependencies with UP and BNSF described previously, CP under those circumstances would have a strong incentive not to facilitate entry by a new carrier to compete with UP and BNSF for PRB coal business, a development that UP and BNSF would certainly view as unwelcome.

At the current time, it is not possible to specify exactly what land a new World Class 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. In addition, the merits of partial electrification of the line near the Basin and the preferred location of yard facilities have not been determined. It should be noted, however, that north of whatever preferred location is determined for the primary staging yard in Wyoming, the trains would move in conventional consists of no more than 150 cars due the limitations of mine loadout facilities. (The World Class operations would take place to the south and east of that yard.) Because the operations at and near the mines would be conventional, there is no reason to anticipate that the preferred alignment in that area would differ materially from that already approved for the DME Project ¹⁰ Moreover, even a casual inspection of the DME alignment (see Figure 1) shows that northwest of Edgemont, SD the DME line is geographically oriented in the general direction of Kansas City (i.e., to the southeast), and only turns toward Minnesota east of that point.

For these reasons, it is reasonable to anticipate that the land held by CP would be in the path of at least the northwest end of a new World Class line toward Kansas City, and that CP likely will not cooperate voluntarily with such an initiative. Under these circumstances, the ability of a new World Class line to assemble the land it would need is placed in doubt. While rail construction authority normally can be assumed to convey needed eminent domain authority, the Board's ruling in Finance Docket No. 34421 appears to leave open the possibility that the type of "parallel" construction in which the World Class line would likely need to engage on CP-owned right-of-way would not be approved.

For these reasons, Board attention is needed to ensure that CP obtaining control of real estate interests in and near the Basin cannot be used to disadvantage the development of a new World Class line to Kansas City. Such a line would prospectively convey substantial public benefits, and enjoys substantial support for its economic viability from fundamental cost, volume and revenue considerations.

¹⁰ This implies that the costly mine access trackage of a new World Class line could prospectively be shared with DME. For this reason and others, I believe there would be tangible economic benefits for the economic viability of the DME Project if the World Class line were constructed.

Table 1

Forecast of Nominal Competitive Rail Rate Level for PRB Coal Provided in 1998

Year	Rate (mills per ton-mile)
1996	8 25
1997	8 09
1998	7 92
1999	7 84
2000	7.77
2001	7 69
2002	7 61
2003	7 53
2004	7 46
2005	7 39
2006	7.31
2007	7 24
2008	7 17
2009	7 09
2010	7 02

Source STB Finance Docket No 33407, Mid-States Coalition for Progress's Brief and Evidence in Opposition to Dakota, Minnesota & Eastern Railroad's Application (August 31, 1998), Verified Statement of Michael A. Nelson, Exhibit 4 at page 36.

Table 2

Wyoming Coal Tonnage Moving in Flows DMF is Geographically Oriented to Serve

Destination State	2006 Tons
South Dakota	1,932
Minnesota	7,192
Wisconsin	20,786
Michigan	16,568
IL (33%)	17,327
New York	3,136
IN (50%)	8,461
OH (50%)	5,284
PA	1,112
NJ	68
New England	0
Subtotal	81,866
Wyoming Total	421,800

Source. U.S. Department of Energy/Energy Information Administration, Cost and Quality of Fuels for Electric Plants 2005 - 2006 Edition, Table 16 A. Origin and Destination of Coal for Electricity Generation By State Total (All Sectors) 2006

Table 3

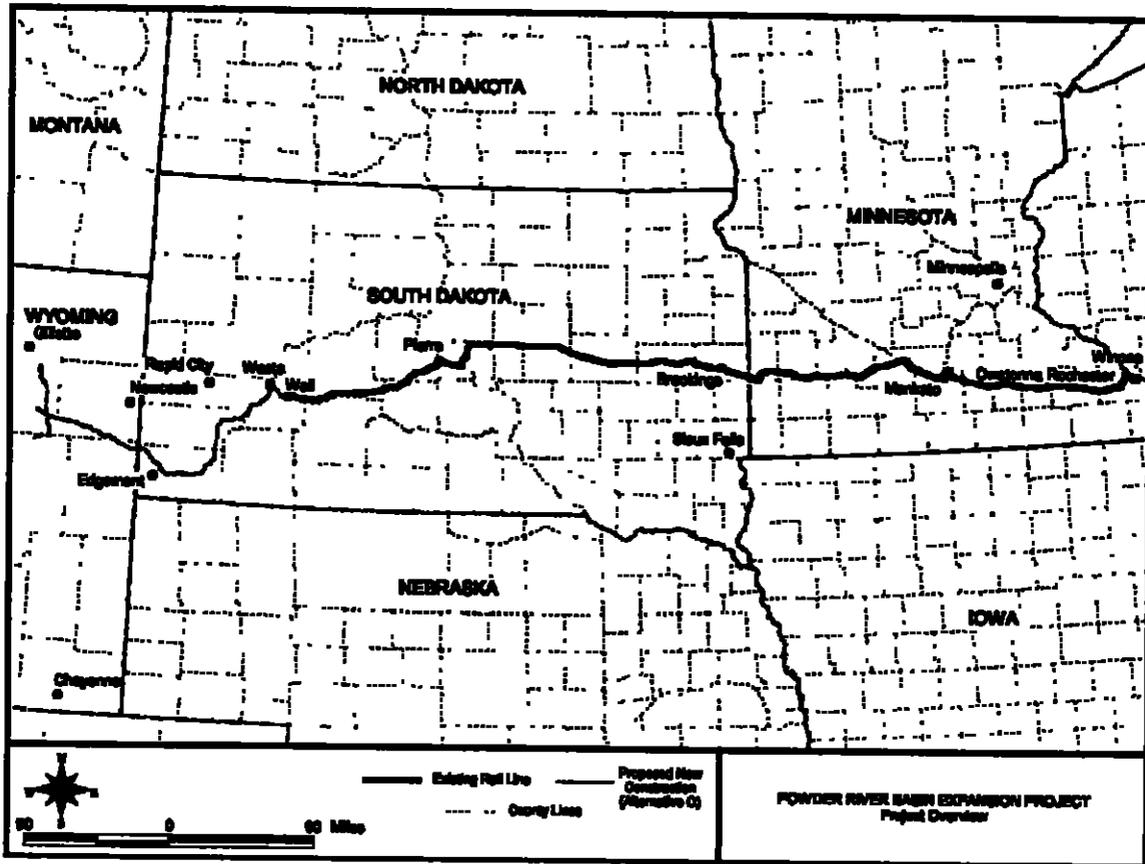
Wyoming Coal Tonnage Moving in Flows a New PRB-Kansas City Line Would be Geographically Oriented to Serve

KC/STL	2006 Tons
Nebraska	13,042
Kansas	22,056
Missouri	46,519
Arkansas	15,428
IL (67%)	35,178
IN (50%)	8,461
OH (50%)	5,284
Oklahoma	21,748
Texas (50%)	28,191
Louisiana	11,813
Alabama	12,542
Georgia	15,186
Tennessee	11,280
Subtotal	246,728
Wyoming Total	421,800

Source U.S. Department of Energy/Energy Information Administration, Cost and Quality of Fuels for Electric Plants 2005 - 2006 Edition, Table 15 A. Destination and Origin of Coal for Electricity Generation By State: Total (All Sectors) 2006

Figure 1

DME Alignment



Source: Surface Transportation Board.

Exhibit A

Curriculum Vitae – Michael A. Nelson

MICHAEL A. NELSON

131 North Street
Dalton, MA 01226

EDUCATION

M.S. Civil Engineering, Massachusetts Institute of Technology

M.S. Management, Alfred P. Sloan School of Management, Massachusetts Institute of Technology

B.S. Management, Massachusetts Institute of Technology

Concentrations in transportation systems analysis, economics and operations research.

EXPERIENCE

Mr. Nelson is an independent transportation systems analyst. He provides management and economic consulting and litigation support. His work typically involves developing and applying methodologies based on operations research, microeconomics, statistics and/or econometrics to solve specialized analytical problems, as illustrated by the following examples of his experience:

Railroad

On behalf of Arkansas Electric Cooperative Corporation (AECC), Mr. Nelson submitted testimony to the Surface Transportation Board (STB) in Ex Parte No. 657 (Sub-No. 1) regarding specific proposals to improve the "stand alone" cost (SAC) methodology used to assess the reasonableness of contested rail rates.

Also for AECC, Mr. Nelson analyzed issues related to rail transportation service in the supply of coal to two potential sites for a new electric generation facility in Arkansas. This work included analysis of likely rate levels in light of movement- and site-specific competitive and operational considerations.

On behalf of a group of coal users, including Ameren, Dominion and AECC, Mr. Nelson submitted a verified statement to the Surface Transportation Board (STB) in Finance Docket No. 34421. This testimony addressed technical, operational and public interest considerations associated with a proposal to permit the construction of a competing rail line within the unused portion of an existing rail carrier's right-of-way.

Mr. Nelson has developed information to assist coal users in responding to the coal supply problems created by the May 2005 derailments and subsequent rail throughput constraints on the Powder River Basin (PRB) Joint Line. He has identified potential actions by coal users to improve PRB coal throughput, transportation issues for substitute coals and fuels, and steps to facilitate rail cooperation.

In response to a public request by the STB for suggested improvements in the SAC methodology, Mr. Nelson provided written and oral testimony in STB Ex Parte No. 657. This testimony identified potential methodological refinements in 10 specific areas, and was cited by Commissioner Mulvey for its high responsiveness to the Board's request.

Mr. Nelson is the founder of the Coalition to Foster Improved Rail Economy ("CoalFIRE"). This initiative is open on a subscription basis to current and prospective PRB coal users. It identifies and promotes awareness of specific potential group actions to improve the competitiveness of PRB rail transportation options within the current legal and regulatory framework. Over 20 specific potential group actions have been identified to date, including steps to add/restore competitors, increase the effectiveness of existing competitors, increase customer leverage and develop external pressure for reasonable competitive conduct by the current PRB rail duopoly.

For a powerplant developer, Mr. Nelson analyzed issues related to rail transportation service in the supply of coal to two potential sites for a new generation facility in Oklahoma. This work included analysis of likely rate levels in light of movement- and site-specific competitive and operational considerations.

Mr. Nelson prepared a 10-year forecast of expected changes in rail productivity and competitive rail rate levels for the movement of coal from the PRB. This forecast has been

provided on a subscription basis to interested parties, and is believed to be the only such forecast that is based on analysis of specific anticipated productivity enhancements (as opposed to extrapolation of past trends). Subscribers have used this information to analyze the merits of converting to PRB coal, to support contract negotiations and for other strategic and planning purposes.

For a powerplant developer, Mr. Nelson analyzed issues related to the anticipated reliance on competitive rail transportation service in the supply of coal to a planned new generation facility in Missouri. This work included analysis of likely rate levels in light of unique limitations faced by one of the competing rail lines.

On behalf of a group of over two dozen major electric utilities, Mr. Nelson provided strategic guidance and analytical support, and participated in negotiations with a Class I railroad regarding prospective multi-billion dollar investments by the utilities to improve their coal transportation options.

For a midwestern utility, Mr. Nelson assisted in the development of improved transportation options for a large coal-fired generating station. As part of this work, he reviewed an analysis performed by a major engineering contractor, and identified a series of cost-effective options that had been overlooked. He then provided strategic guidance and analytical support in the development process.

For a mining company, Mr. Nelson analyzed the transportation options that would be available for a prospective new facility in western Colorado. This included detailed consideration of the "new facilities" condition imposed by the STB in its approval of the merger of the Union Pacific (UP) and Southern Pacific (SP) railroads.

For AECC, Mr. Nelson submitted statements to the STB in Finance Docket Nos. 34177 and 34178. These statements addressed the actual and potential competitive roles of I&M Rail Link (IMRL) in domestic coal transportation, and the prospective impacts associated with control of IMRL by the Dakota, Minnesota and Eastern Railroad (DME).

On behalf of the Town of Easton (MA), representing a coalition of towns, Mr. Nelson identified and corrected a

series of substantial errors and inconsistencies in the Final Environmental Impact Report for the proposal by the Massachusetts Bay Transportation Authority (MBTA) to provide new commuter rail service to New Bedford and Fall River. This extended Mr. Nelson's previous analyses, which had identified and documented a series of significant errors in the development of the MBTA's conclusions regarding the alleged infeasibility of a key alternative route. Mr. Nelson also identified and made preliminary assessments of other alignment and operational possibilities that had been inappropriately omitted from consideration.

As a subcontractor to The Brattle Group, an economic consulting firm, Mr. Nelson provided guidance to the Mexican railroad TFM regarding the identification of different types of competitive and efficiency issues raised by the proposed merger of the other two principal Mexican railroads (Ferromex and Ferrosur). The merger was denied by both the national transportation and antitrust authorities.

For the Cowboy Railroad Development Company (CRDC), a group of major electric utilities, Mr. Nelson directed the identification and evaluation of alternative routes and strategies for creating a new railroad access across Nebraska to coal mines in the PRB.

As part of the work for CRDC, Mr. Nelson analyzed the degree to which the UP/SP merger foreclosed competitive routes that could be offered by a new PRB rail carrier. The results of this analysis were submitted to the STB in Finance Docket 32760 (Sub-No.21), which provided oversight of the UP/SP merger and its impacts.

For a major electric utility, Mr. Nelson performed a detailed analysis of rail transportation options for PRB coal movements to the Sunflower Electric generating station at Holcomb, KS. The results of this analysis were used by the utility in assessing the merits of investing in a planned expansion of that facility.

For an assortment of major electric utilities and power producers, Mr. Nelson has performed detailed analyses of rail transportation options, including build-outs, for a total of over 30 large coal-fired generating stations. The results of these analyses have served as the basis for

management decisions that are projected to save many millions of dollars in fuel costs.

On behalf of AECC, Mr. Nelson submitted a statement to the STB in Finance Docket 32760 (Sub-No.21). This statement addressed competitive issues resulting from the UP/SP railroad merger, with a particular focus on the effect of trackage rights compensation levels.

On behalf of the Committee to Improve American Coal Transportation (IMPACT), Mr. Nelson submitted a statement to the STB in Ex Parte 582 (Sub-No. 1). This statement addressed a wide range of issues related to rail merger policy.

For a major Class 1 railroad, Mr. Nelson assisted senior management staff in the design and evaluation of a potential construction project.

For the Mid-States Coalition for Progress (a group of landowners), Mr. Nelson analyzed the proposal by DME to construct an extension of its line into the PRB. Mr. Nelson developed estimates of DME's volumes and unit revenue levels on the basis of a plant-by-plant analysis, taking into account likely future market conditions and the competitive capabilities of the UP and Burlington Northern Santa Fe (BNSF). Mr. Nelson's analysis was filed at the STB (Finance Docket No. 33407).

For the National Railroad Passenger Corporation (AMTRAK), Mr. Nelson investigated issues related to the definition of "express" traffic that AMTRAK is permitted to carry (STB Finance Docket No. 33469). Mr. Nelson analyzed relevant data from the STB Rail Waybill Sample and the Census of Transportation, and investigated the factors affecting use of Amtrak by the U.S. Postal Service. The definition of "express" eventually adopted by the STB was consistent with Mr. Nelson's findings.

For the Moffat Tunnel Commission (Colorado), Mr. Nelson analyzed the factors affecting future railroad use of that tunnel, which traverses the Continental Divide and serves the principal Colorado coal fields on the UP line that formerly was the Denver and Rio Grande Western Railroad (DRGW) main line west of Denver. The tunnel had historically been owned by the Commission (and leased to the railroad), but under sunset legislation was being

offered for public sale. Mr. Nelson's analysis included study of the utilization of Colorado/Utah vs. PRB coals in the context of the central corridor conditions imposed by the STB in the UP/SP merger.

For Canadian Pacific Railway (CP), Mr. Nelson performed detailed studies of competitive and traffic issues associated with the acquisition and break-up of Conrail by Norfolk Southern and CSX (Finance Docket No. 33388). These studies included analyses of competitive issues in the area served by the former Delaware and Hudson (a CP subsidiary) and in the midwest, competitive issues involving coal traffic throughout the Conrail service area, and traffic impacts associated with potential remedial conditions. CP relied upon the results of Mr. Nelson's studies in reaching its settlements with Applicants in that case.

For SP, Mr. Nelson provided expert testimony before the Interstate Commerce Commission (ICC) in Finance Docket No. 32133 (the proposed control of C&NW by UP). This testimony was based primarily on Mr. Nelson's analyses of data from the Rail Waybill Sample, which identified substantial numbers of specific flows for which the proposed transaction created different types of potential competitive problems (including losses of point-to-point competition, source competition, competition in grain originations, and shipper leverage). In addition, Mr. Nelson's testimony utilized Rail Waybill Sample data to demonstrate the occurrence of merger-related foreclosure from previous UP acquisitions, and provided statistical support for SP's traffic study. Mr. Nelson also conducted a detailed investigation of the impact of the merger on source competition for western coal.

For Rio Grande Industries (RGI), Mr. Nelson provided expert testimony before the ICC in Finance Docket No.'s 31505 (the proposed acquisition by RGI of Soo's Kansas City - Chicago line) and 31522 (the proposed acquisition by RGI of the Chicago, Missouri and Western line between St. Louis and Chicago) based on his analysis of Rail Waybill Sample data. This testimony involved analysis of potential cumulative anti-competitive effects from the proposed transactions, development of time-series estimates of rail traffic volumes and carrier shares in different flows, and assessment of the statistical reliability of the portions of the testimony of other RGI witnesses that were based on Rail Waybill Sample data.

Also for RGI, Mr. Nelson provided expert testimony before the ICC in Finance Docket No. 32000, the consolidation of SP and DRGW. This testimony involved analysis of Rail Waybill Sample data to determine rail traffic volumes in different flows, the statistical reliability of studies conducted by other RGI witnesses, and potential competitive problem flows associated with a consolidation of SP and KCS.

For DRGW, Mr. Nelson provided expert testimony before the ICC in Finance Docket No. 30800 (the acquisition of MKT by UP) based on his analysis of Rail Waybill Sample data. This testimony involved examination of intramodal competition in the central corridor, development of traffic flow databases utilized by other witnesses, assessment of the statistical reliability of other witnesses' studies, and analysis of issues related to use of market share data from waybill samples to evaluate the competitive impact of the proposed merger.

Also for DRGW, Mr. Nelson provided extensive expert testimony before the ICC regarding a number of issues raised by the proposed merger of SP with ATSF (Finance Docket No. 30400):

* Mr. Nelson provided a detailed comparison of the economic and operating characteristics of the intercity trucking and railroad industries, with a particular focus on long-haul markets. Mr. Nelson's analysis of the trucking industry utilized the National Motor Transport Data Base (NMTDB). For this study, Mr. Nelson developed and implemented analytical techniques that compensate for the non-random sampling procedures employed in the gathering of the NMTDB, making it possible to use this source to reliably conduct studies at the industry and corridor level. The Commission adopted the results of Mr. Nelson's study verbatim in its analysis of the anti-competitive consequences of the proposed merger.

* Using the NMTDB and the Rail Waybill Sample, Mr. Nelson analyzed the extent to which rail pricing and services on selected traffic are determined by competing intercity trucking alternatives available to shippers. This analysis was conducted at a highly detailed level, and included explicit accounting for the handling

characteristics of each rail commodity and the operating economics of the corresponding truck equipment needed.

* Mr. Nelson analyzed the tests applied by various economists in the proceedings, including those of the U.S. Departments of Justice and Transportation, to identify rail traffic that would most likely be subject to anti-competitive effects in the wake of the proposed merger. Mr. Nelson identified circumstances under which these tests systematically yield invalid results, and provided guidelines for their proper application.

* Mr. Nelson identified improvements needed in the merger applicants' initial methodology for estimating the rail traffic diversions that likely would result from the proposed merger.

* In addition to this expert testimony, Mr. Nelson served as principal investigator for several studies underlying testimony offered by other witnesses, addressing issues related to intramodal (rail) competition, product and source competition, shipper benefits and leverage and trackage rights compensation. Mr. Nelson also conducted a number of special studies on request for other witnesses and counsel.

For a private client, Mr. Nelson participated in a study of the purchase and utilization of jumbo covered hopper cars by shippers and railroads. This study involved extensive analysis of the Rail Waybill Sample and other data sources, and included a detailed examination of historical car shortages in light of economic and traffic conditions, and other related factors. The results of Mr. Nelson's work were incorporated in testimony before the ICC.

As a subcontractor to consulting firms, Mr. Nelson has participated in a number of other rail-related studies. These include (1) analysis of Rail Waybill Sample data to address issues stemming from traffic protective conditions at the Jacksonville (FL) gateway between FEC and CSX, and (2) analysis of CN's Port Huron-Sarnia tunnel project and the alternative of a tunnel at Detroit-Windsor.

Postal Service

For Magazine Publishers of America (MPA) acting on behalf of a coalition of periodicals mailers, Mr. Nelson analyzed

several issues related to the purchased transportation costs incurred by the Postal Service. This included identification of feasible cost reductions and efficiency improvements, as well as development of needed refinements in the methods used by the Postal Service to analyze transportation costs. The results of this analysis were presented to the Postal Rate Commission (PRC) in the R2000-1 omnibus rate case. A portion of the identified costing refinements has been adopted by the Postal Service.

Mr. Nelson identified and developed opportunities for a major publisher to create more efficient and desirable price/service options by avoiding selected costs in its mailings of periodicals. This work included consideration of transportation, delivery and unfunded retirement liability costs.

For Foster Associates (under contract to the Postal Service), Mr. Nelson worked in the following areas:

* Delivery costing - Mr. Nelson developed a series of refinements in delivery cost analysis procedures. These refinements included analysis of driving time on motorized letter routes, collection costing and extensive revision of costing for special purpose routes and special delivery messengers. In support of the new methodologies, Mr. Nelson developed data collection plans and assisted in the development of survey instruments and innovative procedures to gather new field data from carrier and messenger operations. He conducted extensive analysis of the new data, including development of data cleaning and weighting procedures, analysis program logic, and specifications for new econometric models. He also identified an overlap in costing systems that produced a "double-count" of delivery activity performed by personnel other than special delivery messengers but charged to LDC 24 (Cost Segment 9). He developed spreadsheet modifications needed to incorporate the costing refinements and new data, and eliminate the "double-count" problem. The results of Mr. Nelson's delivery costing work were presented before the PRC in the R97-1 omnibus rate case. The PRC adopted 9 out of 10 of Mr. Nelson's recommended methodological changes, 2 with commendations.

* New products - Mr. Nelson identified the cost basis for a number of potential new product offerings involving Express Mail and Priority Mail, and developed the

analytical framework and information needed to support their implementation. This included design and analysis of a new field study of relevant Express Mail piece characteristics, which was also presented by Mr. Nelson in the R97-1 rate case.

* Litigation support - In Docket No. R94-1, Mr. Nelson reviewed intervenor testimony regarding city delivery carrier and transportation issues, and developed discovery and cross-examination topics for Postal Service counsel.

* IOCS - Mr. Nelson developed refinements in IOCS data gathering procedures to improve the validity and precision of available information regarding Express Mail activities. Mr. Nelson then interpreted the initial results from the new data and provided suggestions for improvements in Express Mail costing procedures.

* Postal AMR - Mr. Nelson developed a plan for analyzing the street time costs associated with a proposal to have postal vehicles perform automated meter reading for utility companies.

* Eagle Network - Mr. Nelson developed a potential methodology for attributing the costs of dedicated air transportation services procured by the Postal Service.

For United Parcel Service (UPS), Mr. Nelson provided extensive expert testimony before the PRC in Docket No. R90-1. This testimony presented Mr. Nelson's studies of cost causality and/or elasticity within the city delivery carrier, special delivery messenger, vehicle service driver, purchased highway transportation and expedited air network operations of the Postal Service. These studies, which involved application of operations research techniques and development of econometric models and other statistical analyses based on postal data, were referenced and relied upon extensively by the PRC in its Opinion and Recommended Decision. To a considerable degree, these studies represented extensions and refinements of Mr. Nelson's previous studies, which were presented before the PRC in Mr. Nelson's testimony in Docket No. R87-1, and in Docket No. RM86-2B, a rulemaking proceeding established in part to explore issues raised in testimony before the PRC in Docket No. R84-1 for which Mr. Nelson served as principal investigator.

Other

Mr. Nelson participated in an airport master planning study for Sydney, Australia. For this study, he developed a comprehensive set of site selection criteria and evaluation measures.

Until February 1984, Mr. Nelson was a Senior Research Associate at Charles River Associates (CRA), an economic research and consulting firm, where his work experience included the following:

Freight Transportation

Mr. Nelson served as Manager of Consulting Services for the National Motor Transport Data Base (described above), which at the time was sponsored by CRA. In this position, he was responsible for handling client requests for information from the database, including problem definition, sampling issues, conduct of analyses and reporting of results. He conducted specific analyses for a number of public and private clients.

Mr. Nelson served as principal investigator for a study of motor carrier safety and traffic characteristics. This study involved extensive analysis of a number of databases, including the FHWA "Loadometer" Study, the 1977 Census of Transportation, the ICC "Empty/Loaded" Survey, and the NMTDB. The results of his work were incorporated in testimony before the U.S. District Court on behalf of a private client engaged in litigation with a state over the use of twin trailers.

Mr. Nelson participated in several other projects providing support for motor carriers involved in litigation cases. For these clients he performed detailed financial analyses of motor carrier operations and traffic in different settings, and assisted in the preparation of testimony and briefs. Mr. Nelson also served as an internal consultant on a number of CRA's other motor carrier, railroad, and freight transportation studies.

For the U.S. Department of Transportation (DOT), Mr. Nelson was principal investigator of a study to develop a conceptual framework and data collection strategy for analyzing the impacts of the motor carrier regulatory reforms implemented under the Motor Carrier Act of 1980.

For this project, Mr. Nelson was responsible for identifying and selecting specific research issues, data requirements, data sources and analytical techniques.

In a study for the Office of the Secretary of Transportation, Mr. Nelson made extensive use of probabilistic modeling techniques to develop quantitative estimates of potential fuel conservation resulting from selected aspects of proposed motor carrier regulatory reforms.

For DOT, Mr. Nelson was principal investigator for a study of the merits of alternative approaches that could be utilized by the ICC to implement the inflation-based index for allowable rate adjustments by railroads mandated by the Staggers Rail Act of 1980. For this study he analyzed the ICC's proposed approach and developed specific conclusions and recommendation in a number of issue areas, including selection of the basic index, productivity adjustments, treatment of profit and non-recurring expenses, frequency of index adjustment, rate averaging, regional differences, collective ratemaking and fuel surcharges. The results of this study were used by DOT in formulating its response to the ICC's proposed approach.

For a private client, Mr. Nelson analyzed the logistical considerations involved in siting a plant to process imported high-value mineral ores. This study, which was part of a larger study to assess the overall economic feasibility of plant construction and operation, involved comparisons of costs and other attributes of a variety of modes and modal combinations, including rail, inland waterway, motor carrier and TOFC.

In a study of urban freight consolidation alternatives conducted for the U.S. Department of Energy (DOE), Mr. Nelson utilized principles of network analysis, simulation and queuing theory to evaluate and critique the merits of previous studies, and recommend research approaches for analysis of route and terminal consolidation strategies.

Also for DOE, Mr. Nelson was a major contributor to a study of potential fuel-use changes that could occur in response to dramatic fuel price increases. Mr. Nelson's work focused on the freight and intercity passenger transportation sectors and included analyses of opportunities for improvements in fuel efficiency by each mode under

different fuel price increase scenarios, as well as modal shifts and net traffic reductions caused by resulting cost (and rate) increases.

Passenger Transportation

Mr. Nelson served as principal investigator for a series of Service and Management Demonstration Evaluations conducted for DOT. For three parallel assessments of the feasibility of user-side subsidies, and one demonstration of taxicab regulatory reforms and paratransit service innovations, he developed instruments for and implemented several surveys, conducted data analysis and prepared Final Evaluation Reports. For an assessment of alternative transit transfer policies, he developed research issues and data requirements, selected and supervised interviews of over 40 transit properties, and wrote or was responsible for all major deliverables. He assisted DOT in the development of research issues to be addressed in demonstrations of innovative checkpoint paratransit services and in the review of a proposed paratransit policy.

Also for DOT, Mr. Nelson was principal investigator of a study of methods to improve transit productivity and cost-effectiveness. This study involved the identification and documentation of 146 distinct productivity-enhancement measures that have been implemented at U.S. transit properties, assessment of the transferability of each measure to different settings, and development of impact magnitude estimates. Prior to this project, Mr. Nelson developed over two dozen ideas for possible innovations to improve transit productivity and cost effectiveness.

Mr. Nelson participated in a financing study of the New York Metropolitan Transportation Authority's proposed multi-billion dollar capital improvement program. Mr. Nelson's responsibilities in this project involved econometric analysis of operating costs, with a particular emphasis on identifying the variability of different cost components with alternative future levels of rapid rail, bus, and commuter rail activity. The results of his work were incorporated in the MTA's Official Statement for the successful initial offering of \$250 million in transit revenue bonds.

For DOT, Mr. Nelson participated in a study to develop technical guidelines for use by local planners to satisfy

alternatives analysis requirements. For this study he developed a matrix-based method for determining data requirements in different scenarios, and played a major role in the development of a method for generating locally responsive alternatives to high-capital transit investments using multicriteria decision techniques.

For the Massachusetts Port Authority, Mr. Nelson participated in a study to forecast future levels of passenger and air cargo activity at Logan International Airport. For this study, Mr. Nelson supervised data collection efforts, developed methods for synthesizing data from diverse sources (FAA, CAB, Port Authority records, etc.) to yield relevant market segment size estimates, and analyzed seasonality and short-term peaking phenomena.

Mr. Nelson also participated in a quantitative assessment of the market penetration potential and associated impacts of electric vehicles for the Electric Power Research Institute (EPRI).

Thesis

In his graduate thesis at M.I.T., which fulfilled the thesis requirements for two Master's degrees, Mr. Nelson developed a comprehensive review of the theoretical and practical shortcomings encountered in the use of linear programming in a real time multiple vehicle routing and scheduling system (dial-a-ride). Based on network analysis techniques, he then developed a set of heuristic algorithms that avoided the shortcomings inherent in the linear programming (LP) approach. The performance of these algorithms was simulated by computer and found to meet or exceed the LP's performance in a variety of scenarios drawn from actual operating data.

TESTIMONY

Surface Transportation Board, Ex Parte No. 657 (Sub-No. 1)

- Written Testimony, 5-1-06
- Reply Testimony, 5-31-06

Surface Transportation Board, Finance Docket No. 34421

- Verified Statement, 9-29-05

Surface Transportation Board, Ex Parte No. 657

- Written Testimony, 4-20-05

- Oral Testimony, 4-26-05

Surface Transportation Board, Finance Docket No. 34178

- Verified Statement, 11-14-02

Surface Transportation Board, Finance Docket No. 34177

- Verified Statement, 7-18-02

Surface Transportation Board, Finance Docket No. 32760
(Sub-No. 21)

- Verified Statement, 8-17-01

- Verified Statement, 8-18-00

Postal Rate Commission, Docket No. R2000-1

- Direct Testimony, MPA-T-3, 5-22-00

Surface Transportation Board, Ex Parte No. 582 (Sub-No. 1)

- Statement, 5-16-00

Surface Transportation Board, Finance Docket No. 33407

- Verified Statement, 8-31-98

- Supplemental Verified Statement, 10-28-98

Surface Transportation Board, Finance Docket No. 33469

- Verified Statement, 11-10-97

- Reply Verified Statement, 11-25-97

Postal Rate Commission, Docket No. R97-1

- Direct Testimony, USPS-T-19, 7-10-97

Interstate Commerce Commission, Finance Docket No. 32133

- Verified Statement, SP-20 (Volume 2), 11-29-93
- Rebuttal Verified Statement, SP-41 (Volume 2), 7-28-94

Postal Rate Commission, Docket No. R90-1

- Direct Testimony, UPS-T-1, 7-16-90
- Rebuttal Testimony, UPS-RT-1, 10-1-90

Interstate Commerce Commission, Finance Docket No. 31505

- Verified Statement, RGI-14/SOO-14 (Volume 2), 9-15-89
- Rebuttal Verified Statement, RGI-55/SOO-55, 2-15-90

Interstate Commerce Commission, Finance Docket No. 31522

- Verified Statement, RGI-7/CMW-7 (Volume 2), 8-25-89

Interstate Commerce Commission, Finance Docket No. 32000

- Verified Statement, RGII-10, 2-22-88
- Verified Opposition and Rebuttal Statement, RGII-59, 6-1-88

Postal Rate Commission, Docket No. R87-1

- Direct Testimony Concerning Special Delivery Messenger and City Delivery Carrier Street Time Costs, UPS-T-1, 9-14-87

- Rebuttal Testimony, UPS-RT-5, 11-23-87
- Statement Regarding SDWAFS Analyses, 12-1-87

Interstate Commerce Commission, Finance Docket No. 30800

- Verified Statement, DRGW-13, 4-7-87
- Verified Statement, DRGW-24, 7-13-87

Postal Rate Commission, Docket No. RM86-2B

- Direct Testimony Concerning City Delivery Carrier Street Time Costs, UPS-T-1, 12-1-86

Interstate Commerce Commission, Finance Docket No. 30400

- Verified Opposition Statement, DRGW-20, 11-21-84

- Verified Opposition Statement, DRGW-23, 12-10-84 (with Paul H. Banner)

- Verified Rebuttal Statement, DRGW-33, 5-29-85

SELECTED PUBLICATIONS

Reports Prepared for Charles River Associates

User-Side Subsidy Demonstration Project: Lawrence, Massachusetts. Final Evaluation Report. Prepared for U.S. Department of Transportation. October, 1983.

Analysis of Labor Conditions and Union Status in the Intercity Trucking Industry. Final Report. Prepared for U.S. Department of Transportation. August, 1983.

Actions Being Taken by Transit Operators to Improve Performance. Final Report. Prepared for U.S. Department of Transportation. April, 1983.

User-Side Subsidy Demonstration Project: Montgomery, Alabama. Final Evaluation Report. Prepared for U.S. Department of Transportation. December, 1982.

Plan for Monitoring the Impacts of Regulatory Reforms Implemented Under the Motor Carrier Act of 1980. Final Report. Prepared for U.S. Department of Transportation. October, 1982.

New York City Transit Authority Revenue Feasibility Study: Economic Analyses and Projections. Final Report. Prepared for Metropolitan Transportation Authority, New York, NY. In part. October, 1982.

Taxi Regulatory Revisions in Dade County, Florida. Data Collection Plan. Prepared for U.S. Department of Transportation. April, 1981.

Analysis of Rail Cost-Plus Pricing Systems. Prepared for U.S. Department of Transportation. March, 1981.

Net Demand for Oil Imports: Preliminary Estimates of Short-Run Price Elasticities. Prepared for the U.S. Department of Energy. In part. December, 1980.

User-Side Subsidy Demonstration Project: Kinston, North Carolina. Final Evaluation Report. Prepared for U.S. Department of Transportation. October, 1980. Executive Summary reprinted in Taxicab Management November/December, 1981.

Potential Fuel Conservation from Regulatory Reform of the Trucking Industry. Prepared for Office of the Secretary of Transportation. July, 1980.

Operator Guidelines for Transfer Policy Design. Prepared for U.S. Department of Transportation. June, 1980.

State of the Art of Current Practices for Transit Transfers. Prepared for U.S. Department of Transportation. June, 1980.

"Generation of Transportation Alternatives." Technical Monograph prepared for U.S. Department of Transportation. January, 1979.

"Definition of Transportation Alternatives." Technical Monograph prepared for U.S. Department of Transportation. November, 1978.

Preliminary Analysis of Alternative Proposals to Encourage Efficient Service Concepts in Urban Freight Movement. Prepared for U.S. Department of Energy. In part. October, 1978.

Other Publications

Nelson, Michael and Daniel Brand. 1982. "Methods for Identifying Transportation Alternatives." Transportation Research Record 867.

Nelson, Michael, Daniel Brand and Michael Mandel. 1982. "State of the Art Current Bus Transfer Practices." Transportation Research Record 854.

Nelson, Michael and Jane Piro. March, 1982. "Implementation and Impacts of the Kinston, North Carolina User-Side Subsidy Demonstration Project." Specialized Transportation Planning and Practice.

Nelson, Michael and Paul H. Banner. 1981. "Analysis of Alternative Railroad Cost Recovery Procedures." Proceedings - Twenty-Second Annual Meeting of the Transportation Research Forum.

Nelson, Michael, Daniel Brand and Michael Mandel. 1981. "Use and Consequences of Timed Transfers on U.S. Transit Properties." Transportation Research Record 798.

Mellman, Robert, Michael Nelson and Jane Piro. 1980. "Forecasts of Passenger and Air Cargo Activity at Logan International Airport." Transportation Research Record 768.

Nelson, Michael. 1978. "Evaluation of Potential Replacements for Failing Conventional Transit Services." M.S. Thesis, Massachusetts Institute of Technology, Department of Civil Engineering and Alfred P. Sloan School of Management.

Exhibit B

Letter from FRA Administrator to DME President Kevin Schieffer



U.S. Department
of Transportation

Federal Railroad
Administration

Administrator

1120 Vermont Ave., NW.
Washington, DC 20590

FEB 26 2007

Mr. Kevin Schieffer
President
Dakota, Minnesota & Eastern Railroad
140 N Phillips Avenue
Sioux Falls, South Dakota 57104

Dear Mr. Schieffer:

I write to convey my decision not to approve the Dakota, Minnesota & Eastern (DM&E) Railroad's application for a \$2.33 billion loan under the Railroad Rehabilitation and Improvement Financing (RRIF) program authorized by 45 U.S.C. 821 et seq. to finance construction of the Powder River Basin (PRB) Expansion Project (Project). The Federal Railroad Administration (FRA) has reviewed DM&E's application in accordance with the criteria set out under the RRIF statute and the regulations promulgated there under, 49 CFR Part 260. With a loan of the size proposed for the DM&E Project, I believe that it is appropriate to exercise particular care in evaluating the risk to the Federal government in making this loan.

Taking FRA's review into account together with advice and reviews from others in the Department of Transportation, I have concluded that a RRIF loan to DM&E would pose an unacceptably high risk to the Federal Government. That risk includes DM&E's highly leveraged financial position and the sufficiency of the collateral to secure the loan, the size of the loan relative to the limited scale and scope of the DM&E's current operations; the risk that DM&E's projected revenues could be impaired by changing market conditions in the railroad industry and the energy sector; the risk that high operating costs could impact DM&E's repayment ability, particularly when combined with tonnage limitations or the inability to increase pricing with inflation; and the risk that physical capacity constraint hurdles will not be easily resolved, thereby negatively impacting projected coal tonnage and system efficiency. There are also substantial uncertainties related to the scope of the PRB construction project (which would be the largest private railroad construction project in 75 years), including the potential for cost overruns and timing uncertainties, and uncertainties related to the possibility that construction cost overruns could lead to an increased need for future equity funding of a portion of the project costs. For these reasons, I have concluded that there is an unacceptable degree of uncertainty with regard to the project and too high a risk concerning whether the obligation can reasonably be repaid, using an appropriate

combination of credit risk premiums and collateral offered by the applicant to protect the Federal Government, as required by 45 U.S.C. 822(g)(4)

During the review of DM&E's application, FRA has determined that the application does, however, meet many of the criteria set out under the RRIF statute and the regulations. DM&E, a railroad, is an eligible borrower under 45 U.S.C. 822(a). The PRB Project is eligible for assistance under the RRIF program because the proceeds of the loan would be used to improve and rehabilitate track, components of track, bridges, yards, buildings and shops and to develop new railroad facilities, satisfying the criteria set forth in 45 U.S.C. 822(b)(1)(A) and (C).

The RRIF statute also directs that

In granting applications for direct loans or guaranteed loans under this section, the Secretary shall give priority to projects that--

- (1) enhance public safety;
- (2) enhance the environment;
- (3) promote economic development;
- (4) enable United States companies to be more competitive in international markets;
- (5) are endorsed by the plans prepared under section 135 of title 23, by the State or States in which they are located;
- (6) preserve or enhance rail or intermodal service to small communities or rural areas;
- (7) enhance service and capacity in the national rail system; or
- (8) would materially alleviate rail capacity problems which degrade the provision of service to shippers and would fulfill a need in the national transportation system

45 U.S.C. 822(c). FRA adopted those criteria when it published substantive criteria for evaluation of applications under the RRIF program (70 FR 56207) as directed by section 9003j of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU).

The PRB Project would significantly enhance public safety by improving the DM&E's tracks, in particular. FRA conducted a review of the STB's EIS for the purpose of adoption pursuant to the Council on Environmental Quality's (CEQ) regulations found at 40 C.F.R. 1506.3 and found that the FRA actions encompassed by the DM&E's RRIF application are substantially the same as the agency actions covered by the STB's EIS and Supplemental EIS (SEIS), that the EIS and SEIS adequately assess the environmental impacts associated with the Project and meet the standards of the CEQ's regulations for an adequate statement, and that the EIS and SEIS can be adopted by FRA. FRA's Record of Decision discussed at some length the predominance of track problems in the safety issues confronting the DM&E and the major contribution which the track improvements to be made with the proceeds of this RRIF loan would make toward eliminating those track problems.

As shown in the Record of Decision, the 4(f)/Section 333 Statement, and the Environmental Impact Statement and Supplemental Environmental Impact Statement on the PRB Project the PRB Project's environmental effects, where adverse, can be mitigated adequately.

The PRB Project would also promote economic development by providing needed additional capacity to transport coal from the Powder River Basin to electric utilities, thereby serving the national energy policy, could help reduce ethanol transportation costs, and would enhance rail service to agricultural and other shippers along the DM&E.

The PRB Project would have little appreciable effect on the international competitiveness of U.S. industries.

The PRB Project would promote and enhance rail service to small communities and rural areas, especially in South Dakota and Minnesota.

The PRB Project would materially alleviate rail capacity problems in shipping coal out of the Powder River Basin which degrade the provision of service to shippers and would fulfill a need in the national transportation system.

In order to make a loan, the statute requires certain findings to be made in writing:

The Secretary shall not make a direct loan or loan guarantee under this section unless the Secretary has made a finding in writing that--

- (1) repayment of the obligation is required to be made within a term of not more than 25 years from the date of its execution;
- (2) the direct loan or loan guarantee is justified by the present and probable future demand for rail services or intermodal facilities,
- (3) the applicant has given reasonable assurances that the facilities or equipment to be acquired, rehabilitated, improved, developed, or established with the proceeds of the obligation will be economically and efficiently utilized;
- (4) the obligation can reasonably be repaid, using an appropriate combination of credit risk premiums and collateral offered by the applicant to protect the Federal Government; and
- (5) the purposes of the direct loan or loan guarantee are consistent with subsection (b) of this section.

45 U.S.C. 822(g) In order to approve a loan, each of these findings must be made in writing by the Secretary or her designee. Pursuant to the Secretary's delegation to the FRA Administrator, I find that repayment of the PRB Project loan would be required to be made within 25 years from the date of its execution. I also find that the PRB Project loan is justified by the present and probable future demand for rail services. I further find that the applicant has given reasonable assurances that the facilities or equipment to be acquired, rehabilitated, improved, developed, or established with the proceeds of the

obligation will be economically and efficiently utilized. I further find that the purposes of the FRB Project loan are consistent with subsection (b) of 45 U.S.C. 822.

I cannot, however, make the fourth finding required by 45 U.S.C. 822 (g) for the reasons explained earlier in this letter. Accordingly, I do not approve DM&E's RRIF loan application.

Thank you for your cooperation during FRA's review of your company's loan application. If you have any questions, please contact me at (202) 493-6014.

Sincerely,



Joseph H. Boardman

Exhibit C

Quote from E. Hunter Harrison Regarding Retribution

and BNSF Railway have filed comments on CP's proposed environmental approach and Mayo Clinic, Iowa Northern Railway Company (INRC) and the Iowa Department of Transport filed comments taking issue with CP's proposed designation of the transaction as "minor." Given the overall economic and environmental (cleaner burning coal) benefits of this project, in addition to the national security implications of energy self-sufficiency, it is reasonable to expect that the project will be approved and rights of way will be granted. The DM&E has reached agreements with 55 of the 56 cities along the routes, only Rochester remains. The DM&E has constantly tried to negotiate with Rochester and made several concessions. As for the Mayo Clinic, most of its facilities are a minimum of 1,200 feet away from any tracks and it chose to build beside the DM&E's existing tracks in Minnesota, (although there are arguments about who built first) and it is not on the path of any new lines, just potentially greater volume. Also, while the Mayo Clinic is raising safety concerns about the railroad, we would note that CP could readily address any safety challenge as they are, and pride themselves on being, a very safe railroad, and its acquisition of the DM&E should improve safety significantly. That said, we believe the Federal Railroad Administration (FRA) which turned down DM&E's previous US\$2.3 billion loan application, despite approval of the project by the NIA, may have succumbed to political pressure, coupled with several valid reasons for not supporting the projects, discussed in this report. CP will only have to contend with political pressure, in our view, lead by the Mayo Clinic.

Competitive response While shippers may perceive that BNSF and UP are providing shoddy service and charging too much for it, we do not anticipate them to stand still while CP marches into their territory. Indeed, BNSF invested US\$625 million in the PRB in 2006, double their 2005 figure. During the October 18th Q3 2007 conference call, Jim Young of Union Pacific had only this to say about the PRB business: "we will compete for business in the Powder River Basin." When asked about the DM&E back in May 2007, CN's President and CEO Hunter Harrison said ("If I was in a position to get to the Powder River Basin, I would not be thrilled about driving into town after making a huge investment and meeting up with CP or BN in the alley"). That said, if CP can deliver better reliability, a shorter haul and therefore better pricing and if PRB grows as expected there should be enough room for it to expand into the PRB region. Furthermore, before committing to this project, we expect CP to secure long term contracts with shippers. We would expect BNSF and UP to also bid for the contracts but if any of the shippers are dissatisfied they may be shopping for a new supplier and welcome CP. Recall that PRB volumes are growing and we expect this growth to continue but we do not expect CP to become an equal player in the PRB market share market out at 16% in our model. In essence CP will be gaining some market share in a growing market. While we expect BNSF and UP to lose some volume, we do not anticipate any significant price competition.

DAVID NEWMAN

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DME 28277

VERIFICATION

I, Michael A. Nelson, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.



Michael A. Nelson

Executed on February 29, 2008

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Arkansas Electric Cooperative Corporation Opposition Evidence And Argument And Request For Conditions, and supporting Verified Statement of Michael A. Nelson, to be served by first class mail, postage prepaid, this 4th day of March 2008, on all parties of record and the following persons as specified in the Board's Decision dated December 27, 2007.

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* Parties marked with an asterisk are being served with both a "Public Version" and a "Highly Confidential Version" of this submission. All other parties are being served with only a "Public Version" of the submission.

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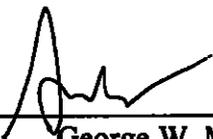
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