

May 19, 2008

*By Hand*

Anne K. Quinlin  
Acting Secretary  
Surface Transportation Board  
395 L Street, S W  
Suite 1260  
Washington, D C 20423-0001



Re: STB Finance Docket No 35081, *Canadian Pacific Railway Company, Et al. - Control - Dakota Minnesota & Eastern Railroad Corp. Et Al*

Dear Acting Secretary Quinlin

Please find enclosed for filing in the above-referenced document an original plus ten (10) copies of the **PUBLIC VERSION** of the Muscatine Power and Water Rebuttal in Support of Request for Conditions

In addition, enclosed is a CD with an electronic copy of the comments in PDF format

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

If you have any questions, please do not hesitate to contact the undersigned

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey O. Moreno".

Jeffrey O. Moreno  
*Attorney for Muscatine Power and Water*

Enclosures

cc All Parties of Record

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB FINANCE DOCKET NO. 35081**

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

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**MUSCATINE POWER AND WATER  
REBUTTAL IN SUPPORT OF REQUEST FOR CONDITIONS**

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*Attorneys for  
Muscatine Power and Water*

Dated May 19, 2008

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**MUSCATINE POWER AND WATER  
REBUTTAL IN SUPPORT OF REQUEST FOR CONDITIONS**

Muscatine Power and Water ("Muscatine"), pursuant to Decision No 4 of the Surface Transportation Board ("STB" or "Board"), served in this docket on December 27, 2007, hereby submits this "Rebuttal in Support of Request for Conditions" on the proposed acquisition of the Dakota, Minnesota & Eastern Railroad Corporation ("DME") by the Canadian Pacific Railway Company ("CP") (collectively the "Applicants") This Rebuttal responds to the April 18, 2008 and April 25, 2008 filings by the Applicants (CPR-14 & 15), and the April 18, 2008 filing by the U S Department of Transportation (DOT-4)

Although the Applicants and DOT exhibit a clear understanding of the facts underlying Muscatine's Request for Conditions (CPR-14 at 45-47, DOT-4 at 13-14), both oppose those conditions, but on slightly different grounds The Applicants oppose Muscatine's Request because "there is no nexus between the proposed transaction and any competitive harm to MP&W " (CPR-14 at 47) DOT does not appear to challenge the nexus, but instead questions the presence of any competitive harm in the first place (DOT-4 at 14) Both are incorrect

Muscatine's competitive concerns originated with DME's acquisition of the Iowa, Chicago & Eastern Railroad ("ICE") in 2003 ICE was a neutral bottleneck carrier at the Muscatine Electric Generating Station located in Muscatine, Iowa ("Muscatine Station") This

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fact qualified Muscatine for the "contract exception" announced in the so-called "Bottleneck Decisions,"<sup>1</sup> which entitles Muscatine to receive proportional or segment rates from ICE for the transportation of coal from one of four interchanges with the Union Pacific Railroad ("UP") and BNSF Railway ("BNSF") to the Muscatine Station. However, because the Board had approved DME's application to construct a rail line into the Powder River Basin ("PRB"), Muscatine stood to lose its eligibility for the contract exception once DME acquired ICE and completed its rail line into the PRB, because the combined DME/ICE no longer would be a neutral bottleneck carrier. Muscatine and DME/ICE entered into a settlement agreement that they intended would preserve the contract exception for Muscatine.

When CP announced its intent to acquire DME/ICE, Muscatine sought to obtain assurances that CP would honor the original intent of the settlement agreement between Muscatine and DME/ICE, particularly upon expiration of their existing transportation contract in 2012. When such assurances were not forthcoming, Muscatine filed its Request for Conditions in this proceeding.

But for CP's proposed acquisition of DME/ICE, Muscatine has no concern that DME/ICE would continue to interpret the settlement agreement consistent with its original intent after 2012. However, absent CP's assurances that it shares that intent, Muscatine fears that CP may attempt to avoid the settlement agreement in 2012, which could render Muscatine ineligible for the "contract exception." CP easily could put these fears to rest, but its decision not to do so only

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<sup>1</sup> *Central Power & Light Co v Union Pac R R Co*, 1996 STB LEXIS 358 (served Dec 31, 1996) ("*Bottleneck I*"), clarified 1997 STB LEXIS 91 (served May 1, 1997) ("*Bottleneck II*"), *aff'd in part*, *MidAmerican Energy Co v STB* 169 F.3d 1099 (8th Cir. 1999).

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serves to enhance Muscatine's fear of competitive harm resulting from this transaction. Thus, there is in fact a direct nexus between this transaction and competitive harm to Muscatine.<sup>2</sup>

DOT surprisingly argues that there is no cognizable competitive harm to Muscatine from this transaction because there was no such harm to Muscatine from the DME/ICE merger (DOT-4 at 14). But the loss of the "contract exception" clearly constitutes competitive harm. Indeed, the Board has required merging railroads to keep gateways open on commercially reasonable terms and to waive all defenses to the "contract exception" as a condition for approval of a merger. See *Canadian Nat'l Ry Co and Grand Trunk Corp -Control—Duluth, Missabe, and Iron Range Ry Co et al*, 2004 STB LEXIS 230, at \*29-30, 52-53 (served April 9, 2004), *Canadian Nat'l Ry Co and Grand Trunk Corp—Control—Wisconsin Central Transp Co et al*, 2001 STB LEXIS 711, at \*14-15, 31, 61 (served Sept 7, 2001). Muscatine merely requests that the Board do no less for it here.<sup>3</sup>

These cases demonstrate that there is nothing unusual, inappropriate, or unprecedented in Muscatine's request that the Board require CP to keep open certain interchanges with UP and BNSF, and to waive its defenses to the "contract exception." In fact, Muscatine's requested conditions are particularly reasonable and narrowly tailored because they provide CP with a process and standards to close one or more of those interchanges in the future on the basis of demonstrated economic and operating efficiencies.

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<sup>2</sup> Applicants also allude to possible rail-barge routings of coal from the PRB to the Muscatine Station, but without explaining the relevance (CPR-14 at 46). The issue in a merger proceeding is a reduction in rail competition, which clearly will occur with the loss of the "contract exception." {{ [REDACTED]

}} (Spratt Reb V S at ¶2)

<sup>3</sup> A single-line CP/ICE route from the PRB to the Muscatine Station also would be longer and more circuitous than any BNSF/ICE or UP/ICE route. The proposed CP/ICE route would be 1150 miles compared to the current BNSF/ICE route of 942 miles, making the CP/ICE route 22% longer (Spratt Reb V S at ¶3). This is yet another example of potential competitive harm from the proposed merger.

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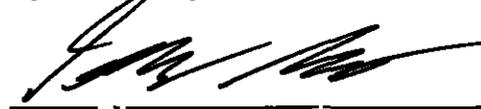
Finally, both CP and DOT suggest that Muscatine has an adequate remedy to address its competitive concerns in a breach of contract action against CP; if CP reneges on the settlement agreement in 2012. Although litigation is an option, it does not eliminate the competitive harm, but merely provides an alternate forum to address that harm. In addition, the requested conditions contemplate that the Board would retain jurisdiction to determine whether and when it would be appropriate for CP to close an interchange with UP or BNSF for economic or efficiency reasons. Under the settlement agreement, that determination would be left to a court. Muscatine submits that the Board has the superior knowledge and expertise to make that determination.

For the foregoing reasons and those stated in Muscatine's March 4, 2008 "Comments and Request for Conditions," Muscatine requests that the Board impose the requested conditions upon CP's proposed acquisition of DME/ICE. However, if the Board denies Muscatine's Request for Conditions, Muscatine asks that the Board clearly state that it does so without prejudice to Muscatine's contract rights under the settlement agreement with DME/ICE.

Respectfully submitted,

Muscatine Power and Water

By its Attorneys,



Jeffrey O. Moreno  
Eric N. Heyer  
THOMPSON HINE LLP  
1920 N Street, N.W.  
Suite 800  
Washington, D.C. 20036  
(202) 331-8800

May 19, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that I have served on this 19th day of May, 2008, a copy of the foregoing "Rebuttal in Support of Request for Conditions " by first-class mail on all parties of record in this proceeding

  
\_\_\_\_\_  
Jeffrey O Moreno

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SURFACE TRANSPORTATION BOARD**

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**REBUTTAL VERIFIED STATEMENT OF BRAD SPRATT  
MUSCATINE POWER AND WATER**

1 My name is Brad Spratt I am the same Brad Spratt who filed a Verified Statement dated March 4, 2008 in support of the Comments and Request for Conditions of Muscatine Power and Water ("Muscatine") I am submitting this Rebuttal Verified Statement in response to statements made in the April 18, 2008 "Response to Comments and Requests for Conditions" filed by the Applicants, Dakota, Minnesota & Eastern Railroad Corporation ("DMF") and Canadian Pacific Railway Company ("CP")

2 The Applicants suggest that Muscatine is not competitively harmed by their proposed merger because Muscatine has a rail/barge option for receiving coal from the Powder River Basin (PRB) at the Muscatine Station in Muscatine, IA {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}

3 If Muscatine were forced to use a single line CP/ICE rail route as a consequence of the proposed merger, that route would be significantly longer than any available BNSF/ICE or UP/ICE route The CP/ICE route would be 1150 miles The current BNSF/ICE route via interchange at Ottumwa, IA is the shortest route at 942 miles The shortest UP/ICE route, via the

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Clinton, IA interchange, is 1062 miles. Even the longer BNSF and UP routes that interchange with ICE in Kansas City, at 1080 miles, are still shorter than the proposed CP/ICE route.

**HIGHLY CONFIDENTIAL—SUBJECT TO PROTECTIVE ORDER**

**VERIFICATION**

STATE OF IOWA            )  
  )  
CITY OF MUSCATINE        )

I, Brad Spratt, verify under penalty of perjury that I have read the foregoing Rebuttal Verified Statement of Brad Spratt, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

Brad Spratt            *BS*