STB FINANCE DOCKET NO. 33407

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

Decided December 9, 1998

We are making a finding, based on the information available to date, that the application filed by the Dakota, Minnesota & Eastern Railroad Corporation (DM&E) seeking authority to construct and operate some 280 miles of new rail line, which would extend the DM&E rail system into the Powder River Basin (PRB or Basin) coal fields in northeastern Wyoming, satisfies the transportation-related requirements of 49 U.S.C. 10901. The extent and nature of the environmental impacts associated with this project, and whether they can be adequately mitigated, will not be entirely clear until the environmental review process, now under way, has been completed. We will issue a subsequent decision on the entire proposed project after completion of the environmental review process assessing the potential environmental effects, and the cost of any environmental mitigation we might impose. This decision does not in any way prejudge our ultimate decision. Nor can any new construction begin until our final decision has been issued and has become effective.

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BY THE BOARD:

INTRODUCTION

By application filed February 20, 1998, DM&E[1] seeks authority under 49 U.S.C. 10901 to construct and operate a new railroad line into the Basin. DM&E plans to build a new 262.03-mile line from a point on its existing line near Wasta, SD, in a generally southern and then western direction, terminating at 11 specified mine sites[2] in Campbell and Converse Counties, WY. It also plans to build a new 13.31-mile line near Mankato, MN (to improve its route and to avoid congestion on a line in Mankato over which DM&E currently has trackage rights), and a new 2.94-mile line near Owatona, MN, to connect with I&M Rail Link there. The projected cost to construct the approximately 278 miles of new rail lines envisioned for the project is $532 million.

In connection with this construction, DM&E also plans to rebuild and comprehensively upgrade some 598 miles of its existing rail line, including relocating and upgrading an existing connection at Winona, MN. The rebuilding and upgrading portions of the project, which would include additional sidings, signaling, grade crossing protections, and other system improvements, would cost approximately $876 million. The total project then, with a few other expected modifications, would cost approximately $1.4 billion.

PROCEDURAL BACKGROUND

Notice of the construction application was served and published on March 13, 1998. In that notice/decision, we determined that it was premature to establish a procedural schedule for the environmental issues which were raised by the application, but requested comments on a procedural schedule for consideration of the transportation issues.[3] By decision served May 7, 1998, the

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[1] DM&E is a Class II railroad currently operating an 1,100-mile rail system located primarily in South Dakota and Minnesota. It moves in the neighborhood of 60,000 carloads of traffic a year, consisting of a variety of grain and mineral products.

[2] Caballo, Belle Ayr, Caballo Rojo, Cordero, Coal Creek, Jacobs Ranch, Black Thunder, North Rochelle, North Antelope, Rochelle and Antelope.

[3] We emphasized at the outset that, although we were initially considering the transportation aspects of the proposed project separately from the environmental aspects, no final decision permitting construction to begin would be issued until such time as all statutory requirements--under both the environmental laws and the transportation laws--had been satisfied. Although the term "conditional approval" has been used to describe this process, there is no approval involved until the (continued...)

Board issued a procedural schedule pertaining to the transportation aspects of this proceeding which permitted interested parties to submit comments and replies. After these submissions were received, the Board set the matter for hearing under the modified procedure, which solicited yet another round of evidentiary pleadings from interested parties. In that decision, served July 16, 1998, we discussed the unique issues and concerns that had been raised in the case to date. We provided guidance for the material to be filed in the second round of comments and explained the type of information we would need to go forward with this case, given the serious concerns raised by the Mid States Coalition for Progress (MSC or the Coalition)[4] and others that DM&E is a marginal carrier that should not be considering such a financially risky enterprise, especially since it may not be needed. The record on the transportation aspects of the proceeding, after we granted DM&E an extension of time to file its reply, closed on October 5, 1998.[5]

Concurrently, the Board's Section of Environmental Analysis (SEA) held agency and public meetings, called scoping meetings, to determine the scope of the environmental analysis. SEA also accepted written public comments as part of the ongoing environmental impact statement (EIS) process. On June 10, 1998, SEA developed and made available a draft scope of study for the EIS and provided an opportunity for public review and comment. On August 7, 1998,

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[3](...continued)
entire process is completed. Rather, the Board makes findings on whether the applicant has satisfied the transportation aspects of section 10901. Only after completion of the environmental process would we allow construction, if appropriate, to begin. It is possible that in our final analysis we could determine that, due to possible adverse environmental impacts, the public interest dictates that the application be denied even though the criteria of section 10901 have otherwise been met. *See, Indiana and Ohio Railway Company--Construction and Operation--Butler, Warren, and Hamilton Counties, Ohio,* 9 I.C.C.2d 783 (1993) (*Indiana and Ohio*). There, the ICC determined that, even though the applicant was financially fit, there was public demand for the service, and the project would not unduly harm existing services, public safety concerns outweighed the transportation benefits of the proposed line, and the application was denied.

[4] The Coalition consists of, among others, landowners and ranchers whose property would be crossed by the proposed project, as well as individuals who otherwise claim they would be adversely affected by the project. Members of the Coalition are listed in Attachment A to Volume I of its Brief filed August 31, 1998.

[5] In a decision served November 3, 1998, the Board granted the Coalition's October 28, 1998 motion for leave to file supplemental evidence 23 days after the close of the record in order to respond to certain new evidence contained in DM&E's rebuttal. That decision also extended the target date for issuance of this decision by 23 days, to December 10, 1998. On November 30, 1998, the United States Department of Agriculture (USDA) filed a request seeking to be made a party of record here and also submitting comments generally in favor of this construction project. MSC has filed in opposition to the Board's consideration of USDA's request.

SEA published an Amended Notice of Intent to notify persons and agencies interested in or affected by the proposed project of additional agency decisions by the Forest Service (U.S. Department of Agriculture), the Bureau of Land Management (U.S. Department of the Interior), and the U.S. Army Corps of Engineers, that would be made by those agencies related to the project, and to seek additional comments relating to these decisions. Also, this notice advised the public that the Board would be the lead agency and that the other agencies would be cooperating agencies in the EIS process.

The Board and these cooperating agencies provided an additional 30-day period, which closed on September 8, 1998, for the public to submit written comments on the draft scope of study and on the August 7th Amended Notice of Intent. Now that this additional comment period has ended, SEA and the cooperating agencies will issue a final scope of study for the EIS, which will be made available to the public. Thereafter, SEA, working with the cooperating agencies, will prepare a Draft Environmental Impact Statement (DEIS) for the proposed project, including proposed environmental mitigation. The DEIS will then be submitted for public comments. The comments will be taken into account in the preparation of a Final Environmental Impact Statement (FEIS). The Board then will review the entire environmental record in making its final decision in this case.

POSITIONS OF THE PARTIES

We have received numerous pleadings from landowners, environmental groups, shipper organizations, shippers and receivers (including electric utilities), DM&E and other railroads, government entities, and rail labor unions, both in support of and in opposition to the project.[6] We have reviewed all the pleadings, but will focus in this decision on DM&E's pleadings, the pleadings submitted in support on behalf of the Western Coal Traffic League (WCTL),[7]

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[6] We have considered all comments. However, because of the large number of comments and because many of them make similar arguments, we will not discuss each comment separately. We have addressed all of the issues raised in the comments. A list of the parties submitting formal comments is attached, with an indication of each party's position. Only the comments of those parties who filed comments in compliance with the Board's rules, which require service of a copy of the comments on DM&E, have been treated as formal comments.

[7] Seven individual power providers who purchase and pay for the rail transportation of Basin coal for use as an electric generation fuel source joined in WCTL's pleading and submission of verified statements in support of the application. These individual providers are Commonwealth Edison Company, Dairyland Power Cooperative, Kansas City Power & Light Company, Lower (continued...)

and the pleading filed in opposition by the Coalition, which reflect the sort of objections being raised by the other parties in opposition.

The Coalition maintains generally that DM&E is a marginal railroad which has struggled for years to maintain its current operations, and that to undertake a project of this magnitude with no firm financing or customer commitments would jeopardize its common carrier obligation to serve its existing shippers. MSC claims that DM&E's application fails to meet the section 10901 statutory standard in that the rail carrier is not fit, financially,[8] or otherwise, to undertake the construction and operation of the proposed line; there is no public demand or need for the proposed service, which would duplicate competitive and efficient rail service already being provided; and the proposed project would harm, rather than serve, the public interest.

The Coalition asserts that the most basic problem presented by DM&E's construction application is that its pursuit and subsequent failure would threaten a system-wide loss of DM&E rail service. DM&E's financial projections for the project, MSC argues, are overstated, and are premised upon both unrealistically high forecasts of coal tonnage that DM&E might attract to its system and the rates that could be charged for movement of that coal. The Coalition doubts that DM&E would be able to obtain more than 42 million tons of coal traffic annually and that this volume, in light of MSC's conclusions as to DM&E's costs and revenues, would not permit the railroad to earn revenues sufficient to pay for the line extension and rehabilitation. The project is not economically viable, MSC states, and would destroy DM&E's ability to continue to provide its current services.[9]

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[7](...continued)
Colorado River Authority, Minnesota Power, Northern States Power Company, and Wisconsin Public Service Corporation. Together with WCTL, these parties collectively are referred to herein as Coal Consumers.

[8] This is not a case, the Coalition argues, in which the Board should defer to the marketplace to decide whether it makes sense to build the DM&E project or not because: (1) the proposed new line can be built only if DM&E is granted the governmental power of eminent domain because DM&E cannot otherwise acquire the private land that it would need to build its new line; and (2) it is clear that the private sector has no interest in investing in this project and that only if the Board were to approve the application would skeptical lenders and equity investors re-think their doubts about the plausibility of DM&E's claims.

[9] In this regard, the Coalition submits the verified statement of Michael A. Nelson, in which he concludes:

The coal volume estimate of 100 million tons annually by 2007, which is relied upon by DM&E as the basis for the design and financial support of the project, is highly unrealistic in the context of likely market conditions for PRB coal and factors that are likely to govern DM&E's market share. (continued...)

Further, the Coalition asserts that there has been no credible showing of demand or need for the proposed project, noting that two large Class I railroads, BNSF and UP,[10] currently serve all the mines DM&E proposes to serve and that DM&E does not project that its entry into the market will result in lower rates charged to customers. MSC claims that the public interest is not served by the expenditure of $1.4 billion on the construction of redundant rail facilities, particularly where there has been no showing that existing service is inadequate. DM&E's proposed service, the Coalition concludes, would offer nothing to the marketplace that BNSF and UP do not today provide.

The Coalition also questions DM&E's ability to conduct the coal train operations it projects and maintains that applicant has provided no assurance that its PRB coal trains would ever reach a customer. The Coalition asserts that DM&E's aggressive and untested operating plan, calling for highly coordinated and very tightly scheduled train operations, is not workable.

Finally, the Coalition, while acknowledging that only the transportation aspects of the project are at issue now, contends that the deleterious environmental impacts of the project require rejection of this application. The Coalition requests that we at least withhold making any findings on the transportation issues until completion of the environmental review process.

DM&E responds that the rail transportation policy favors the construction of new rail lines and that, under revised section 10901, there is a heavy burden on opponents to demonstrate clear inconsistency with the public convenience and necessity before a proposal can be denied. DM&E maintains that the appropriate questions are whether the project would benefit shippers more than hurt them, put other carriers at insurmountable risk, or otherwise do more harm than good to the nation's transportation system.

DM&E claims that the proposed project would bring major benefits to its existing shippers, to coal utilities and mines, as well as to shippers more generally by improving the nation's rail infrastructure. DM&E also asserts that

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[9](...continued)
Rather, a reasonably optimistic estimate of the maximum volume attainable by DM&E from this project is approximately 42 million tons of coal annually * * *. At likely volume and unit revenue levels, DM&E's overall revenues from its coal traffic are insufficient in aggregate to pay the costs associated with the proposed project.

He states that, even if the project appeared to be financially viable, it would create a cost structure for DM&E that would invite its competitors to drive it to insolvency, and summarizes that "construction of the project as proposed is ill-advised. DM&E's pursuit of the project likely will jeopardize its ability to provide even its existing, limited service." V.S. Nelson, at 5.

[10] The Burlington Northern and Santa Fe Railway Company and the Union Pacific Railroad Company, respectively.

this project promises significant benefits for communities along DM&E's existing and proposed future lines, and environmental benefits that would largely or fully offset the negative environmental impacts that might be caused due to construction and operation of the line.

DM&E claims that its entry into the Basin would bring approximately $236 million in annual public benefits, as well as additional unquantifiable benefits. Fewer resources would be consumed in moving PRB coal, for example, because the new DM&E routes include both shorter rail distances and shorter vessel distances in comparison to existing routes, and because DM&E's incremental costs per ton-mile over those shorter distances are lower than the ton-mile costs of BNSF and UP. These savings account for $202 million of the total. DM&E predicts that an additional $34 million in public benefits would result from railcar cost savings due to cycle time[11] improvements and railcar pooling.

Beyond these quantifiable benefits, DM&E claims that its proposed construction would introduce the benefit of effective competition for the first time at seven plants; would enable utilities to reduce some of the $200 million that they now tie up in PRB coal stockpiles; would add 50-100 million tons of sorely needed PRB coal-transportation capacity; would enable PRB mines to operate more efficiently; and would result in improved service for non-coal DM&E shippers.

These benefits would represent major public gains in any transportation market, DM&E argues, and, as the widespread shipper support for this project attests, they are particularly welcome in the PRB transportation market where service on UP and BNSF has been slow and erratic for much of the past 6 years.[12] The public benefits, DM&E asserts, come from the reductions in real resource costs which it maintains would result from this project.

Contrary to the Coalition's assertions, DM&E claims that there is tremendous support for this project and, in fact, uniform support for the project among those with a direct interest in the transportation issues. This includes

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[11] Cycle time refers to the time it takes coal unit trains to go from the originating mine to the utility and back to the mine.

[12] As an example of this, DM&E cites a survey conducted between December 1994 and October 1995, by the Fieldston Company and published in Fieldston's *Coal Transportation Report*, that showed cycle times for PRB coal trains were both high and erratic. Cycle times in DM&E's core market were almost 60% above 1992 levels in December of 1994, dropped to slightly less than 10% above 1992 levels in February of 1995, and then immediately rose to more than 40% above 1992 levels in March of 1995. Some cycle times in the core market were 100% above 1992 levels. More recent surveys show some improvement in cycle times, but they still remain higher than for 1992. These survey results, DM&E maintains, illustrate the inadequacies in service provided by BNSF and UP. *See,* Reply Verified Statement (R.V.S.) of Charles E. Mann, at page 77.

overwhelming support from DM&E's existing shippers, from coal and other shippers and their organizations, and from DM&E's employees. DM&E claims that this project would not harm existing shippers; rather, it states that it represents the best and possibly only hope of efficient continued rail service for these shippers over the long run. DM&E attaches a petition and letters of support from shippers representing 93% of DM&E's 1997 originated and terminated freight revenue (88% by carload). These shippers, DM&E claims, argue that this project would preserve and enhance their rail service, and they urge the Board to promptly approve DM&E's application. The shippers assertedly recognize that DM&E's existing lines need to be rebuilt, and that the existing traffic base on those lines is insufficient to support such a major project.[13]

DM&E maintains that its existing shippers are in no way threatened by this project. DM&E argues that the potential impact on these shippers is the only finance-related determination that the Board need make.[14] Once the project is constructed, DM&E's ability to maintain essential rail service turns on whether it can cover its costs, including operating expenses, fixed charges and outlays for needed capital.

DM&E claims that it would generate revenues far in excess of ongoing needs and that it would be financially able to maintain quality rail service at annual coal volumes of a mere 27 million tons, one third less than it forecasts for its startup year, and 63% less than it projects for 2007.[15] Apart from Coalition witness Nelson's coal rate and volume projections, which DM&E criticizes as totally unrealistic, DM&E argues that the Coalition does not materially dispute the financial strength of the expanded and extended coal

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[13] In support of this observation, DM&E submits the verified statement of Mr. David Levy, who concludes that rebuilding is essential "to sustain operations in the long term," and that "[i]f maintaining rail service throughout South Dakota and southern Minnesota is a significant part of the STB's consideration, this project must be approved." Levy V.S. at 5.

[14] The Board's duty, DM&E argues, is to protect the public interest; it need not protect participants in financial markets, citing *Tongue River R.R.--Rail Construction & Operation--Ashland to Decker, Montana*, STB Finance Docket No. 30186 (Sub-No. 2) (STB served November 8, 1996) (*Tongue River*), at 14:

> The purpose of the financial fitness test is not to protect the carrier or those who elect to invest in the proposed project, but, rather, to protect existing shippers from carrier financial decisions that could jeopardize a carrier's ability to carry out its common carrier obligation to serve the public. [citations deleted].
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> Accordingly, DM&E concludes there is no need for the Board to be concerned about potential investors in the project, or to determine if the project will ultimately be built.

[15] *See,* R.V.S. of Kurt V. Feaster, DM&E's Chief Financial Officer, at 2, and at 9-10.

railroad. The effect of all of the Coalition's witnesses' financial assessments, DM&E claims, would still leave the railroad substantially cash positive every year of the forecast period and with cumulative positive cash flow of $717 million after 6 years of operation.[16]

Even under the extremely unlikely Coalition "disaster scenario" of a DM&E bankruptcy, DM&E argues that it is highly probable that rail service to existing shippers would be maintained. The going concern value of a reorganized DM&E, the railroad claims, would be about three times its estimated net liquidation value after completion of this construction project. Therefore, another party would undoubtedly come forward to provide rail services profitable to it due to the low acquisition cost of a bankrupt DM&E's assets.

DM&E also maintains that its operating plan is sound and would result in highly reliable and safe service. DM&E would operate with greater speed, safety and reliability in carrying PRB coal than either UP or BNSF, it claims, and would have both significant operating and technological advantages over these carriers. Further, DM&E says, the Board need not be concerned with the ability of DM&E's connections to carry PRB coal, because DM&E's east-end connections are established and all affected carriers indicate that they are eager to move coal on terms that they believe would be profitable to them. At these connections, DM&E would have various alternative routings to each of its target markets. Contrary to the Coalition's claims, there are no substantial barriers to moving coal traffic between DM&E and its connecting carriers, and nothing precludes DM&E from offering rate quotations for coal movements from the PRB to destinations with any of these connecting carriers.

WCTL notes that the Coalition does not include any evidentiary support for its arguments regarding loss of service to existing shippers, while numerous letters of support for DM&E's application have been submitted from its existing customers and potential customers, none of whom express concern about potential loss of service. DM&E's customers, WCTL claims, are supportive of the application as a means of maintaining and improving DM&E's existing service.

[16] *Ibid.*, at 4.

WCTL also claims that there is significant public demand[17] or need for this construction project, and that the transaction would result in downward pressures on rates, demonstrable service improvements and efficiencies, and an increase in the capacity of the national rail system. The project would also assertedly increase incentives for UP and BNSF to be better and more responsive rail service providers and marketplace competitors. WCTL points out that, collectively, the Coal Consumers purchase well over 100 million tons of western coal on an annual basis, most of it PRB origin coal. The Coal Consumers firmly believe that an additional marketplace competitor is necessary to meet growing PRB coal demand -- both from a rate and a service standpoint.

WCTL claims that present competition for PRB transportation service is not nearly as vigorous as the opponents of the transaction would have the Board believe. WCTL argues that, if there were adequate competition in the PRB coal transportation service market, none of the utilities would openly support DM&E's application. The DM&E project would establish another PRB transportation competitor, which should have a positive impact on competition, rates, and service, and by approving the proposed transaction, the Board would allow the marketplace -- not the government -- to determine whether a third competitor can succeed. If, as the opponents contend, there turns out to be a lack of public demand for the proposed line, it ultimately would not be built.

Finally, WCTL maintains that this construction would help remedy existing PRB rail system capacity constraints and benefit all PRB coal users by the addition of significant new capacity to the western coal transportation system. The Board, WCTL argues, need only look to the recent serious UP service problems in the West, and the severe pressures on the entire western rail system caused by the UP situation, to see that additional PRB coal-carrying capacity is necessary. According to WCTL, access to the PRB by an additional and independent rail carrier would assist in mitigating UP's and BNSF's capacity shortcomings, and thereby improve rail system reliability.

In reply, the Coalition argues that much of DM&E's evidence contradicts positions that DM&E took in its original filing. For example, MSC maintains that, in his original verified statement, DM&E Witness Mann expressly excluded

[17] WCTL also argues that the lack of shipper contractual commitments for DM&E's proposed service at this early stage of its project should not impede Board approval of this application. As a matter of prudent business practice, WCTL asserts, utility managers will wait until transportation service is authorized before seeking out the new service. DM&E's proposed venture is substantial and it would need to secure service commitments prior to commencing construction; if there are no shipper commitments, there will be no project funding and the project would not be undertaken. WCTL maintains that, if DM&E's proposal to access the PRB transportation market is successful, there is every reason to anticipate that utilities would utilize its services.

from his DM&E coal traffic estimates traffic involving what he called "Additional Markets" outside of the "DM&E Core Market Area." In his reply filing, however, Mr. Mann claims that DM&E could obtain 20 million tons of coal traffic annually from the Additional Markets. In reality, the Coalition says, DM&E would not be able to obtain any significant coal business out of the Additional Markets. The Coalition maintains that DM&E's route to the plants in the Additional Markets is typically hundreds of miles longer than the BNSF and UP routes, and DM&E would have no competitive advantages to offset the circuity of its route. Mr. Mann's attempt to reach outside the DM&E's core market, the Coalition argues, results in the identification of traffic that DM&E is ill-suited to serve. The Coalition concludes that there is no realistic prospect that DM&E would ever handle more than an incidental share of such traffic, or that such traffic would yield a measurable revenue contribution for DM&E.

MSC also argues that many of the supposed public benefits DM&E claims would result from the project are illusory because they depend on DM&E operating with greater efficiency than BNSF and UP, which would not be the case. The Coalition says that other claimed benefits disappear or are sharply reduced when corrections are made for Witness Mann's errors in route mileages, his failure to take account of the role of Montana PRB coal in parts of the Upper Midwest, and his omission of the costs of necessary build-outs.[18] If the DM&E project were built, the Coalition maintains, it would result in large public detriments, not benefits, because the construction would represent a huge misallocation of resources to an unnecessary rail line extension. If, for example, a need develops for additional capacity to carry PRB coal, the most effective way to provide such capacity, MSC claims, would be for BNSF and UP to make selective improvements to their PRB lines.

The Coalition also questions DM&E's new sensitivity study, claiming that it is not a sensitivity study at all because it does not test DM&E's prospects under adverse circumstances. The assumptions used in the "sensitivity" study are overly-optimistic, according to MSC; they are just not as overly optimistic as DM&E's original assumptions. This fact allegedly confirms the Coalition's position that DM&E has to rely on unrealistically favorable assumptions to project that its proposed line extension could be a financial success. In addition, the Coalition maintains that, even under the optimistic assumptions of its so-called sensitivity analysis, DM&E's own projections show that it would need $87.8 million in additional equity funding.

[18] Build-outs are connecting tracks that would need to be constructed to permit DM&E to serve a particular shipper.

MSC argues that DM&E improperly compared BNSF and UP costs to its own expected costs because the DM&E projections Mr. Mann uses reflect the efficiencies of unit train operations, but Mr. Mann compares those costs to BNSF and UP system average costs. System average costs, MSC claims, do not reflect the efficiencies that these railroads enjoy in handling PRB unit coal trains, and which therefore would not impose a floor on their ability to engage in rate competition with DM&E.[19] Against effective BNSF and UP competition, MSC asserts, DM&E could not dominate the PRB coal market as it would have to do to justify the huge investment needed to reach the PRB.

Finally, the Coalition also renews its arguments that DM&E's operating plan is not feasible, claiming that DM&E has shifted positions on certain important considerations. This allegedly not only undermines DM&E's claim that its high efficiency would give it a competitive advantage over BNSF and UP, but also leaves unresolved concerns about safety.

We note that we also continue to receive letters and comments raising myriad environmental concerns about this project. These will be addressed in the ongoing environmental review process in this case.

PRELIMINARY MATTERS

ALJ Appeal. Pursuant to a protective order issued on behalf of the Board by Administrative Law Judge Joseph R. Nacy (*see,* Decision served August 5, 1998), various information submitted in this proceeding was labeled "confidential" or "highly confidential." The Coalition filed a motion to declassify this information on September 4, 1998, which was orally denied by Judge Nacy on November 3, 1998 (written decision served November 12, 1998). The Coalition appealed this decision to the Board on November 12, 1998, and DM&E replied. We are denying MSC's appeal.

Interlocutory appeals from discovery decisions issued by Administrative Law Judges are governed by the strict standard of 49 CFR 1115.1(c), which states that "Such appeals are not favored; they will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice." The Coalition has not satisfied this standard.

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[19] MSC (R.V.S. White) argues that Mr. Mann's conclusion that BNSF's and UP's long-run incremental costs are approximately 8.0 mills per ton-mile is incorrect insofar as unit coal train traffic is concerned, and, as a consequence, his conclusions regarding the lowest feasible rates based on comparisons of these costs to those of DM&E are also invalid. In particular, the Coalition claims, the rate floor for BNSF and UP on unit coal train traffic is likely lower than the 8.25 mills per net ton-mile which Mr. Mann assumes.

In previous decisions, when considering a request to make public certain confidential information filed under seal, we have focused on whether a lower level of classification of material as confidential is needed to allow a party to make its case:

> We resolve any doubts as to the need for confidentiality in favor of protecting the asserted confidentiality unless the opposing party can show that the removal of the designation is necessary for it to make its case, to argue an appeal adequately, or to satisfy a statutory goal.[20]

Here, the Coalition contends that DM&E's classified documents should be made available to the *public* so that full consideration can be given to them. Specifically, it claims that the protective order prevents members of the public from learning of flaws in the application which make the project contrary to the public interest. The Coalition argues that, because it is the Board's statutory role in this case to determine what is in the public interest, it is "* * * inappropriate for crucial evidence * * * to be held secret from the public * * *." (Appeal at page 3). However, the documents are already in the record before us, and we can consider them and give them the weight we deem fit. Further, appellant has complete access to these documents and has not shown any injury to itself from Judge Nacy's denial of its request and maintaining DM&E's designations of "Highly Confidential" and "Confidential." Public disclosure is thus not needed either to assist the appellant in making its case or to assist us in our deliberations on the merits of the proposed construction. The Coalition apparently is arguing for some general right of the public to the classified information, but no such right exists.

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[20] *See, CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company--Control and Operating Leases/Agreements--Conrail, Inc. and Consolidated Rail Corporation*, STB Finance Docket No. 33388, Decision No. 68 (STB served February 23, 1998), quoting *Arizona Public Service Co. v. Atchison, T.& SF. Ry. Co.*, 2 S.T.B. at 372. (Motion objecting to confidential designation denied because movant's counsel does not need to share confidential information with carrier's management in order to make its case). *See also, Lower Colorado River Authority and City of Austin, TX v. Missouri--Kansas--Texas Railroad Company*, No. 40155 (ICC served May 24, 1988), at 1. (Motion for leave to disclose protected material, including construction plans, denied where movant "failed to demonstrate why it is essential for its employees to review the confidential documents in the preparation of its reply").

The decisions cited by appellant are not persuasive.[21] In those proceedings, it was found that declassification of limited amounts of information was necessary to enable the parties to present their case adequately or for the agency to reach its decision. Here, however, the challenged material consists of information to which both the Coalition and the Board already have complete access, and the appeal is based on the questionable premise that "the public" should also have this access. There is, however, no right of public access to information one party merely believes should be made public so that "the public generally" can "understand and evaluate" the proposal. Rather, in order to encourage free and open discovery, there is a right to have confidential information remain so, absent some overriding public policy requiring that that information be divulged. The Coalition has not shown that disclosure of the classified information is necessary to serve any overriding public policy. In this situation, we are not inclined to overrule Judge Nacy's ruling that the documents must remain under seal. As noted, the standard for overturning a judge's discovery decision is a strict one, and appellant has clearly failed to meet it.

We note however that, in spite of the protective order and our desire to honor the parties' requests for confidentiality, we will refer to this confidential information to the extent necessary for clarification and to explain our decision rationally.

Scope of STB Jurisdiction. Various parties, including South Dakota's Governor and its Attorney General, as well as Olmsted County, MN, and individual opponents Fred R. Seymour and Dwight L. Adams, argue that the application is incomplete because it does not address the entirety of the

[21] The Coalition claims that in past cases the Board has declassified documents and other information for which a confidential status has been claimed, where the information was not commercially sensitive or public interest considerations outweighed any claim for limitations on disclosure. It cites *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company--Control and Operating Leases/Agreements--Conrail, Inc. and Consolidated Rail Corporation,* STB Docket No. 33388, Decision No. 78, (STB served May 8, 1998) (*CSX/NS No. 78); Union Pacific Corp. -- Control & Merger -- Southern Pacific Rail Corp.,* STB Finance Docket No. 32760, Decision No. 39 (STB served May 31, 1996) (*UP/SP No. 39); Santa Fe Southern Pacific Corp. -- Control -- SPT Co.*, 2 I.C.C.2d 709, 805 and n.98 (1986) (*SFSP*). These decisions do not support the Coalition's claims here. In *CSX/NS No. 78*, the Board merely sustained, as not constituting a clear error of judgment or manifest injustice, an ALJ ruling allowing the applicants there to refer in oral argument before the Board to a limited portion of a contract that another party had selectively declassified in its brief. In *UP/SP No. 39*, the Board again merely sustained an ALJ's ruling that another party could use in its brief and oral argument a "snippet" out of a single confidential document which the Board regarded as "not commercially sensitive in the usual sense." In *SFSP*, the ICC merely disclosed in its written opinion limited portions of a single document as to which the author had, without objection, been subject to public cross examination.

reconstruction project, and that the proposed rebuilding of DM&E's existing line, as well as the new construction, is subject to the Board's jurisdiction and requires approval under section 10901.

It is well settled, however, that a rail carrier merely planning to improve or upgrade its existing lines does not require our approval. *See, City of Detroit v. Canadian Nat'l Ry.*, 9 I.C.C.2d 1208, 1216 (1993), *petition for review denied sub nom. Detroit/Wayne County Port Auth. v. ICC*, 59 F.3d 1314 (D.C. Cir. 1995); *City of Stafford, Texas v. Southern Pac. Transp. Co.*, Finance Docket No. 32395 (ICC served November 8, 1994) (1994 ICC LEXIS 216), *aff'd*, 69 F.3d 535 (5th Cir. 1995). The fact that a carrier plans to pursue an upgrade in conjunction with construction activity that requires Board approval under 49 U.S.C. 10901 does not alter this. *See, Auburn v. STB*, 154 F.3d 1025, 1033 (9th Cir. 1998), *pet. for rehearing pending* (*Auburn*). The Board cannot make any specific determinations on the transportation merits of the rebuilding portion of this project.

Nonetheless, consistent with our approach in similar cases, the Board's environmental review of the project will assess potential environmental impacts resulting from increased rail operations over the portion of DM&E's line that would be rebuilt. *See, Burlington Northern et al.--Control--Washington Central,* 1 S.T.B. 792 (1996), *aff'd, Auburn*. Moreover, the U.S. Army Corps of Engineers (the Corps) is a cooperating agency with the Board in the environmental review process here (*see,* 40 CFR 1501.6). Part of the Corps' responsibility under the National Environmental Policy Act (NEPA) and the Clean Water Act involves analyzing potential impacts to wetlands on DM&E's existing line that would result from the proposed rebuild. In order to accommodate the Corps, and to avoid the Corps' need to issue its own separate NEPA documents, the EIS in this instance will fully assess the environmental impacts that would result from construction on DM&E's existing line, in addition to assessing impacts from increased rail operations over the current system. Thus, the environmental record in this case will contain information on the rehabilitation and upgrade of DM&E's existing line.

DISCUSSION AND CONCLUSIONS

This construction application is governed by 49 U.S.C. 10901(c), which specifies that:

> (c) The Board shall issue a certificate authorizing activities for which such authority is requested in an application filed under subsection (b) unless the Board finds that such activities are inconsistent with the public convenience and necessity * * *.

While the statute does not define "public convenience and necessity," a three-part test has evolved to evaluate the public convenience and necessity, which requires a determination of whether: (1) the applicant is financially fit to undertake the construction and provide service; (2) there is a public demand or need for the proposed service; and (3) the construction project is in the public interest and will not unduly harm existing services.[22] Public convenience and necessity is also evaluated in light of the rail transportation policy of 49 U.S.C. 10101.[23] It has also been held that the interests of shippers are matters of substantial importance in determining the question of public convenience and necessity in railroad construction applications.[24]

There is no dispute here between the parties as to the three-part test to be used in determining the public convenience and necessity. In fact, both proponents and opponents specifically refer to the three-part test. However, the parties do disagree as to the meaning of the recent changes made to section 10901 in the *ICC Termination Act of 1995*, Pub. L. No. 104-88 (*ICCTA*). The Coalition argues that these changes make no substantive modification to the Act, while DM&E and WCTL maintain that the changes were intended to facilitate a finding that a construction project satisfies the public convenience and necessity criteria.

It is clear that the current standard favors construction applications to a greater extent than the original standard applied under section 1(18) of the Interstate Commerce Act, which required railroads to show that the public convenience and necessity "require or will require the construction" of a new line.[25] This provision was changed in the Staggers Rail Act of 1980, Pub. L. No. 96-448, where section 10901 was amended to make it easier for a proposal to be found in the public interest by providing that the public convenience and necessity need only "permit" the construction, and not necessarily "require" it, as in the prior standard.

The Coalition argues, however, that the *ICCTA* made no change to the statute with respect to the construction of rail lines, citing H. Rep. No. 104-422,

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[22] *See, Tongue River.*

[23] *Indiana and Ohio, supra*, citing *Louisville and Jefferson County Port Authority and CSX Transp., Inc. — Construction and Operation Exemption*, 4 I.C.C.2d 749 (1988). These decisions were issued when the predecessor of section 10101 (former 49 U.S.C. 10101a) was in effect.

[24] *Burlington Northern, Inc. — Construction and Oper.*, 348 I.C.C. 388, 400 (1976), citing *Chesapeake & O. Ry. Co. Construction*, 267 I.C.C. 665 (1947).

[25] In Pub. L. No. 95-473, 92 Stat. 1337, enacted on October 13, 1978, section 1(18) of the Interstate Commerce Act was codified at 49 U.S.C. 10901. Although the wording of the provision was slightly changed, the codification did not change substantive law.

at 179 (1995).[26] Thus, according to the Coalition, it remains DM&E's burden to demonstrate that the PRB line extension it proposes is consistent with applicable public convenience and necessity requirements.

We disagree. First, the Coalition misquotes the statute as saying the Board "should," rather than "shall," approve a project that is not inconsistent with the public interest. The change in the statutory language to *requiring* approval *unless* the Board finds that approval is inconsistent with the public convenience and necessity is clear on its face. The Coalition claims that the legislative history establishes that Congress intended no substantive change to existing law in the ICCTA. However, the legislative history merely states that the Board retains jurisdiction over railroad construction, which is not disputed here. It does not follow, however, as the Coalition argues, that the burden of proof has remained the same.

We agree with DM&E and WCTL that Congress intended to facilitate rail construction by amending section 10901 in the *ICCTA* by shifting the emphasis from whether a project is *consistent* with the public convenience and necessity to whether the project *inconsistent* with the public convenience and necessity. Under the revised statute, proposed rail construction projects are to be given the benefit of the doubt. If they are not found to be inconsistent with the public interest, then they are to be approved. As the Board said in *Class Exem. For The Construction of Connecting Track*, 1 S.T.B. 75, 79 (1996), "there is now a presumption that construction projects will be approved." The changes to section 10901 signal a change from the rationale of earlier decisions that were based on a Congressional emphasis on monitoring railroad construction expenditures to prevent excess capacity.[27] Thus, although the statutory criteria of public convenience and necessity remains, the burden of satisfying that criteria has been made progressively easier.

DM&E, however, goes beyond merely arguing that the revised statute modifies the burden of proof by also arguing that the statute "necessarily imposes on opponents of new railroad construction a heavy burden of rebuttal

[26] In that report, the Conference Committee stated that the amended language made "no change in existing law with respect to the coverage of regulatory authority over construction of rail lines." The Coalition also cites H. Rep. No. 104-311, at 100 (1995), which states that the amended language of section 10901 "retain[ed] the current Federal jurisdiction under former Section 10901 over authority to construct, acquire or operate lines."

[27] In one earlier decision, *Chesapeake & Ohio Ry. v. United States*, 283 U.S. 35, 42 (1931), the Court evaluated the standard of public convenience and necessity, stating that, "[u]ndoubtedly, the purpose of these provisions is to enable the Commission, in the interest of the public, to prevent improvident and unnecessary expenditures for the construction and operation of lines not needed to insure adequate service."

by demonstrating clear inconsistency with the public convenience and necessity." In this respect, DM&E overstates the effect of the statutory changes. As we explained in our July 16, 1998 decision, the statute merely provides that construction applications shall be granted unless we find that "such activities are inconsistent with the public convenience and necessity." This means that where opponents have presented credible evidence challenging the elements that make up the "public convenience and necessity" determination (*i.e.*, financial fitness and public demand or need) in a broad proposal such as this, it is critical for the applicant to respond to these allegations.[28] In short, although there is now a presumption that construction projects satisfy the statutory standard, the opposition here overcame that presumption by coming forward with credible evidence that required a response by DM&E. Thus, as we stated in our July 16, 1998 decision, even given the more favorable policy toward line constructions evidenced by the recent changes to section 10901, DM&E must still explain with specificity why this rail line is needed and applicant's financial fitness to carry the project through to completion, given the evidence presented by opponents in response to DM&E's initial filings.

As noted, the interested parties now have presented additional evidence and arguments on the transportation aspects of this case in response to our July 16, 1998, decision. As we will show, we now have evidence that DM&E would be competitive in a number of markets and, accordingly, that the project is likely to be feasible. Based on all the information now available to us (*i.e.*, the parties filings, including certain DM&E's workpapers and information obtained through discovery submitted into this record by the Coalition, and other public information) it appears that DM&E would likely be more than a marginal carrier. DM&E also has developed the record significantly, per the admonition in our July 16,1998 decision, regarding such issues as what it believes the benefits of this project will be to the public, its financial fitness, and the extent of support for the proposal from the existing shippers. Based on the current record, we therefore can find that DM&E's application meets the transportation criteria of section 10901.

We now turn to our evaluation of the evidence presented to date on the transportation merits of the proceeding.

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[28] This is particularly true where, as here, serious environmental concerns have been raised as well.

FINANCIAL FITNESS

The purpose of the financial fitness test, as has often been stated, is not to protect the carrier or its investors; rather, it is to protect existing shippers from a carrier's proposed actions that could have an adverse impact on the carrier's ability to continue to serve those shippers without detriment to either service or rates. *See, Tongue River*, at 14; also *see, e.g., Illinois Cent. R. Co. v. Norfolk & W. Ry. Co.*, 385 U.S. 57, 67 (1966), *Texas & Pac. Ry. v. Gulf, Etc., Ry.*, 270 U.S. 266, 277-78 (1925), *Texas and New Orleans R.R. Co. v. The North Side Belt Ry. Co.*, 276 U.S. 475 (1928). Based on the present record, we conclude that DM&E has met the applicable statutory and regulatory requirements. As noted, however, this determination could change after completion of the environmental review process if, for example, it turns out the cost of any environmental mitigation we impose would be so high that the project ultimately would not be financially viable.

DM&E maintains that it has shown projected revenues sufficient to cover its operating expenses (operating costs, interest expense and tax liabilities) and to provide a return on investment to shareholders. The Coalition, on the other hand, asserts that DM&E would incur losses in each of the first 3 years of operations, and would not realize a profit until 2005.

The parties present conflicting evidence and argument relative to traffic and revenue forecasts, the operating plan, construction costs, financing (interest on debt), and public benefits. MSC does not seriously challenge DM&E's evidence on the impact of the proposed construction on existing shippers, and there are no significant differences between the parties' construction and operating estimates. Further, even though MSC has challenged some of DM&E's engineering and operating plan evidence, it does not restate DM&E's evidence on these issues. There are, however, substantial differences between the parties' traffic and revenue projections, as well as on the proposed financing.

We have conducted a detailed analysis of the parties' evidence relative to DM&E's traffic and revenue projections, operating plan, construction cost, financing, public benefits and impact of the project on DM&E's existing shippers. The differences between MSC's and DM&E's profitability projections are predominately due to: (1) the use of drastically different forecasts of potential coal tonnage that DM&E could capture out of the PRB; (2) rate forecasts; and (3) the use of different interest rates on the debt that DM&E would incur from the proposed construction and rehabilitation.

DM&E develops five different financial scenarios (revenue and profit projections, *see* summary in Table I below) based on three tonnage and three

netback assumptions.[29] DM&E's most optimistic tonnage forecast is based on delivering 40 million tons of coal in 2002, increasing to 100 million tons in 2007, while a more conservative forecast assumes that DM&E will move from 30 to 75 million tons during the same period.[30] DM&E then develops differing average netbacks per ton-mile projections (rates DM&E could potentially charge), the most optimistic of which is for 9.4 mills per ton-mile in 2002, rising to 10 mills per ton-mile in 2007, while the least optimistic ranges from 8.76 mills to 8.99 mills per ton-mile in this period.[31] DM&E then applies these netback projections to its tonnage projections to calculate four potential revenue streams. The most optimistic of these projections produces a 6-year profit of $953.5 million, and the most conservative a $405.6 million profit. In comparison, MSC forecasts a $2.8 million loss over this 6-year period.

DM&E's final scenario is based on transporting 27 million tons at a 10 mills per ton-mile rate, which it designates as its "break-even" model. It states that this 10 mills per ton-mile average coal transportation rate assumes that DM&E would capture only traffic for which it has the most significant mileage (and therefore competitive) advantages over UP and BNSF, and, thus, movements on which it would realize higher revenue levels per ton-mile.[32] All of DM&E's rate and volume assumptions generate earnings streams which show the project to be profitable.

Under its most optimistic financial scenario, DM&E would generate substantial profits (over $268 million annual profit by 2007)[33], while under its most pessimistic (27 million tons and an average rate of 10 mills per ton-mile)

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[29] Netbacks are discussed below in "REVENUES/RATES."

[30] DM&E also presents a study developed by Schroder & Co. which reduces DM&E's 2007 tonnage by 25% to 75 million tons and reflects DM&E's rate projections. The Schroder study concludes that even under these assumptions, the proposed project would not only be financially viable but would, in fact, result in DM&E achieving rates of return that are higher than those being realized by any of the Class I railroads. *See,* Applicant's Reply Evidence and Argument in Support of Its Application (DM&E Reply), Volume 2B of 2, R.V.S. Mann, Exhibit 1, filed October 5, 1998. There is no independent support for this study.

[31] DM&E's range of netbacks from 9.4 to 10 mills per ton-mile is based on DM&E and its rail partners charging rate levels which are equivalent to the rates currently being charged by the utilities' incumbent carriers. DM&E's range of netbacks from 8.76 to 8.99 mills per ton-mile is developed based on its premise that incumbent carriers will compete more aggressively with DM&E for all traffic.

[32] The estimate of 27 million tons moving at 10 mills per ton-mile is not well explained. We believe it is tied to Table 3 in Witness Mann's reply verified statement that shows DM&E's mileage advantages. However, it could also be derived from Table 14 of DM&E's January 1998 Confidential Offering Memorandum which is found in MSC's Brief, Volume 2B of 2, Exhibit 10, and lists all of DM&E's potential markets.

[33] *See,* R.V.S. of Kurt V. Feaster, Exhibit KVF-1, page 2 of 11.

DM&E would post $46.9 million[34] in annual profit in 2007. On the other hand, MSC's pessimistic scenario forecasts losses *through* the year 2004, with small profits beginning in the year 2005, reaching $23.6 million by 2007.[35] Thus, even assuming that MSC's pessimistic projections become reality, DM&E would realize profits after the year 2004.[36]

[34] *Ibid.*, Exhibit KVF-2, page 1 of 8.

[35] *See*, V.S. of William W. Whitehurst, Jr., Exhibit WWW-16, page 2 of 3.

[36] Moreover, both parties agree that the more coal that is transported by DM&E, the better the financial results will be for the railroad. This is due to economies of density which lower the marginal cost of each additional ton shipped because DM&E's costs are mostly fixed (interest and debt, plus investment in rail assets, track, ties, ballast, grading, and bridges).

The parties' financial scenarios are summarized in Table I below.

TABLE I

Comparative Tonnage Revenue & Income Projections[37]
Years 2002-2007

No.	Scenario	Tonnage Level	Average Millage Rates All Tonnages	Total 6-Year Revenue	Total 6-Year Profit or (Loss)
MSC'S SCENARIO					
1	MSC's Tonnage Level and Millage Rates	17 million tons in 2002, rising to 42 Million Tons by 2007	7.89 mills per ton-mile in 2002 declining to 7.52 mills per ton-mile by 2007	$1.6 billion over the 6-year period	($2.8 million) net loss over the 6-year period
DM&E'S SCENARIOS					
2	DM&E "Break-Even" Tonnage Level (Fixed Millage Rates)	27 million tons per year	10 Mills per ton-mile Fixed over all 6 Years	$1.8 billion over the 6-year period	$241.7 million net profit over the 6-year period
3	DM&E "Lower" Tonnage Level (Lower Millage Rates)	30 million tons in 2002, rising to 75 million tons by 2007	8.76 mills per ton-mile in 2002 rising to 8.99 mills per ton-mile by 2007	$2.7 billion over the 6-year period	$405.6 million net profit over the 6-year period
4	DM&E "Lower" Tonnage Level (Higher Millage Rates)	30 million tons in 2002, rising to 75 million tons by 2007	9.4 mills per ton-mile in 2002 rising to 10 mills per ton-mile by 2007	$2.92 billion over the 6-year period	$532.8 million net profit over the 6-year period
5	DM&E "High" Tonnage Level (Lower Millage Rates)	40 million tons in 2002, rising to 100 million tons by 2007	8.76 mills per ton-mile in 2002 rising to 8.99 mills per ton-mile by 2007	$3.66 billion over the 6-year period	$743.3 million net profit over the 6-year period
6	DM&E "High" Tonnage Level (Higher Millage Rates)	40 million tons in 2002, rising to 100 million tons by 2007	9.4 mills per ton-mile in 2002 rising to 10 mills per ton-mile by 2007	$3.95 billion over the 6-year period	$953.5 million net profit over the 6-year period

[37] The rates shown in this table are average rates DM&E would earn across all of its markets. MSC's projections in this table are based on an interest rate on debt of 9.5%, while DM&E's are based on an 8.25% interest rate.

We will now discuss the three principal areas of disagreement between the parties in developing their financial projections.

TONNAGES

Overall Market Traffic Forecast

MSC argues that DM&E's tonnage and rate projections are overly optimistic and asserts that DM&E would only be able to capture 42 million tons by 2007. It accepts DM&E's phase-in percentages over the 2002 to 2007 period,[38] estimating that DM&E's 2002 tonnage would be 40% of 42 million tons, or about 17 million tons. MSC also contends that the rate per ton that DM&E would be able to charge in the competitive environment would be lower than the rates projected by DM&E.[39] MSC's lower tonnage and rate assumption together with MSC's assumption of a higher (9.5%) interest rate on debt, yields an earnings stream below those presented by DM&E, and losses for DM&E in its early years of operation.

DM&E's forecast of potential traffic it can capture out of the PRB is developed based on an evaluation of individual utility plants' current and future use of Wyoming coal. This forecast is developed based on two assumptions: (1) that in order to comply with Phase II of the Clean Air Act Amendments of 1990 (CAAA 1990), utilities in DM&E's market area would exclusively burn low sulfur Wyoming coal;[40] and (2) that increased demand for electricity would cause utilities to consume additional coal up to a maximum plant capacity factor of 75%, assuming an average heat rate of 10,000 BTU/KWH (kilowatt hour) and

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[38] DM&E assumes that in each year leading up to 2007 it will capture a percentage of the 100 million tons of coal it projects it will carry in 2007. These percentages are: 1) 2002 - 40%; 2) 2003 - 60%; 3) 2004 - 70% 4) 2005 - 80% 5) 2006 - 90% and 2007 - 100%. Although DM&E offers no support for these percentage phase-ins, MSC does not challenge their use and we accept them on that basis.

[39] MSC accepts DM&E's assumption that the lowest feasible rate levels are now at 8.25 mills per ton-mile but contends that productivity improvements in the rail industry will drive carrier costs lower and that rates will follow. We discuss prospective rate levels below.

[40] DM&E expects that plants not currently burning PRB coal would start burning (convert to) Wyoming coal to meet the CAAA 1990 regulations. It also expects utilities to experience "blend creep" in that more PRB coal is expected to be introduced into a plant's fuel blend to comply with CAAA 1990. DM&E assumes a maximum of 85% of the plants' total burn would be low sulfur PRB coal.

coal averaging 8,800 BTU/lb.[41] These assumptions would have an impact on the amount of Wyoming coal which must be burned to produce the same megawatt output because Wyoming coal has lower BTU/lb. than coal it would be replacing and, thus, more PRB coal must be burned at plants currently burning higher BTU/lb. coal from central Appalachia, the Illinois basin, Utah, Colorado, New Mexico, and some mines in Montana. DM&E forecasts that its target markets would potentially burn between 250 and 272 million tons.[42] As an indication that this forecast is reasonable, DM&E submits a total PRB output forecast for 2010 in the range of 530-550 million tons.[43]

DM&E separates coal burning utilities into three categories: (1) six core markets; (2) two additional markets; and (3) a group of utilities which it considers "market expansion" opportunities.[44] It calculates the total potential tons that could be burned at each of these utilities, based on a 75% capacity

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[41] DM&E supports its assumptions by stating that it expects the growth rate for electricity generated by coal-fired plants in the core market areas to be 2.2% per year, requiring capacity utilization factors to exceed 75% by the year 2010. This capacity utilization factor could be considered conservative because of the possible retirement of a significant portion of the nuclear generating capacity in the area, which would have to be replaced by the next-cheapest generation source (coal) and because coal-fired generation plants that switch to PRB coal would gain a cost advantage over competitors that continue to use higher-cost eastern coals. Because of this cost advantage, plants shifting to PRB coal would gain market share at the expense of those plants whose delivered coal per million BTU is higher than that for PRB coal.

[42] Plants in DM&E's target markets currently burn 116 million tons of PRB coal annually. Some of this 116 million tons of coal originates at mines in Montana which DM&E could not serve. However, there is no evidence regarding what portion of the 116 million tons is from Wyoming, coal traffic that DM&E could capture. DM&E projects that plants currently burning Wyoming coal would burn an additional 71 million tons by 2010. Of the plants in DM&E's prospective market area not currently burning any PRB coal, it projects that 63 to 85 million tons may be burned in 2010.

[43] DM&E states that this estimate is for comparison only and lists other forecasters' estimates in Applicant's Reply Evidence and Argument in Support of its Application, Volume 2 of 2, R.V.S. of Mann, Table 2. These other forecasts range from 406 million tons to 492 million tons in 2010. DM&E states that the average of all forecasts is 464 million tons.

[44] DM&E lists its six core markets as: the Great Lakes (power plants served by vessel with rail service to Great Lakes transloading facilities via other railroads); the Upper Midwest Rail (rail-served power plants primarily in Wisconsin and Minnesota); the Upper Mississippi River (power plants served by barge on the upper Mississippi River); the Ohio River (power plants served by barge via the Ohio River system with rail service to river docks via other connecting rail carriers); the Illinois River (power plants served by barge via the Illinois River with rail service to river docks via other connecting rail carriers); and the Chicago Gateway (power plants served by rail in the Chicago/Gary area, and via connections at Chicago). Because the Illinois River market is relatively small (4.8 million tons), it will be considered as part of the Chicago Gateway market. *See,* MSC Reply Brief, V.S. Nelson, at footnote 6. The two additional markets are the Lower Mississippi River and Memphis Gateway markets. A listing of the market expansion opportunities (16 plants) can be found in MSC's Brief Exhibit 10, Table 14.

factor, heat rate of 10,000 BTU/KWH and 8,800 BTU/lb. coal, and adds the tonnages to determine the potential in each market. To the potential tons that could be used in a market, it applies a projected "market share" to forecast the tonnage it will move in 2007.[45] Using the yearly percentage phase-in discussed in footnote 38, it then calculates the volume of coal it could move into each market and adds them on an annual basis from 2002 through 2007.[46]

MSC states that DM&E's forecast for total PRB coal usage is much more optimistic than that of the Department of Energy's Energy Information Agency (EIA), which forecasts total PRB production of some 406 million tons in 2010 in its *Annual Energy Outlook for 1998*. This EIA forecast assumes moderate national economic growth.[47] Based on the EIA estimate of 406 million tons, MSC scales back DM&E's estimate of PRB tons moving to its target markets to 149 million tons, down from DM&E's 250 to 272 million tons. Because of potential rail competition from incumbents, utilities having to "derate" plants to burn low sulfur PRB coal,[48] and lessening demand for lower sulphur dioxide emissions because of the availability of accumulated emission allowances from plants below CAAA 1990 standards, MSC believes this estimate to be a "reasonably optimistic forecast for planning purposes."[49]

MSC supports its lower tonnage estimates by arguing that DM&E would face fierce competition from incumbents and does not have an advantage over

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[45] DM&E's projected market shares vary, depending on whether it has a competitive advantage in the market or is an equal competitor. In the Great Lakes and Upper Midwest Rail markets, DM&E claims to possess a mileage advantage over the incumbents and projects to gain 62% and 61% share respectively. In the upper Mississippi River Market, DM&E also claims a mileage advantage and a 43% share of the market. In its other core markets, Chicago Gateway/Illinois River and Ohio River, DM&E indicates that it would be an equal competitor and assumes an equal share of these markets with the two incumbents, *i.e.*, 33% each.

[46] MSC's Brief and Evidence in Opposition to Dakota, Minnesota and Eastern Railroad Corporation's Application, (MSC's Brief), Volume 2B of 2, Exhibit 10, Table 4A of the Fieldston Report, page 31 contains a market by market breakdown.

[47] DM&E states that the EIA forecasts are based on a large number of assumptions placed in that organization's computer modeling program, some of which are questionable. For example, DM&E contends that the average price of PRB coal used in EIA's model is based on all prices paid, including prices contained in older contacts, which tends to inflate the price used in the model above current price levels. It says the 1996 price used in the EIA model was $6.33, which is $1.83 above the current market price ($4.50) for 8,800 BTU/lb. DM&E claims that, due to the use of such questionable assumptions, EIA's model underestimates total growth in PRB coal production.

[48] Derating of a plant reflects the fact that the plant was not built or modified to burn low BTU coal. Thus, the plant's efficiency deteriorates as more low BTU PRB coal is burned, resulting in less electricity being produced. A plant may be derated from 5% to 20% of its original megawatt capacity.

[49] MSC's Brief, Verified Statement of Michael A. Nelson, pages 8-9. Exhibits 1 and 2 shows how these tonnages were derived.

them other than a limited mileage advantage in certain markets. It states that the technology DM&E proposes to use already exists at UP and BNSF, and that DM&E will not be able to offer speed or reliability advantages except where it has a mileage advantage. It also argues that DM&E does not appear to adequately account for the limitations and uncertainties imposed by: (1) the competitive response to a plant's potential build-out; (2) the use of barge service to compete with direct rail service; (3) the use of three or four carrier routings to replace single line or two carrier service; and (4) the unlimited substitution of Wyoming PRB coal for higher BTU Montana, Hanna Basin or central Appalachian coals without consideration of derating issues (again, the adverse effects, if any, of changing to PRB coal without modifications to the plant's boilers).[50]

The parties' methods for developing DM&E's potential tonnages are based on different methods of estimating future tonnages. DM&E develops a plant-by-plant estimate of potential PRB tons using a specified formula which produces a market-by-market forecast. Based on this forecasting technique, DM&E predicts a total market of 530 to 550 tons for PRB coal in 2010, with 250 to 270 tons used in its target markets. MSC, on the other hand, uses EIA's national forecast of PRB growth of 406 million tons in 2010 and then scales down DM&E's market projection to 149 million tons based on projections of growth in the market areas. MSC does not directly address DM&E's assumptions regarding average plant capacity factor, blend creep or conversion, derating of plants when using lower BTU coal and increasing power requirements in the core markets, other than to comment that they are too optimistic.[51] Nor does MSC respond to DM&E contention that EIA's high average weighted price of all PRB coal does not reflect the current prices being

[50] MSC states that, where build-outs are threatened, incumbents would respond by proposing lower rates that make a build-out uneconomical. It also claims that barge service cannot compete with direct rail service. Where DM&E assumes conversion of a plant to PRB coal, MSC contends that, if after 14 years of two-carrier competition in the PRB, those plants have not yet converted to burn this coal, they must face economic barriers which preclude them from doing so.

[51] While DM&E does not cite any support for its major assumptions of 75% capacity factor or growth in the core markets, EIA's *Challenges of Electric Power Industry Restructuring for Fuel Suppliers*, September 1998, pages 113 and 114, forecasts that under EIA's full competition scenario, electric sales of utilities in the Mid-America Interconnected Network (MAIN) and Mid-Continent Area Power Pool (MAPP) (a large part of DM&E's core market area) are projected to increase from 1.2% to 1.8% per annum and coal-fired plants capacity utilization rates are expected to increase from 57% and 60%, respectively, to a range between 77% to 80% in 2010. In MAIN, EIA projects potential early retirement of four nuclear generators and construction of four gigawatts of new coal fired capacity. This would obviously result in an increase in the amount of coal shipped into this market.

charged for Wyoming PRB coal ($4.50), but simply accepts without question EIA's forecast.[52]

As DM&E points out, the average of all forecasts for PRB tonnage is 464 million tons, and we can expect future demand for PRB coal to fall within the range of all forecasts presented to us in the parties' evidence. Thus, MSC's tonnage forecast must be viewed as an overly conservative estimate of DM&E's prospective market. Because DM&E offers better support for its plant-by-plant, market-by-market analysis of potential use of Wyoming PRB coal in its target markets, we accept DM&E's aggregate PRB tonnage estimates as the best evidence of record, except as noted.[53]

We now address the parties' market share evidence.

Market Share Forecasts

Ohio River Market.[54] MSC concedes DM&E a 33% market share in the Ohio River market compared to DM&E's proposed 35% share. In its supplemental statement, the Coalition argues that DM&E has misrouted BNSF and UP movements to the Ohio River through Chicago because those carriers have more direct routes to barge facilities on the Ohio River,[55] but it does not restate DM&E's market share.

We agree that routing of BNSF and UP coal movements through Chicago overstates DM&E's competitiveness in this market. Our review of these routes shows that both BNSF and UP have shorter routes to the Ohio River market than would DM&E.[56] Therefore, since MSC did not restate a tonnage projection for this traffic, we will accept MSC's original contention that DM&E would be able to capture only 33% of this market. MSC does not afford a basis for reducing DM&E's share of this market below this level and, hence, we will not attempt to do so.

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[52] MSC offers no other evidence in support of its 149 million ton forecast.

[53] *See,* MSC's Reply, Exhibit 10, Table 7. Total potential consumption in the target markets is 250-272 million tons.

[54] DM&E's forecast tonnage for this core market is 55 million tons in 2010. *See,* MSC's Brief, Exhibit 10, Table 14.

[55] MSC states that UP's 1231-mile route to the docks at Metropolis, IL is almost 200 miles shorter than DM&E's 1400-mile interline route with the Illinois Central to Paducah, KY (located just across the Ohio River from Metropolis).

[56] The movement of coal unit trains is based on the routing for coal/bulk in ALK Associates PC Rail for Windows, Version 5.0 routing program.

Chicago Gateway Market.[57] MSC acknowledges that DM&E's mileage to the Chicago Gateway market is the same approximate length as that of BNSF and UP. MSC presents evidence that breaks this market down by segments (Illinois, Indiana and Michigan's central peninsula), claiming that DM&E will gain a 20%, 25% and 30% share, respectively, in these segments versus DM&E's forecast share of 33% overall. MSC contends that DM&E's competitive advantages here are minimal because it would have to market low BTU Wyoming coal against high BTU western coal and because its joint line service with other carriers would compete with UP and BNSF single line service. In the Illinois market, MSC contends that DM&E cannot be competitive because these utilities use higher BTU western coal.[58] MSC also claims that DM&E would be at a disadvantage in the Chicago market because those plants are currently served via single or two-line haul versus DM&E's proposed three-or-four-carrier haul. Inclusion of additional carriers, MSC argues, makes for less competitive circumstances.[59] DM&E responds that the extra interchange would not be a significant disadvantage because the unit trains would operate in

[57] DM&E's forecast tonnage for these combined markets is 79 million tons in 2010. *See,* MSC's Brief, Exhibit 10, Table 14. As noted, this tonnage includes the 4.8 million tons forecast for the Illinois River market.

[58] For example, MSC claims Commonwealth Edison's plants use a significant amount of high BTU western coal. Review of data from Table 24 in EIA's *Cost and Quality of Fuels for Utility Plants*, 1997 Tables, (EIA Table), May 1998 shows that the Kincaid plant used a blend of two-thirds high BTU western coal and less than 5% low BTU PRB coal. DM&E replies that the Kincaid plant is scheduled to convert to all PRB coal in 1999, but it remains unclear whether the coal it will use will be low BTU from mines the DM&E would serve or higher BTU coal from mines which DM&E would not serve. Because Wyoming coal tends to have a lower delivered cost per million BTU, we believe the Kincaid plant could burn lower BTU coal from mines DM&E will be able to serve and that the DM&E could therefore compete for the plant's coal needs. MSC also asserts that Commonwealth Edison's Stateline plant has used a 95% blend of high BTU Wyoming coals. Data from EIA's 1997 Table 24 shows MSC's statement regarding the Stateline plant to be true, but MSC'S overall inference misleading. Commonwealth Edison's plants use of higher BTU western coal accounted for 25% of their total of 19.8 million tons. The majority of the remaining coal received was lower BTU PRB coal, with less than .5 million tons being higher BTU non-Basin coal.

[59] As an example, MSC states that Electric Energy Inc.'s Joppa plant has BNSF single line service where DM&E plans a three-carrier move. In its supplemental evidence, MSC asserts that DM&E treats the Joppa plant as if BNSF and UP would serve it via the Chicago gateway. However, UP's mileage from the PRB to this plant via Kansas City is approximately 1225 miles, compared to the 1445 miles required to reach this plant using DM&E's routing. This plant burns 4.7 million tons of Wyoming PRB coal annually.

run-through service at Winona, which means that there would simply be a change of crews at that point.[60]

In the Indiana segment, MSC again maintains DM&E would face a competitive disadvantage for the same reasons as in Illinois: additional interchanges and use of higher BTU non-PRB coal.[61] DM&E replies that in 1996 these plants used over 50% PRB coal.[62]

In the Michigan market, MSC claims that DM&E would be at a competitive disadvantage because it would provide a three-carrier haul, whereas incumbents can serve the plants with a two-carrier haul. According to MSC's evidence, DM&E would be at a disadvantage on 46.1 out of approximately 89 million tons in the Chicago Gateway market, mainly because of multiple carrier movements and preference for high rather than low BTU coal.

We do not believe the extra interchange between DM&E and a connecting carrier would create a significant disadvantage for DM&E in this market.[63] Run-through and DM&E's time slot service should allow efficient interchange and crew changes and permit DM&E to be an equal competitor in this market. While some high BTU western coal is used in this market, there is a greater amount of low BTU PRB coal burned and there is a large potential for growth. Therefore, DM&E's estimate of a 33% market share as an equal competitor in this market[64] is supported by the record, and MSC's arguments have not shown that DM&E's supporting evidence is flawed.

Great Lakes Market.[65] MSC asserts that this market will receive 32 million tons of coal in 2010, of which DM&E would get a 30% share. MSC claims that DM&E would capture a smaller than proportionate share of this market because: (1) Detroit Edison's Belle River, St. Clair and Trenton Channel plants and

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[60] DM&E states that carriers with which it has had contact express interest in run-through service.

[61] Specifically, it states that Northern Indiana Public Service Co.'s (NIPSCO) plants all use high BTU coal.

[62] Review of EIA's 1997 Table 24 shows that 13% of these plants' total 1997 burn of 7.9 million tons was high BTU Wyoming coal, 48% was low BTU PRB coal from mines DM&E proposes to serve, and the remainder was high BTU eastern coal.

[63] In *Union Pacific/Southern Pacific Merger*, 2 S.T.B. 703 (1997), the Board stated at footnote 20 that "joint-line movements of unit-train coal are not inherently less efficient than single-line movements."

[64] MSC's single example of a mileage disadvantage to Energy Electric's Joppa plant is not sufficient evidence that DM&E would not, for the most part, compete on equal footing with incumbents.

[65] Utilities in this market may currently be served directly by rail or by rail/vessel combination. DM&E's forecast tonnage for this market is 73 million tons in 2010. *See*, MSC's Brief, Exhibit 10, Table 14.

Consumers Power's Weadock plant receive 75% of their 11.8 million tons by rail;[66] (2) UP and BNSF are competitive via the Chicago gateway; and (3) approximately 85% of the tonnage in this market requires conversion from Montana coal.[67] It credits DM&E for its mileage advantage to the Great Lakes at Milwaukee, but also maintains that Wisconsin Electric Power Company's (WEPCO) Presque Isle plant is located at Marquette, MI, which is 278 miles (by water) from Superior, and approximately 564 miles (by water, via Sault Ste. Marie) from Milwaukee.

DM&E claims that it would obtain a 62% share of the potential 73 million tons in this market. It bases its market share forecast on a mileage advantage to the docks at Milwaukee (1032 miles), versus BNSF's Montana haul from Decker and Spring Creek of 1045 miles.[68] DM&E claims that the dock at Milwaukee is ice-free 12 months a year, while Superior Midwest Energy Terminal (SMET), through which BNSF's Montana movements are routed, is ice-bound for 3 of the winter months. Milwaukee's year round operation will permit it to be more productive and lower utilities' inventory cost because they will no longer have to stockpile coal for the 3 months SMET is ice-bound. DM&E also claims that vessels returning to Milwaukee would be able to backhaul iron ore to Chicago (80 miles south of Milwaukee), resulting in vessel rates $.80 per ton lower than those from SMET. It contends that shipping from Milwaukee would be less expensive than transloading at the KCBX terminal in Chicago because the switching and transloading charge of $3.40 makes that move uncompetitive with either SMET or Milwaukee. Finally, it claims that Detroit Edison's Belle River/St. Clair and Consumers Power's Karn-Weadock plants are both served solely by vessel.

As discussed earlier, MSC has not offered any specific evidence refuting DM&E's contention that, for economic and environmental reasons, utility plants in this region would eventually run at a 75% capacity factor and burn an 85%

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[66] As noted, MSC concedes that DM&E would face no mileage disadvantage in the Chicago gateway. If these plants receive delivery by rail, DM&E could then clearly participate through Chicago as an equal competitor.

[67] It maintains that DM&E's analysis of Great Lakes volumes assumes that DM&E would be competing against Wyoming coal moving via Superior 74% of the time, and against Montana coal only 24% of the time, while the Board's Waybill Sample shows that Montana coal accounted for approximately 80% of the PRB coal moving via Superior in 1996.

[68] DM&E recognizes that BNSF's Montana coal is higher BTU (9,300-9,500 versus 8,400-8,800) than Wyoming coal. However, it asserts that utilities burn these coals interchangeably because Wyoming coal suffers no disadvantage with regard to delivered BTU cost. The price per million BTU for Montana coal is approximately the same as that of lower BTU Wyoming coal.

blend of low BTU PRB coal. Nor has MSC provided evidence to support its claim that Montana coal's slightly higher BTU/lb significantly impacts a utility's selection of coal.[69] Other than MSC's unchallenged contention that WEPCO's Presque Isle plant is 564 miles from Milwaukee and 278 from SMET, MSC has not shown DM&E's assumptions regarding vessel rates and transloading charges to be unreasonable.

Approximately 50% of the 28.4 million tons of coal U.S. utility plants in this market received in 1997 was from the Powder River Basin.[70] Of that 50%, about 8.3 million tons were higher BTU Montana coal.[71] While DM&E admits that Montana coal is competitive with Wyoming coal where it has a mileage advantage, DM&E has a shorter water route to most of the Great Lakes market.[72] MSC has not shown that, given the lower delivered cost per million BTU of Wyoming coal, these utilities' preference for Montana coal would likely continue.[73] Rather, it is reasonable to conclude that, as competition for electric production increases, utilities would reduce costs by purchasing coal with the lowest cost per million BTU that is compatible with their boilers or that they can retrofit their boilers to burn. Based on DM&E's mileage advantage to the Great Lakes, the lower delivered BTU cost of Wyoming coal, and the more vigorous nature of the Wyoming market versus the Montana market, we find adequate support in the record as it now exists for DM&E's claim that it could gain a 62% share of the coal delivered to this market.

Upper Midwest Rail Market.[74] MSC breaks the Upper Midwest Rail market into three segments: Minnesota, Wisconsin, and other, assigning DM&E market

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[69] DM&E concedes that, where Montana coal has a mileage advantage over Wyoming coal, Montana coal is competitive in the market place. Three Montana mines are approximately 800 miles from SMET and would enjoy a mileage advantage of over 200 miles over DM&E coal to Milwaukee. However, production at those mines is currently about 20 million tons, and thus, they do not appear to threaten the vigorous nature of the Wyoming coal market in the utility industry.

[70] Abstracted from EIA 1997 Table 24. Ontario Hydro's data are not contained in EIA's data since it is Canadian owned. DM&E claims that this utility could potentially burn 31.6 million tons in 2010. MSC is silent on this issue, and we accept DM&E's claim.

[71] Of this, 7.5 million tons move to Detroit Edison's Belle River /St. Clair plant. It is unclear how this coal was delivered--by vessel, as DM&E claims, or by rail, as MSC asserts.

[72] The distance from Milwaukee to Detroit Trenton Channel Plant is approximately 250 water miles shorter than from SMET.

[73] Montana coal has a higher BTU/lb delivered cost than Wyoming coal. For example, *see,* EIA's 1997 Table 24 for Detroit Edison's Belle River/St. Clair complex. The delivered cost per million BTU of Wyoming coal is approximately $1.01, while Montana coal has a delivered cost of $1.53.

[74] DM&E's forecast tonnage for this market is 44 million tons in 2010. *See,* MSC's Brief, Exhibit 10, Table 14.

shares of 30%, 35%, and 16%, respectively. It calculates a total market share of 29.8%. It concedes mileage advantages to DM&E in the Minnesota and Wisconsin markets, but contends that they are overstated by DM&E. In the Minnesota segment, MSC states that IES Utilities Co.'s Columbia plant receives coal via a BNSF connection with the Canadian Pacific Railway System (CPRS) over a 1072-mile route. This, MSC asserts, translates into a potential DM&E mileage advantage of only 127 miles, rather than 375 miles, as DM&E claims. For Northern States Power's Minneapolis/St. Paul plants (Black Dog, High Bridge, King, and Riverside), MSC claims Montana coal would be competitive with a haul of 760 miles from the Rosebud/Big Sky/Absaloka portion of the Montana PRB to the Minneapolis/St. Paul area. MSC states that, in 1996, this entire market received significant (36% of a total of 36 million tons) Montana coal tonnage. It asserts that this coal would have a small mileage advantage over DM&E's Wyoming coal rather than a mileage disadvantage of 215-232 miles. MSC also claims that Northern States Power's plants would require build-outs in order to use DM&E's service, the longest of which would be 20 miles for the Shelburne plant, and that this may make DM&E uncompetitive in this market.

The Wisconsin segment contains IES Utilities Co., Madison Gas & Electric, Manitowoc Public Utilities, WEPCO and Wisconsin Public Service Corp. MSC claims that plants receiving 56% of current PRB tonnage in Wisconsin would require a build-out to permit them access to a second delivering carrier. MSC also claims that these utilities use high BTU western coal.[75] MSC claims that DM&E's purported 220-250 mile advantages to the Wisconsin Public Service Pulliam and Weston plants ignores BNSF's ability to interchange Montana coal with the Wisconsin Central Railroad (WC) or CPRS at Minneapolis/St. Paul.[76] According to MSC, Madison Gas & Electric's and Manitowoc Public Service's plants are not current users of PRB coal.[77] Finally, MSC claims that DM&E has

[75] This includes WEPCO's Oak Creek and Pleasant Prairie plants and Wisconsin Power and Light's Edgewater plant. Approximately 25% of Oak Creek's coal usage is high BTU New Mexico coal, while Edgewater's high BTU coal burn was only 72,000 tons in 1997. Pleasant Prairie used all low BTU Wyoming coal in 1996 and 1997. EIA Table 24.

[76] MSC cites as an example DM&E's planned route to serve the Pulliam plant, which involves interchange with WC at Minneapolis. MSC asserts that, because the BNSF route from Montana to Minneapolis is shorter than the DM&E/I&M Rail Link (IMRL) movement from Wyoming to Minneapolis, the overall mileage advantage to the Pulliam plant would rest with the BNSF route.

[77] As noted, MSC maintains that plants such as these which have not committed to PRB coal after 14 years of two-railroad competition must face economic barriers to conversion and are thus unlikely to convert now.

a mileage disadvantage of over 200 miles to IES Utilities Co.'s Ottumwa plant, and that DM&E's proposed build-out there is "nonsensical."

On the other hand, DM&E argues it would have a very strong competitive advantage in the Upper Midwest Rail market due to its mileage advantage to 11 plants[78] and forecasts a 61% share of this market. DM&E states that its projections account for rate concessions that would be required to pay for build-outs by allowing an additional rate discount to recover the build-outs' cost and that each utility would gain additional benefit from lower, competitive rail rates. DM&E also argues that MSC evidently did not realize that the build-out at WEPCO's Pleasant Prairie plant is already complete or that IES's Edgewater plant can be served using barges from Milwaukee.

DM&E claims that it would benefit from the newly deregulated electric utility industry, because competitive pressure to be the low-cost producer of electricity would create a need for competitive rail service and lower delivered cost per million BTU. DM&E concedes that some utilities in this market use high-BTU western coal available only from UP and BNSF, but asserts that the majority of the market is for Wyoming coal. It also contends that the plants at which DM&E would have significant mileage advantages are likely to be running at increased capacity factors in the evolving deregulated electricity markets and that PRB coal will fill the gaps as capacity rises.

EIA's Table 24 data shows that utilities in this market received 36.5 million tons of coal in 1997. Of this total, 26.5 million tons were from Wyoming and 7.2 million were from Montana.[79] Montana coal is competitive where it has a mileage advantage, such as from the BNSF-served Absaloka, Big Sky, and Rosebud mines, which, as MSC points out, are just over 830 miles from

[78] The 11 plants are IES Utilities Co.'s Columbia plant, Madison Gas & Electric's Blount Street plant, the City of Manitowoc's Manitowoc plant, Northern States Power's Black Dog, High Bridge, King, and Riverside plants, WEPCO's Oak Creek and Pleasant Prairie plants, and Wisconsin Public Service's Pulliam and Weston plants. They are listed in DM&E's Reply, verified statement of Mann, Table 3. The table shows a rail mileage advantage of 100 miles or more to two plants (both of which would require build-outs), 200 miles or more to seven plants (two of which would require build-outs) and 300 miles or more to two plants (Alliant's Columbia plant and Madison Gas & Electric's Blount Street plant, which also would require build-outs). These 11 plants are expected to consume 22 out of a total market of 44 million tons of coal in 2010.

[79] The largest single user of PRB coal in this market is Northern States' Shelburne plant, which received 8.6 million tons in 1997 and 8 million tons in 1996. Of this total, 4.6 and 4.2 million tons in 1997 and 1996, respectively, were Montana coal from the Rosebud, Absaloka and Big Sky mines. This plant also used 3.8 and 3.9 million tons of Wyoming coal in 1997 and 1996. *See*, EIA 1997 Table 24.

Minneapolis.[80] However, this group of Montana mines produced one-half of the 40 million tons of coal mined in Montana in 1996. When compared to the 255 million tons produced in the Wyoming portion of the PRB, Montana's competitive reach is obviously limited and in this market where it has its greatest mileage advantage, it still only commands 20% of the total market.

In contrast, Wyoming's coal dominates this market with a 75% share, and DM&E's evidence shows that its proposed routes for Wyoming coal command a mileage advantage to the largest users.[81] While build-outs could be required, it appears that some of those plants could benefit greatly from DM&E service. Even the Shelburne plant, with a 20-mile build-out,[82] could find it profitable to use DM&E, because it would not only shorten its Wyoming haul but also permit more competition for the 4.6 million tons of coal coming from Montana.

DM&E's assertion that it would gain a 61% share of the tonnage of the Upper Midwest Rail market is based on its mileage advantage to plants accounting for a majority of the tonnages in that market. MSC concedes that DM&E possesses mileage advantages, but contends that in some instances they are overstated. But MSC does not dispute that mileage advantages of whatever magnitude translate into cost advantages and higher market share. Indeed, MSC relies on that very principle to assign higher market shares to BNSF and UP in markets where those carriers have a mileage advantage.

MSC's argument that the need for several plants to build connections to receive coal via DM&E would defeat DM&E's mileage advantage is unpersuasive. DM&E argues that the utilities' incentive to obtain the benefits of increased competition would induce them to build out. We think that contention is reasonable. DM&E further explains that it could absorb the costs of the build-outs. This also appears reasonable, inasmuch as the cost advantage of lower mileage would be permanent whereas the cost of building out would be incurred only once. The cost of building out would have to be quite substantial in order to defeat a significant mileage advantage, and MSC has not made that showing as to any plant.

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[80] Based on ALK Associates PC Rail for Windows, Version 5.0 routing model for coal/bulk.

[81] DM&E would possess a mileage advantage to plants which received 17.2 million tons in 1997. They are: Northern States Power Black Dog (837,000 tons); High Bridge (757,000 tons); King (1.2 million tons); Riverside (1.3 million tons); Shelburne (3.8 million tons but requires a 20 mile spur); WEPCO's Oak Creek (673,000 tons, but requires a 5-mile spur) and Pleasant Prairie (5.4 million tons, but requires a 1-mile build-out); and Wisconsin Public Service Corp's Pulliam (1.4 million tons) and Weston (1.9 million tons) plants.

[82] Houston Lighting and Power Company, which burns approximately 10 million tons of coal annually, found a build-out of this approximate length to be economic.

Finally, given the impact of CAAA 1990, we cannot subscribe to MSC's argument that high BTU western coal would account for a substantial part of the expected increase in coal usage in this market. Rather, we find more persuasive DM&E's argument, based on historical experience, that the additional impact of Montana coal in this market, likely would be limited. For all of these reasons, we think that DM&E's argument that it would become the dominant rail carrier of coal in the Upper Midwest market is supported on the present record.

Upper Mississippi River.[83] MSC claims that DM&E overlooks the possible role of BNSF's northern corridor line from Montana for several plants in the Upper Mississippi segment. It maintains that Wisconsin P&L's Nelson Dewey plant is a substantial consumer of Montana PRB coal and that Dairyland's Alma-Madgett plant could also use Montana coal. MSC argues that BNSF can reach East Winona from Montana using an 885 mile route (only 75 miles longer than DM&E's 810-mile route) and that BNSF can serve any plant in this market. MSC also asserts that BNSF's line along the Mississippi River in Wisconsin passes through Genoa (the location of a Dairyland plant) and Cassville (the location of the Nelson Dewey plant), giving BNSF the apparent ability to build in to these plants if faced with new competition from DM&E. MSC projects that DM&E would only capture a 33% share of this market.

DM&E contends that it would have a mileage advantage of almost 200 miles over BNSF and UP on Wyoming movements to the Mississippi River. DM&E adds that MSC merely generalizes about conversion and the use of Montana coal without showing that plants actually use it.

This is a small market (6.7 million tons in 1997). The evidence presented indicates that one-third of this market's tonnage in 1997 originated in the Wyoming PRB, and none came from Montana.[84] Because the plants in this market currently ship one-third of their coal from Wyoming and the DM&E route is at least 140 miles shorter than either BNSF's or UP's from Wyoming origins, it appears that DM&E could have the upper hand in this market. As plants shift to higher concentrations of Wyoming coal in their blends to comply with CAAA 1990's stricter emission standards, DM&E should be able to pick up additional tonnages. Therefore, DM&E's projected 42% share appears to be reasonable.

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[83] DM&E's forecast tonnage for this market is 8 million tons in 2010. *See*, MSC's Brief, Exhibit 10, Table 14.

[84] EIA's 1997 Table 24.

Other Market Opportunities.[85] This category is comprised of the Memphis Gateway and Lower Mississippi River markets and other market expansion opportunities, which appear to consist of geographically disbursed utilities. DM&E contends that there is a potential for it to carry 60 million tons of coal to these additional markets. It realizes that it would have to accept lower netbacks because of mileage disadvantages here, but nonetheless believes that it could still compete in these markets. MSC challenges DM&E's proposed share of these markets, contending that mileage disadvantages would make DM&E a weak competitor in them.[86] MSC also maintains that DM&E could offer the utilities in these expansion markets little in the way of incentives which BNSF or UP cannot also offer. It states that plants in DM&E's "other market" expansion opportunities used no PRB coal in 1996 and claims that this fact shows they are outside of the geographic area where PRB coal is a significant competitive option. It further asserts that carriers currently serving these plants would cooperate with the PRB incumbents only if they were made better off financially by promoting the use of PRB coal.

We agree with MSC. DM&E has not supported its contention that it could attain an equal share of these markets and we have excluded this tonnage from our financial projections. Because of distance disadvantages, DM&E likely would have a difficult time competing with UP and BNSF on an equal basis. Further, DM&E has not countered MSC's contention that utilities in its "market expansion opportunities" are outside the geographic limits where PRB coals are economically competitive with other local coals.

Summary. The parties agree that, as DM&E's traffic base expands, the railroad would become more profitable. Moreover, deregulation of electric producers and future competition in electric power markets could make DM&E's target markets prime areas for growth of electric production and, thus, for Wyoming coal. The incremental coal would be more likely to come from the Wyoming PRB because of its lower delivered cost per million BTU and the presence of DM&E in those markets if DM&E were to gain access. Future tonnage originating from the PRB in 2010 will, as discussed previously, likely be somewhere between EIA's estimate of 406 million tons and Witness Mann's forecast of 530 to 550 million tons. DM&E would have a mileage advantage for

[85] DM&E's forecast tonnage for these combined markets is 79 million tons in 2010. *See*, MSC's Brief, Exhibit 10, Table 14.

[86] MSC points out that DM&E's mileage disadvantage in the Memphis Gateway market and Lower Mississippi River would be 185 and 336 miles respectively. It also notes that the incumbents can offer single-line service compared to DM&E multi-carrier service.

Wyoming PRB coal over the incumbents in the Great Lakes, Upper Midwest Rail and Upper Mississippi River markets, and these markets currently ship approximately 34.8 million tons of Wyoming coal. DM&E forecasts that these markets have the potential to receive a total of 129 million tons (76.7 million in the Great Lakes market, 46.2 in the Upper Midwest Rail market and 6.7 in the Upper Mississippi River market) in 2007. In the Chicago Gateway (potential of 89.6 million tons in 2007) and Ohio River (potential of 55.2 million tons in 2007) markets, DM&E would also be a competitor. (Currently, 102 million tons of coal terminate in these two markets, 43.9 million tons of which is Wyoming coal). While MSC has shown that there certainly are some questions regarding exactly what DM&E's total and regional market shares likely would be,[87] there is little doubt based on the present record that DM&E would be a real market presence. While MSC expresses doubts about DM&E's ability to compete in these markets, it agrees that the DM&E would have mileage advantages in some markets and is equidistant with BNSF and UP from other markets. Its restatement of DM&E's projected market based on EIA's overall market forecast is less persuasive than DM&E's more specific utility-by-utility analysis. Therefore, we conclude that the record as developed to date supports DM&E's contention that, in 2002, DM&E's penetration into these markets could equal 40 million tons, increasing to 100 million tons in 2007.

REVENUES/RATES

DM&E has developed netback estimates (mills per ton-mile) based on the incumbents charging current rate levels or 8.25 mills per ton-mile. The latter represents the lowest rates DM&E believes incumbents (UP and BNSF) could feasibly offer in order to capture traffic for movements with full origin-to-destination transportation competition.[88] Assuming as a worst case scenario for

[87] We note that DM&E bases its optimistic financial projections on volumes of 40 million tons in 2002, increasing to 60 million tons in 2003 and by 10 million tons annually through 2007 when it would transport 100 million tons. However, the sum of the products of DM&E's projected market tonnages times market share does not result in a forecast of 100 million tons. Rather, it produces a tonnage projection of approximately 120 million tons. DM&E does not explain this discrepancy.

[88] DM&E estimates, based on its analysis of 1996 BNSF and UP variable costs derived from the Board's Uniform Rail Costing System, that the lowest possible rate level for these carriers was 8.25 mills per ton-mile in 1996. This assumes the incumbents must price above their incremental cost to make a profit. DM&E assumes that the lowest price the incumbents will set for their service is 8.25 mills. DM&E increases this lowest rate level by 0.5 mills per ton-mile for the period 2002-2007.

DM&E that BNSF and UP would compete aggressively for all traffic by offering rates as low as is feasible (8.25 mills per ton-mile), DM&E then calculates the "netback" in mills per ton-mile it would receive if it and its transportation partners captured a specific plant's traffic.[89] These DM&E's transportation pricing assumptions can be found in MSC's Reply, Volume 2B of 2, Exhibit 10, pages 16-24 of Fieldston's report. As set forth in scenarios 3 and 5 in Table I above, this worst case (for DM&E) rate assumption would yield an average market rate for DM&E of 8.76 mills in 2002 and 8.99 mills in 2007.

MSC accepts DM&E's estimate of rates in the 8.25 mills per ton-mile range as the lowest feasible PRB coal rate in 1996 but argues that the direction of competitive PRB coal rates will be downward because of increased competition, declining costs caused by general efficiency improvements in the rail industry, and specific efficiency improvements in unit coal train technology. DM&E, on the other hand, sees productivity in unit coal train operations keeping pace with inflation of input prices, and the lowest likely rate levels for UP and BNSF remaining static at 8.25 mills per ton-mile until 2002.

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[89] DM&E's netback estimates are the mills per ton-mile it believes it can earn if it captures a utility's traffic. Examples of specific plant netbacks are set forth in MSC's Brief, Volume 2A of 2, Exhibit 6, Table 11, pages 37-39. DM&E's netback is calculated by first multiplying the utility's distance from its current or closest potential Wyoming PRB coal supplier times 8.25 mills per ton-mile. This yields the rail portion of the transportation cost. To the rail portion is added any other charges, such as current transloading fees for subsequent vessel or barge movements and the current water borne transportation charges. This calculation provides the total amount a utility would pay to transport coal based on BNSF or UP offering a rail rate of 8.25 mills. From this amount, DM&E then subtracts its estimate of vessel or barge rates, transloading fees, rebates for the utility's cost of a build-out, etc. This calculation results in the lowest feasible amount that DM&E and its rail partners would receive if they captured the traffic. DM&E assumes that the division of this rate between participating carriers is made on a mileage prorate basis and simply divides this amount by the rail distance. Because DM&E and its rail partners would have a mileage advantage to a large number of electric generating plants, DM&E contends that it would receive a higher net-back (mills per ton-mile rate) for its service than BNSF/UP's rate level of 8.25 mills per ton-mile.

The following example, drawn from DM&E's Upper Midwest Rail market, should clarify DM&E's calculations. Wisconsin Public Service Corp's (WPSC) Pulliam generating station received 1.5 million tons of 8,800 BTU/lb coal from Wyoming's Campbell County. According to DM&E, the shortest current rail route from Wyoming to the plant is an interline route combining UP (1,095 miles) and WC (225 miles) movements for a total of 1,320 miles. Based on UP/WC quoting a rate of 8.25 mills, WPSC would pay a rail rate of $10.89 per ton (versus its current higher rate.) DM&E would serve Pulliam with interchanges to I&M Rail Link and WC for a total route of 1,100 miles. Dividing $10.89 by 1,100 miles yields a netback to DM&E and its partners of 9.9 mills per ton-mile. (This calculation does not include DM&E's assumption regarding rail car savings because of its shorter route and, thus, more rapid turnaround of equipment.)

MSC's argument that the lowest feasible PRB rates will decline from 8.25 in 1996 to 7.24 mills per ton-mile in 2007 is unpersuasive.[90] While PRB rates reached a low point in 1993, since that time, they have increased to the 8.25 level.[91] MSC argues that general industry productivity, as reflected in our Rail Cost Adjustment Factor, adjusted for productivity, will lower unit coal train cost and be reflected in those rates. But there is no direct link between general industry productivity improvements and productivity for BNSF or UP unit coal trains. Certainly these carriers have made productivity improvements by using newer, more powerful locomotives, distributed power, larger and lighter rail cars, and longer trains. However, as MSC itself points out, these productivity enhancements have already been put in place. Thus, we see no basis on the current record to conclude that future productivity in unit train operations will cause UP's and BNSF's costs for those movements (but not DM&E's costs) to decline by 2% a year from 1996-1998 and 1% thereafter until 2010, as MSC asserts. Rather, DM&E's view that the lowest feasible rate incumbents might charge would be 8.25 mills per ton-mile in 2002, increasing by 0.5 mills through 2007, appears more representative of what carriers can expect. Accordingly, DM&E's netback assumptions based on its worst case (for DM&E) rate assumption appear to be reasonable.[92]

INTEREST RATE ON PROJECT DEBT

The parties disagree on the cost of debt. DM&E contends it could raise debt capital at a rate of 8.25%. MSC asserts that the debt markets would require a higher return of 9.5% for this project.

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[90] The projected coal rates appear to be too low because recent improvements in overall railroad productivity may not continue unabated into the future, and there is no evidence in the record as to how projected productivity gains would be dispersed. In addition, the rates are inappropriately compared to DM&E's costs, as MSC adjusts DM&E's future rates for anticipated and significant productivity pass-though, but does not adjust its costs.

[91] As noted, DM&E calculated the incumbents' lowest feasible PRB coal rate based on BNSF's and UP's 1996 URCS long run incremental cost. (DM&E's Mann Table 4 or Whitehurst Exhibit WWW-17). MSC states that DM&E's estimate of BNSF and UP long run incremental cost is incorrect and that the lowest feasible rate level should be lower. MSC (Whitehurst V.S. October 28, 1998, at page 1) states that DM&E failed to adjust BNSF and UP cost to reflect efficiencies for unit coal trains attributable to locomotive, fuel, and crew costs. However, MSC did not provide any restated estimates of BNSF and UP costs. Thus, there is insufficient evidence in the record to provide a restatement.

[92] We cannot validate DM&E's plant netbacks or average netback for a core market. DM&E did not submit the data that would have permitted us to do this.

MSC contends that DM&E's proposed 8.25% debt rate is too low because DM&E's debt history shows several previous loans at higher interest rates. These include: a short-term bank revolving loan with a rate of 9.25% in 1996 and 9.5% in 1997; a loan to finance corporate office expansion, issued in 1997 with a 9% rate; $13 million in senior secured notes issued in 1996, maturing in 2006, with a 9.47% rate; and $32 million in senior secured notes to refinance existing debt issued in 1994, maturing in 2007, with a 10.13% rate.

MSC compares the 1994 note to the (then) current cost of debt for Class I railroads in 1994, which was found by the ICC to be 7.9%, stating that DM&E's debt rate was 223 basis points[93] higher than the ICC's Class I rate. Adding 230 basis points to the 1997 cost of Class I railroads' debt determined by the Board (7.2%), it concludes that the DM&E would have to pay at least 9.50% in interest.[94] MSC also compares this 9.5% rate to the projected interest rate for the Tongue River construction project (12.2%), concluding that the 9.5% interest rate is very conservative.

DM&E argues that MSC's assumptions are wrong because this project would transform DM&E into a new, highly efficient railroad. DM&E argues that, therefore, lenders would base the interest rate on the future earnings potential of the railroad after the project is completed, not on the earnings potential and credit history of the existing DM&E. It further argues that the specific characteristics and timing of the Tongue River project resulted in the projected 12.2% interest rate and that comparison with Tongue River is irrelevant. Finally, DM&E contends that the 8.25% rate it has used for debt was developed in consultation with Morgan Stanley, based on the specific characteristics of this project and current debt market conditions.

The question of which interest rate the debt market would require is directly linked to the anticipated risk of the project. If the project is seen as high risk because of uncertainty over whether DM&E can generate sufficient revenue to cover its debt service, investors will require higher rates. On the other hand, lenders may view it as being lower risk because DM&E would be a viable coal hauling railroad with distinct mileage advantages in certain markets.

It is difficult to predict how investors would view the DM&E. Equally hard to predict is what interest rates will be when this debt is actually floated in 2000 or 2001. Currently, interest rates are relatively low. However, we cannot accurately predict whether they will remain at their present levels, continue to

[93] A basis point is one one-hundredth of a percentage point.
[94] MSC does not indicate how 223 basis points became 230 basis points.

fall, or rise over the next 2 years. Lenders, at the time of issuance, would weigh all the benefit and risk factors carefully before lending DM&E some $1 billion.

Based on the available evidence, MSC's use of a 9.5% interest rate appears reasonable and the best evidence of record. MSC provides more support for its debt rate because it bases the rate on the point spread for an actual debt issuance by DM&E, relative to interest rates for Class I carriers. Furthermore, it more closely tracks DM&E's historic debt financing rates.[95] DM&E, on the other hand, only provides evidence based on undocumented discussions with Morgan Stanley and contentions that DM&E, after this project, would be more highly efficient than DM&E today, and that this difference would be perceived as less risky by investors and the financial markets.

CONSTRUCTION COSTS

DM&E anticipates that the proposed construction project would commence late in the year 1999, with major portions of the project occurring during 2000 and 2001. Actual coal traffic is projected to begin moving from the PRB in 2002. As noted, the cost of the entire proposed project would be approximately $1.46 billion, consisting of $532 million for construction of 280 miles of new road and $875.6 million to rebuild 597.8 miles of existing road.

DM&E submits the following costs in support of its new construction program:

New main line earthwork, subgrade, rail, access to 11 mines, grade separations, yards, facilities bridges, misc. (262.03 miles)	$335,790,000
Passing tracks	59,660,000
Signals and power switches	16,610,000
Engineering and contingency	76,340,000
Total, PRB extension	$488,400,000
UP Bypass at Mankato	$38,770,000
I&M Connection at Owatonna	$4,850,000
Total New Construction	$532,020,000

[95] How potential investors ultimately perceive the risk of investing in this project will determine the rate at which DM&E can borrow money. Obviously, if DM&E is able to secure debt at a rate lower than 9.5%, its financial position would be improved.

Compared with railroad construction costs presented by parties as pertinent to hypothetically efficient railroads under the stand-alone cost constraint in maximum rail rate proceedings, DM&E's total construction cost is higher on a per-mile basis.[96] In those proceedings, construction costs averaged $1.55 million per mile, while the costs projected here are about $1.90 million per mile. Because we have accepted the lower per mile costs as reasonable in other cases, and there has been no evidence presented here that this is not a valid comparison, DM&E's higher per mile construction costs appear reasonable. However, we point out there is insufficient detail on the record to compare costs below the aggregate level.

MSC argues that unstable soil under both the new construction and rehabilitation segments would be a significant cost obstacle. However, it presents no specific evidence supporting this claim. In addition, it does not present any alternative cost figures that would indicate the magnitude of the problem. DM&E recognizes that unstable soil conditions exist on both the new construction and rehabilitation portions of the line. Accordingly, DM&E took soil conditions into account in its estimated construction cost. In any event, concerns about erosion and other soil conditions will be fully addressed in the 00EIS.

DM&E states that approximately 598 miles of existing main track would be rehabilitated.

DM&E submits the following costs in support of its rehabilitation program:

Rebuild Existing DM&E main line

Track rehabilitation/rebuild	$273,430,000
Passing tracks	105,550,000
Yards, maintenance facilities	110,940,000
Bridge replace/rehabilitation	118,630,000
Signaling, power switches, misc	131,770,000
Other track work	20,650,000
Other procurement	21,000,000
Engineering and contingency	93,780,000
Total rebuild cost	$875,750,000

[96] *See, Bituminous Coal - Hiawatha, UT to Moapa, NV*, 10 I.C.C.2d 259 (1994); *Coal Trading Corporation, Et Al. v. B & O Railroad Co., Et Al.*, 6 I.C.C.2d 361 (1990); and *Arizona Public Service Co. v. Atchison, T.& SF. Ry. Co.*, 2 S.T.B. 367 (1997).

While we have no historical figures regarding extensive rebuilding of existing track, the projected renovation cost is slightly lower than DM&E's average per-mile cost for new construction discussed above. This appears reasonable. We would expect to see a lower unit cost for rehabilitation compared to new construction because land acquisition and grading are not required.

FINANCIAL FITNESS: CONCLUSIONS

We have restated in Table II DM&E's income statements based on its tonnage forecast of 40 million tons in 2002 increasing to 100 million in 2010, DM&E netbacks[97] assuming incumbents charge rate levels as low as 8.25 mills per ton-mile in response to DM&E entry into the market, and MSC's debt rate of 9.5%. We note that neither the parties' financial statements nor our restatement includes any costs that might be required for mitigation of potential environmental effects. Our restatement is as follows:

TABLE II

	2000	2001	2002	2003	2004	2005	2006	2007
Income Statement								
Tons	NA	NA	40,000	60,000	70,000	80,000	90,000	100,000
Mills	NA	NA	0.00876	0.00878	0.00881	0.00884	0.00896	0.00899
Av Miles	NA	NA	810	810	810	810	810	810
Coal Rev.	0	0	283,824	426,708	499,527	572,832	653,184	728,190
Other Rev	60,793	63,282	78,203	79,737	81,300	82,891	84,512	86,164
Total Rev.	60,793	63,282	362,027	506,445	580,827	655,723	737,696	814,354
Op. Exp.	42,348	52,124	132,018	178,249	201,850	225,466	249,097	272,742
G&A Exp (Net)	3,798	4,443	30,146	36,141	39,053	41,947	43,686	45,972
Deprec & Amort	6,482	6,768	49,899	71,465	82,377	93,367	104,357	115,415
Inc Bef Int/Tax	8,165	(53)	149,964	220,590	257,547	294,943	340,556	380,225
Interest	6,140	6,084	97,730	93,157	88,181	82,755	76,905	70,653
Inc. Tax 38.2%	774	(2,344)	19,953	48,679	64,698	81,056	100,715	118,257
Net Income	1,251	(3,793)	32,281	78,754	104,668	131,132	162,936	191,316

[97] The netback millage rates used in Table II are based on the average of all of DM&E's netback rates.

It also should be noted that we need not rely on DM&E's tonnage forecasts to conclude that the proposed construction and operation appears to be financially feasible based on the evidence available. Taking MSC's projected volume of 17 million tons in 2002, increasing to 42 million tons in 2007--the volumes conceded by MSC to be "reasonably optimistic" and volumes amply supported by the record--and MSC's 9.5% interest rate, and applying the 8.25 millage rate used by MSC in its restatement,[98] the project would begin to produce a positive income in 2004 and, for the period 2002-2007, would produce a net income in excess of $49 million. These results are set out in Table III:

TABLE III

	2000	2001	2002	2003	2004	2005	2006	2007	Total
Income Statement									Profit
Tons			17,000	25,000	29,000	34,000	38,000	42,000	
Mills	NA	NA	0.00825	0.00825	0.00825	0.00825	0.00825	0.00825	
Av Miles	NA	NA	810	810	810	810	810	810	
Coal Rev.	NA	NA	113,603	167,063	193,793	227,205	253,935	280,665	
Other Rev	60,793	63,282	74,204	76,994	78,503	80,038	81,603	83,196	
Total Rev.	60,793	63,282	187,807	244,057	272,296	307,243	335,538	363,861	
Op. Exp.	42,348	52,123	87,434	105,624	114,281	125,354	134,089	142,666	
G&A Exp (Net)	3,798	4,443	28,909	30,030	30,794	31,632	32,393	33,855	
Deprec & Amort	6,482	6,768	23,071	30,759	34,732	39,712	43,762	47,881	
Inc Bef Int/Tax	8,166	(52)	48,393	77,643	92,488	110,546	125,294	139,460	
Interest	6,028	5,510	97,728	93,148	88,172	82,747	76,897	70,978	
Inc. Tax 38.2%	817	(2,125)	(18,846)	(5,923)	1,649	10,619	18,487	26,160	
Net Income	1,321	(3,438)	(30,489)	(9,582)	2,668	17,180	29,909	42,322	49,891

Inasmuch as DM&E should be able to produce a positive annual income on these relatively modest volumes within 3 years of the commencement of operations, and total net income of almost $50 million through 2007 excluding environmental mitigation costs, we conclude that the applicant has met its burden of showing that the proposed construction would pose no threat to the

[98] MSC adopted DM&E's 8.25 mills in its 17 million ton scenario.

ability of DM&E to carry out its common carrier obligation to serve its present customers.[99]

As noted, DM&E contends that it has a variety of financing sources available, and has submitted evidence and testimony from several sources concerning funding. These sources include Morgan Stanley (an investment firm), Schroder & Co. (an investment advisory company), and Lombard Investments (an institutional investment manager). Morgan Stanley submitted a letter dated February 17, 1998, which indicates its belief that the project would appear to be attractive to investors. Schroder provided a study dated August 27, 1998, which, while not making any commitments concerning financing, implies that the project appears promising and casts a favorable light on future earnings of the railroad after completion of the project. Lombard states that it believes that the project is attractive from a financial perspective, that DM&E has assembled an experienced team of financial advisors, that considerable interest exists in the financial community for equity financing prior to the time when construction would begin, and that the financial marketplace, not the Board, would ultimately determine whether this project is attractive enough to investors to obtain needed capital. Lombard also suggests that it might provide some of the financing for the project.

While these statements are all positive, no commitment of funds has been made to date. DM&E indicates that a decision from the Board regarding the transportation aspects of this project will help it go forward and obtain necessary financing. This has been true in prior cases, and the lack of committed financing at this stage is not, in our opinion, grounds to reject the application. As Lombard indicates, the ultimate determination of the financial viability of the project will be made by the financial markets. We see no reason, at this early stage of the project, to deny DM&E the opportunity to take its proposal to the financial markets.

TRANSPORTATION BENEFITS

DM&E contends that the project would generate quantifiable public benefits totaling $236 million per year. These benefits would include $202 million in transportation cost savings for railroad operations and lake vessels resulting

[99] We note that these volumes would not produce a positive cash flow under DM&E's proposed amortization schedule of 13 years. But DM&E has no obligation to pay off its debt in that period of time, nor is it precluded from refinancing its debt at any time. Therefore, we have focused on net income as the better indicator of financial viability.

from improved productivity and efficiency, $24 million in savings resulting from improved railcar cycle times, and $10 million in railcar pooling savings. Other transportation benefits listed by DM&E include: (1) competitive transportation options at seven utility plants for the first time; (2) smaller coal inventories and smaller railcar fleets due to faster cycle times; (3) 50 to 100 million tons of increased coal hauling capacity from the PRB; (4) more efficient operations of PRB mines; and (5) better service for DM&E's existing customers.

In response, MSC argues that virtually all of these benefits would not be realized because of its anticipated minimal usage of DM&E by utilities in these markets. The Coalition estimates railroad and lake vessel savings would be $9.72 million and considers other savings negligible. MSC claims that the proposed benefits due to improved cycle times and railcar pooling are not realistic, nor are DM&E contentions of more competition and more reliable service. Finally, MSC states that the benefits that would be derived from additional capacity are speculative, because both BNSF and UP are adding additional capacity to their PRB lines to meet increasing market demand.

We agree with DM&E that, based on the current record, there likely would be transportation benefits from transportation cost reductions where there are mileage savings. Improved service from this new line construction project should also yield transportation benefits.

PUBLIC INTEREST, DEMAND OR NEED

We also conclude that, based on the information available to date, there is public demand for this project. The Coal Consumers, who collectively purchase and transport by rail well over 100 million tons of coal annually, most of which is from PRB mines, as well as almost all current shippers, have expressed their support. The DM&E project would establish another PRB transportation competitor, which should have a positive impact on rates and service for the increasing volumes of PRB coal. There is presently competition for PRB coal provided by BNSF and UP. But DM&E is offering new PRB coal transportation service that should generate efficiencies and provide important benefits to PRB coal shippers.

It is also clear that the current record provides evidence that the public interest would be well served by this construction. DM&E has documented various anticipated public benefits. Western coal shippers that would be able to receive DM&E service directly by joint line rail service or by joint DM&E and barge service should receive direct benefits from DM&E's proposed service. An additional competitor in this marketplace would respond to the growing demands for the service in question. DM&E should bring a lower cost structure

(including shorter mileage), faster and more reliable service, and additional capacity.

At the same time, existing DM&E shippers' rail service should be preserved and improved. We base this conclusion on DM&E's evidentiary presentation and the fact that some 90% of DM&E's current shippers have indicated their support for this project while none has voiced any objections. DM&E's existing shippers and receivers also indicate that they believe that the only real risk associated with this project is the possibility that the Board might not approve it, which could result in the failure of the railroad to continue to operate. Finally, DM&E's shippers and receivers indicate that they see no risk that their services would be adversely affected from increased competition in the PRB. In fact, they contend that this additional source of PRB coal would benefit their entire region.

DM&E also claims that this construction project would improve service for existing customers. It explains that complete rehabilitation of the existing line from Wasta, SD, to Winona, MN, is necessary to sustain future railroad operations. DM&E asserts that rehabilitation of its lines could not be justified based on DM&E's existing customer base. The railroad indicates that two-thirds of its ties need replacement, ballast is in generally poor condition, and most of its rail needs replacement. In sum, DM&E argues that its assets are worn out and need to be replaced, and that this will occur, to the benefit of existing shippers, if and when this project is approved and constructed.

We agree that DM&E's infrastructure hampers its ability to serve its existing customers. A railroad with annual revenues in the $50 to $60 million range cannot generate sufficient funds to rehabilitate its lines, because normal maintenance expense for over 1,000 miles of track, much of it mainline, runs into millions of dollars per year. Replacing track, ties and ballast that are deteriorating costs millions more. Thus, there appears to be the very real likelihood that, absent the funds generated by this project, DM&E would cease to exist as a viable railroad.

In sum, given the financial analysis set out above, the substantial support by its existing shippers, and the possibility of DM&E's being unable to continue to operate for long without a large infusion of capital sufficient to rehabilitate its system, we believe, based on the record now before us, that the public convenience and necessity test of causing no harm to existing shippers and receivers has been met.

OPERATING AND CONSTRUCTION PLAN

DM&E's operating plan (Plan) and its operating and construction costs are based on the assumption that DM&E will move 40 million tons of coal starting in 2002, increasing to 60 million tons in 2003, and by 10 million tons per year thereafter until it carries 100 million tons in 2007.[100] The general approach in the Plan is similar to the design format presented by parties proposing the use, as benchmarks, of hypothetical and efficient railroads in railroad stand-alone cost maximum rate proceedings.[101] The line proposed for construction here would be built so as to accommodate the movement of a single heavy-loading commodity carried in large volumes and in dedicated trains.

Although MSC disagrees with DM&E's traffic projections, it does not relate its modified traffic projections to a revised construction cost. MSC also claims that DM&E's Plan does not provide the Board with adequate assurance that the Plan can work safely and efficiently, as DM&E claims.[102] MSC voices concerns relative to emergency braking distances for the high speed coal trains mentioned in DM&E's Plan. However, MSC has not shown that DM&E's locomotives would not be able to perform emergency stops within sufficient distances to avoid accidents.[103] Contrary to what the Coalition maintains,[104] we are confident that the line would be configured with braking taken into consideration. We also have no reason to believe that DM&E would not comply with, or be able to meet, all applicable Federal Railroad Administration (FRA) safety standards and that the braking aspects of its proposed state-of-the-art train control system would not receive FRA approval.[105] In any event, the safety aspects of this application will be fully assessed in the environmental analysis.

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[100] DM&E's operating plan and investment will be more than sufficient for the transportation of lower tonnage levels in the earlier years of operation.

[101] *See, West Texas Utilities Company v. Burlington Northern RR Co.*, 2 S.T.B. 638 (1996).

[102] MSC requests that the Board direct DM&E to develop a detailed Safety Integration Plan (SIP), similar to that required in the recent CSX/NS/CR merger (STB Finance Docket No. 33388, *Decision No. 52* served November 3, 1997) before considering the transportation aspects of the application. However, we have never required a SIP in rail construction cases, which do not involve the integration of two corporate cultures on one rail line. Moreover, safety, to the extent appropriate, will be dealt with in the environmental review process. In these circumstances, there is no reason for us to delay issuance of this decision as MSC requests.

[103] All relevant safety concerns, including accident rates, will be addressed in the EIS.

[104] *See,* the Coalition's supplemental submission filed on October 28, 1998, at 20.

[105] On pages 12-14 of his Reply V.S., DM&E Witness Davis explains how the computerized operating model takes braking requirements into consideration using conservative assumptions.

Main Line Construction. DM&E's Plan states that main line track and structures are designed for 315,000-lb. cars operating in 135-car consists with three 6,000 horsepower locomotives distributed in each through train.[106] Maximum operating speed would be 45 mph for loaded coal trains and 49 mph for other trains. DM&E's main line track structure in the new and rehabilitation areas would consist of 136-pound continuous welded rail (CWR) on wood ties at 19.5-inch spacing. Ballast would be a minimum of 12 inches under the ties on 12 inches of subballast. Curves greater than 2 degrees would use concrete ties spaced at 24 inches with additional ballast. Sixty percent of the wooden ties would be replaced on the rehabilitated portion of the line. Maximum grade for the line would be 1.4% on tangent track and curves below 2 degrees. The grade would be restricted to 1.0% on curves greater than 2 degrees. Maximum curvature for the main line would be generally less than 2 degrees. Curves up to 4 degrees would occur on less than 10% of the alignment. Right-of-way width would be 200 ft., except where additional land is required for yards, large cuts or fills, and passing sidings. Subgrade width would be 26 feet in single-line areas. At locations where there would be adjacent track, track centers would be separated by 15 feet.

DM&E further explains that all timber bridges and steel bridges other than through plate girder bridges would be replaced. Through plate girder bridges would be repaired and reinforced. Passing sidings and communication-based train control (CBTC) would be provided with features similar to those in the new construction. Existing grade crossings would be improved as needed. A grade reduction project is included at Wall, SD.

Passing Sidings. DM&E's Plan includes 35-40 passing sidings, with each at least three miles long, located at frequent intervals along the line designed to allow entry at main line speeds of 45 mph and running at reduced speed through the sidings. It proposes to locate sidings to accommodate topographical conditions. Sidings would be constructed using new 115-lb. CWR. Tie and ballast specifications are the same as main track. Sub-ballast would be 9 inches deep. DM&E notes that empty trains would be operating over side tracks, not loaded trains. In the vicinity of passing sidings there would be dragging equipment and hot box detectors, as well as set out tracks for bad order equipment.

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[106] Initial operations will employ 286,000-lb. cars operating in 115-135 car consists.

MSC questions the placement of sidings and criticizes DM&E for changing locations of sidings from optimum locations in order to accommodate topographical conditions. MSC claims that, by failing to locate sidings at the optimum locations, DM&E would impair its claimed efficiencies. DM&E notes, however, that the computer model used for determining passing siding location shows that sidings can be varied. For example, moving the location of a siding to the east could allow an empty westbound train to enter a siding earlier. This may slow the empty westbound trains to a speed that is less than optimal, but would not impair the movement of eastbound loaded trains. Morever, MSC does not quantify the extent to which it believes DM&E's efficiencies would be reduced by the relocation of a siding.

We do not view DM&E's placement of sidings as an obstacle to the issuance of this decision. The final location of sidings is bound to change somewhat as the details of property acquisition and engineering considerations and potential environmental impacts, such as the location of wetlands, becomes fully known. DM&E witness Davis persuasively shows that the computer modeling DM&E used allows for flexibility in the location of sidings. Accordingly, the project is not infeasible simply because DM&E may make adjustments in the location of certain sidings. The current record indicates that DM&E's signal and control systems would ensure that trains meet each other only where there is a siding. In the absence of any evidence of serious problems concerning the location of sidings, we will not create an artificial barrier to entry by requiring applicants to risk the expenditure of large sums to design a project of broad scope such as this down to its final details as to siding locations before we determine whether it satisfies the transportation aspects of section 10901.[107]

Four Major Staging Yards. DM&E's Plan recognizes that, due to the interfaces with mines and connecting carriers, DM&E would not have complete control over the release of loaded trains and the receipt in interchange of empties. As such, the Plan provides for four staging yards to receive, hold and release through trains as necessary, to slot them efficiently onto DM&E's main line operations and to provide the proper maintenance windows. DM&E states that the West Staging Yard would have train and engine crews to take empty trains to the mines and loaded trains from the mines, and stage the loaded trains for slotting the eastbound movement. The other three staging yards would be located across the system at intervals of approximately 225-275 miles, so as to provide for about 8 hours that each train crew would actually be on duty. These

[107] Also, the potential environmental impacts of sidings and anticipated rail operations will be addressed in the EIS.

staging yards would have the capacity to hold trains as necessary to coordinate DM&E's operations with those of connecting carriers, as well as to create the necessary maintenance windows. Contrary to what the Coalition maintains, the Plan, based on the information available to date, leaves adequate room for the unexpected and does not depend on "clockwork-like movements" or train meets "scheduled to occur at 15-minute intervals."[108]

Grade Crossings. DM&E states that, where feasible, major highway crossings and all rail crossings would be separated. DM&E asserts that it plans to build grade separations at almost all locations where new or rebuilt lines cross those of another railroad. DM&E's specifies grade separations at BNSF's line near Burdock, and in the PRB at Antelope, Cordero, and Bell Ayr. (DM&E does not specify what type of construction will be used at the BNSF/UP crossing near Caballo Rojo or the crossing of BNSF line at Burdock.)[109]

DM&E adds that grade crossings would be provided with protection devices. Moreover, appropriate fencing would be provided in cattle country and cattle guards would be provided at road crossings. This information will be used in assessing grade crossings and fencing in the EIS.

Train Control. DM&E explains that its Plan assumes the use of a "Communication Based Train Control" (CBTC) system to manage its train operations. However, DM&E notes that it would also be able to operate efficiently with a standard Centralized Traffic Control (CTC) system and bases its operating and investment cost projections on this type of signal system. MSC claims that the CBTC system DM&E proposes to use is questionable from a safety standpoint because the system is still in the developmental stage and has not yet been approved by FRA. However, because DM&E has not based its operations and investment cost on the CBTC system, MSC's concerns are misplaced. In any event, we note that CBTC systems may be less speculative than alleged by the Coalition.[110]

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[108] Reply V.S. of Levy, at 9-10; reply V.S. of Davis, at 20-21.

[109] We note that DM&E has not yet addressed how it intends to compensate BNSF, UP, and other railroads for crossing their lines in compliance with 49 U.S.C. 10901(d).

[110] A report prepared by DM&E's engineering contractor Parsons Brinckerhoff states that CBTC systems are being tested by two Class I railroads in the Pacific Northwest and estimates that they may be available commercially and approved by FRA in time to be deployed in this project. *See*, Vol. 2B of the Coalition's reply evidence, Exh. 13, at 22.

In its supplemental submission filed on October 28, 1998, the Coalition asserts that DM&E witness Daniels "acknowledged that there was a risk" that its construction schedule would be delayed while the new technology receives FRA approval. Our role, however, is not to guarantee that the project is not delayed to allow the use of new technology but is simply to protect the public interest

(continued...)

DM&E's Plan farther assumes four crew change points across the system, providing a cushion for through train crews to make their runs in under 8 hours, so that there should be no violation of the Hours of Service Act rules. DM&E states that crew changes would occur at the staging yards. Locomotive and car repair and inspections facilities would be constructed at one of the staging yards if that service is provided by DM&E. Locomotive running repairs, servicing and locomotive and car switching would occur at these yards as needed. By handling these requirements at the same location, DM&E expects to minimize train delay and maximize utilization of its crews and equipment. The Plan also assumes maintenance windows of up to 6 hours every day on the main line.

DM&E states that it plans for trains to move across the system in set time slots rather than being dispatched at odd intervals. According to DM&E, such regular movement not only would simplify operations and promote safety, but would also greatly enhance the capacity of the single track. DM&E states that virtually all of the eastbound traffic would be loaded trains that would stop only for crew changes at the staging yards. The use of regularly scheduled slots would also mean that the predominantly empty westbound trains also should not be required to stop between staging yards, as the meeting tracks (in excess of three miles long) would be designed so westbound trains can pass the eastbound trains without losing appreciable speed. As proposed, the scheduled slot system should not only keep trains moving evenly across the main track, but would spread the traffic among the staging and marshaling yards across the system, so that the line would have ample capacity at those facilities.

Train headway is the amount of time between trains heading in the same direction. In order to move 40 million tons of PRB coal, plus anticipated growth of existing business, in the first year DM&E would need the ability to move eight loaded trains a day for 363 days. The headway between each of the loaded trains (as well as the returning empty trains) would be one hour, but the headway would be reduced in subsequent years as traffic levels increase.

Capacity and Growth. DM&E anticipates that the total amount of traffic available would increase over time, and therefore its Plan takes into account likely traffic growth. This is particularly relevant in the case of meeting tracks. DM&E's proposed system is designed with the necessary expansion capacity built in, so that meeting tracks could be added without the need for any track or structures to be relocated. According to DM&E, the final design for this single-

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[110](...continued)
by ensuring that DM&E's existing shippers would not be adversely affected if the project is constructed with the new technology as proposed by DM&E.

track railroad would provide for the reliable and safe movement of 100 million tons of PRB coal as well as the anticipated growth of existing traffic. Initially, only half of the meeting tracks would be constructed; when the capacity of the originally constructed line becomes constrained, the remainder of the designed-in meeting tracks would be built.

The Coalition has not shown that the proposed line would be unable to accommodate all of the projected traffic. The Coalition maintains that DM&E's proposed single track railroad would be inadequate. However, BNSF and UP transport more than 100 million tons of coal over equal or greater distances of bottleneck segments of single line track that, according to the evidence presented, is less efficiently designed than the single line track proposed to be built by DM&E.[111] In recent years, other railroads also have replaced double track with single track or built single line railroads that move comparable numbers of trains with a wider mix of commodities.[112]

Eastern Connections. DM&E's Plan depends on its ability to interchange cars with other railroads. The application identifies three primary interchange points with other railroads: (1) UP at Mankato, MN; (2) I&M Rail Link at Owatonna, MN; and (3) UP, CP, and I&M at Winona/Minnesota City, MN. In addition, DM&E asserts that it is negotiating a fourth interchange agreement, the essential details of which appear in the confidential version of DM&E's pleadings. There currently are no signed agreements with the connecting carriers at these interchange points.

We disagree with the Coalition's argument that the absence of signed interchange agreements is a reason for disapproval of the transportation related aspects of this project. By adopting the Coalition's approach, we would be imposing a duty on applicants like DM&E to reach agreements with connecting carriers before projects are even approved. This would unduly delay applicants like DM&E and place them at a bargaining disadvantage because connecting carriers are under no duty to negotiate with potential connections before they are built or at least finally approved.[113] Moreover, the Coalition's approach would expose both carriers to the risk that the economic value of their connection would change in the interim between adoption of an interchange agreement and completion of a project. In any event, there is no reason to believe that DM&E's

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[111] Reply V.S. of Davis, at 19-29.

[112] Reply V.S. of Levy, at 10-11.

[113] Once a project is finally approved, the jurisdiction of the Board is available to ensure the interchange of cars with connecting carriers where reasonable agreements cannot be reached.

sources of capital would allow DM&E to assume investment risks until the terms of interchange are finalized.

The Coalition alleges that the route proposed by DM&E includes a "nonexistent interchange with Illinois Central Railroad" (IC).[114] However, the *Official Railroad Station List*, a widely used industry guide,[115] shows an interchange between DM&E and the Cedar River Railroad Company, a wholly owned subsidiary of IC, at Glenville, MN.

Based on the current record, DM&E's Plan appears to be feasible.

CONCLUSION

Based on the present record, it appears that DM&E would be competitive in a number of markets and accordingly, that the proposal has not been shown to be infeasible. Giving DM&E every reasonable benefit of the doubt, as the statute requires, we therefore find that, on the record developed to date, the construction and operation of the line of railroad described above satisfies the transportation aspects of 49 U.S.C. 10901. Following the conclusion of the environmental review process, which is ongoing, we will issue a further decision assessing the potential environmental impacts of the proposal and the cost of any environmental mitigation we might impose. This decision does not in any way prejudge our ultimate decision. Nor can any construction begin until our final decision has been issued and has become effective.

It is ordered:

This decision is effective on December 10, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.

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[114] Supplemental V.S. of Witness Nelson, filed on October 28, 1998, page 3, n.2.

[115] This is a public tariff filed with the Board (Tariff OPSL 6000-S).

APPENDIX I

COMMENTERS[116]

COMMENTS IN SUPPORT

City of Philip, South Dakota
City Council and Mayor of the City of Doge Center, Minnesota
City of Midland, South Dakota, Midland City Council
Edison Electric Institute
FirstEnergy
Indianapolis Power & Light Company
Kansas City Power & Light Company
Kentucky Utilities Company
Mankato City Council
Newcastle Chamber of Commerce
Ontario Hydro
Philip Chamber of Commerce
Sleepy Eye City Council
Soo Line Railroad Company d/b/a Canadian Pacific Railway
The Campbell County Chamber of Commerce
The Associated General Contractors of South Dakota, Inc.
United Transportation Union, General Committee of Adjustment, G0270, Monty T. Tuchel
Waseca Area Chamber of Commerce
Western Coal Traffic League
Wisconsin Public Service Corporation
Wisconsin Central Ltd.

COMMENTS IN OPPOSITION

777 Ranch
Arden B. and Lavonne Sigl
Black Hills Group, Sierra Club
Blue Earth County
Bridle Bit Ranch
Cindy S. Thesing
Donley and Nancy Darnell
Dwight L. Adams, Member State of South Dakota Railroad Oversight Committee
Fred R. Seymour, City of Brookings (SD) Railroad *ad hoc* Committee
Legislative Representative Brotherhood of Locomotive Engineers, Division 94, Lawrence Kemper
Leslie Hammack

[116] Of the 147 parties of record listed in our June 5, 1998, decision, 49 filed comments in accordance with our May 5, 1998, decision.

Mike Stufflebean, Legislative Representative, Union Transportation Union, Local #465
Mid-States Coalition for Progress
Nancy Hilding
Niobrara County Commissioners
Prairie Hills Audubon Society
Robert G. Dye
South Dakota Chapter Sierra Club
State of South Dakota Attorney General, Mark Barnett
Thomas R. Wright
Weston County Farm Bureau

OTHER COMMENTS

Mayo Clinic

The Mayo Clinic, located in the City of Rochester, MN, states that it shares the concerns of the greater Rochester community about the adverse effects of the DM&E proposal to rebuild its existing rail line through the heart of Rochester. The Clinic raises concerns regarding delays in the response time for emergency ambulance services, coal dust and the effect it would have on its patients, increased vibrations, crossing safety, and train derailments. The Clinic wants the environmental impact statement to encompass the improvements to the existing railroad as well as the new railroad construction, and it seeks imposition of a condition that would require DM&E to finance mitigating steps to address the health and safety concerns identified above.

Minnesota Department of Transportation

The Department seeks the imposition of several new construction conditions as well as Powder River Basin general construction conditions. It requests that the STB impose several operational conditions on the project to ensure safety, rail service, and interchange with other railroads. Another concern raised by MN/DOT is that DM&E share the financial information necessary to independently analyze the financial structure of the Powder River Basin project as a safeguard to the rail system in Minnesota prior to giving the Powder River Basin project approval. As part of the debt restructuring identified in the Powder River Basin Operating Plan, all outstanding loans from MN/DOT to the DM&E will be repaid. MN/DOT is concerned with DM&E's ability to service new debt. Additionally, MN/DOT submitted a letter from Minnesota's Governor, Arne H. Carlson, who reiterated that any support for the construction project is conditioned on the resolution of concerns of local communities that might be affected by DM&E's project.

Olmsted County

The County argues that applicant does not have sufficiently detailed plans in place that permit the parties of record to adequately comment and argue the merits of the application. It further argues that it is very difficult to separate the transportation matters from the environmental portion of the proceeding. Olmsted wants the Board to modify its order providing for the modified procedure to direct that DM&E provide the specific information necessary to respond to the concerns that have been submitted by the various interested parties, that the period for such submissions be extended as required and that then there be a reasonable period for the interested parties to respond. Additionally, Olmsted contends that the Board should provide that the upgrade portion of the project is subject to the transportation portion of the application and that the submissions of DM&E must include specific detailed information concerning the upgrades and the modifications to the existing

public facilities that will need to be modified to respond to this project and a demonstration of sufficient funding resources to support such changes in the infrastructure.

South Dakota Department of Transportation

The Department states that it has an interest in the financial ability of DM&E to construct and operate the project. It seeks clarification concerning the scope of the approval required by the STB on DM&E's upgrading of existing trackage. The Department claims that all aspects of the project, in addition to the new construction, are also subject to environmental review and STB approval. The Department requests that an independent review by the STB of the financial statements and projections occurs to ensure that any decision by the STB is based on sound, verified information.

The Governor of the State of South Dakota and the Governor's Dakota, Minnesota and Eastern Railroad Oversight Committee

The Committee seeks an interpretation as to the extent of authority the STB has regarding the new construction in Wyoming, South Dakota and the bypasses in Minnesota while the Board's Environmental Analysis Section is considering impacts throughout the entire route over which trains will travel from the Powder River region in Wyoming to the Mississippi River. It maintains that a clarification by the Board is needed.

U.S. Department of Justice, Federal Bureau Prisons, Federal Medical Center

The Center raises concerns about the close proximity of planned railroad track to the prison facility. It seeks a rerouting of tracks outside the City of Rochester.

Winona County Highway Department

The Department recognizes benefits of the proposed construction project but raises concerns about increased rail traffic over a line already under study as a high speed passenger rail line through the Midwest Rail Initiative Study. Winona County wants participation by all rail service providers and all levels of government.

APPENDIX II

HISTORICAL FINANCIAL POSITION

DM&E has submitted historical financial statements for the years 1995 and 1996 in its application. These data are summarized in the table shown on the following page.

These data indicate that the DM&E has realized rates of return that were substantially higher than those realized by the Class I railroads as a whole for the year 1995 and approximately equal to the Class I composite for 1996.[117] The operating ratios for those years were similar to those for the Class I's.[118] Due to new debt financing during 1996, interest expense was higher. Also, certain operating expenses were somewhat higher in 1996 as well.

Historical Financial Data for DM&E - 1996 and 1995

		1996	1995
	Balance Sheet		
1	Net Property, Plant & Equipment	$106,283,187	$73,242,973
2	Other Assets	2,373,544	23,490,519
3	Total Assets	128,656,731	96,733,492
4	Long-Term Debt	73,197,622	42,710,717
5	Deferred Income Tax	14,572,017	12,819,662
6	Other Liabilities	16,923,748	20,150,963
7	Shareholders' Equity	23,963,344	21,052,150
8	Total Liabilities & Equity	128,656,731	96,733,492
	Income Statement		
9	Revenues	56,562,557	4,572,641,837,127,232,000,000,000,000,000,000,000,000,000,000,000
10	Operating Expenses	47,445,698	
11	Operating Income	9,116,859	
12	Other Income	1,214,643	
13	Interest	5,760,438	
14	Income Taxes	1,746,120	
15	Net Income	2,824,944	
16	Operating Ratio (L10/L9)	??	??
17	Return on Equity (L15/L7)	??	ERR
18	Return on Investment ([L11-L14]/[L1-L5])	??	??

[117] The Class I railroad composite return on equity was 12.2% and 7.9% for 1996 and 1995, respectively. The return on investment was 9.0% and 6.5% for those respective years.

[118] The Class I composite operating ratios were 80.5% and 86.4% for 1996 and 1995, respectively.