

STB FINANCE DOCKET NO. 34178¹

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION
AND CEDAR AMERICAN RAIL HOLDINGS, INC. — CONTROL —
IOWA, CHICAGO & EASTERN RAILROAD CORPORATION

Decision No. 7

Decided January 31, 2003

The Board approves the acquisition, by Dakota, Minnesota & Eastern Railroad Corporation, of control of Iowa, Chicago & Eastern Railroad Corporation.

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¹ This decision embraces: STB Finance Docket No. 34178 (Sub-No. 1), *Dakota, Minnesota & Eastern Railroad Corporation—Terminal Trackage Rights—Union Pacific Railroad Company*; and STB Finance Docket No. 34178 (Sub-No. 2), *Dakota, Minnesota & Eastern Railroad Corporation—Trackage Rights Exemption—Iowa, Chicago & Eastern Railroad Corporation and Iowa Northern Railway Company*.

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INTRODUCTION²

The DM&E/IC&E Control Application. By application filed August 29, 2002, Dakota, Minnesota & Eastern Railroad Corporation (DM&E, a Class II railroad),³ Cedar American Rail Holdings, Inc. (Holdings, a noncarrier and a wholly owned subsidiary of DM&E), and Iowa, Chicago & Eastern Railroad

² Abbreviations and acronyms used in this decision are listed in Appendix A.

³ Our regulations divide railroads into three classes based on annual carrier operating revenues. Class I railroads are those with annual carrier operating revenues of \$250 million or more (in 1991 dollars); Class II railroads are those with annual carrier operating revenues of more than \$20 million but less than \$250 million (in 1991 dollars); and Class III railroads are those with annual carrier operating revenues of \$20 million or less (in 1991 dollars). See 49 CFR Part 1201, General Instruction 1-1(a).

Corporation (IC&E, a Class II railroad)⁴ seek approval under 49 U.S.C. 11321-26 for DM&E’s acquisition of indirect control of IC&E through ownership of IC&E’s stock by Holdings.⁵

Two Related Filings. By application filed August 29, 2002, DM&E seeks, contingent upon approval of the DM&E/IC&E control application, an order under 49 U.S.C. 11102 that would permit DM&E to operate, without restriction, over approximately 3,700 feet of Union Pacific Railroad Company (UP) “terminal trackage” in Owatonna, MN.⁶ By notice of exemption filed August 29, 2002, DM&E seeks, contingent upon approval of the DM&E/IC&E control application and the DM&E/UP terminal trackage rights application, overhead trackage rights on the IC&E line between Owatonna, MN, and Mason City, IA, and on the Iowa Northern Railway Company (IANR) line between Plymouth Junction, IA, and Nora Springs, IA.⁷

Parties Supporting The DM&E/IC&E Control Application. The DM&E/IC&E control transaction is supported by 24 parties, including 15 agricultural interests,⁸ 3 railroads,⁹ and 6 other parties.¹⁰ See DME-2 at 111-49; DME-9 at 38-56; Letter of South Dakota Governor William J. Janklow, dated December 12, 2002.

Parties Supporting The Terminal Trackage Rights Application. The terminal trackage rights application is supported by 9 parties. See DME-9

⁴ DM&E, Holdings, and IC&E are referred to collectively as applicants.

⁵ The proposed control transaction is classified as a minor transaction. See 49 CFR 1180.2(c) (classification of transactions under 49 U.S.C. 11323).

⁶ The DM&E/UP terminal trackage rights application is docketed as STB Finance Docket No. 34178 (Sub-No. 1).

⁷ The DM&E/IC&E-IANR trackage rights exemption notice is docketed as STB Finance Docket No. 34178 (Sub-No. 2).

⁸ Ag Processing Inc., AgFirst Farmers Cooperative, Cenex Harvest States Cooperatives, Farmers Cooperative Association of Jackson, Harrold Grain Company, LLC, Minnesota Grain and Feed Association, National Farmers Union, Oahe Grain Corporation, South Dakota Farm Bureau, South Dakota Farmers Union, South Dakota Grain & Feed Association, South Dakota Soybean Processors, Inc., Watonwan Farm Service Company, Agriliance, LLC, and Grain Processing Corporation.

⁹ IANR, Iowa Traction Railroad Company (IATR), and Wisconsin & Southern Railroad Company (W&S).

¹⁰ Greater Huron Development Corporation, IPSCO Steel Inc., the Southern Grainbelt Shippers Association, the Iowa/Minnesota Shippers Association, the City of Jackson, MN, and South Dakota Governor William J. Janklow.

at 38-56; Letter of South Dakota Governor William J. Janklow, dated December 12, 2002.¹¹ We have also received a number of letters from Members of Congress supporting the terminal trackage rights application.

Commenting Parties: DM&E/IC&E Common Control. Submissions were filed by Arkansas Electric Cooperative Corporation (AECC), Muscatine Power and Water Company (MP&W), the Western Coal Traffic League (WCTL), MidAmerican Energy Company (MidAmerican), Soo Line Railroad Company d/b/a Canadian Pacific Railway (CPR), the Commuter Rail Division of the Regional Transportation Authority of Northeast Illinois d/b/a Metra (Metra), the Brotherhood of Locomotive Engineers (BLE), the Iowa Department of Transportation (IDOT), and the United States Department of Transportation (DOT). The evidence, arguments, and requests for affirmative relief in these submissions are summarized in Appendix B.

Commenting Parties: Terminal Trackage Rights. Submissions were filed by UP, WCTL, the City of Owatonna, IDOT, and DOT. The evidence and arguments in these submissions are summarized in Appendix C.

Summary Of Decision. In this decision, we are approving DM&E's acquisition of control of IC&E, subject to the standard *New York Dock* labor protective conditions.¹² We are also denying DM&E's terminal trackage rights application in the Sub-No. 1 docket. Further, we are exempting the DM&E/IC&E-IANR trackage rights at issue in the Sub-No. 2 docket, subject to the standard *Norfolk and Western* labor protective conditions.¹³ We are denying all other conditions sought by the various parties to this proceeding.

¹¹ The supporting parties are the Minnesota Department of Transportation, Southern Grainbelt Shippers Association, South Dakota Grain & Feed Association, Iowa/Minnesota Shippers Association, Agriliance, LLC, IPSCO Steel Inc., Grain Processing Corporation, the City of Jackson, MN, and South Dakota Governor William J. Janklow.

¹² *New York Dock Ry. — Control — Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979) (*New York Dock*).

¹³ *Norfolk and Western Ry. Co. — Trackage Rights — BN*, 354 I.C.C. 605, 610-15 (1978) (*Norfolk and Western*), as modified in *Mendocino Coast Ry., Inc. — Lease and Operate*, 360 I.C.C. 653, 664 (1980) (*Mendocino Coast*).

THE DM&E/IC&E CONTROL APPLICATION
AND THE RELATED FILINGS

Dakota, Minnesota & Eastern Railroad Corporation. DM&E owns or operates approximately 1,103 route miles of rail lines (including approximately 720 route miles of main lines and approximately 383 route miles of branch lines) in Wyoming, South Dakota, Nebraska, Minnesota, and Iowa. DM&E's principal route extends from Colony (Bentonite), WY, through Rapid City, SD, to Winona, MN. Branch lines extend from Rapid City to Crawford, NE, and Chadron, NE; from Blunt, SD, to Onida, SD; from Wolsey, SD, to Aberdeen, SD, via trackage rights on The Burlington Northern and Santa Fe Railway Company (BNSF); from Redfield, SD, to Mansfield, SD; from Waseca, MN, to Hartland, MN; and from Hartland, MN, to Mason City, IA, via trackage rights on UP.¹⁴ DM&E also has a currently inactive branch line extending from Huron, SD, to Yale, SD, and currently inactive trackage rights on BNSF extending from Yale, SD, to Watertown, SD. In addition, DM&E operates via trackage rights over CPR between Minnesota City, MN, and Winona, MN, and over short segments of UP-owned trackage in Mankato, Owatonna, and Winona, MN.

DM&E's principal yard and terminal facilities are located at Rapid City, Pierre, and Huron, SD, and at Tracy and Waseca, MN. DM&E interchanges traffic with UP at Mankato and Winona, MN, and at Mason City, IA; with CPR at Minnesota City, MN; with BNSF at Wolsey, Aberdeen, and Redfield, SD, and at Crawford, NE; and with Nebkota Railway, Inc., at Chadron, NE. DM&E can also conduct, via its overhead trackage rights on UP's Hartland-Mason City line, restricted interchanges with CEDR at Glenville, MN, and with IANR at Manly, IA.¹⁵ Although the lines of DM&E and IC&E cross at grade and connect in Owatonna, MN, DM&E and IC&E cannot (for the most part) interchange at that location due to restrictions on DM&E's trackage rights on the UP-owned track through Owatonna.

¹⁴ DM&E's Hartland-Mason City trackage rights are restricted to interchanging traffic with UP at Mason City and to interchanging limited categories of traffic with IANR at Manly, IA, and with Cedar River Railroad Company (CEDR, a Canadian National Railway Company (CN) subsidiary) at Glenville, MN.

¹⁵ The DM&E/CEDR interchange at Glenville is limited to traffic that originates or terminates at points on CEDR's lines. The DM&E/IANR interchange at Manly is limited to traffic that originates or terminates at points (other than Cedar Rapids, IA) on IANR's lines.

Iowa, Chicago & Eastern Railroad Corporation. IC&E owns or operates approximately 1,397 route miles of rail lines (including approximately 786 route miles of main lines and approximately 611 route miles of secondary or branch lines) in Minnesota, Iowa, Kansas, Missouri, Wisconsin, and Illinois. IC&E, which acquired these lines on July 29, 2002, from I&M Rail Link, LLC (I&M), in an asset acquisition transaction,¹⁶ began its operations on these lines on July 30, 2002. IC&E's principal routes extend from Chicago, IL, to Sabula Junction, IA, and from there both southwest to Kansas City, MO, and northwest to Minneapolis/St. Paul, MN. Significant secondary routes — known as the Corn Lines — extend across Southern Minnesota from Jackson, MN, to Ramsey, MN, and across Northern Iowa from Sheldon, IA to Marquette, IA. Branch lines extend from Davis Junction, IL, through Rockford, IL, and Beloit, WI, to Janesville, WI; from Mason City, IA, to Comus, MN;¹⁷ from Wells, MN, to Minnesota Lake, MN; from Davenport, IA, to Albany, IL, via trackage rights on BNSF; and from Davenport, IA, to Eldridge, IA. IC&E has overhead trackage rights over other railroads at a number of locations, including over CPR between River Junction, MN, and Merriam Park, MN, and between Comus, MN, and Rosemount, MN;¹⁸ over IANR between Nora Springs, IA, and Plymouth Junction, IA (connecting two IC&E line segments); and over Metra's "West Line" between Pingree Grove, IL, and Cragin Junction in Chicago, IL.¹⁹

IC&E's principal yard and terminal facilities are located at Davenport, IA, Ottumwa, IA, Muscatine, IA, Marquette, IA, Mason City, IA, West Davenport, IA, Savanna, IL, and Davis Junction, IL. IC&E owns a non-controlling stock interest in the Kansas City Terminal Railway Company (KCT, a switching and terminal carrier in Kansas City, KS/MO), and is also a joint owner, with The

¹⁶ See *Iowa, Chicago & Eastern Railroad Corporation — Acquisition and Operation Exemption — Lines of I&M Rail Link, LLC*, STB Finance Docket No. 34177 (STB served June 12, 2002, June 26, 2002, and July 22, 2002), and *Iowa, Chicago & Eastern RR—Acquire & Operate--I&M Rail Link*, 6 S.T.B. 499 (2003) (*IC&E/I&M Asset Acquisition*).

¹⁷ The Faribault, MN-Comus, MN segment of the Mason City, IA-Comus, MN line is not currently in service.

¹⁸ The Comus-Rosemount trackage rights are not currently in use.

¹⁹ Applicants claim that IC&E acquired, as assignee from I&M, I&M's rights to use Metra's West Line. This claim, however, has been the subject of a dispute between IC&E and Metra, and, in view of Metra's initial refusal to allow IC&E to access the West Line, IC&E traffic to/from Chicago was initially handled by other railroads — Iowa Interstate Railroad Ltd. (IAIS) and Chicago, Central & Pacific Railroad Company (CC&P, a CN subsidiary) — pursuant to haulage arrangements. Applicants have advised that IC&E commenced operations over the West Line in early September 2002 pursuant to a "temporary detour agreement" between IC&E and Metra, and that IC&E's alternative access routes via IAIS and CC&P also remain in place. See DME-9 at 5 n.7.

Kansas City Southern Railway Company (KCS), of the “Joint Agency” yard facility in Kansas City, MO. IC&E interchanges traffic with The Belt Railway Company of Chicago (BRC) at Cragin Junction/Clearing, IL; with BNSF at East Moline, IL, Moline, IL, Bettendorf, IA, Ottumwa, IA, Minneapolis/St. Paul, MN, and Kansas City, MO; with CEDR at Charles City, IA, and Lyle, MN; with CC&P at Dubuque, IA, and Rockford, IL; with the Chillicothe-Brunswick Rail Authority (CBRA) at Chillicothe, MO; with the Elgin, Joliet & Eastern Railway Company (EJ&E) at Spaulding, IL; with Illinois RailNet, Inc. (IRN), at Davis Junction, IL; with the Indiana Harbor Belt Railroad Company (IHB) at Franklin Park, IL; with IAIS at Rock Island, IL, and Davenport, IA; with IANR at Nora Springs, IA, and Plymouth Junction, IA; with IATR at Mason City, IA; with KCS at Kansas City, MO; with the Minnesota Commercial Railway Company (MCRC) at Minneapolis/St. Paul, MN; with Norfolk Southern Railway Company (NS) at Birmingham, MO, and Kansas City, MO; with CPR at Bensenville, IL, Minneapolis/St. Paul, MN, Northfield, MN, and River Junction, MN; with UP at Clinton, IA, Emmetsburg, IA, Mason City, IA, Sheldon, IA, Minneapolis/St. Paul, MN, Kansas City, MO, and Janesville, WI; and with W&S at Janesville, WI. IC&E also interchanges with all major line-haul carriers at Chicago, through intermediate switching services provided by BRC, IHB, and CPR.²⁰

Cedar American Rail Holdings. Holdings is the beneficial owner of all of the outstanding common stock of IC&E, which is being held in an independent voting trust pending the outcome of this control proceeding. Applicants indicate that, if the control application is approved and consummated, Holdings will function as a holding company for both DM&E and IC&E (i.e., Holdings will oversee the management and coordination of operations on the DM&E/IC&E system and perform marketing and administrative services for both DM&E and IC&E).²¹

Nature of the Control Transaction. Applicants contemplate the acquisition, by DM&E, of indirect control of IC&E through the termination of the voting

²⁰ IC&E’s overhead traffic rights on CPR’s River Junction-Twin Cities line do not allow IC&E to interchange with DM&E at Minnesota City, MN, or Winona, MN, two points at which DM&E lines connect with CPR’s line.

²¹ DM&E’s existing capital structure did not easily allow for the creation of a holding company in the normal corporate chain position above DM&E. Holdings was created as a wholly owned subsidiary of DM&E and technically is positioned in the corporate chain between DM&E and IC&E.

trust in which the IC&E stock is currently held and the distribution of that stock to Holdings, which will allow Holdings to exercise control over the IC&E stock. Applicants indicate that, if and when control is consummated, Holdings will oversee the management and coordination of operations of DM&E and IC&E, which will remain separate entities and conduct their own operations with their own employees.

Public Interest Justifications. Applicants contend that common control will improve applicants' operating and financial performance by allowing both railroads to serve their customers more effectively and to compete more effectively in the mid-American transportation market with Class I railroads, motor carriers, and barges. According to applicants, customers on both carriers will benefit from better equipment coordination and utilization, improved service patterns, and other operating efficiencies made possible by the larger and more diversified traffic base and greater financial resources of the combined DM&E/IC&E system. Applicants anticipate that common control will provide a more stable and reliable environment for shippers on both railroads. Applicants further contend that grain shippers on both DM&E and IC&E will benefit from having access to a combined, coordinated system fleet of over 6,100 covered hopper cars, and that common control will provide shippers and receivers with new routing and service options and more efficient and competitive single-system access to significant new markets and gateways.

More specifically, applicants maintain, with respect to DM&E, that common control will give shippers new, single-system rail access to the longer river shipping season at Mississippi River ports south of Winona, MN, and that grain shippers will enjoy, for the first time, direct single-system service to the major rail gateways of Chicago and Kansas City, new single-system routes to major grain processing plants on IC&E, new direct joint-line routes to processors elsewhere in Iowa (such as on IANR in Cedar Rapids), and "neutral" interline access to significant long-haul destination markets in the south-central United States. And common control, applicants maintain, will guarantee that DM&E will have neutral eastern routings for coal movements from the Powder River Basin (PRB) in Wyoming, if and when DM&E constructs its recently-approved line into the PRB.²²

²² See *Dakota, MN & Eastern RR—Construction—Powder River Basin*, 6 S.T.B. 8 (2002) (*PRB Construction*), *pet. for judicial review pending sub nom. Mid States Coalition for Progress et al. v. Surface Transportation Board et al.*, No. 02-1359 *et al.* (8th Cir. filed February 7, 2002).

Applicants maintain, with respect to IC&E, that, after many years of doubt regarding the viability of the rail lines now owned by IC&E, common control will restore the IC&E lines to a stable, reliable, and essential component of the regional rail network in the north-central United States. Grain shippers on IC&E's lines, applicants argue, will gain potential new routes to the Pacific Northwest for export, while grain receivers on IC&E's lines and elsewhere in Iowa will be assured continued reliable, independent, and long-term access to grain from origins both on IC&E's Corn Lines and on DM&E's lines in southern Minnesota and South Dakota. And, applicants assert, IC&E's largest customer, a steel manufacturing firm near Davenport, IA, will have single-system service for inbound scrap that currently originates on DM&E but must now be interchanged to an intermediate carrier for interchange to IC&E.

Applicants further contend that the proposed control transaction is completely "end-to-end" and will have no adverse impact on competition. According to applicants, DM&E and IC&E serve no common industries today and do not currently interchange traffic at any location,²³ and, therefore, common control will not result in any reduction in existing rail-to-rail competition at any point or in any market. Applicants state that no shipper will lose competitive rail service or access to any existing routing options; that common control will have no adverse impact on the continuation of essential transportation services by DM&E, IC&E, or by any other railroad; and that diversion of traffic from other railroads will be minimal.²⁴

Environmental Considerations. Applicants contend that, under 49 CFR 1105.6(c)(2)(i), the DM&E/IC&E common control proposal is exempt from environmental reporting requirements because common control will not result in changes in carrier operations that will exceed the thresholds established in 49 CFR 1105.7(e)(4) or (5). Applicants anticipate that common control will

²³ Although the routes operated by DM&E and IC&E intersect at five locations (Albert Lea, MN, Owatonna, MN, Mason City, IA, Minnesota City, MN, and Winona, MN), DM&E and IC&E do not currently interchange traffic at any of these locations, primarily because either DM&E or IC&E operates via restricted trackage rights at each of these locations that will not allow for a DM&E/IC&E interchange. DM&E has not explained its rationale for seeking to establish a DM&E/IC&E connection at Owatonna as opposed to any of the other possible points.

²⁴ Applicants anticipate that, as a result of common control, approximately 9,850 carloads of traffic will be diverted to the combined DM&E/IC&E system annually, generating annual revenues of approximately \$8.1 million. Applicants indicate that, for the most part, these anticipated diversions represent extensions of haul on existing DM&E traffic resulting from shippers favoring the single-system service offerings of the combined DM&E/IC&E.

result in only a minor increase (no more than several trains per week) in traffic over IC&E's rail line between Owatonna, MN, and Mason City, IA. They state that this increase will be offset by a roughly corresponding decrease in train operations over DM&E's Waseca, MN-Hartland, MN, line and UP's Hartland, MN-Mason City, IA, line (which includes UP's "Spine Line" route between Albert Lea, MN, and Mason City, IA), and that anticipated traffic increases elsewhere on the combined DM&E/IC&E system will be handled in existing scheduled train movements.

Historic Preservation. Applicants contend that, under 49 CFR 1105.8(b)(1) and (3), the DM&E/IC&E common control proposal is exempt from historic preservation reporting requirements. Applicants explain that rail operations will continue after consummation of common control; that there will not be a substantial change in the level of maintenance of railroad property; that further Board approval will be required to abandon any service; and that there are no plans to dispose of or alter properties subject to Board jurisdiction that are 50 years old or older.

Labor Protection. Applicants do not anticipate that any existing DM&E or IC&E employees will be adversely affected by DM&E/IC&E common control. Applicants state that the labor protection conditions set forth in *New York Dock* will adequately protect any adversely affected employees.

Related Filing: Terminal Trackage Rights Application. In STB Finance Docket No. 34178 (Sub-No. 1), DM&E has filed, contingent upon approval of the DM&E/IC&E control proposal, a "terminal trackage rights" application under 49 U.S.C. 11102 that would have us require UP to permit DM&E to operate, without restriction, over approximately 3,700 feet of UP track in Owatonna, MN (extending between approximately MP 88.6 and MP 87.9).²⁵ DM&E explains that, when it was created in 1986 as a spinoff from the Chicago & North Western Transportation Company (CNW), it acquired from CNW approximately 1,000 miles of rail lines and related trackage rights in South Dakota, Minnesota, and Iowa, extending in a generally west-east direction between Rapid City, SD, and Winona, MN. However, DM&E did not acquire the 2.4-mile segment of the CNW line in Owatonna between approximately MPs 88.6 and 86.2, which included (at approximately MP 87.9) a physical

²⁵ DM&E's request is supported by Iowa DOT, Minnesota DOT, the State of South Dakota, the City of Owatonna, and WCTL, among others.

at-grade connection with a north-south CPR line. Rather, for this 2.4-mile segment, DM&E acquired trackage rights that were both exclusive (CNW did not retain the right to operate over the segment) and restricted (DM&E was allowed to use the trackage rights for overhead traffic, and for any DM&E/CPR interchange traffic that originated or terminated either on the 2.4-mile segment or at industries in Owatonna served by CPR and open to reciprocal switching). CNW retained ownership of the 2.4-mile segment and all ancillary trackage in Owatonna. The 2.4-mile segment, DM&E explains, was “carved out” of the DM&E/CNW asset acquisition transaction in order to preclude an unrestricted DM&E/CPR interchange at Owatonna.

DM&E further explains that CNW’s ownership interest in the 2.4-mile segment was acquired several years ago by UP; that CPR’s (later I&M’s) north-south line through Owatonna was recently acquired by IC&E; that the restriction that was created in 1986 continues to exist even though the 2.4-mile segment has not been used by CNW (or UP) since 1986, and even though the 2.4-mile segment now exists as an “island” that is not connected to the rest of the UP system;²⁶ and that this restriction now precludes the creation of a meaningful DM&E/IC&E connection at Owatonna.

DM&E requests terminal trackage rights over an approximately 0.7-mile portion of the 2.4-mile segment (the portion between approximately MPs 88.6 and 87.9) to establish a direct connection and unrestricted interchange between DM&E and IC&E, which do not presently connect with each other at any location. DM&E contends that, without such relief, which DOT and UP oppose,²⁷ DM&E and IC&E would be unable to effectuate efficiently new competitive traffic routings that would otherwise be made possible by the control transaction.

DM&E acknowledges that, in *PRB Construction*, the Board recently granted DM&E authority to construct, just east of Owatonna, a 1.7-mile “loop” connection between DM&E’s west-east line (beginning at a point east of the eastern end of the 2.4-mile segment) and what was then I&M’s (and is now IC&E’s) north-south line, if it is not able to come to terms with UP for an

²⁶ The UP (formerly CNW) north-south “Spine Line” between the Twin Cities and Kansas City passes *under* the 2.4-mile segment (at approximately MP 88.5) but does not connect with that segment.

²⁷ DOT maintains that the request for terminal trackage rights does not comport with applicable Board precedent. UP contends that the track in question is not a terminal facility and that the standards of 49 U.S.C. 11102(a) have not been met. Both UP and DOT point out that both parties now have strong incentives, without our interference, to negotiate an agreement allowing DM&E to use the UP-owned trackage in Owatonna for an interchange.

interchange at MP 87.9. *See PRB Construction*, 6 S.T.B. at 26, 47 (DM&E authorized to construct the new 1.7-mile loop, which is referred to as “Alternative O-4,”²⁸ if it cannot reach an agreement with UP for a DM&E/I&M interchange at MP 87.9, which is referred to as “Alternative O-5”). *See also* UP-4, Groner v.s., Exhibit 1 (a map depicting the 1.7-mile “Alternative O-4” loop). DM&E argues, however, that, as the Board itself has concluded, *see PRB Construction*, 6 S.T.B. at 26, interchange at MP 87.9 would be “environmentally preferable” to construction of the 1.7-mile loop. And, DM&E asserts, given that the only obstacle to interchange at MP 87.9 is a 1986 restriction on its trackage rights operations, construction of the 1.7-mile loop would be unnecessary and wasteful.

DM&E asserts that private negotiations with UP outside the framework of 49 U.S.C. 11102 to obtain a MP 87.9 interchange are not likely to prove fruitful. DM&E further contends that the requested terminal trackage rights satisfy the criteria of 49 U.S.C. 11102(a) and that, although § 11102(a) provides that compensation for use of terminal trackage rights “shall be paid or adequately secured” before a carrier may begin to use such rights, we should not require that the compensation be established before DM&E can begin use of the proposed terminal trackage rights. Such a requirement, DM&E claims, would delay the public benefits of DM&E/IC&E common control.

Related Filing: Trackage Rights Exemption Notice. In STB Finance Docket No. 34178 (Sub-No. 2), DM&E has filed, contingent upon approval of both the DM&E/IC&E control transaction and the requested terminal trackage rights, a notice of exemption pursuant to 49 CFR 1180.2(d)(7) to obtain overhead trackage rights: (1) on the IC&E line between Owatonna, MN (at approximately MP 101.9), and Mason City, IA (at approximately MP 0.0), a distance of approximately 72.4 miles;²⁹ and (2) on the IANR line between Plymouth Junction, IA (at approximately MP 219.5), and Nora Springs, IA (at approximately MP 210.7), a distance of approximately 8.8 miles. These overhead trackage rights, which are being sought with the approval of IC&E and IANR, will allow DM&E to interchange traffic with IC&E at Austin, MN, and Mason City, IA; with UP at Mason City, IA; with CEDR at Lyle, MN; and with

²⁸ UP acknowledges that the 1986 DM&E/CNW agreement contains no restriction that would prevent DM&E from building the 1.7-mile loop and operating across UP trackage to reach IC&E. *See* UP-4 at 10 n.5.

²⁹ At Ramsey, MN (an intermediate point between Owatonna and Mason City), there is a milepost equation at which MP 72.5 = MP 43.0.

IANR at Plymouth Junction and Nora Springs, IA. DM&E indicates that the overhead trackage rights will facilitate the effective movement of trains and interchange of traffic between DM&E and IC&E, expand routing and service options with other rail carriers, and reduce trackage rights fees paid to UP in connection with DM&E's existing route to Mason City. DM&E indicates that the applicable level of labor protection for the trackage rights is that set forth in *Norfolk and Western*, as modified in *Mendocino Coast*.

DISCUSSION AND CONCLUSIONS

The DM&E/IC&E Control Application: Statutory Criteria. Under 49 U.S.C. 11323(a)(3) and (5), the acquisition of control of a rail carrier by another rail carrier or by a noncarrier that controls another rail carrier requires prior Board approval.³⁰ The criteria for approval are set forth in 49 U.S.C. 11324. Because the DM&E/IC&E control transaction does not involve the merger or control of two or more Class I railroads,³¹ this transaction is governed by § 11324(d), under which we must approve a control application unless we find that: (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

In assessing transactions subject to § 11324(d), our primary focus is on the anticipated competitive effects. We must grant the application unless there will be adverse competitive impacts that are both “likely” and “substantial.” And, even if there will be likely and substantial anticompetitive impacts, we may not disapprove the transaction unless the anticompetitive impacts outweigh the benefits and cannot be mitigated through conditions.³² See *Canadian National et al.—Control—Wisconsin Central Transp. Corp., et al.*, 5 S.T.B. 890 (2001), at 899 (*CN/WC*); *Kansas City Southern Industries, Inc., KCS Transportation*

³⁰ Applicants have indicated that, although the *form* of the DM&E/IC&E control transaction implicates § 11323(a)(3) (“Acquisition of control of a rail carrier by any number of rail carriers.”), the *substance* of the transaction implicates § 11323(a)(5) (“Acquisition of control of a rail carrier by a person [Holdings] that is not a rail carrier but that controls any number of rail carriers.”).

³¹ In *Major Rail Consolidation Procedures*, 5 S.T.B. 539 (2001), and published in the *Federal Register* at 66 Fed. Reg. 32,582 (2001), we adopted new regulations for rail consolidation transactions that involve the merger or control of two or more Class I railroads.

³² Under 49 U.S.C. 11324(c), we have broad authority to place conditions on our approval of § 11323 transactions.

Company, and The Kansas City Southern Railway Company — Control — Gateway Western Railway Company and Gateway Eastern Railway Company, STB Finance Docket No. 33311 (STB served May 1, 1997), slip op. at 4; CSX Corporation and CSX Transportation, Inc. — Control — The Indiana Rail Road Company, STB Finance Docket No. 32892 (STB served November 7, 1996), slip op. at 3-4.

The DM&E/IC&E Control Application: General Competitive Analysis. The evidence demonstrates that the DM&E/IC&E control transaction will cause no harm to competition. DM&E and IC&E serve no common industries and do not currently interchange traffic at any location, and, therefore, common control will not result in any reduction in existing rail-to-rail competition at any point or in any market. No shipper will suffer a direct merger-related loss of competitive rail service.

Turning to indirect competition, we examine the effect of the proposed control transaction on geographic competition, when two carriers transport the same product to the same destination but from different origins, or conversely when two carriers transport the same product from the same origin to two different destinations. No party has suggested that there will be a reduction in geographic competition as a result of DM&E/IC&E common control. Thus, based on the record, we find that the DM&E/IC&E control transaction will not lead to a reduction in geographic competition.

Finally, we consider whether common control will increase DM&E's or IC&E's market power. The combined DM&E/IC&E system will face intense competition from the large Class I rail systems that will surround it. Moreover, as noted above, no shipper will face a reduction in the number of railroads serving any of its facilities, and no reduction in geographic competition is expected. Accordingly, we find that the DM&E/IC&E control transaction will not result in any increase in either carrier's market power. We approve the DM&E/IC&E control application because the evidence demonstrates that there is not likely to be either a substantial lessening of competition, the creation of a monopoly, or a restraint of trade in freight surface transportation in any region of the United States as a result of the control transaction.³³

The evidence further demonstrates that this essentially end-to-end transaction will benefit shippers by enabling both railroads to compete more effectively against their Class I rail competitors, as well as motor carrier and

³³ As discussed below, we have found no merit to the competitive concerns raised by AECC and CPR and have rejected their requests for conditions.

barge competition. Shippers on the DM&E/IC&E system will benefit from the better equipment coordination and utilization, improved service patterns, and other operating efficiencies made possible by common control. Common control also will give shippers on both DM&E and IC&E new routing and service options and more efficient and competitive single-system access to significant new markets and gateways. These beneficial effects for shippers provide additional support for approval of the DM&E/IC&E control transaction.

The DM&E/IC&E Control Application: Relief Sought By AECC. AECC asks that we impose relief to preserve both: (1) the competitive options that DM&E will be able to provide if and when it constructs its recently-approved PRB line, which will be oriented to coal receivers in the north-central United States; and (2) the competitive options that an independent I&M could have provided in conjunction with AECC's plans for an alternative routing for PRB coal that would be oriented to coal receivers in the south-central United States.³⁴ For the reasons given below, we are denying the relief requested by AECC.

(1) *Relief Respecting The Competitive Options That DM&E Itself Will Be Able To Provide.* AECC contends that the viability of DM&E's PRB line has been called into question by recent developments (which, AECC claims, suggest that DM&E's PRB revenues are likely to be lower than originally projected) and by the IC&E/I&M asset acquisition (which, AECC claims, may itself adversely affect prospects for DM&E's PRB construction project). AECC therefore asks that we require DM&E to submit evidence regarding the status of its financing for *PRB Construction*; identify remedial measures for the alleged adverse cross-over effects that the IC&E/I&M asset acquisition may have on the PRB construction project; and demonstrate that IC&E's access to Chicago and other relevant points over former I&M lines has not been compromised.

AECC is arguing, in large part, that we may have erred when we authorized DM&E to build in *PRB Construction*. But we will not permit AECC to use this proceeding to relitigate *PRB Construction*. As noted by DOT, we approved *PRB Construction* after a thorough consideration of all aspects of the proposal, including financial viability. Further, because our approval of construction of DM&E's PRB line was merely permissive, we agree with DOT that it is not particularly pertinent whether DM&E/IC&E common control makes construction of that line more or less likely. Rather, as DOT points out, that is a question for

³⁴ AECC's request that we impose relief intended to preserve the competitive options that an independent I&M could have provided has been supported in principle by WCTL.

DM&E's potential investors and financial supporters. What is important in the control proceeding before us here is whether the combination of DM&E and IC&E will affect the ability of these carriers to meet their common carrier obligations and provide essential services. As indicated, applicants have shown that common control will produce a stronger rail system that will be better able to offer improved services to their existing shippers. No party (including AECC) has introduced persuasive evidence to the contrary.³⁵

(2) *Relief Respecting The Competitive Options That An Independent I&M Could Have Provided.* AECC evidently contemplates seeking authority to construct a fourth line (the first three would be BNSF's, UP's, and DM&E's) into the PRB. This fourth line would apparently require the restoration of the CNW "Cowboy Line" across northern Nebraska, and the construction of extensions west to the PRB and south to Kansas City. AECC explains that, because a large volume of the traffic projected to move via the new Cowboy Line would have to be interchanged at Kansas City with IC&E, the new line would require a neutral IC&E connection at Kansas City. And the availability of this neutral connection, AECC contends, has been threatened in two separate ways. First, AECC contends, the extent of a physical IC&E connection at Kansas City has been called into question by actions taken by CPR. Second, AECC contends, the existence of a neutral IC&E connection is threatened by DM&E's interest in protecting its ability to build its own PRB line. According to AECC, DM&E apparently believes that it will be most likely to realize a return on the substantial investment it has already sunk into its own PRB project if it can prevent others from establishing a new PRB service.

AECC therefore argues that we should require DM&E to demonstrate that the terms of I&M's former access to Kansas City have not been compromised in a manner that would hinder competitiveness for volume coal movements. In addition, AECC asks that we require applicants to provide, to any new rail carrier serving the PRB, access (particularly at Kansas City) to the lines formerly operated by I&M, on nondiscriminatory terms and conditions.

We will not grant the relief sought by AECC. Applicants will have incentives of their own to do whatever can be done to ensure that IC&E has broad access to Kansas City. Moreover, we will not burden an otherwise procompetitive transaction by placing restrictions on the terms and conditions

³⁵ Indeed, as DOT notes, the prospect of a stronger, more financially stable DM&E/IC&E would not seem to undercut the likelihood that the line approved in *PRB Construction* will be built, even if that were a significant issue in this proceeding.

under which applicants may choose to interchange with an as-of-now purely hypothetical entrant into the PRB.

The DM&E/IC&E Control Application: Relief Sought By CPR. CPR has raised issues involving: (1) the Minnesota City gateway; and (2) Metra's West Line. For the reasons given below, we are denying the relief requested by CPR.

(1) *The Minnesota City Gateway.* CPR is concerned that a commonly controlled DM&E/IC&E will favor DM&E-IC&E routings via Owatonna and will discriminate against DM&E-CPR routings via Minnesota City. CPR therefore asks that we impose a condition that would require the combined DM&E/IC&E to keep the Minnesota City gateway open for "interline division interchange traffic." CPR contends that this would give shippers more choices for their grain movements and provide "short haul" advantages for potential PRB coal movements to Minnesota and Wisconsin plants.

We will not grant the "open gateway" condition sought by CPR. The condition would disadvantage the combined DM&E/IC&E from routing traffic via the Owatonna gateway even if doing so were more efficient than a DM&E-CPR routing via Minnesota City. The shipping public will benefit if the combined DM&E/IC&E has the flexibility to operate via its most efficient routings. We do not share CPR's apparent concern that a combined DM&E/IC&E will tend to favor a "long-haul" DM&E-IC&E routing that is less efficient than a "short-haul" DM&E-CPR routing. The competitive pressures that DM&E/IC&E will face from, among others, BNSF and UP will be such that any effort to use an inefficient "long-haul" routing will risk the competitive loss of the traffic.

(2) *Metra's West Line.* Metra, which owns the "West Line" into Chicago, has disputed DM&E's claim that IC&E acquired I&M's trackage rights over the West Line. Initially, in view of Metra's refusal to allow IC&E to access the West Line, IC&E traffic to/from Chicago was handled by IAIS and CC&P pursuant to haulage arrangements. Later, IC&E and Metra negotiated a "temporary detour agreement" pursuant to which IC&E can operate over the West Line. The dispute between DM&E and Metra remains the subject of negotiations, and neither DM&E/IC&E nor Metra has asked us to take any action respecting this matter. Metra, in fact, has advised that it is optimistic that the

negotiations will address its concerns, and that it now believes that it is in a position to protect its interests in any event.³⁶

CPR is not as optimistic about the outcome of these negotiations and raises concerns that, if negotiations fail, future litigation could have unspecified “implications” for shippers, the freight railroads, and Metra.³⁷ CPR has shown that potential issues regarding IC&E’s access to Chicago over the West Line could arise, but, as DOT has said, no party has demonstrated that any action by us regarding access to Chicago (over the West Line or generally) is warranted now, when the parties are still in the process of negotiating an arrangement for use of the West Line, and DM&E coal traffic from the PRB reaching Chicago (via the Metra line or any other line) has not yet begun.

The DM&E/IC&E Control Application: Labor Protection. Under 49 U.S.C. 11326 (with exceptions not pertinent here), the imposition of labor protection is mandatory when approval is sought for a transaction under §§ 11324 and 11325. In the absence of a need for greater protection, the *New York Dock* conditions are appropriate for this type of transaction. Because no need for greater protection has been shown here,³⁸ these conditions will be imposed.³⁹

The DM&E/UP Terminal Trackage Rights Application. Applicants’ systems meet in Owatonna, MN, but the carriers cannot interchange traffic or otherwise connect at that point because of restrictions on DM&E’s use of track owned by UP. As discussed above, these restraints date from DM&E’s creation, when, in return for a more favorable sales price, DM&E agreed that UP’s predecessor would part only with overhead trackage rights on its line through Owatonna.

³⁶ Metra accordingly does not oppose the common control transaction.

³⁷ While the precise nature of CPR’s interest in this matter is not entirely clear, it appears that CPR, which formerly owned the rail lines now owned by IC&E and which had a minority ownership interest in I&M, has its own (undisputed) West Line trackage rights and is also a guarantor of certain long-term contracts that have been assumed by IC&E. CPR advises, in this regard, that, in view of a contractual arrangement that could require CPR to make certain IC&E payments to Metra if IC&E falters financially, CPR has an interest in assuring that IC&E operates successfully over the West Line.

³⁸ There is no allegation that rail employees will be adversely affected by the control transaction.

³⁹ BLE, a railway labor organization, contends, in essence, that the DM&E/IC&E control transaction and the *IC&E/I&M Asset Acquisition* transaction are, in reality, a single transaction (i.e., the acquisition, by DM&E, of control of I&M) and should therefore be treated as such. This argument has already been considered and rejected. See the *IC&E/I&M Asset Acquisition* decisions served July 30, 2002, and 6 S.T.B. 499.

The result was, and is, a 2.4-mile “island” of track in Owatonna owned by UP but unconnected to the rest of the UP system. Pursuant to 49 U.S.C. 11102(a),⁴⁰ applicants have requested terminal trackage rights on approximately 3700 feet of this island of track to enable DM&E to connect and interchange traffic with IC&E at Owatonna. Applicants claim that, without the terminal trackage rights, the combined DM&E /IC&E will not be able to effectuate the new competitive routings that would otherwise be made possible by the control transaction.

We disagree that terminal trackage rights are necessary or appropriate to provide the full benefits of common control. The parties here have incentives to negotiate an agreement under which DM&E would be permitted to connect with IC&E via existing UP trackage in Owatonna—the same result that would be achieved if terminal trackage rights were granted. In *PRB Construction*, DM&E recently obtained authority to construct, just east of Owatonna, a new 1.7-mile connection, if DM&E and UP cannot reach a negotiated agreement to remove the restrictions on DM&E’s use of the 2.4-mile UP-owned line through Owatonna. As DOT and the City of Owatonna note, use of the existing line would be environmentally preferable to construction of the new route. But the fact that DM&E already has the authority to build a connection with IC&E at Owatonna makes it likely that DM&E and UP will negotiate an agreement granting DM&E the additional rights it needs to connect with IC&E via existing UP trackage, in which case the new connection will never be built. UP knows that DM&E could build the new connection, in which case UP would gain nothing. It is therefore in UP’s interest to reach agreement with DM&E so that UP receives some consideration. DM&E, on the other hand, knows that an agreement with UP would save it the cost of building a new connection. DM&E also believes that any delay in reaching an agreement with UP would delay many of the benefits associated with this transaction. It therefore has a very strong incentive to reach an agreement under which it pays UP some amount less than the cost of construction.

Applicants argue that private negotiations are not likely to succeed because the restrictions on DM&E’s ability to interchange traffic at Owatonna have existed for the past 16 years without significant change. But until *PRB Construction* was decided in January 2002, DM&E did not have the leverage now provided by its authority to construct the new connection. Moreover, as UP

⁴⁰ Under 49 U.S.C. 11102(a), we may require a railroad to allow its “terminal facilities, including main-line tracks for a reasonable distance outside the terminal,” to be used by another railroad if the use is practicable, in the public interest, and will not substantially impair the ability of the owning railroad to handle its own traffic.

points out (UP-4 at 12, Exh. 6 at 29-30), in *PRB Construction* DM&E was considerably more optimistic that a mutually satisfactory arrangement with UP would be negotiated. Indeed, in 2001, in comments on the Draft Environmental Impact Statement prepared in *PRB Construction* (reproduced at UP-4, Exh. 6 at 29), DM&E specifically stated that “the common sense result of [approval of the new 1.7-mile connection] would be to facilitate a private agreement between the two railroads which would obviate the need for its ultimate construction.” DM&E explained that it intended to build the new connection only “if for inexplicable reasons” it was unable to come to terms with UP, and stated that it did not believe the new construction was “either necessary or likely.” *Id.* DM&E further noted (*id.* at 29-30): “Common sense will prevail. DM&E has a good, positive working relationship with UP and this is a straight-forward business issue. UP can and should expect reasonable compensation in reaching an agreement, and the cost of constructing [a new connection] provides all the common sense incentive in the world for both parties to take the logical path of a negotiated agreement.”

In these circumstances, the real reason for the terminal trackage rights application appears to be that the price DM&E will pay would be established by us rather than through negotiations with UP. But our policy has long been to encourage private sector dispute resolution whenever possible, particularly in disputes involving compensation.⁴¹ Accordingly, our involvement in how much money DM&E should pay UP to use its track—instead of the nearby new connection authorized in *PRB Construction*—is simply inappropriate.⁴²

We believe this matter must be resolved by the parties and we urge the parties to quickly resolve this issue. Because the record contains letters from many states, groups and political officials who believe that a prolonged delay in reaching an agreement would delay many of the benefits associated with the transaction, we will require the parties to report back to the Board on the status of their negotiations within 60 days of the service date of this decision.

⁴¹ See *Canadian National, et al.—Control—Illinois Central, et al.*, 4 S.T.B. 122 (1999) (*CN/IC*), at 175; *San Jacinto Rail Ltd.—Construction Exemption*, STB Finance Docket No. 34079 (STB served July 19, 2002), slip op. at 6 n.5.

⁴² The parties supporting the imposition of terminal trackage rights here have cited various cases as precedent, but all of these cases are distinguishable.

In short, there is no basis for imposing terminal trackage rights here. Therefore, the request for terminal trackage rights will be denied.⁴³

The DM&E/IC&E-IANR Trackage Rights Exemption Notice. In STB Finance Docket No. 34178 (Sub-No. 2), DM&E has filed a notice of exemption pursuant to 49 CFR 1180.2(d)(7) to obtain overhead trackage rights on the IC&E line between Owatonna, MN, and Mason City, IA, and on the IANR line between Plymouth Junction, IA, and Nora Springs, IA. These trackage rights are intended to facilitate the effective movement of trains and interchange of traffic between DM&E and IC&E, to expand routing and service options with other rail carriers, and to reduce trackage rights fees paid to UP in connection with DM&E’s existing route to Mason City.

We will allow the notice of exemption to take effect on the effective date of this decision, even though DM&E indicated that these trackage rights are intended to be contingent upon approval of *both* the DM&E/IC&E control transaction *and* the terminal trackage rights application. We are taking this action because we are convinced that, one way or another, there will be, in the not too distant future, a DM&E/IC&E connection at Owatonna, and, once that connection has been established, trackage rights in the Sub-No. 2 docket will facilitate applicants’ operations south of Owatonna.⁴⁴

Environmental Issues. The National Environmental Policy Act, 42 U.S.C. 4321-43 (NEPA), generally requires federal agencies to consider “to the fullest extent possible” environmental consequences “in every recommendation or report on major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. 4332(2)(C). Under both the regulations of the President’s Council on Environmental Quality (CEQ) and our own environmental rules, actions whose environmental effects are ordinarily insignificant may be excluded from NEPA review across the board, without a

⁴³ Because we find no basis for the imposition of terminal trackage rights here, we need not decide whether the track in question is a “terminal facility” as that term is used in 49 U.S.C. 11102(a).

⁴⁴ As is customary, the trackage rights will be subject to the employee protective conditions set out in *Norfolk and Western*, as modified in *Mendocino Coast*.

case by case review.⁴⁵ Such activities are said to be covered by a categorical exclusion, which CEQ defines at 40 CFR 1508.4 as:

a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no effect in procedures adopted by a federal agency in implementation of these regulations* * * and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.

Our environmental rules contain various categorical exclusions. As pertinent here, a merger proposal that would not result in operational changes that exceed certain thresholds — generally an increase in rail traffic of at least eight trains a day or a 100 percent increase in rail traffic (measured in gross ton miles annually) — normally requires no environmental review.⁴⁶ 49 CFR 1105.6(c)(2)(i), 1105.7(e). Trackage rights proposals also typically are excluded from the need to prepare environmental documentation. 49 CFR 1105.6(c)(4).

Applicants contend that the DM&E/IC&E control transaction will cause only modest changes in carrier operations, none of which will exceed the thresholds triggering environmental review established in 49 CFR 1105.6(c)(2)(i) and 49 CFR 1105.7(e)(4), (5). Applicants, citing 49 CFR 1105.8(b)(1), (3), further contend that the control transaction is exempt from historic review under the National Historic Preservation Act (NHPA). None of the other parties or commenters have contended that preparation of environmental documentation for this control transaction is warranted.

We agree that no environmental or historic review is warranted in the common control and trackage rights matters before us here. *See* 49 CFR 1105.6(c)(2)(i), (4); 49 CFR 1105.7(e)(4), (5); and 49 CFR 1105.8(b)(1), (3).

It should be noted, however, that in *IC&E/I&M Asset Acquisition* we imposed a condition precluding DM&E from handling any traffic moving to or from the line we approved in *PRB Construction* over what are now IC&E lines until an appropriate environmental review has been conducted in the IC&E/I&M asset acquisition proceeding. As we explained in our *IC&E/I&M Asset Acquisition* decision served July 22, 2002 (slip op. at 16-17), that new environmental inquiry will be initiated when DM&E notifies the Board that it

⁴⁵ 40 CFR 1500.4(p), 1508.4; 49 CFR 1105.6(c).

⁴⁶ An agency's procedures for categorical exclusions "shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect," thus requiring an Environmental Assessment or an Environmental Impact Statement. *See* 49 CFR 1105.6(d). But absent extraordinary circumstances, once a project is found to fit within a categorical exclusion, no further NEPA procedures are warranted.

has begun construction of the new line, and provides the Board with additional necessary traffic and environmental information. Deferring that environmental examination is appropriate given the current uncertainty as to whether the line approved in *PRB Construction* will be built,⁴⁷ and, if built, what portion of the traffic from/to that new line would move over the I&M (now IC&E) lines. The information we would need to assess the potential environmental impacts is not yet available.⁴⁸ Therefore, it would be premature to attempt to conduct such an assessment now.⁴⁹

Effective Date. Applicants indicated, in their initial submission, that they would like to consummate the DM&E/IC&E control transaction as soon as possible, and asked that we shorten the usual 30-day period between the service date of an approval decision and the effective date of that decision. See DME-3 at 8 (applicants asked that approval be effective on the 12th day after the service date of our decision); DME-3 at 14 (applicants asked that approval be effective no later than January 31, 2003). Applicants, however, have not renewed this request in their rebuttal submission. In these circumstances, we will adhere to our usual practice. This decision will therefore be effective on March 5, 2003.

Vice Chairman Burkes, Commenting:

I vote to approve this decision which will allow DM&E to acquire IC&E, but I am very concerned that most of the substantial benefits of this transaction could be delayed for months and even years which could cause considerable competitive, operational and economic harm to the combined DM&E/IC&E system and the shippers it will serve. I strongly urge the parties to quickly resolve the Owatonna issue.

⁴⁷ In *PRB Construction*, as in all our licensing proceedings, our construction authority is permissive. DM&E will have to acquire the right-of-way, secure financing, and obtain approvals from certain cooperating agencies before it can construct the new line. Thus, it is not yet definite that the construction project will proceed.

⁴⁸ As DM&E has not yet obtained any specific contracts to handle PRB coal, the ultimate destination of its potential PRB coal traffic is not known, and the number of PRB coal trains that would interchange at any particular point is therefore unavailable.

⁴⁹ DOT concurs with our approach.

Based on the record, we find:

1. The acquisition of control by Dakota, Minnesota & Eastern Railroad Corporation and Cedar American Rail Holdings, Inc., of Iowa, Chicago & Eastern Railroad Corporation will not substantially lessen competition, create a monopoly, or restrain trade in freight surface transportation in any region of the United States.
2. This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. In STB Finance Docket No. 34178, the proposed acquisition of control by Dakota, Minnesota & Eastern Railroad Corporation and Cedar American Rail Holdings, Inc., of Iowa, Chicago & Eastern Railroad Corporation is approved.
2. In STB Finance Docket No. 34178 (Sub-No. 1), the application for terminal trackage rights is denied.
3. Applicants and UP shall report to the Board on the status of their negotiations regarding the connection in Owatonna within 60 days of the service date of this decision.
4. In STB Finance Docket No. 34178 (Sub-No. 2), the DM&E/IC&E-IANR trackage rights referenced in the notice filed August 29, 2002, are authorized pursuant to the class exemption at 49 CFR 1180.2(d)(7).
5. Approval of the DM&E/IC&E control application in STB Finance Docket No. 34178 is subject to the conditions for the protection of railroad employees set out in *New York Dock Ry. — Control — Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979).
6. The DM&E/IC&E-IANR trackage rights at issue in STB Finance Docket No. 34178 (Sub-No. 2) are subject to the conditions for the protection of railroad employees set out in *Norfolk and Western Ry. Co. — Trackage Rights — BN*, 354 I.C.C. 605, 610-15 (1978), as modified in *Mendocino Coast Ry., Inc. — Lease and Operate*, 360 I.C.C. 653, 664 (1980).
7. Any conditions that were requested by any party in the STB Finance Docket No. 34178 proceeding and/or in the two embraced proceedings but that have not been specifically approved in this decision are denied.
8. This decision shall be effective on March 5, 2003.

By the Board, Chairman Nober, Vice Chairman Burkes, and Commissioner Morgan. Vice Chairman Burkes commented with a separate expression.

APPENDIX A: ABBREVIATIONS AND ACRONYMS

AECC	Arkansas Electric Cooperative Corporation
BLE	Brotherhood of Locomotive Engineers
BNSF	The Burlington Northern and Santa Fe Railway Company
Board	Surface Transportation Board
BRC	The Belt Railway Company of Chicago
CBRA	Chillicothe-Brunswick Rail Authority
CC&P	Chicago, Central & Pacific Railroad Company
CEDR	Cedar River Railroad Company
CFR	Code of Federal Regulations
CLO	Cooperating Labor Organizations
CMW	Chicago, Missouri & Western Railway Company
CN	Canadian National Railway Company
CPR	Soo Line Railroad Company d/b/a Canadian Pacific Railway
CNW	Chicago & North Western Transportation Company
DM&E	Dakota, Minnesota & Eastern Railroad Corporation
DOT	U.S. Department of Transportation
DRGW	The Denver and Rio Grande Western Railroad Company
EJ&E	Elgin, Joliet & Eastern Railway Company
FR	Federal Register
FRA	Federal Railroad Administration
GWWR	Gateway Western Railway Company
Holdings	Cedar American Rail Holdings, Inc.
IAIS	Iowa Interstate Railroad Ltd.
IANR	Iowa Northern Railway Company
IATR	Iowa Traction Railroad Company
IC	Illinois Central Railroad Company
ICC	Interstate Commerce Commission
IC&E	Iowa, Chicago & Eastern Railroad Corporation
IDOT	Iowa Department of Transportation
IHB	Indiana Harbor Belt Railroad Company
IRN	Illinois RailNet, Inc.

I&M	I&M Rail Link, LLC
KCS	The Kansas City Southern Railway Company
KCT	Kansas City Terminal Railway Company
MCRC	Minnesota Commercial Railway Company
Metra	Commuter Rail Division of the Regional Transportation Authority of Northeast Illinois d/b/a Metra
MidAmerican	MidAmerican Energy Company
MP	milepost
MP	Missouri Pacific Railroad Company
MP&W	Muscatine Power and Water Company
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NS	Norfolk Southern Railway Company
PRB	Powder River Basin
RGI	Rio Grande Industries, Inc.
RTP	Rail Transportation Policy
SF	The Atchison, Topeka and Santa Fe Railway Company
Soo	Soo Line Railroad Company
SP	Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company
STB	Surface Transportation Board
TRA	Trackage Rights Agreement
UP	Union Pacific Railroad Company
WCTL	Western Coal Traffic League
WP	Western Pacific Railroad Company
W&S	Wisconsin & Southern Railroad Company

APPENDIX B: SUBMISSIONS RESPECTING COMMON CONTROL

Arkansas Electric Cooperative Corporation.

AECC, a membership-based generation and transmission cooperative that provides wholesale electric power to electric cooperatives, holds ownership interests in three coal-fired Arkansas generating stations (the White Bluff plant at Redfield, the Independence plant at Newark, and the Flint Creek plant at Gentry) that burn, each year, more than 14.5 million tons of PRB coal (AECC's share of this coal is approximately 5 million tons). AECC contends that, because the DM&E/IC&E combination, though essentially end-to-end in nature, has the potential to generate anticompetitive effects, action must be taken to preserve both: (a) the competitive options that DM&E will be able to provide if and when it constructs its recently-approved PRB line; and (b) the competitive options that an independent I&M could have provided in conjunction with an anticipated non-DM&E PRB line that would be oriented to coal receivers in the south-central United States.⁵⁰

DM&E's Own PRB Line. AECC concedes that, even after DM&E's recently-approved PRB line has been constructed, PRB coal moving to AECC's Arkansas facilities will not move via the DM&E line (because, as respects destinations in Arkansas, the route to be operated by DM&E will be a good deal more circuitous than the routes now operated by UP and BNSF).⁵¹ AECC asserts, however, that DM&E itself has acknowledged, in its filings in the *PRB Construction* case, that the construction of DM&E's PRB line will generate indirect benefits for utilities, such as AECC, that are not in the DM&E "market area." AECC explains that, in the *PRB Construction* case, DM&E sought and obtained support from such utilities (including AECC) on the explicit premise that its project would expand rail capacity from the PRB, and would thereby produce indirect benefits even for utilities that would not be able to make effective use of DM&E routings. Such utilities, AECC further explains, supported DM&E's PRB project because they believed that expanded capacity would be at least marginally beneficial to overall system fluidity, leading to decreased cycle times and increased reliability, which, in turn, would lead to

⁵⁰ Letters expressing support for AECC's efforts to preserve the competitive options that an independent I&M could have provided have been submitted by three utility companies: Dominion Resources, Inc.; Entergy Corporation; and Midwest Generation EME, LLC. See AECC-1.

⁵¹ AECC indicates that the DM&E/IC&E route from the PRB to Kansas City (via Owatonna) would be on the order of 1,350 miles, over 500 miles longer than existing UP and BNSF routes.

improved efficiency in the use of shipper-owned cars and reduced fleet size and coal stockpile requirements. AECC therefore maintains that it has an interest (an interest, AECC adds, that was fostered and has been relied upon by DM&E itself) in actions DM&E may take with respect to its PRB project.

This interest is implicated here, AECC contends, because, even aside from the issues raised by DM&E/IC&E common control, certain recent developments have suggested that DM&E's PRB revenues are likely to be significantly lower than originally projected, which (AECC claims) calls into question the financial viability of DM&E's PRB project. (1) AECC contends that, whereas DM&E has previously estimated (in the *PRB Construction* context) that variable costs for UP's and BNSF's PRB coal movements run about 7.9-8.0 mills per ton mile, there is now reason to believe that, at least in one instance, variable costs for UP's PRB coal movements are approximately 2 mills lower. (2) AECC contends that, whereas DM&E's revenue projections (in the *PRB Construction* context) incorporated a rate premium based on DM&E's purported cycle time advantage vis-à-vis UP and BNSF, there is now reason to believe that UP's and BNSF's cycle times are actually equivalent to, and sometimes are better than, those projected for DM&E. (3) AECC contends that, whereas DM&E's volume projections (in the *PRB Construction* context) started at 40 million tons per year and increased to 100 million tons per year, there is now reason to believe that those numbers are overly optimistic.

And, AECC continues, its interests vis-à-vis DM&E's PRB project are further implicated by certain "cross-over effects" that, though not disclosed by DM&E, further call into question the viability of that project. AECC warns that, without a proper assessment of these "cross-over effects," the Board will not be able to determine whether DM&E/IC&E common control will delay or eliminate the benefits of DM&E's PRB project. (1) AECC contends that, because DM&E's original plan (in the *PRB Construction* context) did not include I&M in its list of feasible options for reaching Chicago, the Board cannot now determine whether the additional costs associated with DM&E's planned reliance on IC&E (such additional costs, AECC explains, are related to any capital improvements needed to enable IC&E to support heavy-haul coal trains) will jeopardize the financial feasibility of DM&E's PRB project. (2) AECC contends that, even if IC&E negotiates a settlement that will enable it to use the original I&M route to reach Chicago (or even if IC&E can make alternative arrangements with other railroads to reach Chicago), the Board cannot now determine whether the financial terms associated with IC&E's access to Chicago will support the financial and competitive performance of DM&E's PRB project as originally planned. (3) AECC contends that CPR — reacting to the

IC&E/I&M asset acquisition transaction — has terminated various I&M/CPR interchange agreements, which (AECC continues) means that DM&E will not be able to use certain DM&E-I&—CPR routings to access certain markets (e.g., coal receivers in or accessed via Minneapolis/St. Paul). This is important, AECC explains, because, in the *PRB Construction* context, DM&E's revenue projections were premised on its use of these routings to serve these markets. There is thus, AECC continues, no assurance that DM&E will be able to serve these markets (which, AECC adds, include DM&E's core markets) in the manner it originally projected. (4) AECC contends that, to some extent, use of IC&E to reach Chicago calls into question the entire rationale for using the DM&E mainline to reach the PRB. AECC explains: that the IC&E line that extends west to Sheldon, IA, is part of a Milwaukee Road right-of-way that extends further westward to Rapid City, SD; that DM&E's projected PRB line crosses the Milwaukee Road right-of-way in the vicinity of Creston, SD (in the general vicinity of Rapid City); and that, from Creston, the Milwaukee Road route to Chicago (via Charles City) would be approximately 70 miles shorter than the DM&E route (via Owatonna). The Board, AECC argues, has not considered and does not have the information necessary to consider this potentially more efficient alternative alignment.

An Anticipated Non-DM&E PRB Line. AECC contends that, given the uncertainty regarding the viability of DM&E's PRB project, and given too that many plants in the south-central United States would not enjoy new PRB routing options even if DM&E's PRB line were built, a number of utilities have expressed support for the construction of a non-DM&E line into the PRB. These utilities apparently have in mind the restoration of the CNW "Cowboy Line" that once extended across northern Nebraska, which (the plan apparently goes) could be extended west to the PRB and south to Kansas City.⁵² AECC contends that a revitalized Cowboy Line with a connection to Kansas City would offer the potential for significant mileage reductions in comparison with existing UP and BNSF routes to points in the south-central United States (points, AECC notes, that will not be served by DM&E's PRB line), and could also be used for coal movements to various destinations that will be served by DM&E's PRB line, including: certain rail-served plants in eastern Iowa, northeastern Iowa, and Wisconsin; certain rail-served plants in northern/central Illinois and northern Indiana that could be reached via an IC&E/EJ&E connection at Joliet, IL; and certain plants that can be effectively served via Mississippi River dock facilities.

⁵² See *Union Pacific/Southern Pacific Merger*, 5 S.T.B. 1173 (2001), at 1181.

AECC further contends that, given the geographical distribution of actual and prospective PRB coal movements, an outlet at Kansas City would be far more valuable for many utilities than any outlet that relies on the DM&E main line (with or without the IC&E lines).

DM&E's PRB project and DM&E/IC&E common control apparently pose, from AECC's perspective, two obstacles to restoration of the Cowboy Line. (1) The first obstacle, though not mentioned explicitly by AECC, is that, because DM&E's PRB line and a revitalized Cowboy Line would be competitors for a large volume of PRB traffic, it is not likely (as a practical matter) that both projects can come to fruition, which means (again, as a practical matter) that, if DM&E's PRB line is built first, AECC's new Cowboy Line will never be built at all. (2) The second obstacle, which is mentioned explicitly by AECC, is that, because a large volume of the traffic projected to move via the new Cowboy Line will have to be interchanged at Kansas City with IC&E, the new Cowboy Line will have to have a neutral IC&E connection at Kansas City. And the availability of this neutral connection, AECC contends, has been threatened in two separate ways. First, AECC contends, the extent of a physical IC&E connection at Kansas City has been called into question by actions taken by CPR, which (AECC suggests) has taken issue with the IC&E/I&M asset acquisition transaction. Second, AECC contends, the existence of a neutral IC&E connection is threatened by DM&E's interest in protecting its ability to build its own PRB line; DM&E, AECC explains, apparently believes that it will be most likely to realize a return on the substantial investment it has already sunk into its own PRB project if it can prevent others from establishing a new PRB service.

Relief Requested By AECC. AECC contends that, to ensure that DM&E's private interests do not override the public interest in preserving existing rail competition and fostering the development of new competitive options where feasible, we should impose several conditions on approval of DM&E/IC&E common control. AECC adds that it does not oppose such common control, provided that suitable conditions are imposed to preserve the pre-merger competitive capabilities of I&M.

(1) AECC contends that we should require DM&E to provide, to any new rail carrier serving the PRB, access to the lines formerly operated by I&M, on cost-based (including return on investment) and nondiscriminatory terms and conditions. AECC contends, in particular, that we should require DM&E to maintain, at Kansas City, neutral connections for PRB coal with any new railroad serving the PRB which may connect at Kansas City with the lines formerly operated by I&M. AECC apparently has in mind that these neutral connections,

which might require trackage rights, would have to be made available on the same highly competitive terms that I&M would have offered to attract new business.⁵³

(2) AECC contends that we should require DM&E to submit a formal statement regarding the status of financing for its PRB construction project.

(3) AECC contends that we should require DM&E to identify and address remedial measures for the “cross-over effects” between the IC&E/I&M asset acquisition transaction and DM&E’s PRB construction project, including the ability to reach Chicago in an efficient manner that will serve unit train coal traffic as well as merchandise traffic.

(4) AECC contends that we should require DM&E to prove that I&M’s connectivity at Kansas City is being preserved, and that the terms of IC&E’s access to Kansas City, Chicago, and other relevant points have not been compromised in a manner that would hinder competitiveness for volume coal movements.

WCTL’s Response To AECC; Relief Suggested By WCTL. WCTL advises that AECC’s request that any newly established PRB carrier be provided nondiscriminatory access to IC&E, and its related request that DM&E/IC&E maintain neutral connections at Kansas City for interchanging PRB coal traffic with any such new PRB carrier, are constructive, though perhaps premature. WCTL explains that AECC’s concerns may already have been addressed through representations made by applicants themselves; applicants, WCTL contends, have represented that DM&E/IC&E common control will not cause any customer to lose any competitive rail service options, will not involve the elimination of facilities or the discontinuation of service, and will not threaten the economic viability or competitive effectiveness of other railroads. WCTL further explains that, at least to the extent that any potential future new PRB carrier would seek to serve electric utilities outside the area of DM&E’s proposed service territory, DM&E should have every economic incentive to negotiate mutually agreeable terms and conditions for service over its facilities.

⁵³ AECC argues that DM&E’s hostile attitude toward offering the I&M lines for neutral connections — even for traffic that would not be competitive with DM&E traffic — conflicts with the policy that consolidating carriers should maintain open gateways and neutral connections. *See Major Rail Consolidation Procedures*, 5 S.T.B. at 562-63 (we indicated that “we agree[d]” with the “[n]umerous parties” that had “stress[ed] that gateways must be kept open not just physically but economically.”). AECC adds that, although that policy was announced in the context of consolidations of Class I railroads, competitive considerations also apply in the context of consolidations of Class II railroads.

WCTL notes, however, that it is cognizant of AECC's concerns about the need to protect against the possibility that DM&E may be unwilling to negotiate, in good faith, appropriate connection/access agreements with any possible new-entrant PRB carrier. WCTL believes that, to protect against such an eventuality, it would be appropriate for the Board to consider requiring DM&E to negotiate, in good faith, reasonable IC&E connection and access terms at Kansas City with any new PRB carrier, while reserving, as part of the Board's continuing oversight of the transaction, the right to impose appropriate competitive enhancement measures should such negotiations fail.⁵⁴ This, WCTL advises, would help ensure that approval of DM&E/IC&E common control will not reduce important future PRB competitive service options by new market entrants, while fully preserving the economic benefits of DM&E's PRB construction project and protecting DM&E from possible economic harm. And, WCTL adds, such measures would be consistent with those approved in the *CN/WC* proceeding⁵⁵ and with the requirement in the Board's new merger rules that merger applicants include competitive enhancements as part of their merger plans.⁵⁶

WCTL further contends, however, that we should reject the other conditions sought by AECC. WCTL explains that the various arguments — respecting matters such as project viability, project costs, and financing plans — that were made by parties to our *PRB Construction* proceeding were fully considered in that proceeding and do not warrant reconsideration in this proceeding. And, WCTL adds, it is particularly troubled by AECC's suggestion that we should re-assess DM&E's financing plans for its PRB project; any action by the Board to reopen this matter now, WCTL warns, would lead to additional, and possibly fatal, delay in bringing this privately financed project to fruition.

Applicants' Response To AECC. Applicants contend that AECC's proposed conditions should be denied. AECC, applicants argue, has not provided any justification for its proposed conditions; it has failed to identify the routes it is seeking to protect; it has not even specified precisely where its proposed line would connect with IC&E; it has not provided any evidentiary support for its

⁵⁴ The "competitive enhancement measures" contemplated by WCTL would apparently be such as to preserve competition at potential future connection points between IC&E and a possible new PRB rail carrier entrant.

⁵⁵ See *CN/WC*, 5 S.T.B. at 902-03 (holding the *CN/WC* applicants to their representations respecting gateways).

⁵⁶ See *Major Rail Consolidation Procedures*, 5 S.T.B. at 546-47 ("major merger" applicants are now required to present proposals that enhance, not merely preserve, competition).

allegation (its false allegation, applicants insist) that DM&E has shown a “hostile attitude” toward joint-line routings with other carriers; and it has not provided any evidentiary support for its claim (its false claim, applicants add) that DM&E/IC&E common control would somehow harm DM&E’s plans to construct a DM&E line into the PRB. Applicants further advise: that none of the power plants operated by AECC and its supporters are located on either DM&E or IC&E; that, furthermore, approval of DM&E/IC&E common control would not in any way prevent AECC from proceeding with whatever plans it has to construct whatever PRB lines it has in mind; and that, in any event, to the extent AECC has issues with DM&E’s proposed PRB project, those issues should not be litigated (relitigated, in essence) in the present proceeding.

Muscatine Power And Water Company.

MP&W, a municipal electric utility headquartered in Muscatine, IA, owns and operates four coal-fired electric generating facilities, three of which are located at the Muscatine Electric Generating Station (Muscatine Station) in Muscatine. The Muscatine Station, which is rail-served by a single railroad (IC&E), burns, on an annual basis, approximately 1.1 million tons of coal, all of which is currently acquired from the Buckskin Mine in the PRB of Wyoming. MP&W advises: that this coal moves by rail on BNSF to Ottumwa, IA, where it is interchanged with IC&E (formerly I&M) for delivery to the Muscatine Station; that this BNSF/IC&E movement is provided in accordance with two separate proportional rate contracts, one with BNSF and one with IC&E; and that, when IC&E acquired the assets of I&M, IC&E accepted the proportional rate contract that MP&W had in place with I&M for delivery of PRB coal to the Muscatine Station. MP&W further advises that the transition from I&M to IC&E occurred smoothly, without disruptions in service. MP&W indicates that, although it initially had concerns relating to interchange gateways, it has since reached an agreement with applicants that addresses those concerns. And MP&W adds that, based on this agreement, it is now in full support of the DM&E/IC&E control transaction.

6 S.T.B.

Western Coal Traffic League.

WCTL, an organization whose members are major purchasers of PRB coal,⁵⁷ contends that DM&E/IC&E common control is in the public interest and that, for this reason, the DM&E/IC&E control application should be approved.

DM&E's PRB Construction Project. WCTL contends that, as it argued in its pleadings filed in the *PRB Construction* case, DM&E's PRB construction project is an important private sector investment initiative that will provide competitive and service benefits for coal shippers. WCTL further contends that there is sufficient public demand for the project, that DM&E's business projections are achievable, and that the project, once completed, will improve DM&E's existing services and provide needed additional rail infrastructure capacity in the West and Midwest. WCTL indicates that it continues to support DM&E's PRB project because (in WCTL's view) that project will result in enhanced PRB rate competition, demonstrable service improvements and efficiencies, and an increase in the capacity of the national rail system, all while increasing incentives for the existing PRB incumbents (UP and BNSF) to be better and more responsive rail service providers and marketplace competitors. And, WCTL adds, we should resist any invitation to relitigate issues that were fully resolved in the *PRB Construction* case, because (WCTL advises) relitigation of such issues would only serve to divert attention away from the relevant issues and hamper our ability to efficiently process the instant proceeding on the merits.

DM&E/IC&E Common Control. WCTL contends that the IC&E lines (which, WCTL notes, run between Chicago, Kansas City, and the Twin Cities, and across northern Iowa and southern Minnesota) are an important connection and access link on the eastern part of the DM&E system, that will allow DM&E to reach its current and future customer base. WCTL further contends that approval of DM&E/IC&E common control will help preserve rail service to existing and future customers on both the DM&E lines and the IC&E lines. And,

⁵⁷ WCTL's members include: Alliant Energy; Arizona Electric Power Cooperative, Inc.; Associated Electric Cooperative, Inc.; Center Point Energy; Central Louisiana Electric Company, Inc.; City of Austin, TX; City Public Service Board of San Antonio; Kansas City Power & Light Company; Lower Colorado River Authority; MidAmerican Energy Company; Minnesota Power; Nebraska Public Power District; NRG Power Marketing Inc.; Omaha Public Power District; Texas Municipal Power Agency; Western Resources, Inc.; Wisconsin Public Service Corporation; and Excel Energy.

WCTL adds, DM&E/IC&E common control should improve DM&E's existing services, and provide needed additional rail infrastructure capacity in the West.

MidAmerican Energy Company.

MidAmerican, which is IC&E's largest shipper by volume, ships about 13 million tons a year of PRB coal to its generating stations in Iowa. MidAmerican advises that IC&E delivers PRB coal, from interchanges with other railroads, to MidAmerican's Louisa station near Fruitland, IA, and its Riverside station in Bettendorf, IA. MidAmerican further advises that the availability of secure, efficient, and competitive rail service is extremely important to MidAmerican's competitiveness within its own utility market.

MidAmerican reports that, in the past, railroad acquisition and integration problems have created serious service disruptions. MidAmerican indicates, however, that, to date, IC&E has done a remarkable job in executing a smooth transition. MidAmerican advises that, because the transition has thus far gone well and because MidAmerican anticipates continued service improvements with full integration of DM&E and IC&E, it supports DM&E/IC&E common control. MidAmerican contends that common control will be in the public interest, will enhance the stability of both carriers, and will present opportunities to improve rail service for shippers on IC&E, including MidAmerican. And, MidAmerican adds, a regional partnership between DM&E and IC&E, and the various synergies the two carriers should be able to achieve, will help ensure the long-term viability of critical components of the Iowa rail transportation infrastructure, and, in conjunction with DM&E's proposed line construction into the PRB, will create a new single-system transportation option that could meet MidAmerican's coal sourcing needs.

Soo Line d/b/a Canadian Pacific Railway.

CPR, a Class I railroad, is a former owner of the railroad properties now owned by IC&E. CPR advises that, prior to the IC&E/I&M asset acquisition transaction, CPR had close operational and financial ties with, and a minority ownership interest in, I&M. CPR further advises that, because of geographic closeness and long-term contracts assumed by IC&E upon its purchase of the assets of I&M, the close CPR/I&M relationship has by necessity carried through to IC&E, and that, although the direct financial ties that existed between CPR and I&M no longer exist, a number of contractual relationships still do exist (CPR indicates, by way of example, that it has contractual duties to one IC&E

customer that will require CPR to provide service to that customer if IC&E fails to provide service at specified levels; CPR also indicates that, in view of a contractual agreement that may require CPR to guarantee certain IC&E payments to Metra if IC&E falters financially, CPR has an interest in assuring that IC&E has the financial stability and operational acumen to run trains into the Chicago area over IC&E's main route into the city, Metra's "West Line" from Pingree Grove to Cragin Junction). And, CPR adds, its interest in DM&E/IC&E common control also reflects the fact that IC&E has trackage rights on CPR's River Junction-Twin Cities line, and interchanges traffic with CPR at several locations.

Minnesota City Gateway. CPR contends that, even though DM&E has not explicitly indicated an intention to close the DM&E/CPR gateway at Minnesota City, action should be taken to keep that gateway open, as respects DM&E traffic moving north and east over CPR (north via CPR's Minnesota City-Twin Cities line and east via CPR's River Junction-Chicago line) and also as respects CPR traffic moving west over DM&E. The shipping public, CPR argues, will benefit if the Minnesota City gateway is kept open for "interline division interchange traffic."

(1) As respects PRB coal moving to plants in the Twin Cities and central and northern Wisconsin, CPR fears that DM&E will divert this traffic from its most natural routing (the DM&E/CPR routing via Minnesota City and the Twin Cities) and force it onto a more circuitous routing (the DM&E/IC&E routing via Owatonna and Chicago). CPR warns, however, that a DM&E effort to close the Minnesota City gateway and move coal traffic via IC&E into Chicago would defeat the mileage advantage for Upper Midwest power producers that provided partial justification for DM&E's PRB construction project. For this reason alone, CPR argues, a condition requiring that the Minnesota City gateway remain open would be appropriate.

(2) As respects grain traffic originated by DM&E in South Dakota and southern Minnesota and moving to Chicago, CPR fears that DM&E will divert this traffic from a DM&E/CPR routing (via Minnesota City) to a DM&E/IC&E routing (via Owatonna). CPR, though it concedes that shippers may potentially be benefitted by the increase in routing alternatives, insists that shippers should nevertheless have the right to choose the DM&E/CPR route via Minnesota City, which (CPR claims) is in better physical shape, is more direct, is faster, and (all things considered) is more cost-effective than the DM&E/IC&E route via Owatonna. And, CPR adds, a shipper's right to choose the DM&E/CPR route can only be preserved if the Minnesota City gateway remains a viable option.

(3) CPR further contends that the public interest would also be served by keeping the Minnesota City gateway open for fertilizer shipments coming south from Canada on CPR that are interchanged with DM&E at Minnesota City for movement to farmers in southwestern Minnesota and South Dakota.

Metra's West Line. CPR advises (in its comments filed November 14, 2002) that, as applicants had previously noted (in their primary application, filed August 29, 2002), IC&E's ability to move traffic into the Chicago terminal remains the subject of ongoing negotiations. CPR explains: that CPR has trackage rights over Metra's West Line pursuant to a 1985 Trackage Rights Agreement (the 1985 TRA) between CPR's and Metra's predecessors in interest; that I&M, which moved traffic from/to Chicago via the West Line, was admitted to the West Line as a "third party admittee" under the terms of the 1985 TRA; that, however, disputes have arisen as to the assignability to IC&E of the contract (hereinafter referred to as the I&M agreement) that allowed I&M this access to Chicago, and litigation has ensued; that the litigation has been stayed pending negotiations between the parties over a new agreement that would give IC&E more permanent rights to operate over the West Line; and that, although IC&E traffic has already begun moving over the West Line, it has been moving pursuant to a temporary detour arrangement between IC&E and Metra.

CPR further advises that certain issues respecting the specific provisions of the I&M agreement that might carry through to any new IC&E agreement have not yet been resolved. CPR indicates that IC&E has taken the position that the I&M agreement is assignable in whole, that CPR has no right to object to an assignment to IC&E, and that Metra's consent to such an assignment is not required. CPR further indicates that Metra and CPR have taken the position that no attempt at assignment can be effective without Metra's consent, which (CPR notes) has not yet been given.

CPR cautions that, if negotiations fail, the applicability of the various terms of the I&M agreement may be determined in court. CPR adds that, whether the court chooses to impose the terms of the I&M agreement on CPR, IC&E, and Metra, or whether the court finds that no assignment has taken place, there will be implications for shippers, the freight railroads, and Metra.

Relief Requested By CPR. (1) As respects the Minnesota City gateway, CPR asks that a condition be imposed that would require the combined DM&E/IC&E to keep this gateway open for "interline division interchange traffic" to allow competitive routing for grain, coal, and other shippers who currently use that gateway. This condition, CPR adds, would give shippers more choice with respect to their grain movements, and would also allow the realization of

“short haul” advantages for potential DM&E PRB coal movements to Minnesota and Wisconsin plants.⁵⁸

(2) As respects Metra’s West Line, CPR has not asked that a specific condition be imposed, but it has asked that we recognize: that there remain open questions regarding IC&E’s access to Chicago over this line; and that these questions may require action on our part in the future.

Applicants’ Response To CPR. (1) Applicants contend that CPR’s “Minnesota City gateway” condition should be rejected because: CPR has presented no evidence that DM&E has any plan or intent to cancel its interchange with CPR or otherwise “close” the Minnesota City gateway following common control;⁵⁹ CPR has made no showing that Board intervention is necessary to protect against loss of efficient routing opportunities for shippers;⁶⁰ and, in any event, the ICC and the Board have long held that gateway protection conditions are anticompetitive and not in the public interest.⁶¹

(2) Applicants contend that, although IC&E’s access to Chicago via Metra’s West Line remains the subject of negotiations among IC&E, Metra, and CPR, there is no basis for concern. Negotiations to settle litigation over the assignment to IC&E of the trackage rights held by I&M over Metra’s line, applicants advise, have been ongoing, and substantial progress has been made toward an agreement that would replace I&M’s rights with new long-term IC&E trackage rights over the line. *See DME-9 at 5.*

⁵⁸ Although one version of the condition sought by CPR would keep the Minnesota City gateway open to allow competitive routing options for shippers “who currently use that gateway,” CPR’s comments at 3, it is clear that CPR has in mind that the open gateway condition would also apply to PRB coal shipments that do not “currently” use the DM&E/CPR Minnesota City gateway. *See also* CPR’s comments at 5 (the simplest version of the condition sought by CPR would merely require the combined DM&E/IC&E “to keep this gateway open.”).

⁵⁹ Applicants note that, despite what CPR has suggested, Minnesota City is not today an “open” gateway. Applicants explain that, although IC&E also operates through Minnesota City on overhead trackage rights over CPR’s line and physically could interchange traffic with DM&E, the trackage rights agreement between CPR and IC&E prohibits IC&E from interchanging any traffic with DM&E at Minnesota City.

⁶⁰ Applicants note that no shipper filed comments expressing concern over future routing opportunities via Minnesota City. And, applicants add, CPR presented no evidence of any shipper support for its proposed condition.

⁶¹ *See CSX Corp. et al. — Control — Conrail Inc. et al.*, 3 S.T.B. 196, 303 (1998) (“We continue to believe that conditions of this type [a “routing condition” that would have preserved a railroad’s existing routings with one of the merger applicants] are inefficient, anticompetitive, and contrary to the public interest.”).

Metra.

As previously noted, Metra initially disputed applicants' claim that IC&E acquired, as assignee from I&M, I&M's rights to use Metra's West Line. (1) In its notice of intent to participate (filed October 15, 2002), Metra advised that it had granted IC&E temporary access to the West Line pursuant to a detour agreement, and that it had entered into negotiations with IC&E and CPR over the terms on which IC&E would be granted permanent access to the West Line. (2) In its comments (filed November 13, 2002), Metra advised that it believes that the negotiations, although not yet completed, are likely to result in a satisfactory resolution of its concerns. Metra further advised that it also believes that it possesses, independent of the DM&E/IC&E common control proceeding, remedies that will suffice to protect its interests in the event that the negotiations do not result in a satisfactory resolution of its concerns.

Brotherhood Of Locomotive Engineers.

BLE is a railway labor organization that represented the craft of locomotive engineers on I&M. BLE notes that, in connection with the IC&E/I&M asset acquisition transaction that was docketed in STB Finance Docket No. 34177, BLE joined with the other rail labor organizations representing I&M employees to form the Cooperating Labor Organizations (CLO), which filed a petition to revoke the class exemption that had been used by IC&E in the STB Finance Docket No. 34177 proceeding.

BLE, which urges the dismissal of the DM&E/IC&E control application, contends here, as CLO contended in the STB Finance Docket No. 34177 proceeding, that the IC&E/I&M asset acquisition transaction must be consummated under 49 U.S.C. 11323(a)(3) and cannot be consummated under 49 U.S.C. 10901. BLE contends, in essence, that the two transactions asserted by applicants (the IC&E/I&M asset acquisition transaction docketed in STB Finance Docket No. 34177, and the DM&E/IC&E control transaction docketed in STB Finance Docket No. 34178) are, in reality, a single DM&E/I&M transaction (i.e., the acquisition of control of I&M by DM&E). BLE further contends that DM&E has utilized the "sham" two-step procedure to circumvent the collective bargaining agreements entered into by the CLO unions and I&M and to evade the protections to which the employees are entitled.

Applicants' Response To BLE. Applicants indicate that they do not anticipate that any existing DM&E or IC&E employees will be adversely affected by DM&E/IC&E common control; the arguments raised by CLO in the

STB Finance Docket No. 34177 proceeding and repeated by BLE in the instant proceeding are, applicants claim, wholly without merit. And, applicants add, BLE has neither pointed to any harm to employees from DM&E/IC&E common control nor shown why *New York Dock* labor protection would not adequately protect any adversely affected employees.

Iowa Department Of Transportation.

IDOT supports the DM&E/IC&E control application. (1) IDOT contends that DM&E/IC&E common control will provide another outlet for Iowa grain to the Pacific Northwest market, an outlet that will feature a more direct and efficient connection than previously available to Iowa shippers on the IC&E lines. And, IDOT adds, while common control will provide a greater opportunity for South Dakota and Minnesota shippers by providing more outlets for their grain, overall this will provide a greater revenue base for the entire system and hence will provide the basis for preserving rail service for all shippers. (2) IDOT contends that common control will make possible certain management, operational, and financial efficiencies that may provide a window of opportunity for improving and preserving service on the IC&E lines. Indeed, IDOT advises, common control of DM&E and IC&E is the best hope for continued rail service on the lines now operated by IC&E.

United States Department Of Transportation.

(1) *DM&E/IC&E Common Control, In General.* DOT contends that the DM&E/IC&E control application satisfies the § 11324(d) standard and should, therefore, be approved. DM&E/IC&E common control, DOT argues, poses no demonstrable competitive threat and may increase the financial stability of the DM&E/IC&E applicants, to the benefit of the shippers they serve. The DM&E/IC&E applicants, DOT adds, have consistently asserted that their “end-to-end” merger will produce a stronger rail system that will be better able to offer improved services to their existing shippers; and no party, DOT advises, has introduced persuasive evidence to the contrary.

(2) *Environmental Issues.* DOT agrees that, as we indicated in our *IC&E/I&M Asset Acquisition* decision served July 22, 2002 (slip op. at 16-17), consideration of the potential environmental impacts associated with the prospect of routing, via IC&E lines, traffic moving from/to DM&E’s PRB line should be deferred until such time as DM&E is actually prepared to build that line. DOT also agrees that, until we have conducted an appropriate environmental review

of the cumulative impacts of the *PRB Construction* approval, the *IC&E/I&M Asset Acquisition* approval, and DM&E/IC&E common control, IC&E should not be allowed to handle, over the former I&M lines, any trains moving from/to DM&E's PRB line. (a) DOT agrees that we must consider, at some point, the potential environmental impacts associated with the movement, via IC&E lines, of coal traffic originated on DM&E's PRB line. DOT explains that, once DM&E and IC&E come under common control, the reason given for not considering such impacts in the *PRB Construction* case (our lack of authority to require DM&E to take action on property it does not own) will no longer be valid (because, with common control, DM&E will effectively "own" the IC&E lines). Once DM&E and IC&E come under common control, DOT argues, heretofore "down-line" communities (on the IC&E lines) that were previously deemed ineligible for mitigation measures will be "on-line" and should be considered for relief from demonstrable harms. (b) DOT also agrees that, for the present, we should defer consideration of such "down-line" impacts, and should bar IC&E from handling, over the former I&M lines, any trains moving from/to DM&E's PRB line. DOT argues that the present uncertainty of construction and the multitude of steps that will have to take place before coal may be transported even on DM&E's own lines make it premature to impose specific obligations. Preservation of the *status quo*, DOT adds, both avoids potentially unnecessary or unfounded regulatory determinations and demonstrates the proper willingness to consider mitigation measures when and where that appears appropriate.

(3) *Safety*. Transactions involving railroads of the size of DM&E and IC&E, DOT advises, do not generally present significant safety questions, and, DOT adds, it is unaware of any reason to believe that the DM&E/IC&E control transaction would be an exception to this general rule. DOT notes that, in any event, the Federal Railroad Administration (FRA) will continue to exercise its broad authority over safety in the rail industry to monitor applicants' operations.

(4) *DOT's Response To AECC*. DOT contends that, even if DM&E/IC&E common control were to have an adverse impact on the prospects for DM&E's construction of a new line into the PRB, that would not be an issue that the Board would need to consider as a regulatory matter. DOT explains that our approval of the construction of that line in our *PRB Construction* case was permissive (i.e., we allowed DM&E to build the line) and not mandatory (i.e., we did not require DM&E to build the line). DOT further explains that, because our approval of construction of DM&E's PRB line was merely permissive, it is not particularly pertinent whether DM&E/IC&E common control makes construction of that line more or less likely; that, DOT goes on, is a question for potential investors and financial supporters.

(5) *DOT's Response To CPR And Metra (Regarding Metra's West Line).*

(a) As respects IC&E's right to access the West Line, DOT contends that CPR has made only vague references to the "implications" respecting this matter. DOT further contends that, as respects the West Line, Metra may indeed be able to protect its own interests, although (DOT adds) there are circumstances in which settlements among parties do not automatically resolve all related public interest concerns. DOT concludes by advising that, at the present time, there is no clear indication on the record of any IC&E West Line access issue that warrants the Board's attention; there is, DOT explains, simply no record to support Board action of any sort at this time. And, DOT adds, it is not proposing an oversight condition respecting the West Line. (b) As respects DM&E coal traffic that might move via the West Line, DOT agrees that, as we indicated in our *IC&E/I&M Asset Acquisition* decision served July 22, 2002 (slip op. at 16-17), consideration of the potential environmental impacts associated with the prospect of routing, via any IC&E line, traffic moving from/to DM&E's PRB line should be deferred until such time as there is a more realistic prospect of such traffic.

APPENDIX C:
SUBMISSIONS RESPECTING TERMINAL TRACKAGE RIGHTS

Union Pacific Railroad Company.

UP opposes DM&E's application for terminal trackage rights over UP's Owatonna trackage. UP contends: (1) that a grant of terminal trackage rights would be contrary to the public interest; and (2) that, in any event, DM&E is not entitled to terminal trackage rights under 49 U.S.C. 11102 and our competitive access standards.

(1) A grant of terminal trackage rights at Owatonna would be contrary to the public interest, UP argues: first, because nullification of the so-called "paper barrier" that now bars a DM&E/IC&E connection at Owatonna would unjustifiably expand by regulatory decree the rights that DM&E acquired by purchase in 1986; and second, because DM&E does not actually need terminal trackage rights in order to establish a DM&E/IC&E connection at Owatonna.

First: UP contends that the "paper barrier" exists today because, in 1986, DM&E elected to purchase only overhead trackage rights at Owatonna. And, UP insists, the 1986 DM&E/CNW agreement to grant DM&E only overhead rights in Owatonna was, taken in context, not anticompetitive but pro-competitive. UP explains: that CNW agreed to sell various lines to DM&E for reduced up-front compensation (the purchase price, UP claims, was close to liquidation value) because CNW expected DM&E to feed its on-line traffic to the CNW (now UP) system; that a key element of this feeder-line structure was CNW's retention of various segments of trackage over which DM&E received overhead trackage rights; that the structure of the DM&E spinoff was as much DM&E's choice as CNW's (i.e., CNW was willing to negotiate a sale of the Owatonna trackage at a higher price, but DM&E chose to acquire overhead trackage rights at a lower price); and that, therefore, DM&E's acquisition of only overhead trackage rights at Owatonna was not anticompetitive at all but was, rather, an integral part of a transaction that was pro-competitive because, by spinning off the DM&E lines from CNW, it preserved rail service over several hundred miles of light-density lines in southern Minnesota and South Dakota. It would not be appropriate, UP argues, for DM&E to receive, by regulatory decree, rights that it chose not to purchase at the time of its formation.

Second: UP contends that, even without the terminal trackage rights DM&E now seeks, DM&E will be able to establish a DM&E/IC&E connection at Owatonna, either by building the 1.7-mile "Alternative O-4" connection that we

authorized in our *PRB Construction* decision⁶² or by pursuing a negotiated agreement with UP to obtain from UP (via negotiations, not via regulatory decree) the right to establish an “Alternative O-5” connection at MP 87.9. UP argues that, one way or the other (i.e., either by building the Alternative O-4 connection or by negotiating the Alternative O-5 connection), DM&E will connect with IC&E without Board involvement, and (UP adds) it would disserve the public interest for the Board to short-circuit efforts to reach a marketplace solution. UP argues that, absent Board action giving DM&E an Alternative O-5 connection for free,⁶³ it is in the interest of both parties to reach a negotiated agreement for an Alternative O-5 connection,⁶⁴ and therefore (UP contends) the Board should not, by granting DM&E’s terminal trackage rights request, eliminate DM&E’s incentive to negotiate. Achieving a DM&E/IC&E connection, UP maintains, is not at stake; what is at stake, UP asserts, is the public’s interest in having commercial issues resolved through private negotiations rather than Board-imposed outcomes.

(2) UP contends that, under 49 U.S.C. 11102, we may grant the terminal trackage rights sought by DM&E only if the evidence of record establishes that the Owatonna trackage is a terminal facility and that the competitive access standards announced in *Midtec Paper Corporation v. CNW et al.*, 3 I.C.C.2d 171 (1986) (*Midtec*), have been met. DM&E, UP argues, is not entitled to terminal trackage rights under 49 U.S.C. 11102 and our *Midtec* standards: first, because the Owatonna trackage is not a terminal facility; and second, because DM&E’s terminal trackage rights application does not meet our *Midtec* standards.

⁶² UP notes that, although DM&E sought approval for the Alternative O-4 connection in the *PRB Construction* proceeding, DM&E advised the Board in 1999 that it intends to build that connection “regardless” of its PRB construction project “because of the stand-alone rail service improvement and related competitive opportunities.” UP-4, *Groner v.s.*, Exhibit 4, Attachment B.2, Page 1, Item 2.

⁶³ UP claims that, in discussions with UP, DM&E has taken the position that, if DM&E receives the terminal trackage rights it seeks, UP would not be entitled to any additional compensation beyond that already paid for DM&E’s use of UP’s trackage.

⁶⁴ UP explains that a negotiated agreement is in UP’s interest because, whereas UP will receive nothing if DM&E builds the Alternative O-4 connection, UP will receive at least some consideration if there is a UP-DM&E agreement on an Alternative O-5 connection. And, UP adds, a negotiated agreement is also in DM&E’s interest because, whereas DM&E will have to pay the full cost of constructing an Alternative O-4 connection, DM&E will surely pay less if there is a UP-DM&E agreement on an Alternative O-5 connection. Logic, UP argues, compels the conclusion that UP and DM&E will agree on consideration (for an Alternative O-5 connection) at some value greater than zero but less than the cost of construction of an Alternative O-4 connection.

First: UP argues that, under the standards established by existing precedents,⁶⁵ the Owatonna trackage over which DM&E seeks terminal trackage rights does not include recognized terminal facilities or a terminal area and is not part of a “cohesive commercial area” that includes a terminal area, and, therefore, it cannot be a “terminal facility” under 49 U.S.C. 11102. Owatonna, UP argues, is simply a medium-sized town through which three rail lines happen to pass, and the facilities and rail operations on each of the railroads serving Owatonna are indistinguishable from those at many isolated rural points at which shipper facilities are served by local trains. The Owatonna trackage over which DM&E seeks terminal trackage rights, UP explains, is main line track that passes through Owatonna and crosses an IC&E branch line at grade; it contains no terminal facilities (no freight yards, no classification yards, no team tracks, and no engine facilities, and no car facilities either); and no active shippers are located on it. Owatonna, UP further explains, does not look like a “cohesive commercial area” even taking into consideration both the surrounding area and the shippers served by the three railroads that operate through Owatonna (Owatonna, UP notes, has only three active shippers by rail, one served by DM&E, one served by IC&E, and one served by UP; DM&E’s next closest shipper to the west is 8 miles away and its next closest shipper to the east is 11 miles away; IC&E’s next closest shipper to the north is 15 miles away and its next closest shipper to the south is 18 miles away; UP’s next closest shipper to the north is 15 miles away and its next closest shipper to the south is 10 miles

⁶⁵ “The Interstate Commerce Act does not define ‘terminal facility’ or what is ‘a reasonable distance outside of a terminal.’ While we interpret these phrases liberally, we have in the past stated that terminal functions are the transfer, collection or delivery of freight, and held that a terminal facility is ‘any property of a carrier which assists in the performance of the functions of a terminal.’ However, while use * * * is an appropriate starting point in defining terminal facilities, it is not the only factor bearing on the question of what constitutes terminal track. Circumstances the Commission have held significant include whether operations take place within railroad yard limits and whether service is performed within a cohesive commercial area. The presence of team tracks, freight houses or assembly facilities has also been given significant weight. Thus, the nature of the facilities and the character of the area in which they are located are as important as the use of the facility. A ‘terminal area’ (as opposed to main line track) must contain and cannot extend significantly beyond recognized terminal facilities, such as freight or classification yards or team tracks, and a cohesive commercial area immediately served by those facilities.” *Rio Grande Industries, Inc., et al. — Purchase and Related Trackage Rights — Soo Line Railroad Company Line Between Kansas City, MO and Chicago, IL*, Finance Docket No. 31505, Dec. No. 6 (ICC served November 15, 1989), slip op. at 10-11 (citations, footnote, and paragraph break omitted) (*RGI/Soo*). See also *Golden Cat Division of Ralston Purina Company v. St. Louis Southwestern Railway Company*, Docket No. 41550 (STB served April 25, 1996), slip op. at 7 (*Golden Cat*) (similar statement).

away; and none of the shippers in or near Owatonna is open to reciprocal switching or other form of access by any other railroad).⁶⁶ And, UP adds, even if Owatonna were a “cohesive commercial area,” none of the railroads that operate through Owatonna have any freight yards, classification yards, team tracks, engine facilities, or car facilities in Owatonna itself or anywhere nearby.⁶⁷

Second: UP contends that DM&E’s terminal trackage rights application does not meet our *Midtec* “competitive access” public interest standard. (a) UP argues that DM&E’s terminal trackage rights application should not be evaluated under the “bridge the gap” public interest standard used in the rail-merger context in *Union Pacific — Control — Missouri Pacific; Western Pacific*, 366 I.C.C. 462, 572-78 (1982) (*UP/MP/WP*), in *Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233, 446-50 (1996) (*UP/SP*), and in *CN/IC* (4 S.T.B. at 173-75). UP explains that, in the rail-merger context, in order “to prevent carriers opposing a merger from blocking our ability to craft merger conditions that are clearly in the public interest,” *UP/SP*, 1 S.T.B. at 449, non-applicant carriers have been required “to grant terminal trackage rights to another carrier only in limited circumstances where the rights were designed to bridge a gap within broader trackage rights imposed on applicants and deemed necessary to remedy or mitigate anticompetitive effects in the transaction.” *CN/IC*, 4 S.T.B. at 173 (citation omitted). UP further explains, however, that, in the DM&E/IC&E context, the “bridge the gap” terminal trackage rights DM&E seeks would bridge a gap in its own system for its own use; UP (UP adds) is not blocking our ability to craft merger conditions that would allow an otherwise beneficial merger to proceed. (b) UP argues that, under *Midtec*’s “competitive access” standard, DM&E must show that UP has engaged in anticompetitive conduct with respect to the Owatonna trackage. UP claims that, because it has not engaged in anticompetitive conduct with respect to the Owatonna trackage, DM&E cannot satisfy the *Midtec* standard. UP adds that, although DM&E is arguing that the

⁶⁶ DM&E, UP concedes, may provide “industry switching” for its one active Owatonna shipper, but, UP argues, industry switching performed for an isolated shipper along a railroad’s main line is not the type of activity that provides a basis for granting terminal trackage rights. UP-4 at 21.

⁶⁷ UP also notes that the Owatonna trackage over which DM&E seeks terminal trackage rights is not used for interchange operations, and that no traffic has been interchanged between DM&E or IC&E and any other railroad at or within 25 miles of Owatonna since at least January 1, 2000. And, UP points out, DM&E has indicated that, even if it receives the terminal trackage rights it seeks, the actual DM&E/IC&E interchange will not be conducted at Owatonna but at Mason City (72 miles to the south) because, as DM&E itself has acknowledged, “existing track configurations [at Owatonna] would not easily accommodate interchange operations.” DME-2 at 45 n.7.

overhead nature of DM&E's Owatonna trackage rights represents anticompetitive conduct by UP with respect to the Owatonna trackage, the fact of the matter is that this limitation on DM&E's rights to interchange at Owatonna was integral to the creation of DM&E, which was (UP contends) a decidedly pro-competitive arrangement. (c) UP argues that, even if a broad "public interest" standard were applicable to DM&E's terminal trackage rights application, DM&E would not be entitled to terminal trackage rights at Owatonna. The rights sought by DM&E, UP explains, are not necessary for DM&E to obtain an Owatonna interchange with IC&E or any of the other benefits arising from DM&E/IC&E common control, because (UP goes on) DM&E has an approved, practical construction alternative. Nor, UP adds, are the sought rights required to avoid the wasteful construction of a new connection; provided the Board does not intervene, UP explains, UP and DM&E will negotiate a compromise respecting the Alternative O-5 connection, since both UP and DM&E stand to lose if construction proceeds. The only "benefit" arising from a grant of terminal trackage rights, UP contends, is that the price DM&E pays for the right to connect with IC&E will be established by a regulatory process rather than by negotiations. But this, UP adds, is not a public benefit; the public interest lies in the resolution of business issues such as this through private negotiations.

Applicants' Response To UP. Applicants contend that the positions taken by UP in this proceeding are contrary to the facts, contrary to precedent, and contrary to the position UP took in the *UP/SP* proceeding. Applicants argue: that the UP trackage which DM&E seeks to use is a "terminal facility" within the contemplation of § 11102(a); that the terminal trackage rights sought by DM&E are in the public interest; and that private negotiations are not likely to result in the acquisition of the sought terminal trackage rights.

(1) Applicants contend that the UP trackage which DM&E seeks to use is a "terminal facility" within the contemplation of § 11102(a). Applicants explain: that the phrase "terminal facilities" in § 11102(a) should be given a broad interpretation in view of that provision's remedial purpose;⁶⁸ that railroad

⁶⁸ See *Rio Grande Industries, et al. — Pur. & Track. — CMW Ry. Co.*, 5 I.C.C.2d 952, 979 (1989) (*RGI/CMW*) ("The term 'terminal facilities' should be interpreted broadly because the purpose of the section is highly remedial."); *SPT v. ICC*, 736 F.2d 708, 723 (D.C. Cir. 1984) ("The Commission has long held that the [term] 'terminal facilities' should be broadly construed because the purpose of the section is highly remedial."); *CSX Corp. — Control — Chessie and Seaboard C.L.I.*, 363 I.C.C. 521, 585 (1980) (footnote omitted) (*CSX Control*) ("[S]ince our power to make terminal facilities of one carrier available to another is remedial in nature, the term should (continued...)

property constitutes a terminal facility if it is located in a cohesive commercial area and is used for the transfer of freight as well as for line-haul movements through the terminal;⁶⁹ and that, because the relevant Owatonna track segment is located in the heart of the 5th largest city in southern Minnesota, and has been used for both switching and interchange movements as well as linehaul movements through the terminal, this track segment is a “terminal facility” within the meaning of § 11102(a).

Applicants acknowledge that, as UP has pointed out, we have held that “[a] ‘terminal area’ (as opposed to main line track) must contain and cannot extend significantly beyond recognized terminal facilities, such as freight or classification yards or team tracks, and a cohesive commercial area immediately served by those facilities.” *Golden Cat*, slip op. at 7. Applicants maintain, however, that, although UP views Owatonna as a “rural outpost” much like any other, the fact of the matter is that Owatonna is, by any measure, “a cohesive commercial area.” Owatonna, applicants explain, is a city of over 20,000 people; it is the 5th largest city in southern Minnesota and the county seat for Steele County; it is one of the few small cities in the entire country that is served by three freight railroads and a major interstate highway; it has more than 500 retail, wholesale, and professional firms and over 40 industrial firms; and its primary and secondary retail trade area consists of \$285 million of purchasing power. And, applicants add, whereas *Golden Cat* dealt with a single industry that was served by an industry track located out in the middle of nowhere, Owatonna is a significant industrial center that plays a vital role in the economic infrastructure of southern Minnesota.

Applicants apparently concede that, as alleged by UP, the relevant Owatonna trackage has no freight yards, no classification yards, no team tracks, no engine facilities, and no car facilities. Applicants assert, however, that, under our precedents, “terminal facilities” exist where the trackage is used for switching and interchange movements as well as for linehaul movements through the terminal; and, applicants add, DM&E, on the one hand, and, on the other hand, IC&E and its predecessors⁷⁰ have performed the type of operations on the

⁶⁸(...continued)
be construed liberally.”).

⁶⁹ See *RGI/Soo*, slip op. at 10-11; *UP/SP*, 1 S.T.B. at 447 (“The three KCS segments are ‘terminal facilities’ under 49 U.S.C. 11103 because each lies in the middle of a city, and each is used for switching and interchange movements as well as for line-haul movements through the terminal.”).

⁷⁰ IC&E’s immediate predecessor was I&M; I&M’s immediate predecessor was CPR; and CPR’s immediate predecessor was the Milwaukee Road.

trackage that bring the trackage within the framework and meaning of “terminal facilities.” Applicants explain: that, within the framework of the extremely limited rights granted to DM&E on the Owatonna trackage, DM&E uses UP trackage today to switch the siding to Owatonna Concrete in Owatonna; that, some years ago, DM&E used the trackage to switch the sidings to Miles Homes (which has since gone out of business) and Interstate Mills (which has since removed its rail siding); that, prior to the creation of DM&E in 1986, CNW (DM&E’s immediate predecessor) and the Milwaukee Road (IC&E’s distant predecessor) interchanged cars at Owatonna over a portion of the UP trackage via a track connection which still exists between the two main lines, a track connection (applicants add) that is known today as “the transfer track”; that, although DM&E and IC&E do not today (and although DM&E and I&M did not, on or after January 1, 2000) use the UP trackage to perform switching and interchange operations, DM&E and either I&M or CPR did, on certain occasions prior to January 1, 2000, use the UP trackage to perform switching and interchange operations;⁷¹ and that, furthermore, DM&E mainline operations take place over a portion of the trackage (between the western switch and the eastern switch to the IC&E), and IC&E mainline operations also occur over the same segment. It is indeed ironic, applicants argue, that UP would point to DM&E’s limited usage of the Owatonna segment as a basis for UP’s “no terminal facility” argument, when it is precisely the UP restriction on DM&E/IC&E (or I&M or CPR) interchange that has prohibited more extensive use of the trackage for terminal purposes. There is no question, applicants insist, that, if these restrictions had been lifted at some point in the last 16 years, the terminal facilities themselves would have been used more extensively.⁷²

(2) Applicants contend that the terminal trackage rights sought by DM&E are in the public interest. A grant of terminal trackage rights, applicants explain, will facilitate prompt effectuation of the benefits of DM&E/IC&E common control,⁷³ it will prevent the unnecessary construction of duplicative lines,⁷⁴ it

⁷¹ Applicants point out that such operations were necessarily quite limited, because the applicable trackage agreements then allowed DM&E and either I&M or CPR (and now allow DM&E and IC&E) to perform interchange only in connection with industries located at Owatonna.

⁷² Applicants also see some irony in the fact that, in the *UP/SP* proceeding, UP (according to applicants) argued that the actual use of the terminal trackage is not in and of itself dispositive.

⁷³ The sought rights, applicants advise, will “bridge the gap” between DM&E and IC&E at Owatonna, *see SPT v. ICC*, 736 F.2d at 723 (noting prior ICC decisions ordering “bridge the gap” terminal trackage rights), and thus allow DM&E and IC&E to establish the kind of unrestricted, efficient, and direct connection that will enable DM&E/IC&E to provide the new routing and

(continued...)

will not impair UP's ability to handle its own business,⁷⁵ and it will be in the interests of the local community in the Owatonna area.⁷⁶

Applicants argue that UP is simply wrong in its claim that DM&E's terminal trackage rights request should be evaluated under the narrow *Midtec* "competitive access" standard rather than under the broader *UP/MP/WP* "bridge the gap" standard. See *UP/SP*, 1 S.T.B. at 448-49 (footnote omitted): "Whether the ICC ever applied its relatively exacting *Midtec* precedent in the context of a merger is a matter of some debate. In any event, we believe that it is inappropriate to do so here, and, to the extent that ICC cases suggest otherwise, we specifically overrule them. Instead, we will apply the broad 'public interest' standard that is in section 11103(a) itself." See also *RGI/CMW*, 5 I.C.C.2d at 980 n.30: "In analyzing the various trackage rights sought here, we will not apply the competitive access rules adopted in *Intramodal Rail Competition*, 1 I.C.C.2d 822 (1985) (49 C.F.R. Part 1144). Those rules address the addition of another carrier to the market outside the context of acquisition or merger proceedings."⁷⁷

Applicants further argue that UP is also wrong in its claim that the *UP/MP/WP* "bridge the gap" standard should be applied only when terminal trackage rights are sought to remedy a merger's anticompetitive effects, and not when (as here) such rights are sought to promote and facilitate a merger's pro-competitive effects. Applicants assert that we have never created such a distinction, for which, applicants argue, there is no logical basis. Compare *UP/SP*, 1 S.T.B. at 447-49 ("bridge the gap" terminal trackage rights were imposed to remedy anticompetitive merger effects) and *CSX Control*, 363 I.C.C. at 583 ("bridge the gap" terminal trackage rights were imposed in view of their

⁷³(...continued)

competitive rail service contemplated by the DM&E/IC&E control application. And, applicants add, the sought rights, in addition to creating a direct connection between DM&E and IC&E, will also make possible the establishment of unrestricted interchanges between DM&E and CEDR at Lyle, MN, and between DM&E and IANR at Plymouth Junction, IA, and Nora Springs, IA.

⁷⁴ See *SPT v. ICC*, 736 F.2d at 723 ("The purpose of this section is to avoid 'unnecessarily duplicated' lines."). See also *Spokane, P. & S. Ry. Co. and Union P. R. Co. — Control*, 348 I.C.C. 109, 142-43 (1975).

⁷⁵ Applicants note that the UP trackage over which DM&E seeks terminal trackage rights is an "island" that UP does not use and to which UP no longer has access.

⁷⁶ Applicants, citing the comments filed by the City of Owatonna, note that strong public support exists for granting the terminal trackage rights sought by DM&E in lieu of requiring DM&E to construct a 1.7-mile alternative connection.

⁷⁷ Applicants note that, in the *UP/SP* proceeding, UP urged the Board to apply the *UP/MP/WP* "bridge the gap" standard to the terminal trackage rights sought by BNSF.

“substantial public benefits, by way of improved service capabilities and environmental and safety considerations”) *with RGI/CMW*, 5 I.C.C.2d at 979-80 (“bridge the gap” terminal trackage rights were imposed to facilitate the pro-competitive effects of the transaction itself).

Applicants concede, of course, that, even without the sought terminal trackage rights, DM&E could, on its own, “bridge the gap” between the DM&E and IC&E lines by constructing the 1.7-mile loop connection that was authorized in the *PRB Construction* case. Applicants contend, however, that it is likely that the cost of constructing this connection would be substantial, and, applicants warn, the cost of construction may not be justified on the basis of control-related diversions alone (the 1.7-mile loop, applicants note, was approved as part of a different case that involved different traffic volumes and different economic assumptions). In any event, applicants add, actual construction would take up to two years,⁷⁸ thereby significantly delaying the clear pro-competitive effects of DM&E/IC&E common control.⁷⁹

Applicants further contend that the question that UP has failed to address is, “Why does this make sense?” Why, from a public interest standpoint, would it be preferable to forgo use of an existing 3,700-foot segment of track, which UP does not use and which is not even connected to the rest of its system and which requires no additional construction, and instead insist that DM&E should construct a potentially cost-prohibitive 1.7-mile track through a new area of Owatonna, thereby incurring environmental impacts on the public and causing significant delay in making the benefits of common control available to shippers? And, applicants add, the Board, in weighing the public interest, must take into consideration not only the interests of the railroads and the affected shippers, but also the interests of the residents of the impacted communities.

(3) Applicants contend that private negotiations outside the framework of § 11102 will substantially delay the public benefits of DM&E/IC&E common control and, in any event, are not likely to result in the acquisition of the sought terminal trackage rights. Applicants explain: that DM&E and UP (and, prior to 1996, CNW) have already been engaged, without success, in negotiations for these rights; that such discussions, however, have consistently included demands

⁷⁸ Applicants note that right-of-way acquisition alone could take a year or more to complete, especially if DM&E had to resort to condemnation to acquire some of the right-of-way.

⁷⁹ Applicants add that, UP’s claim to the contrary notwithstanding, there would be no need to delay commencement of DM&E operations pending rehabilitation of the IC&E line south of Owatonna. Applicants explain that, although an 18-mile stretch of that line is currently “excepted track,” the line is in service, and trains can and do run over it.

for unreasonable (and unrelated-to-Owatonna) concessions from DM&E (and later IC&E); that, absent regulatory relief, UP, which would prefer to have DM&E continue to exist as a UP (formerly CNW) feeder line, is highly unlikely ever to grant such rights on any commercially viable terms; and that, in fact, UP has had, and, absent regulatory relief, it will continue to have, no real incentive to grant such rights. Applicants further explain that UP's incentives are to keep DM&E from directly interchanging traffic with IC&E; a direct connection at Owatonna, applicants advise, would allow DM&E/IC&E to divert, away from UP, approximately 1,700 carloads representing approximately \$1.7 million in annual revenues.

UP, applicants note, has argued that the "paper barrier" at Owatonna was an integral part of the pro-competitive transaction that created DM&E. UP, applicants further note, has also argued that, in 1986, DM&E could have acquired the Owatonna trackage if it had been willing to pay the exorbitant price (in DM&E's view) demanded by CNW. Applicants contend, however, that the world has changed much in the past 16 years. CNW, applicants explain, has been gobbled up by UP, and is now part of the largest rail system in North America. And DM&E, applicants further explain, is no longer simply a feeder line to the former CNW; rather, it is engaged in a transaction that, if the paper barrier at Owatonna can be eliminated, will allow DM&E/IC&E to become an effective competitor to other railroads operating through the Midwest.

Applicants contend that, UP's assertions to the contrary notwithstanding, DM&E is prepared to negotiate compensation terms with UP as provided in § 11102, and hardly expects to use the trackage for free. Applicants further contend that we should permit DM&E to commence the sought § 11102 terminal trackage rights operations immediately upon consummation of the underlying transaction, and we should reserve jurisdiction to set the terms of compensation if DM&E and UP are unable to reach an agreement on their own. *See UP/SP*, 1 S.T.B. at 449 n.215 (we pledged that, if BNSF and KCS were unable to reach agreement respecting compensation terms, we would set appropriate terms under condemnation principles; we made this pledge to satisfy the § 11102(a) requirement that compensation must be "adequately secured" before a rail carrier may begin to use Board-imposed terminal trackage rights). *See also SPT v. ICC*, 736 F.2d at 723 (holding that, in the *UP/MP/WP* context, a similar pledge fulfilled the requirement of the term "adequately secured").

Western Coal Traffic League.

WCTL contends that UP, in order to preserve its duopoly position in the PRB, has advanced arguments that are contrary to the Board’s governing precedents and to UP’s own past pronouncements. UP’s opposition to DM&E’s Owatonna terminal trackage rights application, WCTL argues, should be seen for what it is — an attempt to thwart or otherwise hinder the viability of a new direct PRB rail competitor. The public interest, WCTL believes, favors DM&E’s competitive rail service.

(1) WCTL contends that, in *UP/SP*, UP argued, and the Board agreed, that the words “terminal facilities” in what is now § 11102 should be given a liberal construction. *See UP/SP*, 1 S.T.B. at 447 (citing with approval the statement in *SPT v. ICC*, 736 F.2d at 723, that the purpose of what is now § 11102 “is not necessarily limited to benefiting the rail service in the relevant terminal area”). *See also UP/MP/WP*, 366 I.C.C. at 575 (citing with approval a 1951 case in which the ICC said that, given the remedial nature of what is now § 11102, “the words ‘terminal facilities’ should be liberally, not narrowly, construed”). UP’s newly proffered restrictive “terminal” definition, WCTL contends, is inconsistent with governing precedent and with UP’s own past position on the subject.

(2) WCTL contends that, in *UP/SP*, UP argued, and the Board agreed, that, in the rail merger context, the broad “public interest” standard of what is now § 11102 supports a grant of “bridge the gap” terminal trackage rights. *See UP/SP*, 1 S.T.B. at 448 (holding that the terminal trackage rights sought by BNSF in *UP/SP* “fall squarely within” the *UP/MP/WP* precedent, and specifically overruling any ICC cases to the extent such cases suggested that the *Midtec* precedent should be applied in the context of a merger). UP’s position in the *UP/SP* proceeding was correct, WCTL argues, and its contrary position here should be rejected. And, WCTL adds, UP’s position here is also contrary to the Board’s recent pronouncement in *Major Rail Consolidation Procedures*, 5 S.T.B. at 546-47, that it favors additional competitive enhancements sought through merger proceedings.

The City Of Owatonna.

The City of Owatonna supports DM&E’s application for terminal trackage rights over UP’s Owatonna trackage. The sought terminal trackage rights, the City argues, are in the “public interest” as that term is used in 49 U.S.C. 11102.

(1) The City advances four propositions respecting the “public interest” standard, and cites authority in support of each. First, the City cites *UP/SP* in

support of the proposition that the DM&E terminal trackage rights application should be evaluated under the “broad ‘public interest’” standard laid out in 49 U.S.C. 11102, and not under the “relatively exacting” “competitive access” standard laid out in *Midtec*.⁸⁰ Second, the City cites *UP/SP* and *SPT v. ICC*, 736 F.2d 708, 723 (D.C. Cir. 1984), in support of the proposition that the “public interest” standard has been met where the applicant, in relation to its efforts to consolidate its system of commonly-held rail lines, is “bridging a gap” that must be filled to effectively link the system together.⁸¹ Third, the City cites *Construction And Operation — Indiana & Ohio Ry. Co.*, 9 I.C.C.2d 783 (1993), in support of the proposition that the “public interest” standard requires consideration of the impacts of applicants’ consolidation proposal on the City’s quality of life.⁸² Fourth, the City cites *CN/IC* in support of the proposition that

⁸⁰ “Whether the ICC ever applied its relatively exacting *Midtec* precedent in the context of a merger is a matter of some debate. In any event, we believe that it is inappropriate to do so here, and, to the extent that ICC cases suggest otherwise, we specifically overrule them. Instead, we will apply the broad ‘public interest’ standard that is in section 11103(a) itself. Congress gave us broad authority in both the public interest standard in section 11103 and in the public interest standard of section 11343. Thus, we believe that it is appropriate for us to retain the flexibility to use the terminal trackage rights provision to prevent carriers opposing a merger from blocking our ability to craft merger conditions that are clearly in the public interest as the ICC did in the past.” *UP/SP*, 1 S.T.B. at 448-49 (footnote omitted).

⁸¹ “To ameliorate certain anticompetitive consequences of the 1982 UP/MP/WP merger, the ICC imposed a condition granting DRGW [The Denver and Rio Grande Western Railroad Company] trackage rights over a line between Pueblo and Kansas City, part of which was owned by a non-applicant, SF [The Atchison, Topeka and Santa Fe Railway Company]. *UP/MP/WP*, 366 I.C.C. at 572. The ICC used its 49 U.S.C. 11103 power to grant terminal trackage rights. Applying this provision, the ICC determined that granting access to this line to make the agency’s overall merger conditions effective would be in the public interest. *UP/MP/WP*, 366 I.C.C. at 574-76. The Court of Appeals affirmed. *SPT v. ICC*, 736 F.2d at 722-24. We think that the terminal trackage rights sought here [the UP/SP applicants and BNSF sought an order that would permit BNSF to use certain KCS track segments] fall squarely within that precedent.” *UP/SP*, 1 S.T.B. at 448. See also *SPT v. ICC*, 736 F.2d at 723 (citing cases from 1928 and 1975 in which the ICC granted terminal trackage rights “so that the carriers might ‘bridge the gap’ between their line and the terminal.”).

⁸² “[I]n deciding railroad construction applications under the Interstate Commerce Act (Act), we apply the relevant provision — here § 10901 — in light of the rail transportation policy (RTP), set out at 49 U.S.C. § 10101a. As Protestants point out, the RTP, at § 10101a(8), specifically makes it the policy of the United States Government, in regulating the railroad industry — ‘to operate transportation facilities and equipment without detriment to the public health and safety * * *.’ The Protestants further point out correctly that ‘[t]he Commission considers the Rail Transportation Policy (49 U.S.C. § 10101a) to be a statement of the public interest which it will use as a guideline in determining whether the public convenience and necessity require or permit construction of a new rail line * * *.’” *Construction And Operation — Indiana & Ohio Ry. Co.*, 9 I.C.C.2d at 787-88

(continued...)

the “public interest” standard requires consideration of environmental impacts, including safety impacts.⁸³

(2) The City argues, in essence, that the “public interest” standard requires us to choose which of the two possible DM&E/IC&E connections — the Alternative O-4 “1.7-mile loop” connection that we authorized in our *PRB Construction* decision or the Alternative O-5 “MP 87.9” connection for which DM&E now seeks authorization in its terminal trackage rights application — would best serve the public interest. The City claims that there are three reasons why the public interest would best be served by, and why, therefore, we should choose, the Alternative O-5 “MP 87.9” connection.⁸⁴

First: The City contends that, as between the two possible connections, the MP 87.9 connection would do more to promote the health, safety, and welfare of the City’s citizens, because a MP 87.9 connection would minimize (whereas the 1.7-mile loop connection would maximize) DM&E train activity, and the adverse consequences thereof, in Owatonna itself and in the general vicinity of Owatonna.⁸⁵ The City’s explanation, which is given in the context of anticipated PRB coal trains, varies as between, on the one hand, coal trains moving east on the DM&E line and then south on the IC&E line (or return trains moving north on the IC&E line and then west on the DM&E line), and, on the other hand, coal trains moving east on the DM&E line and then north on the IC&E line (or return trains moving south on the IC&E line and then west on the DM&E line). (a) The City explains that a coal train moving east on the DM&E line and then south on the IC&E line (or a return train moving in the reverse direction) would spend less time in the general vicinity of Owatonna, and would move over fewer curves, with the MP 87.9 connection as opposed to the 1.7-mile loop connection. (b) The City concedes that, even with a MP 87.9 connection, a coal train moving

⁸²(...continued)

(footnote and citation omitted; asterisks in original).

⁸³ “In determining the public interest, we balance the benefits of the merger against any harm to competition, essential service(s), labor, and the environment that cannot be mitigated by conditions.” *CN/IC*, 4 S.T.B. at 139. See also *CN/IC*, 4 S.T.B. at 177 (we noted that “the majority” of the environmental conditions imposed on the CN/IC merger “address[ed] safety”).

⁸⁴ The City notes that, in the *PRB Construction* proceeding, it initially urged the construction of a 10.9-mile bypass to the south of Owatonna. The City recognizes, however, that the “10.9-mile bypass” connection is no longer on the table.

⁸⁵ The City cites, as adverse consequences of increased train activity: additional air pollution; additional noise pollution; additional vibrations; impacts on “sensitive” populations near the DM&E/IC&E rail lines; interference with emergency response systems (fire, police, and ambulance); additional rail/pedestrian and rail/highway accidents; and reduction of property values in neighborhoods along the DM&E/IC&E rail lines.

east on the DM&E line and then north on the IC&E line (or a return train moving in the reverse direction) will not be able to move so smoothly through Owatonna; the coal train, rather, will have to enter onto the IC&E line as if it were heading south, it will have to stop, and, before it starts moving north, its locomotives will have to run around the train (and a similar arrangement, in the reverse direction, will have to be made for a return train). The City contends, however, that, with a 1.7-mile loop connection, the train would have to spend even more time in the general vicinity of Owatonna, and, although it would not have to stop, it would have to make a “double pass” through downtown Owatonna.

Second: The City contends that, as between the two possible connections, the MP 87.9 connection would do more to promote economic development in and around Owatonna. The City explains: that the 1986 “paper barrier” has effectively eliminated routing, gateway, and market options for shippers located on the DM&E and IC&E lines; that, given the existence of this “paper barrier,” industrial sites located on the DM&E and IC&E lines have not been viewed favorably by site developers; and that the removal of the 1986 “paper barrier” would expand options for existing and potential shippers in the Owatonna area by allowing such shippers access to rail-served markets and gateways that would be limited only by the scope of the combined DM&E/IC&E system. Approval of DM&E’s terminal trackage rights application, the City argues, would immediately benefit Owatonna and the surrounding community in future efforts to attract rail-served industries, which (the City adds) would increase employment opportunities for Owatonna’s citizens.

Third: The City contends that, as between the two possible connections, the MP 87.9 connection would do more to promote an improved Owatonna rail plant and safer operations. The City explains: that the largest single operational change identified in the DM&E/IC&E operating plan involves train and service routings in and around Owatonna; that these changes, however, appear to depend upon a grant of DM&E’s terminal trackage rights application; that, although applicants contemplate a \$3 million rehabilitation project that will improve the condition of the Owatonna-Austin segment of IC&E’s Owatonna-Mason City line and increase track speeds on this line from 10 mph to 25 mph, it is unlikely that IC&E will undertake any such track improvements should the Board deny the DM&E terminal trackage rights application; and that, if IC&E does not undertake such track improvements, Owatonna will lose the benefits accruing to the community from improved rail physical plant on IC&E and DM&E, including better and safer railroad track conditions, increased train speeds through town, and faster transit times at grade crossings. And, the City adds, if the combined DM&E/IC&E system can achieve the operating efficiencies that

will be made possible by a grant of the DM&E terminal trackage rights application, it will be in a better financial position to ensure that the rail physical plant in Owatonna is maintained to the highest safety standards possible.

Iowa Department Of Transportation.

IDOT, which believes that all anticompetitive barriers should be removed whenever possible, supports the DM&E application for terminal trackage rights at Owatonna. Limitations on traffic interchanges, IDOT advises, are patently anticompetitive, and a continuation of the Owatonna interchange barrier would only foster inefficiencies and drive up costs for DM&E/IC&E and their customers while providing little or no benefit to UP.

United States Department Of Transportation.

DOT acknowledges that, from almost any perspective, the use of existing track is clearly superior to the construction of new track. DOT further acknowledges the negative impact on competition that commonly flows from “paper barriers.” DOT contends, however, that, whether or not the track in question is a terminal facility, DM&E’s terminal trackage rights request fails to satisfy applicable Board precedent, and, for this reason, should not be granted.

DOT explains that, in rail merger cases, the ICC and the Board have routinely imposed trackage rights conditions on merging carriers in order to allow other railroads to redress demonstrable competitive losses occasioned by the merger. DOT further explains that the Board has also imposed such conditions on non-merging third party carriers, but “only in limited circumstances where the rights were designed to bridge a gap within broader trackage rights imposed on applicants and deemed necessary to remedy or mitigate anticompetitive effects in the transaction.” *CN/IC*, 4 S.T.B. at 173 (citation omitted). And, DOT adds, without a sufficient nexus between the merger and the trackage rights proposal “to justify consideration under the less demanding public interest standard we have applied in appropriate circumstances within the context of rail merger proceedings,” *CN/IC*, 4 S.T.B. at 175, the much more demanding requirements of the “competitive access” standard apply.

DOT argues that, because DM&E/IC&E common control presents no threat of competitive harm, the competitive access standard must be applied to DM&E’s terminal trackage rights request. DOT further argues, however, that applicants have not met that standard, because they have not introduced any evidence of competitive abuses by UP. And, DOT adds, the Board has already

approved a different (though inferior) means by which DM&E and IC&E may connect at Owatonna, and, furthermore, there is a reasonable basis to hope that negotiations will produce a superior DM&E/IC&E connection that will avoid increased community impacts in Owatonna.