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January 12, 2007

VIA ELECTRONIC FILING

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 700
Washington, DC 20006

Re: **Finance Docket No. 34177**
Iowa, Chicago & Eastern Railroad Corporation -- Acquisition
and Operation Exemption -- Lines of I&M Rail Link, LLC

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding is the **Reply of Iowa, Chicago & Eastern Railroad Corporation and Dakota, Minnesota & Eastern Railroad Corporation to Comments on Environmental Appendix**, dated January 12, 2007.

If you have any questions regarding this filing, please feel free to contact me.
Thank you for your assistance on this matter.

Respectfully submitted,


William C. Sippel
Attorney for Iowa, Chicago & Eastern Railroad
Corporation and Dakota, Minnesota & Eastern
Railroad Corporation

WCS:tjl

Enclosure

cc: Parties on Certificate of Service
Ms. Victoria J. Rutson, SEA

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34177

IOWA, CHICAGO & EASTERN RAILROAD CORPORATION
-- ACQUISITION AND OPERATION EXEMPTION --
LINES OF I&M RAIL LINK, LLC

**REPLY OF IOWA, CHICAGO & EASTERN RAILROAD CORPORATION
AND DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION
TO COMMENTS ON ENVIRONMENTAL APPENDIX**

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**ATTORNEYS FOR IOWA, CHICAGO &
EASTERN RAILROAD CORPORATION
AND DAKOTA, MINNESOTA & EASTERN
RAILROAD CORPORATION**

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TO COMMENTS ON ENVIRONMENTAL APPENDIX**

Iowa, Chicago & Eastern Railroad Corporation ("IC&E") and Dakota, Minnesota & Eastern Railroad Corporation ("DM&E") hereby reply to the comments regarding the Environmental Appendix prepared and distributed by IC&E and DM&E in accordance with the Board's decision served October 18, 2006 in this proceeding. Notice of the availability of the Environmental Appendix for public review and a request for public comment was published in the *Federal Register* on November 22, 2006. 71 Fed. Reg. 67706.

The limited number of comments filed on the Environmental Appendix are singularly remarkable for what they do not include: With a sole exception, none of the on-line communities on the former I&M Rail Link, LLC ("IMRL") route in Iowa, Illinois and Minnesota have expressed any concern regarding any potential cumulative impacts of IC&E's acquisition of IMRL's rail lines¹ and DM&E's construction of its Powder River Basin line in western South

¹ Iowa, Chicago & Eastern Railroad Corporation -- Acquisition and Operation Exemption -- Lines of I&M Rail Link, LLC, Finance Docket No. 34177 (STB served July 22, 2002) ("IC&E Acquisition"). DM&E's related control of IC&E was approved in Dakota, MN & Eastern et. al. -- Control -- Iowa, Chicago & Eastern, 6 S.T.B. 511 (2003) ("DM&E-IC&E Control").

Dakota and northeastern Wyoming,² or indicated that further environmental review of such matters is required. Instead, the few comments filed largely reflect suspect motives, novel theories, or both: 1) the incumbent duopolist in the PRB who, having aggressively fought DM&E's PRB line construction project behind the scenes for many years and more recently in public, has apparently concluded that the project is too close for comfort and that the environmental review process under NEPA³ might be an additional tool to thwart any such new competition; 2) a PRB construction project opponent located near the DM&E in Rochester, Minnesota -- not within 40 miles of the closest IC&E/IMRL line -- whose environmental objections to the PRB project have been (in the recent words of a federal appellate court) "exhaustively studied" and whose only interests here are to impede the PRB project or to create environmental harms on the former IMRL lines by forcing the diversion of PRB coal trains onto those lines -- and away from itself; and 3) a federal agency that inexplicably sees and seeks an opportunity to reopen and recast with a wider net the environmental review in PRB Construction -- recently concluded after nine years of administrative and judicial proceedings -- regardless of the existence of any actual environmental harms arising from the IC&E acquisition and control transactions or the existence of any precedent for its proposed action. The remaining comments⁴ simply seek review without citing any substantive need or supporting authority, except to argue that this acquisition and control case should be treated as if it were a new

² Dakota, MN & Eastern R. -- Construction -- Powder River Basin, 3 S.T.B. 847 (1998) ("PRB Construction I"); 6 S.T.B. 8 (2002) ("PRB Construction II"), rev'd in part sub nom. Mid States Coalition for Progress v. STB, 345 F.3d 520 (8th Cir. 2003) ("PRB Appeal I"); Dakota, Minnesota & Eastern Railroad Corp. Construction into the Powder River Basin, Finance Docket No. 33407 (STB served February 15, 2006) ("PRB Construction III"), aff'd sub nom. Mayo Foundation v. STB, No. 06-2031 (8th Cir., December 28, 2006) ("PRB Appeal II").

³ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, et seq.

⁴ City of Dubuque, Iowa and Iowa Department of Transportation.

construction case. None of their positions demonstrate, or even relevantly address, a need for further environmental review in this proceeding.

Indeed, the comments of Dubuque -- the only IC&E on-line community to object in any fashion to the Environmental Appendix -- make clear that, in reality, that city objects to the presence of existing train movements through the area and is concerned with potential future non-coal traffic growth having nothing to do with the PRB construction project. Such pre-existing conditions and hypothesized environmental impacts that do not result directly from the transaction under review have never been the basis for environmental review by this agency under NEPA, and are not so here. There are existing grade separations that already accommodate vehicular and pedestrian traffic in the cited areas, and IC&E and DM&E are committed to continuing their existing work with that community to address other present and future concerns.

Another city located on the lines of both DM&E and IC&E has indicated that further environmental review is not necessary and urged the Board to quickly so find. City of Owatonna, Minnesota letter comments, dated December 8, 2006 and filed December 27, 2006. The City of Bellevue, Iowa also previously withdrew its requests for further study and supports IC&E/DM&E's position. The Illinois Department of Transportation, while indicating a generalized interest in operations within the Chicago terminal, expresses no concern with respect to any of the communities on IC&E's line across Illinois. And the U.S. Environmental Protection Agency sees "no significant concerns meriting comment." EPA December 11, 2006 letter.

There is neither a legal basis nor a practical purpose for inventing an environmental review here that NEPA would not otherwise contemplate or allow. The IC&E

acquisition transaction will not have significant cumulative environmental impacts, and thus qualifies for a categorical exclusion from further environmental review under the Board's rules and does not require further environmental documentation.

A. The Comments Reflect No Relevant Cumulative Impacts Arising From The IC&E Acquisition Transaction and the DM&E PRB Construction

In its *Federal Register* notice of the availability of the Environmental Appendix, the Board explained that the relevant present inquiry is what, if any, further environmental review is warranted of any cumulative environmental impacts -- "that is, impacts from more DM&E coal trains operating over the former IMRL lines as a result of the change in ownership of IMRL than would otherwise have moved over the IMRL lines" 71 Fed Reg. 67706 (citing IC&E Acquisition and DM&E/IC&E Control). That plainly is the correct understanding of the potential cumulative impacts to be reviewed here. 40 C.F.R. § 1508.7; Department of Transp. v. Public Citizen, 541 U.S. 752, 769-770 (2004);⁵ Northwest Environ. Advocates v. National Marine Fisheries Serv., 460 F.3d 1125, 1140 (9th Cir. 2006) (where current project

⁵ The Supreme Court in Public Citizen considered the nature of the cumulative impacts review that was required of an agency within the U.S. Department of Transportation by NEPA and 40 C.F.R. § 1508.7, explaining that it was the "incremental impact" of an action when considered in light of other actions -- not the underlying impacts of the other actions themselves -- that the agency must consider:

The "cumulative impact" regulation required FMCSA to consider the "incremental impact" of the safety rules themselves [i.e., the pending action], in the context of the President's lifting of the moratorium [i.e., the prior action] and other relevant circumstances. But this is exactly what FMCSA did in its EA. FMCSA appropriately and reasonably examined the incremental impact of its safety rules assuming the President's modification of the moratorium (and, hence, assuming the increase in cross-border operations of Mexican motor carriers). The "cumulative impact" regulation does not require FMCSA to treat the lifting of the moratorium itself, or consequences from the lifting of the moratorium, as an effect of its promulgation of its Application and Safety Monitoring Rules.

541 U.S. at 769-770.

would have virtually no effect, cataloguing of effects of other projects not necessary for cumulative impacts review).

Remarkably, given this governing standard, there is no serious argument by any of the commenters that the IC&E acquisition and control transaction will have the effect of diverting DM&E-originated PRB coal movements onto IMRL routings over which they would not otherwise have moved.⁶ Instead of disputing that a finding of no significant impact (or "FONSI") is thus required under the governing legal standard, the commenters instead invite the Board to invent new standards that would govern its cumulative impacts review here -- inventions that range from unpersuasive to sublime.

1. Lifting of the Routing Condition Does Not Require Separate NEPA Review

The true motivation for the seemingly weighty comments filed by BNSF Railway Company ("BNSF") is likely lost on no one -- including the Board. BNSF's concerns are not about the acquisition and control case at issue here. Its filing demonstrates far more effectively than any DM&E filing ever could that the PRB construction project will achieve much-needed competition -- which is exactly what BNSF's participation here is aimed at obstructing. BNSF's efforts to undermine the PRB project, including its marketing efforts designed to undermine private sector financing years ago by tying up what BNSF called the PRB marketing "sweet spot" with long-term contracts, are unmistakable in spite of blithe disclaimers to the contrary.⁷ It

⁶ BNSF addresses the subject briefly, in afterthought fashion. Its cursory comments are addressed below.

⁷ The following transcript is from a BNSF employee meeting conducted by CEO Matt Rose at Alliance, Nebraska, date noted as September assumed to be approximately 2002:

Q. "I understand that the DM&E received funding for their proposed coal route into the Powder River Basin. Is that true?"

is ironic and relevant that BNSF has recently criticized DM&E efforts to obtain a Federal Railroad Administration ("FRA") loan -- criticism implicitly repeated in its comments here. BNSF Comments at 9. Ironic because BNSF criticizes the FRA loan on competition policy grounds, in spite of the fact that over 20 years ago BNSF received a comparable federal loan to refurbish a line in South Dakota that it uses to compete directly against DM&E today. And relevant because it is exactly the type of conduct exhibited by BNSF in its prior market foreclosure efforts and reflected again in its comments here. BNSF's filing is consistent with ongoing efforts to undermine the DM&E PRB project, and its inventive legal theories serve no other purpose.

BNSF thus insists repeatedly that the Board's task here is not to review potential cumulative environmental impacts of the IC&E acquisition transaction (which is the subject matter of this docket), but instead to review the environmental effect of lifting the housekeeping routing condition that the Board imposed in 2002 so that it could conduct a future cumulative impacts review of the IC&E acquisition transaction. The proposition is as obtuse as it sounds, and yet it forms the express predicate for nearly everything that follows in BNSF's comments. E.g., BNSF Comments at 1-2 (Board must review "potential environmental consequences that would result from lifting the Board's current prohibition on DM&E's ability to route Power River

A. Rose: "They have not received funding. They received the go-ahead from the Surface Transportation Board to pursue the project. We have been watching this closely. Think about where the line would go, if it happens, and the market area -- eastern Iowa, Minnesota, Wisconsin and Illinois. That will be their sweet spot. We have paid a lot of attention to our customers in that area. I'm not saying we did that because of DM&E, but we have signed long-term contracts with customers in that area. Last year, I signed a 15-year deal with Minnesota Power Company. I feel we are very attentive to this issue. Personally, I don't think the DM&E will build their line. At current prices, it will cost them \$2.1 billion. I said the last time I was here that they would likely get the authority, which has happened. I don't think they will receive the investment to build a third route into the Powder River Basin. I've been wrong before. I may be here, but even if I am, if they build it, I'm not sure what they will haul, because we have long term contracts with customers across their target area."

Basin coal via the former IMRL lines."); Id. at 3 ("Accordingly, for purposes of NEPA, the action here at issue is the Board's approval of DM&E's request to haul PRB coal on the former IMRL lines -- not, as DM&E would have it, the "control" and acquisition of the former IMRL lines that occurred more than four years ago."); Id. at 12 (removal of the routing condition "qualifies as a 'major federal action' subject to NEPA's environmental review requirements."); Id. at 22 ("The proposed action in this case is the lifting of a restriction that applies to PRB coal traffic along the whole system formerly operated by IMRL . . ."). It is thus BNSF's considered position that, in the resumption of the consideration of potential cumulative environmental impacts of the IC&E acquisition transaction that was expressly deferred by the Board in 2002 in this acquisition docket, "[t]he 'acquisition' [] is not the proposed action in front of the STB." BNSF Comments at 13, n.4.⁸

The Board could be forgiven for wondering what BNSF is talking about. In IC&E Acquisition, the Board deferred consideration of the cumulative impacts of the IC&E acquisition, and used the routing condition as simply the procedural housekeeping means to do it. IC&E Acquisition at 16-17 ("To meet our obligations under NEPA . . . we will [later] consider in this proceeding the cumulative impacts of those actions together with our approval of the new line in DME Construction Deferring that examination is appropriate here . . . [under the circumstances] it would be premature to attempt to make that assessment now." (footnotes omitted); Id. at 18 ("The conditions [including the routing condition] we are imposing now assure that any cumulative environmental impacts would be addressed before any such expanded operations could take place. . . . This approach is reasonable and meets the requirements of

⁸ The purpose of this leap of logic is to allow BNSF to argue that the Board must review all environments effects of any DM&E-originated PRB coal moving over the former IMRL lines, rather the cumulative environmental effects of the IC&E acquisition transaction which is the subject of this proceeding.

NEPA.") The Board viewed this approach as a reasonable alternative to staying the entire IC&E acquisition transaction until a cumulative impacts review was completed. IC&E Acquisition at 13 ("a stay of the effective date of the notice of exemption is not required because we can allow the acquisition to proceed with conditions that assure that any cumulative impacts [will be addressed]."); Id. at 17 ("we need not preclude IC&E from proceeding with the proposed acquisition and common control (for which authority will soon be sought)."). And the Board took pains to point out that its approach, including the imposition of the routing condition, was a matter of "internal decisionmaking" and procedure that was consistent with NEPA. IC&E Acquisition at 18, n.39.

Neither the decision nor logic permits the implication that, in imposing this routing condition to facilitate the eventual cumulative impacts review of the IC&E acquisition transaction, the Board was somehow engaging in a "major federal action" such that the eventual removal of the condition would itself require a separate NEPA review.⁹ The STB did not impose the routing condition so that it would have sufficient opportunity to review the environmental impacts of removing the routing condition. It did so to allow a future cumulative impacts review of the IC&E acquisition itself. Lifting what amounts to a partial housekeeping stay upon completion of whatever environmental review, if any, is deemed necessary will be a ministerial act to which NEPA is clearly inapplicable. E.g., Iowa Southern R. Co. -- Exemption -- Abandonment, 5 I.C.C.2d 496, 503 (1989), aff'd sub nom. Goos v. ICC, 911 F.2d 1283, 1295-1296 (8th Cir. 1990).

BNSF's argument essentially posits that the Board has already determined that all DM&E-originated PRB coal traffic that could move via the former IMRL lines (with or without the IC&E acquisition and control transactions) is subject to full environmental review in this

⁹ If that were the case, imposition of the condition would likely have required NEPA review as well.

proceeding. That would necessarily mean that the Board had conducted in 2002 significant components of the environmental review that the Board expressly said it was deferring until later. The routing condition plainly was the result of no such determination. It simply assured that such traffic would not move until the Board decided whether and to what extent such traffic was subject to a cumulative effects review in the IC&E acquisition transaction.

Conditions of this nature -- functionally housekeeping stays that allow completion of required environmental reviews -- are of course used routinely by the Board. E.g., 49 C.F.R. § 1152.50(d)(4); Exemption of Out-of-Service Rail Lines -- Notice of Stay Procedures, 4 I.C.C. 400 (1988) (announcing "policy of routinely staying the effectiveness of the class exemption as it applies to an individual abandonment where an informed decision on pending environmental issues . . . cannot be made prior to the time the exemption authority would otherwise become effective."). Similarly, the Board routinely imposes conditions in abandonment cases that, while allowing the railroad to proceed with other aspects of the abandonment, precludes the railroad from salvaging bridges or structures until completion of historic preservation review process under Section 106 of the National Historic Preservation Act of 1966, 16 U.S.C. § 470. See generally Implementation of Environmental Laws, 7 I.C.C. 2d 807, 813 (1991) (explaining that "[w]e stay exemptions, or subject them to appropriate conditions that delay aspects of the transaction, where necessary to insure a fully informed decision on environmental issues."). No one (until now) has ever contended that, once the required underlying environmental review is completed, lifting the stay or vacating the condition are themselves actions requiring NEPA review. There is no basis for BNSF's argument that such an anomaly exists in this case.

BNSF focuses extensively on the fact that IC&E and DM&E sought removal of the routing condition in their Petition to Reopen and Partially Modify Conditions filed on May

12, 2006, claiming (apparently) that the relief sought there independently constitutes a "major federal action" to which NEPA must apply. We note that the request to lift the condition appears to have been denied in the Board's October 18, 2006 decision, thus rendering BNSF's argument moot. In any event, IC&E and DM&E are more than willing to have the request considered as withdrawn, thus unquestionably leaving the routing condition as what it was intended to be: a housekeeping provision that will be removed by the Board, as a routine, ministerial action in the ordinary course, once any required cumulative impacts review of the IC&E acquisition transaction is completed in this proceeding. It is that acquisition, not the routing condition, to which NEPA applies, and neither BNSF nor the few other commenters have shown (or in most cases even alleged) that there are significant cumulative impacts associated with that transaction.

2. The IC&E Acquisition Transaction and the PRB Construction Project Are Not "Connected Actions" Under NEPA

BNSF alternatively and summarily argues that the IC&E acquisition transaction and the DM&E PRB construction project are "connected actions" that under NEPA must be considered in the same environmental review process. BNSF Comments at 15-16. The Mayo Clinic ("Mayo") makes a similar argument. Mayo Comments at 6-8.¹⁰ That train, however, has plainly left the station. Under the applicable regulations, "[a]ctions are connected if they: (i) Automatically trigger other actions which may require environmental impacts statements; (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously; (iii) Are interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1)(i)-(iii); see Custer County Action Ass'n v. Garvey, 256 F.3d 1024, 1037 (10th Cir. 2001) ("[p]ut simply, projects that have independent utility are not connected actions under [the regulation]."), cert. denied, 534 U.S. 1127 (2002).

¹⁰ The Sierra Club and the Mid-States Coalition for Progress filed a letter indicating that they joined in and adopted Mayo's arguments.

This, of course, is a subject that has been addressed conclusively in the course of both the IC&E Acquisition and the PRB Construction proceedings. IC&E Acquisition at 16, n.34 ("The DME construction project is an independent project that has its own utility and benefits whether or not the instant acquisition goes forward . . . the acquisition transaction and the construction project are separate and distinct -- not 'two links of a single chain'"); PRB Construction III at 19 ("The IMRL acquisition and the DM&E construction project are separate and distinct, and each has its own utility and benefit. Accordingly, the acquisition transaction and the construction project are not 'two links of a single chain,' and the precedent setting forth the proposition that connected actions should be evaluated together is thus inapposite."); PRB Appeal II, slip op. at 10 (STB approval of IC&E acquisition and control transaction was based on "multiple public-interest justifications . . . that are unrelated to DM&E's PRB construction."). To accept the arguments that BNSF and Mayo now proffer would require the Board to reverse both its own prior conclusions and those of the Eighth Circuit. There plainly is no basis for doing so.

3. Locations on the Former IMRL Lines Are Not Subject to the Environmental Review Conducted in the PRB Construction Proceeding

The U.S. Department of Transportation ("USDOT") argues directly that the exhaustive, eight-year environmental review that was just concluded in the PRB Construction proceeding must now be reopened, recast and rerun to include locations on the former IMRL lines. USDOT does not pretend that the IC&E acquisition and control transactions will have any effect on the routing of DM&E-originated PRB coal traffic over the IMRL lines,¹¹ and indeed does not attempt to identify any environmental harms arising directly, indirectly or cumulatively from those transactions. It sees instead simply an opportunity to expand the scope of the PRB

¹¹ "Even if true, that is irrelevant to the correct application of NEPA in these circumstances." USDOT Comments at 6 (footnote omitted). Indeed, USDOT appears to expressly admit that the IC&E acquisition transaction "should not result in significant operational or routing changes for PRB unit coal trains." Id.

Construction environmental review. That opportunity arises, it believes, solely because the IMRL lines are now part of the DM&E corporate family and thus the Board's rationale for not extending the PRB Construction environmental review to locations on railroads other than DM&E is moot. USDOT Comments at 2-3, 6,10; see PRB Construction II, 6 S.T.B. at 34 (mitigation requested by Winona, Minnesota could not be granted because Winona was on a line of Canadian Pacific Railway Company ("CP") rather than DM&E and STB could not impose conditions on CP or require DM&E to take action on property it did not own). USDOT's argument fails for reasons both narrow and broad.

First, under relevant administrative and judicial precedent and guidance, the environmental review conducted in the PRB Construction case would not have been extended to the former IMRL lines even if those lines had been owned by IC&E (and indirectly controlled by DM&E) at the time. The Board's PRB Construction environmental review followed the precedent established in Burlington Northern, et al. -- Control -- Washington Central, 1 S.T.B. 792 (1996) ("BNSF/WC"), aff'd sub nom. City of Auburn v. U.S., 154 F.3d 1025 (9th Cir. 1998) ("Auburn"), cert. denied, 527 U.S. 1022 (1999). See PRB I, 3 S.T.B. at 862; PRB II, 6 S.T.B. at 12-13 (describing review as "consistent with our approach in similar cases," citing Auburn). In BNSF/WC, BNSF sought to re-acquire a rail line extending from Pasco to Cle Elum, Washington (the "Pasco-Cle Elum Line") that it had previously sold to a short-line carrier. That line formed the eastern portion of a route over Stampede Pass, and in connection with the transaction BNSF intended to reactivate and rehabilitate its retained, western portion of the route extending from Cle Elum to Auburn (the "Stampede Pass Line"). From Auburn, traffic from the newly-reactivated route would move north and south on other existing BNSF lines. 1 S.T.B. at 794, 796-798.

In conducting its environmental review of BNSF's proposed acquisition of the Pasco-Cle Elum Line, the SEA and the Board also found it should do an environmental analysis of increased train operations over the reactivated Stampede Pass Line that would result from the project. The SEA and Board explained that no request for regulatory authority regarding the Stampede Pass Line was pending, and that carriers like BNSF could upgrade and increase operations over such lines without Board approval. Nonetheless, the agency found that the Stampede Pass Line was "directly" and "proximately" related to the Pasco-Cle Elum Line, that it was the link between the Pasco-Cle Elum Line and BNSF's existing main lines at Auburn, and that in the absence of BNSF's proposed purchase of the Pasco-Cle Elum Line it was likely to remain inactive. Environmental Assessment, served September 4, 1996, at I-3 (§ 1.2); BNSF/WC, 1 S.T.B. at 804. The SEA and Board thus concluded that it was appropriate to do an environmental analysis of the impacts of increased train operations on the Stampede Pass Line. The Board did not review the environmental impacts of the proposed rehabilitation and upgrading of the Stampede Pass Line, "because these actions do not require Board approval, and maintenance, even if deemed to be upgrading, is more clearly committed to rail management discretion and less clearly related to the transaction we are approving here." 1 S.T.B. at 804.

Additional environmental review and mitigation was requested by the City of Kent, Washington, which was located neither on the Pasco-Cle Elum Line being acquired by BNSF nor on the Stampede Pass Line being reactivated by BNSF. It was instead located a short distance north of Auburn, on the BNSF main line that connected with the Stampede Pass Line at Auburn and over which traffic to and from the Stampede Pass Line would flow. The SEA determined that it would not assess, and develop mitigation to address, environmental impacts of increased traffic through the City of Kent, because,

Kent is not located directly on the Stampede Pass Line [i.e., the line to be upgraded in connection with the action before the agency]. See Figure 1-1. Accordingly, any environmental impacts on Kent would not result directly from this transaction. In these circumstances, we do not believe it is appropriate to assess potential environmental impacts to Kent in the EA."

EA at I-3 (§ 1.2); see also EA at 2 (§ ES-2).

On appeal, the Ninth Circuit affirmed. The appeal of the City of Kent was dismissed with prejudice after settlement. Auburn, 154 F.3d at 1027, n.1. And the court specifically found that the Board did not err in excluding impacts from the reconstruction of the Stampede Pass Line in its environmental review:

[W]e find the parameters of the EA set by the STB, which exclude the impact of the upgrading and rehabilitation of the portion of the rail line already owned by Burlington, do not constitute an abuse of discretion. . . . The only action requiring approval by the Board was the proposed sale of the eastern segment of the Stampede Pass line to Burlington. It therefore was entirely reasonable for the STB to limit its environmental review to effects that would flow directly, from the approval of the sale.

Auburn, 154 F.3d at 1033.

Following BNSF/WC and Auburn, the Board in PRB Construction conducted an environmental review of the traffic increases on DM&E's existing rail line between Wall, South Dakota and Winona, Minnesota that would result from the construction of the PRB extension, because that existing rail line would be rehabilitated as an integral part of the construction project and the benefits of the rehabilitation were directly related to and dependent on the project. PRB I, 3 S.T.B. at 862, 893-894; PRB II, 6 S.T.B. at 12-13, 26 ("[B]ecause the rehabilitation of DM&E's existing line would not occur but for the expansion of DM&E's system, our environmental analysis covers the projected increased use of the existing line and addresses alternative routings for handling the traffic . . ."); see also PRB II, 6 S.T.B. at 15 ("As

the EIS shows, the PRB Expansion Project would result in certain environmental benefits, primarily because DM&E's expansion project would enable DM&E to completely upgrade its existing system"). The Board also reviewed the environmental impacts of the line rehabilitation itself (rather than just increased operations over the rehabilitated line), but solely to accommodate another federal agency that would need to address those effects. PRB I, 3 S.T.B. at 862.

Against this backdrop, USDOT's assumption that the IMRL lines would have been included in the PRB Construction environmental review if they had been controlled by DM&E at the time is plainly wrong. Like the City of Kent in BNSF/WC, IMRL points were not on lines proposed to be upgraded in connection with the project under review and would not have been directly or proximately related to that project. The simple fact that, under USDOT's scenario, they would have been "DM&E" lines over which coal from the new PRB line would flow is indistinguishable from the City of Kent, which was on a BNSF line over which traffic from BNSF's reopened Stampede Pass Line would flow. That is not the relevant factor. The PRB construction project did not encompass, and claimed no benefit from, any rehabilitation of IMRL lines, and as discussed above and at length in prior decisions in this matter, IC&E's acquisition of those lines was separate from and functionally unrelated to the PRB project. Under the judicially-approved procedures in BNSF/WC and Auburn that properly guided the Board's environmental review in PRB Construction, "downstream" impacts on distant lines not being rehabilitated in connection with the underlying project would not have been included in that review -- whether the lines were owned by DM&E or not.¹²

¹² As the applicant and successful proponent of this position in the BNSF/WC proceeding, BNSF would be well aware of these governing criteria, which may explain why they resorted instead to the tortured interpretation of "major federal action" discussed above. We thus find extremely disingenuous BNSF's reliance on BNSF/WC to contend that environmental review and mitigation in the PRB

USDOT seems to believe that the Board's conclusion that it had no power to impose environmental mitigation on another carrier's line in Winona, Minnesota automatically means that any points on (or deemed to be on) a DM&E line anywhere would fall within the scope of the PRB Construction environmental review. See PRB II, 6 S.T.B. at 34; USDOT Comments at 3, 6. But that is not what the Board said with respect to Winona, and there is no reason why the relevant criteria of BNSF/WC and Auburn would not have governed even if the Board had found that it could treat the line at Winona as DM&E's.¹³

It is thus insufficient for USDOT to insist, as does the Iowa Department of Transportation, that locations in Iowa must "be provided the same opportunities for an environmental review and mitigation of impacts as Minnesota and South Dakota communities had during the Powder River Construction proceedings." Iowa DOT Comments at 1. In fact, like Auburn and Kent in BNSF/WC, those locations are not similarly situated with respect to the regulatory matters and considerations before the Board in the PRB Construction proceeding, or with respect to the environmental review that NEPA requires in connection with such proceedings. And as DM&E repeatedly noted and the Board recognized in the PRB Construction case, the further downstream the analysis is from the jurisdictional action (in that case, authority to construct a rail line in western South Dakota and eastern Wyoming), the less reasonably foreseeable downstream impacts are. That was the case even on the contiguous

Construction proceeding should be extended to the City of Dubuque, Iowa. BNSF Comments at 20, n.10. BNSF knew or plainly should have known that Dubuque was like Kent in the BNSF/WC proceeding -- on distant lines of the applicant not being rehabilitated in connection with the underlying project -- and that the very passage cited by BNSF excluded such locales from environmental review.

¹³ Winona, like the City of Auburn in BNSF/WC, was at the junction of the line being rehabilitated in connection with the underlying project and other existing rail lines. The Board found in BNSF/WC that environmental review and mitigation in the City of Auburn was appropriate. Such review was not extended, however, to more distant points like Kent (and by analogy, points on the former IMRL lines like Dubuque).

property owned by DM&E at the time of that review. Here, points on IC&E's lines are on average several hundred miles and numerous rail interchange points further away.

By necessity, environmental review must begin and end somewhere, and the relevant criteria developed by the Board and endorsed by federal appellate courts extend that review in the PRB Construction case only as far as lines that are "proximately related" to the underlying PRB project. As was the case with Kent and remains the case with numerous other communities (such as those on BNSF's own lines used to handle coal out of the PRB) that experience traffic increases not reviewed by the Board, there is no basis to impose an environmental review on the IMRL lines simply because traffic that originates on DM&E's new PRB extension will be handled over those lines. There is always a further environmental review that could be conducted, but law and policy do not allow such a limitless application of NEPA.

That of course is the broader intractable problem associated with USDOT's contention that the exhaustive eight-year environmental review in PRB Construction must be reopened and widened simply on the basis of the subsequent and unrelated acquisition of IMRL's lines by IC&E: it opens a regulatory purgatory from which no escape may be possible. If a new extension of the PRB Construction environmental review to the former IMRL lines took another 3-4 years and DM&E or IC&E were, in that time, to engage in any further line acquisition or other transactions, USDOT's position presumably would result in yet another re-review of the PRB Construction environmental analysis.¹⁴ Railroads considering significant pro-competitive line constructions would be faced with the choice of either foregoing all other transactions during

¹⁴ Cf. PRB Appeal I, 345 F.3d at 551-552 ("If we were to require the Board to take the time to conduct its financial analysis anew, we suspect that adverse parties would then contend that the environmental review was stale."). This is a slippery slope that would not be limited to subsequently-acquired lines. If the STB accepts USDOT's logic, opponents would predictably demand re-review of the DM&E portion of the PRB line construction as well, on the theory that an expanded environmental review must extend backward as well as forward. One such argument, of course, has recently been explicitly rejected by the Eighth Circuit. PRB Appeal II, slip op. at 9-11.

the pendency of the construction proceeding or risking the indeterminate prolonging of the regulatory approval process -- a process which in this case is now rapidly approaching its tenth birthday. The real effect would be to discourage anyone from pursuing projects like the PRB extension in the first place, regardless of the overwhelming public interest benefits they might offer.

Judicial interpretation of NEPA, however, does not contemplate what USDOT would apparently tolerate. See Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 373 (1989) (to require reconsideration of environmental matters for every new circumstance "would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made."); TOMAC v. Norton, 433 F.3d 852, 863 (D.C. Cir. 2006) (reassessments must end at some point or NEPA simply becomes tool to stall new projects indefinitely). The IC&E acquisition transaction is, in the STB's own words, "separate and distinct" from the PRB construction project, rather than "two links of a single chain." The interplay of those two proceedings for environmental review purposes does indeed present a "timing" issue, one that is not uncommon under NEPA. NEPA has a specific and timely methodology for dealing with such matters: cumulative impacts review. USDOT does not assert, however, that the IC&E acquisition transaction will itself result in any genuine cumulative environmental impacts,¹⁵ or otherwise have any environmental impacts that would be

¹⁵ USDOT attempts to avoid the governing criteria for cumulative impacts outlined in DOT v. Public Citizen, 541 U.S. 572 (2004) (see supra at 4, n.5) because the initial federal action in Public Citizen had not been subject to NEPA review when it was undertaken. USDOT Comments at 8, n.7. Yet that fact is plainly irrelevant in considering the cumulative impacts of a subsequent action. 40 C.F.R. § 1508.7 ("Cumulative impact' is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future action regardless of what agency (Federal or non-Federal) or person undertakes such other actions." (emphasis added)). As Public Citizen makes clear, cumulative impact review considers the incremental effects of an action when added to a prior action -- not the environmental effects of the prior action itself.

appropriately mitigated in this proceeding. See, e.g., PRB II, 6 S.T.B. at 32, n.59 ("Our general practice . . . is to mitigate only those environmental impacts that would result directly from an approved transaction"). In their absence, the subsequent IC&E acquisition transaction cannot be considered an opportunity to revisit the scope and substance of the just-completed environmental review in PRB Construction.

4. There Is No Credible Evidence that the IC&E Acquisition Transaction Will Affect the Routing of PRB Coal Traffic

Almost as an afterthought, BNSF offers a cursory argument that the IC&E acquisition transaction will itself result in the diversion of PRB coal traffic onto the former IMRL lines from the routings that would have been used in the absence of that transaction -- the only effort by any commenter to even purportedly address the cumulative impact standard that governs the Board's analysis here. BNSF Comments at 26-28, *Aspebakken V.S.* at 13-15. Inexplicably, BNSF contends that IC&E and DM&E have not conducted any diversion study of such potential changes in PRB coal routings. BNSF Comments at 27, 28. In reality, IC&E and DM&E marketing staff conducted a detailed, market-by-market study of any potential diversions that was included with IC&E/DM&E's May 11, 2006 Petition to Reopen and specifically referenced and incorporated in the Environmental Appendix, with detailed instructions on where that filing could be found. Environmental Appendix at 15, n.26. As discussed there and in the attached Supplemental Joint Verified Statement of Lynn A. Anderson and John K. Brooks ("Anderson/Brooks S.V.S."), the marketing, competitive and operating considerations that will control the routing of DM&E-originated PRB coal are not affected by the change in ownership of the former IMRL lines.

BNSF avers generally that "it is almost always the case that acquisitions promote the diversion of traffic to newly-acquired lines." BNSF Comments at 26. However much that

may represent BNSF's transactional policy, it is not the case here with respect to PRB coal that DM&E would handle from its newly-constructed line. As DM&E seeks to break into a new market currently dominated by BNSF and Union Pacific Railroad Company, the controlling factor is not whether DM&E can obtain a long-haul through an inefficient routing, but whether DM&E can obtain the business in the first place through the most competitive and efficient routing available. The PRB construction project always contemplated coal movements over the former IMRL lines via an Owatonna, Minnesota interchange for certain markets, and the Board in the PRB Construction proceeding granted DM&E authority to construct a track connection at Owatonna specifically so that such movements could occur. PRB Construction I, 3 S.T.B. at 849; PRB Construction II, 6 S.T.B. at 25-26. At the same time, other interline routings -- as relevant here, primarily over CP via a Winona, Minnesota interchange -- were the most efficient option for markets such as those in Wisconsin. IC&E's subsequent acquisition of the former IMRL lines did nothing to change those considerations. The very few specific claims by BNSF's witness that "DM&E would almost certainly gain operating efficiencies by routing more of its PRB coal onto the former IMRL lines now that it owns those lines than it would have when those lines required an interchange," *Aspebakken V.S.* at 14, are incorrect or irrelevant. *Anderson/Brooks S.V.S.* at 1-3.

None of this is news to the Board, which has previously faced similar arguments that IC&E and DM&E would force traffic from efficient interline gateways to long-haul routings via the former IMRL lines:

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.

DM&E-IC&E Control, 6 S.T.B. at 527. This conclusion has most recently been confirmed by the U.S. Court of Appeals for the Eighth Circuit, which specifically found that routings via the former IMRL lines were not an effective or reasonable alternative to a DM&E-CP routing via Winona and would not serve the purposes of the PRB construction project in reaching certain markets. PRB Appeal II, slip op. at 9-10. BNSF has provided no basis to reject these prior agency and judicial holdings.

With the single exception of that unpersuasive and secondary BNSF argument, no commenter has substantively addressed the relevant cumulative impact standard that governs the Board's determination here. Because the IC&E acquisition transaction will have no incremental cumulative effects on the routing of DM&E-originated PRB coal, that transaction is subject to a categorical exclusion from further environmental review and a finding of no significant impact.

B. The Movement of PRB Coal Via the Former IMRL Lines Will Not Have Significant Adverse Effects in Any Event

While an extension of the PRB Construction environmental review to DM&E-originated PRB coal movements over the former IMRL lines would be plainly inappropriate in this acquisition proceeding in the first instance, the absence of meaningful objection from the vast majority of legitimately interested parties -- the on-line communities along IC&E's route in Minnesota, Iowa and Illinois -- also demonstrates that such a review would not serve to address significant environmental harms. Only two commenters -- BNSF and the City of Dubuque -- make any specific claims regarding the impact of PRB coal traffic, and in neither instance are those claims compelling. The SEA and the Board should thus not be concerned that issuing the required FONSI in this proceeding will subject communities to significant unmitigated environmental impacts.

1. BNSF/Savanna

BNSF's comments focus extensively and nearly exclusively on Savanna, Illinois, where lines of BNSF and IC&E cross at grade.¹⁶ BNSF appears to have selected the only location where it and IC&E have any direct operational interaction (at least on the IC&E lines that will handle PRB coal), and then constructed an argument for that location that facilitates its new-found desire to erect regulatory barriers to DM&E's PRB construction project. What BNSF recites at length about Savanna, however, are existing conditions unrelated to any addition of PRB coal trains on IC&E's line. As explained in the attached verified statement of Keith Beckel ("Beckel V.S."), the conditions that BNSF describes at the Savanna crossing result largely from switching operations conducted by IC&E at its adjacent yard that can occupy the interlocking limits of the crossing. Since acquiring the former IMRL lines, IC&E has significantly reduced switching movements at its Savanna Yard, and has plans to eliminate any remaining interference from those operations. IC&E is also contemplating actions that would have the effect of increasing train speeds and thus cut in half the time that an IC&E train occupies the interlocking. Beckel V.S. at 5. The addition to IC&E's line of several PRB coal trains -- which would not conduct switching at Savanna and would represent a fraction of the trains that BNSF operates through the interlocking -- would not significantly exacerbate conditions at Savanna. Beckel V.S. at 1-8.¹⁷

¹⁶ Beyond claims of interference with its own operations, BNSF's comments simply catalogue the various areas that would be covered in an environmental review were one to be conducted in this proceeding. BNSF Comments at 33-45 and Appendix 2. That extended recitation is irrelevant to whether an environmental review is in fact required, or to the supposed impacts that BNSF foresees on itself.

¹⁷ We note that Savanna is an automatic interlocking, meaning that trains of BNSF and IC&E are cleared on a "first come, first served" basis. Beckel V.S. at 2. IC&E thus has no ability to give its trains preference over those of BNSF in traversing the crossing.

Like any carrier, BNSF would of course prefer that the other carrier at any crossing operate fewer rather than more trains, but that is not a basis for environmental review under NEPA. BNSF and IC&E can and will address the crossing issues at Savanna, just as carriers do every day across the nation without the need for STB intervention in the guise of environmental review.

Just as fundamentally, the PRB coal traffic that would cross BNSF's line in Savanna would cross the same BNSF line even if it was not handled by IC&E. The Board has concluded that DM&E's PRB extension project will have minimal effect on the total amount of coal that will be mined and shipped from the PRB, and that "regardless of whether DM&E enters the PRB transportation market as a third competitor, virtually all of the expected year-by-year increases in demand for PRB coal could be met by the existing carriers on their existing routes if the DM&E line is not built." PRB III at 12, 15-16. PRB coal moving via IC&E's line thus would not be "new" traffic in any broad sense, but simply traffic that would otherwise be handled via different routes. If such traffic was still originated by DM&E, it would likely move via a DM&E-Winona-CP routing that would cross the same BNSF line on CP at Grand Crossing in La Crosse, Wisconsin. *Beckel V.S.* at 6. BNSF would likely face greater operational interference from such traffic at Grand Crossing, where BNSF operates on a single track, CP controls the interlocking, and the total number of CP movements is substantially higher than on the IC&E at Savanna. *Beckel V.S.* at 6.

Similarly, if such traffic was instead handled by UP, it would cross the BNSF line that passes through Savanna at Rochelle, to the east -- one of the busiest interlockings in the nation. *Beckel V.S.* at 7. Of course, if BNSF were to handle such traffic itself it would lose operational capacity for the entire length of the movement. In every instance, BNSF faces no

greater operational impact from PRB coal traffic on IC&E's line at Savanna than it would on any of the routes by which such traffic would otherwise move.

2. BNSF/Chicago

The result is the same in Chicago, where the DM&E-originated coal traffic that did not move via the former IMRL lines would otherwise be handled on other local routes with far greater potential for interference with Amtrak, commuter and freight operations. Beckel V.S. at 10. BNSF itself specifically admits that "upon approach to Chicago, either the IMRL [now IC&E] or the CP [the non-optimal alternative for DM&E-originated PRB coal in the absence of an IC&E routing] have similar Metra and interchange constraints to deal with -- indeed, the CP and IMRL routes converge into the same corridor between Bensenville and Cragin, on Chicago's northwest side." BNSF Comments at 28. As a result, the operational and environmental impacts that BNSF posits as arising in Chicago from IC&E's handling of PRB coal are largely ephemeral.

BNSF argues that some amount of this coal would not in fact move through Chicago if handled by BNSF or UP, since those carriers have gateways further to the south in Memphis and St. Louis that are utilized for some coal traffic. BNSF Comments at 22-23. The PRB coal traffic that would be handled via such southern routings, however, is not traffic in the targeted market areas for DM&E's PRB extension project. Beckel V.S. at 9-10; see PRB I, 3 S.T.B. at 883 (DM&E unlikely to compete effectively in Memphis Gateway and Lower Mississippi River markets). To the vast extent, PRB coal traffic that would be handled by DM&E/IC&E through Chicago would be handled by other carriers through Chicago as well.

Ultimately, IC&E's operations in the Chicago terminal are conducted nearly entirely on trackage rights, which are generally subject to categorical exclusion from environmental review under 49 C.F.R. § 1105.5(c)(4). And the bulk of BNSF's brief comments

on the Chicago terminal extend even beyond IC&E's trackage rights operations -- addressing instead purported impacts on the rail lines of Chicago's three terminal switching railroads. Aspebakken V.S. at 12-13. Whatever else may be the case, it is absolutely clear that the SEA and the Board could not address or mitigate in this proceeding environmental impacts on rail lines owned by other carriers. PRB II, 6 S.T.B. at 34.

BNSF's arguments regarding the Chicago switching railroads are revealing of just how attenuated its position here is. Given BNSF's desire for five years of traffic information after initial operation of the PRB line extension (currently forecast for 2009), BNSF Comments at 21, what it really asks is that the SEA examine the effects on a particular interlocking in Chicago seven years from now of potential coal movements from a new line nearly 900 miles away for which construction authority was sought some sixteen years earlier. That is not a recipe for necessary and appropriate environmental review under NEPA; it is a recipe for regulatory gridlock that would effectively defeat any new significant line construction undertakings. The STB should be wary of allowing, at the behest of Class I incumbents, the requirements of NEPA to be warped in such a manner.

3. Dubuque

The only other commenting party alleging any specific environmental harms in response to the Environmental Appendix is the City of Dubuque. Dubuque's comments focus primarily on circumstances unrelated in any way to the movement of DM&E-originated PRB coal traffic: existing train operations through the city, possible increases in non-coal traffic such as ethanol and bio-diesel, fears of "an ethanol spill near our water plant," train speeds and employee training. Dubuque December 11, 2006 letter comments at 2, 3. Even if the PRB Construction environmental review was extended to Dubuque -- and as discussed above there is

no reason why it should or could be -- these types of concerns would not be the proper subject of review and mitigation in that process. E.g., CSX Corporation, et al. -- Control and Operating Leases/Agreements -- Conrail, Inc. and Consolidated Rail Corporation, Finance Docket No. 33388 (STB served July 3, 1997) at 2, n.1 ("[T]he Board's practice consistently has been to mitigate only those environmental impacts that result directly from the transaction. The Board, like its predecessor [], has not imposed mitigation to remedy preexisting conditions such as those that might make the quality of life in a particular community better, but are not a direct result of the [transaction]"); San Jacinto Construction -- Build-Out to Bayport Loop, 6 S.T.B. 821, 832, n.33 (2003); PRB II, 6 S.T.B. at 32, n.59.

As explained in Mr. Beckel's verified statement, there is also no reason to believe that the addition of a limited number of loaded and empty coal trains to IC&E's line would significantly affect community interests in Dubuque. Beckel V.S. at 11-14. Most pertinently, the two areas that the City claims would be adversely affected by increased train operations are today already reached by grade-separated overpasses that accommodate both vehicular and pedestrian traffic. Beckel V.S. at 12-13. Additional trains thus would have no effect on access to, and development of, those areas. Indeed, the most significant mitigation measure that the SEA would likely ever impose if it did conduct an environmental review in Dubuque -- a requirement for grade-separated crossings -- is already in place.

IC&E continues to work closely with Dubuque on the issues it has raised, and is confident that, as with many other IC&E on-line communities, that matters can and will be satisfactorily addressed without the need for STB intervention. Beckel V.S. at 13-14.

**C. The SEA Has Complied with All
Procedural Requirements of NEPA**

Lastly, Mayo argues that the SEA has failed to comply with the procedural requirements of NEPA in conducting this proceeding. Mayo's two procedural arguments are no less questionable than its unspoken motive for participating here.

Mayo first objects that notice of the availability of the Environmental Appendix and of the request for public comments was not published in the *Federal Register*. Mayo Comments at 3. Mayo apparently did not actually review the *Federal Register* before making this argument. See 71 Fed. Reg. 67706 (November 22, 2006).

Second, Mayo objects that IC&E/DM&E (and specifically their counsel) prepared the Environmental Appendix, claiming (apparently) that only an independent third-party contractor could perform that function. Mayo Comments at 3-4. Mayo appears thoroughly confused about the nature and status of the pending environmental review. If the SEA was to determine that an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) was required in this matter, that environmental documentation would be prepared by the SEA itself or by a third-party contractor answerable to the SEA. In the first instance, however, environmental reports that evaluate the potential environmental impacts of the proposed actions are prepared and distributed by the applicant in any transaction that normally requires preparation of an EA or EIS. 49 C.F.R. § 1105.7(a); Policy Statement -- Third-Party Contracting -- Environment Documentation, 5 S.T.B. 467, 469-470 (2001). Here, consistent with its practice in numerous other cases, the SEA required the applicant to prepare and distribute a comparable document before the SEA independently considered and addressed IC&E/DM&E's claim that the IC&E acquisition transaction remained subject to the categorical exclusion of 49 C.F.R. § 1105.6(c) (under which an environmental report is normally not

prepared). See Norfolk Southern Railway Company -- Trackage Rights Exemption -- Meridian Speedway LLC, Finance Docket No. 34821 (STB served March 7, 2006); IC&E Acquisition, October 18, 2006 decision at 5 & n.11. The SEA will independently review the Environmental Appendix and all public comments before determining the appropriate classification of this matter under 49 C.F.R. § 1105.6 and the need for preparation of environmental documentation in the form of an EA or EIS. That is consistent with standard practice, and in no way inconsistent with the requirements of NEPA.

D. Conclusion

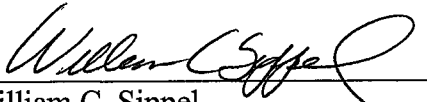
Forty years ago, four Supreme Court justices warned that:

Too many interests have too much to gain from obstruction and delay; and the maze of administrative proceeding and judicial review is not inhospitable to ingenious counsel bent on delay. The history of ICC proceedings is a source book for dilatory tactics and a monument to the successful burial of good projects by over-elaborate procedures manipulated by experts in the art. Meanwhile, national policy continues unfulfilled; urgent national needs for improved [] rail service are impeded

Baltimore & Ohio R. Co. v. U.S., 386 U.S. 372, 472 (1967) (Fortas, J., dissenting). More recently, in authorizing the PRB line construction project, Vice Chairman Burkes commented that "in my mind, approval of this important energy-related project took too long and cost too much." PRB II, 6 S.T.B. at 49. That was *five years ago*. The few parties who would now invent reasons to reopen and recast the exhaustive environmental review just completed in PRB Construction find no support in the law of this agency or NEPA. The IC&E acquisition transaction has no significant cumulative environmental impacts when considered in conjunction with the PRB construction project. The scope of the PRB Construction environmental review cannot be appropriately extended to the former IMRL lines. And virtually none of IC&E's on-line communities have expressed concern over PRB coal movements. NEPA should not and

cannot be allowed to become here simply "a tool to stall new projects indefinitely." TOMAC,
433 F.3d at 863.

Respectfully submitted,

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**ATTORNEYS FOR IOWA, CHICAGO &
EASTERN RAILROAD CORPORATION
AND DAKOTA, MINNESOTA & EASTERN
RAILROAD CORPORATION**

Dated: January 12, 2007

**SUPPLEMENTAL JOINT VERIFIED STATEMENT
OF
LYNN A. ANDERSON AND JOHN K. BROOKS**

Our names are Lynn A. Anderson and John K. Brooks. We are, respectively, Senior Vice President - Marketing and Assistant Vice President - General Merchandise for the Dakota, Minnesota & Eastern Railroad Corporation ("DM&E") and its subsidiary Iowa, Chicago & Eastern Railroad Corporation ("IC&E"). We previously submitted a Joint Verified Statement in this proceeding as part of the Petition of IC&E and DM&E to Reopen and Partially Modify Conditions dated May 11, 2006 (the "May Joint Statement"). In that statement, we discussed in detail the analysis we performed of the potential traffic flows of coal from DM&E's proposed line into Wyoming's Powder River Basin ("PRB") to its target markets (divided into seven subcategories of traffic) and determined, for the reasons discussed therein, that except for an occasional and inconsequential spot movement or other exceptional circumstance, there would be no increase in the movement of DM&E-originated PRB coal over IC&E lines as a result of the IC&E's 2002 acquisition of the lines of I&M Rail Link ("IMRL"). We also provided the projections of IC&E PRB coal movements set forth in the Environmental Appendix.

In this supplemental statement we respond to the assertions made by BNSF Railway Company ("BNSF") in its comments on the Environmental Appendix in this proceeding relating to our projections of IC&E PRB traffic and DM&E/IC&E's ability to control PRB coal routings.

In its comments, BNSF asserts that IC&E will surely handle more PRB coal trains to the Chicago gateway (and through the Savanna, Illinois interlocking) than DM&E/IC&E have projected because IC&E's acquisition of IMRL's lines in 2002 gave DM&E more "control" over PRB coal routings than it would have had with IMRL. Mr. Aspebakken of BNSF states that in a

typical end-to-end merger, the acquiring carrier is often able to divert traffic to the combined system by taking advantage of the benefits of a longer system haul. Ordinarily, that may be true. But, with respect to the ability to "control" PRB coal movements, Mr. Aspebakken has fundamentally confused the market power of BNSF with the market power of DM&E/IC&E.

As the new entrant and the third rail carrier to serve the PRB, DM&E simply doesn't have the ability to unilaterally "control" its coal movements and force them over any single route. The market for PRB coal is highly competitive, and to effectively compete with BNSF and UP, DM&E must utilize all of its available routing options. Lacking the vast terminating options available to a BNSF, DM&E must rely on its ability to develop multiple connection alternatives. Additionally, we have always known that the Chicago terminal is prone to congestion and that it is possible, depending on specific coal contracts, that multiple routing alternatives through Chicago may be necessary to deliver trains. We have to be able to route the coal over the most efficient route available to us. Attempting to force the traffic over a single route, even if it is our own, will not make us competitive in the market for PRB coal.

We agree that single line service can at times be beneficial to a railroad's competitive position. That is precisely why DM&E negotiated for both marketing authority and operating rights over IMRL and why DM&E always considered IMRL as its primary routing option. (Contrary to Mr. Aspebakken's statement, the route mileage from the Southern PRB to Bensenville, Illinois via a DME-CP route versus a DME-IMRL route is within 15 miles.) As we discussed in detail in our May Joint Statement, that is why it was always contemplated that substantial quantities of DM&E-originated PRB coal would move over IMRL's line. But, the reality is that PRB coal producers and their customers ultimately drive the market and therefore

DM&E's success is dependent on developing as many efficient market access alternatives as possible.

The Board would appear to agree with us. In its February, 2003 decision authorizing DM&E to control IC&E, the Board stated:

"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."

The Board clearly understood that DM&E is seeking here to break into a new market dominated by two established and much larger railroads with far more extensive route structures. The controlling factor is not whether DM&E can obtain a long-haul through a single-system but less efficient routing, but whether DM&E can obtain the business in the first place through the most competitive and efficient routing available. DM&E/IC&E simply will not have the ability to force PRB coal routings to move over the long-haul DM&E/IC&E route. Our projections reflect that reality.

BNSF also attempts to support its argument that further environmental review is necessary by performing its own calculation of future IC&E non-coal traffic in an attempt to show that the increase in traffic over IC&E's lines on an annual gross ton mile basis exceeds the Board's thresholds for review. BNSF's analysis is not credible. In a merger case, the applicants take a fixed baseline of their combined traffic and relevant existing traffic from the STB's Waybill Sample and then project diversions of traffic to the new routes of the combined system. Here, any projection of non-coal traffic over the next 5 years would require estimating not diversions of existing traffic from a documented traffic base, but growth in rail business itself of

all potential traffic from all potential sources during that period. That would require taking into account a host of unpredictable factors such as the state of the U.S. economy, the amount of new construction or expansion of on-line shipper facilities, changes in shipper transportation patterns, etc. While anyone can take a snapshot using this or that set of assumptions, it doesn't follow that any such "snapshot" is a reliable predictor of the growth in all non-coal business that will occur in the next 3-5 years. In our experience, it is virtually impossible to reliably or meaningfully predict future non-PRB IC&E baseline traffic. Moreover, as discussed in the Environmental Appendix, the STB generally does not apply the gross ton mile calculation in proceedings involving new rail line construction, since the baseline tonnage is zero and thus the first ton of new traffic would automatically exceed the 100% threshold. Since any PRB coal traffic on the former IMRL lines will result from new line construction, there is similarly no reason to require inclusion of that data here.

We stand by the predictions we made of PRB coal traffic that will move over IC&E through 2011. BNSF has not provided any credible reason to support its claim that those projections are understated.

VERIFICATION

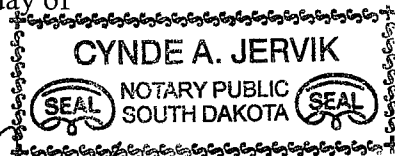
State of South Dakota)
)
County of Minnehaha) SS:

Lynn A. Anderson, being duly sworn, deposes and says that he is Senior Vice President - Marketing of Dakota, Minnesota & Eastern Railroad Corporation and Iowa, Chicago and Eastern Railroad Corporation, that he has read the foregoing statement and knows the facts asserted therein, and that the same are true as stated.



Lynn A. Anderson

SUBSCRIBED AND SWORN TO
before me this 5 day of
January, 2007.





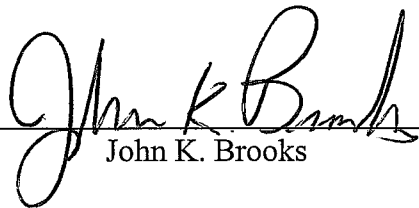
Notary Public

My Commission expires: 6-15-12

VERIFICATION

State of Iowa)
) SS:
County of Scott)

John K. Brooks, being duly sworn, deposes and says that he is Assistant Vice President - General Merchandise of Dakota, Minnesota & Eastern Railroad Corporation and Iowa, Chicago and Eastern Railroad Corporation, that he has read the foregoing statement and knows the facts asserted therein, and that the same are true as stated.



John K. Brooks

SUBSCRIBED AND SWORN TO
before me this 5th day of
January, 2007.



Notary Public

My Commission expires:

DOROTHY L. STEINBECK
Notary Seal - State of Iowa
Commission Number 189394
My Commission Expires March 26, 2009

**VERIFIED STATEMENT
OF
KEITH E. BECKEL**

My name is Keith E. Beckel. I am General Superintendent of the Iowa, Chicago & Eastern Railroad Corporation ("IC&E") in Bettendorf, Iowa. I am responsible for overseeing all of the day-to-day operations of IC&E. I have served in my present position since IC&E commenced operations in July, 2002 when it acquired the rail lines of I&M Rail Link ("IMRL"). Prior to that, I was Superintendent Field Operations for IMRL. I have more than 33 years of experience in railroad operations.

In this statement, I respond to the factual statements made by BNSF Railway Company ("BNSF") and the City of Dubuque ("Dubuque") in their respective comments on the Environmental Appendix in this proceeding as they relate to operating issues. The accompanying Supplemental Joint Verified Statement of Lynn Anderson and John Brooks responds to factual statements made by BNSF as they relate to the routing of rail traffic. Although both BNSF and Dubuque assert that further environmental review by the STB is necessary to address certain concerns they have, a closer look at the complete facts relating to such concerns reveals that what they are seeking to have reviewed are pre-existing conditions. Neither identifies any cumulative impact from IC&E's 2002 acquisition of the lines of IMRL and the Board's approval of the application of the Dakota, Minnesota & Eastern Railroad Corporation ("DM&E") to construct a line into Wyoming's Powder River Basin ("PRB") that would warrant further environmental review.

Savanna, Illinois Crossing

In its comments, BNSF asserts that the present physical configuration of the crossing and interlocking at Savanna, Illinois (where the main lines of IC&E and BNSF cross)

and the current slow speed of IC&E's trains through that crossing, cause delays to trains on BNSF's line and that such delays will be exacerbated by the addition of PRB coal trains on IC&E's line through Savanna, thus requiring further environmental review.

The "Savanna crossing" or "Savanna interlocking" is the location just east of the Mississippi River at Savanna, Illinois where BNSF's north-south double-track main line crosses at grade IC&E's east-west double-track main line. Originally a manual interlocking controlled by IC&E's predecessor the Milwaukee Road from an on-site tower, in 1984 the interlocking was converted to an "automatic" interlocking, meaning it is "first-come, first-served" for any approaching train regardless of railroad or direction. The first train to trigger the interlocking circuit gets to proceed through the crossing. Any approaching train on the other railroad's line must wait for the first train to complete its crossing and clear the circuit before proceeding. For example, if an approaching BNSF train has triggered the interlocking circuit, an approaching IC&E train desiring to cross must stop and wait until the BNSF has cleared the interlocking and vice-versa.

BNSF witness Aspebakken states that BNSF currently operates an average of 42 trains per day through the Savanna interlocking. He states that IC&E switching operations at IC&E's adjacent Savanna Yard east of the crossing "regularly" occupy IC&E's main line triggering the interlocking circuit and thereby preventing trains on BNSF's main line from operating through the crossing. He also states that the relatively slow speed (10 mph) of most IC&E trains through the interlocking prolongs the delays to BNSF trains. He asserts that the operation of IC&E PRB coal trains through the interlocking will only exacerbate the delays to BNSF trains. A look at the complete facts shows that that will not be the case.

IC&E currently operates 4 “through” trains (2 each way) plus a light engine move each way per day through the Savanna crossing. There is no switch engine assigned at Savanna Yard, which consists of 2 tracks parallel to the main line. One of the through trains currently uses Savanna Yard to reclassify cars in its train and, during such switching, will occasionally occupy the interlocking on an irregular basis. As of a few months ago, IC&E operated at least 5, and occasionally 6, trains per day through Savanna plus the light engine move for a total of 8 regular IC&E trains or movements across the diamonds (plus the irregular switching movements.) Combined with the 42 trains per day that BNSF claims to move through the Savanna interlocking, a total of 50 trains per day regularly operated through the interlocking at that time (with switching movements being slower and more problematic for operations there). Quite obviously, given that profile, the suggestion that the addition of 6 through unit coal trains per day -- which do not require any switching at Savanna and which would constitute a 12% increase in the number of trains using the crossing -- will have any substantial impact on BNSF operations is, on its face, unsupportable. This is particularly true given the fact discussed below that the same BNSF mainline crosses through an interlocking farther south with as many as 120 trains per day. Clearly, BNSF, in arguing operational impacts at Savanna, is grasping for straws.

It should be noted that BNSF has no superior right or preference to use the Savanna crossing. It is the junior road and, yet, BNSF’s trains constitute 87% of all of the trains that regularly use the interlocking today. Even after IC&E’s coal trains reach 6 trains per day 5 years from now, BNSF trains would still account for 77% of the total number of trains that regularly use the crossing, assuming that the number of BNSF trains has not increased in the meantime. With 87% of the trains, to the extent that train volume at the crossing results in delays at Savanna today (a common issue at the hundreds of at-grade rail crossings in the

country), BNSF is responsible for 87% of it. Their argument that environmental review is necessary here so as to protect their already superior position at an equal rights crossing is not justified.

As shown in Exhibit B in the Environmental Appendix, DM&E/IC&E project that in the third year of PRB coal train operations (i.e., 2009), approximately six PRB coal trains (3 loaded trains and 3 empty trains) will operate over IC&E between Sabula, Iowa and Hampshire, Illinois (Segment No. 5) and thus will cross the BNSF line at the Savanna interlocking. For the following reasons, the addition of these six trains (an increase which I understand is below the STB's standard threshold for conducting environmental review) will cause little delay to BNSF trains and certainly provides no basis for requiring further environmental review.

First, as discussed in detail in the Joint Verified Statement of Lynn Anderson and John Brooks submitted last May in this proceeding and in the accompanying Supplemental Joint Verified Statement of Messrs. Anderson and Brooks, the PRB coal trains projected to move over IC&E's line would have moved over IMRL's line through the Savanna interlocking and across the BNSF line even if IC&E had not acquired IMRL's line in 2002. Thus, the operation of the PRB coal trains through the Savanna interlocking is not a result of IC&E's acquisition of IMRL's line.

Second, in any event, unilateral changes that IC&E has recently made in its operations at Savanna Yard and additional changes that IC&E may make in the future have had (and would have) a far greater impact on operations at Savanna than 3 loaded and 3 empty coal trains ever would. Over the past 15 months, IC&E has reduced switching operations at its Savanna Yard by approximately two-thirds. This has been accomplished largely by changing blocking patterns in IC&E trains so as to avoid any need to switch at Savanna. Prior to 2009,

IC&E plans to either eliminate all remaining switching at Savanna Yard or, if necessary, reconfigure its yard lead tracks to permit switching to be done within the yard, without entering onto the main line and triggering the interlocking circuit. Although IC&E is taking this action to improve its own operations in this area, a side benefit of these changes will be to reduce, and likely eliminate, the pre-existing condition that Mr. Aspebakken complains about where an IC&E switching operation at its Savanna Yard activates the circuit for the interlocking thus preventing BNSF trains from using the crossing. The proposed PRB coal trains, of course, are unit trains that do not require switching and will not enter the yard or otherwise increase switching operations at Savanna. Savanna will continue to be a crew change point for IC&E (including for coal trains). However, all crew changes in both directions will be handled on IC&E in the clear east of the crossing and outside of the interlocking circuit.

Third, IC&E has also looked at either removing or reconfiguring the existing IC&E "crossover" track east of the Savanna diamonds, where IC&E's mainline goes from double track to single-track with a siding and another track continuing parallel to the single-track main line. Currently, the presence of the crossover, which is operated with hand-thrown switches, requires IC&E eastbound trains to operate at slower than timetable speeds approaching the crossover (and, thus, through the interlocking) to confirm that the crossover switches are properly aligned. By removing the crossover or reconfiguring it with power switches and signals, IC&E trains would be able to operate through the interlocking at the current IC&E timetable speed of 25 mph. By making this simple change (eliminating the crossover), the time that an IC&E train would occupy the crossing would be cut in half. Such a proposed change has nothing to do with prospective PRB coal train operations. If and when we determine to make these changes, the decision will be based on operational considerations at the time. The central

point is that if, in fact, train traffic (whether IC&E's or BNSF's) increases through the crossing, there are feasible and effective solutions available.

Even without such improvements, compared to the alternative locations where these same PRB coal trains would cross the same BNSF line, Savanna may be the crossing location least disruptive to BNSF operations. With the DM&E's PRB construction project having received final approval, and the Board's supplemental environmental review of the project having recently been affirmed by the Court of Appeals, PRB coal trains from the DM&E PRB line are expected to begin moving in 2009. If DM&E-originated coal trains headed for the Chicago gateway cannot use IC&E's line through Savanna, the most logical routing for such trains would be to move to Chicago over the line of the Canadian Pacific Railway ("CPR") via its interchange with DM&E at Minnesota City, Minnesota. The CPR's line crosses the same BNSF line at grade at Grand Crossing (La Crosse), Wisconsin approximately 150 miles north of the Savanna crossing. I understand that at Grand Crossing, the CPR main line is double-track and the BNSF line is single track through the crossing. Thus, all northbound and southbound BNSF trains use the same track through the crossing. The crossing is controlled by CPR. Compared to the grand total of a dozen IC&E movements through the Savanna interlocking even after the PRB coal trains begin to move, I understand that CPR today operates approximately 20 freight trains and 2 Amtrak trains through the Grand Crossing interlocking each day.

Were DM&E to interchange the PRB coal trains to UP for movement to the Chicago gateway, or if DM&E failed to win the traffic and UP originated the trains, the coal trains would cross the same BNSF line at grade at Rochelle, Illinois approximately 60 miles south of the Savanna crossing. According to published data, the Rochelle crossing, like the Savanna crossing, is a four diamond, automatic "first-come, first-served" crossing that handles as

many as 120 trains per day. This is more than twice the number of projected trains that would use the Savanna interlocking, including the projected IC&E PRB coal trains. (A map showing the location of each of these crossings of the BNSF line is attached as Exhibit A.) Thus, the use of any or all three of the alternative crossing locations where the PRB trains would cross the same BNSF line (the use of which I understand would be outside the Board's environmental review process) involves far more potential for delay to BNSF trains than at Savanna.

There is one final point I would like to make regarding the best way to deal with any railroad's concerns with the pre-existing configuration of a crossing or interlocking. Mr. Aspebakken confirms that IC&E and BNSF have met to discuss the options for improving operations through the crossing and reducing delays. Although the parties were not able to reach an agreement on what changes should be made and who should pay for them, IC&E, at its own expense, has implemented at least one of the options discussed (reduction of the potential for IC&E switching operations to trigger the interlocking circuit). In my opinion and experience, changes in the configuration or operation of at-grade rail crossings and interlockings to accommodate one or both parties' changing needs are best handled through negotiations between the parties involved. The agreement in 1984 to automate the Savanna interlocking was the result of just such discussions between the two railroads involved at that time. That is a far better approach than trying to use the STB's environmental process to improve your bargaining position in such negotiations.

The impact of IC&E PRB coal trains on the Savanna crossing is inconsequential. Indeed, operations at Savanna are far more impacted by modest changes in current switching operations (which IC&E can effect without assistance from BNSF) than they ever will by the amount of unit train "through traffic" that involves none of the switching at Savanna referred to

by Mr. Aspebakken. I am confident that neither the BNSF franchise nor its local operations at Savanna are threatened with any material operational impact due to the traffic at issue here.

BNSF's comments regarding its issues at the Savanna crossing do not warrant further environmental review in this proceeding.

Chicago Terminal

BNSF also asserts that further environmental review is necessary to determine the effect on the Chicago terminal, including on commuter service and Amtrak intercity passenger service, of operating PRB coal trains over IC&E's line to Chicago, a location approximately 900 miles from the east end of the DM&E's PRB line. Once again, BNSF has failed to present the complete picture.

IC&E's line to the Chicago gateway from Savanna, Illinois eastward ends at Pingree Grove, Illinois, approximately 25 miles west of Chicago. East of Pingree Grove, IC&E operates entirely via overhead trackage rights over a line owned by the Northeast Illinois Regional Commuter Rail Corporation ("NIRCRC") known as the Milwaukee District West Line. IC&E uses the line to reach the interchange/connection with the Elgin, Joliet & Eastern Railway ("EJ&E") at Spaulding, with the Indiana Harbor Belt Railroad ("IHB") at Franklin Park and with The Belt Railway of Chicago ("BRC") at Cragin Jct. From Pingree Grove, to B-12 at Franklin Park, the Milwaukee District West Line is double-track CTC controlled by CPR. East of B-12, the line is triple track CTC controlled by CPR. A schematic map of the Milwaukee District West Line from Pingree Grove to Cragin Jct. is attached as Exhibit B. IMRL reached the Chicago gateway via overhead trackage rights over the exact same line to the exact same interchanges. BNSF does not operate over any part of the Milwaukee District West Line.

As discussed above, the PRB coal that DM&E/IC&E project it will handle to the Chicago gateway would have moved over IMRL's line to Pingree Grove and the trackage rights over the Milwaukee District West Line even if IC&E had not acquired IMRL's line in 2002. Thus, as discussed above, the operation of the PRB coal trains to the Chicago gateway via this route is not a result of that transaction.

Moreover, as explained in the Environmental Appendix, because a short segment of IC&E's line west of Pingree Grove is located in Kane County, Illinois, which as part of the "Chicago-Gary-Lake County Area" is a non-attainment area under the Clean Air Act, projected train counts would technically exceed the 3 trains per day limit for review for a non-attainment area. Yet, as explained in the Environmental Appendix, any PRB coal traffic that IC&E would expect to handle to or through the Chicago gateway would move to that gateway (and through the same Chicago-Gary-Lake County Area) either on lines of BNSF or UP if DM&E were not able to obtain such traffic, or on the lines of CPR if DM&E did obtain the traffic and routed it via Minnesota City and CPR rather than via Owatonna and the former IMRL lines. I understand that the Board has already concluded that DM&E's PRB project will have a minimal effect on the total amount of coal that would be moved and shipped from the PRB, and that regardless of whether the DM&E's PRB line is built, the demand for PRB coal could be met by the existing carriers on their existing routes. If the PRB coal that DM&E/IC&E project will move over IC&E to eastern connections at the Chicago gateway (and through the Chicago-Gary-Lake County Area) did not move over IC&E, it would move over existing lines of other railroads through the same Chicago-Gary-Lake County Area. The PRB coal that DM&E/IC&E project will move via IC&E to Chicago is not traffic that could efficiently be moved via another rail

gateway. Examples would be a movement to a power plant in Detroit, Cleveland or northern Indiana. Such traffic could not efficiently be handled via Memphis or even St. Louis.

Like the Savanna crossing, operation of the projected PRB coal trains over any of the alternative routes to Chicago involves the potential for far greater impact on the Chicago terminal. If IC&E's line to Chicago could not be used to move DM&E-originated PRB coal to the Chicago gateway, the most logical alternative routing would be on CPR's line via its interchange with DM&E at Minnesota City, Minnesota. CPR's line to Chicago enters the Chicago area from the north over another line owned by NIRCRC known as the Milwaukee District North Line. This line is part of CPR's transcontinental freight route from western Canada. In addition to significant CPR freight traffic, the line handles 60 commuter trains operated by the Chicago commuter authority known as Metra per weekday and 16 Amtrak trains and at least 2 freight trains (one each way) of the Wisconsin & Southern Railroad per day between Rondout, Illinois and Chicago.

If UP or BNSF originated the coal trains, or if DM&E originated the trains and interchanged them to either of those railroads, the potential for adverse impact is even greater. Both the UP and BNSF routes to Chicago are part of major freight transcontinental rail lines handling significant freight traffic. In addition, UP's main line from the west handles 59 Metra commuter trains per weekday. BNSF's line from the west handles 94 Metra commuter trains per weekday and 8 Amtrak trains. In contrast, the IC&E's route from the west via the Milwaukee District West Line is not part of any transcontinental freight route. The line handles 80 Metra commuter trains per weekday and no Amtrak trains. Moreover, the trackage rights agreement governing IC&E's trackage rights operations over the Milwaukee District West Line, entered into

in 2003, contains provisions that deal with the handling of future IC&E PRB coal trains over that line.

I would note that neither Metra, nor Amtrak, nor any freight railroad that uses the Milwaukee District West Line (or for that matter any railroad in the Chicago terminal other than BNSF) has filed any comments or expressed any concerns regarding disruption to its operations as a result of IC&E PRB coal trains operating over that line.

Finally, contrary to BNSF's assertion, the operation of PRB coal trains by IC&E to the Chicago gateway via its line to Pingree Grove and its trackage rights over the Milwaukee District West Line is consistent with the plans and objectives of the CREATE project which IC&E fully supports. To my knowledge, no part of the CREATE project involves any capacity or other rail capital improvements on the portion of the Milwaukee District West Line over which IC&E has trackage rights. Moreover, once interchanged to a connecting railroad such as EJ&E, IHB or BRC, the coal handled in those trains becomes part of the traffic base of that railroad like any other traffic handled by that railroad. To the extent that such traffic benefits from improvements made by that railroad to its lines as part of the CREATE project, there is nothing inappropriate about that. The IC&E's operation of PRB coal trains to the Chicago gateway will have no adverse impact on CREATE and hardly constitutes a reason for conducting further environmental review in this proceeding. Indeed, it is intuitively obvious that adding the IC&E to the list of alternative routings for PRB coal provides more rather than less flexibility for relieving rail traffic congestion in Chicago.

BNSF's comments regarding potential impacts on the Chicago terminal do not warrant further environmental review in this proceeding.

Dubuque, Iowa

In its comments, the City of Dubuque, Iowa -- the only on-line IC&E community to file any comments in response to the Environmental Appendix -- expresses "concern" over the environmental impacts of the "DM&E Project" on the "health, safety and welfare" of its citizens. Yet, Dubuque does not identify any specific environmental impact resulting from the operation of PRB coal trains over IC&E's line through Dubuque, let alone as a result of the change in ownership of the line. Rather, as discussed below, Dubuque's unspecified "concerns" over a handful of trains appear to be related to pre-existing conditions and the potential for any increase in rail traffic through the City regardless of whether or not it is related to IC&E's acquisition of IMRL's lines.

What is now the IC&E's single-track line through Dubuque was constructed in the period 1871-1872. Trains have been operating through Dubuque on this line for 135 years. A single-track line of the Chicago, Central & Pacific Railroad "CC&P"), operated as part of the CN rail system, also runs through downtown Dubuque and along the Mississippi River before crossing the river on its own bridge to East Dubuque, Illinois. In fact, for approximately two miles through downtown Dubuque, the IC&E and CC&P operate over the same relocated main track, the result of a joint line relocation project undertaken by the railroads with the support of the City in the late-1980s.

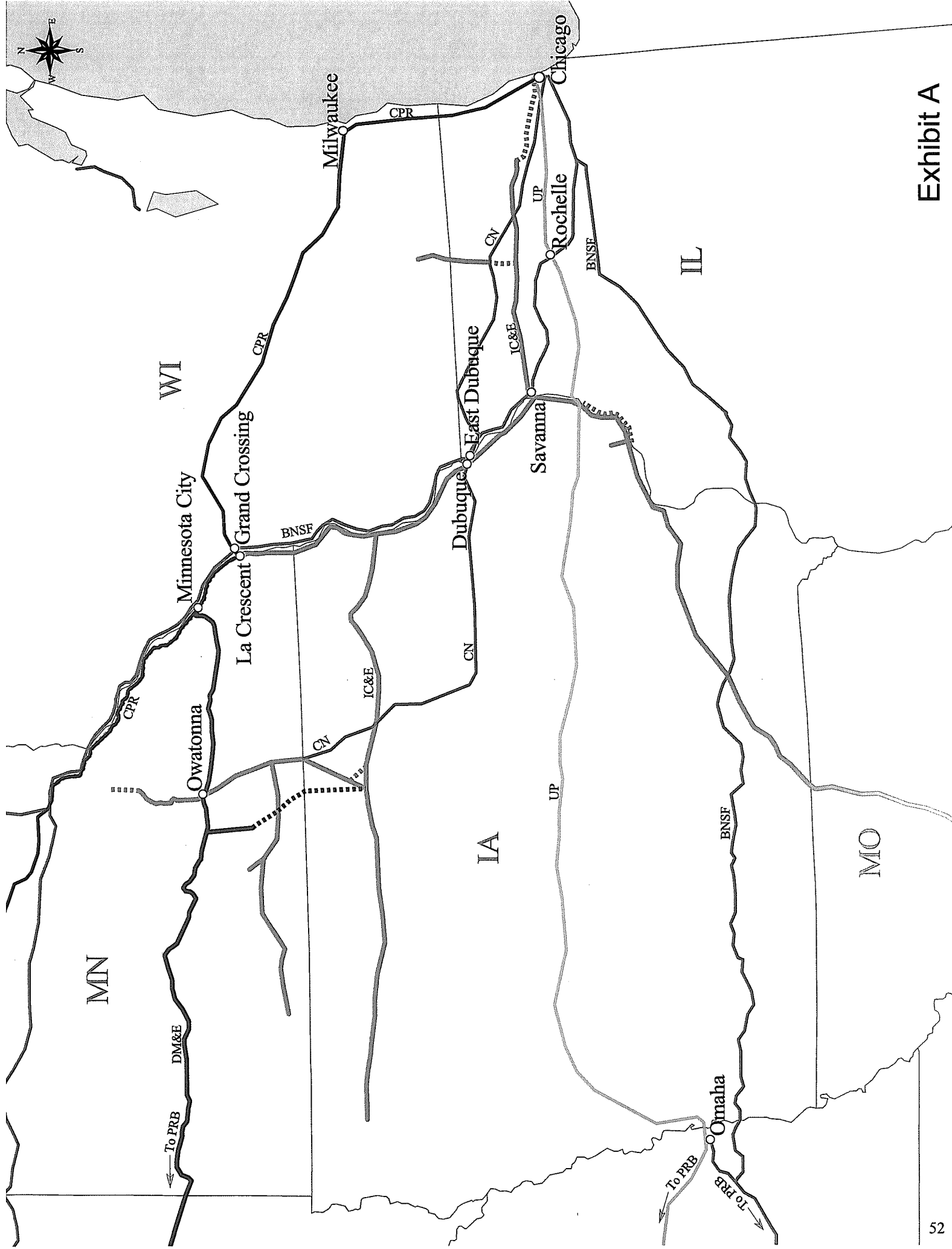
Although Dubuque talks about possible rail movements of ethanol and bio-diesel through the community and expresses concern regarding the effect of a derailment involving hazardous materials, such concerns have nothing to do with the operation of coal trains through the City. Although Dubuque asserts that two "significant areas" of the community along the Mississippi River, the Kerper Boulevard industrial area and the Port of Dubuque (the former

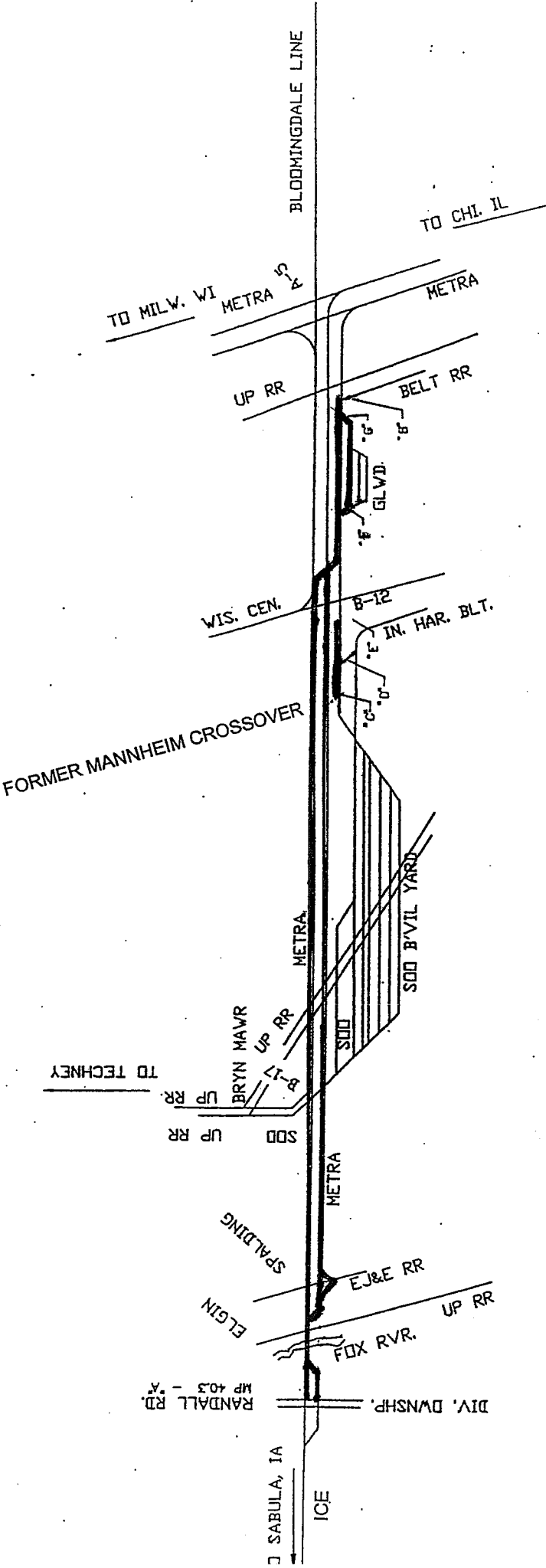
containing certain municipal and industrial facilities and the latter being developed into a tourist/entertainment area), Dubuque fails to mention that each of these areas is reached today via an overpass over the railroad. The Kerper Boulevard area is reached via the Fengler Street overpass over IC&E's line and the Port of Dubuque area is reached via the Third Street overpass over the joint IC&E/CC&P line. In addition to accommodating highway traffic and municipal emergency vehicles, both overpasses include pedestrian walkways. In addition, the Kerper Boulevard industrial area can be reached directly via an exit from Highway 61/151 which itself includes an overpass over the railroad. Moreover, both of the highway bridges that cross the Mississippi River at Dubuque (U.S. Highway 20 and Highway 61/151) include overpasses over the rail line. A street map of Dubuque showing the location of the Kerper Boulevard industrial area and the Port of Dubuque area and each of these overpasses is attached as Exhibit C. As a resident of Dubuque, I have had occasion to use all of these overpasses. The Kerper Boulevard industrial area and the Port of Dubuque area are not cut off from the rest of the City by IC&E's line. They remain accessible to both vehicular and pedestrian traffic when trains come through. As proof, the location of IC&E's rail line and the presence of trains operating over it have hardly deterred development of the Kerper Boulevard industrial area or the extensive re-development that is occurring in the Port of Dubuque area.

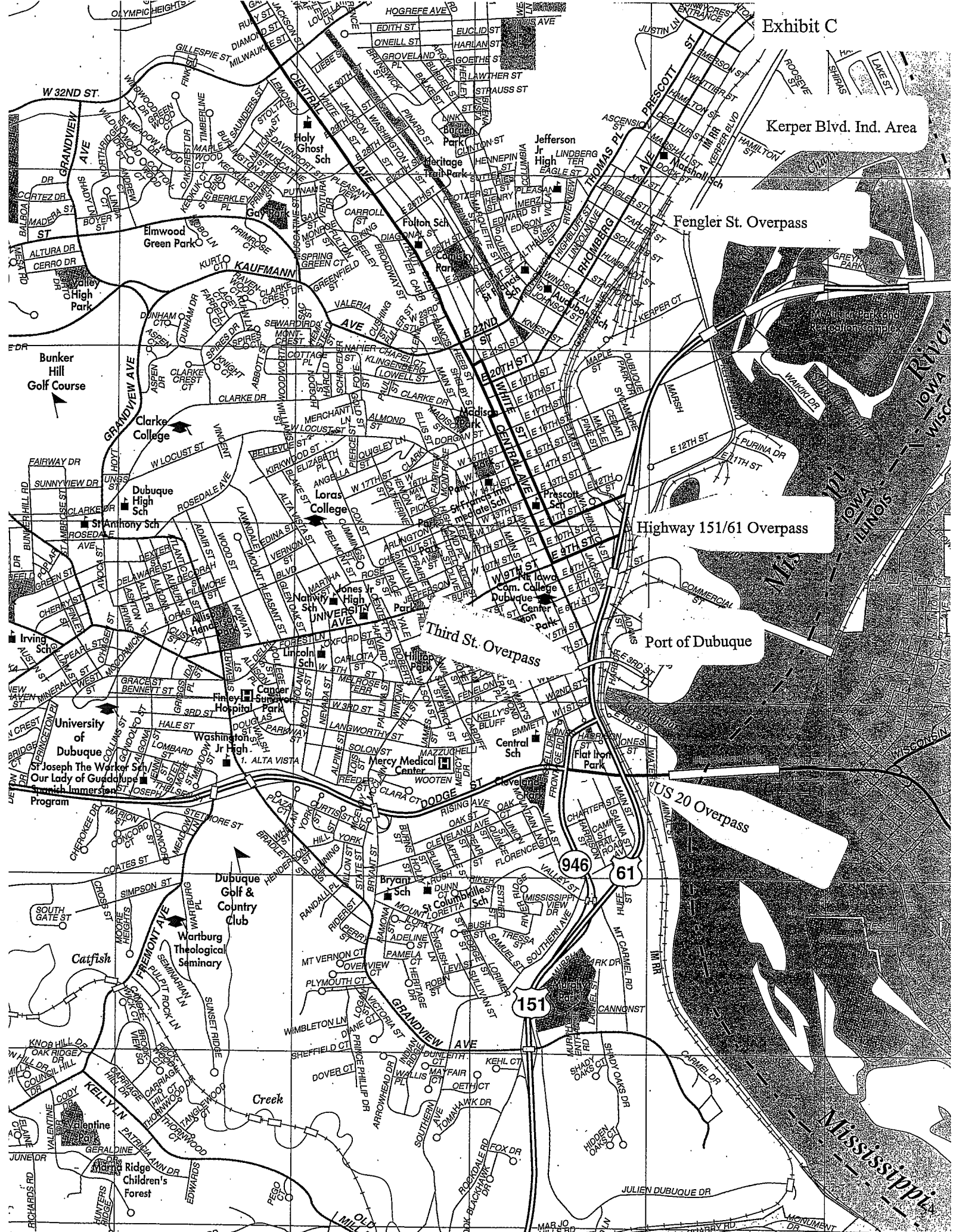
The reality is that Dubuque's concerns have nothing to do with any potential effects of PRB coal trains operating over IC&E's line through the City. Rather, Dubuque here appears to be seeking a broad general environmental review of the effects of all current and future rail operations through the City, including increases in the number of trains due to normal rail traffic growth and other factors unrelated to the effects of the IC&E acquisition transaction.

IC&E is not insensitive to the effects of rail operations on a community. IC&E and DM&E representatives have met with City officials to discuss any concerns that the City may have regarding train operations through the City. As I believe the Board knows, DM&E and IC&E have a demonstrated track record of working with local communities on a voluntary basis to address reasonable community concerns where they exist. Recently, an agreement was reached with the City of Owatonna, Minnesota -- the only location where DM&E and IC&E lines intersect -- resulting in a letter of support from the City in this proceeding. The late-1980s' track relocation project through downtown Dubuque is another example of the fruits of such discussions. DM&E/IC&E will continue to meet with the City to discuss any concerns it may have. But, Dubuque's comments provide no basis for any additional environmental review in this proceeding.

I urge the Board to find that the operation of PRB coal trains over IC&E's lines will have no significant impact on the environment and that no further environmental review in this proceeding is necessary.







Kerper Blvd. Ind. Area

Fengler St. Overpass

Highway 151/61 Overpass

Third St. Overpass

Port of Dubuque

US 20 Overpass

Mississippi

VERIFICATION

State of Iowa)
)
County of Scott) SS:

Keith E. Beckel, being duly sworn, deposes and says that he is General Superintendent of Iowa, Chicago and Eastern Railroad Corporation, that he has read the foregoing statement and knows the facts asserted therein, and that the same are true as stated.

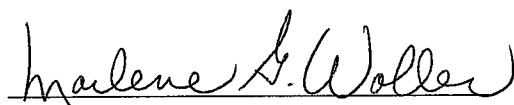


Keith E. Beckel

SUBSCRIBED AND SWORN TO
before me this 5th day of
January, 2007.



MARLENE G. WOLLER
NOTARIAL SEAL-IOWA
COMMISSION NO. 170103
MY COMMISSION EXPIRES: 6/29/08



Notary Public

My Commission expires: 6/29/08

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January, 2007, a copy of the foregoing
**Reply of Iowa, Chicago & Eastern Railroad Corporation and Dakota, Minnesota &
Eastern Railroad Corporation to Comments on Environmental Appendix** was served by
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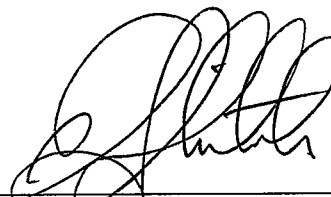
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