

**DM&E**

**DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION**

000895

200882  
337 TWENTY-SECOND AVENUE SOUTH  
POST OFFICE BOX 178  
BROOKINGS, SOUTH DAKOTA 57006  
(605) 697-2400  
FAX: (605) 697-2499

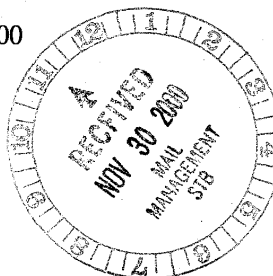
KEVIN V. SCHIEFFER • President & CEO

ENTERED  
Office of the Secretary

DEC - 8 2000

Part of  
Public Record

November 27, 2000



Ms. Elaine Kaiser  
Chief, Section of Environmental Analysis  
Surface Transportation Board  
1925 K Street NW  
Washington, DC 20423-0001

RE: Brookings Bypass Amendment Proposal  
STB Finance Docket No. 33407

## ENVIRONMENTAL DOCUMENT

Dear Ms. Kaiser:

This is a preliminary response to testimony submitted by the City Manager of Brookings, dated November 14, 2000 (presented at the Brookings public hearing). DM&E will include detailed discussion of the Brookings bypass in its final submission, but because the testimony seeks advance guidance from the STB relative to a proposed amendment to the city's initial filing, this preliminary response is provided.

### Proposed Bypass Amendment

We agree with the City of Brookings that "it is obvious that the shortened route (now proposed by Brookings as an alternative to its original proposal) has far less impact than the 14.5 mile bypass (currently being considered in the DEIS)". However, it is a misstatement of fact to suggest that this 8-mile route was recently developed in negotiations with the city and Railco. The 8-mile route was one of several that were originally developed and considered by the City of Brookings prior to Brookings' original submission of the 14.5 mile bypass route. Since that time, the 14.5 mile bypass has been widely discredited as unrealistic. The reasonableness of the longer route now being considered in the DEIS was perhaps best summed up by the current Mayor of Brookings when he expressed his opinion at a public meeting that the 14.5 mile line was "a bunch of crap", adding that "[i]t should be thrown away." (*The Brookings Register*, October 27, 2000, p. A1).

The city's reversal and reconsideration of the 8-mile route came about only when the DEIS indicated that the city may actually be required to share in bypass costs. This is not a new alignment, as one might be lead to believe by the city testimony

Letter to Ms. Elaine Kaiser  
November 27, 2000  
Page 2

Further, it is our belief that going outside of the scope of the EIS as defined in the April 20, 1998 STB bypass notice would further jeopardize this project by subjecting it to additional delays and due process violation challenges. None of the landowners on the shorter bypass line the City now seeks to substitute have received notice. There is no realistic ability for them to formally participate in this process. Also, the STB has up to this point steadfastly adhered to its initial determination that it would not accept further bypass modifications beyond the original deadline. It has rejected proposals from the cities of Owatonna and Rochester to modify their bypass proposals. To accept this modification from Brookings would be highly problematic from a legal and fairness standpoint.

Any suggestion that the Citizens Against the Brookings Bypass (CABB) "reluctantly agrees" with the Railco alignment that the City is now seeking would be absolutely wrong. The CABB made it exceedingly clear that they were not agreeing to any alignment, but rather to a process whereby they would receive the opportunity to comment on the stand-alone merits of and need for a bypass construction. I am very confident in telling you that CABB is strongly opposed to Brookings' proposal.

The \$26 million estimate for the shorter 8-mile line contained in the City's submission is questionable. We will comment in more detail on that figure in our final filing, but think it is important to hold the city accountable for its own estimates. DM&E's share should be defined as a specific dollar amount based on the city's estimates. DM&E's share should be based on the cost of refurbishing the existing line less the additional operating costs of using the less efficient and more maintenance intensive bypass line. Also, credit should be given to the lost business on the existing line (or to the costs associated with maintaining two redundant lines). DM&E's cost estimates to upgrade the existing line will be detailed in our final filing, but is estimated at between \$3 and \$4 million. The fact that the city finds it unrealistic to fund any bypass even with an exaggerated subsidy offer from DM&E helps demonstrate the fundamental unreasonableness of the bypass concept itself.

#### **Proposed "Back-up" Mitigation Plan**

We strongly object to the city's new request for a "back-up mitigation plan" for two fundamental reasons. First, this approach seeks to use an outdated and inapplicable private offer that was developed in good faith negotiations aimed at avoiding this bypass litigation battle altogether. To use it against us now in an adversarial, contested proceeding violates a fundamental rule of good faith negotiations. That proposal required give and take on both sides. It was rejected by the city. The city's new request eliminates any "give" and only wants the "take" portion of an outdated private document. Should the STB now attempt to impose any part of that extraordinary offer (which is no longer available based on the city's decision to pursue a bypass) as a mandatory condition, it would be patently unfair; and it would chill DM&E and any future applicant from working in good faith to resolve these issues through local negotiations. It also would be very unfair to the 51 of 55 communities with whom we do have

Letter to Ms. Elaine Kaiser  
November 27, 2000  
Page 3

agreements. And it would be violative of the spirit of those negotiations themselves, as stated in sections 2<sup>1</sup> and 18<sup>2</sup> of the proposed Agreement Brookings submitted to the STB.

Second, this "have your cake and eat it too" approach is not the process laid out by the STB for bypass proponents. The bypass is clearly to be considered in lieu of mitigation. The city has determined to seek its bypass in lieu of a negotiated agreement or mandated conditions. Unless Brookings is required to choose as every other community had to choose, it will establish a precedent that will have every community in the future demanding that both a conditional bypass and a detailed existing line "back-up" mitigation plan be imposed. That would lead to grossly inefficient procedural delays, costs, and confusion.

<sup>1</sup> SECTION 2 states in the pertinent part: "The parties hereto specifically acknowledge that the conditions agreed to herein do not purport to reflect mandatory conditions reasonably expected to be unilaterally imposed by the STB absent the mutuality of benefits and valuable consideration received by both parties to a negotiated agreement. Accordingly the parties hereto emphasize that no part of this Agreement is intended to be used by either party or any third party to seek or avoid conditions through the regulatory process. Both parties to this Agreement specifically request that this Agreement NOT be considered by any regulatory agency as a guide for unilateral conditions to be imposed on the Project. Unlike unilateral regulatory conditions, there exists in this Agreement mutual beneficial consideration negotiated by the parties hereto."

<sup>2</sup> SECTION 18 states in the pertinent part: "BOTH PARTIES HAVE GAINED BARGAINED FOR CONSIDERATION AS A RESULT OF THIS AGREEMENT. NO ONE PROVISION OF THIS AGREEMENT STANDS BY ITSELF. EACH IS INTERRELATED TO THE OTHER, AND ALL RELY HEAVILY ON AN OVERRIDING PARTNERSHIP RELATION. CITY HAS HELPED PAY FOR THE ENHANCED IMPROVEMENTS BY ITS ONGOING AND EARLY COOPERATIVE PARTNERSHIP EFFORTS, ITS TIMELY SUPPORT, ITS CONSTRUCTIVE EFFORTS TO PROVIDE INFORMATION AND ADVICE IN FOSTERING PROJECT DEVELOPMENT AND PARTICIPATING IN COOPERATIVE RAILROAD DESIGN EFFORTS THAT HAVE RESULTED IN SIGNIFICANT SAVINGS IN TERMS OF COSTS, FUTURE PLANNING AND DEVELOPMENT EFFORTS, CONSTRUCTION PROCESS IMPLEMENTATION, AND MANY OTHER ISSUES. DM&E HAS CONSCIOUSLY AGREED TO MITIGATION CONDITIONS FAR IN EXCESS OF THOSE SUPPORTED BY PAST PRECEDENT BECAUSE OF SIGNIFICANT VALUE PROVIDED BY CITY NOT ONLY WITH RESPECT TO THE DEVELOPMENT OF THE IMMEDIATE PROJECT, BUT ALSO FOR OTHER REASONS INCLUDING BUT NOT LIMITED TO PARTNERSHIP SUPPORT IN PROJECT CONSTRUCTION AND FUTURE OPERATIONS, AND OTHER SUPPORT TO BE PROVIDED THROUGH THE PARTNERSHIP PROCESS. AGREEMENTS AND CONCESSIONS MADE BY THE PARTIES HERETO. FOR THESE AND OTHER REASONS, THE PARTIES HERETO REQUEST THAT THIS AGREEMENT NOT BE CONSIDERED BY THE STB OR ANY OTHER PUBLIC BODY AS A BASIS FOR APPLYING THE CONDITIONS SET FORTH HEREIN OR ANY OTHER ASPECT OF THIS AGREEMENT TO THIRD PARTIES NOT A SIGNATORY TO THIS AGREEMENT, OR FOR ANY OTHER REASON WHATSOEVER UNLESS BY THE MUTUAL SPECIFIC WRITTEN CONSENT OF ALL SIGNATORIES HERETO."

Letter to Ms. Elaine Kaiser  
November 27, 2000  
Page 4

We were disappointed in the city's approach to this issue. It submitted our expired offer without our knowledge or consent, in a manner inconsistent with the proposed agreement language itself and generally unacceptable in any good faith negotiation. We vigorously object to its consideration in shaping any mandated conditions.

#### CONCLUSION

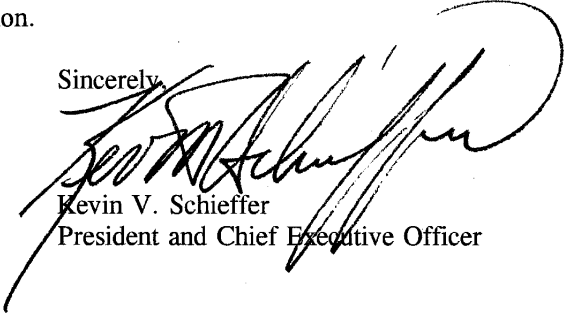
DM&E agrees with Brookings testimony that the shorter 8-mile bypass it now wishes to substitute is more reasonable and feasible than the 16.5-mile B-4 bypass it originally proposed and is being considered in the DEIS. Unfortunately, the city had its chance to submit the more reasonable proposal two years ago, but specifically rejected that suggestion from DM&E -- presumably based on a belief that DM&E would be required to pay all costs. But to substitute the more reasonable line at this late juncture is unfair to those affected and would recklessly jeopardize this proceeding by interjecting new legal and procedural challenges.

Further, the STB should not consider or rely upon a private document prepared in good faith as a part of private negotiations as mandatory "back-up mitigation". To do so would be unfair and would chill any future good faith negotiations.

Most unfortunately, the city two years ago chose to reject the 8-mile alignment and instead submitted the 16.5 mile alignment currently before the Board. For legal and fairness reasons, we think the only course is to remain consistent with clearly stated STB policy and not accept new bypass proposals (or material amendments) after the STB imposed deadline -- which has long since passed. The final Brookings bypass decisions needs to be made on the legal and policy merits of the plan submitted by the City according to established STB procedure.

Thank you for your consideration.

Sincerely,



Kevin V. Schieffer  
President and Chief Executive Officer

KVS/cld (kvs\ekaiser.1)

cc: Senator Tom Daschle  
Senator Tim Johnson  
Representative John Thune  
Citizens Against the Brookings Bypass  
City of Brookings