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June 2, 2008

VIA ELECTRONIC DELIVERY

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***Re: Canadian National Railway Company and Grand Trunk
Corporation - Control - EJ&E West Company
STB Finance Docket No. 35087***

Dear Ms. Quinlan,

We represent Will County, Illinois ("Will County") in the above-referenced docket. Enclosed please find Will County, Illinois' Opposition to Applicants' Request for Establishment of Time Limits for NEPA Review and Final Decision and Motion to Extend Comment Period on Draft Environmental Impact Statement (WILL-10), which was filed electronically with the STB on June 2, 2008.

Sincerely,

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ERG:ljm
Enclosure

cc: All Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35087

**CANADIAN NATIONAL RAILWAY COMPANY AND
GRAND TRUNK CORPORATION
-CONTROL-
EJ&E WEST COMPANY**

**WILL COUNTY, ILLINOIS' OPPOSITION
TO APPLICANTS' REQUEST FOR ESTABLISHMENT
OF TIME LIMITS FOR NEPA REVIEW AND FINAL DECISION
AND
MOTION TO EXTEND COMMENT PERIOD
ON DRAFT ENVIRONMENTAL IMPACT STATEMENT**

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SURFACE TRANSPORTATION BOARD**

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-CONTROL-

EJ&E WEST COMPANY

**WILL COUNTY, ILLINOIS' OPPOSITION
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OF TIME LIMITS FOR NEPA REVIEW AND FINAL DECISION
AND
MOTION TO EXTEND COMMENT PERIOD
ON DRAFT ENVIRONMENTAL IMPACT STATEMENT**

Will County, Illinois ("Will County") submits this memorandum in opposition to the Applicants' motion (identified as a "request") to establish a truncated schedule for the completion of the Board's environmental impact statement ("EIS") and issuance of a final decision in this matter. Will County also moves for an order extending the comment period to at least 120 days.

The schedule proposed by the Applicants, the Canadian National Railway Company and Grand Trunk Corporation (collectively "CN"), which among others, calls for issuance of a draft EIS in less than a month and a half, is unreasonable and unattainable. This is not a typical control proceeding, as CN's motion would have the reader believe. It is a proposed acquisition that involves in some instances a five-fold increase in traffic and a 700 percent increase in

hazardous materials carried in a swath cutting through the entire congested suburban perimeter of Chicago, the third most populous city in the United States.

The reason that the CN has spent \$7 million to date to pay for environmental analysis by the Board's third party environmental consultant, and that CN projects it may spend as much as \$15 million in total for environmental analysis, is because there are very real and significant environmental consequences associated with the proposed transaction. See Applicants' Request for Establishment of Time Limits for NEPA Review and Final Decision (CN-33) ("CN's Motion") at 7, n. 11 (stating currently accrued and potential final costs). Those potential environmental consequences are the subject of the required analyses detailed in the Board's 16-page decision issued on April 28, 2008 approving the Final Scope of Study for the EIS in this matter and the attached 9 page appendix to that decision that details the final scope of study.

In the Board's order in this docket dated November 26, 2007 in which the Board, among others, decided that a full scope EIS was warranted, the Board stated:

The time the EIS will take to prepare cannot be determined ahead of time because there is no way to predict in advance all of the specific issues that may arise. In prior cases, the EIS process has ranged from approximately 18 months to several years.

Decision No. 2 at 16 (served Nov. 26, 2007) (fn. omitted). The Board had it right from the beginning. The realistic time to prepare an EIS analyzing a proposed transaction of this complexity and magnitude is 18 months to several years. No amount of rhetoric, misplaced self righteous indignation, or threat by CN should deter this Board from completing its legal obligation to take a hard look at the alternatives and environmental consequences, and related required mitigation if the proposed acquisition is to proceed.

STATEMENT OF FACTS

In the Board's November 26, 2007 decision, the Board concluded that an EIS was required "in view of the large projected traffic increases on certain line segments, and the potential impacts of the proposed transaction on a number of communities that would likely result from the increased activity levels on rail line segments and at rail facilities." Decision No. 2 at 15 (served Nov. 26, 2007). Nothing has changed from that original analysis.

The EJ&E lines run from the Wisconsin border through densely populated communities in Illinois in Lake County, northwest Cook County, DuPage County, Will County, and southern Cook County, and then into densely populated areas in Indiana. In Will County, the EJ&E effectively bisects Will County. There are 52 public at grade crossings in Will County involving the EJ&E, with 38 of those on the mainline. See Opening Memorandum of Will County (WILL-5) at 2-3 and Ex. 2 thereto at ¶7. Rail traffic in Will County from the East Joliet Yard northward is projected to grow from 18 to 45 trains daily, and rail traffic from the East Joliet Yard south to the county border is projected to grow from 6 to 28 trains daily. *Id.* at 3 and Ex. 1 thereto at ¶7. The increase in hazardous materials carried on those lines is projected to grow by approximately 700 percent. Railroad Control Application (CN-2) at 247, Attachment A-2. Will County has a population in excess of 700,000 people. Opening Memorandum of Will County (WILL-5) at 2 and Ex. 1 thereto at ¶5. Other counties and communities are expected to experience similar rail traffic increases.

The potential regional impact of the proposed acquisition of the EJ&E lines by the CN is enormous. That is why the STB received over 3600 comments on the draft EIS Scope of Study

and why the STB significantly increased the scope of the EIS in response to those comments. See Decision at 2 (served April 28, 2008).

For the reasons set forth below, Will County believes the “hard look” at the environmental consequences of this transaction required by the National Environmental Policy Act (“NEPA”) cannot reasonably be accomplished within the time frames proposed in CN’s motion. Will County also submits that an expansion of the comment period on the draft EIS to 120 days is appropriate.

ARGUMENT

As reflected in the Council on Environmental Quality (“CEQ”) regulations implementing NEPA, an EIS is required to “provide a full and fair discussion of significant environmental impacts” associated with the proposed transaction. 40 C.F.R. §1502.1. “Accurate scientific analysis, expert agency comments and public scrutiny are essential to implementing NEPA.” *Id.* §1500.1. It also requires an analysis of “the reasonable alternatives which would avoid or minimize adverse impacts” of the proposed transaction. *Id.* §1502.1. It is not intended to be a shallow or cursory review. NEPA requires a “hard look” at the environmental consequences of the transaction. *Earth Island Institute v. U.S. Forest Service*, 442 F.3d 1147, 1159 (9th Cir. 2006), *cert denied*, 127 S. Ct. 1829 (2007). A hard look requires consideration of all foreseeable direct, indirect and cumulative impacts. *Id.*

NEPA does not contain any statutory deadline for completion of an EIS. The CEQ regulations implementing NEPA do authorize an agency to set time limits upon requests of the applicant, “[p]rovided, [t]hat the limits are consistent with the purposes of NEPA and other essential considerations of national policy.” 40 C.F.R. §1501.8(a). The factors that the agency

may consider in setting time limits include: (i) potential for environmental harm; (ii) size of the proposed action; (iii) state of the art of analytic techniques; (iv) degree of public need for the proposed action, including the consequences of delay; (v) number of persons and agencies affected; (vi) degree to which relevant information is known and if not known the time required for obtaining it; (vii) degree to which the action is controversial; and (viii) other time limits imposed on the agency by law, regulations, or executive order.

In support of its argument for a truncated schedule, the CN argues that the Stock Purchase Agreement ("SPA") between the CN and the EJ&E's owner, the United States Steel Corporation ("U.S. Steel"), gives U.S. Steel or the CN the right to terminate the agreement if this proceeding is not completed and the transaction closed by December 31, 2008. See CN Motion at 12. The CN suggests that U.S. Steel likely will do so if a short schedule for EIS is not in place. *Id.* The CN also argues that it was reasonable for the parties to have agreed on an outside limit of December 31, 2008 for the transaction to close, given the Board's rules and prior precedent. See, *id.* at 2. Specifically, CN argues that the schedule established in the Conrail proceeding supports its arguments for a truncated schedule.¹

Each of the CN's arguments is briefly discussed below. Put simply, the CN's contractual provisions are not as clear as the CN would lead the Board to believe. Even if they were, they do not trump the NEPA requirements. Moreover, the Board's precedent does not support the CN's arguments. The bottom line is that there is a lot of work to be done, and it cannot be done within the CN's proposed schedule.

¹ CN also suggests that the Board is obligated to complete its environmental review within 180 days, but does not argue that point too vociferously because the alleged 180 day time limit has already passed.

I. CN AND U.S. STEEL'S AGREEMENT CONTEMPLATED THAT THE REQUIRED ENVIRONMENTAL REVIEW WOULD EXTEND BEYOND DECEMBER 31, 2008.

Section 2.3 of the SPA provides that the CN-EJ&E transaction must close by September 1, 2008, "unless closing shall have failed to occur for one or more of the reasons set forth in Section 9.1(b)(ii) of this Agreement in which case closing may be extended to no later than December 31, 2008, after which date this Agreement may terminate at the option of either party." SPA §2.3, CN-2 at 259. However, the party's termination rights under the SPA are governed by Section 9.1 of the SPA. Section 9.1 of the SPA provides in relevant part that the SPA may be terminated:

by any Party if the Closing shall not have occurred by December 31, 2008; *provided* that the right to terminate this Agreement under this Section 9.1(b) shall not be available . . . if the reason for the failure of the Closing to occur on or before such date is one or more of the following: (A) the STB has not issued a final decision in the Exemption Proceeding or the Control Proceeding; [or] . . . (C) the STB has not completed such review of the transactions contemplated by this Agreement as may be required under the National Environmental Policy Act of 1969, 42 U.S.C. §§4321 et seq. or the National Historic Preservation Act, 16 U.S.C. §470, in connection with the Exemption Proceeding and the Control Proceeding. . . .

Id. §9.1 at 293.

Thus, it appears that while the parties may have intended to close the transaction by December 31, 2008, they also recognized in the more specific provisions governing termination that it was entirely possible that the environmental review would extend beyond December 31, 2008. They specifically agreed that the SPA could not be terminated on the grounds that the closing did not occur by December 31, 2008, if the reason for that failure was either because the STB had not issued a final decision or the required environmental review had not been completed by that date.

Accordingly, contrary to the CN's assertion, it is far from clear that U.S. Steel has the right to terminate the SPA if the transaction does not close by December 31, 2008. Moreover, there is not a single shred of evidence in the record that U.S. Steel has any intention of trying to terminate the SPA. In the end, it does not really matter because the CN and U.S. Steel cannot unduly limit the scope or time required by the Board's environmental review by contractual agreement.

II. BOARD PRECEDENT DOES NOT SUPPORT THE SCHEDULE PROPOSED BY CN.

The CN relies on the schedule established in the Conrail case as support for its argument for a truncated schedule. See CN Motion at 3-4 and 18-21. As the Village of Barrington correctly pointed out, a substantial amount of the environmental analysis of the Conrail transaction was done prior to the actual filing of the application. See The Village of Barrington's Reply to Applicants' Request for Establishment of Time Limits for NEPA Review and Final Decision (BARR-4) at 17-22.

In contrast to the Conrail situation, the EIS for the Dakota, Minnesota & Eastern Railroad Corporation's ("DM&E") Powder River Basin Expansion Project took almost four years to complete. See *Mid States Coalition for Progress v Surface Transportation Board*, 345 F.3d 520, 533 (8th Cir. 2003). Obviously, the DM&E matter involved significant rail expansion and rehabilitation issues and alternatives analyses not present in this case, and was one of the largest and most challenging construction projects to come before the Board. However, although some aspects of the DM&E are not present in this case, DM&E did involve an extended evaluation of the impact on communities of dramatically increased train traffic. What is clear from DM&E is that these are difficult and complex issues to analyze, and the importance of having the time required to analyze these issues cannot be unduly limited, as CN requests.

III. THE FINAL SCOPE OF STUDY ENTAILS SUBSTANTIAL AND SIGNIFICANT DATA COLLECTION AND ANALYSIS.

The original draft scope of study for the EIS was very extensive. See NOI to Prepare an EIS (served Dec. 21, 2007). The scope included safety analysis at each of the public grade crossings with average daily traffic counts in excess of 2500; hazardous material safety analyses; analyses of effects on rail traffic and vehicle delays at crossings; land use and socioeconomic impacts on the entire 198 mile traverse through Chicago suburban communities; modeling of air quality impacts in the entire non-attainment area; noise and vibration analyses; biological resources impact, including impacts on endangered and threatened species and habitat and national or state parks and forests and wildfire refuges; impacts on water resources, environmental justice issues and cultural and historic resources; and the whole panoply of secondary and cumulative effects. *Id.* at 7-13.

The final scope of study was served April 28, 2008. Notice of Availability of Final Scope for EIS (served April 28, 2008). It expanded the analysis to include review of alternative rail connections, *id.* at 5-6; an expanded planning horizon for rail and automobile traffic, which of course will impact the air quality modeling, *id.* at 7-8; analysis of airport impacts at the Gary Chicago International Airport, *id.* at 8-9; analysis of the impact on the Star Line, a significant suburb to suburb expansion of the Chicago metropolitan area's commuter rail passenger service, as well as other proposed expansions, *id.* at 9-10; and an expanded air quality analysis. *Id.* at 12.

Although the Final Scope was just issued on April 28, 2008, the CN's proposed schedule would require a draft EIS to be served on July 15, 2008; draft EIS comments due September 2, 2008; and final EIS to be completed November 3, 2008. Given the complex and difficult issues involved in analyzing the environmental impacts of a proposed significant change in train

movement through the densely populated suburban area ringing Chicago, the CN's proposal simply is not a reasonable or workable schedule.

IV. THE PUBLIC INTEREST REQUIRES THAT TIME BE ALLOWED FOR COMPLETION OF THE REQUIRED ENVIRONMENTAL REVIEW.

CN asserts that the public interest benefits of the proposed transaction are at risk, and therefore, its truncated schedule is required. The net public interest benefits of the proposed transaction, if any, will not be known until the environmental analysis required by NEPA is completed. What the public interest requires is that the in-depth environmental review of the proposed transaction required by law be completed, and that it not be limited or restricted by an unreasonable procedural schedule. To the extent the Board sets a procedural schedule for completion of the environmental review of the proposed transaction, it should be based on the time required for a meaningful analysis.

V. THE 45 DAY COMMENT PERIOD SHOULD BE EXPANDED.

45 days is the minimum period allowed for comments on a draft EIS. 40 C.F.R. §1506.10(d) (2007). The Board's rules contemplate that the normal time period for comments on a draft EIS is 45 days, and the Board's December 21, 2007 order indicated that the draft EIS "will be made available for public and agency review and comment for 45 days." Decision at 4 (served Dec. 21, 2007).

Given the breadth and complexity of the issues to be addressed in the draft EIS, as well as the public visibility and significance of those issues, Will County requests that the Board authorize a 120-day comment period. To Will County's knowledge, there are no mitigation agreements in place. The draft EIS by necessity will be expansive, and the impacted parties are entitled to adequate time to evaluate and comment upon the SEA's analysis of issues of far

reaching public impacts and importance. Will County believes that 120 days is required for that purpose.

VI CONCLUSION.

For all the reasons set forth above, the CN's motion to set an abbreviated schedule for completion of the NEPA review should be denied, and the public should have 120 days to comment on the draft EIS.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he has caused a true and correct copy of the foregoing document(s) to be served upon:

ALL PARTIES OF RECORD

SEE ATTACHED SERVICE LIST

by mailing a true and correct copy thereof from the law office of Hinshaw & Culbertson LLP, 400 South Ninth Street, Suite 200, Springfield, Illinois, 62701, to the persons named as parties of record on the Surface Transportation Board's service list as of this date, June 2, 2008.


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