

FLETCHER & SIPPEL LLC

ATTORNEYS AT LAW

29 North Wacker Drive
Suite 920
Chicago, Illinois 60606-2832

Phone: (312) 252-1500
Fax: (312) 252-2400
www.fletcher-sippel.com

WILLIAM C. SIPPEL
(312) 252-1505
wsippel@fletcher-sippel.com

June 21, 2006

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

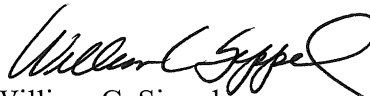
Finance Docket No. 34178
Dakota, Minnesota & Eastern Railroad Corporation
and Cedar American Rail Holdings, Inc. -- Control --
Iowa, Chicago & Eastern Railroad Corporation

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceedings are an original and ten copies of the **Reply of Iowa, Chicago & Eastern Railroad Corporation and Dakota, Minnesota & Eastern Railroad Corporation to Comments on Petition to Reopen**, dated June 21, 2006.

One extra copy of the Reply and this letter also are enclosed. I would request that you date-stamp those items to show receipt of this filing and return them to me in the provided envelope. 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
Enclosures
cc: Parties on Certificate of Service

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

FINANCE DOCKET NO. 34178

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

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

William C. Sippel
Thomas J. Litwiler
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 920
Chicago, Illinois 60606-2832
(312) 252-1500

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

Dated: June 21, 2006

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34177

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-- ACQUISITION AND OPERATION EXEMPTION --
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-- CONTROL --
IOWA, CHICAGO & EASTERN RAILROAD CORPORATION

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

Iowa, Chicago & Eastern Railroad Corporation ("IC&E") and Dakota, Minnesota & Eastern Railroad Corporation ("DM&E") hereby reply to the comments of the City of Bellevue, Iowa ("Bellevue"), the City of Dubuque, Iowa ("Dubuque") and the Iowa Department of Transportation ("IDOT")¹ regarding the Petition to Reopen and Partially Modify Conditions filed by IC&E and DM&E in these proceedings on May 12, 2006.²

¹ By letter dated June 15, 2006 and filed June 16th, the City of Owatonna, Minnesota withdrew its prior filing in these matters and indicated its support for IC&E/DM&E's position. Bellevue submitted a letter dated May 25, 2006 and filed May 30th, and a second letter dated June 1, 2006 that was apparently not formally filed as a pleading at the Board. IC&E/DM&E respond here to both items. Dubuque submitted a letter dated May 31, 2006 and a pleading dated June 1, 2006 (both filed as of June 1st) which appear substantially identical.

² To the extent that Bellevue and IDOT have requested extensions of time for filings, IC&E and DM&E would appear to have the right to reply. Beyond that, IC&E and DM&E seek waiver of 49 C.F.R. § 1104.13(c) as may be necessary to allow acceptance of this reply. Given that the petition to reopen was served on the entire service list of more than fifty parties in two four-year-old dockets and could not easily anticipate the nature of resulting comments, consideration of this brief reply is appropriate and warranted.

No party objects to the request by IC&E and DM&E to modify the condition in ordering paragraph 3 of the decision served July 22, 2002 in Finance Docket No. 34177 ("IC&E Acquisition") and allow the consideration of environmental matters by that decision to proceed prior to the actual commencement of construction of DM&E's new line into the Powder River Basin (the "PRB"). IDOT concurs in that request. IDOT Comments at 1. In addition, no party objects to lifting the routing ban on handling DM&E-originated PRB coal on the former IMRL lines (ordering paragraph 2 of IC&E Acquisition), provided that any consideration of environmental matters herein would be completed by 2009. IDOT acknowledges the legitimate financing rationale for such action, and offers qualified support for lifting the ban. IDOT Comments at 2.

The parties, however, erroneously conflate this case -- involving the IC&E acquisition and control transactions -- with the PRB construction transaction previously considered and approved by the Board after an exhaustive eight-year review in Finance Docket No. 33407.³ This is not a construction case, and should not be treated as one. More specifically, it is not part of Finance Docket No. 33407, and should not be confused with it. To do so would start down a slippery slope of regulatory gridlock that is inconsistent with either legal precedent or common sense. As the Board has already made clear several times, IC&E acquisition and control were independent of and functionally unrelated to the PRB construction project. 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 Board has specifically held that "the acquisition transaction and the construction project are separate and

³ 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"); Dakota, Minnesota & Eastern Railroad Corporation Construction into the Powder River Basin, Finance Docket No. 33407 (STB served February 15, 2006) ("PRB Construction III").

distinct -- not 'two links of a single chain'" Id. Any necessary environmental review in these proceedings must focus on the impacts (direct or cumulative, if any) of the IC&E acquisition and control transactions themselves -- not the DM&E construction case.

With over 50 parties of record in the IC&E acquisition and control proceedings, there have been only 3 comments filed on the petition to reopen. IC&E has what it views as good relations with all of the commenters, understands their issues, and believes none would be well served by the approach which they suggest. IC&E appreciates the political instinct to seek a higher level of review in this acquisition and control case in light of unrealistic and unsupportable proposals from the City of Rochester, Minnesota and the Mayo Clinic publicly demanding that trains be rerouted to Iowa as the "ultimate bypass" of Rochester. IC&E and DM&E have said publicly that they will not agree to any such proposals, and will not use their ownership of the IC&E lines for a political compromise on those proposals. As outlined in the petition to reopen, the former IMRL lines will be used by IC&E in the same manner that IMRL would have used them for PRB coal traffic -- and we do not believe they will be used any more or less as a result of DM&E-IC&E common control. While the self-serving demands of the Rochester interests have created understandable concern in Dubuque and Bellevue, those demands will not and cannot be a basis for reconsidering traffic routings and environmental objections already addressed in PRB Construction.

Nonetheless, the commenters essentially ask the STB to treat the environmental review here as simply a wholesale extension of the exhaustive review already conducted and completed in PRB Construction. IDOT Comments at 1 ("We believe that Iowa communities should 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."); Dubuque Comments at 2 (STB should "ensure a full environmental study of the impacts which could be expected from allowing coal traffic onto a route passing through Dubuque and other Iowa communities."). Under such an approach, this case would become literally indistinguishable from the completed PRB Construction proceeding -- the review there of the impacts of the PRB construction and rehabilitation project on on-line communities in Minnesota and South Dakota must now be fully repeated in Iowa, again with respect to impacts of the underlying PRB construction project.

The difference, of course, is that the PRB construction proposal was the jurisdictional and regulatory subject of the proceedings in Finance Docket No. 33407. The IC&E acquisition and control transactions which are the jurisdictional and regulatory subject of these proceedings are, in the STB's own words, "separate and distinct" from the PRB construction project, and "not two links of a single chain." The approach contemplated by the commenters would essentially convert PRB construction and the IC&E transactions into a single -- if hideously extended -- link on a chain.

The commenters provide no legal support for such a position, and indeed there is none. In control cases like that involved here, "the 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 merger" 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 (emphasis added). While the Board also looks at cumulative environmental impacts, it is beyond dispute that such an analysis looks only at the incremental effects of an

action when considered together with a prior action -- not the effects of the prior action itself.

Department of Transp. v. Public Citizen, 541 U.S. 572, 769-770 (2004).⁴

The absence of any legal support is simply compounded by the massive prudential and regulatory efficiency problems that would result from the approach contemplated by the commenters. As the wording of the IDOT Comments, in particular, makes clear, what is being suggested is essentially a reopening of the PRB Construction proceeding, and an expansion of the scope of the environmental review in that proceeding to an entirely new set of rail lines acquired by IC&E in a subsequent and unrelated transaction. E.g., IDOT Comments at 3 ("The PRB coal traffic impacts on the former IMRL . . . were never analyzed as part of the PRB construction project. . . . Since these lines are now controlled by DME, they are intimately related to the project and the full traffic impacts should be analyzed . . ."). Accepting such a departure from established control case precedent will drag the Board into a regulatory loop that would be virtually endless. A reopened or partially imitated PRB Construction environmental review could likely go on for years (no matter how limited the initial intended scope might be),⁵ and undoubtedly would be used by participants in the original proceedings to re-litigate issues

⁴ As IC&E and DM&E pointed out in their petition, even where the Board evaluates the environmental impact of a line rehabilitation -- as it did with respect to DM&E's existing main line in the PRB Construction proceeding -- it still does not extend that review to other locations on the rail carrier's lines. IC&E/DM&E Petition to Reopen at 22 (citing Burlington Northern Santa Fe Corporation -- Control -- Washington Central Railroad Company, Inc., Finance Docket No. 32974 (STB EA served September 4, 1996) at I-3). Thus, even if the former IMRL lines now owned by IC&E were somehow retroactively considered to be DM&E lines for purposes of the PRB Construction proceeding -- a proposition which we reject and which would create a raft of jurisdictional, regulatory and procedural problems -- it would still be inappropriate to re-conduct the PRB Construction environmental review on those lines.

⁵ Indeed, the commenters indicate that the environmental review they contemplate would realistically not be completed by 2009 -- three years from now. Dubuque Comments at 3; Bellevue Comments at 2.

with which they were dissatisfied. And if DM&E or IC&E have engaged in any intervening transactions by the end of that process, presumably parties will appear to argue that the environmental review of the PRB project must be extended and repeated again. If the existing clear and bright lines between an unrelated construction case and this acquisition and control case are blurred, they will be obliterated -- if not before the Board then by the inevitable judicial appeals that are sure to follow.

Once the Board starts down this slippery slope, it risks losing control of its regulatory docket and its ability to effectively implement regulatory policy favoring pro-competitive construction projects. The outcome here would likely be an STB construction proceeding twelve years in the making -- and perhaps even longer. Far from being mandated by NEPA, such an outcome is discouraged under NEPA. 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).

Nor is there any reason to believe that the legitimate concerns of Bellevue and Dubuque will not be addressed effectively and efficiently by the parties themselves. IC&E regularly meets with communities who express an interest in any issue, as it has with both Bellevue and Dubuque and many other IC&E communities who did not file comments in this proceeding (on issues both related to and unrelated to this proceeding).⁶ As the Board knows, DM&E entered into negotiated agreements with 55 of 56 on-line DM&E communities in the PRB Construction proceeding to address legitimate concerns those communities had. See PRB II, 6 S.T.B. at 19-20, 78-79; PRB III at 4 & n.8; Dakota, Minnesota & Eastern Railroad

⁶ Dubuque and Bellevue both indicate that substantive discussions with IC&E/DM&E have recently begun. Initiation of those discussions followed the Board's final PRB Construction approval, and they are proceeding on a serious and continuing basis.

Corporation Construction into the Powder River Basin, Finance Docket No. 33407 (STB served June 12, 2006) (adding 52nd negotiated community agreement, with Pierre, South Dakota). Notably, four of these agreements were entered into *after* the Board's final ruling. The Board encourages these kinds of voluntary arrangements, recognizing that "privately negotiated solutions often are more effective, and in some cases more far-reaching, than environmental mitigation the Board could impose unilaterally." PRB III at 4, n.8.

DM&E has a demonstrated track record in this area, and is confident that outcomes or discussions mandated by a regulatory proceeding are -- as the Board repeatedly observes -- far less effective than two parties working together. As we expect IDOT would acknowledge, IC&E has been a responsible corporate citizen and has indeed taken a "proactive" approach with customers and communities over the years. See IDOT Comments at 4. This is not a process that needs to be forced with artificial regulatory pressure that has no legal basis. That would do more harm than good. Where, as here, the law plainly precludes treating the IC&E acquisition and control transactions as if they were the PRB construction project, the reasonable likelihood of voluntary arrangements provides an additional compelling reason not to stretch the law beyond its breaking point. In short, there is no record or basis on which to suggest that the Board needs to depart from established precedent in order to ensure that IC&E will work with local communities.

The Board will appropriately consider in these proceedings "cumulative" environmental impacts -- the incremental effect, if any, of the IC&E acquisition and control transactions when added to the PRB construction project -- and IC&E and DM&E submitted extensive evidence on that subject in their petition to reopen. IDOT's comments include arguments about the nature and extent of cumulative effects arising from the IC&E transactions

and, while IC&E and DM&E disagree with those arguments, they can and will be addressed fully in the subsequent cumulative impacts review that the Board will undertake here. To the extent that IDOT and Bellevue seek additional time to file initial responses to the IC&E/DM&E petition to reopen, those requests should be denied; parties have had sufficient time to respond on the threshold issues, and the Board has an ample record on which to grant the two requested condition modifications, set out the scope of the cumulative impacts review to be undertaken, and to initiate the actual review process. IC&E and DM&E do not object to the Board providing the same time provided to commenters in other cases of this nature, which allow parties to respond to the evidence in the IC&E/DM&E petition and to submit their own evidence on cumulative impacts.

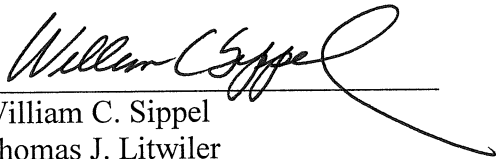
Finally, we note IDOT's explicit comment that, if IC&E and DM&E "wish to avoid litigation or to satisfy some city for political reasons, they could route all of the PRB coal over these [i.e., the IC&E] lines." IDOT Comments at 2-3. As discussed above, we take this as a concern that, to avoid moving trains through Rochester, Minnesota, DM&E will reroute all coal traffic off of the east end of its own line and onto IC&E lines in Iowa. Given the positions and statements of some Minnesota interests and politicians, we understand the source of that concern, and DM&E and IC&E restate here that they will not re-route any traffic onto IC&E lines to avoid litigation or satisfy political considerations. As Lynn Anderson and John Brooks explain at length in their verified statement included with the IC&E/DM&E petition to reopen, DM&E has no intention of using anything but the most efficient and competitive routing for any particular movement of coal. DM&E has fought hard and successfully to assure it has the right to do what the market demands. It cannot be the case that an unwarranted environmental review

should be conducted here simply because certain non-Iowa parties disagree with the outcome of a prior environmental review in a separate and independent transaction.

Paradoxically, the opposite effect is possible if, despite the clear legal requirements and compelling prudential concerns outlined above, a full, multi-year environmental review of any PRB coal movements over the former IMRL lines was required before such movements could occur, as the commenters urge the Board to require. If DM&E proceeded with the PRB project in the meantime, it would necessarily develop its marketing, traffic and operating patterns around the routes available to it -- as relevant here, via DM&E's line through eastern Minnesota to Minnesota City and Winona. That would have the artificial effect of forcibly diverting coal traffic away from natural and desired routings via IC&E and onto less efficient routings through eastern Minnesota and the communities there. It is difficult to see how any legitimate interest or purpose is served by that kind of distortion arising from regulatory process, or by what would effectively be an STB mandate of inefficient traffic routings of a single critical commodity.

WHEREFORE, IC&E and DM&E respectfully request that the Board accept this reply for filing, grant the modifications of conditions sought in the IC&E/DM&E petition to reopen, and initial appropriate procedures to consider the cumulative environmental effects, if any, associated with the IC&E acquisition and control proceedings.

Respectfully submitted,

By: 
William C. Sippel
Thomas J. Litwiler
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 920
Chicago, Illinois 60606-2832
(312) 252-1500

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

Dated: June 21, 2006

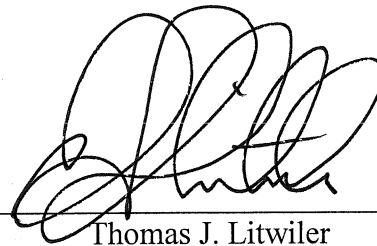
CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June, 2006, a copy of the foregoing **Reply of Iowa, Chicago & Eastern Railroad Corporation and Dakota, Minnesota & Eastern Railroad Corporation to Comments on Petition to Reopen** was served by overnight delivery upon:

Mark R. Lawson, Esq.
Bellevue City Attorney
Mark R. Lawson, P.C.
114 West Platt Street
Maquoketa, IA 52060

Crenna Brumwell, Esq.
Assistant City Attorney
City of Dubuque
330 Harbor View Place
300 Main Street
Dubuque, IA 52001

John Hey
Policy Analyst, Modal Division
Iowa Department of Transportation
800 Lincoln Way
Ames, IA 50010



Thomas J. Litwiler