

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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Canadian Pacific Railway Company, *et al* - Control - )  
Dakota, Minnesota & Eastern Railroad Corp, *et al* ) Finance Docket No 35081  
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**APPLICANTS' REPLY TO  
ARKANSAS ELECTRIC COOPERATIVE CORPORATION'S  
PETITION FOR RECONSIDERATION**

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**Dated: November 5, 2008**

Canadian Pacific Railway Company ("CPR"), Soo Line Holding Company ("SOO Holding"); Dakota, Minnesota & Eastern Railroad Corporation ("DM&E"), and Iowa, Chicago & Eastern Railroad Corporation ("IC&E") (collectively "Applicants") submit this Reply to the Petition for Reconsideration filed in the above-captioned proceeding on October 20, 2008 by Arkansas Electric Cooperative Corporation ("AECC's Petition"). AECC's Petition does not even refer to—much less attempt to satisfy—the standards governing petitions for reconsideration prescribed by the Board's regulations. AECC presents no "new evidence" in support of its Petition, nor does it contend that reconsideration of the *September 30 Decision* is warranted on account of "changed circumstances." Nor does AECC's Petition identify any "material error" in the Board's *September 30 Decision*. Rather, AECC simply repeats the same points and arguments that the Board considered and rejected in the *September 30 Decision*. Because AECC has failed to satisfy the standard for reconsideration, its Petition should be denied.

## I. BACKGROUND

AECC is a generation and transmission cooperative that provides wholesale electric power to electric cooperatives. AECC holds ownership interests in three coal-fired Arkansas generating stations that burn coal originating in the Powder River Basin ("PRB"). AECC filed comments and requests for conditions in this proceeding asserting that the proposed transaction would make it less likely that DM&E would exercise the authority granted to it in *Dakota, Minnesota & Eastern R R Corp—Construction into the Powder River Basin*, STB Fin Docket No. 33407 (Feb. 13, 2006) ("*PRB Construction Decision*"). Specifically, AECC argued (1) that the provisions of the CPR/DM&E acquisition agreement that would obligate CPR to make future contingent payments to DM&E's shareholders if the PRB Project is undertaken and certain coal

volumes are shipped over the new line render the PRB Project nonviable; and (2) that CPR's supposed "interdependence" with incumbent PRB carriers UP and BNSF creates a strong disincentive for CPR to move forward with the PRB Project. See AECC Comments and Requests for Conditions at 2-3. AECC also asserted that, if Applicants do not build the PRB line, their ownership of land acquired in connection with the PRB Project would undermine future efforts by an (unnamed) third party to build a hypothetical rail line between the PRB and Kansas City. *Id.* at 3. In order to address these alleged concerns, AECC requested conditions that would void the contingent payment provisions of the CPR-DM&E acquisition agreement, require CPR to decide by September 1, 2009 whether to proceed with the PRB Project; and, in the event that Applicants do not pursue the PRB Project, require Applicants to sell any real estate previously acquired for the PRB rail line right-of-way to any person who obtains Board authority to construct a new PRB line. *Id.* at 11.

AECC's assertion that its arguments were supported by "irrefutable and unrefuted evidence" (AECC's Petition at 4) is simply not the case. To the contrary, Applicants demonstrated that each of AECC's arguments was incorrect. Applicants refuted AECC's suggestion that the PRB Project would be more financially viable before the proposed transaction than after it. Specifically, Applicants showed that CPR's greater financial capability, as well as its expertise and prior experience both in designing and constructing new rail lines and in conducting coal hauling operations, can only enhance the PRB Project. See Applicants' Rebuttal at 41; Application V.S. Green at 5-6. The contingent payments about which AECC complained are not a "poison pill"—to the contrary, those payments would be triggered only upon attainment of economically valuable milestones that would generate benefits that far exceed the cost of the payments. See *id.* *Id.* Applicants also showed that allegations by AECC

(and similar claims by KCS) that CPR's commercial relationships with BNSF and UP would preclude CPR from acting in its own self-interest were specious. Indeed, all railroads are interdependent, and routine cooperation among carriers does not prevent them from competing for business. The record evidence showed that CPR "competes vigorously with both BN and UP for some traffic, while participating as interchange partners for other traffic " *Id* at 42.

The Board rejected each of AECC's requested conditions. Consistent with its prior holding in *Dakota, MN & E —Control—Iowa, Chicago & E*, 6 S.T.B 511 (2003) ("*DM&E/IC&E Control*"), the Board first observed that "it is not 'particularly pertinent' in a control proceeding whether that change in control makes the PRB line construction more or less likely." *September 30 Decision* at 16 (quoting *DM&E/IC&E Control* at 525-526) AECC had questioned the impact of the transaction at issue in that case on DM&E's financial ability to complete the PRB Project. The Board correctly held that "whether *DM&E/IC&E* common control makes construction of [a PRB] line more or less likely" was "a question for DM&E's potential investors and financial supporters," not a relevant consideration in a control proceeding *DM&E/IC&E Control*, 6 S T B at 525-26

After citing this precedent for rejecting the fundamental premise underlying AECC's conditions requests, the Board held that AECC had not presented convincing evidence either that the contingency payments would have a negative effect on prospects for completion the PRB Project or that CPRC's relationships with UP or BNSF would preclude it from pursuing the project. *September 30 Decision* at 16 As for AECC's demand that the Board force Applicants to divest lands acquired for a corridor for the PRB Project in the event they do not pursue the PRB Project, the Board found both that there was no evidence that the land Applicants had acquired was the only route into the PRB from Kansas City and that, if DM&E acquired property

rights via eminent domain that it would not use for rail purposes, state court remedies regarding those property rights may be available. *Id.*

## II. ARGUMENT

Under the Board's regulations, a petition for reconsideration of an action by the entire Board may be granted only upon a showing that "[t]he prior action will be affected materially because of new evidence or changed circumstances" or that "[t]he prior action involves material error." 49 C.F.R. § 1115.3(b); *see, e.g., Union Pac Corp—Control & Merger—Southern Pac. Rail Corp.*, STB Fin Docket No. 32760 (Sub-No 42) (Aug. 14, 2006) ("[A] petition for reconsideration must show that the prior action will be affected materially because of changed circumstances or new evidence or that the prior action involves material error.") AECC does not bother to mention this standard and does not come close to satisfying it. Indeed, AECC's failure to identify any new evidence, or to articulate with particularity any material error in the *September 30 Decision*—and its decision instead simply to repeat arguments that the Board had already considered—is alone grounds to reject its Petition. *See Kansas City So Ry Co—Trackage Rights Exemption—Gateway W R.R Co*, STB Fin. Docket No. 33780 (June 5, 2000) (denying petition for reconsideration that "for the most part merely repeat[s] arguments addressed in the prior decision"); *Victoria Terminal Enters., Inc—Transportation of Fertilizer Within Texas—Pet for Declaratory Order*, ICC No MC-C-30002 (Apr. 19, 1988) (rejecting petitions to reopen that "largely repeat arguments previously made and fully considered and discussed in our prior decision").

**A. AECC's Petition Does Not Demonstrate Changed Circumstances or New Evidence.**

AECC's Petition consists exclusively of arguments and evidence lifted from AECC's Comments and Requests for Conditions and AECC's Rebuttal Evidence filed earlier in this case. While AECC's Petition repeatedly cites to what AECC has said before, it presents no "new evidence." Nor does AECC do anything to establish "changed circumstances."

**B. AECC's Petition Does Not Demonstrate Material Error.**

AECC's Petition focuses on supposed flaws and oversights in the Board's *September 30 Decision*, but it does not explain why any of the Board's conclusions constitutes "material error" warranting reconsideration. Instead, AECC repeats its prior arguments and complains that the Board did not give them sufficient consideration. AECC is wrong, and it has certainly not identified any "material error" in the *September 30 Decision*.

First, AECC claims that the Board was wrong to adhere to its holding in *DM&E/IC&E Control* that the question of whether a change of control involving DM&E would make completion of the PRB Project more or less likely is not "particularly pertinent" in this proceeding. AECC's Petition at 16. This argument amounts to an attack on the reasoning of both the *PRB Construction Decision* and *DM&E/IC&E Control*. The *PRB Construction Decision* granted DM&E permissive authority to undertake the PRB Project, without imposing any time limit for completing the project or exercising that authority. Because the authority was permissive, in *DM&E/IC&E Control* the Board rejected AECC's arguments about the effect a change in control might have on "the viability of DM&E's PRB line," holding that any such

effect was not pertinent. Here, the Board correctly rejected essentially the same argument by AECC.<sup>1</sup>

Second, AECC repeats its claim that the contingent payments contemplated by the CPR-DM&E acquisition agreement would prevent CPR from undertaking the PRB Project. See AECC Petition at 4. In doing so, AECC simply restates evidence that it previously submitted and the Board has already rejected. As the Board noted, contingency payments are a common way for buyers and sellers to allocate risk, and there is simply no reason to conclude that these payments constitute a "poison pill." *September 30 Decision* at 16. Moreover, AECC's assertion that CPR was "willing to accept the 'poison pill' [contingency payments] in the merger agreement" (AECC's Petition at 6) assumes that those provisions were dictated by DM&E's shareholders. However, AECC offers no rational explanation as to why DM&E's shareholders would insist on contingency payments so high that they would (as AECC claims) scuttle the PRB Project. Such behavior would clearly not be in the DM&E shareholders' economic self-interest. To the contrary, it is reasonable to assume that the parties negotiated the terms of their agreement (including the contingent payment provisions) based upon the common objective of maximizing their return from the transaction.

To the extent AECC complains that the Board did not specifically discuss the reasons why it rejected the testimony of witness Nelson, the Board is not required to expound on the

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<sup>1</sup> AECC's suggestion that it raised "a different argument" in *DM&E/IC&E Control* is wrong. AECC Petition at 1 n 1. In that proceeding, as in this one, AECC requested conditions premised on the notion that a control transaction involving DM&E would have an adverse impact on the PRB Project. AECC's contention that the cases are distinct because only in this proceeding is AECC seeking conditions to prevent "interfer[ence] with the construction of a PRB line by another railroad" is likewise incorrect. *Id.* AECC sought similar conditions to secure rights for a potential "fourth line . . . into the PRB" in *DM&E/IC&E Control*. 6 S.T.B. at 526

rationale for that rejection *See, e.g., Simpson v Young*, 854 F.2d 1429, 1434-35 (D.C. Cir. 1988) (agencies are “not required to address every argument advanced by [a party] no matter how minor or inconsequential the argument may be”); *Pharaon v Board of Governors of Fed Reserve Sys*, 135 F.3d 148, 155 (D.C. Cir. 1998) (agencies “have no obligation to respond at all to insubstantial arguments”). Finally, AECC’s claim that Applicants did not submit “a shred of evidence in response to the viability issue” is plainly false—Applicants explained why CPR’s vastly greater financial resources, line construction expertise and coal hauling experience would enhance the prospects for the PRB Project, not detract from them *See Applicants’ Rebuttal at 41; Applicants’ Brief at 13.*

Third, the Board’s rejection of AECC’s repetitive claim that CPR’s relationship with UP and BNSF would effectively doom the PRB Project was not a “material error.” AECC’s suggestion that the Board did not consider evidence that “it would not be in CP’s ‘economic interest’ to build a line into the PRB” is simply wrong. AECC’s Petition at 6. The Board clearly acknowledged—and rejected—this argument *See September 30 Decision at 16* (noting that “AECC argues that the CPRC risks a loss of cooperation with UP and BNSF”) Elsewhere in the *September 30 Decision*, the Board likewise considered and rejected a similar claim by KCS that CPR’s relationship with UP would cause CPR to act in ways that were contrary to its commercial interest. *See September 30 Decision at 13*. AECC has not shown that CPR’s relationships with BNSF or UP are any different from the cooperative arrangements that are common among connecting rail carriers. Once again, AECC’s assertion that its arguments on this issue were “unrebutted” is demonstrably false. Applicants clearly rebutted such claims and demonstrated that CPR competes vigorously with both BNSF and UP *See Applicants’ Rebuttal at 47*. Indeed, the very evidence cited by AECC (Petition at 7)—the testimony of CPR witness Milloy—

established clearly that CPR both cooperates and competes with UP and BNSF, as CPR's commercial interests dictate

Finally, AECC argues that the conditions it requested "would preserve the possibility of a new PRB line without interfering with CP's legitimate interests." AECC Petition at 9. But the standard for imposing conditions on a control transaction is not whether such conditions might be helpful—the standard is whether the proposed condition is necessary to ameliorate anticompetitive effects that are both "likely" and "substantial." Based upon the record before it, the Board explicitly held that "the CPRC/DM&E/IC&E control transaction is unlikely to cause a substantial lessening of competition." *September 30 Decision* at 9. In light of this central holding, the Board's refusal to impose the conditions requested by AECC (or various other parties) was not material error. To the contrary, it was fully consistent with both the language of Section 11324(d) and longstanding Board precedent.

Moreover, the record does not support AECC's fanciful assertion that any land assembled by DM&E in connection with its planned route into the PRB constitute the only viable corridor for a line linking the PRB with Kansas City. AECC simply speculates that the portion mapped out by DM&E is "likely" to be the best route. *Id.* at 9-10. This unsupported speculation is no reason to impose the extraordinary conditions that AECC demands and certainly does not demonstrate that the Board's refusal to impose those conditions constituted material error. As for AECC's claim not to understand what state law remedies might allow a hypothetical new entrant into the PRB to acquire land from DM&E for a new PRB route, the Board's meaning is clear. If Applicants do not complete the PRB Project, and if another carrier seeks and obtains Board authorization to build a line into the PRB, and if a portion of lines

acquired by DM&E are on the ideal route for such a line, then state eminent domain proceedings would be the appropriate avenue for the new entrant to obtain land from DM&E.

In short, AECC's Petition is little more than a rehash of arguments that the Board has already (correctly) rejected. Section 1115.3(b)'s requirement that a party seeking reconsideration demonstrate "new evidence," "changed circumstances" or "material error" is designed to preclude parties from doing what AECC has done: prolong proceedings by filing reconsideration petitions that simply reargue points the Board has already considered and rejected. AECC's improper petition falls far short of the high standards of § 1115 3(b), and it should be denied.

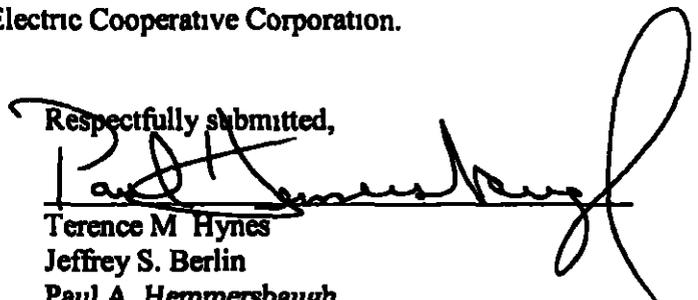
### CONCLUSION

For the reasons set forth herein, Applicants respectfully request the Board to deny the Petition for Reconsideration of the Arkansas Electric Cooperative Corporation.

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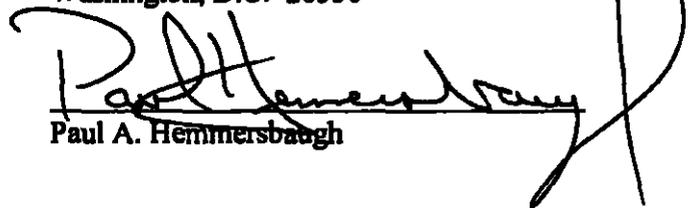
Dated: November 5, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that I have caused the Applicants' Reply to Arkansas Electric Cooperative Corporation's Petition for Reconsideration to be served by first class mail, postage prepaid, this 5th day of November 2008, on all parties of record and the following persons:

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