

306594

ENTERED
Office of Proceedings
May 10, 2023
Part of
Public Record



Oral Argument on Emergency Service Order

NTEC v. BNSF Railway Company

Dkt. No. NOR 42178

Adam Weiskittel **Timothy Strafford** **Anthony LaRocca**
AVP & AGC, OPERATIONS PARTNER PARTNER
BNSF RAILWAY STEPTOE & JOHNSON, LLP STEPTOE & JOHNSON, LLP

MAY 10, 2023

Copyright 2022 BNSF Railway. All rights reserved. All trademarks, copyrights and materials not owned by BNSF are the property of the cited source.

Overview

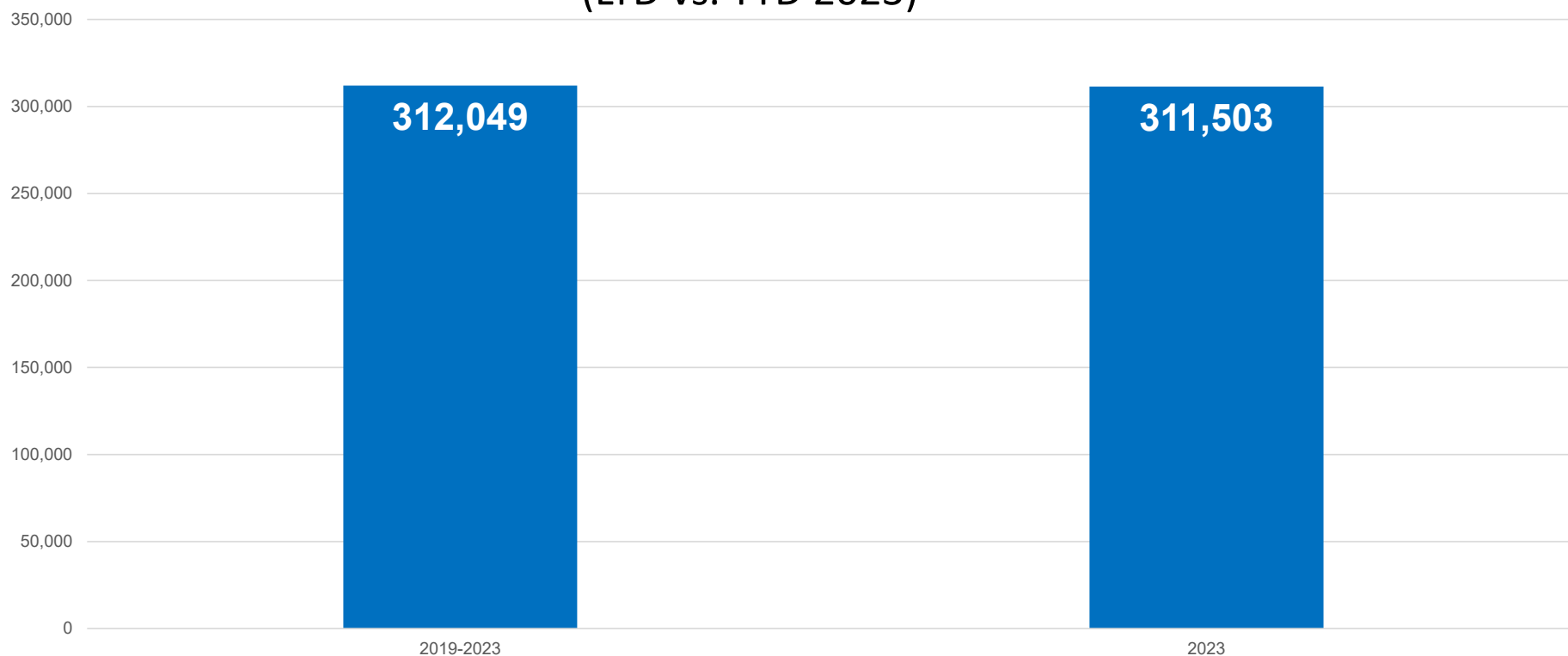


- There is no emergency
- There is no irreparable harm
- There will be harm to others
- NTEC is unlikely to succeed on merits

There is No Emergency



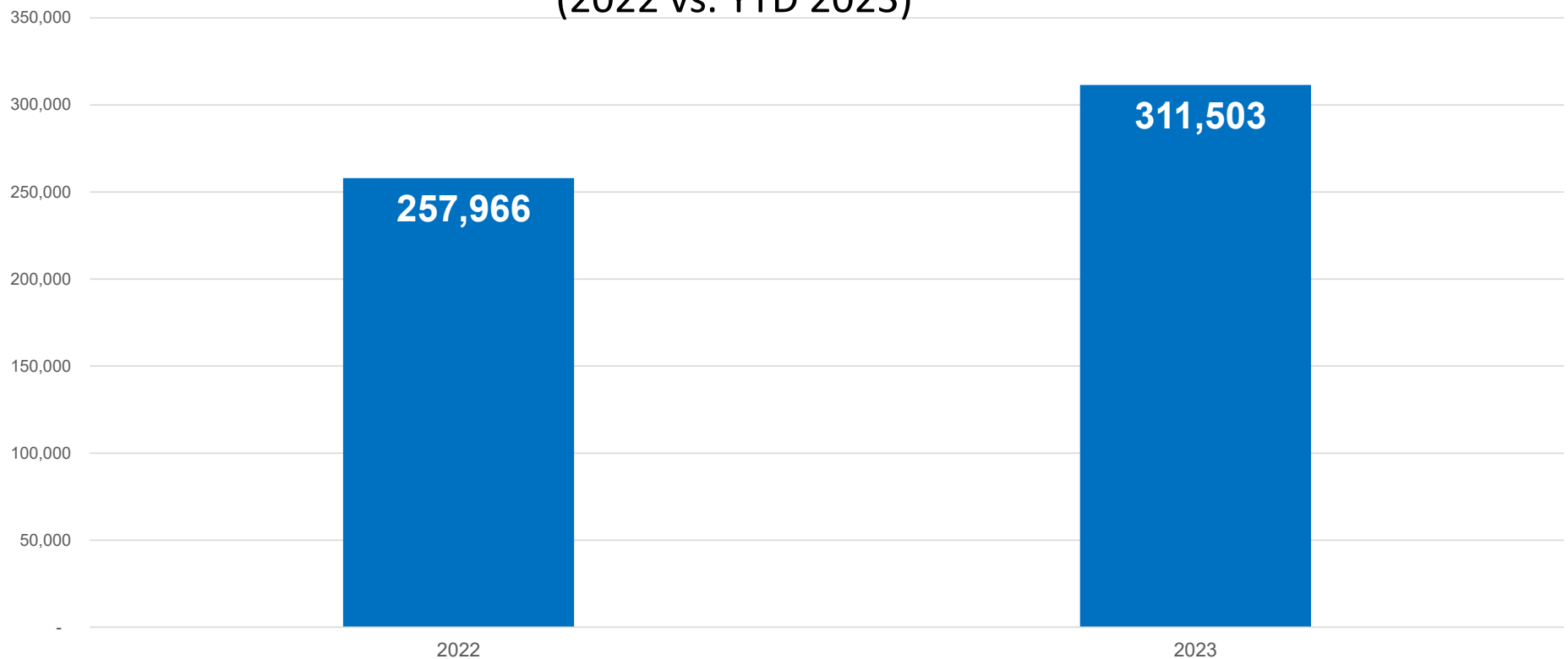
NTEC Monthly Average Tons to Westshore
(LTD vs. YTD 2023)



There is No Emergency



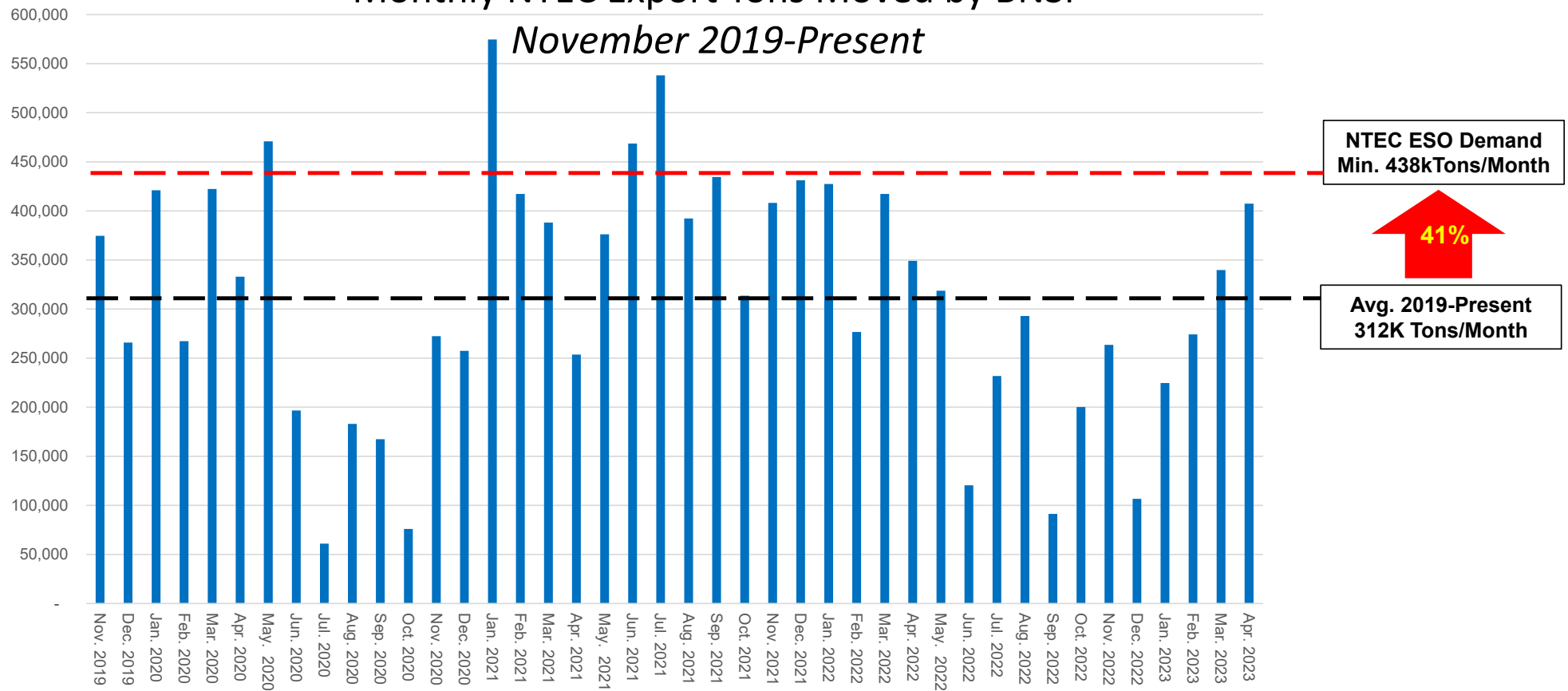
NTEC Monthly Average Tons to Westshore
(2022 vs. YTD 2023)



There is No Emergency



Monthly NTEC Export Tons Moved by BNSF
November 2019-Present



EP 628 - Expedited Relief for Service Inadequacies

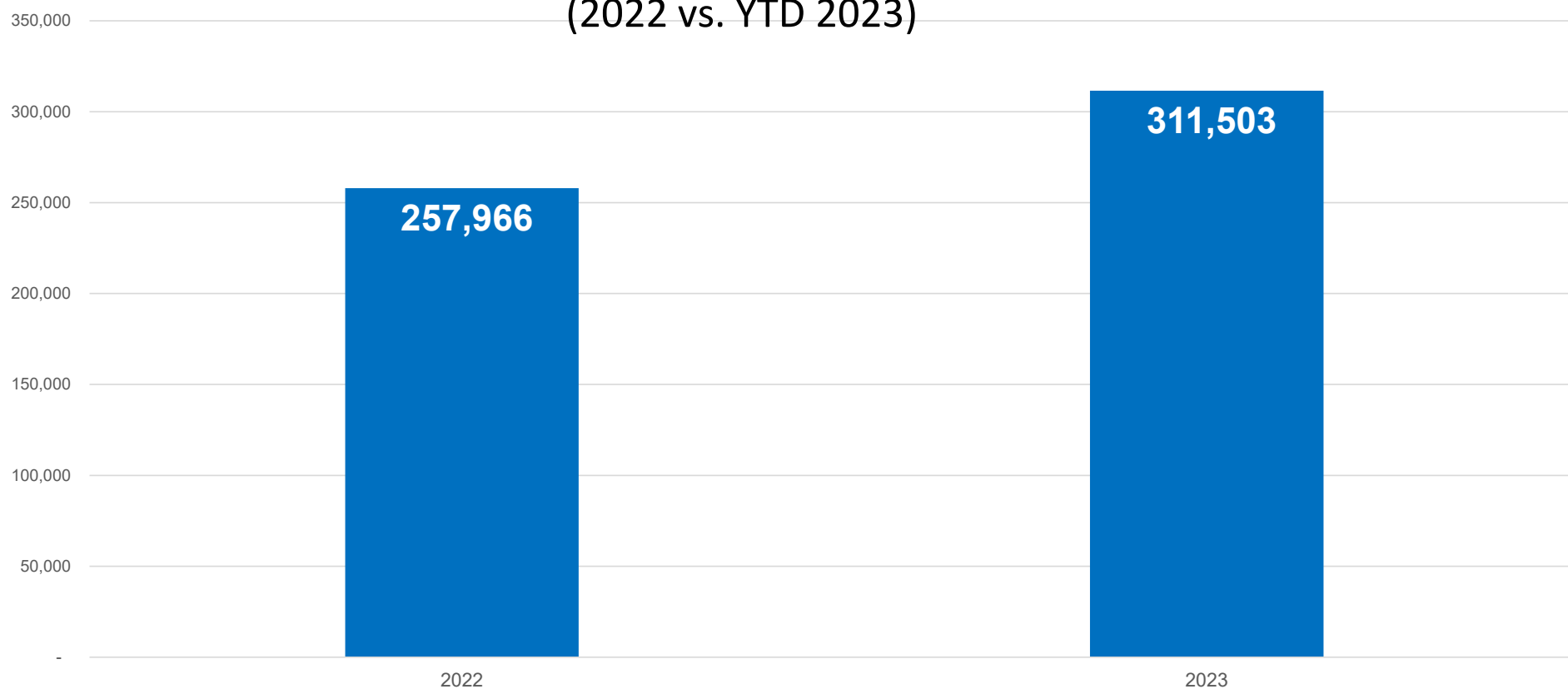


- “[T]hese rules are designed only to address *serious ongoing service disruptions*.”
- “[Not] meant for situations where service is adequate, but simply not up to the level that a particular shipper or connecting carrier might desire.”

NTEC's Other Claims Lack Merit



NTEC Monthly Average Tons to Westshore
(2022 vs. YTD 2023)



EP 762 - Harm to Other Shippers

- “The Board will not award relief *unless it is clear*, based on the limited record, that it will not have an overall negative affect on shippers and that it will *avoid any risk of placing other shippers in similar circumstances as petitioner.*”

 **EXECUTIVE BRANCH OF THE APSÁALOOKE NATION**
P.O. BOX 159, 43 HERITAGE RD.
CROW AGENCY, MONTANA 59022
406-679-6567

Frank Whiteclay, Chairman
Lawrence DeCrane, Vice Chairman
Levi Black Eagle, Secretary
Channis D. Whiteman, Vice Secretary

306572

May 5, 2023

ENTERED
Office of Proceedings
May 5, 2023
Part of
Public Record

VIA E-FILE

Ms. Mai T. Dinh
Director, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: STB Docket No. NOR 42178, Navajo Transitional Energy Company, LLC - Ex Parte Petition for Emergency Service Order

Dear Ms. Dinh,

The Crow Tribe (“Crow” or “Tribe”) is federally recognized Indian tribe located in south-central Montana. The Friendship Treaty of 1825 between the Tribe and the United States recognizes our rights to trade. An 1889 Act of Congress (“Act”) granted the Big Horn Southern Railroad Company (now BNSF) a right-of-way through a part of our Reservation. The Act explicitly provided that the “operation of such railroad shall be conducted with due regard for the rights of the [Crow] Indians.”

306573

ENTERED
Office of Proceedings
May 5, 2023
Part of
Public Record

Global Coal Sales Group, LLC

6641 Dublin Center Drive
Dublin, Ohio 43017
(614) 221-0101

May 5, 2023

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street SW
Washington, DC 20024

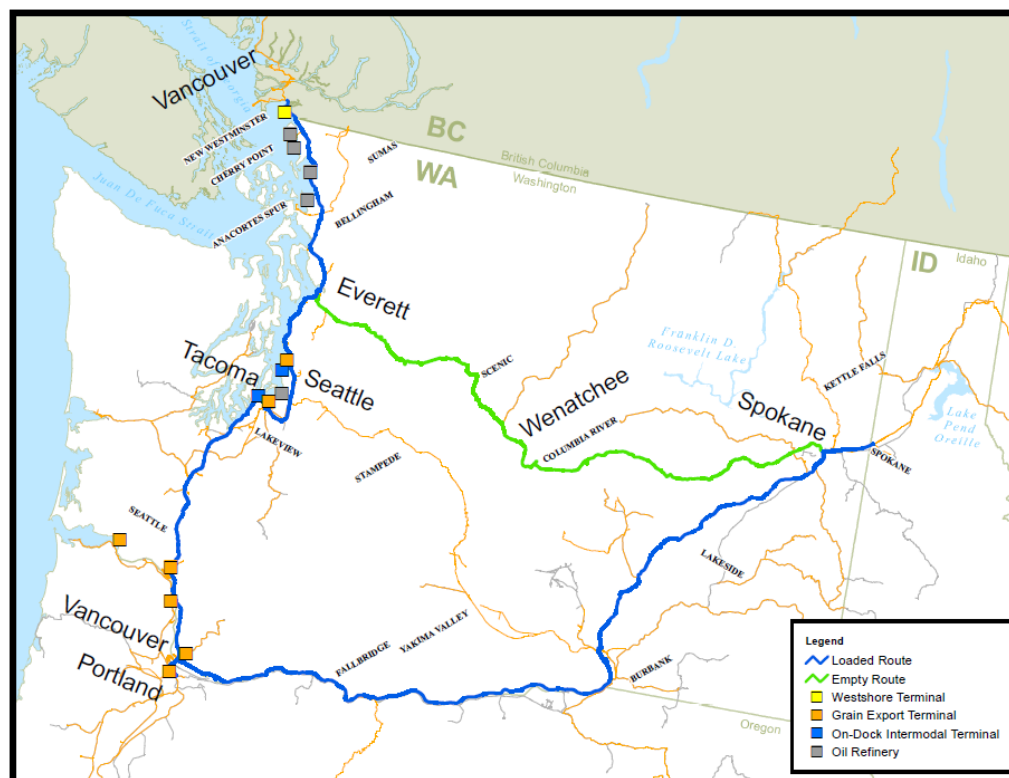
Re: STB Docket No. NOR 42178, Navajo Transitional Energy Company, LLC v BNSF Railway Company

Dear Ms. Brown:

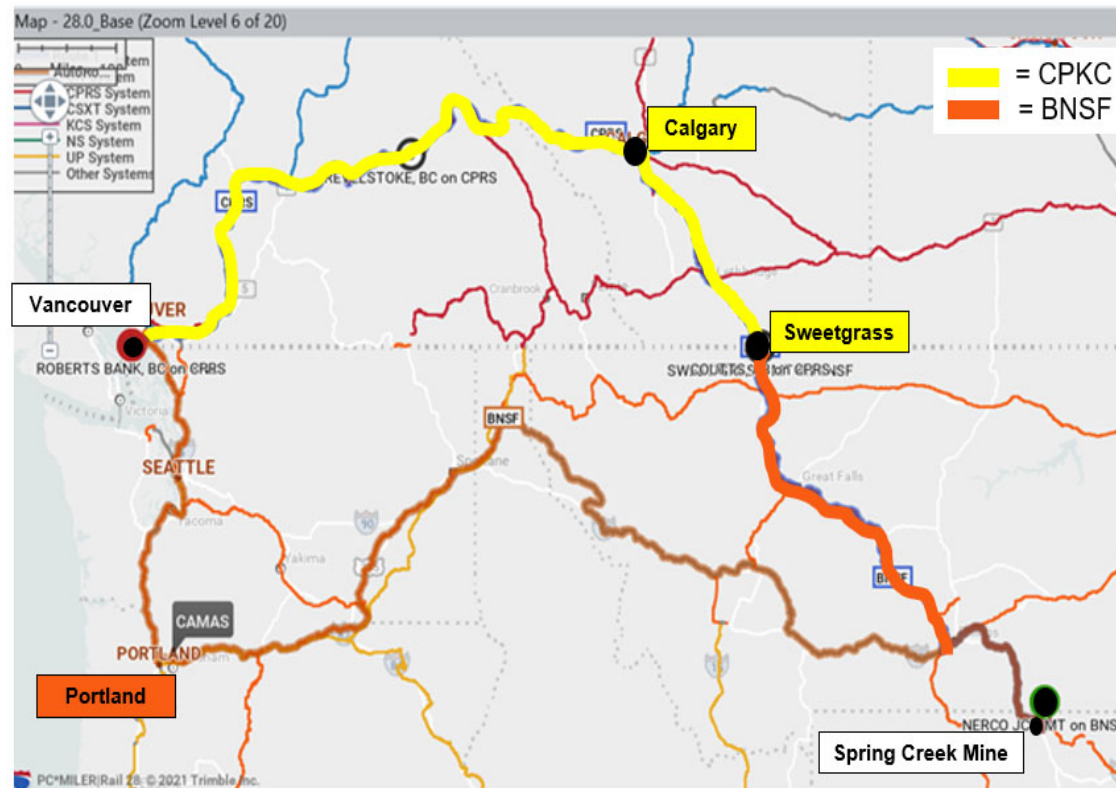
Global Coal Sales Group, LLC (“Global”) is aware of the proceedings that Navajo Transitional Energy Company LLC (“NTEC”) initiated at the Board regarding BNSF’s transportation of coal for export through Westshore Terminals at Roberts Bank, British Columbia. We understand that in NOR 42178, NTEC v. BNSF, Ex Parte Application for Section 11132 Emergency Service

Factors Affecting BNSF's Service to NTEC

PNW Facilities and Routes



Sweetgrass Alternative Available to NTEC



NTEC Has Not Shown Irreparable Harm



The harm will be “certain and great, actual and not theoretical, and so imminent that there is a clear and present need for equitable relief to prevent irreparable harm,” and ...“the harm must be beyond remediation.”

- *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 7-8 (D.C. Cir. 2016) (“*League of Women Voters*”).

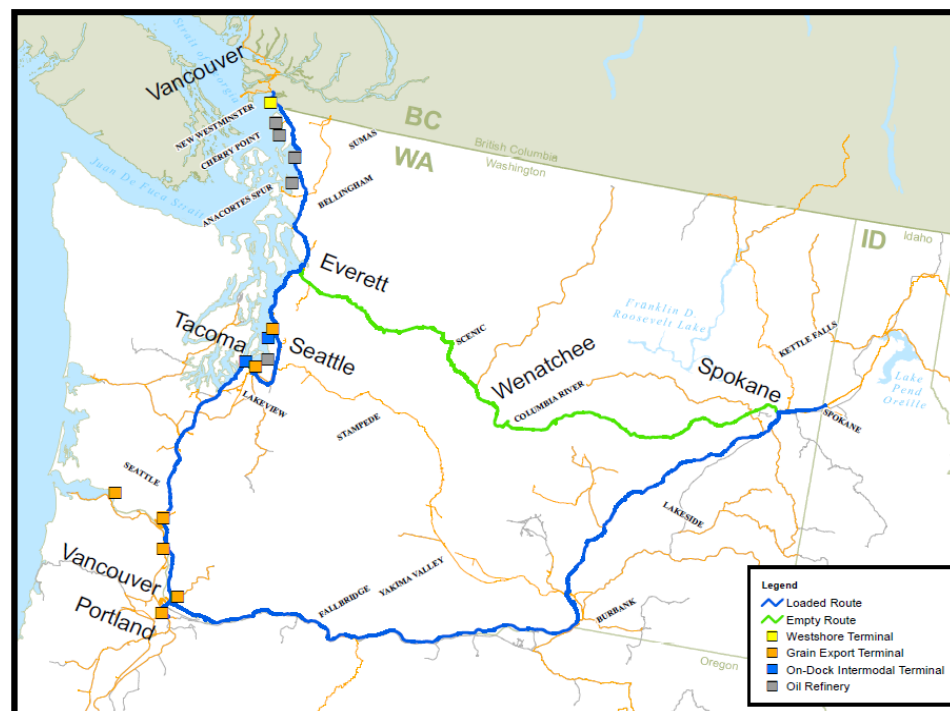
NTEC Has Not Shown Irreparable Harm



- Lost sales cannot be irreparable harm
- NTEC claims \$165M for 2022 damages
- NTEC claims approx. \$10M for 2023 damages

Harm to Others

PNW Facilities and Routes



NTEC Unlikely to Succeed on the Merits



49 U.S.C. § Section 11101(a)

A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request. [**Sentence 1**] A rail carrier shall not be found to have violated this section because it fulfills its reasonable commitments under contracts authorized under section 10709 of this title before responding to reasonable requests for service. [**Sentence 2**] Commitments which deprive a carrier of its ability to respond to reasonable requests for common carrier service are not reasonable. [**Sentence 3**]

Intent of Congress



**Committee on Transportation and Infrastructure,
H.R. Rep. No. 104-311 at 103 (1995)**

Sentence 3 is intended “to clarify that, although a casual requester of service cannot legally demand equal treatment with another shipper who has made a prior contract for service, the carrier may not render itself incapable of reasonably responding to such casual requests for common carrier service, such as by effectively divesting itself of control of its car fleet through committing all or virtually all of the fleet under prior contracts.”

Meaning of Sentence 3



- Did not change priority of contracts
- Reasonableness must be evaluated at time of contract
- Carrier cannot tie up “all or virtually all of the fleet under prior contracts”

Overview



- There is no emergency
- There is no irreparable harm
- There will be harm to others
- NTEC is unlikely to succeed on merits

