

307013

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42179

ENTERED
Office of Proceedings
August 24, 2023
Part of
Public Record

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

**BNSF RAILWAY COMPANY'S
MOTION SEEKING RECOMMENDATION
TO ISSUE LETTER OF REQUEST**

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Dated: August 24, 2023

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42179

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

**BNSF RAILWAY COMPANY'S
MOTION SEEKING RECOMMENDATION
TO ISSUE LETTER OF REQUEST**

INTRODUCTION

BNSF Railway Company (“BNSF”), pursuant to 49 U.S.C. § 1321 and 49 C.F.R. § 1113.2, respectfully requests that the Administrative Law Judge assigned to this proceeding issue the attached Recommendation (**Appendix A**), which recommends that the United States District Court for the District of Columbia issue a Letter of Request on behalf of BNSF to obtain documents and deposition testimony from the following foreign third parties:

WoonBong Energy Co., LTD (“WoonBong Energy”)

25th Floor, RM 2025
149 Sejong-Daero, Jongno-gu,
Seoul, 03186
Republic of Korea
Telephone: +82-2-6001-3327

Korea East West Power Co., LTD (“Korea East West”)
JONGGA-Ro 395, Jung-Gu
44543 Ulsan
Republic of Korea
Telephone: +82 7050001000

Korea South-East Power Co., LTD (“Korea South-East”)
Sadeul-Ro 123 Beon-Gil 32
52852 Jinju-Si
Republic of Korea
Telephone: +82-70-8898-1000

Korea Midland Power Co., LTD (“Korea Midland”)
Boryeongbuk-Ro 160
33439 Boryeong-Si
Republic of Korea
Telephone: +82 70-7511-1114

The Letter of Request (**Appendix B**) seeks the assistance of the appropriate judicial authority in Korea to obtain documents and deposition testimony relevant to these proceedings. In this case, petitioner Navajo Transitional Energy Company, LLC (“NTEC”) has repeatedly cited alleged lost sales and reputational harm in Asia as damages. *See, e.g.*, Compl. ¶ 38. And since NTEC has identified WoonBong Energy, Korea East West, Korea South-East, and Korea Midland (collectively, the “Korean Customers”) as customers who purportedly expressed negative views regarding NTEC’s reputation for reliable coal exportation, *see* Aug. 9, 2023 Resp. to Interrogatory Nos. 11-12 (attached as **Exhibit 1**), it is appropriate to seek discovery from these Korean Customers regarding NTEC’s allegations. The information cannot be obtained through other means. The Korean Customers have internal information and communications relevant to NTEC’s claims that NTEC would not have had access to or may not have retained. BNSF respectfully requests that the

Administrative Law Judge issue the attached recommendation so that BNSF may initiate a brief civil proceeding in the District Court for the District of Columbia's miscellaneous docket and obtain issuance of the Letter of Request.

BNSF has attached to the Letter of Request requests for the production of documents, a set of deposition questions, the Protective Order in this matter, the Surface Transportation Board rules, and the Complaint. BNSF will also file with the District Court certified translations of the documents into Korean.

In support of its Motion, BNSF states the following.

ARGUMENT

I. The District court has the authority to issue a Letter of Request to the appropriate judicial authorities in the Republic of Korea.

The Korean Companies are not subject to the Surface Transportation Board's subpoena power. *See* 49 U.S.C. § 1321 ("The Board may subpoena witnesses and records related to a proceeding of the Board from any place in the United States."). Nonetheless, both the United States and the Republic of Korea are signatories to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Evidence Convention"), 23 U.S.T. 2555; *see also* 28 U.S.C. § 1781 (permitting "the transmittal of a letter rogatory or request directly from a tribunal in the United States to the foreign or international tribunal, officer, or agency to whom it is addressed and its return in the same manner" and reproducing the Hague Evidence Convention); Fed. R. Civ. P. 28(b)(1) ("A deposition may be taken in a foreign country . . . under an applicable treaty or convention [or] under a letter of request"); Hague Conference on Private International Law, Republic of Korea,

available at: <https://www.hcch.net/en/states/authorities/details3/?aid=262> (last visited Aug. 23, 2023); U.S. State Dep’t, South Korea (Republic of Korea) Judicial Assistance Information, <https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/KoreaRepublicof.html> (“State Dep’t Korea Fact Sheet”) (last visited Aug. 23, 2023).¹

The Hague Evidence Convention, as a treaty ratified by and acceded to the United States, is the “supreme law of the land” with the same force and effect as a federal statute. *Laker Airways Ltd. v. Pan Am. World Airways*, 103 F.R.D. 42, 49 (D.D.C. 1984) (“The Hague Convention . . . is an international treaty and as such is entitled to be recognized as part of the supreme law of the land.”); *see also Kapar v. Kuwait Airways Corp.*, 845 F.2d 1100, 1104 (D.C. Cir. 1988) (“As a treaty of the United States, the Convention ‘is equal in stature and force as any other domestic federal law.’”). Although the Surface Transportation Board is authorized to *issue* letters of request, *see* 28 U.S.C. § 1781, judicial authorities in the Republic of Korea will not accept letters of request issued by administrative agencies. *See* State Dep’t Korea Fact Sheet. Therefore, a Letter of Request by the United States District Court for the District of Columbia is proper under United States law.

¹ Because the Republic of Korea is a signatory country, it accepts letters of request in place of letters rogatory. Although similar, letters of request are sent directly from the district court to the foreign nation’s central authority, as opposed to letters rogatory which must be transmitted through diplomatic channels.

II. The Korean Customers possess documents and information that are relevant to these proceedings.

In its Complaint and Petition for Declaratory Order (Apr. 14, 2023) (“Complaint”), Petitioner NTEC claimed damage from “the impact on NTEC’s business reputation when railroad deliveries are inconsistent or non-existent.” Compl. ¶ 38. At the hearing on NTEC’s request for an Emergency Service Order, officials from NTEC vaguely testified regarding the alleged reputational damage it claims based on conversations with Korean customers:

- “[W]e have long-term customers, all of the five major state owned Korean Jenkos [sic] all rely on our product. And so this is a conversation we have to have again and again as to why is it that the railroad’s performing this way? When is it going to get better? What are you doing to ensure that you can be reliable on the future? So that's impacting every single commercial discussion we're having with our customers in Asia.” Hearing Tr. 122:20-123:7 (May 10, 2023).
- “That was probably the most disconcerting, you know, conversations we had when people would say well you know, this railroad problem exists, but it only exists for you.” *Id.* at 123:16-19.

Further, the Board cited the “reputational injuries [NTEC] is suffering” as irreparable harm to support a preliminary injunction in this matter. *See* Surface Transp. Board, Decision at 10, Docket No. NOR 42178 (June 23, 2023).

NTEC has also claimed lost sales. Specifically, NTEC has alleged that “BNSF’s ongoing common carrier service failures also have caused NTEC to lose sales.”

Compl. ¶ 54; *see also id.* ¶ 61 (“BNSF’s unreasonable practices also have caused NTEC to lose export coal sales.”). In NTEC’s August 9, 2023 Supplemental Responses to BNSF’s First Set of Interrogatories, NTEC elaborated on these conversations with the Korean Customers, which NTEC contends “reflect or provide evidence of reputational harm to NTEC caused by BNSF.” *See* Aug. 9, 2023 Resp. to Interrogatory Nos. 11-12. A chart of these purported conversations is reproduced below:

Date	Customer	Location	Communication	NTEC’s Summary
January 30, 2023	Woon Bong Energy	Tokyo, Japan	In-person	Meeting with Woon Bong Energy (NTEC Sales Agent in Korea) regarding BNSF service deficiencies and specifically why NTEC’s rail service lagged far behind other US coal producers in 2022. The meeting also included discussion of prospects for BNSF service to NTEC in 2023.
March 27, 2023	Woon Bong Energy	Email	Email	NTEC addressed the possible need to discontinue offering coal sales to Korean customers due to BNSF continuing service deficiencies and due to awaiting BNSF’s commitment to provide more trains per month.
April 5, 2023	Woon Bong Energy	Email	Email	Email addressed BNSF’s unexpected increase in train counts for April and May and customer interest in additional

Date	Customer	Location	Communication	NTEC's Summary
				cargos on short notice for 2Q23.
July 5, 2023	Woon Bong Energy	Email & Phone	Email & Phone	Multiple Korean customers inquired about the impact of the MRL bridge collapse on potential BNSF service to NTEC.
April 25, 2023	Korea East-West Power	Ulsan, S. Korea	In-person	EWP management requested updates on Spring Creek Mine production and the outlook for BNSF's rail service. EWP expressed specific concerns future business opportunities with NTEC due to its poor logistics reputation in light of its ongoing rail service issues.
April 26, 2023	Korea South-East Power	Jinju, S. Korea	In-person	KOSEP required assurances that that NTEC was taking appropriate actions to resolve the ongoing rail service issues with BNSF. KOSEP indicated that it would reduce its reliance on NTEC unless NTEC could resolve its logistics issues now and going forward. KOSEP asked many questions regarding BNSF and rail operations generally in the United States.
May 15, 2023	Korea South-East Power	Email	Email	NTEC responded to KOSEP's request for information regarding the STB Emergency Service order hearing

Date	Customer	Location	Communication	NTEC's Summary
				and its potential impact on rail service.
April 27, 2023	Korea Midland Power	Boryeong, S. Korea	In-person	KOMIPO's primary topic of discussion was why BNSF continually refused to provide NTEC with requested service levels. KOMIPO indicated that they had heard rumors that NTEC had unfavorable rail agreements versus other potential suppliers.

Id. BNSF must be able to probe NTEC's claims of reputational damages and lost sales with testimony and documents from the customers whose statements allegedly evidence NTEC's purported reputational harm.

Evidence obtained from the Korean Customers would shed light on NTEC's damages claims, which at the moment are speculative. *See* Hearing Tr. at 124 (NTEC witness referring to reputational harm as "highly speculative"). The Korean Customers thus possess information relevant to this case, and witnesses from the Korean Customers would be able to testify regarding NTEC's reputation in Asia and whether its reputation has impacted its ability to conduct business.

A list of the questions to be asked of the witness and documents to be requested is identified in **Schedules A-D** of the proposed Letter of Request attached as Appendix B.

III. BNSF's request for information is consistent with the laws of the Republic of Korea.

The Republic of Korea is a party to the Hague Convention and has an established process to receive letters of request. *See* Hague Conference on Private International Law, Republic of Korea, available at: <https://www.hcch.net/en/states/authorities/details3/?aid=262> (last visited Aug. 23, 2023). The Director of International Affairs at the National Court Administration is the Central Authority for the request. *Id.* The requests conform to the requirements of the laws of the Republic of Korea, which has no blocking statutes in force. *See id.*²

BNSF's Letter of Request complies with the guidelines for seeking documents and testimony. In particular, the proposed document requests and deposition questions are as specific and targeted as reasonably possible to probe NTEC's allegations of reputational damage and inadequate service. BNSF has no means of obtaining the information from the Korean Customers otherwise. As previously stated, although the Republic of Korea is a signatory to the Hague Evidence Convention, the Korean customers are not within the Board's subpoena power.

² In compliance with Korean law, BNSF limits its document requests to specifically dated emails between NTEC and its Korean Customers with a description of their subject matter, as shown in the above chart. *See Declarations of Reservations of the Republic of Korea*, Hague Conference on Private International Law, <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1057&disp=resdn> (last visited Aug. 23, 2023); *see also Fire Insurance Exchange v. CNA International, Inc.*, No. 19-CV-434 (PJS/ECW), 2020 WL 12951122, at *2 (D. Minn. Oct. 29, 2020) (issuing letter of request to South Korea even though party sought documents "relating to" other documents because the issue "is best suited for a court of the Republic of Korea to decide to the extent any objections are raised.").

Finally, BNSF's pressing need for the requested information outweighs any burden on the Korean Customers. The requests are narrowly tailored and straightforward. The existing Protective Order, which will be attached to the Letter of Request and apply to evidence from the Korean Customers, should alleviate any confidentiality concerns.

CONCLUSION

BNSF respectfully requests that the Administrative Law Judge assigned to this proceeding grant the Motion and issue the attached Recommendation, which BNSF will file with the United States District Court for the District of Columbia.

Respectfully submitted,

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Tamara R. Middleton
Adam Weiskittel
Jill M. Rugema
BNSF Railway Company
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2383

/s/ Timothy J. Strafford
Anthony J. LaRocca
Timothy J. Strafford
Molly Bruder Fox
Onika K. Williams
Tara A. Woods
Steptoe & Johnson LLP
1330 Connecticut Ave., NW
Washington, DC 20036
(202) 429-3000

Counsel for BNSF Railway Company

Dated: August 24, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing to be served electronically or by first-class mail, postage pre-paid, on all parties of record in this proceeding. I have also served the Administrative Law Judge assigned to this proceeding via electronic mail.

/s/ Tara A. Woods

Tara A. Woods

Attorney for BNSF Railway Company

August 24, 2023

EXHIBIT 1

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC,	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. NOR 42179
	)	
BNSF RAILWAY COMPANY,	)	
	)	
Defendant.	)	
	)	

**NAVAJO TRANSITIONAL ENERGY COMPANY, LLC’S
SUPPLEMENTAL RESPONSES AND OBJECTIONS TO
BNSF’S FIRST SET OF INTERROGATORIES**

Pursuant to 49 C.F.R. § 1114.26, the Navajo Transitional Energy Company, LLC (“NTEC”) hereby provides this supplemental response to BNSF’s First Set of Interrogatories.

A. General Objections

NTEC incorporates its General Objections included in its Responses and Objections to BNSF’s First and Second Interrogatories served on August 3, 2023.

B. SUPPLEMENTAL AND RESPONSES

INTERROGATORY NO. 11:

Identify all customers or potential customers with whom you have had discussions related to the volume of rail service that you receive from BNSF, identify when those discussions took place, and describe the substance of those discussions.

RESPONSE:

NTEC incorporates its August 3, 2023 response to this Interrogatory. NTEC further states that NTEC met in person with, corresponded with, or spoke by telephone with the following current or potential customers in 2023 as follows:

Date	Customer	Location	Communication	Summary
1/5/2023	JERA	Phone call	Phone	Addressed concerns raised by JERA regarding BNSF's continuing rail service deficiencies.
1/30/2023-2/3/2023	Asia Meetings (detailed below)	Japan and Singapore	In-person	Meetings with customers in Japan and Korea specifically to address concerns raised by those customers regarding ongoing rail performance issues and to attempt to bolster NTEC's reputation with customers.
1/30/2023	Woon Bong Energy	Tokyo, Japan	In-person	Meeting with Woon Bong Energy (NTEC Sales Agent in Korea) regarding BNSF service deficiencies and specifically why NTEC's rail service lagged far behind other US coal producers in 2022. The meeting also included discussion of prospects for BNSF service to NTEC in 2023.
1/30/2023	Mitsubishi Japan	Tokyo, Japan	In-person	Meeting with Mitsubishi, which provides sales-related services to NTEC in the Japanese market. Mitsubishi indicated that if NTEC did not find a fix or solution for BNSF's inconsistent and inadequate rail performance, NTEC (and via extension Mitsubishi) would find it difficult to market in Japan given that Japanese buyers require reliability for long-term business relationships.
1/31/2023	Kyushu Electric	Fukuoka, Japan	In-person	Kyushu expressed concerns that NTEC may not be a reliable supplier for future coal shipments. NTEC discussed BNSF's rail performance and its efforts to secure reliable rail service. Kyushu has not signed on for an additional long-term contract for 2023-24, and the meeting indicated that Kyushu may be difficult to win back as a customer after BNSF's persistent service issues to NTEC.
1/31/2023	Joban	Tokyo, Japan	In-person	Joban required assurances that NTEC was taking appropriate actions to resolve the ongoing rail service issues with BNSF. Joban specifically inquired as to why Signal Peak did not experience the same rail service problems as NTEC.
2/1/2023	JERA Tokyo	Tokyo, Japan	In-person	JERA expressed serious concerns regarding NTEC's rail issues. JERA explicitly stated that NTEC's rail issues may make it more challenging to enter into future long-term agreements. JERA specifically inquired as to why Signal Peak did not experience the same rail service problems as NTEC.
2/3/2023	JERA Singapore	Singapore	In-person	JERA Singapore discussed NTEC's rail challenges as the priority topic of conversation, and they repeatedly inquired about the likelihood of NTEC's rail service recovering in the near or long term. JERA Singapore specifically inquired as to why other US coal

Date	Customer	Location	Communication	Summary
				producers were not equally impacted by BNSF's rail service issues.
3/27/2023	Woon Bong Energy	Email	Email	NTEC addressed the possible need to discontinue offering coal sales to Korean customers due to BNSF continuing service deficiencies and due to awaiting BNSF's commitment to provide more trains per month.
4/3/2023	JERA	Video call	Call	The parties discussed outstanding contract issues and the outlook for BNSF rail service in coming months. JERA again expressed concerns about the reliability of NTEC coal shipments and rail service.
4/5/2023	Woon Bong Energy	Email	Email	Email addressed BNSF's unexpected increase in train counts for April and May and customer interest in additional cargos on short notice for 2Q23.
4/25/2023-4/28/2023	Korea Meetings (detailed below)	Korea	In-person	NTEC scheduled meetings to discuss business opportunities with customers in Korea. All of the customers requested updates on NTEC's rail problems and questioned whether NTEC would be a reliable supplier going forward.
4/25/2023	Korea East-West Power	Ulsan, S. Korea	In-person	EWP management requested updates on Spring Creek Mine production and the outlook for BNSF's rail service. EWP expressed specific concerns future business opportunities with NTEC due to its poor logistics reputation in light of its ongoing rail service issues.
4/26/2023	Korea South-East Power	Jinju, S. Korea	In-person	KOSEP required assurances that that NTEC was taking appropriate actions to resolve the ongoing rail service issues with BNSF. KOSEP indicated that it would reduce its reliance on NTEC unless NTEC could resolve its logistics issues now and going forward. KOSEP asked many questions regarding BNSF and rail operations generally in the United States.
4/27/2023	Korea Midland Power	Boryeong, S. Korea	In-person	KOMIPO's primary topic of discussion was why BNSF continually refused to provide NTEC with requested service levels. KOMIPO indicated that they had heard rumors that NTEC had unfavorable rail agreements versus other potential suppliers.
5/15/2023	Korea Southeast Power	Email	Email	NTEC responded to KOSEP's request for information regarding the STB Emergency Service order hearing and its potential impact on rail service.
6/12/2023	Mitsubishi Japan	Phone call	Phone	Mitsubishi discussed the Japanese markets. Mitsubishi again asked for details on NTEC's expectations for BNSF service and whether NTEC expected to meet customer reliability and volume expectations in light of its rail service issues.
6/24/2023	JERA	Email	Email	JERA inquired about the impact of the MRL bridge collapse on potential BNSF service to NTEC.
7/5/2023	Woon Bong Energy	Email & Phone	Email & Phone	Multiple Korean customers inquired about the impact of the MRL bridge collapse on potential BNSF service to NTEC.

Date	Customer	Location	Communication	Summary
7/26/2023	Mitsubishi Japan	Video call	Call	Mitsubishi discussed the Japanese markets. Mitsubishi again asked for details on NTEC's expectations for BNSF service and whether NTEC expected to meet customer reliability and volume expectations in light the STB's preliminary injunction.

NTEC further states that it frequently communicates by phone with customers or potential customers. NTEC did not keep written records of each of those calls. NTEC further states that discovery is ongoing and NTEC reserves the right to supplement these responses or provide responsive documents in response to this Interrogatory.

INTERROGATORY NO. 12:

Describe all conversations with customers or potential customers that You contend reflect or provide evidence of reputational harm to NTEC caused by BNSF.

RESPONSE:

NTEC incorporates its August 3, 2023 to this Interrogatory. In addition, NTEC incorporates its supplemental answer to Interrogatory No. 11, above.

INTERROGATORY NO. 14:

Describe the basis on which You represented to the Board that You are “getting regular calls” offering additional train sets (as stated at the May 10, 2023 Hearing, Tr. 48:9) and describe those calls, including identifying the call participants and when the calls occurred.

RESPONSE:

NTEC incorporates its August 3, 2023 response to this Interrogatory. NTEC further states that on February 2, 2023, NTEC was contacted by email by RTEX Railcar Leasing & Sales, LLC inquiring about potential NTEC interest in two trainsets of aluminum rotary gondolas available for lease or sale. On April 14, 2023, NTEC was contacted by email by FeNIX FSL about leasing 265 aluminum rotary gondolas. NTEC further states that, from at least January-May, 2023, it received calls approximately every

2-3 weeks from RTEX and/or Wells Fargo regarding the availability of rail cars, either rotary gondolas or rotary rapid discharge models. NTEC did not keep written records of those calls, but NTEC personnel specifically recall having advised BNSF's Patrick Moynihan and/or Michael White about such car availability from time to time. Those recollections formed the basis of the statement quoted in the Interrogatory. NTEC further states that discovery is ongoing and NTEC reserves the right to supplement these responses or provide responsive documents in response to this Interrogatory.

Dated: August 9, 2023

Respectfully submitted,

/s/ Daniel M. Jaffe

Daniel M. Jaffe

Frank J. Pergolizzi

Andrew B. Kolesar III

Slover & Loftus LLP

1224 Seventeenth Street, NW

Washington, DC 20036

(202) 347-7170

*Counsel for Navajo Transitional
Energy Company LLC.*

APPENDIX A

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42179

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

**[Proposed] Recommendation to the United States District Court for the
District of Columbia to Issue Letter of Request for International Judicial
Assistance**

The undersigned Administrative Law Judge finds that the evidence that BNSF Railway Company (“BNSF”) seeks pursuant to the Proposed Letter of Request is reasonably necessary to investigate fully its defenses to Petitioner Navajo Transitional Energy Company, LLC’s (“NTEC”) claim that BNSF harmed NTEC’s business reputation. Specifically, the requested information from the Republic of Korea is relevant to NTEC’s allegations that Korean customers raised concerns about NTEC’s perceived “railroad problems” that affected customers’ willingness to conduct business with NTEC as a result. Thus, the undersigned recommends that the United States District Court for the District of Columbia issue, under its seal and signature, the attached Letter of Request to the appropriate judicial authorities in the Republic of Korea.

A Letter of Request is the appropriate method of gathering the necessary requested evidence outside the United States. BNSF must transmit the Letter of Request with a District Court Judge’s signature and the District Court’s seal affixed

by the clerk of the Court in compliance with Korean law. The proposed Letter of Request solicits international judicial assistance in obtaining relevant information abroad needed in the investigation into alleged reputational harm expressed by Korean customers.

The undersigned has reviewed the requested Letter of Request and finds that it complies with the guidelines set forth by the U.S. Department of State relevant to the Republic of Korea. *See* U.S. State Dep't, Korea Judicial Assistance Information, <https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/KoreaRepublicof.html> (last visited Aug. 23, 2023); *see also* Hague Conference on International Law, Republic of Korea, <https://www.hcch.net/en/states/authorities/details3/?aid=262> (last visited Aug. 23, 2023).

Accordingly, the undersigned respectfully requests the Court to assign a judge to issue the attached Letter of Request.

Respectfully submitted this _____, 2023

The Honorable Thomas McCarthy
Administrative Law Judge

Address for Return of Issued Letter Rogatory:

Timothy J. Strafford
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
Telephone: (202) 429-3000
Email: tstrafford@steptoe.com

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. Civil Case No.: _____

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC
v.
BNSF RAILWAY COMPANY

**REQUEST FOR INTERNATIONAL JUDICIAL ASSISTANCE UNDER THE
HAGUE CONVENTION OF 18 MARCH 1970 ON THE TAKING OF
EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS**

**TO THE DIRECTOR OF INTERNATIONAL AFFAIRS, NATIONAL COURT
ADMINISTRATION, SUPREME COURT OF THE REPUBLIC OF KOREA:**

The United States District Court for the District of Columbia presents its compliments to the Office of National Court Administration of the Supreme Court of the Republic of Korea and requests international judicial assistance to obtain testimony and documentary evidence concerning issues in dispute in pending regulatory litigation pertaining to allegations of reputational harm in the Republic of Korea stemming from alleged “inconsistent or non-existent” railroad deliveries of coal.

This Court requests the assistance described herein pursuant to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, as adopted and implemented in the United States or America at 28 U.S.C. § 1781 and to which the Republic of Korea has also acceded. The

United States District Court is a competent court of law and equity which properly has jurisdiction over this proceeding.

This Court respectfully requests the assistance of the judicial authorities of the Republic of Korea to secure testimony and documentary evidence¹ from:

WoonBong Energy Co., LTD

25th Floor, RM 2025
149 Sejong-Daero, Jongno-gu,
Seoul, 03186
Republic of Korea
Telephone: +82-2-6001-3327

Korea South-East Power Co., LTD

Sadeul-Ro 123 Beon-Gil 32
52852 Jinju-Si
Republic of Korea
Telephone: +82-70-8898-1000

Korea East West Power Co., LTD

JONGGA-Ro 395, Jung-Gu
44543 Ulsan
Republic of Korea
Telephone: +82 7050001000

Korea Midland Power Co., LTD

Boryeongbuk-Ro 160
33439 Boryeong-Si
Republic of Korea
Telephone: +82 70-7511-1114

¹ To the extent BNSF's attempt to specifically describe particular emails between the listed Korean companies and Navajo Transitional Energy Company, LLC is not sufficient to comply with Korean law, *see* Declarations of Reservations of the Republic of Korea, Hague Conference on Private International Law, Hague Conference on Private Int'l Law, <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1057&disp=resdn> (last visited Aug. 21, 2023), this Court respectfully requests the Republic of Korea's assistance in procuring the requested testimony.

The testimony and documentary evidence are intended for use in a regulatory proceeding regarding whether BNSF Railway Company (“BNSF”) has breached its common carrier service obligations to Navajo Transitional Energy Company, LLC (“NTEC”) in exporting NTEC’s coal on BNSF railways. This testimony and documentary evidence, in the view of this Court, will be highly relevant to certain defenses raised by BNSF herein, including to determine the existence and scope of any “reputational damage” NTEC allegedly suffered in Japan due to inconsistent rail service.

This request is made with the understanding that it will not require any person to commit any offence or undergo a broader form of inquiry than he or she would if the proceeding were conducted in the Republic of Korea. In the proper exercise of its authority, this Court has determined that the testimony and documentary evidence requested cannot be secured except by the intervention of the courts of the Republic of Korea.

Statement of Request

- | | |
|---|--|
| 1. Sender | The Honorable _____
United States District Court,
District of Columbia
333 Constitution Avenue N.W.
Washington D.C. 20001
USA |
| 2. Central Authority of the
Requested State | National Court Administration
Attn: Director of International Affairs
Seocho-daero 219
Seocho-gu SEOUL 06590 |

Republic of Korea

3. Person to whom the executed request is to be returned

The Honorable _____
United States District Court,
District of Columbia
333 Constitution Avenue N.W.
Washington D.C. 20001
USA

4. Specification of the date by which the requesting authority requires receipt of the response to the Letter of Request

Date: As soon as practicable

Reason for urgency: Discovery in the matter is currently scheduled to close on September 28, 2023

IN CONFORMITY WITH ARTICLE 3 OF THE CONVENTION, THE UNDERSIGNED APPLICANT HAS THE HONOUR TO SUBMIT THE FOLLOWING REQUEST:

5. a Requesting judicial authority (Article 3,a))

The Honorable _____
United States District Court,
District of Columbia
333 Constitution Avenue N.W.
Washington D.C. 20001
USA

- b To the competent authority of (Article 3, a))

Republic of Korea

- c Names of the case and any identifying number

Navajo Transitional Energy Co. v. BNSF Ry.,
NOR 42179 (STB filed Apr. 14, 2023)

6. Names and addresses of the parties and their representatives (including representatives in the

requested State) (Article 3, b))

a Plaintiff Navajo Transitional Energy Company, LLC
("NTEC")

Representatives Daniel M. Jaffe
Frank J. Pergolizzi
Andrew B. Kolesar III
Slover & Loftus LLP
1224 Seventeenth Street, NW
Washington, DC 20036

b Defendant BNSF Railway Company ("BNSF")

Representatives Timothy J. Strafford
Molly Bruder Fox
Steptoe & Johnson LLP
1330 Connecticut Ave., NW
Washington, DC 20036
USA

c Other parties

Representatives

7. a Nature of the proceedings (divorce, paternity, breach of contract, product liability, etc.) (Article 3, c)) Alleged breach of common carrier obligation before regulatory agency

b Summary of complaint Plaintiff NTEC alleges that BNSF breached its obligation to provide adequate common carrier service on reasonable request in its export coal business. NTEC further asserts that BNSF's inadequate service caused NTEC reputational harm from its customers in Asia.

c Summary of defence and counterclaim Defendant BNSF asserts that NTEC's claims are meritless and asserts defenses including but not limited to that NTEC's requests for service have not been reasonable as required under 49 U.S.C. § 11101(a); BNSF's service has complied with the

		requirements of 49 U.S.C. § 11101(a); and NTEC's damages, if any, are speculative.
	d Other necessary information or documents	NTEC, in its August 9, 2023 discovery responses, described conversations with the Korean companies whose testimony and documents are sought. NTEC alleges that these statements provide evidence of reputational harm that BNSF caused to NTEC.
8.	a Evidence to be obtained or other judicial act to be performed (Article 3, <i>d</i>))	The Korean companies' answers to the attached written questions to be used at trial and the specifically dated emails between NTEC and these companies that were cited and described by NTEC in its interrogatory responses.
	b Purpose of the evidence or judicial act sought	To defend against NTEC's accusations that BNSF caused it reputational harm in Asia.
9.	Identity and address of any person to be examined (Article 3, <i>e</i>))	WoonBong Energy Co., LTD 25th Floor, RM 2025 149 Sejong-Daero, Jongno-gu, Seoul, 03186 Republic of Korea Telephone: +82-2-6001-3327 Korea South-East Power Co., LTD Sadeul-Ro 123 Beon-Gil 32 52852 Jinju-Si Republic of Korea Telephone: +82-70-8898-1000 Korea East West Power Co., LTD JONGGA-Ro 395, Jung-Gu 44543 Ulsan Republic of Korea Telephone: +82 7050001000 Korea Midland Power Co., LTD Boryeongbuk-Ro 160 33439 Boryeong-Si Republic of Korea Telephone: +82 70-7511-1114

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|--|--|
| 10. Questions to be put to the persons to be examined or statement of the subject- matter about which they are to be examined (Article 3, <i>f</i>)) | See attached list. |
| 11. Documents or other property to be inspected (Article 3, <i>g</i>)) | The listed Korean companies are requested to produce the emails described in the attached list. |
| 12. Any requirement that the evidence be given on oath or affirmation and any special form to be used (Article 3, <i>h</i>)) | <p>The testimony shall be given under oath pursuant to the laws of the Republic of Korea.</p> <p>With respect to documentary evidence, it is requested that an authorized representative of the Korean companies state under oath or affirmation, either before the Korean Court or in writing, that the produced documentary evidence specified above are true and correct copies of the original documents.</p> |
| 13. Special methods or procedure to be followed (e.g. oral or in writing, verbatim, transcript or summary, cross-examination, etc.) (Articles 3, <i>i</i>) and 9) | The Requesting Court requests that representatives from the named companies be read the attached questions, their responses to each question be recorded verbatim, and the representatives sign the verbatim transcript. In the event the evidence cannot be taken in the manner requested above, the Requesting Court respectfully requests that the evidence be taken in the manner provided by Korean law. The appearance of the representatives is voluntary and no criminal prosecution in the U.S. will result from a failure to appear. |
| 14. Request for notification of the time and place for the execution of the Request and identity and address of any person to be notified (Article 7) | The Honorable _____
United States District Court,
District of Columbia
333 Constitution Avenue N.W.
Washington D.C. 20001
USA |

- | | |
|---|---|
| 15. Request for attendance or participation of judicial personnel of the requesting authority at the execution of the Letter of Request (Article 8) | No attendance of judicial personnel of the Requesting Authority is requested. |
| 16. Specification of privilege or duty to refuse to give evidence under the law of the State of origin (Article 11, <i>b</i>)) | <p>The privilege or duty of the witnesses to refuse to give evidence shall be the same as if they were testifying under the applicable provisions of the U.S. Federal Rules of Civil Procedure, including if giving such evidence would (1) subject them to a real and appreciable danger of criminal liability in the United States, or (2) disclose a confidential and privileged communication between them and their respective attorneys.</p> <p>Consistent with the laws of the United States, the Korean companies shall not be required to produce documentary evidence which constitutes attorney-client communications, i.e., confidential communications that have not been shared with any other person and which are between an attorney and client concerning legal advice. The Korean companies shall not be required to produce documentary evidence which constitutes attorney work product, i.e., confidential written materials that have not been shared with any other person that have been prepared by or for an attorney in preparation for litigation.</p> |
| 17. The fees and costs incurred which are reimbursable under the second paragraph of Article 14 or under Article 26 of the Convention will be borne by: | Fees and costs incurred which are reimbursable under the Hague Convention shall be borne by Steptoe & Johnson LLP, attorneys for BNSF Railway Company. Steptoe & Johnson LLP is located at 1330 Connecticut Ave., NW, Washington, DC 20036, USA. |

DATE OF REQUEST: _____

SIGNATURE AND SEAL OF THE
REQUESTING AUTHORITY

By: _____
(clerk's signature)

Clerk: _____
(clerk's printed name)

Respectfully submitted under my name and seal:

United States District Court
District of Columbia
Hon. _____, District Judge

SCHEDULE A

BNSF Railway Company's Request for Documents and Testimony from WoonBong Energy Co., LTD

BNSF Railway Company, through the Office of National Court Administration of the Supreme Court of the Republic of Korea, respectfully directs WoonBong Energy Co., LTD ("WoonBong Energy") to produce the documentary evidence and testimony specified herein. Part I sets forth instructions for complying with this Request for Documents and Testimony ("Request"), and Part II sets forth definitions used in this Request. Part III specifies the documents that are sought by this Request. Part IV lists the testimony sought by this Request.

I. Instructions

1. The documentary evidence requested in this Request shall be produced within twenty days of service of the Request on WoonBong Energy, unless otherwise agreed by counsel to the parties. WoonBong Energy should produce responsive documents to counsel for Defendant BNSF Railway Company ("BNSF") to the offices of Steptoe & Johnson LLP, 1330 Connecticut Avenue, NW, Washington, DC 20036, or via electronic delivery means.

2. Responsive documents that are confidential or highly confidential may be produced in accordance with the terms of the Surface Transportation Board's July 18, 2023 granted Protective Order in Docket No. NOR 42179.

3. In responding to the following document requests, furnish all available documents in WoonBong Energy's possession, custody, or control.

4. If you lack the ability to comply with a particular document request, specify whether the inability to comply is because the particular document or category

of documents requested never existed; has been destroyed; has been lost or misplaced; has been stolen; or has never been or is no longer in your possession, custody, or control. If the particular document or category of documents is no longer in your possession, custody, or control, identify the name and address of any person or entity known or believed by you to have possession, custody, or control of that document or category of documents.

5. In answering the following document requests, furnish all available information, including information in the possession, custody, or control of any of your attorneys, directors, officers, agents, employees, representatives, associates, investigators, divisions, affiliates, partnerships, parents or subsidiaries, and persons under your control, who have knowledge.

6. In the event that you object to any document request on the ground that it is allegedly overbroad and/or unduly burdensome for any reason, respond to that request as narrowed to the least extent necessary, in your judgment, to render it not overbroad/unduly burdensome and state specifically the extent to which you have narrowed that request for purposes of your response.

7. In the event that you object to any document request on the ground that it is purportedly vague and/or ambiguous, identify the particular words, terms or phrases that are asserted to make such request vague and/or ambiguous and specify the meaning actually attributed to you by such words for purposes of your response thereto.

8. For any information requested that is not readily available from your records in exactly the form requested, furnish carefully prepared estimates, designated as such. Attach a statement of the basis for such estimates and identify the person or persons making them.

9. If any information called for by one of these document requests is withheld on the grounds of privilege or any other claim of immunity from discovery, then for each document or communication containing withheld information, state the following: (1) the type of document (*e.g.*, letter, memorandum, contract, etc.); (2) its title; (3) its date; (4) its subject matter; (5) the name, address, and employer at the time of preparation of the individual who authored, drafted, or prepared it; (6) the name, address, and employer at the time of dissemination of the individual to whom it was directed, circulated, copied, or who otherwise had access thereto; (7) its number of pages; (8) the nature of the privilege claimed and the facts upon which you rely to support the claim of privilege; and (9) the identification of each discovery request to which the withheld information is responsive.

10. Where an identified document is in a language other than English, state whether an English translation of such document exists. If a document is in a language other than English and an English translation exists, identify and provide both documents.

11. If possible and unless otherwise indicated, supply all financial data requested on a calendar year basis. If fiscal year data is provided, specify the dates on which the fiscal years begin and end.

12. Unless a different time period is specified, you are required to produce responsive documents created on or after January 1, 2019.

II. Definitions

1. “WoonBong Energy” shall refer to WoonBong Energy Co., LTD and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by any of these entities, either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of these same entities.

2. “BNSF” shall mean BNSF Railway Company and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by BNSF Railway Company either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of BNSF Railway Company.

3. “NTEC” shall mean Navajo Transitional Energy Company, LLC, and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by Navajo Transitional Energy Company, LLC, either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of Navajo Transitional Energy Company, LLC.

4. “Cloud Peak Energy, Inc.” shall mean Cloud Peak Energy, Inc., and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by Cloud Peak Energy, Inc., either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of Cloud Peak Energy, Inc.

5. The term “Spring Creek Mine” shall mean the Spring Creek Mine located in Montana, operated by Cloud Peak Energy, Inc. or NTEC.

6. The term “contract” or “agreement” includes agreements, purchase orders, pricing authorities, or contracts in any form, however made, including all documents referred to in the contracts or agreements which set out the rights and obligations of the parties thereunder.

7. The term “any” shall be construed as one or more whenever necessary to bring within the scope of the request all responses that might otherwise be construed as outside its scope.

8. The term “communication” shall mean every manner or method of disclosure, transfer, or exchange of information, whether orally or by document (as defined herein), and whether face-to-face, by telephone, mail, email, facsimile, personal delivery, or other method.

9. “Concerning,” “relating to,” “relate to,” “relates to,” “related to,” “referring or relating to,” “referring to,” “regarding,” and “refer or relate to” shall mean, in whole or in any part, responding to, concerning, relating to, connected with,

involving, commenting on, in respect of, about, associated with, discussing, evidencing, showing, describing, reflecting, analyzing, summarizing, memorializing, consisting of, constituting, identifying, stating, tending to support, tending to discredit, referring to, or in any way touching upon.

10. “Date” as used herein shall mean the exact day, month, and year, if ascertainable, or, if not, the best approximation (including any relationship to other events) thereof.

11. “Describe” shall mean to set out in detail every act, event, fact, or occurrence of any kind whatsoever that explains the answer to the question.

12. The term “document” shall include, without limitation, any written, typed, printed, recorded or graphically portrayed matter in any form or embodiment, that is produced, reproduced, or stored by photographic, magnetic, electronic, mechanical or any other means, and that is in your actual or constructive custody or control, and all copies of the foregoing on which any mark, alteration, writing, or other change from the original has been made.

13. The term “identify,” when used with respect to a person, means to state the person’s full name, present or last known address, and when referring to a natural person, additionally, the occupation or business in which the person is engaged, and the person’s present or last employer and title or position.

14. The term “identify,” when used with respect to a document, means to state, to the extent known, the (i) type of document, (ii) general subject matter, (iii) date of the document, (iv) authors, addressees, and recipients, and (v) when

applicable, the Bates range for the document.

15. The term “identify,” when used with respect to a communication, means to state, to the extent known, the (i) means of communication (*e.g.*, telephone call, meeting, etc.), (ii) date of the communication, (iii) general subject matter of the communication, and (iv) originator, recipient, and any other party to the communication.

16. The terms “person” or “persons” refer to any individual, corporation, partnership, sole proprietorship, firm, board, joint venture, association, agency, authority, commission or other entity.

17. The terms “You” and “Your” shall mean WoonBong Energy, its successors, agents, members, and employees.

III. Documentary Evidence to Be Produced

1. Produce the below referenced emails between WoonBong Energy and NTEC, as described by NTEC in the below chart:

Date	Customer	Location	Communication	NTEC's Summary
March 27, 2023	Woon Bong Energy	Email	Email	NTEC addressed the possible need to discontinue offering coal sales to Korean customers due to BNSF continuing service deficiencies and due to awaiting BNSF's commitment to provide more trains per month.
April 5, 2023	Woon Bong Energy	Email	Email	Email addressed BNSF's unexpected increase in train counts for April and May and customer interest in additional cargos on short notice for 2Q23.
July 5, 2023	Woon Bong Energy	Email	Email	Multiple Korean customers inquired about the impact of the MRL bridge collapse on potential BNSF service to NTEC.

IV. Testimony Evidence to Be Produced

Background

1. What is your name?
2. What is your current position at WoonBong Energy and how long have you had that position?
3. When did you begin working at WoonBong Energy? What was your title when you first began there?
4. Please state your various positions at WoonBong Energy between January 1, 2019 and August 31, 2023 to the extent they have not been covered in the prior questions. If you had multiple titles, please provide which dates you held each title.
5. Did any of these roles relate to purchasing, selling, or marketing coal? If so, please describe these roles.
6. Describe any relation WoonBong Energy has to the coal trade, including (i) whether WoonBong Energy buys, sells, or markets coal; (ii) what markets it buys from, sells to, or trades with.
7. Describe the process by which WoonBong Energy decides which foreign companies from which to purchase coal.

Relationship with NTEC Regarding Coal

8. Describe the relationship between WoonBong Energy and NTEC, including (i) the approximate date the relationship started and ended (if applicable), (ii) the circumstances of the relationship, and (iii) what portion of its coal business

involves NTEC versus other export coal companies selling coal from North American mines.

9. Describe WoonBong Energy's satisfaction with the shipment of coal pursuant to any contract or agreement with Cloud Peak Energy, Inc. or NTEC.

10. Identify any failures by NTEC to comply with any contract or agreement with WoonBong Energy for the shipment of coal to the Republic of Korea.

11. Identify any problems or delays in NTEC's shipment of coal to the Republic of Korea that WoonBong Energy believed to be the result of rail service interruption.

12. Please describe your understanding of NTEC's reputation in the export coal market.

13. What is the basis for your understanding of NTEC's reputation?

14. Has WoonBong Energy ever expressed a concern to NTEC regarding its U.S. rail transportation? If so, what was that position?

15. Describe the reasons for any decision by WoonBong Energy to renew or not to renew any contract or agreement with NTEC for the purchase and shipment of coal.

16. Describe the substance of, estimated duration of, and attendees at the following purported conversations with NTEC:

Date	Customer	Location	Communication	NTEC's Summary
January 30, 2023	Woon Bong Energy	Tokyo, Japan	In-person	Meeting with Woon Bong Energy (NTEC Sales Agent in Korea) regarding BNSF service

Date	Customer	Location	Communication	NTEC's Summary
				deficiencies and specifically why NTEC's rail service lagged far behind other US coal producers in 2022. The meeting also included discussion of prospects for BNSF service to NTEC in 2023.
July 5, 2023	Woon Bong Energy	Email & Phone	Email & Phone	Multiple Korean customers inquired about the impact of the MRL bridge collapse on potential BNSF service to NTEC.

SCHEDULE B

BNSF Railway Company's Request for Documents and Testimony from Korea South-East Power Co., LTD

BNSF Railway Company, through the Office of National Court Administration of the Supreme Court of the Republic of Korea, respectfully directs Korea South-East Power Co., LTD ("Korea South-East") to produce the documentary evidence and testimony specified herein. Part I sets forth instructions for complying with this Request for Documents and Testimony ("Request"), and Part II sets forth definitions used in this Request. Part III specifies the documents that are sought by this Request. Part IV lists the testimony sought by this Request.

I. Instructions

1. The documentary evidence requested in this Request shall be produced within twenty days of service of the Request on Korea South-East, unless otherwise agreed by counsel to the parties. Korea South-East should produce responsive documents to counsel for Defendant BNSF Railway Company ("BNSF") to the offices of Steptoe & Johnson LLP, 1330 Connecticut Avenue, NW, Washington, DC 20036, or via electronic delivery means.

2. Responsive documents that are confidential or highly confidential may be produced in accordance with the terms of the Surface Transportation Board's July 18, 2023 granted Protective Order in Docket No. NOR 42179.

3. In responding to the following document requests, furnish all available documents in Korea South-East's possession, custody, or control.

4. If you lack the ability to comply with a particular document request, specify whether the inability to comply is because the particular document or category

of documents requested never existed; has been destroyed; has been lost or misplaced; has been stolen; or has never been or is no longer in your possession, custody, or control. If the particular document or category of documents is no longer in your possession, custody, or control, identify the name and address of any person or entity known or believed by you to have possession, custody, or control of that document or category of documents.

5. In answering the following document requests, furnish all available information, including information in the possession, custody, or control of any of your attorneys, directors, officers, agents, employees, representatives, associates, investigators, divisions, affiliates, partnerships, parents or subsidiaries, and persons under your control, who have knowledge.

6. In the event that you object to any document request on the ground that it is allegedly overbroad and/or unduly burdensome for any reason, respond to that request as narrowed to the least extent necessary, in your judgment, to render it not overbroad/unduly burdensome and state specifically the extent to which you have narrowed that request for purposes of your response.

7. In the event that you object to any document request on the ground that it is purportedly vague and/or ambiguous, identify the particular words, terms or phrases that are asserted to make such request vague and/or ambiguous and specify the meaning actually attributed to you by such words for purposes of your response thereto.

8. For any information requested that is not readily available from your records in exactly the form requested, furnish carefully prepared estimates, designated as such. Attach a statement of the basis for such estimates and identify the person or persons making them.

9. If any information called for by one of these document requests is withheld on the grounds of privilege or any other claim of immunity from discovery, then for each document or communication containing withheld information, state the following: (1) the type of document (*e.g.*, letter, memorandum, contract, etc.); (2) its title; (3) its date; (4) its subject matter; (5) the name, address, and employer at the time of preparation of the individual who authored, drafted, or prepared it; (6) the name, address, and employer at the time of dissemination of the individual to whom it was directed, circulated, copied, or who otherwise had access thereto; (7) its number of pages; (8) the nature of the privilege claimed and the facts upon which you rely to support the claim of privilege; and (9) the identification of each discovery request to which the withheld information is responsive.

10. Where an identified document is in a language other than English, state whether an English translation of such document exists. If a document is in a language other than English and an English translation exists, identify and provide both documents.

11. If possible and unless otherwise indicated, supply all financial data requested on a calendar year basis. If fiscal year data is provided, specify the dates on which the fiscal years begin and end.

12. Unless a different time period is specified, you are required to produce responsive documents created on or after January 1, 2019.

II. Definitions

1. “Korea South-East” shall refer to Korea South-East Co., LTD and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by any of these entities, either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of these same entities.

2. “BNSF” shall mean BNSF Railway Company and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by BNSF Railway Company either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of BNSF Railway Company.

3. “NTEC” shall mean Navajo Transitional Energy Company, LLC, and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by Navajo Transitional Energy Company, LLC, either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of Navajo Transitional Energy Company, LLC.

4. “Cloud Peak Energy, Inc.” shall mean Cloud Peak Energy, Inc., and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by Cloud Peak Energy, Inc., either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of Cloud Peak Energy, Inc.

5. The term “Spring Creek Mine” shall mean the Spring Creek Mine located in Montana, operated by Cloud Peak Energy, Inc. or NTEC.

6. The term “contract” or “agreement” includes agreements, purchase orders, pricing authorities, or contracts in any form, however made, including all documents referred to in the contracts or agreements which set out the rights and obligations of the parties thereunder.

7. The term “any” shall be construed as one or more whenever necessary to bring within the scope of the request all responses that might otherwise be construed as outside its scope.

8. The term “communication” shall mean every manner or method of disclosure, transfer, or exchange of information, whether orally or by document (as defined herein), and whether face-to-face, by telephone, mail, email, facsimile, personal delivery, or other method.

9. “Concerning,” “relating to,” “relate to,” “relates to,” “related to,” “referring or relating to,” “referring to,” “regarding,” and “refer or relate to” shall mean, in whole or in any part, responding to, concerning, relating to, connected with,

involving, commenting on, in respect of, about, associated with, discussing, evidencing, showing, describing, reflecting, analyzing, summarizing, memorializing, consisting of, constituting, identifying, stating, tending to support, tending to discredit, referring to, or in any way touching upon.

10. “Date” as used herein shall mean the exact day, month, and year, if ascertainable, or, if not, the best approximation (including any relationship to other events) thereof.

11. “Describe” shall mean to set out in detail every act, event, fact, or occurrence of any kind whatsoever that explains the answer to the question.

12. The term “document” shall include, without limitation, any written, typed, printed, recorded or graphically portrayed matter in any form or embodiment, that is produced, reproduced, or stored by photographic, magnetic, electronic, mechanical or any other means, and that is in your actual or constructive custody or control, and all copies of the foregoing on which any mark, alteration, writing, or other change from the original has been made.

13. The term “identify,” when used with respect to a person, means to state the person’s full name, present or last known address, and when referring to a natural person, additionally, the occupation or business in which the person is engaged, and the person’s present or last employer and title or position.

14. The term “identify,” when used with respect to a document, means to state, to the extent known, the (i) type of document, (ii) general subject matter, (iii) date of the document, (iv) authors, addressees, and recipients, and (v) when

applicable, the Bates range for the document.

15. The term “identify,” when used with respect to a communication, means to state, to the extent known, the (i) means of communication (*e.g.*, telephone call, meeting, etc.), (ii) date of the communication, (iii) general subject matter of the communication, and (iv) originator, recipient, and any other party to the communication.

16. The terms “person” or “persons” refer to any individual, corporation, partnership, sole proprietorship, firm, board, joint venture, association, agency, authority, commission or other entity.

17. The terms “You” and “Your” shall mean Korea South-East, its successors, agents, members, and employees.

III. Documentary Evidence to Be Produced

1. Produce the below referenced emails between Korea South-East and NTEC, as described by NTEC in the below chart:

Date	Customer	Location	Communication	NTEC’s Summary
May 15, 2023	Korea South-East Power	Email	Email	NTEC responded to KOSEP’s request for information regarding the STB Emergency Service order hearing and its potential impact on rail service.

IV. Testimony Evidence to Be Produced

Background

1. What is your name?
2. What is your current position at Korea South-East and how long have you had that position?
3. When did you begin working at Korea South-East? What was your title when you first began there?
4. Please state your various positions at Korea South-East between January 1, 2019 and August 31, 2023 to the extent they have not been covered in the prior questions. If you had multiple titles, please provide which dates you held each title.
5. Did any of these roles relate to purchasing, selling, or marketing coal? If so, please describe these roles.
6. Describe any relation Korea South-East has to the coal trade, including (i) whether Korea South-East buys, sells, or markets coal; (ii) what markets it buys from, sells to, or trades with.
7. Describe the process by which Korea South-East decides which foreign companies from which to purchase coal.

Relationship with NTEC Regarding Coal

8. Describe the relationship between Korea South-East and NTEC, including (i) the approximate date the relationship started and ended (if applicable), (ii) the circumstances of the relationship, and (iii) what portion of its coal business

involves NTEC versus other export coal companies selling coal from North American mines.

9. Describe Korea South-East's satisfaction with the shipment of coal pursuant to any contract or agreement with Cloud Peak Energy, Inc. or NTEC.

10. Identify any failures by NTEC to comply with any contract or agreement with Korea South-East for the shipment of coal to the Republic of Korea.

11. Identify any problems or delays in NTEC's shipment of coal to the Republic of Korea that Korea South-East believed to be the result of rail service interruption.

12. Please describe your understanding of NTEC's reputation in the export coal market.

13. What is the basis for your understanding of NTEC's reputation?

14. Has Korea South-East ever expressed a concern to NTEC regarding its U.S. rail transportation? If so, what was that position?

15. Describe the reasons for any decision by Korea South-East to renew or not to renew any contract or agreement with NTEC for the purchase and shipment of coal.

16. Describe the substance of, estimated duration of, and attendees at the following purported conversations with NTEC:

Date	Customer	Location	Communication	NTEC's Summary
April 26, 2023	Korea South-East Power	Jinju, S. Korea	In-person	KOSEP required assurances that that NTEC was taking appropriate actions to resolve the ongoing rail

Date	Customer	Location	Communication	NTEC's Summary
				service issues with BNSF. KOSEP indicated that it would reduce its reliance on NTEC unless NTEC could resolve its logistics issues now and going forward. KOSEP asked many questions regarding BNSF and rail operations generally in the United States.

SCHEDULE C

**BNSF Railway Company's Request for Testimony
from Korea East West Power Co., LTD**

BNSF Railway Company, through the Office of National Court Administration of the Supreme Court of the Republic of Korea, respectfully directs Korea East West Power Co., LTD ("Korea East West") to produce the testimony specified herein. Part I sets forth instructions for complying with this Request for Testimony ("Request"), and Part II sets forth definitions used in this Request. Part III lists the testimony sought by this Request.

I. Instructions

1. In answering the following questions, furnish all available information, including information in the possession, custody, or control of any of your attorneys, directors, officers, agents, employees, representatives, associates, investigators, divisions, affiliates, partnerships, parents or subsidiaries, and persons under your control, who have knowledge.

2. Unless a different time period is specified, the relevant time period is January 1, 2019 to the present.

II. Definitions

1. "Korea East West" shall refer to Korea East West Co., LTD and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by any of these entities, either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of these same entities.

2. “BNSF” shall mean BNSF Railway Company and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by BNSF Railway Company either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of BNSF Railway Company.

3. “NTEC” shall mean Navajo Transitional Energy Company, LLC, and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by Navajo Transitional Energy Company, LLC, either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of Navajo Transitional Energy Company, LLC.

4. “Cloud Peak Energy, Inc.” shall mean Cloud Peak Energy, Inc., and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by Cloud Peak Energy, Inc., either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of Cloud Peak Energy, Inc.

5. The term “Spring Creek Mine” shall mean the Spring Creek Mine located in Montana, operated by Cloud Peak Energy, Inc. or NTEC.

6. The term “contract” or “agreement” includes agreements, purchase

orders, pricing authorities, or contracts in any form, however made, including all documents referred to in the contracts or agreements which set out the rights and obligations of the parties thereunder.

7. The term “any” shall be construed as one or more whenever necessary to bring within the scope of the request all responses that might otherwise be construed as outside its scope.

8. The term “communication” shall mean every manner or method of disclosure, transfer, or exchange of information, whether orally or by document (as defined herein), and whether face-to-face, by telephone, mail, email, facsimile, personal delivery, or other method.

9. “Concerning,” “relating to,” “relate to,” “relates to,” “related to,” “referring or relating to,” “referring to,” “regarding,” and “refer or relate to” shall mean, in whole or in any part, responding to, concerning, relating to, connected with, involving, commenting on, in respect of, about, associated with, discussing, evidencing, showing, describing, reflecting, analyzing, summarizing, memorializing, consisting of, constituting, identifying, stating, tending to support, tending to discredit, referring to, or in any way touching upon.

10. “Date” as used herein shall mean the exact day, month, and year, if ascertainable, or, if not, the best approximation (including any relationship to other events) thereof.

11. “Describe” shall mean to set out in detail every act, event, fact, or occurrence of any kind whatsoever that explains the answer to the question.

12. The term “document” shall include, without limitation, any written, typed, printed, recorded or graphically portrayed matter in any form or embodiment, that is produced, reproduced, or stored by photographic, magnetic, electronic, mechanical or any other means, and that is in your actual or constructive custody or control, and all copies of the foregoing on which any mark, alteration, writing, or other change from the original has been made.

13. The term “identify,” when used with respect to a person, means to state the person’s full name, present or last known address, and when referring to a natural person, additionally, the occupation or business in which the person is engaged, and the person’s present or last employer and title or position.

14. The term “identify,” when used with respect to a document, means to state, to the extent known, the (i) type of document, (ii) general subject matter, (iii) date of the document, (iv) authors, addressees, and recipients, and (v) when applicable, the Bates range for the document.

15. The term “identify,” when used with respect to a communication, means to state, to the extent known, the (i) means of communication (*e.g.*, telephone call, meeting, etc.), (ii) date of the communication, (iii) general subject matter of the communication, and (iv) originator, recipient, and any other party to the communication.

16. The terms “person” or “persons” refer to any individual, corporation, partnership, sole proprietorship, firm, board, joint venture, association, agency, authority, commission or other entity.

17. The terms “You” and “Your” shall mean Korea East West, its successors, agents, members, and employees.

III. Testimony Evidence to Be Produced

Background

1. What is your name?
2. What is your current position at Korea East West and how long have you had that position?
3. When did you begin working at Korea East West? What was your title when you first began there?
4. Please state your various positions at Korea East West between January 1, 2019 and August 31, 2023 to the extent they have not been covered in the prior questions. If you had multiple titles, please provide which dates you held each title.
5. Did any of these roles relate to purchasing, selling, or marketing coal? If so, please describe these roles.
6. Describe any relation Korea East West has to the coal trade, including (i) whether Korea East West buys, sells, or markets coal; (ii) what markets it buys from, sells to, or trades with.
7. Describe the process by which Korea East West decides which foreign companies from which to purchase coal.

Relationship with NTEC Regarding Coal

8. Describe the relationship between Korea East West and NTEC, including (i) the approximate date the relationship started and ended (if applicable),

(ii) the circumstances of the relationship, and (iii) what portion of its coal business involves NTEC versus other export coal companies selling coal from North American mines.

9. Describe Korea East West's satisfaction with the shipment of coal pursuant to any contract or agreement with Cloud Peak Energy, Inc. or NTEC.

10. Identify any failures by NTEC to comply with any contract or agreement with Korea East West for the shipment of coal to the Republic of Korea.

11. Identify any problems or delays in NTEC's shipment of coal to the Republic of Korea that Korea East West believed to be the result of rail service interruption.

12. Please describe your understanding of NTEC's reputation in the export coal market.

13. What is the basis for your understanding of NTEC's reputation?

14. Has Korea East West ever expressed a concern to NTEC regarding its U.S. rail transportation? If so, what was that position?

15. Describe the reasons for any decision by Korea East West to renew or not to renew any contract or agreement with NTEC for the purchase and shipment of coal.

16. Describe the substance of, estimated duration of, and attendees at the following purported conversations with NTEC:

Date	Customer	Location	Communication	NTEC's Summary
April 25, 2023	Korea East-West Power	Ulsan, S. Korea	In-person	EWP management requested updates on Spring Creek Mine production and the outlook for BNSF's rail service. EWP expressed specific concerns future business opportunities with NTEC due to its poor logistics reputation in light of its ongoing rail service issues.

SCHEDULE D

**BNSF Railway Company's Request for Testimony
from Korea Midland Power Co., LTD**

BNSF Railway Company, through the Office of National Court Administration of the Supreme Court of the Republic of Korea, respectfully directs Korea Midland Power Co., LTD ("Korea Midland") to produce the testimony specified herein. Part I sets forth instructions for complying with this Request for Testimony ("Request"), and Part II sets forth definitions used in this Request. Part III lists the testimony sought by this Request.

I. Instructions

1. In answering the following questions, furnish all available information, including information in the possession, custody, or control of any of your attorneys, directors, officers, agents, employees, representatives, associates, investigators, divisions, affiliates, partnerships, parents or subsidiaries, and persons under your control, who have knowledge.

2. Unless a different time period is specified, the relevant time period is January 1, 2019 to the present.

II. Definitions

1. "Korea Midland" shall refer to Korea Midland Power Co., LTD and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by any of these entities, either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of these same entities.

2. “BNSF” shall mean BNSF Railway Company and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by BNSF Railway Company either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of BNSF Railway Company.

3. “NTEC” shall mean Navajo Transitional Energy Company, LLC, and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by Navajo Transitional Energy Company, LLC, either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of Navajo Transitional Energy Company, LLC.

4. “Cloud Peak Energy, Inc.” shall mean Cloud Peak Energy, Inc., and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by Cloud Peak Energy, Inc., either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of Cloud Peak Energy, Inc.

5. The term “Spring Creek Mine” shall mean the Spring Creek Mine located in Montana, operated by Cloud Peak Energy, Inc. or NTEC.

6. The term “contract” or “agreement” includes agreements, purchase

orders, pricing authorities, or contracts in any form, however made, including all documents referred to in the contracts or agreements which set out the rights and obligations of the parties thereunder.

7. The term “any” shall be construed as one or more whenever necessary to bring within the scope of the request all responses that might otherwise be construed as outside its scope.

8. The term “communication” shall mean every manner or method of disclosure, transfer, or exchange of information, whether orally or by document (as defined herein), and whether face-to-face, by telephone, mail, email, facsimile, personal delivery, or other method.

9. “Concerning,” “relating to,” “relate to,” “relates to,” “related to,” “referring or relating to,” “referring to,” “regarding,” and “refer or relate to” shall mean, in whole or in any part, responding to, concerning, relating to, connected with, involving, commenting on, in respect of, about, associated with, discussing, evidencing, showing, describing, reflecting, analyzing, summarizing, memorializing, consisting of, constituting, identifying, stating, tending to support, tending to discredit, referring to, or in any way touching upon.

10. “Date” as used herein shall mean the exact day, month, and year, if ascertainable, or, if not, the best approximation (including any relationship to other events) thereof.

11. “Describe” shall mean to set out in detail every act, event, fact, or occurrence of any kind whatsoever that explains the answer to the question.

12. The term “document” shall include, without limitation, any written, typed, printed, recorded or graphically portrayed matter in any form or embodiment, that is produced, reproduced, or stored by photographic, magnetic, electronic, mechanical or any other means, and that is in your actual or constructive custody or control, and all copies of the foregoing on which any mark, alteration, writing, or other change from the original has been made.

13. The term “identify,” when used with respect to a person, means to state the person’s full name, present or last known address, and when referring to a natural person, additionally, the occupation or business in which the person is engaged, and the person’s present or last employer and title or position.

14. The term “identify,” when used with respect to a document, means to state, to the extent known, the (i) type of document, (ii) general subject matter, (iii) date of the document, (iv) authors, addressees, and recipients, and (v) when applicable, the Bates range for the document.

15. The term “identify,” when used with respect to a communication, means to state, to the extent known, the (i) means of communication (*e.g.*, telephone call, meeting, etc.), (ii) date of the communication, (iii) general subject matter of the communication, and (iv) originator, recipient, and any other party to the communication.

16. The terms “person” or “persons” refer to any individual, corporation, partnership, sole proprietorship, firm, board, joint venture, association, agency, authority, commission or other entity.

17. The terms “You” and “Your” shall mean Korea Midland, its successors, agents, members, and employees.

III. Testimony Evidence to Be Produced

Background

1. What is your name?
2. What is your current position at Korea Midland and how long have you had that position?
3. When did you begin working at Korea Midland? What was your title when you first began there?
4. Please state your various positions at Korea Midland between January 1, 2019 and August 31, 2023 to the extent they have not been covered in the prior questions. If you had multiple titles, please provide which dates you held each title.
5. Did any of these roles relate to purchasing, selling, or marketing coal? If so, please describe these roles.
6. Describe any relation Korea Midland has to the coal trade, including (i) whether Korea Midland buys, sells, or markets coal; (ii) what markets it buys from, sells to, or trades with.
7. Describe the process by which Korea Midland decides which foreign companies from which to purchase coal.

Relationship with NTEC Regarding Coal

8. Describe the relationship between Korea Midland and NTEC, including (i) the approximate date the relationship started and ended (if applicable), (ii) the circumstances of the relationship, and (iii) what portion of its coal business involves NTEC versus other export coal companies selling coal from North American mines.

9. Describe Korea Midland's satisfaction with the shipment of coal pursuant to any contract or agreement with Cloud Peak Energy, Inc. or NTEC.

10. Identify any failures by NTEC to comply with any contract or agreement with Korea Midland for the shipment of coal to the Republic of Korea.

11. Identify any problems or delays in NTEC's shipment of coal to the Republic of Korea that Korea Midland believed to be the result of rail service interruption.

12. Please describe your understanding of NTEC's reputation in the export coal market.

13. What is the basis for your understanding of NTEC's reputation?

14. Has Korea Midland ever expressed a concern to NTEC regarding its U.S. rail transportation? If so, what was that position?

15. Describe the reasons for any decision by Korea Midland to renew or not to renew any contract or agreement with NTEC for the purchase and shipment of coal.

16. Describe the substance of, estimated duration of, and attendees at the following purported conversations with NTEC:

Date	Customer	Location	Communication	NTEC's Summary
April 27, 2023	Korea Midland Power	Boryeong, S. Korea	In-person	KOMIPO's primary topic of discussion was why BNSF continually refused to provide NTEC with requested service levels. KOMIPO indicated that they had heard rumors that NTEC had unfavorable rail

Date	Customer	Location	Communication	NTEC's Summary
				agreements versus other potential suppliers.

ATTACHMENT A

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
July 18, 2023
Part of
Public Record

NAVAJO TRANSITIONAL ENERGY
COMPANY, LLC,

Complainant,

v.

BNSF RAILWAY COMPANY,

Defendant.

Docket No. NOR 42179

JOINT MOTION FOR AMENDED PROTECTIVE ORDER

BNSF RAILWAY COMPANY

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Timothy J. Strafford
Onika K. Williams
Tara A. Woods
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Attorneys for Defendant

NAVAJO TRANSITIONAL
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(202) 347-7170

Attorneys for Complainant

Dated: July 13, 2023

 GRANTED Office of Proceedings	DECISION ID NO.: <u>51801</u>
	DECIDED DATE: <u>7/18/2023</u>
	SERVED DATE: <u>7/18/2023</u>
	APPROVED: <u><i>M. Jaffe</i></u> Director
	☐ _____

	)	
NAVAJO TRANSITIONAL ENERGY	)	
COMPANY, LLC,	)	
	)	
Complainant,	)	
	)	Docket No. NOR 42179
v.	)	
	)	
BNSF RAILWAY COMPANY,	)	
	)	
Defendant.	)	
	)	

Pursuant to 49 C.F.R. § 1104.14, Complainant Navajo Transitional Energy Company, LLC (“NTEC”) and Defendant BNSF Railway Company (“BNSF”) file this joint amended motion requesting that the Surface Transportation Board (“STB” or “Board”) enter a protective order for the above-referenced proceeding, in the form provided in Appendix A to this Motion. The proposed protective order is necessary to protect the confidentiality of any materials containing competitively sensitive, proprietary, and other confidential information that may be provided in this proceeding. The proposed protective order follows the format of the protective orders that the Board has approved in recent cases.²

² *Central Valley Ag Grinding, Inc. and Central Valley Ag Transport v. Modesto and Empire Traction Co.*, NOR 42159 (STB served Sept. 17, 2018); *Dyna Nobel Inc. & Dyna Nobel La. Ammonia, LLC v. NuStar Pipeline Operating P'ship, L.P.*, NOR 42147 (STB served Apr. 26, 2017); *Finch Paper LLC-Pet. for Declaratory Order*, FD 35981 (STB served May 11, 2016);

Accordingly, NTEC and BNSF jointly request that the Board enter a protective order in this proceeding in the form provided in Appendix A to this motion, including the forms of undertaking that accompany it.

BNSF RAILWAY COMPANY

NAVAJO TRANSITIONAL
ENERGY COMPANY, LLC

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Anthony J. LaRocca
Timothy J. Strafford
Onika K. Williams
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Attorneys for Complainant

Dated: July 13, 2023

and *Agrium Inc. & Agrium US, Inc. v. Canadian Pac. Ry. Co.*, NOR 42145 (STB served Nov. 27, 2015). The proposed protective order also includes elements regarding scope of use from the protective order in *Navajo Transitional Energy Co., LLC – Ex Parte Application for Section 11123 Emergency Service Order*, NOR 421278 (STB served April 20, 2023).

APPENDIX A

PROTECTIVE ORDER

1. Any party producing information, data, documents, or other material (hereinafter collectively referred to as “material”) in discovery to another party to this proceeding, or submitting material in pleadings, that the party in good faith believes reflects proprietary or confidential information, may designate and stamp such material as “CONFIDENTIAL,” and such material must be treated as confidential. Such material, any copies, and any data or notes derived therefrom:

- (a) Shall be used solely for the purpose of this proceeding and any judicial review proceeding arising herefrom, and not for any other business, commercial, or competitive purpose.
- (b) May be disclosed only to employees, counsel, or agents of the party requesting such material who have a need to know, handle, or review the material for purposes of the preparation and presentation of evidence and argument in STB Docket No. NOR 42179, any related proceedings before the Board, and/or any judicial review proceedings in connection with STB Docket No. NOR 42179 and/or with any related proceedings, and only where such employee, counsel, or agent has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Confidential Material prior to receiving access to such materials.
- (c) Must be destroyed by the requesting party, its employees, counsel, and agents, at the completion of this proceeding and any judicial review proceeding arising herefrom. However, counsel and consultants for a party are permitted to retain file copies of all pleadings which they were authorized to review under this Protective Order, including Paragraph 10.
- (d) If contained in any pleading filed with the Board shall, in order to be kept confidential, be filed only in pleadings submitted in a package clearly marked on the outside “Confidential Materials Subject to Protective Order.” See 49 CFR 1104.14.

2. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, may in good faith designate and stamp particular material, such as material containing shipper and/or private railcar owner car costs or pricing data or other competitively sensitive information, as “HIGHLY CONFIDENTIAL.” If any party wishes to challenge such designation, the party may bring such matter to the attention of the Board. Material that is so designated may be disclosed only to outside counsel or outside consultants of the party requesting such materials who have a need to know, handle, or review the materials for purposes of this proceeding and any judicial review proceeding arising herefrom and/or from any related proceedings, provided that such outside counsel or outside consultants have been given and have read a copy of this Protective Order, agree to be bound by its terms, and execute the

attached Undertaking for Highly Confidential Material prior to receiving access to such materials. Material designated as “HIGHLY CONFIDENTIAL” and produced in discovery under this provision shall be subject to all of the other provisions of this Protective Order, including without limitation paragraph 1.

3. In the event that a party produces material which should have been designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” and inadvertently fails to designate the material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL,” the producing party may notify the other party in writing within 5 days of discovery of its inadvertent failure to make the confidentiality designation. The party who received the material without the confidentiality designation will return the non-designated portion (including any and all copies) or destroy it, as directed by the producing party, or take such other steps as the parties agree to in writing. The producing party will promptly furnish the receiving party with properly designated material.

4. In the event that a party inadvertently produces material that is protected by the attorney client privilege, work product doctrine, or any other privilege, the producing party may make a written request within a reasonable time after the producing party discovers the inadvertent disclosure that the other party return the inadvertently produced privileged document. The party who received the inadvertently produced document will either return the document to the producing party or destroy the document immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the document, the receiving party is not conceding that the document is privileged and is not waiving its right to later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege.

5. If any party intends to use “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material at hearings in this proceeding, or in any judicial review proceeding arising herefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material to the Board, or the court, as appropriate, with a written request that the Board or the court: (a) restrict attendance at the hearings during discussion of such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material; and (b) restrict access to the portion of the record or briefs reflecting discussion of such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in accordance with the terms of this Protective Order.

6. If any party intends to use “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in the course of any deposition in this proceeding, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent, and all other counsel attending the deposition, and all portions of the deposition at which any such “CONFIDENTIAL,” and/or “HIGHLY CONFIDENTIAL” material is used shall be restricted to persons who may review the material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material shall be kept under seal and treated as “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in accordance with the terms of this Protective Order.

7. Each party is ordered to produce to the other party documents, including rail transportation and other contracts, or other documents or information which, because of confidentiality provisions, cannot be produced without a Board order directing their production to the extent that (1) the other party has requested that the documents be produced in discovery, and (2) the parties agree that the requested documents would be properly discoverable in this proceeding but for the confidentiality provisions(s). Such documents shall be required to be produced only after the other party(ies) to a contract (or other document subject to a confidentiality provision) who are entitled to prior notice have been provided written notice and a reasonable opportunity to object to that production and obtain a ruling from the Board on that objection. Any documents or contracts produced pursuant to this Section 7 shall be treated as "HIGHLY CONFIDENTIAL" and shall otherwise be subject to the terms of this Protective Order. To the extent that material reflecting the terms of contracts, shipper-specific traffic data, other traffic data, or other proprietary information is produced by a party in this or any related proceedings and is held and used by the receiving person in compliance with this Protective Order, such production, disclosure, and use of the material and of the data that the material contains will be deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. § 11904.

8. Except for this proceeding, the parties agree that if a party is required by law or order of a governmental or judicial body to release "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material produced by the other party or copies or notes thereof as to which it obtained access pursuant to this Protective Order, the party so required shall notify the producing party in writing within 3 working days of the determination that the "CONFIDENTIAL" material, "HIGHLY CONFIDENTIAL" material, or copies or notes are to be released, or within 3 working days prior to such release, whichever is soonest, to permit the producing party the opportunity to contest the release.

9. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it publicly shall not be subject to this Protective Order even if the same information is produced and designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in this proceeding.

10. Each party has a right to view its own data, information and documentation (i.e., information originally generated or compiled by or for that party), even if that data, information and documentation has been designated as "HIGHLY CONFIDENTIAL" by a producing party, without securing prior permission from the producing party. If a party (the "filing party") files and serves upon another party (the "reviewing party") a pleading or evidence containing the filing party's "HIGHLY CONFIDENTIAL" material, the filing party shall also prepare and serve contemporaneously upon the reviewing party a "CONFIDENTIAL" version of the pleading or evidence from which the filing party's "HIGHLY CONFIDENTIAL" material has been redacted. The "CONFIDENTIAL" version may be provided in hardcopy or electronic format at the option of the filing party and may be disclosed to those personnel employed by the reviewing party who have read a copy of this Protective Order and executed the attached Undertaking for Confidential Material ("In-house Personnel"). In lieu of preparing a "CONFIDENTIAL" version, the filing party may (simultaneously with the party's submission to the Board of its "HIGHLY CONFIDENTIAL" version) make available to outside counsel for

any other party a list of all “HIGHLY CONFIDENTIAL” information that must be redacted from its “HIGHLY CONFIDENTIAL” version prior to review by in-house personnel, and outside counsel for any other party must then redact that material from the “HIGHLY CONFIDENTIAL” version before permitting any clients to review the submission.

11. Any party filing with the Board a “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” pleading in this proceeding should simultaneously file a public version of the pleading.

UNDERTAKING CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on July_, 2023, governing the production of confidential documents in STB Docket NOR 42179, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than the preparation and presentation of evidence and argument in STB Docket NOR 42179 or any judicial review proceeding arising herefrom. I further agree not to disclose any data or information obtained under this Protective Order to any person who has not executed an Undertaking in the form hereof. At the conclusion of this proceeding and any judicial review proceeding arising herefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that counsel and consultants may retain copies of pleadings which they were authorized to review under the Protective Order. I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Signed: _____

Print: _____

Dated: _____

UNDERTAKING HIGHLY CONFIDENTIAL MATERIAL

As outside [counsel] [consultant] for _____, for which I am acting in this proceeding, I have read the Protective Order served on July __, 2023, governing the production of confidential documents in STB Docket NOR 42179, understand the same, and agree to be bound by its terms. I further agree not to disclose any data, information or material designated "HIGHLY CONFIDENTIAL" to any person or entity who: (i) is not eligible for access to "HIGHLY CONFIDENTIAL" material under the terms of the Protective Order, or (ii) has not executed a "HIGHLY CONFIDENTIAL" undertaking in the form hereof. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated "HIGHLY CONFIDENTIAL," that I will limit my use of those documents and the information they contain to this proceeding and any judicial review proceeding arising herefrom, that I will take all necessary steps to assure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners, and that at the conclusion of this proceeding and any judicial review proceeding arising herefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel and consultants may retain file copies of pleadings filed with the Board. I further understand that I must destroy all notes or other documents containing such highly confidential information in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated "HIGHLY CONFIDENTIAL" by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

OUTSIDE [COUNSEL] [CONSULTANT]

Print: _____

Dated: _____

ATTACHMENT B

Pt. 1112

(2) The movement would exceed 500 highway miles between origin and destination;

(3) There is no intramodal competition from other railroads;

(4) There is no barge competition;

(5) There is no pipeline competition;

(6) The complainant has used truck for 10% or less of its volume (by tonnage) subject to the rate at issue over a five-year period; and

(7) The complainant has no practical build-out alternative due to physical, regulatory, financial, or other issues (or combination of issues).

(b) A complainant may rely on any competent evidence, including a verified statement from an appropriate official(s) with knowledge of the facts, in demonstrating the factors set out in paragraph (a) of this section. An appropriate official is any individual who has either direct or supervisory responsibility for, or otherwise has knowledge or understanding of, the complainant's transportation needs and options. The official(s) should provide his or her title and a short description of his or her duties in the verified statement. In demonstrating the revenue to variable cost ratio, a complainant must show its quantitative calculations.

(c) A defendant's reply evidence under the streamlined market dominance approach may address the factors in paragraph (a) of this section and any other issues relevant to market dominance. A complainant may elect to submit rebuttal evidence on market dominance issues. Reply and rebuttal filings under the streamlined market dominance approach are each limited to 50 pages, inclusive of exhibits and verified statements.

(d)(1) Pursuant to the authority under §1011.6 of this chapter, an administrative law judge will hold a telephonic evidentiary hearing on the market dominance issues at the discretion of the complainant in lieu of the submission of a written rebuttal on market dominance issues.

(2) The hearing will be held on or about the date that the complainant's rebuttal evidence on rate reasonableness is due. The complainant shall inform the Board by letter submitted in the docket, no later than 10 days after defendant's reply is due, whether it

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elects an evidentiary hearing of lieu of the submission of a written rebuttal on market dominance issues.

(3) The Board will provide an unofficial copy of the hearing transcript no later than 5 days after the conclusion of the hearing. The Board will provide the official hearing transcript shortly thereafter. The hearing transcript will be part of the docket in the proceeding.

[85 FR 47697, Aug. 6, 2020]

**PART 1112—MODIFIED
PROCEDURES**

Sec.

1112.1 When modified procedure is used.

1112.2 Decisions directing modified procedure.

1112.3 Default for failure to comply with schedule; effect of default.

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1112.9 Sample verification for statement of fact under modified procedure.

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1112.11 Authority of officers.

AUTHORITY: 5 U.S.C. 559; 49 U.S.C. 1321.

SOURCE: 47 FR 49558, Nov. 1, 1982, unless otherwise noted.

§ 1112.1 When modified procedure is used.

The Board may decide that a proceeding be heard under modified procedure when it appears that substantially all material issues of fact can be resolved through submission of written statements, and efficient disposition of the proceeding can be accomplished without oral testimony. Modified procedure may be ordered on the Board's initiative, or upon approval of a request by any party.

[47 FR 49558, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1112.2 Decisions directing modified procedure.

A decision directing that modified procedure be used will set out the schedule for filing verified statements by all parties and will list the names and addresses of all persons who at that time are on the service list in the

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proceeding. In this part, a statement responding to an opening statement is referred to as a “reply”, and a statement responding to a reply is referred to as a “rebuttal”. Replies to rebuttal material are not permitted. The filing of motions or other pleadings will not automatically stay or delay the established procedural schedule. Parties will adhere to this schedule unless the Board issues an order modifying the schedule.

[47 FR 49558, Nov. 1, 1982, as amended at 61 FR 58491, Nov. 15, 1996]

§ 1112.3 Default for failure to comply with schedule; effect of default.

If a party fails to comply with the schedule for submission of verified statements, or any other requirements established by the modified procedure decision, that party will be deemed to be in default and to have waived any further participation in the proceeding. Thereafter, the proceeding may be disposed of without notice to and without participation by parties in default.

§ 1112.4 Petitions to intervene.

(a) The Board may grant a petition to intervene in a proceeding set for modified procedure if intervention:

(1) Will not unduly disrupt the schedule for filing verified statements, except for good cause shown; and

(2) Would not unduly broaden the issues raised in the proceeding.

(b) The petition to intervene shall set out:

(1) The petitioner’s interest in the proceeding;

(2) Whether the petitioner supports or opposes the relief sought or the action proposed or is otherwise concerned with the issues presented in the proceeding; and

(3) The petitioner’s request, if any, for relief.

[47 FR 49558, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1112.5 Joint pleadings.

Parties with common interests are encouraged to prepare joint pleadings whenever possible.

§ 1112.6 Verified statements; contents.

A verified statement should contain all the facts upon which the witness relies, and to the extent that it contains arguments, they should be based only on those facts. Parties filing reply and rebuttal verified statements will be considered to have admitted the truth of material allegations of fact contained in their opponents’ statements unless those allegations are specifically challenged. Rebuttal statements shall be confined to issues raised in the reply statements to which they are directed.

§ 1112.7 Records in other Board proceedings.

If any portion of the record before the Board in any proceeding other than the proceeding at issue is offered in evidence, a true copy should be presented for the record.

[47 FR 49558, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1112.8 Verification.

The original of any pleading filed must show the signature, capacity, and seal, if any, of the person administering the oath, and the date thereof.

§ 1112.9 Sample verification for statement of fact under modified procedure.

State of _____,
County of _____,
SS: _____

_____ being duly sworn, deposes and says that he has read the foregoing statement, knows the facts asserted there are true and that the same are true as stated.

Signed _____.
Subscribed and sworn to before me this ____ day of _____.
Notary Public of _____.
My Commission expires _____.

§ 1112.10 Requests for oral hearings and cross examination.

(a) *Requests.* Requests for oral hearings in matters originally assigned for handling under modified procedure must include the reasons why the matter cannot be properly resolved under modified procedure. Requests for cross examination of witnesses must include the name of the witness and the subject matter of the desired cross examination.

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(b) *Disposition*. Unless material facts are in dispute, oral hearings will not be held. If held, oral hearings will normally be confined to material issues upon which the parties disagree. The decision setting a matter for oral hearing will define the scope of the hearing.

[61 FR 52712, Oct. 8, 1996]

§ 1112.11 Authority of officers.

Except to the extent that they apply only to the conduct of a public hearing, the officer assigned to handle a proceeding under the modified procedure shall have the same authority as officers assigned to conduct oral hearings as described in § 1113.3(a) and (b).

PART 1113—ORAL HEARING

Sec.

- 1113.1 Scheduling hearings; continued hearings.
- 1113.2 Subpoenas.
- 1113.3 Authority of officers.
- 1113.4 Prehearing conferences.
- 1113.5 Stipulations.
- 1113.6 Appearances; withdrawal or absence from hearing.
- 1113.7 Intervention; petitions.
- 1113.8 Witness examination; order of procedure.
- 1113.9 Prepared statements.
- 1113.10 Records in other Board proceedings.
- 1113.11 Abstracts of documents.
- 1113.12 Exhibits.
- 1113.13 Filing evidence subsequent to hearing.
- 1113.14 Objections to rulings.
- 1113.15 Interlocutory appeals.
- 1113.16 Oral argument before the hearing officer.
- 1113.17 Transcript of record.
- 1113.18 Briefs.
- 1113.19 Pleadings: part of the record.
- 1113.20–1113.30 [Reserved]

AUTHORITY: 5 U.S.C. 559; 49 U.S.C. 1321.

SOURCE: 47 FR 49559, Nov. 1, 1982, unless otherwise noted.

§ 1113.1 Scheduling hearings; continued hearings.

(a) *Assignment; service and posting of notice*. In those proceedings in which an oral hearing is to be held, the Board will assign a time and place for hearing. Notice of hearings will be posted on the Board's Web site, will be served upon the parties and such other persons as may be entitled to receive notice under the Act, and will be avail-

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able for inspection at the Board's office.

(b) *Requests for changes in assignment*. Requests for postponements of date of hearing will be granted only in exceptional circumstances.

(c) *Continuances*. (1) A continuance may be granted at the discretion of the presiding officer.

(2) If the presiding officer announces the time and place of a continued hearing on the record, no further notice need be given.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996; 74 FR 52907, Oct. 15, 2009]

§ 1113.2 Subpoenas.

(a) *Issuance*. A subpoena may be issued upon the direction of the Board on its own motion or upon request. A subpoena may be issued by the Board or by the officer presiding at a hearing and must be signed by the Director of the Office of Proceedings or a member of the Board.

(b) *Requests*. (1) A request for a subpoena to compel the appearance of a person at a hearing to give oral testimony, but not to produce documents, may be made either by letter (only the original need be filed with the Board) or orally upon the record at the hearing. A showing of general relevance and reasonable scope of the evidence sought to be introduced through the subpoenaed person may be required.

(2) A request for a subpoena to compel a witness to produce documentary evidence should be made in writing by petition. The petition should specify with particularity the books, papers, or documents desired and facts expected to be proved, and should show the general relevance and reasonable scope of the evidence sought. The officer presiding at a hearing may grant a request for such a subpoena made orally upon the record.

(c) *Service*. The original subpoena should be exhibited to the person served, should be read to him if he is unable to read, and a copy should be delivered to him by the officer or person making service.

(d) *Return*. If service of subpoena is made by a United States marshal or his deputy, service should be evidenced by his return of the subpoena. If made by

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any other person, such person shall make an affidavit stating the date, time and manner of service; and return such affidavit on, or with, the original subpoena in accordance with the form thereon. In case of failure to make service the reasons for the failure should be stated on the original subpoena. The written acceptance of service of a subpoena by the person subpoenaed will be sufficient without other evidence of return. The original subpoena bearing or accompanied by the required return, affidavit, statement, or acceptance of service, should be returned forthwith to the Chief, Section of Administration, Office of Proceedings, unless otherwise directed.

(e) *Witness fees.* A witness who is summoned and responds to the summons is entitled to the same fee as is paid for like service in the courts of the United States. Such fee is to be paid by the party at whose insistence the testimony is taken at the time the subpoena is served, except that when the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered at the time of service.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996; 74 FR 52907, Oct. 15, 2009; 81 FR 8854, Feb. 23, 2016]

§ 1113.3 Authority of officers.

(a) *General.* (1) The presiding officer has the authority to regulate the procedure in the hearing before him, and has authority to take all measures necessary or proper for the efficient performance of the duties assigned him. These include authority: (i) To hold hearings; (ii) to administer oaths and affirmations; (iii) to grant intervention; (iv) to accept any pleading; (v) to establish special rules of procedure appropriate to the effective handling of the particular proceeding; (vi) to examine witnesses; (vii) to issue subpoenas at the hearing; (viii) to dispose of requests for discovery; (ix) to hold conferences for the settlement and simplification of issues; (x) to rule on motions and dispose of procedural requests; (xi) to make initial decisions; (xii) to exclude any person from the hearing for contemptuous conduct; and (xiii) to take any other action authorized by this part, by the Administra-

tive Procedure Act, or by the Interstate Commerce Act and related acts.

(2) The presiding officer has the authority: (i) To terminate examination or cross-examination of repetitious or cumulative nature; (ii) to limit direct examination to material matters; (iii) to limit cross-examination to disputed material facts; (iv) to require that principal examination or cross-examination be conducted by one or more counsel representing similar interests in proceedings where several parties are involved; (v) to set reasonable schedules for the presentation of witnesses; (vi) and to set reasonable time limits for the examination or cross-examination of witnesses. In order to enforce this paragraph, the officer may require a clear statement on the record of the nature of the testimony to be given by any witness.

(b) *Motions to dismiss; amendments.* (1) The presiding officer shall have power to decide any motion to dismiss the proceeding or other motion which involves final determination of the merits of the proceeding.

(2) The presiding officer may grant leave to amend any application or complaint.

(c) *Preparation of the decision by the prevailing party.* Any proceeding in which an oral hearing is held and in which the officer is able to announce his decision either:

(1) On the record after the close of the taking of testimony and the hearing of arguments by the officer, or

(2) By appropriate notification to the parties after the close of the hearing, may be made the subject of an initial decision prepared by a party or parties in whose favor the officer decides, within a period specified by the officer, and subject to such changes as the officer considers appropriate in the draft prepared for him.

(d) *Recording; media coverage.* The presiding officer shall have authority to permit or to refuse to permit the recording of the hearing by means of live or delayed television or radio broadcast, or the use of a tape recorder or

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other electronic or photographic equipment by any person other than the official reporter.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996; 81 FR 8854, Feb. 23, 2016]

§ 1113.4 Prehearing conferences.

(a) *Purposes.* Upon written notice by the Board in any proceeding, or upon written or oral instruction of an officer, parties or their representatives may be directed to appear before an officer at a specified time and place for a conference, prior to or during the course of a hearing, or in lieu of personally appearing, to submit suggestions in writing, for the purpose of formulating issues and considering:

- (1) The simplification of issues;
- (2) The necessity or desirability of amending the pleadings either for the purpose of clarification, amplification, or limitation;
- (3) The possibility of making admissions of certain averments of fact or stipulations concerning the use by any or all parties of matters of public record, such as annual reports and the like, to avoid the unnecessary introduction of proof;
- (4) The procedure at the hearing;
- (5) The limitation of the number of witnesses;
- (6) The propriety of prior mutual exchange between or among the parties of prepared testimony and exhibits; and
- (7) Such other matters, including disposition of requests for discovery, as may aid in the simplification of the evidence and disposition of the proceeding. Parties may request a prehearing conference.

(b) *Facts disclosed privileged.* Facts disclosed in the course of the prehearing conference are privileged and, except by agreement, will not be used against participating parties either before the Board or elsewhere unless fully corroborated by other evidence.

(c) *Recordation and decision.* Action taken at the conference, including a recitation of the amendments allowed to the pleadings, the agreements made by the parties as to any of the matters considered, and defining the issues, will be recorded in an appropriate decision unless the parties enter into a written

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stipulation as to such matters, or agree to a statement thereof made on the record by the officer.

(d) *Objection to the decision; subsequent proceedings.* If a decision is entered, the parties may, within 20 days of the date of service, or within such lesser time as is set by the officer, present objections on the grounds that the decision does not fully or correctly embody the agreements reached at the conference. Thereafter the terms of the written stipulation or statement of the officer, as the case may be, will determine the subsequent course of the proceedings, unless modified to prevent manifest injustice.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1113.5 Stipulations.

Apart from the procedure contemplated by the prehearing provisions, the parties may, by stipulation in writing filed with the Board at any stage of the proceeding, or orally made at the hearing, agree upon any pertinent facts in the proceeding. The parties should agree to facts in this manner whenever practicable.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1113.6 Appearances; withdrawal or absence from hearing.

(a) *Who may appear.* Any individual may appear for himself. Any member of a partnership which is a party to any proceeding may appear for such partnerships upon adequate identification. A bona fide officer or a full-time employee of a corporation, association, or of an individual may appear for such corporation, association, or individual by permission of the officer presiding at the hearing. A party also may be represented by a practitioner.

(b) *Withdrawal or absence from hearing.* A practitioner who has entered his appearance at the hearing shall not be permitted to withdraw from the hearing, or willfully be absent therefrom, except for good cause and, wherever practicable, only with the permission of the presiding officer. If a person who has entered an appearance withdraws from the hearing in a manner other than that specified, the Board or the

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Officer may take such action as, in the interest of justice and the protection of the lawful rights of all parties to the proceeding, the circumstances of the case may warrant, including the striking out of all or any part of any pleading of the offending party, and including the possible dismissal of the action or proceeding, or any part thereof, the entry of an order of default against that party, or if the withdrawal is without the permission of the presiding officer, disciplining of the practitioner concerned.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1113.7 Intervention; petitions.

(a) *How requested.* Intervention will normally be granted only upon petition. In exceptional circumstances, where the issues would not be broadened or the proceeding delayed, an officer may, at his or her discretion, allow intervention upon motion made orally at the hearing.

(b) *Content generally.* A petition for leave to intervene must set forth the grounds for the proposed intervention, the position and interest of the petitioner in the proceeding, and whether petitioner's position is in support of or in opposition to the relief sought. If the proceeding is by formal complaint and affirmative relief is sought by petitioner, the petition should conform to the requirements for a formal complaint.

(c) *When filed.* A petition for leave to intervene in any proceeding should be filed prior to or at the time the proceeding is called for hearing, but not after, except for good cause shown.

(d) *Broadening issues; filing.* If the petition seeks a broadening of the issues and shows that they would not thereby be unduly broadened, and in respect thereof seeks affirmative relief, the petition should be filed in time to permit service upon and answer by the parties in advance of the hearing.

(e) *Copies; service; replies.* When a petition for leave to intervene is tendered at the hearing, sufficient copies of the petition must be provided for distribution to the parties represented at the hearing. When a petition for leave to intervene is not tendered at the hearing, the petition should be submitted

to the Board together with a certificate that service has been made by petitioner. Any reply in opposition to a petition for leave to intervene not tendered at the hearing must be filed within 20 days after service of the petition to intervene. At the discretion of the Board, leave to intervene may be granted or denied before the expiration of the time allowed for replies.

(f) *Disposition.* Leave to intervene will be granted only when the petitioner addresses issues reasonably pertinent to the issues already presented and which do not unduly broaden them. If leave is granted the petitioner becomes an intervenor and a party to the proceeding.

[47 FR 49559, Nov. 1, 1982, as amended at 53 FR 19301, May 27, 1988; 61 FR 52712, Oct. 8, 1996; 84 FR 12944, Apr. 3, 2019]

§ 1113.8 Witness examination; order of procedure.

Witnesses will be orally examined under oath before the officer unless the facts are presented to the Board in the manner provided under modified procedure. In formal complaint, application, and investigation proceedings, complainant, applicant, and respondent, respectively, shall open and close at the hearing. In the event of further hearings granted on petition, the petitioners requesting further hearing shall open and close the proceeding. Instances exist in which parties other than the respondent may open and close in investigations where the burden of proof is not upon the respondent. Intervenor shall follow the party on whose behalf the intervention is made. The foregoing order of presentation may be varied by the officer.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996; 81 FR 8854, Feb. 23, 2016]

§ 1113.9 Prepared statements.

With the approval of the officer, a witness may read into the record, as his testimony, statements of fact or expressions of opinion prepared by the witness, or written answers to interrogatories of counsel. A prepared statement of a witness who is present at the hearing may be received as an exhibit, provided that the statement does not include argument. Before any such

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statement is read or admitted in evidence, the witness shall deliver to the officer, the reporter, and to opposing counsel, as may be directed by the officer, a copy of such statement or of such interrogatories and the written answers thereto. The admissibility of the evidence contained in such statement will be subject to the same rules as if such testimony was produced orally, including the right of cross-examination of the witness. The officer may require that the witness testify orally if, in the officer's opinion, the memory or demeanor of the witness may be of importance.

§ 1113.10 Records in other Board proceedings.

A portion of the record before the Board in another proceeding may be offered in evidence at an oral hearing. A party making such an offer must provide, as an exhibit, a certified copy of the material sought to be introduced. A hearing officer may waive the requirement that a copy be provided, subject to such conditions as he or she may impose to assure that a copy will be available later, if needed, at no expense to the Board and to assure that the interests of other parties are not prejudiced. An offer of evidence under this section will be subject to objection by other parties.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1113.11 Abstracts of documents.

When documents, such as freight bills or bills of lading, are numerous, the officer may refuse to receive all the documents in evidence and instead admit only a limited number of representative documents. He may instruct, if the proffer be for the purpose of proving damages, that introduction be deferred until there is opportunity to comply with § 1133.2. If the proffer be for another purpose the officer may require the party in orderly fashion to abstract the relevant data from the documents, affording other parties reasonable opportunity to examine both the documents and the abstract, and

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thereupon offer such abstract in evidence in exhibit form.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52713, Oct. 8, 1996; 81 FR 8854, Feb. 23, 2016]

§ 1113.12 Exhibits.

(a) *Copies.* Unless the officer otherwise directs, the original and 10 copies of each exhibit of a documentary character should be furnished for the use of the Board. The original will be delivered to the reporter, and the copy to the officer. If the hearing is before a board, a copy of the exhibit should be furnished to each member of the board, unless the board otherwise directs. Unless the officer for cause directs otherwise, a reasonable number of copies should be furnished to counsel in attendance at the hearing.

(b) *Interchange prior to hearing.* Whenever practicable, the parties should interchange copies of exhibits or other pertinent material or matter before or at the commencement of the hearing; and the Board or presiding officer may so direct.

(c) *When excluded how treated.* When exhibit has been identified, objected to, and excluded, the officer will develop whether the party offering the exhibit withdraws the offer, and if so, permit the return of the exhibit to him. If the excluded exhibit is not withdrawn, it should be given an exhibit number for identification and be incorporated in the record. Exhibit numbers once used for identification will not be duplicated thereafter.

[47 FR 49559, Nov. 1, 1982, as amended at 53 FR 19301, May 27, 1988; 61 FR 52712, Oct. 8, 1996]

§ 1113.13 Filing evidence subsequent to hearing.

Except as provided in this section or as expressly may be permitted in a particular instance, the Board will not receive in evidence or consider as part of the record any documents, letters, or other writings submitted for consideration in connection with any proceeding after close of the hearing, and may return any such documents to the sender. Before the close of a hearing the officer may, at the request of a party or upon his own motion, or upon agreement of the parties, require that

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a party furnish additional documentary evidence that supplements the existing record, within a stated period of time. Documentary evidence to be furnished in this way will be given an exhibit number at the time of filing and the parties advised accordingly.

[47 FR 49559, Nov. 1, 1982, as amended at 53 FR 19301, May 27, 1988; 61 FR 52712, Oct. 8, 1996; 84 FR 12944, Apr. 3, 2019]

§ 1113.14 Objections to rulings.

It is sufficient that a party, at the time the ruling is made or sought, make known to the officer on the record the action which he desires the officer to take or his objection to the action of the officer and his grounds for that objection. An objection not pressed in brief will be considered as waived. Where no brief is filed an objection will be considered as waived if not pressed in an appeal or reply to an appeal, if filed, or in a separate petition dealing only with that objection.

§ 1113.15 Interlocutory appeals.

Rulings of the presiding officer may be appealed prior to service of the initial decision only if:

- (a) The ruling denies or terminates any person's participation,
- (b) The ruling grants a request for the inspection of documents not ordinarily available for public inspection,
- (c) The ruling overrules an objection based on privilege, the result of which ruling is to require the presentation of testimony or documents, or
- (d) The presiding officer finds that the ruling may result in substantial irreparable harm, substantial detriment to the public interest, or undue prejudice to a party.

§ 1113.16 Oral argument before the hearing officer.

At the discretion of the hearing officer and upon reasonable notice to the parties, oral argument may be made at the close of testimony before him as an alternative to the filing of written briefs. Such argument, which should include requested findings and conclusions, will be recorded and made a part of the transcript of testimony, and will be available to the Board for consideration in deciding the case. The making

of such argument will not preclude oral argument before the Board.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1113.17 Transcript of record.

(a) *Filing.* After the close of the hearing, the complete transcript of the testimony taken and the exhibits shall be part of the record in the proceeding.

(b) *Corrections.* A suggested correction in a transcript ordinarily will be considered only if offered not later than 20 days after the date each transcript is filed with the Board. A copy of the letter (original only need be filed with the Board) requesting the suggested corrections should be served upon all parties of record and with 2 copies to the official reporter.

(c) *Objections to corrections.* Parties disagreeing with corrections suggested pursuant to paragraph (b) of this section should file written objections in the same manner as suggested corrections are to be filed. Objections to suggested corrections should be filed not later than 15 days after the filing with the Board of suggested corrections. If no objections are timely filed, the Office of Proceedings shall make the suggested corrections to the transcript. If objections are timely filed, the officer who presided at the hearing shall determine the merits of the suggested correction and enter an appropriate decision in the proceeding.

(d) *No free copies.* The Board will not furnish free copies of the transcript to any party to any proceeding.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996; 74 FR 52907, Oct. 15, 2009]

§ 1113.18 Briefs.

(a) *When filed.* In a proceeding which has been the subject of oral hearing, and in which briefs are to be filed, that fact will be stated by the officer on the record. The officer shall fix the time for filing briefs. Simultaneous filing will normally be required, and reply briefs will not normally be permitted.

(b) *Evidence abstract.* A brief filed after a hearing may contain an abstract of the evidence relied upon by the party filing it, preferably assembled by subjects, with reference to the

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pages of the record, if written, or exhibit where the evidence appears. In the event the party elects not to include a separate abstract in his brief, he should give specific reference to the portions of the record, whether transcript or otherwise, relied upon in support of the respective statements of fact made throughout the brief.

(c) *Requested findings.* Each brief should include such requests for specific findings, separately stated and numbered, as the party desires the Board to make.

(d) *Exhibit reproduction.* Exhibits should not be reproduced in the brief, but may be shown, within reasonable limits, in an appendix to the brief. Analysis of such exhibits should be included in the brief where pertinent.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1113.19 Pleadings: part of the record.

Matters of fact that are verified and filed prior to oral hearing and that are not specifically denied constitute evidence and are part of the record. A witness, who would present such evidence, must be made available for cross-examination if a request is reasonably made. This rule does not apply to protests against tariffs or schedules.

[47 FR 49559, Nov. 1, 1982, as amended at 64 FR 53268, Oct. 1, 1999]

§§ 1113.20–1113.30 [Reserved]

PART 1114—EVIDENCE; DISCOVERY

Subpart A—General Rules of Evidence

Sec.

- 1114.1 Admissibility.
- 1114.2 Official records.
- 1114.3 Admissibility of business records.
- 1114.4 Documents in Board's files.
- 1114.5 Records in other Board proceedings.
- 1114.6 Official notice of corroborative material.
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Subpart B—Discovery

- 1114.21 Applicability; general provisions.
- 1114.22 Deposition.
- 1114.23 Depositions; location, officer, time, fees, absence, disqualification.
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- 1114.26 Written interrogatories to parties.
- 1114.27 Request for admission.
- 1114.28 Depositions, requests for admission, written interrogatories, and responses thereto: inclusion in record.
- 1114.29 Supplementation of responses.
- 1114.30 Production of documents and records and entry upon land for inspection and other purposes.
- 1114.31 Failure to respond to discovery.

AUTHORITY: 5 U.S.C. 559; 49 U.S.C. 1321.

SOURCE: 47 FR 49562, Nov. 1, 1982, unless otherwise noted.

Subpart A—General Rules of Evidence

§ 1114.1 Admissibility.

Any evidence which is sufficiently reliable and probative to support a decision under the provisions of the Administrative Procedure Act, or which would be admissible under the general statutes of the United States, or under the rules of evidence governing proceedings in matters not involving trial by jury in the courts of the United States, will be admissible in hearings before the Board. The rules of evidence will be applied in any proceeding to the end that necessary and proper evidence will be conveniently, inexpensively, and speedily produced, while preserving the substantial rights of the parties.

[47 FR 49562, Nov. 1, 1982, as amended at 61 FR 52713, Oct. 8, 1996]

§ 1114.2 Official records.

An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by a deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record