

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
PETITION FOR SUBPOENAS**

Pursuant to 49 U.S.C. § 1321(c), 49 C.F.R. §§ 1113.2(b), and 1117.1, BNSF Railway Company (“BNSF”) hereby respectfully petitions the Surface Transportation Board (“STB” or “Board”) to issue subpoenas directed to (1) Mitsubishi Corporation RtM (Americas) (“RtMA”),¹ (2) EWP Renewable Corporation (“EWPRC”),² and (3) Kyuden Urban Development America Co LTD (“Kyuden”)³ (collectively, “U.S. Subsidiaries”) for production of documents and deposition testimony. The specific information sought is detailed in the proposed subpoenas attached as Exhibits 1-3.⁴ These requests relate to Navajo Transitional Energy Company, LLC’s (“NTEC”) damage claims in this proceeding, including NTEC’s claim concerning “the impact on NTEC’s business reputation when railroad deliveries are inconsistent or non-existent.” Compl. ¶ 38. More specifically, NTEC has repeatedly cited reputational

¹ RtMA is located at 655 3rd Ave, New York, NY 10017-5621.

² EWPRC is located at 303 Fellowship Road, Suite 105, Mt. Laurel, NJ 08054.

³ Kyuden is located at 200 Bellevue Pkwy Ste 210, Wilmington, DE 19809-370.

⁴ Exhibit 1 is the subpoena for RtMa. Exhibit 2 is the subpoena for EWPRC. Exhibit 3 is the subpoena for Kyuden.

harm and lost sales as damages, *see, e.g.*, May 10, 2023 Hearing Tr. 116:8-17, and specifically identified the parent companies of the U.S. Subsidiaries (the “Parent Companies”)⁵ in its August 9, 2023 Responses to BNSF’s Interrogatories.⁶ These requests are directly related to an integral issue involved in this decision, are narrowly drawn so that the benefit of production far outweighs any burden on the Parent Companies, and are plainly “relevant to the subject matter involved in [this] proceeding” and discoverable under 49 C.F.R. § 1114.21(a).

I. BACKGROUND

The present Petition arises from a Complaint filed by NTEC before the Board on April 14, 2023, alleging inadequacies in BNSF’s rail service shipping coal from NTEC’s Spring Creek Mine in Big Horn County, Montana (“Spring Creek”) to Westshore Terminals (“Westshore”) in British Columbia, Canada. From Westshore, the NTEC coal is shipped to markets in Asia, including Japan and the Republic of Korea. In its Complaint, NTEC alleges that BNSF (1) breached its obligation to provide adequate common carrier service on reasonable request; (2) engaged in

⁵ RtMA’s parent company is Mitsubishi Corporation (“Mitsubishi”). EWPRC’s parent company is Korea East West Power Co., LTD (“Korea East West”). Kyuden’s parent company is Kyushu Electric Power Company Inc. (“Kyushu Electric”).

⁶ BNSF is also seeking the issuance of a letter rogatory to the Parent Companies. Notwithstanding the letter rogatory, BNSF is seeking this subpoena directed to the U.S. Subsidiaries because (1) the Parent Companies are not subject to the Surface Transportation Board’s subpoena power, 49 U.S.C. § 1321; and (2) letters rogatory can take a year or more to execute, U.S. State Dep’t, Preparation of Letters Rogatory, <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/international-judicial-asst/obtaining-evidence/Preparation-Letters-Rogatory.html>. Under the current schedule, the discovery period extends only until September 28, 2023. In addition, both RtMA and EWPRC are involved in the coal trade (like their parent companies).

unreasonable practices in establishing and implementing the terms for such service; and (3) failed to provide safe and adequate coal service. Compl. at 1.

Also on April 14, 2023, NTEC filed an *ex parte* application seeking an emergency service order and/or a preliminary injunction for the Board to restore and maintain adequate coal transportation service from Spring Creek to Westshore. On May 10, 2023, the Board held an oral argument, during which officials from NTEC vaguely testified regarding the alleged reputational damage it claims:

- “When we traveled to Asia in February, and met with Japanese customers, the whole conversation – the vast majority of the conversation was on train service. We hear you have a train problem.” Hearing Tr. 116:9-13 (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 123:17-20.
- “So, the position that BNSF has put all of these shippers in, not just us, but we're the ones who are here, is that you know, there is a real concern that there will be no way to plan your business, no way to execute that business, and there will be millions of dollars in revenues lost, irreparable harms to relationships,” *Id.* at 29:22-30:7.
- “Because if they cut our trains and we can't deliver, we may not get back into that market because we are struggling right now in re-establishing our credibility in that market because of what took place.” *Id.* at 117:6-9.

- “[W]e have long-term customers, all of the five major state owned Korean Jenkos 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.” *Id.* at 122:21-123:8.

The Board found these claims probative, citing the “reputational injuries [NTEC] is suffering” as irreparable harm to support its grant of a preliminary injunction. *See* NOR 42178 slip op. at 10 (STB served June 23, 2023). NTEC elaborated on these conversations with its Japanese and 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 (attached as Exhibit 4). A chart of the Parent Companies’ purported conversations with NTEC is reproduced below:

Date	Customer	Location	Communication	NTEC’s Summary
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

Date	Customer	Location	Communication	NTEC's Summary
				Japan given that Japanese buyers require reliability for long-term business relationships.
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.
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.
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

Date	Customer	Location	Communication	NTEC's Summary
				persistent service issues to NTEC.
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.

Id. BNSF seeks documents and deposition testimony from the U.S. Subsidiaries regarding NTEC's reputation in Asia and whether NTEC's reputation has impacted its ability to conduct business. In addition, BNSF seeks documents and deposition testimony regarding NTEC's allegations of lost sales in Asian markets in which RtMA and EWPRC are market participants.⁷

II. THE BOARD SHOULD ISSUE THE REQUESTED SUBPOENAS

The Board is authorized to “subpoena witnesses and records related to a proceeding of the Board from any place in the United States.” 49 U.S.C. § 1321(c)(1). Under the Board's rules, a party requesting a subpoena to compel the production of documentary evidence must show “general relevance and reasonable scope of the

⁷ To date, BNSF has not identified Kyuden as a participant in the export coal market. However, BNSF seeks discovery of Kyuden based on Kyushu Electric Power Company Inc.'s 100% ownership and control over Kyuden. *See infra* note 8.

evidence sought.” 49 C.F.R. § 1113.2(b)(2). In deciding whether to issue a subpoena, the Board considers “the relevance of the material sought, and the burden on the nonparty.” *Reasonableness of BNSF Ry. Co. Coal Dust Mitigation Tariff Provisions*, FD 35557, slip op. at 5 (STB served June 25, 2012). “The requirement of relevance means that the information might be able to affect the outcome of a proceeding.” *Ballard Terminal R.R.—Aquis. & Operation Exemption—Woodinville Subdivision*, FD 35731 et al. slip op. at 2 (STB served May 17, 2013) (citing *Waterloo Ry.—Adverse Aband.—Lines of Bangor and Aroostook R.R. and Van Buren Bridge Co. In Aroostook Cnty. et al., Me.*, AB 124 (Sub-No. 2) (STB served Nov. 14, 2003)).

The standards for issuance of a subpoena under the Board’s discovery rules have been met. *See* 49 U.S.C. § 1321(c). The Board’s Rules of Practice permit “discovery . . . regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding.” 49 C.F.R. § 1114.21(a). It is also well-settled that the Board’s discovery rules are to be liberally construed. *See, e.g., Duke Energy Corp. v. Norfolk S. Ry.*, NOR 42069, slip op. at 4 (STB served July 26, 2002) (“The Board’s rules generally provide for liberal discovery of non-privileged matter that is reasonably calculated to lead to discovery of admissible evidence.”).

BNSF requires the discovery information described in Exhibits 1-3 to respond to claims made by NTEC regarding the impact of BNSF’s service on NTEC’s reputation and ability to sell coal to customers in Asia. The scope of the requested subpoena is reasonable, and compliance would not be unduly burdensome for the U.S. Subsidiaries. The subpoena has been narrowly tailored to seek only the relevant

documents and testimony related to any lost sales or any “reputational harm” NTEC allegedly suffered in the eyes of the U.S. Subsidiaries. The Board has previously granted petitions for a subpoena ordering a non-party to produce relevant information that may be used by a party in its evidentiary presentation. *See, e.g., Reasonableness of BNSF Ry. Coal Dust Mitigation Tariff Provisions*, FD 35557, slip op. at 1 (STB served Feb. 27, 2012) (Board found that individual members of the Western Coal Traffic League were subject to discovery under the Board’s subpoena power).⁸

⁸ The fact that the U.S. Subsidiaries may need to ask the Parent Companies for certain discovery requested under the subpoena has no bearing on issuance of the subpoena. 8B Charles Alan Wright, Arthur R. Miller, 8B Fed. Prac. & Proc. Civ. § 2210 at 1 n.8 (3d ed. 2023) (“A party need not have actual possession of documents to be deemed in control of them.”). Courts have repeatedly required recipients of discovery requests to obtain the required discovery from affiliated corporations under several separate theories, including (i) whether the “alter ego” doctrine would justify piercing the corporate veil, (ii) whether the litigant corporation acted as the agent of the nonparty corporation in connection with the matter in litigation, (iii) whether the litigant corporation could secure materials from the nonparty corporation to meet its own business needs, and (iv) whether, by virtue of stock ownership or otherwise, one corporation effectively controls the other. *Id.* at 1; *see also Japan Halon Co. v. Great Lakes Chem. Corp.*, 155 F.R.D. 626, 627-28 (N.D. Ind. 1993) (rejecting argument that discovery on Japanese parent company needed to be pursued through letters rogatory and ordering U.S. subsidiary to produce documents from parent).

Here, Mitsubishi effectively controls RtMA through its ownership of Mitsubishi Corporation (Americas), parent company to RtMA. *See Mitsubishi Corporation (Americas), Principal Subsidiaries and Affiliates*, available at <https://www.mitsubishicorp.com/us/en/mca/about/affiliates.html>. Korea East West owns EWPRC, thereby effectively controlling it. *See EWP Renewable Corporation, About Our Parent Company*, available at <http://www.ewprc.com/>. All four of these companies are involved in the coal trade. *See id.*; Mitsubishi Corporation RtM (Americas), *Products and Services*, available at <https://www.mitsubishicorp.com/us/en/mic/bg/mcrtm/>; NTEC Resp. to Interrogatory Nos. 11-12. Kyushu Electric also fully owns Kyuden, thereby effectively controlling it. Kyuden, *Subsidiaries and Affiliated Companies*, available at

Finally, while BNSF has tailored its requests to be as unobtrusive as possible, and do not expect that compliance with the subpoena will present any significant burdens for the U.S. Subsidiaries, BNSF agrees to work with the U.S. Subsidiaries to address any concerns as to burden that may be raised.

III. CONCLUSION

For the foregoing reasons, BNSF moves that the Board issue a subpoena directed to the U.S. Subsidiaries for production of documents and deposition testimony that is responsive to the requests specified in the schedule contained in Exhibits 1-3 hereto, and stipulate that the protective order in this case governs the production of all documents in response to those requests. Given the time associated with obtaining evidence from Asia and the importance of obtaining this information in a timely manner so that it may be utilized in preparing the parties' evidentiary submissions, BNSF respectfully requests that the Board expedite its consideration of this Petition.

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Respectfully submitted,

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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

DOCKET NO. NOR 42179

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

SUBPOENA

Pursuant to 49 U.S.C. § 1321(c), the Surface Transportation Board (“Board”) hereby issues this Subpoena directing Mitsubishi Corporation RtM (Americas) (“RtMA”) to produce the documentary evidence specified herein for use in the above-captioned proceeding. Part I sets forth instructions for complying with this Subpoena, and Part II sets forth definitions used in this Subpoena. Part III specifies the documents that are sought by this Subpoena.

I. Instructions

1. The documentary evidence requested in this Subpoena shall be produced within twenty days of service of the Subpoena on RtMA, unless otherwise agreed by counsel to the parties. RtMA 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 Board's July 18, 2023 granted Protective Order in the above-captioned proceeding.

3. In responding to the following document requests, furnish all available documents in RtMA 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. “RtMA” shall refer to Mitsubishi Corporation RtM (Americas), Mitsubishi Corporation (Americas), Mitsubishi Corporation, 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 RtMA, its successors, agents, members, and employees.

III. Documentary Evidence to Be Produced

1. All contracts or agreements between RtMA and Cloud Peak Energy, Inc. or NTEC related to the shipment of coal from the Spring Creek Mine to Japan or

related to sales-related services that RtMA provides to NTEC.

2. All communications related to any sales-related services that RtMA provides and any decision by any coal customer to renew or not renew a contract with NTEC for coal supply.

3. All communications related to rail service NTEC received for the shipment of coal from the Spring Creek Mine to Japan.

4. All documents sufficient to show the amount of coal purchased from NTEC by various customers as a percentage of coal purchased by those customers in 2020, 2021, and 2022.

5. All communications related to or regarding the following purported conversations between RtMA and NTEC:

Date	Customer	Location	Communication	NTEC's Summary
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.
6/12/2023	Mitsubishi Japan	Phone call	Phone	Mitsubishi discussed the Japanese markets. Mitsubishi again asked for details on NTEC's

Date	Customer	Location	Communication	NTEC's Summary
				expectations for BNSF service and whether NTEC expected to meet customer reliability and volume expectations in light of its rail service issues.
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.

EXHIBIT 2

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42179

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

SUBPOENA

Pursuant to 49 U.S.C. § 1321(c), the Surface Transportation Board (“Board”) hereby issues this Subpoena directing EWP Renewable Corporation (“EWPRC”) to produce the documentary evidence specified herein for use in the above-captioned proceeding. Part I sets forth instructions for complying with this Subpoena, and Part II sets forth definitions used in this Subpoena. Part III specifies the documents that are sought by this Subpoena.

I. Instructions

1. The documentary evidence requested in this Subpoena shall be produced within twenty days of service of the Subpoena on EWPRC, unless otherwise agreed by counsel to the parties. EWPRC 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 Board's July 18, 2023 granted Protective Order in the above-captioned proceeding.

3. In responding to the following document requests, furnish all available documents in EWPRC'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. “EWPRC” shall refer to EWP Renewable Corporation, Korea East West 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 EWPRC, its successors, agents, members, and employees.

III. Documentary Evidence to Be Produced

1. All contracts or agreements between EWPRC and Cloud Peak Energy, Inc. or NTEC related to the shipment of export coal from the Spring Creek Mine.

2. All communications related to any decision by EWPRC to renew or not

renew a contract with NTEC for the shipment of export coal from the Spring Creek Mine.

3. All communications related to BNSF's provision of rail services to NTEC for the shipment of export coal from the Spring Creek Mine.

4. All documents sufficient to show the amount of export coal purchased from NTEC as a percentage of coal purchased by EWPRC in 2020, 2021, and 2022.

5. Communications related to or regarding the following purported conversation between EWPRC and NTEC:

Date	Customer	Location	Communication	NTEC's Summary
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.

EXHIBIT 3

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42179

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC
v.
BNSF RAILWAY COMPANY

SUBPOENA

Pursuant to 49 U.S.C. § 1321(c), the Surface Transportation Board (“Board”) hereby issues this Subpoena directing Kyuden Urban Development America Co LTD (“Kyuden”) to produce the documentary evidence specified herein for use in the above-captioned proceeding. Part I sets forth instructions for complying with this Subpoena, and Part II sets forth definitions used in this Subpoena. Part III specifies the documents that are sought by this Subpoena.

I. Instructions

1. The documentary evidence requested in this Subpoena shall be produced within twenty days of service of the Subpoena on Kyuden, unless otherwise agreed by counsel to the parties. Kyuden 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 Board's July 18, 2023 granted Protective Order in the above-captioned proceeding.

3. In responding to the following document requests, furnish all available documents in Kyuden 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. “Kyuden” shall refer to Kyuden Urban Development America Co LTD, Kyushu Electric Power Company 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 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 Kyuden, its successors, agents, members, and employees.

III. Documentary Evidence to Be Produced

1. All contracts or agreements between Kyuden and Cloud Peak Energy, Inc. or NTEC related to the shipment of export coal from the Spring Creek Mine.

2. All communications related to any decision by Kyuden to renew or not renew a contract with NTEC for the shipment of export coal from the Spring Creek Mine.

3. All communications related to BNSF's provision of rail services to NTEC for the shipment of export coal from the Spring Creek Mine.

4. All documents sufficient to show the amount of export coal purchased from NTEC as a percentage of coal purchased by Kyuden in 2020, 2021, and 2022.

5. All communications related to or regarding the following purported conversation between Kyuden and NTEC:

Date	Customer	Location	Communication	NTEC's Summary
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.

EXHIBIT 4

**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

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