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Via E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E. Street, S.W.
Washington, D.C. 20423

Re: *Navajo Transitional Energy Company, LLC v. BNSF Railway Company*,
STB Docket No. 42179

Dear Ms. Brown:

Earlier today, BNSF Railway Company (“BNSF”) made two unauthorized filings of Sur-replies in a belated and improper attempt to support its Petition for Subpoena and its Motions Seeking Letters Rogatory. BNSF’s sur-replies consist mostly of arguments that BNSF could have submitted in its initial August 8, 2023 filings. Navajo Transitional Energy Company, LLC (“NTEC”) therefore replies in opposition to BNSF’s unauthorized filings, and to BNSF’s inadequate and unsubstantiated requests for leave. The Board should reject BNSF’s filings for the reasons below.

The Board’s rules explicitly state that “a reply to a reply is not permitted.” *See* 49 C.F.R. § 1104.13(c); *W. Resort Transp., LLC et al. – Pet. for Decl. Order – Motor Carrier Transp. of Passengers in Colo.*, MC-F 21008, at 2 (STB served Apr. 8, 2005) (rejecting reply to reply); *Waterloo Ry. Co. – Adverse Abandonment – Lines of Bangor & Aroostook R.R. in Aroostook Cty., ME*, Docket No. AB-124 (Sub-No. 2), at 3 (STB served May 6, 2003) (same). BNSF did not even bother to seek formal leave to file its repetitive sur-replies. Instead, BNSF simply included *pro forma* footnotes in each document suggesting that its sur-replies ought to be accepted without question, support, or brief by BNSF.

BNSF’s sur-replies are particularly inappropriate insofar as they simply: (i) present legal rebuttal; (ii) attempt to cooer up arguments BNSF easily could have made in its initial filings; and (iii) deny the plain facts regarding BNSF’s delay in seeking this

form of discovery. BNSF's sur-replies are unnecessary and impermissible, and they fail to clarify any matter in dispute with regard to BNSF's international fishing expedition (which BNSF seeks to perpetuate through its August 24 requests for still more subpoenas and letters rogatory directed to parties that, once again, are complete strangers to this litigation).

To the extent that BNSF attempts to blithely suggest that such discovery is routine or appropriate, NTEC directs the Board's attention to the fact that BNSF's Petition, Motions, and sur-replies do not present *any* cases or precedent to support the extraordinary discovery BNSF seeks from the Board; namely, discovery from *foreign* affiliates of *strangers* to the subject litigation. Indeed, BNSF has not presented a single case requiring a foreign entity – that was a stranger to such litigation – to produce documents in response to a subpoena directed to a U.S.-based affiliate that itself was a stranger to the litigation. In fact, BNSF's sur-replies present only one new case where BNSF claims foreign discovery was ordered through a subpoena to a U.S. subsidiary; *i.e.*, *Afros S.P.A. v. Krauss-Maffei Corp.*, 113 F.R.D. 127, 130 (D. Del. 1986). Significantly, however, BNSF fails to disclose that the discovery granted in *Afros S.P.A.* was against a *party* to the proceeding and its foreign parent – *not* against a stranger to the litigation and its foreign parent.

BNSF had ample opportunity to fully brief the many complexities of foreign discovery that it now seeks to “explain” and rehabilitate. When it first filed its Petition and Motion, BNSF was well aware of the extraordinary nature of the discovery it sought *and* was well aware that it had the burden of proof in seeking such discovery. BNSF was also well aware of the fact that the Board had rejected BNSF's proposed extension of the procedural schedule, even though in requesting such an extension, BNSF had previewed its intent to embark on its unprecedented and over-reaching attempt to derail the proceedings in NOR 42719. BNSF's sur-replies provide no further reasons or support for granting its Petition and Motion. NTEC asks that the Board reject BNSF's impermissible replies to replies and deny BNSF's underlying Petition and Motions.

Sincerely,



Daniel M. Jaffe
Counsel for Navajo Transitional
Energy Company, LLC

cc: Counsel for BNSF