

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
September 14, 2023
Part of

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

REPLY TO CROW TRIBE LETTER

By letter dated August 8, 2023 but filed and served on September 12, 2023 (“Letter”), The Crow Tribe of Indians (“Crow Tribe”) has raised objections to the production of documents in response to a discovery request that Complainant Navajo Transitional Energy Company, LLC (“NTEC”) served upon Defendant BNSF Railway Company (“BNSF”) in this proceeding on July 19, 2023.

The Crow Tribe’s Letter seeks three forms of relief. First, the Crow Tribe asks that the Board “except[]” from production (by BNSF) certain Crow Tribe-related materials in BNSF’s possession, custody, or control. Letter at 2. Second, the Crow Tribe states that, “[i]f information from our discussion with BNSF is required, NTEC should be under an obligation to request it with specificity in referring to NTEC’s claims.” *Id.* Third, the Crow Tribe asks that any BNSF production of Crow Tribe-related materials should be made under a “Highly Confidential” designation. *Id.*

NTEC respectfully submits the following points in reply:

(1) The Crow Tribe, on its own initiative, interjected itself into the preliminary injunction/emergency service order dispute pending at the Board between NTEC and BNSF. In particular, the Crow Tribe's Energy Director, Mr. Conrad J. Stewart, filed a formal pleading on May 5, 2023 in STB Docket No. NOR 42178 objecting to the emergency service relief that NTEC sought in the proceeding and claiming that such relief "could significantly impact" the Crow Tribe:

The Crow Tribe has been seeking rail service to export our coal resources. We have been seeking to replace the income and economic benefit lost to the Tribe due to the decline in domestic coal sales which have been reduced by approximately 5 million tons since 2014. In July 2022 we wrote to BNSF to request service to export Crow coal from Montana to Westshore Terminals. In response we were advised that BNSF was not able to commit to service for our export needs until 2Q 2023 at the earliest. However we have been meeting with BNSF very regularly since then, including in-person in Fort Worth and at Crow Agency, to prepare for our exports to commence soon.

I write to express our deep concern that an Emergency Service Order entered by the Board could significantly impact our plans to begin exporting coal as early as 2Q 2023 as well as our ability to trade in the export coal market. As such, I urge the Board to carefully consider such competitive impacts in evaluating NTEC's request for an Emergency Service Order and to take no action that would limit our ability to export Crow coal as early as Q2 2023 and into the future.

Exhibit A hereto at 1-2.

(2) During the May 10, 2023 oral argument in Docket No. NOR 42178 and in written materials submitted to the Board, BNSF repeatedly made reference to the Crow Tribe and to the claims that: (i) export coal transportation service that the Crow Tribe had

requested from BNSF supposedly would limit BNSF's ability to provide common carrier service for NTEC; and (ii) export coal transportation service that NTEC had requested from BNSF supposedly would limit BNSF's ability to provide service for the Crow Tribe.¹ The Board's June 23 Decision in NOR 42178 also makes repeated references to the Crow Tribe's May 5, 2023 Comments and to BNSF's arguments regarding the Crow Tribe. *See, e.g.*, June 23, 2023 Decision at 1, 6, 11, 17.

(3) NTEC served its second set of discovery requests to BNSF on July 19, 2023. Exhibit B hereto. NTEC's Request No. 32 seeks BNSF's production of "all post-2021 correspondence between BNSF and the Crow Tribe regarding export coal transportation service, including but not limited to: (a) any draft coal transportation agreements exchanged with the Crow Tribe; and (b) any communications with the Crow

¹ *See, e.g.*, May 10, 2023 Oral Argument in NOR 42178, Transcript ("Tr.") at 140:16-20 ("You've seen the letters filed by Global, by the Crow Tribe, and also by Arch. They all oppose the request for emergency service or injunctive relief, and we would urge the Board to give those opinions great weight."); Tr. at 176:4-14 ("MR. WEISKITTEL: Yeah, so this new business, which I think we've said in our filings, this is the Crow Tribe. And we have been talking with them for probably at least a year about them trying to enter this market. Initially, they thought they were going to be able to have some vessel capacity they could use in June. It turns out that pushed into July, so this was just how we, with the existing finite set of resources we have, how did we try and serve that new customer that was coming to us."); Tr. at 211:12-13 ("MS. LAWLER: It's because the Crow Tribe pushed their shipment into July."); Tr. at 235:11-14 ("[MR. LARocca:] We have other shippers who are asking for service, including the Crow Tribe, and that is a factor that interferes with the assumption that you would just have 23 trains a day now."); BNSF Reply to Board Questions, NOR 42178, at 12 (May 15, 2023) ("Based on the arguments and facts above, the arguments made during the May 10, 2023 oral argument, BNSF's May 5 Supplemental Reply, and BNSF's April 19 Reply, as well as the concerns expressed by the Crow Tribe, Arch, and Global, the Board should deny NTEC's request for an emergency service order and request for a preliminary injunction.").

Tribe regarding the timing of such export coal transportation service or regarding any delays in the commencement of such export coal transportation service.” Exh. B. at 2-3.

(4) NTEC has not requested third-party discovery from the Crow Tribe, but instead, NTEC seeks discovery of documents that are in the possession, custody, and control of BNSF, a party to this proceeding.

(5) The Board routinely orders defendant rail carriers (*i.e.*, parties) to produce contract-related materials in complaint cases. *See, e.g., Duke Energy Co. v. Norfolk S. Ry.*, NOR 42069, at 2-3 (STB served March 4, 2002) (granting the complainant’s motion to compel the defendant’s production of third-party rail transportation contracts); *Carolina Pwr. & Light Co. v. Norfolk S. Ry.*, NOR 42072, at 1-2 (STB served March 23, 2005) (granting motions to compel the defendant’s production of, *inter alia*, “all defendant coal transportation contracts” with third parties).

(6) The Crow Tribe’s alternative suggestion that the Board require NTEC to request information with specificity is both untimely and inapposite. NTEC’s Request No. 32 specifically identified the information that it sought from BNSF. As to the relevance of that information, BNSF itself repeatedly argued to the Board that service to one BNSF export coal shipper would (or at least could) impact service to another BNSF export coal shipper. In any event, in its August 8, 2023 Objections and Responses (Exhibit C hereto), BNSF raised a variety of objections to production (including third-party confidentiality), but BNSF ultimately stated that it “will produce” the subject documents after providing notice to the Crow Tribe:

Subject to and without waiving the foregoing General and Specific Objections, *BNSF will produce*—to the extent such documents are in its possession, custody, control and can be located after a reasonable search—non-privileged documents responsive to this Request, after providing the Crow Tribe with notice and a reasonable time period to object to such production.

Exh. C at 5 (emphasis added).

(7) The July 18, 2023 Protective Order in this case includes language – initially adopted in STB maximum rate reasonableness cases more than two decades ago² – specifically ordering the production of contract-related materials that a party would withhold from production on grounds of confidentiality obligations to a third party:

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*

² See, e.g., *Western Fuels Ass’n, Inc. and Basin Elec. Pwr. Coop. v. The Burlington N. and Santa Fe Ry.*, NOR 42088, at 1 (STB served Nov. 10, 2004) (“The proposed order, as set out in the appendix, is consistent with the protective orders entered by the Board in recent rate proceedings.[] It includes provisions governing the production of highly confidential material and stipulates that the protected exchange of material will not constitute an unauthorized disclosure . . .”); *id.* at § 7 (includes language identical to the protective order in NOR 42179: “Each party is ordered to produce to the other party rail transportation contracts and other contracts which, because of confidentiality provisions, cannot be produced without a Board order directing their production . . .”); *Kansas City Pwr. & Light Co. v. Union Pac. R.R.*, NOR 42095, at § 7 (STB served Oct. 26, 2005) (same).

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.*

Exhibit D hereto at § 7 (emphasis added). The Board began including such language in its protective orders in order to eliminate the burden and delay associated with requiring litigants to file (and requiring the Board to process) individual motions to compel. The Board’s “new” approach uses the initial protective order in a case to mandate such production in advance of the service of discovery requests.

(8) According to the terms of the Protective Order, documents or contracts produced pursuant to Section 7 “shall be treated” as “Highly Confidential.” Any materials designated as “Highly Confidential” may not be shared with internal employees/personnel of a complaining shipper.

* * *

Accordingly, there is no basis for any sort of Board order shielding BNSF’s Crow-related materials from production. The existing Protective Order already addresses confidentiality-based objections to production and obligates BNSF to designate any Crow-related materials produced pursuant to Section 7 of the Protective Order as Highly

Confidential. Furthermore, there is no basis under the Board's precedent or the Protective Order governing this proceeding to allow the Crow Tribe to further delay discovery in this proceeding by requiring a meeting with Judge McCarthy.

Respectfully submitted,

NAVAJO TRANSITIONAL
ENERGY COMPANY, LLC

By: /s/ Daniel M. Jaffe
Daniel M. Jaffe
Frank J. Pergolizzi
Andrew B. Kolesar III
SLOVER & LOFTUS LLP
1224 Seventeenth St., N.W.
Washington, D.C. 20036
(202) 347-7170

Dated: September 14, 2023

Attorneys for Complainant

CERTIFICATE OF SERVICE

I hereby certify that I have this 14th day of September 2023 caused a copy of the foregoing to be served via email upon all parties of record.

/s/ Daniel M. Jaffe

Daniel M. Jaffe

An Attorney for Complainants

EXHIBIT A



EXECUTIVE BRANCH OF THE APSÁALOOKE NATION

P.O. BOX 159, 43 HERITAGE RD.
CROW AGENCY, MONTANA 59022
406-679-6567

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

306572

May 5, 2023

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

VIA E-FILING

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

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

Dear Ms. Dinh,

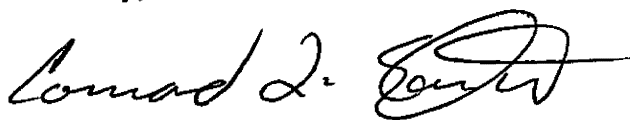
The Crow Tribe ("Crow" or "Tribe") is federally recognized Indian tribe located in south-central Montana. The Friendship Treaty of 1825 between the Tribe and the United States recognizes our rights to trade. An 1889 Act of Congress ("Act") granted the Big Horn Southern Railroad Company (now BNSF) a right-of-way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

The Crow Tribe is aware of the service proceedings that Navajo Transitional Energy Company LLC ("NTEC") initiated at the Board regarding BNSF's transportation of coal for export through Westshore Terminals. We understand that in NOR 42178, NTEC v. BNSF – Ex Parte Application for Section 11123 Emergency Service Order, NTEC has asked the Board to order BNSF to move a set volume of traffic for NTEC beginning May 1, 2023. All of NTEC's export coal will transit through our Reservation. In fact, substantially all coal mined and exported from the Powder River Basin originates from and transits through our ancestral land to Westshore Terminals.

The Crow Tribe has been seeking rail service to export our coal resources. We have been seeking to replace the income and economic benefit lost to the Tribe due to the decline in domestic coal sales which have been reduced by approximately 5 million tons since 2014. In July 2022, we wrote to BNSF to request service to export Crow coal from Montana to Westshore Terminals. In response we were advised that BNSF was not able to commit to service for our export needs until 2Q 2023 at the earliest. However, we have been meeting with BNSF very regularly since then, including in-person in Fort Worth and at Crow Agency, to prepare for our exports to commence soon.

I write to express our deep concern that an Emergency Service Order entered by the Board could significantly impact our plans to begin exporting coal as early as 2Q 2023 as well as our ability to trade in the export coal market. As such, I urge the Board to carefully consider such competitive impacts in evaluating NTEC's request for an Emergency Service Order and to take no action that would limit our ability to export Crow coal as early as Q2 2023 and into the future.

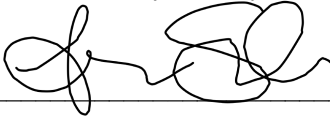
Sincerely,

A handwritten signature in black ink, appearing to read "Conrad J. Stewart", with a stylized flourish at the end.

Conrad J. Stewart
Energy Director

CERTIFICATE OF SERVICE

I certify on May 5, 2023, I served copies of this letter on all parties of record in this proceeding.

A handwritten signature in black ink, appearing to read 'A. Sowden', is written over a horizontal line.

Amanda Sowden

EXHIBIT B

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

Attorneys for Complainant

**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
SECOND REQUESTS FOR
PRODUCTION OF DOCUMENTS**

Complainant Navajo Transitional Energy Company, LLC (“NTEC”), pursuant to 49 C.F.R. Part 1114.30, hereby submits its Second Requests for Production of Documents to Defendant BNSF Railway Company (“BNSF”).

Documents responsive to NTEC’s Requests for Production should be delivered to the offices of Slover & Loftus LLP, 1224 Seventeenth Street, N.W., Washington, D.C. 20036, within twenty (20) days from the date hereof, unless otherwise agreed by the parties. NTEC is prepared to cooperate with BNSF to facilitate the expeditious production of documents with the minimum practical burden. NTEC further requests that BNSF provide reasonable supplementation of its Responses.

I. DEFINITIONS

The Definitions in NTEC's July 3, 2023 First Set of Requests are incorporated and herein as if set forth in full and shall apply to these Second Requests.

II. INSTRUCTIONS

The instructions set forth in NTEC's July 3, 2023 First Set of Requests are incorporated and herein as if set forth in full and shall be applicable to these Requests for Production.

III. REQUESTS FOR PRODUCTION OF DOCUMENTS

Request for Production No. 30

Please produce documents sufficient to show all nominations received by BNSF for 2023 export coal transportation service to Westshore, including documents sufficient to identify: (a) the entity submitting the nomination; (b) the date of the nomination; (c) the time period covered by the nomination; (d) the origin of the requested service; (e) the volume of coal nominated; and (f) the form of the BNSF export coal transportation service sought through the nomination (*i.e.*, contract service or common carrier service). For purpose of this Second Set of NTEC Requests, the term "nomination" shall have the same meaning used on pages 16-17 of the May 5, 2023 Verified Statement of Farah Lawler in STB Docket No. NOR 42178.

Request for Production No. 31

Please produce documents sufficient to show all Coal Forecasting Tool inputs received by BNSF for 2023 export coal transportation service to Westshore, including documents sufficient to identify: (a) the entity submitting the input; (b) the date of the input; (c) the time period covered by the input; (d) the origin of the requested service; (e) the volume of coal nominated; and (f) the form of the BNSF export coal transportation service sought through the input (*i.e.*, contract service or common carrier service).

Request for Production No. 32

Please produce all post-2021 correspondence between BNSF and the Crow Tribe regarding export coal transportation service, including but not limited to: (a) any draft coal transportation agreements exchanged with the Crow Tribe; and (b) any

communications with the Crow Tribe regarding the timing of such export coal transportation service or regarding any delays in the commencement of such export coal transportation service.

Respectfully submitted,

By: /s/ Daniel M. Jaffe
Daniel M. Jaffe
Frank J. Pergolizzi
Andrew B. Kolesar III
SLOVER & LOFTUS LLP
1224 Seventeenth St., N.W.
Washington, D.C. 20036
(202) 347-7170

Dated: July 19, 2023

Attorneys for Complainant

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2023, I caused copies of the foregoing to be served via email upon counsel for BNSF Railway Company.

/s/ Daniel M. Jaffe
Daniel M. Jaffe

EXHIBIT C

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42179

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

COMPLAINT AND PETITION FOR
DECLARATORY ORDER

**BNSF RAILWAY COMPANY'S RESPONSES TO NAVAJO TRANSITIONAL
ENERGY COMPANY, LLC'S SECOND REQUESTS
FOR PRODUCTION OF DOCUMENTS**

Pursuant to 49 C.F.R. Part 1114, Subpart B, BNSF Railway Company ("BNSF") hereby responds and objects as follows to Navajo Transitional Energy Company, LLC's ("NTEC's") Second Set of Discovery Requests ("NTEC's Second Set of Requests" or "Requests," and each a "Request") served on July 19, 2023, in connection with the above-captioned proceeding.

GENERAL RESPONSES

Except as otherwise provided herein, BNSF hereby incorporates by reference its General Responses set forth in BNSF's Responses and Objections to NTEC's First Set of Interrogatories and Requests for Production of Documents.

GENERAL OBJECTIONS

Except as otherwise provided herein, BNSF hereby incorporates by reference its General Objections set forth in BNSF's Responses and Objections to NTEC's First Set of Interrogatories and Requests for Production of Documents.

OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS

Except as otherwise provided herein, BNSF hereby incorporates by reference its Objections to Definitions and Instructions set forth in BNSF's Responses and Objections to NTEC's First Set of Interrogatories and Requests for Production of Documents.

RESPONSES AND OBJECTIONS TO REQUESTS FOR PRODUCTION OF DOCUMENTS

Subject to the General Objections and Objections to Definitions and Instructions stated above, which are incorporated into each of the following responses, BNSF responds to NTEC's Second Requests for Production of Documents as follows:

Request for Production No. 30

Please produce documents sufficient to show all nominations received by BNSF for 2023 export coal transportation service to Westshore, including documents sufficient to identify: (a) the entity submitting the nomination; (b) the date of the nomination; (c) the time period covered by the nomination; (d) the origin of the requested service; (e) the volume of coal nominated; and (f) the form of the BNSF export coal transportation service sought through the nomination (i.e., contract service or common carrier service). For purpose of this Second Set of NTEC Requests, the term "nomination" shall have the same meaning used on pages 16-17 of the May 5, 2023 Verified Statement of Farah Lawler in STB Docket No. NOR 42178.

Response to Request No. 30:

BNSF objects to this Request for Production on the grounds that: (i) it is overbroad and unduly burdensome to the extent that it is not reasonably limited in scope; (ii) it seeks documentation that is neither relevant to NTEC's claims against BNSF in this matter nor reasonably calculated to lead to the discovery of admissible evidence; (iii) it seeks documentation that is in NTEC's possession, custody, or control; (iv) it seeks information that BNSF is prohibited from disclosing under 49 U.S.C. § 11904; and (v) it seeks third party proprietary information, including information that, if produced, could result in a violation of a contractual obligation to third parties.

Subject to and without waiving the foregoing General and Specific Objections, BNSF will produce—to the extent such documents are in its possession, custody, control and can be located after a reasonable search—non-privileged documents responsive to this Request.

Request for Production No. 31

Please produce documents sufficient to show all Coal Forecasting Tool inputs received by BNSF for 2023 export coal transportation service to Westshore, including documents sufficient to identify: (a) the entity submitting the input; (b) the date of the input; (c) the time period covered by the input; (d) the origin of the requested service; (e) the volume of coal nominated; and (f) the form of the BNSF export coal transportation service sought through the input (i.e., contract service or common carrier service).

Response to Request No. 31:

BNSF objects to this Request for Production on the grounds that: (i) it is overbroad and unduly burdensome to the extent that it seeks “all Coal Forecasting Tool inputs received by BNSF for 2023 export coal transportation service to

Westshore” and to the extent that it is not reasonably limited in scope; (ii) it seeks documentation that is neither relevant to NTEC’s claims against BNSF in this matter nor reasonably calculated to lead to the discovery of admissible evidence; (iii) it seeks documentation that is in NTEC’s possession, custody, or control; (iv) it seeks information that BNSF is prohibited from disclosing under 49 U.S.C. § 11904; (v) it seeks third party proprietary information, including information that, if produced, could result in a violation of a contractual obligation to third parties; and (vi) it requires a special study.

Subject to and without waiving the foregoing General and Specific Objections, BNSF will produce—to the extent such documents are in its possession, custody, control and can be located after a reasonable search— screenshots that show the inputs into the Coal Forecasting Tool inputs for 2023 BNSF export coal transportation service to Westshore. BNSF further states that Coal Forecasting Tool inputs do not contain “the form of the BNSF export coal transportation service sought.”

Request for Production No. 32

Please produce all post-2021 correspondence between BNSF and the Crow Tribe regarding export coal transportation service, including but not limited to: (a) any draft coal transportation agreements exchanged with the Crow Tribe; and (b) any communications with the Crow Tribe regarding the timing of such export coal transportation service or regarding any delays in the commencement of such export coal transportation service.

Response to Request No. 32:

BNSF objects to this Request for Production on the grounds that: (i) it is overbroad and unduly burdensome to the extent that it seeks “all post-2021

correspondence between BNSF and the Crow Tribe regarding export coal transportation service” and to the extent that it is not reasonably limited in scope; (ii) it seeks documentation that is neither relevant to NTEC’s claims against BNSF in this matter nor reasonably calculated to lead to the discovery of admissible evidence; (iii) it seeks information that BNSF is prohibited from disclosing under 49 U.S.C. § 11904; and (iv) it seeks third party proprietary information, including information that, if produced, could result in a violation of a contractual obligation to third parties.

Subject to and without waiving the foregoing General and Specific Objections, BNSF will produce—to the extent such documents are in its possession, custody, control and can be located after a reasonable search—non-privileged documents responsive to this Request, after providing the Crow Tribe with notice and a reasonable time period to object to such production.

Dated: August 8, 2023

Respectfully submitted,

/s/ Anthony J. LaRocca

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 Co.

CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2023, I caused copies of the foregoing to be served electronically or by first-class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Tara A. Woods

Tara A. Woods

Attorney for BNSF Railway Company

EXHIBIT D

**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

Anthony J. LaRocca
Timothy J. Strafford
Onika K. Williams
Tara A. Woods
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1330 Connecticut Ave., N.W.
Washington, D.C. 20036-1795
(202) 429-3000

Attorneys for Defendant

NAVAJO TRANSITIONAL
ENERGY COMPANY, LLC

Daniel M. Jaffe
Frank J. Pergolizzi
Andrew B. Kolesar III
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Washington, D.C. 20036
(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
☐ _____	

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

JOINT MOTION FOR AMENDED PROTECTIVE ORDER¹

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

¹ NTEC and BNSF filed a similar Motion in this proceeding on July 11, 2023. The parties intend the instant Motion to supersede or amend that prior version.

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

By: Timothy J. Strafford
Anthony J. LaRocca
Timothy J. Strafford
Onika K. Williams
Tara A. Woods
Steptoe & Johnson LLP
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Washington, D.C. 20036-1795
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Attorneys for Defendant

By: Daniel M. Jaffe
Daniel M. Jaffe
Frank J. Pergolizzi
Andrew B. Kolesar III
SLOVER & LOFTUS LLP
1224 Seventeenth St., N.W.
Washington, D.C. 20036
(202) 347-7170

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: _____