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SERVICE DATE – SEPTEMBER 20, 2023

ALJ

SURFACE TRANSPORTATION BOARD

Docket No. NOR 42179

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

ORDER APPROVING ISSUANCE OF JERA LETTER ROGATORY TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: Judge McCarthy

On August 4, 2023, the undersigned was assigned as the Administrative Law Judge tasked with overseeing discovery disputes in NOR 42179 pursuant to an interagency agreement between the Federal Mine Safety and Health Review Commission and the Surface Transportation Board. The Board memorialized this assignment in a Decision issued on August 7, 2023. In that Decision, the Board extended the procedural schedule so that the discovery period would end on September 28, 2023, unless otherwise extended.

On August 8, 2023, the Board received multiple filings from BNSF Railway Company (“BNSF”), including:

- a. BNSF’s Motion Seeking Recommendation to Issue Letter Rogatory [“JERA Motion”];
- b. BNSF’s Motion Seeking Letter Rogatory [“Westshore Motion”]; and
- c. BNSF’s Petition for Subpoena [JERA Global Petition].

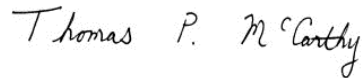
On August 28, 2023, the Board received multiple filings from NTEC, including NTEC’s Consolidated Response to BNSF’s August 8th Motions Seeking Letters Rotatory.

On September 1, 2023, the Board received two “sur-replies” from BNSF, including BNSF’s Sur-reply in Support of Motions for Letters Rogatory. Later that day, NTEC filed a letter with the Board, requesting that the Board “reject BNSF’s impermissible replies to replies and deny BNSF’s underlying Petition and Motions.” Given the condensed time frame provided for discovery in this matter, and due to the complexity of the underlying discovery-related issues at hand, the undersigned liberally interpreted 49 CFR § 1104.13(c) and accepted BNSF’s sur-replies. Furthermore, in the interests of fairness and of maintaining a complete record, the undersigned also accepted NTEC’s September 1 response letter – including those portions which contain substantive rebuttal of the arguments presented by BNSF in its two sur-replies and within its earlier submissions to this tribunal.

In an e-mail order dated September 7, 2023, the undersigned **DENIED** the JERA Global Petition and **GRANTED** the Westshore Motion. Furthermore, the undersigned **GRANTED IN PART** and **DENIED IN PART** the JERA Motion. In so doing, the undersigned denied BNSF's Requests 1 through 4 for the production of documents from JERA, but granted BNSF's Requests 1 through 6 for the production of deposition topics and questions from JERA.

Accordingly, the undersigned instructed that BNSF immediately prepare a new motion consistent with the aforementioned reasoning, which may in turn be considered by the U.S. District Court for the District of Columbia. BNSF filed its Amended Motion Seeking Recommendation to Issue Letter Rogatory on September 15, 2023. The undersigned has reviewed this amended motion and – consistent with the reasoning provided in the previous order – hereby **APPROVES** distribution of the amended letter rogatory and attachments thereto to the U.S. District Court for further consideration.

So Ordered.



Thomas P. McCarthy
Administrative Law Judge
Surface Transportation Board

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SERVICE DATE – SEPTEMBER 7, 2023

SURFACE TRANSPORTATION BOARD

Docket No. NOR 42179

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC
v.
BNSF RAILWAY COMPANY

**E-MAIL ORDER GRANTING IN PART AND DENYING IN PART JERA MOTION;
GRANTING WESTSHORE MOTION; AND DENYING JERA GLOBAL SUBPOENA
PETITION**

Before: Judge McCarthy

The Board is in receipt of multiple filings from each party in NOR 42179. Given the narrow timeframe for discovery imposed by the Board in this matter, the undersigned issues the following truncated order via e-mail.

The following abbreviated procedural history has been provided for the sake of clarity. On August 4, 2023, the undersigned was assigned as the Administrative Law Judge tasked with overseeing discovery disputes in NOR 42179 pursuant to an interagency agreement between the Federal Mine Safety and Health Review Commission and the Surface Transportation Board. The Board memorialized this assignment in a Decision issued on August 7, 2023. In that Decision, the Board extended the procedural schedule so that the discovery period would end on September 28, 2023.

On August 8, 2023, the Board received multiple filings from BNSF Railway Company (“BNSF”), including:

- a. BNSF’s Motion Seeking Recommendation to Issue Letter Rogatory [“JERA Motion”];
- b. BNSF’s Motion Seeking Letter Rogatory [“Westshore Motion”]; and
- c. BNSF’s Petition for Subpoena [JERA Global Petition].

On August 24, 2023, the Board received additional filings from BNSF, including:

- a. A motion seeking a recommendation to issue a third letter rogatory;
- b. A motion seeking issuance of a letter of request; and
- c. A second subpoena petition.

As twenty days have not yet elapsed since the filing of the latter three documents, the undersigned will address the August 24 filings once the Navajo Transitional Energy Company (“NTEC”) has been afforded a right to respond. *See* 49 CFR § 1104.13.

On August 28, 2023, the Board received the following two filings from NTEC:

- a. NTEC’s Consolidated Reply to BNSF’s August 8th Motions Seeking Letters Rotatory [“Consolidated Response”]; and
- b. NTEC’s Reply to BNSF’s August 8th Subpoena Petition [“Subpoena Response”].

On September 1, 2023, the Board received two additional filings from BNSF, including:

- a. BNSF’s Sur-reply in Support of Motions for Letters Rogatory; and
- b. BNSF’s Sur-reply in Support of Petition for Subpoena.

Later that day, NTEC filed a letter with the Board, requesting that the Board “reject BNSF’s impermissible replies to replies and deny BNSF’s underlying Petition and Motions.”

After careful consideration, the undersigned makes the following findings.

First, in the interest of a clear and complete record, the undersigned accepts the submission of 1) BNSF’s Sur-reply in Support of Motions for Letters Rogatory, 2) BNSF’s Sur-reply in Support of Petition for Subpoena, and 3) NTEC’s letter in opposition to the filings of BNSF’s Sur-replies.

It is true that filing a “reply to a reply” is generally impermissible in STB proceedings. *See* 49 CFR § 1104.13(c). Indeed, the Board has often found either 49 CFR § 1104.13(c) or a preceding regulation to be dispositive as to whether a party’s request for leave to file a sur-reply will ultimately be granted. *See, e.g., B.J. Alan Co., Inc., et al.*, No. MC-C-30093, 1989 WL 237899 (DCSS Feb. 8, 1989) (striking complainants’ reply to respondents’ reply “because replies to replies are not permitted under the Commission’s rules.”). However, it is also true that the Board’s controlling rules should “be construed liberally to secure just, speedy and inexpensive determination of the issues presented.” 49 CFR § 1100.3. Both the Board and its predecessor, the Interstate Commerce Commission, have allowed leave to file a reply to a reply in the interest of a complete record, and due to the peculiarities involved within an individual case. *See, e.g., Cities of Auburn & Kent, Wa.-Petition for Declaratory Ord.-Burlington N. R.R. Co.-Stampede Pass Line*, No. 33200, 1997 WL 11352 at *1 (Jan. 10, 1997) (denying a motion to strike and accepting a reply to a reply “in the interest of a more complete record.”); *Conrail Abandonment of A Portion of the W. 30th St. Secondary Track in New York, Ny*, No. AB-167, 1988 WL 225779 at *2 (DCSS Jan. 29, 1988) (construing the procedural rules concerning replies liberally, and waiving rule 1104.13(c) “because of the unusual circumstances of this proceeding, and in order to obtain a complete record”); *Overbrook Farmers Union Coop. Ass’n-Petition for Declaratory Ord.-Violation of 49 U.S.C. 11101(a)*, No. 31166, 1989 WL 251252 at *1 (DCSS Feb. 9, 1989) (“it is apparent from the present record that the substance of the challenged testimony is in dispute. Since this is a declaratory order proceeding on court referral, the best possible record should be available for our consideration.”); *Burlington N., Inc.-Control & Merger-St. Louis-San Francisco Ry. Co.*, No. 28583, 1988 WL 225117 at *1 (DCSS Dec. 14, 1988). Here, it would have been preferable

for BNSF to file a request for leave prior to filing its two sur-replies, and henceforth in this matter both parties should seek leave anticipatorily rather than retroactively. However, given the condensed time frame provided for discovery in this matter, and due to the complexity of the underlying discovery-related issues at hand, the undersigned liberally interprets 49 CFR § 1104.13(c) and accepts BNSF's two sur-replies. Furthermore, in the interests of fairness and of maintaining a complete record, the undersigned also accepts NTEC's September 1 response letter – including those portions which contain substantive rebuttal of the arguments presented by BNSF in its two sur-replies and within its earlier submissions to this tribunal.

Second, after careful review, the undersigned **GRANTS** BNSF's request that a letter rogatory be issued seeking documents and witness testimony from Westshore. Furthermore, the undersigned **GRANTS** BNSF's request to recommend that a letter rogatory be issued seeking witness testimony from JERA, but **DENIES** the portion of the JERA Motion seeking the production of documents from JERA.¹

Within the JERA Motion, BNSF delineates its request for the production of documents from JERA [Attachment A to JERA Motion]. More specifically, BNSF seeks:

1. Contracts or agreements between JERA and Cloud Peak Energy, Inc. or NTEC related to the shipment of coal from the Spring Creek Mine to Japan;
2. Communications related to any decision by JERA to renew or not renew a contract with NTEC for coal supply;
3. Communications related to rail service NTEC received for the shipment of coal from the Spring Creek Mine to Japan; and
4. Documents sufficient to show the amount of coal purchased from NTEC as a percentage of coal purchased by JERA in 2020, 2021, and 2022.

Additionally, BNSF seeks the production of the following deposition topics and questions from JERA [Attachment B to JERA Motion]:

1. Describe the process by which JERA decides which foreign companies from which to purchase coal;
2. Describe the reasons for any decision by JERA to renew or not to renew any contract or agreement with NTEC for the purchase and shipment of coal;
3. Describe JERA's satisfaction with the shipment of coal pursuant to any contract or agreement with Cloud Peak Energy, Inc. or NTEC;
4. Describe NTEC's reputation as a supplier of coal;
5. Identify any failures by NTEC to comply with any contract or agreement with JERA for the shipment of coal to Japan; and
6. Identify any problems or delays in NTEC's shipment of coal to Japan that JERA believed to be the result of rail service interruption.

¹ The JERA Motion references JERA Document Requests 1 through 4 within the text of the letter included at Appendix B to that motion. The undersigned will wait until BNSF supplies an amended motion before approving that the request letter be issued to the U.S. District Court.

Within the Westshore Motion, BNSF seeks the production of:

1. Documents related to Westshore's capacity to receive coal deliveries for NTEC and timing of deliveries for NTEC.
2. Documents related to Westshore's capacity to receive coal deliveries and timing for deliveries of BNSF transported coal.
3. Documents sufficient to show the number of train loads of coal allocated to NTEC in relation to other shippers or receivers of coal.
4. Documents sufficient to show forecasts for vessels to be loaded in 2023.
5. Documents sufficient to show which coal shippers store coal at Westshore, the cost of that storage, and the volume of storage available to each shipper.
6. Documents sufficient to show the impact the 2022 Strike had on the volume of shipments loaded and unloaded in 2022 at Westshore.

[Attachment A to Westshore Motion]

Moreover, BNSF requests the production of the following deposition topics and questions from Westshore:

1. Describe the process by which Westshore allocates loading and unloading capacity to coal shippers.
2. Describe the storage options Westshore offers to coal shippers.
3. Identify any options NTEC has had or currently has to store coal at Westshore for loading onto vessels bound for Asian markets.
4. Describe how Westshore decides the prioritization of vessels for loading.
5. Describe how Westshore decides the prioritization of trains for unloading.
6. Describe how the 2022 Strike impacted the volume of shipments loaded and unloaded at Westshore in 2022.

[Attachment B to Westshore Motion]

In its consolidated response to the JERA and Westshore Motions, NTEC argues that BNSF's requests must fail because the Board's powers enumerated at 49 U.S.C. § 1321 make no specific reference to letters rogatory. Consolidated Response at 9. Further, NTEC argues that the limitation of the Board's subpoena power under 49 U.S.C. § 1321(c) to witnesses and documents "from any place in the United States, to the designated place of the proceeding" necessarily preclude the Board from approving such a request. However, the limitation of the Board's subpoena power is precisely why BNSF has pursued such a rarely used mechanism for obtaining discovery, and the fact that Congress did not specifically promulgate restrictions either 1) empowering a party in a Board proceeding to avail itself of this mechanism, or 2) precluding a party to a Board proceeding from doing so is not dispositive here. NTEC's arguments suggesting that BNSF has unduly delayed in seeking international discovery are also unpersuasive, as BNSF has communicated its intention to pursue such discovery since the early stages of these proceedings. The fact that the Board has chosen to institute a narrow time frame for discovery does not inherently restrict BNSF from seeking such discovery and, in any event, the JERA

Motion, Westshore Motion, and first subpoena request were filed a mere four days after the undersigned was appointed to oversee discovery disputes in this matter.

Further, NTEC itself introduced third-party characterizations of alleged lost sales and damage to its business reputation when it filed its Complaint and Petition for Declaratory Order on April 14, 2023, and NTEC has repeatedly referenced these third-party characterizations throughout the development of these proceedings. Denying BNSF a reasonable opportunity to seek both clarification and verification of the third-party claims that NTEC has put before the Board and which have resulted in a preliminary injunction would belie fundamental notions of fairness and due process. It is NTEC's prerogative to pursue damages in the form of alleged lost sales and harm to its business reputation, but it is BNSF's countervailing prerogative to probe these allegations, even if through a creative and rarely used discovery mechanism. Moreover, the documents and information that BNSF seeks through its motions are not, as NTEC puts it, "duplicative and cumulative of the discovery that is available within NTEC and/or BNSF's own files," but rather represent information that could not be verified without contacting the original third-party source of that information. According, this tribunal finds that, in the interest of fairness and due process, BNSF has the right to test NTEC's claims and should be afforded a reasonable opportunity to do so.

Nevertheless, this tribunal must balance BNSF's specific discovery requests with principles of international law, including existing treaty obligations and principles of international comity. Here, the parties have correctly concluded that neither Japan nor Canada is a state party to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, and that obligations imposed through the ratification of that multilateral agreement are not otherwise controlling. However, NTEC correctly identifies that both the United States and Japan are signatories to the U.S.-Japan Bilateral Consular Convention of 1963 (15 U.S.T. 768), which controls the exchange of evidence between the two countries. Section 17(e)(i) of that convention covers the serving of documents, taking of voluntary depositions, and administering of oaths, while Section 17(f) provides for the production of copies of, or extracts, from documents of public registry, rather than document discovery within a common-law system.

Given that it is generally understood that Japanese courts cannot compel the production of documents or other tangible evidence in executing letters rogatory from a foreign court, *see, e.g., Japan Halon Co. v. Great Lakes Chem. Corp.*, 155 F.R.D. 626, 627 (N.D. Ind. 1993)(internal citations omitted), the undersigned **DENIES** BNSF's Requests 1 through 4 for the production of documents from JERA. However, as Japanese courts are empowered to cooperate in voluntary requests for assistance in taking testimony, the undersigned **GRANTS** BNSF's Requests 1 through 6 for the production of deposition topics and questions from JERA. Accordingly, the undersigned instructs that BNSF immediately prepare a new motion consistent with the aforementioned reasoning, which may in turn be considered by the U.S. District Court.

As Canadian courts are not similarly precluded from ordering document production, the undersigned **GRANTS** Requests 1 through 6 for the production of documents from Westshore and Requests 1 through 6 for the production of deposition topics and questions from Westshore.²

Finally, the undersigned **DENIES** the JERA Global Petition for Subpoena. Approving the issuance of a subpoena to a U.S. based subsidiary would contravene the procedures established through Article 17 of the U.S.-Japan Bilateral Consular Convention of 1963, and thus constitute an improper failure to comply with an international treaty. *See generally, Fujikura Ltd. v. Finisar Corp.*, Case No. 15-mc-80110-HRL (JSC), 2015 WL 5782351, at *7 (N.D. Cal. May 14, 2015).

So Ordered.

Thomas P. McCarthy
Administrative Law Judge
Surface Transportation Board

² A signed copy of the letter included at Appendix A to the Westshore Motion is attached to this e-mail.

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42179

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

**BNSF RAILWAY COMPANY'S AMENDED
MOTION SEEKING RECOMMENDATION TO ISSUE LETTER ROGATORY**

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Counsel for BNSF Railway Company

Dated: September 15, 2023

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42179

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC
v.
BNSF RAILWAY COMPANY

**BNSF RAILWAY COMPANY'S AMENDED
MOTION SEEKING RECOMMENDATION TO ISSUE LETTER ROGATORY**

On August 8, 2023, BNSF Railway Company ("BNSF") moved pursuant to 49 U.S.C. § 1321 and 49 C.F.R. § 1113.2 (the "Motion") for an order recommending that the United States District Court for the District of Columbia issue a Letter Rogatory on behalf of BNSF to obtain documents and deposition testimony from the following foreign third party:

JERA Trading Pte Ltd. ("JERA")¹
Nihonbashi Takashimaya Mitsui Building 25th Floor
2-5-1 Nihonbashi
Chuo-ku, Tokyo
JAPAN

On September 7, 2023, Administrative Law Judge Thomas P. McCarthy issued an Email Order granting BNSF's motion as to requested deposition testimony from

¹ BNSF is also seeking a third-party subpoena to be served domestically on JERA Global Markets, an affiliate of JERA. Given the many steps to seek discovery in Japan and the short discovery schedule, BNSF believes that it cannot wait for JERA Global Markets' response before beginning the lengthy process to contact JERA in Tokyo. In addition, JERA may possess documents and information unavailable to JERA Global Markets.

JERA, but denying it as to the request for production of documents. *See generally* Email Order Granting in Part and Denying in Part JERA Motion; Granting Westshore Motion; and Denying Global Subpoena Petition (Sept. 7, 2023) (the “Order”). The Order directed BNSF to file an amended motion with the document requests removed from the proposed Letter Rogatory to JERA. *See* Order n.1.

BNSF has removed all references to document production and all document requests from the proposed Letter Rogatory (attached hereto as Exhibit A). The Recommendation (Exhibit B) is ready for Administrative Law Judge’s signature, and BNSF intends to file the signed Recommendation, proposed Letter Rogatory and supporting exhibits, NTEC’s Complaint, and certified Japanese translations of the documents with the United States District Court for the District of Columbia when ready.

Accordingly, BNSF respectfully requests that the Administrative Law Judge sign the Recommendation expeditiously to allow the foreign discovery process to begin. BNSF incorporates herein all points and arguments from the Motion and BNSF’s Surreply, filed September 1, 2023.

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Respectfully submitted,

/s/ Timothy J. Strafford
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Counsel for BNSF Railway Company

Dated: September 15, 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/ Onika K. Williams

Onika K. Williams

Attorney for BNSF Railway Company

September 15, 2023

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. Civil Case No.: _____

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

REQUEST FOR INTERNATIONAL JUDICIAL ASSISTANCE
(LETTER ROGATORY)

TO THE APPROPRIATE JUDICIAL AUTHORITY OF JAPAN:

The United States District Court for the District of Columbia presents its compliments to the Appropriate Judicial Authority of Japan, and requests international judicial assistance to obtain deposition testimony to be used in an administrative proceeding before this Court in the above-captioned matter.

The Court requests the assistance described herein in the interests of justice.

I. REQUEST

The Court requests that the Appropriate Judicial Authority of Japan facilitate deposition testimony from the following corporate entity:

JERA Trading Pte Ltd. (“JERA”)
Nihonbashi Takashimaya Mitsui Building 25th Floor
2-5-1 Nihonbashi
Chuo-ku, Tokyo
JAPAN

Specifically, the Court requests that the Appropriate Judicial Authority of Japan direct JERA to provide testimony as to the topics and questions set forth in

Attachment A to this Request. With respect to the methods and procedures to be followed in connection with the requested deposition, the Court respectfully requests that, to the extent possible under Japanese law and appropriate treaties:

a) JERA be requested to designate one or more officers, directors, managing agents, or other person(s) who consent to testify on its behalf as to the topics set forth in **Attachment A**;

b) an examination of the witness be conducted orally by a U.S. consular officer on U.S. consular premises;

c) the parties' legal representatives, their interpreters, and a stenographer be permitted to be present during the examination, provided they obtain a Japanese Special Deposition visa; and

d) the stenographer be permitted to record verbatim the examination, and a full transcript of the examination, in translation from Japanese to English through a qualified interpreter, be made at the time of the examination.

The Court understands that the information requested may be of a confidential nature. As such, the Court understands that such information may be designated under and treated pursuant to the Protective Order entered in this matter, which can be found in **Attachment B**.

Based on the representations made by Petitioner Navajo Transitional Energy Company, LLC ("NTEC"), this Court believes that JERA has knowledge regarding material facts that are relevant for the proper defense of the above-referenced administrative proceeding.

II. FACTS

NTEC is an energy company owned by the Navajo Nation. Among other ventures, NTEC operates the Spring Creek Mine in Montana. BNSF is a rail transportation service provider that provides rail service shipping coal for NTEC from the Spring Creek Mine to domestic destinations as well as the Westshore Terminals (“Westshore”) in British Columbia, Canada. From Westshore, the NTEC coal is shipped to markets in Asia, including Japan.

The U.S. Surface Transportation Board (the “Board”) is an independent agency that acts in a quasi-judicial function to adjudicate certain disputes among railroads and their customers. NTEC has alleged in a legal action with the Board that BNSF has breached its common carrier service obligations to NTEC. NTEC has sought, among other relief, an injunction mandating a certain level of rail service that BNSF must provide from Spring Creek Mine to Westshore. The Board instituted proceedings shortly after NTEC filed its Complaint on April 14, 2023. A decision by the Board is subject to review by a United States Court of Appeals. *See* 28 U.S.C. § 2342.

The Board and this Court seek judicial assistance from the Appropriate Judicial Authority of Japan to evaluate certain NTEC allegations regarding its business reputation in Asia. In particular, NTEC has claimed that, as a result of BNSF’s alleged failures to provide adequate rail service, NTEC has experienced damage from “the impact on NTEC’s business reputation when railroad deliveries are inconsistent or non-existent.” Compl. ¶ 38 (Apr. 14, 2023). Based on information

and belief, JERA, as a Japanese customer of NTEC, possesses information unavailable from other sources concerning NTEC's allegations that Asian customers have chosen not to do business with NTEC due to its perceived problems with BNSF's rail service. The request for judicial assistance stems from NTEC's allegation that Japanese customers raised concerns about NTEC's perceived "railroad problems" and chose not to conduct business with NTEC as a result. The requested information regarding dealings with NTEC are narrow and should not present an undue burden on JERA.

III. EVIDENCE

The questions to which JERA's testimony is requested are set forth in **Attachment A**. The Board-entered Protective Order is contained in **Attachment B**. The Board's regulations that govern the proceedings (49 C.F.R. Parts 1112-13) are reproduced in **Attachment C**.

IV. URGENCY

A response is requested as soon as practicable. Expeditious treatment of this request will allow the parties and the witnesses to arrange a mutually agreeable date for testimony and avoid disruption of the witnesses' business or personal plans.

V. OFFER OF RECIPROCAL ASSISTANCE

The United States District Court for the District of Columbia is willing to provide similar assistance to the Appropriate Judicial Authority of Japan.

VI. REIMBURSEMENT FOR COSTS

BNSF's counsel is willing to reimburse the Appropriate Judicial Authority of Japan for costs and expenses incurred in executing this Letter Rogatory. BNSF's counsel may be contacted at the following address:

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

Signed by:

The Honorable _____
United States District Judge
United States District Court for the District of Columbia
333 Constitution Ave., N.W.
Washington, D.C. 20001
United States of America

Signed in _____, this _____ day of _____, 20_____

[Affix seal of court below:]

ATTACHMENT A

DEPOSITION TOPICS AND WRITTEN QUESTIONS

DEFINITIONS

1. “JERA” shall refer to JERA Trading Pte Ltd., JERA Global Markets, JERA Trading International Pte Ltd., and JERA Co., 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. “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.

1. “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. Unless otherwise provided, the relevant time period for these questions is January 1, 2019, to present.

9. “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.

10. 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.

11. 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.

12. 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.

13. The terms “person” or “persons” refer to any individual, corporation,

partnership, sole proprietorship, firm, board, joint venture, association, agency, authority, commission or other entity.

14. The terms “You” and “Your” shall mean JERA, its successors, agents, members, and employees.

TOPICS AND QUESTIONS

1. Describe the process by which JERA decides which foreign companies from which to purchase coal.
2. Describe the reasons for any decision by JERA to renew or not to renew any contract or agreement with NTEC for the purchase and shipment of coal.
3. Describe JERA's satisfaction with the shipment of coal pursuant to any contract or agreement with Cloud Peak Energy, Inc. or NTEC.
4. Describe NTEC's reputation as a supplier of coal.
5. Identify any failures by NTEC to comply with any contract or agreement with JERA for the shipment of coal to Japan.
6. Identify any problems or delays in NTEC's shipment of coal to Japan that JERA believed to be the result of rail service interruption.

ATTACHMENT B

Pt. 1112

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

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

(4) There is no barge competition;

(5) There is no pipeline competition;

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

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

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

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

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

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

49 CFR Ch. X (10–1–22 Edition)

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

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

[85 FR 47697, Aug. 6, 2020]

PART 1112—MODIFIED PROCEDURES

Sec.

1112.1 When modified procedure is used.

1112.2 Decisions directing modified procedure.

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

1112.4 Petitions to intervene.

1112.5 Joint pleadings.

1112.6 Verified statements; contents.

1112.7 Records in other Board proceedings.

1112.8 Verification.

1112.9 Sample verification for statement of fact under modified procedure.

1112.10 Requests for oral hearings and cross examination.

1112.11 Authority of officers.

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

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

§ 1112.1 When modified procedure is used.

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

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

§ 1112.2 Decisions directing modified procedure.

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

Surface Transportation Board

§ 1112.10

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

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

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

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

§ 1112.4 Petitions to intervene.

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

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

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

(b) The petition to intervene shall set out:

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

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

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

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

§ 1112.5 Joint pleadings.

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

§ 1112.6 Verified statements; contents.

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

§ 1112.7 Records in other Board proceedings.

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

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

§ 1112.8 Verification.

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

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

State of _____,
County of _____,
SS: _____

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

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

§ 1112.10 Requests for oral hearings and cross examination.

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

§ 1112.11

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

[61 FR 52712, Oct. 8, 1996]

§ 1112.11 Authority of officers.

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

PART 1113—ORAL HEARING

Sec.

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

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

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

§ 1113.1 Scheduling hearings; continued hearings.

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

49 CFR Ch. X (10–1–22 Edition)

able for inspection at the Board's office.

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

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

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

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

§ 1113.2 Subpoenas.

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

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

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

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

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

Surface Transportation Board

§ 1113.3

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

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

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

§ 1113.3 Authority of officers.

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

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

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

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

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

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

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

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

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

§ 1113.4

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

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

§ 1113.4 Prehearing conferences.

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

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

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

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

49 CFR Ch. X (10–1–22 Edition)

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

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

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

§ 1113.5 Stipulations.

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

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

§ 1113.6 Appearances; withdrawal or absence from hearing.

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

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

Surface Transportation Board

§ 1113.9

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

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

§ 1113.7 Intervention; petitions.

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

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

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

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

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

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

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

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

§ 1113.8 Witness examination; order of procedure.

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

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

§ 1113.9 Prepared statements.

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

§ 1113.10

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

§ 1113.10 Records in other Board proceedings.

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

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

§ 1113.11 Abstracts of documents.

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

49 CFR Ch. X (10–1–22 Edition)

thereupon offer such abstract in evidence in exhibit form.

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

§ 1113.12 Exhibits.

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

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

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

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

§ 1113.13 Filing evidence subsequent to hearing.

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

Surface Transportation Board

§ 1113.18

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

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

§ 1113.14 Objections to rulings.

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

§ 1113.15 Interlocutory appeals.

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

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

§ 1113.16 Oral argument before the hearing officer.

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

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

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

§ 1113.17 Transcript of record.

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

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

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

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

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

§ 1113.18 Briefs.

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

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

§ 1113.19

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

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

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

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

§ 1113.19 Pleadings: part of the record.

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

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

§§ 1113.20–1113.30 [Reserved]

PART 1114—EVIDENCE; DISCOVERY

Subpart A—General Rules of Evidence

Sec.

- 1114.1 Admissibility.
- 1114.2 Official records.
- 1114.3 Admissibility of business records.
- 1114.4 Documents in Board's files.
- 1114.5 Records in other Board proceedings.
- 1114.6 Official notice of corroborative material.
- 1114.7 Exhibits.

Subpart B—Discovery

- 1114.21 Applicability; general provisions.
- 1114.22 Deposition.
- 1114.23 Depositions; location, officer, time, fees, absence, disqualification.
- 1114.24 Depositions; procedures.
- 1114.25 Effect of errors and irregularities in depositions.

49 CFR Ch. X (10–1–22 Edition)

- 1114.26 Written interrogatories to parties.
- 1114.27 Request for admission.
- 1114.28 Depositions, requests for admission, written interrogatories, and responses thereto: inclusion in record.
- 1114.29 Supplementation of responses.
- 1114.30 Production of documents and records and entry upon land for inspection and other purposes.
- 1114.31 Failure to respond to discovery.

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

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

Subpart A—General Rules of Evidence

§ 1114.1 Admissibility.

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

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

§ 1114.2 Official records.

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

ATTACHMENT C

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: _____

EXHIBIT B

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42179

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

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

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

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

Office of American Citizen Services. The proposed Letter Rogatory solicits international judicial assistance in obtaining relevant information abroad needed in the investigation into alleged reputational harm expressed by Japanese customers.

The undersigned has reviewed the requested Letter Rogatory and finds that it complies with the guidelines set forth by the U.S. Department of State relevant to Letters Rogatory standards generally and Japan specifically. *See* 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>; U.S. State Dep't, Japan Judicial Assistance Information (Apr. 21, 2023), <https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/Japan.html>.

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

Respectfully submitted this 19th day of September, 2023

Thomas P. McCarthy

The Honorable Thomas McCarthy
Administrative Law Judge

Address for Return of Issued Letter Rogatory:

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