

From: Najah K. Gabriel <ngabriel@achp.gov>
Sent: Wednesday, December 21, 2016 12:06 PM
To: Kitay, Evelyn
Cc: Rutson, Vicki; Charlene Vaughn; Miller, Barbara
Subject: RE: Follow-up questions

Evelyn,

Thank you. This information is very helpful. I don't think we need to be kept abreast of the ALJ proceedings and decision, as the information you provided is what we wanted to know at this point. If we decide we do later on, I'll let you know.

Happy Holidays to you all, as well.

Najah

From: Kitay, Evelyn [<mailto:Evelyn.Kitay@stb.gov>]
Sent: Wednesday, December 21, 2016 1:55 PM
To: Najah K. Gabriel
Cc: Rutson, Vicki; Charlene Vaughn; Miller, Barbara
Subject: RE: Follow-up questions

Thanks for your questions, Najah. Yes, a FERC ALJ is presiding over discovery, which includes both issues already raised by the litigants and any future discovery-related issues that may arise in the Harsimus rail line abandonment case. One topic on which the parties have already asked for discovery is 110(k). In May 2015, the STB issued a decision that specifically permitted discovery related to Section 110(k) to proceed. That means that, in discovery, the parties were permitted to seek information from other parties (in the form of documents and/or answers to written questions) that is relevant to the proceeding (including 110(k)). The parties then can use the information and documents provided to them during discovery to make their arguments with the STB. For example, Mr. Montange has alleged that Conrail knowingly sold its rail line without seeking abandonment authority from the STB in order to evade the Section 106 process. Therefore, the STB's May 2015 decision permitted him to ask questions and ask for documents during discovery that could support that argument. (At this point, it's not at all clear what, if anything, Mr. Montange has obtained during discovery that would help him make his argument—I'm just using this as an example to explain our process. It's the same process used by all agencies that are "quasi-judicial"). In October, the FERC ALJ ordered (among other things) that discovery close on December 31, 2016. Because the FERC ALJ will continue to have jurisdiction over discovery unless the STB revokes the referral, should any new discovery issues arise (including a party asking for more time for additional discovery), they would be presented to the FERC ALJ.

Right now, one of the parties is seeking to challenge the FERC ALJ's October decision for reasons unrelated to Section 110(k) or the discovery deadline. In response, the STB will review the decision and determine whether the STB will affirm or overturn part or all of the FERC ALJ's decision. That could take some time. Once the STB makes its determination with respect to the ALJ's decision, it would need to establish a procedural schedule for parties to brief the various issues that were the focus of discovery, including Section 110(k). Mr. Montange's brief would likely set forth all his arguments for why Conrail's sale of the Harsimus line constituted a 110(k) violation. It is likely that others would file briefs in opposition of Mr. Montange's arguments. Then, based on the information in the record and the parties' arguments based on that information, the STB would make a decision on whether there was a 110(k) violation in this case.

I know that there are many uncertainties in the timing of all this, starting with whether the STB will uphold the FERC ALJ's decision. We'd be happy to keep you informed with what's happening, if that would be of help.

If you have further questions, please give me or Vicki a call. Vicki's phone number is 202 245-0295; mine is 202 245-0263.

Hope you and Charlene have a great holiday.

Evelyn

From: Najah K. Gabriel [<mailto:ngabriel@achp.gov>]

Sent: Monday, December 19, 2016 2:40 PM

To: Kitay, Evelyn <Evelyn.Kitay@stb.gov>

Cc: Rutson, Vicki <Vicki.Rutson@stb.gov>; Charlene Vaughn <cvaughn@achp.gov>

Subject: Follow-up questions

Hi Evelyn,

I just have a couple of follow-up questions. You mentioned that the FERC Administrative Law Judge (ALJ) was presiding over the discovery process for the Board's Section 110(k) matter and that the discovery period had recently ended. Did I understand you correctly?

Also, just so that we are clear on the next steps of the Section 110(k) consideration, I have a couple of questions:

1. What role going forward will the ALJ play in the Section 110(k) matter going forward?
2. Now that the discovery period has ended, what is STB's next step?

We want to have a general understanding of the Board's procedural steps for addressing the Section 110(k) matter in case we get any questions about correspondence exchanges.

Thank you,

Najah K. Gabriel

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