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April 29, 2002

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Via Messenger

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

RE: Docket No. NOR 42071; *Otter Tail Power Co. v. The Burlington Northern and Santa Fe Railway Co.*

Dear Secretary Williams:

Enclosed please find an executed original and ten (10) copies of Complainant's Reply to Motion to Compel Responses to Defendant's First Set of Interrogatories and Document Requests for filing in the above-referenced docket.

Also, enclosed is one additional copy of the foregoing motion for stamp and return. Kindly date-stamp the additional copy for return to this office by messenger.

If you have any questions, please do not hesitate to contact me. My direct dial number is (202) 263-4107.

Sincerely,

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Attorneys for Otter Tail Power Co.

Office of the Secretary
Surface Transportation Board
Public Room

Enclosures

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BEFORE THE
SURFACE TRANSPORTATION BOARD

OTTER TAIL POWER COMPANY

Complainant,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

Respondent.

205279
Docket No. NOR 42071



ENTERED
Office of the Secretary

APR 29 2002

Public Record

**COMPLAINANT'S REPLY TO
MOTION TO COMPEL RESPONSES TO DEFENDANT'S
FIRST SET OF INTERROGATORIES AND DOCUMENT REQUESTS**

Complainant, Otter Tail Power Company ("Otter Tail"), hereby replies to the "Motion to Compel Responses to Defendant's First Set of Interrogatories and Document Requests" of defendant, The Burlington Northern and Santa Fe Railway Company ("BNSF"). BNSF characterizes its motion as seeking the production of materials in five areas: (1) information maintained by Otter Tail relating to projections of rail rates from Powder River Basin ("PRB") mine origins; (2) information relating to projections of PRB coal demand and transportation costs made by Otter Tail expert witnesses; (3) information relating to the possible construction of a second electricity generating facility at the site of Otter Tail's existing Big Stone Generating Station; (4) information relating to Otter Tail's decisions whether to purchase electricity from other utilities or to generate it by burning coal; and (5) information relating to Otter Tail's evaluation of non-coal fuel sources for the generation of electricity.

Most of BNSF's Motion is premature and/or moot. BNSF chose to file its Motion just six days before Otter Tail began its production and just ten days before Otter Tail's production

was substantially complete. Otter Tail informed BNSF of this production schedule at the parties' April 12th meet and confer session. At that same meeting, Otter Tail also informed BNSF that it would reconsider some of its burden objections once it had ascertained the volume of documents at issue, and therefore, might produce documents even though Otter Tail still maintained a relevance objection. Otter Tail's production in fact does include documents that are the subject of BNSF's Motion.

Rather than wait a week to determine what documents Otter Tail actually produced, BNSF rushed to the Board with a Motion to Compel. Otter Tail has in fact produced documents responsive to each of the five areas described by BNSF or Otter Tail has determined that responsive documents do not exist. To the extent BNSF seeks to compel the production of additional documents, particularly with respect to the second, fourth and fifth areas, BNSF is overreaching by requesting information beyond Otter Tail's control and/or in the irrelevant areas of product and geographic competition.

I. Background.

BNSF's discussion of the background of this case is a distorted attempt to portray itself as a paragon of virtue when it comes to responding to Otter Tail's discovery and to portray Otter Tail as a stalwart obstructionist who believes that discovery is a one-way street. The reality is that Otter Tail has substantially completed its production in response to every non-objectionable – and numerous objectionable – BNSF discovery requests, while BNSF has yet to produce documents in response to many of Otter Tail's requests.¹ Moreover, Otter Tail substantially completed its entire production in less time than BNSF took to produce only its traffic tapes to Otter Tail.

¹ BNSF asked over a dozen product and geographic competition requests. Although Otter Tail objected to the relevance of all of those requests, it nevertheless agreed to produce some responsive information to most of them in a spirit of cooperation and with the hope of avoiding a discovery dispute.

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Otter Tail filed its complaint with the Board on January 2, 2002. Within two weeks, on January 17, 2002, Otter Tail served BNSF with the main body of Otter Tail's discovery requests. Otter Tail also served three sets of supplemental discovery requests. BNSF objected to nearly all of Otter Tail's requests, but for most requests, further responded that BNSF would produce some unknown subset of responsive documents, subject to its objections. As a consequence of this style of objection, Otter Tail has been required to wait for BNSF actually to produce documents in order to ascertain what, if anything, BNSF will produce. BNSF still has not produced documents in response to many of the document requests to which it indicated it would respond.

BNSF has been dilatory in its own pursuit of discovery, which makes its haste in filing a motion to compel all the more disingenuous. Although Otter Tail filed its complaint on January 2, 2002, BNSF did not serve any discovery upon Otter Tail for 51 days, until February 22, 2002. BNSF cannot claim that it needed this time to develop its discovery requests, since BNSF served upon Otter Tail the exact same requests, number for number, that it served upon Xcel Energy in Docket No. 42057 a year earlier.²

BNSF misleadingly asserts that Otter Tail has not produced any documents while inferring that BNSF has provided substantial discovery to Otter Tail. Motion, note 2. BNSF, however, ignores the fact that Otter Tail had informed BNSF on April 12th, three business days before BNSF filed its Motion, that full production would occur during the week of April 22nd. Otter Tail's production started on April 23rd and was substantially complete on April 26th. Furthermore, at the meet and confer session between BNSF and Otter Tail on April 12th, Otter Tail informed BNSF that it was reviewing documents for responsiveness that very same day at

² In Document Request No. 3, BNSF even failed to change the reference to Xcel's "Pawnee" station to Otter Tail's "Big Stone" station. Furthermore, the Xcel discovery requests were served with the TMPA docket number in TMPA and contained similar missed references to a TMPA generation station at issue. All of this suggests that BNSF's discovery requests to Otter Tail are largely duplicative of several older rate cases, which further belies the notion that BNSF's delay in serving discovery upon Otter Tail was legitimate time needed to prepare discovery.

Otter Tail's headquarters in Fergus Falls, Minnesota, and would have further information as to whether any responsive documents even existed to the objectionable requests the following week. Rather than wait for that review or for Otter Tail's production (as Otter Tail has been forced to do by BNSF), BNSF chose to file its Motion to Compel on April 17th. As a consequence, BNSF's Motion seeks to compel production of many documents that do not exist or in fact have been produced.

BNSF also does not mention that it has had 35 more days to respond to Otter Tail's discovery, since Otter Tail served its discovery on January 17th compared to February 22nd when BNSF served its discovery. BNSF did not produce a single item to Otter Tail until March 22, 2002, or 64 days after Otter Tail served its discovery requests. To date, BNSF has not produced much material other than traffic tapes.³ By contrast, Otter Tail substantially completed all of its production obligations by April 26, 2002, just 62 days after BNSF served its discovery requests.⁴ Thus, Otter Tail has substantially completed its document production in less time than it took BNSF just to produce traffic tapes.

Finally, BNSF portrays its production of traffic tapes as constituting substantial compliance with Otter Tail's discovery requests. But in fact, BNSF has not responded to many of the requests to which it indicated it would respond. Moreover, BNSF has not given Otter Tail any fixed date by which it expects to complete its production.

³ In fact, Otter Tail has had to return to BNSF informally on two separate occasions because BNSF's production of traffic tapes was incomplete. BNSF has not responded to either follow-up request.

⁴ Otter Tail has produced over 7000 pages of documents in response to every request to which Otter Tail responded that it would produce documents.

II. Discussion.

A. Otter Tail has produced all documents responsive to Request No. 7.

Request No. 7 is the most baffling subject of BNSF's Motion because BNSF did not provide any explanation during the April 12th meet and confer session with Otter Tail as to why Otter Tail's response was insufficient. Otter Tail had responded that it would produce responsive documents for all facilities located on the Stand-Alone Railroad ("SARR"). Otter Tail simply objected to the request as premature because Otter Tail had not identified its SARR, since BNSF has only begun to provide Otter Tail with the traffic tapes it needed to begin development of the SARR three days earlier. Thus, the real dispute revolves around Otter Tail's prematurity objection.

Otter Tail's prematurity objection is premised on the fact that rail rate projections for facilities not located on the SARR are irrelevant to this case. In addition, because Otter Tail cannot search for information on rate projections for facilities that have not been identified yet, Otter Tail cannot determine even if any information exists at all. Moreover, because Otter Tail is not in the habit of projecting rail rates for non-Otter Tail facilities, it is highly unlikely that any responsive documents exist. Nevertheless, after making a reasonable search of likely repositories of such information, Otter Tail has not found any responsive documents.

BNSF contends that "if Otter Tail has rail rate projections corresponding to any PRB shippers, those projections of future rail rates would be relevant in assessing the reliability of the rail rate projections that Otter Tail makes for the shippers that are included in its SARR." Motion at 9 [emphasis added]. But, BNSF does not explain why this statement would be true. For example, it is not at all obvious why rail rate forecasts for a PRB coal shipper located in

Texas would be relevant to rate forecasts for shippers on the SARR, which Otter Tail has defined as including the states of Nebraska, Wyoming, Montana, North Dakota and South Dakota.⁵

In the final analysis, Otter Tail has determined that it has no responsive documents for any PRB movements to the SARR states other than those that it already has produced. In addition, a reasonable search has not revealed any responsive documents for PRB movements to non-SARR states. BNSF's Motion, therefore, is moot with respect to Request No. 7.

B. Otter Tail has Produced More Forecasts Prepared by Expert Witnesses Than is Required by the Board's Discovery Rules.

In Section II of its Motion, BNSF addresses Request Nos. 49 and 51, which seek forecasts and projections prepared by Otter Tail's experts. Otter Tail asserted objections of vagueness, ambiguity, overbreadth, burden, and relevance to the Requests as a whole.⁶ Although BNSF points out that Otter Tail amended its responses and objections to Request Nos. 49 and 51 in a March 28, 2002 letter (attached to BNSF's Motion as Ex. 2), BNSF mischaracterizes that letter as a narrowing of the scope of production from Otter Tail's original response. As evidenced by the March 28th letter, Otter Tail, in fact, intended for the amendment to broaden the scope of its production, since an ambiguity in its original response suggested that Otter Tail might not produce any documents. Thus, despite its objections, Otter Tail did agree to produce some documents.

As a preliminary matter, there does not appear to be any dispute between the parties over Request No. 51. BNSF's Motion states that "Request No. 51 seeks projections and forecasts from Otter Tail's experts relating specifically to the movement of coal from the PRB to Otter

⁵ Ironically, this is the same objection that BNSF has raised in response to similar Interrogatories from Otter Tail. See, BNSF Responses to Otter Tail Interrogatory Nos. 24 and 26, attached hereto as Exhibit B. Otter Tail has accepted this narrower scope to these Interrogatories and, in Document Request No. 47, only requested projections on lines in the SARR states. BNSF appears to have a double-standard for itself and for Otter Tail when it comes to the relevance of this discovery.

⁶ Otter Tail further asserted a relevance objection to the extent that a witness does not present evidence on a particular topic listed in the Requests. BNSF's Motion does not challenge the latter objection.

Tail's Big Stone facility." Motion at 11 [emphasis added]. BNSF's Request, however, had asked for all such documents "related in any way" to the Big Stone movement. Otter Tail had objected to that language as overbroad, vague, ambiguous, and irrelevant. Otter Tail always has intended to produce all documents that specifically address the movement of coal to Big Stone. Thus, this portion of BNSF's Motion is moot.

The balance of BNSF's arguments, which relate to Request No. 49, are resolved by the fact that the documents requested are not within Otter Tail's possession, custody, or control. Therefore, Otter Tail cannot volunteer, or otherwise be compelled, to produce this information without the consent of the experts and/or their clients. Otter Tail has produced all responsive documents within its possession, custody or control and thus has no further documents to produce.

Nevertheless, Otter Tail, with the consent of its experts, has produced its expert's forecasts dealing with "national, regional, or PRB coal demand," in an attempt to be consistent with the Board's recent decision in STB Docket No. 42051, Wisconsin Power and Light Co. v. Union Pacific Railroad Co., (served June 20, 2000) (WPL).⁷ BNSF contends that Otter Tail's response is inadequate and that forecasts generated for specific, non-Otter Tail shippers would be "directly relevant to the experts' testimony in this case." Motion at 16.

In FMC Wyoming and FMC Corp., v. Union Pacific Railroad Co., STB Docket No. 42022, 1998 STB Lexis 28 (served Feb. 4, 1998) (FMC), the Board articulated a principled standard that has equal applicability to this case. The Board declined to order FMC to produce prior testimony that its consultant (LEPA) had submitted in other rate cases because LEPA held

⁷ BNSF expresses concern that Otter Tail's reliance on WPL, which concerned only coal demand, is a ruse to justify withholding forecasts of rail rates. Motion at 16-17. Otter Tail's production, however, is based on the spirit rather than the letter of WPL. Thus, Otter Tail represents that its response is not intended to exclude rail rates; however, no such documents exist in the files of its rail rate expert in this proceeding.

such materials “as a fiduciary for its former clients and [was] not free to produce them to FMC.” Id. at *12. In addition, the Board held that UP’s “vague allegations that the prior testimony of the Peabody firm will provide important insights and possible impeachment evidence” were an insufficient basis to order production. Id. at *14.

In this proceeding, the non-Otter Tail, shipper-specific forecasts that BNSF has requested are unreachable under FMC because they were created under the same “fiduciary” relationship identified and protected in FMC. BNSF has provided no justification other than the same speculative and unpersuasive assertions about impeachment value that the Board rejected in FMC. Indeed, the Board previously rejected unsubstantiated assertions that forecasts created in one context are necessarily relevant to those created in another, in STB Finance Docket No. 33388, *CSX Corporation, et al—Control and Operating Leases/Agreements—Conrail Inc. et al.*, (served august 4, 1997) (railroad’s traffic projections from merger proceeding were unrelated to its traffic forecasts in rate case and not useful for impeachment purposes).

BNSF’s Request No. 49 also is at odds with and far broader than the Federal Rules of Civil Procedure with respect to discovery of testifying experts. Courts have viewed Rules 26(b)(4) and 30 as “limitations on the methods by which information may be discovered from experts retained by a party.” Marsh v. Jackson, 141 F.R.D. 431 (W.D. Va. 1992). Generally, a party cannot employ a subpoena duces tecum under Rule 45 to take discovery of testifying experts beyond the foregoing rules and the required disclosures under 26(a)(2)(b). Ambrose v. Southworth Products Corp., 1997 U.S. Dist. Lexis 11901 (E.D. Va. June 24, 1997); Trunk v. Midwest Rubber & Supply Co., 175 F.R.D. 664 (D. Colo. 1997); In re Air Crash Disaster, 720 F. Supp. 1442, 1444 (D. Colo. 1988) (“Defendants’ broad demand for materials and deposition

testimony relating in any way to the experts' aeronautical experience is beyond the appropriate scope of Rule 26(b)(4)(A).").

Under the standards established by the Federal Rules, the Board was generous in WPL by allowing any discovery of consultant files. Otter Tail has been similarly generous in using WPL as a benchmark for its own production of consultant forecasts and projections. The Board should specifically reject BNSF's attempt to recast WPL as a spring-board for unbridled discovery of non-party consultants, whether BNSF employs document requests or a third-party subpoena. See Evanko v. Electronic Systems Assoc's., 1993 U.S. Dist. Lexis 218, *7 (S.D.N.Y. Jan. 8, 1993) (Granting plaintiff's application for protective order against subpoena directed to its expert and noting that "[b]urdensome or otherwise improper discovery demands may serve to discourage experts from participating in lawsuits, to the prejudice of the party who seeks to retain them.").

BNSF also challenges Otter Tail's objection to producing documents to which an expert "contributed," as opposed to documents "prepared by" the expert. Motion at 12-13. BNSF appears to misconstrue the scope of Otter Tail's objection. This distinction is a rational limitation on a request that includes documents to which an expert may have made only a minor contribution in the context of a much larger document with conclusions that cannot be attributed to that expert. Otter Tail, however, is producing documents that were generated under the name of the consulting business, rather than the individual expert, such as subscription service forecasts.

In addition, BNSF challenges Otter Tail's objection to producing expert forecasts about PRB coal demand and movements corresponding to destinations "anywhere in the United States." Motion at 13-14. BNSF's primary argument for this broad discovery is that Otter Tail has made comparable discovery requests of BNSF. But, BNSF does not identify a single such

request by Otter Tail. In fact, Otter Tail has not submitted a request of this scope with respect to BNSF's expert witnesses. Moreover, most of Otter Tail's discovery requests to BNSF are geographically limited to a defined set of "SARR States." BNSF also fails to note that it has objected to the breadth of several Otter Tail requests and that Otter Tail has accepted that narrower scope, pending its review of the documents that BNSF actually produces. Thus, BNSF's "me too" argument is unsubstantiated and in fact indicates that BNSF is trying to have it both ways by objecting to Otter Tail's discovery requests while aggressively pursuing a Motion to Compel Otter Tail to produce the same information.

BNSF's final argument addresses the objections Otter Tail interposed on the grounds that responsive forecasts and projections are proprietary and/or confidential. BNSF's primary argument is that discovery of Otter Tail's consultants is justified because the Board "has repeatedly found that concerns over the confidentiality of information can be addressed through protective orders." Motion at 17. This argument, by itself, does not justify such discovery. On the contrary, the Board has not permitted parties to use protective orders as swords in discovery. See STB Finance Docket No. 33388, CSX Corporation, et al.—Control and Operating Leases/Agreements—Conrail Inc. et al., Slip Op. at 3-4 (served august 4, 1997). For example, in FMC, the Board required UP to make a showing of "compelling need" before allowing discovery of LEPA's prior testimony.

The same standard is appropriate here, where BNSF seeks broad discovery of work that non-party consultants performed for private clients. See STB Docket No. 42057, Public Service Company of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Railway Co., Slip Op. at 4 (served Jan. 31, 2002) (denying a party's request to use evidence produced in one rate case in another absent extraordinary circumstances and compelling need). Other than

inchoate assertions of impeachment value, BNSF has made no showing of extraordinary circumstances or compelling need and its request for intrusive discovery from Otter Tail's experts must be denied to the extent it goes beyond what Otter Tail has in good faith agreed to produce.

C. Information Relating to Otter Tail's Possible Construction of a Second Plant at Big Stone.

Through Request Nos. 5 and 24, BNSF seeks to compel production of documents related to Otter Tail's construction of a second plant at Big Stone. Otter Tail has not decided to construct a second plant at Big Stone, but only has announced a two-year feasibility study that began in October 2001. This is another area where BNSF's Motion is premature, if not moot.

At the April 12th meet and confer session between Otter Tail and BNSF, Otter Tail agreed to reconsider its objections to the extent any analysis of Big Stone II included evaluations of rail rates and/or competitive alternatives to rail transportation of coal. Otter Tail informed BNSF that Otter Tail needed to review Big Stone II documents to determine if such information existed. Otter Tail believed that BNSF had accepted this compromise. BNSF, however, clearly has chosen to jump the gun and file a Motion to Compel without waiting for Otter Tail's response.

In its Motion, BNSF identifies four areas in which it believes Big Stone II documents are relevant to this proceeding: (1) evaluations or discussions of possible rail transportation rates to Big Stone II; (2) discussions about competitive alternatives for the transportation of coal; (3) evaluation of the relative economics of different fuel supplies; and (4) evaluation of the effect of Big Stone II on the operation of Big Stone I. Motion at 19-20. The first two areas are those that Otter Tail agreed to reconsider at the April 12th meet and confer session. The last two areas in BNSF's Motion were not mentioned at the April 12th meet and confer session.

Regarding the first area, Otter Tail has since informed BNSF that it, in fact, has not conducted any evaluation of rail rates in its feasibility study of Big Stone II. See Exhibit A (April 25, 2002 letter from Jeffrey Moreno to Cynthia Quartermann). Rather, Otter Tail simply developed a "zone of reasonableness" for total delivered fuel costs and used that number throughout its analysis. Thus, there are no responsive documents for BNSF's first area. Although not relevant, Otter Tail has offered to produce the delivered fuel cost information used in its feasibility study to BNSF. Id.

Otter Tail also has informed BNSF that no documents exist in the second area, alternatives for the transportation of coal to Big Stone II. Id. Indeed, there are no documents because there are no viable alternatives.

To the extent that BNSF now seeks to compel the production of Big Stone II documents for an evaluation of the relative economics of different fuel supplies and an evaluation of the effect of Big Stone II on Big Stone I (areas three and four), Otter Tail, at the outset, continues to maintain that those documents are not relevant nor are they likely to lead to the discovery of admissible evidence. First, Otter Tail has announced only a two-year feasibility study of Big Stone II. A feasibility study is a far cry from a commitment to construct Big Stone II. For that very reason, Otter Tail does not intend to include Big Stone II in its SARR, even though another coal burning plant at the Big Stone site likely would improve the economics of the SARR.

More to the point, because the feasibility study does not examine non-coal fuel options for Big Stone II, there are no responsive documents to BNSF's third area, the relative economics of different fuel supplies. Indeed, the Otter Tail press release attached as Exhibit 3 to BNSF's Motion clearly states that Otter Tail is studying the feasibility of a second coal-burning unit at Big Stone. Moreover, even if non-coal options were under consideration for Big Stone II, the

economics of different fuel options for Big Stone II would be irrelevant to Big Stone I, since Big Stone II would be constructed as additional, not replacement, capacity to Big Stone I.

Finally, with respect to BNSF's fourth area, the impact of Big Stone II (if constructed) on the operations of Big Stone I, is irrelevant because BNSF would have the same haul over the same route regardless of which plant was burning the coal. Nevertheless, in order to avoid unnecessary discovery disputes, Otter Tail has offered to provide BNSF with relevant portions of documents that address the impact of Big Stone II on the generation of electricity at Big Stone I. See Exhibit A.

Beyond the four areas enumerated at pages 19-20 of the Motion and discussed above, BNSF asserts that other "information from Otter Tail's feasibility study could relate to Otter Tail's evidence in this case," although BNSF is unable to describe how. Motion at 20. BNSF is in fact on a fishing expedition into Otter Tail's files, as illustrated by its statement that "Indeed, without access to the information itself, it would be impossible to create such a list." Id. The Board frowns upon such fishing expeditions. Cf. FMC Wyoming Corp. v. Union Pac. R.R. Co., STB Docket No. 42022, 1998 STB Lexis 230, *13 (served Aug. 31, 1998) (requiring railroad to explain the basis for its assertions "so as to ensure against use of discovery requests as a general fishing expedition").

In summary, Otter Tail has agreed to produce certain Big Stone II documents that relate to rail rates and the impact upon Big Stone I. Otter Tail also has represented that no Big Stone II documents relate to alternatives to rail transportation of coal or to consideration of alternative fuel supplies. Otter Tail nevertheless has agreed to produce certain documents to BNSF despite Otter Tail's adamant objection to the relevance of Big Stone II documents beyond rail rates and

alternatives to rail transportation. Finally, Otter Tail objects to the relevance of Big Stone II documents to the extent BNSF has requested them for unspecified purposes.

D. Information Relating to Product and Geographic Competition.

BNSF has vastly overreached the proper scope of discovery in this proceeding by making numerous requests for information related to product and geographic competition. These requests include the fourth and fifth areas covered by BNSF's Motion to Compel. Despite the objectionable nature of such requests, Otter Tail nevertheless has responded to many of them because doing so was not unduly burdensome relative to a protracted discovery dispute. However, BNSF's requests that pertain to Otter Tail's power purchases and the use of alternative fuels are blatantly abusive of the discovery process and would require Otter Tail to perform a broad and burdensome search of its files for information that is irrelevant and/or cumulative of information already produced.

1. Discovery as to Otter Tail's decisions whether to generate or purchase electricity is overly broad and irrelevant.

BNSF seeks to compel responses to Document Request Nos. 19, 21, 22 and Interrogatory No. 22.⁸ BNSF openly acknowledges that these discovery requests are relevant to the existence of effective product and geographic competition. Motion at 22. But, BNSF asserts that it is entitled to this information because it also is "relevant to SAC issues, namely the volume of coal that Otter Tail will transport over the life of its hypothetical stand-alone railroad as well as the volume of coal that the SARR could be expected to transport to other coal-fired electricity generating facilities included in Otter Tail's stand-alone shipper network." Id.

BNSF's relevance argument, however, could be made for all discovery that also is relevant to product and geographic competition. After all, such competition, in any form, has the

⁸ Although these Requests seek information on both power sales and purchases, BNSF's Motion seeks only to compel production of the latter. Motion at 21, note 15.

theoretical potential to affect the amount of coal consumed by a power plant. But, a very important factor in the Board's decision to exclude product and geographic competition from market dominance determinations was the burden of discovery that was imposed upon complainants. Market Dominance Determinations – Product and Geographic Competition, STB Ex Parte No. 627, 2001 STB Lexis 334, *3-4 (served April 3, 2001). If the Board were to permit BNSF to pursue discovery on product and geographic competition under the cloak of relevance to SAC issues, this exception would swallow rule. Discovery on product and geographic competition would once again become a major part of rate cases and a major deterrent to shippers with legitimate complaints.

BNSF cannot claim that denial of this discovery will deny it access to critical information that would handicap its defense of a rate complaint. BNSF wants this information to determine the volume of coal that Otter Tail will transport over the life of its stand-alone railroad. Motion at 22. But, there are more direct and less onerous ways to discover this information without intruding into product and geographic competition. For example, BNSF can ask for Otter Tail's forecasts, projections, and estimates of its future coal consumption. Such documents already include the impact of projected future power purchases on coal consumption. BNSF in fact has pursued those other options and Otter Tail has produced responsive documents. See Motion, Ex. 1, BNSF Request Nos. 1 and 9. Thus, BNSF's intrusion into product and geographic competition is cumulative.

BNSF's Requests also ask for information on past and present power purchases. Surely BNSF does not need that information to determine coal consumption. Past and present coal consumption is a known historical fact (for which Otter Tail has provided information) that will not change with discovery of information regarding past and present power purchases. This

further illustrates the overbreadth of BNSF's requests and belies any claim that past, present or future power purchases are critical to BNSF's defense.

Otter Tail further informed BNSF at the April 12th meet and confer session that production of all documents related to past, present and future power purchases was burdensome by virtue of the sheer volume of transactions. Otter Tail executes sales and purchase transactions daily. These transactions are executed pursuant to spot purchase enabling agreements, short-term contracts, and long-term contracts. Moreover, Otter Tail engages in these transactions for a variety of purposes, including the sale of excess generation, retail purchases, pass-through purchases and sales, and broker transactions. Daily transactions, which account for approximately half of all energy traded by Otter Tail, amount to approximately 1600 invoices per year under 60 different enabling agreements; monthly transactions involve 30-40 different parties each month; and long-term contracts total more than a hundred. The burden of producing this information outweighs its usefulness to BNSF, particularly since BNSF can determine coal consumption through more direct and less burdensome requests.

Despite Otter Tail's objections, the types of information encompassed by Request Nos. 19, 21 and 22 have been produced as part of Otter Tail's responses to other Requests. See Exhibit A. For example, Otter Tail has produced a variety of projections and forecasts that cover a broad range of areas, including power sales and purchases. Otter Tail has not gone out of its way to redact those documents just because they contain information relevant to product and geographic competition. If BNSF had waited just one week for Otter Tail's production before filing its Motion to Compel, it would have discovered this fact. Therefore, BNSF has in fact received information responsive to those Requests.

Finally, Request No. 22 deserves specific mention. This Request asks for studies, reports, projections, forecasts or analyses as to future purchases and sales of electricity generated by the Big Stone facility, any other electric generating facility owned by Otter Tail, and any other electric generating facility that Otter Tail includes in its SARR. Because Otter Tail does not sell or purchase electricity from or for a particular generating facility, it does not have any responsive documents regarding any of its own facilities. This fact was conveyed to BNSF at the April 12th meet and confer session. Furthermore, although Otter Tail doubts that it has any responsive documents as to the facilities of other utilities on its SARR, that portion of the Request is premature until Otter Tail identifies its SARR.

2. Otter Tail's evaluation of alternative fuels is overly broad and irrelevant.

BNSF also seeks to compel responses to Request Nos. 38 and 39, which address Otter Tail's evaluation of alternative fuels. This is an additional foray into product and geographic competition. Once again, BNSF recognizes the relevance of these Requests to product and geographic competition, but asserts that they also are relevant to the "SAC issue of the volume of coal that Otter Tail can assume to be transported on its SARR during the life of the hypothetical railroad." Motion at 24.

The same arguments against the production of Otter Tail's power purchase information apply with equal force to alternative fuels. BNSF can obtain coal consumption information through a more direct and less onerous line of inquiry, which it has done. For example, Otter Tail's forecasts and projections of coal consumption, which have been produced, already consider the effect of burning alternative fuels. That renders these particular Requests cumulative and burdensome.

Furthermore, Request No. 38 is a vague and ambiguous request because it is unclear whether it refers only to Big Stone or to any type of power plant in general. BNSF's Motion

clarifies the Request to mean the latter. In that case, the Request is exceptionally broad. The Request also has no date parameters. It is difficult to conceive how the economics of building or using any lignite-fired, coal-fired, natural gas-supplied, or oil-supplied generation, at any time in the past, will assist BNSF to determine coal consumption on the SARR. In any event, Otter Tail has produced its Integrated Resource Plan, which is the only document that Otter Tail believes may be responsive to Request No. 38.

Request No. 39 asks Otter Tail to produce all documents related to Big Stone's ability to generate electricity using alternative fuels. Otter Tail is curious as to why BNSF did not simply pursue this information through an Interrogatory regarding the percent and type of alternative fuels that Big Stone can burn, instead of pursuing a much more cumbersome request for all documents related to the ability to burn alternative fuels. Nevertheless, the Integrated Resource Plan is responsive to this Request. Furthermore, Otter Tail has agreed to make the Big Stone engineering specifications available to BNSF for inspection at Otter Tail's headquarters in Fergus Falls, Minnesota. These documents should provide BNSF with all the information it has requested in response to Request No. 39.

III. Conclusion.

WHEREFORE, Otter Tail respectfully requests that BNSF's Motion to Compel be DENIED.

Respectfully submitted,



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Attorneys for Complainant

April 29, 2002

EXHIBIT A

April 25, 2002

By Fax and First Class Mail

Cynthia L. Quarterman
Stephoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036-1795

RE: STB Docket No. 42071, Otter Tail Power Company v. The Burlington Northern and Santa Fe Railway Company

Dear Cynthia:

This letter is in follow-up to our meeting on April 12, 2002 regarding Otter Tail's responses and objections to BNSF's discovery requests. At the outset, I am annoyed and offended that BNSF chose to file its Motion to Compel only three business days after our meeting and just one week before receiving documents from Otter Tail. By waiting only one week, you would have discovered that, in most instances, Otter Tail either does not have responsive documents or that responsive documents indeed have been produced, rendering BNSF's Motion both moot and premature.

At our April 12th meeting, I expressly informed you that Mike Higgins was in Fergus Falls reviewing Otter Tail's document production on that very same day. As a consequence, I did not have specific information on the types of documents that would be produced and their contents. I also informed you that Otter Tail's production would be substantially, if not entirely, completed during the week of April 22nd. On a number of matters, I agreed to reconsider Otter Tail's objections and respond to you once I had become familiar with the universe of documents. But, BNSF filed its Motion to Compel before I even had sufficient time to make the necessary inquiries. Frankly, the timing of BNSF's Motion causes me to seriously question BNSF's good faith desire to resolve our discovery differences.

I will address the subject matters of the Motion to Compel first.

Otter Tail does not have any additional documents that are responsive to Request No. 7. Thus, that part of the Motion to Compel is moot.

Otter Tail will be producing several hundred pages of material from its expert witnesses in response to Request Nos. 49 and 51. Otter Tail, however, cannot produce confidential material that constitutes work performed for specific clients of an expert's consulting business because that material is not within Otter Tail's possession, custody or control. In addition, I believe that you have overstated Otter Tail's objection to producing forecasts to which an expert made a limited contribution. Otter Tail is not using this distinction as a ploy to evade discovery. Rather,

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the distinction is a rational limitation on a request that includes documents to which an expert may have made only a minor contribution in the context of a much larger document with conclusions that cannot be attributed to the Otter Tail expert. Otter Tail already is producing much more than is required by the Federal Rules of Civil Procedure and it is unfortunate that BNSF did not evaluate the material produced before filing its Motion. BNSF's requests for additional information simply is overreaching.

I am particularly perplexed by the inclusion of Request Nos. 5 and 24 in BNSF's Motion. I expressly informed you on April 12th that I would reconsider Otter Tail's objections with respect to any evaluation of rates, coal sources, and rail alternatives in the Big Stone II feasibility analyses. In fact, Otter Tail has decided to respond in all three areas. There are no responsive documents in any of these areas, however, except for a modeling of delivered fuel costs. Although that does not involve any analysis of rail rates, we are willing to produce it if you request it. BNSF's Motion adds two additional reasons for discovering Big Stone II information that you did not mention at our April 12th meeting. Although we object to the relevance of either category, there are no responsive documents on the relative economics of different fuel supplies and we will produce documents on the possible effects of Big Stone II on the generation of electricity by Big Stone I.

As for BNSF's requests concerning Otter Tail's decision to generate or purchase electricity and evaluations of alternative fuels, Otter Tail adheres to its relevance, overbreadth, and burden objections. However, it is quite apparent that many of the forecast and projection documents that Otter Tail is producing in response to other Requests contain a significant amount of information on these subjects.¹ This is consistent with my representation to you on April 12th that BNSF would be getting much of this same information through other Requests.

The remainder of this letter address other issues from our April 12th meeting that are not covered by BNSF's Motion to Compel.

With respect to Request No. 1, you asked whether Otter Tail has "planning runs" or similar documents. The answer is "no." You also asked whether forecast assumptions and methodologies are being produced. After reviewing the forecast documents, the necessary information appears to be contained within them. If you feel something is missing after

¹ For example, the Integrated Resource Plan address these issues as well as documents that begin with the following bates numbers: 000776, 000814, 005847, 005868, 005917, 005924, 005940, 006023 and 006089. In addition, the Gold Books that Otter Tail has agreed to make available for inspection by BNSF in Fergus Falls contain information responsive to Request No. 39. This list is not intended to be all-inclusive, but instead, constitutes responsive items that we have identified from a cursory review.

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April 25, 2002

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reviewing them yourself, we will cooperate to provide you with that information to the extent it is available.

With respect to confidential contracts, we do have some contracts that will require BNSF to file a Motion to Compel.

With respect to all requests with a prematurity objection, Otter Tail will make its best effort to produce responsive information prior to the submission of its opening evidence.

I believe that this covers the open issues from our April 12th meeting. If you have any other questions that cannot be answered from the documents that have been produced, you may contact Mike Higgins or me.

Sincerely,



Jeffrey O. Moreno

EXHIBIT B

OTTER TAIL POWER COMPANY,	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. NOR 42071
	)	
THE BURLINGTON NORTHERN AND	)	
SANTA FE RAILWAY COMPANY,	)	
	)	
Defendant.	)	
	)	

Defendant The Burlington Northern and Santa Fe Railway Company (“BNSF”) hereby objects and responds to Otter Tail Power Company’s Third Set of Interrogatories and Fourth Set of Requests for Production of Documents (“Otter Tail’s Discovery Requests”).

BNSF hereby incorporates by reference its general objections to definitions and instructions set forth in BNSF's Responses and Objections to Complainant's First and Second Set of Interrogatories and Requests for Production of Documents and First Set of Requests for Admission served on February 19, 2002.

II.

RESPONSES

Subject to the General Objections and Objections to Definitions and Instructions incorporated herein, BNSF responds to Otter Tail's Discovery Requests as follows:

INTERROGATORIES

INTERROGATORY NO. 23

Please describe BNSF's knowledge of fuel supply changes involving PRB coal for BNSF's existing and potential new customers. This includes utilities planning to switch from Montana PRB coal to Gillette-area PRB coal, or vice versa. This also includes knowledge of planned changes in the percent of PRB coal, if PRB coal is currently used as part of a blend, as well as new use of PRB coal at units that are currently not burning PRB coal. The information provided should include, but not be limited to, the customer, boiler, current coal supply, future coal supply, tons of PRB coal involved, timing to the fuel supply changes, and the reason for the change.

BNSF RESPONSE: BNSF objects to this Interrogatory on grounds that is overly broad, unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence to the extent it seeks information about customers who Otter Tail does not intend to include in its stand-alone railroad ("SARR"). BNSF further objects to this Interrogatory as premature to the extent that Otter Tail has not identified the PRB customers or movements that Otter Tail intends to include or posit in its SARR. BNSF further objects to this Interrogatory on grounds that the release of such information could result in the violation of contractual obligations to third parties. Subject to these objections, BNSF states that knowledge acquired by BNSF on the matters identified in this Interrogatory is generally incorporated into BNSF's most recent coal forecast.

INTERROGATORY NO. 24

Please describe BNSF's knowledge of all customers that have inquired about new or increased consumption of PRB coal in the future. The information provided should include, but not be

limited to, the customer, boiler, current coal supply, future coal supply, tons of PRB coal involved, timing to the fuel supply changes, and the reason for the change.

BNSF RESPONSE: BNSF objects to this Interrogatory on grounds that is overly broad and unduly burdensome to the extent it seeks information about all inquiries relating to new or increased consumption of PRB coal. BNSF further objects to this Interrogatory on grounds that the relevance, if any, of information about mere inquiries into the possibility of new or increased consumption of PRB coal is outweighed by the burden of responding to this Interrogatory.

INTERROGATORY NO. 25

If BNSF subscribes to, or otherwise receives (regularly or otherwise), any PRB demand or production forecasts from third parties, please identify the third parties, describe how those forecasts are used by BNSF, and describe any documents created by BNSF that rely in whole or in part on information or data from the forecasts.

BNSF RESPONSE: BNSF is in the process of collecting this information and will provide a response to the extent the information is reasonably available.

INTERROGATORY NO. 26

If any coal origins (e.g. mines) have provided long-term projections about planned coal production, or otherwise informed BNSF about any planned or potential expansions of a mine and/or loading capability, please provide the details of these long-term projections or potential expansions including, but not limited to, production, capacity, timing of production changes and expansions, source of the new production or capacity, and status of the expansions.

BNSF RESPONSE: BNSF objects to this Interrogatory as overly broad and unduly burdensome to the extent it seeks information regarding coal origins outside the PRB or coal origins that Otter Tail does not intend to include in its SARR. BNSF further objects to this Interrogatory to the extent it seeks information that is available from public sources. Subject to these objections, BNSF states that it is conducting a reasonably inquiry and will respond as appropriate for the coal origins served by BNSF in the Montana and Wyoming PRB region.

INTERROGATORY NO. 27

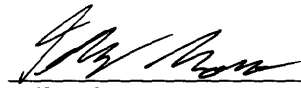
CERTIFICATE OF SERVICE

I hereby certify that this 29th day of April, 2002, I served a copy of the foregoing "Complainant's Second Motion to Compel Production of Documents" on Defendant, The Burlington Northern and Santa Fe Railway Company by hand-delivery upon counsel for Defendant at the following address:

Samuel M. Sipe
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20026

and by overnight mail:

Michael Roper
Senior General Counsel
The Burlington Northern and Santa Fe Railway Company
2500 Lou Menk Drive
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Jeffrey O. Moreno