

BEFORE THE
SURFACE TRANSPORTATION BOARD



OTTER TAIL POWER COMPANY)

Complainant,)

v.)

THE BURLINGTON NORTHERN AND)
SANTA FE RAILWAY COMPANY)

Defendant.)

Docket No. 42071

ENTERED
Office of the Secretary

JUN 17 2002

Part of
Public Record

PETITION TO INTERVENE AND REPLY IN
OPPOSITION TO BNSF SUBPOENA DUCES TECUM
DIRECTED TO L.E. PEABODY & ASSOCIATES, INC.

Pursuant to 49 C.F.R. §1112.4, Public Service Company of Colorado d/b/a Xcel Energy ("Xcel") hereby seeks leave to intervene in this case for the limited purpose of protecting its interests in a discovery dispute between the parties in this proceeding.

On May 28, 2002, defendant The Burlington Northern and Santa Fe Railway Company ("BNSF") filed a Petition for Subpoena Duces Tecum that seeks certain discovery from L.E. Peabody & Associates, Inc. ("Peabody") and Mr. Thomas D. Crowley, whom complainant Otter Tail Power Company ("OTP") has named as a testifying expert on future rail rates in this proceeding. Xcel has been furnished a copy of a redacted version of BNSF's Petition, which broadly seeks to obtain all documents in Peabody's files that discuss or refer to any forecasts, estimates or projections of rail rates for the transportation of Powder River Basin coal.

I.
GROUND FOR INTERVENTION

The Board's rules permit intervention if intervention would not delay the proceedings or unduly broaden the issues raised. Neither is the case here, as (1) the procedural schedule has been suspended, and (2) Xcel is seeking to respond to an attempt by BNSF to greatly broaden the issues in this proceeding. Finally, as to Xcel's interest in this proceeding and whether Xcel supports or opposes the relief sought or the action proposed, as set forth in more detail below, Xcel's interest is limited to the discovery issues raised by BNSF's Petition, and Xcel opposes the Petition and urges that it be summarily denied.

Xcel has a direct and substantial interest in this discovery dispute because Xcel is the complainant in a pending rate complaint proceeding against BNSF in STB Docket No. 42057 that is still in the discovery phase, and Xcel has retained Peabody to assist Xcel in preparing evidence in that proceeding that will demonstrate the unreasonableness of BNSF's rates to Xcel's Pawnee Steam Electric Generating Station ("Pawnee"). Xcel has not formally named Mr. Crowley to be its testifying expert on future railroad rates in Docket No. 42057, as the complainant has in this proceeding. However, Xcel is strongly considering this action given Mr. Crowley's extensive experience and knowledge of this area.

It is therefore not unreasonable for Xcel to conclude that, if BNSF's Petition is granted in this proceeding, BNSF will file a similar, if not identical, petition in Docket No. 42057 if and when Xcel names Mr. Crowley or someone else at Peabody to be Xcel's testifying expert on future railroad rates. Because Xcel is opposed to BNSF's Petition for numerous reasons, Xcel therefore seeks to intervene in this proceeding in order to inform the Board of this opposition and ask the Board to use this proceeding to reject this latest overly-aggressive and meritless discovery tactic by BNSF. Notwithstanding the foregoing, Xcel expressly reserves all rights and

arguments it may have in opposition to any similar petition that BNSF should file in Docket No. 42057.

II. REPLY IN OPPOSITION TO BNSF'S PETITION

Xcel has reviewed the Joint Opposition of Otter Tail Power Company and L.E. Peabody & Associates, Inc. to Defendant's Petition for Subpoena Duces Tecum, filed in response to BNSF's Petition. But for the fact that Mr. Crowley has not been named by Xcel to be its testifying expert on future rail rates, the issues raised by BNSF's Petition and discussed by OTP and Peabody in their reply would also apply to Xcel, as well as every other similarly situated complainant in a coal rate reasonableness proceeding. Xcel agrees with the points raised by OTP and Peabody in their reply, and therefore supports the arguments they raise in opposition to BNSF's Petition.

Moreover, granting BNSF's Petition would almost certainly cause considerable additional harm to Xcel in its efforts to obtain a ruling from the Board prescribing maximum reasonable rates for BNSF's transportation of PRB coal to Pawnee. Xcel's complaint was filed on December 20, 2000, over 17 months ago, and despite the presence of the Board's rules for processing rate complaint cases and a backdrop of legislative intent that such cases should be processed in an expeditious manner, Xcel's case against BNSF is still in the discovery phase and there is no procedural schedule in place. In Xcel's view, this extraordinary delay has been caused in large part by BNSF's behavior during the discovery process, the details of which have been well-chronicled in pleadings filed by the parties in Docket No. 42047.

Granting BNSF's subpoena in this proceeding would almost certainly add to the already extraordinary length of time it has taken for Xcel's complaint to be processed. The reasons for this are threefold. First, it is clear from the fact that BNSF has singled out Peabody and Mr.

Crowley from all of OTP's experts that BNSF's subpoena is about more than just discovery. The immense burden imposed on Peabody by the extremely broad scope of BNSF's subpoena would almost certainly limit Peabody's ability to assist Xcel and other shippers who have retained Peabody to help them prepare their evidence in their rate complaint cases against BNSF and other railroads. It could also have a chilling effect on coal shippers considering retaining Mr. Crowley and Peabody to help them evaluate whether to file a rate complaint case against a railroad.¹ Second, as stated above, there is no reason for the Board to doubt that once the door to this area of discovery is opened, the Board, Peabody, and parties to rate complaint cases will have to repeat this process again and again, since by virtue of the Highly Confidential designation in the protective orders used in these cases information discovered in one proceeding will have to be "re-discovered" in another proceeding. Third, as explained in OTP's and Peabody's reply, basic principles of due process will require the granting of BNSF's Petition to be combined with an expansion of the breadth and scope of discovery in this and other, similar proceedings, such as Xcel's. Specifically, if the Board expands the scope of discovery to include the tangential materials from Peabody covered by BNSF's subpoena, then all testifying experts retained by either party would be subject to such discovery. Since in coal rate reasonableness cases the railroads typically wait until after the complainant files opening evidence to reveal the identity of their testifying experts, consistent application of the precedent that would be set by granting BNSF's Petition would require the Board to establish procedural schedules that permit

¹ Xcel notes in this regard that, although BNSF's Petition is silent on this point, it is hornbook law that to the extent Peabody provided railroad rate forecasting information to counsel for its clients to help counsel provide legal advice, this information is privileged and nondiscoverable by any party in any proceeding. However, the application of this basic rule would be very complicated should BNSF's Petition be granted. Specifically, only Peabody's clients, not Peabody, have the right to assert a privilege. Thus, granting BNSF's Petition would instantly drag numerous third parties into this discovery dispute, since any disagreements between whether a particular document or portion of a document is privileged would necessarily be between BNSF and the Peabody client asserting the privilege. This infusion of multiple third parties into the proceeding would apply to any expert with multiple clients affected by a subpoena seeking client-specific work from the expert and his/her firm.

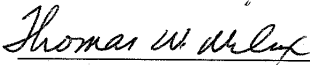
complainants to discover materials from a defendant's testifying experts similar to the materials BNSF is seeking to discover from Peabody. This additional layer of discovery would even further delay the processing of these cases. In Xcel's case, such additional delay would be particularly harmful.

III. CONCLUSION

For all the reasons set forth above, and in the reply filed by OTP and Peabody, the Board must deny BNSF's Petition.

Respectfully submitted,

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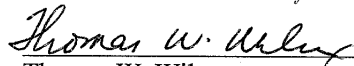
*Attorneys for Public Service Company of Colorado
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June 17, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June, 2002, I served a copy of the PETITION TO INTERVENE AND REPLY IN OPPOSITION TO BNSF SUBPOENA DUCES TECUM DIRECTED TO L.E. PEABODY & ASSOCIATES, INC. by Hand Delivery to counsel for Defendant at the following address:

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