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July 5, 2002



via Hand Delivery

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

ENTERED
Office of Proceedings

JUL 05 2002

Part of
Public Record

**Re: *Otter Tail Power Company v. The Burlington Northern and
Santa Fe Railway Company*, Docket No. NOR 42071**

Dear Secretary Williams:

Enclosed for filing in the above-captioned matter are the original and 10 copies of Defendant's Reply to Petitions to Intervene filed by defendant The Burlington Northern and Santa Fe Railway Company.

Please date stamp the extra copy of this cover letter and return it to the messenger who delivered this filing.

Sincerely,

Anthony J. LaRocca

Enclosures

cc: Counsel for Complainant

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



OTTER TAIL POWER COMPANY,)

Complainant.)

v.)

Docket No. NOR 42071

THE BURLINGTON NORTHERN AND)
SANTA FE RAILWAY COMPANY,)

Defendant.)

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DEFENDANT'S REPLY TO PETITIONS TO INTERVENE

Defendant The Burlington Northern & Santa Fe Railway Company ("BNSF") hereby replies to the June 17, 2002 petitions of PPL Montana, LLC ("PPL"),¹ Public Service Company of Colorado d/b/a Xcel Energy ("Xcel"),² and Muscatine Power & Water ("Muscatine")³ to intervene in this proceeding for the limited purpose of opposing BNSF's May 28, 2002 petition for a subpoena duces tecum directed to L.E. Peabody & Associates, Inc. ("LEPA"). BNSF does not object to the participation of PPL, Xcel and Muscatine in this proceeding for the purpose of

¹ Petition of PPL Montana, LLC to Intervene as to Discovery Issues, and Reply in Opposition to BNSF Petition for Subpoena Duces Tecum Directed to L.E. Peabody & Associates, Inc. (filed June 17, 2002) ("PPL Opposition").

² Public Service Company of Colorado d/b/a Xcel Energy Petition to Intervene and Reply in Opposition to BNSF Subpoena Duces Tecum Directed to L.E. Peabody & Associates, Inc. (filed June 17, 2002) ("Xcel Reply").

³ Muscatine Power & Water Non Party Response to BNSF Subpoena Request (filed June 17, 2002) ("Muscatine Response"). While Muscatine has styled its pleading a non-party response to BNSF's subpoena request, the substance of the pleading is a petition to intervene for purposes of opposing BNSF's request.

filing an opposition to BNSF's subpoena request. However, as discussed below, BNSF does not agree with the arguments asserted by the intervenors in opposition to BNSF's subpoena request.

The grounds for BNSF's request that the Board issue a subpoena duces tecum to Mr. Crowley and his firm, L.E. Peabody, are set out in BNSF's May 28, 2002 Petition and are not repeated here. The intervenors assert two basic reasons for opposing BNSF's request. First, they assert that the information sought by BNSF is too commercially sensitive to be subject to discovery in rail rate litigation. Second, they complain about the burden of complying with the subpoena and predict that granting the subpoena request will further complicate rail rate litigation. Neither argument has merit.

Confidentiality: PPL asserts that the information sought by BNSF should not be subject to discovery because it is of "exceptional commercial sensitivity." PPL Opposition at 3. According to PPL, disclosure of the information could "provide the railroads or their consultants a clear and unfair advantage in any subsequent contract negotiations or litigation." *Id.* at 4. Moreover, the ability to designate the information as "Highly Confidential" under the terms of the Board's March 6, 2002 protective order in this case does not "allay third parties' fears." *Id.* at 6. In a similar vein, Muscatine asserts that even with the existence of a protective order, "there is never an absolute guaranty of anything." Muscatine Response at 2.

Intervenors are asking the Board to observe an egregious double-standard when it comes to discovery of commercially sensitive information. The Board has routinely ordered the production of confidential coal transportation contracts, notwithstanding the concerns of railroads and non-party shippers who have pointed out that disclosure of the information in those contracts could cause commercial harm. The Board's response to those concerns is that the conditions applicable to the use of materials designated as "Highly Confidential" under Board

protective orders “are sufficient to protect the interests of third-party shippers.” *Texas Mun. Power Agency v. The Burlington Northern and Santa Fe Ry. Co.*, slip op. at 2-3, STB Docket No. 42056 (served Feb. 9, 2001) (“*TMPA*”).

PPL tries to distinguish the Board’s practice regarding transportation contracts by downplaying the commercial significance of the information in those contracts. But the terms of those contracts are of extreme commercial sensitivity, particularly when multiple contracts are made available to a consultant like Mr. Crowley who regularly advises shippers in negotiating such agreements. While it is true that the protective orders do preclude the actual use of such information, those orders cannot create a chinese wall in the mind of a consultant like Mr. Crowley. The Board has nevertheless concluded that its protective order is sufficient to prevent the misuse of such highly confidential information.

There is no reason to apply a more rigorous confidentiality standard to BNSF’s request for Mr. Crowley’s forecast information than to complainants’ requests for the production of transportation contracts. The information BNSF seeks may be highly sensitive, but it is no more sensitive than the information that defendant railroads are regularly ordered to produce. As the Board found in the *WPL* case, “[t]hird parties who may have apprehensions regarding disclosure of their extremely sensitive materials can allay their fears by expressing their concern to LEPA, who in turn can . . . determine what level of confidentiality should be assigned to the material produced.” *Wisconsin Power and Light Co. v. Union Pac. R.R. Co.*, STB Docket No. 42051, slip op. at 3, n.5 (served June 21, 2000).

Burden: Xcel makes several burden-related arguments in opposition to BNSF’s subpoena request. First, Xcel argues that the subpoena should be denied because of the “[i]mmense burden imposed on Peabody” to respond to the document request. Xcel Reply at 4.

According to Xcel, the effort required by Mr. Crowley to respond to the request would limit the ability of Mr. Crowley to assist other shippers in pending rate litigation. *Id.* In addition, Xcel claims that if Mr. Crowley is required to produce information, then “all testifying experts retained by either party would be subject to such discovery,” potentially expanding and further complicating rail rate cases. *Id.* (emphasis in original). Finally, Xcel predicts that burdensome disputes will arise over claims of privilege associated with the rail rate forecasts.

Despite Xcel’s hyperbole, it is undeniable that some effort on the part of Mr. Crowley would be required to respond to BNSF’s request, as is the case with virtually all discovery.⁴ BNSF has offered to narrow significantly the scope of its document requests, but some discovery burdens will remain.⁵ These discovery burdens, however, must be weighed against the value and importance of the information sought. Here, BNSF seeks information from a firm that, in the words of its own president, is “constantly . . . engaged in efforts to predict future trends as part of the professional advice that our clients hire us to develop.” Verified Statement of Thomas D. Crowley at 5, filed with Joint Opposition of Otter Tail Power Company and L.E. Peabody & Associates, Inc. to Defendant’s Petition for Subpoena Duces Tecum (June 17, 2002). Mr. Crowley plans to sponsor an expert opinion in this case about the same “future trends” that he analyzes in his commercial consulting practice. The relevance and importance of this information is beyond serious dispute. The Board should have the opportunity to assess the credibility of Mr. Crowley’s litigation forecasts on the critical issue of future rail rates in light of the advice he provides to his commercial clients on the same subject.

⁴ Once this effort is undertaken, however, it is unlikely that significant additional efforts by Mr. Crowley would be required in subsequent litigation.

⁵ See Letter from A. LaRocca to N. DiMichael (filed in STB Docket No. NOR 42071 June 26, 2002).

The Board has recognized in the past that some discovery burdens are acceptable if the information sought in discovery relates to an important issue in the proceeding and is unavailable through other sources. Thus, in the *TMPA* case, the Board required BNSF to assist in carrying out a fuel consumption study even though the Board recognized that the study would be “inconvenient and even intrusive for BNSF.” *TMPA*, slip op. at 8. The need for and importance of the information in that case justified the burden required to produce it. The same considerations apply here. There is no source for Mr. Crowley’s actual beliefs regarding future PRB rate trends other than L.E. Peabody’s files.

Xcel further argues that an order requiring production of information from L.E. Peabody will create additional litigation burdens by encouraging new requests for expert discovery. There is no reason to believe this will happen. In the *Otter Tail* case, Otter Tail identified all of its expert witnesses but BNSF has pursued expert discovery only on the critical issue of rail rate projections. In any event, the Board can deal with any unreasonable expansion of expert discovery if or when it occurs. The mere possibility of future contested discovery requests in other cases is not enough to deny BNSF discovery of relevant and important information here.

Finally, Xcel raises the specter of future disputes over privilege in the event Mr. Crowley is ordered to produce materials on rail rate forecasts. See Xcel Reply at 4, n.1. The scope of any legitimate privilege claims should be extremely narrow in this case. BNSF has offered to exclude materials relating to Mr. Crowley’s participation in litigation, thus eliminating the most likely source of any privilege claims.⁶ Outside of the context of litigation, the requested materials on projected rail rates are not likely to raise any legitimate privilege issues. The communications from an outside consultant to its client are not generally subject to the attorney-

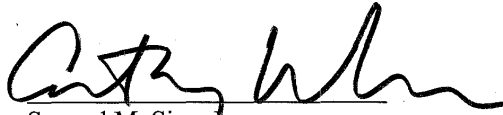
⁶ *Id.*

client privilege.⁷ If privilege disputes complicate the production of rate forecasts from L.E. Peabody, it would only be because L.E. Peabody or its clients choose to manufacture privilege claims as a mechanism for depriving BNSF and the Board of access to relevant information.

CONCLUSION

For the reasons set forth above and in BNSF's May 28, 2002 Petition, the Board should order L.E. Peabody & Associates, Inc. to produce the documents described in the subpoena duces tecum, as modified by BNSF's proposal set out in BNSF's June 26, 2002 letter to Otter Tail's counsel.

Respectfully submitted,



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Dated: July 5, 2002

⁷ See, e.g., *Western Res., Inc. v. Union Pac. R.R. Co.*, 2002 WL 181494, at *7 (D. Kan. Jan. 31, 2002) (In a case involving L.E. Peabody files that were claimed to be privileged, the court noted that "if the advice is sought from the consultant and not the lawyer, no [attorney-client] privilege exists."); *Occidental Chem. Corp. v. OHM Remediation Services Corp.*, 175 F.R.D. 431 (W.D.N.Y. 1997) (refusing to accept a claim of privilege for documents prepared by an outside consultant even though they were prepared at the request of counsel); *United States Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F.Supp. 156, 161 (E.D.N.Y. 1994) ("Courts that have considered the application of the attorney-client privilege to independent outside consultants have been cautious in extending its application.").

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2002, a true and correct copy of the foregoing document
was served by hand on:

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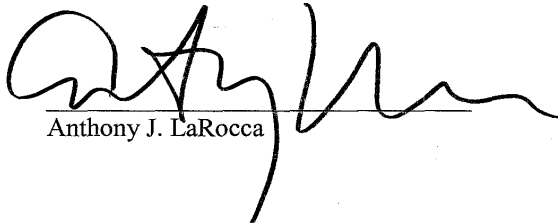
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