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July 9, 2002

Via Hand Delivery

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423

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

Dear Secretary Williams:

Attached for filing in the above-captioned matter is correspondence from
defendant's counsel to complainant's counsel relating to Defendant's Petition for Subpoena
Duces Tecum, filed on May 28, 2002.

Sincerely,


Anthony J. LaRocca

cc: Complainant's Counsel

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July 9, 2002



VIA FACSIMILE

Nicholas J. DiMichael, Esq.
Thompson Hine LLP
Suite 800
1920 N Street, N.W.
Washington, D.C. 20036

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

Dear Nick:

I am responding to your July 1, 2002 letter regarding BNSF's request for a subpoena to L.E. Peabody & Associates, Inc. In your letter, you reject the subpoena modifications proposed in my June 26, 2002 letter to you. Those modifications addressed the two principal sources of concern described in Otter Tail's reply to the subpoena request, i.e., the production of litigation-related materials and materials prepared for shippers whose traffic is unrelated to this SAC case. Your July 1, 2002 letter now emphasizes different concerns over the possibility of privilege disputes and the risk that Mr. Crowley's forecasts will somehow be misinterpreted or taken out of context in the evidentiary presentations. It appears that your ultimate goal is simply to avoid any production of forecasts prepared by Mr. Crowley. In any event, even if these additional concerns were legitimate, they would not justify a refusal to produce relevant and important information on the critical SAC issue of future revenues. BNSF is entitled to the requested discovery for reasons that have been adequately set out in BNSF's original petition and in its July 5, 2002 response to the petitions to intervene of PPL Montana, Xcel Energy and Muscatine Power.

Your July 1, 2002 letter also proposes an alternative to document discovery, namely that you will agree to make Mr. Crowley available for a deposition on the subject of rail rate forecasts "without an associated subpoena duces tecum." As I'm sure you know, a deposition of Mr. Crowley is not a substitute for the production of documents that reflect the actual opinions and

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advice that Mr. Crowley has provided in non-litigation settings. BNSF's request for the subpoena duces tecum is grounded on the likelihood that Mr. Crowley's forecasts of rail rate growth prepared for individual clients are inconsistent with the aggressive rail rate forecasts that he sponsors in rate litigation. It is this discrepancy between *specific* forecasts done for commercial clients and litigation forecasts that BNSF seeks to explore through document discovery from Mr. Crowley. A deposition would not produce this information unless Mr. Crowley was willing to discuss the specific forecasts prepared for particular clients. But if Mr. Crowley was willing to discuss in a deposition the specific advice given to individual clients (and to prepare himself in advance of such a deposition by reviewing the relevant forecasts), then there would be no justification for refusing to produce the forecast materials themselves.

We believe that the requested materials will show that the rail rate forecasts sponsored by Mr. Crowley in SAC presentations are unreliable and unrealistic. Indeed, this may be why the most vocal opposition to the production of the requested materials has come from shippers, like Otter Tail, PPL and Xcel, that are complainants in pending rate reasonableness litigation. Mr. Crowley knows that rates have declined in recent contract negotiations and he is well aware of the downward trend in PRB coal transportation rates over the past two decades, including rates on movements to shippers served by one rail carrier. His advice to commercial clients undoubtedly takes these trends into account, unlike the forecasts he sponsors in SAC litigation. BNSF and the Board should be able to examine Mr. Crowley's real world advice as it was presented to actual clients. A general deposition on forecasting methodologies is not a substitute for access to these documents.

For these reasons we reject your proposed "compromise" and we will pursue the subpoena as modified in my June 26, 2002 letter to you. As with prior correspondence on this subject, we are filing a copy of this letter with the Board. Please call me if you have any questions.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Anthony J. LaRocca', with a stylized, flowing script.

Anthony J. LaRocca

cc: The Honorable Vernon Williams, Secretary,
Surface Transportation Board