

210996

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 Proceedings

MAY 20 2004

OTTER TAIL POWER COMPANY'S
MOTION TO ESTABLISH BRIEFING SCHEDULE

Part of
Public Record

Otter Tail Power Company ("Otter Tail") hereby requests that the Board establish a briefing schedule in the above-captioned proceeding as proposed herein. For reasons set forth herein, Otter Tail proposes a briefing schedule that deviates from prior Board practice, but which Otter Tail believes offers many advantages to both the parties and the Board in light of the Board's recent use of oral arguments in rate proceedings.

Instead of filing post-evidentiary briefs, Otter Tail proposes that the parties submit pre-argument briefs approximately two weeks prior to oral argument. Furthermore, in addition to briefing issues that the parties believe are important, Otter Tail proposes that the Board also have an opportunity to identify any issues that it desires the parties to address in their pre-argument briefs. Under this proposal, the administrative record would have closed on April 29, 2004, when the parties submitted Rebuttal Evidence, which would require the Board to issue a final decision by January 29, 2005. See 49 U.S.C. § 10704(c)(1). Working backward from that date, Otter Tail proposes the following briefing schedule:

STB to identify issues for parties to brief	Friday, October 22, 2004
Pre-Argument Briefs Due	Friday, November 5, 2004
Oral Argument	Friday, November 19, 2004

This proposal offers several advantages over the current briefing process, which was established before the Board scheduled oral arguments as a regular part of its decision-making. Under the current process, the parties typically submit post-evidentiary briefs only 2-3 months after the submission of Rebuttal Evidence. These briefs, coming so soon after the filing of Rebuttal Evidence, largely tend to be repetitive of the Counsel's Argument that is part of the parties' Opening, Reply, and Rebuttal Evidence. Furthermore, briefing typically occurs without any Board input, since the Board seldom has had sufficient time to completely digest and understand the parties' evidence and argument within the current briefing time frame. In short, the current briefing process contributes little to the overall decision-making process other than to summarize the evidence and argument already in the record. Otter Tail submits that, by deferring briefs until later in the process, their value to the Board will be greater.

In every case since STB Docket No. 42069, *Duke Energy Corp. v. Norfolk Southern Ry. Co.*, the Board has held oral argument approximately 1-3 months prior to issuing a final decision. Before each argument, the Board has notified the parties of issues that it desires them to address. Shortly before or after some of these oral arguments, the Board also has requested additional written argument from the parties. Furthermore, recent cases have seen a proliferation of "surrebuttals" and "clarifications," often after the filing of post-evidentiary briefs. There also have been intervening Board decisions that may be pertinent to pending cases. Since each of these events frequently occurs only after the filing of post-evidentiary briefs under the current

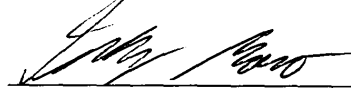
process, these so-called "Final Briefs" rarely are final, and the parties end up submitting additional pleadings either on their own or at the request of the Board.

Otter Tail's proposal would alter the timing when briefs are submitted in an effort to streamline the process, eliminate redundant filings, and provide the Board with truly final arguments in a brief that is based on the most recent precedent. Such briefs would be more meaningful to the Board because they will respond to issues specifically identified by the Board after it has had the opportunity to completely analyze the evidence and because they will summarize all of the evidence based upon the most recent precedent.

Otter Tail recognizes that, because this is a novel proposal, the Board want to discuss certain aspects of it with the parties. If that is the case, Otter Tail proposes that the Board schedule a Technical Conference between the parties and Board staff to determine a proper briefing schedule for this proceeding.

For the foregoing reasons, Otter Tail requests that the Board adopt the briefing schedule as described herein, or in lieu thereof, to schedule a Technical Conference to determine a briefing schedule.

Respectfully submitted,



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Dated: May 20, 2004

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of May, 2004, I served a copy of Complainant Otter Tail Power Company's Motion to Establish Briefing Schedule by hand delivery to counsel for Defendant at the following address:

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