

2 11324

STEPTOE & JOHNSON <sup>LLP</sup>  
ATTORNEYS AT LAW

Samuel M. Sipe Jr.  
202.429.6486  
ssipe@steptoe.com

1330 Connecticut Avenue, NW  
Washington, DC 20036-1795  
Tel 202.429.3000  
Fax 202.429.3902  
steptoe.com

June 9, 2004



**Via HAND DELIVERY**

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

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

Dear Secretary Williams:

Enclosed for filing in the above-captioned matter are the original and ten copies of the Reply of The Burlington Northern and Santa Fe Railway Company's to Otter Tail Power Company's Motion to Establish Briefing Schedule.

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

Sincerely,

Samuel M. Sipe, Jr.

Enclosures

cc: Counsel for Complainant

ENTERED  
Office of Proceedings

JUN - 9 2004

Part of  
Public Record

211324

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

JUN - 9 2004

Part of

REPLY OF THE BURLINGTON NORTHERN AND SANTA FE  
RAILWAY COMPANY TO OTTER TAIL POWER COMPANY'S  
MOTION TO ESTABLISH BRIEFING SCHEDULE

Defendant The Burlington Northern and Santa Fe Railway Company ("BNSF") replies herein to Otter Tail Power Company's ("Otter Tail") Motion to Establish Briefing Schedule ("Motion for Briefing Schedule"), which was filed with the Board on May 20, 2004. BNSF agrees with Otter Tail that the Board should call for the submission of briefs to assist it in reaching its decision in this case. However, BNSF does not agree with Otter Tail that a departure from the Board's established practice regarding the timing of briefs is appropriate.

Otter Tail proposes that instead of ordering the submission of post-evidentiary briefs, as has been the regular practice in recent SAC cases, the Board should order the filing of pre-argument briefs "approximately two weeks prior to oral argument." Motion for Briefing Schedule at 1. Otter Tail proposes a schedule that includes its proposed date of identification of issues for the parties to brief, a due date for briefs, and a date for oral argument.<sup>1</sup>

<sup>1</sup> Otter Tail states that "[u]nder this proposal, the administrative record would have closed on April 29, 2004, when the parties submitted Rebuttal Evidence, which would require

Otter Tail's rationale for this proposed change in the Board's practice is twofold. First, it states that "the current briefing process contributes little to the overall decision-making process other than to summarize the evidence and argument already in the record." *Id.* at 2. Second, Otter Tail maintains that it will assist Board decisionmaking for the parties to address in their briefs "issues specifically identified by the Board." *Id.* at 3. Otter Tail believes that such issues are best identified shortly before oral argument.

As to Otter Tail's first rationale, BNSF does not agree that briefing under the current practice does not assist Board decisionmaking or that such briefing is merely a repetition of counsel's argument accompanying the evidence. Under the current practice, final briefs serve an essential purpose of providing the parties an opportunity to address the case as a whole, in light of all the evidence of record, and to focus the Board's attention on the issues that each of the individual parties believes to be most critical. The Board itself has repeatedly noted that "[i]n complex proceedings such as this one, briefs, properly employed, serve to focus the issues and assist us in analyzing the record."<sup>2</sup> It is helpful for the Board to have an overview of the case as it begins its detailed analysis of the record. Any proposal that would deny the parties an opportunity to identify and address those issues that they believe to be most critical would be unfair and would adversely affect the Board's decisionmaking process.

---

the Board to issue a final decision by January 29, 2005." Motion for Briefing Schedule at 1. However, it is not Otter Tail's role to determine when the administrative record closes.

<sup>2</sup> *Duke Energy Corp. v. Norfolk Southern Ry. Co.*, STB Docket No. 42069, slip op. at 1 (served Mar. 21, 2003). *Accord, Wisconsin Power and Light v. Union Pacific R.R. Co.*, STB Docket No. 42051, slip op. at 1 (served Nov. 15, 2000); *PPL Montana, LLC v. BNSF*, STB Docket No. 42054, slip op. at 2 (served Dec. 12, 2001); *Texas Municipal Power Agency v. BNSF*, STB Docket No. 42056, slip op. at 1 (served May 28, 2002) ("*TMPA*"); *Carolina Power and Light Co. v. Norfolk Southern Ry. Co.*, STB Docket No. 42072, slip op. at 1 (served May 12, 2003); *Public Service Co. of Colorado d/b/a Xcel Energy v. BNSF*, STB Docket No. 42057, slip op. at 1 (served Aug. 8, 2003) ("*Xcel*").

Regarding Otter Tail's second rationale, BNSF agrees that the Board's decisionmaking process may be facilitated by having the parties address issues specifically identified by the Board. However, this factor does not dictate the timing of briefing. In its orders establishing post-evidentiary briefing schedules in the *TMPA* and *Xcel* cases, the Board identified specific issues that it asked the parties to address in their briefs.<sup>3</sup> There is nothing inefficient about the process the Board has followed of asking parties to address specific issues in post-evidentiary briefs and subsequently identifying additional issues for counsel to address at oral argument.

BNSF believes that the current practice regarding post-evidentiary briefs is appropriate and Otter Tail has not demonstrated a need for the Board to change it. The Board is in the best position to know how the timing of briefs will best assist it in its decisionmaking process. If the Board chooses to delay final briefs until the time for oral argument approaches, BNSF requests (1) that the scope of the briefs be broad enough to give the parties the opportunity to address any issues that they believe to be material to the Board's decision (as well as any issues on which the Board may specifically request briefing), and (2) that the parties be given at least four weeks notice of the due date for filing briefs.

Otter Tail suggests in its Motion for Briefing Schedule that the Board may want to discuss aspects of Otter Tail's briefing proposal with the parties at a technical conference. BNSF does not believe that a technical conference is necessary for this purpose. The Board already has sufficient information to determine the briefing schedule that will be most useful to the Board in reaching a decision in this case.

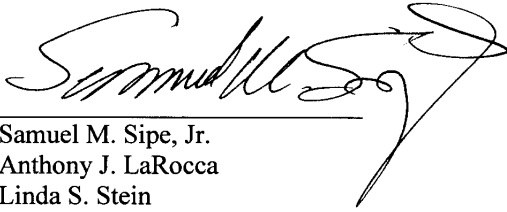
---

<sup>3</sup> *TMPA*, slip op. at 2; *Xcel*, slip op. at 2.

Respectfully submitted,

OF COUNSEL

Richard E. Weicher  
Michael E. Roper  
THE BURLINGTON NORTHERN  
AND SANTA FE RAILWAY COMPANY  
2500 Lou Menk Drive  
P. O. Box 961039  
Ft. Worth, TX 76131-0039  
Phone (817) 352-2368  
Facsimile (817) 352-2397

A handwritten signature in black ink, appearing to read "Samuel M. Sipe, Jr.", with a long, sweeping flourish extending from the end.

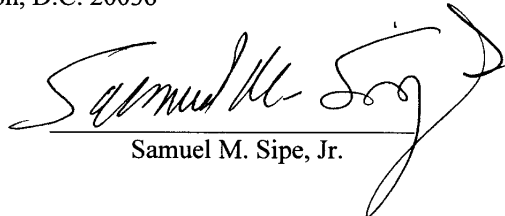
Samuel M. Sipe, Jr.  
Anthony J. LaRocca  
Linda S. Stein  
STEPTOE & JOHNSON, LLP.  
1330 Connecticut Ave., N.W.  
Washington, D.C. 20036  
Phone (202) 429-6486  
Facsimile (202) 429-3902

June 9, 2004

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served by messenger on this 9th day of June, 2004 upon the following counsel for Otter Tail Power Company:

Nicholas J. DiMichael  
Jeffrey O. Moreno  
Michael H. Higgins  
David E. Benz  
THOMPSON HINE LLP  
1920 N Street, N.W.  
Washington, D.C. 20036



Samuel M. Sipe, Jr.