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ATTORNEYS AT LAW

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February 7, 2005

via Hand Delivery

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

Expedited Consideration Requested

ENTERED
Office of Proceedings

FEB - 7 2005

Part of
Public Record

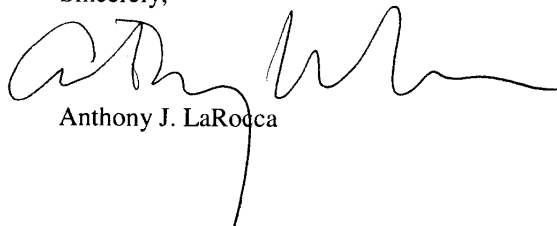
Re: Otter Tail Power Company v. BNSF Railway Company, f/k/a
The Burlington Northern and Santa Fe Railway Company,
Docket No. 42071

Dear Secretary Williams:

Enclosed for filing in the above-captioned matter is an original and ten copies of Defendant's Petition for an Order Clarifying The Scope of Supplemental Evidence. Please note that BNSF Railway Company has requested expedited consideration of this Petition. Since the Petition seeks an order addressing the scope of supplemental evidence to be filed on February 22, 2005, BNSF requests that the Board issue a decision on this Petition by February 15, 2005.

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

Sincerely,



Anthony J. LaRocca

Enclosures

cc: Complainant's Counsel

WASHINGTON

PHOENIX

LOS ANGELES

LONDON

BRUSSELS

BEFORE THE
SURFACE TRANSPORTATION BOARD

EXPEDITED CONSIDERATION REQUESTED

OTTER TAIL POWER COMPANY,

Complainant,

v.

BNSF RAILWAY COMPANY

Defendant.

Docket No. 42071

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**DEFENDANT'S PETITION FOR AN ORDER
CLARIFYING THE SCOPE OF SUPPLEMENTAL EVIDENCE**

Defendant BNSF Railway Company¹ ("BNSF") hereby requests that the Board promptly issue an order clarifying the scope of supplemental evidence called for in the Board's December 13, 2004 order in this matter. The complainant, Otter Tail Power Company ("Otter Tail"), has advised BNSF that it intends to submit evidence on February 22, 2005 that would be the equivalent of a new case-in-chief in this proceeding. The Board should make it clear before supplemental evidence is filed that it will not tolerate such an unwarranted expansion and complication of this case.

In a February 4, 2005 letter to BNSF's counsel, Otter Tail advised BNSF that it was not planning to limit its supplemental evidence to the Glendive-to-Fargo segment of the SARR, as directed by the Board in its December 13, 2004 order. Instead, Otter Tail made clear that it was

¹ Defendant's name has been changed from The Burlington Northern and Santa Fe Railway Company to BNSF Railway Company.

planning to redetermine the capacity needs of the *entire* SARR at issue in this case and to present a new operating plan for the entire SARR. According to Otter Tail, the capacity needs and operating plan for the entire SARR would be based on the RTC model instead of the string program. Moreover, it appears from Otter Tail's letter that it also plans to submit *two* new SARR models in its supplemental evidence -- one *with* the rerouted intermodal traffic that the Board instructed it to exclude from its SAC evidence and one *without* the rerouted traffic. Otter Tail's letter states that it plans "to model *its* SARR on the RTC Model and then to remove the rerouted northern non-coal traffic from that model." See Letter from Jeffrey Moreno to Anthony LaRocca, February 4, 2005, at 1 (*italics in original*). The February 4, 2005 letter is attached to this Petition at Exhibit 1.

The scope of supplemental evidence that Otter Tail plans to submit violates both the letter and the purpose of the Board's order. The Board's December 13, 2004 order was very clear about the limited scope of evidence that would be permitted at this stage of the proceeding. Otter Tail was "directed to file supplemental evidence showing the effect if the disputed rerouted northern non-coal traffic were excluded from its traffic group." December 13, 2004 Order at 2. The Board further directed that the parties' new operating and capacity evidence "*must be confined to . . . the impact on the SAC analysis of including or excluding the two categories of disputed traffic mentioned above . . .*" *Id.* at 3.² The Board's order neither contemplates nor permits the remodeling of the entire SARR that Otter Tail contemplates.

² The Board also instructed the parties to "address how we might assure that any rate prescription resulting from the SAC analysis would not reflect an impermissible cross-subsidy." December 13, 2004 Order at 3. This aspect of the Board's December 13, 2004 order is not at issue here.

The Board's December 13, 2004 order clearly instructed Otter Tail to revise its *existing* SAC evidence to account for the elimination of the rerouted intermodal traffic, not to submit an entirely new set of SAC capacity assumptions and operating statistics. The Board sought evidence from Otter Tail on the amount of capacity that could be eliminated from Otter Tail's existing capacity plan for the Glendive line if the rerouted traffic was excluded from the SARR group, the corresponding reduction in the operating costs, and the effect of these changes on Otter Tail's previously filed SAC results. These are discrete and limited issues. Moreover, the Board instructed Otter Tail to evaluate the impact of *eliminating* the rerouted traffic from the Glendive line. The Board clearly did not contemplate Otter Tail's filing of new SAC evidence based on a traffic group that *included* the rerouted traffic. The Board's instructions to BNSF were similarly limited. BNSF was instructed to identify the additional capacity that would be required by adding certain southbound PRB traffic and the additional operating costs corresponding to this traffic.

Only two line segments were affected by the traffic group changes discussed in the December 13, 2004 order -- the Snowden-Glendive-Fargo line and the PRB lines. The Board's December 13, 2004 order did not contemplate any new evidence by either party relating to other portions of the SARR. Moreover, the Board's December 13, 2004 order instructed only BNSF to address the PRB lines in the supplemental evidence. Otter Tail, however, plans to submit new evidence addressing the entire SARR.

In addition to the language of the order and its limited purpose, the schedule included in the Board's December 13, 2004 order makes it clear that the Board did not contemplate the expansive scope of evidence that Otter Tail plans to submit. The December 13, 2004 order provided a mere 20 days for each party to reply to the other party's evidence. If the Board had

expected Otter Tail to submit an entirely new model of its SARR, it would have established a schedule for reply evidence that provided BNSF with substantially more time to evaluate the evidence. Moreover, the Board's January 19, 2005 order scheduled the filing of final briefs 30 days after reply evidence is due. The Board's tight filing schedule indicates that it did not expect the issues raised in the supplemental evidence to be broad or complex.

Otter Tail's proposed supplemental evidence amounts to a new opening case-in-chief. But Otter Tail has already submitted its capacity and operating cost evidence four times in this case, each time based on different versions of its string program.³ There is no basis for allowing Otter Tail to submit yet another capacity and operating plan for its entire SARR -- let alone *two* new capacity and operating plans for a SARR with and without the rerouted traffic. The Board's December 13, 2004 order stated that "[i]f it wishes, Otter Tail may submit its evidence based on the" RTC. December 13, 2004 Order at 3. But if Otter Tail chooses to use the RTC model in its supplemental evidence, it can comply with the Board's December 13, 2004 order by simply modeling the segment of the OTRR between Glendive and Fargo where the rerouted general freight traffic has been removed, identifying the new capacity requirements and operating statistics for that segment and substituting those assumptions for the assumptions used in Otter Tail's prior evidence. There is no need to model other portions of the SARR. And there clearly is no justification for submitting a new model that includes the rerouted traffic on the Glendive line.

³ Otter Tail submitted operating and capacity evidence based on modified versions of its string program in its June 13, 2003 Opening Evidence, in a July 14, 2003 Errata filing, in its January 9, 2004 Supplemental Opening Evidence, and again in its April 29, 2004 Rebuttal Evidence.

Otter Tail's claim that it needs to remodel the entire SARR with and without the rerouted traffic in order to show the impact of excluding the rerouted traffic is a pretext. Otter Tail is clearly concerned that the Board's invitation to use the RTC model in the supplemental evidence may indicate that as in prior cases, the Board finds that the string program is inadequate. Otter Tail's proposed supplemental evidence is a back door means of introducing a new SARR model based on the RTC in the event the Board rejects Otter Tail's string program evidence. The fact that Otter Tail plans to submit two new SARR models raises the possibility that Otter Tail may also be planning to use the filing of supplemental evidence as an opportunity to submit new evidence on the question *whether* the rerouted intermodal traffic should be excluded from the SARR, an issue the Board clearly did not intend to be addressed in the supplemental evidence.

The Board could not have intended for the supplemental evidence in this case to be used by Otter Tail to remedy fundamental defects in its evidence or to give Otter Tail another chance to support its claims. The Board's December 13, 2004 order sought limited supplemental evidence addressed to traffic group changes that affect two discrete portions of the SARR so that the Board can bring these convoluted proceedings to a close. The Board admonished the parties not to address other issues. The procedural schedule established by the Board is not adequate to deal with the complications that would be introduced by Otter Tail's proposed new evidence. BNSF urges the Board to make it clear that it will not accept evidence that goes beyond the limited scope described in the December 13, 2004 order.

BNSF also requests that the Board expedite its consideration of this Petition and issue a decision by February 15, 2005. Supplemental evidence is scheduled to be filed on February 22, 2005. The Board can and should avoid further complications and delays by making it clear

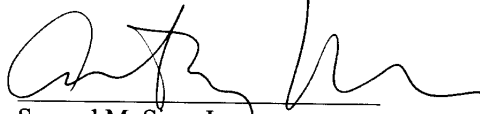
before supplemental evidence is filed that it will not accept the broad new evidence that Otter Tail is planning to submit.

OF COUNSEL

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February 7, 2005

Respectfully submitted,

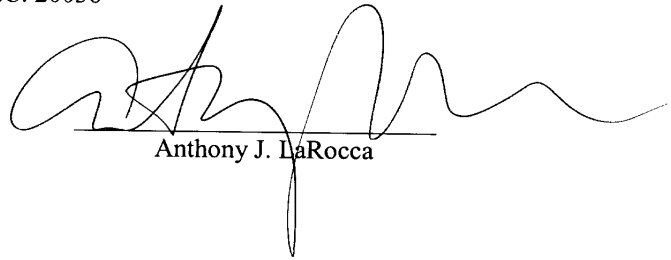
A handwritten signature in black ink, appearing to read 'Samuel M. Sipe, Jr.', written over a horizontal line.

Samuel M. Sipe, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by messenger on
this 7th day of February, 2005 upon the following counsel for Otter Tail Power Company:

Nicholas J. DiMichael
Jeffrey O. Moreno
Thompson Hine LLP
1920 N Street, N.W.
Washington, D.C. 20036



Anthony J. LaRocca



BRUSSELS CINCINNATI CLEVELAND COLUMBUS DAYTON NEW YORK WASHINGTON, D.C.

Exhibit 1

February 4, 2005

By Fax

Anthony J. LaRocca
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036-1795

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

Dear Tony:

This letter responds to your February 1, 2005 letter to me regarding Otter Tail's use of the laptop computer containing the RTC Model that BNSF has provided to Otter Tail for use in this case. Pursuant to a letter agreement dated January 6, 2005, BNSF agreed to provide the laptop computer to Otter Tail "to prepare supplemental evidence called for in the Board's December 13, 2004 decision and to review supplemental evidence submitted by BNSF." Your February 1st letter now contends that Otter Tail's intent to use the RTC Model to model Otter Tail's own stand-alone railroad (SARR) in this case is "outside the scope of the Board's December 13, 2004 order." Otter Tail objects to this characterization and maintains that its planned supplemental evidence using the RTC Model is precisely within the scope of the December 13th order.

The December 13th order states, "Otter Tail is directed to file supplemental evidence showing the effect if the disputed rerouted northern non-coal traffic were excluded from *its* traffic group." Order at 2 [emphasis added]. Furthermore, the Board stated, "If it wishes, Otter Tail may submit its evidence based on the Rail Traffic Controller model used by BNSF, in lieu of its string model." Id. at 3. Based upon these statements, Otter Tail intends to accept the Board's invitation to use the RTC Model to demonstrate the effect of excluding the rerouted northern non-coal traffic from *its* traffic group. The only way for Otter Tail to do this is to model *its* SARR on the RTC Model and then to remove the rerouted northern non-coal traffic from that model.

It makes no sense if, as you suggested in our January 31st telephone conversation, the December 13th order restricts Otter Tail's use of the RTC Model *only* to show the effect of excluding the rerouted traffic from the SARR, as modeled by BNSF using the RTC Model. The Board clearly directed Otter Tail to show the effect of excluding the rerouted northern non-coal traffic "from *its* [Otter Tail's] traffic group," not BNSF's traffic group.

As the Board noted in the December 13th order, BNSF has modeled a very different group of traffic than Otter Tail in two significant respects. First, BNSF already has excluded the rerouted northern non-coal traffic in its reply evidence. This leaves no traffic for Otter Tail to remove from BNSF's RTC Model under your interpretation of the December 13th order. Second, BNSF

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THOMPSON
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February 4, 2005

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also excluded southbound southern PRB coal traffic, which the December 13th order directs BNSF to *include* in its traffic group. The addition of that traffic inevitably will have an impact on the northern portion of the SARR that is not reflected in BNSF's reply evidence, which applies the RTC Model to a very different traffic group. As a consequence of these two major traffic group differences, Otter Tail could not possibly use the RTC Model to show the effect of excluding the rerouted northern non-coal traffic from *its* traffic group, without modeling its SARR.

Indeed, if Otter Tail were to use its string model instead of the RTC model, it still would have to model its entire SARR in order to respond to the December 13th order. It is inconceivable that the Board intended for Otter Tail to do anything different by choosing to use the RTC Model.

Furthermore, Otter Tail's rebuttal evidence strongly criticizes BNSF's decision not to model the entire SARR, but instead to model only two unconnected segments. Your interpretation of the December 13th order would resolve that issue in favor of BNSF. Since the Board did not even address that issue in the December 13th order, that Order cannot be construed to restrict Otter Tail's use of the RTC Model to the same manner that BNSF has used it.

Contrary to your assertion, Otter Tail's use of the RTC Model to model its own SARR is not the equivalent of filing a new opening case-in-chief. For example, consistent with the December 13th Order, Otter Tail does not intend to present any new evidence on unit costs, revenue allocations, or any similar evidence disputed by the parties. The principal changes will be different investment and operating units, which are the inevitable result of the RTC Model's different response to train conflicts in comparison to the string model. However, BNSF has argued many times to the Board about the ease and simplicity of developing these units from the output of the RTC Model. Otter Tail will use these revised units, together with its rebuttal evidence unit costs, to generate operating and investment costs and a DCF model that show the effect of excluding the rerouted northern non-coal traffic from *its* traffic group. The Board clearly had to be aware of these facts when it invited Otter Tail to use the RTC Model.

In summary, Otter Tail's intended use of the RTC Model is entirely consistent with the Board's December 13th order. Therefore, Otter Tail deems your February 1, 2005 letter to be a repudiation of the January 6, 2005 letter agreement.

Sincerely,



Jeffrey O. Moreno