

214356

BEFORE THE
SURFACE TRANSPORTATION BOARD



OTTER TAIL POWER COMPANY,

Complainant,

v.

BNSF RAILWAY COMPANY,

Defendant.

Docket No. 42071

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OTTER TAIL POWER COMPANY'S
SUMMARY OF ORAL ARGUMENT

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Dated: July 18, 2005

In accordance with the Board's order served on July 1, 2005, Complainant, Otter Tail Power Company ("Otter Tail"), hereby notifies the Board that Nicholas J. DiMichael will present oral argument on behalf of Otter Tail at the July 27, 2005 hearing before the Board. Otter Tail intends to reserve some of its allotted time for rebuttal.

Otter Tail also submits the following summary of the points that it intends to address at the hearing.

1. Otter Tail has presented the only operating plan based upon a modeling of the complete Stand-Alone Railroad ("SARR") on the RTC Model. BNSF Railway Company ("BNSF") has modeled only two disconnected segments of the SARR and has failed to incorporate its rail yards and dwell times into the RTC Model. Furthermore, BNSF has not properly linked its four segments of the SARR. Thus, Otter Tail has presented the only feasible operating plan.

2. A market-based approach to cross-over revenue allocation is consistent with precedent and is superior to a purely cost-based approach. Otter Tail is the first complainant ever to present a cross-over revenue allocation method based on the incumbent carrier's actual market divisions, which the STB has held would be the best evidence. Even if the Board were to reject Otter Tail's evidence based on BNSF's actual divisions, the current modified straight-mileage prorate methodology is the next best procedure for allocating cross-over revenue.

3. Otter Tail has presented extensive evidence in this case that the SARR will experience productivity gains that are most comparable to the gains experienced by the real-world Class I railroads. Therefore, the Board should adopt the RCAF-A to inflate base year operating expenses.

4. Otter Tail has properly updated its cost of debt with evidence that the SARR

would refinance its debt at lower interest rates in 2003. The STB previously held that a least cost railroad would refinance its debt if the opportunity presented itself. In the three years that this case has been proceeding through the Board, the opportunity presented itself when interest rates declined dramatically in 2003. BNSF has not presented any reason why the SARR should not be permitted to refinance its debt, just as any real-world railroad would do.

5. BNSF has improperly excluded from the SARR all southbound coal traffic that originates at mines south of Cordero. There is no rule that all traffic on the SARR must share facilities directly with the issue traffic. The Board has held only that such traffic may not cross-subsidize the issue traffic, as determined by the PPL cross-subsidy test.

6. Although Otter Tail disagrees with the logic behind the PPL cross-subsidy test, it has demonstrated that the SARR passes the test.

7. Even if the logic of the PPL cross-subsidy test were valid, BNSF inappropriately and inconsistently applies the test a second time at the rate prescription phase, in violation of basic CMP principles. BNSF denies the SARR real-world revenues on the non-issue traffic, even though only the issue traffic rates will be reduced.

8. BNSF has applied an excessive spare margin and peaking factor to determine the SARR's locomotive and rail car requirements. Otter Tail has presented substantial evidence to support its spare margin based on availability guarantees in BNSF's locomotive maintenance contracts and transportation contracts. Furthermore, BNSF's peaking factor is comparable to building the church for Easter Sunday, a concept that the Board has rejected in its most recent decisions.

9. Otter Tail developed its maintenance-of-way ("MOW") plan based upon the experience of Richard H. McDonald, who was responsible for planning, construction, and

operation of Western Railroad Properties, Inc. ("WRPI"). Mr. McDonald designed the SARR after WRPI and based the SARR's MOW plan upon WRPI's, except that the SARR is able to rely upon contract forces for certain program maintenance. Otter Tail has demonstrated that outsourcing of program maintenance to contractors is a growing trend within the rail industry.

10. BNSF's rail yard designs and yard dwell times are excessive. BNSF bases its yard designs and dwell times upon its own experience, infrastructure, and operations. Because the SARR is designed efficiently for its traffic levels, it is not burdened by the BNSF's limitations. Furthermore, BNSF has inflated many of its dwell times and assumed that tasks that can be performed simultaneously are instead performed sequentially. Mr. McDonald designed the yards and determined dwell times for Otter Tail's SARR based upon his real-world experience.

11. BNSF has incorrectly asserted that the fuel surcharge should be excluded from any rate reduction or reparations. But, if the fuel surcharge is excluded, BNSF will receive a windfall double recovery of its fuel costs.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July, 2005, I served a copy of the "Otter Tail Power Company's Summary of Oral Argument" by hand delivery to counsel for Defendant at the following address:

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