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October 21, 2002



via Hand Delivery

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

ENTERED
Office of Proceedings
OCT 21 2002
Part of
Public Record

**Re: PPL Montana, LLC v. The Burlington Northern and Santa
Fe Railway Company, Docket No. NOR 42054**

Dear Secretary Williams:

Enclosed for filing in the above-captioned matter are the original and 10 copies of Defendant's Reply to the Petition for Leave to Intervene filed by the North Dakota Grain Dealers Association.

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

Sincerely, ...

Anthony J. LaRocca

Enclosures

cc: Counsel for Complainant

WASHINGTON

- 1 -
PHOENIX

LOS ANGELES

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

PPL MONTANA, LLC,

Complainant.

v.

**THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,**

Defendant.

Docket No. NOR 42054

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**DEFENDANT'S REPLY TO THE PETITION OF NORTH DAKOTA GRAIN DEALERS
ASSOCIATION FOR LEAVE TO INTERVENE**

Defendant The Burlington Northern & Santa Fe Railway Company ("BNSF") hereby replies in opposition to the September 30, 2002 Petition of North Dakota Grain Dealers Association ("NDGDA") for Leave to Intervene in this proceeding.¹ The Board's rules do not authorize the intervention of a non-party like NDGDA in an adjudicatory proceeding after a final decision has been reached, where the non-party has no direct interest in the outcome of the litigation and only seeks guidance on how the Board's decision might affect future litigation involving different facts. Because intervention of NDGDA would clearly be inappropriate, BNSF is not filing a separate reply to NDGDA's Petition for Clarification or, Alternatively, Reconsideration of the Board's August 20, 2002 decision in this proceeding.²

¹ Petition of North Dakota Grain Dealers Association for Leave to Intervene in Docket No. 42054, PPL Montana LLC vs. Burlington Northern Santa Fe Railway Company (filed Sept. 30, 2002) ("NDGDA Petition to Intervene").

² Petition of North Dakota Grain Dealers Association for Clarification or, Alternatively, Reconsideration of the Decision Served August 20, 2002 in Docket No. 42054, PPL Montana



NDGDA's Petition to Intervene should be denied for several reasons.

First, the Board issued a final decision in this matter on August 20, 2002 when it dismissed the complaint filed by PPL Montana, LLC. Therefore, there are no proceedings in which NDGDA could intervene except any proceedings initiated by PPL and carried out by the Board under Part 1115 of its rules, entitled "Appellate Procedures." NDGDA's request to intervene should therefore be considered under Part 1115 of the Board's rules. Part 1115, however, contains no provisions for the intervention of a non-party in the appeal of a Board decision, and it would be bad policy for the Board to interpret its appellate rules as permitting the intervention of persons without a direct interest in the subject matter of a litigation. If intervention in an appeal brought under Part 1115 of the Board's rules were permitted whenever a person had a concern about the impact of a decision on other cases, the scope of appellate proceedings under Part 1115 would be substantially expanded. The consequences would be particularly significant in SAC cases, where the Board's SAC decisions may involve issues that could affect litigants in other pending or future cases. It would further complicate and extend SAC litigation to allow intervention of non-parties at the appellate stage, and the Board should not interpret its rules as permitting such intervention.

Second, NDGDA specifically seeks permission to intervene under 49 C.F.R. 1112.4, but that provision appears to apply only to proceedings prior to a final decision. 49 C.F.R. 1112.4 provides for intervention in a proceeding "set for modified procedure" and requires that the requested intervention "not unduly disrupt the schedule for filing verified statements." The language of the rule thus suggests that it is intended to address intervention in proceedings while

LLC vs. Burlington Northern Santa Fe Railway Company (filed Sept. 30, 2002) ("NDGDA Reconsideration").

evidence and argument are still being considered.³ Moreover, the Board and the ICC have repeatedly rejected attempts by non-parties to intervene in proceedings after the record has been closed.⁴

Third, even if 49 C.F.R. 1112.4 could be applied to intervention at the appellate stage of a proceeding, NDGDA does not meet the standards for intervention set out in that provision. Intervention is permitted under §1112.4 only if the intervention will “not unduly broaden the issues raised in the proceeding.” 49 C.F.R. §1112.4(a)(2). NDGDA unquestionably seeks to expand the scope of this proceeding. NDGDA explains that it has “begun preliminary exploration of litigation to challenge the reasonableness of BNSF’s wheat rates from North Dakota.” NDGDA Petition to Intervene, at 3. NDGDA’s concern is that the application of a cross-subsidy analysis in such future litigation involving grain rates “may be fatal to a complaint for rate relief [due to] the possibility that branch lines on which potential grain elevator complainants are located will be regarded as ‘distinct parts’ or separate ‘segments’ of a SAC railroad. . . .” Id. at 4. Therefore, NDGDA seeks guidance from the Board on “how a potential complainant may determine, in advance of a final decision on the merits, whether its stand-alone railroad has a ‘distinct part’ or separate ‘segment’ as to which a cross-subsidization analysis would be required.” Id.

To provide the requested guidance, the Board would have to broaden substantially the scope of issues it will address in its consideration of PPL’s Motion for Reconsideration. PPL

³ NDGDA appears to acknowledge that there is a serious question whether the Board’s rules permit intervention under 49 C.F.R. 1112.4 since it asks the Board to refund its filing fee in the event the Board rejects its petition for reconsideration. See the cover letter to NDGDA Reconsideration.

⁴ See, e.g., *B.J. Alan Co., Inc., et al v. United Parcel Serv., Inc.*, No. MC-C-30093, 1989 MCC LEXIS 398 (ICC decided Sept. 8, 1989); *Knauf Fibre Glass GmbH v. the Alton & Southern Ry. Co., et al*, No. 39739, 1986 ICC LEXIS 326 (ICC decided Apr. 23, 1986).

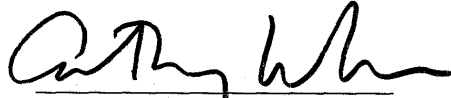
challenges the Board's decision as inconsistent with SAC principles and prior cases and it alleges material error in the Board's implementation of the cross-subsidy analysis to the specific facts of PPL's rate reasonableness evidence. To address those issues, the Board would have no need to articulate general principles governing the application of cross-subsidy analyses in future cases, nor would it have any reason to consider how cross-subsidy analysis would be applied to the particular circumstances of grain transportation.

Fourth, NDGDA's Petition to Intervene should be denied because it seeks, in essence, an advisory opinion on the application of cross-subsidy analysis under factual circumstances other than those at issue in the PPL case. But the ICC has previously stated that it "see[s] no compelling reason to issue non-binding advisory type decisions. . . ." *Liberty Liquors Co. v. Ryder/P-I-E Nationwide, Inc.*, No. MC-C-10951, 1987 WL 99631, at *1 (ICC decided Oct. 8, 1987). Moreover, the Board has repeatedly expressed a preference for resolving SAC issues in the context of specific factual disputes. As the Board noted in the *McCarty Farms* case, "[i]n [Coal Rate] Guidelines...the Commission resolved to consider complaints by rail captive shippers on a case-by-case basis, acknowledging that SAC models may vary." *McCarty Farms, et al. v. Burlington Northern Inc.*, No. 37809, 1995 WL 55449, at *6 (ICC served Feb. 13, 1995). In fact, BNSF and the Union Pacific Railroad Company jointly requested the Board last year to provide guidance on the application of cross-subsidy principles in SAC cases, and the Board replied that "we believe this issue is also best left to consideration in the context of individual cases and we will continue to address this issue on a case-by-case basis."⁵

For the reasons set out above, the Board should deny NDGDA's Petition for Leave to Intervene.

⁵ *PPL Montana, LLC v. The Burlington Northern and Santa Fe Ry. Co.*, STB Docket No. 42054, et al., slip op. at 7 (served Nov. 27, 2001).

Respectfully submitted,



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Dated: October 21, 2002

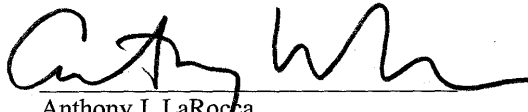
CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2002, a true and correct copy of the foregoing document was served by hand on:

John M. Cutler, Jr.
McCarthy, Sweeney & Harkaway, P.C.
2175 K Street, N.W., Suite 600
Washington, DC 20037

And by overnight mail to the following:

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Fargo, ND 58102


Anthony J. LaRocca