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BEFORE THE  
SURFACE TRANSPORTATION BOARD



PUBLIC SERVICE COMPANY OF COLORADO  
D/B/A XCEL ENERGY,

Complainant,

v.

THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY,

Defendant.

Docket No. 42057

ENTERED  
Office of Proceedings

SEP 25 2003

Part of  
Public Record

**MOTION TO STRIKE**

Complainant Public Service Company of Colorado, d/b/a Xcel Energy ("Xcel"), hereby moves pursuant to 49 C.F.R. Part 1117.1 that the Board strike certain portions of BNSF's Final Brief, as impermissibly introducing new argument and evidence. In both of the situations described below, rather than summarize the evidence already in the record, BNSF has attempted to introduce new argument and evidence that are nowhere to be found in BNSF's evidentiary filings of this proceeding. By waiting until its Final Brief to introduce this new argument and evidence, BNSF has violated the Board's rules because Xcel has not had an opportunity to respond.

Xcel first requests that the Board strike the last paragraph of Section II of BNSF's Brief (and related footnotes). This paragraph begins on the bottom of page 17 with the phrase "There are other reasons . . .", and carries over to page 18. In this paragraph, BNSF advances for the first time an additional theory why it believes the Jeffery Energy Center traffic should be excluded from Xcel's

stand-alone railroad analysis. Stated generally, this theory is that “use of the Edgemont/Alliance route for the Jeffery Traffic avoids interference with other loaded and empty trains being staged in and out of southern PRB mines.” This assertion and the additional discussion BNSF offers in support of it are nowhere found in BNSF’s evidence in this case. Indeed, all BNSF states in the BNSF Reply Evidence pages cited in the Brief is that the Jeffery Energy Center “[r]erouting would add a total of four trains a day over the heavily used joint line.” BNSF Reply Narrative at III.A-24. BNSF’s evidence is silent as to any level of delay or congestion these additional trains might cause on Xcel’s SARR. Yet, in its Brief BNSF now asserts that “Xcel’s operating plan for the SARR would seriously increase the risk of delays for the Jeffery traffic.” BNSF Brief at 18. Had BNSF timely asserted this “seriously increased risk of delay” argument in the section of its Reply Evidence on the Jeffery traffic, Xcel would have thoroughly demonstrated its lack of merit. BNSF’s belated assertion of this claim in its Brief is an obvious violation of the Board’s rules prohibiting new evidence and argument in post-evidentiary briefs. Under the Board’s rules, briefs are intended to merely “focus the issues” and “summarize the evidence already in the record.”<sup>1</sup> BNSF violates these rules by making an argument in its Brief that it did not raise in its evidentiary submissions. BNSF’s only reply to this part of this Motion should be to identify the citations to BNSF’s evidence that it believes contain this specific argument for excluding the Jeffery Energy Center traffic. Any discussion that expands on this part of BNSF’s Brief should also be stricken from BNSF’s reply.

Another violation of the Board’s rules is BNSF’s inclusion of footnote 62, in which BNSF erroneously states that Xcel’s witness Mr. Plaistow “has taken the position in the AEPCO case that

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<sup>1</sup> Duke Energy Corporation v. Norfolk Southern Railway Company, STB Docket No. 42069, slip op. At 1 (served Mar. 25, 2003).

BNSF's internal road property data do not permit segment-specific calculations." BNSF Brief at 44, citing the Opening Evidence of the complainant in AEPCO, filed February 7, 2003. Even if BNSF's characterization of Mr. Plaistow's position in that case is accurate, which it is not, the opening evidence in AEPCO was filed two months prior to the April 4, 2003 due date for filing reply evidence in this proceeding. BNSF's Reply Evidence evidence contained an extensive discussion objecting to Xcel's movement-specific adjustments to BNSF's road property data, which adjustments were sponsored by Mr. Plaistow. BNSF Reply Narrative at II-18 to II-24. The alleged inconsistent position taken by Mr. Plaistow in the AEPCO case is not mentioned anywhere in BNSF's Reply Evidence (or anywhere else in the record in this case). By waiting until its Final Brief to try to introduce into the evidence of this case a paraphrased version of the complainant's opening evidence in AEPCO, BNSF is blatantly attempting to "sandbag" Xcel. In addition, the complainant's opening evidence in AEPCO was filed under seal at the Board, which means that while BNSF counsel has access to this evidence, Xcel may not review it absent an order from the Board or if the complainant in AEPCO voluntarily redesignated portions of its opening evidence to be non-confidential. As explained below, Xcel had no reason to seek access to that evidence, but BNSF's decision to wait until its Final Brief to raise this new point deprived Xcel of doing so in the normal course of this case in order to rebut BNSF's allegation.

In any event, BNSF's statement in footnote 62 is wrong. Counsel for Xcel has conferred with Mr. Plaistow,<sup>2</sup> who indicated that it was not his position in AEPCO that BNSF's internal road

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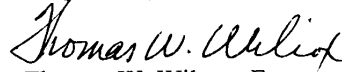
<sup>2</sup> BNSF's mischaracterization of the AEPCO evidence raises the equally false inference that Mr. Plaistow did not inform Xcel that he had taken a contrary position in another case on a key issue in this case. Mr. Plaistow did nothing of the sort, and BNSF counsel's attempt to impugn the integrity of Mr. Plaistow should not be countenanced.

property data do not permit segment-specific calculations as a general proposition, as footnote 62 infers. Mr. Plaistow has also confirmed that it is his practice to make movement specific adjustments when sufficient information is made available from a defendant's records in discovery. In the absence of such information, Mr. Plaistow necessarily relies on system average costs. Footnote 62 should thus be stricken from BNSF's Brief, since it improperly attempts to introduce new evidence into the record in violation of the Board's August 8, 2003 order in this case, and it is wrong in any event.

WHEREFORE, for the reasons set forth hereinabove, the Board should strike the last paragraph of Section II (and related footnotes) and footnote 62 of BNSF's Final Brief in this proceeding.

Bruce A. Colt, Esq.  
Senior Attorney  
Xcel Energy  
800 Nicollet Mall, Suite 2900  
Minneapolis, MN 55402  
(612) 214-4587

Respectfully submitted,

  
Thomas W. Wilcox, Esq.  
Michael H. Higgins, Esq.  
David E. Benz, Esq.  
Thompson Hine LLP  
1920 N St. N.W., Suite 800  
Washington, DC 20036  
(202) 331-8800

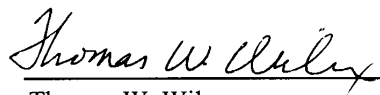
*Attorneys for Complainant*

September 25, 2003

**CERTIFICATE OF SERVICE**

I hereby certify that on this 25th day of September, 2003, I served a copy of the Motion to Strike by hand delivery to counsel for Defendant at the following address:

Samuel M. Sipe, Jr., Esq.  
Anthony J. LaRocca, Esq.  
Cynthia L. Quarterman, Esq.  
Brooke L. Gaede, Esq.  
Steptoe & Johnson  
1330 Connecticut Avenue, NW  
Washington, DC 20036

  
Thomas W. Wilcox