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**VIA E-FILING**

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423-0001

**Re: STB Docket NOR 42178, Ex Parte Application for Section 11123 Emergency Service Order**

Dear Ms. Brown:

Late Friday afternoon, April 14, 2023, BNSF Railway Company (“BNSF”) received from counsel for Navajo Transitional Energy Company (“NTEC”) the Ex Parte Application for Section 11123 Emergency Service Order (“Application”) filed by NTEC, along with a Complaint and Petition for Declaratory Order relating to the same set of underlying facts. BNSF and NTEC have been involved in commercial discussions regarding NTEC’s desired service levels for nearly a year and have been involved in litigation in federal court in Montana since December 2022. Throughout that time, BNSF has consistently communicated to NTEC realistic expectations about BNSF’s anticipated service levels to provide NTEC as much information as possible to plan its ongoing business operations.

The pleadings NTEC filed late Friday afternoon - consisting of 52 pages of legal argument and verified statements, plus another nearly 42 pages of exhibits and attachments - have obviously been in preparation for quite some time, and yet NTEC had not previously notified BNSF of its claim that a sudden state of emergency now exists. The pleadings implicate a complex set of facts and competitive relationships involving multiple BNSF coal shippers and a Canadian export terminal operator, as well as coal and non-coal transportation to an important region of the country, all of which use the same common resources as NTEC’s shipments.

NTEC does not provide the Board with sufficient information to understand and address the important circumstances at issue here. Nevertheless, NTEC seeks an expedited order from the Board by April 24, 2023 that would dramatically increase service frequency to NTEC and argues that the Board need not wait for a response by BNSF. (App. 13 & n.14.) BNSF will respond to the Application on Wednesday, April 19. Even though BNSF believes that NTEC’s request is not an appropriate use of the Board’s emergency service authority, the timing of BNSF’s response will allow the Board to decide the issue on the expedited timeline requested by

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NTEC if it so chooses. In our reply, BNSF will explain why there is no emergency situation necessitating immediate Board action and why the injunctive relief sought in the alternative would not only be unwarranted but would be harmful to the public interest. The reply will also detail BNSF's efforts to transparently communicate with NTEC over a long period of time regarding constraints on capacity and realistic projections of available resources, as well as BNSF's ongoing efforts to meet NTEC's transportation requests both when NTEC was tendering shipments pursuant to multiple transportation contracts with BNSF, and more recently as NTEC has chosen to tender shipments pursuant to BNSF's common carrier pricing authority.

As noted in the Application (App. 8-9 & n.11), BNSF has previously engaged with Board staff through the Rail Customer Assistance Program regarding this dispute and committed to working with staff and NTEC towards a mutually agreeable approach to NTEC's transportation requests. More than two weeks ago, NTEC requested a joint call between BNSF, NTEC and RCPA staff. BNSF immediately agreed and offered times when BNSF representatives were available. BNSF had been waiting to hear confirmation of NTEC's preferred date for such call, and only learned from RCPA staff Friday morning that NTEC was planning to hold off on such a call for the time being. There was no indication from NTEC that it instead planned to file its Application later the same day. Despite NTEC's apparent unwillingness to continue working informally with Board staff, BNSF would be happy to re-engage in that process if the Board believes it would be productive to do so.

Respectfully submitted,

/s/ Anthony J. LaRocca

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cc: Daniel M. Jaffe, Slover & Loftus LLP  
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