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April 19, 2023

VIA E-FILING

Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, SW
Washington, DC 20423

ENTERED
Office of Proceedings
April 20, 2023
Part of
Public Record

Re: **STB Docket NOR 42178, Navajo Transitional Energy Co., LLC v.
BNSF Railway Co.—Ex Parte Application for Section 11123
Emergency Service Order**

Dear Ms. Brown:

Enclosed for e-filing in the above-referenced proceeding is a PUBLIC version of the Reply of BNSF Railway Company, with appropriate redactions that the Board can place in its docket. We are concurrently filing a HIGHLY CONFIDENTIAL version of the Reply to be filed under seal. On April 17, 2023, we filed a Motion for Protective Order that is currently pending.

Respectfully submitted,

/s/ Anthony J. LaRocca

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Attorneys for BNSF Railway Company

Enclosures

cc: All parties of record

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BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42178

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

EX PARTE APPLICATION FOR
SECTION 11123 EMERGENCY SERVICE ORDER

**BNSF RAILWAY COMPANY'S
REPLY TO NTEC'S *EX PARTE* APPLICATION FOR
SECTION 11123 EMERGENCY SERVICE ORDER**

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Dated: April 19, 2023

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Verified Statement of Farah Lawler, BNSF’s Vice President Industrial
Products

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BEFORE THE
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I. Introduction and Summary of Argument

On April 14, 2023, the Navajo Transitional Energy Company, LLC (“NTEC”) filed an *Ex Parte* Application for Section 11123 Emergency Service Order (“Application”) with the Surface Transportation Board (“Board” or “STB”).¹ In the Application, NTEC asks the Board to enter an emergency service order and an injunction directing BNSF Railway Company (“BNSF”) to dramatically increase its shipments of NTEC’s coal to a Canadian terminal for export to Asia. BNSF respectfully urges the Board to deny NTEC’s Application.

¹ On April 14, 2023, NTEC also filed a Complaint and Petition for Declaratory Order (NOR 42179) relating to the same set of underlying facts as its Application for emergency service. BNSF will reply to NTEC’s Complaint and Petition for Declaratory Order at a later date.

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Emergency service orders and injunctions are extraordinary remedies, and neither is justified here. Most importantly, there is no emergency. There is no threat to a water supply or potential disruption of the food chain, as in other emergency service situations recently addressed by the Board, nor is there a service disruption to other sectors identified by the Board as affecting the public welfare, such as energy supply. *See Urgent Issues in Freight Rail Service*, EP 770 (Sub-No. 1) slip op. at 6 & n.12 (STB served June 13, 2022). Nor has there been a sudden decrease in shipments that threatens the financial viability of a shipper, or any threats to terminate a particular transportation service. Rather, NTEC simply wants to get extra service to expand its profitable sales of export coal to Asian markets.

And the extra service that NTEC requests would be extraordinary. NTEC is already receiving an enormous amount of rail transportation from BNSF. NTEC already receives significantly more than the average amount of coal shipped by BNSF to its domestic coal shippers. NTEC is asking the Board to order BNSF to provide extra service – to increase its minimum monthly volume of coal transportation to NTEC to a level that NTEC has previously received in only four of the prior 38 months that NTEC has been in this export market. The market for coal exports to Asia is very attractive right now, and NTEC's desire to dramatically increase its business in that market is understandable. But it does not create an emergency that justifies extraordinary Board action.

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NTEC's desire to make greater profits in the coal export market also does not justify the harms that would be caused if the Board granted the requested emergency service. Although NTEC's application wholly fails to address the potentially wide-ranging consequences of such a Board order, the Board must nevertheless consider them. NTEC's emergency service request seeks to allocate constrained capacity in a way that necessarily implicates the interests of numerous other shippers and third parties. NTEC's claim is not about failure of service, but instead about getting extra service allocated in a constrained market. This raises complex allocation issues that are not appropriate to address in the context of an emergency service request, where the requested relief directly implicates the interests of other non-parties.

Given the increased demand for export coal, there would be an allocation question even without any service disruptions on the network, especially when one participant (e.g., NTEC) wants extra service to increase profits. But as the Board is aware, rail service across the U.S. rail network, including on BNSF, has struggled since late 2021. BNSF has been working hard to restore service to levels that meet our customers' expectations and growth plans, and NTEC acknowledges recent service improvements. See Application at 6 & n.9. But rail capacity remains constrained in several important areas, including the Pacific Northwest. When there are constraints on capacity, as here, a forced increase in the allocation of resources to one shipper (e.g., NTEC) would inevitably result in a forced decrease in the ability to allocate resources to shipments tendered by other shippers. Where no

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actual emergency exists, there is no justification to order the allocation of dramatically more resources to NTEC's shipments at the expense of other shippers.

The other shippers who would be most directly impacted by the relief NTEC requests are shippers competing directly against NTEC for export coal sales via Westshore Terminals in Roberts Bank, British Columbia (just south of Vancouver). But the purpose of an emergency service order should not be to put a finger on the scale of competition to favor one competitor over others. NTEC's primary coal export competitor at the Westshore terminal {{ [REDACTED] [REDACTED] [REDACTED] }} much less the current market conditions. But the export coal market has attracted other coal miners to seek to ship via Westshore Terminals as well, { [REDACTED] } The Board should not allow NTEC to use the extraordinary remedy of an emergency service order to disadvantage its competitors by depriving them of service they would otherwise receive.

An injunction would also be unwarranted. Injunctions are often used to preserve the status quo, but NTEC wants the Board to order BNSF to dramatically *increase* its service, not to preserve its existing service levels. As detailed more below, prior to 2023 BNSF and NTEC had conducted business exclusively pursuant to contracts. Beginning this year, however, NTEC decided to instead ship pursuant to BNSF's common carrier pricing authority, which imposes no minimum volume commitment on NTEC. Now, NTEC is trying to use the Board's injunction powers to impose on BNSF the increased service obligations of a contract without any of the

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negotiated trade-offs. NTEC wants the flexibility of no minimum volume commitments under a common carrier pricing authority while placing an obligation on BNSF to guarantee extra service and a fixed schedule, and be placed in front of the line compared to others that negotiated contracts.

NTEC's request for an injunction is unprecedented. If NTEC's approach is accepted by the Board and shippers see the opportunity to get a Board-ordered transportation contract without any of the market-based trade-offs that underlie contract negotiations, including volume commitments that allow railroads to plan for and justify the allocation of certain resources, it would lead to a reduction in the amount of rail transportation provided pursuant to contract and a flood of litigation.

NTEC also fails to satisfy the well-established technical requirements for the grant of injunctive relief. First and foremost, there is no irreparable harm. If BNSF violated its common carrier obligations, NTEC can seek damages. Indeed, NTEC has already filed for damages in the common carrier complaint filed with the Board along with the Application. It is seeking similar damages in a federal court action relating to export coal rail service that NTEC received last year from BNSF. Injunctive relief is also inappropriate here because it would harm other shippers who would be unable to obtain service they have already bargained to receive pursuant to long-term transportation contracts, as discussed above.

And the harm would not necessarily be limited to shippers that compete with NTEC for export sales. Forcing BNSF to increase its movement of coal for NTEC could also impact other domestic coal shippers, given the tight capacity for coal

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train sets. It could also affect shippers of other commodities in the Pacific Northwest, given the ongoing capacity constraints on BNSF's network in that region. As discussed by BNSF's Vice President of Industrial Products, Farah Lawler in the attached verified statement, the corridor used by these export coal shippers is a very important corridor on BNSF's network relied on by a wide range of shippers who could be impacted by an emergency service order or injunction favoring NTEC. The requested injunction would also be contrary to the public interest because it would undermine established contractual expectations, interfering with commercial relationships between a Canadian terminal and its users, and disrupting international shipping arrangements.²

NTEC ultimately hopes to prevail by prejudicing the Board against BNSF with pejorative and inaccurate descriptions of BNSF's prior conduct and objectives. Those issues are a distraction in this proceeding relating to an emergency service order request. As Ms. Lawler explains in the attached verified statement, BNSF appreciates and respects the sovereignty of the Navajo Nation and values the relationship that we have built over time. BNSF also values NTEC as a customer. BNSF worked closely with NTEC to enable its initial entry into the coal export market, and has since worked closely with NTEC to support the ongoing

² Given the limited time for preparing this response, BNSF has not addressed any of the jurisdictional issues raised by the international aspect of the transportation or by the rail transportation contracts implicated in this proceeding. BNSF does not waive its right to raise these issues later in this proceeding, or in the related common carrier complaint proceeding.

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success of its export coal business. BNSF has been transparent and forthcoming with NTEC about the constraints on BNSF's capacity, the constraints created by the Westshore terminal's limited capacity, the complexities of international shipping arrangements, the need to juggle service requests of others, and its efforts to increase service. BNSF intends to continue working to improve and expand its service to the Westshore terminal and meet the needs of all of the shippers seeking to use that facility.

Intervention by the Board with an extraordinary emergency service order or an injunction is unnecessary, and would be extremely disruptive and harmful to other shippers. The Application should be denied.

II. Background

BNSF transports thermal coal that NTEC mines from its Spring Creek, Montana mine to Westshore Terminals at the Roberts Bank Superport in Delta, British Columbia, Canada ("Westshore") for sale to entities located in Korea and Japan. Spring Creek is one of four Powder River Basin ("PRB") mines that NTEC acquired when it purchased the assets of Cloud Peak Energy, Inc. ("Cloud Peak") out of bankruptcy in 2019. Spring Creek produces 15 million tons annually, most of which moves on BNSF to domestic locations. The amount of Spring Creek coal that moves for export has fluctuated over the years.

Spring Creek is not the only PRB mine shipping coal to Westshore for export.

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The PRB-to-Westshore movements originate in the PRB and move north and west through Montana and then north through Everett, WA into Canada to Westshore's coal terminal in British Columbia. The route is illustrated by the highlighted portions of the map below.



This is a very important corridor on BNSF's network. Other commodities like grain from Midwest farmers, other agricultural commodities, intermodal

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containers, consumer goods, essential industrial commodities, and energy products moving through the Pacific Northwest bound for domestic destinations use these tracks and local crews, as well.

The coal export terminal at Westshore is a large coal terminal, but its capacity is not unlimited. Commercial arrangements and operational realities require BNSF to coordinate train arrivals with Westshore and their mutual customers. However, BNSF has no relationship with the ocean carriers whose vessels dock at Westshore, and no visibility into the financial arrangements that BNSF's export coal shippers make with those ocean carriers.

BNSF has been moving Spring Creek coal for export to Asia via Westshore since long before NTEC acquired the mine. From 2008 through 2019, BNSF provided coal transportation service from Spring Creek to Westshore for Cloud Peak pursuant to a long-term contract { [REDACTED] [REDACTED] } As detailed in the Lawler V.S., BNSF assisted NTEC's entry into the coal export market by renegotiating that contract significantly in NTEC's favor when NTEC acquired Cloud Peak's assets in 2019. As result of becoming party to the Cloud Peak contracts, NTEC became responsible for the substantial liquidated damages that Cloud Peak owed BNSF for failure to meet its minimum volume requirements in both 2018 and 2019.³ To assist NTEC, BNSF negotiated a reduced

³ After acquiring Cloud Peak's assets, NTEC became a party to the coal transportation contracts in place between BNSF and Cloud Peak, including the Amended and Restated BNSF-C-12820 covering export coal moving to Westshore through December 30, 2020, and a separate coal transportation agreement, BNSF-C-12828, which governed the

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amount owed by NTEC and established a quarterly payment schedule to ease the burden associated with amounts.

{ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] }

{ [REDACTED]
[REDACTED]
[REDACTED] } and BNSF agreed. Even though NTEC's { [REDACTED] } BNSF nevertheless agreed to { [REDACTED] }

In 2021, the market for export coal expanded rapidly. As shown in the chart below, the Indonesian Coal Price, a good proxy for demand levels in the Asian trade, began rising rapidly beginning in the fall of 2020.

transportation of coal from Spring Creek to the Westshore Terminal for sale to a single customer in Japan (i.e., JERA Trading Pte Ltd. or “JERA”).

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Seeing a market opportunity, NTEC wanted to dramatically increase the amount of coal it shipped to Westshore. BNSF was able to accommodate that demand at first, and moved a record amount of Spring Creek coal to Westshore in 2021. However, BNSF soon began experiencing systemwide performance issues in late 2021 and 2022 due to a variety of factors as the nation emerged from the pandemic. Significant and uneven surges in demand coupled with shortages of driver, chassis, and warehouse resources necessary to manage the unanticipated influx of volume in the supply chain created significant backlogs at critical BNSF terminals and, in turn, on mainlines.

With these service challenges in the background, the parties began conversations in the summer of 2022 regarding a new agreement for 2023. One of

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the issues discussed was the availability of capacity to meet the high levels of volumes NTEC was requesting, which led to conversations regarding a possible long-term contract with volume commitments on both parties. As part of those conversations, the potential for a mutual release of claims each party had against one another was discussed. Contrary to the assertions of NTEC, the idea of a waiver of claims in a 2023 agreement was neither one sided, nor introduced late in the negotiations. BNSF raised the concept of a release at least as early as August 2022, several months before contract negotiations terminated, and the proposed release was mutual and would have also served to waive pre-existing claims BNSF had against NTEC for liquidated damages.

At the end of 2022, however, NTEC abruptly pulled out of negotiations and filed suit against BNSF in federal court for breach of contract under the 2022 agreement. NTEC subsequently requested a common carrier rate for shipments in 2023. While that common carrier rate would impose no commitments on NTEC, NTEC nevertheless reiterated its demands for a return to the record service levels NTEC had received from BNSF in 2021 under the contract that was then in place.

Throughout BNSF's relationship with NTEC, BNSF has been forthright with NTEC about BNSF's ability to meet their requests for extra service. Recently, BNSF has held weekly operational calls with representatives of NTEC and Westshore to provide up to date information about available capacity. BNSF routinely provides updated train estimates and explores options with NTEC as they emerge.

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III. Argument

Granting NTEC's extraordinary and unwarranted request for an emergency service order and an injunction would require the Board to find emergency circumstances and actual irreparable harm where none exists. The facts set out in NTEC's Application do not warrant either the issuance of an emergency service order or a temporary injunction. No emergency service order is warranted.

NTEC is not entitled to an emergency service order. An emergency service order is extraordinary relief that is reserved for emergency situations of critical magnitude. As the Board's prior rulings illustrate, emergency service orders are only appropriate to address actual emergencies. Emergency Service Orders are particularly ill-suited to situations such as this that involve the allocation of constrained capacity that necessarily will involve the balancing of the competing interests of all of the entities that depend on the availability of common carrier capacity.

1. An emergency service order is an extraordinary remedy meant to address actual emergencies.

The Board may only issue an order an emergency service order under 49 U.S.C. § 11123 when it determines that:

shortage of equipment, congestion of traffic, unauthorized cessation of operations, . . . or other failure of traffic movement . . . creates an emergency situation of such magnitude as to have substantial adverse effects on shippers, or on rail service in a region of the United States, or that a rail carrier providing transportation subject to the jurisdiction of the Board . . . cannot transport the traffic offered to it in a manner that properly serves the public.

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49 U.S.C. § 11123 (emphasis added). “Emergency service orders are designed to preserve rail service where there has been a substantial rail service issue or failure that requires immediate relief.” *Revisions to Regulations for Expedited Relief for Service Emergencies*, EP 762, slip op. 3 (STB served Apr. 22, 2022).

Emergency or alternative service orders are designed to remedy “a substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier.” 49 C.F.R. § 1146.1(a).

As the Board has previously recognized, “a § 11123 emergency service order is an extraordinary remedy and does not issue such an order lightly.” *Canexus Chemicals Canada L.P. v. BNSF Railway—Emergency Service Order*, FD 35524, slip op. at 5 (STB served Oct. 14, 2011). As a result, emergency services orders are exceedingly rare. Emergency service orders are not intended to preserve a particular level of service, rather to address actual emergencies. Thus, in *Granite State Concrete Co. v. Bos. & Me. Co.*, FD 42083, slip op. at 6 (STB served Sept. 15, 2003), the Board denied a request for issuance of an emergency service order where service was less frequent than desired by complainants and found that the level of service “[did] not constitute an emergency as contemplated by 49 U.S.C. 11123(a) or a substantial material deterioration of service as contemplated by 49 CFR part 1146 as a basis for the extraordinary relief available under those provisions.” Consistent with these standards, it is clear that concern about a corporation wanting to increase its profits does not constitute an emergency.

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2. Prior emergency service orders from the Board illustrate the appropriate use of emergency service orders.

As noted above, emergency service orders are very rare. However, the few orders that have been issued in the past several years illustrate the serious nature of circumstances that are required before the Board contemplates an emergency service order. The circumstances of NTEC's desire for extra service do not come close to meeting the requirement of a service emergency under this precedent.

In *Foster Poultry Farms—Ex Parte Petition for Emergency Service Order*, FD 36609 (STB served June 17, 2022), the Board found an emergency order under § 11123 was warranted and directed Union Pacific Railroad Company (“UP”) to provide service to Foster Farms, a chicken grower and processor, because according to Foster Farms, the “corn delivered by UP is corn exclusively used to feed hundreds of thousands of cattle and millions of chickens that provide food supplies and that UP’s service failures impact Foster Farms’ ability to serve the public.” *Id.* at 1. Notwithstanding the serious conditions giving rise to the original order, subsequently, the Board denied a motion from Foster Farms to extend the emergency service order for an additional 90 days because “the record [did] not show that the emergency that prompted the Board’s initial action . . . continue[d] to exist.” *Foster Farms*, FD 36609, slip op. at 2 (STB served July 20, 2022).

Several months later, Foster Farms filed an ex parte petition for a second emergency service order under 49 U.S.C. § 11123 and the Board directed UP to deliver five unit-trains of corn, in part, because Foster Farms stated that it had “cut

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off feed to the dairy cattle to preserve corn for feeding the chickens, which are more susceptible to starvation.” *Foster Farms*, FD 36609, slip op. at 2 (STB served December 30, 2022). There can be no doubt that NTEC missing out on revenues from potential coal sales in Asia does not present the same type of emergency as the potential starvation of millions of livestock.

The Board later made it clear that emergency service orders were not intended to address service problems that were already well known to the shipper. The Board denied as moot Foster Farms’ petition for a second emergency service order because the record indicated that the service issues Foster Farms was experiencing were “recurrent” with “unpredictable service” that had been occurring “since February of 2022.” *Foster Farms*, FD 36609, slip op. at 3 (STB served February 14, 2023). The Board stated that Foster Farms’ concerns about the “additional costs of scrambling to find corn from alternative sources and transportation modes to meet its contractual obligations to customers and otherwise mitigate the harm caused by UP’s service failures” would be “more appropriately addressed, if at all, under other regulatory and statutory provisions, such as the Board’s regulations at 49 C.F.R. § 1147.1 or the common carrier provisions of 49 U.S.C. § 11101 and related regulations.” *Id.* at 3. Whether one believes that BNSF’s service levels to NTEC have been adequate or not, the fact that NTEC has already sued BNSF in federal court for allegedly inadequate service throughout 2022 demonstrates that these service issues have been recurrent in NTEC’s eyes, and thus not appropriate for emergency relief.

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A loss of potential revenue from coal sales in Asia also does not present the same possible emergency situation as an interruption in drinking water supply for millions of Americans. The Board has recognized that the transportation of some commodities presents particularly important public interest concerns. *See Urgent Issues in Freight Rail Service*, EP 770 (Sub-No. 1) slip op. at 6 & n.12 (STB served June 13, 2022). Coal for export to Asia does not fall into that group of commodities.

In *Hasa, Inc. v. Union Pacific Railroad*, NOR 42165 (STB served Aug. 21, 2019), the Board ordered UP to restore and maintain five-day per week service to Hasa, Inc.'s plant at Saugus, Cal., until the Board ruled on a then-pending application for emergency service order and petition for temporary injunction. *Id.* at 1. Hasa, a producer and distributor of sodium hypochlorite and related products, including hydrochloric acid, used for water sanitation and wastewater treatment, filed an ex parte application for an emergency service order under 49 U.S.C. § 11123 for UP to restore service of deliveries of water sanitation commodities to Hasa's plant. *Id.* Hasa argued that the reduction in service would lead to a product shortage, which would deprive millions of people of safe drinking water and threaten the public health. *Id.* at 1-2. Hasa also contended that there was "there [was] no other substitute manufacturer or supplier of sodium hypochlorite in the area, therefore it [could not] obtain chlorine deliveries from any transporter other than UP, and its customers [could not] use substitute products in the short term." *Id.* at 2. Subsequently, in light of the parties' joint request to hold the proceeding in abeyance while the parties attempted to "negotiate a commercial solution," the

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Board vacated its order directing UP to maintain five-day-per-week service to Hasa. *Hasa*, NOR 42165, slip op. at 1-2 (STB served Oct. 3, 2019). The parties ultimately settled and the Board granted the parties' joint motion to dismiss. *Hasa*, NOR 42165 (STB served Oct. 30, 2019).⁴ Unlike the situation in *Hasa*, NTEC cannot claim that its business can affect the public health.

In *Arkansas Midland R.R.—Alternative Rail Service—Line of Caddo Valley R.R.*, FD 35416 (STB served Sept. 17, 2010), the Board issued an emergency service order pursuant to 49 U.S.C. § 11123 and 49 C.F.R. pt. 1146 and allowed Arkansas Midland Railroad to provide rail service on a rail line owned and operated by Caddo Valley Railroad Company because Caddo Valley Railroad was in dire financial straits and would cease service to the shippers on the line within days. *Id.* at 3. Without the emergency service order, the two shippers on the line would “face substantial adverse effects from the loss of rail service.” *Id.* Given that BNSF is not in dire financial straits, there is no risk that BNSF's service to NTEC will cease, and NTEC has not asked for service from an alternative rail carrier, *Arkansas Midland* does not support NTEC's request.

⁴ In another case involving chlorine, *Canexus*, FD 35524 (STB served Oct. 14, 2011), the Board, sua sponte, ordered BNSF and UP to provide emergency service to Canexus, a chlorine manufacturer, and maintain the “status quo” by providing service for Canexus's traffic originating in Canada and the Pacific Northwest, and destined to points in Illinois, Arkansas, and Texas, while the Board resolved Canexus's complaint. *Id.* at 5.

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3. NTEC has failed to meet the requirements for an emergency service order.

This is not an emergency situation justifying immediate Board action. There has been no rapid decline in service or threat of a service termination. The public welfare is not at risk due to an interruption of the nation's energy supply, animal feed, and public water supply. There is no imminent threat of harm to NTEC. The issue here involves profits to be made in the very active export coal market for sales of coal to Asia. NTEC understandably wants to maximize its participation in this lucrative overseas market, even if that means diverting traffic away from a competing supplier of export coal or other BNSF shippers. But its desire to take advantage of a hot market does not create an emergency.

NTEC is asking the Board to order BNSF to transport to Westshore, on a ratable basis, approximately 440,000 tons of NTEC coal per month, or 29 trains per month, for the indefinite future. That is an extraordinary volume of coal and few of BNSF's coal customers receive that volume of coal transportation. As explained by Ms. Lawler, if BNSF were able to move that amount of coal for NTEC, NTEC's export coal business would become ranked as { [REDACTED] } out of BNSF's 90 coal lanes. Under current traffic volumes, NTEC's export coal business alone is already ranked at { [REDACTED] } out of 90, making NTEC one of BNSF's largest coal shippers. NTEC's desire to dramatically increase size of its business – from { [REDACTED] } out of 90 shippers – is not an emergency justifying an emergency service order.

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The requested relief is extraordinary in other respects. As explained by Ms. Lawler, NTEC is asking the Board to require that BNSF move for NTEC a quantity of coal each month for the indefinite future at a level that NTEC has received only in four of the past 38 months that NTEC has owned Spring Creek mine. NTEC is not seeking to restore service at historical levels but rather to dramatically increase service, while maintaining its ability to decrease – or cease altogether – tendering shipments to BNSF. It would be unprecedented to treat the desire of a shipper to dramatically increase traffic volumes as an emergency justifying extraordinary emergency relief.

NTEC claims that they just want to return to service levels in 2021, when service was provided under a contract from NTEC. But 2021 traffic volumes were, themselves, an anomaly. As explained by Ms. Lawler, BNSF moved more coal from the Spring Creek mine to export in 2021 than in any other year since that mine has been selling coal into the export market (since 2005). In fact, 2021 volumes were a 31% increase over the average export service that NTEC/Cloud Peak had consistently experienced over the prior ten years (2011-2021), and a 58% increase over the average export service that NTEC had received in the other two years they owned the Spring Creek mine.

As noted in the cases described above, a service emergency can result from unexpected traffic declines. But NTEC's request for an emergency service order is not prompted by a precipitous decline in service. 2023 transportation volumes exceed the level of transportation NTEC has been receiving for nearly a year and a

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half, when BNSF began experiencing service difficulties across the network.

Indeed, recent shipment volumes are higher than the average for the last year and a half.

Nor is NTEC's request for emergency service relief based on a threat to the financial viability of a particular shipper. NTEC claims that the financial viability of NTEC is important to the Navajo Nation because NTEC funds approximately one-third of the Navajo Nation's General Fund. But Ms. Lawler explains that NTEC is primarily a supplier of domestic coal in the U.S. market. Its financial viability is not dependent on export coal sales. Since NTEC has owned the Spring Creek mine, export volumes have only made up, on average {█} of the total coal tons that NTEC ships on BNSF in a year. In that time, BNSF has moved an annual average of {█} domestic tons for NTEC compared to {█} tons of export coal.

4. NTEC's request would harm other parties

NTEC's request for an emergency service order also ignores the harmful impact of the requested relief on other parties.⁵ As explained by Ms. Lawler, BNSF's inability to provide NTEC with all of the coal transportation it seeks is driven by several constraints that BNSF cannot avoid. There is a constraint on the capacity available at the Westshore facility, where there are limits on the amount of coal that can be stockpiled. BNSF is constrained by the need to schedule the

⁵ See, e.g., *Urgent Issues in Freight Rail Serv.*, EP 770, Hr'g Tr. 871-72, Apr. 27, 2022.

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loading of particular export ships with coal from multiple trains. An individual shipping vessel can require from five to ten trainloads of coal from the same shipper, mandating complex scheduling. {{{ [REDACTED]

[REDACTED] as well as to address requests for coal transportation from other shippers interested in taking advantage of the active and profitable export coal market.

BNSF is also constrained by the resistance in the United States to expansion of new coal export facilities.⁶ There is a constraint on BNSF's coal shipments to Westshore caused by an ongoing shortage of crews in Everett, Washington, which is an important crew district on BNSF's Northwest Division, the part of BNSF's network that NTEC's trains and other shippers' trains must traverse to reach destinations, including export facilities in British Columbia. There is also a constraint on the availability of train sets for large coal unit trains across BNSF's network, including train sets available for important domestic coal shippers.

As a result of these constraints, any order by the Board to BNSF to increase BNSF's shipments of coal to NTEC would require that BNSF reduce service to some other shipper or shippers. It would not be possible simply to expand the size of the pie in response to an emergency service order – if that were possible, BNSF clearly

⁶ See, e.g., Lynda V. Mapes, *Tribes prevail, kill proposed coal terminal at Cherry Point*, The Seattle Times (May 9, 2016), available at <https://www.seattletimes.com/seattle-news/environment/tribes-prevail-kill-proposed-coal-terminal-at-cherry-point/>

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would have done it by now. Rather, one or more of BNSF's current shippers would be required to receive less service.

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }} And as explained by

Ms. Lawler, there are other actual and potential shippers seeking access to Westshore, { [REDACTED] }} to participate in the now attractive coal export market. An order requiring that BNSF expand shipments to NTEC would necessarily mean that NTEC's competitors get less service. Emergency service orders should not be used to realign competitive markets to artificially favor particular shippers.

Other harms could result from an order to expand shipments to NTEC. As Ms. Lawler explains, coal train sets are currently in high demand across BNSF's network. BNSF could not increase its overall supply of coal to Westshore without taking train sets that are already being used for other domestic coal uses, potentially harming domestic coal users and their customers as we approach the hotter summer months when energy demand increases. Ms. Lawler also explains that coal movements to Westshore must pass through Everett, Washington, where crew availability has been particularly tight despite BNSF's persistent efforts. If an Everett crew must be used to operate additional trains moving to Canada, that crew

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would not be available for the vast array of domestic shipments that also rely on Everett crews.

An emergency service order under these circumstances is unwarranted and inappropriate, and could produce collateral harm that affects a wide range of other shippers and commercial arrangements.

B. A preliminary injunction is not warranted under the facts presented by NTEC

NTEC also asks the Board to enter an injunction requiring BNSF to provide increased service to NTEC for an indefinite period. The injunction would be unprecedented. It is not intended to preserve the status quo or to enjoin conduct by BNSF. It seeks a major increase in traffic levels to volumes that NTEC has never obtained, in its history, for sustained periods of time. Moreover, the terms that NTEC seeks are characteristic of rail transportation contracts where both sides make commitments that allow the railroad to plan for certain service levels and justify the investment necessary to achieve them. In effect, NTEC is asking the Board to impose on BNSF the obligations often included in rail transportation contracts without any of the trade-offs that result from contract negotiations.

The Board only has authority to issue an appropriate order, such as a preliminary injunction while a claim is pending, when necessary to prevent irreparable harm. *See* 49 U.S.C. § 1321(b)(4). A party seeking a preliminary injunction must establish all of the following: (1) it is likely to prevail on the merits of any challenge to the action sought to be preliminarily enjoined, (2) it will be

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irreparably harmed in the absence of the requested relief, (3) issuance of the injunction will not substantially harm other parties, and (4) granting the injunction is in the public interest. *See, e.g., Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc. (Holiday Tours)*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Am. Chemistry Council v. Ala. Gulf Coast Ry.*, NOR 42129, slip op. at 4 (STB served May 4, 2012); *see also Union Pac. R.R.—Pet. for Declaratory Order & Preliminary Injunction*, FD 36197, slip op. at 3 (STB served June 29, 2018); *Richard Best Transfer, Inc. v. Union Pac. R.R.*, NOR 42149, slip op. at 4 (STB served Dec. 22, 2016).

A preliminary injunction is an extraordinary remedy and will generally not be granted “unless the requesting party can show that it faces unredressable actual and imminent harm that would be prevented by an injunction.” *Am. Chemistry Council v. Ala. Gulf Coast Ry.*, NOR 42129, slip op. at 4 (STB served May 4, 2012). The party seeking a preliminary injunction “carries the burden of persuasion on all of the elements required for [such] extraordinary relief.” *BP Amoco Chem. Co. v. Norfolk S. Ry.*, NOR 42093, slip op. at 4 (STB served June 6, 2005) (quoting *San Joaquin Valley R.R.—Aban. Exemption—In Tulare & Kern Ctys., Cal.*, AB 398 (Sub-No. 5X), slip op. at 4 (STB served Apr. 3, 1998)).

As discussed below, NTEC has not met this burden and its request for a preliminary injunction is baseless.

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1. NTEC has not demonstrated irreparable harm

The first, and fatal flaw in NTEC’s request is the failure to demonstrate irreparable harm. To show irreparable harm, the NTEC must demonstrate both the imminence and the irreparable nature of any purported harm. The harm alleged “must be both certain and great; it must be actual and not theoretical. Injunctive relief ‘will not be granted against something merely feared as liable to occur at some indefinite time’” *Richard Best Transfer, Inc. v. Union Pac. R.R.*, NOR 42149, slip op. at 4 (STB served Dec. 22, 2016) (quoting *Conn. v. Mass.*, 282 U.S. 660, 674 (1931)). Moreover, “[m]ere injuries, however substantial . . . are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.” *Id.* (quoting *Via. Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958).)

The Board has consistently held that monetary or economic loss does not constitute irreparable harm. *See N. Coast R.R. Auth. v. Sonoma-Marin Area Rail Transit Dist.*, NOR 42148, slip op. at 4 (STB served Oct. 21, 2016) (finding no irreparable harm based on “inconvenience and associated monetary losses”); *Kessler—Pet. for Injunctive Relief*, FD 35206, slip op. at 5 (STB served June 12, 2009); *Am. Chemistry Council*, NOR 42129, slip op. at 4 (additional costs and disruption of business operations caused by carrier’s newly imposed requirements while case was pending were not irreparable harms because they constituted “[i]njuries in terms of

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money, time, and energy,” which are “economic in nature”). Economic loss only rises to the level of irreparable harm, where it “threatens the very existence of the movant's business.” *See Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

An irreparable injury cannot be theoretical. NTEC must make showing that the harm “will in fact occur.” *See Wis. Gas. Co.*, 758 F.2d at 674; see also *Ballard Terminal R.R.—Acquis. & Operation Exemption—Woodinville Subdivision*, FD 35731 et al., slip op. at 6 (STB served Aug. 1, 2013) (denying motion for preliminary injunction because alleged irreparable harm in the absence of an injunction was “remote, speculative, and uncertain”) (citation omitted). “Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur.” *Wis. Gas. Co.*, 758 F.2d at 674.

NTEC fails to meet its burden of showing that it will suffer irreparable harm in the absence of an injunction. NTEC claims, without any support, that it has “no adequate monetary remedy” available to it and that its harm is “certain.” App. 21-23. But NTEC’s claim is belied by its own conduct. In its Complaint and Petition for Declaratory Order, filed the same day as this Application, NTEC requests that the Board award it “damages with interest, pursuant to 49 U.S.C. § 11704(b)” for the alleged violations of BNSF’s common carrier obligations and alleges that to date it has experienced actual and consequential damages “in excess of \$10 million.” Compl. ¶ 62, Prayer for Relief. Likewise, NTEC is pursuing monetary damages in the litigation it filed against BNSF in the Montana federal court, where alleged service shortfalls of the same type alleged here are the focus of NTEC’s claims. *See the*

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attached Preliminary Pretrial Statement of Plaintiff, at 9-10, filed on 3/16/23 in *Navajo Transitional Energy Co. v. BNSF Railway Co.*, CV 22-146-BLG-SPW-KLD, attached at Attachment A.

As explained in detail above, NTEC is concerned that it will be unable to fully participate in an attractive coal export market if it does not receive additional transportation by BNSF. But that concern is solely about money – how much can NTEC earn with additional transportation. Clearly, NTEC would be adequately compensated with monetary relief, if it can show that BNSF violated its common carrier obligations. An injunction is not warranted.

The authorities NTEC cites in support of its position, App. 22, n.24, stand for the unremarkable proposition that financial injury can be irreparable where there is no adequate compensatory relief available through litigation. For example, the Board granted a stay pending reconsideration of its denial of approval for an acquisition where there were allegations that one of the entities may be dissolved absent a stay. *See Stagecoach Group PLC & Coach USA, Inc., et al.—Acquisition of Control—Twin America, LLC*, MC-F-21035, slip op. at 2 (STB served Mar. 9, 2011). There, the parties would have no legal remedy were the Board to later reverse its decision on the acquisition. Similarly, the Board enjoined removal of track assets pending resolution of a complaint where abandonment authority had not yet been requested and where a potential shipper made a colorable claim that it had the funds to purchase the line through the OFA process. *See Colo. Wheat Admin. Comm. v. V & S Ry., LLC*, NOR 42140, slip op. at 5-6 (STB served May 7, 2015). The Board recognized

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that “[t]here is nothing in the Board’s OFA process that would require . . . compensat[ion] . . . for the[] additional costs” of “design, engineering, and labor to install replacement tracks.” *Id.* at 5. Likewise, the Board stayed an order requiring the payment of shipper refunds pending judicial review because there was no legal mechanism that would require a shipper to reimburse a railroad for rates that could have been charged but were not. *W. Tex. Utilis. Co. v. Burlington N. R.R. Co.*, NOR 41191, 1996 WL 347102, at *3 (STB served June 25, 1996) (“Absent some means of assuring that forgone revenues can be recovered, BN could be harmed absent a stay.”). Unlike each of these cases, NTEC has sufficient legal recourse absent an injunction.

NTEC’s failure to demonstrate irreparable harm ends the inquiry—the Board need not address NTEC’s arguments about likelihood of success on the merits, harm to other parties, or public interest considerations here. *See N. Coast R.R. Auth. v. Sonoma-Marin Area Rail Transit Dist.*, NOR 42148, slip op. at 4 (STB served Oct. 21, 2016); *Am. Chemistry Council*, NOR 42129, slip op. at 5; *Seminole Elec. Coop., Inc. v. CSXT Transportation, Inc.*, NOR 42110, slip op. at 4 (STB served Dec. 22, 2008) (“some showing of each of the *Holiday Tours* factors is necessary” to grant an injunction.). Nonetheless, BNSF will also address why NTEC has failed to meet any of the remaining criteria.

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2. NTEC has not proven a likelihood of success on the merits

NTEC has not made a showing that it is likely to succeed on the merits of its Section 11101 Complaint. Without a “substantial indication of probable success, there would be no justification for . . . intrusion into the ordinary processes of administration and judicial review.” *Va. Petroleum Jobbers*, 259 F.2d at 925. To show a likelihood of success on the merits, the party seeking the injunction ordinarily must show “more than a mere possibility” of success. *Nken v. Holder*, 556 U.S. 418, 434 (2009) (internal quotation marks omitted).

First, the standard governing BNSF’s common carrier obligations is whether NTEC’s request for service was reasonable and, if so, whether BNSF has acted reasonably in response. This filing is not the appropriate place to set out in detail the evidence relating to BNSF’s on-going interactions with NTEC. But as described in the Lawler VS, BNSF has made repeated efforts to support NTEC’s export coal business and has acted reasonably in allocating constrained capacity over the past several months. BNSF will demonstrate that it has always acted reasonably toward NTEC in its requests to move coal to Westshore. NTEC itself cites statements made by BNSF in a recent litigation involving the Swinomish Indian Tribal Community to the effect that BNSF’s “common carrier obligations are baked into its DNA.”⁷ BNSF

⁷ See *Swinomish Indian Tribal Community v. BNSF Railway*, No. 2:15-cv-00543-RSL (“Swinomish”), Trial Brief of BNSF Railway, at 2, (W.D. Wash. Mar. 15, 2023) (*emphasis added*).

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made those statements because they reflect BNSF's commitment to its common carrier obligations, and BNSF will show that it met those obligations with NTEC.

Second, BNSF is likely to succeed on the merits because { [REDACTED]

[REDACTED]

[REDACTED] } The

governing statute expressly provides that a railroad does not violate its common carrier obligations if it satisfies its existing contractual obligations first. The statute provides:

A rail carrier shall not be found to have violated this section because it fulfills its reasonable commitments under contracts authorized under section 10709 of this title before responding to reasonable requests for service.

49 U.S.C.A. § 11101(a) (emphasis added). { [REDACTED]

[REDACTED] } the current spike in demand for export

coal that has prompted NTEC to seek increased transportation service. Those commitments are clearly reasonable and must not be interfered with by an inappropriate Board-issued injunction.

Third, NTEC suggests that the Board should give it special treatment in its competition with other export coal suppliers simply because NTEC is affiliated with the Navajo Nation. But neither the 1849 Treaty between the Navajo Nation and the United States of America ("Treaty") nor the Executive Order No. 13175, 3 C.F.R. § 13175 (2000) ("Executive Order") cited by NTEC even suggests that the Board should give special treatment to commercial entities affiliated with tribes where they

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compete with non-native owned entities. The Board is obligated to treat all of its stakeholders with equal regard. And the cases cited by NTEC are inapposite. Those Board decisions pertain to consultations with tribes on environmental matters and are easily distinguishable from the commercial matter at hand.⁸ Here, NTEC is not seeking Board consultation on an environmental matter, it is seeking to force BNSF into a service agreement.

NTEC's Application correctly notes that BNSF has "responsibilities to the public including Native American entities." App. at 10. BNSF appreciates and respects the sovereignty of the Navajo Nation and the relationship we've built over time. But BNSF's responsibilities do not require BNSF to give preferential treatment to NTEC in its competitive efforts to expand its export coal sales.⁹

⁸ See, e.g., *Seven County Infrastructure Coalition—Rail Construction & Operation Exemption—In Utah, Carbon, Duchesne, And Uintah Counties, Utah*, FD 36284, slip op. at 21 (STB served Dec. 15, 2021) (the Board's Office of Environmental Analysis "coordinated and consulted with tribes in accordance with NEPA, Executive Order 13175"); *Alaska R.R. – Construction and Operation Exemption – Rail Line Between North Pole and Delta Jct., AK*, FD 34658, slip op. at 87 (STB served Jan. 6, 2010) (the Executive Order "directs Federal agencies to establish regular and meaningful consultation and collaboration with officials of Federally recognized Tribal Governments (Tribes) in the development of Federal policies or decisions that have Tribal implications."); *Canadian Pac. Ry. – Control – Kansas City Southern Rwy.*, FD 36500, Draft Environmental Impact Statement, at 13, B-6 (Aug. 5, 2022) (consultation on environmental matter); *Tongue River R.R. – Rail Construction and Operation – In Custer, Powder River and Rosebud Counties, MT*, FD 30186, Draft Environmental Impact Statement, at 1-15 (Apr. 17, 2015) (same).

⁹ NTEC's reliance on *Swinomish* is also misplaced. Indeed, in *Swinomish*, the Court held that BNSF's common carrier obligation was limited by its contractual obligations, an argument that NTEC appears to be trying to distinguish here. *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 2023 WL 2646470 (W.D. Wash. Mar. 27, 2023).

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3. An injunction would harm other shippers

To obtain a preliminary injunction, NTEC must demonstrate that the issuance of the injunction will not substantially harm other parties. *See, e.g., Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc. (Holiday Tours)*, 559 F.2d 841, 843 (D.C. Cir. 1977). The harmful impact on other parties – competitors of NTEC for export sales through Westshore, Westshore's commercial relationships with its coal exporters and ocean carriers, other shippers using BNSF's transportation to the PNW, other domestic coal shippers – is described in detail above. It is clear that NTEC does not carry its burden with respect to this important factor.

4. The public interest does not support an injunction

Finally, the extraordinary relief that NTEC is seeking would not be in the public interest. At bottom, NTEC is seeking imposition of an order that would grant them record volume levels achieved when their traffic was under contract. That is, they are seeking to reap the benefits of commitments that they have not made. In turn, their requested order would likely cause BNSF to be unable to meet the commitments made to other rail shippers in rail transportation contracts and deprive those shippers the benefits of those agreements. Such action would run counter to the Board's policy of promoting contracts pursuant to 49 U.S.C. § 10709 and undermine the certainty that such agreements bring both railroads and shippers.

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Beyond § 10709 contracts, the order NTEC is seeking would also interfere with other existing commercial arrangements. As described in the V.S., Westshore is a Canadian port operator that has commercial arrangements with coal producers and international vessel operators. Granting NTEC's request would scramble those relationships and place NTEC at the head of the line. Under these circumstances, the public interest supports denial of the injunction.

IV. Conclusion

For these reasons, BNSF requests that the Board deny NTEC's request for an emergency service order and request for a preliminary injunction. However, as BNSF stated in the letter filed on April 17, 2023 in this matter, BNSF would be happy to re-engage in the conversations with the Rail Customer Assistance Program regarding this dispute if the Board believes it would be productive to do so. BNSF also notes that the Board's staff have been a helpful resource in EP 770 to BNSF as well as the Board members to understand individual service requests in the broader context of network performance and availability of resources used collectively by all customers.

BNSF would be willing to participate in a series of calls with the Board staff group that hosted service calls in 2022 to provide updates on the demand profile for

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export coal as it changes over time and BNSF's service response to that demand in the context of our efforts to service our broad customer base.

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Respectfully submitted,

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Dated: April 19, 2023

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BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42178

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

EX PARTE APPLICATION FOR
SECTION 11123 EMERGENCY SERVICE ORDER

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Attachment A

Preliminary Pretrial Statement of Plaintiff Navajo Transitional Energy Company, LLC

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION**

NAVAJO TRANSITIONAL ENERGY
COMPANY, LLC,

Plaintiff,

v.

BNSF RAILWAY COMPANY,

Defendant.

Case No. CV 22-146-BLG-SPW-KLD

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PRELIMINARY PRETRIAL STATEMENT OF PLAINTIFF NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

Pursuant to Local Rule 16.2(b)(1) and to this Court’s Order dated December 20, 2022 (Doc. 3), Plaintiff Navajo Transitional Energy Company, LLC (“NTEC”), through its undersigned counsel, submits this Preliminary Pretrial Statement.

A. Brief Factual Outline of the Case

Plaintiff NTEC mines thermal coal from its Spring Creek, Montana mine for sale to entities located in Korea and Japan. NTEC sells its export coal on a free-on-board-vessel basis¹ into ocean-going vessels loading at the Westshore Terminals facility at Roberts Bank, British Columbia. NTEC historically has shipped this export coal the 1,500-mile distance from Spring Creek to Westshore via Defendant BNSF Railway Company’s (“BNSF”) rail transportation service. BNSF is the only rail carrier capable of originating coal service at Spring Creek and providing continuous single-carrier rail transportation service from Spring Creek to Westshore. BNSF has provided coal transportation service for Spring Creek export coal for a number of years under a series of separate agreements.

On December 1, 2021, NTEC and BNSF entered into a Coal Transportation Agreement, denominated as “BNSF 90068-0099” (hereinafter the “2022

¹ FOB-vessel means that title to the coal will transfer to NTEC’s customer when the coal is placed on board a vessel at Westshore for shipment to its destination in Asia.

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Contract”). The 2022 Contract had a one-year term beginning on January 1, 2022 and ending on December, 31 of 2022. The 2022 Contract obligated NTEC to utilize BNSF for 100% of NTEC’s required Westshore-bound coal transportation service under the 2022 Contract and was subject to a maximum annual volume of 5.5 million tons. That maximum volume equates to an average of approximately 30 trains per month. In addition, BNSF and NTEC had a separate agreement (BNSF-C-12828) that provided for the transportation of additional volume destined for a single customer in Japan (JERA) (hereinafter referred to as the “JERA Contract”).²

During 2022, BNSF failed to transport a substantial portion of the coal that NTEC required under the 2022 Contract. In practice, BNSF’s failed or refused to schedule and provide a sufficient number of trains (as well as required locomotives, railcars, and crews) to transport NTEC’s Spring Creek coal under the 2022 Contract. Rather than provide NTEC’s required transportation, BNSF instead used its existing resources (*i.e.*, its locomotives, railcars, and crews) to transport the export coal of other BNSF customers for delivery to Westshore.

BNSF breached its contractual obligations to transport NTEC’s coal in two respects. First, BNSF failed to provide the full amount of NTEC’s required, non-JERA coal transportation service. Second, BNSF breached its duty of good faith

² NTEC’s action here does not include any claims under BNSF-C-12828.

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and fair dealing under the 2022 Contract by allocating its available resources to transport export coal to Westshore in a manner that favored other coal export shippers at the expense of NTEC.

BNSF's failure to provide transportation service under the 2022 Contract damaged NTEC by preventing NTEC from fulfilling its coal-sales commitments to its own customers who required transportation service under the 2022 Contract. This failure caused direct monetary damages to NTEC in lost revenues and caused a loss of goodwill. BNSF's failure also caused NTEC to incur significant demurrage charges from the ocean-going vessels destined to non-JERA locations, which waited weeks longer than necessary to load due to BNSF failure to perform under the 2022 Contract.

B. The Basis for Federal Jurisdiction and for Venue in the Division

This Court has jurisdiction pursuant to 28 U.S.C. § 1332(a)(1) (diversity) because: Plaintiff NTEC is an incorporated entity organized by the Navajo Nation, with its corporate offices in Colorado; Defendant BNSF is a citizen of a different state; and the amount in controversy exceeds the sum of \$75,000.00, exclusive of interest and costs.

Venue is proper in this Court under 28 U.S.C. § 1391(b)(2) because: (i) the contract at issue in this proceeding pertains to the transportation of coal mined in this judicial district; (ii) BNSF resides, owns property, and provides rail

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transportation in and through this judicial district; and (iii) BNSF is subject to personal jurisdiction in this judicial district. The Spring Creek Mine is located in Big Horn County, part of the Billings Division of this Court.

C. **The Factual Basis of Each Claim or Defense Advanced by the Party**

- Breach of 2022 Contract (Count I):

The parties' 2022 Contract explicitly states that NTEC "hereby accepts BNSF's offer to provide transportation pursuant to this Certificate for the movement described above" 2022 Contract at 3. The movement "described above" is the transportation of 100% of coal shipped from Spring Creek to the Westshore facility at Roberts Bank, BC in calendar year 2022 up to a maximum of 5.5 million tons of coal. 2022 Contract at 1.

The 2022 Contract is a valid and enforceable contract for the transportation of coal. BNSF agreed to provide railcars, equipment, and other facilities necessary to transport NTEC's export volumes under the 2022 Contract, subject only to the 5.5-million ton annual maximum.

While negotiating the 2022 Contract, NTEC advised BNSF that NTEC's anticipated volumes for the 2022 contract year would reach the 5.5-million ton maximum. At no time during the negotiations did BNSF ever suggest to NTEC that BNSF lacked the capacity (whether expressed in terms of railcars,

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locomotives, track, crews, or any other metric) to transport those volumes under the 2022 Contract.

NTEC reasonably relied on BNSF's commitment to transport up to 5.5 million tons of export coal in 2022 under the 2022 Contract, and NTEC had a reasonable expectation that BNSF would provide all the equipment and resources necessary to transport NTEC's volumes. Based on BNSF's commitment to transport up to 5.5 million tons of export coal to Westshore under the 2022 Contract, NTEC entered into contractual commitments to supply export coal to customers in Asia.

BNSF's commitment to ship up to 5.5 million tons under the 2022 Contract is a separate and distinct obligation from BNSF's commitment under the JERA Contract to ship an additional, lesser volume of coal destined for JERA. The two contracts were negotiated separately, executed in different years (*i.e.*, 2021 for the 2022 Contract and 2018 for the JERA Contract), and had different lengths of term, different prices, and a host of different terms and conditions. Critically, NTEC's claims here do *not* include any claims under the JERA Contract.

Beginning in the early months of 2022, BNSF service began to fall behind the schedule necessary to move all of NTEC's intended export coal volumes under the 2022 Contract. To meet NTEC's total anticipated annual volume, BNSF should have transported an average of 30 trains per month to Westshore under the

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2022 Contract. In 2022, however, BNSF transported only about half of the total volume of Spring Creek coal that NTEC sought to move under the 2022 Contract.

During April and May of 2022, NTEC sought assurances from BNSF that it would meet its transportation obligations under the 2022 Contract. At that time, BNSF personnel acknowledged the shortfall in requested transportation movements and estimated that BNSF service would not improve until the Fourth Quarter of 2022 at the earliest. BNSF then said it would transport a total of only 3.1 million tons of NTEC's coal during 2022 in total under both the 2022 Contract and JERA Contract.

In addition, BNSF personnel and senior executives asserted in communications with NTEC and its sole shareholder, the Navajo Nation, that BNSF believed it was not obligated to move any coal under the 2022 Agreement. *See, e.g.*, June 24, 2022 Letter of BNSF CEO Katie Farmer to the Honorable Jonathan Nez, President of the Navajo Nation, at 1 (“I understand that we may have different views on the nature of BNSF’s service obligations under our contract, but the contract and our recent commercial history make clear that BNSF is not required to move any specific minimum volume of coal in 2022.”).

NTEC incurred substantial damages because of BNSF’s breach of the 2022 Contract.

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- Breach of the Duty of Good Faith and Fair Dealing Under the 2022

Contract (Count II):

BNSF attempts to support its failures under the 2022 Contract by relying upon a provision in the stating that BNSF has “sole discretion” in providing its transportation service.

Notwithstanding BNSF’s failure to provide the full amount of coal transportation required by NTEC under the 2022 Contract, BNSF nevertheless substantially increased its volume of Westshore-bound export coal shipments for other customers relative to 2021 levels.

D. The Legal Theory Underlying Each Claim

NTEC has asserted claims for breach of contract and breach of the duty of good faith and fair dealing under the 2022 Contract.

A claim for breach of contract requires a contract, breach of an obligation under the contract, and damages as a result of the breach. *King v. Recreational Equip., Inc.*, CV 16-27-M-DLC, 2016 WL8711411, at *3 (D. Mont., Dec. 7, 2016). Damages for breach of contract serve to compensate an aggrieved party for the loss sustained. The nonbreaching party should receive a sum that will put it in as good a position as if the contract had been performed.

NTEC and BNSF were parties to a contract for the transportation of coal (Contract 90068-0099). BNSF failed to comply with its obligations under the 2022

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Contract by failing to transport the coal that NTEC required for transportation up to a maximum of 5.5 million tons. BNSF breached this duty by failing to transport coal that NTEC offered under the 2022 Contract below the maximum tonnage limitation.

Each contract also includes an implied duty of good faith and fair dealing. *Phelps v. Frampton*, 170 P.3d 474, 482 (Mont. 2007); *Beaverhead Bar Supply v. Harrington*, 805 P.2d 560, 564 (Mont. 1991). BNSF also breached the 2022 Contract: (i) by failing to ensure that it had sufficient resources available to provide service for NTEC to Westshore; and (ii) by choosing to allocate its resources (whether in the form of trains, locomotives, railcars, or crews) to other BNSF customers, rather than NTEC, for transportation service of export coal to Westshore.

E. Computation of Damages

On the basis of the information presently available to it, NTEC will submit its calculation of damages in this case on the basis of the following:

(1) the actual revenue (less avoided costs) that NTEC was deprived of under its existing coal sales agreements as a direct consequence of BNSF's failure to transport the full volume of coal required under the 2022 Contract;

(2) the additional revenue (less avoided costs) that NTEC was deprived of under spot coal sales agreements that NTEC otherwise could have entered (at then-

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prevailing prices) but for BNSF's failure to transport the full volume of coal required under the 2022 Contract;

(3) the additional demurrage costs that NTEC incurred as a direct consequence of BNSF's failure to deliver sufficient coal volumes to Westshore under the 2022 Contract in a manner that would have allowed the loading of ocean-going vessels (destined to non-JERA locations) within the required time limit for each vessel; and

(4) loss of customer goodwill for failure to ship contracted for coal volumes that was required to be transported under the 2022 Contract and for damage to NTEC's reputation as a reliable coal seller in a highly competitive export coal market.

NTEC's initial estimate of harm indicates that NTEC's total damages relating to BNSF's breaches of the 2022 Contract are at least \$60 million. NTEC's estimate is subject to additional evaluation and discovery.

F. Pendency or Disposition of Related State or Federal Litigation

No related state or federal litigation exists.

G. Proposed Additional Stipulations of Fact and the Parties' Understanding as to What Law Applies

NTEC proposed the following factual statements to BNSF for potential inclusion in a stipulation of facts:

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1. BNSF and NTEC entered into Coal Unit Train Commitment Certificate BNSF 90068-0099 (a/k/a the “2022 Contract”) in December 2021.
2. The 2022 Contract’s term was January 1, 2022 through December 31, 2022.
3. The 2022 Contract was an executed agreement that incorporated the terms of BNSF’s Common Carrier Pricing Authority, BNSF 90068, Revision 92.
4. The 2022 Contract identified Westshore Terminals at Roberts Bank, British Columbia, as the “Destination,” and Spring Creek, Montana as the “Mine.”
5. The Certificate/2022 Contract identified the “Minimum and Maximum Annual Volumes” as: “100% of coal shipped to WS at Roberts Bank, BC in calendar year 2022. NTEC shall provide, for planning purposes, non-binding estimates of tons to be tendered to BNSF for transportation (by month) for the ensuing quarter, no later than December 10, 2021, March 10, 2022, June 10, 2022 and September 10, 2022. The tons shall be reasonably prorated during the calendar year. The maximum annual volume is 5,500,000 short tons.”
6. The 2022 Contract did not contain an arbitration clause.
7. The 2022 Contract does not include a choice-of-law provision.
8. The 2022 Contract was a stand-alone agreement that governed the origin-to-destination rail transportation of export coal movements from the Spring Creek Mine to Westshore Terminals, Roberts Bank, BC.

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9. Each 2022 trainload of Spring Creek export coal moved pursuant to a Bill of Lading designating whether the 2022 Contract or Contract BNSF-C-12828 governed that movement.

In response, BNSF's counsel advised that they were unable to confer with their client upon receipt of NTEC's proposal due to client scheduling. The parties agree to discuss NTEC's proposed facts in more detail on or before March 23, 2023

In addition to the foregoing, Plaintiff NTEC is willing to stipulate to the following:

1. NTEC advised BNSF of its anticipated 2022 coal transportation needs under the then-proposed 2022 Contract on August 17, 2021.
2. Prior to the execution of the 2022 Contract, BNSF never suggested that it was "not required to move any specific minimum volume of coal [under the 2022 Contract] in 2022."
3. In 2022, BNSF did not transport NTEC's requested volume of coal shipments.

NTEC submits that Montana law applies. The 2022 Contract does not include a choice of law provision. Under Montana law, a contract is to be interpreted according to the law and usage of the place where it is to be performed or, if it does not indicate a place of performance, according to the law and usage of

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the place where it is made. *See* Montana Code Annotated § 28-3-102. Coal transportation under the 2022 Contract was mined and loaded into BNSF trains at NTEC's Spring Creek Mine located in Montana. From Spring Creek, Defendant moved each carload of coal to the Westshore Terminals at Roberts Bank, British Columbia, Canada.

H. Proposed Deadlines for Joinder of Parties or Amendment of Pleadings

Plaintiff proposes that the deadlines for joinder of parties and amendment of pleadings be those dates set forth in NTEC's portion of the parties' joint discovery plan.

I. Identification of Controlling Issues of Law Suitable for Pretrial Disposition

The construction or interpretation of a contract is a question of law. *See, e.g., AWIN Real Estate, LLC v. Whitehead Homes, Inc.*, 472 P.3d 165, 168 (Mont. 2020). BNSF has taken the position that it was not required to move any specific minimum volume of coal under the Agreement in 2022. The question of whether, as BNSF has claimed, BNSF had no minimum transportation obligation whatsoever under the parties' coal transportation agreement is a question that will be suitable for pretrial disposition. Similarly, the question of whether, as NTEC contends, the 2022 Contract is a requirements contract that obligated BNSF to provide all of the export coal transportation service that NTEC required, with the

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exception of export coal transported separately under the JERA Contract, will be suitable for pretrial disposition.

J. The Name, City, and State of Individuals with Information that May be Used in Proving or Denying any Party's Claims or Defenses and Summary of that Information

1. Matthew D. Babcock, NTEC Vice President, Sales & Marketing, Broomfield, CO, who may be contacted through Plaintiff's counsel. Mr. Babcock may address NTEC's contract negotiation with BNSF, NTEC's sales of export coal, issues related to demurrage that NTEC incurred, and BNSF's performance under the NTEC agreements.

2. Jason Plett, NTEC Manager of Logistics, Broomfield, CO, who may be contacted through Plaintiff's counsel. Mr. Plett may address NTEC's administration of its contracts with BNSF, BNSF's performance under those contracts, issues related to demurrage that NTEC incurred, and NTEC's contract negotiations with BNSF.

3. Brian Reents, NTEC Director, Sales & Logistics, Broomfield, CO, who may be contacted through Plaintiff's counsel. Mr. Reents may address the administration of the BNSF agreements, BNSF's performance under those agreements, and NTEC's sales of export coal.

4. Vern Lund, NTEC Chief Executive Officer, Broomfield, CO, who may be contacted through Plaintiff's counsel. Mr. Lund may address BNSF's

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performance under the NTEC agreements, contract negotiations with BNSF, and NTEC's sales of export coal.

5. Harry Tipton, NTEC Chief Growth Officer, Broomfield, CO, who may be contacted through Plaintiff's counsel. Mr. Tipton may address BNSF's performance under the NTEC agreements.

6. Rick Ziegler, NTEC Chief Operating Officer, Broomfield, CO, who may be contacted through Plaintiff's counsel. Mr. Ziegler may address BNSF's performance under the NTEC agreements.

7. Stevan Bobb, BNSF Chief Marketing Officer, Ft. Worth, TX. Mr. Bobb may address contract negotiations with NTEC (and possibly other export coal shippers) and BNSF's performance of Contract 90068-0099.

8. Katie Farmer, BNSF Chief Executive Officer, Ft. Worth, TX. Ms. Farmer may address BNSF's performance of Contract 90068-0099.

9. Farah Lawler, BNSF Vice President – Energy, Ft. Worth, TX. Ms. Lawler may address BNSF's contract performance and contract negotiations with NTEC.

10. Jessie McCabe, BNSF Director of Coal Marketing. Ms. McCabe may address BNSF's contract negotiations and contract performance with NTEC.

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11. Todd Carter, Former BNSF Group Vice President, Industrial Products. Mr. Carter may address BNSF's contract negotiations and contract performance with NTEC.

12. Doug Jones, BNSF Assistant Vice President, Operations. Mr. Jones may address BNSF's contract performance.

13. Scott Myers, BNSF Director Operations. Mr. Myers may address BNSFs' contract performance.

K. The Substance of Any Insurance Agreement that May Cover Any Resulting Judgment

NTEC is unaware of the existence of any such insurance agreement.

L. The Status of Any Settlement Discussions and Prospects for Compromise of the Case

Since the filing of NTEC's Complaint, no settlement discussions have taken place, and Plaintiff believes that the prospects for compromise or settlement are not good at this time. Nevertheless, NTEC is willing to entertain reasonable proposals for the amicable resolution of this dispute.

M. Suitability of Special Procedures

Plaintiff does not believe that any special procedures are necessary or appropriate.

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Attachment A
Page 17 of 17

Respectfully submitted,

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Harlan B. Krogh
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*Attorneys for Plaintiff Navajo Transitional
Energy Company, LLC*

Dated: March 16, 2023

Public Version

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42178

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC
v.
BNSF RAILWAY COMPANY

EX PARTE APPLICATION FOR
SECTION 11123 EMERGENCY SERVICE ORDER

Verified Statement of Farah Lawler

Public Version

I. Introduction and Summary

My name is Farah Lawler. I am the Vice President Industrial Products for BNSF Railway Company (“BNSF”). I have been in this position since July 2022. In this role, I lead teams responsible for sales and business development for coal, petroleum and industrial products related to the energy sector, including frac sand. Previously, I have held several marketing and sales roles in Consumer Products, Industrial Products and Agriculture Products at BNSF, including Assistant Vice President, Industrial Products. In these roles, I have acquired substantial knowledge about the market and competitive conditions affecting the energy sector, including the business of coal.

I am submitting this Verified Statement to explain to the Surface Transportation Board (“STB” or “Board”) the transportation at issue in this proceeding, BNSF’s history with Navajo Transitional Energy Company (“NTEC”), and the far-ranging implications of NTEC’s application.

II. BNSF’s Transportation of Coal from the Powder River Basin to Westshore Terminals

BNSF moves coal from mines in the Powder River Basin (“PRB”) of Montana and Wyoming to multiple destinations including West Coast ports in both the United States and Canada. BNSF transports thermal coal that NTEC mines from its Spring Creek, Montana mine to Westshore Terminals in Roberts Bank

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Superport in Delta, British Columbia, Canada (“Westshore”) for sale to entities located in Korea and Japan.

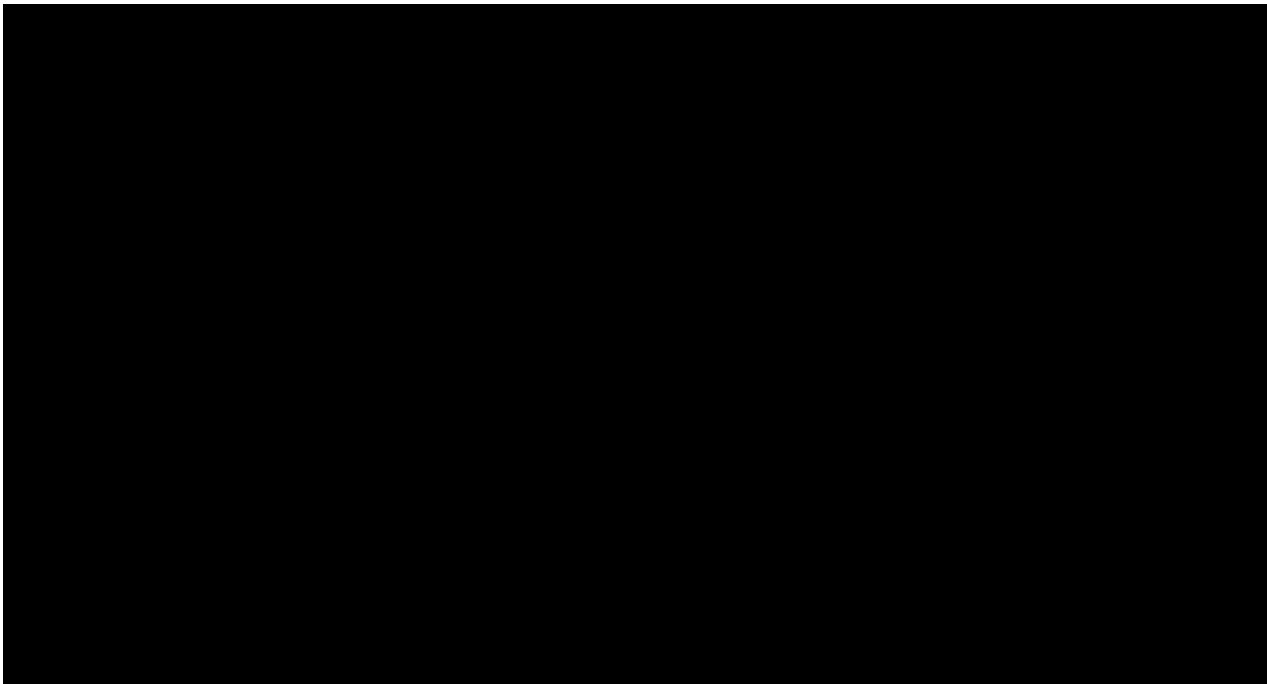
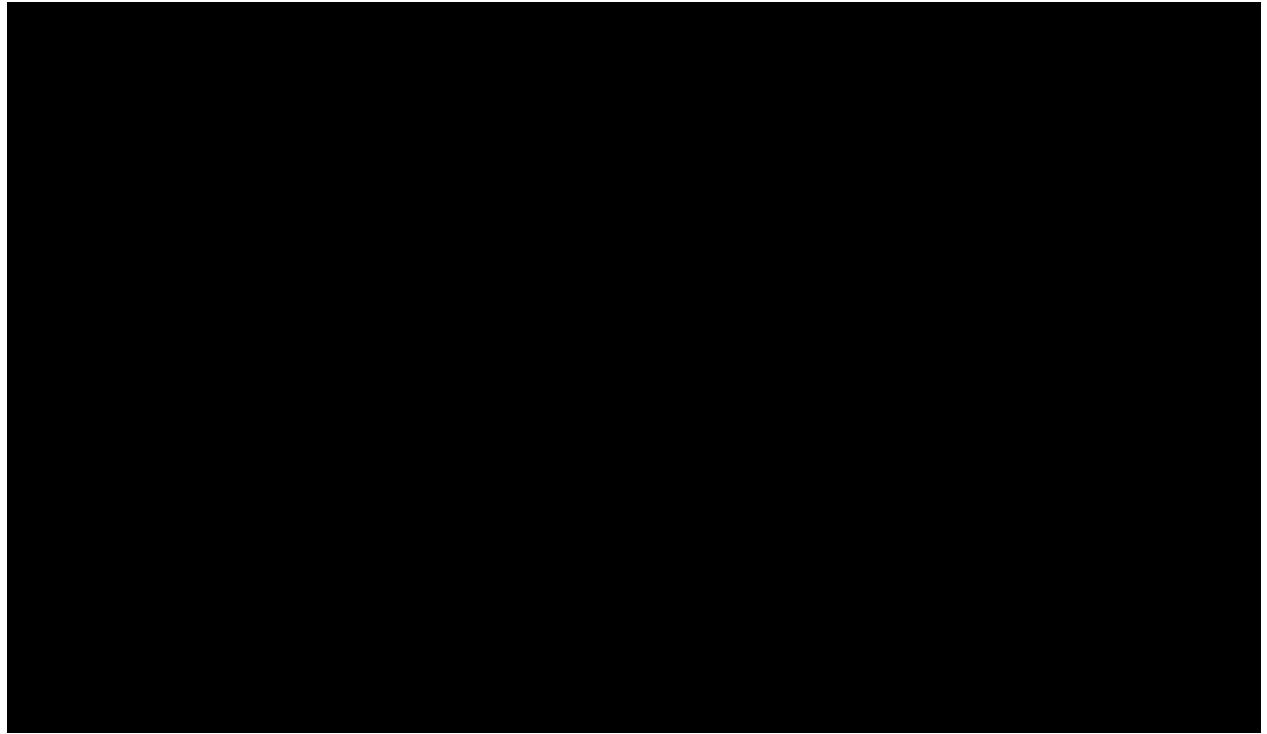
In addition to coal for export, substantial amounts of other commodities including grain, other agricultural commodities, intermodal containers, and energy products move over this part of the BNSF network.

NTEC acquired Spring Creek in 2019, when it purchased the assets of Cloud Peak Energy, Inc. (“Cloud Peak”) in bankruptcy. Spring Creek produces 15 million tons annually. In addition to Spring Creek, NTEC owns and operates three additional mines with significant output as reported by NTEC’s public website: Antelope Mine (approximately 40 million tons), Cordero Rojo Mine (approximately 30 million tons), and Navajo Mine (approximately 4.7 million tons).

The amount of Spring Creek coal that moves for export has fluctuated over the years. Over the last four years, approximately { [REDACTED] } of NTEC’s shipments from Spring Creek mine have moved to Westshore, the remaining portion of the Spring Creek shipments have moved to domestic destinations. In that time, BNSF has moved an average of { [REDACTED] } domestic tons for NTEC compared to { [REDACTED] } of export coal.

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Spring Creek is not the only mine moving coal to Westshore for export. {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]}}

{{

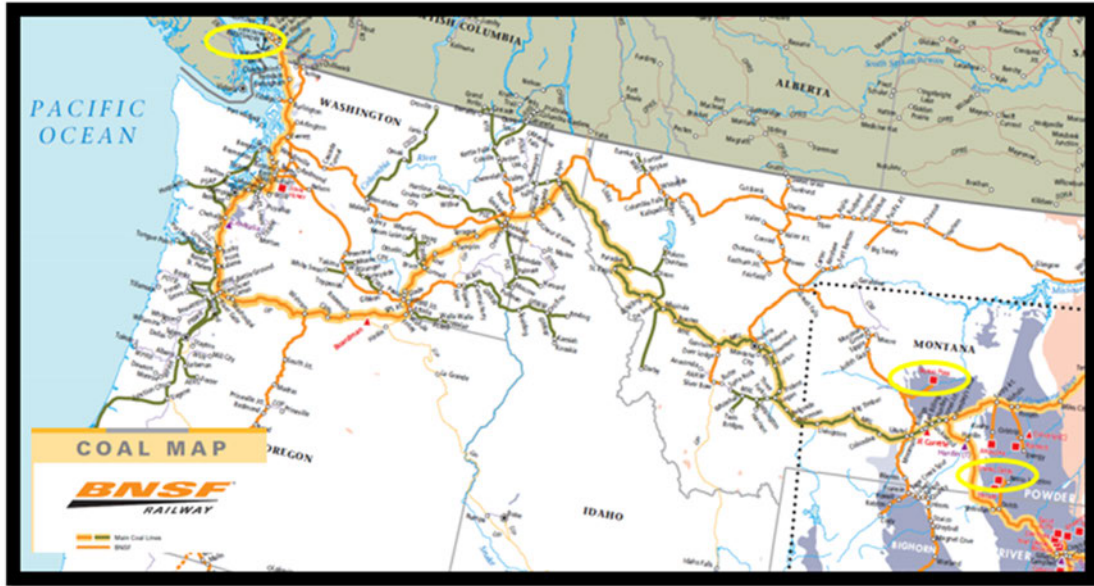
[REDACTED]

}}

In addition to NTEC and {{ [REDACTED] }}, BNSF also serves other coal shippers in the PRB that transport coal to Westshore for export to Asia including {{ [REDACTED] [REDACTED] }} is also planning to tender export coal shipments to BNSF as early as the second quarter of 2023.

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All of these export coal shipments on BNSF from the PRB to Westshore share the same route. The movements originate in the PRB and move north and west through Montana and then north through Everett, WA into Canada to Westshore's coal terminal in British Columbia. The route is illustrated in the map below.



The coal terminal at Westshore places constraints on the delivery of coal by BNSF. Westshore's capacity allocation is determined by several factors. First, Westshore allocates its capacity by commercial agreement with coal producers like NTEC, {{ [REDACTED] }}

In addition to commercial limitations, constraints associated with ocean vessels also determines how capacity is available at Westshore. Coal producers deliver coal to Westshore and purchase capacity on ocean going vessels to complete the transportation to end markets in Asia. Depending on the vessel, between 5 and 12 trainloads are necessary to fill a vessel for Asia and Westshore has limited

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storage capacity. As a result, BNSF has to coordinate its trains to facilitate the loading of vessels for BNSF's (and Westshore's) customers and accommodate variations such as extreme weather freezing coal and labor disruptions at the port.

III. BNSF's History with NTEC

BNSF's association with the Spring Creek mine predates NTEC's ownership. In 2008, the prior owner of the Spring Creek Mine, Cloud Peak Energy ("Cloud Peak"), began selling coal for export to Asia via Westshore. BNSF provided coal transportation service from Spring Creek to Westshore for Cloud Peak pursuant to a long-term contract {{ [REDACTED] }}.

Similarly, BNSF entered into a long-term contract with {{ [REDACTED] }}
[REDACTED]
[REDACTED]}}

After acquiring Cloud Peak's assets, NTEC became a party to the coal transportation contracts in place between BNSF and Cloud Peak, including the Amended and Restated BNSF-C-12820 covering export coal moving to Westshore through December 30, 2020, and a separate coal transportation agreement, BNSF-C-12828, which governed the transportation of coal from Spring Creek to the Westshore Terminal for sale to a single customer in Japan (i.e., JERA Trading Pte Ltd. or "JERA").

In April 2021, NTEC Chief Executive Officer Clark Moseley wrote to BNSF CEO Katie Farmer to express his "gratitude for the efforts of the BNSF coal

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marketing team in concluding a mutually agreeable commercial settlement with NTEC for disputed 2020 rail volume shortfalls.” Exhibit FL-02.

When BNSF-C-12820 expired at the end of 2020, the parties negotiated a new contract that { [REDACTED] }. The 2021 contract was originally for { [REDACTED] }, but was extended { [REDACTED] }, by agreement of the parties. The parties negotiated then a similar { [REDACTED] } { [REDACTED] } for 2022.

In 2021, the market for export coal expanded rapidly. As shown in the chart below, the Indonesian Coal Price, a good proxy for demand levels in the Asian trade, began rising rapidly beginning in the fall of 2020.

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Not surprisingly, NTEC wanted to increase the amount of coal it shipped to Westshore dramatically. BNSF was able to accommodate that demand at first, and BNSF moved a record amount of Spring Creek coal to Westshore in 2021. However, BNSF soon began experiencing systemwide performance issues in late 2021 and 2022 as a result of severe congestion on the network that was caused by a combination of factors. Significant and uneven surges in demand in 2021 coming out of the pandemic coupled with shortages of driver, chassis, and warehouse resources necessary to manage the unanticipated influx of volume in the supply

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chain created significant backlogs at critical BNSF terminals and, in turn, on our mainlines as trains were held short of those terminals. We also saw significant grain demand in the Pacific Northwest in the second half of 2021, and that was a region where we faced, and continue to face, the most difficult hiring environment.

BNSF President and CEO Katie Farmer wrote to NTEC in June of 2022 to express BNSF's desire to work closely with NTEC and noted that BNSF offered NTEC a significant commercial concession to help offset the financial impact on NTEC of receiving fewer coal deliveries in 2022 than desired, but that NTEC did not accept that offer. Exhibit FL-01.

The June 2022 letter noted “the history of prior dealings between the parties, which almost exclusively reflects BNSF making commercial concessions to the benefit of NTEC. In the past, NTEC tendered coal shipments to BNSF pursuant to an agreement that included minimum annual volume commitments and compensation owed to BNSF if NTEC failed to do so. In 2020, NTEC indeed failed to meet its commitment, resulting in NTEC owing BNSF a significant amount of liquidated damages. Because BNSF highly values its relationship with NTEC, BNSF agreed to settle its liquidated damages claim against NTEC for a fraction of the total amount owed by NTEC. This commercial concession came after BNSF had previously waived other contract entitlements and agreed to below market rates to help make NTEC's purchase of Cloud Peak's assets out of bankruptcy a financially viable endeavor.”

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The letter also noted that “[b]eginning in 2021, BNSF and NTEC changed the structure of our contract to give the parties more flexibility as coal volumes fluctuate, eliminating NTEC’s potential exposure to liquidated damages.”

With service challenges in the background, the parties began conversations in the summer of 2022 regarding a new agreement for 2023. One of the issues discussed was the availability of capacity to meet the high levels of volumes NTEC was requesting, which led to conversations regarding a possible long-term contract with the potential for volume commitments on both sides. As part of those conversations, the potential for a mutual release of claims against one another was discussed. BNSF offered financial concessions totaling over { ██████████ } Contrary to the assertions of NTEC, the idea of a waiver of claims in a 2023 agreement was neither one sided, nor introduced late in the negotiations.

At the end of 2022, however, NTEC abruptly pulled out of negotiations and sued BNSF in federal court for breach of contract under the 2022 agreement. BNSF established a common carrier rate for 2023 in response to NTEC’s request.

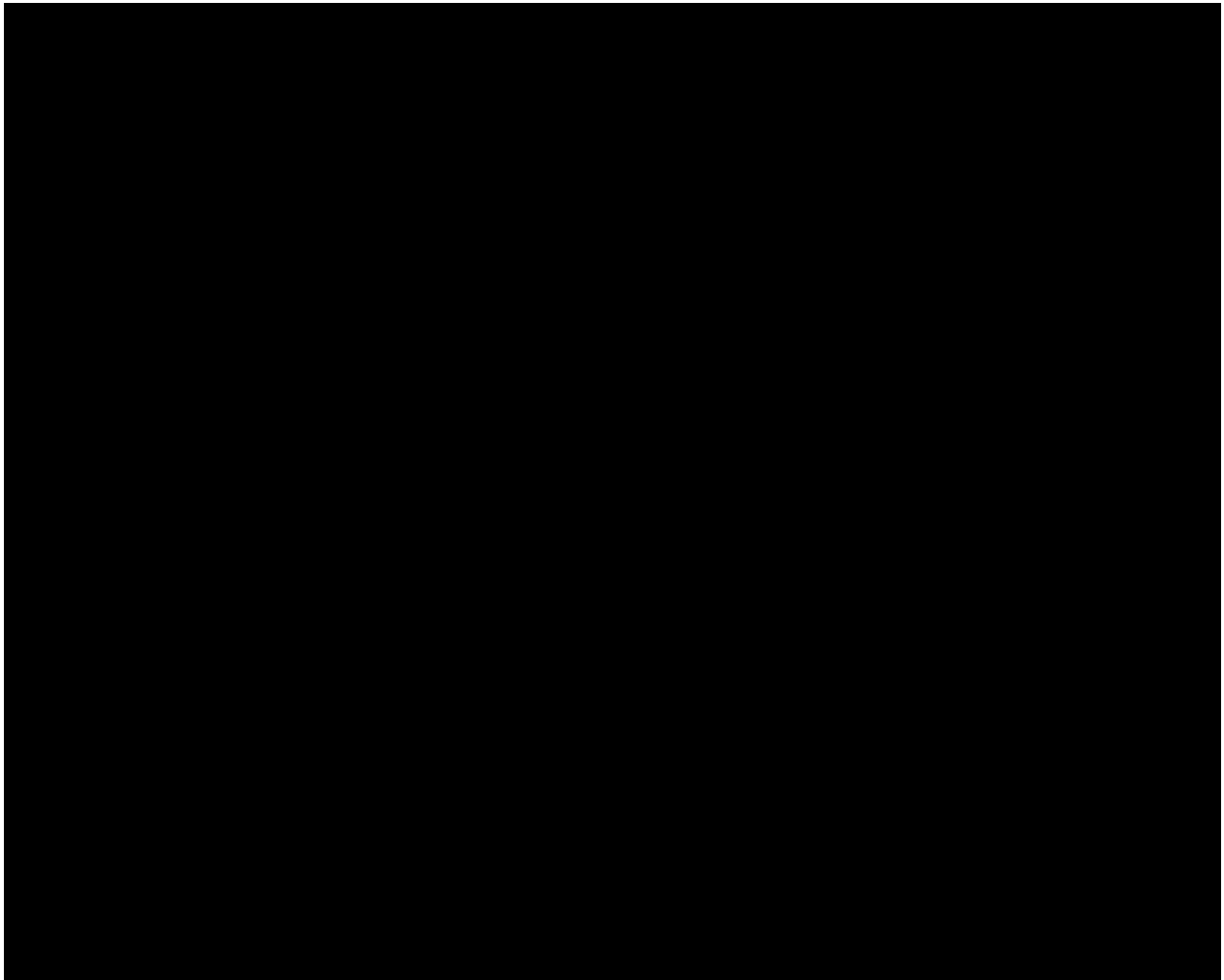
Throughout BNSF’s relationship with NTEC, BNSF has been forthright with NTEC about BNSF’s ability to meet their requests for volumes. Throughout 2022, BNSF was in consistent communication with NTEC. Recently, BNSF has held weekly operational calls with representatives of NTEC and Westshore to provide up to date information about available capacity. BNSF routinely provides updated train estimates and explores options with NTEC as the emerge.

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IV. Implications of NTEC requests for imposition of 2021-level volumes

BNSF has consistently communicated to NTEC that under current conditions BNSF cannot meet its demand that BNSF deliver approximately 440,000 tons of coal per month in BNSF supplied railcars, or roughly 29 trains per month.

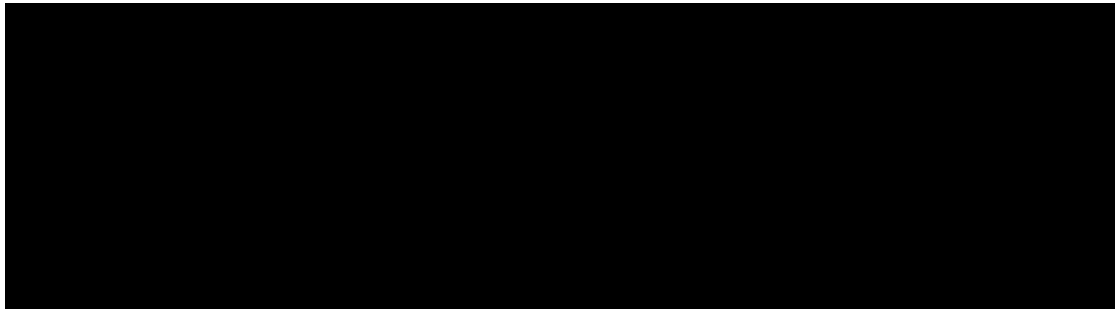
This request and NTEC's Application to the Board seek a dramatic increase in volumes. NTEC is asking for the imposition of monthly volumes of rail service that have only been provided in four out of the 38 months BNSF has moved coal for NTEC. {{



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}}

NTEC is now characterizing not receiving record volume levels as an emergency. BNSF moved more coal from the Spring Creek mine to export in 2021 than in any other year since that mine has been selling coal into the export market (2005). In fact, 2021 volumes were a 31% increase over the average export service that NTEC/Cloud Peak had consistently experienced over the prior ten years (2011-2021), and a 58% increase over the average export service that NTEC had received in the other two years they owned the Spring Creek mine, as illustrated in the chart below. {{



}}

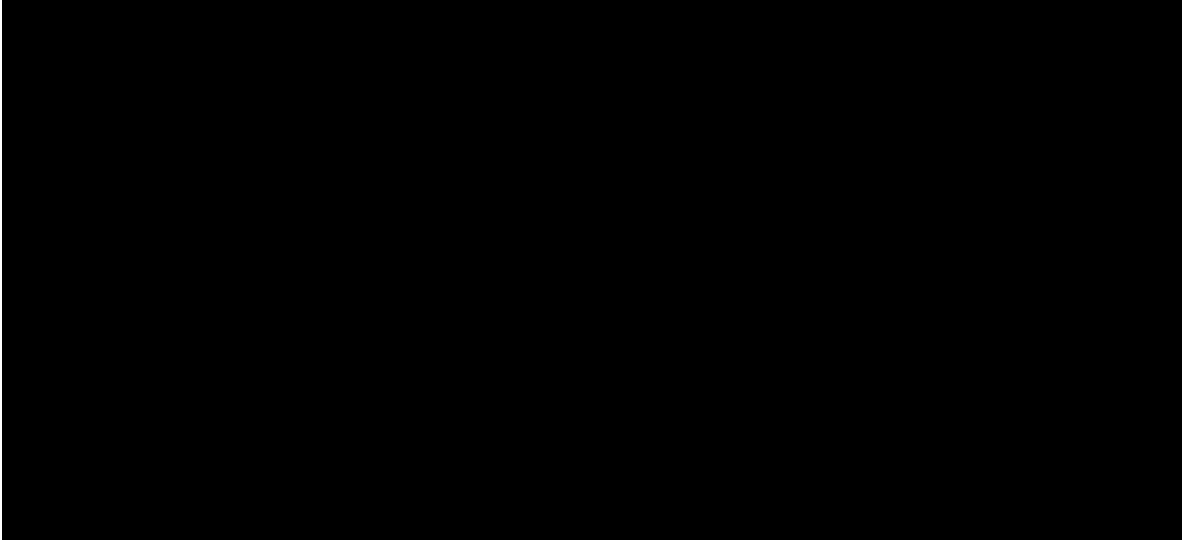
NTEC's current volumes levels are similar to other coal shippers. NTEC's average monthly volume in 2022 was {{ [REDACTED] }}, which exceeds the average monthly coal volumes for BNSF domestic utility shippers in 2022 and each of the last four years.

The Spring Creek to Westshore lane is a high-volume coal export route. Under current service levels, NTEC ranked { [REDACTED] } out of 90 BNSF coal lanes in the

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first quarter of 2023. What NTEC is asking the Board to impose would make them {█} out of 90 for 2023 annually, as illustrated in the chart below.

{{



}}

Moreover, there are short term constraints that prevent BNSF from increasing the volume of service at this time. Notwithstanding aggressive hiring, there are still constraints at Everett, WA, associated with limited crew availability. BNSF has increased our crew hiring efforts and offered incentive bonuses for hires in certain markets like Everett. BNSF is also temporarily redeploying available crew to address crew shortages and incentivizing temporary personnel transfers to address crew shortages where crews are particularly short.

There are also constraints on adding additional trains caused by limited equipment. Export coal shippers utilize BNSF-provided trainsets, representing substantial investment and financial risk for BNSF. BNSF would need an

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additional six or seven train sets for NTEC to move the requested volumes that are not currently available. The equipment making up coal train sets are used by both domestic and export coal shippers.

Thus, there is a finite amount of resources available for NTEC's transportation from the PRB to Westshore. If BNSF dedicates more crews and equipment to NTEC, there are necessarily fewer resources available to other Westshore shippers, other PNW shippers, or other coal shippers. As a result, BNSF has to allocate its capacity to ensure that all customers are served and that the network remains as fluid as possible.

BNSF appreciates and respects the sovereignty of the Navajo Nation and values the relationship that we have built over time. BNSF also values NTEC as a customer and remains open to continuing commercial discussions. BNSF will also continue to communicate with NTEC regarding the constraints on its existing capacity to allow for NTEC to make its business plans.

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VERIFICATION

I, Farah Lawler, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.

/s/ Farah Lawler

Farah Lawler

Executed on April 19, 2022.

Public Version



Katie Farmer
President and
Chief Executive Officer

BNSF Railway Company
P.O. Box 961052
Fort Worth, TX 76161-0052

2650 Lou Menk Drive
Fort Worth, TX 76131-2830
(817) 352-1215
(817) 352-7488 fax
katie.farmer@bnsf.com

June 24, 2022

The Honorable Jonathan Nez
President
The Navajo Nation
P.O. Box 7440
Window Rock, AZ 86515

Dear President Nez:

Thank you for your letter dated June 16, 2022 regarding BNSF's coal transportation agreement with Navajo Transitional Energy Company ("NTEC"), which we received on June 22. I only note those different dates to underscore that BNSF highly values our operational and commercial relationships with NTEC and the Navajo Nation and I am responding to your outreach as promptly as possible.

BNSF has acknowledged in many settings over recent months that we are not meeting the service expectations of our broad customer base. As part of that, we acknowledge that BNSF has not met NTEC's requested volume of coal shipments this year, and we understand that NTEC anticipates missing some opportunities to sell its coal in the export markets as a result. As you know, the terms of our contract align BNSF's and NTEC's interests in maximizing NTEC's market opportunities, and I assure you that we remain committed to working closely with NTEC as BNSF focuses on improving service levels to all BNSF customers.

With that in mind, on June 6, 2022 BNSF offered NTEC a significant commercial concession to help offset the financial impact on NTEC of thus far receiving fewer coal deliveries in 2022 than desired. NTEC did not accept that offer, but we remain hopeful that NTEC will continue to engage with us in those commercial discussions going forward. Unfortunately, NTEC continues to make incorrect assertions about the nature of BNSF's contractual obligations, which, respectfully, makes it more difficult to commercially resolve our contractual disagreements to the benefit of both parties. I understand that we may have different views on the nature of BNSF's service obligations under our contract, but the contract and our recent commercial history make clear that BNSF is not required to move any specific minimum volume of coal in 2022.

The structure of our current contract is an outgrowth of the history of prior dealings between the parties, which almost exclusively reflects BNSF making commercial concessions to the benefit of NTEC. In the past, NTEC tendered coal shipments to BNSF pursuant to an agreement that included minimum annual volume commitments and compensation owed to BNSF if NTEC failed to do so. In 2020, NTEC indeed failed to meet its commitment, resulting in NTEC owing BNSF a significant amount of liquidated damages. Because BNSF highly values its relationship with NTEC, BNSF agreed to settle its liquidated damages claim against NTEC for a fraction of the total amount owed by NTEC. This commercial concession came after BNSF had previously waived other contract entitlements and agreed to below market rates to help make NTEC's purchase of Cloud Peak's assets out of bankruptcy a financially viable endeavor.



June 24, 2022
The Honorable Jonathan Nez
The Navajo Nation

Page 2

Beginning in 2021, BNSF and NTEC changed the structure of our contract to give the parties more flexibility as coal volumes fluctuate, eliminating NTEC's potential exposure to liquidated damages. I disagree with your characterization that BNSF is favoring other customers over NTEC. During this period of service challenges, BNSF has been committed to honoring obligations relative to customer contract terms, including any committed volumes.

Again, BNSF understands that we have not delivered all the coal requested by NTEC in 2022 but we are making significant efforts to improve our service. Currently, service interruptions as a result of significant weather events and resource challenges are significantly impacting BNSF's service, including from NTEC's mines to Westshore Terminal in British Columbia. We are increasing our crew hiring efforts and temporarily redeploying available crew to address crew shortages. In addition, we are incentivizing temporary personnel transfers to address crew shortages where crews are particularly short. We are offering new hire incentives in those markets as well. We have increased the size of our locomotive fleet by 350 units since the start of winter, and have more coming online. We will continue to take steps to drive improvements and hope to build on some initial progress we are seeing on our Northern Region, which includes our critical coal network. As the situation evolves, BNSF is committed to communicating regularly with NTEC on service and delivery volume and schedules.

Again, we appreciate your outreach, and we value deeply our relationship with NTEC and the Navajo Nation. The commercial offer we recently extended reflects our ongoing commitment to that relationship, and we remain open to continuing those commercial discussions. BNSF also looks forward to a continued dialogue with NTEC about NTEC's coal needs and BNSF's service and performance.

Sincerely,

A handwritten signature in black ink that reads "Katie Farmer". The signature is written in a cursive, flowing style.

Katie Farmer
President and Chief Executive Officer

cc: Concetta Tsosie de Haro, Senate Committee on Indian Affairs
Alanna Purdy Montesinos, Office of U.S. Senator Ben Ray Lujan
Holt Edwards, Office of U.S. Senator Cynthia Lummis
Greg Abel, Chairman and CEO, Berkshire Hathaway Energy
Warren Buffett, CEO, Berkshire Hathaway Inc.

April 27, 2021

Ms. Katie Farmer
President and Chief Executive Officer
BNSF Railway
2650 Lou Menk Drive
Fort Worth, TX 76131-2830

Dear Katie,

I would like to express my gratitude for the efforts of the BNSF coal marketing team in concluding a mutually agreeable commercial settlement with NTEC for disputed 2020 rail volume shortfalls. Specifically, I appreciate the willingness of Steve Bobb to listen to our concerns and the quick execution by our BNSF sales representative, Jessie McCabe, to provide a resolution.

Last year we all experienced some significant challenges in our businesses, and I deeply appreciate that we were able to quickly agree on a course of action that helps to maintain the health of our business opportunities going forward.

Again, thank you for your continued support of NTEC's rail transportation needs, and I hope we have an opportunity to discuss our business together in the near future.

Sincerely,



Clark Moseley
Chief Executive Officer

KATIE, AGAIN, THIS AWIN FOR ALL!

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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing *BNSF Railway Company's Reply to NTEC's Ex Parte Application for Section 11123 Emergency Service Order* to be served electronically or by first-class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Tara A. Woods

Tara A. Woods
Attorney for BNSF Railway Company

April 19, 2023