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SEC

SERVICE DATE - MARCH 9, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42059

NORTHERN STATES POWER COMPANY
MINNESOTA D/B/A XCEL ENERGY

v.

UNION PACIFIC RAILROAD COMPANY

MOTION FOR PROTECTIVE ORDER

Decided: March 8, 2001

By complaint filed and served on defendant Union Pacific Railroad Company (UP) on January 26, 2001, Northern States Power Company Minnesota d/b/a Xcel Energy (NSP or complainant), challenges the reasonableness of the common carriage rates assessed by UP on complainant's unit-train movements of coal from origins in Wyoming, to NSP's electric generating facilities at Burnsville and Bayport, MN, and rates assessed by UP from an interchange point with The Burlington Northern and Sante Fe Railway Company (BNSF) at St. Paul, MN, to NSP's electric generating facility at Bayport (on complainant's unit-train movements of coal from origins in Montana).¹ Complainant alleges that UP possesses market dominance over the traffic and requests that maximum reasonable rates be prescribed along with other relief. Complainant also requests an award of reparations. UP answered on February 15, 2001.²

¹ UP's service was formerly provided under rail transportation contracts that expired on December 31, 2000. Because NSP and UP could not reach satisfactory replacement agreements, NSP asked UP to establish applicable common carrier rates under 49 U.S.C. 11101 and 49 CFR 1300. On January 10, 2001, UP established common carriage rate and service terms in response to NSP's request, effective January 1, 2001.

Because BNSF continues to provide its portion of the service from Montana origins under contract, over which the Board has no jurisdiction, 49 U.S.C. 10709(c), the rate applicable to UP's segment of the Montana movements can be separately reviewed. Central Power & Light Co. v. Southern Pac. Transp. Co., Nos. 41242 et al. (STB served Dec. 31, 1996), clarified (STB served Apr. 30, 1997).

² UP and NSP have entered into a partial settlement of their rate dispute that obviates the need for a stand-alone cost presentation. The parties have agreed that, should UP be found to
(continued...)

By joint motion filed February 16, 2001, the parties seek a protective order with respect to evidentiary submissions and discovery. The proposed order, as set out in the appendix, is consistent with the protective orders entered by the Board in recent rate proceedings.³ It includes provisions governing the production of highly confidential material and stipulates that the protected exchange of material will not constitute an unauthorized disclosure, or result in criminal penalties, under 49 U.S.C. 11904.

Good cause exists to grant the motion for protective order. The unrestricted disclosure of confidential, proprietary, or commercially sensitive material could cause serious competitive injury. Issuance of the requested protective order will ensure that the material produced, in response to a discovery request or otherwise, will be used only in connection with this proceeding and not for any other business or commercial purpose. The motion, as outlined by the Board, conforms with the Board's rules at 49 CFR 1104.14 governing requests for protective orders to maintain confidentiality of materials submitted to the Board and the rules at 49 CFR 1114.21(c) for a protective order regarding discovery. Accordingly, the motion for protective order will be granted.

On February 15, 2001, the parties filed a joint report on their conference, held pursuant to 49 CFR 1111.10(b), and have agreed on a procedural schedule with somewhat shorter time frames than those set forth at 49 CFR 1111.8, due to the fact that no stand-alone cost evidence will be presented in this case. The requested procedural schedule, set out below, will be adopted.

It is ordered:

1. The joint motion for protective order is granted.
2. The parties are directed to comply with the protective order in the appendix to this decision.
3. The procedural schedule in this proceeding is as follows:

April 11, 2001	End of discovery period.
May 18, 2001	Opening statements due.
June 18, 2001	Reply statements due.

²(...continued)
have market dominance over NSP's coal traffic, the rate should be limited to 180% of UP's variable cost of providing service to NSP.

³ See Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42056 (STB served Nov. 13, 2000), and cases cited therein.

July 18, 2001

Rebuttal statements due.

4. This decision is effective on its service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

APPENDIX

PROTECTIVE ORDER

1. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings or evidence, that the party believes in good faith reveals proprietary or confidential information, may designate and stamp such material as “CONFIDENTIAL,” and such material must be treated as confidential. Such material, any copies thereof, and any data or notes derived therefrom may be disclosed only to employees, counsel, or agents of the party receiving such material who have a need to know, handle, or review the material for purposes of this proceeding and any judicial review proceeding arising therefrom, and only where such employee, counsel, or agent has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Confidential Material prior to receiving access to such materials.

2. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings or evidence, may in good faith designate and stamp particular material, such as material containing shipper-specific rate or cost data or other competitively sensitive information, as “HIGHLY CONFIDENTIAL.” Material that is so designated may be disclosed only to another party’s outside counsel of record in this proceeding, and to those individuals working with or assisting such counsel who are not employees of the party and have a need to know, review or handle the Highly Confidential materials for purposes of the proceeding, including testifying and consulting experts, provided each such person has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Highly Confidential Material prior to receiving access to such materials.

3. Confidential and Highly Confidential material shall be used by a receiving party solely for the purpose of this proceeding and any judicial review proceeding arising therefrom, and not for any other business, commercial, or competitive purpose.

4. Confidential and Highly Confidential material that is not the receiving party’s own data, information or documents must be destroyed by the receiving party, its employees, counsel, and agents, at the completion of this proceeding and any judicial review proceeding arising therefrom, except that (1) outside counsel (but not outside consultants) for each party are permitted to retain file copies of all pleadings and evidence filed with the Board, and file copies of all work product; and (2) in-house counsel for each party are permitted to retain file copies of all pleadings and evidence which he or she received during the course of this proceeding.

5. Confidential and Highly Confidential material if contained in any pleading or evidence filed with the Board shall, in order to be kept confidential, be filed only in pleadings or evidence submitted in a package clearly marked on the outside “Confidential Materials Subject to Protective Order” or “Highly Confidential Materials Subject to Protective Order.” See 49 CFR 1104.14.

6. In the event that a party produces material which should have been designated as Confidential or Highly Confidential and inadvertently fails to stamp the material as Confidential or Highly Confidential, the producing party may notify the other party in writing within 10 days of discovery of its inadvertent failure to make the confidentiality designation. The party who received the material without the confidentiality designation will return the non-designated portion or destroy it, as directed by the producing party, or take such other steps as the parties agree to in writing. The producing party will promptly furnish the receiving party with properly designated material.

7. In the event that a party inadvertently produces material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, the producing party may make a written request within a reasonable time after the producing party discovers the inadvertent disclosure that the other parties return the inadvertently produced privileged document. The parties who received the inadvertently produced document will either return the document to the producing party or destroy the document immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the document, the receiving party is not conceding that the document is privileged and is not waiving its right to later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege.

8. If any party intends to use Confidential and/or Highly Confidential material at hearings in this proceeding, or in any judicial review proceeding arising therefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such Confidential and/or Highly Confidential material to any Administrative Law Judge, the Board, or the court, with a written request that the Judge, the Board, or the court: (a) restrict attendance at the hearings during discussion of such Confidential and/or Highly Confidential material; and (b) restrict access to the portion of the record or briefs reflecting discussion of such Confidential and/or Highly Confidential material in accordance with the terms of this Protective Order.

9. If any party intends to use Confidential and/or Highly Confidential material in the course of any deposition in this proceeding, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent, and all other counsel attending the deposition, and all portions of the deposition at which any such Confidential and/or Highly Confidential material is used shall be restricted to persons who may review the material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose Confidential and/or Highly Confidential materials shall be kept under seal and treated as

Confidential and/or Highly Confidential material in accordance with the terms of this Protective Order.

10. To the extent that material reflecting the terms of contracts, shipper-specific traffic data, other traffic data, or other proprietary information is produced by a party in this or any related proceedings and is held and used by the receiving person in compliance with this Protective Order, such production, disclosure, and use of the material and of the data that the material contains will be deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. 11904.

11. Except for this proceeding, the parties agree that if a party is required by law or order of a governmental or judicial body to release designated Confidential or Highly Confidential material produced by the other party or copies or notes thereof as to which it obtained access pursuant to this Protective Order, the party so required shall notify the producing party in writing within 3 working days of the determination that the Confidential material, Highly Confidential material, or copies or notes are to be released or within 3 working days prior to such release, whichever is soonest, to permit the producing party to contest the release.

12. All parties must comply with all of the provisions stated in this Protective Order unless good cause, as determined by an Administrative Law Judge decision from which no appeal is taken or by the Board, warrants suspension of any of the provisions herein.

13. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it shall not be subject to this Protective Order even if the same information is produced and designated as Confidential or Highly Confidential in this proceeding.

14. A Confidential or Highly Confidential designation may be removed by consent of a party who asserts the confidentiality, proprietary, or commercially sensitive interest, or, absent such consent, by appropriate Order of the Board, or an Administrative Law Judge from which no appeal is taken, upon application of a party seeking to remove such designation.

15. Each party has a right to view its own data, information and documentation, even if that data, information and documentation has been designated as Highly Confidential by a producing party, without securing prior permission from the producing party.

**UNDERTAKING
CONFIDENTIAL MATERIAL**

I, _____, have read the Protective Order served on March 9, 2001, governing the production of confidential documents in STB Docket No. 42059, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any confidential data or information obtained pursuant to this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than the preparation and presentation of evidence and argument in STB Docket No. 42059 or any judicial review proceeding arising therefrom. I further agree not to disclose any confidential data or information obtained under this Protective Order to any person who is not also bound by the terms of the Order and has not executed an Undertaking in the form hereof. At the conclusion of this proceeding and any judicial review proceeding arising therefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel (but not outside consultants) may retain file copies of its work product and of pleadings and evidence filed with the Board, and in-house counsel may retain file copies of all pleadings and evidence containing confidential material it received during the course of this proceeding. I further understand that a party may retain its own confidential material.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that a party which asserts the confidential interest shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach. I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Dated: _____

**UNDERTAKING
HIGHLY CONFIDENTIAL MATERIAL**

As outside [counsel] [consultant] for _____, for which I am acting in this proceeding, I have read the Protective Order served on March 9, 2001, governing the production of confidential documents in STB Docket No. 42059, understand the same, and agree to be bound by its terms. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated "HIGHLY CONFIDENTIAL," that I will limit my use of those documents and the information they contain, and the use of any techniques disclosed or information learned as a result of receiving such data or information, to the preparation and presentation of evidence and argument in STB Docket No. 42059 and any judicial review proceeding arising therefrom, that I will take all necessary steps to assure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners, except as otherwise provided in the Protective Order, and that at the conclusion of this proceeding and any judicial review proceeding arising therefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel (but not outside consultants) may retain file copies of its work product and of any pleadings and evidence filed with the Board. I further understand that I must destroy all notes or other documents containing such highly confidential information received from the other party in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated "HIGHLY CONFIDENTIAL" by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that a party which asserts the highly confidential interest shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach. I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

OUTSIDE [COUNSEL] [CONSULTANT]

Dated: _____