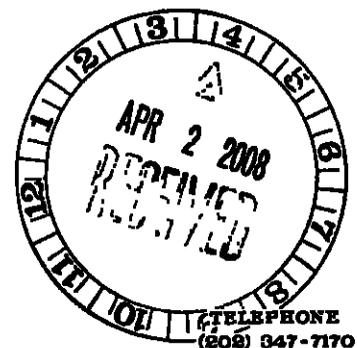


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April 2, 2008

221974

**VIA HAND DELIVERY**

The Honorable Anne K. Quinlan  
Acting Secretary  
Surface Transportation Board  
395 E Street, SW  
Washington, D C. 20423-0001

ENTERED  
Office of Proceedings

APR - 2 2008

Part of  
Public Record

Re: SIB Docket No. 42105, Dairyland Power  
Cooperative v Union Pacific Railroad Company

Dear Ms. Quinlan:

Enclosed for filing in the above-referenced proceeding, please find an original and ten (10) copies of (1) Dairyland Power Cooperative's Report on the Parties' Conference and (2) Motion for Protective Order.

We have included an extra copy of each of these filings. Please indicate receipt by time-stamping these copies and returning them with our messenger.

Sincerely,

John H. LeSeur

Enclosures  
cc: UP Counsel

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**



DAIRYLAND POWER COOPERATIVE )  
 )  
 )  
 Complainant. )  
 )  
 v. )  
 )  
 UNION PACIFIC RAILROAD COMPANY )  
 )  
 )  
 Defendant. )

Docket No. 42105

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ENTERED  
Office of Proceedings  
APR - 2 2008  
Public Record

**DAIRYLAND POWER COOPERATIVE'S  
REPORT ON THE PARTIES' CONFERENCE**

Pursuant to 49 C.F.R. §1111.10(a), counsel for Complainant Dairyland Power Cooperative ("Dairyland") and Defendant Union Pacific Railroad Company ("UP") have conducted a conference to discuss procedural and discovery matters in this case. The results of this conference are summarized below.

1. Dairyland proposed that the parties jointly request that the Board enter an order adopting the procedural schedule set forth in Appendix A and the protective order set forth in Appendix B.
2. UP has rejected Dairyland's proposals. UP's position, as Dairyland understands it, is that the Board should not issue a procedural schedule and protective order until the Board rules on UP's Motion to Dismiss, filed on March 31, 2008.

3. In the absence of an agreement, 49 C.F.R. §1111.10(a) calls for individual parties to file a report proposing a procedural schedule. Dairyland asks the Board to adopt the schedule set forth in Appendix A. The Appendix A schedule is a standard form procedural schedule that is commonly used in STB administrative adjudications handled under the Board's modified procedure. The schedule calls for discovery, followed by opening, reply and rebuttal statements.

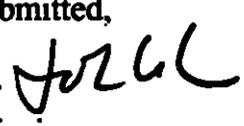
4. UP's objection to the issuance of a procedural schedule is meritless. UP has dredged up a tactical maneuver that plagued the STB and its predecessor agency for years – unilateral attempts by railroad defendants to stop agency proceedings from going forward pending agency resolution of their motions to dismiss. In 1996, the Board adopted rules banning this tactic in cases where a procedural schedule is in place. See Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, 1 S.T.B. 859, 864 (1996) and 1 S.T.B. 754, 763-764 (1996); 49 C.F.R. 1112.2 (“[t]he filing of motions or other pleadings will not automatically stay or delay the established procedural schedule”). The same principles apply, and govern, in cases where a railroad seeks to block the promulgation of a procedural schedule pending resolution of its motion to dismiss. See, e.g., AEP Texas North Co. v. BNSF Ry. Co., STB Docket No. 41191 (Sub-No. 1) (STB served Sept. 11, 2003) at 2 (denying a defendant carrier's request asking the Board to withhold issuance of a procedural schedule until the Board decided the carrier's motion to dismiss).

5. Dairyland asks the Board to follow its now well-established practice of adopting a procedural schedule and directing that the schedule be followed by the parties pending Board resolution of all motions, including motions to dismiss, in accordance with the Board's rules of practice.

6. Dairyland's proposed procedural schedule contains a 46 day discovery period. Dairyland has discussed with counsel for UP the need for prompt discovery. Dairyland reserves the right to request discovery conferences, and to request expedited action to resolve any discovery disputes, as circumstances warrant.

7. Dairyland understands that UP does not object to the form of the proposed protective order set forth in Appendix B, but instead objects to the issuance of any protective order at this time. Dairyland plans to initiate discovery shortly and, as called for under 49 C.F.R. §1104.14(b), will file a separate motion asking the Board to adopt the Appendix B protective order.

Respectfully submitted,

John H. LeSeur   
Frank J. Pergolizzi  
Peter A. Pfohl  
Slover & Loftus  
1224 Seventeenth Street, N.W.  
Washington, D.C. 20036

Attorneys for Dairyland Power  
Cooperative

Dated: April 2, 2008

**PROPOSED PROCEDURAL SCHEDULE**

| <b><u>DATE</u></b> | <b><u>DAY</u></b> | <b><u>EVENT</u></b>              |
|--------------------|-------------------|----------------------------------|
| March 5, 2008      | 0                 | Complaint filed                  |
| March 25, 2008     | 0 + 20            | Answer to Complaint              |
| April 3, 2008      | 0 + 28            | Discovery Begins                 |
| May 19, 2008       | 0 + 74            | End of discovery                 |
| June 18, 2008      | 0 + 104           | Dairyland Opening Statement due  |
| July 18, 2008      | 0 + 134           | UP Reply Statement due           |
| August 18, 2008    | 0 + 165           | Dairyland Rebuttal Statement due |

**PROTECTIVE ORDER**

1. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, that the party in good faith believes reflects proprietary or confidential information, may designate and stamp such material as "CONFIDENTIAL," and such material must be treated as confidential. Such material, any copies, and any data or notes derived therefrom:
  - (a) Shall be used solely for the purpose of this proceeding and any judicial review proceeding arising herefrom, and not for any other business, commercial, or competitive purpose.
  - (b) May be disclosed only to employees, counsel, or agents of the party requesting such material who have a need to know, handle, or review the material for purposes of this proceeding and any judicial review proceeding arising herefrom, 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.
  - (c) Must be destroyed by the requesting party, its employees, counsel, and agents, at the completion of this proceeding and any judicial review proceeding arising herefrom. However, outside counsel for a party are permitted to retain file copies of all pleadings filed with the Board.
  - (d) If contained in any pleading filed with the Board shall, in order to be kept confidential, be filed only in pleadings submitted in a package clearly marked on the outside "Confidential Materials Subject to Protective Order." *See* 49 CFR 1104.14.
2. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, may in good faith designate and stamp particular material, such as material containing shipper-specific rate or cost data or other

**APPENDIX B**  
**STB Docket No. 42105**

competitively sensitive information, as "HIGHLY CONFIDENTIAL." If any party wishes to challenge such designation, the party may bring such matter to the attention of the Board or any Administrative Law Judge presiding over this proceeding. Material that is so designated may be disclosed only to outside counsel or outside consultants of the party requesting such materials who have a need to know, handle, or review the materials for purposes of this proceeding and any judicial review proceeding arising herefrom, provided that such outside counsel or outside consultants have been given and have read a copy of this Protective Order, agree to be bound by its terms, and execute the attached Undertaking for "HIGHLY CONFIDENTIAL" material prior to receiving access to such materials. Material designated as "HIGHLY CONFIDENTIAL" and produced in discovery under this provision shall be subject to all of the other provisions of this Protective Order, including without limitation paragraph 1.

3. 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 5 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.
4. 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 party return the inadvertently produced privileged document. The party 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.

**APPENDIX B**  
**STB Docket No. 42105**

5. 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 the Administrative Law Judge, the Board, or the court, as appropriate, 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.
  
6. 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” material shall be kept under seal and treated as “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in accordance with the terms of this Protective Order.
  
7. Each party is ordered to produce to the other rail transportation and other contracts which, because of confidentiality provisions, cannot be produced without a Board order directing their production to the extent that (1) the other party has requested that the contracts be produced in discovery, and (2) the parties agree that the requested contracts are relevant in preparing their evidence in this proceeding. Any such contracts shall be treated as “HIGHLY CONFIDENTIAL” and shall otherwise be subject to the terms of this Protective Order. 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

**APPENDIX B**  
**STB Docket No. 42105**

and any related proceedings and will not be deemed a violation of 49 U.S.C. § 11904.

8. 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 "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 the opportunity to contest the release.
9. 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.
10. 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.
11. Each party has a right to view its own data, information and documentation (i.e., information originally generated or compiled by or for that party), 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. If a party (the "filing party") files and serves upon the other party (the "reviewing party") a pleading or evidence containing the filing party's "HIGHLY CONFIDENTIAL" material, the filing party shall also prepare and serve contemporaneously upon the reviewing party a "CONFIDENTIAL" version of the pleading or evidence from which the filing party's "HIGHLY CONFIDENTIAL" material has been redacted. The "CONFIDENTIAL" version may be provided in hardcopy or electronic format at the option of the filing party, and may be disclosed to those personnel employed by the reviewing party who have read a copy of this Protective Order and executed the attached Undertaking for CONFIDENTIAL Material ("In-house Personnel"). Alternatively, in lieu of preparing and serving a "CONFIDENTIAL" version of any such pleading or

**APPENDIX B**  
**STB Docket No. 42105**

evidence, the filing party may provide to outside counsel for the reviewing party a list of the filing party's own "HIGHLY CONFIDENTIAL" information that must be redacted from its "HIGHLY CONFIDENTIAL" version prior to review by the reviewing party's In-house Personnel. If the filing party chooses this latter option, it shall provide the list to outside counsel for the reviewing party contemporaneously with the filing of the "HIGHLY CONFIDENTIAL" version, and such outside counsel shall redact the designated material prior to review of the pleading or evidence by the reviewing party's In-house Personnel.

**UNDERTAKING**  
**CONFIDENTIAL MATERIAL**

I, \_\_\_\_\_, have read the Protective Order served \_\_\_\_\_, 2008, governing the production of confidential documents in STB Docket No. 42105, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under 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. 42105 or any judicial review proceeding arising therefrom. I further agree not to disclose any 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 may retain file copies of pleadings filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and 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 \_\_\_\_\_, 2008, governing the production of confidential documents in STB Docket No. 42105, 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 to this proceeding 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, 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 may retain file copies of pleadings filed with the Board. I further understand that I must destroy all notes or other documents containing such highly confidential information 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 parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and 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.

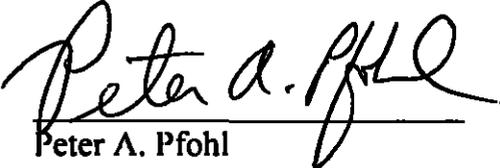
\_\_\_\_\_  
OUTSIDE [COUNSEL][CONSULTANT]

Dated: \_\_\_\_\_

## CERTIFICATE OF SERVICE

I hereby certify that this 2nd day of April, 2008, I served a copy of the foregoing Report on the Parties' Conference by hand delivery on designated outside counsel for UP, as follows:

Linda J. Morgan  
Michael L. Rosenthal  
Covington & Burling  
1201 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

  
Peter A. Pfohl