

Defendant.

the parties were not able to reach an agreement on UP's responses to the Interrogatories covered by this motion within the 10 days permitted by §1114.31(a).² In support of this motion, OPPD states as follows:

A. UP's General Responses to OPPD's First Requests

As a threshold objection, UP has stated that, except for a few requests unilaterally chosen by UP, its production of information and documents responsive to OPPD's First Requests would only occur if the Board denies UP's Motion for a Protective Order, which UP filed on August 1, 2022 in this docket. UP's motion asks the Board to "quash OPPD's discovery requests and stay any further discovery by OPPD pending (i) OPPD's completion of its production of documents responsive to UP's discovery requests, and (ii) the Board's resolution of UP's motion to dismiss."³ OPPD has provided the reasons why UP's motion should be denied in OPPD's Reply filed August 22, 2022, and OPPD reiterates here that there is no basis for granting UP's motion and staying any discovery in this case. Consistent with that position, OPPD asserts a general argument in this Motion to Compel that UP should be directed to answer all of the Interrogatories served by OPPD that are not specifically discussed hereinbelow.

B. The Interrogatories for Which OPPD Seeks an Order Directing UP to Submit a Response

Set forth below are the specific Interrogatories that the parties were unable to reach agreement concerning UP's response and objection(s). They are grouped in three categories. The reasons why a response, or a more complete response, as the case may be, is necessary and required under the Board's discovery rules are provided by OPPD after each grouping or individual Interrogatory.

² OPPD notes that the parties are discussing UP's responses to other Interrogatories but as of the expiration of the 10-day period the parties were in general agreement on UP's responses to those requests.

³ UP Motion for a Protective Order at 3.

1. Interrogatories 5, 9, and 10

Interrogatory 5

Please identify the location and name of each intermodal terminal, Automotive Distribution Center, bulk transfer facility or yard located on UP Lines in Nebraska.

UP Response

UP objects to this Interrogatory because it is overbroad, is unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence to the extent it requires identification of facilities across the entire state of Nebraska.

Subject to and without waiving its objections, UP will produce a list identifying the locations and names of the requested facilities located on lines owned by UP in the vicinity of Omaha, Nebraska.

Interrogatory 9

Please describe how hazardous materials are handled by UP in each of the yards identified in response to Interrogatory No. 5, and specifically describe the procedures used by UP to classify railcars containing hazardous materials and if such classification occurs in a separately designated portion of the yards.

UP Response

UP objects to this Interrogatory to the extent it calls for disclosure of Security Sensitive Information (SSI). UP also objects to this Interrogatory because it is overbroad, is unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence to the extent it requires information about yards located across the entire state of Nebraska.

Subject to and without waiving its objections, UP will produce business records or other documents from which information responsive to this Interrogatory can be derived or ascertained with respect to UP yards in the vicinity of Omaha, Nebraska, to the extent such documents can be produced consistent with UP's legal obligations to safeguard SSI, and to the extent UP handles hazardous materials in its yards in the vicinity of Omaha, Nebraska.

Interrogatory 10

Please identify UP affiliates that provide services to UP in Nebraska. Describe the

services provided by these affiliates. Also provide a description of payments made to affiliates, equity contributions made to affiliates, distributions from affiliates, and other financial or accounting transactions between UP and affiliate.

UP Response

UP objects to this Interrogatory because the terms “affiliates” and “financial or other accounting transactions” are vague and undefined. UP also objects to this Interrogatory because it is overbroad, is unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence to the extent it requires information about services provided across the entire state of Nebraska.

Subject to and without waiving its objections, UP will produce business records or other documents from which information requested by this Interrogatory may be derived or ascertained, and to the extent UP affiliates provide services to UP in the vicinity of Omaha, Nebraska.

In each of the foregoing Interrogatories OPPD has asked for information concerning UP’s facilities and services in the state of Nebraska. However, in each of its responses, UP has said it will only produce responsive information limited to its facilities and services “in the vicinity of Omaha, Nebraska,”⁴ a geographic area that UP does not define. In the first place, UP’s boilerplate objection that these requests are “overbroad and unduly burdensome” should be ignored. Clearly, asking for information limited to UP’s facilities and services in the State of Nebraska is sufficiently focused and imposes no undue burden on UP, particularly since the request is an Interrogatory which asks for written answers. Second, information concerning UP’s facilities and services in Nebraska are clearly relevant to the issues in this case because the North Omaha Power Station (“NOPS”) is located in Nebraska, as are UP’s rail facilities. The information requested is particularly relevant and probative if OPPD seeks to test the reasonableness of the rate at issue using the Board’s Stand-Alone Cost (“SAC”) methodology,

⁴ OPPD notes that UP has asserted this same restriction in at least nine of its responses to the requests for production of documents contained in OPPD’s First Requests, and OPPD therefore reserves its rights to compel appropriate responses to those requests if future circumstances dictate an additional motion to compel.

which requires the complainant to develop a hypothetical competitor to the incumbent railroad to test the reasonableness of the challenged rate. As the complainant, OPPD is afforded significant leeway in preparing its evidentiary submissions, and therefore its is permitted discovery of a broad range of relevant information from the defendant.

In contrast, the vague restriction that UP seeks to impose appears to be based primarily on UP's opinion of what information from OPPD might need to prepare its evidence in this case. According to UP, what it considers to be appropriately within "the vicinity of Omaha, Nebraska" would be determined for each request depending on OPPD's showing of need for the requested information. This position is obviously contrary to the rules of discovery, which permit discovery of material that is relevant and probative even if a party might decide not to use in its evidence for whatever reason.⁵ More significantly, UP's proposed limitation would restrict OPPD's ability to develop and present a SAC model and evidentiary presentation that replicated UP's tracks in Nebraska, should OPPD choose to do so. UP should be directed to respond in full to Interrogatories 5, 9, and 10.

2. Interrogatories 11 and 12

Interrogatory 11

Please state whether UP has calculated its current cost of equity capital ("COE") or current weighted average cost of capital ("COC") during the period January 1, 2019 through the present. If it has, please identify (a) the COE and/or COC values that UP calculated and the periods (including future periods) for which the values were calculated; (b) the methodology, assumptions and inputs used to determine the values; (c) whether and how UP utilized the values that were calculated; and (d) any adjustments that UP made in calculating and/or utilizing the values. Please identify all documents that support your response and/or that memorialize your calculations.

UP Response

⁵ *Arizona Electric Power Coop, Inc. v. BNSF Railway Co. and Union Pacific Railroad Co.*, Docket No. 42113 (Served November 22, 2011) at 14-25, where Board confirmed that a complainant has the latitude in designing its stand-alone railroad, replicating portions of the defendant's network or none of it at all.

UP objects to this Interrogatory because it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Interrogatory No. 12

Please describe your methodology and inputs for calculating UP's COE and COC for the time periods specified in response to the previous Interrogatory. Please describe any adjustments that were made to the COE and COC values in performing the calculations. Please identify all documents that support your response.

UP Response

UP objects to this Interrogatory because it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

UP has flatly refused to provide any responses to these two Interrogatories. Contrary to UP's relevance objection, however, the information sought by Interrogatories 11 and 12 is clearly relevant to the issues in this proceeding and would lead to the discovery of admissible evidence. In paragraph 23 of its Complaint OPPD stated that one of the methodologies it might utilize to testing the reasonableness of the rate at issue is the methodology for determining the reasonableness of reciprocal switch charges proposed by the Board in Docket No. EP 71 (Sub. No.1), *Petition for Rulemaking to Adopt Revised Competitive Switching Rules* (Served July 27, 2016). The proposed methodology is based on the trackage rights compensation methodology used in Finance Docket No. 30,000 (Sub-No. 16), *St. Louis Southwestern Railway Company – Trackage Rights Over Missouri Pacific Railroad Company – Kansas City to St. Louis*. That methodology (the so-called "SSW Compensation") utilizes the incumbent railroad's COE and COC, and so this information is highly relevant to the issues in this case and UP should be directed to respond if full to Interrogatories 11 and 12.

3. Interrogatories 18, 19, 20, and 21

Interrogatory 18

Please identify any discussions since January 1, 2019 between representatives of UP and representatives of equity and debt analysts and/or rating agencies relating to: (a) UP's Replacement Costs, their calculation or their use in financial planning or the setting of revenue goals; (b) UP's ability to meet the Revenue Adequacy Criteria; and (c) UP's success or lack of success in earning returns on invested capital equal to its COC or COE. Please describe in detail the substance of all such discussions. Please identify all documents that support your Answer or that relate to or memorialize any of those discussions.

UP Response

UP objects to this Interrogatory because it is overbroad, is unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. UP also objects to this Interrogatory because it is unduly burdensome in requiring UP to identify "all documents" that support its Answer or that relate to or that memorialize its discussions.

The information requested in Interrogatory No.18 will provide data needed in any forward-looking maximum rate methodology currently utilized by the Board or currently being evaluated by the Board. Such methodologies include the Revenue Adequacy Constraint from *Coal Rate Guidelines, Nationwide*,⁶ which OPPD specifically referenced in paragraph 22 of its Complaint. In addition to assisting OPPD solve for the maximum reasonable rate based on the Revenue Adequacy Constraint methodology⁷, a complete response to this Interrogatory will provided information needed to forecast revenue and volume changes over the time period called for in the model OPPD elects to use to demonstrate that the UP rate is unreasonable. UP should be directed to provide the information requested by this Interrogatory.

⁶ *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520 (1985), *aff'd sub nom. Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987)

⁷ *See, CF Industries v. Koch Pipeline, Co. LP*, STB Docket No. 41685 (served May 14, 1997) at 6 ("One of the CMP constraints is the so-called revenue adequacy constraint, which evaluates whether a carrier is earning sufficient revenues "over time, to average [a] return on investment equal to its cost of capital" citing *Coal Rate Guidelines*, 1 I.C.C.2d at 536).

Interrogatory 19

Please state whether, and if so, describe how the determination of compensation paid to UP executives takes into account: (a) UP's COC or COE; (b) whether UP's earnings or return on investment have matched or exceeded its COC or COE; and (c) whether UP's earnings are sufficient to cover Replacement Costs. If the COC or COE is taken into account, please identify the COC and/or COE percentages used, the methodology for calculating the COC and/or COE, and all inputs utilized. If UP's earnings relative to the COC or COE are taken into account, please identify how the earnings and investment base used in that accounting are determined. If Replacement Costs are taken into account, please identify how Replacement Costs are determined. Please identify all documents that support your Answer.

UP Response

UP objects to this Interrogatory because the term "executives" is vague and undefined. UP also objects to this Interrogatory because it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. UP also objects to this Interrogatory because information regarding UP's executive compensation policies is contained in SEC filings that are public and readily available to OPPD.

UP's objections to this request are also baseless. The term "executives" is not vague. This Interrogatory also seeks information that is relevant and probative to the *SSW Compensation* procedures discussed above for Interrogatories 11 and 12.

Interrogatory No. 20

Please identify and describe any corporate or enterprise-level projections that UP has made from January 1, 2019 to the present of UP's future annual revenues, costs, earnings, profits, operating ratios, return on investment, return on invested capital and/or return on equity for any time period(s) subsequent to December 31, 2020. Please identify all documents that support your response and/or that memorialize your projections.

UP Response

UP objects to this Interrogatory because it is overbroad, is unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. UP also objects to this Interrogatory because it is unduly burdensome in requiring UP to identify "all documents" that support its responses and/or that memorialize its projections.

The information requested in Interrogatory No. 20 is highly relevant and probative because it

will assist OPPD to develop and work with the many different forecasts required by the SAC methodology. The information requested will also be utilized in applying the *SSW Compensation* methodology discussed above.

Interrogatory 21

Please describe the purposes and objectives of UP stock repurchases, or planned stock repurchases that UP has made since January 1, 2019. The description should include, without limitation: (a) why UP decided to make such repurchases or planned repurchases; (b) whether UP determined that shares that were or would be repurchased were worth more or less than, or the same as, the purchase price, and by what measure; (c) any comparisons of the return or benefits that UP obtained or produced, or expected to obtain or produce, on such repurchases or planned repurchases, both in general and relative to other potential uses of the funds used, or to be used, in the repurchases; (d) any return on assets, investment, capital, invested capital, and/or equity, or change in operating ratio, considered, achieved, and/or anticipated in conjunction with such repurchases or planned repurchases; and (e) whether and/or how such repurchases or planned repurchases increased or decreased, or were expected to increase or decrease, the value or price of UP stock or UP earnings per share.

UP Response

UP objects to this Interrogatory because it is overbroad, is unduly burdensome, and seeks information that is neither relevant nor reasonably likely to lead to the discovery of admissible evidence.

The information requested by Interrogatory 21 is highly relevant to the issues of this case. In recent years UP has engaged in significant stock repurchases, or “buy backs.” Stock repurchases can have a downward impact on UP’s COC and COE. It is therefore critical for OPPD to be able to seek discovery of UP’s past, current and planned stock repurchases. Such information will be important for reviewing the reasonableness of the rate at issue under the Revenue Adequacy Constraint maximum rate methodology as it would allow OPPD to present a more accurate view of the financial condition of UP.

C. Conclusion

For all the reasons set forth hereinabove, OPPD requests that the Board grant this Motion to

Compel and direct UP to fully respond to the Interrogatories discussed herein.

Respectfully submitted,

A handwritten signature in blue ink that reads "Thomas W. Wilcox".

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of September 2022, I served a copy of the foregoing Motion to Compel by electronic mail upon the following counsel for Union Pacific Railroad Company:

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