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In regard to Document Request No. 1, which requested production of Contract BNSF-C-13004 (“BNSF Contract”), OPPD confirms that it supplied BNSF Railway Company (“BNSF”) with a copy of UP’s first discovery requests on August 8, 2022, and informed BNSF that OPPD intended to produce BNSF Contract to UP under a Highly Confidential designation pursuant to the Protective Order entered in this case. BNSF responded to OPPD on August 19, 2022, stating that BNSF would only agree to produce a redacted version of the contract, and BNSF attempted to place similar limitations on OPPD’s production of information and documents related to the contract requested by

UP in discovery. OPPD responded to BNSF by letter dated September 2, 2022, citing Section 8 of the Protective Order, and asking BNSF if it planned to lodge an objection with the Board pursuant to the section's terms. BNSF has not responded to OPPD's September 2, 2022 letter. OPPD informed UP counsel during the parties' meet and confer session that OPPD also believes BNSF has been provided a reasonable opportunity to submit an objection to the Board to the production of the BNSF Contract under a Highly Confidential designation.

In regard to UP Request for Production No. 27, which seeks documents relating to the competition and bidding between UP and BNSF that led to the current contract with BNSF, OPPD informed UP during the parties' meet and confer session that OPPD's review of documents responsive to this request revealed that the Request for Proposal ("RFP") OPPD provided to UP and BNSF contained a provision that states "OPPD will not disclose information contained in the RFP or in proposals provided by Bidders, or allow it to be disclosed, except to OPPD employees and agents, as necessary, for the sole purpose of completing the RFP and evaluating proposals, or as required by law." OPPD explained to BNSF in the September 2, 2022 that OPPD believes this clause prevents information received from BNSF falling into this category (i.e., "information contained in the RFP or in proposals provided by Bidders") from being produced by OPPD in this case absent (1) BNSF waiving this restriction, or (2) an order from the STB directing OPPD to produce relevant, non-privileged information under a Highly Confidential designation.

II. Interrogatories

A. UP Interrogatory No. 2 – OPPD withdraws its objection to producing non-privileged, responsive information to subsections (d) – (f) related to the BNSF Contract under a Highly Confidential designation.

B. UP Interrogatory No. 3 – OPPD objects to producing information about the

transportation of coal to the Nebraska City Power Station (“NCPS”). This case is about the reasonableness of the rate UP charges to transport coal from the Gibson Yard to OPPD’s North Omaha Power Station (“NOPS”). UP states it is seeking this information because it anticipates that NCPS will be included in any Stand-Alone Railroad (“SARR”) that OPPD develops under the Stand-Alone Cost (“SAC”) methodology. In the first place, UP has a considerable amount of information about coal transportation to NCPS since it delivered all of the coal to that facility from 2007 to 2021.

OPPD also objects to the relevance of information related to coal deliveries to NCPS because such movement, and the contract negotiations related to it, have no bearing on whether UP has market dominance over the line of railroad it uses to provide service to NOPS that originates in the Gibson Yard pursuant to the challenged rate. Pursuant to 49 U.S.C. §10707(a), market dominance in this case is to be determined based on whether “effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies.” Under well-established Board precedent, this means “whether the complainant can use other railroads [or other modes] *to transport the same commodity between the same points.*”¹ In this proceeding, therefore, the only relevant points for determining whether OPPD can use another railroad (or other mode) to transport coal are the Gibson Yard and NOPS. UP’s vague assertion that information about separate coal shipments to NCPS - which is around 60 miles away from NOPS - might be relevant to whether UP has market dominance between Gibson Yard at NOPS is incoherent. UP appears to be saying that the presence of the switch rate for transportation to and from the Gibson Yard (which UP rate and service curiously categorizes as “voluntary” despite it being contained in a UP tariff) over a track that is owned and operated by UP somehow means there are effective alternatives to UP, even though OPPD can use

¹ See, e.g., STB Docket No. EP 756, *Streamlined Market Dominance* (served September 12, 2019) at 2-3, summarizing general rule applied by the Board.

no other railroad to transport coal to and from the Gibson Yard. The fact that OPPD engaged in a RFP process that sought and obtained bids from UP and BNSF for both NOPS and NCPS does nothing to change the fact that there are no effective transportation alternatives to UP to transport coal from the Gibson Yard to NOPS. UP's argument that the information it seeks pursuant to Interrogatory No. 3 is relevant to the market dominance determination in this proceeding makes no sense.

C. UP Interrogatory No. 4 - In Interrogatory No 4, UP asks OPPD to “identify and describe all offers made to, solicited by, or considered by OPPD at any time for the transportation of coal to Destination, regardless of mode or carrier.” The only information responsive to this request would be offers from BNSF and UP, since OPPD has never transported its coal volumes to NOPS or NCPS by a mode other than rail or by any carrier other than BNSF or UP. And as UP acknowledges, it possesses the information responsive to this Interrogatory as it relates to UP. However, none of this information is relevant to the determination of market dominance in this case for the reasons set forth above. The information from past bidding processes between BNSF and UP dating back to 2007 would provide zero information that would inform the Board about the existence or absence of effective competition to UP for the movement of coal from the Gibson Yard to NOPS.

UP's offer to “narrow” the time period of its request to “2007 to the present” is not based on any actual stated need, but rather an arbitrary “tit for tat” because a few of OPPD's discovery requests contain a similar date range. UP offers no cogent justification for imposing the heavy burden on OPPD to search its files for documents related to a bid process from nearly 16 years ago. In these formal rate cases the parties and the Board should strive for efficiency during the discovery process, not seek to burden the other party with unnecessary discovery requests “just because.” To

the extent the Board concludes this information is relevant, OPPD believes it would be appropriate to limit the production to the bidding cycle prior to that which resulted in the BNSF Contract, which on information and belief began in 2012.

D. Interrogatories Nos. 7, 8, and 9 - In these interrogatories, UP requests information about OPPD's fleet of coal railcars. Like virtually every utility with coal-fired power plants served by today's Class I railroads, OPPD owns or leases the railcars it needs for rail service, which it supplies to the railroads free of charge. UP therefore does not incur any costs related to railcars when it provides coal transportation to OPPD. Because any SARR will seek to reproduce a hypothetical competitor to UP for this service, the SARR will also not incur any costs related to railcars supplied by its customers. Accordingly, UP is incorrect that "car ownership and maintenance costs are relevant in SAC cases because they are an element of SARR operating costs." The fact that OPPD sought car ownership and maintenance costs from UP does not mean UP's reciprocal request to OPPD is relevant. This is because traffic moving on an OPPD-designed SARR may move in railroad owned or leased cars, and to that extent amounts paid by the railroad for such cars will be a cost incurred by the SARR. In that event, the costs UP incurs to own or lease railcars to transport coal is relevant and discoverable.

E. Interrogatories Nos. 12, 13, and 14 -UP represents in its Motion, as it did during the parties' meet and confer session, that all three of these interrogatories are geared toward discovering information about a fairly basic factual issue: the projected volumes of Wyoming Powder River Basin coal that will be burned at NOPS in future years. OPPD does not contest that such information is relevant, and as UP notes in its Motion, OPPD stated it would respond to Interrogatory No. 12 with projections of future coal burns at NOPS. Since UP is seeking information about "future consumption

of coal at NOPS”² its additional request for information about OPPD’s past generation of power from non-coal sources, and the underlying “cost conditions” for such past decisions are of marginal relevance to the future coal use information that UP seeks.

As for Interrogatories Nos. 13 and 14, UP again states it is seeking only information on how much coal OPPD expects to transport to NOPS and burn in the future. Interrogatory No. 13 asks for OPPD’s “policies and procedures” for determining whether to generate or purchase electricity. OPPD does not object to producing non-privileged, relevant information related to OPPD’s long term decision making on this issue because it would provide information on how much coal OPPD projects will be delivered by railroad to NOPS in future years. However, OPPD does not agree that the day-to-day (and sometimes more frequent) decisions made by OPPD personnel concerning whether to generate or purchase of electricity have any relevance to the question of coal deliveries to NOPS. Coal is transported to NOPS pursuant to long-term contracts OPPD enters into for that energy source. The day-to-day decisions on whether to burn the delivered coal or use another source of energy have no bearing on the terms of those contracts. Given the marginal relevance of this information to what UP says it is seeking, the burden of collecting this information does not justify the need for the information.

Similarly, Interrogatory No. 14 asks OPPD to explain its current process for fuel supply planning, which OPPD again is agreeable to doing on a longer-term basis to the extent it bears on the subject of future coal supplies at NOPS. As with Interrogatory No. 13, short term fuel supply planning for coal supply and coal transportation is of little relevance to the overall question of future volumes of coal delivered by railroad to NOPS. Also as with Interrogatory No. 13, the burden of searching for and producing this information to UP is again disproportionate to the stated need for

² Motion at 10.

this information.

III. Conclusion

In conclusion, OPPD participated in good faith in the meet and confer session with UP to attempt to reach agreement on the parties' disputes over the discovery requests covered by UP's motion. OPPD has made further concessions to UP in this Reply to its motion. For the reasons set forth above, the remaining points of dispute should all be resolved in OPPD's favor, and the discovery UP seeks should not be permitted.

Respectfully submitted,



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October 3, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October 2022, I caused a copy of the foregoing document to be served by email on all parties of record in STB Docket No. NOR 42173.

/SS/ Thomas W. Wilcox
Thomas W. Wilcox