

OMAHA PUBLIC POWER DISTRICT,

Complainant,

V.

NOR 42173

UNION PACIFIC RAILROAD COMPANY,

Defendant.

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October 6, 2022

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

OMAHA PUBLIC POWER DISTRICT,	)	
	)	
Complainant,	)	
	)	
v.	)	NOR 42173
	)	
UNION PACIFIC RAILROAD COMPANY,	)	
	)	
Defendant.	)	

**UNION PACIFIC RAILROAD COMPANY’S
APPEAL OF DIRECTOR’S RULING**

Pursuant to 49 C.F.R. § 1114.31(a)(4) and 49 C.F.R. § 1115.9, Union Pacific Railroad Company (UP) hereby appeals the summary ruling of the Director of the Office of Proceedings granting in part a motion filed by Omaha Public Power District (OPPD) to compel UP to respond to Interrogatory Nos. 11, 12, 18, and 21 of OPPD’s first set of discovery requests. *See Omaha Pub. Power Dist. v. Union Pac. R.R.*, NOR 42173 (STB served Oct. 3, 2022) (“Ruling”). The Ruling erroneously grants OPPD requests for discovery that would require UP to produce for inspection certain documents and other information “not ordinarily available for public inspection.” 49 C.F.R. § 1115.9(a)(2).

I. Interrogatory Nos. 11 and 12

The Director erred by requiring UP to produce information that is not relevant to the subject matter of this proceeding in response to OPPD’s Interrogatory Nos. 11 and 12. The Director acknowledged UP showed the information was not relevant for the purpose it was requested by OPPD, but then relied on a different, equally invalid justification to find the information is relevant to this proceeding.

Interrogatory Nos. 11 and 12 request information relating to UP's calculations of its current cost of equity capital (COE) and current weighted average cost of capital (COC).

Interrogatory No. 11 asks UP to state whether it has calculated its COE or COC during the period January 1, 2019 through the present, and if so, to 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 value that were calculated; and (d) any adjustments that UP made in calculating and/or utilizing the values.

The interrogatory also instructed UP to "identify all documents that support your response and/or memorialize your calculations." OPPD's First Requests, Int. No. 11.

Interrogatory No. 12 essentially duplicates subparts (b) and (c) of Interrogatory No. 11 by asking UP to:

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.

OPPD's First Requests, Int. No. 12.

When UP objected on relevance grounds, OPPD moved to compel a response, arguing the requested information was relevant because it could be used to calculate the reasonableness of the charges OPPD is challenging in this proceeding using the so-called "*SSW Compensation*" methodology, which OPPD (wrongly) claimed "utilizes the incumbent railroad's COE and COC":

In paragraph 23 of its Complaint OPPD stated that one of the methodologies it might utilize to test[] 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[1] (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*” [methodology]) 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 in full to Interrogatories 11 and 12.

Motion to Compel at 6.

In opposing OPPD’s motion, UP explained that OPPD’s justification failed because, among other things, the *SSW Compensation* methodology *does not* use the landlord railroad’s COC and COE. Rather, Board precedent “provides for the use of the cost of capital ‘for the railroad industry.’” UP Reply at 11 (quoting *St. Louis Southwestern Ry. Co. Compensation—Trackage Rights*, 4 I.C.C.2d 668, 682) (1987)).

The Director reviewed OPPD’s and UP’s arguments regarding *SSW Compensation* and concluded UP was correct. *See* Ruling at 3–4 & n.8. Upon reaching that conclusion, the Director should have denied OPPD’s motion to compel.

However, the Director proceeded to grant OPPD’s motion, explaining that the requested information was potentially relevant to a different issue: revenue adequacy. *See* Ruling at 3–4. In so doing, the Director ignored OPPD’s stated reason for requesting the information and imposed an unnecessary burden on UP to produce information for purposes not requested by OPPD. The Director also ignored UP’s argument that any COE or COC calculations UP may have performed were irrelevant in this proceeding because the Board has established standard methodologies for calculating COE and COC when those figures are used in regulatory proceedings. *See* UP Reply 10–11 (citing *Railroad Cost of Capital—2021*, EP 558 (Sub-No. 25) (STB served Aug. 2, 2022)). The Director’s decision thus inappropriately opens the door to a collateral attack on the Board’s established methodology. The Director seemed to believe UP’s

calculations might be relevant because *UP* might be planning to launch such an attack. The Director noted *UP*'s Answer to *OPPD*'s Complaint denied that *UP* would be found revenue adequate under methods that are better aligned with Congress's purposes in enacting 49 U.S.C. § 10704(a) than those the Board applies in its annual revenue adequacy determinations. *See* Ruling at 3 n.7. However, the Director misunderstood *UP*'s Answer. *UP* was not hinting at a potential challenge to the Board's COE or COC calculations. *UP* was referring to its advocacy of a different method of evaluating revenue adequacy than the Board's simple comparison of a railroad's accounting returns to its COC in Ex Parte No. 766, *Joint Petition for Rulemaking—Annual Revenue Adequacy Determinations*.

The Board should not allow discovery in this case to proceed down the COE/COC rabbit hole. *OPPD* requested COE/COC information for an identified purpose. The Director correctly found the information was not relevant for that purpose. The Director erred by not denying the motion to compel, and instead relying on a different, misguided justification for requiring *UP* to produce information that is not relevant to disputed issues in this case.

II. Interrogatory No. 18

The Director erred by requiring *UP* to produce information that is not relevant to the subject matter of this proceeding in response to *OPPD*'s Interrogatory No. 18, again relying on a theory of relevance not proposed by *OPPD*.

Interrogatory No. 18 asks *UP* to identify and describe *discussions with representative of equity and debt analysts or ratings agencies* about *UP*'s replacement costs, *UP*'s ability to meet the Board's annual revenue adequacy criteria, and *UP*'s success in earning returns equal to its COC or COE:

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.

OPPD's First Requests, Int. No. 18.

When UP objected to the irrelevant and burdensome nature of this interrogatory, OPPD said the requested information "will provide data needed in any forward-looking maximum rate methodology currently utilized by the Board or currently being evaluated by the Board." Motion to Compel at 7. OPPD also said UP's response would "provide 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." *Id.*

In opposing OPPD's motion, UP explained that OPPD's justification was inconsistent with its interrogatory: identify and describing "discussions" would not provide "data" for any existing or potential "maximum rate methodology." *See* UP Reply at 12. UP also explained that OPPD could obtain actual "data" on potentially relevant topics by requesting production of *data*. UP noted OPPD had requested data on UP replacement cost calculations in its Interrogatory No. 17, and could obtain data regarding UP's ability to meet the Board's revenue adequacy criteria directly from the Board's annual revenue adequacy determinations and UP's Annual Report R-1. *See id.* UP also explained that data regarding its COC and COE would not be relevant in this proceeding for reasons discussed in connection with Interrogatory Nos. 11 and 12. *See id.* Finally, UP explained that the information OPPD requested could not be used to "forecast revenue and volume changes." *See id.* at 12–13.

The Director recited OPPD's and UP's arguments, but then simply stated the requested information requested "is relevant to the issue of revenue adequacy." Ruling at 5. The Director

never evaluated whether OPPD's stated justifications for its requests were valid—whether the requested information was necessary (or could even be used) to calculate “forward-looking maximum rates” or to “forecast revenue or volume changes.” OPPD's justifications were plainly not valid, and the Director should have denied OPPD's motion for that reason alone, rather than require UP to bear the costs of producing information for purposes not even requested by OPPD.

Moreover, the Director failed to explain how the requested information could be used to assess whether UP is revenue adequate. The Director noted the Board's statement in *Consumers Energy* that it “accept[s] all competent and probative evidence relative to [a] carrier's revenue adequacy,” Ruling at 5, but never explained how the requested information—UP's discussions with equity and debt analysts—would be “competent” or “probative,” or why evidence about potentially relevant subjects—*i.e.*, replacement costs and UP's ability to meet the Board's revenue adequacy criteria—could not be obtained directly, rather than fishing through UP discussions with nonparties in the hope of finding some mention of revenue adequacy. The Director should have denied OPPD's motion to compel an answer to Interrogatory No. 18.

III. Interrogatory No. 21

The Director also erred by requiring UP to produce information that is not relevant to the subject matter of this proceeding in response to OPPD's Interrogatory Nos. 21, yet again relying on a theory of relevance not offered by OPPD.

Interrogatory No. 21 asks UP to describe the *purposes and objectives* of UP stock repurchases or planned stock repurchases that UP has made since January 1, 2019, and states that UP's description should address a list of specific facts:

- (a) why UP decided to make such repurchases or planned repurchases; (b) whether UP determined that the 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 repurchase 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.

OPPD's First Requests, Int. No. 21.

When UP objected to the irrelevant and burdensome nature of this interrogatory, OPPD offered the confusing response that "[s]tock repurchases can have a downward impact on UP's COC and COE," so the requested information was "important for reviewing the reasonableness of the rate at issue under the Revenue Adequacy Constraint as it would allow OPPD to present a more accurate view of the financial condition of UP." Motion to Compel at 9.

In opposing OPPD's motion, UP observed that OPPD did not need discovery to calculate any supposed impact of stock repurchases on UP's COC and COE—assuming a collateral attack on the Board's COC calculations would be permissible—because information about UP's stock repurchase is publicly available. *See* UP Reply at 15. UP also explained that information about the "purposes and objectives" of its stock repurchases had no bearing on the application of the Board's Revenue Adequacy Constraint, and OPPD could obtain "accurate" information about "the financial condition of UP" from UP's publicly available financial data. *See id.*

The Director recited OPPD's and UP's arguments, but then simply stated the requested information requested "is relevant to the issue of revenue adequacy." Ruling at 5. The Director never evaluated whether OPPD needed the requested discovery for the reasons OPPD claimed—to recalculate UP's COC and COE or obtain a "more accurate view" of UP's financial condition. OPPD's justifications were plainly not valid, and the Director should have denied OPPD's

motion for that reason alone, rather than require UP to bear the costs of producing information for purposes not even requested by OPPD.

Moreover, the Director failed to explain how the requested information could be used to determine whether UP is revenue adequate. Again, the Director merely pointed to the Board's statement in *Consumers Energy* that it "accept[s] all competent and probative evidence relative to [a] carrier's revenue adequacy," Ruling at 5, without explaining how evidence regarding "the purposes and objectives of UP's stock repurchases, or planned stock repurchases," could be "competent" or "probative" evidence relative to UP's revenue adequacy.

UP recognizes some have pointed to stock repurchases as evidence that railroads are earning adequate revenues. UP disagrees, but it is not seeking to preclude discovery into the number of shares repurchased or the costs of the shares repurchased. However, the asserted connection between share repurchases and revenue adequacy does not justify the discovery permitted by the Director. The Director should have denied OPPD's motion to compel an answer to Interrogatory No. 21.

IV. Conclusion

UP is not resisting valid discovery. This dispute involves just 4 of the 22 interrogatories in OPPD's first set of discovery requests. With regard to each interrogatory discussed above, the Director appeared to try to reduce discovery burdens on UP by narrowing the type of information UP is required to produce. UP appreciates that effort. However, the interrogatories at issue are unjustified, regardless of the burdens of responding—which remain substantial. The Board should reverse the Director's Ruling and deny OPPD's motion to compel.

Respectfully submitted,

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October 6, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 6th 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.

/s/ Michael L. Rosenthal