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SERVICE DATE - LATE RELEASE JANUARY 26, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42012

SIERRA PACIFIC POWER COMPANY AND IDAHO POWER COMPANY

v.

UNION PACIFIC RAILROAD COMPANY

Decided: January 21, 1998

BACKGROUND

In a complaint filed, and served on defendant, Union Pacific Railroad Company (UP), on August 1, 1997, Sierra Pacific Power Company and Idaho Power Company (complainants) allege that rates assessed by UP to move complainants' unit trains of coal from Sharp, UT, to complainants' North Valmy Station (North Valmy), an electric generating plant in north central Nevada, exceed a maximum reasonable level and that UP possesses market dominance over the traffic. Complainants request that maximum reasonable rates be prescribed, along with related rules and service terms for the movement.¹

On September 12, 1997, UP filed a motion to compel complainants to produce documents, which complainants have refused to provide, relating to competition by The Burlington Northern and Santa Fe Railway Company (BNSF) for the movement of coal to North Valmy.² Specifically, UP requested documents related to any bids made by BNSF for the transportation of coal to North Valmy and any contracts between BNSF and complainants for coal movements to North Valmy.

On September 23, 1997, BNSF filed a petition for leave to intervene in this proceeding to seek a protective order preventing disclosure of BNSF's pre-contract bidding and negotiations leading up to an August 28, 1997 letter agreement (Agreement) between complainants and BNSF and Utah Railway Company (URC). Concurrently with its petition to intervene, BNSF filed the motion for the protective order.

On September 24, 1997, complainants filed a reply in opposition to UP's motion to compel and in support of BNSF's petition for leave to intervene and motion for a protective order.

¹ On August 15, 1997, the parties filed a joint motion for the approval of a stipulated protective order. By decision served August 25, 1997, the motion was granted and a protective order was entered.

² The deadline for the completion of discovery was October 15, 1997. By decision served October 10, 1997, the deadline was suspended until further notice.

Complainants note that, in response to BNSF's filing, they have given the Agreement to UP under a highly confidential designation. UP filed a response opposing BNSF's motion for a protective order on September 25, 1997.

On October 1, 1997, UP filed a second motion to compel. In this motion, UP seeks an order compelling complainants to produce the prior testimony and workpapers of their stand-alone cost expert, which complainants have refused to provide. Complainants replied to the motion on October 17, 1997, and concurrently filed a motion for a protective order to prohibit UP from deposing complainants' cost expert. On October 31, 1997, UP replied in opposition to complainants' October 17 motion for a protective order.

On October 24, 1997, complainants filed a motion to compel discovery and for the appointment of an Administrative Law Judge (ALJ). The motion covers: (1) discovery requests to which UP has not fully responded; (2) UP responses to discovery requests that allegedly are incomplete; (3) discovery requests to which UP has objected; and (4) discovery and document requests concerning the market for coal transportation in the western United States. On November 14, 1997, UP responded to complainants' October 24 motion. UP states that, with only a few exceptions, it has responded to complainants' discovery requests, and, therefore, the motion to compel is moot and there is no need to appoint an ALJ. On December 5, 1997, complainants filed a supplement to their motion to compel, identifying the deficiencies in UP's responses and renewing their request for the appointment of an ALJ. On December 22, 1997, UP replied to complainants' December 5 supplement, arguing that complainants' motion to compel is moot because UP has now fully responded.

On November 4, 1997, UP filed a motion to dismiss the complaint, alleging that complainants cannot establish that UP has market dominance in the movement of coal to North Valmy. On November 24, 1997, complainants' replied to UP's motion to dismiss.

On December 1, 1997, UP filed a third motion to compel. This motion concerns the production of documents relating to competition in electricity markets. UP filed a correction to the motion on December 9, 1997. On December 22, 1997, complainants replied to UP's December 1 motion.

DISCUSSION AND CONCLUSIONS

I. Preliminary Matters.

A. Intervention.

BNSF seeks to intervene in this proceeding to prevent the disclosure of certain information that it deems to be commercially sensitive and irrelevant to this proceeding. BNSF states that the information and documents that UP seeks in its first motion to compel contain critical information

about BNSF's negotiations practices and pricing policies. BNSF argues that disclosure of the information and documents would inflict the risk of material harm on BNSF because it would reveal insights into BNSF's negotiating strategies, e.g., how BNSF trades off among various contract terms and reacts to shipper requests. According to BNSF, UP tried to obtain this same information in the UP/SP oversight proceeding³ and BNSF seeks to intervene here in order to protect its interests in keeping this information confidential. We will permit BNSF to intervene for this limited purpose.

B. Request for an ALJ.

As noted in their October 24 motion to compel, complainants sought the appointment of an ALJ to hear and decide the discovery disputes between the parties. Complainants' reason for wanting an ALJ at that time was to assist the Board in enabling the parties to adhere to the original procedural schedule as closely as possible. At the joint request of the parties filed November 10, 1997, the procedural schedule was subsequently suspended until further notice in a decision served November 13, 1997. In its November 14 opposition to complainants' motion to compel, UP also opposes complainants' request for the appointment of an ALJ, arguing that it would add a layer of bureaucracy that is unnecessary to resolve the straightforward discovery issues in this case. In their December 5 supplement to their motion to compel, complainants now argue that an ALJ is needed because of "UP's continued approach of dragging out the discovery phase of this case through piecemeal document production" In its December 22 response, UP counters that complainants are trying to manufacture a discovery dispute where none exists.

Despite the proliferation of pleadings, complainants have not persuaded us that an ALJ is needed to resolve the discovery disputes between the parties. Accordingly, we will deny complainants' request for the appointment of an ALJ and instead resolve all necessary discovery matters in this decision.

II. Motion to Dismiss.

In a proceeding challenging the reasonableness of a railroad rate, before we may determine that the rate is unreasonably high under 49 U.S.C. 10701, we must first find that a carrier has market dominance under 49 U.S.C. 10707, over the transportation to which a challenged rate applies. UP argues that complainants presented extensive evidence and argument in the UP/SP

³ Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company, STB Finance Docket No. 32760 (Sub-No. 21) (UP/SP Oversight).

merger proceeding⁴ that, prior to the merger, UP's rates for coal movements to North Valmy from the Southern Utah Fuel Company (SUFCO) mine were constrained by competition from SP;⁵ that we granted trackage rights to BNSF and URC in UP/SP to replace and preserve the competition previously provided by SP; that we found in the UP/SP oversight proceeding⁶ that the merger did not diminish the intensity of competition for the movement of coal to North Valmy; and that, therefore, based on complainants' own evidence in UP/SP of competition for movements to North Valmy, competition cannot be found to have been diminished by the merger. Accordingly, UP argues that complainants cannot establish the absence of effective competition for coal movements to North Valmy.

Complainants reply that UP has provided no legal authority to support its argument that the decisions in UP/SP or UP/SP Oversight establish conclusively, as a matter of law, that UP does not possess market dominance over the transportation of contract minimum tonnages of coal from the SUFCO mine. Complainants note that the evidence submitted in UP/SP and UP/SP Oversight was limited, that we declined to open UP/SP Oversight for discovery,⁷ and that we stated in UP/SP Oversight that we did not intend to prejudge the merits of this complaint in that decision.⁸

In considering a motion to dismiss, we must construe factual allegations in a light most favorable to complainant. See, e.g., Western Fuels Service Corporation v. The Burlington Northern and Santa Fe Railway Company, STB Docket Nos. 41987 et al. (STB served July 28, 1997). Taking this standard and all other factors into account, we will deny UP's motion to dismiss the complaint. Nevertheless, based on our findings in UP/SP, UP has made a strong argument that there is effective intramodal competition for the traffic at issue.⁹ As complainants note, our findings in

⁴ Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company, Finance Docket No. 32760 (UP/SP). See UP/SP, Decision No. 44 (STB served Aug. 12, 1996).

⁵ SP was the designation used in the merger proceeding to refer collectively to Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company.

⁶ UP/SP Oversight, Decision No. 10 (STB served Oct. 27, 1997).

⁷ Id. at 19.

⁸ Id. at 15.

⁹ In UP/SP, we found that, post-merger, North Valmy would have, in addition to a UP/SP
(continued...)

UP/SP were not intended to prejudge this complaint and we will not do so in advance of receiving and considering evidence and argument on market dominance. However, given our findings in UP/SP, it might be to complainants' advantage to focus the bulk of their evidence and argument with regard to intramodal and intermodal competition on whether truck-URC/BNSF movements from the SUFCO mine via the Savage load-out effectively constrain the baseload contractually committed SUFCO coal tonnage now moving truck-UP/SP via the Sharp load-out.

We are committed to processing maximum rate reasonableness complaints promptly and we recognize that bifurcating cases into separate market dominance and rate reasonableness phases can extend the time it takes to resolve a rate complaint in some instances. Here, however, given the substantial weight of UP's position in its motion to dismiss, we have considerable doubts as to complainants' ability to demonstrate market dominance. Accordingly, to minimize the administrative burdens on the parties, we will bifurcate the market dominance and rate reasonableness phases of this proceeding and postpone the submission and consideration of rate reasonableness evidence until we have resolved the issue of market dominance.

III. UP's First Motion to Compel.

UP argues that it requires the pre-contract information to respond to anticipated claims from complainants that, notwithstanding the Agreement, the history of BNSF's bidding and negotiations leading up to the Agreement demonstrates that BNSF is not an effective competitor and, thus, that UP has market dominance over the transportation of coal to North Valmy. In seeking a protective order to prevent the disclosure of the pre-contract information, BNSF argues that UP has failed to explain how the bid and negotiations information is relevant to the question of whether BNSF provides effective intramodal competition for the movement of coal to North Valmy. BNSF also argues that UP has not made a specific showing that its need for the information outweighs the likelihood of competitive harm to the disclosing party. Complainants agree and, in their reply to the motion to compel, state that it is not readily apparent why documents and information which led up to the Agreement are relevant and necessary either for UP to make its argument or for complainants to respond.

In UP's opposition to BNSF's motion for a protective order, UP argues that it has

⁹(...continued)

single-line option, two BNSF options: (1) a URC-BNSF joint-line haul, sourced from mines open to URC; and (2) a truck-BNSF joint-line haul, sourced from load-outs either at Provo or at other Utah points opened to BNSF under the transloading condition that we imposed. While acknowledging that, post-merger, complainants' single-line options would be reduced from two to one, we pointed out that the difference between single-line service and joint-line service is less important in the coal unit train context and that the URC-BNSF joint-line routing should be quite competitive, especially considering the new coal sources opened to URC under the URC agreement. UP/SP, slip op. at 187.

specifically demonstrated the relevancy of the requested discovery, which it views as central to complainants' theory of the case. According to UP, complainants must be relying on the theory that the history of BNSF's bidding and negotiations for the North Valmy traffic demonstrates that BNSF is not an effective competitor because the fact that a competing railroad has actually secured a contract to move coal to North Valmy is, in UP's view, sufficient evidence that effective competition exists. While UP characterizes the argument as far-fetched, quixotic and implausible, it nevertheless is pursuing the documents in order to disprove the anticipated claim. UP states that, if we grant BNSF's motion for a protective order for confidentiality reasons, we should dismiss complainants' rate case on the ground that it cannot be fairly litigated. Alternatively, it argues that we should draw all reasonable adverse inferences against complainants related to these non-produced documents, which would include the inference that BNSF is fully and directly competitive with UP for movements of coal to North Valmy.

We fail to see the relevance of the pre-contract information and agree with complainants that UP does not need that information to make its argument. The Agreement itself, which complainants have provided to UP, should be sufficient for UP to demonstrate that BNSF is an effective competitor for coal movements originating at or near the Savage load-out. Therefore, we will deny UP's motion to compel.

We do not agree with UP that this result requires dismissal of complainants' rate case on the ground that it cannot be fairly litigated. The burden is on complainants to make an initial showing of market dominance by establishing that there are no direct transportation alternatives (intramodal or intermodal) for the movements at issue that effectively constrain the railroad's pricing. As noted, the existence of the Agreement is strong evidence of intramodal competition, and there is no basis on which we can conceive that evidence about the negotiations leading to the Agreement could overcome the force of the Agreement itself. Therefore, we believe this issue can be fairly litigated without requiring the disclosure of pre-contract negotiations to UP. Because complainants have already produced the Agreement under the terms of the protective order issued in this proceeding, and we are not requiring the production of the underlying documents and information, an additional protective order is not necessary to protect BNSF's limited interest in this proceeding. Therefore, we will also deny BNSF's motion for a protective order.

IV. UP's Second Motion to Compel.

UP seeks the production of the prior testimony and workpapers of complainants' stand-alone cost expert, information that is allegedly relevant to the issue of rate reasonableness. Because we are bifurcating this proceeding and are only considering the parties' market dominance evidence at this time, we will postpone consideration of UP's second motion to compel and complainants' October 17 motion for a protective order.

V. Complainants' Motion to Compel.

In the supplement to their motion to compel, complainants outline the remaining discovery requests that are still in dispute. Almost all of these requests relate to rate reasonableness and, accordingly, we will postpone consideration of the portion of the motion to compel as to these requests until after we have resolved the market dominance issue.

The market dominance-related requests are Nos. 5 and 6 of complainants' second set of discovery requests, served September 29, 1997, and No. 92 of complainants' first set of discovery requests served August 15, 1997. The motion to compel as to Nos. 5 and 6 will be denied because these requests deal with rate comparisons that are not relevant to the issue of market dominance for the transportation at issue. Specifically, No. 5 seeks the production of all requests or solicitations to UP, all correspondence between UP and issuers of the solicitations and/or makers of the requests, all documents analyzing the solicitations and possible responses by UP, and all contracts and agreements between UP and coal shippers for contract and/or common carrier coal transportation service, between 1992 and the present, that originated, terminated, or was handled as overhead traffic in Colorado, Nevada, Utah and Wyoming (except for Powder River Basin origins). No. 6 seeks the same information as in No. 5, but as to service by UP, URC/UP, and/or BNSF/UP. As UP notes in its opposition to the motion to compel, the competitive circumstances related to other coal movements to other coal shippers, which have nothing to do with the shipment of coal to North Valmy, is not probative of any competitive issue in this case.

Unlike requests Nos. 5 and 6, UP has responded to request No. 92, which seeks information relating to UP's policies and methodologies for setting rates for shippers of coal in unit train volumes. In the supplement to their motion to compel, complainants submit that the materials produced by UP, consisting of a single sheet identifying the various steps that UP goes through in preparing a bid proposal for a customer, is unresponsive to the request. UP, in response to the supplement to the motion to compel, argues that the material it submitted is complete, and it explains that it has no formal policy or methodology for setting coal rates.¹⁰ In light of this fact, it appears that UP has fully responded to the request and, accordingly, we will deny complainants' motion to compel.

VI. UP's Third Motion to Compel.

UP describes the six discovery requests that are the subject of its third motion to compel as involving the competition faced by the North Valmy plant in electricity end-markets, and complainants' ability to purchase or sell power from other sources, rather than generating power at North Valmy. We resolve these market dominance-related requests as follows.¹¹

¹⁰ The one-page document which UP produced in response to the request is a checklist that UP states is used by Energy Marketing in preparing coal bids.

¹¹ Complainants challenge UP's third motion to compel on a number of grounds, including
(continued...)

A. Request No. 91.

UP states that complainants have refused to produce any documents that identify or discuss their competitors, both for power sales to their largest customers and for offline power sales. According to complainants, this request would require that they produce every shred of paper or other document, generated or possessed by any person in their companies, identifying or discussing the competitors of complainants for the past 17 years. In addition to the request being overly broad and burdensome, complainants state that it is vague in that UP has not defined “offline power sales” or the word “competitors,” which could constitute a huge universe of entities that buy or sell power or natural gas, and/or provide energy-related products and services.

Because this request is relevant to the issue of market dominance, we will order complainants to produce the documents, if they exist. However, we agree with complainants that the request is overly broad and, therefore, we will restrict the discovery to documents from the past 2 years. Also, we will require UP within 5 days of the service date of this decision to clarify to complainants the meaning of “competitors” and “offline power sales.”

B. Request No. 98.

UP states that complainants have only partially responded to the request for studies or analyses of the costs and benefits of off-system power purchases.¹² In their reply, complainants submit that they have produced large amounts of material, including forecasts, that addresses how each company makes decisions with regard to power purchases. According to complainants, these forecasts are the only existing studies, relating to the costs and benefits of operating alternate resources on a forward-looking basis.

It appears that complainants have provided all the information that they have in response to this request and, accordingly, we will deny UP’s motion to compel a further response.

C. Request No. 102.

UP states that complainants have refused to provide any documents responsive to the request

¹¹(...continued)

that the motion was filed beyond the 10-day time limit in 49 CFR 1114.31(a). Considering the liberties that both sides have taken with our rules, we will not discuss complainants’ argument that UP’s motion is untimely. Suffice it to say that the deadline for the completion of discovery was suspended by the October 10 decision.

¹² In its third motion to compel, UP stated that complainants had produced only a single 5-year forecast, written in 1995. As noted in UP’s correction to its motion, complainants actually produced the 1996 and 1997 versions of the forecast.

for all documents, including but not limited to studies, relating to complainants' expected use of the Alturas Intertie.¹³ According to complainants, the Alturas Intertie will not increase their ability to purchase power from the Pacific Northwest instead of generating power at North Valmy or other plants. They submit that UP's request is overly broad and burdensome.

Because the requested information is relevant to the issue of market dominance, we will order complainants to produce the documents, if they exist. We do not agree with complainants that the request is overly broad or burdensome. The proposed construction of the Alturas Intertie appears to be a relatively new project (to be completed in 1998) and, therefore, the information UP seeks should be readily available.

D. Request No. 103.

UP states that complainants have provided information on the projected level of usage of the Alturas Intertie, as requested, but not on the projected purchase price for electricity from the Intertie. According to UP, this information is relevant to show that purchases from the Alturas Intertie are a direct competitive alternative to the generation of electricity by the North Valmy plant and, therefore, that output from North Valmy could and would be reduced in response to competition from such alternative sources of power. Complainants object to the request as being overly broad, unduly burdensome, and not calculated to lead to the discovery of admissible evidence.

We disagree with complainants. Their response offers generalized information relative to the request, but does not appear to specifically answer UP's question, which is relevant to the issue of market dominance. Accordingly, we will order complainants to fully respond to the request.

E. Request No. 107.

In response to the request for data on sales of power to others for the years 1992-1996 for North Valmy output not purchased by complainants, UP objects to complainants' use of FERC Form 1 data. According to UP, FERC Form 1 data are not broken down separately for the North Valmy plant and, therefore, are not responsive to the request, which focuses specifically on sales of North Valmy output. Complainants respond that the request did not ask for such a breakdown and, in any event, each company records power sales on a system-wide basis and does not break down the information on a plant-by-plant basis.

Complainants' explanation is reasonable and it appears that they have fully complied with the request. Therefore, we will deny UP's motion to compel a further response.

¹³ This request includes any studies of the economic basis for the decision to build the Alturas Intertie.

F. Request No. 119.

UP states that complainants' Fuel and Purchased Power Forecasts, produced in response to the request for all studies and analyses of reductions in the utilization of North Valmy, are only partially responsive to the request.¹⁴ Although the forecasts address issues of pricing, UP argues that there is no analysis of the effects of natural gas prices or hydroelectric power on utilization of North Valmy, which is the information that it seeks. In response, complainants submit that the information is contained in the various FERC forms, Power Operations Planning Worksheets, Integrated Resources Plans, Fuel Budgets, and Fuel and Purchased Power Forecasts, which have already been produced to UP in response to its other requests on these issues.

We agree with complainants that the information they provided is responsive to UP's request. Therefore, we will deny UP's motion to compel a further response.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. BNSF's petition for leave to intervene is granted and its motion for a protective order is denied.
2. Complainants' request for the appointment of an ALJ is denied.
3. UP's motion to dismiss is denied and this proceeding is bifurcated for separate determinations of the market dominance and rate reasonableness issues. The rate reasonableness phase of this proceeding, including all motions related to rate reasonableness, is held in abeyance pending completion of the market dominance phase. The procedural schedule for the market dominance phase of the proceeding is as follows:

Market dominance-related discovery in compliance with this decision must be completed by February 25, 1998;

Opening market dominance evidence is due March 27, 1998;

Reply market dominance evidence is due April 16, 1998; and

¹⁴ In its third motion to compel, UP stated that the most recent Fuel and Purchased Power Forecast produced by complainants was outdated because it was from 1995. As noted in UP's correction to its motion, complainants actually produced the 1996 and 1997 versions of the forecast.

Rebuttal market dominance evidence is due April 27, 1998.

4. UP's first motion to compel, filed September 12, 1997, is denied.

5. Consideration of UP's second motion to compel, filed October 1, 1997, and complainants' motion for a protective order, filed October 17, 1997, is postponed pending completion of the market dominance phase of the proceeding.

6. Consideration of the rate reasonableness requests contained in complainants' motion to compel filed October 24, 1997, is postponed pending completion of the market dominance phase of the proceeding; the motion is denied as to the market dominance-related requests Nos. 5 and 6 of complainants' second set of discovery requests, served September 29, 1997, and No. 92 of complainants' first set of discovery requests served August 15, 1997.

7. UP's third motion to compel, filed December 1, 1997, as corrected on December 9, 1997, is denied as to requests Nos. 98, 107, and 119, and granted as to requests Nos. 91 (as modified in this decision), 102, and 103. With respect to request No. 91, UP must make the clarifications ordered in the decision within 5 days of the service date.

8. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

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As noted in their October 24 motion to compel, complainants sought the appointment of an ALJ to hear and decide the discovery disputes between the parties. Complainants' reason for wanting an ALJ at that time was to assist the Board in enabling the parties to adhere to the original procedural schedule as closely as possible. At the joint request of the parties filed November 10, 1997, the procedural schedule was subsequently suspended until further notice in a decision served November 13, 1997. In its November 14 opposition to complainants' motion to compel, UP also opposes complainants' request for the appointment of an ALJ, arguing that it would add a layer of bureaucracy that is unnecessary to resolve the straightforward discovery issues in this case. In their December 5 supplement to their motion to compel, complainants now argue that an ALJ is needed because of "UP's continued approach of dragging out the discovery phase of this case through piecemeal document production" In its December 22 response, UP counters that complainants are trying to manufacture a discovery dispute where none exists.

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Complainants reply that UP has provided no legal authority to support its argument that the decisions in UP/SP or UP/SP Oversight establish conclusively, as a matter of law, that UP does not possess market dominance over the transportation of contract minimum tonnages of coal from the SUFCO mine. Complainants note that the evidence submitted in UP/SP and UP/SP Oversight was limited, that we declined to open UP/SP Oversight for discovery,⁷ and that we stated in UP/SP Oversight that we did not intend to prejudge the merits of this complaint in that decision.⁸

In considering a motion to dismiss, we must construe factual allegations in a light most favorable to complainant. See, e.g., Western Fuels Service Corporation v. The Burlington Northern and Santa Fe Railway Company, STB Docket Nos. 41987 et al. (STB served July 28, 1997). Taking this standard and all other factors into account, we will deny UP's motion to dismiss the complaint. Nevertheless, based on our findings in UP/SP, UP has made a strong argument that there is effective intramodal competition for the traffic at issue.⁹ As complainants note, our findings in

⁴ Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company, Finance Docket No. 32760 (UP/SP). See UP/SP, Decision No. 44 (STB served Aug. 12, 1996).

⁵ SP was the designation used in the merger proceeding to refer collectively to Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company.

⁶ UP/SP Oversight, Decision No. 10 (STB served Oct. 27, 1997).

⁷ Id. at 19.

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UP/SP were not intended to prejudge this complaint and we will not do so in advance of receiving and considering evidence and argument on market dominance. However, given our findings in UP/SP, it might be to complainants' advantage to focus the bulk of their evidence and argument with regard to intramodal and intermodal competition on whether truck-URC/BNSF movements from the SUFCO mine via the Savage load-out effectively constrain the baseload contractually committed SUFCO coal tonnage now moving truck-UP/SP via the Sharp load-out.

We are committed to processing maximum rate reasonableness complaints promptly and we recognize that bifurcating cases into separate market dominance and rate reasonableness phases can extend the time it takes to resolve a rate complaint in some instances. Here, however, given the substantial weight of UP's position in its motion to dismiss, we have considerable doubts as to complainants' ability to demonstrate market dominance. Accordingly, to minimize the administrative burdens on the parties, we will bifurcate the market dominance and rate reasonableness phases of this proceeding and postpone the submission and consideration of rate reasonableness evidence until we have resolved the issue of market dominance.

III. UP's First Motion to Compel.

UP argues that it requires the pre-contract information to respond to anticipated claims from complainants that, notwithstanding the Agreement, the history of BNSF's bidding and negotiations leading up to the Agreement demonstrates that BNSF is not an effective competitor and, thus, that UP has market dominance over the transportation of coal to North Valmy. In seeking a protective order to prevent the disclosure of the pre-contract information, BNSF argues that UP has failed to explain how the bid and negotiations information is relevant to the question of whether BNSF provides effective intramodal competition for the movement of coal to North Valmy. BNSF also argues that UP has not made a specific showing that its need for the information outweighs the likelihood of competitive harm to the disclosing party. Complainants agree and, in their reply to the motion to compel, state that it is not readily apparent why documents and information which led up to the Agreement are relevant and necessary either for UP to make its argument or for complainants to respond.

In UP's opposition to BNSF's motion for a protective order, UP argues that it has

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single-line option, two BNSF options: (1) a URC-BNSF joint-line haul, sourced from mines open to URC; and (2) a truck-BNSF joint-line haul, sourced from load-outs either at Provo or at other Utah points opened to BNSF under the transloading condition that we imposed. While acknowledging that, post-merger, complainants' single-line options would be reduced from two to one, we pointed out that the difference between single-line service and joint-line service is less important in the coal unit train context and that the URC-BNSF joint-line routing should be quite competitive, especially considering the new coal sources opened to URC under the URC agreement. UP/SP, slip op. at 187.

specifically demonstrated the relevancy of the requested discovery, which it views as central to complainants' theory of the case. According to UP, complainants must be relying on the theory that the history of BNSF's bidding and negotiations for the North Valmy traffic demonstrates that BNSF is not an effective competitor because the fact that a competing railroad has actually secured a contract to move coal to North Valmy is, in UP's view, sufficient evidence that effective competition exists. While UP characterizes the argument as far-fetched, quixotic and implausible, it nevertheless is pursuing the documents in order to disprove the anticipated claim. UP states that, if we grant BNSF's motion for a protective order for confidentiality reasons, we should dismiss complainants' rate case on the ground that it cannot be fairly litigated. Alternatively, it argues that we should draw all reasonable adverse inferences against complainants related to these non-produced documents, which would include the inference that BNSF is fully and directly competitive with UP for movements of coal to North Valmy.

We fail to see the relevance of the pre-contract information and agree with complainants that UP does not need that information to make its argument. The Agreement itself, which complainants have provided to UP, should be sufficient for UP to demonstrate that BNSF is an effective competitor for coal movements originating at or near the Savage load-out. Therefore, we will deny UP's motion to compel.

We do not agree with UP that this result requires dismissal of complainants' rate case on the ground that it cannot be fairly litigated. The burden is on complainants to make an initial showing of market dominance by establishing that there are no direct transportation alternatives (intramodal or intermodal) for the movements at issue that effectively constrain the railroad's pricing. As noted, the existence of the Agreement is strong evidence of intramodal competition, and there is no basis on which we can conceive that evidence about the negotiations leading to the Agreement could overcome the force of the Agreement itself. Therefore, we believe this issue can be fairly litigated without requiring the disclosure of pre-contract negotiations to UP. Because complainants have already produced the Agreement under the terms of the protective order issued in this proceeding, and we are not requiring the production of the underlying documents and information, an additional protective order is not necessary to protect BNSF's limited interest in this proceeding. Therefore, we will also deny BNSF's motion for a protective order.

IV. UP's Second Motion to Compel.

UP seeks the production of the prior testimony and workpapers of complainants' stand-alone cost expert, information that is allegedly relevant to the issue of rate reasonableness. Because we are bifurcating this proceeding and are only considering the parties' market dominance evidence at this time, we will postpone consideration of UP's second motion to compel and complainants' October 17 motion for a protective order.

V. Complainants' Motion to Compel.

In the supplement to their motion to compel, complainants outline the remaining discovery requests that are still in dispute. Almost all of these requests relate to rate reasonableness and, accordingly, we will postpone consideration of the portion of the motion to compel as to these requests until after we have resolved the market dominance issue.

The market dominance-related requests are Nos. 5 and 6 of complainants' second set of discovery requests, served September 29, 1997, and No. 92 of complainants' first set of discovery requests served August 15, 1997. The motion to compel as to Nos. 5 and 6 will be denied because these requests deal with rate comparisons that are not relevant to the issue of market dominance for the transportation at issue. Specifically, No. 5 seeks the production of all requests or solicitations to UP, all correspondence between UP and issuers of the solicitations and/or makers of the requests, all documents analyzing the solicitations and possible responses by UP, and all contracts and agreements between UP and coal shippers for contract and/or common carrier coal transportation service, between 1992 and the present, that originated, terminated, or was handled as overhead traffic in Colorado, Nevada, Utah and Wyoming (except for Powder River Basin origins). No. 6 seeks the same information as in No. 5, but as to service by UP, URC/UP, and/or BNSF/UP. As UP notes in its opposition to the motion to compel, the competitive circumstances related to other coal movements to other coal shippers, which have nothing to do with the shipment of coal to North Valmy, is not probative of any competitive issue in this case.

Unlike requests Nos. 5 and 6, UP has responded to request No. 92, which seeks information relating to UP's policies and methodologies for setting rates for shippers of coal in unit train volumes. In the supplement to their motion to compel, complainants submit that the materials produced by UP, consisting of a single sheet identifying the various steps that UP goes through in preparing a bid proposal for a customer, is unresponsive to the request. UP, in response to the supplement to the motion to compel, argues that the material it submitted is complete, and it explains that it has no formal policy or methodology for setting coal rates.¹⁰ In light of this fact, it appears that UP has fully responded to the request and, accordingly, we will deny complainants' motion to compel.

VI. UP's Third Motion to Compel.

UP describes the six discovery requests that are the subject of its third motion to compel as involving the competition faced by the North Valmy plant in electricity end-markets, and complainants' ability to purchase or sell power from other sources, rather than generating power at North Valmy. We resolve these market dominance-related requests as follows.¹¹

¹⁰ The one-page document which UP produced in response to the request is a checklist that UP states is used by Energy Marketing in preparing coal bids.

¹¹ Complainants challenge UP's third motion to compel on a number of grounds, including
(continued...)

A. Request No. 91.

UP states that complainants have refused to produce any documents that identify or discuss their competitors, both for power sales to their largest customers and for offline power sales. According to complainants, this request would require that they produce every shred of paper or other document, generated or possessed by any person in their companies, identifying or discussing the competitors of complainants for the past 17 years. In addition to the request being overly broad and burdensome, complainants state that it is vague in that UP has not defined “offline power sales” or the word “competitors,” which could constitute a huge universe of entities that buy or sell power or natural gas, and/or provide energy-related products and services.

Because this request is relevant to the issue of market dominance, we will order complainants to produce the documents, if they exist. However, we agree with complainants that the request is overly broad and, therefore, we will restrict the discovery to documents from the past 2 years. Also, we will require UP within 5 days of the service date of this decision to clarify to complainants the meaning of “competitors” and “offline power sales.”

B. Request No. 98.

UP states that complainants have only partially responded to the request for studies or analyses of the costs and benefits of off-system power purchases.¹² In their reply, complainants submit that they have produced large amounts of material, including forecasts, that addresses how each company makes decisions with regard to power purchases. According to complainants, these forecasts are the only existing studies, relating to the costs and benefits of operating alternate resources on a forward-looking basis.

It appears that complainants have provided all the information that they have in response to this request and, accordingly, we will deny UP’s motion to compel a further response.

C. Request No. 102.

UP states that complainants have refused to provide any documents responsive to the request

¹¹(...continued)

that the motion was filed beyond the 10-day time limit in 49 CFR 1114.31(a). Considering the liberties that both sides have taken with our rules, we will not discuss complainants’ argument that UP’s motion is untimely. Suffice it to say that the deadline for the completion of discovery was suspended by the October 10 decision.

¹² In its third motion to compel, UP stated that complainants had produced only a single 5-year forecast, written in 1995. As noted in UP’s correction to its motion, complainants actually produced the 1996 and 1997 versions of the forecast.

for all documents, including but not limited to studies, relating to complainants' expected use of the Alturas Intertie.¹³ According to complainants, the Alturas Intertie will not increase their ability to purchase power from the Pacific Northwest instead of generating power at North Valmy or other plants. They submit that UP's request is overly broad and burdensome.

Because the requested information is relevant to the issue of market dominance, we will order complainants to produce the documents, if they exist. We do not agree with complainants that the request is overly broad or burdensome. The proposed construction of the Alturas Intertie appears to be a relatively new project (to be completed in 1998) and, therefore, the information UP seeks should be readily available.

D. Request No. 103.

UP states that complainants have provided information on the projected level of usage of the Alturas Intertie, as requested, but not on the projected purchase price for electricity from the Intertie. According to UP, this information is relevant to show that purchases from the Alturas Intertie are a direct competitive alternative to the generation of electricity by the North Valmy plant and, therefore, that output from North Valmy could and would be reduced in response to competition from such alternative sources of power. Complainants object to the request as being overly broad, unduly burdensome, and not calculated to lead to the discovery of admissible evidence.

We disagree with complainants. Their response offers generalized information relative to the request, but does not appear to specifically answer UP's question, which is relevant to the issue of market dominance. Accordingly, we will order complainants to fully respond to the request.

E. Request No. 107.

In response to the request for data on sales of power to others for the years 1992-1996 for North Valmy output not purchased by complainants, UP objects to complainants' use of FERC Form 1 data. According to UP, FERC Form 1 data are not broken down separately for the North Valmy plant and, therefore, are not responsive to the request, which focuses specifically on sales of North Valmy output. Complainants respond that the request did not ask for such a breakdown and, in any event, each company records power sales on a system-wide basis and does not break down the information on a plant-by-plant basis.

Complainants' explanation is reasonable and it appears that they have fully complied with the request. Therefore, we will deny UP's motion to compel a further response.

¹³ This request includes any studies of the economic basis for the decision to build the Alturas Intertie.

F. Request No. 119.

UP states that complainants' Fuel and Purchased Power Forecasts, produced in response to the request for all studies and analyses of reductions in the utilization of North Valmy, are only partially responsive to the request.¹⁴ Although the forecasts address issues of pricing, UP argues that there is no analysis of the effects of natural gas prices or hydroelectric power on utilization of North Valmy, which is the information that it seeks. In response, complainants submit that the information is contained in the various FERC forms, Power Operations Planning Worksheets, Integrated Resources Plans, Fuel Budgets, and Fuel and Purchased Power Forecasts, which have already been produced to UP in response to its other requests on these issues.

We agree with complainants that the information they provided is responsive to UP's request. Therefore, we will deny UP's motion to compel a further response.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. BNSF's petition for leave to intervene is granted and its motion for a protective order is denied.
2. Complainants' request for the appointment of an ALJ is denied.
3. UP's motion to dismiss is denied and this proceeding is bifurcated for separate determinations of the market dominance and rate reasonableness issues. The rate reasonableness phase of this proceeding, including all motions related to rate reasonableness, is held in abeyance pending completion of the market dominance phase. The procedural schedule for the market dominance phase of the proceeding is as follows:

Market dominance-related discovery in compliance with this decision must be completed by February 25, 1998;

Opening market dominance evidence is due March 27, 1998;

Reply market dominance evidence is due April 16, 1998; and

¹⁴ In its third motion to compel, UP stated that the most recent Fuel and Purchased Power Forecast produced by complainants was outdated because it was from 1995. As noted in UP's correction to its motion, complainants actually produced the 1996 and 1997 versions of the forecast.

Rebuttal market dominance evidence is due April 27, 1998.

4. UP's first motion to compel, filed September 12, 1997, is denied.

5. Consideration of UP's second motion to compel, filed October 1, 1997, and complainants' motion for a protective order, filed October 17, 1997, is postponed pending completion of the market dominance phase of the proceeding.

6. Consideration of the rate reasonableness requests contained in complainants' motion to compel filed October 24, 1997, is postponed pending completion of the market dominance phase of the proceeding; the motion is denied as to the market dominance-related requests Nos. 5 and 6 of complainants' second set of discovery requests, served September 29, 1997, and No. 92 of complainants' first set of discovery requests served August 15, 1997.

7. UP's third motion to compel, filed December 1, 1997, as corrected on December 9, 1997, is denied as to requests Nos. 98, 107, and 119, and granted as to requests Nos. 91 (as modified in this decision), 102, and 103. With respect to request No. 91, UP must make the clarifications ordered in the decision within 5 days of the service date.

8. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

28606
EB

SERVICE DATE - LATE RELEASE JANUARY 26, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42012

SIERRA PACIFIC POWER COMPANY AND IDAHO POWER COMPANY

v.

UNION PACIFIC RAILROAD COMPANY

Decided: January 21, 1998

BACKGROUND

In a complaint filed, and served on defendant, Union Pacific Railroad Company (UP), on August 1, 1997, Sierra Pacific Power Company and Idaho Power Company (complainants) allege that rates assessed by UP to move complainants' unit trains of coal from Sharp, UT, to complainants' North Valmy Station (North Valmy), an electric generating plant in north central Nevada, exceed a maximum reasonable level and that UP possesses market dominance over the traffic. Complainants request that maximum reasonable rates be prescribed, along with related rules and service terms for the movement.¹

On September 12, 1997, UP filed a motion to compel complainants to produce documents, which complainants have refused to provide, relating to competition by The Burlington Northern and Santa Fe Railway Company (BNSF) for the movement of coal to North Valmy.² Specifically, UP requested documents related to any bids made by BNSF for the transportation of coal to North Valmy and any contracts between BNSF and complainants for coal movements to North Valmy.

On September 23, 1997, BNSF filed a petition for leave to intervene in this proceeding to seek a protective order preventing disclosure of BNSF's pre-contract bidding and negotiations leading up to an August 28, 1997 letter agreement (Agreement) between complainants and BNSF and Utah Railway Company (URC). Concurrently with its petition to intervene, BNSF filed the motion for the protective order.

On September 24, 1997, complainants filed a reply in opposition to UP's motion to compel and in support of BNSF's petition for leave to intervene and motion for a protective order.

¹ On August 15, 1997, the parties filed a joint motion for the approval of a stipulated protective order. By decision served August 25, 1997, the motion was granted and a protective order was entered.

² The deadline for the completion of discovery was October 15, 1997. By decision served October 10, 1997, the deadline was suspended until further notice.

Complainants note that, in response to BNSF's filing, they have given the Agreement to UP under a highly confidential designation. UP filed a response opposing BNSF's motion for a protective order on September 25, 1997.

On October 1, 1997, UP filed a second motion to compel. In this motion, UP seeks an order compelling complainants to produce the prior testimony and workpapers of their stand-alone cost expert, which complainants have refused to provide. Complainants replied to the motion on October 17, 1997, and concurrently filed a motion for a protective order to prohibit UP from deposing complainants' cost expert. On October 31, 1997, UP replied in opposition to complainants' October 17 motion for a protective order.

On October 24, 1997, complainants filed a motion to compel discovery and for the appointment of an Administrative Law Judge (ALJ). The motion covers: (1) discovery requests to which UP has not fully responded; (2) UP responses to discovery requests that allegedly are incomplete; (3) discovery requests to which UP has objected; and (4) discovery and document requests concerning the market for coal transportation in the western United States. On November 14, 1997, UP responded to complainants' October 24 motion. UP states that, with only a few exceptions, it has responded to complainants' discovery requests, and, therefore, the motion to compel is moot and there is no need to appoint an ALJ. On December 5, 1997, complainants filed a supplement to their motion to compel, identifying the deficiencies in UP's responses and renewing their request for the appointment of an ALJ. On December 22, 1997, UP replied to complainants' December 5 supplement, arguing that complainants' motion to compel is moot because UP has now fully responded.

On November 4, 1997, UP filed a motion to dismiss the complaint, alleging that complainants cannot establish that UP has market dominance in the movement of coal to North Valmy. On November 24, 1997, complainants' replied to UP's motion to dismiss.

On December 1, 1997, UP filed a third motion to compel. This motion concerns the production of documents relating to competition in electricity markets. UP filed a correction to the motion on December 9, 1997. On December 22, 1997, complainants replied to UP's December 1 motion.

DISCUSSION AND CONCLUSIONS

I. Preliminary Matters.

A. Intervention.

BNSF seeks to intervene in this proceeding to prevent the disclosure of certain information that it deems to be commercially sensitive and irrelevant to this proceeding. BNSF states that the information and documents that UP seeks in its first motion to compel contain critical information

about BNSF's negotiations practices and pricing policies. BNSF argues that disclosure of the information and documents would inflict the risk of material harm on BNSF because it would reveal insights into BNSF's negotiating strategies, e.g., how BNSF trades off among various contract terms and reacts to shipper requests. According to BNSF, UP tried to obtain this same information in the UP/SP oversight proceeding³ and BNSF seeks to intervene here in order to protect its interests in keeping this information confidential. We will permit BNSF to intervene for this limited purpose.

B. Request for an ALJ.

As noted in their October 24 motion to compel, complainants sought the appointment of an ALJ to hear and decide the discovery disputes between the parties. Complainants' reason for wanting an ALJ at that time was to assist the Board in enabling the parties to adhere to the original procedural schedule as closely as possible. At the joint request of the parties filed November 10, 1997, the procedural schedule was subsequently suspended until further notice in a decision served November 13, 1997. In its November 14 opposition to complainants' motion to compel, UP also opposes complainants' request for the appointment of an ALJ, arguing that it would add a layer of bureaucracy that is unnecessary to resolve the straightforward discovery issues in this case. In their December 5 supplement to their motion to compel, complainants now argue that an ALJ is needed because of "UP's continued approach of dragging out the discovery phase of this case through piecemeal document production" In its December 22 response, UP counters that complainants are trying to manufacture a discovery dispute where none exists.

Despite the proliferation of pleadings, complainants have not persuaded us that an ALJ is needed to resolve the discovery disputes between the parties. Accordingly, we will deny complainants' request for the appointment of an ALJ and instead resolve all necessary discovery matters in this decision.

II. Motion to Dismiss.

In a proceeding challenging the reasonableness of a railroad rate, before we may determine that the rate is unreasonably high under 49 U.S.C. 10701, we must first find that a carrier has market dominance under 49 U.S.C. 10707, over the transportation to which a challenged rate applies. UP argues that complainants presented extensive evidence and argument in the UP/SP

³ Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company, STB Finance Docket No. 32760 (Sub-No. 21) (UP/SP Oversight).

merger proceeding⁴ that, prior to the merger, UP's rates for coal movements to North Valmy from the Southern Utah Fuel Company (SUFCO) mine were constrained by competition from SP;⁵ that we granted trackage rights to BNSF and URC in UP/SP to replace and preserve the competition previously provided by SP; that we found in the UP/SP oversight proceeding⁶ that the merger did not diminish the intensity of competition for the movement of coal to North Valmy; and that, therefore, based on complainants' own evidence in UP/SP of competition for movements to North Valmy, competition cannot be found to have been diminished by the merger. Accordingly, UP argues that complainants cannot establish the absence of effective competition for coal movements to North Valmy.

Complainants reply that UP has provided no legal authority to support its argument that the decisions in UP/SP or UP/SP Oversight establish conclusively, as a matter of law, that UP does not possess market dominance over the transportation of contract minimum tonnages of coal from the SUFCO mine. Complainants note that the evidence submitted in UP/SP and UP/SP Oversight was limited, that we declined to open UP/SP Oversight for discovery,⁷ and that we stated in UP/SP Oversight that we did not intend to prejudge the merits of this complaint in that decision.⁸

In considering a motion to dismiss, we must construe factual allegations in a light most favorable to complainant. See, e.g., Western Fuels Service Corporation v. The Burlington Northern and Santa Fe Railway Company, STB Docket Nos. 41987 et al. (STB served July 28, 1997). Taking this standard and all other factors into account, we will deny UP's motion to dismiss the complaint. Nevertheless, based on our findings in UP/SP, UP has made a strong argument that there is effective intramodal competition for the traffic at issue.⁹ As complainants note, our findings in

⁴ Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company, Finance Docket No. 32760 (UP/SP). See UP/SP, Decision No. 44 (STB served Aug. 12, 1996).

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UP/SP were not intended to prejudge this complaint and we will not do so in advance of receiving and considering evidence and argument on market dominance. However, given our findings in UP/SP, it might be to complainants' advantage to focus the bulk of their evidence and argument with regard to intramodal and intermodal competition on whether truck-URC/BNSF movements from the SUFCO mine via the Savage load-out effectively constrain the baseload contractually committed SUFCO coal tonnage now moving truck-UP/SP via the Sharp load-out.

We are committed to processing maximum rate reasonableness complaints promptly and we recognize that bifurcating cases into separate market dominance and rate reasonableness phases can extend the time it takes to resolve a rate complaint in some instances. Here, however, given the substantial weight of UP's position in its motion to dismiss, we have considerable doubts as to complainants' ability to demonstrate market dominance. Accordingly, to minimize the administrative burdens on the parties, we will bifurcate the market dominance and rate reasonableness phases of this proceeding and postpone the submission and consideration of rate reasonableness evidence until we have resolved the issue of market dominance.

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UP argues that it requires the pre-contract information to respond to anticipated claims from complainants that, notwithstanding the Agreement, the history of BNSF's bidding and negotiations leading up to the Agreement demonstrates that BNSF is not an effective competitor and, thus, that UP has market dominance over the transportation of coal to North Valmy. In seeking a protective order to prevent the disclosure of the pre-contract information, BNSF argues that UP has failed to explain how the bid and negotiations information is relevant to the question of whether BNSF provides effective intramodal competition for the movement of coal to North Valmy. BNSF also argues that UP has not made a specific showing that its need for the information outweighs the likelihood of competitive harm to the disclosing party. Complainants agree and, in their reply to the motion to compel, state that it is not readily apparent why documents and information which led up to the Agreement are relevant and necessary either for UP to make its argument or for complainants to respond.

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single-line option, two BNSF options: (1) a URC-BNSF joint-line haul, sourced from mines open to URC; and (2) a truck-BNSF joint-line haul, sourced from load-outs either at Provo or at other Utah points opened to BNSF under the transloading condition that we imposed. While acknowledging that, post-merger, complainants' single-line options would be reduced from two to one, we pointed out that the difference between single-line service and joint-line service is less important in the coal unit train context and that the URC-BNSF joint-line routing should be quite competitive, especially considering the new coal sources opened to URC under the URC agreement. UP/SP, slip op. at 187.

specifically demonstrated the relevancy of the requested discovery, which it views as central to complainants' theory of the case. According to UP, complainants must be relying on the theory that the history of BNSF's bidding and negotiations for the North Valmy traffic demonstrates that BNSF is not an effective competitor because the fact that a competing railroad has actually secured a contract to move coal to North Valmy is, in UP's view, sufficient evidence that effective competition exists. While UP characterizes the argument as far-fetched, quixotic and implausible, it nevertheless is pursuing the documents in order to disprove the anticipated claim. UP states that, if we grant BNSF's motion for a protective order for confidentiality reasons, we should dismiss complainants' rate case on the ground that it cannot be fairly litigated. Alternatively, it argues that we should draw all reasonable adverse inferences against complainants related to these non-produced documents, which would include the inference that BNSF is fully and directly competitive with UP for movements of coal to North Valmy.

We fail to see the relevance of the pre-contract information and agree with complainants that UP does not need that information to make its argument. The Agreement itself, which complainants have provided to UP, should be sufficient for UP to demonstrate that BNSF is an effective competitor for coal movements originating at or near the Savage load-out. Therefore, we will deny UP's motion to compel.

We do not agree with UP that this result requires dismissal of complainants' rate case on the ground that it cannot be fairly litigated. The burden is on complainants to make an initial showing of market dominance by establishing that there are no direct transportation alternatives (intramodal or intermodal) for the movements at issue that effectively constrain the railroad's pricing. As noted, the existence of the Agreement is strong evidence of intramodal competition, and there is no basis on which we can conceive that evidence about the negotiations leading to the Agreement could overcome the force of the Agreement itself. Therefore, we believe this issue can be fairly litigated without requiring the disclosure of pre-contract negotiations to UP. Because complainants have already produced the Agreement under the terms of the protective order issued in this proceeding, and we are not requiring the production of the underlying documents and information, an additional protective order is not necessary to protect BNSF's limited interest in this proceeding. Therefore, we will also deny BNSF's motion for a protective order.

IV. UP's Second Motion to Compel.

UP seeks the production of the prior testimony and workpapers of complainants' stand-alone cost expert, information that is allegedly relevant to the issue of rate reasonableness. Because we are bifurcating this proceeding and are only considering the parties' market dominance evidence at this time, we will postpone consideration of UP's second motion to compel and complainants' October 17 motion for a protective order.

V. Complainants' Motion to Compel.

In the supplement to their motion to compel, complainants outline the remaining discovery requests that are still in dispute. Almost all of these requests relate to rate reasonableness and, accordingly, we will postpone consideration of the portion of the motion to compel as to these requests until after we have resolved the market dominance issue.

The market dominance-related requests are Nos. 5 and 6 of complainants' second set of discovery requests, served September 29, 1997, and No. 92 of complainants' first set of discovery requests served August 15, 1997. The motion to compel as to Nos. 5 and 6 will be denied because these requests deal with rate comparisons that are not relevant to the issue of market dominance for the transportation at issue. Specifically, No. 5 seeks the production of all requests or solicitations to UP, all correspondence between UP and issuers of the solicitations and/or makers of the requests, all documents analyzing the solicitations and possible responses by UP, and all contracts and agreements between UP and coal shippers for contract and/or common carrier coal transportation service, between 1992 and the present, that originated, terminated, or was handled as overhead traffic in Colorado, Nevada, Utah and Wyoming (except for Powder River Basin origins). No. 6 seeks the same information as in No. 5, but as to service by UP, URC/UP, and/or BNSF/UP. As UP notes in its opposition to the motion to compel, the competitive circumstances related to other coal movements to other coal shippers, which have nothing to do with the shipment of coal to North Valmy, is not probative of any competitive issue in this case.

Unlike requests Nos. 5 and 6, UP has responded to request No. 92, which seeks information relating to UP's policies and methodologies for setting rates for shippers of coal in unit train volumes. In the supplement to their motion to compel, complainants submit that the materials produced by UP, consisting of a single sheet identifying the various steps that UP goes through in preparing a bid proposal for a customer, is unresponsive to the request. UP, in response to the supplement to the motion to compel, argues that the material it submitted is complete, and it explains that it has no formal policy or methodology for setting coal rates.¹⁰ In light of this fact, it appears that UP has fully responded to the request and, accordingly, we will deny complainants' motion to compel.

VI. UP's Third Motion to Compel.

UP describes the six discovery requests that are the subject of its third motion to compel as involving the competition faced by the North Valmy plant in electricity end-markets, and complainants' ability to purchase or sell power from other sources, rather than generating power at North Valmy. We resolve these market dominance-related requests as follows.¹¹

¹⁰ The one-page document which UP produced in response to the request is a checklist that UP states is used by Energy Marketing in preparing coal bids.

¹¹ Complainants challenge UP's third motion to compel on a number of grounds, including
(continued...)

A. Request No. 91.

UP states that complainants have refused to produce any documents that identify or discuss their competitors, both for power sales to their largest customers and for offline power sales. According to complainants, this request would require that they produce every shred of paper or other document, generated or possessed by any person in their companies, identifying or discussing the competitors of complainants for the past 17 years. In addition to the request being overly broad and burdensome, complainants state that it is vague in that UP has not defined “offline power sales” or the word “competitors,” which could constitute a huge universe of entities that buy or sell power or natural gas, and/or provide energy-related products and services.

Because this request is relevant to the issue of market dominance, we will order complainants to produce the documents, if they exist. However, we agree with complainants that the request is overly broad and, therefore, we will restrict the discovery to documents from the past 2 years. Also, we will require UP within 5 days of the service date of this decision to clarify to complainants the meaning of “competitors” and “offline power sales.”

B. Request No. 98.

UP states that complainants have only partially responded to the request for studies or analyses of the costs and benefits of off-system power purchases.¹² In their reply, complainants submit that they have produced large amounts of material, including forecasts, that addresses how each company makes decisions with regard to power purchases. According to complainants, these forecasts are the only existing studies, relating to the costs and benefits of operating alternate resources on a forward-looking basis.

It appears that complainants have provided all the information that they have in response to this request and, accordingly, we will deny UP’s motion to compel a further response.

C. Request No. 102.

UP states that complainants have refused to provide any documents responsive to the request

¹¹(...continued)

that the motion was filed beyond the 10-day time limit in 49 CFR 1114.31(a). Considering the liberties that both sides have taken with our rules, we will not discuss complainants’ argument that UP’s motion is untimely. Suffice it to say that the deadline for the completion of discovery was suspended by the October 10 decision.

¹² In its third motion to compel, UP stated that complainants had produced only a single 5-year forecast, written in 1995. As noted in UP’s correction to its motion, complainants actually produced the 1996 and 1997 versions of the forecast.

for all documents, including but not limited to studies, relating to complainants' expected use of the Alturas Intertie.¹³ According to complainants, the Alturas Intertie will not increase their ability to purchase power from the Pacific Northwest instead of generating power at North Valmy or other plants. They submit that UP's request is overly broad and burdensome.

Because the requested information is relevant to the issue of market dominance, we will order complainants to produce the documents, if they exist. We do not agree with complainants that the request is overly broad or burdensome. The proposed construction of the Alturas Intertie appears to be a relatively new project (to be completed in 1998) and, therefore, the information UP seeks should be readily available.

D. Request No. 103.

UP states that complainants have provided information on the projected level of usage of the Alturas Intertie, as requested, but not on the projected purchase price for electricity from the Intertie. According to UP, this information is relevant to show that purchases from the Alturas Intertie are a direct competitive alternative to the generation of electricity by the North Valmy plant and, therefore, that output from North Valmy could and would be reduced in response to competition from such alternative sources of power. Complainants object to the request as being overly broad, unduly burdensome, and not calculated to lead to the discovery of admissible evidence.

We disagree with complainants. Their response offers generalized information relative to the request, but does not appear to specifically answer UP's question, which is relevant to the issue of market dominance. Accordingly, we will order complainants to fully respond to the request.

E. Request No. 107.

In response to the request for data on sales of power to others for the years 1992-1996 for North Valmy output not purchased by complainants, UP objects to complainants' use of FERC Form 1 data. According to UP, FERC Form 1 data are not broken down separately for the North Valmy plant and, therefore, are not responsive to the request, which focuses specifically on sales of North Valmy output. Complainants respond that the request did not ask for such a breakdown and, in any event, each company records power sales on a system-wide basis and does not break down the information on a plant-by-plant basis.

Complainants' explanation is reasonable and it appears that they have fully complied with the request. Therefore, we will deny UP's motion to compel a further response.

¹³ This request includes any studies of the economic basis for the decision to build the Alturas Intertie.

F. Request No. 119.

UP states that complainants' Fuel and Purchased Power Forecasts, produced in response to the request for all studies and analyses of reductions in the utilization of North Valmy, are only partially responsive to the request.¹⁴ Although the forecasts address issues of pricing, UP argues that there is no analysis of the effects of natural gas prices or hydroelectric power on utilization of North Valmy, which is the information that it seeks. In response, complainants submit that the information is contained in the various FERC forms, Power Operations Planning Worksheets, Integrated Resources Plans, Fuel Budgets, and Fuel and Purchased Power Forecasts, which have already been produced to UP in response to its other requests on these issues.

We agree with complainants that the information they provided is responsive to UP's request. Therefore, we will deny UP's motion to compel a further response.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. BNSF's petition for leave to intervene is granted and its motion for a protective order is denied.
2. Complainants' request for the appointment of an ALJ is denied.
3. UP's motion to dismiss is denied and this proceeding is bifurcated for separate determinations of the market dominance and rate reasonableness issues. The rate reasonableness phase of this proceeding, including all motions related to rate reasonableness, is held in abeyance pending completion of the market dominance phase. The procedural schedule for the market dominance phase of the proceeding is as follows:

Market dominance-related discovery in compliance with this decision must be completed by February 25, 1998;

Opening market dominance evidence is due March 27, 1998;

Reply market dominance evidence is due April 16, 1998; and

¹⁴ In its third motion to compel, UP stated that the most recent Fuel and Purchased Power Forecast produced by complainants was outdated because it was from 1995. As noted in UP's correction to its motion, complainants actually produced the 1996 and 1997 versions of the forecast.

Rebuttal market dominance evidence is due April 27, 1998.

4. UP's first motion to compel, filed September 12, 1997, is denied.

5. Consideration of UP's second motion to compel, filed October 1, 1997, and complainants' motion for a protective order, filed October 17, 1997, is postponed pending completion of the market dominance phase of the proceeding.

6. Consideration of the rate reasonableness requests contained in complainants' motion to compel filed October 24, 1997, is postponed pending completion of the market dominance phase of the proceeding; the motion is denied as to the market dominance-related requests Nos. 5 and 6 of complainants' second set of discovery requests, served September 29, 1997, and No. 92 of complainants' first set of discovery requests served August 15, 1997.

7. UP's third motion to compel, filed December 1, 1997, as corrected on December 9, 1997, is denied as to requests Nos. 98, 107, and 119, and granted as to requests Nos. 91 (as modified in this decision), 102, and 103. With respect to request No. 91, UP must make the clarifications ordered in the decision within 5 days of the service date.

8. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary