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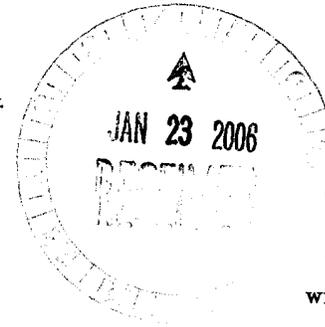
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January 23, 2006

**VIA HAND DELIVERY**

Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W., Room 711  
Washington, D.C. 20423

ENTERED  
Office of Proceedings

JAN 23 2006

Part of  
Public Record

Re: Docket No. 42095, Kansas City Power & Light  
Company v. Union Pacific Railroad Company

Dear Secretary Williams:

Enclosed for filing in the referenced proceeding please find an original and ten copies of Complainant Kansas City Power & Light Company's Second Motion to Compel Responses to Interrogatories and Discovery Requests in the above proceeding.

An additional copy of this pleading is enclosed. Please indicate receipt and filing by time-stamping this extra copy and returning it to the bearer of this letter.

Thank you for your prompt attention to this matter.

Sincerely,

Kelvin J. Dowd

Enclosures

cc: Counsel for Defendant



**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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<b>KANSAS CITY POWER &amp; LIGHT COMPANY</b>	)	
	)	
<b>Complainant,</b>	)	
	)	
v.	)	<b>Docket No. 42095</b>
	)	
<b>UNION PACIFIC RAILROAD COMPANY</b>	)	
	)	
<b>Defendant.</b>	)	
	)	

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**COMPLAINANT'S SECOND MOTION TO COMPEL  
RESPONSES TO INTERROGATORIES AND DOCUMENT REQUESTS**

Pursuant to 49 C.F.R. Part 1114.31, Complainant Kansas City Power & Light Company ("KCPL") hereby moves for an order compelling Defendant Union Pacific Railroad Company ("UP") to answer one interrogatory and produce relevant documents in response to four requests propounded in KCPL's First Set of Admissions, Interrogatories, and Requests for Production of Documents served October 21, 2005 ("First Requests").

In support hereof, KCPL shows as follows:

**BACKGROUND**

On October 12, 2005, KCPL filed its Verified Complaint in this proceeding, challenging UP's common carrier rates, fuel surcharge and service terms applicable to the transportation of coal in unit trains from mines in the Wyoming Powder River Basin to

KCPL's Montrose Generating Station near Ladue, Missouri. The Complaint requests the Board to examine the reasonableness of the rates at issue using its Constrained Market Pricing methodology.

On October 21, 2005, KCPL served its First Requests on UP. On November 21, 2005, UP provided its Objections and Responses ("Responses") to KCPL's First Requests.<sup>1</sup> At that time, UP objected outright to two interrogatories and five requests for production of documents ("RFP"), and made several general objections applicable to all of KCPL's First Requests. To preserve its rights to the documents and responses in question in light of the applicable deadline under the Rules of Practice, KCPL filed a precautionary Motion to Compel on December 1, 2005.

Following the submission of UP's Responses, the parties scheduled a discovery conference of counsel for December 14, 2005. On December 6, 2005, UP sought an extension of time to file its response to KCPL's Motion to Compel pending further negotiations between the parties. On December 12, 2005, the Board opted to dismiss KCPL's Motion to Compel without prejudice, pending the parties' discussions and the eventual staff-supervised discovery conference held on January 13, 2006.

KCPL and UP reached agreement on a variety of disputed discovery matters at their December 14 discovery conference, and through a series of subsequent correspondence between counsel. However, the parties were unable to resolve their disputes concerning KCPL's Interrogatory No. 9 and Request for Production Nos. 1, 2, 37

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<sup>1</sup> A complete copy of KCPL's First Requests and UP's Responses were included on the CD accompanying KCPL's First Motion to Compel.

and 38, which likewise remained open following the staff-supervised discovery conference. These remaining objections concern data in UP's possession that relate to studies of the profitability of UP coal traffic, and data that could be used to make movement-specific variable cost adjustments. For the reasons set forth below, KCPL respectfully requests that the Board compel substantive responses to the subject discovery requests.

### ARGUMENT

The Board and its predecessor repeatedly have held that in cases brought under Constrained Market Pricing principles, the records of defendant railroads are subject to broad discovery. *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520, 548 (1985), *aff'd sub nom. Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987) ("We recognize that shippers may require substantial discovery to litigate a case under CMP, and we are prepared to make that discovery available to them.") The Board's Rules of Practice reinforce this policy, permitting discovery of any non-privileged matter which is relevant to the subject matter involved in a proceeding. *See* 49 C.F.R. Part 1114.21(a). It is also well-settled that the Board's discovery rules are to be liberally construed. *See, e.g., Bar Ale, Inc., v. California Northern R.R.*, Finance Docket No. 32821 (STB served March 15, 1996) at 2. Against the backdrop of these general principles, it is clear that UP's objections should be overruled.

I.

**OBJECTIONS RELATED TO PROFITABILITY STUDIES  
(REQUEST FOR PRODUCTION NOS. 1 AND 2)**

KCPL's Request for Production Nos. 1 and 2 seek data regarding the profitability of UP coal traffic generally, and the profitability of the transportation at issue in this proceeding. Initially, UP objected on a variety of grounds. However, through the various discovery-related conferences and correspondence UP narrowed its objection to the production of responsive documents that relate "to UP's internal costing system." See December 23, 2005 letter from UP counsel to KPCL counsel, a copy of which is included as Attachment A to this Motion . At the staff-supervised discovery conference, UP counsel implied that UP also might have a lingering relevance objection, depending on the extent to which UP argues that the challenged rates should be justified by its need for greater profits on coal traffic. As demonstrated below, however, these remaining objections are without merit, and the Board should grant KCPL's Motion with respect to each Request.

**RFP No. 1**

KCPL's RFP No. 1 states:

Please produce all documents related to the preparation of Item 4140-C to UP Circular 111, attached as Exhibit B to the Complaint in this case, and all predecessor publications thereto, including but not limited to all documents used and/or relied upon in determining the level of the Challenged Rates.

UP's response to this request states only that:

UP objects to this request on the grounds that it is unduly burdensome, is vague, is overbroad, and seeks

information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

## RFP No. 2

KCPL's RFP No. 2 seeks the results of UP's internal studies of the profitability of its coal traffic:

Please produce all studies and analysis conducted by or for UP from January 1, 2000 to date related to (a) the profitability of UP's coal traffic; and (b) the profitability of coal transportation service provided by UP for the account of KCPL.

UP's response included its boilerplate objections, as well as a "management-cost" objection. UP's response also included cryptic references to filings it has made in other rate cases regarding profitability:

Subject to and without waiving its objections, UP states that its publicly available evidentiary filings in recent rate reasonableness challenges contain potentially responsive analyses. See Docket No. 42058, Arizona Electric Power Cooperative v. The Burlington Northern & Santa Fe Ry. & Union Pacific R.R.; No. 42059, Northern States Power Co. v. Union Pacific R.R.; and Docket No. 42051, Wisconsin Power & Light Co. v. Union Pacific R.R.

Defendants in more recent coal rate cases have asserted the need to increase the profitability of their coal traffic as independent grounds for the approval of significant increases in captive coal rates. See, e.g., *Public Service Company of Colorado d/b/a Xcel Energy v. Burlington Northern and Santa Fe Ry.*, STB Docket No. 42057 (STB served Jan. 19, 2005) at 6. KCPL submits that such a claim has no place under the *Coal Rate Guidelines*, since a defendant carrier is assured a rate no lower than the *higher* of 180% of

the variable cost of service, or a stand-alone cost-based rate that guarantees a return on all necessary investment that is equal to the current cost of capital. Board pronouncements are fully consistent with this position.<sup>2</sup> Nevertheless, at the parties' December 14, 2005 discovery conference counsel for UP made it plain that UP intends to argue that revenue requirements should be accorded independent consideration in the ratemaking process, and this argument specifically was not disavowed either in subsequent correspondence with counsel for KCPL or during the January 13 staff-supervised conference. UP effectively has conceded the relevance of its coal-related profitability studies, regardless of the methodology under which they were conducted.

The relevance of profitability data is further supported by UP's other recent filings with the Board, which show its focus on the role of coal traffic profitability in stand-alone cost proceedings. For example, UP's comments in *Railroad Challenges Under the Stand-Alone Cost Methodology*, Ex Parte No. 657 (filed April 20, 2005) included the assertion that the SAC test does not allow UP to recover its costs for coal traffic: "The SAC methodology, as applied in [recent SAC cases involving Western coal], suggests that railroads are earning excessive revenues, even though they cannot afford to make investments America needs. That shows a disconnect between regulation and reality . . . . Application of the SAC methodology thus results in regulated rates that

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<sup>2</sup> See Case No. 05-1030, *BNSF Ry. Co. v. Surface Transportation Board and United States of America* (D.C. Cir.), Brief of Respondents at 32-37.

are too low to generate the revenues rail carriers actually require to supply the transportation services that shippers demand.”<sup>3</sup>

UP also addressed the issue of coal profitability in a letter dated September 20, 2004 filed in Ex Parte No. 655, *Powder River Basin Site Visit*. In this letter, UP claimed:

Union Pacific has seen a steady erosion in the revenue we receive in relation to the costs we incur for transporting coal. If that erosion continues, Union Pacific will find it more difficult to fund the investments necessary to meet projected demands for transportation of coal and all the other commodities that move over our shared network.

KCPL submits that the plethora of published reports of record UP earnings and equity value gains that outpace most U.S. industrial sectors<sup>4</sup> are but the most recent examples of evidence that belies any suggestion of insufficient profit margins on UP coal traffic. Nevertheless, UP’s documented claims confirm the relevance of its internal profitability studies to its expected defenses in this case.

UP’s management cost objection likewise lacks merit. Contrary to UP’s assertions, internal management cost data are not sacrosanct. Relevant precedents do not preclude discovery of so-called “management cost” data where, as here, the information is demonstrably relevant. *See, e.g., San Antonio*, (ICC served Dec. 5, 1986) at 7 (directing production of relevant internal management cost documents); *Arizona Electric*

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<sup>3</sup> UP Comments at 7-8.

<sup>4</sup> *See, e.g.,* “Union Pacific’s Profit Climbs on Demand and Higher Rates,” *The Wall Street Journal*, January 20, 2006 at A-2; *UBS Investment Research*, “First Read: Union Pacific,” January 19, 2006 at 1; *Rail Stock Watch*, Issue No. 84, December 2, 2005 at 5.

*Power Cooperative, Inc. v. The Atchison, Topeka and Santa Fe Ry.*, ICC Docket No. 37437 (ICC served Oct. 23, 1986) 1986 ICC LEXIS 104, at \*5-\*10.<sup>5</sup> KCPL is not asking UP to produce its internal costing system or open that system to extensive review and analysis. Rather, KCPL has narrowly requested that UP produce the results of any management cost studies that reflect internal conclusions about the profitability of coal traffic -- those kept and made in the ordinary course of business, rather than those prepared solely for this case. KCPL is entitled to discovery of non-privileged information in UP's possession that would enable it to test the results of any coal profitability studies that may be introduced by the defendant.<sup>6</sup>

UP's vague reference to profitability data that supposedly is available in the records of other cases is no substitute for the information to which KCPL is entitled here. Indeed, a review of the limited public filings in the cases cited by UP yields nothing more than general expressions of concern by UP that revenue must increase as a condition of

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<sup>5</sup> See also *Arkansas Power & Light Co. – Petition to Institute Rulemaking Proceeding – Implementation of Long-Cannon Amendment to the Staggers Rail Act*, 365 I.C.C. 983, 997 (1982) (holding that if a Long-Cannon discovery request “is reasonable, the railroads may not generally refuse to provide information about their costs of providing service on the ground that cost information is proprietary”).

<sup>6</sup> In past cases, the Board has denied requests for management cost data on relevance grounds when it was sought for the purpose of calculating variable costs that would conflict with the product of the statutorily-approved URCS methodology, because a railroad's internal costing system may not be structured in a manner consistent with the URCS model. See, e.g., *Potomac Electric Power Company v CSX Transportation, Inc.*, STB Docket No. 41989 (STB served May 27, 1997) at 2-3. In contrast, the data sought here is relevant because it reflects the railroad's internal view of the profitability of its coal traffic, a matter placed in issue by BNSF in *Xcel*, by UP in Ex Parte No. 657, and already raised by UP in early stages of this proceeding.

reinvestment in its infrastructure.<sup>7</sup> Moreover, even if useable profitability data were available in those cases, it is now decidedly out of date given recent actions by UP (and BNSF) to aggressively raise their rates for transporting Powder River Basin coal. The Board should order UP to produce the up-to-date profitability data requested by KCPL, irrespective of the methodology by which it was produced.

If UP is not compelled to produce the profitability data in question, then UP should be precluded from introducing any evidence that would purport to justify the reasonableness of the challenged rates by reference to the profit margins or rates of return that UP allegedly earns on its coal traffic.<sup>8</sup> See e.g., *Public Service Company of Colorado D/B/A XCEL Energy v. The Burlington Northern and Santa Fe Railway Company*, Docket No. 42057 (STB served June 8, 2004) at 93 (“[A party] may not impeach that evidence with information it failed to produce during discovery.”); *Potomac Electric Power Company v. CSX Transportation, Inc.*, Docket No. 41989 (STB served Nov. 24, 1997) at 5 (finding that a party may not introduce evidence not produced during discovery, particularly when the other party has no opportunity to respond to it).

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<sup>7</sup> The evidentiary filings in the *Wisconsin Power & Light* and *Northern States Power* cases were not public. UP’s public evidentiary filings in the *Arizona Electric Power Cooperative* case say nothing about the overall profitability of UP’s coal traffic.

<sup>8</sup> UP may respond that it will include among its workpapers data and/or documents that support any profitability-related claims that it may make. However, such a promise will not satisfy KCPL’s entitlement to meaningful discovery. Among other things, KCPL has a right to the production of data and documents in UP’s possession that tend to *refute* such claims as well.

## II.

### **OBJECTIONS RELATED TO MANAGEMENT COSTS (REQUEST FOR PRODUCTION NOS. 37 AND 38 AND INTERROGATORY NO. 9)**

UP objects entirely to Request for Production Nos. 37 and 38 and Interrogatory No. 9 as propounded by KCPL. These objections likewise are without merit, and the Board should grant KCPL's Motion with respect to the Interrogatory and Requests.

RFP Nos. 37 and 38 are interrelated. The Requests are stated below, followed by UP's response, which was identical in each case:

#### RFP No. 37:

Please produce documents sufficient to show the information used by UP for the following items in determining the maintenance and operating costs associated with providing coal unit train transportation services, including the definitions and decoders needed to understand each piece of information and the supporting data used to develop the information (all in a computer-readable format to the extent available):

- a. Roadway maintenance;
- b. Road property investment;
- c. Locomotive investment;
- d. Locomotive maintenance;
- e. Locomotive fuel;
- f. Railcar investment;
- g. Railcar maintenance;
- h. Train and engine crews; and
- i. Clerical expenses.

RFP No. 38:

Please produce all documents related to any determination by UP of its costs of transporting coal from Origins to Destination using any of the information described in Interrogatory No. 8 and/or produced in response to Request for Production No. 3[7] (in a computer-readable format if available) during the period from 2002 to the present.

UP Response:

UP objects to this request on the grounds that is unduly burdensome, is vague, is overbroad and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. UP specifically objects to the extent that this request seeks documents related to UP's internal costing system on the grounds that its internal costing system is irrelevant in STB rate cases and therefore is not discoverable. See Docket No. 42059, Northern States Power Co. v. Union Pacific R.R., Decision served May 24, 2001, pp. 8-9.; Docket No. 42038, Minnesota Power v. Duluth, Missabe & Iron Range Ry., Decision served July 8, 1999, p. 2; Potomac Electric Power Co. v. CSX Transportation, Inc., 2 S.T.B. 290, 293-94 (1997).

Interrogatory No. 9:

Please provide a complete description of the information used by UP in determining the maintenance and operating costs associated with the movement of coal in unit trains over its rail lines both in general and for individual coal movements, including but not limited to costs related to equipment that UP owns, leases, operates and/or uses in providing coal service involving unit trains.

UP Response:

UP objects to this interrogatory on the grounds that it is unduly burdensome, is vague, is overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, UP also objects on the grounds that, to the extent this information exists, it is highly proprietary and is irrelevant in STB rate cases and therefore is not discoverable. See Docket No. 42059, Northern States Power Co. v. Union Pacific R.R., Decision served May 24, 2001, pp. 8-9; Docket No. 42038, Minnesota Power v. Duluth, Missabe & Iron

Range Ry., Decision served July 8, 1999, p. 2; Potomac Electric Power Co. v. CSX Transportation, Inc., 2 S.T.B. 290, 293-94 (1997).

Subject to and without waiving its objections, UP states that the equipment costs components of the movement of KCPL trains by UP will be available in the documents to be produced in response to KCPL's document requests.

UP's management cost objection is unfounded. As discussed above, agency precedents do not preclude discovery of management cost data where the information is demonstrably relevant. *See, e.g., San Antonio*, (ICC served Dec. 5, 1986) at 7 (directing production of relevant internal management cost documents); *Arizona Electric Power Cooperative, Inc. v. The Atchison, Topeka and Santa Fe Ry.*, ICC Docket No. 37437, 1986 ICC LEXIS 104, at \*5-\*10 (ICC served Oct. 23, 1986).

As with KCPL's Document Requests Nos. 1 and 2, relevance clearly is established in this case. While system average unit costs and related data can be used to calculate variable costs using the URCS model, KCPL also is entitled to use movement and line-specific cost adjustments where appropriate, an approach that the Board repeatedly has held is superior to exclusive reliance on system-average costs in cases addressing unit train rates on coal. *San Antonio*, 1 I.C.C.2d 561, 571 (1986). *See also FMC Wyoming Corp. and FMC Corp. v. Union Pacific R.R.*, 4 S.T.B. 699, 747 (2000); *West Texas Utilities Co. v. Burlington Northern R.R.*, 1 S.T.B. 638, 721 (1996); *Omaha Public Power Dist. v. Burlington Northern R.R.*, 3 I.C.C.2d 123, 148-49 (1986), *aff'd* 3 I.C.C.2d 853 (1987).

In the past, litigants in KCPL's position had a reasonable opportunity to develop movement-specific adjustments in key variable cost areas, as detailed operating and financial inputs could be obtained from non-management cost railroad records. Over time, however, it has become apparent that UP and other carriers stopped maintaining the data needed and historically used to determine accurate, line-specific adjustments, other than under the rubric of "management costs" which allegedly lay outside the limits of available discovery. Conveniently for the railroads, this circumstance allows the defendant to assert unavoidable sole reliance on system average costs, which invariably would be higher than movement-specific calculations. For example, in Request for Production No. 75, KCPL sought train dispatcher sheets from 2002 to the present. A typical request propounded in other cases, train dispatcher sheets are a useful tool in determining UP's cost of providing service because they usually provide dates, times, locations and frequency of helper service, information on train size, locomotive changes, bad order car set-outs and pick-ups, switching activities and other train and engine crew activities.<sup>9</sup> Yet, UP stated in its responses that it does not retain train dispatcher sheets, despite the fact that only a few years ago the Board granted a motion to compel such records. *See Northern States Power*, (STB served May 24, 2002) at 3-4.

Simple fairness demands that KCPL be given access to the tools traditionally available to shippers to enable them to reflect the universally-acknowledged

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<sup>9</sup> Certain data contained in train dispatcher sheets is often found in other data sources, such as train movement records, but train dispatcher sheets usually contain more details concerning the particular elements of a given movement, thereby making it more valuable (*e.g.*, details of delays or switching costs that cannot be captured in an aggregated and coded system such as the train movement records.)

economies and efficiencies associated with unit train service in the determination of variable costs. In this regard, it also bears mention again that KCPL is *not* seeking access to UP's internal management cost models or formulas. Rather, consistent with precedent, KCPL's requests are limited to the operating and financial *inputs* that UP relies upon. *See Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Railway Co.*, Docket No. 42038 (STB Served May 11, 1999) at 9.

Finally, in light of the demonstrated relevance of the documents and data at issue, any concerns raised about the proprietary or confidential nature of the information are answered by the strict terms of the Protective Order that governs this case, which is more than sufficient to assure that none of this information is improperly disseminated or used for any purpose other than this litigation.

### CONCLUSION

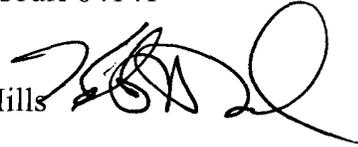
For the foregoing reasons, KCPL requests that the Board compel responses to the KCPL Interrogatory and Requests for Production discussed herein.

Respectfully submitted,

KANSAS CITY POWER & LIGHT  
COMPANY

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Dated: January 23, 2006

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December 23, 2005

## BY FACSIMILE AND FIRST-CLASS MAIL

Kelvin J. Dowd, Esq.  
Slover & Loftus  
1224 Seventeenth Street, N.W.  
Washington, DC 20036

Re: Finance Docket No. 42095, Kansas City Power &  
Light Company v. Union Pacific Railroad Company

Dear Kelvin:

We are writing to follow up on several items discussed during the parties' December 14 meet-and-confer session and to confirm agreements and understandings reached at that meeting. If your recollections vary from ours, please let us know immediately so we can work to resolve any differences.

### Issues Related to Both Parties' Discovery Requests

#### Discovery Cut-Off

The parties agreed to a discovery cut-off of December 31, 2005. We understand this to mean that neither party will produce or rely upon movement-specific data (e.g., shipment characteristics, cycle times, crew wages) for shipments occurring after December 31, 2005, and neither party will be required, except as otherwise specifically agreed, to search for and produce documents created after December 31, 2005. We further understand that the discovery cut-off date will not foreclose either party from relying on data that become publicly available on or after January 1, 2006 (e.g., RCAF indices, UP's Annual Report) for calculating costs.

#### Business Records

The parties agreed that each party could rely upon the internal documents produced by the other party as the business records of that party. The parties thus agreed to withdraw their reciprocal requests for witness identification.

Issues Related to KCPL's Discovery Requests to UP

1. Request to Expedite Production

At the meet-and-confer session, you identified several categories of documents that KCPL considers a high priority for discovery. The categories were: (i) traffic tapes, (ii) track charts and timetables, (iii) coal contracts and other coal pricing authorities, (iv) UP's traffic forecasts, and (v) train movement data for KCPL trains. UP agreed to expedite production of these documents, though we explained that UP's 2006 forecast would not be available until it is completed sometime in January 2006. UP also agreed to expedite production of lists with respect to its responses that offered to produce a reasonable number of documents (e.g., coal car leases, locomotive leases) from lists to be provided by UP.

2. Documents Related to Non-Coal Traffic

At the meet-and-confer session, we explained that UP objected to producing documents related to non-coal traffic because we did not expect KCPL to include non-coal traffic in its stand-alone railroad and in many instances the production of documents related to non-coal traffic would greatly increase the burden associated with responding to KCPL's discovery requests. We told you that UP will produce traffic data that includes non-coal traffic, so that KCPL can determine whether it truly wants to include non-coal traffic in its stand-alone railroad. We also explained that UP will produce non-coal data where it would be more burdensome to exclude non-coal data from other documents we intend to produce.

The parties agreed to revisit other issues regarding KCPL's requests for non-coal data if, after reviewing the traffic data, KCPL represents that it will include non-coal traffic in its stand-alone railroad.

3. Documents Withheld Under UP General Objection 16

UP agreed to inform KCPL if it withholds any documents based on its General Objection 16. UP told KCPL that the only documents currently being withheld based on this objection are FIST accounting data related to Document Request No. 9.

4. Item 4140 and Profitability Studies (Doc. Req. Nos. 1 and 2)

At the meet-and-confer session, you explained KCPL's reasons for propounding these requests, and UP agreed to take the issue under advisement.

We now agree to produce the requested documents, subject to UP's general objections and its specific objections to producing documents related to UP's internal costing system.

5. Planned Capacity Enhancements (Doc. Req. No. 3)

At the meet-and-confer session, you explained KCPL's concern that UP's response would not include capacity enhancements that were planned but not yet completed. In response to UP's concerns about burden, you said that KCPL would modify the request to seek only documents "sufficient to show" planned capacity improvements on UP rail lines used for the transportation of coal from mines in Wyoming.

We have considered your proposed modification, and we now agree to include in our response documents sufficient to show any currently planned but not-yet-completed capacity enhancements or capital improvements on the UP lines used for the transportation of coal from mines in Wyoming to utilities in the Midwest or Eastern U.S.

6. Railcar Repair and Maintenance (Doc. Req. No. 36)

At the meet-and-confer session, we explained the burdens involved in complying with this request, which literally seeks repair and maintenance records and related documents for all of the cars on the UP system. You asked whether UP had a study of railcar repair and maintenance similar to the study of locomotive repair and maintenance that we will produce in response to RFP No. 19. We agreed to make inquiries and get back to you. We are still trying to determine whether UP has responsive documents that could be produced without imposing an undue burden on UP.

7. Traffic Forecasts (Doc. Req. No. 53)

At the meet-and-confer session, we agreed to produce UP's official traffic forecasts and projections that are used in operations and capital planning. As noted above, notwithstanding the discovery cut-off, we agreed to produce UP's traffic forecast for 2006, which we expect to be completed in January 2006.

8. Construction Projects (Doc. Req. Nos. 115 and 116)

At the meet-and-confer session, you indicated that KCPL was seeking more in response to these requests than AFEs. You said that KCPL was seeking documents such as specifications, bids, and handbooks, as well as documents that would show cost sharing with public entities. We agreed to explore whether UP could develop a workable proposal that would involve more than access to AFEs. We are still trying to determine whether we can develop a workable proposal that would allow KCPL access to additional documents without imposing an undue burden on UP.

Issues Related to UP's Discovery Requests to KCPL

1. Documents Withheld Under KCPL General Objection No. 5

At the meet-and-confer session, you stated that KCPL will withhold documents based upon its "confidentiality" objection only when responsive documents are subject to a confidentiality agreement with a non-party, that KCPL will inform UP if such an issue arises, and that KCPL will attempt to address any confidentiality issues with the affected non-parties.

2. Documents Withheld Under Objection to Producing "All" Documents

At the meet-and-confer session, you stated that KCPL will not rely on its objection to producing "all" documents to withhold production of responsive information. You stated that KCPL was objecting only to producing multiple copies of documents or multiple documents containing the same information.

3. Objection Relating to Business Records

At the meet-and-confer session, you clarified that when KCPL objected to interrogatories based on its "option to produce business records," KCPL intended to state that it will produce responsive business records.

4. Coal Contracts and Related Documents (RFP Nos. 3 and 4)

At the meet-and-confer session, you confirmed that KCPL will produce all contracts in force at any time during the period from 1999 to the present, and stated that it will produce documents relating to contracts in force at any time from 2002 to the present.

5. Fuel Surcharges (RFP No. 13)

At the meet-and-confer session, the parties discussed KCPL's objection to producing information about fuel surcharges related to generation facilities that will not be included in KCPL's stand-alone traffic group and the parties' understanding of the term "fuel surcharges." We explained that UP is entitled to broader discovery than KCPL was initially willing to provide, particularly because of the vaguely defined nature of KCPL's challenge to UP's fuel surcharge. We also pointed out that UP had agreed to KCPL's requests to produce documents relating to UP's fuel surcharge.

We believe the parties made significant progress during the meet and confer and may, in fact, be in accord on the appropriate scope for KCPL's response. We would appreciate your confirmation that KCPL will produce all non-privileged documents relating to fuel surcharges and the recovery of fuel costs for rail transportation generally, and that it will not withhold such documents on the basis that they relate to facilities not included in the

COVINGTON & BURLING

Kelvin J. Dowd, Esq.

December 23, 2005

Page 5 of 8

stand-alone traffic group. We would also appreciate your confirmation that KCPL will define the term "fuel surcharges" broadly to include any mechanism in a railroad contract, tariff, or similar price document intended to provide for recovery of increases in fuel prices.

6. Documents Comparing Rates/Service at Montrose to Rates/Services at Other Facilities (RFP No. 14)

KCPL initially objected to producing any documents in response to this request. At the meet-and-confer session, we explained that KCPL made the requested documents relevant by including unreasonable practices charges in its Complaint. You appeared to agree that evidence of rate/service terms for generating facilities other than Montrose might be relevant to whether UP's tariff provisions are unreasonable.

In an effort to arrive at a compromise, we asked whether KCPL would be willing to produce documents relating to KCPL's negotiations with respect to its other facilities. You said you would take under advisement the possibility of producing contracts between KCPL and BNSF for coal transportation to KCPL's facilities other than Montrose.

In a telephone call today, you said that KCPL will produce its agreements with BNSF if UP will accept this production as a sufficient response to RFP No. 14. We appreciate your offer, and we would be willing to modify our request to seek only the agreements and documents reflecting the negotiations between KCPL and BNSF that resulted in the agreements.

Please let us know whether KCPL will accept this compromise.

7. Dispatching Decisions (RFP No. 15)

KCPL initially objected to producing any documents in response to this request. At the meet-and-confer session, you stated that you would determine whether KCPL can provide its dispatching model in response to UP's Request No. 15(e).

Please let us know as soon as possible whether KCPL will produce its dispatching model or, if not, whether it has an alternative proposal for producing information regarding its dispatching decisions.

8. Studies, Forecasts, and Projections (RFP No. 16)

At the meet-and-confer session, you stated that despite KCPL's objection to producing information related to generating facilities that will not be included in the stand-alone traffic group, KCPL would produce national, regional, or PRB forecasts of the types requested in UP's Request No. 16.

COVINGTON & BURLING

Kelvin J. Dowd, Esq.

December 23, 2005

Page 6 of 8

We would appreciate confirmation that KCPL will not withhold documents containing responsive information about studies, forecasts, and projections for Montrose on the grounds that documents also contain information about plants other than Montrose.

9. Gain or Loss of Customers (RFP Nos. 17 and 18)

At the meet-and-confer session, you stated that KCPL will produce (i) studies regarding the relationship between KCPL's gaining or losing customers and the amount of coal consumed at Montrose; (ii) data showing the number of customers KCPL has served over the last five years; (iii) projections and forecasts of the number of KCPL's customers; and (iv) documents that link the number of customers to coal consumption at Montrose.

10. Forecasts Prepared by Consultants (RFP No. 20)

At the meet-and-confer session, you stated that KCPL will make an effort to obtain forecasts that were prepared by consultants that it has retained to present evidence in this case that relates to national, regional, or PRB coal demand or production, as long as the forecasts were not prepared for a specific client or available for sale to the general public.

Please let us know as soon as possible whether KCPL has been successful in its efforts so we can determine whether we need to raise this issue at the Board-sponsored discovery conference.

11. Construction or Expansion of Facilities (RFP Nos. 23 and 24)

At the meet-and-confer session, you stated that KCPL will develop a proposal for producing responsive documents regarding the new construction planned for Iatan, and will produce responsive documents with respect to other generating facilities to be included in KCPL's stand-alone railroad.

Please let us know as soon as possible what information you propose to produce with respect to Iatan so we can determine whether we need to raise this issue at the Board-sponsored discovery conference.

12. Transmission Constraints at Montrose (RFP No. 25)

At the meet-and-confer session, UP stated that it was willing to limit its request for documents sufficient to show limits on the transmission capacity from Montrose. You stated that KCPL will produce such documents.

13. Capacity Utilization (RFP No. 27)

At the meet-and-confer session, in response to UP's requests for additional documents responsive to this request, you stated that KCPL's stand-alone evidence will limit

capacity utilization at generating facilities included in the stand-alone railroad at 85%, or at the current level, if the current level is already above 85%.

14. Rail Cars (RFP No. 34)

At the meet-and-confer session, you agreed that KCPL will produce documents sufficient to show the requested information with respect to all rail cars it owns or leases and in use for coal transportation service, not merely those rail cars used for coal transportation service to Montrose.

15. PRB Mine Ability to Meet Demand (RFP No. 36)

At the meet-and-confer session, you agreed that KCPL will produce any responsive documents in its possession that are not in the public domain.

16. Reports Provided to Stakeholders (RFP No. 49)

At the meet-and-confer session, UP agreed to clarify its request. To clarify, we are requesting copies of any regular, periodic reports provided to the Kansas or Missouri PSCs.

17. Train Operations (RFP No. 53)

At the meet-and-confer session, UP clarified and limited this request by explaining that we were seeking documents regarding (i) activities at Montrose that affected train operations and cycle times, such as documents describing problems with frozen coal and broken dumpers, and (ii) how efficiently equipment is being used in coal service to Montrose. You stated that KCPL will produce documents responsive to this request, as clarified and limited.

18. Service Term Allegations (RFP No. 55)

KCPL initially objected to producing any documents responsive to this request. At the meet-and-confer session, we explained that UP was entitled to responsive documents as part of discovery, and that we are not limited to the documents KCPL decides to rely upon in submitting its evidence. You stated that KCPL will produce documents responsive to this request.

19. Circular 111's Impact on KCPL and Customers (RFP No. 56)

At the meet-and-confer, you agreed that KCPL will produce documents relating to damages associated with its unreasonable practice allegations.

COVINGTON & BURLING

Kelvin J. Dowd, Esq.

December 23, 2005

Page 8 of 8

20. Basis for KCPL's Unreasonable Practice Claims (Interrogatory No. 22)

At the meet-and-confer session, we asked whether KCPL would state which UP practices it intends to challenge as unreasonable practices. You stated that you could provide a partial list, but that KCPL reserved the right to challenge additional practices as unreasonable. Please let us know whether KCPL has changed its mind, or whether it remains unwilling to tell UP what practices it intends to challenge as unreasonable.

Sincerely



Michael L. Rosenthal

cc: Louise A. Rinn, Esq.  
Linda J. Morgan, Esq.

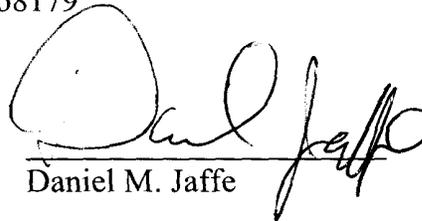
**CERTIFICATE OF SERVICE**

I hereby certify that on this 23rd day of January 2006, I served copies of the foregoing First Motion to Compel upon counsel for Defendant by hand, as follows:

Linda J. Morgan  
David L. Meyer  
Michael L. Rosenthal  
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1201 Pennsylvania Avenue, N.W.  
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and by Federal Express, as follows:

J. Michael Hemmer  
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Daniel M. Jaffe