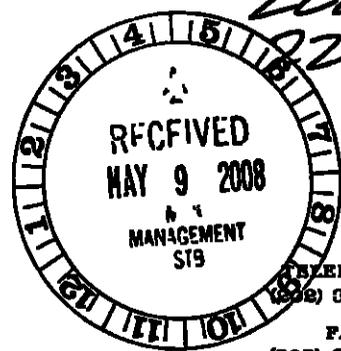


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222320

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May 9, 2008

BY HAND DELIVERY

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C 20423-0001

ENTERED
Office of Proceedings
MAY 09 2008
Part of
Public Record

Re: Docket No. 42104, Entergy Arkansas, Inc and Entergy Services, Inc v Union Pacific R R and Missouri & Northern Arkansas R R Co, Inc ; Finance Docket No 32187, Missouri & Northern Arkansas Railroad – Lease, Acquisition and Operation Exemption – Missouri Pacific R R and Burlington Northern R R

Dear Ms Quinlan:

Enclosed for **FILING UNDER SEAL** in the above-referenced proceeding please find a separately packaged original and ten (10) copies of Complainants' Second Motion to Compel Union Pacific Railroad Company's Responses to Discovery Requests. Complainants respectfully request that the Board afford **EXPEDITED CONSIDERATION** to this motion

We also have enclosed an original and ten copies of a **REDACTED, PUBLIC** version of this motion for filing on the Board's public docket We have enclosed additional copies of each version of this motion to be date-stamped and returned to the bearer of this filing Thank you for your attention to this matter

Sincerely,

Andrew B Kolesar III
An Attorney for Entergy Arkansas, Inc
and Entergy Services, Inc

Enclosures

222319

EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



ENTERGY ARKANSAS, INC. and
ENTERGY SERVICES, INC., Complainants)

v.)

UNION PACIFIC RAILROAD)
COMPANY and MISSOURI &)
NORTHERN ARKANSAS RAILROAD)
COMPANY, INC., Defendants.)

Docket No. 42104

ENTERED
Office of Proceedings

MAY 09 2008

Part of
Public Record

MISSOURI & NORTHERN ARKANSAS)
R.R. – LEASE, ACQUISITION AND)
OPERATION EXEMPTION – MISSOURI)
PACIFIC R.R. and BURLINGTON)
NORTHERN R.R.)

Finance Docket No. 32187

**COMPLAINANTS' SECOND MOTION TO COMPEL
UNION PACIFIC RAILROAD COMPANY'S
RESPONSES TO DISCOVERY REQUESTS**

REDACTED, PUBLIC VERSION
- HIGHLY CONFIDENTIAL INFORMATION DELETED -

OF COUNSEL

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ENTERGY ARKANSAS, INC. and
ENTERGY SERVICES, INC.

By: C. Michael Loftus
Frank J. Pergolizzi
Andrew B. Kolesar III
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: May 9, 2008

Attorneys & Practitioners

EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



ENTERGY ARKANSAS, INC. and)
ENTERGY SERVICES, INC., Complainants)

v.)

Docket No. 42104)

UNION PACIFIC RAILROAD)
COMPANY and MISSOURI &)
NORTHERN ARKANSAS RAILROAD)
COMPANY, INC., Defendants.)

MISSOURI & NORTHERN ARKANSAS)
R.R. – LEASE, ACQUISITION AND)
OPERATION EXEMPTION – MISSOURI)
PACIFIC R.R. and BURLINGTON)
NORTHERN R.R.)

Finance Docket No. 32187)

**COMPLAINANTS' SECOND MOTION TO COMPEL
UNION PACIFIC RAILROAD COMPANY'S
RESPONSES TO DISCOVERY REQUESTS**

REDACTED, PUBLIC VERSION
– HIGHLY CONFIDENTIAL INFORMATION DELETED –

Complainants Entergy Arkansas, Inc (“EAI”) and Entergy Services, Inc. (“ESI”) (collectively, “Entergy”), hereby move for an order compelling Defendant Union Pacific Railroad Company (“UP”): (i) to produce documents responsive to Entergy’s initial document requests; (ii) to produce documents that will be highly relevant to the Board’s consideration of issues raised by UP’s May 2, 2008 document production; and

(iii) to make one or more UP personnel available for deposition to address matters raised by UP's document production in this case.

Entergy has attempted to resolve this dispute without the Board's involvement, but UP has refused to provide the responsive documents or the deposition(s) that Entergy has requested. This motion and the Board's involvement are therefore required.

The central issue raised by this motion is whether a defendant in a proceeding before the Board can delay document production until the end of a discovery period, then decline to permit any follow-up inquiry regarding the documents actually produced or regarding the defendant's effort to discredit or impeach those documents (*i e* , the claim that the documents produced do not actually reflect the defendant's analysis of final lease terms). Effectively, the position that UP has taken with respect to this issue would force litigants to serve extremely broad, burdensome discovery requests at the outset of discovery (and to notice the depositions of a large number of employees), then to accept whatever production is made without any ability to engage in follow-up. As such, the UP position would eviscerate the notion of a discovery "period" and instead would substitute the mere right to serve a single round of requests that must specifically identify every potential issue that could be raised by highly confidential documents that are solely within the other party's possession.

BACKGROUND

Through the instant proceeding, Entergy seeks relief from the continued enforcement of the paper barrier restriction set forth in the 1992 Lease between UP and M&NA (“UP/M&NA Lease”). That agreement imposes a substantial annual rental obligation upon M&NA, but relieves that obligation in part or in whole if M&NA limits its interchange of traffic with a carrier other than UP. The rental payment and interchange limitation effectively preclude M&NA from providing service to coal shippers in conjunction with a long-haul carrier other than UP.

Entergy served discovery requests in this case upon UP on March 17, 2008. UP served its formal written responses and objections to those requests on April 16, 2008. Entergy filed a motion to compel UP’s production of documents on April 29, 2008. UP filed its reply in opposition to Entergy’s motion on May 1, 2008. The Board granted Entergy’s motion in part by decision served May 7, 2008. (Entergy submitted its requests and UP’s responses to the Board as attachments to Entergy’s first motion to compel).

UP produced its *first* installment of documents in response to Entergy’s requests on May 2, 2008. Included therein was UP’s “Approval for Line Disposition” analysis regarding the then-contemplated UP/M&NA transaction (Exhibit No. 1 hereto).

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] } *See, e g ,*

Exhibit No. 1 at 304.

Upon review of the documents that UP produced on May 2, 2008, Entergy determined that UP had not produced documents that are related to – and will be highly relevant to the parties’ and the Board’s effort to understand – the documents that UP actually has provided. Accordingly, Entergy’s May 7, 2008 letter to UP (Exhibit No 2 hereto) identified a number of follow-up inquiries regarding the analyses contained in UP’s production, and requested that UP make one or more knowledgeable individuals available for deposition to address topics listed by Entergy regarding those analyses and any related production

By letter dated May 8, 2008 (Exhibit No. 3 hereto), UP objected to Entergy’s request for follow-up document production and depositions

ARGUMENT

A. Legal Standard

The Board’s Rules of Practice permit “discovery . . . regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding.” 49 C.F.R. § 1114.21(a) It is also well-settled that the Board’s discovery rules are to be

liberally construed. *See, e g* , Finance Docket No. 32821, *Bar Ale, Inc v California Northern Railroad Co.* (STB served March 15, 1996) at 2

B. UP's "Approval for Line Disposition" Analysis

UP's Approval for Line Disposition analysis includes a great deal of information that is relevant to the central issues in dispute in this case. In particular, this analysis {

[REDACTED]

UP further explained that {

[REDACTED]

[REDACTED]

Exhibit No. 1 at 303 (emphasis added). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } *Id* at 304.

On balance, UP concluded that { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

UP's analysis bears an indication that { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

UP's Approval for Line Disposition analysis { [REDACTED]

[REDACTED]

{ [REDACTED]

[REDACTED]

[REDACTED]

Id at 309 (emphasis added) { [REDACTED]
[REDACTED]
[REDACTED] }
{ [REDACTED]
[REDACTED] }

The UP/M&NA Lease, however, included an annual rental obligation of \$90 million that M&NA would have been obligated to pay if it had interchanged all (or nearly all) of its traffic with a carrier other than UP. *See* Entergy's February 19, 2008 Complaint at 6 (quoting the UP/M&NA Lease at Section 4 01) The lease included lesser annual rental amounts depending upon the share of traffic that M&NA interchanged with UP.

**PERCENTAGE OF THE TOTAL
TRAFFIC THAT WAS INTER-
CHANGED WITH LESSOR RENT DUE LESSOR**

100 - 95%	\$ - 0 -
94 - 85%	\$10,000,000
84 - 75%	\$20,000,000
74 - 65%	\$20,000,000
64 - 55%	\$30,000,000
54 - 45%	\$40,000,000
44 - 35%	\$50,000,000
34 - 25%	\$60,000,000
24 - 15%	\$70,000,000
14 - 5%	\$80,000,000
0 - 4%	\$90,000,000

Id Notably, these rental amounts are subject to escalation each year in accordance with the “Producer Price Index – Finished Goods (Reference Base 1982 = 100)” pursuant to Section 4.04 of the Lease. Entergy has calculated that the current level of the maximum payment would be \$114 million *See* Complaint at 6 n.1.

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } In that regard, if M&NA had interchanged 100% of its traffic to a carrier other than UP solely in 1993 (assuming for the sake of argument that such a diversion would have been possible on the basis of existing contracts between

UP and its customers), then M&NA would have been obligated to pay UP \$90 million for 1993 alone.¹

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } Of course, if M&NA had paid \$90 million to UP for its hypothetical interchange of all traffic with another carrier in 1993, it nevertheless would have remained obligated under the lease to interchange at least 95% of its traffic with UP for 1994, or it would have faced a rental payment obligation to UP in 1994 as well

Taken to its extreme, the language of the UP/M&NA Lease would entitle UP to a payment, in nominal dollars, of \$1.35 billion over the fifteen-year “project life” of the Lease if M&NA had elected to interchange all of its traffic with other carriers in each of those fifteen years { [REDACTED]

[REDACTED]

[REDACTED] }

The Board held in *Review of Rail Access and Competition Issues – Renewed Petition of the Western Coal Traffic League*, STB Ex Parte No. 575 (STB served Oct 30, 2007), at 10, that “[t]he revenue stream resulting from the agreement

¹ { [REDACTED]

[REDACTED]

In its Approval for Line Disposition Analysis, { [REDACTED]

[REDACTED]

C. Entergy's Follow-Up Discovery Inquiries

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

First, Entergy has requested that UP produce the supporting workpapers, spreadsheets, or databases for the figures set forth in the UP analysis. See Entergy's May 7 Letter (Exhibit No. 2 hereto) at 2 ("Entergy requests that UP produce all support and all workpapers for the analyses set forth therein, including but not limited to any electronic versions of those analyses (e.g., native Excel files), and any underlying databases, spreadsheets, or other documents from which the information set forth in documents 302-310 was derived.") This supporting detail should be helpful in permitting the parties and the Board to better understand the assumptions that UP made in evaluating the proposed transaction, and thus is highly relevant to the issues in dispute in this case. Under the Board's liberal discovery standard, Entergy is entitled to request the production of documents that may lead to the discovery of admissible evidence. Entergy has made its request for this supporting documentation during the discovery period in this case, and in very short order after receiving UP's May 2, 2008 production.

Second, UP's May 2, 2008 letter conveying its document production to Entergy (see Exhibit No. 4 hereto) raised the claim that UP's 1992 economic analysis did not reflect the final terms of the UP/M&NA Lease. In its May 7, 2008 letter, Entergy requested that UP provide documents through which it will be able to evaluate UP's claim in this regard. These include the draft of the agreement relied upon by UP in

performing its economic analysis, any correspondence related to modifications of the draft, and any subsequent economic analysis performed with regard to a supposedly modified form of the agreement.

While UP has argued that Entergy's follow-up discovery should have been raised earlier, Entergy had no reason to anticipate that { [REDACTED] [REDACTED] } would be one that UP itself would characterize (on May 2, 2008) as not reflecting the final details of the transaction. Presumably, UP intends to argue that the Approval for Line Disposition analysis is somehow irrelevant because it reflects a non-final version of the agreement. There is no way in which Entergy could have anticipated, in advance, that UP would take this position. Moreover, in light of the fact that { [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] }

If UP is unwilling to produce documents in response to Entergy's requests or to make a witness available to explain the circumstances of the Approval for Line Disposition analysis, UP should be bound by the documents that they have produced. Absent complete production of documents that would allow Entergy to explore the basis of UP's claim that the analysis does not reflect the final terms of the UP/M&NA

transaction. UP should not be heard either now or in its evidence to attempt to discredit or impeach its own analysis of that transaction.

Third, as stated above, { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } See Exhibit No. 2 at 3. Entergy is not seeking documents that are unavailable or nonexistent, but instead, simply requests that UP confirm that additional documents do not exist that are responsive to Entergy's Request No. 5, if that is the case. Moreover, as described below, Entergy requests that UP make a witness available for deposition to explain { [REDACTED]

[REDACTED]

[REDACTED] }

Fourth. Entergy has requested that UP produce documents from which

Entergy could determine, as a factual matter, whether { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } See

Exhibit No 1 at 304 In particular, Entergy has requested the following production from UP.

{ [REDACTED]

[REDACTED] }

.See Exhibit No 2 at 3.

Entergy's expectation in preparing its discovery requests in this case was that it would determine the costs that UP avoided through the M&NA transaction using an URCS Phase III analysis. As such, Entergy deliberately excluded requests from its discovery that would seek broad categories of information regarding crew costs. (Entergy notes that UP originally objected to producing virtually any documents in response to Entergy's requests, but now seeks to fault Entergy for not serving more expansive discovery requests).

In any event, { [REDACTED]

[REDACTED]

[REDACTED] } Entergy

respectfully submits that follow-up of this nature (made prior to the conclusion of the discovery period) is entirely reasonable and, if UP is able to identify responsive documents, will permit the parties to submit evidence that is more narrowly tailored to the specific facts at issue in this case. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

Finally, in light of the fact that { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } See Exhibit No 2 at

3. Documents of this nature fall within the scope of Entergy's March 17, 2008 request for financial analyses of the subject transaction See Entergy's Request No 5.

D. Deposition(s)

In its May 7, 2008 letter to UP, Entergy requested that UP make available for deposition the employee or employees with knowledge of the following topics:

(i) The preparation of the analyses set forth on pages 302 to 310 of UP's document production (and any supporting workpapers or analyses),

(ii) { [REDACTED] },

(iii) { [REDACTED] }, and

(iv) The preparation of any documents produced by UP in response to this letter.

See Exhibit No. 2 at 4.

As Entergy has explained with regard to its requests for follow-up document production, each of these topics is relevant to the central issues in dispute in this case. The Board's regulations permit parties to take depositions without leave of the Board *See* 49 C F R § 1114.21(b); *id* at § 1114.22(a). UP's May 8 letter simply argues that UP will not cooperate with Entergy's deposition requests because "Entergy could have requested depositions" when it requested document discovery from UP. *See* Exhibit No. 3 at 3.

Entergy has provided notice of its intention to take the deposition of one or more knowledgeable UP employees prior to the termination of the discovery period in this case, and on the basis of the documents that UP has produced in this case UP's objection effectively would preclude any possible follow-up in Board proceedings, and would encourage parties in future disputes to serve extraordinarily broad and burdensome discovery and deposition requests at the outset of a proceeding, simply as a protective measure. Entergy's request, instead, permits a narrowing of issues through discovery, and follow-up discovery (and depositions) on discrete subjects raised by the document production itself.

CONCLUSION

For the foregoing reasons, Entergy requests that the Board afford expedited consideration to this motion and issue an order compelling UP to provide responses to Entergy's follow-up discovery inquiries and to make one or more UP individuals available for deposition to respond to inquiries regarding UP's document production.

Respectfully submitted,

ENTERGY ARKANSAS, INC. and
ENTERGY SERVICES, INC

OF COUNSEL:

Slover & Loftus
1224 Seventeenth St , N W.
Washington, D.C. 20036
(202) 347-7170

By: C. Michael Loftus
Frank J. Pergolizzi
Andrew B Kolesar III 
1224 Seventeenth Street, N W.
Washington, D C. 20036

Dated. May 9, 2008

Attorneys & Practitioners

CERTIFICATE OF SERVICE

I hereby certify that I have this 9th day of May, 2008 caused highly confidential and redacted copies of the foregoing to be served by email and first-class mail, postage-prepaid upon counsel for the parties of record in this case.



Andrew B Kolesar III

Exhibit No. 1

[REDACTED]

Exhibit No. 2

[REDACTED]

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May 8, 2008

VIA EMAIL

Andrew B. Kolesar III, Esq.
 Slover & Loftus
 1224 Seventeenth Street, N.W
 Washington, DC 20036

Re: Docket No. 42104, *Entergy Arkansas, Inc and Entergy Services, Inc v Union Pacific Railroad Company and Missouri & Northern Arkansas Railroad Company, Inc*
 Finance Docket No 32187, *Missouri & Northern Arkansas Railroad Company, Inc – Lease, Acquisition and Operation Exemption – Missouri Pacific Railroad Company and Burlington Northern Railroad Company*

Dear Andy

This responds to your letter of May 7, 2008. Your letter sets forth several new discovery requests, including requests for depositions of Union Pacific personnel, that seem to be designed to justify Entergy's effort to extend the procedural schedule in this case for the second time. We do not believe that any additional discovery is appropriate or that it would be appropriate to extend the procedural schedule in order to accommodate additional discovery.

The Board initially established a procedural schedule under which Entergy would file opening evidence by April 28, 2008. Union Pacific had previously told Entergy that we would agree to a schedule that would give Entergy more time, and thus we did not object when Entergy asked the Board to modify the schedule so discovery would close on May 30 and Entergy would file opening evidence on July 1. In response to Entergy's request, the Board extended the procedural schedule by a month and a half, so discovery would close on May 10 and Entergy would file opening evidence on June 10. We believe there is no good reason to extend the schedule yet again to accommodate Entergy's new discovery requests. We respond to your specific points in detail below.

COVINGTON & BURLING LLP

Andrew B. Kolesar III, Esq.

May 8, 2008

Page 2

A Divisions

As Union Pacific explained in response to Entergy's motion to compel, we have continued to search for information documenting Union Pacific payments to M&NA in response to Entergy's Request Nos. 6 and 9(t). As a result of those efforts, Union Pacific has located certain electronic records that appear to correspond to the documents attached to your letter as Exhibit 1. Union Pacific will produce those records. Of course, Union Pacific will also produce any additional documents located in compliance with the Board's decision served May 7

B Approval for Line Disposition

Union Pacific's production of its "Approval for Line Disposition" and the accompanying analyses fully satisfied Union Pacific's obligation to produce documents in response to Entergy's Request No. 5. The extensive list of "follow-up" questions in your letter are new discovery requests that Entergy could have and should have made at the time of its initial discovery requests, particularly if Entergy expected to abide by the Board's procedural schedule

Entergy's Request No 5 asked Union Pacific to produce "any study, analysis or estimate of the expected reduction in cost, cost, income, benefit, margin or return on investment that UP anticipated from entering into the Lease Agreement with M&NA." In my May 2, 2008 letter transmitting the first set of materials Union Pacific was producing in response to Entergy's discovery requests, I explained that Union Pacific was producing the "Approval for Line Disposition" and the accompanying analyses in response to Entergy's Request No 5. If Union Pacific had located other non-privileged documents that were responsive to Request No. 5, they would have been produced.

Union Pacific's production has apparently prompted Entergy to think up a series of new discovery requests, but Entergy could have requested the same information it now seeks when it served its first discovery requests back on March 17, at which point the parties could have addressed the requests without any need to extend the procedural schedule for a second time

For example, Entergy is apparently no longer content to review Union Pacific's studies and analyses of the benefits anticipated from the UP/M&NA Lease, and it now wants to review "all support and all workpapers for the analyses." This new request goes beyond Entergy's initial request for "any study, analysis or estimate."

As another example, Entergy is apparently no longer content to analyze the actual terms of the UP/M&NA Lease, and it now wants to analyze the course of the parties'

COVINGTON & BURLING LLP

Andrew B. Kolesar III, Esq.

May 8, 2008

Page 3

negotiations by reviewing drafts of the UP/M&NA Lease and correspondence between Union Pacific and M&NA. Again, this request goes beyond Entergy's initial request.

As still another example, Entergy is apparently no longer content to review documents regarding Union Pacific's anticipated benefits from entering into the UP/M&NA Lease, and it is now asking for additional Union Pacific records, in addition to the fifteen years of traffic and revenue data that Union Pacific has agreed to produce, to test whether the anticipated benefits were realized. Once again, this request goes beyond Entergy's initial request.

Union Pacific conducted a reasonable search and produced the responsive documents that it located in response to Entergy's Request No. 5. Union Pacific produced those documents to avoid discovery disputes, notwithstanding our view that the information is not relevant to this proceeding. We are not willing to allow Entergy to expand the scope of its initial discovery requests under the guise of "follow-up" questions, particularly when Entergy could have sought the requested information long ago and without the need for a second extension of the procedural schedule in this case

C Depositions

Your May 7 letter also for the first time requests depositions of one or more Union Pacific employees regarding the documents produced in response to Request No. 5 – that is, documents reflecting Union Pacific's analysis of anticipated benefits from entering into the UP/M&NA Lease. Entergy could have requested depositions on this topic when it requested document discovery from Union Pacific, and Union Pacific could have addressed that request within the timeframe for discovery established by the Board. As discussed above, we are not willing to allow Entergy to use last-minute discovery requests as an excuse for extending the procedural schedule.

D. Schedule

Finally, your May 7 letter, as modified by an email you sent earlier today, asks whether Entergy can represent to the Board that Union Pacific agrees with, or at least does not object to, Entergy's request to extend the procedural schedule. We appreciate your courtesy in soliciting our views on the proposed modified schedule. The dates proposed in your email would create a scheduling conflict for several lawyers involved in this case who are also involved in a trial that is scheduled to begin on August 11. A possible "fix" might be to move Entergy's opening evidence and the railroad reply evidence one week earlier.

However, for the reasons discussed above, Union Pacific will object to any request by Entergy to extend the procedural schedule to allow time for additional discovery. Moreover, because Union Pacific will object to Entergy's request for additional discovery in

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Andrew B Kolesar III, Esq.

May 8, 2008

Page 4

general and because we may raise specific objections based on burden, relevance, and other grounds to some or all of the additional discovery requests that Entergy ultimately serves, it is questionable whether even the extended schedule you have proposed is realistic.

In a second email you sent today, you reported that one of your colleagues who is working on this case had surgery yesterday and will be "out of commission for two weeks " If those circumstances would make it difficult for Entergy to file its evidence in accordance with the current schedule, Union Pacific would not object to a two-week extension of the dates for filing evidence. However, Union Pacific would object to any suggestion that the additional time could be used to conduct additional discovery

Sincerely,



Michael L. Rosenthal

**cc C Michael Loftus, Esq
Frank J Pergolizzi, Esq.**

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May 2, 2008

BY HAND

Andrew B. Kolesar III, Esq.
Slover & Loftus
1224 Seventeenth Street, N.W
Washington, DC 20036

Re: *Docket No. 42104, Entergy Arkansas, Inc and Entergy Services, Inc
v Union Pacific Railroad Company and Missouri & Northern Arkansas
Railroad Company, Inc
Finance Docket No. 32187, Missouri & Northern Arkansas Railroad
Company, Inc – Lease, Acquisition and Operation Exemption – Missouri
Pacific Railroad Company and Burlington Northern Railroad Company*

Dear Andy.

Enclosed please find a disk containing the following documents responsive to Complainants' First Set of Interrogatories and Requests for Production of Documents.

RFP No 1. UP/M&NA Lease, including all amendments and supplements These materials are bates labeled UP-HC-0000001 to UP-HC-0000145 and are designated "Highly Confidential."

RFP No 2. Other agreements between UP and M&NA. These materials are bates labeled UP-HC-0000146 to UP-HC-0000301 and are designated "Highly Confidential."

RFP No 5 UP analysis of expected benefits from UP/M&NA Lease UP has not located any documents that reflect the final lease terms, particularly with respect to M&NA's handling of Entergy coal traffic However, UP is producing its "Approval for Line Disposition" and the accompanying analyses These materials are bates labeled UP-HC-0000302 to UP-HC-0000310 and are designated "Highly Confidential."

COVINGTON & BURLING LLP

Andrew B. Kolesar III, Esq.

May 2, 2008

Page 2

Please call if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael L. Rosenthal". The signature is fluid and cursive, with the first name "Michael" and last name "Rosenthal" clearly distinguishable.

Michael L. Rosenthal

Enclosure

Exhibit No. 5

[REDACTED]