

INTERSTATE COMMERCE COMMISSION 03/20/96

FINANCE DOCKET # 32760 2256-2313 3+

1 wanted to see it.

2 JUDGE NELSON: Let me look at the
3 comments. This material he quotes on page 2 comes
4 from what?

5 MR. LIVINGSTON: The staff decision.

6 JUDGE NELSON: What's a staff decision?

7 MR. LIVINGSTON: Well, it was not a
8 Commission decision, not a full Commission decision.

9 JUDGE NELSON: I didn't know they render
10 such things. And then what --

11 MR. DOWD: Your Honor, just for -- the
12 many procedural issues in the first instance were
13 ruled upon by the Office of Proceedings.

14 JUDGE NELSON: I see.

15 MR. DOWD: By a designated officer, and
16 then dissatisfied parties can take it to the full
17 Commission.

18 JUDGE NELSON: All right. Then that was
19 appealed?

20 MR. LIVINGSTON: That particular one where
21 the block quote is?

22 JUDGE NELSON: Yes.

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1 MR. LIVINGSTON: I don't know, but the
2 next case he cites, the Chicago and Northwestern
3 case --

4 JUDGE NELSON: Yes.

5 MR. LIVINGSTON: -- which is also an
6 abandonment case, that was -- and I have a copy of the
7 Commission's decision which I will hand Your Honor,
8 and I've marked the relevant language of that decision
9 in which the Commission stated that it does not have
10 a power --

11 JUDGE NELSON: The right to discovery in
12 abandoned proceedings is made on a case-by-case basis.

13 MR. LIVINGSTON: Right.

14 JUDGE NELSON: Well --

15 MR. LIVINGSTON: That, it is our view, is
16 the law, and there's --

17 JUDGE NELSON: If this were an abandonment
18 case, we'd do citing on a case-by-case basis.

19 MR. LIVINGSTON: Right.

20 JUDGE NELSON: But it isn't an abandonment
21 case.

22 MR. LIVINGSTON: Well --

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1 JUDGE NELSON: It's a merger case.

2 MR. LIVINGSTON: -- it's both.

3 JUDGE NELSON: What has that got to do
4 with it?

5 MR. LIVINGSTON: It's both.

6 JUDGE NELSON: Oh, there are abandonment
7 applications here?

8 MR. LIVINGSTON: Right. Now, in the case
9 of Wisconsin --

10 JUDGE NELSON: Well, we've looked at this
11 on a case-by-case basis, and we have compelled
12 discovery from shippers.

13 MR. LIVINGSTON: Well, but what we need
14 here is --

15 JUDGE NELSON: What is it you want me to
16 do here, consistent with those rules?

17 MR. LIVINGSTON: Well, his objection --
18 and I think it's the only objection he has made -- is
19 that as a shipper he is immune from discovery.

20 JUDGE NELSON: Well, I will overrule that.

21 MR. LIVINGSTON: That's what we need, and
22 we need to have --

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1 JUDGE NELSON: Fine.

2 MR. LIVINGSTON: -- an order and to
3 communicate that to Mr. McFarlane.

4 JUDGE NELSON: So you want to prepare an
5 order for me to sign that will say this?

6 MR. LIVINGSTON: That's correct.

7 JUDGE NELSON: All right. Bring it
8 around --

9 MR. LIVINGSTON: And direct him to
10 respond, because otherwise --

11 JUDGE NELSON: I will look at it.

12 Now, whether he responds immediately or in
13 Phase 2, that's yet another question.

14 MR. LIVINGSTON: He did not raise any
15 Phase 2 objections, and I believe -- I know it is the
16 case with three of his clients -- Mountain Claims,
17 Springfield Plastics, and Illinois Transit -- that the
18 discovery there was quite tailored. I don't have the
19 Wisconsin Electric ones in front of me, so I can't
20 speak to that. That may be --

21 JUDGE NELSON: Well, make up an order that
22 recites that this ground has no merit, and he is

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1 ordered to comply with discovery just like anybody
2 else and he should make --

3 MR. LIVINGSTON: That's, I think, the --

4 JUDGE NELSON: Then we'll see what his
5 response is.

6 MR. LIVINGSTON: That's fine.

7 JUDGE NELSON: Then he may invoke
8 relevance burden --

9 MR. LIVINGSTON: Well, I --

10 JUDGE NELSON: -- privileges we don't
11 know. We'll have to see what he says.

12 MR. LIVINGSTON: There were deadlines for
13 asserting objections.

14 JUDGE NELSON: Well, I read this as a kind
15 of threshold objection which he is trying to protect
16 against all discovery.

17 MR. LIVINGSTON: It's a threshold
18 frivolous objection, and I don't think you can come
19 into court and say, "Well, Your Honor, I've got an
20 objection to number 1," and then come in 30 days later
21 and say, "Well, you didn't like that one, here is
22 objection number 2," and then 30 days later, "Well,

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1 here is objection number 3." You can't do that in a
2 court, and I don't think he should be permitted that
3 our position would be --

4 JUDGE NELSON: No, and then he may pay the
5 price if his utility wants to file something. So what
6 do you want the order to say?

7 MR. LIVINGSTON: We want it to say that
8 this --

9 JUDGE NELSON: That his objection has no
10 merit.

11 MR. LIVINGSTON: That his objection is
12 overruled.

13 JUDGE NELSON: And?

14 MR. LIVINGSTON: And that he should
15 promptly respond to the discovery request.

16 JUDGE NELSON: Well, why don't you send
17 him a copy of this transcript?

18 MR. LIVINGSTON: I think it would --

19 JUDGE NELSON: That wouldn't have the same
20 impact as a -- see, to get an order out we have to do
21 it, and then it has to go over to the Board, and the
22 Board issues, and you're talking about some period of

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1 time here.

2 MR. LIVINGSTON: Well, we will communicate
3 with him today ourselves to tell him that Your Honor
4 has overruled this blanket immunity --

5 JUDGE NELSON: That's correct.

6 MR. LIVINGSTON: -- that he has asserted.

7 JUDGE NELSON: I don't find any blanket
8 immunity. Shippers are not immune from discovery in
9 this case.

10 MR. LIVINGSTON: Right. And we will --

11 JUDGE NELSON: The ad hoc circumstances of
12 this case.

13 MR. LIVINGSTON: We will advise him of
14 that today without awaiting any further paperwork.

15 JUDGE NELSON: Why don't you do that and
16 see where it goes.

17 MR. LIVINGSTON: We would like to be able
18 to tell him that Your Honor has directed him to
19 respond just as other parties have been responding in
20 the case.

21 JUDGE NELSON: He should respond on the
22 same basis as other parties. That is correct.

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1 Is this utility a member of any of the
2 other groups?

3 MR. DOWD: He's not a member of the
4 Western Coal Traffic League.

5 MR. McBRIDE: Nor is it a member of the
6 Western Shippers Coal League.

7 JUDGE NELSON: But they're a substantial
8 company, Wisconsin Electric Power. This is no fly-by-
9 night operation that ought to be ignoring our
10 proceedings here, unless it's just not that serious.
11 And maybe this will flush them out and see what's
12 going on.

13 MR. LIVINGSTON: Your Honor, if this
14 ruling would apply, he has three other clients that
15 have made the same objection.

16 JUDGE NELSON: So Mr. McFarlane, on behalf
17 of the -- as to the Wisconsin Electric Power Company,
18 and what are these other clients?

19 MR. LIVINGSTON: The other clients are
20 Illinois Transit -- these are all listed in our
21 March 18 letter -- Springfield Plastics, and Mountain
22 Plains Communities and Shippers Coalition.

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1 JUDGE NELSON: Well, my position is that
2 the objection to request for discovery is without
3 merit and that these shippers have to make discovery
4 like anybody else, subject to the same claims and
5 defenses and liabilities as everyone else. And that's
6 my ruling.

7 MR. LIVINGSTON: Thank you, Your Honor.

8 JUDGE NELSON: What's next?

9 MR. LIVINGSTON: That's all we can do on
10 that one.

11 Let me consult briefly with Mr. DiMichael.
12 Maybe he is next.

13 We have reached a deal with -- on Dow and
14 Kennecott, which I suppose ought to be recited, and I
15 believe Mr. DiMichael has it.

16 Do you want to recite it?

17 MR. DiMICHAEL: Sure. The agreement we
18 have as far as Dow is that Dow will produce all
19 documents dated January 1, '93, or later, developed by
20 or in the possession of employees of its Rail Services
21 Procurement Group that discuss transportation options
22 or transportation competition or that compare

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1 transportation offers, service, or prices, as well as
2 contracts developed by or in the possession of
3 employees of that office with other carriers,
4 regardless of mode.

5 This production will be limited to
6 commodities transported to or from Dow's facilities at
7 Freeport, Texas, or Plaquemine, Louisiana, that are
8 shipped from either site in excess of 400 rail
9 carloads per year.

10 The applicants understand that some of the
11 contracts with other modes may be subject to
12 confidentiality provisions, and Dow will be promptly
13 notifying these carriers that it will be providing
14 these contracts to applicants under highly protective
15 conditions, and that disputes raised by these other
16 carriers may require a hearing before the
17 Administrative Law Judge.

18 MR. LIVINGSTON: That's correct. And I
19 think he said that this applies to commodities going
20 to and from the facilities. Subject to that, that's
21 my understanding of the --

22 JUDGE NELSON: All right.

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1 MR. LIVINGSTON: -- appeal. That's right.

2 JUDGE NELSON: All right.

3 MR. LIVINGSTON: Okay. And Kennecott.

4 MR. DiMICHAEL: Kennecott is less neat.

5 This regards commodities from the Colowiya Mine or
6 Kennecott's magma copper facilities. And, again,
7 Kennecott will produce documents dated 1/1/93 or later
8 that discuss transportation options, transportation
9 competition, or that compare transportation offers,
10 service, or prices, as well as contracts with other
11 carriers, regardless of mode. That's all we need
12 there.

13 MR. LIVINGSTON: I think that states the
14 agreement and that --

15 JUDGE NELSON: All right.

16 MR. LIVINGSTON: -- resolves that.

17 The next one on the list, Your Honor, is
18 the production of state PUC filings discussing sources
19 of fuel. Mr. Norton has had some discussions on this
20 subject.

21 Gerry, is this one right?

22 MR. NORTON: Your Honor, I think it is not

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1 right. We have had some I think useful discussions in
2 trying to limit it. There is a proposal which has to
3 be tailored to the different state regulatory regimes,
4 and I think, you know, it would be better to take it
5 off the agenda today and we'll bring it back if we
6 have to.

7 JUDGE NELSON: That's fine. It's off,
8 then, without prejudice to its renewal.

9 MR. LIVINGSTON: Should we have a date for
10 coming back?

11 MR. DOWD: Your Honor, under the protocol
12 that Mr. Norton and I have discussed -- and this, of
13 course, only applies to Arizona Electric, TU Electric,
14 Entergy, and the Wisconsin utilities, firms we
15 represent. We are planning to confer with Mr. Norton
16 this week regarding what materials may be responsive
17 and available pursuant to a reformulated request.

18 And so presumably by the end of this week
19 we'll have some sort of an understanding, either as to
20 what we're going to produce or as to where we still
21 disagree.

22 JUDGE NELSON: Do we have a conference

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1 schedule for next week?

2 MR. NORTON: We don't, Your Honor, and it
3 may be that for this it might make sense to
4 contemplate a telephone conference, if it should be
5 necessary, to be scheduled on a day's notice.

6 JUDGE NELSON: We can do that. Just call
7 up and make the arrangements.

8 MR. NORTON: I think that might -- our
9 sense is that it's probably not going to be necessary,
10 but I think that would be satisfactory.

11 JUDGE NELSON: If you need a telephone
12 conference, we can arrange it.

13 MR. NORTON: We're agreeable to that.

14 JUDGE NELSON: Let's see. Today is
15 Wednesday. I must have left my calendar upstairs. We
16 don't have anything scheduled this Friday.

17 MR. NORTON: Right.

18 JUDGE NELSON: And so the next scheduled
19 conference would be what, a week from Friday? Maybe
20 we should leave it there.

21 MR. DOWD: Well, that's the date the
22 comments are due, and it's unlikely that anyone --

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1 JUDGE NELSON: Nothing --

2 MR. DOWD: -- would be available for --

3 JUDGE NELSON: That's the 29th.

4 MR. DOWD: Right.

5 JUDGE NELSON: So as a practical matter,
6 we won't have a conference next week, is that correct?

7 MR. LIVINGSTON: Well --

8 MR. DOWD: As to this matter, Your Honor,
9 I'm --

10 JUDGE NELSON: Well, as to anything. Is
11 there a --

12 MR. LIVINGSTON: Well, for instance, you
13 deferred ruling on that South Orient matter this
14 morning.

15 JUDGE NELSON: Yes.

16 MR. LIVINGSTON: And we may try to get
17 that up for a decision. That's a little different
18 because they not only didn't appear today, they have
19 never bothered to file objections or responses. So --

20 JUDGE NELSON: I don't know what you want
21 me to do in terms of reserving time for next week.

22 MR. LIVINGSTON: Well, I don't either.

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1 I'm just saying it's conceivable that something will
2 come up. I don't want to --

3 JUDGE NELSON: If you need a conference,
4 then, or anyone does, call up our office and we'll try
5 to take it from there as to what we could do. I'm
6 supposed to be hearing in a gas case, but we can
7 squeeze it in.

8 MR. NORTON: I'm sure that it would be
9 very limited in scope if we do.

10 JUDGE NELSON: Most people are writing the
11 materials now.

12 Okay. What's next?

13 MR. LIVINGSTON: Next is one that deals
14 only with Western Resources, and it deals with a
15 particular interrogatory that asked for details about
16 the coal tonnages, and the types and the source of
17 coal that that company uses, and what forms of
18 transportation. Other -- it's a very narrow, it's a
19 Phase 1 request. It was answered substantially by
20 most of the other parties, but Western Resources has
21 simply said no.

22 JUDGE NELSON: May I see it?

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1 MR. LIVINGSTON: Yes. Give me your book;
2 I can find it for you. Interrogatory number --

3 JUDGE NELSON: Number 2 it says in the
4 letter.

5 MR. LIVINGSTON: Right.

6 JUDGE NELSON: Now, who is Western
7 Resources?

8 MR. LIVINGSTON: Are they represented here
9 today?

10 MR. DOWD: Western Resources is the parent
11 company of Gas Power and Light. They're not
12 represented here today.

13 MR. LIVINGSTON: Well, Mr. DiMichael
14 submitted this.

15 MR. NORTON: Well, yeah.

16 MR. LIVINGSTON: He just left.

17 MR. NORTON: I'm sorry. He's --

18 MR. LIVINGSTON: He just left.

19 MR. NORTON: I think Mr. Wilcox in that
20 firm was handling this matter, and I have made several
21 attempts to speak with him and he was out of town and
22 no one else has followed up on it. So we haven't had

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1 a chance to talk more specifically.

2 But as Mr. Livingston indicated, this is
3 a question that the other utilities have all answered,
4 and we don't know of any basis for distinguishing
5 Western Resources from the others, in terms of
6 their obligation to --

7 JUDGE NELSON: Here's Mr. DiMichael now.
8 We're talking about this interrogatory directed to
9 Western Resources, a client of your firm. And I think
10 someone else from the firm maybe represents them.

11 MR. DiMICHAEL: Yes. Well, I --

12 JUDGE NELSON: If you can give us any
13 help, we'd appreciate it.

14 MR. DiMICHAEL: Well, if I could ask what
15 the --

16 JUDGE NELSON: The contention is that --

17 MR. DiMICHAEL: -- the interrogatory that
18 is -- where we are here.

19 JUDGE NELSON: This is the interrogatory
20 that asks, for each separate year, certain basic data
21 as to mines.

22 MR. LIVINGSTON: Prices and

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1 transportation, right.

2 JUDGE NELSON: Who are supplying the coal
3 burned at Western Resources plants.

4 MR. LIVINGSTON: The mines, the prices,
5 the transportation routings.

6 MR. NORTON: Can we have a moment, Your
7 Honor?

8 JUDGE NELSON: Of course.

9 MR. LIVINGSTON: Okay. We have an
10 agreement, Your Honor, that they will file a response
11 in 10 days, subject to further -- I think that's the
12 agreement.

13 JUDGE NELSON: The representation, Mr.
14 DiMichael, is from the applicants that other -- just
15 precise question, right, Mr. Livingston?

16 MR. LIVINGSTON: That's what Mr. Norton
17 says. I haven't reviewed the --

18 MR. NORTON: That's correct.

19 JUDGE NELSON: And, therefore, if you have
20 problems with it, they ought to be special problems it
21 would seem.

22 MR. LIVINGSTON: But we have agreed that

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1 he would answer in 10 days.

2 JUDGE NELSON: Very well. All right.
3 What's next?

4 MR. LIVINGSTON: Next is the request to
5 certain utilities, not including Western Resources --

6 (Laughter.)

7 -- for average minehead prices on coal
8 and --

9 JUDGE NELSON: This is a matter of
10 confidentiality, isn't it? Is that the problem?

11 MR. LIVINGSTON: I think that may be the
12 -- part of the problem, which I -- I think they have
13 confidentiality provisions in their contracts with the
14 mines that they can't disclose this material. And I
15 think an order from Your Honor would solve that
16 problem, that you can override the confidentiality
17 provisions in the contract. That, as I understand it,
18 has been done in the case of applicants' contracts,
19 where applicants have a contract with a third party
20 and there's a promise that the contract would not be
21 disclosed.

22 We've produced -- as it says in our

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1 letter, we've produced materials that have
2 confidentiality provisions, either by getting waivers
3 or by doing it pursuant to your orders.

4 JUDGE NELSON: You represent these
5 utilities?

6 MR. DOWD: Yes, Your Honor.

7 JUDGE NELSON: All right.

8 MR. DOWD: And just to correct the record
9 slightly from the letter -- and I realize it may be
10 confusing because there are a number of parties here.
11 But one of the parties listed in this bullet item is
12 Wisconsin Power and Light. Wisconsin Power and Light,
13 in fact, has disclosed its minehead prices, because in
14 the case of that particular utility those prices are
15 not the subject of confidentiality agreements.

16 And separately, TU Electric, who is also
17 shown here, does not burn coal. TU Electric has
18 historically burned lignite and only recently engaged
19 in test burns of coal. The only minehead prices that
20 they would have would be the prices for these test
21 burns. And TU Electric has offered to stipulate that
22 the prices that it paid for its test coal would not be

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1 relevant to its comments in this proceeding.

2 As to the other three -- Entergy, Arizona
3 Electric, and Wisconsin Public Service --

4 JUDGE NELSON: I don't see Arizona there.

5 I see --

6 MR. DOWD: Well --

7 JUDGE NELSON: -- Entergy.

8 MR. DOWD: There is a reference to several
9 utilities, and they didn't list them all. But Arizona
10 Electric raised the same objection.

11 JUDGE NELSON: All right.

12 MR. DOWD: And so presumably, applicants
13 request applied to --

14 JUDGE NELSON: All right.

15 MR. DOWD: -- to all.

16 Your Honor, it is our position that the
17 question of confidentiality and the question whether
18 an order should be entered requiring the production of
19 confidentiality requires a balancing between the need
20 for and the relevance of the information and the
21 interest of confidentiality.

22 And that balancing test is endorsed by the

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1 Commission in its prior decisions dealing with similar
2 issues -- the Nevada Power rate proceeding decision
3 served January 15, 1988, a case involving Degussa
4 Corporation and Southern Pacific, in 1993. Indeed, a
5 motion involving Oklahoma Gas and Electric in the BN
6 Santa Fe merger just last year.

7 The Commission's standard is that where
8 information is sought in discovery which is
9 confidential, that it can be ordered disclosed if the
10 need for and the relevance of that information
11 outweighs the confidentiality interest.

12 Now, with regard to things like trackage
13 rights compensation, well, that goes to the heart of
14 this case -- the reasonable of the trackage rights
15 compensation. In the case of utility rate proceedings
16 where a carrier was asked to produce confidential
17 shipper contracts, that again -- the revenues under
18 those contracts were a necessary element of the
19 maximum rate proceeding.

20 JUDGE NELSON: On this case, if the
21 confidentiality is what drives all of this, why can't
22 we go at the problem by deleting identifying details?

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1 MR. DOWD: Well, Your Honor, I think
2 it's --

3 JUDGE NELSON: If all we have is a number,
4 and they don't know whose number it is.

5 MR. DOWD: Well, they already have the
6 information, because they already know the sources of
7 the coal. That information was provided. The
8 tonnages were provided. What was not provided was
9 simply the minehead price.

10 JUDGE NELSON: Well, why don't we give the
11 minehead price but delete the identifying details of
12 the --

13 MR. DOWD: Well, Your Honor, if I may, Mr.
14 Livingston would probably need to say this, so I'll
15 say it for him. I think, frankly, the minehead price
16 doesn't do you much good if you don't know the coal
17 company that charged the price.

18 As we understand it, and we assume, that
19 the apparent purpose of this interrogatory relates to
20 the issue of potential or actual competition between
21 coal sources for a given utility's business. We take
22 that that's the premise of the question.

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1 Witness Sharp, applicant's witness Sharp,
2 in his verified statement filed with the application,
3 and again during his deposition, made clear his
4 position on behalf of applicants that if one is
5 determining the relative competitiveness of coals for
6 a given utility, what's important is the delivered
7 price at the power plant. It's not the railway or the
8 minehead price per se, but it's the delivered price at
9 the power plant.

10 The three utilities that have objected on
11 confidentiality grounds have provided the applicants
12 with the delivered prices for all of their coal, and
13 have provided those delivered prices by coal source.

14 So our view and our position regarding
15 this interrogatory is that for those utilities who are
16 under contractual commitments to keep these prices
17 confidential, they have already provided to the
18 applicants all of the information the applicants
19 legitimately need to address the issue to which this
20 interrogatory is related. On that basis, the
21 relevance and need for the information does not
22 outweigh the confidentiality.

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1 JUDGE NELSON: Mr. Livingston?

2 MR. LIVINGSTON: Well, I --

3 JUDGE NELSON: Why do you need this stuff?

4 MR. LIVINGSTON: Well, first of all, I
5 don't think he's saying that it's irrelevant, and the
6 minehead prices do go to this question of the
7 competitiveness of different coal sources. Powder
8 River Basin Coal has minehead prices at one level,
9 Hanna Basin at another, Colorado and Wyoming at
10 another, and those are -- that relates to the issues
11 in the case about coal, about are these mines directly
12 competitive? And part of that has to do with what is
13 the minehead price, which is also related to what's
14 the cost of bringing the coal up and getting it ready
15 for shipment.

16 JUDGE NELSON: What has this got to do
17 with the merger?

18 MR. LIVINGSTON: Those are big issues in
19 this case that have been raised.

20 JUDGE NELSON: What issues?

21 MR. LIVINGSTON: The issues are is the
22 coal -- one of the issues is is the coal that SP

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1 originates in Colorado and Utah competitive with the
2 coal that UP originates in Powder River Basin? And
3 there are differences in minehead prices.

4 JUDGE NELSON: Now, suppose they --

5 MR. LIVINGSTON: This is --

6 JUDGE NELSON: -- the applicants want to
7 say that the two coals do not compete with each other?

8 MR. LIVINGSTON: That the coal sources
9 essentially are non-competitive.

10 JUDGE NELSON: So that the --

11 MR. LIVINGSTON: Right.

12 JUDGE NELSON: -- merger doesn't matter,
13 that you've got the UP carrying the Wyoming coal, the
14 SP carrying the Colorado Utah coal. The two are
15 different; it doesn't make any difference if there's
16 one --

17 MR. LIVINGSTON: They are different coals.
18 They are different minehead prices. They are
19 different -- there are a number of other differences.
20 All of that is presented in the testimony, and it's
21 the focus of a lot of the dispute.

22 JUDGE NELSON: And the utilities want to

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1 say that the two coals, while different, can play off
2 one against the other. And so there's railroad
3 competition there now that will disappear if the
4 merger occurs. Is that their position?

5 MR. LIVINGSTON: Well, I'm not exactly
6 sure what his client's positions are, and I would
7 hesitate to state it. He can state that.

8 MR. DOWD: I've heard that position
9 expressed by a great many coal shippers, yes, Your
10 Honor.

11 JUDGE NELSON: Yes.

12 MR. LIVINGSTON: And this gets at a part
13 of the problem.

14 JUDGE NELSON: So --

15 MR. LIVINGSTON: It's not the whole
16 answer. Delivered prices are important. Of course
17 they're important. And there are other important
18 facts that need to be --

19 JUDGE NELSON: If you know the delivered
20 price --

21 MR. LIVINGSTON: This is a relevant fact.

22 JUDGE NELSON: If you know the delivered

1 price, why do you need to know the price at the mine?

2 MR. LIVINGSTON: Because one of the
3 factors in determining whether coals are from
4 competitive sources is to look at the cost and prices
5 -- the cost of mining the coal and the prices being
6 offered for sale at the minehead. That tells you
7 something. It doesn't tell you everything, but it
8 tells you something.

9 MR. DOWD: Your Honor, applicant's --

10 MR. LIVINGSTON: At least there are
11 parties -- there are certainly parties in this case
12 who are taking that position.

13 MR. DOWD: Your Honor, applicant's expert,
14 Mr. Sharp, among others I believe, have already
15 expressed very specific testimony as to minehead
16 prices out of various mines. They know. These people
17 are experts, and it's no great secret, for example,
18 what Black Thunder coal costs. It's no great secret
19 what coal from Colowiya costs, or what have you.

20 The problem that we have with the
21 interrogatory is you are tying a specific utility to
22 a specific coal transaction, where the two parties

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1 that entered into that transaction did so on a
2 presumption that it would be kept confidential.

3 If all the applicants need to know are the
4 minehead prices charged by --

5 JUDGE NELSON: Why can't we give the
6 prices and delete the identifying details?

7 MR. LIVINGSTON: Well, I think he was
8 right about that, that you'd need to know where it's
9 coming from.

10 JUDGE NELSON: Why?

11 MR. LIVINGSTON: Because if you don't know
12 where -- if you just know what the price is and you
13 don't have any way of matching it up with a source,
14 you don't know anything.

15 JUDGE NELSON: So you gave it by state?
16 What are these two coals called?

17 MR. LIVINGSTON: Well, there's coal --

18 MR. DOWD: There are more than two, Your
19 Honor. And depending upon the utility, if you gave it
20 by state you'd be identifying the mine. The utility
21 that got coal from one mine in Wyoming and one mine in
22 Colorado, if you said, "Well, the Wyoming coal is X,

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1 and the Colorado coal is Y," then you'll have the
2 answer.

3 JUDGE NELSON: Well, what if we said, "The
4 UP coal price is so and so, and the SP coal price is
5 so and so"? Would that give you anything?

6 MR. LIVINGSTON: I was distracted, Your
7 Honor. I'm sorry.

8 JUDGE NELSON: Suppose that I directed
9 production of the prices as identified by the carrying
10 railroad. So you would know what the -- what mine
11 mouth prices were for the coal moving on the UP and,
12 similarly, the coal moving on the SP, without
13 identifying what mine it came out of. Could you use
14 that?

15 MR. LIVINGSTON: Well, if there's no way
16 of identifying the source, then I don't think it's
17 useful information.

18 JUDGE NELSON: Then I'm really not getting
19 as to why you need this.

20 MR. LIVINGSTON: Because it helps one
21 evaluate whether Colorado coal is competitive with
22 some other coal. It's a factor in that evaluation.

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1 What are the minehead prices?

2 MR. DOWD: Your Honor, again --

3 MR. LIVINGSTON: It's not the end of the
4 story; it's part of the story.

5 JUDGE NELSON: What is a minehead price?

6 MR. LIVINGSTON: It's the price that --
7 didn't have to transport, price of the coal right
8 there at the mine.

9 JUDGE NELSON: Does anyone buy coal that
10 way?

11 MR. LIVINGSTON: There are some utilities
12 that are mine mouth plants.

13 MR. DOWD: Mine mouth utilities, though,
14 Your Honor, are unaffected by this merger.

15 MR. LIVINGSTON: Right.

16 MR. DOWD: Because they per se have no
17 need for transportation. You know, we --

18 MR. LIVINGSTON: But a coal mine might
19 sell at a minehead price.

20 MR. DOWD: If this were a case, Your
21 Honor, where there was no way for the applicants to
22 get at minehead prices that given producers charge,

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1 for example, it may be a different story. But the
2 fact is they can get that information without our --

3 JUDGE NELSON: How do they get it?

4 MR. DOWD: -- violating our
5 confidentiality agreement.

6 JUDGE NELSON: How do they get it?

7 MR. DOWD: Well, for one thing, it is
8 freely known throughout the industry what given coal
9 companies are charging at a particular point in time
10 for their product, within a few cents a ton.

11 JUDGE NELSON: How do they get that?

12 MR. DOWD: There are publications that do
13 it, publications that do surveys of these sorts of
14 things.

15 JUDGE NELSON: What about that?

16 MR. DOWD: They call up the coal
17 companies.

18 JUDGE NELSON: Mr. Livingston, he says you
19 can get this from other sources.

20 MR. LIVINGSTON: Like if we could get this
21 -- this from other sources, what we've asked for, we
22 wouldn't be having a dispute here. Obviously, there

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1 is something they have that isn't public.

2 MR. DOWD: Well, yes. What they have is
3 the particular price that Wisconsin Public Service
4 Corporation paid for coal from a specific mine. That
5 transaction is confidential.

6 Our position is, according to Mr. Sharp,
7 all --

8 JUDGE NELSON: What if we deleted the name
9 of the buyer, and we just disclosed the mine and its
10 price?

11 MR. DOWD: They already have the names of
12 the buyers, because we gave them answers to every
13 other element of the interrogatory.

14 JUDGE NELSON: Do they know what mines
15 you're buying from?

16 MR. DOWD: Yes.

17 JUDGE NELSON: Oh, I see. So you've given
18 them so much that you've given away the prize here if
19 you give --

20 MR. DOWD: Well, no, we haven't given away
21 the prize, if you will, Your Honor, because we have
22 not disclosed the minehead price. So we have not --

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1 JUDGE NELSON: No, I understand.

2 MR. DOWD: -- violated the confidentiality
3 contracts.

4 JUDGE NELSON: If you were to give them
5 this number, it would tell them too much because of
6 what you've already given.

7 MR. DOWD: Well, Your Honor, our position
8 is that we want to --

9 JUDGE NELSON: I don't want to penalize
10 you because you already were cooperative.

11 MR. DOWD: We have already given them the
12 information that their own expert says is the
13 information you use to decide the issue that this
14 interrogatory is directed to.

15 JUDGE NELSON: I understand that.

16 MR. DOWD: So further information, as
17 regards the issue at hand, would be superfluous. But
18 it would do real harm to the one providing the
19 information, because it would require them to, in
20 essence, violate a confidentiality restriction that
21 they have entered into with their supplier.

22 MR. LIVINGSTON: Your Honor, as to -- we

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1 do have a highly restrictive protective order. Highly
2 restrictive. Lots of highly sensitive material has
3 been produced by the applicants and by some other
4 parties as well. The confidentiality --

5 JUDGE NELSON: Well, we've also made in
6 roads and tightened that sometimes for especially
7 sensitive stuff. We've given it to counsel only.

8 MR. NORTON: Your Honor, I think I might
9 point out that the request does not call for the
10 specific contract price. It calls for average
11 minehead price, which may or may not be -- present
12 a --

13 JUDGE NELSON: How do we get the average?

14 MR. NORTON: They know what they pay over
15 a year, not just --

16 JUDGE NELSON: Oh, that one company deals
17 with over a year.

18 MR. NORTON: It's an annual average, yeah.

19 MR. DOWD: Your Honor, none of these
20 utilities buy coal under tariffs or anything. They're
21 all under contract. And, indeed, Entergy --

22 JUDGE NELSON: What could they do with

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1 this? Suppose they learned that Entergy's average
2 price paid for such-and-such a coal from Wyoming was
3 so much. What would they do with it?

4 MR. DOWD: I have no --

5 JUDGE NELSON: That would be harmful.

6 MR. DOWD: -- useful speculation on that.

7 JUDGE NELSON: How would it harm you?

8 MR. DOWD: The harm is that Entergy has
9 entered into a transaction with a supplier, wherein it
10 obligated itself under contract to keep the price
11 confidential.

12 JUDGE NELSON: I understand that, but I
13 have to also assess the harm that would flow here, and
14 I'm not getting a good picture of that either.

15 MR. DOWD: The potential harm --

16 JUDGE NELSON: What could the enemy do
17 with this?

18 MR. DOWD: Well, it's not a question of
19 what the enemy, if you will, could do. It's the --

20 JUDGE NELSON: First of all, who is the
21 enemy, the railroad? Or another utility? Or another
22 mine?

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1 MR. DOWD: Well, if you're talking about
2 from the danger of disclosure --

3 JUDGE NELSON: Exactly.

4 MR. DOWD: -- the enemy, if you will, is
5 everyone other than the two parties to the agreement.
6 The risk, the harm, is that the supplier with whom the
7 transaction was entered into --

8 JUDGE NELSON: Say my mother-in-law
9 learned at age 84 what the average price for coal is
10 at the mine in Wyoming destined for the electricity of
11 some utility. What could she do with it?

12 MR. DOWD: I don't know. Does she have
13 stock in a utility?

14 JUDGE NELSON: Not that I know of.

15 MR. LIVINGSTON: Your Honor, as I
16 understand it --

17 JUDGE NELSON: Just a person. What could
18 she do with it?

19 MR. DOWD: I don't know, and the focus is
20 not on --

21 JUDGE NELSON: Well, how about Mr.
22 Livingston, what could he do?

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1 MR. DOWD: I have no question that Mr.
2 Livingston would scrupulously abide by any
3 confidentiality restriction that exists here. The
4 harm is simply that in the future the supplier will no
5 longer be able to rely as much on the covenant of the
6 utility that it won't disclose, because they say,
7 "Well, yeah. But when you got in a scrape in the
8 merger, you disclosed it."

9 JUDGE NELSON: Can I see the agreement?

10 MR. DOWD: I don't have it with me. .

11 JUDGE NELSON: We don't have them here?

12 MR. DOWD: The coal supply agreements?

13 JUDGE NELSON: Yes.

14 MR. DOWD: No.

15 JUDGE NELSON: Where the confidentiality
16 is set down.

17 MR. DOWD: No, we haven't produced that.
18 It was not requested. We -- for those utilities whose
19 coal supply arrangements were not covered by a
20 confidentiality restriction, we provided --

21 JUDGE NELSON: Can we defer this until we
22 can see these contracts? I'd like to see what's in

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1 them, and I'd also like to get a better explanation on
2 each side of exactly why it is the applicants want it.
3 Throw out a hypothetical argument, what you want to do
4 with it. And from the utilities, I'd like to hear a
5 better explanation of what they fear, other than that
6 they made a promise. That's worth something. People
7 ought to back up promises, generally.

8 MR. LIVINGSTON: Well, Your Honor, as far
9 as the promise is concerned, the --

10 JUDGE NELSON: I'm not asking you about
11 that. I'm asking you for two things -- one, more
12 time, and, two, during which time we'll get to look at
13 the contracts and see what's in them, and get an
14 explanation from both counsel in a more precise way as
15 to what it is they want to do with these materials.
16 In your case it's what case it is you want to build
17 out of this price, and in the utility's case it's what
18 harm can befall them for releasing it under the
19 protective order.

20 MR. LIVINGSTON: Could I --

21 JUDGE NELSON: I don't understand any of
22 those things right now.

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1 MR. LIVINGSTON: Okay. Your Honor, I
2 don't -- my guess is this coal supply contract is
3 enormous. We can --

4 JUDGE NELSON: We can look at one.

5 MR. DOWD: Well, Your Honor, if I may --

6 MR. LIVINGSTON: We could pick out the
7 clauses --

8 JUDGE NELSON: For the confidentiality --

9 MR. LIVINGSTON: -- of each one of these
10 contracts, just the confidentiality clause, fax
11 that --

12 JUDGE NELSON: Even one, if we can agree
13 that there's a typicality rule here, one would be
14 fine.

15 MR. LIVINGSTON: My guess is they would
16 vary. Indeed, some may have specific provisions for
17 government subpoenas and government orders, or
18 disclosures made pursuant to governmental process.

19 JUDGE NELSON: We've got to start looking
20 at those things.

21 MR. LIVINGSTON: Right. So I think he
22 ought to -- I don't think there will be a typical one.

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1 Maybe I'm wrong. But if he could fax those to us by
2 10:00 tomorrow morning --

3 MR. DOWD: Your Honor, no. We have to
4 file comments a week from Friday. The minehead
5 prices, to the extent that they are helpful at all in
6 their analysis, are only marginally so. And they can
7 wait until after the 29th.

8 MR. LIVINGSTON: Your Honor, this --

9 MR. DOWD: This is not critical data.
10 They've acknowledged it's not critical data. They've
11 acknowledged that it's just sort of helpful.

12 MR. LIVINGSTON: This is --

13 MR. DOWD: But in that category, I mean,
14 you know, we are trying to get our comments together.

15 JUDGE NELSON: They've already made a case
16 for the proposition that there's no diminution of
17 competition as to these coals, because the two coals,
18 whatever they are, don't compete with each other. Do
19 I get that picture?

20 MR. LIVINGSTON: Right.

21 JUDGE NELSON: Therefore, it doesn't
22 matter if there's a merger as to these trains carrying

1 this coal, from Wyoming on the one hand and Utah and
2 Colorado on the other. Right so far?

3 MR. LIVINGSTON: We believe there is no
4 competitive problem with the coal --

5 JUDGE NELSON: Right. So it doesn't
6 matter if you've got five railroads or one, they are
7 two different things.

8 MR. LIVINGSTON: They are two different
9 coals.

10 JUDGE NELSON: Yes.

11 MR. LIVINGSTON: We've explained in our
12 evidence why we think there is no coal competition
13 problem. But I don't see any reason why we need --
14 this is supposed to be Phase 1 discovery.

15 JUDGE NELSON: So what you're getting now
16 is material to beef up your case that you've already
17 made?

18 MR. LIVINGSTON: Well, it's going to
19 relate to our case and relate to their --

20 JUDGE NELSON: Say it comes --

21 MR. LIVINGSTON: -- opposition.

22 JUDGE NELSON: It's terrific for you, it's

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1 the best possible case --

2 MR. DOWD: Your Honor?

3 JUDGE NELSON: -- you will then say to the
4 Commission what -- see, we told you so?

5 MR. LIVINGSTON: I can't tell you what I'm
6 going to say until I see what the evidence is, but I
7 can tell you this.

8 JUDGE NELSON: Imagine your best possible
9 case.

10 MR. LIVINGSTON: I can tell you what's
11 happening with us. I'm sort of getting squeezed for
12 time. We had a Phase 1 and a Phase 2. This is
13 Phase 1, and it -- now they want to push it off
14 effectively into Phase 2, and we're going to be
15 getting more -- less and less information now and more
16 and more information later, and we will be swamped at
17 the last minute.

18 There is no reason why he -- he should
19 have brought those confidentiality clauses if he was
20 going to rely on them. He should have brought them
21 here today, and we could have resolved this thing.
22 And I can't imagine that there is any reason why those

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1 clauses --

2 JUDGE NELSON: And you should be able
3 to --

4 MR. LIVINGSTON: -- can't be circulated by
5 tomorrow morning.

6 JUDGE NELSON: You should be able to be
7 telling me in detail exactly what this -- where this
8 fits in the whole case, and I'm not getting it here.

9 MR. LIVINGSTON: I don't think that --
10 there is really no dispute that this is relevant. I
11 can't tell you exactly what I'm going to use the
12 evidence for until I see the evidence, but there's no
13 question --

14 MR. DOWD: Your Honor, relevance alone --
15 under the Commission's test, relevance alone is not
16 adequate.

17 JUDGE NELSON: All right. My ruling is
18 that this request for these prices will be deferred to
19 Phase 2. We'll look at it in the context of a
20 responsive filing by the utilities and then see what
21 the railroad has to answer. And if it means that
22 these prices have to come out, they'll have to come

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1 out.

2 I may want to look at the confidentiality
3 agreement. I'd certainly be open to suggestions as to
4 how to protect the numbers, if you want to do it on a
5 counsel only basis or keep them in a vault somewhere,
6 or whatever else. But I don't know that the issue is
7 going away. I just want to look at it there.

8 And when we look at it again, I want to
9 have the contract language here, and I want to have
10 thought out arguments on both sides as to where these
11 numbers lead.

12 On the applicant's side, hypothesize the
13 best possible discovery, marvelous numbers, and
14 explain to me what it is and how you'd use them. And
15 on the utility side, explain to me what bad things
16 would happen competitively if these numbers went into
17 Mr. Livingston's hands, or got out of his hands into
18 the hands of others, or whatever. And then I can
19 evaluate all of this stuff in a way that I don't seem
20 to have a grasp of now.

21 What is next?

22 MR. LIVINGSTON: The next request in the

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1 letter has to do with document request number 31 to
2 Tex Mex and document request number 33 to KCS. And as
3 to those, those have both been deferred. Excuse me.
4 Excuse me. Tex Mex has been deferred or resolved --
5 deferred.

6 JUDGE NELSON: All right. So we have KCS
7 number 33?

8 MR. LIVINGSTON: Yes. I think I left you
9 with my version of it. No, that's one is yours. Oh,
10 okay.

11 MR. LUBEL: Bill, that's not the only one
12 of ours that --

13 MR. LIVINGSTON: No, it's not.

14 MR. LUBEL: Your Honor, if I may make a
15 suggestion, just the big picture on KCS --

16 JUDGE NELSON: Yes.

17 MR. LUBEL: -- their discovery to us --

18 JUDGE NELSON: We'll take them all up at
19 once?

20 MR. LUBEL: Well, what I was going to
21 suggest -- yes, I mean, any way they want to do it, or
22 Your Honor wants to do it. But just so you'll see the

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1 picture, there are -- including this 33, I understand
2 there are like 31 requests that they've raised of --
3 to us that they've raised in their letters to you.

4 We've responded to all of them. We've
5 filed responses, objections, and said we'd give
6 information or we wouldn't give information. As to 26
7 of those, we have said, "We're going to give you this
8 information," and we're in the process of doing it.
9 Of course, we've said that some of it would be with
10 our filing, in our filing, and it will -- some will be
11 put in our depository.

12 I've even made the offer today that I will
13 make my best efforts to give them as much of that
14 information as I can prior to the 29th.

15 JUDGE NELSON: So are we through with this
16 letter now?

17 MR. LIVINGSTON: Excuse me.

18 MR. LUBEL: No. Your Honor --

19 JUDGE NELSON: I'm lost now.

20 MR. LIVINGSTON: Let me -- if I can
21 interrupt here.

22 MR. LUBEL: If I could just finish what I

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1 was saying. There are only five of them, Your Honor,
2 of the 31 requests that we have --

3 JUDGE NELSON: Well, we were talking about
4 one, number 33.

5 MR. LUBEL: If I --

6 JUDGE NELSON: And now you're up with 30
7 others.

8 MR. LUBEL: The earlier letter --

9 JUDGE NELSON: Let's do them one at a
10 time.

11 MR. LUBEL: Okay.

12 JUDGE NELSON: We're starting with
13 document request number 33.

14 MR. LUBEL: Fine, Your Honor.

15 JUDGE NELSON: You're disputing that KCS
16 has not adequately responded to number 33.

17 MR. LIVINGSTON: Right.

18 JUDGE NELSON: Is that right, Mr.
19 Livingston?

20 MR. LIVINGSTON: That's correct.

21 JUDGE NELSON: All right. Where is number
22 33?

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1 MR. LIVINGSTON: It's in the KCS response,
2 which is in about the middle of the volume.

3 JUDGE NELSON: Well, I'm going to ask you
4 to find it.

5 MR. LIVINGSTON: Okay.

6 MR. LUBEL: Your Honor, while he's looking
7 for that, I'll point out that this is one of the five
8 that we have objected to responding. We said we're
9 not going to produce anything in response to only five
10 of the 31 at issue.

11 JUDGE NELSON: Well, now we'll look at
12 this one.

13 MR. LUBEL: Okay.

14 JUDGE NELSON: 33.

15 MR. LUBEL: 33.

16 JUDGE NELSON: Produce all documents
17 relating to the reported acquisition by Kansas City
18 Southern Industries. What is that, a holding company?

19 MR. LUBEL: Yes, Your Honor.

20 JUDGE NELSON: Of the railroad.

21 MR. LUBEL: I'm assuming so.

22 JUDGE NELSON: Of a 49 percent interest in

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1 Mex Rail, Inc. What is Mex Rail, Inc.?

2 MR. LUBEL: I believe that's the parent of
3 the Tex Mex Railroad. And we don't dispute that that
4 was purchased, Your Honor.

5 JUDGE NELSON: There is such a holding.

6 MR. LUBEL: Yes.

7 JUDGE NELSON: Okay. And -- well, let's
8 start before the "and." All documents relating to the
9 acquisition by -- let's read -- it's by your railroad,
10 of a 49 percent interest in the Tex Mex. Okay? Your
11 objection is?

12 MR. LUBEL: Okay. Your Honor, our
13 objection, as we've stated, is that it's overbroad and
14 burdensome and not relevant to this proceeding. The
15 language itself undermines it.

16 JUDGE NELSON: I agree.

17 MR. LUBEL: The --

18 JUDGE NELSON: All documents is too far.
19 To that extent, I'm sustaining the objection.

20 Do you want to try to reshape it, Mr.
21 Livingston? I'm certainly receptive to a suggestion
22 in that regard.

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1 MR. LIVINGSTON: Well, it certainly ought
2 to include all evaluations by -- that were written by
3 or submitted to executives of the company that
4 evaluated or discussed the reasons for the acquisition
5 and any related agreements, and which set forth any
6 related agreements.

7 JUDGE NELSON: Okay. He wants to know --

8 MR. LIVINGSTON: We've also asked here for
9 their regulatory filings.

10 MR. LUBEL: Your Honor, as to the
11 regulatory filings --

12 JUDGE NELSON: We'll get to that. We have
13 to go slowly here.

14 MR. LUBEL: Excuse me, Your Honor.

15 JUDGE NELSON: I don't know this stuff as
16 well as you all do. If I could race through it, I'd
17 be through now.

18 So he wants the documents relating to the
19 acquisition, insofar as they show -- what was your --
20 the reason why --

21 MR. LIVINGSTON: The reasons for the --
22 the justifications for, the rationale for --

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1 JUDGE NELSON: Okay. What about that?

2 MR. LUBEL: How is it relevant, Your
3 Honor?

4 JUDGE NELSON: Okay. How is it relevant
5 to this case?

6 MR. LIVINGSTON: Your Honor, it will show,
7 as well as the related agreements together, will show
8 the relationship between KCS and Tex Mex, two of the
9 parties in this case, that they play an active role
10 and will shed light perhaps -- can't say until we see
11 the documents -- on what their actual interests are
12 and what their actual motives may be for positions
13 they're taking.

14 JUDGE NELSON: Is Tex Mex controlled by
15 KCS?

16 MR. LUBEL: No, sir, Your Honor. We have
17 a 49 percent interest, and that's a matter of public
18 record.

19 JUDGE NELSON: Where is the other 51
20 percent?

21 MR. LUBEL: I believe that that is owned
22 by Mex Rail, Inc., or -- I could be wrong. There

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1 could be another entity involved.

2 JUDGE NELSON: Forty-nine percent of many
3 entities is total control.

4 MR. LUBEL: My understanding is that there
5 is one other entity that has 51 percent, Your Honor.

6 JUDGE NELSON: So you're just a minority
7 stockholder?

8 MR. LUBEL: That's right, and that's a
9 matter of public record. We have that --

10 JUDGE NELSON: You accept that there's no
11 control?

12 MR. LIVINGSTON: Well, I don't accept that
13 they're just a minority stockholder the way
14 individuals are --

15 JUDGE NELSON: Assume a world of two
16 stockholders, one is 51 percent, the other 49. KCS is
17 the 49.

18 MR. LIVINGSTON: Well, you've got to look
19 at the --

20 JUDGE NELSON: They're a minority
21 stockholder.

22 MR. LIVINGSTON: You've got to look at the

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1 agreements, what the relationship is. Many times when
2 you have a 51/49, or some other arrangement, you will
3 find that the minority has made an investment, that it
4 has rights, that it has veto rights, and --

5 JUDGE NELSON: That's the kind of thing
6 we're looking for?

7 MR. LIVINGSTON: We want to see what the
8 deal is and what the justifications and rationale for
9 it are, and what the relationship is.

10 JUDGE NELSON: Didn't they have to submit
11 all of this to the Commission or the Board when they
12 acquired the 49, or they didn't because it was not
13 controlling? Is that the theory?

14 MR. LUBEL: I do not know, Your Honor.
15 But to the extent there are regulatory filings, they
16 are a matter of public record. They can get them.

17 JUDGE NELSON: You don't know what they
18 are.

19 MR. LUBEL: I do not know, Your Honor.
20 I'm assuming there were things filed.

21 JUDGE NELSON: It strikes me that we're
22 going to have to have some discovery here. Forty-nine

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1 percent of a railroad is a lot of that railroad. This
2 is the KCS that controls it.

3 MR. LUBEL: But, Your Honor, just --

4 JUDGE NELSON: They run right down there
5 into this territory. A lot of this talk we've had
6 about Houston and Brownsville could involve -- where
7 is the Tex Mex run on this map? What --

8 MR. LUBEL: Doesn't it run, Your Honor,
9 from Corpus Christie over to Laredo?

10 JUDGE NELSON: The one that goes east and
11 west?

12 MR. LUBEL: Yes, Your Honor.

13 JUDGE NELSON: Yes. What's the
14 significance of this? Give me some help on this.

15 MR. LIVINGSTON: Well, as I said, this
16 will develop and show, we hope, what the actual
17 relationship is between these two parties and that
18 will --

19 JUDGE NELSON: Well, what's your best
20 possible case?

21 MR. LIVINGSTON: I don't know what my --
22 the best possible case, Your Honor, is. I want to see

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1 what their documents show. Maybe the documents are
2 highly relevant. Maybe they're middling relevant.
3 Maybe some of them are relevant and some are not. I
4 can't say that until I see them. The subject matter
5 is relevant, or at least it's a subject matter where
6 it is well calculated to lead to the discovery that
7 this --

8 JUDGE NELSON: Well, I certainly think so,
9 and I'm going to order some discovery. Now, the
10 question is how to narrow this. And you've started to
11 say documents that show the purpose of the
12 acquisition?

13 MR. LIVINGSTON: Purpose and the rationale
14 and the justification written by the executives or
15 their staff.

16 JUDGE NELSON: When was this acquisition?
17 When did it happen? Let's get a date to the
18 documents.

19 MR. LUBEL: I don't know, Your Honor. Mr.
20 Bredenberg said that he -- he alluded to it a little,
21 and I should know but I apologize, Your Honor. I --

22 JUDGE NELSON: Then we can't help you with

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1 anything.

2 MR. LUBEL: I think it was some time in
3 1995.

4 MR. NORTON: I believe that's correct,
5 yes.

6 JUDGE NELSON: So these are documents
7 written to officers of the Kansas City Southern
8 Industries?

9 MR. LIVINGSTON: Written for them by their
10 staff or written by them. Certainly want Board
11 presentations concerning the transactions, and the
12 documents that reflect the transactions, including
13 side agreements.

14 JUDGE NELSON: Okay. I'm going to -- any
15 reason that I shouldn't order that?

16 MR. LIVINGSTON: Well, in terms of the
17 scope and breadth --

18 MR. LUBEL: Well, certainly, Your Honor.
19 I mean, side agreements? How does that relate to this
20 merger? Side agreements relating to what?

21 JUDGE NELSON: Well, it might or might
22 not. Do you want to specify -- can we get that a

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1 little more precise?

2 MR. LUBEL: Because, Your Honor, you know,
3 they just said -- you know, in prior discovery
4 disputes over the last couple of months, you have
5 always said we need to have a showing more than just
6 we want to find out what's there.

7 JUDGE NELSON: Well, that's when there's
8 some threshold hurdle like we have this privilege of
9 the settlement business. This seems to me fairly
10 straightforward. I'm going to leave this to counsel
11 to work on. We'll take some break here before the day
12 is over. See if you can't come up with some language.

13 I'm going to order discovery with regard
14 to this acquisition. So start with that assumption,
15 Mr. Lubel, and then it's in your interest to work to
16 get this as narrow as possible, and so it is for Mr.
17 Livingston because the narrower it is, as you know my
18 practice, the more likely I am to grant it.

19 What's next?

20 MR. LIVINGSTON: The last item in the
21 letter on page 4 has to do with Montana Rail Link and
22 that has been resolved or deferred? Resolved. And so

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