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January 23, 2009

224388

BY HAND

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

ENTERED
Office of Proceedings

JAN 23 2009

Part of
Public Record

Re: STB Docket No. NOR 42111, *Oklahoma Gas and Electric
Company v. Union Pacific Railroad Company*

Dear Secretary Quinlan:

Enclosed for filing *under seal* in the above-reference matter are an original and ten copies of the CONFIDENTIAL version of Union Pacific's Opening Evidence, as well as three sets of Union Pacific's workpapers (which are also CONFIDENTIAL.)

We have separately enclosed for filing in the Board's *public docket* an original and ten copies of a REDACTED version of Union Pacific's Opening Evidence.

Additional paper copies of this filing are also enclosed. Please return date-stamped copies to our messenger.

Thank you for your attention to this matter.

Sincerely,

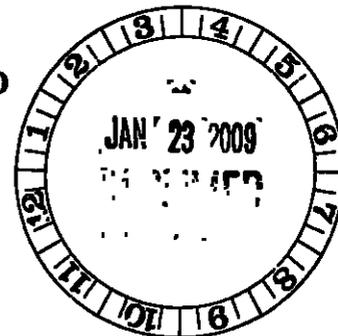
A handwritten signature in black ink, appearing to read "Michael L. Rosenthal".

Michael L. Rosenthal

Enclosures

cc Counsel for OGE Energy Corporation

REDACTED – TO BE FILED IN THE PUBLIC RECORD



BEFORE THE
SURFACE TRANSPORTATION BOARD

OKLAHOMA GAS & ELECTRIC COMPANY,

Complainant,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant

Docket No 42111

ENTERED
Office of Proceedings

JAN 23 2009

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Public Record

UNION PACIFIC'S OPENING EVIDENCE

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January 23, 2009

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



OKLAHOMA GAS & ELECTRIC COMPANY,)	
)	
Complainant,)	
)	
v)	Docket No. 42111
)	
UNION PACIFIC RAILROAD COMPANY,)	
)	
Defendant)	

UNION PACIFIC'S OPENING EVIDENCE

Union Pacific Railroad Company ("UP") hereby submits its opening evidence in compliance with the Board's Order served December 3, 2008. As a result of the Joint Stipulation filed November 21, 2008, the only issues in this case are whether the challenged rates are subject to the Board's jurisdiction and, if so, what are the maximum reasonable rates. Accordingly, UP is submitting this evidence using an abbreviated version of the format prescribed in *General Procedures for Presenting Evidence in Stand-Alone Rate Cases*, STB Ex Parte No. 347 (Sub-No. 3) (STB served Mar. 12, 2000).

I. COUNSEL'S ARGUMENT AND SUMMARY OF EVIDENCE

Oklahoma Gas & Electric Company ("OG&E") challenges the reasonableness of UP's rail transportation rates for the movement of coal from the Powder River Basin to OG&E's Muskogee Electric Generating Station in Fort Gibson, Oklahoma. UP's rates were established in Item 5400-A of UP Tariff 4221, which became effective on January 1, 2009.

UP has narrowed the scope of this case substantially. For purposes of this case, UP has waived its right to present stand-alone cost evidence and has stipulated that if the Board

finds it has jurisdiction to regulate the challenged rates, the maximum reasonable rates are 180 percent of variable costs as calculated pursuant to the Board's procedures. *See* Joint Stipulation and Report on the Parties' Conference Pursuant to 49 C.F.R. § 1111.10(b), filed November 21, 2008. UP also has waived its right to contest whether there is qualitative evidence of effective competition from other carriers or modes of transportation for the transportation to which the rates apply. *See id*

In addition, UP and OG&E have agreed that the Board should calculate the jurisdictional threshold for purposes of determining its jurisdiction based on the traffic and operating characteristics of OG&E traffic that moved from November 1, 2007 through October 31, 2008. *See id*; *cf Tex Mun Power Agency v Burlington N & Santa Fe Ry*, STB Docket No 42056, slip op. at 28 (STB served Sept. 27, 2004) (Board can make market dominance determination even in the absence of actual movements under a challenged rate).

Finally, the parties have agreed on the nine inputs for the URCS Phase III program to calculate the jurisdictional threshold for each origin-destination pair. *See* Joint Submission of URCS Phase III Operating Characteristics, filed January 9, 2009.

Exhibits A and B hereto show that, based on the data available at this time, the challenged rates exceed the jurisdictional threshold as calculated in accordance with the parties' stipulation and are therefore subject to the Board's jurisdiction. Thus, the only issue that remains is to prescribe maximum reasonable rates

Under these circumstances, the Board should direct UP to establish, and OG&E to pay, common carrier rates for UP's movements of coal from the Powder River Basin to OG&E's Muskogee Electric Generating Station that yield revenues equal to 180 percent of UP's variable costs through the end of 2018. *See, e.g., Kansas City Power & Light Co v Union Pac R R.*

STB Docket No. 42095, slip op. at 9-10 (STB served May 19, 2008). The Board cannot and should not prescribe specific rates for future movements because the Board and the parties lack the necessary information to calculate the variable costs of those movements – namely, the actual operating characteristics for OG&E’s traffic and UP’s URCS costs in future periods. *See id.* at 9 (“The parties should therefore calculate the rate floor for later periods in a manner consistent with the procedures and findings contained in this decision.”), *cf. Tex. Mun. Power Agency*, slip op. at 28 (explaining that rate prescriptions apply to future movements before the information necessary to calculate variable costs is known and that parties are expected to agree on the computation of variable costs once the information becomes available).¹

With respect to reparations for movements under the challenged tariff, a similar issue exists. Neither party has submitted evidence regarding the actual operating characteristics of the OG&E traffic for any period in which the challenged rates were in effect, and UP’s 2009 URCS costs will not be available until sometime in 2010. Thus, the Board and the parties do not

¹ If the Board were to attempt to prescribe specific rates for future movements before it had the information necessary to calculate the variable costs of those movements, it would risk violating the principle that the Board cannot prescribe a rate below 180 percent of variable costs. *See, e.g., West Tex. Utils. Co. v. Burlington N. R.R.*, 1 S. Ct. 638, 677 (1996); *Tex. Mun. Power Agency*, slip op. at 29. Thus, until UP’s variable costs for the issue traffic can be determined and the final prescribed rate can be calculated, UP must be allowed to publish rates that serve as interim rates, subject to UP’s obligation to pay reparations and interest. This must be the case because “the shipper may receive reparations for overpayment while the carrier can never be made whole after underpayment.” *Burlington Northern, Inc. v. United States*, 459 U.S. 131, 141-42 (1982); *cf. Seminole Elec. Coop. v. CSX Transp., Inc.*, STB Docket No. 42110 (STB served Dec. 22, 2008) at 3 (explaining that policy considerations counsel against premature interference with railroad pricing decisions because shippers can obtain reparations with interest if rates are found to be unreasonably high).

If the Board were to depart from precedent and prescribe specific rates for future movements, then in order to avoid inflicting irreparable harm on UP, it would have to establish a mechanism that would allow UP to recover any underpayments – *i.e.*, payments of rates that prove to be below 180% of UP’s variable costs – plus interest, from OG&E once information regarding actual operating characteristics and variable cost becomes available. *Cf. Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1), slip op. at 70 (STB served Oct. 30, 2006).

have the necessary information to calculate the maximum reasonable rates for movements during the reparations period at this time. *See Kansas City Power & Light Co*, slip op at 9

In this situation, the Board should order the parties to calculate the maximum reasonable rates for the reparations period in a manner consistent with the Board's procedures once they have the information necessary to make those calculations – that is, the actual operating characteristics for OG&E's traffic and UP's URCS costs for 2009 – and award reparations to OG&E for any portion of the transportation charges collected by UP under the challenged tariffs that exceeds 180 percent of UP's variable costs, together with interest. *See id*

The Board should *not* calculate maximum reasonable rates for reparations purposes based on the information contained in the parties' Joint Submission and jurisdictional threshold calculations. The parties agreed to use that information for purposes of determining the Board's jurisdiction over the challenged rates, but as the Board has recognized, reparation calculations must be based on actual, movement-specific information. *See id*

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² Bracketed material has been redacted from the public version of U.P.'s Opening Evidence

} Such an outcome would be inconsistent with the fundamental principle that a prescribed rate cannot fall below the 180 percent jurisdictional threshold. *See West Tex Utils*, 1 S.F.B. at 677; *cf Tex Mun Power Agency*, slip op at 29 (“The railroad is protected by the terms of the prescription itself, which assures that the prescribed rate cannot fall below the 180% R/VC floor for any movement in any year.”).³

II. MARKET DOMINANCE

The Board may regulate the reasonableness of a challenged rate only if a carrier has market dominance over the traffic involved. *See* 49 U.S.C. § 10701(d)(1), 10707(b) & (c). By definition, a carrier does not have market dominance when the revenues produced by the movement at issue are less than 180 percent of the variable costs to the carrier of providing the service. *See id* § 10707(d)(1)(A). For the purposes of this proceeding, UP has waived its right to contest whether there is qualitative evidence of effective competition from other carriers or modes of transportation for the transportation to which the rates apply.

A. QUANTITATIVE EVIDENCE.

This section of the Narrative describes the calculation of the variable costs that UP incurs to transport coal for OG&F from the Powder River Basin to the Muskogee Electric Generating Station for the purpose of determining whether the Board has jurisdiction over the challenged rates. The variable cost evidence presented in this section is supported by Mark J.

³ If the Board were to order UP to pay reparations before information about actual operating costs and variable costs becomes available, the Board would have to establish a mechanism that would allow UP to recover any underpayments, plus interest, from OG&F once that information becomes available. *See* note 1, *supra*.

Draper, UP's Manager- Economic Research and Analysis. Mr. Draper's verification is set out in Section IV to this Narrative.

OG&E challenges the reasonableness of UP rates published in Item 5400-A of UP Tariff 4221, which became effective on January 1, 2009. Item 5400-A contains separate rates for railroad-provided and shipper-provided cars with a minimum lading weight of 118 tons per car and a train size between 130 and 135 cars per train.

UP and OG&E have agreed upon all of the URCS Phase III inputs to be used in calculating the jurisdictional threshold for purposes of determining whether the Board has jurisdiction over the movements covered by OG&E's Complaint. The inputs reflect the actual operating characteristics for transportation from the Powder River Basin mines from which UP transported coal to the Muskogee Electric Generating Station from November 1, 2007 through October 31, 2008, and average operating characteristics for UP-served mines from which OG&E did not purchase coal during that one-year period. The operating characteristics are listed in Attachments 1 and 2 to the parties' Joint Submission of URCS Phase III Operating Characteristics.⁴

Mr. Draper developed UP's variable costs and the related jurisdictional thresholds using the URCS Phase III program and data contained in the parties Joint Submission of URCS Phase III Operating Characteristics. In performing these calculations, Mr. Draper relied on UP 2007 URCS costs, indexed to first-quarter 2009 levels. Mr. Draper used UP 2007 URCS costs because he had no alternative – more recent URCS costs are not yet available. {

⁴ See Electronic workpaper "Joint Submission pdf"

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The results of Mr. Draper's calculations are provided in Exhibits A and B. UP's workpapers include all of the underlying details.⁶

Respectfully submitted,



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Attorneys for Union Pacific Railroad Company

January 23, 2009

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⁶ See Electronic workpapers "Threshold analysis rr cars.xls" and "Threshold analysis private cars.xls."

CERTIFICATE OF SERVICE

I, Michael I. Rosenthal, certify that on this 23rd day of January, 2009, I caused a copy of Union Pacific's Opening Evidence to be served by hand on

Thomas W. Wilcox, Esq.
Sandra I. Brown, Esq.
David E. Benz, Esq.
Troutman Sanders LLP
401 9th Street, N.W., Suite 1000
Washington, DC 20004

and by first-class mail, postage prepaid, on

Patrick D. Shore, Esq.
Senior Attorney
OGE Energy Corporation
321 N. Harvey
P.O. Box 321, M/C 1208
Oklahoma, OK 73101



Michael L. Rosenthal

IV WITNESS QUALIFICATIONS AND VERIFICATIONS

A. Mark J. Draper

Mark J Draper is Manager – Economic Research and Analysis for Union Pacific Railroad Company. His office is located at 1400 Douglas Street, Omaha, Nebraska, 68179. Mr Draper is responsible for, among other things, Union Pacific’s regulatory costing efforts. Mr. Draper has worked in Union Pacific’s Finance Department for nearly 29 years.

Mr. Draper is sponsoring evidence relating to Union Pacific’s variable costs for the issue movements. His evidence is incorporated in Section II.A. of the Narrative. Mr Draper has signed a verification of the truth of the statements contained therein. A copy of Mr Draper’s verification is attached hereto.

I declare under penalty of perjury that I have read the Opening Evidence that I have sponsored, as described in the foregoing Statement of Qualifications, and that the contents thereof are true and correct. Further, I certify that I am qualified and authorized to sponsor this testimony.

Executed on January 22, 2009



Mark. J. Draper

**Jurisdictional Threshold Analysis for OG&E Movements:
Shipper-Provided Cars**

**(Movements/Data from November 2007-October 2008
2007 URCS Cost Indexed to 1Q 2009)**

Mine	Rate per Ton	Variable Cost per Ton	R/MC Ratio
Antelope	\$18.75	\$8.84	2.12
Belle Ayr	\$19.67	\$9.28	2.12
Black Thunder	\$19.17	\$9.06	2.12
Black Thunder South	\$19.05	\$9.00	2.12
Cabello	\$19.70	\$9.24	2.13
Cabello Rojo	\$19.64	\$9.22	2.13
Coal Creek	\$19.49	\$9.17	2.13
Cordero	\$19.53	\$9.18	2.13
Jacobs Ranch	\$19.17	\$9.07	2.11
North Antelope	\$18.81	\$8.91	2.11
Rochelle	\$18.81	\$8.90	2.11
Thunder West	\$19.23	\$9.09	2.12

**Jurisdictional Threshold Analysis for OG&E Movements:
Railroad-Provided Cars**

**(Movements/Data from November 2007-October 2008
2007 URCS Cost Indexed to 1Q 2009)**

Mine	Rate per Ton	Variable Cost per Ton	R/MC Ratio
Antelope	\$21.11	\$9.94	2.12
Belle Ayr	\$22.14	\$10.43	2.12
Black Thunder	\$21.58	\$10.18	2.12
Black Thunder South	\$21.45	\$10.11	2.12
Cabello	\$22.17	\$10.38	2.14
Cabello Rojo	\$22.12	\$10.36	2.14
Coal Creek	\$21.94	\$10.30	2.13
Cordero	\$21.99	\$10.32	2.13
Jacobs Ranch	\$21.58	\$10.19	2.12
North Antelope	\$21.18	\$10.02	2.11
Rochelle	\$21.18	\$10.00	2.12
Thunder West	\$21.65	\$10.22	2.12