

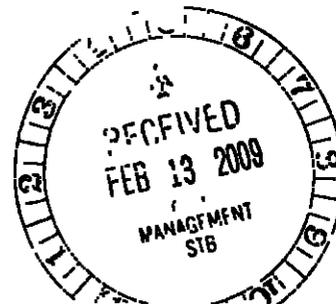
THOMAS W. WILCOX
202 274 2913 telephone
202 654 5608 facsimile
tom.wilcox@troutmansanders.com
Admitted in DC

TROUTMAN SANDERS

TROUTMAN SANDERS LLP
Attorneys at Law
401 9th Street, N.W.
Suite 600
Washington, District of Columbia
20004 2134
202 274 2950 telephone
202 274 2994 facsimile
troutmansanders.com

February 13, 2009

224531



VIA HAND DELIVERY

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

ENTERED
Office of Proceedings

FEB 13 2009

Part of
Public Record

**Re: STB Docket NOR 42111, *Oklahoma Gas & Electric Company*
*v. Union Pacific Railroad Company***

Dear Ms. Quinlan:

Enclosed for filing in the above-captioned case please find the Reply Evidence of Oklahoma Gas & Electric Company ("OG&E"). The original and ten (10) copies are enclosed. An additional copy is included for date-stamping and return via our messenger.

Please note that the Reply Evidence refers to material that the defendant Union Pacific Railroad ("UP") included in its Opening Evidence and designated Confidential under the Protective Order in effect for this proceeding. OG&E does not believe that any of the material so designated by UP and redacted from the Public Version of its Opening Evidence is Confidential. Out of an abundance of caution, and given that the compressed procedural schedule in this case prevented formal review of UP's designations prior to the filing of Reply Evidence, OG&E has redacted references to the information in the Public Version of its Reply Evidence. Nevertheless, OG&E urges the Board to determine that none of the information redacted by UP and OG&E is Confidential, and consider placing all versions of the parties' filings in the public record.

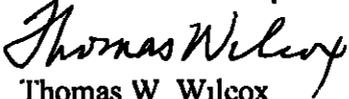
As mentioned above, OG&E's Reply Evidence contains Confidential Information which is redacted from the Public Version. Redacted material is contained in brackets [] in the Confidential Version. OG&E is also filing, under seal and pursuant to the Protective Order in effect for this proceeding, the original and ten (10) copies of the Confidential Version. An additional copy of the Confidential Version is also enclosed for date-stamping and return via our messenger.

OG&E has also enclosed three (3) compact disks which contain the Public Version, and three (3) compact disks which contain the Confidential Version.

**TROUTMAN
SANDERS**

Hon Anne K Quinlan
February 13, 2009
Page 2

Please feel free to contact me with any questions

Sincerely,

Thomas W Wilcox

Enclosure

cc Michael L Rosenthal, Esq (counsel for Defendant)
Patrick D Shore, Esq
Allen F Gould

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

224531

OKLAHOMA GAS & ELECTRIC COMPANY)

Complainant,)

v)

UNION PACIFIC RAILROAD COMPANY)

Defendant)

Docket NOR 42111

REPLY EVIDENCE

ENTERED
Office of Proceedings

FEB 13 2009

Part of
Public Record

Patrick D Shore, Esq
Senior Attorney
OGE Energy Corporation
321 N Harvey
P O Box 321, M/C 1208
Oklahoma City, OK 73101-0321
Telephone 405 553 3658

Thomas W Wilcox
Sandra L Brown
David E. Benz
Troutman Sanders LLP
401 9th St NW, Suite 1000
Washington, DC 20004
Telephone 202 274 2913
Facsimile 202 654 5608

Dated February 13, 2009

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

OKLAHOMA GAS & ELECTRIC COMPANY)	
)	
Complainant,)	
)	
v)	Docket NOR 42111
)	
UNION PACIFIC RAILROAD COMPANY)	
)	
Defendant)	
)	

REPLY EVIDENCE

Complainant Oklahoma Gas & Electric Company ("OG&E") hereby submits its Reply Evidence pursuant to the procedural schedule issued by the Surface Transportation Board ("Board" or "STB") on December 3, 2008 in this case

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

<hr/>)	
OKLAHOMA GAS & ELECTRIC COMPANY)	
	Complainant,)	
)	
	v)	Docket NOR 42111
)	
UNION PACIFIC RAILROAD COMPANY)	
	Defendant)	
<hr/>)	

I.

Counsel’s Reply Argument and Summary of Reply Evidence

In its Opening Evidence filed January 23, 2009 in this proceeding, Union Pacific Railroad Company (“UP”) has repudiated all three of the defenses it raised in response to OG&E’s Complaint, *i.e.*, (1) that the Board lacks jurisdiction to consider the Complaint because UP lacks market dominance over the traffic at issue, (2) that “the revenue-to-variable cost ratio of the traffic at issue is less than 1.8”, and (3) that “the level of the challenged rate [sic] is reasonable.” UP Answer at 5.¹ Indeed, UP now admits that all of the common carrier rates it has established for the transportation of coal from the Southern Powder River Basin in Wyoming (“SPRB”) to OG&E’s Muskogee Generating Station, “exceed the jurisdictional threshold as calculated in accordance with the parties’ stipulation and are therefore subject to the Board’s jurisdiction.” UP Opening Evidence at 3. Having admitted its liability and waived its remaining

¹ UP had previously waived its right to argue that there was no qualitative market dominance over the traffic at issue, and that use of the Board’s constrained market pricing principles would produce a maximum reasonable rate higher than 180% of UP’s variable costs for providing the transportation covered by the challenged rates.

defenses, UP now states “the only issue is to prescribe maximum reasonable rates ” *Id* OG&E of course agrees, and its Opening Evidence demonstrates, that all of the rates UP has established for the transportation of coal from mines in the SPRB to the Muskogee Generating Station are unreasonable OG&E also agrees with UP that “the Board should now 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 Generating Station that yield revenues equal to 180% of UP’s variable costs through the end of 2018 ” *Id* at 3 The opening evidence of each party demonstrates substantial agreement between them on the degree to which the challenged rates are unreasonable as of January 1, 2009 The differences in the parties’ calculations are discussed in more detail below, and in this Reply Evidence OG&E explains why its Opening Evidence provides the Board with the best evidence of record on the maximum reasonable rate levels to be prescribed by the Board effective January 1, 2009, and to provide the basis for the payment of reparations to OG&E for shipments made under these rates between January 1, 2009 and the date UP implements such prescribed rates

UP, on the other hand, while readily admitting that its rates are unreasonable, stops far short of agreeing that the rates OG&E should pay as of January 1, 2009 should be at the jurisdictional threshold levels calculated by the parties, or that UP should pay OG&E any reparations for the amounts OG&E has begun paying over and above the maximum reasonable rate levels starting January 1, 2009 Rather, UP has taken the extraordinary position in its Opening Evidence that the Board should not grant OG&E *any* relief at the present time, and should allow UP to establish “interim rates” to remain in effect until UP’s 2009 URCS variable costs are available, purportedly at the end of 2010 *Id* at 4, note 1 After vaguely asserting this position in a footnote, UP provides no further explanation of what these “interim rates” would be

Absent such explanation in UP's evidence, and given the absence of any UP rates for transportation to the Muskogee Generating Station other than the rates at issue in this case, OG&E can only assume that UP means it should be allowed to continue to charge the challenged rates until UP's 2009 URCS costs become available. If this is true, then UP's ultimate position in this case, if adopted by the Board, would effectively mean that *the Board would take no action on OG&E's complaint for nearly two years*, assuming the STB maintains its historic schedule of releasing final URCS models nine to eleven months after the close of the year.² The stated reason for this extraordinary position is UP's claim, without any supporting evidence, that the Board should depart from its well-established precedent and practice of indexing URCS variable costs – in this case indexing 2007 URCS costs to 1Q09 levels – because [

] As explained in Section II-A-4

below, such unsupported speculation provides no justification whatsoever for such a dramatic departure from established agency precedent and practice

Finally, consistent with the Board's practice in prior rate reasonableness cases in which the initially prescribed maximum reasonable rates were established at the jurisdictional threshold

² This is the STB's historical practice, but there is no guarantee that the final 2009 URCS UP variable costs will be issued by the STB and available to the parties "sometime in 2010" as UP asserts. In at least one case, problems assembling and verifying URCS cost data pushed the issuance of final URCS data by the Board into a third year. See *Texas Municipal Power Agency v. Burlington Northern Santa Fe Railway*, STB Docket No. 42056 (STB Served Sept. 24, 2004) ("TMPA") at 39, note 76 (where final 2000 URCS data did not become available until January, 2002)

and the rate floors for later periods were calculated as information became available,³ OG&E in its Opening Evidence proposed that the Board incorporate into its decision in this case a process by which the parties can ensure that the prescribed rates commencing with January 1, 2009 stay at the jurisdictional threshold as relevant URCS UP data, movement characteristics, and other data become available over the prescription period. This “true-up” mechanism, which entails the refund of overpayments by UP and the payment of underpayments by OG&E, both with interest, adequately addresses UP’s concerns about the alleged “irreparable harm” to UP, and does so without waiting nearly two years for the 2009 URCS data to be released.

For the reasons set forth hereinabove and in this Reply Evidence, and the record in this proceeding, it is undisputed that (1) the Board has jurisdiction to examine the reasonableness of the rates OG&E has challenged in its Complaint, and (2) all of the rates encompassed by the Complaint and established by UP for transportation of coal from the SPRB to the Muskogee Generating Station beginning January 1, 2009 are unreasonable. Consequently, OG&E respectfully requests that the Board forthwith issue an order and decision that

1. Finds UP has market dominance over the transportation at issue and that all of the challenged rates are unreasonably high;
2. Orders UP to establish and maintain rates for the issue traffic commencing January 1, 2009 that do not exceed the maximum reasonable rates as calculated by OG&E and listed in Table II-A-1 of OG&E’s Opening Evidence,
3. Orders UP to pay OG&E reparations for the amount OG&E has paid to UP for transportation under the unreasonable rates from January 1, 2009 to the date UP establishes the maximum reasonable rates prescribed by the Board, and
4. Directs that the prescribed rates shall remain in effect through 2009 subject to the process proposed by OG&E at pages II-A-7 and II-A-8 of its Opening Evidence.

³ *Wisconsin Power & Light Company v Union Pacific Railroad Company*, Docket 42051 (served September 13, 2001)(“WPL”) and, more recently, *Kansas City Power & Light Company v Union Pacific Railroad Company*, Docket 42095 (served May 19, 2008)(“KCPL”).

for ensuring the maximum reasonable rates remain at the jurisdictional threshold
for the prescription period

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

<p>OKLAHOMA GAS & ELECTRIC COMPANY</p> <p style="text-align: center;">Complainant,</p> <p style="text-align: center;">v</p> <p>UNION PACIFIC RAILROAD COMPANY</p> <p style="text-align: center;">Defendant</p>	<p>)</p>	<p>Docket NOR 42111</p>
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------	-------------------------

II.

Market Dominance

OG&E and UP agree that UP possesses quantitative and qualitative market dominance on the traffic to OG&E's Muskogee Generating Station, and they agree on the traffic and operating ("T&O") inputs into the STB's Phase III Costing Model

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

_____)	
OKLAHOMA GAS & ELECTRIC COMPANY)	
	Complainant,)	
	v)	Docket NOR 42111
UNION PACIFIC RAILROAD COMPANY)	
	Defendant)	
_____)	

II-A

Market Dominance – Quantitative Evidence

1. Summary of the Parties' URCS Phase III Variable Cost Evidence⁴

In this case, the most recent URCS UP costs are the 2007 URCS costs, which the parties stipulated would provide the basis for the 1Q09 URCS Phase III cost calculations. In their respective Opening Evidence filings, OG&E and UP calculated different 1Q09 URCS UP Phase III variable costs and, consequently, different jurisdictional thresholds and proposed prescribed rates. See Exhibit II-A-3 to this Reply Evidence. As described below, there are two main reasons for this difference: (1) a flaw in the STB's URCS Phase III program that can lead to different variable cost calculations for the same movement, and (2) UP made an error in calculating 1Q 2009 URCS costs. Accordingly, while UP's calculations produced a lower variable cost calculation and jurisdictional threshold level than OG&E, OG&E's calculations were more consistent with the indexing practices adopted and used by the Board and are

⁴ Due to the unique and truncated nature of proceedings in this case, OG&E has deviated slightly from the standard outline given in *General Procedures for Presenting Evidence in Stand-Alone Cost Cases*, Ex Parte 347 (Sub-No. 3) (served March 12, 2001)

therefore the best evidence of record before the Board. As such, the Board should adopt OG&E's jurisdictional threshold calculations to establish the 1Q09 prescribed rates in this proceeding.

a. The parties agreed on the URCS Phase III inputs

In the Joint Submission filed on January 9, 2009, the parties notified the Board that they had agreed on the nine inputs to the URCS Phase III model for initial calculation of variable costs. These nine inputs are based on UP's rail service to the Muskogee Generating Station for the one year period from November 1, 2007 to October 31, 2008.

b. The STB's URCS Phase III Costing Model Produces Inconsistent Cost Results

Both UP and OG&E used the STB's URCS Phase III costing model to develop the 2007 variable cost. See OG&E Opening Evidence at II-A-2 and UP Opening Evidence at 7. However, while OG&E used the Phase III model's "Batch Cost Program" function to calculate the 2007 variable costs for the movements from the SPRB to the Muskogee Generating Station, UP apparently used the Phase III model's "Railroad Cost Program" function for its variable cost calculations.⁵ Due to different rounding procedures⁶, the two different programs within the STB's Phase III model produce slightly different variable cost results. Table II-A-2 below compares OG&E's and UP's 2007 Phase III costs produced using the STB's Phase III model.⁷

⁵ The "Batch Cost Program" allows the user to calculate the variable costs of multiple movements simultaneously by loading the T&O characteristics into a single file. The "Railroad Cost Program" develops variable costs for only one movement at a time by having the user interactively enter the T&O characteristics for the single movement. OG&E was able to replicate UP's 2007 variable costs using the Phase III model's "Railroad Cost Program."

⁶ The Batch Cost Program rounds the miles input to the nearest whole number while the Railroad Cost Program does not round the miles input.

⁷ Table II-A-1 was included in OG&E's Opening Evidence.

TABLE II-A-2

**Summary of OG&E And UP's Variable Cost of Service From
Orin Subdivision Mines to The Muskogee Generating Station – 2007**

<u>Origin</u>	<u>Time Period</u>	<u>OG&E Phase III Cost (\$/Ton)</u>	<u>UP Phase III Cost (\$/Ton)</u>	<u>Difference //</u>
(1)	(2)	(3)	(4)	(5)
Shipper Provided Railcars				
1 Antelope	2007	\$9 55	\$9 55	\$0 00
2 Belle Ayr	2007	\$10 02	\$10 02	\$0 00
3 Black Thunder	2007	\$9 78	\$9 78	\$0 00
4 Black Thunder South	2007	\$9 72	\$9 72	\$0 00
5 Caballo	2007	\$9 99	\$9 98	\$0 01
6 Caballo Rojo	2007	\$9 96	\$9 96	\$0 00
7 Coal Creek	2007	\$9 90	\$9 90	\$0 00
8 Cordero	2007	\$9 92	\$9 92	\$0 00
9 Jacobs Ranch	2007	\$9 80	\$9 79	\$0 01
10 North Antelope	2007	\$9 62	\$9 62	\$0 00
11 Rochelle	2007	\$9 61	\$9 61	\$0 00
12 Thunder West	2007	\$9 82	\$9 82	\$0 00
Railroad Provided Railcars				
13 Antelope	2007	\$10 74	\$10 74	\$0 00
14 Belle Ayr	2007	\$11 27	\$11 27	\$0 00
15 Black Thunder	2007	\$11 00	\$11 00	\$0 00
16 Black Thunder South	2007	\$10 93	\$10 92	\$0 01
17 Caballo	2007	\$11 22	\$11 22	\$0 00
18 Caballo Rojo	2007	\$11 19	\$11 19	\$0 00
19 Coal Creek	2007	\$11 12	\$11 13	(\$0 01)
20 Cordero	2007	\$11 14	\$11 14	\$0 00
21 Jacobs Ranch	2007	\$11 00	\$11 00	\$0 00
22 North Antelope	2007	\$10 82	\$10 82	\$0 00
23 Rochelle	2007	\$10 81	\$10 80	\$0 01
24 Thunder West	2007	\$11 04	\$11 03	\$0 01

// Column (3) – Column (4)

As shown in Table II-A-2 above, the STB's URCS Phase III model produces different variable costs per ton for two movements to OG&E's Muskogee Generating Station in shipper supplied railcars, and in four movements in railroad provided railcars, depending upon the costing function used. OG&E continues to rely upon its Opening variable cost calculations in this Reply

c. UP Miscalculated Its Variable Cost Index

UP made three errors in indexing the 2007 URCS variable costs to the first quarter of 2009. First, UP incorrectly accounted for changes in wage supplement expenses in its URCS Composite index developed from Annual Report Form R-1 data. UP deviated from prior cases by including Unemployment Insurance taxes from Schedule 450, Line 8 in its calculation of "Wage Supplements."⁸ OG&E excluded these costs from the "Wage Supplements" and instead included the costs in "Other Expenses – Nonindexable" as has been the practice in prior STB cases. Second, UP incorrectly deducted Car Lease Rental Expenses and Locomotive Lease Rental Expenses from its calculation of "Other Indexable Expenses" in its URCS Composite index. This was apparently due to a typographical error in UP's electronic workpapers.⁹ Third, UP used an amalgamation of two separate indices to calculate UP's 1Q 2009 URCS variable costs from the 2007 URCS variable costs. UP initially used an URCS Composite index based on actual Railroad Cost Recovery ("RCR") and Producer Price Index – All Commodities ("PPI") factors to calculate 4Q 2008 URCS variable costs from 2007 URCS variable costs. Then, UP used the RCAF-U to index its 4Q 2008 variable costs to 1Q 2009 wage and price levels.

⁸ See UP Opening electronic workpapers "Threshold analysis private cars xls," worksheet "R1 Expenses," cell D28, and "Threshold analysis rr cars xls," worksheet "R1 Expenses," cell D28.

⁹ UP included the phrase "System Average" in cells E132 and E133 in both of its "R1 Expenses" worksheets. However, the worksheet requires that the phrase "System avg" be used to correctly calculate the index. The use of the different phrase caused UP's worksheet to deduct these additional costs.

In contrast, OG&E used actual RCR and PPI values through 4Q 2008 in its Composite URCS index, and forecasted changes in the PPI and RCR indices to develop a forecasted Composite URCS index to 1Q 2009. See OG&E Opening Evidence at II-A-5 to II-A-6. The use of forecasted RCR and PPI factors in the Composite URCS index produces a more precise forecast of 1Q 2009 price levels than relying upon the change in the RCAF-U because the RCAF-U applies different weighting factors than are customarily used in the URCS Composite index.

The impact of the combined differences in 2007 variable cost estimates and URCS index values are shown in Table II-A-3 below which compares OG&E's 1Q 2009 variable cost calculations to UP's 1Q 2009 variable cost calculations.

TABLE II-A-3
Summary of OG&E And UP's Variable Cost of Service From
Orin Subdivision Mines to The Muskogee Generating Station – 1Q 2009

<u>Origin</u>	<u>Time Period</u>	<u>OG&E Phase III Cost (\$/Ton)</u>	<u>UP Phase III Cost (\$/Ton)</u>	<u>Difference //</u>
(1)	(2)	(3)	(4)	(5)
Shipper Provided Railcars				
1 Antelope	1Q 2009	\$9 40	\$8 84	\$0 56
2 Belle Ayr	1Q 2009	\$9 86	\$9 28	\$0 58
3 Black Thunder	1Q 2009	\$9 62	\$9 06	\$0 56
4 Black Thunder South	1Q 2009	\$9 56	\$9 00	\$0 56
5 Caballo	1Q 2009	\$9 83	\$9 24	\$0 59
6 Caballo Rojo	1Q 2009	\$9 80	\$9 22	\$0 58
7 Coal Creek	1Q 2009	\$9 74	\$9 17	\$0 57
8 Cordero	1Q 2009	\$9 76	\$9 18	\$0 58
9 Jacobs Ranch	1Q 2009	\$9 64	\$9 07	\$0 57
10 North Antelope	1Q 2009	\$9 46	\$8 91	\$0 55
11 Rochelle	1Q 2009	\$9 45	\$8 90	\$0 55
12 Thunder West	1Q 2009	\$9 66	\$9 09	\$0 57
Railroad Provided Railcars				
13 Antelope	1Q 2009	\$10 57	\$9 94	\$0 63
14 Belle Ayr	1Q 2009	\$11 09	\$10 43	\$0 66
15 Black Thunder	1Q 2009	\$10 82	\$10 18	\$0 64
16 Black Thunder South	1Q 2009	\$10 75	\$10 11	\$0 64
17 Caballo	1Q 2009	\$11 04	\$10 38	\$0 66
18 Caballo Rojo	1Q 2009	\$11 01	\$10 36	\$0 65
19 Coal Creek	1Q 2009	\$10 94	\$10 30	\$0 64
20 Cordero	1Q 2009	\$10 96	\$10 32	\$0 64
21 Jacobs Ranch	1Q 2009	\$10 82	\$10 19	\$0 63
22 North Antelope	1Q 2009	\$10 64	\$10 02	\$0 62
23 Rochelle	1Q 2009	\$10 64	\$10 00	\$0 64
24 Thunder West	1Q 2009	\$10 86	\$10 22	\$0 64

// Column (3) – Column (4)

As shown in Table II-A-3 above, the difference in Phase III costs and indexing methods leads to a difference of between \$0.55 and \$0.59 per ton in shipper supplied railcars and \$0.62 and \$0.66 per ton in railroad supplied railcars.

2. The Jurisdictional Thresholds Calculated by OG&E Should be the Maximum Reasonable Rates Paid by OG&E Starting January 1, 2009 and the Basis for the Payment of Reparations

The Board has long recognized that “by their nature rate prescriptions apply to future movements, before the information necessary to calculate the variable costs of those future movements is known.” *TMPA* at 29. This is due to the inescapable fact that a railroad’s URCS variable cost inputs for the year in which a challenged rate goes into effect are not compiled and submitted to the Board, and are therefore not available to the parties or to the Board when a complaint is filed. *See id.* at 39, note 76 (“Final URCS numbers for any given calendar year are generally available in the second half of the following year.”) *See also* note 1, *supra*.

Accordingly, the ICC and the STB have over time developed well-established procedures for accurately estimating URCS variable costs through the use of indexing, and the Board has historically prescribed rates for movements before the final URCS Phase III model is issued for the year in which the rates are prescribed. For example, in *TMPA, supra*, the Board used BNSF’s 2000 URCS numbers “as the starting point to develop the [2001] variable costs associated with providing transportation for TMPA.” *TMPA* at 39. In *Public Service Company of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Railway Company*, Docket 42057, slip op. at 120-122 (served June 8, 2004) (“*Xcel*”), both parties used BNSF’s 2001 URCS variable costs to calculate the jurisdictional thresholds for 2001-2003. *See id.* at 122. Two examples of coal rate cases where the Board used prior years’ URCS costs to calculate the jurisdictional thresholds and prescribe maximum reasonable rates at those levels

and order reparations are *WPL* and *KCPL*. In *WPL*, the Board used the “final URCS run for UP for 1999” to calculate UP’s variable costs and the jurisdictional threshold for 2000, which thresholds the Board prescribed as the initial maximum reasonable rates *WPL* at 35-39. In *KCPL*, the Board used 2006 URCS costs to determine UP’s variable costs and the jurisdictional threshold for 2006 and the first quarter of 2007, and prescribed the initial maximum reasonable rates at those levels *KCPL* at 8-9 and Appendices A and B.

The indexing procedures used by OG&E to calculate the jurisdictional thresholds and maximum reasonable rate levels for transportation from the SPRB to the Muskogee Generating Station follow well established Board practices and precedent from which there is no valid reason to deviate. Accordingly, the Board is on fundamentally solid ground prescribing the rates listed in Table II-A-1 of OG&E's Opening Evidence (and also listed in Exhibit II-A-3) as the maximum reasonable rates OG&E should pay as of January 1, 2009, and in rejecting UP’s suggestion that the Board should refrain from determining the jurisdictional thresholds for January 1, 2009 until UP’s 2009 URCS costs become available in late 2010. UP Opening Evidence at 5-6.

UP also claims that the Board cannot calculate and award reparations because neither party has submitted evidence regarding the movements that have occurred under the challenged rates since January 1, 2009. *Id.* However, this case should be no different than any other coal rate case, and once the Board issues an order requiring UP to establish rates at the jurisdictional thresholds calculated by OG&E and UP establishes such rates, the parties can confer and identify the traffic entitled to reparations, calculate the reparations and applicable interest, and jointly submit this information to the Board. *See, e.g., KCPL, Statement of 2007 Reparations*, filed January 22, 2008, and 49 C.F.R. §1133.2

3. **OG&E's Proposed Process for Ensuring the Prescribed Rates Remain at UP's URCS Variable Cost Levels Negates UP's Concerns About Rates Beyond 1Q09**

OG&E does not dispute that the parties and the Board, as of the closing of the record in this case under the expedited procedural schedule agreed to by the parties and established by the Board, do not have the necessary information to compute the rate floor for periods beyond the first quarter of 2009. OG&E Opening Evidence at II-A-7. This is certainly not unprecedented or unusual, or something with which UP is unfamiliar, having been the defendant in two prior cases with similar evidentiary records and outcomes. See *WPL* at 34, *KCPL* at 9. In both cases the Board ordered UP and the complainant to calculate future rate floors as relevant data became available for the applicable years. In recognition of this practice, OG&E has taken the additional step in this proceeding of proposing the means by which the calculation of future rate floors can be made by the parties and adjusted as more up-to-date URCS costing data, actual movement characteristics, and other data become available. Under this process, the rates in Table II-A-1 would remain in effect through 1Q10, and the parties would "true up" the jurisdictional threshold at that time using the 2008 URCS Phase III costing model, actual 2009 operating quarterly operating characteristics, and Association of American Railroads and Bureau of Labor Statistics indexes. OG&E Opening Evidence at II-A-7. Any overpayments by OG&E over the prior year, less the initial reparations payment to OG&E, would be refunded to OG&E by UP, with interest. Any underpayments by OG&E would be made to UP, also with interest. Except for accounting for the initial reparations payment, which would occur only in 2009, this annual process would be repeated for each year of the prescription period. This proposed process addresses all of the concerns expressed by UP in its Opening Evidence concerning the need to recover any

underpayments by OG&E, with interest, in the event the jurisdictional thresholds adopted by the Board for 1Q09 change as more recent data becomes available to the parties

4. UP's Arguments for Departing from Well Established Precedent are Unfounded

a. The Board Has Consistently Refused to Speculate About Future | |

Despite the Board's long established recognition that indexing of URCS variable costs is necessary in rate reasonableness cases, and the corresponding development of well-established URCS variable cost indexing procedures, UP has taken the position in this case that the Board should depart from its prior precedent and wait nearly two years for the issuance of UP's 2009 URCS Phase III costs to prescribe *any* rates or award *any* reparations to OG&E for the indisputably unreasonable rail rates at issue. Such a result would be fundamentally unfair to OG&E given that UP concedes it has established, and OG&E is now paying unreasonable rail rates. Moreover, such a result would be directly contrary to the Board's desire to make coal rate reasonableness cases more streamlined and efficient, particularly cases such as this where the only issue is calculating the URCS Phase III variable costs, in which cases the Board has required "expedited" schedules. *KCPL* (STB served May 4, 2007) at 2. Such expedited schedules heighten the necessity of using the Board's indexing practices to determine jurisdictional thresholds.¹⁰ For all these reasons, UP bears a high burden in asking the Board to substantially divert from its established practices and policies in this case. However, the only justification UP offers for this extraordinary and material departure from Board precedent is

¹⁰ On this point, OG&E adds that the compressed procedural schedule in this case and the date established for filing reply evidence were in response to the insistence of UP in-house counsel that closing of the evidentiary record in this proceeding coincide with her international travel plans. OG&E's accommodation of this request by UP's counsel should not now be allowed to be turned around by UP to try and gain an advantage because the compressed procedural schedule results in the evidentiary record closing without final 2009 URCS costs

speculation, unsupported by any evidence or data, that [

] The fact that UP has offered no evidentiary support for its claims provides sufficient justification for the Board to reject them. Moreover, the Board has previously rejected an attempt by UP to modify prescribed rates calculated using the best evidence before the Board in the record of a particular case for the purpose of anticipating changes to the calculations based on potential future developments. Specifically, in *WPL* the Board rejected UP's attempt to adjust the results of the Board's application of the Discounted Cash Flow model in that proceeding "to account for the risk that the EWRR [the SARR involved] would not realize the revenue estimates projected here." *WPL* at 31. While in this case the parties have stipulated that the maximum reasonable rates will be established in this proceeding based on the best evidence calculating the jurisdictional threshold, the Board's rationale in *WPL* for rejecting UP's attempt, specifically that "*it would not be appropriate to require a shipper to pay higher rates now as insurance for the carrier against any future shifts in demand.*" *id.* at 33, note 83 (emphasis added), is also directly applicable to UP's attempt in this case to have OG&E pay higher "interim rates" for the purpose of [

] In any event, as explained below, such claims of [] provide no basis for the Board to depart from years of precedent and practices

b. Incorporating [] into Current URCS Phase III Calculations Would Reverse the Board's Efforts to Simplify the Jurisdictional Threshold Calculation

The level of a railroad's business is never exactly the same from year-to-year, it varies up and down. This fact of life in the rail industry has been present in every coal rate case filed before the Board, some of which have taken up to 14 years to finally decide *Bituminous Coal – Hiawatha, Utah to Moapa, Utah*, ICC Docket No. 37038, 1 I C C 2d 259 (1994). While cases are decided more quickly now, if the Board heeded UP's request and [

[] Railroad defendants claiming that [] would argue that URCS costs are going to rise, and shipper complainants arguing that [] would argue that URCS costs should be lower.¹¹ The adoption of such an approach, and the ensuing "battle of the experts" in subsequent rate cases, would effectively eviscerate the Board's decision in *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub- No. 1), to simplify the jurisdictional threshold calculation by removing movement specific adjustments. There is no need for the Board, particularly in this case where no evidentiary support has been submitted by UP, to engage in this sort of hypothesizing and micromanaging, which could easily "spiral[] out of control." *Seminole Electric Cooperative, Inc v CSX Transportation, Inc*, Docket 42110, slip op. at 3 (served Dec. 22, 2008).

¹¹ For example, looking back at 2003-2006 it is undisputed that railroad [] steadily, and such [] was known and accurately predicted in the 2003-04

c. **There is No Guarantee that the URCS Formula Will Not Change Over Time**

Finally, UP's request that the Board wait almost two years for the issuance of 2009 URCS Phase III costing data before prescribing a rate or ordering the payment of reparations based on UP's [] changing the jurisdictional thresholds calculated in OG&E's Opening Evidence, is also flawed because it assumes that the URCS Phase III formula and its application by the Board will stay the same each year. There is no such guarantee, as evidenced by *Major Issues in Rail Rate Cases, supra*, and, more recently in Ex Parte No. 681, *Class I Railroad Accounting and Financial Reporting – Transportation of Hazardous Materials* (STB Served January 5, 2009), in which the Board has instituted an advance notice of public rulemaking on the treatment of certain costs associated with the movement of hazardous materials. The potential for modifications to the URCS Phase III procedures from time to time by the Board means there is no guarantee that future URCS costs will match historic URCS unit costs indexed to future wage and price levels. Processes such as the one proposed by OG&E to account for changes to the URCS Phase III calculations for 1Q09 over time as more current data becomes available adequately account for such variations, if any

timeframe. However, at no point did the STB seek to delay decisions in rate cases on the basis that actual year URCS costs would eventually be lower than estimated URCS variable costs.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

<hr/>)	
OKLAHOMA GAS & ELECTRIC COMPANY)	
	Complainant,)	
)	
v)	Docket NOR 42111
)	
UNION PACIFIC RAILROAD COMPANY)	
	Defendant)	
<hr/>)	

II-B

Market Dominance - Qualitative

In this case, UP has waived its right to dispute the fact that it has qualitative market dominance over the transportation of coal from the SPRB to the Muskogee Station. See OG&E Opening Evidence, Exhibit I-3 at 1-2, UP Answer at ¶ 14. Hence, qualitative market dominance is stipulated and need not be addressed by OG&E in this Reply Evidence or by the Board.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

<hr/>)
OKLAHOMA GAS & ELECTRIC COMPANY)
)
Complainant,)
)
v)
)
UNION PACIFIC RAILROAD COMPANY)
)
Defendant)
<hr/>)

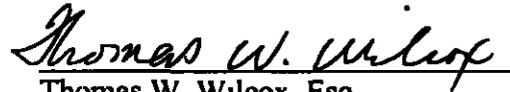
Docket NOR 42111

III.

Stand-Alone Cost

As stated in OG&E's Opening Evidence, UP has waived the right to argue that a SAC analysis would produce maximum reasonable rates in excess of 180% of UP's variable costs of providing rail service to the Muskogee Station. See OG&E Opening Evidence, Exhibit I-3 at 1, UP Answer at ¶ 18. The parties have stipulated that the prescribed rates should be set at the jurisdictional threshold, and that a SAC analysis would not be necessary in this case.

Respectfully submitted,



Thomas W Wilcox, Esq
Sandra L Brown, Esq
David E Benz, Esq
Troutman Sanders LLP
401 9th Street, NW, Suite 1000
Washington, DC 20004
Telephone 202.274 2913
Facsimile 202 654 5608

Patrick D Shore, Esq
Senior Attorney
OGE Energy Corporation
321 N Harvey
P O Box 321, M/C 1208
Oklahoma City, OK 73101
Telephone 405 553 3658

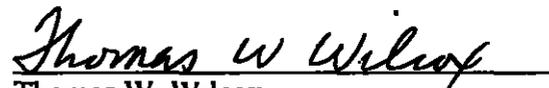
*Attorneys for Complainant Oklahoma Gas &
Electric Company*

February 13, 2009

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February 2009, I served a copy of the foregoing Reply Evidence by hand delivery, upon counsel for the Defendant at the following address

Linda J Morgan, Esq
Michael L Rosenthal, Esq
Covington & Burling LLP
1201 Pennsylvania Avenue NW
Washington, DC 20004


Thomas W Wilcox

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

_____)	
OKLAHOMA GAS & ELECTRIC COMPANY)	
	Complainant,)	
)	
v)	Docket NOR 42111
)	
UNION PACIFIC RAILROAD COMPANY)	
	Defendant)	
_____)	

IV.

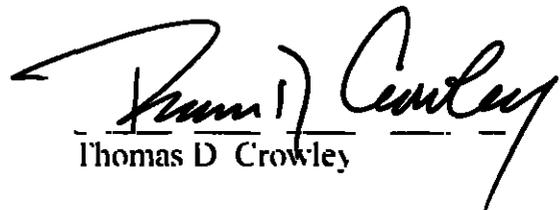
Witness Qualifications and Verification

Thomas D Crowley is the witness responsible for the market dominance, variable cost, and jurisdictional threshold portions of the Reply Evidence of OG&E Mr Crowley's Statement of Qualifications is found in Part IV of the OG&E Opening Evidence

VERIFICATION

I, Thomas D Crowley, verify under penalty of perjury that I have read Part II-A of the Reply Evidence of Oklahoma Gas & Electric Company ("OGE") in this proceeding and know the contents thereof, that I am sponsoring the evidence contained therein regarding Defendant Union Pacific Railroad Company's quantitative market dominance over the traffic at issue, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

My qualifications are set forth in the Opening Evidence filed by OGE in this proceeding on January 23, 2009.


Thomas D Crowley

Executed on February 13, 2009

EXHIBIT II-A-3

Comparison of OG&E and UP's 1Q09 Jurisdictional Threshold

<u>Mine</u> (1)	1Q09 Jurisdictional Threshold					
	Private Cars			Railroad Cars		
	<u>OG&E 1/</u> (2)	<u>UP 2/</u> (3)	<u>Difference 3/</u> (4)	<u>OG&E 4/</u> (5)	<u>UP 5/</u> (6)	<u>Difference 6/</u> (7)
1 Antelope	\$16 92	\$15 91	\$1 01	\$19 03	\$17 89	\$1 14
2 Belle Ayr	\$17 75	\$16 70	\$1 05	\$19 96	\$18 77	\$1 19
3 Black Thunder	\$17 32	\$16 31	\$1 01	\$19 48	\$18 32	\$1 16
4 Black Thunder South	\$17 21	\$16 20	\$1 01	\$19 35	\$18 20	\$1 15
5 Caballo	\$17 69	\$16 63	\$1 06	\$19 87	\$18 68	\$1 19
6 Caballo Rojo	\$17 64	\$16 60	\$1 04	\$19 82	\$18 65	\$1 17
7 Coal Creek	\$17 53	\$16 51	\$1 02	\$19 69	\$18 54	\$1 15
8 Cordero	\$17 57	\$16 52	\$1 05	\$19 73	\$18 58	\$1 15
9 Jacobs Ranch	\$17 35	\$16 33	\$1 02	\$19 48	\$18 34	\$1 14
10 North Antelope	\$17 03	\$16 04	\$0 99	\$19 15	\$18 04	\$1 11
11 Rochelle	\$17 01	\$16 02	\$0 99	\$19 15	\$18 00	\$1 15
12 Thunder West	\$17 39	\$16 36	\$1 03	\$19 55	\$18 40	\$1 15

1/ OG&E Opening Evidence Exhibit II-A-1, Line 14

2/ UP Opening Evidence Exhibit A (Variable Cost Per Ton x 1 8)

3/ Column (2) - Column (3)

4/ OG&E Opening Evidence Exhibit II-A-2, Line 14

5/ UP Opening Evidence Exhibit B (Variable Cost Per Ton x 1 8)

6/ Column (5) - Column (6)