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EXPEDITED CONSIDERATION REQUESTED

August 13, 2009

BY HAND

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

ENTERED
Office of Proceedings

AUG 13 2009

Part of
Public Record

Re: STB Docket No. 42111, *Oklahoma Gas and Electric
Company v. Union Pacific Railroad Company*

Dear Secretary Quinlan:

Enclosed for filing in the above-reference docket are an original and ten copies of Union Pacific Railroad Company's Petition for Clarification. UP is requesting expedited consideration of its Petition because it is required to establish new rates in accordance with the Board's Decision in this proceeding on or before September 22, 2009.

An additional paper copy of this filing is 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

EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



OKLAHOMA GAS & ELECTRIC COMPANY,)

Complainant,)

v.)

UNION PACIFIC RAILROAD COMPANY,)

Defendant.)

Docket No. 42111



**UNION PACIFIC RAILROAD COMPANY'S
PETITION FOR CLARIFICATION**

Union Pacific Railroad Company ("UP") hereby seeks clarification of the Board's instructions for calculating maximum lawful rates in future periods in *Oklahoma Gas & Electric Co. v. Union Pacific Railroad Co.*, Docket No. 42111 (STB served July 24, 2009) ("Decision"). Specifically, UP seeks to clarify (a) the versions of the AAR and PPI indices to be used, (b) the date on which to begin charging new rates, and (c) the process of updating the actual operating characteristics used to calculate new rates.

UP is filing this petition to ensure that it implements the Decision in accordance with the Board's intent and to avoid future disputes regarding implementation of the Decision.

UP respectfully requests that the Board expedite its consideration of this matter because UP is required to establish new rates in accordance with the Decision on or before September 22, 2009.

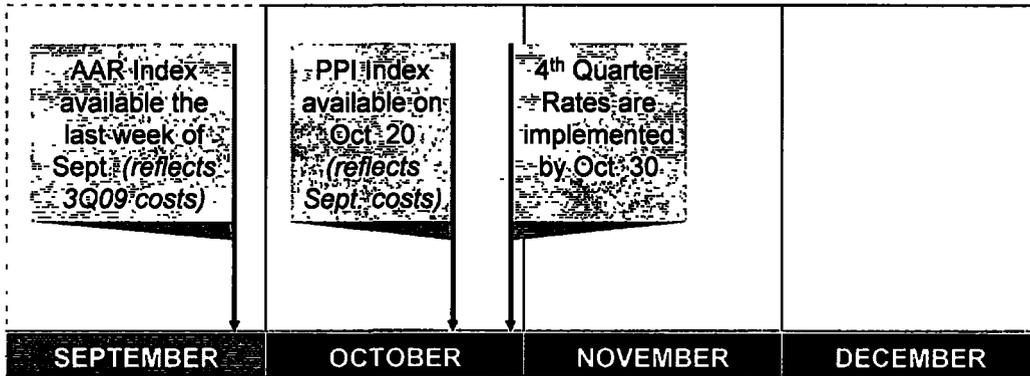
A. Clarification Of The Appropriate AAR And PPI Indices.

UP believes that the Board intended UP to calculate new rates for each quarter using the AAR and PPI indices that are available by the first few weeks of the quarter. For example, UP will calculate new rates for the fourth quarter of 2009 based on the AAR index that is expected to become available during the last week of September 2009 (*i.e.*, the September 2009 edition of the AAR index), and the average of the three most-recent PPI indices¹ – *i.e.*, the July 2009 PPI index (which is scheduled to become available on August 18, 2009), the August 2009 PPI index (which is scheduled to become available on September 15, 2009), and the September 2009 PPI index (which is scheduled to become available on October 20, 2009).² Similarly, UP would calculate new rates for the first quarter of 2010 based on the December 2009 edition of the AAR index (expected to become available during the last week of December 2009) and the average of the October 2009, November 2009, and December 2009 PPI indices (all of which are scheduled to become available by January 20, 2010). The following charts illustrate UP’s understanding of the timing issue:

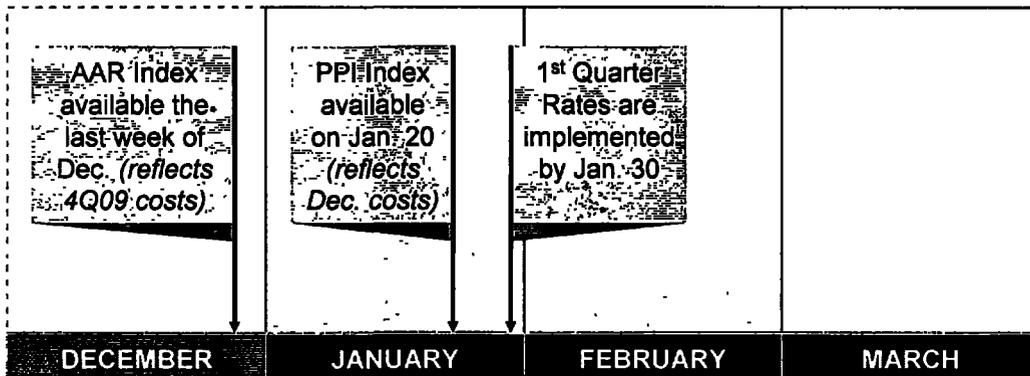
¹ The Board’s calculations of R/VC percentages for the first and second quarters of 2009 in the Decision appear to have utilized a three-month average of the PPI indices.

² The Decision notes that the AAR and PPI indices “normally” become available two weeks into the start of a new quarter. Decision at 11, n.16. However, as noted above, it can take almost three weeks into the start of a new month for the prior month’s PPI index to be released, *e.g.*, the September 2009 PPI is scheduled to become available on October 20, 2009. The scheduled release dates for the PPI index can be found online at: www.bls.gov/schedule/news_release/ppi.htm.

FOURTH QUARTER OF 2009



FIRST QUARTER OF 2010



UP believes that its interpretation is consistent with footnote 16 of the Decision.

UP is seeking clarification, however, because the text on page 11 of the Decision might be read to suggest that UP should be using AAR and PPI indices that would allow it to estimate variable costs “at the beginning of a quarter.” Decision at 11. The text is inconsistent with the Board’s more detailed instructions in footnote 16 because the PPI indices that would allow UP to implement new rates at the beginning of a new quarter would have to be versions of those indices that became available during the prior quarter (and would thus reflect cost levels from an even earlier quarter).³ UP believes that the more detailed instructions in footnote 16 more

³ For example, before the fourth quarter begins on October 1, the three most-recent PPI index available will be the June 2009, July 2009, and August 2009 PPI indices, released on July 14, (continued...)

accurately reflect the Board's intention to limit the amount of lag that is inherent in any method of establishing rates that will apply prospectively using AAR and PPI cost indices.⁴

B. Clarification Of The Appropriate Date To Begin Charging New Rates.

UP believes that the Board intended UP to implement any necessary change to its rates and begin charging the new rates no more than ten days from the date on which the AAR and PPI indices become available, even though that would mean the new rates would not be implemented until several weeks after each quarter begins. For example, in the fourth quarter of 2009, UP will make any necessary rate changes and begin charging any new rates no more than ten days after receiving the September 2009 PPI index (which, as noted above, is scheduled to become available on October 20, 2009).

UP believes that its interpretation is consistent with footnote 16 of the Decision. UP is seeking clarification, however, because the text on page 11 of the Decision might be read to suggest that UP should charge the same rates throughout each entire quarter. *See* Decision at 11 ("UP should then multiply the stipulated maximum lawful R/VC ratio by the variable costs to

August 18, and September 15, respectfully. Therefore, to publish a rate at the very beginning of the fourth quarter would require UP to use a PPI index from the second quarter, *i.e.*, June 2009.

⁴ The Board's calculations of R/VC percentages for the first and second quarters of 2009 in the Decision do not provide the parties with guidance on which version of the indices to use for calculating rates in subsequent quarters. In the Decision, the Board calculated the R/VC percentages for the first quarter using an AAR index that did not become available until just before the end of the first quarter and a three-month average of the January 2009, February 2009, and March 2009 PPI indices, which were not all available until the second quarter. The Board followed the same approach for the second quarter, using the AAR index from the end of the quarter and a three-month average of the April 2009, May 2009, and June 2009 PPI indices, which were not all available until the third quarter. The Board apparently took that approach because those indices had become available by the time of the Decision. *See* Decision, App. B & C.

UP cannot take a comparable approach. It cannot prospectively set rates for one quarter using indices that do not become available until the end of that same quarter or early in the next quarter.

calculate the rates to be charged in that quarter.”). UP could charge the same rate for the entire quarter only by retroactively adjusting its bills for movements that occurred before it calculated the new rates, once it has calculated the new rates, but that process would impose administrative burdens on both the shipper and the carrier. In light of the Decision’s rejection of the truing processes proposed by both parties, UP does not believe the Board intended UP to adjust rates retroactively.

C. Clarification Of The Appropriate Operating Characteristics.

Finally, UP also seeks clarification with respect to two issues related to the actual operating characteristics that are to be used to update the maximum lawful rate calculation each quarter.

1. Relevant Time Period.

UP believes that the Board intended UP to update its rate calculations using actual operating characteristics for trains that moved in the twelve-month period preceding the start of the quarter in question. For example, UP would use the actual operating characteristics of trains moving from October 1, 2008, through September 30, 2009, when it updates rate calculations for the fourth quarter in October 2009. Using twelve months of actual operating data is consistent with the approach that the parties used in their evidence and that the Board adopted in the Decision. Using a twelve-month rolling average also would make quarterly rate calculations less susceptible to short-term distortions and thus produce more predictable rates than using only the last quarter’s data.⁵

⁵ If, as the Decision suggests, the same procedures are to be followed for cases decided under the Board’s *Simplified Standards*, which will typically involve fewer movements than a case decided under the *Coal Rate Guidelines*, then using twelve months of operating data is more likely to ensure that relevant movements will be available.

2. Appropriate Operating Characteristics In The Absence Of Recent Operating Data.

The decision does not specify what actual operating characteristics UP should use to update its rate calculations for origins from which no traffic had moved in the prior quarter. For example, the rate prescription applies to all Southern Powder River Basin mines used by Oklahoma Gas & Electric Company (“OG&E”), but OG&E may concentrate its shipments to a few mines during one period and then plan to shift to another in a coming period. In developing their evidence, when no traffic had moved from an origin, the parties agreed to base their cost calculations on an average of the operating characteristics for all other origins from which traffic had moved.

UP asks the Board to clarify that it should take essentially the same approach to updating its rate calculations that the parties used in developing their evidence – that is, for any origin, if no movements occurred in any one of the prior four quarters, UP should calculate new unit train rates based on the average tons per car and cars per train of all other traffic that had moved under the prescribed rates in the prior twelve months, but using the actual miles for the particular origin.

D. Conclusion

UP is seeking clarification of the issues discussed above to ensure that its implementation of the Decision is consistent with the Board’s intent. If UP has misinterpreted the Board’s intent, we ask that the Board clarify its decision and describe as specifically as possible the indices to use and timing of the required calculations.

Respectfully submitted,



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Attorneys for Union Pacific Railroad Company

August 13, 2009

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that on this 13th day of August, 2009, I caused a copy of Union Pacific Railroad Company's Petition for Clarification to be served by hand on

Thomas W. Wilcox, Esq.
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and by first-class mail, postage prepaid, on

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Michael L. Rosenthal