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AUG 25 2009
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The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington. DC 20423

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

Dear Secretary Quinlan:

Enclosed for filing in the above-referenced matter are an original and ten copies of Union Pacific Railroad Company's Response to Oklahoma Gas & Electric Company's Additional Requests for Clarification.

Thank you for your attention to this matter.

Sincerely,

Louise A. Rinn

Louise A. Rinn

Enclosures

cc: Counsel for OGE Energy Corporation
Michael Rosenthal

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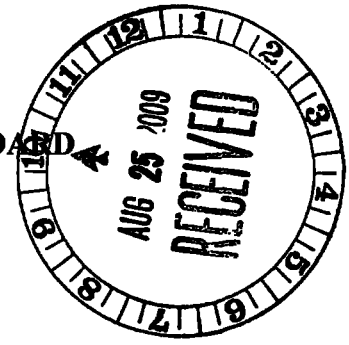


**BEFORE THE**
**SURFACE TRANSPORTATION BOARD**

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

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**UNION PACIFIC RAILROAD COMPANY'S**
**RESPONSE TO OKLAHOMA GAS & ELECTRIC COMPANY'S**
**ADDITIONAL REQUESTS FOR CLARIFICATION**

Union Pacific Railroad Company ("UP") hereby responds to requests by Oklahoma Gas & Electric Company ("OG&E") for the Board to clarify or to expand its July 24, 2009 decision ("Decision"), set forth in OG&E's August 20, 2009 reply to UP's Petition for Clarification ("OG&E Reply").[1]

## I. Prescribed Rates for the Third Quarter of 2009.

OG&E asks the Board to "clarify that under the procedure outlined in the Decision, the 3Q09 rates could have been established no later than July 24, 2009, and should be established at the same levels of the 2Q09 rates." OG&E Reply at 3. UP disagrees with the requested clarification for two reasons.

[1] UP is not responding to OG&E's reply with regard to issues raised in UP's Petition for Clarification. Our response is limited to new issues raised by OG&E in its filing.

First, UP cannot calculate third quarter 2009 ("3Q09") rates until the Board clarifies what operating statistics are to be used in calculating rates for 3Q09 and future quarters. In fact, OG&E apparently agrees with UP that the Board should clarify what operating statistics should be used. *See id.* at 4 ("OG&E concurs with UP that this aspect of Decision requires clarification"). Because UP believes that operating statistics based on a rolling twelve-month average are more appropriate (for reasons stated in its Petition for Clarification at 5) and OG&E prefers quarterly statistics, UP cannot calculate 3Q09 rates until the Board resolves the issue.

Second, UP disagrees that 3Q09 rates should be identical to the rates that apply to the second quarter of 2009 ("2Q09"). Whether the Board clarifies the Decision by instructing the parties to use annual operating statistics or quarterly operating statistics to calculate maximum reasonable rates in 3Q09 and future quarters, those operating statistics will be different than the ones that the Board used to prescribe rates for 2Q09.[2]

## II. Provision of Operating Statistics to OG&E.

OG&E asks the Board to supplement the procedures outlined in the Decision "to require UP to provide the actual operating characteristic data for the prior quarter to OG&E within five (5) days of the end of the quarter." OG&E Reply at 5.[3] Although OG&E asserts that

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[2] OG&E appears to suggest that the Board's calculation of maximum reasonable rates for 2Q09 is "subject to adjustment." OG&E Reply at 1. However, the Board has plainly prescribed maximum reasonable rates for 2Q09 at the levels set forth in Appendix C to the Decision. *See* Decision at 8 ("Based on the stipulation of the parties, we therefore set the maximum rates that can be charged for coal moving from the SPRB to the Muskogee Station at the 180% R/VC ratio level, as illustrated in Appendix B (for First Quarter 2009) and Appendix C (for Second Quarter 2009)."); *id.* at 1-2 ("As shown in Appendices B and C, the amount of relief for movements in shipper-supplied railcars ranges from $1.66 to $1.91 per ton for the first two quarters of 2009.").

[3] This request does not appear to be a legitimate request for clarification because the Decision did not speak to this issue at all, as OG&E acknowledges in its submission. OG&E Reply at 3. However, UP is responding in the event the Board treats OG&E's request as a petition for reopening or reconsideration.

such information is "known to UP immediately after the end of the quarter and can be easily supplied to OG&E," *id.*, in reality that is not the case.

UP closes its books for the prior quarter at the beginning of each January, April, July and October. UP then must devote significant computer, accounting, and financial analysis resources to compile all of the financial and operating data needed to prepare its quarterly earnings announcements. This limits the availability of other information until these analyses are substantially complete. In addition, holidays and weekends further constrain UP's ability to supply such data within the first five days of most quarters. Annual holidays on January 1 and July 4 would present a particular problem under OG&E's proposed 5-day deadline. For example, UP would have only two working days before the January 5, 2010, deadline proposed by OG&E because January 1 is a Friday and January 4 will be the first working day in 2010.

Moreover, OG&E does not need UP to provide it with information about the actual operating characteristics of its own trains. The number of cars per train and the number of tons per car and the mine origin appear on the freight bills in OG&E's possession.[4] Thus, there is no need to impose a special, additional burden on UP to supply this data to OG&E.

In the spirit of compromise, UP is willing to voluntarily provide its supporting calculations, including the operating statistics it relied upon, to OG&E by the time it establishes new rates. UP will also confer with OG&E about any discrepancies that OG&E believes may exist and adjust the rates retroactively in the event of an error. Of course, any such retroactive corrections must go both ways: if an error resulted in a rate lower than it should have been, OG&E should be required to retroactively pay the correct, higher rate.

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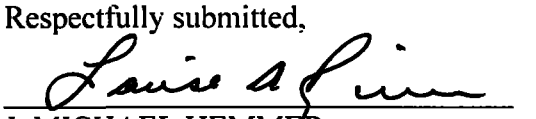
[4] OG&E states that it recalculated 2Q09 rates using 2Q09 operating parameters. OG&E Reply at 3. Those operating parameters were not supplied by UP.

UP also submits that the Board should reject OG&E's proposed five-day deadline because of the wider implications of the quarterly rate adjustment method established in the Decision. The Board made it clear that it expected the schedule and the calculations established in the Decision to apply to all rate prescriptions, not just the OG&E case. The Board confirmed its intention in *Western Fuels Association, Inc. and Basin Electric Power Coop. v. BNSF Railway Co.*, STB Docket No. 42088 (Sub-No. 1) (Decision served July 27, 2009). Although it is understandable that OG&E is focused only on its own case, neither UP nor the Board can afford to ignore the substantial burdens that railroads would face if OG&E's proposed five-day deadline were imposed in all rate cases.[5]

## CONCLUSION

The Board should (i) order that UP calculate 3Q09 rates in accordance with its guidance on what period to use for operating statistics; and (ii) reject OG&E's request that UP supply operating statistics within five days after the end of each quarter.

Respectfully submitted,



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August 24, 2009

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[5] UP currently has three active rate complaints pending that involve challenges to 14 different rates and at least 18 different origin-destination pairs. Many of the origin-destination pairs involve joint rates with another rail carrier. While UP believes that its rates are reasonable, it is possible the Board will conclude otherwise. Nonetheless, this illustrates that the possibility of other movements subject to rate prescriptions exists.

## CERTIFICATE OF SERVICE

I, Colleen Graham, certify that on this 24th day of August, 2009, I caused a copy of Union Pacific Railroad Company's Response to Oklahoma Gas & Electric Company's Additional Requests for Clarification to be served electronically and by first-class mail, postage prepaid, on

Thomas W. Wilcox, Esq.
GKG Law, P.C.
1054 Thirty-First Street, N.W.
Washington, D.C. 20007

and by first-class mail, postage prepaid, on

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