

223924
NOV 7 2008
RECEIVED

TROUTMAN SANDERS LLP
ATTORNEYS AT LAW

40 9TH STREET N.W. SUITE 1000
WASHINGTON D.C. 20004 2134
www.troutmansanders.com
TELEPHONE 202 274-2950

Thomas W. Wilcox
Thomas.Wilcox@troutmansanders.com

Direct Dial 202-274-2913
Fax 202-654-5608

November 7, 2008

Via hand delivery
The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

FEE RECEIVED
NOV - 7 2008
SURFACE
TRANSPORTATION BOARD

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

Dear Secretary Quinlan

Enclosed for filing please find the original and ten (10) copies of the Complaint of Oklahoma Gas and Electric Company. A check for \$350 is also attached to cover the filing fee required by 49 C.F.R. § 1002.2. An additional copy of the Complaint is included for date stamping and return to the undersigned via messenger.

Please feel free to contact me if you have any questions.

Very truly yours,
Thomas W. Wilcox
Thomas W. Wilcox

ENTERED
Office of Proceedings
NOV - 7 2008
Part of
Public Record

Enclosure

cc Mr. J. Michael Hemmer, Esq.
Mr. Patrick D. Shore, Esq.
Mr. Allen F. Gould

FILED
NOV - 7 2008
SURFACE
TRANSPORTATION BOARD

223924

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FEE RECEIVED
NOV - 7 2008
SURFACE
TRANSPORTATION BOARD

OKLAHOMA GAS and ELECTRIC COMPANY
P O Box 321
Oklahoma City, OK 73101-0321

Complainant,

v.

UNION PACIFIC RAILROAD COMPANY
1400 Douglas Street
Omaha, NE 68179

Defendant

Docket NOR 42111

FILED
NOV - 7 2008
SURFACE
TRANSPORTATION BOARD

COMPLAINT

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

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

Dated November 7, 2008

ENTERED
Office of Proceedings
NOV - 7 2008
Part of
Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

OKLAHOMA GAS and ELECTRIC COMPANY
P O Box 321
Oklahoma City, OK 73101-0321

Complainant,

v

UNION PACIFIC RAILROAD COMPANY
1400 Douglas Street
Omaha, NE 68179

Defendant.

Docket NOR 42111

COMPLAINT

COMES NOW Complainant, Oklahoma Gas and Electric Company ("OG&E"), and files this Complaint against Defendant, Union Pacific Railroad Company ("UP"), pursuant to 49 U.S.C. §§11701 and 11704, seeking the establishment of reasonable rates, practices, and other service terms for the transportation of coal from UP-served coal mine origins in the Southern Powder River Basin region of Wyoming ("SPRB") to OG&E's Muskogee Electric Generating Station in Fort Gibson, Oklahoma ("the Muskogee Station")

In support hereof, OG&E states as follows:

IDENTITY OF THE PARTIES

1 OG&E is an investor-owned, regulated electric utility and a subsidiary of OGE Energy Corp., with headquarters in Oklahoma City, Oklahoma. OG&E has a total of 6,800

megawatts of capacity and is engaged in the generation, transmission, and distribution of electric power to more than 750,000 retail customers in Oklahoma and Western Arkansas. OG&E also engages in electric power sales to the wholesale electric market

2 OG&E owns and operates the Muskogee Station, a coal-fired electric generating station that consumes roughly 6,000,000 tons of coal per year purchased by OG&E from mines served by UP in the SPRB. The Muskogee Station is a base-load power generation source for OG&E, producing 10,000,000 megawatt hours annually.

3 UP is the nation's largest railroad, and is a common carrier engaged in the common carriage of freight in interstate commerce under the jurisdiction of the Surface Transportation Board ("Board" or "STB"). UP is subject to the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101 *et seq.*, and to the jurisdiction of this Board. UP provides the only feasible means of transporting coal to Muskogee Station, and exerts sole control over the transportation rates charged to OG&E for this transportation

COAL TRANSPORTATION TO MUSKOGEE STATION

4. The Muskogee Station's three generating units went online in 1977, 1978, and 1984. All of the coal consumed at these units has been delivered by UP and its predecessors-in-interest by unit train rail service, which is the only feasible means of transporting the volume of SPRB coal required at Muskogee Station.

5. The UP-served SPRB mines from which the Muskogee Station's coal originates are roughly 1,000 miles from the Muskogee Station. BNSF Railway Company ("BNSF") also has access to the SPRB mines from which OG&E procures coal for the Muskogee Station, but BNSF does not own track that connects to the Muskogee Station. The closest BNSF-owned rail

line is approximately 40 miles from Fort Gibson and the plant site. On information and belief, BNSF may have limited rights to operate over UP trackage leading into the town of Muskogee, Oklahoma, which trackage is located on the west side of the Arkansas River. Fort Gibson and the Muskogee Station are located on the east side of the Arkansas River and there exists no access to any rights BNSF may have to the UP trackage on the west side of the river.

6. Since January 1, 1994, UP has delivered all coal consumed at Muskogee Station pursuant to two interdependent rail transportation contracts between OG&E, UP and UP's predecessors in interest¹ entered into pursuant to the predecessor to 49 U.S.C. § 10709². These contracts, ICC-UP-C-7233 and ICC-WRPI-C-0151 ("The Contracts"), are due to expire on December 31, 2008.

7. Coal delivered to Muskogee Station by UP travels via all rail service from the SPRB on UP-owned trackage in unit trains of gondola rail cars supplied free of charge to UP by OG&E. These cars were specifically acquired by OG&E for the transportation of coal to Muskogee Station.

OG&E'S EFFORTS TO NEGOTIATE A NEW CONTRACT WITH UP

8. In anticipation of the expiration of The Contracts at the end of 2008, OG&E approached UP in October, 2007 with the goal of negotiating a new rail transportation contract or contracts with UP for SPRB coal deliveries to the Muskogee Station. OG&E started discussions with UP well in advance of the expiration dates of The Contracts because the Muskogee Station is a base-load generation unit and a critical component of OG&E's electric generation mix for ratepayers in Oklahoma and western Arkansas.

¹ Missouri Pacific Railroad and Western Railroad Properties, Incorporated

² 49 U.S.C. § 10713

9 Despite over 12 months of effort on the part of OG&E, UP has not offered contract rates and service terms for rail service to Muskogee Station that are reasonable and acceptable to OG&E. In fact, UP's transportation rate offers have been far in excess of UP's costs of providing rail service to Muskogee Station, and substantially above the current rates contained in The Contracts.

10 With the parties at an impasse on new contract terms for service commencing January 1, 2009, OG&E on October 7, 2008 submitted a formal request for common carrier rates and service terms from UP for rail service to Muskogee Station commencing January 1, 2009, in accordance with 49 U.S.C. § 11101 and 49 C.F.R. Part 1300. (See Exhibit A to this Complaint, which is a letter from Allen F. Gould to Jeffrey Maier, dated October 7, 2008.)

11 After initially declining to establish the requested common carrier rates and service terms to the Muskogee Station within the time frame set forth in the Board's regulations, UP eventually responded to OG&E's formal request on October 31, 2008 and supplied common carrier rates and service terms effective January 1, 2009 for transportation from 11 SPRB mines to the Muskogee Station. (See Exhibit B to this Complaint, which is a Letter and Attachment A from Jeff W. Maier to Allen F. Gould dated October 31, 2008.)

12 The common carrier transportation rates and service terms established by UP on October 31, 2008 for the transportation of coal from the listed SPRB mine origins to Muskogee Station commencing January 1, 2009 are unreasonable.

**UP POSSESSES MARKET DOMINANCE OVER
TRANSPORTATION OF COAL TO THE MUSKOGEE STATION**

13. The Muskogee Station currently burns approximately 6,000,000 tons per year of SPRB coal, and the only way that this quantity of coal can be feasibly transported to Muskogee

Station is via unit train railroad service UP is the only railroad with tracks that are physically connected to the Muskogee Station's rail unloading tracks and facilities

14 There is no effective competition from other railroads or other modes of transportation for the transportation of the Muskogee Station's coal requirement from the SPRB Hence, UP possesses qualitative market dominance over transportation of coal for OG&E to the Muskogee Station 49 U S C. § 10707

15. Each of the common carrier transportation rates established by UP and provided to OG&E on October 31, 2008 (See Exhibit B to this Complaint) for transportation of coal from SPRB mines to the Muskogee Station produce revenues to UP substantially in excess of 180% of UP's variable costs of providing the transportation. Therefore, UP has quantitative market dominance over rail transportation to Muskogee Station, as described in 49 U.S C § 10707(d)

16. Because UP possesses market dominance over the transportation of coal from the SPRB to the Muskogee Station, the Board has jurisdiction over the reasonableness of the common carrier rates, rules, and practices established by UP for coal transportation to Muskogee Station 49 U S C. § 10701(d)(1),

THE COMMON CARRIER RATES, CHARGES, RULES, AND PRACTICES APPLIED BY UP TO THE TRANSPORTATION OF COAL TO THE MUSKOGEE STATION ARE UNLAWFUL AND UNREASONABLE

17. The common carrier transportation rates and service terms established by UP and provided to OG&E for transportation of coal from the SPRB to OG&E's Muskogee Station are unreasonable, unlawful, and exceed maximum reasonable levels permitted by 49 U.S.C. §§ 10701, 10702, 10704, and/or 10707

18 In compliance with 49 C F R § 1111 1(a), OG&E states that the common carrier transportation rates and service terms established by UP and provided to OG&E should be

evaluated by the Board using the Constrained Market Pricing principles first described in *Coal Rate Guidelines – Nationwide*, Ex Parte 347 (Sub-No 1), 1 ICC 2d 520 (1985)

19 This Complaint encompasses any changes or successors to the rates and terms established by UP and contained in Exhibit B to this Complaint, and all future iterations, issuances, or forms of common carrier tariffs, price documents, rates, charges, rules, and service terms applicable to the transportation by UP of coal to the Muskogee Station

20 Neither this proceeding nor the granting of the relief requested will constitute a major federal action significantly affecting the quality of the human environment or the conservation of energy resources

21 OG&E will participate in the Board's mandatory mediation process described at 49 C.F.R. § 1109.4

WHEREFORE, Complainant Oklahoma Gas and Electric Company prays that Defendant Union Pacific Railroad Company be required to answer the charges herein; that this Complaint be assigned for hearing under 49 C.F.R. Part 1111; and that, after due hearing and investigation, this Board

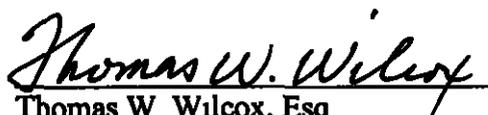
(1) find that the common carrier rates, service terms and charges UP has established for the transportation by rail of coal from SPRB mine origins to the Muskogee Station are unreasonable in violation of 49 U.S.C. §§ 10701(d)(1) and 10702;

(2) issue an order pursuant to 49 U.S.C. § 10704(a)(1) which prescribes just and reasonable rates and related rules and service terms applicable to UP's rail transportation of OG&E coal from SPRB mine origins to the Muskogee Station based on the evidence to be submitted in this Complaint proceeding,

(3) award OG&E reparations, plus any applicable interest, as calculated based on the record in this proceeding, in accordance with 49 U.S.C. § 11704 for the unlawful charges assessed by UP from and after January 1, 2009, and

(4) grant to OG&E such other and further relief as the Board may deem proper under the circumstances

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
Phone: (202) 274-2913
Fax (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 73101-0321
(405) 553-3658

Attorneys for Complainant Oklahoma Gas and Electric Company

November 7, 2008

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 2008, I served a copy of the foregoing Complaint by overnight mail, upon the chief legal officer for Defendant at the following address.

J Michael Hemmer, Esq
General Counsel
Union Pacific Railroad Company
1400 Douglas Street
Omaha, NE 68179

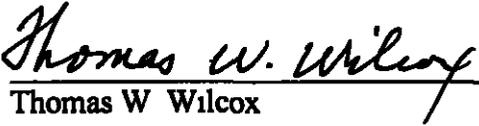

Thomas W Wilcox

EXHIBIT A

OGE Energy Corp. PO Box 321
Oklahoma City, Oklahoma 73101-0321
405-553-3000
www.oge.com



By Hand Delivery

Mr. Jeffrey Maier
AVP – Energy
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179

10/7/08

Dear Jeff

Oklahoma Gas and Electric Company (“OG&E”) has attempted to engage Union Pacific Railroad Company (“UP”) in negotiations for a contract covering the transportation of coal from Powder River Basin (“PRB”) mines served by UP to OG&E’s Muskogee Generating Station, beginning January 1, 2009. These attempts were prompted by the impending expiration at the end of this year of our current rail transportation contract with UP for this transportation. Unfortunately, our attempts to negotiate mutually acceptable contract terms to replace the current contract have been unsuccessful.

In light of the parties’ failure to agree to new contract rates and service terms for the Muskogee station, OG&E requests, pursuant to 49 U.S.C. §11101 and 49 C.F.R. Part 1300, that UP provide OG&E with common carrier rates and service terms for the transportation of coal from all mines served by UP in Converse and Campbell Counties, Wyoming to the Muskogee Generating Station. Pursuant to 49 C.F.R. §1300.2 and/or §1300.3, respectively, OG&E requests that UP (1) disclose the existing rates and service terms that would apply to the transportation of OG&E’s coal described in attachment A starting on January 1, 2009, or (2) establish reasonable rates and service terms that will apply to the described transportation as of January 1, 2009. OG&E also requests that UP immediately notify OG&E of any future increases in the rates provided and any future changes to pertinent service terms.

Please provide the requested information in compliance with the time frames set out in section 49 U S C § 11101 and 49 CFR Part 1300.

Sincerely,

A handwritten signature in black ink that reads "Allen F. Gould".

Allen F Gould
Manager Fuels
OG&E Electric Services

ATTACHMENT A

**Parameters of Transportation Covered by Request
for Disclosure or Establishment of Rates and Service Terms
Under 49 U.S.C. 11101 and 49 CFR Part 1300**

Effective Date: January 1, 2009

Commodity: Raw sub-bituminous Coal, STCC 11-21 Series (excluding artificially dried or processed coal)

Origins: UP-served mine origins in Converse and Campbell Counties, Wyoming

Destination: OG&E's Muskogee Generating Station

Annual Volume: A minimum of approximately 5,500,000 tons per calendar year and a maximum of approximately 7,000,000 tons per calendar year, tendered in reasonably even monthly increments

Route of movement: UP Direct from origin mines

Equipment: Approximately 1460 shipper-supplied aluminum rotary gondola railcars with an average lading weight of 118 tons per car, and compatible with the loading facilities at origin mines and the unloading facilities at Destination.

Railcar Capacity: Maximum gross weight on rail capacity of 286,000 pounds

Service Provisions: A non-inclusive list of service provisions for which disclosure/establishment is sought by OG&E includes:

- Delivery standard
- Scheduling
- Maximum and minimum train sizes
- Loading and unloading free-time
- Liquidated damages
- Loss and damage of commodity
- Surcharges and accessorial charges

EXHIBIT B



October 31, 2008

Mr. Allen F. Gould
Manager Fuels
OGE Energy Corporation
420 South Broadway
Oklahoma City, OK 73109

Dear Allen,

This letter responds to your request for common carrier rate(s) to cover the movement of coal from UP-served mines in the Southern Powder River Basin (SPRB), WY to the Muskogee Generating Station, located at or near Ft Gibson, Oklahoma (Destination)

The rates and applicable terms are stated on Attachment A. The rates are stated as if they were published and effective beginning in November, 2008. Since contract rates exist currently under contract WRPI 0151, we will publish the rates and terms in a new price document on or before December 11, 2008. As you may know, common carrier rates are subject to change at any time so long as twenty (20)-days notice is provided for any increase; therefore, when we publish common carrier rates or terms to be effective January 1, 2009, we may publish rates or terms that are different from those specified in the attachment, subject to notice requirements.

There is no provision for liquidated damages as there is no minimum volume requirement or service commitment beyond common carrier reasonable dispatch

If you have any questions, please let me know

Best Regards,

A handwritten signature in black ink, appearing to be "JW Maier".

Jeff W. Maier
Assistant Vice President - Energy

UNION PACIFIC RAILROAD
1400 Douglas Street, Stop 1260, Omaha, Nebraska 68179-1260
ph. (402) 544-4502 fx (402) 233-3039
jwmaier@up.com

ATTACHMENT A
Response to Request for Common Carrier Rates
Rates and Service Terms to Be Published in Price Document

Effective Date: January 1, 2009

Route: UP direct from origin mines specified in rates to OG&E'S Muskogee Generating Station ("Destination")

Volume Maximum annual volume 7,000,000 tons per calendar year
No minimum volume applies

Annual Volume Estimate: For planning purposes, Shipper will advise Railroad of its intent to ship under these rates as specified in the Monthly Coal Tonnage Forecast (see UP Circular 6603-series Item 250). In addition, not later than December 1, 2008, and July 1, in subsequent years, Shipper shall provide to Railroad an estimate of tons of Coal anticipated to be loaded in the next calendar year by month ("Annual Volume Estimate"). This information should include tons from each of its suppliers and origins as soon as it is known. The nominated tonnage must be ratable. A monthly nomination is ratable if it is no more than 10% greater or 10% less than one-twelfth of the annual total. The Annual Volume Estimate must be submitted electronically via UP's secured website (www.uprr.com/customers/energy Bulk Train Planner)

Equipment: Shipper will supply suitable equipment at no charge to UP. The number of trainsets in service for transporting coal to Destination shall not exceed nine (9), but Railroad reserves the right, in its sole judgment, to limit the number of trainsets that will be in service in order to retain fluidity or to meet loading schedules, or if adding trainsets in active service would not materially increase delivered tonnage.

Railcars shall be compatible with the loading facility and unloading facility. All railcars shall be open-top hopper or gondola railcars, and shall have a marked capacity sufficient to hold 118 net tons of lading without exceeding 286,000 pounds gross-weight-on-rail ("GWOR") Such railcars shall also meet or exceed the Association of American Railroad ("AAR") Interchange Rules, as amended from time-to-time.

Jeff W. Maier
Assistant Vice President - Energy

UNION PACIFIC RAILROAD
1400 Douglas Street, Stop 1260, Omaha, Nebraska 68179-1260
ph (402) 544-4502 fx (402) 233-3039
jwmaier@up.com

Transportation is subject to provisions of the AAR Interchange Rules, including those rules governing railcar repair, maintenance, damage, or destruction, in a manner prescribed by the "Field Manual of Interchange Rules" and the "Office Manual of the Interchange Rules" adopted by and currently in use by the AAR. Railcars must also comply with Item 226 of UP Circular 6603-Series as amended from time-to-time.

Train Size Minimum of 130 cars and maximum of 135 cars loaded at 118 net tons per car.

Service UP shall use reasonable efforts to transport Coal based on the circumstances when the transportation occurs UP shall not be responsible for delays due to weather, track maintenance or construction, equipment failures, Acts of God, embargoes, labor activities including strikes, denial of or limitation of access to track controlled by any party other than UP, or events outside control of UP

Rates.	<u>Origin Mine</u>	<u>Rate</u> <u>(U.S \$/net ton)</u>
	Caballo Mine	\$22.99
	Belle Ayr	\$22.95
	Caballo Rojo	\$22.90
	Cordero	\$22.82
	Coal Creek	\$22.54
	West Thunder	\$22.46
	Jacobs Ranch.	\$22.41
	Black Thunder.	\$22.41
	South Black Thunder.	\$22.26
	No. Antelope/Rochelle	\$21.98
	Antelope	\$21.92

These rates are not subject to any fuel surcharge.

Other Applicable Terms: UP Circular 6603-Series, including but not limited to, Item 125 Other Rules, shall apply to the extent the specific provisions of the published price document do not supersede those rules. [A link to UP Circular 6603 is enclosed]

Changes: The rates and terms may change at any time at rail carrier's discretion so long as 20 days-notice is provided for any increase

Jeff W. Mater
Assistant Vice President - Energy

UNION PACIFIC RAILROAD
1400 Douglas Street, Stop 1260, Omaha, Nebraska 68179-1260
ph (402) 544-4502 fx (402) 233-3039
jwmater@up.com

Publication:

The rates and service provisions described in this attachment shall be published in a UP price document on or before December 11, 2008 to be effective on January 1, 2009.

Jeff W. Maier
Assistant Vice President - Energy

UNION PACIFIC RAILROAD
1400 Douglas Street, Stop 1260, Omaha, Nebraska 68179-1260
ph. (402) 544-4502 fx (402) 233-3039
jwmaier@up.com