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September 25, 2006

VIA HAND DELIVERY

Hon. Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Room 711
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Office of Proceedings

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Re: Docket No. 42095, Kansas City Power & Light
Company v. Union Pacific Railroad Company

Dear Secretary Williams:

Enclosed for filing in the referenced docket please find an original and ten copies of the Opening Brief of Kansas City Power & Light Company. Also enclosed are two WordPerfect Diskettes containing the Brief.

An additional copy of the Brief also is enclosed. Kindly indicate receipt and filing of the Brief by time-stamping this extra copy and returning it the bearer of this letter.

Thank you for your attention to this matter.

Sincerely,

Kelvin J. Dowd
An Attorney for
Kansas City Power & Light Company

KJD:jml
Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



KANSAS CITY POWER & LIGHT
COMPANY

Complainant,

v.

UNION PACIFIC RAILROAD COMPANY

Defendant.

Docket No. 42095

**OPENING BRIEF OF
KANSAS CITY POWER & LIGHT COMPANY**

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

KANSAS CITY POWER & LIGHT	)	
COMPANY	)	
	)	
Complainant,	)	
	)	Docket No. 42095
v.	)	
	)	
UNION PACIFIC RAILROAD COMPANY	)	
	)	
Defendant.	)	
	)	

**OPENING BRIEF OF
KANSAS CITY POWER & LIGHT COMPANY**

Kansas City Power & Light Company ("KCPL"), the Complainant¹ in this proceeding, submits this its Opening Brief in compliance with the Decision and Order served by the Board on July 27, 2006 ("*Decision*").

STATEMENT OF THE CASE

In this proceeding, KCPL challenges the reasonableness of the common carrier rates, rules and practices established by Defendant, Union Pacific Railroad Company ("UP"), for essential unit train coal transportation service from Wyoming's Powder River Basin ("PRB") to KCPL's Montrose Generating Station near Ladue,

¹ KCPL's Verified Complaint pursuant to 49 U.S.C. §§ 10701(d) and 11701(b) ("Complaint"), which initiated this proceeding, was filed on October 12, 2005.

Missouri (“Montrose”). The rates, rules and practices at issue are published in Item 4140-D of UP’s Unit Train Coal Common Carrier Circular 111.

Faced with a December 31, 2005 expiration date for a coal transportation contract with UP that for many years effectively covered 100% of PRB coal shipments to Montrose, KCPL sought to negotiate a contract extension or new agreement, consistent with the terms of the expiring contract. Complaint, ¶ 16. UP declined, however, and took the position that post-contract service to Montrose only would be offered within the common carrier framework of Circular 111. Accordingly, UP established applicable rates and service terms through Item 4140 of that Circular. *Id.* at ¶ 17.

The terms of Circular 111 (including Item 4140) were determined unilaterally by UP. No negotiations between KCPL and UP preceded their disclosure to KCPL, and KCPL’s agreement was neither secured nor sought before Circular 111 and Item 4140 were put in place. *Id.* at ¶ 10.

As established by UP, Item 4140 of Circular 111 published two sets of rates applicable to coal service to Montrose. The first, designated “Option 1,” set a rate that could be used by KCPL without regard to the volume of coal tendered for transportation. The second set, designated “Option 2,” would apply if KCPL tendered a certain minimum quantity of coal in each of three (3) consecutive twelve (12) month periods, and established a specific rate that corresponded to each period. The Option 1 Montrose rate was significantly higher than the corresponding Option 2 rates. *Id.* at ¶ 11.

In order to transport coal to Montrose under the Option 2 rates, UP required KCPL to execute a “Volume Commitment Certificate,” which was in a form dictated by UP. *Id.*, Exhibit A. KCPL believed that all of the common carrier rates that UP had established for Montrose – Option 1 as well as Option 2 – were unreasonably high under the standards of the *Coal Rate Guidelines*. Complaint, ¶ 23, 24. However, KCPL had no choice but to use UP service under Circular 111 following the December 31, 2005 expiration of its then-current contract, and obviously preferred to pay the lower Option 2 rates pending any eventual Board determination of the maximum reasonable rates applicable to Montrose coal service.

The UP-dictated Volume Commitment Certificate that KCPL was required to execute in order to ship coal under the Option 2 rates contains the following language:

...Shipper acknowledges the reciprocal benefits under Option 2 terms and conditions and agrees to be bound by the applicable terms and conditions set forth in this Circular and Rate Item associated with Destination.

Id. KCPL understood the rates and service terms established in Circular 111 and Item 4140 to be common carrier rates and service terms, and did not agree that there were “reciprocal benefits” associated with the Circular provisions, which had been established unilaterally by UP. KCPL therefore sought clarification from UP as to the language quoted above and the status of Circular 111 rates, including the Option 2 rates. In response, UP confirmed that the service held out under the Circular was common carrier service, and that UP did not intend that a contractual relationship would arise with a customer that executed a Volume Commitment Certificate. *Id.* at ¶ 12.

On October 12, 2005, KCPL transmitted an executed Volume Commitment Certificate to UP, indicating KCPL's intent to ship coal under the Option 2 rates set out in Item 4140 of Circular 111. In a transmittal letter accompanying the Certificate, however, KCPL stated that it was executing the Certificate under protest, and solely because it was a necessary prerequisite to obtaining service under the Option 2 rates. KCPL clarified that the subject rates were not the product of any agreement between KCPL and UP, that KCPL did not intend to enter into a binding contract with UP based upon those rates, and that KCPL's execution of the Certificate was specifically conditioned on the understanding that the subject rates and Circular 111 service terms were common carrier rates and practices, and were fully subject to the jurisdiction of the Board.²

UP made no response to KCPL's Certificate or the accompanying transmittal letter, and at no time took issue with any statements by KCPL concerning the legal status of Circular 111 rates and service terms. To the contrary, in its November 1, 2005, Answer in this proceeding, UP stated:

UP admits that a shipper intending to ship coal under Option 2 rates is required to execute a "Volume Commitment Certificate," that the form of the certificate appears as General Rule Item 300 of Circular 111, . . . that it has represented that Option 2 rates are common carrier rates, and that it has represented that a shipper's execution of a "Volume Commitment Certificate" does not create a contract under 49 U.S.C. § 10709.

Answer, ¶ 12.

² Copies of the transmittal letter and Certificate are attached to this Opening Brief as Counsel's Exhibit No. 1.

Consistent with the foregoing, on October 12, 2005, KCPL filed its Complaint in this docket, challenging the reasonableness of the Option 2 Montrose rates established in Item 4140 of Circular 111. On October 26, 2005, the Board served a decision which adopted a procedural schedule calling for completion of the evidentiary phase of this case by September 25, 2006. However, four (4) months later, in a decision served February 27, 2006, the Board suspended that schedule pending the outcome of the ongoing rulemaking proceeding denominated as Ex Parte No. 657 (Sub-No. 1), *Major Issues in Rail Rate Cases*.³ Some five (5) months after that, nine (9) months after KCPL's Complaint gave a full exposition of all matters at issue in this proceeding, and notwithstanding the uncontested facts summarized above, the Board directed KCPL and UP to "submit briefs . . . showing cause as to why this proceeding should not be dismissed for lack of jurisdiction pursuant to 49 U.S.C. § 10709" *Decision* at 4.

SUMMARY OF ARGUMENT

The *Decision* should be vacated, and no further consideration should be given by the Board to the issues raised therein.

The law is clear that the Board is without jurisdiction to determine whether KCPL and UP entered into a lawful, binding contract. Decisions of three federal courts of appeals following enactment of the *Staggers Rail Act of 1980* make plain not only that

³ By that time, KCPL and UP had completed the mandatory mediation described in 49 C.F.R. Part 1109.4, and were well along in discovery.

the Board lacks authority to enforce or interpret a contract between a railroad and its customer, but also that it has no jurisdiction in the first instance to decide whether a contract exists. Moreover, rulings by the Board's predecessor in the wake of those decisions establish that unless a party to a rate proceeding raises the claim that a contract exists, and supports that claim with meaningful evidence and a petition to a court of competent jurisdiction, it is improper for the Board to delay the proceeding on account of the possibility that the transportation at issue might be the subject of a contract.

Here, neither KCPL nor UP has alleged the existence of a contract, presented any evidence of same, or petitioned a court for a declaratory ruling. Under the unanimous line of authorities discussed in this Opening Brief, therefore, the Board should vacate its *Decision* forthwith, and re-establish a procedural schedule for this case.

Assuming *arguendo* that the Board has jurisdiction to decide the question, it is beyond doubt that KCPL and UP did not enter into a contract covering post-2005 PRB coal shipments to Montrose. Independently and in writing, each party has manifested its specific intent *not* to make a contract, which the law holds is outcome determinative on the question. Even if the Volume Commitment Certificate or other documentation exchanged between the parties otherwise do bear some resemblance to documents which could be used to confirm a contractual arrangement, the undisputed fact that KCPL and UP each clearly stated its intent *not* to do so means that no contract could have arisen.

Finally, the “characteristics” of Circular 111 and the KCPL Volume Commitment Certificate that the Board suggests are consistent with contract service – a minimum volume requirement, a UP service commitment, a “force majeure” provision, and a three-year rate schedule – all are typical of acknowledged common carrier transportation arrangements, particularly those applicable to unit train utility coal movements. Especially given the parties’ common intent not to enter into a contract, those features of the Circular cannot provide a basis for concluding that a binding Section 10709 agreement exists.

ARGUMENT

I.

THE BOARD LACKS JURISDICTION TO DETERMINE WHETHER A CONTRACT EXISTS IN THIS CASE

In its *Decision*, the Board plainly states its intent to render a formal determination whether KCPL and UP entered into a binding contract when KCPL tendered the Circular 111 Volume Commitment Certificate for the Item 4140 Option 2 rates. *Decision* at 4. KCPL respectfully submits that the Board does not have jurisdiction to consider or decide that question. Rather than continuing on a course that is outside the scope of its statutory authority, the Board should act promptly to re-establish the procedural schedule in this case.

The Board correctly acknowledges in the *Decision* that when Congress specifically authorized shippers and rail carriers to enter into contracts through the *Staggers Rail Act of 1980*, it “expressly removed all matters and disputes arising from contracts from the ICC’s (and now the Board’s) jurisdiction.” *Decision* at 4 (citing former 49 U.S.C. §10713(i) and current 49 U.S.C. § 10709(c)). As judicial and agency precedents from the years immediately following enactment of those reforms make clear, however, that express preclusion of Board authority also extended to questions concerning the *existence* of contracts. The *Decision* purports to set the stage for a Board action that lies outside the scope of its jurisdiction.

The *Staggers Act* provisions formally endorsing shipper-carrier contracts included a “grandfather clause” that addressed the status of rate agreements between shippers and railroads that were entered into prior to the effective date of the *Act*. As currently codified in 49 U.S.C. § 10709(e), the clause provides:

Any lawful contract between a rail carrier and one or more purchasers of rail service that was in effect on the effective date of the Staggers Rail Act of 1980 shall be considered a contract authorized by this section.

Soon after the *Act*’s enactment, litigation ensued over the role that this clause should play in rate reasonableness disputes that were initiated prior to the *Act*, but involved claims of valid rate agreements that previously would have been considered by the ICC under its

1978 Contract Rates Policy.⁴ Of particular relevance here, one of the issues that arose concerned the proper forum for adjudicating the question whether, in a particular case, a “lawful contract” existed. In an appeal from an ICC maximum rate determination that pre-dated the effective date of current Section 10709(e),⁵ the agency took the position that it was empowered in the first instance to decide such issues.⁶ However, that position was squarely *rejected* by the Sixth Circuit:

The Commission also appears to imply that it has authority under subsection 10713(j) [now Section 10709(e)] to entertain and decide questions concerning the existence and validity of contracts in terms of the common law of contracts. This is the first indication to this court that the Commission intended to undertake such a purely judicial task, and we are unable to find support in the Staggers Rail Act or prior law for it. Certainly, the Commission has never before claimed any expertise as to the existence and interpretation of contracts

Cleveland Cliffs Iron Co. v. I.C.C., 664 F.2d 568, 591 (6th Cir. 1981). *Accord Hanna Mining Co. v. Escanaba & Lake Superior Railroad Co.*, 664 F.2d 594, 600 (1981) (“The question of the legality and existence of such contracts remains subject to challenge . . . in . . . court It is not thereafter subject to further review by the ICC”).

⁴ Ex Parte No. 358-F, *Change of Policy – Railroad Contract Rates* (I.C.C. served November 9, 1978).

⁵ *Increased Rates on Coal, BN, Montana to Superior, WI*, 362 I.C.C. 625 (1980).

⁶ *See also Rates on Iron Ore, Randville to Escanaba via Iron Mountain*, 365 I.C.C. 144, 151 (1981) (“[w]e consider it both legally sound and administratively practical for the Commission to determine the lawful existence of a pre-act contract”).

The following year, the D.C. Circuit reached the same conclusion. When the ICC ordered the suspension of a post-*Staggers Act* tariff rate increase on grounds that it violated a pre-*Staggers Act* rate prescription predicated in part on a rate agreement between the shipper and carrier, the railroad appealed. Before the court, the ICC maintained “that it is the proper forum of first instance to ‘adjudicate a dispute . . . concerning the (1) existence or (2) the lawfulness of a pre-Act agreement’”⁷ The Court disagreed:

[W]e conclude that the paramount design of Congress to reduce the ICC’s regulatory role, and the clear legislative intent to place contract disputes in court, must direct the Commission’s course. Accordingly, . . . the ICC should accept the tariff and leave contract enforcement questions to the plenary authority of the district court.

679 F. 2d at 939-40 (footnote omitted). Later in its opinion, the court re-affirmed the basis for its holding:

The courts to which the Staggers Act has committed contract questions are adequately equipped to determine whether alleged agreements are in fact binding legal contracts

Id. at 942 (citing *Cleveland Cliffs*, 664 F.2d at 592). See also *Kansas Power & Light Co. v. Burlington Northern Railroad Co.*, 740 F.2d 780, 785 (10th Cir. 1984) (“The courts, not the ICC, . . . is the appropriate forum for determining the existence of an enforceable contract.”).

⁷ *Burlington Northern Railroad Co. v. I.C.C.*, 679 F.2d 934, 937 (D.C. Cir. 1982).

In the wake of these judicial pronouncements, the ICC revised its previous policy position and acknowledged its lack of jurisdiction to make determinations as to the existence of contracts:

In *Cleveland Cliffs* . . . , a Federal court ruled that, after the enactment of the Staggers Act, the Commission retained jurisdiction to evaluate only the reasonableness of pre-Staggers Act contract rates that were in effect and under administrative challenge at this Commission on October 1, 1980 Otherwise, the sole remedy for breaches of an alleged contract, or a determination of whether in fact a contract exists, lies in an appropriate court

If the existence of a contract rate was an issue . . . , then, based on the analysis above, the only jurisdiction which this Commission or State agencies would have is that set forth in *Cleveland Cliffs* and *Burlington Northern, supra*. This would preclude the [ICC] . . . from ruling on the existence of a contract rate

Docket No. 39060, *Petition for Review of a Decision of the Public Service Commission of Utah Pursuant to 49 U.S.C. 11501*, I.C.C. served March 2, 1983, at 2, 3 (“*Utah*”). See also *Rates on Iron Ore, Randville to Escanaba via Iron Mountain*, 367 I.C.C. 506, 509 (1983) (“[T]o entertain and decide questions concerning the existence and validity of contracts . . . is a purely judicial task which is not to be performed by the Commission.”).

In revising its policy to comply with the courts’ holdings that “no administrative agency may determine the existence and validity of an alleged rate contract,”⁸ the ICC ventured that the proper course to follow in circumstances where the

⁸ *Utah* at 4.

question of the existence of a rate contract arose in the context of a rate reasonableness proceeding would be to “defer any consideration of the rate reasonableness issue until the extent of our jurisdiction is determined by a court’s ruling on the possible existence of a contract rate”⁹ Significantly, however, the agency made clear that such deference could only be justified if one of the *parties* claimed that a contract existed,¹⁰ and submitted actual evidence to support the claim:

We caution all litigants in administrative rate proceedings . . . that the potential jurisdictional issue of an alleged rate contract must be raised in some minimal evidentiary fashion to require the agency to defer to the courts under *Cleveland Cliffs* and *Burlington Northern*.

Utah at 4.

The law and agency rules in the wake of *Cleveland Cliffs*, *Burlington Northern*, *Kansas Power & Light* and *Utah* were clear: (1) the ICC had no jurisdiction to consider the question of the existence of a binding contract; (2) if a contract question was raised, the agency’s only course would be to defer consideration of a rate challenge pending a court ruling on the jurisdictional issue; and (3) the ICC would *only* defer if one of the parties raised a contract claim, and supported that claim with an evidentiary showing.

The strict limits on the Board’s jurisdiction and the requirements for deferral of a pending rate proceeding were further elucidated in *Toledo Edison Company v. Norfolk*

⁹ *Utah* at 3.

¹⁰ *Id.*

& *Western Railway Company*, 367 I.C.C. 869 (1983). In that case, the defendant railroad sought dismissal of a rate complaint on grounds that the movement was governed by a contract. In considering this claim, the ICC first observed that “[a]s the party raising the contract issue . . . , N&W has the burden of showing the presence or absence of a contract. . . .”¹¹ Addressing the showing that had been proffered by the carrier, the agency ruled that unless at least one party to the dispute strongly advanced and supported the position that a valid contract existed, an ongoing rate proceeding could neither be dismissed nor delayed on that ground:

[D]efendant’s evidence is largely circumstantial and does not convince us of the possibility that a contract exists. Some greater showing is necessary in order for the Commission to separate genuine from frivolous contract rate defenses. The potential for delay in deferring to a court’s jurisdiction is a serious concern and we must assure ourselves that the action is correctly taken. Additional evidence that would be persuasive would be the defendant’s initiation of a court proceeding in support of its contract claim. This would demonstrate the defendant’s good faith belief in its contract arguments [H]owever, in the absence of a commitment from the defendant to pursue this matter in court, there is insufficient evidence to show a reasonable possibility that a contract between the parties may have existed. In order to give the defendant the opportunity to correct this defect, we will hold this proceeding in abeyance and defer consideration of the requested relief for 30 days . . . during which time N&W will be required to notify us whether it intends to seek a judicial determination of its contract claim. *If it does not respond or if it states its intent not to proceed judicially, we will resume consideration of this proceeding. . . . [W]e emphasize that this decision does not reflect a conclusion that a contract in fact does or does not exist. That issue has been*

¹¹ 367 I.C.C. at 871.

delegated to the courts by the contract provisions of the Staggers Act.

367 I.C.C. at 872-73 (emphasis added).

Cleveland Cliffs, Burlington Northern, Kansas Power & Light, and the agency decisions entered in light of those court rulings clearly establish that the Board does not have jurisdiction to render a determination as to the existence of a lawful contract between KCPL and UP. Moreover, in light of the uncontested fact that neither KCPL nor UP has claimed the existence of a contract in this case,¹² much less raised the issue in a court of competent jurisdiction or offered any evidence that establishes a “reasonable possibility” that a contract was entered, under *Utah* and *Toledo Edison* there is no legal basis to defer jurisdiction of KCPL’s Complaint pending consideration of the contract issue in another forum. The only proper course for the Board at this stage is to promptly discontinue this inquiry, and re-establish a procedural schedule for the rate proceeding.

II.

NO CONTRACT EXISTS BETWEEN KCPL AND UP

As shown, the *Decision* expresses an intention on the part of the Board to render a legal determination that it is without jurisdiction to make. Assuming *arguendo*

¹² Indeed, as discussed in Part II, *infra*, the fact that both KCPL and UP clearly manifested their intent *not* to enter into a contract would be fatal to any finding that a contract exists, assuming *arguendo* that the question properly could be considered by the Board.

that the question whether a lawful transportation contract between KCPL and UP exists as a consequence of KCPL's execution of the Volume Commitment Certificate is within the Board's purview, however, it is clear that it must be answered in the negative. Both KCPL and UP, clearly and in writing, manifested their intent *not* to enter into a contractual relationship, which under the law is dispositive on the issue. Moreover, the document cited by the Board as potentially evidencing agreement¹³ fairly cannot be so interpreted in the totality of relevant circumstances, particularly in light of the parties' common intent.

A. KCPL and UP Did Not Intend to Contract

It is well-settled that when considering whether a shipper and railroad have entered into a Section 10709 contract – as with commercial contracts generally – “the controlling question . . . is the matter of intent of the parties.” *Kansas Power & Light Co.*, 740 F.2d at 785. *See also Sidwell Oil & Gas Co., Inc. v. Loyd*, 630 P.2d 1107, 1112 (Kan. 1981); *Olathe Millwork Co. v. Dulin*, 189 S.W. 3d 199, 203 (Mo. App. 2006). Of particular relevance here, the law also is clear that if parties to a purported agreement stipulate that they did *not* intend to bind themselves contractually, then no enforceable agreement can arise, even if those parties exchange documentation that in other circumstances might be considered indicative of a contract. *Kind v. Clark*, 161 F.2d 36, 46 (2d Cir. 1947). *See also Cerro de Pasco Copper Corp. v. Knut Knutsen, O.A.S.*, 187 F.2d 990, 991 n.2 (2d Cir. 1951); *Restatement (Second) of Contracts*, §§ 21

¹³ *Decision* at 3.

and 71(c); Corbin, *Corbin on Contracts* §2.13 (Joseph M. Perillo ed., rev. ed. 1993). As succinctly summarized by one court:

Although it is not necessary to the formation of a contract that the parties consciously intend to affect their legal relations, particularly when their actions are such as usually would create a contractual obligation, when the parties have expressed the intention *not* to affect their legal relations, a contract will not have been formed.

The Catholic University of America v. Bragunier Masonry Contractors, Inc., 775 A.2d 458, 472 (Md. Ct. Spec. App. 2001) (emphasis in original).

In this case, there is indisputable documentation not only of KCPL and UP's lack of an intent to contract, but of their common and specific intent *not* to conclude a binding agreement.

Counsel's Exhibit No. 1 to this Brief is a copy of the transmittal letter that KCPL sent to UP on October 12, 2005, in tandem with the executed Circular 111 Volume Commitment Certificate for post-2005 PRB coal shipments to Montrose. This is the letter referenced in Paragraph 17 of KCPL's Complaint, and on page 3 of the *Decision*.

KCPL's specific intent not to enter into a contract by virtue of the delivery of the Certificate hardly could be more directly stated:

The Circular 111 rates as published are not the product of any agreement between KCPL and UP. . . .

KCPL's execution of the Certificate is based on the specific understanding that the Circular 111 Option 2 rates and related service terms are common carrier rates and practices, and shall not be considered as reflecting any intent

to enter into a rail transportation contract with UP that incorporates those rates and terms.

Counsel's Exhibit No. 1, p. 1.

KCPL's Complaint echoed this position:

KCPL made clear . . . that the Circular 111 rates were not the product of any agreement between KCPL and UP; . . . that KCPL was electing the Option 2 rates as the only alternative to the even higher Option 1 rate; and that KCPL's execution of the Certificate was specifically conditioned on the understanding that the Option 2 rates and related service terms are common carrier rates and practices, fully subject to the jurisdiction of this Board. . . .

Complaint, ¶ 17.

UP's statements on the public record are equally clear in their manifestation of the carrier's intent not to enter into a contract with KCPL for post-2005 PRB coal transportation service to Montrose. In its Answer in this proceeding, UP:

- admitted that Circular 111 rates are established as common carrier rates (¶11);
- admitted that it represented that Option 2 rates are common carrier rates, and that execution of a Volume Certificate "does not create a contract under 49 U.S.C. § 10709 " (¶ 12);
- admitted that Item 4140 of Circular 111 established common carrier rates for coal service to Montrose (¶13);
- admitted that it declined KCPL's invitation to enter into contract negotiations over post-2005 coal service to Montrose and instead proposed to transport coal in common carrier service under Circular 111 (¶16); and
- did not dispute the statements made by KCPL in its October 12, 2005, transmittal letter, other than to aver

that it does not possess market dominance over coal shipments to Montrose, and that the Circular 111 rates and terms under challenge in this proceeding are reasonable (§17, 23-26).

UP's written statements in this proceeding also are entirely consistent with its characterization of Circular 111 rates (both the Option 1 and Option 2 versions) as common carrier rates in formal pleadings in other legal forums,¹⁴ and with statements in public corporate documents that extol Circular 111 pricing as a distinct alternative to commercial contracts.¹⁵

In the *Decision*, the Board acknowledges that “[b]oth KCPL and UP characterize Option 2 of the Circular as establishing common carrier rates, rather than contract rates.” *Id.* at 4. That is both correct and legally dispositive. The Board’s observations concerning the contents of Circular 111 notwithstanding, the undisputed fact that KCPL and UP each have manifested an intent not to enter into a binding agreement necessarily compels the conclusion that no contract exists. *Kansas Power & Light, supra*; *Kind, supra*; *Corbin, supra* (“It is not necessary that the parties shall consciously advert to legal relations in order to make an enforceable contract, but it is important whether they express an intention to exclude legal relations.”).

¹⁴ See Civ. Action No. 3:05 CV-899-N, *Western Coal Traffic League v. BNSF Railway Co. and Union Pacific Railroad Co.* (N.D. Tex.), Union Pacific Railroad Company’s Motion to Dismiss, June 10, 2005 at 14-15; *id.*, Union Pacific Railroad Company’s Reply Brief In Support of Its Motion to Dismiss, August 15, 2005, at 8-10.

¹⁵ Union Pacific Railroad Company 2004 Annual Report, Letter to Shareholders at 1.

The Board accurately recites the principle that parties cannot confer jurisdiction by agreement on an agency where it does not otherwise exist. *Decision* at 4.¹⁶ However, that principle has no application here. KCPL and UP have not taken a transaction or dispute which admittedly lies outside the Board's statutory authority, and through agreement¹⁷ or non-objection sought to place it before the Board.¹⁸ Rather, by independent action each has manifested its intent not to enter into a binding contract with the other, which by *operation of law* means no contract exists. Absent a contract, the commercial framework for the interstate transportation of coal by rail is common carrier service, which the governing statute places squarely within the Board's exclusive jurisdiction. *See* 49 U.S.C. § 10501.

**B. The Relevant Documentation Does Not
Support A Finding That A Contract Exists**

While the parties' lack of intent to contract is outcome determinative, the relevant documentation likewise contradicts the notion that KCPL and UP entered into a Section 10709 contract for post-2005 PRB coal transportation service to Montrose.

¹⁶ Citing *Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459 (D.C. Cir. 2005) and *Weinberger v. Bentex Pharms., Inc.*, 412 U.S. 645 (1973).

¹⁷ In point of fact, KCPL and UP do not have a common position with respect to the Board's jurisdiction to adjudicate KCPL's Complaint. UP disputes KCPL's contention that UP possess market dominance over coal shipments to Montrose. *See* Answer, Defenses 1 and 2.

¹⁸ In *Columbia Gas*, FERC claimed jurisdiction over meter service – which by statute specifically lies *outside* its authority – because the pipeline voluntarily filed a tariff covering meter service with the agency and the opposing party allegedly did not object. 404 F.3d at 461-462.

As the Board acknowledged, on its face Circular 111 is presented as a “Unit Train Coal Common Carrier Circular,”¹⁹ not a contract, and its General Rule Item 300 specifically provides that “[i]n the event of a conflict between the terms of a [Volume Commitment] Certificate and the terms of a contract, the terms of the contract shall govern.” The clear import of these terms is that Circular 111 service is something *other* than contract service, *i.e.*, common carriage.

The Board references KCPL’s execution of the UP-dictated Volume Commitment Certificate, which contains language stating that the “Shipper . . . agrees to be bound by the applicable terms and conditions set forth in this Circular . . . ,” as implying some acceptance by KCPL of the terms established by UP in Item 4140. *Decision* at 3. However, as KCPL made clear in its transmittal letter, its execution of the Certificate was made under duress, and for the sole purpose of securing essential transportation service. *See* Counsel’s Exhibit No. 1. As the Board’s predecessor held under very similar circumstances, such a coerced “acceptance” cannot give rise to any “express or implied waiver of the right to challenge the lawfulness of the rate.” *Aggregate Volume Rate on Coal, Acco, Utah to Moapa, Nevada*, 364 I.C.C. 678, 689 (1981); *Omaha Public Power District v. Burlington Northern Railroad Co.*, 1987 WL 98577 (I.C.C. 1982) at *10 (“[I]n view of OPPD’s continuous protest to BN that the . . . rate was too high and that it did not willingly accept the rate, there is no possibility that

¹⁹ *Decision* at 2.

there was an agreement between the parties.”). *See also Nice Ball Bearing Co. v. Bearing Jobbers, Inc.*, 205 F.2d 841, 845 (7th Cir. 1953) (no contract was formed because the parties did not intend to enter into a contract, notwithstanding their writing, and expressed that intent to one another).²⁰

Finally, the history of the commercial relationship between KCPL and UP confirms that the documentation attending post-2005 UP shipments to Montrose does not evidence a Section 10709 contract. KCPL’s Complaint and UP’s Answer both recite – without disagreement – that upon expiration of an acknowledged, formal Section 10709 contract denominated as Contract No. ICC-UP-30239, UP shifted business forms and substituted the generic common carrier Circular 111 for post-contract shipments. *See* Complaint, ¶ 9, 16; Answer ¶ 9, 16. Unlike ICC-UP-30239, which was filed (and presumably remains on file) with the ICC, Circular 111 contains no references whatsoever to Section 10709 or contract service generally. *Cf. Cross Oil Refining & Marketing, Inc. v. Union Pacific Railroad Co.*, 1998 WL744366 (S.T.B.) at *2.

²⁰ As Professor Corbin observed, “. . . if one uses words of promise and at the same time clearly expresses an intention not to perform it, the promissory words have no meaning or effect.” *Corbin, supra* § 1.15 at 41.

III.
THE “CHARACTERISTICS” OF A CONTRACT
CITED BY THE BOARD ARE TYPICAL OF
COMMON CARRIER ARRANGEMENTS

In the *Decision*, the Board makes reference to several features of Circular 111 that purportedly are “characteristics of a rail transportation contract.”²¹ Presumably, the presence of these terms influenced the Board’s action here, albeit nine (9) months after the Complaint (which included a copy of the Circular) was filed. They include a minimum volume requirement with associated economic consequences should KCPL fail to meet it; a UP service commitment if KCPL supplies railcars for the movement; a “force majeure” provision; and a rate schedule for Option 2 that establishes specific rates for a three-year period. *Decision* at 3. However, *all* of these features also are typical of acknowledged common carrier arrangements, especially those applicable to unit train and trainload coal service. They cannot be considered independent indicia of a contract, especially when the parties’ own, plain written statements of intent make clear that no contract exists.

Common carrier rail service tariffs that establish rates whose application is conditioned on a coal shipper tendering a prescribed, minimum annual freight volume have been commonplace and were endorsed by the Board’s predecessor for at least 40 years. *See, e.g., Natural Gas Pipeline Co. of America v. New York Central Railroad Co.*, 323 I.C.C. 75, 76 (1969); *Coal to New York Harbor Area*, 311 I.C.C. 355, 360 (1960);

²¹ *Decision* at 4.

Coal From Kentucky, Virginia and West Virginia to Virginia, 308 I.C.C. 99, 101 (1959). See also *Unit Train Rates on Coal – Burlington Northern, Inc.*, 361 I.C.C. 655, 667 (1979). Where the specified minimum annual volume was not met, these tariffs typically required additional payments by the shipper, whether in the form of higher “fallback” rates or a fixed sum payable after-the-fact. *Natural Gas Pipeline Co.*, 323 I.C.C. at 77; *Coal to New York Harbor Area*, 311 I.C.C. at 360. While Circular 111 refers to payments due in the event of a volume shortfall as “liquidated damages,” in purpose and effect they are indistinguishable from the additional payments prescribed in the tariffs approved in these prior cases.

Likewise, there is established precedent for a railroad offering dedicated equipment and service guarantees in the context of common carriage subject to the Board’s jurisdiction, particularly where (as here) the shipper supplies the railcars. For example, in *Grain By Rent-A-Train, IFA Territory to Gulf Ports*, 339 I.C.C. 579 (1971), the ICC approved tariffs under which the railroad held out to dedicate locomotive power to shippers who supplied their own railcars, and to offer transit time guarantees backed up by a refund of prepayments if the service standard was not met. *Id.*, 359 I.C.C. at 584-586. More recently, the Board’s predecessor endorsed a common carriage program in which dedicated service at agreed-upon rates with damages payments for the railroad’s failure to perform was offered to grain shippers, as a specific alternative to rail transportation contracts. *National Grain and Feed Association v. Burlington Northern*

Railroad Co., 8 I.C.C. 2d 421 (1992), *aff'd. in relevant part, rev'd. on other grounds sub nom.*, *National Grain and Feed Association v. United States*, 5 F.3d 306 (8th Cir. 1993).²²

The inclusion of terms providing “force majeure” relief from the application of certain Circular 111 requirements also is fully consistent with common carrier service. *See, e.g., Investigation Into the Need for Defining Reasonable Dispatch*, 355 ICC 162, 172 (1977). *See also National Grain and Feed Association*, 8 I.C.C. 2d at 436 n.23. Indeed, equivalent relief is provided in UP’s current general rules circular for common carrier coal movements,²³ and force majeure provisions are included in other tariffs and common carrier pricing authorities that have been brought before the Board in maximum rate proceedings under the *Coal Rate Guidelines*.²⁴ Plainly, force majeure relief is not the exclusive province of contract service.

Finally, the fact that Circular 111 Item 4140 Option 2 establishes in advance the rates that will apply over a three-year period in no way indicates that they are intended to be contract, as opposed to common carrier rates. The statute which governs UP’s

²² Notably, in rejecting an argument that the program at issue in that case gave rise to contracts that did not comply with then-applicable filing rules, the ICC agreed that “rail carriers should be free to determine whether a particular service should be offered in tariff or contract format if the service is legally compatible under both formats.” 8 I.C.C. 2d at 436.

²³ *See* UP Circular 6603-C, Items 360 and 500, available at www.up.com/customers/ind-prod/pdf/UP6603BOOK.pdf.

²⁴ *See, e.g., Docket No. 42088, Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Co.*, Complaint, October 19, 2004 at Exhibit B; *Docket No. 42058, Arizona Electric Power Cooperative, Inc. v. BNSF Railway Co.*, Complaint, December 29, 2000 at Exhibit A.

common carrier price publication obligations says only that such rates cannot be increased unless a minimum of twenty (20) days' notice is given to the affected shipper(s). *See* 49 U.S.C. §11101(c). Nothing in the statute precludes a railroad from establishing rates with the representation that it will *refrain* from increasing them beyond specified levels over a specified time frame. Moreover, a number of universally-acknowledged common carrier coal movements to electric utilities are governed by publications which establish rates for multiple years into the future, including those currently at issue in *Western Fuels, supra* (Common Carrier Pricing Authority BNSF 90077), and those challenged before the Board and adjudicated in the *PSCo/Xcel*²⁵ (Common Carrier Pricing Authority BNSF 90043-C), *PPL Montana*²⁶ (Common Carrier Pricing Authority BNSF 90041-C) and *TMPA*²⁷ (Common Carrier Pricing Authority BNSF-90042) cases.

In sum, all of the “characteristics of a rail transportation contract” that the Board finds in Circular 111²⁸ also are well-established features of common carrier coal transportation arrangements. Whether and to what extent one or more of those terms (among many others) may be present in actual rail contracts entered into by other parties

²⁵ Docket No. 42057, *Public Service Co. of Colorado d/b/a/ Xcel Energy v. BNSF Railway Co.*, STB served June 2, 2004.

²⁶ Docket No. 42054, *PPL Montana, LLC v. BNSF Railway Co.*, STB served August 20, 2003.

²⁷ Docket No. 42056, *Texas Municipal Power Agency v. BNSF Railway Co.*, STB served March 4, 2003.

²⁸ *Decision* at 4.

has no bearing on the question whether the UP rates at issue in this case properly are subject to the Board's jurisdiction. As demonstrated *supra*, it is undisputable that they are.

CONCLUSION

Upon reconsideration in view of the points and authorities set forth herein, the Board should vacate the *Decision*, discontinue any further proceedings pursuant thereto, and promptly re-establish a procedural schedule for consideration of the merits of this case.

Respectfully submitted,

KANSAS CITY POWER & LIGHT COMPANY

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Dated: September 25, 2006

COUNSEL'S EXHIBIT NO. 1



Kansas City Power & Light®

October 12, 2005

General Director
Logistics and Demand
Union Pacific Railroad Company
Marketing and Sales Energy Group
Stop 1260
1400 Douglas Street
Omaha, NE 68179

Dear Sir or Madam:

Enclosed is a Union Pacific Circular 111 Option 2 Volume Commitment Certificate for Rate Item 4140-C (MO, Ladue, Montrose Generating Station), which has been executed on behalf of Kansas City Power & Light Company.

This Certificate is being submitted only because KCPL is without an acceptable alternative arrangement for necessary coal transportation service to the Montrose Station after December 31, 2005. The Circular 111 rates as published are not the product of any agreement between KCPL and UP. These rates were set unilaterally by UP, and KCPL does not consider them to be reasonable as applied to our unit train movement. Likewise, we do not agree that the non-economic service terms set out in Item 4140-C and the base Circular 111 itself are appropriate or equitable from the standpoint of fulfilling KCPL's legitimate transportation requirements.

KCPL's execution of the Certificate is based on the specific understanding that the Circular 111 Option 2 rates and related service terms are common carrier rates and practices, and shall not be considered as reflecting any intent to enter into a rail transportation contract with UP that incorporates those rates and terms. KCPL specifically reserves all of its legal rights with respect to common carrier rates and practices, including but not limited to the right to challenge the reasonableness of the rates, surcharges and other terms contained in Circular 111 and Item 4140-C, as well as any subsequent changes in the rules and regulations incorporated therein by reference, before the Surface Transportation Board.

Should UP take a position before any court, agency or other authority that the execution of a Circular 111 Option 2 Volume Certificate constitutes the formation of a contract, KCPL reserves the right to revoke its execution of the enclosed Certificate, and pursue all available remedies at law or in equity.

Respectfully,

Mary Britt Turner

Mary Britt Turner
Manager, Fuels

GENERAL RULE ITEM 400 (Revision: F)
Item Re-Issued: Mar. 4, 2005 Effective: Apr. 1, 2005

Circular 111 Option 2 Volume Commitment Certificate

Certificate # _____
(Assigned by UP)

Shipper Name: Kansas City Power & Light
Address: 1201 Walnut
Kansas City, MO 64106-2124
Attn: Manager, Fuels

Circular 111, Rate Item 4140-C for Rate Item Destination: MO, Ladue (Henry Cty) Montrose Station

Interchange/Connection If applicable: _____

If alternative option exists in Rate Item, Equipment Furnished by:

Railroad _____ Shipper _____ Both _____

First Date of Volume Commitment Period: January 1, 2006

(Must be the first day of a calendar quarter, not less than 90 days or more than 24 months after signed Certificate is submitted)

Last Date of Volume Commitment Period: December 31, 2008

(Must be the last day of a calendar quarter, 36 or more months after commencement date, in increments of 12 months, as determined by rate columns offered in the Rate Item)

Volume Commitment Period Good-Faith Estimate of Tonnage: 6,300,000

(If both Shipper Owned or Leased Equipment and Railroad Owned or Leased Equipment, specify volumes for each)

Volume Year 1

Volume Quarter 1: 525,000
Volume Quarter 2: 525,000
Volume Quarter 3: 525,000
Volume Quarter 4: 525,000

Volume Year 3

Volume Quarter 9: 525,000
Volume Quarter 10: 525,000
Volume Quarter 11: 525,000
Volume Quarter 12: 525,000

Volume Year 2

Volume Quarter 5: 525,000
Volume Quarter 6: 525,000
Volume Quarter 7: 525,000
Volume Quarter 8: 525,000

(Use attachment for additional
Volume Years if applicable)

By signature below, Shipper acknowledges the reciprocal benefits under Option 2 terms and conditions and agrees to be bound by the applicable terms and conditions set forth in this Circular and Rate Item associated with Destination. All of the Option 2 terms and conditions set forth in Circular 111 will be held constant for the term of this Certificate, as well as the Fuel Surcharge mechanism set forth in UP Circular 6603-Series at the time of Certificate receipt. If a change has been announced but is not yet in effect, the announced term, condition and/or rate will apply.

By Shipper: Mary Britt Turner

Title: Manager, Fuels

Date: October 12, 2005

Fax to: (402) 501-0163

Attention: General Director Logistics and Demand, Union Pacific Railroad Energy Marketing and Sales

Issued: August 18, 2005
Effective: March 31, 2004
Expiration: December 31, 2025

UP 111

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Item:
Concluded on this page

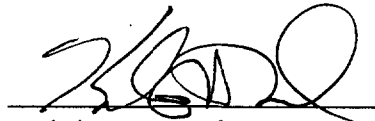
CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September 2006, I served copies of the foregoing Opening Brief of Kansas City Power & Light Company upon counsel for Defendant by hand, as follows:

Linda J. Morgan
David L. Meyer
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