

OGE ENERGY CORP
Form 8-K
August 20, 2003

FORM 8-K

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

CURRENT REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

Date of Report (Date of earliest event reported): August 18, 2003

Commission file number 1-12579

OGE ENERGY CORP.

(Exact name of registrant as specified in its charter)

Oklahoma
(State or other jurisdiction of
incorporation or organization)

73-1481638
(I.R.S. Employer
Identification No.)

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321 North Harvey
P.O. Box 321
Oklahoma City, Oklahoma 73101-0321
(Address of principal executive offices)
(Zip Code)

405-553-3000
(Registrant's telephone number, including area code)

Item 5. Other Events

OGE Energy Corp. (the Company) is the parent company of Oklahoma Gas and Electric Company (OG&E), a regulated electric utility with approximately 720,000 customers in Oklahoma and western Arkansas and Enogex Inc. and its subsidiaries (Enogex), a natural gas pipeline company with principal operations in Oklahoma and Arkansas.

On August 18, 2003, OG&E signed an asset purchase agreement to acquire NRG McClain LLC's 77 percent interest in the 520 megawatt ("MW") NRG McClain Station. The purchase price for the interest in the plant is approximately \$159.9 million, subject to adjustment for prepaid gas and property taxes. The plant includes gas-fired combined cycle combustion turbine units and is located near Newcastle, Oklahoma in McClain County, Oklahoma. The plant began operating in 2001. The owner of the remaining 23 percent in the plant is the Oklahoma Municipal Power Authority (OMPA).

Closing is subject to customary conditions including receipt of regulatory approval by the FERC. Because the current owner of the plant has filed for bankruptcy protection, the acquisition also is subject to approval by the bankruptcy court. The Company expects that as part of the bankruptcy approval process, NRG McClain LLC's interest in the plant will be subject to an auction process to be approved by the bankruptcy court. Although NRG McClain has reached an agreement with its secured lenders and the creditors' committee for its parent, NRG Energy, on the sale of the plant, these and other NRG McClain LLC's creditors can object to the asset purchase agreement and the auction under certain conditions. The Company cannot guarantee the terms of the auction process or that OG&E will be the winning bidder in the auction or that OG&E may not raise the price it proposes to pay for the power plant. Assuming the bankruptcy court approves the sale on a timely basis, the Company anticipates that the acquisition will be completed no later than December 1, 2003.

Following the acquisition, OG&E expects to operate the plant in accordance with a joint ownership and operating agreement with the OMPA that is in the process of being negotiated. Under this agreement, OG&E would operate the facility, and OG&E and the OMPA would be entitled to the net available output of the plant based on their respective ownership percentage. All fixed and variable costs would be shared in proportion to the respective ownership interests. OG&E expects to utilize its portion of the output, 400 MWs, to serve its native load. OG&E will file with the OCC a request to increase its base rates to recover its investment in, and the operating expenses of, the plant. As provided in its most recent rate settlement with the OCC, pending approval of the request to increase base rates to recover the investment in the plant, OG&E will have the right to accrue a regulatory asset, for a period not to exceed 12 months subsequent to the acquisition, consisting of the non-fuel operation and maintenance expenses, depreciation, cost of debt associated with the investment and ad valorem taxes. Upon approval by the OCC of OG&E's request, all prudently incurred costs accrued through the regulatory asset within the 12 month period will be included in OG&E's prospective cost of service.

As part of its most recent rate settlement with the OCC, OG&E undertook to acquire electric generating capacity of not less than 400 MWs. The acquisition of a 77 percent interest in

the NRG McClain Station would constitute an acquisition of such generation under the recent OCC settlement order. OG&E expects this new generation will provide savings, over a three-year period, in excess of \$75.0 million to its Oklahoma customers. These savings will be derived from: (i) the avoidance of purchase power contracts otherwise needed; (ii) replacing an above market cogeneration contract when it can be terminated at the end of August 2004; and (iii) fuel savings associated with operating efficiencies of the new plant. These savings, while providing real savings to Oklahoma customers are not expected to effect the profitability of OG&E because OG&E's rates would not need to be reduced to accomplish these savings.

As indicated above, the decision of OG&E with respect to the purchase of this new generation will be subject to a review by the OCC as a part of a general rate case for the purpose of determining the level of just and reasonable costs associated with the new generation to be included in customers' rates. The OCC's review is expected to include, but not be limited to, an analysis and review of the alternatives to purchasing the new generation, the amount paid for such new generation and the level of capacity purchases. OG&E will provide monthly reports, for a period of 36 months after the acquisition, to the OCC Staff, documenting and providing proof of savings experienced by OG&E's customers. In the event OG&E is unable to demonstrate at least \$75.0 million in savings to its customers during this 36-month period, OG&E will have an

**ASSET PURCHASE AGREEMENT
DATED AS OF AUGUST 18, 2003**

BY AND BETWEEN

OKLAHOMA GAS AND ELECTRIC COMPANY

and

NRG McCLAIN LLC

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ASSET PURCHASE AGREEMENT

THIS ASSET PURCHASE AGREEMENT (this Agreement), dated as of August 18, 2003, is made by and between NRG McClain LLC, a Delaware limited liability company (Seller), and Oklahoma Gas and Electric Company, an Oklahoma corporation (Buyer).

Preliminary Statements

A. Seller owns a 77% undivided interest as a tenant in common (with the Oklahoma Municipal Power Authority, a governmental agency and body politic and corporate of the State of Oklahoma (OMPA) owning the remaining 23% undivided interest) in an approximately 520 MW gas-fired combined cycle electric generating facility primarily located in McClain County, Oklahoma (including all equipment, electrical transformers, pipeline and electrical interconnection facilities (including water discharge facilities and water injection facilities) related thereto, the Power Plant), and is engaged in the business of generating and selling electric power therefrom (the Business).

B. Seller desires to sell substantially all of its assets, properties, rights and interests, including its interest in the Power Plant, to Buyer.

C. Buyer desires to purchase and acquire from Seller, upon the terms and subject to the conditions hereinafter set forth, substantially all assets, properties, rights and interests of Seller used or useful in connection with the operation of the Business, but specifically excluding the Retained Assets and the Retained Liabilities (each as defined below), in consideration of certain payments by Buyer and the assumption by Buyer of specified liabilities and obligations of Seller specifically disclosed in this Agreement (such purchase, the Asset Purchase).

D. Seller has filed, or the Business Day after the execution and delivery of this Agreement by the parties hereto will file, a voluntary petition initiating a case under chapter 11 of the Bankruptcy Code in the Bankruptcy Court (the Case) and intends that the transactions contemplated by this Agreement shall be implemented through the filing of a motion for the sale of such assets (other than the Retained Assets) pursuant to Sections 363 and 365 of the Bankruptcy Code in accordance with the terms of this Agreement, in which case the consummation of such sale shall be subject to the entry by the Bankruptcy Court of the Approval Order (as defined below), approving such sale.

E. Until the closing of the Asset Purchase, Seller intends to continue in the management and possession of its properties as a debtor in possession in the Case pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code and subject to the terms and conditions of this Agreement.

In consideration of the premises and the mutual covenants hereinafter contained and other good and valuable consideration had and received, Buyer and Seller, on the basis of, and in

reliance upon, the representations, warranties, covenants, obligations and agreements set forth in this Agreement, and upon the terms and subject to the conditions contained herein, hereby agree as follows:

**ARTICLE I
Certain Definitions**

As used in this Agreement, the following terms shall have the following respective meanings:

AAA has the meaning set forth in Section 13.14(a).

AAA Rules has the meaning set forth in Section 13.14(a).

Accounts Receivable means: (i) all of Seller's trade and other accounts and notes receivable; and (ii) subject to Section 5.12, all rights, claims, and benefits under all performance bonds, surety bonds, and Insurance Policies.

Acquisition Proposal means a proposal involving a third party (other than Buyer or any of its Affiliates) and Seller or any of its Affiliates relating to any merger, consolidation, business combination, sale of all or substantially all of Seller's assets, sale of equity interests or any restructuring, recapitalization, investment, or similar transaction (whether through a plan of reorganization or otherwise) involving Seller or any significant portion of the assets or Business to be purchased by Buyer pursuant to this Agreement.

Affiliate (and, with a correlative meaning, Affiliated) means, with respect to any Person, any other Person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such first Person. As used in this definition, control (including, with correlative meanings, controlled by and under common control with) mean possession, directly or indirectly, of power to direct or cause the direction of management or policies (whether through ownership of securities or partnership or other ownership interests, by contract or otherwise).

Agreement has the meaning set forth in the initial paragraph hereof.

Alternative Transaction has the meaning ascribed to it in the Sale Motion and shall include, without limitation, a Recapitalization.

Approval Order has the meaning set forth in Section 5.3(a).

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Asset Purchase has the meaning set forth in the Preliminary Statements.

Assumed Liabilities has the meaning set forth in Section 2.9.

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Bankruptcy Code means title 11 of the United States Code, 11 U.S.C. §§101-1330, as now in effect or hereafter amended.

Bankruptcy Court means the United States Bankruptcy Court for the Southern District of New York.

Bidding Procedures has the meaning given such term in Section 5.4.

Bidding Procedures Order has the meaning given such term in Section 5.3(a).

Books and Records means all of Seller's files and records (or copies of relevant portions thereof) relating to the Purchased Assets, the Assumed Liabilities, or the operations of the Business as of or prior to the Closing Date, including without limitation all documents, drawings, reports, operating data, operating safety and maintenance manuals, inspection reports, engineering design plans, blueprints, specifications and procedures, and similar items, but only insofar as the same are not Retained Books and Records or may be disclosed without (a) violating any legal constraints or obligations regarding the confidentiality thereof, provided all such materials excluded from the definition of Books and Records pursuant to this clause (a) are described on Schedule 2.2(e), (b) waiving any attorney/client, work product, or like privilege, (c) disclosing information about the activities of Seller or its Affiliates that is unrelated to the Power Plant or the Business, or (d) disclosing confidential proprietary models or other information of Seller or any of its Affiliates pertaining to energy project evaluation, energy or natural gas price curves or projections, or other economic predictive models, which excluded files and records shall be deemed Retained Books and Records.

Business has the meaning given such term in the Preliminary Statements.

Business Day means a day, other than a Saturday or a Sunday, on which commercial banks are not required or authorized to close in New York City, New York.

Business Employee has the meaning given such term in Section 3.5.

Buyer Required Regulatory Approvals means those consents, approvals, filings and notices set forth in Schedule 4.4 that the Buyer must obtain from or make with any Governmental Authority in connection with the transactions contemplated by this Agreement.

Case has the meaning given such term in the Preliminary Statements.

Cash means all cash, time deposits, certificates of deposit, marketable securities, short-term investments and other cash equivalents of Seller, but excluding any Prepaid Items.

CERCLA means the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 et seq., as amended.

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Chapter 11 Expenses means the costs incurred and expenses paid or payable by Seller or any Affiliate in connection with the administration of the Case, including, without limitation: (a) fees and expenses related to any debtor-in-possession financing, (b) obligations to pay professional and other fees and expenses in connection with the Case (including, without limitation, fees of attorneys, accountants, investment bankers, financial advisors, noticing agents, and consultants retained by Seller or any Affiliate thereof, any creditors' or equity holders' committee, or any debtor-in-possession or pre-petition lender, and any compensation for making a substantial contribution to the Case), (c) fees and expenses payable to the United States Trustee or the Clerk of the Bankruptcy Court under Section 1930 of title 28, United States Code, and (d) expenses of members of any creditors' or equity holders' committee.

Closing has the meaning set forth for such term in Section 2.6.

Closing Date has the meaning set forth for such term in Section 2.6.

Code means the Internal Revenue Code of 1986, as amended, and any successor thereto.

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Contracts means (a) all existing contracts, agreements and commitments, whether written or oral, of Seller and (b) all contracts, agreements and commitments, whether written or oral, of Seller that are entered into between the date of this Agreement and the Closing Date in compliance with Section 5.1 or, if not entered into in compliance with Section 5.1, are consented to in writing by Buyer after the date of this Agreement. Notwithstanding the foregoing or the contents of any Schedule to this Agreement, Contracts shall not include any Excluded Contracts.

Debt of any specified Person means: (a) any and all liabilities and obligations of any Person (i) for borrowed money (including the current portion thereof), (ii) under or related to any reimbursement obligation relating to a letter of credit, bankers' acceptance or note purchase facility, (iii) evidenced by a bond, note, debenture or similar instrument (including a purchase money obligation), (iv) for the payment of money relating to a lease or instrument that is required to be classified as a capitalized/finance lease obligation in accordance with GAAP, (v) for all or any part of the deferred purchase price of property or services (other than trade payables), (vi) under or related to any DIP Arrangement, and (vii) under or related to any agreement that is an interest rate swap agreement, basis swap, forward rate agreement, commodity swap, commodity option, equity or equity index swap or option, bond option, interest rate option, forward foreign exchange agreement, rate cap, collar or floor agreement, currency swap agreement, cross-currency rate swap agreement, swaption, currency option or other similar agreement (including any option to enter into any of the foregoing), and (b) any and all liabilities and obligations of others described in the preceding clause (a) that such Person has guaranteed or that is recourse to such Person or any of its assets or that is otherwise its legal liability or that is secured in whole or in part by the assets of such Person. For purposes of this Agreement, Debt shall include any and all accrued interest, success fees, prepayment premiums, make-whole premiums or penalties, and fees or expenses (including, without limitation, attorneys' fees) associated with any Debt.

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DIP Arrangement means a debtor-in-possession financing facility or cash collateral arrangement in the Case for Seller.

Effective Time has the meaning given such term in Section 2.1.

Emission Allowances means all authorizations to emit specified units of pollutants or Hazardous Substances from the Power Plant, which units are established by the Governmental Authority with jurisdiction over the Power Plant under (a) an air pollution control and emission reduction program designed to mitigate global warming or interstate or intrastate transport of air pollutants, (b) a program designed to mitigate impairment of surface waters, watersheds, or groundwater, or (c) any pollution reduction program with a similar purpose, in each case regardless of whether the Governmental Authority establishing such authorizations designates such authorizations by a name other than allowances.

Employee Benefit Plans has the meaning given such term in Section 3.14(a).

Environmental Condition means any event, circumstance or condition, whether discovered or undiscovered as of the Closing Date, related in any manner whatsoever to: (i) the past, continuing, or current presence, Release or threatened Release of material amounts of any Hazardous Substance into the environment or any building, structure, or workplace, in violation of any Environmental Law; (ii) the presence of any Hazardous Substance on or under the Owned Real Property, or any building or structure thereon, which presence either: (A) is not in material compliance with any Environmental Law; or (B) causes Buyer to be subject to any material liability or any obligation to investigate, remediate, or remove such Hazardous Substance under any Environmental Law; (iii) the past, continuing, or current Release, threatened Release, transportation, arrangement for transportation, treatment, storage, or disposal of any material amounts of any Hazardous Substance originating on or from the Owned Real Property to or at any off-site location; (iv) the placement of structures or materials into waters of the United States; (v) the presence of friable asbestos; or (vi) any material violation by Seller or any of its Affiliates of any Environmental Law existing as of the Closing Date or arising from conditions existing as of or prior to the Closing Date (including, but not limited to, the revocation of or failure to possess any required permits or licenses).

Environmental Law means all Laws relating to pollution or protection of the environment, natural resources or human health and safety, as the same may be amended or adopted, including, without limitation, laws relating to Releases or threatened Releases or otherwise relating to the manufacture, processing, distribution, use, treatment, storage, transport, disposal or handling of Hazardous Substances, including: CERCLA; the Resource Conservation and Recovery Act of 1976, 42 U.S.C. Sections 6901 et seq.; the Federal Water Pollution Control Act, 33 U.S.C. Sections 1251 et seq.; the Clean Air Act, 42 U.S.C. Sections 7401 et seq.; the Hazardous Materials Transportation Act, 49 U.S.C. Sections 1471 et seq.; the Toxic Substances Control Act, 15 U.S.C. Sections 2601 through 2629; the Oil Pollution Act of 1990, 33 U.S.C. Sections 2701 et seq.; the Emergency Planning and Community Right-to-Know Act, 42 U.S.C.

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Sections 11001 et seq.; the Safe Drinking Water Act, 42 U.S.C. Sections 300f through 300j; the Occupational Safety and Health Act, 29 U.S.C. Sections 651 et seq.; the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. Sections 1201 et seq.; any similar laws of the State of Oklahoma or of any other Governmental Authority having jurisdiction over the site at which the Power Plant is located or otherwise applicable to the Power Plant, Seller or the operator(s) thereof; and regulations implementing the foregoing.

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Environmental Reports means any and all environmental review and assessment reports, including, but not limited to, Phase I or II environmental site assessments, results of any environmental sampling and any reports discussing compliance with Environmental Laws, which Seller has ever caused to be prepared or has ever received within the last five (5) years with respect to the Power Plant and the Owned Real Property, all of which are identified on Schedule 3.13(c).

ERISA means the Employee Retirement Income Security Act of 1974, as amended.

ERISA Affiliate means (i) any corporation or other entity included with Seller in a controlled group of corporations or other entities within the meaning of Section 414(b) of the Code; (ii) any trade or business (whether or not incorporated) which is under common control with Seller within the meaning of Section 414(c) of the Code; (iii) any member of an affiliated service group of which Seller is a member within the meaning of Section 414(m) of the Code; or (iv) any other person or entity treated as an affiliate of Seller under Section 414(o) of the Code.

Excluded Contracts means any and all of the contracts, agreements, and commitments that: are set forth on Schedule 2.2(j) hereto; evidence Debt (including, without limitation, Debt under or related to the Prepetition Credit Agreement); relate to any amounts payable to current or former equityholders or Affiliates of Seller; or are removed by Buyer from Schedule 3.8 pursuant to Section 5.6(b).

Executory Contracts means all Contracts (including, but not limited to, any Contracts that are unexpired leases) entered into by or assigned to Seller that are executory (as provided under the Bankruptcy Code and applicable case law) as of the Petition Date, but not including the Excluded Contracts.

Existing Survey means that certain plat of a survey prepared by Covey Land Surveying, dated October 29, 2001 and last revised on November 29, 2001, covering all or part of the Owned Real Property.

Existing Title Policy means, that certain title policy no. 72004 1602, dated December 3, 2001, issued by Chicago Title Insurance Company.

FERC means the Federal Energy Regulatory Commission, or any successor agency thereto.

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Final Order means an order of the Bankruptcy Court or other court of competent jurisdiction as to which no stay is in effect.

GAAP means generally accepted accounting principles in effect in the United States at the time of application thereof applied on a consistent basis.

Good Utility Practices means, with respect to the Business and the Power Plant, any of the practices, methods and acts generally engaged in or approved by a significant portion of the independent electric power generation industry during the relevant time period that, in the exercise of reasonable judgment in light of the applicable manufacturer's recommendations and the facts known or that reasonably should have been known at the time the decision was made, would reasonably have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Good Utility Practice is intended to consist of practices, methods or acts generally accepted in the region where the Power Plant is located, and is not intended to be limited to optimum practices, methods or acts to the exclusion of all others.

Governmental Authority means any federal, state, county, local, municipal or foreign governmental or administrative agency or political subdivision thereof, any governmental authority, board, bureau, commission, department or instrumentality, any court or administrative tribunal, and any Native American tribal council or similar governing entity.

Hazardous Substance means (a) any petrochemical or petroleum products, radioactive materials, radon gas, asbestos in any form, urea formaldehyde foam insulation and transformers or other equipment that contain dielectric fluid that may contain polychlorinated biphenyls, (b) any chemicals, materials or substances, whether solids, liquids, semi-liquids or gas, defined as or included in the definition of hazardous substances, hazardous wastes, hazardous materials, hazardous constituents, restricted hazardous materials, extremely hazardous substances, substances, contaminants, pollutants, irritants, toxic pollutants or words of similar meaning and regulatory effect under any applicable Environmental Law, and (c) any other chemical, material or substance, exposure to which is prohibited, limited or regulated by any applicable Environmental Law.

HSR Act means the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended.

Insurance Policies has the meaning given such term in Section 3.17.

Intellectual Property has the meaning given such term in Section 3.7.

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Interconnect Point has the meaning given such term in Section 2.1(j).

Inventories means all of Seller's inventory, including fuel, chemical and gas inventories, materials, supplies, and spare parts, whether on hand or in transit.

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IRS means the Internal Revenue Service.

Key Contracts means those Contracts listed on Schedule 8.4 hereto.

Knowledge means (a) in the case of Seller, all information that is actually known by any of the following individuals: George Schaefer, Kurt Reuman, Jim Milkovich, David Lloyd, Michael Manning and John R. Whiteley, and all individuals who, after the date hereof, replace any such person in such person's employment position with Seller or an Affiliate thereof; and (b) in the case of Buyer, all information that is actually known by any of the following individuals: Peter Delaney, Jesse Langston and Leon Howell.

Law means any law (including common law), statute, regulation, ordinance, rule, order, decree, judgment, consent decree, settlement agreement or governmental requirement enacted, promulgated, entered into, agreed or imposed by any Governmental Authority.

Licenses means all governmental licenses, permits, franchises and other authorizations of any Governmental Authority set forth on Schedule 3.10.

Lien means any security interest, pledge, mortgage, lien, charge, encumbrance, conditional sale agreement, title retention contract, right of first refusal, option to purchase, proxy, voting trust or voting agreement or any similar interest.

Loss and Losses means any and all liabilities, damages, losses, deficiencies, interest, claims, actions, demands, causes of action, judgments, settlements, fines, costs and expenses (including, without limitation, reasonable attorney's fees, accountants' fees and all other expenses incurred in investigating, preparing or defending any litigation or proceeding, commenced or threatened, but excluding punitive, special, incidental and consequential damages).

Material Adverse Effect means any change or effect that is, individually or in the aggregate, materially adverse to the business, condition, assets, properties or operations of Seller, the Power Plant or the Business, taken as a whole, other than: (a) the mere filing or commencement of the Case; (b) any change or effect resulting from the announcement by Seller of its intention to sell the Purchased Assets to Buyer; (c) any change (or changes taken together) or effect (i) generally affecting the international, national or regional or local electric generating, transmission or distribution industry as a whole, (ii) resulting from changes in the international, national, regional or local wholesale or retail markets for electric power, (iii) resulting from changes in the international, national, regional or local fuel markets for the type of fuel used at the Power Plant, (iv) on the North American, national, regional or local electric transmission or distribution systems or (v) resulting from changes in the general national or regional economic or financial conditions; (d) any change in Law, or any judgments, orders or decrees that apply generally to all similarly situated Persons; or (e) any order or act of any Governmental Authority applicable to providers of generation, transmission or distribution of electricity generally.

Material Contracts has the meaning given such term in Section 3.8.

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Nonassignable Item has the meaning given such term in Section 2.12.

NRG Marks means the names and marks NRG Energy and NRG, together with all derivations and variations thereof, and the NRG Energy corporate logo, together with all derivations or variations thereof.

Objections has the meaning given such term in Section 5.2(e).

OCC means the Oklahoma Corporation Commission, or any successor agency thereto.

O&O Agreement means the Ownership and Operating Agreement for the McClain Generating Facility by and between OMPA and Seller (f/k/a Duke Energy McClain, LLC), dated as of March 1, 2001, as amended by the first amendment thereto dated as of August 31, 2001 and the second amendment thereto dated as of November 28, 2001.

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OMPA has the meaning given such term in the Preliminary Statements.

Optional Procedures has the meaning set forth in Section 13.14(c).

Ordinary Course means the ordinary and normal course of Seller's conduct of the Business consistent with past practice employed by Seller.

Owned Real Property means the undivided ownership interest in and to the real property, including any easements, rights-of-way and servitudes, identified in Schedule 3.11 hereto, together with a like undivided interest in and to all buildings, structures and improvements thereon (including the Power Plant), but only to the extent such buildings, structures and improvements constitute fixtures under applicable Law.

Permitted Liens means all (a) Liens that are set forth on Schedule 3.4 hereto, the terms and provisions of the Contracts listed on Schedule 3.8 (without giving effect to any deletion from such schedule pursuant to Section 5.6(b)) and Licenses listed on Schedule 3.10, and the other matters specifically described as Liens or potential Liens referred to in Schedules 3.12 and 3.13(b); (b) Liens for Taxes and other governmental charges and assessments which are not yet due and payable, or Taxes the validity of which is being contested in good faith by appropriate proceedings and listed on Schedule 3.12; (c) exceptions set forth in the Existing Title Policy and all matters shown on the Existing Survey which are not otherwise a Permitted Lien under another clause of this definition, together with any exceptions set forth in the Title Report that become Permitted Liens pursuant to Section 5.2(e); (d) exceptions, restrictions, easements, charges, rights-of-way and monetary and nonmonetary encumbrances which are set forth in any License; (e) mechanics, carriers, workers, repairers and other similar Liens arising or incurred in the Ordinary Course and not yet due and payable, or which are being contested in good faith by appropriate proceedings and listed in Schedule 3.12; (f) zoning, entitlement, conservation restriction and other land use and environmental regulations of any Governmental Authority;

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(g) restrictions and regulations imposed by any Governmental Authority or any local, state, regional, national or international reliability council, or any independent system operator or regional transmission organization with jurisdiction over either Seller or the Power Plant; (h) Liens in favor of the Prepetition Lenders securing obligations under the Prepetition Credit Agreement, and any instruments and agreements executed in connection therewith, but only to the extent that such Liens are released from the Purchased Assets at or prior to Closing; (i) the Seller Required Consents and Seller Required Regulatory Approvals; and (j) such other Liens or imperfections in or failures of title that would not, individually or in the aggregate, materially detract from the value or use of the Purchased Assets, taken as a whole.

Person means any individual, firm, corporation, partnership, limited liability company, joint venture, association, estate, trust, Governmental Authority or body or other entity, and shall include any successor (by merger or otherwise) of such Person.

Personal Property means all of the personal property (excluding Inventories) of Seller used or held for use by Seller, including, without limitation, all machinery, furniture, fixtures, equipment, computer hardware, vehicles, lubricants, chemicals, filters, fittings, connectors, seals, gaskets, tools, special tools, dies, construction in progress, and repair and replacement parts (except to the extent disposed of in the Ordinary Course prior to the Closing Date or otherwise at the direction of the Bankruptcy Court), and such additional items of personal property as are acquired prior to the Closing Date.

Petition Date means the date on which Seller files a voluntary petition initiating a case under chapter 11 of the Bankruptcy Code in the Bankruptcy Court.

Power Act means the Federal Power Act of 1935, as amended, and the rules and regulations promulgated thereunder.

Power Plant has the meaning given such term in the Preliminary Statements.

Prepaid Estimate has the meaning given such term in Section 2.7(a).

Prepaid Items means all of the prepaid expenses, advance payments, surety accounts, deposits and other similar assets of Seller.

Prepetition Credit Agreement means the credit agreement, dated as of November 28, 2001, among NRG McClain LLC, WestLB AG, New York Branch (formerly known as Westdeutsche Landesbank Girozentrale, New York branch), as agent and collateral agent, and the lenders party thereto, as such credit agreement has been and may be amended, supplemented, restated or otherwise modified.

Prepetition Lenders means the Persons (other than Seller and its Affiliates) from time to time that are parties to the Prepetition Credit Agreement.

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Property Tax means any ad valorem, personal property, real property or similar Tax, liability for which arises from ownership of a Purchased Asset.

Purchased Assets has the meaning set forth in Section 2.1.

Purchase Price has the meaning given such term in Section 2.3.

Recapitalization means a transaction pursuant to which the holders of the Debt of Seller obtain a majority of the equity interests of Seller or all or substantially all of the assets of Seller in exchange for such Debt.

Release means any release, spill, leak, discharge, abandonment, disposal, pumping, pouring, emitting, emptying, injecting, leaching, dumping, depositing, dispersing, allowing to escape or migrate into or through the environment (including ambient air, surface water, ground water, wetlands, land surface and subsurface strata or within any building, structure, facility or fixture) of any Hazardous Substance, including the abandonment or discarding of Hazardous Substances in barrels, drums, or other containers.

Remediation means any action of any kind to address an Environmental Condition or Release or threatened Release or the presence of Hazardous Substances on or in the air, soil or groundwater, including the following: (i) monitoring, investigation, assessment, treatment, cleanup, containment, remediation, removal, mitigation, response or restoration work; (ii) obtaining any permits, consents, approvals or authorizations of any Governmental Authority necessary to conduct any such work; (iii) preparing and implementing any plans or studies for such work; (iv) obtaining a written notice from a Governmental Authority with jurisdiction under applicable Environmental Laws that no material additional work is required by such Governmental Authority; (v) any response to, or preparation for, any inquiry, order, hearing or other proceeding by or before any Governmental Authority with respect to any such Environmental Condition, Release or threatened Release or presence of Hazardous Substances; (vi) any other activities required under Environmental Laws to address an Environmental Condition or the presence of or Release of Hazardous Substances in the air, soil or groundwater; and (vii) attorney, consultant and other expert fees associated with any activity listed above.

Representatives means, collectively, such Person's Affiliates and his, her or its and their respective directors, officers, partners, members, employees, representatives, agents, advisors (including accountants, legal counsel, environmental consultants, engineering consultants and financial advisors), parent entities and other controlling Persons.

Retained Assets has the meaning set forth in Section 2.2.

Retained Books and Records has the meaning set forth in Section 2.2(e).

Retained Liabilities has the meaning set forth in Section 2.10.

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Retained Name has the meaning set forth in Section 2.2(f).

Sale Motion has the meaning given such term in Section 5.3(a).

Seller Required Consents means those consents, approvals and authorizations set forth on Schedule 3.3(c) that Seller must obtain from, or make with, any third party (other than a Governmental Authority) in connection with the transactions contemplated by this Agreement.

Seller Required Regulatory Approvals means those consents, approvals, filings and notices set forth on Schedule 3.3(b) that Seller must obtain from, or make with, any Governmental Authority in connection with the transactions contemplated by this Agreement.

Survey has the meaning given such term in Section 5.17.

Taxes means all taxes, charges, fees, levies or like other assessments (whether U.S. federal, state, local or foreign) based upon or measured by income and any other tax, including, without limitation, gross receipts, profits, premium, sales, use, occupation, value added, ad valorem, transfer, franchise, withholding, payroll, employment, unemployment, excise, windfall profits, transfer, license, occupation or property taxes, together with any interest, penalties or additions to tax resulting from, attributable to, or incurred in connection with any such taxes or any contest or dispute thereof.

Taxing Authority means a taxing authority of the United States of America, any state thereof or the District of Columbia, any local governmental subdivision thereof or any foreign government.

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Tax Returns means returns, reports, statements, notices, forms or other documents or information required to be filed with any Taxing Authority in connection with the determination, assessment, collection or payment of any Taxes or in connection with the administration, implementation or enforcement of or compliance with any legal requirement relating to any Taxes.

Title Insurer has the meaning given such term in Section 5.2(e).

Title Policy has the meaning given such term in Section 5.16.

Title Report has the meaning given such term in Section 5.2(e).

Transaction Documents means this Agreement, together with all Exhibits and Schedules hereto, and any and all related agreements and instruments (including, without limitation, the Bidding Procedures Order and the Approval Order).

Transaction Taxes has the meaning given such term in Section 7.1.

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WARN has the meaning given such term in Section 2.10(g).

All other initially capitalized terms will have the meaning ascribed to them elsewhere in this Agreement.

ARTICLE II Sale of Assets; Closing

Section 2.1 Purchase and Sale. On the basis of the representations, warranties, covenants and agreements and subject to the satisfaction or waiver of the conditions set forth herein, at the Closing, Seller shall sell, convey and transfer to Buyer and Buyer shall purchase from Seller as of and with effect from 12:01 a.m. central standard time on the Closing Date (the Effective Time), all of Seller's right, title and interest in and to all assets owned by or leased or licensed to Seller and used or held for use by Seller whether real, personal or mixed, tangible or intangible, with such changes to such assets as may occur from the date hereof to the day immediately preceding the Closing Date consistent with the terms and conditions of this Agreement, excepting only the Retained Assets (Seller's right, title and interest in and to all such assets other than the Retained Assets being, collectively, the Purchased Assets). Without limiting the generality of the foregoing, except as set forth in Section 2.2 below or otherwise constituting Retained Assets, the Purchased Assets shall include all of Seller's right, title and interest in:

- (a) the Personal Property;
- (b) the Inventories;
- (c) the Contracts;
- (d) the intellectual property owned by or licensed to Seller;
- (e) the Books and Records (subject to the provisions of Section 5.2(c) below);
- (f) the Owned Real Property;
- (g) [intentionally omitted];
- (h) the Prepaid Items;
- (i) the Licenses;
- (j) the electrical connection equipment and ancillary support facilities located on the Power Plant side of any distribution or transmission interconnection point used in the Business (the Interconnect Point);
- (k) unexpired, transferable warranties and guarantees from third parties to the extent relating to or of Purchased Assets; and

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- (l) all Emission Allowances with respect to the Power Plant.

Section 2.2 Retained Assets. Notwithstanding anything herein to the contrary, Seller shall retain and the Purchased Assets shall not include the following assets of Seller (collectively, the Retained Assets):

- (a) Cash;
- (b) subject to Section 5.12, all performance bonds, surety bonds, and insurance policies and other similar assets with respect to the Business or Power Plant, including all rights, claims and benefits thereunder, and including Prepaid Items in respect thereof;
- (c) all Accounts Receivable;
- (d) all rights to the refund or credit of any Taxes for taxable periods or portions thereof ending on or prior to the Closing Date, but only to the extent such Taxes are Retained Liabilities or are not otherwise paid by Buyer;

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