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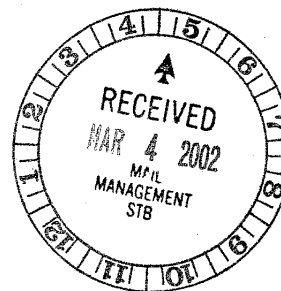
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March 4, 2002

By Hand Delivery

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

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Office of the Secretary
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Re: STB Docket No. 42069, Duke Energy Corp. v. Norfolk Southern Railway Co.

Dear Mr. Williams:

Enclosed for filing in the above-referenced proceeding are a signed original and ten copies of Defendant's First Motion to Compel Answers to Interrogatories and Production of Documents. Also enclosed is a computer disk containing a copy of this submission in WordPerfect 9.0 format.

Please acknowledge receipt of these papers for filing by date-stamping the enclosed duplicate paper copy and returning it with our messenger. Thank you for your attention to this matter.

Very truly yours,

G. Paul Moates
Vincent F. Prada

Enclosures

cc: Counsel for Complainants (w/encls.)

204896

BEFORE THE
SURFACE TRANSPORTATION BOARD

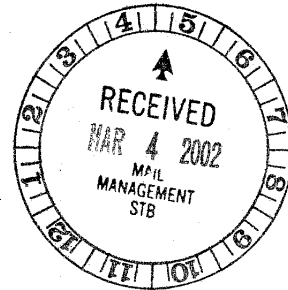
DUKE ENERGY CORPORATION,

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

Defendant.



STB Docket No. 42069

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**DEFENDANT'S FIRST MOTION TO COMPEL ANSWERS TO
INTERROGATORIES AND PRODUCTION OF DOCUMENTS**

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DATED: March 4, 2002

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BEFORE THE
SURFACE TRANSPORTATION BOARD

DUKE ENERGY CORPORATION,

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

Defendant.

STB Docket No. 42069

**DEFENDANT'S FIRST MOTION TO COMPEL ANSWERS TO
INTERROGATORIES AND PRODUCTION OF DOCUMENTS**

Pursuant to 49 C.F.R. §§ 1114.30 and 1114.31, Defendant Norfolk Southern Railway Company ("NS") hereby moves the Board for an order compelling Complainant Duke Energy Corporation ("Duke") to provide adequate responses to NS' First Set and Second Sets of Interrogatories and Requests for Production of Documents. In addition, to permit the Board to act on this motion to compel (and any others that may be filed) and the parties to complete ongoing discovery, NS requests that the Board extend the discovery period -- presently scheduled to close today -- in this proceeding until all discovery disputes have been resolved and all outstanding discovery has been completed.¹

¹ With the concurrence of Duke counsel, this motion (with respect to NS' first set of discovery requests) is being filed one business day beyond the ten-day period for motions to compel specified in 49 C.F.R. § 1114.31(a), in order to permit the parties to complete their discussions over possible resolution of their dispute. The Board previously has not rigorously enforced the time specified for motions to compel when, as here, the parties first attempted to negotiate the scope of discovery before seeking relief from the agency. *See, e.g., Arizona Public Service Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 2 S.T.B. 367, 371 n.8 (1997). Moreover, by filing its motion today, NS was able to include in the instant motion to compel certain disputes that arise out of Duke's responses (served late on Friday, March 1, 2002) to NS' second set of discovery

(continued...)

INTRODUCTION AND SUMMARY

Duke, a diversified energy producer and seller with over \$60 billion in annual revenues (approximately ten times the size of NS' revenues), is challenging in this proceeding the reasonableness of NS' rail rates for the transportation of coal between a variety of Central Appalachian coal origins and four electric generating plants located in North Carolina and served by NS. Through this complaint, Duke seeks significant Board-prescribed reductions in NS' rates. Consistent with the practice in stand-alone cost ("SAC") coal rate reasonableness proceedings, Duke served extraordinarily broad and burdensome discovery requests, which NS at great time and expense has been working (and continues to work) diligently to answer.

This motion is necessary because Duke, unlike NS, is not taking its discovery obligations seriously. Duke has either failed or flatly refused to produce important categories of requested documents and information that are relevant to the issues in this case and that are necessary to NS' defense. In addition to other issues relating to intramodal and intermodal competition, variable costs and SAC, NS' discovery requests seek substantial information bearing on the increasingly important issue of the estimated future coal traffic volumes and revenues of the stand-alone railroad ("SARR") used to test the reasonableness of NS' challenged rates.

Duke has objected to virtually all of these discovery requests on relevance and burdensomeness grounds. In some instances, Duke has produced what it weakly suggests "may be" responsive information, but these materials consist almost entirely of readily available public reports filed with the Federal Energy Regulatory Commission ("FERC") or state regulatory

(...continued)

requests and that raise issues similar to those posed by Duke's responses to NS's first set of requests.

agencies and, in the main, do not contain the most pertinent information requested by NS. After prodding by NS and in response to NS' expressed intent to file a motion to compel discovery, Duke belatedly (late in the day on Friday, March 1, 2002) produced certain limited amounts of additional responsive documents, and promised to produce other information which NS has not yet received. Even taking account of these recently produced documents, the vast preponderance of the documents produced by Duke consists of routine train status reports and reports publicly filed with federal and state regulatory agencies.

NS has sought to narrow the scope of its requests and took the initiative to schedule a meeting (held on February 27, 2002) with Duke counsel in an attempt to reach resolution of these discovery issues. Although Duke committed to providing some additional information in certain areas, the parties have not resolved their differences. As relevant here, the parties' dispute relates to the following six areas:

- Forecasts: NS requested internal Duke forecasts or projections of future coal and other fuel usage, electricity generation and other factors (including electricity demand, fuel prices, generating capacity, rail rate levels, inflation and other economic indicators) that would affect future coal consumption at the Duke coal-fired plants at issue in this proceeding. Such information is relevant to the future coal traffic volumes and revenues of the SARR. To date, Duke has produced a third-party coal forecast, aggregated system-wide generation and fuel forecasts contained in reports it files with state regulatory agencies and, late last week, short-term coal consumption forecasts for its coal-fired plants. But Duke has refused to produce any other internal forecasts of other economic measures that would affect future coal consumption (including forecasted fuel usage and generation at non-coal plants and power purchases). Duke also has refused to produce its internal forecasting model, the input data and assumptions underlying the projections it has produced, or any forecast model output not contained in the public reports.
- Environmental Regulation and Emissions Restrictions: NS requested, but Duke has refused to produce, any studies or analyses of the actual or possible impact of Duke's compliance with the Clean Air Act or other environmental regulations on the level or costs of electricity generation and on

the future volume, quality and sources of coal consumed at its coal-fired generating plants. These environmental restrictions, including sanctions the U.S. government is now seeking to impose on Duke for alleged violations of the Clean Air Act at the generating plants at issue in this case, could have a direct and dramatic impact on the volume and type of coal consumed in the future at the issue plants and, therefore, the volume of coal available to the SARR.

- Economic Dispatch Practices: Like most integrated electric utilities, Duke meets its demand for electricity from among a variety of sources of electricity supply (including generation from coal-fired and non-coal facilities and purchased power) on the basis of the relative costs of each available source. How much electricity Duke produces (and in the future will produce) at the issue coal-fired plants and how much coal will be transported to those plants are thus heavily dependent on the relative costs and availability of power produced at other Duke facilities and available on the wholesale power market. NS therefore asked Duke for information about its current dispatch practices. Duke has agreed to produce monthly "snapshots" of the dispatch priorities of its generating facilities, but has refused to produce the computer model it uses to determine dispatch order and level, or even the input data and assumptions used in that model.
- Alternative Fuels/Technological Changes: NS requested, but Duke has refused to produce, studies and analyses by Duke assessing the possible use of alternative fuels and the impact of changes in electric generating technology on future generating output and fuel consumption at its generating plants. Although these studies would directly bear on the likely future electricity production (and, hence, coal consumption) at the plants served by the SARR, Duke has refused to produce responsive information -- even with respect to the coal-fired Duke plants served by NS.
- Impact of Rail Rates on Electricity Generation: NS requested, but Duke thus far has failed to produce, studies or analyses of the impact or possible impact that changes in the level of railroad coal transportation rates would have on the volume of coal consumed at particular electric generating plants. Because SAC analysis requires an assessment of the future rate levels of the SARR as well as its coal traffic volume, and changes in rail rates (and therefore electricity generation costs) likely affect the volume of electric power produced at a particular facility, such information is directly relevant to the proper calculation of stand-alone costs.
- Impact of Challenged Rail Rates on Duke: NS requested, but Duke has failed to produce, information concerning the impact of the challenged NS rail rates on Duke, including its ability (or inability) to recover its coal transportation costs from its ratepayers. This information is relevant to Duke's assertion that the challenged NS rates are "confiscatory" and "out-

rageous,” and to rebut any claim by Duke that the challenged rates should be regulated under the “phasing” element of the Board’s Constrained Market Pricing standards for coal rates.

- Coal Supply Contracts: Because Duke’s future coal purchase obligations for particular coal sources could have an impact on the coal volumes available to the SARR, NS asked Duke to produce its current long-term coal supply contracts. Duke has indicated that, apart from confidentiality considerations, it is willing to produce these contracts but (as in the case of Duke’s requests for production of rail transportation contracts) has requested a Board order compelling production of these contracts.
- Other Confidentiality Restrictions: As with NS’ request for coal supply agreements, Duke has objected to a number of NS’ discovery requests on the basis of third-party confidentiality restrictions. Duke is willing to produce such information if the Board enters an order requiring production.

With the exception of the last two items, Duke’s objections to NS’ discovery requests in these areas amount, at bottom, to the claim that because the Board expressed concern about the burden of railroad discovery requests in deciding to exclude consideration of product and geographic competition in market dominance determinations,² shipper complainants are immune from even minimally burdensome discovery on SAC issues. The Board should squarely reject any such assertion. Even if some of the information NS is requesting might also have been relevant to the issues of product and geographic competition prior to the Board’s decision in Ex Parte 627, the requested information is unquestionably relevant to SAC issues, as Duke itself acknowledges in its discovery responses.³

² STB Ex Parte No. 627, *Market Dominance Determinations -- Product & Geographic Competition* (served Dec. 21, 1998, July 2, 1999), *pet. for review granted sub nom. Association of American Railroads v. United States*, 237 F.3d 676 (D.C. Cir. 2001), *on remand* (served April 6, 2001), *pet. for review pending sub nom. Association of American Railroads v. United States*, No. 01-1213 (D.C. Cir.).

³ NS disagrees with the Board’s decision in Ex Parte 627, which the railroads are challenging in a pending petition for judicial review. However, NS is not claiming here that the requested information is discoverable because it is relevant to product and geographic competition.

Duke's principal basis of objection -- that NS' requests are burdensome -- should be rejected out of hand. Discovery is necessarily a two-way street: when a complaining shipper with the abundant resources that Duke commands comes before this Board asking for potentially millions of dollars in Board-ordered rate relief, and in the process serves discovery requests requiring the defendant railroad to produce voluminous internal records about virtually every aspect of its business and operations, it is not asking too much to require the complainant to answer legitimate discovery requests directed to relevant and critically important issues on which the outcome of the proceeding may turn. Indeed, NS is entitled to review the requested Duke documents and information to make sure that the claims advanced in its SAC evidence in this proceeding are not inconsistent with the facts and positions reflected in its own internal business records. Requiring Duke to bear reasonable burdens in responding to appropriate discovery requests directed to SAC and other central issues is essential if there is to be even a modicum of fairness, or a level playing field, in the respective burdens of shippers and railroads in maximum rate reasonableness litigation.

Thus, as explained more fully below, Duke should be compelled to provide more complete discovery responses on the discrete subjects described below. The Board also should extend the discovery period to permit the discovery process to be completed in an orderly fashion.

PROCEDURAL BACKGROUND

The complaint in this proceeding, filed by Duke on December 19, 2001, challenges the maximum reasonableness of common carrier rates established by NS for application to the transportation of coal between a variety of Central Appalachian coal origins, on the one hand, and four of Duke's coal-fired electric generating stations located in North Carolina (Allen,

Belews Creek, Buck and Dan River). Duke filed the complaint when the parties were unsuccessful in negotiating a new rail transportation contract to replace a contract that had governed NS' service to the four plants and that expired on December 31, 2001. Duke has made it clear to NS that its complaint seeks a substantial reduction in the common carrier rates applicable to its coal shipments.

On the same day that it filed its complaint against NS, Duke filed a parallel, and largely mirror-image, complaint challenging the reasonableness of CSXT's rates for the transportation of coal from various Central Appalachian mine origins to three Duke electric generating stations (Cliffside, Lee and Riverside) served by CSXT and located in North and South Carolina. STB Docket No. 42070, *Duke Energy Corp. v. CSX Transportation, Inc.*

Duke operates another electric generating station -- Marshall -- that is served directly by both CSXT and NS. Duke has regularly exploited the direct competition between CSXT and NS for delivery of coal at Marshall as leverage in negotiating contract rates for coal shipments to the solely served Duke plants. Although Duke's complaint appears (without basis) to allege that NS has market dominance with respect to coal transportation at Marshall (Complaint, ¶¶ 4, 9), Duke is not challenging either rail carrier's common carrier rates for coal shipments to that plant, and is not seeking any rate relief with respect to such shipments.

Both Duke and NS have served discovery requests. Consistent with the recent practice of shippers in SAC cases, Duke's discovery requests are extremely broad and burdensome, seeking voluminous data and information from NS involving virtually every aspect of its rail business and operations (including detailed traffic and train operating data, confidential rail transportation contracts, internal strategic business plans and forecasts of rail traffic volumes and revenues, operating statistics, detailed roadway and equipment investment and maintenance

costs, inventories and construction costs, land sale transactions, joint facility agreements, and information and data concerning numerous other topics). Despite the enormous burden imposed by Duke's discovery requests -- which number over *550 separate requests* (including sub-parts) -- NS has worked diligently over the past two months to locate, in some cases to develop, and to produce responsive information. This effort has involved virtually every department in the railroad, dozens of in-house NS personnel, counsel and consultants, and untold amounts of resources, time and expense. NS is close to completing the production of responsive information, although Duke has yet to schedule visits to NS facilities to review several categories of responsive records that NS offered (in January) to make available for on-site inspection.

NS served its first set of interrogatories and document production requests on January 17, 2002. Those requests sought various types of information and documents from Duke concerning intramodal and intermodal competition, variable costs and SAC issues. More specifically, in light of the fact that Duke dispatches its electric generating resources (including coal-fired generating facilities served by CSXT and NS, as well as non-coal plants and purchases of electric power generated by sources outside the Duke system) on the basis of relative cost, and that factors affecting relative costs and availability of power from all sources materially affect the amount of power produced (and, therefore, coal consumed) at the specific plants at issue in this proceeding, NS requested that Duke produce information concerning power generation and operations at all Duke plants and other sources of power available to Duke. For similar reasons, NS requested forecasts and projections (and underlying data and assumptions) for electric power generation, coal consumption, rail transportation rates and other factors (such as coal prices and availability) directly affecting future power generation, burn rates and revenues to rail carriers transporting coal. Similarly, NS asked Duke to produce copies of its coal supply contracts and

rail transportation contracts, each of which potentially affects the volumes of coal that would be available for transportation by the SARR. NS also requested that Duke produce any analyses or studies regarding the effect of technological changes, environmental regulations and litigation, and potential changes in availability or cost of fuels that might affect the operating levels and coal consumption of generating plants potentially served by the SARR.

On February 14, 2002, NS served on Duke a second set of interrogatories and document requests. These supplemental requests sought additional information in discrete areas, also generally relating to information relevant to the issue of the future traffic volumes and revenues of the SARR.

Duke's responses to NS' first discovery requests, served February 19, 2002, objected on various grounds to the vast majority of NS' requests.⁴ Attempting to avoid meaningful discovery on central issues, Duke characterized a large proportion of NS' discovery requests as "relevant principally (if not solely) to the subject of indirect competition (*i.e.*, product and/or geographic competition)," which the Board has ruled in Ex Parte 627 it will no longer consider in making market dominance determinations. Duke Responses, General Objection No. 1. Apparently recognizing that NS' requests were directed to relevant issues other than product and

⁴ A copy of Duke's responses to NS' first set of discovery requests is included as Attachment A hereto. Many of Duke's responses and objections are so vague and opaque that it is difficult to determine whether Duke intends to produce any responsive documents or information and, if so, what types or categories of documents it intends to produce and when. For example, in response to several specific document requests and interrogatories, Duke simply refers to one of its general objections. That general objection, in turn, generically states that Duke will produce a few selected documents (primarily public FERC filings) that "may" (or may not) contain responsive information, and that NS should review those materials "to investigate whether and what responsive information is included therein." See Duke Responses, General Objection No. 1; Duke Response to NS Interrogatory Nos. 20-27; Response to NS Document Production Request Nos. 13, 14, 17-24, 26, 27, 32, 33 (all incorporating General Objection No. 1).

geographic competition (including, notably, SARR traffic volumes and revenues) (*id.*), Duke also asserted a blanket burden objection, alleging that the burden of producing responsive documents would outweigh their evidentiary value. *Id.* Duke's responses to NS' second discovery requests, served March 1, 2002, advance similar objections.⁵

The documents Duke has agreed to produce consist primarily of public filings, widely circulated general reports, and generalized documents submitted to public agencies describing at a high level of aggregation general forecasts for electricity demand, generation and fuel consumption. These include third-party coal forecasts, FERC Annual Report Form R-1 reports (akin to the annual reports railroads file with the Board), FERC Form 423 data (reporting monthly coal deliveries by plant), and Integrated Resource Plans, Annual Plans and/or Short-Term Action Plans filed with state regulatory agencies detailing system-wide load forecasts and plans to meet those load requirements. Duke also produced a one-page document listing forecasted rail rates for certain plants and, late last week, a collection of short-term coal consumption forecasts for its coal-fired plants (extending to 2003 only). Duke has produced no other internal forecasts (including long-term forecasts or forecasts of economic indicators that would affect the level of future coal consumption at Duke's plants). Duke has produced no internal studies or analyses of the effects of environmental regulations on generating output or coal consumption, analyses of future coal supply, or other similar internal analyses bearing on future coal usage. Duke also provided limited materials on its economic dispatch practices, but has refused to disclose its dispatch model or assumptions. Duke agreed to produce coal supply agreements and

⁵ A copy of Duke's responses to NS' second set of discovery requests is included as Attachment B.

certain other requested materials governed by third-party confidentiality restrictions if NS obtained a Board order (which Duke will not oppose) compelling their production.

Although Duke has stated that it intends to produce (and in other instances, will consider producing) limited additional documents, it has not advised NS of the specific nature of those documents or when they will be produced (other than that Duke expects such production to be completed within the next two weeks). In addition, Duke's responses to NS' second discovery requests indicate that Duke will be producing (but it has not yet produced) additional responsive documents. As of the filing of this motion, Duke's entire document production (with the exception of a substantial volume of routine one-page train status reports) comprises approximately two boxes of documents, the large majority of which consist of photocopies of public filings and other public documents.

At NS' request, the parties on February 27, 2002 met and conferred concerning the deficiencies in Duke's discovery responses, and attempted to narrow their differences. For its part, NS offered to consider narrowing certain of its requests. The burden of producing the materials NS presently seeks would not be great, particularly in comparison to the burden NS has shouldered in responding to Duke's discovery requests. At the meeting, NS advised Duke that it was not demanding all responsive documents and information in the categories that are now the subject of this motion. In important respects, however, Duke was unwilling to discuss ways to reduce the alleged burden of production, instead insisting that any production of responsive information would be too burdensome in light of the evidentiary value of such information. Duke has thus refused to produce entire categories of relevant information to which NS is entitled.

Duke's continued refusal to produce critical relevant materials bearing on central issues in this case, including the core issues of future traffic and revenues potentially available to

the SARR, impedes both NS' ability to defend this case and the Board's ability to make decisions based on the best available evidence. Because NS believes such information is vitally important to this rate case, it is forced to file this motion to compel.

ARGUMENT

The Board's rules authorize broad discovery, providing in part that a party "may obtain discovery . . . regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding." 49 C.F.R. § 1114.21(a). Decisions of the Board have repeatedly affirmed the broad scope of discovery. *See, e.g.,* STB Docket No. 42022, *FMC Corp. v. Union Pacific Railroad Co.* (served Feb. 5, 1998), at 8 ("parties may obtain discovery regarding any non-privileged matter which is relevant to the subject matter"); STB Docket No. WCC-104, *Trailer Bridge, Inc. v. Sea Star Lines* (served Oct. 27, 2000), 2000 STB LEXIS 627 at *18. Moreover, under the liberal discovery rules governing this proceeding, a party must produce all responsive non-privileged information so long as the request for that information is reasonably calculated to lead to the discovery of admissible evidence. *E.g., Trailer Bridge, Inc.*, 2000 STB LEXIS 627, at *18; *see* 49 C.F.R. § 1114.21(a)(2) ("It is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.").

This motion seeks an order compelling Duke to produce full and complete responses to NS' discovery requests in the following areas: (1) projections and forecasts of electricity demand and generation, coal consumption and rail rates; (2) analyses of costs and effects of compliance with applicable environmental laws, regulations and requirements; (3) Duke's "economic dispatch" policies and practices; (4) studies or analyses of the impact of possible use of alternative fuels or changes in technology on Duke's electricity generation; (5) the impact of

changes in rail rates for coal transportation on electricity generation and coal consumption; (6) coal supply contracts; and (7) certain other materials governed by third-party confidentiality restrictions. NS also seeks a revision of the discovery schedule to allow the Board to consider and rule on this motion and to provide adequate time for completion of discovery in accordance with the Board's ruling on the motion.

I. THE BOARD SHOULD COMPEL DUKE TO PROVIDE MORE COMPLETE RESPONSES TO NS' INTERROGATORIES AND DOCUMENT REQUESTS.

A. Projections and Forecasts

As the Board knows, an important element of any SAC calculation under the 20-year Discounted Cash Flow ("DCF") model currently employed by the agency is the estimation of the future traffic volumes and revenues of the SARR. In recent years, this element of the SAC analysis has assumed increasing importance as a disputed evidentiary issue, to the point that the issue of forecasts has a major (if not controlling) impact on the outcome of a SAC case. *See, e.g.,* STB Docket No. 42051, *Wisconsin Power & Light v. Union Pacific Railroad Co.* (served Sept. 12, 2001), at 14-28; STB Docket No. 42022, *FMC Wyoming Corp. v. Union Pacific Railroad Co.* (served May 12, 2000), at 26-37; *West Texas Utilities Co. v. Burlington Northern Railroad Co.*, 1 S.T.B. 638, 660-64 (1996), *aff'd sub nom. Burlington Northern Railroad v. STB*, 114 F.3d 206 (D.C. Cir. 1997).⁶ Indeed, in the recent *Wisconsin Power* case, the Board's resolution of the forecast issue, along with its analysis of the SARR traffic grouping issues, were virtually outcome-determinative, as the Board found the resolution of those issues made it unnecessary to

⁶ *See, e.g.,* STB Docket No. 42056, *Texas Municipal Power Agency v. Burlington Northern Santa Fe Railway Co.*, Defendants' Joint Motion for Limited Consolidation (dated July 5, 2001), at 7-16 (discussing importance of SARR traffic and revenue forecasts to SAC results, and the
(continued...)

resolve many disputed SAC construction and operating cost issues. *See* STB Docket No. 42051, *Wisconsin Power & Light v. Union Pacific Railroad Co.* (served Sept. 12, 2001), at 28-30.

Because of the paramount importance of traffic projections and forecasts to the SAC analysis, NS' discovery requests sought from Duke its forecasts and projections of demand for electric power, electricity generation, coal and other fuel consumption, rail rate levels and other economic indicators (such as inflation factors, the costs and availability of alternative sources of electricity, including purchased power) that would have a bearing on the future level of electricity generation -- and, therefore, coal consumption and coal transportation volumes -- at the Duke plants at issue in this proceeding and any other generating facilities potentially served by the SARR. For example, NS' Interrogatory No. 24 requested information concerning Duke's forecasts of various relevant factors and indicators, including generating capacity, demand for power, transmission constraints, coal burn and other fuel burn, coal consumption, costs of coal, rail transportation costs and rates, and projected rates of inflation. Interrogatory No. 25 requested information concerning the assumptions and data used to prepare those forecasts. Document Production Request No. 28 sought documents comprising or related to the forecasts identified in response to Interrogatory No. 24. Document Production Request Nos. 30-31, in turn, sought production of computer models that Duke uses or could use to develop forecasts or estimates of the various economic measures bearing on future SARR traffic volumes and revenues, including input data and assumptions and previous output from such models.

(...continued)

concerns about excessive reliance upon necessarily uncertain and speculative forecasts of economic events 20 years into the future).

Duke objected to these discovery requests on various grounds. Duke asserted that the requests were objectionable because: (1) the requested information was relevant only to the issue of product and geographic competition, which is no longer considered in market dominance determinations; (2) any requested information other than forecasts of coal tonnage volumes, coal prices and rail rates for coal shipments to the four issue Duke plants and Marshall is irrelevant; (3) the requested coal price and rail rate forecast information is confidential; and (4) producing the requested information would be burdensome. *See, e.g.*, Duke Response to Interrogatory Nos. 24-25.

In accordance with these objections, Duke produced (or offered to produce) certain limited forecast information. As of this date, the materials produced by Duke are limited to generalized reports filed with state regulatory agencies containing highly aggregated estimates of future electricity generation and fuel consumption by fuel type,⁷ one coal consumption forecast prepared by a commercial outside vendor, and one sheet containing unspecified estimates of future rail rates for certain Duke plants. Late in the day on Friday, March 4, 2002, in apparent response to NS' stated intent to file a motion to compel discovery, Duke produced short-term forecasts (extending only to the year 2003) of coal consumption for all of its coal-fired generating plants. Duke has also advised NS that it will produce (if available) inflation and rail cost forecasts, but has not yet done so.

⁷ These publicly filed reports include Duke's recent Integrated Resource Plans, Annual Plans and Short-Term Action Plan, all of which summarize the results of Duke's forecasting model in estimating future electricity demand and fuel consumption for Duke's system as a whole and for different fuel types. These reports do not contain any plant-specific fuel consumption or electricity generation forecasts, nor do they detail the assumptions and data inputs underlying the projections contained in the reports.

Despite its last-minute production of short-term coal "burn" forecasts, Duke's responses to date are seriously deficient, particularly given the extraordinary importance of the SARR forecast issue in SAC cases. Apart from the one-page list of estimated future rail rates and short-term coal consumption forecasts, Duke has produced *no* internal (as distinct from publicly filed reports) projections or forecasts. As the Board knows, such internal forecasts -- prepared for business and planning purposes -- have been relied on in recent cases to estimate SARR traffic revenues and volumes, often in preference to forecasts prepared for litigation or regulatory purposes. *See, e.g., Wisconsin Power* at 14-28. In addition, Duke has produced no plant-specific fuel consumption forecasts for any of its non-coal plants, nor any long-term fuel consumption or generation forecasts for any of its generating facilities. Duke has refused to produce its forecast model (which is used to generate the aggregated forecasts described in the state-agency reports that Duke produced), or even to produce information concerning the data inputs and assumptions that are used in the forecast model and that underlie the aggregated forecast results reported to the state agencies. And, apart from the publicly filed reports, Duke has flatly refused to produce forecast information for any economic measure other than coal consumption and transportation volumes, rail rates and coal prices at Duke's coal-fired generating plants, even though it does not (and cannot) deny that those economic factors would affect future coal consumption for electricity generation purposes.

Duke's objections to the production of this requested information are groundless. Because NS is seeking the requested forecast information for purposes of assessing the future traffic volumes and revenues of the SARR, Duke's objection based on the Board's exclusion of consideration of product and geographic competition is patently without merit. The Board's decision in *Ex Parte 627* furnishes Duke no immunity from appropriate discovery on issues rele-

vant to SAC issues, whether or not the requested information might have been pertinent to product and geographic competition issues. Duke's separate confidentiality objection with respect to rail rate and coal price forecast information is similarly without merit in view of the Protective Order that has been entered in this case to safeguard confidential commercial data.⁸

Duke's more fundamental objection -- that forecasts of any economic measure other than coal consumption, coal transportation volumes, coal price and rail rate information for the four issue Duke generating plants and for Marshall -- is also unsound. Duke's position ignores the fact that the future volume of coal transported to and consumed at the five coal-fired plants served by NS (and presumably to be served by the SARR) is affected by a large number of other economic factors the forecasts of which would be directly relevant to the validity of any coal volume forecast prepared by Duke in the regular course of business or tendered in evidence in this proceeding.⁹ For example, future coal consumption at a generating plant such as Belews Creek will depend on the level of electricity demand in Duke's service territory, which in turn is dependent on various macroeconomic factors such as economic growth and energy conservation plans. Forecasts of electricity demand and generation in the region served by Duke would also have relevance in assessing any projections of future coal consumption at the issue plants and

⁸ Duke has advised NS counsel that, as with NS' requests for production of coal supply contracts (see Section I-G below), Duke would not oppose production of the requested rail rate and coal price forecast information (not otherwise covered by another objection) if the Board were to enter an order compelling such discovery, and Duke would not oppose NS' motion to compel production of such materials.

⁹ Duke's willingness to produce short-term internal coal consumption forecasts for coal plants other than those served by NS is an acknowledgement of these interdependent factors affecting coal consumption levels at particular facilities, even though Duke in producing such materials has continued to deny their relevance.

Marshall. NS is entitled to review any forecasts Duke possesses on these economic measures to assess the validity of its SARR traffic and revenue projections.

Similarly, the level of future coal consumption and transportation volumes at the five NS-served coal plants will be deeply affected by the future availability and relative cost of *alternative* sources of electric power available or potentially available to Duke. Like most large electric utility systems, Duke determines the amount of electricity to be generated at a particular generating facility following the practice of "economic dispatch" -- under which it utilizes available electric power sources (including coal-fired generation, non-coal generation and purchased power) in order of their relative cost.¹⁰ Thus, the amount of electricity consumed at a plant like Belews Creek (and, as a result, the volume of coal delivered to and consumed at that plant) is affected by the availability and relative costs of electric power produced at other Duke generating facilities not served by NS and of electric power available for purchase on the wholesale market. Forecasts of the future availability, capacity and cost of such sources of alternative power are, for this reason, highly relevant to the assessment of the future level of coal tonnages delivered to and consumed at the NS-served coal plants potentially included in the SARR in this case.

For example, if Duke's internal forecasts projected a significant increase in gas-fired or nuclear generating capacity within the Duke system in future years, or a significant reduction in the costs of producing gas-fired or nuclear power (including fuel prices), Duke's "economic dispatch" practice would indicate that these projected changes would affect (indeed,

¹⁰ See Duke Response to Interrogatory No. 19 ("Duke states that, in determining the relative order in which power will be generated or dispatched, it generally follows an economic dispatch policy in which generating resources are ranked in terms of operating costs.").

all other things being equal, would reduce) the likely level of electricity generation and coal consumption at the five NS-served coal plants. Similarly, projections of decreases in purchased power prices or increases in the availability of purchased power could dramatically affect the future volumes of coal burned at the NS plants, or cast doubt on the validity of any forecasts produced by Duke internally or for this litigation predicting significant coal traffic volume growth for the SARR. Forecast information suggesting that coal prices or rail rates for Duke coal plants not served by NS would decline could similarly cast doubt on any projection of robust traffic growth for the SARR in this case.

In sum, forecast information of relevant economic factors measuring or affecting future electricity generation output at all of Duke's generating facilities is unquestionably relevant to the estimate of the future coal traffic volumes of the SARR. If Duke has prepared or possesses forecasts on these economic factors (which are identified in Interrogatory No. 24), they are relevant and should be produced. In particular, the system-wide forecasts of electricity generation and fuel consumption summarized in the state-agency reports produced by Duke necessarily must include certain assumptions or forecasts of all of the various factors that affect the sources and volume of electricity produced by Duke. Those assumptions and data inputs, as well as any separate forecasts, are directly relevant to the SARR's future traffic volumes and revenues.

Duke's final objection to the production of the requested forecast information -- that producing anything other than the aggregated public-agency reports would be unduly burdensome -- also cannot be sustained. In discussions with Duke counsel, NS has made clear that it is willing to narrow the scope of its requests if the volume of responsive material is unduly burdensome to produce, and has further indicated that NS is not interested in every document

tangentially related to the forecasting process, but only seeks information reflecting disaggregated forecasts and sufficient supporting information necessary to assess the forecasts' assumptions and conclusions. NS has also advised Duke that, if its computer forecasting model is governed by third-party licensing restrictions or for some reason is otherwise burdensome to produce, NS would accept a print-out or listing of the material data inputs and assumptions that produce the forecast results, as well as copies of data output from the model. Because Duke has not only refused to produce the requested forecast data, but has failed to identify what responsive information exists and what the burden would be in producing it, Duke's claim of burden cannot be given credence.

Accordingly, the Board should compel Duke to provide fuller responses to NS' discovery requests (Interrogatory Nos. 24-25 and Document Production Request Nos. 28, 30-31) seeking forecast information. In particular, NS asks that Duke be required to produce, for *all* of the economic measures and indicators identified in Interrogatory No. 24, (1) *internal* forecasts and projections, (2) forecasts and projections for all Duke generating plants (including non-coal plants), (3) Duke's forecasting model (or, at a minimum, a description of the input data and assumptions that affect forecast results under the model), and (4) any output or forecast results produced by Duke's forecasting model.

B. Impacts of Environmental Regulations and Emissions Restrictions on Future Coal Consumption and Electricity Generation

Duke's coal-fired electric generating plants (including the five NS-served coal plants) are subject to significant and extensive environmental laws and regulations, imposed by both federal and state governments. Most prominent among these provisions is the federal Clean Air Act and implementing regulations. The 1990 amendments to the Clean Air Act created sig-

nificant additional limitations on power plant emissions of sulfur dioxide, nitrogen oxide, ozone and other products of combustion, to be phased in over a period of many years (the second phase of which commenced in 2000 and is scheduled to be fully phased-in by 2009).¹¹ Other Clean Air Act programs, including the "Prevention of Significant Deterioration" and "New Source Review" programs, impose significant compliance costs and limitations on coal-fired power plants.¹² State laws impose additional regulatory costs and limitations on coal-fired power plants. All of these requirements, as well as others pending in proposed regulations and legislation, impose substantial -- and, for the most part, increasingly restrictive -- emissions limitations and compliance costs on coal burning power plants.¹³

¹¹ See Clean Air Act, Chapter IV, 42 U.S.C. §§ 7651-7651o; *id.*, § 7651d (Phase II sulfur dioxide limits).

¹² See 42 U.S.C. §§ 7470-79 (PSD); *id.*, §§ 7501-7503 (non-attainment NSR).

¹³ For example, the "acid rain" provisions of the Clean Air Act Amendments impose increased limitations on coal plant emissions (phased in over 15 years). Duke meets the sulfur dioxide emissions standards today only through purchase of emissions allowances. The Environmental Protection Agency ("EPA") has recently initiated a process requiring states to re-write their implementation plans for compliance with National Ambient Air Quality Standards ("NAAQS") (see 42 U.S.C. §§ 7409-7410), which will impose increased limitations on nitrogen oxide emissions at coal plants. Those new, more stringent limitations are due to go into effect in 2004. See 42 U.S.C. §§ 7410(k) ("SIP call" provision); 63 Fed. Reg. 57356 (Oct. 27, 1998) (NO_x SIP Call), *aff'd sub nom. Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000); 42 U.S.C. § 7426. EPA is also proposing new standards for fine particulate emissions which, when likely implemented in the next decade, will further reduce permissible emissions. EPA is considering, but has not yet formally proposed, emissions restrictions for mercury and carbon dioxide. Meanwhile, North Carolina (the location of the NS-served Duke plants) last year considered legislation that would have imposed additional emissions restrictions on Duke's coal-fired plants and required the installation of "scrubbers" and other pollution abatement equipment to achieve compliance -- facilities which, if installed, would affect the cost of burning coal as well as the quality (and, therefore, potential sources) of coal burned at Duke's plants. See Attachment C (summary of proposed North Carolina legislation).

Because these requirements and attendant costs are significant, they may (indeed, are likely to) affect Duke's decisions concerning the amount of electric power it produces at its coal-fired plants, including the four issue plants and Marshall. The impacts of these regulations likely will also affect Duke's decision whether to convert these plants to alternative fuels (*e.g.*, natural gas), utilize different types of coal from different sources than those used currently, or shift power production from the NS-served coal plants to generating facilities that use other fuels or other means of generation. They would also affect Duke's consideration of the possible closure or retirement of one or more of the NS-served coal plants or units at those plants.¹⁴

In addition, Duke's coal-fired power plants are the subject of a large and pending Clean Air Act enforcement suit brought by the United States and others.¹⁵ In that litigation, the United States seeks to impose severe restrictions on Duke's coal-fired plants, as well as fines and penalties for numerous alleged violations of the Clean Air Act. If the United States were to prevail in that action, Duke would be required either to engage in enormously expensive retrofitting of most coal-fired generating units in its system (during this retrofitting process the unit at issue could not be operated), or shut down those units permanently. Either compliance option would have dramatic effects on coal consumption by Duke generating plants. Thus, just as environmental regulations may significantly affect Duke's coal-fired power plant operations, the pend-

¹⁴ See, *e.g.*, Energy Information Administration, U.S. Department of Energy, THE EFFECTS OF TITLE IV OF THE CLEAN AIR ACT AMENDMENTS OF 1990 ON ELECTRIC UTILITIES: AN UPDATE (March 1997) (available at <http://www.eia.doe.gov/cneaf/electricity/clean_air_upd97>) (discussing emissions restrictions and electric utility compliance strategies).

¹⁵ See EPA Press Release (Dec. 22, 2000) (announcing lawsuit) (included as Attachment D hereto); Office of Legal Policy, U.S. Department of Justice, NEW SOURCE REVIEW: AN ANALYSIS OF THE CONSISTENCY OF ENFORCEMENT ACTIONS WITH THE CLEAN AIR ACT AND IMPLEMENTING REGULATIONS (Jan. 2002) (available at <<http://www.usdoj.gov/olp>>) (discussing current status of lawsuit and identifying Duke plants at issue).

ing environmental litigation could substantially affect the level of electricity generation (and resulting coal consumption) at those plants, as well as the sources (and types) of coal that will be burned in the future and the relative costs of electricity generation at these plants as compared with alternative sources of electric power available to Duke.

Because of the significant potential effects of environmental laws, regulations, and enforcement litigation on the future volume of coal consumed by (and hence transported to) the NS-served Duke coal plants potentially included in the SARR, NS propounded several discovery requests seeking information concerning Duke's assessment of the potential impacts of environmental regulation and emissions restrictions on the level and costs of both electricity generation and coal consumption at the NS-served plants. Interrogatory No. 27 asked Duke to identify state or federal regulatory proceedings to which Duke has been a party and in which Duke's compliance with the amended Clean Air Act or other environmental regulations was at issue. Document Production Request Nos. 33 and 38(b) requested Duke to produce studies or analyses concerning the impact or potential impact of Duke's compliance with the amended Clean Air Act, or other existing or proposed environmental regulations or emissions restrictions, on the volume and type of coal consumed at Duke's plants, the relative costs of producing electric power at such plants and the level of electricity generation at such plants. NS' second discovery requests sought additional documents relating to specific related subjects, including studies or analyses relating to the U.S. government Clean Air Act enforcement action, the proposed North Carolina emissions legislation and other actual or proposed emissions regulations. NS Document Production Request Nos. 65, 66, 70.¹⁶

¹⁶ NS' second requests also asked Duke to produce studies or analyses of the possible impacts of environmental (as well as mining and trucking) regulation on coal availability and reserves in the
(continued...)

Duke has unequivocally refused to produce documents and information responsive to these requests, asserting objections based on relevance and burden. *See, e.g.*, Duke Response to NS Interrogatory No. 27; Duke Response to NS Document Production Request Nos. 33, 38(b), 65, 66, 70, 76(d).¹⁷ Contrary to Duke's assertion, studies or analyses of the impacts or potential impacts of existing or proposed emissions restrictions on the volume of coal delivered to and consumed at the NS-served coal plants potentially included in the SARR is directly and centrally related to the issue of the future traffic volumes and revenues of the SARR. As indicated, emissions restrictions may alter significantly the volume of electricity produced at the Duke coal plants and the volume, quality and sources of the coal that is consumed for electricity generation at those plants in the future. At the very least, internal Duke studies or analyses that suggest or predict that environmental restrictions or the pending U.S. enforcement action may require curtailment of electricity generation at Duke's coal-fired plants, increase the relative costs of such coal-fired generation or cause Duke to switch to lower-sulfur coal sources (such as Powder River Basin coal) or to entirely different fuels (such as natural gas), would be powerful

(...continued)

Central Appalachian mine region from which Duke obtains coal for use at the NS-served plants at issue in this case. NS Document Production Request No. 76(d).

¹⁷ In an apparent attempt to deflect attention from its refusal to provide responsive information and documents, Duke states in its responses to these requests that responsive information "may" be found in certain publicly filed reports referred to in General Objection No. 1. *See, e.g.*, Duke Response to NS Document Production Request Nos. 33, 38(b). These reports do not address the issues and the information NS is seeking except very generally and indirectly. Not surprisingly, these publicly filed reports do not even consider, must less analyze with specificity, the potentially dramatic effects of changes in environmental and emissions regulations, or the outcome of the pending U.S. enforcement action, on the level and costs of Duke's coal-fired electricity generation and coal consumption. It is inconceivable, however, that Duke has not studied these issues and assessed their potential impact on Duke's electricity generation business, and Duke has not denied that such responsive documents exist.

relevant evidence rebutting any claim by Duke that the SARR's traffic volumes and revenues will increase significantly over the anticipated DCF period used for SAC analysis in this case. Because the requested information is relevant to future SARR traffic volumes and revenues, Duke's objection that it is relevant to the issues of product and geographic competition is misguided.

Duke's burden objection is also unpersuasive, and furnishes no proper basis for Duke to resist all discovery on this important issue. NS has assured Duke counsel that NS is seeking production only of formal studies or analyses, and not every piece of correspondence or internal communications, relating to emissions restrictions and their impacts on coal-fired electricity generation. Because Duke has not identified *any* responsive studies, analyses or information that it would be willing to produce, and instead has adamantly stated that it will not produce any such responsive documents, NS cannot even assess whether its requests are unduly burdensome or fashion proposals to alleviate that burden. In light of Duke's intransigent refusal to produce any responsive documents assessing the impact of environmental regulations on current and future electricity generation at its coal-fired plants, and the unquestionable relevance of such information to the issue of the future SARR traffic volumes and revenues, the Board should order Duke to respond fully to NS' Interrogatory No. 27 and Document Production Request Nos. 33, 38(b), 65, 66, 70 and 76(d).

C. Economic Dispatch Practices

Like most integrated electric utilities, Duke meets its demand for electricity from a variety of sources of electricity supply (including generation from coal-fired and non-coal facilities and purchased power) on the basis of the relative costs of each available source. *See* Duke Response to NS Interrogatory No. 19 (describing in general terms how Duke applies eco-

conomic dispatch practices). How much electricity Duke produces (and in the future will produce) at the issue coal-fired plants (and Marshall) and how much coal will be delivered to and consumed at those plants are thus heavily dependent on the relative costs and availability of power produced at other Duke facilities and available on the wholesale power market.

Moreover, information about how Duke *today* applies economic dispatch practices to determine the order in which it draws upon particular generation sources to meet electricity load, and how it calculates the relative dispatch order and position of its coal-fired plants in that order, is of considerable relevance to the likely *future* dispatch order and, as a result, to the likely future level of electricity generation and coal consumption at the coal plants likely to be served by the proposed SARR. Duke's economic dispatch practices -- including the effects of differing fuel and operating costs, heat rates, and generation capacity at its coal and non-coal generating facilities -- have a direct and strong bearing on the future traffic volumes and revenues of the SARR in this case.

NS therefore requested in discovery several types of documents and information relating to Duke's economic dispatch practices, including formal policies or procedures Duke has promulgated or instructions Duke has given to its dispatchers regarding dispatch priorities and the selection of internal generation as opposed to off-system power purchases ("make or buy" decisions). NS Interrogatory Nos. 19, 20; NS Document Production Request Nos. 17, 20, 22. In addition, NS requested information concerning the historical dispatch order and dispatch price of Duke's existing generating facilities (NS Interrogatory Nos. 11(o)-(p); NS Document Production Request Nos. 18, 21), and studies or analyses of Duke's decision whether to generate or purchase electric power to meet its load requirements (NS Document Production Request

No. 23). NS also requested production of computer models or software used by Duke to determine dispatch order. NS Document Production Request Nos. 30-31.

Duke objected on various general grounds (including relevance and burden) to all of these discovery requests, even as it acknowledged in response to Interrogatory No. 19 that it does follow an economic dispatch practice in deciding whether and when to generate electric power at the NS-served coal plants and how much to generate (decisions that have an obvious impact on coal deliveries and consumption). In addition to its response acknowledging the use of economic dispatch policies, Duke initially produced a single sheet of paper reflecting a “snapshot” of the dispatch priority of its generating units for the month of January 2002. *See, e.g.*, Duke Response to NS Interrogatory Nos. 11 & 19. Late last week, Duke also grudgingly agreed to produce monthly dispatch “snapshots” for the period since January 1, 1999 (although NS has not yet received these documents). But Duke has thus far failed to produce any written policies or guidelines on dispatch practices or make-or-buy decisions. And it has refused to produce any information concerning its dispatch model, including data inputs and assumptions or output runs. In short, Duke is willing to provide a few “snapshots” of its dispatch order, but will not produce any information disclosing the methodology or assumptions on which those “snapshots” were based.

In response to Duke’s objections, NS has decided not to pursue all of the dispatch-related information that it sought in its written discovery requests. In order to narrow the parties’ dispute and reduce any burden to Duke, NS seeks an order compelling Duke to produce Duke’s dispatch computer model or, at a minimum, an identification of the data inputs and as-

assumptions used in the model.¹⁸ In view of the relevance of economic dispatch practices to the future electricity generation output and coal consumption of the Duke coal plants likely to be included in the SARR, and the minimal burden involved, the Board should require Duke to produce this information.

D. Impacts of Alternative Fuels and Technological Advances on Future Coal Consumption and Electricity Generation

Related to its requests for documents and information concerning the potential impacts of emissions regulations on future coal consumption and electricity generation at Duke generating plants, NS' Document Production Request No. 24 asked Duke to produce studies or analyses relating to the possible future use of alternative (non-coal) fuels to generate electricity at any Duke facility, the conversion of existing facilities to permit the use of alternative fuels, and the impacts of both on future coal consumption and electricity generation. The request further sought production of studies or analyses of the impact of technological changes in electricity generation on future coal consumption and electricity generation.

The information requested by NS is highly relevant to the issue of the likely future coal consumption and electricity generation levels of the issue Duke coal plants and Marshall and, thus, to the future traffic volumes and revenues of the SARR. Despite this, Duke has unqualifiedly refused to produce *any* responsive information, apparently on grounds of relevance

¹⁸ Duke has advised NS that the computer model it uses for determining the dispatch order of its generating facilities is governed by a software license that restricts disclosure of the model to third parties. If so, Duke should produce the inputs (data and assumptions) that Duke employs in applying the dispatch model, and any data runs or output from the model – information that would not require Duke to produce licensed software.

and burden.¹⁹ Duke Response to NS Document Production Request No. 24. Indeed, during the parties' recent discovery conference, Duke counsel stated unequivocally that Duke would not produce responsive information even with respect to the issue coal-fired plants and Marshall, which could be included in the SARR.²⁰ Duke's position cannot be sustained. If Duke has conducted studies or analyses regarding the feasibility of converting issue coal-fired plants to the use of alternative fuels, or has studied possible technological changes or facilities modifications that would affect the level of electricity generation and coal consumption, at these plants, such information would be directly relevant to -- and highly probative of -- the issue of the future coal traffic volumes and revenues of the SARR designed to provide coal transportation service to these very plants.

Duke has failed to explain, much less substantiate, its claim of undue burden in responding to this request. NS stands ready to discuss with Duke ways to narrow the request if, indeed, the volume of responsive documents is so large as to impose an unreasonable burden of production. But Duke should not be allowed to use a vague burden objection to prevent any discovery into the highly relevant subject matter of NS' document request. Duke should be ordered to produce documents responsive to this NS Document Production Request No. 24.

¹⁹ Duke's response refers to FERC and state-agency reports referenced in General Objection No. 1, but those reports do not contain anything more than generalized discussions having at best only peripheral connection to the subject matter of NS' request.

²⁰ In a letter received March 1, 2002, Duke counsel made statements concerning Duke's intentions regarding possible conversion of Duke's coal-fired plants to use alternative fuels. However, Duke has produced no responsive studies, analyses or documents relating to this issue, nor has it stated that it possesses no responsive documents.

E. Impacts of Rail Rate Levels on Future Coal Consumption and Electricity Generation

NS' Document Production Request Nos. 29(b) and 29(c) asked Duke to produce any studies and analyses that considered the impact or potential impact that changes in the level of the rail rates charged by NS for the transportation of coal to the issue Duke plants and Marshall could have on the volume of electric power produced at those plants and the relative position of those plants in the dispatch order of Duke generating facilities. Such information would be relevant to the estimated future traffic volumes and revenues of the SARR. In particular, NS' request sought information concerning the relationship between rail rate levels for coal transportation service (which affects the costs of electric power produced at a given facility) and the electricity output of the generating plant. For example, if Duke possessed internal studies suggesting that increases in rail rate levels would adversely affect the volume of coal consumption and electricity generation at the Duke facilities served by the SARR, that information would have direct relevance to (and rebut) any claim in this proceeding that the SARR could simultaneously enjoy increasing rail rate levels and consistently increasing utility coal traffic volumes.

Duke has refused to produce any documents or information responsive to this request. The requested information is relevant, and any burdensomeness objection should be obviated by NS' willingness to confine its request to genuine studies and analyses, as opposed to informal and unorganized emails or other internal communications of an informal nature. The Board should compel Duke to respond to NS Document Production Request Nos. 29(b) and 29(c).

F. Impacts of Challenged Rates on Duke

Duke has alleged in its complaint in this case that the challenged rates of NS are “exorbitant,” “punitive,” “outrageous” and “confiscatory.” Complaint ¶ 12. In order to respond to any evidence Duke may tender in support of these wild (and unfounded) accusations, including any possible contention by Duke that NS’ rates should be limited by the “phasing” constraint of the Board’s Constrained Market Pricing coal maximum rate reasonableness standards, NS asked Duke several discovery requests designed to elicit facts about the impact of NS’ challenged rate levels on Duke and its ratepayers. Specifically, NS Interrogatory Nos. 36 and 37 and NS Document Production Request No. 59 requested Duke to supply information regarding its ability or inability to recover from its electricity ratepayers (wholesale or retail) any portion of the costs of transporting coal by rail to any Duke plant. Duke objected to these requests on grounds of relevance.

Duke’s unspecified relevance objection is without merit. As noted, Duke’s ability (or inability) to recover the costs of rail transportation resulting from the challenged NS rates in this proceeding would be relevant to any claim by Duke under the “phasing” constraint, which potentially applies in cases where otherwise reasonable rate increases could have an unduly harmful impact on a rail shipper unless phased in gradually. Duke makes no claim that responding to these requests is burdensome. Accordingly, the Board should order Duke to respond.

G. Coal Supply Contract Information

Contractual commitments that Duke may have to purchase specified volumes of coal from particular coal sources would have a direct and significant effect on the coal traffic volumes available for movement by the proposed SARR in this case, both currently and during

the future period covered by the Board's DCF analysis. Such agreements would be relevant to the issue of the SARR's traffic volumes not only with respect to agreements covering coal consumed at the issue coal plants and Marshall, but at Duke coal plants not served by NS. For example, if Duke had long-term contractual commitments to purchase large volumes of coal for use at a CSXT-served coal plant not included in the SARR, that contractual obligation might well limit the coal volumes shipped to NS-served plants in the future. Coal supply agreements also are relevant to SARR traffic volumes because the contract coal price (and changes in the agreed price in the future) could affect the volume of coal Duke elects to purchase for use at a plant served by the SARR.

Because of the relevance of this information, NS' requests sought production of Duke's existing long-term coal supply contracts. NS also requested documents reflecting negotiations between Duke and its contract coal suppliers over possible amendment or termination of existing contracts, documents assessing potential future sources of coal supply, and information about coal prices. NS Interrogatory Nos. 12(d), 22; NS Document Production Request Nos. 10-12.

Although it raised a number of objections to the production of this requested information, Duke's only asserted basis for withholding it is that the coal supply contract information is confidential, presumably meaning that the information is governed by contractual confidentiality provisions. Duke's responses indicate (and Duke counsel confirmed during the parties' recent conference) that, while Duke would not produce this contract information without an order by the Board compelling discovery, Duke would not oppose such an order. *See, e.g.*, Duke Response to NS Document Production Request No. 10. Duke's position is, of course, consistent with the procedure that the parties followed with respect to Duke's request for the production of

NS' rail transportation contracts with coal shippers.²¹ Accordingly, NS requests that the Board enter an order compelling discovery with respect to the requested coal supply contract information (including contracts, coal price information and renegotiation documents).²²

H. Responsive Information Governed by Other Third-Party Confidentiality Restrictions

As in the case of NS' request for production of Duke's coal supply contracts, Duke has asserted, in response to a number of NS discovery requests relating to various subjects, an objection that production of the requested information would violate certain unspecified third-party confidentiality restrictions. *See, e.g.*, Duke Response to NS Interrogatory Nos. 12(d), 12(g), 24(l), 24(m); Duke Response to NS Document Production Request Nos. 12, 43, 61, 62, 67, 71, 75. In view of the restrictions contained in the Protective Order that the Board has entered in this case, Duke's confidentiality objections are without merit. NS understands Duke's position to be merely that it objects to the production of the requested information (not otherwise withheld on the basis of another objection) unless the Board enters an order -- which Duke will not oppose -- requiring production. Accordingly, NS requests that the Board specifically overrule Duke's confidentiality objections with respect to these requests.

²¹ *See* Defendant's Reply to Complainant's First Motion to Compel Production of Documents (dated Feb. 11, 2002).

²² NS understands that Duke's position on coal supply contract information (requesting that NS obtain, but not opposing, an order compelling discovery) also applies to Duke's confidentiality objections with respect to coal price and rail rate information responsive to NS Interrogatory Nos. 12(d), 12(g), 24(l) & 24(m), and Document Production Request Nos. 12 and 43. NS therefore requests that the Board's order specifically overrule Duke's confidentiality objection with respect to these requests.

II. THE BOARD SHOULD ADJUST THE PROCEDURAL SCHEDULE IN THIS CASE TO PERMIT ORDERLY RESOLUTION OF THIS MOTION AND COMPLETION OF DISCOVERY.

The procedural schedule proposed jointly by NS and Duke in this proceeding, and adopted by the Board in its decision served February 5, 2002 (at 2), provides for the "default" 75-day discovery period set forth in the Board's rules governing SAC cases. 49 C.F.R. § 1111.8. Under this 75-day discovery schedule, all discovery was to be completed *today*, March 4, 2002. When the parties agreed to propose this schedule, however, they advised the Board of the possible need to expand the discovery period. *See* February 5 Order at 2 n.4. NS agreed to the proposed schedule with the understanding, expressed in the joint report to the Board, that the Board would consider adjustment of the schedule if circumstances warranted. At the time the parties submitted their proposed schedule to the Board (January 7, 2002), the only pending discovery requests were those served by Duke on NS, and they were the focus of the parties' expression of concern over the potential inadequacy of the 75-day discovery period.

The course of the parties' discovery activities since they submitted their proposed schedule nearly two months ago, including the filing of the instant motion to compel, amply confirms that the discovery period (and possibly the schedule for the filing of evidence) indeed must be extended in this proceeding. Neither Duke nor NS has in fact completed discovery, and the Board will require some amount of time in which to resolve the discovery issues raised in the instant motion (and any other motions to compel that may be filed), allow Duke a reasonable time to produce any documents or information it is ordered to produce as a result of this motion, and enable NS to assess the adequacy of any such additional production of responsive documents and information.

Even apart from the issues raised in this motion, numerous discovery activities remain incomplete. Both Duke and NS have committed to producing (or making available) additional responsive material. Despite very diligent efforts (and extraordinary expense), NS has not completed the production of all materials responsive to Duke's discovery requests, including the production of coal transportation contracts that were the subject of the recent Duke motion to compel. NS is hopeful that this production will be completed in the next few weeks (although most responses have been completed).

In addition, Duke counsel have recently advised NS that Duke intends to review various types of requested business records that NS (in its discovery responses served in late January) offered to make available for Duke representatives to review on-site at the locations where these records are maintained in the normal course of business. The scheduling of these on-site inspections was a matter within the control of Duke in the first instance, and it did not pursue the issue until nearly one month after NS served its discovery responses. Nonetheless, NS is willing to allow Duke to go forward with these on-site records inspections, provided the Board extends the discovery schedule.

Duke has also agreed to produce certain generally described categories of additional documents and materials responsive to NS' discovery requests (including NS' second set of discovery requests, Duke's responses to which were served late on March 1, 2002). During the parties' recent discovery conference, Duke advised that it would be producing additional responsive material relating to coal forecasts, generating plant service lives, coal inventory levels at Duke's coal-fired plants, documents regarding assessment of future coal supply alternatives, land appraisals, and other areas. Duke stated that it expects to complete such production (a portion of which was received late on Friday, March 1, 2002) within the next ten days to two weeks.

Because NS has only just received (but has not had an opportunity to review meaningfully) certain of these materials, and because production of these materials (particularly in response to NS' second discovery requests) has not been completed, it is uncertain whether Duke's continuing production will engender additional discovery disputes requiring resolution by the Board.

Finally, in addition to the parties' ongoing efforts to respond to previously served discovery requests, Duke served yet another set of discovery requests on NS at the close of business on Friday, March 1, 2002 -- the second to last business day before the scheduled *completion* of discovery. These new discovery requests -- over 35 in number (including subparts) -- request detailed information about the accounting for the acquisition of control and operation of Conrail and the accounts comprising NS' Annual Report Form R-1. Responding to these new requests will take considerable time and effort. NS is prepared to assume this burden, provided that the discovery schedule is extended.

For these reasons, NS requests that the Board indefinitely extend the discovery schedule in this proceeding until the issues raised in the instant motion to compel have been fully resolved (including the production of all documents and information required by the Board) and all outstanding discovery has been completed. The outstanding discovery issues may well also warrant an adjustment in the scheduled dates for the filing of evidence, particularly if ongoing discovery efforts interfere with the parties' ability to prepare their evidentiary submissions. (The information requested in Duke's just-served third set of discovery requests, for example, appear to implicate information and issues that relate to the proper calculation of variable costs, which would be addressed in the parties' opening evidence, presently due April 18, 2002.) At a minimum, however, the Board should extend the discovery cut-off date until all discovery issues have been resolved and discovery completed.

CONCLUSION

For all of the foregoing reasons, the Board should grant NS' motion to compel answers to interrogatories and production of documents, and should extend the discovery schedule in this proceeding until the issues raised by the instant motion have been resolved and all outstanding discovery has been concluded.

Respectfully submitted,



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DATED: March 4, 2002

A

DUKE ENERGY CORPORATION,	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. 42069
	)	
NORFOLK SOUTHERN RAILWAY COMPANY,	)	
	)	
Defendant.	)	
	)	

Complainant Duke Energy Corporation ("Duke"), pursuant to 49 C.F.R. Part 1114, hereby responds to the First Set of Interrogatories and Requests for Production of Documents (the "Requests") served by Norfolk Southern Railway Company ("NS") on January 17, 2002.

In addition to the Specific Objections raised below, Duke objects generally to NS's Requests as follows:

1. Product and/or Geographic Competition Information. Duke objects to the Requests on grounds of relevance and burden to the extent that they seek information that is relevant principally (if not solely) to the subject of indirect competition (*i.e.*, product and/or geographic competition) for NS's service to Allen, Belews Creek, Buck, and/or Dan River. This

inquiry is no longer part of the Board's market dominance analysis. *See* Ex Parte No. 627, *Market Dominance Determinations -- Product and Geographic Competition*, Decisions served December 21, 1998, July 2, 1999, and April 6, 2001. Moreover, even assuming *arguendo* that documents containing such information were marginally relevant to some issue actually in dispute in this case (*e.g.*, stand-alone traffic volumes for Duke plants), the burden of producing such documents would exceed their evidentiary value, particularly to the extent that Duke will produce information directly relevant to the question of future coal deliveries by NS to the Duke plants. *See* Ex Parte No. 627, Decision served December 21, 1998 (referring to burdens associated with production and consideration of product and geographic competition evidence).

Notwithstanding this General Objection, Duke will produce a variety of different materials to NS that contain information called for in NS's various product and/or geographic competition requests. These materials will include Duke's FERC Form 1, FERC Form 580, Annual Plan, Integrated Resource Plan, and Short-Term Action Plan. Duke objects on grounds of burden to identifying which information included within these materials is responsive to the many individual NS Requests (and subparts of individual NS Requests) which relate to product and/or geographic competition. As such, citations to this General Objection should be understood as referring NS to these materials to investigate whether and what responsive information is included therein.

2. Non-Waiver. Duke's willingness to produce some or all of the information sought by a particular Request should not be interpreted either as a waiver of Duke's objections (particularly General Objection No. 1) or as an admission that information derived therefrom is relevant to this case. Duke hereby reserves all rights to contest the relevance or

admissibility in this proceeding of any information produced or generated in discovery.

Moreover, the assertion of certain objections by Duke to the Requests is not intended to, and shall not, waive any other objections not expressly asserted herein. Duke reserves the right to assert other objections, or to otherwise amend or revise its objections and responses as necessary or appropriate.

3. Burden. Duke objects to the "Definitions" and "Instructions" contained in the Requests to the extent they would impose burdens or obligations on Duke exceeding those specified in applicable provisions of the Surface Transportation Board's Rules of Practice at 49 C.F.R. Part 1114.

4. Privilege. Duke objects to the Requests to the extent that they seek documents or information that are protected by the attorney-client privilege and/or are subject to the attorney work-product protection. In addition, Duke objects to NS's Instruction No. 8 insofar as it requests the production of a privilege log.

5. Compliance with Protective Order. Duke's willingness to provide answers and produce documents containing commercially sensitive, proprietary, and/or trade secret information is conditioned upon compliance with the Protective Order served by the Board in this proceeding on February 5, 2002.

6. Special Studies. Duke objects to NS's Requests as unduly burdensome and oppressive to the extent they require Duke to conduct a special study or analysis to produce the information sought.

7. Availability. Duke objects to NS's Requests as unduly burdensome and oppressive to the extent that they seek documents or information either contained in NS's own

files or otherwise in its possession, or readily available from public sources, including but not limited to materials on public file at the STB, the Federal Energy Regulatory Commission, or any court or government agency.

8. Definition of Duke. Duke objects to NS's Definition No. 11 on grounds of overbreadth, burden, and relevance to the extent that it may be interpreted to request production of documents that are not in the possession, custody, or control of the Complainant.

9. Definition of Duke Plant. Duke objects to NS's Definition No. 12 on grounds of overbreadth, burden, and relevance to the extent that it includes plants other than Allen, Belews Creek, Buck, and Dan River (hereinafter referred to as the "issue plants" or the "plants at issue in this case"), particularly to the extent that it includes "any and all" generating plants or facilities which, although not owned or operated by Duke, nevertheless "produce power that is purchased or used by Duke." See Docket No. 42038, *Minnesota Power v. Duluth, Missabe & Iron Range Ry. Co.*, Decision served May 11, 1999.

10. Requests for Information/Documents regarding Non-Complaint Origins and Destinations. Except as otherwise noted, Duke objects on grounds of relevance to providing information and/or producing documents regarding movements between origins not at issue in this case (*i.e.*, non-complaint origins) and/or destinations not at issue in this case. See Docket No. 42038, *Minnesota Power v. Duluth, Missabe & Iron Range Ry. Co.*, Decision served May 11, 1999.

11. Separate Responses to Sub-Parts. Duke objects to NS's Instruction No. 1 on grounds of burden.

12. Verifications. Consistent with past practice in cases of this nature (including NS's practice in this case itself), Duke has not secured verifications of the answers to Interrogatories herein. To that end, Duke objects to NS's Instruction No. 2 on grounds of burden.

13. Computer Layout Information. Duke objects to Instruction No. 4 on grounds of burden.

14. Computer-Readable Format Priority. Duke objects to Instruction No. 10 on grounds of burden.

15. Continuing Nature of Requests. Duke objects to Instruction No. 11 on grounds that it is inconsistent with the procedural schedule in stand-alone rate cases, and with the Board's governing regulations.

16. Non-Waiver/Date. The production by Duke of some documents that pre-date January 1, 1999 shall not be construed as an agreement by Duke to produce other documents that pre-date January 1, 1999 in response to the same or other Requests, to which Duke hereby objects on grounds of burden and relevance.

17. Response Deadline. Duke objects to the 30-day response deadline set forth in the Requests as unreasonable and unduly burdensome in light of the volume and complexity of the information and documents requested by NS. Duke's search for responsive documents and information is ongoing, and such materials (if otherwise not subject to an objection) will be produced as expeditiously as reasonably possible under the circumstances.

Duke's following Specific Objections and Responses to NS's Requests are subject to and without waiver of the foregoing General Objections.

SPECIFIC OBJECTIONS AND RESPONSES

A. INTERROGATORIES

Interrogatory No. 1: State the basis of the allegation, contained in Paragraph 2 of the Complaint, that the eight coal-fired electric generating stations referred to in such Paragraph are "baseload" generating stations.

Response:

Duke objects to this Interrogatory as premature and inconsistent with the Board's procedural rules regarding stand-alone cost proceedings. *See* Docket No. 42038, *Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Ry. Co.*, Decision served May 11, 1999.

Interrogatory No. 2: State the basis of the allegation, contained in Paragraph 4 of the Complaint, that rail constitutes the only practicable method of transporting to the coal-fired Duke Plants the volumes of coal burned at such plants.

Response:

See Response to Interrogatory No. 1 (regarding prematurity).

Interrogatory No. 3: State the basis of the allegation, contained in Paragraph 8 of the Complaint, that the challenged common carrier rates of NS generate revenue-to-variable cost ratios in excess of 180 percent for the transportation of coal between the origins covered by Duke's Complaint, on the one hand, and Allen, Belew's Creek, Buck, Dan River and Marshall, on the other hand.

Response:

See Response to Interrogatory No. 1 (regarding prematurity). Duke also objects to this Interrogatory to the extent that it suggests that Duke is challenging NS's rate for service to Marshall.

Interrogatory No. 4: State the basis of the allegation, contained in Paragraph 9 of the Complaint, that NS possesses "market dominance" (as defined

in 49 U.S.C. § 10707) with respect to the transportation of coal between the origins covered by Duke's Complaint, on the one hand, and Allen, Belews Creek, Buck, Dan River and Marshall, on the other hand.

Response:

See Response to Interrogatory No. 1 (regarding prematurity). Duke also objects to this Interrogatory to the extent that it suggests that Duke is challenging NS's rate for service to Marshall.

Interrogatory No. 5: State the basis of the allegation, contained in Paragraph 10 of the Complaint, that the challenged common carrier rates established by NS for the transportation of coal between the origins covered by Duke's Complaint, on the one hand, and Allen, Belews Creek, Buck, Dan River and Marshall, on the other hand, are unreasonably high in violation of 49 U.S.C. §§ 10701(d)(1) and 10702.

Response:

See Response to Interrogatory No. 1 (regarding prematurity). Duke also objects to this Interrogatory to the extent that it suggests that Duke is challenging NS's rate for service to Marshall.

Interrogatory No. 6: State the basis of the allegation, contained in Paragraph 12 of the Complaint, that Duke should be entitled, if it prevails in proving that the challenged common carrier rates of NS exceed a maximum reasonable level, to (a) interest on reparations in excess of that specified in 49 C.F.R. § 1141.1 and (b) a modification of or alternative to the percentage-reduction methodology used by the STB to determine reparations or a rate prescription.

Response:

See Response to Interrogatory No. 1 (regarding prematurity).

Interrogatory No. 7: State whether, during the period from January 1, 1999 to the present, Duke has considered, analyzed or studied the possibility of acquiring or constructing rail facilities in order to enable more than one rail carrier

to provide transportation of coal to any Duke Plant. If the answer to this Interrogatory is affirmative, identify separately for each such proposal to acquire or construct rail facilities the following:

- (a) The name and location (city and state) of the Duke Plant to which transportation by more than one rail carrier would be enabled as a result of such acquisition or construction of rail facilities;
- (b) The date or time period during which the proposal to acquire or construct such rail facilities was (or is) under consideration, analysis or study;
- (c) The rail carrier (or carriers) that would be enabled to provide transportation of coal to the Duke Plant, or that would be enabled to participate in the rail transportation of coal to the Duke Plant, as a result of such acquisition or construction of rail facilities;
- (d) The estimated costs of constructing, maintaining and operating the rail facilities proposed to be acquired or constructed;
- (e) The anticipated design, location and operation of the rail facilities proposed to be acquired or constructed; and
- (f) The reasons why the proposed rail facilities were not acquired or constructed or, if such facilities are currently under construction, the current status of the proposal.

Response:

Duke objects to this Interrogatory on grounds of relevance and overbreadth to the extent that it seeks information regarding movements or potential movements between origin and destination pairs that are not at issue in the Complaint. *See* General Objection No. 10 (regarding the limited scope of inquiry into intra- and intermodal competition). Without waiving these objections, Duke states that it will produce documents including information that is responsive to this Interrogatory, to the extent that such information relates to the possibility of acquiring or constructing rail facilities in order to enable more than one rail carrier to transport coal to any of the issue plants.

Interrogatory No. 8: State whether, during the period from January 1, 1999 to the present, Duke has considered, analyzed or studied the possibility of acquiring or constructing rail facilities in order to enable more than one rail carrier to provide transportation of coal from any mine or source used (or that could be used) to supply coal for use at any Duke Plant. If the answer to this Interrogatory is affirmative, identify separately for each such proposal to acquire or construct rail facilities the following:

- (a) The name and location (city and state) of the mine or source from which transportation by more than one rail carrier would be enabled as a result of such acquisition or construction of rail facilities;
- (b) The date or time period during which the proposal to acquire or construct such rail facilities was (or is) under consideration, analysis or study;
- (c) The rail carrier (or carriers) that would be enabled to provide transportation of coal from the mine or source, or that would be enabled to participate in the rail transportation of coal from the mine or source, as a result of such acquisition or construction of rail facilities;
- (d) The estimated costs of constructing, maintaining and operating the rail facilities proposed to be acquired or constructed;
- (e) The anticipated design, location and operation of the rail facilities proposed to be acquired or constructed; and
- (f) The reasons why the proposed rail facilities were not acquired or constructed or, if such facilities are currently under construction, the current status of the proposal.

Response:

Duke objects to this Interrogatory on grounds of relevance and overbreadth to the extent that it seeks information regarding movements or potential movements between origin and destination pairs that are not at issue in the Complaint. *See* General Objection No. 10 (regarding the limited scope of inquiry into intra- and intermodal competition). Without waiving these objections, Duke states that during the period from January 1, 1999 to the present, it has not considered, analyzed or studied the possibility of acquiring or constructing rail facilities in order

to enable more than one rail carrier to transport coal from any mine or source at issue in this case (i.e., origins from which NS has provided rates that Duke has challenged in the Complaint) to any of the issue plants.

Interrogatory No. 9: State whether, during the period from January 1, 1999 to the present, any carrier (other than NS) has solicited the transportation of coal for all or part of the movement from any coal mine or coal producing facility to Allen, Belews Creek, Buck, Dan River or Marshall. For purposes of this Interrogatory, "solicited" means any oral or written communication relating to the subject of the actual or possible transportation of coal to Allen, Belews Creek, Buck, Dan River or Marshall.

- (a) If the answer to this Interrogatory is affirmative, identify separately for each such solicitation the following:
 - (1) The mode of transportation involved;
 - (2) The name and business address of each carrier involved;
 - (3) The amount of coal tonnage sought in the solicitation;
 - (4) The origins and destinations involved in the solicitation;
 - (5) The dates and means of the solicitation, whether by telephone, letter, personal visit or other means;
 - (6) The full name, job title and corporate affiliation of each person who solicited the coal tonnage;
 - (7) The rates quoted or rate estimates offered and the transportation services offered by each carrier identified in the answer to subpart (2) hereof for each amount of tonnage identified in the answer to subpart (3) hereof;
 - (8) For each amount of coal tonnage identified in the answer to subpart (3) hereof, whether the carrier represented that it had adequate equipment to transport all of the tonnage involved in the solicitation and, if not, the portion of the tonnage for which it represented such equipment was available; and

- (9) Whether the carrier possessed operating authority, or did not need specific operating authority, to allow it to transport all or any portion of each amount of tonnage identified in the answer to subpart (3) hereof.
- (b) For each solicitation identified in the answer to this Interrogatory, identify the following:
 - (1) Duke's response to the solicitation;
 - (2) The reasons for such response;
 - (3) Whether Duke used any transportation service of the soliciting carrier and, if so, indicate the amounts of tonnage for which Duke used such service separately for each calendar month, origin and destination; and
 - (4) If Duke decided not to use any service of such carrier, the reasons for that decision.

Response:

Duke objects to this Interrogatory to the extent that it seeks information regarding movements or potential movements between origin and destination pairs that are not at issue in the Complaint. *See* General Objection No. 10 (regarding the limited scope of inquiry into intra- and intermodal competition). Without waiving these objections, and subject to Duke's response to Interrogatory No. 7, Duke states that during the period from January 1, 1999 to the present, no carrier (other than NS) has solicited the transportation of coal from any mine or source at issue in this case for use at any Duke Plant at issue in this case.

Interrogatory No. 10: State whether, during the period from January 1, 1999 to the present, Duke has solicited the transportation service of any carrier (other than NS) for the transportation of coal for all or part of the movement from any coal mine or coal producing facility to Allen, Belews Creek, Buck, Dan River or Marshall. For purposes of this Interrogatory, "solicited" means any oral or written communication relating to the subject of the actual or possible transportation of coal to Allen, Belews Creek, Buck, Dan River or Marshall.

- (a) If the answer to this Interrogatory is affirmative, identify separately for each such solicitation the following:
- (1) The mode of transportation involved;
 - (2) The name and business address of each carrier involved;
 - (3) The amount of coal tonnage sought in the solicitation;
 - (4) The origins and destinations involved in the solicitation;
 - (5) The dates and means of the solicitation, whether by telephone, letter, personal visit or other means;
 - (6) The full name, job title and corporate affiliation of each person who solicited the coal tonnage;
 - (7) The rates quoted or rate estimates offered and the transportation services offered by each carrier identified in the answer to subpart (2) hereof for each amount of tonnage identified in the answer to subpart (3) hereof;
 - (8) For each amount of coal tonnage identified in the answer to subpart (3) hereof, whether the carrier represented that it had adequate equipment to transport all of the tonnage involved in the solicitation and, if not, the portion of the tonnage for which it represented such equipment was available; and
 - (9) Whether the carrier possessed operating authority, or did not need specific operating authority, to allow it to transport all or any portion of each amount of tonnage identified in the answer to subpart (3) hereof.
- (b) For each solicitation identified in the answer to this Interrogatory, identify the following:
- (1) The carrier's response to the solicitation;
 - (2) The reasons stated by the carrier for such response;
 - (3) Whether Duke used any transportation service of the carrier and, if so, indicate the amounts of tonnage for which Duke used such service separately for each calendar month, origin and destination; and

- (4) If Duke decided not to use any service of such carrier, the reasons for that decision.

Response:

Duke objects to this Interrogatory to the extent that it seeks information regarding movements or potential movements between origin and destination pairs that are not at issue in the Complaint. *See* General Objection No. 10 (regarding the limited scope of inquiry into intra- and intermodal competition). Without waiving these objections, and subject to Duke's response to Interrogatory No. 7, Duke states that during the period from January 1, 1999 to the present, it has not solicited the transportation of coal by any carrier other than NS from any mine or source at issue in this case for use at any Duke Plant at issue in this case.

Interrogatory No. 11: Identify each electric power generating unit, plant or facility (referred to herein as "unit") included in or comprising any Duke Plant. For each such unit:

- (a) Identify the name and location (city and state) of the unit;
- (b) Identify the owner or owners of the unit and, in the case of multiple ownership interests, the nature, type and size of each owner's ownership interest in the unit;
- (c) Identify the operator or operators of the unit, if different than the owner(s) of the unit;
- (d) Identify the person that arranges or is responsible for arranging the procurement of fuel and fuel transportation for the unit, if different than the owner(s) or operator(s) of the unit, and the corporate, contractual or other relationship between such person and the owner(s) and/or operator(s) of the unit;
- (e) Identify the date on which construction of the unit was commenced, the date on which construction of the unit was completed, and the date on which the unit was placed into service;

- (f) Identify (i) the original expected service life of the unit, including the date on which electric generating operations at the unit originally were expected or anticipated to end and, if different, (ii) the current expected service life of the unit, including the date on which electric generating operations at the unit currently are expected or anticipated to end;
- (g) Identify any future planned, contemplated or anticipated construction or modification of facilities at the unit that might affect the service life of the unit, including the date on which electric generating operations at the unit are expected or anticipated to end;
- (h) Identify the electric power generating capacity of the unit (in megawatts), including the date, amount and causes of any change in such capacity since the original construction of the unit;
- (i) Identify any anticipated future change in the electric power generating capacity of the unit (in megawatts) and the date, amount and causes of such change;
- (j) Describe in detail the electric power generating operations at and organization of the unit;
- (k) Describe in detail how fuel and other supplies are transported and delivered to the unit;
- (l) Describe in detail all transportation, loading and unloading facilities (including rail, truck and/or coal handling facilities) for the delivery of fuel and other supplies to the unit;
- (m) Identify the total net generation (in kilowatt hours) of electricity of the unit during each calendar month from January 1, 1999 to the present;
- (n) Identify the total operation and maintenance expenses of the unit during each calendar month from January 1, 1999 to the present;
- (o) Identify the dispatch priority of the unit, in relation to other electric power generating units of Duke Plants, and the comparative cost per unit of output (as used in determining the relative dispatch priority) of the unit, during each calendar month (or other time period for which records of such dispatch priority are maintained) from January 1, 1999 to the present;
- (p) Identify the dispatch price (*i.e.*, the price or cost per unit of output used by Duke in determining whether to dispatch a unit or generate electric power from a unit) of the unit during each calendar month (or other time period

for which records of such dispatch price are maintained) from January 1, 1999 to the present;

- (q) Identify the native or jurisdictional load requirements or commitments (in kilowatt hours) of the unit during each calendar month from January 1, 1999 to the present;
- (r) Identify the date, time and duration (in hours) of each scheduled outage or shutdown of the unit during each calendar month from January 1, 1999 to the present;
- (s) Identify the date, time and duration (in hours) of each actual outage or shutdown of the unit during each calendar month from January 1, 1999 to the present;
- (t) Identify the Capacity Factor of the unit during (i) each calendar month from January 1, 1999 to the present and (ii) each calendar year from January 1, 1999 to the present;
- (u) Identify the total volume or amount of each type of fuel (*i.e.*, coal, gas, oil, nuclear, etc.) burned or used in the unit during each calendar month from January 1, 1999 to the present;
- (v) Identify any future planned, contemplated or anticipated construction or modification of facilities (including scrubbers) at the unit that might affect the type and/or volume or amount of fuel burned or used in the unit, and how such construction or modification of facilities would affect the type and/or volume or amount of fuel burned or used in the unit; and
- (w) The average delivered cost (per Btu) of each type of fuel burned or used in the unit during each calendar month from January 1, 1999 to the present.

Response:

Duke objects to subparts (n), (o), (p), and (q) of this Interrogatory on grounds of relevance. *See* General Objection No. 1 (regarding product and/or geographic competition).

Duke also objects to this Interrogatory on grounds of relevance to the extent that it seeks information regarding plants not at issue in this case, and information regarding any fuel other

than coal. See General Objection No. 10 (regarding the limited scope of inquiry into intra- and intermodal competition).

Without waiving these objections, Duke states that it will produce documents containing information responsive to subparts (a) - (m) and (r) - (w) with respect to Duke's coal-fired plants (with the exception of information regarding the loading, transportation, unloading, or use of fuels other than coal), to the extent that such documents can be identified and produced without undue burden. Moreover, in response to subpart (o), Duke states that it will produce a snapshot of the 2002 dispatch priorities of each of Duke's generating resources, but Duke cautions NS that factors other than cost (e.g., ramping constraints) may play a role in determining whether to employ a given generating resource. Finally, Duke states that information responsive to other subparts of this Interrogatory may be contained in the documents that Duke references in General Objection No. 1.

Interrogatory No. 12: Identify, separately for each coal-fired electric power generating unit, plant or facility (referred to herein as "unit") identified in response to Interrogatory No. 11, and for each calendar month from January 1, 1999 to the present, the following:

- (a) The name and location (city and state) of each mine or source that supplied coal to the unit;
- (b) The name of the owner(s) and/or operator(s) of each such mine or source that supplied coal to the unit;
- (c) The total number of tons of coal that was supplied by each such mine or source to the unit;
- (d) The purchase price (excluding the cost of transporting the coal from such mine or source to the unit) per ton of coal supplied by each such mine or source to the unit;

- (e) The name and transportation mode of the carrier (or carriers) that transported coal from each such mine or source to the unit and the total number of tons of coal transported by each such carrier (or carriers) from each such mine or source to the unit;
- (f) The location (city and state) of any interchange or exchange of the shipment between the carriers that participated in the transportation of the shipment between the mine or source and the unit;
- (g) The rates and total charges per ton for such transportation of coal by each such carrier (or carriers) from each such mine or source to the unit; and
- (h) Whether Duke provided equipment for the transportation of the shipment between each such mine or source and the unit and, if so, (i) the number of each type of such equipment and (ii) the number of each type of such equipment that was (a) owned or (b) leased by Duke.

Response:

Duke objects to this Interrogatory to the extent that it seeks information about origins and/or destinations that are not at issue in this case. *See* General Objection No. 10 (regarding the limited scope on inquiry into intra- and intermodal competition). In addition, Duke objects to subparts (d) and (g) of this Interrogatory on grounds of relevance and confidentiality, and as to subpart (g) to the extent that it seeks information that is readily available to NS from its own files. Without waiving these objections, Duke states that it will produce documents including the information requested in subparts (a), (b), and (c) of this Interrogatory with respect to each of its coal-fired plants. *See also* Duke FERC Form 423 Reports. As to subparts (e) and (f), Duke states that all tons were transported via NS or CSX Transportation, Inc. ("CSXT") in single-line service. Finally, as to subpart (h), Duke states that with the exception of shipments made on an emergency basis during a dumper outage at the Belews Creek facility, all of the referenced coal moved in carrier-supplied equipment. *See* Response to Interrogatory No. 29.

Interrogatory No. 13: Identify each electric power generating unit, plant or facility (referred to herein as "unit") planned or under construction by or for Duke (including any unit that will produce electric power for Duke's use or benefit).

For each such unit:

- (a) Identify the name and location (city and state) of the unit;
- (b) Identify the owner(s) of the unit and, in the case of multiple ownership interests, the nature, type and size of each owner's ownership interest in the unit;
- (c) Identify the operator or operators of the unit, if different than the owner(s) of the unit;
- (d) Identify the person that is expected or anticipated to arrange or be responsible for arranging the procurement of fuel and fuel transportation for the unit, if different than the owner(s) or operator(s) of the unit, and the corporate, contractual or other relationship between such person and the owner(s) and/or operator(s) of the unit;
- (e) Identify the date on which construction of the unit was or is expected or anticipated to be commenced, the date on which construction of the unit is expected or anticipated to be completed, and the date on which the unit is expected or anticipated to be placed into service;
- (f) Identify the expected or anticipated service life of the unit, including the date on which electric generating operations at the unit are expected or anticipated to end;
- (g) Identify the expected or anticipated electric power generating capacity of the unit (in megawatts);
- (h) Describe in detail the expected or anticipated electric power generating operations at and organization of the unit;
- (i) Describe in detail how fuel and other supplies are expected or anticipated to be transported and delivered to the unit;
- (j) Describe in detail all expected or anticipated transportation, loading and unloading facilities (including rail, truck and/or coal handling facilities) for the delivery of fuel and other supplies to the unit;
- (k) Identify the expected or anticipated total annual net generation (in kilowatt hours) of electricity of the unit;

- (l) Identify the expected or anticipated total operation and maintenance expenses of the unit by calendar month, year or other time period for which Duke has calculated estimates of such expenses;
- (m) Identify the expected or anticipated dispatch priority of the unit, in relation to other electric power generating units of Duke Plants, and the expected or anticipated comparative cost per unit of output (as used in determining the relative dispatch priority) of the unit, by calendar month, year or other time period for which Duke has calculated estimates of such dispatch priority;
- (n) Identify the expected or anticipated dispatch price (*i.e.*, the price or cost per unit of output used by Duke in determining whether to dispatch a unit or generate electric power from a unit) of the unit, by calendar month, year or other time period for which Duke has calculated estimates of such dispatch price;
- (o) Identify the expected or anticipated native or jurisdictional load requirements or commitments (in kilowatt hours) of the unit by calendar month, year or other time period for which Duke has calculated estimates of such requirements or commitments;
- (p) Identify the expected or anticipated Capacity Factor of the unit by calendar month, year or other time period for which Duke has calculated estimates of such Capacity Factors;
- (q) Identify the total volume or amount of each type of fuel (*i.e.*, coal, gas, oil, nuclear, etc.) expected or anticipated to be burned or used in the unit by calendar month, year or other time period for which Duke has calculated estimates of such volumes or amounts; and
- (r) Identify the average delivered cost (per Btu) of each type of fuel expected or anticipated to be burned or used in the unit by calendar month or other time period for which Duke has calculated estimates of such costs.

Response:

Duke objects to this Interrogatory on grounds of relevance and burden (*see* General Objection No. 1 (regarding product and/or geographic competition)) and to the extent that it relates to movements of coal to plants not at issue in this case. *See* General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition). Without waiving these

objections, Duke states that there are no units, plants, or facilities planned or under construction by or for Duke that would consume coal.

Interrogatory No. 14: Identify, separately for each coal-fired electric power generating unit, plant or facility (referred to herein as "unit") identified in response to Interrogatory No. 13, the following:

- (a) The name and location (city and state) of each coal producer or supplier that is expected or anticipated to supply fuel to the unit or that Duke and/or its consultants or contractors have identified or considered as a possible supplier of fuel to the unit;
- (b) The name and location (city and state) of each coal mine or coal producing facility that is expected or anticipated to supply fuel to the unit or that Duke and/or its consultants or contractors have identified or considered as a possible source of fuel for the unit;
- (c) The total number of tons of coal that is expected or anticipated to be supplied by each such mine or source to the unit by calendar month, year or other time period for which Duke has calculated estimates of such coal supply;
- (d) The purchase price (excluding the cost of transporting the coal from such mine or source to the unit) per ton of coal that is expected or anticipated to be supplied by each such mine or source to the unit by calendar month, year or other time period for which Duke has calculated estimates of such coal supply;
- (e) The name and transportation mode of each carrier (or carriers) that is expected or anticipated to supply fuel to the unit or that Duke and/or its consultants or contractors have identified or considered as a possible transporter of fuel to the unit, and the total number of tons of coal expected or anticipated to be transported by each such carrier (or carriers) from each such mine or source to the unit by calendar month, year or other time period for which Duke has calculated estimates of such coal shipment volume; and
- (f) The estimated, expected or anticipated rates and total charges per ton for such transportation of coal by each such carrier (or carriers) from each such mine or source to the unit by calendar month, year or other time period for which Duke has calculated estimates of such coal shipment rates or charges.

Response:

There are no coal-fired units, plants, or facilities that have been identified in response to Interrogatory No. 13.

Interrogatory No. 15: Identify, separately for each coal producer or supplier and for each mine or source identified in response to Interrogatory No. 12 and No. 14, and for each mine or source that Duke has considered as a possible future source of coal for use at any Duke Plant, the following:

- (a) The total number of tons of coal produced by the mine or source during each calendar month from January 1, 1999 to the present;
- (b) The total number of tons of coal expected or anticipated to be produced by the mine or source in the future for supply to any Duke Plant;
- (c) The total monthly and annual coal production capacity of the mine or source;
- (d) Any expected or anticipated future change in the monthly and annual coal production capacity of the mine or source and the date, amount and causes of such change;
- (e) (i) The original expected service life of the mine or source, including the date on which coal production operations at the mine or source are expected or anticipated to end and, if different, (ii) the current expected service life of the mine or source, including the date on which coal production operations at the mine or source are expected or anticipated to end; and
- (f) The total amount (in number of tons) of coal reserves recoverable from the mine or source.

Response:

Duke objects to this Interrogatory on grounds of relevance to the extent that it seeks information regarding coal origins and/or destinations not at issue in this case. *See* General Objection No. 10 (regarding the limited scope of inquiry into intra- and intermodal competition). Without waiving this objection, Duke states that it will produce documents containing responsive information with respect to each of its coal-fired plants to the extent that such documents can be identified and produced without undue burden.

Interrogatory No. 16: Identify, separately for each coal-fired Duke Plant, and for each calendar day or calendar month (or, if not available for such time periods, for the smallest increment of time for which Duke maintains records) from January 1, 1999 to the present, the following:

- (a) The coal inventory level (*i.e.*, the amount of coal, in tons, maintained or available at a Duke Plant for use in generating electric power) authorized by regulatory authorities to be maintained at the Duke Plant;
- (b) The coal inventory level (*i.e.*, the amount of coal, in tons, maintained or available at a Duke Plant for use in generating electric power) forecast in advance or projected or targeted by Duke to be maintained at the Duke Plant; and
- (c) The coal inventory level (*i.e.*, the amount of coal, in tons, maintained or available at a Duke Plant for use in generating electric power) actually maintained at the Duke Plant.

Response:

Duke objects to this Interrogatory on grounds of relevance and burden, both to the extent that it seeks information regarding plants not at issue in this case (*see* General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition)) and with respect to the substance of the information sought. *See* General Objection No. 1 (regarding product and/or geographic competition). Without waiving these objections, Duke states that it will produce

documents containing responsive information with respect to the issue plants and the Marshall plant to the extent that such documents can be identified and produced without undue burden.

Interrogatory No. 17: Identify any proposed, planned, expected or anticipated changes in the authorized, targeted or actual coal inventory level (*i.e.*, the amount of coal, in tons, maintained or available at a Duke Plant for use in generating electric power) for any Duke Plant.

Response:

See Response to Interrogatory No. 16.

Interrogatory No. 18: Identify and describe in detail Duke's current policies and procedures for fuel and/or fuel procurement for any Duke Plant.

Response:

Duke objects to this Interrogatory on grounds of vagueness to the extent that it does not adequately distinguish: (i) procedures for fuel; and (ii) procedures for fuel procurement. Duke also objects to this Interrogatory to the extent that it seeks information regarding plants that are not at issue in this case (*see* General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition)), and regarding fuels other than coal. *See* General Objection No. 1 (regarding product and/or geographic competition). Without waiving these objections, Duke states that it will produce responsive documents, to the extent that they can be identified and produced without undue burden, that set forth Duke's formal policies and procedures regarding the procurement of coal.

Interrogatory No. 19: Identify and describe in detail Duke's current policies and procedures for determining the relative order in which power will be generated or dispatched from particular electric generating units, plants or facilities owned and/or operated by Duke.

Response:

Duke objects to this Interrogatory on grounds of relevance and burden. *See* General Objection No. 1 (regarding product and/or geographic competition) and General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition). Without waiving these objections, Duke states that, in determining the relative order in which power will be generated or dispatched, it generally follows an economic dispatch policy in which generating resources are ranked in terms of operating costs. Duke further states that it will produce a snapshot of the 2002 dispatch priorities of each of Duke's generating resources, but Duke cautions NS that factors in addition to cost (*e.g.*, ramping constraints) may play a role in determining whether to employ a given generating resource.

Interrogatory No. 20: Identify and describe in detail Duke's current policies and procedures for determining whether, and to what extent, native or jurisdictional load electric power requirements of Duke's retail electric customers are, should be or could be satisfied by (a) electric power generated or produced by Duke or (b) electric power purchased or obtained by Duke from persons not affiliated with Duke.

Response:

Duke objects to this Interrogatory on grounds of relevance and burden. *See* General Objection No. 1 (regarding product and/or geographic competition). Without waiving these objections, Duke states that information responsive to this Interrogatory may be contained in the documents that Duke references in General Objection No. 1.

Interrogatory No. 21: Identify, for each calendar month from January 1, 1999 to the present, any transmission constraints affecting the transportation, transmission or distribution of electric power:

- (a) Within the Duke system;
- (b) Between the Duke system and other utilities or electric power producers and/or sellers comprising the members of the Regional Transmission Organization or NERC Regional Council of which Duke or its service territory is or is proposed to be a part; and
- (c) Between or among different NERC Regional Councils.

Response:

Duke objects to this Interrogatory on grounds of relevance and burden. *See* General Objection No. 1 (regarding product and/or geographic competition). Without waiving these objections, Duke states that information responsive to this Interrogatory may be contained in the documents that Duke references in General Objection No. 1.

Interrogatory No. 22: Identify and describe any negotiations or communications that have occurred during the period from January 1, 1999 to the present, or are contemplated by Duke to occur in the future, between Duke and any other person with respect to the actual, proposed or possible (a) amendment, modification, supplementation, replacement or alteration of the terms of any coal supply contract produced in response to Document Request No. 10 or (b) arrangement for the supply of coal to any Duke Plant.

Response:

Duke objects to this Interrogatory on grounds of confidentiality and on grounds of relevance and burden. *See* General Objection No. 1 (regarding product and/or geographic competition). Moreover, Duke objects to this Interrogatory to the extent that it seeks information regarding origins and/or destinations that are not at issue in this case. *See* General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition). Without waiving these objections, Duke states that it will produce documents containing responsive information, to the

extent that such documents can be identified and produced without undue burden, and to the extent that they are not subject to confidentiality restrictions with third parties.

Interrogatory No. 23: For each calendar month (or other time period for which Duke maintains records) during the period from January 1, 1999 to the present, identify the following:

- (a) The total native or jurisdictional load electric power requirements of Duke's retail electric power customers;
- (b) The total actual consumption by Duke's retail electric power customers of electric power sold or distributed by Duke;
- (c) The total amount of electric power generated or produced by Duke (excluding purchases or exchanges of electric power generated or produced by persons other than Duke);
- (d) The total average cost (per kilowatt hour) of the electric power generated or produced by Duke (excluding purchases or exchanges of electric power generated or produced by persons other than Duke);
- (e) The total amount of electric power purchased or acquired by Duke from any person not affiliated with Duke;
- (f) The total average cost (per kilowatt hour) of the electric power purchased or acquired by Duke from any person not affiliated with Duke;
- (g) The total amount of electric power sold or distributed by Duke to any person not affiliated with Duke (excluding sales or distribution of electric power to Duke's retail electric power customers);
- (h) The total average sales price or revenue (per kilowatt hour) received by Duke for the electric power sold or distributed by Duke to any person not affiliated with Duke (excluding sales or distribution of electric power to Duke's retail electric power customers);
- (i) The total average profit (per kilowatt hour) earned by Duke for the electric power sold or distributed by Duke to any person not affiliated with Duke (excluding sales or distribution of electric power to Duke's retail electric power customers);

- (j) The relative share of electric power that, to meet native or jurisdictional load requirements, was (i) purchased by Duke to meet native or jurisdictional load or other electric generating requirements or (ii) produced by Duke to meet native or jurisdictional load or other electric generating requirements;
- (k) The relative share of electric power generated at each Duke Plant that was used to meet native or jurisdictional load or other electric generating requirements of Duke Plants, or that was used to complete off-system and/or wholesale electric power sales or transfers; and
- (l) The revenues, net income and/or profits generated by Duke in connection with the sale or transfer of electric power generated at any Duke Plant.

Response:

Duke objects to this Interrogatory on grounds of relevance and burden. See General Objection No. 1 (regarding product and/or geographic competition) and General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition). Without waiving these objections, Duke states that information responsive to this Interrogatory may be contained in the documents that Duke references in General Objection No. 1.

Interrogatory No. 24: Identify all Forecasts prepared by or for Duke or in Duke's possession, custody or control during the period from January 1, 1999 to the present (including any breakdowns of any such forecasts, projections or estimates by commodity classification, geographic region, NERC Regional Council, coal mine or source, coal producer or supplier, generator or producer of electric power, railroad, year or other time period, Duke Plant, or any other category) referring to the level, volume or rate of change in any of the following:

- (a) The expected or anticipated electric power generating capacity of Duke or of any electric power generating unit, plant or facility (referred to herein as "unit") included in or comprising any Duke Plant by calendar month, year or other time period;
- (b) The expected or anticipated total net generation (in kilowatt hours) of electric power of electricity generators or producers, Duke or any unit by calendar month, year or other time period;

- (c) The expected or anticipated Capacity Factor of electricity generators or producers, Duke or any unit by calendar month, year or other time period;
- (d) The expected or anticipated native or jurisdictional load requirements or commitments (in kilowatt hours) of electricity generators or producers, Duke or any unit by calendar month, year or other time period;
- (e) The expected or anticipated volume of demand for electric power produced or sold by electricity generators or producers, power marketers, Duke or any unit by calendar month, year or other time period;
- (f) The expected or anticipated volume of sales (in dollars) of electric power produced or sold by electricity generators or producers, power marketers, Duke or any unit by calendar month, year or other time period;
- (g) The expected or anticipated level of the prices of electric power available for purchase or sale in the wholesale electricity market by electricity generators or producers, power marketers, Duke or any unit by calendar month, year or other time period;
- (h) The location, amount and duration of any transmission constraints affecting or potentially affecting the transportation, transmission or distribution of electric power;
- (i) The expected or anticipated volume or amount of each type of fuel to be burned or used by electricity generators or producers, Duke or any unit for purposes of generating electric power by calendar month, year or other time period;
- (j) The expected or anticipated number of tons of coal to be burned or used by electricity generators or producers, Duke or any unit for purposes of generating electric power by calendar month, year or other time period;
- (k) The expected or anticipated number of tons of coal to be purchased or acquired by electricity generators, Duke or any unit for purposes of generating electric power by calendar month, year or other time period;
- (l) The expected or anticipated price or cost of coal to be purchased or used by electricity generators or producers, Duke or any unit for purposes of generating electric power by calendar month, year or other time period;
- (m) The expected or anticipated level of prices of coal that could be used by electricity generators or producers, Duke or any unit for purposes of generating electric power by calendar month, year or other time period;

- (n) The expected or anticipated number of tons of coal to be transported by rail by, for or to electricity generators or producers, Duke or any unit by calendar month, year or other time period;
- (o) The expected or anticipated level of railroad rates for the transportation of coal that could be used by electricity generators or producers, Duke or any unit for purposes of generating electric power by calendar month, year or other time period;
- (p) The expected or anticipated level or rate of change in the Rail Cost Adjustment Factor (with or without an adjustment for railroad productivity) published by the STB, or any other measure of the level or rate of change in the costs of providing rail freight transportation services, by calendar month, year or other time period; and
- (q) The expected or anticipated level or rate of change in the Consumer Price Index, the Producer Price Index, the Gross Domestic Product-Implicit Price Deflator, or any other measure of inflation or rate of change in the level of prices, by calendar month, year or other time period.

Response:

Duke objects to this Interrogatory on grounds of relevance and burden to the extent that it seeks information regarding plants that are not at issue in this case (*see* General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition), and with respect to the substance of subparts (a) - (h), (i) (to the extent that it relates to fuel other than coal), (l), and (m). *See* General Objection No. 1 (regarding product and/or geographic competition). Duke also objects to subparts (l) and (m) on grounds that they seek information that is subject to confidentiality restrictions with third parties.

Without waiving these objections, Duke states that it will produce documents containing information that is responsive to subparts (i) (as to coal), (j), (k), (n), and (o) as to each of the issue plants and the Marshall plant, to the extent that such documents can be identified and produced without undue burden, and (as to subpart (o)) to the extent that Duke

may do so without violating confidentiality restrictions with third parties. Duke also states that it will produce documents containing information that is responsive to subparts (p) and (q) to the extent that such documents can be identified and produced without undue burden. Finally, Duke states that information responsive to other subparts of this Interrogatory may be contained in the documents that Duke references in General Objection No. 1.

Interrogatory No. 25: For each Forecast identified in response to Interrogatory No. 24, identify and describe in detail the methodology used to develop or prepare the Forecast including, but not limited to, the following:

- (a) All assumptions utilized in preparing or developing such Forecast; and
- (b) All data bases and sources of information used or relied upon to develop or prepare such Forecast.

Response:

See Response to Interrogatory No. 24. Duke also objects to this Interrogatory on grounds of burden to the extent that it seeks information in a raw form that would be duplicative of the information produced in response to Interrogatory No. 24 without conveying additional relevant information. Without waiving these objections, Duke states that it will produce documents including information responsive to this Interrogatory (as limited by Duke's response to Interrogatory No. 24), to the extent that such documents can be identified and produced without undue burden.

Interrogatory No. 26: Identify each consultant, expert or research firm employed by or for Duke during the period from January 1, 1999 to the present in relation to coal procurement and/or coal transportation. For each person identified in response to this Interrogatory, identify the following:

- (a) The person employing such consultant, expert or research firm;

- (b) The date or dates of each such employment;
- (c) The stated purpose of each such employment; and
- (d) The report or other written communications made pursuant to such employment.

Response:

Duke objects to this Interrogatory to the extent that it seeks information regarding coal to be utilized at plants that are not at issue in this case. *See* General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition). Duke also objects to this Interrogatory on grounds that it is premature. Without waiving these objections, Duke states that with the exception of its preparation for and prosecution of the instant case, no consultants, experts, or research firms have been employed by or for it in relation to coal procurement for and/or coal transportation to the issue plants.

Interrogatory No. 27: Identify, by docket number and agency name, each state or federal regulatory proceeding (a) to which Duke has been a party during the period from January 1, 1999 to the present and (b) which has involved the question of Duke's compliance with the Amended Clean Air Act or any other existing or proposed law or regulation restricting emissions from electric generating facilities at any electric power generating unit, plant or facility owned (in whole or in part) and/or operated by Duke.

Response:

Duke objects to this Interrogatory on grounds of relevance and burden. *See* General Objection No. 1 (regarding product and/or geographic competition) and General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition). Without waiving these objections, Duke states that information responsive to this Interrogatory may be contained in the documents that Duke references in General Objection No. 1.

Interrogatory No. 28: State whether Duke has conducted, caused to be conducted, or has access to any studies, reports or other documents describing or analyzing the costs of utilizing privately owned or leased rail cars for the movement of coal or the costs of maintaining privately owned or leased rail cars for the movement of coal. If the answer to this Interrogatory is affirmative, describe in detail the scope of each such study, report or other document, the methodology utilized therein and the detailed results thereof.

Response:

Duke will produce documents which include information that is responsive to this Interrogatory, to the extent that such documents can be identified and produced without undue burden.

Interrogatory No. 29: For each hopper car or gondola owned or leased by Duke, and for each of the calendar years 1999 to the present, identify the following:

- (a) The owner or lessee of the car;
- (b) The location(s) from which the hoppers or gondolas are assigned;
- (c) Car initial and number;
- (d) Source of car;
- (e) Car model or type;
- (f) Tare weight;
- (g) Date of purchase or lease;
- (h) Original cost plus additions and betterments;
- (i) Description of financing vehicle (e.g., equipment trust);
- (j) Debt rate as a percent;
- (k) Finance terms (in years);

- (l) Annual depreciation;
- (m) Accrued depreciation;
- (n) If leased, whether capital or operating lease;
- (o) If capital lease, the capitalized value of the lease by car or car group. If group of cars, identify the number (by initial and number) and aggregate dollars;
- (p) If an operating lease, the quarterly, semi-annual, annual, etc. lease payment by car or car group covering the term of the lease. If a group of cars, identify the number (by initial and number) and aggregate dollars;
- (q) The movement history of each car, including location, miles traveled between stations (loaded and empty), and the time and date of arrival at each station; and
- (r) The history (on a year-to-year basis) of per diem payments received by Duke or other owner or lessor for the use of each car.

Response:

Duke will produce documents containing responsive information to the extent that such documents can be identified and produced without undue burden.

Interrogatory No. 30: For each of the hopper or gondola cars identified in response to Interrogatory No. 29, identify maintenance and/or repair expenses by individual hopper or gondola car initial and number (owned and leased), incurred by Duke for each of the calendar years 1999 to the present.

Response:

Duke will produce documents containing responsive information to the extent that such documents can be identified and produced without undue burden.

Interrogatory No. 31: For each of the hopper or gondola cars identified in response to Interrogatory No. 29, identify the total car unit-miles corresponding to the maintenance and repair expenses identified in Interrogatory No. 30 (*i.e.*, by

individual hopper or gondola car initial and number, or car type or car series) for each of the calendar years 1999 to the present.

Response:

Duke will produce documents containing responsive information to the extent that such documents can be identified and produced without undue burden.

Interrogatory No. 32: Identify the individual days during the period January 1, 1999 to the present on which coal unloading operations at Allen, Belews Creek, Buck, Dan River or Marshall were suspended because of employee vacations or holidays or for any other reason and, for each such closing, the reason or reasons for such closing.

Response:

Duke objects to this Interrogatory on grounds of relevance to the extent that it seeks information regarding coal unloading operations at Marshall. *See* General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition). Without waiving this objection, Duke states that it will produce documents containing responsive information for the listed plants to the extent that such documents can be identified and produced without undue burden.

Interrogatory No. 33: Identify each weekend (*i.e.*, Saturday and following Sunday) during the period from January 1, 1999 to the present on which coal unloading operations at Allen, Belews Creek, Buck, Dan River or Marshall were suspended and, for each such suspension, the reasons for such suspension.

Response:

See Response to Interrogatory No. 32.

Interrogatory No. 34: State whether coal is or can be unloaded from NS's railroad cars at Allen, Belews Creek, Buck, Dan River or Marshall 24 hours per

day. If the response to this Interrogatory is less than 24 hours per day, identify all circumstances which prevent 24-hour per day unloading.

Response:

See Response to Interrogatory No. 32.

Interrogatory No. 35: Identify, separately for each calendar month from January 1, 1999 to the present, the date, time and duration of any period in which coal unloading operations at Allen, Belews Creek, Buck, Dan River or Marshall could not be carried out continuously, and the reasons why such coal unloading operations could not be carried out continuously.

Response:

See Response to Interrogatory No. 32.

B. DOCUMENT PRODUCTION REQUESTS

1. Produce all documents that underlie, support or relate to the allegation, contained in Paragraph 9 of the Complaint, that NS possesses "market dominance" (as defined in 49 U.S.C. § 10707) with respect to the transportation of coal between the origins covered by Duke's Complaint, on the one hand, and Allen, Belews Creek, Buck, Dan River and Marshall, on the other hand.

Response:

Duke objects to this Request to the extent that it characterizes Duke's Complaint as referring to "market dominance" regarding movements to Marshall. Duke also objects to this Request for the reasons set forth in response to Interrogatory No. 1 (regarding prematurity).

2. Produce all documents that underlie, support or relate to the allegation, contained in Paragraph 8 of the Complaint, that the challenged common carrier rates of NS generate revenue-to-variable cost ratios in excess of 180 percent for the transportation of coal between the origins covered by Duke's Complaint, on the one hand, and Allen, Belews Creek, Buck, Dan River and Marshall, on the other hand.

Response:

Duke objects to this Request to the extent that it characterizes Duke's Complaint as referring to rates for movements to Marshall. Duke also objects to this Request for the reasons set forth in response to Interrogatory No. 1 (regarding prematurity).

3. To the extent not produced in response to Document Request No. 2, produce each study or analysis (including, but not limited to, strategic studies, long-range planning studies, analyses of options, management audit studies or reports and testimony), and all workpapers and other supporting documents and data (including machine-readable data), prepared by Duke (or by any person retained or employed by Duke) during the time period from January 1, 1999 to the present, referring to the variable costs of service or to the revenue-to-variable cost ratios for the transportation of coal by rail between any origin and any Duke Plant. For each such study or analysis, produce all underlying workpapers and source documents, including (without limitation) all computer-readable data containing inputs to or the results of such study or analysis.

Response:

Duke objects to this Request on grounds of relevance to the extent that it seeks information regarding the cost of service to plants not at issue in this case. Without waiving this objection, Duke states that no non-privileged, responsive documents exist regarding service to the issue plants.

4. Produce all documents that underlie, support or relate to the allegation, contained in Paragraph 10 of the Complaint, that the challenged common carrier rates established by NS for the transportation of coal between the origins covered by Duke's Complaint, on the one hand, and Allen, Belews Creek, Buck, Dan River and Marshall, on the other hand, are unreasonably high in violation of 49 U.S.C. §§ 10701(d)(1) and 10702.

Response:

Duke objects to this Request to the extent that it characterizes Duke's Complaint as referring to rates for movements to Marshall. Duke also objects to this Request for the reasons set forth in response to Interrogatory No. 1 (regarding prematurity).

5. To the extent not produced in response to Document Request No. 4, produce each study or analysis (including, but not limited to, strategic studies, long-range planning studies, analyses of options, management audit studies or reports and testimony), and all workpapers and other supporting documents and data (including machine-readable data), prepared by Duke (or by any person retained or employed by Duke) during the time period from January 1, 1999 to the present, referring to the maximum reasonableness of the rates charged (or proposed to be charged) by NS or to the stand-alone costs of service for the transportation of coal by rail between any origin and any Duke Plant. For each such study or analysis, produce all underlying workpapers and source documents, including (without limitation) all computer-readable data containing inputs to or the results of such study or analysis.

Response:

Duke objects to this Request on grounds of relevance to the extent that it seeks information regarding the rates and/or costs for service between origins and/or destinations not at issue in this case. Without waiving this objection, Duke states that no non-privileged, responsive documents exist regarding service between the issue origins and the issue plants.

6. Produce all documents referring to any of the following:
 - (a) The feasibility and/or costs of receiving coal at Allen, Belews Creek, Buck, Dan River or Marshall by means of motor carriers, water carriers, conveyors or any other non-rail transportation mode;
 - (b) The feasibility and/or costs of receiving coal at Allen, Belews Creek, Buck, Dan River or Marshall by means of any rail carrier other than NS;
 - (c) The feasibility and/or costs of constructing or acquiring transportation facilities so as to receive coal at Allen, Belews Creek, Buck, Dan River or

Marshall transported in whole or in part by means of any rail carrier other than NS;

- (d) The feasibility and/or costs of constructing or acquiring transportation facilities so as to receive coal at Allen, Belews Creek, Buck, Dan River or Marshall transported in whole or in part by means of any non-rail carrier;
- (e) The availability or unavailability to Duke of effective competitive transportation alternatives to NS's coal transportation services for delivery of coal to Allen, Belews Creek, Buck, Dan River or Marshall;
- (f) The nature and source of any competitive or business leverage Duke possesses or might possess in negotiating with NS reasonable rail rates for NS's coal transportation services for delivery of coal to Allen, Belews Creek, Buck, Dan River or Marshall; and
- (g) The costs incurred by NS in transporting coal between any mine or source and any Duke Plant.

Response:

Duke objects to this Request on grounds of relevance to the extent that it seeks information regarding Marshall and to the extent that it seeks information regarding the competitive leverage that supposedly would be created by indirect forms of competition. *See* General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition) and General Objection No. 1 (regarding product and/or geographic competition). Without waiving these objections, and subject to Duke's response to Interrogatory No. 7, Duke states that no non-privileged, responsive documents exist regarding service to the issue plants.

7. Produce, separately for each proposal to acquire or construct rail facilities identified in response to Interrogatory No. 7 or No. 8, each document referring to such proposal, including (but not limited to) the following:

- (a) All studies and analyses of the feasibility and/or costs of constructing, maintaining or operating the rail facilities proposed to be acquired or constructed;

- (b) All studies and analyses relating to the engineering, design or operation of the rail facilities proposed to be acquired or constructed;
- (c) All documents referring to the use of the rail facilities proposed to be acquired or constructed by any rail carrier, the terms of such use, and the rates and charges for transportation over such facilities;
- (d) All correspondence relating to such proposal; and
- (e) All regulatory filings made by Duke with Federal, state or municipal governmental agencies or departments in connection with such proposal.

Response:

See Responses to Interrogatory Nos. 7 and 8. Without waiving the objections set forth therein, Duke states that no non-privileged, responsive documents exist regarding service between the issue origins and issue plants.

8. Produce all documents referring to any solicitation identified in response to Interrogatory No. 9 or No. 10.

Response:

See Responses to Interrogatory Nos. 9 and 10. Without waiving the objections set forth therein, Duke states that no non-privileged, responsive documents exist regarding service between the issue origins and the issue plants.

9. Produce each contract in effect at any time during the period from January 1, 1999 to the present between Duke, on the one hand, and any carrier (other than NS), on the other hand, for the transportation of coal to any Duke Plant. The response to this Document Request should include all supplements and amendments to each such coal transportation contract, as well as all documents necessary to determine, during the entire time period covered by this Document Request, the applicable carrier, mine or source, Duke Plant, transportation rate or charges, and volume of coal transported or to be transported under such contract.

Response:

Duke objects to this Request on grounds of relevance to the extent that it seeks coal transportation contracts for service to plants other than Allen, Belews Creek, Buck, and Dan River. See General Objection No. 1 (regarding product and/or geographic competition) and General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition). Duke also objects to this Request to the extent that it seeks production of contracts that are subject to confidentiality agreements with third parties. Without waiving these objections, Duke states that there are no responsive coal transportation contracts between Duke and a carrier other than NS for service to the plants at issue in this case. Moreover, Duke states that it would not object to the production of responsive contracts regarding coal transportation service to Marshall if the Board were to order such production.

10. Produce each coal supply contract to which Duke is or was a party and which was in effect at any time during the period from January 1, 2001 to the present. The response to this Document Request should include all supplements and amendments to each such coal supply contract, as well as all documents necessary to determine, during the entire period covered by this Document Request, the applicable seller, mine or source, price and volume of the coal supplied under the contract.

Response:

Duke objects to this Request on grounds of relevance to the extent that it seeks coal supply contracts from origins not at issue in this case and/or to the extent that it seeks contracts for the supply of coal to be used at plants that are not at issue in this case. See General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition). Duke also objects to this Request on grounds that the requested materials are confidential and contain provisions that expressly prohibit Duke from disclosing the terms of such contracts to third

parties without the consent of the other contracting party, or when compelled to do so by a court or government order. Without waiving these objections, Duke states that it would not object to the production of the requested materials if the Board were to require such production in this case.

11. Produce all documents referring to any negotiations or discussions that have occurred during the period from January 1, 1999 to the present, or are contemplated by Duke to occur, between Duke and any other person for the purpose of (a) amending, modifying, supplementing, replacing or altering the terms of any coal supply contract produced in response to Document Request No. 10 or (b) arranging for the supply of coal to any Duke Plant.

Response:

See Response to Request No. 10. In addition, Duke objects to the production of documents reflecting the negotiation of a coal supply contract or an amendment to a coal supply contract that either: (i) has expired; or (ii) is currently effective, on grounds that such documents would be duplicative of information that is contained in the contracts that NS has requested.

12. Produce all documents referring to the actual, contemplated or possible supply of coal by any producer or supplier of coal to any Duke Plant during any future time period, including all studies or analyses prepared by or for Duke referring to any such actual, contemplated or possible future supply of coal and all documents containing communications between Duke and any coal producer or supplier referring to any such actual, contemplated or possible future supply of coal.

Response:

See Response to Interrogatory No. 22 and Request No. 10.

13. Produce all fuel supply contracts (other than coal supply contracts identified in Document Request No. 10) to which Duke is a party and which has an effective term of more than one year. The response to this Document Request should include all supplements and amendments to each such fuel supply contract,

as well as all documents necessary to determine, during the entire period covered by this Document Request, the applicable seller, source, price and volume of the fuel supplied under the contract.

Response:

Duke objects to this Request on grounds of relevance and burden. *See General Objection No. 1 (regarding product and/or geographic competition).*

14. Produce all contracts for the purchase and/or sale of electric power or electric generating capacity (other than contracts for the purchase and/or sale of electric power to/from Duke's retail electric customers) to which Duke is a party and which has an effective term of more than one year. The response to this Document Request should include all supplements and amendments to each such purchase and/or sale contract, as well as all documents necessary to determine, during the entire time period covered by this Document Request, the applicable purchasers and/or sellers, the source of the electric power or generating capacity covered by such contract, the volume or amount of electric power or generating capacity covered by such contract, the duration of such contract, and the prices or other charges specified in such contract.

Response:

Duke objects to this Request on grounds of relevance and burden. *See General Objection No. 1 (regarding product and/or geographic competition).*

15. Produce all documents referring to the present or future authorized, targeted or actual coal inventory level (*i.e.*, the amount of coal, in tons, maintained or available at a Duke Plant for use in generating electric power) for any Duke Plant.

Response:

Duke objects to this Request on grounds of relevance and burden. *See General Objection No. 1 (regarding product and/or geographic competition).* Duke also objects to this Request to the extent that it seeks information regarding inventory levels at plants that are not at issue in this case. *See General Objection No. 10 (regarding the limited inquiry into intra- and*

intermodal competition). Without waiving these objections, Duke states that it will produce documents containing responsive information regarding the issue plants and the Marshall plant, to the extent that such documents can be identified and produced without undue burden.

16. Produce all documents comprising or referring to Duke's current policies and procedures for fuel and/or fuel procurement for any Duke Plant.

Response:

Duke objects to this Request to the extent that it seeks documents related to fuel other than coal (*see* General Objection No. 1 (regarding product and/or geographic competition)), and related to origins and/or destinations that are not at issue in this case. *See* General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition). Duke also objects to this Request on grounds of burden in that a large number of documents in Duke's files arguably may comprise or refer to Duke's policies and procedures for fuel and/or fuel procurement. Finally, Duke objects to this Request as vague and ambiguous in that Duke is unaware of whatever distinction NS may be making as between "fuel" and "fuel procurement."

Without waiving these objections, Duke states that it will produce formal statements of its coal acquisition policy (if any exist), to the extent that such statements can be identified and produced without undue burden.

17. Produce all documents comprising or referring to Duke's current policies and procedures for determining the relative order in which power will be generated or dispatched from particular electric generating units, plants or facilities owned and/or operated by Duke.

Response:

Duke objects to this Request on grounds of relevance and burden. *See* General Objection No. 1 (regarding product and/or geographic competition). Without waiving these objections, Duke states that documents responsive to this Request may be included within the documents that Duke references in General Objection No. 1. *See also* Duke's Response to Interrogatory No. 19.

18. Produce all documents supporting or explaining the calculation or development of each dispatch price identified in response to Interrogatory No. 11(p), including documents identifying the fuel expense, variable operation and maintenance expense and heat rate component by output segment for each unit.

Response:

See Response to Request No. 17.

19. Produce documents identifying, separately for each electric power generating unit, plant or facility included in or comprising any Duke Plant and for each calendar month, day, hour or block of hours (the smallest increment of time for which Duke maintains records) from January 1, 1999 to the present, the amounts of operation and maintenance expenditures determined or assigned as variable costs as opposed to fixed costs, including all documents supporting or explaining the calculation or development of such determination or assignment.

Response:

Duke objects to this Request on grounds of relevance and burden. *See* General Objection No. 1 (regarding product and/or geographic competition). Without waiving these objections, Duke states that documents responsive to this Request may be included within the documents that Duke references in General Objection No. 1.

20. Produce all documents comprising or referring to Duke's current policies and procedures for determining whether, and to what extent, native or jurisdictional load electric power requirements of Duke's retail electric customers are, should be or could be satisfied by (a) electric power generated or produced by Duke or (b) electric power purchased or obtained by Duke from persons not affiliated with Duke.

Response:

Duke objects to this Request on grounds of relevance and burden. *See* General Objection No. 1 (regarding product and/or geographic competition). Without waiving these objections, Duke states that documents responsive to this Request may be included within the documents that Duke references in General Objection No. 1.

21. Produce documents identifying, separately for each electric power generating unit, plant or facility included in or comprising any Duke Plant and for each calendar month, day, hour or block of hours (the smallest increment of time for which Duke maintains records) from January 1, 1999 to the present, the electric power purchase price at which Duke would purchase electric power from a person not affiliated with Duke rather than generating or producing such power at the unit or another Duke Plant, including all documents supporting or explaining the calculation or development of such price.

Response:

Duke objects to this Request on grounds of relevance and burden. *See* General Objection No. 1 (regarding product and/or geographic competition). Without waiving these objections, Duke states that documents responsive to this Request may be included within the documents that Duke references in General Objection No. 1.

22. Produce all documents referring to any instructions, guidelines or policies provided to or used by Duke personnel in determining the relative order in which electric power will be generated or dispatched from particular electric generating units, plants or facilities owned and/or operated by Duke and the volume or amount of electric power to be generated by such units.

Response:

Duke objects to this Request on grounds of relevance and burden. *See* General Objection No. 1 (regarding product and/or geographic competition). Without waiving these objections, Duke states that documents responsive to this Request may be included within the documents that Duke references in General Objection No. 1. *See* Response to Interrogatory No.

19.

23. Produce each study or analysis (including, but not limited to, strategic studies, long-range planning studies, feasibility studies, technical analyses, analyses of options, management audit studies or reports and testimony), and all workpapers and other supporting documents and data (including machine-readable data), prepared by Duke (or by any person retained or employed by Duke) during the period from January 1, 1999 to the present, referring to the extent to which native or jurisdictional load electric power requirements of Duke's retail electric customers in the future will be, or could be, satisfied by (a) electric power generated or produced by Duke or (b) electric power purchased or obtained by Duke from persons not affiliated with Duke.

Response:

Duke objects to this Request on grounds of relevance and burden. *See* General Objection No. 1 (regarding product and/or geographic competition). Without waiving these objections, Duke states that documents responsive to this Request may be included within the documents that Duke references in General Objection No. 1.

24. Produce each study or analysis (including, but not limited to, strategic studies, long-range planning studies, feasibility studies, technical analyses, analyses of options, management audit studies or reports and testimony), and all workpapers and other supporting documents and data (including machine-readable data), prepared by Duke (or by any person retained or employed by Duke) during the period from January 1, 1999 to the present, referring to any of the following:

- (a) The possibility that alternative fuels (including, but not limited to, gas, oil, nuclear, coal-based synthetic fuels or solar) might or could be used in the future to generate electricity at any existing Duke Plant;
- (b) The possibility that alternative fuels (including, but not limited to, gas, oil, nuclear, coal-based synthetic fuels or solar) might or could be used in the future to generate electricity at any Duke Plant to be constructed or operated in the future;
- (c) The impact of potential advances in technology on the volume or amount of coal (or alternative fuels) required or used in the future to generate electricity at any existing Duke Plant;
- (d) The impact of potential advances in technology on the volume or amount of coal (or alternative fuels) required or used in the future to generate electricity at any Duke Plant to be constructed or operated in the future; and
- (e) The feasibility, costs and benefits of converting any coal-fired Duke Plant to allow it to use alternative fuels (including, but not limited to, gas, oil, nuclear, coal-based synthetic fuels or solar) to generate electricity.

Response:

Duke objects to this Request on grounds of relevance and burden. *See* General Objection No. 1 (regarding product and/or geographic competition). Without waiving these objections, Duke states that documents responsive to this Request may be included within the documents that Duke references in General Objection No. 1.

25. Produce each study or analysis (including, but not limited to, strategic studies, long-range planning studies, feasibility studies, technical analyses, analyses of options, management audit studies or reports, and testimony), and all workpapers and other supporting documents and data (including machine-readable data), prepared by Duke (or by any person retained or employed by Duke) during the period from January 1, 1999 to the present, referring to the actual, planned, proposed or possible (a) shutdown or closure of any Duke Plant or (b) extension of the service life of any Duke Plant as a result of construction or modification of facilities or modification of operating practices.

Response:

Duke objects to this Request on grounds of relevance and burden. *See* General Objection No. 1 (regarding product and/or geographic competition) and General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition). Duke also objects to this Request on grounds of relevance to the extent that it seeks documents related to plants that are not at issue in this case. Without waiving these objections, Duke states that it will produce documents sufficient to show the anticipated service life of the issue plants and the Marshall plant.

26. Produce each study or analysis (including, but not limited to, strategic studies, long-range planning studies, feasibility studies, technical analyses, analyses of options, management audit studies or reports and testimony), and all workpapers and other supporting documents and data (including machine-readable data), prepared by Duke (or by any person retained or employed by Duke) during the period from January 1, 1999 to the present, referring to any existing or actual or potential future transmission constraints affecting the transportation, transmission or distribution of electric power:

- (a) Within the Duke system;
- (b) Between the Duke system and other utilities or electric power producers and/or sellers comprising the members of the Regional Transmission Organization or NERC Regional Council of which Duke or its service territory is or is proposed to be a part; and
- (c) Between or among different NERC Regional Councils.

Response:

Duke objects to this Request on grounds of relevance and burden. *See* General Objection No. 1 (regarding product and/or geographic competition). Without waiving these objections, Duke states that documents responsive to this Request may be included within the documents that Duke references in General Objection No. 1.

27. Produce each study or analysis (including, but not limited to, strategic studies, long-range planning studies, feasibility studies, technical analyses, analyses of options, management audit studies or reports and testimony), and all workpapers and other supporting documents and data (including machine-readable data), prepared by Duke (or by any person retained or employed by Duke) during the period from January 1, 1999 to the present, referring to any proposed or planned investment or project related to the removal or alleviation of any existing or actual or potential future transmission constraints affecting the transportation, transmission or distribution of electric power:

- (a) Within the Duke system;
- (b) Between the Duke system and other utilities or electric power producers and/or sellers comprising the members of the Regional Transmission Organization or NERC Regional Council of which Duke or its service territory is or is proposed to be a part; and
- (c) Between or among different NERC Regional Councils.

Response:

Duke objects to this Request on grounds of relevance and burden. *See* General Objection No. 1 (regarding product and/or geographic competition). Without waiving these objections, Duke states that documents responsive to this Request may be included within the documents that Duke references in General Objection No. 1.

28. Produce all documents referring to or comprising any Forecast identified in response to Interrogatory No. 24 including (but not limited to) all documents referring to the methodologies identified in response to Interrogatory No. 25.

Response:

Subject to the objections set forth in response to Interrogatory Nos. 24 and 25, Duke states that it will produce materials responsive to the Requests.

29. Produce all documents referring to any of the following subjects:
- (a) The reasonableness of the level of the rates charged by NS for the transportation of coal to Allen, Belews Creek, Buck, Dan River and Marshall;
 - (b) The impact of the level of the rates charged by NS for the transportation of coal to the Allen, Belews Creek, Buck, Dan River and Marshall on the volume of electricity output generated at any unit, plant or facility included in or comprising Allen, Belews Creek, Buck, Dan River or Marshall; and
 - (c) The effect that actual or hypothetical changes in the level of the rates charged by NS for the transportation of coal to Allen, Belews Creek, Buck, Dan River or Marshall might or would have on:
 - (1) The volume of electricity output generated at any unit, plant or facility included in or comprising Allen, Belews Creek, Buck, Dan River and Marshall;
 - (2) The relative dispatch priority of Allen, Belews Creek, Buck, Dan River and Marshall within the Duke electric generating systems;
 - (3) The amount and type of electricity output that could be sold, exchanged or transferred by Duke to third parties and the amount of revenue or profit potentially earned from such power transactions; and
 - (4) The feasibility, costs and benefits of reducing the level of electricity produced at any unit, plant or facility included in or comprising Allen, Belews Creek, Buck, Dan River and Marshall and of closing or shutting down power generation activities at any such unit, plant or facility on a temporary or permanent basis.

Response:

Duke objects to this Request on grounds of relevance and burden to the extent that it seeks documents regarding Marshall (*see* General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition)), and with respect to the substance of subparts (b) and (c). *See* General Objection No. 1 (regarding product and/or geographic competition).

Without waiving these objections, Duke states as to subpart (a) that no non-privileged, responsive documents exist regarding rates for service to the issue plants.

30. Produce (in computer-readable format to the extent available) any computer model, computer program, software or other system, maintained and/or used by or for Duke during the period January 1, 1999 to the present, or that was or could be used to forecast, project or estimate:

- (a) The costs of transporting coal or other fuels to any Duke Plant;
- (b) The delivered costs of obtaining coal or other fuels for use at any Duke Plant;
- (c) The electric power generating capacity of Duke or of any electric power generating unit, plant or facility (referred to herein as "unit") included in or comprising any Duke Plant by calendar month, year or other time period;
- (d) The total net generation (in kilowatt hours) of electric power of electricity generators or producers, Duke or any unit by calendar month, year or other time period;
- (e) The Capacity Factor of electricity generators or producers, Duke or any unit by calendar month, year or other time period;
- (f) The native or jurisdictional load requirements or commitments (in kilowatt hours) of electricity generators or producers, Duke or any unit by calendar month, year or other time period;
- (g) The volume of demand for electric power produced or sold by electricity generators or producers, power marketers, Duke or any unit by calendar month, year or other time period;
- (h) The volume of sales (in dollars) of electric power produced or sold by electricity generators or producers, power marketers, Duke or any unit by calendar month, year or other time period;
- (i) The level of the prices of electric power available for purchase or sale in the wholesale electricity market by electricity generators or producers, power marketers, Duke or any unit by calendar month, year or other time period;

- (j) The location, amount and duration of any transmission constraints affecting or potentially affecting the transportation, transmission or distribution of electric power;
- (k) The volume or amount of each type of fuel to be burned or used by electricity generators or producers, Duke or any unit for purposes of generating electric power by calendar month, year or other time period;
- (l) The number of tons of coal to be burned or used by electricity generators or producers, Duke or any unit for purposes of generating electric power by calendar month, year or other time period;
- (m) The number of tons of coal to be purchased or acquired by electricity generators, Duke or any unit for purposes of generating electric power by calendar month, year or other time period;
- (n) The price or cost of coal to be purchased or used by electricity generators or producers, Duke or any unit for purposes of generating electric power by calendar month, year or other time period;
- (o) The level of prices of coal that could be used by electricity generators or producers, Duke or any unit for purposes of generating electric power by calendar month, year or other time period;
- (p) The number of tons of coal to be transported by rail by, for or to electricity generators or producers, Duke or any unit by calendar month, year or other time period;
- (q) The level of railroad rates for the transportation of coal that could be used by electricity generators or producers, Duke or any unit for purposes of generating electric power by calendar month, year or other time period;
- (r) The level or rate of change in the Rail Cost Adjustment Factor (with or without an adjustment for railroad productivity) published by the STB, or any other measure of the level or rate of change in the costs of providing rail freight transportation services, by calendar month, year or other time period; and
- (s) The level or rate of change in the Consumer Price Index, the Producer Price Index, the Gross Domestic Product-Implicit Price Deflator, or any other measure of inflation or rate of change in the level of prices, by calendar month, year or other time period.

Response:

Duke objects to subparts (b) (as to all fuel except coal), (c) - (j), (n), and (o) on grounds of relevance and burden. *See* General Objection No. 1 (regarding product and/or geographic competition). Duke also objects to this Request to the extent that it seeks documents regarding plants other than those at issue in this case (*see* General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition)). Finally, Duke objects to this Request to the extent that it seeks documents that are subject to licensing restrictions, and objects to this Request as vague and ambiguous in its use of the term "other system."

31. Produce all documents (including, but not limited to, all data inputs, all data runs, all intermediate and final output and results) referring to any application or use by Duke, during the period from January 1, 1999 to the present, of any computer model, computer program, software or other system identified in Document Request No. 30.

Response:

See Response to Request No. 30. Without waiving the objections set forth therein, Duke states that the documents that it references in General Objection No. 1 reflect Duke's formal forecasts of many, if not all, of the topics listed in Request No. 30. In addition, Duke states that it will produce documents containing forecasts of the nature sought in subparts (r) and (s) of Request No. 30 to the extent that such documents can be identified and produced without undue burden.

32. Produce each study or analysis (including, but not limited to, strategic studies, long-range planning studies, analyses of options, management audit studies or reports and testimony), and all workpapers and other supporting documents and data (including machine-readable data), prepared by Duke (or by any person retained or employed by Duke) during the time period from January 1, 1999 to the present, referring to any of the following subjects:

- (a) The wholesale market for the purchase and/or sale of electric power;
- (b) Competition for the purchase and/or sale of electric power in the wholesale market;
- (c) Duke's actual or potential expenses, revenues or profits from the purchase and/or sale of electric power in the wholesale market; and
- (d) Any of the subjects identified in Document Request No. 30(a) through No. 30(s).

Response:

Duke objects to subparts (a), (b), and (c) of this Request on grounds of relevance and burden. *See* General Objection No. 1 (regarding product and/or geographic competition).

Without waiving these objections, Duke states that documents responsive to subparts (a), (b) and (c) of this Request may be included within the documents that Duke references in General Objection No. 1.

Duke objects to subpart (d) of this Request for the reasons set forth in response to Request No. 30. In addition, Duke objects to subpart (d) of this Request on grounds of burden to the extent that it seeks production of "all workpapers and other supporting documents and data (including machine-readable data)," since this material is likely to be duplicative of the requested studies or analyses and unlikely to yield additional relevant information. Without waiving these objections, Duke refers NS to Duke's response to Request No. 31.

33. Produce each study or analysis (including, but not limited to, strategic studies, long-range planning studies, analyses of options, management audit studies or reports and testimony), and all workpapers and other supporting documents and data (including machine-readable data), prepared by Duke (or by any person retained or employed by Duke) during the time period from January 1, 1999 to the present, referring to the impact or potential impact of (i) Duke's compliance with the Amended Clean Air Act or any other existing or proposed law or regulation restricting emissions from electric generating facilities, (ii)

deregulation of the electric utility industry and/or (iii) the introduction of competition in the generation and sales of electric power on any of the following:

- (a) Duke;
- (b) Any Duke Plant;
- (c) The volume or amount of electric power generated or produced at any Duke Plant;
- (d) The volume or amount of electric power sold by Duke to persons other than Duke's retail electric power customers;
- (e) The revenues or profits earned by Duke from the sale of electric power to persons other than Duke's retail electric power customers;
- (f) The volume or amount of coal burned or used at any Duke Plant;
- (g) The relative cost to generate or produce electric power at any Duke Plant as compared with the generation or production costs of electric power producers or sellers other than Duke;
- (h) The relative cost to generate or produce electric power at any Duke Plant as compared with the cost of purchasing or acquiring electric power from producers or sellers other than Duke; and
- (i) Duke's ability or potential ability to compete for present or future sales of electric power with electric power producers or sellers other than Duke.

Response:

Duke objects to this Request on grounds of relevance and burden. *See* General Objection No. 1 (regarding product and/or geographic competition) and General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition). Without waiving these objections, Duke states that documents responsive to this Request may be included within the documents that Duke references in General Objection No. 1.

34. Produce all documents governing or referring to the authority or participation of Duke Energy Corporation in negotiating or arranging the procure-

ment of fuel and/or fuel transportation for any Duke Plant (including, without limitation, any Duke Plant owned by Duke Power Company or Duke/Fluor Daniel).

Response:

Duke objects to this Request on grounds of relevance. See General Objection No. 1 (regarding product and/or geographic competition) and General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition).

35: Produce all documents referring to any proposed, planned, contemplated or possible transaction involving any of the following:

- (a) The sale or transfer by Duke of the ownership and/or operation of any Duke Plant to any other entity (including shareholders of any affiliate of Duke)
- (b) The purchase by Duke of the ownership and/or operation of any electric generating plant or facility from any other entity;
- (c) The acquisition by Duke of any person that engages in the generation, sale or distribution of electric power; and
- (d) The merger or consolidation of Duke with any person that engages in the generation, sale or distribution of electric power.

Response:

Duke objects to this Request on grounds of relevance and burden. See General Objection No. 1 (regarding product and/or geographic competition) and General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition). Without waiving these objections, Duke states that it will produce responsive documents, if any exist and can be identified and produced without undue burden, regarding the sale or transfer by Duke of any of the issue plants or the Marshall plant.

36. For each employment of a consultant, expert or research firm identified in response to Interrogatory No. 26, produce the following:

- (a) All documents prepared by such consultant, expert or research firm in connection with such employment; and
- (b) All documents containing communications between Duke and such consultant, expert or research firm in connection with such employment.

Response:

No consultants, experts, or research firms were identified in response to Interrogatory No. 26.

37. Produce each Integrated Resource Plan or other similar report or study prepared by or for Duke during the period January 1, 1999 to the present, including all underlying supporting materials and workpapers.

Response:

Duke objects to this Request on grounds of relevance. *See* General Objection No. 1 (regarding product and/or geographic competition). In addition, Duke objects to this Request as vague and ambiguous in its use of the phrase "similar report." Finally, Duke objects to this Request on grounds of burden to the extent that it seeks production of "all underlying supporting materials and workpapers."

Without waiving these objections, Duke states that it will produce its most recent Integrated Resource Plan and will produce the Short-Term Action Plans that it now prepares in lieu of an Integrated Resource Plan. As indicated in General Objection No. 1, Duke will also produce its "Annual Plans," which may be "similar" to its Integrated Resource Plan. Finally, Duke's willingness to produce its pre-January 1, 1999 Integrated Resource Plan should not be interpreted as a waiver of Duke's objection to producing documents created before that date.

38. Produce each study or analysis (including, but not limited to, strategic studies, long-range planning studies, analyses of options, management audit studies or reports and testimony), and all workpapers and other supporting documents and data (including machine-readable data), prepared by Duke (or by any person retained or employed by Duke) during the time period from January 1, 1999 to the present, referring to any of the following:

- (a) Duke's fuel management, fuel procurement and/or fuel transportation functions;
- (b) Duke's compliance with the Amended Clean Air Act or any other existing or proposed law or regulation restricting emissions from electric generating facilities at any electric power generating unit, plant or facility owned (in whole or in part) and/or operated by Duke; and
- (c) Duke's preparations for or compliance with deregulation of the electric utility industry and/or the introduction of competition in the generation and sales of electric power.

Response:

Duke objects to subpart (a) of this Request on grounds of relevance and burden to the extent that it seeks information regarding fuels other than coal, and to the extent that it seeks production of "all workpapers and other supporting documents and data (including machine-readable data)." Without waiving these objections, Duke states that it will produce documents, if any exist and can be identified and produced without undue burden, that are responsive to subpart (a) of this Request.

Duke objects to subparts (b) and (c) of this Request on grounds of relevance and burden. See General Objection No. 1 (regarding product and/or geographic competition). Without waiving these objections, Duke states that documents responsive to subparts (b) and (c) of this Request may be included within the documents that Duke references in General Objection No. 1.

39. Produce each study or analysis (including, but not limited to, strategic studies, long-range planning studies, analyses of options, management audit studies or reports and testimony), and all workpapers and other supporting documents and data (including machine-readable data), prepared by Duke (or by any person retained or employed by Duke) during the time period from January 1, 1999 to the present, referring to transmission constraints or limitations on transmission capacity affecting the transportation, transmission or distribution of electric power:

- (a) Within the Duke system;
- (b) Between the Duke system and other utilities or electric power producers and/or sellers comprising the members of the Regional Transmission Organization or NERC Regional Council of which Duke or its service territory is or is proposed to be a part; and
- (c) Between or among different NERC Regional Councils.

Response:

By letter dated January 18, 2002, NS withdrew this Request.

40. Produce each study or analysis (including, but not limited to, strategic studies, long-range planning studies, analyses of options, management audit studies or reports and testimony), and all workpapers and other supporting documents and data (including machine-readable data), prepared by Duke (or by any person retained or employed by Duke) during the time period from January 1, 1999 to the present, referring to the removal or alleviation of transmission constraints relevant to the movement of power:

- (a) Within the Duke system;
- (b) Between the Duke system and other utilities or electric power producers and/or sellers comprising the members of the Regional Transmission Organization or NERC Regional Council of which Duke or its service territory is or is proposed to be a part; and
- (c) Between or among different NERC Regional Councils.

Response:

By letter dated January 18, 2002, NS withdrew this Request.

41. Produce each monthly Form 423 ("Monthly Report of Cost and Quality of Fuels for Electric Plants") filed with the FERC during the period from January 1, 1999 to the present and relating to any electric power generating unit, plant or facility owned (in whole or in part) and/or operated by Duke.

Response:

Duke objects to this Request on grounds of relevance to the extent that it seeks documents related to Duke plants that NS does not serve. *See* General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition). Duke also objects to this Request to the extent that it seeks information regarding fuel other than coal. *See* General Objection No. 1 (regarding product and/or geographic competition). Duke also objects to this Request on grounds that the information sought is readily available to NS from public sources. Without waiving these objections, Duke states that it will produce the requested documents.

42. Produce each separate response to interrogatories provided by Duke to the FERC under Docket No. IN79-6 (Fuel and Energy Purchase Practices pursuant to Section 205(f)(2) of the Federal Power Act) during the period from January 1, 1999 to the present.

Response:

Duke objects to this Request on grounds of relevance to the extent that it seeks documents related to Duke plants that NS does not serve. *See* General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition). Duke also objects to this Request to the extent that it seeks information regarding fuel other than coal. *See* General Objection No. 1 (regarding product and/or geographic competition). Without waiving these objections, Duke states that it will produce its most recent FERC Form 580.

43. To the extent not otherwise provided in response to any other Document Request, produce, for the period from January 1, 1999 to the present, each official form periodically filed by Duke with state regulatory commissions or agencies having jurisdiction to regulate the generation, sale and distribution of electric power and containing data (including volume and cost) on coal procurement for, or coal transportation of coal consumed or projected to be consumed at, any Duke Plant (including Allen, Belews Creek, Buck, Dan River and Marshall).

Response:

Duke objects to this Request to the extent that it seeks documents regarding origins and/or destinations that are not at issue in this case. *See* General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition). Moreover, Duke objects to this Request on grounds of confidentiality in that it seeks information regarding Duke's coal and coal transportation expenditures. Duke also objects to this Request on grounds of burden in that volume and delivered cost information regarding coal consumed at the issue plants exists in Duke's FERC Form 423's. Without waiving these objections, Duke states that it will produce responsive documents regarding the issue plants and the Marshall plant, to the extent that such documents can be identified and produced without undue burden (or the violation of a confidentiality restriction with a third party).

44. Produce all studies, reports or other documents identified in response to Interrogatory No. 28, as well as the workpapers and explanation of procedures relating to such studies, reports or other documents.

Response:

Duke objects on grounds of burden and relevance to producing "the workpapers and explanation of procedures relating to such studies, reports or other documents." Without waiving these objections, Duke states that it will produce the requested studies, to the extent that such documents can be identified and produced without undue burden.

45. Produce documents sufficient to identify the dates, from January 1, 1999 to the present, on which coal unloading operations at any Duke Plant (including Allen, Belews Creek, Buck, Dan River and Marshall) were suspended because of employee vacations or holidays or for any reason and, in the case of each such suspension, the duration and reason for such suspension.

Response:

Duke will produce responsive documents regarding the issue plants and the Marshall plant, to the extent that such documents can be identified and produced without undue burden.

46. Produce documents sufficient to identify the incidence or frequency of coal unloading operations on weekends at any Duke Plant (including Allen, Belews Creek, Buck, Dan River and Marshall) during the period from January 1, 1999 to the present.

Response:

See Response to Request No. 45.

47. Produce documents sufficient to identify the dates, from January 1, 1999 to the present, on which coal unloading operations at any Duke Plant (including Allen, Belews Creek, Buck, Dan River and Marshall) could not be carried out continuously on a 24-hour per day basis and, in the case of each such instance, the duration and reason for such failure to carry out coal unloading operations continuously on a 24-hour per day basis.

Response:

See Response to Request No. 45.

48. Produce all mine loading permits relating to any shipment of coal between any mine origin or source, on the one hand, and Allen, Belews Creek, Buck, Dan River and Marshall, on the other hand, during the period from January 1, 1999 to the present, and all documents referring to any change in such mine loading permits (including changes in scheduled loading date or destination of the shipment) and the nature of and reasons for any such change.

Response:

Duke objects to this Request on grounds of relevance to the extent that it seeks documents regarding coal to be delivered to Marshall by CSXT. Duke also objects to this Request on grounds of burden in that it seeks production of a large number of routine, transactional documents which, to the extent that they are relevant, merely include information that is already in NS's possession by virtue of the fact that NS has transported all of Duke's relevant coal. Without waiving these objections, Duke states that it will produce documents containing information regarding coal transported by NS for the period of time from January 1, 2002 to the present, to the extent that such documents can be identified and produced without undue burden.

49. Produce all documents in Duke's possession, custody or control, at any time during the period from January 1, 1999 to the present (including, without limitation, documents containing communications between Duke and any coal mine operator or coal supplier), referring to any of the following:

- (a) The extent to which coal loading operations at any origin or source that supplies coal to Allen, Belews Creek, Buck, Dan River or Marshall are or could be carried out on particular days of the week (including weekends and holidays);
- (b) The extent to which coal loading operations at any origin or source that supplies coal to Allen, Belews Creek, Buck, Dan River or Marshall are or could be carried out during particular hours of the day;
- (c) The extent to which coal unloading operations at Allen, Belews Creek, Buck, Dan River or Marshall are or could be carried out on particular days of the week (including weekends and holidays); and
- (d) The extent to which coal unloading operations at Allen, Belews Creek, Buck, Dan River or Marshall are or could be carried out on particular hours of the day.

Response:

Duke objects to this Request on grounds of burden to the extent that potentially responsive documents could be found in routine correspondence between: (i) Duke and a large number of third party coal suppliers; or (ii) a number of different individuals at Duke, over a three-year period. Without waiving these objections, Duke states that it will produce documents that set forth formal policies with respect to loading or unloading operations, to the extent that such documents can be identified and produced without undue burden.

50. Produce all documents referring to, or sufficient to identify, the following:

- (a) The extent to which railroad cars carrying coal traffic to any Duke Plant (including Allen, Belews Creek, Buck, Dan River or Marshall) have been or are loaded to their full physical capacity; and
- (b) The average load of coal per railroad car carrying coal traffic to any Duke Plant (including Allen, Belews Creek, Buck, Dan River and Marshall).

Response:

See Response to Request No. 48.

51. Produce documents identifying, or that could be used to identify, for each railroad freight car used for the shipment of coal between any mine or source (hereinafter referred to as "Origin"), on the one hand, and Allen, Belews Creek, Buck, Dan River or Marshall (hereinafter referred to as "Destination"), on the other hand, from January 1, 1999 to the present, the following:

- (a) The name and location (city and state) of the Origin from which the shipment originated;
- (b) The name and location (city and state) of the Destination at which the shipment was delivered;
- (c) The date and time when the empty rail car used for the shipment was placed at the Origin and made available by the serving railroad for loading;

- (d) The date and time when loading of the rail car used for the shipment was completed at the Origin and the loaded car was made available to the serving railroad for movement to Destination;
- (e) The date and time when, if at all, the loaded rail car used for the shipment was interchanged or transferred to another railroad at an intermediate point between Origin and Destination;
- (f) The date and time when the loaded rail car used for the shipment was placed at the Destination and made available by the serving railroad for unloading;
- (g) The date and time when the rail car used for the shipment, after unloading at the Destination, was made available to the serving railroad for movement to the same or a different Destination; and
- (h) The date and time when the rail car used for the shipment was placed at the same or a different Destination for reloading.

Response:

See Response to Request No. 48.

52. Produce documents identifying, or that could be used to identify, for each shipment of coal between any mine or source (hereinafter referred to as "Origin"), on the one hand, and Allen, Belews Creek, Buck, Dan River or Marshall (hereinafter referred to as "Destination"), on the other hand, from January 1, 1999 to the present, the following:

- (a) The loaded transit time between each Origin and Destination;
- (b) The empty transit time between each Origin and Destination;
- (c) The round-trip transit time between each Origin and Destination;
- (d) The train cycle time for each shipment;
- (e) The freight car cycle time for each shipment; and
- (f) The locomotive cycle time for each shipment.

Response:

See Response to Request No. 48.

53. Produce (in machine-readable format if available) all data or information obtained by or for Duke from NS's Coal Transportation Management System for the period from January 1, 1999 to the present.

Response:

See General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition). Without waiving this objection, Duke states that it will produce responsive documents, to the extent that they can be identified and produced without undue burden.

54. Produce documents identifying, or that could be used to identify, for each mine or source (hereinafter referred to as "Origin") that supplied coal to any Duke Plant from January 1, 1999 to the present or that could in the future be used to supply any Duke Plant, the following:

- (a) The name and location (city and state) of the Origin;
- (b) The track capacity in feet at each mine or source;
- (c) Schematics showing the trackage configuration at each mine with both the track that NS owns (or jointly owns) and the mine-owned track clearly identified;
- (d) Annual weeks, days per week, and hours per day, of mine coal loadout operation;
- (e) Average tons per car loaded; and
- (f) Loading capacity (tons per hour).

Response:

Duke objects to this Request on grounds of relevance and burden to the extent that it seeks information about coal movements between origins and destinations that are not at issue in this case. *See* General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition). Without waiving these objections, Duke states that it will produce documents containing responsive information regarding coal that was or could be burned at any of the issue plants or the Marshall plant, to the extent that such documents can be identified and produced without undue burden.

55. Produce documents identifying, or that could be used to identify, for each Duke Plant (hereinafter referred to as "Destination") that received coal from January 1, 1999 to the present, the following:

- (a) The name and location (city and state) of the Destination;
- (b) The track capacity in feet at each Destination;
- (c) Schematics showing the trackage configuration at each Destination with both the track that NS owns (or jointly owns) and the track not owned (or jointly owned) by NS clearly identified;
- (d) Annual weeks, days per week, and hours per day, of coal unloading operations;
- (e) Average tons per car unloaded; and
- (f) Unloading capacity (tons per hour).

Response:

Duke objects to this Request on grounds of relevance and burden to the extent that it seeks documents regarding Duke plants not at issue in this case. *See* General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition). Without waiving these

objections, Duke states that it will produce documents sufficient to show the information sought in this Request as to the issue plants and the Marshall plant, to the extent that such documents can be identified and produced without undue burden.

56. Produce all documents referring to any sale or acquisition of land (improved or unimproved) completed by Duke in the states of Virginia, West Virginia, North Carolina, South Carolina, Georgia, Kentucky or Tennessee during the period from January 1, 1999 to the present including (but not limited to) documents showing the location of the parcel, size of the parcel, sale or acquisition price, a description of any improvements to the parcel, date of sale, and any characteristics of the parcel such as land use, utilities, access and topography.

Response:

Duke objects to this Request on grounds of relevance and burden to the extent that it seeks information regarding: (i) sales or acquisitions of land that is improved; (ii) sales or acquisitions of land by entities other than Duke Power; (iii) improvements to individual parcels; and (iv) characteristics of individual parcels. Without waiving these objections, Duke states that it will produce documents regarding Duke Power's sales and/or acquisitions of unimproved land in the listed states, to the extent that such documents can be identified and produced without undue burden.

57. Produce all appraisals prepared by or for Duke, or in Duke's possession, custody or control, at any time during the period from January 1, 1999 to the present, for any real estate parcels located in the states of Virginia, West Virginia, North Carolina, South Carolina, Georgia, Kentucky or Tennessee.

Response:

Duke objects to this Request on grounds of relevance and burden to the extent that it seeks information regarding: (i) appraisals of land that is improved; and (ii) appraisals of land by or for any entity other than Duke Power. Without waiving these objections, Duke states that it

will produce appraisals performed by or for Duke Power with respect to unimproved land in the listed states, to the extent that such appraisals can be identified and produced without undue burden.

58. Produce, to the extent not produced in response to any Document Request, all documents consulted or used in preparing Duke's response to any Interrogatory.

Response:

Duke will produce responsive, non-privileged documents to the extent that they can be identified and produced without undue burden or the violation of a confidentiality and/or licensing restriction with a third party.

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Dated: February 19, 2002

Attorneys for Complainant

DUKE ENERGY CORPORATION,	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. 42069
	)	
NORFOLK SOUTHERN RAILWAY COMPANY,	)	
	)	
Defendant.	)	
	)	

Complainant Duke Energy Corporation ("Duke"), pursuant to 49 C.F.R. Part 1114, hereby responds to the Second Set of Interrogatories and Requests for Production of Documents (the "Requests") served by Norfolk Southern Railway Company ("NS") on February 14, 2002.

In addition to the Specific Objections raised below, Duke hereby incorporates the General Objections set forth in Duke's February 19, 2002 Responses and Objections to Defendant's First Set of Interrogatories and Requests for Production of Documents, and makes the additional following General Objections:

18. Response Deadline. Duke objects to the 15-day response deadline set forth in the Requests as unreasonable and unduly burdensome in light of the volume and

complexity of the information and documents requested by NS. Duke's search for responsive documents and information is ongoing, and such materials (if otherwise not subject to an objection) will be produced as expeditiously as reasonably possible under the circumstances.

Duke's following Specific Objections and Responses to NS's Requests are subject to and without waiver of the foregoing General Objections.

SPECIFIC OBJECTIONS AND RESPONSES

A. INTERROGATORIES

Interrogatory No. 36: Identify any constraints (legal or otherwise) that prevent Duke from recovering from its electricity ratepayers (wholesale or retail) any portion of the costs of transporting coal by rail to any coal-fired Duke Plant, including increases in such costs of rail transportation.

Response:

Duke objects to this Interrogatory on grounds of relevance and burden both as to its substance and to the extent that it seeks information regarding the cost of transporting coal to plants other than the issue plants.

Interrogatory No. 37: Identify, for each calendar year from January 1, 1999 to the present, the amount of any coal transportation costs that Duke did not recover from its electricity ratepayers (wholesale or retail), the reasons for such failure to recover such costs, and the circumstances of such failure.

Response:

Duke objects to this Interrogatory on grounds of relevance both as to its substance and to the extent that it seeks information regarding the cost of transporting coal to plants other than the issue plants.

B. DOCUMENT PRODUCTION REQUESTS

59. Produce all documents referring to Duke's ability or right to recover from its electricity ratepayers (wholesale or retail) any portion of the costs of transporting coal by rail to any coal-fired Duke Plant, including increases in such costs of transportation.

Response:

Duke objects to this Request on grounds of relevance both as to its substance and to the extent that it seeks information regarding the cost of transporting coal to plants other than the issue plants.

60. Unless otherwise produced in response to Document Request No. 16, produce all documents comprising or referring to Duke's current policies and procedures for procurement of coal transportation.

Response:

See Response to Request No. 16. Without waiving the objections set forth therein, Duke states that it will produce formal statements of its policies and procedures for the procurement of coal transportation (if any exist), to the extent that such statements can be identified and produced without undue burden.

61. Produce each study or analysis (including, but not limited to, strategic studies or plans, long-range planning studies or plans, analyses of options, management audit studies or reports and testimony), and all work papers and other supporting documents and data (including machine-readable data), prepared by Duke (or by person retained or employed by Duke) during the time period from January 1, 1999 to the present, referring to the possibility of obtaining coal for any Duke Plant from any mine or source that did not at that time supply coal to that particular Duke Plant.

Response:

Duke objects to this Request on grounds of relevance. *See* General Objection No. 1 (regarding product and/or geographic competition). Duke also objects to this Request to the extent that it seeks information regarding coal purchased or to be purchased from origins not at issue in this case and/or coal used or to be used at locations other than the issue plants. *See* General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition). Finally, Duke objects to this Request to the extent that it seeks the production of documents which contain information that is subject to confidentiality restrictions with third parties (i.e., coal suppliers and/or coal transporters). Without waiving these objections, Duke states that it will produce responsive studies or analyses of the possibility of obtaining coal for any Duke plant from any mine or source that did not at that time supply coal to that particular Duke plant, to the extent that such documents can be identified and produced without undue burden, and to the extent that such documents can be produced without violating any confidentiality restrictions with third parties.

62. Produce all documents referring to the possibility of replacing the coal currently being consumed at any coal-fired Duke Plant with coal having different coal quality specifications or coal supplied from any alternative source.

Response:

See Response to Request No. 61.

63. Produce all documents referring to competition that coal-fired electricity generation of Duke faces or could in the future face from gas-fired electric generating facilities for the production and sale of electricity at the retail or wholesale level including, but not limited to, wholesale customers producing their own electricity using gas-fired electric generating facilities.

Response:

Duke objects to this Request on grounds of relevance and burden. *See* General Objection No. 1 (regarding product and/or geographic competition). Duke also objects to this Request on grounds of relevance to the extent that it seeks information regarding coal and other fuels consumed at plants other than the issue plants, including other plants not owned or operated by Duke.

64. Produce any study or analysis (including, but not limited to, strategic, long-range planning studies or plans, feasibility studies, technical analyses, analyses of options, management audit studies or reports and testimony) prepared by Duke (or by any person retained or employed by Duke) during the period January 1, 1999 to the present, referring to the actual, anticipated or projected share, in future electricity generation distributed to Duke's customers or through power sales by Duke, of the following means of electricity generation:

- (a) Nuclear;
- (b) Coal-fired;
- (c) Conventional hydro;
- (d) Oil-fired;
- (e) Gas-fired;
- (f) Petroleum coke; and
- (g) Pumped storage hydro.

Response:

Duke objects to this Request on grounds of relevance and burden. *See* General Objection No. 1 (regarding product and/or geographic competition). Duke also objects to this Request to the extent that it seeks information regarding the use of coal from origins not at issue in this case at plants not at issue in this case. *See* General Objection No.1 (regarding the limited

inquiry into intra- and intermodal competition). Without waiving these objections, Duke states that the documents referenced in General Objection No. 1 (and other documents that Duke has produced or will produce in this case) include responsive information regarding Duke's historic and anticipated mix of generating resources.

65. Unless otherwise produced in response to Document Request Nos. 33 or 38, produce all documents, created at any time from January 1, 1999 to the present, referring to any actual or potential impact on the costs of operating any coal-fired Duke Plant resulting from actual or proposed changes in government laws or regulations including, but not limited to:

- (a) The Clean Air Act Amendments of 1990;
- (b) The October 1998 Environmental Protection Agency ("EPA") rule in regional ozone control;
- (c) The January 2000 EPA rule on emission control;
- (d) The Kyoto Protocol of 1997 and subsequent developments related to the initial Protocol; and
- (e) Modifications planned, assumed or considered by Duke in response to the lawsuit filed by the U.S. Department of Justice identified in Document Request No. 66.

Response:

Duke objects to this Request on grounds of relevance and burden. *See* General Objection No. 1 (regarding product and/or geographic competition). Duke also objects to this Request to the extent that it seeks information regarding the cost of operating coal-fired plants other than the issue plants. Without waiving these objections, Duke states that documents responsive to this Request may be included within the documents that Duke references in General Objection No. 1.

66. Produce all documents referring to the 29 projects performed at 25 of Duke's coal-fired electric generating units that the U.S. Justice Department on behalf of the EPA has claimed were major modifications under the Clean Air Act including, but not limited to, documents referring to any of the following:

- (a) The nature of the projects;
- (b) The nature of the allegations made by the U.S. Justice Department regarding the modifications;
- (c) The costs of installing additional emission controls that the U.S. Justice Department is seeking to require Duke to implement; and
- (d) The impact on Duke's electricity generation should the relief requested by the U.S. Justice Department be granted.

Response:

Duke objects to this Request on grounds of relevance and burden. *See* General Objection No. 1 (regarding product and/or geographic competition). Duke also objects to this Request to the extent that it seeks information regarding coal-fired plants other than the issue plants.

67. Produce all documents, created at any time from January 1, 1999 to the present, referring to actual or proposed coal tolling arrangements, including documents referring to and sufficient to identify any of the following:

- (a) Duke's coal tolling policies and criteria for engaging in coal tolling;
- (b) Duke's filings and communications with state utility regulatory commissions or agencies in North Carolina and South Carolina regarding coal tolling;
- (c) Duke's analysis of coal tolling economics;
- (d) Duke's coal tolling customers, including markets and other intermediates including Duke affiliates;

- (e) Duke's coal tolling accounting policies; and
- (f) The accounting basis for Duke's FERC Form 1 coal tolling entries.

Response:

Duke objects to this Request on grounds of relevance and burden. *See* General Objection No. 1 (regarding product and/or geographic competition). Duke also objects to this Request to the extent that it seeks information regarding plants other than the issue plants. Finally, Duke objects to this Request to the extent that it seeks the production of documents containing information that is subject to confidentiality restrictions with third parties. Without waiving these objections, Duke states that it will produce documents containing responsive information regarding each of Duke's coal-fired plants, to the extent that such documents can be identified and produced without undue burden, and to the extent that such documents can be produced without violating confidentiality restrictions with third parties.

68. Produce documents sufficient to identify separately, for the period from January 1, 1999 to the present, the monthly and annual fuel and purchased power costs that were (a) incurred by Duke and (b) incurred by Duke and recovered by Duke in its rates for its jurisdictional electricity customers in North Carolina and South Carolina.

Response:

Duke objects to this Request on grounds of relevance and burden. *See* General Objection No. 1 (regarding product and/or geographic competition). Without waiving these objections, Duke states that information responsive to this Request may be included within the documents that Duke references in General Objection No. 1 and/or Duke's FERC Form 423 Reports.

69. Produce documents sufficient to identify, for the period from January 1, 1999 to the present, and separately for each coal-fired Duke Plant and each state in which Duke conducts electric generation and sales operations, (a) Duke's actual coal inventory levels and costs by year and (b) Duke's coal inventory levels and costs authorized by state regulatory agencies for recovery of costs through rates charged to Duke's jurisdictional electricity customers.

Response:

Duke objects to this Request on grounds of relevance and burden, both to the extent that it seeks information regarding plants not at issue in this case (*see* General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition)) and with respect to the substance of the information sought. *See* General Objection No. 1 (regarding product and/or geographic competition). Without waiving these objections, Duke states that it will produce documents containing information regarding Duke's actual and authorized coal inventory levels (for each of its coal-fired plants) to the extent that such documents can be identified and produced without undue burden.

70. Produce any study or analysis (including, but not limited to, strategic, long-range planning studies or plans, feasibility studies, technical analyses, analyses of options, management audit studies or reports and testimony) prepared by Duke (or by any person retained or employed by Duke) referring to the 2001 North Carolina legislative proposals and Duke's analysis of and position(s) thereon that would have provided for Duke's recovery of its investment in environmental upgrades at its coal-fired plants.

Response:

Duke objects to this Request on grounds of relevance and burden. *See* General Objection No. 1 (regarding product and/or geographic competition). Duke also objects to this Request to the extent that it seeks information regarding fuel use at coal-fired plants other than the issue plants.

71. For each coal-fired Duke Plant, the Duke system and all Duke entities, produce the following documents regarding coal-based synthetic fuel (synfuel):

- (a) Studies on the use of synfuel;
- (b) Environmental applications and modifications required to use synfuel;
- (c) Studies on participation in synfuel projects;
- (d) Studies on the tax benefits of synfuel use and production by Duke; and
- (e) Communications with DTE regarding DTE's proposed synfuel project at any Duke Plant or any other plant.

Response:

Duke objects to this Request on grounds of relevance and burden. *See* General Objection No. 1 (regarding product and/or geographic competition). Duke also objects to this Request to the extent that it seeks information regarding plants other than the issue plants. *See* General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition). Finally, Duke objects to this Request to the extent that it seeks the production of documents containing information that is subject to confidentiality restrictions with third parties. Without waiving these objections, Duke states that it will produce documents containing responsive information regarding each of Duke's coal-fired plants, to the extent that such documents can be identified and produced without undue burden, and to the extent that such documents can be produced without violating confidentiality restrictions with third parties.

72. Produce all documents created or in Duke's possession, custody or control at any time during the period from January 1, 1999 to the present referring to the transmission capability of the VACAR grid to move power from and to Duke's service territory, including studies of the transmission ability to move

power from new power generators owned by Duke and the others to Duke's service territory.

Response:

Duke objects to this Request on grounds of relevance and burden. *See General Objection No. 1 (regarding product and/or geographic competition).*

73. Produce all documents referring to interconnection studies and requests for interconnections for new electric generators to Duke's system.

Response:

Duke objects to this Request on grounds of relevance and burden. *See General Objection No. 1 (regarding product and/or geographic competition).*

74. Produce all documents, created during the period from January 1, 1999 to the present, that refer, in connection with Duke's consideration of participation in any proposed Regional Transmission Organization ("RTO") (including, without limitation, the Grid South RTO), to any of the following:

- (a) The utilization of Duke's coal-fired electric generating units for service to Duke's customers;
- (b) The sale of electric power produced at any coal-fired Duke Plant to non-jurisdictional customers; and
- (c) The availability of purchased power to Duke's system.

Response:

Duke objects to this Request on grounds of relevance and burden. *See General Objection No. 1 (regarding product and/or geographic competition) and General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition).*

75. Produce all documents referring to the possibility that any Duke Plant could utilize petroleum coke or coals obtained from (a) overseas, (b) Northern Appalachia or (c) the Powder River Basin.

Response:

Duke objects to this Request on grounds of relevance and burden. *See* General Objection No. 1 (regarding product and/or geographic competition). Duke also objects to this Request to the extent that it seeks information regarding coal origins and/or coal-fired plants not at issue in this case. *See* General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition). Finally, Duke objects to this Request to the extent that it seeks documents containing information that is subject to confidentiality restrictions with third parties. Without waiving these objections, Duke states that it will produce documents containing information that is responsive to this Request regarding the use of coal or petroleum coke from any of the listed origins at any of Duke's coal-fired plants, to the extent that such documents can be identified and produced without undue burden, and to the extent that such documents can be produced without violating confidentiality restrictions with third parties.

76. For Central Appalachian coal origins, produce any studies or analyses of:

- (a) Shifts in coal origin districts;
- (b) Reserve availability and depletion;
- (c) Coal suitability including, but not limited to, sulfur, ash, and ash fusion;
and
- (d) The effects of environmental, mining and trucking restrictions on Central Appalachian coal availability and reserves.

Response:

Duke objects to subparts (a) and (d) of this Request as vague and ambiguous.

Duke also objects to this Request to the extent that it seeks information regarding coal mines and/or coal-fired plants not at issue in this case. *See* General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition). Without waiving these objections, Duke states that it will produce studies or analyses containing information that is responsive to subparts (b) and (c) of this Request, to the extent that such documents can be identified and produced without undue burden.

77. Produce any study or analysis, and any document, referring to investments or potential investments by Duke or others for Duke in coal mines, coal docks, or any coal transportation facility (other than rail cars).

Response:

Duke objects to this Request on grounds of relevance and to the extent that it seeks information regarding coal use at plants other than the issue plants. *See* General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition). Duke also objects to this Request as duplicative of prior Requests in this case to the extent that it seeks information regarding the development of rail spurs. Without waiving these objections, Duke states that it will produce responsive documents, to the extent that such documents can be identified and produced without undue burden.

78. Produce Duke's responses from 1999 to 2001 to NERC's generating availability data system (GADS) for each Duke Plant.

Response:

Duke objects to this Request on grounds of relevance and burden. *See* General Objection No. 1 (regarding product and/or geographic competition) and General Objection No. 10 (regarding the limited inquiry into intra- and intermodal competition). Without waiving these objections, Duke states that it will produce its responses from 1999 to 2001 to NERC's generating availability data system for each of Duke's coal-fired units.

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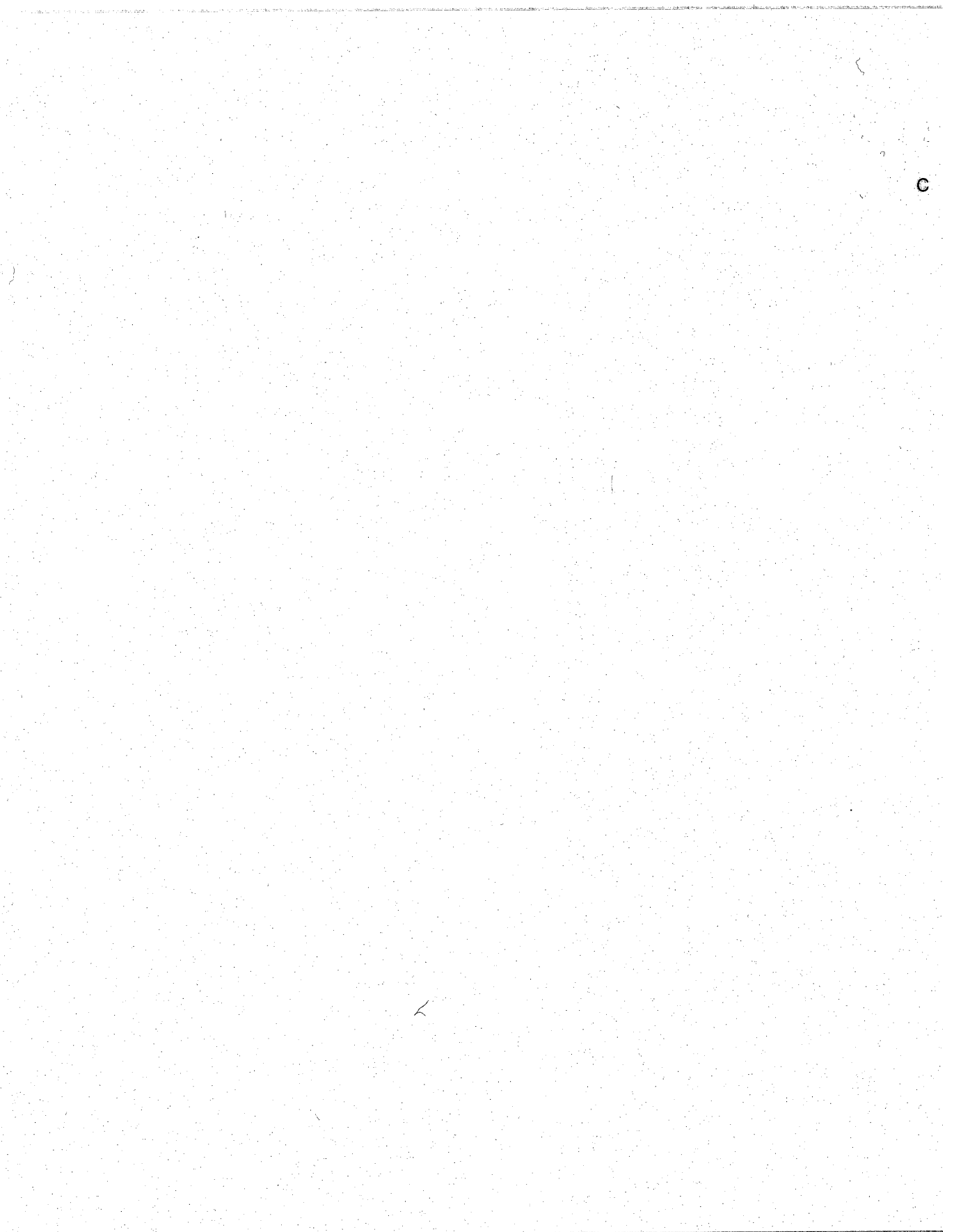
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Dated: March 1, 2002

Attorneys for Complainant



Summary of the NC Clean Smokestacks Bill

Bill Title: Improve Air Quality /Electric Utilities; SB 1078, HB 1015

~~Summary of the Clean Smokestacks Bill~~

On Monday April 23, the North Carolina Senate passed the North Carolina Clean Smokestacks Bill with an overwhelming 43 – 5 vote. The NC House of Representatives is currently considering an identical bill where it has over 50 co-sponsors and bipartisan support. Governor Easley has also indicated his support for the bill. The utilities, Duke Energy and Progress, Energy stated that they can and will meet the reductions called for in the bill.

The Clean Smokestacks bill would do the following:

- ◆ **NOx Cap.** Set a statewide cap to reduce NOx emissions year-round by 78% from 1998 levels. This cap essentially extends the NOx SIP call requirements year-round. The reduction would be phased in by 2009.
- ◆ **SO2 Cap.** Set a statewide cap to reduce SO2 emissions by 73% from 1998 levels. The reduction would be phased in by 2013.
- ◆ **Additional NOx and SO2 Reductions.** Direct the Environmental Management Commission, the state's rule-making body, to evaluate annually beginning in 2004, the need for further reductions of these pollutants.
- ◆ **Other States.** Direct the state to use its resources to compel other states to make similar reductions.
- ◆ **Study Carbon Dioxide.** Direct the state to study issues related to setting standards for carbon dioxide emissions.
- ◆ **Study Mercury.** Direct the state to study issues related to setting standards for mercury emissions.
- ◆ **Cost Recovery.** Allow utilities to recover the full cost of compliance for reductions pertaining solely to this bill.

Existing Requirements Standards Proposed in the Clean Smokestacks Bill

Caps for SO₂ (tons)				
	2000	2009	2010	2013
Federal Title IV Requirements (Acid Rain Program)	317,000		266,000	
NC Clean Smokestacks Bill		250,000		130,000

Caps for NO_x (tons)			
	2007 Summer	2007 Year-Round	2009
Federal NO _x SIP Call (5 months of year only)	28,000		
Clean Smokestacks Bill (year-round)		60,000	56,000

There is not a standard for mercury in the bill, but controlling NO_x and SO₂ also reduces mercury emissions.

- ♦ Estimated Incidental Mercury Reduction – 66% reduction from 1998 levels



Senate Bill 1078

Improve Air Quality/Electric Utilities. (= H 1015)

Bill Text: [Edition 1](#) [Edition 2](#)

Introduced by: [Allen H. Wellons](#), [Austin M. Allran](#), [Brad Miller](#), [Charles Carter](#), [Charles W. Albertson](#), [Daniel G. Clodfelter](#), [David F. Weinstein](#), [Eleanor Kinnaird](#), [Eric Miller Reeves](#), [Fletcher L. Hartsell, Jr.](#), [Frank W. Ballance, Jr.](#), [Hamilton C. Horton, Jr.](#), [Howard N. Lee](#), [James Calvin Cunningham](#), [James Forrester](#), [Jeanne H. Lucas](#), [John A. Garwood](#), [John H. Kerr III](#), [Kay R. Haqan](#), [Linda Garrou](#), [Patrick J. Ballantine](#), [Philip E. Berger](#), [Robert A. Rucho](#), [Robert C. Carpenter](#), [Stephen M. Metcalf, I.](#), [LaFontaine Odom, Sr.](#), [Tony Rand](#), [Virginia Foxx](#), [Wib Gulley](#), [William R. Purcell](#)

P/L = Public/Local Bill | * = Affects Appropriations
* = Bill Text Has Changed

Session	2001 - 2002	Prime Sponsors	Stephen M. Metcalf, I.
Fiscal Note	Available	Attributes	P

Date		Action
04/04/2001	S	Filed
04/05/2001	S	Ref To Com On Agriculture/Environment/Natural Resources
04/18/2001	S	Reptd Fav Com Substitute
04/18/2001	SA	Com Substitute Adopted
04/19/2001	S	Withdrawn From Cal
04/19/2001	S	Placed On Cal For 4/23/2001
04/23/2001	S	Passed 2nd & 3rd Reading
04/25/2001	H	Rec From Senate
04/25/2001	H	Ref to the Com on Public Utilities and, if favorable, to the Com on Environment and Natural Resources

[\[how a law is made\]](#)

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2001 - 2002 Session Bill Number:

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GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2001

S

2

SENATE BILL 1078*
Agriculture/Environment/Natural Resources
Committee Substitute Adopted 4/18/01

Short Title: Improve Air Quality/Electric Utilities. (Public)
Sponsors:
Referred to:

April 5, 2001

A BILL TO BE ENTITLED
AN ACT TO IMPROVE AIR QUALITY IN THE STATE BY REQUIRING
REDUCTIONS IN THE EMISSIONS OF CERTAIN POLLUTANTS FROM
CERTAIN FACILITIES THAT BURN COAL TO GENERATE ELECTRICITY.
The General Assembly of North Carolina enacts:

SECTION 1. G.S. 143-215.107 reads as rewritten:

"§ 143-215.107. Air quality standards and classifications.
(a) Duty to Adopt Plans, Standards, etc. - The Commission
is hereby directed and empowered, as rapidly as possible within
the limits of funds and facilities available to it, and subject
to the procedural requirements of this Article and Article 21:

- (1) To prepare and develop, after proper study, a comprehensive plan or plans for the prevention, abatement and control of air pollution in the State or in any designated area of the State.
- (2) To determine by means of field sampling and other studies, including the examination of available data collected by any local, State or federal agency or any person, the degree of air contamination and air pollution in the State and the several areas of the State.
- (3) To develop and adopt, after proper study, air quality standards applicable to the State as a whole or to any designated area of the State as the Commission deems proper in order to promote the policies and purposes of this Article and Article 21 most effectively.
- (4) To collect information or to require reporting from classes of sources which, in the judgment of the Environmental Management Commission, may cause or contribute to air pollution. Any person operating or responsible for the operation of air contaminant sources of any class for which the Commission requires reporting shall make reports containing such information as may be required by the Commission concerning location, size, and height of contaminant outlets, processes employed, fuels used, and the nature and time periods or duration of emissions, and such other information as is relevant to air pollution and available or reasonably capable of being assembled.
- (5) To develop and adopt emission control standards as in the judgment of the Commission may be necessary to prohibit, abate, or control air pollution commensurate with established air quality standards. This subdivision does not apply to that portion of the National Emission Standards for Hazardous Air Pollutants for asbestos that governs demolition and renovation as set out in 40 C.F.R. § 61.141, 61.145, 61.150, and 61.154 (1 July 1993 edition).

- (6) To adopt motor vehicle emissions standards; to adopt, when necessary and practicable, a motor vehicle emissions inspection and maintenance program to improve ambient air quality; to require manufacturers of motor vehicles to furnish to the Equipment and Tool Institute and, upon request and at a reasonable charge, to any person who maintains or repairs a motor vehicle, all information necessary to fully make use of the on-board diagnostic equipment and the data compiled by that equipment; to certify to the Commissioner of Motor Vehicles that ambient air quality will be improved by the implementation of a motor vehicle emissions inspection and maintenance program in a county. The Commission shall implement this subdivision as provided in G.S. 143-215.107A.
- (7) To develop and adopt standards and plans necessary to implement programs for the prevention of significant deterioration and for the attainment of air quality standards in nonattainment areas.
- (8) To develop and adopt standards and plans necessary to implement programs to control acid deposition and to regulate the use of sulfur dioxide (SO₂) allowances and nitrogen oxides (NO_x) emissions in accordance with Title IV and implementing regulations adopted by the United States Environmental Protection Agency.
- (8a) To develop and adopt standards and plans and to implement programs to control emissions of oxides of nitrogen (NO_x) and sulfur dioxide (SO₂) as provided in G.S. 143-215.107D.
- (9) To regulate the content of motor fuels, as defined in G.S. 119-16, to require use of reformulated gasoline as the Commission determines necessary, to implement the requirements of Title II and implementing regulations adopted by the United States Environmental Protection Agency, and to develop standards and plans to implement this subdivision. Rules may authorize the use of marketable oxygen credits for gasoline as provided in federal requirements.
- (10) To develop and adopt standards and plans necessary to implement requirements of the federal Clean Air Act and implementing regulations adopted by the United States Environmental Protection Agency.
- (11) To develop and adopt economically feasible standards and plans necessary to implement programs to control the emission of odors from animal operations, as defined in G.S. 143-215.10B.
- (12) To develop and adopt a program of incentives to promote voluntary reductions of emissions of air contaminants, including, but not limited to, emissions banking and trading and credit for voluntary early reduction of emissions.
- (13) To develop and adopt rules governing the certification of persons who inspect vehicle-mounted tanks used to transport motor fuel and to require that inspection of these tanks be performed only by certified personnel.
- (14) To develop and adopt rules governing the sale and service of mobile source exhaust emissions analyzers and to require that vendors of these analyzers provide adequate surety to purchasers for the performance of the vendor's contractual or

other obligations related to the sale and service of analyzers.

(b) Criteria for Standards. - In developing air quality and emission control standards, motor vehicle emissions standards, motor vehicle emissions inspection and maintenance requirements, rules governing the content of motor fuels or requiring the use of reformulated gasoline, and other standards and plans to improve ambient air quality, the Commission shall consider varying local conditions and requirements and may prescribe uniform standards and plans throughout the State or different standards and plans for different counties or areas as may be necessary and appropriate to improve ambient air quality in the State or within a particular county or area, achieve attainment or preclude violations of state or national ambient air quality standards, meet other federal requirements, or achieve the purposes of this Article and Article 21.

(c) Chapter 150B of the General Statutes governs the adoption and publication of rules under this Article.

(d), (e) Repealed by Session Laws 1987, c. 827, s. 205.

(f), (g). Repealed by Session Laws 1995, c. 507, s. 27."

SECTION 2. Article 21B of Chapter 143 of the General Statutes is amended by adding a new section to read:

"§ 143-215.107D. Emissions of oxides of nitrogen

(NOx) and sulfur dioxide (SO2) from
certain coal-fired electric generating units.

The Environmental Management Commission shall adopt rules to implement G.S. 143-215.107(a)(8a) as provided in this section. For emissions of oxides of nitrogen (NOx), the Commission shall develop and adopt standards and plans and implement programs to control emissions from coal-fired generating units, as those terms are defined in 40 Code of Federal Regulations § 96.2 (1 July 2000 Edition), that are owned or operated by an investor-owned public utility, as defined in G.S. 62-3, and that have the capacity to generate 25 or more megawatts of electricity so that no later than 1 January 2007 these units will collectively emit no more than 60,000 tons of oxides of nitrogen (NOx) annually and no later than 1 January 2009 these units will collectively emit no more than 56,000 tons of oxides of nitrogen (NOx) annually. For emissions of sulfur dioxide (SO2), the Commission shall develop and adopt standards and plans and implement programs to control emissions from coal-fired generating units, as those terms are defined in 40 Code of Federal Regulations § 96.2 (1 July 2000 Edition), that are owned or operated by an investor-owned public utility, as defined in G.S. 62-3, and that have the capacity to generate 25 or more megawatts of electricity so that no later than 1 January 2009 these units will collectively emit no more than 250,000 tons of sulfur dioxide (SO2) annually and no later than 1 January 2013 these units will collectively emit no more than 130,000 tons of sulfur dioxide (SO2) annually."

SECTION 3. Article 7 of Chapter 62 of the General Statutes is amended by adding a new section to read:

"§ 62-133.6. Environmental compliance expenditure-
recovery.

(a) As used in this section, the term
'environmental compliance expenditures' means only those
expenditures incurred after 1 July 2001 by an electric utility
to comply with standards adopted pursuant to G.S. 143-215.
107D that exceed the expenditures required to comply with
the revisions to the State Implementation Plan (SIP) to
reduce emissions of oxides of nitrogen (NOx) pursuant to the
final notice published by the Administrator of the United States
Environmental Protection Agency at 63 Federal Register 57491 (27
October 1998) codified at 40 Code of Federal Regulations §
51.121 (1 July 2000 Edition).

(b) The Commission shall hold a hearing and shall allow each electric utility to recover all just, reasonable, and prudently incurred environmental compliance expenditures through an environmental compliance expenditure-recovery factor that is separate from the electric utility's base rates.

(c) The Commission shall set the environmental compliance expenditure-recovery factor for each utility at least annually. The Commission shall base the environmental compliance expenditure-recovery factor on projections of environmental compliance expenditures for a future 12-month period. The Commission shall incorporate into the environmental compliance expenditure-recovery factor determination the experienced under-recovery or over-recovery of the electric utility's environmental compliance expenditures incurred during the previous 12-month period. Any refund or collection made as part of this process shall include interest at a rate to be determined by the Commission.

(d) The Commission shall adopt rules to implement this section.

SECTION 4. It is the intent of the General Assembly that the State use all available resources and means, including negotiation, participation in interstate compacts and multistate and interagency agreements, and litigation to induce other states and entities, including the Tennessee Valley Authority, to achieve reductions in emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) comparable to those required by G.S. 143-215.107(a)(8a), as enacted by Section 1 of this act, and G.S. 143-215.107D, as enacted by Section 2 of this act, on a comparable schedule. The State shall give particular attention to those states and other entities whose emissions negatively impact air quality in North Carolina or whose failure to achieve comparable reductions would place the economy of North Carolina at a competitive disadvantage.

SECTION 5. The Environmental Management Commission shall study the desirability of requiring and the feasibility of obtaining reductions in emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) beyond those required by G.S. 143-215.107(a)(8a), as enacted by Section 1 of this act, and G.S. 143-215.107D, as enacted by Section 2 of this act. The Environmental Management Commission shall consider the availability of emissions reduction technologies, increased cost to consumers of electric power, reliability of electric power supply, actions to reduce emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) taken by states and other entities whose emissions negatively impact air quality in North Carolina or whose failure to achieve comparable reductions would place the economy of North Carolina at a competitive disadvantage, and the effects that these reductions would have on public health, the environment, and natural resources, including visibility. In its conduct of this study, the Environmental Management Commission may consult with the Utilities Commission and the Public Staff. The Environmental Management Commission shall report its findings and recommendations to the General Assembly and the Environmental Review Commission annually beginning 1 September 2004.

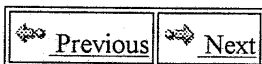
SECTION 6. The General Assembly anticipates that measures implemented to achieve the reductions in emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) required by G.S. 143-215.107(a)(8a), as enacted by Section 1 of this act, and G.S. 143-215.107D, as enacted by Section 2 of this act, will also result in significant reductions in the emissions of mercury from coal-fired generating units. The Division of Air Quality of the Department of Environment and Natural Resources shall study issues related to monitoring emissions of mercury and the development and implementation of standards and plans to

implement programs to control emissions of mercury from coal-fired generating units. The Division shall evaluate available control technologies and shall estimate the benefits and costs of alternative strategies to reduce emissions of mercury. The Division shall annually report on its interim findings and recommendations to the Environmental Management Commission and the Environmental Review Commission beginning 1 March 2002. The Division shall report its final findings and recommendations to the Environmental Management Commission and the Environmental Review Commission no later than 1 March 2005.

SECTION 7. The Division of Air Quality of the Department of Environment and Natural Resources shall study issues related to the development and implementation of standards and plans to implement programs to control emissions of carbon dioxide from coal-fired generating units and other stationary sources of air pollution. The Division shall evaluate available control technologies and shall estimate the benefits and costs of alternative strategies to reduce emissions of carbon dioxide. The Division shall report its findings and recommendations to the Environmental Management Commission and the Environmental Review Commission no later than 1 March 2002.

SECTION 8. This act is effective when it becomes law.

D



Headquarters Press Release

Washington, DC

Date: 12/22/00

Published:

Title: U.S. FILES CLEAN AIR LAWSUIT AGAINST DUKE ENERGY

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

FOR IMMEDIATE RELEASE ENRD

FRIDAY, DECEMBER 22, 2000 (202) 514-2008

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U.S. FILES CLEAN AIR LAWSUIT AGAINST DUKE ENERGY

Complaint Is Part Of National Initiative To Stop Illegal Pollution From Coal-Fired Power Plants

WASHINGTON, D.C. – The Justice Department on behalf of the EPA today filed a lawsuit against Duke Energy, charging that eight of the electric utility's power plants illegally released massive amounts of air pollutants for years.

The lawsuit filed in Greensboro, N.C. alleges that Duke Energy violated the Clean Air Act by making major modifications to its coal-fired power plants in the Carolinas without installing the equipment required to control smog, acid rain and soot. For more than a decade, the plants have operated without the best available emissions-control technology, increasing air pollution near the facilities and also downwind of the plants, along the Eastern Seaboard.

"Today, the Clinton-Gore Administration is taking another step in its ongoing enforcement against illegal and harmful levels of air pollution from coal-fired power plants," said EPA Administrator Carol Browner. "Yesterday, we announced a \$1.4 billion dollar settlement with Cinergy to cut such emissions. We hope that Duke Energy also will agree to reduce their emissions. Such an action would provide great health benefits to people living in the vicinity of these plants and also to communities located miles downwind. Until then, we will continue to pursue these cases."

This lawsuit is the latest step in the federal government's ongoing initiative to stop illegal pollution from coal-fired power plants. The United States aims to reduce dramatically the amount of sulfur dioxide, nitrogen oxides, and particulate matter that electric utility plants release into the atmosphere.

"Dirty air effects all of us, and the Justice Department is committed to pursuing companies that are to blame," said Lois J. Schiffer, Assistant Attorney General in charge of the

Environment Division. "The actions of this company compromised our health and degraded our environment."

The lawsuit against Charlotte, N.C.-based Duke seeks to force the utility to install appropriate air pollution-control technology that will significantly reduce emissions of sulfur dioxide and nitrogen oxides. The United States also seeks civil penalties. The Clean Air Act authorizes civil penalties of up to \$25,000 for each day of violation at each plant prior to January 30, 1997, and \$27,500 for each day thereafter.

Power plants existing at the time the Clean Air Act was amended in the late 1970s were "grandfathered." Therefore, utility companies were not required to retrofit those existing plants with new air pollution control equipment, unless the utilities undertook major modifications of those plants. The government asserts that Duke Energy made major modifications to its plants in order to extend their lives and avoid the cost of building new plants. Under the Clean Air Act, modifications of this kind require installation of the "best available control technology," but the utilities did not do so.

Coal-fired power plants collectively produce more pollution than any other industry in the United States. They account for nearly 70 percent of sulfur dioxide emissions each year and 30 percent of nitrogen oxides emissions. In addition to detrimental health effects on asthma sufferers, the elderly and children, power plant emissions have been linked to forest degradation, waterway damage, reservoir contamination, and deterioration of stone and copper in buildings.

To combat these environmental effects, the EPA and the Justice Department in November 1999 launched a national initiative, targeting electric utilities throughout the Midwest and Southeast whose coal-fired power plants violate the law. In addition to Duke Energy, the United States has brought legal actions for Clean Air Act violations against American Electric Power, Cinergy, FirstEnergy, Illinois Power, Southern Indiana Gas & Electric Company, the Southern Company, and the Tampa Electric Company. The EPA has brought a related administrative action against the Tennessee Valley Authority – a federal agency that owns and operates many coal-fired power plants.

Yesterday, the EPA and the Justice Department announced a \$1.4 billion agreement with Cinergy to settle the Clean Air Act claims, calling for significant upgrades in pollution control technology at 10 power plants in Ohio and Indiana. In February 2000, the federal government reached a similar settlement with the Tampa Electric Company addressing two Florida power plants. Also as part of the initiative, the United States last month reached an agreement in principle with Virginia Electric Power Company, which calls for the Richmond-based utility to undertake major environmental improvements at eight plants in Virginia and West Virginia. The lawsuits against the other utilities continue.

R-200 # # #



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CERTIFICATE OF SERVICE

I hereby certify that, on this 4th day of March, 2002, I served the foregoing "Defendant's First Motion to Compel Answers to Interrogatories and Production of Documents" by causing a copy thereof to be delivered, in the manner indicated, to each of the following:

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Hae-Won Min