

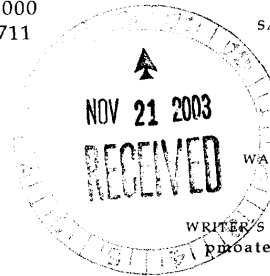
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November 21, 2003

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

ENTERED
Office of Proceedings

NOV 21 2003

Part of
Public Record

Re: Duke Energy Corp. v. Norfolk Southern Co., STB Docket No. 42069

Dear Secretary Williams:

Attached for filing in the above-referenced proceeding are the original and 16 copies of the "Reply of Defendant Norfolk Southern Railway Company to Complainant Duke Energy Corporation's Petition for Stay of the Board's November 6, 2003 Decision". We have also enclosed 16 CDs containing electronic workpapers supporting this Reply, and a computer diskette containing an electronic copy of this Reply. Also attached is an additional paper copy to be stamped and returned to our messenger.

Please direct any questions regarding this pleading to the undersigned.

Sincerely,

G. Paul Moates
Paul A. Hemmersbaugh

Enclosures

cc: William L. Slover, Esq.

209463

BEFORE THE
SURFACE TRANSPORTATION BOARD

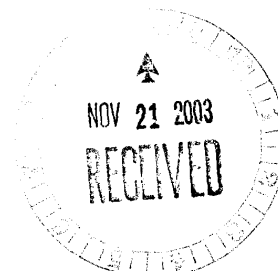
DUKE ENERGY CORPORATION,

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

Defendant.



STB Docket No. 42069

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REPLY OF DEFENDANT NORFOLK SOUTHERN RAILWAY
COMPANY TO COMPLAINANT DUKE ENERGY CORPORATION'S
PETITION FOR STAY OF THE BOARD'S NOVEMBER 6, 2003 DECISION

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Counsel for Defendant Norfolk Southern Railway Company

DATED: November 21, 2003

DUKE ENERGY CORPORATION,

 Complainant,
v.

NORFOLK SOUTHERN RAILWAY COMPANY,

 Defendant.

STB Docket No. 42069

Defendant Norfolk Southern Railway Company (“NS”) respectfully submits this Reply to Complainant Duke Energy Corporation’s “Petition to Stay Order Pending Correction of Decision for Technical Error.” No stay is appropriate, and Duke’s Petition should be denied.

The Board's November 6, 2003 Decision applied the Board's Stand-Alone Cost test to the evidence submitted by the parties, and concluded that the challenged rates were not unreasonable. *See* Decision, STB Doc. No. 42069 (served Nov. 6, 2003) (the "Decision"). After the close of business on November 18 (the day after the time for filing stay petitions expired) Complainant Duke Energy ("Duke") served on NS two motions, one a reconsideration petition labeled a "Petition to Correct Technical Error," (the "Error Petition") and the second a "Petition for Stay" of the Decision and all further proceedings in this matter ("Stay Petition"). Duke's stay motion is untimely, because governing regulations provide that a stay petition must be filed within ten days of the action the petitioner seeks to stay – here, that period expired, at the latest, on November 17, 2003, the day before Duke filed its Stay Petition. *See* 49 C.F.R. § 1115.3(f). Duke requested expedited action on its Stay Petition, and therefore, despite the

untimeliness of Duke's motion, NS has filed this Reply within 48 hours of the first time its counsel saw Duke's petitions.

There is no need for the Board to stay this proceeding during the pendency of Duke's reconsideration request. Duke has filed a fairly standard reconsideration petition – which, even if granted, would not change the outcome of this case – and the Board should consider and decide that motion promptly and in accordance with its regulations governing reconsideration motions. NS also plans to file a reconsideration petition within the period specified by the Board's regulations (i.e., on or before November 26, 2003). While it is entirely possible that the Board may determine that some adjustments to its Decision are appropriate in light of the parties' reconsideration petitions, given the complexity of these cases, such a possibility is present in every case. That possibility provides no basis for the Board to depart from its regulations and practice of deciding such motions promptly and efficiently without issuing a stay, thereby serving the interests of the parties and the public in finality and resolution of these cases in a timely manner.

Duke would suffer no harm at all, let alone irreparable harm, if a stay is denied. Conspicuously absent from Duke's two petitions is a revised Discounted Cash Flow table, or any other effort to show what Duke contends would be the overall effect of the alleged "errors" it has identified in its reconsideration petition on the Board's SAC results. *See* Decision at 38-39. NS has made those calculations, and the results show that, even if the Board were to adopt the full amount of every one of the seven alleged "computational" errors described in Duke's reconsideration, the SARR would still experience a cumulative revenue shortfall of more than \$120 million. Duke thus cannot show it would suffer irreparable harm in the absence of a stay – the *sine qua non* for the issuance of a stay. This failure is dispositive, and the Stay Petition should be denied on this basis alone, without further consideration.

Duke's 180-degree reversal of position concerning the need for expeditious resolution of this proceeding is noteworthy. Throughout this proceeding, Duke has adamantly insisted that "justice delayed is justice denied," and that the Board must issue a decision as quickly as possible. Indeed, on several occasions Duke sought to excuse errors and omissions in its evidence by claiming that its need for fast resolution of this case prevented it from more fully developing its evidence. See, e.g., Duke Op. I-11 to 12. When the Board determined it needed supplemental evidence concerning re-routed crossover traffic, Duke opposed the Board's proposal, arguing that any delay was unacceptable to Duke. Less than a month ago, when Duke filed the supplemental evidence the Board ordered, Duke used the first three pages of its brief to criticize the Board's request for additional evidence, and to complain that the three-week extension of the Board's decision deadline was not only intolerable, but actually unlawful. See Response of Complainant Duke Energy Corporation to Board Order Served October 10, 2003 at 1-3 ("Duke Supp. ____") Now – without even acknowledging its oft-repeated demands for the fastest decision possible; its repeated claims that it was suffering significant harm every day it continued to pay the challenged rates; and its recent claim that the Board had violated its statutory duty by extending the decision schedule by three weeks – Duke has executed a complete about-face, telling the Board it should stay the Decision, and all further proceedings in this matter, until it rules on Duke's reconsideration petition.

Preliminary Matter

Duke's "Error Petition" is in fact a petition for reconsideration. The Board's rules provide one, and only one, specific method for seeking revision of a decision of the Board based on a claim of material error in that decision, a "Petition for Reconsideration." See 49 C.F.R. § 1115.3. Any petition for reconsideration should be filed in accordance with the requirements of Section 1115.3. Duke's thinly disguised reconsideration petition, coupled with its Stay Petition, appear designed to provide Duke with two successive bites at the reconsideration "apple" – the

first in the present “Error Petition,” and the second at some indefinite future date after the Board has decided the issues in Duke’s first petition. In addition to flouting the Board’s regulations, such a piecemeal approach would be inefficient, and unfair to NS, which intends to follow the Board’s regulations by filing a single petition discussing all of the matters in the Decision that NS wishes the Board to reconsider.

Standard for Issuance of Stay

In order to obtain the extraordinary remedy of a stay of the Board’s Decision, Petitioner Duke must demonstrate all of the following: (1) a strong likelihood that Duke will prevail on the merits; (2) Duke will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed; and (4) the public interest supports granting the stay. *San Jacinto Ltd Construction Exemption and the Burlington Northern and Santa Fe Railway Company Operation Exemption – Buildout to the Bayport Loop Near Houston*, STB . Doc. 34079, Slip Op at 4 (served July 9, 2003) (citing, *Virginia Petroleum Jobbers Ass’n*). The party seeking a stay must prove “all of the elements required for such extraordinary relief.” *Id.*

Duke has not even attempted to show that it will be irreparably harmed in the absence of a stay, or that the public interest supports a stay. As NS shows below, the opposite is true – there is no risk of irreparable harm, and the public interest militates against a stay. Without more, Duke’s failure to produce any evidence on these two essential elements – let alone carry its burden of persuasion – compels denial of its Stay Petition. *See, e.g., Virginia Petroleum Jobbers Ass’n v. Federal Power Comm’n*, 259 F.2d 921, 926-27 (D.C. Circuit 1958) (denying injunctive relief for failure to show irreparable harm or that public interest favored such relief, despite showing of likelihood of success on the merits). Moreover, Duke has not demonstrated it has a “strong likelihood” of prevailing on the merits of its reconsideration petition, or that NS and other interested parties will not suffer harm if the Board issues a stay.

I. There Is No Risk of Irreparable Harm to Duke.

With respect to the Board's overall rate reasonableness determination, Duke would be in no different position if the Board accepted Duke's proffered revisions. Even after making all of the seven specific changes Duke advocates, the SAC analysis would still show that the cumulative net present value of the SARR's costs exceed its revenues by approximately \$120 million, and therefore the challenged rates would remain well below a reasonable maximum level. See NS Stay Reply Exhibit; NS Stay Reply electronic workpapers.¹ Thus, even in the event that the Board were to grant in its entirety the specific relief Duke seeks in its reconsideration petition, Duke would not suffer irreparable harm – indeed, it would suffer no harm whatsoever – because the final result would be the same and NS' full challenged rates would be held reasonable.

Duke's entire argument for a stay is as follows: if the Board grants Duke's reconsideration petition, "the Decision will be different," in unspecified ways, and therefore "no useful purpose would be served through further proceedings (i.e. proceedings related to reconsideration, phasing, and/or judicial review)." Stay Petition at 2. This *non sequitur* proves nothing. If Duke's unsupported quantum leap of "logic" were sufficient, a party could suspend all proceedings – and preempt other parties' opportunity to file a reconsideration petition – merely by being the first to file a post-decision motion asserting that if that motion were granted, the decision would be "different" in some unspecified way. Surely, if Duke a viable claim for a stay, it could point to at least some actual harm it would suffer in the absence of a stay.

¹ NS has made its best effort to implement the specific changes Duke seeks in its Petition to the Board's DCF spreadsheet analysis. Because Duke provided no workpapers to support its calculations, or the assumptions it made to determine the "ripple" effect of the changes it seeks on interdependent elements of the DCF, NS has not been able, in the very short time available, to replicate with absolute precision the dollar values Duke claims are associated with the changes it requests. Greater precision is not possible without more information from Duke. NS is confident, however, that any imprecision in its analysis does not materially affect the conclusion that, even after making the changes listed in Duke's Petition, the SARR would continue to experience a cumulative revenue shortfall well in excess of \$100 million.

Here, because the bottom line SAC result will be unaffected regardless of how the Board rules on Duke's pending motion, Duke has no reasonable argument that proceedings should be halted until the Board decides that motion. Even if the Board grants Duke's pending reconsideration petition, nothing will change with respect to the three matters Duke seeks to delay (phasing, reconsideration, and judicial review). First, the independent "phasing" constraint addresses only whether a challenged rate should be phased in over a period of time because imposing the rate all at one time will cause economic dislocation. See Coal Rate Guidelines at 546-47. The phasing inquiry thus has nothing to do with the results of the SAC analysis to which Duke's reconsideration petition is addressed. Second, neither logic or equity would justify staying reconsideration proceedings to accommodate Duke, because Duke itself has already initiated such proceedings by filing its (misnamed) "Error Petition." The Board readily can – and should – determine Duke's pending reconsideration petition, and NS' forthcoming reconsideration petition, in accordance with its regulations governing such petitions. See 49 C.F.R. § 1115.3. Third, Duke cannot show that simply requiring it to follow the normal process (including standard time limits) and requirements that apply to all parties seeking judicial review of federal agency action would cause it any harm, and certainly not extraordinary, irreparable harm.

Duke has made no showing that it would suffer irreparable harm if a stay does not issue, nor could it. Because a finding of irreparable harm is the single most important, indispensable prerequisite for the issuance of a stay, Duke's stay petition should be denied on this basis alone. *See Virginia Petroleum Jobbers Ass'n*, 259 F.2d at 926-27.

II. Duke Has Not Shown it Has A Strong Likelihood of Success on the Merits.

Duke has not shown a strong likelihood of full success on the merits of its reconsideration petition, because some of its claims may not be accepted, and because Duke's claims do not take account of other, offsetting errors that NS will identify in its own

reconsideration petition. Despite Duke's claim that its reconsideration petition only seeks to correct "technical" and "computational" errors, a substantial majority of the costs Duke asks the Board to change actually involve claims that the Board erred by adopting NS' evidence. For example, review of the Board's decision and supporting workpapers shows that, with respect to bridge abutments, the Board adopted NS' Reply evidence.² NS filed its Reply evidence on September 30, 2002, and Duke filed its Rebuttal evidence (which was its final opportunity to challenge NS' evidence) on November 19, 2002. Duke now claims for the first time, a full year after the final round of evidence and ten months after the completion of final briefing, that the number of bridge abutments set forth in NS' Reply Evidence was incorrect, and so the Board's decision adopting that evidence is incorrect. As a result, Duke contends the Board should reduce road property investment by \$284.4 million, which accounts for well over one-half of the total dollar amount of the changes sought in Duke's reconsideration petition.

Based on a preliminary review conducted by NS' consultants in the very short time available before NS filed this Reply, it appears that NS' evidence inadvertently did effectively double-count bridge abutments. As the Board knows, these cases are very complex, and the parties must file a huge volume of evidence in a short time. As a result, it is almost inevitable that both parties' evidence will contain some errors. For its part, NS has strived to alert the Complainant and the Board to any and all material errors, and to correct those errors, as soon as possible after it discovers them. In this instance, NS first became aware of what now appears to be an error when it reviewed Duke's reconsideration petition on November 19, 2003. NS has not yet had an opportunity to determine the full extent of any such error, however, or the dollar value associated with such an error. NS will address this issue more fully in its response to Duke's reconsideration petition, which NS intends to file within the time limit provided by the Board's

² Compare NS Reply Electronic Spreadsheet "IIIF - Construction Total.xls," Tab "Type I," Cells I26, J26, K26, L26, M26 and N26; Tab "Type II," Cells I30, J30, K30 and L30; Tab "Type III," Cells I30, J30, K30 and L30 with STB revised construction total 50-50_reroute.xls (same tab and cell numbers).

regulations. *See* 49 C.F.R. § 1104.13. Even if Duke's post-close-of-record attack on NS' evidence turns out to be factually accurate, however, there is a real question whether such an extremely belated evidentiary argument is procedurally barred. *See, e.g.,* Decision, *Duke Energy Corp. v. CSXT*, Doc. No. 42070 (March 25, 2003).

Duke makes essentially the same argument with respect to tunnel investment costs. The Board adopted NS' cost evidence for tunnels and tunnel daylighting, contained in NS' Reply evidence filed in September 2002.³ Now, more than a year later, Duke claims for the first time that there was an error in NS' evidence, which the Board adopted in its Decision. Again, regardless of the substantive merits of Duke's claim regarding the purported error, a strong argument can be made that Duke should be procedurally barred from raising what is essentially a new surrebuttal argument a full year after it filed its rebuttal evidence. The foregoing two items account for more than \$343 million of the approximately \$464 million total value of the items raised in Duke's reconsideration petition. Thus, if the Board were to find that Duke's failure to raise these issues in a timely manner precludes it from raising those issues now, the dollar value of the changes Duke seeks in its reconsideration petition would decline by 74%.

It is disingenuous for Duke to claim that the Board's use of the RCAF-U to index SARR operating costs is a "technical" or "computational" error. *See* Duke Error Petition at 8-9. Duke disagrees with the Board's decision to apply the RCAF-U (following the procedure it adopted in TMPA), but it cannot seriously claim that the Board made a technical or arithmetic error involving the "misapplication" of that index. In reality, Duke is asking the Board, in a roundabout way, to change its present policy of applying the RCAF-U to index operating costs.⁴

³ Compare NS Reply Electronic Spreadsheet "IIIF - Construction Total.xls," Tab "Tunnel Inv," Cells N2 through N63 with STB revised construction total 50-50_reroute.xls (same tab).

⁴ Because Duke has only argued what the Board should not do, but has not suggested how it believes the Board should index operating costs, the effect of the Board's "granting" this portion of Duke's petition is indeterminate. Without speculation, NS cannot quantify the effect on the DCF were the Board to accept Duke's argument. NS thus has not attempted to include this in the restated DCF prepared for this Reply.

It is beyond genuine dispute that Duke is making a substantive request for reconsideration, not a request to correct a “technical error.”

Moreover, Duke has not shown any reason that the Board should allow it to file two or more separate petitions for reconsideration, simply by calling the first one a petition to correct errors. All reconsideration petitions seek correction of what the petitioner perceives as errors, be they errors of fact or errors of law. There is no reason to permit a party to file multiple reconsideration motions by breaking putative errors into separate categories. Duke asserts that it is filing its Error Petition pursuant to 49 C.F.R. § 1117, the regulatory provision for motions not otherwise provided for in the Board’s specific rules. The flaw in this argument is that reconsideration petitions are otherwise provided for, in Section 1115.3. The Board should reject Duke’s inappropriate tactical gambit and confirm that each party may file one reconsideration petition, due no later than 20 days after the Board issues its Decision. *See* 49 C.F.R. § 1115.3.⁵

Duke has not shown that it has a strong likelihood of prevailing on the bulk of its claims, or on its inherent argument that it should be allowed to file multiple reconsideration motions.

III. Contrary to Duke’s Claim, NS Will Be Harmed by Further Delay in this Proceeding

Duke claims assertion that NS will suffer no harm if the Board grants Duke’s stay petition. Duke is incorrect. As Duke itself argued last month, continuing uncertainty about the applicable rate, and lack of finality cause harm to the parties and their ability to plan and make business decisions. *See* Duke Supp at 2. This is particularly true for NS in this case, because Duke is NS’ largest coal customer. Nor can NS advise its shareholders or the investment community with any degree of certainty about how the Decision may affect NS until the

⁵ NS would not object if Duke wishes to augment its existing reconsideration petition by filing additional arguments on or before November 26, 2003, the deadline for filing reconsideration petitions pursuant to Section 1115.3. The Board should require that Duke limit any such supplemental filing to 10 pages or fewer, in order to ensure compliance with the 20-page limit on reconsideration motions. Alternatively, NS would not object if Duke withdraws its currently pending reconsideration petition (denominated “Petition to Correct Technical Error”) and submits, on or before November 26, 2003, a new reconsideration petition that satisfies the 20-page limit.

Decision is final. Further, because the Board has raised the possibility of phasing, even under the current schedule it may be some time before NS is able to project accurately the effect of the rates charged to Duke. Staying any phasing proceeding will prolong this undesirable uncertainty.

IV. The Public Interest Argues Against a Stay

Granting a stay would harm the public interest by requiring the Board to engage in inefficient piecemeal review and disposition of multiple reconsideration motions, by unnecessarily delaying any follow-on phasing proceeding, and by delaying the issuance of the Board's final decision. The approach Duke advocates would be inefficient and waste Board resources (and hence public resources) by forcing the Board to decide at least two separate reconsideration motions filed seriatim by the same party. It is well established that judicial economy is disserved by allowing such piecemeal challenges to adjudicatory decisions, particularly where, as here, such serial determinations can be readily avoided by enforcing a rule requiring parties to bring all of their claims at once. Moreover, the public interest is best served by having all administrative challenges to the Decision before the Board for its full consideration at the same time, as will be the case if the Board denies the Stay Petition.

CONCLUSION NS respectfully requests that the Board deny Duke's motion for stay, adhere to the current schedule, and advise the parties that the Board will entertain only one reconsideration motion from each party, which should be filed in accordance with the Board's regulations.

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DATED: November 21, 2003

Respectfully submitted,



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NS STAY REPLY EXHIBIT

STB Table 2, from Decision in Doc. No. 42069 (November 6, 2003)

Cash Flow (in millions of dollars)

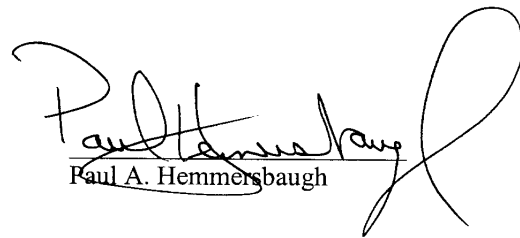
Restated By NS To Reflect Changes Sought in Duke Reconsideration Motion

Year	Capital Costs & Taxes	Annual Operating Costs	Total Annual Costs	Annual revenues	Annual Over/(Under) Payment (Current)	Annual Over/(Under) Payment (Present Value)	Cumulative Over/(Under) Payment (Present Value)
2002	\$293.7	\$227.9	\$521.6	\$488.2	(\$33.4)	(\$31.8)	(\$31.8)
2003	302.6	236.3	538.9	555.6	16.7	14.4	(17.4)
2004	312.0	233.9	546.0	550.1	4.1	3.2	(14.2)
2005	321.9	240.1	562.0	576.8	14.8	10.4	(3.8)
2006	332.1	250.0	582.1	597.6	15.6	9.9	6.1
2007	342.4	260.7	603.1	623.5	20.4	11.8	17.9
2008	352.6	268.5	621.1	638.1	17.0	8.9	26.8
2009	363.2	273.4	636.5	643.8	7.3	3.5	30.2
2010	374.5	278.6	653.1	647.2	(5.9)	(2.5)	27.7
2011	386.4	284.3	670.7	653.8	(16.9)	(6.5)	21.2
2012	398.8	288.6	687.4	655.9	(31.5)	(11.0)	10.2
2013	411.6	298.5	710.1	674.3	(35.7)	(11.3)	(1.1)
2014	424.8	307.7	732.5	688.9	(43.6)	(12.5)	(13.6)
2015	438.4	319.1	757.5	710.1	(47.5)	(12.3)	(25.9)
2016	452.6	325.8	778.4	717.0	(61.4)	(14.4)	(40.2)
2017	467.2	335.5	802.7	733.2	(69.6)	(14.7)	(54.9)
2018	482.3	344.5	826.8	744.0	(82.8)	(15.9)	(70.8)
2019	497.9	355.9	853.8	761.9	(91.9)	(15.9)	(86.8)
2020	514.1	366.8	880.9	774.8	(106.1)	(16.6)	(103.4)
2021	530.8	376.5	907.3	784.8	(122.5)	(17.4)	(120.8)

CERTIFICATE OF SERVICE

I hereby certify that, on this 21st day of November, 2003, I served the foregoing
Reply of Defendant Norfolk Southern Railway Company to complainant Duke Energy
Corporation's Petition for Stay of the Board's November 6, 2003 Decision, by causing two
copies to be delivered, by hand, to:

William L. Slover
Robert D. Rosenberg
Christopher A. Mills
Andrew B. Kolesar III
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036



Paul A. Hemmersbaugh