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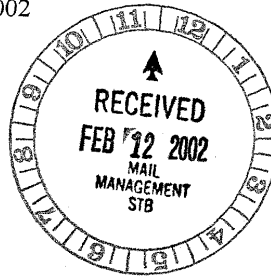
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February 12, 2002

By Hand Delivery

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



Re: STB Docket No. 42070, Duke Energy Corp. v. CSX Transportation, Inc.

Dear Mr. Williams:

Enclosed for filing in the above-referenced proceeding are a signed original and ten copies of Defendant's Reply to Complainant's First Motion to Compel 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,

Vincent F. Prada

G. Paul Moates
Terence M. Hynes
Vincent F. Prada

Enclosures

cc: Counsel for Complainants (w/encls.)

204748

BEFORE THE
SURFACE TRANSPORTATION BOARD

Original

DUKE ENERGY CORPORATION,

Complainant, ^{ENTERED} Office of the Secretary

v.

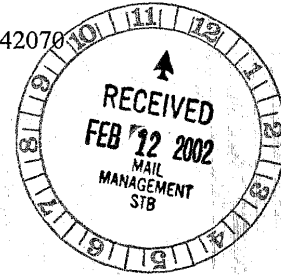
CSX TRANSPORTATION, INC.

Defendant.

FEB 12 2002

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STB Docket No. 42070



**DEFENDANT'S REPLY TO COMPLAINANT'S FIRST
MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

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Counsel for Defendant CSX Transportation, Inc.

DATED: February 12, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD

DUKE ENERGY CORPORATION,

Complainant,

v.

CSX TRANSPORTATION, INC.,

Defendant.

STB Docket No. 42070

**DEFENDANT'S REPLY TO COMPLAINANT'S FIRST
MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

Pursuant to 49 C.F.R. § 1104.13(a), Defendant CSX Transportation, Inc. ("CSXT") hereby replies to the First Motion to Compel Production of Documents filed by Complainant Duke Energy Corporation ("Duke") on February 5, 2002.

Duke's Motion asks the Board to compel CSXT to produce its transportation contracts with any coal shipper whose traffic traverses any portion of the CSXT rail lines over which Duke's coal shipments also move. (Duke Request for Production No. 44 – *see* Duke Motion at 2). CSXT recognizes Duke's legitimate interest in obtaining discovery concerning the commercial terms under which coal shipments potentially includable in the traffic group for Duke's stand-alone railroad move today. At the same time, CSXT takes seriously its contractual commitments to coal shippers to preserve the confidentiality of their transportation arrangements with CSXT. In order to balance appropriately Duke's interest in obtaining discovery and the equally legitimate interest of other coal shippers -- many of which are competitors of Duke -- CSXT urges the Board to afford those shippers an adequate opportunity to voice any objections

they may have to forced disclosure of their confidential rail transportation contracts prior to ordering such disclosure.

CSXT's coal transportation contracts are highly confidential and, in many instances, contain provisions that expressly prohibit CSXT from disclosing their terms to third parties except where compelled by a court or government order.¹ While the subject contracts might contain information that would be useful to Duke in preparing its stand-alone cost evidence in this proceeding, CSXT's other coal shippers have a legitimate countervailing interest in preserving the confidentiality of the commercial terms under which they purchase transportation services from CSXT. CSXT attempted to accommodate these competing interests in its response to Duke Request No. 44, by stating that it would not object to production of the subject contracts pursuant to an STB order, provided that (i) affected shippers were provided adequate notice of the prospective forced disclosure of their contract(s); and (ii) any contracts produced in response to Duke Request No. 44 were treated as "Highly Confidential" under the terms of the Protective Order (which was served by the Board on February 5, 2002). *See* Motion at 3 (quoting CSXT Response to Duke Request for Production No. 44).

Duke has indicate that it does not object to CSXT's proposed requirement that the subject coal transportation contracts be treated as "Highly Confidential" under the Protective Order. (*See* Motion at 6.) Thus, the only question is whether (as CSXT proposes) shippers whose contracts Duke seeks to obtain through discovery should have an opportunity to express their views to the Board before production of those contracts is compelled.

¹ Many of the subject contracts also require CSXT to notify the shipper party of any effort by a third party to compel disclosure of the contract. In order to satisfy this requirement, CSXT has begun the process of providing notice of Duke's Motion to the subject coal shippers.

CSXT strongly believes that the Board should afford such an opportunity to potentially affected shippers. In order to facilitate such a process, CSXT has identified all coal transportation contracts that are responsive to Duke Request No. 44, and has begun the process of giving affected customers notice of Duke's request for production of those agreements. All that CSXT asks is that the STB give these shippers a reasonable opportunity to raise any objections they may have to forced disclosure of their contracts prior to ruling on Duke's Motion. Specifically, CSXT proposes that the Board reserve its ruling for a period of 20 days to enable affected shippers to present their objections (if any) to the Board.

Duke suggests that such a notice period is both "improper and unnecessary." (Duke Motion at 6.) Contrary to Duke's assertions, the Board's decision in STB Docket No. 42056, *Texas Municipal Power Agency v. Burlington Northern Santa Fe Railway Co.* (served Feb. 9, 2001) ("*TMPA*") does not support Duke's position. To the contrary, in *TMPA* the Board did, in fact, give shippers an opportunity to object to production of their transportation contracts to the complainant (although the Board ultimately overruled the specific objections on the merits raised by those shippers). Thus, *TMPA* supports CSXT's view that the appropriate way to balance the interests of all parties would be to afford affected coal shippers a fair opportunity to be heard on the merits of Duke's Motion.

The terms under which coal shippers purchase rail transportation services from CSXT (and other carriers) are highly confidential and commercially sensitive. The routine inclusion in such contracts of provisions prohibiting disclosure of contract terms reflects the strong desire of shippers to shield their commercial arrangements from third parties – especially

where (as here) the party seeking disclosure may be a direct competitor.² The legitimate expectation of CSXT's coal shippers that the terms of their transportation contracts with CSXT will be held in confidence should not be swept away (as Duke proposes) without affording those parties an opportunity to make their views known to the Board.

² Under the terms of the Protective Order, the requested coal transportation contracts could be disclosed only to Duke's outside counsel and consultants. However, those attorneys and consultants regularly advise other electric utilities and coal interests in unrelated matters, including transportation contract negotiations. Even an inadvertent disclosure or use of confidential information from CSXT's coal contracts in connection with such other matters could significantly impair the commercial interests of CSXT and its other coal shippers. Thus, the Protective Order does not necessarily assuage the confidentiality concerns of CSXT's coal shippers regarding the disclosure of their contracts in this proceeding.

CONCLUSION

For all of the foregoing reasons, CSXT respectfully requests that the Board condition any order compelling the production of coal transportation agreements responsive to Duke's Request for Production No. 44 in the manner proposed by CSXT herein.³

Respectfully submitted,



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Counsel for Defendant CSX Transportation, Inc.

DATED: February 12, 2002

³ Duke's Motion erroneously states that, as of the date of that Motion (February 5, 2002), CSXT had not yet produced any documents in response to any of Duke's 116 separate discovery requests. (Motion at 3, n.1) In fact, CSXT had produced more than 4000 pages of responsive documents to Duke on February 1, and has subsequently produced more than 4000 additional pages of responsive materials.

CERTIFICATE OF SERVICE

I hereby certify that, on this 12th day of February, 2002, I served the foregoing
"Defendant's Reply to Complainant's First Motion to Compel Production of Documents" by
causing a copy thereof to be delivered, in the manner indicated, to each of the following:

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