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July 11, 2002



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BY HAND DELIVERY

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

ENTERED
Office of Proceedings

JUL 12 2002

Part of
Public Record

Re: Docket No. 42069, Duke Energy Corporation
v. Norfolk Southern Railway Company

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding please find an original and ten copies of Complainant Duke Energy Corporation's Reply in Opposition to Norfolk Southern Railway Company's Petition for Modification of Procedural Schedule, for which NS requests an expedited decision.

Also enclosed is an additional hard copy to be date-stamped and returned to our messenger.

Thank you for your attention to this matter.

Sincerely,

Christopher A. Mills

CAM:dmb

Enclosures

cc: Counsel for Defendant

BEFORE THE
SURFACE TRANSPORTATION BOARD



DUKE ENERGY CORPORATION,

Complainant,

v.

NORFOLK SOUTHERN RAILWAY
COMPANY,

Defendant.

Docket No. 42069

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DUKE ENERGY CORPORATION'S REPLY IN OPPOSITION
TO NS'S PETITION FOR MODIFICATION OF PROCEDURAL SCHEDULE

DUKE ENERGY CORPORATION

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Dated: July 11, 2002

Attorneys for Complainant

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



DUKE ENERGY CORPORATION,

Complainant,

v.

NORFOLK SOUTHERN RAILWAY
COMPANY,

Defendant.

Docket No. 42069

**DUKE ENERGY CORPORATION'S REPLY IN OPPOSITION
TO NS'S PETITION FOR MODIFICATION OF PROCEDURAL SCHEDULE**

Complainant Duke Energy Corporation ("Duke") hereby replies in opposition to the Petition for Modification of Procedural Schedule ("Petition" or "Pet.") that Defendant Norfolk Southern Railway Company ("NS") filed on July 9, 2002.

While Duke continues to join NS in requesting an expedited decision on NS's Motion to Compel, Duke strongly opposes NS's request for what amounts to an indefinite suspension of the procedural schedule. Indeed, NS's Petition embodies Duke's worst fears by seeking precisely the sort of delay that Duke has actively sought to avoid from the outset of its rate case. Granting the Petition would severely prejudice Duke by extending the period that Duke is obliged to pay NS's confiscatory rates.

Stripped of the self-serving rhetoric and distortions, what lies at the heart of NS's Petition is that (a) NS requested materials that for the most part were specifically excluded from discovery and presentation in Ex Parte No. 627, and (b) NS is claiming it needs additional time to prepare its SAC evidence because the Board has not ruled on its

Motion to Compel. Duke agrees with the need for expedition, but reiterates that any delay is both intolerable in view of the exorbitant rates that Duke must bear while its rate case remains pending, and unnecessary in terms of enabling NS to prepare its reply SAC evidence. NS's Motion to Compel should be denied except with respect to coal supply contracts, and production of those contracts (which can be completed within a day or two) provides no basis for any delay.

As Duke noted in its Opening Evidence, the extraordinarily high level of the challenged rates -- which embody unprecedented and punitive increases over the expiring contract rates -- has compelled Duke to exert every possible effort to adhere to the procedural schedule mandated under the Board's rules. As a result, Duke has been forced to forego pursuit of a number of movement-specific cost and operational matters that NS failed to produce in discovery in order to avoid delay.¹ Duke was not entirely successful in avoiding delay because of all the infirmities in NS's document production.²

Duke especially objects to NS's statement (Pet. at 12) that Duke's assertion of the need to avoid delay has become "tiresome." The unfortunate reality is that rate cases do take too long, and the delays experienced in the Western rate cases cited at p. 8 n. 9 of NS's Petition cannot be reconciled with the time lines specified in the ICCTA and

¹ These matters included information needed to isolate the costs associated with the Conrail transaction and exclude them from NS's system-average costs because Duke's movements utilize little, if any, of the Conrail-related assets, and information needed to develop variable maintenance-of-way costs using the SFGT formula.

² NS's belated production of decoders and instructions (required, by NS's own admission, to process NS's traffic and car movement data) forced Duke to request a brief postponement of the evidentiary due dates. After Duke submitted its Opening Evidence, NS produced additional information showing that its previous document production had understated NS coal volumes in the SARR's territory.

the Board's regulations. Moreover, NS plainly exploited its rate-setting freedom to the hilt by imposing a massive and punitive rate increase on Duke. Duke's efforts to keep this case close to schedule may be tiresome to NS, which benefits directly from every delay, but a timely decision on the merits is extremely important to Duke and its ratepayers in North and South Carolina. The enormity of NS's rate increases compels Duke to do everything within its power to avoid delay.

NS's Petition for delay rests on a series of "red herrings." In particular, NS argues that production of a wide variety of documents that Duke may possess concerning future coal burn, plant dispatching, environmental compliance, etc., is "imperative" because it bears on SARR design and capital/operating costs. (Pet. at 10, 12.) Duke's traffic constitutes a relatively small percentage of the SARR's traffic group, and NS has long had Duke's 15-year plant-specific coal burn forecasts, documents showing the monthly dispatch order of its power plants for the past three years, integrated resource plans, etc. NS cannot seriously expect the Board to believe NS's experts require a vast array of additional data from Duke to critique Duke's future SARR coal traffic volumes (or develop their own). As the Board well knows from recent rate cases such as Wisconsin, a plethora of information concerning future regional coal burn forecasts – and other information of the kind NS seeks from Duke – is available to NS's experts from a wide variety of sources, as confirmed by NS's own opening evidence (Vol. 1, Part IV.C).

Another red herring in NS's Petition is the focus (Pet. at 4, 6, 10-11) on the request for production of Duke's confidential coal supply contracts. While Duke did not object to production of the contracts beyond entry of an order for production, those contracts constitute only a small, and very discrete, portion of the materials that NS seeks.

Duke reaffirms that the contracts can be produced quickly (within 1-2 days) and has every reason to believe that NS could review and assimilate them quickly. If the contracts were of any real value to NS, NS would surely have focused on them before now. However, NS's seven-page, single-spaced letter submitted on June 24, 2002, which demanded expedited action on the Motion to Compel, is silent as to the contracts.

The materials that NS seeks bear directly upon geographic and product competition issues that the Board has properly excluded from stand-alone rate cases. As Duke explained in its Reply to the Motion to Compel, the fact that NS seeks to pursue these materials under the guise of stand-alone volumes rather than market dominance does not alleviate the burdens associated with producing the materials and responding to arguments supposedly based upon them, nor does it increase the Board's resources and expertise to address those contentions. For these reasons, efforts to rely on the requested types of materials were properly (and squarely) rejected in the Wisconsin decision.

Accordingly, Duke takes strong exception to NS's self-serving and contrived claims that NS's requested extension "has become necessary because Duke has refused" materials to which NS is somehow entitled, that "NS availed itself of [any] right to pursue discovery of relevant information," and/or that NS's motion is "likely" to be granted in significant part. (Pet. at 4, 6, and 10.) The reality is that NS has elected to pursue the very materials that the Board excluded from both discovery and presentation in Ex Parte No. 627, and NS thus assumed the substantial risk that its motion would not be granted. The possibility that NS might not obtain all the materials that possibly exist to support arguments that it is fully capable of making anyway based on the information that its hired experts already have is scarcely reason to delay the case.

Finally, NS's insinuations (e.g., p. 9 n.10) that it has somehow been "hampered" by delayed production on Duke's part are makeweight. Duke has been diligently responding to numerous NS supplemental "workpaper" requests which were made after Duke filed its opening evidence. The July 3, 2002 documents were produced in response to such a request, and consisted primarily of records of train "dumps" of coal at the Duke's plants.³ The information is hardly as significant as NS suggests, was provided over six weeks before NS's reply evidence is due, and pales in comparison to the volume and significance of the information that NS produced in the period starting two weeks before Duke's submission of its opening evidence and continuing after Duke submitted its opening evidence.

Accordingly, Duke strongly opposes NS's Petition. The underlying Motion to Compel lacks merit, and the delay that would flow from granting NS's Petition would not improve the process or enhance the ultimate quality of the Board's decision, but would simply enable NS to prolong its exploitation of Duke, its captive shipper.⁴

³ The additional documents NS references consist of billing and payment records for current train movements. Duke does not receive freight bills as such from NS, but instead generates its own billings and payments electronically.

⁴Duke notes that the exploitation would be tempered if the Board conditioned any extension on an interim "rollback" in Duke's rates, subject to a true-up upon the issuance of a decision on the merits. Specifically, within ten days of the Board's decisions, NS's rates would be set at the level of the expiring contract rates plus adjustments based on the RCAF-A. To the extent the Board's decision prescribes or authorizes higher rates for past shipments (which Duke believes is unlikely), Duke would promptly pay for any such "undercharges" along with interest at the same rate applicable to reparations for NS's overcharges. Payment would be without prejudice to further appeals. To the extent there is any basis for delay, this approach would afford NS the additional time it supposedly needs, while alleviating Duke's burden of having to pay NS's outrageous rates while the

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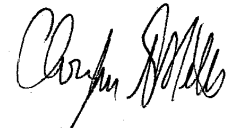
In summary, Duke's firm view is that the Motion to Compel should be decided expeditiously, that the Motion should be denied except as to the contracts, and that the Petition for Extension should be denied in any event.

Respectfully submitted,

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Dated: July 11, 2002

Attorneys for Complainant

⁴(...continued)

proceeding remains pending, thus making both parties "whole."

Duke acknowledges that the Board lacks direct suspension authority. However, the Board's now standard procedure, for which it has no direct authority, is to stay the effectiveness of a rate prescription pending judicial review unless a shipper undertakes to pay the higher rates that might be established through review. Given Duke's undertaking to make NS whole for any undercharges, there is no reason why the Board could not, or should not, follow a similar procedure here. Again, Duke reiterates that NS should not receive any extension, but if the Board believes otherwise, it should follow this approach.

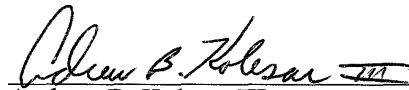
CERTIFICATE OF SERVICE

I hereby certify that I have this 11th day of July, 2002 served copies of the foregoing Reply to Petition for Modification of Procedural Schedule by hand upon:

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