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SEC

LATE RELEASE – APRIL 5, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42069

DUKE ENERGY CORPORATION  
v.  
NORFOLK SOUTHERN RAILWAY COMPANY

STB Docket No. 42070

DUKE ENERGY CORPORATION  
v.  
CSX TRANSPORTATION, INC.

STB Docket No. 42072

CAROLINA POWER & LIGHT COMPANY  
v.  
NORFOLK SOUTHERN RAILWAY COMPANY<sup>1</sup>

Decided: April 5, 2005

In a decision served on October 20, 2004, the Board determined that the challenged rates being charged by the railroads in these three cases had not been shown to be unreasonable under the Board's stand-alone cost (SAC) test. The Board also noted that the SAC test is not the only regulatory constraint on railroad pricing, and that rate relief under the phasing constraint was potentially available to the complainants. The complainants in these proceedings, Duke Energy and Carolina Power & Light, filed separate requests for phasing relief on November 19, 2004.

On March 11, 2005, the complainants filed a joint motion to compel responses to discovery on the matter of phasing. The complainants request documents pertaining to railroad profitability analyses, traffic and revenue data, revenue masking factors, and post-2005 pricing. The defendants filed a joint reply in opposition to the motion on March 21, 2005. On March 29, 2005, the parties' representatives met with Board staff

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<sup>1</sup> These proceedings are not consolidated. They are being handled together in a single decision for administrative convenience.

for a discovery conference to address the issues raised by the complainants' motion to compel.

### 1. Profitability Analyses

In their Interrogatory Nos. 1 through 4, and Document Request Nos. 7, 9, 10, and 14 through 19, complainants seek the production of documents that include summaries and/or analyses of the profitability of the defendant railroads' coal movements. Defendants object to the requests on the grounds that the information is not relevant to the phasing process, and that the information sought involves internal management costing information not typically discoverable in these proceedings.

Complainants state that the purpose for which they seek this information is to evaluate the magnitude of the rate increases imposed on them in the context of the profit margins under such rates, as compared to the defendant railroads' profit margins on other coal movements. According to complainants, the information is relevant to their analysis of the defendant railroads' short-term revenue needs and may identify any movements that yield revenues less than their variable costs.

It is contrary to Board precedent to require a party to produce internal management costing information, because costs in Board proceedings are to be determined using the Board's Uniform Rail Costing System (URCS). See Minnesota Power v. Duluth, Missabe and Iron Range Ry., STB Docket No. 42038 (STB served July 8, 1999); Potomac Elec. Power v. CSX Transp., STB Docket No. 41989, et al. (STB served May 27, 1997). Complainants already have access to URCS, the Board's regulatory cost model which they state may be used to identify traffic operating at a loss. Complainants also have access to the defendants' confidential transportation contracts for all coal movements for the past five years. This cost and revenue information is sufficient for the purposes stated by the complainants. Complainants' contention that URCS may imperfectly reflect all costs is not a sufficient justification to warrant departure from Board precedent. Therefore, these portions of complainants' motion will be denied.

### 2. Traffic and Revenue Data

In Document Request Nos. 1 and 2, complainants seek production of updated traffic and revenue information in the form of computerized traffic and revenue data, and car movement files, for the years 2001 through the present.<sup>2</sup> They state that they seek this information in order to conduct a rate increase comparison between their rate increase and those of other shippers, to determine whether any traffic is yielding revenues less than its variable costs, and to conduct a profitability comparison using the revenue

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<sup>2</sup> The request also includes production of coal transportation contracts for the years 2001 through the present. In a decision served on March 23, 2005, the Board granted complainants' motion to compel discovery of these contracts, subject to the provisions of the protective orders issued in these proceedings.

information produced and comparing the revenues to regulatory costing data, as maintained in URCS.

Defendants object to the requests on the grounds that the information sought is not relevant, and can only be produced by way of a burdensome, expensive, and time-consuming process. According to defendants, developing the requested information would cost in excess of \$100,000 and would require a review of millions of car movement records filling hundreds of tape cartridges.

The burden of producing the traffic tapes appears to be substantial. The coal transportation contracts that the defendants have already agreed to provide contain more than 5 years' worth of detailed information regarding customer names, traffic origins and destinations, volume commitments, rate and ancillary charges, and service terms. Given that this information is already available to the complainants, there is no justification for imposing an additional, and substantial, burden upon the defendants. The complainants' request for the traffic tape data will be denied.

### 3. Waybill Masking Factors

In Document Request No. 20, complainants also request that the defendants produce the revenue masking factors used in the 2001-2003 Carload Waybill Sample (Waybill Sample) obtained from the Board for both defendant railroads, so that the complainants may "unmask" the revenues for the traffic in the Waybill Sample.<sup>3</sup> Complainants contend that they should be permitted to unmask the defendants' revenues, for the purpose of comparing the defendants' pricing practices for the issue traffic to defendants' pricing practices for other demand-inelastic traffic. Complainants maintain that this analysis would be relevant to a rate increase comparison, and to an assessment of both the short-term revenue needs of the defendants and the relative profitability of the issue traffic. They also argue that the burden on the defendants of producing the information is not significant and that the existing protective orders would protect the confidential masking factors.

Defendants object to release of the masking factors. They contend that the complainants have sufficient movement-specific information for both coal and non-coal traffic as a result of access to the Waybill Sample and the confidential transportation contracts. From that information, the defendants argue, the complainants would be able to perform the analyses that are the intended use for the data. They also argue that release of the masking factors would permit the complainants to identify the actual

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<sup>3</sup> For each movement contained in the Waybill Sample, the database contains detailed, comprehensive information on rail carload freight traffic flows and characteristics, such as: the originating and terminating freight stations, the railroads participating in the movement, all railroad interchange points, the number of cars, the car types, the movement weight in tons, the commodity, and the freight revenue. To protect the commercially sensitive, confidential revenue data, the railroads apply masking factors to their waybill sample data to preserve the confidentiality of the revenues attributable to contract traffic.

revenues earned on all shipments in the Waybill Sample data, information that is highly confidential and commercially sensitive. Finally, the defendants note that a request for this information has already been denied by the Board's Office of Economics, based on longstanding Board policy not to release the unmasked revenues or masking factors to parties in a proceeding before the Board. See CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company—Control and Operating Leases/Agreements—Conrail, Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33388 (STB served Oct. 3, 1997) (Conrail).

The relevancy of complainant's intended use for the unmasked Waybill Sample in a phasing proceeding is unclear. Complainants clarified at the discovery conference that their principal purpose in seeking the unmasked Waybill Sample data would be to analyze individual rate increases between 2001 and 2004. But the Waybill Sample is only a small sampling of annual shipments, so a movement in the 2001 sample is not likely to appear in the sample each year from 2001 to 2004. Complainants have failed to explain how they could use the Waybill Sample for the time-series analysis contemplated. Complainants contend that they would also use the information to quantify traffic that is not covering its costs and recalculate the short-term revenue needs of the defendant railroads. Such challenges to the Board's annual revenue adequacy findings, which would entail an expansive analysis, are inconsistent with the expedited discovery and phasing analysis contemplated by the Board for these proceedings. See Duke Energy Corp. v. Norfolk S. Ry., STB Docket No. 42069 (STB served Nov. 6, 2003) at 40 ("If Duke elects to pursue this option, it should suggest a procedural schedule that would permit expedited discovery of the phasing-related materials previously sought by NS and the filing of evidence and argument by the parties and would permit quick and fair Board review.").

In any event, the staff's decision is controlled here by the Conrail decision. In that case, the Board overturned an Administrative Law Judge's decision to compel discovery of the masking factors, thereby expressing its policy not to release masking factors under circumstances similar to those here. See Conrail at 7 ("[t]he confidentiality of each railroad's masking factors has been essential to the Board's effort to gather the data it needs to fulfill its statutory duties") & 8 n.28 ("even the existence of the protective order applicable to this proceeding cannot justify the forced production of [the railroad's] masking factors"). Both the information sought here and how the complainants would use that information are comparable to the Conrail proceeding. Accordingly, this decision must adhere to Board precedent and deny the request for the masking factors.

As noted above, complainants have also requested unmasked confidential waybill data or the masking factors from the Board. The Acting Director of the Office of Economics, Environmental Analysis, and Administration denied that request, and that denial has been appealed to the Board. If complainants appeal this order, the Board might consider the two appeals together, as they involve related information and issues.

4. Post-2005 Pricing Documents

Complainants' Document Request No. 6 seeks information relating to the defendants' post-2005 rate-setting practices. The request seeks, among other items, documents regarding bids, offers, and responses to requests for proposals relating to the proposed transportation of coal by defendants in 2005 and beyond. According to complainants, the information is relevant as a means of comparing the magnitude of the rate increases experienced by complainants with that experienced by other shippers. Complainants also assert that the information is pertinent in evaluating the defendants' revenue needs. Defendants contend that the requested information is not relevant to the phasing inquiry, and that disclosure of such information could prejudice ongoing contract negotiations.

Contract negotiations are, by their very nature, speculative. The defendants have consented to produce all completed contracts, and they have offered to supplement their production through the end of the discovery period. Therefore, the portion of complainants' motion that requests document production of defendants' ongoing coal transportation contract negotiations will be denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Complainants' joint motion to compel discovery is denied, as discussed above.
2. This decision is effective on the date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams  
Secretary