

SERVICE DATE - AUGUST 26, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42072

CAROLINA POWER & LIGHT COMPANY

v.

NORFOLK SOUTHERN RAILWAY COMPANY

MOTION TO COMPEL DISCOVERY

Decided: August 26, 2002

In a verified complaint filed and served on defendant Norfolk Southern Railway Company (NS) on February 1, 2002, Carolina Power & Light Company (CP&L) challenges the reasonableness of rates and other terms for unit train coal transportation service by NS from various origins in West Virginia, Kentucky, and Virginia to CP&L's Roxboro electricity generating facility in Hyco, NC, and Mayo electricity generating facility in Mayo Creek, NC.¹ CP&L alleges that NS possesses market dominance over the traffic and requests that maximum reasonable rates be prescribed along with other relief, including reparations. This decision addresses NS's motion to compel responses by CP&L to NS's discovery requests and denies the motion, except to the extent that CP&L has agreed to provide the requested information.

BACKGROUND

In a decision served on March 12, 2002 (March 12 decision), a procedural schedule was set, which was later extended,² and the parties' joint motion for a protective order was granted. The protective order included provisions governing the production of highly confidential material and stipulated that the protected exchange of material would not constitute an unauthorized disclosure, or result in criminal penalties, under 49 U.S.C. 11904. In a decision served on May 1, 2002, CP&L's

¹ The service was provided by NS under a rail transportation contract that expired on March 31, 2002. As of April 1, 2002, common carrier rates and service terms replaced the expired contract rates, as outlined in a January 29, 2002 letter from NS to CP&L.

² The decision extending the procedural schedule, served on May 30, 2002, established the following filing dates: opening statements due (and filed) on June 10, 2002; reply statements due on September 6, 2002; and rebuttal statements due on October 7, 2002.

motion to compel discovery of specified rail transportation contracts was granted, subject to the highly confidential provisions of the protective order and the parties' agreement as to the number of non-coal transportation contracts to be produced.

NS's motion to compel, filed on April 2, 2002, seeks more complete responses from CP&L to NS's discovery requests in its First Set of Interrogatories and Requests for Production of Documents.³ CP&L replied to NS's motion to compel on April 17, 2002.

DISCUSSION AND CONCLUSIONS

Through its discovery requests, NS seeks information regarding the estimation of future traffic volumes and revenues of CP&L's proposed stand-alone railroad (SARR). Under the stand-alone cost (SAC) test used by the Board in determining the reasonableness of a challenged rail rate, a shipper designs a SARR that is specifically tailored to serve an identified traffic group. Because a SAC analysis covers an extended (usually 20-year) period, it entails projections of future traffic and revenues.

NS states that, because CP&L determines the amount of electricity produced at the coal-fired plants at issue based on the relative costs of all available sources of electricity, the future volume of coal consumed by the coal-fired plants served by the SARR depends upon, among other factors, the relative costs and capacity of these electricity sources. NS states that documents assessing these factors are therefore relevant to the projection of future SARR traffic volumes and revenues, and thus their production constitutes a reasonable burden to place upon CP&L.

The information NS seeks in its motion to compel comprises the following categories: (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) CP&L's economic dispatch computer model or an identification of the model's data inputs and assumptions; (4) studies or analyses of the impact of possible use of alternative fuels (including Western coal) or changes in technology on CP&L's electricity generation, as relevant to future electricity production at the plants served by the SARR; (5) studies addressing the impact of changes in rail rates for coal transportation on electricity generation and coal consumption; and (6) CP&L's existing long-term coal supply and coal transportation contracts, as well as documents assessing potential future sources of coal supply, coal prices, and coal transportation costs. NS contends that CP&L has responded to its discovery requests with public reports, routine train operating records, and summaries of coal consumption and electricity generating forecasts, which is insufficient and not fully responsive to NS's requests. The discoverability of the type of information contained in

³ NS narrowed the scope of some of its requests based on CP&L's objections.

the first five categories was addressed in Duke Energy Corporation v. Norfolk Southern Railway Company, STB Docket No. 42069, et al. (STB served July 26, 2002) (Duke Energy). The Duke Energy decision, therefore, will serve as guidance for consideration of NS's motion to compel.

1. Projections and forecasts of electricity demand and generation, coal consumption, and rail rates. NS seeks from CP&L forecasts and projections of demand for electric power, electric generation, coal and other fuel consumption, rail rate levels, and other economic indicators that would impact the future level of electricity generation at the CP&L plants at issue in this proceeding and any other generating facilities potentially served by the SARR.⁴ To alleviate concerns as to the potential burden of its request, NS expresses a willingness to narrow the scope to information reflecting disaggregated forecasts and supporting information sufficient to assess the assumptions and conclusions of the forecasts. It states that, should the burden of the request or third-party licensing restrictions make the request for access to CP&L's computer forecasting model untenable, it will 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.

CP&L contends that it has produced all of the relevant forecasts in its possession, including its three most recent long-term forecasts, monthly fuel reports, forecasts regarding changes in the Rail Cost Adjustment Factor and other measures of inflation, as well as materials relevant to each of its coal-burning facilities regarding coal burn, consumption, coal and transportation costs, capacity factor, heat rates, and electricity production costs. According to CP&L, it is prohibited by a third-party licensing agreement from producing the proprietary software of the forecast model, but it has produced additional documents that contain forecast information, including its fossil fuel inventory plans, budget power estimates, integrated resource plans, and all applicable Federal Energy Regulatory Commission forms. Given the extent of its production already, CP&L argues that NS has not shown a need for more information sufficient to overcome the burden of further production of documents.

NS's identical interrogatories and document production requests were denied as overly broad and burdensome in the range of information and documents sought in Duke Energy, slip op. at 5-7. With the information already produced by CP&L, as outlined above, NS should have sufficient forecast and projection information needed to advance its position. Accordingly, this portion of the motion to compel will be denied.

2. Analyses of costs and effects of compliance with applicable environmental laws, regulations, and requirements. NS seeks discovery related to the potential effects of environmental laws,

⁴ NS Interrogatory Nos. 23 and 24 and NS Document Production Request Nos. 28, 30, and 31.

regulations, and requirements on the future volume of coal consumed by the coal plants of CP&L that are served by NS and that potentially would be included in the SARR.⁵ According to NS, this information is relevant to future SARR traffic volumes and revenues because environmental laws and regulations have a significant potential impact on the level and costs of electricity generation and coal consumption at the NS-served plants, as well as the volume and type of coal consumed at those plants. NS argues that its request is reasonable, as it has limited the scope to formal studies and analyses, but that it cannot evaluate the extent to which production of the materials would constitute a burden because CP&L has failed to identify any responsive studies or analyses it would be willing to produce.

CP&L objects to production on the grounds that the information requested is of questionable relevance. CP&L also submits that responding to the requests would involve a large-scale search. In light of the uncertainty as to the value of the information, CP&L's position is that the burden of its production outweighs its potential usefulness.

This portion of the motion to compel also will be denied. NS's interrogatories and document production requests are overbroad in scope and unreasonably burdensome to CP&L. To the extent that NS seeks information about regulatory proceedings involving CP&L, that information is publicly available. It is unnecessary to require one party to provide information to which the other party already has access. Duke Energy, slip op. at 8.

3. Economic dispatch policies and practices. NS requests CP&L documents and information relating to CP&L's economic dispatch practices, including formal policies or procedures or instructions given to dispatchers regarding dispatch priorities and the selection of internal generation.⁶ NS also has requested past dispatch information⁷ and studies or analyses of decisions on whether to generate or purchase electric power,⁸ as well as production of computer models or software used by CP&L to determine dispatch order.⁹ Upon CP&L's objections to the relevance and burden of these requests,

⁵ NS Interrogatory No. 26 and NS Document Production Request Nos. 33 and 37(b).

⁶ NS Interrogatory Nos. 18 and 19 and NS Document Production Request Nos. 17, 20, and 22.

⁷ NS Interrogatory No. 10(o)-(p) and NS Document Production Request Nos. 18 and 21.

⁸ NS Document Production Request No. 23.

⁹ NS Document Production Request Nos. 30 and 31.

NS has limited its request to the production of CP&L's dispatch computer model, or an identification of the data and assumptions used in the model.

CP&L states that, while it objects on grounds of relevancy and burden, it will produce documents in response to NS's more limited request for an identification of the dispatch order of all generating facilities in the CP&L system. Therefore, this portion of the motion to compel is granted, to the extent that CP&L has not already responded to NS's revised and more limited request.

4. Studies or analyses of the impact of possible use of alternative fuels or changes in technology on CP&L's electricity generation. NS seeks production of studies or analyses relating to the possible use of alternative fuels and the impact of changes in electric generating technology on future generating output and fuel consumption at CP&L's generating plants.¹⁰ According to NS, the information addresses the likely future coal consumption and electricity generation levels of the issue CP&L coal plants, and thus it is relevant to the future traffic volumes and revenues of the SARR.

CP&L states that, contrary to NS's allegations, it has produced responsive documents already, citing the integrated resource plan that contains studies it conducted on the costs/benefits of specified alternative fuel technologies and the effect the plan would have on the cost/reliability of energy service. CP&L confirms that it informed NS that it does not plan to modify the issue facilities so as to impact fuel burn or the type of coal to be received. It objects to further production, arguing that the relevance of the information does not justify imposition of the burden, which would be extensive.

This portion of the motion to compel will be denied. The requests are overly broad and burdensome. CP&L has already provided fossil fuel inventory plans that include forecasts of coal burn and receipts. Production of additional documents on this issue is unnecessary given CP&L's assertion that it does not plan to modify its facilities. See Duke Energy, slip op. at 9-10.

5. Impact of changes in rail rates for coal transportation on electricity generation and coal consumption. NS seeks studies and analyses relating to the potential impact that changes in the rail rates it charges for transporting coal to the issue plants could have on the volume of coal consumed, and the relative position of those plants in the dispatch order of CP&L generating facilities.¹¹ NS argues that the information is relevant to the estimated future traffic volumes and revenues of the SARR.

¹⁰ NS Document Production Request No. 24.

¹¹ NS Document Production Request No. 29(b)-(c).

CP&L states that, while it objects to production on grounds of relevancy, it has located one responsive document and will provide it to NS. This portion of the motion to compel is therefore granted, to the extent that CP&L has not already produced the single document responsive to NS's request.

6. Coal supply and coal transportation contracts. The request contained in this portion of NS's motion to compel would require CP&L to produce agreements that, according to CP&L, contain confidentiality provisions prohibiting disclosure to third parties. NS's discovery requests seek production of CP&L's existing long-term coal supply contracts and existing coal transportation contracts,¹² as well as documents assessing potential future sources of coal supply and information about coal prices and coal transportation costs.¹³ NS argues that this information is discoverable as relevant to the coal traffic volumes available for movement by the proposed SARR. NS notes that CP&L has communicated that it will produce these documents without further objection, upon a Board order compelling it to do so.

In its reply to the motion to compel, CP&L confirms that, despite its objections to the information's relevancy to the proceedings, it does not object to the production of coal supply and coal transportation contracts and other information governed by confidentiality restrictions, provided the Board enters an order compelling the production.

The protective order entered in this proceeding provides shippers with sufficient protection against competitive damage from the disclosure of transportation contracts.¹⁴ It is well settled that a protective order ensures that confidential, proprietary, or commercially sensitive information will be used solely for the involved proceeding and not for other purposes. Any concerns of the shippers regarding disclosure of sensitive materials should be directed to the complainant, who, along with the defendant, can determine what level of confidentiality should be assigned to the material produced. See

¹² NS Document Production Request Nos. 9 and 10.

¹³ NS Interrogatory Nos. 11(d), 11(g), and 21 and NS Document Production Request No. 12.

¹⁴ See Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42056, slip op. at 2-3 (STB served Feb. 9, 2001), where the Board stated that, "[w]hile we understand the concerns raised by those shippers here, we are satisfied that the parties' agreements regarding scope and the application of the 'highly confidential' provisions of the protective order are sufficient to protect the interests of third-party shippers."

Duke Energy Corporation v. Norfolk Southern Railway Company, STB Docket No. 42069, slip op. at 2 (STB served Mar. 4, 2002), citing Pennsylvania Power & Light Company v. Consolidated Rail Corporation, CSX Transportation, Inc., and Norfolk Southern Railway Company, STB Docket No. 41295 (STB served Mar. 10, 1997).

Here, CP&L does not object to the production requests as long as there is a Board order compelling production. The protective order in this proceeding resolves any concerns arising out of third-party confidentiality agreements. Accordingly, the portion of NS's motion pertaining to the production of coal supply and coal transportation contracts and other information governed by confidentiality restrictions of the protective order issued in the March 12 decision will be granted.

It is ordered:

1. NS's motion to compel discovery of CP&L's coal supply and coal transportation contracts, related documents, and the other third-party confidential materials discussed above are granted, subject to the protective order issued in the March 12 decision.

2. CP&L is directed to supply the information it has agreed to furnish.

3. In all other respects, the motion to compel is denied.

4. This decision is effective on the date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary