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2/3494

March 7, 2005

BY HAND DELIVERY

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W., Room 711  
Washington, D.C. 20423-0001

ENTERED  
Office of Proceedings

Part of  
Public Record

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

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding please find an original and ten (10) copies of Duke Energy Corporation's First Motion to Compel CSX Transportation, Inc.'s Production of Documents in Response to Phasing Requests. We have enclosed an electronic copy of this Motion on a computer diskette in WordPerfect format.

We also have enclosed an additional copy of this Motion to be date-stamped and returned to the bearer of this Motion. Thank you for your attention to this matter.

Sincerely,



Andrew B. Kolesar III  
An Attorney for Duke Energy Corporation

Enclosures

213494



**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

DUKE ENERGY CORPORATION,	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. 42070
	)	
CSX TRANSPORTATION, INC.,	)	ENTERED
	)	Office of Proceedings
	)	
Defendant.	)	MAR - 7 2005
	)	Part of
	)	Public Record

**COMPLAINANT'S FIRST MOTION TO COMPEL  
CSX TRANSPORTATION, INC.'S PRODUCTION OF  
DOCUMENTS IN RESPONSE TO PHASING REQUESTS**

DUKE ENERGY CORPORATION

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Dated: March 7, 2005

Attorneys for Complainant

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

DUKE ENERGY CORPORATION,	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. 42070
	)	
CSX TRANSPORTATION, INC.,	)	
	)	
Defendant.	)	

**COMPLAINANT'S FIRST MOTION TO COMPEL  
CSX TRANSPORTATION, INC.'S PRODUCTION OF  
DOCUMENTS IN RESPONSE TO PHASING REQUESTS**

Pursuant to 49 C.F.R. § 1114.31, Complainant Duke Energy Corporation ("Duke"), hereby moves for an order compelling Defendant CSX Transportation, Inc. ("CSXT") to produce documents in response to Duke's Request for Production ("Request") Nos. 3 and 4.<sup>1</sup> These requests, which Duke served upon CSXT on January 21, 2005, seek production of a number of CSXT's coal transportation contracts. The Board routinely orders production of such materials, and in fact, previously ordered production of coal transportation contracts in this case by order served March 4, 2002.

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<sup>1</sup> In accordance with the schedule adopted by the Board in its decision served March 4, 2005, Duke will file a second motion to compel regarding the phasing requests in this proceeding by March 11, 2005. See Docket No. 42069, Duke Energy Corp. v. Norfolk Southern Ry., Docket No. 42070, Duke Energy Corp. v. CSX Transp., Inc., Docket No. 42072, Carolina Power & Light Co. v. Norfolk Southern Ry. (STB served March 4, 2005).

Duke has filed the instant Motion because CSXT has represented that the scope of the Board's March 4, 2002 order was not broad enough to encompass the coal transportation contracts that are the subject of Duke's Request Nos. 3 and 4.

### **BACKGROUND**

The Board has established a procedural schedule in this case through which the parties will conduct discovery and will submit three rounds of evidence regarding the question of "phasing-in" the increases reflected in CSXT's challenged rates.

On January 22, 2005, Duke served its Phasing discovery requests upon CSXT (the "Requests"). Included amongst Duke's discovery were two requests which sought the production of CSXT's coal transportation contracts:

#### Request No. 3:

For each year or partial year 2001 to the present, please produce all transportation contracts, including amendments and supplements thereto (or letters of understanding with appendices or attachments), and all tariffs or other documents containing common carrier rate and service terms that CSXT entered into, agreed to or provided which govern shipments of coal (coal being identified as STCC 112) that either: (a) relate to shippers included in Duke's SARR traffic group; (b) relate to the transportation of coal by CSXT to any shipper that is presently served by CSXT and that lacks facilities, access rights, or other means to receive rail service at destination from any railroad other than CSXT; or (c) relate to the transportation of coal by CSXT and a connecting carrier to any shipper that lacks facilities, access rights, or other means to receive rail service by more than one rail carrier.

Request No. 4:

To the extent that any of the documents produced in response to Document Request No. 3, herein, relate to any shipper(s) that was not included in Duke's SARR traffic group, please produce all transportation contracts, including amendments and supplements thereto (or letters of understanding with appendices and attachments), and all tariffs or other documents containing common carrier rate and service terms that applied to the shipper's coal shipments prior to the date CSXT entered into, agreed to or provided the documents produced in response to Document Request No. 3.

Duke propounded these Requests in order to obtain information relevant to the phasing inquiry insofar as it relates to CSXT's pricing practices for its coal transportation services.

In its February 22, 2005 Responses to Duke's Requests, CSXT objected as follows to producing documents in response to Request Nos. 3 and 4:

Response to Request No. 3:

CSXT objects to Request No. 3 on the grounds that it is overbroad, unduly burdensome and oppressive, and that the requested information is not relevant to any issue properly before the Board in this phasing proceeding. *See* response to Request No. 1.

CSXT further objects to this Request on the grounds that such coal transportation contracts are confidential and, in many instances, contain provisions that expressly prohibit CSXT from disclosing the existence or terms of such contracts to third parties without the consent of the shipper, or which permit such disclosure only when disclosure is compelled by a court or government order.

Subject to any without waiving any of its objections, CSXT states that it would not object to making such contract materials available to Duke at CSXT's offices if the STB were to require such production. In an earlier decision in this proceeding, the STB ordered CSXT to produce similar contracts to Duke, subject to the requirement that the existence and terms of any such contracts be treated as Highly Confidential pursuant to the terms of the Stipulated Protective Order. *See* STB Doc. No. 42069 (sic), *Duke Energy Corp. v. CSX Transportation, Inc.*, (decision served March 1, 2002) (sic). CSXT is agreeable to producing the requested contracts pursuant to a similar order of the STB requiring such production here.

Response to Request No. 4:

CSXT objects to Request No. 4 on the grounds that it is overbroad, unduly burdensome and oppressive, and that the requested information is not relevant to any issue properly before the Board in this phasing proceeding. CSXT further objects to Request No. 4 on the grounds that CSXT does not maintain the information sought by that Request, and that such information could be developed, if at all, only through an unduly burdensome and oppressive special study, which CSXT objects to performing. Duke is just as capable as CSXT of identifying which shippers were, or were not, included in Duke's SARR traffic group.

At their informal discovery conference on February 24, 2005, the parties reached agreement regarding the special study objection that CSXT raised in response to Request No. 4. Specifically, the parties agreed that – with an STB order in place requiring the production of contracts in response to the two Requests, and with the benefit of its review of the contracts to be produced in response to Request No. 3 – Duke would identify which contracts it sought in response to Request No. 4, rather than requiring

CSXT to engage in a special study to identify those contracts. On the basis of this modification, CSXT confirmed that it would be agreeable to producing documents in response to Request No. 4 (as identified by Duke after review of CSXT's contract production) on the same basis as Request No. 3.

## ARGUMENT

### I. Legal Standard

The Board and its predecessor repeatedly have held that the records of defendant railroads in cases brought under the Constrained Market Pricing principles are subject to broad discovery. See, e.g., Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 548 (1985), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987) ("We recognize that shippers may require substantial discovery to litigate a case under CMP, and we are prepared to make that discovery available to them."). The Board's Rules of Practice reinforce this policy, permitting discovery of any matter, not privileged, which is relevant to the subject matter involved in a proceeding. See 49 C.F.R. § 1114.21(a). It is also well-settled that the Board's discovery rules are to be liberally construed. See, e.g., Finance Docket No. 32821, Bar Ale, Inc., v. California Northern R.R. (STB served March 15, 1996), at 2.

## **II. The Board Routinely Orders Production of Coal Transportation Contracts**

In this case, the contract information sought by Duke is reasonably calculated to lead to the discovery of admissible evidence, and therefore easily satisfies the Board's standard under the Coal Rate Guidelines and the Board's Rules of Practice. CSXT has represented that it is "agreeable to producing the requested contracts" pursuant to an order of the Board similar to the order previously served in this proceeding on March 4, 2002.

The Board repeatedly and consistently has required the production of coal transportation contracts in cases litigated under the Coal Rate Guidelines. See, e.g., Docket No. 42056, Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Ry. (STB served Feb. 9, 2001); Docket No. 42054, PPL Montana, LLC v. Burlington Northern and Santa Fe Ry. (STB served Nov. 9, 2000); Docket No. 41295, Pennsylvania Power & Light Co. v. Consolidated Rail Corp. (STB served March 10, 1997); Docket No. 41989, Potomac Electric Power Co. v. CSX Transp., Inc. (STB served March 3, 1997).

In light of the absence of any opposition to Duke's requests (beyond the need for an STB order), and in light of the Board's past practice in similar situations, Duke requests that the Board issue an order requiring production in response to Duke's Request Nos. 3 and 4, so that CSXT may produce the requested coal transportation contracts.

**CONCLUSION**

For the foregoing reasons, Duke respectfully requests that the Board grant this Motion to Compel.

Respectfully submitted,

DUKE ENERGY CORPORATION

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(202) 347-7170

Dated: March 7, 2005

Attorneys for Complainant

**CERTIFICATE OF SERVICE**

I hereby certify, that I have this 7th day of March, 2005 caused to be served copies of the foregoing Motion to Compel on counsel for defendant CSX Transportation, Inc. as follows:

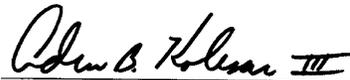
By hand delivery to:

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and by Federal Express to:

Ellen M. Fitzsimmons, Esq.  
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