

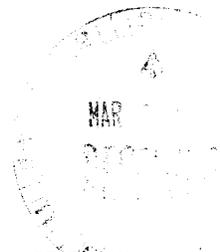
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March 7, 2005

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

MAR 7 2005

Part of
Public Record

Re: Docket No. 42069, Duke Energy Corp. v. Norfolk Southern Ry.

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 Norfolk Southern Railway Company'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

2/3495



BEFORE THE
SURFACE TRANSPORTATION BOARD

DUKE ENERGY CORPORATION,)	
)	
Complainant,)	
)	
v.)	Docket No. 42069
)	
NORFOLK SOUTHERN RAILWAY COMPANY,)	Office of FRA Hearings
)	
Defendant.)	MAR 7 2005
)	Post of Public Record

**COMPLAINANT'S FIRST MOTION TO COMPEL
NORFOLK SOUTHERN RAILWAY COMPANY'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,)	
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v.)	Docket No. 42069
)	
NORFOLK SOUTHERN RAILWAY COMPANY,)	<small>ENTERED</small> Office of Proceedings
)	
Defendant.)	<small>MAR 11 2005</small>
)	
		<small>Part of Public Record</small>

**COMPLAINANT’S FIRST MOTION TO COMPEL
NORFOLK SOUTHERN RAILWAY COMPANY’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 Norfolk Southern Railway Company (“NS”) to produce documents in response to Duke’s Request for Production (“Request”) Nos. 3 and 4.¹ These requests, which Duke served upon NS on January 26, 2005, seek production of a number of NS’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.

¹ 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 NS 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 NS's challenged rates.

On January 26, 2005, Duke served its Phasing discovery requests upon NS (the "Requests"). Included amongst Duke's discovery were two requests which sought the production of NS'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 NS 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 NS to any shipper that is presently served by NS and that lacks facilities, access rights, or other means to receive rail service at destination from any railroad other than NS; or (c) relate to the transportation of coal by NS 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 NS 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 NS's pricing practices for its coal transportation services.

In its February 25, 2005 Responses to Duke's Requests, NS objected as follows to producing documents in response to Request Nos. 3 and 4:

Response to Request No. 3:

NS objects to this Request on the ground that it is overbroad and unduly burdensome and seeks information not relevant to this phasing proceeding. NS further objects to this Request on the ground that the requested transportation contracts are confidential and, in many if not most instances, contain provisions that expressly prohibit NS from disclosing the existence or terms of such contracts to third parties without the consent of the other contracting party, or which permit such disclosure or identification only when it is compelled by a court or government order. NS further objects that it produced documents responsive to this Request (through the year 2000) in its document production in connection with the SAC proceeding in this case. Subject to any without waiving its objections, NS states that it would make available for review (by Duke's outside counsel and consultants who have signed the undertaking agreeing to be bound by the terms of the Protective Order governing Highly

Confidential information) responsive utility or export coal contracts dated after the year 2000 if the STB were to issue an order compelling production of those contracts. (In an earlier order in this proceeding, the STB ordered NS to produce similar contracts to Duke on the condition that the existence and terms of any such contract are treated as Highly Confidential pursuant to the terms of the Stipulated Protective Order. *See Order, Duke Energy Corp. v. Norfolk Southern Railway Co.*, STB Doc. No. 42069 (served March 4, 2002)). If, after Duke reviews of (sic) all of the contracts and common carrier rate quotes NS has produced in this case, it believes it needs for purposes of this phasing proceeding a limited number of contracts pertaining to other shippers, NS will entertain a request for contracts for a limited list of such shippers provided by Duke.

Response to Request No. 4:

NS specifically objects that the information sought by this Request could be developed, if at all, only through an unduly burdensome special study, which NS objects to performing. NS further objects that Duke has not identified the shippers that would be served by its SARR, and that the way Duke designed its SARR makes it difficult if not impossible to identify all shippers that would be served by the SARR. Subject to, and without waiving, its objections, NS will produce its common carrier rates for utility coal traffic generated from 2001 to the present.

At their informal discovery conference on February 24, 2005, the parties reached agreement regarding the special study objection that NS 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 NS

to engage in a special study to identify those contracts. On the basis of this modification, NS confirmed that it would be agreeable to producing documents in response to Request No. 4 (as identified by Duke after review of NS'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. NS 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 NS 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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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 Norfolk Southern Railway Company as follows:

By hand delivery to:

G. Paul Moates, Esq.
Terence M. Hynes, Esq.
Paul A. Hemmersbaugh, Esq.
Sidley Austin Brown & Wood
1501 K Street, N.W.
Washington, D.C. 20005

and by Federal Express to:

James A. Squires, Esq.
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