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January 11, 2011

VIA ELECTRONIC FILING

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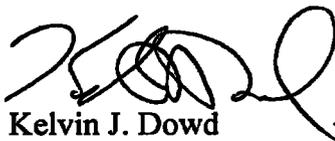
Re: Docket No. NOR 42128, South Mississippi Electric
Power Association v. Norfolk Southern Railway Company

Dear Ms. Brown:

Enclosed for filing in the above-referenced proceeding is Complainant
South Mississippi Electric Power Association's Motion to Establish Procedural Schedule.

Thank you for your attention to this matter.

Sincerely,



Kelvin J. Dowd
An Attorney for Complainant

Enclosures

KJD:lad

cc: Counsel for Defendant

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION,)	
)	
Complainant,)	
)	
v.)	Docket No. NOR 42128
)	
NORFOLK SOUTHERN RAILWAY COMPANY,)	
)	
Defendant.)	
)	

COMPLAINANT’S MOTION TO ESTABLISH PROCEDURAL SCHEDULE

Pursuant to 49 C.F.R. Parts 1111.8, 1111.10(b) and 1117, Complainant South Mississippi Electric Power Association (“SMEPA”) respectfully requests that the Board adopt the schedule set forth in Appendix A hereto as the procedural schedule to govern this case. The filing of this Motion has been made necessary by the refusal of Defendant, Norfolk Southern Railway Company (“NS”) to negotiate regarding such a schedule, as required by the Board’s rules.

BACKGROUND

SMEPA's Complaint initiating this proceeding was filed and served on December 28, 2010. Therein, SMEPA invoked the stand-alone cost ("SAC") constraint of the *Coal Rate Guidelines*¹ as one of the standards against which the reasonableness of the NS common carrier rates at issue should be evaluated.²

Consistent with the Board regulations applicable to the establishment of procedural schedules and related matters (49 C.F.R. Parts 1111.8(a) and 1111.10(b)), counsel for SMEPA approached counsel for NS to arrange a conference within seven (7) days after the filing of the Complaint, to discuss a schedule and preliminary discovery matters. Such a conference was held by telephone on January 5, 2011, and initially addressed a schedule proposed by SMEPA. Counsel for the parties were not able to reach agreement on a schedule during this call, although alternative dates for various stages and pleadings were reviewed. The conference concluded with NS counsel agreeing to provide a revised proposed schedule for SMEPA's consideration.³

Unfortunately, instead of a counter-proposal, counsel for SMEPA subsequently received notice from NS counsel that the railroad was unwilling to engage in any further

¹ *Coal Rate Guidelines – Nationwide*, 1 I.C.C. 2d 520 (1985), *aff'd. sub nom Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3rd Cir. 1987).

² Complaint, ¶ 17, 18. SMEPA also challenged the reasonableness of the subject rates under the revenue adequacy constraint.

³ Counsel for the parties did reach agreement on the terms of a Protective Order to safeguard the confidentiality of sensitive and/or proprietary business information that may be exchanged during discovery. SMEPA separately filed a consent motion for approval and adoption of this Order on January 7, 2011.

negotiations regarding a schedule, discovery, or other procedural matters, until the conclusion of the mandatory mediation process described in 49 C.F.R. Part 1109.4. The stated basis for NS' refusal is its interpretation of 49 C.F.R. Part 1111.10(b), read in isolation, as no longer requiring parties to cases brought under the SAC test to confer regarding scheduling and discovery until seven (7) days after the conclusion of Board-sponsored mediation. In its current form, that subpart reads as follows:

(b) Stand-alone cost or simplified standards complaints. In complaints challenging the reasonableness of a rail rate based on stand-alone cost or the simplified standards, the parties shall meet, or discuss by telephone, discovery and procedural matters within 7 days after the mediation period ends. The parties should inform the Board as soon as possible thereafter whether there are unresolved disputes that require Board intervention and, if so, the nature of such disputes.

While the foregoing may at first appear to be unambiguous, SMEPA submits that to apply it in the manner invoked by NS would violate the Administrative Procedures Act, and conflict with other regulations specifically applicable to scheduling and mediation in SAC cases, as reflected in prior Board scheduling orders. Respectfully, SMEPA suggests that the quoted language may have been published in error, and that the Board both should adopt the schedule proposed herein, and clarify the procedural obligations of parties to SAC cases pending formal correction of the language in question.

ARGUMENT

1. Application of the Rule as Advocated by NS Would Violate the Administrative Procedures Act

The law is clear that before the Board or any federal regulatory agency promulgates a new rule or regulation of general applicability, or makes a change in an existing rule that originally was promulgated in a formal proceeding, public notice of the proposed new or changed rule and an opportunity for comment by interested parties must be provided. 5 U.S.C. § 553 (b) and (c); *City of Idaho Falls v. F.E.R.C.*, 2011 WL 9326 *5 (D.C. Cir. Jan. 4, 2011); *Sugar Cane Growers Coop. of Florida v. Venemen*, 289 F.3d 89, 95 (D.C. Cir. 2002). This mandate is a cornerstone of administrative law, and agency actions in derogation of it cannot stand.

At least until October, 2007, 49 C.F.R. Part 1111.10(b) only addressed cases brought under the SAC constraint, and prescribed the procedure followed by SMEPA here:

(b) *Stand-alone cost complaints.* In complaints challenging the reasonableness of a rail rate based on stand-alone cost, the parties shall meet, or discuss by telephone, discovery and procedural matters within 7 days after a complaint is filed. The parties should inform the Board as soon as possible thereafter whether there are unresolved disputes that require Board intervention and, if so, the nature of such disputes.

See Appendix B hereto. This rule originally was promulgated through a notice-and-comment procedure.⁴ At no time from October, 2006 through the present has the Board notified the public of a proposal or intent to change the rule for SAC case scheduling to

⁴ See 61 Fed. Reg. 52710 (Oct. 8, 1996).

delay the establishment of a procedural schedule until after the 60-day minimum mediation period prescribed by 49 C.F.R. Part 1109.4, which period does not begin to run until ten (10) business days after a SAC complaint is filed. *See* 49 C.F.R. Part 1109.4(b). This is not an inconsequential issue, as demonstrated by the fact that when it first adopted the mediation requirement, the Board acknowledged concerns expressed by the rail shipper community that mediation not become a cause of procedural delay by promulgating Part 1109.4(f), which specifies that “the onset of mediation will not affect the procedural schedule in stand-alone cost rate cases....”⁵

The regulatory language on which NS bases its resistance arose from the Board’s deliberations in Ex Parte No. 646 (Sub-No.1), *Simplified Standards for Rail Rate Cases*, a proceeding that was concluded in 2007 and by its own terms dealt exclusively with rate disputes *other than* those brought under the SAC constraint.⁶ In its decision proposing the rules and guidelines that would apply to those cases which would not be adjudicated on the basis of SAC, the Board did not signal any intent to change the rules governing SAC cases, and proposed “meet and confer” rules for proceedings under the simplified standards that called for a conference within seven (7) days after the Board determined that a case was eligible for handling under those standards.⁷ Not surprisingly, therefore,

⁵ *See Procedures to Expedite Resolution of Rail Rate Challenges to be Considered Under the Stand-Alone Cost Methodology*, 6 S.T.B. 805, 807 (2003).

⁶ Decision served September 5, 2007 (“*Simplified Standards*”) at 4.

⁷ *Simplified Standards*, Decision served July 28, 2006 at 17, 31. The appendix to this decision included proposed regulatory language that would have called for the conference to take place within seven (7) days after the answer to a complaint is filed. In both SAC

among the many participating parties in the proceeding, there were virtually no non-railroads which were likely to become involved in proceedings invoking the SAC constraint, and no electric utilities that were directly responsible for the payment of rail freight charges for the transportation of coal.⁸

The final decision in *Simplified Standards* adopted expedited default schedules for non-SAC cases, a streamlined discovery process, and a 20-day mandatory mediation period,⁹ all of which differ significantly from the corresponding elements of a SAC case. *Compare* 49 C.F.R. Parts 1109.4, 1111.8. It was in the context of these very different, non-SAC procedural structures that the Board also determined that parties would “meet and confer on discovery and other matters within 7 business days after the mediation period ends.” *Simplified Standards* at 25. Without comment or explanation, however, the new subpart to 49 C.F.R. Part 1111.10 that the Board appended to its decision lumped SAC and simplified cases together, in the language which currently appears as Part 1111.10(b). *Id.* at 109.

Inasmuch as a change in the rules governing the handling of SAC cases in the manner implied by the language on which NS relies would openly violate governing law, as it was “promulgated” without prior notice and opportunity for public comment under

cases, and cases brought under the simplified standards, that is twenty (20) days after the complaint is submitted. Nothing in the appendix language suggested that a scheduling conference in a SAC case would be delayed until after conclusion of a 60-day mediation period.

⁸ *Simplified Standards*, Decision served September 5, 2007, at 11.

⁹ *Id.* at 22-24.

5 U.S.C. § 553, SMEPA respectfully suggests that the current publication was made in error, and that a reasonable interpretation is that the “meet and confer” rule adopted in *Simplified Standards* was intended to establish a new and separate rule applicable only to those cases, while leaving the prior rule for SAC cases unchanged. This is supported by the fact that the Board did just that in adopting new default schedules for non-SAC cases, promulgating 49 C.F.R. Part 1111.9 while leaving the SAC default schedule in Part 1111.8 in place (*see the discussion infra*). SMEPA expresses no view as to the action that should be taken to correct the apparent error for purposes of future application. For purposes of the instant proceeding, however, the Board should clarify that the provision for a conference of parties seven (7) days after the close of mediation is intended to apply only to cases brought under the *Simplified Standards*, and that in this SAC proceeding the rule is as understood and followed in SAC cases up to the instant:¹⁰ SMEPA and NS were obliged to meet and confer regarding a schedule and preliminary discovery issues within seven (7) days after SMEPA filed its Complaint.

2. Deferring a Procedural Schedule Until the Close of Mediation Conflicts With Other Applicable Regulations

Other Board regulations confirm that the establishment of a procedural schedule in a case brought under the SAC constraint should not be deferred pending the conclusion of mandatory mediation. For example, the default schedule prescribed in 49 C.F.R. Part 1111.8(a), which pointedly was not affected by the *Simplified Standards* decision, specifies that the parties’ conference pursuant to Part 1111.10 (b) is to take place within

¹⁰ This includes cases initiated after October, 2007.

seven (7) days after a complaint is filed, and that discovery commences promptly after such filing. This contrasts with the scheme adopted in *Simplified Standards*, which contemplates that the discovery process (and the rest of the procedural schedule) in non-SAC cases does not begin until the end of the accelerated mediation period. See 49 C.F.R. Part 1111.9. While the Board in coal rate cases frequently departs from the schedule set out in Part 1111.8, heretofore it has not delayed the establishment of a procedural schedule until the conclusion of mediation. See, e.g., *Seminole Elec. Coop., Inc. v. CSX Transp., Inc.*, (STB Docket No. 42110, served Dec. 11, 2008) (adopting procedural schedule during mandatory mediation period).

Additionally, the rules governing mediation in SAC proceedings specifically provide that “the onset of mediation will not affect the procedural schedule in stand-alone cost rate cases...” 49 C.F.R. Part 1109.4(f). As noted *supra*, this rule was adopted in response to concerns raised by shippers that the mandatory mediation process should not become a vehicle for procedural delay. Deferring the establishment of a schedule in the first instance until after mediation is concluded cannot be squared with the rule that mediation “will not affect” such schedule.

3. The Procedural Schedule Proposed by SMEPA is Reasonable

Despite NS’ refusal to continue discussions over a schedule following the parties’ initial conference, the proposed schedule set forth in Appendix A takes into account the views expressed by the NS representatives during that conference, and is consistent generally with schedules approved by the Board in more recent coal rate cases, including the *Seminole Electric* proceeding. The schedule proposed by SMEPA also takes account

of the schedules proposed in the other proceedings brought under the SAC methodology that currently are pending before the Board.¹¹

The schedule set out in Appendix A is reasonable, and should be adopted.

CONCLUSION

For the reasons set forth herein, the Board should issue an order establishing a procedural schedule for the conduct of this case, in accordance with Appendix A.

¹¹ See *Total Petrochemicals USA Inc. v. CSX Transp., Inc., et al.*, STB Docket No. 42121, Motion to Modify Procedural Schedule (filed Jan. 10, 2011); *Intermountain Power Agency v. Union Pac. R.R.*, STB Docket No. 42127, Report on the Parties' Conference Pursuant to 49 C.F.R. § 1111.10(b), Appendix A, (filed Jan. 6, 2011).

Respectfully submitted,

**SOUTH MISSISSIPPI ELECTRIC
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Dated: January 11, 2011

Attorneys & Practitioners

STB Docket No. NOR 42128

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION

v.

NORFOLK SOUTHERN RAILWAY COMPANY

Proposed Procedural Schedule

<u>Date</u>	<u>Day</u>	<u>Event</u>
December 28, 2010	0	Complaint filed; discovery period begins
January 18, 2011	0+20	Defendant files Answer
June 15, 2011	0 + 169	Discovery completed
July 15, 2011	0 + 199	Joint submission of operating characteristics
September 2, 2011	0 + 248	Complainant files opening evidence
December 2, 2011	0 + 339	Defendant files reply evidence
February 17, 2012	0 + 356	Complainant files rebuttal evidence
March 19, 2012	0 + 375	Parties file closing briefs

§ 1111.5

against them may be filed with the answer. An answer to a cross complaint shall be filed within 20 days after the service date of the cross complaint. The party shall serve copies of an answer to a cross complaint upon the other parties.

(d) *Failure to answer complaint.* Averments in a complaint are admitted when not denied in an answer to the complaint.

§ 1111.5 Motions to dismiss or to make more definite.

An answer to a complaint or cross complaint may be accompanied by a motion to dismiss the complaint or cross complaint or a motion to make the complaint or cross complaint more definite. A motion to dismiss can be filed at anytime during a proceeding. A complainant or cross complainant may, within 10 days after an answer is filed, file a motion to make the answer more definite. Any motion to make more definite must specify the defects in the particular pleading and must describe fully the additional information or details thought to be necessary.

§ 1111.6 Satisfaction of complaint.

If a defendant satisfies a formal complaint, either before or after answering, a statement to that effect signed by the complainant must be filed (original only need be filed), setting forth when and how the complaint has been satisfied. This action should be taken as expeditiously as possible.

§ 1111.7 Investigations on the Board's own motion.

(a) *Service of decision.* A decision instituting an investigation on the Board's own motion will be served by the Board upon respondents.

(b) *Default.* If within the time period stated in the decision instituting an investigation, a respondent fails to comply with any requirement specified in the decision, the respondent will be deemed in default and to have waived any further proceedings, and the investigation may be decided forthwith.

§ 1111.8 Procedural schedule in stand-alone cost cases.

(a) *Procedural schedule.* Absent a specific order by the Board, the following

49 CFR Ch. X (10-1-06 Edition)

general procedural schedule will apply in stand-alone cost cases:

Day 0—Complaint filed, discovery period begins.

Day 7 or before—Conference of the parties convened pursuant to § 1111.10(b).

Day 20—Defendant's answer to complaint due.

Day 75—Discovery completed.

Day 120—Complainant files opening evidence on absence of intermodal and intramodal competition, variable cost, and stand-alone cost issues. Defendant files opening evidence on existence of product and geographic competition, and revenue-variable cost percentage generated by complainant's traffic.

Day 180—Complainant and defendant file reply evidence to opponent's opening evidence.

Day 210—Complainant and defendant file rebuttal evidence to opponent's reply evidence.

(b) *Conferences with parties.* (1) The Board will convene a technical conference of the parties with Board staff prior to the filing of any evidence in a stand-alone cost rate case, for the purpose of reaching agreement on the operating characteristics that are used in the variable cost calculations for the movements at issue. The parties should jointly propose a schedule for this technical conference.

(2) In addition, the Board may convene a conference of the parties with Board staff, after discovery requests are served but before any motions to compel may be filed, to discuss discovery matters in stand-alone cost rate cases. The parties should jointly propose a schedule for this discovery conference.

[61 FR 52711, Oct. 8, 1996; 61 FR 53996, Oct. 16, 1996, as amended at 63 FR 2639, Jan. 16, 1998; 68 FR 17313, Apr. 9, 2003]

§ 1111.9 Procedural schedule to determine whether to use simplified procedures.

Absent a specific order by the Board, the following procedural schedule will apply in determining whether to grant a request under § 1111.1(a) to use the simplified procedures (with the remainder of the procedural schedule to be determined on a case-by-case basis):

Day 0—Complaint filed, discovery period begins.

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Day 20—Defendant's answer to complaint and opposition to use of simplified procedures due.

Day 30—Complainant's response to use of simplified procedures due.

Day 50—Board's determination of whether simplified procedures should be used.

[63 FR 2639, Jan. 16, 1998]

§ 1111.10 Meeting to discuss procedural matters.

(a) *Generally.* In all complaint proceedings, other than those challenging the reasonableness of a rail rate based on stand-alone cost, the parties shall meet, or discuss by telephone, discovery and procedural matters within 12 days after an answer to a complaint is filed. Within 19 days after an answer to a complaint is filed, the parties, either jointly or separately, shall file a report with the Board setting forth a proposed procedural schedule to govern future activities and deadlines in the case.

(b) *Stand-alone cost complaints.* In complaints challenging the reasonableness of a rail rate based on stand-alone cost, the parties shall meet, or discuss by telephone, discovery and procedural matters within 7 days after a complaint is filed. The parties should inform the Board as soon as possible thereafter whether there are unresolved disputes that require Board intervention and, if so, the nature of such disputes.

[61 FR 52711, Oct. 8, 1996, Redesignated and amended at 63 FR 2639, Jan. 16, 1998]

PART 1112—MODIFIED PROCEDURES

Sec.

1112.1 When modified procedure is used.

1112.2 Decisions directing modified procedure.

1112.3 Default for failure to comply with schedule; effect of default.

1112.4 Petitions to intervene.

1112.5 Joint pleadings.

1112.6 Verified statements; contents.

1112.7 Records in other Board proceedings.

1112.8 Verification.

1112.9 Sample verification for statement of fact under modified procedure.

1112.10 Requests for oral hearings and cross examination.

1112.11 Authority of officers.

AUTHORITY: 5 U.S.C. 559; 49 U.S.C. 721.

SOURCE: 47 FR 49558, Nov. 1, 1982, unless otherwise noted.

§ 1112.1 When modified procedure is used.

The Board may decide that a proceeding be heard under modified procedure when it appears that substantially all material issues of fact can be resolved through submission of written statements, and efficient disposition of the proceeding can be accomplished without oral testimony. Modified procedure may be ordered on the Board's initiative, or upon approval of a request by any party.

[47 FR 49558, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1112.2 Decisions directing modified procedure.

A decision directing that modified procedure be used will set out the schedule for filing verified statements by all parties and will list the names and addresses of all persons who at that time are on the service list in the proceeding. In this part, a statement responding to an opening statement is referred to as a "reply", and a statement responding to a reply is referred to as a "rebuttal". Replies to rebuttal material are not permitted. The filing of motions or other pleadings will not automatically stay or delay the established procedural schedule. Parties will adhere to this schedule unless the Board issues an order modifying the schedule.

[47 FR 49558, Nov. 1, 1982, as amended at 61 FR 58491, Nov. 15, 1996]

§ 1112.3 Default for failure to comply with schedule; effect of default.

If a party fails to comply with the schedule for submission of verified statements, or any other requirements established by the modified procedure decision, that party will be deemed to be in default and to have waived any further participation in the proceeding. Thereafter, the proceeding may be disposed of without notice to and without participation by parties in default.

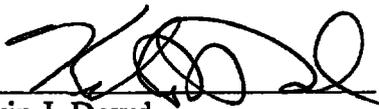
§ 1112.4 Petitions to intervene.

(a) The Board may grant a petition to intervene in a proceeding set for modified procedure if intervention:

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of January, 2011, I caused a copy of the foregoing Motion to Establish Procedural Schedule to be served by hand delivery and email on counsel for the Defendant, as follows:

G. Paul Moates, Esq.
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