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SEC

SERVICE DATE - FEBRUARY 5, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42069

DUKE ENERGY CORPORATION

v.

NORFOLK SOUTHERN RAILWAY COMPANY

MOTION FOR PROTECTIVE ORDER

Decided: February 4, 2002

By complaint filed and served on defendant Norfolk Southern Railway Company (NS) on December 19, 2001, Duke Energy Corporation (Duke Energy) alleges that the rates to be assessed on the movement of coal from origins in Virginia, West Virginia, and Kentucky to Duke Energy's Allen, Belews Creek, Buck, and Dan River electric generating facilities, located, respectively, at Belmont, Walnut Cove, Spencer, and Eden, NC, will exceed a maximum reasonable level.¹ Duke Energy alleges that NS possesses market dominance over the traffic and requests that maximum reasonable rates be prescribed along with other relief. Duke Energy also requests an award of reparations. NS answered on January 8, 2002.

By joint motion filed January 7, 2002, the parties seek a protective order with respect to evidentiary submissions and discovery. The proposed order, as set out in the appendix, is consistent with the protective orders entered by the Board in recent rate proceedings.² It includes provisions governing the production of highly confidential material and stipulates that the protected exchange of material will not constitute an unauthorized disclosure, or result in criminal penalties, under 49 U.S.C. 11904.

Good cause exists to grant the motion for protective order. The unrestricted disclosure of confidential, proprietary, or commercially sensitive material could cause serious competitive

¹ NS's service was formerly provided under a rail transportation contract that expired on December 31, 2001. Because the parties could not reach a satisfactory replacement agreement, Duke Energy asked NS to establish applicable common carrier rates under 49 U.S.C. 11101 and 49 CFR 1300. On November 19, 2001, NS established common carriage rates and service terms covering these movements, effective January 1, 2002.

² See Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42056 (STB served Nov. 13, 2000), and cases cited therein.

injury. Issuance of the requested protective order will ensure that the material produced, in response to a discovery request or otherwise, will be used only in connection with this proceeding and not for any other business or commercial purpose. The motion conforms with the Board's rules at 49 CFR 1104.14 governing requests for protective orders to maintain confidentiality of materials submitted to the Board and the rules at 49 CFR 1114.21(c) for a protective order regarding discovery. Accordingly, the motion for protective order will be granted.

On January 7, 2002, the parties filed a joint report on their conference, held pursuant to 49 CFR 1111.10(b). They have agreed on a procedural schedule with time frames extended from those established in 49 CFR 1111.8.³ The procedural schedule set out below will be adopted.⁴

It is ordered:

1. The joint motion for protective order is granted.
2. The parties are directed to comply with the protective order in the appendix to this decision.
3. The procedural schedule in this proceeding is as follows:

March 4, 2002	End of discovery period.
April 18, 2002	Opening statements due.
July 17, 2002	Reply statements due.
August 20, 2002	Rebuttal statements due.

³ In addition to the filings specified in 49 CFR 1111.8, the proposed procedural schedule suggests a date for filing simultaneous briefs. It is not uncommon for the briefing schedule to be delayed, either because of ongoing related procedural matters, see, e.g., PPL Montana, LLC v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42054, et al. (motion for limited consolidation filed July 5, 2001, and denied Nov. 27, 2001), or by the need to identify problems with the record that the parties will be asked to address in the briefs. Therefore, it is premature to establish a date for the filing of briefs.

⁴ It should be noted, however, that the parties anticipate possible expansion of the discovery period.

4. This decision is effective on its service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

APPENDIX

PROTECTIVE ORDER

1. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings or evidence, that the party believes in good faith reveals proprietary or confidential information, may designate and stamp such material as “CONFIDENTIAL,” and such material must be treated as confidential. Such material, any copies thereof, and any data or notes derived therefrom may be disclosed only to employees, counsel, or agents of the party receiving such material who have a need to know, handle, or review the material for purposes of this proceeding and any judicial review proceeding arising therefrom, and only where such employee, counsel, or agent has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Confidential Material prior to receiving access to such materials.
2. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings or evidence, may in good faith designate and stamp particular material, such as material containing shipper-specific rate or cost data or other competitively sensitive information, as “HIGHLY CONFIDENTIAL.” Material that is so designated may be disclosed only to another party’s outside counsel of record in this proceeding, and to those individuals working with or assisting such counsel who are not regular employees of the party and have a need to know, review, or handle the Highly Confidential material for purposes of the proceeding, including testifying and consulting experts, provided each such person has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Highly Confidential Material prior to receiving access to such materials.
3. Each Undertaking for Confidential Material and Undertaking for Highly Confidential Material executed by a person authorized to receive access to Confidential Material or Highly Confidential Material shall be kept for the duration of this proceeding and any related court litigation or judicial appeals by the party with which such person is affiliated or associated, and a copy of each such Undertaking shall be served upon counsel of record for each party no later than 10 days after such Undertaking is executed.
4. Confidential and Highly Confidential material shall be used by a receiving party solely for the purpose of this proceeding and any judicial review proceeding arising therefrom, and not for any other business, commercial, or competitive purpose.
5. Confidential and Highly Confidential material that is not the receiving party’s own data, information, or documents must be destroyed by the receiving party, its employees, counsel, and agents at the completion of this proceeding and any judicial review

proceeding arising therefrom, except that: (1) outside counsel (but not outside consultants) for each party are permitted to retain file copies of all pleadings and evidence filed with the Board and file copies of all work product; and (2) in-house counsel for each party are permitted to retain file copies of all pleadings and evidence which they received during the course of this proceeding.

6. Confidential and Highly Confidential material, if contained in any pleading or evidence filed with the Board, shall, in order to be kept confidential, be filed only in pleadings or evidence submitted in a package clearly marked on the outside "Confidential Materials Subject to Protective Order" or "Highly Confidential Materials Subject to Protective Order." See 49 CFR 1104.14.
7. In the event that a party produces material which should have been designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" and inadvertently fails to stamp the material as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL," the producing party may notify the other parties in writing within 10 days of discovery of its inadvertent failure to make the confidentiality designation. The parties who received the material without the confidentiality designation will return the non-designated portion or destroy it, as directed by the producing party, or take such other steps as the parties agree to in writing. The producing party will promptly furnish the receiving parties with properly designated material.
8. In the event that a party inadvertently produces material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, the producing party may make a written request within a reasonable time after the producing party discovers the inadvertent disclosure that the other parties return the inadvertently produced privileged document. The parties who received the inadvertently produced document will either return the document to the producing party or destroy the document immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the document, the receiving party is not conceding that the document is privileged and is not waiving its right to later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege.
9. If any party intends to use Confidential and/or Highly Confidential material at hearings in this proceeding, or in any judicial review proceeding arising therefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such Confidential and/or Highly Confidential material to any Administrative Law Judge, the Board, or the court, with a written request that the Administrative Law Judge, the Board, or the court: (a) restrict attendance at the hearings during discussion of such Confidential and/or Highly Confidential material; and (b) restrict access to the

portion of the record or briefs reflecting discussion of such Confidential and/or Highly Confidential material in accordance with the terms of this Protective Order.

10. If any party intends to use Confidential and/or Highly Confidential material in the course of any deposition in this proceeding, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent, and all other counsel attending the deposition. Attendance at any portion of the deposition at which any such Confidential and/or Highly Confidential material is used shall be restricted to persons who may review the material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose Confidential and/or Highly Confidential material shall be kept under seal and treated as Confidential and/or Highly Confidential material in accordance with the terms of this Protective Order.
11. To the extent that material reflecting the terms of contracts, shipper-specific traffic data, other traffic data, or other proprietary information is produced or otherwise disclosed by a party in this or any related proceedings and is held and used by the receiving person in compliance with this Protective Order, such production, disclosure, and use of the material and of the data that the material contains will be deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. 11904.
12. Except for this proceeding, the parties agree that if a party is required by law or order of a governmental or judicial body to release Confidential or Highly Confidential material produced by the other party or copies or notes thereof as to which it obtained access pursuant to this Protective Order, the party so required shall notify the producing party in writing within 3 working days of the determination that the Confidential material, Highly Confidential material, or copies or notes are to be released or within 3 working days prior to such release, whichever is soonest, to permit the producing party to contest the release.
13. All parties must comply with all of the provisions stated in this Protective Order unless good cause, as determined by the Board, or by an Administrative Law Judge in a decision from which no appeal is taken, warrants suspension of any of the provisions herein.
14. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it shall not be subject to this Protective Order even if the same information is produced and designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in this proceeding.
15. A "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" designation may be removed by consent of a party who asserts the confidential, proprietary, or commercially sensitive interest, or, absent such consent, by appropriate decision of the Board, or of an

Administrative Law Judge from which no appeal is taken, upon application of a party seeking to remove such designation.

16. Each party has a right to view its own data, information, and documentation, even if that data, information, and documentation has been designated as “HIGHLY CONFIDENTIAL” by a producing party, without securing prior permission from the producing party.

**UNDERTAKING
CONFIDENTIAL MATERIAL**

I, _____, have read the Protective Order served on February 5, 2002, governing the production of confidential documents in STB Docket No. 42069, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any confidential data or information obtained pursuant to this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than the preparation and presentation of evidence and argument in STB Docket No. 42069 or any judicial review proceeding arising therefrom. I further agree not to disclose any confidential data or information obtained under this Protective Order to any person who is not also bound by the terms of the Order and has not executed an Undertaking in the form hereof. At the conclusion of this proceeding and any judicial review proceeding arising therefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel (but not outside consultants) may retain file copies of its work product and of pleadings and evidence filed with the Board, and in-house counsel may retain file copies of all pleadings and evidence containing confidential material it received during the course of this proceeding. I further understand that a party may retain its own confidential material.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that a party which asserts the confidential interest shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach. I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Dated: _____

**UNDERTAKING
HIGHLY CONFIDENTIAL MATERIAL**

As outside [counsel] [consultant] for _____, for which I am acting in this proceeding, I have read the Protective Order served on February 5, 2002, governing the production of confidential documents in STB Docket No. 42069, understand the same, and agree to be bound by its terms. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated "HIGHLY CONFIDENTIAL," that I will limit my use of those documents and the information they contain to the preparation and presentation of evidence and argument in STB Docket No. 42069 and any judicial review proceeding arising therefrom, that I will take all necessary steps to ensure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners, except as otherwise provided in the Protective Order, and that at the conclusion of this proceeding and any judicial review proceeding arising therefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel (but not outside consultants) may retain file copies of its work product and of any pleadings and evidence filed with the Board. I further understand that I must destroy all notes or other documents containing such highly confidential information received from the other party in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated "HIGHLY CONFIDENTIAL" by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that a party which asserts the highly confidential interest shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach. I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

OUTSIDE [COUNSEL][CONSULTANT]

Dated: _____