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February 5, 2002

BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Unit
1925 K Street, N.W.
Washington, D. C. 20423



Re: Docket No. 42069, Duke Energy Corporation
vs. Norfolk Southern Railway Company

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding please find an original and ten (10) copies of Complainant Duke Energy Corporation's First Motion to Compel Production of Documents.

We have also enclosed an additional copy of this Motion to be date-stamped and returned to the bearer of this letter.

Thank you for your attention to this matter.

Sincerely,

ENTERED
Office of the Secretary

FEB 06 2002

Part of
Public Record

A handwritten signature in cursive script, appearing to read "Christopher A. Mills".

Christopher A. Mills
An Attorney for Duke Energy
Corporation

Enclosures

cc: Paul R. Kinny, Esq. (by federal express)
G. Paul Moates, Esq. (by hand delivery)
Henry D. Light, Esq. (by federal express)

BEFORE THE
SURFACE TRANSPORTATION BOARD

DUKE ENERGY CORPORATION,
Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Defendant.

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) Docket No. 42069
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COMPLAINANT'S FIRST MOTION TO
COMPEL PRODUCTION OF DOCUMENTS

DUKE ENERGY CORPORATION

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Dated: February 5, 2002

Attorneys for Complainant

BEFORE THE
SURFACE TRANSPORTATION BOARD

DUKE ENERGY CORPORATION,	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. 42069
	)	
NORFOLK SOUTHERN RAILWAY COMPANY,	)	
	)	
Defendant.	)	
	)	

**COMPLAINANT'S FIRST MOTION TO
COMPEL PRODUCTION OF DOCUMENTS**

Pursuant to 49 C.F.R. § 1114.31, Complainant Duke Energy Corporation ("Duke") hereby moves for an order overruling Defendant Norfolk Southern Railway Company's ("NS") stated objections and compelling NS to produce documents in response to Duke's Request for Production ("Request") No. 44. This request, which Duke served upon NS on December 27, 2001, seeks production of all NS coal transportation contracts -- and tariffs -- which govern shipments (made in the year 2001 or thereafter) that traverse a portion of the route used for the NS movements to Duke's subject plants that are at issue in this case. The Board routinely orders production of such materials in stand-alone cost cases.

BACKGROUND

On December 19, 2001, Duke filed a Verified Complaint in this proceeding challenging the reasonableness of NS's quoted

common carrier rates for transporting coal in unit train service from various origins in Virginia, West Virginia and Kentucky to Duke's Allen, Belews Creek, Buck and Dan River electrical generating facilities. The Complaint calls for an examination of the reasonableness of the rates at issue using the Board's Constrained Market Pricing ("CMP") methodology, specifically the stand-alone cost constraint.

On December 27, 2001, Duke served its First Set of Interrogatories and Production of Documents upon NS. Duke's Request No. 44 is as follows:

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 you entered into, agreed to or provided which govern shipments of coal (coal being identified as STCC 112) that traverse or that will traverse any portion of the Duke route(s) and that are handled by NS as originating, terminating, overhead or single-line carrier in any of the years 2001 and beyond.

This request was intended to obtain information relevant to the traffic group for Duke's stand-alone railroad ("SARR"), and to provide information regarding the future traffic and revenue for that SARR.

In its January 28, 2002 Responses to Duke's Requests, NS objected to producing any documents in response to Request No. 44. NS's full response is as follows:

NS objects to this Request on the ground that it is overbroad and unduly burdensome. 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. Subject to and without waiving its objections, NS states that it would not object to the production of such contracts if the STB were to require such production in this proceeding. NS would not object to the entry of an appropriate order to this effect by the STB, provided that (i) such order requires the parties to provide advance notice to any shipper whose contract is subject to production to Duke Energy, and affords that shipper adequate opportunity to object to such production; and (ii) the existence and terms of any such contract are treated as Highly Confidential pursuant to the terms of the Stipulated Protective Order.^[1]

(Emphasis added). NS's response makes no reference to Duke's request for production of tariffs.

ARGUMENT

I. Legal Standard

The Board and its predecessor repeatedly have held that the records of defendant railroads in cases brought under the CMP model are subject to broad discovery. See, e.g., *Coal Rate Guidelines, Nationwide*, 5 I.C.C.2d 520, 548 (1985), *aff'd sub*

¹ For the Board's information, NS has not yet produced any documents in response to Duke's discovery requests, even though the thirty (30) day response period expired on Monday, January 28, 2002.

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 . . . regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding" See 49 C.F.R. Part 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 Railroad Co.*, Decision 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 *Coal Rate Guidelines* and the *Rules of Practice*. In that regard, the Board has consistently held that rail transportation contracts to which the defendant carrier is a party are highly relevant to the determination of an appropriate stand-alone railroad traffic group, and its associated volumes and revenues. See, e.g., Docket No. 42054, *PPL Montana, LLC v. Burlington Northern and Santa Fe Ry. Co.*, Decision served November 9, 2000; Docket No. 41295, *Pennsylvania Power & Light Company v. Consolidated Rail Corp.*, Decision served March 10, 1997; Docket No.

41989, *Potomac Electric Power Company v. CSX Transportation, Inc.*, Decision served March 3, 1997.

NS has declined to produce any documents in response to Request No. 44, stating that many of the responsive contracts contain confidentiality provisions which prohibit their disclosure absent an order by a court or other government agency. The Board, however, has consistently found that the existence of a protective order will satisfy all confidentiality concerns of the nature raised by NS. *Id.*²

For example, in its recent decision in Docket No. 42056, *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company ("TMPA")*, Decision served February 9, 2001, the Board granted a motion to compel the production of coal transportation contracts under circumstances nearly identical to those presented here. After determining that -- absent an order of the Board -- BNSF would be precluded by confidentiality clauses from producing the contracts, the Board ruled that the probative value of the contracts outweighed confidentiality concerns that could be assuaged by a protective order, and ordered production of a substantial number of contracts between BNSF and its shippers. *Id.* at 3. Duke requests that the Board grant similar relief in this case, so that NS may produce the requested coal transportation contracts.

² Such a protective order now is in place in this case. See Order served February 5, 2002.

**III. NS's Proposed Condition
is Improper and Unnecessary**

As noted above, NS states that it would not object to the issuance of an order by the Board compelling the production of the rail transportation contracts if: (i) such contracts are treated as highly confidential, and (ii) the Board's order gives shippers an opportunity to object to the production of their contracts. While Duke does not object to the treatment of coal transportation contracts as "highly confidential" information, Duke strongly opposes NS's separate effort to introduce additional, unnecessary delay to this process.

The Board has declined to impose this proposed notice requirement in the past. For example, in the *TMPA* case, BNSF opposed a motion to compel the production of coal transportation contracts on the grounds that "shippers should be afforded the opportunity to challenge the production of information related to their specific arrangements." See *TMPA*, Decision served February 9, 2001, at 2. In ordering production of the requested contracts, however, the Board declined to impose any such notice requirement. *Id.* at 2-3 ("[W]e 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.").

Since December 27, 2001, NS has had the opportunity -- if it so desired -- to notify its shippers of the possible production of their contracts. There is no need to wait now

(much less after a Board order) for NS to take that step, especially since the confidentiality concerns of the shippers are adequately addressed by the protective order. If, as Duke requests, the Board orders production of the subject contracts, there is no purpose to be served by inviting an additional round of objections to be filed before the Board.³ Instead, the Board should simply order NS to produce the responsive contracts.

CONCLUSION

For the foregoing reasons, Duke moves that the Board overrule NS's objections and compel NS to promptly produce all documents that are responsive to Duke's Request No. 44.

Respectfully submitted,

DUKE ENERGY CORPORATION

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Washington, D.C. 20036

Dated: February 5, 2002

Attorneys for Complainant

³ Opening evidence is due in this case on April 18, 2002.

CERTIFICATE OF SERVICE

I hereby certify that I have this 5th day of February, 2002 served copies of this Motion to Compel by overnight express courier on the senior legal officer of defendant Norfolk Southern Railway Company ("NS") as follows:

Henry D. Light, Esq.
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510-2191

and by hand delivery on designated outside counsel for NS, as follows:

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

A handwritten signature in cursive script, reading "Andrew B. Kolesar III", written in dark ink.

Andrew B. Kolesar III