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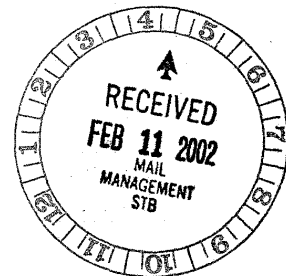
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February 11, 2002

By Hand Delivery

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

ENTERED
Office of the Secretary
FEB 12 2002
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Re: STB Docket No. 42069, Duke Energy Corp. v. Norfolk Southern Railway Co.

Dear Mr. Williams:

Enclosed for filing in the above-referenced proceeding are a signed original and ten copies of Defendant's Reply to Complainant's First Motion to Compel Production of Documents. Also enclosed is a computer disk containing a copy of this submission in WordPerfect 9.0 format.

Please acknowledge receipt of these papers for filing by date-stamping the enclosed duplicate paper copy and returning it with our messenger. Thank you for your attention to this matter.

Very truly yours,

G. Paul Moates
Vincent F. Prada

Enclosures

cc: Counsel for Complainants (w/encls.)

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original

BEFORE THE
SURFACE TRANSPORTATION BOARD

DUKE ENERGY CORPORATION,

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

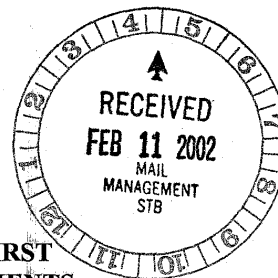
Defendant.

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STB Docket No. 42069



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

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Counsel for Defendant Norfolk Southern Railway Company

DATED: February 11, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD

DUKE ENERGY CORPORATION,

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

Defendant.

STB Docket No. 42069

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

Pursuant to 49 C.F.R. § 1104.13(a), Defendant Norfolk Southern Railway Company ("NS") hereby replies to the First Motion to Compel Production of Documents, filed by Complainant Duke Energy Corporation ("Duke") on February 5, 2002. As explained below, NS does not oppose entry of an order compelling production of the confidential coal transportation contracts requested by Duke, but it asks that the Board withhold issuance of such an order for a brief period necessary to permit affected third parties an opportunity to be heard with respect to any objections they may have to the forced disclosure of their confidential rail transportation contracts to representatives of Duke.

Duke seeks an order compelling NS to produce documents responsive to Duke's Request for Production No. 44. That request seeks production of all transportation contracts between NS and any rail customer governing shipments of coal traversing NS rail lines utilized by Duke's coal shipments under the challenged common carrier rates. In its response served January 28, 2002, NS objected to Duke's Request No. 44 on the ground that the requested

transportation contracts are confidential and generally prohibit non-consensual disclosure to third parties except when compelled by a court or government order.¹ NS recognized, of course, that the requested coal transportation contracts contain information potentially relevant to the stand-alone cost issues in this case. Accordingly, consistent with the procedure that has been followed in recent coal rate reasonableness cases,² NS stated in its discovery response that it would not object to production of the requested contracts if (1) the Board enters an order compelling such production, (2) affected shippers are afforded an opportunity to object to such production, and (3) any contracts produced in response to Duke's request are treated as "Highly Confidential" under the terms of the parties' then-proposed Protective Order (which the Board subsequently entered on February 5, 2002). See Motion at 3 (quoting NS Response to Duke Request for Production No. 44).

For these reasons, as stated in the discovery response, NS does not oppose Duke's request for an order compelling production of the requested coal transportation contracts. Duke has acknowledged its willingness to treat as "Highly Confidential" under the Protective Order any contracts that are produced by NS. As a result, the only issue now in dispute is whether the Board should afford interested third parties -- the rail customers who are parties to the NS rail transportation contracts that Duke is requesting -- an opportunity to be heard with respect to any objections they may have to the disclosure of their confidential contract terms to Duke.

¹ Some of these rail transportation contracts also contain provisions requiring a party to notify the other party of any requested or compelled disclosure of the contract to third parties.

² See, e.g., STB Docket No. 42054, *PPL Montana, LLC v. Burlington Northern & Santa Fe Railway Co.* (served Nov. 9, 2000); STB Docket No. 41295, *Pennsylvania Power & Light Co. v. Consolidated Rail Corp.* (served March 10, 1997); STB Docket No. 41989, *Potomac Electric Power Corp. v. CSX Transportation, Inc.* (served March 3, 1997).

NS firmly believes that the Board should take action to ensure that these affected third parties (who have no other involvement in the rate dispute between Duke and NS) are given a fair opportunity to protect their interests. As the Board appreciates, privately negotiated rail transportation contracts represent extraordinarily sensitive (and competitively significant) information, and their confidentiality is diligently guarded by railroad and shipper parties alike. NS takes seriously its contractual commitments to preserve the confidentiality of privately negotiated rail transportation contract terms. In NS's experience, coal contract customers typically disfavor or actively oppose the disclosure of their confidential contracts to other parties in litigation, particularly when those parties may be direct competitors of that rail customer.³

Since receiving Duke's discovery requests in late December, NS has identified the responsive coal transportation contracts and has given affected customers notice of Duke's request for production. All that NS asks now is that the Board give these parties an opportunity to raise any objections they may have to the forced disclosure of their sensitive commercial contracts.

In order to safeguard the rights of these affected contracting parties to be heard before their contracts are produced to Duke, NS requests that the Board withhold issuance of the requested order compelling production for a period of 20 days from the filing of Duke's motion to compel -- a relatively short period of time that should be sufficient to enable those shipper parties

³ Under the terms of the Protective Order, the requested coal transportation contracts would be disclosed only to outside counsel and consultants for Duke, and not to in-house Duke personnel. However, Duke's outside counsel and consultants regularly represent other electric utilities and coal interests in unrelated matters and even inadvertent disclosure or use of confidential contract terms in connection with those other matters could prove damaging to the parties. The Protective Order terms thus do not entirely assuage the confidentiality concerns of shipper parties to NS's coal transportation contracts.

who wish to object to raise their objection before the Board. This 20-day period corresponds to the normal period allowed under the Board's procedural rules for the filing of replies to motions. 49 C.F.R. § 1104.13(a).

The Board's decision in STB Docket No. 42056, *Texas Municipal Power Agency v. Burlington Northern & Santa Fe Railway Co.* (served Feb. 9, 2001) ("*TMPA*"), cited by Duke in its Motion (at 6), is not inconsistent with NS's request here. In *TMPA*, the Board in fact afforded shippers an opportunity to object to the requested production of their coal transportation contracts to a complainant in a coal rate reasonableness case, but overruled their objections on the merits. Thus, the Board in *TMPA* provided those third parties precisely the same right -- a fair opportunity to be heard on the merits -- that NS is asking the Board to grant to affected contract shippers in this case.⁴

⁴ Although not necessary to a decision on Duke's Motion, NS wishes to correct Duke's assertion (Motion at 3 n.1) that NS has not produced any documents responsive to Duke's discovery requests. That assertion is incorrect, and it was incorrect at the time Duke filed its motion. In fact, NS hand-delivered over 4,000 pages of documents to Duke's counsel on February 1, 2002 -- four days before Duke filed its motion to compel. NS is continuing to collect and produce materials responsive to Duke's enormously broad and burdensome discovery requests in this case.

CONCLUSION

For all of the foregoing reasons, NS does not object to the entry of an order compelling the production of coal transportation agreements responsive to Duke's Request for Production No. 44, subject to the conditions set forth herein.

Respectfully submitted,



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Counsel for Defendant Norfolk Southern Railway Company

DATED: February 11, 2002

CERTIFICATE OF SERVICE

I hereby certify that, on this 11th day of February, 2002, I served the foregoing
"Defendant's Reply to Complainant's First Motion to Compel Production of Documents" by
causing a copy thereof to be delivered, in the manner indicated, to each of the following:

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Robert D. Rosenberg
Christopher A. Mills
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Vincent F. Prada