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205808

July 9, 2002

By Messenger

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JUL 10 2002

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

Re: STB Docket No. 42069, Duke Energy Corp. v. Norfolk Southern Railway Co.

Dear Mr. Williams:

Enclosed for filing on behalf of Defendant Norfolk Southern Railway Company in the above-referenced case are a signed original and ten copies of a "Petition for Modification of Procedural Schedule." As explained in the Petition, Norfolk Southern requests an **expedited decision**.

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

Very truly yours,

A handwritten signature in cursive script, appearing to read 'Vincent F. Prada'.

G. Paul Moates
Vincent F. Prada.

cc: Counsel for Complainant

EXPEDITED DECISION REQUESTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

DUKE ENERGY CORPORATION,

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

Defendant.



STB Docket No. 42069

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PETITION FOR MODIFICATION OF PROCEDURAL SCHEDULE

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Counsel for Defendant Norfolk Southern Railway Company

DATED: July 9, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD

DUKE ENERGY CORPORATION,

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

Defendant.

STB Docket No. 42069

PETITION FOR MODIFICATION OF PROCEDURAL SCHEDULE

Pursuant to 49 C.F.R. §§ 1104.7(b) and 1117.1, Defendant Norfolk Southern Railway Company ("NS") hereby petitions the Board for a modification of the procedural schedule to extend the current due date for reply evidence (August 15, 2002) for a period of at least 30 days after the satisfactory completion of all additional discovery the Board may require in its decision on NS's pending motion to compel discovery from Complainant Duke Energy Corporation ("Duke"). NS also asks that a corresponding adjustment be made in the current due date for rebuttal evidence (September 23, 2002). In view of the approaching deadline for reply evidence under the current procedural schedule and the relatively long lead time for incorporation of the requested discovery materials in NS's stand-alone cost ("SAC") analyses, NS requests that Duke be required to file any reply to this petition on an expedited basis no later than July 12, 2002, and that the Board promptly advise the parties of its action on the petition as soon as possible thereafter.

The requested adjustment of the schedule for evidentiary submissions in this SAC rate complaint proceeding has become necessary because Duke has refused to produce in discovery several important categories of documents and information that NS requires in order to develop its reply SAC evidence, and because NS's motion to compel Duke to produce the requested materials -- filed more than four months ago -- remains pending without decision before the Board.¹ As NS explained in its recent letter urging the Board to render a prompt decision on the pending motion to compel, the documents and information that motion asks the Board to require Duke to produce are critical to NS's ability to respond effectively to Duke's opening SAC evidence, which was filed on May 24, 2002.²

The discovery materials withheld by Duke include information NS needs to assess the likely future traffic volumes and revenues of the stand-alone railroad ("SARR") designed to test the reasonableness of NS's challenged rates -- an issue that has assumed growing importance in recent SAC cases. The disputed materials include forecasts of future electricity generation and coal consumption (and of economic indicators that would affect them), documents assessing the impacts of present and future emissions and other environmental regulations on future coal consumption and sources, analyses of potential alternative sources and types of coal that Duke could use to generate electricity and new technologies and facilities that could affect future coal volumes and sources, plant dispatch information and other materials bearing directly on the likely future traffic volumes and revenues reasonably available to the

¹ Defendant's First Motion to Compel Answers to Interrogatories and Production of Documents (filed Mar. 4, 2002) ("Motion to Compel").

² Letter From G. Paul Moates to Vernon A. Williams (filed June 24, 2002) ("June 24 Letter").

SARR. The requested materials also include coal supply agreements and other coal sourcing materials that Duke has indicated it is willing and able to produce if the Board enters an appropriate order compelling discovery. NS's failure to obtain the requested discovery materials, or even to know what materials will ultimately be available for its use, has severely prejudiced its ability to prepare adequate responsive SAC testimony.

Absent the requested extension of the evidentiary schedule, the current situation imposes an intolerable, and procedurally unfair, burden on NS. Having properly and timely invoked its right under the Board's rules to obtain discovery of information necessary to the preparation of its evidence, NS would be (and presently is) required to prepare its evidence before that discovery has even been completed. Not only does this violate the Board's SAC procedures, which expressly provide that discovery is to be completed before the allowed period for parties to prepare and submit their evidence (49 C.F.R. § 1111.8), it would effectively deny NS its right to pursue appropriate discovery in support of its defense. The Board should remedy these concerns by modifying the existing evidentiary schedule to permit an orderly resolution of NS's pending motion to compel, and completion of all discovery required by the Board's order, while, at the same time, protecting NS's right to an adequate period of time in which to obtain and review those materials and prepare its SAC reply evidence.³

³ Issues similar to those raised by NS's motion to compel in this case have been raised, and are awaiting Board action in STB Docket No. 42072, Carolina Power & Light Co. v. Norfolk Southern Railway Co. ("CP&L"). Because reply evidence in the CP&L case presently is not due until approximately three weeks after the reply deadline in this case, NS is not at this time requesting a modification of the CP&L procedural schedule, although such a request may become necessary.

BACKGROUND

As the Board is aware, this proceeding involves a complaint, filed by Duke on December 19, 2001, challenging the reasonableness of NS's common carrier rates applicable to the transportation of coal between a variety of Central Appalachian coal origins and four of Duke's electric generating stations located in North Carolina (Allen, Belews Creek, Buck and Dan River). Duke's rate-reasonableness complaint is governed by the Board's Constrained Market Pricing standards, including the SAC test.⁴

Consistent with the procedural rules governing SAC rate cases (49 C.F.R. § 1111.8), the original procedural schedule adopted by the Board provided for an initial period for discovery, followed by authorized periods for preparation and filing of opening, reply and rebuttal evidence. By order served February 5, 2002, the Board adopted a schedule providing that all discovery was to be completed by March 4, 2002, followed by a 45-day period for preparation and filing of opening evidence (due April 18, 2002), a 90-day period for preparation and filing of reply evidence (due July 17, 2002), and a 34-day period for preparation and filing of rebuttal evidence (due August 20, 2002).

As is customary in SAC cases, both parties pursued discovery requests seeking substantial amounts of documents and information in support of their respective cases. Duke requested, and NS produced, voluminous amounts of data and information. When NS objected to producing rail transportation contracts containing third-party confidentiality restrictions without a formal order by the Board compelling such production, the Board (by order served March 1, 2002) promptly granted Duke's motion to compel, and the contracts were produced

⁴ See Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520 (1985), aff'd sub nom. Consolidated Rail Corp. v. United States, 912 F.2d 1444 (3rd Cir. 1987).

shortly thereafter. Nevertheless, dissatisfied with the timing of some of NS's other responses to Duke's crushingly burdensome discovery requests, Duke then requested (and the Board granted) an extension of the evidentiary schedule. By order served April 5, 2002, the Board granted Duke's request (unopposed by NS) to extend the due date for opening, reply and rebuttal evidence to May 24, 2002, August 15, 2002 and September 23, 2002, respectively.⁵

Like Duke, NS availed itself of its right to pursue discovery of relevant information. Many of NS's discovery requests sought documents and information relevant to the issue of the existing and future coal traffic volumes and revenues of the SARR to be designed by Duke under the SAC test. NS's requests included Duke's long-term coal supply contracts and documents relating to its negotiations over possible future coal sources, the impact of emissions restrictions and other environmental regulations on coal sourcing and coal shipment forecasts, economic forecasts, plant dispatch procedures and forecasts, and similar types of information. Although Duke produced some responsive information, it objected to large categories of NS's requests on various grounds. With regard to NS's requests for production of Duke's long-term coal supply contracts and related documents concerning coal supply analyses, Duke objected solely on the ground that the requested materials were governed by third-party confidentiality restrictions, which -- like those contained in NS's rail transportation contracts -- could be overcome by a Board order compelling discovery. Duke has stated that it would not oppose the entry of such an order. With regard to other materials sought by NS, Duke simply objected to producing them under any conditions.

⁵ The revised evidentiary schedule reduced by seven days the period for preparation of reply evidence (which, in SAC cases, is the principal filing by the defendant railroad) and increased by five days the period for preparation of rebuttal evidence (which, in SAC cases, is more substantial for the complainant shipper).

NS filed a timely motion to compel discovery on March 4, 2002, seeking the Board's assistance in obtaining access to several specific categories of documents and information that Duke had refused to produce. In that motion, NS requested that the Board adjust the discovery schedule as necessary to resolve the issues raised in NS's motion. Recognizing that the discovery materials that were the subject of NS's motion were relevant to NS's reply SAC evidence, which at that time was not due for several months, NS did not at that time ask the Board to modify the due dates for submission of evidence. Motion to Compel at 34-36. In its reply to NS's motion to compel, Duke suggested that no adjustment of the evidentiary schedule was then warranted because NS's motion to compel, which Duke for the most part opposed, would be resolved well before the due date for the evidence to which the requested materials related.⁶

In contrast to Duke's (unopposed) motion to compel discovery, NS's motion to compel has not received prompt action. It has been pending for over four months, during which time the parties have filed opening evidence (on May 24, 2002), and over half of NS's allotted time for preparation of reply SAC evidence (currently due August 15, 2002) has now passed. Recognizing that continued delay in the resolution of the discovery issues raised in NS's motion would impede its efforts to develop responsive SAC evidence, NS by letter dated June 24, 2002 urged the Board to decide the pending discovery issues immediately, and explained in detail how continued delay in resolving that motion had prejudiced NS's ability to prepare responsive SAC

⁶ Duke Energy Corporation's Reply to Motion to Compel (filed Mar. 15, 2002) ("Duke Reply"), at 24-28.

testimony. In response, Duke also asked that the Board promptly decide the pending motion to compel but opposed any adjustment of the procedural schedule.⁷

ARGUMENT

It is an elementary principle of fair litigation procedure that necessary discovery must be completed before the parties may reasonably (or fairly) be expected to develop and submit testimony addressed to the merits of the parties' dispute.⁸ The Board's SAC procedures reflect this orderly procedure by providing, in the "default" procedural schedule for SAC cases, that discovery should be completed before the parties are required to prepare and file their evidence addressed to the merits of the dispute. 49 C.F.R. § 1111.8. Similarly, in recent coal rate cases in which discovery had not been completed before the scheduled submission of evidence, the Board has taken action to protect the parties' procedural rights by extending the schedule as necessary to resolve pending discovery disputes and permit the parties to complete discovery.⁹ As these rulings suggest, it would be arbitrary and capricious for the Board first to

⁷ Letter From Christopher A. Mills to Vernon A. Williams (filed June 26, 2002). NS responded to Duke's letter on June 28, 2002. Letter From G. Paul Moates to Vernon A. Williams (filed June 28, 2002).

⁸ See, e.g., United States v. \$100,375 in U.S. Currency, 70 F.3d 438, 440 (Fed. Cir. 1995) (trial date extended to permit completion of discovery); Randolph v. Laeisz, 986 F.2d 964, 969 (5th Cir. 1990) (same); New York v. Solvent Chemical Co., 875 F. Supp. 1015, 1021 (W.D.N.Y. 1995) (noting that "discovery is far from complete and there is much to be done before the case can come to trial").

⁹ See, e.g., STB Docket No. 42071, Otter Tail Power Co. v. Burlington Northern & Santa Fe Railway Co. (served May 30, 2002) (suspending evidentiary schedule indefinitely pending resolution of pending discovery motions and completion of discovery); STB Docket No. 42058, Arizona Electric Cooperative, Inc. v. Burlington Northern & Santa Fe Railway Co. (served Dec. 31, 2001) (same); STB Docket No. 42056, Texas Municipal Power Agency v. Burlington Northern & Santa Fe Railway Co. (served Feb. 9, 2001) (same); STB Docket No. 42054, PPL Montana, LLC v. Burlington Northern & Santa Fe Railway Co. (served Nov. 9, 2000) (extending
(continued...))

authorize parties to pursue discovery of relevant information necessary to prepare their cases on the merits and then, simultaneously, to force those parties to prepare and file evidence before that discovery has been completed.

Yet that is the situation NS presently confronts. Because of Duke's refusal to answer key discovery requests (served nearly six months ago), and because the Board has not even ruled on NS's motion to compel responses to these requests, NS is now faced with the prospect of preparing its SAC reply evidence without the discovery it believes it was entitled to obtain. Although discovery was supposed to have been completed on March 4, 2002 under the Board's procedural schedule, discovery is still far from complete, more than four months after the supposed discovery cut-off. And, although the Board's SAC procedures contemplate that parties in NS's position would have all discovery materials in hand before commencement of the laborious process of preparing SAC reply evidence, more than half of NS's allotted time for preparation of reply evidence has now passed without a ruling on the pending motion to compel and without the substantial discovery materials that NS is seeking through that motion.¹⁰

These circumstances have severely prejudiced NS's ability to prepare adequate SAC testimony responding to Duke's opening SAC evidence. NS's need for the documents and

⁹(...continued)
evidentiary schedule pending resolution of discovery disputes).

¹⁰ NS has also been hampered in its preparation of SAC reply evidence by Duke's production of substantial discovery documents and workpapers underlying its opening evidence well after the May 24, 2002 filing date. As an example, late in the day on Wednesday, July 3d, Duke produced a substantial amount of previously omitted workpapers underlying its SAC evidence. At the same time, it produced without explanation approximately 2,200 pages of additional documents apparently responsive to NS's original discovery requests served last January. This additional material represents, in volume, nearly half of the total amount of documents previously produced by Duke in this case. Initial review of the documents indicates that most involve records that were in existence well before the scheduled close of discovery in this case.

information that are at issue in the motion to compel is fully explained in NS's motion and in NS's letters of June 24 and 28, 2002, urging the Board to decide the pending motion. Rather than burden the Board with a repetition of the showing made in those submissions, NS wishes to emphasize two points.

First, the disputed documents and information at issue in NS's pending motion to compel are highly relevant to the important (and sometimes outcome-determinative) issue of the future traffic volumes and revenues of the SARR. As the Board appreciates, SAC presentations involve a large number of interdependent studies assessing the network and traffic configuration of the proposed SARR and its present and future traffic volumes and revenues, facilities requirements, construction costs and operating expenses. Determining the estimated traffic volume of the SARR is an integral building block of SAC analysis, and affects studies and preparation of evidence in all other areas as well. For this reason, it is imperative for NS to have access to the information necessary to determine the SARR's likely traffic volumes and revenues before it can realistically analyze and develop evidence addressing the SARR's facilities requirements, construction costs, operating plan and operating expenses.

Second, it is likely that the Board's decision on NS's pending motion to compel will, in fact, require the production of additional discovery materials that Duke has thus far refused to produce. As noted in NS's Motion to Compel (at 31-33), Duke has made clear that it is willing and able to produce certain categories of requested documents (notably, long-term coal supply agreements and related documents concerning coal sourcing analyses) if the Board would overrule third-party confidentiality objections by entering an affirmative order compelling discovery. Duke Reply at 24. Thus, with respect to these requested discovery materials, Duke acknowledges that they are relevant and discoverable, and Duke will voluntarily produce those

materials if the Board enters an appropriate order requiring their production notwithstanding the existence of contractual confidentiality restrictions. As a result, this is not a case in which the claimed prejudice would be mooted by a simple denial of the motion to compel.¹¹

Accordingly, NS requests that its right to obtain and use relevant discovery materials be protected through a modification of the existing procedural schedule. In order to afford the Board adequate time to complete its decision on the pending motion to compel, and to permit all discovery required by that order to be completed with sufficient time for NS to review the produced materials and incorporate them as appropriate in its SAC analyses and related evidence, NS asks that the Board extend the current due dates for reply and rebuttal evidence by a period of 30 days from the completion of all outstanding discovery (either Duke's completion of all discovery production directed by the Board's decision on NS's pending motion to compel or service of a Board decision denying the motion in its entirety). An extension of 30 days duration is eminently fair, in light of the fact that more than 45 days (or more than half) of the time allotted for NS to prepare its reply SAC evidence has already passed.

The arguments Duke can be expected (based on prior submissions) to make in opposition to this request for modification of the procedural schedule are without merit. First,

¹¹ In Arizona Public Service Co. v. Atchison, Topeka & Santa Fe Railway Co., 2 S.T.B. 367 371-72 (1997), the Board decided a long-pending discovery dispute in its final decision on the merits of a coal rate complaint, but the circumstances there were very different than those presented here. In Arizona, the defendant railroad had appealed an ALJ order granting the complaining shipper's motion to compel discovery of internal rail costing information. The Board granted the appeal, holding that the requested discovery was improper, in its decision on the merits. Thus, the Board held that the party seeking discovery was not entitled to the requested materials. Equally important, the party seeking discovery in that case did not ask the Board to suspend the evidentiary schedule to permit resolution of the discovery dispute before the parties' submission of evidence, choosing instead to proceed voluntarily with its evidentiary filing without the requested materials.

Duke's oft-repeated and adjective-laden claim that any delay in the schedule should be denied because of the allegedly excessive level of the challenged rates proves too much, as it asks the Board to prejudge the merits of Duke's rate challenge in deciding fair procedures for adjudication of that very claim (which NS of course disputes). The argument is also tiresome: every rate complainant argues that proceedings should be accelerated because its rates are so obviously too high. The Board cannot be swayed by such arguments, but should respect each party's positions by adopting fair procedures that preserve the rights of both parties and permit orderly development of the evidentiary record.

Second, Duke has argued that adjustment of the procedural schedule is unwarranted because the additional discovery materials to which NS is entitled are limited in scope and can be incorporated in NS's reply SAC evidence even if produced following a Board decision on the motion to compel served only a "few weeks" before the current August 15 filing date. Duke Reply at 28. This argument again improperly asks the Board to prejudge the merits of a pending dispute, this time the pending motion to compel. In any event, given the interdependent nature of the various studies and calculations comprising a complete SAC reply submission, it is unreasonable to expect NS to be able effectively to make use of requested discovery materials if they are not produced until shortly before the due date for the reply evidence. Clearly, Duke's interest is in reducing as much as possible the interval between the production of any additional discovery materials and NS's due date for reply evidence, but that narrow self-interest obviously should not control the Board's assessment of fair procedures.

Finally, the Board should not be concerned that, by granting NS's request for modification of the evidentiary schedule, it would inappropriately expand the time period for NS's preparation of reply evidence. Under the Board's SAC procedures, NS is entitled to have

at least 60 days (in this case 83 days) after the completion of discovery in which to prepare and file its reply evidence. 49 C.F.R. § 1111.8; Board decisions served February 5 and April 5, 2002. NS's petition here seeks to restore at least some of that evidence-preparation interval.

Even more important, however, an extension of NS's time interval for preparation of evidence would be anything but unfair to Duke. It bears emphasis that the predicament that NS (and the Board) face today is due to Duke's flat refusal to produce large categories of relevant documents and information requested by NS in discovery. In addition, if Duke had been concerned about the possible need for an adjustment in the evidentiary schedule to accommodate the orderly resolution of the parties' pending discovery disputes, Duke could have requested a further extension of the due dates for opening evidence, thus preserving the original intended intervals between the opening and reply evidence. Instead, Duke forged ahead with its strategy of resisting discovery and, simultaneously, pushing for adherence to an accelerated evidentiary schedule.¹² However advantageous from the standpoint of Duke's own litigation interests, the Board should not reward such tactics. If Duke wishes to resist discovery, it must bear the consequences, which include necessary adjustment of the evidentiary schedule to accommodate the resolution of the resulting discovery dispute.

REQUEST FOR EXPEDITED DECISION

As the Board appreciates, SAC evidentiary submissions are complex, and require a large number of interdependent cost calculations and supporting analyses of the SARR's network configuration, facilities requirements, traffic volumes and revenues, construction costs

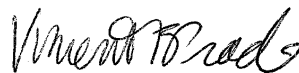
¹² Of course, Duke made an exception to this strategy when it needed additional time to review discovery materials and, with NS's concurrence, it sought an extension of the due date for its opening SAC evidence.

and operating expenses. It takes considerable time to prepare these studies which, if performed properly, are difficult to adjust late in the process. It is therefore important that NS have all relevant discovery materials in hand well before the ultimate due date for its SAC reply evidence. Because the current due date for reply evidence is fast approaching, and because the issues raised by the instant petition are uncomplicated and have already been the subject of various submissions by the parties, NS requests that the Board afford this petition expedited consideration and decision. Specifically, NS requests that Duke be required to file any response to this petition by July 12, 2002, and that the Board very promptly thereafter advise the parties (informally if necessary) of its decision on NS's present request for modification of the procedural schedule.

CONCLUSION

For all of the foregoing reasons, the Board should: (1) modify the procedural schedule in this proceeding to extend the current due date for reply evidence (August 15, 2002) for a period of at least 30 days after the satisfactory completion of all additional discovery the Board may require in its decision on NS's pending motion to compel discovery; (2) make a corresponding adjustment in the current due date for rebuttal evidence (September 23, 2002); (3) require Duke to file an expedited response to this petition no later than July 12, 2002, and (4) promptly advise the parties of its action on the petition as soon as possible thereafter.

Respectfully submitted,



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Counsel for Defendant Norfolk Southern Railway Company

DATED: July 9, 2002

CERTIFICATE OF SERVICE

I hereby certify that, on this 9th day of July, 2002, I served the foregoing "Petition for Modification of Procedural Schedule" by causing a copy thereof to be delivered, in the manner indicated, to each of the following:

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