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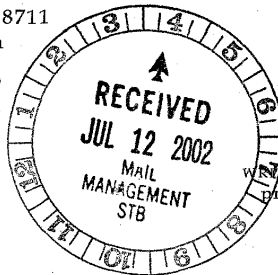
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July 12, 2002

EXPEDITED HANDLING REQUESTED

By Messenger

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

ENTERED
Office of Proceedings

JUL 15 2002

Part of
Public Record

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

Dear Secretary Williams:

Defendant Norfolk Southern Railway Company ("NS") respectfully requests leave to submit the following brief response to a new issue raised by Complainant Duke Energy Corporation ("Duke") in its July 11, 2002 opposition to NS's petition for modification of the procedural schedule. In footnote 4 of its opposition, Duke suggests that the Board should condition any extension of the evidentiary schedule on an interim "rollback" of the challenged NS rates, subject to a true-up arrangement in which Duke would agree to pay the difference (plus interest) between the "interim" rates and any higher rate levels found reasonable by the Board in its final decision on the merits.

The Board should reject this unprecedented suggestion -- which would impose on NS an unauthorized reduction in its presumptively lawful rates as the price for obtaining the right to fair and adequate procedures -- for several reasons.

First, as Duke acknowledges (Opp. at 8 n.4), an interim "rollback" of the challenged rates is flatly inconsistent with the regulatory structure. That structure contemplates that a shipper challenging the reasonableness of a railroad's rates must pay the challenged rates during the pendency of the complaint proceeding, subject to compensation by an award of reparations and interest if (and only if) the challenged rates are later found to be unreasonable.

Second, the underlying premise of Duke's proposal is that the Board's existing rules -- including award of reparations and interest -- are not fully compensatory for the damage

Honorable Vernon A. Williams

July 12, 2002

Page 2

Duke incurs if required to ship freight under rates held to be unreasonably high. (Duke also places heavy reliance on its claim that NS's rates were set to "game" the system, a charge that is not only unproven and false, but one that deserves no credence until decided after receipt of all evidence.) There is no basis for this agency to conclude that its own damages rules are somehow inadequate, which would be the implication of any Board decision adopting Duke's interim "rollback" proposal. In any event, Duke has requested that the Board's damages rules be modified in this case to increase the rate of interest on any reparations award and to require NS to reimburse Duke for its filing fee. NS does not concede that Duke is entitled to any such relief, but the fact that Duke is seeking it surely means that it believes the Board will be able to provide full relief if Duke should ultimately prevail on the merits.

Third, Duke's analogy to the practice the Board has recently followed in ruling on railroads' requests to stay an adverse maximum-rate decision pending judicial review is entirely misdirected. In the stay context, the Board has already issued a final decision finding that the challenged rates are unlawfully high and prescribing a reduction in the challenged rates to reasonable levels. The Board's stay orders simply direct that the rate prescription be implemented immediately. Here, by contrast, there has been no agency finding that NS's challenged rates are unreasonable -- to the contrary, the statutory structure embodies a presumption that they are not unreasonable. Duke's proposed interim "rollback" improperly asks the Board to prejudge the merits.

Fourth, and perhaps most importantly, Duke's proposal is just plain outrageous. It is Duke's own deliberate refusal to answer NS's discovery requests that has created the need for a modification of the procedural schedule. And the notion that Duke -- a \$60 billion corporation that enjoys full regulatory cost recovery for its transportation costs -- is unfairly burdened by being required to pay the challenged rates unless or until it proves they are unlawful, defies credulity.

NS is entitled to a fair and adequate opportunity to contest Duke's claims, and to pursue the right to discovery and have sufficient time and ability to make use of discovery materials in preparing its evidence. The Board should grant the requested modification of the evidentiary schedule.¹

¹ Duke's statement that NS's June 24, 2002 letter to the Board was "silent" as to NS's request for Duke's coal supply contracts (Opp. at 6) is simply inaccurate. NS's letter addressed that point on pages 1, 2, 3 and 5.

SIDLEY AUSTIN BROWN & WOOD LLP

WASHINGTON, D.C.

Honorable Vernon A. Williams

July 12, 2002

Page 3

Very truly yours,



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