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March 14, 2003

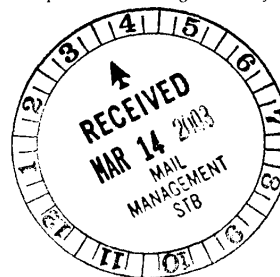
BY HAND

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

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Office of Proceedings

MAR 14 2003

Part of
Public Record



Re: STB Docket No. 42072, *Carolina Power & Light Company v. Norfolk Southern Railway Company*

Dear Secretary Williams:

We write in response to CP&L's recent letter to the Board in connection with the above-captioned proceeding. See Letter from C. Michael Loftus to Secretary Williams (March 12, 2003). CP&L's letter complains about NS' submission of actual traffic data for the fourth quarter of 2002 for SARR origin-destination pairs, data that were not available at the time the parties submitted their Rebuttal evidence. Id.; see Moates Letter to Secretary Williams (Feb. 28, 2003) (transmitting NS' fourth quarter 2002 traffic data). To dispel any doubt or confusion, NS emphasizes at the outset that it does not seek to alter its SAC presentation or results in any way based on recent data showing that actual traffic was substantially lower than assumed in NS' (and CP&L's) SAC presentation.

NS submitted this actual data in order to assist the Board in evaluating the untimely new traffic forecast evidence CP&L introduced as part of its effort to use its Rebuttal submission to change its case-in-chief. On Rebuttal, CP&L introduced new evidence (sponsored by its traffic expert) to claim that the downward trend in actual coal traffic on the lines comprising the SARR would reverse in the fourth quarter of 2002 and early 2003, and introduced a new forecast based on an unsupportable manipulation of a third-party forecast. See CP&L Rebut. at III-A-9 to 11, 49-51. In response, NS first pointed out that CP&L's traffic expert had contemporaneously published forecasts that – in direct contradiction to the made-for-litigation forecast he sponsored in CP&L's Rebuttal – predicted that coal production would continue to decline through 2003. See NS Brief at 13 (citing Coal Monthly, Dec. 2002).¹ NS also submitted its actual traffic data for fourth quarter 2002, to allow the Board to determine for itself whether CP&L's Rebuttal

¹ NS' brief contains a typographical error, misstating the publication's year. The correct date is December 2002.

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claim (which apparently even its sponsor did not believe) or NS' forecast evidence more accurately projected actual traffic on the lines of the SARR.² Given that NS does not seek to use this data to change its SAC presentation, CP&L is apparently arguing that the Board should be denied objective facts that bear directly on the validity of a forecast CP&L improperly introduced for the first time on Rebuttal.

CP&L seeks to have it both ways. On the one hand, it introduced very substantial new evidence on Rebuttal that should have been presented in its Opening case-in-chief, thereby depriving NS of an opportunity to respond.³ On the other hand, it objects loudly to NS' modest response of submitting a small amount of actual traffic data that were not available at the time the parties filed their rebuttal evidence, solely to refute the forecasts CP&L made on Rebuttal. As its brief makes clear, NS wholeheartedly supports the principle that new evidence untimely introduced should be disregarded, and urges the Board to enforce its rule against introducing new evidence on Rebuttal by refusing to consider any of the new evidence CP&L introduced on Rebuttal. See, e.g., NS Brief at 8-11, 38-39.

² The actual traffic data that NS submitted show that the assumptions NS used in its traffic and revenue evidence substantially overstated actual traffic volumes. Unlike CP&L, which submitted substantial new evidence concerning several central elements of its case on Rebuttal and relied upon that evidence for its revised, final discounted cash flow runs and SAC conclusions, NS did not revise its SAC presentation to reflect this more favorable actual data. Because those data were not yet available when the parties' submitted their final round of evidence in late November, NS' traffic evidence, its DCF runs, and its SAC presentation in general, remain the same as they were when NS filed its Reply.

³ As NS explained in its brief, CP&L's improper introduction of new evidence for the first time on Rebuttal was widespread, and by no means confined to its traffic projections. For example, in the area of Road Property Investment alone, CP&L radically revised its case-in-chief on Rebuttal by: (i) introducing new and radically different earthmoving equipment, which is a primary determinant of earthmoving costs, the largest single cost difference between the parties; (ii) substituting a wholly different communications system for the satellite-based system it posited in its case-in-chief; (iii) removing a large number of bridges from the SARR bridge inventory it submitted in its case-in-chief; (iv) relocating a major yard from the site posited in its case-in-chief, and claiming the new yard would cost substantially less to build; and (v) introducing a new mine service plan based upon system-wide use of distributed power and new track configurations, without adjusting its SARR track configuration or accounting for the costs of constructing such new configuration. See generally NS Brief (Feb. 28, 2003) (describing these and numerous other instances in which CP&L introduced new and substantially different evidence on Rebuttal, thereby depriving NS of an opportunity to evaluate and respond to that new evidence). NS did not submit new evidence to respond to the vast majority of CP&L's numerous attempts to introduce new evidence on Rebuttal. NS made a minor exception to this approach for its actual fourth quarter traffic data, concluding that this objective data would allow the Board to determine for itself which party's traffic projections for 2002 were more accurate. In every other instance, NS is relying on the Board to enforce its rule against new evidence on Rebuttal.

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CP&L's letter also cryptically alleges that NS' brief "reference[d] . . . sealed records in another proceeding," without disclosing what CP&L contends the brief "referenced." CP&L may be alluding to NS' general statement that the "string diagram model," upon which CP&L relies to demonstrate the feasibility of its SARR and to generate its operating statistics, is the same flawed model (sponsored by the same consultant) proffered in the other pending rate case against NS. See NS Brief at 8, n.14 (citing Duke Energy v. Norfolk Southern Ry., STB Doc. No. 42069). NS' non-specific mention of a companion case pending against it involving the same consultants, the same counsel, and the same computer model does not disclose any specific substantive information, let alone any confidential or highly confidential information.

Thank you for your time and consideration of this response.

Very truly yours,



G. Paul Moates

Paul A. Hemmersbaugh

cc: C. Michael Loftus