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April 21, 2003

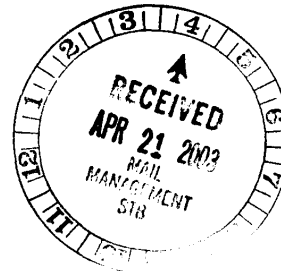
BY HAND

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

ENTERED
Office of Proceedings

APR 21 2003

Part of
Public Record



Re: Duke Energy Corporation v. CSX Transportation, Inc., Docket No. 42070

Dear Secretary Williams:

We write regarding assertions made in Complainant Duke Energy's ("Duke") "Post-Evidentiary Brief," initially filed April 14, 2003 in the above-captioned proceeding. Duke appended to the end of its brief an "Afterword," which raised for the first time new and unverified allegations and arguments. See Duke Brief at 39 (Apr. 14, 2003) ("VI. Afterword"). Duke raised these allegations for the first time on April 14, 2003 – in a document Duke itself labels "post-evidentiary" – more than four months after the parties filed their final round of evidence in this matter. Not only is Duke's new "evidence" untimely, it is also unverified by any witness and unsupported by any citation to the evidentiary record, or to any other source. See id.

The Board has made abundantly clear that parties may not submit new evidence for the first time on Rebuttal or in their final brief, unless they first petition the Board for permission to submit such evidence. See, e.g., Order in Doc. No. 42070 served March 25, 2003 (striking new evidence Duke submitted on rebuttal in this case). Because the new allegations raised in Duke's "Afterword" are untimely and lack any evidentiary support, CSXT respectfully requests that the Board disregard that Afterword entirely and exclude it from the Board's consideration of this matter.

If the Board nonetheless decides to consider Duke's Afterword submission, CSXT hereby petitions the Board to accept and consider CSXT's following summary response: Duke's untimely claims are disingenuous and misleading. The alleged rate "increase" to which Duke refers is the result of CSXT's consistent application of the escalation provision of the CORE 120 common carrier tariff at issue in this proceeding. CORE 120, which Duke itself attached as an exhibit to its Amended Complaint, clearly and expressly states that its rates are subject to quarterly inflation adjustments based on the RCAF-U. See Duke Amended Complaint Exh. G at

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¶ 13 ("Quarterly Rate Adjustments"). Duke is well aware of this provision – CSXT made several such adjustments during the pendency of this proceeding, and gave written notice to Duke of each of those adjustments. (Contrary to Duke's suggestion, CSXT did not impose a lump sum 6.5% rate increase on April 1, 2003. Rather, the cumulative inflation adjustment during the thirteen months from March 1, 2002 to April 1, 2003 (based on increases in the RCAF published by the Board) was approximately 6.4%. CSXT adjusted Duke's rates in accordance with the terms of CORE 120 on a quarterly basis). Prior to filing its brief, Duke did not object to the amount of these inflation adjustments or suggest such an adjustment was improper.

Moreover, any such suggestion would be belied by the fact that the very same inflation adjustment was an integral element of Duke's own SAC presentation in this proceeding. Duke's SARR revenue projections escalated rates for the issue traffic using the RCAF-U for the entire 20-year DCF period. See, e.g., Duke Op. WP csxRevprojbasedontariffs_revised.xls Sheet2; Duke Reb. II-A-65 to 66; CSXT Reply III-A-50 to 51 (accepting Duke's use of RCAF-U to project rates for issue traffic). Thus, Duke's claim in its Afterword – that its SAC computations discussed on brief do not reflect rate escalations for the issue traffic – is false.

Nor is it correct for Duke to claim it first received notice of the inflation adjustment to its rates on April 11, 2003. Duke has long been aware of the thirteen-month-old tariff's quarterly inflation adjustment provision, because CSXT made similar quarterly adjustments to Duke's actual rates in 2002 and earlier in 2003. Moreover, the Board publishes the quarterly RCAF index, generally issuing a decision ten days before the end of a calendar quarter. The RCAF for the coming quarter is thus readily available to anyone who is interested, including Duke. Presumably, Duke was aware of the most recent change in the RCAF index on or about March 20, 2003, when the Board issued its Decision. See Quarterly Rail Cost Adjustment Factor, STB Ex Parte No. 290 (Sub-No. 5) (served March 20, 2003). On April 3, 2003, CSXT sent a letter to Duke confirming that, as of two days earlier, Duke's rates had been adjusted to reflect the quarterly change in the RCAF-U announced by the Board in March. Even if Duke somehow did not receive this confirmation until April 11, as it claims, it plainly had ample notice of the adjustment well before that time, and it suffered no prejudice in any event.

Duke's "Afterword" is erroneous, untimely, unsupported, and contradicted by its own evidence. The Afterword should be stricken from the record and form no part of the Board's consideration of this matter.

Very truly yours,

G. Paul Moates

Paul A. Hemmersbaugh

cc: William L. Slover