

SLOVER & LOFTUS

ATTORNEYS AT LAW

1224 SEVENTEENTH STREET, N. W.
WASHINGTON, D. C. 20036-3003

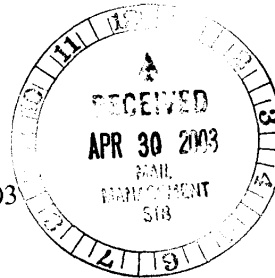
WILLIAM L. SLOVER
C. MICHAEL LOFTUS
DONALD G. AVERY
JOHN H. LE SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
CHRISTOPHER A. MILLS
FRANK J. PERGOLIZZI
ANDREW B. KOLESAR III
PETER A. PFOHL
DANIEL M. JAFFE
KAREN HASSELL HERREN
KENDRA A. ERICSON

TELEPHONE:
(202) 347-7170

FAX:
(202) 347-3619

WRITER'S E-MAIL:

ws@sloverandloftus.com



April 30, 2003

BY HAND DELIVERY

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

ENTERED
Office of Proceedings

APR 30 2003

Part of
Public Record

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

Dear Secretary Williams:

Please accept this letter as the reply of Duke Energy Corporation ("Duke") to the letter petition which CSX Transportation, Inc. ("CSXT") filed on April 21, 2003.

Background

This proceeding involves the reasonableness of railroad rates on coal. After the evidentiary record was closed, Duke, in an Afterword to its brief dated April 14, 2003, directed the Board's attention to the fact that the rates challenged in Duke's complaint subsequently had been increased by another 6.4% by CSXT. CSXT asks that the Board disregard these increases by excluding Duke's Afterword.

Discussion

Duke's Afterword was included in its brief to bring to the Board's attention the fact that the rates challenged in Duke's Complaint and discussed in the evidence were no longer the effective rates and that the effective rates were higher by 6.4% (\$1.00+ per ton) as a consequence of subsequent increases imposed by CSXT. Duke's Afterword

complements the Board's long-established policy to "take official notice of all relevant tariff material, even if not supplied by the parties." Docket No. 40807, Chemtronics, Inc. – Petition for Declaratory Order – Certain Rates and Practices of Brown Transport Truckload, Inc., Decision served May 31, 1994; see also Interstate Commerce Commission v. Louisville & N. R.R., 118 Fed. 613, 624 (S.D. Ga. 1902) (where an increased rate on a particular commodity is put into effect while proceedings are pending before the Commission to determine the legality of the rate previously in force, the Commission has jurisdiction to consider and determine the legality of the rate as advanced).

Because common carrier schedules are no longer filed with the Board, the continuing effectiveness of its tariff notice policies in rate cases depends to a great degree on measures such as those taken by Duke in its Afterword to apprise the Board of changes in common carrier schedules.

CSXT's proffered summary response is meritorious only to the extent that it corroborates Duke's complaints concerning CSXT's shortcomings as a common carrier. See Duke Brief at 16 (CSXT's rate schedules "transgress the Board's requirements concerning the form and content of common carrier schedules."). CFR Section 1300.4's Notice Requirement for common carrier rate schedules requires inter alia that written notice of rate increases be provided 20 days in advance and that the notice "must clearly identify the increases." CSXT's increase notice, referenced in its letter (attached hereto as Exhibit I) violates Section 1300.4 because it:

1. increases Duke's rates retroactively by 1 full year; and
2. fails to "clearly identify the increases" imposed.

The Honorable Vernon A. Williams
April 30, 2003
Page 3

Whether via Duke's Afterword or by official notice, the Board must take account of CSXT's increased rates, if its report in this proceeding is to present accurate revenue/cost, reparations, etc., calculations.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "William L. Slover".

William L. Slover
An Attorney for Duke Energy Corporation

Enclosure

cc: Paul A. Hemmersbaugh, Esq.

Exhibit I

CSX TRANSPORTATION
CSXT-CORE-120

Common Carrier Rate on Coal
 For Duke Energy

Supplement 6 (cancels supplement 5 and contains all changes)

Issued: April 1, 2003

Effective Date: March 1, 2002
Termination Date: February 29, 2004

1. Transportation Particulars:

(I) Rates per net ton to:

<u>Origin</u>	<u>State</u>	<u>Brice, NC</u>	<u>Riverbend, NC</u>	<u>Terrell, NC</u>	<u>Pelzer, SC</u>
Apex 2	KY	\$17.28	\$17.34	\$18.35	\$17.34
Arnold Fork	KY	\$17.50	\$17.77	\$18.78	\$17.77
Bates Branch	KY	\$17.50	\$17.77	\$18.78	\$17.77
Benedict	VA	\$16.64	\$16.70	\$17.72	\$16.70
Beth	WV	\$18.25	\$18.30	\$19.40	\$18.30
Blue Grass 4	KY	\$17.92	\$17.98	\$19.00	\$17.98
Brookside	KY	\$16.97	\$17.02	\$18.03	\$17.02
Buckeye 1	KY	\$17.92	\$17.98	\$19.00	\$17.98
Cheyenne 1	KY	\$17.50	\$17.77	\$18.78	\$17.77
Clover	KY	\$17.17	\$17.23	\$18.24	\$17.23
Collco	VA	\$16.70	\$16.75	\$17.77	\$16.75
Creech	KY	\$16.97	\$17.02	\$18.03	\$17.02
Damron Fork	KY	\$17.29	\$17.34	\$18.35	\$17.34
Democrat 1	KY	\$17.50	\$17.77	\$18.78	\$17.77
Fanco	WV	\$18.46	\$18.51	\$19.62	\$18.51
Fola	WV	\$18.78	\$18.83	\$19.95	\$18.83
Fork Creek	WV	\$18.25	\$18.30	\$19.40	\$18.30
Gatliff	KY	\$17.17	\$17.23	\$18.24	\$17.23
Goff	KY	\$17.29	\$17.34	\$18.35	\$17.34
Guaranty	KY	\$17.50	\$17.55	\$18.57	\$17.55
Hamilton 2	KY	\$17.17	\$17.23	\$18.24	\$17.23
Hampton 3	WV	\$18.51	\$18.57	\$19.68	\$18.57
Hilo	KY	\$16.97	\$17.02	\$18.03	\$17.02
Holbrook	WV	\$18.25	\$18.30	\$19.40	\$18.30
Homer III	WV	\$18.20	\$18.25	\$19.25	\$18.25
Hutchinson	WV	\$18.32	\$18.37	\$19.49	\$18.37
Ivel	KY	\$17.50	\$17.55	\$18.57	\$17.55
Jesse Branch	KY	\$17.29	\$17.34	\$18.35	\$17.34
Kohlsast	WV	\$18.51	\$18.57	\$19.68	\$18.57
Leatherwood 1	KY	\$17.92	\$17.98	\$19.00	\$17.98
Lick	WV	\$18.51	\$18.57	\$19.68	\$18.57
Lynch 3	KY	\$16.97	\$17.02	\$18.03	\$17.02
Marfork	WV	\$18.51	\$18.57	\$19.68	\$18.57
Mayflower	VA	\$16.64	\$16.70	\$17.72	\$16.70
McVicker	KY	\$17.29	\$17.34	\$18.35	\$17.34
Mousie	KY	\$17.50	\$17.55	\$18.57	\$17.55
Myra	KY	\$17.29	\$17.34	\$18.35	\$17.34
Neece Creek	VA	\$16.70	\$16.75	\$17.77	\$16.75
NRG	KY	\$16.97	\$17.02	\$18.03	\$17.02

1. Transportation Particulars continued:

Origin	State	(I) Rates per net ton to			
		Brice, NC	Riverbend, NC	Terrell, NC	Pelzer, SC
Patton	KY	\$17.29	\$17.34	\$18.35	\$17.34
Pittco	VA	\$16.70	\$16.75	\$17.77	\$16.75
Praise	KY	\$17.29	\$17.34	\$18.35	\$17.34
Prenter	WV	\$18.25	\$18.30	\$19.40	\$18.30
Raccoon	KY	\$17.29	\$17.34	\$18.35	\$17.34
Ramsey	KY	\$17.29	\$17.34	\$18.35	\$17.34
Rapid Loader	KY	\$17.50	\$17.77	\$18.78	\$17.77
Roxanna	KY	\$17.92	\$17.98	\$19.00	\$17.98
Sapphire	KY	\$17.92	\$17.98	\$19.00	\$17.98
Sarah	KY	\$16.97	\$17.02	\$18.03	\$17.02
Scotts Branch	KY	\$17.29	\$17.34	\$18.35	\$17.34
Slones Branch	KY	\$17.29	\$17.34	\$18.35	\$17.34
Sunny Knott	KY	\$17.50	\$17.55	\$18.57	\$17.55
Sylvester	WV	\$18.51	\$18.57	\$19.68	\$18.57
Toms Fork	WV	\$18.30	\$18.35	\$19.47	\$18.35
Typo	KY	\$17.92	\$17.98	\$19.00	\$17.98

Commodity: Steam Coal (STCC NO. 11-212-90)
 Synthetic Fuel: Rates herein do not apply to chemically altered coal, or synthetic fuel within the meaning of Internal Revenue Code Section 29
 Route: CSXT Direct
 Equipment: Railroad supplied gondolas and bottom drop hoppers
 Train Size: 55 car unit train (Minimum)
 Loading/Unloading: Refer to Items 10 and 11
 Demurrage: Subject to the provisions of CSXT 8200-series except as amended in CSXT-CORE-120, Item 11
 Fuel Surcharge: Subject to Fuel Surcharge as published in CSXT 8200-series
 Volume Incentive Year: As used herein, Year shall mean a 12 month period commencing on March 1

2. Incorporation of Tariffs, Rules, ETC:

This Price Sheet incorporates all tariffs (i.e. Common Carrier Rates, including CSXT 8200-series and other service terms), statutes and regulations that would apply if this Price Sheet did not exist, as of the date of shipment tender. The provisions of this Price Sheet control in case of any direct and express conflict.

3. Payment:

Payment of all rates and charges must be received by CSXT from industry within fifteen (15) days of the date of each bill. CSXT finance charges for late payment will apply (refer to CSXT-8200 series). CSXT may cancel these credit provisions at any time. Industry may not set off payment in any dispute with Carrier

4. Bill of Lading:

The provisions of the Uniform Straight Bill of Lading (Bill of Lading) are incorporated herein reference. Industry will add the following to each bill of Lading:

"Subject to CSXT-CORE-120"

5. Damage Claims:

Any claims for loss, damage or delay to Commodity shipments shall be governed by the 49 USC 11707 and 49 CFR 1005.

6. Reservation System – Trainload/Unit Train Service:

The reservation system for trainload/unit train service as detailed in the CSXT-8200 series publication will apply.

7. Car Supply:

Carrier car supply is not guaranteed but will be supplied subject to Carrier's availability and distribution considerations.

8. Volume Incentives:

Volume incentives for ratable, consistent shipment patterns will be paid on: (a) One Year basis (current Year) and (b) a rolling consecutive Three Year basis. Volume incentives will be paid on an annual basis in the form of a refund and are subject to the following terms and conditions:

a.) Volume Incentive Refund:

Discount on Net Freight Paid on Net Tons
Qualifying for Volume Refund

<u>Volume Incentive Band</u> <u>Annual Net Tons (MM)</u>	<u>One Year Refund</u>	<u>Three Year Refund</u>
2.0 – 2.49	0.50%	0.17%
2.5 – 2.99	0.75%	0.25%
3.0 – 3.49	1.00%	0.33%
3.5 – 3.99	2.75%	0.92%
4.0 – 4.49	4.05%	1.35%
4.5 – 4.99	5.25%	1.75%
5.0 – 5.49	6.10%	2.03%
5.5 – 5.99	6.10%	2.03%
6.0 – 6.49	6.10%	2.03%

Note: CSXT will pay refunds as a percentage of the net freight paid by Duke. (any freight paid minus any other applicable discounts, rebates, or refunds paid on Duke shipments).

*Prior to each January 15th, Duke shall elect a Volume Incentive Band for the Three Years moving forward. Duke will be eligible for a volume incentive refund for the One Year Refund at the end of each Year. Duke shall specify its election by submitting the Volume Incentive Declaration Form.

In addition Duke will be eligible for the rolling Three Year Refund at the end of Year Three, and then each Year thereafter.

For Year 2002 only, CSXT will waive the January 15 election requirement and will change the election date to March 15, 2002.

8. Volume Incentives (continued)

b) General Terms and Conditions:

- *Volume Bands elected for the rolling consecutive Three Year period shall be within 500,000 net tons (plus or minus) from one election Year to the next.
- *Duke may elect a Volume Band by January 15 for the next Year that is independent from prior election i.e. revised from prior rolling Three Year elections.
- *Duke will qualify for the Three Year volume refund only if Duke actually ships its elected volume band for each individual Year over a consecutive Three Year period and it did not change its election for any Year in the Three Year period.
- *Total net tons qualifying for the volume incentive refunds will include net tons shipped on CSXT-CORE-120 via CSXT to Brice, NC, Riverbend, NC, Terrell, NC and Pelzer, SC.
- *Shipments must be a minimum of 75 cars per unit train in order to be included in the Volume Incentive calculation.

c) Ratable Shipment Requirement – Volume Incentives:

The volume incentive refunds are offered with the requirement that shipments be "ratable" on a daily and monthly basis, i.e. a relatively smooth shipping pattern.

For the purposes of calculating volume to any of the four individual Duke plants served by CSXT, the following constraints and or adjustments will apply:

***Daily Volume Counter – Adjusted for Ratability**

If the sum of net tons loaded on any weekday (Sunday through Saturday) exceeds 16% of the total net tons for the month, the number of net tons loaded on the weekday in question shall be reduced to 16% of the monthly total. A new monthly total will be developed by summing the lessor of 16% or the net tons actually loaded for each day of the month.

***Monthly Volume Counter– Adjusted for Ratability**

The number of net tons eligible for the volume incentive on a monthly basis will be the lessor of the adjusted month's tonnage (per Daily Volume Counter-Adjustment) or 105% of the prior month. This calculation is intended to minimize volume fluctuations from month to month.

***Annual Volume Counter– Adjusted for Ratability**

The annual volume calculated for purposes of the volume incentive refund will be the sum of the Monthly Volumes as adjusted above.

9. Lading Incentives:

As an incentive for Duke to influence producers to load efficiently, CSXT will pay a refund of \$.02 per net ton for each full ton in excess of 90 net tons lading weight shipped per car, up to the applicable load limit for that car. The refund calculation only applies to the tonnage in excess of 90 net tons in each car. The refund will be paid on all net tons in the car. To ensure safe loading practices, the refund will not apply to any train if any car in the train is loaded in excess of 286,000 pounds gross weight on rail or greater than its load limit.

Example: 110 net tons in car

110	20 x \$.02=\$0.40
-90	\$0.40 Refunded on
20	all net tons in car

10. Loading/Unloading Incentives:

The following incentive refund will be available to Duke if the actual loading and unloading times of railroad owned equipment for movements under this Tariff meet the following parameters:

Load/Unload Incentives Per Net Ton

<u>Origin</u>	<u>Destination</u>	<u>Incentive Refund</u>
4 Hour	4 Hour	\$0.50
4 Hour	24 Hour	\$0.40
24 Hour	4 Hour	\$0.40
24 Hour	24 Hour	\$0.30

11. Demurrage – Origin & Destination:

Origin and Destinations will be rated as either a 24 hour or a 4 hour facility as stated in the Tariff-CSXT-8200. As stated in Item 10, above, CSXT will offer incentives for actual loading and unloading consistent within the allotted time. In addition, the applicable free time will be doubled such that a 4 hour facility will be changed to 8 hours and the free time for a 24 hour facility will be changed to 48 hours. If loading/unloading is in excess of the applicable free time, CSXT Tariff 8200 demurrage charges will be applied. While demurrage at origin will remain for the account of the shipper, Duke will receive as a benefit through this incentive the efficiencies created by the producer for loading within the 4 hour or 24 hour window, whichever is applicable.

12. Trainsize Incentive:

CSXT will provide Duke an incentive for trains ordered and actually loaded as 75 or 90 car trains. If a train is ordered as a 75 car train and loaded within the Free Time provided in this Publication as 75 or more cars, CSXT will refund \$1,875 per train. If a train is ordered as a 90 car train and is loaded within the Free Time provided in this publication as 90 cars or more, CSXT will refund \$3,600 per train.

13. Quarterly Rate Adjustments:

All rates are subject to quarterly increase or decrease with the Rail Cost Adjustment Factor-Unadjusted. Rates will not be adjusted below the base rates as detailed in CSXT-CORE-120

14. Alternative Route Rate Adjustment: (Effective March 14, 2002)

(R) Item cancelled effective June 27, 2002

15. Capital Improvement Recovery Charge: (Effective March 14, 2002)

(R) Item cancelled effective June 27, 2002

16. Submission of Refund Claim Form:

Within ten days of the end of each month, Duke may submit a refund claim using the attached Refund Claim Form detailing the information necessary by train reservation number to determine Duke's eligibility for refunds. CSXT recommends, but this common carrier quotation does not require, that Duke submit the information on a diskette. Duke may request reasonable extensions of time to submit the forms, should the ten day limit prove difficult to meet. All incentives/refunds/rebates as described in CSXT-CORE-120 will be paid within 20 days of the end of each Year or receipt of Duke's claim whichever is later.

17. Common Carriage Application:

The rates, terms, and conditions as published herein (CSXT-CORE-120) are established for the use and benefit of the Duke Power Company in the production of electricity from the coal transported and subsequently burned as pulverized coal purchased by Duke Power Company and may not be used by any other entity, transferred to any other entity or used in combination with any other movement, including without limitation subsequent transportation by rail or truck from any of the stated destinations.

In addition, CSXT-CORE-120 is only applicable to the origins as specifically listed in this publication. Intermediate applications of origins not listed in CSXT-CORE-120 will not apply.

The rates, terms and conditions herein may be modified from time to time by supplements

(I) Increase – Effective April 1, 2003

**CSX TRANSPORTATION
CSXT-CORE-128**

Common Carrier Rate on Synthetic Fuel
For Duke Power Company
Supplement 4 (cancels supplement 3 and contains all changes)
Issued: April 1, 2003

Effective Date: March 12, 2002
Termination Date: February 29, 2004

1. Transportation Particulars:

(I) Rates per net ton to:

<u>Origins</u>	<u>State</u>	<u>Brice, NC</u>	<u>Riverbend, NC</u>	<u>Terrell, NC</u>	<u>Pelzer, SC</u>
Arnold Fork	KY	\$18.30	\$18.57	\$19.57	\$18.57
Bates Branch	KY	\$18.30	\$18.57	\$19.57	\$18.57
Clover	KY	\$17.98	\$18.03	\$19.05	\$18.03
Marfork	WV	\$19.30	\$19.35	\$20.48	\$19.35
Mayflower	VA	\$17.45	\$17.50	\$18.51	\$17.50
Myra	KY	\$18.08	\$18.14	\$19.04	\$18.14

Commodity:	Synthetic Fuel Derived from Coal (STCC No. 29-911-91) hereinafter referred to as Synthetic Fuel. Synthetic Fuel Definition: Commodity shall mean non-hazardous, non-liquid, non-gaseous fuel produced by altering the chemical composition of coal feedstock through a qualified producing facility as defined in Section 29 (c) (1) (c) of the Internal Revenue Service Code.
Route:	CSXT Direct
Equipment:	Railroad supplied gondolas and bottom drop hoppers.
Train Size:	55 car unit train (Minimum).
Lading, Loading/Unloading, Trainsize Incentives:	Subject to items 9, 10 and 12 of CSXT-CORE-120
Demurrage and Other Terms and Conditions:	Subject to the provisions of CSXT 8200-series except as amended in CSXT-CORE-120, Item 11.
Fuel Surcharge:	Subject to Fuel Surcharge as published in CSX 8200-series.
Finance Charge:	Subject to Finance Charge in CSXT 8200-series.
Volume Incentive:	The tonnage of Synthetic Fuel shipped under this rate authority shall be counted for purposes of determining Duke Power's entitlement to Volume Incentives as provided in Core-120, Item 8.

Application of CSXT-CORE-120:

Except for the freight rates as defined herein for Synthetic Fuel, all other terms and conditions of CSXT-CORE-120 will apply to CSXT-CORE-128.

Common Carriage Application:

The rates, terms and conditions as published herein (CSXT-CORE-128) are established for the use and benefit of the Duke Power Company in the production of electricity from the Synthetic Fuel transported and subsequently burned in a pulverized form purchased by Duke Power Company and may not be used by any other entity, transferred to any other entity or used in combination with any other movement, including without limitation subsequent transportation by rail or truck from any of the stated destinations.

In addition, CSXT-CORE-128 is only applicable to the origins as specifically listed in this publication. Intermediate applications of origins not listed in CSXT-CORE-128 will not apply.

The terms and conditions herein may be modified from time to time by supplements.

(I) Increase – Effective April 1, 2003