

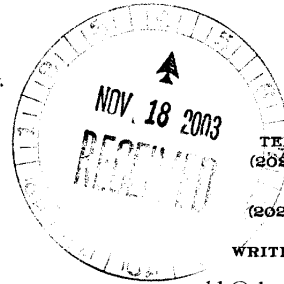
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November 18, 2003

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

NOV 19 2003

Part of
Public Record

Re: Docket No. 42069, Duke Energy Corporation
v. Norfolk Southern Railway Company

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding please find an original and fifteen (15) copies of: (1) Complainant Duke Energy Corporation's ("Duke") Petition to Correct Technical Error; and (2) Complainant's Petition to Stay Order Pending Correction of Decision for Technical Error, as to which Duke respectfully requests **EXPEDITED HANDLING**.

We have enclosed an additional hard-copy of each of these documents to be date-stamped and returned to the bearer of this letter. Thank you for your attention to this matter.

Sincerely,

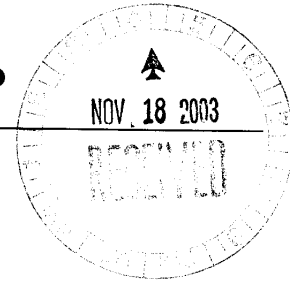
Andrew B. Kolesar III

Enclosures

cc: Counsel for Defendant
Mr. David M. Konschnik

209440

BEFORE THE
SURFACE TRANSPORTATION BOARD



DUKE ENERGY CORPORATION,

Complainant,

v.

NORFOLK SOUTHERN RAILWAY
COMPANY,

Defendant.

Docket No. 42069

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PETITION TO CORRECT
TECHNICAL ERROR

Part of
Public Record

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Dated: November 18, 2003

Attorneys for Complainant

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DUKE ENERGY CORPORATION,	)	
	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. 42069
	)	
NORFOLK SOUTHERN RAILWAY	)	
COMPANY,	)	
	)	
Defendant.	)	
	)	

**PETITION TO CORRECT
TECHNICAL ERROR**

Comes now Duke Energy Corporation ("Duke"), the Complainant in this proceeding, and pursuant to 49 C.F.R. § 1117.1 of the Board's Rules of Practice, submits this Petition To Correct Technical Error and in support thereof shows:

I

BACKGROUND

On November 6, 2003, the Board served its Decision in its proceeding. Thereafter, on November 7, 2003, the Board provided a copy of its workpapers which underlie the numerous calculations and computations appearing in the Decision.

Duke has performed a careful review and analysis of the Decision's computations and calculations and the documentation underlying them in the workpapers

and has determined that the Board's Decision is flawed as a consequence of technical error.

II

THE BOARD IS EMPOWERED TO CORRECT TECHNICAL ERROR

The authority of the Board to correct its technical errors and mistakes is well established. See American Trucking Ass'ns v. Frisco Transp. Co., 358 U.S. 133, 145 (1958). In various past proceedings under the Coal Rate Guidelines, the Board has been quick to address and remedy technical errors in its decisions where a party brings the existence of a technical error or errors in decisions to the Board's attention. See Docket No. 41185, Arizona Pub. Serv. Co. v. The Atchison, Topeka and Santa Fe Ry., Decision served April 17, 1998 ("APS"); Docket No. 41191, West Texas Utilities Co. v. The Burlington N. and Santa Fe Ry., Decision served May 29, 2003 ("WTU").

In APS, the Board explained that the technical error which it would correct upon notification by a party could either be "computational errors" or an error arising from the "inadvertent misapplication of our stated procedures." Id. at 14. In APS, the Board remedied errors in each of these categories, whereas in WTU the alleged error involved only the misapplication of a procedure.

III
COMPUTATIONAL ERRORS IN
THE BOARD'S DECISION

The Board's Decision contains an astonishing number of technical errors in the computational category which, in the aggregate, result in mistakes of a magnitude heretofore unprecedented in the Board's many decisions under the Guidelines. Also unprecedented is the circumstance that the errors are overwhelmingly prejudicial to the positions of only one party. Herewith is a catalog of specific computational errors found in the Board's Decision and their precise quantification:

1. Costs for Bridge Abutments (\$284.4 million error).

The Decision doubled the unit costs for abutments for all three bridge types on the SARR, effectively doubling the number of bridge abutments and overstating road property investment by \$284.4 million.

Specifically, the "STB Revised Construction Total 50-50_Reroute.xls" spreadsheet doubles the unit costs for bridge abutments, presumably to reflect the fact that each bridge has two abutments. However, the number of bridge abutments already reflects the needed doubling, and the Board's calculations result in four (4) abutments per bridge, which is a mistake. The specific cell references are below:

(1) Bridge Type	(2) Bridge Quantities Cells	(3) Abutment Quantities Cells (already doubled) ¹	(4) Abutment Unit Costs Cells (Where Second Doubling Occurs)
Tab "Type I"	I15, K15, M15	I26, K26, M26	J26, L26, N26
Tab "Type II"	I19, K19	I30, K30	J30, L30
Tab "Type III"	I19, K19	I30, K30	J30, L30

2. Retaining Walls Quantity (\$90.8 million error).

The Decision replicated an NS data entry error in retaining wall quantities, causing a \$90.8 million overstatement in road property investment.

Duke Rebuttal Narrative at p. III-F-71 n.53 explained that the ICC Engineering Report for valuation section SOU-33-NC has an input quantity of 14.2 for "piling sheet driven for protection" (Duke's Op. Workpapers Vol. 7, p. 03431), but NS input a value 14.2 million (NS Reply electronic workpaper "III-F 2 Grading.xls," tab "IIIF Other ICC," cell L31). The Board ignored Duke's evidence. The explanation in

¹The cells in column (3) use the term "bridges," and not "abutments," but the cells appear under the "abutments" heading and plainly refer to abutments and not bridges. Indeed, the cells in column (3) double the number of bridges calculated in the cells in column (2) and the doubled quantities are later multiplied by the abutment unit costs in column (4). The cells in column (3) should thus say "abutments" and not "bridges."

Also, the path of the Board's calculation from the unit costs to its ultimate bridge construction cost total (tab "Unit Cost and Quantity," cells O11-O13) is not altogether clear. The Board does appear to have elsewhere removed the sixty (60) highway bridges as indicated in the Decision at page 109. Removing those sixty bridges from the "Bridge Inventory" tab of "STB Revised Construction Total 50-50_Reroute.xls" causes the calculations for the Type I, II, and III tabs to equal the Board's hardcoded costs in the "Unit Cost and Quantity" tab. The Board's ultimate bridge construction cost total thus includes the doubled unit costs addressed above.

Board spreadsheet “Revised Grading 50-50-Reroute.xls,” tab “III-F Summary,” cell E10 states that the Board relied on NS’s retaining wall quantities and that the Board then (a) removed NS’s 50% quantity additive for the wider roadbed being utilized, and (b) multiplied the resulting value by 0.98915 to exclude the reroutes. By starting with NS’s underlying retaining wall quantities, which included the noted quantity input error, the Board erroneously overstated the ultimate retaining wall costs.

3. Overstatement of Tunnel Investment (\$58.9 million error).

The Decision included tunnel investment for fifteen (15) tunnels that the Board found should be daylighted. However, the daylighting process involves building an open cut rather than a tunnel and subsumes any need for tunnel investment. The inclusion of the tunnel investment for daylighted tunnels results in a double count overstating road property investment by \$58.9 million.

The “STB Revised Construction Total 50-50_Reroute.xls” spreadsheet designates the daylighted tunnels with the number “1” under column L of the “Tunnel Inv” tab. Accordingly, the following cells should have zero dollars in the cost calculation column: N5, N14, N21, N26, N27, N29, N32, N33, N34, N43, N46, N48, N52, N53, and N63.²

4. Incorrect Quantity for Tunnel Daylighting (\$21.6 million error).

The Decision at page 93 purports to accept Duke’s quantities for tunnel daylighting. However, the “STB Revised Grading 50-50-Reroute.xls” spreadsheet, tab

²The Board’s total linear feet calculation (cell F55) already excludes the daylighted tunnels, so no additional correction is needed for that quantity calculation.

“IIF_17 EW Cost,” cell E73 uses the NS quantities shown in the “STB Revised Construction 50-50_Reroute.xls” spreadsheet, tab “Daylighted Tunnel,” cell F141. Using Duke’s quantities reduces road property investment by \$21.6 million.

5. Mobilization Calculation Mistakes (\$1.04 million error).

The Decision’s mobilization additive has several errors. First, the “STB Restated Mobilization Percentages.xls” spreadsheet, tab “bridges,” cell J28, reflects 574 bridges, but the “STB Revised Undertrack Bridges.xls” spreadsheet, tab “Inventory [sic] Summary,” cell F2, shows STB Total Bridge Count of 501 bridges.

Second, in the “grading” tab of the “STB Restated Mobilization Percentages.xls” spreadsheet, cells H92-H110 do not reflect the final earthwork quantities that appear in the “STB Revised Grading 50-50-Reroutes.xls” spreadsheet, tab “IIF_17 EW Cost.” The needed corrections are as follows:

Cells in “STB Restated Mobilization.xls,” tab “Grading” that require source for correct quantities	Source Cells in “STB Revised Grading 50-50-Reroutes.xls,” tab “IIF_17 EW Cost” for correct quantities
H93	K82+K83
H96	L82+L83
H98	L82+L83
H100	M82+M83
H102	M82+M83
H104	N82+N83
H108	$(K82+K82+L82+L83+M82+M83+N82+N83) * 0.7$
H110	$(K82+K82+L82+L83+M82+M83) * 0.3$

Third, rows 106 and 112-123 of the same “grading” tab reflect mobilization costs for (a) spreading embankment, (b) excavation and compaction for culverts, (c) undercutting, and (d) fine grading. The Decision rejected the costs for these activities at pages 94, 97, 95 and 95, respectively, and the mobilization costs should be zero.

These errors collectively overstate road property investment by \$1.04 million.

6. Maintenance of Way Annual Expense Mistakes (\$1.8 million error).

The Decision at page 83 purported to accept NS’s maintenance of way costs over Duke’s in most instances. However, the “STB Restated MOW1-Reroute.xls” spreadsheet utilizes Duke’s, and not NS’s, cost for bridge contract work cost (cell E13), and NS’s, and not Duke’s, building maintenance cost (cell E19),³ and it also does not include NS’s cost for storm water prevention (cell E23). Correcting these three errors increases first-year operating expenses by \$1.8 million.

7. Inadvertent Misapplication of Mileage Prorate (\$1.2 million error).

The Board’s “Revenues and Tons Straight Mile Blocks Without 88 Reroutes.xls” spreadsheet misapplied the Board’s new “Modified Straight-Mileage Prorate” (“MSP”) revenue division methodology by assuming that NS is the termination carrier on each movement and thus entitled to credit for an additional 100 miles. Specifically, the formula used in each row of Column AQ of tab “Contract and water”

³The Decision at page 83 n.91 found that Duke’s building maintenance cost should be used because NS accepted that cost in its Reply Narrative. The Decision’s use of NS’s figure for this item is thus in error.

adds 200 miles to each movement to account for the miles assigned to the origin and termination of each movement. However, on twenty-six (26) of the movements included in the ACC's traffic base, the NS serves as the interline and not the destination carrier, and is thus not entitled to the extra 100 miles for terminating the movement.⁴ Eliminating the additional mileage block increases the ACC's first-year revenues by \$1.2 million.

IV

ERROR INVOLVING MISAPPLICATION OF A STATED PROCEDURE

As was the situation with the APS and the WTU decisions, the Board's Decision here is also flawed by a technical error consisting of its inadvertent misapplication of a stated procedure. In its Decision in TMPA,⁵ the Board enunciated its view of the correct procedure for indexing the operating costs of SARRs. Therein it stated that the operating costs of SARRs which handle "only unit coal trains" (id. at 161) would be indexed by the Board's RCAFU.

In its Decision in this proceeding, the Board similarly indexed the SARR's operating costs by the RCAFU (p.37), relying upon its TMPA procedure (id. at 161). However, while it is true that Duke's evidence supported an efficient unit train-only SARR like the SARR in TMPA, the Board rejected Duke's operating plan and adopted, in its entirety, the operating plan of NS, which plan replicated NS's existing operations in

⁴Columns AK and AL of the tab "Contract and water" identify the origination and termination blocks for each movement.

⁵Docket No. 42056, Texas Municipal Power Agency v. The Burlington N. and Santa Fe Ry., Decision served March 24, 2003 ("TMPA").

which cars from different mines are gathered for movements in conventional railroad service. Whatever the merits (or lack thereof) of indexing SARR operating costs by the RCAFU, this procedure is misapplied to the conventional train operations adopted by the Board in the Decision. In applying the TMPA-unit train procedure to the conventional railroad operations of the SARR in this proceeding, the Board inadvertently misapplied its stated procedure.

V

CONCLUSION

As Duke's petition demonstrates, there are numerous technical errors in the Board's Decision. When the Board corrects its mistakes and errors, the Decision will require changes of substance. In particular, the Board will need to make major revisions to its claim that the SARR will experience a revenue shortfall of \$550 million (p. 38) and to its Table 2 Cash Flow (p. 39) which depicts SARR profitability over a 20-year span. This Table now shows the SARR to be unprofitable in every year of its 20-year existence. These claims and findings will be without evidentiary support once the Decision is corrected for technical error and the findings and conclusions are conformed to the corrected evidence. Moreover, in a corrected Decision, other issues implicated under the Guidelines including phasing (p. 39), variable costs (p. 10) and gaming (p. 63), will require treatment and/or different treatment to conform to the corrected Decision.

WHEREFORE, Duke prays that the Decision, served herein on November 6, 2003, be corrected for the technical errors, identified by Duke, and a revised Decision be reported which is in conformance with the correct evidence and procedure.

Respectfully submitted,

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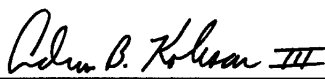
Dated: November 18, 2003

Attorneys for Complainant

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2003, a copy of the foregoing
Petition To Correct Technical Error of Complainant Duke Energy Corporation, was
served by hand upon the following counsel for Defendant Norfolk Southern Railway
Company:

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