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February 14, 2005

VIA HAND DELIVERY

The Honorable Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Room 711
Washington, DC 20423

ENTERED
Office of Proceedings
FEB 14 2005
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Public Record



Re: *Duke Energy Corp. v. CSX Transportation, Inc.*, Docket No. 42069; > 213272
Duke Energy Corp. v. Norfolk Southern Ry., Docket No. 42070; and > 213273
Carolina Power & Light Co. v. Norfolk Southern Ry., Docket No. 42072 > 213274

Dear Secretary Williams:

Enclosed for filing please find an original and 10 copies of the Appeal of Denial of Request for Waybill Information.

An additional copy of the Appeal also is enclosed. Kindly indicate receipt and filing by time-stamping this copy and returning it to the bearer of this letter.

Thank you for your attention to this matter.

Sincerely,

C. Michael Loftus
An Attorney for
Duke Energy Corporation and
Carolina Power & Light Company

cc: Mr. David Konschnik
Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DUKE ENERGY CORPORATION,

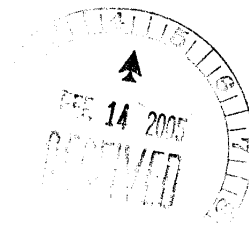
Plaintiff

v.

CSX TRANSPORTATION INC.,

Defendant.

213272
Docket No. 42069



DUKE ENERGY CORPORATION,

Plaintiff

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

Defendant.

213273
Docket No. 42070

ENTERED
Office of Proceedings

FEB 14 2005

Part of
Public Record

CAROLINA POWER & LIGHT COMPANY,

Plaintiff

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

Defendant.

213274
Docket No. 42072

APPEAL OF DENIAL OF REQUEST FOR WAYBILL INFORMATION

INTRODUCTION

Slover & Loftus, acting as counsel for Duke Energy Corporation ("Duke")
and Carolina Power & Light Company ("CP&L"), pursuant to 49 C.F.R. § 1011.6(b)

hereby appeal to the Surface Transportation Board (“STB” or “Board”) from the February 4, 2005 denial by Mr. Michael A. Redisch, (Acting) Director of the Office of Economics, Environmental Analysis and Administration (herein referred to as “OEEAA”) of its request for access to the 2001, 2002 and 2003 Costed Waybill Sample files for Norfolk Southern Railway Company (“NS”) and CSXT Transportation, Inc. (“CSXT”) (NS and CSXT are jointly referred to as “Railroads”). In disapproving this request, the OEEAA stated: “The Surface Transportation Board’s long standing policy is that the unmasked revenues and the specific masking factors you request are highly confidential, for internal Board use only, and not to be released to waybill users.”

As discussed below, Slover & Loftus’ costed waybill request should have been granted, and denial of the request constitutes a clear error of judgment, for several reasons. First, the evidence Duke and CP&L seek to present utilizing the requested information is highly relevant to the Board’s consideration of the phasing constraint. Second, information of the same type as the requested actual revenue has been produced in discovery routinely in maximum rate case proceedings. Its production through the Costed Waybill Sample would cause no harm to the involved Railroads because they would be adequately protected through a protective order. Finally, requiring Duke and CP&L to pursue this information through the discovery process imposes unnecessary burden and needlessly increases the costs to shippers of seeking relief under the Board’s

phasing constraint and is inconsistent with the Board's stated desire to simplify maximum rate proceedings and streamline discovery.

Concurrent with the filing of this appeal, Duke and CP&L have filed a separate request for the Costed Waybill Sample that does not seek access to the unmasked revenues and the specific masking factors sought by the January 25 request. Rather than pursue that data through this new request, Duke and CP&L intend to pursue the confidential revenue data and masking factors through pending discovery requests served on the defendant Railroads. Duke and CP&L have been advised by counsel for Railroads that they object to the production of such information. As a result, it may be necessary to pursue a Motion to Compel in the rate proceedings. If Duke and CP&L are successful in obtaining the confidential revenue data and masking factors from the Railroads it would obviate the need to address this appeal. Accordingly, Duke and CP&L hereby request that the Board hold the instant appeal in abeyance pending the Railroads' responses to Duke and CP&L's discovery requests and the Board's consideration of any related Motion to Compel.

ARGUMENT

I. THE REQUESTED INFORMATION IS HIGHLY RELEVANT TO PHASING AND ITS DISCLOSURE CAN BE ADEQUATELY PROTECTED

The January 25 request for the Costed Waybill Sample, together with the unmasked revenues and masking factors, was made in order to enable the preparation of

evidence in connection with the Board's consideration of the phasing constraint in the Duke and CP&L rate proceedings. The Costed Waybill Sample contains data that is necessary to conduct certain analyses relevant to the Board's consideration of "the revenue needs of the defendant railroad[s]," "an appropriate means for applying the phasing constraint," and the Railroads' "base of potentially captive shippers to cover its revenue shortfall." See, Docket No. 42069, *Duke Energy Corp. v. Norfolk Southern Ry.* (STB served Nov. 6, 2003), at 40; Docket No. 42070, *Duke Energy Corp. v. CSX Transp., Inc.* (STB served Feb. 4, 2004) at 33.

Consistent with the requirements of Part 1244.9(e), Duke and CP&L have provided a detailed explanation of the purpose for which, and justification as to why, the requested data is needed. Specifically, Duke & CP&L explained their intent to present evidence to the Board addressing, *inter alia*, the Defendants' pricing practices with respect to the issue traffic relative to their pricing practices with respect to other, similarly demand-inelastic traffic on their systems. Cf. Docket No. 42069, *Duke Energy Corp. v. Norfolk Southern Ry.* (STB served Nov. 6, 2003), at 39 ("[a]t times, a rate that may not have been proven unreasonable under a SAC test may be an increase that causes significant economic dislocation or have other inequitable consequences that may need to be mitigated for the greater public good") and, at 40 (the phasing constraint "should provide some restraint to a railroad's pricing even if the railroad falls far short of the Board's measure of revenue adequacy or has only a small base of potentially captive

shippers to cover its revenue shortfall”). Duke and CP&L explained that such evidence may include evidence of the nature the Board has developed in the context of Ex Parte No. 347 (Sub-No. 2), *Rate Guidelines – Non-Coal Proceedings* (e.g., the Revenue Shortfall Allocation Method or “RSAM” (both adjusted and unadjusted) and $R/VC > 180\%$, though not for the same universe of traffic included in such measures as calculated by the Board). The Costed Waybill Sample data requested would provide an efficient and economical means for Duke and CP&L to obtain the necessary information for such analyses, with respect to each Railroad.

Counsel for the defendant Railroads informed the OEEAA that it opposed the release of the requested waybill information, and unmasked revenues and masking factors, based on its view that:

The data sought by Complainants’ counsel . . . is highly confidential and contains highly sensitive and proprietary rate and price information. To the best of our knowledge, the Board has *never* ordered release to the shippers of the Costed Waybill Sample and the revenue masking factors sought by [Counsel].

Letter dated February 1, 2005 from Terence M. Hynes to Dr. William F. Huneke (emphasis in original), *citing* STB Finance Docket No. 33388, *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company – Control and Operating Leases/Agreements – Conrail Inc. and Consolidated Rail Corporation*, Decision No. 42 (served Oct. 3, 1997) at pp. 5-8 (“*Conrail*”). The Railroads’ counsel further noted that Duke and CP&L had requested access to the same

information through discovery requests in STB Docket Nos. 42069, 42070 and 42072 and that the information requested was “wholly irrelevant.” The Railroads thus stated that they “strenuously object to producing the requested waybill information.”

Significantly, OEEAA rejected the request based solely on the policy that the unmasked revenues and the specific masking factors requested were “highly confidential, for internal Board use only, and not to be released to waybill users.” While recognizing that this has been the Board’s general policy, it should not be a basis for the uniform rejection of all requests for the unmasked revenues and masking factors. Indeed, in responding to a Western Coal Traffic League request that such data be made available to parties in rate and rulemaking cases, the Board noted that it “is best to address the issue of access to contract information on a case-by-case basis.” Ex Parte No. 385 (Sub-No. 4), *Modification of the Carload Waybill Sample and Public Use File Regulations* (STB served June 16, 2000) at 4.

This is the first time the Board has dealt with a phasing proceeding. Accordingly, the Board has never before addressed a request for the Costed Waybill Sample, including a request for unmasked revenues and masking factors, in such a proceeding. As Duke and CP&L explained in their January 27, 2005 supplemental letter, given the nature of phasing proceedings, these cases are particularly appropriate for allowing access to the requested Costed Waybill Sample.

Further, any concerns about the confidentiality of the subject revenue data must be considered in the context of the proceedings at issue. The type of information that would be disclosed through the unmasked revenues and masking factors is routinely provided in rail rate proceedings. For example, certain confidential rate information has already been produced in earlier phases of this proceeding, including both the highly confidential traffic tapes (which contain detailed shipper specific revenue information) and the underlying transportation contracts for certain coal shippers. There is no reason why the same type of protective orders that protect these types of highly confidential revenue and contract information would not protect the information requested here.

In light of the foregoing, the release of the requested confidential revenue information would not reveal information that “has never been made available” or that the Board has “never intended to be made available” as described in the context of a rail merger proceeding that was very different from the instant rate cases. *C.f., Conrail*. Rather, in the context of rate proceedings, the type of revenue and contract information that would be revealed by the unmasked revenues contained in the pertinent Costed Waybill Sample files is the type of information that is regularly made available in rate proceedings subject to protective order conditions. There is no basis to suggest that the same protections would be inadequate for purposes of the consideration of this same type of data in the phasing stage of the rate cases in Docket Nos. 42069, 42070 and 42072.

**II. THE COSTED WAYBILL SAMPLE IS AN EFFICIENT
MEANS TO OBTAIN THE REQUESTED DATA**

Pursuant to 49 C.F.R. § 1244.9(b)(4), the Costed Waybill Sample is available to transportation practitioners, consultants and attorneys for use in preparing the types of evidence in STB proceedings that Duke and CP&L described in their January 25 request. Part 1244.9(b)(4)(i) specifically notes that to obtain the Costed Waybill Sample for this purpose, however, the requestor must show the Costed Waybill Sample “is the only single source of the data *or obtaining the data from other sources is burdensome or costly*, and the data is relevant to issues pending before the Board.” (Emphasis added). As noted above, Duke and CP&L have demonstrated that the requested information is relevant to its intended use in the rate proceedings.

Duke and CP&L do not maintain at this time that the Costed Waybill Sample is the “only single source” through which it can obtain the requested information.¹ Indeed, as the Board noted in *Conrail*: “Production by CSX and NS of their revenue masking factors should not be particularly difficult.” *Conrail* at 7 n.25. However, requiring Duke and CP&L to obtain this information from the Railroads will increase the burden and cost associated with the use of that information for purposes of the phasing proceedings for two reasons.

¹ However, the Board’s costing of the Costed Waybill Sample is available only through the Board.

First, as the Railroads have made clear in their February 1, 2005 letter to Mr. Gardner, they will not produce this information voluntarily. As a result, Duke and CP&L will incur additional costs associated with moving to compel this otherwise readily available information. Duke and CP&L will also be burdened by the introduction of unnecessary delay before obtaining access to this information. Second, requiring Duke and CP&L to obtain the information from the Railroads will result in additional burden and cost to the shippers in other respects. The instant Phasing proceedings are on an extremely tight procedural schedule. Denying the Costed Waybill request will, at a minimum, delay Duke and CP&L's access to information that is very important to the preparation of its Opening Evidence. In addition, even if the information requested is obtained from the Railroads, either voluntarily or by order of the Board, it will not be in the same format as the information requested from the Board. Instead of receiving a completely analyzed set of data, Duke and CP&L would need to engage in substantial analytical work to produce the data in the form it is possessed by the Board in order to remove the masking. Requiring Duke and CP&L to undertake this effort is more burdensome (particularly given the time constraints of these proceedings) and costly than if the Board were to provide the unmasked revenues through the Costed Waybill request.

For the foregoing reasons, OEEAA's denial of the Costed Waybill request should be overturned and the information requested should be provided by the Board to

Slover & Loftus and L.E. Peabody & Associates, Inc. for the limited purposes of use in Docket Nos. 42069, 42070 and 42072. Such production is fully consistent with the Board's recent expressions of concern about the costs relating to rail rate case proceedings and the need to streamline discovery in these cases. Access to the Costed Waybill Sample for the purposes described above will enable shippers to prepare and present critical evidence on the phasing constraint in a more efficient and lower cost manner.

There has been much attention to the costs of maximum rate litigation during the Chairman's tenure. As Chairman Nober has noted to Congress:

Preparing that evidence and presenting it to the Board are very expensive – parties have testified that a SAC case can cost as much as \$3 million to prosecute, \$5 million to defend, and generate more than 700,000 pages of material.

Testimony of Roger Nober, Chairman of the Surface Transportation Board, House Committee Transportation and Infrastructure Subcommittee on Railroads, Hearing on the status of Western Railroad Economic Regulation, at 6, March 31, 2004. In the same testimony, Chairman Nober noted the Board's actions in attempting to reduce the costs associated with these cases, including procedures designed to streamline discovery and encourage the resolution of discovery disputes through staff conferences.

The Board is now faced with a new offshoot of the maximum rate litigation process – the first ever proceedings under the phasing constraint. The information that

Duke and CP&L seek through the Costed Waybill Sample represents information that could be obtained, and used, far more efficiently and economically from the Board, than from the Railroads.

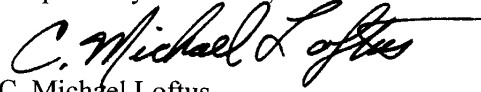
The Board should not endorse processes that unnecessarily increase the cost for captive rail shippers to seek relief from massive rate increases in a phasing proceeding. Allowing access to the confidential unmasked revenue fields and revenue masking factors, subject to appropriate confidentiality constraints, is one way the Board could fulfill its stated goal of reducing the cost of these cases, while causing no hardship to the Railroads.

CONCLUSION

For all of the foregoing reasons, the February 4, 2005 decision of the Acting Director should be overturned, and the Board should provide access to all fields of the 2001, 2002 and 2003 Costed Waybill Sample for NS and CSX, including the unmasked revenues for each revenue field and the revenue masking factors for each railroad for each unique commodity group. Data pertaining to CSX shall only be used for purposes of

Docket No. 42069 and data pertaining to NS shall only be used for purposes of Docket
Nos. 42070 and 42072.

Respectfully submitted,



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ATTORNEYS FOR DUKE ENERGY
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POWER & LIGHT COMPANY

Dated: February 14, 2005

CERTIFICATE OF SERVICE

I hereby certify, that I have this 14th day of February, 2005 caused to be served copies of the foregoing Appeal of Denial of Request for Waybill Information by hand delivery on counsel for defendant Norfolk Southern Railway Company and CSX Transportation, Inc. as follows:

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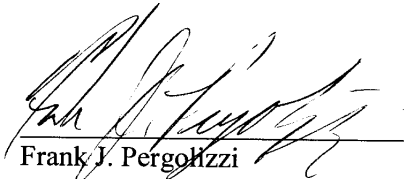
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