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February 22, 2005

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By Hand Delivery

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

FEB 22 2005
RECEIVED

Re: Duke Energy Corporation v. CSX Transportation, Inc., Docket No. 42070 .. 213389
Duke Energy Corporation v. Norfolk Southern Railway, Docket No. 42069- 213390
Carolina Power & Light Company v. Norfolk Southern Railway, Docket No. 42072 -213391

Dear Secretary Williams:

Enclosed for filing on behalf of CSX Transportation, Inc. ("CSXT") and Norfolk Southern Railway Company ("NSR") in the above-referenced proceeding are a signed original and ten (10) copies of Defendants' Reply in Opposition to Complainants' Appeal of Denial of Request for Waybill Information. Additionally, this filing includes a floppy disk containing an electronic version of the Reply.

Please acknowledge receipt of this submission for filing by date-stamping the enclosed duplicate paper copy and returning it to our messenger.

If you have any questions concerning this filing, please contact one of the undersigned. Thank you for your attention to this matter.

Sincerely,


G. Paul Moates
Terence M. Hynes
Paul A. Hemmersbaugh

Enclosures

cc: Counsel for Complainants (w/encls.)

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DUKE ENERGY CORPORATION,	)	
	)	
<i>Complainant,</i>	)	
v.	)	
	)	
CSX TRANSPORTATION, INC.,	)	
	)	
<i>Defendant.</i>	)	
DUKE ENERGY CORPORATION,	)	
	)	
<i>Complainant,</i>	)	
v.	)	
	)	
NORFOLK SOUTHERN RAILWAY COMPANY,	)	
	)	
<i>Defendant.</i>	)	
CAROLINA POWER & LIGHT COMPANY	)	
	)	
<i>Complainant,</i>	)	
v.	)	
	)	
NORFOLK SOUTHERN RAILWAY COMPANY	)	
	)	
<i>Defendant.</i>	)	

STB Docket No. 42070

STB Docket No. 42069

STB Docket No. 42072

**DEFENDANTS' REPLY IN OPPOSITION TO COMPLAINANTS'
APPEAL OF DENIAL OF REQUEST FOR WAYBILL INFORMATION**

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Counsel for Defendants CSX Transportation, Inc. and Norfolk Southern Railway Company

DATED: February 22, 2005

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

<u>DUKE ENERGY CORPORATION,</u>	)	
	)	
<i>Complainant,</i>	)	
v.	)	STB Docket No. 42070
	)	
CSX TRANSPORTATION, INC.,	)	
	)	
<i>Defendant.</i>	)	
<u>DUKE ENERGY CORPORATION,</u>	)	
	)	
<i>Complainant,</i>	)	
v.	)	STB Docket No. 42069
	)	
NORFOLK SOUTHERN RAILWAY COMPANY,	)	
	)	
<i>Defendant.</i>	)	
<u>CAROLINA POWER & LIGHT COMPANY</u>	)	
	)	
<i>Complainant,</i>	)	
v.	)	STB Docket No. 42072
	)	
NORFOLK SOUTHERN RAILWAY COMPANY	)	
	)	
<i>Defendant.</i>	)	

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**DEFENDANTS' REPLY IN OPPOSITION TO COMPLAINANTS'
APPEAL OF DENIAL OF REQUEST FOR WAYBILL INFORMATION**

CSX Transportation, Inc. ("CSXT"), Defendant in Docket No. 42070, and Norfolk Southern Railway Company ("NSR"), Defendant in Docket Nos. 42069 and 42072, jointly submit this Reply in opposition to the Appeal filed in the above-captioned proceedings by Complainants Duke Energy Corporation ("Duke") and Carolina Power & Light Company ("CP&L") on February 14, 2005 ("Complainants' Appeal"). Complainants' Appeal asks the Board to overturn a decision issued on February 4, 2005 by the Acting Director of the Board's Office of Economics that declined to grant Complainants' request for access to the 2001, 2002 and 2003 STB Costed Waybill Sample files (including unmasked revenue fields) for CSXT and

NSR (the "*Director's Decision*"). For the reasons set forth hereinafter, Complainants' Appeal should be denied.

The Board's regulations at 49 CFR § 1011.6(b) state that "[a]ppeals are not favored and will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice." *Id.* The requirements of this regulation are "stringent." Finance Docket No. 33388, *CSX Corp. and CSX Transportation, Inc., Norfolk Southern Corp. and Norfolk Southern Railway Co.—Control and Operating Leases/Agreements—Conrail Inc. and Consolidated Rail Corp.* ("Conrail Control") (decision served May 8, 1998). Complainants have not demonstrated any error in the *Director's Decision*, nor have they articulated any exceptional circumstance that would warrant the extraordinary relief that they request.

I. THE *DIRECTOR'S DECISION* IS CONSISTENT WITH WELL-ESTABLISHED BOARD PRECEDENT.

Complainants assert that denial of their request for access to the Costed Waybill Sample constituted a "clear error of judgment." Complainants' Appeal at 2. Complainants are wrong. The *Director's Decision* confirms what has always been the case – that no one (other than the Board and its staff) is entitled to access to the Costed Waybill Sample or to the revenue masking factors used in compiling the Carload Waybill Sample. The Board's regulations at 49 C.F.R. § 1244.9 provide a procedure for obtaining the Carload Waybill Sample, but not the Costed Waybill Sample (which is prepared for the Board's internal purposes only). The Board has never authorized the release of the Costed Waybill Sample, or the revenue masking factors, to a shipper. See Letter dated February 1, 2005 from Terence M. Hynes to Dr. William F. Huneke at 1. As the *Director's Decision* correctly stated, the Board's "long standing policy is that the unmasked revenues and the specific masking factors . . . are highly confidential, for internal Board use only, and not to be released to waybill users." *Director's Decision* at 1.

Complainants' suggestion that the confidentiality of the Costed Waybill Sample could be adequately protected by making it available to them pursuant to a protective order is beside the point. "These masking factors have never been made publicly available, not even under a protective order; they have been held in the strictest confidence, and, at any time, have been known only by a few members of the Board's staff." *Conrail Control*, Decision No. 42 (served Oct. 3, 1997) at 6 (emphasis added). Indeed, in the *Conrail Control* proceeding, the Board stated unequivocally that "[i]f movants had requested that we allow them access to the masking factors in our possession, we would have rejected their request, not for lack of a protective order, but because such masking factors have never been made available, and have never been intended to be made available, to any person not on our staff." *Id.* at 7 (emphasis added.) The *Director's Decision* is fully consistent with the Board's prior rulings.

II. THE PURPOSES FOR WHICH COMPLAINANTS SEEK TO USE THE COSTED WAYBILL SAMPLE DATA ARE NOT RELEVANT TO THE ISSUES PROPERLY BEFORE THE BOARD IN THESE PHASING PROCEEDINGS.

Complainants claim that access to the Costed Waybill Sample is required to enable them to prepare evidence that is "highly relevant to the Board's consideration of the phasing constraint." Complainants' Appeal at 2. According to Complainants, such evidence would address "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." Complainants' Appeal at 4. Complainants vaguely assert that access to the Costed Waybill Sample is also "necessary" to "conduct certain analyses" relating to matters such as "the revenue needs of the defendant railroads," "an appropriate means for applying the phasing constraint" and the Defendants' "base of potentially captive shippers to cover [their] revenue shortfall." *Id.* Complainants' Appeal fails to demonstrate that evidence derived from the Costed Waybill Sample would be relevant to the issues properly before the Board in a phasing proceeding –

much less that denying Complainants access to the Costed Waybill Sample for the purpose of preparing such evidence would result in any "manifest injustice." 49 C.F.R. § 1011.6(b).

Complainants' Appeal -- and the discovery requests served by Complainants in each of the pending cases (to which Defendants will respond in due course, pursuant to the Board's January 6, 2005 scheduling order) -- seek massive volumes of shipment-specific traffic and car movement data that, in the absence of a showing of significant economic dislocation, is simply not relevant to any issue legitimately before the Board in these phasing proceedings. The standards for considering a request for phasing relief were established in *Ex Parte 347* (Sub. No. 1), *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520 (Aug. 8, 1985) ("*Guidelines*"). In that decision, the ICC stated that:

We continue to believe that in some instances otherwise justified rate increases could cause significant economic dislocations which must be mitigated for the greater public good. In those situations, phasing may be an appropriate means of balancing the public need for a sound, healthy rail system with the public need for smooth, orderly economic transitions. However, the degree of phasing should be tailored to the equities of the situation at hand.

We will only require phasing of a rate increase where the party seeking such relief demonstrates the need for it with specificity. In balancing the equities of the particular situation, we will consider such factors as the short-term revenue requirements of the railroads, the magnitude of the proposed increase, the magnitude of past increases, the impact of the rate increase on kilowatt-hour charges, the dependence of the utility on coal (as opposed to other fuels), the economic conditions in the final destination market (and the impact of the rate change on that market), the economic conditions in the coal supply area (and the impact of the rate increase on that region), and any supply contracts involved.

1 I.C.C.2d at 546-547 (emphasis added). More recently, in the *Duke/NSR* proceeding, the Board described the standard governing the phasing constraint in the following terms:

[a]t times, a rate that may not have been proved 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. Therefore,

the Guidelines include a ‘phasing’ constraint on railroad pricing. (Citation omitted). This constraint limits the introduction of otherwise permissible rate increases if they would lead to severe dislocation of economic resources.”

Docket No. 42069, *Duke Energy Corp. v. Norfolk Southern Ry. Co.* (served November 6, 2003) at 39 (emphasis added). *See also* Docket No. 42070, *Duke Energy Corp. v. CSX Transportation, Inc.*, (served February 3, 2004) at 32.¹

As the Board’s pronouncements make clear, it is appropriate to consider whether to phase-in a rate that passes the SAC test only “in those situations” where a Complainant has shown “with specificity” that implementation of the entire increase would cause significant harm that needs to be mitigated “for the greater public good.” Thus, the Board’s inquiry is, in the first instance, directed to the consequences of permitting the full rate increase to go into effect. If the Complainant cannot establish the essential predicate for phasing relief – i.e., that immediate implementation of the challenged rates would cause significant economic dislocation – the Board would not reach the further question whether, in a particular case, phasing may be appropriate to accommodate “the public need for smooth, orderly economic transitions.” *Id.* The *Guidelines* articulate a number of factors (e.g., the short-term revenue requirements of the railroad, the dependence of the utility on coal, and the impact of the rate increase in destination markets) that the Board may consider in determining the “degree of phasing” (*Guidelines* at 546) appropriate in a particular case. However, those factors do not come into play unless and until Complainant

¹ The suggestion in *Duke/NSR* that phasing might be appropriate to mitigate “inequitable consequences” other than “significant economic dislocation” is not supported by the ICC’s analysis in the *Guidelines* decision. *Guidelines* makes clear that the prerequisite for seeking relief under the phasing constraint is a showing that implementation of the full challenged rate would cause “significant economic dislocation” that must be mitigated to accommodate “the public need for smooth, orderly economic transitions.” *Guidelines* at 546 (emphasis added). In short, the *Guidelines* standard requires a showing of harm to the public which ought to be mitigated for the public good.

has made the requisite showing of economic dislocation that must be mitigated for the public good.

Complainants' request for access to the Costed Waybill Sample must be evaluated in light of these standards. Complainants' Appeal fails to articulate any basis for finding that the highly confidential and commercially sensitive data set forth in the Costed Waybill Sample are necessary to prepare evidence on any issue properly before the Board in these phasing proceedings. The Costed Waybill Sample file will not shed light upon the consequences of the challenged rate increases for Complainants or for the public (i.e., Complainants' customers). Indeed, Complainants do not even argue that they plan to use the Costed Waybill Sample data to prove the existence of such adverse consequences. That is not surprising. As Complainants well know, the challenged rates have been in effect for more than three years (almost three years in the case of CP&L), and neither Complainants nor their customers have experienced any "economic dislocation" at all – much less "significant" economic consequences that need to be mitigated "for the greater public good." To the contrary, public filings by Duke and CP&L demonstrate convincingly that the challenged rate increases have had no material impact on their operations or profitability, or upon the economic well-being of consumers.

Both Duke and CP&L are permitted by statute to recover increases in fuel costs (including the cost of both purchasing coal and transporting it to the issue plants) in the rates they charge to electricity consumers. *See* North Carolina Gen. Stat. 62-133.2; South Carolina Code Ann. § 58-27-865(B) (Supp. 2001). *See also* Duke FERC Form No. 1 (year ending December 31, 2002) at 123.18) ("All jurisdictions allow Duke Energy to adjust electric rates for past over- or under-recovery of fuel costs."). As a result, the challenged rates have caused no "economic dislocation" for Complainants. Indeed, Duke's revenues from electricity sales have increased steadily in the years since the challenged rates went into effect. According to Duke's

filings with FERC, those revenues were \$4.49 billion in 2001 (the year before the challenged rates went into effect), \$4.66 billion in 2002 and \$4.71 billion in 2003. *See* Duke FERC Form No. 1 for the years ending December 31, 2001, 2002 and 2003, Account 400. CP&L also reported steady increases in revenues from electricity sales during the period in which the challenged rail rates have been in effect. CP&L's revenues were \$3.27 billion in 2001 (the year before the challenged rates went into effect), \$3.46 billion in 2002 and \$3.50 billion in 2003. *See* CP&L FERC Form No. 1 for the years ending December 31, 2001, 2002 and 2003, Account 400.

Public information likewise demonstrates beyond question that the challenged rates have not imposed an economic burden on Complainants' customers. In approving CP&L's application to recover fuel cost increases incurred during the period from April 1, 2002 (the date upon which the rail rates challenged by CP&L went into effect) through March 31, 2003, the North Carolina Utilities Commission ("NCUC") found that the proposed adjustment would result in an increase of only \$0.56 per month for a typical CP&L customer. *See* NCUC Docket No. E-2, Sub-No. 833, *In the Matter of Application of Carolina Power & Light Company d/b/a Progress Energy Carolinas, Inc. For Authority to Adjust Its Electric Rates and Charges Pursuant to G.S. 62-133.2 and NCUC Rule R8-55* (Order Approving Fuel Charge Adjustment dated September 25, 2003, Appendix A). Likewise, in its order approving Duke's proposed adjustment to electricity rates to recover fuel cost increases incurred by Duke during the period from January 1 2002 (the date upon which the rail rates challenged by Duke went into effect) through December 31, 2002, the NCUC determined that the proposed adjustment would result in an increase of approximately \$1.17 per month for a typical Duke customer. *See* NCUC Docket No. E-7, Sub-No. 725, *In the Matter of Application of Duke Energy Corporation Pursuant to G.S. 62-133.2 and NCUC Rule R8-55 Relating to Fuel Charge Adjustments for Electric Utilities* (Order Approving Fuel Charge Adjustment dated June 25, 2003, Appendix A). These findings,

which were based upon evidence sponsored by CP&L and Duke in their respective proceedings, demonstrate beyond question that collection of the challenged rates by Defendants has not caused any “economic dislocation” for customers of Duke and CP&L. *Duke/NSR*, Decision served February 3, 2004 at 39.

Nevertheless, Complainants contend that they should be granted access to the Costed Waybill Sample to assist them in preparing evidence addressing “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.” Complainants’ Appeal at 4. *See* Letter dated January 28, 2005 from C. Michael Loftus to Dr. William F. Huneke at 2. To the extent that Complainants mean to suggest that a disparity between the rates charged by Defendants to Complainants and those charged to other exclusively-served coal shippers, in the absence of resulting economic dislocation, would warrant phasing of the challenged rates, they are mistaken. The era of regulating rail rates to achieve “equalization” among shippers has long passed. “Congress, in the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 35, and in subsequent legislation, effectively steered the ICC (and now the Board) away from the pre-1976 practice of regulating so as to equalize rates.” Docket No. 42077, *Arizona Public Service Co. v. BNSF*, (decision served October 14, 2003) at 4. *See also* Ex Parte No. 282 (Sub-No. 5), *Rulemaking Concerning Traffic Protective Conditions*, 366 I.C.C. 112, 122 (1982) (“[t]he attempt to require equalized rates would be directly contrary to congressional policy”); Docket No. 15037, *Southwestern Millers’ League v. Atchison, Topeka & Santa Fe Ry. Co.*, 364 I.C.C. 724, 730 (1981) (prior orders equalizing rates on certain grain shipments found inconsistent with policies embodied in 4R Act and Staggers Act; ICC concludes that “[w]e can no longer endorse an attempt to enhance the competitive position of certain shippers at the expense of the rail carriers who serve them”). Any contention that Defendants’

rates to Complainants should be phased in simply because those rates are higher than rates paid by other coal shippers would fly in the face of the principles of differential pricing upon which the Board's CMP ratemaking policies are founded.

In short, Complainants have not identified any relevant evidence that they propose to introduce in these phasing proceedings that would require them to have access to the STB's Costed Waybill Sample.

III. GRANTING COMPLAINANTS' APPEAL IS NOT NECESSARY TO PREVENT MANIFEST INJUSTICE.

Complainants have failed to demonstrate that granting their appeal is necessary to "prevent manifest injustice." 49 C.F.R. § 1011.6(b). Indeed, Complainants' plea for access to the Costed Waybill Sample has been rendered largely moot by the Office of Economics' February 14, 2005 decision granting Complainants' alternative request for access to all fields from the 2001-2003 Carload Waybill Samples for CSXT and NSR. *See* Letter dated February 15, 2005 from Leland L. Gardner to C. Michael Loftus. As a result of that approval, Complainants will have access to movement-specific information relating to all coal and non-coal traffic handled by Defendants during the years 2001, 2002 and 2003. In addition, in response to Complainants' discovery requests, Defendants are willing to make available to Complainants' outside counsel and consultants transportation contracts and common carrier tariffs entered into by Defendants during the period January 1, 2001 through the present (subject to a Board order requiring them to do so, which Defendants would not oppose).

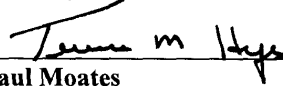
Collectively, the Carload Waybill Sample and the documents made available to Defendants through discovery provide detailed information regarding customers, traffic origins and destinations, traffic routings, rates and service terms for coal traffic handled by Defendants during the period from January 1, 2001 to the present. These materials are more than sufficient to enable Complainants to prepare whatever movement-specific evidence they may believe to be

relevant to the issues in these phasing proceedings. Complainants' further request for access to the unmasked revenues contained in the STB Costed Waybill Sample, or to the revenue masking factors used by Defendants, is unwarranted.

IV. CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the Board deny Complainants' Appeal.

Respectfully submitted,



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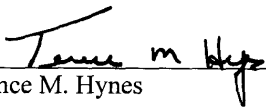
Counsel for CSX Transportation, Inc. and Norfolk Southern Railway Company

DATED: February 22, 20005

CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of February 2005, I served the foregoing
Defendants' Reply in Opposition to Complainants' Appeal of Denial of Request for Waybill
Information by causing five (5) copies thereof to be delivered, via hand delivery, to:

William L. Slover
Robert D. Rosenberg
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