

SERVICE DATE – MAY 11, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35305

ARKANSAS ELECTRIC COOPERATIVE CORPORATION –
PETITION FOR DECLARATORY ORDER

Decided: May 10, 2010

This decision modifies the procedural schedule in this proceeding.

In response to a petition filed by Arkansas Electric Cooperative Corporation (AECC) on October 2, 2009, and the reply of BNSF Railway Company (BNSF) on October 21, 2009, the Board instituted a declaratory order proceeding under 49 U.S.C. § 721 and 5 U.S.C. § 554(e) on December 1, 2009. The issues before the Board include whether provisions of a BNSF tariff are an unreasonable practice, whether BNSF may establish rules regarding coal dust dispersion from coal trains operating over its lines, and whether refusal to provide service to shippers not in compliance with the provisions would violate BNSF's common carrier obligation. Tariff 6041-B Items 100 and 101, the provisions at issue, require that Powder River Basin (PRB) coal shippers using the Joint Line¹ or the Black Hills Subdivision ensure that the emission of coal dust from the cars does not exceed the coal dust emissions standards set by BNSF. The tariff at issue is scheduled by BNSF to become effective on August 1, 2010.

In the December 1, 2009 decision, the Board set a procedural schedule that required any person wishing to participate in the proceeding as a party of record (POR) to file a notice of intent to participate by December 11, 2009. Discovery closed on February 1, 2010. Opening evidence and argument from all PORs was due on March 16, 2010. Reply evidence and argument from all PORs was due on April 30, 2010. The decision set May 17, 2010, as the due date for rebuttal evidence and argument from all PORs.

In a joint petition filed on May 5, 2005, the Western Coal Traffic League, Concerned Captive Coal Shippers, AECC, American Public Power Association, Edison Electric Institute, National Rural Electric Cooperative Association, National Coal Transportation Association, Ameren Energy Fuels and Services Company, TUCO, Inc., and Texas Municipal Power Agency (collectively, Shipper Interests) request that the Board extend the due date for the submission of rebuttal evidence and argument to June 4, 2010. The shippers argue that the full extension is justified due to the voluminous, detailed, and technical nature of the reply evidence; new

¹ The Joint Line is the rail line serving the southern PRB that is jointly owned by BNSF and the Union Pacific Railroad Company and operated and maintained by BNSF.

arguments raised in the reply evidence; and a 1,351-page supplemental document production by BNSF, which was served on April 28, 2010. In a reply filed May 6, 2010, BNSF states that it does not oppose an extension to May 27, 2010. BNSF does, however, oppose an extension to June 4, 2010, due to the expedited nature of the proceeding and the approaching August 1, 2010 effective date of the tariff at issue.

Good cause exists to revise the procedural schedule in this proceeding, and therefore the Shipper Interests' petition will be granted. While BNSF is correct that the original procedural schedule adopted on December 1, 2009, was expedited at the request of both BNSF and AECC,² and that the tariff is scheduled to become effective soon, the Shipper Interests have demonstrated a need for additional time to analyze the technical, voluminous evidence. The deadline for rebuttal evidence and argument will be extended to June 4, 2010.

It is ordered:

1. The Shipper Interests' motion to revise the procedural schedule, as last established in a decision served on December 1, 2009, is granted.

2. The procedural schedule in this proceeding is revised as follows:

June 4, 2010 Rebuttal evidence and arguments due from all PORs.

3. This decision is effective on its date of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

² See AECC's Pet. for Declaratory Order, Annex 1, Proposed Procedural Schedule (proposing a similar schedule to the one the Board ordered).