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SERVICE DATE – DECEMBER 1, 2009

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35305

ARKANSAS ELECTRIC COOPERATIVE CORPORATION –  
PETITION FOR DECLARATORY ORDER

Decided: November 30, 2009

AGENCY: Surface Transportation Board.

ACTION: Institution of declaratory order proceeding; request for notices of intent to participate and comments; and issuance of procedural schedule.

SUMMARY: In response to a petition filed by Arkansas Electric Cooperative Corporation (AECC) on October 2, 2009, and the reply of BNSF Railway Company (BNSF), the Board is instituting a declaratory order proceeding under 49 U.S.C. 721 and 5 U.S.C. 554(e).<sup>1</sup> The issues before the Board arise from Tariff 6041-B Items 100 and 101 (Tariff provisions), issued by BNSF on May 27, 2009, which require that Powder River Basin (PRB) coal shippers using the Joint Line<sup>2</sup> or the Black Hills Subdivision must ensure that the emission of coal dust from the cars does not exceed the coal dust emissions standards set by BNSF. The issues raised in these filings include: (1) whether the Tariff provisions constitute an unreasonable rule or practice; (2) whether BNSF may establish rules designed to inhibit the dispersion of coal dust from coal trains operating over its lines; and (3) whether refusal to provide service for non-compliance with the Tariff provisions or other actions to enforce compliance would violate BNSF's common carrier obligation. Due to the vital role transportation of coal by rail plays in the nation's energy supply and the economy in general, the Board seeks public comment and participation on this matter.

DATES: The effective date of this decision is December 1, 2009. Any person who wishes to participate in this proceeding as a party of record (POR) must file, no later than December 11, 2009, a notice of intent to participate. Discovery will close on February 1, 2010. Opening evidence and argument from all PORs is due on March 16, 2010. Reply evidence and argument

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<sup>1</sup> By a separate decision, the Board will address the imposition of a protective order in this proceeding.

<sup>2</sup> The Joint Line is the rail line serving the southern PRB that is jointly owned by BNSF and the Union Pacific Railroad Company (UP) and operated and maintained by BNSF.

from all PORs is due on April 30, 2010. Rebuttal evidence and argument from all PORs is due on May 17, 2010.<sup>3</sup>

ADDRESSES: Any filing submitted in this proceeding must be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the E-FILING link on the Board's website, at <http://www.stb.dot.gov>. Any person submitting a filing in the traditional paper format should send an original and 10 copies (and also an electronic version), referring to STB Finance Docket No. 35305, to: Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001. In addition, one copy of each filing in this proceeding must be sent (and may be sent by e-mail only if service by e-mail is acceptable to the recipient) to each of the following: (1) Eric Von Salzen (representing AECC), McLeod, Watkinson & Miller, One Massachusetts Avenue, N.W., Suite 800, Washington, DC 20001; (2) Samuel M. Sipe, Jr. (representing BNSF), Steptoe & Johnson LLP, 1330 Connecticut Avenue, N.W., Washington, DC 20036; (3) Joe Rebein (representing UP), Shook, Hardy & Bacon L.L.P., 2555 Grand Blvd., Kansas City, Missouri 64108; (4) John H. LeSeur (representing Western Coal Traffic League (WCTL)), Slover & Loftus LLP, 1224 Seventeenth Street, N.W., Washington, DC 20036; and (5) any other person designated as a POR on the service-list notice (as explained below, the service-list notice will be issued as soon after December 11, 2009, as practicable).

Copies of written comments will be available for viewing and self-copying at the Board's Public Docket Room, Room 131, and will be posted to the Board's website.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 245-0395. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at: 1-800-877-8339].

SUPPLEMENTAL INFORMATION: AECC is a generation and transmission cooperative that provides wholesale electric power to electric cooperatives throughout Arkansas. AECC is a co-owner, with other utilities, of generation assets that burn millions of tons of PRB coal annually. During normal operating conditions, three of these plants -- White Bluff at Redfield, AR, Independence at Newark, AR, and Flint Creek at Gentry, AR -- receive all of their PRB coal via the Joint Line. On May 27, 2009, BNSF issued the Tariff provisions stating that "[e]ffective November 1, 2009, Shipper shall take all steps necessary to ensure that Trains handling cars loaded with Coal from any mine origin that move over [the Joint Line or Black Hills Subdivision] shall not emit more than an Integrated Dust Value (IDV.2) of [300 units or 245 units, respectively] in order to enhance retention of coal in rail cars." AECC seeks a declaratory order stating that the Tariff provisions constitute an unreasonable rule or practice and an illegal refusal to provide service. AECC also asks that the order state that BNSF must permit shippers to transport coal on the Joint Line and Black Hills Subdivision without such restrictions.

On October 21, 2009, BNSF, a Class-I rail carrier operating in the western United States, replied to AECC's petition contesting, among other things, AECC's underlying presumption that

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<sup>3</sup> Although oral argument on these issues was requested by BNSF, we are not ruling on that request at this time.

the Tariff provisions are injurious to coal shippers. BNSF states that coal dust contaminates the ballast and can impact ballast integrity, ultimately causing derailments. Therefore, BNSF claims the Tariff provisions are intended to promote the safe, efficient, and uninterrupted flow of coal from mine to generating station. BNSF itself requests the Board issue a declaratory order stating that (1) BNSF is entitled to establish rules designed to inhibit the dispersion of coal dust over its lines in the interest of safe and efficient rail operations and of reliability of service on its rail lines; and (2) BNSF's Tariff provisions are not unreasonable.

Under 5 U.S.C. 554(e), the Board has discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty. The issues raised by AECC and BNSF merit further consideration. A declaratory order proceeding is thus instituted in this proceeding.

We received, on October 22, 2009, a letter from WCTL requesting that we accept public input on the declaratory order proceeding.<sup>4</sup> Due to the significance of this matter to coal shippers, railroads, and other interested parties, we are opening this declaratory order proceeding for public participation. Any person who wishes to participate in this proceeding as a POR must file, no later than December 11, 2009, a notice of intent to participate and must adhere to the procedural schedule established in the Appendix. To ensure each POR receives all filings, the Board will serve, as soon after as practicable, a notice containing the official service list (the service-list notice). Each POR will be required to serve upon all other PORs, within 10 days of the service date of the service-list notice, copies of all filings previously submitted by that party (to the extent such filings have not previously been served upon such other parties). Each POR also will be required to file with the Board, within 10 days of the service date of the service-list notice, a certificate of service indicating that the service required by the preceding sentence has been accomplished. Every filing made by a POR after the service date of the service-list notice must have its own certificate of service indicating that all PORs on the service list have been served with a copy of the filing. Members of the United States Congress and Governors are not parties of record and need not be served with copies of filings, unless any Member or Governor has requested to be, and is designated as, a POR.

In their filings, AECC and BNSF discuss the alleged adverse effects of coal dust on rail roadbeds and ballast, implicating safety and environmental issues. Because the Board's consideration of the issues raised in this proceeding could relate to other federal agencies' areas of expertise, any agency with an interest in the outcome of these issues is encouraged to comment.

Both AECC and BNSF request that a procedural schedule be adopted. They both request that we allow for a 60-day period of discovery. While the legal nature of a declaratory order proceeding might not always necessitate discovery, due to the factually intense nature of the dispute here we will permit discovery among BNSF, AECC, and any other shippers potentially affected by the tariff, including shipper organizations that represent those shippers. These

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<sup>4</sup> WCTL also requested leave to intervene, to which UP replied on October 28, 2009. In a separate filing on October 21, 2009, UP also requested leave to intervene. Because we are inviting public participation in this proceeding, we need not address the requests for leave to intervene, but we have made the requesting parties PORs.

entities may conduct discovery pursuant to the Board's regulations at 49 CFR 1114.21, *et seq.* In the interests of ensuring the necessary discovery is obtained in a timely and efficient manner, we will assign and authorize a Board employee to act as a discovery facilitator to entertain and rule upon all disputes concerning discovery in this proceeding. Any appeals of decisions by the discovery facilitator must be filed within 3 business days of the date of the action and responses to appeals must be filed within 3 business days thereafter. Appeals will be governed by the standard at 49 CFR 1115.1(c).<sup>5</sup>

Board decisions, notices, and filings in this and other Board proceedings are available on our website at [WWW.STB.DOT.GOV](http://WWW.STB.DOT.GOV).

It is ordered:

1. A declaratory order proceeding under 5 U.S.C. 554 and 49 U.S.C. 721 is instituted.
2. The parties to this proceeding must comply with the procedural schedule adopted by the Board in this proceeding as shown in the Appendix.
3. The parties to this proceeding must comply with the procedural requirements described in this decision.
4. The special appellate procedures set forth in this decision will apply to rulings made by the Board employee assigned to act as a discovery facilitator in this matter.
5. This decision is effective on December 1, 2009.

By the Board, Chairman Elliott, Vice Chairman Nottingham, and Commissioner Mulvey.

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<sup>5</sup> 49 CFR 1115.1(c) states, in relevant part, that "appeals are not favored; they will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice."

APPENDIX

Procedural Schedule

December 1, 2009	Declaratory order proceeding instituted
December 11, 2009	Notices of intent to participate due
February 1, 2010	Close of discovery
March 16, 2010	Opening evidence and argument due from all PORs
April 30, 2010	Reply evidence and argument due from all PORs
May 17, 2010	Rebuttal evidence and argument due from all PORs