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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**WESTERN COAL TRAFFIC LEAGUE—
PETITION FOR DECLARATORY ORDER**

**BNSF RAILWAY COMPANY'S OPPOSITION TO
ARKANSAS ELECTRIC COOPERATIVE CORPORATION'S
MOTION FOR LEAVE TO FILE REBUTTAL EVIDENCE AND ARGUMENT**

BNSF Railway Company ("BNSF") opposes the motion filed on December 20, 2011, by Arkansas Electric Cooperative Corporation ("AECC") for leave to file rebuttal evidence and argument in this proceeding. AECC had ample opportunity to become a party and timely file evidence and argument that BNSF could have addressed in its own filings. AECC chose instead to wait until the end of the third and last round of pleadings, with no prior warning or justification, to attempt to submit new argument and lengthy testimony by a new witness. AECC's filing is an abuse of the orderly process that the Board established to identify and address the issues in this proceeding that should not be countenanced. Moreover, AECC presents no evidence or argument at this late stage of the proceeding that would advance the Board's consideration of a record that has already been fully developed. The Board should deny AECC's motion.

AECC has no excuse for having waited until now to become involved in this proceeding. When the Board initiated the proceeding in its decision dated September 28, 2011, it invited comments from the public and established a due date of October 13, 2011, for notices of intent to participate. Slip op. at 3. AECC, an entity that is not even a BNSF shipper, did not file a notice.

Nor did AECC seek leave to file opening evidence and argument on the October 28 due date, or reply evidence and argument on the November 28 due date.

AECC suggests in its motion that its impetus for getting involved belatedly was its review of the reply evidence and argument submitted by BNSF. AECC Motion at 1. That assertion is belied by AECC's own filing. The first issue that it addresses in its argument and that its witness addresses in his statement is the alleged "unsuitability" of the Board's reliance on BNSF's fair value calculations under GAAP purchase accounting. AECC Br. at 2, Nelson VS at 3-7. The workpapers supporting those calculations were made available to all interested parties—pursuant to the Board's September 28 decision and the protective order in this proceeding—before the parties' opening filings. Moreover, the methodology and process for performing the fair value calculations was addressed by BNSF and its witnesses in BNSF's opening evidence and argument.

After reviewing BNSF's workpapers and opening evidence and argument, WCTL and its supporters confirmed in their reply that they were not challenging the methodology BNSF used to determine the fair value of its assets. WCTL Reply Br. at 7-9, 35-36. AECC's challenge to that methodology is not only untimely but is based on a fundamental misunderstanding of the methodology. Both AECC and its witness assert that the accountants retained by BNSF and Berkshire (Ernst & Young and Deloitte & Touche) made their purchase accounting adjustments based on an "optimized" route network of "only 6,600 route miles of track (compared to the 32,000 route miles BNSF actually operates)." AECC Br. at 3; Nelson VS at 5. In fact, BNSF's witness Hund testified that the optimized network approach assigned "no value" to 6,600 route

miles. Hund VS at 5.¹ AECC and its witness, therefore, base their concerns about the methodology on a wholly mistaken premise.

Similarly, AECC's belated discussion of revenue adequacy does not advance the Board's consideration of the issues in this proceeding. BNSF had no need in its rebuttal to address the subject of its revenue adequacy or inadequacy, since no one on reply disagreed with BNSF's evidence under the Board's established revenue adequacy standards that BNSF would have been revenue inadequate with or without the purchase accounting adjustment. AECC's witness, however, takes BNSF's witnesses Kolbe and Neels to task for failing to recognize that if the Board four years ago had adopted a cost of capital standard that AECC advocated, but the Board refused to adopt, the entire rail industry would be revenue adequate. Nelson VS at 14-15. Needless to say, this is not the place to relitigate the Board's cost of capital standard.²

While AECC asserts that its filing is not duplicative of other pleadings (AECC Motion at 2), Mr. Nelson spends considerable time saying the same thing CURE has said about a supposed "double-count" of inflation when a nominal cost of capital is applied to an investment base that is adjusted under GAAP purchase accounting. Nelson VS at 12-14. AECC has no basis for

¹ Mr. Nelson also asserts that Mr. Hund "candidly admits that BNSF and Berkshire Hathaway management personnel don't even understand the methodology that the accountants used." Nelson VS at 5. This is nonsense. What Mr. Hund said is that purchase accounting is a "technical accounting and regulatory practice" that requires valuation experts to perform, and BNSF and Berkshire retained expert accounting firms for that purpose. Hund VS at 4. In the valuation process, an optimized network "was planned and assessed by E&Y and BNSF." *Id.* at 5 (emphasis added). After the results were audited by Deloitte & Touche, they were recorded and included in Berkshire's and BNSF's annual 10-K filings with the SEC, which were signed and certified by Berkshire's Chairman and its Principal Financial Officer and by BNSF's Chairman and its Chief Financial Officer, Mr. Hund. *Id.* at 6.

² AECC frankly concedes that "[t]his rebuttal builds on analyses that AECC has previously submitted to the Board in a number of other dockets." AECC Motion at 1 and n.1. AECC fails to explain, however, why the Board should use this proceeding to revisit those analyses.

claiming that it needed to intervene at this late stage to defend another party's claims. There is no dearth of shipper representation in this proceeding. CURE itself has made a filing in every round and has made its "double-count" claims in every round.

The "circularity" issue to which Mr. Nelson also devotes several pages (Nelson VS at 16-19) has also already been thoroughly aired in the parties' prior filings. In fact, WCTL has conceded that it is "not contending that the transaction price was not *bona fide*, or that Mr. Buffet is attempting to 'game' the system by paying an inflated price for BNSF in the hopes of recovering inflated returns from all of BNSF's customers." WCTL Reply Br. at 38. Thus, AECC appears to be attempting to reopen an issue that the other parties have moved beyond. That simply underscores why the Board should not permit AECC's belated filing. The process of opening, reply, and rebuttal arguments and evidence is intended to identify, sharpen, and narrow the issues. It defeats the purpose of that process if a party like AECC—apparently dissatisfied at the last minute with the positions being taken or arguments being made by the parties who have participated according to the Board's established procedures from the beginning—is permitted to intervene to make new arguments.

In sum, far from being "useful to the Board" (AECC Motion at 1), AECC's belated "rebuttal" filing is an affront to the Board's established procedures in this case and it presents no evidence or argument that would assist the Board in addressing the issues in this case. AECC's motion should be summarily denied.

Respectfully submitted,

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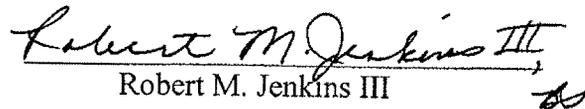
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Dated: December 28, 2011

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing BNSF Railway Company's Opposition to Arkansas Electric Cooperative Corporation's Motion for Leave to File Rebuttal Evidence and Argument were served on December 28, 2011, by U.S. mail on counsel for Arkansas Electric Cooperative Corporation and on all parties of record.


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