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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35305

**NOTICE OF INTENT TO PARTICIPATE OF
AMERICAN PUBLIC POWER ASSOCIATION,
EDISON ELECTRIC INSTITUTE, AND
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION**

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Dated: December 10, 2009

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Introduction

Pursuant to the Board's decision served December 1, 2009, American Public Power Association ("APPA"), the association of public power electric utilities, Edison Electric Institute ("EEI"), the association of investor-owned electric utilities, and National Rural Electric Cooperative Association ("NRECA"), the association of consumer-owned electric power systems, hereby provide notice of their intent to participate in this proceeding.

On October 2, 2009, Arkansas Electric Cooperative Corporation ("AECC") filed Petitions for a Declaratory Order and for a Stay, both with respect to BNSF Railway Company's Tariff No. 6041-B ("BNSF's Tariff"). On October 21, 2009, BNSF voluntarily extended the deadline in Items 100 and 101 of its Tariff to August 1, 2010, obviating the necessity of a filing in support of the Stay Petition filed by AECC. APPA, EEI, and NRECA awaited the STB's determination whether to institute a declaratory proceeding before filing the instant Notice of Intent to Participate.

APPA, EEI, and NRECA collectively represent the interests of many, if not all, of the shippers of Powder River Basin ("PRB") coal on BNSF and Union Pacific Railroad Company, as explained more specifically *infra*.

Interests of APPA

APPA represents the interest of the more than 2,000 not-for-profit, publically owned electric utilities nationwide, located in 49 of the 50 states and collective serving over 45 million Americans.

Interest of EEI

EEI is the association of U.S. shareholder-owned electric companies. EEI's members serve 95 percent of the ultimate customers in the shareholder-owned segment of the industry, and they represent approximately 70 percent of the U.S. electric power industry. EEI's diverse membership includes utilities operating in all regions, including in regions with Regional Transmission Organizations and Independent System Operators ("RTO/ISOs"), and companies supplying electricity at wholesale in all regions.

Interest of NRECA

The NRECA is the national service organization representing 930 non-profit electric power systems that supply central station electricity to over 40 million consumer-owners in 47 states covering 75% of the nation's land mass.

Discussion

AECC has brought a matter to the STB that is of great importance to railroads, coal suppliers, and customers of railroads and coal suppliers. Many of APPA's, EEI's, and NRECA's members are customers of the railroads, including

BNSF of course, and of the coal companies, as the STB is well-aware. *Inter alia*, BNSF's Tariff purported to impose on the loaded coal trains of AECC, APPA's members, EEI's members, and NRECA's members, and on other coal shippers out of the PRB, limits on the amount of coal dust that may be emitted from any loaded coal train. For the Joint Line, Item 100 of BNSF's Tariff states:

"Effective 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 shall not emit more than an integrated dust value (IDV.2) of 300 units to enhance retention of coal in the coal cars. An IDV.2 unit is a measure of the volume of coal dust coming off of the coal train over its entire length."

For the Black Hills Subdivision, Item 101 of BNSF Tariff 6041-B imposes an even lower emission limit of 245 units. However, in response to AECC's Petition, BNSF voluntarily postponed the November 1, 2009 effective date in the Item Nos. 100 and 101. Despite the postponement, BNSF's Tariff raises many unanswered questions.

APPA, EEI, and NRECA have not yet taken a firm position on any the questions raised by BNSF's Tariff, because there is an absence of reliable information about this coal-dust emissions situation. But APPA, EEI, and NRECA firmly believe that there are too many uncertainties associated with this matter to permit a Tariff, which of course has the force and effect of law, to go into effect until the STB is convinced that the Tariff is reasonable, is clear with respect to the parties' obligations, will not impose wasteful and unnecessary obligations on shippers and on essential transportation, is the most cost-effective approach to the problem, and will not produce other unanticipated problems.

Indeed, APPA, EEI, and NRECA believe that the law, which is also cited in the AECC Petitions and in the decisions cited therein, requires that the government -- here, FRA -- determine if necessary whether safety-related obligations railroads seek to impose on shippers are reasonable. *Conrail v. ICC*, 646 F.2d 642 (D.C. Cir.), *cert. denied*, 454 U.S. 1047 (1981); *Akron, Canton & Youngstown Rwy. v. ICC*, 611 F.2d 1162 (6th Cir. 1979), *cert. denied*, 449 U.S. 830 (1980). Absent such a determination, BNSF's emission limitations may constitute an "unreasonable practice" under the law, providing a basis for the Board to order BNSF not to implement its emission limitations.

At the same time, APPA, EEI, and NRECA do not intend that any action the STB may take with respect to BNSF's Tariff should in any way interfere with voluntary actions that BNSF and any of its customers may take to resolve the issues of concern to BNSF with respect to emissions of coal dust. This Board has had a longstanding practice of encouraging voluntary agreements between railroads and shippers, rather than regulation. APPA, EEI, and NRECA believe that the STB should encourage such voluntary agreements as the best possible outcome in this proceeding.

Conclusion

APPA, EEI, and NRECA hereby provide notice of their intent to participate in this proceeding, and believe that the Board should make clear that it encourages a voluntary resolution of the issues raised by BNSF's Tariff.

Respectfully submitted,

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Dated: December 10, 2009

Certificate of Service

I hereby certify that I have served, this ¹⁴10 day of December, 2009,

a copy of the foregoing pleading on the following:

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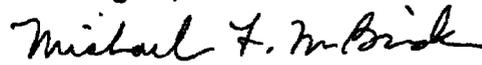
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