

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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ARKANSAS ELECTRIC COOPERATIVE )	
CORPORATION – PETITION FOR )	
DECLARATORY ORDER )	Finance Docket No. 35305
)	

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**JOINT MOTION TO STRIKE  
SUPPLEMENTAL TESTIMONY OF GREGORY FOX**

The Western Coal Traffic League (“WCTL”), Concerned Captive Coal Shippers (“CCCS”), Arkansas Electric Cooperative Corporation (“AECC”), American Public Power Association (“APPA”), Edison Electric Institute (“EEI”), and National Rural Electric Cooperative Association (“NRECA”) (collectively referred to as “Shipper Interests”), submit this Joint Motion to Strike improper extra-record testimony provided by BNSF witness Gregory Fox at the July 29, 2010 argument in Finance Docket No. 35305, as contained at July 29, 2010 Hearing Video, Part 2 at 02:10:17 through 02:10:43.<sup>1</sup> In support hereof, Shipper Interests state as follows.

**I. BACKGROUND**

On July 21, 2010, BNSF informed the Board that it intended to have one of its fact witnesses, Gregory Fox, appear at the argument scheduled in the above-captioned proceeding. In response to objections by several shippers that the designation of Mr. Fox to argue created risk that BNSF would use Mr. Fox’s appearance as an opportunity to

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<sup>1</sup> A hearing transcript is not presently available for the July 29, 2010 Hearing.

supplement a closed record, BNSF assured the Board that “Mr. Fox will not be presenting new evidence at the hearing. Rather, Mr. Fox will be highlighting significant aspects of BNSF’s prior evidentiary submissions.” July 22, 2010 letter from Samuel M. Sipe, Jr. On July 26, 2010, the Office of Proceedings denied AECC’s Motion to Strike and authorized Mr. Fox to appear at the hearing.

Despite BNSF’s assurances, however, in the course of BNSF’s rebuttal argument, Mr. Fox provided new testimony relating to recent testing concerning the alleged effectiveness of surfactants on limiting coal dust. Subsequent to the hearing, counsel for WCTL/CCCS contacted counsel for BNSF and noted their concerns that the subject testimony was beyond the scope of the record in this proceeding.

BNSF responded to WCTL/CCCS’ concerns about Mr. Fox’s supplemental testimony by letter dated August 2, 2010. (Copy attached). While BNSF’s Counsel admitted that Mr. Fox went beyond the existing record and “inadvertently referred to the results of tests of surfactants that are currently being conducted,” they attempted to justify this new evidence by stating that “Mr. Fox’s reference to surfactant effectiveness is consistent with information in the record on the results of tests that were previously conducted.” August 2, 2010 letter citing Rebuttal Verified Statement of William VanHook at page 11.

## **II. ARGUMENT**

Mr. Fox’s supplemental rebuttal testimony should be stricken for several reasons. First, as BNSF’s August 2 letter makes clear it is indisputable that Mr. Fox’s supplemental rebuttal testimony extended beyond him merely “highlighting significant

aspects of BNSF's prior evidentiary submissions." Instead, Mr. Fox was referencing testing that took place *after* the evidentiary submissions were completed.

Second, Mr. Fox's supplemental rebuttal hearing testimony does not reference the same testing that Mr. VanHook addressed in his Rebuttal. Mr. VanHook's testimony referenced tests conducted in 2005-2006 and 2008. Mr. Fox, on the other hand, referenced recent, *i.e.*, 2010, testing. As WCTL/CCCS have noted, the earlier testing was flawed and based on an insignificant and statistically unreliable sample. WCTL/CCCS Op. at 47 n 22; WCTL/CCCS Reply at 20-21. The parameters of the 2010 testing are not a part of this record. No party has had an opportunity to test these parameters in this proceeding and/or to offer contrary testimony about the true effectiveness and reliability of the 2010 testing process. Allowing BNSF to "support" the prior testing results with untested supplemental testimony about the 2010 testing is inappropriate and greatly prejudicial to all of the non-railroad participants in this proceeding.

### **CONCLUSION**

For the foregoing reasons, Mr. Fox's testimony concerning recent testing should be stricken from the record.

Respectfully submitted,

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Dated: August 4, 2010

## **CERTIFICATE OF SERVICE**

I hereby certify that this 4th day of August, 2010, I have caused the forgoing to be served via first-class mail, postage prepaid upon counsel for all parties of record to this case.

/s/ Frank J. Pergolizzi  
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August 2, 2010

**BY E-MAIL**

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Re: *Petition of Arkansas Electric Cooperative for a Declaratory Order,*  
STB Finance Docket 35305

Dear Andy,

You asked me to determine whether the information referred to by Mr. Fox in his rebuttal comments regarding the effectiveness of surfactants is in the record of this proceeding. In his comments, Mr. Fox inadvertently referred to the results of tests of surfactants that are currently being conducted, and because those tests are very recent, the information is not in the record. However, Mr. Fox's reference to surfactant effectiveness is consistent with information already in the record on the results of tests that were previously conducted. *See Rebuttal Verified Statement of William VanHook at page 11.*

Regards,

  
Anthony J. LaRocca