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March 16, 2010

Via Electronic Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
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Re: F.D. 35305 – Petition of Arkansas Electric
Cooperative for a Declaratory Order

Dear Ms. Brown:

Please find enclosed the Initial Comments of American Public Power Association, Edison Electric Institute, and National Rural Electric Cooperative Association for filing in the above-referenced proceeding.

Respectfully submitted,



Michael F. McBride

*Attorney for American Public Power Association,
Edison Electric Institute, and National Rural
Electric Cooperative Association*

cc (w/encl.): All Persons on the Service List

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35305

**ARKANSAS ELECTRIC COOPERATIVE CORPORATION –
PETITION FOR A DECLARATORY ORDER**

**INITIAL COMMENTS OF AMERICAN PUBLIC POWER ASSOCIATION,
EDISON ELECTRIC INSTITUTE, AND
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION**

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Due and Dated: March 16, 2010

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Introduction and Summary

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 submit their Initial Comments.

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.

Following the Board’s determination to institute a declaratory proceeding on December 1, 2009, APPA, EEI, and NRECA submitted their Notice of Intent to Participate.¹

¹ BNSF has argued that AECC is not a “shipper” on the BNSF, apparently because Entergy, a member of EEI, receives the freight bills for coal shipments to one or more plants owned jointly by Entergy and AECC. Without taking a position on the merits of that argument, APPA, EEI, and NRECA collectively represent the interests of

There are a number of important questions raised by BNSF's Tariff that are being addressed herein, and that affect APPA's, EEI's, and NRECA's members. One overriding question is one APPA, EEI, and NRECA believe needs to be answered: is BNSF's claimed right to impose emission limitations on loaded coal trains in its Tariff a matter subject to governmental review and approval, and, if so, is it a matter within the jurisdiction of the STB, the Federal Railroad Administration, or both? In the interests of avoiding repetition, APPA, EEI, and NRECA will not address all of the important questions that may be raised about BNSF's Tariff, but have chosen instead to emphasize (1) the question of agency authority over BNSF's Tariff and the emission limitations contained therein, (2) the exclusive jurisdiction of FRA to determine safety standards for railroad transportation, and (3) the large number of unresolved questions pertaining to the "coal dust" issue (many of which are listed herein).

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 collectively 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

many, if not all, of the shippers of Powder River Basin coal on BNSF and Union Pacific Railroad Company. Other groups, such as the Western Coal Traffic League, are also participating. The participation of APPA, EEI, NRECA, and WCTL makes it unnecessary for the STB to rule on BNSF's contention that AECC is not a "shipper."

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.

Argument

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. BNSF's Tariff *inter alia* imposes 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 Powder River Basin (“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.”

BNSF's Tariff raises many unanswered questions. Without in any way suggesting that these are the only questions that arise as a result of BNSF's Tariff, such questions include:

1. How do shippers and the STB know that it was coal dust alone, and not the manner in which the Joint Line was constructed or maintained, that was the cause of the derailments in 2005, or that is the source of the alleged continuing problem with coal dust on the Joint Line (and perhaps the Black Hills Subdivision)?
2. BNSF's actions make it clear that it perceives coal dust as a potential safety problem associated with maintenance of its coal-hauling rail lines (and the effect of such coal dust on operations of coal trains). (The ICC and the courts have held that Federal Railroad Administration, not the STB, sets safety standards for railroads and railroad operations.) Why is BNSF's determination to limit emissions confined to coal dust, instead of also including emissions of dust from iron ore and many other commodities?
3. What is the definition of a "unit" of "integrated dust value?"
4. How were the emission limits of 300 units, and 245 units, derived?
5. How often will BNSF maintain its devices for measuring emissions from loaded coal cars, and will the STB be expected to oversee such matters if shippers believe that the devices are not providing proper readings?
6. Would improved profiling solve the alleged coal-dust problem in a more cost-effective way?
7. What are the consequences of allegedly exceeding the stated IDV.2 limits?
8. What process, if any, is provided for shippers to dispute BNSF's finding that an emission limit has been exceeded?

9. **What assurance does BNSF have that it is possible to meet its emission limits?**
10. **How would shippers or the STB know whether profiling (*i.e.*, loading the coal in such a manner as to reduce dust emissions) may alone satisfy BNSF's emission limits, so as to avoid the necessity of spraying chemicals on the coal to keep dust below the emission limits?**
11. **How do shippers and the STB know that coal dust from the tops of loaded rail cars is the primary source of coal dust (especially given the enhanced profiling that has occurred in recent months)?**
12. **If it is later determined that coal dust from the tops of loaded railcars is not the source of the problem with ballast, will there be some method of compensation for the expense of spraying?**
13. **On information and belief, the BNSF sampling device at MP90 on the Joint Line does not begin sampling until after the locomotive have passed due to concern that diesel exhausts may contaminate the sample. Does that suggest that any ballast problem is not necessarily the responsibility of the coal shippers, and that locomotive emissions could be a potential cause?**
14. **Coal shippers already pay for maintenance of rail lines, including ballast and sub-ballast in their rates. If shippers are, in effect, required to spray, does that amount to double-charging shippers for railroad costs?**
15. **Maintenance costs are estimated in STB rate proceedings to be approximately 5 cents/ton/year, whereas spraying coal is estimated to cost approximately 25 cents/ton/year. Should the STB determine that spraying is wasteful and**

unnecessary if it would be cheaper and more efficient to perform routine maintenance rather than also require spraying?

APPA, EEI, and NRECA have not taken a firm position on any the questions or issues raised above, because there is an absence of reliable information about this coal-dust emissions situation, and about the technical, operational, and commercial circumstances that are involved with that 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. 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), *citing Atchison Railway Co. v. United States*, 232 U.S. 199, 217 (1914); *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, or a violation of BNSF's common-carrier obligation.

It is crystal-clear that the inclusion of "emission limits" in BNSF's Tariff is subject to the STB's authority to determine if BNSF has engaged in an "unreasonable practice" within the meaning of 49 U.S.C. § 10702 or a violation of its common-carrier

obligation under 49 U.S.C. § 11101 because the Board has plenary authority over all railroad tariffs, over alleged unreasonable practices, and over allegations of a violation of the common-carrier obligation.

It is equally clear that this matter is subject to the STB's authority if, as AECC alleges in its Petition, the derailments that BNSF blames on coal dust were actually caused by BNSF's faulty construction or inadequate maintenance. Petition of Arkansas Electric Cooperative Corporation for a Declaratory Order, at p. 3 ("There are strong reasons to believe that substandard construction and failure by BNSF to perform proper routine track maintenance are the primary causes of the problems that BNSF blames on coal dust, including the 2005 derailments.").

However, if the Board concludes that substandard construction or inadequate maintenance were not involved in the problems BNSF blames on coal dust, then, in this situation, APPA, EEI, and NRECA urge the Board to withhold its determination until the FRA determines whether BNSF's "emission limits" are appropriate and would accomplish the objective of preventing railroad derailments, or *inter alia* : (1) whether there is more coal dust coming from the bottom of bottom-dump coal cars than is blowing off the tops of open-top hopper cars, (2) whether BNSF and UP, who own or lease many of the bottom-dump coal cars, are applying stringent emission limits to rail cars primarily provided by shippers, but not applying any limits to coal dust emerging from the bottom of their own rail cars; (3) whether spraying of coal is substantially reducing coal dust and is significantly reducing the amount of coal dust, and the necessary associated maintenance, on the Joint Line; and (4) whether it would be more cost-effective for BNSF and UP to perform maintenance (estimated at approximately 5

cents/ton/year), rather than spraying the coal (which is estimated to cost approximately 25 cents/ton/year). APPA, EEI, and NRECA urge this approach because FRA, rather than the STB, is the agency empowered to establish railroad safety standards.

Following any such ruling by FRA, APPA, EEI, and NRECA believe it would then be appropriate for the STB to determine if the “emission limits” in BNSF’s Tariff constitute an “unreasonable practice” or a violation of BNSF’s common-carrier obligation. This conclusion may be reached if BNSF has imposed wasteful and unnecessary expenses or obligations on coal shippers, *e.g.*, *Conrail v. ICC, supra*, 646 F.2d at 647 (citing authorities), or would prevent coal shippers from transporting coal.

Conclusion

For the reasons stated herein, APPA, EEI, and NRECA urge the Board to (1) assert its authority over the lawfulness of BNSF’s Tariff, (2) decline to address whether BNSF’s Tariff and “emission limits” are “unreasonable practices” or a violation of the common-carrier obligation until FRA has addressed the matters set forth herein and by AECC, WCTL, and other shipper parties, and (3) following a determination by FRA, determine whether BNSF’s “emission limits” and the implicit requirement to spray coal before it can be transported on BNSF constitutes an “unreasonable practice.”

Respectfully submitted,

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Certificate of Service

I hereby certify that I have served, this 16th day of March, 2010, a copy of the

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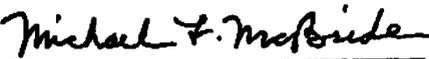
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