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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB FINANCE DOCKET NO. 35305**

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

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**REBUTTAL EVIDENCE AND ARGUMENT OF  
AMEREN ENERGY FUELS AND SERVICES COMPANY**

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June 4, 2010

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**ARKANSAS ELECTRIC COOPERATIVE CORPORATION –  
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**OPENING EVIDENCE AND ARGUMENT OF  
AMEREN ENERGY FUELS AND SERVICES COMPANY**

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Ameren Energy Fuels and Services Company (“AFS”), pursuant to the decisions of the Surface Transportation Board (“Board” or “STB”) served on December 1, 2009 and May 11, 2010 in the above-captioned docket, hereby files its Rebuttal Evidence and Argument.

**I. BACKGROUND**

In its Opening Evidence, AFS raised a number of concerns about certain new coal dust rules of the BNSF Railway Company (“BNSF”), currently found at items 100 and 101 of tariff BNSF-6041-B. In particular, AFS addressed questions about the evidence available supporting the tariff, BNSF’s current dust monitoring, and the proposed implementation of the tariff. AFS also stated that, if the BNSF action is found reasonable by the Board, then the most efficient and logical solution would be for BNSF to implement the coal dust remediation; and any costs incurred by BNSF should be offset by the reduced maintenance needed or included in transportation rates. Importantly, AFS also stated that if BNSF is permitted to impose its tariff or otherwise require shippers to undertake these actions and incur these costs, a safe harbor must be created to protect shippers from liability.

With this Rebuttal Evidence and Argument, AFS provides a response to additional statements made by BNSF and the Union Pacific Railroad Company (“UP”) in their Reply Evidence and Argument filed on April 30, 2010 in this proceeding.

## **II. REBUTTAL**

### **A. BNSF And UP Have Incorrectly Characterized AFS’s Opening Evidence**

In its Reply Evidence, BNSF incorrectly stated that AFS asserted in its opening evidence that BNSF should pay the full cost of any expenses associated with coal dust remediation. BNSF Reply at 28. In truth, AFS stated that, if surfactant application is the proper way to address coal dust, then “the easiest solution would be for BNSF to apply the product to every train in a uniform manner. Costs incurred by BNSF in application should be offset by reduced maintenance costs due to a decrease in ballast fouling, or included in transportation rates.” AFS Opening at 10.

Meanwhile, UP claimed in its Reply Evidence that AFS “raises the possibility” that the May 2005 derailments were due to deferred maintenance and/or defective track design. UP Reply at 15. While AFS mentioned the 2005 derailments in its Opening Evidence, it did not discuss or speculate about the cause of the derailments. AFS Opening at 2-3.

UP also asserted that AFS “suggest[ed]” BNSF’s coal dust tariff is unnecessary because railroads have transported coal in open-top cars for more than 100 years. UP Reply at 16 (n. 12). This is a gross oversimplification of the AFS position. AFS stated that “[c]oal has been shipped in coal cars whose design has been approved by the Association of American Railroads (“AAR”) for over 100 years. The method of loading these cars has been prescribed by AAR open-top

loading rules.” Hence, UP’s characterization of AFS’s position completely omits the real focus – the fact that coal car design and loading has been prescribed by the AAR.<sup>1</sup>

**B. If The Board Finds The BNSF Coal Dust Tariff Reasonable, Then The Most Efficient And Logical Approach Is For BNSF To Implement The Solution**

As stated by AFS in its Opening Evidence and notwithstanding the mischaracterizations in the Reply filings, AFS believes that BNSF should implement the coal dust remediation if the Board finds the BNSF coal dust actions to be reasonable. AFS Opening at 9-10. Any costs incurred by BNSF in implementing the remediation should be included in transportation rates or offset by reductions in the allegedly “extraordinary” maintenance required by fouled ballast. AFS Opening at 9. See also BNSF Opening at 13 (asserting “extraordinary” maintenance is required due to coal dust).

Having BNSF implement the coal dust remediation for the transportation is, by far, the best approach for several reasons. First, BNSF has voluminous information on the coal dust issue. In its filings in this proceeding, BNSF says it has analyzed the coal dust issue and its effect on ballast in great detail for many years. BNSF has studied application of surfactants on coal trains since at least 2005. BNSF Opening at 15; Opening V.S. VanHook at 22. BNSF is currently conducting a “large scale trial of dust suppression alternatives.” BNSF Opening at 15. BNSF has also provided extensive evidence in support of its claim that it knows how and why coal dust is a problem for railbed integrity.

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<sup>1</sup> In a third way, UP also misconstrued AFS’s Opening Evidence. UP claimed AFS wants the Board to “dictate” that railroads cannot set their rates to recover costs associated with coal dust. UP Reply at 21-22. AFS never stated that the railroads should be prohibited from recovering their costs via rates. In fact, nearly the opposite is true - AFS stated its concern that the coal dust issue might be a way to separately charge for certain maintenance costs rather than including them in the overall transportation rate. AFS Opening at 8-9.

Second, BNSF is the best party to implement a coal dust remediation because BNSF is the operator of the affected trains. BNSF interacts, in-person, with the PRB coal mines on a daily basis, coordinating train operations and coal loading times. BNSF has employees on site with the trains at all times, unlike the shippers whose employees are hundreds if not thousands of miles away.

Third, a uniform BNSF-implemented solution would be the simplest and most efficient way to address coal dust because the alternative would border on chaos – numerous individual shippers being forced to separately arrange with over a dozen mines regarding potentially varying surfactant application and equipment. It would be inefficient and a logistical nightmare.

Despite these compelling reasons, BNSF disagrees that it should implement the coal dust remediation if the Board finds the tariff reasonable. In particular, BNSF claims that “[t]he far more efficient alternative is to let the shippers decide how they want to comply with the coal dust emission standards and make their own arrangements with suppliers of the necessary services and materials.” BNSF Reply at 5. As described above, it strains credulity to suggest it would be “more efficient” for each shipper to make its “own arrangements.”

In support of its rejection of the simple and efficient approach, BNSF also claims: (1) the coal mines are the agents of the shippers; (2) BNSF does not have the right or the ability to establish the necessary infrastructure at the coal mines; (3) BNSF would have to use mainline track capacity to add the surfactant; (4) BNSF should not choose chemicals due to possible impact on utility operations; and (5) giving shippers the control leads to innovation and cost-effective approaches.

These concerns are illusory and misplaced. As AFS stated in its Opening Evidence, a uniform solution is the best response to any coal dust issue in rail transportation. AFS Opening

at 9-10. BNSF has voluminous data on coal dust, and BNSF knows how and where coal dust is problematic. BNSF operates the trains and already has employees on site, while the shippers' employees are hundreds or thousands of miles away. As for BNSF's specific numbered concerns above:

(1) Whether or not the mines are agents is irrelevant (and they are not agents of AFS); BNSF works much more closely with mines on a daily basis than the shippers do.

(2) BNSF can enter into an agreement with the coal mines for application of the surfactant just as easily as the shippers can (and perhaps more easily because there would only be one agreement per mine rather one for each customer of the mine). In fact, BNSF is already coordinating the application of surfactant to numerous trains. See BNSF Opening at 15; Opening V.S. VanHook at 22; Opening V.S. Emmitt at 13. See also attached Highly Confidential Exhibits 1-6 (documents produced by BNSF in discovery). BNSF has also noted that Norfolk Southern "works with participating mines to improve dust reduction through use of surfactants." BNSF Reply at 8.

(3) Alternatively, BNSF can build a surfactant application area on its track, as other railroads have done, and recover construction costs through its rates.

(4) AFS has not encountered and is not aware of any utility operation issues resulting from the "large scale trial" currently organized by BNSF. (5) BNSF's claims of cost-effectiveness are backwards. It would not be cost-effective (in fact, it would be manifestly inefficient) for numerous shippers to each individually select a different surfactant, individually arrange with the mine owner, and individually construct surfactant application equipment at the mines.

**C. At The Very Least, The Board Should Require BNSF To Provide A Safe Harbor For Shippers**

As AFS stated in its Opening Evidence, there is a need for a safe harbor of approved methods and products if the coal dust tariff is found reasonable and shippers are required to implement the solution. AFS Opening at 10. Without a safe harbor, shippers could spend millions of dollars, be forced to effectively indemnify BNSF under the terms of the tariff<sup>2</sup>, and might still be found to have failed BNSF's IDV.2 standard. It is manifestly unreasonable for BNSF to force compliance and liability on shippers when it would be much simpler for BNSF to implement the solution or, at least, provide a safe harbor.

**D. BNSF Should Be Required To Provide Each Shipper With Data From The Shipper's Trains**

AFS previously stated that BNSF's use of the Tracksides Monitors to evaluate trains has been problematic because shippers only receive notification of trains that allegedly fail the IDV.2 standard. AFS Opening at 6. BNSF has not provided the measurement results for all trains of a shipper that pass the Tracksides Monitors. AFS also noted some curious coincidences regarding trains in service to the operating companies of Ameren Corporation. AFS Opening at 6-7.

In its Reply Evidence, BNSF did not provide any response to AFS's concerns about the transparency of the Tracksides Monitoring results. BNSF did, however, supply additional information about the curious coincidences surrounding certain trains serving operating companies of Ameren Corporation. The new information provided by BNSF exemplifies the need for all results of Tracksides Monitoring to be sent promptly to the relevant shippers, not just results where the IDV.2 standard is exceeded. Without timely access to all of its data, a shipper

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<sup>2</sup> Though the terms of the tariff are vague, it appears to make shippers responsible for any "adverse impact" on employees, property, locomotives, or railcars of BNSF resulting from shippers' attempt to comply with BNSF's IDV.2 standard.

will not be able to perform any evaluations on its trains or make fully informed conclusions or comments about the performance of its trains.

### III. CONCLUSION

For all the reasons described herein and in AFS's Opening Evidence, AFS respectfully requests that the Board find BNSF's coal dust tariff unreasonable or alternatively, if the Board permits BNSF to shift this burden to the shippers, then BNSF must provide a safe harbor from shippers implementing the tariff.

Respectfully submitted,



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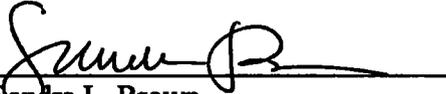
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June 4, 2010

**CERTIFICATE OF SERVICE**

I hereby certify that on this 4th day of June 2010, a copy of the foregoing was served via first-class mail, postage prepaid, on all parties of record and that an electronic copy was provided to BNSF's counsel and most other parties of record.

  
Sandra L. Brown

**EXHIBITS 1-6**  
**REDACTED**