

DEC 20 2011

Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

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REASONABLENESS OF BNSF RAILWAY
COMPANY COAL DUST MITIGATION
TARIFF PROVISIONS

)
)
) Finance Docket No. 35557
)

ARKANSAS ELECTRIC COOPERATIVE
CORPORATION – PETITION FOR
DECLARATORY ORDER

)
)
) Finance Docket No. 35305
)

**MOTION FOR ISSUANCE OF A PROTECTIVE ORDER AND
MODIFICATION OF PROTECTIVE ORDER**

Petitioner the Western Coal Traffic League (“WCTL”) and BNSF Railway Company (“BNSF”) file this Motion for Issuance of a Protective Order and Modification of Protective Order. In support hereof, WCTL and BNSF state as follows:

1. In its decision served November 22, 2011 (“*November 22 Decision*”), the Board instituted a new declaratory order proceeding (Finance Docket No. 35557). As part of its *Decision*, the Board invited parties to address the possible extension of the protective order issued in Finance Docket No. 35305 to the new proceeding in Finance Docket No. 35557, to allow confidential or highly confidential materials produced or used in Finance Docket No. 35305 to be used in Finance Docket No. 35557.

2. WCTL and BNSF have engaged in discussions concerning protective order matters and request that the Board adopt the proposed protective order set forth in Attachment 1 in Finance Docket No. 35557. The proposed protective order is

identical (except for the different Finance Docket No. references in the undertakings) to the protective order adopted by the Board in Finance Docket No. 35305 (STB served Dec. 1, 2009).

3. WCTL believes that because of the close similarity of issues and facts involved in Finance Docket No. 35305 and Finance Docket No. 35557, both of which were instituted to address BNSF coal dust emission standards under BNSF's Coal Dust Tariff¹ and BNSF's Revised Coal Dust Tariff,² and both involving WCTL and BNSF (and other parties), there is a demonstrable and essential need for the parties to evaluate and use the confidential and highly confidential discovery materials produced and pleadings submitted in STB Finance Docket No. 35305 for the purpose of preparing evidence for use in Finance Docket No. 35557 that are currently not available for use in the new proceeding absent amendment and modification of the protective order. In order to assist and facilitate the exchange of discovery and the building of the evidentiary record in Finance Docket No. 35557 – as well as the Board's evaluation of the evidence and argument – WCTL requests that the Board amend and modify the protective order of STB Finance Docket No. 35305 to permit any discovery produced or pleadings filed in that docket to be used in the preparation of evidence in Finance Docket No. 35557, and under the same confidentiality designation used in Finance Docket No. 35305.

¹ BNSF Price List 6041-B, Items 100 and 101, issued on April 29, 2009 and on May 27, 2009 (“Coal Dust Tariff”).

² BNSF Price List 6041-B Item 100, issued on July 20, 2011 (“Revised Coal Dust Tariff”).

4. BNSF agrees that there is some factual overlap between STB Finance Docket No. 35305 and Finance Docket No. 35557, but it does not agree that there is a close similarity of issues and facts involved in the two proceedings or that there is a demonstrable need for the parties to evaluate and use confidential or highly confidential materials produced or used in STB Finance Docket No. 35305 in Finance Docket No. 35557. However, BNSF wishes to advance the new proceeding as quickly as possible and it does not wish to delay the proceeding with discovery disputes relating to discovery materials that have already been produced in Finance Docket No. 35305. Therefore, while BNSF does not concede that any prior discovery materials produced or used in Finance Docket No. 35305 will lead to the development of relevant evidence in Finance Docket No. 35557, BNSF does not object to WCTL's request to extend the protective order in Finance Docket No. 35305 to permit the use of discovery materials produced in that proceeding and pleadings filed in that proceeding for purposes of preparing evidence for use in Finance Docket No. 35557.³

WHEREFORE, for the reasons set forth above, WCTL and BNSF jointly request that the Board issue an order adopting the protective order set forth in Attachment 1. WCTL also requests, and BNSF does not object to the Board amending and modifying the protective order of STB Finance Docket No. 35305 to permit any discovery materials produced and pleadings filed in that docket to be used in preparing

³ The parties each reserve the right to challenge the relevance of the evidence derived from discovery produced or pleadings filed in Finance Docket No. 35305.

evidence for use in Finance Docket No. 35557, and under the same confidentiality designation.

Respectfully submitted,

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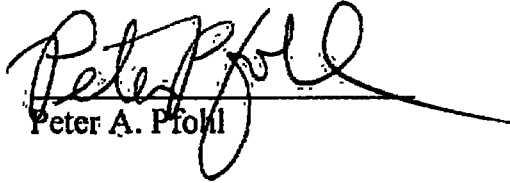
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Dated: December 20, 2011

CERTIFICATE OF SERVICE

I hereby certify that this 20th day of December, 2011, I have caused the forgoing Motion to be served by first-class mail, or by more expedited means, on all parties of record in Finance Docket No. 35303 and in Finance Docket No. 35557.


Peter A. Pfohl

PROTECTIVE ORDER

1. Any party producing information, data, documents, or other material (hereinafter collectively referred to as "material") in discovery to another party to this proceeding, or submitting material in pleadings, that the party in good faith believes reflects proprietary or confidential information, may designate and stamp such material as "CONFIDENTIAL," and such material must be treated as confidential. Such material, any copies, and any data or notes derived therefrom:

(a) Shall be used solely for the purpose of this proceeding and any judicial review proceeding arising herefrom, and not for any other business, commercial, or competitive purpose.

(b) May be disclosed only to employees, counsel, or agents of the party requesting such material who have a need to know, handle, or review the material for purposes of this proceeding and any judicial review proceeding arising herefrom, and only where such employee, counsel, or agent has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Confidential Material prior to receiving access to such materials.

(c) Must be destroyed by the requesting party, its employees, counsel, and agents, at the completion of this proceeding and any judicial review proceeding arising herefrom. However, counsel for a party is permitted to retain file copies of all pleadings filed with the Board which they were authorized to review under this Protective Order, including Paragraph 10.

(d) If contained in any pleading filed with the Board shall, in order to be kept confidential, be filed only in pleadings submitted in a package clearly marked on the outside "Confidential Materials Subject to Protective Order." See 49 CFR 1104.14.

2. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, may in good faith designate and stamp particular material, such as material containing shipper-specific rate or cost data or other competitively sensitive information, as "HIGHLY CONFIDENTIAL." If any party wishes to challenge such designation, the party may bring such matter to the attention of the Board. Material that is so designated may be disclosed only to outside counsel or outside consultants of the party requesting such materials who have a need to know, handle, or review the materials for purposes of this proceeding and any judicial review proceeding arising herefrom, provided that such outside counsel or outside consultants have been given and have read a copy of this Protective Order, agree to be bound by its terms, and execute the attached Undertaking for Highly Confidential Material prior to receiving access to such materials. Material designated as "HIGHLY CONFIDENTIAL" and produced in discovery under this provision shall be subject to all of the other provisions of this Protective Order, including without limitation paragraph 1.

3. In the event that a party produces material which should have been designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" and inadvertently fails to designate the material as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL," the producing party may notify the other party in writing within 5 days of discovery of its inadvertent failure to make the confidentiality designation. The party who received the material without the confidentiality designation will return the non-designated portion (including any and all copies) or destroy it, as directed by the producing party, or take such other steps as the parties agree to in writing. The producing party will promptly furnish the receiving party with properly designated material.

4. In the event that a party inadvertently produces material that is protected by the attorney client privilege, work product doctrine, or any other privilege, the producing party may make a written request within a reasonable time after the producing party discovers the inadvertent disclosure that the other party return the inadvertently produced privileged document. The party who received the inadvertently produced document will either return the document to the producing party or destroy the document immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the document, the receiving party is not conceding that the document is privileged and is not waiving its right to later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege.

5. If any party intends to use "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material at hearings in this proceeding, or in any judicial review proceeding arising herefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material to the Board, or the court, as appropriate, with a written request that the Board or the court: (a) restrict attendance at the hearings during discussion of such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material; and (b) restrict access to the portion of the record or briefs reflecting discussion of such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material in accordance with the terms of this Protective Order.

6. If any party intends to use "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material in the course of any deposition in this proceeding, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent, and all other counsel attending the deposition, and all portions of the deposition at which any such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material is used shall be restricted to persons who may review the material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material shall be kept under seal and treated as "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material in accordance with the terms of this Protective Order.

7. To the extent that material reflecting the shipper-specific data or other proprietary information is produced by a party in this or any related proceedings and is held and used by the receiving person in compliance with this Protective Order, such production, disclosure, and use of the material and of the data that the material contains will be deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. 11904.

8. Except for this proceeding, the parties agree that if a party is required by law or order of a governmental or judicial body to release "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" material produced by the other party or copies or notes thereof as to which it obtained access pursuant to this Protective Order, the party so required shall notify the producing party in writing within 3 working days of the determination that the "CONFIDENTIAL" material, "HIGHLY CONFIDENTIAL" material, or copies or notes are to be released, or within 3 working days prior to such release, whichever is soonest, to permit the producing party the opportunity to contest the release.

9. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it shall not be subject to this Protective Order even if the same information is produced and designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in this proceeding.

10. Each party has a right to view its own data, information and documentation (i.e., information originally generated or compiled by or for that party), even if that data, information and documentation has been designated as "HIGHLY CONFIDENTIAL" by a producing party, without securing prior permission from the producing party. If a party (the "filing party") files and serves upon another party (the "reviewing party") a pleading or evidence containing the filing party's "HIGHLY CONFIDENTIAL" material, the filing party shall also prepare and serve contemporaneously upon the reviewing party a "CONFIDENTIAL" version of the pleading or evidence from which the filing party's "HIGHLY CONFIDENTIAL" material has been redacted. The "CONFIDENTIAL" version may be provided in hardcopy or electronic format at the option of the filing party, and may be disclosed to those personnel employed by the reviewing party who have read a copy of this Protective Order and executed the attached Undertaking for Confidential Material ("In-house Personnel"). In lieu of preparing a "CONFIDENTIAL" version, the filing party may (simultaneously with the party's submission to the Board of its "HIGHLY CONFIDENTIAL" version) make available to outside counsel for any other party a list of all "HIGHLY CONFIDENTIAL" information that must be redacted from its "HIGHLY CONFIDENTIAL" version prior to review by in-house personnel, and outside counsel for any other party must then redact that material from the "HIGHLY CONFIDENTIAL" version before permitting any clients to review the submission.

11. Any party filing with the Board a "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" pleading in this proceeding should simultaneously file a public version of the pleading.

UNDERTAKING

CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on December __, 2011, governing the production of confidential documents in STB Finance Docket No. 35557, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than the preparation and presentation of evidence and argument in STB Finance Docket No. 35557 or any judicial review proceeding arising herefrom. I further agree not to disclose any data or information obtained under this Protective Order to any person who has not executed an Undertaking in the form hereof. At the conclusion of this proceeding and any judicial review proceeding arising herefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel may retain file copies of pleadings filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Signed: _____

Print: _____

Affiliation: _____

Dated: _____

UNDERTAKING

HIGHLY CONFIDENTIAL MATERIAL

As outside [counsel] [consultant] for _____, for which I am acting in this proceeding, I have read the Protective Order served on December __, 2011, governing the production of confidential documents in STB Finance Docket No. 35557, understand the same, and agree to be bound by its terms. I further agree not to disclose any data, information or material designated "HIGHLY CONFIDENTIAL" to any person or entity who: (i) is not eligible for access to "HIGHLY CONFIDENTIAL" material under the terms of the Protective Order, or (ii) has not executed a "HIGHLY CONFIDENTIAL" undertaking in the form hereof. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated "HIGHLY CONFIDENTIAL," that I will limit my use of those documents and the information they contain to this proceeding and any judicial review proceeding arising herefrom, that I will take all necessary steps to assure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners, and that at the conclusion of this proceeding and any judicial review proceeding arising herefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel may retain file copies of pleadings filed with the Board. I further understand that I must destroy all notes or other documents containing such highly confidential information in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated "HIGHLY CONFIDENTIAL" by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

OUTSIDE [COUNSEL] [CONSULTANT]

Print: _____

Affiliation: _____

Dated: _____