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BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
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April 18, 2012
Part of
Public Record

DOCKET FD 35557

REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS

DOCKET FD 35305

PETITION OF ARKANSAS ELECTRIC COOPERATIVE CORPORATION
FOR A DECLARATORY ORDER

UNOPPOSED MOTION OF ARKANSAS ELECTRIC COOPERATIVE CORPORATION
TO MODIFY PROTECTIVE ORDER TO PERMIT USE IN FD 35557 OF
DOCUMENTS PRODUCED BY BNSF RAILWAY COMPANY IN FD 35305

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Dated: April 18, 2012

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GRANTED

Office of
Proceedings

DECISION ID NO.: 42352

DECIDED DATE: 4/23/12

SERVICE DATE: 4-23-12

APPROVED: *Rachael Campbell*
Director



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET FD 35557

**REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS**

DOCKET FD 35305

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

**UNOPPOSED MOTION OF ARKANSAS ELECTRIC COOPERATIVE CORPORATION
TO MODIFY PROTECTIVE ORDER TO PERMIT USE IN FD 35557 OF
DOCUMENTS PRODUCED BY BNSF RAILWAY COMPANY IN FD 35305**

Arkansas Electric Cooperative Corporation ("AECC") moves to amend the Protective Order to allow AECC to use BNSF Confidential and Highly Confidential documents produced in FD 35305 in preparing evidence in FD 35557. BNSF Railway Company ("BNSF"), through their counsel, has indicated that BNSF does not oppose this motion.

This Motion is sought in order to resolve a dispute regarding BNSF's responses to AECC's discovery requests in FD 35557. See Decision served in that docket

on March 5, 2012 ("March 5 Decision"). See, also, Arkansas Electric Cooperative Corporation's Motion To Compel Discovery From BNSF Railway Corporation (filed Feb. 13, 2012) ("AECC Motion To Compel"), and BNSF Railway Company's Reply To

Motion To Compel Discovery By Arkansas Electric Cooperative Corporation (filed Feb. 23, 2012) ("BNSF Reply").

Background

Generally, AECC's discovery requests asked for documents covering the period from January 1, 2005 to the Close of Discovery. BNSF, however, objected "to producing materials generated before November 1, 2009 that were produced to AECC and other parties in *Coal Dust I* [FD 35305]". BNSF Reply at 14. In the March 5 Decision, the Board said:

As a preliminary matter, the Board believes that AECC already has much of the material responsive to its requests. AECC was a party to Coal Dust I and made extensive discovery requests to BNSF. The Board's decision here will not prevent AECC from using the discovery materials it obtained from BNSF in Coal Dust I. While AECC argues that the Board ruled previously that confidential documents from the prior proceeding cannot be routinely used in this proceeding [citation omitted], the Board extended the protective order from the prior proceeding to this proceeding for materials previously produced by BNSF [citing the Board's Decision in this docket served January 13, 2012, at 2]. AECC therefore has access to all the documents that BNSF produced in the prior proceeding and may seek to demonstrate any particular document's relevance to the reasonableness of the safe harbor provision. [at 2]

In the January 13, 2012 Decision referred to in the above-quoted passage, the Board said:

The Board . . . will not grant a blanket extension of the protective order in Docket No. FD 35305.

* * *

Should parties wish to use confidential or highly confidential materials filed by other parties in Docket No. FD 35305, they must

first seek the Board's approval to extend the prior protective order to those parties.

With respect to this and other discovery disputes, the Board's March 5 Decision "suggest[ed] that AECC negotiate with BNSF to resolve this discovery matter", and said that the Board would "consider a motion by AECC to compel BNSF's response to a more tailored set of discovery requests, if necessary." March 5 Decision at 3.

Discussion

As suggested by the Board, counsel for AECC and BNSF have negotiated and resolved all outstanding discovery disputes, subject only to the entry of a Board order allowing AECC to use BNSF Confidential and Highly Confidential documents produced in FD 35305 in preparing evidence in FD 35557.

Accordingly, in order to resolve the discovery dispute regarding AECC's requests for the pre-November 2009 documents and BNSF's objections thereto, AECC is asking the Board to allow AECC to use BNSF Confidential and Highly Confidential documents produced in FD 35305 in preparing evidence in FD 35557, notwithstanding that the Protective Order in FD 35305 allowed such documents to be used "solely for the purpose of this proceeding [FD 35305] and judicial review proceeding arising therefrom". AECC believes that the relief it is requesting is consistent with the March 5, decision.

In making this Motion, AECC is mindful that the scope of FD 35557 is not the same as the scope of Docket FD 35305. Not all documents that were relevant to the issues in FD 35305 are relevant to the issues in FD 35557, and vice versa. However, AECC believes that there are substantial overlaps in the issues in the two cases, and that

this Motion represents a reasonable compromise to provide AECC with documents that relate to the issues in FD 35557, while not unduly burdening BNSF.

AECC is authorized to state that BNSF does not oppose this request, while preserving its relevance objections to such materials. 1/

Respectfully submitted,

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1/ It may not be necessary for the Board to enter orders in both FD 35557 and FD 35305 to grant the relief requested in this Motion. The relief requested involves the use by AECC in FD 35557 of certain BNSF documents, which AECC had requested in discovery filed in FD 35557. Because BNSF objected to producing in FD 35557 documents that it had already produced in FD 35305, AECC is seeking the right to use in FD 35557 the previously-produced BNSF documents, and BNSF does not oppose AECC doing so. The only parties directly involved in this issue are AECC and BNSF, both of which are parties to FD 35557. However, in response to AECC's request for BNSF's consent or non-opposition to this Motion, BNSF stated that it believes that the Motion must be filed in FD 35305 as well as in FD 35557. BNSF stated that the integrity of a protective order in a particular case is important to BNSF, and that the protective order in FD 35305 is clear that the documents produced subject to the protective order may not be used outside of that proceeding. BNSF takes the position that the protective order in that proceeding must be modified to achieve what AECC is seeking, and that this can be done by filing the Motion in both cases. Accordingly, AECC is filing this Motion in both dockets to satisfy BNSF's concerns.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April 2012, I caused a copy of the foregoing to be served electronically on all parties of record on the service lists in FD 35305 and FD 35557.


Eric Von Salzen