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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35305

**ARKANSAS ELECTRIC POWER COOPERATIVE CORPORATION -
PETITION FOR A DECLARATORY ORDER**

Office of the
ENTERTAINMENT
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Part of
Public Record

OPENING STATEMENT OF TUCO INC.

Pursuant to the procedural schedule issued in this proceeding on December 1, 2009, TUCO INC. ("TUCO") hereby submits its Opening Statement.

I. IDENTITY AND INTEREST OF TUCO

TUCO is a Texas corporation located in Amarillo, Texas which is wholly owned by NexGen Resources, a privately-held company headquartered in Denver, Colorado. NexGen Resources is dedicated to the development and procurement of energy and natural resources. Since 1979, TUCO has procured and administered the rail transportation and fuel supply arrangements for Xcel Energy's Tolk and Harrington Generating Stations, two approximately 1000MW coal-fired power plants located near Muleshoe and Amarillo, Texas, respectively. Together, these plants annually burn approximately nine (9) million tons of coal from the Powder River Basin in Wyoming ("PRB"), which is presently transported by BNSF Railway from the PRB to Texas pursuant to two long term rail transportation contracts. The transportation of TUCO's coal takes place under operating conditions virtually identical to nearly every other PRB coal shipper. For example, consistent with current industry practices TUCO is required by BNSF to supply it, free of charge, hundreds of open top gondola rail cars for such

transportation. Although TUCO's contracts do not contain a "coal dust mitigation standard," to the extent BNSF and UP adopt such standards that they intend to apply to all coal shippers, TUCO will be affected by such standards when its contracts expire in the near future.

II. OPENING STATEMENT OF TUCO

In this proceeding, Arkansas Electric Cooperative Corporation ("AECC") has sought an order from the Board declaring that a coal dust emission standard recently inserted by BNSF into Items 100 and 101 of its "BNSF Price List 6041-B" is an unreasonable practice under 49 U.S.C. §10702 and an unlawful refusal to provide service in violation of BNSF's common carrier obligations. Petition for Declaratory Order at 1. The provision at issue contains standards BNSF proposes to impose on its coal shipper customers purportedly designed to reduce the amount of coal and coal dust that is lost from their coal cars in transit. The challenged standard, and the issues surrounding it, are not new. BNSF first announced its intentions to impose a "coal dust standard" on its customers in September of 2006, not long after fouled ballast underlying the PRB Joint Line track operated and maintained by BNSF caused two train derailments, which triggered significant service disruptions in the PRB and beyond.

BNSF has denied AECC's allegations that the emission standard is an unlawful practice, and in doing so has stated that "the whole purpose of coal dust mitigation is to ensure the safety and efficiency of coal transportation, an objective that is in the public interest and in the interests of railroads and shippers alike." BNSF's Reply to Petition for Declaratory Order at 1 ("Reply"). While TUCO does not dispute that coal dust from loaded railcars, if not removed from rail ballast through proper periodic track

maintenance, could eventually lead to unsafe transportation conditions, TUCO disagrees that “the whole purpose” of the standards set forth in Items 100 and 101 is to ensure safe and efficient transportation, and that what BNSF proposes makes sense from a public policy standpoint. Rather, what is not addressed by BNSF in its Reply are (1) the fact that for nearly 200 years coal dust from loaded open railcars has fallen on railroad tracks and ballast and the potential unsafe effects of such deposits have been prevented by regular maintenance paid for by shippers through their rail rates; and (2) the huge economic windfall to BNSF and other coal hauling railroads of fundamentally changing the established allocation of costs and responsibilities between railroads and shippers through “emission standards” such as the one BNSF has proposed.¹

Since the commencement of its role for Xcel Energy’s predecessor Southwestern Public Service Company in 1979, TUCO has purchased and shipped approximately 270 million tons of PRB coal to the Tolk and Harrington stations. As stated above, TUCO is a typical PRB coal shipper in that it is required by BNSF to supply unit trains of open top, gondola railcars to BNSF as a prerequisite for receiving coal transportation service. Open top gondola railcars enable mines, railroads, and utilities to maximize the efficiency of the overall logistics chain, which in part maximizes the revenues of the hauling railroad by enabling it to deliver large volumes of coal in cycled, unit train service. Given the large volumes of coal that are shipped to the Tolk and Harrington Plants annually, and the distance of those plants from the PRB coal mines supplying the coal they burn, TUCO has acquired and must maintain a fleet of over one thousand three hundred (1300)

¹ TUCO is not addressing in this Opening Statement the numerous questions surrounding the science and engineering studies BNSF represents support its standard, which TUCO understands other parties to this proceeding may be addressing.

open top railcars at a considerable cost to TUCO. Moreover, TUCO must fill its railcars to full capacity in order to meet contractual minimum tender requirements imposed on it by BNSF, or suffer monetary penalties. For rail service from BNSF TUCO has paid rail rates that TUCO presumes include all TUCO's share of BNSF's costs of providing service to Tolk and Harrington, including all costs of maintaining the ballast underlying the portion of BNSF's system used for this service. This is because TUCO presumes BNSF would not charge rates that did not recoup all of its costs of providing service, and because TUCO has never been asked by BNSF to pay an additional surcharge or cost for ballast maintenance. TUCO has seen industry estimates of the costs of complying with BNSF's "coal dust mitigation rules" and its "coal dust emission standards" that range from \$.10 to \$.30 per ton. If so, and assuming nine million tons continue to be shipped to Tolk and Harrington annually, the additional cost for TUCO to comply with the BNSF standards, in the event they eventually apply to TUCO, would be between \$900,000 and \$2,700,000 annually absent a corresponding reduction in TUCO's rail rates.

Coal has been safely and efficiently transported in open top gondola railcars for nearly 200 years in all sorts of weather conditions without the need for coal dust emission standards. Given the long term *status quo* in the rail transportation industry, BNSF should be required to demonstrate in this proceeding why periodic maintenance of the Joint Line and other tracks on BNSF's system should not still be sufficient to mitigate the adverse effects of coal dust deposits BNSF claims. Specifically, BNSF cites as the primary inspiration for its new standard the 2005 Joint Line derailments and the service disruptions that resulted, which BNSF attributes to "weakened track structure caused primarily by a combination of coal dust and heavy flooding." Reply at 4. However,

BNSF should be required to demonstrate that the coal dust accumulation on the Joint Line that led to the 2005 derailments occurred despite the fact that BNSF was performing regular maintenance of the Joint Line commensurate with the amount of traffic moving over the line. Moreover, heavy flooding can do doubt affect ballast in any event, but BNSF's Reply begs the question of whether more frequent maintenance of the Joint Line's ballast would have enabled it to properly drain despite the presence of heavy precipitation and flooding, thereby preserving track integrity.

BNSF also skirts entirely the larger economic and public policy issues presented by its proposed standard. BNSF has given no indication that it intends to bear any of the costs associated with implementing or complying with its proposed standard. From an economic standpoint, putting the onus on rail shippers to control "emissions" of coal from their railcars results in a huge economic windfall to the railroad implementing such standards. First, as stated above, rail rates include the costs associated with maintaining track and ballast used to provide the service, which include the costs of cleaning up coal dust that falls from the fully loaded, open top gondola cars that the railroads require their customers to use as a prerequisite to receiving service. If all coal stays in the railcar (assuming for the sake of argument that the BNSF standard can be met), then absent a reduction in the rate, the railroad will receive revenues to cover a cost it no longer incurs. The disparity is widened further because not only is the shipper still paying the rate that includes a ballast maintenance component, it is now incurring the additional cost of complying with the "emission standard." Finally, the economic benefit to the railroad is expanded further still because less need for track maintenance means that tracks do not have to be taken out of service, which permits the railroad to run more trains over a given

track segment for longer periods of time, thus further increasing railroad productivity and profits. Accordingly, the BNSF standard will require coal shippers to incur significant increased costs, but the benefits of such costs will overwhelmingly inure to BNSF. For these reasons, the Board's review of BNSF's "emission standard" should entail a cost-benefit analysis of maintaining the *status quo* versus the fundamental changes BNSF proposes, and a means to equitably apportion those costs and benefits. BNSF should also be required to demonstrate from a public policy standpoint that the costs associated with its fundamental change of the *status quo* do not exceed the costs of the current means of mitigating ballast fouling. In other words, it makes no sense from a public policy standpoint if the safety and efficiency BNSF claims is the "whole purpose of coal dust mitigation" can be achieved through long established track maintenance practices at a lower cost than the costs of implementing the standards BNSF has proposed.

Respectfully submitted,

TUCO INC.

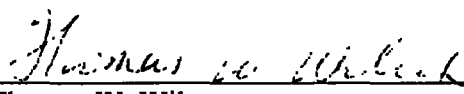
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Dated: March 16, 2010

CERTIFICATE OF SERVICE

I do hereby certify that on March 16, 2010, I have served a true and correct copy of the foregoing Opening Statement of TUCO, Inc., to all Parties of Record on the Service List published by the Board for this proceeding via United States mail, first class postage prepaid.



Thomas W. Wilcox