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The Honorable Cynthia T. Brown
Chief, Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: Reply to “Notice of Workpaper Filing” in EP 766, Joint Petition
for Rulemaking—Annual Revenue Adequacy Determinations

Dear Ms. Brown:

The Western Coal Traffic League (“WCTL”) submits this letter in reply to the “Notice of Workpaper Filing” that the three railroad Petitioners (Union Pacific, Norfolk Southern, and Canadian National) submitted very late yesterday, February 4, 2021, in the above-referenced proceeding.

Petitioners’ “Notice of Workpaper Filing” is both mistitled and not in compliance with the Board’s previous directive because it is largely a notice of all the workpapers that the Petitioners did not file. Petitioners submitted a lengthy (182-page) petition on September 1, 2020, that purported to rest on the analysis of fourteen years of data (2006-2019). The Board directed Petitioners to file their workpapers and to make them available to other parties. Yet, Petitioners filed data for only a single year, 2019. Moreover, even the 2019 data is incomplete. Petitioners have filed only the data that directly supports their calculation, leaving other parties with the ability to do nothing more than effectively confirm the Petitioners’ arithmetic. Petitioners have not provided the additional data, which undoubtedly exists, that would permit alternative calculations using different inputs, *e.g.*, what happens if one considers goodwill along with amortizable inputs, or what happens when firms migrate in and out of the S&P 500. Petitioners also have designed the limited data that they chose to provide as “Highly Confidential,” even though none of that data is proprietary or confidential as to Petitioners themselves. In that regard, it appears that the workpapers rest largely on publicly-available records.

Petitioners state that they have restricted and conditioned their workpapers at the behest of their data providers, Compustat and Duff & Phelps. However, it was Petitioners' choice to utilize data from those providers, and Petitioners should not be allowed to benefit from the consequences of their own decisions by limiting the workpaper information available to responding parties and the Board itself. Petitioners especially should not be allowed to propose a massive change in how the annual revenue adequacy determinations are made without full disclosure of the underlying data.

Furthermore, parties such as WCTL should not be placed in the position of having to prepare comments without full access to all of the relevant data, including associated data that Petitioners chose to exclude because it did not support their position, or alternatively, be compelled to purchase licenses for use of proprietary third-party programs as a condition of access to data that is directly implicated in a public rulemaking proceeding.

WCTL submits that unless Petitioners are ordered to promptly comply with the Board's clear directive and produce all workpapers and data underlying the allegations and calculations in their initial petition, subject to the governing Protective Order, the Board should terminate the referenced proceeding, with prejudice. Petitioners cannot be permitted to benefit from using their superior resources to create an uneven playing field to their advantage.

WCTL is raising these issues at the earliest possible opportunity so that it and other interested parties do not have to waste time and resources reviewing partial data and an incomplete and thus defective filing. For that reason, WCTL asks that the Board act on the matter expeditiously.

Respectfully submitted,

William L. Slover
/s/ Kelvin J. Dowd
Robert D. Rosenberg
Attorneys for the Western Coal
Traffic League

cc: Service List for EP 766