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

Re: EP 766, Joint Petition for Rulemaking—Annual Revenue Adequacy Determinations

Dear Ms. Brown:

I am writing on behalf of Petitioners¹ in response to the letters submitted by a group of shipper organizations,² dated February 9, 2021, and Western Coal Traffic League (“WCTL”), dated February 5, 2021. Both demand the STB terminate this proceeding unless Petitioners violate licensing agreements with Compustat and Duff & Phelps by providing license-protected data from 2006-2018 to unlicensed parties. The Board should deny this request.

First, the unreasonableness of their draconian demands is best illustrated by reviewing the actual proposal and the illustrative data that has already made public. The Petition presents a simple idea. Rather than determining revenue adequacy based only on an accounting calculation of whether a railroad’s return on investment (ROI) exceeded the industry cost of capital, the Petition proposes that the Board place those calculations into context, comparing the financial performance of the railroad industry against non-railroad companies with which railroads compete for capital.

¹ Specifically, Union Pacific Railroad Co., Norfolk Southern Railway Co., and the U.S. rail operating affiliates of Canadian National Railway Company.

² Specifically, the American Chemistry Council, Corn Refiners Association, The Fertilizer Institute, The Chlorine Institute, American Fuel & Petrochemical Manufacturers, and the National Grain and Feed Association (collectively, “Joint Shippers”).

Therefore, the goal of the calculations presented in the Petition was to replicate the Board's methodology to enable an apples-to-apples comparison. Petitioners first calculated the cost of capital using the Board's methodology. This required use of the Duff and Phelps Cost of Capital Navigator—the same source the Board uses for its annual cost of capital calculations.³ Petitioners then used information from S&P 500 companies' financial reports to calculate ROI, on the same basis that STB calculates ROI. For this data, Petitioners used Compustat, a widely-used data tool that gathers financial information from public reports. Compustat is relied upon by multiple agencies including the FCC, Securities and Exchange Commission, and the Federal Reserve.⁴ Indeed, Compustat-based evidence was presented in several ICC revenue adequacy determinations.⁵

In the Petition, Petitioners provided illustrative calculations from 2006 through 2019. Petitioners also provided a detailed explanation of their mathematical calculations as Appendix A to the supporting verified statement, and filed a spreadsheet containing calculations of ROI and cost of capital for every S&P 500 company for every year since 2006.

³ See, e.g., *Railroad Cost of Capital—2019*, at 7-8, Ex Parte 558 (Sub-No. 23) (served Aug. 5, 2020) (noting that Duff and Phelps Cost of Capital Navigator was source of market-risk premium).

⁴ See, e.g., Notice of Proposed Rulemaking, Rule 144 Holding Period and Form 144 Filings, Securities and Exchange Commission, 86 Fed. Reg. 5063, 5082 (Jan. 19, 2021); *In the matter of Represcribing the Authorized Rate of Return for the Interstate Services of Local Exchange Carriers*, 5 F.C.C. Rcd. 892 (Feb. 12, 1990); Maria Tito, Trade in Goods and Services: Measuring Domestic and Export Flows in Buyer-Supplied Data, FEDS Notes, (June 26, 2019), available at <https://www.federalreserve.gov/econres/notes/feds-notes/measuring-domestic-and-export-flows-in-buyer-supplier-data-20190626.htm>.

⁵ See *Adequacy of Railroad Revenue (1980 Determination)*, 364 I.C.C. 311, 331 (1980); *Adequacy of Railroad Revenue (1979 Determination)*, 362 I.C.C. 344, 348 (1979); *Adequacy of Railroad Revenue (1978 Determination)*, 361 I.C.C. 79, 111 (1978).

However, both the Compustat and Duff & Phelps Cost of Capital Navigator are subject to licensing agreements. Compustat and Duff & Phelps are understandably unwilling to release the crown jewels of their data business to any party who walks through the STB doors, even under a protective order. Nonetheless, Petitioners negotiated with each provider to obtain special permission to provide the complete data that underlay Petitioners' calculations for the example year of 2019 to unlicensed parties (so long as they agree to the protective order).

Importantly, Petitioners can provide the licensed data for 2006-2018 to any party who has or secures its own license. If the STB secures such licenses—at an annual expense of less than \$25,000—its staff can explore those datasets in greater depth, and Petitioners can provide workpapers to show the arithmetic for the 2006-2018 calculations. But Petitioners cannot purchase those licenses for the STB without violating the Anti-Deficiency Act.

Second, WCTL and Joint Shippers claim a hardship when none exists. Both WCTL and the bulk of the Joint Shippers fail to mention that *they themselves have submitted expert testimony to the Board relying on Compustat data*.⁶ For example, in Ex Parte 711 (Sub-No. 1), a coalition of shippers including the American Chemistry Council, the American Fuel and Petrochemicals Manufacturers, the Chlorine Institute, and the Fertilizer Institute submitted joint comments on a Notice of Proposed Rulemaking that the Board published on July 27, 2016 in that docket.⁷ The coalition's comments were supported in part by a Verified Statement from Thomas D.

⁶ Objections to use of the Duff and Phelps Cost of Capital Navigator make no sense. According to Duff & Phelps's website, a "pro" subscription allowing access to all available data years from 1999 through 2021 is available for only \$595. See <https://dpcostofcapital.com/uscost-of-capital>. The Board's own cost of capital determinations rely on this Duff and Phelps resource, and WCTL in particular has recently commented on issues involving that Duff & Phelps data. See, e.g., Reply of Western Coal Traffic League, at 4, 8, *Railroad Cost of Capital—2019*, Ex Parte 558 (Sub-No. 23) (filed May 11, 2020).

⁷ See Opening Comments of Shipper Coalition for Railroad Competition, *Reciprocal Switching*, Ex Parte No. 711 (Sub-No. 1) (filed Oct. 26, 2016).

Crowley and Daniel L. Fapp, both prominent economic consultants who regularly represent shippers before the Board. In their Verified Statement, Mr. Crowley and Mr. Fapp relied in part on data from “Compustat” to present an analysis of the relationship between fair market value and book value for certain Class Is.⁸

Mr. Crowley and Mr. Fapp similarly relied on Compustat in work for the Western Coal Traffic League in 2012, when they used Compustat reports to make arguments about Berkshire Hathaway and BNSF.⁹ And Mr. Fapp indicated he reviewed Compustat reports in his solo verified statement supporting the Western Coal Traffic League’s 2013 petition for a rulemaking to change the way in which the Board calculates the cost of capital.¹⁰

In short, the commenters’ own past behavior demonstrates the ubiquity and usefulness of Compustat data, and their own ability to retain experts who possess appropriate licenses. A license to this economic data is as commonplace for consulting firms as a license to Westlaw is for law firms. But WCTL and Joint Shippers do not want the underlying data. They want instead a pretense for dismissal.

Finally, WCTL’s allegation that “even the 2019 data is incomplete” is flatly wrong. WCTL complains that Petitioners did not provide “additional

⁸ See *id.*, Verified Statement of Thomas D. Crowley & Daniel L. Fapp at 20 & Ex. 3.)

⁹ See Joint Comments of Western Coal Traffic League et al., Verified Statement of Thomas D. Crowley & Daniel L. Fapp at 8, *Western Coal Traffic League—Pet. for Declaratory Order*, STB Finance Docket No. 35506 (filed Nov. 8, 2012).

¹⁰ See Petition for Rulemaking, Verified Statement of Daniel L. Fapp at 1 n.2, *Petition of the Western Coal Traffic League to Institute a Rulemaking Proceeding to Abolish Use of the Multi-stage Discounted Cash Flow Model in Determining the Railroad Industry’s Cost of Capital*, Ex Parte 664 (Sub-No. 2) (filed March 4, 2013); see also Reply Statement of Western Coal Traffic League, at 5 & Ex. C at 4, *Railroad Cost of Capital – 2015*, Ex Parte No. 558 (Sub-No. 19) (filed May 11, 2016) (supporting argument with academic paper on stock buybacks that performed analysis using Compustat data).

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data, which undoubtedly exists, that would permit alternative calculations using different inputs” WCTL Reply at 1. The purpose of workpapers is not to provide a pool of data for other parties to make alternative calculations. If WCTL or the Joint Shippers are interested in exploring other changes to the Board’s annual revenue adequacy determinations, they (not Petitioners) must secure the data needed for any alternative calculation (and the license for such data, if one is needed).

In sum, data is not free. In a world with increasingly complicated databases, the compilation and distribution of that information is not without cost. Petitioners have provided the Board and the public with illustrative ROI and cost-of-capital calculations for every company in the S&P 500 for the past 14 years. The Joint Shippers and WCTL are sophisticated trade associations, who routinely retain seasoned economic consultants *with licenses to these very same data sources*. They can easily check our arithmetic. As the STB expands its data-driven inquiries, it is sensible to require stakeholders to engage appropriate experts with access to these comprehensive economic datasets. We urge the STB to accept Petitioners’ submission as sufficient.

Best regards,

/s/ Ray Atkins

Raymond A. Atkins, Ph.D.

cc: Parties of Record for EP 766