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Office of Proceedings
February 11, 2021
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Public Record

February 11, 2021

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

Dear Ms. Brown:

Fairness dictates that the Western Coal Traffic League (“WCTL”) have an opportunity to respond to the latest omissions, distortions, and diversions presented by railroad Petitioners in their letter submitted yesterday, February 10, 2021, in the above-referenced proceeding.

First, Petitioners implicitly confirm that they will not be submitting full workpapers to support their Petition and reply in support thereof, contrary to what the Board directed in its December 30, 2020 decision. That fatal omission alone dictates dismissal of their Petition and discontinuance of the proceeding.

Second, there is no basis for requiring WCTL or the Board to acquire licenses to access the proprietary data that Petitioners have chosen to rely upon. The Board has previously directed the railroads not to rely on such data. *E.g., Railroad Cost of Capital – 2006*, EP 558 (Sub-No. 10) (STB served April 15, 2008), at 7 (“... WCTL complains that AAR has relied on a proprietary data source... This is disconcerting. It now appears that the relevant index ... is not publicly available at all.... We ... reject the AAR’s reliance on a proprietary data source.”). Repeat violations are no less serious.

Third, the fact that the Board may accept use of proprietary data in limited instances does not make Petitioners’ nose of the camel tactic here any more acceptable. The same is at least as true as to Petitioners’ claim that there is no hardship to WCTL

because its consultants have used Compustat data previously. In this instance, WCTL chose, before Petitioners' revealed their data restrictions, to work with a different expert consultant, one without access to such data. Petitioners are in no position to dictate another party's choice of consultant. Petitioners' further assertion that WCTL is acting on "pretense" is outrageous, although illustrative of their blame the victim strategy.

Fourth, Petitioners double down on their strategy in stating that "[t]he purpose of workpapers is not to provide a pool of data for other parties to make alternate calculations." Petitioners seek to put WCTL and other parties in a position where they have to pay to play (which seems to be part of a broader railroad strategy in rulemakings and adjudications). It took WCTL and their consultant several hours to ascertain how Petitioners' calculations for just one company for one year do, and do not, reconcile to that company's 10-K. Petitioners are providing only enough data to check their math for a single year, but not enough to review their logic or selection of certain inputs rather than others. What Petitioners depict as calculations for other years are merely results.

Finally, there is nothing "apples-to-apples" in comparing the returns relative to cost of capital of railroads relative to selected firms, many of which are not so dependent on property, plant, and equipment assets or that have accounting peculiarities. Furthermore, a prior shipper attempt to rely on the cost of capital of a shipper group was rejected precisely because the railroad successfully argued that railroads are different and even unique. *Omaha Public Power Dist. v. Burlington Northern R.R. Co.*, 3 I.C.C.2d 123, 147 (1986) (stating that "railroading is a very unique undertaking, involving enormous capital investments"). Petitioners are not comparing apples and apples, but are instead comparing apples, bananas, beans, grocery stores, cars, software, consulting services, etc., (while excluding banks and real estate companies, and thus not including "every S&P 500 company"). The Petition should not have been entertained in the first place, but it certainly should not be entertained if Petitioners are unwilling or unable to comply with the Board's decision directing workpaper submission, as they plainly are.

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