

Before the Surface Transportation Board

STB Docket No. EP 766

**Joint Petition for Rulemaking—Annual Revenue Adequacy
Determinations**

Reply Comments of Joint Shippers

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Jeffrey O. Moreno
Karyn A. Booth
Jason D. Tutrone
Thompson Hine LLP
1919 M Street, NW Suite 700
Washington, D.C. 20036
(202) 331-8800
Jeff.Moreno@ThompsonHine.com
Karyn.Booth@ThompsonHine.com
Jason.Tutrone@ThompsonHine.com

Counsel for:
American Chemistry Council
Corn Refiners Association
The Fertilizer Institute
The National Industrial Transportation
League

Thomas W. Wilcox
Law Office of Thomas W. Wilcox, LLC
1629 K. Street, NW Suite 300
Washington D.C. 20006
(202) 508-1065
tom@twilcoxlaw.com

Counsel for:
National Grain and Feed Association

Michael McBride
Van Ness Feldman LLP
1050 Thomas Jefferson St., NW
Washington, D.C. 20007
(202) 298-1800
mfm@vnf.com

Counsel for:
The Chlorine Institute

Rob Benedict
Vice President, Petrochemicals and
Midstream
American Fuel & Petrochemical
Manufacturers
1800 M Street NW, Suite 900 North
Washington, DC 20036
(202) 457-0480
RBenedict@afpm.org

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The American Chemistry Council, American Fuel & Petrochemical Manufacturers, Corn Refiners Association, The National Grain and Feed Association, The Chlorine Institute, The Fertilizer Institute, and The National Industrial Transportation League (collectively, “Joint Shippers”) file these comments in reply to the opening comments submitted in response to the Surface Transportation Board’s (“Board” or “STB”) decision served on December 30, 2020, in Docket No. EP 766. That decision sought comments on the September 1, 2020, petition by Joint Carriers¹ seeking a rulemaking to change the Board’s procedures for determining the revenue adequacy of Class I rail carriers (the “Petition”). The Petition involves two proposals: (1) redefining revenue adequacy as occurring when a railroad’s return on investment (“ROI”) exceeds the railroad industry cost of capital (“COC”) by more than the median S&P 500 firm’s ROI exceeded its COC (the “Comparison Proposal”); and (2) using the “flow-through method” for treating deferred taxes in revenue adequacy determinations (the “Deferred Taxes Proposal”).

Joint Carriers and the Association of American Railroads (“AAR”) have filed the only opening comments that support the Comparison Proposal. For the most part, these comments merely recycle the arguments that Joint Carriers have already made in this proceeding, which Joint Shippers have thoroughly addressed in their opening comments.

¹ “Joint Carriers” are Union Pacific Railroad Company, Norfolk Southern Railway Company, and the U.S. rail operating affiliates of Canadian National Railway Company.

However, Joint Carriers’ opening comments also include several statements that actually reinforce Joint Shippers’ criticism of the Comparison Proposal. For example, Joint Shippers explained that comparing railroads to the S&P 500 is inappropriate because railroads compete for capital with *all* other firms, not just those in the S&P 500.² Joint Carriers made a similar observation, stating that “railroads compete for capital with *all* companies—not merely a subset of companies with similar characteristics.”³ Nevertheless, Joint Carriers inexplicably conclude that the S&P 500—an elite subset of all publicly traded firms—is an appropriate comparison group for measuring railroad revenue adequacy.⁴ Further, Joint Carriers state that “in the absence of any better evidence, it is reasonable for the Board to use the Median S&P 500 Differential as an approximate *starting point* for measuring revenue adequacy.”⁵ Joint Shippers have provided evidence showing that Median S&P 500 Differential has no bearing on revenue adequacy because the difference between a firm’s ROI and COC is highly correlated to its industry and

² (Joint Shippers’ Comments 20, May 17, 2021.)

³ (Joint Carriers’ Comments 15, May 17, 2021 (emphasis in original).)

⁴ (Joint Carriers’ Comments 16 (“In sum, the rail industry competes for capital with (at least) *all* publicly-traded [sic] firms, inclusive of the entire S&P 500. . . . Thus, the most appropriate comparison group for measuring revenue adequacy is the S&P 500 Benchmark Group”) (emphasis in original).)

⁵ (Joint Carriers’ Comments 12 (emphasis in original).) Median S&P 500 Differential means the difference between the ROI and COC of the median S&P 500 firm.

structural attributes, among other things, and the constant updating of the S&P 500 makes the Median S&P 500 Differential a measure of superstar performance.⁶

Although Joint Shippers focused their opening comments on the Comparison Proposal, they oppose the Deferred Taxes Proposal for the reasons that Western Coal Traffic League and Seminole Electric Cooperative, Inc. articulated in their opening comments.⁷ The Deferred Taxes Proposal would measure whether railroads are earning a return on deferred taxes equal to their cost of capital even though deferred taxes are effectively an interest-free loan—the railroads hold the deferred taxes at low or no cost. In other words, the Deferred Taxes Proposal would measure whether railroads are earning returns well above their cost of capital, which is unnecessary to attract sufficient capital.

Instead of improving the accuracy of the Board's revenue adequacy determinations, both the Comparison Proposal and Deferred Taxes Proposal would set the revenue-adequacy bar well above what is necessary to attract and retain capital adequate to provide a sound rail transportation system. The Board thus should terminate this proceeding.

⁶ (Joint Shippers' Comments 22-27.)

⁷ (W. Coal Traffic League & Seminole Elec. Coop. Comments pt. F, May 17, 2021.)

Respectfully submitted,

/s/ Jason D. Tutrone

Jeffrey O. Moreno
Karyn A. Booth
Jason D. Tutrone
Thompson Hine LLP
1919 M Street, NW Suite 700
Washington, D.C. 20036
(202) 331-8800
Jeff.Moreno@ThompsonHine.com
Karyn.Booth@ThompsonHine.com
Jason.Tutrone@ThompsonHine.com

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American Chemistry Council
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Michael McBride
Van Ness Feldman LLP
1050 Thomas Jefferson St., NW
Washington, D.C. 20007
(202) 298-1800
mfm@vnf.com

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Rob Benedict
Vice President, Petrochemicals and
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American Fuel & Petrochemical
Manufacturers
1800 M Street NW, Suite 900 North
Washington, DC 20036
(202) 457-0480
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