

Surface Transportation Board
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings
October 6, 2023
Part of
Public Record

Office of Economics

September 26, 2023

Mr. Richard M. Couch
Thompson Hine LLP
1919 M. Street, N.W.
Suite 700
Washington, D.C. 20036-1600

Re: Waybill Request WB23-53 & EP761 & EP755

Dear Mr. Couch:

The Surface Transportation Board (STB or Board) has received your extension request dated September 25, 2023 for permission to extend your access to the confidential Carload Waybill Sample (CCWS) with masked revenues in connection with EP 761, Hearing on Revenue Adequacy and EP 755 Final Offer Rate Review, on behalf of the American Chemistry Council (ACC). This access was originally granted in WB17-44, WB19-48, WB21-71, and WB22-52. You contend that your extension is necessary in order to continue to develop, evaluate, and propose an alternative to SAC in connection with these proceedings. You assert that there may be additional opportunities to present the model to the Board and to refine the model as necessary.

Based on the explanations and justifications contained in your request, your extension is granted for continued access to the data in connection with the above proceedings. ***This approval becomes effective when signed agreements from the individuals listed below are received by the STB:***

- a) *Jeffrey O. Moreno – Thompson Hine*
- b) *Jason D. Tutrone – Thompson Hine*
- c) *Richard M. Couch – Thompson Hine*
- d) *Kevin W. Caves – Infotech Consulting, Inc.*
- e) *Kathryn Kaduck – Econ One Research, Inc.*
- f) *Augustus Urschel – Econ One Research, Inc.*
- g) *Thomas D. Crowley – L.E. Peabody*
- h) *Timothy D. Crowley – L.E. Peabody*
- i) *Daniel L. Fapp – L.E. Peabody*
- j) *Ray H. Thibault – L.E. Peabody*
- k) *Christopher A. Gomez – L.E. Peabody*

The expiration date for this agreement is September 30, 2024. Unless you seek and obtain a renewal from the STB, this agreement upon expiration obligates you to return or destroy all copies of the data (see item 6 of the agreement). Any request for renewal will need to provide

Waybill Agreement WB23-53

a detailed explanation for why continued access to the data is necessary and demonstrate that you are continuing to actively use the data for the originally requested purpose.

Several aspects of the CCWS limit the conclusions that may be drawn from analysis of the CCWS: 1) the CCWS is a sample, and 2) the CCWS is based on terminating shipments from relatively large carriers. Only those railroads with more than 4,500 annual terminating carloads are included in the sample. The limited sampling of small railroads may have a substantial effect on studies covering areas served predominately by non-sampled railroads. For additional information on the CCWS, see *Reference Guide* @ <https://www.stb.gov/reports-data/waybill/> on the Board's website.

The rules for release of waybill data are codified at 49 C.F.R. § 1244.9. The CCWS contains confidential shipper and railroad data. As a result, the CCWS is commercially sensitive and has the potential to cause competitive harm to shippers and railroads if disclosed. Therefore, the following agreement must be signed, and a copy of the signature pages returned to the STB, before any waybill data can be used.

Your signature acknowledges your agreement to comply with the following:

1. You will use the CCWS data released to you solely for purposes of the proceedings identified above. Such purposes include any judicial review arising from the proceedings.
2. Absent permission from the STB, you shall make the information contained in the CCWS (including work product and analyses derived from the CCWS) available only to the individuals identified above. The STB may approve access for additional individuals for purposes of the proceeding. In general, such individuals must be outside counsel in the proceedings, transportation practitioners, and those individuals working with or assisting such counsel or practitioners who are not regular employees of the party represented, who have a need to know, review, or handle the CCWS for purposes of the proceedings, including testifying and consulting experts. Each such additional individual must review and sign this agreement and return a copy of the signature page to the STB.
3. Pleadings and evidence filed with the Board in the proceedings may contain CCWS data (including work product and analyses derived from the CCWS). Unless data in the pleadings and evidence are aggregated to the level of at least three shippers and will prevent the identification of an individual railroad, the pleadings and evidence must be filed with the Board under confidential filing procedures (both in e-filing and paper submissions). Such pleadings and evidence should be appropriately marked to indicate that they contain confidential Waybill data and, if submitted in paper or on physical media, be in a package clearly marked on the outside "Highly Confidential Material: Contains Waybill

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Data.” Such pleadings will not be posted in the publicly available docket. A public version of the pleading and evidence that redacts unaggregated CCWS data should also be filed for posting in the public docket.

4. Pleadings and evidence (and underlying workpapers) containing CCWS data (including work product and analyses derived from the CCWS) may be disclosed only to outside counsel or other independent representatives for other parties to the proceedings who have signed an agreement with the Board that grants them access to the underlying CCWS data.
5. CCWS data may be disclosed to the reviewing court in briefs filed or oral argument made in connection with judicial review arising from the proceedings, but the party making such disclosure must take adequate steps to maintain the confidentiality of the data by filing pleadings under seal and seeking confidential treatment of the data at oral argument (and in any transcripts). Counsel who wish to access CCWS data for purposes of participating in judicial review arising from the proceedings must have signed an agreement with the Board that grants access to the data, and may be added pursuant to paragraph 2 above.
6. Except as provided in paragraph 4 above, you will refer any requests for CCWS data in your possession (including work product and analyses derived from the CCWS) to the STB for processing and will inform the requesting party of such referral to the STB. If you are compelled by law or order of a governmental or judicial body to release CCWS data, you shall notify the Board in writing within three days of any determination that CCWS data must be released, and in no event later than five days before the CCWS data is scheduled to be released.
7. In order to retain access to the CCWS beyond the expiration date specified above, you must submit a written request for an annual extension of the agreement no later than thirty days prior to the expiration date and the renewal request must be approved by the Office of Economics. **If an annual agreement is not signed and approved, you must certify by no later than the expiration date that all CCWS data (including all work product and analyses derived from the CCWS) obtained under this agreement has been destroyed or returned to the STB.** Notwithstanding the foregoing, outside counsel (but not outside consultants or transportation practitioners) for each party may retain file copies of all pleadings and evidence filed with the Board and file copies of all work product. The non-disclosure requirements of this agreement shall continue to apply to such file copies for as long as they are retained.
8. Failure to request an extension (if necessary), or destroy or return CCWS data when required, may prevent any future release of CCWS data to you. Violations of this agreement may subject you to sanctions by the Board.

Waybill Agreement WB23-53

After all parties have signed and returned this agreement the extension is granted.

Sincerely,

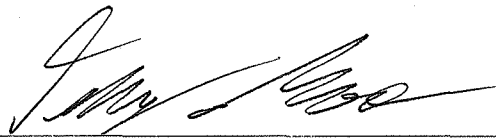
Francis X. O'Connor

Francis O'Connor
Acting Director
Office of Economics

Waybill Agreement WB23-53

I have read and understand the conditions for release of the CCWS data. I agree to comply fully with these conditions and the provisions of this confidentiality agreement. No later than thirty days before the agreement expires, I will request an extension of this agreement, if necessary. If no extension is requested, I will return or destroy all CCWS data and certify that I have done so. I have the authority to sign this agreement.

By: Jeffrey O. Moreno

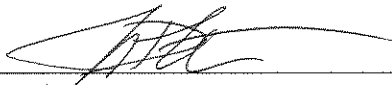
A handwritten signature in black ink, appearing to read "Jeffrey O. Moreno", written over a horizontal line.

Signature

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By: Jason D. Tutrone



Signature

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By: Richard M. Couch



Signature

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By: Kevin W. Caves



Signature

Kevin W. Caves

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By: Kathryn Kaduck



Signature

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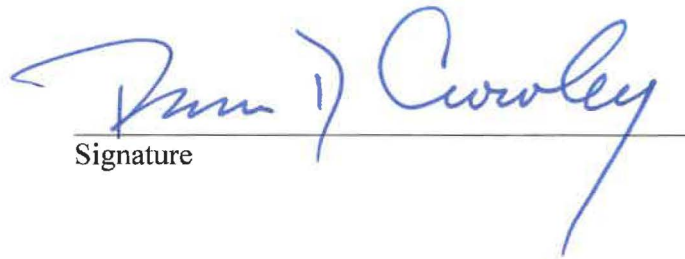
By: Augustus Urschel

Augustus Urschel

Signature

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By: Thomas D. Crowley


Signature

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By: Timothy D. Crowley



Signature

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By: Daniel L. Fapp

A handwritten signature in blue ink, appearing to read "Daniel L. Fapp", is written over a horizontal line. The signature is stylized with a large initial "D" and a long, sweeping underline.

Signature

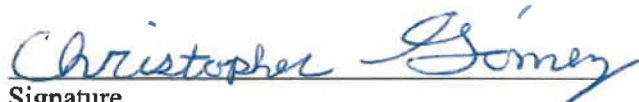
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By: Ray H. Thibault


Signature

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By: Christopher A. Gomez


Signature

September 25, 2023

Francis O'Connor
Deputy Director
Office of Economics
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: WB22-52; Extension Request

Dear Deputy Director O'Connor:

We are seeking an extension up to and including October 4, 2024, of confidential Carload Waybill Sample (CCWS) access granted under WB22-52.

The Office of Economics originally granted this access on April 17, 2018, in response to Waybill Request WB17-44 to allow Thompson Hine LLP, Economists, Inc., and L.E. Peabody & Associates, Inc. (collectively "Requestors")¹ limited access to the CCWS for the purpose of developing, evaluating, and proposing alternatives to the Board's Stand-Alone Cost (SAC) standard.² On September 30, 2019, the Office of Economics: granted in part Waybill Request WB19-48 to allow Requestors to access data provided under WB17-44 for use in connection with Surface Transportation Board proceedings in EP 755 and EP 761; combined WB17-44 and WB19-48; and set the expiration date for WB19-48 to September 30, 2020. On October 8, 2020, the Board granted a request by Requestors to extend access to the CCWS under WB17-44 and WB19-48 in connection with dockets EP 761 (Hearing on Revenue Adequacy) and EP 755 (Final Offer Rate Review). On October 4, 2021, the Board granted another request by Requestors to extend access to the CCWS under WB17-48 and WB19-48 and consolidated these waybill dockets under WB21-71. On October 3, 2022, the Board granted Requestor's extension request for access to the CCWS with masked revenues in connection with EP 761 and EP 755.

The requested extension is necessary to enable Requestors to continue to develop, evaluate, and propose an alternative to SAC. Specifically, Requestors are using the CCWS to develop an econometric model on behalf of the American Chemistry Council (ACC) as part of a rate benchmarking standard that could become an alternative to SAC and that the Board could use to apply the revenue-adequacy constraint under the Interstate Commerce Commission's *Coal Rate*

¹ On September 10, 2018, Requestors submitted new Undertakings for individuals who had relocated from Economists, Inc. to EconOne Research. Therefore, all references to "Requestors" in this letter substitute EconOne for Economists, Inc.

² On March 26, 2019, the Office of Economics extended WB17-44 to April 30, 2020.

Francis O'Connor
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Guidelines decision.³ ACC presented this model in EP 755, and in EP 761 and EP 722, which involve revenue adequacy. Accordingly, ACC's benchmarking model is before the Board in several active proceedings,⁴ and ACC may have more opportunities to present the model to the Board. Without continued access to the CCWS, Requestors will not be able to continue to advocate for use of the model and refine it as necessary.

For the foregoing reasons, Requestors respectfully request an extension of Waybill Agreement WB22-52 to October 4, 2024.

Respectfully,

/s/ Richard M. Couch
Richard M. Couch

³ *Coal Rate Guidelines, Nationwide*, 1 I.C.C. 2d 520 (1985).

⁴ Although the Board issued a final rule in EP 755, the rule is currently under appeal, which could result in reconsideration of aspects of the rule.
