

BEFORE THE
SURFACE TRANSPORTATION BOARD

METHODODOLOGY TO BE EMPLOYED IN DETERMINING THE RAILROAD INDUSTRY'S COST OF CAPITAL	)))))	Ex Parte No. 664
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WESTERN COAL TRAFFIC
REPLY TO AAR PETITION TO REOPEN

WESTERN COAL
TRAFFIC LEAGUE

Of Counsel:

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Dated: December 27, 2007

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Western Coal Traffic League (“WCTL” or the “League”) hereby replies in opposition to the Petition to Reopen (“Petition”) that the Association of American Railroads (“AAR”) filed in the above-captioned proceeding on December 21, 2007.

Good cause does not exist for acceptance of the AAR’s filing. *See, e.g.*, 49 C.F.R. § 1115.3(c) (when “a party seeks an opportunity to introduce evidence, the evidence must not appear to be cumulative,” and “an explanation must be provided why it was not previously adduced”). The AAR’s proffered evidence is cumulative of its earlier submissions. Everything in the filing could have been submitted in the two weeks between the December 4 hearing and the Board’s December 18 decision closing the record, if not before, and the AAR had no sound basis for assuming that what it had to say would be responsive to any further questions that might be forthcoming from the Board. The AAR filing is also factually inadequate and seeks to impugn prior railroad testimony.

First, the claim in the AAR Petition at 1 that WCTL raised the relevance of the prospective market risk premium for the first time at the December 4 hearing is incorrect. WCTL addressed the matter in its October 29, 2007 reply filing, *e.g.*, legal

comments at 5, 12-14, Crowley/Fapp Reply VS at 21-23, and Hodder Reply VS at 6-7. Moreover, WCTL did so in response to railroad contentions concerning the prospective market risk premium introduced by Kansas City Southern, an AAR member, and Dr. Myers himself (VS at 10 n.10) in the September 27, 2007 filings.

Second, WCTL's conversion of the electric utility cost of capital as calculated in various state regulatory decisions to reflect the railroad capital structure was based on the report from Regulatory Research Associates that the AAR submitted. The report stated that the data depicts "the common equity component of the adopted capital structure," making that capital structure the appropriate starting point for converting the cost of equity. Again, the AAR's attempt to impugn the evidence that it previously submitted is inappropriate for a petition to reopen.

Third, the AAR's belated comments concerning the UBS and S&P reports are also inappropriate since WCTL presented them in its December 8, 2006 and July 25, 2007 filings, respectively. The AAR could certainly have addressed those reports earlier, if it were so inclined. Instead, it is using its Petition to Reopen to get in the last word, hedge its position, or to obtain still additional delay. "A party should not withhold evidence it considers to be relevant until after it has obtained a result not to its liking, and then seek to have the proceeding reopened so that it may introduce that evidence." F.D. No. 34013, *B. Willis, C.P.A., Inc. -- Petition for a Declaratory Order* (STB served July 26, 2002), at 3.

Accordingly, the AAR has not demonstrated good cause for its petition to reopen, and it should be denied. If, however, the Board should grant the petition and/or find the belated evidence worthy of consideration, WCTL would be pleased to respond to any claims the Board deems significant.

Respectfully submitted,

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TRAFFIC LEAGUE

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Dated: December 27, 2007

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CERTIFICATE OF SERVICE

I hereby certify that this 27th day of December, 2007, that I have caused
copies of the foregoing document to be served on all parties of record in this proceeding.

/s/ Robert D. Rosenberg