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## VIA EMAIL FILING

Ms. Cynthia Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20433-0111

Re: Ex Parte No. 722, Railroad Revenue Adequacy

Dear Ms. Brown:

This letter is submitted on behalf of the Western Coal Traffic League (“WCTL”), Consumers Energy Company (“Consumers”) and South Mississippi Electric Power Association (“SMEPA”) (collectively, the “Allied Shippers”), in accordance with the Board’s decision served July 29, 2015, keeping the record open until August 6, 2015, for the submission of supplemental information. In this letter, the Allied Shippers (1) supplement their responses to two (2) questions posed by the Board during the hearing; and (2) reply to certain claims made by counsel for Norfolk Southern Railway (“NS”) regarding the Allied Shippers’ proposal for implementation of the Revenue Adequacy Constraint in the *Coal Rate Guidelines*, 1. I.C.C. 2d 520 (1985), *aff’d sub nom. Consolidated Rail Corp. v. United States*, 812 F. 2d 1444 (3<sup>rd</sup> Cir. 1987), to which the Allied Shippers did not have an opportunity to respond during the hearing. The Allied Shippers respectfully request that this letter be included in the record for the referenced proceeding.

During the hearing, the Board asked whether the feature of the Allied Shippers’ proposal that would allow a market dominant railroad to increase a captive shipper’s rate beyond inflation if it met the “revenue need” criteria in the *Coal Rate Guidelines* (1 I.C.C.2d at 536 n.36) improperly shifted a burden of proof in rate litigation

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from a complainant shipper to a defendant railroad. As we answered at the time, consistent with the governing statute, the Allied Shippers' proposal imposes on the *shipper* the burden of proving both market dominance and the revenue adequacy of the defendant, which are the prerequisites to rate relief under *C.F. Indus., Inc. v. Koch Pipeline Co., L.P.*, 4 S.T.B. 637 (2000). The predicate for this relief is the holding in the court-approved *Guidelines* that "captive shippers should not be required to continue to pay differentially higher rates than other shippers when some or all of that differential is no longer necessary to ensure a financially sound carrier capable of meeting its current and future service needs." 1 I.C.C.2d at 535-36. Consistent with that same holding, the Allied Shippers' proposal allows an exception to the constraint on further rate increases if the railroad can make a proper evidentiary showing under the "revenue need" criteria. *Id.* at 536 n.36. The railroad's responsibility for such a presentation gives effect to the former Interstate Commerce Commission's directive that the *railroad* "would have to demonstrate with particularity" the three (3) criteria set out in the *Guidelines*. The *Guidelines* effectively designed a rebuttable presumption that any further differential pricing on a captive shipper's traffic by a revenue adequate railroad would be unreasonable, absent a showing by the railroad of the need for additional revenue that cannot be met from sources other than the complainant shipper. *See C.F. Indus.*, 4 S.T.B. at 661. The Allied Shippers' proposal implements these standards and procedures outlined by the ICC.

Court decisions under the Administrative Procedures Act make clear that rebuttable presumptions are permissible in agency proceedings, and may shift the burden of presenting evidence without affecting the statutory burden of proof. *See, e.g., Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 716 (D.C. Cir. 2011); *Amax Coal Co. v. Dir.*, 312 F.3d 882, 893-94 (D.C. Cir. 2002). The Board itself has used rebuttable presumptions to the same effect, with court approval and without any indication that raising such a presumption was tantamount to shifting a burden of proof. For example, in *Citizens Against Rails-to-Trails v. Surface Transportation Board*, 267 F.3d 1144 (D.C. Cir. 2001), the D.C. Circuit endorsed the Board's use of a rebuttable presumption that a trail sponsor with which a railroad chose to negotiate met the Trails Act's statutory prerequisite that such sponsor was prepared and able to assume full responsibility for management and maintenance of the trail. The court rejected arguments that use of the presumption improperly amounted to an abdication of a Board duty to render findings before awarding a certificate of interim trail use. *See* 267 F. 3d at 1152-53. *See also Jost v. Surface Transportation Board*, 194 F.3d 79 (D.C. Cir. 1999). Likewise, in *BNSF Ry. Co. v. Surface Transportation Board*, 453 F.3d 473 (D.C. Cir. 2006), the court noted with approval the rebuttable presumption available to complainants invoking the Stand-Alone Cost Constraint that revenues attributable to non-issue traffic in a hypothetical traffic group would be equal to "the level of their current rates." 453 F.3d at 477, *quoting Coal Rate Guidelines*, 1 I.C.C.2d at 544. There was no suggestion that a defendant's potential ability to rebut that presumption amounted to a shift in the burden of proof regarding stand-alone revenues, which remained with the complainant.

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The Allied Shippers' proposal is to the same effect. A captive shipper's demonstration that it is subject to market dominance and that the defendant railroad is revenue adequate raises a presumption that a rate increase above actual inflation is unreasonable, and shifts to the railroad the burden of presenting evidence under the *Guidelines*' exceptions criteria. If it does so, the Board still must make a finding on the question of reasonableness, with the ultimate burden of persuasion remaining with the shipper. If the railroad makes no such showing, the Board's finding follows the presumption supported by the shipper's *prima facie* case.

The D.C. Circuit's affirmance of the Board's 2000 decision in *C.F. Indus., Inc.* further illustrates this construct. *See C.F. Indus., Inc. v. Surface Transportation Board*, 255 F.3d 816 (D.C. Cir. 2001). The ruling under review in that case awarded rate relief upon findings of market dominance and the revenue adequacy of the defendant. The Board referred specifically to the "revenue need" criteria under the *Guidelines*, and determined that the defendant had failed to meet the test for the collection of higher revenues. *See* 4 S.T.B. at 661. The D.C. Circuit denied the carrier's petition for review, finding the Board's ruling to be a "reasonable reading of the agency's rate guidelines and...not subject to reversal by this court." *C.F. Indus., Inc.*, 255 F.3d at 828. It would be illogical to conclude that the defense included in the Allied Shippers' proposal would be viewed by a reviewing court as placing an improper burden of proof on the railroads, when a prior Board application of the same remedy that included a finding that the defendant carrier had not presented adequate evidence to support the same defense easily passed judicial muster.

A second question posed by the Board during the July 22 hearing inquired whether WCTL's position in this proceeding on the subject of linking revenue adequacy to expanded competitive access relief was consistent with arguments that may have been raised by WCTL in *Ex Parte No. 711*, *Petition for Rulemaking to Adopt Revised Competitive Switching Rules* ("*Ex Parte No. 711*"). During the hearing, WCTL and the Allied Shippers took no position on the merits of the remedy under consideration in *Ex Parte No. 711*, but strongly urged that any expansion of the availability of competitive switching or other access remedies should not compromise a captive shipper's rights under the *Coal Rate Guidelines*, or alter the standards for determining market dominance as a jurisdictional prelude to relief under the *Guidelines*.

WCTL itself did not participate in *Ex Parte No. 711*, nor did Consumers Energy or SMEPA. However, two (2) WCTL members – Entergy Arkansas, Inc. and Kansas City Power & Light Company – submitted comments as part of an *ad hoc* group known as the Joint Coal Shippers. As summarized in their March 1, 2013 Opening Submission, the Joint Coal Shippers' position was entirely consistent with Allied Shippers' response to the Board's question in this proceeding regarding any interplay between revenue adequacy and the issues under consideration in *Ex Parte No. 711*:

The Board instituted [*Ex Parte No. 711*] to obtain public comment and evidence concerning the potential impacts of the National Industrial Transportation League (“NITL”) proposal to adopt revised competitive switching rules under 49 U.S.C. §11102(c). As detailed below, the Joint Coal Shippers respectfully submit that whatever action (if any) the Board ultimately determines to take in this regard, the Board should make clear that it intends no change in the standards and principles applicable to determinations of market dominance under 49 U.S.C. §10707. Certain language in the *July 2012 Decision* suggests that the Board might consider the mere availability of a competitive switching option – standing alone – to be determinative on the question of market dominance and the availability of maximum rate relief for a given movement. The Joint Coal Shippers respectfully submit that captive coal shippers would be adversely impacted if the Board were to rely on the existence of a novel and untested competitive switching remedy as a basis for limiting a shipper’s ability to obtain origin-to-destination rate relief.

*Ex Parte No. 711*, Opening Submission of Entergy Arkansas, Inc., Kansas City Power & Light Company, Seminole Electric Cooperative, Inc. and Wisconsin Electric Power Company d/b/a WE Energies, March 1, 2013, at 1-2.

Finally, we wish to respond briefly to certain claims made during the July 22 hearing by counsel for Norfolk Southern Railway (“NS”) concerning the Allied Shippers’ proposal for implementation of the Revenue Adequacy Constraint. Since NS’ appearance followed the Allied Shippers’ by several hours, we did not have the opportunity to respond during the hearing. Specifically, NS suggested that the Allied Shippers had failed to disclose that their proposed captive shipper rate increase limitation could be invoked by a shipper upon expiration of a rail transportation contract entered under 49 U.S.C. §10709, and alleged that the availability of this remedy would discourage railroads from offering rate discounts in long-term contracts in the future. There is no factual basis on the record for either of these assertions.

That the Allied Shippers’ proposed constraint on rate increases by revenue adequate railroads (like NS) could be invoked by a captive shipper upon expiration of a contract was clearly explained on page 31 of the Allied Shippers’ September 5, 2014 Joint Opening Comments in this proceeding. The Allied Shippers discussed both the need for the remedy to be available to ex-contract shippers if it was to have any meaningful

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impact on the captive shipper community, and the Board precedents that established its authority to rely on contracts as source documents for rates in effect on traffic moving under them. The issue of ex-contract shippers' access to the Revenue Adequacy Constraint is quite prominent in the Allied Shippers' written submissions.

With respect to contracts – specifically contracts for the transportation of coal to generating facilities such as those operated by the Allied Shippers – nothing on the evidentiary record in this proceeding supports the assertion that railroads have offered or are offering rate “discounts” to captive shippers in proposals for long-term contracts. Published accounts indicate that the preponderance of coal transportation contracts today range in duration from one (1) to five (5) years; “long-term” agreements largely are relics of markets past. Likewise, the experience of the Allied Shippers – which is extensive and includes interactions with all four (4) major U.S. railroads – shows that pricing on captive contract traffic tends to be guided by the railroad's perception of the rate level that it believes could be defended if challenged before the Board. Railroad rates on captive coal traffic are determined principally by reference to the carrier's own economic self-interest, not the preferences of the shipper. It reasonably may be assumed that any hypothetical “discount” that a carrier might contemplate for captive traffic – the only traffic potentially impacted by the Revenue Adequacy Constraint under the *Guidelines* – would be driven by its assessment of the regulatory maximum, which under the Allied Shippers' proposal still could be adjusted post-contract to keep up with actual cost inflation. The “disincentive” argument advanced on behalf of NS at the July 22 hearing has no real foundation.

On behalf of the Allied Shippers, we appreciate this opportunity to respond to the Board's questions, and to supplement our hearing presentation.

Respectfully submitted,

/s/ Kelvin J. Dowd  
An Attorney for  
The Western Coal Traffic League,  
Consumers Energy Company and  
South Mississippi Electric Power Association

cc: The Hon. Daniel Elliott  
The Hon. Ann Begeman  
The Hon. Deb Miller