

No. _____

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

In re WESTERN COAL TRAFFIC LEAGUE,

Petitioner.

PETITION FOR WRIT OF MANDAMUS

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GLOSSARY

APA	Administrative Procedure Act
Board	Surface Transportation Board
4-R Act	Railroad Revitalization and Regulatory Reform Act of 1976
ICC	Interstate Commerce Commission
League	Western Coal Traffic League
Notice	Docket No. EP 722, <i>Railroad Revenue Adequacy</i> (Notice served Apr. 2, 2014)
<i>Revenue Adequacy 2014</i>	Docket No. EP 722, <i>Railroad Revenue Adequacy</i>
STB	Surface Transportation Board
TRAC	<i>Telecomms. Rsch. & Action Ctr. v. FCC</i>

INTRODUCTION

Congress has directed the Surface Transportation Board (“STB” or “Board”) to promulgate standards to determine on an annual basis whether large rail carriers are earning adequate revenues. 49 U.S.C. §§ 10704(a)(2), (3). Congress has also directed the STB to determine the maximum reasonableness of rail rates (49 U.S.C. § 10702(d)(1)) and the STB has adopted rules that place a constraint on maximum rail rates charged by revenue adequate rail carriers.

In 2014, the Board published a notice (“Notice”) instituting a proceeding asking for public comments addressing two issues: whether its current standards for measuring railroad revenue adequacy should be modified and how it should apply its revenue adequacy constraint. *Railroad Revenue Adequacy*, STB Docket No. EP 722 (“*Railroad Revenue Adequacy 2014*”). A-1 to 5.

In response to the Board’s Notice, the Western Coal Traffic League (“League”), an organization comprised of rail shippers of coal mined in the western United States, filed extensive comments (i) demonstrating that the Board’s current revenue adequacy standards were substantially overstating revenues carriers needed to be deemed revenue adequate; (ii) setting forth proposed approaches to accurately determine carrier revenue adequacy; and (iii) requesting the Board adopt a League-developed methodology to quantify maximum relief

under the revenue adequacy constraint. Many other rail users presented similar comments and proposals.

The record in *Revenue Adequacy 2014* initially closed in August 2015 – nearly eight years ago. Since that time the Board has not addressed the merits of the League’s comments and proposals (or those submitted by other shippers). The shipping public deserves better than this lack of action from the agency Congress has entrusted to protect them from unlawfully high rail rates.

There comes a time when “a court must let the agency know, in no uncertain terms, that enough is enough.” *In re Int’l Chem. Workers Union*, 958 F.2d 1144, 1150 (D.C. Cir. 1992) (internal quotation marks omitted). Eight years of delay is enough. The League respectfully requests the Court issue a writ of mandamus directing the STB to take action to address the merits of the issues it raised in *Revenue Adequacy 2014*.

STATEMENT OF JURISDICTION

This Court has jurisdiction under the Hobbs Act to review final STB orders, 28 U.S.C. § 2342(5), and, to preserve that jurisdiction, has authority to issue writs of mandamus under the All Writs Act, 28 U.S.C. § 1651(a), to address claims of unreasonable STB delay. *Telecomms. Rsch. & Action Ctr. v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984) (“*TRAC*”) (“Because the statutory obligation of a Court of Appeals to review on the merits may be defeated by an agency that fails to resolve

disputes, a Circuit Court may resolve claims of unreasonable delay in order to protect its future jurisdiction.”); 5 U.S.C. § 706(1) (directing reviewing courts to “compel agency action” that has been “unreasonably delayed”).

The League has standing to invoke the Court’s jurisdiction. *Ctr. For Biological Diversity v. EPA*, 56 F.4th 55, 66 (D.C. Cir. 2022) (setting forth the standards governing associational standing). The League actively participated as a party in *Revenue Adequacy 2014* (e.g., A-53, 161); its individual members (A-77) would have standing to bring this Petition; the League’s organizational interests include participation in STB rulemaking proceedings affecting coal transportation rates (A-55 to 56); and the relief the League requests does not require participation of its individual member companies. The League’s member companies would have standing to individually pursue this writ because they pay railroads for freight transportation (e.g., A-164); in *Revenue Adequacy 2014*, the Board is addressing whether its current revenue adequacy standards and rules should be changed to protect shippers from payment of unreasonably high rail rates (A-4); and the injuries League-member companies are currently incurring as a result of the delay will be redressed if the Court grants the League’s requests for action (A-65, 73 to 76).

STATEMENT OF RELIEF SOUGHT

The League requests that the Court issue a writ of mandamus directing either (i) that the STB publish a Notice of Proposed Rulemaking in *Revenue Adequacy 2014* within ninety days of the Court's issuance of its writ and that the STB take final action in the noticed proceeding within one year after the date of publication of its Notice of Proposed Rulemaking (or such other time period the Court deems to be reasonable) or (ii) that the STB serve a final decision in *Revenue Adequacy 2014* within ninety days of the Court's issuance of its writ explaining why it is discontinuing the proceeding.

STATEMENT OF THE ISSUE PRESENTED

Whether the STB's continuing failure to address the merits of the issues in *Revenue Adequacy 2014* nearly eight years after the record initially closed constitutes unreasonable delay warranting an order from this Court compelling such action.

STATEMENT OF FACTS

A. The STB's Railroad Revenue Adequacy Standards

In 1976, Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 ("4-R Act"). Section 205 of the 4-R Act directed the Interstate Commerce Commission ("ICC") to:

develop and promulgate (and thereafter revise and maintain) reasonable standards and procedures for the establishment of revenue levels adequate under honest, economical and efficient management to cover total operating expenses, including depreciation and obsolescence, plus a fair, reasonable, and economic profit or return (or both) on capital employed in the business. Such revenue levels should (a) provide a flow of net income plus depreciation adequate to support prudent capital outlays, assure repayment of a reasonable level of debt, permit the raising of needed equity capital, and cover the effects of inflation and (b) insure retention and attraction of capital in amounts adequate to provide a sound transportation system in the United States.

Id., 90 Stat. 31, 41.

The ICC responded to Section 205 by instituting a rulemaking proceeding and adopting revenue adequacy regulations. *Standards and Procedures for the Establishment of Adequate Railroad Revenue Levels*, 358 I.C.C. 844 (1977), *as modified*, 359 I.C.C. 270 (1978). The ICC’s new regulations called for the agency to make annual carrier revenue adequacy determinations (*id.*, 358 I.C.C. at 911) based on the agency’s consideration and weighing of “all pertinent financial indicators, including a rate of return on net investment equal to the cost of capital, other financial ratios and the flow of funds.” *Id.* at 910. The ICC specifically rejected the railroad industry’s proposal to rely solely on one financial indicator to determine carrier revenue adequacy – whether the carrier’s return on investment equaled at least the cost of capital. *Id.* at 872 (“Adequate revenue determination

for railroads, then, should not be based simply on a rate of return at the cost capital rate. It should also give attention to a direct appraisal of the carriers' capital needs, and of their ability to finance those needs.”).

In its first applications of its multi-factor revenue adequacy standards, the ICC found that during the 1975 to 1977 time-period, 13 of the then 36 Class I railroads¹ had earned adequate revenues. *Adequacy of Railroad Revenue (1978 Determination)*, 362 I.C.C. 199, 256-57 (1979). The ICC also said that it planned to fine-tune and revise these regulations based on its initial experience in applying them. *Id.* at 259; *Adequacy of Railroad Revenue (1978 Determination)*, 362 I.C.C. 794, 797 (1980).

In 1980, Congress enacted the Staggers Rail Act of 1980. Pub L. No. 96-448, 94 Stat. 1895 (“Staggers Act”). The Staggers Act made no substantive changes to the definition of revenue adequacy set forth in Section 205 of the 4-R Act; directed the ICC to “revise as necessary” its current revenue adequacy regulations in a new rulemaking proceeding; and legislatively codified the ICC regulation calling for the agency to make annual carrier revenue adequacy determinations. *Id.* § 205, 94 Stat. 1895, 1906.

¹ The ICC, and later the STB, adopted rules which categorize rail carriers into three classes (I, II and III) based on their annual operating revenues. *See, e.g.*, 49 C.F.R. § 1201 General Instructions 1-1 (2021) (current rules). Class I railroads are the ones within the highest classified level of operating revenues.

Following the enactment of the Staggers Act, the ICC conducted another revenue adequacy rulemaking proceeding. *Standards for Railroad Revenue Adequacy*, 364 I.C.C. 803 (1981), *aff'd sub nom. Bessemer & Lake Erie R.R. v. ICC*, 691 F.2d 1104 (3d Cir. 1982). This time, the ICC did an about-face and adopted rules calling for the agency to look only at only one metric to determine carrier revenue adequacy – whether the carrier’s return the return on investment at least equaled the cost of capital. *Id.*, 364 I.C.C. at 807 (“[W]e believe that in order for a railroad to be considered revenue adequate it must be earning a rate of return equal to the current cost of capital.”). The railroad industry supported the ICC’s decision to measure revenue adequacy using only a return on investment equals cost of capital standard. *Id.* at 809-10. The League and other shippers opposed the changes. *Id.* at 807 n.1. & 809 n.4.

The ICC’s adoption of its return on investment equals cost of capital standard as the sole test to determine carrier revenue adequacy had a dramatic effect on the number of rail carriers it found to be revenue adequate. In its first application of its new standards, the ICC found that only 3 of 35 Class I railroads were revenue adequate in 1979. *Id.* at 821. It also found that many of the revenue inadequate carriers were far away from revenue adequacy. *Id.* at 826. The ICC reached similar results in each of its subsequent annual revenue adequacy determinations – few railroads were found revenue adequate under the ICC’s

return on investment equals cost of capital standard. *See, e.g., Railroad Revenue Adequacy – 1985 Determination*, 3 I.C.C.2d 541, 544 (1987) (no Class I railroads found revenue adequate); *Railroad Revenue Adequacy – 1990 Determination*, 8 I.C.C.2d 1 (1991) (one Class I railroad found revenue adequate); *Railroad Revenue Adequacy – 1994 Determination*, Ex Parte No. 524, 1995 WL 491156 at *2 (I.C.C. Aug. 18, 1995) (one Class I railroad found revenue adequate).

In 1995, Congress enacted the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (“ICC Termination Act”). The ICC Termination Act abolished the ICC (*id.* § 101, 109 Stat. 803, 804); created the STB as the successor agency to the ICC (*id.* § 201, 109 Stat. 803, 932-934); amended, *inter alia*, the railroad transportation laws in Subtitle IV of U.S. Code Title 49 (*id.* § 202, 109 Stat. 803, 804-852); provided that most of these amended railroad transportation laws be administered by the STB (*id.*); and contained a savings provision stating that all rules issued by the ICC would remain in effect unless changed or terminated by the STB, a court or operation of law. *Id.* § 204, 109 Stat. 803, 941.

The ICC Termination Act retained the 4-R Act definition of revenue adequacy (*see id.* § 102, 109 Stat. 803, 810, amending 49 U.S.C. § 10704(a)(2)) and, following its enactment in 1995, the STB began making annual revenue adequacy determinations using the same return on investment equals cost of capital

standard that was in effect when the ICC was abolished.² For many years, the STB's results were also the same – it found most Class I railroad to be revenue inadequate. *See, e.g., Railroad Revenue Adequacy – 2000 Determination*, Ex Parte No. 552 (Sub-No. 5), 2001 WL 866249 at *1 (S.T.B. July 31, 2001) (no Class I railroad found revenue adequate); *Railroad Revenue Adequacy – 2005 Determination*, Ex Parte No. 552 (Sub-10), 2006 WL 3008488 at *1 (S.T.B. Oct. 23, 2006) (one Class I railroad found revenue adequate).

The STB's findings that major railroads were revenue inadequate came under increasing scrutiny because rail users, now joined by many others, believed the STB's findings bore no correlation with the actual financial strength or true "revenue adequacy" of these carriers. *See, e.g., Railroad Revenue Adequacy – 1995 Determination*, 1 S.T.B. 167, 171 (1996) (Commissioner Owen concurring) ("Given the sharply improved financial success of railroads in recent years, coupled with the consistent revenue inadequacy of almost all Class I railroads, it is appropriate that we revisit the method by which we measure revenue adequacy."); *Statement of Professor Alfred E. Kahn on Railroad Revenue Adequacy Standards*

² The STB subsequently adopted some modifications to the formula inputs used by the ICC. *See, e.g., Use of a Multi-Stage Discounted Cash Flow Model in Determining the Railroad Industry's Cost of Capital*, EP 664 (Sub-No. 1) (S.T.B. Jan. 28, 2009) (change in the method used to calculate the industry average cost of capital).

at 1 (National Economic Research Associates, Feb. 1997) (the STB’s return on investment equals cost of capital “method is discredited, quite simply, by the nonsensical results it produces”) (A-39); *Oversight Hearing on the State of the Railroad Industry, Hearing Before the Subcomm. on Surface Transp. & Merchant Marine of the S. Committee on Comm., Sci. & Transp.*, 107th Cong. 99 (May 9, 2001) (statement of Dr. Harvey Levine at 2) (“Incredibly, the alleged state of railroad revenue inadequacy prevailed during the early and mid-1990s, even when railroads enjoyed record earnings”) (A-34); Majority Staff of the Office of Oversight and Investigations of the S. Comm. on Commerce, Sci. and Transp., *The Current Financial State of the Class I Freight Rail Industry* (Sept. 15, 2010) at 14 (“Class I freight railroads . . . are now some of the most highly profitable businesses in the U.S. economy.”). A-185.

At the same time the ICC and the STB were finding most Class I railroads to be revenue inadequate, the agencies approved a series of rail mergers and acquisitions that led to the formation of only four large rail carriers – BNSF Railway Co., Union Pacific Railroad Co., Norfolk Southern Railway. Co. and CSX Transportation, Inc. These four carriers now account for nearly 90% of all freight traffic in the continental United States. *In re Rail Freight Surcharge Antitrust Litig.*, 725 F.3d 244, 247 (D.C. Cir. 2013).

Between 2011 and 2021 (the last year for which a determination was made), these four carriers had become so profitable that the STB determined they were revenue adequate in many of these years because their annual return on investment exceeded the applicable annual industry average cost of capital:

STB Revenue Adequacy Determinations					
Year	Industry Cost of Capital	BNSF Railway ROI	Union Pacific ROI	NS Railway ROI	CSX Transp. ROI
2011	11.57%	12.39%	13.11%	12.87%	11.54%
2012	11.12%	13.47%	14.69%	11.48%	10.81%
2013	11.32%	14.01%	15.39%	12.07%	10.00%
2014	10.65%	12.88%	17.35%	11.69%	10.18%
2015	9.61%	12.82%	15.54%	9.03%	9.00%
2016	8.88%	10.11%	13.39%	9.20%	8.62%
2017	10.04%	10.70%	14.08%	10.05%	8.84%
2018	12.22%	11.89%	15.80%	11.63%	13.18%
2019	9.34%	12.04%	15.55%	11.59%	12.84%
2020	7.89%	11.60%	14.44%	7.52%	11.35%
2021	10.37%	13.19%	17.03%	13.18%	15.51%
*Bold indicates Revenue-Adequate Carrier					

See Docket No. Ex Parte 552, *Railroad Revenue Adequacy* (Jan. 27, 2022), available at <https://www.stb.gov/wp-content/uploads/Revenue-Adequacy-chart-2020-2.pdf> (A-228); *Railroad Revenue Adequacy – 2021 Determination* at *1, Docket No. EP 552 (Sub-No. 26), 2022 WL 4113798 (S.T.B. Sept. 6, 2022).

B. The STB's Revenue Adequacy Constraint

The STB has jurisdiction to determine the maximum reasonableness of common carrier rates where the rail carrier (or carriers) charging the rate has “market dominance” over the transportation to which the rate applies. *See* 49 U.S.C. § 10701(d)(1). The STB determines maximum rate reasonableness in large railroad maximum rate cases using standards initially adopted by the ICC in 1985. *Coal Rate Guidelines – Nationwide*, 1 I.C.C.2d 520 (1985) (“*Guidelines*”), *aff'd sub nom. Consol. Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987).

The *Guidelines* set forth four “constraints” on rail pricing of market dominant traffic: the stand-alone cost constraint; the management efficiency constraint; the phasing constraint; and the revenue adequacy constraint. As described by the ICC, “the logical first constraint on a carrier’s pricing is that its rates not be designed to earn greater revenues than needed to achieve and maintain this revenue adequacy level.” *Id.*, 1 I.C.C. 2d at 535 (internal quotation marks omitted).

No rail shipper has ever obtained any rate relief under the revenue adequacy constraint. The reasons are two-fold. First, the ICC never found, and STB has never found, that a defendant rail carrier was sufficiently “revenue adequate” to trigger application of the constraint. *See, e.g., Consumers Energy Co. v. CSX Transp., Inc.*, Docket No. NOR 42142 at *5 (S.T.B. Jan. 11, 2018) (“Consumers

has not demonstrated that [CSX Transportation, Inc.] is revenue adequate.”);

Bituminous Coal – Hiawatha, Utah, to Moapa, Nev., 6 I.C.C.2d 1, 9 (1989)

(complaint “has failed to satisfactorily rebut the railroads’ prima facie showing that they have not achieved revenue adequacy”). Second, the ICC never provided, nor has the STB ever provided, any guidance to rail shippers on how to quantify rail pricing relief under the revenue adequacy constraint, assuming the constraint is properly invoked.

C. The STB’s *Revenue Adequacy 2014* Proceeding

On April 2, 2014, the Board instituted by Notice a new proceeding, *Railroad Revenue Adequacy 2014*. A-1. The Board’s Notice contains a brief discussion of the Board’s return on investment equals cost of capital standard for determining revenue adequacy and its revenue adequacy constraint. A-2 to 4. The Board observed that “[i]n the last several years, questions have been raised regarding the agency’s methodology for determining revenue adequacy and whether it appropriately measures the financial condition of the rail industry.” A-4. The Board also noted that it “has not yet had the opportunity to address how the revenue adequacy constraint would work in practice in large rail rate cases.” *Id.*

The Board asked interested parties to submit opening and reply comments addressing these issues and said it planned to schedule a public hearing. A-5.³

The Board received extensive comments; conducted a two-day public hearing (A-103, 108 to 112); and received post-hearing submissions. A-141, 142. In its comments and hearing presentations, the League presented detailed evidence, supported by expert witness statements, demonstrating that the Board's return on investment equals cost of capital standard substantially overstated the revenues carriers needed to be deemed revenue adequate (A-60 to 62, 81 to 92) (League Comments); proposed that the Board develop an alternative methodology to determine carrier revenue adequacy (a methodology that incorporated funds flow analyses and a variety of financial ratios) (A-62 to 66) (League Comments); and asked the Board to adopt a methodology the League had developed to quantify maximum rate relief under the adequacy constraint (a methodology that presumptively limited rate increases a revenue adequate defendant carrier could

³ The Board also asked parties to submit comments raised in a separately docketed proceeding concerning the methodology the STB used to calculate the railroad industry's cost of equity capital, a computation that impacted the cost of capital calculations used by the Board in its annual revenue adequacy determinations. A-4 to 5. The Board issued a final decision in that separate docket in 2018. *Petition of the Western Coal Traffic League to Institute a Rulemaking Proceeding to Abolish the Use of the Multi-Stage Discounted Cash Flow Model in Determining the Railroad Industry's Cost of Equity Capital*, Docket No. EP 664 (Sub-No. 2), 2018 WL 4677553 (S.T.B. Sept. 28, 2018).

impose on the issue traffic to those that were cost-based) (A-66 to 76) (League Comments).

Other shipper commenters agreed with the League that the Board's return on investment equals cost of capital standard was substantially overstating the revenues carriers needed to be determined revenue adequate;⁴ many supported the League's proposal to implement the revenue adequacy constraint;⁵ and several presented additional implementing proposals.⁶

Following the close of the record in August 2015 (A-141, 142), the Board took no action in *Revenue Adequacy 2014* for four years. In September 2019, the Board undertook a procedural step: it reopened the record briefly (A-145 to 147) to receive written submissions and hold a public hearing to address an STB staff report⁷ that, *inter alia*, contained staff-recommended proposals to implement the

⁴ *E.g.*, A-47 to 48 (Olin Corp. Comments); A-13 to 15 (Arkansas Elec. Coop. Corp. Comments); A-27 to 30 (Comments of Concerned Shipper Ass'ns); A-43 (Comments of Consumers United For Rail Equity); A-100 (Nat'l Grain & Feed Ass'n Reply Comments).

⁵ *E.g.*, A-95, 96 (Concerned Shipper Ass'ns Reply Comments); A-140 (Alliance for Rail Competition Hearing Testimony).

⁶ *E.g.*, A-114 to 135 (Concerned Shipper Ass'ns Consolidated Hearing Testimony); A-49 to 51 (Olin Corp. Comments); A-16 to 21 (Ark. Elec. Coop. Corp. Comments).

⁷ STB Rate Reform Task Force, *Rep. to the Surface Transportation Board* (April 25, 2019).

revenue adequacy constraint in rate cases. A-212 to 213, A-215 to 221. The League and other shippers participated in the Board’s hearing. A-148 to 152. In its hearing presentation, the League once again asked the Board to adopt the revenue adequacy constraint implementing proposal it had first made in 2014. A-162 to 163.⁸ The record closed again, this time in February 2020. A-166. Since that time, the Board has taken no action in *Revenue Adequacy 2014*.⁹

D. The League’s Requests Below for STB Action

On August 11, 2018, the League filed a petition requesting that the Board institute a new proceeding to address and end the regulatory delays in several major proceedings, including *Revenue Adequacy 2014*. A-196 to 200. The Board did not institute a new proceeding but said it would enter the League’s request in the record in each proceeding. *See Petition by the Western Coal Traffic League*

⁸ Another trade association supplemented a revenue adequacy constraint proposal it had first made in 2014. A-156 to 160 (Am. Chem. Council Written Testimony).

⁹ In 2020, the Board instituted a separately docketed proceeding to address a railroad industry-sponsored proposal asking the Board to adopt new standards that require carriers to earn a premium over the industry average cost of capital before they can be found revenue adequate. *Joint Petition for Rulemaking – Annual Revenue Adequacy Determinations*, Docket No. EP 766, 2020 WL 7778234 (S.T.B Dec. 30, 2020). The Board received comments in response to the railroads’ proposal in 2021. In its comments, the League emphasized that if the railroads’ proposal was adopted, no major railroad would be found revenue adequate (or close to it). A-223 to 224. The STB has not issued a decision addressing the merits of the railroads’ proposal.

Regarding Four Regulatory Dockets, Docket No. EP 740 (S.T.B. May 17, 2018); A-203 to 204.

On August 24, 2022, the League filed a petition in *Revenue Adequacy 2014* asking the Board to address the comments it had received from shippers and to issue a responsive Notice of Proposed Rulemaking. A-168, 170 to 174. Major shipper organizations filed a joint reply supporting the League’s petition. A-175 to 178. They agreed “that there is a vital need for the Board to propose reasonable rules for implementing the revenue adequacy constraint and that there is a robust record in this proceeding for the Board to act now.” A-175. The Board has not responded to the League’s petition.

REASONS WHY THE WRIT SHOULD ISSUE

This Court has found a writ of mandamus compelling agency action is warranted when three conditions are met: (i) the agency has a “clear duty to act” (*In re Core Commc’ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008) (internal quotation marks and citation omitted)); (ii) the agency has “unreasonably delayed the contemplated action” (*id.*) (internal quotation marks and citation omitted); and (iii) the petitioner has no “adequate alternative means of attaining the relief [it]

desires.” *Id.* at 860; accord *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004). Each condition is satisfied here.¹⁰

I. THE STB HAS A CLEAR DUTY TO ACT

Under the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 *et seq.*, the STB has a clear statutory duty to “proceed to conclude a matter presented to it” “[w]ith due regard for the convenience and necessity of the parties . . . and within a reasonable time.” 5 U.S.C. § 555(b). The STB’s *Revenue Adequacy 2014* proceeding is a “matter presented to” the agency and the STB is obligated to conclude the proceeding “within a reasonable time.” *Pub. Citizen Health Rsch. Grp. v. Auchter*, 702 F.2d 1150, 1158 (D.C. Cir. 1983) (per curiam) (finding an agency violated its duty under the APA by not concluding a proceeding within a reasonable time); *In re Am Rivers*, 372 F.3d at 419 (finding an agency was required under the APA to conclude the matter presented to it within a reasonable time).

The APA also requires the STB to give “[p]rompt notice . . . of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding,” along with a “brief statement of the grounds for denial.” 5 U.S.C. § 555(e). The League and other

¹⁰ Satisfaction of these conditions also demonstrates the League’s “clear and indisputable” right to relief. *Am. Hosp. Ass’n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016) (cleaned up).

shippers filed comments in *Revenue Adequacy 2014* requesting that the Board promulgate new standards for determining carrier revenue adequacy and for applying the revenue adequacy constraint. If the Board intends to deny these requests, it is obligated to provide the League, and the other shippers, “prompt notice” of its denial in a judicially reviewable final decision explaining its actions. 5 U.S.C. § 555(e); accord *Amerijet Int’l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (holding that under 5 U.S.C. § 555(e), (“an agency must articulate an explanation for its action”).

The STB’s clear duty to act is also manifested in its regulatory responsibilities to the shipping public. Congress has entrusted the STB with specified economic oversight authority over the Nation’s freight railroads. This authority includes applying rules that allow the agency to accurately determine whether railroads are “revenue adequate” (49 U.S.C. §§ 10704(a)(2),(3)) and to fairly determine whether rail rates on market dominant traffic exceed a reasonable maximum. 49 U.S.C. § 10701(d)(1).

The STB recognized in 2014 that the accuracy of its standards for determining revenue adequacy had been called into question by many, including some of its own Members. The STB also recognized that shippers needed guidance on how to implement the revenue adequacy constraint. The Board instituted *Revenue Adequacy 2014* to address these issues, and it has a clear duty

under 49 U.S.C. §§ 10704(a)(2), (3), 49 U.S.C. §10701(d)(1), and 5 U.S.C. § 555(b) to not only address these issues, but to address them in a timely manner.

II. THE STB HAS FAILED TO DISCHARGE ITS DUTY TO ACT IN A TIMELY MANNER

The APA directs this Court to compel agency action unreasonably delayed. *See* 5 U.S.C. § 706(1). When determining whether an agency’s delay is “so egregious as to warrant mandamus,” (*TRAC*, 750 F.2d at 79) this Court typically considers six factors. *Id.*, 750 F.2d at 80. The STB’s failure to take action in *Revenue Adequacy 2014* for nearly eight years after the record initially closed clearly constitutes unreasonable delay and warrants a writ of mandamus.

A. The STB’s Delay is Excessive

The first *TRAC* factor provides that “the time agencies take to make decisions must be governed by a rule of reason.” 750 F.2d at 80 (internal quotation marks and citation omitted). Although “[t]here is ‘no *per se* rule on how long is too long to wait for agency action,” this Court has found “a reasonable time for agency action is typically counted in weeks or months, not years.” *In re Am. Rivers*, 372 F.3d at 419 (cleaned up); *Midwest Gas Users Ass’n v. FERC*, 833 F.2d 341, 359 (D.C. Cir. 1987) (“[A] reasonable time for an agency decision could encompass months, occasionally a year or two, but not several years or a decade.”) (internal quotation marks and citation omitted).

The STB’s delay in *Revenue Adequacy 2014* is clearly unreasonable because its inaction has dragged on for years. *Revenue Adequacy 2014* was instituted on April 2, 2014 – over nine years ago. The record initially closed on August 6, 2015 – almost eight years ago – and the proceeding was ripe for decision at that time.

The STB did reopen the *Revenue Adequacy 2014* record in 2019 to consider an STB staff report, but continued to take no merits action thereafter, so the delays which started in 2015 continued unabated. Moreover, the staff report recommended that the Board take action to implement its revenue adequacy constraint, a recommendation first made by rail users in 2014.

B. The STB’s Delay Contravenes Congressional Directives

The second *TRAC* factor states “where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for the rule of reason.” *Id.*, 750 F.2d at 80. Here, Congress has repeatedly indicated its clear expectation that the STB resolve regulatory proceedings, such as *Revenue Adequacy 2014*, expeditiously.

In 1995, Congress created the STB as the successor agency to the ICC. *See* Termination Act, § 201. In the Termination Act, Congress enacted a new rail policy that directs the STB “to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought [before the Board].” 49

U.S.C. § 10101(15). The STB has violated this clear congressional directive by not handling and resolving *Revenue Adequacy 2014* in an expeditious manner.

The STB is also engaging in an impermissible end-run around the timetable reporting obligations Congress adopted in the STB Reauthorization Act of 2015, Pub L. No. 114-110, 129 Stat. 2228 (“Reauthorization Act”). In the Reauthorization Act, Congress supplemented the rail transportation policy by directing the Board to provide quarterly progress reports on all major unfinished regulatory proceedings. Reauthorization Act § 15(b) (codified at 49 U.S.C. § 1304 note).¹¹ Congress took this action to increase STB transparency and improve the “glacial pace”¹² at which the Board was known to process many of its major regulatory proceedings, including *Revenue Adequacy 2014*. See S. Rep. No. 114-52 at 10 (2015) (Reauthorization Act intended to “improve inefficiencies at the STB and reduce delays”).

Shortly after Congress passed the Reauthorization Act, then-Board Member Begeman correctly characterized the new quarterly reporting requirement as a

¹¹ The Reauthorization Act also increased the number of Board Members from three to five. *Id.* § 4, 129 Stat. 2228, 2229, codified at 49 U.S.C. § 1301(b).

¹² *Freight Rail Reform: Implementation of the STB Reauthorization Act of 2015: Field Hearing Before the S. Comm. on Commerce, Sci. & Transp.*, 114th Cong. 47 (Aug. 11, 2016) (“*Field Hearing*”) (prepared statement of Hon. Ann D. Begeman, Member, STB).

“game-changer”¹³ because both the parties and the Board Members will “know that deadlines exist and the target dates for Board action.” *Id.* Similarly, then-Board Vice Chairman Miller correctly observed that Congress’s “vision to create a [quarterly pending proceeding] reporting requirement was extremely pragmatic. Absent the reporting requirements of the Act, I strongly suspect that many of these proceedings would still be in a state of regulatory limbo.”¹⁴

In its first year of quarterly reporting (2016), the STB properly adhered to its Congressional directives by fixing specific dates for its next substantive action in *Revenue Adequacy 2014* – initially October 2016¹⁵, and then June 2017.¹⁶ However, in all subsequent reports, the STB has stated only that its next substantive action in *Revenue Adequacy 2014* is “TBD.” *See, e.g., Rep. on Pending STB Regulatory Proceedings – April 3, 2017 (A-195); Rep. on Pending STB Regulatory Proceedings First Quarter 2023 (April 3, 2023) (A-230).*

The Board’s “To Be Determined” designation eviscerates its congressionally mandated reporting requirement. With a “TBD” designation, there is no deadline

¹³ *Field Hearing* at 48.

¹⁴ *Id.* at 34 (prepared statement of Hon. Deb Miller, Vice-Chair, STB).

¹⁵ *Rep. on Pending STB Regulatory Proceedings* (April 1, 2016) (A-187); *Rep. on Pending STB Regulatory Proceedings – July 1, 2016* (A-189).

¹⁶ *Rep. on Pending STB Regulatory Proceedings – Oct. 3, 2016* (A-191); *Rep. on Pending STB Regulatory Proceedings – Jan. 3, 2017* (A-193).

for action, and *Revenue Adequacy 2014* has returned to the same “regulatory limbo” it was in before Congress imposed the reporting requirement.

C. The STB’s Delay is Unreasonable in the Sphere of Economic Regulation

The third *TRAC* factor states “delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake.” *Id.*, 750 F.2d at 80. Applying this factor in economic regulation cases, this Court has recognized that “[e]conomic harm is clearly an important consideration and will, in some cases, justify court intervention” *Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987). The STB’s delay in *Revenue Adequacy 2014* is unreasonable in the sphere of economic regulation, as demonstrated by this Court’s precedent of finding unreasonable agency delays of shorter duration in economic regulation cases. *See, e.g., MCI Commc’ns Corp. v. FCC*, 627 F.2d 322, 324-25 (D.C. Cir. 1980) (four-year delay unreasonable); *Air Line Pilots Ass’n Int’l v. Civil Aeronautics Bd.*, 750 F.2d 81, 86 (D.C. Cir. 1984) (five-year delay unreasonable).

D. The STB’s Delay is Not Due to Competing Agency Priorities

The fourth *TRAC* factor provides that “the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority.” *Id.*, 750 F.2d at 80. This factor is significant in cases where an agency claims its delay is due to the press of other agency business. To the best of the League’s

knowledge, the STB has never claimed its delay in taking substantive action in *Revenue Adequacy 2014* is due to its need to act in cases of “a higher or competing priority.”

E. The STB’s Delay is Irreparably Injuring Shippers

The fifth *TRAC* factor states that the Court should “take into account the nature and extent of the interests prejudiced by delay.” *Id.*, 750 F.2d at 79. The interests prejudiced by the Board’s delay are precisely those the Board sought to protect when it instituted the now long-delayed *Revenue Adequacy 2014* proceeding.

The Board is charged with making accurate annual revenue adequacy determinations (49 U.S.C. § 10704(a)(3)) and the Board knew at the time it instituted *Revenue Adequacy 2014* (2014) that substantial questions had been raised by shippers, academics, Congressional Committees and even some of its own Members as to whether the Board’s return on investment equals cost of capital standard was over-stating the amount of revenue carriers need to be deemed revenue adequate under the standards set forth in 49 U.S.C. § 10704(a)(2).

The Board also knew that even under the disputed return on investment equals cost of capital standard, it was starting to find that major carriers were revenue adequate (though less so than if accurate revenue adequacy standards applied), findings that were likely to trigger application of its long moribund

revenue adequacy constraint, a constraint that would remain rudderless unless the Board provided guidance to shippers on how relief under the standard (once triggered) should be quantified.

The STB's failure to act in *Revenue Adequacy 2014* irreparably injures shippers. The revenue adequacy constraint was first promulgated by the ICC in 1985. Between 1985 and 2023 (38 years) no shipper has obtained any rate relief under this standard. In the absence of Board action in this proceeding, that will continue to be the case, a result that will irreparably injure rail shippers by allowing revenue adequate carriers to continue to charge rates that exceed reasonable maximums.

The Board's delays also irreparably injure consumers. In *Revenue Adequacy 2014*, the regular member companies of the League are electric utilities. A- . These utilities pay rail rates to their carriers, and then pass-through their rate payments to their customers – electric utility ratepayers – as part of their customers' monthly electric bills. A-164 to 165. The Board's failure to act in *Revenue Adequacy 2014* has resulted in carriers continuing to saddle shippers (and their customers) with rates far in excess of those revenue adequate carriers need to charge.

Finally, the problem for large shippers is particularly acute. In the past 38 years, no rail shipper has ever obtained any rate relief under three of the four

“constraints” that apply in large rate cases: the management efficiency, phasing and revenue adequacy constraints. A few large coal shippers have obtained rate relief under the stand-alone cost constraint, but the stand-alone cost constraint, as administered by the STB, has become so time-consuming, complex and costly to litigate that it offers no practical remedy for most large shippers, a fact that Board Members and Board staff have repeatedly recognized. *See, e.g., Sunbelt Chlor Alkali P’ship v. Norfolk S. Ry.*, Docket No. NOR 42130, 2014 WL 2805254 (S.T.B. June 20, 2014) at *27 (Chairman Nober, concurring) (stand-alone cost cases are “difficult for carriers, for the agency, and most importantly for the complaint shippers”); *id.* at ** 28-29 (Vice-Chairman Miller, concurring) (stand-alone cost cases are “burdensome” and the Board should explore alternatives including “how the revenue adequacy constraint should be applied in determining the reasonableness of rates”); STB Rate Reform Task Force, *Rep. to the Surface Transportation Board* at 6 (April 25, 2019) (“the [stand-alone cost] process [has] spiraled in complexity and cost to the parties” and stand-alone cost cases now “reportedly cost as much as \$10 million”). A-210.

The Board can fill this yawning gap in its rules – a gap that irrevocably injures large rail shippers – by proposing and adopting rules in *Revenue Adequacy 2014* that accurately measure carrier revenue adequacy and that instruct parties on how to quantify relief under the revenue adequacy constraint.

F. The STB's Delay is Improper

The sixth *TRAC* factor states, “the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.” *Id.*, 750 F.2d at 80 (internal quotation marks and citation omitted). The League does not assert that the Board engaged in any ethically improper behavior, but, as discussed above, does assert that the Board’s extensive delay is improper, because it ignores the Board’s statutory directives to decide pending proceedings expeditiously. The result is that shippers, and their customers, continue to be irreparably injured.

III. THE LEAGUE HAS NO ADEQUATE ALTERNATIVE REMEDY

The League actively participated in the *Revenue Adequacy 2014* proceeding, a proceeding that is now over nine years old. The League has waited patiently for the Board to address the merits of the comments and rulemaking proposals it and others have tendered in *Revenue Adequacy 2014*. Despite the League’s requests for merits action, the Board has chosen not to act. Under these circumstances, the League’s only remaining adequate remedy is to petition this Court for a writ of mandamus.

CONCLUSION

For the reasons set forth above, the League respectfully requests that the Court grant this Petition.

Respectfully submitted,

By: /s/ William L. Slover
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*Counsel for the Western Coal
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May 5, 2023

ADDENDA

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rules 21(d) and 28(a)(1)(A), Petitioner hereby certifies as follows:

A. Parties

Petitioner is the Western Coal Traffic League (“League”). Respondents are the Surface Transportation Board (“STB”) and the United States of America.

B. Ruling Under Review

The League challenges the STB’s unreasonable delay in taking action in *Railroad Revenue Adequacy*, STB Docket No. EP 722, Notice served April 2, 2014.

C. Related Cases

Petitioner is not aware of any related case(s).

Respectfully submitted this 5th day of May, 2023.

/s/ William L. Slover
William L. Slover

*Counsel for the Western Coal
Traffic League*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Petitioner, the Western Coal Traffic League (“League”), hereby submits the following corporate disclosure statement:

The League is a voluntary national trade association, whose regular membership consists entirely of shippers of coal mined west of the Mississippi River. The League advocates the interests of its members before regulatory agencies, legislative bodies, and state and federal courts. The League is an active participant *Railroad Revenue Adequacy*, STB Docket No. EP 722, the proceeding which forms the subject of this Petition. The League has not issued shares or debt securities to the public and does not have any parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

Respectfully submitted this 5th day of May, 2023.

/s/ William L. Slover
William L. Slover

*Counsel for the Western Coal
Traffic League*

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 21(d) and 32(a), I hereby certify that:

The foregoing petition complies with the type-volume limitation of Fed. R. App. P. Rule 21(d). This petition contains 6,434 words, excluding the parts of the petition exempted by Fed. R. App. P. Rules 21(d) and 32(f).

The foregoing petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). This Petition has been prepared in a proportionately spaced typeface using Microsoft® Word for Microsoft 365 MSO (Version 2303 Build 16.0.16227.20202) 32-bit version of Microsoft Word in 14-point Times New Roman font.

Respectfully submitted this 5th day of May, 2023.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on this 5th day of May 2023, I electronically filed the foregoing Petition for Writ of Mandamus and Appendix with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. As Circuit Rule 21(c) requires, four paper copies of the foregoing petition and appendix will be hand delivered to the Court.

In addition, I caused true and correct copies of the foregoing Petition and Appendix to be served by first class mail, postage prepaid, or hand delivery on counsel for Respondent Surface Transportation Board and Respondent United States as follows:

Craig M. Keats
Office of the General Counsel
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

Merrick B. Garland
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