

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 755

FINAL OFFER RATE REVIEW

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**COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY**

Norfolk Southern Railway Company (“Norfolk Southern”) joins the comments of the Association of American Railroads (“AAR”) in response to the September 12, 2019, Notice of Proposed Rulemaking (“NPRM”) in this proceeding. We respectfully submit these additional comments and urge the Surface Transportation Board (“STB”) to withdraw the NPRM. In addition to the reasons set forth in the comments submitted by the AAR, the NPRM is fundamentally flawed in that it fails to recognize an independent economic analysis previously commissioned by the STB.

On September 19, 2014, the STB retained InterVISTAS Consulting LLC (“InterVISTAS”), an independent economic consulting firm, to perform an independent analysis evaluating potential simplifications to the STB’s rate regulation approaches and to consider possible alternatives. InterVISTAS conducted that independent analysis over the following two years – and at a cost to the STB of nearly one million dollars – and produced a final report dated September 14, 2016 (the “InterVISTAS Report”). In considering the appropriateness of further simplifications to the STB’s Three-Benchmark test, the simplest of the STB’s current methodologies, the InterVISTAS Report concluded that the “Three-Benchmark test is already relatively simple” and that further

simplifications would “compromise the nature of the test and its adherence to [constrained market pricing] principles.”¹

In January 2018, the STB established a Rate Reform Task Force (“RRTF”) comprised of STB staff to perform essentially the same task previously assigned to InterVISTAS.² The STB’s Rate Reform Task Force conducted its review over the following 16 months and produced its own final report dated April 25, 2019 (the “RRTF Report”). The RRTF Report consists of 72 pages with 47 footnotes, but does not cite to or even acknowledge the existence of the InterVISTAS Report.

The InterVISTAS study applied well-established and reasoned economic analysis to assess the effectiveness of the STB’s rate regulatory regime compared to potential alternatives. By contrast, the RRTF lacks any reasoned economic analysis and appears to be driven more by opinions and observations, focusing in large part on interviews with stakeholders gauging their level of satisfaction with the STB’s rate regulatory regime.³ In describing what animated its recommendations, the RRTF expressed its belief – without citation to any supporting evidence – that the railroad industry has achieved the requisite financial health to bear the burden of more aggressive STB rate regulation, noting that “Wall Street finds the railroad industry one of the more attractive investment opportunities in the market.”⁴

Contrary to the InterVISTAS Report’s conclusion that further simplifications of the Three-Benchmark test would be inappropriate, the RRTF Report specifically recommends not only

¹ InterVISTAS Report at 128-29.

² See *InterVISTAS Study*, Ex Parte 736 (STB served June 28, 2018) (Board Member Miller, concurring) (describing the RRTF as charged with “exploring alternative rate reasonableness methodologies,” in the same manner as InterVISTAS).

³ See *id.* (describing the RRTF’s work as most notably “holding informal meetings with stakeholders to discuss options and ideas for reforming the Board’s rate review methodologies”).

⁴ RRTF Report at 11.

further simplifications to the Three-Benchmark test itself,⁵ but also, in a purported effort to simplify the STB's rate regulation even further, a final offer arbitration process that allows the complainant to choose its own rate reasonableness methodology, making such process completely untethered to constrained market pricing.⁶

Although the NPRM in this proceeding cites frequently to the recommendations of the RRTF regarding final offer decision-making, it fails to acknowledge, let alone reasonably consider, the conclusions of the InterVISTAS Report.⁷ Ultimately, when deciding whether to overhaul its rate regulatory regime, the STB should defer to economic experts like InterVISTAS – the independent consultant that the STB itself chose to conduct a rigorous analysis of rate regulatory alternatives – rather than relying on the opinions and observations of its staff, which were formed primarily in response to interviews with self-interested shippers, and which have not been publicly considered or tested.

In particular, for purposes of this docket, the STB should heed InterVISTAS's warning that simplification to the STB's rate regulation methodology beyond the level of simplification embodied by the Three-Benchmark test would be inconsistent with constrained market pricing and untethered to sound economics.⁸ Indeed, the InterVISTAS report concluded that the "STB's Full-SAC has stood the test of time as a maximum rate reasonableness methodology and is justifiable *in some cases*. However, the less expensive Simplified-SAC and Three-Benchmark methods are

⁵ See RRTF Report 42-52.

⁶ See RRTF Report at 18.

⁷ See, e.g., InterVISTAS Report at 76 ("It is our opinion that the non-transparent final offer arbitration process used in Canada to constrain undue exercise of any market power by railways provides no guidance for alternatives to SAC. It may be that the methodologies put forward by one party or the other in the arbitrations could provide insight, but as the process is confidential, no guidance can be provided.").

⁸ See InterVISTAS Report at 128-29.

also available as options for shippers, and there is reason to believe that shippers can achieve similar results to Full SAC under these less-costly alternatives.”⁹

Accordingly, for the reasons set forth herein and in the comments filed by the AAR, Norfolk Southern respectfully requests that the NPRM be withdrawn.

Respectfully Submitted,



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⁹ InterVISTAS Report at xviii (emphasis in original).