

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**Ex Parte No. 755
FINAL OFFER RATE REVIEW
Ex Parte No. 665 (Sub-No. 2)**

ENTERED
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Public Record

EXPANDING ACCESS TO RATE RELIEF

COMMENTS OF CSX TRANSPORTATION, INC.

CSX Transportation, Inc. (“CSXT”) respectfully files these comments in response to the Notice of Proposed Rulemaking proposed in the above-captioned docket on September 11, 2019 (“NPRM”). CSXT also joins the opening comments of the Association of American Railroads (“AAR”) in full.

The Board’s Final Offer Rate Review (“FORR”) proposal suffers from a fundamental shortcoming: it lacks any standard for a Board determination of rate reasonableness. The Board spells out procedural rules for FORRs, but it fails to set forth any substantive standard that it would use to choose between the “final offers.” The Board should not pursue a rate reasonableness process with no discernible basis or standard. Not only does this approach give rise to serious concerns, it also creates real practical problems for litigants, who are left with no guidance as to what standards the Board will be using or what evidence would be deemed sufficient to support a final offer. Indeed, the Board itself would be prejudiced by this approach. If the Board fails to establish any substantive standard for how a reasonable rate will be determined, and if it employs a “final offer” approach where neither party sees the other’s final position until it is submitted, the Board may find itself faced with completely disparate final offers based on starkly different methodologies, and with no clear pathway to assessing which

offer is “best.” CSXT respectfully requests the Board to abandon the NPRM’s effort to create a rate reasonableness procedure with no governing methodology.

The existence of Canadian Final Offer Arbitration (“FOA”) is not evidence that a “no methodology” rate reasonableness procedure is desirable. Canadian FOA differs from the FORR proposal in key ways. The Canadian FOA process and FOA decisions are completely confidential, and FOA decisions do not create precedents. In contrast, FORR decisions will be public and precedential, which is a recipe for disruption and confusion, particularly if FORR decisions depart from established Board precedent. Moreover, Canadian FOA was explicitly authorized by statute. In the United States, by contrast, Congress made clear that any arbitration processes must be “voluntary” and must “consider the Board’s methodologies for setting maximum lawful rates, giving due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues.” 49 U.S.C. § 11708 (a), (c)(3). Adoption of a mandatory arbitration-like FORR process without any governing methodology is both unwise and inconsistent with Congress’s command.

For these reasons and those set forth in AAR’s Opening Comments, the Board should not adopt the NPRM.

Respectfully submitted,

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