

SURFACE TRANSPORTATION BOARD**Ex Parte 755****Final Offer Rate Review**

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***Summary of Ex Parte Meeting held July 10, 2020
between
the American Chemistry Council
and Surface Transportation Board Member Patrick Fuchs***

American Chemistry Council (“ACC”) Attendees:

- Jeffrey Sloan, Senior Director, Regulatory & Technical Affairs, ACC
- Jill Brubaker, Director, Federal Government Affairs, ACC
- Jeffrey Moreno, Counsel to ACC
- Jason Tutrone, Counsel to ACC

STB Attendees:

- Patrick Fuchs, Member
- Lisa Novins, Attorney-Advisor

Meeting Summary:

ACC began the meeting by thanking the Board for holding ex parte meetings in this proceeding and working toward a more practical and accessible rate review process. ACC explained that it supports the flexibility that the Board’s Final Offer Rate Review (FORR) proposal provides; it believes that, if FORR is available, shippers will use innovative rate review methodologies based on sound economic principles; and it believes that FORR is consistent with the Board’s authority and appropriately balances all aspects of the Rail Transportation Policy. ACC also observed that the rate benchmarking proposal that it has offered for consideration in this proceeding satisfies the rate reasonableness criteria that the Board would consider in FORR and is ideally suited for use in the FORR process. ACC and Member Fuchs proceeded to discuss the following matters:

1. ACC has proposed several minor, but important process modifications. Most significantly, the Board should extend the discovery period and permit motions to compel through an expedited process. These proposals would help ensure a fair and workable process, with only modest increases to the Board’s proposed timeline.
2. ACC explained that the Board should not limit the FORR process to cases using the streamlined market dominance approach. ACC stated that few shippers would choose the streamlined market dominance approach that the Board proposed as a requirement for FORR without more objective standards and the ability to qualify on a mode-specific basis; therefore, few shippers would be eligible to use FORR. ACC noted that it has proposed an expedited, bifurcated market dominance approach to address these concerns. Member Fuchs

asked questions about how market dominance thresholds would prevent chemical shippers from accessing FORR and whether the Board should be concerned about setting an overinclusive threshold. ACC responded that certain commodities might merit different thresholds but the Board should not be concerned about being overinclusive because railroads could rebut any prima facie market dominance showing and any overinclusiveness should be clear from discovery.

3. ACC explained that concerns about FORR depriving parties of a full hearing on rate reasonableness are misplaced. ACC stated FORR provides clear standards for evaluating a party's offer and involves the Board exercising its independent judgment to select the most appropriate offer. The binary nature of the FORR process encourages parties to submit similar evidence rather than extreme positions, which occurs in SAC cases. Therefore, the parties' FORR evidence is more likely to present a reasonable rate than the evidence submitted under other methods. ACC pointed out that the Board has a statutory duty to develop simplified methodologies when SAC cases are too costly given the value of a case, and thus would be afforded significant deference when balancing that mandate against tradeoffs associated with FORR. The Board has made a reasonable judgment that FORR is the best means to ensure reasonable rates in small cases and has mitigated the potential for less accuracy through limits upon the duration and amount of relief.
4. ACC stated the \$4 million relief cap in FORR cases should apply only to two years of rate prescription, not to reparations. In addition, ACC stated the Board should clarify that the cap applies to individual O-D pairs. ACC noted that the legal context for the cap is the statutory authorization to prescribe simplified procedures where the costs of stand-alone-cost cases are excessive given the value of the case, and using an example in ACC's reply comments, explained that the relief caps proposed by railroads would be too low to make a FORR case financially sensible and the cost of a SAC case still would be too high, which would still leave many carload shippers without access to regulatory remedies. The parties discussed the previous justifications for relief caps in other proceedings and the implications of potential relief caps in the context of chemical shippers' individual O-D pairs.

ACC concluded by observing that rate reasonableness and enhanced competition are complimentary regulatory tools, not substitutes. The parties discussed potential changes to the Board's arbitration regulations. ACC stated that FORR must be part of a broader initiative to reduce reliance upon regulatory rate relief by enhancing competition if it is to achieve its objectives.