

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

***Summary of Ex Parte Teleconference Meeting held July 14, 2020
between
the American Chemistry Council
and Surface Transportation Board Chairman Ann Begeman***

**ENTERED
Office of Proceedings
July 16, 2020
Part of
Public Record**

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:

- Ann Begeman, Chairman
- Rachel Campbell, Managing Director
- Craig Keats, General Counsel
- Bill Brennan, Director of the Office of Economics
- Kim Hillenbrand, Transportation Industry Analyst
- Chris Diamond, Attorney-Advisor
- Adam Kress, Attorney-Advisor
- Amanda Gorski, Attorney-Advisor
- Valerie Quinn, Attorney-Advisor

Meeting Summary:

ACC began the meeting by thanking the Board for holding ex parte meetings in this proceeding and stating that working toward a more practical and accessible rate review process is important for ACC and shippers. ACC explained that it supports the Board’s Final Offer Rate Review (FORR) proposal and the flexibility and opportunity it provides for use of alternative rate reasonableness methodologies. If FORR is available, shippers will use innovative rate reasonableness methodologies based on sound economic principles and consistent with the Board’s rate review criteria. ACC also stated that FORR is consistent with the Board’s statutory authority and effectively balances all aspects of the Rail Transportation Policy. ACC and chairman Begeman proceeded to discuss the following matters:

1. ACC explained that FORR would inspire innovative rate review solutions, including the rate benchmarking proposal that ACC has offered for consideration in this proceeding. The benchmarking proposal satisfies the FORR rate-reasonableness criteria and is ideally suited for the FORR process.

2. 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.
3. 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.
4. ACC explained that the \$4 million relief cap in FORR cases should apply only to two years of rate prescription, not to reparations. This would provide important rate predictability to a prevailing shipper and reflect the litigation risks that a carload shipper would incur to challenge a rate. In addition, the Board should clarify that the cap applies to individual O-D pairs. This would account for the high cost of a stand-alone-cost case with aggregated carload lanes and the high burden of aggregating lanes under the FORR process. ACC also suggested that the Board consider waiving or increasing the cap if a complainant uses a methodology that is more economically robust than the three-benchmark method.
5. ACC explained that concerns about FORR depriving parties of a full hearing on rate reasonableness are misplaced. 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 discourages extreme positions so that the parties' FORR evidence is more likely to present a reasonable rate than the evidence submitted under other methods. ACC also 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. When asked how, in ACC's view, the Board would address the shipper's burden of proof if it has a binary choice between the shipper's and carrier's evidence, ACC responded that the Board could find that the shipper has not met its burden when it takes an extreme position, making it unlikely that the shipper would submit evidence that would not satisfy its burden of proof.
6. ACC observed that rate reasonableness and enhanced competition are complimentary regulatory tools, not substitutes, and 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.
7. Chairman Begeman asked whether shippers would prefer FORR over an arbitration program for rate disputes. ACC explained that the details of the arbitration program would impact any preference. It also identified various disadvantages to arbitration that FORR addresses, including a lengthy market dominance process and unclear standards regarding allowable rate reasonableness methodologies.