

SURFACE TRANSPORTATION BOARD**Ex Parte 755****Final Offer Rate Review*****Summary of Ex Parte Meeting held July 14, 2020
between******the American Chemistry Council
and Surface Transportation Board Vice Chairman Martin Oberman*****ENTERED
Office of Proceedings
July 17, 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:

- Martin Oberman, Vice Chairman
- Ellen Erichsen, 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 Board’s Final Offer Rate Review (FORR) proposal and the flexibility and opportunity it provides for use of alternative rate reasonableness methodologies. ACC commented that 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 Vice Chairman Oberman 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. ACC stated that 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, ACC believes the Board should extend the discovery period and permit motions to compel through an expedited process. ACC explained that these proposals would help ensure a fair and workable process, with only modest increases to the Board’s proposed timeline. Vice Chairman Oberman asked about the extent to which parties would need to disclose their rate reasonableness methodology when making motions to compel and whether parties should be required to explain the reason for their discovery requests. ACC responded that parties would

likely need to explain the basis for their discovery requests when negotiating discovery disputes and this may result in disclosure of a party's methodology. It also responded that requiring parties to explain the basis for their discovery request would promote what otherwise would occur in correspondence between parties about a dispute or under a meet and confer requirement.

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. ACC also noted that this approach would be available in any type of rate case and selected at the same time as the shipper selects the rate case process. ACC explained this also would enable a shipper to use all or some of the modal presumptions available under the Board's streamlined proposal while imposing expedited time frames and page limits to narrow the shipper's market dominance showing.
4. ACC explained that the \$4 million relief cap in FORR cases should apply only to two years of rate prescription, not to reparations. ACC further explained that 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. ACC also suggested that the Board consider waiving or increasing the cap upon a complainant's request made at the outset of a case if the complainant uses a methodology that is more economically robust than the three-benchmark method. Moreover, ACC suggested that the relief cap should not be any lower than the cap applicable to three-benchmark proceedings because methods, such as ACC's proposed benchmarking method, for FORR proceedings can be more economically robust than three-benchmark. In response to questions from Vice Chairman Oberman, ACC explained 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.
5. ACC explained that concerns about FORR depriving parties of a full hearing on rate reasonableness are misplaced. ACC remarked that FORR provides clear standards for evaluating a party's offer and involves the Board exercising its independent judgment to select the most appropriate offer. ACC further remarked that 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. ACC expressed its belief that 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.
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.

ACC remarked that competitive switching is a ready-made tool for enhancing competition in limited circumstances.

7. Vice Chairman Oberman asked whether an arbitration would be an appealing alternative to FORR for shippers. ACC explained that the details of the arbitration program would impact its appeal. It also identified various disadvantages to arbitration when compared to FORR, including a lengthy market dominance process, unclear standards regarding allowable rate reasonableness methodologies, railroads' ability to opt out of arbitration on short notice, and additional layers of available appeals.