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August 31, 2012

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Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E. Street, S.W.  
Washington, D.C. 20423

Re: E.I. du Pont de Nemours & Company v. Norfolk Southern Railway Company, STB Docket No. 42125

Dear Ms. Brown:

Norfolk Southern Railway Company (“NS”) respectfully submits this letter to address one point raised by DuPont’s August 27, 2012 Reply to NS’s Motion for Modification of the Procedural Schedule (“Reply”) and accompanying production of supplemental evidence. Specifically, DuPont just this week produced to NS for the first time two additional workpapers that DuPont claims were “inadvertently omitted” from its Opening Evidence. These new workpapers were provided after NS filed its Motion to Modify the Procedural Schedule (“Motion”). At the time NS filed that Motion it did not expect that DuPont would submit new workpapers in support of its Opening Evidence at this late date. NS respectfully requests that the Board accept NS’s short response to DuPont’s recent action, in order to ensure that the Board has a complete record on which to assess NS’s Motion.<sup>1</sup>

<sup>1</sup> See, e.g., *E.I. du Pont de Nemours & Co. v. Norfolk So. Ry. Co.*, STB Docket No. 42125 (accepting surreplies on DuPont motion to extend procedural schedule “[i]n the interest of compiling a more complete record”); *Allied Erecting & Dismantling, Inc. – Petition for Declaratory Order – Rail Easements in Mahoning County, Ohio*, STB Fin. Docket No. 35316, at n.2 (June 23, 2010) (accepting two replies to replies “in order to establish a more complete record”); *City of Alexandria, VA – Petition for Declaratory Order*, STB Fin. Docket No. 35157 (Nov. 6, 2008) (allowing reply to reply “[i]n the interest of compiling a full record”).

On August 27, DuPont produced a disk to NS containing two workpapers that DuPont claims support its evidence as to the hypothetical DuPont Railroad's yards. While DuPont describes these as "summary workpapers" (Reply at 4 n.5), one of them is a 114-megabyte Excel file that is one of the largest data files that DuPont has submitted as part of its Opening Evidence. NS is evaluating the newly-produced DuPont workpapers, and NS intends to address their substance in its Reply Evidence. But what is important for present purposes is that DuPont's decision to supplement its Opening Evidence with additional workpapers nearly four months after the April 30 deadline for it to file Opening Evidence is further justification for the modest extension to the procedural schedule requested by NS's Motion.

DuPont asserts that it "inadvertently omitted" these workpapers from its Opening Evidence. It then goes so far as to suggest that NS is to blame for DuPont's omission because NS did not specifically request that DuPont produce them. Reply at 4 n.5. This attempted blame-shifting makes little sense. In the first place, DuPont was required to submit all its supporting evidence in its opening filing, and any omissions in that filing are *DuPont's* responsibility.<sup>2</sup> Moreover, DuPont's charge that NS failed to ask for workpapers that DuPont did not include in its Opening Evidence is Alice-in-Wonderland logic. How could NS be blamed for not divining the existence of workpapers that DuPont did not include in its Opening Evidence, and whose existence it first disclosed on the day it produced them?

Regardless of DuPont's excuses for its late production of these workpapers, the indisputable fact is that DuPont supplemented its opening evidence with voluminous workpapers on August 27, barely one month before the current deadline for NS to file Reply Evidence. This belated supplementation alone would justify a modification of the procedural schedule. *See, e.g., DuPont v. NS*, STB Docket No. 42125, Decision at 2 (Jan. 13, 2012) (relying on NS's production of limited data in November 2011—over two months before the deadline for DuPont's opening evidence – to grant DuPont an additional 90 day extension of time in which to file its opening evidence because "[e]ven if the data . . . were not central to the case, as NSR asserts, it would still be important to ensure that the complainant in a case of this extraordinary size has enough time, after assembling a full set of information, to develop its evidence without shortcuts.").

When DuPont's late production is considered in combination with the other justifications for an extension described in NS's Motion, the record strongly supports an extension of the procedural schedule. Indeed, DuPont admits that "'the unusual scope and complexity' of this proceeding may pose challenges for the development of evidence." Reply at 2. DuPont has magnified those challenges by deciding to produce additional opening evidence at the eleventh

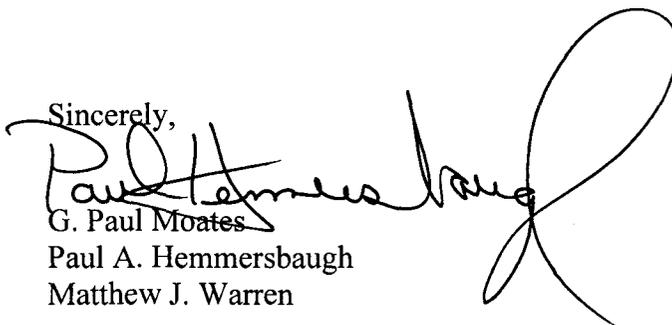
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<sup>2</sup> *See General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases*, 5 S.T.B. 441, 445 ("We remind parties that, in presenting evidence, the party with the burden of proof on a particular issue must present its entire case-in-chief in its opening evidence.").

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hour. For this reason in addition to those set forth in NS's Motion, the Board should grant NS's Motion for Modification of the Procedural Schedule in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul Hemmersbaugh", with a large, stylized flourish extending to the right.

~~G. Paul Moates~~  
Paul A. Hemmersbaugh  
Matthew J. Warren

cc: Jeffrey O. Moreno