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April 12, 2012

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VIA E-FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: ***Canexus Chemicals Canada, L.P. v. BNSF Railway Company*****, STB Docket No. NOR 42132**

Dear Ms. Brown:

Please find attached the Rebuttal Evidence of Canexus Chemicals Canada, L.P. ("Canexus") for e-filing in the above-captioned Docket. Canexus is filing both a Highly Confidential and Public Version of its Rebuttal Evidence. Highly Confidential Information is redacted from the Public Version and is denoted with brackets [ ]. Pursuant to the Board's e-filing procedures, Canexus is filing the Highly Confidential Version under seal.

Canexus is also hand-delivering to the STB today three (3) compact disks to accompany this filing, which contain the rebuttal electronic workpapers of Canexus' witnesses Mr. Thomas Crowley and Mr. Charles Stedman.

Please feel free to contact me with any questions.

Regards,

Thomas W. Wilcox

Thomas W. Wilcox
Attorney for Canexus Chemicals Canada, L.P.

Enclosure
cc: Counsel for BNSF Railway Company

PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

CANEXUS CHEMICALS CANADA, L.P.	)	
Complainant,	)	
v.	)	Docket No. NOR 42132
BNSF RAILWAY COMPANY	)	
Defendant.	)	

COMPLAINANT'S REBUTTAL EVIDENCE

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April 12, 2012

PUBLIC VERSION

TABLE OF CONTENTS

PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

CANEXUS CHEMICALS CANADA, L.P.	)	
Complainant,	)	
v.	)	Docket No. NOR 42132
BNSF RAILWAY COMPANY	)	
Defendant.	)	

COMPLAINANT'S REBUTTAL EVIDENCE

Complainant Canexus Chemicals Canada, L.P. ("Canexus") hereby submits its Rebuttal Evidence in this proceeding. This Rebuttal Evidence consists of two parts: (a) Counsel's Argument responding to the legal and other issues raised by defendant BNSF Railway Company's ("BNSF") reply evidence; and (b) the Rebuttal Verified Statement of Mr. Thomas D. Crowley and Mr. Charles A. Stedman, President and Vice President, respectively, of L.E. Peabody & Associates, Inc. ("Crowley/Stedman Rebuttal VS"), providing written testimony and evidence in support of Canexus' Rebuttal Evidence. This Rebuttal Evidence demonstrates (1) Canexus' Final Offer Comparison Groups are the most similar in the aggregate to the issue movements; (2) the challenged rates are presumptively unreasonable; and (3) the presumptively maximum reasonable rate levels produced by properly applying the Three-Benchmark methodology should not be increased due to the presence of any "other relevant factors" as that term is defined and applied under the *Simplified Standards* and Board precedent.

PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

CANEXUS CHEMICALS CANADA, L.P.	)	
Complainant,	)	
v.	)	Docket No. NOR 42132
BNSF RAILWAY COMPANY	)	
Defendant.	)	

PART I – COUNSEL'S ARGUMENT

I. INTRODUCTION

In its Reply Evidence, BNSF made no changes or adjustments to its opening comparison group evidence, and so its "final offer" comparison group evidence is exactly the same as its opening comparison group evidence. Nor did BNSF make any modifications to any of the four proposed upward adjustments to the presumed maximum reasonable rates produced by application of the Three-Benchmark methodology to BNSF's "alternative" comparison group composed of chlorine movements selected only from the 2009 Carload Waybill Sample data provided to the parties at the outset of this case. BNSF's Reply Evidence also contains several invalid criticisms of Canexus' opening comparison groups, but Canexus' Final Offer Comparison Groups now contain features of BNSF's opening groups in keeping with the spirit and intent of the Three-Benchmark process under *Simplified Standards*, so most of BNSF's criticisms on Reply are moot, and those that aren't have no merit. In addition, on Reply BNSF attempted to apply BNSF's flawed proposed "other relevant factors" adjustments to only a subset of the movements contained in Canexus' opening comparison groups – just the chlorine movements - a meaningless and irrelevant exercise since under the final-offer selection process of *Simplified Standards* the Board has expressly ruled it will not modify a party's comparison group evidence. *Simplified Standards* at 18 (the comparison group process is an "either/or" selection, with no modifications by the Board"). Finally, BNSF's Reply Evidence contains a brand new, fifth proposed upward adjustment based on alleged "other relevant factors," which adjustment was offered for the very first time in the Reply round of this proceeding and should therefore be ignored, but in any event is just as fundamentally flawed as the adjustments BNSF proposed in its Opening Evidence, if not more so. These aspects of BNSF's Reply Evidence are addressed in more detail below, and in the accompanying Crowley/Stedman Rebuttal VS.

II. ARGUMENT

A. Canexus' Final Offer Comparison Groups are Demonstrably Superior to BNSF's Single Comparison Group

In the Reply phase of this case, Canexus chose to modify its opening comparison groups and submit "final offer" comparison groups that include some of the elements of BNSF's opening "alternative" comparison group. Canexus Reply at 16-17. In contrast, BNSF elected to make no changes to its opening "preferred" and "alternative" groups. Canexus continues to maintain that BNSF's "preferred" comparison group evidence and all other evidence utilizing BNSF's 2011 internal traffic data must be stricken from the record in this proceeding in light of the Board's February 8, 2012 decision denying BNSF's motion to use selected BNSF 2011 traffic data in this case. Further affirmation of that decision to exclude the 2011 BNSF traffic data from this case was provided by the Board's March 12, 2012 decision in Docket No. EP 646

(Sub-No.3), *Waybill Data Released in Three-Benchmark Rail Rate Proceedings* (*March 12 Decision*).[1]

The final offer comparison groups presented to the Board by the parties that comply with *Simplified Standards* and the rulings in this case are (1) BNSF's "alternative" comparison group made up of BNSF chlorine movements selected from the 2009 Carload Waybill Sample data provided to the parties; and (2) Canexus Final Offer Comparison Groups of TIH commodity movements selected from all four years of the Waybill Sample data provided to the parties. Because BNSF made no changes to its opening "alternative" comparison group all of the criticisms of that comparison group set forth in Canexus' Reply Evidence remain applicable without modification. As explained in more detail below and by Messrs. Crowley and Stedman, BNSF's criticisms of Canexus' comparison groups are unwarranted and Canexus' final offer groups are superior to BNSF's single group and should be selected by the Board for the R/VC_{comp} portion of the Three-Benchmark analysis determination of the presumed maximum reasonable revenue to variable cost (R/VC) ratios and rates.

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1 BNSF's 2011 data should not have been included in BNSF's Opening Evidence after the Board's denial of BNSF's motion to use its 2011 traffic data in this case, and its inclusion in BNSF's Reply Evidence is surprising in light of the *March 12 Decision*. In that decision the Board finalized its rule that parties would be provided the four most recent years of the Carload Waybill Sample. In doing so, the Board affirmed its prior numerous statements that the Waybill Sample data "<u>defines the range of data that will be available to the parties</u>," and that parties "may construct their comparison groups <u>from any combination of movements drawn from the four-year Waybill Sample Data.</u>" *March 12 Decision* at 4 (emphasis added). More significantly, the Board explicitly and emphatically rejected the arguments of railroad parties in that proceeding advocating the use of current data, which arguments formed the underpinning of BNSF's Motion. In the *March 12 Decision* the Board rejected all of the railroads' arguments for using current data and reaffirmed its prior determinations that current traffic data from the railroads' files could not be used in the comparison group analysis of a Three Benchmark case. Despite BNSF's disingenuous claim to the contrary, there is no "uncertainty surrounding the Board's precise intentions concerning the use of the 2011 data." BNSF Reply at 3-4.

1. Canexus' All-TIH Movements Comparison Groups are Superior to BNSF's Single Comparison Group

In its Reply Evidence BNSF assails Canexus for proposing opening comparison groups that contain too few chlorine movements and TIH commodities other than chlorine, specifically anhydrous ammonia. BNSF Reply at 8, 10-14. In the first place, BNSF's complaints that Canexus included insufficient chlorine movements in its opening comparison groups, *Id.* at 8-10, have been mooted by the fact that Canexus included nine single line chlorine movements from BNSF's 2009 "alternative" comparison group in Canexus' final offer comparison groups. This increased the percentage of chlorine movements in the groups to 69% for the Albuquerque final offer group and 26% for the Glendale final offer group. Canexus Reply at 12-13; Crowley/Stedman Reply VS at 16-17. Second, Canexus' Reply Evidence contains a lengthy refutation of BNSF's arguments in its Opening Evidence why anhydrous ammonia movements should not be deemed comparable to chlorine movements, which arguments BNSF has summarized in its Reply Evidence. BNSF Reply at 11. Third, BNSF's Reply Evidence includes newly offered purported "quantitative evidence" that allegedly further demonstrates that the two commodities are not comparable. *Id.* at 11-15. This new material consists of (1) a comparison of BNSF common carrier rates for chlorine and anhydrous ammonia and URCS system average variable costs; and (2) a review of the prices paid by end users of the two commodities. Messrs. Crowley and Stedman describe the flaws in both of these new evidentiary arguments. These include the following:

* BNSF's comparison analysis is based on unilaterally established common carrier rates and "origin-destination lanes," not R/VC ratios of actual rail movements. As explained in Section B.2 below, this is not consistent with the Three-Benchmark

methodology and opens the door to it being easily gamed by railroad defendants. Crowley/Stedman Rebuttal VS at 6-7.

* BNSF's model gives every common carrier rate the same weight, regardless of whether any traffic moved under the rate, thereby impermissibly ignoring the expansion factors associated with each movement and failing to provide any representation of the actual market for transportation of either commodity. *Id.* at 7.
* The analysis ignores contract movements of either commodity. *Id.*
* The analysis claims a R/VC ratio discrepancy between chlorine and anhydrous ammonia based on a snapshot in time that biases the result in BNSF's favor, another element of BNSF's evidence that is contrary to the fundamental principles of *Simplified Standards*. *Id.* at 6-9. Specifically, the discrepancy between chlorine and anhydrous ammonia rates claimed by BNSF for 2011 virtually disappeared in 2012 when BNSF implemented rate increases for anhydrous ammonia on a par with the 2011 increases for chlorine. *Id.* at 9.
* Evidence of the respective prices paid by end users of chlorine and anhydrous ammonia is irrelevant in a Three-Benchmark case, where the rates are evaluated based on a comparison of the rates and costs of transporting the commodities, not what end users pay for them. *Id.* at 9-10

2. Glendale Issue Traffic is Properly Included in the Albuquerque Comparison Group

BNSF's criticisms of Glendale chlorine movements in the Carload Waybill Sample being included in Canexus' Albuquerque comparison group are puzzling, since Canexus merely adhered to the established practice of *Simplified Standards* of excluding issue movements from the comparison group to be used to assess the reasonableness of that rate. *Id.* at 10. Moreover, BNSF's complaints about the Albuquerque comparison group having too few chlorine movements have been mooted by the inclusion in the final offer comparison group of nine additional single line chlorine movements from BNSF's "alternative" comparison group, raising the overall percentage of chlorine movements in the final offer group to 69%.

3. **Canexus' Use of 2006-2008 Data was Affirmed by the *March 12 Decision***

BNSF's complaints that Canexus' comparison groups are inferior because they do not contain a sufficient amount of 2009 movements have been mooted by Canexus' inclusion in each of its final offer groups of nine 2009 movements from BNSF's "alternative" comparison group. As such, fully 25 out of 50 comparable movements in the Glendale group are from 2009, and 22 out of 32 comparable movements in the Albuquerque group are 2009 movements. *Id.* at 11.

Moreover, Messrs Crowley and Stedman demonstrate that the R/VC ratios for TIH commodities over all four years of the Carload Waybill Sample data provided to the parties (and used to develop the RSAM and R/VC_{180} ratios) are consistent. *Id.*

Finally, Canexus' use of all four years of the Confidential Waybill Sample data provided to the parties was affirmed by the *March 12 Decision*. BNSF's claim that this decision was somehow "prejudicial" to BNSF is overblown, BNSF Reply at 17, since it also affirmed BNSF's decision to use only 2009 data to present a comparison group. It should be clear to the Board from BNSF's criticisms of Canexus' use of 2006-2008 data that BNSF would not have done anything differently had the *March 12 Decision* been issued at an earlier date. BNSF would have only been possibly prejudiced had the Board ruled on March 12 that BNSF could not limit its comparison group evidence to a single year of the Carload Waybill Sample data, which the *March 12 Decision* did not do.

* * *

In summary, most of BNSF's reasons for asking the Board to select BNSF's "alternative" comparison group" over Canexus' comparison groups have been mooted, and the remaining reasons have been demonstrated by Canexus to have no merit. On balance, Canexus has presented the Board with a "final offer" comparison group for each movement that is the most similar in the aggregate to the specific issue movement and each group should therefore be utilized in the Three-Benchmark analysis to determine the maximum reasonable R/VC ratios and corresponding rate for each movement.

B. Other Relevant Factors

As explained in Canexus' Reply Evidence, when the Three-Benchmark methodology is applied utilizing Canexus' final offer comparison groups, the challenged rates to Albuquerque and to Glendale are "above a reasonable confidence interval around the estimate of the means for the adjusted comparison group" and therefore they are "presumed unreasonable and, absent any 'other relevant factors,' the maximum lawful rate will be established at that boundary level." *Simplified Standards* at 21. This is also true of if Board was to apply the Three-Benchmark methodology to BNSF's "alternative" comparison group. BNSF Opening Evidence at 55-56 (applying the methodology produces a presumed maximum reasonable R/VC ratio of 247% for both movements). "Other relevant factors" adjustments (up or down) are the sole means provided for in *Simplified Standards* to account for the regulatory lag inherent in the process due to its reliance on the Confidential Waybill Sample. *Simplified Standards* at 85.

No doubt because BNSF's only valid comparison group leads to a determination that the challenged rates are presumptively unreasonable, BNSF has devoted most of its efforts in this case to developing a "shotgun" approach of proposing multiple upward adjustments to the presumed maximum reasonable R/VC levels and rates. Under *Simplified Standards*, this requires that BNSF "quantify this evidence, so that the Board will have an objective, transparent means of adjusting the maximum lawful rate upwards or downwards." *Id.* at 77. However, the Board has expressly excluded "any . . . evidence of movement-specific adjustments to URCS." *Id.* at 22, 77-78. In addition, the Board can and has proscribed other categories of evidence from the "other relevant factors" portion of the Three-Benchmark rules. *Id.* at 78; Canexus Reply at 21-22. BNSF must also not exceed the strict limits established on such proposals for the salutary purpose of ensuring "that evidentiary disputes over 'other relevant factors' do not get out of hand and defeat the purpose of this simplified approach." *Simplified Standards* at 78.

As demonstrated at length in Canexus' Reply Evidence, and supplemented in this Rebuttal Evidence, BNSF has utterly failed to meet its burden of demonstrating that the presumed maximum reasonable R/VC ratios and rates should be increased. This is primarily due to the fact that BNSF's proposals proceed from the basic premises that (1) the Board accept as presumptively reasonable the across-the-board rate increases BNSF unilaterally imposed on chlorine and other TIH commodities in 2011, and (2) that the Board accept as true all of BNSF's claims concerning the alleged additional costs it is incurring for PTC, insurance and regulatory compliance costs. But just as significant, each one of BNSF's proposals contains numerous serious and fundamental flaws that render each clearly unacceptable and inappropriate under *Simplified Standards* to address any "regulatory lag" in this case.[2]

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[2] Canexus' Reply Evidence demonstrates in detail how each one of the four proposed adjustments in BNSF's Opening Evidence violates one or more of the following: (1) the Board's ruling denying BNSF's motion to use selected BNSF 2011 traffic in this case; (2) the Board's categorical exclusion of PTC-related "other relevant factors" adjustments in Three-Benchmark cases; (3) the Board's explicit prohibition, consistent with its prohibition in rate cases generally, on making movement-specific adjustments to URCS; and (4) the overarching prohibition on presenting "other relevant factors" evidence that is overly complex and opens the door to the

1. BNSF's Opening Evidence Proposed Adjustments

BNSF's Opening Evidence included four proposed upward adjustments to the presumed maximum reasonable rates produced by applying the Three-Benchmark methodology to BNSF's flawed single opening "alternative" comparison group. In its Reply Evidence, Canexus provided a detailed and extensive demonstration of the flaws and deficiencies of each one of the four proposed adjustments. Canexus Reply at 17-32. Crowley/Stedman Reply VS at 20-39.[3]

On Reply, BNSF made no changes to the four adjustments it proposed in its Opening Evidence. However, BNSF attempted to apply each of the flawed proposed adjustments to only a subset of Canexus' opening comparison groups: the chlorine movements contained in those groups. BNSF Reply at 18-19. This analysis on its face is meaningless. Even if Canexus had rigidly stood by its opening comparison groups like BNSF did –which Canexus did not – and even if the Board was inclined to select a final comparison group made up of only the chlorine movements in Canexus' opening comparison groups for the R/VC_{comp} prong of the Three-Benchmark analysis –which Canexus is not even proposing - the Board has explicitly ruled that it will not make such modifications because of the "final offer" principles of *Simplified Standards*. *Simplified Standards* at 18. Consequently, the entire discussion contained on pages 17-26 of BNSF's Reply Evidence would be meaningless even if Canexus had <u>not</u> modified its

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costly "battle of the experts" common to full Stand-Alone Cost cases that the Board explicitly has excluded from Three-Benchmark cases. Canexus Reply at 18-19. These flaws are also evidence in BNSF's brand new, fifth proposed adjustment contained in its Reply Evidence, as discussed in this Rebuttal Evidence and the Crowley/Stedman Rebuttal VS.

[3] In their Rebuttal VS Messrs Crowley and Stedman further explain how BNSF's proposed adjustments would be a significant departure from basic stand-alone cost principles concerning the allocation of joint and common costs by allocating 100% of the costs of PTC and insurance to the issue movements and other TIH movements instead of allocating the costs to all traffic that moves on the relevant tracks of the defendant. Crowley/Stedman Rebuttal VS at 18-19.

opening comparison groups. Since Canexus did modify its opening comparison groups, this discussion becomes moot, as well.

2. <u>**Newly Proposed "Public Current Rate Adjustment"**</u>

BNSF in its Opening Evidence attempted to circumvent the prohibition in *Simplified Standards* on using current defendant traffic data in BNSF's comparison group evidence, a prohibition affirmed by the Board's denial of BNSF's motion to use 2011 traffic data, by including virtually this same comparison group data in its proposed "Current Rate Adjustment." Canexus Reply Evidence at 20-21. This was in direct contravention of the Board's February 8 decision denying BNSF's motion to use its 2011 traffic data, and Canexus has moved to strike this evidence from the record. In its Reply Evidence, BNSF has proposed yet another adjustment to the presumed maximum reasonable rate levels, which consists of yet another comparison group made up of purported current BNSF common carrier rates and URCS variable costs. This proposed adjustment should also be rejected, for the reasons discussed below.

First and foremost, the proposed adjustment should be rejected on procedural grounds, since BNSF has raised it for the very first time in its Reply evidence. BNSF's claim that this brand new theory is being introduced on Reply in response to Canexus' Motion to Strike is not true. BNSF Reply at 5. BNSF itself characterizes this proposed adjustment as an alternative to its proposed Current Rate Adjustment, which means there is no reason why this proposed adjustment could not have been raised in BNSF's opening evidence. Accordingly, the introduction of this new proposed adjustment in the reply phase of this case is untimely and should not be considered by the Board.[4]

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4 *Simplified Standards* explicitly requires the defendant railroad to submit its "other relevant factors" in its opening evidence. *Simplified Standards* at 23, note 31. This requirement is consistent with the overall intent and purpose of the Three-Benchmark rules to be streamlined

Second, this proposed adjustment should be rejected because, just like the Current Rate Adjustment, it too is an attempted end run around the Board's prohibition on using current data from the carrier's files in comparison group evidence by attempting to introduce the same data in the "other relevant factors" component of the Three-Benchmark methodology. Specifically, instead of using BNSF internal 2011 traffic data, the "Public Current Rate Adjustment" consists of comparison group evidence assembled using 2012 common carrier rate information and system average variable costs calculated by BNSF. *See* Crowley/Stedman Rebuttal VS at 13-15. Because this adjustment constitutes the same impermissible circumvention of the Board's explicit prohibition on using current rate information in comparison group evidence, only with a subset of current BNSF data, the new proposed adjustment should be rejected on this ground as well.

Third, this proposed adjustment should be rejected because, <u>at bottom, it is not based on any R/VC ratios for actual traffic, but instead merely on common carrier rates unilaterally established by BNSF for "origin-destination pairs."</u> BNSF Reply at 27. Just because a common carrier rate is established, this does not mean that any traffic moved (or is intended to move) under it. This is especially true in today's industry environment, where BNSF and the other Class I railroads have publicly and aggressively sought to limit or even eliminate chlorine and other TIH commodities from their systems, in part by establishing prohibitively high common carrier and contract rates. Accordingly, basing any comparative rate analysis solely on rates

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and cost-effective for complainants. Allowing railroads to introduce new theories and evidence on "other relevant factors" adjustments in the Reply phase of Three-Benchmark cases would create a dangerous precedent whereby, as in this case, complainants will be forced to spend additional costs and resources they should not expect to incur. The Three-Benchmark methodology was designed to be affordable for the small size rate disputes and it is crucial for the complainants to be able to accurately project their litigation costs. This calls for strict enforcement of the applicable procedural rules.

established for "origin-destination pairs" is fundamentally at odds with the basic premises of the Three-Benchmark methodology. *See* Crowley/Stedman Rebuttal VS at 15. In addition, even assuming that some traffic moved under one or more of the rates used in the proposed adjustment's analysis, the adjustment requires the Board to conclusively determine that every one of the common carrier rates used in the analysis was reasonable under the Board's rate reasonableness standards. At a minimum this would be highly prejudicial to Canexus and future complainants seeking relief under the Three-Benchmark methodology. Even more egregious, however, is the fact that acceptance of BNSF's proposed "Public Current Rate Adjustment" would open the door for the railroads to easily game the Three-Benchmark methodology by simply (1) unilaterally establishing extremely high common carrier rates for TIH and other targeted commodities that either would never be used by shippers, or only used for a handful of shipments; and then (2) using such artificially high common carrier rates to preclude relief for rates on higher-volume routes that are brought before the Board and are found to be presumptively unreasonable through application of the Three-Benchmark rules.

Finally, as explained by Messrs. Crowley and Stedman, the proposed adjustment is fatally flawed. Crowley/Stedman Rebuttal VS at 16-18. This is because in calculating the R/VC ratios for the "origin-destination pairs" contained in the analysis, BNSF used <u>system average</u> variable costs. This is flatly inconsistent with BNSF's oft-repeated claims in this proceeding that its huge rate increases in 2011 were due in large part to the regulatory "sea change" of increased PTC costs, increased insurance costs, and the increased costs of regulatory compliance. Canexus has vigorously disputed BNSF's claims about the reasons for its 2011 rate increases, and also its other proposed "other relevant factors" adjustments for PTC and insurance costs. However, BNSF cannot on the one hand argue that its rate increases were due in large part to such cost increases, and propose other adjustments to the presumed maximum reasonable rates in this case for PTC and insurance costs, and then on the other hand calculate a "Public Current Rate Adjustment" based on system average URCS costs, which do not include the PTC and insurance costs BNSF has complained of. Crowley/Stedman VS at 17-18. In addition to being a blatant internal inconsistency within BNSF's evidence, calculating R/VC ratios using high rate levels purportedly established because of increased costs, and then excluding those costs from the URCS variable cost denominator, produces an artificially high R/VC ratio for that "origin-destination pair." *Id.*

In summary, none of the five adjustments proposed by BNSF came close to meeting the strict standards established by the Board for proposed adjustments to the presumed maximum reasonable rates produced by the Three-Benchmark methodology based on "other relevant factors."

III. CONCLUSION

In conclusion, the Board should accept Canexus' Final Offer Comparison Groups to use in applying the Three-Benchmark methodology to determine the presumed maximum reasonable R/VC ratios and corresponding rate levels for the Glendale Movement and the Albuquerque Movement. These R/VC ratios and rate levels are as follows:

Movement	R/VC Ratio	Maximum Rate Per Carload
Albuquerque	218%	$12,531
Glendale	223%	$11,337

Moreover, for the reasons set forth in Canexus' Reply Evidence and this Rebuttal Evidence, the Board should reject all of BNSF's proposed adjustments to the presumptive maximum R/VC ratios and rates based on the presence of "other relevant factors" as defined by

Simplified Standards. After applying the Three-Benchmark methodology as advocated by Canexus, the Board should:

(1) find that BNSF's common carrier rates applicable to the transportation of chlorine between North Vancouver and Glendale, AZ and Albuquerque, NM are unreasonable;

(2) prescribe just and reasonable rates for the future applicable to the rail transportation of Canexus' traffic, pursuant to 49 U.S.C. §§ 10704(a)(1) and 11701(a);

(3) award Canexus reparations, plus applicable interest, in accordance with 49 U.S.C. §11704 for unlawful rates set by BNSF for the period beginning March 16, 2011 to the date BNSF establishes just and reasonable rates prescribed by the Board in this proceeding; and

(4) grant to Canexus such other and further relief as the Board may deem proper under the circumstances.

Respectfully submitted,

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Attorneys for Complainant Canexus Chemicals Canada, L.P.

Dated: April 12, 2012

PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

CANEXUS CHEMICALS CANADA, L.P.	)	
Complainant,	)	
v.	)	Docket No. NOR 42132
BNSF RAILWAY COMPANY	)	
Defendant.	)	

PART II – REBUTTAL VERIFIED STATEMENT

Rebuttal VS of
Crowley/Stedman

PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

Canexus Chemicals Canada, L.P.	)	
	)	
Complainant	)	
	)	
	)	
v.	)	**Docket No. NOR 42132**
	)	
	)	
The BNSF Railway Company	)	
	)	
Defendant	)	

REBUTTAL
Verified Statement
Of

Thomas D. Crowley
President
And
Charles A. Stedman
Vice President
L. E. Peabody & Associates, Inc.

On Behalf of
Canexus Chemicals Canada, L.P.

Due Date: April 12, 2012

TABLE OF CONTENTS **PAGE**

I. INTRODUCTION

We are Thomas D. Crowley and Charles A. Stedman. We are the same Thomas D. Crowley and Charles A. Stedman who filed verified statements in this proceeding on February 13, 2012 ("Opening VS") and March 13, 2012 ("Reply VS") on behalf of Canexus Chemicals Canada, L. P. ("Canexus"). Our qualifications and experience are attached to our Opening VS as Exhibit No. 1 and Exhibit No. 2, respectively.

Canexus is requesting that the Surface Transportation Board ("STB" or "Board") prescribe reasonable rates, service terms and reparations associated with the transportation of chlorine via The BNSF Railway Company ("BNSF") for the following two (2) movements:

1. North Vancouver, British Columbia, Canada to Glendale, AZ ("Glendale Movement"); and
2. North Vancouver, British Columbia, Canada to Albuquerque, NM ("Albuquerque Movement").

In our Opening VS, we applied the STB's procedures for the Three-Benchmark Methodology specified in the STB's September 5, 2007 decision in Ex Parte No. 646 (Sub-No. 1) *Simplified Standards for Rail Rate Cases* ("*Simplified Standards*"). In support of Canexus' request, we provided the following information:

1. The revenue / variable cost ("R/VC") ratio for each of the issue movements;
2. The selection of comparable BNSF movements from the STB's Unmasked Confidential Waybill Sample ("Waybill Sample") for BNSF for each year 2006 through 2009; and
3. The upper boundary of the R/VC ratio for the comparison group (referred to as the "Maximum R/VC Ratio") for each of the issue movements following the STB's procedures specified in *Simplified Standards*.

Simultaneous with the filing of Canexus' opening evidence on February 13, 2012, BNSF filed its opening evidence in this proceeding. In our Reply VS, we critiqued and responded to

BNSF's opening evidence and incorporated revisions to the analyses included in our Opening VS. Our Reply VS included the "Final Offer" comparable groups for each issue movement[1].

Simultaneous with the filing of Canexus' reply evidence on March 13, 2012, BNSF filed its reply evidence is this proceeding including its "Final Offer" comparable group for the issue movements.

In our Rebuttal verified statement ("Rebuttal VS"), we respond to the criticisms included in BNSF's reply evidence related to our Opening VS, and provide a critique of BNSF's reply evidence, analyses and results. Our Rebuttal VS is summarized under the following headings:

II. Final Offer Comparison Groups

III. Other Relevant Factors

[1] See Reply VS, Exhibit No. 10 (Glendale) and Exhibit No. 11 (Albuquerque).

II. FINAL OFFER COMPARISON GROUPS

Simplified Standards specified the procedures to develop the Maximum Revenue to Variable Cost ("R/VC") ratio for the issue movements using the Three-Benchmark Methodology. The centerpiece of this methodology is each party's development of its comparison group(s) for the issue move(s). In our Opening VS, we presented the results of our initial analyses following the STB procedures including our two initial comparison groups, *i.e.,* one for each issue move.[2] In our Reply VS, we presented the results of our analyses using our two "final offer" comparison groups and critiqued BNSF's initial alternative case single comparison group.[3] In this Rebuttal VS, we will critique BNSF's "final offer" alternative case single comparison group and respond to BNSF's reply criticisms of Canexus' two comparison groups under the following topical headings:

A. BNSF's Final Offer Comparison Group; and

B. Canexus' Final Offer Comparison Groups.

A. BNSF'S FINAL OFFER COMPARISON GROUP

In BNSF's Reply, BNSF continued to present two comparison groups, *i.e.*, a "preferred" comparison group and an "alternative" comparison group.[4] In our Reply VS, we explained why BNSF's "preferred" comparison group is not a valid comparison group because it is based on data which the STB ruled cannot be used in this proceeding.[5] We also explained why BNSF's initial alternative single comparison group was not appropriate for the two issue moves.[6] As BNSF has made no modifications to its initial alternative single comparison group, all of the criticisms contained in our Reply VS remain applicable and need not be expanded on Rebuttal.

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[2] See our Opening VS at pages 8 through 10.
[3] See our Reply VS at pages 7 through 19.
[4] See BNSF Reply at pages 5 through 7.
[5] See our Reply VS at pages 7 and 8.
[6] *Id* at pages 9 through 16.

B. CANEXUS' FINAL OFFER COMPARISON GROUPS

In this section of our Rebuttal VS, we respond to BNSF's reply criticisms of Canexus' initial comparison groups and how these criticisms relate to Canexus' final offer comparison groups, if at all. Our discussion is contained under the following headings:

1. Primary Differences; and
2. BNSF's Alleged Principal Defects in Canexus' Comparison Groups.

1. Primary Differences

In its Reply, BNSF describes five primary differences between BNSF's and Canexus' initial comparison groups.[7] A brief summary of BNSF's criticisms plus a brief summary of our response explaining why each criticism has no merit follows:

1. BNSF criticizes Canexus for including movements other than chlorine in its comparison groups while BNSF included only chlorine movements. In our Reply VS, we explained why TIH movements other than chlorine were valid for inclusion in the comparison groups.[8] BNSF goes on to state that Canexus' comparison groups contain too few chlorine movements. While Canexus' disagrees that its initial comparison groups contained too few chlorine movements, this criticism is moot because Canexus increased the number of chlorine movements in its final offer comparison groups by adding nine local chlorine movements from BNSF's alternative case single comparison group to each of Canexus' comparison groups.[9]

2. BNSF criticizes Canexus for the way it handled the issue movements in its comparison groups. As explained in our Reply VS, Canexus handled the issue movements consistent with *Simplified Standards*.[10] This issue is discussed further in the next section of our Rebuttal VS.

3. BNSF criticizes Canexus for including Waybill Sample movements from 2006 through 2008 in its comparison groups rather than limiting them to only 2009 movements as BNSF did. This is not a valid criticism for the simple reason that Canexus followed STB precedent and used four years of Waybill Sample data. Four years of Waybill Sample

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[7] See BNSF Reply at pages 8 through 10.
[8] See our Reply VS at pages 11 through 13.
[9] *Id* at pages 16 and 17.
[10] *Id* at pages 10 and 11.

data were used by *all parties* in the four previous Three-Benchmark proceedings.[11] Canexus' use of four years of Waybill Sample data also conforms to the four years of data used by the STB to generate the RSAM and $RVS_{>180}$ ratios required to develop the Maximum R/VC Ratio. Finally, the Board affirmed that four years of data would be supplied to the parties, and each could use all four years of the data if they wished to do so, in its *March 12, 2012 Decision*[12].

4. BNSF claims that its use of rebill (interline) movements in its alternative case comparison group is more appropriate than Canexus' use of only local movements. As discussed in our Reply VS, BNSF's inclusion of rebill movements is inappropriate and contrary to explicit STB precedent.[13]

5. BNSF claims that its "alternative comparison group has a more expansive mileage-band than does Canexus's group."[14] Regardless of the merits of this criticism, it is moot as Canexus accepted BNSF's expanded mileage band for the local movements included in BNSF's alternative case comparison group[15] when developing Canexus' final offer comparison groups.

2. BNSF's Alleged Principal Defects <u>In Canexus' Comparison Groups</u>

Of the five foregoing "primary differences", BNSF claims three of the "principal differences are defects"[16]. Each of BNSF's claimed problems is discussed below under the following topics:

a. Anhydrous Ammonia Shipments;

b. Glendale Issue Traffic; and

c. 2006 Through 2008 Movements.

a. Anhydrous Ammonia <u>Shipments</u>

BNSF continues to claim that Canexus' inclusion of anhydrous ammonia movements in its

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11 See STB Docket No. 42099 *E.I. DuPont de Nemours and Company v. CSX Transportation, Inc.* ("*DuPont Non-Haz*"), decision served June 30, 2008; STB Docket No. 42100 *E.I. DuPont de Nemours and Company v. CSX Transportation, Inc.* ("*DuPont TIH*"), decision served June 30, 2008; STB Docket No. 42101 *E.I. DuPont de Nemours and Company v. CSX Transportation, Inc.* ("*DuPont Haz*"), decision served June 30, 2008; and STB Docket No. 42114 *US Magnesium, L.L.C. v. Union Pacific Railroad Company* ("*USM*"), decision served January 28, 2010.

12 See STB March 12, 2012 decision in Ex Parte 646 (Sub-No. 3), *Waybill Data Released in Three-Benchmark Rail Rate Proceeding ("March 12, 2012 Decision").*

13 See our Reply VS at pages 15 and 16.

14 See BNSF Reply at page 10.

15 See our Reply VS at pages 16 and 17.

16 See BNSF Reply at 10

two comparison groups is a "serious deficiency."[17] BNSF lists all the reasons it offered in opening that the transportation of chlorine and anhydrous ammonia is not comparable. We refuted all of those reasons in our Reply VS.[18] In its Reply, BNSF provides two additional reasons why chlorine and anhydrous ammonia should not be considered comparable. As shown below, neither of BNSF's new claims is valid.

First, BNSF included a table showing a comparison of "average" R/VC ratios for chlorine and anhydrous ammonia movements as of March 16, 2011 based on an analysis of BNSF publicly-available rates and BNSF-developed variable costs. This table is based on BNSF's "Public Current Rate Adjustment" other relevant factor rate adjustment that BNSF presents for the first time in its Reply.[19] As discussed in Section III of this Rebuttal VS, BNSF's analysis of "common carrier price authorities" is not an analysis of actual rail movements, but rather is an analysis of "origin-destination lanes."[20] BNSF's hypothetical analysis does not demonstrate that any traffic actually moved under these common carrier rates or tariffs.

At page 12 of its Reply Evidence, BNSF included a table (Table 1) that compares the average R/VC ratio BNSF calculated for 27 chlorine lanes to the average R/VC ratio BNSF calculated for 12 anhydrous ammonia lanes. BNSF had published public tariff rates as of March 16, 2011 for all of these lanes and each was within 700 miles of either of the two issue movement distances. BNSF calculated the revenues for these lanes based on the published tariff rate and the applicable March 2011 fuel surcharge tariff. BNSF calculated the variable costs for these lanes based on the 2010 STB URCS unit costs indexed to 1Q11. BNSF's table shows that the average R/VC ratio for the selected chlorine lanes as of March 16, 2011 was { } while the average R/VC ratio for the selected anhydrous ammonia lanes as of March 16, 2011 was { }. BNSF points to

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[17] See BNSF Reply at page 10.
[18] See our Reply VS at pages 11 through 13.
[19] See BNSF Reply at pages 11 and 12.
[20] *Id* at page 12.

this difference in R/VC ratios as proof that actual movements of anhydrous ammonia are not comparable to actual movements of chlorine.

There are several problems with BNSF's argument. First, using established tariff rates instead of the revenues and URCS variable costs of actual rail movements to establish R/VC ratios opens the door to a process of systematic gaming for the railroads. If this methodology was accepted by the Board, the railroads could simply publish tariff rates for lanes over which they know no movements will occur and then, when a shipper challenged rates that it actually used for transportation, point to those never-to-be-used rates as justification for the challenged rates where traffic does move.

Second, under the Three-Benchmark methodology, use of the comparable moves contained in the unmasked Waybill file must be balanced through use of the corresponding expansion factors associated with each comparable movement. If the sampled movements are evaluated without regard for the corresponding expansion factors, the comparable movement group is not truly representative of the universe of comparable shipments. Because the Waybill sample is random and unbiased, there is a greater chance of the inclusion of shipments over high-volume lanes in the sample. The expansion factors account for this and ensure that the sampled movements, when expanded, are given the proper weighting. Under BNSF's model, every published tariff rate is given precisely the same weight, regardless of the volume of traffic (if any) that moved under each included rate on March 16, 2011 or at any other time since then. Therefore, BNSF's model cannot be assumed to be representative of the actual market for transportation of either commodity.

Third, BNSF's model only includes rates for movements governed by public pricing authorities. Because it ignores all movements governed by privately negotiated contracts, BNSF's model is critically flawed and cannot be assumed to be representative of the overall market for the transportation of either chlorine or anhydrous ammonia.

Fourth, it is important to remember that the main premise behind BNSF's attempt to create a distinction between chlorine and anhydrous ammonia rates is BNSF's claims that it imposed unilateral rate increases on chlorine movements around the time when BNSF issued the challenged rates. BNSF defends its rate increases as necessary and reflective of the costs it must incur to implement PTC systems and carry high liability risk premiums due to its common carrier obligation to carry TIH generally and chlorine specifically. At the time of BNSF's chosen data for this particular analysis, March 16, 2011, BNSF had completed the implementation of its unilateral rate increase on chlorine movements. The corollary to BNSF's point is that the rates for anhydrous ammonia were no longer comparable to the rates for chlorine as of that date because anhydrous ammonia did not receive a similar across-the-board rate increase.

However, based on BNSF's more recent tariffs governing the movement of chlorine and anhydrous ammonia (published as of March 31, 2012),[21] it is evident that BNSF has just implemented a similar unilateral rate increase on anhydrous ammonia movements this year. We evaluated all of the { } anhydrous ammonia lanes and { } chlorine lanes BNSF included in its "Public Current Rate" analysis supporting its Table 1. We found that the rates for { } anhydrous ammonia movements and { } chlorine movements BNSF included in its analysis had expired as of March 29, 2012. For the remaining { } anhydrous ammonia lanes, the current rates increased by { } percent on average since March 16, 2012. For the remaining { } chlorine lanes, the current rates increased by only { } percent on average since March 16, 2012. Table 1 below contains a summary of the changes in chlorine and anhydrous ammonia rates for lanes BNSF included in its analysis since March 16, 2011.

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[21] BNSF 90096-5000 Rev 70 and BNSF 90084-3000-A Rev 95.

Table 1

Summary of the Change in Rates for Lanes BNSF
Included in its Public Current Rate Analysis Since March 16, 2011

	Commodity (1)	Lanes Included in BNSF Analysis as of 3/16/2011 (2)	Lanes That Have Expired as of 3/29/2012 (3)	Remaining Lanes with Active Rates Published as of 3/31/2012 (4)	Average Rate Increase Since 3/16/2011 for Remaining Active Lanes (5)
1.	Chlorine	{ }	{ }	{ }	{ }
2.	Anhydrous Ammonia	{ }	{ }	{ }	{ }

Source: Work Paper "Public Current Rate Adjustment Canexus Reb v3.xlsx" level "rate comp summary"

Therefore, the R/VC ratio discrepancy BNSF notes in its Table 1 was only present for a brief moment in time (a calendar year) because BNSF happened to implement its price hike for chlorine a year before it implemented a similar price hike for anhydrous ammonia. This is precisely why the Board was correct to endorse the use of four years of waybill sample data in Three-Benchmark rate cases in its March 12, 2012 Decision, and it underscores why the universe of historical movement data is a superior source of comparable rates than the published tariff rates on any one particular day.

Next, BNSF includes a chart comparing the Producer Price Indexes ("PPI") for chlorine and anhydrous ammonia from 2006 to the present.[22] BNSF's chart is irrelevant for the following reasons. The issue that is being evaluated under the Three Benchmark methodology is the transportation rates and the variable costs of transporting the two commodities, not the entirely separate issue of the price of the commodities. In our Reply VS,[23] we discussed in detail BNSF's claims concerning the comparability of chlorine and anhydrous ammonia from a transportation perspective. BNSF provided no evidence that its rail rates for chlorine and anhydrous ammonia are related in any way to the prices of the commodities or that the fluctuation of commodity prices, such as that shown in BNSF's Chart 1, has any impact on the transportation rates being charged to

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22 *Id* at pages 13 and 14.
23 See our Reply VS at pages 11 through 13.

move these two, or any other, commodities. For example, BNSF ships a large volume of coal from the Powder River Basin ("PRB") in Wyoming. The prices for the coal produced in the PRB can vary significantly based on the various characteristics of the coal available at each of the mines, the time of year, the weather and the availability of alternate fuels. BNSF publishes many common carrier price authorities for the transportation of coal from the PRB to locations all over the U. S. We do not know of any common carrier price authorities that change with the price of the coal being transported.

b. Glendale
<u>Issue Traffic</u>

BNSF objects to Canexus' comparison group for the Albuquerque movement because it includes Glendale movements that are contained in the Waybill Sample and met our selection criteria. BNSF claims that this inclusion is only to "exploit the regulatory lag problem."[24] BNSF is incorrect.

As discussed in our Reply VS, we excluded the issue movements from the comparison group for the particular movement being evaluated according to the requirements of *Simplified Standards*. In other words, Glendale movements were excluded from the Glendale comparison group and Albuquerque movements were excluded from the Albuquerque comparison group.[25] The two issue movements must be treated separately with specific comparison groups tailored to each movement. If each issue movement was filed under a separate complaint, there would be no discussion about including Glendale movements in a comparable group for the Albuquerque movement. As a result, Glendale movements, as well as any other movement other than the Albuquerque movement, are includable in the comparison group for the Albuquerque movement as long as they meet the specified selection criteria.

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[24] See BNSF Reply at page 15.
[25] See our Reply VS at pages 10 and 11.

c. 2006 Through 2008 Movements

BNSF complains that Canexus relied too heavily on 2006 through 2008 Waybill Sample movements in the composition of its two comparison groups.[26] BNSF's complaint has no substance, especially when Canexus' final offer comparison groups are examined. For the Glendale final offer comparison group, fully half (25 out of 50) of the comparable movements are from 2009, including nine chlorine movements. For the Albuquerque final offer comparison group, two-thirds (22 out of 32) of the comparable movements are from 2009, including thirteen chlorine movements. More importantly, the STB's Three Benchmark Methodology relies on the relationship of revenues to variable cost, not absolute values. These relationships are consistent over all four years of the Waybill Sample data provided to the parties and used to develop the three factors that make up the Three Benchmark maximum rate methodology, i.e., the development of the RSAM, R/VC_{180} and Comparison Group ratios.

[26] See BNSF Reply at pages 16 and 17.

III. OTHER RELEVANT FACTORS

In its Opening evidence, BNSF proposed four separate (upward) adjustments to the R/VC ratio calculated under the STB's Three Benchmark Methodology to account for "other relevant factors". BNSF's four separate, upward adjustments included:

1. Current Rate Adjustment
2. Historical PTC Adjustment
3. Liability Risk Adjustment
4. Future PTC Adjustment

In our Reply VS, we explained why each of BNSF's four "other relevant factors" adjustments was in violation of the Board's rulings and precedent and/or otherwise without merit. BNSF has not modified any of these proposed adjustments on Reply. All of our analyses and conclusions presented in our Reply VS are still valid.

In BNSF's Reply, BNSF introduced a brand new fifth "other relevant factor" upward adjustment, the "Public Current Rate Adjustment," which it presented as an alternative to BNSF's original "Current Rate Adjustment". This new adjustment suffers from the same critical flaws as BNSF's original "Current Rate Adjustment" proposal and should be rejected for the reasons we set out in our Reply VS, as supplemented below.

Also in BNSF's Reply, BNSF applied its four original and one new "other relevant factor" adjustments to a subset of the comparison traffic groups proposed by Canexus in its Opening. We address the application of BNSF's "other relevant factor" adjustments below.

A. PUBLIC CURRENT RATE ADJUSTMENT

As we discussed in our Reply VS, BNSF's "Current Rate Adjustment" is based on selected BNSF 2011 data from its internal files. The STB has ruled repeatedly that the use of selected waybills from railroads' internal files cannot be used in this or any Three Benchmark Methodology proceeding. Additionally, the STB specifically prohibited the use of selected 2011 waybills from BNSF's internal files in this case. Therefore, we did not critique the mechanics of BNSF's Current Rate Adjustment.

On March 12, 2012, the day before the parties filed their reply evidence in this case, the STB released its *March 12, 2012 Decision* which affirmed prior STB declarations which clearly articulated that any comparison group based on traffic data other than the four-year Waybill Sample provided by the STB is impermissible. Specifically, the STB ruled that:

> The rail carriers argue that, instead of permitting the use of four years of Waybill Sample data, we should instead require the carrier to make available its most recent traffic data... We disagree. Based on our experience in Stand-Alone Cost (SAC) cases and in processing the annual Waybill Sample data, we have already concluded that using the prepared Waybill Sample data is one of the linchpins to the simplified rate review process. The release of four years of Waybill Sample data to the parties minimizes the possibility that additional traffic data will be needed for the parties to develop their comparison groups. [27]

BNSF's original "Current Rate Adjustment" explicitly violated the Board's policy because it relied on "its most recent traffic data." BNSF's new "Public Current Rate Adjustment" does the same thing. Specifically, BNSF's "Public Current Rate Adjustment" relies on a subset of "its most recent traffic data" common carrier tariff rates.

BNSF's justification for its "Public Current Rate Adjustment" is that it "address[es] the fundamental regulatory lag problem that is presented in this case."[28] BNSF claims that its "Public Current Rate Adjustment" is needed to account for BNSF's belief that, "chlorine R/VC levels in 2009, not just chlorine rate levels, differed from (and were not comparable to) current chlorine R/VC levels."[29] More specifically, BNSF asserts that it implemented an across-the-board rate increase on chlorine shipments in 2011 that "resulted in rate increases for transporting chlorine and other TIH products that are significantly greater than would have been necessary to simply cover

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[27] *March 12, 2012 Decision,* p 5.
[28] BNSF Reply, p. 18.
[29] Id, p. 19, fn 43.

inflationary increases in variable costs."[30] Interestingly, BNSF's rate increase was applied in the same manner to "chlorine and other TIH" shipments, despite BNSF's claims that an appropriate comparison group for determining the maximum reasonable R/VC should include only chlorine shipments.

As a threshold matter, BNSF's "Public Current Rate Adjustment" is impermissible because it is actually a thinly veiled attempt to replace the comparison group. This BNSF adjustment replaced shipments selected from the historical Waybill data, with a substitute comparison group comprised of shipments using current data. In BNSF's model, BNSF first calculates an R/VC ratio for the chlorine movements for which it had issued public tariff rates as of March 16, 2011 ("2011 R/VC ratio"). BNSF then compares its 2011 R/VC ratio to the R/VC ratio it had calculated for the movements BNSF selected from historical waybill data in its "alternative" comparison group ("2009 R/VC ratio") and, based on the differential between the two R/VC ratios, makes an upward adjustment to the Three-Benchmark R/VC ratio. Therefore, like the "Current Rate Adjustment", the "Public Current Rate Adjustment" simply replaces the historical comparable moves BNSF selected with an altered set reflecting the R/VC ratio of its preferred (and prohibited) comparable movement group. BNSF is simply attempting to use the "Other Relevant Factors" portion of the Three-Benchmark process to try and introduce current traffic data that is expressly prohibited in the "Comparison Group" portion.

The Board considered and rejected this very sort of adjustment in its June 30, 2008 Decision in STB Docket No. 42099.[31] In that case, CSXT attempted to adjust the comparison group R/VC to account for "Regulatory Lag" by "adjust[ing] revenues by publicly available data... adjust[ing] costs by using publicly available data and the indexing methods used in stand-alone cost cases...

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[30] Id.

[31] *E.I. Du Pont De Nemours & Co. v. CSXT Transp. Inc.* NOR 42099 ("*DuPont*"), served June 30, 2008.

[and] raising the R/VC ratios in the comparison groups."[32] In explaining its rejection of CSXT's proposed adjustment, the Board noted several problems with the theory behind the adjustment, including the fact that such an adjustment would create a disconnect between the applicable expansion ratio (RSAM ÷ R/VC>180) and the corresponding traffic group from which comparable movements had been selected. Specifically, the Board pointed out that the expansion ratio will change as pricing changes, thus offsetting the impact of the rate increases in a Three-Benchmark case.[33] Put simply, if BNSF changes its pricing structure to significantly increase rates, then it will require less differential pricing of potentially captive traffic. As a result, the expansion ratio applicable to its comparison group R/VC in Three-Benchmark rate cases will necessarily decrease as the higher rates are implemented. However, in this case BNSF seeks to apply <u>both</u> the unadjusted expansion ratio that reflects 2009 rates <u>and</u> the adjusted R/VC ratio that reflects 2011 rates. BNSF's proposed adjustment is therefore one-sided and a maximum rate level based on this adjustment would be unreliable (and in this case, too high).

In addition to being flatly contrary to the Board's prohibition on using traffic data other than historical Waybill data in Three Benchmark cases, there are several other problems with BNSF's approach. First, just because BNSF has issued tariff rates for chlorine shipments does not mean that the rates are reasonable or that any shipments have moved under them – or even, in today's climate where the railroads publicly state they do not want to handle TIH commodities – whether there is any intention for the rates to be used. If this "Public Current Rate Adjustment" was legitimized in

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[32] *DuPont*, p. 18.

[33] Id. As the Board explained:

"We expressed concerns about an apple-to-oranges adjustment in Simplified Standards (at 84-85). Consider a hypothetical example where a carrier was revenue adequate in 2006, such that the RSAM ÷ R/VC>180 ratio shows the carrier earning 5% more from its potentially captive traffic than would be needed to earn adequate revenues in that time period. In that situation, the expansion ratio would serve to reduce the R/VC ratios of the comparison group in 2006 by 5% to more accurately reflect reasonable rates. Assume further that the carrier had increased all revenues by 10% between 2006 and 2007. It does not follow that the comparison group R/VC ratios should be adjusted upward by 10%, as those R/VC ratios would already provide the carrier more than needed to achieve adequate revenues in 2006 and there is no evidence to suggest that higher rates would be proper. In fact, in this hypothetical, the evidence would suggest that an opposite adjustment should be made. That is, if a revenue adequate carrier had been raising rates, then it would need less (not more) differential pricing of potentially captive traffic. When the 2007 information becomes available, the RSAM and R/VC>180 benchmarks for 2007 would change accordingly and suggest that the comparison group R/VC levels should be adjusted downward, not upward as sought by the carrier."

this proceeding, the railroads could easily game the Three Benchmark analysis by simply issuing tariff rates that would never be used by shippers, or that would be used to move only a handful of shipments. The railroads could then claim that the existence of published rates that were never (or little) used were legitimate justification for artificially high rates on higher-volume routes. The STB recognized this problem and seeks to determine a reasonable rate based on evaluation of sufficient historical data to provide a long-term understanding of the issue market.

> [I]n a rate case, we are not asked to determine the maximum lawful rate on the day the tariff was issued, but for a multi-year prescriptive period.[34]

Second, BNSF alleges that its new rate setting philosophy appears to be based on a belief that it should be able to allocate costs to TIH shipments in a manner that overrides the STB's long-standing use of the Uniform Railroad Costing System ("URCS") variable costs to determine reasonable rates. As noted in BNSF's opening evidence,[35] the reasons BNSF gives for instituting universal rate increases on TIH shipments is that BNSF believes TIH shipments are responsible for costs it incurs (1) to implement PTC equipment as required by Federal regulation; and (2) in premiums for high liability insurance coverage levels it claims it carries only because it transports TIH. Stated differently, BNSF justifies its higher rates based exclusively on a claim that these higher costs are incurred exclusively because of, and directly attributable to, TIH shipments. For reasons we discussed in detail in our Reply VS, neither the costs associated with PTC implementation nor the costs associated with high liability premiums are directly attributable to TIH traffic. However, even if they were (and if BNSF's rate increases were justified), then by definition BNSF's "Public Current Rate Adjustment" would be critically flawed.

Specifically, the alleged cost increases BNSF associates with TIH shipments and BNSF's inflated rates must either be considered together or not at all. Yet its Public Current Rate Adjustment would apply the rate increases independently to alter the R/VC ratios. This application

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[34] *March 12, 2012 Decision*, p. 9.
[35] See BNSF opening at pages 17-18.

completely ignores the relationship between costs and rate setting that BNSF uses to justify its new rate structure.

Stated another way, BNSF claims the current rate adjustment is required to reflect BNSF's new philosophy on TIH rate setting (that TIH shippers should bear higher costs associated with PTC investment and insurance premiums). However, in its "Public Current Rate Adjustment," BNSF compares the new higher rates (purportedly established to defray higher costs associated with TIH traffic) to system average variable costs, so the "higher costs" are not reflected in the comparison.

In reality, if BNSF's rates were actually set to recover BNSF's estimated cost increases, the R/VC ratios would go down, assuming constant margins. The following Table 2 simple hypothetical example demonstrates the flaw inherent in BNSF's methodology.

Table 2
Demonstration of Critical Flaw in BNSF's "Public Current Rate Adjustment"

	Item (1)	**Source** (2)	**Amount** (3)
	Hypothetical Movement Prior to BNSF Cost Re-allocation and Rate Changes		
1.	Pre-Adjustment Rate	Assumed	$2,800
2.	System Average Variable Cost	Assumed	$1,000
3.	Calculated Margin	Line 1 minus Line 2	$1,800
4.	R/VC Ratio	Line 1 ÷ Line 2	2.80
	Hypothetical Movement After BNSF Cost Re-allocation and Rate Changes		
5.	TIH-Specific Variable Cost	Assumed	$2,000
6.	Constant Margin	Line 3 above	$1,800
7.	Rate Adjusted to Reflect Increased Costs	Line 5 plus Line 6	$3,800
8.	R/VC Ratio	Line 7 ÷ Line 5	1.90
	BNSF Current Rate Adjustment R/VC Overstatement		
9.	System Average Variable Cost	Line 2 above	$1,000
10.	Rate Adjusted to Reflect Increased Costs	Line 7 above	$3,800
11.	Calculated Margin	Line 10 minus Line 9	$2,800
12.	R/VC Ratio	Line 10 ÷ Line 9	3.80

As demonstrated above, if BNSF's new rate structure truly reflected cost increases then the R/VC ratio would logically go down, not up. By ignoring the alleged TIH-specific cost increases in developing its "Public Current Rate Adjustment," BNSF is artificially inflating the R/VC ratio associated with TIH shipments. In addition, BNSF's rate increases are only justifiable if the cost increases based on allocation of PTC and insurance costs to TIH shipments are valid, which we have demonstrated is not the case. However, even if the cost increases are valid, then they must be considered together with the increased rates and reflected in the R/VC ratio calculation. Otherwise, neither the alleged cost increases nor the unjust rate increases should be considered. The Board recognized this disconnect when it issued its decision in the *March 12, 2012 Decision*:

> For example, relying only on data provided by the carrier presents the problem that, unlike the Waybill Sample data, the traffic data provided by the carriers would not include the variable cost data necessary to determine R/VC ratios.[36]

B. APPLICATION OF BNSF ADJUSTMENTS TO CANEXUS' COMPARISON GROUPS

BNSF claims its "Historical PTC Adjustment" is needed "to reflect the impact of BNSF's historical PTC costs on the maximum reasonable rate for movements of TIH," and that its "Liability Risk Adjustment" is needed "to reflect the fact that a substantial portion of BNSF's insurance premiums are due solely to its transportation of TIH traffic."[37] BNSF attempts to justify its adjustments based on its unsubstantiated claim that the STB has acknowledged that "URCS does not adequately attribute the PTC [and insurance] costs incurred by BNSF to the TIH traffic responsible for those costs."[38] However, the STB's position is that:

> It must be remembered that the Three-Benchmark model is designed to approximate the maximum reasonable rate that would be determined under the more rigorous SAC model. The fundamental purpose of the Three-Benchmark approach is not to reflect a snapshot of current market conditions; it is to use

[36] *March 12, 2012 Decision,* at 6.
[37] BNSF opening, pg. 58
[38] Id.

> the three benchmarks to decide the reasonable maximum contribution to joint and common costs for the issue movement where no cost-based approach is feasible. The R/VC_{Comp} benchmark is used to approximate the maximum reasonable rate that a rail carrier could charge under the SAC constraint.[39]

Under the stand-alone cost model, a complaining shipper is free to select a traffic group consisting of the issue traffic and other traffic that would use the constructed facilities. One of the fundamental purposes for selecting other traffic is to defray the joint and common costs associated with the construction and operation of the hypothetical stand-alone railroad. Two components of those joint and common costs are PTC installation and operating costs, including insurance premiums. Under the full SAC methodology, those costs are allocated to all traffic that moves on the constructed system.

However, BNSF seeks to allocate all of those costs to the issue traffic (and other TIH traffic) in its Three-Benchmark model. This is a significant and substantial departure from stand-alone cost theory. Rather than using the Three-Benchmark model to "approximate the maximum reasonable rate that a rail carrier could charge under the SAC constraint," BNSF's proposed "other relevant factor adjustments" contradict the treatment of joint and common costs under the stand-alone cost constraint.

In its Reply, BNSF applies its four original and the fifth new "other relevant factor" adjustments to only the chlorine movements in the comparison traffic groups selected by Canexus in Opening. BNSF's development and application of its four original "other relevant factor" adjustments in Reply is mechanically identical to its development and application of its four original "other relevant factor" adjustments in Opening. The only difference is that BNSF applied the adjustments to the maximum R/VC ratio calculated based on application of the Board's Three-Benchmark methodology, to the chlorine movements of the comparison traffic groups selected by Canexus rather than the comparison traffic group selected by BNSF in Opening. We discussed the

[39] *March 12, 2012 Decision,* at 9.

problems associated with BNSF's "Current Rate," "Historical PTC," "Liability Risk," and "Future PTC" adjustments at length in our Reply VS and showed that none of the adjustments are valid.

BNSF's application of its new "Public Current Rate Adjustment" in Reply is mechanically identical to its application of its original "Current Rate Adjustment" in Opening. The only difference is that BNSF applied the adjustments to the maximum R/VC ratio calculated based on application of the STB's Three-Benchmark methodology to the chlorine movements of the comparison traffic groups selected by Canexus rather than the comparison traffic group selected by BNSF in Opening. As discussed in the prior section of this Rebuttal VS, BNSF's new "Public Current Rate Adjustment" is also fatally flawed and should be rejected.

VERIFICATION

COMMONWEALTH OF VIRGINIA)
)
CITY OF ALEXANDRIA)

I, THOMAS D. CROWLEY, verify under penalty of perjury that I have read the foregoing Verified Statement of Thomas D. Crowley, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

Thomas D. Crowley

Thomas D. Crowley

Sworn to and subscribed
before me this 11th day of April, 2012

Helen Mary Koch

Helen Mary Koch
I was commissioned notary as Helen Mary Lunsford
Notary Public for the State of Virginia

My Commission Expires: May 31, 2015
Registration Number: 7507963

VERIFICATION

COMMONWEALTH OF VIRGINIA)
)
CITY OF ALEXANDRIA)

I, CHARLES A. STEDMAN, verify under penalty of perjury that I have read the foregoing Verified Statement of Charles A. Stedman, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

Charles A Stedman

Charles A. Stedman

Sworn to and subscribed
before me this 11th day of April, 2012

Helen Mary Koch

Helen Mary Koch
I was commissioned notary as Helen Mary Lunsford
Notary Public for the State of Virginia

My Commission Expires: May 31, 2015
Registration Number: 7507963

CERTIFICATE OF SERVICE

I do hereby certify that on this 12th day of April, 2012, I have served a copy of the foregoing Complainant's Rebuttal Evidence by email and hand-delivery upon counsel for Defendant at the following address:

Samuel M. Sipe, Jr.
Anthony J. LaRocca
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Thomas W. Wilcox

Thomas W. Wilcox