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VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
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395 E Street, S.W.
Washington, D.C. 20423-0001

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April 12, 2012
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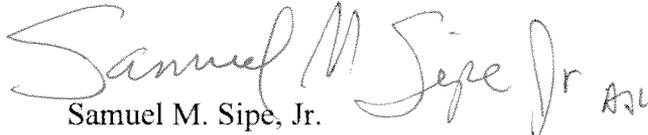
Re: ***Canexus Chemicals Canada L.P. v. BNSF Railway Company,***
STB Docket No. 42132

Dear Ms. Brown:

Enclosed for filing in the above-captioned matter is the public version of BNSF Railway Company's Rebuttal Evidence. We have redacted highly confidential information from the filing, including waybill sample data. We are filing under separate cover the highly confidential version of BNSF's Rebuttal Evidence, and a CD that contains the electronic work papers of our consultant, Mr. Fisher.

If you have any questions, please do not hesitate to contact me.

Sincerely,


Samuel M. Sipe, Jr.

Enclosures

cc: Counsel of Record

PUBLIC

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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CANEXUS CHEMICALS CANADA, L.P.)	
)	
Complainant,)	
)	
v.)	Docket No. 42132
)	
BNSF RAILWAY COMPANY)	
)	
Defendant.)	
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REBUTTAL EVIDENCE OF BNSF RAILWAY COMPANY

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April 12, 2012

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

CANEXUS CHEMICALS CANADA, L.P.)	
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REBUTTAL EVIDENCE OF BNSF RAILWAY COMPANY

I. INTRODUCTION

This case presents a fundamental issue in the application of the Board's Three Benchmark standard. BNSF has shown in this case that a regulatory lag problem resulting from the use of historical revenue to variable cost ("R/VC") ratios would "skew the results of the final offer process."¹ BNSF's uncontested evidence demonstrates that R/VC levels on chlorine shipments have fundamentally changed between 2009, the last year for which Waybill Sample data are available, and March 2011, when BNSF established the issue traffic rates. The Board previously told the D.C. Circuit that it had established a mechanism for addressing the problem of regulatory lag in individual cases.² Canexus would have the Board ignore the regulatory lag problem altogether in this case. But the failure to address the problem here, where the evidence of a regulatory lag problem is unmistakable, would produce arbitrary results and call into question the theoretical underpinnings of the Three Benchmark approach.

¹ See *Waybill Data Released in Three-Benchmark Rail Rate Proceedings*, STB Docket No. Ex Parte 646 (Sub-No. 3) at 7 n. 15 (served Mar. 12, 2012) ("*March 12 Decision*").

² *CSX Transportation, Inc. v. Surface Transportation Board*, 568 F.3d 236, 247-248 (D.C. Cir. 2009).

Canexus is trying to use the Three Benchmark methodology to freeze rates at historical levels notwithstanding fundamental changes in toxic-by-inhalation (“TIH”) transportation costs and market conditions that have occurred over the past several years. The Three Benchmark test was not intended to freeze historical rates into place for years into the future. The Three Benchmark test was intended to test the reasonableness of challenged rates by reference to rates charged on comparable movements to determine whether the issue traffic is being asked to make an unduly large contribution to joint and common costs compared to other similar traffic.³ In effect, Canexus is challenging the rate increase that BNSF took in March 2011, not the level of the rates for the issue traffic that resulted from the rate increase. This is an improper use of the Three Benchmark methodology.⁴ To use the Three Benchmark test as a back door means to preclude rate increases would be an arbitrary and unreasonable extension of the Three Benchmark test.

In prior cases, the Board has emphasized the need to keep Three Benchmark cases simple and feasible for use in situations where the value of potential relief is relatively small. Simplification is a worthy goal, but it cannot justify arbitrary methods or results. *Simplified Standards* at 4. In any event, BNSF has offered simple and straightforward ways to address the problem of regulatory lag in this case. Canexus tries to create the illusion that BNSF’s methods for addressing regulatory lag are complicated when they are not.

³ *Simplified Standards for Rail Rate Cases*, STB Docket No. 646 (Sub-No. 1) at 17 (served Sept. 5, 2007) (“*Simplified Standards*”)

⁴ The Board’s Coal Rate Guidelines provide a specific means of challenging rate increases that a shipper claims are too extreme, but Canexus did not pursue a challenge to BNSF’s rate increase under that approach. *Coal Rate Guidelines Nationwide*, STB Ex Parte No. 347 (Sub-No. 1), 1 I.C.C. 2d 520, 546-547 (1985). Instead, Canexus chose to challenge BNSF’s rates for the issue traffic under the Three Benchmark approach.

The distortions created by regulatory lag in this case could be addressed either directly, by comparing the issue traffic R/VC ratios to comparison group R/VCs that reflect current rate levels, or indirectly, by adjusting historical rates to account for the impact of BNSF's post-2009 Positive Train Control ("PTC") expenditures and thereby eliminating much of the distorting effect of the regulatory lag. The most direct way to avoid the problem of regulatory lag would be to use 2011 traffic data for purposes of identifying the comparison group R/VC ratios. BNSF's preferred comparison groups are selected from post-March 15, 2011 traffic data. An alternative would be to use BNSF's proposed current rate adjustment, which adjusts historical rates from the Waybill Sample data using 2011 BNSF traffic data or public price authorities to ensure that the results reflect current rate levels. Both approaches directly address regulatory lag by comparing current issue traffic R/VC ratios to current R/VC ratios of the comparison group.

An indirect way to address much of the distortion created by the "lag" in Waybill Sample data available for use in the comparison groups would be for the Board to apply BNSF's Historical PTC Adjustment as an other relevant factor. The Historical PTC Adjustment does not produce a comparison of current issue traffic R/VC ratios to current rates or current R/VC ratios for the comparison group. Instead, the Historical PTC Adjustment addresses regulatory lag by dealing with the most significant development affecting TIH costs since 2009, *i.e.*, the substantial expenditures to comply with the statutory requirement to install PTC. A maximum rate based on R/VC ratios from the 2009 Waybill Sample data would distort the Three Benchmark analysis because those historical R/VC ratios do not reflect PTC costs that were incurred after 2009. An adjustment to the historical R/VC ratios is necessary to reflect PTC costs that are not included in those R/VC ratios but which BNSF is entitled to recover from current movements.

The need to adjust a presumed maximum rate that is based on historical R/VC ratios to account, at a minimum, for PTC expenditures is evident from the results that Canexus sponsors in this case. Canexus is asking the Board to prescribe maximum rates for movements of perhaps the most hazardous substance handled by BNSF over some of the longest routes on BNSF's network at ridiculously low R/VC levels that are out of line with maximum reasonable rates for chlorine movements that the Board has prescribed for other rail carriers. Canexus seeks to achieve this implausible result by having the Board totally ignore the distortions created by regulatory lag in this case. BNSF has presented the Board with reasonable and straightforward options to address the regulatory lag problem and failure to accept those options would render the application of the Three Benchmark methodology in this case arbitrary.

II. THE BOARD SHOULD SELECT BNSF'S FINAL COMPARISON GROUPS AS THEY ARE MOST SIMILAR IN THE AGGREGATE TO THE ISSUE MOVEMENTS

Under the Three Benchmark methodology, the Board must choose among the final comparison groups presented by the parties to select the comparisons groups that are "most similar in the aggregate to the issue movements."⁵ Given the uncertainty surrounding the Board's precise intentions regarding the use of 2011 data in the comparison groups,⁶ BNSF continues to present two alternative Three Benchmark cases: (1) a preferred case under which the comparison group movements were selected from BNSF's 2011 traffic data produced in this case; and (2) an alternative case under which the comparison group movements were selected from the Waybill Sample data provided by the STB in this case. The final comparison groups tendered by BNSF are the same as BNSF's initial comparison groups.

⁵ *Simplified Standards* at 18.

⁶ See BNSF Opening Evidence at 4-6.

Whether BNSF's preferred case applies (because the Board ultimately permits use of movements from 2011 traffic data in comparison groups) or BNSF's alternative case applies (because the Board does not permit such use), the Board must choose BNSF's comparison groups for the Three Benchmark analysis. Between Canexus's and BNSF's final comparison groups, BNSF's final comparison groups (either preferred or alternative) are the "most similar in the aggregate to the issue traffic movements."

A. BNSF's Final Preferred Comparison Groups Are More Similar to the Issue Traffic Movements than Canexus's Final Comparison Groups

BNSF's preferred comparison groups consist of chlorine movements from BNSF's actual 2011 traffic data. As explained in BNSF's opening evidence, BNSF's preferred comparison groups are superior to any comparison groups consisting of movements drawn from the historical Waybill Sample data provided by the Board because BNSF's preferred comparison groups, like the issue traffic movements, reflect BNSF's March 2011 fundamental change in the pricing of the transportation of chlorine and other TIH commodities marketed by the Industrial Products ("IP") group. In contrast, comparison groups derived from Waybill Sample data from 2009 or earlier years, like Canexus's final comparison groups, are not instructive for Three Benchmark purposes. They do not consist of R/VCs that are comparable to the issue traffic movements because they do not reflect BNSF's fundamental change in pricing in March 2011. BNSF has shown that for all of its chlorine movements, R/VC levels in 2009, as well as rate levels, were not comparable to its chlorine R/VC levels subsequent to the March 2011 pricing change.⁷

The issue traffic rates being challenged here are the product of BNSF's March 2011 price change, and therefore the only movements that are truly comparable to the issue traffic movements are those that were also subject to that price change. For that reason alone, BNSF's

⁷ BNSF Opening Evidence at 60-64; BNSF Reply Evidence at 26-28.

preferred comparison groups are more similar to the issue traffic movements than Canexus's comparison groups, which do not reflect the March 2011 price change. There are other differences between BNSF's preferred comparison groups and Canexus's final comparison groups, such as Canexus's use of anhydrous ammonia compared to BNSF's use of only chlorine. BNSF explains below in connection with BNSF's alternative comparison groups that a consideration of the other differences between BNSF's preferred comparison groups and Canexus's final comparison groups reinforces the conclusion that BNSF's preferred comparison groups should be selected by the Board.

Consequently, if the Board ultimately allows the parties to use movements from BNSF's 2011 traffic data in the comparison groups, the Board should select BNSF's preferred comparison groups in this Three Benchmark case.

B. BNSF's Alternative Comparison Groups Are More Similar to the Issue Traffic Movements than Canexus's Final Comparison Groups

If the Board ultimately precludes the parties from using BNSF's 2011 traffic data to select movements for the comparison groups and, thereby, requires the comparison groups to be drawn from the Waybill Sample data, the Board should select BNSF's alternative comparison groups which are more similar in the aggregate to the issue traffic movements than Canexus's comparison groups. However, as explained below, one or more other relevant factor adjustments would need to be made to the presumed maximum reasonable rates if the comparison groups selected by the Board are comprised of historical movements from the Waybill Sample data.

BNSF's final alternative comparison groups consist of selected 2009 chlorine movements in the Waybill Sample data provided by the STB. As explained by BNSF on opening, the paucity of potentially comparable movements in the Waybill Sample required a relaxation of certain selection criteria accepted by the Board in prior Three Benchmark cases to develop a

comparison group with an adequate number of movements. Specifically, for its alternative comparison groups, BNSF broadened the distance criterion to include movements that were more than 500 loaded miles.

Canexus selected movements from the 2006-2009 Waybill Sample data for its comparison groups. As shown below, it took a different (and much inferior) approach to BNSF's to address the problem of insufficient data that exists if Waybill Sample data must be used to develop the comparison groups.

1. Primary Differences Between BNSF's Alternative Comparison Groups and Canexus's Final Comparison Groups

Canexus's final comparison groups differ from its initial comparison groups in one respect – Canexus added the local chlorine movements from BNSF's alternative comparison groups that were more than 500 loaded miles to Canexus's initial comparison groups. By accepting BNSF's distance criterion, Canexus has eliminated one difference that had existed between the criteria used by BNSF to select its alternative comparison groups and the criteria used by Canexus to select its initial comparison groups. The remaining differences between BNSF's selection criteria and Canexus's selection criteria for the final comparison groups based on historical Waybill Sample data are as follows.

First, with respect to commodity type, BNSF limits its comparison groups to chlorine movements, whereas Canexus includes multiple TIH products other than chlorine (mostly anhydrous ammonia movements) in its comparison groups. While Canexus has added some chlorine movements to its final comparison groups as a result of accepting BNSF's distance criterion, anhydrous ammonia movements still make up a significant percentage of Canexus's final comparison groups. Canexus's final Glendale comparison group is 26% chlorine

movements and 72% anhydrous ammonia movements.⁸ Canexus's final Albuquerque comparison group is approximately 69% chlorine movements (many of which are actually Glendale issue traffic movements) and 31% anhydrous ammonia movements. *Id.* As BNSF demonstrated on opening and reply, anhydrous ammonia is not comparable to chlorine so it is not appropriate to determine R/VC ratios on chlorine movements by reference to R/VC ratios on anhydrous ammonia movements.⁹ As shown below, Canexus has not demonstrated otherwise.

Second, BNSF includes rebilled chlorine movements as well as local chlorine movements in its comparison groups whereas Canexus only includes local movements. As BNSF explained on opening, including rebilled movements is appropriate because the issue traffic movements are local movements with some characteristics of interline movements. Moreover, the issue that led the Board to reject inclusion of rebilled traffic in *US Magnesium v. Union Pacific R.R. Co.*, STB Docket No. 42114 (served Jan. 28, 2010) ("*US Magnesium*") is not present here.¹⁰ Again, as shown below, Canexus has not demonstrated otherwise.

Other differences between BNSF's alternative comparison groups and Canexus's final comparison groups also remain, including: (a) Canexus continues to include Glendale issue traffic movements in its Albuquerque comparison group, while BNSF continues to exclude any issue traffic movements from its comparison groups, and (b) Canexus continues to include Waybill Sample movements from 2006-2009 in its final comparison groups, while BNSF continues to limit its alternative comparison groups to 2009 Waybill Sample data.

⁸ BNSF rebuttal workpaper "Canexus Final Tender Comparison Group Summary.xlsx." BNSF's rebuttal workpapers are included on an electronic workpaper CD.

⁹ BNSF Opening Evidence at 44-50; BNSF Reply Evidence at 10-15.

¹⁰ BNSF Opening Evidence at 50-51.

In short, since Canexus has accepted BNSF's distance criterion, the main issue facing the Board in deciding which comparison groups to choose (if it declines to accept comparison groups based on 2011 traffic data) is whether Canexus's inclusion of anhydrous ammonia movements in comparison groups designed to test the reasonableness of rates on local chlorine movements is better or worse than BNSF's inclusion of rebilled chlorine movements in its alternative comparison groups. As shown below, BNSF's inclusion of rebilled chlorine movements results in comparison groups more similar in the aggregate to the issue traffic movements than Canexus's inclusion of anhydrous ammonia movements. The other differences between BNSF's alternative comparison groups and Canexus's final comparison groups also support this conclusion.

Thus, if the Board declines to allow the parties to use movements from BNSF's 2011 traffic data in the comparison groups, the Board should select BNSF's alternative comparison groups in this Three Benchmark case.

2. The Inclusion of Rebilled Chlorine Movements Is Clearly Superior to the Inclusion of Anhydrous Ammonia Movements in the Comparison Groups

Anhydrous Ammonia vs. Chlorine Movements: BNSF's alternative comparison groups consist entirely of chlorine movements whereas Canexus's final comparison groups are based largely on anhydrous ammonia movements. BNSF presented substantial evidence on opening and reply demonstrating that it is not appropriate to include anhydrous ammonia movements in the comparison groups because they are not comparable to chlorine movements.

In its reply at 11-12, BNSF used public information to show that as of March 16, 2011, when the challenged rates went into effect, the R/VC ratios of BNSF's chlorine movements and BNSF's anhydrous ammonia movements selected using Canexus's criteria were very different. Specifically, as of March 16, 2011 and using Canexus's selection criteria, BNSF's chlorine

movements had an average R/VC of 366% and BNSF's anhydrous ammonia movements had an average R/VC of 239%. In its reply at 12-14, BNSF used public pricing data to show that the market prices for sales of chlorine and anhydrous ammonia were very different and often moved in opposite directions from 2006 to the present. This further corroborates that chlorine and anhydrous ammonia are sold in entirely different markets.

In its opening at 46-50, BNSF presented qualitative evidence showing that there is no reasonable basis to conclude that demand elasticity for anhydrous ammonia movements is similar to demand elasticity for chlorine movements. BNSF showed that chlorine and anhydrous ammonia have different end uses, that anhydrous ammonia has many more substitutes than chlorine, that anhydrous ammonia is often transported by transportation modes other than rail whereas chlorine is predominantly transported by rail, and that chlorine poses a much greater health risk if it is released from rail cars than anhydrous ammonia.

Canexus makes no serious effort to demonstrate that chlorine and anhydrous ammonia are comparable commodities or that R/VC ratios for the two commodities should be expected to be similar due to similar transportation demand characteristics. Instead, Canexus argues incorrectly that the STB's prior decisions in *Dupont*¹¹ and *US Magnesium* created a precedent favoring the inclusion of anhydrous ammonia movements in comparison groups in Three Benchmark cases involving the reasonableness of chlorine movements.¹² To the contrary, the Board explained in *US Magnesium* that in a Three Benchmark case involving a challenge to the rates of chlorine movements, "[a]ll else being equal, local single-line *chlorine* movements would be the preferable comparison groups for the issue movements." *US Magnesium* at 9 (emphasis

¹¹ *E.I. DuPont De Nemours & Co. v. CSX Transp., Inc.* STB Docket No. 42100 (served June 30, 2008) ("*Dupont*").

¹² Canexus Reply Evidence at 9-10.

added). While the Board ultimately selected comparison groups in *Dupont* and *US Magnesium* that included anhydrous ammonia and chlorine movements, the Board's decisions were based on the evidence presented in those particular cases, which involved the traffic and revenue data of railroads other than BNSF. Indeed, facts that influenced the Board to select comparison groups with anhydrous ammonia in those cases are not present here. There is no basis here for the concern that the STB expressed with accepting chlorine-only comparison groups in *Dupont* at 9, *i.e.*, that the defendant railroad CSX acknowledged pricing "chlorine beyond what would otherwise be commercially justifiable, in an effort to induce shippers to use substitutes for chlorine or source it from nearer locations." BNSF's March 2011 price increase applied to rates for transportation of *all* TIH commodities marketed by the IP group, not just to chlorine rates, and it was not an attempt to raise rates beyond what was commercially justifiable.¹³ Moreover, as explained below, there is no basis here for the Board's concern in *US Magnesium* at 8-9 that rebilled chlorine movements in the comparison groups had significantly higher (50% higher) R/VC ratios than the local chlorine movements.

Canexus also relies on the similarity in the range of R/VC ratios 180 percent and higher for the anhydrous ammonia movements and the chlorine movements in its final comparison groups as evidence that "BNSF considers the demand, risk, and transportation characteristics of the two commodities to be very similar, if not the same."¹⁴ This assertion is groundless and verges on nonsense. The existence of a range of R/VC ratios at a given point in time for movements of a particular commodity suggests that the demand characteristics of different

¹³ Verified Statement of David L. Garin dated Dec. 14, 2011 (included with BNSF's Opening Evidence) at 2, 4.

¹⁴ Canexus Reply Evidence at 12; *see also* Reply Verified Statement of Thomas D. Crowley and Charles A. Stedman dated March 13, 2012 (included with Canexus's Reply Evidence) at 12 (hereafter "Crowley/Stedman VS").

movements of that commodity vary somewhat from movement to movement. A comparable range of R/VC ratios for a second commodity does not suggest that the two commodities are similar, or that their transportation characteristics are similar, or that the elasticities of demand for the transportation of the two commodities are predominantly similar. It merely suggests that demand elasticities for movements of the second commodity, like the first, vary somewhat from movement to movement. The existence of similarity in the range of R/VC ratios for a subset of the movements in the 2006-2009 Waybill Sample is merely a coincidence, as illustrated by the similar ranges of R/VC ratios for movements of very different commodities identified by Mr. Fisher in Table 1 below.

Table 1¹⁵
Non-Comparable Commodities in
2006-2009 Waybill Sample Data with Similar R/VC Ratio Ranges
Local, R/VC > 180%, Miles > 500

STCC	Commodity	Carloads	Avg. R/VC	Min R/VC	Max R/VC
0113215	Corn	{{			}}
2812815	Chlorine Gas	{{			}}
0113110	Barley	{{			}}
2819815	Anhydrous Ammonia	{{			}}

In any event, to the extent the Board views the similarity or dissimilarity of R/VC ratios as a relevant factor to consider in evaluating whether two different commodities have comparable demand elasticity, BNSF has already shown that chlorine and anhydrous ammonia are not comparable as of March 16, 2011, the relevant date for purposes of this case since it is the date the challenged rates became effective. Specifically, as shown above, BNSF's R/VCs for anhydrous ammonia and chlorine were very different as of March 16, 2011.

¹⁵ BNSF rebuttal workpaper "BNSF CWS RVC Summary.xlsx." Throughout BNSF's Rebuttal Evidence, highly confidential materials are designated with double brackets "{{{".

Next, citing to a single 2007 customer notice describing a discounted rate program that was to apply to TIH shippers using improved tank cars, Canexus argues that this public document shows that BNSF appears to treat chlorine and anhydrous ammonia the same. Canexus Reply Evidence at 12-13. This document shows only that BNSF provided an incentive for all TIH shippers to use better equipment; it says nothing about the way BNSF set its prices for transporting different TIH commodities. BNSF provided substantial public evidence showing it priced the transportation of chlorine and anhydrous ammonia differently.

Finally, Canexus argues that BNSF produced no documents in discovery indicating that BNSF treats chlorine and anhydrous ammonia differently from a demand elasticity or risk assessment standpoint. Canexus Reply Evidence at 13. Since Canexus never requested any documents relating to BNSF's pricing of TIH commodities in discovery,¹⁶ Canexus cannot have expected BNSF to produce them in discovery.

Rebilled vs. Local Chlorine Movements: BNSF's alternative comparison groups include local and rebilled chlorine movements whereas Canexus's final comparison groups include only local movements. BNSF explained on opening that it was appropriate to include rebilled chlorine movements in the comparison groups since the issue traffic movements, while they are local movements, have some characteristics of interline movements. Specifically, Canadian National ("CN") physically serves Canexus's facility in North Vancouver, British Columbia, Canada and interchanges tank cars containing Canexus's chlorine for both issue

¹⁶ A review of Canexus's discovery requests served December 16, 2011, which are included in BNSF's rebuttal workpapers, demonstrates that Canexus never asked for discovery on this topic.

characteristics as well as commercial characteristics are relevant in analyzing whether movements are comparable and the fact that BNSF receives Canexus's chlorine shipments from a second carrier, CN, is a relevant operating characteristic that the Canexus chlorine movements share with rebilled BNSF chlorine movements. In any event, the interline characteristics of the issue traffic movements were simply one factor BNSF considered in concluding that the issue traffic movements and rebill chlorine movements were comparable. Of more significance is the fact that the issue traffic movements and rebilled movements both involve transportation of the same commodity – chlorine.

Second, Canexus argues that BNSF is only including rebilled movements to obtain an adequate number of movements for its alternative comparison groups. Canexus Reply Evidence at 15. But this is hardly a basis for disqualifying such movements. Choices must be made to assemble a comparison group of sufficient size from sparse Waybill Sample data. Canexus itself has included movements in its comparison groups that are not the same as the issue traffic movements presumably to obtain an adequate number of movements for the comparison groups. For example, Canexus included anhydrous ammonia movements in its comparison groups and Glendale issue traffic movements in its Albuquerque comparison group. The question is not whether the movements in the comparison groups differ in any respect from the issue traffic movements but which party's comparison groups are most similar in the aggregate to the issue traffic. As BNSF has demonstrated, its alternative comparison groups with rebilled chlorine movements are much more similar to the issue traffic movements than Canexus's comparison groups with anhydrous ammonia movements.

Third, Canexus incorrectly asserts that the *US Magnesium* decision established a "rule" that precludes the "use of interline, re-billed movements in Three Benchmark cases" involving

challenges to rates on local chlorine movements. Canexus Reply Evidence at 15. Canexus then asserts that BNSF's use of rebilled traffic is "contrary to that rule." *Id.* However, the Board did not establish such a rule in *US Magnesium*. Rather, the Board determined, based on the facts presented in that case, that UP's rebilled chlorine traffic was not sufficiently comparable to UP's local issue traffic movements to include in the comparison groups. As shown above, the facts that led the Board to reach this conclusion in *US Magnesium* are not present here.

Finally, it would not be appropriate for the Board to apply the Waybill Sample data "distortion" test that it used in *US Magnesium* in this case. In *US Magnesium*, the Board calculated the average R/VC ratios from the Waybill Sample data for the TIH commodities included in the comparison groups and for local/rebilled chlorine movements to attempt to determine the "distortion" caused by inclusion of non-chlorine movements and rebilled movements in the comparison groups. Such a test would not be useful here, since the test uses Waybill Sample data from 2006-2009 and, as a result, would not reflect the fundamental change in pricing made by BNSF in March 2011 that applied to the challenged issue traffic movements. As described above, that pricing change must be taken into account and, when it is, it is clear that a significant difference exists between the average R/VCs for BNSF anhydrous ammonia and chlorine movements. In addition, the circumstances under which the Board decided to apply the "distortion" test in *US Magnesium* do not apply here. That test was not adopted by the Board as a generally applicable test to determine the types of movements that should be included in comparison groups. Rather the Board adopted it to evaluate the "relatively extreme comparison groups" proposed by both of the parties in that case. *US Magnesium* at 9. The Board considered UP's inclusion of rebilled chlorine movements to be "relatively extreme" given that the average R/VC on UP's rebilled chlorine movements was more than 50% higher than the average R/VC

on UP's local chlorine movements. Since BNSF has not presented "relatively extreme comparison groups," there is no need for the Board to apply the Waybill Sample "distortion" test.

In sum, the evidence establishes that BNSF's inclusion of rebilled chlorine movements in its alternative comparison groups is clearly superior to Canexus's inclusion of anhydrous ammonia movements in its comparison groups and, as a result, BNSF's alternative comparison groups are more similar in the aggregate to the issue traffic movements than Canexus's final comparison groups.

3. Other Comparison Group Issues

There are a few other differences between BNSF's alternative comparison groups and Canexus's final comparison groups dealt with briefly below. As shown below, a consideration of these differences only serves to reinforce the conclusion that BNSF's alternative comparison groups are more similar in the aggregate to the issue traffic movements than Canexus's final comparison groups. In any event, even if the Board were to agree with Canexus on these differences, it would not change the overall conclusion that BNSF's comparison groups should be selected.

First, Canexus continues to include Waybill Sample movements from 2006-2009 in its comparison groups whereas BNSF limits its alternative comparison groups to 2009 Waybill Sample data. As BNSF explained on opening and reply, Canexus's use of the older 2006-2008 Waybill Sample data exacerbates an already serious regulatory lag problem in this case since most of the regulatory changes relating to TIH transportation had not yet occurred when the 2006-2008 rates were in effect.²⁰ Further, the Board should reject any attempt by Canexus to use

²⁰ BNSF Opening Evidence at 43-44; BNSF Reply Evidence at 16-17.

the Board's *March 12 Decision* allowing the use of up to four years of Waybill Sample data in a comparison group as support for a conclusion that Canexus's inclusion of four years of Waybill Sample data in its comparison groups is superior. The *March 12 Decision* does not stand for the proposition that a comparison group consisting of movements drawn from four years of Waybill Sample data is inherently superior. The decision merely provides that a party may select movements from one to four years of Waybill Sample data for its comparison groups.²¹ BNSF has shown that, to the extent Waybill Sample data is used to select the comparison groups, only the most recent year of data – 2009 data – should be used. In any event, reliance on the *March 12 Decision* in resolving this issue would be prejudicial to BNSF since it was issued after BNSF submitted opening evidence with its initial comparison groups (from which final comparison groups must be selected) and only one day before BNSF submitted reply evidence with its final comparison groups.

Second, Canexus continues to include Glendale issue traffic movements in its final comparison group for Albuquerque issue traffic while BNSF does not include any issue traffic movements in its comparison groups. As BNSF explained in its reply, at 15-16, Canexus only included the 2006-2009 Glendale movements in the Albuquerque comparison group because they are old movements with artificially low rates that have no relevance to the rates that BNSF is charging today. Including the Glendale movements provides the added benefit to Canexus of getting more chlorine movements into the Albuquerque comparison group. In this respect, Canexus is trying to exploit the regulatory lag rather than address the distortions created by the regulatory lag. Canexus would not have included the *current* Glendale movements in a comparison group because those rates reflect BNSF's March 2011 change in pricing

²¹ *March 12 Decision* at 4.

transportation of TIH commodities and would not help Canexus's case. Indeed, Canexus is challenging the reasonableness of the rates BNSF currently charges for the Glendale movement.

Canexus attempts to gloss over this difference in the parties' comparison groups by claiming that BNSF omitted the Glendale and Albuquerque movements from its alternative comparison groups because BNSF "chose to present a single alternative comparison group" for both issue traffic movements. Canexus Reply Evidence at 7. Canexus is wrong. As BNSF explained on opening, at 43, it identified an alternative comparison group for the Glendale issue traffic movement and an alternative comparison group for the Albuquerque issue traffic movement. However, when BNSF applied its selection criteria, the same 26 movements fit the selection criteria for both the Glendale and Albuquerque issue traffic movements. Consequently, the alternative comparison groups for the Glendale and Albuquerque issue traffic movements are identical. BNSF did not set out to create a single comparison group for both issue traffic movements, as Canexus claims.

In short, the other differences between BNSF's alternative comparison groups and Canexus's final comparison groups further buttress the conclusion that BNSF's alternative comparison groups are more similar in the aggregate to the issue traffic movements than Canexus's final comparison groups. If the Board does not allow the parties to use movements from BNSF's 2011 traffic data in the comparison groups, it should select BNSF's alternative comparison groups in this Three Benchmark case.

III. OTHER RELEVANT FACTORS

As BNSF explained in its opening evidence, if the Board accepts BNSF's preferred comparison groups, there is no need to apply an other relevant factor to adjust the average R/VC

ratio of the comparison group.²² If the Board accepts comparison groups tendered by a party based on historical Waybill Sample data, it will be necessary to apply an other relevant factor to adjust the resulting R/VC ratios.

On reply, Canexus sets the threshold for application of an other relevant factor so high that, as a practical matter, no party would ever be able to demonstrate its entitlement to such an adjustment and the issue of regulatory lag could never be addressed. For example, Canexus claims that each of BNSF's proposed other relevant factors is "overly complex and opens the door to the costly 'battle of the experts.'"²³ Canexus is wrong. BNSF's other relevant factors are based on data maintained by BNSF in the ordinary course of business (*e.g.*, traffic data or data on actual PTC expenditures) and the adjustments that BNSF develops from these data are simple and straightforward. Canexus's position appears to be that, if evaluation of an other relevant factor requires use of an expert with knowledge of URCS, then the other relevant factor is too complicated. Canexus's position cannot be correct given the requirement that a party quantify the impact of a proposed other relevant factor under the Three Benchmark test. Even if BNSF's other relevant factors did involve some degree of complexity, BNSF has demonstrated a clear regulatory lag issue in this case that must be addressed. Canexus cannot shut its eyes to this problem by contending that "simplification" must trump all other relevant factor evidence even where it will result in arbitrary rate regulation. The Board should reject Canexus's claim that no adjustment to the presumed maximum rates based on other relevant factors is required.

²² BNSF Opening Evidence at 41, Table 5. BNSF explained that if the Board were to prescribe a maximum reasonable rate using BNSF's preferred comparison groups, it would be necessary for the prescription to include a mechanism that would adjust the prescribed rate in future prescription years to account for actual PTC expenditures made in the future. BNSF Opening Evidence at 57.

²³ Canexus Rebuttal Evidence at 19; *see also id.* at 19, n. 15, 24-25, 28.

BNSF has identified two methods by which the Board can solve or alleviate the regulatory lag problem in this case by applying an other relevant factor adjustment. The Board could directly address the change in R/VC levels from 2009 to 2011 by applying either BNSF's Current Rate Adjustment or Public Current Rate Adjustment. Alternatively, the Board could indirectly address the regulatory lag problem by applying BNSF's Historical PTC Adjustment to deal with the most significant development affecting TIH costs since 2009. The simplest and most direct approach would be to apply one of the Current Rate Adjustments.

Canexus voices myriad complaints other than "complexity" about the other relevant factors sponsored by BNSF. BNSF addresses Canexus's arguments below.

A. Current Rate Adjustment

1. A Current Rate Adjustment Is the Most Effective Way to Address Regulatory Lag

BNSF explained in its opening and reply evidence that if the Board uses historical Waybill Sample data for purposes of calculating a maximum reasonable R/VC ratio, a current rate adjustment is needed so that the maximum reasonable rates for *current* issue traffic movements will reflect the fundamentally different costs and market conditions that exist today as compared to those that existed in 2009 or before.²⁴ BNSF showed that this case presents a unique situation in which major changes in regulation and market conditions occurred between the years during which the Waybill Sample data issued for use in this case were generated and the date on which the issue traffic rates were established. A comparison of R/VC ratios from the historical Waybill Sample data period to current R/VC ratios for chlorine movements affected by these far-reaching changes in the market will produce a false and arbitrary picture of the reasonableness of the issue traffic rates.

²⁴ See, e.g., BNSF Opening Evidence at 10-11.

The Board has previously stated that in most Three Benchmark cases the use of historical Waybill Sample data will not produce distortions in the level of the maximum reasonable R/VC ratios because costs and revenues can be assumed to rise in parallel: “the effects of price shifts associated with an inflationary increase in costs should be largely offset, leaving the R/VC unaffected.”²⁵ However, BNSF’s evidence shows that the R/VC ratios for chlorine movements have not been static and that revenues increased by a significantly greater percentage than URCS variable costs between 2009 and 2011.²⁶ The changes in R/VC levels were not the result of normal inflation but rather were brought about by the fundamental changes in costs and in market conditions that occurred after 2009, including changes produced by the new regulatory environment and substantial new costs associated with the new regulatory environment. Thus, BNSF has established that “comparisons of R/VC ratios of similar traffic for different years would skew the results of the final offer process.”²⁷

If the Board fails to address this regulatory lag problem, the rationale supporting the Three Benchmark methodology will be fatally undermined. The Board recently stated that the “R/VC_{COMP} benchmark is used to approximate the maximum reasonable rate that a rail carrier could charge under the SAC constraint.”²⁸ Here, it is clear that an R/VC_{COMP} drawn from the Waybill Sample would not approximate SAC results unless it is adjusted to account for current costs and market conditions. If a SAC analysis were carried out today to test the reasonableness of the issue traffic rates, the cost and revenue data used in that SAC analysis would reflect the costs and regulatory changes that have occurred since 2009. For example, it is almost

²⁵ *Simplified Standards* at 85.

²⁶ *See* BNSF Opening Evidence at 61, Table 8.

²⁷ *March 12 Decision*, at 7 n.15.

²⁸ *Id.* at 7.

inconceivable that a SAC analysis carried out today to test current rates for chlorine movements would ignore BNSF's actual and expected PTC costs, as well as other costs associated with complying with the fundamental regulatory changes that have occurred since 2009. The Waybill Sample R/VC ratios do not include or reflect those costs because the movements in the Waybill Sample took place before the fundamental changes in the market.²⁹

To ignore the changes that have occurred by relying only on 2009 or earlier years' Waybill Sample data in this case would sever any relationship between the Three Benchmark test and constrained market pricing ("CMP") and would produce arbitrary results. The courts have made it clear that it is not appropriate for the Board to ignore CMP principles solely in the interests of simplifying the rate reasonableness review process. *Burlington Northern Railroad Co. v. I.C.C.*, 985 F.2d 589, 596-99 (D.C. Cir. 1993).

2. Canexus Has Not Demonstrated that BNSF's Current Rate Adjustment Is Invalid

Canexus's primary argument against BNSF's Current Rate Adjustment is that, because it is calculated using BNSF 2011 traffic data, it is precluded by the Board's February 8, 2012 order ("*February 8 Decision*") denying BNSF's motion to permit use of 2011 movements in comparison groups without any discussion of the merits.³⁰ Canexus's apparent logic is that if the Board barred the use of 2011 traffic data for use in identifying a proper comparison group, it also

²⁹ In its recent Waybill Data decision, the Board stated that "[t]he fundamental purpose of the Three-Benchmark approach is not to reflect a snapshot of current market conditions. . . ." *March 12 Decision*, at 7. The Board's concern that the Three Benchmark approach not be based on a "snapshot" of market conditions at a single point in time is not applicable here. BNSF's evidence shows that the regulatory and market changes that have produced new rate levels for chlorine traffic are not temporary conditions but reflect fundamental changes in the market.

³⁰ Canexus Reply Evidence at 19-20. Canexus's arguments are directed against BNSF's Current Rate Adjustment rather than the Public Current Rate Adjustment that BNSF sponsored on reply. The Public Current Rate Adjustment does not make use of 2011 traffic data and is therefore not subject to Canexus's assertion that use of such data is prohibited.

barred the use of any “other relevant factor” that is based on 2011 traffic data. According to Canexus, BNSF’s Current Rate Adjustment “is simply an alternate means of producing the same result” as using the 2011 traffic data in a comparison group and therefore “constitutes an attempted end-run around the Board’s denial of the BNSF Motion by moving the comparison group analysis into the ‘other relevant factors’.”³¹ Canexus asserts that use of current traffic information in “other relevant factors” is not only barred in this case but “should also be prohibited in future Three-Benchmark cases.”³²

BNSF explained in its reply to Canexus’s motion to strike that Canexus is simply wrong that the *February 8 Decision* addressed the use of 2011 traffic data for the purposes of presenting evidence on other relevant factors. BNSF’s motion asked only for permission to expand the data from which comparison group movements could be drawn to include BNSF’s actual 2011 traffic data. The Board was not called upon to address, and did not address, the scope of evidence that can be used for other relevant factors. Indeed, the Board elsewhere has made it clear that the limits it has imposed on the information and data that can be used to identify a comparison group do not apply to the presentation of other relevant factors. The Board emphasized this distinction in the *March 12 Decision*, at 8, n.19, noting that “evidence outside the four years of Waybill Sample data provided under this rule may be used to attempt to demonstrate ‘other relevant factors.’”

Canexus purports to read the *February 8 Decision* in this case as concluding that the Board will not consider information about current R/VC levels in a Three Benchmark case but will instead establish maximum rate levels based only on historical R/VC levels. Canexus’s reading of the Board’s *February 8 Decision* is totally unsupported by any language in the

³¹ *Id.* at 20.

³² *Id.*

decision and it is plainly wrong. The Board established in *Simplified Standards* that parties are entitled to present other relevant factors evidence that addresses “market changes not reflected in the comparison group.”³³ The Board also made representations to the D.C. Circuit that parties would be permitted to address regulatory lag through other relevant factors evidence in individual cases. Information concerning current R/VC levels is highly pertinent to whether regulatory lag is an issue and whether market changes have occurred that are not reflected in the Waybill Sample data. Indeed, information concerning current R/VC levels may be one of the few methods by which parties can demonstrate the presence of regulatory lag issues and quantify other relevant factors to address regulatory lag. If the Board were to accept Canexus’s argument that current rate information is barred, it would cripple the ability of parties to Three Benchmark cases to demonstrate and address regulatory lag.

Canexus also argues that applying a Current Rate Adjustment “requires the Board to accept that BNSF’s huge increases in TIH rates starting in 2011 were lawful and reasonable.”³⁴ The thrust of Canexus’s argument is that current rate levels should not be considered in a Three Benchmark case because doing so would “bless” any rate increase that had taken place during the interval between the year of the most recent waybill sample and the current year. Canexus makes no effort to mask its objective – to use the Three Benchmark test as a mechanism to freeze rates in place at historical levels and preclude railroads from taking rate increases. In effect, Canexus is challenging BNSF’s rate increase as opposed to the level of rates resulting from the rate increase. Such an approach is contrary to the purpose and intent of the Three Benchmark methodology. The Board’s objective in a Three Benchmark case is to determine whether the issue traffic is being singled out to make a greater contribution to joint and common costs than

³³ *Simplified Standards* at 85.

³⁴ Canexus Reply Evidence at 20.

other “similarly situated” traffic. The Board never indicated that the Three Benchmark test was to be used to prevent or moderate rate increases over time.

Indeed, such an approach would be directly contrary to the governing statute. The statute provides that a rail carrier “may establish any rate,” which must be reasonable if the carrier has market dominance. 49 U.S.C. §§ 10701(c), (d). The ratemaking freedom given to railroads under the statute was intended to allow railroads to respond to market conditions without regulatory constraints other than the requirement that where a railroad is market dominant, the resulting rate must be reasonable based on objective standards. The objective standard adopted by the Board in Three Benchmark cases is whether the issue traffic movement is being singled out for unfair treatment relative to other similar traffic. The fact that rates may have increased for traffic similar to the issue traffic is an important factor in determining whether the issue traffic has been singled out for unfair treatment.³⁵

Canexus also argues, in contradictory fashion, that while the reasons for the rate increases that BNSF took in March 2011 are “irrelevant,” BNSF failed to justify those rate increases and also failed to produce materials in discovery supporting BNSF’s claim that “the costs and burdens of regulatory compliance justified its rate increases.”³⁶ Canexus is wrong on both counts. BNSF described in detail the fundamental changes that occurred after 2009 in its opening evidence. A new regulatory regime was developed for the transportation of TIH commodities and BNSF incurred substantial PTC expenses, among other costs, to comply with the new regulatory requirements.³⁷ These clearly could “justify” a rate increase to the extent any

³⁵ If Canexus wanted to challenge the rate increase, rather than the level of the challenged rates, it should have sought relief under the Phasing Constraint set out in *Coal Rate Guidelines*. 1 I.C.C. 2d at 546-47.

³⁶ Canexus Reply Evidence at 5.

³⁷ BNSF Opening Evidence at 14-16, 64-70.

justification is required. Canexus's discovery complaint is particularly misplaced. Canexus studiously avoided asking in discovery any requests regarding the reasons or bases for BNSF's pricing decisions.³⁸ Canexus apparently wanted to avoid any indication through its discovery requests that it considered issues relating to BNSF's rate increase to be relevant in this case. Canexus cannot now criticize BNSF for not producing information Canexus never requested. In any event, BNSF did produce, among other things, detailed documentation of the actual PTC costs that BNSF has incurred.³⁹

3. Application of Current Rate Adjustment and Public Current Rate Adjustment

In its opening evidence, BNSF showed the results of applying the Current Rate Adjustment to BNSF's alternative comparison groups.⁴⁰ In its reply evidence, BNSF showed the results of applying the Current Rate Adjustment to the comparison groups proposed by Canexus in its opening evidence.⁴¹ BNSF also presented a Current Rate Adjustment based on public data and showed the results of applying that adjustment to Canexus's opening comparison groups and to BNSF's alternative comparison groups.⁴²

As noted above, Canexus modified its comparison groups on reply to include single-line chlorine moves of 500 miles or more from BNSF's alternative comparison groups that Canexus

³⁸ See Canexus discovery requests included with BNSF's rebuttal workpapers.

³⁹ See BNSF Opening Evidence at 68-69 (describing documents produced to Canexus and summarizing PTC expenditures).

⁴⁰ BNSF Opening Evidence at 64.

⁴¹ BNSF Reply Evidence at 22. While Canexus otherwise criticizes BNSF's Current Rate Adjustment, Canexus does not present any critique of the specific methodology that BNSF developed to apply the Current Rate Adjustment. For example, Canexus does not challenge the reasonableness of BNSF's approach to addressing the revenue need adjustment and confidence interval in applying the Current Rate Adjustment.

⁴² BNSF Reply Evidence at 28.

had not included on opening. This change in selection criteria requires a recalculation of the Current Rate Adjustment and the Public Current Rate Adjustment as applied to the Canexus comparison groups. BNSF explained in its reply evidence that, for purposes of both the Current Rate Adjustment and the Public Current Rate Adjustment, an average current R/VC is calculated for each comparison group on the basis of the selection criteria for that group.⁴³ To recalculate the Current Rate Adjustment for application to Canexus's final offer comparison groups, Mr. Fisher applied Canexus's revised selection criteria to identify matching movements in BNSF's post-March 15, 2011 traffic data and calculated a new average $R/VC_{CURRENT}$ for each comparison group. Similarly, to recalculate the Public Current Rate Adjustment, Mr. Fisher applied the revised selection criteria to identify the matching origin-destination pairs from the appropriate public pricing authorities and calculated a new average $R/VC_{CURRENT}$ for each comparison group. Mr. Fisher then used each new average $R/VC_{CURRENT}$ to determine the respective Current Rate Adjustment factors and Public Current Rate Adjustment factors following the methodology described in BNSF's reply evidence.⁴⁴ The tables below show the results of applying the Current Rate Adjustment and the Public Current Rate Adjustment to Canexus's revised, final offer comparison groups.

⁴³ See BNSF Reply Evidence at 20, 26. Only chlorine movements are used for purposes of either adjustment.

⁴⁴ See BNSF Reply Evidence at 20-21, 27.

Table 2⁴⁵
Maximum R/VC Ratios for Canexus Final Tender Comparison Groups
Incorporating Current Rate Adjustment

Destination	Canexus Maximum R/VC	Current Rate Adjustment	Max R/VC with Current Rate Adjustment
Glendale	223%	1.25	279%
Albuquerque	218%	1.28	279%

Table 3⁴⁶
Maximum R/VC Ratios for Canexus Final Tender Comparison Groups
Incorporating Public Current Rate Adjustment

Destination	Canexus Maximum R/VC	Current Rate Adjustment	Max R/VC with Current Rate Adjustment
Glendale	223%	1.59	355%
Albuquerque	218%	1.63	355%

B. Historical PTC Adjustment

BNSF's Historical PTC Adjustment is designed to reflect the impact of the actual PTC costs that BNSF has already incurred on the maximum reasonable rate. Unless the Current Rate Adjustment is applied, the Historical PTC Adjustment is necessary when comparison groups are drawn from the Waybill Sample data because the regulatory changes that caused BNSF to make substantial PTC expenditures, and the actual expenditures themselves, had not occurred in 2009. As a result, the R/VC ratios for Waybill Sample movements do not reflect any PTC

⁴⁵ BNSF rebuttal workpaper "Current Rate ORF Applied to Canexus Final Tender.xlsx." If the Board were to prescribe a rate based on applying the Current Rate Adjustment to Canexus's comparison groups, it would also need to apply the Future PTC Adjustment.

⁴⁶ BNSF rebuttal workpaper "Public Current Rate Adjustment Rebuttal.xlsx."

expenditures.⁴⁷ As BNSF has documented, however, BNSF began to incur massive PTC expenses in 2010.⁴⁸

BNSF showed the results of applying the Historical PTC Adjustment to BNSF's alternative comparison groups in its opening evidence.⁴⁹ BNSF has not changed its alternative comparison groups for purposes of its final offer, so there is no need to recalculate the results of the application of the Historical PTC Adjustment to BNSF's alternative comparison groups. However, because Canexus's change in its comparison groups results in different maximum R/VC ratios, the impact of the Historical PTC Adjustment as applied to Canexus's new comparison groups needs to be recalculated. The results of applying the Historical PTC Adjustment to Canexus's final comparison groups are restated in the following table.

Table 4⁵⁰
Maximum R/VC Ratios for Canexus's Final Tender Comparison Groups
Incorporating Other Relevant Factor for 2010-2011 PTC Costs

Destination	Canexus Maximum R/VC	2010 Investments		2010+2011 Investments	
		Other Relevant Factor	2011 Maximum R/VC	Other Relevant Factor	2012 Maximum R/VC
Glendale	223%	1.19	266%	1.38	308%
Albuquerque	218%	1.25	273%	1.49	325%

Canexus makes two primary arguments against the Historical PTC Adjustment and a series of more specific criticisms. None of Canexus's objections is valid.

First, Canexus asserts that the adjustment is a prohibited movement-specific adjustment to URCS.⁵¹ Canexus misunderstands the Board's prior discussion of movement-specific

⁴⁷ BNSF demonstrated that the amount of PTC costs included in BNSF's 2009 URCS investment base is *de minimus*. See BNSF Opening Evidence at 58 n.99; 69, Table 10.

⁴⁸ See BNSF Opening Evidence at 68-70.

⁴⁹ BNSF Opening Evidence at 77.

⁵⁰ BNSF rebuttal workpaper "Comparison Group Rate Adjustments Rebuttal.xlsx"

⁵¹ Canexus Reply Evidence at 23.

adjustments in the context of Three Benchmark cases. The Board's concern about movement-specific URCS adjustments in rate reasonableness cases has focused on adjustments proposed by the parties to the variable costs of the issue traffic movement in an effort to make the issue traffic rate appear to be higher or lower on an R/VC basis. In *Simplified Standards*, the Board concluded that the use of movement-specific adjustments in calculating the R/VC level of the issue traffic rates would not be accepted in Three Benchmark cases due to the complexity of the resulting debates over the validity of proposed movement-specific adjustments and due to the fact that an adjustment to the issue traffic variable costs would require similar adjustments to the variable cost calculations of movements in the comparison group.⁵²

BNSF's Historical PTC Adjustment has nothing to do with the R/VC levels of the issue traffic. BNSF is not proposing to adjust the issue traffic R/VC calculations, either current or future, in any way. Nor does the Historical PTC Adjustment seek to make any movement-specific adjustments to the calculation of variable costs of any movements in the comparison group.⁵³ Movements that took place in 2009 or prior years have no variable costs associated with PTC installation because those costs did not occur until after 2009. The Historical PTC Adjustment does not involve a revision to the URCS cost calculations for historical movements. Instead, the Historical PTC Adjustment is based on the premise that the historical R/VC ratios, calculated in accordance with the Three Benchmark methodology, are not appropriate indicators of comparability for current movements because those historical R/VC ratios do not reflect costs that have subsequently been incurred. The purpose of the Historical PTC Adjustment is to adjust the presumed maximum reasonable rate so that it reflects current costs.

⁵² *Simplified Standards* at 84.

⁵³ As BNSF is not making a movement-specific adjustment to R/VC ratios, the laundry list of quotations describing the impropriety of such adjustments contained in the *Crowley/Stedman VS*, at 22-23, is irrelevant.

It may be true that an Historical PTC Adjustment would not be necessary if URCS attributed PTC costs to the movements responsible for those costs. But the fact that URCS does not attribute PTC costs to TIH movements does not invalidate the use of an Historical PTC Adjustment in a Three Benchmark case – to the contrary, it demonstrates why an adjustment is necessary. The fact that the use of unadjusted R/VC ratios from historical movements that preceded BNSF’s PTC expenditures will not allow BNSF to recover current and future PTC costs that are not reflected in those R/VC ratios is a conclusive reason why the adjustment is needed.

Even if the Historical PTC Adjustment could be characterized as a “modification” to the way URCS treats PTC-related costs, that “modification” is necessitated by the Board’s express requirement that any “other relevant factors” adjustment must quantify the impact of the changed market condition on the presumed maximum reasonable R/VC ratio. Because URCS does not currently attribute PTC costs to TIH traffic, and because the Waybill Sample R/VC ratios do not include PTC costs at all, the way to quantify the impact of these new costs on maximum R/VC levels is to compute an other relevant factor using URCS as a mechanism to assign the appropriate amount of variable costs to TIH traffic. The Board cannot base its Three Benchmark methodology on R/VC ratios, require that other relevant factors quantify the impact on R/VCs, and then reject a party’s quantitative evidence on grounds that it constitutes a prohibited movement-specific adjustment to URCS. Such an approach would contradict the Board’s commitment to consider other relevant factors.

Canexus also argues that the Historical PTC Adjustment should be rejected because it would interfere with the Board’s pending consideration of changes to URCS to address PTC

costs and other TIH issues.⁵⁴ It would be inappropriate to avoid addressing the impact of PTC costs in this case simply because the Board may, at some point in the future, modify URCS to account for and allocate PTC costs in a different manner. BNSF has shown that the actual PTC costs it has incurred to date and its future PTC costs will not be reflected in prescribed rates in this case unless an adjustment is made to any R/VC_{COMP} calculated from historical Waybill Sample movements. Indeed, the Board has acknowledged that something must be done in the future so that URCS will better attribute PTC cost directly to TIH traffic.⁵⁵ If the Board were to prescribe rate levels without considering the PTC issue, it would be cold comfort for BNSF that at some undefined future date the Board might take steps to ensure that URCS properly allocates PTC costs. BNSF would have no ability to recover payments from Canexus for the depressed prescribed rates it was required to charge in the interim. Future Board modifications to URCS may prevent future arbitrary rate reasonableness decisions, but they will not protect BNSF's rights in this case.⁵⁶

Canexus also makes a number of subsidiary arguments against the Historical PTC Adjustment that should be summarily dismissed. This flurry of arguments is a poorly disguised effort to make the PTC issue look complicated, when in reality the adjustment proposed by BNSF is straight-forward and easy to apply.

⁵⁴ Canexus Reply Evidence at 24-25.

⁵⁵ See BNSF Opening Evidence at 66-67.

⁵⁶ Moreover, refusing to address PTC expenses here would also be inconsistent with the Board's prior practice. In *Montana v. BNSF Railway Co.* the Board made clear that it will not defer or decline to address URCS-related issues in pending cases even though those issues may be the subject of future changes to URCS. *Montana v. BNSF Railway Co.*, STB Docket No. 42124 (served Feb. 16, 2011) (rejecting BNSF motion to dismiss or hold proceeding in abeyance pending Board review of URCS make-whole adjustment).

Consideration of PTC Costs is Not Barred by *US Magnesium*: Canexus contends that the Board prohibited all other relevant factors relating to PTC investments in *US Magnesium*.⁵⁷ Indeed, Canexus makes the frivolous assertion that BNSF is collaterally estopped from litigating this issue.⁵⁸ A party cannot be collaterally estopped by a prior decision when it was not a party to the prior proceeding.⁵⁹ Canexus also overstates the scope of the Board's treatment of PTC costs in *US Magnesium*. In that case, UP sought an adjustment to account for PTC expenditures that it had not yet incurred and could not quantify. Given the absence of actual PTC expenses, the Board expressed skepticism that it would be possible to account for PTC expenditures consistent with the objectives of a Three Benchmark case. But years have passed since *US Magnesium* and the Board is presented with different evidence here. The evidence on actual PTC costs that BNSF has presented is concrete, fully documented, and simple to use in developing an other relevant factor adjustment. BNSF has shown that a PTC adjustment can be made without overly complicating Three Benchmark cases.⁶⁰ There would be no valid reason to refuse to consider PTC costs in this case.

BNSF Has Documented its PTC Costs. In a related vein, Canexus alleges that BNSF's PTC costs are not adequately documented. This claim is false. BNSF produced detailed company records, prepared in the ordinary course of business, that set forth BNSF's PTC costs. These included Capital Project Approval Requests and the detailed spending records for individual Authorization for Expenditure projects. BNSF also produced Excel spreadsheets

⁵⁷ Canexus Reply Evidence at 21-22.

⁵⁸ *Id.* at 22.

⁵⁹ *See, e.g., Allen v. McCurry*, 449 U.S. 90, 94 (1980) (“Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action *involving a party to the first case.*”) (emphasis added).

⁶⁰ *See* BNSF Opening Evidence at 64-77.

prepared in the ordinary course of business that tracked these expenditures.⁶¹ BNSF has fully satisfied its obligation to quantify these expenditures for purposes of an other relevant factor adjustment.

The Board Would Not Have to Modify Rate Prescriptions in Coal Cases: Canexus also contends that if the Board concludes here that PTC costs should be attributed solely to TIH traffic, the Board would need to adjust existing rate prescriptions in non-TIH cases.⁶² The grounds for Canexus's assertion that decisions in other rate cases would have to be revisited are particularly obscure. Canexus appears to be arguing that BNSF is asking the Board to modify the way URCS attributes PTC-related costs to specific movements and that any such change to URCS would have to be applied in other cases. But as discussed above, BNSF is not asking the Board to make any changes in URCS. BNSF's Historical PTC Adjustment is a straightforward way to ensure that any prescribed rate *in this case* properly reflects PTC costs that are attributable to TIH movements, including the issue traffic movements. BNSF is not asking the Board to change the way URCS accounts for PTC costs as a general matter. BNSF's Historical PTC Adjustment has no relevance to or impact on the decisions that have been reached in other rate reasonableness cases.⁶³

The Adjustment Is Not Inconsistent with BNSF's Purchase Accounting: Canexus asserts that BNSF's Historical PTC Adjustment is "directly contrary to BNSF's treatment of the

⁶¹ See BNSF Opening Evidence at 68.

⁶² Crowley/Stedman VS at 26.

⁶³ If a shipper in a different rate case thought that the Board's acceptance of the Historical PTC Adjustment here might be grounds for asking the Board to change an existing rate prescription, it would be free to request a reopening of its existing rate prescription. However, it is highly unlikely that any proposed change in the treatment of PTC costs in a rate case involving coal would make any non-negligible difference. In any event, even if the Board's decision were viewed as having wider implications, that could not justify failing to address a real issue involving the parties to this proceeding.

acquisition premium paid by Berkshire Hathaway to purchase BNSF in 2010.”⁶⁴ Canexus’s contention is nonsense. There is no inconsistency in the facts that BNSF made significant PTC expenditures throughout 2010 and the overall value of assets in the broader STB property account was reduced as a result of the purchase accounting treatment of those assets. The decrease in overall asset values was attributable to assets other than the PTC investments, the vast majority of which had not even occurred by the February 2010 date as of which the asset write-down was determined.

PTC Costs Should Be Assigned to TIH and Passenger Traffic: Canexus also criticizes BNSF’s Historical PTC Adjustment on grounds that it assigns the cost of PTC installation only to TIH and passenger traffic, rather than to all traffic potentially using the lines on which PTC is installed.⁶⁵ Canexus claims that since other traffic will benefit from PTC, PTC costs should be assigned to all traffic. There are two fundamental problems with this argument. First, Canexus presents no evidence at all that the installation of PTC will have any impact on or benefit for non-TIH traffic. PTC is required by Congress for the purpose of addressing the hazards relating to transportation of TIH commodities and safety concerns relating to passenger traffic. It was not conceived as a means of improving the efficiency of rail operations. Second, in rate reasonableness cases, costs should be assigned based on principles of causation. Costs should be assigned to movements or groups of movements based on whether those movements caused the costs to be incurred, not based on abstract notions of who benefits from the fact that the costs were incurred. The legislative mandate that requires BNSF to adopt PTC is triggered exclusively by passenger traffic and by TIH traffic. If a line does not carry sufficient volumes of either, it is not required to be equipped with PTC. Thus, if it were not for TIH and passenger

⁶⁴ Canexus Reply Evidence at 25.

⁶⁵ Crowley/Stedman VS at 29-30.

traffic, BNSF would not be incurring costs to install PTC. PTC costs should be assigned to the traffic that causes BNSF to incur the costs.⁶⁶

PTC Costs Should Not Be Assigned to the Waybill Sample R/VCs in the

Comparison Group: Finally, Canexus makes the bizarre claim that a proper adjustment for PTC costs would reduce the comparison group R/VC ratios that are used to determine the maximum reasonable rate.⁶⁷ Canexus's asserts, without providing a rationale, that PTC costs should be added to the variable costs in the denominator of the comparison group R/VC ratios, thereby producing a lower R/VC_{COMP}. Canexus asserts that this adjustment is required to "offset" PTC costs BNSF allegedly assigns to the issue traffic. It is difficult to address Canexus's argument because it is based on a complete misunderstanding, or deliberate distortion, of BNSF's Historical PTC Adjustment. First, contrary to Canexus's claim, the Historical PTC Adjustment does not "assign PTC investment costs to the issue traffic"⁶⁸ or adjust the issue traffic R/VCs in any way. The Historical PTC Adjustment is a factor applied to the presumed maximum rates so that the rates will reflect costs that are not included in the historical R/VC

⁶⁶ Canexus makes a subsidiary attack on BNSF's decision to assign PTC costs for purposes of quantifying its other relevant factor to TIH traffic on a loaded car-mile basis. Crowley/Stedman VS at 30-31. As explained in BNSF's opening evidence, this is a reasonable mechanism to assign the costs to the traffic that is responsible for creating the costs. See BNSF Opening Evidence at 74-75 and n. 133. Canexus does not propose an alternative assignment method that it believes would be appropriate, although it refers to other metrics such as locomotive unit miles and empty gross-ton miles. Clearly, the mere existence of other metrics does not invalidate BNSF's approach. Further, there is no evident causal linkage between locomotive unit miles and PTC costs, nor would there be any basis for assigning PTC costs to empty miles, since empty miles do not, by definition, involve the transportation of TIH commodities that give rise to PTC costs.

Canexus also claims that TIH traffic must not be responsible for PTC costs because TIH traffic moves today over some segments where PTC will not be installed. See Crowley/Stedman VS at 31. This claim ignores the obvious point that traffic patterns will change in the future when the PTC mandate goes into effect.

⁶⁷ Crowley/Stedman VS at 31-32.

⁶⁸ *Id.* at 31.

ratios. Second, it would make no sense to add variable costs (but no revenues) to comparison group R/VCs because, as even Canexus concedes, the comparison movement R/VC ratios do not reflect any PTC costs or any revenues intended to cover those costs.⁶⁹ Indeed, in 2009 and before, there were no PTC costs for the Waybill Sample movements to incur. The question addressed by the Historical PTC Adjustment is how an average drawn from comparison R/VCs *that do not reflect PTC costs* should be adjusted to a level that *would reflect* PTC costs. Adding expenses to drive down the comparison R/VC ratios, as proposed by Canexus, is entirely illogical. Higher costs, such as the PTC costs that BNSF has actually incurred, cannot be expected to result in *reduced* rates and R/VC ratios.

C. Liability Risk Adjustment

In arguing that BNSF's Liability Risk Adjustment suffers from the same problems as the Historical PTC Adjustment,⁷⁰ Canexus fails to acknowledge the important differences between the two. The Historical PTC Adjustment is intended to adjust the presumed maximum rates so that they reflect new PTC costs that were not incurred during the historical period in which the comparison group movements took place. In this respect, the Historical PTC Adjustment eliminates much of the distorting effect of regulatory lag. A major cause of the fundamental changes in costs and market conditions from 2009 to 2011 is the PTC mandate and the need for railroads to begin making substantial PTC expenditures. By applying the Historical PTC Adjustment, the Board can indirectly address one of the principal causes of the change in market rates between 2009 and 2011.

In contrast, the Liability Risk Adjustment is not intended to reflect new costs that have occurred since the comparison group movements took place. Canexus is correct in pointing out

⁶⁹ *Id.*

⁷⁰ *See id.* at 33.

that the Liability Risk Adjustment is not designed to compensate for regulatory lag.⁷¹ Instead, it is intended to implement BNSF's contention that maximum reasonable rates for chlorine movements should allow BNSF to recover costs associated with liability risk from the movements responsible for those risk-related costs.⁷²

BNSF believes that the Liability Risk Adjustment is appropriate given the Board's recognition that URCS improperly "spreads [insurance] expenses across all traffic of the railroad, rather than attributing those higher insurance costs specifically to the transportation of the hazardous materials."⁷³ BNSF believes that the Board should not prescribe rates for TIH commodities that do not properly reflect the liability-related costs that such traffic imposes on BNSF, and the point of BNSF's Liability Risk Adjustment is to quantify those costs and allow BNSF to recover them in any rates prescribed by the Board. BNSF is not presenting the Liability Risk Adjustment to deal with "market changes not reflected in the comparison group or the average RSAM and R/VC comp benchmarks," *Simplified Standards* at 85, which is the purpose of the Historical PTC Adjustment. But the Board has not said that other relevant factors evidence is limited to dealing only with regulatory lag. The Board has stated more broadly that parties "may introduce 'other relevant factors' to show that the maximum lawful rate should be higher or lower." *Simplified Standards* at 77. BNSF's Liability Risk Adjustment shows that the presumed maximum R/VC levels on movements of TIH traffic should be higher so that BNSF

⁷¹ Canexus Reply Evidence at 28.

⁷² See BNSF Opening Evidence at 78; BNSF Reply Evidence at 24.

⁷³ *Class I Railroad Accounting and Financial Reporting – Transportation of Hazardous Materials*, STB Ex Parte No. 681, slip op. at 2 (served Jan. 5, 2009).

will have the opportunity to recover its liability-related costs from the traffic that has caused BNSF to incur those costs.⁷⁴

Most of Canexus's arguments regarding the Liability Risk Adjustment border on the frivolous. First, Canexus argues that BNSF should not be allowed to recover for excess insurance costs attributable to TIH transportation because BNSF could choose not to have insurance.⁷⁵ Canexus makes a related argument that BNSF has not demonstrated that its decisions concerning insurance purchases and liability limits were prudent.⁷⁶ Canexus offers no support at all for its suggestion that BNSF is purchasing insurance that it does not need. The claim is absurd on its face. The Board should reject out of hand any suggestion that it would be appropriate to import into STB regulation a "prudent investment rule" from the sphere of public utility regulation.

Canexus also argues that a Liability Risk Adjustment is not needed because the installation of PTC may reduce BNSF's future expenditures on insurance.⁷⁷ This claim is entirely speculative and is, in any case, irrelevant. The Liability Risk Adjustment is intended to allow BNSF to recover from chlorine shippers the insurance-related costs that BNSF is incurring today as a result of handling chlorine shipments, not what expenses it might incur in the future.

⁷⁴ BNSF reported the results of applying the Liability Risk Adjustment factor to its alternative comparison groups in its opening evidence, at 24. The results of applying the Liability Risk Adjustment to Canexus's final offer comparison groups are shown in BNSF rebuttal workpaper "Comparison Group Rate Adjustments Rebuttal.xlsx." In addition, Mr. Fisher determined that the impacts of combining the Historical PTC Adjustment and Liability Risk Adjustment were slightly overstated in BNSF's prior evidence. Corrected versions of Table 19 from BNSF's Opening Evidence and Table 5 from BNSF's Reply Evidence are included in BNSF rebuttal workpaper "Comparison Group Rate Adjustments Rebuttal.xlsx."

⁷⁵ Canexus Reply Evidence at 29.

⁷⁶ *Id.* at 30.

⁷⁷ *Id.* at 30.

Messrs. Crowley and Stedman also argue that BNSF should not be allowed to recover liability-related costs from TIH movements because the risk associated with TIH transportation depends on traffic levels.⁷⁸ Whether or not this assertion is true, it is beside the point. Even if the risk of an accident increases with higher traffic levels, the liability risk is caused by the presence of TIH traffic and it would not exist but for the TIH traffic. The costs associated with that risk should therefore be assigned to the TIH movements.

Finally, Canexus makes the obscure claim that insurance premiums are “expenses” rather than investments that will earn returns and therefore should not be recovered through an adjustment to the prescribed R/VC ratio.⁷⁹ The short answer to this criticism, and the incomprehensible discussion accompanying it, is that the Board has required that any other relevant factor adjustment be expressed as a quantifiable adjustment to R/VC ratios.

D. Future PTC Adjustment

Canexus’s arguments concerning why no PTC adjustment of any type should be made are addressed above. The thrust of Canexus’s critique specific to the Future PTC Adjustment is that there is too much uncertainty about future PTC expenses to allow those expenditures to be included in the rate reasonableness analysis.⁸⁰ This argument makes no sense in light of the design of the Future PTC Adjustment. As BNSF described in its opening evidence, at 82-83, the point of the Future PTC Adjustment is to allow modification of the maximum prescribed R/VC ratios as PTC expenditures are made in the future *once those costs are known and can be quantified*. The adjustment would only be made once previously unreflected PTC expenditures

⁷⁸ Crowley/Stedman VS at 36.

⁷⁹ *Id.* at 37.

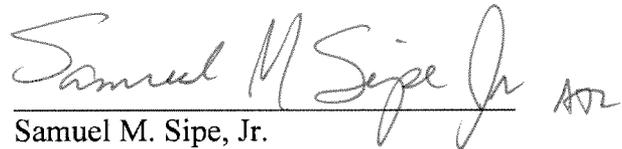
⁸⁰ Canexus Reply Evidence at 31.

for the immediately prior year had been made and could be quantified. Due to the design of the adjustment, there is no uncertainty. Certainty will be provided as the money is actually spent.

IV. CONCLUSION

For the foregoing reasons, the Board should find that the challenged rates do not exceed a maximum reasonable level.

Respectfully submitted,



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April 12, 2012

ATTORNEYS FOR BNSF RAILWAY CO.

Certificate of Service

I hereby certify that on this 12th day of April, 2012, I caused to be served a copy of the Highly Confidential and Public versions of the Rebuttal Evidence of BNSF Railway Company on the following by hand delivery:

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Linda S. Stein

WITNESS VERIFICATION

Benton V. Fisher's qualifications were included in BNSF's Opening Evidence filed on February 13, 2012.

Here, Mr. Fisher is sponsoring the calculations underlying BNSF's rebuttal evidence and the calculation and application of other relevant factors. Mr. Fisher declares under penalty of perjury that he has read the Rebuttal Evidence that he has sponsored, and that the contents thereof are true and correct to the best of his knowledge and belief.

Executed on April 11, 2012



Benton V. Fisher
Benton V. Fisher