PUBLIC VERSION—HIGHLY CONFIDENTIAL MATERIAL REDACTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

224099

E.I. DUPONT DE NEMOURS AND COMPANY Complainant, v. CSX TRANSPORTATION, INC. Defendant.	Docket No. NOR 42112

PETITION FOR INJUNCTIVE RELIEF

On November 10, 2008, Complainant E.I. du Pont de Nemours and Company ("DuPont") filed a Complaint with the Surface Transportation Board ("Board") pursuant to 49 U.S.C. 11701 and 11704, alleging that the rates to be charged by the defendant CSX Transportation, Inc. ("CSXT") effective December 1, 2008 on 99 lanes of traffic exceeded a just and reasonable maximum rate. DuPont asked the Board to prescribe a just and reasonable rate on these 99 lanes, and to award damages, plus interest, to the extent that DuPont has paid or will pay common carrier rates in excess of a just and reasonable maximum rate for each of these lanes.

Based upon volumes shipped during the 12 month period from October 1, 2007 through September 30, 2008, the December 1, 2008 rates that CSXT is charging DuPont for these 99 lanes represent $[redacted][1] in additional transportation costs for DuPont compared to the rates that CSXT was charging DuPont just 18 months ago. Indeed, the December 1, 2008 rates that CSXT is charging DuPont represent $[redacted] in additional transportation costs compared to the rates in CSXT's common carrier "Private Price Lists" ("PPLs") for DuPont that expired on

[1] All shaded text is HIGHLY CONFIDENTIAL and CONFIDENTIAL information that has been redacted from the public version of this pleading

November 30, 2008, but which CSXT offered to continue in a so-called "signature-less" contract until May 31, 2009 provided DuPont waived its right to challenge those rates before the Board The service terms and conditions in CSXT's existing PPLs are indistinguishable from the common carrier terms and conditions that became effective December 1, 2008.

The rates imposed by CSXT represent, in total and for each of the 99 challenged lanes, a significant burden for DuPont at a time when all American manufacturing companies are experiencing extraordinarily difficult business conditions. For the three movements that are the subject of this Petition, DuPont has determined after careful analysis that monetary damages at the conclusion of this case will be a completely inadequate remedy for the harm caused by CSXT's challenged tariff rates. [redacted]

Accordingly, pursuant to 49 C.F.R. Part 1117 and 49 U.S.C. § 721(b)(4), DuPont hereby petitions the Board for an order enjoining CSXT from charging the common carrier tariff rates scheduled to become effective on December 1, 2008 for the following rail movements, pending a final decision by the Board on the rate reasonableness challenges filed by DuPont in its Complaint in this docket:

Origin	Destination	Route	Commodity Name	STCC	Dec. 1 CSXT Tariff Rate w/o Fuel Surcharge
Edgemoor, DE	New Johnsonville, TN	NS-CINTI-CSXT	Titanium Dioxide	2816130	$3351/car
Niagara Falls, NY	Edgemoor, DE	CSXT-BUFF-NS	Chlorine	2812815	$3772/car
Wurtland, KY	Petrolia, PA	CSXT-NEWCA-BPRR	Fuming Sulfuric Acid	2819340	$6600/car

In lieu of the tariff rates scheduled to become effective on December 1, 2008, CSXT should be permitted to charge only the applicable rates in common carrier PPLs published by CSXT for DuPont that expired on November 30, 2008. These PPLs contain joint rates for through movements, whereas the new tariff rates for through movements effective December 1, 2008 are Rule 11 rates. For the purpose of this motion, DuPont asks the Board to prevent CSXT from charging rates in excess of its division of the joint rate in the PPLs.

As a condition of this relief, DuPont will keep account of the differences between the charges paid and those that would have been paid under the tariff rates effective December 1, 2008 Further, DuPont stipulates that, if the Board ultimately determines any portion of the proposed rate increases to be reasonable, DuPont will refund the appropriate amount to CSXT, with interest at the prescribed regulatory rate.

This Petition is supported by Verified Statements from the following individuals:

1. Mary Pileggi, the U.S /Canada Regional Logistics Manager for DuPont, presents the negotiation history between DuPont and CSXT and addresses CSXT's qualitative market dominance over the three Petition movements. ("Pileggi V.S.")

2. Thomas D. Crowley, President of L.E. Peabody & Associates, Inc., addresses CSXT's quantitative market dominance over the three Petition movements, and demonstrates why DuPont is likely to succeed on the merits of its SAC claim. ("Crowley V.S.")

3. Ann K. Lopez, Global Supply Chain Manager for DuPont Titanium Technologies, and Michelle E. Moore, Executive Buyer for DuPont, jointly address the irreparable harm to DuPont at its Edgemoor, DE, titanium dioxide production facility from CSXT rate increases for the transportation of chlorine to Edgemoor and of titanium dioxide from Edgemoor. ("Lopez/Moore V.S.")

4. Denise Kopko, Business Manager for Sulfur Products for DuPont, addresses the irreparable harm to DuPont from the CSXT rate increase for the transportation of fuming sulfuric acid from Wurtland, KY to Petrolia, PA. ("Kopko V.S.")

5. Robin Burns, Vice President—Supply Chain for Occidental Chemical Corporation, addresses the irreparable harm caused by the CSXT rate increase for the transportation of fuming sulfuric acid from Wurtland, KY to Petrolia, PA, to INDSPEC Chemical Company, which is a DuPont customer and the receiver at Petrolia. ("Burns V S.")

I. BACKGROUND.

DuPont relies extensively upon a safe, efficient, and economic rail transportation to remain competitive in the markets it serves. Pileggi V.S. at ¶3. DuPont either ships or receives approximately 60,000 rail cars annually to or from 40 rail-served facilities in the United States via more than 40 rail carriers, including all seven Class I railroads. *Id* DuPont is captive to a single rail carrier at 33 of these locations. *Id* CSXT, which has access to 20 DuPont rail-served facilities and is the sole rail provider at 15 of them, is the largest rail transportation provider to DuPont. *Id* at ¶4. DuPont ships or receives a wide variety of commodities on CSXT, including

plastics, ilmenite ore, titanium dioxide, sulfuric acid, chlorine, refrigerant gases and limestone. *Id*

For nearly 20 years, CSXT's transportation of DuPont products has been governed by a Master Rail Transportation Agreement, CSXT-1847 ("Master Contract"). *Id* at ¶5. The parties amended this Master Contract periodically over the years to extend its term and regularly adjust CSXT's rates. Pursuant to a 2004 amendment, the Master Contract was scheduled to expire on May 31, 2007. *Id*

Well in advance of the scheduled expiration date, in February 2006, DuPont initiated negotiations to renew the Master Contract. *Id.* at ¶6. CSXT, however, did not submit a written contract proposal to DuPont until March 2007, which permitted less than three months to conclude contract negotiations covering dozens of commodities moving over hundreds of traffic lanes *Id* Furthermore, CSXT's proposal included substantial rate increases and other unacceptable terms to DuPont. When the parties were unable to reach an agreement by May 31. 2007, CSXT agreed to a two week extension of the Master Contract. *Id* at ¶7. At the conclusion of this brief contract extension, on June 16, 2007, CSXT published in four private price lists ("PPLs"), CSXT 41248, 43006 97247 and 97249, the same contract rates that CSXT had offered and DuPont had rejected *Id*

Due to the stalemate in their contract negotiations, and without any alternatives to CSXT for much of its rail transportation needs, DuPont filed three complaints against CSXT's PPL rates for seven movements using the Board's small rate case standards adopted in Ex Parte No. 646 (Sub-No 1), *Simplified Standards for Rail Rate Cases* (served Sept 5, 2007). Pileggi V.S. at ¶8 CSXT asked the Board to dismiss the DuPont complaints, however, because CSXT asserted that its PPLs for DuPont were in fact contract rates beyond the Board's jurisdiction, as

opposed to challengeable common carrier tariff rates. After reviewing all of the circumstances surrounding CSXT's publication of the PPLs, the Board rejected CSXT's position, and determined that the PPLs were challengeable common carrier rates. STB Docket Nos. NOR 42099, 42100, and 42101, *E.I du Pont de Nemours and Company v. CSX Transportation, Inc* (served December 17, 2007). On June 30, 2008, the Board issued final decisions granting DuPont rate relief for six of the seven challenged rates, and determining that CSXT lacked market dominance over the seventh movement. STB Docket Nos. NOR 42099, 42100, and 42101, *E.I. du Pont de Nemours and Company v. CSX Transportation, Inc* (served June 30, 2008).

While the small rate cases were pending before the Board, on June 1, 2008, CSXT republished each of the PPLs with numerous rate increases. Pileggi V.S. at ¶9. CSXT also informed DuPont that, in the absence of a contract agreement, CSXT would terminate the PPLs effective November 30, 2008, and require DuPont to use CSXT's public pricing documents, which contained significantly higher rates than the PPLs that DuPont already believed to be unreasonably high *Id*

In October 2008, without a contract agreement in sight, CSXT offered to extend the PPL rates, but with a very significant caveat. DuPont would have to agree either to place the PPL rates in a signature-less contract, outside of the Board's rate jurisdiction, or to waive its right to file a rate complaint against the PPL rates. *Id.* at ¶13. Otherwise, CSXT would require DuPont to begin paying much higher tariff rates on December 1, 2008. *Id*

Throughout this time period, CSXT and DuPont continued their contract negotiations. But, CSXT's proposals did not improve substantially from the rates that DuPont initially determined to be unacceptable. *Id.* at ¶14. DuPont recognized that its regulatory remedy for

such a large number of captive movements lay solely with a large rate case using stand-alone cost ("SAC") procedures. *Id.* But the enormity of CSXT's rate increases on a multitude of the challenged movements, coupled with the small volumes shipped by DuPont over many lanes, make this a very costly decision for DuPont. *Id.* Although DuPont will be entitled to monetary reparations for these movements based on the difference between the challenged rates and the maximum reasonable rates, DuPont has determined that monetary reparations are an inadequate remedy for the harm CSXT's tariff rates will cause relative to the three movements in this Petition. Therefore, DuPont is submitting this Petition for Injunctive Relief to prohibit CSXT from increasing its rates to DuPont above the PPL rate levels.

II. THE LEGAL STANDARD FOR INJUNCTIVE RELIEF.

In evaluating requests for injunctive relief under 49 U.S.C. § 721(b)(4), the Board applies the four-part test from *Washington Metropolitan Area Transit Comm'n v Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977) Relative to the three movements at issue in this Petition, DuPont easily meets this test, which asks whether: (1) there is a strong likelihood of success on the merits; (2) irreparable harm is threatened, (3) other interested parties will not be substantially harmed; and (4) the public interest supports the relief requested. *See Railroad Salvage & Restoration, Inc. and G F. Weideman, Int'l, Inc.—Petition for Investigation and for Emergency Relief under 49 U S.C §721(b)(4)*, STB Docket No. 42107, 2008 WL 2588613 (S T.B.) (served June 30, 2008); *DeBruce Grain, Inc. v Union Pac. R R Co*, STB Docket No 42023, 1998 WL 205998 (S.T.B.), at *1 n.7 (served April 27, 1998).

The *Holiday Tours* test is a flexible one: "if the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak." *Estate of Coll-Monge v Inner Peace Movement*, 524 F.3d 1341, 1349 (D.C. Cir. 2008); *see also CSX*

Trans., Inc. v. Williams, 406 F.3d 667, 670 (D.C. Cir. 2005) (noting that "relief may be justified where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury"); *Virginia Petroleum Jobbers Ass'n v FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (noting that "[t]he injury held insufficient to justify a stay in one case may well be sufficient to justify it in another, where the applicant has demonstrated a higher probability of success on the merits"). The factors should be considered on a "sliding scale" such that they are "balanced against each other." *Davenport v Int'l Bhd of Teamsters, AFL-CIO*, 166 F.3d 356, 360-61 (D.C. Cir. 1999). However, at least some showing of irreparable harm is necessary, even if the other three factors militate in favor of granting relief. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006).

DuPont, as the party seeking injunctive relief, must and will "show that the injury complained of is of such imminence that there is a clear and present need for relief" *Wisconsin Gas Co. v FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Although "economic loss does not, in and of itself, constitute irreparable harm," *Wisconsin Gas Co*, 758 F.2d at 674; *see also The New York, Susquehanna & Western Ry Corp.—Discontinuance of Service Exception—In Broome and Chenango Counties, NY*, STB Docket No. AB-286, 2008 WL 4415853 (S.T.B.) (served Sept. 30, 2008), irreparable injury may be found where monetary damages are difficult to ascertain or inadequate, *CSX Trans., Inc. v. Williams*, 406 F.3d at 673.[2] As demonstrated in Part III.A., below, it is clear that, if CSXT implements the new rates on the three lanes at issue, DuPont will suffer losses that are substantial, imminent and irreparable.

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[2] A decision from the U S District Court for the Middle District of Tennessee referencing § 721(b)(4)'s predecessor statute, 49 U S C § 10707(c) (1995), suggests that injunctive relief is appropriate where higher transportation charges would endanger the shipper's contracts to supply its output to third parties because of competitors' lower transportation costs and the railroad's service is not unprofitable *See Murray Ohio Mfg Co v Louisville & Nashville R R Co*, 496 F Supp 179, 182 (M D Tenn 1980) (noting that "there would be no effective means of compensating [the loss of major contracts] with money damages because it would be impossible to tell how many contracts were actually lost because of the discontinued piggyback service")

It is not necessary to show success on the merits with absolute certainty. It is sufficient for the plaintiff to raise questions going to the merits that are "so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Hamilton Watch Co v Benrus Watch Co*, 206 F. 2d 738, 740 (2d Cir. 1953) If there is "fair ground for litigation and thus for more deliberative investigation, a [party] should not be required at an early stage to draw the fine line between mathematical probability and a substantial probability of success." *Holiday Tours*, 559 F. 2d at 844. As discussed in Section III.B., below, the evidence strongly supports the position of DuPont in this case.

III. EVIDENCE AND ARGUMENT.

A. DuPont Has Established Irreparable Harm.

The first factor, and the one essential factor in an injunction analysis, is irreparable harm. As noted above, irreparable harm must be more than just monetary harm, except that monetary harm can be irreparable when it is difficult to ascertain or quantify. Once irreparable harm is established, the degree of harm required for an injunction will vary on a sliding scale with the strength of the other three factors. Thus, for example, a very strong likelihood of success on the merits will require a much smaller degree of irreparable harm than a weaker case on the merits. Although DuPont request an injunction against CSXT's December 1, 2008 rates for three movements, two of those movements involve the same DuPont production facility at Edgemoor, DE, and thus contribute to the same irreparable harm.

1. Movements to and from Edgemoor, Delaware.

DuPont produces titanium dioxide at its Edgemoor, DE facility. DuPont ships both raw materials inbound and finished product outbound by rail. CSXT originates the inbound transportation of chlorine from Niagara Falls, NY to Edgemoor, and it delivers outbound

shipments of titanium dioxide from Edgemoor to New Johnsonville, TN. The combined impact of CSXT's December 1, 2008 rate increases for these two movements will cost this DuPont business an additional [redacted]

The challenged rate, effective December 1, 2008, for transporting chlorine from Niagara Falls to Edgemoor is $3782 per car, including a fuel surcharge, and produces an R/VC ratio of 1,215%. Crowley V.S. at 5. DuPont cannot calculate the precise increase over the PPL tariff rate for this movement that expired on November 30, 2008, because the PPL rate is a joint rate and DuPont does not know CSXT's division. The through rate equivalent effective December 1st, however, is a [redacted] increase over the PPL through rate, which itself was a substantial increase over the previously effective contract rate. Pileggi V S. at ¶11 Based upon [redacted] cars transported over this lane in the last 12 months, this rate increase will cost DuPont an additional [redacted] in rail transportation costs annually for CSXT's very short 26 mile portion of this joint line move. *Id.*

The challenged CSXT Rule 11 rate, effective December 1, 2008, for transporting titanium dioxide from Edgemoor to New Johnsonville is $3500 per car, including a fuel surcharge, and produces an R/VC ratio of 384%. Crowley V.S at 5. DuPont cannot calculate the precise increase over the PPL tariff rate for this movement that expired on November 30, 2008, because the PPL rate is a joint rate and DuPont does not know CSXT's division. The through rate equivalent effective December 1st, however, is an [redacted] increase over the PPL through rate, which itself was a substantial increase over the previously effective contract rate Pileggi V.S. at ¶10. Based upon [redacted] cars transported over this lane in the last 12 months, this rate increase will cost DuPont an additional [redacted] in rail transportation costs annually. *Id.*

The Edgemoor production facility is unique among the DuPont plants that produce titanium dioxide. [redacted] Lopez/Moore V.S at ¶4. [redacted] DuPont has partially compensated for these market impacts by reducing production costs. [redacted]

The prospect of receiving reparations at the end of this rate case cannot offset the uncertainty of the amount of reparations for the 2-3 years required to litigate the case, further uncertainty from any appeals, and the potential for additional rate increases from CSXT over this time period *Id* at ¶5. [redacted]

DuPont also cannot pass the CSXT rate increases on to its customers This would place DuPont at a significant competitive disadvantage to imported titanium dioxide. *Id.* at ¶6. DuPont estimates that passing through the CSXT rate increase will cause a [redacted] loss of sales. *Id* [redacted] In that situation, monetary damages are inadequate or difficult to ascertain.

[redacted]

[redacted] *Wisconsin Gas Co.*, 758 F. 2d at 674; *Holiday Tours*, 559 F. 2d at 843, n. 2. *See also, Union Pac R R. Co —Abandonment in Fremont and Teton Counties, ID*, 6 I.C.C. 2d 641, 648 (1990) (denying petition to stay earlier decision authorizing abandonment because "there is no suggestion that the existence of any farms is threatened"); *Coalition for Common Sense in Gov't Procurement v U S*, __ F. Supp. 2d __, 2008 WL 4277983, at *5 (D D C. 2008) ("To successfully shoehorn potential economic loss into a showing of irreparable, a plaintiff must establish that the economic harm is so severe as to cause extreme hardship to the business or threaten its very existence ").

3. The fuming sulfuric acid movement from Wurtland to Petrolia.

DuPont produces fuming sulfuric acid, also known as "Oleum," at its Wurtland, KY facility. DuPont is the only producer of Oleum in the United States. Burns V.S. at ¶4. However, the sustainability of the Wurtland facility is heavily dependent upon a stable and long-term relationship with its largest customer, INDSPEC Chemical Corporation ("INDSPEC"). Kopko V.S at ¶2.

INDSPEC is the world's largest producer of resorcinol, which is a bonding agent that enhances the adhesion of rubber to steel and is used primarily in the manufacture of tires. Burns V.S. at ¶2. INDSPEC manufactures resorcinol, resorcinol-based resins, and resorcinol derivatives at a plant in Petrolia, PA. *Id.* INDSPEC also produces selected grades of sodium sulfite for the paper industry and sodium sulfate for the glass industry. *Id* INDSPEC consumes over [redacted] tons of Oleum annually at Petrolia *Id* at ¶4. [redacted] *Id.*

The challenged rail rate, effective December 1, 2008, for transporting fuming sulfuric acid from Wurtland to Petrolia is $6733 per car, including a fuel surcharge, and produces an R/VC ratio of 751%. Crowley V S. at 5. DuPont cannot calculate the precise increase over the PPL tariff rate for this movement that expired on November 30, 2008, because the PPL rate is a joint rate and DuPont does not know CSXT's division. The through rate equivalent effective December 1st, however, is a [redacted] increase over the PPL through rate, which DuPont had rejected as an unreasonable contract offer by CSXT. Pileggi V.S. at ¶12. Based upon [redacted] cars transported over this lane in the last 12 months, this rate increase will cost either DuPont or INDSPEC, if DuPont were to pass the rate increase through to INDSPEC, an additional [redacted] in rail transportation costs annually. *Id.*

[redacted] Burns V.S. at ¶5. Because INDSPEC's primary customers are in the troubled automotive industry, *id*, prospects for 2009 are bleak. Furthermore, INDSPEC faces tremendous pressure from increasing raw material prices and foreign competition. *Id* CSXT's rate increases add significant additional pressure [redacted]. *Id* at ¶¶4-5 INDSPEC employs nearly 300 people in the Petrolia area and 26 additional people in Pittsburgh. *Id.* at ¶3. In addition, INDSPEC indirectly creates a large number of additional jobs in the Petrolia area. *Id*

Because INDSPEC is the largest customer of the Wurtland plant, the long-term sustainability of Wurtland is dependent upon a long-term relationship with INDSPEC Kopko V.S. at ¶2. Including the rate increase effective December 1, 2008, CSXT has increased its rates on the transportation of Oleum from Wurtland to Petrolia by approximately [redacted] in just a single year. *Id.* at ¶3. On top of this cost increase, [redacted], DuPont must spend [redacted] to retrofit the plant to comply with an Environmental Protection

Agency consent decree. *Id* at ¶4. [redacted]. *Id* [redacted]

As noted in the preceding discussion of irreparable harm to the Edgemoor facility, [redacted] constitutes irreparable harm because it is an injury beyond remediation. In addition, any loss of business that DuPont would experience, even if measurable and compensable in monetary damages, is beyond the scope of reparations permitted by 49 U.S.C. § 11704(b). [redacted] This too is irreparable harm.

B. DuPont Has a Very Strong Probability of Success on the Merits.

In order to determine the probability that DuPont will succeed on the merits of its SAC Complaint, the Board must consider evidence of both market dominance and rate reasonableness for the three movements at issue. A strong probability of success will compensate for a lesser degree of irreparable harm and vice versa.

1. CSXT possesses market dominance over all three movements.

There is a high degree of probability that CSXT possesses both quantitative and qualitative market dominance over all three movements in this Petition. All three movements have revenue/variable cost ("R/VC") ratios well in excess of 180%. Crowley V.S. at 5. All three movements have access to only CSXT at either the origin or destination Pileggi V.S. at ¶15. Furthermore, these movements have little or no competition from alternate modes

The movement of titanium dioxide from Edgemoor, DE to New Johnsonville, TN does not have an economically competitive alternative to rail. Barge is not an option at all. *Id.* at ¶17. From January 1, 2006 through October 31, 2008, DuPont shipped a total of just four truckloads of titanium dioxide from Edgemoor to New Johnsonville. *Id.* Because this movement is over 827 miles long, trucks simply cannot compete with rail. *Id*

The movement of chlorine from Niagara Falls, NY to Edgemoor, DE does not have an economically viable alternative to rail transportation. Due to safety concerns, DuPont transports chlorine, a toxic-inhalation-hazard ("TIH") material, by only two modes: barge, and when barge is not available, rail. *Id.* at ¶18. Water is not an option for this movement. *Id.* at ¶19. DuPont does not transport chlorine by truck anywhere in North America, and does not solicit bulk truck shipments of chlorine. *Id* at ¶18 In the small rate cases filed by DuPont against CSXT, both agreed that intermodal competition from truck does not exist for chlorine movements because it is a TIH material. STB Docket No. NOR 42100, *E.I. du Pont de Nemours and Company v. CSX Transportation, Inc.*, p. 3 (served December 17, 2007).

The movement of fuming sulfuric acid from Wurtland, KY to Petrolia, PA, is not subject to effective intermodal competition. DuPont does not transport fuming sulfuric acid at all by barge Pileggi V.S. at ¶21. From January 1, 2006 through October 31, 2008, DuPont shipped a total of [redacted] trucks of fuming sulfuric acid from Wurtland to Petrolia. *Id* at ¶22. DuPont tendered every single one of those truck shipments in May and June 2006, which accounted for just [redacted] of the total volume of fuming sulfuric acid over that lane in 2006. *Id* These were emergency shipments to supply a customer because fire had severely damaged a rail bridge on the destination carrier's line. *Id.* Upon restoration of the rail bridge, DuPont resumed shipping entirely by rail. *Id.* Because fuming sulfuric acid is a TIH material, DuPont rarely transports it

by truck. This is reflected by the fact that over 80% of fuming sulfuric acid shipments company-wide from 2006 through October 2008 moved by rail.[3] *Id.* at ¶20.

2. CSXT's rates for all three movements are unreasonable.

There is a high probability that CSXT's rates for the three injunction movements are unreasonably high. DuPont witness Crowley has compared the R/VC ratios of these three movements to the R/VC ratios of maximum reasonable rates determined by the Board in the recent rail rate cases. All three of the injunction movements have much higher R/VC ratios.

In recent SAC cases, the maximum prescribed rates had much lower R/VC ratios. Some of those cases produced SAC rates below the jurisdictional threshold R/VC ratio of 180%. The highest R/VC ratio in those cases that produced prescribed rates above 180% was 337%. Crowley V.S. at 8.

In three small rate cases filed by DuPont against CSXT and decided only six months ago, the Board prescribed R/VC ratios between 287% and 332%. *Id.* at 6-7. One of those commodities, chlorine, is also at issue in the Niagara Falls to Edgemoor movement in this Petition. The prescribed R/VC ratios for the two chlorine movements in those small rate cases were 287% and 321%. In stark contrast, the CSXT rate from Niagara Falls to Edgemoor has a 1,215% R/VC ratio. *Id* at 5.

CSXT's rates for all three injunction movements produce R/VC ratios of 384%, 751% and 1,215%. At such high levels, there is a high probability CSXT's rates are unreasonable

C. CSXT Will Not Be Harmed By An Injunction.

A third relevant factor for injunction requests is whether other interested parties would be harmed by the injunction, also known as a balancing of the equities between the affected parties.

[3] The vast majority of truck shipments are of 20% Oleum, which is less hazardous than the 67% Oleum that moves from Wurtland to Petrolia.

In contrast to the substantial and irreparable harm to DuPont of paying the challenged rates, CSXT will not be harmed by the requested injunction. DuPont agrees, as a condition to the injunction, to keep account of the difference between the challenged rates and the rates actually paid to CSXT and, at the conclusion of this proceeding, to pay CSXT any amounts owed for each movement above the already paid rates. Thus, CSXT will be made whole if and to the extent it may prevail on the merits, whereas DuPont will not be made whole as demonstrated by its irreparable harm.

Furthermore, the rates that DuPont seeks to pay CSXT during the injunction period are at the same level as the divisions DuPont currently pays CSXT in the PPL tariff rates that expire on November 30, 2008. Even more importantly, CSXT has offered to extend those rates beyond November 30th, but not in the form of a common carrier tariff that DuPont could challenge before the Board. Pileggi V.S. at ¶13. Thus, CSXT will not be harmed by these rate levels Indeed, it is clear that CSXT, by requiring DuPont to waive any right to challenge the PPL rates before the Board, has imposed the higher challenged tariff rates upon DuPont only as an economic disincentive to exercising its statutory right to obtain a maximum reasonable rate from the Board.

D. The Injunction is Consistent with the Public Interest.

The final factor relevant to an injunction request is the public interest In this case, the injunction requested by DuPont is consistent with the public interest.

CSXT's motive for imposing such sizeable rate increases upon DuPont is contrary to the public interest. Congress enacted rate regulatory provisions to ensure reasonable rates for captive rail shippers. CSXT has had PPL tariff rates in place for DuPont since June 16, 2007 that mirror rates that CSXT offered and DuPont rejected in contract negotiations. CSXT's recent

communications to DuPont are clear that CSXT would keep those same rates in place beyond November 30, 2008, but only if DuPont waives its regulatory right to challenge those rates. Pileggi V.S. at ¶13. Thus, the clear rationale for CSXT's sizeable tariff rate increases on December 1, 2008, is to discourage DuPont from invoking its regulatory remedies by making it substantially more costly for DuPont to do so.

This is not what Congress intended when it granted railroads ratemaking freedom in the Staggers Act. CSXT is abusing that freedom to discourage regulatory complaints, which clearly is inconsistent with the public interest. The injunction requested by DuPont would neutralize the most harmful impacts of that abuse upon DuPont.

IV. CONCLUSION.

For the foregoing reasons, DuPont requests that the Board grant this Petition for Injunctive Relief.

Respectfully submitted,

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December 2, 2008

VERIFIED STATEMENT OF

MARY PILEGGI

PUBLIC VERSION—HIGHLY CONFIDENTIAL MATERIAL REDACTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

E.I. DUPONT DE NEMOURS AND COMPANY,	)	
Complainant,	)	
v	)	Docket No. 42112
CSX TRANSPORTATION, INC.	)	
Defendants.	)	

VERIFIED STATEMENT OF MARY PILEGGI
E I. DUPONT DE NEMOURS AND COMPANY

1 My name is Mary Pileggi I am the U S /Canada Regional Logistics Manager for E.I. du Pont de Nemours and Company ("DuPont" or the "Company") in Wilmington, DE. I have been an employee of DuPont since December 1, 1999. Currently, I manage the transportation of products and raw materials manufactured or acquired by DuPont in the U.S. and Canada. My responsibilities include logistics, transportation equipment, safety, security, and supervision of the negotiation and administration of contracts between DuPont and its carriers. Prior to joining DuPont, I worked for Conrail. I am submitting this Verified Statement in support of the Company's petition for injunctive relief against CSX Transportation, Inc. ("CSXT"), wherein DuPont requests that, for the duration of this proceeding, CSXT be permitted to charge only the applicable rates in the common carrier Private Price Lists currently scheduled to expire on November 30, 2008, for movements of titanium dioxide from Edgemoor, DE, to New Johnsonville, TN, movements of chlorine from Niagara Falls, NY, to Edgemoor, DE, and movements of fuming sulfuric acid from Wurtland, KY, to Petrolia, PA

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DUPONT RELIES UPON RAIL TRANSPORTATION SERVICES FOR THE TRANSPORT OF ITS INPUTS AND PRODUCTS

2 DuPont is a global science company creating sustainable solutions essential to a better, safer, healthier life for people everywhere. Operating in more than 70 countries, DuPont offers a wide range of innovative products and services for markets including agriculture, nutrition, electronics, communications, safety and protection, home and construction, automotive and apparel. The science-based solutions that DuPont delivers to the global marketplace require as raw materials or intermediates products that are both hazardous and non-hazardous in nature.

3. DuPont needs a safe, efficient, and competitive rail transportation network to remain viable in the markets it serves. DuPont ships or receives approximately 60,000 rail cars annually and has 40 active rail shipping locations in the United States along the Gulf Coast and East of the Mississippi River Of this total rail volume, 60% of the railcars contain hazardous materials, and 17% of the total contain materials classified as toxic inhalation hazards ("TIH") DuPont tenders traffic to more than 40 U.S. railroads, including all seven Class I railroads and regional and short line carriers. Eighty-eight percent of the rail transportation needs of DuPont are met by CSXT, UP, NS, and KCS. Of the 40 active sites, DuPont is captive to one carrier at 33.

4. CSXT is the largest rail transportation carrier for DuPont. CSXT has access to 20 of the 40 DuPont rail sites and the Company is captive to CSXT at 15 locations. DuPont ships or receives a wide variety of commodities on CSXT, including plastics, ilmenite ore, titanium dioxide, sulfuric acid, chlorine, refrigerant gases, and limestone Eleven (11) percent of the DuPont shipments on CSXT are TIH materials, 27% are other hazardous material shipments, and the remaining 62% are non-hazardous shipments

II.
CSXT'S UNREASONABLE CONTRACT RATE PROPOSALS HAVE LEFT DUPONT WITH NO ALTERNATIVE OTHER THAN TO PROCEED WITH THIS COSTLY LARGE RATE CASE

5. From 1988 until June 16, 2007, DuPont's products were shipped on CSXT pursuant to the terms of a Master Rail Transportation Agreement, CSXT -1847 ("Master Contract"), that covered freight transportation for a wide range of origin and destination pairs Over the years, the Company and CSXT periodically amended the Master Contract to extend its term and regularly adjust CSXT's rates Under an amendment agreed to in 2004, the Master Contract was scheduled to expire on May 31, 2007

6 DuPont first initiated discussions with CSXT to renew the Master Contract in February 2006, over a year in advance of the anticipated expiration date. CSXT, however, failed to submit a written contract proposal to DuPont until March 2007, thus allowing DuPont less than three months to conclude comprehensive contract negotiations covering dozens of commodities moving over hundreds of traffic lanes nationwide

7. CSXT's written contract proposal included substantial rate increases and other terms that were unacceptable to DuPont. When the parties failed to reach an agreement by May 31, 2007, DuPont requested a two month extension of the Master Contract to continue negotiations, but CSXT would agree only to a two-week extension At the conclusion of the two-week extension, on June 16, 2007, CSXT published in four private price lists, CSXT 41248, 43006, 97247, and 97249 (hereinafter, the "PPLs"), the same rates CSXT had offered in its written contract proposal that DuPont had previously rejected.

8. Because the Company was failing to make any headway in its contract negotiations with CSXT and because DuPont was presented with no alternative to CSXT for

much of its rail transportation needs, the Company filed three complaints against CSXT's PPL rates for seven movements using the Board's small rate case standards

9. While the small rate cases were pending before the Board, on June 1, 2008, CSXT republished each of the PPLs with numerous rate increases. CSXT also informed DuPont that, if the two parties failed to agree on a master rail transportation contract, CSXT would terminate the PPLs as of November 30, 2008, and require DuPont to pay the rates established in CSXT's public pricing documents. CSXT's public tariff rates are significantly higher than the PPL rates that DuPont already believes to be unreasonable.

10. CSXT's tariff rate for the movement of titanium dioxide from Edgemoor, DE, to New Johnsonville, TN is $3500 per car, including a fuel surcharge. While DuPont cannot calculate the precise increase over the PPL tariff rate for this movement because the PPL rate is a joint rate and DuPont does not know CSXT's division, the through rate equivalent is a [redacted] increase over the PPL through rate, which itself was a substantial increase over the previously effective contract rate. As noted above, DuPont has already rejected this PPL through rate as an unreasonable contract offer by CSXT. Based on the historical usage of [redacted] transported over this lane during the last 12 months, this rate increase will cost DuPont an additional [redacted] in rail transportation costs annually.

11. CSXT's tariff rate for the movement of chlorine from Niagara Falls, NY, to Edgemoor, DE is $3782 per car, including a fuel surcharge. Again, DuPont cannot calculate the precise increase over the PPL tariff rate for this movement because the PPL rate is a joint rate and DuPont does not know CSXT's division. However, the through rate equivalent is a [redacted] increase over the PPL through rate, which DuPont has already rejected. Based on the historical

usage of [redacted] transported over this lane in the last 12 months, this rate increase will cost DuPont an additional [redacted] in rail transportation costs annually

12. CSXT's tariff rate for the movement of fuming sulfuric acid from Wurtland, KY to Petrolia, PA is $6733 per car, including a fuel surcharge. Again, DuPont cannot calculate the precise increase over the PPL tariff rate for this movement because the PPL rate is a joint rate and DuPont does not know CSXT's division. The through rate equivalent is a [redacted] increase over the PPL through rate, which DuPont has already rejected. Based on the historical usage of [redacted] transported over this lane in the last 12 months, this rate increase will cost DuPont an additional [redacted] in rail transportation costs annually.

13. In October 2008, with the Company and CSXT still unable to close the gap in their proposed master contract terms, CSXT offered to extend the PPL rates for an additional period. CSXT's offer, however, was conditioned on DuPont's agreement to either (i) place the PPL rates in a signature-less written contract, and thus outside of the Board's rate jurisdiction, or (ii) waive its statutory right to file a rate complaint challenging the PPL rates In the event that DuPont would not agree to such an arrangement, CSXT threatened to require DuPont to begin paying the much higher public tariff rates on December 1, 2008.

14. While DuPont did not abandon its contract negotiations with CSXT at any point during this time period, CSXT's proposals did not improve substantially from the rates contained in CSXT's initial written contract proposal. The Company came to recognize that its only regulatory remedy for such a large number of captive movements was to bring a large rate case using the stand-alone cost ("SAC") procedures. Its only alternative would be to simply acquiesce to CSXT's market power. However, the enormity of CSXT's rate increases over a

wide range of challenged movements, coupled with the small volumes shipped by the Company over many lanes, make the decision to commence litigation a very costly one for DuPont.

III.
THERE IS NO INTRAMODAL COMPETITION

15. DuPont is captive to CSXT for rail service on each of the three movements at issue in the petition for injunctive relief. CSXT is the only rail carrier that serves DuPont's New Johnsonville, TN plant for the titanium dioxide movement originating in Edgemoor, DE. Similarly, CSXT is the only rail carrier that serves the Niagara Falls, NY and Wurtland, KY origins for the chlorine and fuming sulfuric acid movements to Edgemoor, DE, and Petrolia, PA, respectively. Thus, DuPont has no alternative to CSXT for rail transportation for any of the three movements at issue.

IV.
THERE IS NO INTERMODAL COMPETITION

A.
TITANIUM DIOXIDE SHIPMENTS

16. DuPont produces titanium dioxide at its Edgemoor, DE facility. DuPont ships the finished product outbound by rail, and CSXT delivers outbound shipments from Edgemoor to New Johnsonville, TN.

17. Barge transportation is not an available option for the shipment of titanium dioxide from Edgemoor, DE to New Johnsonville, TN. Titanium dioxide has never been shipped by barge. From January 1, 2006, through October 31, 2008, DuPont shipped a total of just four truckloads of titanium dioxide over this lane. Because the movement is over a long distance—827 miles—trucks simply cannot compete with rail with respect to pricing.

B.
CHLORINE SHIPMENTS

18 Due to safety concerns, DuPont does not transport chlorine, a TIH material, by any mode except rail and water. Safety is a core value of DuPont; when transporting TIH materials, DuPont requires its businesses to use the lowest risk transportation option available, for chlorine, this is barge transportation first and rail second. All DuPont facilities in the United States that consume chlorine are designed to accept deliveries by rail. Because of its highly toxic nature, DuPont does not transport any chlorine by truck anywhere in North America and does not solicit bulk truck shipments of chlorine

19 Barge transportation is not an available option, however, for the shipment of chlorine from Niagara Falls, NY to Edgemoor, DE. Thus, rail transport by CSXT is the only mode of transportation available for the chlorine movements from Niagara Falls to Edgemoor.

C.
FUMING SULFURIC ACID SHIPMENTS

20. DuPont safety guidelines require that fuming sulfuric acid products, which are TIH materials, be shipped by rail over truck when possible, in order to utilize the lowest risk transportation option available. From 2006 through October 2008, over [redacted] of fuming sulfuric acid shipments moved by rail across all lanes Company-wide.

21. Barge transportation is not an option for transporting fuming sulfuric acid from Wurtland to Petrolia

22 DuPont shipped only [redacted] truckloads of fuming sulfuric acid from Wurtland, KY, to Petrolia, PA over nearly three years from January 1, 2006, through October 31, 2008. DuPont tendered all [redacted] of those truck shipments over just two months between May 10, 2006, and June 22, 2006. These truckloads accounted for only [redacted] of the total volume of fuming sulfuric acid

that was transported over this lane in 2006 alone. The truck shipments were tendered because a rail bridge owned by the Buffalo and Pittsburgh Railroad ("BPRR"), which provides joint line service with CSXT to Petrolia, caught fire and was severely damaged on May 10, 2006. The area the bridge had crossed had to be filled in to re-build the only rail route into the facility DuPont's customer operates at Petrolia, and construction on the re-built line was not completed until June 22, 2006. Following the rebuilding of the rail route, DuPont resumed shipping fuming sulfuric acid entirely by rail. Thus, DuPont only shipped this TIH material via truck over this lane during the last three years as a brief emergency measure while rail service was unavailable.

VERIFICATION

I, Mary Pileggi, verify under penalty of perjury that I have read the foregoing Verified Statement of Mary Pileggi, 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.

Mary Pileggi

Mary Pileggi

JOINT VERIFIED STATEMENT OF
ANN K. LOPEZ AND MICHELLE E. MOORE

PUBLIC VERSION—HIGHLY CONFIDENTIAL MATERIAL REDACTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

E.I. DUPONT DE NEMOURS AND COMPANY Complainant, v. CSX TRANSPORTATION, INC. Defendant.	)	Docket No. 42112

JOINT VERIFIED STATEMENT OF
ANN K LOPEZ AND MICHELLE E. MOORE
E.I. DUPONT DE NEMOURS AND COMPANY

1. My name is Ann K. Lopez I am the Global Supply Chain Manager for DuPont Titanium Technologies for E.I. du Pont de Nemours and Company ("DuPont"or the "Company) in Wilmington, DE I have been an employee of DuPont since June 4, 1984. My responsibilities include global titanium dioxide supply planning, management, and optimization. I am submitting this Verified Statement in support of the Company's claims that the rates that CSX Transportation, Inc. ("CSXT") will charge on two movements involving the Company's Edge Moor, DE facility, beginning December 1, 2008, will cause irreparable harm.

2. My name is Michelle E Moore. I am an Executive Buyer for E.I. du Pont de Nemours and Company ("DuPont"or the "Company) in Wilmington, DE I have been an employee of DuPont since 1988. My responsibilities include the sourcing of chlorine, caustic and other commodity chemcials. I am submitting this Verified Statement in support of the Company's claims that the rates that CSX Transportation, Inc. ("CSXT") will charge on two

movements involving the Company's Edge Moor, DE facility, beginning December 1, 2008, will cause irreparable harm.

3. DuPont produces titanium dioxide at Edge Moor Rail transportation is essential both for the delivery of inbound raw materials of chlorine and the tender of outbound titanium dioxide. Although Norfolk Southern serves the Edge Moor facility, CSXT originates inbound shipments of chlorine from Niagara Falls, NY and terminates outbound shipments of titanium dioxide at New Johnsonville, TN. On December 1, 2008, CSXT will increase its rate on the inbound chlorine movement to $3772 per car (excluding fuel surcharges), and on the outbound titanium dioxide movement to $3351 per car (excluding fuel surcharges). The collective impact of these rate increases upon the Edge Moor facility will be [redacted][1]

4. Edge Moor is unique among the various DuPont titanium dioxide production plants [redacted]

5 DuPont cannot simply absorb this cost increase at Edgemoor while its rate case is pending before the Board. There is too much uncertainty over at least 2-3 years, plus any appeal period, regarding the amount of reparations, if any, that might be obtained. Furthermore, CSXT

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[1] All shaded text is HIGHLY CONFIDENTIAL and CONFIDENTIAL information that has been redacted from the *public version of this pleading*

[2] In an attempt to use as much of the Edge Moor titanium dioxide production as possible, the Edge Moor to New Johnsonville titanium dioxide movement is an internal DuPont movement to another DuPont production facility where the titanium dioxide from Edge Moor can be processed to obtain a grade that is useable in non-paper applications. The added layer of transportation already makes this more costly for DuPont and the CSXT rate increase jeopardizes the viability of even this small volume movement

could raise its rates even further while the case is pending, further exacerbating this harm [redacted]

6. [redacted]

There is substantial and growing competition from foreign imports, which have captured a majority share of the U.S. market for titanium dioxide [redacted]

VERIFICATION

I, Ann K. Lopez, verify under penalty of perjury that I have read the foregoing JOINT VERIFIED STATEMENT OF ANN K. LOPEZ AND MICHELLE E. MOORE, 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.

Ann K. Lopez

I, Michelle E. Moore, verify under penalty of perjury that I have read the foregoing JOINT VERIFIED STATEMENT OF ANN K. LOPEZ AND MICHELLE E. MOORE, 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.

Michelle E. Moore

VERIFIED STATEMENT OF

DENISE KOPKO

PUBLIC VERSION—HIGHLY CONFIDENTIAL MATERIAL REDACTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

E.I. DUPONT DE NEMOURS AND COMPANY Complainant, v CSX TRANSPORTATION, INC. Defendant.	)	Docket No 42112

VERIFIED STATEMENT OF DENISE KOPKO
E.I. DUPONT DE NEMOURS AND COMPANY

1. My name is Denise Kopko. I am the Business Manager for Sulfur Products for E.I. du Pont de Nemours and Company ("DuPont"or the "Company) in Wilmington, DE. I have been an employee of DuPont since 1991. My responsibilities include ensuring the long term business success of the Sulfur Products Business. I am submitting this Verified Statement in support of the Company's claim that the rates that CSX Transportation, Inc. ("CSXT") will charge, beginning December 1, 2008, for the transportation of fuming sulfuric acid (also known as "Oleum") will cause irreparable harm.

2. DuPont produces 67% Oleum at its Wurtland, KY plant. DuPont ships Oleum to INDSPEC Chemical Corporation ("INDSPEC") at Petrolia, PA, via CSXT. INDSPEC requires substantial quantities of Oleum to produce resorcinol and resorcinol-based products. The long-term sustainability of the Wurtland facility is dependent upon a stable and long-term relationship with INDSPEC.

3. CSXT intends to increase its rate for this transportation by [redacted][1] on December 1, 2008. When combined with other rate increases in the past year, CSXT's rate has risen by approximately [redacted] At that level, transportation will comprise approximately [redacted] of total Oleum production costs at Wurtland. [redacted].

4. Furthermore, the lack of predictable and competitive rail rates is making it difficult for DuPont and its customers to make important decisions. In response to a 2007 Environmental Protection Agency consent decree, DuPont must spend [redacted] to retrofit the Wurtland plant [redacted]. CSXT's rate increases and the lack of rail rate predictability jeopardize the future of our customer base, which directly affects the ability of DuPont to make this investment.

5. The impact of CSXT's proposed rate increase on INDSPEC's Petrolia plant is addressed in the Verified Statement of Robin A. Burns.

[1] All shaded text is HIGHLY CONFIDENTIAL and CONFIDENTIAL information that has been redacted from the public version of this pleading

VERIFICATION

I, Denise M. Kopko, verify under penalty of perjury that I have read the foregoing Verified Statement of Denise M. Kopko, 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.

Denise M Kopko

Denise M. Kopko

VERIFIED STATEMENT OF

ROBIN A. BURNS

PUBLIC VERSION—HIGHLY CONFIDENTIAL MATERIAL REDACTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

E.I. DUPONT DE NEMOURS AND COMPANY Complainant, v. CSX TRANSPORTATION, INC. Defendant.	)	Docket No. 42112

VERIFIED STATEMENT OF ROBIN A. BURNS

1. My name is Robin A Burns I am Vice President – Supply Chain for Occidental Chemical Corporation, a New York corporation ("Occidental"). I have been an employee of Occidental since 1985. My responsibilities include logistics and transportation for Occidental and its affiliates, subsidiaries and sister companies, including INDSPEC Chemical Corporation, a Delaware corporation ("INDSPEC"). I am submitting this Verified Statement in support of the Petition for Injunctive Relief filed by E.I. du Pont de Nemours and Company ("DuPont") in the above-captioned proceeding, as that petition relates to the transportation of fuming sulfuric acid (also known as "Oleum") from Wurtland, KY to Petrolia, PA by CSX Transportation, Inc ("CSXT").

2. INDSPEC is an indirect wholly-owned subsidiary of Occidental Petroleum Corporation, the ultimate parent of Occidental, based in Pittsburgh, Pennsylvania INDSPEC is engaged in the business of manufacturing and marketing resorcinol, resorcinol-based resins and other resorcinol derivatives. It is the world's largest resorcinol producer. Resorcinol is a bonding agent that enhances the adhesion of rubber to steel and is primarily used in the

manufacture of tires. In addition to its resorcinol products, INDSPEC produces and markets selected grades of sodium sulfite and sodium sulfate Sodium sulfate is used in the paper industry and sodium sulfite in the manufacture of glass

3. INDSPEC's sole production facility is located in Petrolia, PA As one of the major employers in the Petrolia area, INDSPEC directly employs nearly 300 people at its production facility in Petrolia and nearly as many contractors. In addition, INDSPEC employs 26 people in the corporate, sales and research offices in the Pittsburgh area. This facility indirectly creates a significant number of additional jobs in the Petrolia area.

4. Oleum is one of the major raw materials consumed by INDSPEC at Petrolia. We consume approximately [redacted] tons per year The product is sourced from the DuPont Wurtland facility and is shipped solely by rail. We have been advised that CSXT will be increasing its rates for this transportation on December 1, 2008 from $5001/car to $6600/car. If DuPont passes this cost through to INDSPEC, it will have a negative [redacted][1] annual impact on our business. There is no other domestic producer of Oleum (e.g , fuming sulfuric acid of 67% concentration).

5. INDSPEC ships approximately [redacted] tons of product by rail mainly to the automotive markets. This business is currently under tremendous pressure from increasing raw material prices, increasing competition from China, as well as falling domestic demand for original equipment tires due to current economic conditions that are dramatically reducing automotive sales. [redacted] The additional rail costs INDSPEC would incur while Dupont presents their large rate case will cause irreparable damage to its business going forward.

[1] All shaded text is HIGHLY CONFIDENTIAL and CONFIDENTIAL information that has been redacted from the public version of this pleading

VERIFICATION

I, Robin A Burns, verify under penalty of perjury that I have read the foregoing Verified Statement of Robin A Burns, that I know the contents thereof, and that the same are true and correct. Further, I certify, in the name and on behalf of Occidental, that I am qualified and authorized to file this statement.

Robin A Burns

Robin A. Burns

VERIFIED STATEMENT OF THOMAS D. CROWLEY

BEFORE THE
SURFACE TRANSPORTATION BOARD

E I DUPONT DE NEMOURS AND COMPANY Complainant, v CSX TRANSPORTATION, INC Defendant	)	Docket No NOR 42112

PETITION FOR INJUNCTIVE RELIEF UNDER 49 U.S.C. 721(b)(4)

Verified Statement

of

Thomas D Crowley
President
L.E. Peabody & Associates, Inc

on behalf of

E I DuPont de Nemours and Company

Date December 1, 2008

I INTRODUCTION

My name is Thomas D Crowley I am an economist and the President of L E Peabody & Associates, Inc, an economic consulting firm that specializes in solving economic, financial, transportation, marketing, and fuel supply problems I have spent most of my career of over thirty-seven (37) years evaluating fuel supply issues and railroad operations, including railroad costs, accounting, prices, financing, cost of capital, capacity and equipment planning issues My assignments in these matters were commissioned by railroads, producers, and shippers of different commodities. A copy of my credentials is included as Exhibit No.1 to this verified statement.

I have been requested by E I DuPont de Nemours and Company ("DuPont") to estimate the first quarter 2009 rate to variable cost ("R/VC") ratios and the jurisdictional threshold rates associated with CSX Transportation's ("CSXT") Association of American Railroads ("AAR") Accounting Rule 11 ("Rule 11") rates for transporting DuPont's traffic for a portion of the rail movement of three origin/destination pairs These three origin/destination pairs include 1) Wurtland, KY to Petrolia, PA, 2) Niagara Falls, NY to Edgemoor, DE, and 3) Edgemoor, DE to New Johnsonville, TN

My testimony is discussed below under the following topical headings.

A. CSXT Rule 11 Rates for Moving DuPont Shipments

B. Revenue to Variable Cost Ratios And Jurisdictional Threshold

C. CSX/DuPont R/VC Ratios Compared with STB Findings in Previous Proceedings

A. CSX RULE 11 RATES FOR MOVING DUPONT SHIPMENTS

Prior to June 16, 2007, CSXT transported DuPont's commodities pursuant to a Master Contract with DuPont When the parties were unable to reach agreement on new contract rates, CSXT published common carrier tariff rates in a collection of private price lists for DuPont The rates published by CSXT were the same contract rate offers that DuPont had rejected in negotiations

CSXT has informed DuPont that, absent a contract agreement, the rates published in the DuPont private price lists will expire on November 30, 2008 In response to a DuPont request for the common carrier tariff rates that will be effective on December 1, 2008, CSXT provided the single line and Rule 11 rates shown in Exhibit A and Exhibit B to DuPont's Complaint filed on November 10, 2008 The rates published for the three moves examined in this statement are Rule 11 rates

Table 1 below shows for each of the three traffic lanes, the origin/destination, route, commodity and CSXT's Rule 11 rate per carload effective December 1, 2008

Table 1

CSXT Rule 11 Rates per Carload for Selected DuPont Shipments - - December 2008

Origin/Destination (1)	Route (2)	Commodity (3)	CSXT Rule 11 Rate Per Carload (4)
1 Wurtland, KY to Petrolia, PA	CSXT/NewCA/BPRR	Acid Fuming Sulfur	$6,600
2 Niagara Falls, NY to Edgemoor, DE	CSXT/Buff/NS	Chlorine	$3,772
3 Edgemoor, DE to New Johnsonville, TN	NS/Cinti/CSXT	Titanium Dioxide	$3,351

In addition to the base rate per carload for each movement, a fuel surcharge based on CSXT's HDF Fuel Surcharge Publication 8661 Series applies to each of these rates CSXT's HDF Fuel Surcharge Publication 8661-B, the most current series, governs all regulated common carrier linehaul freight rates existing or established by CSXT on or after April 23, 2007, and applies a fuel surcharge of $0.01 per rail carmile for every $0 04 per gallon increase in the average on-highway diesel fuel price ("HDF") that equals or exceeds $2.00 per gallon for the calendar month two months prior to the calendar month of shipment [1] Based on the average HDF price for October 2008, the latest full month available of HDF fuel prices, the fuel surcharge applicable to shipments beginning December 1, 2008 is $0 40 per car mile

Based on this most current fuel surcharge data, I have calculated the December 1, 2008 fuel surcharge per car for each issue movement using the $0 40 per car-mile surcharge and CSXT movement miles CSXT's base rate, fuel surcharge and the total rate per carload for each the three DuPont's movements are shown in Table 2 below

Table 2

CSXT Rule 11 Rates and Fuel Surcharge per Carload for Selected DuPont Shipments - - December 2008

Movement (1)	Base Rate Per Carload [1/] (2)	Fuel Surcharge Per Carload (3)	Total Rate Per Carload [2/] (4)
1 Wurtland, KY to Petrolia, PA	$6,600	$133 20	$6,733 20
2 Niagara Falls, NY to Edgemoor, DE	$3,772	$10.40	$3,782 40
3 Edgemoor, DE to New Johnsonville, TN	$3,351	$149 20	$3,500 20

[1/] Table 1 above
[2/] Column (2) + Column (3)

[1] See CSX's website at http//csx com/share/customers/docs/docs/Fuel_Surcharge – 8661 – REF23613 pdf

B. REVENUE TO VARIABLE COST RATIOS AND JURISDITIONAL THRESHOLD

The STB decision in Ex Parte 657 (Sub-No 1), *Major Issues in Rail Rate Cases*, served October 30, 2006 ("*Major Issues*") requires parties to maximum rate proceedings to determine each issue movement's regulatory variable cost of service using unadjusted Uniform Railroad Costing System ("URCS") variable costs and the URCS Phase III costing model [2] Pursuant to the STB's *Major Issues* decision, I have calculated the variable costs for each of DuPont's three traffic lanes using a 2007 CSXT URCS Phase III model The Phase III costing model that I used was developed using the most current cost information available, and therefore reflects the best estimate of regulatory variable costs of service in the first quarter of 2009 ("1Q09") [3] I developed eight of the required inputs into the model – operating railroad, shipment type, freight cars per shipment, railcar type, railcar ownership, tons per car, commodity and type of movement – based on historic movement data provided by DuPont I calculated the remaining input for the model, loaded movement miles, for each movement using ALK Technologies PC* Miler/Rail program, Version 10 0 ("PC Rail") In addition, I indexed the URCS variable cost calculations to 1Q09 price levels through a combination of AAR's Rail Cost Recovery ("RCR") indices through 2Q08 and L E. Peabody & Associates, Inc.'s forecast of the AAR's RCR indices from 2Q08 to 1Q09 for all cost inputs, except for fuel costs For the fuel component of the index, I relied upon the change in the West Texas Intermediate fuel price from the average of 2007 to the

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[2] See *Major Issues* at 47

[3] The 2007 URCS Phase III model includes a 2007 pre-tax cost of capital of 16 75 percent based upon an after-tax cost of capital of 11 33 percent as calculated by the STB in Ex Parte No 558 (Sub-No 11), *Railroad Cost of Capital – 2007*, served September 26, 2008

current price as of November 3, 2008 [4] The results of my variable cost analyses are shown in Table 3 below

Table 3

CSXT URCS Phase III variable Cost per Carload – 1Q09

Movement (1)	Variable Cost (2)
1 Wurtland, KY to Petrolia, PA	$896 70
2 Niagara Falls, NY to Edgemoor, DE	$311 23
3 Edgemoor, DE to New Johnsonville, TN	$911 20

Based on the total rate per carload, including fuel surcharges and CSXT's URCS Phase III regulatory variable costs, I have estimated the revenue to variable cost ("R/VC") ratios for DuPont's three movements as of 1Q09 The results of my calculations are shown in Table 4 below Table 4 also summarizes the STB's jurisdictional threshold rates for CSXT's portion of each DuPont move.

Table 4

CSXT Revenue to Variable Cost Ratios for Selected DuPont Shipments – 1Q09

Movement (1)	Total Rate per Carload 1/ (2)	Variable Cost per Carload 2/ (3)	R/VC Ratio 3/ (4)	Jurisdictional Threshold per Carload 4/ (5)
1 Wurtland, KY to Petrolia, PA	$6,733 20	$896 70	751%	$1,614 06
2 Niagara Falls, NY to Edgemoor, DE	$3,782.40	$311 23	1,215%	$560 21
3 Edgemoor, DE to New Johnsonville, TN	$3,500 20	$911 20	384%	$1,640 16

1/ Table 2 above
2/ Table 3 above
3/ Column (2) – Column (3)
4/ Column (3) x 1 80

[4] I assumed the November 3, 2008 price would be representative of 1Q09 fuel prices

C. CSXT/DUPONT R/VC RATIOS COMPARED WITH STB FINDINGS IN PREVIOUS PROCEEDINGS

The R/VC ratios produced by CSXT's rates for the three DuPont moves are higher than any of the R/VC ratios produced in any recent maximum reasonable rate proceeding, regardless of the maximum rate standard used by the STB This section of my verified statement compares the R/VC ratios for the three DuPont moves to the R/VC ratios found for maximum reasonable rates prescribed by the STB

1. DuPont Three Benchmark Proceedings

In STB Docket Nos 42099, 42100 and 42101, DuPont challenged the reasonableness of CSXT's tariff rates for the transportation of four different commodities between seven different origin-destination pairs, pursuant to the Board's simplified and expedited procedures adopted in *Simplified Standards*[5] In decisions issued on June 30, 2008, the Board prescribed rate reductions for six of the seven lanes The maximum reasonable rates prescribed for these six origin-destination pairs are shown in Table 5 below and in all instances are lower than the R/VC ratios produced by the CSXT rates for the three moves evaluated in this verified statement.

[5] STB Ex Parte No 646 (Sub No 1), *Simplified Standards for Rail Rate Cases*, served September 5, 2007 ("*Simplified Standards*")

Table 5
R/VC Ratios for Prescribed Rates in Previous DuPont Proceedings

	Docket No. (1)	Origin (2)	Commodity (3)	R/VC Ratios (4)
1	42100	Niagara Falls, NY	Chlorine	287%
2	42100	Carneys Point, NY	Chlorine	321%
3	42101	Neuse, NC	Nitrobenzene	319%
4	42099	Amphill, VA	Plastic Powder	329%
5	42099	Duart, NC	Plasticizers	332%
6	42099	Washington, WV	Plasticizers	332%

The Table 5 moves are all DuPont moves and involve single car shipments of chemicals in shipper provided cars In addition, rates for two of the moves shown in Table 5 are for the shipment of chlorine, the same commodity moved in the shipment from Niagara Falls, NY to Edgemoor, DE (See Table 1 above).

As shown in Table 5 above, the STB found that the maximum reasonable rates for moving chlorine in Docket 42100 produce R/VC ratios of 287% and 321% from DuPont's Niagara Falls and Carneys Point origins, respectively By contrast CSXT's rate at issue in this proceeding for moving chlorine from Niagara Falls to Edgemoor yields and R/VC of 1,215% (See Table 4 above)

2. **Maximum Rate Proceedings**

Similarly, the STB prescribed rates in several recent maximum rate proceedings where the stand-alone cost constraint was used In each instance, rates were prescribed at the greater of stand-alone cost or the jurisdictional threshold of 180% of variable cost Where the STB prescribed rates based on the stand-alone cost constraint, the prescribed rates produced R/VC ratios which are significantly lower than the R/VC ratios produced by the CSXT rates for the three moves evaluated in this verified statement

Table 6 below shows the R/VC ratios for all prescribed rates in maximum rate proceedings that were based on the stand-alone cost constraint beginning in the year 2000

Table 6
R/VC Ratios for Prescribed Rates in Previous SAC Proceedings

	Docket No. (1)	Shipper (2)	Decision Served (3)	R/VC Ratio (4)
1	42022	FMC Corporation	May 12, 2000	180 0% - 337 0%
2	42056	Texas Municipal Power Agency	September 12, 2004	194 1%
3	42057	Xcel Energy	May 3, 2005	259 2% - 268 6%

As shown in Table 6 above, the highest prescribed maximum reasonable rate, where the stand-alone cost constraint was used by the STB in any of these proceedings, is 337 0% which is substantially below the R/VC ratios produced by CSXT's rates for the three movements (See Table 4 above)

While the shipments in two of the three proceedings shown in Table 6 above apply to unit coal train shipments[6/], the fact remains that in each instance where the STB found the rates at issue were unreasonable, the STB prescribed a rate which yields R/VC ratios that are substantially below those produced by CSXT's rates for the three movements evaluated in this verified statement

[6/] The shipments in the FMC Corporation proceeding involved various chemical commodities, moving in single car, and multiple car and unit train shipments

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

Sworn to and subscribed
before me this 1st day of December, 2008

Diane R Kavounis
Notary Public for the State of Virginia

My Commission Expires November 30, 2012
Registration Number 7160645

STATEMENT OF QUALIFICATIONS

My name is Thomas D Crowley I am an economist and President of the economic consulting firm of L E Peabody & Associates, Inc The firm's offices are located at 1501 Duke Street, Suite 200, Alexandria, Virginia 22314, and 10445 N Oracle Road, Suite 151, Tucson, Arizona 85737.

I am a graduate of the University of Maine from which I obtained a Bachelor of Science degree in Economics I have also taken graduate courses in transportation at George Washington University in Washington, D C I spent three years in the United States Army and since February 1971 have been employed by L. E. Peabody & Associates, Inc

I am a member of the American Economic Association, the Transportation Research Forum, and the American Railway Engineering and Maintenance-of-Way Association

The firm of L E Peabody & Associates, Inc specializes in analyzing matters related to the rail transportation of coal. As a result of my extensive economic consulting practice since 1971 and my participating in maximum-rate, rail merger, service disputes and rule-making proceedings before various government and private governing bodies, I have become thoroughly familiar with the rail carriers that move coal over the major coal routes in the United States This familiarity extends to subjects of railroad service, costs and profitability, railroad capacity, railroad traffic prioritization and the structure and operation of the various contracts and tariffs that historically have governed the movement of coal by rail

STATEMENT OF QUALIFICATIONS

As an economic consultant, I have organized and directed economic studies and prepared reports for railroads, freight forwarders and other carriers, for shippers, for associations and for state governments and other public bodies dealing with transportation and related economic problems Examples of studies I have participated in include organizing and directing traffic, operational and cost analyses in connection with multiple car movements, unit train operations for coal and other commodities, freight forwarder facilities, TOFC/COFC rail facilities, divisions of through rail rates, operating commuter passenger service, and other studies dealing with markets and the transportation by different modes of various commodities from both eastern and western origins to various destinations in the United States. The nature of these studies enabled me to become familiar with the operating practices and accounting procedures utilized by railroads in the normal course of business

Additionally, I have inspected and studied both railroad terminal and line-haul facilities used in handling various commodities, and in particular unit train coal movements from coal mine origins in the Powder River Basin and in Colorado to various utility destinations in the eastern, mid-western and western portions of the United States and from the Eastern coal fields to various destinations in the Mid-Atlantic, northeastern, southeastern and mid-western portions of the United States These operational reviews and studies were used as a basis for the determination of the traffic and operating characteristics for specific movements of coal and numerous other commodities handled by rail.

STATEMENT OF QUALIFICATIONS

I have frequently been called upon to develop and coordinate economic and operational studies relative to the acquisition of coal and the rail transportation of coal on behalf of electric utility companies. My responsibilities in these undertakings included the analyses of rail routes, rail operations and an assessment of the relative efficiency and costs of railroad operations over those routes I have also analyzed and made recommendations regarding the acquisition of railcars according to the specific needs of various coal shippers The results of these analyses have been employed in order to assist shippers in the development and negotiation of rail transportation contracts which optimize operational efficiency and cost effectiveness

I have developed property and business valuations of privately held freight and passenger railroads for use in regulatory, litigation and commercial settings. These valuation assignments required me to develop company and/or industry specific costs of debt, preferred equity and common equity, as well as target and actual capital structures. I am also well acquainted with and have used the commonly accepted models for determining a company's cost of common equity, including the Discounted Cash Flow Model ("DCF"), Capital Asset Pricing Model ("CAPM"), and the Farma-French Three Factor Model

Moreover, I have developed numerous variable cost calculations utilizing the various formulas employed by the Interstate Commerce Commission ("ICC") and the Surface Transportation Board ("STB") for the development of variable costs for common carriers,

STATEMENT OF QUALIFICATIONS

with particular emphasis on the basis and use of the Uniform Railroad Costing System ("URCS") and its predecessor, Rail Form A I have utilized URCS/Rail form A costing principles since the beginning of my career with L E Peabody & Associates Inc in 1971

I have frequently presented both oral and written testimony before the ICC, STB, Federal Energy Regulatory Commission, Railroad Accounting Principles Board, Postal Rate Commission and numerous state regulatory commissions, federal courts and state courts This testimony was generally related to the development of variable cost of service calculations, rail traffic and operating patterns, fuel supply economics, contract interpretations, economic principles concerning the maximum level of rates, implementation of maximum rate principles, and calculation of reparations or damages, including interest I presented testimony before the Congress of the United States, Committee on Transportation and Infrastructure on the status of rail competition in the western United States I have also presented expert testimony in a number of court and arbitration proceedings concerning the level of rates, rate adjustment procedures, service, capacity, costing, rail operating procedures and other economic components of specific contracts

Since the implementation of the *Staggers Rail Act of 1980*, which clarified that rail carriers could enter into transportation contracts with shippers, I have been actively

STATEMENT OF QUALIFICATIONS

involved in negotiating transportation contracts on behalf of coal shippers Specifically, I have advised utilities concerning coal transportation rates based on market conditions and carrier competition, movement specific service commitments, specific cost-based rate adjustment provisions, contract reopeners that recognize changes in productivity and cost-based ancillary charges I have also reviewed, analyzed and evaluated both UP's Circular 111 and BNSF 90068 rate levels and other terms and conditions on behalf of coal shippers

I have been actively engaged in negotiating coal supply contracts for various users throughout the United States In addition, I have analyzed the economic impact of buying out, brokering, and modifying existing coal supply agreements My coal supply assignments have encompassed analyzing alternative coals to determine the impact on the delivered price of operating and maintenance costs, unloading costs, shrinkage factor and by-product savings

I have developed different economic analyses regarding rail transportation matters for over sixty (60) electric utility companies located in all parts of the United States, and for major associations, including American Paper Institute, American Petroleum Institute, Chemical Manufacturers Association, Coal Exporters Association, Edison Electric Institute, Mail Order Association of America, National Coal Association, National Industrial Transportation League, North America Freight Car Association, the Fertilizer Institute and Western Coal Traffic League. In addition, I have assisted numerous

STATEMENT OF QUALIFICATIONS

government agencies, major industries and major railroad companies in solving various transportation-related problems

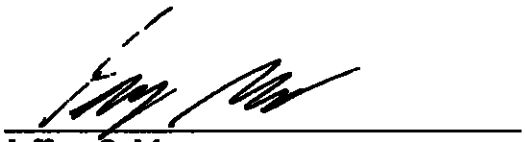
In the two Western rail mergers that resulted in the creation of the present BNSF Railway Company and Union Pacific Railroad Company and in the acquisition of Conrail by Norfolk Southern Railway Company and CSX Transportation, Inc , I reviewed the railroads' applications including their supporting traffic, cost and operating data and provided detailed evidence supporting requests for conditions designed to maintain the competitive rail environment that existed before the proposed mergers and acquisition In these proceedings, I represented shipper interests, including plastic, chemical, coal, paper and steel shippers.

I have participated in various proceedings involved with the division of through rail rates For example, I participated in ICC Docket No 35585, *Akron, Canton & Youngstown Railroad Company, et al v Aberdeen and Rockfish Railroad Company, et al* which was a complaint filed by the northern and mid-western rail lines to change the primary north-south divisions I was personally involved in all traffic, operating and cost aspects of this proceeding on behalf of the northern and mid-western rail lines. I was the lead witness on behalf of the Long Island Rail Road in ICC Docket No 36874, *Notice of Intent to File Division Complaint by the Long Island Rail Road Company*

CERTIFICATE OF SERVICE

I hereby certify that this 2nd day of December, 2008, I served a copy of the foregoing Petition for Injunctive Relief by hand delivery upon counsel for Defendant at the following address:

G. Paul Moates
Sidley Austin LLP
1501 K Street, NW
Washington, D.C. 20005



Jeffrey O Moreno