

BEFORE THE
SURFACE TRANSPORTATION BOARD

220106

_____)
E I DUPONT DE NEMOURS AND COMPANY))
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Complainant,))
))
v))
))
CSX TRANSPORTATION, INC))
))
Defendant))
_____)



ENTERED
Office of Proceedings
AUG 21 2007

MOTION FOR PROCEDURAL SCHEDULE

Part of
Public Record

By Complaint filed contemporaneous with this Motion, E I du Pont de Nemours and Company ("DuPont") has challenged the reasonableness of common carrier rates published by CSX Transportation, Inc ("CSXT") DuPont also has requested that the Board determine the reasonableness of the challenged rates be determined using the simplified standards adopted pursuant to 49 U S C § 10701(d)(3) in Ex Parte No 347 (Sub-No 2), *Rate Guidelines—Non-Coal Proceedings*, 1 S T B 1004 (1996) By this Motion, DuPont asks the Board to adopt the procedural schedule set forth herein, upon determining that DuPont is eligible to use the simplified standards

The Board has adopted a procedural schedule to determine whether to use the simplified standards at 49 C F R § 1111.9 That schedule provides for a determination of eligibility by the Board within 50 days of filing a complaint The Board, however, has not adopted a procedural schedule beyond that time period for presenting evidence under the simplified standards, if the case is eligible for the simplified standards Nevertheless, the Board adopted a procedural schedule for the very first case filed under the simplified standards in *BP Amoco Chemical Co v*

Norfolk Southern Ry Co , STB Docket No 42093, slip op at 5 (served June 6, 2005), and it has proposed a similar procedural schedule for small rate disputes in *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), slip op at 29 (served July 28, 2006)

DuPont asks the Board to adopt the following procedural schedule, subject to the discussion of various issues in this Motion

Phase I: Eligibility (Determined by 49 C.F.R. § 1111.9)	
Complaint Filed	Day 0
Defendant's Answer to Complaint and Opposition to Use of Simplified Procedures	Day 20
Complainant's Response to use of simplified procedures	Day 30
Board Decision on Eligibility	Day 50
Phase II: Determination of Comparison Traffic Group	
Discovery Begins	Day 50
Technical Conference on discovery, procedure, and other matters of process	Day 55
Discovery Ends	Day 100
Tender of Initial Comparison Groups	Day 110
Technical Conference on Comparison Groups	Day 115
Tender of Final Comparison Groups	Day 120
Cross-Replies to Comparison Groups	Day 130
Board Decision on Comparison Group	Day 140
Phase III: Merits	
Opening Evidence and Argument on Merits and Market Dominance	Day 155
Reply Evidence and Argument	Day 170
Rebuttal Evidence and Argument	Day 180
Final Board Decision within 45 days	

Discovery DuPont proposes that each party be limited to ten interrogatories (including subparts) and ten document requests (including subparts) DuPont believes that depositions are unnecessary in a small rate case, since depositions are rare even in stand-alone cost cases DuPont proposes that Motions to Compel be governed by 49 C F R § 1114 31(a)(2)-(4), that appeals to the Chairman of a ruling by Board staff be due within 3 business days, replies to the

appeal be due within another 3 business days, and that the criteria in 49 C.F.R. § 1115.9(a) govern the standard of review for such appeals

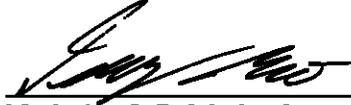
Variable Cost DuPont proposes that the Board calculate the variable cost of the issue traffic and all movements in the comparison traffic group, by using the Phase III URCS program, without movement-specific adjustments. DuPont agrees with the Board's conclusion in *Major Issues in Rail Rate Cases*, Ex Parte No. 657 (Sub-No. 1) (served Oct. 30, 2006), that the time and expense associated with calculating movement-specific adjustments far outweigh the benefits of greater precision. That determination in the context of full stand-alone cost cases carries even greater weight for small rate cases under the simplified standards.

Comparable Traffic Group DuPont proposes to use the Final Offer process for selecting the comparable traffic that was proposed in both *BP Amoco* and Ex Parte No. 646 (Sub-No. 1), but only if DuPont's outside counsel and consultant are provided with access to the unmasked confidential waybill sample. Contemporaneous with the filing of DuPont's Complaint and this Motion, DuPont also has requested access to the unmasked confidential waybill sample, which DuPont has attached to this Motion as Exhibit "A." As expressed in greater detail in that request, unmasked revenues are needed in order to accurately identify traffic in the Waybill Sample with >180 revenue-to-variable cost ratios, which defines the universe of potentially comparable traffic. Otherwise, depending on whether the masking factor is positive or negative, the Waybill Sample either will overstate or understate potentially comparable traffic. In addition, a final offer process is fundamentally unfair if CSXT has access to the unmasked data but DuPont does not. There is no rational reason why the confidentiality of that data could not be sufficiently protected by the standard protective orders that the Board has employed to protect

**the confidentiality of competitively sensitive railroad and shipper data in other proceedings,
including the very same rate information contained in the unmasked revenues**

**WIHEREFORE, for the foregoing reasons, DuPont requests that the Board adopt the
proccdural schedule and procedures proposed herein**

Respectfully submitted,



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EXHIBIT A

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By Messenger

Mr Leland I. Gardner, Director
Office of Economics, Environmental Analysis and
Administration
Surface Transportation Board
395 E Street, S W
Washington, D C 20423

Re Request for Release of Confidential Waybill Data in connection with STB Docket Nos
NOR 42099, 42100, and 42101

Dear Director Gardner

Thompson Hine LLP, on behalf of itself and L. E. Peabody & Associates, Inc ("LEPA"), both of whom are making this request on behalf of Complainant E. I. DuPont de Nemours and Company ("DuPont"), hereby requests that the Board release all fields and records included in the Costed Waybill Sample for calendar year 2006, pursuant to 49 C.F.R. § 1244.9(b)(4). In addition, Thompson Hine requests that the Board provide unmasked revenues in the Costed Waybill Sample. This letter sets out the information required by 49 C.F.R. § 1244.9(e).

I. The Requesting Parties and Their Purpose.

Thompson Hine and LEPA are, respectively, outside counsel and consultants to DuPont, which today has filed three formal complaints challenging the reasonableness of certain common carrier rates published by CSX Transportation, Inc. DuPont has requested that the Board determine the reasonableness of those rates pursuant to the simplified standards adopted in Ex Parte No. 347 (Sub-No. 2), *Rate Guidelines – Non-Coal Proceedings*, 1 S.T.B. 1004 (1996) ("*Small Case Guidelines*"). pursuant to 49 U.S.C. § 10701(d)(3).

The Costed Waybill Sample is used to calculate the three revenue-to-variable cost benchmarks that the Board has adopted in *Small Case Guidelines* as the starting point to determine rate reasonableness. In addition, the Costed Waybill Sample is also proposed to be used in developing a comparison group for small rate disputes under the Board's proposal in *Simplified Standards for Rail Rate Cases*, S.T.B. Ex Parte No. 646 (Sub-No. 1), served July 26, 2006, slip op. at 20 ("*Proposed Simplified Standards*"). The purpose of this request is to obtain access to the unmasked Costed Waybill Sample in order to prepare evidence for DuPont that is directly relevant to these benchmark standards.

The Board permits rail carriers to alter the revenues for contract traffic in the Waybill Sample through the use of "masking factors," for confidentiality purposes. These masking factors may

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be different from carrier to carrier and for different commodities or commodity groups transported by each carrier. In addition, a masking factor may be either positive or negative (or not applied at all). Railroads apply masking factors to the revenue appearing on the Waybill Sample and provide these masking factors to the Board. The Board has applied these masking factors to the Waybill Sample in order to unmask the revenues used to calculate the revenue-to-variable cost benchmarks adopted in *Small Case Guidelines* and updated annually by the Board.

II. Justification for Access to the Requested Data

The Costed Waybill data using unmasked revenues is needed to develop evidence under the *Small Case Guidelines*, as well as under the proposed procedures in *Proposed Simplified Standards*. The *Small Case Guidelines* employ three revenue-to-variable cost benchmarks as starting points for use in a reasonableness analysis. *Id.* at 1020, 1022. As the Board noted, "in making their respective benchmark r/vc presentations, we expect both shipper-complainants and defendant-railroads to present whatever additional information is available that bears on the reasonableness of the pricing of the traffic at issue." Significantly, the Board declared that "[t]his could include a distribution analysis of the component numbers that produced the average figure [citation omitted]" as well as "an analysis of any relevant subset of numbers that more closely compares with the traffic at issue." *Id.* at 1022.

Access to the Costed Waybill Sample using unmasked revenues is necessary if DuPont is to undertake the "more particularized analysis" (*id.* at 1020) that the Board required in its *Small Case Guidelines* decision, as well as in the selection of the comparison group in *Proposed Simplified Standards*, in at least three respects:

A. Calculation of the R/VC_{comp} benchmark.

The Board established the " R/VC_{comp} " benchmark to measure the markup taken on >180 traffic that involves similar commodities moving under similar transportation conditions. *Small Case Guidelines*, 1 S T B at 1034. The "comparative group" must be taken from the Costed Waybill Sample. *Id.* at 1055. As noted above, the masking factors chosen by each carrier to mask contract revenues can be different across commodities or commodity groups, and can be either positive or negative. In contrast, the RSAM and $R/VC_{>180}$ benchmarks are calculated using *unmasked* revenues.

Unless the revenues in the Costed Waybill Sample are unmasked, it will be impossible to make an accurate analysis using the three factors established by the Board under the *Small Case Guidelines*. Indeed, there are insoluble problems in utilizing the R/VC_{comp} factor whether a complainant uses either the "landscape" approach or the "formula" approach under the *Guidelines*.

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If the formula approach from *Guidelines* is used, the *Guidelines* indicate that a "markup" should be applied to the variable cost of the issue traffic. That "markup" is derived by dividing the RSAM by the $R/VC_{>180}$ factor (both of which are calculated using unmasked revenues) and multiplying the resulting fraction by the R/VC_{comp} (which would be calculated using masked revenues, unless the Board provided the masking factors)

But if, for example, the rail carrier has inflated Waybill Sample contract revenues by twenty percent, then the R/VC_{comp} factor will be significantly higher than the actual (unmasked) revenues would indicate. The $RSAM / R/VC_{>180}$ fraction (determined on the basis of unmasked revenues) will be multiplied by this inaccurately high R/VC_{comp} figure (determined on the basis of masked revenues), thus producing a mismatch.

Similarly, if the "landscape" method is used, the R/VC ratio of the issue traffic is to be directly compared to the RSAM, $R/VC_{>180}$ and the R/VC_{comp} figure. *Id.* at 1039-40. But again, if the rail carrier has inflated Waybill Sample contract revenues by twenty percent, then the R/VC_{comp} figure (derived using masked revenues) will be higher than an R/VC_{comp} figure using the actual (unmasked) revenues, and will not produce a valid comparison to the issue traffic.

Thus, access to Costed Waybill Sample using unmasked revenues is necessary to know the "actual" markup on >180 traffic that involves similar commodities moving under similar transportation conditions." *Id.* The Board has for many years warned parties obtaining access to masked data that use of revenue data from the Carload Waybill Sample in any type of comparison could lead to wrong or misleading results. See e.g., STB letter dated June 6, 2005 in response to WB456-1. Since the very purpose of the R/VC_{comp} is to compare revenue, it would be arbitrary and capricious for the Board to require complainants to develop this comparative benchmark, while making it impossible to make that comparison on the basis of factually correct data.

The Board's proposal, in *Proposed Simplified Standards*, to unmask revenue for the comparable traffic *after* the final comparable group has been determined by the Board is not a panacea to this problem. While potentially addressing the problem of mixing RSAM and $R/VC_{>180}$ benchmarks calculated from unmasked data with an R/VC_{comp} benchmark calculated from masked data, the masking factor still presents another problem. It prevents the Complainant from accurately identifying the >180 traffic in the Waybill Sample that constitutes the universe of potentially comparable traffic from which to select a comparable traffic group.

The inability of the Complainant to accurately identify the universe of potentially comparable traffic from the Waybill Sample is highly prejudicial. For example, if a railroad has *inflated* its Waybill Sample revenues by twenty percent, many movements that are <180 nevertheless would

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appear to be eligible for inclusion in the "comp" group only to be dropped when the revenues of the final "comp" group are unmasked. Even more alarming, if a railroad has *deflated* its Waybill Sample revenues by twenty percent, many movements that are eligible for the comparable group will be overlooked because they appear as <180 traffic in the masked Waybill Sample. This fact will not be revealed to the Complainant even after the comparable group revenues are unmasked. The exclusion of this legitimate group of potentially comparable traffic will skew the maximum reasonable rate upward because the excluded traffic will possess the lowest R/VC ratios.

Moreover, upon unmasking waybill revenues *after* determining the comparable group, it is possible that there would be no comparable traffic at all, or only a statistically insignificant number of comparable movements. This would render moot all of the time, effort and money expended on the case, a result that could be avoided merely by granting the complainant access to the unmasked waybill sample at the beginning of the proceeding, subject to an appropriate protective order.

The defendant-railroad also will have a substantial litigation advantage over the complainant, because it will have access to unmasked data throughout the process of selecting the comparison group for movements on its own system. That advantage allows the railroad to selectively choose only traffic for the comparison group that will drive a higher R/VC ratio when the STB ultimately unmasks the "comp" group. Knowing the most beneficial movements to include in the comparison group beforehand will allow the defendant railroad to spend the time and effort to justify the inclusion of these movements in the final comparison group and the exclusion of unfavorable movements. It is arbitrary and capricious for the Board to permit one party in litigation access to information denied to the other party, especially when the unmasked information is so essential to determining a reasonable rate.

B. Calculation of the RSAM benchmarks.

The Board has developed the Revenue Shortfall Allocation Methodology, or "RSAM," to measure the uniform markup above variable cost that would be needed from every shipper of potentially captive traffic in order for the carrier to recover all of its URCS fixed costs and earn a return on investment at the current cost of capital. In *Small Case Guidelines*, the Board established two RSAM figures, one with and one without an "efficiency adjustment" designed to account for traffic carried at less than URCS variable cost. The Board uses unmasked revenues from the Costed Waybill Sample to calculate both RSAM figures. In *Small Case Guidelines*, the Board stated that "the correct measure lies somewhere between the two [RSAM] figures" and that it would look at both figures "and treat them as the relevant starting range for our consideration." *Small Case Guidelines*, 1 S T B at 1030.

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Without access to the Costed Waybill Sample using unmasked revenues, it is impossible to develop an analysis that would determine *which* point between the two RSAM figures the Board should adopt as the "correct measure" within the "relevant range" by, for example, making a distribution analysis suggested by the Board in *Small Case Guidelines*. Unless the unmasked revenues are known, it is impossible to know *how much* traffic is *actually* carried at less than a compensatory level, and the distribution of such less-than-variable-cost traffic

For example, if the carrier's masking factors increase contract revenues for a commodity by twenty percent, then the actual amount of traffic carried at less than a compensatory level could be substantially higher than would be indicated by the Costed Waybill Sample data with masked revenues. In addition, the actual proportion of traffic contributing only marginally to the carrier's fixed costs could be significantly higher than would be indicated by the Costed Waybill Sample data with masked revenues. Without the actual, unmasked revenue for movements within the Waybill Sample, it also will be impossible to analyze the below-variable-cost traffic to recommend to the Board a point within the "relevant starting range." It would be arbitrary and capricious for the Board to require parties to present "additional information" including a distribution analysis, without giving parties the means to do so.

Moreover, the Board has observed that the range between the adjusted and unadjusted RSAM figures is quite broad for some carriers, while narrower for others, reflecting the extent to which a carrier handles traffic at rates that produce *r/vc* ratios below 100%. *Id.* at 1033. According to the agency, this is based on the composition of a carrier's traffic and its pricing practices. *Id.* The Board declared that the parties "can and should address any specific efficiency considerations that apply to the particular carrier defendant(s) that would serve to narrow that range." *Id.* at 1030. But without unmasked revenue from the Costed Waybill Sample, it is impossible to address any "specific efficiency considerations" for a particular carrier defendant. Indeed, the Board's *own* analysis in *Small Case Guidelines* specifically pointed to below-variable-cost *contract* revenues as an explanation for a specific carrier's RSAM figures – a matter which can only be tested if contract revenues are unmasked. See, *id.* at 1033, n. 86.

The Board cannot simply choose to ignore the efficiency-adjusted RSAM as it proposed to do in STB Docket No. 42093, *BP Amoco Chemical Company v. Norfolk Southern Railway Company* ("*BP Amoco*"), served June 6, 2005. The Board must consider the factors set out in 49 U.S.C. §10701(d)(2), including the amount of traffic carried at levels that do not contribute to the going concern value of the carrier and the amount of traffic that contributes only marginally to fixed costs. Indeed, the RSAM figure adjusted for efficiency was *specifically intended* to develop information related to these so-called "Long-Cannon-1" and "Long-Cannon-2" managerial efficiency tests. See *Small Case Guidelines*, 1 S.T.B. at 1020, see also, Ex Parte 347 (Sub-No. 2), *Rate Guidelines – Non-Coal Proceedings*, decision served December 1, 1995, slip op. at 18 ("through its efficiency adjustment, [the RSAM] gives effect to the first two 'Long-Cannon'

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factors " [emphasis added]) The Board cannot simply choose to ignore traffic carried at less than a compensatory level or traffic that contributes only marginally to the carrier's fixed costs without any analysis whatsoever¹

Since it must consider the Long-Cannon-1 and the Long-Cannon-2 factors, the Board must have evidence – accurate evidence – as to the amount of traffic carried at levels that do not contribute to the going concern value of the carrier and the amount of traffic that contributes only marginally to fixed costs. The Costed Waybill Sample is the only practical source of information as to the amounts and levels of those categories of traffic,² and unmasked revenues are necessary if that information is to be accurate.

C. Presentation of a more particularized analysis.

The Board has made clear in its *Small Case Guidelines* that the three r/vc benchmarks "only provide the starting point for a rate reasonableness analysis, not the end result." *Small Case Guidelines*, 1 S T B at 1022, and that a complainant is entitled to supplement its evidence with more particularized analyses. As the Board has noted, the Waybill Sample is "the only known source from which reasonably reliable and comprehensive information can be obtained on rail carload freight traffic flow and its characteristics." 46 Fed Reg 26781 (May 15, 1981). It is intended to serve the needs of the agency, as well as the traffic data needs of "other Federal, State and local governments, the transportation industry" and other persons. *Id.* Thus, the Waybill Sample is a unique and essential source of the information required to conduct more particularized analyses.

For example, the Board has recognized that, since the *Small Case Guidelines* were developed, the rail system no longer has significant excess capacity. See, *BP Amoco*, slip op at 10, *Proposed Simplified Standards*, slip op at 21-22. In such a capacity-constrained environment, there is even *less* justification for rates that return to the carrier less than their long-run variable cost, and a complainant would be entitled, if not expected, to present to the Board evidence that a carrier has failed to maximize its revenue from a portion of its traffic base, and that the consequences of such a failure should not be borne by the carrier's captive shippers.

¹ The extreme nature of the Board's decision in *BP Amoco* is underscored by the fact that, in the *Small Case Guidelines* proceeding, not even the Association of American Railroads proposed eliminating all traffic shown by the Waybill Sample to be carried at less than variable cost, but that an appropriate adjustment would be to eliminate traffic carried at less than directly variable costs ("DVC"). See, *Small Case Guidelines*, 1 S T B at 1028 and n 70.

² The Board has already rejected in its *Small Case Guidelines* decision the possibility of obtaining the defendant railroad's traffic tapes, which would be the only other source for obtaining information on the Long-Cannon-1 and Long-Cannon-2 factors. *Small Case Guidelines*, 1 S T B at 1055.

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III. Board Precedent Does Not Preclude Release of Unmasked Revenues.

Thompson Hine recognizes that the Board has established a high standard for the release of Costed Waybill Data using unmasked revenues. See, STB Finance Docket No 33388, *CSX Corporation and CSX Transportation Inc , Norfolk Southern Corporation and Norfolk Southern Railway Company – Control and Operating Leases/Agreements - Conrail, Inc and Consolidated Rail Corporation*, Decision No 42, served October 3, 1997 ("*CSX/NS Waybill Decision*"), and STB Docket No 42069, *Duke Energy Corporation v Norfolk Southern Railway* and consolidated cases, served April 5, 2005 ("*Duke Energy Waybill Decision*") However, as explained in detail above, the standards established by the Board have been met in this case, in view of the identity of the requesters, the purpose to which this information will be used, the direct relevance of the data, and the efforts to restrict the persons to whom the information will be made available

The agency's decisions in *CSX/NS Waybill Decision* and *Duke Energy Waybill Decision* do not preclude release of the Costed Waybill Sample using unmasked revenues that is requested here. The *CSX/NS Waybill Decision* makes clear that a decision to release or not release the masking factors depends upon the Board's evaluation of the balance between the carrier's need for confidentiality and the relevance of the information to the inquiry. The Board noted in the *CSX/NS Waybill Decision* that the confidentiality policy underlying the maintenance of the Waybill Sample "tips the scales against a finding of relevance" in that case, "because the standard against which the relevance of commercially sensitive information is judged is necessarily higher than the standard against which the relevance of less sensitive information is judged." *Id*, slip op at 8. In that case, the proposition that the movants were seeking to prove with the unmasked revenues was "highly questionable," since it challenged a "basic principle of economics, that firms will generally attempt to maximize their profits," and amounted to essentially a "fishing expedition." *Id* Thus, the Board found that the higher standard of relevance had not been met in that case, given the potential uses to which the information would be put

In the present case, in contrast, the need for the Costed Waybill Sample using unmasked revenue is far from highly questionable, because it is directly relevant to the accurate measure of the factors that the Board has *specifically* prescribed in *Small Case Guidelines*, which are at the foundation of any proceeding prescribing a maximum reasonable rate under those guidelines. Instead of a "fishing expedition", Thompson Hine seeks information, on behalf of DuPont, that will enable DuPont to present evidence to satisfy the very standards for small cases enunciated by the Board

Similarly, in the *Duke Energy Waybill Decision*, the Board noted that the complainant's intended use for the unmasked Waybill Sample in a phasing constraint proceeding was "unclear." *Id*, slip

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op at 3 The complainants in those consolidated cases desired to analyze individual rate increases between 2001 and 2004 using the unmasked Costed Waybill Sample. But, the agency noted, the Waybill Sample is only a small sampling of individual shipments, so that a movement in the 2001 sample is not likely to appear in the sample each year from 2001 to 2004. Thus, the time-series analysis contemplated by the complainant in that case was not possible. Therefore, the Board denied the request, because the higher standard of relevance had not been met.

In this case, on the other hand, no time-series analysis is contemplated, but the use of the unmasked revenues will be used to accurately calculate the R/VCcomp, as well as adjustments to the RSAM that would directly relate to the appropriate point within the relevant range denominated by the RSAM with and without the efficiency adjustment, including proper accounting for managerial efficiency under the Long-Cannon factors.

V. Confidentiality Protection Measures.

The standard protective order used in Board proceedings will protect the confidentiality of the unmasked revenues from the Waybill Sample. The "HIGHLY CONFIDENTIAL" designation restricts access only to outside counsel and consultants and allows the parties to submit evidence that is shielded from public access. This protective order has been considered adequate to protect the most competitively sensitive analyses in railroad merger proceedings and it has been adequate in stand-alone cost rate cases to protect the very same contract revenue data that is masked in the Waybill Sample. Thus, there is no rational basis for denying access to the unmasked revenues in the Costed Waybill Sample in a small rate case with the same protections.

Sincerely,



Nicholas J. DiMichael
Jeffrey O. Moreno
Thompson Hine LLP

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of August, 2007, a copy of the foregoing Motion for Procedural Schedule was served by overnight courier in accordance with 49 C F R 1111.3 upon the following

Ellen M. Fitzsimmons
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