

TABLE OF CONTENTS

INTRODUCTION	1
I. CSXT IS NOT MARKET DOMINANT OVER THE TRAFFIC AT ISSUE.	3
A. DuPont Has Not Proven Market Dominance for the Two Plasticizer Movements	4
B. DuPont Has Not Proven Market Dominance for the Plastics Movement	8
II. COMPARISON CRITERIA AND FINAL COMPARISON GROUP	12
A. Introduction.	12
B. Similar Selection Criteria Applied by Both Parties	14
C. Similar Factors Applied Differently by the Parties.	15
D. Criteria Applied by CSXT But Not by DuPont	16
1. CSXT's Criteria Select Like Commodities, DuPont's Criteria Do Not	17
2. DuPont's Failure to Consider Fuel Surcharge	28
3. CSXT Selection Criteria from Opening that No Longer Account for Differences Between the Parties	29
E. More Restrictive Criteria Applied by DuPont	31
F. Summary	33
III. RSAM, ADJUSTMENTS, AND APPLICATION OF BENCHMARKS	35
A. The Adjustments Proposed by CSXT Are Appropriate and Necessary	35
1. Updating Historical 2002-2005 Costs and Rates to the Same Year as the Challenged Rate	35
2. Technical Correction to RSAM Calculation.	36
B. DuPont's Proposed Changes to the RSAM Are Unwarranted and Should be Rejected	37
1. The Board Should Reject DuPont's Proposal to Change the RSAM for 2002 to 2005 Retroactively Based Upon a New, Not Yet Implemented, Methodology for Calculating the "Cost of Capital "	37

2	This Individual Case Adjudication is Not the Proper Proceeding to Consider a Far-Reaching Retroactive Change to a Key STB Statistic	40
3	Adjusting the Three-Benchmark Approach to Costs in a Coherent Manner Would Add Complexity, Cost, and Delay to this “Simplified” Proceeding	43
IV	OTHER RELEVANT FACTORS	47
V.	THREE BENCHMARK RATE REASONABLENESS RESULTS	49
	CONCLUSION	50

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

E.I. DUPONT DE NEMOURS AND COMPANY)

Complainant,)

v)

CSX TRANSPORTATION, INC.)

Defendant)

**PUBLIC
VERSION**

Docket No. NOR 42099

REPLY EVIDENCE OF CSX TRANSPORTATION, INC.

INTRODUCTION

DuPont's Complaint in this case—and in the two companion cases it has filed at NOR 42100 and NOR 42101—is an attempt to disaggregate a single multimillion-dollar commercial dispute into selected, isolated rates to be challenged in multiple individual Three Benchmark cases.¹ There is no apparent objective reason DuPont would choose to challenge these particular rates instead of others. It appears that DuPont may be seeking to use the results of these proceedings in an attempt to gain negotiating leverage for its many other movements on CSXT.² DuPont's attempt fails, because it is not entitled to relief under the Three Benchmark Approach for multiple reasons.

First, DuPont has not satisfied its burden to demonstrate that CSXT has market dominance over the three issue movements. The evidence demonstrates that there is a viable and cost-competitive truck alternative for both the plasticizer movements. And, DuPont's claims that the risk of contamination makes truck transportation infeasible is not supported by the

¹ See Dean Piacente Verified Statement at ¶¶ 3-5

² See *id.* at ¶ 5

evidence—the risk of contamination is minimal. Similarly, truck transportation is a viable alternative for the Amphill-Wyandotte synthetic plastic powder movement. In short, DuPont cannot satisfy its burden to prove market dominance for any of the three issue movements, and the Complaint should be dismissed without further consideration.

Second, DuPont’s “initial tender” of comparison groups do not consist of movements that are actually comparable to the issue traffic. While CSXT developed its comparison groups by using criteria that reflect its consideration of the real-world factors that drive pricing for the issue movements, several of the criteria used by DuPont for its initial tender are neither logical nor defensible. As a result, DuPont’s initial comparison groups consist of widely disparate and dissimilar movements that cannot be deemed “comparable” in any meaningful sense. CSXT’s comparison groups should be adopted if this case is not dismissed due to DuPont’s failure to demonstrate market dominance.

Third, DuPont’s proposal that the Board retroactively adjust its current RSAM calculations for 2002-2005 is entirely unjustified. The Board recently decided to apply a new Capital Asset Pricing Methodology (“CAPM”) for calculating rail carriers’ cost of capital *prospectively*. Departing from that practice by recalculating RSAM in this proceeding both poses severe practical hurdles and raises serious concerns about the legality and fairness of such retroactive rulemaking. And it would be improper for the Board to undertake such a far-reaching revision of its past determinations in this individual case adjudication.³

³ CSXT reiterates its objection to the Three Benchmark Approach itself and the rules and limitations the Board adopted to govern cases brought under that approach, and CSXT incorporates its prior discussion of its objections herein. *See* CSXT Opening at 8-14.

I. CSXT IS NOT MARKET DOMINANT OVER THE TRAFFIC AT ISSUE

The Complaint should be dismissed because DuPont has not satisfied its burden of demonstrating that CSXT has market dominance over the traffic at issue, and the Board, therefore, lacks jurisdiction over the challenged rates. Available evidence demonstrates that there is effective truck competition for all three of the movements at issue. This significant truck competition has been acknowledged by DuPont and it has constrained CSXT's rates. DuPont's claim that there is no effective truck competition for these movements is not supported by the record, and is at odds with substantial evidence that there is real and viable competition for transportation of the issue traffic.

The Board's rate jurisdiction is limited to traffic over which CSXT has market dominance. 49 U.S.C. § 10707(a-b) "[M]arket dominance is a threshold jurisdictional requirement," and DuPont acknowledges the complainant has "the burden of proof to show that there is not effective competition" for transportation of the traffic at issue. *Government of the Territory of Guam v Sea-Land Serv., Inc.*, STB W.C.C. 101, slip op. at 6 (Feb. 2, 2007), see *Garden Spot & N Ltd P'ship & Ind Hi-Rail Corp—Purchase & Operate—Ind R.R. Co Line Between Newton & Browns, IL*, I.C.C. No. 31953, 1993 WL 458881, at *1 n.5 ("rate complainant[] [has] *substantial burden of proof* to establish market dominance") (emphasis added). In short, DuPont has to do more than *assert* market dominance—it must *prove* market dominance. It has failed to do so.

The Board's market dominance analysis contains both quantitative and qualitative components.⁴ Assessing qualitative market dominance requires an examination of "the

⁴ CSXT does not contest that the issue movement's revenue-to-variable cost ("R/VC") ratio exceeds the jurisdictional threshold (sometimes mischaracterized as the ratio for quantitative market dominance) set forth in 49 U.S.C. § 10707(d)(1)(A).

competitive alternatives available to the shipper, including intramodal [and] intermodal competition” *Southwest R R Car Parts Co v Missouri Pacific R R Co* . STB Docket No 40073, slip op at 2 (Feb 11, 1998) The Board’s analysis is “based on the specific market involved, and not broad-brush generalities about competitive conditions in unspecified markets and considers potential, as well as actual, competition in determining whether alternatives exist” *Id* at 6 Whether a mode of competition is effective is a question of whether it is feasible—not whether it has been used in the past *Id* A rail carrier is not market dominant when “[the alternative] transportation is a competitive factor on movements from particular origin areas to the destinations” *Consolidated Papers, Inc v Chicago & North Western Transp Co* , 71 C C 2d 330, 337 (1991) Here, truck transportation is a competitive factor on all three issue movements, and DuPont has not proven market dominance

A. DuPont Has Not Proven Market Dominance for the Two Plasticizer Movements

Throughout the parties’ long business relationship, DuPont has consistently reminded CSXT that truck transportation is CSX’s primary competition for many of the movements covered by the Master Contract—including the three issue movements *See Kuzma V S* , Ex 4, ¶¶ 7-8 Before it filed this lawsuit, DuPont represented to CSXT that if it were to switch to trucks it could save significant costs associated with rail, including high ownership and lease costs, cleaning and maintenance costs, and high infrastructure maintenance costs at its receiving facilities *See id* at ¶ 7

[REDACTED]

[REDACTED] Now,

seemingly for purposes of this litigation, DuPont has reversed field to assert that trucking is not a feasible alternative. That assertion is unsupported and unconvincing, particularly in light of DuPont's pre-litigation conduct.

According to DuPont, the primary reason that truck shipments of plasticizers are not feasible is the risk of contamination during the loading and unloading process. See Opening Evid. at 11-12. Tellingly, however, DuPont does not offer *any* evidence of the actual risks of contamination. And in fact the risk of contamination is minimal. Data compiled by Transflo⁵ over the last ten years shows that it transloaded 687,000 rail cars of various bulk products (in liquid and dry form) from rail car to truck over the last ten years, and experienced only 47 incidents of contamination. See Ex. 10 (Contamination Data from Transflo), see also *Karn v. S.*, Ex. 4 at ¶ 4. This data represents a success rate of 99.993%, or conversely, a contamination rate of only 0.007%. In terms of truckloads, there were only 47 incidents of contamination out of more than 2.4 million truck transfers, which equals a contamination rate of 0.002%. The evidence demonstrates that, contrary to DuPont's unsupported assertions, any risk of contamination is minimal.

⁵ TRANSFLO, Terminal Services, Inc. is a CSXT subsidiary that specializes in transloading and handling bulk materials.

Similarly, DuPont's contentions that truck is much more costly than rail are not supported by the record [REDACTED]

[REDACTED]

[REDACTED] Such an "express acknowledgment of truck competition" proves that CSXT is not market dominant. *See Consolidated Papers*, 71 C C 2d at 338

[REDACTED]

[REDACTED] Thus, the record

demonstrates that comparable motor carrier rates⁶ impose competitive constraints on CSXT's pricing. Accordingly, CSXT does not have market dominance over these two movements.⁷ See *FMC Wyoming Corp v Union Pacific R R Co*, 4 S T B 699, 713-14 (2000)

Despite the existence of competitive truck rates, DuPont claims that additional costs associated with trucking render truck transportation infeasible. DuPont asserts that the truck rates do not include fuel surcharge and other costs not associated with rail, including possible

⁶ In addition, both these movements have transloading alternatives. When CSXT developed its rates for the two plasticizers movements at issue, CSXT considered *all* the competitive alternatives to both movements

Thus, DuPont's argument that the competitive alternatives pose a mere "outer limit" on the rates CSXT can charge is misplaced and inappropriate. Cf. *FMC Wyoming*, 4 S T B at 718 ("[Price] matches set by alternatives with *significantly higher* costs [that are not offset by costs associated with rail] is not enough to demonstrate effective competition") (emphasis added)

⁷ There is "no doubt that in certain circumstances product and geographic competition effectively limit railroad pricing," and a case where a shipper can completely shift its shipments to another destination is one such circumstance. *Market Dominance Determinations - Product and Geographic Competition*, 3 S T B 937, n 49 (1998). The Board abandoned consideration of evidence of product and geographic competition in stand-alone-cost cases not because such evidence was not relevant (as the Board acknowledged, such competition is relevant to market dominance), but rather because of the substantial discovery burdens it imposes on litigants. *Id.* at 10. Here no burdensome discovery on geographic competition was necessary, and the Board's rationale for not considering such evidence in SAC cases does not apply. This is relevant evidence bearing directly on the question of market dominance, and the Board should consider and address it before exercising jurisdiction over this movement

Thus, based on demonstrated source and geographic competition alone, the Board should find that CSXT does not have market dominance over the Heyden-Washington movement

detention and accessorial charges, and additional employee costs. DuPont's analysis fails to account for the significant *savings* of switching to truck transportation, including reduced inventory costs, elimination of rail car lease or ownership costs, and the possibility of reduced labor costs by using truckers to load and unload the product, instead of having DuPont operators perform loading-related duties at the plant. See *Kuzma V S*, Ex 3 at ¶¶ 7-8. These substantial cost savings could offset the additional costs DuPont claims it will incur if it shifts to truck.⁸ It is certainly true that "[t]here are significant costs associated with whatever method [DuPont] chooses", however, DuPont has produced "no evidence that the [additional] costs related to motor transport would exceed those related to rail transport." *FMC Wyoming*, 4 S T B at 712. DuPont has therefore failed to carry its burden to demonstrate market dominance.

B. DuPont Has Not Proven Market Dominance for the Plastics Movement

DuPont's argument that truck transportation is not a competitive alternative to CSXT's rail service for the Amphill-Wyandotte synthetic plastic powder movement because truck costs are "significantly" higher than rail costs is not consistent with the facts or the law. First, truck rates are *not* significantly higher than CSXT's challenged rate. According to DuPont's Opening Evidence, [REDACTED]

[REDACTED] In other words, there is only a [REDACTED] price differential between truck and rail rates. The existence of competitive and comparable rates supports a finding of intermodal competition. See

⁸ This is not to say that truck transportation for these movements is superior to rail transportation. CSXT competes with truck transportation both by providing competitive rates and by providing its shippers, including DuPont, with a service that closely matches their supply chain needs and that is often safer and preferred by customers. Contrary to DuPont's assertions, however, these factors are not market dominance characteristics, but instead service and quality advantages that render rail a superior transportation service.

⁹ As DuPont states in its Opening Evidence, approximately 3.5 trucks are needed to handle the volume moved in one rail car. See DuPont Opening Evid at 18.

Salt River Project Agricultural Improvement & Power District v Atchison, Topeka & Santa Fe Ry Co, 1 I.C.C. 2d 684, 693 (1985) (comparable motor carrier rate, which was only 3% higher than defendant's rate, supported finding of intermodal competition)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹¹ This cost-competitive option disproves DuPont's claim that CSXT has market dominance over the issue movement

Even setting aside the transloading alternative, the small differential between CSXT's line-haul rates and truck transportation is not sufficient to demonstrate that the truck alternative is infeasible. See *Int'l Minerals & Chems Corp v Burlington Northern, Inc*, ICC Docket No 38084S, slip op at 10 (May 12, 1986) (finding that the 29% price differential between truck and rail costs did not *per se* warrant a conclusion that the trucking alternative was infeasible)

DuPont must demonstrate that "the differential is so high (for this industry and this product) as to render truck movement an impractical competitive alternative." *Id* It is DuPont's burden to "address the anticipated effect [the] differential would have on its ability to compete." DuPont has not even attempted to make such a showing, and thereby has failed to carry its burden of proving market dominance

DuPont's other arguments that trucking is not a feasible alternative are unpersuasive. First, DuPont claims that switching to trucks would increase congestion at its customer's facility

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹¹ Moreover, because the Wyandotte destination is served by both Norfolk Southern ("NS") and CSX. DuPont could source the issue commodity from another location served by NS, which also exerts further competitive pressure on CSX's rail rates for the plastics issue traffic. See *Karn V S.*, Ex 3, at ¶ 2 c

██████████ See *FMC Wyoming*, 4 S T B at 713 (increase in traffic of about 15 trucks per day was insignificant) *Second*, DuPont argues trucking is infeasible because 1) trucks require additional storage capacity at its customer's facility, 2) trucks are subject to detention and demurrage charges, and 3) there are insufficient pneumatic trailers available to handle all its traffic. It is well-established, however, that an alternative carrier need not be able to ship 100% of the shipper's requirements in order to provide effective competition. See *Aluminum Ass'n, Inc. v Akron Canton & Youngstown R R Co*, 367 I C C 475, 484 (1983) (holding that a competing mode does not have to be capable of handling substantially all, or even a majority, of the subject traffic to be considered effective competition). So long as some volume can be diverted and impose competitive constraints on CSXT's pricing, the Board should find effective competition exists.

Third, DuPont argues that as a solid, plastics are only marginally less susceptible to contamination than plasticizers. As demonstrated above, however, the *de minimis* risk of contamination is insufficient to support a finding that motor carrier transportation, or intermodal transportation involving transloading are not feasible alternatives. See section I A, *supra*.

Moreover, DuPont provides very little evidence to support its assertions regarding the purported infeasibility of truck transportation. It is incumbent on DuPont to produce *evidence* to meet its burden of demonstrating that trucking is not a viable alternative, particularly in light of the demonstrated existence of a competitive truck rate. It is not CSXT's burden to prove it does not have market dominance, it is DuPont's burden to prove that CSXT has market dominance. At bottom, DuPont has failed to produce sufficient evidence to carry its burden for each of the

issue movements, and the Board should dismiss DuPont's Complaint in its entirety for lack of market dominance¹²

II. COMPARISON CRITERIA AND FINAL COMPARISON GROUP

A. Introduction

The keystone of the *Simplified Standards* procedures for Three Benchmark cases is the development of an accurate comparison group for the issue traffic. Under the Three Benchmark approach, the R/VC_{COMP} derived from the comparison group is the Board's "primary evidence of reasonable R/VC levels" for the issue traffic. See *Simplified Standards for Rail Rate Cases*, Ex Parte 646 (Sub-No. 1), slip op. at 17 (served Sept. 5, 2007) ("*Simplified Standards*"). For this reason, the Board emphasized that selection of an appropriate comparison group would require a careful review of "a variety of factors" that relate to comparability. *Id.* Indeed, if the admittedly "rough and imprecise" (*id.* at 73) Three Benchmark approach is to have any meaning, the Board must carefully select a comparison group that is as analogous to the issue traffic as possible. A rate prescribed from an ill-fitting comparison group is destined to be inaccurate and arbitrary.

¹² DuPont has failed to substantiate its allegations that CSXT has market dominance over the issue movements. As the party with the burden of proof to establish market dominance, DuPont was required to produce any and all evidence of such market dominance in its case-in-chief, in order to afford CSXT the opportunity to address and respond to that evidence. See *FMC Wyoming*, 4 S T B at 790, 805 (new evidence could not be offered on rebuttal because the defendant would not have the opportunity to respond). DuPont presented its case-in-chief on market dominance in its Opening Evidence, and the Board's rules prohibit it from introducing any new evidence subsequently to attempt to meet its threshold burden of proving market dominance. Therefore, any attempts by DuPont to introduce new evidence on reply or rebuttal would be untimely, and should not be considered by the Board. See *Duke Energy Corp v CSX Transportation, Inc.*, STB Docket No. 42070, slip op. at 4 (Mar. 21, 2003) ("Rebuttal may not be used in [rate] cases as an opportunity to introduce new evidence that could and should have been submitted in the party's case-in-chief"), *General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases*, STB Ex Parte No. 347 (Sub-No. 3), slip op. at 5 (Mar. 9, 2001) ("[T]he party with the burden of proof on a particular issue must present its entire case-in-chief in its opening evidence. Rebuttal may not be used as an opportunity to introduce new evidence that could and should have been submitted on opening to support the opening submissions.")

For this reason, CSXT has spent significant time and effort to identify appropriate comparability criteria for each of the issue movements in DuPont's three complaints. This effort has involved extensive consultation with CSXT marketing officers about the relevant markets for the issue movements and the factors that actually drive prices in the market. Through this process, CSXT has identified comparable movements by applying a coherent set of criteria that correspond to the real-world factors that affect pricing for the issue movements. DuPont, by contrast, has not done this—as the discussion below illustrates. Accordingly, the Board should adopt CSXT's comparison groups.

CSXT and DuPont each submitted an "initial tender" of comparable movements with the Opening Evidence filed on February 4, 2008. Each party relied upon one comparison group to evaluate the challenged plastics rate, and a separate comparison group to evaluate both of the challenged plasticizers rates. *See CSXT Opening Evid. at 21-22, see generally Crowley v S.* Based on its experience and knowledge concerning the issue movements and relevant transportation markets, CSXT developed a set of criteria designed to select a meaningful group of movements that are "comparable" to the issue traffic. DuPont, on the other hand, used a relatively small number of broad parameters to select large groups of disparate movements for "comparison" purposes. CSXT demonstrates that DuPont's approach indiscriminately lumps together markedly different movements to form a diverse collection that simply are not "comparable" – either to the issue traffic or to one another – in any meaningful sense.

Below CSXT discusses in more detail the selection criteria by the two parties and the resulting differences in their respective comparison groups. CSXT first describes how the parties used some similar initial selection criteria. CSXT also explains that it adjusted certain of its selection criteria in order to eliminate otherwise distracting debates about those factors and focus

on the more significant differences between the parties' comparison groups. The vast majority of the differences between the parties' initial comparison groups is attributable to two factors. First, DuPont did not limit its comparison groups to like commodities. Instead, DuPont included movements of wholly unrelated commodities, such as farm, food, and stone products, as the majority of the movements in each of its comparison groups. Second, DuPont did not differentiate between movements with and without fuel surcharge provisions, thereby ignoring the fact that the challenged rates include a fuel surcharge, and that the Waybill Sample allows for ready identification of traffic for which CSXT collects a fuel surcharge. By failing to focus its selection criteria, DuPont generated inferior comparison groups that include less comparable traffic than the group proffered by CSX.¹³ Accordingly, CSXT's groups are "most similar in the aggregate to the issue movements" of plastics and plasticizers. *See Simplified Standards* at 18.

B. Similar Selection Criteria Applied by Both Parties

CSXT and DuPont applied four initial selection criteria that are essentially the same in developing their plastics and plasticizers comparison groups. First, both parties followed the direction of *Simplified Standards* by limiting potentially comparable movements to those generating R/VC ratios greater than 180%.¹⁴ Second, the parties each limited potentially comparable movements to the same broad freight car type as that used by the issue traffic covered hoppers for plastics and tank cars for plasticizers. Third, both parties limited potentially

¹³ DuPont's comparison groups for plastics and plasticizers each consist of more than 1,000 records, *more than 35 times larger* than one of the comparison groups it submitted in Docket No. 42100 and *more than 50 times larger* than its comparison group in Docket No. 42101.

¹⁴ While the parties apply this criteria similarly in identifying their comparison groups, this would not be the case if the Board were to accept DuPont's proposal to use the new CAPM model to re-estimate – retroactively – the cost of equity, as this would require recalculation of CAPM-based R/VC ratios for the potentially comparable movements, and require a separate determination of which traffic is in the "R/VC>180%" category.

comparable movements to those moving in private equipment, the type used by all issue traffic in this case Fourth, because each of the issue commodities has been identified as non-hazardous,¹⁵ the parties limited potentially comparable movements to traffic that does not report a Hazmat code (49-series header) in the Waybill Sample¹⁶

C. Similar Factors Applied Differently by the Parties

In their opening evidence, CSXT and DuPont also addressed similar parameters, but applied different approaches, which in turn produced different comparable-movement results for two types of traffic

- (1) Interline Traffic, and
- (2) Issue Traffic

First, because the challenged rates apply to movements handled solely by CSXT, each party excluded from its comparison groups records that do not identify CSXT as the originating and the terminating carrier in the Waybill Sample. See CSXT Opening Evid at 17, DuPont Opening Evid at 23. Review of the verified statement and workpapers of DuPont's consultant Mr. Crowley, indicates that DuPont also excluded Waybill Sample records that identify no carriers other than CSXT, but report a "rebill code" that suggests the traffic may be interchanged with another carrier.¹⁷ In order to eliminate confusion and remove any basis for arguing that this

¹⁵ While certain shipments of plasticizers are classified as Hazmats, DuPont has identified the issue commodities as non-hazardous. See DuPont Am Compl at ¶ 4

¹⁶ As explained below, DuPont's use of this Hazmat approach in conjunction with its overly broad group of commodities resulted in the inclusion of a significant number of Hazmat movements in its "non-Hazmat" comparison groups for plastics and plasticizers. See section II D 1, *infra*

¹⁷ In many instances, this rebilled traffic may identify shipments moving under "Rule 11" accounting, where a carrier provides a rate for a portion of an interline move. In such cases, the revenues in the Waybill Sample would not be subject to the same distortion that results from allocating a portion of through revenues to CSXT, but instead would reveal actual CSXT revenues for the movement. Because the Board has limited comparison group evidence to

factor suggests that DuPont's comparison groups are superior in this respect. CSXT accepts and applies to its final comparison groups DuPont's proposed limitation of potentially comparable movements to traffic that reports a rebill code of zero *See Crowley V S* , at 8

Second, each party sought to exclude issue-traffic movements from its comparison groups [REDACTED]

[REDACTED] CSXT determined the records to exclude by reviewing the traffic of the issue commodity moving from the origin to the destination identified in the complaint *See CSXT Opening Evid* at 16 DuPont, by contrast, limited its identification of issue traffic to records bearing car initials indicating movements in DuPont equipment (*i e* , freight car initial "DUPX") [REDACTED]

[REDACTED] DuPont's criterion failed to identify all of the issue traffic, and thus failed to eliminate 18 issue movement records from its plasticizers comparison group *See CSXT work paper "42099 reply Analysis.xls"* As CSXT explained in its opening evidence, a sound comparison group must exclude the issue traffic This defect alone warrants rejection of DuPont's comparison group

D. Criteria Applied by CSXT But Not by DuPont

CSXT further refined its potentially comparable movements to include traffic that also met five additional criteria

Waybill Sample and publicly available data, however, CSXT is prohibited from using non-public information to demonstrate which moves should be included and which should be excluded

- (1) Similar Commodities,
- (2) Fuel Surcharge.
- (3) Domestic,
- (4) Single-Car Shipments, and
- (5) CSXT Single-Line

DuPont applied none of these criteria. The vast majority of the differences between the parties' comparison groups are the result of DuPont's failure to apply the first two criteria. The following sections describe the extremely overbroad "comparison" groups generated by DuPont's failure to screen out dissimilar commodities and movements not subject to a fuel surcharge. CSXT then discusses the initial comparison-group differences attributable to the three remaining factors. Regarding these three factors, CSXT accepts DuPont's position for one criterion and explains that the other two are rendered moot by other factors. Accordingly, these three factors no longer account for differences between the parties' comparison groups, focusing the assessment of comparability to the issue traffic on the first two items.

1 CSXT's Criteria Select Like Commodities, DuPont's Criteria Do Not

It is truly remarkable that DuPont gave no weight to the type of commodity in selecting "comparable" movements. *Simplified Standards* made abundantly clear that comparison groups should consist of similar commodities. See *Simplified Standards* at 17 ("[W]e will favor a comparison group that consists of movements of like commodities.") Ignoring this direction, DuPont did not limit the types of commodities it selected, and instead baldly asserted that "the proper comparison group should include all commodities transported in single-line CSXT service for a similar distance in the same equipment." In addition to flouting an express requirement of *Simplified Standards*, DuPont's indiscriminate inclusion of any and all commodities in its comparison groups is inconsistent with the purpose of identifying a comparison group – to gather and distill "comparable" movements (and separate them from movements that are not comparable) that may serve as a basis for a rate comparison. As CSXT

explained on opening, plastics and plasticizers are each specialized commodities classified in specific subcategories of the STCC 28 header, which broadly covers all “Chemicals or Allied Products”¹⁸ DuPont Opening Evid at 25-26 DuPont’s approach, however, would not even limit its comparison groups to commodities falling within the broad two-digit STCC category, much less impose any tighter “like commodity” limit

DuPont misconstrued language in *Simplified Standards* as supporting its approach Despite acknowledging the Board’s admonition that a comparison group should “consist of like commodities,” DuPont proceeded to stand that requirement on its head, defining “like commodities” as those that have similar URCS variable costs DuPont Opening Evid at 25¹⁹ What the Board was explaining in the passage relied upon by DuPont was simply that, everything else being equal, movements of similar commodities will likely have similar URCS costs See *Simplified Standards* at 17 Through logical sleight-of-hand and selective quotation, DuPont contorted this statement to assert the inverse, *viz*, if movements have similar variable costs, then, without more, they are like commodities *Compare id with* DuPont Opening Evid at 25 This is both fallacious logic and contrary to common sense²⁰ Just as the statement that “all elephants are animals” does not mean that all animals are elephants, the statement that movements of similar commodities will likely have similar URCS costs does not mean that all

¹⁸ See User Guide for the 2004 Surface Transportation Board Carload Waybill Sample at 155 (July 31, 2005)

¹⁹ In addition, use of a cost-based criterion to select comparable movements would contravene a foundational principle of modern railroad regulation – carriers are expected to engage in demand-based pricing (not cost-based pricing)

²⁰ The variable costs for the potentially comparable movements are based upon CSX1’s unadjusted system-average URCS While such costs are predicated on a variety of factors, including commodity, they largely fail to account for differences in the commodity being handled, the relative demand for the commodity, the volume, whether it is hazardous material, and the myriad market and commercial considerations that determine whether or not particular movements are comparable

movements generating similar URCS costs are movements of similar commodities. To the contrary, movements of very different commodities of different values, having different markets, and very different transportation markets, demand elasticities, and characteristics can and do have similar unadjusted URCS system average costs.

Moreover, DuPont's own statements and positions in the other two pending cases flatly contradict its illogical position in this case and reveal that position to be both disingenuous and deceptive. In its opening evidence in the chlorine case, DuPont stated

In Simplified Standards, the Board noted that one of the factors that it would review is the "commodity type" in order to determine comparability. The Board has not provided any further guidance on what makes a commodity "similar."

DuPont Opening Evid. at 19, STB Dkt. No. 42100 (Feb. 4, 2008) (emphasis added) ²¹

Accordingly, in the chlorine case (Dkt. No. 42100) – unlike this case – DuPont does not use "similar URCS costs" as a selection criterion.

In the pending nitrobenzene case, DuPont used the identical language set forth in the block quotation from its chlorine case submission. See DuPont Open Evid. at 18, STB Dkt. No. 42101 (Feb. 4, 2008). As in the chlorine case, DuPont's nitrobenzene evidence says nothing attempting to equate similar URCS costs to "like commodities," and does not use similarity of URCS variable costs as a comparison group selection criterion. See *id.* at 18-19. DuPont's opposite and irreconcilable definitions of similar commodities filed in three pending cases on the

²¹ This stands in stark contrast to DuPont's misstatement in this case that the Board had further indicated that "similar variable costs" should be equated with "similar commodities." See DuPont Open Evid. at 25, STB Dkt. No. 42099 (Feb. 4, 2008) (DuPont claimed that "in *Simplified Standards*, the Board has focused on the transportation and cost characteristics to determine if a commodity is "similar" for purposes of comparability. A 'like commodity' is one in which the 'variable cost calculation of the issue movement and the comparison group will be similar" [sic]).

very same day show that DuPont’s commodity selection criteria and arguments are disingenuous and entirely result-driven

Indeed, had the Board intended that parties include in their comparison groups all movements with similar URCS costs, it need not have advised parties to identify movements of similar commodities (nor even to exercise any judgment at all) – it could have simply instructed them to engage in the mechanical exercise of finding all movements with similar URCS costs and loading them into their comparison group. While this is apparently what DuPont did, this is not a principled approach, and it has no value for purposes of identifying actually comparable movements. The Board should reject this major criterion proffered by DuPont – and hence its entire comparison group – as meaningless, manipulative, and self-serving.

a Plastics

DuPont’s refusal to exclude dissimilar commodities results in a broad assortment of disparate products in the large collection of movements it proffered as “comparable” to the plastics issue movement. Table 1 highlights the disparate commodities that resulted from DuPont’s approach, showing that *more than two-thirds* of its plastics comparison group are not movements of plastics, and many have little-to-nothing in common with plastics.

Table 1

STCC (2-digit, except where noted)	Description	Number of Records	% of Comparison Group
32-	Stone, Clay, Glass	157	14%
20-	Food Products	128	11%
01-	Farm Products	116	10%
	Other Non-Chemicals	15	1%
	Total, Non-Chemicals	416	37%
28-, excl. 28211	Non-Plastics	363	32%
28211-	Plastics	352	31%

Moreover, even DuPont's proposed comparable movements that happen to fall within the broad two-digit STCC 28 category (which covers plastics) consist of mostly non-plastics commodities²² For example, products in DuPont's comparison group for plastic powder include the following chemicals and compounds, none of which bears much relevant resemblance to plastic powder terephthalic acid (177 records – 16% of its entire comparison group)²³, ammonium sulphate (57 records), soda ash (24 records), diammonium phosphate fertilizer (23 records),²⁴ phosphate (18 records), and carbon black (14 records)

In stark contrast, CSXT limited its potentially comparable plastics movements to those commodities included in the far narrower five-digit STCC header 28211, defined as "Plastic Materials or Synthetic Resins" See CSXT Opening Evid at 20, User Guide, *supra* note 15 CSXT's limitation to like commodities through use of a transportation industry standard,

²² While CSXT used the STCC 28 header in its initial screening of records from the Waybill Samples, it did so as a gross screen and programming convenience for querying the nearly one-half million records See CSXT Opening Evid at 15-16 CSXT then further refined the commodities to be included in its comparison groups for each of the plastics and plasticizers. See CSXT Opening Evid at 20, 21

²³ Terephthalic Acid ("TA") is a feedstock used in the production of plastics, while synthetic plastic powder are a more downstream, semi-finished product

²⁴ Diammonium phosphate ("DAP") freight shipments are subject to strong modal competition

hierarchical classification system provides a specific comparability factor that is vastly superior to DuPont's failure to give commodity any consideration

Comparison of revenues generated by the parties' radically different comparable groups further illustrates the differences between the diverse and dissimilar commodities that DuPont included in its comparison group, and the plastics included in CSXT's comparison group. Chart 1 summarizes by commodity category the average revenue per car-mile for the movements in DuPont's comparison group. As the chart demonstrates, the revenues for the plastics commodities are significantly higher than those of the other traffic in DuPont's comparison group, ranging from [REDACTED]. See CSXT work paper "42099 Reply Analysis.xls". This also serves to illustrate that the more similar commodities in CSXT's comparison group have transportation demand characteristics that are more comparable to the issue traffic than the disparate movements included in DuPont's group. While of course these revenues are an imperfect proxy for the relative demand elasticities for these products, the Board's limitation of admissible comparison-group evidence to data from the Waybill Sample and public sources means such relative rate levels are one of the best available indicia of relative levels of demand and demand elasticity in these cases.²⁵ See *Simplified Standards* at 17 (commodity type and

²⁵ DuPont may respond that this discussion simply seeks to advance CSXT's interests by asserting that lower-rated traffic is not comparable. Such a response would miss the point. The purpose of this discussion is to show that the majority of movements included in DuPont's comparison group are moving at rates that are significantly different from those generated by movements of the issue traffic's commodity group. The more refined identification of like commodities that CSXT's comparison group consists of commodities and movements whose markets and demand characteristics are much more similar than those of DuPont's indiscriminate collection of commodities

demand elasticity are two of only four factors expressly listed as relevant comparability factors)²⁶

Chart 1

REDACTED



b Plasticizers

Here again, DuPont's failure to apply a criterion identifying similar commodities results in a comparison group for plasticizers that includes movements of a wide variety of disparate commodities. Table 2 shows that 40% of the movements that DuPont would include are not

²⁶ The R/VC >180% dividing line provides a rough binary separation between traffic that is more demand elastic and less demand elastic, but because the Board requires the parties to include only traffic with R/VCs greater than 180%, this provides no information about the relative elasticities of demand of any traffic eligible to be included in a comparison group

even STCC 28 “Chemicals or Allied Products” and that another 45% are various types of other chemicals that are not even considered “Plastics Intermediates,”²⁷ neither of which is similar to the plasticizers commodity carried by the issue movements

Table 2

STCC (2-digit, except where noted)	Description	Number of Records	% of Comparison Group
20-	Food Products	202	19%
29-	Petroleum Products	87	8%
40-	Waste or Scrap	67	6%
32-	Stone, Clay, Glass	41	4%
Other Non-Chemicals		29	3%
Total, Non-Chemicals		426	40%
28-, excl. CSXT 28003	Non-Plastics Intermediates	477	45%
CSXT 28003	Plastics Intermediates	160	15%

CSXT, in contrast, limited its potentially comparable movements to those commodities included in “CSXT-28003,” a general public tariff that covers “Plastics Intermediates,” including plasticizers. *See* CSXT Opening Evid. at 21. CSXT further explained that these commodities were similar, sharing common characteristics, uses, and markets. *Id.* Most important, CSXT charges the same rate for the movement of every commodity included in CSXT-28003 tariff over the same lane. That is, if a movement is between the same origin and destination, CSXT applies the same rate for every commodity covered by the tariff. CSXT’s collection of these commodities in a single tariff shows that its marketing, sales, and commercial departments, acting in the normal course of business and exercising their transportation market expertise and knowledge, find these commodities so similar that they charge the same rate for

²⁷ As explained below and in CSXT’s Opening evidence, the “Plastics Intermediates” group includes plasticizers. *See* CSXT Opening Evid. at 21-22.

all CSXT's comparable group is vastly superior to that generated by DuPont, which fails to give like-commodities meaningful consideration²⁸

DuPont's comparison group consists of widely disparate and unrelated commodities. The predominant non-STCC 28 commodities that DuPont loaded into its comparison group include Corn Syrup (181 movement records – nearly 20% of DuPont's entire comparison group), Crankcase Drainings (38), Waste Water (26), and Limestone Slurry (24) None of these commodities could seriously be deemed "comparable" to plasticizers

Moreover, review of the commodities within the STCC 28 category but outside of the items covered by CSXT's "Plastics Intermediates" tariff reveals yet another problem, and lack of comparability, produced by DuPont's approach By failing to use a like-commodity criterion, DuPont included in its comparison group movements of hazardous materials that the Waybill Sample did not specifically flag as such As a result, DuPont's comparison group includes many commodities that are hazardous materials, and even certain Toxic by Inhalation Hazard ("TIH") commodities, for which the corresponding STCC 49 was not included These include Chlorine (41 records), Hydrochloric Acid (35), Phenol (28), Sulphuric Acid (23), and Caustic Soda (21)²⁹ DuPont conceded that an appropriate comparison group for these movements should exclude hazardous materials See DuPont Opening Evid at 25, Crowley V S at 8-9 But DuPont's failure to limit its comparison group to like commodities resulted in inclusion of numerous hazardous materials For all of the foregoing reasons, CSXT's comparison group is thus

²⁸ In fact, while DuPont made no reference to CSXT's public tariff covering plasticizers, it argues in Docket No 42101 that another public tariff "represents strong evidence" regarding similar demand elasticities, and relies upon the commodities in the tariff as an indicator of comparability See DuPont Opening Evid , Dkt No 42101, at 20 (filed Feb 4, 2008)

²⁹ Chlorine and Sulphuric Acid are TIH commodities of which DuPont included movements in its comparison groups for evaluating the chlorine rates challenged in Docket No 42100 Similarly, Phenol represents the majority of the moves in DuPont's comparison group for evaluating the rate challenged for hazardous material nitrobenzene in Docket No 42101

substantially more similar to the plasticizer issue movements than the group proffered by DuPont, and the Board should adopt CSXT's comparison group

Similar to the demonstration for the plastics comparison groups above, the commodities that DuPont included in its plasticizers comparison group have sufficiently different revenues from the Plastics Intermediates commodities that CSXT included. Chart 2 summarizes by commodity category the average revenue per car-mile for the movements in DuPont's comparison group. As the chart illustrates, the revenues for the [REDACTED] commodities are higher ranging from [REDACTED] higher than those of the other traffic in DuPont's comparison group. See CSXT work paper "42099 Reply Analysis.xls". Again, while the revenue comparison is only a rough proxy for measures of relative demand that are not readily available and hence not admissible in this proceeding, it reveals that the vast majority of the potpourri of disparate movements generated by DuPont's approach are not comparable to the group of commodities that includes the issue traffic. CSXT's approach of limiting the selection to commodities that it considers similar in the normal course of its business and to which it applies the same pricing structure results in the comparison group that is "most similar in the aggregate to the issue movements."

Chart 2

REDACTED



2 *DuPont's Failure to Consider Fuel Surcharge*

While DuPont's failure to incorporate any commodity selection criteria alone renders unacceptable its comparison groups for plastics and for plasticizers, its failure to differentiate between movements that are and are not subject to a fuel surcharge further undermines its proffered groups. CSXT appropriately limited its comparison groups to only those movements for which CSXT applied a fuel surcharge. *See CSXT Opening Evid* at 18. The challenged rates carry a fuel surcharge. Other moves to which CSXT applies a fuel surcharge are more likely to reflect the same market dynamics as the issue traffic. Traffic to which a fuel surcharge does not

apply are likely to be less comparable³⁰ CSXT may not have been able to apply a fuel surcharge due to market factors that are not comparable to those of the issue traffic, or in lieu of applying a surcharge it may have negotiated other terms that would not be reflected in the R/VC for that movement. Regardless of the marketplace reason that some movements have fuel surcharges and others do not, it cannot be seriously disputed that, holding other factors constant, movements with fuel surcharges are more similar to one another than a collection of movements with and without fuel surcharge provisions. CSXT's use of this comparability factor – which is readily identified from the Waybill Sample – renders its comparison groups for plastics and plasticizers superior to DuPont's proffered group.

3 CSXT Selection Criteria from Opening that No Longer Account for Differences Between the Parties

In order to reduce comparison factor disputes, and to eliminate confusion and diversion from the most important differences between the parties' selection criteria, CSXT has eliminated differences between the parties related to three selection criteria it used in its Opening evidence.³¹ First, CSXT excluded shipments that originated or terminated outside the United States from its potentially comparable movements, due to the differing laws, regulatory, and reporting requirements, and other challenges in performing reliable comparisons of revenues and costs.³² *See* Opening Evid. at 17-18. DuPont, by contrast, included 40 and 51 records for

³⁰ Because of fuel rate price increases and volatility this decade, CSXT has endeavored to increase the "coverage" of its fuel surcharge wherever possible. Those movements that do not have a fuel surcharge, despite CSXT's effort, have commercial considerations that distinguish them from the increasing majority of CSXT movements covered by fuel surcharges.

³¹ This is due to one adjustment that CSXT makes to its Reply comparison group, the application of other criteria, and the Board's limitation that the parties rely only upon moves that were included in one of the parties' opening comparison groups.

³² After the filing of its opening evidence, CSXT determined that it had inadvertently misapplied this filter, resulting in the inclusion in its plastics and plasticizers comparison groups of certain shipments originating from Sarnia, Ontario, a station on the U.S.-Canadian border.

international shipments in its comparison groups for plastics and plasticizers, respectively. In order to remove any basis for DuPont to contend that this factor suggests DuPont's comparison groups are superior, CSXT accepts DuPont's approach.³³ For its final comparison groups, CSXT removes its country of origin or destination criterion.

Second, while CSXT limited its potentially comparable movements to the "single-car" shipments (*i.e.*, less than 6 carloads) like the issue traffic, DuPont included shipments that were waybilled in multiple-car or trainload blocks. Compare CSXT Opening Evid. at 17 with DuPont Opening Evid. at 25. Although such multiple-car and trainload shipments represent 120 records in its comparison group for plastics, virtually all (97%) are shipments of non-plastics commodities.³⁴ Further, none of the four plastics shipments in multiple-car blocks from DuPont's comparison group were movements to which a fuel surcharge applied. As none of DuPont's multiple-car or trainload shipments would be included in CSXT's comparison group due to application of CSXT's like commodities and fuel surcharges criteria, the application of a "single-car shipment" criterion does not represent a difference between the parties' comparison groups in this case. Stated differently, if the Board adopted CSXT's comparison group, it would not be excluding movements that DuPont selected based on ignoring the single-car-multiple-car distinction.

Third, CSXT also excluded from potentially comparable movements shipments that were originated or terminated by a short-line or switching carrier, as the Waybill Sample does not

³³ Here, and elsewhere, when CSXT accepts a DuPont position on a selection criterion, it does so for the sole purpose of limiting the disputes between the parties regarding comparison criteria in this specific case. Although CSXT accepts a DuPont approach for that purpose only, such acceptance does not necessarily indicate that, as a general matter, CSXT agrees that use (or non-use) of a particular criterion is appropriate for purposes of identifying comparable movements.

³⁴ These types of shipments comprise only 5 of DuPont's comparison group for plasticizers.

accurately report CSX1's portion of the costs and revenues of such movements³⁵ See CSXT Opening Evid at 17 While DuPont's comparison groups for plastics and plasticizers included 43 and 46 such movements, the vast majority (85%) were associated with non-chemicals (STCC 28) traffic For the 13 records representing movements of like commodities in DuPont's comparison groups in which a short-line or switching carrier participated, none has a fuel surcharge Because they would be excluded from CSXT's comparison groups regardless of whether the movement was originated or terminated by a short-line or switching carrier, the "no short-line carrier" criteria does not represent a difference between the parties in this case

E. More Restrictive Criteria Applied by DuPont

There is one area where DuPont's selection criteria were more restrictive than those used by CSXT on opening – length of haul Specifically, while CSXT explained that a group of comparable movements could be obtained by excluding that traffic for which length of haul generally has the most effect – movements of distances shorter than 200 miles – DuPont selected only those movements whose length is within a certain distance of the length of each issue traffic movement Compare CSXT Opening Evid at 17 with DuPont Opening Evid at 24 While CSXT is willing to accept, solely for the purposes of focusing the dispute on the factors contributing significantly to the parties' differences, a more limited mileage criterion, it must correct two errors that DuPont committed in performing its mileage selection

First, DuPont states that while it selected movements for the comparable group whose loaded miles are plus or minus 150 miles of the distance traveled by the issue traffic, it did so "rounded to the nearest 50 miles" See DuPont Opening Evid at 24 DuPont explains that this would result in the inclusion of movements between 600 and 900 miles for the plastics issue

³⁵ CSXT used the Freight Station Accounting Code ("FSAC") information reported in the Waybill Samples to identify such movements

traffic, which DuPont claims moves 772.1 loaded miles. DuPont has provided no support for this anomalous rounding approach, nor for the unnecessary and distorting proposition that the resulting comparison group for the plastics movement, for example, should include traffic that travels 172.1 miles shorter than the issue traffic to 127.9 mile longer, a 35% disparity. In this Reply, CSXT applies DuPont's factor of plus or minus 150 miles to the issue traffic's loaded miles, without unnecessary and distorting rounding. See CSXT work paper "42099 Reply Analysis.xls"

Second, DuPont identified its comparison group based on movements that were within 150 miles of the purported loaded miles (estimated by PC Rail) that it submitted with its Amended Complaint. Compare DuPont Opening Electronic work paper "NON-HAZ Issue Movement Miles.pdf" with DuPont Am Compl at 3. CSXT provided with its Answer to the Amended Complaint records of the actual loaded distances traveled by the issue traffic in 2007, and continued to rely upon those mileages in its Opening Evidence. See CSXT Answer at 5, work paper "detailed_movement_record_42099.xls". DuPont has provided no evidence in opposition to CSXT's actual loaded miles. Table 3 summarizes the differences between the parties.

Table 3

Commodity	Origin	Destination	DuPont	CSXT	Diff	% Diff
Plastics	Amphill, VA	Wyandotte, MI	772	820	48	6%
Plasticizers	Heyden, NJ	Duart, NC	592	714	123	21%
Plasticizers	Heyden, NJ	Washington, WV	590	646	56	9%

--
For this reply filing, CSXT applies DuPont's factor of plus or minus 150 miles (without rounding) to the actual loaded miles of the issue traffic movements³⁶ See CSXT work paper "42099 Reply Analysis.xls"

F. Summary

CSXT's selection criteria produce much superior comparison groups for the plastics and plasticizers movements than DuPont's overbroad collection of disparate movements. Based on the modifications that CSXT makes in this Reply,³⁷ the unadjusted R/VCs from the Waybill Samples – before consideration of the market changes from the 2002-2005 base period to 2007 – are [REDACTED] for the plastics comparison group and [REDACTED] for both plasticizers comparison groups. The following chart presents the unadjusted R/VCs from each party's opening evidence, for the records that were common to both parties' initial tenders,³⁸ and for CSXT's final comparison groups.³⁹

³⁶ The actual distance of the Duart plasticizer movement is nearly 70 miles longer than that to Washington, an issue movement that DuPont has now discontinued. As a result, there are two Waybill Sample records for even longer shipments that are within 150 miles of the Duart move, but more than 150 from the Washington move. While this produces two comparison groups, one with the two records and one without, the average unadjusted R/VCs differ by less than one-half of one percentage point.

³⁷ As explained above, CSXT modifies its Opening comparison groups for plastics and plasticizers to (1) exclude records coded as rebilled, (2) include international traffic, and (3) include only movements within 150 miles of the issue traffic.

³⁸ *Simplified Standards* provides that any movement that is in both parties' initial tenders is "required to be included in each side's final comparison group," unless there is agreement by the party to exclude it. *Simplified Standards* at 18.

³⁹ For convenience, CSXT shows the results for the plastics movement and only the Duart plasticizers movement.

Chart 3

REDACTED

	Number of Records	RVC	RSAM Adjusted RVC	Upper Boundary
Plastics in Covered Hoppers (Amphill, VA - Wyandotte, MI)				
2007 Indexed by Systemwide Chemical Increases	132	█	█	█
2007 with Actual Revenues Where Available	132	█	█	█
Plasticizers in Tanks (Heyden, NJ - Duart, NC)				
2007 Indexed by Systemwide Chemical Increases	89	█	█	█
2007 with Actual Revenues Where Available	89	█	█	█
Plasticizers in Tanks (Heyden, NJ - Washington, WV)				
2007 Indexed by Systemwide Chemical Increases	87	█	█	█
2007 with Actual Revenues Where Available	87	█	█	█

III. RSAM, ADJUSTMENTS, AND APPLICATION OF BENCHMARKS

A. The Adjustments Proposed by CSXT Are Appropriate and Necessary

As CSXT explained in its opening evidence, in addition to selecting the comparison group movements, at least two further inputs are essential to allow a meaningful analysis of the challenged rates

1 *Updating Historical 2002-2005 Costs and Rates to the Same Year as the Challenged Rate*

First, cost and rate levels must be updated from 2002-2005 to 2007. Extraordinary growth in demand and unprecedented capacity constraints experienced by the American rail industry in recent years mean that all major railroads, including CSXT, have experienced robust growth in revenues during that period. See CSXT Open at 25-28 & Appendix 6, see also *Piacente V S*, Ex. 2, at ¶ 6-7, 9. CSXT's very substantial growth in revenues and revenue per unit during the watershed period between the early years of this decade and the present mean that prevailing rate levels from 2002-2005 cannot provide meaningful comparators for the challenged rates, which were established in mid-2007.⁴⁰ Under these circumstances, use of rates from as long as five years prior to establishment of the challenged rates would present an apples-to-oranges rate comparison and would significantly exacerbate the rate compression flaw inherent in the Three Benchmark approach.

⁴⁰ CSXT recognizes that the Board indicated that, as a general matter, it thought that it would not be necessary to update to current levels the costs and revenues from the Waybill Samples provided for use in Three Benchmark cases. See *Simplified Standards* at 84-85. CSXT has made clear its strong disagreement with this conclusion, and this is one of issues it will present in the pending appeal of *Simplified Standards*. See *CSX Transportation, Inc v STB*, 07-1369 (D.C. Cir.). However, because of the timing of these cases, the acknowledged effect of the "regulatory lag" is particularly acute. Thus, even under the approach announced by the Board in *Simplified Standards*, the market conditions and circumstances of these cases justify an adjustment to mitigate the effect of that regulatory lag. See *id.* at 85 (recognizing the problem of regulatory lag and indicating that parties could present evidence to show that maximum lawful rate should be adjusted to reflect "market changes not reflected in the comparison group").

In a time of high demand for, and tight supply of, rail transportation services, economic theory and regulatory policy dictate that prices should go up. Application of outdated historical rates and costs would ignore market reality and artificially depress rail rates through distorting regulatory intervention. This, in turn, would reduce the ability of CSXT to generate the return on investment necessary to justify and allow it to continue to invest in capital improvements designed to relieve capacity constraints and improve service.

Adjustment of comparison group costs and revenues is essential to avoid this unwise market distortion and its negative potential ramifications for CSXT and its customers. Accordingly, CSXT has presented evidence demonstrating how both costs and revenues should be updated to current levels. The method CSXT proposes to use to update costs is standard and non-controversial, and is the same method DuPont used to update its estimate of the variable costs of the issue traffic. CSXT has also presented two alternative methods for updating comparison group revenues, one based solely upon public information and the other based in part on current revenue information CSXT produced to DuPont in discovery in this case. See CSXT Opening Evid. at 25-26.

2 *Technical Correction to RSAM Calculation*

Second, the Board must adjust its RSAM calculations to correct a technical error that results in a failure to account for the effect of income taxes. See CSXT Opening Evid. at 22-24. As CSXT explained in its opening submission, this technical correction is necessary to implement the Board's intent that the RSAM be based upon the amount of revenue a carrier would need to earn in order to recover its annual revenue shortfall (i.e. the amount by which a carrier's actual revenues fall short of revenues necessary to earn "adequate revenues" for the year in question). See *id.* at 24. CSXT presented evidence demonstrating how to make the adjustment to ensure that both the revenue shortfall and the amount of revenue a carrier would

need to earn to cover that shortfall are calculated in after-tax dollars. *See id.* at 23. The Board should make this technical correction to effectuate its intent that the RSAM represent the amount a carrier would need to earn to recover its annual revenue shortfall. *Compare Simplified Standards at 19-20 with Rate Guidelines –Non-Coal Proceedings*, STB Ex Parte 347 (Sub-No 2) (Dec 11, 2007), *Simplified Standards at 19-20 with Rate Guidelines –Non-Coal Proceedings*, STB Ex Parte 347 (Sub-No 2) (Dec 20, 2007) ⁴¹

B. DuPont's Proposed Changes to the RSAM Are Unwarranted and Should be Rejected

1 The Board Should Reject DuPont's Proposal to Change the RSAM for 2002 to 2005 Retroactively Based Upon a New, Not Yet Implemented, Methodology for Calculating the "Cost of Capital"

DuPont asks the Board to retroactively change its existing, established RSAM calculations for the years 2002-2005, by applying a new – and, to date, never applied by the Board in any context – “Capital Asset Pricing Methodology” (“CAPM”) methodology for calculating rail carriers’ cost of capital. The Board recently announced it would begin to apply *prospectively* the new CAPM approach to estimate rail carriers’ cost of capital for years from 2006 forward. *Compare DuPont Opening Evid. at 24-25 with Decision*, STB Ex Parte No. 558 (Sub-No 10) (served Jan 17, 2008) (directing rail carriers to develop and submit information

⁴¹ This technical correction to the arithmetical calculation of the RSAM is different in kind from the organic change to the RSAM proposed by DuPont. As discussed below, what DuPont proposes is to substitute a new model for the derivation of the cost of capital to change retroactively the RSAM in a manner not contemplated by *Simplified Standards*. *See infra* III B 1. Whereas the technical correction CSXT has identified would correct an inadvertent error and implement the Board’s intent as described in Ex Parte 646, the wholesale changes DuPont proposes would require the Board to affirmatively change its intended methodology. *See infra* III B -IV. Indeed, the Board expressly considered and rejected one of the two changes DuPont proposes in the *Simplified Standards* proceeding. *Simplified Standards at 19-20 with Rate Guidelines –Non-Coal Proceedings*, STB Ex Parte 347 (Sub-No 2), *see infra* at IV. With respect to the substitution of a new cost of capital model, there is no evidence to suggest the Board was not aware it was using its established DCF model as an essential input to the RSAM figures it issued in December 2007. *See infra* at III B.

and calculate new CAPM cost of equity for 2006)⁴² In short, DuPont proposes that the Board use these simplified rate reasonableness adjudication proceedings to engage in a wholesale retroactive recalculation of RSAMs from past years. There is no justification to do so, and the Board should reject DuPont's proposal to apply the Board's 2008 CAPM changes retroactively.

In the first place, DuPont's claim that the Board is "legally obligated" to use CAPM to recalculate RSAMs for prior years is plainly wrong. See DuPont Opening Evid. at 24. On the contrary, this agency's precedents establish that it generally does *not* retroactively apply such methodology changes. See, e.g., *Edison Elec. Institute v. ICC*, 969 F.2d 1221, 1228 (D.C. Cir. 1992), *Alabama Power Co. v. ICC*, 852 F.2d 1361, 1371 (D.C. Cir. 1988). When the ICC determined in 1989 to begin accounting for productivity in its RCAF calculations, it rejected calls to apply that adjustment retrospectively, finding both that retrospective application could upset "settled expectations," and that data limitations restricted the agency's ability fairly to calculate and apply a retrospective adjustment. *Edison Elec. Institute*, 969 F.2d at 1227. The D.C. Circuit found that the agency's decision not to apply retroactively its changed calculations was reasonable. *Id.* at 1227-28. Similarly, the ICC refused to retroactively apply its newly-adopted procedures to adjust the RCAF to correct forecast errors, reasoning that a retroactive

⁴² Even under the expedited schedule adopted by the Board, interested parties' argument and evidence concerning the calculation of a CAPM-based cost of capital (the first year for which the Board will attempt to use this new methodology) was fully submitted just days ago, on February 29, 2008. Because the parties disagree on how the CAPM approach should be implemented, and thus how the 2006 cost of capital should be calculated, it now appears unlikely that the Board will issue a final determination of the 2006 cost of capital before mid-to-late March 2008. Because the parties' final rebuttal submissions in these cases are due April 4, 2008, it would not be possible (let alone desirable) for the Board to obtain input from all interested parties—including numerous entities who are not parties to these adjudicatory proceedings—regarding the appropriate CAPM-based cost of capital for four historical years (2002-2005), resolve methodological and data disputes, establish retroactive new costs of capital for those years, and publish newly RSAM CAPM-based figures in time for the parties to these cases to use them in their evidence.

application would unfairly penalize carriers who relied on the previously published RCAF. *See Alabama Power*, 852 F.2d at 1371. As in *Edison Electric Institute*, the D.C. Circuit found this refusal to be reasonable. *See id.* In short, there is clearly no basis for DuPont's claim that the Board is "obligated" to use the new CAPM approach to recalculate previous RSAMs.

Indeed, ordinarily agencies may *not* apply new rules retroactively. *See Bowen v Georgetown Univ. Hosp.*, 488 U.S. 204, 207 (1988) ("Retroactivity is not favored in the law. . . . [A] statutory grant of rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress.") DuPont's demand that the Board use CAPM to recalculate past RSAMs is exactly that—a retroactive application of the Board's January 17, 2008 rule. DuPont would have the Board use its new rule to reopen—in the middle of pending adjudicative proceedings—its previous determinations of RSAM. Such a reexamination would disrupt settled expectations and business conduct and commercial decisions made several years ago in reliance on the Board's published RSAM figures. Moreover, if the Board were to use CAPM to change its method of calculating the RSAM in three benchmark cases, it would have little principled basis not to apply CAPM retroactively to reopen a host of settled decisions, rules and determinations in which cost of capital is a component—including determinations of revenue adequacy, the proposed abandonment of rail lines, and the setting of compensation for trackage rights. *See Railroad Cost of Capital – 2005*, STB Ex Parte 558 (Sub-No. 9), at 1 (Sept. 15, 2006) (listing some of the proceedings in which cost of capital is a factor).⁴³

⁴³ Indeed, if the Board were to use CAPM to reopen RSAM determinations for periods three-to-seven years ago, it would be open to claims that SAC decisions from that period should be reopened and relitigated based on the new cost-of-capital methodology and its potential effects on *inter alia*, variable costs, R/VC ratios, and whether a defendant carrier should be deemed "revenue adequate." To be clear, CSXT believes such claims would be inappropriate and rejected. However, re-opening a settled Board determination and benchmark based on

Properly, the Board has been cautious about upsetting settled expectations by revising cost of capital calculations for prior years. On the same date that it had notified parties of its intent to revise cost of capital methodology, the Board also issued its 2005 cost of capital determination, using its established discounted cash flow methodology. See *Railroad Cost of Capital – 2005*, STB Ex Parte 558 (Sub-No 9) (Sept 15, 2006). As the Board subsequently explained to the D C Circuit, it applied a DCF method while considering changes to that method because of “the need for finality” and the importance of having a final cost of capital number for the “many other decisions the Board must make.” See Brief of STB and United States at 40, *Western Coal Traffic League v STB*, 07-1064 (D C Cir) (Oct 24, 2007). The need for finality is even more pronounced here, where the question is not whether the Board should postpone issuing a single cost of capital determination during pending rulemaking, but whether it should revisit all of its past decisions involving a cost-of-capital component.⁴⁴ The Board should not undertake such a complex *retroactive* change having such potential consequences and implications.

2 *This Individual Case Adjudication is Not the Proper Proceeding to Consider a Far-Reaching Retroactive Change to a Key STB Statistic*

Moreover, this is not the proper proceeding in which to seek retroactive changes to the RSAM methodology. The Board adopted *Simplified Standards*, including the present RSAM methodology, as the product of several years of public hearings, multiple STB proceedings, and an extensive notice-and-comment rulemaking in which many interested parties – including all

retroactive application of a newly adopted (and, to date, not tested by federal court appeal) cost of capital methodology would invite precisely this sort of argument and litigation.

⁴⁴ DuPont does not expressly contend that the Board should change its cost of capital determination for years prior to 2002, but this is only because its goal in this case – changing the otherwise applicable maximum reasonable rate – does not require charges to years prior to 2002.

Class I rail carriers and more than one hundred shippers or their representatives – submitted several rounds of comments

Using this proceeding to change retroactively the RSAM for previous years—an action that affects not only the parties to this proceeding but also all other major rail carriers and rail shippers—would be procedurally improper and unsound as a matter of policy. If DuPont believes that the Board’s historical RSAM calculations should be revised in light of the Board’s prospective adoption of CAPM, the appropriate step would be to file a petition to reopen those proceedings pursuant to 49 U.S.C. § 722(c) and 49 C.F.R. § 1115.4. *Cf. Western Coal Traffic League v. STB*, 07-1064 (D.C. Cir.) (Feb. 1, 2008) (denying petition for review of 2005 cost of capital decision and holding that appropriate remedy was for petitioner to file petition to reopen that proceeding). To date, neither DuPont nor any other entity has petitioned the Board to reopen any of the Board’s prior RSAM calculations. Until such time as a party moves to reopen those proceedings, there is no justification for the Board to even *consider* revisiting them.⁴⁵

Even if the Board were to decide – in the proper context of a rulemaking proceeding in which all interested parties could participate – to apply a new cost of capital methodology for some purposes (*e.g.*, in decisions rendered in reopened STB Ex Parte No. 664 and one or more reopened subdockets of STB Ex Parte No. 558), the question of whether existing RSAM determinations should be changed by inserting a new cost of capital methodology should only be considered in a reopened *Simplified Standards* (Ex Parte No. 646) proceeding. As DuPont

⁴⁵ The first relevant request from a shipper for the Board to adopt CAPM on record appears to have been in the comments of the Western Coal Traffic League in Ex Parte No. 558 (Sub-No. 9), which were filed on April 28, 2006. Prior to April 2006 (and certainly in 2002-2005), had no notice or reason to believe there would be a change in the cost of capital methodology that might affect settled regulatory decisions, determinations, and parameters governing their pricing activity and business and commercial decisions. It would be particularly unfair to revise cost of capital calculations for decisions made before any shipper suggested a change to the cost of capital methodology.

knows very well, a number of shipper groups, including DuPont's own industry association, filed a motion seeking reconsideration of several aspects of the Board's *Simplified Standards* decision, and that motion is pending before the Board. See *Petition for Reconsideration and Suggestion for Expedited Oral Argument of American Chemistry Council et al.*, STB Ex Parte No 646, Sub-No 1 (filed Oct 12, 2007)⁴⁶ Despite this attempted second bite at the *Simplified Standards* apple on behalf of DuPont by its counsel in this case – and despite that Petition's express request for change to an aspect of calculation of the RSAM for purposes of Three Benchmark cases – the Petition does not request that the Board apply a new cost of capital model to calculate the RSAM prospectively, let alone retroactively. See *id*

Moreover, DuPont – which participated in the *Simplified Standards* rulemaking both as a member of a trade association and in its individual capacity – has not sought reopening or reconsideration of the Board's resulting recalculation of the RSAM in Ex Parte 347 (Sub-No 2). Here again, if DuPont wishes to seek to reopen the Board's recent recalculation of the RSAM – which it presumably conducted with full knowledge of the then-imminent adoption of a new cost of capital model for prospective application, it should do so in that rulemaking proceeding and afford all interested parties an opportunity to comment. Compare Decision, STB Ex Parte No 347 (Sub-No 2) (Dec 20, 2007) with Decision, STB Ex Parte No 664 (Jan 17, 2008) (Decision adopting new cost of capital model issued less than one month after final Board decision determining RSAM for 2002-2005)

⁴⁶ Among the dozens of shipper organizations filing the reconsideration petition, the lead petitioner was the "American Chemistry Council," a chemical industry association of which DuPont is a prominent member. See *Petition for Reconsideration and Suggestion for Expedited Oral Argument of American Chemistry Council et al.*, STB Ex Parte No 646, Sub-No 1 (filed Oct 12, 2007). DuPont's counsel in this case is also the primary counsel for petitioners in the pending reconsideration petition. See *id*

3 *Adjusting the Three-Benchmark Approach to Costs in a Coherent Manner Would Add Complexity, Cost, and Delay to this "Simplified" Proceeding*

In the context of these specific pending cases, attempting to change the RSAM by retroactively applying CAPM would add complexity, confusion, and potential delay to these "simplified" proceedings. First, because the Board has not yet made its first annual cost of capital determination using the new methodology, it is impossible to determine at this juncture if DuPont's consultant made his CAPM-based calculations in accordance with the approach the Board will ultimately adopt. Recognizing the potential for divergent interpretations, applications, and implementation of the CAPM model it adopted last month, the Board sought supplemental evidence, and initiated a separate series of public comments for the sole purpose of obtaining interested parties' input and arguments concerning the implementation of that model. See STB Ex Parte No. 558 (Sub-No. 10), *Railroad Cost of Capital – 2006* (served Jan. 17, 2008) (establishing three rounds of comments on the implementation of the CAPM model adopted in STB Ex Parte 646). Given that the Board has not yet decided how it will implement CAPM, there is not yet a standard against which CSXT could evaluate DuPont's proposed application of that model in these cases.

Second, there are several other variables and calculations that would be affected by a change to CAPM, but DuPont's evidence did not make the necessary adjustments. As a result, the changes DuPont advocates would result in an internally inconsistent analysis that would include both CAPM-based costs and DCF-based costs. In order to allow an apples-to-apples analysis, all inputs and variables affected by a change to CAPM would have to be adjusted – any other approach would be logically and analytically incoherent and arbitrary. For example, if CAPM were used to generate a new RSAM figure for use in these proceedings, consistency would require recalculation of "Return On Investment" variable costs for all comparison group

movements. Once those costs were revised for the selected comparison groups, the parties would then need to recalculate the R/VC ratios for all comparison group movements.⁴⁷ DuPont's failure to recalculate those R/VCs is not surprising – because CAPM-based ROI costs would be significantly lower than their existing DCF-based counterparts, the resulting R/VC ratios for the same comparison groups would be substantially higher. Similarly, DuPont did not recalculate the issue traffic R/VCs to reflect CAPM-based costs, a complex multiple-step process.

Third, DuPont's proposed adoption of the CAPM model for the Three Benchmark approach would require the parties to alter the Waybill Samples the Board provided to the parties for use in these cases, which the Board has prohibited. The *Simplified Standards* Decision expressly provided that proposed comparable movements must be drawn from the Waybill Sample provided to the parties by the Board at the outset of the case” and a Board decision in this case prohibit *Simplified Standards* at 18 (emphasis added). In this case, the Board expressly directed that the only evidence that would be admissible for purposes of selecting or advocating for comparable movements would be the Waybill Sample provided by the Board and publicly available evidence. See *E I DuPont de Nemours & Co v CSX Transp. Inc*, STB Docket Nos. 42099 *et al*, Decision at 2, 3, 4 (Jan. 15, 2008).

The Board has further directed the parties that they must limit potential comparison traffic to movements that generate an R/VC ratio of greater than 180%. See CSXT Opening Evid. at 18, DuPont Opening Evid. at 23, V S. Crowley at 8-9 (indicating DuPont identified traffic eligible for inclusion in comparison group by using R/VC > 180% cutoff using a DCF-based cost of equity calculation), *E I DuPont de Nemours & Co v CSX Transp. Inc*, STB

⁴⁷ Because several of DuPont's proposed comparison groups are quite large, its proposed change would require the recalculation of variable costs and R/VCs for thousands of movement records for DuPont's comparison groups alone.

Docket Nos 42099 *et al* , Decision at 3 (Jan 31, 2008) (“the comparison group should be made up of ‘captive traffic over which the carrier has market power’”) The change DuPont proposes, however, would use the CAPM model to revise the Board’s Waybill Sample by “recalculating” variable costs for the entire Sample and using the resulting new variable costs to develop a new and different group of movements generating R/VC ratios greater than 180% See V S Crowley at 13-14 ⁴⁸ This “re-costed” Waybill Sample is not the Waybill Sample provided to the parties by the Board at the outset of the case

As the Board further found in *Simplified Standards* changes to Waybill Sample fields should be considered, if at all, only in a separate rulemaking convened to address changes to they Waybill Sample Addressing a proposal to adjust the Waybill Sample revenue field to take account of rebates, the Board stated that if parties “believe there are ways to improve the accuracy and use of the Waybill Sample, they are encouraged to provide their specific recommendations in a petition for a rulemaking, but broad changes to the Waybill Sample fall outside the scope of this rulemaking” *Simplified Standards* at 85 (emphasis added) If changes to Waybill Sample revenue and cost fields were outside the scope of the extensive *Simplified Standards* notice-and-comment rulemaking, they are surely far beyond the scope of a single rate case brought under those rules

⁴⁸ This adjustment illustrates the two result-oriented reasons DuPont advocates retroactive application of the CAPM model to change the RSAM figures the Board issued a few weeks before the parties filed their Opening Evidence First, the reduced cost of capital that would be generated by a CAPM model lowers the amount of revenue a revenue inadequate carrier needs to earn in order to attain the annual revenue adequacy level Second, application of the CAPM model to reduce variable costs also would increase the number of movements deemed to generate an R/VC > 180, which expands the movements from which the reduced revenue shortfall is to be recovered In combination, those two changes result in a substantially lower RSAM/RVC > 180 ratio, which in turn reduces the adjustment to comparison group R/VCs and ultimately results in a significantly lower maximum reasonable R/VC

Moreover, a logically and analytically coherent CAPM-based approach would require selection of comparable movements from the revised group of traffic (based on CAPM-based variable costs) that generate R/VC ratios above 180%. This, however, would require use of data and information the Board has held inadmissible for purposes of selecting comparison groups, data that is neither set forth in the Waybill Sample furnished by the Board nor publicly available.⁴⁹ Thus, the rules the Board adopted in this very proceeding preclude a principled and coherent application of the new RSAM methodology advocated by DuPont. See *E I DuPont de Nemours & Co v CSX Transp, Inc*, STB Docket Nos 42099 *et al*, Decision at 2, 3, 4 (Jan 15, 2008)

Fourth, the changes necessary to implement a consistent restructuring of the Three Benchmark approach to apply a new cost of capital model would constitute a prohibited adjustment to URCS costs. As explained above, DuPont's proposal requires re-costing all of the movements in the Waybill Samples, *i e*, adjusting those movements' URCS costs. The Board has made clear that it will not allow adjustments to URCS costs in Three Benchmark cases. See *Simplified Standards* at 16 (parties may "use only unadjusted URCS to calculate the variable cost of the issue movement and all movements in the comparison group"). *id* at 84 ("[W]e conclude that simplified guidelines can only be achieved by adhering strictly to the URCS model to calculate variable costs")⁵⁰. Thus, the retroactive change advocated by DuPont would require an adjustment to URCS costs, which the Board has flatly prohibited.

⁴⁹ For example, the Board has issued no CAPM model-based cost of equity determinations for any year to date, and certainly not for historical years (such as 2002-2005) for which it previously published DCF-based cost of capital determinations.

⁵⁰ The Board first decided not to allow URCS cost adjustments in SAC cases, in *Major Issues in Rail Rate Cases*, STB Ex Parte No 657 (Sub-No 1) Decision (served Oct 30, 2006). That Decision, which *Simplified Standards* relies upon and incorporates by reference, makes clear that there are only nine "user input" parameters parties may use to calculate URCS costs. *Major*

In sum, DuPont's self-serving proposal is untimely and procedurally improper, would constitute unsound and fundamentally unfair retroactive rulemaking in the context of an individual adjudication, has broad potential ramifications for other matters well beyond this proceeding; would inject considerable complexity, confusion, and potential for delay into a proceeding the Board has designed to be simple, low-cost and efficient, and would violate rules adopted in *Simplified Standards* and in this specific case. For all of the foregoing reasons, the Board should reject DuPont's proposal to apply a new cost of capital model retroactively in this case.

IV. OTHER RELEVANT FACTORS

DuPont suggests that the Board reverse its recent *Simplified Standards* decision and modify the RSAM by applying an "efficiency adjustment" that would reduce maximum reasonable R/VC ratios. The Board has consistently rejected such a modification of the RSAM calculation, and DuPont offers no argument that would justify such an alteration of the Board's approach in the first cases filed under the new *Simplified Standards*. When the Board adopted the *Simplified Rate Guidelines*, it found that modifying the RSAM to eliminate the shortfall attributable to all traffic generating R/VC < 100% would "understate the revenue requirements that should be borne by captive shippers," and therefore rejected that overbroad modification. *Simplified Rate Guidelines*, 1 S '1 B 1004, 1029 (1996). The Board further noted that URCS "variable costs" include unattributable joint and common costs, including "fully 50% of road ownership costs, and 70% of total operating expenses."⁵¹

Issues Decision at 52, n 166. Cost of equity or "cost of capital" is not one of those nine available "user inputs." *See id*.

⁵¹ Even attributable costs overstate the variable costs of any particular movement. A better measure of short run variable costs is directly variable costs, or "DVC." AAR testimony cited by the Board in 1996 demonstrated that "only 2.3% of all rail traffic (accounting for 3% of industry

Second, in one of the few decisions rendered under the *Simplified Rate Guidelines*, the Board flatly rejected the same RSAM modification DuPont proposes in this case – removal from the revenue shortfall determination all movements that generate an R/VC of less than 100% was not “justified by the objectives of a managerial efficiency adjustment” See *BP Amoco Chemical Company v Norfolk Southern Railway Company*, STB Dkt No 42093, slip op at 9-11 (served June 6, 2005) ⁵² As the Board explained,

In [*Simplified Rate Guidelines*], the Board recognized that an R/VC ratio below 100% does not necessarily reflect improper pricing or a money-losing service. The RSAM benchmark the agency would use was therefore left unresolved [in 1996], but was expected to fall within [a] range [between the unadjusted RSAM and an adjusted figure calculated by removing movements with R/VC < 100%]. The uncertainty created by this range does not appear justified by the objectives of a managerial efficiency adjustment. The amount of revenue shortfall attributed to traffic with an R/VC ratio below 100% cannot provide any reasonable approximation or useful surrogate for other inefficiencies in a carrier’s system. And while specific inefficiencies can be brought to light in a SAC analysis under the *Coal Rate Guidelines*, any attempt to measure carrier-specific inefficiencies under the simplified guidelines would add undue cost and complexity to an inquiry that must necessarily sacrifice some precision to achieve simplicity.

Id at 9-10 (emphasis added) ⁵³

revenues) fails to recover its DVC [Directly Variable Costs]” *Id* at 1029, n 70. DVC is the measure that is used to approximate short run marginal costs, or “going concern value,” a Long Cannon factor. See *id* at 1027-28.

⁵² A number of factors unrelated to managerial efficiency account for movements that are recorded as generating R/VC ratios of less than 100 percent. For example, more detailed explanation of the non-efficiency reasons that CSXT moves traffic whose URCS costs appear to generate R/VC ratios of less than 100% is set forth in the Verified Statement of Benton V Fisher, attached as Exhibit 5 hereto.

⁵³ The Board further found in *BP Amoco* that rail industry conditions have changed substantially since 1996, such that “there is no longer significant excess capacity in the rail industry” *Id* at 10. This eliminated the Board’s primary rationale in 1996 for leaving open the possibility that some efficiency adjustment might be appropriate in some cases. Cf. *Simplified Rate Guidelines*, 1 STB at 1029.

Finally, in *Simplified Standards*, the Board eliminated the RSAM “range” concept altogether and adopt a single RSAM without any modification for movements generating R/VCs < 100%. *Simplified Standards* at 19. The Board explained that it had proposed to eliminate the RSAM range and use a single “unadjusted” RSAM for the Three Benchmark approach. *Id.* In three full rounds of comments and a hearing, no party to the rulemaking proceeding – including DuPont – opposed the Board’s proposal, and the Board adopted its unopposed proposal.

Thus, the Board has made it abundantly clear on multiple occasions that the modification DuPont attempts to resurrect is neither appropriate nor useful, and the Board will not use it in Three Benchmark cases. DuPont had ample opportunity to make whatever arguments it wished to make concerning such an adjustment during the Ex Parte No. 646 rulemaking, but it declined to comment. Having chosen to remain silent during the rulemaking, DuPont should not be heard to raise this tired, discredited argument for the first time now in specific cases, after the Board has adopted final rules. Because DuPont has not proposed – let alone supported – any more refined or precise efficiency adjustment than the blunt and overbroad approach of eliminating all traffic with R/VC < 100, it has failed to carry its burden of demonstrating that the Board should consider such an RSAM modification as an “other relevant factor.” *See Simplified Standards* at 22 (in order to support adjustment of the maximum reasonable rate to account for alleged carrier inefficiency, shipper must “quantify[] the extent of the inefficiency and how that should affect the presumed maximum lawful rate.”) Accordingly, the Board should reject DuPont’s request for an RSAM adjustment.

V. THREE BENCHMARK RATE REASONABLENESS RESULTS

Pursuant to the *Simplified Standards*, after determining the average adjusted R/VC for the comparison groups, the next step is to estimate the confidence interval around the mean and to determine the upper boundary for the range of R/VC ratios below which a rate could not be

found unreasonable. The upper boundary is determined based on the sample size, the standard deviation of the adjusted R/VC ratios, and a statistical measure “t-statistic” that estimates the 90% confidence interval. See *Simplified Guidelines* at 20-22 Table 3 summarizes the results

	Upper Boundary	Issue Traffic RVC
<i>Publicly Available Chemicals Revenue Increases</i>		
Plastics (Amphill, VA - Wyandotte, MI)	████	████
Plasticizers (Heyden, NJ - Duart, NC)	████	████
Plasticizers (Heyden, NJ - Washington, WV)	████	████
<i>2007 Actual Revenue Update, Where Available</i>		
Plastics (Amphill, VA - Wyandotte, MI)	████	████
Plasticizers (Heyden, NJ - Duart, NC)	████	████
Plasticizers (Heyden, NJ - Washington, WV)	████	████

Source: CSXT work paper “42099 Comp Groups xls”

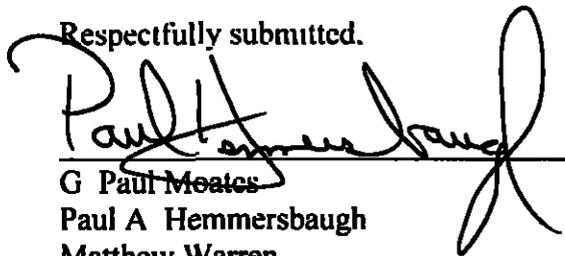
The adjusted R/VC ratios of ██████ for the Amphill-Wyandotte plastics comparison group, of ██████ for the Heyden-Duart plasticizers comparison group, and of ██████ for the Heyden-Washington plasticizers comparison group are each higher than the R/VC’s for the respective issue traffic movements. Therefore, using CSXT’s comparison groups, each of the challenged rates is below the maximum reasonable rate and not unreasonable.

CONCLUSION

For all the above reasons, and the reasons in CSXT’s Opening Evidence, the Board should find that the challenged rate is not unreasonable.

Peter J Shudtz
Paul R Hitchcock
Steven C Armbrust
CSX Transportation, Inc
500 Water Street
Jacksonville, FL 32202

Respectfully submitted.

A handwritten signature in black ink, appearing to read "G Paul Meates", is written over a horizontal line. The signature is fluid and cursive.

~~G Paul Meates~~
Paul A Hemmersbaugh
Matthew Warren
Debbie J Kim
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000
(202) 736-8711 (fax)

Counsel to CSX Transportation, Inc

Dated: March 5, 2008

EXHIBIT 1

Exhibit 1 contains Highly Confidential information subject to a Protective Order entered by the STB in this case, and therefore is not included in this Public filing.

EXHIBIT 2

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

E I DUPONT DE NEMOURS AND COMPANY)

Complainant,)

v)

CSX TRANSPORTATION, INC)

Defendant)

Docket No NOR 42099

**VERIFIED STATEMENT OF DEAN M. PIACENTE
CSX TRANSPORTATION, INC.**

1 My name is Dean M Piacente I am Vice-President - Chemicals and Fertilizer in the CSX Transportation ("CSXT") Marketing Department In my position, I am responsible for the marketing and pricing of CSXT's transportation service for the commodities at issue in the three pending cases before the Surface Transportation Board brought against CSXT by E I DuPont de Nemours and Company ("DuPont") I am providing this verified statement for inclusion in each of those cases The purpose of this verified statement is to describe

- a The tremendous changes that have occurred in the markets for rail transportation over the past few years, and to give the Board a sense of how much rail (and, indeed, competing mode) freight rates have risen in that time, and
- b The unique nature of chlorine transportation on CSXT

2 My main point, common to all three cases, is that the Board should not decide these cases by relying exclusively upon carload revenues generated by prices that prevailed even a few years ago Such an approach would constitute a faulty method for assessing the reasonableness of our

current rates in all three cases, but most especially in Docket No 42100,¹ involving shipments of chlorine

Part of the difficulty stems from the concept of a “comparable movement.” There seems to be a view that “comparable movements” should be understood to mean “data sets” from the carload waybill sample – even if those data sets contain five-year-old data. I do not agree. In my view, a “comparable movement” means a transportation movement that occurred between an origin and a destination pair, which for some set of reasons is regarded as having sufficient similarities with the issue movement such that its current revenue and current costs can be appropriately compared with the current revenue and current costs of the issue movement. At the very least, the revenues and costs applied to the comparison origin-destination pairs should be current market revenues and costs. Otherwise, the Board will be engaged in price-setting based on history – not the market.

3 DuPont is one of CSXT’s largest customers, shipping thousands of carloads of a variety of commodities in hundreds of traffic lanes and generating annual freight revenues of approximately [REDACTED]. For many years DuPont moved its traffic on CSXT under an omnibus, privately negotiated transportation contract (the “Master Contract”) which covered the several hundred lanes over which DuPont traffic moves. Over the years, DuPont and CSXT renegotiated the terms of that Master Contract several times and amended it as new facilities or movements were added to the scope of the arrangement. The Master Contract was a complex document that covered both hundreds of movements and a variety of other terms and conditions,

[REDACTED]

[REDACTED]

¹ Chlorine is specifically addressed in a latter portion of this statement

4 In the summer of 2006, CSXT and DuPont began discussing a renewal of the Master Contract. The goal of these negotiations was a new contract that would govern the parties' entire commercial relationship. While throughout the course of the negotiations DuPont and CSXT discussed rates for many specific lanes, the focus of the negotiations was [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

5 The traffic covered by this Complaint (and the two companion cases DuPont has filed) therefore is simply a small component of a large dispute between the parties regarding hundreds of lanes of traffic long governed by a complex, integrated Master Contract. There is no apparent reason DuPont has selected these isolated movements to challenge instead of others. It appears, however, that DuPont intends to use the results of these proceedings in an attempt to gain negotiating leverage for its many other movements on CSXT.

6 Over the past several years, a confluence of market factors has driven transportation prices upward by substantially greater percentages than the rate of inflation. While this may have come as a surprise to many customers, who have in many cases enjoyed annual rate reductions (adjusted for inflation) for over a decade, it reflects the natural workings of the marketplace.

7 Every business attempts to maximize its pricing, consistent with optimizing volumes, and I do not suggest that CSXT has ever done anything else. However, what we have found since approximately 2004 is that the marketplace has been changing rapidly, and we have generally

been able to negotiate higher prices with our customers. Broadly generalizing, this has been true across our entire customer base, with different dynamics in the company's different marketing groups – as would be expected given the very different dynamics of the underlying commodities and products markets.

8 Since 2004, overall CSXT revenue per car for all chemicals market traffic (which we define as movements of commodities having two digit STCC header 28 and which contains all the commodities at issue in these three cases) has increased by at least 38 percent. I calculated this percentage increase using CSXT's publicly available Quarterly Commodities Statistics data for the period 2004 through 2007. Chlorine rates have changed even more, [REDACTED] [REDACTED] (Chlorine represents a special case and I discuss it in more detail below).

9 For this reason, simply using an unadjusted revenue figures appearing in the Waybill Sample for movements that occurred in 2004, or even 2005 as the basis for comparison with rates in 2007 and 2008, would be highly misleading. The market has changed radically since 2004-05. Rail capacity is being challenged in many lanes, and we must price additional traffic that customers want CSXT to handle in those lanes accordingly. All-in transportation costs include any applicable fuel surcharge, which has risen as the price of oil has risen. Publicly-available market reports indicate that motor carriers are raising their freight rates as well. Driver shortages, hours of service considerations, equipment shortages, and highway congestion all contribute to upward pressure on motor carrier pricing. Barges also seem to be increasing prices, and are reportedly in an industry-wide recapitalization cycle.

10 Finally, I would like to turn to the special case of chlorine. There are several points that need to be made about this commodity.

- There is a rapidly growing set of legal requirements for special attention and handling for Toxic Inhalation Hazard chemicals
- Chlorine prices on CSXT have risen faster over the past several years than for virtually any other commodity
- CSXT is engaged in a multi-year effort to adjust chlorine rates to (1) discourage unnecessary shipments via CSXT and (2) discourage longer distance shipments via CSXT
- CSXT would prefer not to transport chlorine, and if given the right to refuse to do so, would handle this commodity only where absolutely necessary for the public health and welfare
- There is no price that CSXT could charge that would economically justify the risk that our company is forced to take moving chlorine. We purchase all the liability insurance that is reasonably available and yet we still subject our company to a risk of ruinous liability should a catastrophic incident occur in a highly populated area. One need look no further than the Norfolk Southern's incident at Graniteville, SC in 2005 to understand how grave an incident can be

11 There is a rapidly growing set of legal requirements for special attention and handling for Toxic Inhalation Hazard chemicals. The Board is doubtless familiar with proposed regulations by DOT and TSA regarding handling of these commodities. DOT's proposed routing analysis and other rules have already imposed substantial, but difficult to quantify, costs on CSXT in the form of management time planning on how to implement the rules if adopted as proposed. Once implemented, CSXT will be required to analyze each movement of chlorine, identifying a route based upon a 27-factor analysis, as well as comparing that route with a best alternative route. As proposed, this would be an annual effort with a recalibration of the process every five years. TSA proposes to prohibit the use of certain interchanges between carriers and to impose new requirements for pick-up and delivery between carrier and consignors and consignees. The changes in routing that the TSA regulations require will clearly add costs to handling chlorine, and in some cases may make handling by rail impossible unless TSA adopts a waiver process.

12 In addition to these rulemaking initiatives, TSA has also issued voluntary action items associated with the movement of chlorine and other TIH materials, and these too, have imposed difficult to quantify costs on CSXT. Under the Implementing Recommendations of the 9/11 Commission Act of 2007, more rulemakings – many directly focused on chlorine and other TIH materials will be forthcoming. Over the next five years, the burden of handling chlorine will only grow.

13 None of these burdens and costs are adequately recognized in the unadjusted URCS costs that the Board will apply to the rates at issue in these cases.

14. As I mentioned above, chlorine prices on CSXT have risen faster over the past several years than nearly any other commodity, increasing by [REDACTED] since 2004 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] We hope that producers and buyers

will begin to look for alternative products.

15 The transportation characteristics of anhydrous ammonia and chlorine significantly differ even though before are classified as “TIH” commodities. First, rail shipments of anhydrous ammonia are subject to significant truck competition as well as pipeline alternatives. Indeed, CSXT faces truck competition for movements of anhydrous ammonia up to 1,000 miles in length. See Ex 2 (Grammar Logistics Brochure). There is no such competition for chlorine.

movements. Second, anhydrous ammonia is used primarily in agriculture, as a fertilizer or fertilizer component. Chlorine, in contrast, is used in manufacturing processes to create other high value products like medicines, and specialty plastics and materials. There are numerous product substitutes for anhydrous ammonia, but few for chlorine. The presence of these and other competitive and market factors and transportation alternatives simply render shipments of anhydrous ammonia incomparable to shipments of chlorine.

16. We also hope that buyers will look, in the shorter term for closer sources. To encourage that, we are striving to price chlorine and other TIH materials in ways that discourage longer hauls. There is little else that CSXT can do to encourage these kinds of shifts in distribution patterns.

17. Looking back to before 2004, I acknowledge that CSXT took a different outlook. We realized that we had a common carrier obligation to transport these goods, and undertook to price so as to facilitate the distribution of chlorine so that producers on our lines could readily sell their product anywhere in CSXT's service territory without transportation cost becoming an impediment. As a consequence, chlorine manufacturers in Canada had every economic incentive to sell their product to buyers in south Florida, and they did just that. CSXT safely carried those products year after year down the I-95 corridor for over a thousand miles. CSXT is no longer willing to do that. We are attempting to discourage such movements, and hope the Board's decision in this case will not return us to that distribution model.

18. DuPont does not accept this new paradigm. Apparently, from its perspective, it is the duty of the railroad to take DuPont's products – no matter how dangerous or how far – wherever DuPont wants them to go. Furthermore, DuPont apparently believes the price for undertaking that risk should be set artificially low by the government.

decisions themselves find their way into the Carload Waybill sample, and used against us as "comparable movements "

22 CSXT would prefer not to transport chlorine, and given the right to refuse to do so would handle this commodity only where absolutely necessary for the public health and welfare. It is manifestly unfair to compel a company to engage in an activity it does not wish to undertake when that activity exposes it to ruinous liability, and then undermine its efforts to enhance public safety with its pricing policies by artificially imposing price controls

23 There is no price that we could charge that would economically justify the risk that our company is forced to take moving chlorine. The burden is more than increased regulation, higher costs, and liability risks CSXT has been criticized over and over by local government leaders, environmental activists, and the news media for transporting chlorine and other TIH materials through urban centers Our corporate reputation has been damaged despite the fact that we do not choose to accept these materials, and have no say in where they are shipped from or to Less than one percent of CSXT's revenues come from moving chlorine, yet a prominent national newspaper has criticized CSXT for allegedly putting its balance sheet before people because it is fulfilling its legal obligation to carry such freight

24 In deciding whether to impose price reductions on CSXT to facilitate DuPont's distribution network, I ask the Board to take into consideration these other, non-cost factors, as a matter of sound public policy

I declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this testimony

Executed on this 2nd day of March, 2008


Dean M. Piacente
Dean M Piacente

EXHIBIT 3

Exhibit 3 contains Highly Confidential information subject to a Protective Order entered by the STB in this case, and therefore is not included in this Public filing.

EXHIBIT 4

Exhibit 4 contains Highly Confidential information subject to a Protective Order entered by the STB in this case, and therefore is not included in this Public filing.

EXHIBIT 5

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

E I DUPONT DE NEMOURS AND COMPANY)

Complainant,)

v.)

CSX TRANSPORTATION, INC)

Defendant)

Docket No NOR 42099

**VERIFIED STATEMENT OF BENTON V. FISHER
CSX TRANSPORTATION, INC.**

I. Introduction

My name is Benton V Fisher I am a Senior Managing Director in the Network Industries Strategies group of FTI Consulting My office address is 1101 K Street, N W , Washington, D C , 20005 My qualifications and prior testimony are attached to this verified statement as Exhibit BVF-1

I have been asked by CSXT to respond to portions of DuPont's opening submission in this proceeding and, in particular, the adjustment proposed by DuPont witness Thomas D. Crowley to remove from the Board's calculation of the annual RSAM movements that have an R/VC ratio of less than one In this statement, I describe why DuPont's proposed adjustment is inconsistent with the Board's recent decisions, explain that the level of aggregation within URCS and the lack of adequate detail in the Board's Carload Waybill Sample hinder the ability to determine if shipments are moving below directly variable cost, and conclude that there is no basis for applying such an adjustment within the context of the Board's Three-Benchmark methodology.

II. DuPont's Proposed Efficiency Adjustment to the RSAM is Improper

In an apparent effort to demonstrate that CSX I is inefficient and could reduce its revenue inadequacy, Mr Crowley recalculates CSXT's 2002-2005 and 4-year average RSAM ratio after elimination of movements that have R/VC ratios less than 1.00. He then recomputes the adjusted RSAM to $R/VC_{>1.80}$ and substitutes the new ratio into the calculation of his "Maximum R/VC Ratio" for each issue movement. This approach raises a host of issues that the STB has addressed many times before, including in the Ex Parte No. 347 (Sub-No. 2), Rate Guidelines – Non-Coal Proceedings decision issued on December 27, 1996, and most recently in the Ex Parte No. 646 (Sub-No. 1), Simplified Standards for Rail Rate Cases decision issued on September 5, 2007. The STB's findings in these proceedings leave little doubt that the conclusions Mr Crowley draws from his analysis are faulty.

As a threshold matter, Congress found more than two decades ago that it was unlikely that railroads handled much traffic at rates failing to contribute to going concern value. In fact, Congress found it unlikely that railroads were handling much traffic at rates below those that would maximize the benefit of these traffic movements to the carrier.¹

Furthermore, in the Rate Guidelines - Non-Coal Proceedings decision referenced above, the STB concluded

We agree that URCS variable costs may include a significant portion of what may actually be unattributable joint and common costs. As AAR points out, URCS treats fully 50% of road ownership costs and 70% of total operating expenses on average, as variable (and thus attributable to specific movements). Moreover, AAR has catalogued various waybill and costing limitations that it claims would cause profitable traffic to appear to be unremunerative.

Shippers acknowledge these shortcomings, but argue that, even if not a perfectly accurate measure of cross-subsidization, exclusion of the <100 traffic provides a

¹ Specifically, when enacting the Staggers Rail Act of 1980, Congress concluded that "a carrier has no reason to keep a rate below the most beneficial level, [so that] the conferees have no reason to believe rates will be held below the most beneficial level except by oversight." Cost Standards for Railroad Rates, 364 L.C. 898, 904. The ICC agreed, noting that "the possibility of harmful predatory pricing under the rules proposed here is *de minimis*, and that the procedural safeguards offered by our protest standards are adequate to guard against such minimal danger as might exist." Id.

reasonable surrogate for other inefficiencies in the railroad system. But the shippers offer no support for making a connection or for a bald assertion that the amount of revenue shortfall attributable to the <100 traffic group provides a reasonable approximation of all types of inefficiencies.

Rate Guidelines - Non-Coal Proceedings, IS T B 1028-1029 (footnotes deleted)

The following is a brief description of some of the flaws in DuPont's contention that traffic with R/VC ratios less than 1.00 should be removed from the RSAM calculation.

a. Traffic that Earns More Than Its Directly Variable Costs Contributes To Both Going Concern Value and a Railroad's Joint and Common Fixed Costs.

Traffic contributes to the going concern value of a carrier when the revenues generated by that traffic either maintain or increase the carrier's net cash flow.² The additional amount of revenue earned by the carrier from this traffic helps to cover the railroad's joint and common fixed costs.

To achieve a positive cash flow from a given movement requires only that the revenue generated by that movement exceed the costs that vary directly with the move. In this context, only the incremental costs that would be incurred to provide a specific service should be considered. Thus, the directly variable costs of a traffic movement are those costs which can be attributed to the carriage of that traffic. So long as the incremental revenues from a movement are greater than the incremental costs caused by that movement, the movement contributes to the railroad's going concern value and hence the railroad's joint and common costs.

The Board has recognized that it cannot determine whether traffic contributes to a railroad's going concern value by using the URCS variable cost calculations produced by the general purpose costing system and the Ex Parte No. 399 costing procedures. Instead, the Board has adopted two measures, directly variable costs ("DVC") and the presumptive cost floor ("PCF").³

² 362 I C C 831, Ex Parte No. 355, Cost Standards for Railroad Rates

³ 364 I C C 905, Ex Parte No. 355, Cost Standards for Railroad Rates

The presumptive cost floor is defined by the Board as the sum of the line-haul cost of lading, the applicable switching costs, and station clerical costs. These are the costs that almost always vary with the level of transportation. Directly variable costs are defined as the sum of these three cost categories plus any other costs that vary directly with the movement being examined. By definition, DVC calculations are a function of the particular circumstances associated with individual movements. Thus, they must be calculated on a case-specific basis, using information that is not available from the STB's Waybill Sample. As a result, if one were going to employ a single across-the-board standard to the entire traffic base in order to evaluate contribution to going concern value for a railroad system, the PCF is the only suitable benchmark. In testimony filed in Rate Guidelines - Non-Coal Proceedings, the AAR demonstrated that only 0.3 percent of the nation's railroad traffic moved below the PCF in 1993.

b. The URCS Waybill Sample Costing Process Is the Wrong Tool to Use to Determine Whether an Individual Movement is Making a Contribution to Going Concern Value.

The Uniform Railroad Costing System ("URCS") is the Board's general-purpose regulatory costing formula for the determination of freight railroad movement costs. A dynamic costing tool that incorporates new data as it becomes available annually, URCS estimates the variable costs of rail movements from an intermediate-term perspective. The costing system incorporates annual financial and operating statistics data for each of the Class I railroads for a rolling, five-year period and formulates from these data an econometric relationship between physical "output" and the costs required to produce that output. These cost functions, based on the collective experience of all Class I railroads over time, are used to determine the variability percentages for the individual Class I carriers.

Using these equations and variabilities, system-wide carrier information on one-, three-, and five-year bases is processed to derive the URCS variable costs associated with each unit of output for each railroad. These "unit costs" are then applied against the characteristics of a given

movement to determine the URCS variable cost for that movement. As the Board is aware, the URCS variabilities are based upon cross-sectional analyses of railroad data which effectively measure the medium-run relationship between changes in the level of various expense groupings to large changes in various measures of traffic volume. In evaluating individual pricing decisions, however, the relevant costs are those that vary with marginal or -- at best -- very small changes in traffic volume.

In some industries, this distinction might not be significant. But as the Board recognizes the railroad industry is characterized by significant economies of scale, scope and density that arise because railroad operating expenses and capital investment are incurred as "step functions" that require significant changes in volume before it is economically rational to adjust the level of expenditure. For example, substantial increases in volume would be required before it would make sense to replace 115 pound rail with 132 pound rail. The existence or non-existence of a particular shipper's traffic -- even a large-volume shipper -- would be unlikely to be sufficient, alone, to change a railroad's plans. Yet this is precisely the relevant issue when evaluating pricing decisions *for individual shippers*.

Of course, all of the movements that use a particular facility need to cover collectively the cost of that facility, because the facility is an attributable cost of handling these movements as a group. And it is precisely this level of cost that URCS -- by design -- reflects well. But because the URCS variability percentages are derived by examining the effects of large changes in volume, they overstate the costs that are attributable to individual movements -- as the STB recognized in its Rate Guidelines - Non-Coal Proceedings decision. Thus, URCS variable costs are inappropriate for determining whether individual movements cover their long-run marginal cost.⁴

⁴ This is why, of course, the Board previously established the PCF and DVC cost standards -- in an effort to more accurately identify costs that are attributable to individual movements.

In addition to this limitation of URCS, the existence of extensive joint and common costs, the complex variety of services provided by CSXT, the limited information available from the Waybill Sample and the system-wide average cost structure of URCS make the Waybill Sample costing process a poor vehicle for accurately determining a precise movement cost for individual rail shipments. These distortions are especially evident among the traffic with URCS R/VC ratios below one.

If the URCS costs reflected in the Waybill Sample were accurate for this traffic, this data would suggest that CSXT has handled significant volumes of traffic at rates that fail to contribute to going concern value year after year. Not only is this inconsistent with CSXT's experience with its own traffic, it is inconsistent - as noted elsewhere in this discussion - with the conclusions reached by the ICC/STB and Congress. Presented below are specific reasons why the URCS costs reflected in the Costed Waybill Sample overstate the attributable costs of and/or understate the revenues generated by carrying traffic with R/VC ratios below one.

(1) Variable Costs For Non-Class I Carriers

The R/VC ratios for movements in which Class II and Class III carriers participate do not accurately reflect the contribution earned on that traffic. The URCS costing methodology is driven almost exclusively by the expenses associated with operations of the Class I railroads. Therefore, the URCS unit costs that are applied to develop R/VC ratios reflect, in the main, the operating practices of only the largest seven of the more than 500 freight railroads operating in the United States. Movements over non-Class I carriers are not assigned the variable unit costs incurred by those carriers, but rather the variable unit costs associated with Class I railroad operations⁵.

This is important, because many of CSXT's revenues are generated by shipments that occur in conjunction with movements over one or more non-Class I railroads that typically enjoy lower

⁵ Portions of movements over non-Class I railroads are costed using regional default values which are made up almost entirely of Class I variable costs.

variable costs than those exhibited by a Class I carrier. Class II and III carriers often are able to economically operate routes that have proven marginal or unprofitable to the Class I railroads. Their lower cost structures permit the transportation of traffic with relatively lower revenues. Because the higher URCS-based variable costs for Class I railroads are utilized as a surrogate for the lower variable costs incurred by Class II and Class III carriers in the Waybill Sample costing process, the R/VC ratios available from the costed Waybill Sample for movements that involve non-Class I carriers frequently understate the contribution earned on the traffic, thereby deflating the R/VC ratio.

(2) Private Car Costs

The algorithms used to apply URCS variable unit costs to the Waybill Sample movements apply mileage- or time-oriented freight car rental costs. The costing program assumes that no car cost is incurred (car costs "set" to zero) only in the case of coal unit trains comprised of privately-owned cars. But today more than 40 percent of all U.S.-based rail cars are owned by entities other than railroads, and close to 50 percent of all cars on CSXT lines at any given time are private car. Railroads such as CSXT are increasingly setting their rates on non-coal shipments in privately-owned cars on a basis that provides for no freight car allowance payment from the railroad. When this happens, of course, the rate quoted by CSXT is likely to be lower than would otherwise be the case.

It is this lower rate (revenue) that appears on the Waybill Sample, but available data do not permit the Waybill Sample costing process to identify those non-coal shipments transported on the basis of a "no-pay" private car. Accordingly, costs for these shipments are overstated, and the R/VC ratio understates the contribution earned in these instances.

(3) Local Switching (Spotted/Pulled Ratios)

When rail cars are loaded at or near the unloading point of the previous move, carriers may price the loaded movement with the knowledge that there is little or no cost associated with placing

the car at the loading position or for empty repositioning, especially if the car is moving to an off-line destination⁶ However, the industry switching costs are developed in URCS by multiplying the switches by the spotted/pulled ratios (instead of empty return ratios) In movements of this type, the wrong ratio would be used and would result in allocating to the shipment a switch move that did not occur Thus, the URCS variable costs of the movement are overstated

(4) Empty Return Assignment

The URCS variable cost assumptions assign to backhaul movements -- and the preceding loaded movement -- an empty return ratio that incorrectly assumes costs would be incurred for a subsequent empty return for the type of equipment being used Because the inbound loaded, reload, and backhaul movements are achieving higher-than-average utilization of the rolling stock, the costs assigned by URCS are higher than those actually incurred, and the resulting R/VC ratios are lower than those actually attributable to the traffic

(5) Backhaul Pricing

To obtain more efficient utilization of equipment in instances where a car would otherwise move empty (such as a "foreign" car returning empty to its "home" road), CSXT may price a load for this car at a level in excess of the incremental cost attributable to this tonnage, but below the full URCS variable cost The cost of returning this car empty to the owning road is essentially "sunk" and, therefore, the attributable cost actually incurred is substantially lower than URCS variable cost Any revenue generated in excess of this amount would assist CSXT in covering its fixed and common costs

The fact that this type of innovative pricing is being utilized cannot be determined from any of the fields in the Waybill Sample data base, nor is it possible to match the backhaul movement

⁶ CSXT prices to the market -- not to cost This consideration would not affect the competitive price, but might enable CSXT to meet the competition with the assurance that it was not pricing below its relevant costs

with its corresponding loaded movement. Therefore, the URCS variable costs assigned to such a movement overstate the costs actually incurred by CSXT.

(6) Surplus Equipment

Fluctuations in economic conditions can cause a short-term surplus of a particular type of rail freight car. When this happens, the ownership costs of this surplus equipment are still incurred by the owner. In an effort to defray at least some of the cost of owning a fleet of cars which would be incurred even if the cars sit idle, CSXT may agree to lower-than-"normal" transportation rates in order to generate traffic that will utilize the equipment and make some contribution to the related ownership costs. These rates might well be below the URCS variable cost level for such a movement.

(7) Repositioning

CSXT participates in movements of rail cars that, while empty of cargo, contain shipping devices (various fixtures and appurtenances including, among other things, blocking, cradles, racks, skids, pallets, bolsters, etc.) needed for the shipment of a variety of kinds of freight. These cars must be returned to a point of loading so that this equipment can be utilized in a subsequent loaded movement. In some cases, the shipping devices used in many cars will be consolidated into a single rail car for the return move.

Data from the costed Waybill Sample for these return movements may suggest that the rate being charged is non-compensatory, but the relatively low revenue associated with these repositioning moves is misleading. These moves are only part of an overall profitable package of movements assembled by the railroad marketing departments that include related, but separately-waybilled, "front haul" loaded movements. Only when these movements are linked together can the true overall contribution (and, therefore, the "correct" R/VC ratio) of the bundle of movements be known. But because these movements are waybilled individually, the corresponding loaded and

return movements cannot be matched on the Waybill Sample. As a result, the return movements often are incorrectly identified as non-compensatory.

(8) Inter-terminal and Intra-terminal Moves

Where inter-terminal and intra-terminal movements appear in the Waybill Sample, they are costed, incorrectly, as if they are short line-haul moves. This overstates the costs actually attributable to these moves (which are normal yard re-positionings) and incorrectly identifies them on the costed Waybill Sample as non-compensatory.

(9) Rebilling

For a number of reasons CSXT may use the "Rule 11" accounting provision under which carriers participating in a joint rail movement separately bill their charges for the movement. In the Waybill Sample, "rebilled" shipments appear as a second movement that originates and/or terminates at the rebilling location even though the move is simply interchanged at that point.⁷ The Waybill Sample costing process assigns an origination and/or termination switch cost, instead of the lower cost associated with the actual interchange between the roads, which overstates the URCS/Waybill Sample variable cost for these movements.

(10) Operating Modifications

Since the enactment of the Staggers Act in 1980, the railroad industry has significantly rationalized its plant and staffing. Between 1980 and 2006, Class I railroads reduced employment by 63 percent and miles of road by 42 percent.⁸ CSXT has also achieved substantial improvements in productivity. Productivity improvement of this magnitude results in a major restructuring of the operating patterns and practices of individual carriers. These changes are decidedly beneficial to the railroad and the majority of its shippers, but some dislocations may occur -- for example, the

⁷ In fact, because the Waybill Sample does not include 100 percent of all movements, all of the segments that comprise a single Rule 11 movement may not be included in the Waybill Sample.

⁸ Much of the route mileage was sold to non-Class I carriers, rather than abandoned.

closing of a route or the consolidation of a train yard -- that can cause the variable costs for certain shippers to increase. Under these circumstances, a carrier may elect to increase the existing rate gradually, but while this transition takes place, the costed Waybill Sample may indicate a low R/VC ratio for these movements.

(11) Special Conditions

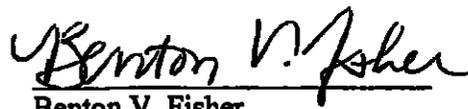
The area in which the URCS-based costing of the Waybill Sample is least effective relates to specific incentive pricing situations. In addition to the items enumerated above, the Waybill Sample and URCS are ill-equipped to detect and establish the proper costs for marketing techniques such as short-term incentive rates (to fill the capacity of a regularly-scheduled but underutilized train, for instance). The actual attributable costs of such traffic are lower than the variable costs assigned by URCS, and their revenues do generate contribution for the railroads.

c. Summary

Given all of the above, the contribution to the revenue needs of the railroads generated by the traffic that is above the presumptive cost floor but below 100 percent of URCS variable costs should not be ignored by the Board. The Board has dealt with this issue before and determined that, if there is a need to ascertain -- on an across-the-board basis -- whether individual movements can be presumed to generate revenues below their attributable costs, the PCF should be used. Obviously, CSXT has determined that this traffic does cover its attributable costs, and carrying it is therefore efficient and reduces the contribution required from captive traffic, including DuPont's issue traffic. DuPont's proposed adjustment should be rejected.

I declare under penalty of perjury that the foregoing is true and correct I further certify that I am qualified and authorized to sponsor and file this testimony

Executed on March 4, 2008


Benton V. Fisher

Benton V. Fisher

Senior Managing Director - Economic Consulting

benton.fisher@fticonsulting.com

1101 K Street, NW
Suite B100
Washington, DC 20005
Tel (202) 312-9100
Fax (202) 312-9101

Education
BS in Engineering and
Management Systems,
Princeton University

Benton V. Fisher is a Senior Managing Director of FTI's Economic Consulting group, located in Washington, D C Mr Fisher has more than 15 years of experience in providing financial, economic and analytical consulting services to corporate clients dealing with transportation, telecommunications, and postal subjects

Mr Fisher has sponsored expert testimony in rate reasonableness proceedings before the Surface Transportation Board

Mr Fisher graduated from Princeton University with a Bachelor of Science degree in Engineering and Management Systems

Surface Transportation Board

- | | |
|--------------------|---|
| January 15, 1999 | Docket No 42022 FMC Corporation and FMC Wyoming Corporation v Union Pacific Railroad Company, Opening Verified Statement of Christopher D Kent and Benton V Fisher |
| March 31, 1999 | Docket No 42022 FMC Corporation and FMC Wyoming Corporation v Union Pacific Railroad Company, Reply Verified Statement of Christopher D Kent and Benton V Fisher |
| April 30, 1999 | Docket No 42022 FMC Corporation and FMC Wyoming Corporation v Union Pacific Railroad Company, Rebuttal Verified Statement of Christopher D Kent and Benton V Fisher |
| July 15, 1999 | Docket No 42038 Minnesota Power, Inc v Duluth, Missabe and Iron Range Railway Company, Opening Verified Statement of Christopher D Kent and Benton V Fisher |
| August 30, 1999 | Docket No 42038 Minnesota Power, Inc v Duluth, Missabe and Iron Range Railway Company, Reply Verified Statement of Christopher D Kent and Benton V Fisher |
| September 28, 1999 | Docket No 42038 Minnesota Power, Inc v Duluth, Missabe and Iron Range Railway Company, Rebuttal Verified Statement of Christopher D Kent and Benton V Fisher |
| June 15, 2000 | Docket No 42051 Wisconsin Power and Light Company v Union Pacific Railroad Company, Opening Verified Statement of Christopher D Kent and Benton V Fisher |
| August 14, 2000 | Docket No 42051 Wisconsin Power and Light Company v Union Pacific Railroad Company, Reply Verified Statement of Christopher D Kent and Benton V Fisher |
| September 28, 2000 | Docket No 42051 Wisconsin Power and Light Company v Union Pacific Railroad Company, Rebuttal Verified Statement of Christopher D Kent and |



Benton V Fisher

December 14, 2000 Docket No 42054 PPL Montana, LLC v The Burlington Northern Santa Fe Railway Company, Opening Verified Statement of Christopher D Kent and Benton V Fisher

March 13, 2001 Docket No 42054 PPL Montana, LLC v The Burlington Northern Santa Fe Railway Company, Reply Verified Statement of Christopher D Kent and Benton V Fisher

May 7, 2001 Docket No 42054 PPL Montana, LLC v The Burlington Northern Santa Fe Railway Company, Rebuttal Verified Statement of Christopher D Kent and Benton V Fisher

October 15, 2001 Docket No 42056 Texas Municipal Power Agency v The Burlington Northern Santa Fe Railway Company, Opening Verified Statement of Benton V Fisher

January 15, 2002 Docket No 42056 Texas Municipal Power Agency v The Burlington Northern Santa Fe Railway Company, Reply Verified Statement of Benton V Fisher

February 25, 2002 Docket No 42056 Texas Municipal Power Agency v The Burlington Northern Santa Fe Railway Company, Rebuttal Verified Statement of Benton V Fisher

May 24, 2002 Docket No 42069 Duke Energy Corporation v Norfolk Southern Railway Company, Opening Evidence and Argument of Norfolk Southern Railway Company

June 10, 2002 Docket No 42072 Carolina Power & Light Company v Norfolk Southern Railway Company, Opening Evidence and Argument of Norfolk Southern Railway Company

July 19, 2002 Northern States Power Company Minnesota v Union Pacific Railroad Company, Union Pacific's Opening Evidence

September 30, 2002 Docket No 42069 Duke Energy Corporation v Norfolk Southern Railway Company, Reply Evidence and Argument of Norfolk Southern Railway Company

October 4, 2002 Northern States Power Company Minnesota v Union Pacific Railroad Company, Union Pacific's Reply Evidence

October 11, 2002 Docket No 42072 Carolina Power & Light Company v Norfolk Southern Railway Company, Reply Evidence and Argument of Norfolk Southern Railway Company

November 1, 2002 Northern States Power Company Minnesota v Union Pacific Railroad Company, Union Pacific's Rebuttal Evidence

November 19, 2002 Docket No 42069 Duke Energy Corporation v Norfolk Southern Railway Company, Rebuttal Evidence and Argument of Norfolk Southern Railway Company

- November 27, 2002 Docket No 42072 Carolina Power & Light Company v Norfolk Southern Railway Company, Rebuttal Evidence and Argument of Norfolk Southern Railway Company
- January 10, 2003 Docket No 42057 Public Service Company of Colorado D/B/A Xcel Energy v The Burlington Northern and Santa Fe Railway Company, Opening Evidence and Argument of The Burlington Northern and Santa Fe Railway Company
- February 7, 2003 Docket No 42058 Arizona Electric Power Cooperative, Inc v The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad, Opening Evidence of The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad
- April 4, 2003 Docket No 42057 Public Service Company of Colorado D/B/A Xcel Energy v The Burlington Northern and Santa Fe Railway Company, Reply Evidence and Argument of The Burlington Northern and Santa Fe Railway Company
- May 19, 2003 Docket No 42057 Public Service Company of Colorado D/B/A Xcel Energy v The Burlington Northern and Santa Fe Railway Company, Rebuttal Evidence and Argument of The Burlington Northern and Santa Fe Railway Company
- May 27, 2003 Docket No 42058 Arizona Electric Power Cooperative, Inc v The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad, Joint Variable Cost Reply Evidence of The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad
- May 27, 2003 Docket No 42058 Arizona Electric Power Cooperative, Inc v The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad, Reply Evidence of The Burlington Northern and Santa Fe Railway Company
- June 13, 2003 Docket No 42071 Otter Tail Power Company v The Burlington Northern and Santa Fe Railway Company, Opening Evidence of The Burlington Northern and Santa Fe Railway Company
- July 3, 2003 Docket No 42058 Arizona Electric Power Cooperative, Inc v The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad, Joint Variable Cost Rebuttal Evidence of The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad
- October 8, 2003 Docket No 42071 Otter Tail Power Company v The Burlington Northern and Santa Fe Railway Company, Reply Evidence of The Burlington Northern and Santa Fe Railway Company
- October 24, 2003 Docket No 42069 Duke Energy Corporation v Norfolk Southern Railway Company Supplemental Evidence of Norfolk Southern Railway Company
- October 31, 2003 Docket No 42069 Duke Energy Corporation v Norfolk Southern Railway Company, Reply of Norfolk Southern Railway Company to Duke Energy Company's Supplemental Evidence

- November 24, 2003 Docket No 42072 Carolina Power & Light Company v Norfolk Southern Railway Company, Supplemental Evidence of Norfolk Southern Railway Company
- December 2, 2003 Docket No 42072 Carolina Power & Light Company v Norfolk Southern Railway Company, Reply of Norfolk Southern Railway Company to Carolina Power & Light Company's Supplemental Evidence
- January 26, 2004 Docket No 42058 Arizona Electric Power Cooperative, Inc v The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company, Joint Supplemental Reply Evidence and Argument of The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company
- March 1, 2004 Docket No 41191 (Sub-No 1) AEP Texas North Company v The Burlington Northern and Santa Fe Railway Company, Opening Evidence and Argument of The Burlington Northern and Santa Fe Railway Company
- March 22, 2004 Docket No 42071 Otter Tail Power Company v The Burlington Northern and Santa Fe Railway Company, Supplemental Reply Evidence of The Burlington Northern and Santa Fe Railway Company
- May 24, 2004 Docket No 41191 (Sub-No 1) AEP Texas North Company v The Burlington Northern and Santa Fe Railway Company, Reply Evidence of The Burlington Northern and Santa Fe Railway Company
- March 1, 2005 Docket No 42071 Otter Tail Power Company v BNSF Railway Company, Supplemental Evidence of BNSF Railway Company
- April 4, 2005 Docket No 42071 Otter Tail Power Company v BNSF Railway Company, Reply of BNSF Railway Company to Supplemental Evidence
- April 19, 2005 Docket No 42088 Western Fuels Association, Inc and Basin Electric Power Cooperative, Inc v BNSF Railway Company, Opening Evidence of BNSF Railway Company
- July 20, 2005 Docket No 42088 Western Fuels Association, Inc and Basin Electric Power Cooperative, Inc v BNSF Railway Company, Reply Evidence of BNSF Railway Company
- September 30, 2005 Docket No 42088 Western Fuels Association, Inc and Basin Electric Power Cooperative, Inc v BNSF Railway Company, Rebuttal Evidence of BNSF Railway Company
- October 20, 2005 Docket No 42088 Western Fuels Association, Inc and Basin Electric Power Cooperative, Inc v BNSF Railway Company, Surrebuttal Evidence of BNSF Railway Company May 1, 2006 Docket No Ex Parte 657 (Sub-No 1) Major Issues in Rail Rate Cases, Verified Statement Supporting Comments of BNSF Railway Company
- June 15, 2006 Docket No 42088 Western Fuels Association, Inc and Basin Electric Power Cooperative, Inc v BNSF Railway Company, Reply Supplemental Evidence of BNSF Railway Company

June 15, 2006 Docket No 41191 (Sub-No 1) AEP Texas North Company v BNSF Railway Company, Reply Supplemental Evidence of BNSF Railway Company

March 19, 2007 Docket No 41191 (Sub-No 1) AEP Texas North Company v BNSF Railway Company, Reply Third Supplemental Evidence of BNSF Railway Company

March 26, 2007 Docket No 42088 Western Fuels Association, Inc and Basin Electric Power Cooperative, Inc v BNSF Railway Company, Reply Second Supplemental Evidence of BNSF Railway Company

July 30, 2007 Docket No 42095 Kansas City Power & Light v Union Pacific Railroad Company, Union Pacific's Opening Evidence

August 20, 2007 Docket No 42095 Kansas City Power & Light v Union Pacific Railroad Company, Union Pacific's Reply Evidence

February 4, 2008 Docket No 42099 E I DuPont De Nemours v CSX Transportation, CSX's Opening Evidence

February 4, 2008 Docket No 42100 E I DuPont De Nemours v CSX Transportation, CSX's Opening Evidence

February 4, 2008 Docket No 42101 E I DuPont De Nemours v CSX Transportation, CSX's Opening Evidence

EXHIBIT 6

Exhibit 6 contains Highly Confidential information subject to a Protective Order entered by the STB in this case, and therefore is not included in this Public filing.

EXHIBIT 7

Exhibit 7 contains Confidential information subject to a Protective Order entered by the STB in this case, and therefore is not included in this Public filing.

EXHIBIT 8

Exhibit 8 contains Highly Confidential information subject to a Protective Order entered by the STB in this case, and therefore is not included in this Public filing.

EXHIBIT 9

Exhibit 9 contains Highly Confidential information subject to a Protective Order entered by the STB in this case, and therefore is not included in this Public filing.

EXHIBIT 10

Exhibit 10 contains Highly Confidential information subject to a Protective Order entered by the STB in this case, and therefore is not included in this Public filing.

EXHIBIT 11

Exhibit 11 contains Highly Confidential information subject to a Protective Order entered by the STB in this case, and therefore is not included in this Public filing.

EXHIBIT 12

Exhibit 12 contains Highly Confidential information subject to a Protective Order entered by the STB in this case, and therefore is not included in this Public filing.

EXHIBIT 13



Testimony of

Gary W Spitzer

**Vice President/General Manager DuPont Chemical Solutions Enterprise
E I du Pont de Nemours and Company
1007 Market Street
Wilmington, DE 19898
302-774-1000**

**Before the
House Transportation
And Infrastructure Committee**

"Rail Competition and Service"

September 25, 2007

✓

Chairman Oberstar and distinguished Members of the Committee, my name is Gary Spitzer. I am the Vice President and General Manager for DuPont Chemical Solutions Enterprise. In this role, I lead a global business in a segment of our company. DuPont provides products and services to a large number of markets including agricultural products, construction, industrial chemicals, energy, manufacturing, health care, transportation, and homeland security. Thank you for this opportunity to speak today.

A competitive and efficient rail distribution system is vital to DuPont and its absence is adversely affecting our ability to operate in the United States and compete in the global market. I am here to explain why DuPont and other similar companies consider enactment of H R 2125, the Rail Competition and Service Improvement Act of 2007, critical to our great Nation's economic growth. DuPont also supports legislation such as H R 1650, which would subject the railroads to the same antitrust provisions that govern the conduct of other participants in the free enterprise system.

DuPont is a global corporation founded 205 years ago on the banks of the Brandywine River in Wilmington, Delaware. Initially, DuPont made only one product, black powder. A century later, its focus shifted to chemicals, materials and energy. In our third century, we are bringing together biology and chemistry to meet societal needs for safe and abundant food, alternative fuels, and other sustainable solutions to enable a better, safer and healthier life for people everywhere. DuPont has revenues of over \$27 billion a year, with 135 manufacturing and processing sites in 70 countries and over 60,000 employees. In the United States alone, DuPont employs about 36,000 workers in 33 states.

One thing has remained unchanged throughout the history of DuPont – our uncompromising commitment to safety. Our Company's founder, E I du Pont, built safety into the very fabric of DuPont culture by living, and requiring managers to live, on the Company's first manufacturing sites. That culture and clear personal accountability remain just as strong today. Safety forms the foundation for every system and process, including transportation, in DuPont. Indeed, our safety culture has been the underpinning for many DuPont products through the years. Our discovery of nylon, for example, made safer parachutes for D-Day, and our development of Neoprene®, a synthetic rubber, made military transportation easier and safer. Today, products such as DuPont Kevlar® high-performance fiber, which is credited with the survival of over 3,000 law enforcement officers in the United States over the last thirty years, help save lives. In addition to being used for body armor, Kevlar® is used for vehicle armor, for aircraft parts, bridge construction, fiber optic cable and numerous other functions. Another DuPont fiber, Nomex®, is used for personal protection by first responders, including firefighters. Our Sentry-glass® technology helps to protect both private citizens in skyscrapers and other structures around the world and government employees at critical governmental installations such as the Pentagon and U S Embassies.

America's freight trains have been vital to DuPont operations since 1858 when the Pennsylvania Railroad first transported our products. They remain essential to our business.

today To produce Kevlar®, Nomex® and many of our other products, DuPont requires a vast array of chemicals, some regulated by the Department of Transportation (DOT) and some not Quite often, due to their composition, characteristics or volume, these chemicals must be transported by rail Therefore, a safe, efficient, cost-effective, and responsive rail transportation system is critical to my business, the majority of businesses within DuPont, and our country's manufacturing community as a whole Without such a system, we run the risk of no longer being able to manufacture some products within the United States, provide jobs to your constituents, or contribute exports to help balance our Nation's trade deficit

Our Nation's defense, international trade and domestic economy are also largely dependent on a safe, financially healthy and efficient, domestic rail system Our economy requires carriers, in all modes of transportation, that can compete in a balanced marketplace and earn a fair return on their investment Competitive and efficient carriers should be able to earn their cost of capital and attract investment dollars while providing real value to their customers The railroads have, over the years, provided such value to DuPont and other customers They have also, at times, acted in ways which harmed their customers and the economy We are now in one of the latter periods

When Congress passed the Staggers Act in 1980, there were over 40 Class I railroads competing for business Today, after more than 50 mergers and consolidations, there are only seven Class I railroads in North America, and four of them control over 95 % of the railroad business This unprecedented consolidation has resulted in entire states, regions, and industries becoming captive to a single railroad This level of concentration and the lack of competition resulting in poor and unpredictable service and monopoly pricing were not envisioned by Congress when it reformed the applicable laws in 1980 Nor were they contemplated by companies such as DuPont

Value is what DuPont and other rail customers expect from their supply chain participants Value is reflected in the superior service that carriers would offer in a truly competitive environment Value is continuous improvement and innovation In the context of rail transportation, value is reliable, consistent transit times Value is the delivery of services that keep customers competitive in the markets they serve The inconsistency and lack of predictability in transit time that characterize rail service today translate into added cost and competitive disadvantage. They force shippers to add otherwise unnecessary (and expensive) rail cars to their fleets and to either hold more inventory at the point of manufacture or ship it into an already congested network This increases costs for everyone and exacerbates the congestion problems that rail customers battle regularly and the carriers seek public funds to alleviate

Congress also did not envision that captive rail customers would be left unprotected by the Surface Transportation Board ("STB"), the very agency charged with ensuring that the freight rail marketplace did not become the federally protected monopoly it is now. Rail customers who have sought the STB's assistance in helping them realize the fair play of competition, instead remain dependent on monopoly service As a result, they have little if any

redress for the non-responsiveness and mediocre service provided by the railroads at exorbitant prices. This is certainly the case for DuPont, which is captive at thirty-two out of thirty-nine U S rail shipping sites and at many of its customers' sites. The results are increased costs that make us less competitive, and unreliable transportation of raw materials and finished products into and out of our sites.

The potential impact of mediocre rail service and cost increases is illustrated by our experiences at the DuPont Spruance facility in Virginia. DuPont Spruance is our largest manufacturing facility in North America and employs more than 2,600 people. It is where we produce Kevlar®, the life-saving fiber used for body armor for our troops now in Iraq and Afghanistan, as well as by law enforcement personnel throughout the United States. DuPont is captive to CSX at Spruance – no other railroad serves the plant and there is no practical alternative form of transport for on-time delivery of raw materials into the facility. On several occasions during the past 15 months we have seen shipments of essential raw materials run more than 5 days late. While shutdowns were avoided through collaboration between DuPont and the railroad, we came uncomfortably close to delays that could hinder production. Mr. Chairman, as I am sure you and the other members of the Committee appreciate, any curtailment in production could lead to a shortage of body armor essential to our troops as well as subject DuPont to potential penalties under the Defense Production Act of 1950.

In addition to making DuPont extremely vulnerable to transportation delays at Spruance, the Company's captivity to one rail carrier there also threatens our competitiveness and increases the costs incurred by both local governments and the Federal government to acquire Kevlar®, Nomex® and Tyvek®, the third product made at the site. Recently, CSX increased the rates it charges DuPont to transport raw materials to Spruance by 9% to 102% depending on the specific move and product being transported. Although these increases bear no rational connection to the level of service being provided, DuPont had no alternative but to accept them and the consequent rise in the cost of goods sold to the U S military and law enforcement and fire protection agencies around the world. Those increases amount to over \$2 million annually.

Ever-escalating rail rates without any commensurate cost improvement opportunities (such as faster and more consistent transit times) have driven companies out of certain businesses or forced them to seek lower cost solutions offshore. For example, a polyester fiber manufacturer in the southeastern United States has announced the closure of a plant that employs 260 people. DuPont supplied a raw material, ethylene glycol, for that plant. Recently, a carrier imposed a 42% increase in the rail rate to that captive destination. The added cost of inbound product would have increased the manufacturing cost, making this plant even less competitive when compared to offshore producers. Our customer will now import glycols from Taiwan and weave polyester fiber at another site. Two hundred and sixty workers at the plant lost their jobs, the community lost tax revenue, DuPont lost a customer, and the carrier that imposed a 42% rate increase lost 160 carloads of business each year.

Another DuPont customer located in Pennsylvania is similarly challenged to remain competitive versus imports. The customer manufactures a product essential to tire production. Its manufacturing facility is served by a short line railroad that connects with more than one

Class I rail carrier. However, the two DuPont plants from which we can ship to the customer are both captive to the same Class I railroad. Trucking is not a viable alternative for routine shipping of the regulated material involved. Recently, the Class I railroad increased the rate it charges DuPont to move the pertinent material by 78%, resulting in a \$600,000 annual cost increase to our customer without any added value or benefit to anyone. As you know, the tire industry that remains in the United States is under severe competitive pressure from offshore producers despite the many recent press reports concerning quality and safety issues with imported tires. We must avoid another case where a company will shut its doors and our Nation will pay the price in lost jobs, a reduced tax and industrial base and increased trade deficit as more and more of the tires on our passenger cars and military vehicles are made abroad.

Carriers cannot claim ignorance concerning the specific potential impact of their price increases. During recent contract discussions, DuPont invited one of its carriers to business reviews with four of our strategic business units. During those reviews, DuPont presented data concerning the effect of proposed price increases on the business of DuPont and its customers, including the customer who ultimately shut down its plant. The extreme rate increases went forward unabated.

As the examples I have discussed demonstrate, the railroads are now prepared to take full advantage of their ability to impose monopolistic pricing even if they literally drive captive shippers like DuPont out of certain businesses. Developments since the enactment of the Staggers Act and its progeny confirm what my own experiences at DuPont suggest -- that our economy would be better served by changing the current regulatory framework that enables the Class I railroads to operate as legally protected regional monopolies.

Congress enacted the Staggers Act because after the end of World War II, the nation's privately owned and operated rail infrastructure was permitted to decline, costs related to inefficient work practices and poor infrastructure were extremely high, service had suffered and safety-related incidents were on the rise. Competition from motor carriage and waterborne competitors had increased and, in 1980, less than half of the Nation's domestic freight traveled by rail. This contrasted markedly with figures which showed that in 1947 railroads were hauling three times as much tonnage as motor carriers.

Congressional concern was deepened by a 1978 Department of Transportation report to Congress which predicted that "the (rail) industry between 1976 and 1985 would have a capital shortfall of between 13.1 and 16.1 billion dollars (\$16 to \$20 billion in 1980 dollars)." The House Committee on Interstate and Foreign Commerce, citing the Department's report, concluded that "There is no reason to believe that railroad, operating in the present regulatory environment will improve their earnings. Failure to overcome [this] will mean a continued deterioration in the railroad service which will have the effect of driving more shippers away from railroads."

Congress concluded that the system had to change and, with the help of the rail community and industry, including DuPont, set out to accomplish that task. After considerable debate, Congress enacted the Staggers Act with the following stated goals

- (1) to assist the railroads of the Nation in rehabilitating the rail system in order to meet the demands of interstate commerce and the national defense,
- (2) to reform Federal regulatory policy so as to preserve a safe, adequate, economical, efficient, and financially stable rail system,
- (3) to assist the rail system to remain viable in the private sector of the economy, and
- (4) to assist in the rehabilitation and financing of the rail system

To help balance the new rights and protection afforded the railroads, Congress recognized the right of rail carriers and shippers to enter into contracts and provided for oversight of rail rates by the Interstate Commerce Commission (later replaced by the Surface Transportation Board)

It is clear that when it enacted the Staggers Act, Congress believed that existing competition between railroads and between modes of transportation would protect the consumer. The House Conference Report, which accompanied the Act, contains the following findings and rationale in support of the 1980 legislation

The Conferees find that historically the enactment of the Interstate Commerce Act was essential to prevent the abuse of monopoly power by railroads and to maintain a national railroad network as an essential part of the nation's transportation system. However, today, most transportation is competitive and many of the Government regulations affecting railroads have become unnecessary and inefficient. Nearly two-thirds of inter-city freight is transported by modes of transportation other than railroads. Earnings by the railroad industry are the lowest of any transportation mode and are insufficient to generate funds for the necessary capital improvements. The industry's failure to achieve increased earnings will result in either further deterioration of the rail system or the need for additional Federal subsidy. Modernization of economic regulation of railroads, with greater reliance on the marketplace, is essential to achieve maximum utilization of railroads.

Times and the marketplace have changed and the issue now is whether the Staggers Act has accomplished its goals. Have the railroads been financially rehabilitated? Are they safer, more efficient, and economically stable? And, if the answers to these questions are positive, has the time come to reexamine the prerogatives afforded the rail community under the Act? Should the railroads continue to enjoy government "protection"? Or, should the rules and rigors of a competitive marketplace govern? And, what of the consumer, the user of railroad services? Will the marketplace protect the user or will the monopolistic behavior the railroads exhibited in the early 20th Century reassert itself? These are the questions the members of Congress will have to

ponder The answers lie in our history and in the changing conditions of the emerging global marketplace

The rail industry has enjoyed a veritable rebirth as a result of the Staggers Act. Railroads, with the support of their customers and approval of the Interstate Commerce Commission, began to abandon unproductive track. Small, less productive segments with high costs and low productivity were sold to independent entrepreneurs. Labor negotiations resulted in substantially improved work rule changes and a dramatic reduction in the rail labor force. Poor and badly maintained cars and related equipment were removed from the system and customers were required to bear the cost of their replacement. The promise of improved service, greater efficiency and lower cost encouraged large rail customers to comply with these new capital requirements and to enter into long term contracts that created financial stability and brought predictability to rail balance sheets. Renewed faith by Wall Street, fostered by the passage of the Staggers Act, related work rules, and balance sheet improvements, brought capital to invest in new, more efficient locomotive power, communications and control equipment and to rehabilitate rail infrastructure. Finally, consolidation of the Nation's rail system into larger and larger Class I railroads resulted first in a more balanced of market place and later in the emergence of market dominance by an elite few

The time has come to remove the protections afforded the rail industry by the ICC and its successor the STB. This is the time for Congress to bring more balance to the relationship between shippers – particularly captive shippers such as DuPont – and rail carriers.

By any measure, today's railroads are able to compete for capital without further governmental protection. Rail infrastructure of the Class I railroads is in better condition now than at any time in history. Rail service has stabilized although it is still inconsistent despite reported record profits for the Class I railroads. New equipment and technology hold the promise of still further productivity improvement. Earnings and the balance sheets of the Class I railroads – especially when adjusted for merger premiums – have never been better and compare favorably with those of their biggest competitor - the motor carrier industry.

Railroads have become "stocks of interest" and sophisticated investors are seeing them as having a very favorable upside for earnings. Warren Buffet, for example, has recently purchased large amounts of rail common stock, another indication of the railroad industry's favorable financial outlook.

In January 2007, Union Pacific announced that it would buy back 20 million common shares (or 7% of the company's 270 million outstanding shares) and increase its dividend payment to shareholders by 17%. Similarly, CSX reported that it would buy back an additional \$1 billion dollars of shares to bring its current repurchase program to over \$3 billion (or over 15% of the company's outstanding stock). CSX also announced an increase of 25% in its annual dividend. In at least some instances the railroads are spending more to repurchase stock than they invest in infrastructure. CSX, for example, is reportedly spending an aggregate of only \$1.3

- \$1.4 billion on infrastructure in calendar years 2006 and 2007, while it intends to reward investors with \$3 billion through stock repurchases during the three-year period ending on December 31, 2008

The railroads' attractiveness to sophisticated investors derives in part from their ability to impose unfair monopoly pricing. Morgan Stanley recently noted that based on favorable rulings on two rate cases filed before the Surface Transportation Board "rails have much more pricing upside left under current regulatory guidelines. Yet another pro-rail ruling will also leave shippers frustrated and more reluctant to pay the \$5-6 million cost to file rate disputes with the STB. We believe that rate case filings could slow from here, and captive rates will need to go much higher before reaching any regulatory limits under current guidelines." Morgan Stanley concluded that "Railroad customers who cannot switch transportation modes acknowledged there is little they can do in the near term to combat rising railroad pricing and are thus planning for significant increases in railroad rates." Similarly, in recent commentary (April 19, 2007), Bear Sterns analyst Ed Wolfe stated that "Firm pricing despite signs of quickly weakening truck pricing is an important part of the rail story. CSX gave strong evidence that its pricing is holding up well. We don't expect our year EPS numbers for CSX or the sector to come down despite continued down year over year volumes into strong yields and improving productivity." In the view of the markets, at least, the railroads are dominant monopolies unaffected by their nearest competition. What's more, it is reasonable to conclude, that the Class I railroads are able to freely dictate prices for their services without fear of interference by any regulatory agency.

But is this the end of the inquiry? Should the railroads be permitted to determine the fate of the industries they serve? Will they, through their monopolistic rate increases, cause manufacturing sites to close, mining to be curtailed and farmer's fields to be plowed under? Will their actions exacerbate the loss of well paying, US manufacturing jobs and inhibit exports while enjoying monopoly profits?

The views of the investment community concerning the state of competition are confirmed by hard data. Recent trends support the proposition that the railroads of the 21st Century bear a much closer resemblance to those of the early 20th Century than to their less powerful cousins of the 1970's. In the late 1890's emerging industry, agricultural and mining interests were completely dependent on a single railroad system to transport their products to market. The robber barons of the time used this leverage to extract "monopoly profits" from the farmers, miners and other "captive" shippers of the day. The expected balance which competition brings to the market place was missing. Government intervention was required and the Interstate Commerce Act (passed in 1887, amended in 1902) and much of the current anti-trust law was enacted to help restore balance to the marketplace.

Today, the rail industry is highly concentrated. The forty plus Class I railroads that existed in 1980 have been reduced to a mere handful. The four largest effectively control different sections of the country and any real competition among them is essentially non-existent. In the chemical industry, for example, nearly two thirds of chemical shippers are now served by only one railroad. Further, due to the characteristics of the products or the economics of

transporting the materials in bulk, no effective competition from motor carriage exists. A study by Escalation Consultants (2003) concluded that captive chemical customers pay, on average, rail rates that are 77% higher than rates for competitive chemical customers. The following chart illustrates the point.

	<u>NS</u>	<u>CSX</u>	<u>BN</u>	<u>UP</u>
Farm Products Captive Rate	\$21 37	\$36 74	\$45 28	\$37 99
Farm Products Non-Captive Rate	\$11 88	\$20 83	\$26 09	\$21 29
Coal Captive Rate	\$17 56	\$17 22	\$16 77	\$17 00
Coal Non-Captive Rate	\$9 76	\$9 76	\$9 66	\$9 53
Chemicals Captive Rate	\$36 98	\$34 33	\$42 57	\$38 94
Chemicals Non-Captive Rate	\$20 56	\$19 46	\$24 52	\$21 82
Lumber or Wood Captive Rate	\$29 43	\$36 13	\$59 19	\$59 49
Lumber or Wood Non-Captive Rate	\$16 36	\$20 48	\$34 10	\$33 34
Pulp, Paper Captive Rate	\$39 48	\$40 82	\$62 14	\$55 40
Pulp, Paper Non-Captive Rate	\$21 95	\$23 14	\$35 80	\$31 05

Source: Escalation Consultants (2003)

Additional competition from new entrants into the rail industry is highly unlikely. Current environmental rules, local ordinances and permits, land availability and cost, construction expense, and other constraints make the building of new competitive railroads virtually impossible.

Railroad dominance is even more severe in the agriculture and mining sectors than it is in my industry. In some cases, rail rates – imposed in the absence of competition and by dominant rail carriers – can determine which farmer, mining interest or manufacturer survives.

CSX President Michael Ward was quoted in Purchasing magazine as asserting that his company “only intends” to increase prices “up to 6%”. DuPont has never objected to fair and reasonable rate increases provided they are tied to tangible service improvements. However, reasonable price increases is not what the Company is currently experiencing. DuPont is seeing significantly higher increases from all Class I railroads -- we have had no choice but to accept double, and in some cases triple digit increases to get our raw materials and products moved.

In today’s global economy, competitive forces are accentuating the impact of cost inputs, including transportation. According to figures released by the American Chemistry Council, the chemistry sector of the US economy went from a trade surplus of \$20.4 billion in 1995 to a net import position of \$9.0 billion in 2005. This is a reversal of US production of almost \$30

billion dollars in ten years. During this same time period, employment in the chemistry sector fell from 982,000 to 879,000, a loss of about 104,000 jobs. A May 2, 2005 Business Week article reported that " of 120 chemical plants being built around the world with price tags of \$1 billion or more, just one . is in the United States. China, by contrast has 50 "

While lost jobs and closed plants are not solely attributable to the market power exercised by the railroads, poor service, inflexibility and the railroads' exercising monopoly pricing power and the inflationary impact of their actions on the price of U S manufactured goods plays a significant role in the decision of many businesses to expand their operations overseas instead of the United States. For example, Toyota recently conditioned its decision to build an assembly plant in the United States on whether it would receive service from more than one railroad. Toyota indicated that it would not construct the new plant at a location in the United States unless it could be assured that it would not become a "captive shipper" of a single rail provider.

The future, if current regulatory structures are maintained and past practices are permitted to continue, will bring an even greater concentration of rail power.

The current rail policy of the United States, as expressed in section 10101 of title 49 of the United States Code states, among other things, that

[1]is the policy of the United States Government – (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense, and

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital.

The STB is not currently recognizing and enforcing these provisions in its decisions. If these provisions are not recognized and enforced and if the rail industry is permitted to continue its current merger and pricing practices, these congressionally mandated policy goals will not be met. There will be no competition among rail carriers and rates will be permitted to exceed even the current monopoly levels.

Change is required and all realistic options must be considered. Congressional intervention is necessary to prevent the pendulum from returning to the 1900's. "Modernization of the economic regulation of the railroads", required in 1980, is again required. If DuPont and other manufacturers are to remain competitive in a global economy, Congress must repair our Nation's rail system and once again make it reliable, responsive, affordable and accountable.

First, reform must begin at the STB Simply put, that agency has been ineffective and broken While the STB is supposed to fairly mediate rate disputes between the railroads and shippers, available evidence suggests that the STB process is skewed in the railroads' favor

In an October 2006 report, the Government Accountability Office concluded that the rate complaint process is largely inaccessible to shippers – even as the number of shippers eligible for relief has increased substantially as railroads have exercised their monopoly power The fee for filing a large rate case at the STB is \$178,200 compared to the \$150 filing fee applicable in federal district court The large rate case process is also far too lengthy and costly The STB itself has recently indicated that it costs at least \$4.5 million to litigate a case under the agency's large rate case rules, and large rate cases have required more than three years for a decision The STB's own new rules for medium-sized cases state that such cases will require a year and a half and \$1 million to litigate - far too long in a dynamic global economy and far too expensive

The STB imposes an almost impossible burden of proof on rail customers In "competitive access" cases (one of the pro-competitive changes made by the Staggers Act), that burden is so high that not a single case has been filed in the last eighteen years The burden of proof on shippers filing large and medium-sized rate cases requires them to construct a hypothetical railroad and establish that the fees charged by such a railroad would be lower than the rates charged by the actual carrier The difficulty in this burden can be shown in the results of the STB decisions Over the past five years, of the ten large rate cases decided by the STB, eight have resulted in complete losses for the shipper Even in the two cases in which the shipper obtained some relief, the measure of relief was far less than that sought - in one case a miniscule 1 to 3 percent reduction in the rate

These burdens have made shippers extremely reluctant to file complaints While the STB recently modified the process for large rate cases, rail customers believe that these changes are actually worse for them than prior rules Indeed, two massive STB decisions issued just last week under the new large-case rules both resulted in complete losses for the shippers The September 13, 2007, Coal and Energy Price Report stated "[T]here is overwhelming sentiment among U.S. captive coal shippers that settling the ongoing rate issue over increasing rail rates will require more than appealing one's case to the Surface Transportation Board" The report continued "People realize that they can't win with the current STB, so you have to take it back to Congress"

Many of the necessary reforms can be achieved through passage of H.R. 2125, the Railroad Competition and Service Improvement Act of 2007 DuPont actively supports H.R. 2125 as it seeks to preserve existing rail-to-rail competition in areas of the country where competition is working and looks to reduce impediments to competition that adversely affect us and other rail customers

The so-called "bottleneck" issue illustrates the type of problem and inequity that H.R. 2125 is designed to correct The STB has ruled that carriers are not required to facilitate competition to or from captive locations by offering a rate to the nearest interchange with

another carrier We suffer the ill-effects of this practice at our Niagara Falls, New York site where DuPont manufactures metallic sodium and ships it to customers along the Gulf coast and the Pacific Northwest In a competitive scenario, CSXT, the only carrier with service to our plant, would be required to provide a rate for the 26 miles between our plant and the Norfolk Southern interchange in Buffalo, New York Instead, we are forced to use CSXT to transport our shipments all the way to Chicago at much higher rates DuPont is the only remaining producer of metallic sodium in the United States, yet we are at risk of losing this business to overseas competitors due in part to the high cost of captivity

Among its numerous provisions, the proposed legislation would remedy the "bottleneck" problem and many of the other deficiencies at the STB. H R 2125 would require the agency to do what it was intended to do promote effective competition among rail carriers at origins and destinations, enforce reasonable rates for rail customers in the absence of competition, and ensure efficient and reliable rail transportation service for all rail customers

Second, while DuPont acknowledges that this legislation does not fall within this Committee's primary jurisdiction, we support enactment of H.R. 1650, The Railroad Antitrust Enforcement Act of 2007. We agree with the 17 state attorneys general who, on August 17, 2006, wrote to Congress urging enactment of legislation that would subject the railroads to the antitrust laws As they noted, the "Surface Transportation Board has failed its responsibility to restrain railroad monopoly power," and some of the practices it allows are considered by the United States Department of Justice to be "of questionable legality under the nation's antitrust laws"¹ "Historically, our nation has found that the best way to ensure economic success and economic efficiency is through the discipline of competition"²

From time to time the courts and the Congress have granted various industries exemptions from specific applications of the antitrust laws However, these exemptions are, in theory, issued sparingly and only when competitive markets are ensured through alternative means Unfortunately, the American railroad industry has accumulated a very broad exemption from the nation's antitrust laws that shields the industry from antitrust enforcement even where competitive markets are not ensured through alternative means

H R 1650 seeks to correct this imbalance by repealing the railroad exemptions in both the antitrust and transportation statutes, so that antitrust law fully covers railroads just as it covers other industries Additionally, it permits the Justice Department and the Federal Trade Commission to review mergers under antitrust law, and allows state attorneys general and other private parties to sue for treble damages and sue for court orders to halt anti-competitive conduct, both of which are not currently allowable under federal law

The major Class I railroads pushed for introduction of H R 2116, the Railroad Investment Tax Credit of 2007, to obtain a 25% federal investment tax credit and first year expensing provision for investments in railroad infrastructure Some level of investment tax credit may be sound national policy, but only if it is part of a comprehensive solution to rail reliability problems and the overall infrastructure problems of the entire U S transportation

industry The railroads' desire for this tax credit may also give the Congress, for the first time in decades, an opportunity to address both the concerns of the major railroads and the legitimate concerns of rail customers in such a manner that a strengthened national rail system may emerge DuPont believes that to be effective, any investment tax credit provided to the rail industry must be focused and must be coupled with provisions in H R 2125, H R 1650 and the overall solution to the national transportation infrastructure problems

Individual shippers and carriers have cooperated in the past to structure a solution which enhances their collective interests and well-being and which supports the national interests DuPont has participated in such efforts and is fully prepared to participate in them again It is time for the rail industry to join with Congress and its customers to create a balanced, market based system serving the common interests of carriers, shippers and the country at large It is essential that this be done and done quickly We must start now

In closing, Chairman Oberstar, I want to thank you and the members of the committee for allowing me to share my Company's views on this important issue We look forward to joining you in creating a legislative and regulatory framework that will help build a truly competitive transportation and supportive network - including a rail system - that will add value to United States' chemical, manufacturing, mining, energy and agricultural industries, provide jobs to our citizens and permit us to continue to compete and grow in the global marketplace DuPont appreciates the important work of this Committee and we stand ready to work with you as you move forward

¹ A Communication from the State Attorneys General of Arizona, Arkansas, California, Connecticut, the District of Columbia, Iowa, Kentucky, Louisiana, Minnesota, Mississippi, Montana, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota and Wisconsin to the Judiciary Committees of the U S Senate and House of Representatives in Support of H R 3318 and S 3612, Applying the Nation's Antitrust Laws to Railroads, August 17, 2006

² Id

EXHIBIT 14

STB Docket No NOR 42099

E.I. du Pont de Nemours and Company v. CSX Transportation

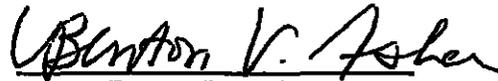
Verification of Benton V Fisher

I am Benton V. Fisher. I am the same Benton V. Fisher who sponsored portions of CSXT's Opening Evidence in this proceeding, filed February 4, 2008. My statement of qualifications was included as Appendix 5 to that evidence.

I am sponsoring portions of the testimony presented in Sections II and IV.B of the foregoing Reply Evidence of CSX Transportation, Inc. I have read the testimony set forth in those sections, and the statements contained therein are true and correct to the best of his knowledge, information, and belief.

I declare under penalty of perjury that the foregoing is true and correct. I further certify that I am qualified and authorized to sponsor and file this testimony.

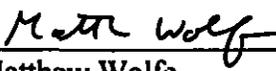
Executed on March 4, 2008


Benton V Fisher

CERTIFICATE OF SERVICE

I hereby certify that, on this 5th day of March, 2008, I served a copy of the foregoing by courier and by first class mail, postage prepaid on the following

Nicholas J. DiMichael
Jeffrey O Moreno
Thompson Hine LLP
1920 N St , NW
Suite 800
Washington, DC 20036



Matthew Wolfe