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ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

E I DUPONT DE NEMOURS AND COMPANY)

Complainant,)

v)

CSX TRANSPORTATION, INC)

Defendant)

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market dominant over its sliver of the market is supported by neither common sense nor the precedent from the I C C and the D C Circuit rejecting analogous market dominance claims. Moreover, CSXT is not market dominant over the movement of chlorine from Niagara Falls to New Johnsonville because of the significant source competition from the PPG plant at Natrium. The Board should dismiss the Complaint as to the two movements that terminate in New Johnsonville.

Second, DuPont's "initial tender" of comparison groups are not nearly as comparable to the issue traffic as the groups proffered by CSXT. 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 are inadequate and plainly inferior to CSXT's comparison groups.

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 poses both severe practical hurdles and serious concerns about the legality 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 adjudication.

Fourth, the uniquely hazardous nature of chlorine should preclude DuPont from obtaining a regulatory reduction of market-based rates. Because of the costs and risks of transporting chlorine (including insurance costs and the risk of ruinous liability in the event of a catastrophic event), absent a common carrier obligation, CSXT would not choose to move such

traffic. The challenged rates are eminently reasonable in light of the risks associated with transportation of chlorine. CSXT has worked to restructure its chlorine rates to discourage unnecessarily long hauls, such as the issue movement from Niagara Falls to New Johnsonville. Longer shipments of chlorine create increased risks for CSXT and the residents of the communities through which it travels, and it is entirely appropriate that these longer shipments be priced in accordance with that greater risk. The Board should recognize this sound public policy, and should not use its regulatory power to undermine that policy, or CSXT's market-based rates, by deeming the challenged rates unreasonable.³

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

The Complaint should be dismissed as to the Natrum-New Johnsonville movement because DuPont has not demonstrated that CSXT has market dominance over the traffic at issue

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The Board's rate jurisdiction is limited to traffic for which CSXT has market dominance. 49 U.S.C. § 10707(a-b) "[M]arket dominance is a threshold jurisdictional requirement," and as the complainant, DuPont has "the burden of proof" to show that there is not effective competition." *Government of the Territory of Guam v. Sea-Land Serv., Inc.*, STB W.C.C. 101, slip op. at 6 (Feb. 2, 2007), *Garden Spot & N. Ltd. P'ship & Ind. Hi-Rail Corp.—Purchase & Operate—Ind. R.R. Co. Line Between Newton & Browns, IL*, 1 C.C. No. 31953, 1993 WL

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 12-18.

⁴ For purposes of this litigation, CSXT will not contest market dominance for the Niagara Falls-Carneys Point movement.

458881. at *1 n 5 (“rate complainant[] [has] *substantial burden of proof* to establish market dominance”) (emphasis added)

The Board’s market dominance analysis contains both quantitative and qualitative components⁵ Assessing qualitative market dominance requires an examination of “the 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 In particular, “[w]here there are alternative routings between origin and destination and where no carrier participates in all the alternatives,” “there is by definition some inter[m]odal competition” *Amstar Corp v Alabama Great S R R*, I C C No 38239S, 1987 WL 99849, at *4 (Nov 10, 1987) And, in such a situation “a complainant has a heavy burden to establish such a lack of bargaining power that there is no effective competition” *Id*

In this case, there is more than simply an “alternative routing” to rail that establishes some intermodal competition for the Natrium-New Johnsonville movement Here, the “alternative” to CSXT rail transportation service is the dominant, preferred routing—and overwhelmingly so [REDACTED]

⁵ CSXT does not contest that the revenue-to-variable cost (“R/VC”) ratios for the issue traffic exceed the jurisdictional threshold (sometimes mischaracterized as a ratio for quantitative market dominance) set forth in 49 U S C § 10707(d)

██████████ See *id* at 3 By DuPont's own admissions, CSXT is DuPont's supplemental, second-choice carrier over the Natrium-New Johnsonville chlorine movement To contend that CSXT, a stop-gap transportation option ██████████ DuPont's traffic, has "market dominance" over this movement defies logic See, e.g., *Consol Papers, Inc v Chicago and North Western Transp Co*, 71 C C 2d 330, 337-38 (1991) (evidence showing the railroad's low market share of the issue traffic supported a finding of intermodal competition)

Despite DuPont's demonstrated ability to ship at least the overwhelming majority of chlorine it needs via barge, DuPont contends CSXT is somehow "market dominant" over the small amount of Natrium-New Johnsonville chlorine movements it ships In support of this remarkable claim, DuPont offers only its conclusory assertions that because "there is not sufficient barge capacity" to handle 100% of chlorine shipments from Natrium to New Johnsonville See DuPont Opening Evid at 13 DuPont's position is both legally meritless and factually wrong First, this agency and the U S Court of Appeals for the D C Circuit have unequivocally held that a railroad that competes with other modes of transportation for shipments over a particular lane does not become "market dominant" simply because those alternatives are occasionally unavailable See *Salt River Project Agric Improvement & Power Dist v Southern Pacific Transp Co*, No 38087S (served Nov 25, 1983), *aff'd*, 762 F 2d 1053, 1063 (D C Cir 1985) ("*Salt River*")

In *Salt River*, the shipper was able to receive its product via other modes of transportation from alternative origins, and only utilized the defendant carrier's services when other [origins] were unavailable *Id* at 1063-64 The shipper argued that [its] alternative [origins] did not put pressure on the defendant carrier's rates because the carrier knew that its rail service was only

required when [the alternatives were not] available *Id* at 1064 Notwithstanding the ICC's acceptance of the shipper's allegations that the rail carrier's rates covering the residual traffic were not constrained by the availability of alternative origins, it nevertheless found that the "continuing movement of fuel oil from other origins to the [destinations]" warranted a finding of effective geographic competition *Id* Accordingly, the ICC found that the rail carrier lacked market dominance over the traffic at issue

The D C Circuit affirmed the Commission's decision, holding that the ordinary presence of feasible transportation alternatives precluded a finding of market dominance *Id* The *Salt River* court explained that it was irrelevant that from time to time the shipper might be forced to use rail service While "there may be short term and exceptional situations" where none of the shipper's competitive alternatives were available, a rail carrier does not become market dominant every time the unavailability of other options may give it "transitory market power" *Id* at 1065 "[N]othing in the [Interstate Commerce] Act or its legislative history suggest[s] that Congress intended to guarantee shippers 'at any given time' a number of equally attractive transportation alternatives Rather, Congress intended to protect shippers who are *truly* subject to the market power of a railroad because they have no transportation alternative" *Id* at 1062 (internal quotations and alterations omitted)

The Board has recognized that under *Salt River*, "[s]hort-term or transitory market power is insufficient to establish market dominance" *Southwest R R Car Parts*, STB No 40073, slip op at 2 (Feb 11, 1998) (citing *Salt River*)⁶ DuPont's argument that CSXT temporarily becomes

⁶ While *Salt River* involved product and geographic competition, its holding is plainly applicable to modal competition The *Salt River* shipper's occasional inability to access product or geographic alternatives is akin to DuPont's claimed inability to use barge transportation from time to time In neither case does the possibility that other transportation alternatives occasionally might be unavailable justify a finding of market dominance Moreover, the Board's

market dominant on those infrequent occasions when DuPont "must" use CSXT rail service instead of its regular barge service with CSXT rail service is precisely the sort of allegation of "transitory market power" that cannot establish market dominance. DuPont itself claims that, "the only times DuPont tenders chlorine to CSXT from Natrium to New Johnsonville" are "when the inland waterways are too high or too low, when locks are damaged or under repair, or other conditions restrict or completely preclude barge transportation." See DuPont Opening Evid. at 14. These transitory situations do not create market dominance. DuPont's suggestion that barge is not an effective alternative, because DuPont cannot always ship 100% of the volume it requires, should be rejected out of hand. It is well-established that an alternative carrier need not be able to ship 100% of the shipper's requirements in order to be deemed effective competition. See *Aluminum Ass'n, Inc. v The 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).⁷

Furthermore, DuPont's assertion that there is insufficient barge capacity to handle the entirety of the New Johnsonville-Natrium chlorine movement is belied by its own documents. DuPont potentially could receive more, and possibly all, of its chlorine requirements via barge

determination to no longer consider product and geographic competition in stand-alone-cost cases was not based on a finding that such factors do not affect market dominance, but rather on the practical consideration that the significant time and resources necessary to investigate product and geographic competition placed undue burdens on complainants. That consideration is of no moment here.

⁷ If DuPont's position were the law, then a rail carrier would be found market dominant anytime alternative transportation could not supply 100% of the transportation desired by the shipper. Such an extreme position is directly refuted by several of this agency's previous decisions. See, e.g., *Eli Lilly & Co v Burlington Northern R R Co.*, No. 38262S, at 7, 14 (July 13, 1984) (finding effective competition exists where the complainant's alternatives could not transport all of its requirements), *Aluminum Ass'n.* 367 I C C at 484 ("[W]e reiterate that not all aluminum has to move by truck for motor carriage to exert competitive pressure on the railroads.")

Such increased use of barge transportation would further reduce and potentially eliminate

DuPont's reliance on CSXT's rail service [REDACTED]

Moreover, DuPont has made no showing that it cannot store chlorine at New Johnsonville for use on those occasions when water and other conditions may limit barge shipments. Storage at DuPont's New Johnsonville facility could eliminate the need for CSXT's rail service and reduce, if not eliminate, the danger posed by the transportation of chlorine, a highly poisonous T1H gas, through population centers such as Charleston, West Virginia and Cincinnati, Ohio.

For essentially the same reasons, CSXT is not market dominant over the Niagara Falls-New Johnsonville movement. CSXT does not contend that there are readily available modal transportation alternatives for the issue movement [REDACTED]

[REDACTED]

[REDACTED] Because of the very significant source competition for this movement, it

would defy marketplace reality and common sense to find CSXT “market dominant” for the Niagara Falls-New Johnsonville movement

DuPont has not demonstrated that Natrium is not an option for it to obtain all of its chlorine needs for New Johnsonville [REDACTED]

[REDACTED]

This significant source competition is apparent from the face of the record, and addressing it does not require *any* discovery—let alone the burdensome discovery that motivated the Board’s decision in *Market Dominance Determinations – Product and Geographic Competition*, 3 S T B 937, n 49 (1998) And, this case presents circumstances in which an effective competitive alternative source is not just available, that source *already provides 90 percent* of the New Johnsonville facility’s chlorine shipments Thus, the practical and policy concerns that motivated *Market Dominance Determinations’* decision to discontinue consideration of source and geographic competition in SAC cases are simply not present in this case Highly relevant evidence obtained without burdensome discovery demonstrates significant source and geographic competition for the Niagara Falls to New Johnsonville movement The Board should consider this evidence demonstrating geographic competition and find that CSXT is not market dominant for the Niagara Falls-New Johnsonville movement

In conclusion, DuPont has failed to carry its burden of proving that CSXT has market dominance over the shipment of chlorine from Natrium to New Johnsonville, or from Niagara Falls to New Johnsonville Accordingly, the Board should dismiss DuPont’s Complaint as to those two movements⁸

⁸ 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

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. *Simplified Guidelines* at 17. 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.

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

order to afford CSXT the opportunity to address and respond to that evidence. *See FMC Wyoming Corp v Union Pac R R Co*, 4 S T B 699, 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) ("We remind parties that, in presenting evidence, the 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.")

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 their Opening Evidence filed on February 4, 2008 While CSXT submitted with its Opening Evidence one set of comparable chlorine movements for evaluating the challenged rates, DuPont developed three different comparison groups.⁹ *Compare* CSXT Opening Evid at 24 with Crowley V S. Exhibit_(TDC-3), Exhibit_(TDC-4), Exhibit_(TDC-5) 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 chlorine movements that are “comparable” to the issue traffic DuPont, on the other hand, did not limit its comparison groups to comparable chlorine traffic

In the following sections, CSXT discusses in more detail the selection criteria applied by the two parties and the resulting differences in their respective 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 chlorine, but instead expanded its comparison to include a broader collection of commodities it identifies as Toxic by Inhalation Hazards (“TIHs”) 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 generates inferior

⁹ As explained below, in order to focus on the more significant differences between the parties’ comparison groups, on Reply CSXT will employ a similar mileage criteria to DuPont’s and now generates three comparison groups

comparison groups that include less comparable traffic than the group proffered by CSXT. Accordingly, CSXT's groups are "most similar in the aggregate to the issue movements" of chlorine. See *Simplified Standards for Rail Rate Cases*, Ex Parte 646 (Sub-No. 1), slip op. at 18 (served Sept. 5, 2007) ("*Simplified Standards*").

B. Similar Selection Criteria Applied by Both Parties

CSXT and DuPont applied three initial selection criteria that are essentially the same in developing their chlorine 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%.¹⁰ Second, the parties each limited potentially comparable movements to the same freight car type – tank cars – as that used by the issue traffic. Third, both parties limited potentially comparable movements to those moving in private equipment, the type used by all issue traffic in this case.

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 20; DuPont

¹⁰ 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.

Opening Evid at 18 Review of the verified statement and work papers of DuPont's consultant Mr Crowley indicates that DuPont also excluded Waybill Sample records that identify no carriers other than CSXI, but report a "rebill code" that suggests the traffic may be interchanged with another carrier ¹¹ While CSXT did not apply the same "rebill code" criterion as DuPont, review of the comparison group movements that it selected confirms that there were no records reported as rebilled See CSXT Opening Evid, work paper "42100 Results.xls" In other words, had CSXT in fact applied DuPont's filter, it still would have produced the same comparison group Notwithstanding the slightly different criteria in this area, this does not account for differences between the parties' comparison groups

Second, each party sought to exclude issue-traffic movements from its comparison groups See CSXT Opening Evid at 18, DuPont Opening Evid, Exhibit_(TDC-3), at 1, Exhibit_(TDC-4), at 2, Exhibit_(TDC-5), at 4 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 19 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹¹ 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 CSXI, but instead would reveal actual CSXT revenues for the movement Because the Board has limited comparison group evidence to the Waybill Samples 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

[REDACTED]

DuPont's criterion failed to identify all of the issue traffic, and thus failed to eliminate 12 issue movement records from its comparison groups. See CSXT work paper "42100 Reply Analysis.xls"

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

- (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 section describes the overbroad "comparison" groups generated by DuPont's failure to screen out movements of dissimilar commodities and movements not subject to a fuel surcharge. CSXT then discusses the initial comparison-group differences attributable to the three remaining factors. With respect to those three factors, CSXT accepts DuPont's position for one of the factors and explains that the other two are rendered moot by other factors and requirements¹². 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 criteria.

¹² 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.

1 CSXT's Criteria Selected the Like Commodity. DuPont's Criteria Did Not

In this case, the most significant selection criterion is that used to select comparable commodities. CSXT uses only movements of chlorine so there is no question that the commodity in CSXT's comparison groups is as "like" the issue commodity as possible – they are identical. DuPont advocates a much less precise, and ill-fitting selection of movements of purportedly similar commodities. DuPont notes that the chlorine issue traffic is a TIH, and then attempts to include any and all movements of commodities whose only apparent commonality is that, if released into the environment, they would be "toxic-by-inhalation" to humans.¹³ The "TIH" appellation is a loose classification that applies to disparate commodity types, based solely on their very hazardous nature. The fact that a commodity is labeled a TIH says nothing about the commercial uses of the product, the value of the product, its markets, demand for that product relative to other products, shippers' (or receivers') elasticity of demand for transportation of the commodity, or any other commercial marketplace determinant of transportation rates.¹⁴

¹³ Review of the list of TIHs on which DuPont relied to select its comparison groups indicates that it is incomplete.

[REDACTED]

DuPont did not include in its comparison groups all of the movements covered by its selection criteria. While CSXT does not believe that a comparison group for chlorine should include any non-chlorine traffic, this is nonetheless an inconsistency between DuPont's stated selection criteria and the movements it actually selected.

¹⁴ DuPont's claim that CSXT's prices demonstrate that all commodities that pose a toxic by inhalation hazard (TIH) have a transportation "demand elasticity of zero" is nonsense. See Dupont Open Evid. at 20. In the first instance, DuPont has not attempted to demonstrate, nor could it, that its demand for rail transportation of chlorine between the issue origins and destinations would not change at all regardless of the rate charged by CSXT. Further, DuPont's claim that CSXT offers no public tariff for TIH commodities is simply wrong. See CSXT 7882 (public tariff for anhydrous ammonia). More important, as CSXT has shown, because of other shipping options as well as source and product competition, movements of other TIH

Table 1 summarizes the breadth of different commodities that resulted from DuPont's approach, showing that *as much as 45%* of the comparison group by which it suggests the challenged rates for its chlorine shipments be evaluated are not movements of chlorine

Table 1

STCC (7-digit)	Description	Niagara Falls – New Johnsonville		Natrium – New Johnsonville		Niagara Falls – Carneys Point	
		Number of Records	% of Comp Group	Number of Records	% of Comp Group	Number of Records	% of Comp Group
2819815	Anhydrous Ammonia	9	29%	12	14%	49	30%
2819315	Sulphuric Acid	1	3%	5	6%	5	3%
◇2812815	Other Non-Chlorine	4	13%	8	9%	9	5%
Total, Non-Chlorine		14	45%	25	28%	63	38%
2812815	Chlorine	17	55%	63	72%	101	62%

In contrast, CSXT limited its comparable group to movements of the issue commodity, chlorine ¹⁵ This is eminently reasonable as chlorine is, in part because of the general paucity of other viable transportation options, a unique commodity ¹⁶ As CSXT explained in its opening evidence, the markets for chlorine and the other major TIIH commodity, anhydrous ammonia, are

commodities (such as anhydrous ammonia) have a far greater elasticity of demand for rail transportation than movements of chlorine *See § 1, supra*

¹⁵ A further difference exists between the parties' selection of hazardous materials for their comparison groups. In limiting its comparison groups to chlorine, CSXT included chlorine movements regardless of whether the Waybill Sample record also reported a Hazmat code (49-series header). DuPont, however, included only those chlorine and other TIIH records that also reported Hazmat codes in the Waybill Samples, resulting in the exclusion of certain chlorine movements that CSXT would include as comparable. *See DuPont Opening Evid at 20*. Unlike DuPont, CSXT's approach recognizes that *all* chlorine moves are hazardous, regardless of their data reporting in the Waybill Sample. *See 49 C.F.R. part 173.115(c) (2007)*

¹⁶ The two issue movements terminating in New Johnsonville are the exception that proves the rule – both have the relatively rare option of barge transportation of chlorine. Over the road trucks are generally not considered a practicable alternative for transporting chlorine for any appreciable distance.

much different. *See* CSXT Opening Evid. at 23. As a general matter, anhydrous ammonia is used primarily in agriculture, as a fertilizer or fertilizer component. Chlorine, on the other hand, is used in numerous manufacturing processes to create high value products such as numerous types of plastics, medicines, and other specialized products and materials. Further, there are significantly more viable transportation modes and distribution channels for anhydrous ammonia than for chlorine. *See id.* Rail shipments of anhydrous ammonia are subject to considerable competition from motor carrier highway and pipeline alternatives, and account for less than one half of the total volume of that commodity transported in the United States. *See id.* There are also more alternatives to anhydrous ammonia that may be shipped over the same lanes, including products that provide substitutes for anhydrous ammonia, but not chlorine. *See Piacente v. S.*, Ex. 2, at ¶ 15. Further evidence of the disparity between the two commodities' markets, demand, and pricing is that CSXT does not even include them in the same business groups for marketing purposes: chlorine is marketed and managed by the Chemicals marketing department, and anhydrous ammonia is the responsibility of CSXT's Phosphates and Fertilizers marketing department. In short, commercial and market attributes and factors demonstrate that chlorine and anhydrous ammonia are distinctly different commodities that simply do not belong in the same comparison group.

Comparison of revenues generated by the different commodities in DuPont's comparison groups further illustrates the differences between chlorine and anhydrous ammonia. 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 chlorine movements are [REDACTED] than for the anhydrous ammonia movements in DuPont's comparison groups. This also serves to demonstrate that there are likely differences in the

transportation demand characteristics of anhydrous ammonia and those of chlorine, seriously calling into question whether they are “like commodities,” as DuPont claims. 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.¹⁷ See *Simplified Standards* at 17 (commodity type and demand elasticity are two of only four factors expressly listed as relevant comparability factors)¹⁸

¹⁷ A suggestion that this argument merely serves CSXT’s interest in excluding lower-rated traffic 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 use of a single like commodity – chlorine – ensures that CSXT’s comparison group consists solely of movements of a commodity whose markets and demand characteristics are much more similar than those of DuPont’s indiscriminate collection of commodities.

¹⁸ 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.

Chart 1

REDACTED

2 DuPont's Failure to Consider Fuel Surcharge

While DuPont's inclusion of anhydrous ammonia alone renders its comparison groups for chlorine unacceptable, 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 CSXT Opening Evid at 21-22. 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 is likely to be less comparable¹⁹ 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

¹⁹ Because of fuel 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 this policy and effort, have commercial considerations that distinguish them from the increasing majority of CSXT movements covered by fuel surcharges

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 group for chlorine superior to DuPont's proffered groups.

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.²⁰ 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. *See* CSXT Opening Evid. at 21. DuPont, by contrast, included 18 records for international shipments in its comparison groups. 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. For its final comparison groups CSXT removes its country of origin or destination criterion.

Second, while CSXT limited its potentially comparable movements to the same single-car shipments (*i.e.*, less than 6 carloads) as the issue traffic, DuPont included shipments that were waybilled in multiple-car or trainload blocks. *Compare* CSXT Opening Evid. at 20 with DuPont

²⁰ 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.

Opening Evid at 19 Although such multiple-car and trainload shipments represent 7 records in its comparison group for chlorine, none of them were chlorine movements See DuPont Opening Evid Exhibit_3_TIH Comparables Lane 1.xlsx, Exhibit_4_TIH Comparables Lane 1.xlsx, Exhibit_5_TIH Comparables Lane 1.xlsx As none of DuPont's multiple-car or trainload shipments would be included in CSX's comparison group due to application of CSXT's like commodities and fuel surcharge criteria, the application of a "single-car shipment" criteria does not represent a difference between the parties in this case

Third, CSX also excluded from potentially comparable movements shipments that were originated or terminated by a short-line or switching carrier, as the revenue and cost information reported in the Waybill Sample does not reflect CSXT's portion of the move See CSXT Opening Evid at 20-21 While DuPont's comparison groups for chlorine included two such movements, neither was chlorine. Thus, as they would be excluded from CSX's comparison groups regardless of whether the movement was originated or terminated by a short-line or switching carrier, application of 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 was more restrictive than CSX in its Opening Evidence – 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 CSX Opening Evid at 21 with DuPont Opening Evid at 18 While CSXT is willing to accept a more limiting mileage criterion, solely for the purposes of focusing the dispute on the factors

contributing significantly to the parties' differences, 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 that the issue traffic moves, it did so "rounded to the nearest 50 miles." See DuPont Opening Evid. at 18. DuPont explains that this would result in the inclusion of movements between 750 and 1,050 miles for the Niagara Falls-New Johnsonville issue traffic, which moves 880.7 loaded miles. DuPont has provided no support for this anomalous rounding approach, or for the proposition that the resulting comparison group for the plastics movement, for example, should include traffic that travels from 130.7 miles shorter than the issue traffic to 169.3 miles longer, a 30% 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 distracting rounding. See CSXT work paper "42100 Reply Analysis.xls"

Second, DuPont identified its comparison group based on movements that were within 150 miles of the purported loaded miles that listed its Amended Complaint. Compare Dupont Opening Electronic work paper "TIH 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_42100.xls". Table 2 summarizes the differences between the parties.

Table 2

Origin	Destination	DuPont	CSXT	Diff	% Diff
Niagara Falls, NY	New Johnsonville, TN	881	881	0	0%
Natrum, WV	New Johnsonville, TN	723	748	25	3%
Niagara Falls NY	Carneys Point, NJ	588	579	(9)	-2%

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 movements. See CSXT work paper "42100 Reply Analysis.xls"

F. Summary

CSXT's selection criteria produce much superior comparison groups to those generated by DuPont's overbroad collection of disparate movements. Based on the modifications that CSXT makes in this Reply,²¹ the unadjusted R/VCs from the Waybill Samples – before consideration of the market changes from the 2002-2005 base period to 2007 – range from [REDACTED] to [REDACTED] across the three 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,²² and for CSXT's final comparison groups.

²¹ As explained above, CSXT modifies its Opening comparison groups for chlorine to (1) include international traffic, and (2) include only movements within 150 miles of the issue traffic.

²² *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.

Chart 2

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	Number of Records	RVC	RSAM Adjusted RVC	Upper Boundary
Niagara Falls, NY - New Johnsonville, TN²³				
2007 Indexed by Systemwide Chemical Increases	7	█	█	█
2007 with Actual Revenues Where Available	7	█	█	█
-				
Natrium, WV - New Johnsonville, TN				
2007 Indexed by Systemwide Chemical Increases	35	█	█	█
2007 with Actual Revenues Where Available	35	█	█	█
-				
Niagara Falls, NY - Carneys Point, NJ				
2007 Indexed by Systemwide Chemical Increases	63	█	█	█
2007 with Actual Revenues Where Available	63	█	█	█

Source CSXT workpaper "42100 Comp Groups.xls."

²³ CSXT recognizes that application of DuPont's mileage criterion limits the comparison group for the Niagara Falls-New Johnsonville movement to 7 records. CSXT examined the impact of expanding the mileage band to include other movements that were within 250 miles of the issue traffic, instead of 150. Under this scenario, the resulting upper boundary would permit the maximum rate to be set at a higher R/V than the figures shown in the table above. See CSXT electronic work paper "chlorine250.xls". To avoid disputes related to applying different mileage criteria, CSXT correctly applies the plus or minus 150-mile band for all chlorine moves.

CSXT's results shown in the above table include an adjustment to bring the historical 2002-2005 Waybill Samples R/VCs to 2007 levels. On opening, CSXT explained that, due to the dynamics of the chemicals markets broadly and significant effects for chlorine specifically over the last five years, such an adjustment would be required if older Waybill Sample records were to be used meaningfully to establish current rates. In its opening and again on reply, CSXT provides two alternatives to bring revenues to current levels: one based on the pattern in CSXT's chemicals traffic revenues in aggregate, based on its publicly available financial reports, and another based on the actual 2007 revenues for the specific Waybill Sample movements in the comparison group,²⁴ based on detailed traffic and revenue information produced to DuPont in discovery. While the increases in rate levels for chemicals traffic overall (from the public data) were significant, those specific to chlorine traffic (from the detailed discovery data) were extraordinary. The following table shows the increase in the average revenue per car from each Waybill Sample year (2002-2005) to 2007 for the system-wide chemicals traffic, and for the 40 chlorine movements that were included in both parties' comparison groups (*i.e.*, "common records") and also could be matched to the 2007 records. These data highlight the need for the Board to take account of the considerable increases in chlorine rates that have occurred, generally double the average increase for all chemicals.

²⁴ CSXT queried the 2007 data on actual revenues by movement to identify matches – by origin, destination, commodity, and car type – to the movements in its comparison group from the 2002-2005 Waybill Samples. For the matches, CSXT determined the change in revenue per carload from the earlier period to 2007. CSXT provides additional comparisons of its comparable traffic group traffic revenues for 2007-2008 with Waybill Sample (2002-05) revenues in section IV, below. *See* Table 4, *infra*.

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

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 Open Evid* at 26-28

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")

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 Open Evid. at 24-26. As CSX I 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 25-26. 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 26. 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).²⁷

²⁷ 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 III B, *infra*.

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 Open 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 and calculate new CAPM cost of equity for 2006).²⁸ 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. DuPont Open at 24. On the contrary, this

²⁸ 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.

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 application would unfairly penalize carriers which 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.*

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 in prior years 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)²⁹

Properly, the Board has been cautious about upsetting settled expectations by changing 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), *aff'd sub nom Western Coal Traffic League v. STB*, 07-1064 (D.C. Cir.) (Feb. 1, 2008). 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 a pending rulemaking, but whether it should

²⁹ 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 re-opened and relitigated based on the new cost-of-capital methodology and its potential affects on *inter alia*, variable costs, R/VC ratios, and whether a defendant carrier should be deemed “revenue adequate.” To be clear, CSXI believes such claims would be inappropriate and rejected. However, re-opening a settled Board determination and benchmark based on retroactive application of a newly adopted cost of capital methodology would invite precisely this sort of argument and litigation.

revisit all of its past decisions involving a cost-of-capital component³⁰ Particularly in the context of an individual “simplified” rate case, the Board should not undertake to make complex *retroactive* changes having such broad 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 multiple agency proceedings, several years of public hearings, and extensive notice-and-comment rulemaking in which many interested parties – including all of the 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

³⁰ 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 changes to years prior to 2002

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.³¹

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 knows very well, a number of shipper groups, including DuPont's 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).³² 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

³¹ 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), CSXT and other interested parties had no notice or reason to believe that there might be a change in the cost of capital methodology that could 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 had even suggested a change to the cost of capital methodology.

³² 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.*

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)

3 *Adjusting the Three-Benchmark Approach to Apply CAPM in a Coherent Manner Would Add Unnecessary 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, or the Board, 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 this proceeding, consistency would require recalculation of "Return On Investment" variable costs for all comparison group movements. Once those costs are revised for the selected comparison groups, the parties would then need to recalculate the R/VC ratios for all comparison group movements.³³ 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*

³³ 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.

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 Open Evid.* at 21, *DuPont Open Evid* at 17, *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 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 ³⁴ This “re-costed” Waybill Sample is not the Waybill Sample provided to the parties by the Board at the outset of the case

³⁴ 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

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* a 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.

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.³⁵ 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)

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.

³⁵ 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.

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")³⁶. Thus, the retroactive change advocated by DuPont would require an adjustment to URCS costs, which the Board has flatly prohibited.

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.

³⁶ 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 Issues* Decision at 52, n. 166. Cost of equity or "cost of capital" is not one of those nine available "user inputs." See *id.*

IV. OTHER RELEVANT FACTORS

A. The Board Should Reject DuPont's Other Proposed RSAM Modification as Unsound and Untimely.

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 T 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."³⁷

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 *B P Amoco*

³⁷ 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 revenues) fails to recover its DVC [Directly Variable Costs]." *Id.*, 1 S T B 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.

Chemical Company v Norfolk Southern Railway Company, STB Dkt No 42093, slip op at 9-11 (served June 6, 2005) ³⁸ 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) ³⁹

Finally, in *Simplified Standards*, the Board eliminated the RSAM "range" concept altogether and adopted 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

³⁸ 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 4 hereto.

³⁹ 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 S T B at 1029.

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.

B. The Risks Posed By Transportation of Chlorine, And the Corresponding Importance of Encouraging Shorter Hauls of Chlorine, Provide Further Support for the Conclusion That The Challenged Rates are Reasonable.

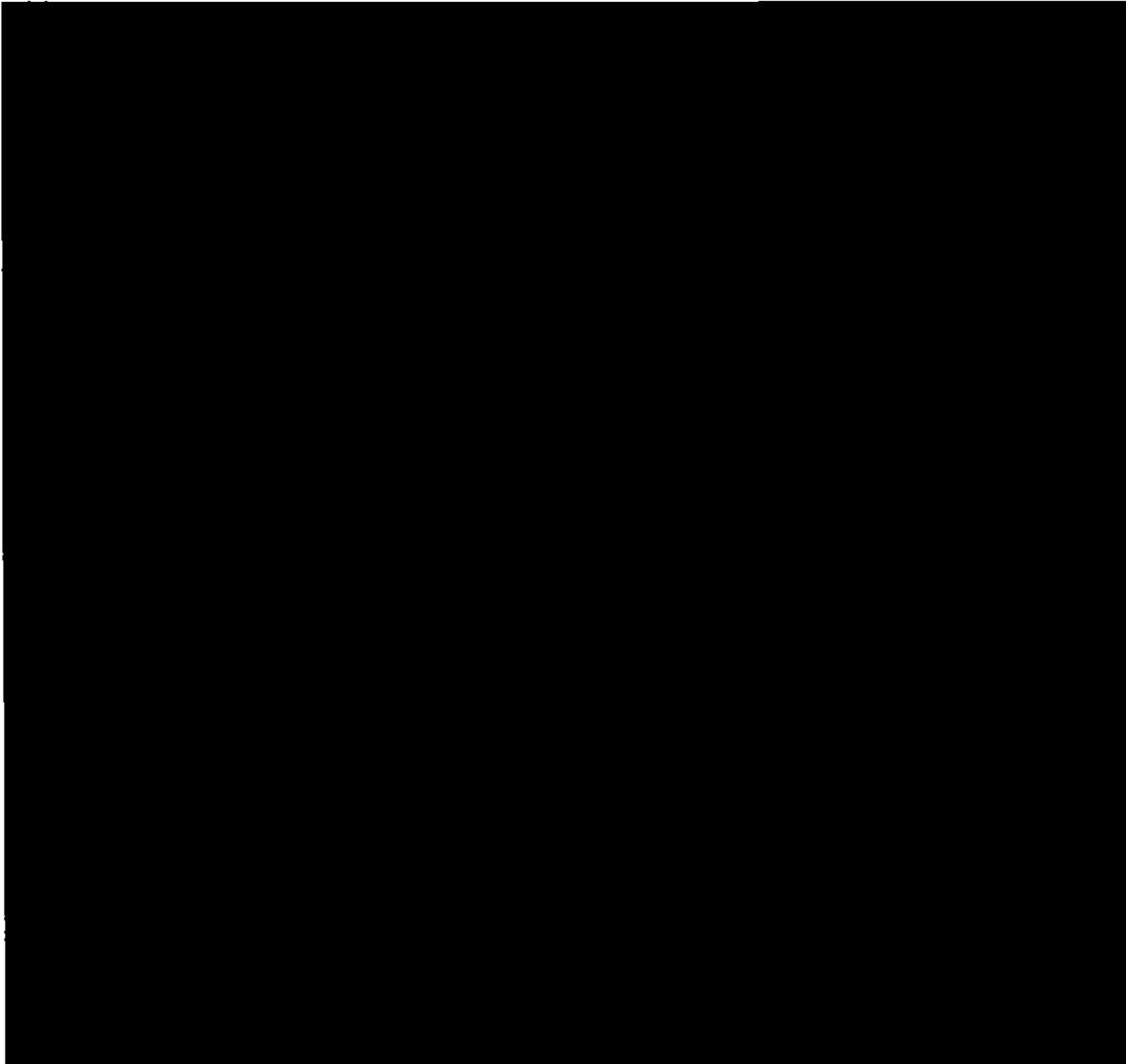
Chlorine is one of the most highly hazardous materials that CSXT is called upon to transport. The Board has afforded parties the opportunity to raise “other relevant factors” that should be considered in weighing the reasonableness of the railroad’s rates. Here, the highly hazardous nature of this commodity is the “elephant in the living room.” It cannot be ignored, and fortunately the Board’s foresight in contemplating the possibility of considering “other relevant factors” permits a full and frank consideration of this commodity’s hazards in this case.

It is essential that the Board use current revenues and costs when evaluating CSXT's current rates for transportation of chlorine. From 2004 through 2007 alone, CSXT revenue for chemicals traffic has increased by approximately 38 percent. *See Piacente V S*, Ex. 2 at ¶ 8.⁴⁰ Moreover, as the following Table illustrates, from 2004 to the present, CSXT rates for movements of chlorine in its comparison group have increased by one hundred sixteen percent (116%), faster than for nearly any other commodity moved by CSXT. *See id.* at ¶ 8.⁴¹, *see also* CSXT Open Evid. at 24-30 and supporting workpapers.

⁴⁰ CSXT Vice-President – Chemicals and Fertilizer Marketing Dean M. Piacente's Verified Statement, which is attached hereto as Exhibit 2, provides a more detailed and thorough description of much of the information summarized in this Section IV B, including recent changes in the market for transportation of chlorine, and CSXT's significant change in pricing policy for chlorine and other TIH commodities. CSXT commends the Board's attention to Mr. Piacente's full statement, as it explains some of the very important policy considerations implicated in this case.

⁴¹ To be conservative, CSXT calculated the difference between average rates charged in 2004 (or, in other comparisons, the relevant year or years during the period 2002 to 2005) for comparison group origin-destination pairs, and the lowest applicable rate for those pairs as of March 3, 2008. Thus, the 116% increase figure is conservative; likely understates the actual overall increase in CSXT chlorine rates during that period.

Table 4



Given the very substantial increases in comparison group rates illustrated in the foregoing chart, any meaningful comparison of the issue traffic rates with the rates of comparable traffic must use current cost and rate levels. In this context, any approach that fails to adequately account for the dramatic changes in the market for transportation of chlorine, as reflected in the price increases between the years covered by the Waybill Sample used in these cases and the present, would be truly arbitrary and capricious. *See Piacente V S*, Ex. 2, at ¶¶ 2, 6-7, 9.

A number of other factors further distinguish chlorine from other commodities handled by CSXT, and distinguish the present chlorine transportation market from the market a few years ago. First, there is a rapidly growing set of legal requirements for special attention to, and handling of, movements of TIH chemicals, which impose an ever increasing set of additional costs on rail transportation of chlorine *id* at 10-12. Second, CSXT has determined that there is no price it could charge that would economically justify the risk it undertakes when it is forced (under its common carrier obligation) to move chlorine. [REDACTED]

[REDACTED] Third, because of the extraordinary risk of transporting chlorine, CSXT is engaged in a multi-year effort to adjust its chlorine rates in order to discourage unnecessary shipments via CSXT, and to discourage longer distance shipments of chlorine via CSXT. *See Piacente V.S.*, Ex. 2, at 20

Although CSXT's prices for transportation of chlorine have risen rapidly in recent years, those increases have not been uniform across CSXT's customer base. *See Piacente V S.*, Ex. 2 at ¶ 20 Some customers, such as DuPont, had very favorable contract rates that pre-dated the tragic TIH releases in Graniteville, S.C , Minot, N.D., and elsewhere. *See id* , at ¶ 17. Those lower rates make no economic sense today, and CSXT is working to bring lower legacy rates for

[REDACTED]

chlorine transportation into line with other rates, consistent with CSXT's new approach to TIH transportation pricing *Id* at ¶ 17, 20-21

DuPont apparently does not accept the new pricing paradigm necessitated by this new era. It does not appear to be interested in working with CSXT to minimize lengths of haul for chlorine or other poisonous substances, but rather wishes to ship such products wherever it desires, without regard for distance or magnified risk of release of such substances into the environment. *See id*, at ¶ 18. To take but one example, DuPont plans to expand a plant that manufactures a poisonous gas in Tennessee, and use that additional gas as an input to a new manufacturing facility it plans to build and open in Utah. *Id* at ¶ 19. DuPont plans to move the gas from Tennessee to Utah via CSXT. While CSXT has urged DuPont to consider other options that would not entail such a long haul of poisonous gas (*e.g.* manufacture the poisonous gas input at or near the Utah plant), DuPont has refused to do so. *Id*. Thus, despite the availability of other options for transportation of a poisonous commodity to a new facility, DuPont has opted for a long rail movement of that commodity, apparently because this is its lowest cost option. *See id*. Effectively, DuPont is choosing to impose the risks and costs of its sourcing and manufacturing decisions on rail carriers and the people living along the unnecessarily long routes over which it ships poisonous commodities, including chlorine.

DuPont clearly would like to be able to purchase Chlorine wherever it is cheapest, and has asked this agency to force down CSXT's Chlorine prices to facilitate its rail shipments. For decades, CSXT worked to facilitate these kinds of sourcing options, and to enable longer hauls for economic opportunities for its customers. But the terrorist acts of September 11, 2001, high profile tragedies such as Graniteville, SC and Minot, ND, and a tort system that cries out for reform have changed the paradigm.

If it ever was, it can no longer be considered sound public policy to attempt to expand sourcing options so that Chlorine can move from Canada to Miami over CSXT's I-95 route. To the contrary, many local government leaders are calling for an end to rail shipments of Chlorine through their jurisdictions. Should the federal government order lower prices to ship Chlorine from New York to Tennessee – through Buffalo, Erie, Ashtabula, Cleveland, Columbus and Cincinnati – when a barge option from Natrium, West Virginia to New Johnsonville, Tennessee is readily available?

While the challenged rates represent a significant increase over DuPont's prior rates, that increase is in line with the market, with relevant commercial forces and business considerations, and with CSXT's reasonable and responsible policies regarding the pricing of chlorine. If the Board does not uphold the rates challenged in this case, it will be undermining the market-based determination of rates (where the market properly takes into account the cost and risks of moving the traffic at issue), and allowing DuPont to shift the costs of its activity onto others, and thwarting CSXT's efforts to discourage long hauls of chlorine and other ultra-hazardous materials.

In this proceeding, CSXT is not asking the Board to relieve it of the common carrier obligation to transport from Niagara Falls or Natrium to New Johnsonville, or Niagara Falls to New Jersey. The question here, is whether it is sound federal transportation policy to encourage those and other long-distance movements, substituting the decision of the regulator for the pricing decisions of the railroad. Under the Board's *Simplified Standards*, CSXT has demonstrated that its rates for the two Chlorine movements in question are reasonable. No sound public policy would be advanced furthered by finding those rates unreasonable.

V. THREE BENCHMARK RATE REASONABLENESS RESULTS

Pursuant to the *Simplified Standards*, after determining the average adjusted R/VC for the chlorine 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 5 summarizes the results.

Table 5

	Upper Boundary	Issue Traffic RVC
<i>Publicly Available Chemicals Revenue Increases</i>		
Niagara Falls, NY - New Johnsonville, IN	█	█
Natrum, WV - New Johnsonville, TN	█	█
Niagara Falls, NY - Carneys Point, NJ	█	█
<i>2007 Actual Revenue Update, Where Available</i>		
Niagara Falls, NY - New Johnsonville, IN	█	█
Natrum, WV - New Johnsonville, TN	█	█
Niagara Falls, NY - Carneys Point, NJ	█	█

The adjusted R/VC ratios for the Natrum-New Johnsonville comparison group and Niagara Falls-Carneys Point comparison group are each higher than the R/VC's for the respective issue traffic movements. Therefore, using CSXT's final comparison group, and applying the Three Benchmark approach in the appropriate manner advocated by CSXT, even without considering other relevant evidence, each of those two challenged rates is below the maximum reasonable rate.

The adjusted R/VC ratio of the comparison group for the Niagara Falls-New Johnsonville comparison group falls narrowly below the R/VC for the issue movement. Thus, a mechanistic, blindered application of the Three Benchmark formulas that did not consider the context and the

extraordinary costs and risks of transporting chlorine might indicate that the challenged rate slightly exceeds a maximum reasonable level. In determining whether to use the rough and imprecise initial result of the Three Benchmark formulas to find the challenged rates unreasonable, the Board should consider all of the factors that affect TIH rates, but are not adequately taken into account by the Three Benchmark formulas. Most prominently, CSXT's common carrier obligation to move chlorine imposes on it very large additional costs, including substantial additional insurance costs and the risk of huge financial liability.

Moreover, CSXT's current pricing policy appropriately seeks to discourage longer hauls of chlorine in favor of shorter hauls, and thereby places the safety of residents along CSXT's routes – including the cities of Buffalo, Erie, Ashtabula, Cleveland, Columbus, and Cincinnati, and numerous other towns that lie on CSXT's route between Niagara Falls and New Johnsonville – over DuPont's wish to source its chlorine from wherever it finds most convenient or expedient. CSXT is implementing its new risk-based TIH pricing in a manner designed to allow its customers time to adjust, and to avoid serious disruption of its customers' businesses. As a result, not all chlorine movements' prices have yet been increased to levels consistent with CSXT's new risk-based approach to TIH transportation pricing. Reducing DuPont's rates because CSXT did not increase the rates to all chlorine traffic abruptly at the same time would punish CSXT for having engaged in this graduated approach.

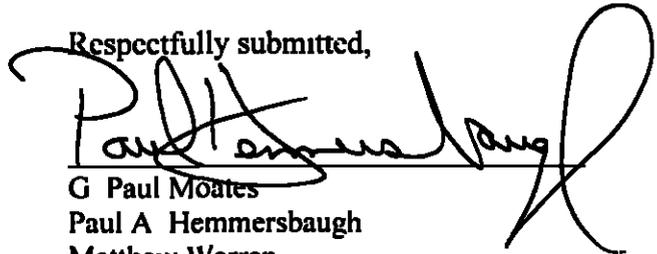
These and all of the "other relevant factors" discussed above strongly militate in favor of finding the Niagara Falls-New Johnsonville rate – which is only marginally above the ceiling generated by application of the initial Three Benchmark formulas – reasonable. Finding otherwise would make a mockery of *Simplified Guidelines'* promise to consider "other relevant factors," beyond the wooden application of rate comparison formulas. See *Simplified Standards*

at 22 (“evidence of ‘other relevant factors’ [can] demonstrate that the maximum lawful rate should be higher or lower” than the upper boundary of the comparison group) More important, such unwise regulatory intervention to reduce risk-based market prices would provide the wrong message and incentive to TIH shippers regarding efforts to reduce the risks of catastrophic releases of those materials by reducing the time and distance they are carried on rail carriers’ networks Based upon all of the relevant evidence, the Board should find all three of the challenged rates do not exceed a maximum reasonable level

CONCLUSION

The Board should dismiss two of the three rate challenges in this case for lack of jurisdiction, and find the remaining rate reasonable And, in any event, based upon all of this Reply Evidence and arguments and CSXT’s Opening Evidence, the Board should find that all three of the rates challenged in this case do not exceed a maximum reasonable level

Respectfully submitted,



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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)	
)	
<i>Complainant,</i>)	
)	
v)	Docket No NOR 42100
)	
)	
CSX TRANSPORTATION, INC)	
)	
<i>Defendant</i>)	
)	

**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, CSX1 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 CSX1 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]
[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.

19 DuPont recently announced that it would expand a plant in Tennessee to manufacture Titanium Tetra-chloride, another poisonous gas, primarily for use in a new paint manufacturing facility That new manufacturing facility is to be in Utah In other words, DuPont, for its own economic benefit, is designing a distribution need that will force a transportation movement of a toxic inhalation hazard over a thousand miles, and through a number of high threat urban areas CSXT has tried to discourage that plan We have urged DuPont to build its TiCl4 production capability at the Utah consumption site to minimize the need for TIH transportation We have advised DuPont that the rates CSXT will quote will be at levels that are substantially higher than those challenged here We have advised DuPont that given an option CSXT will not accept that traffic None of this has changed DuPont's decision to design in dependence on a thousand-mile transportation movement

20 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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The outcome of this case will affect the future of those efforts

21 Some of our customers have been willing to work with us in making changes – at least to reduce unnecessarily long hauls Even more encouraging, one of our major customers has made it a corporate policy to minimize TIH shipments and has publicly stated that it would like to change its operations and processes so that it does not need to transport chlorine CSXT has been supportive of those efforts and that is reflected in our pricing Of course, those pricing

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 3rd day of March, 2008

Sean 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

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

E I DUPONT DE NEMOURS AND COMPANY)

Complainant,)

v)

CSX TRANSPORTATION, INC)

Defendant)

Docket No NOR 42100

**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 CSXT 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 $R/VC_{>1.00}$ 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 PCI 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 operations.⁵

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 destination.⁶ 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

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Senior Managing Director - Economic Consulting

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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 |
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Benton V Fisher

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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
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- 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
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- 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 5

Grammer Logistics, LLC

18375 East 345 South
Grammer, Indiana 47236

Dear Future Customer

Rail transportation rates for anhydrous ammonia are on the rise. Are you prepared with an alternative source when rail rates exceed your planned budget?

Trucks can be competitive with rail transportation up to 1,000 miles. Right Now!

If you're moving NH3 in volume give Grammer a call. We may give you the competitive pricing edge you need.

For a truck quote give Ron Bowen a call at 1-800-333-7410. Remember, "If your saving money – You're making money".

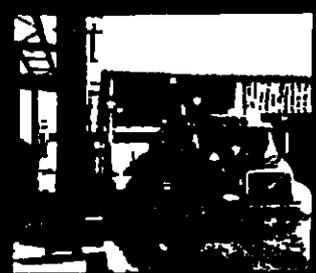
Thank You

Ron Bowen

**Ron Bowen
Sales & Marketing
Grammer Logistics, LLC.**

Get the real story from the
anhydrous ammonia
experts...

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- TANK INSTALLATIONS
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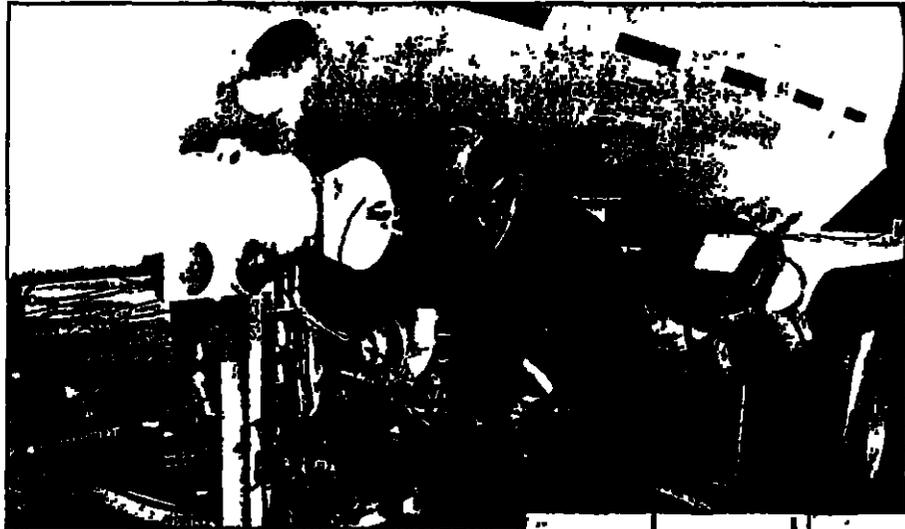


Grammer Industries, Inc.

ANHYDROUS AMMONIA TRANSPORTATION

*"In our experience,
Grammer Industries has
provided a high level of
expertise—handling
anhydrous ammonia,
focusing on safety, main-
tenance of equipment
and above all, customer
satisfaction."*

Dion Mick
Koch Industries, Inc



EXPERIENCED DRIVERS PROFESSIONALLY TRAINED IN PRESSURIZED TANK OPERATIONS

At the core of Grammer Industries is the original devotion to the safe transportation of anhydrous ammonia. This has served as the primary focus of the company for over 25 years. Grammer stands alone as the leader in safe, dependable NH₃ transportation for industrial and agricultural applications.

- Service to fossil fuel powered energy plants to reduce emissions to meet the Federal Clean Air Act.
- Dependable deliveries in a timely manner
- Old-fashioned personal service utilizing the latest transportation technology
- Over 125 MC-331 transports assuring carrier flexibility for your peak shipping requirements



- A practical approach to environmental responsibility
- Capabilities and resources for logistics management
- Provide technical support as needed for any anhydrous ammonia operation
- Excellent working relationship with all nitrogen suppliers
- Working partnership with federal and state regulators helping all customers meet requirements and regulations.

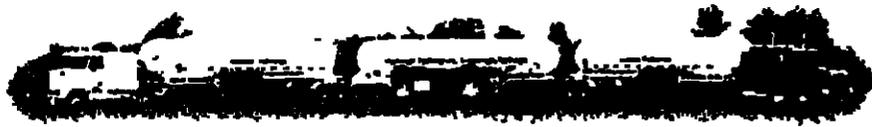
***Grammer offers continuous
product, equipment, service,
and maintenance.***

Grammer
Industries, Inc.

800.333.7410

www.grammerindustries.com
E-Mail: grammer@iquest.net

A SAFE, RELIABLE, TURNKEY SERVICE COMPANY WITH A "CAN DO" PHILOSOPHY



Outstanding Safety

Safety is paramount at Grammer Industries, Inc—from the CEO to the drivers. We believe in providing the safest possible environment for everyone. Our safety instructors understand the importance of personalized training that exceeds DOT requirements. Each driver is trained in:

- General awareness and familiarity of federal codes and regulations,
- Hands-on product training,
- Proper procedures for loading and off-loading products,
- Hazard recognition,
- Emergency response procedures,
- Recognition and proper use of personal protective equipment,
- Accident avoidance,
- Fire safety,
- Safe driving practices,
- HM126 qualification training,
- and HM225 qualification training

Safety Training Trailer

The Grammer Industries' "MC331 Safety Trailer" has traveled coast-to-coast training firefighters, emergency response personnel, shippers, and the public in pressure vessel operations. Trainees get an up-close and personal look at how a pressure trailer is constructed, its safety features and how the pumps and valves operate. This information is critical in understanding daily operations or in the event of an emergency situation.



Grammer believes in providing professional training to every driver.

- **SAFETY CAN BE MANAGED**
- **WITH EFFORT ACCIDENTS AND INJURIES CAN BE PREVENTED**
- **PROFESSIONALS KEEP THEMSELVES AND OTHERS FROM DANGER**



The MC331 Safety Training Trailer is the only privately owned cut-away training vessel of its kind in the United States.

This unit can come to your facility for hands-on training.



"The training session was presented in a very professional manner and the information received will further enhance our knowledge and skills concerning the operation and maintenance of pressure type cargo tank motor vehicles and the assessment critiques of the training were very positive."

Kenneth D Strickland
State Director
Indiana Division of the USDOT

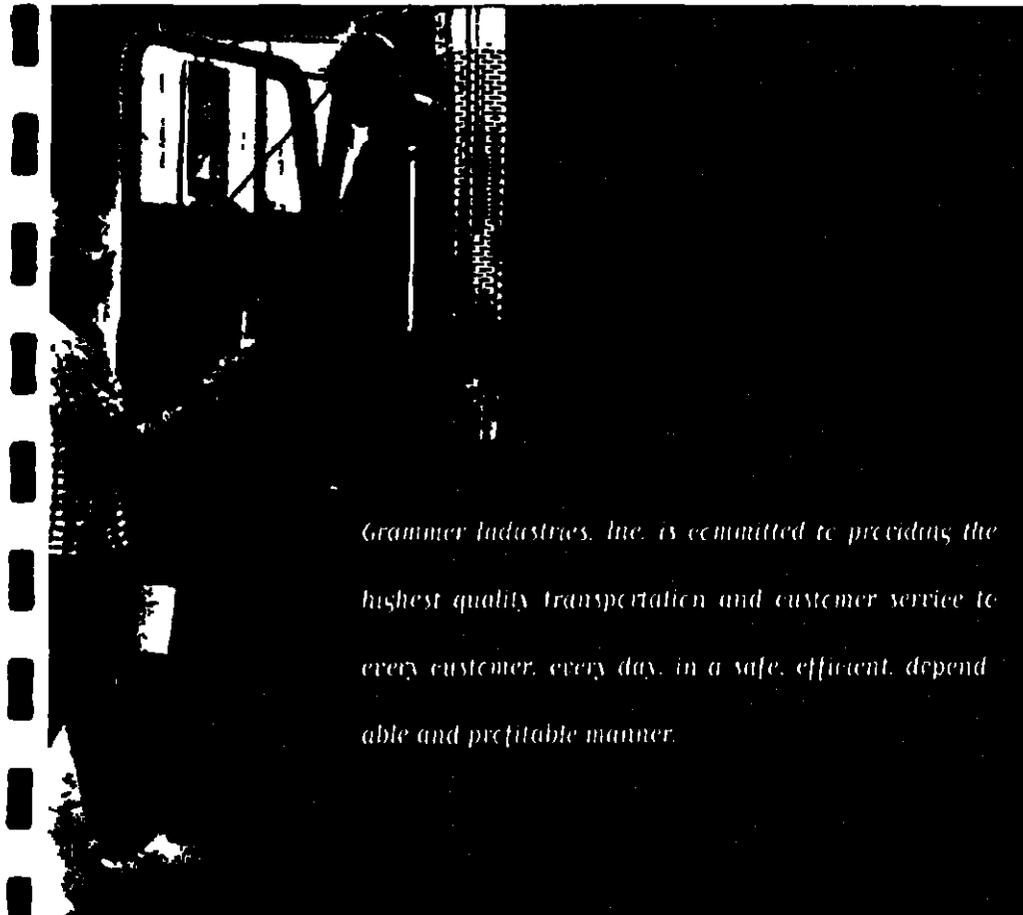
OUTSTANDING SAFETY & TRAINING

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Grammer Industries, Inc. is committed to providing the highest quality transportation and customer service to every customer, every day, in a safe, efficient, dependable and profitable manner.

- Work honestly with customers, vendors, and employees.
- Provide rapid response to our customer needs.
- Protect our environment.
- Provide personalized service from the time the order is placed through delivery of the load.
- Promote an unrivaled safety record through a strong corporate commitment.
- Commitment to an aggressive preventative maintenance program ensuring reliable equipment.
- Provide a positive image of the transportation industry.
- Implement the latest technology increasing efficiency and customer service.



QUALCOMM Satellite Communication
You can't see the ship, the location of the container for service and security.

Grammer Industries is comprised of professional, dedicated personnel that set the standard in the handling of Anhydrous Ammonia. Our record of first class service and around the-clock commitment offers our customers a worry free environment.

"Grammer's involvement and concerted effort in the regulatory arena, to ensure the safe transport of hazardous materials, identifies it as a carrier committed to high quality service for their customer partnerships"

Deborah L. Allen
Manager, Product Quality
PCS Nitrogen, Inc

**Call the
transportation
specialists today!**

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Grammer
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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

STB Docket No NOR 42100

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

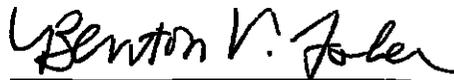
Verification of Benton V. Fisher

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 3 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