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BEFORE THE
SURFACE TRANSPORTATION BOARD

E.I. DUPONT DE NEMOURS AND COMPANY)

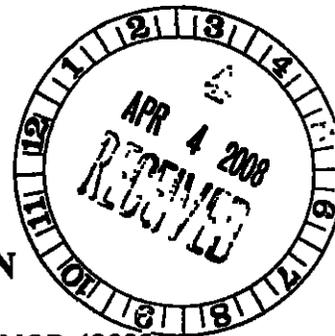
Complainant,)

v.)

CSX TRANSPORTATION, INC.)

Defendant.)

PUBLIC
VERSION



Docket No. NOR 42099

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REBUTTAL EVIDENCE OF CSX TRANSPORTATION, INC.

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Dated: April 4, 2008

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INTRODUCTION AND SUMMARY

CSXT respectfully submits this Rebuttal Evidence in further support of its positions in this case. At the outset, CSXT emphasizes a few important points. *First*, DuPont's Complaint in this case constitutes a misuse of the Board's procedures for "small rate disputes." *Simplified Standards for Rail Rate Cases*, STB Ex Parte 646 (Sub-No 1), at 22 (Sept. 5, 2007) ("*Simplified Standards*"). DuPont—a Fortune 100 company with over \$27 billion in annual revenue—has a large commercial dispute with CSX Transportation, Inc. ("CSXT") arising from the expiration of the parties' Master Contract, which governed all of DuPont's traffic on CSXT over hundreds of lanes. Apparently seeking to obtain negotiating leverage in this broader commercial disagreement, DuPont cherry-picked seven lanes of traffic for challenge in this and two other allegedly "small" cases under the Three Benchmark approach set forth in *Simplified Standards*. DuPont's "improper attempt[] to disaggregate a large claim into a number of smaller claims" violates the letter and the spirit of the Three Benchmark process, and the Board could dismiss DuPont's challenge on that ground alone. *See E I DuPont de Nemours & Co. v CSX*

Transp. Inc. , STB Docket Nos 42099 *et al.*. Decision at 4 (Jan. 22, 2008) (hereafter decisions in these cases will be cited by docket number and date).¹

Second. if the Board does consider these cases, the Board should reject DuPont's challenges. DuPont's Complaint should be dismissed for lack of jurisdiction, because it has not carried its burden of demonstrating that CSXT is market dominant over the issue movements. As demonstrated in CSXT's Reply Evidence, all three of the issue movements are subject to significant truck competition, and DuPont has not produced evidence sufficient to demonstrate that CSXT has market dominance.

Third, if the Board considers DuPont's Three Benchmark challenges on the merits, it should find the challenged rates do not exceed a maximum reasonable level. As CSXT has demonstrated, its proffered comparison groups are superior to those proffered by DuPont. DuPont has included movements without fuel surcharges in its comparison groups, even though the application of a fuel surcharge is driven by market factors that make movements with fuel surcharges more comparable to the issue movements than movements without fuel surcharges. *See generally* *Karn V S* , Ex. 2. DuPont's own witness reveals that one of its motivations for ignoring this factor is its belief – which this case shows is incorrect – that fuel surcharge movements necessarily have “higher R/VC ratios” than non-fuel surcharge movements. *See* DuPont Reply, *Crowley V.S.* at 18. This is an improper basis for selecting comparable movements. DuPont's result-driven approach should be rejected, and the Board should adopt CSXT's comparison groups.

¹ CSXT also reiterates and preserves its previously-stated objections to the Three Benchmark approach itself and the rules and limitations the Board adopted to govern cases brought under that approach. CSXT incorporates its prior discussion of its objections herein. *See* CSXT Opening at 12-18.

Fourth, it is essential that the Board adjust revenues and costs of comparison traffic to 2007 levels. Some of the Waybill Sample movements in the parties' comparison groups date from 2002, and the most recent date from 2005. It makes no sense to use historical rates from three to six years ago as a basis to determine in 2008 the reasonableness of a rate established in 2007, let alone potentially lock in a rate for five years into the future —particularly in light of the sea change in rail transportation markets over recent years. If there is to be any validity in determining the reasonableness of rates by comparing them to rates for other movements, the Board must ensure that it is not comparing apples and oranges. That is exactly what it would do if it does not update the revenues and costs of comparison group traffic to 2007 levels.

Finally, in the unlikely event that the Board were to find one or more of CSXT's rates unreasonable, the Board should allocate any rate prescription evenly over the five-year time period for rate prescriptions. DuPont is entitled to a maximum relief of \$1 million in this case over the next five years. *See* Docket Nos. 42099 *et al* , Decision at 3 (Jan. 22, 2008); *see also Simplified Standards* at 28. The *Simplified Standards* do not clearly indicate how any rate relief should be allocated over the five-year prescription period. It seems reasonable, however, that the Board would intend that available relief (after deduction of any reparations) be spread evenly over the five-year period. In the absence of such a requirement, a large shipper like DuPont with multiple source and transportation options would have incentive to exhaust the maximum available relief as quickly as possible and then switch its traffic to a different origin, source, or transportation provider. Such opportunistic tactics are not consistent with the purpose of the Board's relief limits, which are to limit the application of the rough and imprecise Three

Benchmark approach to truly small cases For this reason, the Board should ensure that any rate relief it might award in this case is allocated evenly over the five-year rate prescription period

I. DUPONT HAS NOT DEMONSTRATED THAT CSXT HAS MARKET DOMINANCE OVER THE ISSUE MOVEMENTS.

DuPont has failed to prove that CSXT has market dominance over the issue movements. To the contrary, CSXT demonstrated in its Reply Evidence that each of the three issue movements is subject to significant truck competition.

CSXT further showed that DuPont's unsubstantiated, made-for-litigation argument that the risk of contamination rendered trucking infeasible, is meritless. See CSXT Reply at 5. Indeed, the data presented by CSXT in its Reply Evidence showed that the risk of contamination of the issue commodities is at most, *de minimis*. *Id.*, see also CSXT Reply Ex. 10 (contamination data). Thus, because of DuPont's failure to produce evidence sufficient to meet its burden of proving CSXT has market dominance over the issue movements, the Board should dismiss DuPont's complaint in its entirety for lack of jurisdiction.²

II. CSXT'S FINAL COMPARISON GROUPS ARE SUPERIOR TO THOSE PROFFERED BY DUPONT.

On Reply, each of the parties accepted some of the selection criteria proffered by the other party. As a result, the parties' final comparison groups are more similar to one another than their initial comparison groups. While there remain significant differences between the

² See *Duke Energy Corp v CSX Transportation, Inc*, S.T.B. Docket No. 42070, at 4 (Mar. 21, 2003) (any attempt to introduce evidence on Rebuttal that should have been presented in a party's case-in-chief, is untimely and shall not be considered by the Board).

parties' comparison groups, those differences are primarily attributable to the use and application of a small number of comparability factors *First*, because the issue traffic is subject to a fuel surcharge, CSXT included in its comparison groups only movements that are also subject to CSXT's fuel surcharge. DuPont contends that, despite the obvious difference between movements with and without fuel surcharges, it did not confine its comparison groups to movements subject to a fuel surcharge for two primary reasons. Neither of those reasons can withstand scrutiny. DuPont initially claims, disingenuously, that it cannot determine whether the amounts reported in the Waybill Samples' "Miscellaneous Charges" field represent fuel surcharges. As the Board and DuPont both know, however, CSXT reports fuel surcharges in that field. Moreover, as a straightforward comparison of the applicable fuel surcharge (which is readily determined using the fuel surcharge mechanism described in CSXT's public website and information from the Waybill Sample) and the Waybill Sample records for the comparison groups illustrates, CSXT reported only fuel surcharge revenue in the Miscellaneous Revenue field. As CSXT demonstrates, the amount reported in the Miscellaneous Revenue field matches the applicable fuel surcharge exactly for the overwhelming majority of movements in each of CSXT's three comparison groups in this case. DuPont's second argument consists of a series of red herrings, all based upon the illogical notion that selection of comparable movements should be based on whether, how, and to what extent CSXT's fuel surcharge program "recovers" its overall fuel cost. While this complex question may be of interest in other contexts, it has no relevance to the selection of movements that are comparable to the issue traffic in a Three Benchmark case. DuPont thus offers no meaningful reason for its failure to confine its comparison groups to movements that, like the issue traffic, are subject to a fuel surcharge³

³ As discussed below, movements without a fuel surcharge represent more than two-thirds of the records in DuPont's comparison group for the plastics movements and nearly one-half of the

Second, while CSXI uses the actual miles traveled by the issue traffic for purposes of applying the parties' common mileage band criteria, DuPont rejects the use of actual mileage in favor of a rough and imprecise estimate that distorts the actual length of the issue movements and undermines the accurate application of the mileage factor. At the outset of the case, CSXT provided to DuPont the actual miles traveled by each of the movements, identifying the actual route followed by each in the real world. Nonetheless, in both its Opening and Reply submissions, DuPont eschewed the actual miles and instead used an estimate of the length of those movements generated by PC Rail. In every instance, the PC Rail miles used by DuPont are different from the actual miles used by CSXT. DuPont compounds that error by rounding each of its estimated mileages to the nearest 50 miles. Because the mileage band itself is only 150 miles, the potential error introduced by rounding to the nearest 50 miles is manifest. *See* CSXT Reply at 31-32. However, DuPont has offered no explanation for the unnecessary and distorting extra step of rounding its already inaccurate mileage estimates. CSXT made a significant concession by adopting the narrow mileage band advocated by DuPont. If that criterion is to be applied in a meaningful manner, it is essential that the baseline for its application – the length of the issue movements – be calculated using actual miles, without rounding. Because DuPont's comparison groups are based upon the compound inaccuracy of both mileage estimation errors, they should be rejected.

Third, the parties disagree as to what constitutes "issue traffic." While the parties agree that issue traffic should be excluded from the comparison groups, DuPont narrowly defines that term to include only a subset of the traffic covered by its complaints. CSXT defines issue traffic to mean the traffic "at issue" in DuPont's Complaint, *i e*, that traffic whose rates DuPont

records in DuPont's comparison groups for the plasticizers movements.

chose to challenge in this case. As the Board has previously explained, DuPont could have chosen to bring multiple individual complaints, each covering a single lane. Indeed, this is precisely what it chose to do in STB Docket No. 42101. Having elected, in its sole discretion, to challenge the rates for multiple movements in a single Complaint, DuPont must abide by the consequences of that decision. The odd result of DuPont's cramped definition of issue traffic is most clearly illustrated in its comparison groups for traffic in the Heyden-Duart and Heyden-Washington comparison groups. DuPont's final comparison groups for those two lanes are *identical* (consisting of 142 of the same Waybill Sample records) with one exception: the Heyden-Duart movement is excluded from the Heyden-Washington comparison group and vice versa. Thus, DuPont simultaneously contends that each of those two movements is comparable to the same 142 movement records for purposes of one comparison group, but it is not comparable to the identical movements for a second comparison group. This defies logic. Either a movement is comparable to 142 other movements, or it is not.

CSXT, on the other hand, does not seek to have its cake and eat it too. Consistent with DuPont's election to put multiple lanes of traffic at issue in a single case, CSXT uniformly excludes the same Complaint "issue traffic" from each of its final comparison groups in this case. CSXT and DuPont agree that the purpose of excluding issue traffic from the comparison groups is to avoid using historic rates for the very movements whose rates are challenged as part of the "benchmark" for comparative determination of the reasonableness of the rates applying to the challenged movements. *See* DuPont Reply at 18 (quoting CSXT evidence). CSXT's selection criterion reasonably and consistently achieves this agreed aim, while DuPont's does not.

A. Whether a Movement is Covered by a Fuel Surcharge is a Relevant Comparison Criterion That DuPont Fails to Apply.

All of the issue movements have fuel surcharges. CSX's final comparison group therefore includes only movements to which a fuel surcharge applies. DuPont, however, ignores this important comparability factor and has included numerous movements in its final comparison group to which no fuel surcharge applies. As demonstrated in Table 1, over [redacted] of the movements in DuPont's plastics groups were not subject to a fuel surcharge, and well over [redacted] of its two plasticizer comparison groups had no fuel surcharge.

Table 1

DuPont's decision to ignore fuel surcharges renders its comparison groups less comparable to the issue movements, because the presence or absence of a fuel surcharge is a market-based factor that effectively distinguishes between movements that are subject to different market forces and conditions. DuPont attempts to cloud the issue by making various irrelevant claims about whether and to what extent CSXT's fuel surcharge "recovers" its overall cost of fuel. In this Three Benchmark proceeding, such claims are a diversion that confuses the simple question at issue: when the issue traffic is subject to a fuel surcharge, are movements that also have such fuel surcharges more comparable to the issue traffic than movements that lack fuel surcharges? The clear answer is yes. CSX1's use of a fuel surcharge criterion makes its

comparison groups more comparable to the issue traffic than DuPont's groups, which fails to take into account this distinguishing characteristic of the issue movements.

1 Applicable Fuel Surcharges Are Reported in the Miscellaneous Charges Field of the 2002-2005 Waybill Samples, and DuPont Has Long Had Ample Evidence to Confirm This Fact

DuPont initially claims that it does not know, and apparently is unable to determine, whether the Miscellaneous Charges field in the CSXT Waybill Samples reports fuel surcharges, or whether other charges might also be reported in that field. *See* DuPont Reply at 21-22; Crowley Reply V.S at 15. As the Board is well aware, CSXT reports fuel surcharge revenue in the Miscellaneous Charges field.⁴ Moreover, when, at the request of DuPont's consultants, the parties met with Board staff for a technical conference to discuss Waybill Sample fields and the calculation of the RSAM, the parties discussed the very Miscellaneous Charges field that DuPont now claims it does not understand and cannot use to verify that the movements CSXT selected for its comparison groups were covered by its fuel surcharge. Since the time DuPont received the Waybill Samples furnished by the Board (well before it filed its opening evidence), DuPont has had all of the information it needed to verify that the Miscellaneous Charges field reports CSXT's fuel surcharge. *See* V S Fisher, Ex. 1 at ¶¶ 2. 5-6.

DuPont cannot seriously claim that CSXT's selection criterion is inappropriate because its witness cannot confirm the "link" between fuel surcharge and the miscellaneous charges reported in the Waybill Samples. The Board made the Waybill Samples available to the parties on November 9, 2007 (for years 2001-2004) and on December 19, 2007 (for 2005), the latter being six weeks before the parties filed their Opening Evidence.

⁴ *See Rate Guidelines – Non-Coal Proceedings*, STB Ex Parte No. 347 (Sub-No.2) (Dec. 20, 2007). In the December 11, 2007 RSAM decision, the Board explained that it was including the miscellaneous charges field "in order to capture fuel surcharges for those railroads that do not include fuel surcharges in the total revenue field of the waybill record." *See id* at 2.



Contrary to DuPont's claim, public information and evidence in the record at the time that the parties filed their Opening Evidence were more than adequate to support CSXT's use of the Miscellaneous Charges field to identify movements that were subject to a fuel surcharge and verify that the fuel charge amount was accurately reported. Thus, contrary to DuPont's Reply assertion, CSXT has presented ample evidence to show that CSXT fuel surcharge revenue is reported in the Miscellaneous Charges field. To demonstrate this fact, CSXT Witness Fisher calculated the fuel surcharges for the comparison group movements according to the contemporaneous CSXT fuel surcharge mechanism, and then compared them with the revenues reported in the Miscellaneous Charges field of the corresponding Waybill Samples. *See* V.S. Fisher, Ex. 1 at ¶¶ 7-8. For all but two of the 221 unique movement records in CSXT's three comparison groups, the amount reported in the Miscellaneous Revenues field

matched CSXT's fuel surcharge.⁷ This confirms that CSXT reported fuel surcharge revenue, and only fuel surcharge revenue, in the Miscellaneous Revenues field for the movements in CSXT's comparison groups in this case. *See id*. As demonstrated above, DuPont could have easily verified this fact using data available to it in this case. CSXT properly and accurately identified movements subject to a fuel surcharge using the Waybill Sample's Miscellaneous Charges field.

2 *Market Factors and Commercial Considerations Determine Whether a Movement is Subject to a Fuel Surcharge*

Whether a movement has a fuel surcharge is a function of the market dynamics of that movement. As fuel costs skyrocketed in recent years, CSXT responded by working to apply a fuel surcharge mechanism to as much traffic as possible. *See* CSXT Opening at 18; CSXT Reply 29 n.30; *see also* Karn V S., Ex. 2 at ¶ 2. But while CSXT was able to apply a fuel surcharge to its common carrier traffic immediately and promptly began to negotiate fuel surcharges for new contracts, it was not able to apply fuel surcharges to traffic moving under existing contracts. *See* CSXT Opening at 18; *see also* Karn V.S., Ex. 2 at ¶ 2. As CSXT explained in Ex Parte No. 661,

A very large proportion of CSXT's carloads are carried pursuant to contracts with its customers—not pursuant to common carrier rates. When [CSXT's amended fuel surcharge] went into effect on June 1,

2003, CSXT could not apply it to many existing contracts. Since June 1, 2003, however, CSXT has sought to incorporate the fuel surcharge into new contracts and renewed contracts . . .

Written Statement of CSXT at 9, Ex Parte 661, *Railroad Fuel Surcharges* (Apr. 27, 2006).

As those legacy contracts—many of which had relatively long terms—have gradually expired, CSXT has negotiated replacement agreements that include fuel surcharge provisions. *See* CSXT Opening at 18; *Karn V.S.*, Ex 2 at ¶ 2.

Because the application of a fuel surcharge is a significant, market-based factor that distinguishes movements like the issue traffic from movements without a fuel surcharge, it is an appropriate comparison factor.

DuPont's true motivation for refusing to apply this factor is betrayed by the testimony of its consultant, who argues against the application of this criterion by complaining

that movements covered by a fuel surcharge “have higher R/VC ratios” than non-fuel surcharge movements. Crowley Reply V.S. at 16. Mr. Crowley’s telling comment demonstrates DuPont’s result-oriented approach to the selection of comparable movements, in which the deciding factor in determining whether to apply a comparability criterion is its effect on the comparison group’s R/VC ratio, and, ultimately, on the final rate reasonableness analysis. Under the result-driven approach suggested by DuPont’s primary witness, the fact that application of a particular comparability factor may raise the comparison group’s R/VC is sufficient reason to reject or ignore that factor, even such obvious comparability factors as the application of a fuel surcharge. The purpose and intention of the Three Benchmark approach, of course, is to identify traffic that is reasonably comparable to the issue traffic first, and then to derive from that traffic group benchmarks that may be used to assess the reasonableness of the challenged rates, *not* to start by identifying movements that generate the results most favorable to one party and then to label them “comparable.”⁹

3 DuPont’s Substantive Criticisms of CSXT’s Use of Fuel Surcharges as a Comparison Factor Are Irrelevant and Unsupported

DuPont’s objections to using fuel surcharges as a comparability factor are a study in misdirection, and entirely beside the point. DuPont’s primary argument is that CSXT might have “recovered” its fuel costs for traffic without a fuel surcharge in some other way. *See*

DuPont Reply at 22-23 ¹⁰ But what is at issue here is not cost recovery, it is comparability. As explained, certain CSXT movements do not have a fuel surcharge due to market factors and conditions that distinguish them from movements like the issue traffic, which are subject to fuel surcharges. *See* CSXT Reply at 28-29; *Karn V.S.*, Ex. 2 at ¶¶ 2, 6. That market distinction is the reason that non-fuel-surcharge movements are less comparable to the issue traffic than movements with fuel surcharges. Whether or not CSXT recovered its fuel costs – or any other specific component of its costs of providing rail transportation service – on any particular movement is irrelevant to whether that movement is comparable to the issue movements.¹¹

DuPont's claim that the "market-based decision" to apply a fuel surcharge does not bear on comparability is misguided in several ways. DuPont Reply at 22. First, the idea that CSXT unilaterally "decided" what traffic would have fuel surcharges is incorrect—CSXT plainly could not "decide" to apply a fuel surcharge to pricing agreements that did not allow it. More fundamentally, the identification of traffic with similar "market-based" characteristics is the goal and intention of developing a comparable group, not a basis for criticizing that group.

¹⁰ DuPont's point of departure for its entire series of arguments against this comparison factor is its contention that CSXT excluded movements without fuel surcharges from its comparison groups based upon "the unsupported assumption that this indicates that fuel costs were not recovered." *See* DuPont Reply at 21. CSXT did not make this argument or "assumption." *See* CSXT Reply at 28-29 (discussion of fuel surcharge comparability factor). DuPont does not – because it cannot – provide any cite to CSXT's evidence as the basis for this strawman claim, which is the essential premise for all of DuPont's substantive arguments against using the application of a fuel surcharge as a comparison factor.

¹¹ Similarly irrelevant to the question of comparability is DuPont's unsupported allegation that CSXT "overrecovered" its fuel costs for movements covered by a fuel surcharge. DuPont Reply at 22-23. There is no evidence that CSXT was "overrecovering" fuel costs for any particular movement in the waybill sample. Regardless, CSXT's revenue for any particular movement is not a relevant comparability factor. DuPont's witness' contrary suggestion, that the relative R/VC ratios of fuel surcharge movements are somehow relevant to determining comparability, is wrong. *See* DuPont Reply, *Crowley V.S.* at 16. Indeed, accepting Mr. Crowley's suggestion that the selection of comparable movements be guided by their R/VC ratios would make the Three Benchmark exercise circular, arbitrary and meaningless.

The comparability factors the Board identified in *Simplified Standards*—“length of movement, commodity type, traffic densities of the likely routes involved, and demand elasticity”—are *market* characteristics that affect railroads’ price-setting decisions. See *Simplified Standards* at 17. Under the demand-based differential pricing approach that is the cornerstone of modern railroad economics and rail rate regulation, carriers are expected to base their prices on “the market demand which they observe[].” *Coal Rate Guidelines*, 1 I.C.C.2d 520, 527 (1985). The elasticity of demand and other commercial conditions and market factors that affect whether traffic was subject to a fuel surcharge are precisely what makes traffic more comparable than not.

The final variation on DuPont’s cost-recovery based theme is the claim that, for movements not having a fuel surcharge, application of the RCAF index “would have captured the increase in CSXT’s fuel costs.”¹² DuPont Reply at 22. Even if DuPont’s fuel cost recovery arguments and allegations were relevant to the present comparability question—which they are not—DuPont’s predicate assumptions are sheer speculation.

It is impossible to determine whether or to what extent any particular movement was subject to an alternative fuel cost recovery mechanism without relying on non-public data.

¹² DuPont does not specify which RCAF index it is relying upon for this speculative assertion. The comparison that witness Crowley makes between the fuel component of an unspecified version of the RCAF and the EIA diesel fuel index is also of little-to-no value, because it considers neither the relative weight the RCAF assigns to fuel costs nor CSXT’s actual cost experience in the relevant period.

Under the Board's governing rulings, parties may not rely upon non-public data for comparison group selection. *See* Decision, STB Docket Nos. 42099 *et al* , at 2-4 (Jan 31, 2008). Decision, STB Docket Nos. 42099 *et al* , at 2-3 (Jan. 15, 2008) It cannot be determined, based on public information, whether, and to what extent, any particular movement that is not covered by CSXT's fuel surcharge was subject to adjustment by an index or hybrid index that included a fuel component. Thus, inclusion of only traffic with a fuel surcharge is more likely to reflect traffic having similar market characteristics to the issue traffic than the indiscriminate approach of not screening for a fuel surcharge ¹³ And, even if the parties were allowed to use non-public evidence to identify which of the several available escalators and indices applied to which movements, DuPont still has provided no evidence to show that any one of those indices under- or over-recovered the fuel costs of a particular movement. ¹⁴

Despite DuPont's attempt to obscure the issue by detouring through irrelevant and unsupported speculation about relative cost recovery, the relevant question remains whether the application of a fuel surcharge is an appropriate comparison criterion. There is little real dispute that, holding other factors constant, the issue movements (which have fuel surcharges) are more comparable to movements with fuel surcharges than to movements without fuel surcharges. DuPont's failure to account for this factor is both significant and a sufficient reason for the Board to select CSXI's comparison groups.

¹³ In the same vein, DuPont's argument that "the fuel component of the RCAF" increased at a different rate than the U.S. Energy Information Administration U.S. No. 2 Diesel Price index—even if it were correct—is not relevant. DuPont Reply at 22. Again, the question here is whether the presence of a fuel surcharge affects the comparability of traffic, not whether or to what extent a given fuel surcharge recovered fuel costs.

¹⁴ Any attempt to conduct such an analysis would be costly, complex, time-consuming, and subject to considerable discretion. As the Board has repeatedly emphasized, its intention and goal is to make Three Benchmark proceedings expeditious, simple, and relatively inexpensive. Application of CSXT's fuel surcharge criterion would serve these goals while simultaneously ensuring selection of more comparable movements than DuPont's standardless approach.

B. All Issue Traffic Should be Excluded from the Comparison Groups.

A further flaw in DuPont's comparable groups is its inclusion of issue traffic. It makes little sense to include in a "comparable" group those movements whose rates are being challenged in this very complaint. DuPont acknowledges that issue traffic should be excluded, but then excludes only that portion of the issue traffic that moves between the same origin and destination for which it is designing the comparison group. *See* DuPont Reply at 17-18. In particular, it included the Heyden-Duart movement for its comparable group for the Heyden-Washington movement, and conversely it included the Heyden-Washington movement for its comparable group for the Heyden-Duart movement. This inclusion of issue traffic in DuPont's comparison groups is unreasonable.

"Issue traffic," properly defined, includes all traffic whose rates the complainant chooses to challenge in the same complaint. The traffic at issue in this case is the movements from Heyden to Duart, from Heyden to Washington, and from Amptill to Wyandotte. DuPont chose to challenge all three rates in this single complaint. As the Board has previously noted, if DuPont had wished to challenge the rates for these multiple lanes in multiple complaints, it could have done so. *See* Decision, STB Docket Nos. 42099 *et al.* at 3 (Jan. 22, 2008). Having chosen to bring a single complaint to challenge rates for multiple movements, DuPont must live with the consequences of that choice. The traffic that DuPont has put at issue is the traffic whose rates it is challenging, and that traffic should not have been included in DuPont's group of comparable traffic. Indeed, because the comparable group is to be a group of traffic from which the Board can derive a rough standard of comparison for assessing the reasonableness of the rates on the

issue traffic, it makes little sense to include movements whose rates are being challenged as unreasonable.¹⁵

The odd result of DuPont's cramped definition of issue traffic is most clearly illustrated in its comparison groups for traffic in the Heyden-Duart and Heyden-Washington comparison groups in DuPont's pending challenge to CSXT rates in Docket No. 42099. DuPont's final comparison groups for those two lanes are *identical* (consisting of 142 of the same Waybill Sample records) with one exception: the Heyden-Duart movement is excluded from the Heyden-Washington comparison group and *vice versa*. Thus, DuPont simultaneously contends that each of those two movements is comparable to the same 142 movement records for purposes of one comparison group, but it is not comparable to the identical movements for a second comparison group. This defies logic. Either a movement is comparable to 142 other movements, or it is not.¹⁶

¹⁵ The issue traffic movements DuPont includes in its comparison groups were contract movements under the former CSXT-DuPont master contract. While anomalies in the Waybill Sample have made it impossible to determine based on public data whether other traffic from the Waybill Sample moved under contract rates rather than common carrier rates, *see* CSXT Opening at 19, here there is no dispute that the issue traffic movements were contract movements (under a contract that expired in June 2007). Contract traffic is generally not comparable to common carrier traffic. *See* Ex Parte 646, CSXT/NS Reply Comments at 29 (Nov. 30, 2006), *see also Simplified Standards* at 83 (“[H]olding everything else constant, a comparison group that consists of just common carrier traffic will be selected over a group that includes contract traffic.”). While CSXT is not relying on the fact that the issue movements are contract movements as grounds for excluding them from a comparison group, this evidence further confirms the soundness of the position that issue traffic should be excluded and DuPont's comparison group should be rejected.

¹⁶ But for the two issue movements, DuPont's two plasticizers comparison groups are identical. Thus, as a matter of logic, there is no reason those two movements could not be considered in a single comparison group. Had DuPont chosen to use a single comparison group for both of the plasticizer issue movements, however, the illogic of its position would be thrown into even starker relief: it would be forced to simultaneously argue that a movement *is and is not* comparable to all of the movements it selected using other factors. Properly defining “issue traffic” as the movement(s) the complainant chooses to challenge in a single complaint avoids such logical contortions and has the added benefit of reducing the incentive for complainants to

In fact, *Simplified Standards* indicates that comparable traffic should be “traffic of other potentially captive shippers. *Simplified Standards* at 75 (emphasis added) Here, there is no question that the traffic from the Heyden-to-Washington lane and the Duart-to-Washington lane is DuPont’s own traffic. Such traffic is not appropriate comparison traffic, and DuPont’s decision to include it in its final comparable group is further grounds to reject DuPont’s comparable group.¹⁷

C. CSXT’s Final Mileage Criteria Are Superior Because They Use Actual Mileage Rather than an Estimate and Avoid Unnecessary Rounding.

In order to minimize the differences between CSXT’s and DuPont’s comparison groups, CSXT agreed to the narrow mileage criterion proffered by DuPont, and corrected two errors in DuPont’s calculation of the baseline length of the issue movements. *See* CSXT Reply at 31-32 *First*, DuPont continues to use the PC Rail-based estimate of the issue traffic’s loaded miles, without providing any explanation of why it ignored the actual loaded miles provided by CSXT more than four months ago in its initial filing *See* CSXT Answer at 5 (Nov. 19, 2007) The Board specified only nine actual movement characteristics that parties should use as inputs to calculate the “unadjusted” URCS Phase III costs of the issue movements and comparison group movements. *See Simplified Standards* at 25, 84; *see also* Ex Parte 657, *Major Issues in Rail Rate Proceedings* at 48-52, 59-60 (Oct. 30, 2006) (“*Major Issues*”). As the Board explained in *Major Issues*, use of these nine actual “movement-specific operating characteristics” is what allows URCS to generate variable cost figures that approximate the actual variable cost of the “the movement at issue.” *See Major Issues* at 52. One of the nine movement-specific

include multiple movements in their complaints to seek an advantage in a Three Benchmark case.

characteristics that must be used to generate unadjusted URCS variable costs that the Board has directed the parties to use in Three Benchmark cases is a movement's actual "one-way distance" or "loaded miles." See *Simplified Standards* at 25; *Major Issues* at 52, n.166.¹⁸

Second, CSXT applied the plus-or-minus 150 miles band to the issue traffic's loaded miles without DuPont's unnecessary and inappropriate device of "rounding to the nearest 50 miles." *Id* at 31. DuPont makes no attempt in either its Opening or Reply Evidence to explain why rounding the issue traffic mileage to the nearest 50 miles is reasonable. At best, this practice has no utility. And, in many instances, rounding could significantly distort the application of the mileage band and the resulting comparison group. For example, by rounding its PC Rail miles for the Amphill to Wyandotte plastics movements to , DuPont would

¹⁸ As directed, CSXT used actual loaded miles in calculating URCS costs, and for developing its comparison groups.

select only movements that ranged from [redacted] to [redacted] miles. As a result, it included [redacted] shipments of less than [redacted] miles, or more than [redacted] miles shorter than even its underestimate of the movement miles. Thus, while CSXT accepts, for purpose of this case, DuPont's mileage band, it does not accept DuPont's unexplained, unsupported – and potentially distorting – practice of rounding the length of the issue movements to the nearest 50 miles.

Instead of using the issue traffic's actual loaded miles that CSXT provided with its Answer last November, DuPont's Opening and Reply Evidence use an inaccurate estimate of the length of the movement generated by PC Rail.¹⁹ Application of the mileage band to an inaccurate estimate of the length of movement results in a less accurate and less reliable indicator of comparability.²⁰ Together, DuPont's use of issue traffic mileage estimates that vary substantially from the actual length of the issue movements and its compounding error of rounding the (already inaccurate) mileage to the nearest 50 miles make DuPont's mileage criterion substantially inferior to that used by CSXT to select its final comparison groups. The Board should reject DuPont's compound imprecision and adopt CSXT's comparison groups.

D. DuPont's Density Analysis is Untimely, and Provides No Additional Support for Its Proffered Comparison Groups.

For the first time in its Reply, DuPont asks the Board to consider the traffic densities on the line segments used by its comparison groups as a selection criterion. *See*

¹⁹ Because DuPont knew the actual loaded miles of the issue movements long before it filed its Opening Evidence, there is no justification for its failure to use that data in its Opening Evidence, or in order to select its final comparison groups in its Reply.

²⁰ In fact, CSXT provided to DuPont in discovery movement records indicating that the 2007 plastics shipments actually average [redacted] miles from Amthill to Wyandotte. As described above, by using a PC Rail estimate of [redacted] miles, and then rounding down to [redacted], DuPont selected only movements in the [redacted] mile range. As a result, DuPont included [redacted] shipments – nearly one-third of its comparison group – that were less than [redacted] miles, or more than [redacted] miles shorter than the actual distance traveled by the plastics issue traffic. Thus, DuPont's rounded estimate approach to its plus-or-minus- [redacted]-mile criterion selects movements that range from [redacted] miles shorter to only [redacted] miles longer.

DuPont Reply at 25. DuPont's attempt to introduce a new factor for the Board's consideration for the first time in its Reply should be deemed untimely and not considered by the Board. *See Simplified Standards* at 18 (stating that the Three Benchmark procedures allow both parties to participate in the *winnowing* process) (emphasis added); *see also Duke Energy Corp. v. CSX Transportation, Inc.*, STB Docket No. 42070, at 4 (Mar. 21, 2003); *General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases*, STB Ex Parte No. 347 (Sub-No. 3) (Mar. 9, 2001). DuPont attempts to excuse the untimely proffering of a new factor by claiming that it did not identify density as a relevant criterion in its case-in-chief "due to the uncertainty of whether [the parties] could use the density maps produced by CSXT in discovery." *See* DuPont Reply at 25. In fact, however, the Board ruled that the parties could use the density maps prior to the deadline for the parties' opening submissions. *See* STB Docket No. 42099 *et al.*, Decision at 4 (Jan. 31, 2008); *see also* CSXT Opening at 14 n.14. While the timing of the Board's decision left only a limited amount of time to incorporate density arguments into the parties' opening submissions, it is disingenuous for DuPont to claim that it did not know whether it could include the density data in its Opening Evidence. Because both CSXT's density data (produced in mid-December in response to DuPont's discovery requests) and the Board's Order permitting the use of that data were available to DuPont before its opening submission, if DuPont wished to use traffic density as a comparison group selection criterion, it should have included that evidence and argument in its case-in-chief, and not in its Reply Evidence.

Even if the Board were to consider DuPont's untimely proffer of a new comparability factor, DuPont's argument that its comparison groups are comparable in density to the issue movements does not undermine the superiority of CSXT's comparison groups. In fact, review of DuPont's proffered density analysis reveals an outcome it may not have intended, that CSXT's

criteria selected movements that were *closer* to the density of the plastics issue-traffic movement. As background, DuPont's density analysis involved determining the average density over the routes for the issue traffic and the movements it considered comparable to the issue traffic.²¹ Based on those calculations and a comparison of the average density across the comparable movements, DuPont concluded that its comparison groups "are comparable in density with each of the issue movements." See DuPont Reply at 31.

CSXT made one refinement to DuPont's analysis. Accepting for the sake of discussion DuPont's density calculations, CSXT separated each of DuPont's comparison groups between movements that were also in CSXT's corresponding group, and those that were only in DuPont's. For the plastics issue movements, the average density for CSXT's comparison group movements was closer to that of the issue traffic than the movements included in DuPont's proffered comparison group. Table 2 below summarizes the average density for the issue traffic movements and for those movements that are in DuPont's comparison groups, separately for the two categories described above.

Table 2

²¹ DuPont's analysis determined CSXT's density for the routes generated by PC Rail, which may not account for the actual route of movement.

Thus, if the Board were to consider DuPont's untimely density analysis or give it any weight whatsoever, it should recognize that DuPont's own density analysis indicates that CSXT's plastics comparison groups are more comparable to the issue traffic than are the comparison groups proffered by DuPont.

E. Other Factors

While the parties dispute the application of other comparison factors, those factors do not ultimately affect the composition of the competing comparison groups. See CSXT Reply at 29-31. First, CSXT maintains that "single-car" shipments (*i.e.*, less than 6 carloads) are more comparable than multiple-car or unit-train shipments to the issue traffic, which was transported in single-car shipments. Nevertheless, DuPont included multiple-car shipments in one of its final comparison groups. Specifically, DuPont included four multiple-car shipments for its final comparable group for the Amphill-Wyandotte plastics movement. DuPont Reply Crowley V.S. at 18. The parties' difference about the application of a "single-car" comparison factor is moot, however, because the four multiple-car shipments in DuPont's plastics comparison group were not subject to a fuel surcharge. Because these movements did not have a fuel surcharge, CSXT would not have selected these records in its comparison group even if it had included multiple-car shipments. Because this comparison factor does not generate differences between the parties' comparison groups, it need not be considered in evaluating which comparison group is superior.

Additionally, on Reply, DuPont dramatically changed its approach to identifying comparable movements, by selecting traffic from a much smaller universe of commodities. For the plasticizers comparison groups, DuPont accepted the use of the commodities covered by the same CSXT tariff – CSXT 28003 – that CSXT used in selecting comparable movements. For

the plastics group, DuPont also relied upon a CSXT tariff – CSXT 28211 – that includes the issue-traffic commodity. Having for the first time placed any limitation on the commodities it includes,²² DuPont is critical of CSX1’s use of the 28211 STCC header, and not the commodities from the tariff, to identify comparable traffic. For several reasons, DuPont’s criticism is misplaced. First, DuPont’s approach includes only 11 records from three commodities outside STCC 28211, representing only 3% of its comparison group. The commodities covered by those records fall outside STCC 28211 – according to the STCC taxonomy, those commodities are less “like” the other commodities classified as STCC 28211. Second, even if CSXT’s like commodity selection criterion had initially included shipments of these non-28211 commodities, its other selection criteria would have excluded each of those 11 records. Significantly because 9 of the 11 records report distances of 615 miles – 157 miles shorter than DuPont’s estimate of 772 miles for the plastics issue movement – even DuPont’s selection criteria would have excluded those movements when it applied its 150-mile band criterion, were it not for the distorting effect of DuPont’s unnecessary rounding of issue movement mileages. Further, neither of the other two non-28211 records was subject to a fuel surcharge provision, and thus they would not have been included in CSXT’s comparison group regardless of commodity. DuPont’s criticism is thus both erroneous and moot, because its inclusion of shipments of other non-STCC 28211 commodities does not cause a difference between the parties’ final comparison groups.

²² On Opening, DuPont did not limit its comparison groups by commodity at all, claiming that all movements having similar variable costs were comparable commodities. See CSXT Reply at 17-27.

III. THE BOARD SHOULD ACCEPT CSXT'S PROPOSED ADJUSTMENTS TO THE BENCHMARKS, AND REJECT THE RESTRUCTURING OF THE BENCHMARKS PROPOSED BY DUPONT.

A. RSAM Tax Adjustment

In its opening submission, CSXT explained that the Board's current RSAM calculations make an error that adds the calculated shortfall from the Board's revenue adequacy determinations (which are computed on an after-tax basis) to revenues for traffic moving at above 180 percent of variable costs (which are on a pre-tax basis). To correct this indisputable error, CSXT explained that the revenue adequacy shortfall should be adjusted to reflect pre-tax levels and calculated the required adjustment using CSXT's statutory Federal and state income tax rates. The corrected RSAM figures submitted by CSXT are summarized in the table below.

Table 3

Summary of RSAM Corrected To Reflect Proper Treatment of Shortfall Income Taxes

	Board RSAM Mark-up	Board R/VC_{>180}	Shortfall (After-Tax)	Shortfall (Pre-Tax)	Corrected RSAM	RSAM / R/VC_{>180} Ratio
	(1)	(2)	(3)=(1)-(2)	(4)=(3)/(1- tax rate)	(5)=(2)+(4)	(6)=(5)/(2)
2002	286%	238%	48%			
2003	292%	239%	53%			
2004	292%	231%	61%			
2005	300%	236%	64%			
Average	292%	236%	56%			

On Reply, DuPont does not dispute CSXT's claim that the Board's current RSAM logic incorrectly combines after-tax shortfalls with pre-tax revenues. Instead its witness, Mr. Crowley, describes what he claims are two problems with CSXT's proposed correction:

1. CSXT assumes that the additional revenue from the revenue adequacy shortfall calculation would be taxed at the statutory tax rate, and,

2. That the variable costs used to calculate the RSAM and $R/VC_{>180}$ ratios are already overstated due to an over recovery of income taxes.

DuPont Reply at 28 In addition, DuPont asserts that this proceeding is an inappropriate forum for a change to the RSAM calculations. Below, CSXT addresses each of DuPont's arguments

1 CSXT's Correction of the RSAM Properly Uses the Statutory Tax Rate

Mr. Crowley contends that CSXT erred by correcting the RSAM revenue adequacy shortfall to include taxes at the statutory tax rate instead of using CSXT's effective or marginal tax rates. Although he would prefer to use the marginal tax rate, which he describes as "the tax rate that applies to the last dollar of the tax base," he explains that marginal tax rate is difficult to determine and cannot be computed from the record in this proceeding. He then defaults to the "effective tax rate" as the purportedly appropriate rate to apply to make the correction

Mr. Crowley is wrong to assert that either an effective or marginal tax rate should be used to correct the RSAM revenue adequacy shortfall for taxes. All incremental taxable income earned by CSXI incurs incremental tax at the statutory tax rate and any revenue required to offset the revenue adequacy shortfall is no exception. While it is true that the amount of cash CSXT actually pays in Federal and state income taxes in any one year could be influenced by tax-loss carryforwards and carrybacks, and by deductions that generate deferred taxes, these merely represent differences in the timing of when CSXT actually makes the tax payments CSXT still incurs tax liability at the statutory rates. While CSXT had net operating loss carryforwards during these periods, all of these losses were usable by CSXT on its income earned in this or subsequent periods. Thus, additional revenue to cover the revenue adequacy shortfall would not be offset by net operating losses that would have otherwise been unavailable to CSXT. Similarly, government tax credits might reduce the cash tax in a year, however, there

would be no additional tax credits generated as a product of the additional incremental income. As such, the proper assumption is that the incremental tax liability that CSXT would incur for the income attributable to offset the revenue adequacy shortfall should be measured at the statutory rate. In addition, because the Board's RSAM calculations assume that the revenues for traffic moving above 180 percent of variable costs would increase to levels required to eliminate the revenue adequacy shortfall with no corresponding increase in capital or operating cost expenditures, the added revenues would generate no new tax deductions, which further confirms that the statutory tax rate is the appropriate rate to use to correct the RSAM calculations.

Use of the statutory tax rate is also supported by the Board's general purpose costing procedures for railroads. Specifically, the Board's Uniform Rail Costing System (URCS) develops costs attributable to the payment of Federal income taxes using the statutory tax rate.

2 *DuPont's Criticism of URCS Does Not Undermine the Demonstrated Need for Correction to the RSAM Calculation.*

Mr. Crowley argues that URCS use of the statutory federal tax rate to add income tax related variable costs to individual movements provides for more taxes than CSXT actually pays on a cash basis. He suggests that by overstating the income tax burden, URCS improperly reduces the number of movements in the Board's carload waybill sample with revenue to variable cost ratios in excess of 180 percent, thus suppressing the number of movements from which the revenue adequacy shortfall can be recovered, and, he claims, artificially inflating the RSAM. Although he quantifies the effects of his alleged overestimate of income taxes in URCS for the year 2005, he does not restate the Waybill Sample variable costs for 2002 through 2005

using the effective tax rate²³ This is a fatal flaw in Mr. Crowley's analysis, because appropriate. corresponding recalculation of costs would lower URCS variable costs and increase the R/VC ratios for the comparable traffic group under the Board's three benchmark methodology If such a consistent adjustment were made, any overstatement in the calculated RSAM produced by the differential between URCS use of statutory Federal income tax rates and the CSXT effective tax rate would be offset by the corresponding increase in R/VC ratios for the comparable traffic (as a result of the substitution of the effective tax rate to URCS cost calculations).

3 *It is Entirely Appropriate to Correct the Erroneous RSAM Calculation in This Proceeding*

In its argument, DuPont erroneously suggests that the Board's current RSAM calculation, which was announced by the Board in its September 2007 decision in *Simplified Standards*, was subject to four rounds of comments and a public hearing. In fact, because it was included as part of the Board's final decision in that proceeding, the specific RSAM formulation adopted by the Board was not subject to public comments. More important, the Board did not issue its actual calculation of the new RSAM until December 11, 2007, and corrected that calculation on December 20, 2007. *See* Notice, STB Ex Parte 347 (Sub-No. 2) (Dec. 11, 2007); *See* Notice, STB Ex Parte 347 (Sub-No. 2) (Dec 20, 2007).

²³ The URCS adjustment advocated by DuPont is also contrary to the Board's rule that it will not consider such adjustments in these cases. *See Simplified Standards* at 22, 84. Moreover, the Board has made clear that it will not consider criticisms of URCS or proposed changes to URCS in a Three Benchmark case. In its *Major Issues* Decision which the Board adopted by reference in *Simplified Standards*, it made clear that "if a party believes that URCS could be improved . . . it may request a *separate rulemaking*," and that, "in an individual rate reasonableness proceeding, [the Board] will use [its] existing URCS model, without further movement-specific adjustment." *Major Issues* at 61 (emphasis added).

Moreover, regardless of when the RSAM was developed by the Board, it is the Board's standard practice to correct obvious errors in its Decisions. *See, e.g., Western Fuels Ass'n, Inc v. BNSF Ry Co*, STB Docket No. 42088, slip op at 10 (served Feb. 28, 2008) (ordering parties to correct technical errors when filing their supplemental evidence); *Otter Tail Power Co. v BNSF Ry Co*, STB Docket No., slip op. at 2 (served May 26, 2006) (reopening, *sua sponte*, the proceeding to correct a technical error)²⁴

B. The Board Should Reject the Retroactive Changes to the RSAM Proposed by DuPont.

DuPont's proposed restructuring of RSAM methodology is untimely, unworkable in practice, and contrary to law. *First*, DuPont's proposal to restructure the RSAM by applying a so-called "efficiency adjustment" is based on erroneous assumptions, would not achieve its stated objective, and has been flatly and unequivocally rejected by the Board on several occasions. *See* CSXT Reply at 47-49; *id* at Exhibit 5 (V.S. Fisher). As the Board summarized in a *Simplified Guidelines* decision

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.

²⁴ CSXT's proposal simply seeks to correct an inadvertent error in the calculation of the RSAM, which implement the Board's intent in Ex Parte 646. DuPont's CAPM proposal, in contrast, would make wholesale organi

B P Amoco Chemical Co. v Norfolk So. Ry. Co., STB Docket No. 42093, Decision at 9-10 (June 6, 2005). Moreover, as the Board explained in its recent decision rejecting the same proposal in the *Simplified Standards* proceeding, DuPont's argument is untimely and is therefore barred as a matter of law. *See Simplified Standards*, STB Ex Parte No 646 (Sub-No. 1) Decision at 12-13 (served March 19, 2008) (denying motion for reconsideration of elimination of same efficiency adjustment for failure to raise it during the notice-and-comment period in the rulemaking proceeding).

Second, DuPont's proposal to revise the RSAM retroactively by inserting a new model for calculating the cost of capital is inconsistent with due process and the rules the Board has adopted to govern these proceedings, procedurally improper, and would inject substantial additional complexity, expense, and potential delay to these proceedings. *See CSXT Reply* at 37-47. The general rule is that agencies may not apply new rules – like the Board's recent adoption of the new "CAPM" model for determining carriers' cost of equity – retroactively. *See CSXT Reply* at 37-40. DuPont has offered no reason for the Board to make an exception to this rule in order to apply a new cost of capital model (adopted *after* the Board issued its final *Simplified Standards* rules) retroactively to these cases. Further, the forum in which to consider such a significant change, with broad implications for all Class I rail carriers and their customers, is a notice-and-comment rulemaking that affords all interested parties an opportunity for input, not in this individual adjudication involving only one carrier and one shipper. *See id* at 40-42.²⁵

²⁵ In challenging CSXT's request that the Board correct what is essentially an arithmetic error in its RSAM calculation, DuPont argues that the Board should not make such an adjustment "within the narrow confines of this proceeding," but should instead only consider it in a notice and comment proceeding. *See DuPont Reply* at 30-31. As CSXT explained above, it seeks only a technical correction to the RSAM calculations to effectuate the Board's intent, while DuPont seeks a fundamental substantive change to a key component of the RSAM, and seeks to make that change retroactive.

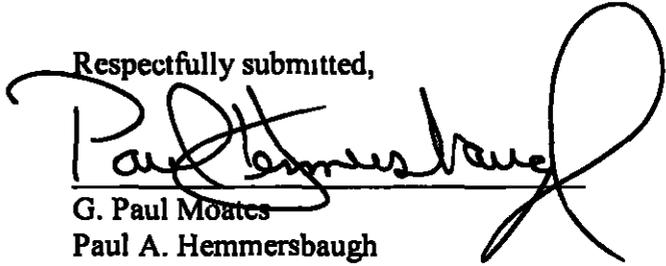
Finally, because analytical consistency would require the Board to change a number of other parameters, benchmarks, and calculations if it changed the cost of capital calculation (and very well might require the parties to submit additional evidence), DuPont's proposed retroactive change would add considerable complexity, disputes, expense, and potential delay to these simplified proceedings, thereby thwarting a fundamental goal of the Three Benchmark approach. *See id* at 43-47. DuPont's proposed revamping of the RSAM to make far-reaching retroactive changes is unwise, unfair, untimely, and unlawful, and therefore should be rejected.

CONCLUSION

The Board should adopt CSXT's evidence in its entirety, and find that the challenged rates do not exceed maximum reasonable levels

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Dated: April 4, 2008

corrected in a formal rulemaking (a notion that CSXT rejects), then certainly it must concede that the broad substantive change it seeks should only be considered – if at all – in such a rulemaking.

EXHIBIT 1

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

E.I. DUPONT DE NEMOURS AND COMPANY)

Complainant,)

v.)

CSX TRANSPORTATION, INC.)

Defendant.)

Docket No. NOR 42099

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

I. Introduction

1. My name is Benton V. Fisher. I am a Senior Managing Director at FTI Consulting in Washington, DC, and am the same Benton V. Fisher who filed a verified statement accompanying CSXT's Reply Evidence in this proceeding and also sponsored portions of CSXT's Opening and Reply Evidence in this proceeding. I am also sponsoring portions of the testimony presented in Sections II and III of the foregoing Rebuttal Evidence of CSX Transportation, Inc. My qualifications and prior testimony were attached as Exhibit BVF-1 to my Reply Verified Statement.

2 I have been asked by CSXT to respond to portions of DuPont's reply submission in this proceeding and, in particular, the claim that DuPont could neither ascertain CSXT's reporting of fuel surcharges in the Waybill Sample records provided in this case nor confirm CSXT's use of information in the Waybill Samples and in the public domain to apply its selection criterion and include in its comparison groups only CSXT movements that had a fuel surcharge.

II. CSXT Waybill Samples and Miscellaneous Charges Field

3. In November and December 2007, the Board released CSXT's 2001-2005 Waybill Sample files to the parties for use in identifying movements that are potentially comparable to the issue traffic in each of DuPont's three complaints.¹ Each of those files contained "Revenue" fields – including both expanded and unexpanded figures² – and a "Miscellaneous Charges" field. Also in December 2007, the Board released a decision in Ex Parte No. 347 (Sub-No.2) in which it presented its RSAM calculations for 2002-2005. In that decision, the Board indicated that it had included the amounts reported as Miscellaneous Charges, in order to capture fuel surcharges. Either party had the ability to review the amounts reported in the Waybill Sample records and verify whether the Miscellaneous Charges field represented CSXT's surcharge, based on information in the Waybill Sample and public domain.

III. CSXT's Comparison Groups

4. For CSXT's initial tender of comparison groups submitted with its Opening Evidence, CSXT explained that it limited comparable traffic to movements to which a fuel surcharge applied by selecting only those Waybill Sample records that had amounts reported in the Miscellaneous Charges field. *See* CSXT Opening Evid. at 16. In its Reply filing, CSXT modified certain criteria in response to DuPont's evidence, and continued to

¹ STB Docket Nos. 42099, 42100, and 42101.

² The term "expanded" in this context relates to the fact that each Waybill Sample record is, as its name suggests, drawn from a sample and thus representative of more than one shipment record. As records of single-car shipments like the traffic at issue in this proceeding are generally sampled at a 2.5% rate, each sampled record represents 40 carloads. Thus, most of the single-car shipments in the Waybill Sample are associated with 1 actual carload that, when adjusted by the sampling ratio, is reported as 40 expanded carloads. The expansion factor is also applied similarly to other figures (e.g., revenues, variable costs) and the resulting fields accordingly identified as "Expanded."

require that its comparable traffic include only movements with a fuel surcharge, which it continued to identify based on the Miscellaneous Charges amounts reported in the Waybill Sample records.

IV. Fuel Surcharge Validation

5. In response to DuPont's claim that there was no "link" between the Miscellaneous Charges field and the CSXT fuel surcharge, I reviewed the records that CSXT included in its Final Comparison Groups. In order to confirm that the existence of a fuel surcharge could be readily discerned for individual Waybill Sample records, I performed the following series of steps for each record in CSXT's groups.

- a. I calculated the Revenue per carload based on the Expanded Revenues and Expansion Factor reported for the Waybill Sample record;
- b. I calculated the ratio of the Miscellaneous Charges³ to the Revenues based on the Miscellaneous Charges reported for the Waybill Sample record and the Revenue figure calculated in Step a. above; and
- c. I determined the CSXT fuel surcharge from information on CSXT's public website for the waybill date reported for the Waybill Sample record

6.

³ Because the Miscellaneous Charges and other amounts are reported in total for the waybill, waybills covering more than one carload would require a separate adjustment for comparison on a per-carload basis. CSXT's comparison groups in this case, however, are comprised entirely by waybill records with only one carload, indicating that the Miscellaneous Charges reported on the Waybill Sample record are on a "per-carload" basis consistent with the unexpanded Revenues calculated in Step a.

⁴ This example is the first record listed in CSXT's comparison group included in Exhibit 1 to the Reply evidence

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

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 April 3, 2008

Benton V. Fisher
Benton V Fisher

EXHIBIT 2

Exhibit 2 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.

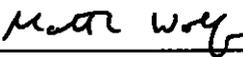
EXHIBIT 3

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.

CERTIFICATE OF SERVICE

I hereby certify that, on this 4th day of April, 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