

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

E.I. DUPONT DE NEMOURS AND COMPANY)

Complainant,)

v.)

CSX TRANSPORTATION, INC.)

Defendant.)

**PUBLIC
VERSION**

Docket No. NOR 42100

REBUTTAL EVIDENCE OF CSX TRANSPORTATION, INC.

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

Moreover, movements of chlorine or other similar highly toxic materials should not be considered in a Three Benchmark case, particularly because the Board has prohibited adjustments to URCS costs, which would be essential to accurately reflect the actual costs of moving chlorine. The considerable risk, liability exposure, and regulatory requirements associated with transportation of chlorine make it poorly suited for a Three Benchmark case. At the least, the Board should carefully consider the risks presented by transportation of chlorine and the effect that a regulatory cap on market-based rates for this highly dangerous traffic would have on efforts by CSXT to encourage more responsible lengths of haul for chlorine and other toxic-by-inhalation (“TIH”) and other poisonous chemicals. CSXT’s chlorine rates are eminently reasonable in light of the catastrophic risks posed by this traffic to CSXT and to the residents of the communities through which it travels. The Board should not encourage unnecessarily long shipments of chlorine by granting DuPont’s request for a regulatory reduction of market-based rates.²

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.

² As CSXT discussed in its Reply evidence, the extraordinary risk of TIH and poisonous-by-inhalation (“PIH”) transportation, the increasing legal requirements for such transportation, and the dramatic effect that the risk of TIH and PIH transportation has on CSXT’s ability to obtain adequate liability insurance are relevant factors that the Board must consider when evaluating the reasonableness of CSXT’s rates. *See* CSXT Reply at 44-46. The relevance of these factors recently was reinforced by the Pipeline and Hazardous Materials Safety Administration’s (“PHMSA”) notice of proposed rulemaking mandating enhanced safety standards for railroad tank cars transporting PIH. *See* Hazardous Materials: Improving the Safety of Railroad Tank Car Transportation of Hazardous Materials, 73 Fed. Reg. 17818 (Apr. 1, 2008). PHMSA recognized that even though transportation of PIH only amounts to 0.3 percent of all rail carloads and therefore only generates “limited revenue,” the transportation of PIH “has led to the

Second, if the Board does consider these cases, it should reject DuPont's challenges. DuPont's challenges to the Natrium-New Johnsonville and Niagara Falls-New Johnsonville movements should be dismissed for lack of jurisdiction, because CSXT is not market dominant over either movement. DuPont's claim that CSXT is market dominant for the Natrium-New Johnsonville movement

is both contrary to common sense and foreclosed by Board and Court precedents.

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 insisted on including non-chlorine movements in its final comparison groups, despite the fact that such movements pose different risks and have significantly different market dynamics than the issue movements. And DuPont has included a large volume of movements without fuel surcharges in its comparison group, 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 (mistaken)

imposition of 'hundreds of millions of dollars of liability.'" *Id* at 17831 (quoting Dec. 14, 2006 AAR statement). Moreover, PHMSA noted that there was record evidence that the insurance industry was unwilling to insure railroads against the multi-billion dollar risks associated with PIIH transportation and that insurance premiums for the rail industry had doubled recently. *See id*. And, PHMSA's proposal to enhance tank car performance further demonstrates the unique regulatory costs of transporting chlorine. This confirmation of the significant risks and liability caused by transportation of PIIH commodities like chlorine is an important factor that the Board should consider before granting DuPont's request for a regulatory reduction of its rates for transporting a highly hazardous commodity.

belief 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.

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. In the case of transportation of chlorine, the change in pricing during that period has been even more dramatic, due to increased awareness of risks (post-Graniteville), regulatory changes to address security concerns, and CSXT’s adoption of more risk-based pricing. 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 demonstrate that CSXT has market dominance over two of the three issue movements. Throughout this litigation, DuPont has freely admitted that barge transportation is the dominant mode of transportation for the Natrium to New Johnsonville chlorine movement. *See* DuPont Opening at 13; Am. Compl., Ex. A at 2. Despite its admission that barge is a very significant, lower cost, and indeed preferred transportation alternative to rail transportation for this movement, DuPont hypothesizes that CSXT has market dominance over the small fraction of the issue traffic that, from time to time, moves by rail instead of barge. As explained in CSXT's Reply Evidence, however, DuPont's "transitory market dominance" argument (*i.e.*, the theory that CSXT may have temporary "market dominance" on those occasions on which DuPont claims barge transportation is not available) defies common sense and is foreclosed by decisions of the Board, the Interstate Commerce Commission, and the Court of Appeals for the D.C. Circuit. *See* CSXT Reply at 5-7; *see also* *Southwest R.R. Car Parts Co. v. Missouri Pacific R.R. Co.*, STB Docket No. 40073, slip op. at 2 (Feb. 11, 1998) ("Short-term or transitory market power is insufficient to establish market dominance.") (internal citation omitted).

In a case upon which DuPont relies heavily in its Reply, the Board found that a rail carrier's single-digit percentage share was not sufficient to show that the defendant pipeline lacked market dominance. See DuPont Reply at 26 (citing *CF Industries, Inc. v Koch Pipeline Co., L.P.*, 4 S.T.B. 637, 644 (2000)).

DuPont would turn the *CF Industries* finding on its head, asking the Board to find that an alternative, secondary mode of transportation has market dominance over that movement. What is more, in the same decision, the Board rejected many of the arguments DuPont proffers as reasons that barge may be ineffective competition for a small portion of its traffic. See DuPont Opening at 14. Specifically, the Board rejected the claimant's arguments that barge transportation provided ineffective competition because waterways are subject to floods, low water, and icing. Compare *CF Industries*, 4 S.T.B. at 646 with DuPont Opening at 14 ("waterways are too high or too low, when locks are damaged or under repair, or other conditions restrict or completely preclude barge transportation").

Importantly, DuPont has offered no evidence to support its conclusory assertion that "there is not sufficient barge capacity" to handle the _____ of its New Johnsonville chlorine traffic that moves by rail.

DuPont failed to

produce any evidence to the contrary.⁴ This evidence indicates that CSXT lacks market dominance over the Natrium-New Johnsonville movement and over the Niagara Falls-New Johnsonville movement.⁵ See CSXT Reply at 8-9. DuPont has the “heavy burden” of proving CSXT has market dominance. See, e.g., *Amstar Corp v. Alabama Great S R.R.*, I.C.C. No. 38239S, 1987 WL 99849, at *4 (Nov. 10, 1987). DuPont’s own admissions, and the evidence adduced by CSXT, show that barge is the dominant mode of transportation for chlorine to DuPont’s New Johnsonville facility. DuPont has not produced any evidence whatsoever to support its conclusory assertions that CSXT has market dominance over the issue traffic. As a matter of law, DuPont has not demonstrated that CSXT has market dominance over transportation of chlorine to DuPont’s New Johnsonville facility. Because of DuPont’s failure to meet its burden of proving market dominance, the Board should dismiss DuPont’s challenges to CSXT’s rates for the Natrium to New Johnsonville and Niagara Falls to New Johnsonville movements for lack of jurisdiction. See 49 U.S.C. § 10707(a)-(b).

⁴ *Cf. Duke Energy Corp v CSX Transp. 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)

⁵ Source competition is apparent from the face of the record and does not impose any burdensome discovery on either party, which was the grounds for the Board’s decision in *Market Dominance Determinations – Product and Geographic Competition*, 3 S.T.B. 937, 946 n.49 (1998); see also *CF Industries, Inc v Koch Pipeline Co., L.P.*, 4 S.T.B. 367, 643 (2000) (“Our decision not to consider evidence of product and geographic competition in rail rate cases was based on our substantial experience with how these factors were exploited by railroad defendants to delay and thwart the prosecution of rail rate cases. . . . We have no basis to make a similar determination with respect to pipeline rate cases. Because product and geographic competition are *relevant* considerations, we will consider evidence of such competition in this case.”) (emphasis added). Accordingly, in this case, the Board should consider the evidence of source competition and find that CSXT does not have market dominance over the Niagara Falls to New Johnsonville movement.

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 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 Sample's "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 for every single movement 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 and multifaceted question may be of interest to some 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 surcharge.⁶

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. For the issue movements for which actual 2007 movement records were available, the PC Rail miles used by DuPont are different from the actual miles used by CSXT.⁷ 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 22. 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

⁶ As discussed below, movements without a fuel surcharge represent _____ of the records in DuPont's comparison groups for chlorine

⁷ Actual 2007 movement records were not available for the Niagara Falls – New Johnsonville move. Indeed, DuPont has not moved any chlorine traffic between that origin and destination on for at least fifteen months, dating back to a time well before it filed this rate case. To say the least, it is odd that DuPont would choose to challenge a rate for a lane over which it does not move traffic from among the hundreds of CSXI lanes serving a DuPont origin or destination (and covered by the expired master contract)

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 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 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.

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 20-21 (quoting CSXT evidence). CSXT’s selection criterion reasonably and consistently achieves this agreed aim, while DuPont’s does not.

Fourth, CSXT’s traffic group better satisfies the Board’s preference for “like” commodities in a comparison group. CSXT’s comparison group consists solely of the issue commodity, chlorine. The final comparison groups selected by DuPont, on the other hand, include shipments for anywhere from three to six other commodities, in addition to chlorine. Although DuPont is correct that all of the other commodities it selected have one attribute in common – they are considered, to various extents, “toxic-by-inhalation hazards” (TIH),⁸ in other significant respects those commodities are not “like” chlorine. The predominant non-chlorine commodity included in DuPont’s groups is anhydrous ammonia which, while certainly toxic and dangerous if released into the environment, is not nearly as toxic as chlorine. More relevant to the assessment of comparability that is at the heart of these cases, the markets for transportation of anhydrous ammonia in which CSXT competes are much different from the markets for transportation of chlorine. Those different markets, competitive alternatives and corresponding differences in shippers’ demand elasticity, as well as other commercial conditions and considerations described below and in CSXT’s previous submissions, make anhydrous ammonia

⁸ Moreover, DuPont does not even apply its TIH comparison factor accurately. As CSXT explained in its Reply, DuPont included in its comparison groups some, but not all the commodities identified as a TIH. *See* CSXT Reply at 15 n.13.

significantly different from chlorine. Accordingly, CSXT appropriately excluded anhydrous ammonia and other disparate commodities from its chlorine comparison groups.

A. Whether a Movement is Covered by a Fuel Surcharge is a Relevant and Important Comparison Criterion.

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,

of the movements in each of DuPont's three comparison groups had no fuel surcharge

Table 1

DuPont's decision to ignore this factor 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. CSXT'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 27. As the Board is well aware, CSXT reports fuel surcharge revenue in the Miscellaneous Charges field.⁹ 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 for the movements in CSXT's comparison group, and nothing else. *See* V.S. Fisher, Ex. 1 at ¶ 3.

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

⁹ *See Rate Guidelines – Non-Coal Proceedings*, STB Ex Parte No. 347 (Sub-No.2) (Dec. 11, 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.

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.

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 ¶¶ 5-6 For every single movement in each of CSXT's comparison groups –approximately 70 different records – the fuel surcharge amount and the amount reported in the Miscellaneous Revenues field matched 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* V.S. Fisher at ¶ 6. 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 21; CSXT Reply at 19 n 19; *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 21; *see also* Karn V.S., Ex. 2 at ¶ 2. As CSXT explained in 2006 testimony in the STB's Fuel Surcharge proceeding, 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 21; see also 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 18. 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."¹³

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 28-29.¹⁴ But what is at issue here is not cost recovery, it is comparability. As

¹⁴ 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 28. CSXT did not make this argument or "assumption." *See* CSXT Reply at 19-20 (discussion of fuel surcharge comparability factor). DuPont does not –

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 ¶¶ 3, 5 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.¹⁵

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 28. 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. 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

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

¹⁵ 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 28-29 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 18. 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.

railroad economics and rail rate regulation, carriers are expected to base their prices on “the market demand which they observe[]” *Coal Rate Guidelines*, 11 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”¹⁶ DuPont Reply at 28. 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. 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

¹⁶ 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.

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.¹⁷ 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 would have provided no evidence to show that any one of those indices under- or over-recovered the fuel costs of a particular movement.¹⁸

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 CSXT's comparison groups.

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,

¹⁷ In the same vein, DuPont's argument that "the fuel component of the RCAI" 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 28. 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.

¹⁸ 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 CSXI's fuel surcharge criterion would serve these goals while simultaneously ensuring selection of more comparable movements than DuPont's standardless approach.

but then excludes only that portion of the issue traffic that moves between the same origin and destination as the one of those three movements for each comparison group. *See* DuPont Reply at 20-21. For example, it included the Niagara Falls-New Johnsonville movement in its Natrium-New Johnsonville and Niagara Falls-Carneys Point comparable groups. 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 consists of the movements from Niagara Falls to New Johnsonville, from Natrium to New Johnsonville, and from Niagara Falls to Carneys Point. 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.¹⁹

¹⁹ 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, Docket No. 42099 at 19, here there is no dispute that the issue traffic movements drawn from the Waybill Sample 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

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 Niagara Falls to New Johnsonville lane, from the Natrium to New Johnsonville lane, and from the Niagara Falls to Carneys Point lane is Complainant 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.²⁰

C. CSXT’s Comparison Group is Superior Because it Consists Solely of the Issue Commodity.

Despite its efforts to discount CSXT’s comparison groups, DuPont does not – and indeed cannot – argue that its comparison groups are comprised of more “like” commodities than CSXT’s comparison groups. In fact, CSXT’s inclusion of only chlorine movements renders the commodity in its comparison groups *identical* to that of the issue commodity. In *Simplified Standards*, the Board made clear its preference for comparison groups comprised of the same, or very similar commodities, stating that it would favor comparison groups comprised of “like commodities so that the variable cost calculation of the issue movement and comparison group will be similar.” *Simplified Standards* at 17. In this instance, by excluding movements of other commodities, CSXT has eliminated the introduction of other commodity-related transportation characteristics. Although DuPont concedes that the transportation of chlorine presents a higher

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.

level of risk and differing transportation characteristics than other commodities, it asserts that all other TIHs present the same risks, and are therefore comparable. DuPont's assertion is incorrect.

Data collected by the Environmental Protection Agency and analyzed by the Transportation Research Board shows that smaller concentrations of chlorine have the similar adverse health effects to those of much larger concentrations of anhydrous ammonia. See Transportation Research Bd. of the Nat'l Acads., NCHRP 525: A Guide to Transportation's Role in Public Health Disasters (2006) (citing EPA's National Advisory Council/AEGLS website at <http://www.epa.gov/oppt/aegl/chemlist.htm>). The Transportation Research Board explains that within ten minutes, an airborne concentration of 2.8 parts per million ("ppm") of chlorine can result in "irreversible or long-lasting serious health effects, or an impaired ability to escape [the contaminated zone]." *Id.* at 9. On the other hand, it takes an airborne concentration of 270 ppm of anhydrous ammonia to have the same effect. *Id.* Furthermore, while it would take an airborne concentration of 2,700 ppm of ammonia to cause "life-threatening health effects or death," a concentration of only 50 ppm of chlorine would have the same effect. *Id.* The report goes on to explain that "[t]he principal difference between chlorine and ammonia as an effective means of causing mass casualties lies in the *very different levels of toxicity.*" *Id.* at A-5 (emphasis added). Because a significantly lower concentration of chlorine can result in adverse health effects than a much larger concentration of ammonia, "a release of ammonia will propagate to a much smaller distance than would the release of the same mass of chlorine before falling below [life-threatening] levels" *Id.* The foregoing evidence by a leading, neutral transportation research agency clearly shows that the risk (and potential liability) associated with the transportation of chlorine is significantly greater than that associated with anhydrous ammonia,

thus, DuPont's claim that "all TIH commodities share similar risk characteristics" is not supported by the evidence.²¹

DuPont's alternative justifications for the inclusion of other TIH commodities are similarly meritless. As CSXT has explained, anhydrous ammonia participates in a more global market and is subject to much greater intermodal competition. *See* CSXT Opening at 23; CSXT Reply at 16-18. DuPont's reliance on the Board's decision in *CF Industries v Koch Pipeline Co., LP*, 4 S.T.B. 637, 643 (2000), is misplaced. In *CF Industries*, the Board found, based on the facts of that particular case, that the defendant had market dominance over the ammonia transportation at issue because the majority of the issue destinations on the defendant's ammonia pipeline were not subject to effective barge and rail transportation. Oddly, DuPont contends that the Board's finding, on the specific facts of a constrained market pricing case, that neither barge nor rail transportation provided an effective alternative to pipeline transportation of anhydrous ammonia to most of the pipeline's destinations, somehow supports a conclusion that movements of anhydrous ammonia and chlorine are comparable for purposes of this Three Benchmark case. *See* DuPont Reply at 26. For several independent reasons, this inscrutable argument fails.

First, the *CF Industries* discussion upon which DuPont relies was a *market dominance* analysis, which concerned only transportation of anhydrous ammonia and did not involve any comparison whatsoever of movements of different commodities. The fact that a

carrier has *market dominance* over a commodity has no bearing on whether a movement of that commodity is *comparable* to the movement of another commodity. *Second*, even with respect to the same commodity, analysis of competition in transportation markets is a very fact- and context-dependent endeavor, and conclusions regarding one market cannot logically be transferred to another market. That is, a finding on the facts of a specific case, that rail does not provide effective modal competition to pipeline for transportation of a commodity between certain origins and destinations provides no basis to conclude that rail cannot effectively compete for transportation of that commodity in all markets.²²

Third, contrary to DuPont's suggestion, the Board's finding in *CF Industries* that *barge* transportation of anhydrous ammonia did not provide effective competition for *pipeline* transportation has no logical connection to DuPont's claim that, when transported by rail, anhydrous ammonia and chlorine are "like commodities." See DuPont Reply at 26. To say the least, this is a non sequitur. The question of whether two modes are competitive options for transportation of one commodity says nothing about whether two commodities, when transported by a third mode, are either "like commodities" or "comparable" within the meaning of the Three Benchmark approach.

²² Indeed, if DuPont's approach were followed, a market dominance inquiry would be far more simple – the Board would only need to see if it had previously found that a carrier had market dominance over the transportation of the issue commodity, and if it had made such a finding, then without further analysis of the relevant facts or transportation alternatives, the Board could mechanically conclude the carrier was market dominant in the present case. If the Board had not previously found that a carrier was market dominant with respect to a particular commodity, then it would automatically find that the carrier lacked market dominance. While such an approach might have the seeming virtue of simplicity, it would be arbitrary and entirely divorced from whether the carrier actually had market dominance over a particular movement

Thus, even if DuPont's deeply flawed argument from *CF Industries* were otherwise relevant, it would be inapposite here because that case did not consider competition between rail and truck transportation.

Fifth, DuPont's suggestion that anhydrous ammonia and chlorine are like commodities, because both will move by rail when in areas "beyond the reach of [barges and pipelines]," is factually incorrect, and logically insufficient to show that movements of anhydrous ammonia are "comparable" to movements of chlorine.

See CSX I Reply, Ex. 5 (brochure for Grammar Logistics, LLC truck services, "Trucks can be competitive with rail transportation up to 1,000 miles. Right Now!"). In contrast, chlorine rarely moves by truck, regardless of the length of haul. *See* DuPont Opening at 13. And, even if trucks did not provide effective competition for rail carrier transportation of ammonia, this would not even begin to show that chlorine and anhydrous ammonia are "like commodities."²³

²³ Trucks generally do not provide a competitive alternative for long haul transportation of coal. Presumably not even DuPont would argue that coal and chlorine are therefore "like commodities."

Thus, contrary to DuPont's unsupported assertions, anhydrous ammonia has a different risk profile than chlorine, and the markets for chlorine transportation and for ammonia transportation are – like the markets for the commodities themselves – substantially different. See CSXT Opening at 23; CSXT Reply at 17; see also V S Lube, Ex. 3 at ¶ 2. If anything, *CF Industries* serves to highlight the differences between transportation of anhydrous ammonia and chlorine, and the reasons why they are not “like commodities” for purposes of a Three Benchmark analysis.

While the foregoing demonstrates that movements of anhydrous ammonia are not comparable to those of chlorine, CSXT also reiterates that the inclusion of anhydrous ammonia movements (and other non-chlorine TIHs) as “comparable” movements is not useful because of the different and disparate sources and end-uses of the commodities, as well as the wide variety of routes, capacities, and densities. See CSXT Opening at 23, CSXT Reply at 17-18; see also V.S. Lube, Ex. 3, at ¶¶ 4, 5. Alone, the mere fact that a commodity is classified as a TIH does not render all movements of all other TIHs comparable for the purposes of a Three Benchmark analysis. Indisputably, different TIHs have varying commercial uses, values, markets, and demands.²⁴ See CSXT Opening at 23; CSXT Reply at 17, V.S. Lube, Ex. 3, at ¶¶ 2, 4, 5. In these Three Benchmark proceedings, the question before the Board is which of the proffered groups is *more* comparable to the issue movements. Because CSXT's comparison groups are comprised of only chlorine movements, by definition, CSXT has employed a more precise “like”

²⁴ Further testament to these significant market differences is the fact that CSXT does not even include anhydrous ammonia and chlorine in the same business group. See CSXT Reply at 17. CSXT's anhydrous ammonia business is marketed and managed by CSX's Phosphate and Fertilizers marketing department, while its chlorine business is managed by the Chemicals marketing department. *Id*

commodity criterion than that imposed by DuPont, rendering CSXT's groups superior in comparability to the issue movements.

D. 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.²⁵ See CSXT Reply at 22. *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*

²⁵ CSXT accepted the fairly narrow 150-mile band proposed by DuPont in order to minimize the differences between the parties comparison factors. In one instance, application of this narrow mileage band resulted in a relatively small comparison group (for the Niagara Falls, NY to New Johnsonville, TN movement). As CSXT explained on Reply, use of a broader mileage band – which would have been entirely appropriate – would have increased the size of CSXT's comparison group and resulted in a higher maximum reasonable R/VC ratio for that movement. See CSXT Reply at 24 n.23. Thus, it cannot be asserted that CSXT used a relatively small comparison group in order to generate an outcome more to its liking. CSXT believes that the most important determinant of the comparability of a comparison group is the selection and application of the comparison criteria, not the size of the comparison group. Depending on the nature and parameters of the issue movement and whether it is a "typical" or "atypical" movement on the defendant carrier's system, the sizes of appropriate comparison groups can and should vary. Indeed, the way that DuPont generated a larger comparison group was by including movements of commodities (primarily anhydrous ammonia) that are not "like" – and are subject to significantly different market forces than – CSXT's chlorine traffic. See *supra*, at II.C.; V.S. Lube, Ex. 3, at 1-5. Recognition of the potential variations in the size of comparison groups is one purpose for the Board's use of a confidence interval. CSXT's selection criteria generated larger final comparison groups for the other two movements at issue in this case. The fact that the same strong, reasonable comparison criteria generated a relatively small comparison group for one movement is not a reason to disfavor that group, it is simply a reflection of the unusual nature of the movement.

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 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.166.²⁶

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.* DuPont makes no attempt in either its Opening or Reply Evidence to explain why

²⁶ As directed, CSXT used actual loaded miles in calculating URCS costs, and for developing its comparison groups

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 Niagara Falls to New Johnsonville movements to [redacted], DuPont would select only movements that ranged from [redacted] to [redacted] miles. As a result, it included [redacted] shipments – fully one-quarter of its total comparison group of [redacted] – of [redacted] miles, nearly [redacted] longer than its estimate 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 instead use an inaccurate estimate of the length of the movement generated by PC Rail.²⁷ 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.²⁸ 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

²⁷ 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.

²⁸ For example, CSXT provided to DuPont in discovery movement records indicating that the 2007 shipments actually average [redacted] miles from Natrium to New Johnsonville. By using a PC Rail estimate of [redacted] miles, and then rounding down to [redacted], DuPont would select only movements that ranged from [redacted] to [redacted] miles. As a result, DuPont included [redacted] shipments – nearly one-quarter of its comparison groups – of less than [redacted] miles, more than [redacted] miles shorter than the actual distance traveled by the 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.

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.

E. DuPont's Density Evidence is Untimely and Should Not Be Considered – If it is Considered, DuPont's Analysis Indicates CSXT's Comparison Groups Are Superior.

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* DuPont Reply at 31. 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*, S.T.B. Docket No. 42070, at 4 (Mar. 21, 2003); *General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases*, S.T.B. 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 31. In fact, however, the Board ruled that the parties could use the density maps prior to the deadline for the parties' opening submissions. *See* S.T.B. Docket No. 42099 *et al*, Decision at 4 (Jan. 31, 2008), *see also* CSXT Opening at 18 n.13. 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 issue-traffic movements for two of the three comparison groups. 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.²⁹ 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 two of the three 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

²⁹ DuPont's analysis determined CSXT's density for the routes generated by PC Rail, which may not account for the actual route of movement.

Table 2

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

F. 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 20-21.* Most prominently, 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 its final comparison groups. Specifically, DuPont included six multiple-car shipments for its final comparable group for the Carneys Point movement, two multiple-car movements for its final comparable group for the Natrium movement, and one multiple-car movement for the final comparable group for the Niagara Falls movement. *DuPont Reply Crowley V S at 20.* The parties' difference about the application of a "single-car" comparison factor is moot, however, because the multiple-car shipments in DuPont's comparison groups were shipments of anhydrous ammonia and sulfuric acid—not chlorine. *See DuPont Reply workpaper "Docket 42100-Exhibit_18-11H Reply Comparable Group Lane 3.xlsx".* Because

these movements were not movements of chlorine, 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.

III. THE BOARD SHOULD ACCEPT CSXT'S PROPOSED ADJUSTMENTS TO THE BENCHMARKS, AND REJECT THE RETROACTIVE STRUCTURING 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 33. 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 CSXT 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 a Correction to the RSAM Calculations

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 rate.³⁰ 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);

³⁰ 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).

See Notice, STB Ex Parte 347 (Sub-No 2) (Dec. 20, 2007).

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).³¹

B. The Board Should Adjust Comparison Group Costs and Revenues to 2007 Levels in Order to Allow a Meaningful Comparison to the Challenged Rates.

CSXT demonstrated in its Opening Evidence the need to adjust to current levels the revenues and costs of the comparison groups selected from the 2002-2005 Waybill Samples. CSXT Opening at 26-27. Specifically, it provided a detailed analysis showing that revenues – whether measured by the actual 2007 revenues for individual movements (from discovery data produced to DuPont) or by publicly available information for CSXT chemicals traffic revenue growth overall – had considerably outpaced railroad cost inflation during the same period. See *id.* at 27-29. In its Reply filing, CSXT presented similar evidence for its final comparison groups. See CSXT Reply at 26-27; see also *id.* at Ex. 2 Piacente V S ¶¶ 6-7, 9. CSXT also

³¹ 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 organic changes to the RSAM See CSXT Reply at 28 n.27

presented evidence showing CSXT revenue increases from 2002-05 to 2007 for movements in both parties' comparison groups. *Id.* at 26 (Table 3). This illustrated that, while the increases in rate levels for CSXT's chemicals traffic during that period were significant, the increases for CSXT's chlorine movements were extraordinary,

.³² Notwithstanding the established need to address the market changes in setting current rates, DuPont criticizes the updating of historical rates advocated by CSXT as unnecessary and essentially argues that the Board should ignore these disproportionate increases and evaluate the reasonableness of 2007 rates (and potentially prescribe a rate through 2012) based on 2002-2005 price levels. As CSXT explains, DuPont's argument misreads a discussion and hypothetical example in *Simplified Standards* and disregards the Board's clear intention to allow adjustments to offset significant demonstrated effects of regulatory lag, such as those at issue in this case.

DuPont's primary criticism of CSXT's adjustment of comparison group revenues and costs to 2007 levels is that it did not also adjust other benchmarks.³³ DuPont is correct that

³² *See, e.g.*, Table 3, CSXT Reply at 26 (showing average increase in rates for chlorine movements in both parties' comparison groups of from 2005 to 2007 (annually) and 83% from 2004 to 2007 (annually)). These annual rates of increase are times the average railroad cost inflation (annually) during the same periods. *Compare* Table 5, CSXT Opening at 29.

³³ DuPont's claim that use of four historical years' Waybill Sample movements (resulting in a comparison of rates established in 2007 with rates charged in 2002) is necessary to "avoid cyclical fluctuations" finds no support in *Simplified Standards* or the Board's decisions in this case. The fact is that DuPont is challenging a rate that will be in effect from mid-2007 through mid-2008, not CSXT's average historical rates from 2002 to 2005. The Board did not propose to draw comparison groups from four historical years' Waybill Samples in its rulemaking notice, and no party offered comments on the notion. *See* CSXT Reply in Opposition to DuPont Motion to Compel at 6-10 (explaining this in more detail, noting that, although the Board indicated it might release Waybill Samples for four years, in context that proposal appeared to have been intended to allow the parties to verify the Board's RSAM calculations, which it indicated it would average over four years), *see also* STB Ex Parte 646 Hearing Decision at 5 (Jan. 22, 2007); *id.*, Notice of Proposed Rulemaking at 23 n.41 (July 26, 2006). Nor does *Simplified*

while CSXT presented evidence demonstrating the necessary updates to the revenues and costs of the comparison group movements – producing a more current average R/VC ratio for the comparable traffic – it did not make an estimated adjustment to the RSAM factor or the average R/VC > 180% figure. Even if such adjustments to those two benchmarks were warranted, the unavailability of essential data would make any effort to develop such benchmarks speculative and unreliable. Because of regulatory lag, many of the inputs necessary to derive those benchmarks are simply not available to determine the other benchmarks at 2007 levels. Unlike updating the revenues and costs for individual movements with current information, changes in the system-wide mix of traffic and corresponding cost inputs would make estimating those benchmarks a difficult and uncertain enterprise. The lack of cost of capital or revenue shortfall determinations by the Board for 2007 (or 2006) would make any attempt to calculate the RSAM even more speculative. However, the inability to calculate accurately the RSAM and R/VC_{>180} benchmarks and corresponding adjustments to comparison group R/VC ratios does not justify ignoring current rates and costs in favor of historical price data from an era with much different market conditions than those that prevail today. The Board anticipated such circumstances and expressly provided for adjustments to offset the demonstrated effect of regulatory lag, stating:

[W]e recognize that relying on the Waybill Sample introduces some regulatory lag in the analysis. Accordingly, parties may present (as “other relevant factors”) evidence that the presumed maximum lawful rate should be higher, or lower, due to market changes not reflected in the comparison group or the average RSAM and R/VC_{>180} benchmarks.

Standards state that use of four years’ Waybill Samples is either necessary or appropriate. Rather, it simply announces that the Board will make available at the outset of the case the most recent four years’ Waybill Samples. *See Simplified Standards* at 80. In this case, the Board ruled that parties *may* use such data if they wish but said nothing about cyclical fluctuations or whether two, four, six, or more years might serve to “smooth” such fluctuations, stating simply that: “Because our procedures provide for 4 years of waybill data to be supplied, all of that data are available to a party in developing its comparison group.” STB Docket Nos. 42099 et al, Decision at 2 (served Jan. 15, 2008).

Simplified Standards. STB Ex Parte No. 646 (Sub-No. 1), Decision at 85 (emphasis added)³⁴

CSXT has demonstrated the clear need to account for the very significant changes in rates charged for the movements the parties consider comparable to the issue traffic – the traffic that provides the basis for the determination of a maximum reasonable rate for the current period.

DuPont's arguments misread the Board's discussion of revenue adjustments and regulatory lag in *Simplified Guidelines*. Fairly read, the Board's example and discussion indicate only that the Board rejected as unnecessary one commenter's proposal to adjust comparison traffic R/VCs to reflect the carrier's system-average inflation. DuPont seeks to expand the Decision's discussion of the proposal of one commenter well beyond its intended scope, in order to prevent any and all revenue and cost adjustments necessary to address the distorting effects of regulatory lag. This is flatly inconsistent with the Board's express intention to consider such adjustments. *See Simplified Standards* at 85.

The Decision posited one hypothetical set of circumstances in which a revenue adjustment – without a corresponding cost adjustment – could potentially result in comparison group revenues that are increased to a higher level than necessary. *See id.* The Board's hypothetical posited a revenue-adequate carrier (apparently meaning a carrier that earned adequate revenues in the preceding year) whose overall revenues increased 10% in the most recent year, and who, prior to the Board's publication of the RSAM and R/VC_{>180} figures for the most recent year, sought a 10% increase in its comparison group R/VC levels. *See id.* Under

³⁴ The Board could not have intended to consider adjustments to account for regulatory lag only when their precise effect on future RSAM and R/VC_{>180} benchmarks could be demonstrated. Inability to generate a precise estimate of such benchmarks is the inherent difficulty at the heart of the problem of regulatory lag. If all of the necessary inputs, data and calculations for determining relevant benchmarks to be calculated and published in the future could be accurately ascertained and identified in the present, there effectively would be no regulatory lag.

that particular hypothetical set of circumstances, the Board indicated that a 10% increase in those R/VC levels would not be warranted, because the corresponding RSAM and R/VC_{>180} benchmarks (once they were available) would suggest a downward adjustment to R/VC levels. *See id* While the Board's hypothetical posits one of many possible sets of facts and assumptions, and a plausible (though by no means necessary) result, those hypothetical conditions do not exist in the present case.³⁵

What DuPont fails to acknowledge is that the Board was describing only one of many possible scenarios, not a uniform set of conditions that dictate the same inflexible rule in every actual case. There are at least four important differences between the *Simplified Standards* hypothetical and the facts of this case. *First*, the hypothetical example (*Simplified Standards* at 85) assumes a revenue-adequate carrier. The Board has not found CSXI to have earned adequate revenues at any time during the period from 2002 to the present. Indeed, in the years for which the RSAM and R/VC_{>180} benchmarks are available, the RSAM adjustment as calculated by the STB (prior to adequately accounting for the effect of income taxes) would require that the R/VC ratios of the comparison group be increased by % (varying with the year). *See* DuPont Opening Exhibit (TDC-6). Adjusting the RSAM in order to account for the effect of taxes would require increases of %. *See* CSXT Opening at 26 (Table 3).

Second, the hypothetical example implicitly assumes that the railroad's costs are not escalated to current levels. CSXT's approach increases costs to current levels, avoiding the

³⁵ Even under the Board's hypothetical facts and assumptions, the magnitude of the comparison group R/VC adjustment due to application of the RSAM and R/VC_{>180} could not be determined, as that would depend on other inputs, including changes to the carrier's traffic mix and the relative amount of traffic generating R/VC > 180% in the year in question.

magnifying effect of an increase to revenues without a corresponding increase to costs.³⁶ See CSXT Opening at 27-28. *Third*, the hypothetical assumes that the current year RSAM and $R/VC_{>180}$ benchmarks would not allow the hypothetical carrier to collect increased revenues without a downward adjustment of its R/VC . See *Simplified Standards* at 85. In many cases, however, it would be entirely possible for a carrier to collect increased revenues in successive years without any reduction in its revenue requirements or its RSAM/ $R/VC_{>180}$ ratio, because a number of other factors and inputs affect the calculation of the two benchmarks. In each year from 2003 to 2005, CSXT has collected increasing revenues, and its RSAM/ $R/VC_{>180}$ ratio has simultaneously increased.

Fourth, the hypothetical example assumes the carrier increases all revenues by the same overall average percentage. Here, CSXT's chlorine revenues have increased by approximately % annually from 2004 to 2007, twice the rate of increase for all chemicals traffic and for all traffic system-wide. This is the most important consideration in the present case. DuPont's attempt to over-generalize and extrapolate from that specific hypothetical fails to consider the specific facts and evidence in this case, in which the revenues for a particular commodity far outpace a carrier's overall revenue increases. The following table illustrates the percentage difference between (i) CSXT's overall average revenue growth from the years covered by the historical Waybill Samples provided by the Board and 2007, and (ii) its revenue growth for chlorine traffic for those years

³⁶ Particularly in the current era of constrained rail capacity and demand for rail transportation services that significantly exceeds supply, it is erroneous to assume that increases in rates will be "largely offset" by increases in rail costs. Cf. *Simplified Standards* at 85. Plainly, rail transportation rates for chlorine have increased at a significantly faster rate than corresponding rail costs over the last three to four years.

Table 4

	<i>Change in Average Revenue per Carload to 2007 from</i>			
	2002	2003	2004	2005
All CSXT Rail Traffic ¹	44%	42%	35%	24%
CSXT Local Chlorine Traffic ²				
CSXT Chlorine Traffic in Both Parties' Comparison Groups ³				

¹ Public financial reports [<http://investors.csx.com/phoenix.zhtml?c+92932&p=irol-reports>other.]

² CSXT Waybill Samples (2002-2005) and Actual 2007 Revenues produced to DuPont in discovery, included in CSXT Opening work paper "42100 Results.xls"

³ CSXT Reply at 26 (Table 3).

CSXT's demonstration that its chlorine rate increases considerably outpaced those of its traffic overall presents precisely the situation the Board contemplated would be appropriate for adjustment to address the effects of regulatory lag. CSXT's 2007 records for its local STCC 28 local traffic, which CSXT produced to DuPont in discovery on December 19, 2007, include approximately carloads of chlorine³⁷ These records also indicate that the average revenue for this local chlorine traffic was approximately per carload This amount is higher than the average revenue per carload, including fuel surcharge, of approximately for CSXT's local chlorine shipments reported in the 2005 Waybill Sample from this case. This nearly increase in revenues is more than the railroad cost inflation during this

³⁷ CSXT produced this data to DuPont in discovery on December 19, 2007, well before the Board issued its Order announcing that parties should confine their comparison group selection evidence to Waybill Sample data and public information. *See* Decision, STB Docket Nos 42099, *et al.* (served Jan. 15, 2008). Regardless, CSXI's request that comparison group revenues and costs be adjusted to 2007 levels does not constitute part of the comparison group selection process and is not being used to "advocate for a particular comparison group," and therefore, it is plainly admissible *Compare id with* STB Docket Nos. 42099, *et al.*, Decision at 4 (served Jan 31, 2008) (clarifying that limitation of evidence to Waybill Sample and public information applies only to comparison group selection, not to other parts of the proceeding).

period.³⁸ suggesting a -percent adjustment to the comparison group R/VC's,³⁹ on average, similar to the result submitted by CSXT on Opening and Reply.⁴⁰ By contrast, however, the revenue increases for the chlorine market represent less than million annually to the CSXT system (carloads x increase per carload).⁴¹ While such revenue charges are significant to the R/VCs of the traffic included in the comparison groups they would comprise less than of CSXT's revenue adequacy shortfall.⁴² Thus, far from having a large "inevitable offsetting effect" as suggested by DuPont, the adjustment CSXT advocates would have only a *de minimis* effect on the RSAM and R/VC_{>180} benchmarks.⁴³

The foregoing demonstration that CSXI's chlorine rates increased far more rapidly than its rates for other commodities during the relevant period also addresses another of DuPont's Reply criticisms of CSXT's revenue adjustment. In its Reply filing, DuPont emphasized the many different chemical commodities that CSXT transports. See DuPont Reply at 42. In a remarkable about-face from its Opening position in the plastics and plasticizers case

³⁸ Railroad cost inflation from 2005 to 2007 was 5.9%, as shown in Table 5 to CSXT's Opening Evidence at 29.

that *all commodities* shipped in the same car type are “comparable,”⁴⁴ DuPont now claims on Reply that “each of these different commodities is driven by different market factors and conditions,” and criticized CSXT for failing to differentiate between the rates of changes in revenues among the commodities included in the comparison group and all of its chemicals. *Id.*⁴⁵ In response, CSXT has addressed DuPont’s new-found claim using evidence in the record and affirmed its showing that the change in chlorine rates is dramatically different from that of other chemicals and for all traffic system-wide. Because CSXT has demonstrated extraordinary change in chlorine revenues that is not adequately taken into account due to regulatory lag, and because the adjustment CSXT requests would have only a *de minimis* effect on other benchmarks, the Board should adjust the costs and revenues of CSXT’s comparison group traffic to 2007 levels.

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

DuPont’s proposed restructuring of the 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 39-41; *id.* at Exhibit 4 (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

⁴⁴ *See* STB Dkt. No. 42099, DuPont Opening at 25.

⁴⁵ DuPont’s new-found demand for commodity specificity is also difficult to reconcile with its position in this case that any commodity that is a toxic-by-inhalation hazard should be considered “comparable” to chlorine. *See* DuPont Reply at 25.

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.

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 29-38. 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 29-32. 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 Guidelines* 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 32-34.⁴⁶

⁴⁶ 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

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 34-40. 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

As demonstrated above and in CSXT's opening and reply evidence, the Board should dismiss this case as to the Natrium-New Johnsonville and Niagara Falls-New Johnsonville movements because DuPont has not demonstrated that CSXT is market dominant for those movements. Moreover, for the reasons above, the Board should adopt CSXT's comparison groups and adjust the R/VC for those groups in the appropriate manner advocated by CSXT. After determining the average adjusted R/VC for the chlorine comparison groups and estimating a confidence interval to determine the upper boundary for the R/VC ratio below which a rate could not be found unreasonable, both the Natrium-New Johnsonville rate and the Niagara Falls-Carneys Point rate are below the maximum reasonable rate. *See CSXT Reply at 47.*

The adjusted R/VC ratio of the Niagara Falls-New Johnsonville comparison group falls narrowly below the R/VC ratio for the issue movement. But consideration of other relevant

"within the narrow confines of this proceeding," but should instead only consider it in a notice and comment proceeding. *See DuPont Reply at 36.* 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 to 2002. If DuPont thinks an unintentional arithmetic error can only be 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 in such a rulemaking

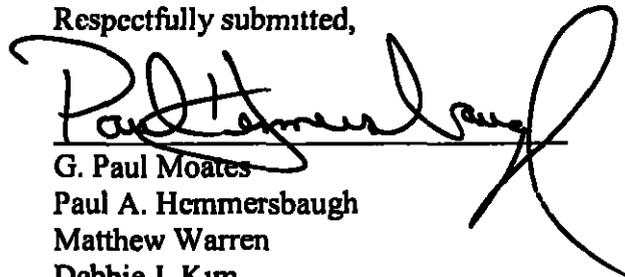
factors – including the extraordinary costs and risks of transporting chlorine and the public policy benefits of discouraging longer hauls of chlorine through means like CSXT’s new risk-based TIH pricing policy – strongly support a finding that the Niagara Falls-New Johnsonville rate is reasonable. *See id.* at 47-48. These compelling policy reasons are precisely the sort of “other relevant factors” that demonstrate that a rate is reasonable even if it is slightly above the the rate generated by the Three Benchmark formula. *See Simplified Standards* at 22.

* * *

In short, 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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Respectfully submitted,



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Counsel to CSX Transportation, Inc.

Dated: April 4, 2008

EXHIBIT 1

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

E.I DUPONT DE NEMOURS AND COMPANY)

Complainant,)

v.)

CSX TRANSPORTATION, INC.)

Defendant.)

Docket No. NOR 42100

**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 F'l 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 19* 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

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

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

E.I. DUPONT DE NEMOURS AND COMPANY)

Complainant,)

v.)

Docket No. NOR 42100

CSX TRANSPORTATION, INC.)

Defendant)

**VERIFIED STATEMENT OF STEPHEN J. LUBE
CSX TRANSPORTATION, INC.**

1. My name is Stephen J. Lube, and I am the Director of Marketing, Chemicals Division of CSX Transportation, Inc. ("CSXT") I have held this position since July 2004. In this capacity, my responsibilities include marketing and pricing CSXT's transportation services for a variety of chemicals, including chlorine. I submit this verified statement to further explain the differences between the transportation markets for chlorine and anhydrous ammonia. Most importantly, the transportation market for anhydrous ammonia is subject to considerably more modal competition than the market for chlorine – CSXT's rail service for the transportation of anhydrous ammonia faces substantial pipeline and barge competition, as well as truck competition.

2. In the United States, the majority of anhydrous ammonia moves by either pipeline, truck, or barge transportation, or a combination of those modes. On the other hand, chlorine is only rarely subject to pipeline competition (generally for very short movements), and almost never subject to significant truck competition. There are thousands of miles of pipeline that move anhydrous ammonia over long distances, while pipeline movements of chlorine are only used for chlorine produced on-site or at an adjacent facility (for example, for PVC production). There is

an extensive network that moves anhydrous ammonia by barge to distribution points along the Mississippi, Ohio, and Tennessee Rivers. At these distribution points, anhydrous ammonia is stored in large holding tanks, and eventually transloaded to be moved (primarily by truck) to various end-users. No similar multi-modal distribution networks exist for chlorine. Lastly, trucking is generally not an option for the movement of chlorine. On the other hand, trucking can be a very competitive alternative to rail service for moves of up to one thousand miles.

3. The stark difference in the rail market shares for anhydrous ammonia and chlorine transportation clearly illustrates that the two commodities face very different transportation markets. In a public statement released in May 2006, The Chlorine Institute approximated that in the United States, 85% of all long-distance movements of chlorine were moved by rail. On the other hand, based on data gathered and published by The Fertilizer Institute, of the approximately 19 million tons of anhydrous ammonia that was either produced in the United States or imported from foreign markets, only 4.8 million tons moved by rail. In other words, in 2005, only 25% of the anhydrous ammonia used or consumed in the United States moved by rail. The Port of Tampa provides a more specific example of the competition CSXT faces for transportation of anhydrous ammonia. Annually, approximately 4 million tons of anhydrous ammonia comes into Tampa. Of that amount, only approximately 500,000 tons moves by rail.

REDACTED

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 1st day of April, 2008



Stephen J. Lube

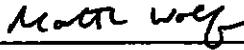
EXHIBIT 4

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

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