

April 4, 2008

222007



The Honorable Anne K. Quinlan  
Acting Secretary  
Surface Transportation Board  
395 E Street, SW  
Washington, D C 20423

RE Docket No NOR 42101, *E I du Pont de Nemours and Company v CSX Transportation, Inc*

Dear Secretary Quinlan

Please find enclosed for filing in the above referenced matter, an original and ten (10) copies of E I du Pont de Nemours and Company's Reply Evidence - **PUBLIC VERSION** Also enclosed is a compact disk containing written text in pdf format

An extra copy of this filing is enclosed for stamping and returning to our offices

If you have any questions, please do not hesitate to contact the undersigned

Sincerely,

Nicholas J DiMichael  
Jeffrey O Moreno

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**



222007

E I DUPONT DE NEMOURS AND COMPANY )

Complainant, )

v )

CSX TRANSPORTATION, INC., )

Defendant )

Docket No. NOR 42101

**COMPLAINANT'S REBUTTAL EVIDENCE**

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April 4, 2008

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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E I DUPONT DE NEMOURS AND COMPANY		)	
	Complainant,	)	
	v.	)	Docket No. NOR 42101
CSX TRANSPORTATION, INC ,		)	
	Defendant	)	
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**COMPLAINANT'S REBUTTAL EVIDENCE**

Complainant E I. du Pont de Nemours and Company ("DuPont") hereby submits its Rebuttal Evidence in response to the Reply Evidence of defendant, CSX Transportation, Inc ("CSXT"), filed in this proceeding on March 5, 2008. This Rebuttal Evidence consists of three parts: (a) an Argument that summarizes the evidence submitted and discusses the legal standards to be applied in this case, (b) the Rebuttal Verified Statements and accompanying exhibits of (1) Ms. Mary Pileggi, North American Region Logistics Manager, DuPont Logistics, Global Sourcing and Logistics ("Pileggi Reb V S"), and (2) Mr. Thomas D. Crowley, President, L. E. Peabody and Associates, Inc ("Crowley Reb V S"), and (c) various exhibits from discovery of CSXT in this proceeding.

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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E I DUPONT DE NEMOURS AND COMPANY		)	
	Complainant,	)	
		)	
	v	)	Docket No NOR 42101
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CSX TRANSPORTATION, INC ,		)	
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	Defendant	)	
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**PART I—ARGUMENT**

DuPont has challenged the reasonableness of CSXT's rail transportation rates in this small rate case, and two others, under the Three-Benchmark approach adopted by the Board in *Simplified Standards for Rail Rate Cases*, Ex Parte No. 646 (Sub-No 1), decision served September 7, 2007, *petition for reconsideration denied* March 19, 2008 ("*Simplified Standards*") In this proceeding, DuPont has challenged CSXT's rate for the movement of nitrobenzene, STCC 2815147, from Pascagoula, MS to Neuse, NC

As a threshold matter, DuPont has thoroughly established CSXT's market dominance over the movement at issue CSXT's contrary argument relies almost entirely on the contention that DuPont claimed to have a competitive truck option during their failed contract negotiations Despite this fact, CSXT still imposed a sizeable █%<sup>1</sup> rate increase upon DuPont, which hardly constitutes an effective competitive constraint Moreover, CSXT ignores the fact that DuPont rarely ships nitrobenzene by truck when rail is an option and has never done so for the issue movement CSXT also discounts the fact that, even after its significant rate increase, trucks

<sup>1</sup> All shaded text is CONFIDENTIAL and HIGHLY CONFIDENTIAL information that has been redacted from the public version of this pleading

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remain substantially more costly than rail. Although CSXT accuses DuPont of ignoring cost savings from truck, that simply is not true. The cost savings that CSXT asserts DuPont would realize either were included in the DuPont analysis or they would not accrue at all. In order to make its argument against market dominance, CSXT misleadingly and deceptively attempts to apply statements that DuPont made about *other* commodities and movements to the *issue* commodity and movement, when such comparisons clearly are not appropriate.

DuPont and CSXT have proposed a "final offer" comparison group that differs in just two criteria. In the aggregate, the differences show that DuPont has selected the most similar comparison group to the issue movement.

First, although both parties have applied the same criteria for selecting comparable movements based upon distance, only DuPont has applied that criteria to the proper length of haul for the issue movement. DuPont has used the issue movement miles derived from the same source as the Waybill Sample, whereas CSXT has used internal records that cannot be verified by DuPont. Since the Board has prohibited the parties from selecting comparable movements based upon any information other than from the Waybill Sample or a public source, CSXT's miles are *de facto* unreasonable.

The second, and most significant, difference is that CSXT has added a fuel surcharge criteria that overstates the reasonable level of contribution to joint and common costs. CSXT has excluded all movements without an amount in the "Miscellaneous Charges" field of the Waybill Sample on the unproven assumption that fuel costs were not recovered on those movements. But, even if the Board were to accept this assumption as true, the fuel surcharge methodology applied by CSXT from 2002 to 2005 was subsequently declared to be an unreasonable practice because that methodology over-recovered actual changes in fuel costs for individual movements.

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in order to cross-subsidize movements without a fuel surcharge. By restricting its comparison group to only movements that over-recovered fuel costs, CSXT has artificially inflated the R/VC ratio. In contrast, by not including a fuel surcharge factor in its selection of the comparison group, DuPont has averaged the effect of CSXT's fuel surcharge over-recovery on some movements against CSXT's alleged under-recovery on other movements. Thus, the DuPont comparison group is eminently more reasonable and similar in the aggregate to the issue movement.

DuPont has proposed two adjustments to the average R/VC ratios of the comparison group to account for "other relevant factors." First, DuPont has applied the Board's recently-adopted capital asset pricing methodology ("CAPM") to recalculate the RSAM and R/VC > 180 benchmarks for 2002 through 2005, in order to "ensure the availability of accurate cost information in regulatory proceedings." 49 U.S.C. 10101(14). CSXT wrongly asserts that this adjustment would constitute an impermissible retroactive rulemaking. But, this would not be a retroactive rulemaking because it does not take away or impair vested rights acquired under existing law. Nor does it impact any settled expectations of CSXT in the current RSAM or R/VC > 180. Finally, although DuPont did not make adjustments to all of the variables and calculations that would be affected by a switch to CAPM, because the Board has prohibited such adjustments in *Simplified Standards*, the DuPont analysis conservatively understates the reduction to the maximum reasonable rate of making all of those adjustments. DuPont has proven this fact by calculating the maximum reasonable rate of the issue movement, if CAPM were actually applied to all the other variables that CSXT has identified.

Second, DuPont has calculated an efficiency-adjusted RSAM in order to account for the Long-Cannon factors in the statute. The efficiency-adjusted RSAM eliminates traffic being

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carried at less than long-run variable cost. Because there no longer is significant excess capacity in the rail industry, there is no reason for CSXT to be transporting commodities at less than this level.

CSXT also has proposed two adjustments for "other relevant factors." First, CSXT claims that there is a flaw in the RSAM methodology that fails to include taxes in the revenue shortfall. DuPont contends that there is no actual shortfall because URCS overstates the tax component of variable costs by using the statutory tax rates, which in turn overstates the revenue shortfall. However, even if the Board accepts CSXT's contention, the proper fix is to apply CSXT's effective tax rate rather than its statutory tax rate. But, given the multitude of countervailing factors that must be considered before declaring the existence of a flaw in the RSAM methodology and determining how to fix such a flaw, this narrow proceeding between just CSXT and DuPont is not the appropriate forum for deciding these issues.

Second, CSXT improperly has adjusted the revenues and costs of every comparison group movement to 2007 "market" levels, before determining the average R/VC ratio of the group. But, this adjustment would undermine the Board's carefully considered decision to use a 4-year average of all three benchmarks in order to smooth out the impact of market fluctuations over time. CSXT's adjustment also is not objective because it fails to show the countervailing effects that its adjustments would have on the RSAM and  $R/VC > 180$ , which would decrease the expansion ratio applied to the comparison group average R/VC ratio. CSXT also has failed to demonstrate that its adjustment is necessary or appropriate to reflect any change in the market that is not captured by the R/VC ratio. In fact, DuPont demonstrates that no adjustment is necessary.

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The maximum R/VC ratio that CSXT advocates in this proceeding is anything but reasonable. Before making its two "other relevant factor" adjustments, the CSXT comparison group produces a maximum R/VC ratio of 329%, which is very close to the DuPont unadjusted R/VC ratio of 319% and would provide DuPont with a rate reduction. After making its adjustments, however, the CSXT maximum R/VC ratio jumps to 424%. DuPont Witness Crowley has calculated CSXT's return on equity ("ROE") at this rate level on a pre- and post-tax basis. Crowley Reb. V.S. at 14-15 & Ex. TDC-17. The pre-tax ROE for the issue movement is 132.9%, compared to the Board's 2005 CAPM weighted average cost-of-capital of 12.9%. The post tax ROE for the issue movement is 93.6% compared to the Board's 2005 CAPM weighted average cost-of-capital of 8.4%. Returns at these levels cannot be reasonable.

DuPont presents this Reply Evidence and Argument in six parts. Part I responds to CSXT's market dominance evidence. Part II addresses the differences between the parties' variable cost calculations for the issue movements. Part III compares and contrasts the differences between the party's "final offer" comparison groups. Part IV addresses the "other relevant factors" that each party has presented. Part V presents the maximum R/VC ratios for the issue movements based on the DuPont "final offer" comparison group, as adjusted by its "other relevant factors." Finally, Part VI summarizes the relief that DuPont requests.

### **I. CSXT POSSESSES MARKET DOMINANCE.**

CSXT wrongly contends that DuPont has made a "180-degree reversal from its past representations about the effectiveness of truck competition" for the purposes of this rate litigation. But, CSXT's contention is predicated upon deceptive, misleading, and plainly erroneous statements. Moreover, CSXT ignores most of the evidence submitted by DuPont, pursuant to *Product and Geographic Competition*, 21 C.C.2d 1, 21 (1985), to address the effectiveness of truck competition.

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A. CSXT Erroneously Presumes that Any Form of Rate Constraint Constitutes Effective Competition.

CSXT argues that effective truck competition exists because (1) [REDACTED]

[REDACTED]

[REDACTED] and (2) [REDACTED]

[REDACTED] CSXT Reply Ev. at 3-5 Neither argument, however, demonstrates the existence of effective truck competition

[REDACTED]

[REDACTED]<sup>2</sup> In *FMC Wyoming Corp v Union Pac R R Co*, 4 S T B 699, 717 (2000), the Board considered and rejected a similar argument made by UP that it lacked market dominance because FMC had successfully threatened to use a

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<sup>2</sup> [REDACTED]

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transload option to extract rate reductions<sup>3</sup> But the Board held that UP's decision to "match[] prices set by alternatives with significantly higher costs, while maintaining a dominant market share, is not enough to demonstrate effective competition for the traffic at issue." *Id* 717-18 [footnotes omitted] While acknowledging that "[t]he transload alternative does impose an outer limit on the rate that UP can charge," the Board concluded that UP still could "exercise considerable market power before reaching that outer limit " *Id* at 718 The Board also declared that "[s]tatements made to UP in the course of rate negotiations can only be regarded as posturing in aid of FMC's negotiation position " *Id*

Similarly, in *McCarty Farms v Burlington Northern, Inc* , 3 I C C 2d 822 (1987), the Interstate Commerce Commission ("ICC") held that BN possessed market dominance despite the introduction of rate reductions and service enhancements Specifically, "[t]he high level of BN's rates [made] the introduction of limited rate reductions and unit train service less than persuasive evidence of effective competition." *Id* at 832

[REDACTED]

[REDACTED]

[REDACTED]

It is quite clear that CSXT increased its rate in response to its perception of the prices set by a truck alternative with significantly higher costs DuPont has demonstrated that its costs to truck nitrobenzene from Pascagoula to Neuse are [REDACTED]% higher than its rail transportation costs via CSXT even after this [REDACTED]% rail rate increase DuPont Op Ev at 12-13 [REDACTED]

[REDACTED]

[REDACTED]

---

<sup>3</sup> This more complete analysis of *FMC Wyoming* belies CSXT's general citation to the same case for exactly the opposite holding See CSXT Reply Ev at 4

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[REDACTED]<sup>4</sup> CSXT is also touting the superior fuel cost advantage of rail over truck in a major television advertising campaign. Thus, [REDACTED]

[REDACTED] CSXT was merely matching what it perceived to be the rates of a significantly higher cost competitor. A constraint such as this does not equate to effective competition. *FMC Wyoming* at 718 and n. 39, citing *Ariz. Pub. Serv. Co. v. U.S.*, 742 F.2d 644, 650-51 (D.C. Cir. 1984).

**B. CSXT's Critique of the DuPont Evidence is Inaccurate and Distorted.**

Although CSXT claims that the truck cost comparisons submitted by DuPont, showing a [REDACTED] % cost differential between truck and rail, are not credible, it does not submit any cost evidence of its own to rebut those comparisons. CSXT Reply Ev. at 7-8. Instead, CSXT engages in an inaccurate and distorted critique of the DuPont evidence, and then argues that DuPont has not carried its burden of proof.

**1. DuPont has presented reliable evidence of its actual costs to transport nitrobenzene by truck from Pascagoula to Neuse.**

In order to demonstrate the significant difference between rail and truck costs for the issue movement, DuPont presented rates from three trucking companies. DuPont Op. Ev. at 12. CSXT describes these rates as "selective," [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>4</sup> See DuPont Reb. Ex. A (CSX-ALLHC-000326) and Ex. B (CSX-ALLHC-000910). See also, CSXT Reply Ev., Piacente Reply V.S. at ¶9 ("Driver shortages, hours of service considerations, equipment shortages, and highway congestion all contribute to upward pressure on motor carrier pricing.")

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The motor carrier with the highest cost differential, [REDACTED], also is the only carrier ever to actually handle the issue movement by truck, and even then only for a few months after Hurricane Katrina. The invoices that DuPont included as Opening Evidence exhibits show the actual amounts DuPont paid during this time period. See Pileggi Op. V.S., Ex. 6. Thus, far from being "selective," this is the most instructive evidence of truck rates in this case.

DuPont also submitted the rates in a contract with [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] For this reason, however, CSXI is wrong when it speculates that a greater volume commitment would get DuPont a lower rate. See CSXT Reply Ev. at 8, n. 6. Thus, to the extent this rate evidence is "selective," it is to the benefit of CSXI.

Finally, DuPont submitted a rate quote from [REDACTED]

[REDACTED]

Unlike the other two rates quoted by DuPont, however, this was not an actual contract rate, but a quotation that DuPont obtained for the purpose of its contract negotiations with CSXT. Pileggi Reb. V.S. at ¶5. For that reason alone, it probably is the most "selective" of the three rates presented by DuPont. But DuPont included it as evidence that even the most favorable comparison for CSXT shows that truck costs are [REDACTED]% greater than the cost of using CSXT.

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2. CSXT wrongly claims that DuPont has overstated the differential between rail and truck costs.

CSXT incorrectly contends that the [REDACTED] % rail-to-truck "price differential is overstated because DuPont's evidence made no attempt to account for the cost savings (including labor and rail car cost savings) that it could realize if it switched to truck transportation " CSXT Reply Ev at 8-9. It is incredulous that CSXT even makes this claim at all, since DuPont clearly and unequivocally addressed precisely these cost considerations in its Opening Evidence At page 12, DuPont walked the Board through its calculation of its average rail equipment cost (i.e. lease and maintenance) of \$ [REDACTED] per shipment, which DuPont then added to the challenged rail rate before comparing rail and truck costs<sup>5</sup> See also, Pileggi Reb. V S. at ¶8. Thus, the [REDACTED] % cost differential presented in the DuPont Opening evidence already considers rail car cost savings

DuPont did not address any labor savings from using truck because there would not be any The contrary representations of CSXT witness Kuzma are deceptive and misleading See Kuzma Reply V.S at ¶5. [REDACTED]

[REDACTED] In fact, when DuPont did truck nitrobenzene from Pascagoula to Neuse during the few months immediately following Hurricane Katrina, its customer, [REDACTED], complained about the additional labor costs it incurred to unload four times as many trucks as rail cars *Id*

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<sup>5</sup> In another example of either carelessness or wanton disregard for the facts, CSXT inaccurately cites a DuPont presentation to CSXT as evidence that DuPont incurs \$ [REDACTED] per trip in rail car maintenance costs See CSXT Reply Ev at 5, n 5, citing to Ex 5 That presentation, however, covers multiple movements, and the \$ [REDACTED] rail car maintenance cost clearly refers to sulfuric acid movements to Neuse from Kentucky and Virginia The only nitrobenzene rail car costs in that presentation are lease costs on the last page of CSX I's Ex 5 That presentation does not identify the rail car maintenance costs for the issue movement

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] This is yet another example of CSXT's carelessness or wanton disregard for the facts.

In addition to the misrepresentations noted above, Mr Kuzma's credentials to discuss what DuPont has represented in its negotiations with CSXT are highly suspect. He has never negotiated rates directly with DuPont Logistics or any of the DuPont businesses and throughout the 2007 contract negotiations his presence was very limited. Pileggi Reb V S at ¶7. Indeed, most of Mr. Kuzma's anecdotes are from 2005 and have nothing to do with the most recent contract negotiations. See Kuzma Reply V S at ¶¶5-6.

**C. CSXT Wrongly Challenges the Relevance of the DuPont Market Dominance Evidence.**

DuPont has addressed its market dominance evidence to the relevant factors identified in *Product and Geographic Competition*, 21 C C 2d 1, 21 (1985) ("*P&G Competition*")

- (1) the amount of the product in question that is transported by motor carrier where rail alternatives are available,
- (2) the amount of the product that is transported by motor carrier under transportation circumstances (i.e., shipment size and distance) similar to rail,
- (3) the amount of the product that is transported using motor carrier by shippers with similar needs (distributional, inventory, et cetera) as the shipper protesting the rate,

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(4) physical characteristics of the product in question that may preclude transportation by motor carrier; and

(5) the transportation costs of the rail and motor carrier alternatives

CSXT does not even cite to *P&G Competition* in its Reply Evidence, much less attempt to address these factors. Instead, CSXT attempts to minimize the DuPont evidence with general statements that each item of evidence by itself does not establish market dominance. But, CSXT fails to respond to the collective impact of the DuPont evidence, which clearly does establish market dominance over the issue movement.

First, DuPont submitted evidence that it does not transport nitrobenzene by truck to any destination except when rail is not an option. With a single exception, DuPont shipped nitrobenzene by truck only when rail was unavailable or when less than a full rail car was required. DuPont Op. Ev. at 10-11 [REDACTED]

[REDACTED] Moreover, DuPont proved that it has never shipped nitrobenzene by truck from Pascagoula to Neuse, except when rail was unavailable after Hurricane Katrina. *Id.*

CSXT pretends this evidence is irrelevant, because "[t]he question before the Board is whether a particular transportation is economically feasible, not necessarily whether it has been used in the past." CSXT Reply Ev. at 7, quoting *McCarty Farms v. Burlington Northern, Inc.*, 3 I.C.C.2d 822, 825-26 (1987). But, CSXT ignores the fact that evidence of past truck use still is relevant to the question of economic feasibility. See *Product & Geographic Competition*, 2 I.C.C.2d at 21 (effective truck competition may be deduced from the amount of the product transported by truck when rail alternatives are available). *McCarty Farms* stands only for the proposition that, without more, the failure to use trucks for the issue movement in the past will

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not establish market dominance. But, DuPont has shown that it rarely uses truck for any nitrobenzene movements, not just the issue movement. In addition, DuPont has submitted evidence that addresses several of the other relevant evidence identified in *P&G Competition*.

Second, DuPont presented a detailed cost comparison of its rail and truck alternatives for the issue movement. DuPont Op. Ev. at 12-13. Those cost differentials, which DuPont has defended against CSXT's attacks in the preceding section, show a [REDACTED] % cost differential in favor of rail. That evidence offers a powerful explanation for the very small number of nitrobenzene shipments by truck.

Third, DuPont presented evidence on the hazardous nature of nitrobenzene that strongly favors rail over truck transportation when there is an option. *Id.* at 10. As explained in the next section, below, CSXT's response to that evidence is based upon a DuPont statement that has nothing to do with nitrobenzene or transportation by bulk truck. Therefore, CSXT has not rebutted this evidence.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Because "[t]he feasibility of using motor carriage as an alternative to rail may depend on the nature of the product and the needs of the shipper or receiver," this un rebutted evidence also is relevant to market dominance. *McCarty Farms*, 31 C.C.2d at 829.

All of the above evidence, in the aggregate, proves that CSXT possesses market dominance over the transportation of nitrobenzene from Pascagoula to Neuse. CSXT's attacks

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upon the component parts of the DuPont evidence must fail, because the Board considers all of the evidence together when determining market dominance

**D. CSXT Intentionally Has Altered Evidence in This Case.**

Throughout the market dominance discussion above, DuPont has noted multiple inaccuracies in CSXT's analysis of DuPont evidence and discovery documents in this case that suggest at best carelessness, and at worst, deception. There is one blatant inaccuracy, however, that appears to have no other explanation than deception, which in turn would tar every other inaccuracy with the same brush.

At page 9 of its Reply Evidence, CSXT attacks the DuPont claim that it prefers to ship nitrobenzene by rail whenever possible because of its particularly hazardous nature. The focal point of CSXT's attack is a statement from an internal DuPont document that, according to CSXT, contradicts the DuPont claim. CSXT, however, has altered the text of the DuPont document to make it say something completely different. The following text is from the original document, which is CSXT Reply Ex 9

[REDACTED]

CSXT quotes the text in italics on page 9 of its Reply Evidence. The following mark-up shows the changes that CSXT made to the original text:

[REDACTED]

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CSXT deliberately changed the commodity referenced in the quote from chlorine to nitrobenzene, and it replaced the reference to one-ton cylinders with trucks

In this instance, mere carelessness cannot explain such blatant changes to the quoted text that completely alter the meaning. CSXT did not misunderstand this document, it intentionally sought to misrepresent the contents. DuPont has identified several other misrepresentations in CSXT's reply evidence, in which CSXT inappropriately attempts to apply statements made by DuPont concerning *other* commodities and movements to the *issue* commodity and movement. What other facts in this case has CSXT misrepresented that neither DuPont nor the Board is capable of identifying?

### **II. CSXT HAS NOT FOLLOWED THE BOARD-MANDATED PROCEDURES FOR CALCULATING VARIABLE COSTS.**

As DuPont explained on page 13 of its Reply Evidence, CSXT has not followed the Board's prescribed procedures for calculating variable costs. The proper calculation of variable costs is important because the maximum reasonable rate is the product of the adjusted average R/VC ratio for the comparison group multiplied by the variable cost of the issue movement.

The loaded mileage inputs for calculating the URCS variable costs of movements in the Waybill Sample are generated from the PC\*Miler|Rail program. Crowley Reply V.S. at 5. Therefore, DuPont has used the same source to identify the loaded miles for the issue movements. In contrast, CSXT has used loaded miles from its internal records for the issue movements, which accounts for the entire difference in the party's variable cost calculations.

But, it would be inconsistent to use CSXT's internal records for the issue movements while continuing to rely upon the PC\*Miler|Rail program for all of the comparison movements. Indeed, all three of the small case benchmarks are calculated from the Waybill Sample, including

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the loaded miles generated from the PC\*Miler|Rail program <sup>6</sup> Therefore, the maximum R/VC ratio generated by those benchmarks should be applied to variable costs based upon the same data source

**III. THE DUPONT "FINAL OFFER" COMPARISON GROUP IS THE MOST SIMILAR TO THE ISSUE MOVEMENT**

The "final offer" comparison group presented by DuPont and CSXT for the issue movement is distinguished by just two factors First, CSXT has excluded all movements with no amount in the "Miscellaneous Charges" field of the Waybill Sample on the unsupported assumption that fuel costs were not recovered for such movements Second, although the parties have agreed upon the distance criteria for comparison movements, they have applied that criteria to different loaded miles DuPont Witness Crowley has compared the movements in each party's "final offer" comparison group and identified the reasons why each has excluded certain movements that the other has included Crowley Reb V S at 5-6, Ex TDC-14 DuPont believes that its "final offer" comparison group is the "most similar in the aggregate to the issue movements " *Simplified Standards* at 18

**A. CSXT's Fuel Surcharge Criteria Is Based Upon A Methodology That The Board Declared To Be An Unreasonable Practice.**

CSXT unreasonably assumes that all movements with no amount in the "Miscellaneous Charges" field of the Waybill Sample should be excluded from the comparison group because they did not recover their fuel costs. DuPont has challenged that assumption because CSXT has not demonstrated that it records all fuel surcharges in the "Miscellaneous Charges" field and because there are means other than fuel surcharges to recover fuel costs DuPont Reply Ev at 18-20.

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<sup>6</sup> See Part III B , *infra*, for a more detailed discussion of the role of the PC\*Miler|Rail program to select movements of comparable distances

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However, one factor rises above all others to rebut CSXT's position. By its own admission, from 2002-2005, CSXT was over-recovering fuel costs on traffic that was subject to a fuel surcharge as a means to recover its overall fuel expenses, effectively cross-subsidizing traffic that was not subject to a fuel surcharge. See DuPont Reply Ev. at 19-20. The Board rejected that fuel surcharge methodology as an unreasonable practice because "there is no real correlation between the rate increase and the increase in fuel costs for that particular movement to which the surcharge is applied." *Rail Fuel Surcharges*, STB Ex Parte No. 661, slip op. at 7 (served Jan. 26, 2007).

Based upon the Board's holding, movements with a fuel surcharge (assuming that is what the "Miscellaneous Charge" field represents) should be excluded from the comparison group because they would overstate the maximum reasonable R/VC ratio. However, if the Board were to exclude movements with a fuel surcharge for overstating cost recovery, and exclude movements without a fuel surcharge for understating cost recovery, there would be no movements left from which to select a comparison group.

A reasonable approach is to include movements in the comparison group, without any regard to the "Miscellaneous Charges" field. This would permit CSXT's conceded over-recovery of fuel costs for the one category of movements to offset its alleged under-recovery on the other. The average R/VC ratio of the combined categories would be most similar to what it would have been if CSXT had properly accounted for fuel in both categories of movements in the first place. Because the DuPont comparison groups do this and CSXT's do not, DuPont has taken a reasonable approach, whereas CSXT has not.

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**B. DuPont Has Used the Only Source for Length of Haul Permitted by Simplified Standards.**

In its "final offer" comparison group, CSXT has adopted the DuPont distance criteria, but with two exceptions, one of which violates *Simplified Standards*. DuPont rounded the issue movement mileage, as provided in the Waybill Sample by the PC\*Miler|Rail program, to the nearest 50 miles and selected movements that fell within a range of 150 miles on either side of that number. Although CSXT has accepted the +/-150 mile range applied by DuPont, it has applied that range to the loaded miles in its internal records rather than the loaded miles in the Waybill Sample. In addition, CSXT has not rounded the issue movement miles from its internal records.

The fatal flaw in CSXT's approach is its use of loaded miles from its internal records. In *Simplified Standards* at page 83, the Board clearly and unequivocally stated that it "will select the comparison group based on information contained in the Waybill Sample released to the parties at the outset of the case and other publicly available information." The miles used by CSXT for the issue movement is not from the Waybill Sample or publicly available information, and therefore cannot be used to identify comparable movements. Thus, DuPont has applied the 150-mile range adopted by both parties to the issue movement miles obtained from the only permissible source.

In addition to being legally improper, it is analytically improper to use CSXT's internal records to calculate the distance of the issue movement while relying upon the Waybill Sample for the distance of the comparable movements. In order to make appropriate comparisons, the distances of the issue movement and the comparison movements should be drawn from the same data source, the PC\*Miler|Rail program, which applies the same methodology to calculate the loaded miles for all movements in the Waybill Sample.

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Lastly, CSXT has not adopted the convenient rounding technique employed by DuPont. Although CSXT attempts to portray this as creating a huge discrepancy, the reality is much different. DuPont Witness Crowley has calculated the impact upon the DuPont "final offer" comparison group of rounding the issue movement miles to the nearest 50 miles versus not rounding at all. See Crowley Reb. V S. at 10 & Ex TDC-15. The revised comparison group causes a change in the maximum R/VC ratio from 319% to 330%, an increase of only 3.4%. This ratio remains well below the issue R/VC of 373%. Thus, the fact that DuPont rounded the issue miles for convenience does not detract from the reasonableness of its comparison group.

### **C. DuPont has Selected the Most Reasonable Comparison Group.**

The Board will select the comparison group that it determines "is most similar in the aggregate to the issue movements." *Simplified Standards* at 18. "The selection of the best comparison group will be governed by which group the Board concludes provides the best evidence as to the reasonable level of contribution to joint and common costs for the issue movement." *Id.* In the aggregate, DuPont has submitted the most reasonable comparison group for the issue movement.

Both parties have applied the same distance criteria of +/-150 miles around the issue movement miles. However, because CSXT has used a prohibited data source for the issue movement miles, its application of the distance criteria is *de facto* unreasonable.

In addition, CSXT has unreasonably applied a fuel surcharge criteria. CSXT has excluded all movements without an amount in the "Miscellaneous Charge" field of the Waybill Sample on the unproven assumption that fuel costs were not recovered on those movements. Moreover, even if the Board accepts this assumption as true, CSXT's comparison group consists of only movements to which CSXT applied a fuel surcharge methodology that the Board has determined to be an unreasonable practice, because that methodology over-recovers actual

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changes in fuel costs for individual movements. Consequently, CSXT's comparison group overstates "the reasonable level of contribution to joint and common costs." *Id.*

In summary, DuPont has selected the most reasonable comparison group in the aggregate, based upon the two differences between the "final offer" comparison group selected by each party. Although both parties have applied the same mileage criteria, because CSXT applied the criteria to mileage derived from a prohibited data source, only DuPont has applied the criteria reasonably. Furthermore, CSXT's fuel surcharge criteria causes its comparison group to overstate the reasonable level of contribution to joint and common costs. By not including a fuel surcharge criteria, DuPont has reasonably selected a comparison group where the average R/VC ratio of movements both with and without a fuel surcharge is a more accurate reflection of a reasonable level of contribution to joint and common costs. Since these are the only differences between the party's comparison group, DuPont clearly has selected the most reasonable group that is similar in the aggregate to the issue movement.

#### IV. "OTHER RELEVANT FACTORS"

Both CSXT and DuPont have proposed two adjustments each to the maximum reasonable R/VC ratios of their comparison groups to account for "other relevant factors."<sup>7</sup> DuPont has recalculated the RSAM and R/VC > 180 benchmarks to reflect the Board's newly-adopted cost-of-capital methodology for all four years of the Waybill Sample, and it has calculated an efficiency-adjusted RSAM. CSXT has adjusted the RSAM for an alleged need to account for taxes in the revenue-shortfall, and it claims that it is necessary to index the costs and revenues of its comparison group to 2007 levels. CSXT's adjustments are inappropriate, unnecessary, and inherently biased. In contrast, the DuPont adjustments are reasonably and objectively tailored to

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<sup>7</sup> Although CSXT does not describe its adjustments as "other relevant factors," the DuPont critique remains the same.

**PUBLIC VERSION**

reflect the Board's most current and precise cost-of-capital methodology and to eliminate inefficient pricing from CSXT's RSAM benchmark

**A. DuPont Has Offered A Reasonable, Objective And Transparent Means To Apply The CAPM Methodology.**

In its Opening Evidence at 23-25, DuPont adjusted the Board's RSAM and R/VC>180 figures by calculating the cost of capital underlying those benchmarks in accordance with the Capital Asset Pricing Model ("CAPM") weighted average cost of capital ("WACC") methodology adopted in *Methodology to be Employed in Determining the Railroad Industry's Cost of Capital*, STB Ex Parte No 558 (Sub-No 10), slip op at 1, (served Jan 17, 2008) ("*Changed Cost of Capital Methodology*"), which the Board described as employing "more current and precise techniques " Because Congress has directed the Board to "ensure the availability of accurate cost information in regulatory proceedings," 49 U.S.C. 10101(14), DuPont argued that the Board is legally obligated to make these adjustments. In the alternative, DuPont argued that the Board should make these adjustments as part of its consideration of "other relevant factors " DuPont Op. Ev at 26

**1. The Board is legally obligated to recalculate the RSAM and R/VC>180 benchmarks using the CAPM methodology.**

CSXT inappropriately relies upon *Edison Elec Institute v ICC*, 969 F 2d 1221 (D C Cir. 1992) ("*EEI*"), and *Alabama Power Co v ICC*, 852 F 2d 1361 (D C Cir 1988) ("*Alabama Power*"), to claim that the Board is not legally obligated to use the CAPM WACC methodology to recalculate the RSAM and R/VC >180 benchmarks CSXT Rep Ev at 26 Neither decision stands for the blanket proposition that the Board is never required to apply a new methodology retroactively Rather, in both decisions, the Court affirmed ICC decisions not to apply changes to the RCAF retroactively because the ICC had reasonably interpreted the statute in light of the facts before it. Both decisions and their facts are distinguishable from this case.

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In *EEI*, the Court affirmed the ICC's decision not to apply the newly-adopted RCAF-A retroactively based upon the concerns cited by the agency

In deciding not to restate the RCAF, the ICC cited four concerns: (1) a railroad might be made "financially liable for rate actions that were protected when they were taken", (2) data limitations make it difficult to calculate accurately productivity gains made prior to 1986, (3) there is a lack of evidence that present rates are unreasonably high, and (4) restatement would have an "unknowable but potentially substantial" impact upon railroads' earnings *Productivity Adjustment*, 5 I.C.C. 2d at 470-71.

*EEI* at 1227-28 The Court held that it was reasonable for the ICC "to preserve settled expectations" expressed in the first concern, and to avoid the speculation required by the second concern *Id* at 1228 Because those reasons were sufficient to affirm the agency, the Court did not address the other two concerns *Id*

None of those concerns are present in this case First, CSXT has not expressed any settled expectations in the current RSAM or R/VC>180, nor could it since they were first published only three months ago. Second, there are no data limitations to revising the RSAM or R/VC>180 to reflect the CAPM WACC methodology Crowley Reb. V S. at 15-16. Third, the precise issue in this case is whether CSXT's current rates are unreasonably high, and accurate RSAM and R/VC >180 benchmarks are essential to making that determination By contrast, in *EEI*, the ICC's concern was with the effect of applying the RCAF-A to past rates Finally, restatement of the RSAM and R/VC >180 will not have the substantial impact upon railroad earnings that concerned the Board in *EEI* precisely because these restatements will not affect past rates

In *Alabama Power*, 852 F.2d at 1370-72, the Court affirmed the ICC's decision not to make a full retroactive adjustment to the RCAF index to correct a forecast error that dated back to the inception of the RCAF. Although the Court observed that the Petitioners' argument for

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retroactive adjustment had "some force," *id* at 1371, it ultimately affirmed the agency because it had engaged in a reasonable balancing of the equities by concluding that the harm to railroads outweighed the harm to shippers. *Id* In this case, however, the equities clearly favor DuPont because the Board's more precise CAPM WACC methodology protects DuPont from paying unreasonably high rates that otherwise would be considered reasonable under the former, and less precise, cost of capital methodology that the Board itself acknowledged has "fallen into disfavor" *Changed Cost of Capital Methodology*, at 5 In contrast, CSXT has no settled expectations based upon the current RSAM and R/V<180 calculations

### **2. The Board is permitted to adjust prior year RSAM and R/V<180 figures by CAPM.**

CSXT incorrectly claims that use of the CAPM WACC methodology to recalculate past RSAM and R/V<180 figures would be an impermissible retroactive application of a new rule CSXT Reply Ev at 27\_, citing *Bowen v Georgetown Univ Hosp*, 488 U.S. 204, 207 (1988) The retroactive rulemaking referred to in *Bowen*, however, concerned the application of a new rule to vested rights under the previous state of the law *Id* (the court rejected an attempt to apply a new rule retroactively to recoup monies paid out under the old rule) In contrast, CSXT has no vested rights based upon either the prior RSAM or cost-of-capital calculations The D.C. Circuit has distinguished *Bowen* on this very basis, holding that "[a] law is 'retroactive' if it 'takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past'" *Assoc. of Accredited Cosmetology Schools v Alexander*, 979 F.2d 859, 864 (D.C. Cir. 1992), quoting *Neild v Dist. of Columbia*, 110 F.2d 246, 254 (D.C. Cir. 1940) Because none of these things result from using the CAPM WACC to recalculate past RSAM and R/V<180 benchmarks, such action would not constitute retroactive rulemaking

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Furthermore, what CSXT claims the Board cannot do to the RSAM and R/V<180 figures, the Board in fact already has done. The Board adopted a new RSAM methodology in *Simplified Standards*, which it subsequently applied retroactively to the years 2002 to 2005, even though the Board previously had calculated the RSAM for those years under a different methodology. Compare the decisions served on Dec 20, 2007 and April 25, 2006 in *Rate Guidelines—Non-Coal Proceedings*, STB Ex Parte No. 347 (Sub-No. 2). What DuPont seeks is much less intrusive because it does not seek to change the RSAM methodology at all. Rather, DuPont asks the Board to update its cost-of-capital input to the RSAM methodology, by using the most current and precise cost of capital.

Contrary to CSXT's claims, this would not "disrupt settled expectations and business conduct and commercial decisions made several years ago in reliance on the Board's published RSAM figures." CSXT Reply Ev. at 27. The RSAM figures that DuPont seeks to update were published only three months ago.

CSXT's assertion that the Board would have to reopen settled decisions, if it applies a CAPM WACC in this case, is absolutely wrong. CSXT Reply Ev. at 27, n. 21. Whereas a settled decision is administratively final, this case is not. DuPont asks only that the Board apply its most current and precise standards to determine the reasonableness of CSXT's rates in this pending case. The Board is under no obligation to reopen settled, administratively final decisions that applied the old cost of capital methodology in place at the time those cases were decided. See *United States v Estate of Donnelly*, 397 U.S. 286, 295-97 (1970) (Harlan, J., concurring) (In the civil area, a new decisional rule should not apply retroactively "when the transaction is beyond challenge because the rights of the parties have been fixed by litigation and have become res judicata"), quoted in *American Trucking Associations, Inc v Smith*, 496

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U.S. 167, 214-15 (1990) (Stevens, J., *dissenting*) (although dissenting in the result, this was the majority opinion on the issue of retroactivity, *see id.* at 201 (Scalia, J. *concurring in judgment*))

3. **Implementation of CAPM does not constitute an impermissible adjustment to URCS.**

CSXT attempts to avoid application of the CAPM WACC methodology by calling it an impermissible adjustment to URCS. CSXT Reply Ev. at 34. But that is not what the Board meant when it declared its intention to use only unadjusted URCS to calculate the variable cost of the issue and comparison group movements. The Board was addressing requests to make "movement-specific" adjustments to URCS to substitute the cost of handling a specific movement for the system average cost used by URCS. *Simplified Standards* at 84, *See also, Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1), slip op. at 48 (served Oct 30, 2006) (movement-specific adjustments are "the use of variable cost units different from the URCS system-wide average figure.") The application of the CAPM WACC is not a movement-specific adjustment, it is a "technical correction" to an URCS input that is uniformly applied to the calculation of the URCS variable cost for all movements.

4. **DuPont has conservatively understated the effect of applying the CAPM approach.**

CSXT contends that the Board cannot apply the CAPM WACC in this case because multiple other variables and calculations would be affected by a switch to CAPM WACC, for which DuPont has not made any adjustments. CSXT Reply Ev. at 31-34. These are the recalculation of variable costs for both the issue and comparison traffic, the re-identification of traffic in the Waybill Sample with an R/VC > 180, and the re-selection of a comparable group from this revised R/VC > 180 traffic. As CSXT correctly observes, however, this "would require use of data and information the Board has held inadmissible for purposes of selecting comparison groups." *Id.* at 34. For that reason, DuPont did not calculate the impact of the

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CAPM WACC upon all of these other variables. But, by making only the changes that it presented in its Opening and Reply Evidence, DuPont took a conservative approach that produces a higher maximum reasonable rate than a full approach would have produced.

Although CSXT correctly notes that the CAPM WACC may cause the R/VC ratio of the comparison group to increase, *id.* at 32, CSXT neglects to mention the countervailing effects of reducing the variable cost of the issue movement and increasing the amount of traffic with an  $R/VC > 180$ . The net effect of these changes inevitably produces a lower maximum reasonable rate than applying just the adjustments that DuPont has made.

To demonstrate this fact, DuPont witness Crowley has shown the other effects of switching to the CAPM WACC and how they flow through to determine the maximum reasonable rate for the issue movement. Crowley Reb. V.S. at 17, Ex. TDC-18. In the DuPont Opening and Reply Evidence, Mr. Crowley only adjusted the CSXT RSAM and  $R/VC > 180$  benchmarks by re-costing the 2002-2005 Waybill Sample data to include the CAPM WACC. Now, in order to show the CAPM WACC impact upon the other variables identified by CSXT, Mr. Crowley has taken the additional steps of using the CAPM WACC to recalculate the issue movement variable costs and revising the comparison group by applying the DuPont "final offer" selection criteria to the revised universe of  $R/VC > 180$  traffic in the Waybill Sample.

The DuPont Reply Evidence, adjusted for the CAPM WACC, produced a maximum R/VC of 297% and a maximum rate of \$5681.97. The restated CAPM WACC procedure produces a higher maximum R/VC ratio of 306% that, when applied to a lower issue movement variable cost, results in a lower maximum rate of \$5582.76. Crowley Reb. V.S., Ex. TDC-18.

This proves that CSXT's critique of the DuPont application of the CAPM WACC methodology is a red-herring. The additional steps that DuPont did not take, because *Simplified*

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*Standards* does not permit them, would produce a lower maximum reasonable rate. DuPont is not asking the Board to prescribe that rate, but has introduced this information solely in response to CSXT's charge that DuPont did not take these steps for result-oriented reasons. CSXT Reply Ev. at 33, n. 26.

### **B. DuPont Has Properly Applied An Efficiency Adjustment to the RSAM.**

In its Opening Evidence at 26-28, DuPont argued that the Board must apply an "efficiency adjusted" RSAM in order to satisfy its statutory obligation to consider the Long-Cannon factors. The efficiency adjusted RSAM eliminates traffic being carried at less than long-run variable cost. Because there no longer is significant excess capacity in the rail industry, DuPont argued that today, more than ever before, there is no reason for rail carriers to be transporting commodities at less than long-run variable cost.

CSXT contends that the Board should reject an efficiency-adjusted RSAM as an "other relevant factor" because the Board eliminated the RSAM "range" concept in *Simplified Standards* after no party objected to its proposal. CSXT Reply Ev. at 36-37. It is misleading to claim that no party objected to elimination of the efficiency-adjusted RSAM in *Simplified Standards*. The Board in fact proposed a new methodology for calculating the RSAM that was very different from its prior methodology, which had included the RSAM range. *Simplified Standards* (decision served July 28, 2006), pp. 22-24. No party objected to elimination of the RSAM range as to that methodology. However, in the final *Simplified Standards* decision, at pp. 19-20, the Board decided not to adopt that methodology, but instead adopted an entirely different methodology from any that it, or any commenting party, had proposed. Thus, the Board never offered any party an opportunity to object to elimination of the RSAM range as to the RSAM methodology that it ultimately adopted.

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Although the Board recently rejected a petition for reconsideration of the efficiency-adjusted RSAM in *Simplified Standards* (decision served March 19, 2008), the Board did so on procedural, not substantive, grounds. Moreover, the Board noted that the petitioners "ask for something we have already granted. Under the Three-Benchmark method, parties may submit evidence of 'other relevant factors' to demonstrate that the maximum lawful rate should be higher or lower, such as evidence 'that the railroads are not operating as efficiently as possible.' *Simplified Standards* at 22." *Id.*, slip op. at 13. Thus, the Board has not foreclosed the evidence submitted by DuPont that CSXT is carrying traffic at less than long-run variable cost and that such traffic should be excluded from the RSAM benchmark.

### **C. The Board Should Reject CSXT's RSAM Adjustment.**

CSXT has identified an alleged flaw in the Board's RSAM calculation that it attempts to correct. CSXT Op. Ev. at 19-21. Because the RSAM revenue shortfall is calculated after all taxes have been paid, CSXT claims that the revenue needed to make up that shortfall also must be calculated after taxes in order for CSXT to achieve revenue adequacy. There are two fundamental problems with CSXT's adjustment.

First, even if the Board accepts CSXT's contention that there is a flaw, CSXT erroneously applies its statutory tax rate, even though its effective tax rate was much lower in 2002-2005. DuPont Reply Ev. at 22-23. This causes CSXT to grossly overstate the amount of revenue required to pay taxes on the revenue shortfall. Although the proper tax rate to consider is CSXT's marginal tax rate, that can only be determined from CSXT's actual tax returns, which CSXT has declined to put into evidence in this proceeding. Therefore, CSXT's effective tax rate is the best and most reliable evidence.

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DuPont, however, does not accept CSXT's claim that any adjustment to the RSAM is required, because URCS overstates the tax component of variable costs by using the statutory tax rate *Id* at 23-24. This has resulted in URCS including taxes for CSXT that are several times more than CSXT's actual tax expense. This overstates CSXT's variable costs, which reduces the Revenue>180 amount. Thus, CSXT's revenue shortfall is already overstated.

As this debate has demonstrated, there are a multitude of countervailing factors that must be considered before declaring the existence of a flaw in the RSAM methodology and precisely how to fix such a flaw. Indeed, the Board received several rounds of comments in *Simplified Standards* without anyone identifying this alleged flaw. Therefore, the Board should not determine the existence of a flaw within the narrow confines of this proceeding between just DuPont and CSXT. Rather, the Board should apply the RSAM that it adopted after extensive public notice and comment and direct CSXT to raise the alleged flaw in a petition to reopen *Simplified Standards*.

### **D. CSXT's "Market" Adjustment Is Neither Necessary Nor Appropriate.**

CSXT wrongly attempts to adjust the revenues and costs of every comparison group movement to 2007 "market" levels because the challenged rates were first published in 2007. DuPont has objected to CSXT's adjustments as unnecessary and inappropriate on three grounds.

First, CSXT incorrectly assumes that the Board should evaluate rate reasonableness based upon a static period in time, *i.e.*, a specific calendar year. But, from the earliest permutations of the Three-Benchmark approach, the Board has strived to follow a multi-year approach that smooths out market fluctuations over time. Because a rate prescription is for a five year period, it is important to prescribe a rate that is based neither upon the peak nor the trough of the business cycle. CSXT's "market" adjustments would undermine the Board's carefully considered decision to use a 4-year average of all three benchmarks in order to smooth out the impact of

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market fluctuations over time when comparing the R/VC ratios of the issue traffic with a comparison group DuPont Reply Ev at 25-27

Second, CSXT's adjustment methodology is far from objective CSXT has adjusted only the R/VC ratios of the comparison group benchmark, without accounting for the offsetting impact of those adjustments upon the RSAM and R/VC>180 benchmarks *Id* at 27-29 What we are left with are comparison movement R/VC ratios that nominally have been indexed to 2007 price levels, and RSAM and R/VC >180 ratios based on averages of 2002 to 2005 historic rates and costs This apples-to-oranges comparison would allow CSXT to apply a much higher R/VC ratio to DuPont than would be proper. The Board rejected a similar proposal in *Simplified Standards*, at pp 84-85, and it should do so again in this case

Third, CSXT has not demonstrated that its adjustment is necessary to reflect changes in the market DuPont Reply Ev. at 29-30 CSXT's primary justification for its proposed adjustment is that total revenues for its chemical group as a whole have increased since 2002 CSXT's chemical group, however, covers a broad range of commodities, including sand, plastics, petroleum coke, LPG, soda ash and various TIH commodities, that have nothing in common other than being included in CSXT's chemical business group CSXT has not attempted to attribute its increased revenues to a more narrow group that includes the issue commodities Neither has CSXT attempted to segregate fuel surcharges from its increased revenue, which is a significant revenue factor that is independent of the chemical transportation market.

In order to show that indexing is not necessary, DuPont Witness Crowley has developed the range and average R/VC ratios of the DuPont "final offer" comparison groups for each year of the Waybill Sample from 2002 to 2005. Crowley Reb. V S at 12 and Ex TDC-16 Although the R/VC ratios cover a wide range, the annual averages fall within a much narrower band.

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Furthermore, the average R/VC ratio is highest in the earliest year. This validates the Board's conclusion in *Simplified Standards*, pp. 84-85, that no indexing of revenues or variable costs is necessary, since the R/VC ratios will reflect the annual changes in revenues and variable costs.

**V. CALCULATION OF MAXIMUM R/VC RATIOS**

DuPont has calculated the maximum R/VC ratio for the issue movement in three ways. First, DuPont has applied the formula in *Simplified Standards* to "final offer" comparison group. Second, DuPont has adjusted the result of the Board's formula, as described in its opening evidence, to account for the "Long-Cannon" factors in the statute 49 U.S.C. 10701(d)(2)(A)-(C). Third, DuPont has recalculated the RSAM and R/VC >180 benchmarks, as described in its opening evidence, to apply the Board's most current and accurate methodology for calculating the cost of capital. DuPont has summarized these results in the chart below.

<b>Maximum R/VC Ratio Based Upon DuPont "Final Offer" Comparison Group</b>	
Maximum R/VC Ratio Based Upon <i>Simplified Standards</i> without "other relevant factors" <sup>8</sup>	319%
Maximum R/VC Ratio Based Upon RSAM with efficiency adjustment <sup>9</sup>	299%
Maximum R/VC Ratio Based Upon New Cost of Capital Methodology <sup>10</sup>	297%

**VI. CONCLUSION**

DuPont respectfully requests the Board to

<sup>8</sup> Crowley Reply V S at 21, Table 4

<sup>9</sup> Crowley Reply V S at 36, Table 5

<sup>10</sup> Crowley Reply V S at 38, Table 6

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- (1) find that the CSXT's common carrier rates applicable to the transportation of the commodity between the origin and destination named in the Complaint are unreasonable,
- (2) prescribe just and reasonable rates for the future applicable to the rail transportation of DuPont traffic, pursuant to 49 U S C §§ 10704(a)(1) and 11701(a); and,
- (3) award DuPont reparations, plus applicable interest, in accordance with 49 U.S.C. § 11704 for unlawful rates set by CSXT for the period beginning June 16, 2007 to the effective date of a decision by the Board prescribing just and reasonable rates.

Respectfully submitted,



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*Attorneys for E I du Pont de Nemours and  
Company*

April 4, 2008

**PUBLIC VERSION**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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E I. DUPONT DE NEMOURS AND COMPANY		)
	Complainant,	)
		)
v		)
		)
CSX TRANSPORTATION, INC ,		)
	Defendant	)
<hr/>		)

Docket No NOR 42101

**PART II – REBUTTAL VERIFIED STATEMENTS**

- 1) Rebuttal Verified Statement of Mary Pileggi, North American Region Logistics Manager, DuPont Logistics, Global Sourcing and Logistics
- 2) Rebuttal Verified Statement of Thomas D Crowley, President, L E Peabody and Associates, Inc , Alexandria, Virginia

**PUBLIC VERSION**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

<hr/>		)	
E.I. DUPONT DE NEMOURS AND COMPANY		)	
	Complainant,	)	
		)	
v		)	Docket No. 42101
		)	
CSX TRANSPORTATION, INC		)	
	Defendant.	)	
<hr/>		)	

**REBUTTAL VERIFIED STATEMENT OF MARY PILEGGI  
E I DUPONT DE NEMOURS AND COMPANY**

1 My name is Mary Pileggi. I am the U S /Canada Regional Logistics Manager for E.I du Pont de Nemours and Company ("DuPont") in Wilmington, DE. I am the same Mary Pileggi who submitted a Verified Statement as part of the Opening Evidence filed by DuPont in this proceeding on February 4, 2008. I am submitting this Rebuttal Verified Statement in response to claims made by CSX Transportation, Inc ("CSXT") in its Reply Evidence filed on March 5, 2008 that CSXT lacks market dominance over the transportation of nitrobenzene from Pascagoula, MS to Neuse, NC.

2. CSXT contends that effective truck competition exists

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]<sup>1</sup>

3. [REDACTED] we scrambled on very short notice to craft a case based upon the little information that we had from the one and only time we ever had used trucks to carry nitrobenzene from Pascagoula to Neuse. As I stated in my Opening Verified Statement, that was for only a few months after Hurricane Katrina, when rail simply was not an option [REDACTED]

[REDACTED] In fact, the truck rates that we had paid following Hurricane Katrina were much higher than even the rate increase that CSXT was proposing for this traffic [REDACTED]

[REDACTED]

[REDACTED]

4 [REDACTED]

[REDACTED] However, even that rate increase was [REDACTED]% above previous levels

[REDACTED]

[REDACTED]

5 I presented the only real truck rate offers in my Verified Statement submitted with the DuPont Opening Evidence. First, I presented the rates of [REDACTED], which was the only motor carrier to actually handle this movement by truck, after Hurricane Katrina. Those truck costs exceeded the cost of using CSXT by [REDACTED]%. Second, I presented the rates of [REDACTED]

[REDACTED]

[REDACTED] this should be among the lowest rates available to DuPont, which still exceeds the cost of using CSXT by [REDACTED]%. However, in order to be extra conservative in my

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<sup>1</sup> All shaded text is CONFIDENTIAL and HIGHLY CONFIDENTIAL information that has been redacted from the public version of this pleading

**PUBLIC VERSION**

analysis of truck rates, I also included an even lower rate quote from [REDACTED], which was not an actual contract rate, like the other two, but a verbal quotation obtained during our hastily assembled presentation to CSXT during contract negotiations. Even though that rate was the lowest of the three, it still exceeded the cost of using CSXT by [REDACTED]%, and thus was never used as evidence of effective truck competition

6. CSXT claims that DuPont could have obtained even lower truck rates if it had included a large volume commitment, [REDACTED]

[REDACTED] That is an improper observation. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

7 CSXT witness, Bruce Kuzma, claims that I have overstated the [REDACTED]% price differential between rail and truck because I failed to account for cost savings, such as labor and rail car costs, that DuPont would realize if it switched to trucks. Mr. Kuzma is incorrect. I accounted for all the savings that he claims I overlooked. Moreover, Mr. Kuzma claims that DuPont represented many of these savings in contract negotiations with CSXT. I don't know how Mr. Kuzma can speak so authoritatively on our contract negotiations, since he has never negotiated price levels directly with any of the DuPont Logistics or with any DuPont business units, and throughout our 2007 contract negotiations, his presence at face-to-face negotiation sessions with DuPont has been very limited

**PUBLIC VERSION**

8 I expressly included rail car cost savings in paragraph 14 of my Opening Verified Statement I added \$ [REDACTED] per rail shipment to CSXT's line haul rate before comparing the rail and truck costs

9 I did not include any labor savings from using truck because there would not be any

[REDACTED]

[REDACTED] In fact, [REDACTED], our nitrobenzene customer at Neuse, complained about the additional labor costs that it incurred to unload four times as many trucks as rail cars after Hurricane Katrina

10 I also did not include any inventory cost savings from switching to truck because there would not be any. Mr Kuzma misleadingly contends that DuPont would save on inventory costs based entirely on a statement that DuPont made about shipments of salt to Niagara Falls, NY But, DuPont never made such a claim as to this nitrobenzene movement. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**VERIFICATION**

STATE OF DELAWARE    )  
                                  )  
CITY OF WILMINGTON    )

I, Mary Pileggi, verify under penalty of perjury that I have read the foregoing Rebuttal Verified Statement of Mary Pileggi, that I know the contents thereof, and that the same are true and correct Further, I certify that I am qualified and authorized to file this statement

Executed on April 3, 2008

  
\_\_\_\_\_  
Mary Pileggi

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

<b>E. I. duPont de Nemours and Company</b>	)	
	)	
<b>Complainant</b>	)	
	)	
<b>v.</b>	)	<b>Docket No. NOR 42101</b>
	)	
<b>C.SX Transportation, Inc.</b>	)	
	)	
<b>Defendant</b>	)	

**Rebuttal  
Verified Statement**

**of**

**Thomas D. Crowley  
President  
I. E. Peabody & Associates Inc**

**Due Date: April 4, 2008**

**PUBLIC VERSION**

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**LIST OF EXHIBITS**

<b><u>EXHIBIT NO.</u></b>	<b><u>DESCRIPTION</u></b>
IDC-14	Comparison of DuPont and CSXT Reply Evidence "Final Offer" Comparable Groups for the Pascagoula Movement
IDC-15	Impact of Rounding of Issue Traffic Miles on DuPont's Hazardous Comparable Group and Maximum R/VC Ratio
TDC-16	Comparison of DuPont's Reply Comparable Group R/VC Ratio Range and Average by Year – Hazardous
IDC-17	Rate of Return Implicit in DuPont's Line-Haul Rates For Hazardous Movement on CSX I
TDC-18	Comparison of Application of CAPM Cost of Capital in DuPont's Reply to CSX I's Suggested Application Methodology – Hazardous

## **I. INTRODUCTION**

My name is Thomas D. Crowley. I am the same Thomas D. Crowley who filed verified statements in this proceeding on February 4, 2008 ("Opening VS") and March 5, 2008 ("Reply VS") on behalf of E. I. duPont de Nemours and Company ("DuPont"). My qualifications and experience are attached to my Opening VS as Exhibit\_(TDC-1).

DuPont is requesting that the Surface Transportation Board ("STB") prescribe reasonable rates, service terms and reparations associated with the transportation of Nitrobenzene (a hazardous commodity) via CSX Transportation, Inc. ("CSXT") from Pascagoula, MS to Neuse, NC (Pascagoula Movement).

In my Opening VS, I applied the STB's procedures for the Three-Benchmark Methodology specified in the STB's September 5, 2007 decision in Ex Parte No. 646 (Sub-No. 1) *Simplified Standards for Real Rate Cases* ("Simplified Standards") and provided the following information in support of DuPont's request:

1. The revenue / variable cost ("R/VC") ratio for the issue movement.
2. The selection of comparable CSXT movements from the STB's Unmasked Confidential Waybill Sample ("Waybill Sample") for CSXT for each year 2002 through 2005.
3. The upper boundary of the R/VC ratio for the comparable group (referred to as the Maximum R/VC Ratio) for the issue movement following the STB's procedures specified in *Simplified Standards*.
4. The identification and quantification of other relevant factors, and
5. The relief to which DuPont is entitled for the issue movement.

Simultaneous with the filing of DuPont's Opening evidence on February 4, 2008, CSXT filed its Opening evidence in this proceeding. In my Reply VS, I critiqued and responded to CSXT's Opening evidence and incorporated revisions to the analyses included in my Opening VS. My Reply VS included the "Final Offer" comparable groups for the issue movement.<sup>1</sup>

Simultaneous with the filing of DuPont's Reply evidence on March 5, 2008, CSXT filed its Reply evidence in this proceeding with its "Final Offer" comparable group for the issue movement.

In my Rebuttal verified statement ("Rebuttal VS"), I respond to CSXT's Reply evidence criticisms of my Opening VS, and provide a critique of CSXT's Reply evidence analyses and results. My Rebuttal VS is summarized under the following headings:

- II Variable Costs and R/VC Ratio for the Issue Movement
- III Comparable Group Selection
- IV Other Relevant Factors
- V Relief for DuPont

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<sup>1</sup> See Reply VS Exhibit (IDC-11)

**II. VARIABLE COSTS AND R/VC  
RATIOS FOR THE ISSUE MOVEMENTS**

As discussed in my Reply VS at pages 3 through 7, CSXT and DuPont agreed on the rates for the issue movement but disagreed on the variable costs. I identified one difference between DuPont's and CSXT's Opening evidence calculation of variable costs and explained why CSXT was incorrect.

In its Reply evidence, CSXT did not address differences in the parties' variable cost calculations. The correct variable costs and R/VC ratio for the issue movement are shown in Tables 2 and 3 respectively in my Reply VS.

### **III. COMPARABLE GROUP SELECTION**

The SIB's decision in Simplified Standards specified the procedures to develop the Maximum R/V<sub>C</sub> Ratio for the issue movement using the Three Benchmark Methodology. The primary component of the specified procedures is the selection of the comparable group for the issue movement as it forms the basis for all subsequent calculations. Each party selects its initial comparable group for the issue movement and submits it in simultaneous opening evidence filings. After reviewing the other party's opening evidence, each party has the option to make modifications to its initial comparable group but is restricted to the universe of movements submitted in opening, i.e., the combination of movements submitted by both parties. On Reply, each party must submit its "final offer" comparable group for the issue movement without the benefit of evaluating criticisms from the other party. On Rebuttal, each party may critique the other party's "final offer" comparable group.

In my Opening VS, I presented the comparable group for the issue movement. In my Reply VS, I critiqued CSXI's comparable group that it filed for the issue movement. I also modified my comparable group based on CSXI's Opening evidence. In its Reply, CSXT critiqued my opening comparable group and revised its opening comparable group by adopting some of DuPont's selection criteria. My review of CSXI's Reply evidence and my discussion of the remaining differences in the comparable movement selection criteria are summarized below under the following topics:

- A. Comparison of Comparable Groups
- B. Differences in Selection Criteria

**A. COMPARISON OF  
COMPARABLE GROUPS**

In my Reply VS at pages 8 through 17, I compared the respective initial comparable groups and developed the "final offer" comparable group for the issue movement. In CSXT's Reply evidence at pages 10 through 22 CSXT addressed the differences between the parties' initial comparable group and developed its "final offer" comparable group for the issue movement. In this Rebuttal I have developed a comparison of CSXT's "final offer" comparable group to the "final offer" comparable group from my Reply VS.

Exhibit\_(TDC-14) compares my Reply comparable group for the Pascagoula Movement to the Reply comparable group presented by CSXT. Exhibit\_(TDC-14) is broken into two sections. The first section lists the movements in my Reply VS comparable group ("DuPont Section"). These movements are color-coded to identify whether or not they were included in CSXT's comparable group. Movements shaded in blue were included in CSXT's Reply comparable group. Movements shaded in yellow were not included in CSXT's Reply comparable group. For the yellow-shaded movements I identified one of the following reasons as to why that particular movement was not included in CSXT's comparable group based on CSXT's Reply description of its selection criteria:

1. The miscellaneous charges were zero, or
2. The movement mileage was outside of CSXT's mileage range.

The applicable reason for exclusion from CSXT's Reply comparable group is identified by numbers 1 and 2 (corresponding to the above two reasons) which were placed to the left of each yellow-shaded movement on Exhibit\_(TDC-14).

The second section of Exhibit\_(TDC-14) lists the movements in CSXT's Reply comparable group and compares them to the comparable group I submitted in Reply for the Pascagoula Movement (CSXT Section ). CSXT's movements are color-coded to identify whether or not they were included in my Reply comparable group. Movements shaded in blue were included in my Reply comparable group.<sup>2</sup> Movements shaded in green were not included in my Reply comparable group. For the green-shaded movements, I identified that the only reason why that particular movement was not included in my Reply comparable group was that the miles for the movement fell outside the mileage range specified in my selection criteria, i.e., outside +/- 150 miles of the miles for the issue movement rounded to the nearest 50-mile increment.

My discussion of the reasons for the differences between CSXT's Reply comparable groups and my Reply comparable groups for each issue movement is contained in the following section:

**B. DIFFERENCES IN  
SELECTION CRITERIA**

In my Opening VS. at pages 8 through 10, I explained how I selected the comparable movements from the SIB's Waybill Samples for 2002 through 2005 to develop the comparable group for the issue movement. At pages 13 through 19 of its Opening filing, CSXT explained how it selected the comparable group that it applied to the movement at issue. At pages 8 through 16 of my Reply VS., I critiqued the differences between the respective parties' Opening comparable group. At pages 10 through 22 of its Reply evidence, CSXT did the same.

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<sup>2</sup> These are the same movements shaded in blue in the DuPont Section of Exhibit\_(TDC-14)

The comparison of the Reply comparable groups submitted by DuPont and CSXT discussed above identified only two remaining differences in selection criteria. My discussion of these differences is contained under the following headings:

1. Miscellaneous Charges
2. Length of Haul
3. Summary

**1. Miscellaneous Charges**

At pages 17 through 18 of its Reply, CSXT claims it “appropriately limited its comparison group to only those movements for which CSX applied a fuel surcharge” while DuPont did not apply this limitation. CSXT uses the Miscellaneous Charges field in the Waybill Sample as the identifier as to whether or not a movement was assessed a fuel surcharge.

This fuel surcharge issue was addressed at pages 12 through 14 of my Reply VS and CSXT raises no new arguments in its Reply.

First, CSXT provided no evidence of a link between fuel surcharges and miscellaneous charges reported in the Waybill Sample. The Waybill Sample User Guide provided by the STB along with the Waybill Sample defines Miscellaneous Charges as “The total of all miscellaneous charges, excluding transit and freight revenue charges, shown in dollars.” The definition clearly encompasses more than fuel surcharge revenues.

Second, CSXT did not provide any evidence that it reports fuel charges separately in the miscellaneous charges field of the Waybill Sample or that fuel surcharges are the only monies reported in the miscellaneous charges field

Lastly, CSXT attempted to justify its exclusion of movements with no miscellaneous charges, which CSXT equates to fuel surcharges, by stating that fuel prices have nearly tripled from January 2002 to January 2008 and more than doubled from January 2002 to December 2005, the time period covered by the Waybill Sample.<sup>2</sup> CSXT gives the impression that it was not compensated for increasing fuel prices if there was no fuel surcharge shown for a movement. Even assuming that the miscellaneous charges did reflect fuel surcharges, the lack of miscellaneous charges does not mean that CSXT was not compensated for increasing fuel prices.

Exhibit\_(TDC-9) to my Reply VS contained a comparison of the increase in the EIA U.S. No. 2 Diesel fuel price cited by CSXT and the fuel component of the Rail Cost Adjustment Factor (RCAF) used to adjust rates for rail traffic. As shown in Reply Exhibit\_(TDC-9), the fuel component of the RCAF increased at a faster rate than EIA's U.S. No. 2 Diesel price. Specifically, the fuel component of the RCAF nearly quadrupled from 1Q02 to 1Q08 and more than tripled from 1Q02 to 4Q05. Even if there was no separate fuel charge, the rate adjustment mechanism, e.g., the RCAF, was capturing the increase in CSXT's fuel prices.

For the above reasons, CSXT's exclusion of comparable movements simply on the basis of zero miscellaneous charges is improper.

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<sup>2</sup> See footnote 15 on page 16 of CSXT's Opening evidence.

## **2. Length of Haul**

In my Opening VS. at page 9 I explained that one of my selection criteria for comparable movements was loaded miles within a range of plus or minus 150 miles of the issue movement loaded miles rounded to the nearest 50 miles. This resulted in a mileage range of 650 to 950 miles for the Pascagoula Movement. In my Reply VS. I continued to rely on this mileage range when selecting my "final offer" comparable group for the issue movement.

In Opening CSXI's selection criteria was much broader, i.e., CSXT included movements in the comparable group with mileages as low as 202 miles and as high as 1,130 miles. CSXT's broad mileage range was critiqued at pages 15 through 16 of my Reply VS.

In Reply CSXI accepted the mileage range of plus or minus 150 miles but applied it incorrectly. CSXT attempts to justify its misapplication by claiming that DuPont committed two errors in its mileage selection. First, CSXI takes issue with the rounding of the issue movement miles to the nearest 50-mile increment prior to the application of the plus or minus 150 mile range. Second, CSXT disagrees with the issue movement miles used by DuPont. As explained below, neither of these differences are errors.

DuPont's rounding of the issue miles to the nearest 50-mile increment was the criteria selected to identify comparable movements in the Waybill Sample. There was no intention to identify more shorter or more longer movements as CSXI seems to infer in its discussion at page 20 of its Reply evidence.

To test the impact of DuPont's 50-mile rounding criteria, I used the universe of comparable movements selected by each party in Opening and applied the selection criteria I used in Reply for the selection of the final offer comparable group changing only the mileage range to plus or minus 150 miles of the issue movement miles as calculated by DuPont. The result, shown in Exhibit (TDC-15) is that the rounding of the issue miles has only a minor impact on the comparable group and the resulting Maximum R/VC Ratio. Specifically, for the Pascagoula Movement, the number of comparable movements increases from 23 to 40 and the Maximum R/VC Ratio increases from 319% to 330%. While the number of comparable movements nearly doubles, the Maximum R/VC Ratio increases by less than 4%. Stated differently, the impact of rounding the issue movement miles has virtually no impact on the Maximum R/VC Ratio.

CSXI's disagreement with DuPont's issue movement miles used to determine the starting point for the mileage range has no merit. As I explained at pages 5 through 6 of my Reply VS. CSXI improperly relied on miles from internal data prohibited by the STB. DuPont properly relied on miles obtained from the same source used to develop the miles for the movements in the Waybill Sample.

### **3. Summary**

CSXI has improperly and unreasonably included only those movements with miscellaneous charges greater than zero. CSXI has also improperly applied the mileage range by relying on miles developed using information that the STB has prohibited from these proceedings.

DuPont's comparable group should be accepted by the STB.

#### **IV. OTHER RELEVANT FACTORS**

In this section of my Rebuttal VS I respond to CSXI's Reply evidence pertaining to the other relevant factors included by CSXT. Then, I respond to CSXI's Reply evidence criticism of DuPont's other relevant factors. These discussions are contained below under the following headings:

A. CSXI's Other Relevant Factors

B. DuPont's Other Relevant Factors

#### **A. CSXT'S OTHER RELEVANT FACTORS**

My discussion of CSXI's other relevant factors addresses the two factors developed by CSXT in its evidence, i.e., (1) an adjustment to RSAM Ratio, and (2) indexing of Waybill Sample variable costs and revenues.

##### **1. Adjustment to RSAM Ratio**

In my Reply VS at pages 22 through 27, I explained why CSXI's adjustment to the RSAM Ratio for an alleged failure to include taxes was improper and erroneous. In its Reply evidence, at pages 24 through 25, CSXI refers to this correction as simply a "technical correction" and claims that it is different from the "organic change to the RSAM proposed by DuPont." CSXI offers no support for its contention that the STB erred in Simplified Standards. CSXT's adjustment should be rejected by the STB.

**2. Indexing of Waybill Sample  
Variable Costs and Revenues**

In my Reply VS. at pages 27 through 34, I explained why CSXI's indexing of Waybill Sample variable costs and revenues was improper, unsupported, and unnecessary.

In its Reply at pages 23 through 24, CSXT continues to assert that the 2002 to 2005 revenue and variable cost data for the comparable group from the Waybill Sample provides an inconsistent comparison for evaluating the R/VC ratios of the challenged rates and must be indexed to 2007.

To demonstrate that indexing is not required, I developed the range and average R/VC ratios for the comparable movements included in DuPont's "final offer" comparable group included in my Reply VS. The results of this analysis are shown on Exhibit\_(IDC-16).

Exhibit\_(IDC-16) shows that the R/VC ratios for the comparable movements over the four-year period of 2002-2005 cover a wide range each year but the annual averages are within a much narrower band. Exhibit\_(IDC-16) also shows that the R/VC ratios are higher in the earlier years. This supports the STB's position at pages 84-85 of Simplified Standards that no indexing of revenues or variable costs is necessary as the R/VC ratios will reflect the annual changes in revenues and variable costs. Applying CSXT's indexing methodology to the revenues and variable costs will artificially increase the R/VC ratios of the comparable movements as shown by the high R/VC ratios presented in CSXI's evidence.

**B. DUPONT'S OTHER  
RELEVANT FACTORS**

In my Opening VS, I included two other relevant factors and quantified their application on the calculation of the Maximum R/VC Ratio for the issue movements. In my Reply VS, I performed the same analyses applied to the "final offer" comparable groups for each issue movement. In its Reply, CSX1 criticized the two other relevant factors presented in my testimony. CSX1's criticisms and my responses are discussed under the following topics:

1. STB's RSAM Ratio Adjusted for Efficiency
2. STB's RSAM and R/VC<sub>IM</sub> Ratios Adjusted for the STB's New Cost of Capital Methodology

**1. STB's RSAM Ratio  
Adjusted for Efficiency**

At pages 11-12 of my Opening VS, I described the methodology I used to adjust the STB's RSAM for efficiency. I used that same methodology in my Reply VS.

In its Reply at pages 35 through 37, CSX1 claimed that DuPont's RSAM ratio adjusted for efficiency should be rejected by the SIB. The "Long-Cannon" factors address the amount of traffic transported by a railroad (a) at revenues that do not cover costs and (b) at revenues that contribute only marginally to fixed cost. Simplified Standards allows a party to introduce evidence on other relevant factors including that the defendant railroad is not operating as efficiently as it could. My efficiency adjustment addresses these Long Cannon concerns.

My adjustment to the RSAM ratio by excluding movements with a R/VC ratio less than 1.0 satisfies both of these objectives. First, it eliminates the inefficiency of CSXT handling traffic that does not cover its cost or contributes only marginally to fixed costs. Second, it satisfies the other relevant factors component of Simplified Standards as I have quantified the impact on the calculation of the maximum R/VC ratios for the issue movements.

**2. STB's RSAM and R/VC<sub>1000</sub>  
Ratios Adjusted for the STB's  
New Cost of Capital Methodology**

At pages 13-15 of my Opening VS, I described the methodology I used to incorporate the STB's January 17, 2008 decision in Ex Parte No. 664 Methodology to be Employed in Determining the Railroad Industry's Cost of Capital ("Cost of Capital") to replace its single-stage Discounted Cash Flow (DCF) model with a Capital Asset Pricing Model ("CAPM") to determine the cost of equity component in the cost of capital calculation. I used that same methodology in my Reply VS.

In its Reply at pages 25 through 35, CSXI put forth several reasons why DuPont's adjustment should not be accepted by the STB. Before I discuss the reasons why I believe CSXI's position should be rejected, I will summarize the return on equity implicit in the line-haul rates that CSXI's evidence suggests should be charged to move the issue traffic. Table 1 below compares the return on equity included in the 2005 CAPM WACC to the return on equity included in the rate level suggested by CSXI's evidence on pre-tax and after-tax bases.

<u>Item</u> (1)	<u>Return On Equity</u>	
	<u>After-Tax</u> (2)	<u>Pre-Tax</u> (3)
1 STB 2005 CAPM WACC	8.4%	12.9%
2 Pascagoula Movement	93.6%	32.9%

Source Exhibit\_(TDC-17)

Table 1 demonstrates that the return on equity implicit in the rate level suggested by CSXT's evidence is many multiples greater than the STB 2005 CAPM WACC return on equity

I will now address CSXT's critique of DuPont's cost of capital other relevant factor

First CSXT states that the STB does not and should not, retroactively apply methodology changes and cites several proceedings in support of its position CSXT is ignoring one very important consideration, i.e. the RSAM calculation is based on a multi-year average It would be improper and incorrect to adjust the calculation for the CAPM cost of capital in one year and then average it with other years where the adjustment is not made

Second CSXT claims that this proceeding is not the proper forum for a "far-reaching" retroactive change CSXT states that the current RSAM methodology was developed as a product of multiple agency proceedings over several years CSXT's objection is a double standard The incorporation of the change to the cost of capital, which the STB has approved is nothing more than a "technical

correction to use CSXI's terminology. The STB has the data and programs in place to substitute the CAPM cost of capital into its URCS program to develop revised URCS formulas for the 2002-2005 time period and then apply the revised URCS formulas to the movements in the Waybill Sample to develop the variable costs for each movement. Once this has been completed, the selection process and Maximum R/VC Ratio calculations follow the procedures outline in Simplified Standards.

Third, CSXF claims that adjusting for the CAPM cost of capital would add complexity, cost and delay to these proceedings. This is only partially true. There has been some degree of complexity and cost added because DuPont, rather than the STB, has made the calculations to substitute the CAPM cost of capital into the URCS and Waybill Sample process. However, this complexity and cost will disappear in future proceedings once the STB performs these calculations and distributes the revised URCS and Waybill Sample to the parties to these types of disputes. As for delay, CSXT is misguided because the schedule for the instant proceeding has not been modified for this issue.

Fourth, CSXT claims that DuPont failed to make other necessary adjustments to fully reflect the impact of the CAPM cost of capital. Specifically, DuPont did not re-cost the comparable group movements or the issue movements using the CAPM cost of capital. CSXT goes on to say that the comparable group should be re-selected based on the revised R/VC ratios that would result from the revised variable costs using the CAPM cost of capital.

CSXT is correct that DuPont did not re-cost the comparable group movements or the issue movement and did not re-select the comparable group as these adjustments are prohibited by

Simplified Standards Specifically the impact of other relevant factors must be quantified after the comparable group has been selected from the Waybill Sample provided from the STB That is why DuPont adjusted only the R/VC adjustment ratio applicable to the comparable group movements for the application of the CAPM cost of capital

However all of the adjustments identified by CSXT can be made and I have done so in this Rebuttal in order to demonstrate that DuPont's methodology provided conservative results Exhibit (IDC-18) displays the results of my analysis The variable cost, maximum R/VC ratio and maximum rate for the issue movement based on my Reply VS application of the CAPM cost of capital adjustment are shown in Columns (2) through (4), respectively Columns (5) through (7) show the results after making the adjustments suggested by CSXI including re-selecting the comparable movements As CSXT surmised the maximum R/VC ratio is higher for the issue movement However the application of the higher maximum R/VC ratio to the lower issue movement variable costs results in a lower maximum rate than shown in my Reply VS Based on this analysis, DuPont's methodology for the CAPM costs of capital adjustment is conservative

In summary DuPont's modification for CAPM cost of capital is a technical correction should be made retroactively and can be implemented by the STB with minimal effort even reflecting all the adjustments suggested by CSXI

**V. RELIEF FOR DUPONT**

As shown in Table 7 of my Reply VS. DuPont is entitled to relief totaling \$140 million using the STB > RSAM and R/VC<sub>180</sub> ratios subject to the appropriate cap in Three-Benchmark cases. The relief increases to \$191 million using the RSAM and R/VC<sub>180</sub> ratios adjusted for efficiency and to \$197 million using the RSAM and R/VC<sub>180</sub> ratios adjusted only for the CAPM cost of capital (i.e., unadjusted for efficiency), again subject to the appropriate cap.

REDACTED

**REDACTED**

**REDACTED**

**REDACTED**

REDACTED



**PUBLIC VERSION**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

---

E I DUPONT DE NEMOURS AND COMPANY )

Complainant, )

v. )

CSX TRANSPORTATION, INC , )

Defendant )

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Docket No NOR 42101

**PART III – REBUTTAL EXHIBITS**

# **EXHIBIT A**

**REDACTED**

# **EXHIBIT B**

**REDACTED**

**CERTIFICATE OF SERVICE**

I hereby certify that I have on this 4th day of April 2008, served a copy of the foregoing Complainant's Rebuttal Evidence on Paul Moates and Paul Hemmersbaugh, Sidley and Austin, 1501 K Street, NW, Washington, D C. 20005, via hand delivery and email



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Jeffrey O Moreno