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FOUNDED 1866

December 28, 2007

Electronic Filing

Vernon Williams
Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C.
20423

Re: DuPont v. CSX Transportation, Inc., STB Dkt. Nos. 42099, 42100, 42101

Dear Secretary Williams:

Enclosed, for filing in the above-referenced cases, is Defendant CSX Transportation's Reply in Opposition to the Motions to Compel of E.I. DuPont De Nemours and Company ("DuPont"). Please file this Reply in each of the three above-referenced cases. If you have any questions about this filing, please contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "Paul Hemmersbaugh", with a large, stylized flourish extending from the end of the signature.

Paul A. Hemmersbaugh

cc: Nicholas DiMichael

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

	)	
E.I. DUPONT DE NEMOURS AND COMPANY	)	
	)	
<i>Complainant,</i>	)	
	)	
v.	)	Docket Nos. NOR 42099,
	)	42100, and 42101
	)	
CSX TRANSPORTATION, INC.	)	
	)	
<i>Defendant.</i>	)	
	)	

**DEFENDANT CSX TRANSPORTATION INC.’S REPLY IN OPPOSITION TO
THE MOTION TO COMPEL OF E.I. DUPONT DE NEMOURS AND COMPANY**

Defendant CSX Transportation, Inc. (“CSXT”) hereby submits this Reply in Opposition to the Motions to Compel of E.I. DuPont De Nemours and Company (“DuPont”).¹ DuPont’s Motions seek to impose upon CSXT the significant burden and expense of compiling and producing a large volume of information and documents that are not relevant to DuPont’s challenge to CSXT rates established in 2007. DuPont chose to challenge CSXT rates for seven selected movements (from among the hundreds covered by the parties’ expired contract) under the “Three Benchmark” approach that the Board adopted to provide a “simplified and expedited” method of determining rate reasonableness for small shipments. *See Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), Decision at 22 (Sept. 4, 2007) (“*Simplified Standards*”). Limited, expeditious discovery is key to achieving the central aim of the Three Benchmark approach: simple, expedited, and inexpensive rate reasonableness

¹ For convenience and simplicity, CSXT consolidates its response to each of DuPont’s three identical Motions to Compel in this single Reply.

determinations for small cases. *See id.*; 49 U.S.C. § 10701(d)(3). Having made the tactical decision to proceed under the simplified Three Benchmark approach, DuPont now attempts to avoid its inherent simplifying limitations by seeking burdensome and time-consuming discovery regarding historical data of little relevance to these cases. Moreover, the purpose for which DuPont seeks this burdensome discovery – to expand the universe of potentially “comparable” movements to four historical years stretching back to 2002 – would add substantial complexity, delay, and expense to these proceedings. As demonstrated below, DuPont has failed to meet its burden to show that its requests for burdensome, time-consuming, and costly discovery are appropriate in these cases. Because there appears to be a genuine dispute between the parties about the proper source for comparable movements, CSXT requests that the Board also clarify that each party’s proposed may include only origin-destination pairs drawn from the most recent Waybill Sample data (presently for the year 2005) provided to the parties.

DuPont’s Motions seek three primary categories of historical documents and information. First, they seek all CSXT Private Price Quotations (“PPQs”) for movements from the Waybill Samples for 2002 through 2005, inclusive, that are local to CSXT, have an R/VC_{>180}, and move in tank cars or in covered hoppers. At a minimum, the requested documents would comprise tens of thousands of pages and would take several weeks of employee-hours and computer time for CSXT to identify, gather, and produce. In response to DuPont’s request, CSXT conducted a special study to develop, and generate a list of all PPQs satisfying DuPont’s criteria for the most recent Waybill Sample (2004) available to the parties at the time of production of that information and produced that

listing to DuPont.² In order to resolve this dispute, CSXT would be willing to conduct another special study and produce similar information for the 2005 Waybill Sample, which the Board issued after the deadline for production of documents.

Second, DuPont seeks information, filtered by criteria similar to those described above, identifying movements from the Waybill Samples for 2002 through 2005 for which there is dual rail service at both the origin and destination. Developing such information requires a burdensome and laborious effort similar to that required to develop the PPQ listing. Nonetheless, to accommodate DuPont's request, CSXT again conducted a special study to develop a listing of such movements for 2004 and produced that information to DuPont on December 18, 2007. In order to resolve this dispute, CSXT would be willing to conduct yet another special study to develop and produce similar information for movements from the 2005 Waybill Sample.

Third, DuPont seeks the production of CSXT rail density charts from 2002 through 2005. Because rail density for prior years is not relevant to the evaluation of current rates and movements, and because previous and outdated density charts are difficult to locate, CSXT objected to producing historical density charts. After it filed its objections, however, CSXT located density charts for the years 2001 through 2006, and produced those documents to DuPont on December 19, 2007.³ Item C in each of DuPont's three Motions is therefore moot.

² CSXT is not required to conduct such a special study, but it did so in an effort to accommodate DuPont's request for PPQ information.

³ DuPont apparently did not review the documents that CSXT produced before filing its Motions on December 20, 2007, and instead based its Motions on CSXT's objections rather than the documents it produced.

Standard

Consistent with the congressional mandate to establish an expeditious, simple, and less expensive approach for smaller rate cases, the *Simplified Standards* Decision provides for limited discovery and establishes demanding standards for the evaluation of motions to compel discovery:

In reviewing discovery disputes by either party over evidence of other relevant factors, we will *scrutinize the burden* placed on the party from which discovery is sought. *Even if information requests are clearly relevant, if the burden is considerable we might not require the discovery.*

Simplified Standards, Decision at 22 (emphasis added); see also *id.* at 78 (“[T]he better approach is to apply strict discovery standards, *under which greater emphasis will be placed on the burden imposed.*”) (emphasis added). Limited discovery is necessary to achieve a rail rate dispute resolution that is “accessible to small shippers in a *timely* and *cost-effective* manner.” *Id.* at 36.⁴ This higher standard is also consonant with the Board’s practice of favoring narrow discovery in proceedings that follow expedited procedural schedules and require particularly orderly administration. See *Pioneer Industrial Ry. Co. – Alternative Rail Service*, STB Finance Docket No. 34917, STB

⁴ DuPont apparently does not believe that expeditious compliance with discovery obligations is a two-way street, or that both parties must meet discovery schedules in order to allow a Three Benchmark case to be completed in accordance with the tight procedural schedule established in *Simplified Standards*. When DuPont filed its Motions to Compel, two days after the deadline for production of responsive documents under the Board’s rules, it had not yet produced a single document to CSXT. For its part, CSXT conducted a strenuous, time-and-resource intensive effort to produce responsive documents and information within the tight timelines provided by the rules, and had *completed* its production before DuPont filed its Motions to Compel. As of the date of this filing, DuPont still has not completed its document production and its counsel has indicated it likely will not make its next document production until after the December 31, 2007 deadline for completion of all discovery.

Docket Nos. AB-878, AB-1066X (Jan. 12, 2007) (“In light of this decision and the *expedited procedural schedule* intended to resolve these issues quickly, [the Board] believe[s] the narrower discovery requests, if any, would be more appropriate. . . .”) (emphasis added); *PEPCO v. CSX Transp., Inc.*, STB Docket No. 41989 (May 14, 1997). Applying this rigorous standard, the Board should deny DuPont’s Motions, which seek to compel burdensome but only marginally relevant discovery, in their entirety.

I. THE BURDEN OF IDENTIFYING, GATHERING, AND PRODUCING DATA AND INFORMATION REQUESTED FOR THE YEARS 2002 THROUGH 2003 FAR OUTWEIGHS ANY MARGINAL POTENTIAL RELEVANCE OF THAT DATA.

DuPont’s Motions seek historical documents and information pertaining to movements from the 2002 through 2005 Waybill Samples. Such historical documents and information, particularly for information pertaining to the movements contained in the 2002 and 2003 Waybill Samples, have little-to-no relevance to the challenged rates that were issued in 2007. The significant burden on CSXT to identify, gather, and produce such historical information outweighs any minimal potential relevance or value of that information, particularly in simplified and expedited Three Benchmark cases.

A. DuPont's Requests For 2002 Through 2003 Are, At Most, Marginally Relevant To The Challenged Rates Which Were Issued In 2007.

DuPont essentially contends that the Board's statement that comparable movements should "be drawn from the Waybill Sample provided to the parties by the Board at the outset of the case," renders all documents and information bearing on movements contained in the Waybill Samples for 2002 through 2005 subject to discovery.⁵ However, such historical information (concerning 2002-2004 Waybill Sample movements) is neither relevant nor within the scope of these cases.

Particularly in a time of rapidly changing rail transportation market conditions and volatile input costs (e.g., the doubling of diesel fuel costs since 2004), the Board should take care to limit any Three Benchmark case comparison group to the most recent available data. Changes in costs, rates, and other market conditions from 2002 to the present make comparisons with prior years (including comparisons of revenue-to-variable cost ratios) very difficult and of essentially no value in assessing the reasonability of 2007 rates. *See CSXT Motion to Hold Proceedings in Abeyance* at 4-8 (detailing market, cost, and revenue changes from 2001 to the present). R/VC-based comparisons – the heart of the Three Benchmark approach – must compare current (or

⁵ In its Motions, DuPont implicitly changes the time period of its request to 2002 through 2005 because the Board made available the 2005 Waybill Sample on December 19, 2007, the day after document production was to be completed under the Board's rules and after CSXT had substantially completed document production. In light of the Board's issuance of the 2005 Waybill Sample (and despite the fact that DuPont has not amended its discovery requests) and in order to resolve this dispute, CSXT would be willing to provide the same responsive information and documents for the 2005 Waybill Sample that it provided for the 2004 Waybill Sample. CSXT continues to object, however, to the lack of relevance and burden of producing information and documents pertaining to the 2002 and 2003 Waybill Sample.

very nearly current) data to that derived for the issue movements, or else they are meaningless.

Use of multiple historical years' Waybill Sample data would introduce confusion and complexity to Three Benchmark analysis, and further distort what is already a very rough and imprecise approach to evaluating rate reasonableness. Movement patterns vary substantially from year to year, as producers enter and exit markets and receivers change their sources and sourcing patterns. Over the course of four years, markets change, and lanes that moved traffic in an early year may have ceased to move traffic, routings may have changed, and movements from a sample that may have been representative four or even six years earlier (accounting for regulatory lag) may no longer be at all representative of a carrier's current traffic. Perhaps more important, over the course of several years, both rail transportation costs and revenues change, at different and varying rates. Any rational, non-arbitrary comparison and analysis of rates and prices across several years necessarily would be required to take account of, and adjust for, such changes to allow an apples-to-apples comparison. Such multi-period adjustments would be neither simple nor expeditious.

DuPont's simplistic reading of two unconnected sentences cobbled together from distant sections of the *Simplified Standards* Decision ignores both the context and the purpose of different elements of the Three Benchmark approach. See Motions at 3 (referring to a phrase from page 18 of the Decision and a sentence from page 80 of the appendix). DuPont argues that the Board's decision to release to parties four years of Waybill Samples data corresponding with the four most recent RSAM figures means that the comparison group should be drawn not from the most recent available Waybill

Sample data, but rather from data for the three preceding years as well. *See id.* Not only would this interpretation of the Decision flout Simplified Standards’ goals of simplicity and expeditious determination of small rate cases, it is not consistent with the history of this rulemaking and the rest of the Decision.⁶

In the Board’s Notice of Proposed Rulemaking (“NPRM”) and again in its decision highlighting issues to be addressed by witnesses at the public hearing, the Board expressed its concern that access to unmasked revenue data from the Waybill Sample was necessary to allow the parties to verify the Board’s RSAM and $R/VC > 180$ calculations. *See* Hearing Decision at 5 (Jan. 22, 2007); NPRM at 23, n. 41 (July 26, 2006). At the same time, the Board indicated that, for the purposes of rate cases, it would use four-year average figures to calculate the RSAM. *See* NPRM at 24. In order to enable the parties to a Three Benchmark case independently to verify the Board’s RSAM calculations for the four years comprising the average, it would be necessary for the Board to release Waybill Samples with unmasked revenues for all four of those years. This is precisely what the Board did in the final Simplified Standards decision, where it stated that,

⁶ The Board’s statement requiring potential comparable movements to “the Waybill Sample provided to the parties by the Board at the outset of the case” (*Simplified Standards*, Decision at 18) sought to ensure a level playing field between complainants and defendants by limiting comparison group selection to data readily available to both parties, namely the Waybill Sample and “other publicly available information.” *See Simplified Standards*, Decision at 83. Carrier commenters had advocated use of other information from their files (*e.g.* concerning movements not contained in the Waybill Sample) to select the comparison group. The Board determined that, because complainants would not have access to such data, comparison group movements should be limited to those contained in the Waybill Sample produced to both parties. *See id.* Thus, read in the proper context, the “must be drawn from the Waybill Sample” language of the Decision *limits* potentially comparable movements to Waybill Sample data; it does *not* expand the universe of potentially comparable movements to include three additional historical years’ Waybill Samples.

following the filing of a rate complaint invoking the Three Benchmark approach, the Board would “release the unmasked [revenues]Waybill Sample for the defendant carrier . . . for the 4 years that correspond with the most recently published RSAM figures.” *Simplified Standards*, Decision at 80 (emphasis added).

There is no indication in the record of the Simplified Standards proceeding that the Board decided to release four historical years of Waybill Sample data in order to expand the universe of movements from which the parties could select their comparison group, or for any reason other than to allow the parties to verify the Board’s RSAM and R/VC > 180 calculations. Indeed, all of the evidence is to the contrary. The NPRM does not state that the Board proposed to use multiple years’ Waybill Samples as the source for potential comparable movements. To CSXT’s knowledge, no party to the rulemaking proceeding submitted comments suggesting that it understood the Board to be proposing to use more than one year’s Waybill Sample for purposes of selecting comparable movements. Indeed, the parties who objected to a *one-to-two year* “regulatory lag” surely would have objected even more strongly to a *five-to-seven years lag* had the Board proposed to allow parties to select comparable movements from four years of historic Waybill Samples. *See, e.g.*, Opening Comments of Union Pacific Railroad Company at 58 (noting that unless the Board remedies the problem of lag in availability of Waybill Sample data, “a challenge to a rate set in June 2007 could potentially be analyzed based on rates that had not been available in the market since January 2005.”). Plainly, no party to the Simplified Standards proceeding understood the Board to be proposing to use four years’ Waybill Samples for purposes of comparison movement selection. And, had the

Board adopted such a materially different new rule without providing notice or opportunity to comment, that rule would be arbitrary, capricious and contrary to law.

More specifically, DuPont's position fails to consider that data and information for 2002 and 2003 movements do not reflect today's market conditions. Because market factors and conditions have changed radically in recent years, information and data from 2002 and 2003 is irrelevant to evaluation of the challenged rates, which were issued in mid-2007.

In recent years, CSXT's rail system has experienced demand for rail services, evidenced in part by increased congestion and capacity constraints on many of its key lanes. Capacity constraints, coupled with increasing demand for rail transportation services, have created an increased need for capital investment in rail infrastructure and facilities to ease congestion and reduce capacity limitations. The increased demand for rail services has also resulted in increased rail revenues in many markets, which is reflected in increased revenue per car. None of these demand-driven market characteristics and conditions is reflected in the historical data DuPont seeks in its Motions. In addition, data prior to 2005 does not adequately reflect the recent, drastic increases in the cost of diesel fuel, which has dramatically affected CSXT's costs of handling the issue traffic. CSXT considered each of these factors when it issued the challenged rates in mid-2007. From 2001 to 2004, however, such factors and market conditions were far less significant.

Changes have been even more pronounced in the transportation of hazardous materials, and in particular the transportation of chlorine. Rail transportation of chlorine and other hazardous materials changed drastically beginning in January 2005 following a

rail accident and release of chlorine near Graniteville, South Carolina. The Graniteville accident resulted in the deaths of eight residents and the train's engineer as well as the hospitalization of over 500 people due to the release of toxic chlorine gas. *Public Health Consequences from Hazardous Substances Acutely Released During Rail Transit --- South Carolina, 2005; Selected States, 1999—2004*, 54 (03) (Jan. 28, 2005) CDC Morbidity and Mortality Weekly Report, at 64-67, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5403a2.htm>. In 2006 alone, the carrier involved in the Graniteville accident recorded a charge of \$41 million to pay for expenses associated with the accident that were not covered by insurance. See Norfolk Southern Corp. Quarterly Report, Form 10-Q, SEC File No. 1-08339 (Oct. 31, 2006).

In the wake of that tragic accident and in response to heightened security concerns, new safety and security regulations have been issued, additional new and costly federal regulations are pending and likely to be issued very soon, and numerous new voluntary practices and procedures are being implemented by CSXT and other rail carriers, all to reduce the likelihood of an accidental release of chlorine or other highly hazardous material, and to minimize and mitigate any damage that might result from such a release.⁷ Recent increases in rail safety and security costs have been coupled with increased rail insurance costs, including significantly higher liability insurance rates. In some instances, full liability insurance coverage is not available at any reasonable cost.

Information and data prior to 2005 also do not reflect the significant and growing

⁷ CSXT is actively encouraging receivers of toxic inhalation hazard materials, such as chlorine, to source their purchases from sources that are geographically close to the receiver, in order to reduce the risk of accidental release of such materials. Today, CSXT attempts to create economic incentives for TIH transportation mileage reduction through some of its pricing. This new approach is not reflected in the historical information sought in DuPont's Motions.

government and public opposition to the transportation of hazardous materials through populated areas, which have affected the costs of transporting hazardous materials.

Movements that do not reflect the foregoing developments and conditions, as well as other changes in the market and environment in the last several years, simply are not “comparable” to movements in 2007-2008 and beyond. Thus, because the relevance and probative value pre-2004 data to the reasonableness of rates in 2008 is minimal, the Board should deny DuPont’s motion to compel burdensome discovery from 2001 through 2003. *See Procedures to Expedite Rail Rate Challenges to be Considered Under the Stand-Alone Cost Methodology*, STB Ex Parte No. 638 (Apr. 2, 2003) (Board emphasized “that a party seeking to compel discovery must show . . . that it needs the information to make its case”).

B. DuPont’s Discovery Requests Would Impose Significant Burdens Upon CSXT.

Against the very marginal relevance of the historical information sought by DuPont, the Board must balance the excessive costs and disproportionate burdens those requests would impose upon CSXT. In addition to the inconsistency of such burdensome discovery with the goals of a simplified and inexpensive proceeding, the additional time it would take CSXT to identify, gather, and produce such documents would very likely require an extension of the present tight procedural schedule. *Cf. Simplified Standards* at 22.

1. CSXT’s Private Price Quotations (“PPQs”)

The burden of searching for and producing the old and superseded information and data that DuPont seeks in these Motions would be significant. First, much of the sought data is not reasonably accessible to CSXT. For example, CSXT’s historical PPQs

are complex, cumulative documents reflecting frequent changes and amendments. Since 2004, CSXT has maintained most of those documents in electronic format on a mainframe computer. PPQs dating from 2003 and earlier, however, are primarily maintained in paper copies. Identifying and locating them would require manual searching of paper indices and hundreds of binders in CSXT files. CSXT would then be required to redact irrelevant, but highly confidential and sensitive commercial information from those voluminous documents (in many instances the redacted information concerning movements not contained in the Waybill Sample would constitute the overwhelming majority of the text of the PPQ) before copying and producing them.

Even for years following 2003, the identification and production of specific PPQs would be a time-and labor-intensive project. For example, in order to identify documents responsive to DuPont's request regarding the 2004 Waybill Sample, CSXT conducted a burdensome special study, which it was not required to undertake. CSXT's consultants first screened the 2004 Waybill Sample data provided by the Board to extract data sets matching the requirements specified by DuPont's requests. Then, CSXT attempted to match its proprietary pricing databases (querying approximately 700,000 records) with the data extracted from the Waybill Sample. This process required matching every car number, initial, and waybill date in the data extracted from the 2004 Waybill Sample with corresponding data in CSXT databases. Because of differences between the two data sets and their incompatible formats and parameters, CSXT personnel were then required to manually review each purported data match and remove or correct erroneous matches and data. This effort was very time-and-labor intensive, and took CSXT approximately a

week to complete for a single year (2004).⁸ All of those efforts simply identified potentially responsive PPQ identifier numbers.

Producing the actual documents themselves would require a second, substantially more burdensome effort. The existing version of a single PPQ that includes an origin-destination pair selected from the 2004 Waybill Sample frequently includes numerous other movements, as well as rates and terms developed, revised, and amended many times over the course of several years. In order to produce one such historical PPQ – which often constitutes many separate, interlinked and overlapping files and documents – CSXT would be required to manually extract and format the file and then print the resulting hundreds of pages. Because of the format, CSXT produced a list of responsive PPQs to DuPont, and has offered to allow DuPont’s outside counsel or consultants to come to CSXT’s offices in Jacksonville to review the corresponding documents for 2004.

Identifying, locating, and producing PPQs for prior years would require an even more burdensome and time-consuming process, because pre-2004 PPQs generally are not maintained electronically. CSXT estimates that producing PPQ data for the 2005 Waybill Sample similar to that produced for 2004 would require expenditure of time and resources similar to those used to generate the 2004 data. Nonetheless, in an effort to resolve this dispute and to accommodate DuPont, CSXT offers to gather and produce information concerning 2005 Waybill Sample PPQs analogous to that it produced for

⁸ One reason this process is so laborious and time-consuming is that CSXT’s system is designed primarily to allow it to view current PPQs for business purposes and CSXT rarely has a business need to review old PPQs that are no longer in force.

2004, and to allow DuPont's outside counsel or consultants to come to CSXT offices in Jacksonville to review the corresponding documents for 2005.⁹

2. Evidence Concerning Historical Market Dominance

DuPont's request that CSXT identify movements that are served by more than one carrier at origin and destination based upon the constraints and filters created by DuPont for four years' Waybill Samples, is equally burdensome. CSXT undertook a burdensome special study in order to identify the requested movements from the 2004 Waybill Sample. To identify the responsive movements, CSXT's consultants first had to extract data from the 2004 Waybill Sample corresponding to the criteria set forth in DuPont's discovery requests. CSXT then attempted to match the extracted data with CSXT data (including individual car number, initial, and waybill date information for every car), which is uses different parameters and formats than the Waybill Sample. Next, CSXT was required to re-format that data and run it through multiple screens and filters in order to find otherwise responsive movements where both the origin and the destination were served by at least two rail carriers. Finally, because of inaccuracies resulting from the use of multiple unrelated databases, CSXT personnel were required to manually check the results to correct errors and make other adjustments. Identifying responsive

⁹ If the Board were to order the production of these additional documents and information from the years 2002 and 2003, CSXT would require significant additional time, effort and expense to comply. In that event, an extension of the procedural schedule would likely be necessary to afford the parties time to complete discovery and develop and file their opening evidence, presently due on January 28, 2008. In addition, CSXT requests that the Board order DuPont to reimburse CSXT for the costs of preparing any additional information and documents, including costs of employee time, computer time, supplies, and reproduction. See *Annual Volume Rates on Coal - Rawhide Junction, WY to Sergeant Bluff, IA*, Nos. 37021, 37029 (Mar. 11, 1985) (Commission stating that while the production of the sought after discovery was required, the costs imposed by production could be passed on to the movant).

movements for years prior to 2004 would be even more burdensome as not all pre-2004 data is electronically stored, and is not easily accessible.

The burden of establishing market dominance is on DuPont, the Complainant. “In rail cases, because a finding of market dominance is a threshold jurisdictional requirement, we place the burden of proof on the shipper to show that there is not effective competition.” *Government of the Territory of Guam v. Sea-Land Serv., Inc.*, STB W.C.C.-101, 2007 WL 295310 at *4 (Feb. 2, 2007); *Garden Spot & N. Ltd. P’ship & Ind. Hi-Rail Corp.—Purchase & Operate—Ind. R.R. Co. Line Between Newton & Browns, IL*, I.C.C. No. 40857, 1993 WL 458881, at *1 n.5 (“rate complainant[] [has] substantial burden of proof to establish market dominance”). CSXT has no obligation to conduct further special studies to facilitate DuPont’s market dominance analyses. Moreover, if DuPont wishes to analyze whether certain historical movements had direct rail competition at their origin and destination, it can obtain such data from publicly available data sources that show stations with dual rail service. CSXT is certainly not required to undertake a special study to identify historical movements satisfying the parameters of DuPont’s requests, where such information is publicly available. *See Duke Energy v. Norfolk So. Co.*, STB Docket Nos. 42069, 42070 (July 26, 2002) (holding that production of publicly available information is unnecessary). In order to resolve this dispute and avoid further delay, however, CSXT would be willing to conduct another burdensome special study and process to identify responsive movements drawn from the recently released 2005 Waybill Sample.

3. CSXT has Already Produced Potentially Relevant, Responsive Information and Documents.

As demonstrated above, CSXT timely produced responsive information and documents pertaining to the 2004 Waybill Sample and has offered to provide the same responsive information for the 2005 Waybill Sample. With the two most recent years' Waybill Samples, corresponding PPQs and direct rail competition evidence, DuPont would have more than enough responsive information to use for a case challenging 2007 rates.¹⁰ The burden on CSXT of conducting additional special studies necessary to develop and produce information for additional historical years would be significant and unjustified. *See Duke Energy, supra* (denying motions where responsive information had already been produced sufficient for movant to advance its position); *Otter Tail, supra* (same); *PEPCO, supra* (same).

II. DUPONT'S MISCELLANEOUS POINTS ARE EITHER MOOT OR IRRELEVANT.

DuPont's request for information and documents prior to January 1, 2005 should be denied as irrelevant to this proceeding. DuPont specifically seeks to compel production of pre-2005 studies and analyses associated with handling and transporting the issue commodities and pre-2005 documents concerning differences between the costs of transporting the issue commodities and the costs of transporting other commodities. Any cost studies or analyses conducted prior to 2005 would not be relevant to the reasonableness of a rate established in mid-2007. As explained above, market conditions have changed substantially since 2004. Accordingly, any such information created prior to 2005 would be irrelevant to the reasonableness of rates that were issued in mid-2007.

¹⁰ CSXT's maintains that only origin-destination pairs drawn from the most recent available year's Waybill Sample may properly be used as comparable movements in Three Benchmark cases.

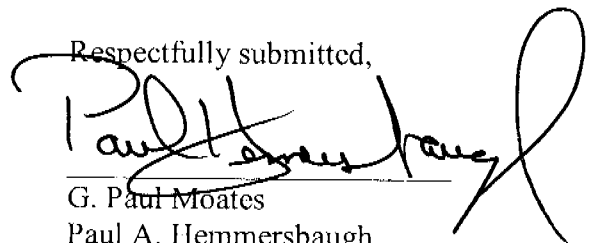
Finally, the Board need not address DuPont's argument concerning CSXT's objection to the production of non-classified information that could jeopardize the safety of the public and of CSXT employees. At DuPont's request, CSXT agreed to serve its discovery objections the week before it produced substantive responses and documents. As a result CSXT served its objections before it had fully completed its review of potentially responsive documents and information. Ultimately, CSXT did not withhold responsive information based upon this objection. Therefore, DuPont's Motions concerning this objection are moot. CSXT maintains its objection is sound and appropriate and reserves the right to assert and defend that objection in the future, should the need arise.

CONCLUSION

For all of the foregoing reasons, Defendant respectfully requests that the Board deny DuPont's Motion in its entirety.

Peter J. Shudtz
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Steven C. Armbrust
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Respectfully submitted,



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Dated: December 28, 2007