

February 4, 2008

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

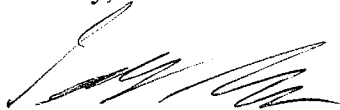
RE: Docket No. NOR 42101; *E.I. du Pont de Nemours and Company v. CSX Transportation, Inc.*

Dear Secretary Quinlan:

Please find enclosed for filing in the above referenced matter, E.I. du Pont de Nemours and Company's Opening Evidence - **PUBLIC VERSION**.

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

Sincerely,



Nicholas J. DiMichael
Jeffrey O. Moreno

PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

E.I. DUPONT DE NEMOURS AND COMPANY)

Complainant,)

v.)

CSX TRANSPORTATION, INC.,)

Defendant.)

Docket No. NOR 42101

COMPLAINANT'S OPENING EVIDENCE

Nicholas J. DiMichael
Jeffrey O. Moreno
Karyn A. Booth
Eric W. Heyer
Thompson Hine LLP
1920 N St. N.W., Suite 800
Washington, D.C. 20036

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

February 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.		)	
		)	

COMPLAINANT'S OPENING EVIDENCE

Complainant E.I. du Pont de Nemours and Company ("DuPont" or "the Company") hereby submits its Opening Evidence in this proceeding. DuPont is a manufacturer of chemicals, additives, plastics, coatings and agricultural products, with numerous production facilities throughout the continental United States and around the globe. DuPont is a major user of rail service to transport commodities that it consumes and produces around the globe. This Opening 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 Verified Statements and accompanying exhibits of: (1) Ms. Mary Pileggi, North American Region Logistics Manager, DuPont Logistics, Global Sourcing and Logistics ("Pileggi V.S."); and, (2) Mr. Thomas D. Crowley, President, L.E. Peabody and Associates ("Crowley 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		)	
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Complainant,		)	
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Defendant.		)	
		)	

PART I — ARGUMENT

Under 49 U.S.C. 10701, where a railroad has "market dominance," its transportation rates for common carrier service must be "reasonable." The determination of "reasonableness" is a matter exclusively within the jurisdiction of the Board, 49 U.S.C. 10501, whose decisions are reviewable under the standards of the Administrative Procedure Act. Under 49 U.S.C. 10707, "market dominance" is defined as the "absence of effective competition" from other rail carriers or modes of transportation for the movement to which a rate applies.

In order for the Board to find that a rail carrier lacks "effective competition," the Board must find that the rate exceeds the so-called "jurisdictional threshold," that is, the revenues produced by the challenged rate are equal to or greater than 180% of the carrier's variable cost of providing the service. In determining whether there is "effective competition," the Board may only consider competition from other rail carriers or other transportation modes (*e.g.*, motor or water carriers); it may not consider competition from other products or from the same product produced in other geographic regions. *See, Market Dominance Determinations – Product and*

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Geographic Competition, 3 S.T.B. 937, 949 (1998), *aff'd Association of American Railroads v. STB*, 306 F.3d 1008 (D.C. Cir. 2002).

In determining the "reasonableness" of a challenged rate, the Board must be guided by the rail transportation policy in 49 U.S.C. 10101. In the context of this proceeding, important policies include 49 U.S.C. 10101(6) ("to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital"); 10101(2) ("to require fair and expeditious regulatory decisions when regulation is required"); 10101(5) ("to foster sound economic conditions in transportation . . . "); and 10101(15) ("to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part").

Moreover, the Board is required to give consideration to the so-called "Long-Cannon" factors contained in 49 U.S.C. 10701(d)(2)(A)-(C). These include: (a) the amount of traffic which is transported at revenues which do not contribute to going concern value and the efforts made to minimize such traffic; and, (b) the amount of traffic which contributes only marginally to fixed costs and the extent to which rates on such traffic can be changed to maximize the revenues from such traffic.

Also, the Board must recognize that the rail carrier should have the opportunity to earn an "adequate revenue," which is defined as revenue sufficient – under honest, economical and efficient management – to cover operating expenses, support prudent capital outlays, repay a reasonable level of debt, raise needed equity capital, and otherwise retain capital in amounts adequate to provide a sound rail transportation system. 49 U.S.C. 10704(a)(2).

Although the foregoing statutory provisions are familiar and long-standing, this proceeding is anything but ordinary.

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In response to the Congress' requirement for the "expeditious handling" of rate reasonableness cases, and Congress' order to the Board to "establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case," the Board in 1996 adopted guidelines for non-SAC cases that were set forth in *Rate Guidelines – Non-Coal Proceedings*, 1 S.T.B. 1004 (1996) ("*Rate Guidelines*"). However, a decade passed in which the non-SAC guidelines were completely unused by shippers. In 2006, the Board concluded that *Rate Guidelines* needed significant changes to achieve the statutory goal of providing captive shippers with meaningful access to regulatory remedies for rail rates that are unreasonable. Accordingly, in September 2007 the Board adopted revised procedures that built upon the guidelines and standard adopted in 1996. Ex Parte 646 (Sub-No. 1), *Simplified Standards for Rail Rate Cases*, decision served September 7, 2007 (petition for reconsideration pending) ("*Simplified Standards*").

This case, and two other complaints filed by DuPont at the same time as this proceeding, is the very first case to be litigated under the Board's new *Simplified Standards* rules. This case, then, will set precedent for the next decade or more, and will help to determine whether the Board's new rules actually fulfill their promise of providing an expeditious, fair and effective check upon the abuse of rail market power.

The Evidence and Argument of DuPont is in six parts. Part I sets forth the background to this case and the key facts that the Board must consider regarding the movements at issue. Part II discusses the legal standards and evidence relating to market dominance, *i.e.*, whether there is "effective competition" from other carriers or modes of transportation to which the rates apply, including whether the challenged rates exceed the jurisdictional threshold. Part III discusses

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criteria employed by DuPont relating to the "R/VCcomp" factor and the initial "comparison group" that advocates should be used to determine the presumptively unreasonable rate.

Simplified Standards, p. 21. Part IV will also discuss the application of both the "expansion ratio," *i.e.*, the ratio of the RSAM factor ÷ R/VC>180 factor, as well as the confidence interval around the mean, in order to develop the presumed maximum reasonable rate. *Id.* at 21-22. Part V will discuss evidence on "other relevant factors," as set forth in *Simplified Standards*, p. 22. Finally, Part VI will discuss the application of the policies in the statute to the evidence DuPont has tendered and the conclusions it has drawn.

I. INTRODUCTION

This case is extraordinarily important to DuPont, which is facing competitive pressures from foreign suppliers on the operation of its production facilities within the United States. Congress has mandated that rail rates be "reasonable" where a carrier is market dominant because rail rates have an important impact on real shippers in the real world. Unreasonably high rates undermine the competitiveness of American manufacture. Thus, the results of this proceeding will help to determine the competitiveness of American manufacture on the world market.

A. The Movement at Issue

On June 15, 2007, a master agreement between DuPont and CSXT covering rail freight transportation expired. *Pileggi V.S.* at ¶ 5. In its place, CSXT published common carrier tariff rates for a broad range of origin-destination pairs and commodities previously covered by the agreement. *Id.* One of the commodities now covered by these common carrier tariff rates is nitrobenzene, STCC 2815147.

In this small rate case, DuPont challenges the reasonableness of CSXT's rates for the movement in single line rail service of nitrobenzene by tank car approximately 817 miles from

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Pascagoula, MS to Neuse, NC. Nitrobenzene is a Class 6.1 hazardous material and its transportation is subject to regulation. The challenged rate, including the fuel surcharge, is published in CSXT 97249. *Id.* and Pileggi Ex. 1.

DuPont produces nitrobenzene at its Pascagoula facility and ships it by rail to its customer, Covidien, at Neuse. Pileggi V.S. at ¶ 7. Covidien uses nitrobenzene in the production of acetaminophen, which is a key ingredient in Tylenol. *Id.* Covidien is the only domestic producer of acetaminophen and DuPont supplies [REDACTED]¹ of Covidien's nitrobenzene requirements. *Id.* [REDACTED]

[REDACTED]. *Id.*

Effective June 16, 2007, CSXT published a common carrier rate of \$6,980 per car for the issue movement. Beginning June 16, 2007, CSXT also assessed a fuel surcharge. The rate plus the applicable fuel surcharge is \$7,143.34 per car.

B. Background to the Challenged Rates

For many years, the transportation of nitrobenzene, as well as all other DuPont products, was governed by successive Master Rail Transportation Agreements. Most recently, the relationship between CSXT and DuPont was governed by CSXT-1847 ("Master Contract"). (See, Pileggi Verified Statement attached to Dupont September 24, 2007 Reply to CSXT Motion to Dismiss, p. 2) (hereafter, "9/24/07 Pileggi V.S."). That contract provided for the addition of new movements as the market changed, and the regular escalation of the agreed-to rates by means of an agreed-to escalation factor. *Id.* The Master Contract was scheduled to expire on May 31, 2007. *Id.*

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

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Although DuPont requested new contract rates from CSXT covering the 21 separate DuPont sites served by CSXT over one year prior to the expiration of the contract, CSXT did not provide a written contract proposal until March 9, 2007, just 12 weeks prior to the expiration of the contract. *Id.* at 3. The carrier's proposal failed to cover all traffic lanes, established a rate structure that the carrier knew was incompatible with DuPont's payment systems, and included substantial and unexplained rate increases. *Id.*

With only ten weeks remaining until the expiration of the contract, DuPont developed a counter-proposal and sent it to CSXT. *Id.* DuPont also asked CSXT to meet with four of its business units most dependent upon CSXT to assist the carrier in understanding the impact of its proposed rate increases on the businesses. Those meetings took place between May 7 and June 7, 2007. *Id.*

Despite the Company's attempts to negotiate with CSXT and to educate the carrier, on May 23, 2007, in the midst of the scheduled meetings with the business units, CSXT informed DuPont that it intended to publish the rates in the previously rejected March 9 proposal, with an effective date of June 1, 2007. *Id.* In view of the meetings already scheduled and the need for further discussions, DuPont asked CSXT to extend the existing contract for a two month period to allow the parties to try and reach a mutually acceptable agreement. *Id.* DuPont believed that a two-month extension would be necessary, based on the scope and complexity of the traffic at issue, the delay in receiving the CSXT contract proposal, and because it still had not received complete rate information from CSXT for all traffic lanes to be included in the contract. *Id.* at 3-4.

However, on May 25, 2007, CSXT informed DuPont that it would agree to only a two week extension of the contract, until June 15, 2007. CSXT told DuPont that it would publish the

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rate proposed on March 9 in the tariff challenged in this proceeding. *Id.* On June 5, DuPont made one last request to CSXT to extend the current rates to June 30 to allow the contract negotiations to continue. *Id.* On June 8, CSXT denied that request. *Id.* Because DuPont had no other option, it tendered traffic to CSXT, including the issue movement, pursuant to the tariff. *Id.*

On August 21, 2007, DuPont filed the Complaint that initiated this proceeding.

II. CSXT IS MARKET DOMINANT OVER THE TRANSPORTATION TO WHICH THE CHALLENGED RATE APPLIES

CSXT possesses market dominance over the transportation of nitrobenzene from Pascagoula, MS to Neuse, NC. In their initial disclosures, both parties have calculated variable costs that would result in an R/VC ratio for this movement that exceeds the 180% jurisdictional threshold. 49 U.S.C. § 10707(d)(1)(A). Furthermore, DuPont has never transported nitrobenzene over this route, except when rail was unavailable due to *force majeure* conditions created by Hurricane Katrina.

A. There is No Dispute Over CSXT's Quantitative Market Dominance.

There does not appear to be any dispute between the parties that CSXT possesses quantitative market dominance over the issue movement. Although CSXT's Answer to the First Amended Complaint denies the allegation that the R/VC ratio for this movement exceeds 180%, CSXT's initial disclosures accompanying its Answer produce an R/VC ratio that is well in excess of 180%. Therefore, DuPont presumes that CSXT's denial applies only to the specific variable cost calculated by DuPont, and not to the fact that the R/VC ratio exceeds 180%.

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B. There is No Effective Intra- or Intermodal Competition.

CSXT's rate for the issue nitrobenzene movement is not constrained by intra- or intermodal competition. There is no intramodal competition at all for this movement and intermodal competition is not effective.

1. Intramodal competition does not exist.

There is no intra-modal competition for the issue movement. Although two rail carriers serve the origin at Pascagoula, the destination at Neuse is captive to CSXT. *Pileggi V.S.* at ¶ 8. The Board has "generally found a lack of intramodal competition where...a single railroad serves the sole origin...because a railroad occupying a monopoly position in a routing would not necessarily be restrained from setting an unreasonably high rate for that portion and keeping the monopoly profits for itself, regardless of whether competition existed over other segments." *Amstar Corp. v. The Atchison, Topeka and Santa Fe Ry. Co.*, No. 37478, 1987 ICC LEXIS 47, *11 (Nov. 23, 1987). This applies with equal relevance to a sole-served destination. See *Metropolitan Edison Co. v. Conrail*, 5 I.C.C. 2d 385, 413 (1989) ("When one carrier participates in all available routings, it will not necessarily have any incentive to moderate the revenue collected from this traffic."). Thus, there is no alternative rail transportation to CSXT available to DuPont for the issue movements.

2. Intermodal competition is limited and ineffective.

Although truck transportation exists as an alternative to rail for the issue movement, "the mere existence of some alternative does not in itself constrain the railroads from charging rates far in excess of the just and reasonable rates that Congress thought the existence of competitive pressures would ensure." *Ariz. Pub. Serv. Co. v. U.S.*, 742 F. 2d 644, 650-51 (D.C. Cir. 1984). "At the core of the 'effective competition' standard is the idea that there are competitive, market

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pressures on the railroads deterring them from charging monopoly prices for transporting goods."

Id. Thus, the fact that a rail carrier "matches 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." *FMC Wyoming*, 4 S.T.B. at 718.

In *Product and Geographic Competition*, 2 I.C.C. 2d 1, 21 (1985), the Interstate Commerce Commission ("ICC") identified the various types of evidence relevant to determining if trucks are an effective competitive alternative to rail. Such evidence in this case thoroughly demonstrates the ineffectiveness of truck competition for the transport of nitrobenzene from Pascagoula to Neuse.

The first type of evidence is the physical characteristic of the product in question that may preclude transportation by motor carrier. Nitrobenzene is a Class 6.1 hazardous material that can be absorbed through the skin and is flammable at a broad range of temperatures. *Pileggi V.S.* at ¶ 6. In light of the Company's commitment to safety and product stewardship, when rail is an option, DuPont prefers to transport nitrobenzene by rail rather than truck. *Id.* at ¶ 9. In addition, most DuPont customers prefer to receive nitrobenzene by rail. *Id.* at ¶ 6. These facts are borne out by the actual experience of DuPont transporting nitrobenzene to its customers, including its customer at Neuse.

A second relevant category of evidence is the amount of the product in question that is transported by truck where rail is available. In 2006, DuPont tendered [REDACTED] loads of Nitrobenzene by bulk truck in the continental United States, which is the equivalent of [REDACTED] rail cars,² compared with [REDACTED] loads by rail. *Id.* at ¶ 10. All of these bulk truck loads originated at Pascagoula. The bulk trucks moved to just four destinations: [REDACTED]

² A single rail car can haul the equivalent of four trucks of Nitrobenzene. *Pileggi V.S.* at ¶10.

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[REDACTED].³ *Id.* at ¶ 11. Three of these four destinations received nitrobenzene by truck because they did not have rail access. *Id.* Only [REDACTED] was physically capable of receiving Nitrobenzene by both truck and rail. *Id.* Even then, DuPont shipped [REDACTED] rail cars to [REDACTED] compared with only [REDACTED] trucks, or the equivalent of [REDACTED] rail cars. *Id.*

In 2007, DuPont shipped a similarly small amount of nitrobenzene by truck. Only [REDACTED] truckloads were shipped from Pascagoula. *Id.* at ¶ 12. All of them went to non-rail served destinations at [REDACTED], and one truck load each to [REDACTED] [REDACTED]. *Id.* There were no truck shipments to [REDACTED] in 2007. *Id.* These facts validate the Company's claim that it ships Nitrobenzene by truck principally when deliveries cannot physically be made via rail.

The ineffectiveness of truck competition is even more apparent when the focus is upon the issue movement. [REDACTED]

[REDACTED] *Id.* at ¶ 13. [REDACTED], DuPont tendered [REDACTED] rail cars of nitrobenzene for transport from Pascagoula to Neuse in 2006, but did not tender a single truck load of nitrobenzene over that lane. *Id.* To date, DuPont has *never* shipped nitrobenzene to Neuse by truck, except in 2005 after Hurricane Katrina, when damage to the Pascagoula facility prevented DuPont from shipping by rail. *Id.* [REDACTED]

Id. at ¶ 7.

██████████ CSXT no longer appears constrained by such factors. Exhibit A (CSX-42101HC-000048)

³ [REDACTED] is an interchange point for shipments moving into [REDACTED].

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Another type of relevant evidence is the amount of the product that is transported by truck under transportation circumstances similar to rail. However, since it already is established that very little nitrobenzene ever travels by truck at all when rail is available, that fact dispenses with this category of evidence.

The final category of relevant evidence is the transportation cost of the rail and truck alternatives. The cost of shipping nitrobenzene by truck from Pascagoula to Neuse is not competitive even after CSXT's [REDACTED] rate increase. CSXT's tariff rate for this movement, including fuel surcharge, is approximately \$7143 per car. *Pileggi V.S.* at ¶ 14. DuPont also has lease and maintenance costs of [REDACTED] associated with rail equipment. *Id.* Given that DuPont's rail fleet averages [REDACTED] cycles annually, its average equipment cost is [REDACTED] per shipment. *Id.* This makes DuPont's total rail cost approximately [REDACTED] per car.

In contrast, DuPont has obtained rate quotes from three trucking companies for much higher rates.

1. The lowest quote, from [REDACTED], included a line haul rate of [REDACTED], a fuel surcharge of [REDACTED], and a cleaning charge of [REDACTED], for a total of [REDACTED] per truck load. This cost multiplied by four trucks equals [REDACTED], which is [REDACTED] greater than DuPont's rail costs. *Id.* at ¶16, Ex. 3.
2. According to the DuPont contract with [REDACTED], the truck line haul rate would be [REDACTED] plus a fuel surcharge of approximately [REDACTED], or [REDACTED] per truck. This cost multiplied by four trucks equals [REDACTED], which is [REDACTED] greater than the DuPont rail costs. *Id.* at ¶17, Ex. 4.
3. The DuPont contract with [REDACTED] includes a line haul rate of [REDACTED], a [REDACTED] fuel surcharge, a [REDACTED] cleaning charge, and a [REDACTED] drayage charge to a tank cleaning facility, for a total of [REDACTED] per truck. This cost multiplied by four trucks equals [REDACTED], which is [REDACTED] greater than the DuPont rail costs. *Id.* at ¶ 18, Ex. 5.

The [REDACTED] contract contains rates that DuPont actually paid to truck nitrobenzene from Pascagoula to Neuse after Hurricane Katrina in late 2005 and that are still effective today. *Id.* at

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¶ 18. A sampling of the invoices received by DuPont from [REDACTED] and other carriers reflects a total cost range from [REDACTED] up to [REDACTED] per truck load, depending upon the carrier and the imposition of detention, cleaning, and drayage charges. *Id.* at ¶ 19, Ex. 6. Those truck rates are the equivalent of [REDACTED] up to [REDACTED] per rail car. *Id.* at 19.

All of the above factors demonstrate a total lack of effective competition from trucks for the issue movement. In summary, nitrobenzene is a hazardous material that DuPont prefers to ship by rail and most customers prefer to receive by rail; DuPont does not in fact ship large quantities of nitrobenzene by truck, and almost never does so when rail is an option; and even if DuPont and its customers were willing to ship nitrobenzene by truck, the cost of doing so from Pascagoula to Neuse is a minimum of [REDACTED] greater than shipping by rail, even after CSXT's [REDACTED] rate increase to DuPont.

III. THE DUPONT COMPARISON GROUP MEETS THE STANDARDS SET FORTH BY THE BOARD IN SIMPLIFIED STANDARDS, AND THE EVIDENCE SHOWS THAT THE RATES CHARGED BY CSXT ARE PRESUMPTIVELY UNREASONABLE AND UNLAWFUL

In *Simplified Standards*, the Board indicated that it would adopt a "final offer" procedure whereby the complainant and the defendant tender initial evidence regarding an appropriate comparison group. *Simplified Standard*, p. 18. The Board indicated that the movements to be included in the comparison group must be drawn from the unmasked confidential Waybill Sample provided to the parties by the Board at the outset of the case, which in this case is the Waybill Sample for the years 2002 through 2005. Under the procedures adopted in *Simplified Standards*, after the initial tenders are made in the opening evidence, each party is then to tender, in its reply evidence, its "final offer" group of movements that it believes should comprise the comparison group. The Board indicated that it will then select the comparison group that is

"most similar in aggregate to the issue movements," by means of an "either-or," "final offer" selection. *Id.*

A. Factors To Be Consulted In Determining Comparability

In its *Rate Guidelines* and *Simplified Standards* decisions, the Board set out principles that would exclude certain movements from an appropriate comparison group, or exclude certain evidence that might be used to support inclusion of certain movements in a comparison group. In *Simplified Standards*, the Board also established a non-exclusive list of "comparability factors" that the agency would consult in determining which comparison group is "most similar in aggregate" to the issue movements.

First, the Board noted that the comparison group must consist of "only captive traffic over which the carrier has market power." *Id.* at 17. However, the Board has made clear that it will conclusively presume that all traffic from the Waybill Sample with a revenue-to-cost ratio of 180 or more is "captive." *Rate Guidelines*, 1 S.T.B. at 1025-1026.⁴ The Board also indicated that traffic from non-defendant railroads would be excluded from any comparison group, because, among other things, the "R/VC ratios of one carrier cannot fairly be compared to the R/VC ratios charged by another railroad, since the amount of joint and common costs differ between carriers, thus creating differences in R/VC ratios between carriers." *Simplified Standards*, p. 82.

Continuing its focus on costs and R/VC ratios, in *Simplified Standards*, the Board also declared that, since the comparison is to be based on mark-ups over variable cost (rather than comparisons of absolute dollar levels), movements with different cost characteristics (such as

⁴ In *Simplified Standards*, the Board also noted that the Waybill Sample does not identify the shipper of a movement, so that trying to identify the shipper involved for a particular movement in the Waybill Sample, to develop shipper-specific information from the files of the carrier, would be complicated and expensive. *Id.*, p. 84. Trying to determine whether a shipper in the Waybill Sample with a R/VC ratio of 180 percent or more was "captive" would lead to huge litigation costs.

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multiple car or unit train movements in a case in which a complaint is brought against a single-car rate) can be included in an appropriate comparison group. *Id.*; *see also*, concurrence by Vice Chairman Buttrey, *id.* at 36. This is because there is no reason to assume, *a priori*, that the R/VC ratios of single car, multiple car, and unit train movements are or should be different.

The Board indicated that, because it is using the Uniform Rail Costing System (URCS) to develop the variable cost for the issue movement and comparison movements, the Board will favor a comparison group that "consists of like commodities" so that "the variable cost calculation of the issue movement and comparison group will be similar." *Id.* at 17. Accordingly, the Board noted that comparability would be determined by reviewing a variety of cost factors, such as "length of movement, commodity type, [and] traffic densities of the likely routes involved." *Id.*

The Board indicated that it would also review "demand elasticities," although the Board carefully noted that the comparison group "need not have movements with identical demand." *Id.*

The Board stated that it would *not* automatically exclude contract traffic from consideration in the comparison group, for two independent reasons. *Id.* at 82-83. First, the Board noted that one cannot assume that contract rates provide no useful information as to the maximum lawful rate of the challenged movement. Second, the Board was concerned that excluding contract movements from the comparison group may leave insufficient movements in the Waybill Sample to perform a statistically meaningful comparison analysis. However, the Board did indicate that, all other factors being equal, a comparison group that consists of just common carrier traffic will be preferred over a group that includes contract traffic. *Id.* at 83.

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Finally, the Board placed strict limitations on the *type* of evidence that could be used to establish comparability. The Board declared that it would select the comparison group "based on information contained in the Waybill Sample . . . and other publicly available information," because to do otherwise would place the shipper on an uneven playing field with the carrier, or would lead to delayed proceedings and high litigation costs, which would be inconsistent with the Congressional policy." *Id.*

B. The DuPont Comparison Group Correctly Applies the Factors Enumerated By the Board and Should Be Selected By the Board

The Verified Statement of witness Crowley sets forth the procedures used to select the DuPont initial comparison group. As explained in further detail in that Verified Statement, witness Crowley selected movements from the 2002-2005 unmasked confidential Waybill Sample having the following characteristics, which are consistent with the standards enumerated by the Board in its *Simplified Standards* decision as discussed above.

1. Movements with a Revenue to Variable Cost Ratio Greater than 180 Percent

In *Simplified Standards*, the Board noted that the purpose of the R/VCcomp benchmark is to use the R/VC ratios of "'other potentially captive traffic' (i.e., traffic priced above the 180% R/VC level) as evidence of the reasonable R/VC levels for traffic of that sort." *Simplified Standards*, p. 17.⁵ The DuPont comparable group consists only of traffic with a revenue to variable cost ratio of greater than 180 percent

2. Movements in Single-Line CSXT Service

In *Simplified Standards*, the Board ruled that it would exclude non-defendant traffic from the comparison group. *Simplified Standards*, p. 82. The DuPont comparable group consists only

⁵ See also, *Rate Guidelines*, 1 S.T.B. at 1035 ("to be similar traffic, the comparison traffic should involve a ...commodity...moving...at an r/vc level above 180.")

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of traffic moved by CSXT. Because the issue movement is transported in single-line CSXT service, the DuPont comparable group consists only of movements in the Waybill Sample that conform to paragraph (1) above and that also originate and terminate solely on CSXT. Thus, the DuPont comparable group not only applies the exclusion required by the STB, but also incorporates only those movements that correspond to the single-line nature of the DuPont movement at issue in this complaint.

3. Movements of Similar Distances

In *Simplified Standards*, the Board noted that one of the factors that it would review is the "length of movement" in order to determine comparability.⁶ Although the Board has not provided specific details on what constitutes a similar length of movement, DuPont has reasonably applied the Board's guidance. Specifically, DuPont has selected movements for the comparable group whose loaded miles are within a range of plus or minus 150 miles of the issue movement's loaded miles, rounded to the nearest 50 miles. *See*, Crowley V.S., p. 9. As noted by witness Crowley, the loaded miles for the Pascagoula movement equal 816.7 miles, which rounded to the nearest 50 miles is 800 miles. Therefore, the mileage range for comparable movements equals 650 to 950 miles. *Id.*, note 3.

4. Movements in Similar Equipment

In neither *Simplified Standards* nor in *Rate Guidelines* did the Board identify car type or equipment as a factor in determining the comparable group. Nevertheless, DuPont believes that the Board's general focus on "similar traffic" would include traffic moving in similar equipment. Accordingly, for the movement encompassed in the Complaint, the DuPont comparable group consists of movements in the same car type as the issue movement (i.e., tank cars). Crowley

⁶ See also, *Rate Guidelines*, 1 S.T.B. at 1035 ("to be similar traffic, the comparison traffic should involve a...commodity... moving similar distances.")

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V.S., p. 9. In addition, because the issue movement is in a private car, the DuPont comparable group also consists of movements in private cars. *Id.*

5. Movement Characteristics

As noted above, in *Simplified Standards*, the Board stated that movements with different cost characteristics (such as multiple car or unit train movements in a case in which a complaint is brought against a single-car rate) can be included in an appropriate comparison group.

Simplified Standards, p. 17; *see also*, concurrence by Vice Chairman Buttrey, *id.* at 36.

Therefore, DuPont has included single car, multi-car and unit train movements in its comparable group.

6. Movements of Like Commodities

In *Simplified Standards*, the Board noted that one of the factors that it would review is the "commodity type" in order to determine comparability.⁷ The Board has not provided any further guidance on what makes a commodity "similar." However, DuPont notes that the commodity at issue in this proceeding, nitrobenzene, is a Class 6, Division 6.1 hazardous commodity, as that term is defined by the Department of Transportation. *See* 49 C.F.R. 172.101. A Class 6, Division 6.1 hazardous commodity is a "poisonous material . . . other than a gas, which is known to be so toxic to humans as to afford a hazard to health during transportation, or which, in the absence of adequate data on human toxicity "is presumed to be toxic to humans" because it meets various requirements for oral toxicity, dermal toxicity, and inhalation toxicity, or is an "irritating material . . . which causes extreme irritation, especially in confined spaces." *Id.*

DuPont recognizes that the movement of hazardous commodities impose certain operational requirements on carriers such as CSXT. DuPont also recognizes that not all

⁷ See also, *Rate Guidelines*, 1 S.T.B. at 1035 ("to be similar traffic, the comparison traffic should involve a similar commodity")

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hazardous materials pose the same type of hazard. However, all Class 6, Division 6.1 hazardous materials have similar types and degrees of toxic effects. DuPont, therefore, with one exception, has limited its comparable group to only those commodities that are classified in the same manner by the Department of Transportation, whose hazardous properties are similar, and therefore would rationally pose the same type of transportation condition to the carrier.

The single exception is for TIH commodities. Certain TIH materials are included in Class 6, Division 6.1. TIH materials are gases or liquids that are known or presumed on the basis of tests to be so toxic to humans as to pose a hazard to health in the event of a release during transportation. *See* 49 CFR 171.8, 173.115, and 173.132. Because TIH materials are deemed to pose a greater hazard than other types of hazardous commodities, the federal government imposes more stringent requirements upon their transportation. Therefore, it would be improper to conclude that Class 6, Division 6.1 TIH commodities impose the same types of transportation conditions upon CSXT as non-TIH commodities. Since nitrobenzene is not a TIH commodity, DuPont has excluded Class 6, Division 6.1 TIH commodities from its comparable group. Crowley V.S., p. 8.

Accordingly, the DuPont comparable group consists of movements that meet all of the criteria listed above, and that consist only of movements of a commodity whose STCC number is classified as a Class 6, Division 6.1 Hazardous Material by the Department of Transportation, but excluding all TIH commodities.

7. Movements with Similar Demand Elasticities

In *Simplified Standards*, the Board noted that one of the factors that it would review is the "demand elasticity" in order to determine comparability. *Simplified Standards*, p. 17. The Board noted, however, that "the comparison group need not have movements with identical demand."

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Moreover, in *Rate Guidelines*, the Board noted that "railroads do not directly measure demand elasticity in setting their rates. . . ." *Rate Guidelines*, 1 S.T.B. at 1034.

DuPont believes that the comparable group that it has chosen – consisting of Class 6, Division 6.1 hazardous commodities moving in similar equipment, at similar distances, in single-line CSXT service, at R/VC ratios exceeding 180 – also reflect similar demand elasticities. This is because such commodities are "measur[ing] the markup taken on >180 traffic moving under similar transportation conditions." *Rate Guidelines*, 1 S.T.B. at 1034.

However, there is an independent, publicly-available means of confirming that CSXT itself believes that the comparable group chosen by DuPont has similar demand elasticities. Attached as Exhibit B is the cover page to CSXT Tariff 28-151, which covers public pricing on nitrobenzene and other cyclic intermediate commodities. In this tariff, CSXT has established the same prices on all 28-151 and 28-152 (five character STCC) commodities, with just five exceptions not relevant in this case. This represents a list of approximately 150 commodities.

DuPont has examined this CSXT tariff, and has determined that all of the Class 6, Division 6.1 commodities in DuPont's comparable group are included in this price list. Thus, this public price list represents strong evidence that the entity most affected by differing demand elasticity – CSXT itself – has determined that the demand elasticities of those commodities are the same. Thus, the Board should determine that, under the facts presented in this case, the demand elasticities of the issue traffic and the comparable group chosen by DuPont are similar. This evidence is especially compelling in view of the fact that the Board itself has noted that perfect similarity of demand within the comparable group is not required. See, *Simplified Standards*, p. 17 ("the comparison group need not have movements with identical demand.").

8. Contracts

In *Simplified Standards*, the Board noted that, if all other factors are equal, a comparison group that consists of only common carrier traffic will be selected over a group that includes contract traffic. Although this question cannot be decided until the parties submit their final comparable groups (since there is no way to determine, at present, whether all other factors are in fact equal), there are a number of considerations in this particular case and at this particular time, that strongly indicate that the Board should not credit any presumption in favor of comparable groups that contain only common carrier movements, regardless of the final comparison groups submitted by the parties in this case.

First, the rates that are the subject of this complaint were published in CSXT "Private Price Lists" ("PPLs"). In a Motion to Dismiss filed September 4, 2007, CSXT publicly chose to argue that such PPLs were "contracts." In a decision rendered in this case on December 20, 2007, the Board found that the PPLs were in fact tariffs, despite CSXT's characterization of them as contracts in its Motion, and despite the fact that CSXT labelled the PPLs as "confidential."⁸

Although the Board, in making its decision, relied to some extent on the facts of the interactions between CSXT and DuPont, the Board found "most significant[]" the fact that the CSXT PPLs "unambiguously state[d]" that "*Rail Transportation Contracts* take precedence over prices published herein for commodities over the same route." Decision served December 20, 2007, p. 5 [emphasis in original]. The placement and phrasing of this text in the CSXT PPLs

⁸ In a decision in this case served January 31, 2008, the Board confirmed that evidence with respect to comparability would be limited only to evidence in the Waybill Sample or other public information. CSXT's decision to file a Motion to Dismiss in this case renders the information in that motion public; the railroad cannot choose to both publicly argue a position and then claim that the matter is not publicly available. Moreover, in its decision, the Board noted that it was unclear "whether CSXT's unilateral attempt to designate the agreement 'confidential' is consistent with its obligations under section 11101." Decision served December 20, 2007, p. 6. The wording of CSXT's PPLs, at least as they have been presented to DuPont, falls within the scope of publicly available information.

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suggest that this language is not limited just to the PPLs submitted to DuPont, but is a boilerplate feature of CSXT PPLs in general. In that event, all CSXT PPLs would share similar infirmities as alleged "contracts," despite the fact that they may have been all coded as "contract" movements in the Waybill Sample. Indeed, given the public evidence in this case, it is impossible to tell whether CSXT has coded the Waybill Sample to correctly reflect the nature of its PPLs.

Finally, in Ex Parte No. 669, *Interpretation of the Term "Contract" in 49 U.S.C. 10709*, the Board has proposed rules to more clearly distinguish contracts from tariff movements. The facts of this case reveal that the Board is on sound ground in attempting to clarify the situation, and until there are clearer standards for determining what is a contract and what is a tariff, the Board should not credit a carrier's designation in the Waybill Sample.⁹

IV. APPLICATION OF THE RATIO OF THE RSAM ÷ R/VC>180

In *Simplified Standards*, the Board indicated that, once it selects the appropriate comparison group using the final-tender process, it would then adjust each movement in the comparison group by the ratio of the RSAM ÷ R/VC>180 four-year average contained in the Board's December 20, 2007 decision in Ex Parte 347 (Sub-No. 2), *Rate Guidelines – Non-Coal*

⁹ Particularly in connection with this specific case, the Board should be aware that information provided by CSXT has revealed substantial inconsistencies in the way that CSXT codes in the Waybill Sample different movements allegedly governed by the same rate authority. This is a matter going to the integrity of this field in the Waybill Sample upon which the Board is relying in Three Benchmark cases. In response to DuPont's discovery, CSXT agreed to provide a list of requested PPLs and to match those PPLs to specific movements in the 2004 and 2005 Waybill Samples. In Exhibit C, DuPont has sorted and grouped the waybill data by PPL number (column 8). The Calculated Rate Flag (column 16) contains a "0" for tariff moves and a "1" for contract moves. These two columns reveal that CSXT frequently has flagged different movements governed by the same PPL as both contract and common carrier moves. But the same PPL cannot be both a contract and a tariff. Clearly, CSXT has failed to properly code contract and tariff movements in the Waybill Sample. Given CSXT's inconsistencies in coding contract and tariff movements in the Waybill Sample, the Board in this case should drop its presumption in favor of the comparison group with the fewest contract movements. *See, Simplified Standards*, p. 83. The Board can solve this problem in the Ex Parte 669 proceeding, however, by ordering the carriers to cleanse the Waybill Sample of any contract designations that do not fall within the definition of a 10709 contract eventually adopted by the Board.

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Proceedings, served December 20, 2007. As set forth in his Verified Statement, Witness Crowley has applied that ratio to each movement in the comparable group chosen by DuPont. Crowley V.S., pp. 9-10. Then, as set forth in *Simplified Standards*, witness Crowley calculated the mean and standard deviation for the adjusted R/VC ratios for the comparable group. Next, using the mean and standard deviation, witness Crowley calculated the 90% confidence interval around the estimate of the mean to determine the upper boundary of the mean for the comparable group, which becomes the presumed maximum level. *Id.* As noted in that Verified Statement, the results are as follows for the movement at issue in this complaint:

Presumed Maximum Rate for Issue Movement Using STB's December 20, 2007 RSAM and R/VC>180 Factor	
Item	Pascagoula Movement
3Q07 Per Car Rate (including FSC)	\$7143.18
3Q07 Variable Cost Per Car	\$1913.12
R/VC Ratio	373%
Maximum R/VC Ratio	327%
Maximum Rate Per Car	\$6255.90

Witness Crowley made this calculation on the basis of the Board's December 20, 2007 calculation of the RSAM and R/VC>180. That calculation, in turn, was based on the cost of capital developed under a methodology that the Board has since discarded. Specifically, in a decision served January 17, 2008, the Board decided "that the time has come to replace the single-stage Discounted Cash Flow (DCF) model we have used since 1981 to estimate the cost of

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equity." *Methodology to be Employed in Determining the Railroad Industry's Cost of Capital*, decision served January 17, 2008 ("*Changed Cost of Capital Methodology*").

Congress has directed the Board to "ensure the availability of accurate cost information in regulatory proceedings." 49 U.S.C. 10101(14). Thus, as a matter of law, the Board must recalculate the RSAM and R/VC>180 figures developed in its December 20 decision in Ex Parte 347 (Sub-No. 2), by applying the "more current and precise techniques" adopted in *Changed Cost of Capital Methodology*, p. 1., to the cost of capital underlying the RSAM and R/VC>180 benchmarks, since those figures play a central role in calculating maximum reasonable rates under the Three-Benchmark procedure in *Simplified Standards*.

In *Changed Cost of Capital Methodology*, p. 5, the Board determined that the single stage DCF methodology underlying the cost-of-capital used in the December 20 decision "had fallen into disfavor in the finance and academic communities and that CAPM was a more current and widely used approach to estimating the cost of equity." Indeed, the Board noted that the railroads themselves "no longer seriously challenge the need to replace the 1981 DCF Model with more current approaches." *Id. See also, id.*, p. 7, note 12. Consequently, the Board held that "[g]iven the central role this calculation plays in our economic regulation of the rail industry, the time has come to modernize our approach to address concern over continued use of the 1981 DCF Model." *Id.*, p. 7. In light of the Board's own conclusions regarding the need to replace the 1981 DCF Model with a more current and precise approach, now that the Board has adopted such an approach, it is legally obligated to apply that approach in this proceeding.

Given the Board's January 17 *Changed Cost of Capital* decision; the fact that all of the inputs to develop a cost of capital based on the new methodology are readily available and easy to apply; the centrality of the cost of capital to the calculation of the RSAM and R/VC>180; and,

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the fact that a decision in this case will not be due for five months and thus the Board has ample time to calculate a new expansion ratio, the Board must recalculate the RSAM and R/VC>180 to reflect its new cost of capital decision.

In his Verified Statement, Witness Crowley has applied the procedures adopted by the Board in its *Changed Cost of Capital Methodology* decision to the RSAM and R/VC>180 figures for the years 2002 – 2005. *See*, Crowley V.S., pp. 13-15. Application of the methodology adopted in *Changed Cost of Capital Methodology* would produce the following maximum R/VC ratios and the following maximum rates per car:

Presumed Maximum Rate for Issue Movement Using STB's RSAM and R/VC>180 Factors Developed By Using <i>Changed Cost of Capital Methodology</i>	
Item	Pascagoula Movement
3Q07 Per Car Rate (including FSC)	\$7143.18
3Q07 Variable Cost Per Car	\$1913.12
R/VC Ratio	373%
Maximum R/VC Ratio	304%
Maximum Rate Per Car	\$5815.88

V. **OTHER RELEVANT FACTORS DEMONSTRATE THAT THE PRESUMED MAXIMUM LAWFUL RATE SHOULD BE ADJUSTED DOWNWARD**

A. **Even If the Board Does Not Apply the Procedures In Its *Changed Cost of Capital Methodology* Decision To Recalculate the RSAM and R/VC>180 Directly, It Should Adjust the Presumed Maximum Rate Downward on the Basis of That Decision As an "Other Relevant Factor"**

In Section IV above, DuPont has argued that, as a matter of law, the Board must recalculate the RSAM and R/VC>180 factors to apply the most current, and more importantly the most accurate, methodology for calculating the cost of capital in the critical "expansion ratio" that it will apply to the comparison movements.

Even if the Board does not believe that it must apply the procedures in its *Changed Cost of Capital Methodology* decision to recalculate the RSAM and R/VC>180 factors as a matter of law, it should do so as part of its consideration of "other relevant factors." As presented by Mr. Crowley, the application of the *Changed Cost of Capital Methodology* procedures has a major effect on the expansion ratio, and cannot be ignored. The cost of capital is, in fact, a major element in the railroad's cost structure, and to utilize the Board's most current and most precise procedures is clearly relevant in the calculation of a maximum reasonable rate.

B. **The Board Should Adjust the Presumed Maximum Rate Downward To Account for Information Relevant to the Long-Cannon Factors**

Under 49 U.S.C. 10701(d)(2)(A)-(C), the Board is required to give consideration to the so-called "Long-Cannon" factors contained in that section, including (a) the amount of traffic which is transported at revenues which do not contribute to going concern value and the efforts made to minimize such traffic; and, (b) the amount of traffic which contributes only marginally to fixed costs and the extent to which rates on such traffic can be changed to maximize the revenues from such traffic; and (c) whether one commodity is assuming an unreasonable share of the cost burden of the carrier. 49 U.S.C. 10701(d)(2)(A)-(C).

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In its *Rate Guidelines* decision, the Board calculated two versions of the RSAM, with and without an "efficiency adjustment." The RSAM with the "efficiency adjustment" reflected the fact that the carrier was transporting some traffic at rates that were less than its variable cost, and, in accordance with the first two Long-Cannon requirements, the "efficiency adjustment" eliminated that traffic from consideration in calculating the RSAM. *Rate Guidelines*, 1 S.T.B at 1029-1030. In *Rate Guidelines*, the Board indicated that it would "look at both figures (the adjusted and unadjusted RSAM figures) and treat them as the relevant starting range for our consideration." *Id.*, p. 1030. However, in its *Simplified Standards* decision, the Board eliminated the efficiency adjustment, on the grounds that no party had requested the Board to retain it. *Simplified Standards*, p. 19.¹⁰

Whether or not the Board formally retains an "efficiency adjusted" RSAM, the Board is still required to consider the Long-Cannon factors in its determination of a maximum reasonable rate. The amount of traffic being carried at less than long-run variable cost must be considered as an "other relevant factor" in a Three-Benchmark case.

In its decision in Docket No. 42093, *BP Amoco Chemical Company v. Norfolk Southern Railway Company*, served June 6, 2005 ("*BP Amoco*"), the Board proposed to only use the unadjusted (i.e., without the efficiency adjustment) RSAM in that proceeding. The Board ruled in that decision that the "uncertainty" created by the range between the adjusted and the unadjusted RSAM "did not appear justified by the objectives of the managerial efficiency adjustment." *Id.*, p. 10. The Board noted that the amount of revenue shortfall attributed to traffic with an R/VC ratio below 100% cannot provide any reasonable approximation or useful

¹⁰ This issue is one of those subject to a Petition for Reconsideration in the *Simplified Standards* proceeding.

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surrogate for other inefficiencies in a carrier's system, and that the adjustment was outdated because "there is no longer significant excess capacity in the rail industry." *Id.*

But if there is in fact "no longer significant excess capacity in the rail industry," then there is no reason for carriers to be transporting goods at less than long-run variable cost. Yet, as shown in the analysis by Mr. Crowley, *see* Crowley V.S., pp. 11-12, CSXT is in fact still carrying traffic at rates that are less than variable cost as calculated under URCS.

The Long-Cannon factors not only include a consideration of traffic that does not contribute to going concern value, but also require the Board to consider "the amount of traffic which contributes only marginally to fixed costs and the extent to which . . . rates on such traffic can be changed to maximize the revenues from such traffic . . ." 49 U.S.C. 10701(d)(2)(B). Even if traffic that is being transported at rates that produce a revenue to variable cost ratio below 100% still contributes (on a short-run basis) to the carrier's going concern value, such traffic is still contributing "only marginally" to the carrier's fixed costs, within the definition of the second Long-Cannon factor, since such traffic is being transported at rates that are less than long-run variable cost as calculated by URCS.

While the rates on such traffic might be justified if the carrier has excess capacity (since it would still be better for the carrier to transport that traffic even if such traffic contributes only marginally to fixed costs), there is no justification for captive shippers to subsidize such traffic when there is little or no excess capacity. Thus, the Board should credit, as an "other relevant factor," the adjustment shown in Mr. Crowley's Verified Statement calculating the RSAM value when such below-variable-cost traffic is eliminated. See Crowley V.S., pp. 11-12.

VI. BOTH THE PRESUMED MAXIMUM LAWFUL RATE AND THE RATE PRODUCED BY THE APPLICATION OF OTHER RELEVANT FACTORS MEET ALL OF THE REQUIREMENTS AND POLICIES OF THE STATUTE

Under 49 U.S.C. 10704(a)(2), the Board is to make an adequate and continuing effort to assist carriers in attaining adequate revenues, which are those sufficient, under honest, economical and efficient management, to cover operating expenses, support prudent capital outlays, repay a reasonable level of debt, raise needed equity capital, and otherwise retain capital in amounts adequate to provide a sound rail transportation system. 49 U.S.C. 10704(a)(2).

There is no doubt that the rate level DuPont sets forth in this evidence meets those requirements. Without considering evidence on "other relevant factors," the presumed maximum reasonable rate DuPont sets forth in its evidence is 327% of the carrier's long-run variable cost – *i.e.*, more than three times a cost level that includes a return on variable cost at a current cost of capital. These levels exceed CSXT's 4-year average RSAM set forth in the Board's December 20, 2007 decision in Ex Parte 347 (Sub-No. 2), *Rate Guidelines – Non-Coal Proceedings*. They far exceed the 4-year average revenue to variable cost ratio of the average captive (*i.e.*, over 180% R./VC ratio) shipment as determined by the CSXT's R/VC>180, as set forth in the same decision. Even considering evidence of "other relevant factors," the rate DuPont seeks far above the level needed by CSXT for revenue adequacy, especially if the reductions in the cost of capital under the Board's new methodology are considered.

Revenues at this level meet all the requirements of the statute, and the Board should so find.

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VII. CONCLUSION

DuPont respectfully requests the Board to:

- (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's 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



Nicholas J. DiMichael
Jeffrey O. Moreno
Karyn A. Booth
Eric W. Heyer
Thompson Hine LLP
1920 N St. N.W., Suite 800
Washington, D.C. 20036

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

February 4, 2008

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

	)	
E.I. DUPONT DE NEMOURS AND COMPANY	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. NOR 42101
	)	
CSX TRANSPORTATION, INC.,	)	
	)	
Defendant.	)	
	)	

PART II – VERIFIED STATEMENTS

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

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**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" or the "Company") in Wilmington, DE. I have been an employee of DuPont since December 1, 1999. Currently, I manage the transportation of products and raw materials manufactured or acquired by DuPont in the U.S. and Canada. My responsibilities include logistics, transportation equipment, safety, security, and supervision of the negotiation and administration of contracts between DuPont and its carriers. Prior to joining DuPont, I worked for Conrail. I am submitting this Verified Statement in support of the Company's claims that CSX Transportation, Inc. ("CSXT") possesses market dominance over the transportation of nitrobenzene from Pascagoula, MS to Neuse, NC.

I.

**DUPONT RELIES UPON RAIL TRANSPORTATION SERVICES FOR THE SAFE AND
SECURE TRANSPORT OF HAZARDOUS MATERIALS**

2. DuPont is a global science company creating sustainable solutions essential to a better, safer, healthier life for people everywhere. Operating in more than 70 countries, DuPont offers a wide range of innovative products and services for markets including agriculture, nutrition,

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electronics, communications, safety and protection, home and construction, automotive and apparel. The science based solutions that DuPont delivers to the global marketplace require as raw materials or intermediates products that are both hazardous and non-hazardous in nature.

3. DuPont needs a strong, efficient, safe and competitive rail transportation network to remain viable in the markets it serves. DuPont ships or receives approximately 60,000 railcars annually. Of this total rail volume, 60% of the railcars contain hazardous materials. The nature of the products and volumes that we ship or receive require movement by rail. DuPont has 39 active rail shipping locations in the US situated along the Gulf Coast and East of the Mississippi River. DuPont tenders traffic to 38 US railroads, including all seven Class I's and regional and shortline carriers. Eighty-eight percent of the rail transportation needs of DuPont are met by CSXT, UP, NS and KCS. Of the 39 active rail sites, DuPont is captive to one carrier at 32.

4. CSXT is the largest rail transportation carrier for DuPont. CSXT has access to 21 of the 39 DuPont rail sites and the Company is captive to CSXT at 16 locations. DuPont ships or receives a wide variety of commodities on CSXT, including plastics, ilmenite ore, titanium dioxide, sulfuric acid, chlorine, refrigerant gases and limestone.

5. DuPont and CSXT have had a series of contractual relationships from 1988 until 2007. When the last of those contracts expired on June 15, 2007, CSXT sought to impose rate increases that averaged ■¹ percent across all pertinent traffic lanes. Due to the excessive rate increases, the parties failed to agree upon a new contract and CSXT published rates for DuPont in four common carrier tariffs. The rate at issue in this proceeding is published in CSXT 97249, which I have attached as Pileggi Ex. 1.

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

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6. Safety is a core DuPont value. Nitrobenzene is a Class 6.1 hazardous material that can be absorbed through the skin and is flammable at a broad range of temperatures. Therefore, when transporting nitrobenzene in bulk, DuPont prefers to use the lowest risk transportation option available. In addition, most of the Company's customers prefer to receive nitrobenzene by rail.

7. The DuPont customer at Neuse is Covidien (formerly known as Mallinckrodt), the only domestic producer of acetaminophen, which is a key ingredient in Tylenol. DuPont supplies █% of Covidien's nitrobenzene, which is used to produce acetaminophen. █

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II. INTRAMODAL COMPETITION

8. Although DuPont has access to two rail carriers at Pascagoula, the destination at Neuse is captive to CSXT for rail service. Thus, DuPont has no alternative to CSXT for rail transportation of the issue movement.

III. INTERMODAL COMPETITION

9. Typically, DuPont moves nitrobenzene by truck only when rail is not an option, or when rail cannot deliver the commodity in the time that it is needed. This has been true both

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with respect to the issue movement and for all of the Company's nitrobenzene transportation in total.

10. In all of 2006, DuPont as a company tendered [REDACTED] tank cars of nitrobenzene, or more than seven times the number of tank trucks ([REDACTED]). A single tank car can hold the same amount of nitrobenzene as four tank trucks. Thus, these [REDACTED] tank trucks carried the equivalent of [REDACTED] rail cars, which comprised just 3% of the Company's total volume of nitrobenzene shipments in 2006.

11. Furthermore, all of the Company's truck shipments of nitrobenzene in 2006 originated at Pascagoula and moved to just four destinations: [REDACTED]
[REDACTED] Only [REDACTED], however, was even capable of receiving deliveries by both truck and rail. Therefore, the other three destinations received nitrobenzene by truck because rail was not an option at all, not because truck was more competitive. Since there were only [REDACTED] truck movements to [REDACTED], which is the equivalent of less than [REDACTED] tank cars, compared with [REDACTED] rail movements, truck clearly was a rare exception.

12. In 2007, DuPont shipped a similarly small amount of nitrobenzene by truck. There were only [REDACTED] truck movements, and all of them originated at Pascagoula and went to the same non-rail served destinations as in 2006, at [REDACTED], and a single truckload each was delivered to [REDACTED]. There were no truck shipments of nitrobenzene to [REDACTED] in 2007.

13. DuPont has *never* shipped a single truckload of nitrobenzene from Pascagoula to Neuse, except in 2005 after Hurricane Katrina. For only approximately three months, and only after reluctant consent was obtained from the customer's senior management, DuPont shipped nitrobenzene by truck because hurricane damage to the Pascagoula facility temporarily prevented DuPont from shipping by rail. Otherwise, DuPont does not ship nitrobenzene to Neuse by truck

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[REDACTED]. DuPont's customer prefers rail deliveries,

_____. See Pileggi Ex. 2.

Consistent with that requirement, in 2006, DuPont tendered [REDACTED] rail cars of nitrobenzene from Pascagouls to Neuse, but did not tender a single truck load.

14. Even if Covidien would agree to receive nitrobenzene by truck, the cost is not competitive with CSXT's rail rate. DuPont's rail cost to transport nitrobenzene from Pascagoula to Neuse is approximately \$[REDACTED] per car. CSXT's tariff rate plus July 2007 fuel surcharge is \$7143 per car. In addition DuPont has rail car lease and maintenance costs of \$[REDACTED] per month, which based upon an average of [REDACTED] round trips annually, equals \$[REDACTED] per shipment.

15. In response to CSXT's rate increases for the issue movement, DuPont compared three rates for moving nitrobenzene by truck. The three motor carriers were [REDACTED]

three rates for moving nitrobenzene by truck. The three motor carriers were [REDACTED]
[REDACTED]. [REDACTED]
[REDACTED].

16. [REDACTED] offered the best rate. The sum of the \$ [REDACTED] line haul rate, a \$ [REDACTED] fuel surcharge, and a \$ [REDACTED] cleaning charge was \$ [REDACTED] per truck load. *See* Pileggi Ex. 3. This cost multiplied by four trucks produces a rail equivalent rate of \$ [REDACTED], which is [REDACTED] % greater than the Company's rail costs.

17. Under a contract with [REDACTED], DuPont pays a line haul rate of \$[REDACTED] and a fuel surcharge of approximately \$[REDACTED], for a total rate of \$[REDACTED] per truck. *See* Pileggi Ex. 4 (This is a mileage-based rate of \$[REDACTED] applied to a 775 mile haul). This cost multiplied by four trucks produces a rail equivalent rate of \$[REDACTED], which is [REDACTED]% greater than the Company's rail costs.

PUBLIC VERSION

18. The contract between DuPont and [REDACTED] includes a line haul rate of \$[REDACTED], a \$[REDACTED] fuel surcharge, a \$[REDACTED] cleaning charge, and a \$[REDACTED] drayage charge to a tank cleaning facility, for a total of \$[REDACTED] per truck. *See* Pileggi Ex. 5. This cost multiplied by four trucks produces a rail equivalent rate of \$[REDACTED], which is [REDACTED]% greater than the Company's rail costs. DuPont actually paid this rate immediately following Hurricane Katrina, when rail was unavailable and that rate is still in effect today.

19. A sampling of the invoices received by DuPont for post-Katrina truck shipments contains total costs ranging from \$[REDACTED] to \$[REDACTED] per truck load. *See* Pileggi Ex. 6. The amounts varied by the carrier and by whether DuPont incurred detention, cleaning, and/or drayage charges on a particular movement. Those rates multiplied by four trucks produces a rail equivalent rate of \$[REDACTED] to \$[REDACTED] per car.

VERIFICATION

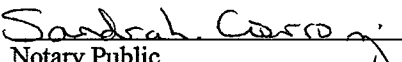
STATE OF DELAWARE)
)
CITY OF WILMINGTON)

I, Mary Pileggi, verify under penalty of perjury that I have read the foregoing 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.



Mary Pileggi

Sworn to and subscribed
before me this day of February 1st, 2008



Notary Public

SANDRA L. CORROZI
NOTARY PUBLIC
STATE OF DELAWARE
My Commission Expires Jan 13, 2009

Pileggi

Exhibit 1



TRANSPORTATION

PRIVATE PRICE LIST CSXT 97249

**Containing
Confidential Information
for
DUPONT PATRON GROUP1**

CONTAINING PRICES ON

CHEMICALS

Prices are subject to increase, change or expiration. Any change to prices will be shown in supplements to or a reissue of this document, or through advanced notification. Except as otherwise noted, ancillary charges contained in CSXT Tariff 8100 (Merchandise)/8200 (Coal) Series, as of the date of shipment tender, shall apply.

EFFECTIVE: June 16, 2007
(except as otherwise noted)

EXPIRATION: May 31, 2008

CSX TRANSPORTATION
CHEMICALS
www.ShipCSX.com
Jacksonville, FL 32202

June 21, 2007

CSX
TRANSPORTATION
PRIVATE PRICE LIST CSXT 97249

**PARTICIPATING
CARRIERS**

ABBREVIATION

NAME OF CARRIER

CSXT CSX TRANSPORTATION, INC.

CSX
TRANSPORTATION
PRIVATE PRICE LIST CSXT 97249

**PUBLICATION
INFORMATION**

CONTACT PERSONNEL

Please refer to www.ShipCSX.com

CURRENCY

Prices are stated and payable in U.S. funds unless shipment is wholly within Canada,
then price is stated in Canadian funds.

ALTERNATION / NON-ALTERNATION OF PUBLICATION

Rail Transportation Contracts take precedence over prices published herein for the same commodities over the same routes.

Prices published in this private Price List will alternate with prices, with similar price conditions, published in other private documents and take precedence over public price documents.

ALTERNATION OF PRICES

Prices in this publication will alternate with other prices, with similar price conditions, in this publication, unless otherwise specified in an alternation provision documented in the Private CSXT 97249 (0) workbook, sheet tab labeled CSXT Price List.

CONFLICT OF RULES

The rules in this Price List will take precedence over rules contained in other separate publications when shipments move under the prices contained in Private CSXT 97249 (0) workbook.

DESCRIPTION OF COMMODITIES AND INSPECTION

The description of commodity(s) on the Shipping Document will conform to the Standard Transportation Commodity Code (STCC) and show the STCC Number(s). When different prices are provided for the same commodity(s) according to the type of packing or package, the type of packing or package should be shown.

The Carrier(s) reserve the right to inspect shipments to determine applicable prices. When the commodity(s) are found to be incorrectly described, freight charges will be collected according to the proper description.

EMERGENCY ROUTING

When in the case of pronounced traffic congestion (not an embargo), washout, wreck or other similar emergency, or through Carriers' error, Carriers forward shipments via other junction points of the same Carriers or via the lines of other Carriers party to the Price List, the price to apply will be that specified in this Price List, but not higher than the price applicable via the route of movement.

EQUIPMENT MILEAGE ALLOWANCE

For mileage allowance provisions on privately owned or lease equipment please see Private CSXT 97249 (0) workbook, sheet tab labeled CSXT Price List.

FUEL RATE ADJUSTMENT

In the event that the monthly average price per gallon of highway diesel fuel (as determined below, the "HDF Average Price") equals or exceeds 200.0 cents, CSXT will apply a mileage-based fuel adjustment to the linehaul rates and charges provided for in this Contract or publication. The fuel adjustment will be applied to each shipment having a bill of lading or other shipping instruction dated on or after the first day of the second calendar month following the calendar month of a given HDF Average Price determination.

The "HDF Average Price" for a month will be the average price for that month of U.S. No. 2 Diesel Retail Sales by All Sellers, as determined and published by the U.S. Department of Energy, Energy Information Administration ("DOE-EIA"). That average price will, in calculating the HDF Average Price, be rounded to the nearest 1/10th of a cent applying conventional rounding principles. The fuel adjustment will be 1 cent per mile per railcar for every 4 cents per gallon, or portion thereof, by which the HDF Average Price for the calendar month two months prior to the calendar month of shipment exceeds 199.9 cents.

The DOE-EIA publication referenced above can currently be found at www.eia.doe.gov. On the home page select "Petroleum;" under "Prices" select "Weekly Retail Gasoline and Diesel Prices;" for the "Area" select "U. S.;" for the "Period" select "Monthly" then refer to the data on the line entitled "Diesel (On-Highway)." Monthly data is normally published Wednesday after the last Monday of a given month. If DOE-EIA ceases publication of the above information, CSXT will employ a suitable substitute source of price or measure.

The mileage to be applied in calculating the fuel adjustment will be based on rail miles between origin, interchange(s) and destination, and can be found at www.csx.com. On the home page select "Customers;" select "Prices, Tariffs, Fuel Surcharge;" select "Fuel Surcharge;" then select "Mileage" and follow the instructions provided. Registration will be required to use the ShipCSX functions.

INTERNAL ROUTING

Prices or routes published herein, to, from or via stations on CSXT, while on the rails of CSXT, are applicable only over the shortest distance between the stations where transportation is performed by CSXT, except as otherwise specifically authorized by other agreement(s), or unless handled out of route for Carrier's convenience.

INCORPORATION OF DOCUMENTS

Prices subject to rules and conditions of Railway Equipment Register, STCC 6001, OPPL 6000, UFC 6000, Rules Circular CSXT 4048 Series (Waste Shipments) when applicable, and CSXT Tariff 8100 (Merchandise)/8200 (Coal) Series, unless otherwise noted.

LOADING AND UNLOADING

Consignors and Consignees will load and unload cars.

Consignors must load all cars in accordance with the Association of American Railroads' Circular 42 Series and appropriate AAR commodity loading publications and revisions thereof, or as approved by Rail Carriers involved. All unused securement devices must be returned to and stored in the same car from which removed, and devices must be secured. To inquire about loading and unloading requirements for a participating Carrier other than CSXT, contact that Carrier's sales office. For further information on CSXT loading and unloading requirements, contact:

Director - Freight Damage Prevention
CSX Transportation, Inc. - J815
P.O. Box 44085
Jacksonville, FL 32231-4085
800-327-9715 (Within U.S.)
904-279-6331 (Outside U.S.)

Temporary blocking, flooring or lining, corrugated fibreboard or plywood separators or dividers, standards, strips, stakes or similar bracing or supports (hereafter referred to as dunnage), bulkheads, partitions, temporary doors or door protection, not constituting a part of the car, when required to protect and make freight secure for shipment, will be furnished and installed by Consignor at his expense.

Transportation charges for dunnage, when made, shall be at the price applicable to the freight which it accompanies.

Consignee is responsible for unloading all material from the rail car. This includes lading, dunnage, loading or unloading enhancement materials, or any other miscellaneous debris. Failure to comply with these rules will result in Consignee being charged for all associated removal costs (minimum of \$150 to a maximum of \$500 per car).

When equipment is found to be misloaded or overloaded, the Consignor will be given the opportunity to correct the situation at the Consignor's expense. Consignor is responsible for all damage to freight, rail equipment, or both caused by misloading or overloading. For overloaded cars on CSXT, see CSXT Tariff 8100 Series.

Consignee is required to return and secure the same car, all railroad owned securement devices removed to complete unloading, securely lock all bulkhead doors, return wooden doors used in transportation of bulk commodities and close all exterior doors and hatches.

LOSS AND DAMAGE LIABILITY OF CARRIER

The Carrier shall be liable for claims only if Carrier negligence is shown by the claimant to be the proximate cause of the loss or damage.

Carrier liability for shortage of goods shall be conditioned upon evidence of unauthorized entry into the rail car while the same is in the possession of the Carriers.

Carrier shall not be liable for special or consequential damages, including market decline claims, products deterioration, or other such claims based on delay in transportation, nor shall Carrier be liable for punitive damages or attorney fees.

Carrier liability for damages or shortages is contingent upon Carrier or its agent receiving immediate notification of all noted visible damages and/or shortages discovered during the unloading of a rail car. Damage or shortages discovered other than between 8:00 A.M. and 5:00 P.M., Monday through Friday, are subject to reporting no later than 24 hours following unloading from rail car, Saturdays, Sundays, and Holidays excluded. Concealed damage must be reported immediately upon discovery and made available for inspection at point of delivery. Damage may be reported to: Telephone: 800-432-1032.

Failure of the shipper to comply with packaging requirements of the Uniform Freight Classification and AAR loading provisions shall be a defense to any claim for damage.

Any claim for loss or damage shall be filed within nine (9) months of the date the shipment was delivered, or in the case of failure to make delivery, then within nine (9) months after a reasonable time for delivery. Any lawsuit or other action for the enforcement or liability for loss of damage shall be instituted within one year after the railroad first declines the claim. Loss and Damage Claims should be filed with:

Director - Freight Claims Services
CSX Transportation, Inc. - J815
P.O. Box 44085
Jacksonville, FL 32231-4085
800-327-9715 (Within U.S.)
904-279-6331 (Outside U.S.)

ONE CONSIGNOR, CONSIGNEE, AND DESTINATION

The name of only one Consignor, one origin, one Consignee and one destination shall appear on a Shipping Document. The Shipping Document may also specify the name of a third party that will be billed for the freight charges or a party at the same destination to be notified of the arrival of the shipment. See provisions in the Private CSXT 97249 (0) workbook, sheet tab labeled CSXT Column Definitions.

OVERCHARGE CLAIMS

Claims for overpayment of charges must be in writing and received by Carriers no later than three years after delivery or tender of delivery of shipment. Any lawsuit for overpayment of charges must be filed within:

- A. three years after delivery or tender of delivery of shipment or
- B. six months from the date of Carriers' disallowance of the last timely filed claim, whichever occurs later.

For Overcharge Claim Information pertaining to a participating Carrier other than CSXT contact that Carrier's sales office.

To inquire on CSXT overcharge claims contact:

Patron Overcharge Claims
CSX Transportation, Inc. - J605
6737 Southpoint Drive South, 2nd Floor
Jacksonville, FL 32216-6177
904-279-4764

PACKAGING (applicable on regulated commodities)

Shipper must package all shipments governed by this Price List in accordance with Rules 5, 40, 41 and 51 of the Uniform Freight Classification, UFC 6000 Series, and exceptions thereto as published in 2000 Series Tariffs.

PAYMENT OF CHARGES - EXTENSION OF CREDIT

Customers not on credit must pay freight and other accrued transportation charges prior to transportation of a shipment if it is tendered "prepaid" and prior to placement of a shipment if it is tendered "collect". In order to establish credit with CSX Transportation, Inc., contact:

CSX Transportation, Inc.
Credit Administration - J220
500 Water Street
Jacksonville, FL 32202
Telephone: 904-366-3807
Fax: 904-366-4406

On-line at www.csx.com

- a) Click on "Customers" (on menu bar)
b) Click on "Credit Application" under "Become a Customer"

If credit has been established with CSX Transportation, Inc., freight and other accrued transportation charges shall be paid fifteen (15) calendar days or less from the billing date.

Freight and other accrued transportation charges may not be offset by overcharge, freight damage or other claims.

CSX Transportation, Inc. reserves the right to cancel the credit of any party and place the responsible party (Consignee, Consignor, or other billed party) on a cash basis. If the party responsible for freight charges has not established credit with CSXT, or has their credit cancelled by CSX Transportation, Inc., pursuant to 49 CFR, Section 1320.2, they will be subject to Liquidated damages interest, in addition to the Liquidated damages interest shall not apply in instance of clear clerical error on the part of CSX Transportation, Inc. "Liquidated damages interest" means 20% of the charges due.

PRICE APPLICATION

Actual City locations applying from or to stations within the switching district will be designated as "SD" (Switch District) in the Private CSXT 97249 (0) workbook with sheet tab labeled CSXT Price List.

Prices will NOT apply to/from stations within the switching district of a zip code, state, FSAC (Freight Station Accounting Code), or NRB (National Rate Basis).

Prices in this Price List and other Price Lists may not be used to make a combination of prices that defeat the through prices documented in this CSXT Price Authority.

PRICE TERMS AND CONDITIONS (additional):

Carrier agrees to provide rail transportation service at the rates and subject to the additional terms and conditions set forth in Private CSXT 97249 (0) workbook with sheet tabs labeled CSXT Price List, CSXT Commodity Definitions, CSXT Column Definitions, CSXT Location Groups, and CSXT Price List Terms. The workbook is a part of this Price List and may be supplemented from time to time.

PROPORTIONAL APPLICATION OF PRICES (applicable only to Rule 11 rates)

When Price List proportional prices are used to construct through charges beyond the geographic scope of this publication on a through Shipping Document, the Price List charges will be assessed and billed separately by CSXT or other participating Carriers, as appropriate. Shipping Documents on such rebilled shipments must indicate that the shipment is made under Railway Accounting Rule 11. Industry agrees to specify on each Bill of Lading and requests origin Carrier to place the following statement on the waybill:

"Charges to Carriers which are party to this Price List are separately collected pursuant to Railway Accounting Rule 11."

REJECTED, REFUSED, RETURNED SHIPMENTS

Unless restricted, shipments reaching destination but unloaded (for reasons other than the Carriers' errors), may be returned to the original shipping point via the reverse route at the same price and conditions, unless a lower price exists for such return shipments.

SHIPPING DOCUMENT

Prior to tender of freight, Consignor shall execute a Shipping Document similar in content to the Uniform Bill of Lading. However this Price List shall override any inconsistent terms in the Shipping Document.

Pileggi

Exhibit 2

Redacted

Pileggi

Exhibit 3

Redacted

Pileggi

Exhibit 4

Redacted

Pileggi

Exhibit 5

Redacted

Pileggi

Exhibit 6

Redacted

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

E. I. duPont de Nemours and Company)

Complainant)

v.)

CSX Transportation, Inc.)

Defendant)

Docket No. NOR 42101

Verified Statement

of

Thomas D. Crowley

President

L. E. Peabody & Associates, Inc.

Due Date: February 4, 2008

PUBLIC VERSION

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LIST OF EXHIBITS

<u>EXHIBIT NO.</u>	<u>DESCRIPTION</u>
TDC-1	Statement of Qualifications
TDC-2	3Q07 Variable Costs for DuPont's Hazardous Movement on CSXT
TDC-3	Comparable Group and Maximum R/VC Ratio for the Pascagoula Movement
TDC-4	RSAM to $R/VC_{>180}$ Ratio Adjusted for Efficiency
TDC-5	Comparison of Railroad Industry Cost of Capital Based on the STB's Single Stage Discounted Cash Flow Model ("DCF") to the STB's Capital Asset Pricing Model ("CAPM") - - 2002 through 2005
TDC-6	RSAM to $R/VC_{>180}$ Ratio Adjusted for CAPM Cost of Capital

I. INTRODUCTION

My name is Thomas D. Crowley. I am an economist and President of the economic consulting firm of L. E. Peabody & Associates, Inc. The Firm's offices are located at 1501 Duke Street, Suite 200, Alexandria, Virginia 22314, 5901 N. Cicero Avenue, Suite 504, Chicago, Illinois 60646 and 10445 N. Oracle Road, Suite 151, Tucson, Arizona 85737. My qualifications and experience are attached to this verified statement as Exhibit_(TDC-1).

E. I. duPont de Nemours and Company ("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").

I have been requested to apply 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 Rail Rate Cases ("Simplified Standards") and provide the following information to support 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.

My verified statement describes how I developed the above information and the results of my analyses. The remainder of my verified statement summarizes the analyses I have performed and the results are summarized under the following headings and in the accompanying Exhibits.

- II. Revenue/Variable Cost Ratios for the Issue Movements
- III. Maximum Revenue/Variable Cost Ratios for the Issue Movements
- IV. Other Relevant Factors
- V. Relief for DuPont

II. REVENUE / VARIABLE COST RATIO FOR THE ISSUE MOVEMENT

The first step in the STB's Three-Benchmark analysis is to calculate the R/VC ratio for the issue movement. To develop an R/VC ratio, the rates and variable costs for the movement need to be developed. These three components are discussed below under the following topics.

- A. Rate for the Issue Movement
- B. Variable Costs for the Issue Movement
- C. R/VC Ratio for the Issue Movement

A. RATE FOR THE ISSUE MOVEMENT

Dupont's 3Q07 rate (including the July 2007 fuel surcharge) for the issue movement is shown in Table 1 below.

Table 1 3Q07 Rate Per Car (Including Fuel Surcharge) <u>for Issue Movement</u>	
<u>Item</u> (1)	<u>Pascagoula- Neuse</u> (2)
1. 3Q07 Rate Cost Per Car	\$6,979.84
2. July 2007 Fuel Surcharge Per Car ^{1/}	<u>\$163.34</u>
3. Total Rate Per Car - 3Q07 ^{2/}	\$7,143.18
^{1/} CSXT July 2007 surcharge of \$0.20 per loaded mile from CSXT Fuel Surcharge Publication 8661-A	
^{2/} Line 1 + Line 2	

As shown in Table 1 above, the 3Q07 rate for the issue movement equals \$7,143.18 per car.

**B. VARIABLE COSTS FOR
THE ISSUE MOVEMENT**

In the STB's October 30, 2006 decision in Ex Parte No. 657 (Sub-No. 1) *Major Issues in Rail Rate Cases* ("Major Issues"), the STB revised the variable cost procedures for rate complaints. The STB decided that variable costs would be calculated using the STB's Uniform Railroad Costing System ("URCS") Phase III cost program without adjustments. The STB also identified the following nine inputs to calculate unadjusted variable costs for an issue movement:

1. Railroad;
2. Loaded miles (including loop track miles);
3. Shipment type (local, originated delivered, bridge or received terminated);
4. Number of freight cars per shipment;
5. Tons per car;
6. Commodity (for loss and damage only);
7. Type of movement (single car, multiple cars or unit train);
8. Car ownership (railroad or private); and
9. Type of car.

Table 2 below shows the nine inputs that I incorporated into CSXT's URCS Phase III cost program for the issue movement.

Table 2 CSXT's URCS Phase III Cost Program <u>Inputs for the Issue Movement</u>	
<u>Item</u> (1)	<u>Pascagoula- Neuse</u> (2)
1. Railroad	CSXT
2. Loaded Miles	816.7
3. Shipment Type	Originated & Terminated
4. Number of Freight Cars Per Shipment	1
5. Tons Per Car	90
6. Commodity (3-digit STCC)	281
7. Type of Movement	Single Car
8. Car Ownership	Private
9. Type of Car	Tank > 22,000 gallons

The nine items summarized in Table 2 were input into the Phase III cost program for the movement and applied to the CSXT 2005 URCS unit costs. The base year 2005 costs for the issue movement were then indexed to 3Q07 levels.

Table 3 below shows the base year 2005 variable costs and the 3Q07 indexed variable costs for the issue movement.

Table 3 STB's URCS Phase III Cost Program <u>Variable Costs Per Car</u>	
<u>Item</u> (1)	<u>Pascagula - Neuse</u> (2)
1. 2005 Variable Cost Per Car ^{1/}	\$1,788.12
2. 3Q07 Variable Cost Per Car ^{1/}	\$1,913.12
^{1/} Exhibit_(TDC-2).	

As shown in Table 3 above, the 3Q07 variable costs for the issue movement equal \$1,913.12 per car.

**C. R/VC RATIO FOR
THE ISSUE MOVEMENT**

Table 4 below shows the base year 2005 variable costs, the 3Q07 indexed variable costs, the 3Q07 rate (including fuel surcharge) and the R/VC ratio for the issue movement.

Table 4 STB's URCS Phase III Cost Program <u>Variable Costs Per Car and R/VC Ratio</u>	
<u>Item</u> (1)	<u>Pascagoula - Neuse</u> (2)
1. 2005 Variable Cost Per Car ^{1/}	\$1,788.12
2. 3Q07 Variable Cost Per Car ^{1/}	\$1,913.12
3. 3Q07 Rate per Car (Including Fuel Surcharge) ^{2/}	\$7,143.18
4. R/VC Ratio ^{3/}	373%
^{1/} Exhibit_(TDC-2). ^{2/} Table 1 above. ^{3/} Line 3 ÷ Line 2 x 100.	

As shown in Table 4 above, the R/VC ratio for the issue movement equals 373%.

III. MAXIMUM REVENUE / VARIABLE COST RATIOS FOR THE ISSUE MOVEMENT

The STB's decision in Simplified Standards specified the procedures to develop the Maximum R/VC Ratio for the issue movement using the Three Benchmark Methodology. The results of my analyses following the STB procedures are summarized below under the following topics.

- A. Selection of Comparable Movements
- B. Maximum R/VC Ratio for the Issue Movement

A. SELECTION OF COMPARABLE MOVEMENTS

The STB provided DuPont with Waybill Samples for 2002 through 2005 containing all waybill records in which CSXT was a participating railroad. Movements with characteristics similar to the issue movement were selected to form the "comparable group" for the issue movement. The movements in the comparable group for the issue movement were selected based on the following criteria:

1. The commodity (STCC) is classified as Hazard Class 6.1 (excluding TIH);^{1/}
2. The movement is classified as a hazardous commodity in the Waybill Sample;
3. CSXT originates and terminates the movement;
4. The rebill code is zero;^{2/}
5. The R/VC ratio is greater than 180%;

^{1/} A complete listing of the STCC's used for the comparable movements is included in my electronic workpapers in file "Exhibit 3_Haz Comparables Lane 1.xlsx", Tab "Select 6.1 STCC".

^{2/} The "Rebill Code" field in the Waybill Sample identifies those records that are local movements with a code of "0" and those records that reflect only a portion of the movement with codes of "1", "2" or "3."

6. The car type is the same as the issue movement (i.e., tank car);
7. The car ownership is private; and
8. The loaded miles are within a range of plus or minus 150 miles of the issue movement loaded miles rounded to the nearest 50 miles.^{3/}

Exhibit_(TDC-3) contains a listing of the comparable group for the issue movement.^{4/}

B. MAXIMUM R/VC RATIO FOR THE ISSUE MOVEMENT

To develop the Maximum R/VC Ratio for the issue movement, I followed the procedures set forth in Simplified Standards. First, I selected the comparable group for the issue movement. Next, I multiplied the R/VC for each comparable movement by the ratio of the CSXT RSAM and $R/VC_{>180}$ four-year average contained in the STB's December 20, 2007 decision in Ex Parte No. 347 (Sub-No. 2) Rate Guidelines - Non-Coal Proceedings ("Non-Coal Guidelines"). I then calculated the mean and standard deviation for the adjusted R/VC ratios for the comparable group. Next, using the mean and standard deviation, I calculated the 90% confidence interval around the estimate of the mean to determine the upper boundary of the mean for the comparable group which becomes the threshold for determining if a rate is unreasonable.^{5/}

Table 5 below compares the issue movement R/VC ratio to the Maximum R/VC Ratio calculated following the STB's procedures.

^{3/} The loaded miles for the Pascagoula Movement equal 816.7. 816.7 miles rounded to the nearest 50 miles is 800 miles; therefore, the mileage range for comparable movements equals 650 to 950 miles.

^{4/} The selection process used to identify the comparable movements for the issue movement is included in the electronic workpapers supporting my verified statement.

^{5/} The calculation of the Maximum R/VC Ratio for the issue movement is shown in Exhibit_(TDC-3).

Table 5 Maximum Rate for Issue Movement Using STB's RSAM and R/VC>180	
Item (1)	Pascagoula- Neuse (2)
1. 3Q07 Rate per Car (Including Fuel Surcharge) ^{1/}	\$7,143.18
2. 3Q07 Variable Cost per Car ^{2/}	\$1,913.12
3. R/VC Ratio ^{3/}	373%
4. Maximum R/VC Ratio ^{4/}	327%
5. Maximum Rate per Car ^{5/}	\$6,255.90
6. Amount CSXT Rate per Car Exceeds Maximum Rate per Car ^{6/}	\$887.28
^{1/} Table 1 above ^{2/} Table 3 above ^{3/} Line 1 ÷ Line 2 x 100 ^{4/} Exhibit_(TDC-3) ^{5/} Line 2 x Line 4 ^{6/} Line 1 - Line 5	

As shown in Table 5 above, CSXT's rate for the issue movement (Line 1) exceeds the rate based on the Maximum R/VC Ratio (Line 5) for the comparable group by an amount equal to \$887.28 per car.

IV. OTHER RELEVANT FACTORS

In this section of my verified statement, I quantify and apply other relevant factors to the issue movement. The results of my other relevant factor analyses are summarized below under the following headings.

- A. STB's RSAM Ratio Adjusted for Efficiency
- B. STB's RSAM and $R/VC_{>180}$ Ratios Adjusted for the STB's New Cost of Capital Methodology

A. STB'S RSAM RATIO ADJUSTED FOR EFFICIENCY

The STB's CSXT RSAM calculation is based on all movements involving CSXT including those movements that have an R/VC ratio of less than 1.0. I have recalculated CSXT's 2002-2005 and 4-year average RSAM ratio after elimination of movements that have an R/VC ratio less than 1.0. As shown in Exhibit_(TDC-4), this calculation results in a 4-year average CSXT RSAM ratio of 273% which is less than the STB's 4-year average CSXT RSAM of 292%. Exhibit_(TDC-4) also compares the RSAM to $R/VC_{>180}$ ratio used to adjust the R/VC ratios of the comparable movements prior to eliminating non-compensatory traffic and after that traffic is eliminated, i.e., a change from 1.24 to 1.16.

To quantify the impact of this modification, I substituted the 1.16 ratio of the RSAM (excluding movements with an R/VC of less than 1.0) to $R/VC_{>180}$ into the calculation of the Maximum R/VC Ratio for each issue movement. Specifically, I adjusted the R/VC ratios of the comparable group

by 1.16 instead of 1.24 and recalculated the Maximum R/VC Ratio for the issue movement.^{6/} The results of this substitution are summarized in Table 6 below.

Table 6 Maximum Rate for Issue Movement Using Efficiency RSAM and R/VC>180	
Item (1)	Pascagoula - Neuse (2)
1. 3Q07 Rate per Car (Including Fuel Surcharge) ^{1/}	\$7,143.18
2. 3Q07 Variable Cost per Car ^{2/}	\$1,913.12
3. R/VC Ratio ^{3/}	373%
4. Maximum R/VC Ratio with RSAM Adjusted for Efficiency ^{4/}	307%
5. Maximum Rate per Car ^{5/}	\$5,873.28
6. Amount CSXT Rate per Car Exceeds Maximum Rate per Car ^{6/}	\$1,269.90
^{1/} Table 1 above ^{2/} Table 3 above ^{3/} Line 1 ÷ Line 2 x 100 ^{4/} Electronic workpapers ^{5/} Line 2 x Line 4 ^{6/} Line 1 - Line 5	

As shown in Table 6 above, CSXT's rate for the issue movement (Line 1) exceeds the rate based on the Maximum R/VC Ratio using the RSAM adjusted for efficiency (Line 5) for the comparable group by an amount equal to \$1,269.90 per car.

^{6/} See electronic workpapers, file "Efficient_Haz Comparables Lane 1.xlsx".

**B. STB'S RSAM AND R/VC_{>180} RATIOS
ADJUSTED FOR THE STB'S NEW
COST OF CAPITAL METHODOLOGY**

In its 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"), the STB changed the methodology used to calculate the railroad industry's annual cost of capital. Specifically, the STB replaced 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. The cost of capital is used in the STB's URCS formula and impacts the unit costs for the return components used by the URCS Phase III cost program.

I incorporated the CAPM cost of capital into the calculation of the maximum rates for the issue movements. Analytically, I performed the following steps:

1. I developed the cost of capital for each year 2002-2005 using the CAPM methodology contained in Cost of Capital. The results are shown in Exhibit _(TDC-5);
2. I modified all return on investment unit costs in the STB's URCS Phase III unit cost files for each year 2002-2005 by the ratio of the CAPM cost of capital to the single stage DCF cost of capital for each year;
3. I recalculated the variable costs using the URCS Phase III cost program for all movements involving CSXT in the 2002-2005 Waybill Samples with an R/VC ratio greater than 165;^{2/}
4. I recalculated the RSAM and R/VC ratios based on the movements in the Waybill Samples that exceeded an R/VC ratio of 180 using the revised costs; and

^{2/} As the RSAM and R/VC ratios are based only on movements with an R/VC ratio greater than 180, I only re-costed those movements in the Waybill Sample that could potentially have an R/VC ratio of that level. To account for the lower variable costs resulting from the revised return unit costs and the reality that current R/VC ratios of less than 180 for some movements would be changed to an R/VC ratio greater than 180, I selected all movements with a current R/VC ratio greater than 165.

5. I performed the same calculations described above to determine the Maximum R/VC Ratio for the issue movement.

Exhibit_(TDC-6) shows the RSAM and $R/VC_{>180}$ ratios and the adjustment ratio for the comparable group R/VC ratios that result from using the CAPM cost of capital.^{8/} Exhibit_(TDC-6) also compares the RSAM to $R/VC_{>180}$ ratios used to adjust the R/VC ratios of the comparable movements prior to using the CAPM cost of capital and after using the CAPM cost of capital, i.e., a change from 1.24 to 1.15. The calculation of the Maximum R/VC Ratio for the issue movement, using the RSAM to $R/VC_{>180}$ ratio based on the CAPM methodology, is contained in my workpapers.^{9/} The results of this analysis are summarized in Table 7 below.

^{8/} These ratios do not reflect the efficiency adjustment described previously.

^{9/} See electronic workpapers, files "CAPM_Haz Comparables Lane 1.xlsx".

Table 7 Maximum Rate for Issue Movement Using CAPM RSAM and R/VC>180	
Item (1)	Pascagoula - Neuse (2)
1. 3Q07 Rate per Car (Including Fuel Surcharge) ^{1/}	\$7,143.18
2. 3Q07 Variable Cost per Car ^{2/}	\$1,913.12
3. R/VC Ratio ^{3/}	373%
4. Maximum R/VC Ratio with RSAM Adjusted for CAPM ^{4/}	304%
5. Maximum Rate per Car ^{5/}	\$5,815.88
6. Amount CSXT Rate per Car Exceeds Maximum Rate per Car ^{6/}	\$1,327.30
^{1/} Table 1 above ^{2/} Table 3 above ^{3/} Line 1 ÷ Line 2 x 100 ^{4/} Electronic workpapers ^{5/} Line 2 x Line 4 ^{6/} Line 1 - Line 5	

As shown in Table 7 above, CSXT's rate for the issue movement (Line 1) exceeds the rate based on the Maximum R/VC Ratio using the RSAM and R/VC_{>180} ratios adjusted for the CAPM cost of capital (Line 5) for the comparable group by an amount equal to \$1,327.30 per car.

V. RELIEF FOR DUPONT

In this section of my verified statement, I present the relief that DuPont is entitled to for the issue movement based on the methodologies described above. The results of my analyses are shown in Table 8 below.

Table 8			
<u>Estimated Relief to DuPont For Movement At Issue</u>			
(in thousands)			
<u>Movement</u> (1)	<u>STB's RSAM and R/VC>180</u> (2)	Based on:	
		<u>Efficient RSAM and R/VC>180</u> (3)	<u>CAPM RSAM and R/VC>180</u> (4)
1. Pascagoula, MS - Neuse, NC	\$1,193	\$1,708	\$1,785

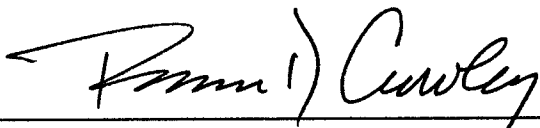
As shown in Table 8 above, DuPont is entitled to relief totaling \$1.19 million using the STB's RSAM and $R/VC_{>180}$ ratios subject to the appropriate cap in Three-Benchmark cases. The relief increases to \$1.71 million using the RSAM and $R/VC_{>180}$ ratios adjusted for efficiency and to \$1.79 million using the RSAM and $R/VC_{>180}$ ratios adjusted only for the CAPM cost of capital (i.e., unadjusted for efficiency) ^{10/}, again subject to the appropriate cap.

^{10/} See electronic workpapers, file "HAZ Relief Summary.xls" for the detailed calculations.

VERIFICATION

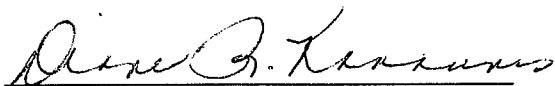
COMMONWEALTH OF VIRGINIA)
)
CITY OF ALEXANDRIA)

I, THOMAS D. CROWLEY, verify under penalty of perjury that I have read the foregoing Verified Statement of Thomas D. Crowley, 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.



Thomas D. Crowley

Sworn to and subscribed
before me this day of February 4, 2008



Diane R. Kavounis
Notary Public for the State of Virginia

My Commission expires: November 30, 2012

STATEMENT OF QUALIFICATIONS

My name is Thomas D. Crowley. I am an economist and President of the economic consulting firm of L. E. Peabody & Associates, Inc. The firm's offices are located at 1501 Duke Street, Suite 200, Alexandria, Virginia 22314, 5901 N. Cicero Avenue, Suite 504, Chicago, Illinois 60646 and 10445 N. Oracle Road, Suite 151, Tucson, Arizona 85737.

I am a graduate of the University of Maine from which I obtained a Bachelor of Science degree in Economics. I have also taken graduate courses in transportation at George Washington University in Washington, D.C. I spent three years in the United States Army and since February 1971 have been employed by L. E. Peabody & Associates, Inc.

I am a member of the American Economic Association, the Transportation Research Forum, and the American Railway Engineering and Maintenance-of-Way Association.

The firm of L. E. Peabody & Associates, Inc. specializes in solving economic, marketing and transportation problems. As an economic consultant, I have organized and directed economic studies and prepared reports for railroads, freight forwarders and other carriers, for shippers, for associations and for state governments and other public bodies dealing with transportation and related economic problems. Examples of studies I have participated in include organizing and directing traffic, operational and cost analyses in connection with multiple car movements, unit train operations for coal and other commodities, freight forwarder facilities, TOFC/COFC rail facilities, divisions of through rail rates, operating commuter passenger service, and other studies dealing with markets and the transportation by different modes of various commodities from both eastern and western origins to various destinations in the United States. The nature of these

STATEMENT OF QUALIFICATIONS

studies enabled me to become familiar with the operating practices and accounting procedures utilized by railroads in the normal course of business.

Additionally, I have inspected and studied both railroad terminal and line-haul facilities used in handling various commodities, and in particular unit train coal movements from the Powder River Basin to various utility destinations in the midwestern and western portions of the United States and from the Eastern Coal Fields to various destinations in the Mid-Atlantic, northeastern and southeastern portions of the United States. These operational reviews and studies were used as a basis for the determination of the traffic and operating characteristics for specific movements of coal and numerous other commodities handled by rail.

I have frequently been called upon to develop and coordinate economic and operational studies relative to the acquisition of coal and the rail transportation of coal on behalf of electric utility companies. My responsibilities in these undertakings included the analyses of rail routes, rail operations and an assessment of the relative efficiency and costs of railroad operations over those routes. I have also analyzed and made recommendations regarding the acquisition of railcars according to the specific needs of various coal shippers. The results of these analyses have been employed in order to assist shippers in the development and negotiation of rail transportation contracts which optimize operational efficiency and cost effectiveness.

Moreover, I have developed numerous variable cost calculations utilizing the various formulas employed by the Interstate Commerce Commission ("ICC") and the Surface Transportation Board ("STB") for the development of variable costs for common carriers, with particular emphasis on

STATEMENT OF QUALIFICATIONS

the basis and use of Rail Form A and its replacement costing formula the Uniform Railroad Costing System ("URCS"). I have utilized Rail Form A/URCS costing principles since the beginning of my career with L. E. Peabody & Associates Inc. in 1971.

I have frequently presented both oral and written testimony before the ICC, STB, Federal Energy Regulatory Commission, Railroad Accounting Principles Board, Postal Rate Commission and numerous state regulatory commissions, federal courts and state courts. This testimony was generally related to the development of variable cost of service calculations, rail traffic and operating patterns, fuel supply economics, contract interpretations, economic principles concerning the maximum level of rates, implementation of maximum rate principles, and calculation of reparations or damages, including interest. I presented testimony before the Congress of the United States, Committee on Transportation and Infrastructure on the status of rail competition in the western United States. I have also presented testimony in a number of court and arbitration proceedings concerning the level of rates, rate adjustment procedures, rail operating procedures and other economic components of specific contracts.

Since the implementation of the Staggers Rail Act of 1980, which clarified that rail carriers could enter into transportation contracts with shippers, I have been actively involved in negotiating transportation contracts on behalf of coal shippers. Specifically, I have advised utilities concerning coal transportation rates based on market conditions and carrier competition, movement specific service commitments, specific cost-based rate adjustment provisions, contract reopeners that recognize changes in productivity and cost-based ancillary charges.

STATEMENT OF QUALIFICATIONS

I have been actively engaged in negotiating coal supply contracts for various users throughout the United States. In addition, I have analyzed the economic impact of buying out, brokering, and modifying existing coal supply agreements. My coal supply assignments have encompassed analyzing alternative coals to determine the impact on the delivered price of operating and maintenance costs, unloading costs, shrinkage factor and by-product savings.

I have developed different economic analyses for over sixty (60) electric utility companies located in all parts of the United States, and for major associations, including American Paper Institute, American Petroleum Institute, Chemical Manufacturers Association, Coal Exporters Association, Edison Electric Institute, Mail Order Association of America, National Coal Association, National Industrial Transportation League, North America Freight Car Association, the Fertilizer Institute and Western Coal Traffic League. In addition, I have assisted numerous government agencies, major industries and major railroad companies in solving various economic problems.

In the two Western rail mergers that resulted in the creation of BNSF Railway Company and Union Pacific Railroad Company and in the acquisition of Conrail by Norfolk Southern Railroad Company and CSXT, I reviewed the railroads' applications including their supporting traffic, cost and operating data and provided detailed evidence supporting requests for conditions designed to maintain the competitive rail environment that existed before the proposed mergers and acquisition. In these proceedings, I represented shipper interests, including plastic, chemical, coal, paper and steel shippers.

STATEMENT OF QUALIFICATIONS

I have participated in various proceedings involved with the division of through rail rates. For example, I participated in ICC Docket No. 35585, Akron, Canton & Youngstown Railroad Company, et al. v. Aberdeen and Rockfish Railroad Company, et al. which was a complaint filed by the northern and midwestern rail lines to change the primary north-south divisions. I was personally involved in all traffic, operating and cost aspects of this proceeding on behalf of the northern and midwestern rail lines. I was the lead witness on behalf of the Long Island Rail Road in ICC Docket No. 36874, Notice of Intent to File Division Complaint by the Long Island Rail Road Company.

As a result of my extensive economic consulting practice since 1971 and my participating in maximum-rate, rail merger, and rule-making proceedings before various government and private governing bodies, I have become thoroughly familiar with the operations, practices and costs of the rail carriers that move coal over the major coal routes in the United States.

3Q07 Variable Costs for DuPont's Hazardous Movement on CSXT

Origin
Destination

Pascagoula, MS
Neuse, NC

URCS PHASE III INPUT ITEM

INPUT

SOURCE

1. Railroad	CSXT	DuPont
2. Type of Shipment	OT (Originate & Terminate - Local)	DuPont
3. One-Way Distance (Loaded Miles)	816.7	PCRail, Version 10 (Practical, Familized)
4. Type of Car (URCS Code)	Tank > 22,000 gallons (URCS Code 16)	DuPont
5. Number of cars	1	DuPont
6. Car Ownership	Private	DuPont
7. Commodity Type (STCC)	281 - Industrial Chemicals	DuPont
8. Weight (tons per car)	94	DuPont
9. Type of Movement	Single Car	DuPont

<u>Cost Item</u> (1)	2005 Phase III				<u>Make-Whole</u> (6)	<u>Total incl. make-whole</u> (7)	<u>Indexed to 3Q07 1/</u> (8)
	<u>OPR</u> (2)	<u>DRL</u> (3)	<u>ROI</u> (4)	<u>Total</u> (5)			
Gross Ton-mile	\$300.10	\$81.18	\$246.17	\$627.44		\$627.44	\$671.30
Locomotive unit-mile	\$261.28	\$31.80	\$47.76	\$340.85		\$340.85	\$364.68
Carload Clerical	\$25.56			\$25.56	\$9.25	\$34.81	\$37.24
Crew Wage	\$225.87			\$225.87		\$225.87	\$241.66
Train-mile other	\$21.25	\$0.23	\$0.37	\$21.86		\$21.86	\$23.39
SEM - O&T, Interchange, I&I	\$169.54	\$13.98	\$52.51	\$236.03	\$228.76	\$464.79	\$497.29
Private Car Rental	\$71.50			\$71.50		\$71.50	\$76.49
Loss & Damage	\$1.00			\$1.00		\$1.00	\$1.07
Total				\$1,550.10	\$238.01	\$1,788.12	\$1,913.12

1/ CSXT index from annual 2005 to 3Q07 - 1.06991

REDACTED

**Summary of CSXT Ratios of RSAM to
R/VC $>_{180}$ (Excluding R/VC $<_{100}$ Shortfall) - 2002 to 2005**

	4-Year Average	2005	2004	2003	2002
	(1)	(2)	(3)	(4)	(5)
<u>RSAM</u>					
1. STB Decision <u>1/</u>	292	300	292	292	286
2. CSXT Waybill Data Based on R/VC $>_{180}$ <u>2/</u>	273	283	272	273	262
<u>R/VC $>_{180}$ <u>3/</u></u>					
3. STB Decision <u>1/</u>	236	236	231	239	238
4. CSXT Waybill Data Based on R/VC $>_{180}$ <u>2/</u>	236	236	231	239	238
<u>RSAM to R/VC Ratio <u>4/</u></u>					
5. STB Decision	1.24	1.27	1.26	1.22	1.20
6. CSXT Waybill Data Based on R/VC $>_{180}$ <u>2/</u>	1.16	1.20	1.18	1.14	1.10

1/ STB Ex Parte No. 347 (Sub-No. 2) decided December 20, 2007. The actual calculated 4 year average for RSAM is 292.5 or 293.

2/ STB Ex Parte No. 646 (Sub-No. 1) decided September 4, 2007, p. 10, "Potentially captive traffic is defined as all traffic priced above the 180% R/VC level..."

3/ All R/VC $>_{180}$ ratios calculated without rounding.

R/VC ratios are calculated by taking the total move revenue divided by the total move variable cost.

Expanded miscellaneous charges have been included in the revenue.

4/ RSAM $\div$ R/VC $>_{180}$

REDACTED

**Comparison of Railroad Industry Cost of Capital
Based on the STB's Single Stage Discounted Cash
Flow Model ("DCF") to the STB's Capital Asset
Pricing Model ("CAPM") -- 2002 through 2005**

		STB Cost of Capital			
		DCF Model		CAPM	
Year		After Tax 1/	Pre-Tax 2/	After Tax 3/	Pre-Tax 3/
(1)		(2)	(3)	(4)	(5)
1.	2002	9.8%	13.7%	8.1%	11.1%
2.	2003	9.4%	13.3%	7.9%	11.0%
3.	2004	10.1%	14.5%	8.4%	11.8%
4.	2005	12.2%	17.9%	9.2%	13.2%

1/ STB Decisions in Ex Parte No. 558

2/ With equity adjusted to pre-tax levels; used in the STB's URCS formula

3/ Based on the methodology from the STB's January 17, 2008
decision in Ex Parte No. 664

**Summary of CSXT Ratios of RSAM to
R/VC _{>180} (Using CAPM Methodology) - 2002 to 2005**

	<u>4-Year Average</u>	<u>2005</u>	<u>2004</u>	<u>2003</u>	<u>2002</u>
	(1)	(2)	(3)	(4)	(5)
<u>RSAM</u>					
1. STB Decision <u>1/</u>	292	300	292	292	286
2. CSXT Waybill Data Based on R/VC _{>180} <u>2/</u>	281	279	285	283	275
<u>R/VC _{>180} 3/</u>					
3. STB Decision <u>1/</u>	236	236	231	239	238
4. CSXT Waybill Data Based on R/VC _{>180} <u>2/</u>	245	247	242	245	245
<u>RSAM to R/VC Ratio 4/</u>					
5. STB Decision	1.24	1.27	1.26	1.22	1.20
6. CSXT Waybill Data Based on R/VC _{>180} <u>2/</u>	1.15	1.13	1.18	1.16	1.12

1/ STB Ex Parte No. 347 (Sub-No. 2) decided December 20, 2007. The actual calculated 4 year average for RSAM is 292.5 or 293.

2/ STB Ex Parte No. 646 (Sub-No. 1) decided September 4, 2007, p. 10, "Potentially captive traffic is defined as all traffic priced above the 180% R/VC level..."

3/ All R/VC _{>180} ratios calculated without rounding.

R/VC ratios are calculated by taking the total move revenue divided by the total move variable cost.

Expanded miscellaneous charges have been included in the revenue.

4/ RSAM ÷ R/VC _{>180}

REDACTED

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

E.I. DUPONT DE NEMOURS AND COMPANY)

Complainant,)

v.)

CSX TRANSPORTATION, INC.,)

Defendant.)

Docket No. NOR 42101

PART III – EXHIBITS

Exhibit A CSXT E-mail, dated August 9, 2005.

Exhibit B CSXT 28151 (Description of commodities)

Exhibit C List of 2004 and 2005 Waybill Movements with R/VC Ratios > 1.8 Moving
Under CSXT PPQs

Exhibit A

Redacted

Exhibit B

You are here: [ShipCSX](#) > [Resources](#) > [Price Look-Up](#) > Product Detail

January 25, 2008 9:37 A

CSX Transportation**Chemicals:Petrochemicals (Tank Cars) (CSXT28151)****STCC # Description****PETROCHEMICALS**

28151	CYCLIC INTERMEDIATES FROM BENZENE,
Exclude: 2815130	ISOPHTHALIC ACID
Exclude: 2815134	DIMETHYL TEREPHTHALATE
Exclude: 2815177	PARAXYLENE
Exclude: 2815179	CYCLOHEXANONE
Exclude: 2815185	PARAMETHYLSTYRENE
28152	CYCLIC INTERMEDIATES FROM BENZENE,
2818105	ACETONE, NEC, SYNTHETIC,

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Exhibit C

Redacted

Certificate of Service

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

A handwritten signature in black ink, appearing to read 'Jeffrey O. Moreno', is written over a horizontal line.

Jeffrey O. Moreno