

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

E.I. DUPONT DE NEMOURS AND COMPANY)

Complainant,)

v.)

CSX TRANSPORTATION, INC.)

Defendant.)

Docket No. NOR 42099 - 221077

Docket No. NOR 42100 - 221078

Docket No. NOR 42101 - 221079

**REPLY OF E.I. DUPONT DE NEMOURS AND COMPANY
TO DEFENDANT CSX TRANSPORTATION, INC.'S PETITION TO HOLD
PROCEEDINGS IN ABEYANCE AND MOTION FOR CLARIFICATION
or
IN THE ALTERNATIVE, MOTION TO RECALCULATE RSAM AND R/VC>180
FACTORS IN LIGHT OF REVISIONS TO COST OF CAPITAL METHODOLOGY**

Complainant, E.I. DuPont de Nemours and Company ("DuPont"), hereby submits its responses to "Petition to Hold Proceedings in Abeyance and Motion for Clarification" filed by Defendant CSX Transportation Inc ("CSXT") on December 7, 2007. In that Motion, CSXT asks the Board to hold these proceedings in abeyance until the Board makes available the 2006 Waybill Sample to the parties, because the "regulatory lag" that CSXT contends would result from the use of prior data will allegedly undermine the accuracy of any comparison and because more current data is likely to be available "soon." CSTX also separately asks the Board to clarify that \$1 million is the maximum available relief in a case involving the Three Benchmark Approach set forth in *Simplified Standards for Rail Rate Cases*, Ex Parte 646 (September 5, 2007) ("*Simplified Standards*"), collectively for all movements encompassed in a complaint.

CSXT's Motion to Hold in Abeyance should be denied. CSXT's motion is inconsistent with the policy of the statute and with the Board's decision in *Simplified Standards*. Since CSXT's Motion was filed, the Board has released the 2005 RSAM and R/VC>180 factors, and has granted DuPont's request to access the 2005 Costed Waybill Sample. Thus, part of the "regulatory lag" cited by CSXT has been cured without delaying these cases. Moreover, there is no reason to believe that more current data is likely to be available "soon," as CSXT alleges. The delay in issuing the 2006 Costed Waybill Sample is caused, among other things, by the absence of a 2006 cost of capital. One of the key costs in the Costed Waybill Sample is the cost of capital. Use of the 2006 Costed Waybill Sample will depend upon the issuance by the Board of a decision in Ex Parte 664, *Methodology To Be Employed in Determining the Railroad Industry's Cost of Capital ("Revisions to Cost of Capital Methodology")*, and it is uncertain when that decision will be issued. These cases should not be held in abeyance for an indefinite period of time while that case is decided. Finally, there is no reason to believe that the overall effect of a delay will either be significant or will be to the detriment of CSXT, as the railroad argues in its Motion.

However, if the Board is inclined to grant CSXT's Motion to Hold in Abeyance -- a delay which will require an issuance of a new methodology for determining the cost of capital and a calculation of the cost of capital for 2006 -- the Board should, for the very same reasons advanced by CSXT in its Motion, also recalculate the 2003–2006 RSAM and R/VC>180 to take into account the new methodology for determining the cost of capital. If it is true, as CSXT argues, that the "[t]he Board's duty to 'examine the relevant data' in deciding this case requires the Board to consider the most accurate data in its possession" (CSXT Motion, p. 7), then the Board must also utilize, in the RSAM and the R/VC>180 calculations, a railroad cost of capital

for each of the relevant years that conforms to the agency's finding that the Board's "simple DCF approach has been replaced by more sophisticated and precise techniques to estimate the cost of equity. . . ." *Revisions to Cost of Capital Methodology*, decision served August 20, 2007, p. 7. Such a recalculation would be a simple matter, especially in light of the fact that the Board has already calculated a revised cost of capital using its proposed new methodology for the years 2003, 2004, 2005 and 2006. *Id.*, p. 8.

Finally, the CSXT's Motion for Clarification also should be denied. The Board's decision in *Simplified Standards* makes clear that the \$1 million limit on relief is to be applied on a movement-by-movement (or more precisely as discussed below, on a rate-by-rate basis) basis. Indeed, the Board's rejection in *Simplified Standards* of an "aggregation rule" confirmed that position. CSXT's own comments in the Ex Parte 646 proceeding conceded that aggregation should not apply where movements did not share common facilities. CSXT Reply Comments in Ex Parte 646 dated November 30, 2006, p. 7. DuPont's Non-Hazmat Complaint (involving three movements of plastics)¹ and TIH Complaint (involving three movements of chlorine)² specifically allege that the multiple movements do not share substantial facilities, an assertion that CSXT has not challenged in its Motion. CSXT's argument that the \$1 million limit is a "per complaint" rather than "per movement" or "per rate" limit is simply an attempt to restore an "aggregation rule" that the Board specifically rejected and to disavow a position that CSXT affirmatively advanced in the rulemaking proceeding. Finally, CSXT's petition for clarification simply elevates form over substance, and would merely increase the cost and complexity of rate cases under the Three-Benchmark procedures.

¹ NOR 42099, *E I DuPont de Nemours and Company v CSX Transportation, Inc*

² NOR 42101, *E I DuPont de Nemours and Company v CSX Transportation, Inc*

PROCEDURAL HISTORY

On August 21, 2007, DuPont filed Complaints in the three cases encompassed by CSXT's current Motion. On the same day, DuPont filed a request for release of confidential waybill data applicable to each complaint. On August 31, 2007, CSXT filed a Motion to Dismiss the three cases, to which DuPont replied on September 24. Meanwhile, on September 7, 2007, the Board issued a decision ordering DuPont to supplement its complaints to conform to the requirements of the rules that the Board had issued in its September 5th *Simplified Standards* decision. On October 29, 2007, counsel for DuPont received a letter from the Board, setting forth the conditions on which data from the unmasked Costed Carload Waybill Sample data for the four years that corresponded with the then-most-recently-published RSAM data, i.e., 2001 through 2004. DuPont complied with those conditions, and on November 9, 2007 received the unmasked Costed Carload Waybill Sample data from the Board for the years 2001-2004.

On December 11, 2007, the Board issued a decision in STB Ex Parte No. 347 (Sub-No. 2), *Rate Guidelines - Non-Coal Proceedings*, in which the Board issued new RSAM and R/VC>180 numbers for the four years from 2002 through 2005. The RSAM and R/VC>180 factors in that decision conformed to the methodology for calculating those numbers set forth in the Board's September 5 *Simplified Guidelines* decision.

Finally, on December 17, DuPont sent a letter to the Board requesting access to the 2005 unmasked Costed Waybill Sample, a request that the Board granted on December 19. That letter indicated that, since the parties are only in the middle of the discovery period in the three cases, "there is ample time for the parties to incorporate the 2005 Waybill Sample into their selection of a comparable traffic group" without delaying these proceedings.

ARGUMENT

I. CSXT's Motion to Hold In Abeyance Should Be Denied

In its Motion, CSXT asks the Board to issue an open-ended order to hold these proceedings in abeyance until the Board issues the 2006 Waybill Sample for the parties' use in these cases. CSXT argues that there would be a serious "regulatory lag" since the most recent four-year annual Waybill Sample (the relevant period defined by *Simplified Standards*) is for the years 2001–2004, for comparison to rates applicable in mid-2007. CSXT Motion, pp. 4–5. CSXT argues that there have been substantial changes in revenues since 2004, a situation that would allegedly compromise rate comparisons under the Three-Benchmark Approach *Id.* at 6. Moreover, CSXT argues that the alleged regulatory lag could be "mitigated with a minimum of delay." *Id.* at 7. CSXT's request is unnecessary and unreasonable.

First, CSXT's argument is flatly inconsistent with the policy of the statute. In Section 10701(c)(3), the Congress ordered the Board to establish a "simplified *and expedited* method for determining the reasonableness of challenged rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case." 49 U.S.C. §10701(c)(3). CSXT's request for an open-ended order holding these proceedings in abeyance contradicts that statutory directive, as well as numerous substantive and procedural decisions made by the Board in *Simplified Guidelines* in order to promote the timely resolution of complaints.³

Second, by releasing the 2005 RSAM and R/VC>180 numbers on December 11, 2007, the Board placed itself in a position to release the 2005 unmasked Costed Waybill Sample for use by the parties. On December 17, DuPont made a request for the 2005 unmasked Costed Waybill Sample to the Board. On December 19, the Board made the 2005 Waybill Sample

³ See, e.g., *Simplified Guidelines*, pp. 22–24 (tight procedural schedules); 25–26 (streamlined discovery and motions to compel); 84, 95–96 (no adjustment to URCS), 85 (no waybill sample adjustments)

available to the parties, well before the parties have begun to analyze the Waybill Sample for evidence in this case. Thus, the Board has already significantly reduced the amount of time between the effective date of the rates for the complained-of movements (June 2007) and the data that will be used to form the comparable group (the four-year period ending in December 2005). As the Board noted in its *Simplified Standards* decision, no adjustment for rail costs is necessary because the Three-Benchmark approach focuses on R/VC ratios (where the effects of inflation are reflected in both the numerator and denominator), thus offsetting any inflationary impacts.⁴

Third, it is not at all clear that any lag that would allegedly result from the use of 2002 to 2005 unmasked Costed Waybill Sample data and the absence of 2006 Waybill Sample data, will either make a significant difference, or even works to CSXT's disadvantage.

The Board has clearly stated that it will not rely on RSAM and R/VC>180 figures for a single year, but will use a four-year average. *Simplified Standards*, p. 20 The Board has also stated that it will select the comparison group "based on information contained in the Waybill Sample released to the parties at the outset of the case", *i.e.*, the four years that correspond to the most recently published RSAM figures. *Simplified Standards*, pp 80, 83. Since the Board has already released 2005 RSAM figures, it is clear that in this case the Board will use 2002 to 2005 data. Use of 2006 data will therefore change only one year of comparables, out of the four years that the Board will use.

⁴ It should be noted that CSXT is not content with asking for a delay until the 2006 Waybill Sample data is released. In footnote 4 and in footnote 7, CSXT "reserves its rights" to address any alleged regulatory gap between 2006 Waybill Sample or any earlier year's Waybill Sample data and the rates at issue in this proceeding, by for example seeking to use current rates for the comparison group traffic. DuPont believes that any such adjustment would be highly improper, and would not take into account a myriad of other factors that could also be analyzed. DuPont reserves its rights to contest any such adjustments, if and when CSXT formally advances them.

Moreover, CSXT argues that its revenues per car have increased 9.9% per year since the fourth quarter of 2005, and its average revenue per car for chemicals traffic has increased approximately 30% since the end of 2004. But even assuming *arguendo* the correctness of these figures for the Costed Waybill Sample, any increase in revenue experienced by CSXT in 2006 that may increase the revenue-to-variable cost ratios of the comparables is likely to be counterbalanced by a decrease in the "expansion ratio" (i.e., the ratio of the RSAM $\div$ R/VC >180) that will be used to compute a reasonable rate over that same period. This is because revenue increases in 2006 are likely to both decrease the RSAM and increase the R/VC >180 , thus decreasing the ratio of the RSAM to the R/VC >180 , and in turn decreasing the level of the maximum reasonable rate.

Fourth, there is no indication that more current data is likely to be available soon. At the present time, the STB has not issued any figure for the railroad industry's 2006 cost of capital – a key input into the 2006 unmasked Costed Waybill Sample.⁵ This is because the Board is currently analyzing how it should revise its methodology for determining the railroads' cost of capital. See Ex Parte 664, *Revisions to Cost of Capital Methodology*, decision served August 20, 2007. The fact of the matter is that the 2006 Waybill Sample *cannot* be issued until Ex Parte 664 is decided. But it is unfair, unreasonable, and contrary to the Congressional requirement for an "expedited" procedure for non-SAC cases, for DuPont's complaints to be held in abeyance pending a rulemaking with no deadlines. This is especially true when CSXT, in September 27,

⁵ See, Comments of the Association of American Railroads, Ex Parte 664, submitted September 27, 2007 ("AAR Cost of Capital Comments"), p. 3, fn. 2 ("The cost of capital is also an important input to the Board's regulatory costing system for railroads, the Uniform Rail Costing System ('URCS').")

2007 comments in Ex Parte 664, urged the Board to substantially revise its proposed procedures.⁶

At bottom, CSXT is arguing for an unnecessary, unreasonable and open-ended order holding these complaints in abeyance. CSXT's request would, at least absent any indication from the Board that the 2006 Waybill Sample is likely to be issued in the very near future, seriously impair DuPont's rights to an "expedited" determination of its challenge to CSXT's unreasonably high rates.

II. In the Alternative, if CSXT's Motion to Hold In Abeyance Is Granted, DuPont Moves the Board To Apply Any Revised Cost of Capital Methodology To Calculate the 2003 to 2006 RSAM and R/VC>180 Figures

As noted above, DuPont believes that the CSXT Motion to Hold in abeyance should be denied, particularly in view of the fact that the 2006 Costed Waybill Sample cannot be released until the Board decides Ex Parte 664, the cost of capital proceeding. However, if the Board decides to grant CSXT's Motion because, for example, the cost of capital proceeding will be decided in the very near future (e.g., 30 days), then DuPont moves the Board to recalculate the 2003 to 2006 RSAM and R/VC 180 figures using the new cost of capital methodology.

The Board has noted that the cost of capital is used in maximum rate cases. *Revisions to Cost of Capital Methodology*, decision served August 20, 2007, p. 2. As correctly noted by the AAR in the cost of capital proceeding, see fn.5 above, the cost of capital is an important input to URCS, the Board's regulatory costing system. And, the Board's decisions in *Simplified Standards and Rate Guidelines – Non-Coal Proceedings* make clear that variable costs determined by URCS are used in calculating the RSAM and R/VC>180 benchmarks. See,

⁶ Comments of counsel for the Association of American Railroads at the hearing of the Board in Ex Parte 664, December 4, 2007, and comments for CSX Transportation Company in Ex Parte 664, September 27, 2007, p. 9

Simplified Standards, pp. 20 (RSAM and R/VC>180 factors calculated using carrier's variable cost); *Rate Guidelines – Non-Coal Proceedings*, 1 S.T.B. 1004, 1029-1031, 1038-1039 (RSAM and R/VC>180 calculated using URCS variable cost). Thus, it is clear that the cost of capital is a key component in calculating the RSAM and the R/VC>180.

If the Board holds these cases in abeyance pending release of the 2006 Waybill Sample, which in turn depends on the calculation of the 2006 cost of capital, the Board should apply any new cost of capital methodology to recalculate the 2003, 2004, 2005 and 2006 RSAM and R/VC>180. Such a recalculation would be required for the very same reason that CSXT is requesting the Board to hold these proceedings in abeyance – that the "[t]he Board's duty to 'examine the relevant data' in deciding this case requires the Board to consider the most accurate data in its possession." CSXT Motion, p. 7. Clearly, if the Board revises methodology to determine the cost of capital, the Board should apply that methodology to the cost of capital used in the RSAM and R/VC>180 figures that will in turn be used in this proceeding.

Such a recalculation would not delay these proceedings any longer than the delay sought by CSXT. Indeed, in its August 20, 2007 decision in *Revisions to Cost of Capital Methodology*, the Board has already calculated a cost of capital using its proposed new procedures for 2003, 2004, and 2005. Plainly, the Board already has the inputs to recalculate a cost of capital for the years 2003-2006. See, *Revisions to Cost of Capital Methodology*, decision served August 20, 2007, p. 8. Moreover, the record in the cost of capital proceeding is replete with data concerning calendar years prior to 2006. See, e.g., Ex Parte 664, Comments of the Association of American Railroads submitted September 27, 2007; Comments of the Western Coal Traffic League, submitted September 27, 2007. Insertion of a new cost of capital figure into the 2003, 2004, and

2005 Costed Waybill Sample would be a simple matter of programming, and the calculation of revised RSAM and R/VC>180 would likewise be a mechanical process.

Moreover, CSXT appears to agree that if the Board changes its methodology for determining the railroad industry's cost of capital, then such change would be required to be applied to all of the years relevant to these complaint proceedings. CSXT's Motion states:

If, during the pendency of these cases, the Board were to issue a decision in Ex Parte 664 that would significantly alter its railroad cost of capital calculation, that decision could require significant changes in the URCS cost calculations, which in turn would materially change R/VC ratios. Particularly if the Board were to consider allowing comparison group traffic to be selected from a Costed Waybill Sample for a year other than the most recent year for which that data is available, this could result in R/VC comparisons and rate reasonableness determinations based upon materially different - and hence not comparable - data sets and calculations.

CSXT Motion, p. 6, fn. 6.⁷ It is clear that the Board's *Simplified Standards* already allows comparison group traffic to be selected from a Costed Waybill Sample for a year other than the most recent year for which data is available. See, *Simplified Standards*, pp. 80, 83. CSXT's argument specifically encompasses "rate reasonableness determinations" based on the prior years' data sets, and under the Board's Three-Benchmark procedures, the RSAM and R/VC>180 calculations are clearly a part of the rate reasonableness determination.

⁷ CSXT appears to be arguing that the Board should permit comparisons only for the most recent year in the four-year period for which the Board grants access to data. DuPont strongly disagrees. The Board's decision in *Simplified Standards* makes clear that the Board will apply an "expansion factor" based upon a four-year average of RSAM and R/VC>180 calculations. See, *Simplified Standards*, p. 20. As the Board had previously noted in *Rate Guidelines – Non-Coal Proceedings*, 1 S T B at 1032, "a carrier's RSAM figures fluctuate from year to year within certain general parameters. This is not surprising given the cyclical nature of railroad traffic [footnote omitted], and the effect can be minimized by applying multi-year average (we use a four-year averaging period), so as to smooth out annual variations and minimize the impact of any year that may have been aberrational for that carrier." In light of this precedent, the Board correctly determined that it would release unmasked Costed Waybill Sample data for the four years that correspond to the most recently published RSAM figures. *Id.*, p. 80. It would be incorrect and inconsistent with the Board's decisions in *Simplified Standards* and *Rate Guidelines – Non-Coal Proceedings* to use a four-year average for the RSAM and R/VC>180 calculations, and a single year's data for comparability purposes.

Therefore, if the Board holds these cases in abeyance for the 2006 Costed Waybill Sample, DuPont moves the Board to apply the change in the methodology to determine the cost of capital to the calculation of the RSAM and R/VC¹⁸⁰ for 2003 through 2006.⁸

III. The Board Should Affirm that the Maximum Value to be Applied in a Three Benchmark Case is \$1 Million of Relief for Each Challenged Rate, Subject to a Review on the Basis of Improper Aggregation

The second part of CSXT's two-part motion is a "Motion for Clarification" that the relief available to DuPont in these three cases is "per case," i.e., per complaint. CSXT's argument focuses on the fact that in the TIH Complaint, DuPont challenged three separate rates on three separate movements published separately in a CSXT tariff, between various origins and destinations, and in the Non-Hazmat Complaint, DuPont also challenged three separate rates on three separate movements published separately in a CSXT tariff, between various origins and destinations. CSXT argues that the three movements in each complaint should be aggregated for the purpose of the \$1 million limit to relief set by the Board in *Simplified Guidelines*. CSXT contends that a "per movement" limit to relief is inconsistent with the "letter and spirit" of *Simplified Guidelines* and is a "subversion" of the Board's eligibility approach. CSXT Motion, p. 8-9.

CSXT is wrong on both counts. CSXT's position is in flat contradiction both to the Board's decision and to its *own* position in the *Simplified Guidelines* proceeding. Moreover, CSXT's argument simply elevates form over substance.

⁸ Although the Board has indicated that it would not apply a changed cost of capital to past cases, see STB Docket No. 41191 (Sub-No. 1), *AEP Texas North Company v. BNSF Railway Company*, decision served September 10, 2007, slip op. at 108, these DuPont complaint cases are not already decided. It would be arbitrary and capricious for the Board to delay these cases, change its cost of capital methodology, and apply that methodology to the RSAM and R/VC¹⁸⁰ just to the 2006 Costed Waybill Sample.

First, in *Simplified Guidelines*, the Board clearly stated that "the limit on relief will apply to the difference between the challenged rate and the maximum lawful rate, whether in the form of reparations, a rate prescription, or a combination of the two." *Simplified Guidelines*, p.28 [emphasis added]. In DuPont's TIH and Non-Hazmat cases, there is a *separate* "challenged rate" published by CSXT for *each* complained-of movement.⁹ Thus, by the terms of the STB's own decision, the limit to relief is on a "per rate" basis, which in the DuPont case means that the limit applies separately to each movement, since there is a separate and different rate for each challenged movement.

Indeed, it is important to note that the Board's evaluation of the amount of traffic that would qualify for the Three-Benchmark, Simplified-SAC, and Full-SAC methodologies set forth at p. 35 of its decision in *Simplified Standards* was taken from the Waybill Sample, which is on a movement-by-movement basis – further confirmation (if any were necessary) that the Board contemplated that its selected limits for relief would be determined on a movement-by-movement basis.

CSXT complains in its Motion that a limit to relief on a movement-by-movement (or more precisely, as DuPont notes above, on a rate-by-rate) basis would permit large utilities or other large companies to bring complaints under the Three-Benchmark approach. CSXT Motion, p. 9. But this is rearguing a position that the Board specifically rejected. In its *Simplified Standards* decision, the Board rejected railroad industry arguments to rule that the eligibility for a Three-Benchmark approach will *not* be based on the size of the shipper. *Simplified Standards*, p. 5.

⁹ The complained-of rates are all different. In the TIH Complaint, the rate for the Niagara Falls movement is \$9,173.17 per car, the rate for the Natrium movement is \$5,993.75 per car; and the rate for the Carneys Point movement is \$4,896.66 per car. In the Non-Hazmat complaint, the Wyandotte movement is \$6,426.42 per car, the rate for the Duart movement is \$5,917.66 per car, and the rate for the Washington movement is \$5,604.86 per car.

Moreover, in the *Simplified Standards* decision, the Board specifically rejected its original proposal that would have required a mechanical mechanism whereby individual disputes would be aggregated for the purpose of eligibility limits. *Simplified Standards*, p. 32. But CSXT's argument is flatly inconsistent with the Board's rejection of a mechanical "aggregation rule." If, as CSXT argues in its Motion, all the movements at issue in a complaint are automatically aggregated for the purposes of the eligibility limit, the Board would simply have substituted one mechanical aggregation rule for another.

Additionally, the Board expressly noted that it is "able to readily detect and remedy improper attempts by a shipper to disaggregate a large claim" that it has "ample discretion to protect the integrity of its processes from abuse." See, *Simplified Standards*, pp. 32-33. It is significant that CSXT has *not* claimed that the three movements in each complaint should be aggregated because DuPont has abused the Board's processes. That CSXT has not done so simply reflects the fact that the six movements at issue in the two complaints originate and terminate in a wide variety of states throughout CSXT's system, including New Jersey, Virginia, Michigan, North Carolina, West Virginia, New York, and Tennessee, and there is no question that a Simplified-SAC and Full-SAC would be too costly given the value of these cases, either individually or combined. There is no abuse here.¹⁰

In fact, it is utterly paradoxical that CSXT's current argument is flatly inconsistent with CSXT's *own position* in the *Simplified Standards* case, and would go even farther than the "aggregation rule" proposed by the Board. Specifically, in its November 30, 2006 Reply

¹⁰ At page 10 of its Motion, CSXT speculates that DuPont may intend to bring additional cases under the Three-Benchmark standard, which CSXT claims should be brought under the Simplified-SAC or the Full-SAC standard. DuPont notes that it has made no determination whether to bring any additional cases, and if and when it does so, and if and when it decides to bring any such cases under a Three-Benchmark or Simplified-SAC standard, DuPont is confident that the Board will be able to fairly evaluate any proper CSXT claim at that time.

Comments, CSXT noted that the Board's proposed aggregation rule would and should not apply in the case of "movements that share only the same origin but use entirely different rail lines and facilities to transport commodities to destinations in different destinations (say movements originating in Kansas City but moving to destinations in Los Angeles, New York, and Atlanta)". CSXT Reply Comments in Ex Parte 646, submitted November 30, 2006, p. 8. But CSXT's current argument would mechanically aggregate the movements in the Non-Hazmat and TIH complaints for the purposes of the limits to relief, in direct contradiction to CSXT's earlier position, even though the individual movements share few rail lines and facilities.

Finally, CSXT's argument is simply an attempt to elevate form over substance. CSXT's argument falls apart if DuPont would have filed seven complaints instead of three. But this would merely have multiplied the paper and confused the processing of the cases, increasing the expense for all concerned.¹¹ DuPont filed three complaints based on the common issues attributable to the nature of the commodities (i.e., hazardous, non-hazardous, and TIH), in order to streamline the presentation of evidence and avoid unnecessary and wasteful duplication of resources by both parties and the Board. Nevertheless, if the Board is inclined to grant CSXT's motion for clarification -- a course that DuPont strongly opposes -- then the Board should permit DuPont to file six new complaints covering the separate TIH and non-hazmat movements, with requests for reparations dating back to June 16, 2007, the date that DuPont denoted for a rate prescription in its original TIH and Non-Hazmat complaints.¹² But such an exercise -- which

¹¹ In such a situation, the seven cases would have been in the precise same procedural posture as now if the Board would have thereafter consolidated the three TIH complaints and the three Non-Hazmat complaints for processing.

¹² Alternatively, if the Board believes that the aggregation of three separate movements in the TIH and the Non-Hazmat complaint deprived the Board of a \$150 filing fee for the aggregated movements, DuPont would be willing to submit an additional filing fee for the four additional TIH and Non-Hazmat movements to the agency

would be required for simple fairness – merely reveals the formalistic nature of CSXT's argument.

Respectfully submitted,



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Certificate of Service

I hereby certify that I have, on this 19th day of December, served a copy of the foregoing Reply on Paul Moates and Paul Hemmershaugh, Sidley and Austin, 1501 K ST. N.W. Washington, D.C., 20005, via first-class mail and email.

