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March 13, 2012

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: ***Canexus Chemicals Canada L.P. v. BNSF Railway Company,***
STB Docket No. 42132

**ENTERED
Office of Proceedings**

MAR 13 2012

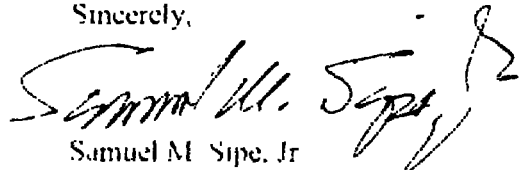
Dear Ms. Brown:

**Part of
Public Record**

Enclosed for filing in the above-captioned matter is the public version of BNSF Railway Company's Reply Evidence. We have redacted highly confidential information from the filing, including waybill sample data. We are filing under separate cover the highly confidential version of BNSF's Reply Evidence, and a CD that contains the electronic work papers of our consultant, Mr. Fisher.

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

Sincerely,


Samuel M. Sipe, Jr.

Enclosures

cc: Counsel of Record

PUBLIC

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

CANEXUS CHEMICALS CANADA, L.P.

Complainant,

v.

BNSF RAILWAY COMPANY

Defendant.

Docket No. 42132

REPLY EVIDENCE OF BNSF RAILWAY COMPANY

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March 13, 2012

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BEFORE THE
SURFACE TRANSPORTATION BOARD

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CANEXUS CHEMICALS CANADA, L.P.	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. 42132
	)	
BNSF RAILWAY COMPANY	)	
	)	
Defendant.	)	
	)	

REPLY EVIDENCE OF BNSF RAILWAY COMPANY

I. INTRODUCTION

Canexus's opening evidence shows that a failure to address recent changes in the market for transportation of chlorine would produce arbitrary and unreasonable results in this Three Benchmark case. As BNSF explained in its opening evidence, BNSF raised its chlorine rates across the board in March 2011 because it realized that those rates were significantly below market levels and inconsistent with recent regulatory changes.¹ As a result, the challenged rates are not out of line with current rates for other chlorine movements. But Canexus's opening evidence ignores altogether BNSF's change in the rate structure for chlorine transportation. By using outdated data and rates for non-chlorine commodities for its comparison groups, Canexus proposes to freeze BNSF's rates at levels that applied years before BNSF's rate increase or the changes in market and regulatory conditions that led to BNSF's rate increase. According to Canexus, the Board must prescribe maximum rates just above the jurisdictional threshold – 213% revenue to variable cost ("R/VC") for issue movements to Albuquerque, NM, and 222%

¹ See Opening Evidence of BNSF Railway Company, at 16-18 (filed Feb. 13, 2012)("BNSF Opening Evidence").

R/VC for issue movements to Glendale, AZ. These rates make no sense in today's market for some of the longest movements of extremely hazardous chlorine in the country, and would be significantly out of line with maximum reasonable rates for chlorine transportation by other rail carriers (ranging from 287% R/VC to 356% R/VC) that the Board has imposed in other Three-Benchmark cases in the past few years.²

The rates proposed by Canexus are inconsistent with current market rates for comparable BNSF traffic. BNSF demonstrated in its Opening Evidence and in its Motion to Use 2011 Data that current average BNSF chlorine rates are in the range of 50% higher than the maximum rate levels that Canexus is now proposing.³ Moreover, the rates proposed by Canexus do not reflect the substantial costs that BNSF incurs to transport TIH products, including chlorine – such as actual Positive Train Control (“PTC”) expenditures and insurance costs. Because Canexus relies on rates from 2009 and before for its comparison groups,⁴ its comparison rates could not possibly reflect expenses, like PTC expenses, that were incurred only in later years.

Canexus further undermines the reliability of its results by deriving its proposed maximum rates from comparison groups that are largely composed of non-chlorine movements. Anhydrous ammonia shipments comprise an overwhelming 88% of the Carload Waybill Sample

² See BNSF Opening Evidence at 3. While BNSF's challenged rates are not judged by comparison to R/VC ratios of similar movements on other Class I carriers, these prescribed chlorine rates provide useful information regarding reasonable R/VC's on chlorine transportation generally.

³ See, e.g., BNSF Opening Evidence, at 37 (reporting current comparable average R/VC's based on 2011 data of 319% for Glendale and 324% for Albuquerque); Verified Statement of Benton V. Fisher, BNSF's Motion to Permit Consideration of 2011 TIH Movements from BNSF Traffic Data in Selecting Comparison Group, at 6-7 (filed Dec. 14, 2011). The Motion is referred to hereafter as “Motion to Use 2011 Data.” Mr. Fisher's Verified Statement was attached to BNSF's Opening Evidence as Exhibit 5.

⁴ For Canexus's Glendale comparison group, 61% of the included movements predate 2009. For the Albuquerque comparison group, the figure is 43%.

records in Canexus's Glendale comparison group and 43% of its Albuquerque comparison group. In its opening evidence, BNSF explained why movements of anhydrous ammonia are not comparable to chlorine movements. BNSF explains further in this reply evidence how the price trends for chlorine and anhydrous ammonia show that these two commodities operate in very different markets.

To accept Canexus's proposed comparison groups and maximum rates would be to arbitrarily freeze rates – until 2016 – at levels that prevailed years ago despite the momentous changes in regulation, costs imposed by regulation, and rate levels that have occurred in the interim. It would be irrational and contrary to the pricing freedom granted to railroads by ICCTA⁵ to use the Three Benchmark methodology as a mechanism to lock in rates at outdated levels. The Three Benchmark methodology is a comparison methodology that identifies the maximum reasonable level of challenged rates currently being charged by the defendant railroad by reference to the R/VC ratios on the issue traffic movements vis-a-vis R/VC ratios for comparable movements. It is not, and was never intended to be, a methodology for freezing rates at historical levels. If the Board were to accept the approach proposed by Canexus, it would effectively preclude railroads from raising rates except to reflect cost inflation. Any attempt to increase prices could be defeated by shippers who are permitted to rely upon outdated, unadjusted Waybill Sample data.

BNSF has not made changes to its proposed initial comparison groups for purposes of its final comparison group tender. BNSF continues to believe that using comparison groups based on actual 2011 traffic shipments addresses the problems that arise from using outdated, limited Waybill Sample data in this case. Given the uncertainty surrounding the Board's precise

⁵ ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995).

intentions concerning the use of 2011 data. BNSF therefore continues to sponsor the preferred comparison groups described by BNSF in its opening evidence.⁶ As a second-best option, BNSF continues to sponsor the alternative comparison group described in its opening evidence.⁷ As BNSF explains, BNSF's alternative comparison group is the superior comparison group for this case if the comparison group is to be chosen exclusively from the historical Waybill Sample data. However, as BNSF explained in its opening evidence, several other relevant factor adjustments would need to be made to the presumed maximum reasonable rates determined using its alternative comparison group. BNSF does not propose any changes to the other relevant factor adjustments that BNSF submitted in its opening evidence.

BNSF's reply evidence also describes how the other relevant factors sponsored by BNSF in its opening evidence similarly would apply to Canexus's comparison groups if the Board were to choose Canexus's comparison groups as the basis for carrying out this Three Benchmark analysis. As BNSF explains, application of its Current Rate Adjustment, the Historical PTC Adjustment, the Liability Risk Adjustment, and the Future PTC Adjustment would address some of the deficiencies in Canexus's approach and produce maximum reasonable rates that are more consistent with the objectives of the Three Benchmark methodology.

Finally, BNSF also sponsors in this reply evidence a new Public Current Rate Adjustment developed using public data. The Current Rate Adjustment sponsored by BNSF in its opening evidence was developed using 2011 BNSF traffic data that were produced to Canexus in discovery. BNSF continues to believe that the Current Rate Adjustment sponsored on opening represents the best method for adjusting maximum reasonable rates derived using Waybill Sample data to reflect the fundamental change in BNSF pricing of THH transportation that

⁶ See BNSF Opening Evidence at 30-37.

⁷ *Id.* at 42-56.

occurred in March 2011. BNSF has, however, developed the Public Current Rate Adjustment based on public data in response to Canexus's assertion in its motion to strike⁸ that BNSF traffic data cannot be used for any purpose in a Three Benchmark case – an assertion that BNSF believes to be incorrect. BNSF shows how this Public Current Rate Adjustment would apply both to Canexus's comparison groups and BNSF's alternative comparison group.

As was the case with BNSF's opening evidence, the calculations underlying BNSF's reply evidence, the presentation of chlorine and anhydrous ammonia price data, and the calculation and application of other relevant factors are sponsored by BNSF's witness Benton V. Fisher.⁹

II. COMPARISON GROUPS

A. BNSF Final Comparison Groups

The final comparison groups tendered by BNSF are the same as BNSF's initial comparison groups. For the reasons set forth in BNSF's opening evidence, BNSF presents two final comparison groups: (1) preferred comparison groups selected from BNSF's 2011 traffic data produced in this case; and (2) an alternative comparison group based on movements from the Carload Waybill Sample records provided by the STB in this case. The movements in the preferred and alternative comparison groups are identified in Exhibits 6 through 8 of BNSF's opening evidence, and the selection criteria used to identify the movements in the preferred and alternative comparison groups are described in Section IV of BNSF's opening evidence.¹⁰

⁸ See Canexus Motion to Strike filed Feb. 21, 2012.

⁹ Mr. Fisher's witness qualifications and verification are included in Appendix A.

¹⁰ See also BNSF opening workpapers "Preferred Comparison Group Glendale.xlsx," "Preferred Comparison Group Albuquerque.xlsx," and "2009 CWS Chlorine Records.xlsx," included on the workpapers CD filed with BNSF's Opening Evidence.

1. BNSF's Preferred Comparison Groups

BNSF's preferred approach is to use comparison groups drawn from actual 2011 movement data. As explained in BNSF's Motion to Use 2011 Data and BNSF's opening evidence, the use of 2011 movement data produces comparison groups that are superior to any comparison group derived from Waybill Sample data. BNSF's fundamental change in the pricing of chlorine transportation in March 2011 means that the use of Waybill Sample data from 2009 or earlier years will not produce meaningful rate comparisons for the challenged issue traffic rates. Moreover, there are very few movements in the Waybill Sample data, whether the movements are drawn from the 2009 Waybill Sample or prior years, that have characteristics comparable to the issue traffic. The most straightforward and appropriate approach to carrying out the Three Benchmark analysis in this case is to use the 2011 traffic data to establish the current level of rates on comparable movements. The parties are waiting for further guidance from the Board concerning the circumstances under which a comparison group based upon actual BNSF 2011 traffic data may be used.¹¹

2. BNSF's Alternative Comparison Group

If, instead of using 2011 data, the parties are required to use only Waybill Sample data in their comparison groups, the paucity of potentially comparable movements in the Waybill Sample data creates significant issues concerning the appropriate criteria to use to develop an acceptable comparison group. BNSF proposed an alternative comparison group drawn from year 2009 chlorine movements contained in the 2009 Waybill Sample. As explained in detail in BNSF's opening evidence, it was necessary to relax certain selection criteria to develop a comparison group of adequate size from the 2009 Waybill Sample data. For its alternative

¹¹ See BNSF Opening Evidence at 4-6.

comparison group, BNSF therefore broadened the distance criterion to allow inclusion of movements that were more than 500 loaded miles. In other regulatory contexts, the Board has distinguished between long-haul and short-haul movements based on whether the movement has a length of haul of more than or less than 500 miles.¹² This approach produced a comparison group of sufficient size that consisted entirely of chlorine movements, but which still required “other relevant factor” adjustments described in Section V of BNSF’s opening evidence so that the maximum reasonable rates for the issue traffic movements would reflect changes in the marketplace, legislatively-mandated expenses, and price increases that occurred after 2009.

B. Canexus’s Initial Comparison Groups are Markedly Inferior to BNSF’s Comparison Groups

Canexus selected movements from the 2006-2009 Waybill Sample data for its comparison groups. It took an entirely different, and markedly inferior, approach to BNSF in resolving the data insufficiency problem that exists if the Waybill Sample data is used to develop the comparison groups.

If the Board does not allow the parties to select comparison group movements from BNSF’s 2011 traffic data, the Board’s task will be to choose between potentially imperfect comparison groups submitted by the parties. In this circumstance, the Board would be effectively faced with the question whether the better comparison group is BNSF’s alternative comparison group, which is based on a somewhat broader mileage band and covers movements of the commodity at issue in the case drawn from the most recent year of Waybill Sample data, or Canexus’s groups, which use somewhat narrower mileage bands and consist of data for movements other than chlorine and movements that occurred as long ago as 2006. As discussed more fully below, the better group is BNSF’s alternative comparison group:

¹² *Id.* at 52 and note 89.

- BNSF's comparison group includes only chlorine, which is the commodity for which the challenged rates have been established.
- Canexus has submitted no evidence to suggest that movements of anhydrous ammonia are comparable to movements of chlorine whereas BNSF has submitted substantial evidence showing that anhydrous ammonia and chlorine movements are not comparable.
- There is no reason to believe that movements of anhydrous ammonia provide a better measure of comparability to issue traffic movements than movements of chlorine over somewhat shorter distances.

1. **Primary Differences Between BNSF and Canexus Comparison Groups**

The criteria used by BNSF to select its alternative comparison group differ from the criteria used by Canexus in several ways. First, with respect to commodity type, Canexus chose to include multiple TIH products other than chlorine (almost exclusively anhydrous ammonia) in its comparison groups while BNSF chose to limit its comparison groups to chlorine movements. Canexus's Glendale comparison group is less than 10% chlorine movements, and all {{ }} of the included chlorine movements occurred in {{ }}.¹³ Approximately 88% of the comparison group is anhydrous ammonia movements. Canexus's Albuquerque comparison group is less lopsided on the surface, but is still nearly one-half anhydrous ammonia movements.¹⁴ Canexus made no showing in its opening evidence as to why it would be appropriate to set chlorine rates for BNSF in 2011-2016 by reference to anhydrous ammonia or other TIH rates from 2006-2009. Nor could it do so, for the reasons explained at length by BNSF on opening and discussed further below.

¹³ BNSF reply workpaper "Canexus Opening Comparison Group Summary.xlsx." BNSF's reply workpapers are included on an electronic workpaper CD. Throughout BNSF's reply evidence, highly confidential materials are designated with double brackets – "{{ }}".

¹⁴ *Id.*

Second, Canexus included Glendale issue traffic movements in its comparison group for the Albuquerque issue traffic movement while BNSF does not include any issue traffic movements in its comparison groups. Specifically, approximately { { } } of the chlorine movements in Canexus's Albuquerque comparison group are Glendale issue traffic movements.¹⁵ Without these Glendale movements, for which Canexus asserts that the *current* rates are unreasonable, the Albuquerque comparison group would consist of only { { } } records, fewer than any comparison group previously adopted by the STB in a Three-Benchmark case.¹⁶ As BNSF explains below, Canexus's use of the Glendale movements in the Albuquerque comparison group is an effort to exploit the regulatory lag problem to create a comparison group that would otherwise be far too small for use in this case.

Third, Canexus chose to include in its comparison groups Waybill Sample movements from 2006-2008 while BNSF limited its alternative comparison group to 2009 Waybill Sample movements. As a result of this Canexus selection criterion, 61% of the movements in Canexus's Glendale comparison group and 43% of the movements in Canexus's Albuquerque comparison group are not from the most recent year in the Waybill Sample, 2009.¹⁷ Use of data even older than the most recent year in the Waybill Sample exacerbates what is already a serious regulatory lag problem in this case. Most of the regulatory changes relating to transportation of TIH materials had not even taken place when 2006-2008 rates were in effect.¹⁸

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ To the extent that the Board construes its decision, issued yesterday, as providing a justification for relying on data from multiple years in a comparison group as opposed data for only a single year, BNSF is prejudiced by the timing of that decision. *See Waybill Data Released in Three-Benchmark Rail Rate Proceedings*, STB Docket No. Ex Parte 646 (Sub-No. 3) (served Mar. 12, 2012) ("*March 12 Decision*"). BNSF had no opportunity to consider the impact

Fourth, BNSF includes rebill chlorine movements as well as local chlorine movements in its comparison groups. (Canexus's comparison groups include only local movements). As BNSF explained on opening, this is appropriate since the issue traffic movements are local movements that nevertheless share some characteristics with interline traffic.¹⁹ The use of rebill movements also expands the comparable traffic group. BNSF showed that the concerns leading the Board to reject the use of rebill traffic in *US Magnesium* do not apply here.²⁰

Finally, BNSF's alternative comparison group has a more expansive mileage-band than does Canexus's group. BNSF included movements of more than 500 loaded miles while Canexus included movements that were within plus or minus 700 miles of the length of the issue traffic movements. BNSF explained in its opening evidence the reasons that it is appropriate in this case – where there is a shortage of arguably comparable Waybill Sample movements – to include rebill movements and movements of more than 500 loaded miles in its alternative comparison groups.²¹

2. Principal Defects in Canexus's Comparison Groups

The most significant problems with Canexus's comparison group selection criteria are described below.

a. Canexus's Comparison Groups Consist Predominantly of Anhydrous Ammonia Shipments

Heavy reliance on anhydrous ammonia shipments is a serious deficiency in both Canexus comparison groups. Canexus offered no explanation in its opening evidence as to why it would

of the reasoning contained in that decision on the composition of its alternative comparison group.

¹⁹ BNSF Opening Evidence at 33, 50.

²⁰ *Id.* at 33-34, 51.

²¹ *Id.* at 50-53.

make sense to set the R/VC ratios for the chlorine issue traffic movements based on R/VC ratios for anhydrous ammonia movements. The Board has expressed skepticism about the comparability of chlorine and anhydrous ammonia in prior cases. For example, in *US Magnesium*, the Board noted that “the two commodities do not share the same relative demand characteristics, and there is some evidence that they may have dissimilar transportation risks.”²² BNSF showed in its opening evidence that there is no reasonable basis for believing that demand elasticity for anhydrous ammonia movements is similar to demand elasticity for movements of chlorine. As BNSF explained on opening, there are different end uses for chlorine and anhydrous ammonia; there are significantly more substitutes for anhydrous ammonia than for chlorine; anhydrous ammonia can and is transported by methods other than rail while approximately 85% of long-distance transportation of chlorine is by rail; the transportation characteristics of chlorine differ from, and involve more risk if released, than those for anhydrous ammonia; and prices for transportation of the two commodities differ.²³

In addition to the qualitative evidence BNSF offered on opening, BNSF presents quantitative evidence below that further demonstrates that anhydrous ammonia movements are not comparable to chlorine movements. First, as of March 16, 2011 when the challenged rates went into effect, it is abundantly clear on the basis of public information that the R/VC ratios on BNSF’s movements of chlorine and anhydrous ammonia were at substantially different levels. BNSF witness Mr. Fisher makes this showing by computing an average BNSF chlorine R/VC and an average BNSF anhydrous ammonia R/VC as of March 16, 2011, the date that the

²² *US Magnesium, L.L.C. v. Union Pacific Railway Co.*, STB Docket No. 42114, slip op. at 7 (served Jan. 28, 2010) (notes omitted). There, the Board nonetheless accepted comparison groups based largely on anhydrous ammonia because of what it considered to be more serious defects in the other tendered comparison groups.

²³ See BNSF Opening Evidence at 46-50.

challenged issue traffic rates became effective, based upon public information. Specifically, Mr. Fisher identified BNSF's common carrier price authorities for chlorine and anhydrous ammonia movements as of March 16, 2011, which are available on BNSF's public website. He then identified from those common carrier price authorities the public rates for the chlorine and anhydrous ammonia movements in the origin-destination lanes that met the criteria used by Canexus to select the movements in its comparison groups.²⁴ Next Mr. Fisher calculated the R/VC for each of these lanes.²⁵ He then separately calculated the average R/VC for the chlorine movements (366%) and for the anhydrous ammonia movements (239%).²⁶ In other words, as of March 16, 2011, BNSF's R/VCs for transporting chlorine based on Canexus's selection criteria were more than 50% higher than its R/VCs for transporting anhydrous ammonia.

Table 1²⁷
Average R/VC Ratios for Chlorine and Anhydrous Ammonia
Using Canexus's Criteria and Publicly-Available Rates as of March 16, 2011

Commodity	Number of Lanes	Average R/VC
Chlorine	27	366%
Anhydrous Ammonia	12	239%

Second, chlorine and anhydrous ammonia price data available to the public corroborate that chlorine and anhydrous ammonia are sold in entirely different markets, and that there is therefore no basis to conclude that chlorine transportation is comparable to the transportation of

²⁴ The relevant public rates identified by Mr. Fisher are contained in BNSF reply workpaper "Public Current Rate Adjustment.xlsx."

²⁵ BNSF reply workpaper "Public Current Rate Adjustment.xlsx." The R/VC was calculated for each lane based on the STB's 2010 URCS indexed to 1Q 2011, and included fuel surcharges as of March 2011.

²⁶ BNSF reply workpaper "Public Current Rate Adjustment.xlsx."

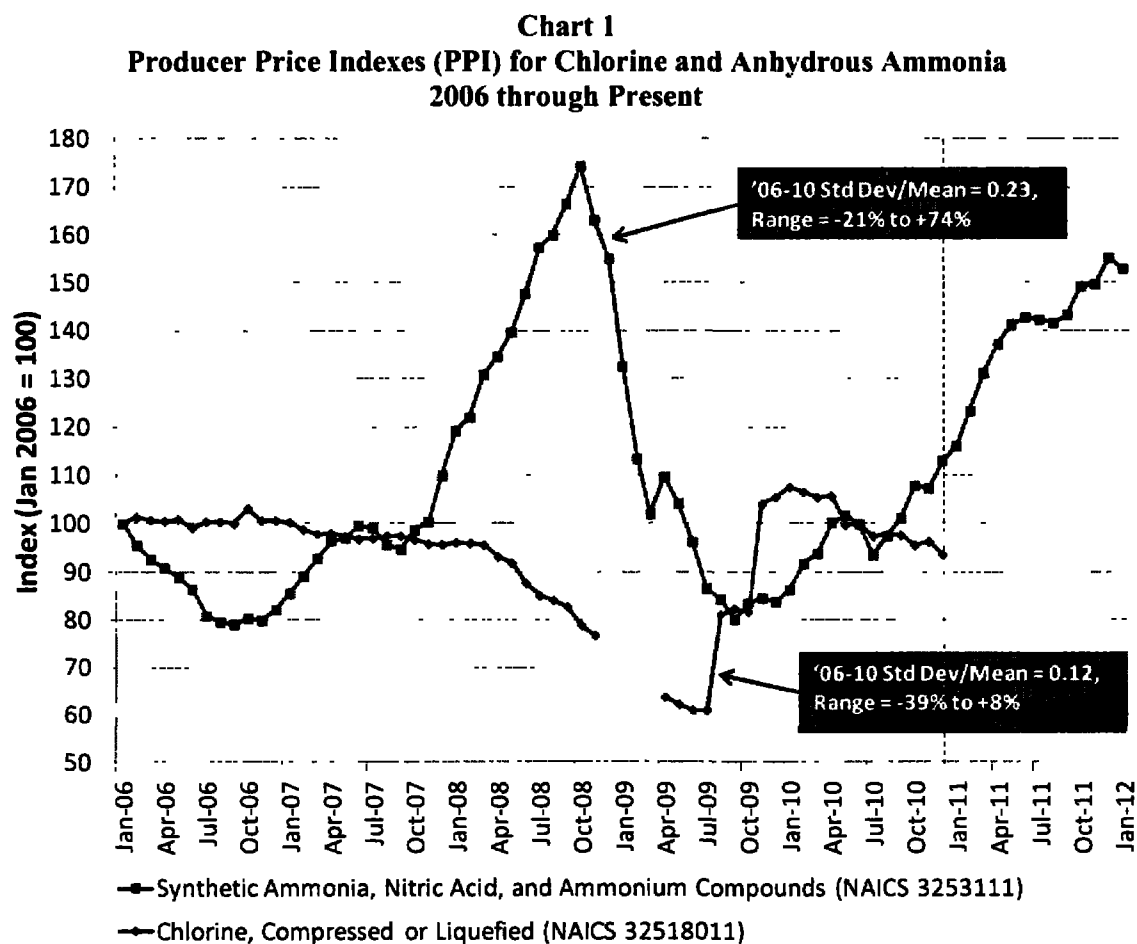
²⁷ *Id.*

anhydrous ammonia. Chart 1 below presents the industry Producer Price Indexes (PPIs) that correspond to anhydrous ammonia and chlorine.²⁸ From 2006 to 2010,²⁹ the price for anhydrous ammonia fluctuated to a considerably greater extent – and in the opposite direction – than did the price for chlorine, increasing by more than two-thirds from late 2007 to late 2008.³⁰ During this same period, the chlorine price decreased, before returning to prior levels.

²⁸ PPIs measure the average change over time in the selling prices received by domestic producers for their output, are available for different levels of North American Industry Classification System (NAICS) codes, and are published by the Bureau of Labor Statistics (BLS). <http://www.bls.gov/ppi/>. The BLS classifies chlorine and anhydrous ammonia into different NAICS industry codes. Chlorine is classified within Other Basic Inorganic Chemical Manufacturing (NAICS 325180) and anhydrous ammonia is classified within Fertilizer Manufacturing – Nitrogenous Fertilizer Manufacturing (NAICS 325311).

²⁹ The chlorine PPI was not published for four months from December 2008 through March 2009 and was discontinued as of January 2011. <http://bls.gov/ppi/ppidr201101.pdf>

³⁰ The standard deviation divided by the mean is presented in the chart to compare the volatility of the two indexes.



The markets for transportation of chlorine and anhydrous ammonia are significantly diverse. There would be no reasoned basis for finding that movements of chlorine are comparable to movements of anhydrous ammonia and, consequently, no reason for finding that Canexus's comparison groups which include large numbers of anhydrous ammonia movements are reasonable. It would not be sufficient to conclude that a comparison group based largely or predominantly on anhydrous ammonia rates would be acceptable because "that is all that is available." BNSF has demonstrated that chlorine-only comparison groups drawn from Waybill Sample data are feasible. Canexus's heavy reliance on anhydrous ammonia traffic in their

comparison groups produces arbitrary results. The Board must reject Canexus's comparison groups which are based largely or predominantly on anhydrous ammonia.

b. Canexus's Albuquerque Comparison Group Includes Glendale Issue Traffic

On its face, Canexus's Albuquerque comparison group appears to include a substantial proportion of chlorine movements although nearly half the comparison movements are still anhydrous ammonia. This appearance is deceptive because {{ }} of the chlorine movements in the group (nearly {{ }} of the entire group) are actually Glendale movements, which are issue traffic movements.³¹ If these Glendale issue movements were not included, the comparison group would consist of only {{ }} movements, and would be 71% anhydrous ammonia.³² The Board cannot conclude here, as it did in the *DuPont* cases, that including challenged movements in a comparison group would not "materially affect" the choice of comparison group.³³ Without the Glendale movements, the Albuquerque comparison group would be too small to use.

There is no reason for Canexus to include the Glendale issue movements in the Albuquerque comparison group except to exploit the regulatory lag problem. If it were not for the regulatory lag inherent in using older Waybill Sample data, a complaining shipper would have no incentive to use issue-traffic movements – which the shipper contends are unreasonably high – in a comparison group used to determine maximum reasonable rates. Indeed, the current

³¹ BNSF reply workpaper "Canexus Opening Comparison Group Summary.xlsx."

³² *Id.*

³³ See, e.g., *E.I. duPont de Nemours & Co. v. CSX Transportation, Inc.*, STB Docket No. 42100, slip op. at 8 n.24 (served June 30, 2008).

R/VC ratio on the Glendale movement is 291% R/VC in fourth quarter 2011.¹⁴ which Canexus claims is too high. Canexus includes the Glendale movements in the Albuquerque comparison group to take advantage of the fact that the outdated Waybill Sample data show that historically the R/VC ratio on that traffic averaged {{ }}.¹⁵ If it were not for inclusion of the Glendale movements in the Albuquerque comparison group, that group would have an insufficient number of movements. Canexus cannot expect to save what is otherwise an inadequate comparison group by exploiting the regulatory lag problem and relying on issue traffic Glendale movements for its Albuquerque comparison group.

c. Canexus's Comparison Groups Rely Heavily on Movements from 2006 to 2008

Both Canexus comparison groups depend heavily on Waybill Sample data movements from 2006 to 2008. Movements of this vintage make up 61% of the Glendale comparison group and 43% of the Albuquerque comparison group.¹⁶ The bias towards older data is even more pronounced with respect to the few included chlorine movements than it is for the comparison groups overall. All of the chlorine movements in the Glendale comparison group are from {{ }} and 69% of the chlorine movements in the Albuquerque comparison group predate 2009.¹⁷

¹⁴ Canexus and BNSF use the same methodology to calculate the R/VCs for the issue traffic movements. Compare BNSF opening workpaper "2011 Issue RVC.xlsx" and Canexus opening workpapers "Exhibit 4 Glendale Variable Costs 1Q11 -SSI.xlsx" and "Exhibit 5 Albuquerque Variable Costs 1Q11.xlsx." The issue traffic R/VCs that Canexus includes in its opening evidence (300% for Glendale traffic and 315% for Albuquerque as of 1Q 2011) differ from those presented by BNSF (291% for Glendale traffic and 306% for Albuquerque as of 4Q 2011) only because the R/VCs are calculated as of different points in time -- 1Q 2011 for Canexus and 4Q 2011 for BNSF.

¹⁵ BNSF reply workpaper "Canexus Opening Comparison Group Summary.xlsx."

¹⁶ *Id.*

¹⁷ *Id.*

BNSF explained in its opening evidence that use of pre-2009 Waybill Sample data can only serve to exacerbate the regulatory lag problem. With respect to chlorine, the problem is particularly pronounced. As BNSF explained, rates from 2006-2008 could not reflect the market changes that have occurred as a result of the significant regulatory changes that have affected the transportation of TIH commodities in recent years.³⁸ Those changes had not been implemented at the time those rates were charged.

As noted above, the Board's untimely decision that a party may use four years' of Waybill Sample data in its comparison group is prejudicial to BNSF. As described in BNSF's opening evidence, the Board initially proposed to allow only the use of the most recent year's Waybill Sample data for comparison group purposes. The Board then issued a rule in which it instead allowed the use of four years' Waybill Sample data. The Board's decision to allow use of four years' data was reversed by the U.S. Court of Appeals for the District of Columbia Circuit, which found that the Board had not provided parties to the rulemaking the opportunity to comment and expressed concern about the regulatory lag issue that would arise from using outdated price data. On remand, the Board instituted a new rulemaking to consider whether permitting use of data from four years would be appropriate,³⁹ and did not serve a decision in that proceeding until yesterday. *See March 12 Decision.*

III. OTHER RELEVANT FACTORS

In the unlikely event that the Board chooses Canexus's comparison groups for the Three Benchmark analysis in this case, the other relevant factor adjustments sponsored by BNSF in its opening evidence – the Current Rate Adjustment, the Historical PTC Adjustment, the Liability Risk Adjustment, and the Future PTC Adjustment – should apply to Canexus's comparison

³⁸ See BNSF Opening Evidence at 14-16, 27-28.

³⁹ *Id.* at 27.

groups. In this section, BNSF describes how the first three other relevant factors should be applied to Canexus's comparison groups.⁴⁰

In this section, BNSF also presents the Public Current Rate Adjustment that was developed using public data. BNSF believes that the Current Rate Adjustment that it sponsored on opening represents the best approach for reflecting the fundamental change in BNSF's pricing of TIIH transportation between 2009, the time period that the most recent Waybill Sample movements were transported, and post-March 15, 2011, the time period during which the issue traffic rates have been in effect. Nevertheless, BNSF has developed the Public Current Rate Adjustment in response to Canexus's assertion in its motion to strike that BNSF traffic data cannot be used for any purpose in a Three Benchmark case – an assertion that BNSF believes to be incorrect. BNSF demonstrates how this Public Current Rate Adjustment could be applied to both Canexus comparison groups and to BNSF's alternative comparison group in lieu of the Current Rate Adjustment sponsored in BNSF's opening evidence. Both approaches address the fundamental regulatory lag problem that is presented in this case, one with internal traffic data and the other with publicly available data. The results are comparable – in both cases the issue traffic R/VC ratios are below the current level of R/VC ratios for comparable traffic.

A. Current Rate Adjustment

BNSF proposed a Current Rate Adjustment that applies to its alternative comparison group in its opening evidence.⁴¹ BNSF explained that the adjustment was necessary to adjust the results based on 2009 Waybill Sample data to reflect the fundamental change in pricing for TIIH

⁴⁰ As BNSF explained in its opening evidence, because the Future PTC Adjustment applies to future actual PTC expenditures, it cannot be calculated until those expenditures have been made.

⁴¹ See BNSF Opening Evidence at 60-64.

products that BNSF implemented in March 2011.⁴² This fundamental price change resulted in rate increases for transporting chlorine and other TIH products that are significantly greater than would have been necessary simply to cover inflationary increases in variable costs.⁴³

Since Canexus's comparison groups consist of movements from the historical Waybill Sample, the Current Rate Adjustment would need to be applied for the same reasons if the Board were to choose Canexus's comparison groups. However, the Current Rate Adjustment as applied to Canexus's comparison groups must differ in one respect from the Current Rate Adjustment applied to BNSF's alternative comparison group. Canexus's comparison group includes movements of anhydrous ammonia and other non-chlorine movements. As explained above, since those non-chlorine commodities, including their BNSF transportation rates as of March 16, 2011, are not comparable to chlorine movements, non-chlorine movements would not be relevant in developing a current rate adjustment for chlorine movements, like the issue traffic movements. Therefore, the current rate adjustment factor to be applied to the maximum rates determined using Canexus's comparison groups should be calculated based on the difference

⁴² *Id.* at 61.

⁴³ *Id.* In the *March 12 Decision*, the Board disagreed with the railroads' argument that use of Waybill Sample data in a Three-Benchmark case produces distorted results due to regulatory lag. The Board faulted the railroads for focusing on rates whereas the Three-Benchmark test focuses on R/VC ratios. Specifically, the STB stated that "the carriers have provided no reason to believe that comparisons of a carrier's R/VC ratios for similar traffic over different time periods are *prima facie* misleading or otherwise invalid. Indeed, the comments submitted by the rail carriers contain virtually no discussion of R/VC ratios themselves and are devoid of any evidence that comparisons of R/VC ratios of similar traffic for different years would skew the results of the final offer process." *March 12 Decision* at 7 n.15. However, in this proceeding, BNSF has focused on the R/VC ratios and demonstrated that chlorine R/VC levels in 2009, not just chlorine rate levels, differed from (and were not comparable to) current chlorine R/VC ratios. See BNSF Opening Evidence at 60-64 (showing that revenue per carload of chlorine increased faster than variable cost per carload of chlorine between 2009 and March 2011 and that post-March 15, 2011 R/VCs for chlorine were 42% higher than comparison group chlorine R/VCs). See also Section III.E and Tables 6, 7, and 8 below (describing Public Current Rate Adjustment and differences between historical and current chlorine R/VC levels).

between the rates in the Canexus comparison groups and post-March 15, 2011 BNSF rates for non-issue traffic *chlorine* movements (not for anhydrous ammonia or other non-chlorine movements) that otherwise fit the selection criteria employed by Canexus.

With this exception, the Current Rate Adjustment for Canexus's comparison groups is calculated following the same methodology described in BNSF's opening evidence. Specifically, the steps used to calculate the Current Rate Adjustment for Canexus's comparison groups are as follows:

Step 1. Mr. Fisher applied the criteria used by Canexus to select chlorine movements for its comparison groups to BNSF's post-March 15, 2011 traffic data produced in this case to identify 2011 BNSF movements that satisfy the same selection criteria as the chlorine movements in Canexus's comparison groups but that also paid rates reflecting the fundamental market change in pricing that BNSF adopted effective March 16, 2011. There were 85 and 115 post-March 15, 2011 movements identified through this process for Canexus's Glendale Comparison Group and Canexus's Albuquerque Comparison Group, respectively.⁴⁴

Step 2. Next, Mr. Fisher determined the average current R/VC for the chlorine movements selected in Step 1 using Canexus's Glendale Comparison Group selection criteria (307%) and Canexus's Albuquerque Comparison Group selection criteria (304%).⁴⁵

Step 3. Mr. Fisher then compared this $R/VC_{CURRENT}$ (307% for Glendale comparison group and 304% for Albuquerque comparison group) to the R/VC_{COMP} benchmark from Canexus's comparison groups, (206% for Glendale and 198% for Albuquerque). The ratio of $R/VC_{CURRENT}$ to R/VC_{COMP} is 1.49 for Canexus's Glendale comparison group and 1.53 for Canexus's Albuquerque comparison group.

⁴⁴ BNSF reply workpaper "Current Rate ORF Applied to Canexus Opening.xlsx."

⁴⁵ *Id.*

Step 4. While the 1.49 and 1.53 ratios capture the difference in R/VC ratios for the movements in the Canexus comparison groups (2006-2009) and current BNSF chlorine rate levels (post-March 15, 2011), it would not be appropriate to apply this ratio to the maximum R/VCs determined by the Board after application of the revenue need adjustment and the confidence interval adjustment. Thus, a further adjustment must be made. For the reasons explained in BNSF's opening evidence,⁴⁶ Mr. Fisher further adjusts the R/VC difference factor (1.49 for Glendale comparison group and 1.53 for Albuquerque comparison group) to eliminate the impact of applying a revenue need adjustment factor and adjusts the R/VC difference factor to eliminate the impact of the confidence interval adjustment to reflect the fact that the current rate levels are not based on a sample.

After application of the revenue need adjustment factor that incorporates the 2006-2009 RSAM and $R/VC_{>IRU}$ benchmarks and the determination of the upper boundary of the confidence interval, the maximum reasonable R/VC for the Canexus comparison groups is 222% for the Glendale comparison group and 213% for the Albuquerque comparison group. Thus, the factor by which the R/VC_{COMP} is increased by these adjustments is 7.7% for Canexus's Glendale comparison group and 7.6% for Canexus's Albuquerque comparison group. To avoid applying the 2006-2009 revenue need and upper boundary adjustments to the R/VC results from the current period, Mr. Fisher reduces the R/VC difference factor to eliminate the effect of these adjustments, producing a Current Rate Adjustment of 1.38 (1.49 divided by 1.077 = 1.38) for Canexus's Glendale comparison group and 1.43 (1.53 divided by 1.076 = 1.43) for Canexus's Albuquerque comparison group.⁴⁷

⁴⁶ See BNSF Opening Evidence at 62-63.

⁴⁷ BNSF reply workpaper "Current Rate ORF Applied to Canexus Opening.xlsx."

The following table summarizes the results of applying a Current Rate Adjustment Factor to Canexus's Glendale and Albuquerque comparison group maximum reasonable rates.

Table 2⁴⁸
Maximum R/VC Ratios for Canexus's Opening Comparison Groups
Incorporating Current Rate Adjustment

Destination	Max R/VC for Canexus Comparison Groups	Current Rate Adjustment	Max R/VC with Current Rate Adjustment
Glendale	222%	1.38	307%
Albuquerque	213%	1.43	304%

As BNSF explained on opening evidence, if the Current Rate Adjustment were applied, the only other factor that would need to be applied to Canexus's comparison groups would be the Future PTC Adjustment.

B. Historical PTC Adjustment

BNSF explained in its opening evidence that the rates contained in the 2006-2009 Waybill Sample data provided to the parties do not reflect the substantial PTC expenditures that BNSF has made since 2009. As a result, another relevant factor adjustment is necessary to reflect those substantial PTC expenditures if the STB does not apply BNSF's Current Rate Adjustment. This is as true for the Waybill Sample movements that Canexus selected in its comparison groups as it is for the movements contained in BNSF's alternative comparison group. Therefore, just as the Historical PTC Adjustment would be required for BNSF's alternative comparison group, it is required for Canexus's comparison groups if the STB does not apply BNSF's Current Rate Adjustment.

⁴⁸ BNSF reply workpaper "Current Rate ORF Applied to Canexus Opening.xlsx."

The steps for computing the Historical PTC Adjustment are detailed in BNSF's opening evidence.⁴⁹ The same factors would be applied to the maximum reasonable rates derived from Canexus's comparison groups so long as the movements in a comparison group are all TIH movements.⁵⁰ The appropriate adjustment factors are developed from BNSF's actual PTC expenditures and they identify the portion of total PTC costs that every BNSF TIH movement would bear on a loaded car-mile basis. The table below presents the results of applying the Historical PTC Adjustment to the maximum reasonable rates derived from Canexus's comparison groups.

Table 3⁵¹
Maximum R/VC Ratios for Canexus's Opening Comparison Groups
Including Other Relevant Factor for 2010-2011 PTC Investment Costs

Destination	Canexus Maximum R/VC	2010 Investments		2010+2011 Investments	
		Other Relevant Factor	2011 Maximum R/VC	Other Relevant Factor	2012 Maximum R/VC
Glendale	222%	1.19	264%	1.38	306%
Albuquerque	213%	1.25	266%	1.49	317%

In summary, applying an other relevant factor to Canexus's comparison groups to account for PTC results in maximum R/VC ratios somewhat below the issue traffic R/VC ratios in 2011 but maximum reasonable R/VC ratios in excess of the R/VC ratios for the challenged rates in 2012 and beyond.

⁴⁹ See BNSF Opening Evidence at 70-77.

⁵⁰ For this reason, it does not matter for purposes of this other relevant factor that the Canexus comparison groups include anhydrous ammonia movements as well as chlorine movements since both products are TIH commodities.

⁵¹ BNSF reply workpaper "Comparison Group Rate Adjustments.xlsx."

C. Liability Risk Adjustment

As with the Historical PTC Adjustment, the rationale for applying the Liability Risk Adjustment factor is equally applicable if the maximum reasonable rates are based on Canexus's comparison groups as if they are based on BNSF's alternative comparison group. As BNSF explained in its opening evidence, a liability risk adjustment accounts for the additional insurance expense that BNSF incurs as a result of handling TIH commodities, including anhydrous ammonia and other non-chlorine TIH materials. Moreover, BNSF determined the appropriate liability risk adjustment by spreading the relevant costs on a per-car basis across all TIH movements. Therefore, the Liability Risk Adjustment that should be applied to Canexus's comparison group would be the same as the adjustment that BNSF sponsored in its opening evidence.⁵² The following table shows the results of applying the Liability Risk Adjustment to maximum reasonable rates derived from Canexus's comparison groups.

Table 4⁵³
Maximum R/VC Ratios for Canexus's Opening Comparison Groups
Including Other Relevant Factor for Liability Risk Costs

Destination	Canexus Maximum R/VC	Other Relevant Factor	Maximum R/VC
Glendale	222%	1.13	251%
Albuquerque	213%	1.16	247%

As explained in BNSF's opening evidence, if the Current Rate Adjustment is not applied, the Historical PTC Adjustment and Liability Risk Adjustment factors should both be applied

⁵² See BNSF Opening Evidence at 78-81.

⁵³ BNSF reply workpaper "Comparison Group Rate Adjustments.xlsx."

when maximum rates are calculated based on Waybill Sample data.⁵⁴ The table below shows the effect of applying both adjustment factors to Canexus's maximum reasonable rates.

Table 5⁵⁵
Maximum R/VC Ratios for Canexus's Opening Comparison Groups
Including Other Relevant Factors for Historical PTC and Liability Risk Costs

Destination	Canexus Maximum R/VC	Historical PTC Factor		Insurance Risk Factor	Maximum R/VC	
		2010 Investment	2010+2011 Investment		2011	2012
Glendale	222%	1.19	1.38	1.13	299%	346%
Albuquerque	213%	1.25	1.49	1.16	309%	368%

In sum, the fourth quarter 2011 R/VCs for the issue traffic movements – 291% for the Glendale movement and 306% for the Albuquerque movement – are lower than the R/VCs for Canexus's comparison groups when the Historical PTC and Liability Risk Adjustments are applied. Application of those adjustments to Canexus's comparison groups demonstrates that the challenged rates for the issue traffic movements are reasonable.

D. Future PTC Adjustment

BNSF's opening evidence explained that BNSF will continue to incur additional PTC expenses in the future and that, to the extent any rate prescription is in effect, it should have a mechanism to adjust the level of prescribed rates to reflect those actual future PTC expenditures.⁵⁶ The need for such an adjustment mechanism is independent of the source of the maximum reasonable rates prescribed, whether it is a comparison group sponsored by BNSF (preferred or alternative comparison group) or a comparison group sponsored by Canexus. The

⁵⁴ See BNSF Opening Evidence at 58-59.

⁵⁵ BNSF reply workpaper "Comparison Group Rate Adjustments.xlsx."

⁵⁶ See BNSF Opening Evidence at 82-83.

derivation and application of the future PTC adjustment factor is described in BNSF's opening evidence and requires no adjustments or changes to be applied if the maximum reasonable rates are determined using Canexus's proposed comparison groups.

E. Public Current Rate Adjustment

In its motion to strike, Canexus objected to the use of 2011 traffic data for any purpose in this case, including the use of such data in presenting evidence regarding other relevant factors. BNSF explained in its March 12, 2012 reply to Canexus's motion to strike that Canexus had no grounds for asking the Board to strike BNSF's evidence relating to the Current Rate Adjustment. The Board's February 8, 2012 decision in this case had nothing to do with the use of 2011 traffic data in presenting other relevant factor evidence, and the Board clearly does and should allow use of such data for calculating other relevant factors. BNSF nonetheless submits an alternative Public Current Rate Adjustment that can be calculated using publicly available information instead of BNSF's 2011 traffic data. BNSF believes that the previously sponsored Current Rate Adjustment factor is a superior method for adjusting maximum reasonable rates to reflect current levels, but offers this Public Current Rate Adjustment factor as an alternative for the Board's consideration.

The Public Current Rate Adjustment factor is calculated in the same manner as the Current Rate Adjustment factor with the exception that the average current R/VC ratio ($R/VC_{CURRENT}$) for chlorine transportation is based on common carrier public pricing authorities rather than on BNSF's 2011 traffic data. To determine $R/VC_{CURRENT}$ from public data, Mr. Fisher identified BNSF's public pricing authorities for chlorine traffic as of March 16, 2011. As explained above, since non-chlorine movements are not comparable to chlorine movements, a current rate adjustment should adjust maximum rates derived using historical data to reflect

current *chlorine* rates.⁵⁷ Mr. Fisher then identified the origin-destination pairs in the relevant pricing authorities that met the selection criteria (other than commodity type) used to create each of the three potential comparison groups to which the adjustment could be applied: the BNSF alternative comparison group, the Canexus Albuquerque comparison group, and the Canexus Glendale comparison group.⁵⁸ He calculated for each movement the current variable costs, based on information that was either publicly available or derived from the Waybill Sample records provided to the parties in this case.⁵⁹ For each comparison group, he calculated an $R/VC_{CURRENT}$ based on the chlorine rates for those origin-destination pairs in the relevant pricing authorities as of March 16, 2011. Table 6 below presents the average R/VC results for the chlorine lanes that meet the criteria used to select each comparison group.

Table 6⁶⁰
Average R/VC Ratios for Current BNSF Chlorine Rates
From Publicly Available Information

BNSF Alternative Comparison Group	355%
Canexus Glendale Comparison Group	366%
Canexus Albuquerque Comparison Group	362%

The results of applying the Public Current Rate Adjustment factor to BNSF-sponsored and Canexus-sponsored maximum reasonable rates are set forth in the following two tables.

⁵⁷ For the reasons discussed above, chlorine rates should not be based on a comparison to anhydrous ammonia rates. As shown in BNSF reply workpaper "Public Current Rate Adjustment.xlsx", however, including current anhydrous ammonia rates in the Public Current Rate Adjustment would not change the results. BNSF's challenged rates do not exceed a reasonable maximum under the Three-Benchmark test even if anhydrous ammonia rates are included in the Public Current Rate Adjustment.

⁵⁸ BNSF reply workpaper "Public Current Rate Adjustment.xlsx."

⁵⁹ *Id.*

⁶⁰ *Id.*

Table 7⁶¹
Maximum R/VC Ratios for BNSF Alternative Comparison Group
Incorporating Public Current Rate Adjustment

Destination	4Q 2011 Issue Traffic R/VC	Max R/VC for BNSF Alternative Comparison Group	Public Current Rate Adjustment	Max R/VC with Public Current Rate Adjustment
Glendale	291%	247%	1.44	355%
Albuquerque	306%	247%	1.44	355%

Table 8⁶²
Maximum R/VC Ratios for Canexus's Opening Comparison Groups
Incorporating Public Current Rate Adjustment

Destination	Max R/VC for Canexus Comparison Groups	Public Current Rate Adjustment	Max R/VC with Public Current Rate Adjustment
Glendale	222%	1.65	366%
Albuquerque	213%	1.70	362%

In sum, the R/VCs for the issue traffic movements are lower than the R/VCs for either BNSF's alternative comparison group or Canexus's comparison groups when the Public Current Rate Adjustment is applied. Application of the Public Current Rate Adjustment demonstrates that the challenged rates for the issue traffic movements are reasonable under the Three-Benchmark test whether the Board adopts BNSF's alternative comparison group or Canexus's comparison groups.

IV. CONCLUSION

For the foregoing reasons, the Board should reject the comparison groups sponsored by Canexus, adopt the final comparison groups of BNSF, and find, based on BNSF's evidence, that

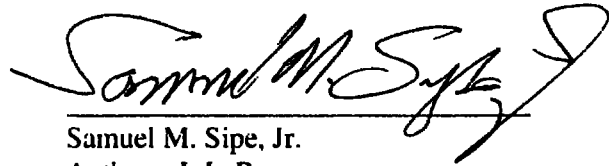
⁶¹ *Id.*

⁶² *Id.*

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the challenged rates do not exceed a maximum reasonable level.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Samuel M. Sipe, Jr.", written over a horizontal line.

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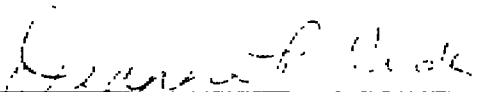
ATTORNEYS FOR BNSF RAILWAY CO.

Certificate of Service

I hereby certify that on this 13th day of March, 2012, I caused to be served a copy of the Highly Confidential and Public versions of the Reply Evidence of BNSF Railway Company on the following by hand delivery:

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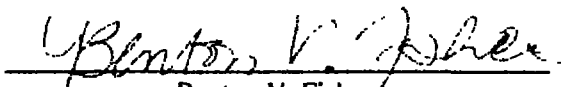
Deanna P. Cook

WITNESS VERIFICATION

Benton V. Fisher's qualifications were included in BNSF's Opening Evidence filed on February 13, 2012.

Here, Mr. Fisher is sponsoring the calculations underlying BNSF's reply evidence, the presentation of chlorine and anhydrous ammonia price information, and the calculation and application of other relevant factors. Mr. Fisher declares under penalty of perjury that he has read the Reply Evidence that he has sponsored, and that the contents thereof are true and correct to the best of his knowledge and belief.

Executed on March 12, 2012


Benton V. Fisher