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BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423

FINANCE DOCKET NO. 33556



CANADIAN NATIONAL RAILWAY COMPANY, GRAND TRUNK CORPORATION,
AND GRAND TRUNK WESTERN RAILROAD INCORPORATED
- CONTROL -
ILLINOIS CENTRAL CORPORATION, ILLINOIS CENTRAL RAILROAD
COMPANY, CHICAGO, CENTRAL & PACIFIC RAILROAD COMPANY, AND
CEDAR RIVER RAILROAD COMPANY

PETITION OF ATOFINA PETROCHEMICALS, INC.
FOR RECONSIDERATION

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Martin W. Bercovici
KELLER AND HECKMAN LLP
1001 G Street, NW
Suite 500 West
Washington, DC 20001
(202) 434-4144
Attorney for ATOFINA Petrochemicals, Inc.

September 10, 2002

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SUMMARY OF ARGUMENT

ATOFINA Petrochemicals, Inc., requests reconsideration of the Board's *CN/IC* Decision No. 39 denying the Petition of ATOFINA and The Kansas City Southern Railway for Oversight, Interpretation and Enforcement of the "Geismar Condition" imposed on the *CN/IC* merger. The Board denied the request that the Geismar Condition be interpreted in a generic fashion to cover all Geismar parties, including those such as ATOFINA who could deliver traffic to Geismar via a short line construction. The Board went beyond the issue of interpretation and further found that ATOFINA and KCS had not shown good cause to reopen the merger, even though petitioners indicated they were prepared to demonstrate grounds for reopening if the Board denied the request for interpretation and enforcement.

ATOFINA seeks reconsideration on three (3) grounds. First, it was material error for the Board to address the grounds for reopening when the parties expressly stated they would provide the grounds if needed following the interpretation. ATOFINA further demonstrates changed circumstances, including a change in Board policy, warranting reopening.

Second, the Board raises issues of feasibility of a line between Carville and Geismar as a related decisional issue. This represents a change in Board policy, of which ATOFINA has no knowledge and opportunity to address. The Board also raises an issue of whether the KCS build-in to Geismar would have been constructed, which conflicts with the rationale for the Geismar Condition, and also is inconsistent with the background recited in Decision No. 39. To the extent the Board relied on either of these considerations, it committed material error. With regard to the feasibility of a Carville-to-Geismar line, ATOFINA had an engineering analysis conducted which concludes such a line is feasible.

Third, the Board failed to consider the effects of the loss of competition resulting from the Access Agreement and the *CN/IC* merger on ATOFINA. Consideration of merger-related competitive loss is statutorily required, and it was material error for the Board to fail to engage in a balancing of interests with full evaluation of the competitive loss suffered by ATOFINA.

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**PETITION OF ATOFINA PETROCHEMICALS, INC.
FOR RECONSIDERATION**

ATOFINA Petrochemicals, Inc. ("ATOFINA") respectfully submits this Petition for Reconsideration of the Board's Decision No. 39 served August 27, 2002, in response to the Petition of ATOFINA and the Kansas City Southern Railway Company ("KCS") for Oversight, Interpretation and Enforcement of Merger Conditions ("Joint Petition"). This Petition is submitted pursuant to 49 C.F.R. §1115.3.

I. The Board Committed Material Error in Denying the Joint Petition Due to Failure to Demonstrate Good Cause for Reopening.

A. The Board Inappropriately Disposed of the Joint Petition For Failure To Warrant Reopening.

As reflected throughout the two pleadings of ATOFINA and KCS, the Joint Petition sought a determination of whether the "Geismar Condition" adopted in the Canadian National

Railway/Illinois Central Railroad merger ("CN/IC")¹ was party-limited, or in fact addressed the loss of competition at Geismar, Louisiana as a result of the combination of the merger and the Access Agreement between CN and KCS.² In its Reply, CN argued that the Petitioners had not demonstrated grounds for reopening. In the Correction and Opposition to Holding Proceeding in Abeyance, ATOFINA and KCS reiterated that the Joint Petition sought interpretation, enforcement and oversight, and that the grounds for reopening would be addressed subsequently, if the Board determined that the relief requested could not be granted as a matter of interpretation, enforcement and oversight.³ The Board so noted Joint Petitioners' position in its decision,⁴ but then proceeded to treat the request as one for reopening.⁵

ATOFINA respectfully submits it was material error for the Board to ignore the expressly stated intent and purpose of the Joint Petition as one of seeking interpretation, enforcement and oversight, and instead to deny the Joint Petition for failure to demonstrate good cause for reopening. This is particularly egregious in that the Board's treatment of the Joint Petition is inconsistent with its recent action in addressing a request of The Burlington Northern and Santa Fe Railway Company ("BNSF") regarding the mechanism for adjusting trackage rights fees

¹ *Canadian National Ry. Co., Grand Trunk Corp., and Grand Trunk Western R.R. Inc. – Control – Illinois Central Corp., Illinois Central R.R. Co., Chicago, Central and Pacific R.R. Co., and Cedar River R.R. Co.*, STB Finance Docket No. 33556 (hereinafter "CN/IC"), Decision No. 37 at 33 (served May 25, 1999).

² See Joint Petition at 7-8 ("The issue presented in this Petition is whether the condition imposed by the Board in CN/IC expanding the Access Agreement to also encompass Rubicon, Uniroyal, and Vulcan was intended to be personal to the requesting companies or whether the condition was intended to preserve the competition at Geismar, and therefore is available to all similarly-situated shippers who otherwise would have lost such competition as a result of the CN/IC merger and the Access Agreement."). See also Correction and Opposition to Holding Proceeding in Abeyance at 3 ("Second, the Petition seeks interpretation and enforcement of a condition imposed by the Board in approving the CN/IC merger.").

³ Correction and Opposition to Holding Proceeding in Abeyance at 1, n.1 (Aug. 12, 2002).

⁴ Decision No. 39 at 7, n. 17.

⁵ The Board did so after also questioning whether KCS had the right to seek reopening in light of the Access Agreement, and implied that this was an issue for the Board rather than a court to resolve. Decision No. 39 at 5, n. 12.

acquired over the lines of Union Pacific Railroad ("UP") in connection with the 1996

UP/Southern Pacific merger. In that decision, the Board held that it did

not believe that BNSF has shown on this record that the disputed items ... should be excluded ... from the URCS calculations Nevertheless, we will not now dismiss the BNSF-98 Clarification Petition for failure to "state a claim." Rather, we will allow BNSF a further opportunity to demonstrate that the disputed item should be omitted from the URCS calculations We are giving BNSF this additional opportunity because, as we recently noted in our decision concluding the formal oversight process for the UP/SP merger, "It is important that the trackage rights fee adjustment mechanism work as intended"⁶

It is equally important, here, that the competitive losses resulting from the CN/IC merger be thoroughly addressed. Competitive effects are one of five factors specifically enumerated in the ICC Termination Act ("ICCTA") to be considered by the Board regarding railroad mergers.⁷ The Board explicitly reserved oversight over competition in the Baton Rouge-New Orleans corridor. In terminating oversight early, the Board, with full recognition that ATOFINA and KCS may seek Board intervention with regard to Geismar haulage, stated that it has continuing authority to enforce merger conditions "and to modify decisions entered in merger and control proceedings ..."⁸ Now, however, the Board seeks to rush to judgment, and to hang a "CLOSED" sign over the Board's doorway, forever foreclosing substantive consideration of whether the loss of competition at Geismar should be further protected. Competitive losses arising out of railroad mergers permanently impact the affected communities and regions, and the Board should be absolutely certain that it has thoroughly considered the interests of the potentially affected parties. If the Geismar Condition cannot be interpreted broadly, it is material error to deny

⁶*Union Pacific Corp., Union Pacific R.R. Co., and Missouri Pacific R.R. Co. – Control and Merger – Southern Pacific Rail Corp., Southern Pacific Transp. Co., St. Louis Southwestern Ry. Co., SPCSL Corp., and The Denver and Rio Grande Western R.R. Co.*, STB Finance Docket No. 32760, (hereinafter "UP/SP"), Decision No. 96 (served March 21, 2002).

⁷ 49 U.S.C. §11324 (b).

⁸ *CN/IC* (Sub-No. 4), Decision No. 4 (served Dec. 27, 2001). *See also* Joint Comments of ATOFINA Petrochemicals, Inc. and The Kansas City Railway Company, Fin. Doc. No. 33556 (Sub-No. 4) (Nov. 27, 2001).

ATOFINA the opportunity to demonstrate changed circumstances as it indicated it is prepared to do.

B. Changed Circumstances Justify Reopening.

Reopening is justified as a result of two significant changed circumstances which were neither foreseen nor reasonably foreseeable. The first changed circumstance is that the Board in the UP/SP merger established a precedent that it would not remedy the loss of opportunity to build-out to a build-in which is obviated by the merger. In *UP/SP*, Enterprise Products Company sought remedial relief for the loss of the potential build-out to the build-in proposed by UP to the petrochemical complex at Mont Belvieu, Texas, an area served exclusively by SP. While Enterprise Products was not on the build-in route, its plant was approximately one mile removed; and it contemplated a build-out to the build-in line, when the latter was completed. The Board twice rejected Enterprise Products' request for relief—in its initial merger decision and in disposition of Enterprise Products' subsequent petition, and instead left Enterprise in the position of itself completing the approximate ten mile line construction to reach the UP line under the generic build-in/build-out condition imposed on the UP/SP Merger.⁹ As set forth in the associated affidavit of Mike Spahis, Fina Oil and Chemical Company (ATOFINA's predecessor) was well aware of the Board's UP/SP merger decision. In addition to the denial of remedial relief to Enterprise Products, the Board also reiterated the policy adopted by its predecessor agency, the Interstate Commerce Commission, in the Burlington Northern/Santa Fe merger, to the effect that the Board will not impose a condition which would improve the posture of a sole-

⁹ *UP/SP*, Decision No. 44 (served Aug. 12, 1996) at 189 and Decision No. 68 (served Mar. 10, 1997).

served shipper by eliminating the need for a line construction to achieve competitive service.¹⁰ Where Enterprise Products with a one mile build-out to a lost build-in was not successful before the Board, Fina, with a several mile line construction, foresaw no basis to believe it would be successful in overturning the Board's *UP/SP* precedent established only two years earlier and reinforced the previous year.¹¹

Notwithstanding the Enterprise Products' precedent, the Board in *CN/IC* granted remedial relief to producers in Geismar on or adjacent to the proposed KCS build-in line. Moreover, those parties, with relatively short extensions to the proposed KCS build-in line, were granted access to the haulage rights accorded KCS; and their access was not conditioned upon line construction to maintain the exact *status quo ante*.¹²

In addition, Fina did not, and reasonably could not, at the time of the *CN/IC* merger proceeding contemplate for itself a build-out from its Carville plant to Geismar, considering the relatively size of the plant, generating approximately 5,000 railcar shipments per year. See Spahis affidavit and affidavit of Jim Waguespack. In mid-1999, well after the close of the record in the *CN/IC* merger,¹³ Fina began to plan for plant expansion; however, capital for the plant expansion was not committed until the fall of 2000. Only with that plant expansion did the

¹⁰ *UP/SP*, Decision No. 44 at 189 (Union Carbide); *Burlington Northern, Inc. and Burlington Northern R.R. Co. – Control and Merger – Santa Fe Pac. Corp. and The Atchison, Topeka and Santa Fe Ry. Co.*, ICC Finance Docket No. 32549, Decision No. 38 at 68, 98 (served August 23, 1995) (hereinafter “*BN/SF*”) (Oklahoma Gas and Electric Co. and Phillips Petroleum).

¹¹ Pleading theories or policies which have been recently rejected by the Board is not known to be a practice favored or encouraged by the Board. Chairman Morgan, in testimony to the Senate Commerce Committee on July 31, 2002, spoke of the Board's decisions as providing guidance to parties in formulating their advocacy positions. While the comments were directed to rate reasonableness litigation, the principle seems generally applicable.

¹² *CN/IC*, Decision No. 37 at 33.

¹³ Comments were due by Oct. 27, 1998, and briefs by Feb. 19, 1999, *CN/IC* Decision No. 6, as modified by Decision No. 11 (served Aug. 14, 1998 and Oct. 2, 1998, respectively).

production volume justify consideration of a build-out by ATOFINA to Geismar. *See* affidavit of Thomas A. Schmitz.¹⁴

Neither the Board's reversal of its *UP/SP* Enterprise Products precedent nor the change in the production dynamics of the Carville plant to the point that a line construction could be economically justified were foreseeable at the time participation in the CN/IC merger was required.¹⁵ Considering both changed circumstances, and particularly that one entailed the Board's change in its remedial policy for losses in merger proceedings, ATOFINA respectfully submits that good cause to reopen has been demonstrated consistent with *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 667 (9th Cir. 1989), *cert. denied*, 493 U.S. 1093 (1990).

II. It was Material Error for the Board to Consider Feasibility of Construction of a Carville-to-Geismar Rail Line and of the KCS Geismar Build-In.

A. The Board Inappropriately Infers That Build-ins to Geismar Are Not Practicable.

The Board in Decision No. 39 questions whether a rail line from Carville to Geismar is, in fact, feasible,¹⁶ suggests that the distance from Carville to Geismar "could be significant,"¹⁷ and also questions whether the KCS build-in itself may have been constructed "given the environmental concerns."¹⁸

¹⁴ As set forth in the Schmitz affidavit, the economics of line construction entail a number of factors, including plant output and the amount of traffic captive to the incumbent carrier due to a destination monopoly. In addition to the plant expansion recently concluded, the plant will accommodate further expansion of production capacity, further justifying a build-out. *See* Waguespack and Schmitz affidavits.

¹⁵ The fact that three shippers at Geismar adjacent to the proposed KCS build-in line were willing to seek remedial relief does not make such a change foreseeable to Fina, particularly considering its distance from Geismar and the prospect of the necessity to build-out to Geismar.

¹⁶ Decision No. 39 at 6, n. 16 and 8.

¹⁷ *Id.* at 6, n. 16.

¹⁸ *Id.* At 7.

Consideration of the feasibility of a Carville-to-Geismar build-out constitutes a change of agency policy of which ATOFINA had neither notice nor opportunity to address. In *UP/SP* the Board explicitly rejected the notion that shippers must demonstrate feasibility of a build-out or build-in in order to qualify for other-carrier operating rights to provide the substitute for the potential competition lost through the merger. The Board there stated, “the only test of feasibility is whether the line is actually constructed.”¹⁹ It is a violation of basic due process to enforce a standard against an applicant that previously has not been enunciated. *Hatch v. Federal Energy Regulatory Commission*, 654 F.2d. 825, 835-836 (D.C. Cir. 1981).

Second, ATOFINA’s request for relief was predicated on implementation of a build-out to Geismar. Since haulage would not occur until the line is constructed, and considering the *UP/SP* principle regarding feasibility discussed immediately above, the distance to Geismar is immaterial.

Third, the Board’s implication that the KCS build-in may not have been completed appears to be a boot-strap effort to justify a result-driven outcome. Not only did the Board itself state that “... our Section of Environmental Analysis (SEA) preliminarily concluded that construction and operation of either of two feasible alternatives ... would have no significant environmental impacts, provided that KCS implemented the mitigation recommended by SEA,”²⁰ but the proposition that the KCS line may never have been built conflicts with *CN/IC* and the Board’s rationale for the Geismar Condition. There, it was “because of this merger and the related Access Agreement, it seems improbable that any Geismar construction project will

¹⁹ *UP/SP*, Decision No. 44 at 146.

²⁰ Decision No. 39 at 2

ever be authorized and built.”²¹ It was this loss of the potential competition from the loss of the build-in that served as the basis for the Geismar Condition.²²

B. The Carville-To-Geismar Build-In Is Feasible.

In the summer of 2001, ATOFINA commissioned a study by TranSystems Corporation to evaluate the feasibility of a rail line from the Carville plant to Geismar. TranSystems delivered a final report to ATOFINA in February 2002. That report concludes that a rail line following the river, of approximately three miles in length, would be feasible from an engineering and construction standpoint. *See* affidavit of Charles R. Carr. ATOFINA is serious about securing rail-to-rail competition for its petrochemical production facilities.²³ ATOFINA does not approach the Board seeking theoretical remedies with no practical application.

III. It Was Material Error for the Board to Have Failed To Consider the Competitive Loss Suffered by ATOFINA Flowing From The CN/IC Merger And The Access Agreement.

The Board’s decision hardly acknowledges that ATOFINA has been adversely affected by the CN/IC merger and the Access Agreement. Nor does the Board discuss its obligations under the ICCTA to consider the effect on competition within a region and to consider the public interest in acting on merger applications. These considerations require a balancing of interests. Instead, the Board’s decision is directed entirely at discrediting ATOFINA’s position, even to the

²¹ CN/IC Decision No. 37 at 33 (emphasis added).

²² *Id.* Certainly, the Board is not suggesting that it adopted the Geismar Condition for reasons other than to remedy the loss of the competitive build-in by KCS, as reflected in the CN/IC decision.

²³ As the Board is aware, ATOFINA is a limited partner in San Jacinto Rail Limited, which is planning a build-in, in conjunction with BNSF, at Bayport, Texas, Finance Docket No. 34079. *See* Decision served August 28, 2002.

point of contradicting prior findings, and denying ATOFINA the opportunity to make its case for reopening.

The ICCTA requires the Board to consider whether a proposed transaction involving consolidation or merger of railroads “would have an adverse effect on competition among railroads in the affected region or in the national rail system.” 49 U.S.C. §11324(b)(5). In *CN/IC* the Board recognized that the Access Agreement “is clearly merger-related”, and further determined that the combination of the Access Agreement and the merger would spell the end of the KCS build-in.²⁴ Now, however, the Board states it mitigated only part of the harm inflicted.

The statute, as quoted above, requires the Board to consider the effect of loss of competition in a region, and not merely the loss to individual parties. The Board knew, or should have recognized, that the effects of the loss of the KCS Geismar build-in were broader than merely affecting three parties in addition to those covered by the Access Agreement. The effects are more broadly recognized in the Access Agreement itself, which extends the haulage opportunity not just to BASF, Borden and Shell, but more generally to any shipments originating or terminating “on the properties owned by Shell, Borden and BASF”²⁵—thereby including any new plants developed following sub-division of those properties.²⁶

More importantly, the Geismar build-in proceeding evidenced there is substantially more production capacity than provided strictly by the three parties which supported the build-in petition. In the conditional approval of the build-in, Geismar was identified as the second largest

²⁴ *CN/IC*, Decision No. 37 at 33.

²⁵ Access Agreement at II.C., reproduced at Joint Petition at Ex. B (emphasis added).

²⁶ The quoted passage is broader than the company-specific access described in Decision No. 39 at 2-3.

industrial corridor in the world.²⁷ While the traffic of BASF, Borden and Shell accounted for “the preponderance of the traffic necessary to make the construction economically viable,”²⁸ according to the record in the Geismar build-in proceeding rail shipments to and from those three companies amounted to fewer than 30,000 cars,²⁹ less than half the 59,000 carloads of traffic and 60,000 empties identified by Illinois Central as moving to and from Geismar annually.³⁰ The IC pleadings in the Geismar build-in proceeding were filled with references to Geismar traffic generally and specifically identified other Geismar area shippers.³¹ Even accounting for the traffic of Rubicon, Uniroyal and Vulcan,³² one-third of the Geismar traffic is excluded from the Access Agreement.

The ICCTA directs the Board to:

approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Board may impose conditions governing the transaction, including ...requiring the granting of trackage rights and access to other facilities. Any trackage rights and related conditions imposed to alleviate anti-competitive effects of the transaction shall provide for operating terms and compensation levels to ensure that such effects are alleviated.³³

The language concerning conditioning transactions to alleviate anti-competitive effects, consistent with the language of Section 11324(b)(5) requiring the Board to consider competitive

²⁷ *Kansas City Southern Railway Company – Construction Exemption – Ascension Parish, Louisiana*, ICC Finance Docket No. 32530 (hereinafter “*Geismar Exemption*”), Decision at 1 (served June 30, 1995). Figure A-6 to the Geismar Draft EIS identifies all of the Geismar area industries.

²⁸ *CN/IC*, Decision No. 37 at 33.

²⁹ *Geismar Exemption*, Draft Environmental Impact Statement at Table 3-5 (served July 16, 1997) (assuming average loading weight of one hundreds tons per car).

³⁰ Comments of the Illinois Central Railroad Company on Scope of Environmental Impact Statement, Fin. Doc. No. 32530, Verified Statement of Edmond L. Harris at 3 and 13 (January 29, 1996).

³¹ *Id.* at Verified Statement of Edward G. Kammerer at 3 and 9; Reply of Illinois Central Railroad Company To Supplemental Comments, Fin. Doc. No. 32530 at 17 and Verified Statement of Edmond L. Harris at 6 and 10 (May 12, 1997).

³² Rubicon, Uniroyal and Vulcan accounted for approximately 12,500 carloads of traffic. *CN/IC* Decision No. 37 at 107 and 111.

³³ 49 U.S.C. §11324(c) (emphasis added).

effects “in the affected region,” is much broader than the effects on individual parties in a region. Regardless of whether it would have been preferable for ATOFINA’s predecessor to have participated in the CN/IC merger, the issue of the loss of competition at Geismar was squarely before the Board; and it is the Board’s duty to protect the public interest, and to address the effects in the region, and not merely the effect on individual shippers. While it is customary for railroads in merger proceedings to limit the information they voluntarily disclose and to seek to limit remedial conditions to the narrowest scope possible, it is the Board which is charged with the responsibility to address the effects in the involved region and to protect the public interest. While the Board may not have the duty to seek out affected parties, it should not ignore the facts and circumstances presented and limit remedies beyond the apparent scope of the injury.³⁴

ATOFINA recognizes the interest in achieving finality with regard to proceedings before the agency. Nonetheless, the Board is empowered to reopen proceedings,³⁵ and it retained oversight to address competitive issues.³⁶ Considerations in reopening entail a balancing of interests. Such balancing is absent from Decision No. 39, the Board virtually ignoring the loss to ATOFINA. The fact that parties other than Rubicon, Uniroyal and Vulcan, in addition to those identified in the Access Agreement, would be affected by the loss of the KCS build-in were known to both CN and IC.³⁷ In light of the Board’s recent adverse precedent in *UP/SP*, and further considering that securing haulage from Geismar would have entailed line construction for

³⁴ Not only was the KCS build-in plead by the Geismar parties, but also the Board was well aware of the build-in and its relation to the merger since it *sua sponte* ordered the Geismar build-in held in abeyance upon notice of the Access Agreement. *Geismar Exemption*, Decision served Aug. 27, 1998; *CN/IC*, Decision No. 39 at 3.

³⁵ 49 U.S.C. §722 (c) and 49 C.F.R. § 1115.4; 49 U.S.C. §11327.

³⁶ *CN/IC* (Sub-No. 4), Decision No. 4 (served Dec. 27, 2001).

³⁷ Based on its past history of railroad merger involvement, KCS could have been expected to identify the broader competitive effects and argue for comprehensive remedies. In the CN/IC merger, however, KCS was a marketing partner with CN and received certain limited operating rights, including Geismar access to three shippers. Thus, KCS was neutralized with regard to the broader Geismar competitive issues.

a facility which then could not justify such construction, it is well understandable that ATOFINA's predecessor did not press the point. In now seeking for remedial relief, ATOFINA has attempted to structure its remedy in a manner fully consistent with prior Commission precedent that the Board will not impose a condition which will improve a party's pre-merger circumstances. Accordingly, ATOFINA seeks nothing more than what it would have been able to accomplish had KCS completed the build-in, namely KCS rail service from Geismar, which it would achieve through construction of a line extension from its plant to the "footprint" of the KCS build-in line. This would be tantamount to a long plant lead-in, and would place ATOFINA in the same service posture as those identified in the Geismar Condition.³⁸ Furthermore, the extension of the haulage arrangement to "any chemical manufacturing facilities operated on the properties" of the companies identified in the Access Agreement does not limit CN's exposure to KCS haulage service in a finite way.

The Board has recognized that, in light of the Access Agreement, there is no economic basis for a build-in/build-out between the Geismar area and the KCS mainline and that the Board likely would not approve such a construction project.³⁹ *A fortiori*, a line from Carville is even less feasible, in that Carville lies approximately 3 miles west of Geismar. Absent inclusion in the Geismar Condition, ATOFINA is totally foreclosed from securing competitive rail service. Yet, ATOFINA suffers the exact same loss of competitive opportunity as BASF, Borden, Rubicon, Shell, Uniroyal and Vulcan would have suffered absent the Access Agreement and the Geismar

³⁸ ATOFINA did not wait an inordinately long period of time to seek remedial relief. The plant expansion was authorized in the fall of 2000 and completed in November 2001. *See* Waguespack affidavit. After the authorization for the capital expenditure, ATOFINA initiated a planning process. *See* Schmitz affidavit. ATOFINA contacted CN concerning its interest in the Geismar Condition and also placed the Board on notice in its CN/IC oversight comments in November 2001. ATOFINA also was dealing with KCS during this period. ATOFINA has been diligent and proceeded in a logical and reasonable manner. Moreover, petitions to reopen may be filed at any time, 49 C.F.R. §1115.4.

³⁹ CN/IC, Decision No. 37 at 33.

Condition. For the Board to decline to consider the changed circumstances which brings ATOFINA before the Board at this time, and to refuse to consider the competitive impacts, and to engage in a balancing test as required by the ICCTA, serves not to promote the public interest, but rather to reward CN for finding a way to limit analysis of the full competitive impacts in the Geismar region and for locking-up KCS so that KCS would not effectively advocate for the interests impacted by the merger. The Board's suggestion that ATOFINA's situation can be addressed through negotiation and a "private-sector resolution" is fanciful,⁴⁰ ignoring the nature of both railroad market power and shipper-carrier negotiations. With no effective transportation alternative, ATOFINA's Carville plant is a victim of the CN/IC merger and forever captive.

WHEREFORE, THE PREMISES CONSIDERED, ATOFINA Petrochemicals, Inc., respectfully urges the Surface Transportation Board to find that good cause exists for reopening the CN/IC merger, that ATOFINA permanently lost a competitive rail opportunity through the convergence of the Access Agreement and the CN/IC Merger, and finally that ATOFINA is entitled to KCS service, via haulage from Geismar, at such time as it completes construction of an appropriate line from the plant to the Geismar industrial district proposed to have been served by the KCS Geismar build-in.

Respectfully submitted,



Martin W. Bercovici
KELLER AND HECKMAN LLP
1001 G Street, NW, Suite 500 West
Washington, DC 20001
(202) 434-4144
Attorney for ATOFINA Petrochemicals, Inc.

September 10, 2002

⁴⁰ ATOFINA has approached CN, and CN did not respond. Joint Petition at 7 and Ex. E.

AFFIDAVIT OF MIKE SPAHIS

My name is Mike Spahis. I am the former Manager of Logistics and Distribution for Fina Oil and Chemical Company, which became ATOFINA Petrochemicals, Inc. I served in that capacity from 1996 to 2000, and was employed by the company for a total of seventeen years. I left the company in 2000 when the corporate offices were relocated from the Dallas area to Houston.

I am personally knowledgeable regarding the company's decision not to participate in the Canadian National/Illinois Central merger. The final decision was made by H. Patrick Jack, Fina's Executive Vice President-Chemicals with input from myself and others. Mr. Jack, as well as myself and others within the company, were fully familiar with the Board's decision regarding the Union Pacific/Southern Pacific Merger. Mr. Jack was chairman of the Society of the Plastics Industry, Inc. at the time of the UP/SP merger, and I was the vice-chairman of SPI's Transportation group. Both he and I were very much involved in SPI's position with regard to that merger.

When the CN/IC merger application was filed in mid-1998, Fina was engaged in discussions on whether to participate before the Board with regard to the Carville facility and the loss of the KCS build-in opportunity. Fina had been in discussions with the KCS concerning the potential build-in for the Carville facility for several years prior to the merger application as we understood the importance of competitive access for our facilities. We were aware of the Board's UP/SP decision having followed the case from the beginning to end and the effects that it had on all of Fina's facilities. In addition, we were aware of the denial of remedial relief to Enterprise Products Company, which also lost the opportunity for a build-out to a railroad build-in as a consequence of the merger eliminating the build-in. Knowing that the Board only one and two years earlier had addressed this situation, which was very similar to that of our Carville Plant, but with a shorter build-out requirement, we had no reason to believe the Board would be responsive to our loss of potential competitive opportunity due to the termination of the KCS build-in. In addition, we understood that the Board would not impose a condition on merging railroads to allow direct competitive service to a sole-served shipper which lost a build-out opportunity since the Board's policy was to refuse to improve a shipper's pre-merger situation. If Fina was to actively seek a remedy, we wanted to make sure that our case was consistent with past Board decisions and had justification for the filing. Taking all factors into account, also

including the relative size of our Carville Plant in 1998, we did not see the basis to pursue a remedy in the CN/IC merger which appeared beyond our reach.

I certify under penalty of perjury that the foregoing is true based upon my knowledge and information.

September 6, 2002


Mike Spahfs

AFFIDAVIT OF JAMES WAGUESPACK

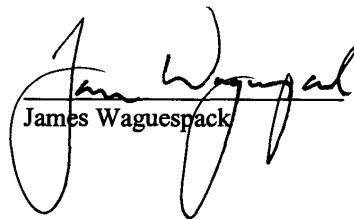
I am James Waguespack. I hold the position of Product Manager-Styrenics of ATOFINA Petrochemicals Company, Inc. My responsibilities include the supply chain and commercial aspects of the styrene and polystyrene businesses associated with the production facilities at Carville, Louisiana. Prior to my present position, I was Plant Manager at Carville.

ATOFINA completed a capacity expansion of the Carville polystyrene production facility in November 2001. Planning for the capacity expansion began in mid-1999, and the capital commitment for the capacity expansion was approved in the fall of 2000.

The recently completed capacity expansion increases the production capability at Carville from an output of approximately 5,500 railcars annually to the projected 8,500 annual railcar capacity. The facility can accommodate the addition of at least one further production line.

I certify under penalty of perjury that the foregoing is true based upon my knowledge and information.

September 5th, 2002


James Waguespack

AFFIDAVIT OF THOMAS A. SCHMITZ

My name is Thomas A. Schmitz. I am the President of **TAS**Consulting, an economic and management consulting firm with offices located at 5364 43rd Street, N.W., Washington, DC 20015.

I have been continuously employed in the transportation and logistics area since 1974. I served as Chief of the Interstate Commerce Commission's Rail Cost Analysis Section, and later as the Chief of its Economic Analysis Section. I have also provided transportation and logistics consulting services and strategic planning to an array of rail-served shippers and receivers.

I was retained by ATOFINA Petrochemicals, Inc. (ATOFINA) during the period July 2001 to July 2002 to assist in transportation analysis and planning related to the distribution of its polymer products by rail from its three production facilities. The following statement is based on my studies pertaining to ATOFINA's distribution of polystyrene from its plant in Carville, LA (Carville Plant).

Canadian National Railway Company (CN) is the only carrier with access to the Carville plant. Due to the captive rail status of the plant, ATOFINA has experienced significant difficulty in negotiating competitive line-haul rates and accessorial charges.

ATOFINA asked me to study the economic feasibility of a short rail line build-out to nearby Geismar, LA, to take advantage of the transportation competition provided by Kansas City Southern Railway (KCS) via the haulage agreement approved by the Surface Transportation Board as a condition of CN's merger with the Illinois Central Gulf Railroad in 1999 ("Geismar Condition").

The starting point for my study was an analysis of the polystyrene rail shipments from the Carville Plant to determine which ones could be potentially diverted to a KCS routing, i.e. those shipments to other than CN captive destinations. Based on Carville's

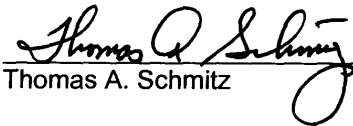
Affidavit of Thomas A. Schmitz

new production capacity (on line in November of 2001), and in conjunction with demand forecasts and customer profiles, I found that a significant number of the estimated 7500 annual carload shipments could be offered to KCS. I developed new routes for those divertible shipments and then calculated the rail cost-of-service that would be incurred by KCS to handle that traffic from Baton Rouge, LA or Jackson, MS, the haulage points under the Geismar Condition.

Based on my experience and understanding of competitive vs. captive rail rates, I concluded that if KCS wanted this new traffic it could offer very competitive rates at compensatory levels. ATOFINA's preliminary rate negotiations with KCS confirmed my economic analysis. Further, I found that the sum of KCS rate offers, the estimated haulage fee KCS would have to pay CN, and the cost ATOFINA would incur to operate the new rail line would result in a substantial reduction in freight expenses when compared to those ATOFINA would otherwise pay to CN to handle the expanded volume of its Carville traffic.

I ultimately concluded that given the carload volume resulting from the recent plant expansion, and particularly if ATOFINA were to further expand plant output, that savings resulting from competitive rail rates would amortize the construction of a line to Geismar and that the project is therefore economically justified.

I declare, under the penalty of perjury, that the foregoing statement is a true and correct statement and that I am authorized to submit it.

 September 5, 2002
Thomas A. Schmitz

AFFIDAVIT OF CHARLES R. CARR

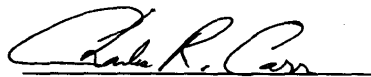
I am Charles R. Carr, and I hold the position of Manager, Logistics and Distribution, of ATOFINA Petrochemicals, Inc. I have been employed by ATOFINA (formerly Fina Oil and Chemical Company) since 1985.

In early 2001, with the approaching completion of the capacity expansion at our polystyrene production facility at Carville, Louisiana, the company undertook to examine the prospect of securing competitive rail service for the Carville plant. The only practical and economically feasible option entailed seeking inclusion in the "Geismar Condition" adopted in the CN/IC Merger. To determine whether that approach was practical, ATOFINA commissioned TranSystems Corporation to prepare an engineering assessment of the feasibility of developing a new rail line between the plant and the Geismar, Louisiana area proposed to be served by Kansas City Southern Railway through a build-in to Geismar and now served via a haulage arrangement with Canadian National Railway.

TranSystems prepared a report for ATOFINA, delivered in final in February 2002, which assessed alternative routes and recommended a route of approximately three miles in length. Along this route, TranSystems identified no residential occupancy and no recreational land use. The dominant land uses along the alignment are timber and agricultural, according to the TranSystems report. Moreover, there are no public lands along the proposed alignment. The report evidences that construction of a rail line between Carville and Geismar is feasible.

I certify under penalty of perjury that the foregoing is true based upon my knowledge and information.

September 5, 2002


Charles R. Carr

CERTIFICATE OF SERVICE

This is to certify that I have this 10th day of September, 2002, caused the foregoing Petition of ATOFINA Petrochemicals, Inc. For Reconsideration in Finance Docket No. 33556 to be served upon all known parties of record in this proceeding by first-class mail or a more expeditious method.

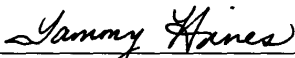
Paul A. Cunningham
Harkins Cunningham
Suite 600
801 Pennsylvania Avenue, N.W.
Washington, DC 20004-2615

[By Hand Delivery]

William A. Mullins.
TROUTMAN SANDERS LLP
401 9th Street, NW
Suite 1000
Washington, DC 20004

Nicholas J. DiMichael
Thompson Hine LLP
1920 N. St. N. W., Suite 800
Washington, DC 20036

Thomas E. Schick
American Chemistry Council
1300 Wilson Boulevard
Arlington, VA 22209



Tammy Hines