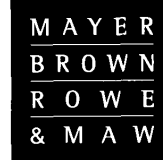
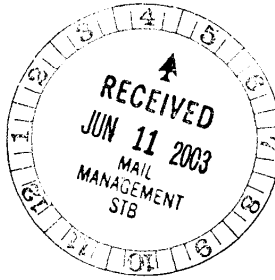


June 11, 2003

By Hand

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423



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Re: Finance Docket No. 34079, San Jacinto Rail Limited and The Burlington Northern and Santa Fe Railway Company – Construction and Operation of A Rail Line From Bayport Loop in Harris County, Texas

Dear Secretary Williams:

Please find enclosed for filing in the above-captioned proceeding the original and ten (10) copies of the Reply of San Jacinto Rail Limited and The Burlington Northern and Santa Fe Railway Company to Galveston Bay Conservation and Preservation Association and The League of United Latin American Citizens' Motion for Stay Pending Review and to the City of Houston's Petition for Stay Pending Judicial Review. Also enclosed is a 3.5 inch disk containing the text of the pleading in WordPerfect 9 format.

I would appreciate it if you would date-stamp the enclosed extra copy of this submission and return it to the messenger for our files. Thank you for your assistance.

Sincerely yours,

Adrian L. Steel, Jr.

Enclosure

cc: All Parties of Record

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JUN 11 2003

Part of
Public Record

BEFORE THE SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34079

**San Jacinto Rail Limited Construction Exemption And
The Burlington Northern And Santa Fe Railway Company
Operation Exemption – Build-Out To The Bayport Loop Near
Houston, Harris County, TX**



**Reply Of San Jacinto Rail Limited And
The Burlington Northern And Santa Fe Railway Company To
Galveston Bay Conservation And Preservation Association And The League
Of United Latin American Citizens' Motion For Stay Pending Review And
To The City Of Houston's Petition for Stay Pending Judicial Review**

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Attorneys for San Jacinto Rail Limited and
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BEFORE THE SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34079

**San Jacinto Rail Limited Construction Exemption And
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**Reply Of San Jacinto Rail Limited And
The Burlington Northern And Santa Fe Railway Company To
Galveston Bay Conservation And Preservation Association And The League
Of United Latin American Citizens' Motion For Stay Pending Review And
To The City Of Houston's Petition for Stay Pending Judicial Review**

Pursuant to 49 C.F.R. § 1115.5(a), San Jacinto Rail Limited (“San Jacinto”) and The Burlington Northern and Santa Fe Railway Company (“BNSF”) (collectively, “Petitioners”) hereby reply to the petitions for stay pending judicial review filed by Galveston Bay Conservation and Preservation Association (“GBCPA”) and The League of United Latin American Citizens (“LULAC”),¹ and the City of Houston (“City”) (collectively, “Movants”).

¹ Petitioners will respond to GBCPA’s and LULAC’s arguments notwithstanding their petition’s fatal procedural defects. They are unclear as to the procedural posture of their “Motion for Stay Pending Review” (“GBCPA Mot.”). They state that they are seeking a stay because they plan to file a petition for reconsideration with the Board by June 16. GBCPA Mot. at 2. However, if that is the case, their petition is out of time. See 49 C.F.R. § 1115.3(f) (“[a] petition to stay [pending reconsideration] . . . shall be filed within 10 days of service of the action”). If GBCPA and LULAC actually are moving pursuant to 49 C.F.R. § 1115.5(a) for a stay pending judicial review, their petition for stay should be dismissed because they have no petition for review on file in any appropriate U.S. Court of Appeals as required by 49 C.F.R. § 1115.5(a). See *Boulder Airport, Inc. v. Stapleton Stagecoach, Co.*, 1993 WL 5071 (ICC Jan. 12, 1993), at 1 (finding no basis for a stay under 1115.5(a) because “there [wa]s no indication that any appeal to the Federal courts ha[d] been filed”). This is also the case for the City. These reasons alone are sufficient for the Board to dismiss the petitions for stay without additional deliberation.

Background

On May 9, 2003, the Surface Transportation Board (“Board”), pursuant to 49 U.S.C. §§ 10502 and 10901, granted final approval to Petitioners to construct and operate a 12.8-mile rail line (the “Bayport Loop Build-In”) in the Bayport Industrial District in Southeast Houston, Harris County (“May 9 Decision”). As set forth in detail in the May 9 Decision at 6-11, the Board’s action was taken after nearly two years of study² by the Board’s Section of Environmental Analysis (“SEA”) of the potential environmental impacts of the proposed Bayport Loop Build-In. Consistent with the requirements of the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* (“NEPA”) and the Council on Environmental Policy’s (“CEQ’s”) NEPA regulations, 40 C.F.R. Part 1500, SEA provided notice and opportunities for public comment at several points in the environmental review process.³

On December 6, 2002, SEA issued its draft environmental impact statement (“DEIS”) and held public meetings on January 14 and 15, 2003, in Pasadena and Houston, Texas, respectively.⁴ SEA thereafter addressed the issues raised in GBCPA and the City’s comments, along with those of other groups and individuals, in the final environmental impact statement (“FEIS”), issued on May 2, 2003.⁵ Only at the conclusion of this process did the Board, based upon SEA’s analysis,

² Petitioners filed their Petition for Exemption to construct and operate the Bayport Loop Build-In on August 30, 2001. At the initiation of environmental review by the Board, Petitioners publicly supported preparation of an environmental impact statement (“EIS”) by SEA even though the Board’s environmental review regulations, 49 C.F.R. Part 1105, did not require preparation of an EIS for this project.

³ SEA notified the public of its intent to prepare an EIS on October 1, 2001. As part of scoping, SEA issued a draft scope of study on November 26, 2001, and held four public scoping meetings on January 14 and 15, 2002. At the request of commenters, including the City, SEA extended the comment period by an additional 30 days. Both GBCPA and the City submitted comments on the draft scope within the specified period. When SEA issued its final scope of study on July 19, 2002, it responded to the issues raised by the commenters, including GBCPA and the City. 67 Fed. Reg. 47604 (2002).

⁴ Again, at the request of commenters, including GBCPA and the City, SEA extended the comment period by an additional 25 days. Both GBCPA and the City filed lengthy comments expressing their views as to the environmental impacts of the proposed Bayport Loop Build-In and participated in the public meetings.

⁵ As noted in the May 9 Decision, in addition, “SEA undertook extensive public outreach activities, including meetings and consultations, numerous site visits, and use of the Board’s official website, to give interested agencies, (cont’d)

determine that none of the proposed build alternatives would have significant environmental effects. May 9 Decision at 11.

For the reasons set forth in the May 9 Decision, the Board utilized a procedure set forth in the CEQ regulations at 40 C.F.R. 1506.10(b) in which the 30-day “waiting period” after release of the FEIS before final agency action may run concurrently with an agency’s internal appeal period. May 9 Decision at 14.

Argument

To justify a stay, Movants must demonstrate that (1) there is a strong likelihood that they will prevail on the merits; (2) they will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed by a stay; and (4) the public interest supports the granting of a stay. *See Union Pacific Corp., et al.—Control and Merger—Southern Pacific Rail Corp., et al. (“September 1996 Decision”),* Finance Docket No. 32760, Decision No. 55 (served Sept. 27, 1996) (denying stay), *citing Cuomo v. United States Nuclear Regulatory Comm’n*, 772 F.2d 972, 974 (D.C. Cir. 1985); *Washington Metropolitan Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Movants carry a heavy burden in seeking the extraordinary relief of a stay pending judicial review. *San Joaquin Valley Railroad Co.—Abandonment Exemption—In Tulare and Kern Counties, CA*, 1998 WL 151294 (STB Apr. 3, 1998) (“*San Joaquin*”), *citing Canal Authority of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974) (“[t]he party seeking stay or injunctive relief carries the burden of persuasion on all of the elements required for extraordinary relief such as a stay”). And as noted by the Seventh Circuit in denying a stay of an ICC abandonment decision, a “strong presumption of regularity supports any

(... cont’d)

organizations, and members of the general public the opportunity to learn about the project, define issues, and actively participate in the environmental review process.” May 9 Decision at 6. SEA also made all notices and documents available in Spanish.

order of an administrative agency; a stay pending judicial review is a rare event and depends on a demonstration that the administrative process has misfired.” *Busboom Grain Co., Inc. v. ICC*, 830 F.2d 74, 75 (7th Cir. 1987) (“*Busboom Grain*”).

A. Movants Have Not Demonstrated a Strong Likelihood of Success on the Merits.

1. The City’s Challenge to the Board’s NEPA Procedures Will Fail.

The City contends that the Board’s use of an exception to the rules on timing provided in the CEQ regulations, 40 C.F.R. § 1506.10(b),⁶ is not legitimate because the Board has a single member at this time. Petition of the City of Houston, Texas, For Stay Pending Judicial Review (“City Pet.”) at 4. The City argues that, due to the Board’s current status, there is no opportunity to alter the May 9 Decision, as required by § 1506.10(b), because the Board has no legal authority to act.⁷ *Id.*

The Board already has addressed the issue of its authority to act in this single-member situation, noting that, under its governing statute, such authority “is not limited by ‘a vacancy,’ 49 U.S.C. 702(a)(7), and the general rule of statutory construction is that the singular encompasses the plural, and vice versa.” *The Burlington Northern and Santa Fe Railway Co.—Trackage Rights Exemption—Union Pacific Railroad Co.*, STB Finance Docket No. 34345 (Sub-No. 1) (served May 23, 2003), slip op. at 2. Such an interpretation of an agency’s own authorizing statute would be entitled to deference by a federal court. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 844 (1986) (contemporaneous interpretation of statute which agency is entrusted to

⁶ Section 1506.10(b) of the CEQ regulations addresses the timing of agency action. That provision provides for a 30-day waiting period after release of the FEIS before an agency may issue its decision on a proposal. However, when an agency’s own regulations provide for an internal agency appeal process, the 30-day waiting period may run concurrently with the administrative appeal period. This procedure makes sense because it allows interested parties to digest and respond to the FEIS before the decision actually becomes final, but results in greater efficiency in the NEPA process.

⁷ The City also argues that there is no opportunity for altering the decision because, with a single member, there is no opportunity for discussion. City Pet. at 4. This argument is subsumed within the first regarding the Board’s authority to act and therefore also is addressed by the following discussion regarding that authority.

administer must be accorded considerable weight). Furthermore, the Seventh Circuit found that Congress intended the precursor to the “vacancy” provision cited by the City, 49 U.S.C. 701(b)(7),⁸ to mean that the “Commissioners in office, however many there are, [are] to be ‘the Commission’ for all purposes.” *Assure Competitive Transp., Inc. v. U.S.*, 629 F.2d 467, 473 (7th Cir. 1980). This fundamental precept has been ratified by subsequent cases. *Nicholson v. ICC*, 711 F.2d 364 (D.C. Cir. 1983); *State of Michigan Dep’t. of Transp. v. ICC*, 698 F.2d 277 (6th Cir. 1983); *Union Pacific Railroad Co. v. U.S.*, 637 F.2d 764 (10th Cir. 1981). *See also* Reply of Bayport Producers at 4-7.⁹ Thus, the Board has the authority to consider and act upon any petition for reconsideration filed in this proceeding, and the use of the exception in Section 1506.10(b) is proper.

2. None of Movants’ Challenges to the Reasonableness of the Board’s Environmental Analysis Has a Strong Likelihood of Success.

Movants have mounted the most difficult of challenges to an agency’s NEPA process: attacking the adequacy of the analysis in the impact statement. Their arguments, rather than presenting evidence of the Board’s failure to “consider an important aspect of the problem,” *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), simply take issue with its ultimate conclusions. This type of disagreement with an agency’s substantive analysis is not likely to be the basis for a court to order an agency to redo its impact statement. And in this case, Movants do not contend—nor could they contend—that their views were not before the Board during the environmental review process.

Courts apply a “rule of reason” in reviewing the adequacy of an EIS—a “pragmatic standard which requires good faith objectivity but avoids ‘fly specking’” the document.

⁸ The original vacancy provision of Section 10301(e) was continued without change in Section 701(b)(7), and thus the court’s interpretation of the provision remains equally authoritative.

⁹ Petitioners adopt and incorporate the arguments contained in the Reply of Bayport Producers.

Mississippi River Basin Alliance v. Westphal, 230 F.3d 170, 175 (5th Cir. 2000) (internal citations omitted). Often this standard is equated with, and is informed by, application of the arbitrary and capricious standard of the Administrative Procedure Act, 5 U.S.C. § 706. The Fifth Circuit has developed three criteria for determining the adequacy of an EIS:

(1) whether the agency in good faith objectively has taken a hard look at the environmental consequences of a proposed action and alternatives; (2) whether the EIS provides detail sufficient to allow those who did not participate in its preparation to understand and consider the pertinent environmental influences involved; and (3) whether the EIS explanation of alternatives is sufficient to permit a reasoned choice among different courses of action.

Id. at 174. Courts engage in this review while deferring to the “informed discretion of the responsible federal agencies” because of the “high level of technical expertise” required. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377 (1989), *citing Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976).

First, GBCPA and LULAC offer only unsubstantiated statements as to why they will succeed on the merits. GBCPA Mot. at 3. These bare conclusions offer nothing for the Board to analyze and are insufficient to determine any likelihood of success, let alone a strong one. *See September 1996 Decision, supra* (finding “highly generalized” explanation of Board’s failures in NEPA process insufficient to meet burden of showing likelihood of success). As such, they have not begun to carry their substantial burden in demonstrating the necessity of a stay.

As for the City, its arguments are equally easily dispatched. The City argues that the Board failed to take a “hard look” at the impacts to Ellington Field, to the Water Treatment Facility, to pipeline safety and on increased traffic. Without conceding in any instance that the Board was required to study the issues asserted by the City, nonetheless, the Board, through SEA,

thoroughly analyzed the issues.¹⁰ In each case, the Board, through SEA, considered and analyzed the environmental effect of the proposal, took account of the comments on the issue, and responded to the comments by explaining the agency's logic and methodology. Accordingly, given the deference required by a reviewing court, it is highly unlikely the City can establish any instance in which the Board's analysis was unreasonable or arbitrary and capricious.¹¹ Thus, the City also has failed to make the "powerful showing of probable administrative error" as required for a stay.¹² *Busboom Grain, supra*, at 75.

B. Movants Will Not Suffer Irreparable Harm In the Absence of a Stay.

To warrant injunctive relief, injury must be "both certain and great" and "actual and not theoretical," *i.e.* the injury must be "of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (emphasis in original, citations and internal quotations omitted). Movants state the harm they allegedly will suffer in only the most general, conclusory terms. City Pet. at 8-9; GBCPA Mot. at 4. Extraordinary relief should only be granted in situations in which the movants have amply demonstrated that the alleged "harm will *in fact* occur." *Id.* Coupled with the low likelihood of success on the merits of their claims, neither the City nor GBCPA has demonstrated irreparable injury sufficient for a stay.¹³

¹⁰ The Board analyzed these issues at length in the DEIS and FEIS: (1) impacts to Ellington Field are analyzed in the DEIS at 4-66 to 4-69 and comments responded to in the FEIS at 4-118 to 4-122; (2) Water Treatment Facility, DEIS at 4-68 and FEIS at 4-122 to 4-123; (3) pipeline safety, DEIS at 4-19 to 4-23 and App. E and FEIS at 4-60 to 4-72; and (4) increased rail traffic on new line, DEIS at 4-1 to 4-6 and App. C and FEIS 4-22 to 4-28.

¹¹ It is disingenuous for the City to make the argument now that the Board did not adequately study the potential impacts of the project on its properties when it refused throughout the nearly two years of environmental study to respond to repeated requests by SEA, BNSF and San Jacinto to gain access to its properties such as the Water Treatment Facility. *See* Verified Statement of Larry Naeger ("Naeger V.S.") at ¶ 10.

¹² The reasonableness of SEA's analysis no doubt will be analyzed in-depth in Petitioners' response to Movants' promised petitions for reconsideration.

¹³ It should be emphasized that Movants have not claimed that they were denied any procedural rights to notice and comment during SEA's NEPA review process, as outlined in the Background section above.

C. Petitioners and Others Will Be Harmed by Imposition of a Stay.

If a stay were imposed, causing delay¹⁴ in the construction and operation of the rail line, Petitioners would be harmed in several concrete ways. First, Petitioners would be unable to achieve the return on their investment in this project for the period of time of the stay. Naeger V.S. at ¶ 6 (“BNSF already has committed substantial resources toward this project, foregoing other capital investment opportunities”).¹⁵ See, e.g., *San Joaquin*, *supra*, at 4 (“a stay would prevent SJVR from achieving the savings that abandonment of the line would provide”). Many coordinated activities, including vendor commitments, ongoing in preparation for construction would be affected by any delay. Naeger V.S. at ¶ 8. Second, the shipper partners of San Jacinto will be deprived of the benefits of reduced rates engendered by increased competition, their objective in participating in this proposed project. See Reply of Bayport Producers at 7-8; Naeger V.S. at ¶ 7.

In addition, this construction project will bring millions of dollars of business to the local construction industry. A delay in the construction will also cost the local construction industry this business during the period of a stay. Naeger V.S. at ¶ 8.

D. The Public Interest Favors Denial of the Petitions for Stay.

The public interest favors denial of a stay. The Petitioners’ proposed build-in project will bring competitive service to the shippers in the Bayport Industrial District. Naeger V.S. at ¶ 9 (“[w]ith each and every day that competitive rail service is not available to the Bayport Loop, consumers and the marketplace, both directly and indirectly, are absorbing the cost of significantly

¹⁴ Although characterized as a “short delay” by the City, City Pet. at 9, a stay for the length of appellate review likely would last for at least a year—a considerable delay in the life of a project such as this one.

¹⁵ The Board’s rules are not clear as to whether the ten-page limit on replies to petitions for stay pending judicial review includes attachments. See 49 C.F.R. § 1115.5(c). If the rule applies to attachments, and given that Petitioners are filing a joint reply to Movants’ petitions, Petitioners, to the extent necessary, seek a waiver of the ten-page limit of Section 1115.5(c) for purposes of consideration of the attached Verified Statement of Larry Naeger.

higher rail transportation when they purchase products produced by industries located in the Bayport Loop”).

There is ample authority to show that the public interest is served by the implementation of rail construction projects such as the Bayport Loop Build-In. First, this project will fulfill the build-in condition imposed by the Board in the Union Pacific Railroad Company and Southern Pacific Rail Corporation merger proceeding in 1996.¹⁶ Second, the competitive situation created by the Bayport Loop Build-In is in furtherance of the National Rail Transportation Policy which favors reduced regulatory barriers to entry in competitive markets. *See* 49 U.S.C. § 10101(1) (“[i]n regulating the railroad industry, it is the policy of the United States Government . . . to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail”).¹⁷ Thus, Congress has determined, in providing a statutory scheme that acknowledges rail transportation’s unique importance in the United States’ economy, that it is in the public interest for projects such as the Bayport Loop Build-In to be built.¹⁸ Far from being a mere bump in the road, as Movants would cavalierly suggest, indefinite delay may in some instances be the functional equivalent of regulatory disapproval of capital intensive projects such as this project, particularly where substantial investments and business risk of multiple players are involved. Any delay in this project will harm these important interests.

¹⁶ *See UP/SP Merger*, 1 S.T.B. 233 (1996). This condition is discussed in the DEIS at 1-2 to 1-3.

¹⁷ Any delay would also be inconsistent with the policies set forth in a recent Presidential Executive Order favoring streamlined environmental reviews and expedition of transportation infrastructure projects in the interest of the national economy and public benefits. Exec. Order No. 13274, 67 Fed. Reg. 59,449 (Sept. 23, 2002).

¹⁸ Indeed, the Board has adopted a general presumption that construction projects will be approved under the “public convenience and necessity” standard of the ICC Termination Act of 1995. *See Class Exemption for the Construction of Connecting Track Under 49 U.S.C. 10901*, 1 S.T.B. 75, 79 (1996); *Dakota, Minnesota & Eastern R.R. Corp. Construction into the Powder River Basin*, STB Finance Docket No. 33407 (served Dec. 10, 1998), at 17.

Respectfully submitted,



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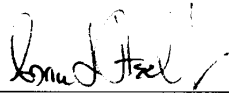
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Attorneys for San Jacinto Rail Limited and
The Burlington Northern and Santa Fe Railway Company

Date: June 11, 2003

CERTIFICATE OF SERVICE

I do hereby certify that copies of the Reply of San Jacinto Rail Limited and The Burlington Northern and Santa Fe Railway Company to Galveston Bay Conservation and Preservation Association and The League of United Latin American Citizens' Motion for Stay Pending Review, and to the City of Houston's Petition for Stay Pending Judicial Review are being served on all parties of record via United States mail on June 11, 2003.



VERIFIED STATEMENT OF LARRY NAEGER

1. My name is Larry Naeger. I am Director Sales-Industrial Products at The Burlington Northern and Santa Fe Railway Company ("BNSF"). My office address is 2650 Lou Menk Drive, Marketing Building , 3rd Floor, Fort Worth, Texas 78131.

2. I joined BNSF in July 1984. Since that time, I have held positions in marketing or sales and have been in my current position since February 2001.

3. As Director Sales-Industrial Products at BNSF, I am involved in the development and implementation of strategic commercial initiatives for the company. Currently, one of my responsibilities is to serve as Project Manager for the Bayport Loop Build-In with responsibility for all phases of the project.

4. On behalf of BNSF and San Jacinto Rail Limited ("SJRL"), I am submitting this Verified Statement in support of their Reply to the petitions of the City of Houston and the Galveston Bay Conservation and Preservation Association petitions for stay in connection with the decision of the Surface Transportation Board served on May 9, 2003 approving the construction and operation of a new rail line to serve existing shippers in the Bayport Loop near Houston, Texas (Finance Docket No. 34079) (the "Bayport Loop Build-In"). I am basing this Verified Statement on first-hand knowledge from my involvement as BNSF's primary contact with our partners on all matters relating to this project.

5. The purpose of this Verified Statement is to describe the irreparable harm that would come to BNSF and SJRL, the construction industry located in Houston, our shipper partners, and the public were the Bayport Loop Build-In delayed by a stay of the STB's approval. Construction of the \$80 million new rail is currently planned to begin in the fall/winter of 2003. We anticipate rail operations to be phased in as construction progresses, with shipments estimated to commence in late 2004/early 2005. In order to begin construction at that time, many interrelated activities are proceeding apace such as completion of final design and engineering plans for the new line, overpasses, and bridges, land acquisition of parcels needed to construct the line, and requests for binding bids by construction firms in the Houston area who are willing to commit substantial resources to the project. In addition, because of the sheer size of the construction project, there is significant lead-time involved in ordering materials and equipment for construction, and related financial commitments to vendors of such items.

6. BNSF already has committed substantial resources toward this project, foregoing other capital investment opportunities. A stay of the STB's approval would delay BNSF's ability to proceed with construction and operation of the new rail line, tie up its commitment of capital resources with no return on investment, and compromise the company's ability to meet critical commercial deadlines to begin service to its shipper partners.

7. The negative impact of any delay in project schedule would not only bring harm to BNSF. Its shipper partners, and other businesses located in the Bayport Loop that will benefit from the competitive rail service (with the likely reduction in rail transportation rates), would face uncertainty as to the future rail transportation services available to them as well as potentially punitive measures to be imposed by their existing rail carrier, Union Pacific Railroad. Such uncertainty could be commercially devastating inasmuch as rail transportation costs are a significant component of the cost of doing business, and directly impact the cost to consumers and the marketplace of the products produced by the Bayport Loop industries. As detailed in statements of support and other materials contained in the record of this proceeding, Bayport Loop industries could suffer significant rate increases if competitive rail service is not timely realized or be forced to move business operations to locations outside of Bayport. *See, e.g.*, Statement of Velsicol Chemical Corporation and Verified Statements of Shipper/Partners .

8. The construction industry in Houston also would be harmed by any delay or uncertainty in the project schedule that would be caused by a stay. To succeed in being awarded a bid for construction activities, bidders must be willing to be unilaterally bound for a period of time, likely to be in the range of 90 days. Bidders must forego other business opportunities during that period of commitment. A stay could prolong that period of commitment and further jeopardize the ability of the construction industry to realize other construction business in Houston. Another consequence of a stay is that BNSF and SJRL would likely receive higher bids for the project construction due to the uncertainty as to when construction would actually occur.

9. In my view, the public interest would be harmed were a stay imposed. With each and every day that competitive rail service is not available to the Bayport Loop, consumers and the marketplace, both directly and indirectly, are absorbing the cost of significantly higher rail transportation when they purchase products produced by industries located in the Bayport Loop.

10. Finally, it is worth noting that the City of Houston, which now seeks a delay of this important project, consistently refused to be cooperative throughout the nearly two year of environmental study conducted by the Board's Section of Environmental Analysis ("SEA"). Despite repeated attempts by representatives of BNSF, SJRL and SEA to gain information from the City about its future plans or access to its properties for survey of possible wetland or other resources, the City did not respond and/or refused to be helpful.

VERIFICATION

I verify under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Further, I certify that I am qualified and authorized to file this Verified Statement.


Larry Naeger

Dated: 6/10/03