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TOTAL PETROCHEMICALS

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By Electronic Filing

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

Re: Notice of Intent to Submit Written Testimony for Ex Parte No. 658 – The 25th
Anniversary of the Staggers Rail Act of 1980: A Review and Look Ahead

Dear Mr. Williams:

Enclosed is TOTAL PETROCHEMICALS USA, INC.'s Written Testimony for submission at the Board's October 19, 2005 public hearing in the above captioned matter.

Very truly yours,

Heather A. Campbell

Enclosure



TOTAL PETROCHEMICALS USA, INC.

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EX PARTE 658

**HEARING ON THE
25TH ANNIVERSARY OF THE STAGGERS RAIL ACT OF 1980:
A REVIEW AND LOOK AHEAD**

SUBMISSION OF WRITTEN TESTIMONY

ALAN CRAMER – MANAGER SUPPLY CHAIN LOGISTICS

TOTAL PETROCHEMICALS USA, INC.

TOTAL PETROCHEMICALS USA, INC. ("TPI") appreciates the opportunity to submit written testimony to the Surface Transportation Board ("STB") about the impact of the rail industry's de-regulation in the post-Staggers Act era on TPI.

First of all, I would like to introduce you to TPI. TPI is a global producer of petrochemicals (polypropylene, polyethylene, styrene, polystyrene), base chemicals and transportation fuels with production facilities in Texas and Louisiana. TPI has built its petrochemicals business with a strong manufacturing bias, based on world-scale plants and technologically advanced operations. TPI manufactures petrochemicals for the plastics industry. We produce plastic pellets for use in everyday household items like food containers, furniture, carpets, and beverage bottles to name just a few.

Through the years, we have cut every operating dollar possible out of our manufacturing budgets yet our costs to distribute continue to grow at alarming rates year after year. We ship our products from our petrochemical plants primarily by rail. Until recently, at most of our plant locations we were serviced by one origin railroad. In addition, a large percentage of our customers' facilities are also served by only one railroad. We are indeed captive shippers and as such have been subjected to excessive rail transportation charges along with poor service. The Rail industry is certainly one of the few American industries where you consistently pay more for less service or product value. We believe we are captive to a monopoly who says "ship it our way or don't ship".

TPI endorses and supports the written testimony submitted by C.U.R.E. For disclosure purposes, TPI is a member of C.U.R.E. and I am its Secretary/Treasurer.

Since the Staggers Rail Act of 1980, Shippers have seen the "Microsofting" of the railroads. This "Microsofting" phenomena has been to the Shippers' detriment, in terms of cost and service as well as Shippers' abilities to negotiate rates and commercial terms with the rail carriers.

Today, rail carriers can act capriciously and without regard to the actual terms of their contracts and the spirit and intent of the contract negotiations. Shippers cannot go to the STB for any relief or remedy from such commercial conduct if they have a contract. TPI had a Class 1 railroad unilaterally cancel storage agreements, despite the contract terms and negotiations, and impose accessorial tariff charges despite contrary and/or restrictive express contractual language. Shippers must expend extraordinary internal resources and time—measured in years in some instances - just to get a contract.

Competitive Access

TPI has heard Chairman Nober's statements that a Shipper must resort to constructing a rail line in order to obtain competitive access to its plants. Sometimes a Shipper can do a build-in/build-out, which is always at a significant cost, and sometimes it can't build-in/build-out at all. I would like to share TPI's post-Staggers Act experience with competitive access to captive plants.

Bayport, Texas. TPI (formerly known as ATOFINA Petrochemicals, Inc.), along with Basell and Lyondell/Equistar (other chemical producers in the Bayport Industrial Loop), joined the BNSF in the San Jacinto Rail Ltd. project to construct a 12.8 mile rail line into the Bayport Loop to serve our plants. As the STB knows, it thoroughly evaluated this rail construction project and approved it. However, the BNSF encountered obstacles with the local city government in acquiring a necessary parcel of land needed for the rail line's four (4) possible routes and was not able to condemn the land in the local county court through the eminent domain process. After delay, the SJRL shippers did not end up with true competitive access in the form of a second rail line into their respective plants, but instead have alternative access through shared trackage rights. This shared access arrangement only provides competition to the original SJRL shipper partners and does not address one of the more important stated goals of the project, that of increased capacity to the Bayport Industrial Loop. Five years later, TPI now has competitive access at its Bayport plant, but this project illustrates that even though the STB approves a build-in/build-out, it can take years to achieve competitive access and STB approval does not

always mean that a Shipper will receive the intended economic or service improvement outcome.

Carville (Bruns), Louisiana. In sharp contrast to our Bayport plant is our plastic resin plant in Carville, Louisiana, located in an industrial area on the lower Mississippi River. This plant is captive to the Canadian National Railway (CN).

In 1995, the Kansas City Southern Railway (KCS) proposed to extend its Louisiana rail network to serve the Geismar industrial area, approximately three miles down-river from our Carville plant. The proposed KCS line was less than nine miles in length. That effort was cut short in 1998 when, while awaiting the STB's approval, KCS and CN entered into a joint marketing agreement in conjunction with the proposed merger of CN and IC. As part of that arrangement, CN agreed to provide haulage on behalf of KCS for the three chemical shippers at Geismar who gave supporting statements for the KCS build-in. The STB then ordered the Geismar build-in application to be held in abeyance.

In approving the CN/IC merger, the STB granted the request of three other Geismar shippers, located next to those plants to be served via haulage, for inclusion in the haulage arrangement. For all practical purposes, the CN/KCS joint marketing arrangement and Access Agreement extinguished the KCS build-in to Geismar and its surrounding area and the STB ultimately dismissed that application.

In June, 2002, TPI (then known as ATOFINA) and KCS jointly asked the STB to interpret and enforce its expansion of the Geismar haulage arrangement as extending to all parties who could have been served by KCS through the build-in. This would include TPI, conditioned on construction of a rail line of approximately 3 miles from its Carville plant to Geismar. That remedy would have preserved our rights as if the KCS line had been built.

TPI relied on the ICCTA provision requiring the STB to consider whether a rail merger "would have an adverse effect on competition among rail carriers in the affected region . . ." 49 U.S.C. §11324(b)(5). Regardless of the number or identity of shippers asking for remedial relief in a merger proceeding, it is the Board's duty to consider the effect of the merger on "competition among rail carriers in the region." [emphasis added] In our situation, the region is the Geismar region.

Even though the STB still had oversight over the CN/IC merger, it denied the ATOFINA/KCS petition on procedural grounds. Two times the STB failed to protect competition for Carville traffic against loss in a merger: first, when it ignored the loss of competition to the Geismar region shippers in the CN/IC merger; and second, when the

STB denied the ATOFINA/KCS petition on procedural grounds, refused to address the merits and correct its earlier failure to comply with its statutory duty. The STB has reinforced both our captivity to the CN and the CN's bottleneck control of our Carville plant.

Our Carville plant and the STB's decisions in Finance Docket No. 33556, Decisions Nos. 39 and 40 also illustrate the impact on captive Shippers of the inconsistencies or lack of uniformity in STB merger conditions. Our Bayport plant was the beneficiary of the UP/SP merger's broader STB conditions, whereas our Carville plant cannot get competitive access, even if TPI built the rail line to Geismar, because the CN/IC merger had "more-tailored condition[s]", see Decision No. 39, page 7. As a result, if a captive Shipper is unfortunate enough to be in the "wrong" geographical area subject to the "wrong" merger conditions, it will be precluded from competitive access. Under the current STB rulings, TPI's Carville plant can never achieve competitive access and will remain captive to the CN.

Do the Current Rate Relief Procedures Really Work for Rail Shippers?

In reality, only a coal or other unit train Shipper can effectively bring a rate case before the STB. Because of the STB's prior decisions, the Staggers Act and ICCTA, TPI is effectively barred from bringing: (1) a rate case against any of its rail carriers; and (2) a bottleneck case for the Carville plant.

The STB cannot review a rate case if a Shipper has a contract with a rail carrier. If a Shipper can get a contract, then a commercially prudent Shipper has a difficult decision to make: forego set and known contract rates and terms for a period of time or "go to tariff" for the sole purpose of bringing a rate reasonableness case. If a shipper voluntarily goes to tariff for all or some lanes of traffic (depending on what and where it ships to), it might not get a contract that could protect at least some lanes of traffic from rates that could be greater than 300% - 400 % + RVC. This is a tough economic decision to make. In light of the burdensome costs of \$3+ million to bring a STB rate case, one of many questions for the STB to consider today should be: In the current economic realities of increasing raw material, energy and transportation costs in a global economy, what rational and sane Shipper can afford to make an economic decision to forego a contract, and go to tariff rates in order to spend \$3 million or more on a rate case before the STB? Doesn't this question alone support the fact that the Staggers Act economically harms rail Shippers?

2005 BP v. NS Proceeding. This proceeding was the first rate case to be filed under the STB's 1996 Rate Guidelines - Non-Coal Proceedings. Granted, procedural processes

were set forth by the STB as a result of this matter, but a glaring fact is that these rate guidelines were in place for nine (9) years before any Shipper utilized them. This further shows that the system favors the railroads.

Furthermore, the STB did not address the merits of BP's rate case **AT ALL** in the BP v. NS proceeding. The STB ordered the parties to mediation, which was confidential, and that is how the issues got resolved – by confidential mediation - not by STB hearings, a STB determination of the case and a STB published decision. This cloak of confidentiality does not provide other rail Shippers with information or guidance at all. How can the STB say that its 1996 Rate Guidelines for non-coal Shippers work?

Four key messages from TPI:

1. The railroad pricing model is monopolistic, not logical or fair. The distance from our LaPorte, TX plant, which has competitive access, to Chicago is 1,267 miles while Carville, LA (Bruns), a captive plant, to Chicago is 935 miles. Our rates to Chicago for the shipment of non-hazardous cargo of plastic pellets on the captive route are 225% higher than those on the competitive route. The only difference is our Carville, LA facility has no choice in rail carriers.
2. All of the railroads are now demanding fuel surcharges and while we do understand their issue, we do not agree with their methodology. Their current method is to take a % charge against the freight rate. Using the example above and assuming a theoretical surcharge of 10% we would pay almost \$200 less to go the 1,267 miles from LaPorte than we would pay in fuel surcharge for the shorter 935 mile trip. No provision for fuel economies of newer more fuel efficient equipment is considered, no adjustment for higher or lower use routes is made. This is not a surcharge to offset the rapid rise in fuel costs it is simply and additional profit center or it would be designed on a consumption basis.
3. Our industry is struggling to compete with foreign manufacturers in part because foreign producers can choose their port of entry into the United States based on areas with competitive rail service, which allows them to strategically avoid areas where railroads engage in monopolistic pricing practices. This provides foreign companies with a clear advantage over domestic producers.
4. Our company, like so many others, has a Global approach to corporate investment. Future growth and expansion in the USA is at stake in this issue. Corporations may decide it is much more economically practical to build or expand in foreign countries thereby affecting growth in the USA.

TPI firmly believes a balanced commercial relationship between the railroads and their customers, both captive and non-captive, is absolutely necessary. Too often, captive rail customers are confronted not only with a lack of competitive options but no swift or effective remedy regarding pricing complaints at the STB. Certainly, in the current atmosphere of fierce global competition, continuing the status quo of high prices due to little competition among rail carriers and no quick way to resolve pricing issues will result in more American jobs moving overseas.

Both balanced commercial relationships and financially strong railroads are necessary to provide the secure, effective transportation system the nation needs to remain competitive in the global marketplace.

Our statement today and our support of the statement made by C.U.R.E. are not designed to call for re-regulation of the nations railroads. Our goal is to express the frustration of many shippers over the current railroad practices that block competition and deny shippers access to competitive pricing for railroad services. We do believe changes in national rail policy are necessary to achieve the objective of balanced commercial relationships and financially strong railroads. TPI is merely making a pro-competition statement consistent with the concepts adopted by the Congress in 1980 when it partially deregulated the railroads.

There must be a way for the railroad industry to achieve long-term financial viability while providing efficient service at prices that will allow American business to compete successfully in the global market.

At a minimum, rail Shippers need the relief and remedies that are currently proposed in S.B. 919 *Railroad Competition Act of 2005* and its companion House Bill. TPI's written testimony about the effects of the Staggers Act on Shippers is not to advocate legislation to the STB, but to point out to the STB that it cannot sit back and wait for Congress to "fix the problem" by enacting legislation. As one of the many companies and shipper organizations participating in Captive Rail Shippers' Day on July 20, 2005, it is apparent to me and to TPI that the rail industry and the rail lobby – although concentrated in only a handful of Class 1 rail carriers when compared to the dozens of Shippers who came to Capitol Hill that day – appear to be insurmountable obstacles to the passage of any reasonable legislation that will allow rail Shippers procedural mechanisms for certain rate and competitive access relief.

Therefore, it is of utmost importance that the STB hear, consider, and ACT on what rail Shippers have to say during this 25th anniversary review of the Staggers Act. Rail

Shippers need the STB to take action now and correct the imbalances created by the Staggers Act. How many Shipper "horror stories" must the STB hear before it will balance the scales so that the scales don't continue to be solely weighed in the railroads' favor?

TOTAL PETROCHEMICALS USA, INC. appreciates the opportunity to present its comments to the Surface Transportation Board.

Respectfully submitted,

TOTAL PETROCHEMICALS USA, INC.

By Alan Cramer