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April 17, 2008

VIA ELECTRONIC FILING

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, NW
Washington, DC 20423-0001

Re: STB Ex Parte No. 677, Common Carrier Obligation of Railroads

Dear Secretary Quinlan:

Enclosed for filing in the above-referenced proceeding is the "Testimony of Robin A. Burns, Vice President Supply Chain for Occidental Chemical Corporation." We understand that this submission is sufficient to satisfy the Board's filing requirements for testimony and written submissions, and that service on the service list is not required. Please advise if any of that is not correct. Thank you for your cooperation.

Very truly yours,

Michael F. McBride

Michael F. McBride
Attorney for Occidental Chemical Corporation

Surface Transportation Board

Ex Parte No. 677

Common Carrier Obligation of Railroads

Testimony of Robin A. Burns, Vice President Supply Chain for Occidental Chemical Corporation

My name is Robin Burns and I am the Vice President Supply Chain for Occidental Chemical Corporation, more commonly known as OxyChem. I am here today to express OxyChem's position of support for maintaining the common carrier obligation.

Of particular importance to OxyChem is an adequate rail transportation network throughout the United States. Railroads must continue to be required, as common carriers, to carry hazardous materials (such as chlorine) that are necessary for many of the industrial applications essential to our economy. The common carrier doctrine is a bedrock of the remaining rail regulation, and provides the sole basis for policy comfort with the rail industry consolidation.

OxyChem is a leading North American manufacturer of basic chemicals and vinyl resins, including chlorine, caustic soda and polyvinyl chloride (PVC) – the building blocks for a range of products including pharmaceuticals, water purification, detergents, electronics, building materials and many more. OxyChem employs 3,100 people at 23 domestic locations spread throughout the central to eastern United States. Literally thousands of customers, who range in size from small closely-held distributors to municipal water treatment agencies to multinational corporations, purchase these chemicals for key medical applications, crop protection, communications, minimization of water loss and automobile manufacturing applications. Our products, which are used in water purification, medical supplies, pharmaceuticals, construction

materials and agricultural chemicals, are vital to the economy of the United States. It is not an exaggeration to say that our products are crucial to the health and welfare of its citizens.

Safe and reliable rail transportation of our products is critical to our success as a company and essential if we are to meet the needs of our customers and the public.

Our various business units make over 70,000 rail shipments per year; of these, approximately 48,000 are shipments of hazardous materials which include chlorine, vinyl chloride monomer, caustic soda and muriatic acid, among several others. Of the 48,000 hazardous material shipments, approximately 20% are chlorine, which is considered a Poisonous Inhalation Hazard or PIH. In total, we manufacture approximately 3.6 million tons/yr of chlorine of which 2.7 million tons/yr are delivered by pipeline, and thus approximately 900,000 tons are moved by the railroads. We operate a private rail car fleet of ~10,000 owned or leased cars with ~1400 dedicated for chlorine. Due to the locations and needs of our many customers and users across the United States, transportation by rail is essential to the safe provision of this critical building block. Pipeline transportation is not feasible for small or geographically distant customers. Generally trucks are not cost effective and are inherently riskier considering the number and distance required to handle the volume (45,000 trucks would be required in place of 10,000 railcars).

OxyChem has a long-standing commitment to the safe transportation of our products. We have continuously moved to improve our railcar safety and security including on-site rail-yard infrastructure and security improvements, additional pre-shipment inspections, testing of railcar monitoring technology and improved sealing of railcar connections. This was most recently demonstrated by OxyChem becoming an active participant in the Next Generation Rail Tank Car (NGRTC) project. The NGRTC project, a consortium of PIH shippers led by Dow and

OxyChem, a railcar manufacturer and one class I railroad, is chartered with the objective of developing a railcar which will be 5-10 times stronger than current car designs in terms of withstanding a railroad accident. Our participation in this project includes a public commitment to replace our entire chlorine rail fleet with the NGRTC design by 2017.

It is essential that we partner with the railroads and work together to ensure the safe transportation of hazardous materials, as we have done for years as a leader in the Responsible Care initiative, and we will continue to do so. OxyChem was recently given an award for contributions made to the training efforts of TRANSCAER, which is an initiative co-sponsored by shippers and railroads and other transportation companies that focuses on training of local emergency responders.

Railroads have considerable discretion regarding shipments of goods and use that discretion to maximize revenue and mileage, sometimes at the expense of safety. OxyChem has obligations to mitigate customer freight expense and strives to reduce the number of miles that chlorine moves over the rails. Unfortunately, this objective is not always supported by the railroads. Recently we had an opportunity to move a chlorine car 112 miles instead of 421 miles. The rate for the shorter move was significantly higher than for the longer move. Our request to get the railroad to lower their rate, allowing us to move the material a shorter distance was denied. When we challenged them on their decision, they stated they did not want the PIH move on their railroad.

In the 1970s the ICC held that railroads are and must remain common carriers of spent nuclear fuel and high-level radioactive waste despite any risks associated with carrying those commodities, and it found that rail was several times safer than trucks to move radioactive materials. Its finding extended to other commodities, and those circumstances are unchanged

today. Many hazardous materials (such as chlorine) are typically not transported by truck for various economic and safety reasons unless absolutely necessary. Therefore, it is not only in the public interest to require railroads to carry these vital materials for OxyChem and the rest of American industry – it is absolutely necessary that they do so.

As the Board is well-aware, railroads are regulated by the STB when acting as common carriers, not when acting as contract or private carriers. Moreover, STB rate regulation is available only when (a) the railroad is acting as a common carrier, (b) there is no effective transportation competition, and (c) the railroad is charging very high rates. But in such circumstances, STB regulation is vital, because the shipper has no option but to transport commodities at the rate set by the railroad or the STB. Shippers like OxyChem depend on railroads for the transportation of vital commodities, such as chlorine, and so they must have the ability to compel railroads to abide by their contractual agreements. Otherwise, shippers may be required to live up to their contractual obligations, but not railroads, a situation certain to discourage shippers from entering into such contracts. Rather, the STB should encourage both shippers and carriers to enter into contracts where contracts are mutually beneficial and therefore almost certain to be in the public interest. But the STB should also be sensitive to a shipper's plight. Railroads insist on tying excessive rates on some routes to their willingness to offer contract rates on more competitive routes. In recent months, railroads have not always been willing to quote a common carrier rate at OxyChem's request, or in some instances have made their willingness to do so contingent on OxyChem agreeing to *all* of the rates that the shipper and the railroad are then negotiating. It is unreasonable to require a shipper to agree to an unreasonable rate or other contractual term as a price for entering into a contract for rates and service terms on other transportation being provided by the same railroad, yet this is a

widespread practice. The STB should require railroads to quote common carrier tariff rates separately from contract rate quotations for each such movement if the shipper so requests.

OxyChem firmly believes that there are *no* cost or safety issues related to the transportation of hazardous materials that are properly within the STB's jurisdiction to consider, for several reasons. Now that railroads have been substantially deregulated, there is no transportation provided by a railroad that is required to be provided without the rate for the transportation reflecting the legitimate costs of service provided. That is so because the statute permits the railroads to charge "any rate" for transportation, unless a complaint is filed against the rate and the STB determines that the rate is unreasonably high. The STB has never set a rail rate that did not reflect all of the railroad's costs of service.

At times in recent years, railroad service problems have gotten worse due to merger-related problems and then due to capacity constraints and operational deficiencies. It is vital that the STB remain an effective regulatory backstop to encourage commercial resolutions of rate and service disputes. The only way that the STB can remain an effective backstop is to preserve the railroads' common carrier obligation, without diluting the effectiveness of that obligation by, for example, exempting vital commodities which are dependent on the railroad mode from that obligation. The Board required that railroads must, consistent with their common carrier obligation, quote a common carrier rate to any shipper, which has made a reasonable request for such transportation.

Frankly, the railroads' stated position presents a fundamental challenge to this Board – it is the most fundamental duty of this Board to enforce the railroads' common carrier obligation, because, without it, the Interstate Commerce Act has no meaning for shippers, because they have no ability to compel railroads to carry what American industry absolutely needs them to carry.

If the railroad industry believes that changes to the statutory common carrier obligation are appropriate, it must seek those changes from Congress, not the STB. Also, if there is to be any limitation, monetary or otherwise, on liability, as the railroads have proposed, or a refusal to carry certain commodities, neither the Board nor the railroads are empowered to take such actions. Rather, Congress is empowered to do so, because the existing statutes require railroads to carry all hazardous commodities tendered in conformance with all applicable governmental regulations. OxyChem has always been willing to discuss legislative issues with the railroad industry, but this proceeding is not the appropriate venue for doing so.

In answer to the question, "To Whom Does the Common Carrier Obligation Apply", the common carrier obligation applies to *any* rail carrier providing transportation or service when the shipper has made a "reasonable" request for transportation. Railroads have a duty to transport *all* commodities tendered to them in conformance with applicable governmental regulations, with only a few exceptions. None of the exceptions depends on the hazardous nature of the commodity. As stated by the Canadian National Railway Company in its 2007 Annual Report: "In railroad and related transportation operations, it is possible that derailments, explosions or other accidents may occur that could cause harm to human health or to the environment. In addition, the Company is also exposed to liability risk, faced by the railroad industry generally, in connection with the transportation of toxic-by-inhalation hazardous materials such as chlorine and anhydrous ammonia, commodities that are essential to the public health and welfare and that, as a common carrier, the Company has a duty to transport."

Rail transportation is the safest way to transport these critical products across the U.S. We should not eliminate the common carrier obligation based on incidents with clearly assignable causes with respect to railroad performance.

OxyChem is grateful for the opportunity to speak today on the need to maintain the current common carrier obligation. Chlorine and its derivative products are vital to the way we live. It is imperative that we preserve our right to transport OxyChem products (including chlorine) safely, securely and economically via rail and that we maintain the railroads' current common carrier obligation.

Thank you for your consideration.