

**Before the
Surface Transportation Board
Washington, DC 20423**

In The Matter Of:)

San Jacinto Rail Limited -- Authority to)
Construct -- And the Burlington Northern)
Santa Fe Railway Company -- Authority to)
Operate -- Petition for an Exemption from)
49 U.S.C. § 10901 -- Build-Out to the)
Bayport Loop Near Houston, Harris)
County, Texas)

Finance Docket No. 34079

208037

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**REPLY OF
ATOFINA PETROCHEMICALS, INC., BASELL USA INC.,
EQUISTAR CHEMICALS, LP AND LYONDELL CHEMICAL COMPANY
TO MOTION AND PETITION FOR STAY PENDING REVIEW**

ATOFINA Petrochemicals, Inc., Basell USA Inc., Equistar Chemicals, LP and Lyondell Chemical Company (hereinafter the "Bayport Producers") respectfully submit this Reply to the Petition of the City of Houston, Texas for Stay Pending Judicial Review (hereinafter "City"), and to the Galveston Bay Conservation and Preservation Association and League of United Latin American Citizens' Motion for Stay Pending Review (hereinafter "GBCPA"), regarding the decision served May 9, 2002 in the proceeding captioned above approving the exemption for San Jacinto Rail Limited ("SJRL") and The Burlington Northern and Santa Fe Railway Company ("BNSF") to construct and operate a new rail line to serve Bayport, Texas ("Decision").¹ This

¹ Bayport Producers assume GBCPA seeks a stay pending judicial review and not reconsideration before the Board. For the 1st time, a request for stay was due on or before May 19, 2003, 10 days after service of the Board's Decision. 49 C.F.R. §1115.3 (f). No waiver having been sought or good cause demonstrated for a late filing, the Board should not entertain an untimely petition for stay pending reconsideration. *Accord, CSX Transportation, Inc. — Abandonment Exemption — In Fayette and Nicholas Counties, WV*, STB Docket No. AB-55 (Sub-No. 538X) (served Feb. 11, 1997). The confusion over GBCPA's intent arises out of the inconsistency between its cover letter accompanying its petition, which clearly identifies its intent to seek a stay pending judicial review, and page 2 of the Motion which recites GBCPA's intent to file for reconsideration.

Reply is submitted pursuant to 49 C.F.R. § 1115.5 (a).² This Reply is being submitted in a Confidential version and in a Public version in that certain information provided by Bayport Producers individually constitutes proprietary commercial and financial information.³

STATEMENT OF INTEREST

The Bayport Producers are partners in SJRL, and construction of the SJRL line will bring competitive rail service to the Bayport Industrial District in Harris County, Texas, and therefore to the Bayport Producers' petrochemical complexes.⁴ The benefits of competitive rail service were spelled out in affidavits from each of the Bayport Producers submitted in support of their petition for exemption in this proceeding and in the Board's decision conditionally approving the requested exemption, subject to completion of the environmental review process.⁵

STANDARD FOR GRANT OF A STAY

To justify a stay petitioners must demonstrate: (1) they are likely to prevail on the merits; (2) they will be irreparably harmed in the absence of a stay; (3) other interested parties will not be substantially harmed by a stay; and (4) grant of a stay would be in the public interest.

Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977);

² 49 C.F.R. § 1115.5 (c) provides a petition or reply may not exceed 10 pages in length. This rule is unclear whether the limitation refers to the pleading or to the pleading plus any associated verified statements and exhibits. If the latter, Bayport Producers request waiver of the page limitation in order to inform the Board of the irreparable harm which they would experience if a stay were to be issued. This is new information to the record, not previously relevant, and is one of the four factors to be considered in ruling on a stay request. Accordingly, good cause exists for receipt of this information.

³ Bayport Producers, as reflected in n. 2, *infra*, are submitting financial information concerning the harm they anticipate in the event a stay is issued. That information is entitled to protection against public disclosure pursuant to 5 U.S.C. § 552 (b) (4) and 49 C.F.R. §1001.4. Aggregate financial impact information is set forth in the Public version of this Reply; however, the individual company data appears only in the affidavits associated with the Confidential version.

⁴ Each of the Bayport Producers is described in further detail in their Verified Statements associated with the Petition for Exemption which initiated this proceeding.

⁵ Decision served August 28, 2002.

Virginia Petroleum Jobbers Assoc. v. FPC, 259 F.2d 921 (D.C. Cir. 1958). The party seeking a stay carries the burden of persuasion on all of the elements required for stay. *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974). As discussed below, neither petitioner has made the showing required under this standard.

ARGUMENT

The Board has conducted an exhaustive review of the Bayport build-in. While the project is of limited scope and qualified under the Board's Environmental Assessment procedure,⁶ the Board elected to prepare the more detailed Environmental Impact Statement ("EIS"). In doing so, the Board held four (4) days of hearings in the Houston area, two on the scope analysis and two on the Draft EIS. The Board received comments at the hearings, in writing, and by telephone, and did so in both English and Spanish. The Board consulted with various federal and state agencies throughout the environmental review process, including the Federal Aviation Administration, National Aeronautics and Space Administration, and U.S. Coast Guard. The Board's Draft EIS and Final EIS address every issue raised in the scope process, and in the comments on the Draft EIS. Twice, due dates for submissions to the Board were extended to enable GBCPA, the City and others additional time to submit comments.⁷ The Board's decision is thorough and well supported by the record compiled from the parties and by the Board and its contractor which assisted in the environmental review process. The fact that the Board did not accept the views of GBCPA and the City and evaluated the record differently than those parties advocated does not mean that the Board did not give the SJRL proposal the "hard look" required

⁶ Decision at 6.

⁷ See Decisions served Feb. 13, 2002 and Dec. 20, 2002.

by NEPA, the Council on Environmental Quality (“CEQ”) regulations at 40 C.F.R. 1500, et seq., and the Board’s environmental rules at 49 C.F.R 1105, et seq.

Bayport Producers are aware that SJRL and BNSF also will be responding to the requests for stay. As part of SJRL, Bayport Producers fully endorse and adopt the arguments of SJRL and BNSF as their own. This Reply focuses on two issues: (i) the argument of the City that the Board procedurally failed to meet the NEPA requirements in issuing the Decision, and (ii) the claims that other parties—namely Bayport Producers—will not suffer irreparable harm from a stay of the Board’s Decision.

The Board Fully Complied with NEPA Procedural Requirements

The City proffers a bootstrap argument that the Board’s Decision fails to meet the NEPA procedural requirements. The City does not allege lack of either notice or opportunity for comment. Rather, the focus of the City’s argument concerns the Board’s use of an alternative procedure available under the CEQ regulations regarding publication of the final EIS argument. That procedure allows an agency to have publication of notice of availability of the final EIS by the Environmental Protection Agency run concurrently with the reconsideration period under the agency’s rules. 40 C.F.R. § 106.10 (b)(2). Under the CEQ regulations, that procedure may be utilized when “a real opportunity exists to alter the decision,” *id.* As the City’s argument is understood, this procedure became unavailable to the Board when one of the two sitting members of the Board resigned the week following issuance of the Decision. In effect, the City argues that while the Decision was lawfully rendered, since two members of the Board were sitting and voted on the Decision, the subsequent resignation of Commissioner Morgan renders a lawful decision unlawful *nunc pro tunc*. The City offers no case authority for this extraordinary position.

The City offers two prongs to support its argument. First, the City argues that the procedure utilized is an “exemption”, and that “attempts to qualify for a regulatory exemption are strictly construed against the party seeking the exemption.” The City cites the case *O’Neal v. Barrow Cty Bd. of Comm’rs*, 980 F.2d 674, 677 (11th Cir. 1993), as support for its argument.⁸ Not only did the Board not rely on an “exemption”, but the *O’Neal* case does not stand for the proposition claimed. The notice procedure is fully described in the CEQ regulations as an option available to the agencies. 40 C.F.R. § 106.10 (b)(2). This alternative procedure is described in the regulations as “an exception to the [foregoing] rules on timing . . .” *id.* (emphasis added), not an “exemption”.⁹ Moreover, the *O’Neal* case does not seek to lay down a general principle of administrative law. Rather, the case was narrowly focused on a statutory exemption to the Fair Labor Standards Act, about which the court stated: “Before we further consider this standard, we note that any exemption from the FLSA, including that set out in section 7 (k) and the implementing regulations, must be narrowly construed against the employer.”¹⁰ This case has no applicability to STB or CEQ procedures.

Second, the City argues that the Board chairman acting as the sole sitting member of the agency does not have the power to act alone, or if he does have such power that such action does not satisfy the CEQ requirement that there be a real opportunity to alter the agency’s decision. This argument is fatuous. Congress abolished the requirement for a quorum when it superceded

⁸ Petition at 4.

⁹ “Exemption” entails “Freedom from a general duty or service: . . .”, Blacks’s Law Dictionary, West Pub. Co. (1990). Unlike the STB, CEQ does not have an exemption procedure. *Compare* 40 C.F.R. Part 1507 with 49 C.F.R. Part 1121 and 49 U.S.C. §10502.

¹⁰ *O’Neal* at 676-77, citing *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295 (1959), which also specifically refers to FLSA. The City’s overt misrepresentation of case authority raises issues of whether the City and its counsel violated Rule 3.3, Candor Toward the Tribunal, of the D.C. Rules of Professional Conduct. *See* Comment [3] to Rule 3.3.

the Interstate Commerce Act with the ICC Termination Act (“ICCTA”).¹¹ Even when a quorum requirement existed, the courts interpreted the agency composition and quorum requirements to be based on the sitting members of the agency, not the number of members authorized by statute.¹² Moreover, the City acknowledges that the ICCTA expressly provides that “A vacancy in the membership of the Board does not impair the right of the remaining members to exercise all of the remaining powers.” 49 U.S.C. § 701 (b)(7).¹³ The City further acknowledges 1 U.S.C. 1, which states: “In determining the meaning of any Act of Congress, unless the context indicates otherwise-- . . . words importing the plural include the singular . . .”¹⁴ 1 U.S.C. § 1 is meant, by its terms, to be read together with 49 U.S.C. § 701 (b)(7). These are the statutory terms which are to be interpreted, not solely the latter provision in isolation, under the first prong of the *Chevron*¹⁵ test. In other words, one need not “interpret” Section 701 (b)(7); it only needs to be applied in accordance with the rules of Rules of Construction adopted by Congress at 1 U.S.C. Chapter 1; and that application is clear on its face.¹⁶ The City’s further argument that the Board’s recent decision in Finance Docket No. 34345 (Sub-No.-1) asserting the power of the Board to act

¹¹ Former 49 U.S.C. § 10306 (a) was not carried forward to the ICCTA.

¹² See, e.g., *Assure Competitive Transportation, Inc. v. United States*, 629 F.2d 467 (7th Cir. 1980) (“From the explicit language of [Section 10301(e) of the Interstate Commerce Act—the direct predecessor of Section 701(b)(7) of the ICCTA] we are persuaded that Congress intended those Commissioners in office, however many there are, to be ‘the Commission’ for all purposes.” *Id.* at 473; “The problem, if there is one, lies not with the existing Commissioners, who have been validly appointed, or with the existing Commission, which is authorized by statute to act with vacancies. The only arguable illegality is on the part of the President [for] failing to appoint a full complement of Commissioners.” *Id.* at 475, *cert. denied*, 449 U.S. 1124 (1981); see also *Nicholson v. I.C.C.*, 711 F.2d 364 (D.C. Cir. 1983) in which the court dismissed petitioner’s challenge to the ICC’s authority due to vacancies and other reasons as “frivolous”, stating “The Act authorizes those [sitting] Commissioners to exercise the powers of the Commission irrespective of vacancies in the membership of the Commission.” *Nicholson* at n. 7.

¹³ Petition at 4.

¹⁴ *Id.* at 5.

¹⁵ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

¹⁶ To argue that the use of the plural in Section 701 (b)(7) satisfies the “unless the context indicates otherwise” condition of 1 U.S.C. § 1 is circular and would render nugatory the rule of construction prescribed by Congress.

through its sole member “is simply incorrect”¹⁷ offers no rebuttal to the finding that a contrary position on the Board’s authority would eviscerate the powers of the agency in a manner in conflict with Congressional intent.¹⁸

The City also argues that even if so empowered to act in a solo capacity, the Board comprised of a single member would not satisfy the CEQ regulation providing for simultaneous tolling periods since there would be no real opportunity to alter the agency’s decision. To this end, the City would impose an “opportunity for discourse, discussion, or give and give and take within the Board”¹⁹ which does not exist in the ICCTA or in the CEQ regulations. The CEQ regulation only requires that the STB have a procedure available to consider and respond to reconsideration requests.²⁰ The STB’s procedures fully satisfy this requirement.

Bayport Producers Would Be Irreparably Harmed by Issuance of a Stay

Both GBCPA and the City assert, without supporting affidavits, facts or analysis, that a stay would not harm other parties.²¹ These claims not only are unfounded; they are untrue.

¹⁷ Petition at 5, referring to *The Burlington Northern & Santa Fe R.y. Co.—Trackage Rights Exemption—Union Pacific RR Co.* (served May 23, 2003) (“BNSF”).

¹⁸ The City also seeks to distinguish *Railroad Yardmasters of America v. Harris*, 721 F.2d 1332 (D.C. Cir. 1983), cited by the Board in BNSF. Again, the City’s legal argument relies on selective quotation taken out of context and ignores the court’s reasoning. Following the statutory passage cited at n. 16 of the City’s Petition, the statute goes on to require two members of the agency to constitute a quorum—a requirement the court did not find inconsistent with action by a single member sitting alone. Also, the statutory passage cited by the City from *Yardmasters* uses the same plural phrase “remaining members” found in Section 701 (b)(7) of the ICCTA—of which the City argues for literal application; and the court in *Yardmasters* cited to 1 U.S.C. § 1, also conveniently ignored by the City. *Yardmasters* clearly is applicable precedent.

¹⁹ Petition at 4.

²⁰ If the City seeks to imply that since the only sitting Board member is the Chairman who participated in the Decision and that he would be unlikely to change his views and consequently there is no meaningful opportunity to alter the decision, query the difference if Commissioner Morgan had not resigned and the two members who made the original decision still remained on the agency? The strength of the opportunity to alter the decision rests with the facts and arguments presented by petitioner(s), not in some contrived “discourse” requirement.

²¹ GBCPA Motion at 4; City Petition at 9. Indeed, GBCPA makes the preposterous statement that SJRL would be “benefited” by a stay and further environmental analysis. The City also contends that a stay would be “short,” whatever that means. The City already has sought delay in the STB’s proceedings, as has GBCPA, both through

The need for two-carrier rail service was described by the affidavits of each of the Bayport Producers associated with the Petition for Exemption which initiated this proceeding. Neither GBCPA nor the City, nor any other party, challenged, let alone refuted, any of those showings. The Board made affirmative findings in granting a conditional exemption regarding the public interest benefits from this project, including increased competition.²² Delay of those benefits itself would constitute harm to Bayport Producers. *Illinois Central RR Co.—Construction and Operation Exemption—In East Baton Rouge Parish, LA*, STB Finance Docket No. 33877 (Decision served Feb. 20, 2002).

The associated affidavits of the Bayport Producers further detail the irreparable harm from a stay of the decision and delay of construction of the SJRL line. Bayport Producers have quantified their out-of-pocket cost in terms of anticipated increased transportation costs as amounting to more than \$1.5 million per month of delay. If an appeal were to span only one year, a stay would cost the Bayport Producers in excess of \$18 million. In addition, the Bayport Producers describe the harm to their customer relationships resulting from perpetuation of their captivity to a single railroad, compounded by the retribution exacted by the incumbent carrier for prosecuting development of the SJRL line. These harms are real and irreparable.²³

extension of the comment period and also through reopening of the scoping process. *See* Letter from Lee P. Brown, Mayor to Chairman Morgan, Jan. 30, 2002; Decision served Dec. 3, 2002. Delay for the sake of delay appears to be the City's motive: in a condemnation proceeding to obtain a necessary parcel of land for the route construction, the City requested a 90 day delay and after the hearing was rescheduled it failed to appear.

²² Decision served August 28, 2002.

²³ By contrast, the irreparable harm asserted by GBCPA and the City consists solely of one paragraph each of conclusive statements and arguments, supported neither by affidavits nor quantified and particularized claims of injury.

CONCLUSION

A stay of an agency decision is an extraordinary remedy, to be issued only under compelling circumstances. Petitioners may be unhappy with the conclusions and findings reached by the Board, but that dissatisfaction does not give rise to a deficiency in the Board's conduct of the environmental review, nor constitute a likelihood of success on the merits of an appeal, nor comprise irreparable harm, nor—particularly considering the irreparable harm to be experienced by Bayport Producers—constitute a compelling showing of serving the public interest.

WHEREFORE, THE PREMISES CONSIDERED, Bayport Producers respectfully urge the Surface Transportation Board to DENY the requests of Galveston Bay Conservation and Preservation Association and the City of Houston for a stay of the exemption to construct and operate a new rail line to serve the Bayport Industrial District.

Respectfully submitted,

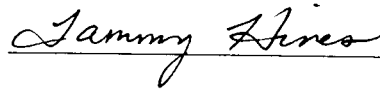
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Attorney for ATOFINA Petrochemicals,
Inc., Basell USA Inc., Equistar Chemicals,
LP and Lyondell Chemical Company

June 11, 2003

CERTIFICATE OF SERVICE

I, do hereby certify that on this 11th day of June, 2003, I am serving all parties petitioning for stay in Finance Docket Number 34079 by the same means Bayport Producers were served, and all other parties of record by first class mail, postage paid.

A handwritten signature in cursive script, reading "Tammy L. Hines", is written over a horizontal line.

Tammy L. Hines

AFFIDAVIT OF CHARLES R. CARR

My name is Charles R. Carr and I am employed by ATOFINA Petrochemicals, Inc. at its corporate office located at 15710 JFK Blvd., Houston, Texas 77032.

I submit this Affidavit for and on behalf of ATOFINA Petrochemicals, Inc. ("ATOFINA") in response to the contentions made by the City of Houston, Texas ("the City"), the Galveston Bay Conservation and Preservation Association ("GBCPA") and the League of United Latin American Citizens ("LULAC") that no interested parties will be harmed by a stay of the Surface Transportation Board's ("STB") decision authorizing San Jacinto Rail Limited ("SJRL") to construct a new rail line to serve ATOFINA's polyethylene production facility in the Bayport industrial complex. ATOFINA is also a limited partner in SJRL through its subsidiary, Bay Junction, Inc.

ATOFINA's Bayport, Texas polyethylene plant has a production capacity of approximately 900 million pounds of polyethylene plastic resin per year, which is shipped out of its plant almost exclusively (90% - 95%) by rail. Only one rail carrier serves ATOFINA's Bayport plant -- the Union Pacific Railroad (UP). ATOFINA has been working with the Burlington Northern and Santa Fe Railway (BNSF) for over three (3) years on this project to bring competitive rail service to the Bayport industrial complex. The STB's May 9, 2003 decision approving construction of the SJRL line will enable BNSF, as Operator, to provide competitive rail service to ATOFINA's Bayport plant.

Contrary to the assertions made by the City, GBCPA and LULAC, ATOFINA Petrochemicals, Inc., an interested party, will in fact be substantially and irreparably harmed by a stay of the STB's decision approving the SJRL's rail line construction. While construction

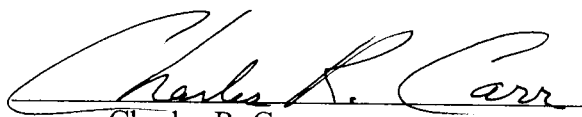
the new SJRL rail line could be completed by late 2004/early 2005, any stay of the STB's decision, pending the appeals process, delays the commencement and completion of construction of this new rail line for one (1) year or more until the appeal process is completed.

It is well known that railroads follow "differential pricing" practices, whereby shippers, such as ATOFINA, are charged different freight rates depending upon their individual circumstances. As has been documented, differential pricing results in captive shippers paying freight rates of one third or more greater than those shippers having competitive rail service. Between the premium rates ATOFINA is forced to pay for rail service as a captive shipper and any add-ons to those rates which UP may impose in the future as retaliation for ATOFINA's seeking competitive service, ATOFINA estimates the costs it will sustain as a result of a stay of the STB's decision and resultant delays in the commencement and completion of construction of the SJRL line will be at least ---REDACTED--- dollars per month, costs which ATOFINA cannot expect to recover.

As a result, ATOFINA must pay substantially higher rail freight costs to move its polyethylene plastic resins out of its Bayport plant than the rail freight costs paid by our competitors who have competitive rail service. This puts ATOFINA at a substantial competitive disadvantage in our markets, both domestically and in export trade. Freight and distribution costs are the second highest costs (behind feedstocks) incurred in the production and sale of plastic resins, i.e., polyethylene.

Delays caused by a stay of the STB's decision, as requested by the City, GBCPA and LULAC, will constitute substantial and irreparable harm to ATOFINA. A stay will result in substantial costs to ATOFINA and will also result in delays in securing competitive rail service to ATOFINA's Bayport plant.

I hereby affirm on penalty of perjury that the foregoing is true and correct based on my knowledge and information.



Charles R. Carr

June 10, 2003

AFFIDAVIT OF

JEFFREY L. HEMMER

On this day, Jeffrey L. Hemmer appeared before me, the undersigned notary public, and after I administered an oath to him, upon his oath, he said:

My name is Jeffrey L. Hemmer. I am Vice President, Supply Chain for Lyondell Chemical Company and Equistar Chemicals, L.P. (hereinafter "the Enterprise"). My business address is 1221 McKinney Street, Houston, Texas 77010. I am authorized by my company to author this affidavit to address the harm that will be caused to the Enterprise in the event of a stay of the decision by the Surface Transportation Board (STB) authorizing construction by San Jacinto Rail Limited (SJRL) of a new rail line to bring competitive service to our three plants at Bayport, Texas. The facts stated in this affidavit are within my personal knowledge and are true and correct.

The Enterprise is a limited partner in SJRL through its affiliates Lyondell Bayport, LLC and Equistar Bayport, LLC. The Enterprise can produce more than 2,300 million pounds per year of plastic raw materials and 5,200 million pounds per year of chemicals in the Bayport Industrial District. We ship over 1235 million pounds of products by rail, and our plants are captive to the Union Pacific Railroad (UP) in that UP is the only railroad which serves the Bayport area. We have been working with the Burlington Northern and Santa Fe Railway (BNSF) for more than three years to develop a competitive rail option at Bayport, and the product of that effort is the decision by the STB adopted and issued May 9, 2003, to grant

approval for construction of the SJRL line which will enable BNSF to provide that competitive service.

The Enterprise would be substantially and irreparably harmed in the event of a stay pending appeal of the STB's approval of the Bayport line construction. The initiation of competitive service must await completion in the new rail line, which we understand will commence early 2005. Any stay pending appeal would push that time out by many months, which we understand, could exceed one year or more until the appeal process is completed.

It is well known that railroads follow "differential pricing" practices, whereby shippers are charged different rates depending upon their individual circumstances. As has been documented, differential pricing results in captive shippers paying rates one third or more greater than shippers having competitive options. In addition, since the announcement of the SJRL project, Union Pacific has continued to act in a way that reinforces the fact that they have monopolistic power where rail competition does not exist. We estimate the unrecoverable costs to the Enterprise from delay in the construction and completion of the SJRL line as -- **REDACTED**-- per month.

Being subject to transportation charges substantially greater than those paid by our competitors who have a choice between or among rail carriers places the Enterprise at a substantial disadvantage in our markets, both domestically and internationally. Transportation constitutes the third highest cost (behind raw materials and payroll) incurred in the production and sale of plastic raw materials. Any delay in securing competitive rail service at Bayport, Texas will result in substantially increased costs and in the consequential erosion of our market position, as discussed above.

The foregoing is stated under penalty of perjury.

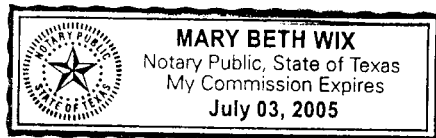
Jeffrey L Hemmer

SWORN TO and SUBSCRIBED before me by Jeffrey L. Hemmer on June 10, 2003.

Mary B. Wit

Notary Public in and for

State of Texas



AFFIDAVIT OF
ROBERT W. GRANATELLI

1. My name is Robert W. Granatelli. I am employed with Basell USA Inc. ("Basell") as its Supply Manager – Fleet/Transportation Services. My office is located at Basell's headquarters on 912 Appleton Road, Elkton, Maryland 21921.
2. My educational background includes a Bachelor of Science in Transportation (1969) and a Masters of Science in Transportation (1976). I received both degrees from the University of Alabama.
3. I joined Basell in 1988. Prior to my employment with Basell, I worked for the International Paper Company as its Manager of Rail Pricing for six years and then served as its Manager, Transportation Services for one year. Since my employment with International Paper, continuing through my employment at Basell, I have held positions with increasing responsibility in transportation and logistics, including rates and service administration for rail and truck, import/export and purchasing of terminal services.
4. My current responsibilities as Supply Manager – Fleet/Transportation Services at Basell include negotiation, implementation and oversight of all domestic and international transportation agreements relating to Basell's North American distribution operations. I am also responsible for monitoring and analyzing transportation developments and strategies and for the implementation of those strategies to maximize the service and price options for the distribution of Basell's products. To fulfill these responsibilities, I must track and interpret market conditions and rules and regulations relevant to Basell's transportation needs.
5. Basell is a participant in a project aimed at bringing competitive rail service to Basell's production facility located on the "Bayport Loop" southeast of Houston, Texas. I have been and

remain, on behalf of Basell, directly responsible for all commercial activities related to the construction of a new rail line that would bring competitive access to Basell's Bayport plant and to other producers on the Bayport Loop.

6. Basell submits this Affidavit to describe the irreparable harm that will befall Basell should a delay in the timing of the competitive access occur.

7. Basell produces polypropylene, a raw material plastic resin, and is a limited partner in San Jacinto Rail Limited ("SJRL") through its wholly owned affiliate, Basell Impact Holding Company. Basell's customers use our raw material plastics to make a wide range of products such as textiles, packaging and everyday household products. Basell's resin is also utilized in the automotive and electronics industries.

8. As more fully described in my verified statement, submitted in support of the application in this proceeding, Basell is dependent upon rail transportation to serve its customers. 100% of Basell's finished product is loaded directly into railcars. Basell ships virtually all (approximately 98%) of its product by rail and maintains a fleet of nearly four thousand owned or leased specialty railcars dedicated solely to the storage and transport of plastic resin. (Those shipments not made by rail are primarily emergency bulk-truck shipments required due to a failure in rail delivery or a delay in the production process. Notably, approximately four (4) bulk-trucks are required to move the same amount of resin contained in a single railcar.) Moreover, the vast majority of plastic resin consumers are set up to input resin directly from a railcar into their operations and therefore prefer, if not demand, to receive their delivery by railcar.

9. One of the two primary production facilities owned by Basell is located on the Bayport, Texas railway station ("Bayport") and is monopolized by the Union Pacific. Given this

monopoly, Basell currently has no competitive alternatives through which it can move product out of its Bayport plant.

10. Basell's viability in increasingly competitive world and domestic markets, particularly in the polypropylene arena, depends upon improvements in the cost, efficiency and effectiveness of its rail transportation needs.

11. Basell, its fellow limited partners and the Burlington Northern Santa Fe Railway ("BNSF") have worked together for more than three years to develop a competitive rail option at Bayport. Recently, that effort culminated in a decision, adopted and issued by the Board on May 9, 2003, to grant approval for construction of a new rail line which will allow the BNSF to provide competitive rail service to the Bayport facilities of Basell and the other limited partners in SJRL.

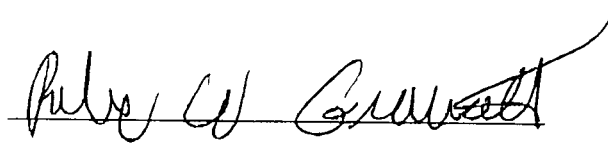
12. Railroads vigorously, and publicly, defend what they call a “differential pricing” practice (see, e.g., http://www.aar.org/getFile.asp?File_id=109). Through what they call “differential pricing,” railroads charge shippers like Basell, over which they hold a monopoly, far more than what they charge customers where head-to-head rail competition exists. Railroads charging premium rates to monopolized customers like Basell do not, however, provide a higher level of service. The level of captivity determines the rate, not the level of service. Put another way, it costs Basell more to ship its product to customers than it does for Basell’s competitors (other raw material plastic manufacturers) that enjoy head-to-head rail competition. Indeed, I understand that monopolized rail facilities in the business of chemistry pay up to 60% more for transportation with lesser service than competitively served rail facilities that enjoy better service. The monopoly over Bayport places Basell at a disadvantage against its competitors, particularly given that in the highly competitive conditions of today’s plastics market these increased costs cannot be passed along to Basell’s customers. Any delay in SJRL would serve to continue the competitive harm.

13. Additionally, Basell will suffer irreparable harm from retaliatory behavior of the incumbent railroad. Basell has already endured what it can only deem as punitive behavior from the Union Pacific since the announcement of the SJRL project. This retaliatory behavior costs Basell significant sums of money (which can never be recovered), has interrupted Basell’s supply chain operations and impacted Basell’s ability to supply its customers. All of these consequences hurt Basell’s ability to maintain its position in the intensely competitive plastics market.

14. Basell understands that operations on the new rail line are expected to begin in late 2004 or early 2005. As part of the massive undertaking to obtain the competitive alternative approved by the Board, and as a consequence of the punitive behavior already endured, Basell has had to carefully plan its transportation and supply chain operations accordingly. A stay pending appeal would push the availability of a competitive alternative out by many months, if not more than a year when considering potential appeals. Such a delay means that contracts for all aspects of Basell's transportation operations (e.g., storage and transportation), that protect Basell from intolerable tariff rates and demurrage charges, will expire with the current monopoly rail provider. As a departing, monopolized customer, Basell's experience is that it will be unable to obtain reasonable contract extensions and will be forced to pay those unconscionable tariff rates and demurrage charges. Such a circumstance will have dire consequences for Basell's supply chain operations and would more than double Basell's transportation costs. Basell estimates that each month of delay caused by a stay will cost Basell in excess of REDACTED Basell will be unable to recover these increased costs, which as stated above, cannot be passed along to customers.

15. In order for Basell's Bayport plant to remain a viable, competitive production location, improvements in service and competitive rates must be realized. Transportation is Basell's second-highest cost of production and sale, second only to the cost of feedstock. Any delay in the implementation of a competitive alternative will cause erosion to Basell's market position due to sudden and dramatic increases in rail transportation costs and in deterioration of service.

I hereby affirm on penalty of perjury that the foregoing is true based on my knowledge and information.

A handwritten signature in black ink, appearing to read "Robert W. Granatelli", written over a horizontal line.

Robert W. Granatelli

June 11, 2003