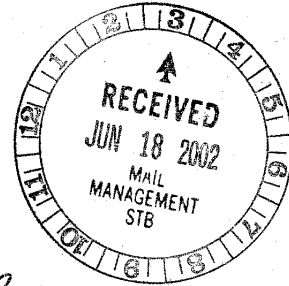


BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33556



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

PETITION OF ATOFINA PETROCHEMICALS, INC. AND
THE KANSAS CITY SOUTHERN RAILWAY COMPANY
FOR OVERSIGHT, INTERPRETATION
AND ENFORCEMENT OF MERGER CONDITIONS

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FOR OVERSIGHT, INTERPRETATION
AND ENFORCEMENT OF MERGER CONDITIONS**

ATOFINA Petrochemicals, Inc. ("ATOFINA") and The Kansas City Southern Railway Company ("KCS") respectfully submit this Petition for oversight, interpretation and enforcement of one of the conditions imposed by the Surface Transportation Board ("STB" or the "Board") in approving the merger of the Canadian National Railway Company ("CN") and the Illinois Central Railroad Company ("IC").¹ ATOFINA and KCS seek a determination from the Board that the "Geismar Condition" adopted in the CN/IC merger² applies to all traffic moving to

¹ *Canadian National Ry. Co., Grand Trunk Corp., and Grand Trunk Western R.R. Inc. - Control - Illinois Central Corp., Illinois Central R.R. Co., Chicago, Central and Pacific R.R. Co., and Cedar River R.R. Co.*, STB Finance Docket No. 33556, Decision No. 37 (STB served May 25, 1999) (hereinafter "*CN/IC*"). To the extent the Board determines that the issue raised in this petition is not subject to oversight, interpretation and enforcement, but rather requires reopening the CN/IC merger, ATOFINA and KCS request that this petition be treated as a Petition To Reopen filed pursuant to 49 U.S.C. § 722(c) and 49 C.F.R. § 1115.4 or as a Request for Issuance of a Supplemental Order filed pursuant to 49 U.S.C. § 11327.

² *CN/IC* at 32-33.

and/or from the Geismar area that could have moved via KCS had the latter completed its proposed build-in³ and was not adopted solely for the benefit of six named companies.

I. BACKGROUND

A. Petitioners

ATOFINA, a subsidiary of TotalFinaElf, produces plastic resins and base chemicals at locations in Louisiana and Texas. As pertinent to this petition, ATOFINA operates a polystyrene production facility in the Geismar, Louisiana area known as Carville.⁴ The ATOFINA polystyrene facility generates, at current production levels, approximately 7,000 rail cars of traffic per year. Adjacent to ATOFINA's polystyrene facility is Cos-Mar Company's styrene monomer production plant, which is a joint venture between ATOFINA's wholly owned subsidiary Cosden, Inc. and GE Petrochemicals, Inc. While inbound feedstocks move via barge and pipeline and outbound styrene monomer moves predominately by direct feed to the adjacent ATOFINA polystyrene facility, a small portion of the styrene production moves by rail to third party customers.⁵

KCS is a Class I common carrier by rail operating over 6,400 track miles in partnership with its affiliates in 11 central and southeastern states and Mexico. KCS has 979 miles of track

³ *Kansas City Southern Railway Company – Construction Exemption – Ascension Parish, Louisiana*, ICC Finance Docket No. 32530 (ICC served June 30, 1995) (hereinafter "*Geismar Exemption*"); see discussion at I.B., *infra*.

⁴ The railroad station name utilized by CN is Bruns; other carriers refer to the plant location as Geismar. The area is further described at note 8, *infra*, and on Exhibit A, which is a map of the Geismar area from the *Geismar Exemption* Draft Environmental Impact Statement (STB served July 16, 1997) showing the locations of the various Geismar shippers.

⁵ While ATOFINA files this Petition solely on its own behalf, ATOFINA contemplates that any new rail service established to implement the relief requested herein also would be available to Cos-Mar and its principals, and any other similarly-situated shippers.

in the state of Louisiana alone. Part of the KCS main line in Louisiana extends from Baton Rouge through Ascension Parish to New Orleans. Within Ascension Parish, both KCS and CN/IC provide transportation service over their respective rail lines. Pursuant to overhead haulage rights emanating from the "Access Agreement" between KCS and CN and through the expansion of those haulage rights by the Board through the Geismar Condition imposed in the CN/IC merger, KCS and CN compete against each other for the traffic of certain shippers located in the Geismar area.⁶

B. KCS's Proposed Build-In To Ascension Parish, Louisiana

In February 1995, KCS filed a construction exemption with the Board seeking approval to construct and operate approximately nine miles of track in Ascension Parish, Louisiana, in order to serve the industrial corridor at Geismar, Louisiana.⁷ The Geismar area was represented at the time as being "the second largest industrial corridor in the world."⁸ The exemption

⁶ The pertinent part of the Access Agreement reads as follows:

"C. Geismar, LA. CN/IC will permit KCS access to any rail freight traffic to which CN/IC has access and is produced by or used for production in any chemical manufacturing facilities operated on the properties owned by Shell, Borden and BASF at Geismar, LA . . ."

CN-KCSR Settlement Agreement at 3, CN-1, Attachment B ("Access Agreement"), *CN/IC* (submitted Feb. 22, 1999). A copy of the relevant portion of the Access Agreement is attached to this Petition as Exhibit B. The Board expanded this access beyond Shell, Borden, and BASF to also include Rubicon, Uniroyal, and Vulcan. *See CN/IC* at 32-33.

⁷ *Geismar Exemption*.

⁸ *Id.* at 1. "Corridor" is the appropriate characterization of the area. Chemical plants and terminals virtually line the river over a distance of several miles. Exhibit C to this Petition is an index of the industries along the lower Mississippi River from the Mississippi River Industries Map (Homesite Company, Baton Rouge, LA). On this index, the ATOFINA plant (identified as "Cosmar/Fina") is shown as being located at Geismar. The plant is located on the index at river mile 187.9 on the east side of the Mississippi. Other industries identified on the index as being located at Geismar, with river mileage provided, are Allied Signal and Arcadian (both at 187E),

petition was conditionally approved in June 1995, subject to completion of the environmental review process.⁹ A draft environmental impact statement was served by the STB on July 16, 1997,¹⁰ and was awaiting finalization at the time of the announcement of the CN/IC merger.

C. CN/IC Merger

On July 15, 1998, CN and IC filed a merger application with the Board seeking authority for the acquisition by CN of control of IC and the integration of the rail operations of CN and IC.¹¹ In conjunction with the CN/IC merger, CN, IC and KCS entered into an "Alliance Agreement" providing for joint marketing and coordinated operations intended to further their movement of NAFTA and other north-south traffic. In addition, CN and KCS entered into an "Access Agreement," in furtherance of and complementary to the Alliance Agreement, which provided for certain trackage and/or haulage rights by CN and KCS over the tracks of the other carrier. These two agreements were deemed by both the contracting parties and the Board to be settlement agreements arising out of the CN/IC merger.¹²

As pertinent to this Petition, the Access Agreement specifically gave KCS access over IC's lines via overhead haulage rights to the properties of three shippers at Geismar, Louisiana – BASF Corporation, Borden Chemical and Plastics, Ltd., and Shell Corporation.¹³ The Geismar shippers to be served under the Access Agreement were those who had provided verified

Borden (185E), and Shell (183.2E). BASF, identified in the Access Agreement, is located at 183.5-183.9E. These six plants alone cover a stretch of 4.7 miles along the river.

⁹ *Geismar Exemption*.

¹⁰ *Geismar Exemption*, Draft Environmental Impact Statement.

¹¹ *CN/IC* at 4.

¹² *CN/IC*, Decision No. 12 at 7 (STB served Oct. 16, 1998).

¹³ *See* n. 6, *supra*.

statements in support of KCS's exemption petition.¹⁴ As a consequence of the Access Agreement, the Board *sua sponte* issued a decision holding further proceedings in the *Geismar Exemption* case in abeyance.¹⁵

In the CN/IC merger proceeding, three Geismar parties – Rubicon, Inc., Uniroyal Chemical Company, Inc., and Vulcan Chemical – requested the Board to condition approval of the merger on the expansion of the Access Agreement to allow KCS to serve other Geismar shippers. The Board found the Access Agreement to be “clearly merger-related.”¹⁶ The Board further stated:

Despite the fact that none of these three shippers came forward to support the Geismar construction application, it now appears that, if the construction had been approved and completed, each could have reached the proposed Geismar branch line by constructing short segments of connecting track. Now, because of this merger and the related Access Agreement, it seems improbable that any Geismar construction project will ever be authorized and built. Indeed, because of the pendency of the instant case, we issued a decision holding the construction application in abeyance. Geismar (STB served Aug. 27, 1998).

A loss of a build-in/build-out option may constitute a significant loss of potential competition, depending upon the circumstances. Here, now that KCS has obtained access to the three shippers that would have provided the preponderance of the traffic necessary to make the construction economically viable, it is improbable that KCS will pursue, or that we would approve, this construction project.¹⁷

The Board also retained oversight to consider issues relating to competition between CN and KCS in the Baton Rouge-New Orleans corridor.¹⁸

¹⁴ Compare Access Agreement at 3 with *Geismar Exemption* at 2-3.

¹⁵ *Geismar Exemption* (STB served Aug. 27, 1998).

¹⁶ *CN/IC* at 33.

¹⁷ *Id.*

¹⁸ Indeed, the Board specifically preserved oversight in *CN/IC* in order to be able to address issues such as those presented here – competitive issues specifically arising in the Baton Rouge-

D. ATOFINA's Relation to Geismar Access

In August, 1996, during the pendency of KCS's *Geismar Exemption* proceeding, representatives of ATOFINA's predecessor, Fina Oil and Chemical Company ("Fina"), held discussions with KCS representatives regarding a possible extension of KCS's proposed build-in to Fina's plant north of the Borden plant at Carville.¹⁹ KCS indicated that any plans to extend the proposed Geismar line to the polystyrene facility would have to be deferred until after the ICC ruled on the exemption petition. Before that effort could materialize, it was overtaken by the CN/IC merger and the Access Agreement. Shortly thereafter, Fina representatives held discussions with IC regarding service to the plant, and understood from those discussions that CN would treat the plant as if it were competitively served in conjunction with any capacity expansions. Through subsequent engineering process controls and construction of additional capacity completed in 2001, the output of the polystyrene plant was increased by more than sixty percent (60%). ATOFINA then learned that its understanding regarding the treatment to be accorded the plant upon its capacity expansion was not the same understanding as that of CN/IC. While an accommodation was reached, ATOFINA initiated investigation of the opportunity to bring long term competitive rail service to its polystyrene facility, leading to renewed discussions with KCS in 2001.

New Orleans corridor. In terminating oversight before the end of the five-year term provided for in the decision approving the merger, the Board specifically recognized that the instant issue might arise thereafter for a decision. The Board stated that it would "remain available to consider and promptly resolve disputes relating to KCS's access to shippers under any of the conditions we imposed on the CN/IC." *CN/IC* (Sub-No.4) (General Oversight), Decision No. 4 at 3 (STB served Dec. 27, 2001); *see also* Joint Comments of ATOFINA and KCS filed November 27, 2001, *CN/IC* (General Oversight).

¹⁹ W.W. Graham Memo to File (Aug. 21, 1996) (attached as Exhibit D to this Petition).

Central to the recent discussions between ATOFINA and KCS was the concept of building a rail line between the ATOFINA facility and the closest Geismar point served pursuant to the Access Agreement (a distance of approximately three miles) in the belief that doing so would qualify the ATOFINA facility to receive service pursuant to the Access Agreement and the Geismar Condition. On November 16, 2001 ATOFINA sent a letter to CN requesting CN to acknowledge that the Geismar condition would apply to the ATOFINA traffic if ATOFINA were to build a rail line to a point in Geismar in the immediate vicinity of where ATOFINA's line would have connected to the proposed KCS Geismar line.²⁰ CN did not formally respond to the ATOFINA request, but rather advised ATOFINA informally that it would not grant the request. In the meantime, ATOFINA and KCS jointly filed comments with the Board regarding the proposed termination of formal CN/IC merger oversight.²¹ The Board subsequently decided to terminate oversight, and in doing so noted in its decision that it would maintain continuing jurisdiction and oversight over the transaction to address disputes over the conditions imposed.²²

II. ARGUMENT

The issue presented in this Petition is whether the condition imposed by the Board in *CN/IC* expanding the Access Agreement to also encompass Rubicon, Uniroyal, and Vulcan was intended to be personal to the requesting companies or whether the condition was intended to preserve the competition at Geismar, and therefore is available to all similarly-situated shippers

²⁰ Letter from Steve R. Cornell, Vice President, Base Chemicals and Manufacturing, ATOFINA, to J.J. Ruest, Vice-President, Chemicals and Petroleum, CN (Nov. 16, 2001) (attached as Exhibit E to this Petition).

²¹ Joint Comments of ATOFINA and KCS filed November 27, 2001, *CN/IC* (General Oversight).

²² *CN/IC* (Sub-No. 4) (General Oversight), Decision No. 4 (STB served Dec. 27, 2001). Notably, CN did not oppose, or even comment on, the ATOFINA/KCS request to the Board to acknowledge that it retains oversight whether or not the formal process remains open.

who otherwise would have lost such competition as a result of the CN/IC merger and the Access Agreement. ATOFINA and KCS submit that the Board's ruling was intended to preserve competition at Geismar and should not be read so narrowly as to encompass only shippers who were named in the Access Agreement or shippers who participated in the *CN/IC* proceeding. Indeed, to hold otherwise would be inconsistent with precedent, the original intent of the KCS Geismar build-in and the *CN/IC* decision. Given CN's refusal to recognize this principle and allow ATOFINA to invoke the Access Agreement, the Board should expeditiously rule that ATOFINA and other similarly-situated Geismar area shippers that suffered the same loss of competition as the six shippers currently covered by the Access Agreement are entitled to avail themselves of the provisions of the Access Agreement.

A. STB Precedent Warrants The Grant Of Access To ATOFINA And Other Geismar Area Shippers Who Would Have Been Served By The Proposed KCS Build-In

Past decisions of the STB and its predecessor repeatedly have recognized that "new construction provides additional service to shippers, and in many cases, the kind of additional competition that the rail transportation policy seeks to promote . . ."²³ Similarly, the Board has a policy of remedying the loss of potential build-in/build-out opportunities in merger proceedings through the imposition of conditions. In recent merger proceedings, the Board consistently has afforded remedial protection to those shippers losing a build-in/build-out opportunity by granting to a competitor of the merging parties the right to receive access over the merged railroad via trackage or haulage rights to the point where a shipper would have reached if it had completed its build-in/build-out proposal. Examples of such remedies can be found in: the BN/SF merger

²³ *Geismar Exemption* at 5; see also *Gateway Western Ry. Co. - Construction Exemption - St. Clair County, IL*, ICC Finance Docket No. 32158 (Sub-No. 1) at 5 (ICC served May 11, 1993); 49 U.S.C. §§ 10101(1), (4), (5) (1997).

with regard to Oklahoma Gas and Electric Company and Phillips Petroleum;²⁴ the UP/SP merger with regard to Dow Chemical, Entergy and Union Carbide, and also generically throughout the extensive BNSF trackage rights;²⁵ and the Conrail acquisition with regard to Indianapolis Power and Light.²⁶

Moreover, when presented with similar petitions for clarifications in prior mergers regarding the scope of a build-in/build-out condition, the Board consistently has ruled that the condition it imposed was intended to protect against the loss of competition and was not to be read technically and narrowly. For example, in the *UP/SP* merger proceeding, an issue was raised as to whether Entergy had a pre-merger option to build out from its White Bluff power plant to a Southern Pacific line, in which case BNSF would be given trackage rights that would give it access to the build-out connection point, contingent upon the construction. The Board stated that "if Entergy's now-contemplated build-out had been constructed prior to the merger, SP would have had the right to reach Entergy's plant."²⁷ The Board accordingly held that the condition imposed to protect against loss of build-in/build-out opportunity must be given

²⁴ *Burlington Northern, Inc. and Burlington Northern R.R. Co. – Control and Merger – Santa Fe Pac. Corp. and The Atchison, Topeka and Santa Fe Ry. Co.*, ICC Finance Docket No. 32549, Decision No. 38, 10 I.C.C. 2d 661 at 68, 98 (ICC served August 23, 1995) (hereinafter "*BN/SF*").

²⁵ *Union Pacific Corp., Union Pacific R.R. Co., and Missouri Pacific R.R. Co. – Control and Merger – Southern Pacific Rail Corp., Southern Pacific Transp. Co., St. Louis Southwestern Ry. Co., SPCSL Corp., and The Denver and Rio Grande Western R.R. Co.*, STB Finance Docket No. 32760, 1 S.T.B. 233, Decision No. 44 at 146, 185, 188, and 189 (STB served Aug. 12, 1996) (hereinafter "*UP/SP*").

²⁶ *CSX Corp. and CSX Transp., Inc., Norfolk Southern Corp. and Norfolk Southern Ry. Co. – Control and Operating Leases/Agreements – Conrail Inc. and Consolidated Rail Corp.*, STB Finance Docket No. 33388, Decision No. 89 at 116 (STB served July 23, 1998) (hereinafter "*Conrail*"); Conrail, Decision No. 96 at 14 (STB served Oct. 19, 1998).

²⁷ *UP/SP*, Decision No. 88 at 6 (STB served Mar. 21, 2000).

application to the potential point of build-in/build-out, notwithstanding UP's urging the Board to read the underlying UP/SP trackage rights agreement very narrowly. The following year in the oversight phase of the merger proceeding, Entergy and BNSF requested interpretation and enforcement of the build-in/build-out condition for the same White Bluff power plant and questioned whether that opportunity was subject to routing limitations. The Board replied that "[t]here is no basis to conclude, nor did we intend, that the [routing] restrictions contained in Section 6(c) of the BNSF Agreement would work to narrow the scope of the remedial conditions that we imposed to prevent those competitive options from being lost."²⁸

In the instant situation, as in the prior merger cases, the merged party (CN/IC) refuses to recognize the clear intent of the Board's reasoning and purpose for imposing the Geismar Condition. As in the prior cases, Petitioners here are simply seeking a determination by the Board that the condition imposed as a result of the Access Agreement should not be narrowly read as to grant access only to the six shippers identified by the Board when the merger was approved. Indeed, such a narrow interpretation would run counter to the Board's own policy of interpreting its conditions to replicate, as closely as possible, the competition that otherwise would be lost if the Board had not imposed a condition.

The Board often has said that it does not protect "competitors" in merger proceedings, but rather functions to protect "competition."²⁹ The interpretation of the Geismar Condition now being requested by both ATOFINA and KCS is completely consistent with that policy. ATOFINA and KCS are asking the Board to recognize that when it granted petitioners Rubicon, Uniroyal, and Vulcan the same haulage rights that BASF, Borden, and Shell were to obtain via

²⁸ *UP/SP* (Sub-No. 21), Decision No. 19 at 3 (STB served Nov. 8, 2001).

²⁹ *See e.g., UP/SP* at 101.

the Access Agreement, the Board did not intend to limit the scope of its condition to only those three specific shippers. Instead, the Board recognized the principle that shippers who could have utilized the KCS Geismar line had it been built would lose that ability as a result of the merger and the Access Agreement. Thus, to protect against that loss of competition, the Board concluded that such situated shippers should be granted the same rights and remedies as BASF, Borden, and Shell. Accordingly, all shippers located in the Geismar area, such as ATOFINA, who could have utilized the KCS line had it been built are entitled to the same relief as BASF, Borden, Shell, Rubicon, Uniroyal, and Vulcan.

B. KCS's Proposed Build-In Would Have Encompassed ATOFINA And Other Geismar Area Shippers Who Could Have Reached The Proposed Build-In Line

Interpreting the Board's Geismar Condition as covering all Geismar area shippers who lost the competitive option that the KCS build-in would have provided not only is consistent with the Board's previous precedents but also is consistent with the purpose and underlying principle of the original KCS build-in. KCS's initial petition in the *Geismar Exemption* proceeding was captioned "Construction Exemption – Ascension Parish, Louisiana." It was neither captioned "Construction Exemption – Geismar" nor was it captioned "Construction Exemption – BASF, Borden and Shell." While the *Geismar Exemption* petition specifically referenced only the plants of the three parties who provided verified statements and traffic commitments, the petition was not so limited in its scope, nor could it have been without KCS violating its common carrier obligations. Indeed, if the line had been built, KCS would have had a common carrier obligation to serve any shipper that constructed an industry connector to the KCS line.³⁰ Even the Board

³⁰ See 49 U.S.C. §§ 11101 and 11103; see also *Battaglia Distributing Co., Inc. v. Burlington Northern R.R. Co.*, STB Finance Docket No. 32058 (STB served Jun. 27, 1997) (carrier has obligation under 11103(a) to construct, maintain, and operate, on reasonable conditions, a switch

noted in its draft EIS in the *Geismar Exemption* proceeding that shippers could build "industry connectors" to reach the KCS rail line without Board authority,³¹ thereby potentially expanding the universe of parties served by the line.

Notably, when the Board imposed the CN/IC Geismar Condition, it explicitly recognized that shippers other than BASF, Borden, and Shell would lose a competitive option as a result of the KCS build-in being held in abeyance, and most likely never occurring, because of the Access Agreement. Rubicon, Uniroyal, and Vulcan were not named in the *Geismar Exemption* petition. Yet, the Board found that these three shippers would have been able to use the KCS line had it been built and were thus losing a competitive option as a result of the CN/IC merger and the Access Agreement.

Likewise, the Board did not limit the scope of its condition to cover only shippers who were located directly along the proposed KCS route. For example, while the KCS *Geismar Exemption* petition mentioned only the BASF, Borden and Shell facilities, covering river miles 183.2 to 185.0, the Vulcan Chemical facility, granted access by the Board in the Geismar Condition, is located south of the Shell plant. Similarly, Rubicon, while between the BASF and Borden facilities, is not located on the proposed KCS line but rather is separated from that line by the Uniroyal plant to the north and by the BASF plant to the east. Notwithstanding the fact that these shippers were not specifically mentioned in the *Geismar Exemption*, the Board found that such shippers could have used the KCS line – *i.e.*, they could have received service via an industry connector.

connection); *Interstate Commerce Comm'n v. Baltimore & Annapolis R.R. Co.*, 398 F.Supp. 454 (D. Md. 1975), *aff'd* 537 F.2d 77 (4th Cir. 1976) (Interstate Commerce Act and common law imposes duties upon railroad to provide and furnish transportation upon reasonable request).

³¹ *Geismar Exemption*, Draft Environmental Impact Statement at iv.

ATOFINA occupies the same substantive posture as Vulcan occupied before the CN/IC merger condition, and thus ATOFINA should be subject to the same policy of preservation of competition. The ATOFINA facility is located in Ascension Parish.³² As noted, during the pendency of KCS's exemption proceeding, representatives of ATOFINA's predecessor Fina held discussions with KCS representatives regarding extension of KCS's proposed build-in to Fina's plant. KCS indicated that any plans to extend the Geismar line would have to be deferred until after the ICC ruled on the exemption petition. As the Fina discussions with KCS clearly evidence, KCS understood that the line could be extended to the Fina facility following construction.³³

C. The Geismar Condition Should Be Read To Include All Geismar Area Shippers

The preceding discussion demonstrates that ATOFINA clearly would have benefited from the KCS build-in. As with Rubicon, Uniroyal, and Vulcan, ATOFINA should be allowed to avail itself of the Access Agreement. In fact, it should be noted that the Access Agreement is not limited to specified entities and only those particular entities. Rather, the Access Agreement itself contemplated that KCS would have access not only to the traffic of the shippers which supported its exemption petition, but also to the traffic of any successors or assigns, or any

³² While the ATOFINA plant does not lie within the "footprint" of the proposed KCS line, ATOFINA contemplates extending a rail line to the area in Geismar that was proposed to be served by KCS. ATOFINA has preliminarily reviewed the likely construction route. As reflected in Figure A-2 of the *Geismar Exemption* Draft Environmental Impact Statement, Louisiana Highway 73 forms the northern boundary of the Borden plant. On the north side of the Highway 73, property is available for a "turn-out." This would place ATOFINA, if it builds the line, in the very same position as Vulcan. Alternatively, if necessary, ATOFINA is confident that it could secure the needed space on the Borden plant site for its turn-out.

³³ *Id.*; *Accord CN/IC* at 109 and 112; *see also id.* at 113 (STB summarized Applicants' reply to the Geismar parties as addressing the timing of the access to KCS if KCS line had been built -- not whether they would have been served at all).

unidentified parties who may originate shipments from those locations by means, for example, of subdivision of the property of any of the identified producers and construction of a new facility at those sites.³⁴

As with Rubicon, Uniroyal, and Vulcan, the Access Agreement itself did not contemplate service to ATOFINA. However, it should be noted that, with regard to the specification in the Access Agreement of points eligible for service, the Access Agreement was the product of negotiation and compromise as a necessary element of the overall settlement and Alliance relationship between KCS and CN/IC. While in the context of these settlement discussions KCS accepted CN's limitation of the Access Agreement to cover only three Geismar area shippers, the Board did not agree with that limitation and expanded the scope of that agreement to cover other Geismar area shippers. Likewise, the Board should make clear that its condition granting KCS haulage rights to other Geismar shippers who were not identified in the original Access Agreement also is applicable to any Geismar area shipper who could have been served by KCS had the Geismar line been built.

D. The Relief Sought Is Intended To Replace Lost Competition, Not Create New Competition

Finally, it is important to note that the relief sought herein is not intended to extend the Geismar haulage beyond the geographic area of the reach of the planned KCS build-in within the Geismar industrial corridor discussed in *CN/IC*. Rather, the relief sought is intended to place ATOFINA and other area shippers in the same position they would have been had KCS's proposed build-in been completed – *i.e.*, if a shipper could have reached the KCS line, it should be given access to competitive service at Geismar via the haulage rights condition. That was the

³⁴ See n. 6, *supra*.

test applied in *CN/IC* and that should be the test applied to ATOFINA and other similarly situated shippers.

ATOFINA and KCS request that the Board apply the rationale of the Geismar Condition in accordance with the following simple test: shippers who could have received direct KCS service via an industry connector should be deemed included in the Geismar Condition; shippers for whom additional line construction authority may have been required, *e.g.*, ATOFINA, should qualify for inclusion in the Geismar Condition if they extend rail service to the Geismar area to be served by KCS.³⁵

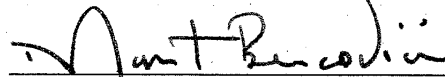
Equitably, functionally and substantively, the interpretation requested by ATOFINA and KCS is consistent with Board precedent, the Access Agreement, and the Geismar Condition in *CN/IC*. Such a holding would simply reiterate the long standing principle espoused by the ICC and the STB that no shipper should lose the competition that a potential build-in/build-out provides as a result of a merger.

III. CONCLUSION

In summary, the loss of a build-in/build-out option is recognized by the Board to constitute a significant loss of potential competition. The CN-KCS Access Agreement was determined by the parties and the STB to be directly related to the CN/IC merger. As a consequence of the Access Agreement, the KCS Geismar build-in was effectively terminated, thereby eliminating a potential build-in and representing a significant loss of potential

³⁵ As detailed above, in prior mergers where the merger would have extinguished competitive service rendered via a build-in/build-out, the Board has retained the build-in/build-out opportunity coupled with trackage rights granted to another carrier. Here, where the competitive line was extinguished, the Board properly refrained from imposing a requirement on Rubicon, Uniroyal and Vulcan to construct an industrial lead to nowhere for the sole purpose of preserving the *status quo ante* of demonstrating that they could have reached KCS if the Geismar line had been built. The test set forth above preserves this same distinction, as well as the principle enunciated in *BN/SF*, *supra*, that new rail line construction, if it then would have been required

competition. To remedy the loss of that competitive option, the Board in *CN/IC* protected the opportunity for other Geismar parties to participate in the Access Agreement. The same opportunity should exist for ATOFINA or others who can deliver traffic to KCS at Geismar.



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June 18, 2002

CERTIFICATE OF SERVICE

This is to certify that I have this 18th day of June, 2002, caused the foregoing Petition of Atofina Petrochemicals, Inc. and The Kansas City Southern Railway Company for Oversight, Interpretation And Enforcement Of Merger Conditions in Finance Docket No. 33556 to be served upon all parties of record in this proceeding by first-class mail or a more expeditious method.

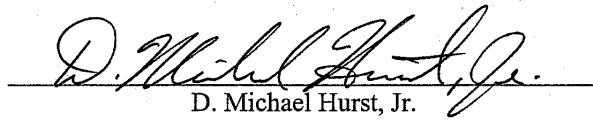

D. Michael Hurst, Jr.

EXHIBIT A

A map of the Geismar area

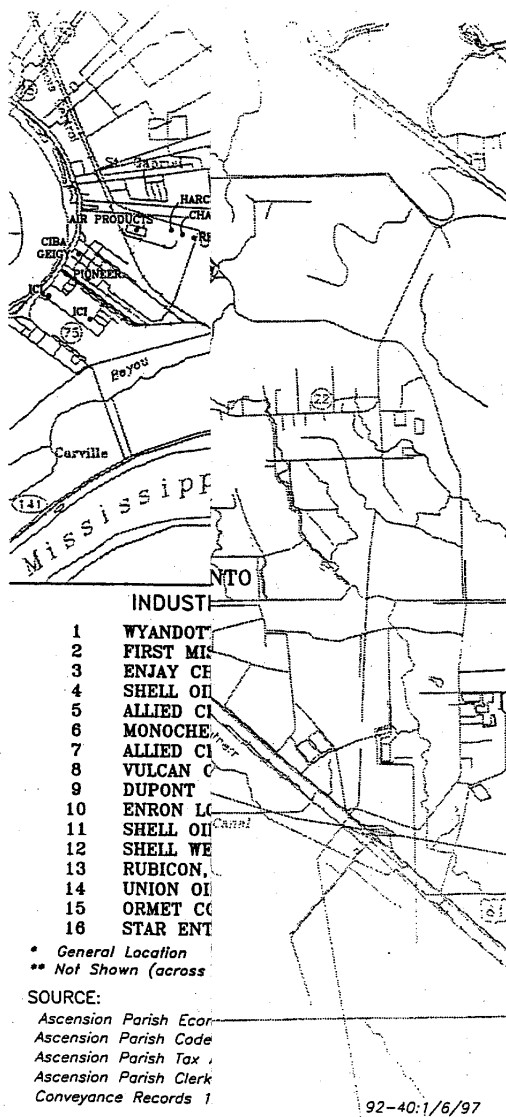


FIGURE A-6

EXHIBIT B

Extract Of CN-KCSR Settlement Agreement, CN-1, *CN/IC* (submitted Feb. 22, 1999)

- B. Bonnet Carre Spillway Bridges. KCSR and CN, as soon as practicable after the Control Implementation Date, will confer and make good faith efforts to reach agreement on the best means to relocate and consolidate operations now conducted over the trackage between Frellsen Junction and the North side of the Bonnet Carre Spillway Bridges.
- C. Geismar, LA. CN/IC will permit KCSR access to any rail freight traffic to which CN/IC has access and is produced by or used for production in any chemical manufacturing facilities operated on the properties owned by Shell, Borden and BASF at Geismar, LA on the Effective Date within the boundaries outlined in color on the map attached as Exhibit A to this Agreement (the "Geismar Customer Facilities"). Such access will be permitted commencing after the Control Implementation Date or October 1, 2000, whichever is later. This Subsection II.C will not apply in the event that, prior to such access being permitted, KCSR is the subject of a proposed transaction which, as of the Effective Date, would require the approval of the STB pursuant to 49 U.S.C. §11323; however, should KCSR, prior to such access being granted, be the subject of a proposed transaction which, as of the Effective Date, would have required the approval of the STB pursuant to 49 U.S.C. §11323, and should such transaction be terminated and not consummated, this Subsection II.C shall again apply as if KCSR had not been a subject of that transaction.
1. Access to the Geismar Customer Facilities will be provided in the form of overhead haulage (including switching between such facilities and Geismar Yard) between Geismar yard and Baton Rouge, LA at the rate of [] , including switching provided or arranged by CN/IC but exclusive of inter- or intra-plant switching.
 2. For that portion of the traffic provided haulage pursuant to paragraph 1 of this Subsection II. C that originates or terminates at points within Florida, Georgia, South Carolina, North Carolina, Virginia, Maryland, Delaware, New Jersey, that part of New York

EXHIBIT C

Index of the industries along the lower Mississippi River from the Mississippi River Industries
Map (Homesite Company, Baton Rouge, LA)

MISSISSIPPI RIVER INDUSTRIES MAP

INDUSTRIES			
Agrico - Faustina Plant	166.7 - 166.9 W	Formosa - Baton Rouge	Chlorine, VCM
- Uncle Sam Plant	160.4 E	Georgia Gulf - Plaquemine	Chlorine, PVC,
- Hahnville	128.7 W		Ammonia, Phenol, & Methanol
Airco - New Orleans		Georgia Pacific - Port Hudson	Paper Mill
Air Products - Plaquemine		Gold Bond - Westwego	Building Products
- St. Gabriel		GSU - Baton Rouge	Electrical Gen. Stations
- Gelsmar		- St. Gabriel	Electrical Gen. Stations
- Convent(Sorrento)		ICI - St. Gabriel	Herbicides, Refrigerants
- New Orleans		James River - St. Francisville	Specialty Paper Mill
Allied Signal - Gelsmar		Kaiser - Gramercy	Alumina
- Baton Rouge		L P & L	Electrical Gen. Stations
Amac - Braithwaite		(ENTERGY) - Gypsy	Electrical Gen. Stations
American Cyanamid (Avondale)		- Nine Mile Point	Electrical Gen. Stations
Ampro - Donaldsonville		- Michoud (3 Units)	Electrical Gen. Stations
Arcadian - Gelsmar		La Roche - Gramercy	Chlorine, CFC's
Ashtand - Plaquemine		- Baton Rouge	Specialty Aluminas
Avondale Industries		Liquid Carbonic - Gelsmar	Synthesis Gas
BASF		Melamine - Donaldsonville	Melamine Crystal
B F Goodrich - Plaquemine		Mississippi River Alcohol	Ethanol
Bayou Steel - Montz		Monsanto - Barton Plant - Luling	Agricultural Chemicals
Big Three - Plaquemine		Nalco - Garyville	Water Tr. Chemicals, Polymers
- Norco		Ormet - Burnside	Alumina
- Gelsmar		Oxychem - Addis	PVC
Borden - Gelsmar		- Convent	Chlorine, EDC
CF Industries Donaldsonville		- Hahnville	Chlorine
Calceiner Ind. - Gramercy		Pioneer - St. Gabriel	Chlorine
- Norco		Paxon - Baton Rouge	HD Polyethylene
- Chalmette		Rubicon - Gelsmar	TDI
Chevron - Belle Chasse (Oak Point)		Rhone-Poulenc - Baton Rouge	Sulfuric Acid
- Donaldsonville (St. James)		- Gelsmar	Phosphoric Acid
Ciba Geigy - St. Gabriel		Shell - Gelsmar	Detergent Intermediates
Colonial Sugar - Gramercy		- Norco-Mfg. Complex	Steam Cracking-Olefins
Copolymer - Addis		- Norco Chem Plant	Olefin Derivatives
- Baton Rouge		- Hahnville	Polybutylene
Cosmar/Fina - Gelsmar		- Jefferson	Lubricants
Deitch		Sid Richardson	Carbon Black
Domino Sugar - Arabi		Triad - Donaldsonville	Ammonia, Urea
Dow Chemical - Plaquemine		Union Carbide - Taft	Ethylene & Derivatives
		Union Texas - Gelsmar	Ethylene
		Uniroyal	EPDM, Specialty Chem.
		Vulcan Materials - Gelsmar	Chlorine, CHC
		Witco - Hahnville	Plasticizers & Stabilizers
		- Harahan	Chemicals Dispersants
		- Harvey - (Gretna)	Mineral Oils, Sulfonates
DuPont - Burnside (Darrow)			
- LaPlace			
Exxon - BR Chemical Plant			
- Baton Rouge Plastics			

EXHIBIT D

W.W. Graham Memo to File (Aug. 21, 1996)

KDC
WJW

August 21, 1996

MEMO TO FILE:

On August 13, Ken Clark, Steve Milligan and myself met with Fina Oil & Chemical Company in Dallas, Texas. The primary purpose of the meeting was for them to query us on the progress and status of Geismar. They are very interested in the build-in being extended up to them (approximately 4.7 miles north of Borden). It was explained that we can't discuss this further until after final approval of the current proposed build-in. They indicated that other customers in their area would also be interested. The attached is info that they provided. We committed to continuing this discussion at a later date.

W. W. GRAHAM

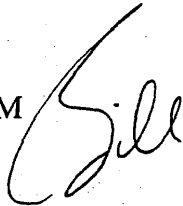


EXHIBIT E

Letter from Steve R. Cornell, Vice President, Base Chemicals and Manufacturing, ATOFINA, to
J.J. Ruest, Vice-President, Chemicals and Petroleum, CN (Nov. 16, 2001)



ATOFINA Petrochemicals, Inc.

Steve Cornell
Vice President Base Chemicals
and Manufacturing

November 16, 2001

J.J. Ruest
Vice-President
Chemicals and Petroleum
Canadian National
935 de La Gauchetiere Street West, 10th Floor
Montreal, Quebec H3B 2M9

Dear Mr. Ruest:

As you undoubtedly are aware both from public announcements and from conversations we have been holding with members of your staff, ATOFINA is engaged in the process of securing competitive rail service for several of its petrochemicals production facilities in the United States. We have already announced our involvement in a joint project with BNSF to build-in to the Bayport area and we are now working with Kansas City Southern Railway to bring competitive service to our facility at Carville, Louisiana.

Our plans for Carville entail building-out from Carville to Geismar, Louisiana and connecting there with the haulage arrangement CN has in place with KCS.

The purpose of this letter is to request your concurrence in allowing KCS to handle ATOFINA rail traffic pursuant to the Geismar access provisions in effect through your agreement with KCS and the conditions imposed in the CN/IC rail merger proceeding by the Surface Transportation Board upon completion of our build-out from Carville to Geismar.

Please be assured that we believe there is ample opportunity for both CN and KCS to serve our Carville transportation needs. We are pursuing competitive rail service opportunities in order to remain competitive within our industry, to assure optimum service to our customers, and to assure that we achieve the most efficient transportation option available.

Your attention to the foregoing is appreciated. We look forward to your response.

Very truly yours,


Steve R. Cornell
Vice President Base Chemicals
and Manufacturing

cc: Gerald K. Davies, Executive VP and COO, Kansas City Southern Railway
Martin W. Bercovici, Keller and Heckman, LLP, Chuck Carr

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AFFIDAVIT OF KENNETH E. WAITE

**Affidavit
of
Kenneth E. Waite**

I am Kenneth E. Waite, and I hold the position of Business Analyst at ATOFINA Petrochemicals, Inc. My responsibilities include negotiation and procurement of rail transportation services for the company's polystyrene production facility at Carville, Louisiana.

I hereby affirm that the facts set forth in the Petition seeking oversight, interpretation and enforcement of the CN/IC merger conditions at Section I.D., ATOFINA's Relation to Geismar Access, other than with regard to discussions held with Kansas City Southern representatives concerning extension of the proposed Geismar line (which is supported by Exhibit D), are true and correct based both on my personal knowledge and on a review of company records maintained in the ordinary course of business.

I certify that I am authorized to file this affidavit on behalf of ATOFINA Petrochemicals, Inc. I declare the foregoing is true and correct under penalty of perjury.


Kenneth E. Waite

June 17, 2002
Date