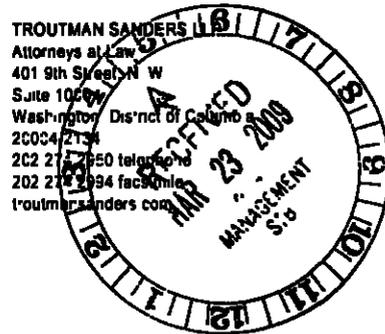


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Administration DC

# TROUTMAN SANDERS



March 23, 2009

## VIA HAND DELIVERY

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

224730

ENTERED  
Office of Proceedings  
MAR 23 2009  
Part of  
Public Record

**Re: STB Finance Docket No. 35219, *Union Pacific Railroad Company* –  
*Petition for Declaratory Order***

Dear Ms. Quinlan:

Enclosed for filing in the above-captioned case please find the original and ten (10) copies of a redacted, Public Version of the Comments in Opposition and Request for Order Compelling UP to Provide Common Carrier Rates submitted on behalf of US Magnesium, LLC (“USM”). An additional copy is included for date-stamping and return via our messenger. The redacted material is contained in brackets [ ] in the “Highly Confidential” version of the Comments and Request, the original and ten (10) copies of which are being filed under seal pursuant to the Protective Order in effect for this proceeding. An additional copy of the Highly Confidential version is also enclosed for date-stamping and return via our messenger. USM has also enclosed three (3) compact disks which contain the Public Version, and three (3) compact disks which contain the Highly Confidential Version.

Please note that the verification page of the Verified Statement of Dr. Howard Kaplan is a facsimile version of the original page. The original version of the verification page will be filed in this docket when received by the undersigned.

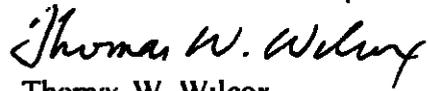
Finally, USM assumes that, under the circumstances of this Declaratory Order Proceeding, the filing fee associated with separate formal filings to compel the establishment of common carrier rates under 49 CFR §1002.2(56)(v) is not required. Nevertheless, out of an abundance of caution USM has enclosed with this filing a check to cover the requisite fee, and respectfully requests that this check be returned to the undersigned should USM’s assumption turn out to be correct.

**TROUTMAN  
SANDERS**

Hon Anne K Quinlan  
March 23, 2009  
Page 2

Please feel free to contact me with any questions

Sincerely,



Thomas W Wilcox  
*Counsel for US Magnesium, LLC*

Enclosure

cc Dr Howard Kaplan  
Counsel for Union Pacific Railroad Company

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**



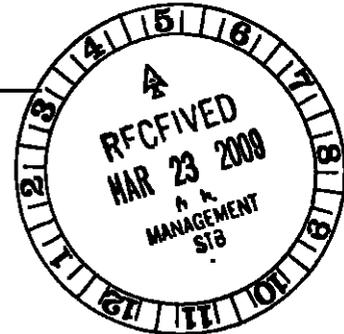
224730

**STB Finance Docket No. 35219**

**PETITION OF UNION PACIFIC RAILROAD COMPANY  
FOR A DECLARATORY ORDER**

**ENTERED  
Office of Proceedings  
MAR 23 2009  
Part of  
Public Record**

**COMMENTS IN OPPOSITION  
AND  
REQUEST FOR ORDER COMPELLING UP  
TO PROVIDE COMMON CARRIER RATES**



Pursuant to 49 C.F.R. §1104.13, and the decision served in this proceeding by the Board's Acting Director of the Office of Proceedings on March 10, 2009, US Magnesium LLC ("USM") hereby submits these Comments in opposition to the Petition of Union Pacific Railroad Company for a Declaratory Order ("Petition") filed in this proceeding on February 18, 2009. USM is also requests that the Board issue an order compelling UP to establish rates and service terms to the four destinations at issue in the Petition. As explained in more detail below, USM is the shipper whose lawful request to Union Pacific ("UP") for common carrier rates and service terms for the transportation of chlorine to the four destinations covered by the Petition was declined by UP in violation of 49 U.S.C. §11101(b) and the Board's regulations at 49 C.F.R. Part 1300. USM was in the process of preparing its reply in opposition to the Petition for filing on March 10, 2009 when the Office of Proceedings *sua sponte* served the aforementioned decision on behalf of the Board instituting a declaratory order proceeding under the authority of 49 U.S.C.

§721 and 5 U S C §554(e) Finance Docket No 35219, *Union Pacific Railroad Company – Petition for Declaratory Order* (decision served March 10, 2009)(“*March 10 Decision*”) The *March 10 Decision* announced that the Board is seeking public comment on the Petition on or before March 31, 2009 For the reasons set forth below, the Board should deny the Petition and issue an order directing UP to immediately provide USM with the rates and service terms it has requested for the four movements covered by the Petition These Comments and Request are supported by the Verified Statement of Dr Howard Kaplan, an employce of USM and its predecessors in interest since 1981, and who is currently employed by USM as a contractor with the title of Vice President, Chemicals and By-Products (“Kaplan V S”) In his statement, Dr Kaplan provides relevant factual background about USM and its need for the transportation of chlorine by UP to the four destinations at issue

**I.  
IDENTITY OF US MAGNESIUM, LLC**

USM is a corporation based in Salt Lake City, Utah that specializes in the manufacture and supply of magnesium ingot products, magnesium recycling services, chemical by-products, and energy Kaplan V S at 2-3 USM is the only producer of primary magnesium in the United States and North America, operating a manufacturing facility in Rowley, Utah located on the Great Salt Lake where magnesium has been produced by USM and its predecessors since 1972 *Id* at 3 Magnesium has a wide variety of applications, it is used in aluminum alloying to make aluminum sheet for truck bodies, aircraft skins, and beverage cans Many aluminum casting alloys such as car wheels also contain magnesium as an important alloying ingredient *Id* Magnesium is also necessary for producing titanium, zirconium, beryllium, and uranium Use of magnesium castings in the automobile industry reduces the weight of automobiles and, thereby, reduces fuel consumption Magnesium also has military applications *Id*

To manufacture magnesium, USM uses magnesium chloride from the Great Salt Lake, which is rich in minerals. USM concentrates the magnesium chloride through evaporative ponds, and then, after numerous purification steps, electrolyzes it to separate the magnesium and chlorine (the Rowley facility also produces calcium chloride, iron chlorides, and hydrochloric acid). *Id* The production ratio of magnesium and chlorine at the Rowley facility is approximately one to one. Prior to 2001 a significant portion of the chlorine produced by USM's magnesium manufacturing processes was vented into the atmosphere pursuant to permits issued under the federal Clean Air Act. *Id* at 4. However by 2006, the chlorine emissions from the facility were reduced to nearly zero due to more stringent permitting requirements<sup>1</sup> and a relatively recent innovation developed by USM and its predecessors that allows the chlorine co-produced with the magnesium to be captured and liquefied for sale. *Id* USM's environmentally sensitive processes for manufacturing magnesium have garnered awards from the State of Utah and the U S Environmental Protection Agency. *Id* at 5.

**II.**  
**USM'S NEED FOR THE RAIL TRANSPORTATION OF**  
**CHLORINE PRODUCED BY ITS ROWLEY FACILITY**

Chlorine production by the Rowley facility is therefore a necessary co-product of the plant's main function as a magnesium producer. Due to the vagaries of the global market for magnesium, the facility's annual magnesium production, and therefore its chlorine volumes, can vary widely over the course of the year and within a particular year. *Id* at 3-8. If the chlorine could not be transported off site and sold, then USM would be forced to cut overall production of magnesium, incur the costs of scrubbing the chlorine, or pay monetary penalties. *Id* at 4.

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<sup>1</sup> USM has an operating permit that limits the amount of chlorine emitted to the air to 3,000 tons per year annually, although, as explained in these Comments and Request, plant emissions have been near zero since 2006. *Id* at 4.

However, the sale of chlorine for further beneficial use enables USM to compete in a global market and survive as the only producer of magnesium in the United States. Without the sales of the chlorine produced by its operations, it is possible that the Rowley facility would close *Id.* at 6 USM sells this chlorine to end-users for a variety of purposes, including water purification, pharmaceutical manufacturing, and plastics manufacturing. Chlorine is used at water treatment plants across the country, thereby playing a critical role in creation of safe drinking water for millions of Americans. Additionally, it is estimated that chlorine and its derivatives comprise 45% of the United States' gross domestic product.<sup>2</sup>

The Rowley facility is located on a UP rail line, and from 1972 to date the chlorine produced by the Rowley facility has been transported to end-users almost exclusively via rail service by UP, since there are no other feasible or cost-effective means to transport the volumes of chlorine the Rowley facility produces. *Id.* at 5. In the last ten years, approximately [ ] carloads of USM's chlorine ([ ] tons) have been transported by the UP – all in USM-supplied tank cars – without any incidents or spills. US Magnesium has been awarded the Union Pacific Pinnacle safety award several times – most recently in 2008 – for safe loading practices and zero non accident releases. *Id.* USM is extremely proud of its safety record and believes it has a good working relationship with UP to ensure safe operations into the future.

### **III. USM'S REQUEST FOR COMMON CARRIER RATES AND SERVICE TERMS**

Prior to March, 2009, UP provided rail transportation pursuant to a rail transportation contract. *Id.* at 5. During the negotiations to replace the rail transportation contract with a new contract upon the expiration of its term, USM submitted to UP a written request for common

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<sup>2</sup> See "benefits of chlorine" at the Chlorine Institute website, <http://www.chlorineinstitute.org>

carrier rates and service terms pursuant to 49 C F R §1300.3 for the rail transportation of chlorine from USM's Rowley facility to 35 UP-served destinations<sup>3</sup> Kaplan V S , Exhibit A (Letter from Howard Kaplan to Robert G Worrell, UP Senior Assistant, UP-Chemicals dated January 16, 2009) USM requested rates and terms to this number of destinations due to its magnesium production forecasts that were significantly higher for 2009 and 2010 than previous years Kaplan V S at 5-6

The Petition acknowledges USM's request, and does not claim that it was defective or otherwise not in compliance with the Board's rules On January 26, 2009 UP responded to USM's request and supplied rates and service terms to all but seven of the destinations requested by USM Kaplan V S . Exhibit B (Letter from Robert G. Worrell, to Howard Kaplan, dated January 26, 2009) Four of those destinations Allemania, LA; Dallas, TX, Houston, TX, and Plaquemine, LA, are included in UP's Petition The stated reasons for UP's refusal to supply rates and service terms to six<sup>4</sup> of these destinations are set out in UP's letter

- 1 UP had provided rates to these destinations "for the last four years and USM has never shipped on them;"
- 2 UP concluded "there was no indication" that USM "has the opportunity to ship on them now," and

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<sup>3</sup> The Petition erroneously states that USM's request covered 32 destinations Petition at 2 (UP's Petition is not numbered).

<sup>4</sup> UP's January 26, 2009 letter also refused to provide rates and service terms to three other destinations Dupo, Ill; Festus, MO, and Memphis, TN. As for Dupo and Festus, UP supplied the same rationale for its refusal to quote rates to these two destinations as it did for the four destinations covered by its Petition UP supplied no rationale for refusing to provide rates and service terms to Memphis On March 11, 2009, after the Board issued its March 10 Decision in this proceeding, USM submitted a letter to UP protesting its continued refusal to supply rates to the seven destinations Kaplan V S., Exhibit C On March 20, 2009, UP replied and informed USM that it had on that day published the requested rates to Dupo, Festus and Memphis in Tariff UP 4949, Item 1000 (The rates are actually in Item 1000-A ) UP cited its pending Petition as the reason for continuing to refuse to comply with USM's request as to Houston, Dallas, Allemania and Paquemine Kaplan V.S , Exhibit D

- 3 It is “not a reasonable request of service” to expect UP to transport “this deadly chemical over 1000 miles through several High Threat Urban Areas when there is an abundant supply of chlorine located at sources much closer to the destination ”

UP’s first assertion is incorrect In 2007 UP transported [ ] of chlorine from the Rowley facility to [ ], an end user located in Allemania, and in 2008 USM shipped [ ] on UP to Houston Kaplan V.S. at 5 The other reasons for UP’s denial are addressed below

#### IV. ARGUMENT

##### A. UP’s Refusal to Provide Rates in Response to USM’s Request Clearly Violated 49 USC 11101(b)

Railroads shall provide rail transportation on “reasonable request,” 49 U S C §11101(a), and “shall also provide” rates and service terms upon the “request” of any person 49 U S C §11101(b) The obligation to provide rates and service terms on request is unqualified The Board recognizes that the obligation to first provide tariff rates on request is “linked” to the obligation to subsequently provide common carrier service because rates are a “necessary predicate to any specific request for service” *Pejepscot Industrial Park, Inc , d/b/a Grimmel Industries – Petition for Declaratory Order*, Docket 33989, slip op at 8 (served May 15, 2003) Accordingly, a railroad’s attempt to refuse to provide rates in response to a request from a shipper is held to a very strict standard “Without rates, and any attendant terms setting forth the particulars of a service, a shipper cannot make a specific service request It is axiomatic that a rail carrier may not indirectly avoid its common carrier obligation to provide service by evading its obligation to establish rates upon request” *Id*, See also *E I DuPont de Nemours and Company v CSX Transportation, Inc*, Docket 42099, slip op at 5 (served Dec 20, 2007) (“*DuPont I*”)(“CSXT has an obligation to make common carrier rates available to any person

upon request under 49 U.S.C. 11101(b)”) <sup>5</sup> In USM’s case, UP’s refusal to provide rail rates for the transportation of chlorine hampers USM’s business planning because USM is unable to quote chlorine prices to its customers if rail transportation rates are unknown.

The Board’s view that §11101(b) compels railroads to timely provide rates upon request was articulated by Commissioner (then-Chairman) Nottingham in a recent proceeding investigating the scope of the common carrier obligation. “I think it just bears reiterating that the Board takes very seriously any refusal by a railroad to quote a tariff under any circumstances other than if it’s involving an exempt commodity.” *Common Carrier Obligation of Railroads, Ex Parte 677*, hearing transcript at page 527, statement of Chairman Nottingham (April 24, 2008). Chlorine (STCC 2812815) is not an exempt commodity. Accordingly, UP’s request to have the Board declare that UP may avoid its common carrier obligation to USM by refusing its request to establish rates to the four destinations at issue is directly contrary to §11101(b) and established Board precedent.

**B. UP Has No Valid Excuse for Refusing to Supply the Rates Requested by USM**

In the first place, UP has not provided any of the information required, nor evoked the necessary procedures required by 49 U.S.C. §10502(a), to exempt this transportation from the requirements of 49 U.S.C. §11101(b), and thereby attempt to meet the only exception to

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<sup>5</sup> The Board’s rules under 49 C.F.R. Part 1300 reflect the statute’s intent that railroads must provide rates upon request under §11101(b). When a person formally requests disclosure of an existing tariff rate, the rate must be provided by the railroad “immediately,” which the Board understands to mean within a few hours or by the next business day. 49 CFR § 1300.2(b). When the request is for a new tariff rate, the railroad must respond “promptly.” 49 CFR § 1300.3. In this scenario, “promptly” means as soon as reasonably possible, but no later than 10 business days after the request. Instead of responding with a rate, the railroad may also request additional information from the shipper regarding the transportation to which the rate would apply. In such a case, the tariff rate should be provided within 10 business days from the receipt of the additional information. 49 CFR § 1300.3.

responding to a valid request from a shipper under §11101 as articulated by Chairman Nottingham See also, DuPont I at 6 (where the Board rejected CSXT's attempt to have the Board declare that the reasonableness of rail rates for transportation of hazardous materials should not be considered under the Simplified Standards for Rail Rate Cases<sup>6</sup> because CSX did not formally seek exemption authority under §10502(a)) The Board should reject UP's attempt to circumvent the prerequisite of §10502 to accomplish an effective exemption from §11101(b) for selected traffic via its Petition

Other than its erroneous claims about USM's need for the service for which the requested common carrier rates would apply, the only reason UP has stated for refusing to supply rates to the four destinations at issue is that UP has concluded there are closer alternative sources of chlorine available to USM's customers, so UP should not have to transport USM's chlorine due to alleged safety and/or security concerns reflected in new hazardous materials transportation regulations See Kaplan V S , Exhibit B <sup>7</sup> UP cites no authority whatsoever that such reasons are valid grounds for denying USM's request, nor does UP attempt to distinguish the ample authority that is contrary to its position <sup>8</sup> Moreover, the regulations, adopted by the Department of Homeland Security ("DHS") and the Transportation Security Administration ("TSA") in November, 2008 and codified at 49 CFR Parts 1520 and 1580, do not provide any grounds for granting the Petition UP argues it should be able to refuse a request to supply rates for the

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<sup>6</sup> STB Ex Parte No. 646 (Sub-No.1), *Simplified Standards for Rail Rate Cases* (served September 5, 2007)

<sup>7</sup> The arbitrariness of UP's position is further illustrated by the fact that UP gave the same reasons for first refusing to supply rates to Dupo and Festus but then supplied these rates on March 20 without explanation in response to USM's letter of March 11, 2009 See note 4, supra

<sup>8</sup> *Classification Ratings of Chemicals, Conrail, April 30, 1986*, Docket 9265, 3 ICC2d 331 (1986), *Radioactive Materials, Missouri-Kansas-Texas Railroad Company*, Docket 36307, 357 ICC 458 (1977), *The Akron, Canton & Youngstown Railroad Company v Interstate Commerce Commission*, 611 F 2d 1162 (6<sup>th</sup> Cir 1979)

transportation of chlorine by rail where service under those rates would entail movements within a High Threat Urban Areas (“HTUA”) under the regulations. Petition at 1-3. See Appendix A to 49 C.F.R. Part 1580. But these regulations were in no way promulgated to stop the present transportation of chlorine and other hazardous materials by rail through HTUAs. Rather, no doubt because DHS and TSA acknowledged that chlorine provides essential public health benefits and has a widespread impact on the Nation’s economy, the regulations anticipate that transportation of chlorine by rail will continue to occur, and they implement measures to ensure this transportation occurs safely and sufficient precautions are in place to ensure the security of the commodities. The new regulations place additional responsibilities on all the parties in the logistics chain moving hazardous materials from production to market, including both railroads and shippers. As a “rail hazardous materials shipper” under the regulations, USM will have additional responsibilities and associated costs, which it has accepted as part of doing business in today’s world. The Board should not permit UP to bend new regulations into a justification for abrogating UP’s statutory obligations under §11101(b). Nor should the Board allow UP to dictate the market for chlorine and thereby threaten USM’s survival.

Moreover, the DHS and TSA regulations in no way single out chlorine as some sort of “ultra hazardous” commodity that warrants special treatment or restriction in HTUAs, and for the Board to do so in response to the Petition would be directly contrary to very recent Board precedent. As recently as June, 2008 this Board rejected a similar attempt by a Class I railroad to create a special category of rail transportation for chlorine within the group of TIH commodities. STB Docket NOR 42100, *E I DuPont De Nemours and Co v CSX Transportation, Inc.* (served June 30, 2008) (“*DuPont II*”). In that rate case brought under the Simplified Standards, note 6 *supra*, the Board rejected CSXT’s attempt to create a traffic comparison group under the “Three

Benchmark Analysis” of the Simplified Standards comprised solely of chlorine movements because CSXT alleged that chlorine “is comparable to no other commodity” *Id* at 9 In rejecting this notion, the STB stated “CSXT has offered no evidence that chlorine must be handled differently than any other TIH chemical moving in tank cars Indeed the Federal Railway Administration and the Pipeline and Hazardous Materials Safety Administration do not treat the transportation of chlorine differently from the transportation of any other TIH product ” *Id*

Finally, the common carrier obligation exists in large part so that companies such as USM with facilities in relatively remote locations with only rail as a viable transportation mode can move their products to market and therefore stay in business UP’s extremely generalized factual assertions about the demand for chlorine by end users in Houston, Dallas, Allemania, and Plaquemine and the proximity of alternative supplies of chlorine in these areas are unsupported and disputed See Reply of the Chlorine Institute Inc to the Petition of the Union Pacific Railroad Company for a Declaratory Order, filed in this docket on March 12, 2009 at 3-4, Kaplan V S at 6-7 UP also provides no support for its vague claim that “other governmental agencies have pressed us to find ways to reduce TIH transportation risks ” Petition at 2 UP’s unilateral assessment of the market for chlorine and USM’s need for the rates it requested also fails to recognize that USM must have these destinations available to it in order to ensure the chlorine produced by its magnesium production has a buyer Kaplan V S at 6-8. In any event, the grounds advanced by UP in its Petition would turn on its head the railroad statutory

common carrier obligation to serve and permit railroads to dictate whether companies survive or perish in their particular markets<sup>9</sup>

**C. The Board Should Direct UP to Provide USM with Rates and Service Terms for Transportation to the Four Destinations Covered by the Petition**

UP does not dispute that USM's January 18, 2009 request met all the requirements of §11101(b) and the Board's regulations, and the Petition asserts the grounds for UP's refusal to supply the requested rates and service terms in compliance with §11101(b) and 49 C F R Part 1300. USM has disputed those grounds in these Comments and Request. USM further notes that the *March 10 Decision* in this proceeding permits UP to provide the Board with "rebuttal and reply" filings on or before April 20, 2009.<sup>10</sup> USM submits that under these circumstances the Board will have sufficient evidence before it to not only rule on the Petition, but in the event the Petition is denied also order UP to immediately provide USM with rates and service terms from USM's Rowley facility to the four destinations at issue. The issuance of such an order is entirely appropriate in this declaratory order proceeding since the mere denial of the Petition without such an accompanying directive will require USM to file a separate complaint or petition seeking such an order should UP delay supplying the requested rates and service terms, or

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<sup>9</sup> Any request for service under the rates provided by UP to the four destinations at issue pursuant to §11101(b) would easily meet the "reasonable" standard of §11101(a). USM clearly has a business need for the transportation, and USM has a long history of transporting chlorine on the UP system without any spills or incidents, receiving multiple safety awards from UP. *Kaplan V S* at 5 ("USM has been awarded the Union Pacific Pinnacle safety award the past three years for safe loading practices and zero non accident releases"). The tank cars used for USM's transportation are supplied to UP by USM. Finally, UP has no basis for arguing that any request for service to Allemania, Dallas, Houston or Plaquemine would be unprofitable to UP, or would be unreasonable from an operational or equipment standpoint, and the Petition contains no such allegations.

<sup>10</sup> Despite filing a confidential version of its Petition UP chose to assert very few facts in support of its Petition and its refusal to provide rates in response to USM's request. UP should not be allowed in any rebuttal filing to assert facts and argument that should have been included in its Petition in anticipation of opposition from USM and other parties.

continue to refuse to supply the requested rates, which would result in further delay, as well as unnecessary duplication of effort and increased cost to USM and UP

**V.  
Conclusion**

For the reasons stated in these Comments and Request, UP's Petition should be denied and the Board should issue an order accompanying its denial of the Petition that requires UP to immediately provide the rates and service terms requested by USM in its January 18, 2009 request for the transportation of chlorine from Rowley to the following four destinations Plaquemine, LA, Allemania, LA, Houston, TX, and Dallas TX.



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David E Benz  
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Telephone 202 274.2913  
Facsimile 202 654 5608

Dated March 23, 2009

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB Finance Docket No. 35219**

**PETITION OF UNION PACIFIC RAILROAD COMPANY  
FOR A DECLARATORY ORDER**

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**VERIFIED STATEMENT OF DR. HOWARD KAPLAN**

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My name is Dr Howard Kaplan I have worked with the magnesium business in Salt Lake City since 1981 I was formerly the Vice President of Sales for Magcorp (a predecessor of US Magnesium, LLC ("USM")) where I was responsible for all sales of Magnesium Metal and Chemical co-products (chlorine) and Chemical By-Products I am currently employed by USM as a contractor with the title of Vice President, Chemicals and By-Products My current duties for USM include responsibility for all aspects of chemical sales and marketing, including responsibilities for transportation negotiations and railcar and regulatory compliance I received a Doctorate in Metallurgy and Materials Science from the University of Pennsylvania in 1970

I am the same Dr Howard Kaplan who testified before the Surface Transportation Board on July 22, 2008 as part of the Board's public hearing in Ex Parte No 677 (Sub-No 1) *Common Carrier Obligations of Railroads – Transportation of Hazardous Materials*, and I also submitted written testimony in the record of that proceeding This verified statement is offered in support of USM's Comments in Opposition and Request

for Order Compelling UP to Provide Common Carrier Rates, filed in response to the Petition for Declaratory Order filed by the Union Pacific Railroad Company ("UP") in this docket on February 18, 2009, in which the UP seeks a ruling from the STB that UP need not provide rates and service terms to USM for the transportation of chlorine from USM's Rowley, Utah processing facility to four destinations that are very important to USM's business - Houston and Dallas, Texas, and Allemania and Plaquemine, Louisiana UP's Petition followed the refusal by UP to supply rates and service terms to these and three other destinations<sup>1</sup> requested by USM on January 18, 2009 pursuant to 49 U S C §11101 and the Board's regulations at 49 CFR Part 1300 These rates and service terms were requested as negotiations between USM and UP were breaking down over contract rates and terms to replace the current contract between the parties for this transportation UP does not dispute the validity of USM's request or its compliance with Board rules and procedures. UP has simply refused to supply the requested rates and service terms to these four destinations for the reasons set forth in its Petition, and asked the Board to affirm that refusal This statement sets out the factual basis why USM strongly opposes UP's Petition and why the Board must deny UP's Petition and order UP to supply USM with the rates and service terms to the four Texas and Louisiana destinations referenced in the Petition

**A. US Magnesium, LLC**

USM is the only surviving magnesium producer in the United States and North America As explained in more detail below, this survival is due in large part to the

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<sup>1</sup> UP also initially refused to provide rates and service terms to Dupo, Illinois, Festus, Missouri, and Memphis, Tennessee

ability of USM to find buyers of chlorine produced by its operations USM operates a facility in Rowley, Utah located on the shores of The Great Salt Lake where magnesium has been produced by USM and its predecessors since 1972 USM is involved in the manufacture and supply of magnesium ingot products, magnesium recycling services, chemical co-products and by-products, and energy Magnesium has a wide variety of applications, it is used in aluminum alloying to make aluminum sheet used for bodies, aircraft skin, beverage cans and in various aluminum castings Many aluminum casting alloys such as car wheels also contain magnesium as an important alloying ingredient Magnesium is also necessary for producing titanium, zirconium, beryllium, and uranium Use of magnesium in the automobile industry reduces the weight of automobiles and, thereby, reduces fuel consumption Magnesium also has military applications

**B. USM's Chlorine Production and Need for Rail Transportation by UP**

Chlorine is a necessary co-product of USM's magnesium manufacturing operations This is because the feedstock for USM's operations is the vast amount of magnesium chloride present in the Great Salt Lake USM uses solar energy to remove water using an extensive system of evaporative ponds and purification steps in order to concentrate raw brine so that the lake's magnesium chloride can be electrolyzed to produce magnesium and chlorine (the Rowley facility also produces calcium chloride, iron chlorides, and hydrochloric acid) The production ratio of magnesium and chlorine at the Rowley facility is approximately one to one Accordingly, a critical fact for the Board to appreciate in this proceeding is that the volume of chlorine produced by USM in a given year is directly related to the demand for magnesium in the United States and the world, and this demand can vary from year to year.

Prior to 2001 a significant portion of the chlorine produced by USM's magnesium manufacturing processes was vented into the atmosphere pursuant to permits issued under the Federal Clean Air Act. For example, in 1989 USM's predecessor at Rowley emitted 55,000 tons of chlorine into the atmosphere. The capture of essentially all the chlorine during the magnesium manufacturing process is a relatively recent innovation developed by USM and its predecessors. This innovation was driven in part by lower limits on the chlorine the Rowley facility can emit under its air permits. Specifically, even though the plant has nearly zero chlorine emissions, USM has an operating permit that limits the amount of chlorine emitted to the air to 3,000 tons per year annually, and if the chlorine cannot be collected for sale, we must cut overall production of magnesium and chlorine, scrub the chlorine, or pay monetary penalties. USM sells the chlorine collected through its manufacturing process to end-users for a variety of purposes, including water purification, pharmaceutical manufacturing, and plastics manufacturing. Chlorine is used at water treatment plants across the country, thereby playing a critical role in creation of safe drinking water for millions of Americans. Additionally, it is estimated that chlorine and its derivatives and products comprise 45% of the United States' gross domestic product.<sup>2</sup>

The new technology installed at the Rowley facility in 2001 led to significant reductions in manpower, energy usage and maintenance expenses, and allowed the chlorine produced by the magnesium operations to be captured and liquefied for sale, thus simultaneously reducing USM's overall emissions and improving our economic

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<sup>2</sup> See <http://www.chlorineinstitute.org>, describing the "benefits of chlorine" at the Chlorine Institute website.

model. By 2006 the chlorine emissions from the Rowley facility had been reduced to nearly zero. Therefore, USM engages in an environmentally sensitive method of magnesium production by enabling re-use of the chlorine produced. In 2003, the Utah State Legislature awarded USM with a citation recognizing its improvement in the efficiency of the plant while reducing its impact on the environment. We also received a Climate Protection Award from the U.S. Environmental Protection Agency in 2004.

The chlorine produced by the Rowley facility has been transported to end-users almost exclusively via rail service by UP, since there are no other feasible or cost-effective means to transport the volumes of chlorine the Rowley facility produces. UP has transported USM's chlorine in USM's fleet of tank cars since 1972. In the last ten years, approximately [ ] carloads of chlorine ([ ] tons) have been transported by the UP without any incidents or spills. UP is also incorrect in stating that it has supplied rates to USM for the transportation of chlorine to Houston and Dallas, Texas, and to Allemania and Plaquemine, LA, "the last four years and USM has never shipped on them." Exhibit B. In 2007 USM shipped [ ] of chlorine on UP to [ ], an end user in Allemania, LA, and in 2008 USM shipped [ ]

[ ] on UP to Houston. US Magnesium has been awarded the Union Pacific Pinnacle annual safety award several times - the most recent being 2008 - for safe loading practices and zero non accident releases. USM is extremely proud of its safety record and believes it has a good working relationship with UP to ensure safe operations into the future.

Prior to March, 2009, UP transported chlorine produced by the Rowley facility pursuant to a rail transportation contract. USM first approached UP about a new contract

for chlorine movements in October, 2008. At the time USM had forecast its production of magnesium (and a corresponding volume of chlorine) to be about [ ] tons at the start of 2009, with increases during the year of chlorine by virtue of additional process changes, to reach total volumes of about [ ] tons annualized at the end of 2009. Volumes were further forecast to [ ] tons per year in 2010 and beyond. These were significant increases versus previous years, and this necessitated asking for a number of additional lanes in 2009 in order to ensure all available chlorine could be sold. The global economic turndown has led to significantly reduced magnesium demand and therefore, USM has had no choice but to reduce magnesium production, which has also reduced chlorine production for sale. Despite the lower levels of current magnesium production, the market for it is unpredictable enough that production could ramp up on short notice, in which case USM must have rates in place to various destinations in case it needs rail service from UP when additional chlorine is produced from the magnesium operations. These destinations include the four destinations in the Petition (Houston, Dallas, Allemania, and Plaquemine), as some of the greatest demand for chlorine exists at these and other Gulf Region destinations. Moreover, the viability of the Rowley facility and USM is dependent on the ability of USM to sell the chlorine produced by its operations. In today's world market for magnesium, eliminating the sales of the co-product chlorine would render the Rowley facility uneconomic, forcing the closure of the last remaining producer of magnesium in the United States.

USM strongly opposes UP's attempt, through its Petition, to dictate when and where USM can ship the chlorine it produces, because permitting UP to make such decisions would significantly harm USM's business. In considering UP's request, as

applied to USM, it is critical that the Board understand the volumes of chlorine USM requires to be transported are determined by the Rowley facility's magnesium production,

not necessarily by the market for chlorine or the demands of USM's chlorine customers

Accordingly, if magnesium production increases as USM forecasts, then USM must have the ability to send the chlorine produced by this production to a wide variety of potential destinations. These destinations include the four destinations covered by UP's Petition: Houston and Dallas, Texas, and Allemania and Plaquemine, Louisiana. Located at these destinations are some of the largest users of chlorine in the United States, [

] In 2007, USM shipped [ ] of chlorine to [ ]

when production increased and market conditions required us to find new customers. During 2007 we shipped additional cars as far away as Florida in order to keep product moving and maintain empty cars for storage. USM's rail fleet is limited and when too many cars become full, marketing decisions must be made to move the product to avoid a plant shutdown. While USM may not require UP to regularly transport rail cars of chlorine to these destinations, USM must have rates and terms available to ship to them as a "relief valve" in the event the chlorine produced by its operations cannot be otherwise sold or disposed of. As I understand UP's position, it wants the STB to rule that UP need not provide transportation of USM's chlorine to the four named destinations because UP has determined that purchasers of USM's chlorine in these areas can obtain sufficient amounts of chlorine from producers more closely located to their operations. I disagree with UP's conclusions concerning the availability and location of sufficient supplies of chlorine for the end users in Texas and Louisiana. More importantly, the Petition misses the point why USM must be able to ship chlorine to these locations, and

why these end users would purchase USM's chlorine instead of chlorine from other suppliers. The Board must not enable UP to unilaterally control the ability of USM to sell or dispose of its chlorine production by deciding where USM can ship its chlorine. This would not only permit UP to dictate the market for chlorine, but also to dictate the amount of magnesium produced by USM, and accordingly, USM's survival.

I, Howard Kaplan, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to sponsor this testimony.

Executed March 2<sup>nd</sup>, 2009.

A handwritten signature in black ink, appearing to read "Howard Kaplan", is written over a horizontal line. The signature is cursive and includes a long, sweeping underline that extends to the right.

Howard Kaplan

# **EXHIBIT A**

Proprietary Privileged and Confidential

January 16, 2009

Bob Worrell  
Sr Assistant Vice President Chemicals  
Union Pacific Railroad  
1400 Douglas Street  
Omaha, NE 68179

Dear Bob.

As we move ahead with our contract negotiations US Magnesium hereby requests Union Pacific (UP) to publish public tariff rates on the following set of UP lanes<sup>1</sup> As you know, the response should be provided as soon as reasonably possible, as but no later than 10 business days from receipt of this request

We would like those rates to be available as a pricing authority effective on February 1, 2009. If the contract negotiations do not produce acceptable results, US Magnesium may decide to ship on one or more of these public tariff rates

STCC: 2812815 Chlorine Gas, Liquefied

From: UT, ROWLEY

To:

AZ, ELOY  
AZ, PHOENIX  
AZ, SAHUARITA  
CA, COLTON  
CA, LOS ANGELES  
CA, MOJAVE  
CA, ONTARIO  
CA, PITTSBURG  
CA, SACRAMENTO  
CA, SAN JOSE  
CA, SANTA FE SPRINGS  
CA, SAUGUS  
CA, STOCKTON  
CA, SYLMAR  
CA, TORRANCE  
CO, DENVER  
IA, CAMANCHE  
IA, CEDAR RAPIDS  
ID, LEWISTON  
IL, DUPO  
IL, EAST CHICAGO

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<sup>1</sup> See CFR Title 49 Part 1300 3 Response to request for establishment of a new rate

**Proprietary Privileged and Confidential**

**LA, ALLEMANIA  
LA, PLAQUEMINE  
MO, FESTUS  
MO, KANSAS CITY  
MO, ST LOUIS  
NE, OMAHA  
NV, HENDERSON  
NV, SPARKS  
OK, NOWATA  
TX, HOUSTON  
TN, MEMPHIS  
TX, DALLAS  
UT LITTLE MOUNTAIN  
UT, SALT LAKE CITY**

**Many of these lanes already have excessively high rates, a message we have conveyed consistently in our meetings with Union Pacific. Nevertheless, we are continuing to move ahead with our contract negotiations.**

**The traffic on all of these lanes originates at Rowley, Utah on the Union Pacific Railroad. The US Magnesium rail freight commodity on all of the preceding lanes is Chlorine STCC 2812815.**

**US Magnesium and UP have reached mutually satisfactory solutions in previous negotiations. We remain open to reasonable solutions and encourage UP to join together with US Magnesium again in developing an acceptable negotiated solution. If such does not occur we see a distinct possibility that US Magnesium will reluctantly decide to seek a rate reasonableness determination from the Surface Transportation Board.**

**If you have any questions please contact me.**

**Sincerely,**

**Howard Kaplan  
Vice President**

# **EXHIBIT B**



Privileged and Confidential

January 26, 2009

Dr. Howard Kaplan  
Vice President – Chemicals & By-Products  
US Magnesium I.L.C.  
238 N 2200 West  
Salt Lake City, UT 84116

Dear Howard

We are in receipt of your letter dated January 18, 2009 that requested common carrier tariff rates from Union Pacific. In response to that letter and request, we have published rates in the Tariff UP 4949, item 1000 subject to the terms and conditions of the Tariff UP 6007, item 695.

The rates are for chlorine (STCC 2812815) from Rowley, UT to destinations listed in your January 18<sup>th</sup> letter. Please note that rates for the destinations of Plaquemine, Alemania, Dupo, Festus, Houston, and Dallas were not included in the Tariff because the request for rates in these lanes was not reasonable for two reasons:

First, Union Pacific has provided rates to these destinations for the last four years and US Magnesium has never shipped on them. There is no indication that US Magnesium has the opportunity to ship on them now.

Secondly, it is not a reasonable request for service to expect Union Pacific to transport this deadly chemical over 1000 miles through several High Threat Urban Areas when there is an abundant supply of chlorine located at sources much closer to the destination. The shorter transportation distances for those other sources is consistent with the principles put forth in the recent federal safety regulations established for chlorine and similar commodities.

The Tariff UP 4949, Item 1000 will be effective February 15, 2009 [

]

If you have any questions or would like to discuss this matter further, please give me a call

Sincerely,

A handwritten signature in black ink, appearing to read "Bob".

Robert G. Worrell  
Senior Assistant Vice President - Chemicals

# **EXHIBIT C**



US Magnesium LLC

238 North 2200 West

Salt Lake City, Utah 84118-2921

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Via Electronic Mail

Mr. Robert G. Worrell  
Senior Assistant Vice President – Chemicals  
Union Pacific Railroad Company  
1400 Douglas Street  
Omaha Nebraska 68179

Dear Bob:

On January 16, 2009 US Magnesium submitted to UP a request pursuant to 49 USC §11101 and 49 CFR Part 1300 for 35 common carrier rates and associated service terms for the rail transportation of chlorine from US Magnesium's Rowley, Utah facility to various destinations. UP responded to this request on January 26 by publishing 28 of the requested rates in Tariff UP 4949, item 1000. These rates were established subject to the terms and conditions of Tariff UP 6607, item 695, and they went into effect on March 4, 2009. US Magnesium is shipping chlorine under these rates. However, UP refused to provide requested rates and service terms from Rowley to the following seven destinations:

Houston, TX  
Dallas, TX  
Allemania, LA  
Plaquemine, LA  
Dupo, IL  
Festus, MO  
Memphis, TN

On February, 18, 2009, UP followed up its refusal by filing a Petition for a Declaratory Order in Surface Transportation Board Finance Docket No. 35219. The petition asks the Board for an order declaring that UP does not have to provide to US Magnesium rates and service terms for four of the seven destinations: Houston, TX; Dallas TX; Allemania, LA; and Plaquemine, LA. On March 10, 2009, the date for US Magnesium and other interested parties to reply in opposition to UP's Petition, the STB issued a decision by which the Board on its own motion accepted the petition, instituted a declaratory order proceeding, and requested public comments from interested parties. According to the Board's decision, this proceeding will last at least until April 20, 2009 when "UP's rebuttal and reply to comments" are due. US Magnesium opposes UP's February 18 petition and believes the STB's decision to institute a proceeding was improper and harmful to US Magnesium's interests.

UP does not have any valid grounds for declining US Magnesium's lawful and proper request for common carrier rates to the seven destinations listed above. It is absolutely critical



US Magnesium LLC

238 North 2200 West

Salt Lake City, Utah 84118-2921

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that US Magnesium be able to transport its chlorine production by rail to multiple alternative destinations since there is very limited storage available at the Rowley facility, and chlorine production is determined by magnesium production, which is in turn controlled by market conditions. Accordingly, all of the 35 destinations for which US Magnesium requested rates must be available for rail deliveries of the Rowley facility's production in a given year. Indeed, production levels and sales needs may make it necessary for US Magnesium to promptly receive rate quotes from UP for transportation to additional destinations. UP's obligations and rights as a common carrier railroad do not include dictating where, and when US Magnesium can market the chlorine produced by its magnesium operations.

US Magnesium reiterates its request that UP provide the seven requested rates immediately. UP's refusal to provide or establish rates and service terms in response to the January 16, 2009 request is a violation of 49 U.S.C. §11101 and the Board's regulations, and US Magnesium intends to pursue all available avenues to obtain these rates and acceptable related service terms from UP at the earliest opportunity.

Sincerely

A handwritten signature in black ink, appearing to read 'Howard Kaplan'. The signature is fluid and cursive, with a long horizontal line extending to the right.

Howard Kaplan

# **EXHIBIT D**



**BUILDING AMERICA®**

Via Electronic Mail

March 20, 2009

Dr. Howard Kaplan  
Vice President – Chemicals & By-Products  
Us Magnesium LLC  
238 N 2200 West  
Sale Lake City, UT 84116

Dear Howard,

Thank you for your letter that I received on March 11, 2009, restating US Magnesium's request for rates to Houston, TX; Dallas, TX; Allemania, LA, Plaquemine, LA; Dupo, IL; Festus, MO; and Memphis, TN.

Union Pacific has published the requested rates to Dupo, IL; Festus, MO; and Memphis, TN, in Tariff UP 4949, Item 1000. Union Pacific continues to respectfully decline to quote rates to Houston, TX, Dallas, TX; Allemania, LA, and Plaquemine, LA. As you are aware, Union Pacific has filed a Petition for a Declaratory Order in Surface Transportation Board Finance Docket No. 35219. In the Petition, Union Pacific requested clarification from the Board regarding Union Pacific's obligation to publish these requested rates. When clarification is provided by the Board, Union Pacific will act in accordance with the guidance

Sincerely,

Robert G. Worrell  
Senior Vice President-Chemicals

**CERTIFICATE OF SERVICE**

I hereby certify that on this 23<sup>rd</sup> day of March 2009, I caused the foregoing Comments in Opposition and Request for Order Compelling UP to Provide Common Carrier Rates to be sent via overnight delivery to counsel for the Petitioner, Union Pacific Railroad, at

Tonya Conley  
Union Pacific Railroad Company  
1400 Douglas Street  
Omaha, NE 68179

  
\_\_\_\_\_  
David E Benz