

LAW OFFICES OF
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December 16, 2011

Ms. Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D. C. 20423

DEC 16 2011

RE: FD 35583 *Eastern Alabama Railway LLC v. Utilities Board of the
City of Sylacauga*

231503

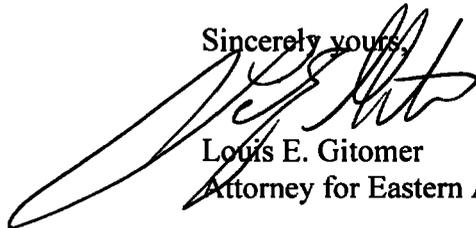
Dear Ms. Brown:

Enclosed for are the original and 10 copies of a Petition for Declaratory Order filed by the Eastern Alabama Railway LLC, a disc with the pleading in WORD and pdf format, and a check for the filing fee of \$1,400.

Please time and date stamp a copy of the Petition and return it with our messenger.

Thank you for your assistance. If you have any questions please call or email me.

Sincerely yours,



Louis E. Gitomer
Attorney for Eastern Alabama Railway LLC

Enclosure

FEE RECEIVED

DEC 16 2011

TRANSPORTATION BOARD

ENTERED
Office of Proceedings

DEC 16 2011

Part of
Public Record

FILED

DEC 16 2011

**SURFACE
TRANSPORTATION BOARD**

231503

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 35503

EASTERN ALABAMA RAILWAY LLC
v.
UTILITIES BOARD OF THE CITY OF SYLACAUGA

PETITION FOR DECLARATORY ORDER

Pursuant to 5 U.S.C. §554(c) and 49 U.S.C. §721(a), the Eastern Alabama Railway LLC (“EARY”) petitions the Surface Transportation Board (the “STB”) for an order declaring that the proposed condemnation of certain property of the EARY by the Utilities Board of the City of Sylacauga is preempted under 49 U.S.C. §10501.

In an order entered on November 17, 2011, the Honorable Robert B. Propst, Senior United States District Judge referred “this case to the Surface Transportation Board (‘STB’) to determine whether the ICCTA preempts the Board’s state court condemnation action and related issues.” *Utilities Board of the City of Sylacauga v. Eastern Alabama Railway LLC*, USDC, ND, Alabama Eastern Division, Case No.: 1:11-CV-03192-RBP, slip op. at 1 (footnote omitted). In the footnote, the Court stated that it “is, of course, amenable to the STB’s consideration of any issues raised by the parties which the STB is willing to address.” The Court’s Order and Memorandum Opinion are attached as Exhibit 1.

The case originated with a condemnation action brought by the Utilities Board in the Probate Court for Talladega County, Alabama, *Utilities Board of the City of Sylacauga v. Eastern Alabama Railway LLC*, Case No. 2011/197. The Utilities Board seeks to condemn a 20-

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 35503

EASTERN ALABAMA RAILWAY LLC
v.
UTILITIES BOARD OF THE CITY OF SYLACAUGA

PETITION FOR DECLARATORY ORDER



Scott G. Williams Esq.
Senior Vice President & General Counsel
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(410) 296-2250
Lou@lgraillaw.com

Attorneys for: EASTERN ALABAMA
RAILWAY LLC

Dated: December 16, 2011

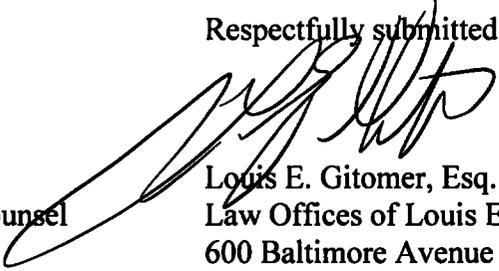
foot wide and 100.59 feet long sewer line “on, across, under and over the land ... and the right to construct and erect on, across, under and over said land” the railroad line, and a 20-foot wide and 100.83 feet long water line “on, across, under and over the land ... and the right to construct and erect on, across, under and over said land” the railroad line. The Utilities Board Complaint is attached as Exhibit 2. EARY contends that the condemnation and construction sought by the Utilities Board will interfere with its railroad operations and is therefore preempted under 49 U.S.C. §10501(b)(1).

EARY filed a Notice of Removal on September 2, 2011 (see Exhibit 3) and then a Motion to Refer on November 15, 2011 (see Exhibit 4).

EARY respectfully requests the STB to open a declaratory order proceeding to resolve the issues relating to preemption referred by Judge Propst.

Respectfully submitted,

Scott G. Williams Esq.
Senior Vice President & General Counsel
RailAmerica, Inc.
7411 Fullerton Street, Suite 300
Jacksonville, FL 32256
(904) 538-6329



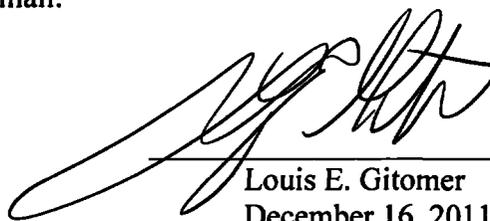
Louis E. Gitomer, Esq.
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600 Baltimore Avenue
Suite 301
Towson, MD 21204
(410) 296-2250
Lou@lgraillaw.com

Attorneys for: EASTERN ALABAMA
RAILWAY LLC

Dated: December 16, 2011

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served upon the Honorable Robert B. Propst and counsel for Utilities Board of the City of Sylacauga electronically and by pre-paid first class mail.



Louis E. Gitomer
December 16, 2011

EXHIBIT 1

.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION**

**UTILITIES BOARD OF THE CITY OF)
SYLACAUGA, a municipal corporation,)**

Plaintiff,)

v.)

CASE NO.: 1:11-cv-03192-RBP

**EASTERN ALABAMA RAILWAY, LLC,)
a limited liability company, et al.,)**

Defendant.)

**ORDER REFERRING CASE TO SURFACE
TRANSPORTATION BOARD**

Before the court are Plaintiff Utilities Board of the City of Sylacauga (“Plaintiff” or “Utilities Board”)’s Motion to Remand filed on October 3, 2011 and Defendant Eastern Alabama Railway, LLC (“Defendant” or Eastern Alabama)’s Motion to Refer this case to the Surface Transportation Board filed on November 15, 2011.

This court stays further consideration of the subject matter jurisdiction issue and the motion to remand prior to any declaration, advisory opinion, or declination to consider of the STB. The court refers this case to the Surface Transportation Board (“STB”) to determine whether the ICCTA preempts the Board’s state court condemnation action and related issues.¹ The court also orders the parties to provide the STB with a copy of this order and the memorandum opinion that accompanies it and to take all necessary steps to bring the referred issue before the STB.

The court also orders that the pending motions in this case are stayed pending the STB’s

¹ The court is, of course, amenable to the STB’s consideration of any issues raised by the parties which the STB is willing to address.

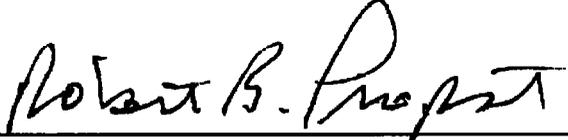
decision.

If the STB determines that the Board's claims are not preempted, the court will remand the case to the Talladega County Probate Court. If the STB renders any other decision or declines to render a decision, the court will further consider the case.

The court **ORDERS** the parties to notify the court of the status of proceedings before the Surface Transportation Board when the Board makes its ruling or after ninety (90) days have passed from the entry of this order, whichever comes first.

It is the intent of this court to refer all matters and issues for decisions, rulings, declarations and orders to the extent of the authority of the STB to address, declare, rule and order with regard thereto.

DONE and ORDERED this the 17th day of November, 2011.



ROBERT B. PROPST
SENIOR UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION**

UTILITIES BOARD OF THE CITY OF)	
SYLACAUGA, a municipal corporation,)	
)	
Plaintiff,)	
)	
v.)	CASE NO.: 1:11-cv-03192-RBP
)	
EASTERN ALABAMA RAILWAY, LLC,)	
a limited liability company, et al.,)	
)	
Defendant.)	

MEMORANDUM OPINION

This cause is before the court on plaintiff Utilities Board of the City of Sylacauga’s (“Utilities Board”) Motion to Remand its condemnation action against Eastern Alabama Railway, LLC (“Eastern Alabama”) filed on October 3, 2011.

FACTS AND PROCEDURAL HISTORY

Utilities Board filed a Complaint for Condemnation in the Probate Court of Talladega County, Alabama, on September 2, 2011, claiming an interest in certain land owned by Eastern Alabama in Talladega County and a right to condemn the property pursuant to Ala. Code § 11-50-314(11) (1975). Eastern Railway is engaged in Alabama in the business of interstate rail transportation services. The purpose for condemnation was described in the Complaint as follows:

ARTICLE THIRD: That the uses and purposes for which the said land, rights and interests hereinafter described are to be condemned and taken are in connection with the construction, operation and maintenance of subterranean water and sewer pipes, lines; facilities and other appliances necessary and convenient in

connection therewith, and plaintiff therefore seeks to acquire ways and rights-of-way of 20 feet in width on, across, under and over the land as hereinafter described in Parcel 1 and Parcel 2 of Article Fourth hereof, and the right to construct and erect on, across, under and over said land such subterranean water and sewer pipes, lines and facilities, and all appliances necessary, convenient and useful in connection therewith for such purposes, together with all the rights conferred by law and all that are necessary, useful and convenient to the enjoyment of said rights, ways and rights-of-way for such uses and purposes.

The property described in Parcels 1 and 2 of Article Fourth, or a portion thereof or interest therein, has previously been subjected to a public use. Plaintiff alleges that there is an actual necessity that the lands described in Parcel 1 and 2 of Article Fourth be condemned for the purposes described herein, and Plaintiff further alleges that the uses and purposes to which such lands are sought to be condemned will not materially interfere with the public use to which such lands have previously been devoted.

Eastern Alabama filed a Notice of Removal on September 2, 2011 pursuant to 28 U.S.C. § 1441(b) based on federal question jurisdiction under 28 U.S.C. § 1331. It argues the action is completely preempted by the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”), 42 U.S.C. § 10101 *et seq.* Eastern Alabama then filed an answer on September 8, 2011 which included affirmative defenses and a counterclaim for declaratory and injunctive relief. Utilities Board filed an Objection and Answer to Eastern Alabama’s Counterclaim on September 29, 2011 and a Motion to Remand the action on October 3, 2011, arguing that this court lacks subject-matter jurisdiction over this action because the action is not preempted by federal law, and that Eastern Alabama’s removal was procedurally defective because it did not obtain the consent to removal of all defendants.

SUMMARY OF THE ARGUMENTS¹

PLAINTIFF

¹ This court has not included all arguments and citations of the parties addressed in briefs, proposed orders, proposed opinions, etc.

First, Utilities Board argues that the particular condemnation action it seeks against Eastern Alabama is not preempted by federal law. It argues that the United States Supreme Court has only held three statutes to transform state law claims into federal claims based on the doctrine of complete preemption and that the ICCTA is not one of them. Eastern Alabama, it claims, relies on a “fundamental misunderstanding of the difference between *complete* preemption, which is sufficient for removal jurisdiction, and *ordinary*, or defensive preemption, which cannot confer federal subject-matter jurisdiction.” Eastern Alabama has only explained how the courts and the Surface Transportation Board (“STB”), the agency responsible for enforcing the ICCTA, have analyzed ordinary preemption issues under categorical preemption and as applied preemption, but has not extended its analysis to complete preemption.

The preemption provision contained in the ICCTA is “not nearly as sweeping as [Eastern Alabama] suggests.” Moreover, the mere presence of a preemption provision in a statute does not automatically entail preemption (citing *Island Park, LLC v. CSX Transportation*, 559 F.3d 96, 101 (2nd Cir. 2009)). The ICCTA’s preemption provision extends only “to the regulation of rail transportation, not to all things incidentally related to railroads,” (citing 49 U.S.C. § 10501(b)). (“Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.”) (Emphasis added)). Specifically, the ICCTA does not preempt a claim unless it *interferes* with the railroad’s operations.” (emphasis in original) (citing *Island Park*, 559 F.3d at 104). According to Utilities Board, courts and the STB have determined that underground sewer crossings such as the one it seeks to install on Eastern Alabama’s land do not interfere with railroad operations. (citing STB Order, *Lincoln Lumber Co.*, 2007 WL 2299735, at *2 (Aug. 10,

2007).

DEFENDANT

Eastern Alabama argues that the ICCTA, which abolished the Interstate Commerce Commission and replaced it with the STB, extended exclusive federal jurisdiction to matters relating to rail transportation which had formerly been reserved for State jurisdiction, (citing 49 U.S.C. § 1050(b)). Eastern Alabama asserts that its use of the property in question constitutes “rail transportation” within the meaning of the ICCTA’s preemption provision. Moreover, “the preemptive effect of the ICCTA is broad and sweeping,” (citing *CSX Transp. Inc. v. Georgia Pub. Serv. Comm’n*, 944 F. Supp. 1573, 1581-84 (N.D. Ga. 1996)). Both the express terms of the ICCTA and decisions by several courts and the STB indicate that Congress intended the ICCTA to preempt state law specifically in the case of condemnation.

Furthermore, Eastern Alabama argues that Utilities Board’s proposed condemnation *will* interfere with railroad operations:

Here, the property sought to be condemned by the Utilities Board is necessary to the operation and maintenance of active mainline tracks along the Eastern Alabama Railway which is used for freight services between Sylacauga, Alabama and Talladega, Alabama. The taking of this property would impair and inhibit the ability of Eastern Alabama to utilize the property for current and future railroad operations and maintenance or potential expansions or enhancement to the Eastern Alabama Railway. After the taking, the presence of the water and sewer pipes “**on, across, under, and over**” (*see* Complaint for Condemnation) the mainline tracks would pose serious operating, safety and maintenance concerns.

Eastern Alabama states that, “[t]he Utilities Board’s argument misapprehends the scope of the doctrine of primary jurisdiction which does not divest a federal court of original subject matter jurisdiction or removal jurisdiction over matters governed by the ICCTA.” Eastern Alabama is seeking in its counterclaim an order from this court “(1) declaring that the [STB] has

exclusive jurisdiction to decide whether the Utilities Board may condemn the railroad property at issue, and (2) enjoining the Utilities Board from proceeding in an Alabama state court to condemn the property at issue..." There is no resulting inconsistency between the relief sought in this court and the jurisdiction of the STB.

Eastern Alabama argues that the tax collector was either a nominal party or was fraudulently joined because she does not have an interest in the property that the Utilities Board is seeking to condemn.

MOTION TO REMAND STANDARD

Federal courts are courts of limited jurisdiction. *See Russell Corp. v. American Home Assurance Co.*, 264 F.3d 1040, 1050 (11th Cir. 2001). Therefore, federal courts have power to hear only those cases that they have been authorized to hear by the Constitution or by Congress. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). The limited nature of federal court jurisdiction has caused the Eleventh Circuit to favor remand of removed cases where federal jurisdiction is not absolutely clear. *Russell Corp.*, 264 F.3d at 1050. The removal statute is to be construed narrowly with doubt construed against removal. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 107-09 (1941); *University of South Alabama v. American Tobacco Co.*, 168 F.3d 405, 411 (11th Cir. 1999).

A case may be removed to federal court only if the case could have been brought originally in federal court pursuant to the court's diversity or federal question jurisdiction. *See* 28 U.S.C. § 1441(a). The determination of whether federal jurisdiction exists must be made on the face of the plaintiff's well-pleaded complaint. *Pacheco De Perez v. AT & T Co.*, 139 F.3d 1368, 1373 (11th Cir. 1998). An anticipated or even inevitable federal defense generally will not

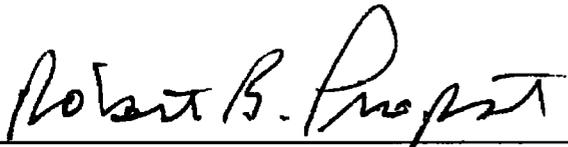
support removal. *Id.* at 1373 (citing *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392-93 (1987)).

The burden of establishing federal jurisdiction is placed on the defendant, with all doubts resolved in favor of remand, *Diaz v. Sheppard*, 85 F.3d 1502, 1505 (11th Cir. 1996).

CONCLUSION

The court has considered the briefs, etc. filed by the parties and conducted a recorded telephone conference on November 16, 2011. This court is persuaded by Judge Proctor's cited order. The court will refer issues to the Surface Transportation Board. The court will stay further consideration of the remand motion until the STB has either rendered a declaration or declined the reference.

This the 17th day of November, 2011.



ROBERT B. PROPST
SENIOR UNITED STATES DISTRICT JUDGE

EXHIBIT 2

UTILITIES BOARD OF THE CITY
OF SYLACAUGA,
a corporation,

Plaintiff,

v.

EASTERN ALABAMA RAILWAY,
et al.,

Defendants.

IN THE PROBATE COURT FOR
TALLADEGA COUNTY, ALABAMA

CASE NO.: 2011/197

NOTICE TO DEFENDANT

TO: Eastern Alabama Railway, LLC
c/o C T Corporation System
2 North Jackson Street, Suite 605
Montgomery, AL 36104

You are hereby notified that Utilities Board of the City of Sylacauga, a corporation, has filed its written complaint in this Court, a copy of which is attached hereto, seeking to condemn and to acquire the lands, rights and interests therein described for ways and rights-of-way within which to construct, operate and maintain subterranean water and sewer pipes, lines; facilities and other appliances necessary and convenient in connection therewith for the delivery, supply and sale to the public of water on, across and under strips of land according to the final location survey of the said ways and rights-of-way hereto made by the plaintiff, the said strips of land and the lands of which the same are a part being situated in Talladega County, Alabama, and being set forth in said complaint.

The hearing of said complaint has been set by this Court for the 6th day of October, 2011, at 10 o'clock a.m., and you are hereby notified to answer or object to such complaint at or prior to such hearing. Notice of said complaint and of the day so appointed for the hearing thereof is hereby given you.

Witness my hand this 25th day of August, 2011.

Billy L. Atkinson
Judge of the Talladega County Probate Court

UTILITIES BOARD OF THE CITY
OF SYLACAUGA,
a corporation,

Plaintiff,

v.

EASTERN ALABAMA RAILWAY,
LLC, ET AL.,

Defendants.

IN THE PROBATE COURT FOR
TALLADEGA COUNTY, ALABAMA

CASE NO.: _____

FILED
08/23/2011 04:16 PM
BILLY L. ATKINSON
PROBATE JUDGE
TALLADEGA County, ALABAMA

COMPLAINT FOR CONDEMNATION

Comes now Utilities Board of the City of Sylacauga ("Utilities Board"), a municipal corporation of the state of Alabama, and files this complaint against Eastern Alabama Railway, LLC ("EARLY") and all others claiming an interest in the land described below, for an order of condemnation of the lands, rights, and interests therein, hereinafter described, and shows unto the Court as follows:

ARTICLE FIRST: That the plaintiff, Utilities Board, is a municipal corporation organized and existing under the laws of the State of Alabama, with its principal place of business in Talladega County, Alabama.

That the following party against whom this complaint is filed is a domestic limited liability company doing business in the State of Alabama:

<u>NAME</u>	<u>ADDRESS</u>	<u>INTEREST</u>
Eastern Alabama Railway, LLC	2413 Hill Road Sylacauga, AL 35151	Owner of Interest in Property

**REGISTERED AGENT
FOR SERVICE:**
C T Corporation System
2 North Jackson Street, Suite 605
Montgomery, AL 36104

That the following person against whom this complaint is filed is over the age of nineteen (19), is of sound mind, and is a resident of the State of Alabama:

<u>NAME</u>	<u>ADDRESS</u>	<u>INTEREST</u>
Sally K. Flowers Revenue Commissioner	Talladega County Courthouse 1 Courthouse Square Talladega, AL 35161	Tax Lien

That the said defendants are the owners of, or the owners of an interest in or on, the land hereinafter described and herein set out.

ARTICLE SECOND: Plaintiff is a municipal corporation having the right by its charter to own, maintain, and operate a water and sewer system for customers in and contiguous to the City of Sylacauga, and the rights, ways and rights-of-way herein described are sought to be condemned for its water and sewer pipes, lines, and facilities for that purpose. Plaintiff has the right to condemn pursuant to section 11-50-314(11) of the 1975 Code of Alabama, as amended.

ARTICLE THIRD: That the uses and purposes for which the said land, rights and interests hereinafter described are to be condemned and taken are in connection with the construction, operation and maintenance of subterranean water and sewer pipes, lines; facilities and other appliances necessary and convenient in connection therewith, and plaintiff therefore seeks to acquire ways and rights-of-way of 20 feet in width on, across, under and over the land as hereinafter described in Parcel 1 and Parcel 2 of Article Fourth hereof, and the right to construct and erect on, across, under and over said land such subterranean water and sewer pipes, lines and facilities, and all appliances necessary, convenient and useful in connection therewith for such purposes, together with all the rights conferred by law and all that are necessary, useful and convenient to the enjoyment of said rights, ways and rights-of-way for such uses and purposes.

The property described in Parcels 1 and 2 of Article Fourth, or a portion thereof or interest therein, has previously been subjected to a public use. Plaintiff alleges that there is an actual necessity that the lands described in Parcel 1 and 2 of Article Fourth be condemned for the purposes described herein, and Plaintiff further alleges that the uses and purposes to which such lands are sought to be condemned will not materially interfere with the public use to which such lands have previously been devoted.

ARTICLE FOURTH: That the said rights, ways, rights-of-way and other interests sought to be condemned for such uses and purposes are on, across, over, under and adjacent to strips of land described hereinafter, according to the final location survey of the said ways and rights-of-way heretofore made by the plaintiff, the said strips of land and the lands of which the same are a part being situated in Talladega County, Alabama, and described as follows:

Parcel #1

A 20 foot sewer line easement being 10 feet in equal width on each side of the following described line: Commence at a concrete monument in place being the Northwest corner of Section 35, Township 21 South, Range 3 East, Talladega County, Alabama; thence proceed South 89° 12' 38" East along the North boundary of said quarter-quarter section for a distance of 752.06 feet; thence proceed South 00° 47' 22" West for a distance of 97.03 feet a point on the Northerly boundary of a railroad right-of-way, said point being the centerline of said sewer line easement and the point of beginning. From this beginning point proceed South 23° 41' 31" East along the centerline of said sewer line easement for a distance of 100.59 feet to a point on the Southerly boundary of said railroad right-of-way.

A diagram portraying Parcel #1, the property sought to be taken, and any remainder is attached to this complaint as Exhibit A.

The said **EARY** and **Sally K. Flowers**, as Revenue Commissioner, are the owners of the land described above and/or of an interest on or in said lands.

Parcel #2

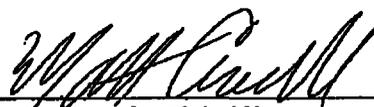
A 20 foot water line easement being 10 feet in equal width on each side of the following described line: Commence at a concrete monument in place being the Northwest corner of Section 35, Township 21 South, Range 3 East, Talladega County, Alabama; thence proceed South 89° 12' 38" East along the North boundary of said quarter-quarter section for a distance of 762.46 feet; thence proceed South 00° 47' 22" West for a distance of 93.49 feet a point on the Northerly boundary of a railroad right-of-way, said point being the centerline of said water line easement and the point of beginning. From this beginning point proceed South 23° 43' 13" East along the centerline of said water line easement for a distance of 100.83 feet to a point on the Southerly boundary of said railroad right-of-way.

A diagram portraying Parcel #2, the property sought to be taken, and any remainder is attached to this complaint as Exhibit A.

The said **EARY** and **Sally K. Flowers**, as Revenue Commissioner, are the owners of the land described above and/or of an interest on or in said lands.

WHEREFORE, PREMISES CONSIDERED, plaintiff prays that this Court will make and enter an order appointing a day for the hearing of this complaint; that a copy of the complaint and notice of hearing date be served upon the defendants; and that upon such hearing, an order will be made by this Court condemning to the uses and purposes of this plaintiff, all the rights, authority and power sought and described herein, and for such other and further orders as may be authorized by law.

UTILITIES BOARD OF
THE CITY OF SYLACAUGA

By 
Attorney for Plaintiff

OF COUNSEL:

W.T. CAMPBELL, JR.
Attorney at Law
400 West Third Street
Sylacauga, Alabama 35150
(256) 245-5268

BALCH & BINGHAM LLP
James A. Bradford
Matthew F. Carroll
David R. Burkholder
P. O. Box 306
Birmingham, Alabama 35201
(205) 251-8100

STATE OF ALABAMA)
JEFFERSON COUNTY)

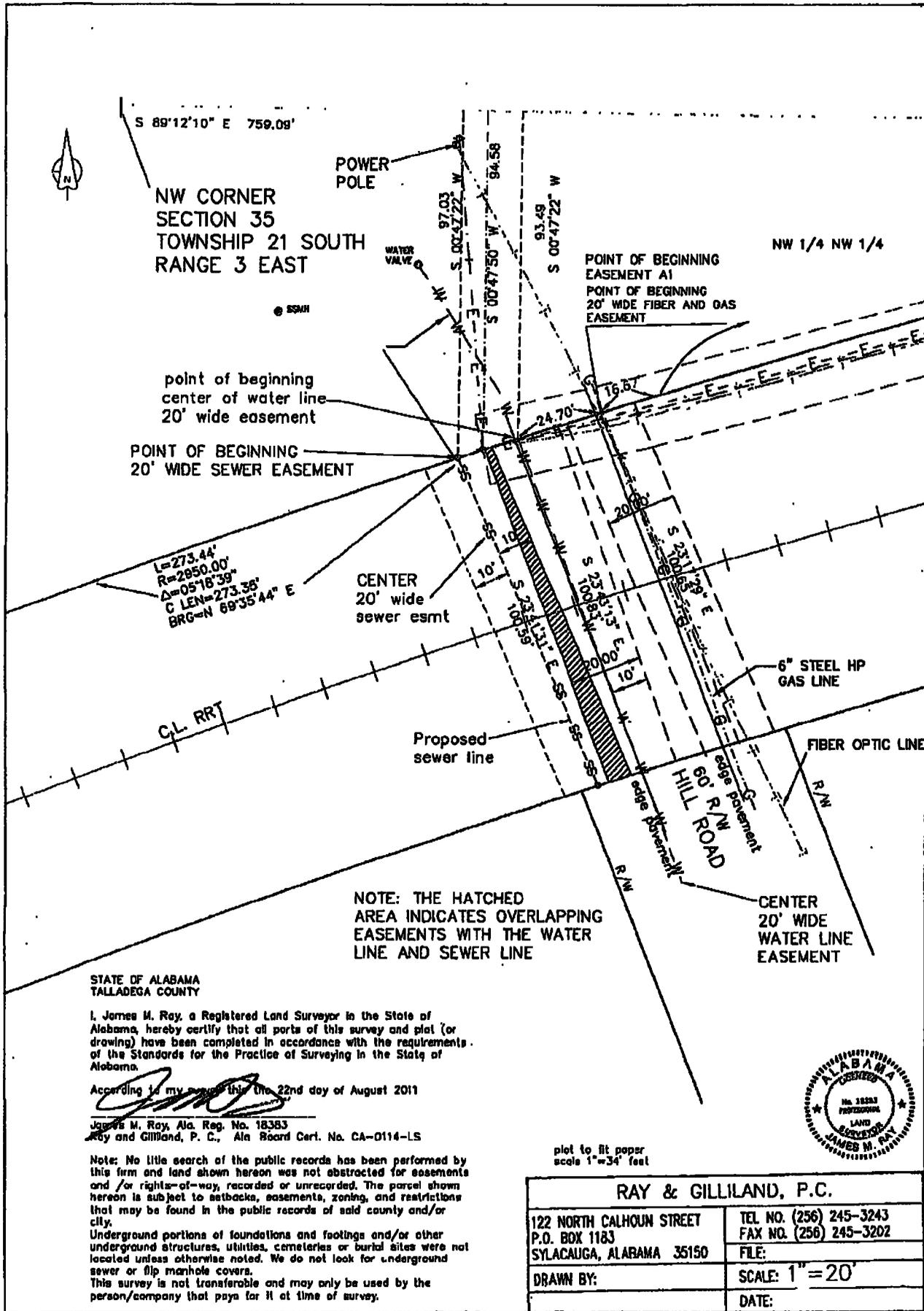
Before me, the undersigned authority, personally appeared, MATT CARROLL, who being by me first duly sworn, deposes and says that he is one of the attorneys for the plaintiff, Utilities Board of the City of Sylacauga, and has the authority to make this affidavit and to institute and prosecute the foregoing Complaint for the condemnation of the lands, rights, and interests therein described, and that the statements contained in the foregoing complaint are true and correct as therein alleged or upon information and belief as therein alleged.

Matt Carroll

Sworn to and subscribed before me this 23rd day of August, 2011

Pracy D. Miller
Notary Public

My Commission Expires: 5-1-15



NW CORNER
SECTION 35
TOWNSHIP 21 SOUTH
RANGE 3 EAST

NW 1/4 NW 1/4

point of beginning
center of water line
20' wide easement

POINT OF BEGINNING
20' WIDE SEWER EASEMENT

L=273.44'
R=2950.00'
Δ=05°18'39"
C LEN=273.36'
BRG=N 69°35'44" E

CENTER
20' wide
sewer esrmt

POINT OF BEGINNING
EASEMENT A1
POINT OF BEGINNING
20' WIDE FIBER AND GAS
EASEMENT

6" STEEL HP
GAS LINE

FIBER OPTIC LINE

HILL ROAD
60' R/W
edge pavement

CENTER
20' WIDE
WATER LINE
EASEMENT

NOTE: THE HATCHED
AREA INDICATES OVERLAPPING
EASEMENTS WITH THE WATER
LINE AND SEWER LINE

STATE OF ALABAMA
TALLADEGA COUNTY

I, James M. Roy, a Registered Land Surveyor in the State of Alabama, hereby certify that all parts of this survey and plat (or drawing) have been completed in accordance with the requirements of the Standards for the Practice of Surveying in the State of Alabama.

According to my records this was done the 22nd day of August 2011

James M. Roy, Ala. Reg. No. 18383
Roy and Gilliland, P. C., Ala Board Cert. No. CA-0114-LS

Note: No title search of the public records has been performed by this firm and land shown hereon was not abstracted for easements and /or rights-of-way, recorded or unrecorded. The parcel shown hereon is subject to setbacks, easements, zoning, and restrictions that may be found in the public records of said county and/or city.

Underground portions of foundations and footings and/or other underground structures, utilities, cemeteries or burial sites were not located unless otherwise noted. We do not look for underground sewer or flip manhole covers.
This survey is not transferable and may only be used by the person/company that pays for it at time of survey.



plot to fit paper
scale 1"=34' feet

RAY & GILLILAND, P.C.	
122 NORTH CALHOUN STREET P.O. BOX 1183 SYLACAUGA, ALABAMA 35150	TEL NO. (256) 245-3243 FAX NO. (256) 245-3202
DRAWN BY:	FILE:
	SCALE: 1" = 20'
	DATE:

Billy L. Atkinson
Judge of Probate
P. O. Box 737
Talladega, Alabama 3516

REGISTERED MAIL



7009 0060 0001 5330 9759



Eastern AL. Railway
c/o C.T. Corp Sys
2 N. Jackson St, Ste 605
Montgomery, AL 36104

3610453621

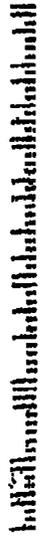


EXHIBIT 3

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION**

UTILITIES BOARD OF THE CITY OF SYLACAUGA, a municipal corporation,)	
)	
Plaintiff,)	
)	
v.)	
)	CIVIL ACTION NO.
)	
EASTERN ALABAMA RAILWAY, LLC, a limited liability company, et al.,)	
)	
Defendants.)	
)	
)	

NOTICE OF REMOVAL

Defendant Eastern Alabama Railway, LLC ("Eastern Alabama") hereby gives notice of the removal of this action to the United States District Court for the Northern District of Alabama, Eastern Division, pursuant to 28 U.S.C. §§ 1441(b) and 1446. As grounds for this removal, Eastern Alabama shows as follows:

Federal Question

1. This action is removable pursuant to 28 U.S.C. § 1441(b) based on federal question jurisdiction under 28 U.S.C. § 1331 because this action is completely preempted by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), 42 U.S.C. §10101 *et seq.* The Utilities Board of the City of Talladega ("Utilities Board") improperly seeks to condemn property owned by Eastern Alabama for use in connection with water and sewer lines.

2. The ICCTA abolished the Interstate Commerce Commission and replaced it with the Surface Transportation Board ("STB") and also extended *exclusive* Federal jurisdiction to matters relating to rail transportation which had formerly been reserved for State jurisdiction. See 49 U.S.C. § 1050(b) ("The jurisdiction of the [STB] . . . is *exclusive* . . . [T]he remedies provided under this part with respect to regulation of rail transportation are *exclusive and preempt* the remedies provided under Federal or State law.") (emphasis added). The statute defines "rail transportation" expansively to encompass any property, facility, or equipment related to the movement of passengers and property by rail and any related services. 49 U.S.C. § 10102(9). The preemptive effect of the ICCTA is broad and sweeping, and courts have observed that "it is difficult to imagine a broader statement of Congress' intent to preempt statute regulatory authority over railroad operations" that that contained in section 10501(b). *CSX Transp. Inc. v. Georgia Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1581-84 (N.D. Ga. 1996).

3. The express terms of the ICCTA demonstrate that Congress intended the ICCTA to preempt state law, and several courts and the STB have specifically held that the use of state law to condemn railroad property is preempted by ICCTA. See, e.g., *City of Lincoln v. Surface Transp. Bd.*, 414 F.3d 858, 861-62 (8th Cir. 2005); *Wisconsin Central Ltd. v City of Marshfield*, 160 F. Supp. 2d 1009, 1013-14 (W.D. Wis. 2000); *City of Lincoln-Petition for Declaratory Order*, STB Finance Docket No. 34425, 2004 WL 1802302, at *4 (S.T.B. Aug. 11, 2004).

4. As one court held: "[C]ondemnation is regulation The City is impermissibly attempting to subject to state law property that Congress specifically put out of reach." *Wisconsin Central*, 160 F. Supp. 2d at 1013-14. "Giving effect to the

condemnation authority of municipalities over railroad property conflicts with Congress' purpose in enacting the ICCTA." *Id.* at 1015.

5. Courts and the STB have distinguished between two types of preempted state actions or regulations: "categorically preempted" actions and actions that are preempted "as applied." *Harris County, Texas v. Union Pacific Railroad Co.*, Civil Action No. H-10-4363, 2011 WL 3489607, at *5 (S.D. Tex. Aug. 9, 2011); *see also CSX Transp., Inc.-Petition for Declaratory Order*, STB Finance Docket No. 34662, 2005 WL 1024490, at **2-3 (S.T.B. May 3, 2005). The first category includes state or local regulations that prevent or govern activities directly regulated by the STB. *Harris County, Texas*, 2011 WL 3489607, at *5. Such regulations are preempted on the basis of the act of regulation itself and not the reasonableness of the particular state or local action. *Id.* The second category – "as applied" preemption – requires "a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation." *Id.*

6. Under circumstances similar to those here, where a City sought to condemn a portion of a railroad right of way for creating a recreational area with a pedestrian trails, the STB held that the ICCTA preempted the City's proposed condemnation, citing the railway's potential future plans for the property and safety concerns for users of the proposed trail. *City of Lincoln*, 2004 WL 1802302, at *3-4. The Eighth Circuit affirmed the STB's determination, noting: "Condemnation is a permanent action, and it can never be stated with certainty at what time any particular part of a right of way may become necessary for railroad uses." *City of Lincoln*, 414 F.3d at 862.

7. Similarly, where a County sought to condemn a railroad crossing, the Court held that even "railroad crossing disputes may be preempted 'as applied,' if the crossings 'impede rail operations or pose undue safety risks.'" *Harris County, Texas v. Union Pacific Railroad Co.*, Civil Action No. H-10-4363, 2011 WL 3489607, at *5 (S.D. Tex. Aug. 9, 2011).

8. Here, the property sought to be condemned by the Utilities Board is necessary to the operation and maintenance of active mainline tracks along the Eastern Alabama Railway which is used for freight service between Sylacauga, Alabama and Talladega, Alabama. The taking of this property would impair and inhibit the ability of Eastern Alabama to utilize the property for current and future railroad operations and maintenance or potential expansions or enhancement to the Eastern Alabama Railway. After the taking, the presence of the water and sewer pipes "*on, across, under, and over*" (*see* Complaint for Condemnation) the mainline tracks would pose serious operating, safety and maintenance concerns.

9. Pursuant to the ICCTA and the decisions interpreting the statute, it is clear that the Utilities Board has no authority to condemn the property at issue. Congress has completely removed the power of the states (and their political subdivisions) to regulate railroads and their property in the manner sought by the Utilities Board. The Utilities Board "is impermissibly attempting to subject to state law property that Congress specifically put out of reach." *Wisconsin Central*, 160 F. Supp. 2d at 1013-14.

10. When a federal statute wholly displaces state-law causes of action through complete preemption, the state claim can be removed. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003). In effect, complete preemption allows a state law complaint to be

recharacterized as an action arising under federal law, justifying removal to federal court. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 64 (1987). Because the ICCTA completely preempts the claim asserted by plaintiff, removal is appropriate. *See, e.g., PCI Transp. Inc. v. Fort Worth & W.R.R. Co.*, 418 F.3d 535, 543-45 (5th Cir. 2005) (affirming denial of motion to remand and holding that claims were completely preempted by the ICCTA); *Fayard v. Northeast Vehicle Services, LLC*, 490 F. Supp. 2d 134, 142 (D. Mass. 2007) (holding that defendants properly removed case to federal court because claims were completely preempted by ICCTA).

Nominal Party

11. Defendant Sally K. Flowers was named as a party to this action in her official capacity as the Tax Collector of Talladega County, Alabama and is either a nominal party or is fraudulently joined because she does not have an interest in the property that the Utilities Board is seeking to condemn; therefore, her consent is not required for the case to be removed because she is a nominal party. *See, e.g., Tri-Cities Newspapers, Inc. v. Tri-Cities Printing Pressmen & Ass'ts Local 349*, 427 F.2d 325, 327 (5th Cir. 1970); *Landsell v. American Home Products Corp.*, No. Civ.A CV99S2110NE, 1999 WL 33548541, at *7 (N.D. Ala. Oct. 26, 1999); *Miles v. Kilgore*, 928 F. Supp. 1071, 1075 n. 2 (N.D. Ala. 1996).

Venue

12. Venue is proper in the Northern District of Alabama, Eastern Division, under 28 U.S.C. § 1441(a) because the state court where the case has been pending is located in this District.

Other Matters

13. This action was filed on August 25, 2011, by plaintiff Utilities Board in the Probate Court of Talladega County, Alabama. The case number in the state court action is 2011/197.

14. No further proceedings have been had in this action. The time within which to answer the Complaint has not expired, and defendant Eastern Alabama has not appeared in this case in the Probate Court of Talladega County.

15. This Notice of Removal is timely in accordance with 28 U.S.C. § 1446(b) as it is being filed within 30 days after defendant Eastern Alabama was served with the Complaint for Condemnation on August 29, 2011.

16. True and correct copies of all process, pleadings and orders which have to date been served upon defendant Eastern Alabama in the action in the Probate Court of Talladega County are attached as Exhibit A and made a part hereof as if fully set forth herein.

17. Defendant Eastern Alabama will promptly give written notice of the removal to all parties and will file a copy of this notice of removal with the Clerk of the Talladega County Probate Court which is the state court where the case has been pending.

WHEREFORE, defendant Eastern Alabama requests that the United States District Court for the Northern District of Alabama, Eastern Division, assume jurisdiction of this civil action, make and enter such Orders as may be necessary to bring before this Court all proper parties for disposition hereof, and submits that the giving of written notice to plaintiff and the filing of a copy of this Notice of Removal with the Clerk of the

Probate Court of Talladega County, Alabama shall effect the removal of said action to this Court.

This the 2nd day of September, 2011.

Respectfully submitted,

/s/ Turner B. Williams

Turner B. Williams

John F. De Buys, Jr.

Mark M. Lawson

Attorneys for Defendant, Eastern

Alabama Railway, LLC

OF COUNSEL:

BURR & FORMAN LLP

3400 Wells Fargo Tower

420 North 20th Street

Birmingham, Alabama 35203

Telephone: (205) 251-3000

Fax: (205) 458-5100

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served on the following by directing same to their office addresses through first-class, United States mail, postage prepaid, on this the 2nd day of September, 2011:

W.T. Campbell, Jr.
Attorney at Law
400 West Third Street
Sylacauga, Alabama 35150

James A. Bradford
Matthew F. Carroll
David R. Burkholder
Balch & Bingham LLP
P.O. Box 306
Birmingham, Alabama 35201

/s/ Turner B. Williams _____

OF COUNSEL

EXHIBIT A

UTILITIES BOARD OF THE CITY
OF SYLACAUGA,
a corporation,

Plaintiff,

v.

EASTERN ALABAMA RAILWAY,
et al.,

Defendants.

IN THE PROBATE COURT FOR
TALLADEGA COUNTY, ALABAMA

CASE NO.: 2011/197

NOTICE TO DEFENDANT

TO: Eastern Alabama Railway, LLC
c/o C T Corporation System
2 North Jackson Street, Suite 605
Montgomery, AL 36104

You are hereby notified that Utilities Board of the City of Sylacauga, a corporation, has filed its written complaint in this Court, a copy of which is attached hereto, seeking to condemn and to acquire the lands, rights and interests therein described for ways and rights-of-way within which to construct, operate and maintain subterranean water and sewer pipes, lines; facilities and other appliances necessary and convenient in connection therewith for the delivery, supply and sale to the public of water on, across and under strips of land according to the final location survey of the said ways and rights-of-way hereto made by the plaintiff, the said strips of land and the lands of which the same are a part being situated in Talladega County, Alabama, and being set forth in said complaint.

The hearing of said complaint has been set by this Court for the 16th day of October, 2011, at 10 o'clock a.m., and you are hereby notified to answer or object to such complaint at or prior to such hearing. Notice of said complaint and of the day so appointed for the hearing thereof is hereby given you.

Witness my hand this 25th day of August, 2011.

Billy L. Atkinson
Judge of the Talladega County Probate Court

**UTILITIES BOARD OF THE CITY
OF SYLACAUGA,**
a corporation,

Plaintiff,

v.

**EASTERN ALABAMA RAILWAY,
LLC, ET AL.,**

Defendants.

**IN THE PROBATE COURT FOR
TALLADEGA COUNTY, ALABAMA**

CASE NO.: _____

FILED
08/23/2011 04:16 PM
BILLY L. ATKINSON
PROBATE JUDGE
TALLADEGA County, ALABAMA

COMPLAINT FOR CONDEMNATION

Comes now Utilities Board of the City of Sylacauga ("Utilities Board"), a municipal corporation of the state of Alabama, and files this complaint against Eastern Alabama Railway, LLC ("EARY") and all others claiming an interest in the land described below, for an order of condemnation of the lands, rights, and interests therein, hereinafter described, and shows unto the Court as follows:

ARTICLE FIRST: That the plaintiff, Utilities Board, is a municipal corporation organized and existing under the laws of the State of Alabama, with its principal place of business in Talladega County, Alabama.

That the following party against whom this complaint is filed is a domestic limited liability company doing business in the State of Alabama:

<u>NAME</u>	<u>ADDRESS</u>	<u>INTEREST</u>
Eastern Alabama Railway, LLC	2413 Hill Road Sylacauga, AL 35151	Owner of Interest in Property

**REGISTERED AGENT
FOR SERVICE:**
C T Corporation System
2 North Jackson Street, Suite 605
Montgomery, AL 36104

That the following person against whom this complaint is filed is over the age of nineteen (19), is of sound mind, and is a resident of the State of Alabama:

<u>NAME</u>	<u>ADDRESS</u>	<u>INTEREST</u>
Sally K. Flowers Revenue Commissioner	Talladega County Courthouse 1 Courthouse Square Talladega, AL 35161	Tax Lien

That the said defendants are the owners of, or the owners of an interest in or on, the land hereinafter described and herein set out.

ARTICLE SECOND: Plaintiff is a municipal corporation having the right by its charter to own, maintain, and operate a water and sewer system for customers in and contiguous to the City of Sylacauga, and the rights, ways and rights-of-way herein described are sought to be condemned for its water and sewer pipes, lines, and facilities for that purpose. Plaintiff has the right to condemn pursuant to section 11-50-314(11) of the 1975 Code of Alabama, as amended.

ARTICLE THIRD: That the uses and purposes for which the said land, rights and interests hereinafter described are to be condemned and taken are in connection with the construction, operation and maintenance of subterranean water and sewer pipes, lines; facilities and other appliances necessary and convenient in connection therewith, and plaintiff therefore seeks to acquire ways and rights-of-way of 20 feet in width on, across, under and over the land as hereinafter described in Parcel 1 and Parcel 2 of Article Fourth hereof, and the right to construct and erect on, across, under and over said land such subterranean water and sewer pipes, lines and facilities, and all appliances necessary, convenient and useful in connection therewith for such purposes, together with all the rights conferred by law and all that are necessary, useful and convenient to the enjoyment of said rights, ways and rights-of-way for such uses and purposes.

The property described in Parcels 1 and 2 of Article Fourth, or a portion thereof or interest therein, has previously been subjected to a public use. Plaintiff alleges that there is an actual necessity that the lands described in Parcel 1 and 2 of Article Fourth be condemned for the purposes described herein, and Plaintiff further alleges that the uses and purposes to which such lands are sought to be condemned will not materially interfere with the public use to which such lands have previously been devoted.

ARTICLE FOURTH: That the said rights, ways, rights-of-way and other interests sought to be condemned for such uses and purposes are on, across, over, under and adjacent to strips of land described hereinafter, according to the final location survey of the said ways and rights-of-way heretofore made by the plaintiff, the said strips of land and the lands of which the same are a part being situated in Talladega County, Alabama, and described as follows:

Parcel #1

A 20 foot sewer line easement being 10 feet in equal width on each side of the following described line: Commence at a concrete monument in place being the Northwest corner of Section 35, Township 21 South, Range 3 East, Talladega County, Alabama; thence proceed South 89° 12' 38" East along the North boundary of said quarter-quarter section for a distance of 752.06 feet; thence proceed South 00° 47' 22" West for a distance of 97.03 feet a point on the Northerly boundary of a railroad right-of-way, said point being the centerline of said sewer line easement and the point of beginning. From this beginning point proceed South 23° 41' 31" East along the centerline of said sewer line easement for a distance of 100.59 feet to a point on the Southerly boundary of said railroad right-of-way.

A diagram portraying Parcel #1, the property sought to be taken, and any remainder is attached to this complaint as Exhibit A.

The said EARY and Sally K. Flowers, as Revenue Commissioner, are the owners of the land described above and/or of an interest on or in said lands.

Parcel #2

A 20 foot water line easement being 10 feet in equal width on each side of the following described line: Commence at a concrete monument in place being the Northwest corner of Section 35, Township 21 South, Range 3 East, Talladega County, Alabama; thence proceed South 89° 12' 38" East along the North boundary of said quarter-quarter section for a distance of 762.46 feet; thence proceed South 00° 47' 22" West for a distance of 93.49 feet a point on the Northerly boundary of a railroad right-of-way, said point being the centerline of said water line easement and the point of beginning. From this beginning point proceed South 23° 43' 13" East along the centerline of said water line easement for a distance of 100.83 feet to a point on the Southerly boundary of said railroad right-of-way.

A diagram portraying Parcel #2, the property sought to be taken, and any remainder is attached to this complaint as Exhibit A.

The said EARY and Sally K. Flowers, as Revenue Commissioner, are the owners of the land described above and/or of an interest on or in said lands.

WHEREFORE, PREMISES CONSIDERED, plaintiff prays that this Court will make and enter an order appointing a day for the hearing of this complaint; that a copy of the complaint and notice of hearing date be served upon the defendants; and that upon such hearing, an order will be made by this Court condemning to the uses and purposes of this plaintiff, all the rights, authority and power sought and described herein, and for such other and further orders as may be authorized by law.

UTILITIES BOARD OF
THE CITY OF SYLACAUGA

By


Attorney for Plaintiff

OF COUNSEL:

W.T. CAMPBELL, JR.
Attorney at Law
400 West Third Street
Sylacauga, Alabama 35150
(256) 245-5268

BALCH & BINGHAM LLP
James A. Bradford
Matthew F. Carroll
David R. Burkholder
P. O. Box 306
Birmingham, Alabama 35201
(205) 251-8100

STATE OF ALABAMA)
JEFFERSON COUNTY)

Before me, the undersigned authority, personally appeared, MATT CARROLL, who being by me first duly sworn, deposes and says that he is one of the attorneys for the plaintiff, Utilities Board of the City of Sylacauga, and has the authority to make this affidavit and to institute and prosecute the foregoing Complaint for the condemnation of the lands, rights, and interests therein described, and that the statements contained in the foregoing complaint are true and correct as therein alleged or upon information and belief as therein alleged.

Matt Carroll

Sworn to and subscribed before me this 23rd day of August, 2011

Pracy D. White
Notary Public

My Commission Expires: 5-1-15

**UTILITIES BOARD OF THE CITY
OF SYLACAUGA,
a corporation,**

Plaintiff,

v.

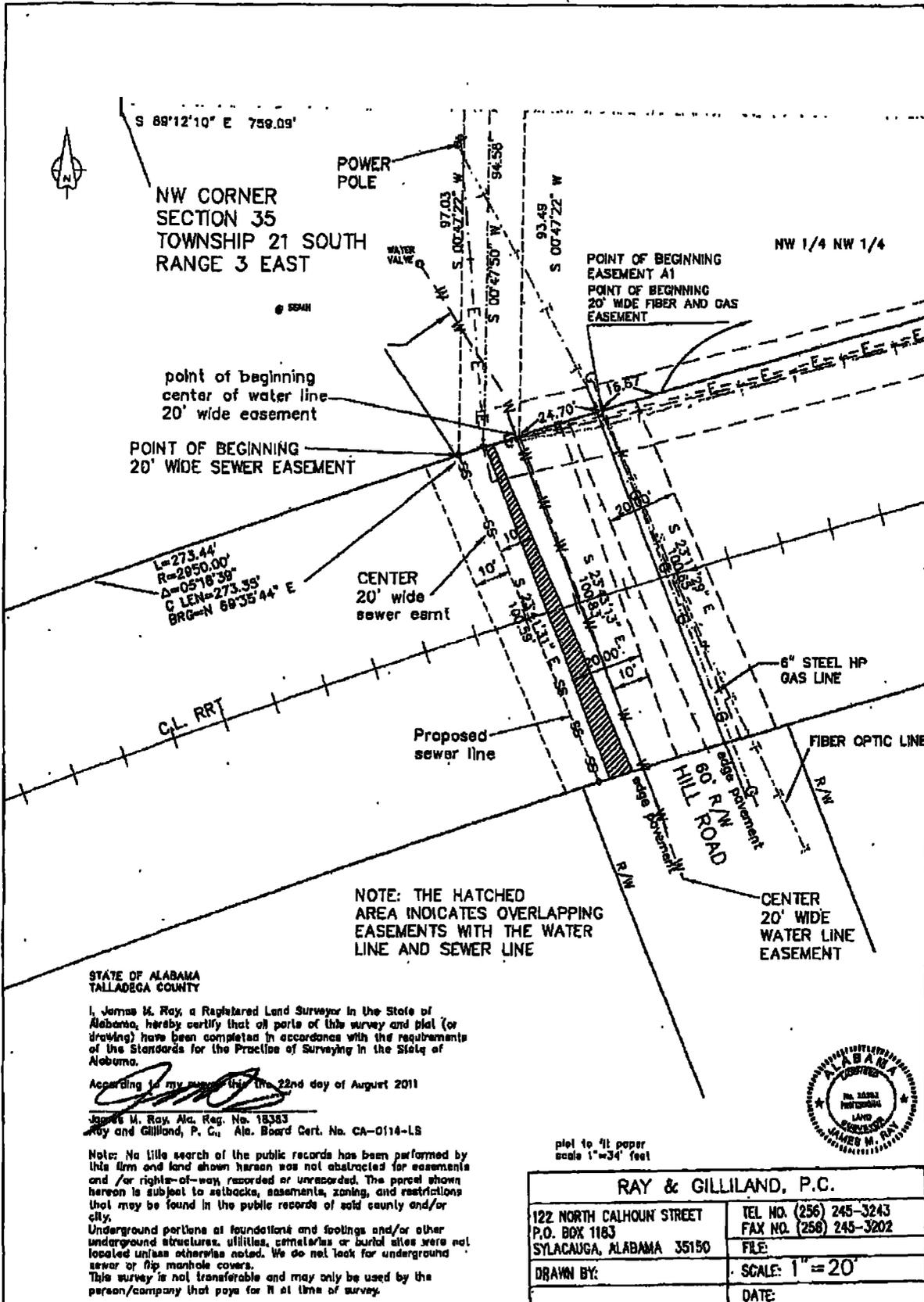
**EASTERN ALABAMA RAILWAY,
LLC, ET AL.,**

Defendants.

**IN THE PROBATE COURT FOR
TALLADEGA COUNTY, ALABAMA**

CASE NO.: _____

**EXHIBIT A TO
COMPLAINT FOR CONDEMNATION**



**UTILITIES BOARD OF THE CITY
OF SYLACAUGA,**
a corporation,

Plaintiff,

v.

EASTERN ALABAMA RAILWAY,
et al.,

Defendants.

**IN THE PROBATE COURT FOR
TALLADEGA COUNTY, ALABAMA**

CASE NO.: 2011/197

NOTICE TO DEFENDANT

09 7009 0080 0001 5330 9759

TO: Eastern Alabama Railway, LLC
c/o CT Corporation System
2 North Jackson Street, Suite 605
Montgomery, AL 36104

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only. No Insurance Coverage Provided)
For delivery information visit our website at www.usps.com

OFFICIAL USE

Postage	\$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$

Send To: EARLY c/o CT. Cor Sys
2 N Jackson St Ste 605
Mont, AL 36104

PS Form 3811, February 2004

1. Article Addressed to:
Eastern AL Railway
c/o CT Corp. Sys
2 N Jackson St, Ste 605
Montgomery, AL 36104

2. Article Number:
7009 0080 0001 5330 9759

3. Package Type:
 Certified Mail
 Registered
 Insured Mail
 Registered Mail (Extra Fee)
 Express Mail
 Return Receipt for Merchandise
 C.O.D.
 Yes
 No

4. Restricted Delivery? (Extra Fee)
 Yes
 No

5. Is delivery address different from item 1? Yes
 No
If YES, enter delivery address below:

6. Signature of Addressee:
[Signature]

7. Signature of Sender:
[Signature]

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day

so appointed for the hearing thereof is he
Witness my hand this 25th day

**UTILITIES BOARD OF THE CITY
OF SYLACAUGA,**
a corporation,

Plaintiff,

v.

EASTERN ALABAMA RAILWAY,
et al.,

Defendants.

**IN THE PROBATE COURT FOR
TALLADEGA COUNTY, ALABAMA**

CASE NO.: 2011/197

NOTICE TO DEFENDANT

CM 7009 0080 0001 5330 9742

TO: Sally K. Flowers, Revenue Commissioner
Talladega County Courthouse
Post Office Box 1017
Talladega, Alabama 35161

U.S. Postal Service
CERTIFIED MAIL, RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)
For delivery information visit our website at www.usps.com

OFFICIAL USE

Postage	\$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$

Postmark: AUG 22 2011 TALLADEGA, AL

Send To: Sally Flowers
PO Box 1017
Talla AL 35161

2426 DEES 1000 0900 6002

PS Form 3811, February 2004 Domestic Return Receipt 7009 0080 0001 5330 9742

1. Article Addressed to:
Sally Flowers
Rev. Comm.
P.O. Box 1017
Talladega, AL 35161

SENDER COMPLETE THIS SECTION

2 4 6 8 10 12 14 16 18 20 22 24 26 28 30 32 34 36 38 40 42 44 46 48 50 52 54 56 58 60 62 64 66 68 70 72 74 76 78 80 82 84 86 88 90 92 94 96 98 100

2. Service Type
 Certified Mail
 Registered Mail
 Insured Mail
 G.O.D.
 Registered Delivery/Extra Fee
 Yes
 Express Mail
 Return Receipt for Merchandise

3. Signature
 Agent
 Addressee
 Receiver by (Print or Stamp)
S.M.C. Flowers
 Date of Delivery
 Yes
 No

4. Is delivery address different from item 1? Yes No
 If YES, enter shipping address below:

COMPLETE THIS SECTION ON DELIVERY

so appointed for the hearing thereof is heret

Witness my hand this 25th day of

EXHIBIT 4

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION**

**UTILITIES BOARD OF THE CITY OF
SYLACAUGA, a municipal corporation,**

Plaintiff,

v.

**EASTERN ALABAMA RAILWAY, LLC,
a limited liability company, et al.,**

Defendants.

**CIVIL ACTION NO.
1:11-cv-03192-RBP**

**EASTERN ALABAMA'S MOTION TO REFER CASE TO SURFACE
TRANSPORTATION BOARD**

Defendant Eastern Alabama Railway, LLC ("Eastern Alabama"), pursuant to 28 U.S.C. § 1336 and the doctrine of primary jurisdiction, requests that this Court enter an Order referring this case to the Surface Transportation Board. Moreover, even if the parties do not raise the issue of primary jurisdiction, the Court may do so *sua sponte*. See, e.g., *Syntek Semiconductor Co. v. Microchip Tech., Inc.*, 307 F.3d 775, 780 n.2 (9th Cir. 2002). This motion is based on the pleadings and briefs in this case.

WHEREFORE, Eastern Alabama moves this Court to enter an Order referring this case to the Surface Transportation Board.

This the 15th day of November 2011.

Respectfully submitted,

/s/ Turner B. Williams

Turner B. Williams

John F. De Buys, Jr.

Mark M. Lawson

Attorneys for Defendant,

Eastern Alabama Railway, LLC

OF COUNSEL:

BURR & FORMAN LLP

3400 Wells Fargo Tower

420 North 20th Street

Birmingham, Alabama 35203

Telephone: (205) 251-3000

Fax: (205) 458-5100

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November 2011, I have filed the foregoing via the Court's CM/ECF System, which will automatically send a copy of the foregoing to attorneys of record in this case, and that I have also sent a copy of the foregoing by United States First Class mail, postage prepaid, on any non-CM/ECF participants listed below:

W.T. Campbell, Jr.
Attorney at Law
400 West Third Street
Sylacauga, Alabama 35150

James A. Bradford
Matthew F. Carroll
David R. Burkholder
Balch & Bingham LLP
Post Office Box 306
Birmingham, Alabama 35201

Sally K. Flowers
Talladega County Revenue Commissioner
Post Office Box 1017/1119
Talladega, Alabama 35161

/s/ Turner B. Williams
OF COUNSEL