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October 3, 2008

223726

BY HAND DELIVERY

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

Re: Docket No. 42110, Seminole Electric Cooperative, Inc. v. CSX Transportation, Inc.

Dear Secretary Quinlan:

Enclosed for filing in the referenced docket please find an original and 10 copies of the Petition for Injunctive Relief of Seminole Electric Cooperative, Inc. Also enclosed is a word perfect diskette containing the Petition.

An additional copy of the Petition also is enclosed. Kindly indicate receipt and filing of the Petition by time-stamping this extra copy and returning it to the bearer of this letter.

Thank you for your attention to this matter.

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Sincerely,

Kelvin J. Dowd
An Attorney for Seminole Electric Cooperative, Inc.

KJD lad

BEFORE THE
SURFACE TRANSPORTATION BOARD

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223726

SEMINOLE ELECTRIC COOPERATIVE, INC.	)	
Complainant,	)	
v.	)	**Docket No. 42110**
CSX TRANSPORTATION, INC.	)	
Defendant.	)	

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PETITION FOR INJUNCTIVE RELIEF

Pursuant to 49 C.F.R. Part 1117 and 49 U.S.C. § 721(b)(4), Seminole Electric Cooperative, Inc. ("SECI") hereby petitions the Surface Transportation Board ("Board") for an order enjoining CSX Transportation, Inc. ("CSXT") from applying the rates determined under Tariff CSXT-8200-Series[1] ("Tariff Rates") to the transportation of coal by CSXT to SECI's Seminole Generating Station ("SGS"), pending the resolution of SECI's challenge to the reasonableness of such rates, which challenge was initiated by the filing of SECI's Verified Complaint in this docket. The Tariff Rates are scheduled to take effect on January 1, 2009, upon the expiration of the parties' coal transportation contract, denominated as Contract CSXT-68681 ("Contract"). In lieu of the Tariff Rates,

[1] The specific rates that would apply to SECI are those set forth in Section 9 of Supplement 2 to Tariff CSXT-8200-Series, and are discussed in greater detail in SECI's Verified Complaint at ¶¶ 10-11

CSXT should be permitted to charge only the rates applicable under the Contract as of its expiration date, subject to future, quarterly adjustments based on changes in the Rail Cost Adjustment Factor, unadjusted for productivity improvements ("RCAFU"). as determined by the Board pursuant to 49 U.S.C. § 10708.[2]

SECI's Complaint was filed pursuant to 49 U.S.C. §§ 11701 and 11704, and seeks the establishment of just and reasonable rates for unit train coal transportation service to SGS from (1) CSXT-served mine origins and origin groups in Kentucky, Illinois, Indiana, West Virginia and Pennsylvania; and (2) CSXT-served coal transfer terminal facilities at Charleston, South Carolina. By this Petition, SECI requests an order limiting the rates that CSXT can collect pending the outcome of the Complaint proceeding. As a condition of this relief, SECI will keep account of the difference between charges paid and those that would have been paid under the Tariff Rates, and stipulates that if the Board ultimately finds any portion of the proposed increases to be reasonable, SECI will refund the appropriate amount to CSXT, with interest at the prescribed regulatory rate.

[2] The terms of the Contract -- including rates -- are confidential However, they are known to both CSXT and SECI, and their disclosure in this Petition is not essential to its consideration by the Board or the granting of the relief requested Should the Board deem otherwise, however, SECI is prepared to submit the relevant terms of the Contract under seal

I. BACKGROUND

SECI is a non-profit electric generation and transmission cooperative headquartered in Tampa, Florida. SECI generates, sells and transmits bulk supplies of wholesale electricity, primarily to its ten member distribution cooperatives, which are also not-for-profit entities. The members, in turn, provide retail electric distribution services to residential, commercial and industrial consumers. Currently, SECI and its members serve nearly 900,000 metered residential and business consumers in 46 of Florida's 67 counties.

The primary energy resource serving SECI and its member systems is SGS, which is located in Northeast Florida near Palatka, in Putnam County. SGS currently consumes approximately 4,000,000 tons of coal each year, a volume which is expected to increase to 6,000,000 tons upon completion of construction of a new generating unit.

With rare exceptions, CSXT or its predecessor companies have delivered all the coal consumed at SGS since it commenced commercial operation. Since late 1998 and through the date of this Petition, all coal shipped to the station has been transported by CSXT in direct rail service from various origins pursuant to a contract that SECI negotiated with CSXT and entered into pursuant to 49 U.S.C. § 10709. As noted above, the parties' Contract will expire on December 31, 2008. As outlined in SECI's Verified Complaint (at ¶ 7-8), SECI endeavored for almost two (2) years to reach agreement with CSXT on rates and other terms for a new contract, without success. Commencing January 1, 2009, therefore, coal will be transported by CSXT to SGS in common carrier service.

CSXT has confirmed that the common carriage rates applicable to coal movements to SGS are those set forth in Section 9 of Supplement 2 to Tariff CSXT-8200-Series. *See* Complaint ¶¶ 8-11. Based upon an average lading weight of 120 tons per SECI carload, as of October 1, 2008 the following charges (which include the CSXT "fuel surcharge") apply to SECI coal shipments:

Origin	Rate per Ton
Dotiki, KY	$49.22
Epworth, IL	$51.05
Warrior, KY	$48.72
Elk Creek, KY	$48.57
Sullivan, IN	$52.45
Robinson Run, WV	$57.46
Bailey Mine, PA	$59.82
Charleston, SC	$33.83

As compared to the rates that SECI currently pays under the Contract, the Tariff Rates represent increases well in excess of 100%.[3] As set forth below, requiring SECI to pay the Tariff Rates beginning January 1, 2009 will result in a dramatic added financial burden on SECI, and will cause irreparable harm both to SECI and its members' ratepayers. Conversely, CSXT will suffer little financial harm, if any, if the Board grants the injunctive relief requested

[3] The measure of the rate increases is attested by John W Geeraerts, SECI's Assistant General Manager and Chief Financial Officer, whose Verified Statement accompanies this Petition

during the pendency of the Complaint proceeding. For these reasons, SECI's Petition should be granted.

II. ARGUMENT

The governing statute provides that the Board may "when necessary to prevent irreparable harm, issue an appropriate order . . . ." 49 U.S.C. § 721(b)(4).[4] In determining whether to issue an injunction pursuant to this authority, the following four factors are considered: (1) whether petitioner has made a strong showing that it is likely to prevail on the merits of the case; (2) whether petitioner has shown that without such relief, it will be irreparably harmed; (3) whether the issuance of an injunction would substantially harm the other parties interested in the proceedings; and (4) whether awarding relief is in the public interest. *See DeBruce Grain, Inc. v. Union Pacific R R*, Docket No. 42023 (STB served December 22, 1997); *see also Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977).

As demonstrated below, analysis of the four injunction factors weighs heavily in favor of SECI's request for an order limiting CSXT's rate increases pending a determination as to the reasonableness of the Tariff Rates.

[4] This provision was added to the law as part of the ICC Termination Act of 1996, and was intended in part as a substitute for the Board's predecessor's power to suspend scheduled rate increases pending investigation, which was repealed by the same statute *See* H R Conf Rep 104-122, 1995, U S C C A N 850, 855

1. There is a Substantial Likelihood That SECI Will Prevail on the Merits

In determining preliminarily whether SECI is likely to prevail on the merits of its rate Complaint, it is not necessary to find that eventual success is a matter of "mathematical probability." Rather, the requirement of a "substantial likelihood" of success is evaluated relative to the other three factors. *Holiday Tours*, 559 F.2d at 843. If there is "fair ground for litigation and thus for more deliberative investigation, a [party] should not be required at an early stage to draw the fine line between mathematical probability and a substantial probability of success." *Id.* at 844; *see also Hamilton Watch Co. v Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953) ("to justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, wholly without doubt." and it is usually enough that the plaintiff raises questions going to the merits that are "so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation."): *see also Charlie's Girls Inc v Revlon, Inc*, 483 F.2d 953, 954 (2d Cir. 1973) (petitioner requesting a permanent injunction "assumes the burden of demonstrating either a combination of probable success and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor.")

There is Board precedent for the issuance of injunctive relief to restrain rail rate increases pending the outcome of an underlying complaint, based on a showing of a likelihood of success on the merits grounded on the magnitude of the proposed increase. In *Arizona Public Service Co. and PacifiCorp. v. The Burlington Northern and Santa Fe Railway Co.*, 2003 WL 21055725 (May 12, 2003) ("*APS*"), BNSF sought to impose a 64% rate increase on the complainant's coal traffic. While the Board acknowledged that "[o]rdinarily, where there is a dispute about the appropriate rate, the equities favor allowing the carrier's rate to control pending our resolution of the dispute," the Board was "concerned that allowing BNSF to charge its proposed $6.91 per ton rate, even if only temporarily, could expose Arizona to significant financial hardship. Arizona presumably has not budgeted for such a dramatic, sudden, and unexpected increase in its transportation costs." *Id.* at *5. Therefore, "[t]o avoid irreparable harm to Arizona from a massive and unexpected increase in its transportation rate," the Board exercised its authority under Section 721(b)(4) and ordered BNSF not to increase its then-current rate:

> Accordingly, we will remove the prescriptive effect of our prior rate order and exercise our broad authority under 49 U.S.C. 721(b)(4) to prevent irreparable harm. Specifically, we instruct BNSF to collect no more than $4.21 per ton while the reopening is pending, but we direct both parties to keep account of the amounts paid during the pendency of the proceeding on reopening and, at the conclusion, to make the other party whole for what it would be entitled to but for this direction to maintain the status quo while we recalculate the maximum reasonable rate. If we conclude that the maximum reasonable rate is below $4.21, we will order BNSF to reimburse Arizona for all overpayments (plus interest) as of the effective date of this decision. Similarly, if we find that the maximum reasonable rate

> is now above $4.21, we will instruct Arizona to remit to BNSF the underpayments (plus interest) as of the effective date of this decision. In this manner, neither party will suffer irreparable harm while we recalculate the maximum reasonable rate.

Id. at *6.

In the present case, SECI is facing abrupt, massive rate increases that are, on a percentage basis, nearly twice the level that the Board in *APS* found warranted injunctive relief during the pendency of the underlying rate complaint.[5] As shown in the accompanying Verified Statement of Thomas D. Crowley, the proposed increases produce revenue-to-variable cost ratios of between 364.5% and 706.3%, a clear indicator both of the severe financial burden that the increases would impose on SECI, and of the likelihood that SECI will prevail in demonstrating that the resulting rates are unreasonable. Moreover, as explained by Mr. Geeraerts in his Verified Statement, SECI is willing to stipulate to the use of the "keep account" measure endorsed by the Board in *APS*. Under these circumstances, and in light of the irreparable harm threatened by the CSXT rate increases discussed next, the first prong of the *Holiday Tours* test should be deemed satisfied.

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[5] As noted *supra*, the increases proposed by CSXT would raise SECI's coal transportation rates by over 100% overnight. By comparison, the Board's predecessor expressed serious concern over economic dislocations resulting from one-time rate increases of only 15%, during its deliberations over the methodologies to be used to assess the reasonableness of rail rates on coal *See Coal Rate Guidelines -- Nationwide*, 1 I C C 2d 520, 546 (1981)

2. In the Absence of an Injunction <u>SECI Will be Irreparably Harmed</u>

If the Board fails to issue an injunction pursuant to 49 U.S.C. § 721(b)(4), not only will SECI suffer an undue financial burden, both SECI and its members' retail ratepayers will be irreparably harmed. Over a two-year period, the magnitude of the Tariff Rate increases on coal moving to SGS would exceed $230 million, which is more than twice the value of SECI's entire current equity. V.S. Geeraerts at 6. As Mr. Geeaerts explains, disputed cost increases such as the CSXT rate increases at issue can be accounted for by SECI in one (1) of two (2) ways, which often are used in combination: (1) SECI can include the increases in its current wholesale rates to its members, subject to refund should such increases be found unreasonable in the future; or (2) SECI can defer recognition of a portion of the increases for member wholesale rate purposes until the Complaint proceeding is concluded, whereupon any increases found to be reasonable in excess of the amounts not deferred would be recovered through future member rates. V.S. Geeraerts at 4-7 However, under either approach, harm would result which could not be compensated by a subsequent Board reparations order.

a. <u>Current Recognition of the Rate Increases</u>

One alternative treatment available to SECI is to recognize the CSXT rate increases in its current wholesale rates to the SECI members, collecting the revenues needed to pay the higher rates subject to later refunds once this proceeding is concluded. However, SECI's member distribution cooperatives then

would pass the charges on to their 900,000 metered consumers through their retail rates. V.S. Geeraerts at 4-5. The impact of this would be significant, since CSXT is proposing to more than double SECI's annual coal transportation costs.
Mr. Geeraerts' current estimate is that the CSXT rate increase would raise fuel related generation costs at SGS by \$12.17 per megawatt-hour, which is an increase in variable production costs of more than 40%. V.S. Geeraerts at 4. This translates directly into a substantial increase in the members' ratepayers' monthly electric bills. *Id.*

In the event that the Board upholds SECI's Complaint and orders prescriptive relief and reparations, any refunds of unreasonable charges collecting during the pendency of the proceeding would pass from SECI to its members and, ultimately, to their ratepayers. As Mr. Geeraerts explains, however, the ratepayers who absorb the higher charges in the first instance would not necessarily be the same people who would share in a reparations award some 18-24 months later. *Id.* at 5. The counties in Florida that are served by SECI's members experience annual population shifts, as people migrate in or out of the counties, along with natural population turnover through births and deaths on an ongoing basis. As the Board's predecessor recognized, the fact that challenged rail rate increases on a utility's coal traffic would be paid by a customer base that likely will have changed by the time a reparations award is made supports a finding of irreparable harm. *See San Antonio, Texas v. Burlington Northern Railroad Company*, Docket No. 36180 (ICC served May 12, 1986) at 2.

b. Deferring Recognition of the Rate Increase

In lieu of recognizing 100% of the proposed rate increases, SECI could elect to defer a portion for future recovery once this proceeding is concluded. SECI could not possibly defer all of the increase, as the measure of the higher rail rates over only two (2) years is more than twice SECI's current equity. Any amounts that were deferred, however, effectively would have to be financed, as SECI lacks a present capacity to simply absorb the higher costs. V.S. Geeraerts at 6-7. SECI's present cost of credit (65-112 basis points over the LIBOR rate) is estimated at 4% or more (*id* at 7), a rate which is more than four times the current 91-day U.S. Treasury Bill rate that governs interest on reparations awards under 49 C.F.R. Part 1141. As such, should SECI be forced to pay the Tariff Rates beginning in January 2009, it never could be fully compensated for its additional costs were it to prevail in the underlying Complaint proceeding. V.S. Geeraerts at 7.

3. CSXT Will Not be Substantially Harmed if the Board Issues an Injunction

CSXT will not be substantially harmed if the Board enters an order under 49 U.S.C. § 721(b)(4) precluding CSXT from applying the Tariff Rates under the circumstances described in this Petition, including SECI's willingness to stipulate to a "keep account" measure. While the magnitude of the proposed increase -- $230 million in the first two years alone -- is dramatic in the context of

SECI's generation fuel costs, it represents a very modest share of CSXT's overall revenues. Indeed, the full extent of the increases over a two-year period is less than 60% of CSXT's *net earnings* for a *single quarter. See* http://www.investors.csx.com/phoenix.zhtml?c=92932&p=irol-irhome ("20082Q Report"). ("CSX Corporation today reported 2nd Quarter 2008 earnings of $385 million, or a record 93 cents per share. Last year, CSX reported 2nd Quarter earnings of $324 million or 72 cents per share").

The rates currently in effect for coal transportation to SGS are the product of a voluntary, bilateral agreement between CSXT and SECI, and thus by definition provide CSXT with what it considers to be an acceptable level of profit and/or return on its investment in the SGS movement. Under the terms of the order sought by SECI, the value of those rates to CSXT would be fully protected and maintained through quarterly adjustments based on changes in the RCAFU, and should any part of the increases at issue be found reasonable, CSXT would be made whole for the associated interim revenue deferrals, with interest. Under the circumstances, the balance of potential hardships to the parties strongly favors the requested relief.

4. An Injunction is Consistent with the Public Interest

Finally, issuance of the requested injunction is consistent with the public interest. Wholly apart from the very legitimate question whether an action that abruptly more than doubles an electric cooperative's fuel transportation costs ever could be thought to serve the public's interests,[6] SECI previously demonstrated that if it is compelled to pay the increased rates during the pendency of this proceeding, a potentially significant segment of its members' ratepayers would experience irreparable economic injury. *See* pp. 9-10 , supra; *San Antonio, supra.* There is no hypothetical public interest "benefit" that could result from the CSXT rate increases which might offset this harm.

While CSXT's motive in establishing the Tariff Rates for application to the SGS coal movement may not be particularly relevant to the question of the reasonableness of those rates, the carrier's action clearly exhibits an indifference to the economic considerations of SECI's members and their ratepayers. Those ratepayers represent the public interest in this dispute, and it is entirely appropriate that the Board exercise its statutory authority as a counterweight to that indifference.

III. CONCLUSION

Based upon the foregoing, and the accompanying testimony of Messrs. Geeraerts and Crowley, the Board should enter an order pursuant to 49 U.S.C. § 721(b)(4), enjoining CSXT from increasing the rates for coal transportation to SGS from the levels provided under SECI's Contract as of December 31, 2008, other than by the quarterly change in the RCAFU, pending the outcome of this proceeding. The order should be subject to the stipulation that

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[6] *Coal Rate Guidelines*, 1 I.C.C 2d at 546.

SECI will keep account of the difference between charges actually paid and those which would have been paid under the Tariff Rates, and will refund to CSXT any portion thereof which ultimately is found to be reasonable, together with interest calculated under 49 C.F.R. Part 1144.

Respectfully submitted,

SEMINOLE ELECTRIC
COOPERATIVE, INC.

By: Kelvin J. Dowd
Christopher A. Mills
Daniel M. Jaffe
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Dated: October 3, 2008

VERIFIED STATEMENT
OF
JOHN W. GEERAERTS

My name is John W. Geeraerts. I am Assistant General Manager and Chief Financial Officer of Seminole Electric Cooperative, Inc. ("SECI"), headquartered in Tampa, Florida. I have been in my current position for approximately one year. Prior to that, I held the positions of Senior Vice President and Chief Financial Officer, and Vice President, Financial Services of SECI for two years and five and one-half years, respectively.

In each of my positions with SECI over the past eight and one half years, I have held increasing levels of responsibility for all matters related to SECI's finances and financial strategies. These include general financing operations and capital projects, accounting and tax matters, management of debt obligations and credit facilities, and procurement. I also have and have had the job of developing and proposing recommended annual budgets for consideration by the SECI Board of Trustees, which among other things include development of the revenue requirements used in the calculation of rates for projected wholesale power transactions between SECI and its members, and the impact of changes in the cost of generating electricity at the Seminole Generating Station ("SGS") -- including fuel costs -- on the rates charged by SECI to its members, which directly affect the retail rates set by SECI's members.

Effective January 1, 2009, CSX Transportation, Inc. ("CSXT") has proposed to increase its rates for the transportation of coal from origins in the Illinois Basin and Appalachia to SGS by more than 100%, over the levels that SECI currently pays under a contract set to expire at the end of this year. SECI has challenged the reasonableness of these increases before the Surface Transportation Board ("STB"), and seeks an order prescribing the maximum rates that CSXT can charge for this service. It is my understanding that if SECI pays the increased rates while this proceeding is pending and the STB later determines that the increases were unreasonable, CSXT could be required to refund to SECI the difference between the rates paid and the maximum reasonable rates, together with interest. I further understand that the interest rate that would apply is set by regulation (49 C.F.R. Part 1141) at the coupon equivalent yield of 91-day U.S. Treasury Bills. As of the week of September 22, 2008, that rate was substantially less than 1.00%.

The purpose of my Statement is to describe the two alternative methods available to SECI to account for the disputed portion of the CSXT rates should SECI be forced to pay them while its case is pending, and the unavoidable financial consequences of each alternative for SECI and its members' ratepayers. While the precise split has not finally been determined, SECI would use a combination of these two methods to address any increased charges that SECI incurs.

SECI's Relationship With Its Members

SECI's members are individual distribution cooperatives that subscribe by contract to acquire from SECI substantially all of the electricity needed to serve their customers' requirements, which electricity in part is produced from SGS and other facilities that SECI owns and/or in which SECI holds a participation interest. SECI provides wholesale electric service to its members, who in turn distribute and sell electrical service to the approximately 900,000 metered ratepayers within their general service territory in peninsular Florida. The retail rates paid by these consumers are directly influenced by SECI's generation fuel costs, including in particular the cost of coal delivered to SGS. Simply put, SECI's fuel costs are the primary driver of the wholesale rates to its members, which in turn drive the retail rates to the ultimate consumers.

SECI's formal governing body is its Board of Trustees, which is comprised of representatives from each member. Full time executive staff -- such as myself -- retain responsibility for the day-to-day management of SECI, and develop recommendations for presentation to the Board of Trustees on major issues respecting budgets, capital projects, cooperative governance, and the establishment of wholesale rates, which issues are resolved by the Board. The decision concerning how to account for increased coal transportation charges imposed by CSXT during the pendency of a maximum rate proceeding is one which ultimately would be made by the Board of Trustees.

Alternative No. 1: Recognize the Increased Cost In Current Rates

If SECI is compelled to pay the dramatically increased CSXT rates while this dispute is pending, the first accounting treatment option open to the cooperative would be to recognize the higher charges in the current SECI fuel budget, and recover the increased costs through wholesale rates to its members, subject to subsequent refund. Under this approach, the SECI wholesale rates to its members would include the higher charges, and those members then would pass the charges on to their consumers through their retail rates. The impact would be significant, for as I noted above, CSXT is proposing to more than double SECI's annual coal transportation bill. My current estimate is that the CSXT rate increase would raise generation costs at SGS by $12.17 per megawatt-hour, which is a production cost hike of more than 40%. This translates into an expected retail rate increase for our members of approximately $6.50 per month, for the average ratepayer.

Were the STB to rule in SECI's favor on its rail rate complaint and order CSXT to refund the excess coal freight charges paid over the maximum levels determined in the proceeding, SECI would recognize those refunds through reductions in the fuel costs passed through its wholesale rates to its members, which reductions in turn would be passed along to the members' retail ratepayers. However, the retail ratepayers who would benefit from the later refunds are not necessarily the same people who would have paid the higher electric bills as a consequence of the CSXT rate increases.

The counties in Central Florida that are served by SECI's members experience regular shifts in population attributable to migration (both in and out) and natural increases and decreases (births and deaths) that are typical of the state as a whole. According to the most recent available census data (from 2000), the ten-year period ending in 2000 saw a net change (increase) of almost 1,000,000 residents among these Central Florida counties. On a daily basis, the estimated rate of change was almost 850 per day, a trend which has continued throughout this decade. More directly, data collected by the Bureau of Economic and Business Research at the University of Florida indicates that for the state of Florida as a whole, 56% of the homeowners have lived in their present homes for five years or less, which would not be unexpected for a state traditionally characterized by a shifting population.

It is my understanding that an STB rail rate proceeding easily can take two (2) years or more to complete. If SECI is required to pay higher CSXT rates in 2009 and 2010, then receives a refund of overcharges in 2011 or 2012, the retail ratepayers who bore the additional costs of a pass-through of higher wholesale rates would not necessarily be the same ratepayers who would receive compensatory refunds after the conclusion of the proceeding.

<u>Alternative No. 2: Defer A Portion of the Increased Cost</u>

In lieu of fully recognizing and passing through its wholesale rates the increased CSXT coal transportation charges, SECI has the option of deferring recognition of a portion of the disputed payments pending final resolution of this proceeding. Under this approach, if SECI was required to pay the higher rail rates it would do so, but would defer recovery of a portion of these higher rail costs from its members through its wholesale rates until the STB proceeding was concluded. Consistent with the provisions of Statement of Financial Accounting Standards No. 71, and subject to Board of Trustees approval, SECI would recover any deferred amounts that were in excess of an STB-ordered refund through future wholesale member rates, and would credit against future wholesale rates any refund which exceeds the amounts deferred.

Over a two-year period, the magnitude of the scheduled CSXT rate increases on coal moving to SGS would exceed $230 million, which is more than twice the value of SECI's entire current equity. As such, it would not be possible for SECI to defer recovery of even most -- much less all -- of the increase. Additionally, pre-existing budgetary commitments will strictly limit SECI's available cash in 2009 and 2010. Therefore, any portion of the CSXT rate increase which is not recovered through current wholesale rates would have to be financed.

SECI presently maintains credit lines totaling $220 million, for general purposes. However, substantial portions of those credit facilities are committed to support necessary and long-planned capital improvements at SECI's existing generation facilities, as well as investments in new generation (including both coal-fired and nuclear assets) to meet the expanding demand for electricity within the territories served by our members and to replace expiring purchased power contracts between SECI and other generating utilities. As a result, our borrowing capacity would have to be increased in order to finance deferred increases in coal transportation costs.

Assuming that SECI was able to access additional credit on terms comparable to our current facilities, at today's rates I estimate that our cost of funds would be approximately 4.0% or higher (predicated on our existing facilities' standard of 65-112 basis points over the prevailing LIBOR rate). In contrast, as I noted previously, the interest rate payable on any STB-ordered refund is set by regulation at the 91-day Treasury Bill rate, which currently stands at less than 1%. To the extent that SECI relies on the deferral of recognition alternative in accounting for the scheduled CSXT rate increases, therefore, we would incur costs that could not be recovered through an award of reparations at the conclusion of this proceeding.

The "Keep Account" Alternative

As I have explained in this Statement, each of the two options available to SECI to treat the proposed CSXT rate increases for accounting purposes presents the prospect of economic losses that could not be recovered through an STB reparations award. The same holds true, of course, for any combination of the two alternatives. Under any scenario, both SECI and its members' retail ratepayers would experience uncompensable harm should SECI be required to pay the higher CSXT rates while this proceeding is pending.

Against this background, I am authorized to represent that if the STB orders CSXT to maintain its rates for SECI coal transportation at the levels that would be determined under the current, covering contract for the duration of this proceeding, SECI would keep account of the difference between freight charges calculated under those rates and the charges that would have been assessed under the proposed common carrier rates. If at the conclusion of this proceeding it was determined that any part of the increase was reasonable, SECI would pay CSXT the difference between the charges collected and those which would have applied under the higher, approved rates, together with interest calculated under the same STB regulations that apply to shipper reparations awards.

VERIFICATION

STATE OF FLORIDA)
) **SS:**
COUNTY OF HILLSBOROUGH)

John W. Geeraerts, being duly sworn, deposes and says that he has read the foregoing Statement, knows the contents thereof, and that the same are true as stated to the best of his knowledge, information and belief.

John W. Geeraerts

John W. Geeraerts

Sworn and subscribed before
me this 25th day of September, 2008.

Antonia M. Vaccaro

Notary Public
My Commission expires: 6/13/11

ANTONIA M. VACCARO
Notary Public, State of Florida
Commission No. DD684877
Qualified in Hillsborough County
Commission Expires June 13, 2011

BEFORE THE
SURFACE TRANSPORTATION BOARD

SEMINOLE ELECTRIC COOPERATIVE, INC. **16313 North Dale Mabry Highway** **Tampa, Florida 33688**	)	
Complainant,	)	
v.	)	**Docket No. 42110**
CSX TRANSPORTATION, INC. **500 Water Street** **Jacksonville, Florida 32202**	)	
Defendant.	)	

PETITION FOR INJUNCTIVE RELIEF UNDER 49 U.S.C. 721(b)(4)

Verified Statement
of
Thomas D Crowley
President
L.E. Peabody & Associates, Inc.

on behalf of

Seminole Electric Cooperative, Inc.

Date: October 3, 2008

I. INTRODUCTION

My name is Thomas D. Crowley. I am an economist and the President of L. E. Peabody & Associates, Inc., an economic consulting firm that specializes in solving economic, transportation, marketing, and fuel supply problems. I have spent most of my consulting career of over thirty-seven (37) years evaluating fuel supply issues and railroad operations, including railroad costs, accounting, prices, financing, cost of capital, capacity and equipment planning issues. My assignments in these matters were commissioned by railroads, producers, and shippers of different commodities. A copy of my credentials is included as Exhibit No. 1 to this verified statement.

I have been requested by Seminole Electric Cooperative, Inc. ("SECI") to estimate the first-quarter 2009 rate to variable cost ("R/VC") ratios for the movement of coal from certain mines located in the states of Illinois, Indiana, Kentucky, West Virginia and Pennsylvania, and from a coal transfer facility in South Carolina, to SECI's Seminole Generating Station ("SGS") located at Bostwick, Florida under common carrier rail rates implemented by CSX Transportation, Inc. ("CSXT").

My testimony is discussed further below under the following topical headings:

II. Rates To SGS

III. URCS Phase III Variable Costs

IV. R/VC Ratios

II. <u>RATES TO SGS</u>

CSXT currently transports coal to SECI's SGS under a rail transportation contract entered into by both parties in 1998 This contract will expire on December 31, 2008, at which time CSXT will transport coal to SGS in common carrier service. The common carrier rates applicable to the coal movements to SGS are set forth in Section 9 to Tariff CSXT-8200-Series. Tariff CSXT 8200-J, which became effective July 1, 2008, develops prices based upon a mileage scale that calls for a charge of $25 per net ton plus $0.025 per ton per mile for movements up to 1,200 miles based on the distance from and to CSXT stations via the shortest route.[1]

To develop the rates pursuant to Tariff CSXT 8200-J, I began by identifying the origin to destination miles for each prospective coal movement to the SGS. Section 9 of Tariff CSXT 8200-J states that the mileage for each rate calculation will be based on the "shortest route" between CSXT origin and destination stations.[2] Therefore, I utilized the shortest route from each mine origin station to Bostwick, Florida, the CSXT station serving the SGS, using miles provided by SECI based on the ShipCSX Rail Mileage Lookup Tool. Based on the mileage calculations, I next applied the common carrier charge of $25 per ton plus $0.025 per ton per mile to each movement to determine the base common carrier rate applicable to each origin-destination pair The results of my calculations are shown in Table 1 below

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[1] See Tariff CSXT 8200-J at page 48
[2] See Tariff CSXT 8200-J at page 48

Table 1

CSXT Common Carrier Rates To SECI's SGS

	Origin	Miles 1/	Base Rate ($/ton) 2/
	(1)	(2)	(3)
1	Dotiki, KY	812	$45 30
2	Epworth, IL	873	$46 83
3	Warrior, KY	795	$44 88
4	Elk Creek, KY	790	$44 75
5	Sullivan, IN	920	$48 00
6	Robinson Run, WV	1,088	$52.20
7	Bailey Mine, PA	1,167	$54 18
8	Charleston, SC	296	$32 40

1/ Source: ShipCSX Rail Mileage Lookup Tool
2/ $25 per ton – (Column (2) x $0.025 per ton per mile).

As shown in Table 1 above, estimated base transportation rates as of July 1, 2008 to SECI's SGS range from $32.40 to $54.18 per ton

In addition to the base rate for each movement, Section 9 of Tariff CSXT 8200-J also calls for the application of a fuel surcharge based on CSXT's HDF Fuel Surcharge Publication 8661 Series. CSXT's HDF Fuel Surcharge Publication 8661-B, the most current in the series, governs all regulated common carrier linehaul freight rates existing or established by CSXT on or after April 23, 2007, and applies a fuel surcharge of 1¢ per railcar mile for every 4¢ per gallon increase in the average on-highway diesel fuel price ("HDF") that equals or exceeds $2.00 per gallon for the calendar month two months prior to the calendar month of shipment.[3] Based on the average HDF price for August 2008, the latest full month available of HDF fuel prices, the fuel surcharge applicable to shipments beginning October 1, 2008 is $0.58 per car-mile.

Based on this most current fuel surcharge data, I have calculated the October 1, 2008 fuel surcharge per ton for each issue movement using the $0.58 per car-mile surcharge, the origin destination miles for each movement, and an assumed 120 tons per railcar based upon SECI's historical average lading to the SGS. The fuel surcharge and total rate per ton from each prospective SECI origin are shown in Table 2 below.

[3] See CSXT's website at http://shipcsx.com/public/ec.shipcsxpublic/Main?module=public.fuel&target=blastfax

Table 2

Common Carrier Rates To SECI's SGS

Origin	**Miles 1/**	**Base Rate ($/Ton) 2/**	**Fuel Surcharge ($/ton) 3/**	**Total Rate ($/ton) 4/**
(1)	(2)	(3)	(4)	(5)
1 Dotiki, KY	812	$45 30	$3 92	$49 22
2. Epworth, IL	873	$46 83	$4 22	$51 05
3 Warrior, KY	795	$44 88	$3 84	$48 72
4 Elk Creek, KY	790	$44 75	$3.82	$48 57
5 Sullivan, IN	920	$48 00	$4 45	$52 45
6 Robinson Run, WV	1,088	$52 20	$5.26	$57.46
7 Bailey Mine, PA	1,167	$54 18	$5.64	$59 82
8 Charleston, SC	296	$32 40	$1 43	$33 83

1/ Source ShipCSX Rail Mileage Lookup Tool
2/ *$25 per ton + (Column (2) x $0 025 per ton per mile)*
3/ [Column (2) x $0 58 per car-mile] – 120 tons per car
4/ Column (3) + Column (4)

As shown in Table 2 above, the rates per ton, including estimated fuel surcharges, to SECI's SGS are estimated to range from $33.83 to $59 82 as of October 2008

III. URCS PHASE III VARIABLE COSTS

The Surface Transportation Board's ("STB") decision in Ex Parte 657 (Sub-No. 1), *Major Issues In Rail Rate Cases*, served October 30, 2006 ("*Major Issues*") requires parties to maximum reasonable rate proceedings to determine each issue movement's regulatory variable cost of service using unadjusted Uniform Railroad Costing System ("URCS") variable costs calculated using the URCS Phase III costing model [4] Pursuant to the STB's *Major Issues* decision, I have calculated the variable costs for each prospective movement using a 2007 CSXT URCS Phase III model The Phase III costing model I used was developed using the most current cost information available, and therefore reflects the best estimate of regulatory variable costs of service in the first quarter 2009.[5] I developed eight (8) of the required inputs into the model – operating railroad, shipment type, average cars per train, railcar type, railcar ownership, average tons per car, commodity type and movement type – based on historic movement data for coal shipments to SECI's SGS. I calculated the miles for each movement using ALK's Technologies, Inc.'s PC Miler/Rail v 13 0 ("PC Rail") practical mileage formula,[6] which reflects the miles based on actual operating considerations and not the shortest available route. In addition, I indexed the URCS variable cost calculations to first quarter 2009 price levels through the use of a L E. Peabody & Associates, Inc. forecast of the AAR's

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[4] See *Major Issues* at 47.

[5] The 2007 URCS Phase III model includes a 2007 pre-tax cost of capital of 16 75 percent based upon an after-tax cost of capital of 11.33 percent as calculated by the STB in Ex Parte No 558 (Sub-No. 11), *Railroad Cost of Capital – 2007*, served September 26, 2008.

[6] PC Rail allows users to calculate origin-destination miles using four (4) different route formula – Practical Route, Shortest Route, Intermodal Route and Coal/Bulk Route According to PC Rail's help menu, "Practical routings are based on mileage as well as on the mainline/branchline code to simulate most likely movements of general merchandise traffic *Shortest routes are chosen to minimize distance between two points* Shortest routings determine the shortest actual distance between stop points and may be used, in many cases, to obtain tariff miles Intermodal and Coal/Bulk may be used to determine the exceptional routings that these types of trains sometimes require "

Railroad Cost Recovery indices for all cost inputs, except for fuel costs For the fuel component of the index, I relied upon the change in the Energy Information Administration's ("EIA's") forecast of on-highway diesel fuel from EIA's September 2008 Short Term Energy Outlook. The results of my variable cost calculations are shown in Table 3 below.

Table 3

CSXT's URCS Phase III Variable Costs On Movement To SECI's SGS - - 1Q09

Origin	CSXT URCS Phase III Costs ($/ton) 1/
(1)	(2)
1 Dotiki, KY	$11 40
2 Epworth, IL	$12 17
3 Warrior, KY	$11 19
4 Elk Creek, KY	$11 17
5 Sullivan, IN	$12 86
6 Robinson Run, WV	$15.41
7 Bailey Mine, PA	$16 41
8 Charleston, SC	$4 79

1/ Source Exhibit No 2

As shown in Table 3 above, the URCS Phase III variable costs to SECI's SGS are estimated to range from $4 79 to $16 41 per ton at 1Q09 wage and price levels.

III. R/VC RATIOS

Based on the total rate per ton, including fuel surcharges, shown in Table 2 above and the URCS Phase III regulatory variable costs contained in Table 3 above, I have estimated the R/VC ratios for movements to SECI's SGS as of 1Q09.[7] The results of my calculations are shown in Table 4 below.

Table 4

R/VC Ratios On Movements To SECI's SGS - - 1Q09

Origin	Total Rate ($/Ton) 1/	URCS Phase III Costs ($/ton) 2/	R/VC Ratio 3/
(1)	(2)	(3)	(4)
1 Dotiki, KY	$49 22	$11 40	431 8%
2 Epworth, IL	$51 05	$12 17	419 5%
3 Warrior, KY	$48 72	$11 19	435 4%
4 Elk Creek, KY	$48 57	$11 17	436 4%
5 Sullivan, IN	$52 45	$12 86	407.9%
6 Robinson Run, WV	$57 46	$15 41	372 9%
7 Bailey Mine, PA	$59 82	$16.41	364 5%
8 Charleston, SC	$33.83	$4.79	706 3%

1/ Source. Table 2
2/ Source: Table 3
3/ Column (2) – Column (3).

As shown in Table 4 above, the R/VC ratios for coal movements to SECI's SGS range from 364.5 percent to 706.3 percent.

[7] I presume for practical purposes that the rates, including fuel surcharges, as of October 2008 will equal the rates in the first quarter 2009

VERIFICATION

COMMONWEALTH OF VIRGINIA)
)
CITY OF ALEXANDRIA)

I, THOMAS D. CROWLEY, verify under penalty of perjury that I have read the foregoing Rebuttal Verified Statement of Thomas D. Crowley, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

Thomas D. Crowley

Sworn to and subscribed
before me this 3rd day of October, 2008

Joanne M. Walton
Notary Public for the State of Virginia

My Commission Expires: December 31, 2008
Registration Number: 178167

STATEMENT OF QUALIFICATIONS

My name is Thomas D. Crowley. I am an economist and President of the economic consulting firm of L. E. Peabody & Associates, Inc. The firm's offices are located at 1501 Duke Street, Suite 200, Alexandria, Virginia 22314, and 10445 N. Oracle Road, Suite 151, Tucson, Arizona 85737

I am a graduate of the University of Maine from which I obtained a Bachelor of Science degree in Economics. I have also taken graduate courses in transportation at George Washington University in Washington, D.C. I spent three years in the United States Army and since February 1971 have been employed by L E. Peabody & Associates, Inc

I am a member of the American Economic Association, the Transportation Research Forum, and the American Railway Engineering and Maintenance-of-Way Association.

The firm of L. E Peabody & Associates, Inc. specializes in analyzing matters related to the rail transportation of coal. As a result of my extensive economic consulting practice since 1971 and my participating in maximum-rate, rail merger, service disputes and rule-making proceedings before various government and private governing bodies, I have become thoroughly familiar with the rail carriers that move coal over the major coal routes in the United States. This familiarity extends to subjects of railroad service, costs and profitability, railroad capacity, railroad traffic prioritization and the structure and operation of the various contracts and tariffs that historically have governed the movement of coal by rail.

STATEMENT OF QUALIFICATIONS

As an economic consultant, I have organized and directed economic studies and prepared reports for railroads, freight forwarders and other carriers, for shippers, for associations and for state governments and other public bodies dealing with transportation and related economic problems. Examples of studies I have participated in include organizing and directing traffic, operational and cost analyses in connection with multiple car movements, unit train operations for coal and other commodities, freight forwarder facilities, TOFC/COFC rail facilities, divisions of through rail rates, operating commuter passenger service, and other studies dealing with markets and the transportation by different modes of various commodities from both eastern and western origins to various destinations in the United States. The nature of these studies enabled me to become familiar with the operating practices and accounting procedures utilized by railroads in the normal course of business.

Additionally, I have inspected and studied both railroad terminal and line-haul facilities used in handling various commodities, and in particular unit train coal movements from coal mine origins in the Powder River Basin and in Colorado to various utility destinations in the eastern, mid-western and western portions of the United States and from the Eastern coal fields to various destinations in the Mid-Atlantic, northeastern, southeastern and mid-western portions of the United States. These operational reviews and studies were used as a basis for the determination of the traffic and operating characteristics for specific movements of coal and numerous other commodities handled by rail.

STATEMENT OF QUALIFICATIONS

I have frequently been called upon to develop and coordinate economic and operational studies relative to the acquisition of coal and the rail transportation of coal on behalf of electric utility companies. My responsibilities in these undertakings included the analyses of rail routes, rail operations and an assessment of the relative efficiency and costs of railroad operations over those routes. I have also analyzed and made recommendations regarding the acquisition of railcars according to the specific needs of various coal shippers. The results of these analyses have been employed in order to assist shippers in the development and negotiation of rail transportation contracts which optimize operational efficiency and cost effectiveness.

I have developed property and business valuations of privately held freight and passenger railroads for use in regulatory, litigation and commercial settings. These valuation assignments required me to develop company and/or industry specific costs of debt, preferred equity and common equity, as well as target and actual capital structures. I am also well acquainted with and have used the commonly accepted models for determining a company's cost of common equity, including the Discounted Cash Flow Model ("DCF"), Capital Asset Pricing Model ("CAPM"), and the Farma-French Three Factor Model.

Moreover, I have developed numerous variable cost calculations utilizing the various formulas employed by the Interstate Commerce Commission ("ICC") and the Surface Transportation Board ("STB") for the development of variable costs for common carriers, with particular emphasis on the basis and use of the Uniform Railroad Costing System ("URCS") and its predecessor, Rail

STATEMENT OF QUALIFICATIONS

Form A. I have utilized URCS/Rail form A costing principles since the beginning of my career with L. E. Peabody & Associates Inc in 1971

I have frequently presented both oral and written testimony before the ICC, STB, Federal Energy Regulatory Commission, Railroad Accounting Principles Board, Postal Rate Commission and numerous state regulatory commissions, federal courts and state courts. This testimony was generally related to the development of variable cost of service calculations, rail traffic and operating patterns, fuel supply economics, contract interpretations, economic principles concerning the maximum level of rates, implementation of maximum rate principles, and calculation of reparations or damages, including interest I presented testimony before the Congress of the United States, Committee on Transportation and Infrastructure on the status of rail competition in the western United States. I have also presented expert testimony in a number of court and arbitration proceedings concerning the level of rates, rate adjustment procedures, service, capacity, costing, rail operating procedures and other economic components of specific contracts.

Since the implementation of the *Staggers Rail Act of 1980*, which clarified that rail carriers could enter into transportation contracts with shippers, I have been actively involved in negotiating transportation contracts on behalf of coal shippers. Specifically, I have advised utilities concerning coal transportation rates based on market conditions and carrier competition, movement specific service commitments, specific cost-based rate adjustment provisions, contract

STATEMENT OF QUALIFICATIONS

reopeners that recognize changes in productivity and cost-based ancillary charges. I have also reviewed, analyzed and evaluated both UP's Circular 111 and BNSF 90068 rate levels and other terms and conditions on behalf of coal shippers.

I have been actively engaged in negotiating coal supply contracts for various users throughout the United States. In addition, I have analyzed the economic impact of buying out, brokering, and modifying existing coal supply agreements. My coal supply assignments have encompassed analyzing alternative coals to determine the impact on the delivered price of operating and maintenance costs, unloading costs, shrinkage factor and by-product savings.

I have developed different economic analyses regarding rail transportation matters for over sixty (60) electric utility companies located in all parts of the United States, and for major associations, including American Paper Institute, American Petroleum Institute, Chemical Manufacturers Association, Coal Exporters Association, Edison Electric Institute, Mail Order Association of America, National Coal Association, National Industrial Transportation League, North America Freight Car Association, the Fertilizer Institute and Western Coal Traffic League. In addition, I have assisted numerous government agencies, major industries and major railroad companies in solving various transportation-related problems.

In the two Western rail mergers that resulted in the creation of the present BNSF Railway Company and Union Pacific Railroad Company and in the acquisition of Conrail by Norfolk Southern Railway Company and CSX Transportation, Inc., I reviewed the railroads' applications

STATEMENT OF QUALIFICATIONS

including their supporting traffic, cost and operating data and provided detailed evidence supporting requests for conditions designed to maintain the competitive rail environment that existed before the proposed mergers and acquisition. In these proceedings, I represented shipper interests, including plastic, chemical, coal, paper and steel shippers.

I have participated in various proceedings involved with the division of through rail rates. For example, I participated in ICC Docket No 35585, *Akron, Canton & Youngstown Railroad Company, et al. v Aberdeen and Rockfish Railroad Company, et al.* which was a complaint filed by the northern and mid-western rail lines to change the primary north-south divisions. I was personally involved in all traffic, operating and cost aspects of this proceeding on behalf of the northern and mid-western rail lines. I was the lead witness on behalf of the Long Island Rail Road in ICC Docket No. 36874, *Notice of Intent to File Division Complaint by the Long Island Rail Road Company*.

Summary Of Variable Cost For Seminole's Traffic – 1Q09

Item (1)	Dotiki, KY (2)	Epworth, IL (3)	Warrior, KY (Cardinal 9) (4)	Elk Creek, KY (5)	Sullivan, IN (6)	Robinson Run, WV (8)	Bailey/ Emerald, PA (9)	Charleston, SC (7)
A. Movement Parameters								
1 Railroad	CSXT	CSXT	CSXT	CSXT	CSXT	CSXT	CSXT	CSXT
2 Miles 1/	813.1	870.8	797.3	795.5	922.1	1,113.8	1,188.4	316.7
3 Shipment Type	Local	Local	Local	Local	Local	Local	Local	Local
4 Cars per Train	100	100	100	100	100	100	100	100
5 Car Type	Rotary Gondola	Rotary Gondola	Rotary Gondola	Rotary Gondola	Rotary Gondola	Rotary Gondola	Rotary Gondola	Rotary Gondola
6 Car Ownership	Private	Private	Private	Private	Private	Private	Private	Private
7 Tons per Car	120	120	120	120	120	120	120	120
8 Commodity	Coal	Coal	Coal	Coal	Coal	Coal	Coal	Coal
9 Movement Type	Unit Train	Unit Train	Unit Train	Unit Train	Unit Train	Unit Train	Unit Train	Unit Train
B. Variable Costs and Jurisdictional Thresholds								
10 Phase III Cost Base Year 2007 2/	$10.21	$10.90	$10.02	$10.00	$11.51	$13.80	$14.69	$4.29
11 Index to 1Q09	1.1167	1.1167	1.1167	1.1167	1.1167	1.1167	1.1167	1.1167
12 Phase III Cost 1Q09	$11.40	$12.17	$11.19	$11.17	$12.86	$15.41	$16.41	$4.79
C. Rate To Variable Cost Ratios								
13 CSXT Miles for rate making purposes 3/	812	873	795	790	920	1,088	1,167	296
14 Rate Per Ton Including Fuel Surcharge 4/	$49.22	$51.05	$48.72	$48.75	$52.45	$57.46	$59.82	$33.83
15 R/VC Ratio Including Fuel Surcharge 5/	431.8%	419.5%	435.4%	436.4%	407.9%	372.9%	364.5%	706.3%

1/ Based on PC Rail v. 13.0 practical miles
2/ 2007 CSX URCS Phase III costs
3/ CSX miles for rate making purposes were identified from the ShipCSX Rail Mileage Lookup Tool
4/ Tariff CSXT 8200-J
5/ Line 14 ÷ Line 12

CERTIFICATE OF SERVICE

Pursuant to 49 C.F.R. Part 1111.3, I hereby certify that on this 3rd day of October, 2008, I caused copies of this Petition for Injunctive Relief to be served by overnight express courier on the senior legal officer of Defendant CSX Transportation, Inc., as follows:

E.M. Fitzsimmons, Esq.
Sr. Vice-President-Law,
General Counsel and
Corporate Secretary
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

Kelvin J. Dowd
An Attorney for
Seminole Electric Cooperative, Inc.