

BEFORE THE
SURFACE TRANSPORTATION BOARD

SEMINOLE ELECTRIC COOPERATIVE, INC.)

Complainant,)

v.)

CSX TRANSPORTATION, INC.)

Defendant)

Docket No. NOR 42110

DEFENDANT CSX TRANSPORTATION, INC.'S
REPLY TO PETITION FOR INJUNCTIVE RELIEF

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Dated: October 17, 2008

INTRODUCTION

The Board should deny Seminole the extraordinary and unprecedented injunctive relief it seeks – which would provide it an inequitable windfall by extending the highly favorable, below market, and outdated contract rates which Seminole enjoys today – for several reasons. First, like Seminole’s rate complaint, its preliminary injunction motion is premature and not ripe for consideration. The rates that Seminole challenges – and upon which it bases its Petition for Injunction – are general scale rates that are very unlikely to apply to Seminole’s coal shipments. The parties’ existing contract (the “1998 Contract”) governs all CSXT coal shipments to the Seminole Generating Station (“SGS”) until December 31, 2008, 2 ½ months away. Even if the parties are unable to reach agreement on a new contract, Seminole would not move a single car under any common carrier rate until January 2009.

CSXT has not yet established Seminole-specific common carrier rates. As Seminole knows very well, however, CSXT has promised to publish such a rate on or before November 15, 2008. *See* Verified Statement of Michael Sullivan (“V.S. Sullivan”) at 6. CSXT scale rates apply only in the absence of a contract or specific common carrier rates. In all likelihood, Seminole will not ship any traffic under the scale rates it seeks to enjoin, because the contract rates will apply through December 31, 2008, and Seminole-specific common carrier rates or new contract rates will apply thereafter. Thus, Seminole’s motion is premature.

Second, even if Seminole were challenging specific, applicable common carrier rates, the injunction it seeks would be unprecedented in the Board’s history and contrary to established policy. Longstanding statutory policy vests the ratemaking initiative with the carrier. Because the law allows a shipper to receive reparations for overpayments plus interest but prevents a carrier from recovering for underpayments, a common carrier rate is to remain in full

force and effect unless and until the Board finds it exceeds a maximum reasonable level. The Interstate Commerce Commission Termination Act of 1995 (“ICCTA”) repealed the agency’s former authority to suspend a common carrier rate prior to a full, on-the-merits rate reasonableness determination. Recognizing the sound public policy against suspension, the Board has repeatedly affirmed that it will consider enjoining a lawfully established common carrier rate only in the most extraordinary circumstances in which such relief is necessary to address an imminent threat of irreparable harm. This case does not present such extraordinary circumstances.

Third, Seminole has not satisfied its burden of establishing each of the four essential elements for injunctive relief. To the contrary, Seminole has not established a single one of those four elements. Seminole’s petition for injunctive relief – a rate suspension petition in all but name – should be denied for failure to satisfy the requirements for such an extraordinary remedy.

ARGUMENT

I. SEMINOLE HAS NOT DEMONSTRATED THE IMMINENT LIKELIHOOD OF IRREPARABLE HARM REQUIRED FOR THE EXTRAORDINARY REMEDY OF AN INJUNCTION UNDER 49 U.S.C. § 721(b)(4).

As a threshold matter, Seminole’s injunction petition is not ripe for consideration. Because Seminole’s current rates are governed by contract, and will remain subject to contract for approximately 10 more weeks, CSXT has not yet established specific common carrier rates to govern coal movements to SGS. Seminole has moved no traffic under the CSXT scale rates it purports to challenge, and it concedes it could not move any traffic under any tariff until at least 2009. *See, e.g.*, Petition at 1. Thus, it is questionable whether the Board even has jurisdiction

over the Complaint.¹ It certainly does not make sense for the Board to assert jurisdiction and take the further step of exercising equitable powers to grant an extraordinary injunction against general scale rates when CSXT will issue Seminole-specific rates in less than a month. CSXT does not intend to “strand” Seminole’s coal car fleet, and it will therefore issue Seminole-specific rates applicable to movements in railroad-supplied cars and with an appropriate allowance for movements in Seminole-supplied cars.

Even if the Board were to assert jurisdiction and consider Seminole’s motion for preliminary injunction, it should deny the injunction because Seminole has not demonstrated it faces imminent irreparable harm, an indispensable threshold requirement for the Board to exercise its extraordinary emergency power. A rail common carrier such as CSXT has the statutory right to establish rail transportation rates in the first instance. *See* 49 U.S.C. § 10701(c). Rail carriers’ long-established “ratemaking initiative” is an integral part of the common carrier obligation, which requires a railroad to accept traffic tendered to it. Based entirely on the Complaint and the untested allegations of its consultant concerning revenue-to-variable cost ratios, Seminole seeks the Board’s extraordinary intervention to deny CSXT its statutory right to set the rate by which it chooses to fulfill its common carrier obligation. The Board should deny Seminole’s request to enjoin CSXT from collecting its lawfully established common carrier rate as unprecedented and unnecessary; inconsistent with federal statutes and

¹ Seminole’s reliance on *Kansas City Power & Light Co. v. Union Pacific Railroad Company*, STB Docket No. 42095 (May 16, 2008), as precedent for its premature filing is misplaced. In that case, the utility filed its complaint before the expiration of the contract term where the carrier had both established the tariff rates that would apply after the contract’s expiration and “declined to negotiate another rail transportation contract.” *Id.*, slip op. at 2. In short, there was no question in *KCP&L* that the challenged rates would apply after the contract ended. Here, on the other hand, it is clear that the rates Seminole has challenged will *not* apply after the contract ends.

fundamental policy vesting the ratemaking initiative with the rail carrier; and unsupported by the meager record in this case.

Historically, the ICC had broad powers to suspend a common carrier rate established by a rail carrier prior to its taking effect. Beginning with the Staggers Act, however, Congress sharply curtailed the ICC's power to suspend a common carrier rate prior to a full on-the-merits determination of whether the rate in question was unreasonable. *See, e.g.*, 49 U.S.C. § 10707(c) (1994) (now repealed). Ultimately, Congress *repealed* the ICC's former power to suspend rates, in a key provision of ICCTA. As the Board has summarized,

In [ICCTA], Congress further facilitated railroads' rate-making initiative by repealing the rate suspension procedures under which rate adjustments were sometimes prohibited from taking effect without first being investigated. . . .

Arizona Public Service Co. v. BNSF, STB Doc. No. 42077, Slip Op at 7 (served Oct. 14, 2003) (the "*Lee Ranch*" case). Thus, it is clear that the Board does not have the power to suspend common carrier rates that was once exercised by the ICC. Seminole's request for an injunction, however, is the same thing under a different name. What Seminole is seeking is an order prohibiting CSXT from collecting a lawfully established common carrier rate at the very outset of the case, prior to the submission of any market dominance or Stand-Alone Cost ("SAC") evidence or a determination of whether the challenged rate is unreasonable under governing standards.² As the Board recognized in *Lee Ranch*, this is the power that Congress withdrew in ICCTA in all but the most exceptional circumstances. Moreover, what Seminole is actually asking the Board to do is to extend its highly favorable and outdated, non-market contract rates

² Seminole relies upon alleged R/VC ratios and the size of CSXT's scale rate in relation to the expired contract rate to support its claim that the rates are too high and should be enjoined. *See* Petition at 6-8. The Board need not consider the merits of those allegations because R/VC ratios and the size of a rate increase over a previous contract rate are not relevant here because the maximum reasonable rates will be determined under the Stand-Alone Cost constraint of the Constrained Market Pricing methodology. *See Coal Rate Guidelines*, 1 I.C.C.2d 520 (1985).

for the duration of the case – a result that would be a tremendous windfall for the shipper, especially if the Board were to grant Seminole's request for an extended procedural schedule. *See* Complainant's Report on the Parties' Conference Pursuant to 49 C.F.R. § 1111.10(b) (filed Oct. 15, 2008) (attached as Appendix A). In fact, such a result would leave Seminole's coal transportation rates among the lowest of any Florida utility, *See* attached Verified Statement of Seth Schwartz, President of Energy Ventures Analysis, Inc. ("V.S. Schwartz") at 5 and attached V.S. Sullivan at 4 ("...should the Board grant Seminole the rate freeze that it is seeking during the duration of this case, Seminole's members would have an enormous advantage over [Jacksonville Electric's] customers since JEA's rates would be 60-70% higher than Seminole's.")

Separately, ICCTA authorized a limited residual power to issue injunctions in emergency situations in which such relief was essential to prevent imminent irreparable harm. *See* 49 U.S.C. § 721(b)(4). Although this emergency power was intended primarily to allow the Board to prevent irreparable harm in the context of exemption proceedings, Congress noted that, in the context of rail rates, the Board was also "empowered under section 721(b)(4) to grant administrative injunctive relief to address imminent threat of irreparable harm." Conference Report 104-422, § 10701 (1995) (emphasis added). As explained in *Lee Ranch*, the Board will consider such relief only where the party seeking that relief satisfies all of the requirements for emergency injunctive relief, including a showing that the requesting party "will be irreparably harmed in the absence of the requested relief." *Lee Ranch*, STB Docket No. 42077 Decision at 4-5 (emphasis added).³

³ As demonstrated below, Seminole has not demonstrated that it will be irreparably harmed absent an injunction. This failure alone compels denial of the preliminary injunction petition.

Consistent with the statute and congressional intent, the Board has exercised the extraordinary emergency injunction authority extremely sparingly. In a *Simplified Guidelines* case, the complainant invoked Section 721(b)(4) and sought to enjoin application of the challenged common carrier rate. See *B.P. Amoco Chemical Co. v. Norfolk Southern Railway Co.*, STB Docket No. 42093 (served June 6, 2005). The Board denied the injunction request because the complainant had failed to show that it would suffer irreparable injury in the absence of an injunction. See *id.*, slip op. at 3 (explaining that, if the Board found the challenged rate unreasonable at the end of the case, it would “order reparations to BP reflecting the difference between the challenged rate and the maximum reasonable rate along with interest”).

In another case, a coal supplier sought an injunction based on allegations of a “gross . . . disparity” between a carrier’s rail transportation rates from two mine origins that competed to supply coal to the same utility.⁴ See *Arizona Pub. Serv. Co. v. Burlington N. and Santa Fe Ry. Co.*, STB Docket No. 42077 (served Oct. 14, 2003)(“*Lee Ranch*”). The Board denied the injunction because the movant had failed to show it faced harm that was “both imminent and irreparable.” *Id.*, slip op at 3-4. The Board further found that granting the requested rate suspension injunction was inconsistent with its limited rate regulatory function, and that issuing injunctions to address indirect effects of rail rates could “spiral[] out of control.” *Id.* at 5. The Board concluded that the only way to maintain control of such a process would be

⁴ The disparity was itself the result of the only time the Board has enjoined collection of a rate during the pendency of a rate case. The Board enjoined BNSF from collecting a new rate during the pendency of a reopened rate case, which resulted in a disparity between the Board-limited rate from one mine and the common carrier rate from a competing mine to the same power plant. See *Lee Ranch*, slip op. at 1-3 (served Oct. 14, 2003). This collateral injury illustrates one of the potential unintended consequences of issuing an extraordinary injunction like that sought in this case.

to deny railroads “the pricing initiative” guaranteed to them by statute. *Id.* (citing 49 U.S.C. § 10701(c)).

The Board should deny Seminole’s injunction petition because it has not made the essential threshold showing that it will suffer imminent and irreparable harm. Seminole contends that it may suffer “irreparable” harm if CSXT’s common carrier rates go into effect because: (i) if the Board finds that the rates exceed a maximum reasonable level and orders reparations; and (ii) if Seminole passes those reparations on to its members and customers; and (iii) if those utilities in turn pass along the reparations to their ratepayers in the form of refunds, then (iv) the “ratepayers who would benefit from the later refunds are not necessarily the same people who would have paid the higher electric bills” during the pendency of this case. *See* V.S. John Geeraerts at 3. For several independent reasons, this attenuated argument does not show that Seminole will suffer imminent irreparable harm if the Board does not issue an injunction.

First, the harm that Seminole alleges is not to Seminole itself, or even to its members, but to customers of its members. This is the sort of indirect harm allegation that the Board correctly refused to consider in *Lee Ranch*. Moreover, Seminole’s approach would create an equal indirect and hypothetical harm for a different set of its members’ customers. Assuming CSXT’s rates are found reasonable, to adopt Seminole’s approach would be to impose costs on later Seminole customers who did not use the services provided during the pendency of the case.

Second, even if Seminole were authorized to act for ultimate retail customers, its attenuated, compound speculation about potential injury does not approach a concrete showing that those indirect customers will suffer imminent or irreparable harm. Seminole offers no evidence that any of its member utilities would seek to distribute their share of any hypothetical

reparations to their individual ratepayers, let alone that any such fractional distribution would be substantial.

Third, it is well established that monetary or “economic loss by itself does not constitute irreparable harm.” *Delaware and Hudson Company – Lease and Trackage Rights – Springfield Terminal Railway Company*, ICC Fin. Docket No. 30695 (Sub-No. 4) Decision at 3 (served Nov. 2, 1995). What Seminole alleges here is the potential for some unknown and indefinite monetary loss by an unquantified number of people who may or may not have a mechanism to obtain “compensatory refunds” if they move out of the area. Even if Seminole’s speculation proved correct, the resulting injury would be simple economic harm, for which monetary damages are an adequate remedy. *See id.* (“Petitioners’ speculative concerns about economic loss do not constitute irreparable harm.”). Moreover, as explained in the attached Verified Statement of Seth Schwartz, Seminole’s rail transportation costs to SGS are not the primary driver of the rates to its members’ customers. Indeed, even using Seminole’s estimates, application of CSXT’s scale rates would cause Seminole’s wholesale charges to its members to increase by approximately 10% and its members’ retail rates to the ultimate consumers to increase by about 6%. *See V.S. Schwartz at 2.*

Fourth, Seminole’s argument “proves” too much. In every case in which a rate is held unreasonable, some ultimate consumers (who were economically affected by the challenged rate) will have left the area or otherwise be unable or unavailable to share the benefit of reparations awarded to the complainant. If Seminole’s argument were accepted, the Board would be required to immediately suspend every challenged rate upon the filing of a rate complaint. Such a result would nullify carriers’ statutory ratemaking initiative. Moreover, Seminole fails to consider the offsetting “windfall” that would accrue to ratepayers who moved

out of the area during the case if the challenged rate is ultimately upheld, or if the maximum reasonable rate is found to be higher than the level at which it was suspended during the pendency of the proceeding.⁵ Under Seminole’s theory, the current ratepayers at the time of the final rate reasonableness determination would “unfairly” bear the departed ratepayers’ share of the maximum reasonable rate. As Mr. Schwartz explains, Seminole’s theory is completely belied by the practices of the Florida Public Service Commission which “has not found this consideration...important enough to even mention in its consideration of deferring recovery of under-recovered fuel costs.” (V.S. Schwartz at 4).

Seminole’s alternative irreparable harm argument is that, to the extent it does not pass along increased transportation costs to its members, it would be required to “finance” those increased costs. *See* Petition at 11; V.S. Geeraerts at 6. At bottom, this is simply a claim that Seminole will be “irreparably” harmed by increased transportation costs because it will have to pay those costs. But, in the event that the challenged rates are found to exceed a reasonable maximum, money damages would be a complete and adequate remedy for the resulting economic harm. Again, an injury that can be adequately remedied by money damages is, by definition, not irreparable harm. *See, e.g., Springfield Terminal*, slip op. at 3.

⁵ In fact, the sole authority that Seminole cites in support of its novel theory that potential ratepayer turnover “supports a finding of irreparable harm” actually held the opposite, and denied a motion seeking an injunction suspending payments. *See* Petition at 10 (citing *San Antonio v. Burlington N. R.R. Co.*, I.C.C. Docket No. 36180 (served May 12, 1986)). In *San Antonio*, the carrier sought to suspend the payment of reparations to the complainant *after* the ICC had found the challenged rate unreasonable and awarded reparations. *See id.* at 1 (asking ICC to impose stay of reparations pending judicial review). Applying the traditional four-part test for injunctive relief, the ICC found that the carrier/petitioner had failed to show it would suffer irreparable harm in the absence of an injunction. *Id.* at 1-2. Discussing the carrier’s proposal to make reparations payments into an escrow account (similar to Seminole’s proposal to “keep account” of suspended payments in this proceeding), and based on the complainant’s assurance that all reparations would be passed on to ratepayers, the ICC found that ratepayers who left the area during the pendency of the appeal could conceivably suffer harm as a result of erroneous suspension of reparations. *Id.* at 2.

Seminole also claims that the rate of interest prescribed by the Board's regulation is not adequate to compensate it for its cost of money. Seminole Petition at 11. Seminole has not challenged regulations governing the award of interest in its Complaint, and such a challenge would not be appropriate in a single case adjudication. The Board's regulations concerning interest on reparations have been in place for at least 15 years, and Seminole was certainly aware of those regulations when it filed its Complaint. If Seminole believes those regulations should be changed, it should petition the Board to commence a notice-and-comment rulemaking in which all interested parties have an opportunity to provide input. Regardless, the claim that the regulatory rate of interest that would be applied to any reparations may not be sufficient to cover Seminole's current cost of money does not demonstrate irreparable harm.⁶

In sum, Seminole has failed to make the essential threshold showing of imminent irreparable harm required for an injunction under its statutory emergency powers. *See* 49 U.S.C. § 721(b)(4) (authorizing such relief only "when necessary to prevent irreparable harm"); *Lee Ranch*, slip op at 4 ("A party seeking an injunction must show that the harm it faces is both imminent and irreparable").⁷ This failure to make the threshold irreparable harm showing necessary for further consideration of injunctive relief compels denial of the Petition without further consideration.

⁶ Here again, this sort of claim could be made in virtually every case. Even an entity that has sufficient cash or liquidity to pay rates without relying on credit could argue that the regulatory interest rate is insufficient to compensate it for the return it could have obtained from alternative investments during the pendency of the proceeding.

⁷ Although a showing of irreparable harm is a necessary precondition to injunctive relief, it is not sufficient. As numerous STB and ICC cases have held, the party seeking injunctive relief – under Section 721(b)(4) or on any other basis – bears heavy burdens of production and persuasion on all four requirements for such extraordinary relief. *See, e.g., B.P. Amoco Chemical*, slip op. at 3.

II. SEMINOLE HAS NOT SATISFIED THE REMAINING ESSENTIAL ELEMENTS FOR INJUNCTIVE RELIEF.

In order to obtain injunctive relief, the movant must show that: (1) it is likely to succeed on the merits; (2) it will be irreparably harmed in the absence of the requested relief; (3) issuance of the injunction will not substantially harm other parties; and (4) granting the injunction is in the public interest. *See B.P. Amoco Chemical Co. v. Norfolk So. Ry. Co.*, STB Docket No. 42093, Decision (June 6, 2005) slip op at 3 (citing *DeBruce Grain Inc. v. Union Pacific RR*, 2 S.T.B. 773, 775 n.3 (1997)). A party seeking an injunction “carries the burden of persuasion on all of the elements required for [such] extraordinary relief . . .” *Id.* As demonstrated below, movant Seminole has failed to satisfy its burden on any of those elements, and the injunction must be denied.

A. Seminole Has Not Shown It Has a Substantial Likelihood of Prevailing on the Merits.

To support its claim it has a strong likelihood of success on the merits, Seminole relies entirely on two related assertions regarding the challenged rate, claiming that the change from the existing contract rate is: (i) “abrupt” and (ii) “massive.” Seminole Petition at 8. The first claim is false, and the second is both an exaggeration that ignores the rate history and legally irrelevant. Because Seminole offers nothing else to support its likelihood of success on the merits, it has failed to establish this critical prerequisite to injunctive relief.

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2. **The Size of the Increase of a Rate is Not Relevant to a SAC Analysis, and in Any Event, the Anticipated Rate Increase is Not Unreasonable**

Seminole filed its rate challenge under the Constrained Market Pricing principles of *Coal Rate Guidelines*, 1 I.C.C.2d 520 (1985), indicating that it intends to proceed under the SAC constraint. Under the SAC methodology, the Board establishes the reasonableness of a challenged rate by determining the competitive rate that would exist in a “contestable market.” *See generally Coal Rate Guidelines*, 1 I.C.C.2d 520 (1985). The entire analysis focuses on the challenged rate – neither the level of a prior rate a complainant may have paid, nor the magnitude of the difference between the challenged rate and a prior rate has any relevance to a SAC analysis. Thus, Seminole’s claim that CSXT’s scale rates, if it applied in January 2009, would represent a large increase over its current long-term contract rates, has nothing to do with whether a SAC analysis would find those rates reasonable. If a SAC analysis finds a rate unreasonable, the fact that the challenged rate is identical to a longstanding contract rate would have no effect whatsoever on that finding or the resulting rate prescription and reparations.

Similarly, if a SAC analysis determines a rate is not unreasonable, the magnitude of the increase over a prior rate is irrelevant.⁸

Even if the size of a rate increase at issue were relevant in a SAC case – which it is not – Seminole’s claims regarding the size of the increase it anticipates are exaggerated and ignore Seminole’s rate history. Seminole has enjoyed very favorable, below-market rail transportation rates for a number of years. Its real objection is that it believes the common carrier rate CSXT will establish will reflect current demand and market conditions.

As demonstrated by the attached Verified Statement of Mr. Michael Sullivan, CSXT’s Assistant Vice President-Utility South Coal, Seminole’s contract rates are the product of unique factors that enabled Seminole to secure an unusually favorable rate in contract negotiations in 1998. *See* V.S. Sullivan at 2-4. When Seminole began operations at SGS in 1984, it did not receive coal at that facility via all-rail movements. Instead, Seminole received coal for the SGS plant from West Kentucky by barge down the Ohio and Mississippi Rivers and across the Gulf of Mexico into Port St. Joe in Gulf County, Florida. *See id.* at 3. At least as early as 1986, the coal then was transferred to the Apalachicola Northern Railroad, which interchanged with CSXT at Chattahoochee, Florida for delivery to the SGS facility. *See id.* Until late 1991, those movements via CSXT were exclusively tariff-based. *See id.* In 1991, CSXT and Seminole entered into a contract for the Chattahoochee-Palatka move for the time period October 1, 1991-December 31, 2004. *See id.*

⁸ Seminole has not invoked the phasing constraint, which *Coal Rate Guidelines* suggested might be available in extraordinary circumstances to mitigate significant economic dislocations that might result from the collection of an otherwise reasonable and justified rate. *See Coal Rate Guidelines*, 1 I.C.C.2d at 546-47. Neither the ICC nor the Board has ever applied the phasing constraint. The ICC made clear that phasing would be reserved for extraordinary situations “where the party seeking such relief demonstrates the need for it with specificity.” *Id.* at 547.

particularly favorable (*i.e.* low) rate to a shipper is not grounds for the Board to “suspend” the market rate and allow the shipper to continue to benefit from an artificially low rate.

The reasonableness of a common carrier rate reflecting market conditions very different than those prevailing when the parties negotiated Seminole’s expiring contract rates is further illustrated by a simple comparison to what Seminole’s tariff rate would be had CSXT simply kept its pre-contract tariff rate in place and indexed that tariff to RCAF-U. Seminole tariff 4733 as published on January 23, 1991 provided a rate of \$24.88 per ton in system equipment for transportation from Dotiki origins to SGS. *See id.* at 6. If that rate were indexed by the RCAF-U, it would be \$48.30 as of the third quarter of 2008—nearly at the level of the CSXT scale rates that Seminole claims are “massive.” *Id.* at 6-7. Seminole, which for nearly a decade has benefited from the particularly favorable rates in the 1998 Contract, should not now be heard to cry foul because it will be subject to tariff rates that are commensurate with the rates being paid by its competitors and comparable to a simple escalation of the rates Seminole itself paid in 1991.

Similarly, if one considers the publicly stated transportation costs for the cross-Gulf arrangements Seminole negotiated before entering into any contract with CSXT it is obvious that Seminole has a very favorable contract. That cost, cited in local newspapers, was \$22.72 on October 10, 1991 (*see* Appendix B) and is essentially the level of the rates enjoyed by Seminole under its expiring contract nearly 27 years later. Indeed, Seminole currently has the advantage of having the lowest delivered cost of coal to any power plant in the state of Florida, in large part because of the low rail rates under its existing rail contract. *See* V.S. Schwartz at 5.

Moreover, according to Seminole’s own URCS calculations, the expiring contract rates generate R/VC ratios that are below the Board’s jurisdictional threshold. As demonstrated

by the Verified Statement of Benton Fisher, the current contract rates for several of the movements challenged by Seminole are less than 180% above the URCS costs for those movements as calculated by Seminole's witness Mr. Crowley. See attached Verified Statement of Benton V. Fisher ("V.S. Fisher"). Seminole's request that the Board suspend CSXT's rates at the level of the contract rates is therefore nothing less than a request that the Board effectively prescribe rates below the 180% jurisdictional threshold for the duration of this case.

Finally, even if Seminole's existing rates were not substantially below market, the fact that new common carrier rates represent a large percentage increase over existing rates, standing alone, does not indicate that those rates are unreasonable. Recently, the Board decided a case in which the challenged rate was 100 percent greater than the expired contract rate. The complainant asserted that the magnitude of the increase, combined with the fact that the rate per mile far exceeded that paid by utilities farther away, demonstrated that the challenged rate was unreasonable. See *Western Fuels Ass'n v. BNSF Ry. Co.*, STB Docket No. 42088, slip op. at 4 (served Sept. 26, 2007). The Board disagreed, finding that "[s]tanding alone, these facts do not indicate that the new rate is unlawful or what the maximum reasonable rate would be." *Id.* Moreover, following a full SAC analysis, the Board found the challenged rate to be reasonable, notwithstanding the fact that it was twice as large as the expiring contract rate. *Id.* at 4-5.⁹

The sole case in history in which the Board suspended a rate pursuant to its §721(b)(4) authority involved extraordinary circumstances that are not present here. In *Arizona Public Service Co. v. BNSF*, STB Docket No. 41185 (served Oct. 14, 2003) (the "McKinley" case), the STB had prescribed a maximum rate and ordered reparations based upon a SAC

⁹ Because the Board changed certain procedures during the pendency of the case, it granted the complainant permission to submit new evidence. See *id.* at 5. The Board has not yet issued a decision based on that new evidence.

analysis founded on the assumption that coal would be available from the McKinley mine through the end of the SAC analysis period. *See Arizona Public Service Co. v. Atchison, T. & S.F. Ry Co*, 2 S.T.B. 367, 384-85 (1997). Ten years before the expiration of the SAC analysis period, it became clear that McKinley – the sole mine on the SARR – would soon run out of coal. As a result, the carrier (now BNSF) sought to reopen the case and vacate the existing rate prescription so it could establish a new common carrier rate. *McKinley*, slip op. at 5. The complainant agreed that reopening was appropriate, but contended that new evidence it intended to produce would show that the maximum reasonable rate should be *lower* than the existing prescription. The Board indicated that it believed reopening was appropriate, but that it was concerned about the effect on complainant APS of suddenly being required to pay BNSF’s substantially higher common carrier rate, because APS had not had an opportunity to budget for a “dramatic, sudden, and unexpected increase in transportation costs.” *See id.*

Critically, BNSF agreed to forgo the funds that would be generated by the higher common carrier rate, if the Board would reopen the case and ensured that BNSF would not be “permanently deprived of the additional funds” from the challenged rate if the Board found the prescribed rate too low. *See McKinley* at 5. To address the extraordinary circumstances and in light of BNSF’s voluntary agreement to suspend temporarily its ratemaking initiative, the Board crafted a unique compromise tailored to the specific facts and circumstances of the *McKinley* case. The Board vacated the existing rate prescription, enjoined BNSF from collecting the higher common carrier rate it had established, and directed the parties to “keep account” of the amounts paid during the pendency of the reopened proceeding in order to allow one party to make the other whole based upon the result of the proceeding (*i.e.*, if the maximum reasonable rate was lower than the rate collected during the proceeding, the carrier would pay the

complainant the difference and if the maximum reasonable rate was higher than the collected rate, the complainant would pay the carrier the difference). *See McKinley* at 5-6.

While the Board stated that it believed the *McKinley* approach was lawful, that position was not tested by the parties on judicial review. Both parties wished to reopen the proceeding and vacate the prescription (APS believing the prescribed rate was too high and BNSF believing the prescribed rate was too low, in light of changed circumstances). Therefore, in order to obtain a reopening without prejudicing their opportunity to obtain a “true-up” at the conclusion of the case, neither party had reason or incentive to object to or challenge the Board’s approach. CSXT believes there are serious and substantial questions about whether the *McKinley* approach was lawful. And, in the unexceptional circumstances of the present case, CSXT emphatically does not consent to the suspension of its lawfully established rate during the pendency of this proceeding.

The Board need not reach the question of whether a *McKinley*-like remedy is lawful, because the extraordinary circumstances that led to the Board’s action in that case simply are not present here. Rather, this is a standard SAC rate case in which the complainant alleges that a common carrier rate is “too high” and seeks a rate prescription and reparations. The Board is not being asked to vacate an existing rate prescription or suddenly and unexpectedly to change any of the basic parameters of the parties’ commercial relationship. *Cf. McKinley* (when Board vacated rate, APS would have faced sudden and unforeseeable change from prescribed rate level to substantially higher common carrier rate, without adequate opportunity to budget, plan or mitigate the sudden impact). As explained above, Seminole has been aware that its rail rates were significantly below market levels for several years, and it has had abundant opportunity to plan for rail rate increases and factor them into its budgets and financial planning. With full

knowledge that a significant rate increase would be necessary to align its rail transportation rates with market forces, Seminole intentionally declined to take advantage of opportunities to implement the increase more gradually over time.¹⁰ If Seminole has failed to plan and budget for a rail rate increase, it has no one to blame but itself.

Moreover, in *McKinley*, there were real, substantial, and novel questions about the appropriate status of the carrier's ratemaking initiative in the unusual context of a request for reopening, and whether vacating the prescription during the pendency of a reopened proceeding was either required or appropriate. Here, in contrast, there is no existing rate prescription and CSXT's statutory ratemaking right is clear and unencumbered. *See* 49 U.S.C. § 10701(c). If a shipper could obtain an order preemptively enjoining the collection of a lawfully established rate based solely on general allegations that the rate represented a large increase that might have a significant financial effect on the shipper or its customers, Section 10701(c)'s preservation of railroads' ratemaking initiative would be rendered essentially meaningless. The relief Seminole seeks is no less than the elimination of a carrier's statutory right to establish, maintain and collect rates, under the guise of an exercise of extraordinary power granted to allow the Board to protect and advance the statutory rights and policies established by ICCTA, including Section 10701(c). It would be perverse indeed if a party were allowed to use this extraordinary power to subvert a carrier's exercise of a core statutory right guaranteed by ICCTA.

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3. **The Board Does Not Presently Have Jurisdiction to Suspend CSXT's Rates**

Finally, there are serious questions about the Board's jurisdiction to grant an injunction suspending CSXT's rates. In the first place, it is doubtful that the Board even has jurisdiction to suspend a rate that does not apply (and will not apply) to Seminole's traffic. The Board only has authority to prescribe "a rate charged or collected by a rail carrier for transportation." 49 U.S.C. § 10704(a)(1). Here, CSXT's mileage scale rates have not been used by Seminole to move any traffic, so those rates will be neither "charged" nor "collected," and the Board does not have jurisdiction to suspend them. Moreover, if the Board enjoins the application of those rates (or any other common carrier rate CSXT may establish) before they take effect – as the Petition requests – they never will have been "charged or collected."

Further Seminole has not demonstrated that CSXT has market dominance over movements to SGS. The Board does not have jurisdiction to determine the reasonableness of rates for movements unless it first determines that the carrier is market dominant. *See* 49 U.S.C. § 10701(d)(1). It surely does not have jurisdiction to *suspend* a rate without determining that CSXT is both qualitatively and quantitatively market dominant. As demonstrated above, Seminole asks the Board to suspend CSXT rates that generate R/VC ratios below the jurisdictional threshold (See V.S. Fisher). Moreover, Seminole's petition does not even attempt to demonstrate that CSXT has qualitative market dominance. As a result, Seminole has not even met its burden of demonstrating that the Board has jurisdiction over Seminole's extraordinary request.

B. Seminole Has Not Established The Two Remaining Prerequisites to Injunctive Relief.

1. The Requested Relief Would Harm Defendant CSXT.

By statute, rail carriers have the right to establish and maintain any lawful rate, unless and until the Board finds such a rate exceeds a maximum reasonable level. *See* 49 U.S.C. § 10701(c). The extraordinary relief sought by Seminole would deprive CSXT of that statutory right based *solely* on the allegations of its Complaint and Petition, before any discovery, before the Board has found it has jurisdiction, before any SAC evidence has been filed, and long before the Board makes a rate reasonableness determination on the merits. The bare allegations of the Complaint and the general, untested allegations of two statements submitted in support of the Petition are wholly inadequate to deny CSXT its clear and express right to “establish any rate” it finds appropriate. Denial of this important ratemaking right would constitute a clear and indisputable harm to CSXT. Seminole offers no argument or evidence to the contrary.

Equally important, if the Board enjoins CSXT from collecting the common carrier rate it establishes during the pendency of the proceeding, CSXT would likely be precluded from retroactively collecting any underpayments incurred as a result of the Board suspending CSXT’s rate at a level lower than the maximum reasonable rate determined by the Board at the conclusion of the proceeding. As the Board has explained:

Ordinarily, 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. Under the statute, the shipper may receive reparations for overpayments, but a carrier is not generally entitled to further compensation if we find that there has been an underpayment.

(*McKinley*), slip op. at 5 (emphasis added) (citing *Burlington Northern, Inc. v. United States*, 459 U.S. 131, 141-42 (1982); *see Arizona Grocery Co. v. Atchison, Topeka & S.F. Ry. Co.*, 284 U.S.

370 (1932) (prohibiting retroactive reparations after agency order had prescribed lawful rate to be charged and collected).¹¹

2. Granting the Injunction is Not in the Public Interest.

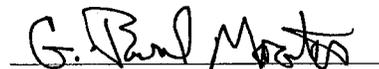
Seminole offers no new argument to carry its burden of showing that an injunction is in the public interest. Instead, it simply reiterates its claim that if it is required to pay CSXT's lawfully established rates, some retail ratepayers may suffer economic injury. *See* Petition at 13. As demonstrated above, Seminole has not shown that any indirect economic effect of CSXT's transportation rates on retail ratepayers could not be redressed by monetary damages in the event the challenged rate is found to exceed a maximum reasonable level. *See supra* at 8-10. Moreover, enjoining CSXT from charging or collecting a common carrier rate during the pendency of the proceeding would violate Section 10701(c), thereby harming the public interest in enforcement of the law and rights guaranteed by the law. Finally, an injunction against CSXT's common carrier rate would preserve Seminole's artificial cost advantage over other utilities in the region, thereby undermining competition and the public's strong interest in robust, competitive electricity markets.

¹¹ Seminole claims that the relative harm to CSXT would be less than the harm to Seminole from following the normal course under which the carrier collects the challenged rate during the pendency of the proceeding. Petition at 11-12. The relevant inquiry, however, is whether the harm to CSXT would be *substantial*. *See BP Amoco Chemical*, slip op at 3 (movant must show injunction "will not substantially harm other parties"). Using the figures alleged by Seminole for purposes of discussion, depriving CSXT of \$230 million of revenue would undeniably constitute substantial harm. Moreover, notwithstanding the escrow approach the Board adopted with the consent of the parties in *APS/BNSF McKinley*, CSXT believes it is not clear that approach is lawful or consistent with Supreme Court precedents.

CONCLUSION

For the above reasons, Seminole's Petition for Injunctive Relief should be denied.

Respectfully submitted,



Peter J. Shutz
Paul R. Hitchcock
Steven C. Armbrust
John P. Patelli
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Jacksonville, FL 32202

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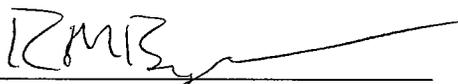
Counsel to CSX Transportation, Inc.

Dated: October 17, 2008

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of October, 2008, I caused a copy of the foregoing Reply of CSX Transportation, Inc. to Petition for Injunctive Relief to be served on the following parties by first class mail, postage prepaid or more expeditious method of delivery:

Kelvin J. Dowd
Christopher A. Mills
Slover & Loftus
1224 17th Street, NW
Washington, DC 20036


Richard Bryan

APPENDIX A

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**COMPLAINANT’S REPORT ON THE PARTIES’ CONFERENCE
PURSUANT TO 49 C.F.R. PART 1111.10(b)**

Counsel for Complainant and Defendant have conducted a conference to discuss procedural and discovery matters in this case, pursuant to 49 C.F.R. Part 1110.10(b). The results of their conference are summarized below.

1. Complainant proposed the procedural schedule for this case set out in the attached Appendix A. However, the parties were unable to agree upon a procedural schedule. As the proposed schedule set forth in Appendix A is consistent with the procedural schedules adopted in other recent rail rate cases brought under the stand-alone cost constraint, Complainant respectfully requests that the Board issue an order adopting this schedule.

2. The parties have agreed upon the form of a Protective Order, to facilitate discovery by protecting the confidentiality of materials reflecting the terms of contracts, financial statements and data, and other confidential and proprietary information in the event that such materials are produced and/or included in evidentiary filings in this proceeding. The proposed Protective Order is attached as Appendix B. It is based upon similar Orders entered by the Board in recent cases brought under the stand-alone cost constraint. Complainant respectfully requests that the Board promptly enter such Order for use in this proceeding so that discovery can get under way.

Respectfully submitted,

SEMINOLE ELECTRIC COOPERATIVE,
INC.

By: Kelvin J. Dowd
Christopher A. Mills
Daniel M. Jaffe
Joshua M. Hoffman
Slover & Loftus
1224 Seventeenth Street, NW
Washington, DC 20036
202.347.7170



Of Counsel:

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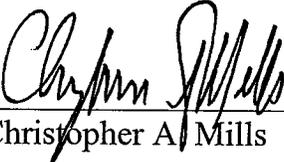
Dated: October 15, 2008

Its Attorneys

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October, 2008, I served the foregoing Report on Conference upon defendant CSX Transportation, Inc. by causing a copy thereof to be hand-delivered to its counsel, as follows:

G. Paul Moates, Esq.
Paul A. Hemmersbaugh, Esq.
Sidley Austin LLP
1201 K Street, N.W.
Washington, D.C. 20005



Christopher A. Mills

APPENDIX A

STB Docket No. 42110

SEMINOLE ELECTRIC COOPERATIVE, INC.

v.

CSX TRANSPORTATION, INC.

Proposed Procedural Schedule

<u>DATE</u>	<u>DAY</u>	<u>EVENT</u>
October 3, 2008	0	Complaint filed
October 23, 2008	0 + 20	Answer to Complaint due
November 24, 2008	0 + 52	Staff-supervised discovery conference
February 2, 2009	0 + 122	End of discovery
April 17, 2009	0 + 196	Opening Evidence due
May 18, 2009	0 + 227	Staff-supervised technical conference
July 20, 2009	0 + 289	Reply evidence due
September 21, 2009	0 + 352	Rebuttal Evidence due

APPENDIX B

St. Petersburg Times

Florida's Best Newspaper

ST. PETERSBURG, FLORIDA, SATURDAY, OCTOBER 10, 1968

70 PAGES

VOL. 98 — NO. 76

High in mid to upper
80s. Low near 70. W
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data 2-A.

Seminole Electric executives vigorously deny wrong

By WILLIAM MOTTINGHAM
St. Petersburg Times Staff Writer

TAMPA — For the first time since they were accused of bungling a \$1.5-billion coal hauling contract, executives with Seminole Electric Cooperative Inc. went public Friday to deny any wrongdoing.

"I've never done a dishonest thing in my entire utility career (of 32 years)," Executive Vice President and General Manager Harry W. Wright said.

"We are very concerned about some of the allegations because we feel that an outstanding job has been done" in striking the 22-year transportation agreement, he said.

FOR MORE THAN a month, Seminole Electric leaders had been close-mouthed about the coal hauling

agreement, though Leesbury broker H. Malcolm Blahop had complained of unfairly losing out in the year-long contract competition.

Blahop had accused utility executives of improperly sharing his pricing information with the firm that ultimately won the contract — Central Gulf Lines Inc., a subsidiary of the New Orleans-based International Shipholding Corp. He also claimed that his price was lower and better than Central Gulf's.

When *The St. Petersburg Times* asked the Seminole Electric executives to answer Blahop's charges and tell their side of the story in a detailed article about the controversy, they repeatedly refused. It was the same stance they had taken several weeks earlier, when *The Times*

See UTILITY, B-A



Utility from 1-A

Published articles outlining accusations that the utility had rigged bids in the award of a \$24.9 million limestone supply contract and improperly handled another for fill.

BUT THAT CHANGED Friday, Wright and two other Seminoles executives — General Services Director Joseph Casey and Public Affairs Director Lawrence M. Neal — unexpectedly called a press conference to respond to questions.

All of these charges and allegations against me are "baseless," said Wright.

"What's actually happened here, and it's going to be proven so, is that an outstanding job has been done on this coal transportation contract."

"The limestone, the fill dirt were excellent arrangements for Seminoles (Electric), you know, with the job holder and the people handling getting the job. And that is a fact."

Casey, whom Wright described as the "principal negotiator" for the coal hauling contract, also had pointed words for his critics.

"He chose to go to the press and the politicians" rather than give to Seminoles Electric leaders that his price was as Casey told Bishop contends, "\$40 million lower."

"The information that was never shared with Central Gulf at any time was price."

SEMINOLE ELECTRIC is a nonprofit utility serving 254,000 customers throughout 11 Florida customer organizations, among them, the Associated River Electric Coopers Live Inc., based in Dade City.

Unlike other utilities in the state, Seminoles Electric is not regulated by the Florida Public Service Commission. Instead, it is watched over by the Rural Electrification Administration (REA), an arm of the U.S. Department of Agriculture.

As a result of the allegations involving Seminoles Electric, federal investigators from the Agriculture Department have been sifting through utility records over the past several weeks to see if any federal law has been broken.

Wright said that he had declined to comment for the Times article because, "I guess we didn't have any confidence in the way it would come out."

HE ACCUSED the newspaper and reporter Barry Clinton of "slandering" past articles about the utility and failing to be "objective."

In a related matter, Clinton was subpoenaed Friday to answer questions in connection with a lawsuit against Anheuser-Busch, the Crystal River businessman who won Seminoles Electric's limestone contract now the target of bid-rigging charges. Tavernier is being sued by the state.

Department of Environmental Regulation for allegedly failing to obtain required dredge and fill permits for the limestone mine.

Lawyers for The Times sought to quash the subpoena, but the action was postponed until Marion Circuit Judge Wallace E. Sturgis returns from vacation Oct. 10.

Seminole Electric is building a \$1.1-billion power plant complex near Paducah, and will fuel the generators with coal from mines in Kentucky and Illinois. From the mines, the coal will be barged down the Ohio and Mississippi Rivers, then along the Gulf of Mexico shore to Florida.

THE CONTRACT with Central Gulf, signed last February called for the barges to unload at the port of Sturgis, which sits at the northernmost tip of the Apalachicola River.

But Wright announced that, on Thursday, Seminoles Electric's board of trustees approved a secretly amended contract to the coal hauling contract — changing the barge unloading point to Port St. Joe.

The amendment, which Wright declined to give reporters had come at the request of REA.

"REA did have some concerns" about the initial plan to barge coal up the environmentally sensitive Apalachicola River, Wright said. The river does not maintain an adequate depth, he said. Wright acknowledged, but it will be made deeper by the time the barges arrive.

Just the same, both Wright and Casey said they are confident that the Port St. Joe destination is the "most economical" flow available.

BISHOP REACHED last Friday aboard a cruise ship off the Florida coast, continued to insist that he was not given fair treatment by Seminoles Electric.

"All we got from Joe Casey was the 'insult and indignation,'" Bishop said. He criticized Casey's press conference contention that "far more than a year" utility executives had notified Bishop several weeks prior to the contract offer.

Seminole Electric now says its coal will now be hauled for \$22.72 per ton. Bishop said he still believes that he could do the work for less.

In the past, Bishop has also criticized other aspects of the Seminoles Electric contract with Central Gulf, among them a "cost-plus" provision that allows the barge firm to change the pricing computations early in the contract's life.

Mr. Casey defended the provision, saying that it insures that the utility will get the coal it needs while Central Gulf "makes a fair rate of return."

Wright also said that not all of the utility trustees who signed on the contract amendment actually read the document. None of them were given copies, Wright said. He cannot recall if any actually asked — because the utility is concerned that the information would be leaked to the press.

— St. Petersburg Times Staff Writer Barry Clinton contributed to this report.

SULLIVAN

BEFORE THE
SURFACE TRANSPORTATION BOARD

_____)	
SEMINOLE ELECTRIC COOPERATIVE, INC.)	
)	
Complainant,)	
)	Docket No. NOR 42110
v.)	
)	
CSX TRANSPORTATION, INC.)	
)	
Defendant)	
_____)	

**VERIFIED STATEMENT OF MICHAEL P. SULLIVAN IN SUPPORT OF
DEFENDANT CSX TRANSPORTATION, INC.'S REPLY TO PETITION FOR
INJUNCTIVE RELIEF**

My name is Michael P. Sullivan. I am Assistant Vice President-Utility Coal South in the CSX Transportation, Inc. ("CSXT") Coal Department. In this position, I am responsible for marketing CSXT Coal Services to fourteen major utilities located in the Southern Region of CSXT service territory. My team and I negotiate coal transportation contracts with all of our utility customers in Alabama, Mississippi, Georgia, North Carolina, South Carolina, and Florida, including Seminole Electric Cooperative ("Seminole"). I have been personally involved with CSXT's relationship with Seminole since 2001. I also have an understanding of CSXT's dealings with Seminole before 2001, based on my review of CSXT's files and discussions with other CSXT personnel who were directly involved in CSXT's relationship and negotiations with Seminole before 2001.

I am submitting this Verified Statement in support of CSXT's Reply to Seminole's Petition for Injunctive Relief in the above-captioned action. I understand that Seminole is asking the Board to suspend CSXT's common carrier rates when CSXT's and

Seminole’s coal transportation contract expires on December 31, 2008, on the grounds that an increase from Seminole’s contract rates would be “sudden,” “unexpected,” and “massive.” Seminole Petition at 7-8. This is simply not the case. Seminole has known for many years that CSXT considered Seminole’s contract rates—which were negotiated a decade ago in a very difficult environment—to be well below market and that a rate increase would be warranted after the contract expired. CSXT made this clear to Seminole as early as January 2005. [] [] []

For Seminole to suggest that a January 1, 2009 rate increase would be “unexpected” or “abrupt” is wrong and completely ignores the indisputable fact that Seminole has known of this coming increase for years. Moreover, the idea that CSXT proposes “massive” increases is incorrect. In the first place, the CSXT scale rates that Seminole seeks to suspend will not apply to its traffic after January 1, 2009. As Seminole well knew when it filed its Complaint and Petition, CSXT plans to provide Seminole with Seminole-specific tariff rates by November 15, 2008. Seminole’s request to enjoin the scale rates therefore makes no sense, since Seminole will not move traffic under those rates. And when CSXT does provide new Seminole-specific common carrier rates, they will represent a return to reasonable tariff rates upon expiration of an unusually favorable contract. Indeed, a simple RCAF-U escalation of the tariff rates Seminole was paying under ICC CSXT 4733 Series before it entered a contract with CSXT yields \$48.30 a ton, a rate commensurate with those scale rates.

CSXT’s Contract With Seminole

CSXT transports coal to Seminole at its Palatka, Florida facility, Seminole Generating Station (“SGS”). Seminole began operations at SGS in 1984. At the outset Seminole

did not receive coal at SGS via all-rail movements. Instead, Seminole received coal for the SGS plant from West Kentucky and Illinois by barge down the Ohio and Mississippi Rivers and across the Gulf of Mexico into Port St. Joe in Gulf County, Florida. At least as early as 1986, the coal then was transferred to the Apalachicola Northern Railroad, which interchanged with CSXT at Chattahoochee, Florida for delivery to the SGS facility. Until late 1991, those movements via CSXT were exclusively tariff-based. In 1991, CSXT and Seminole entered into a contract for the Chattahoochee-Palatka move for the time period October 1, 1991-December 31, 2004 (the “1991 Contract”).

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After negotiations over CSXT’s offer, CSXT and Seminole agreed to a 10-year, all-rail transportation contract in December 1998 (the “1998 Contract”). The 1998 Contract governed CSXT’s transportation of coal and petroleum coke to SGS from multiple origins[]

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[]. The 1998 Contract explicitly canceled and replaced the 1991 Contract. The 1998 Contract expires on December 31, 2008.

Negotiation of A Replacement for the 1998 Contract

For ten years Seminole has had the benefit of the below-market rates negotiated in the 1998 Contract. Seminole has long been aware that these unusually favorable rate terms could not last in perpetuity. Seminole has known for nearly four years that CSXT considers the 1998 Contract rates to be well below the market, and that CSXT would seek to negotiate new rates beginning in 2009 that more closely reflect market rates—market rates that other Florida utilities have accepted in their contract negotiations. For example, CSXT has just executed a new rail transportation contract with Jacksonville Electric Authority (“JEA”) which embodies rate increases well in excess of those which Seminole here claims to be “unexpected” and “massive”. In fact, should the Board grant Seminole the rate freeze that it is seeking during the duration of this case, Seminole’s members would have an enormous advantage over JEA’s customers since JEA’s rates would be 60-70% higher than Seminole’s.

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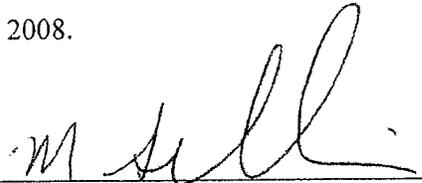
the parties were in the midst of negotiations, Seminole requested common carrier rates from CSXT. However, with nine months to run on the existing contract and the markets changing rapidly, we believed it to be unrealistic and inappropriate to quote Seminole-specific common carrier rates that would not be effective until 2009. The coal transportation marketplace can change in the course of a year (and certainly has recently), and we did not want to make a specific quote in March only to have to change that quote in November. As we explained to Seminole, because any CSXT common carrier rate for Seminole would be market based and would have to consider all “the relevant operating, commercial and other pertinent factors at th[e] time” the contract was about to expire, CSXT wished to wait to establish such a rate until a time closer to January 1, 2009. Moreover, we had a contract in place and we were optimistic that a new agreement would be reached. Nonetheless, because Seminole had formally requested a common carrier rate quote, we did advise it promptly that CSXT’s existing system-wide scale rates (Tariff CSXT 8200-series), which include no volume consideration and no other qualification criteria, generally apply to any non-contract movement, including those to Seminole. On September 26, 2008, CSXT reiterated that, if negotiations were unsuccessful, “CSX will publish Seminole-specific tariff rates based upon Seminole’s indications of origins required to handle volume in 2009.” Those “Seminole-specific rates” would be published “on or before November 15, 2008”—well in advance of the 1998 Contract’s expiration. As we represented, CSXT will publish those rates on or before November 15, 2008. While CSXT is still in the process of devising Seminole-specific tariff rates, we expect that those Seminole-specific rates will be lower than the mileage scale rates that Seminole seeks to enjoy.

CSXT's Rate Increase Is Not Unreasonable

Finally, Seminole's claim that CSXT's rate increase would be unreasonable is incorrect. CSXT will establish transportation rates to Seminole's facility that are commercially reasonable and commensurate with rates that similar utility companies have agreed to pay to CSXT for similar services in today's marketplace. Indeed, even CSXT's scale rates are not far above what Seminole's tariff rate would be had CSXT simply kept its pre-contract tariff rate in place and indexed that tariff to RCAF-U. Seminole tariff 4733 as published on January 23, 1991 provided a rate of \$24.88 per ton in system equipment for transportation from Dotiki to SGS. If that rate were indexed to RCAF-U, it would be \$48.30 as of the third quarter of 2008—nearly at the level of the CSXT scale rates that Seminole claims are “massive.” Moreover, market rates for coal transportation have changed significantly since the 1998 Contract was negotiated. For example, between January 2000 and October 2008, the average revenue per car for CSXT Utility South has increased some 93%. It is simply unreasonable for Seminole, which long has benefited from the particularly favorable rates in the 1998 Contract, to now cry foul because it will be subject to tariff rates that are commensurate with the rates being paid by Seminole's competitors and comparable to a simple escalation of the 1991 tariff rates applying to Seminole.

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

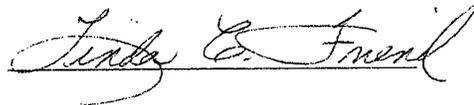
Executed on this 17th day of October, 2008.


Michael P. Sullivan

STATE OF FLORIDA
COUNTY OF DUVAL

I, LINDA FRIEND, the undersigned Notary Public, in and for said county, and in said state, hereby certify that MICHAEL SULLIVAN, who signed the foregoing instrument and who are personally known to me, acknowledged before me on this day that being informed of the contents of the instrument they as such officers and with full authority executed the same voluntarily for and as the act of said corporation.

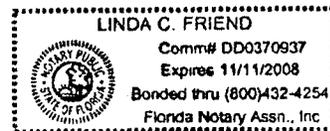
Given under my hand and official seal this 17TH day of OCTOBER, 2008.



_____, Notary Public

Commission #

My Commission expires 11-11-08



SCHWARTZ

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

SEMINOLE ELECTRIC COOPERATIVE, INC.)	
)	
Complainant,)	
)	
v.)	Docket No. NOR 42110
)	
CSX TRANSPORTATION, INC.)	
)	
Defendant)	
)	

VERIFIED STATEMENT OF SETH SCHWARTZ IN SUPPORT OF DEFENDANT CSX TRANSPORTATION, INC.'S REPLY TO THE PETITION FOR INJUNCTIVE RELIEF

My name is Seth Schwartz. I am President of Energy Ventures Analysis, Inc., a consulting firm active in analyzing energy markets.

I am submitting this Verified Statement in support of CSXT's Reply to Seminole's Petition for Injunctive Relief in the above-captioned action. I understand that Seminole ("SECI") is asking the Board to enjoin -- that is, suspend -- CSXT's common carrier rates when CSXT's and SECI's coal transportation contract expires on December 31, 2008, on the grounds that an increase from SECI's contract rate would "result in a dramatic added financial burden on SECI, and will cause irreparable harm both to SECI and its members' ratepayers". This is simply not the case.

Impact of CSXT Transportation Rate on SECI's Members' Rates

In his Verified Statement, SECI's Chief Financial Officer Mr. John W. Geeraerts stated: "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 customers." He alleged that, if SECI

were to pay increased rail rates while this dispute is pending, and were to recover the increased costs through wholesale rates to its members and the members were to pass the charges on to their consumers, the impact on the retail rates would be significant.

In fact, according to SECI's 2007 Annual Report, SECI's wholesale charges to its members were \$1,192.63 million, while its payments for rail transportation to SGS were \$74.4 million. Thus, the existing CSXT rail contract accounted for only 6.2% of SECI's wholesale rates to its members. SECI's members, in turn, charge their ratepayers a rate which reflects the members' operating and capital costs, which are 40% – 50% above SECI's wholesale rates (which were \$69.20 per MWh in 2007). Thus, the existing CSXT rail contract accounted for less than 5% of the retail rates paid by SECI's members' ratepayers.

From 2001 to 2007, SECI's payments to CSXT under the existing rail contract increased by \$15.4 million, while SECI's revenues from wholesale sales to its members increased by \$500.5 million over the same period, so the rail payments accounted for 3% of the increased wholesale charges.

Using SECI's estimate that the tariff rates will cause its cost to increase by \$115 million, and assuming that the rate increase were to be passed on by SECI to its members in its wholesale rates, this would cause SECI's wholesale charges to its members to increase by 10% and its members' retail rates to increase by about 6%. Simply put, SECI's rail transportation costs to SGS are not the primary driver of the wholesale rates to its members, and the retail rates to the ultimate consumers; the rail rates are merely one factor and not a very large one.

The Impact on Retail Customer Rates for Electricity

Mr. Geeraerts alleged that, if SECI were to pay increased rail rates while this dispute is pending, and were to recover the increased costs through wholesale rates to its

members and the members were to pass the charges on to their consumers, the impact on the retail rates would be significant. He estimated that the expected retail rate increase for the average ratepayer would be \$6.50 per month. This would be an increase in retail rates of about 6%.

The cost of fuel has been increasing for all electric utilities and the impact of CSXT's tariff rates on SECI's customers would be less than the rate increases experienced by other ratepayers in Florida during 2008. The Florida investor-owned utilities have their rates regulated by the Florida Public Service Commission, and these rates consist of base rates and a fuel cost recovery factor. Each of the four major investor-owned utilities has filed for increases in its fuel cost recovery factor which are greater than the effect which CSXT's tariff rates would have on SECI.

Florida Power & Light, the largest utility in Florida, received a 28.5% increase in its fuel cost recovery factor effective August 2008, which was an increase in its average residential customer bill of \$16.28 per month (15.9%). Progress Energy Florida received an increase in its fuel cost recovery factor of 26.2% effective August 2008, which increased its average residential customer bill by \$8.68 per month (8.0%). Gulf Power received an increase in its fuel cost recovery factor of 28.3% effective August 2008, which increased its average residential customer bill by \$11.54 per month (10.1%). Tampa Electric has filed for an increase in its fuel cost recovery factor effective January 2009 which would increase its average residential customer bill by \$14.44 per month, an increase of 12.7%.

The impact of CSXT's proposed tariff rates on SECI's members' rates is less than the impact of changes in the fuel costs for other Florida electric utilities on their retail ratepayers.

Timing Differences in Fuel Charges to Electric Ratepayers is Standard Practice

SECI contends that the fact that SECI's customer base likely will have changed by the time a reparations award (if any) is made supports a finding of irreparable harm. This issue is a fact of life in the electric utility industry. The customer base for every utility changes daily, weekly, monthly and annually. New ratepayers are moving in and existing ratepayers are moving out. New customers are being born and existing customers are dying. The electric utility industry typically passes on its actual cost of fuel for power generation, but it has never been under the illusion that the fuel cost recovery from its customers will match exactly those customers who were present at the time the costs were incurred.

Almost every electric utility has a fuel cost recovery factor. Typically, this factor is calculated based on the expected fuel costs for the prospective year divided by the expected power sales for the prospective year. The utility keeps track of its actual fuel costs during the year and will have a balance of over-recovered or under-recovered costs. The amount of over or under recovery is then added to the next prospective year's projected costs.

In Florida, it is the standard methodology of the Florida Public Service Commission ("FPSC") to levelize fuel costs over a 12-month period, but the FPSC has approved the practice of spreading out fuel cost recoveries over a 2-year period in order to moderate the impact on customers. In this consideration, the FPSC has not been disturbed by the fact that the customers are likely to change over the 2-year period of fuel cost recovery. While SECI claims that the change in the customers would be a cause of irreparable harm, the FPSC has not found this consideration is important enough to even mention in its consideration of deferring recovery of under-recovered fuel costs.

Competitiveness of the Existing CSXT Rail Contract

Due in large part to the existing CSXT rail contract, SECI currently enjoys the lowest delivered cost of coal for any power plant in the state of Florida, including those plants which have competitive access to water delivery in addition to CSXT rail service. For example, the St. Johns River Power Park in Jacksonville, Florida has more competitive options than any power plant in the region. It can take coal directly by ocean vessel, and the majority of its coal supply is currently imported from Colombia. It also has purchased petroleum coke delivered by vessel as well as coal delivered by CSXT unit train from Central Appalachia, Northern Appalachia and the Illinois Basin. The plant purchases a similar volume as SECI and has scrubbers which allow it to purchase high-sulfur coal and petroleum coke as well. Despite all of these competitive delivery options, the delivered cost of coal to St. Johns River Power Park in the first six months of 2008 was \$0.11 per million Btu higher than the delivered cost to SECI.

**RESUME OF
SETH SCHWARTZ**

EDUCATIONAL BACKGROUND

B.S.E. Geological Engineering, Princeton University, 1977

PROFESSIONAL EXPERIENCE

Current Position

Seth Schwartz is the President and co-founder of Energy Ventures Analysis. Mr. Schwartz directs EVA's coal and utility practice and manages the COALCAST Report Service. The types of projects in which he is involved are described below:

Fuel Procurement

Assists utilities, industries and independent power producers in developing fuel procurement strategies, analyzing coal and gas markets, and in negotiating long-term fuel contracts.

Fuel Procurement Audits

Audits utility fuel procurement practices, system dispatch, and off-system sales on behalf of all three sides of the regulatory triangle, i.e., public utility commissions, rate case intervenors, and utility management.

Coal Analyses

Directs EVA analyses of coal supply and demand, including studies of utility, industrial, export, and metallurgical markets and evaluations of coal production, productivity and mining costs.

Natural Gas Analyses

Evaluates natural gas markets, especially in the utility and industrial sectors, and analyzes gas supply and transportation by pipeline companies.

Expert Testimony

Testifies in fuel contract disputes and rate cases, including arbitration, litigation and regulatory proceedings, regarding prevailing market prices, industry practice in the use of contract terms and conditions, market conditions surrounding the initial contracts, and damages resulting from contract breach.

Acquisitions and Divestitures

Assists companies in acquisitions and sales of reserves and producing properties, both in consulting and brokering activities. Prepares independent assessments of property values for financing institutions.

Seth Schwartz
Page Two

Prior Experience

Before founding Energy Ventures Analysis, Mr. Schwartz was a Project Manager at Energy and Environmental Analysis, Inc. Mr. Schwartz directed several sizable quick-response support contracts for the Department of Energy and the Environmental Protection Agency. These included environmental and financial analyses for DOE's Coal Loan Guarantee Program, analyses of air pollution control costs for electric utilities for EPA's Office of Environmental Engineering and Technology, Energy Processes Division, and technical and economic analysis of coal production and consumptions for DOE's Advanced Environmental Control Technology Program.

Publications

Crerar, D.A., Susak, N.J., Borcsik, M., and Schwartz, S., "Solubility of the Buffer Assemblage Pyrite + Pyrrhotite + Magnetite in NaCl Solutions from 200° to 350°", Geochimica et Cosmochimica Acta (42)1427-1437, 1978.

VERIFICATION

I, Seth Schwartz, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.


Seth Schwartz

Executed on: October 16, 2008

FISHER

BEFORE THE
SURFACE TRANSPORTATION BOARD

<hr/>)	
SEMINOLE ELECTRIC COOPERATIVE, INC.)	
)	
Complainant,)	
)	Docket No. NOR 42110
v.)	
)	
CSX TRANSPORTATION, INC.)	
)	
Defendant)	
<hr/>)	

VERIFIED STATEMENT OF BENTON V. FISHER
CSX TRANSPORTATION, INC.

I. INTRODUCTION

My name is Benton V. Fisher. I am a Senior Managing Director in the Network Industries Strategies Group of FTI Consulting, specializing in the economic analysis of network industries, including railroad transportation. My business address is 1101 K Street, Suite B100, Washington, DC 20005.

I have been asked by Defendant CSX Transportation (“CSXT”) to prepare this Verified Statement in response to a Petition for Injunctive Relief submitted by Complainant Seminole Electric Corporation (“SEC”) on October 3, 2008, the same day that SEC filed its rate reasonableness complaint that initiated this proceeding. I understand that SEC is requesting that after the expiration of its transportation contract with CSXT,¹ SEC should be permitted to continue to pay rates calculated under the terms of the Contract for subsequent shipments. In this statement, I explain that if the Surface Transportation Board (“STB”) were to grant SEC’s

¹ SEC’s Complaint identifies that Contract CSXT-68681 will expire on December 31, 2008. Complaint at 4

petition, it would be enforcing a cap on rates that currently generate rate-to-variable cost (“R/VC”) ratios *below* the jurisdictional threshold level for the Complaint traffic.

II. CURRENT CONTRACT RATES FOR SEC SHIPMENTS

SEC’s Complaint and Petition each identify shipments from eight origins. CSXT provided me with the Fourth Quarter 2008 rates per ton under Contract CSXT-68681 that apply to SEC’s shipments from seven of the eight Complaint origins,² as shown in the table below.

Origin	Contract Rate per Ton (4Q 2008)
Dotiki, KY	[]
Epworth, IL	[]
Warrior, KY	[]
Elk Creek, KY	[]
Robinson Run, WV	[]
Bailey Mine, PA	[]
Charleston, SC	[]

III. REVENUE-TO-VARIABLE COST RATIOS FOR SEC’S SHIPMENTS, BASED ON SEC’S OWN ESTIMATE OF URCS VARIABLE COSTS

By Congressional mandate, the STB has no jurisdiction on traffic that moves at rates generating R/VC ratios below 180 percent of variable costs, and the Board is precluded from setting rates that generate R/VC ratios below that threshold. In order to compare the levels at which SEC is asking the STB to allow its rates to be capped to the jurisdictional threshold, it is necessary to calculate the variable costs of the shipments to which those rates apply. In its recent Ex Parte No. 657 (Sub-No. 1) rulemaking proceeding, the STB adopted the use of unadjusted system-average costs generated from the Uniform Rail Costing System (“URCS”)

² SEC’s Complaint did not identify a specific origin in the Sullivan IN rate group.

model as the basis for determining the jurisdictional threshold.³ In this proceeding, SEC submitted an estimate of the URCS costs for the Complaint traffic in a Verified Statement submitted with its Petition. In that Statement, SEC witness Thomas D. Crowley presented the following URCS variable costs per ton for shipments from each of the Complaint origins.⁴

Origin	SEC Variable Cost per Ton (1Q 2009)
Dotiki, KY	\$11.40
Epworth, IL	\$12.17
Warrior, KY	\$11.19
Elk Creek, KY	\$11.17
Robinson Run, WV	\$15.41
Bailey Mine, PA	\$16.41
Charleston, SC	\$4.79

When the current Contract rates are divided by SEC’s estimate of the variable costs for shipments from the corresponding origin, it is evident that *three* of the seven moves currently have R/VC ratios that are less than the jurisdictional threshold of 180%, and the other four are all moving at rates that are within [] of that threshold.⁵ The following table presents the R/VC ratios under SEC’s estimate of URCS variable costs.

³ Ex Parte No. 657 October 2006 decision, at 60.

⁴ I note that SEC’s variable costs may be understated due to reliance on mileage distances that are likely not reflective of the route actually traversed by these shipments. SEC witness Crowley explains that he selected a routing in the PCRail model that may be more applicable for general merchandise traffic – referred to as a “Practical” routing – instead of choosing the “Coal/Bulk” routing option. Crowley VS at 6, fn 6 The STB prefers the use of the actual loaded miles for the Complaint traffic as one of the inputs for developing unadjusted system-average URCS costs. Ex Parte No. 657 October 2006 decision, at 60

⁵ Under SEC’s variable cost estimates, the highest R/VC under the Contract (Charleston) is []
[]
[]

Origin	Contract Rate / SEC Cost Ratio
Dotiki, KY	[]
Epworth, IL	[]
Warrior, KY	[]
Elk Creek, KY	[]
Robinson Run, WV	[]
Bailey Mine, PA	[]
Charleston, SC	[]

As explained below, when two of the costing inputs that SEC used are appropriately modified, the current R/VC ratios for shipments from *all* of the mine origins are below the jurisdictional threshold. The only Complaint traffic with a rate that would be above 180% is the [] movement with an R/VC of [] percent of the jurisdictional threshold.

IV. MODIFICATIONS TO SEC COSTING INPUTS AND RESTATED COSTS AND R/VC RATIOS

There are two modifications to SEC’s costing inputs that I believe to be appropriate: (1) the mileage distances for the shipments from the Complaint origins to the destination and (2) the index used to adjust the URCS costs from base-year 2007 levels to the current period. First, as explained above, SEC relied upon a routing algorithm in the PCRail model that produces different results than that for coal traffic. When the likely routing for coal traffic is selected, the distances are longer than the miles on which SEC’s costs are based for six of the seven Complaint movements, as shown below.

Loaded Distance from Origin	SEC Practical Routing	Coal/Bulk Routing	Percent Difference
Dotiki, KY	813.1	849.9	5%
Epworth, IL	870.8	907.6	4%
Warrior, KY	797.3	834.1	5%
Elk Creek, KY	795.5	832.3	5%
Robinson Run, WV	1,113.8	1,160.9	4%
Bailey Mine, PA	1,188.4	1,419.0	19%
Charleston, SC	316.7	316.7	0%

Second, witness Crowley explains that in indexing the URCS costs to more current levels, he relied upon a forecast generated by his company for all costs except fuel, and a fuel-cost forecast from the Energy Information Administration. Crowley VS at 6-7 SEC provided none of the materials underlying this calculation; all that can be determined is that the result of Mr. Crowley's efforts was an index of 1.1167,⁶ *i.e.*, a conclusion that CSXT's First Quarter 2009 cost levels would be almost 12% higher than those in 2007. Without the specific calculations or his company forecast on which he relied, I substituted an index following the standard approach adopted by the STB in cases involving URCS variable costs,⁷ and used the AAR's Railroad Cost Recovery indices through the period most recently available, Third Quarter 2008. Under this approach, I determined that the Third Quarter 2008 index would be 1.1697, or that CSXT's cost levels in Third Quarter 2008 were 17% higher than the 2007 base-year totals.

I calculated 2007 URCS variable costs for the shipments based (1) on the Coal mileages shown in the above table; and (2) the same movement parameters that SEC used for the other

⁶ See Line 11 of Exhibit No. 2 to Crowley VS.

⁷ This is the same approach that was used by both parties to bring base-year costs to later-period levels in the recent DuPont rate cases against CSXT. See, *e.g.*, STB Docket No. 42100

PUBLIC VERSION

inputs,⁸ with one exception. Shipments from the Epworth IL origin – which as shown above would move at a rate below the jurisdictional threshold under SEC’s costs – require movement over the Evansville Western Railway (“EVWR”). Consistent with STB precedent,⁹ I developed costs for this traffic as an interline movement between the shortline and CSXT, and used the corresponding Eastern Regional URCS costs for the EVWR portion. Having calculated 2007 URCS costs for shipments from all the origins, I indexed the results to Third Quarter 2008 levels based on the 1.1697 factor explained in the prior paragraph.

The following table compares the indexed variable costs that SEC witness Crowley submitted to the costs resulting from modifying only the mileage distances and index, and also presents the R/VC ratios for the current Contract rates based on the Restated variable costs. As indicated above, the rates for *six* of the O-D pairs are currently generating R/VC ratios below the STB’s jurisdictional threshold. (The only rate generating a ratio above the jurisdictional threshold is that for shipments from [], and even that one is within [] percent of the threshold.)

⁸ I have not examined the validity of the other costing inputs, *e.g.*, cars per train. Further, CSXT can be expected to present calculations of the variable costs for the Complaint traffic in later filings, consistent with the evidentiary schedule followed in large rate cases.

⁹ See, *e.g.*, STB Docket No. 42095 Kansas City Power and Light v. Union Pacific Railroad (decided May 16, 2008), at 8.

Origin	SEC Variable Cost per Ton (1Q 2009)	Restated Variable Cost per Ton (3Q 2008)	4Q 2008 Contract Rate / Restated Cost Ratio
Dotiki, KY	\$11.40	\$12.49	[]
Epworth, IL	\$12.17	\$13.71	[]
Warrior, KY	\$11.19	\$12.27	[]
Elk Creek, KY	\$11.17	\$12.25	[]
Robinson Run, WV	\$15.41	\$16.84	[]
Bailey Mine, PA	\$16.41	\$20.44	[]
Charleston, SC	\$4.79	\$5.04	[]

Verification and Statement of Qualifications of Benton V. Fisher

Benton V. Fisher is a Senior Managing Director at FTI Consulting, Inc., an economic and financial consulting firm with offices located at 1101 K. St. NW, Washington DC 20005. Since 1991, Mr. Fisher has been involved in various aspects of transportation consulting including economic studies involving costs and revenues, traffic and operating analyses, and work with performance measurement and financial reporting systems.

Mr. Fisher holds a Bachelor of Science in Engineering degree from Princeton University. In 1990, he served as the Deputy Controller for the Bill Bradley for U.S. Senate Campaign. In 1991, he joined Klick, Kent & Allen, Inc., which was acquired by FTI Consulting, Inc., in 1998. While with the firm Mr. Fisher has performed numerous analyses for and assisted in the preparation of expert testimony related to merger applications, rate reasonableness proceedings, contract disputes, and other regulatory costing issues before the Interstate Commerce commission, Surface Transportation Board, Federal Energy Regulatory Commission, Postal Rate Commission, Federal Court and State Utility Commissions.

I declare under penalty of perjury that the foregoing is true and correct. I further certify that I am qualified and authorized to sponsor and file this testimony.

Executed on 17 October, 2008

Benton V. Fisher

Benton V. Fisher