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PUBLIC VERSION
BEFORE THE
SURFACE TRANSPORTATION BOARD

SEMINOLE ELECTRIC COOPERATIVE, INC.)
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 Complainant,)
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 v.)
)
 CSX TRANSPORTATION, INC.)
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 Defendant.)
_____)

ENTERED
Office of Proceedings
OCT 22 2008
Part of
Public Record

Docket No. 42110

**COMPLAINANT'S MOTION TO STRIKE PORTIONS
OF DEFENDANT'S REPLY TO COMPLAINANT'S
PETITION FOR INJUNCTIVE RELIEF**

Complainant Seminole Electric Cooperative, Inc. ("SECI"), pursuant to 49 C.F.R. Part 1117.1, hereby requests the Board to strike certain portions of the Highly Confidential Version of Defendant CSX Transportation Inc.'s ("CSXT") Reply to SECI's Petition for Injunctive Relief ("Reply") filed on October 17, 2008. The portions of CSXT's Reply that should be stricken include the following:

1. In the Reply itself, all of the bracketed material appearing on pages 13-14 and 16.
2. In the supporting Verified Statement of Michael P. Sullivan, all of the bracketed material appearing on pages 2 through 5.

This material should be stricken, and disregarded by the Board in deciding whether to grant SECI's Petition for Injunctive Relief, because it was submitted to the Board in violation of a confidentiality agreement between the parties, in which each party agreed not to disclose confidential information concerning their rail transportation contract negotiations (or the terms of their current rail transportation contract) to third parties. The confidentiality undertakings between the parties are described in the accompanying Verified Statement of William J. Reid ("Reid V.S."), SECI's Director of Fuel Supply who has led the negotiations with CSXT for an extended or new contract to transport coal to SGS.¹ As Mr. Reid states, SECI has never consented to the disclosure of information concerning the parties' confidential contract negotiations to the Board.

As shown below, CSXT's selective disclosure of confidential information concerning the parties' contract negotiations to the Board not only violates the parties' agreement, but will have a chilling effect on any future negotiations between SECI and CSXT, including any prospects for settlement of this rate litigation through Board-sponsored mediation. Such disclosures are also contrary to public policy and to Board precedent concerning the confidentiality of settlement negotiations.

¹ In order to adequately inform the Board as to CSXT's violation of its confidentiality agreement with SECI, SECI has no choice but to provide relevant portions of the agreement to the Board in a "Highly Confidential" version of this Motion which is being filed under seal. SECI is also filing a "Public Version" of this Motion for posting on the Board's web site

I. CSXT's Unauthorized Disclosure of Contract Negotiations to the Board Violates Its Confidentiality Obligations Under the Parties' Current Rail Transportation Contract

CSXT presently transports coal to SECI's Seminole Generating Station in Florida ("SGS") in single-line service pursuant to a rail transportation contract executed in December of 1998. This contract, known as Contract CSXT-68681, expires on December 31, 2008. As indicated in SECI's Verified Complaint and in Mr. Reid's Verified Statement, the parties negotiated over a possible extension of Contract CSXT-68681, or a new contract to replace it, for several years. Until this litigation commenced, both parties consistently have treated information concerning their negotiations as confidential, both pursuant to what SECI considered was a mutual understanding and in accordance with the confidentiality requirements of Contract CSXT-68681. (Reid V.S. at 4.)

Contract CSXT-68681 contains an express confidentiality provision in Article XXXIII which is reproduced on page 3 of the Reid V.S. With exceptions not pertinent here, the provision states that {

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CSXT's Reply does not indicate why the carrier apparently believes that it is free to disclose confidential information concerning the parties' contract negotiations to the Board in this litigation, notwithstanding the confidentiality

requirements of Contract CSXT-68681 and both parties' consistent prior treatment of the negotiations as confidential. However, on information and belief, CSXT purportedly is relying on a March 31, 1998 letter agreement between SECI and CSXT concerning the confidentiality of the 1998 on-going negotiations that led to the execution of Contract CSXT-68681 in December of the same year. The March 31, 1998 letter agreement, which is appended to the Reid V.S. as Exhibit 1, applied to {

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and prohibited disclosure of any such {

}. The March 31, 1998

confidentiality agreement contained the following exception to its non-disclosure requirement:

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See Reid V S. at 5

The quoted provision of the March 31, 1998 confidentiality agreement did not authorize either party to disclose any confidential information to the Board concerning the parties' contract negotiations once Contract CSXT-68681 was executed. First, it is clear from the language and context of the March

31, 1998 confidentiality agreement that it covered only the negotiations that led to the execution of Contract CSXT-68681 more than eight months later, and that it was intended to permit limited disclosure concerning the contract negotiations to this Board only if an agreement could not be reached and SECI chose instead to initiate a challenge to the common carrier tariff rate then applicable to CSX direct rail service to SGS. (Reid V.S. at 5.)

Second, and equally important, the March 31, 1998 confidentiality agreement was absorbed in and superseded by Article XXXIII of Contract CSXT-68681 under Contract CSXT 68681's integration clause. The integration clause, contained in Article XXXIV, is reproduced on page 8 of the Reid V.S. and provides as follows:

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Under this integration clause, the March 31, 1998 confidentiality agreement (which pre-dated Contract CSXT-68681) was replaced in its entirety by Article XXXIII of Contract CSXT-68681 since both agreements involved the same "subject matter": CSXT single-line coal transportation to SGS and the confidentiality of terms agreed upon to govern that transportation. This is also consistent with SECI's view of the relationship between the March 31, 1998

confidentiality agreement and Contract CSXT-68681 (Reid V.S. at 6), a view which at no time was contradicted by any representative of CSXT (*id.*).²

In summary, CSXT continues to have a contractual obligation not to disclose confidential information concerning the parties' contract negotiations to the Board – whether filed under seal or not – and CSXT has violated that obligation notwithstanding that the confidential information is contained largely in a filing designated as “Highly Confidential.”

II. The Unauthorized Disclosure of Confidential Settlement Information Is Contrary to Public Policy and Board Precedent and the Information Should Therefore Be Stricken

Public policy, as exemplified by Federal Rule of Evidence 408, disfavors the admissibility of information concerning compromise negotiations involving the claim at issue. Rule 408 provides in pertinent part:

(a) Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount. . .”

(b) conduct or statements made in compromise negotiations regarding the claim except when offered in a criminal case. . . .

² SECI notes that even if the March 31, 1998 were somehow deemed applicable to the present situation, thus permitting the disclosure of confidential information concerning the parties' contract negotiations to the Board if submitted under seal, Mr. Sullivan's initial verified statement in support of CSXT's October 31, 2008 Petition to Stay Proceedings was submitted as a public document without any redaction of material describing the ongoing confidential contract negotiations between SECI and CSXT.

This rule was adopted in promotion of the public policy favoring the compromise and settlement of disputes that would otherwise be discouraged with the admission of evidence of settlement discussions. *See Oakcrest Dental Center v. Leonar*, 480 F.3d 791, 805 (6th Cir. 2007); *Florida Power & Light Co. v. United States*, 2003 WL 2412996 (U.S. Court of Claims, May 21, 2003) (citing *Manko v United States*, 87 F.3d 50, 54 (2nd^d Cir. 1996)).

While the Board technically is not bound by the Federal Rules of Evidence, its stated policy is that evidence of settlement or compromise discussions is inadmissible in agency adjudications unless the material is required to be provided by a statute or regulation. *Sandusky County, et al. - Feeder Line Application - Consolidated Rail Corporation Carruthers Secondary in Sandusky and Seneca Counties, OH*, 6 I.C.C.2d 568, 582 (1990) (granting a motion to strike evidence of compromise discussions because the agency's policy . . . "is strongly to encourage the resolution of [disputed] issues by agreements between parties rather than administrative action, and to discourage action that would chill the negotiation of agreements. . . . A narrow view of the prohibition against disclosing the contents of settlement negotiations would not further our policy of fostering settlements, and we will not adopt that view here" (*id.*)).

The general policy against disclosing settlement or compromise discussions is reinforced here by the parties' clear intention that the contract negotiations would be confidential, as described above and in Mr. Reid's Verified

Statement.³ If CSXT is permitted to disclose the contents of what SECI thought were confidential contract negotiations to the Board, this plainly will have a chilling effect on future settlement negotiations (not to mention SECI's relationship with CSXT) because SECI will be less willing to share confidential information if it must harbor concerns that the information would later be used against it in rate litigation *Id.* at 8.

III. Evidence Concerning the Parties' Confidential Contract Negotiations is Irrelevant to the Board's Disposition of SECI's Petition for Injunctive Relief

Finally, the disclosures of confidential information pertaining to the parties' ongoing contract negotiations in CSXT's Reply and in Mr. Sullivan's accompanying Verified Statement have no relevance to the issues raised by SECI's Petition for Injunctive Relief. CSXT seeks to use that information to show that SECI {

} (CSXT Reply at 13-14, 16; Sullivan V.S. at 3-4).

³ The parties' efforts to negotiate an extended or new contract clearly constitute settlement negotiations, as agreement on a new or extended contract would result in SECI's voluntary dismissal of its Complaint in this proceeding.

CSXT fails to explain the relevance of any of this information to SECI's Petition for Injunctive Relief, although it certainly confirms CSXT's intent (not to mention its apparent feeling of entitlement) to significantly increase SECI's rates following the expiration of Contract CSXT-68681. This, of course, is what has driven SECI to seek rate relief from the Board in the first place.

The rates set out in Contract CSXT-68681 were the product of arms-length negotiations between SECI and CSXT in 1998, and reflected the parties' respective interests at the time. As Mr. Reid notes, CSXT was aware that the rate levels in Contract CSXT-68681 were needed if it wanted to convert the SGS coal traffic from primarily a rail-water-rail movement to a CSXT all-rail movement. (Reid V.S. at 7 n. 4.) CSXT's reference to "market" coal rate levels being considerably higher today is irrelevant to determining whether SECI is entitled to preservation of the *status quo* pending a decision on the merits of its complaint in this proceeding, or to determining the ultimate relief to which SECI is entitled. Indeed, CSXT acknowledges as much at page 14 of its Reply, where it asserts that "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."

SECI notes that CSXT witness Benton Fisher, in his Verified Statement accompanying CSXT's Reply, relies upon the current rates in Contract CSXT-68681 in developing CSXT revenue/variable cost ("r/vc") calculations for the SGS coal movements, and thus discloses the current contract rates in the

“Highly Confidential” version of his statement. SECI is not seeking to strike Mr. Fisher’s limited disclosure of the contract rates under seal, if his statement is interpreted as responding to the verified statement of SECI Witness Thomas Crowley that accompanied SECI’s Petition for Injunctive Relief.

Mr. Fisher re-calculates Mr. Crowley’s r/vc ratios for the SGS traffic to reflect the current contract rates, and concludes that the ratios are below the 180% jurisdictional threshold for movements from all of the costed origins. SECI does not agree with Mr. Fisher’s conclusion because his calculations use the Board’s system-average URCS variable costs which do not fully reflect the efficiencies of these movements. However, the Board need not address this issue, or the differences between Mr. Fisher’s and Mr. Crowley’s variable-cost calculations, because SECI is willing to modify its request for injunctive relief to reflect interim rates at 180% of the variable costs as calculated by Mr. Fisher (thus avoiding the jurisdictional issue raised by CSXT). The resulting interim rates are as follows:

<u>Origin</u>	<u>Witness Fisher’s Variable Cost Per Ton</u>	<u>Jurisdictional Threshold Level (180% of V.C.)</u>
Dotiki, KY	\$12.49	\$22.48
Epworth, IL	\$13.71	\$24.68
Warrior, KY	\$12.27	\$22.09
Elk Creek, KY	\$12.25	\$22.05
Robinson Run, WV	\$16.84	\$30.31
Bailey Mine, PA	\$20.44	\$36.79
Charleston, SC	\$ 5.04	\$ 9.07

CONCLUSION

For all of the foregoing reasons, the Board should strike the portions of CSXT's Reply to Complainant's petition for Injunctive Relief that disclose confidential information concerning the parties' contract negotiations, as identified on the first page above, and disregard them in deciding SECI's Petition for Injunctive Relief. Given the express confidentiality provisions of the parties' current rail transportation contract, as described above and in Mr. Reid's testimony, the Board should also admonish CSXT not to introduce evidence of the parties' confidential negotiations related to the formation of that contract in the late 1990's during the merits phase of this case.

Respectfully submitted,

SEMINOLE ELECTRIC COOPERATIVE,
INC.

By: Kelvin J. Dowd
Christopher A. Mills
Daniel M. Jaffe
Joshua M. Hoffman



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Dated: October 22, 2008

Its Attorneys

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of October, 2008, I served the foregoing Motion to Strike (Public Version) together with the supporting Verified Statement of William J. Reid 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.
Matthew J. Warren, Esq.
Sidley Austin LLP
1201 K Street, N.W.
Washington, D.C. 20005



Christopher Al Mills

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**VERIFIED STATEMENT OF WILLIAM J. REID
IN SUPPORT OF COMPLAINANT'S MOTION TO STRIKE**

My name is William J. Reid. I am employed by Seminole Electric Cooperative, Inc. ("SECI") as Director of Fuel Supply, with offices at 16313 North Dale Mabry Highway, Tampa, FL 33618. I have occupied this position since February 1, 2002, when I joined SECI. Prior to my employment with SECI I was Director of Fuels (a comparable position) for Westar Energy, Inc., and its predecessors. Westar is an investor-owned electric utility headquartered in Topoka, KS.

As Director of Fuel Supply for SECI, my duties include the acquisition of fuel for SECI's generating stations. This includes the acquisition of coal and petcoke (and related transportation) for use at SECI's Seminole Generating Station ("SGS")

located near Palatka, FL. I am also responsible for administration of SECI's current rail transportation contract with CSX Transportation, Inc. ("CSXT") for the delivery of coal to SGS. This contract (Contract CSXT-68681) was entered in 1998 and has a term that will expire on December 31, 2008. Although I was not with SECI when this contract was negotiated, I am familiar with its terms and I am aware of its negotiating history as a result of my review of SECI's files and discussions with other SECI personnel who were directly involved in the negotiations. I have led the SECI team that has been engaged in negotiations with CSXT toward a possible extension of Contract CSXT-68681 or a new, replacement contract

I am submitting this Verified Statement in support of SECI's motion to strike portions of CSXT's Reply to SECI's Petition for Injunctive Relief that describe the confidential negotiations between SECI and CSXT that led to the execution of Contract CSXT-68681 in 1998, as well as the more recent, unsuccessful negotiations concerning an extension of the contract. Specifically, I will inform the Board as to the parties' express confidentiality undertakings, and explain why CSXT's selective disclosure of various aspects of the negotiations both in the "Argument" portion of its Reply and in the accompanying Verified Statement of Michael P. Sullivan ("Sullivan V.S") violates those undertakings. This is a matter of great concern to SECI, as it is contrary to our understanding of both parties' non-disclosure obligations with respect to a contract that reflects proprietary and confidential business information.

**Contract CSXT-68681 contains a confidentiality provision in Article
XXXIII, which provides in its entirety as follows:**

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Prior to the institution of this rate litigation, both parties to the contract have treated as confidential not only the terms of Contract CSXT-68681, but all discussions, negotiations and documents pertaining to the contract's negotiation as well as extension of its term beyond the scheduled expiration date of December 31, 2008. In the latter regard, SECI has always treated the negotiations as involving a probable extension of the current contract, or a possible new contract but in either case subject to the confidentiality provisions of Article XXXIII. Both parties have acted in a manner consistent with such treatment, as all of CSXT's proposals for new or replacement contract terms have been marked "CSXT Confidential Proposal for Seminole Electric Coop."¹ SECI has never consented to disclosure of confidential information concerning the parties' contract negotiations to the STB. CSXT's disclosures concerning the contract negotiations to the Board ignore not only the parties' express confidentiality obligations under Article XXXIII, but also the requirement that the party making disclosure {

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I am advised by counsel that CSXT evidently regards itself as free to disclose confidential information pertaining to the parties' contract negotiations to the Board in this case under a March 31, 1998 letter agreement concerning the confidentiality

¹ This includes the two most recent proposals submitted by CSXT on September 26, 2008, referred to by Mr. Sullivan in his initial verified statement accompanying CSXT's Petition to Stay Proceedings filed in this case on October 10, 2008. I note that Mr. Sullivan's initial verified statement was not even filed under seal.

of the negotiations concerning the current contract between the parties, provided the information is filed under seal. A copy of that letter agreement is appended hereto as Reid Exhibit 1. The March 31, 1998 confidentiality agreement applies to {

} and prohibits disclosure of any

such {

} The third

paragraph of the confidentiality agreement provides the following exception to the non-disclosure requirement:

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The language and context of the March 31, 1998 confidentiality agreement indicate that it covered only the negotiation of the current contract (CSXT-68681) between the parties, and was intended to permit limited disclosure to the STB only if an agreement could not be reached and SECI chose instead to initiate a rate case challenging the common carrier tariff rate then applicable to CSX-direct rail service to SGS.² This is

² This tariff rate is described on page 7 of the Sullivan V S.

how SECI has always understood the intent of the March 31, 1998 confidentiality agreement.

Our understanding has also been that the March 31, 1998 confidentiality agreement was superseded by the confidentiality provision (Article XXXIII) of Contract CSXT-68681. In this regard, Contract CSXT-68681 was entered into on December 11, 1998 – after the March 31, 2008 confidentiality agreement – and contains a clause in Article XXXIX which provides as follows:

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Under this language, Contract CSXT-68681's confidentiality provision superseded and replaced the 1998 confidentiality agreement since both agreements involved the same subject matter (CSXT single-line coal transportation to SGS). We have never viewed the 1998 confidentiality agreement as authorizing either party to disclose confidential information pertaining to either Contract CSXT-68681 or any extended or successor contract covering the same subject matter to the STB. Nobody from CSXT has ever expressed a contrary view to me during our discussions over the past several years.³

³ For the sake of completeness, SECI and CSXT entered into a separate confidentiality agreement dated June 27, 2005 with respect to the exchange of information regarding the expansion of SGS

I instructed our counsel to abide by the confidentiality provision in CSXT-69681 in responding to CSXT's October 10, 2008 Petition to Stay Proceedings, and not to go further than CSXT did in disclosing either the contents of Contract CSXT-68681 or the negotiations for an extended or replacement contract. CSXT's subsequent selective disclosure of the confidential negotiations in the Sullivan V.S. is one-sided, and I do not understand why any of these disclosures are relevant to the matters currently before the Board. It is certainly true that SECI has known for some time that we would likely be facing a rate increase when Contract CSXT-68681 expires, given CSXT's view of the "market" (everything the traffic can bear⁴), and we have negotiated in good faith to try to limit the amount of the increase. Although we have been unsuccessful in our efforts, we are aware that CSXT's pricing power with respect to the movement of coal to SGS is ultimately constrained only by the availability of common carrier rates that are subject to challenge before this Board if they exceed a reasonable level.

With respect to the revenue/variable cost relationships discussed by CSXT witness Benton Fisher in his verified statement accompanying CSXT's Reply, most of the

and CSXT's ability to transport additional coal to the plant. This separate confidentiality agreement was required by CSXT before CSXT would continue discussions with SECI. The June 27, 2005 agreement had a two-year term, and expired on June 28, 2007. However, while the June 27, 2005 agreement was not formally extended, SECI has continued to abide by its provisions which are similar to those of Article XXXIII of Contract CSXT-68681.

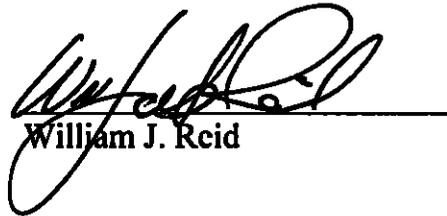
⁴ In this regard, I note that CSXT freely and voluntarily entered into Contract CSXT-68681 in late 1998, and must have regarded the rate levels in that contract as "market" rate levels that it had to meet if it wanted to convert the SGS coal traffic from primarily a rail-to-water-to rail movement to a CSXT all-rail movement. CSXT's insistence, as early as 2005, on substantially higher rate levels after the expiration of this contract smacks of "bait and switch" to me

coal moving to SGS comes from Alliance's West Kentucky mine origins which are in CSXT's West Kentucky rate group. The specific origins involved are the Dotiki, Warrior and Elk Creek/Hopkins County mines which are very close to one another. These mines accounted for 73.8% of the coal moving to SGS in 2007 and 83.5% of the coal moving to SGS in the first nine months of 2008.

If the Board permits CSXT to introduce evidence concerning the parties' confidential settlement negotiations in this case, this will have a chilling effect on any future negotiations and relationships with CSXT as SECI would be less willing to provide confidential information that might later be used against it in this rate case.

VERIFICATION

I, William J. Reid, verify under penalty of perjury that I am the Director of Fuel Supply of Seminole Electric Cooperative, Inc., that I have read the foregoing Verified Statement and know the contents thereof, and that the same are true as stated to the best of my knowledge, information and belief. I further certify that I am qualified and authorized to file this Statement.


William J. Reid

Dated: October 21, 2008

REID EXHIBIT 1

[REDACTED: CONTAINS HIGHLY CONFIDENTIAL INFORMATION]