

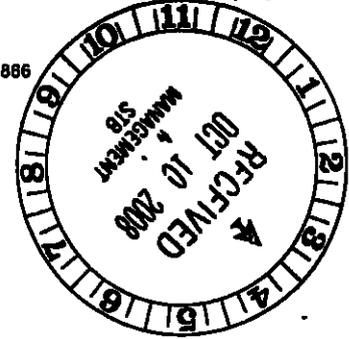


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October 10, 2008

223746

By Hand

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

Re Seminole Electric Cooperative, v CSX Transportation, STB Docket No 42110

Dear Secretary Quinlan

Enclosed for filing in the above-referenced matter, please find the original and ten copies of "Defendant CSX Transportation Inc 's Petition to Stay Proceedings " Please stamp the enclosed copies to indicate the Petition has been received and filed, and return the stamped copies with our messenger, for our files Thank you for your assistance in this matter

If you have questions, please contact the undersigned

Very truly yours,

Paul A Hemmersbaugh

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Office of Proceedings
OCT 10 2008
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Enclosures

cc Kelvin Dowd

BEFORE THE
SURFACE TRANSPORTATION BOARD

SEMINOLE ELECTRIC COOPERATIVE, INC

Complainant,

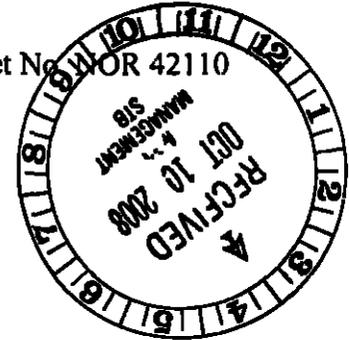
v

CSX TRANSPORTATION, INC

Defendant

223746

Docket No. OR 42110



DEFENDANT CSX TRANSPORTATION, INC.'S PETITION TO STAY PROCEEDINGS

Pursuant to 49 C F R § 1117.1 and other applicable authority, Defendant CSX Transportation, Inc ("CSXT") petitions the Board to stay the procedural schedule in the above-captioned proceeding to allow CSXT and Seminole Electric Cooperative, Inc ("Seminole") to attempt to resolve this dispute through mediation. The procedural schedule should be stayed pending mediation both because of the genuine prospect that mediation will be successful and because Seminole's complaint is premature.

First, mediation has a significant likelihood of resolving this matter without the need for the parties to begin the burdensome and costly process of litigating a stand-alone cost case. Prior to the filing of this Complaint, CSXT and Seminole had been engaged in the process of negotiating a replacement for the long-term contract under which CSXT has transported coal to Seminole's Seminole Generating Station facility in Palatka, Florida ("SGS") for the past decade. Negotiations have been ongoing for the last several months, and CSXT believes there is a good possibility that mediation under the Board's auspices could facilitate the resolution of the parties' remaining differences and permit an agreement on a new contract.

Second, a brief stay while the parties pursue mediation will not prejudice Seminole, and is an appropriate solution to the practical difficulties posed by Seminole's premature filing. Seminole filed its complaint nearly three months before the expiration of the parties' contract. As a result of that premature filing, the complaint challenges CSXT mileage "scale" rates even though CSXT previously informed Seminole that CSXT is in the process of establishing new Seminole-specific tariff rates that would go into effect should contract negotiations be unsuccessful. CSXT promised to provide these new rates on or before November 15, yet Seminole elected to file its Complaint now against mileage scale rates that it knows will not be used to move its traffic. In short, Seminole is not shipping any traffic pursuant to the tariff rates it challenges in the complaint, it likely will not ship traffic subject to those rates, and in no circumstances will it ship any traffic subject to the Board's jurisdiction before 2009. And Seminole's premature filing creates considerable procedural complications—for example, it would force CSXT to answer by October 23 a complaint based on rates that subsequently would be replaced, and would force the parties to complete discovery before their contract has expired. A brief stay during mediation will both alleviate these procedural complications and allow the parties to concentrate on resolving their differences without costly litigation.

BACKGROUND

CSXT transports coal to Complainant Seminole at its Seminole Generating Station ("SGS") facility near Palatka, Florida, pursuant to a long-term rail transportation contract entered in December 1998 (the "1998 Contract"). *See* Verified Statement of Michael P. Sullivan at 1. The 1998 Contract governs CSXT's transportation of coal and petroleum coke to SGS from multiple origins. The 1998 Contract was negotiated in a competitive environment and in light of Seminole's transportation alternatives, including barge delivery via the St. Johns River on which

SGS is located, water-truck service via Jacksonville, and inland waterway to cross-gulf barge (and then via rail) *See id* at 1-2. Indeed, prior to the 1998 Contract Seminole received most of its coal via cross-gulf barge *See id* at 2. As a result of these competitive factors and Seminole's long-term volume commitment, the 1998 Contract provided very favorable rate terms for Seminole *See id*. The 1998 Contract expires on December 31, 2008 *See id*.

Until the filing of the Complaint, CSXT and Seminole had been engaged in active negotiations for a new contract *See id*. The parties have exchanged multiple contract proposals and conferred on several occasions to discuss a new contract. Throughout these negotiations CSXT has made clear to Seminole that market conditions had changed significantly (and continued to change), and that any new contract would necessarily reflect those changed circumstances, including increased demand for CSXT's services, capacity constraints, and increased costs. The market supports significantly higher rates for Seminole's traffic going forward compared to the relatively low rates in the 1998 Contract *See id*.

During contract negotiations in March 2008, Seminole asked CSXT to provide it with common carrier rates for Seminole's coal traffic *See id*. CSXT responded that it was simply too early for CSXT to determine what other common carrier rates it might put in place for Seminole for service that would not commence until nine months in the future *See id*. CSXT nevertheless informed Seminole that its scale rates under CSXT Tariff 8200 could be applied to Seminole's traffic, and that if contract negotiations were unsuccessful CSXT would provide new common carrier rates for service to SGS *See id* at 3. CSXT further explained that 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[c] time" the contract was

about to expire, CSXT wished to wait to establish such a rate until a time closer to January 1, 2009. *See id.* at 2-3

Over the summer of 2008, CSXT and Seminole exchanged several proposals for new contract terms. CSXT gave Seminole its most recent proposal on September 26, 2008. *See id.* at 3. At Seminole's request, CSXT provided one proposal in which the rail rate was linked to natural gas prices, and another more conventional proposal. CSXT told Seminole that it hoped that one of these proposals would meet Seminole's needs and enable the parties to reach agreement on a new contract before the 1998 Contract expired. 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." *Id.* Those "Seminole-specific rates" would be published "on or before November 15, 2008"—well in advance of the 1998 Contract's expiration. *Id.*

Seminole responded to CSXT's September 26 proposals by filing its Complaint on October 3. Despite Seminole's precipitous decision to file a rate case months before the 1998 Contract expires, CSXT remains optimistic that the parties can resolve their differences through negotiations, and believes that a Board-supervised mediation could help the parties reach a mutually beneficial agreement. *See id.* at 3-4

ARGUMENT

I. The Board Should Stay Proceedings During Mediation

CSXT believes that the parties may be able to resolve these cases through mediation, and respectfully requests that the Board both facilitate such mediation and stay further proceedings in this matter during mediation. The Board has a "strong preference for resolution of differences by negotiation," *CSX Corp. et al.—Control & Operating Leases/Agreements—Conrail, Inc. & Consolidated Rail Corporation*, STB Fin. Docket No. 33388 (Sub-No. 88) (May

5, 1999), and it has recognized the efficacy of mediation in the context of rail rate challenges by requiring mandatory mediation in all rate cases. See 49 C.F.R. § 1109.4, *Simplified Standards for Rail Rate Cases*, Ex Parte 646 (Sub-No. 1), at 103-04 (Sept. 5, 2007). Indeed, mediation under the supervision of Board staff has successfully resolved rate cases in the past. See, e.g., *Williams Olefins, L.L.C. v Grand Trunk Corp.*, STB Docket No. 42098 (served Feb. 14, 2007), *BP Amoco Chem. Co. v Norfolk So. Ry. Co.*, STB Docket No. 42093 (served June 28, 2005).

The Board should stay the procedural schedule during mediation for two reasons. First, there is a reasonable prospect of successfully resolving this litigation through mediation. The parties have negotiated for an extensive period, and CSXT remains willing to work with Seminole to reach a mutually satisfactory solution. CSXT and Seminole have a long commercial relationship, and both parties have an interest in reaching agreement on a long-term solution that avoids costly litigation. A Board-supervised mediation will likely help the parties resolve some of their differences about the potential relief in a rate case, and facilitate meaningful progress toward a resolution of their disagreement.

Second, a stay is particularly appropriate because of the serious procedural difficulties and jurisdictional problems presented by Seminole's premature filing. The 1998 Contract does not expire for nearly three months, and Seminole will not ship any traffic pursuant to a CSXT common carrier rate until 2009 at the earliest. Without a stay the parties would be on course to complete discovery by December 10—three weeks before the contract expires. See 49 C.F.R. § 1111.8(a) (under ordinary stand-alone cost procedural schedule, discovery completed on Day 75). And much of discovery would have to take place before November 15—and therefore before CSXT has even published Seminole-specific common carrier rates. A schedule under which the parties complete discovery before the challenged rate even takes effect—and

would have to devise many discovery requests and responses before that rate had even been determined—is unprecedented and would inevitably create considerable inefficiencies. Another problem is that CSXT would be required to answer Seminole’s Complaint before November 15, before it establishes new Seminole-specific common carrier rates. In fact, it is possible that Seminole might re-evaluate its decision to pursue this litigation after CSXT establishes new common carrier rates. In that event discovery would have been an utter waste of the parties’ resources.¹

Third, Seminole has filed a “Petition for Injunctive Relief,” claiming that the increased rates it anticipates it will incur after the 1998 Contract expires justify an emergency suspension of CSXT’s common carrier rates. This injunctive relief Petition—to which CSXT intends to respond next week—is further grounds for a stay. As Seminole well knows, the mileage scale rates it has chosen to challenge in this Petition are not the common carrier rates that will be applicable to its traffic when the contract expires. The Board cannot possibly consider the factors necessary to decide this petition (such as the likelihood of success on the merits) before CSXT issues Seminole-specific common carrier rates. A stay would allow the Board to consider Seminole’s Petition at a time when all the relevant facts are available—most critically the actual common carrier rate that Seminole prematurely claims must be suspended.

Finally, there is a serious question whether the Board even has jurisdiction over a challenge to a common carrier rate by a shipper whose contract will not expire for nearly three months – particularly where the carrier has pledged to publish a new tariff for the shipper before expiration of the contract. *See Central Power & Light Co v Southern Pac Transp Co*, 1 S T B 1059, 1079 (1996) (“[T]he Board is without authority to adjudicate a rate case involving a

1

common carrier rate that might be used upon the expiration of a contract until at or near the time at which the contract expires ") A stay during mediation will help to alleviate that jurisdictional problem by ensuring that proceedings – if needed -- do not begin until a time closer to when the challenged rates would take effect A brief stay is a reasonable means for the Board both to encourage the prospects for success in mediation and to address the practical problems caused by Seminole's premature filing

In short, rather than begin extensive discovery proceedings in a challenge to a rate that is not in effect and that will be supplemented by a new rate by November 15, the Board should stay proceedings for a brief period to allow the parties to attempt to mediate this dispute A thirty-day stay should be sufficient to determine whether mediation has a prospect of success The Board could extend that period if appropriate

CONCLUSION

For the above reasons, the Board should stay proceedings on Seminole's Complaints pending a reasonable effort to mediate the disputes

Respectfully submitted,



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Counsel to CSX Transportation, Inc

Dated October 10, 2008

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of October, 2008, I caused a copy of the foregoing
Petition to Stay Proceedings and Request for Board-Supervised Mediation of CSX
Transportation, Inc to be served on the following parties by first class mail, postage prepaid or
more expeditious method of delivery

Kelvin J Dowd
Slover & Loftus
1224 17th Street, NW
Washington, DC 20036



Richard Bryan

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

223746

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

Docket No NOR 42110

**VERIFIED STATEMENT OF MICHAEL P. SULLIVAN IN SUPPORT OF
DEFENDANT CSX TRANSPORTATION, INC.'S PETITION TO STAY PROCEEDINGS**

My name is Michael P Sullivan I am Assistant Vice President-Utility South Coal in the CSX Transportation ("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")

CSXT transports coal to Seminole at its Seminole Generating Station ("SGS") facility near Palatka, Florida, pursuant to a long-term rail transportation contract negotiated in December 1998 (the "1998 Contract") The 1998 Contract governs CSXT's transportation of coal and petroleum coke to SGS from multiple origins The 1998 Contract was a 10-year, all-rail contract that canceled and replaced a 1991 CSXT-Seminole contract that was to have expired December 31, 2004 The 1998 Contract was negotiated in light of Seminole's competitive transportation alternatives, including barge delivery via the St Johns River on which SGS is

located, water-truck service via Jacksonville, and inland waterway to cross-gulf barge (and then via rail) In fact, prior to the 1998 Contract Seminole received most of its coal via cross-gulf barge As a result of these competitive factors and Seminole's long-term volume commitment, the 1998 Contract provided very favorable rate terms for Seminole The 1998 Contract expires on December 31, 2008

In November 2004, Seminole and CSXT met at Seminole headquarters to begin discussions about a new transportation contract to commence in 2009 At that meeting, and throughout our many negotiations since then, we have informed Seminole that market conditions are significantly different today than in 1998 and that the 1998 Contract carries extremely favorable terms compared to today's marketplace During negotiations CSXT has made clear to Seminole that any new contract would necessarily reflect those changed marketplace conditions, including increased demand for CSXT's services, capacity constraints, and increased costs Throughout 2007 and 2008, CSXT and Seminole have been engaged in active negotiations for a new contract The parties have exchanged multiple offers and counteroffers and conferred on several occasions to discuss a new contract

In March 2008, while 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, it was unrealistic 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. 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 Seminole.

Over the summer of 2008, CSXT and Seminole exchanged several proposals for new contract terms. We gave Seminole our most recent proposal on September 26, 2008. At Seminole's request, CSXT provided one proposal in which the rail rate was linked to natural gas prices, and another more conventional proposal. We told Seminole that CSXT hoped that one of these proposals would meet Seminole's needs and enable the parties to reach agreement on a new contract before the 1998 Contract expired. We 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. Seminole responded to our September 26 letter by filing this rate complaint.

CSXT is ready, willing, and able to continue to negotiate and pursue resolution up through the end of the contract, and we believe that a Board-supervised mediation could help the parties reach a mutually beneficial agreement. I am optimistic that there is still an opportunity for the parties to negotiate an agreement. In my experience, these complicated coal transportation contracts typically take a very long time to negotiate, and very frequently new contracts are not concluded until the very end of the contract term. Just recently, CSXT reached agreement with a utility on the terms of a new contract on the very last day of the old agreement,

and did not actually sign a document until over 30 days after the old contract had expired. There should be no reason why a resolution of this contract cannot be accomplished before the end of the existing contract term.

In conclusion, CSXT is willing to provide transportation rates to Seminole that are commensurate with rates that similar utility companies have agreed to pay to CSXT for similar services in today's marketplace, and wishes to work with Seminole toward a reasonable agreement. And, there is a genuine prospect that mediation could help this negotiation process. It would be constructive and conducive to resolution to have a mediator from the Board's staff who is familiar with the regulatory process.

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 10th day of October, 2008

Michael P Sullivan
Michael P Sullivan

STATE OF FLORIDA
COUNTY OF DUVAL

I, Florence J. Miller, the undersigned Notary Public, in and for said county, and in said state, hereby certify that Michael P. 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 10th day of October, 2008

Florence J. Miller

_____, Notary Public

My Commission expires _____

