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February 24, 2010

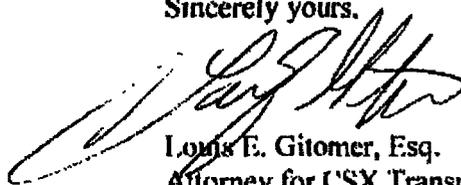
Ms. Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D. C. 20423

RE: Finance Docket No. 35312, *Massachusetts Department of Transportation-
Acquisition Exemption-Certain Assets of CSX Transportation, Inc.*

Dear Ms. Brown:

Enclosed for e-filing is the Response of CSX Transportation, Inc. Thank you for
your assistance. If you have any questions, please contact me.

Sincerely yours.



Louis E. Gitomer, Esq.
Attorney for CSX Transportation, Inc.

Enclosure

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35312

MASSACHUSETTS DEPARTMENT OF TRANSPORTATION
- ACQUISITION EXEMPTION -
CERTAIN ASSETS OF CSX TRANSPORTATION, INC.

RESPONSE OF CSX TRANSPORTATION, INC. TO COMMENTS OF THE
BROTHERHOOD OF RAILROAD SIGNALMEN AND BROTHERHOOD OF
MAINTENANCE OF WAY EMPLOYEES DIVISION/IBT AND COMMENTS OF THE
AMERICAN TRAIN DISPATCHERS ASSOCIATION

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Counsel for CSX Transportation, Inc.

Dated: February 24, 2010

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35312

MASSACHUSETTS COASTAL RAILROAD, LLC
-ACQUISITION-
CSX TRANSPORTATION, INC.

RESPONSE OF CSX TRANSPORTATION, INC. TO COMMENTS OF THE
BROTHERHOOD OF RAILROAD SIGNALMEN AND BROTHERHOOD OF
MAINTENANCE OF WAY EMPLOYEES DIVISION/IBT AND COMMENTS OF THE
AMERICAN TRAIN DISPATCHERS ASSOCIATION

CSX Transportation, Inc. ("CSXT") responds to the Comments of the Brotherhood of Railroad Signalmen and Brotherhood of Maintenance of Way Employees Division/IBT filed on February 3, 2010 (the "BMWWE BRS Comments") and the Comments of the American Train Dispatchers Association filed on February 3, 2010 (the "ATDA Comments"). CSXT supports the Motion to Dismiss filed on November 24, 2009 by the Massachusetts Department of Transportation ("MADOT"). The Motion to Dismiss follows precedent long established by the Surface Transportation Board (the "Board") and its predecessor, the Interstate Commerce Commission (the "ICC").¹ Moreover, the concept enumerated in *State of Maine* and its progeny is legally correct and sound public policy.

BACKGROUND

CSXT has agreed to sell the real estate and track and materials (the "CSXT Property") to

¹ The precedent established in *Maine DOT-Acq. Exemption, ME. Central R. Co.*, 8 I.C.C.2d 835 (1991) ("*State of Maine*") has evolved over the years to include transactions congruent to the one proposed in this proceeding by MADOT and CSXT.

MADOT, while retaining a permanent freight easement that will enable CSXT to continue to provide common carrier rail service.² Through the permanent freight easement, CSXT is retaining the exclusive right to provide exclusive common and contract carrier freight service over the CSXT Property. MADOT will not be able to provide common or contract carrier freight service over the CSXT Property.³ Nor will any subsidiary, affiliate or assignee of MADOT.

MADOT proposes to acquire the CSXT Property in two stages. At the First Closing, MADOT proposes to acquire the remaining 4.87 miles of the Grand Junction Branch between milepost QBG 0.00 and milepost QBG 2.70 and between milepost QBG 5.70 and milepost QBG 7.87, the remaining 1.10 miles of the Boston Terminal Running Track between milepost QBB 0.00 and milepost QBB 1.10, the South Coast Lines consisting of (1) the New Bedford Subdivision, which is 18.40 miles between milepost QN 13.40 at Cotley Jct. and milepost QN 31.80 at New Bedford, (2) the Fall River Subdivision, which is 14.20 miles between milepost

² On November 24, 2009, MADOT filed a Notice of Exemption under 49 C.F.R. §1150 and a concurrent motion to dismiss in *Massachusetts Department of Transportation–Acquisition Exemption–Certain Assets of CSX Transportation, Inc.*, Finance Docket No. 35312 (the “MADOT Transaction”). The Notice of Exemption became effective on December 24, 2010. See *Massachusetts Department of Transportation–Acquisition Exemption–Certain Assets of CSX Transportation, Inc.*, Finance Docket No. 35312 (STB served December 10, 2009).

³ Had CSXT constructed the CSXT Property after 1920, it would have been required to obtain a certificate of public convenience and necessity to construct and operate the CSXT Property, essentially the license to become a common carrier and own and operate the CSXT Property. Through the permanent freight easement, CSXT is in essence retaining the certificate, the key ingredient to being able to conduct rail carrier service. An analogy is to the sale of motor carrier operating rights. The ICC previously granted authority for the purchase and sale of motor carrier operating rights, sometimes with tangible assets and sometimes on their own. The ICC recognized that a motor carrier could not operate in interstate commerce without operating rights. The certificate-equivalent right reserved to CSXT through the permanent freight easement is the same as motor carrier operating rights and is required for a railroad to be considered a common carrier subject to the Board’s jurisdiction.

QNF 0.00 at Myricks and milepost QNF 14.20 at Fall River, and (3) 0.08 mile of the North Dartmouth Industrial Track between milepost QND 0.00 and milepost QND 0.08, collectively a distance of approximately 32.68 miles (the "South Coast Lines")⁴, and 6.00 miles of the North Dartmouth Industrial Track between milepost QND 0.00 and milepost QND 6.00 (the "First Closing Lines").⁵ At the Second Closing, MADOT proposes to acquire portions of the Boston Main Line consisting of the 22.92-mile Framingham to Worcester segment between milepost QB 21.38 and milepost QB 44.30 and the 9.71 miles Cove to Newton segment between milepost QB 1.12 and milepost 10.83⁶ (the "Second Closing Line").⁷ The commuter service over the MADOT Lines will continue to be provided by the Massachusetts Bay Transportation Authority ("MBTA"), a non-carrier. Maps of the lines being sold by CSXT to MADOT are part of the Notice of Exemption.

CSXT will retain a permanent freight easement over the MADOT Lines so that it can continue to provide common carrier service to its shippers. Details concerning the permanent

⁴ CSXT and the Massachusetts Coastal Railroad LLC ("Mass Coastal") jointly filed a minor application under 49 U.S.C. 11323(a)(2) on November 24, 2009 for Mass Coastal to acquire the permanent freight easement in the South Coast Lines. Finance Docket No. 35314, *Massachusetts Coastal Railroad, LLC—Acquisition—CSX Transportation, Inc.*

⁵ CSXT previously sold the track and material between milepost QND 0.08 and QND 6.00 (the "Bay Colony Line") to the Bay Colony Railroad Corporation ("Bay Colony") and leased the real estate to Bay Colony. *Bay Colony Railroad Corporation—Acquisition and Operation Exemption—CSX Transportation, Inc., as Operator for New York Central Lines, LLC*, STB Finance Docket No. 34446 (STB served January 16, 2004). Pursuant to the agreement between CSXT and MADOT, Bay Colony will continue to provide common carrier service over the Bay Colony Line. MADOT is acquiring only the real estate for the Bay Colony Line, it is not acquiring the track and materials.

⁶ CSXT is only selling the track and materials on the Cove to Newton segment. The real estate was previously sold to the Massachusetts Turnpike.

⁷ The First Closing Lines and the Second Closing Line are collectively referred to as the "MADOT Lines".

freight easement and operations under the permanent freight easement are provided in the *MADOT Transaction*. CSXT has agreed, with the consent of MADOT, to sell the permanent freight easement over the South Coast Lines to Mass Coastal.

ARGUMENT

1. *State of Maine* is a reasonable legal interpretation.

BMWE and BRS and ATDA argue that *State of Maine* is inconsistent with the law and should be overturned by the Board. The argument that *State of Maine* is contrary to law is based on a misinterpretation of the scope of the Board's jurisdiction over MADOT under 49 U.S.C. §10501 and compounded by the reliance on four clearly distinguishable decisions (two by the ICC and two by the Board).

MADOT is not a rail carrier today. Typically, when a non-carrier acquires a rail line, it is required to obtain authority from the Board. 49 U.S.C. §10901 and 49 C.F.R. §1150.1(a) ("Noncarriers require Board approval under section 10901 to construct, acquire or operate a rail line in interstate commerce"). However, the transaction between CSXT and MADOT has been structured so that MADOT is not acquiring a rail line.

A rail line consists of land, track, ties, other track materials, and a certificate (or certificate equivalent) from the Board authorizing the common carrier operation. Whether a track is a regulated rail line or not, turns on the intended use. *Nicholson v. ICC*, 711 F.2d 364, 367 (D.C. Cir. 1983). MADOT intends to use the CSXT Property for public transportation, which is not subject to the jurisdiction of the Board. 49 U.S.C. §10501(c)(2). MADOT does not intend to use the CSXT Property to provide common or contract carriage of freight, which is subject to the Board's jurisdiction. 49 U.S.C. §10501. In order to accommodate MADOT's goal

of only providing unregulated (by the Board) public passenger transportation, CSXT has agreed to sell MADOT the CSXT Property, but has reserved to CSXT the rights to sufficient assets to operate the property, including the right to provide common carrier rail service over the rail line through the permanent freight easement.⁸ The CSXT Property sold to MADOT is not subject to the requirement that MADOT obtain authorization under section 10901 because MADOT is not subject to Board jurisdiction under section 10501(c)(2) based on MADOT's operations and because CSXT retained the regulated common carrier rights and obligation.

A. MADOT will not become a rail carrier pursuant to 49 U.S.C. §10501 on acquisition of the CSXT Property.

BMW and BRS state that 49 U.S.C. §10501(a)(1) and (a)(2)(A) and (c)(2), when read together require the conclusion that MADOT will become a rail carrier subject to the jurisdiction of the Board upon its acquisition of the CSXT Property.

MADOT is acquiring the CSXT Property, but not the right to provide regulated common carrier service, that right and obligation is being retained by CSXT as part of the permanent freight easement. It is clear that MADOT's public passenger transportation will not be subject to Board jurisdiction pursuant to 49 U.S. C. §10501(c)(2). BMW and BRS argue that acquisition of the CSXT Property and the continued operation by CSXT is sufficient for MADOT to become

⁸ CSXT could have structured the transaction to abandon the CSXT Property and then sell the abandoned non-jurisdictional property to MADOT. MADOT, as the non-carrier owner could then have granted CSXT limited rights to operate over the CSXT Property without becoming a railroad. See *Texas & Pacific. Chevron U.S.A., Inc.--Lease and Operation Exemption--Richmond Belt Railway*, ICC Finance Docket No. 32352 (ICC served June 12, 1995), *appeal dismissed*, *Brotherhood of Locomotive Engineers v. U. S.*, 101 F.3d 718 (D.C. Cir. 1996), where the tenant's use, rather than the character of the trackage itself, is controlling with regard to the tenants own operations. Instead of following the less efficient regulatory track, CSXT and MADOT followed the efficient process permitted by *State of Maine*.

subject to the Board's jurisdiction under section 10501(a) and (b).

MADOT is not acquiring a rail line. MADOT is acquiring specific assets from CSXT. MADOT is not acquiring the assets being retained by CSXT in the permanent freight easement, which includes the right to provide common carrier service, and which is subject to Board jurisdiction. Without the right to provide common carrier service, MADOT is only acquiring sufficient assets to provide mass transportation which is outside the Board's jurisdiction. Since MADOT is not acquiring sufficient assets with the CSXT Property to provide common carrier service (except for the mass transportation service that is beyond the jurisdiction of the Board), it is not subject to the Board's jurisdiction. The legislative history confirms this analysis.

The legislative history of section 10501 fully supports the conclusion that MADOT will not become a carrier subject to the Board's jurisdiction.

In the Conference Report, the discussion of the Senate Amendment states that "The Board's rail jurisdiction would be limited to freight transportation, because rail passenger transportation today (other than service by Amtrak, which is not regulated under the Interstate Commerce Act) is now purely local or regional in nature and should be regulated (if at all) at that level." H. Rep. 104-422, 1st Sess. at 167. In discussing the Conference substitute, the Conference Report states that "This provision adopted by the Conference changes the statement of agency jurisdiction to reflect curtailment of regulatory jurisdiction in areas such as passenger transportation. ... This section also clarifies that, although regulation of passenger transportation is generally eliminated, public transportation authorities that meet the existing criteria for being rail carriers may invoke the terminal area and reciprocal switching access remedies of section 11102 and 11103." *Id.*

When section 10501(a)(1) and (a)(2)(A) and (c)(2) are read in light of the legislative history, it is clear that the Board's regulation of public transportation authorities is limited to 49 U.S.C. §§11102 and 11103. *See also* H. Rep. 104-311, 1st Sess. at 96. Public transportation authorities such as MADOT are not subject to the requirements of 49 U.S.C. §10901 when they are not acquiring the freight transportation franchise with the physical assets, as is the case here. CSXT is retaining the sole right and obligation to provide freight transportation through the permanent freight easement. CSXT will be the only party with the legal right to provide regulated freight transportation over the CSXT Property (except for its sale of the permanent freight easement over the South Coast Lines to Mass Coastal). MADOT will have no authority to provide freight transportation on the CSXT Property. MADOT will not be a rail carrier subject to the jurisdiction of the Board. The argument advanced by BMW and BRS is based on a commuter authority acquiring sufficient assets to provide freight service. That is not the transaction proposed by MADOT and CSXT. MADOT will only provide mass transportation and CSXT will provide the common carrier freight transportation. Under the transaction proposed by CSXT and MADOT, MADOT continues to be excepted from the Board's jurisdiction under section 10501(c)(2).

There is a substantial inconsistency in the statutory argument made by BMW and BRS. BMW and BRS first argue that the mere acquisition of the assets of an active rail line that allow a public entity to provide only commuter operations while a freight railroad retains the assets necessary to continue to provide common carrier freight service makes a public entity a rail carrier. But then, on page 27, BMW and BRS argue that the acquiring public entity does not become a rail carrier if its contract operator, which will be a rail carrier, performs all of the tasks

associated with the operation using its own employees. In other words, BMW and BRS argue that if the commuter operator does not contract out any of its work, the commuter authority itself is not a rail carrier.

BMW and BRS are at best inconsistent, and at worst trying to graft onto the definition of a common carrier requirements from agreements negotiated between employees and their employers. BMW and BRS cite to no provision in the statutes because there is none. The rail carrier status of MADOT should not turn on what workforce performs which functions.

However, according to BMW and BRS: (1) if the operator performs all of the functions with its employees, then, MADOT is not a rail carrier; but (2) if the operator later decides to contract out signal maintenance (perhaps because there is no agreement forbidding such contracting out), then MADOT is a rail carrier. This inconsistent argument merely demonstrates that BMW and BRS are attempting to have the Board craft a definition of rail carrier in order to reduce the flexibility of rail commuter operators in their arrangements with employees and in determining whether their employees or other employees perform certain functions.

B. The four decisions relied upon are distinguishable.

BMW and BRS rely on the administrative decisions in *Brotherhood of Loco Engineers v. Staten Island*, 360 I.C.C. 464 (1979) (“SIRTOA”); *City of Austin, TX-Acquisition-Southern Pacific Transportation Company*, ICC Finance Docket No. 30861(A) (ICC served November 4, 1986) (“City of Austin”); *American Orient Express Railway Company LLC-Petition for Declaratory Order*, STB Finance Docket No. 34502 (STB served December 29, 2005) (“American Orient Express”); and *DesertXpress Enterprises, LLC-Petition for Declaratory Order*, STB Finance Docket No. 34914 (STB served June 27, 2007) (“DesertXpress”) for the

proposition that *State of Maine* is inconsistent with ICC and Board precedent.

State of Maine, at 837, determined that there was no ICC jurisdiction over the transaction involving the sale of land and track and materials and that the State of Maine would not become a common carrier subject to the ICC's jurisdiction because

no common carrier rights or obligations are being transferred. Rather, both parties agree that MEC retains the common carrier obligation and that it could not cease to offer service on the line without prior ICC permission.

Moreover, nothing in the transfer of underlying assets, in this case would disenable MEC from meeting its common carrier obligation. The permanent and unconditional easement which it retains ensures MEC (and its successors and assigns) both the full right and necessary access to maintain, operate and renew the line.

As was the case in *State of Maine*, CSXT is not selling the "common carrier rights or obligations" to MADOT. CSXT and Mass Coastal must obtain abandonment authority from the Board before either could stop serving shippers on the CSXT Property. Through the agreements with MADOT, CSXT will have access to the CSXT Property and MADOT will have the obligation, enforceable by CSXT, to maintain the CSXT Property. The Board has recently stated that

the Board examines in each case whether the agreements between the parties continue to give the freight carrier the ability to conduct its existing and reasonably foreseeable freight operations so that it can satisfy its common carrier obligation.

While the freight carrier must continue to have a permanent easement or its equivalent to provide freight service, the public agency acquiring the right-of-way and track may negotiate terms and conditions with the freight carrier necessary to provide reliable commuter service or protect the agency's investment so long as such terms and conditions do not unreasonably interfere with freight rail service. Thus, the easement or the operating agreement may restrict freight operations to specific parts of the day, provided that the window for exclusive freight operations is adequate to satisfy the service needs of freight shippers. Likewise, the public agency may assume responsibility for maintaining the line and

dispatching freight operations if the operating procedures are reasonable and do not discriminate against freight service, and if the freight carrier has the right to inspect and to request prompt repair of any track defects.⁹

BMW and BRS refuse to accept the concept of a permanent freight easement. Instead, they argue that MADOT's mere acquisition of the CSXT Property converts MADOT into a railroad subject to the Board's jurisdiction. The BMW and BRS theory is that the owner of railroad tracks that are connected to the national rail system where freight trains operate is a railroad subject to Board jurisdiction. Such an expansive theory would make every shipper that owned or operated track at or near its facility a common carrier subject to Board jurisdiction. But as the Board knows, this is not the case, nor should it be. Shippers, and others who would fall within the BMW and BRS definition of a railroad subject to Board jurisdiction, are not railroads because they do not have authority to operate as common carriers of freight. Like the shippers, MADOT will not have authority to operate as a common carrier of freight because CSXT is retaining the permanent freight easement.

In *SIRTOA*, the Staten Island Rapid Transit Operating Authority ("SIRTOA") acquired a certified rail line. In finding SIRTOA a common carrier subject to its jurisdiction, the ICC said:

We must conclude therefore, that the city received an unqualified certificate of public convenience and necessity to acquire the line and to have the line operated in the same manner as it was operated by its predecessor-owner SIRI.[footnote omitted]

SIRTOA at 472. In contrast, MADOT is not acquiring the certificate to provide common carrier service. CSXT is specifically retaining the right to provide common carrier operations as part of

⁹ *Maryland Transit Administration—Petition for Declaratory Order*, STB Finance Docket No. 34975 (STB served September 19, 2008) at 4-5.

the property rights it is retaining in the permanent freight easement. MADOT is acquiring the CSXT Property. CSXT is responsible for providing adequate transportation to the freight shippers by retaining the permanent freight easement and the equivalent of the certificate.

In *City of Austin*, at 3-4, the ICC concluded that “by purchasing an active line of railroad, City not only will assume, from SPT, the common carrier obligation to ensure service over the line, but also will retain the common carrier obligation regardless of whether it operates the line or arranges by contract for someone else to operate it.” The City of Austin sought to acquire all of the assets comprising the line, including the common carrier obligation from the selling railroad. Again, unlike the City of Austin, in this proceeding, MADOT is not seeking to acquire the common carrier obligation from CSXT. Indeed, CSXT is retaining the common carrier obligation as part of the property rights delineated in the permanent freight easement.

In finding American Orient Express Railway Company LLC (“AOERC”) to be a rail carrier, the Board stated “that this holding is limited to the particular facts of this case.” *American Orient Express* at 6. The facts from *American Orient Express* are distinguishable from MADOT’s acquisition of the CSXT Property and the retention of the permanent freight easement by CSXT. First, AOERC was a new private entity, not a public entity like MADOT so that it did not qualify for the exception from Board jurisdiction mandated by Congress. AOERC was using the lines of railroads, while MADOT will be using its own lines. AOERC was involved in long distance private passenger operations, while MADOT is involved in providing local commuter service as a public entity providing a public service in the Commonwealth of Massachusetts. Finally, MADOT is not offering common carriage subject to the Board’s jurisdiction. Pursuant to the exception under section 10501(c)(2), MADOT is offering commuter transportation

pursuant to the laws and regulations of the Commonwealth of Massachusetts on its schedule and at its own stations.¹⁰ The passenger operations of MADOT are excepted from Board jurisdiction under section 10501(c)(2) and are not similar to the fact based conclusion that the operations of AOERC resulted in AOERC acting as a common carrier subject to the Board's jurisdiction.

As in *American Orient Express*, in *DesertXpress*, at 3, the Board restricted the scope of its holding when it stated that "our findings here are relevant only to the specific project DesertXpress is proposing and the individual facts and circumstances at issue here." DesertXpress Enterprises, LLC ("DesertXpress") is not a public transportation authority like MADOT, instead, it is a private enterprise. DesertXpress intends to provide service to passengers as a common carrier and to seek a "certificate" from the Board. MADOT will provide a commuter service, but will only operate pursuant to the laws and regulations of Massachusetts, as it is excepted from the Board's jurisdiction under section 10501(c)(2). MADOT filed the Motion to Dismiss to avoid obtaining a "certificate" from the Board in order to avoid the common carrier requirements. MADOT should not have to request authority from the Board in order to discontinue or abandon service to certain line segments. Nor should MADOT be required to answer complaints about service before the Board, when Congress has said that such issues should be regulated locally.

As distinguished, the ICC and Board decisions relied on by BMW and BRS provide no basis for the Board to overturn the well reasoned and long standing precedent of *State of Maine*.

2. *State of Maine* remains good public policy.

State of Maine has fostered the expansion of public commuter operations throughout the

¹⁰ MADOT will certainly comply with the requirements of 49 U.S.C. §10501(c)(3)(A).

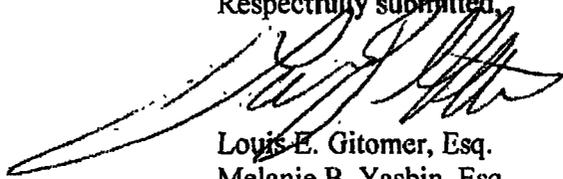
country over formerly private property. Where railroads were unwilling to allow lines they own to be used for any or expanded commuter service, the acquisition of those lines by commuter authorities without ICC or Board approval or the imposition of common carriers obligations has expanded commuter operations while reducing the railroads' concerns about liability, paying for track expansion and the cost of maintenance for commuter operations.

Railroads have been able to negotiate with commuter authorities in order to continue to provide rail freight service, while commuter service expands. CSXT is unaware of any formal complaints made to the ICC or the Board concerning rail freight service where a line has been sold to a commuter authority, and the unions cite none. Were a complaint filed and adjudicated against CSXT, CSXT assures the Board that it would take any and all steps necessary to comply with a Board order.

CONCLUSION

CSXT respectfully requests the Board to grant the Motion to Dismiss filed by MADOT. MADOT will not become a common carrier by railroad as the result of its acquisition of the CSXT Property through the proposed transaction. Through the permanent freight easement, CSXT will retain property rights, including the common carrier obligation, which will leave CSXT as the common carrier on the CSXT Property while MADOT remains a public transportation provider, not subject to the jurisdiction of the Board.

Respectfully submitted,



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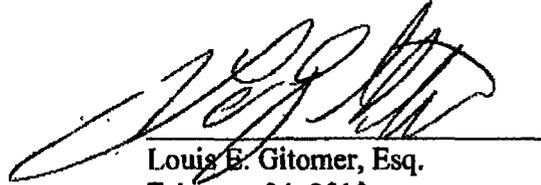
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Counsel for CSX Transportation, Inc.

Dated: February 24, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served electronically or by first class mail, postage pre-paid on the parties of record to this proceeding.

A handwritten signature in black ink, appearing to read "L. Gitomer", is written over a horizontal line.

Louis E. Gitomer, Esq.
February 24, 2010