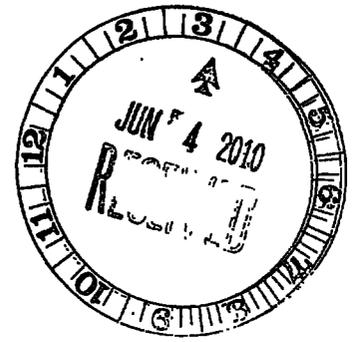


PUBLIC VERSION



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**SEMINOLE ELECTRIC COOPERATIVE,
INC.**

Complainant,

v.

CSX TRANSPORTATION, INC.

Defendant.

227229

Docket No. 42110

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**BRIEF OF COMPLAINANT
SEMINOLE ELECTRIC COOPERATIVE, INC.**

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ACRONYMS

The following acronyms are used:

2009 AEO	2009 Annual Energy Outlook April Update Forecast
ATC	Average Total Cost
ATF	Across-The-Fence
CMP	Constrained Market Pricing
CSXI	CSX Intermodal, Inc.
CSXT	CSX Transportation, Inc.
DCF	Discounted Cash Flow
EVA	Energy Ventures Analysis
FPSC	Florida Public Service Commission
EIA	Energy Information Administration
H&BU	Highest and Best Use
MGA	Monongahela Railway
MMM	Maximum Markup Methodology
MOW	Maintenance-of-Way
RCAFA	Rail Cost Adjustment Factor, adjusted for productivity
RCAFU	Rail Cost Adjustment Factor, unadjusted for productivity
r/vc	Revenue-to-Variable Cost
SARR	Stand-Alone Railroad
SAC	Stand-Alone Cost
SECI	Seminole Electric Cooperative, Inc
SGS	Seminole Generating Station, located near Palatka, FL
SFRR	Seminole Florida Railroad
URCS	Uniform Railroad Costing System

CASE GLOSSARY

The following short form case citations are used:

<i>AEPCO</i>	<i>Ariz. Elec. Power Coop., Inc. v. The Burlington N. and Santa Fe R.R. Co. and Union Pac. R.R. Co.</i> , 7 S.T.B. 224 (2003)
<i>AEP Texas</i>	<i>AEP Tex. N. Co. v. BNSF Ry.</i> , STB Docket No. 41191 (Sub-No. 1) (STB served September 10, 2007).
<i>APS</i>	<i>Ariz. Pub. Serv. Co. and Pacificorp. v. The Atchison, Topeka and Santa Fe Ry.</i> , 3 S.T.B. 70 (1997)
<i>Coal Rate Guidelines or Guidelines</i>	<i>Coal Rate Guidelines, Nationwide</i> , 1 I.C.C.2d 520 (1985), <i>aff'd sub nom. Consolidated Rail Corp. v. United States</i> , 812 F.2d 1444 (3 rd Cir. 1987)
<i>CP&L</i>	<i>Carolina Power & Light Co. v. Norfolk S. Ry.</i> , 7 S.T.B. 235 (2003)
<i>Duke/CSXT</i>	<i>Duke Energy Corp. v. CSX Transp. Inc.</i> , 7 S.T.B. 402 (2004)
<i>Duke/NS</i>	<i>Duke Energy Corp. v. Norfolk S. Ry.</i> , 7 S.T.B. 89 (2003)
<i>Duke/NS II</i>	<i>Duke Energy Corp. v. Norfolk S. Ry.</i> , 7 S.T.B. 862 (2004)
<i>General Procedures</i>	<i>General Procedures For Presenting Evidence in Stand-Alone Cost Rate Cases</i> , 5 S.T.B. 441 (2001)
<i>Major Issues</i>	<i>Major Issues in Rail Rate Cases</i> , STB Ex Parte No. 657 (Sub-No. 1) (STB served Oct. 30, 2006)
<i>McCarty Farms</i>	<i>McCarty Farms, Inc. v. Burlington N. Inc.</i> , 3 I.C.C. 2d 823 (1987)
<i>McCarty Farms II</i>	<i>McCarty Farms, Inc. v. Burlington N., Inc.</i> , 2 S.T.B. 460 (1997)
<i>Metropolitan Edison</i>	<i>Metropolitan Edison v. Conrail</i> , 5 I.C.C. 2d 385, 410 (1989).
<i>OG&E</i>	<i>Oklahoma Gas & Electric Co. v. Union Pac. R.R.</i> , STB Docket No. 42111 (STB served July 24, 2009)
<i>Otter Tail</i>	<i>Otter Tail Power Co. v. BNSF Ry.</i> , STB Docket No. 42071 (STB served January 27, 2006)

PSCo/Xcel *Public Service Co. of Colorado d/b/a Xcel Energy v. Burlington N. and Santa Fe Ry.*, 7 S.T.B. 589 (2004)

TMPA *Texas Mun. Power Agency v. Burlington N. and Santa Fe Ry.*, 6 S.T.B. 573 (2003)

TMPA II *Texas Mun. Power Agency v. Burlington N. and Santa Fe Ry.*, 7 S.T.B. 803 (2004)

WFA/Basin *Western Fuels Ass'n, Inc. and Basin Electric Power Coop. v. BNSF Ry.*, STB Docket No. 42088 (STB served September 10, 2007)

WFA/Basin II *Western Fuels Ass'n, Inc. and Basin Electric Power Coop. v. BNSF Ry.*, STB Docket No. 42088 (STB served February 18, 2009)

Wisconsin P&L *Wisconsin Power and Light Co. v. Union Pac. R.R.*, 5 S.T.B. 955 (2001)

West Texas Utilities *West Tex. Utils. Co. v. Burlington N. R.R.*, 1 S.T.B. 638 (1996), *aff'd sub nom. Burlington N. R.R. v. STB*, 114 F.3d 206 (D.C. Cir. 1997)

As summarized herein and detailed in SECI's Opening and Rebuttal Evidence submitted on August 31, 2009 and April 15, 2010, respectively, CSXT possesses market dominance² over the coal movements to the Seminole Generating Station ("SGS") that are at issue in this proceeding, and all of the challenged rates as set forth in Tariff CSXT-32531 substantially exceed 180% of the variable cost of the subject service. *See* 49 U.S.C. § 10707(d)(1). The Board therefore has jurisdiction over SECI's Complaint and over the common carrier rail rates at issue. The evidence also demonstrates that the challenged rates all exceed a maximum reasonable level under the Constrained Market Pricing ("CMP") test of the Board's *Coal Rate Guidelines*, and therefore are unlawful under 49 U.S.C. § 10701. Upon the record, SECI is entitled to a prescription of just and reasonable rates under 49 U.S.C. § 10704, and an award of damages (including fully compensatory interest) pursuant to 49 U.S.C. § 11704 for amounts charged by CSXT for coal transportation service to SGS since January 1, 2009 in excess of the lawful maximum rates.

As of the Fourth Quarter of 2009, the lawful maximum rates for CSXT service to SGS -- and the rates³ that should be prescribed by the Board for application to SECI's coal traffic -- are as follows:

² As defined in 49 U.S.C. § 10707.

³ SECI's Complaint and case for relief encompasses Tariff CSXT-32531 rates applicable to shipments in railcars provided by SECI, as well as rates applicable to shipments in railcars supplied by CSXT. *See* SECI Rebuttal at II-7-12.

<u>Origin</u>	<u>Max. Rate Per Ton SECI Railcars</u>	<u>Max. Rate Per Ton CSXT Railcars</u>
Dotiki, KY	\$21.24	\$22.28
Pattiki, IL (Epworth)	\$22.81	\$23.92
Warrior, KY (Cardinal 9)	\$20.83	\$21.85
Elk Creek, KY (Cimarron)	\$20.81	\$21.83
Gibcoal, IN	\$22.54	\$23.63
Consol 95, WV	\$27.54	\$28.82
Bailey Mine, PA	\$29.32	\$30.67
Charleston, SC (coal)	\$8.55	\$9.11
Charleston, SC (petcoke)	\$8.57	\$9.14

I.

PRELIMINARY MATTERS

CSXT's attempted defense of its tariff rates to SGS -- all of which exceed 300% of unadjusted system average variable costs and approach 50 mills per ton-mile for long-haul, unit train coal service -- includes two (2) claims which can and should be dispensed with summarily.

First, CSXT maintains that the relationship between the *delivered cost* of fuel to SGS taking into account the challenged rail rates, and delivered costs allegedly experienced by other Florida utilities, somehow is relevant to the question of whether the

challenged rail rates are reasonable.⁴ However, both the Board and the courts have rejected the notion that a statutory mandate to establish reasonable rates can be satisfied by comparing challenged rates to rates prevailing in some defined “market,”⁵ and CSXT’s comparison of delivered costs masks the very real and significant disparity between the *rail rates* to SGS -- the component of delivered cost that CSXT controls -- and those charged to other Florida utilities moving coal by rail. As SECI showed on Rebuttal, on an apples-to-apples basis the rates at issue in this proceeding are {
} those of the other utilities in CSXT’s delivered cost comparison group. *See* SECI Rebuttal at II-31-32. While CSXT cannot defend its rates on a comparative basis, its ability to take for itself the economic “rent” arising from SECI’s relatively lower coal supply costs by raising the SGS rail rates until SECI’s delivered costs approach some pre-ordained level is a classic indicator of monopoly power over SGS coal shipments. *Coal Exporters Ass’n v. U.S.*, 745 F. 2d 76, 91-93 (D.C. Cir. 1984).

Second, CSXT challenges the Board’s jurisdiction over the Tariff CSXT 32531 rates applicable to shipments from three (3) of the issue origins (Bailey, PA, Gibcoal, IN and the Port of Charleston, SC), on the grounds that SECI did not ship coal from these origins during the two (2) years prior to the filing of its Complaint, and does not specify movements from these origins in its current coal consumption forecast.

⁴ *See, e.g.*, CSXT Reply at II-22-23.

⁵ *WFA/Basin II* at 2; *Coal Rate Guidelines -- Nationwide*, STB Ex Parte No. 347 (Sub-No.1) (STB served May 23, 1990) at 1. *See also Federal Power Commission v. Texaco*, 417 U.S. 380, 394 (1974).

CSXT Reply at I-9-12. This claim likewise lacks merit. As SECI has shown, the origins in question all are eligible sources of future spot or short-term coal purchases, and are not named in SECI's internal forecast only because it is not possible to specify in advance which sources will be tapped in any given year as a result of SECI's coal supply solicitation process. SECI Rebuttal at I-11-13. The subject origins and rates are covered by SECI's Complaint and encompassed in the SAC evidence in this proceeding; under *TMPA*, the prescriptive relief justified by the instant record extends to those origins:

[W]e are persuaded that the better policy is for a rate prescription to be self-effectuating where a mine is embraced in both the original complaint and the SAC evidence. There is no sound legal or public policy reason why *TMPA* should be required to re-litigate its rate complaint, in whole or in part, to obtain the benefit of the rate prescription when it shifts traffic from one of the mines covered by its rate complaint to another mine covered by the same complaint.

TMPA II, 7 S.T.B. at 830.

II.

CSXT POSSESSES MARKET DOMINANCE OVER COAL TRANSPORTATION TO SGS

The Board's authority to adjudicate the reasonableness of the rates at issue and award relief to SECI first depends upon a finding that CSXT possesses market dominance over the service that is the subject of Tariff CSXT-32531; that is, that there is "an absence of effective competition from other rail carriers or modes of transportation" for CSXT's coal delivery service to SGS. 49 U.S.C. § 10707(a). The governing statute further provides that the Board cannot make a finding of market dominance unless the

ratio of the challenged rates to the variable cost of the issue service exceeds 180%.

49 U.S.C. § 10707 (d)(1)(A). In this case, there is no dispute that the revenue-variable cost (“r/vc”) ratios produced by the rates subject to SECI’s Complaint substantially exceed 180%.⁶

The court and agency jurisprudence concerning the matter of “qualitative” market dominance establishes certain key criteria for determining whether and to what extent a rail carrier faces “effective competition.” The basic test is whether “there are any alternatives sufficiently competitive (alone or in combination) to bring market discipline to [a railroad’s] pricing.” *West Texas Utilities*, 1 S.T.B. at 645, quoting *Metropolitan Edison*, 5 I.C.C. 2d at 410. In applying this test, it is not enough to look only to whether a hypothetical -- or even actual -- alternative exists; it must be shown that the erstwhile competition acts as a true economic constraint on the defendant’s rate ambitions:

⁶ In its Reply Evidence, CSXT raised four (4) points of contention with respect to SECI’s Opening presentation on variable costs. On Rebuttal, SECI adjusted the traffic and operating inputs in response to CSXT’s first point, and demonstrated that the remaining three (3) lacked merit and should be rejected by the Board. *See* SECI Rebuttal at II-2-12.

At the core of the “effective competition” standard is the idea that there are competitive market pressures on the railroads deterring them from charging monopoly prices from transporting goods. *Of course, any such effective competition will always be relative to a particular price that the railroads charge....* The mere existence of some alternative does not in itself constrain the railroads from charging rates far in excess of the just and reasonable rates that Congress thought the existence of competitive pressures would ensure.

Arizona Pub. Serv. Co. v. U.S., 742 F. 2d 644, 650-651 (D.C. Cir. 1984) (emphasis in original). *See also McCarty Farms*, 3 I.C.C. 2d at 832.

In this case, CSXT claims that it faces effective intermodal competition for its coal service to SGS, and that qualitative market dominance therefore is lacking. CSXT does not argue that an effective alternative transportation system actually exists and is available for SECI’s use for the bulk of its annual utility fuel requirements. Rather, CSXT’s thesis is that with a sufficient capital investment, SECI could *create* a competitive alternative in the form of an eight-step (for Illinois Basin coal shipments) or five-step (for Northern Appalachia coal shipments), multi-modal transport chain, culminating in the delivery of coal by barge up the St. Johns River from Jacksonville, Florida⁷ to a point near SGS, for unloading (using new facilities that would have to be constructed) and movement by conveyor (using new facilities that would have to be constructed) to the plant. CSXT also argues that SECI currently could shift

⁷ While SGS is geographically south of Jacksonville, the natural flow of the St. Johns River is north, thus placing SGS “upriver” from Jacksonville.

approximately 8% of its annual fuel requirements from rail to motor carriage for delivery to SGS from Jacksonville. According to the carrier, the possibilities of water deliveries and a partial diversion to trucks have acted as meaningful constraints on CSXT's pricing.

SECI's evidence conclusively demonstrates that CSXT's intermodal competition theory is a fallacy, and that the rates at issue in this proceeding are the predictable product of CSXT market dominance.

A. Barge Deliveries to SGS Are Not Operationally or Economically Feasible

After correcting CSXT's inaccurate and misleading recitation of the history of the parties' commercial relationship⁸ and addressing the essentially irrelevant claim that the challenged rates are consistent with rates charged by CSXT to other Florida utilities,⁹ SECI's Rebuttal shows that the intermodal "alternative" theorized by CSXT is fraught with design flaws and operational obstacles that make it physically infeasible. Moreover, even if these disqualifying obstacles are assumed away, CSXT and its consultants have dramatically understated the cost of the hypothetical barge "option."

As a threshold matter, the claims raised by CSXT here regarding the theoretical availability of barge transportation to SGS are contradicted by the prior sworn

⁸ SECI shows, *inter alia*, that an actual or perceived barge "option" for SGS coal deliveries was never seriously considered, and never raised in negotiations with CSXT as an alternative to rail deliveries. SECI Rebuttal at II-20-25. Indeed, the only documented motivation for CSXT's agreement to first contract with SECI in 1991 was the threat of regulation by the Board's predecessor. *Id.*

⁹ CSXT bases its claim of alleged rate parity on a comparison of *delivered* coal costs. As SECI showed, when the focus shifts to rail rates, the reality is that the challenged rates are { } the average of the rates for the other members of CSXT's comparison group. SECI Rebuttal at II-30-32.

testimony of its own consultant. Appearing before the FPSC in 2004, Dr. Robert Sansom, then-President of EVA, the consultants sponsoring CSXT's barge alternative claims in this case, unequivocally characterized SECI and SGS as "captive to the CSXT rail system," and testified that CSXT service to SGS is not threatened by "rail/barge competition." SECI Rebuttal at II-34. Dr. Sansom's testimony was accepted by the FPSC, and CSXT prevailed in its case before the agency. *Id.* The better evidence of record here confirms Dr. Sansom's conclusions.

The operational infeasibility of CSXT's hypothetical 8-step and 5-step programs for alternative transportation service to SGS is detailed in SECI's Rebuttal Narrative (at II-38-41) and the accompanying report by Bulk Terminals Group, LLC (SECI Rebuttal Exhibit II-B-1). The fatal flaws in the CSXT/EVA plan include:

1. Assuming that coal can be transloaded from vessels to river barges in open ocean, using cranes that are not certified for ocean operations and barges that would be swamped by normal ocean swells.
2. Assuming that a vessel-to-barge transfer can be coordinated and efficiently executed on a daily basis in any weather, with barges fleeted some 23 miles away from the vessel transfer point.
3. Assuming that the cranes that CSXT/EVA have selected for vessel transfer and barge unloading near SGS can operate consistently at 100% of their design rate, even though actual practice shows transfer rates closer to 50% of the design rate.

4. Assuming rates of transfer and maximum berth times for barges at a hypothetical dock near SGS that cannot be achieved in actuality.

5. Ignoring normal environmental occurrences on the St. Johns River, such as bad weather, fog, recreational craft interference, etc., which inevitably would adversely affect barge transit times.

6. Failing to consider or account for the need for and implications of extensive dredging of the St. Johns River in order to support a coal dock operation, including spoils disposal, periodic re-dredging, and the limitations posed by manatee habitat. *See* SECI Rebuttal at II-39-41 and Rebuttal Exhibit II-B-1 at 3-11, 13-19, 21-29, 31-33.

The analysis of EVA's cost estimates performed principally by Hellerworx, Inc.¹⁰ shows that even if one assumes away all of the obstacles which preclude the operational feasibility of the CSXT scheme, the carrier's consultants have grossly underestimated the costs associated with the hypothetical system, and thus overstated its value as a potential competitive threat to CSXT rail service. For example:

1. By relying on an out-dated source that does not reflect current market conditions, EVA wrongly assumes that SECI would incur little or no additional cost in arranging for coal shipments to originate at inland barge terminals.

2. EVA assumes, without support, that barge rates paid by SECI for river coal transport would always reflect the low end of prevailing spot rates.

¹⁰ SECI Rebuttal Exhibit II-B-2.

3. EVA unrealistically assumes that all coal transfers between river and ocean barges can take place precisely, and without delays caused by weather, congestion, equipment failures, or other routine causes that lead to demurrage fees and other cost increases, especially as volumes increase.

4. EVA makes the wholly unrealistic assumption that CSXT voluntarily would “short-haul” itself on hypothetical movements from Northern Appalachia origins to coastal ports.

5. Because of its erroneous assumption regarding crane transfer rates, EVA has underestimated the loading and unloading times at all hypothetical points of transfer, and thus underestimated both capital and operating costs for the required transfer crane capacity. In some case, the costs are underestimated by a factor of close to 100%.

6. EVA completely ignored costs associated with coal degradation, a natural and inevitable occurrence when coal is transported over long distances by water and endures repeated handling and modal transfers. Based on EVA’s Dr. Sansom’s prior testimony to the FPSC, a reasonable degradation allowance in current dollars would add approximately \$4.00 per ton to the cost of the barge delivery “option.” See SECI Rebuttal at II-41-44 and Rebuttal Exhibit II-B-2 at 8-10, 12-16, 18-22, 25-28, 31-32.

Taken together, the cost understatements resulting from the many errors and omissions in the EVA estimate at a *minimum* range from { } per ton, depending on the coal origin.¹¹ The resulting “rates” for purposes of comparison to the

¹¹ A full calculation of understated costs would include the additional capital required to properly construct an adequate barge unloading facility at Palatka, assuming

CSXT tariff rates at issue would be between *at least* { } per ton, again depending upon the origin. Even these conservative numbers cannot be characterized legitimately as “effective to restrain rail rates to a reasonable level.” *McCarty Farms*, 3 I.C.C. 2d at 832.

In previous cases wherein railroad defendants have argued that a complainant could “build its way” to competition, the measure of the capital investment required has been key to the Board’s consideration of the effectiveness of the hypothetical threat. In *TMPA*, the Board examined a proposed project estimated to cost \$49 million to complete, and found that the cost and the requisite amortizing savings of \$3.21 per ton made the project both financially infeasible and insufficient to provide “competitive pressure to effectively discipline BNSF’s rate.” 6 S.T.B. at 584. Similarly, in *West Texas Utilities* the Board examined and dismissed as ineffective so-called “build-out options” that were estimated to cost \$62 - \$79 million, depending upon the route chosen. 1 S.T.B. at 651. By comparison, in this case the requisite capital investment exceeds { },¹² and the amortization schedule shows an *increase* in rates over those under challenge.¹³ Under the Board’s precedents, and as a simple matter of

arguendo that the necessary real estate somehow materialized and the myriad permitting and regulatory obstacles were overcome. The inadequacies in the system designed by EVA are detailed in SECI Rebuttal Exhibit II-B-1 at 12-19. Estimating the additional capital requirements would entail a complete redesign of the EVA system, an exercise that was unnecessary given that the barge “option” was shown to be uneconomic even *before* such an adjustment. SECI Rebuttal at II-44 n. 67.

¹² SECI Rebuttal Exhibit II-B-2 at 24-29.

¹³ SECI Rebuttal Exhibit II-B-2 at 4.

common sense, the barge “option” hypothesized by CSXT and its consultants offers absolutely no meaningful economic constraint on the carrier’s pricing of coal transportation to SGS.

B. Property Limitations and Regulatory Obstacles

Another fundamental flaw in CSXT’s barge delivery theory is its assumption that a large, river coal barge unloading dock and conveyor can be sited on the riverbank near SGS. *See* CSXT Reply at II-29-30. In fact, the land parcel identified by CSXT is already fully occupied, there are no other nearby parcels available, and the myriad regulatory approvals and permits that would be required all but foreclose construction even if the necessary land existed.

As SECI showed on Rebuttal, the 4.5 acre parcel that it owns on the riverbank is occupied by a pumphouse, underground piping and related facilities which cannot support overlapping construction, or have access thereto restrained. Moreover, the easements that SECI currently holds do not permit construction of the kind of facilities that CSXT envisions, and the essential need to keep the SGS water intake equipment free of debris precludes both dredging and the nearby operation of tugs, each of which would generate effluents that contaminate the intake water. SECI Rebuttal at II-45-46. Expansion of SECI’s landholdings likewise is precluded by the residential development that surrounds SECI’s existing parcel, as graphically displayed in

photographs included in SECI's Rebuttal Evidence.¹⁴ *Id.* at II-47-52 and at 46 n. 72.

CSXT's blithe answer is to assume that SECI simply could take whatever property was needed by eminent domain;¹⁵ however, serious doubt exists whether SECI's limited statutory power in this area as an electric utility could be stretched to encompass a redundant and highly disruptive transportation facility.

The Board has previously acknowledged that regulatory/permitting requirements and the likelihood of community opposition to a construction project can render a hypothetical "build" infeasible as a source of *bona fide* transportation competition. *See West Texas Utilities*, 1 S.T.B. at 652. In this case, CSXT gives short shrift to the extensive regulatory approval requirements that would be triggered by a construction proposal such as that advanced by EVA, effectively dismissing these obstacles as a "cost of doing business for any proposed new construction...." CSXT Reply at II-41. As SECI explained in detail on Rebuttal, however, at least six (6) separate classes of governmental action and/or approval would be needed for a project such as that hypothesized by EVA, each of which carries the potential to kill it in its tracks:

¹⁴ The close proximity of these residences also would feature prominently in any permit considerations for the construction and operation of any new above-ground coal handling facility, with its attendant noise and air and water quality impacts.

¹⁵ CSXT Reply at II-29-30.

1. Amendment of Putnam County, Florida's future land use map to rezone land parcels adjacent to the river;
2. Putnam County and Florida Department of Transportation authorization of the undercrossing or overcrossing of County Road 209 and the associated right-of-way by a coal conveyor;
3. Authorization by the State Board of Trustees of the Internal Improvement Trust Fund for the use of sovereign state lands for those portions of the dock system that would be located in the river;
4. Modification of the existing SGS site certification by the Florida Electrical Power Plant Siting Board;
5. Issuance by the Florida Department of Environmental Protection of an air construction permit for new facilities, and a revision of the existing air operation and surface water discharge permits for SGS; and
6. Issuance of a dredge and fill permit for construction in the river, by the U.S. Army Corp of Engineers.

See SECI Rebuttal at II-59-69. Further, community opposition (which would be assured¹⁶) very likely would include CSXT itself, which has an established record of litigating against its customers to prevent them from accessing fuel or transportation alternatives that might deprive the carrier of revenue. *Id.* at II-61-62.

¹⁶ The photographs included in SECI's Rebuttal Evidence represent just one segment of the well-organized and well-funded opposition that would be expected to arise in response to a proposal to construct a large, industrial coal transfer facility in the midst of a residential and recreational area. SECI Rebuttal at II-46-52. *See also id.* at II-69-71.

C. CSXT's Pricing is Unconstrained by Competitive Forces

The “market discipline” that the Board’s precedents point to as a product of genuine, effective competition¹⁷ is not an abstract concept that cannot be measured empirically. Rather, if it exists it would be manifest in an actual rate response to the alleged competitive threat. The absence of any such response is another indication of market dominance. *See Cranston Corp. v. The Alabama Great Southern Railroad, et al.*, ICC Docket No. 38239S (ICC served November 10, 1987) at 7; *Metropolitan Edison Co. v. Conrail, et al.*, ICC Docket No. 37931S (ICC served July 22, 1988) at 18. *See also Arizona Pub. Serv. Co.*, 742 F. 2d at 650.

In this case, CSXT responded to the parties’ failure to reach agreement on a contract to govern post-2008 coal shipments to SGS by establishing common carrier rates which { } SECI’s coal transportation costs overnight. CSXT was not threatened with, nor did it experience any loss of traffic or revenue as a result of this action. *See* SECI Rebuttal at II-71-72. CSXT may claim in its filings before the Board that the threat of intermodal competition affects its pricing, but for purposes of a determination of market dominance it is actions -- not words -- that count. CSXT’s actions in establishing the issue rates without fear of traffic losses confirms that it possesses market dominance over coal shipments to SGS. *McCarty Farms*, 3 I.C.C. 2d at 832; *Market Dominance Determinations and Consideration of Product Competition*, 365 I.C.C. 118, 129 (1981).

¹⁷ *See West Texas Utilities*, 1 S.T.B. at 645; *Dayton Power & Light Co. v. Louisville & Nashville Railroad Co.*, 1 I.C.C. 2d 375, 379 (1985).

D. CSXT Possesses Market Dominance Over Coal and Petcoke Shipments from Charleston

Finally, SECI's Rebuttal Evidence refutes CSXT's claim that it does not have market dominance over coal and petcoke shipments from Charleston, SC because allegedly SECI could shift the origin of those shipments to Jacksonville¹⁸ and deliver them to SGS by truck. *See* CSXT Reply at II-46-49. Specifically, to truck ex-vessel coal or petcoke anywhere inland requires storage capacity at the port of entry, given that the fuel arrives in 30,000+ ton vessels and must be transloaded to 25-ton trucks. CSXT's own consultants' workpapers confirm that there are no permitted facilities at Jacksonville available to perform this function for third parties such as SECI. *See* SECI Rebuttal at II-73-74.

Assuming *arguendo* that storage capacity at Jacksonville magically materialized, by CSXT's own reckoning the "truck to SGS" approach could only handle a maximum of about 350,000 tons per year, or about 8% of the forecasted annual solid fuel volumes moving to SGS. Even if this diversion was possible, such a small portion of the relevant traffic cannot provide any real constraint on CSXT's pricing. *Metropolitan Edison*, 5 I.C.C. 2d at 410.¹⁹

¹⁸ Coal and petcoke arrive at Charleston via ocean vessel, and are transloaded to CSXT rail service for delivery to SGS.

¹⁹ As SECI noted in its Rebuttal, CSXT claims that SECI could truck coal and petcoke to SGS for about \$7.00 per ton (CXT Reply at II-47), and yet CSXT still established a rate of \$28.00 per ton to move it by rail from Charleston under Tariff CSXT-32531. Such is not the action of a firm genuinely concerned with the threat of intermodal competition.

III.

THE CHALLENGED RATES EXCEED MAXIMUM REASONABLE LEVELS, AND THEREFORE ARE UNLAWFUL

Proper application of the stand-alone cost (“SAC”) constraint under the *Coal Rate Guidelines* clearly demonstrates that the challenged tariff rates are unreasonably high, in violation of 49 U.S.C. § 10701, and that SECI is entitled to the prescription of reasonable, lawful rates pursuant to 49 U.S.C. § 10704 and an award of compensatory damages in accordance with 49 U.S.C. § 11704 (b). The evidence detailing the SAC calculations that support these conclusions is set out in Part III of SECI’s Opening and Rebuttal presentations, and the accompanying Exhibits and workpapers. In this portion of its Brief, SECI addresses in summary fashion the principal issues between the parties with respect to SAC, and the proper resolution of those issues.

A. SECI’s Stand-Alone Traffic Group Is Consistent With Precedent and Supported by the Evidence

Evidence of the traffic volumes and revenues that would be available to the SFRR, initially set forth in Part III-A of SECI’s Opening presentation, is updated and restated, with adjustments responsive to CSXT’s Reply, in Part III-A of SECI’s Rebuttal Evidence.

1. There Are No External Re-Routes on the SFRR System

CSXT’s first substantive charge against the SFRR traffic group is that it includes improper external re-routes. SECI Rebuttal at III-A-6-7. As SECI showed on Rebuttal, however, CSXT’s claim targeted only 183 out of a total of 3,201 separate

moves handled in the base year,²⁰ and upon consideration of the data finally produced in full by CSXT on Reply, only 10 of those movements (barely 0.03%) do not traverse the lines replicated by the SFRR in the “real world.” *Id.* at III-A-8, 12. These 10 movements were excluded from the SFRR traffic group in the Rebuttal restatement.

Board precedent confirms that so long as the defendant actually used a particular route for the transportation of a portion of the traffic moving between two points (either local or overhead/cross-over), the complainant can route all traffic between those points over the selected route without triggering the Board’s evidentiary rules for external re-routes. *TMPA*, 6 S.T.B. at 594-595; *Duke/CSXT*, 7 S.T.B. at 419. *See also, WFA/Basin II* at 11 n.16. SECI’s Rebuttal Evidence establishes that of the 183 movements challenged by CSXT, all but 10 pass the applicable test and properly cannot be categorized as external re-routes. SECI Rebuttal at III-A-11-12. The remaining few, which could only be analyzed in complete detail after consideration of CSXT’s Reply Evidence,²¹ were removed from the final SFRR traffic group.²²

2. SECI’s Evidence Accurately Determines Historic and Projected Traffic Volumes for the SFRR

At pages III-A-13 through III-A-59 of its Rebuttal Narrative, SECI answers in detail the various criticisms leveled by CSXT against SECI’s calculation of historic and projected traffic volumes for the SFRR. As with most evidentiary areas, SECI makes

²⁰ SECI Rebuttal at III-A-7.

²¹ SECI Rebuttal at III-A-8.

²² The SFRR traffic group also includes two subsets that have been internally re-routed. This traffic is not in dispute. SECI Rebuttal at III-A-13.

selective adjustments to account for updated information or in response to meritorious points raised by CSXT. For the most part, however, CSXT's critiques are shown to be without merit.

a. Coal Traffic

For non-issue coal traffic, SECI's Rebuttal presentation updated the 2009 tonnage estimates through application of the EIA's April 2009 AEO update, consistent with precedent. *AEP Texas* at 16; *Duke/NS*, 7 S.T.B. at 145. In its Reply, CSXT argued for reliance on what it claimed were "actual" CSXT volumes for the first three quarters of the year. As SECI explains, however, the figures proffered by CSXT were not supported by actual traffic and train/car movement data, and therefore cannot be verified. SECI Rebuttal at III-A-15-16. SECI's updated 2009 volumes are the better evidence of record.

In forecasting future volumes of non-issue coal traffic, SECI applied the rule adopted in *CP&L* and grouped origins on an EIA production region basis, before applying the neutral EIA coal growth forecast for each region. *CP&L*, 7 S.T.B. at 250. See SECI Rebuttal at III-A-18. CSXT collaterally attacks the *CP&L* rule, arguing first that it is a narrow ruling limited to the resolution of a unique discovery dispute, then challenging it as permitting improper external re-routes and proffering a "correction" that basically follows an approach that was *rejected* in *CP&L*. See CSXT Reply at III-A-39-53. As SECI explains in detail on Rebuttal, CSXT's claims are wholly without merit. SECI Rebuttal at III-A-18-38.

CSXT's "discovery dispute" thesis is undone by the decision's own characterization of the problem being addressed, and its specific disclaimer²³ that discovery was a cause of that problem:

As CP&L pointed out, however, the coal business in the Central Appalachian region is constantly shifting. A customer may ship from one mine in one year, then shift to another the next year, and back to the first mine in the following year. Consequently, to freeze the traffic group as NS would, limiting it to the exact origin-destination (O/D pair) matches reflected in one particular year, is unduly restrictive and does not fairly reflect the traffic that would be available to the [SARR] in any given year.

CP&L, 7 S.T.B. at 249. In the same vein, the "additional reasons"²⁴ advanced by CSXT for ignoring the rule are refuted by the decision itself. The Board's endorsement of "origin shifting" was key to its resolution of the need to accommodate ever-shifting coal purchase patterns in the East;²⁵ nothing in the decision limits its application to cases where all origins are served by the SARR;²⁶ and the orientation of the *CP&L* defendant's variable costs on a mine district basis played no role in the ruling.²⁷ To the contrary, its

²³ See *CP&L*, 7 S.T.B. at 250 n.6 (the Board explained that the flaws addressed were in the "methodology used by NS for identifying traffic in the [SARR] group, not some broader problem with the traffic data NS produced in discovery.").

²⁴ CSXT Reply at III-A-42.

²⁵ SECI Rebuttal at III-A-20-21.

²⁶ SECI Rebuttal at III-A-22.

²⁷ *Id.* at III-A-23.

essence is squarely applicable to this case, and supports SECI's aggregation approach to coal volume forecasts:

The better approach is to view the traffic group selected by [the complainant] here *as meant to encompass all coal traffic served by NS that moves over the lines replicated by the [SARR]* and to view the particular coal traffic that moved over those lines in [the base year] as *representative of the aggregate traffic that would be expected to move on the [SARR] in future years.*

CP&L, 7 S.T.B. at 250 (emphasis supplied).

The *CP&L* regional aggregation rule does not create impermissible external re-routes, as CSXT claims.²⁸ The methodological assumption underlying the rule is that given the shifting traffic patterns in the East, it is reasonable to expect that a movement from one origin in the base year which shifts away in later years would be replaced by other movements coming *to* that origin in those later years. *Id.* at 249-250. The aggregation approach does not change the routing for a particular movement in the base year (or a future year). It recognizes the reality of future traffic shifts which practicably cannot be forecast with specificity in the base year. The difference -- and its significance -- is demonstrated in the movement examples addressed by SECI in its Rebuttal (at III-A-25-30). These cases, which compare CSXT's 2009 forecast of future traffic patterns to the actual movement records of the shippers in question, show that without the *CP&L*

²⁸ In *CP&L*, the Board separately discussed the regional aggregation approach to coal traffic forecasting (7 S.T. B. at 249-251) and the rules regarding re-routes (*id.* at 253-254), and made no mention of any conflict between the two.

rule and its reliance on forecasts by production region, coal traffic that *in fact* moved over the SFRR's lines would not be credited to the SFRR.

By assuming that the base year is “*representative* of the aggregate traffic that would be expected to move” over the SARR in the future (*id.*, emphasis supplied), the EIA production region approach accounts both for the traffic that shifts from a base year SARR origin or route to another SARR origin or route, and for traffic that does not move over the SARR in the base year, but can be expected to shift to a SARR origin or route in future years. In the specific context of this case, the *CP&L* rule accomplishes these very purposes, and avoids artificial volume and revenue losses that result from CSXT's narrow focus on O-D pairs.²⁹

For projections of non-issue coal traffic over the 2010-2018 period, SECI relies on EIA's April 2009 AEO Update. Contrary to CSXT's suggestion (CSXT Reply at III-A-56), it would not be appropriate to commit in advance to use the 2010 EIA AEO, as it was not available when SECI's Rebuttal was submitted, and there is not a legitimate likelihood that any differences between the two would be significant enough to pass the *WFA/Basin* substitution test. See *WFA/Basin* at 28; SECI Rebuttal at III-A-20-41.

²⁹ As detailed in SECI's Rebuttal (at III-A-32-38), CSXT proffers a “correction” of 2009 coal volumes that starts with reductions based on the flawed re-route and forecast theories addressed *supra*, then reduces volumes further by ignoring the mandate of *CP&L* that all traffic that could be expected to move over the SFRR facilities should be accounted for. *Id.*, 7 S.T.B. at 250. As SECI explains, CSXT's allocation approach does not account for new shippers (those who received coal from SFRR origins in 2009 but did not do so in 2008), or 2009 coal destined to an existing SFRR shipper that had shifted to a new production region but remained a SFRR customer. SECI Rebuttal at III-A-33-36.

Future projections of coal traffic to SGS properly are based on SECI's Fuel Supply Plan,³⁰ which was prepared in the ordinary course of cooperative business and is used for many purposes unrelated to litigation, including SECI's annual financial forecast and its 2009 Ten Year Site Plan, which was submitted to the FPSC. *See* SECI Rebuttal at III-A-42. CSXT calls attention to the fact that forecasted tonnage levels for 2010 are some 1,100,000 tons higher than actual volumes consumed in 2009, but as SECI explained (and CSXT was aware), 2009 was marked by a series of unplanned unit outages at SGS that dramatically reduced coal consumption as compared to more typical years. SECI Rebuttal at III-A-41-42. SECI also explained the demographic changes and generation facilities upgrades that supported higher future consumption volumes. *Id.* at III-A-43. All told, SECI's projections represent the better evidence of record. *TMPA*, 6 S.T.B. at 603; *Wisconsin P&L*, 5 S.T.B. at 970-971; *West Texas Utilities*, 1 S.T.B. at 662-663.

b. Intermodal Traffic

The parties acknowledge that “[i]ntermodal traffic patterns, volumes and commodity mix are all very dynamic, and they shift substantially over time.” CSXT Reply at III-A-63. However, in developing revenue divisions and forecasting traffic and revenues for the SFRR, the traffic group in the SAC analysis effectively was fixed according to the most recent data available when SECI's evidence was prepared. The CSXI forecast produced by CSXT and relied upon by both parties does not allow the

³⁰ SECI Opening at III-A-11.

identification of new traffic that would traverse the SFRR, though it shows aggregate growth that surely includes new SFRR traffic. To capture this new traffic, and consistent with the *CP&L* rule that the base traffic group is representative of expected future movements, SECI applied the CSXI 2009 forecast to 2008 SFRR movements, reducing by half on an annual basis the volumes between O-D pairs that showed traffic in 2008 but were not included in the 2009 forecast. On Rebuttal, SECI demonstrated the reasonableness of this approach. SECI Rebuttal at III-A-44-46.

SECI's Rebuttal restatement accepts CSXT's re-alignments of certain station names which were mismatched between traffic data and the CSXI forecast. *Id.* at III-A-47. However, SECI also detected four (4) additional misalignments that CSST did not correct, and included these as well. *Id.*³¹

For base year movements that followed more than one route, SECI selected one of the actual routes and assumed that the SFRR would use that route for all movements in the forecast years. This is consistent with the long-recognized right of a SARR proponent to consolidate traffic over one of several alternative routes that the defendant uses in actuality. *See WFA/Basin II* at 11 n. 16; *TMPA*, 6 S.T.B. at 594-595. CSXT, in contrast, argues for holding 2008 route distributions constant, even though there is no reason to assume that routes wouldn't shift given the dynamic nature of intermodal traffic. As SECI demonstrates, this approach violates *CP&L* by failing to

³¹ The CSXT data included with its Reply also revealed that for certain movements to or from New Orleans, origin and destination designations were changed such that the movements were not recognized in the traffic forecast. SECI adjusted the intermodal volumes to account for this correction. SECI Rebuttal at III-A-51.

capture traffic which actual data shows would be available to the SFRR. SECI Rebuttal at III-A-48-50.

CSXT did identify certain traffic lanes where SECI's forecast double-counted volumes (for a total of 24,249 intermodal units). SECI eliminated these from its restatement. However, the station re-alignments discussed *supra* allowed more forecast traffic to be matched to base year movements, and *increased* SFRR volumes by 22,269 units. The net adjustment, then, is a reduction of 1,980 intermodal units, or about 0.4% of SECI's Opening volume. SECI Rebuttal at III-A-50-51.

c. General Freight Traffic

The issues presented with respect to the proper determination of SFRR general freight volumes largely parallel those for intermodal traffic,³² and should be resolved accordingly. Thus, CSXT's challenge to SECI's approach to application of the 2009 forecast to the 2008 base traffic group should be rejected, based upon the *CP&L* principles and the necessities raised by the limitations of CSXT's data.³³ The limited number of traffic double-counts that were detected in SECI's Opening volumes (3.8% of the total general freight carloads), have been eliminated from SECI's restatement. SECI

³² As noted *supra*, CSXT proposed (and SECI augmented) corrections to some mis-aligned station names which emerged from an analysis of CSXT's intermodal traffic data. A similar review of CSXT's general freight data shows another 20 such mis-alignments between the 2008 base traffic data and the forecast. SECI has corrected these on Rebuttal. *See* SECI Rebuttal at III-A-52-53.

³³ SECI Rebuttal at III-A-53-54.

Rebuttal at III-A-55.³⁴ CSXT raises two (2) additional issues in connection with general freight volumes which do not also relate to intermodal traffic, though neither of the adjustments proposed by CSXT is meritorious.

First, CSXT argues for the removal of all non-SARR empty cars that the SFRR would handle (to keep intact the trains it receives from CSXT) in exchange for a line-haul cost credit, using the same arrangement that CSXT and CSXI employ in actuality today. *See* CSXT Reply at III-C-178. The credit is based on gross ton-miles, which includes the tare weight of empty railcars. By arbitrarily removing these cars, CSXT is changing the SFRR traffic group and reducing available revenue, something which is not the defendant's prerogative under the *Coal Rate Guidelines*. SECI Rebuttal at III-A-54-55.

Second, claiming that it understated shipment declines in the automotive and metals sectors when it prepared its 2009 general freight forecast, CSXT proposes to reduce the SFRR auto and metals traffic volumes using Global Insight's forecasts for light vehicle and iron and steel production. CSXT Reply at III-A-75-76. However, CSXT provided no evidence of the extent to which the Global Insight forecasts played a role in the development of the CSXT forecast, which relied on multiple additional inputs. Additionally, CSXT would apply a single commodity adjustment across a wide array of STCC moves, which almost certainly will distort forecasted volumes for many other

³⁴ SECI also accepts an adjustment to the volumes of synthetic gypsum projected for a single shipper, based on information provided by CSXT in its Reply. *Id.* at III-A-56.

commodities. Taken together with the fact that CSXT continues to rely on its 2009 forecast for all other non-coal commodity groups, the proposed adjustments for auto and metals traffic are not well-grounded and should be rejected. SECI Rebuttal at III-A-56-58.³⁵

SECI's restatement of general freight traffic appears on its Rebuttal Table III-A-5. The summary of total peak year traffic volumes for the SFRR is shown on Rebuttal Table III-A-6. *See* SECI Rebuttal at III-A-58-59.

3. Revenues

Differences between the parties regarding revenues for the SFRR which are not attributable to CSXT's improper and/or arbitrary reductions in SFRR traffic volumes are addressed in SECI's Rebuttal at pages III-A-59 through III-A-72. In those instances where CSXT proposed a legitimate revenue adjustment, SECI adopted it in its Rebuttal restatement, as indicated in the Narrative. By and large, however, CSXT's objections lack merit, and should be overruled.

a. Coal Revenues

CSXT proposes to adjust coal revenues for the SFRR based on what it claims are "actual" 2009 coal rates for the subject movements. CSXT Reply at III-A-79. However, CSXT produced no supporting data for its 2009 volume and revenue figures; they were simply hard-coded numbers on a spreadsheet. Additionally, CSXT's claimed

³⁵ Also noteworthy is the public data cited by SECI that shows relatively robust growth in the rail commodity groups subject to CSXT's proposed adjustment, which further undercuts CSXT's claims. SECI Rebuttal at III-A-58.

rates only cover the first three quarters of 2009; CSXT simply would assume that fourth quarter rates equal the average of those three. As SECI shows, however, the major indexes used by most of the contracts covering SFRR coal traffic increased (in some cases substantially) from 3Q09 to 4Q09. SECI Rebuttal at III-A-61-62. In addition to being unsupported by traffic data, CSXT's proposed substitute rates would understate SFRR revenues. CSXT's adjustments should be rejected.³⁶

CSXT also proposed a biased adjustment to SFRR fuel surcharge revenues from coal traffic. CSXT reduced the revenue for two (2) shippers whose contracts purportedly set higher strike prices for surcharge application than CSXT's Fuel Surcharge Publication 8661-B, but it did not produce revised surcharge provisions for all *other* 2009 contract renewals. Board precedent is clear that a party cannot invoke partial data that is favorable to its cause without producing complete information to enable a determination whether there is offsetting data in the same field or category. *Wisconsin P&L*, 5 S.T.B. at 979; *Duke/NS*, 7 S.T.B. at 144-145. CSXT's adjustments should be rejected.

b. Intermodal Revenues

CSXT proposed an acceptable procedure for calculating 2009 intermodal revenues from 2008 base levels, but then failed to follow it. SECI Rebuttal at III-A-65-

³⁶ CSXT also claims to have used the rates presented by SECI on Opening for movements which were not part of the base traffic group, but did occur in 2009. SECI shows that this claim is not valid, either. CSXT only used SECI's rates for a limited number of movements; otherwise it applied its flawed 1Q-3Q average rates. SECI Rebuttal at III-A-62-63.

66. The average rates for actual intermodal traffic handled by the SFRR increased materially (by more than 3%) from 2008 to 2009, and that increase properly should be reflected in SFRR's revenues. *Id.* at III-A-66.

CSXT argues for a reduction in intermodal fuel surcharge revenues by applying a weighted average surcharge based on contracts produced in discovery to all other contract movements, and for all movements following contract expiration. CSXT Reply at III-A-87-91. However, this skews the results artificially in CSXT's favor. The contracts selected by SECI for production represent movements with the highest volumes, and shippers with the most effective negotiating leverage. It is not rational to assume that reduced surcharges or higher strike prices negotiated by these shippers would be freely available to *all* intermodal customers. SECI Rebuttal at III-A-67-68. SECI's evidence relies on CSXT's established surcharge tariff, the same method concurred in by CSXT itself with respect to coal traffic. It is the more reasonable method, and should be used for intermodal movements as well.

c. General Freight Revenues

The principal issue between the parties with respect to general freight revenues for the SFRR also relates to fuel surcharges. Here too, CSXT's alternative calculations should be rejected.

For non-sampled contract movements, SECI applied a weighted average surcharge based on sampled movements through 2010, then CSXT's published base surcharge rate for 2011-2018. CSXT argues for application of the weighted average contract surcharge for the entire SAC period. However, the average is weighted by

contact term, and in all cases the average term expired in 2010. SECI Rebuttal at III-A-69. CSXT's approach violates a basic rule of sampling; *i.e.*, results should be applied to non-sampled fields only for the time periods covered by the sample. Applying results to a period outside the sample observations is inherently arbitrary.

Challenging SECI's application of the general tariff surcharge following contract expiration, CSXT rather amazingly argues that it would be "unreasonable" to assume that the carrier would not simply agree to continue the surcharge terms in effect following contract expiration, instead of reverting to higher tariff charges. CSXT Reply at III-A-94. SECI's own experience following the expiration of its prior contract with CSXT in 2008 belies the carrier's claim. Indeed, it would be unreasonable *not* to assume that CSXT would negotiate to improve its economic position, and hold its tariff terms as a default outcome. SECI Rebuttal at III-A-70.

4. Revenue Divisions on Cross-Over Traffic

Because SECI's Rebuttal traffic group includes no off-SARR or "external" re-routes, it is unnecessary to consider an alternative SAC analysis such as that described in *WFA/Basin II*. With the minor adjustments made by SECI on Rebuttal, all SFRR traffic uses actual routes used by CSXT in the base year, and thus reflects actual CSXT costs. SECI Rebuttal at III-A-71.

In its Rebuttal restatement, SECI recalculated the variable costs used for ATC purposes on the basis of the final 2008 URCS data for CSXT, which was not available when SECI filed its Opening Evidence. SECI also made appropriate updates to its fixed cost and density calculations. *Id.* at III-A-72. As shown on Rebuttal Table III-

A-8, restated revenues for the SFRR (including a comparison to CSXT's understatement) are as follows:

<u>SFRR Revenues (\$ millions)</u>				
<u>Year</u> (1)	<u>SECI</u> <u>Opening</u> (2)	<u>CSXT</u> <u>Reply</u> (3)	<u>SECI Rebuttal</u> (4)	<u>Difference</u> (5)
2009	\$1,116.1	\$ 942.0	\$1,048.0	\$106.0
2010	\$1,250.8	\$1,035.4	\$1,182.2	\$146.8
2011	\$1,272.0	\$1,058.5	\$1,259.3	\$200.8
2012	\$1,360.7	\$1,153.4	\$1,350.0	\$196.6
2013	\$1,488.0	\$1,274.1	\$1,459.0	\$184.9
2014	\$1,571.0	\$1,361.6	\$1,531.3	\$169.7
2015	\$1,652.5	\$1,434.5	\$1,607.1	\$172.6
2016	\$1,737.6	\$1,508.5	\$1,689.5	\$181.0
2017	\$1,832.6	\$1,592.5	\$1,776.2	\$183.7
2018	\$1,936.6	\$1,680.7	\$1,874.6	\$193.9

B. SECI's Operating Plan for the SFRR Is Feasible, and Its Operating Costs Are Well-Supported

The stand-alone system, operating plan, and calculation of annual operating expenses for the SFRR are addressed in detail in Parts III-B, III-C and III-D of SECI's Opening and Rebuttal Evidence. A summary of the proper resolution of each and every issue that has arisen between the parties on these subjects is far beyond the scope of this Brief. SECI submits that its Rebuttal restatement represents the best evidence of record

with respect to each of these points. Herein, SECI addresses four (4) of the issues related to the SFRR's operating plan and expenses that have the greatest impact on overall SAC.

1. SECI Developed a Valid Operating Plan for the SFRR

The Board's precedents call for a SARR proponent to demonstrate that its operating plan is capable of providing the service required by the traffic group. *Duke/NS*, 7 S.T.B. at 99, 117. In this case, SECI met its burden by designing a plan which assumed that the SFRR would originate and/or accept all trains on its system intact, as they are loaded and released or (for overhead traffic) interchanged to the SFRR, and transport them over its system either to destination or to the point where CSXT traffic data showed the trains would leave the SFRR's lines for further handling by CSXT. SECI Rebuttal at III-C-5-7. SECI modeled the SFRR operations using the RTC Model, and confirmed through transit time analysis that the SFRR has the capacity and operational capability to move the customers' traffic between the relevant on-SARR and off-SARR points consistent with the shippers' needs. *Id.* at III-C-9-10.

Given the mix of traffic and commodities handled by the SFRR, it was apparent that not all cars in a train moved to the same point, and that some intermediate switching (pick-ups or set-offs of cars) and local switching occurred routinely. As SECI explained in detail, however, SECI was unable to identify all of these operations and include them in its RTC simulation, due to problems with the CSXT car event and train movement data and SECI's inability to obtain timely and complete information from

CSXT in order to interpret and utilize the data.³⁷ Since the purpose of developing an operating plan for a SARR is to determine the *cost* of serving the subject traffic group, however, SECI accounted for all intermediate or local activities through application of a surrogate cost additive. SECI Opening at III-C-24-25 and III-D-108-109. The use of a reasonable surrogate methodology to counter the absence of data or impracticality of actual observation in a regulatory context is consistent with precedent. *Flying J. Inc. v. F.E.R.C.*, 363 F. 3d 495, 499 (D.C. Cir. 2004); *Chemical Mfrs. Assn. v. E.P.A.*, 28 F. 3d 1259, 1264 (D.C. Cir. 1994); *Implementation of Energy Policy and Conservation Act of 1975*, 357 I.C.C. 599, 600 (1978).

While CSXT challenged SECI's use of the surrogate switching cost approach to the data deficiencies,³⁸ the carrier did not attempt to demonstrate that actual costs for intermediate or local handling were higher than the costs determined by SECI. Instead, as addressed *infra*, CSXT created an entirely new scheme for handling SFRR traffic which bore *no relation* to the actual way that trains hauling that traffic move in the

³⁷ See SECI Rebuttal at III-C-7-9 and Rebuttal Exhibit I-1. SECI will not recount again here the catalogue of data problems, or the reasons why CSXT's claim that the data produced in discovery was sufficient to enable the modeling of all intermediate car moves is not grounded in fact. Those are explained in detail in SECI's Rebuttal Exhibit I-1. Tellingly, however, it took CSXT 28 pages in a separate Reply Exhibit to explain how SECI allegedly could have used the databases *after* CSXT already had the benefit of SECI's selected traffic group, and in the end CSXT did not even use those databases itself to attempt to determine actual movements. SECI Rebuttal at III-C-7-8.

³⁸ CSXT Reply at III-C-4.

real world.³⁹ In its Reply, however, CSXT did provide supplemental information and explanations which enabled SECI to determine the actual intermediate and local/yard switching that took place on certain SFRR trains. SECI modeled these movements using the RTC Model, determined the incremental changes in time associated with the switching activities, and converted those changes into dollars to compare with SECI's surrogate costs. As explained in SECI's Rebuttal presentation, the results of a test of 47 trains showed that for all trains, the actual 2009 operating expenses were lower than those determined by SECI using the surrogate methodology. SECI Rebuttal at III-C-12-20. If anything, the surrogate approach utilized by SECI as an antidote for significant CSXT data shortcomings overstates the actual costs associated with intermediate and local activities.

2. CSXT's New Operating Plan Should be Rejected

In response to SECI's operating plan and in an effort to justify significant additional costs in facilities and staffing, CSXT purported to create an entirely new plan and model different operations for non-coal and other bulk traffic. However, as SECI explains on Rebuttal,⁴⁰ CSXT's new plan is not based on the actual general freight and intermodal trains that moved over the SFRR. CSXT ignored those trains, lumped all of the cars handled by the SFRR into new groups based on their on-SARR points, then created new car blocks and new trains that were assumed to run without regard to real-

³⁹ CSXT's alternative universe plan fails the fundamental test of validity enunciated in *Duke/NS*, 7 S.T.B. at 99, 117.

⁴⁰ SECI Rebuttal at III-C-21-26.

world CSXT trains.⁴¹ As a result, CSXT's plan posits service to the SFRR's customers that is significantly different from that actually provided by CSXT. Board precedent requires rejection of CSXT's approach. *Duke/NS*, 7 S.T.B. at 117-121.

Unlike SECI's operating plan, CSXT's new creation does not maintain any continuity with the trains on which the cars were received at the on-SARR point. Among other effects, this leads to significant increases in the classification and other handling of the cars, with a corresponding write-up in costs.⁴² Indeed, the increases in rail facilities and staffing for train and engine crews alone artificially inflate annual operating expenses for the SFRR by more than \$77 million.⁴³ Additionally, the trains created by CSXT's program cannot be synchronized with the car and train event data produced by CSXT in discovery, as their movements bear no relation to actual train movements. Thus, while CSXT "modeled" the operation of the new trains while on the SFRR using the RTC Model, the information needed to evaluate, *e.g.*, the transit time for a car from the time it arrived at the on-SARR point to its arrival at destination, is not available.⁴⁴ This means

⁴¹ CSXT performed this illusion using a computer program (MultiRail) which was not included in its Reply workpapers, and was not provided to SECI (along with the relevant input files) until less than a month before the filing deadline for SECI's Rebuttal Evidence. SECI Rebuttal at III-C-21 n. 19. After some training by the program's proprietor, SECI was able to use it to confirm the procedure that CSXT followed. *Id.* at III-C-23 n. 21.

⁴² See SECI Rebuttal at III-C-24 n. 22.

⁴³ See SECI Rebuttal at III-D-3.

⁴⁴ CSXT only presented average train speeds, which were not dissimilar from the average SFRR train speeds under SECI's plan. See CSXT Reply at III-B-34-35; SECI Rebuttal at III-C-26 n. 23.

that it is not possible to determine whether CSXT's new trains plan can meet the transportation needs of the SFRR traffic group, an essential element of feasibility. *Duke/NS II* at 7 S.T.B. at 871; *PSCo/Xcel*, 7 S.T.B. at 610. The inability of CSXT's plans to pass this test is another reason why it should be rejected.

Obviously, a SARR's operating plan plays an important role in determining the facilities needs and operating expenses of the SARR. *AEP Texas* at 16; *Duke/NS*, 7 S.T.B. at 99. As noted *supra*, CSXT's new trains plan leads to a write-up of expenses for SFRR facilities and personnel of more than \$77 million annually. However, it develops the statistics supporting this result in a manner that runs counter to Board precedent, further undermining both the plan and the statistics that flow from it.

An examination of CSXT's Reply Evidence indicates that the program relied upon by CSXT generated statistics for the SFRR (*e.g.*, car-miles, gross ton-miles, etc.) for one day. CSXT's analysts apparently then multiplied these average daily statistics by 365 to arrive at annual figures. SECI Rebuttal at III-C-28. However, this approach has been rejected by the Board on previous occasions, including most recently in *WFA/Basin*, where the Board refused to accept annual statistics extrapolated from a *week's* worth of data. *WFA/Basin* at 33. CSXT's reliance on a single day in this case is even more untenable. By comparison, SECI developed annual statistics by applying the average times from its RTC model to all trains moving over the SFRR in the base year, consistent with the Board's holdings. SECI Rebuttal at III-C-28-29.

CSXT's newly created operating plan represents "reply evidence that is itself unsupported, infeasible [and] unrealistic," and fails to meet the tests for a valid plan

that can be used in a SAC analysis. *Duke/NS*, 7 S.T.B. at 101. SECI's operating plan is the better evidence of record.

3. Maintenance of Way

CSXT proposes to add more than \$46 million to the SFRR's annual operating expenses in the form of inflated staffing, equipment inventory and contractor costs for maintenance-of-way ("MOW") functions. CSXT's proposed adjustments are spread throughout the various sub-categories of MOW expenses, and are addressed in detail at pages III-D-100 through III-D-137 of SECI's Rebuttal Evidence. By and large, CSXT's critiques are without merit, and its cost adders are not justified.⁴⁵

One general group of claims raised by CSXT rests on the carrier's argument that the opinions offered by its expert witness Mr. Bagley are superior to the plans, models and assessments presented by SECI's engineering expert, Mr. Harvey Crouch. *See* SECI Rebuttal at III-D-102-115. However, SECI's evidence is grounded on real-world comparisons to MOW practices actually used by large railroads such as NS, and SECI's experts' direct observations of the CSXT lines being replicated by the SFRR. *Id.* at III-D-102-103, 110-114. It also is consistent with recent Board precedent,⁴⁶ including the established principle that a SARR does not have to duplicate plans and personnel that result from an incumbent's status as a unionized railroad. *PSCo/Xcel*, 7

⁴⁵ SECI has adjusted its MOW expenses upward in response to certain points raised by CSXT, from \$53.8 million to \$54.3 million at the 2009 level. SECI Rebuttal at III-D-137.

⁴⁶ For example, SECI's use of four-person MOW crews and its determination of signal maintenance requirements both find support in *WFA/Basin*, at 58, 63.

S.T.B. at 651; *TMPA*, 6 S.T.B. at 687. It is not nearly enough for CSXT to simply offer opinion -- without any real supporting data -- espousing a “better way.” *General Procedures*, 5 S.T.B. at 446.

In a number of instances, CSXT offered adjustments to staffing or assignments with no specific supportive showing at all. Thus, CSXT critiques SECI’s signal maintainer requirements as not being model-based, but then identifies no model that could or should be used for the task. SECI Rebuttal at III-D-116. Likewise, CSXT proposes to double the number of bridge and building supervisors and inspectors, but offers no explanation as to why this is necessary. SECI Rebuttal at III-D-119. The same deficiency effectively rebuts its proposal to add work-train equipment for ballast distribution. *Id.* at III-D-122.

The Board’s evidentiary rules provide that where a complainant’s evidence on a disputed issue is feasible and supported, it is to be used for the SAC analysis unless the defendant demonstrates otherwise *and* “offers feasible and realistic alternative evidence that avoids the infirmities” *Duke/NS*, 7 S.T.B. at 100-101. On the issue of MOW expenses, SECI presented a feasible plan and associated costs, amply supported by credible and well-sourced data. CSXT has neither shown SECI’s program to be infeasible, nor offered persuasive alternative evidence much beyond the “better way” approach that was rejected in *General Procedures*.

4. The Former MGA Lines

Among the more settled principles of SAC analysis is the rule that a SARR proponent should not be required to include costs -- including capital costs-- that the defendant did not incur itself. *TMPA*, 6 S.T.B. at 685 n. 164; *Wisconsin P&L*, 5 S.T.B. at 1019; *McCarty Farms II*, 2 S.T.B. at 504 n.81. One of several corollaries is the well-established rule that where the incumbent enjoys operating or trackage rights over lines owned by a third party, the SARR is presumed to step into the incumbent's shoes under the agreement(s) governing such an arrangement, and is not required to incur the cost of constructing those lines unless the defendant also incurred those costs. *AEPCO*, 7 S.T.B. at 228; *PSCo/Xcel*, 7 S.T.B. at 665; *Wisconsin P&L*, 5 S.T.B. at 1006.

Approximately 135 miles of lines of the former Monongahela Railway which are now owned by NS⁴⁷ reach the Bailey, Federal 2, Loveridge and other mines in southwestern Pennsylvania and northwestern West Virginia. Under the Monongahela Usage Agreement between CSXT and NS ("MGA Agreement"), CSXT received joint operating rights over the lines in order to serve those mines,⁴⁸ in consideration of the payment by CSXT of a trackage rights fee and a commitment to pay 50% of all new, non-severable capital improvements made each year.⁴⁹ Notably, however, CSXT did *not* have to contribute capital to the original acquisition of NS's share of Conrail, which included

⁴⁷ NS acquired the lines as part of its share of the former Conrail lines that were the subject of the Board's consideration and approval in Finance Docket No. 33388.

⁴⁸ Typically, NS operates CSXT coal trains between the mines served by the MGA lines and CSXT's Newell Yard. SECI Rebuttal at III-B-4.

⁴⁹ See CSXT Reply e-workpaper "MGA Agreement.pdf."

the MGA lines, and there is no evidence that CSXT or its predecessors bore any portion of the costs of original construction of the lines.

Consistent with precedent and the terms of the MGA Agreement, the SFRR would receive NS-originated trains moving over the MGA lines at Newell Yard (near Brownsville, PA), pay NS the fees calculated under the Agreement, and compensate NS for 50% of the cost of capital improvements made by NS for the benefit of both railroads during and subsequent to the SFRR's construction period. SECI also includes the route miles for the MGA lines for purposes of calculating operating expenses and ATC revenue divisions. SECI Rebuttal at III-B-4 n. 4. In its Reply, however, CSXT asserts that the SFRR *also* should incur some \$325 million in capital investment, supposedly half the cost of building the MGA lines (including 77 bridges). *See* SECI Rebuttal at III-B-5. There is no legitimate basis for this add-on.

Nothing in the Board's 1998 Decision in the Conrail proceeding or the MGA Agreement itself requires a capital contribution payment by CSXT for one-half of the value or original cost of the MGA lines, and CSXT has offered no evidence of any such payment. Indeed, a number of operating arrangements such as that involving the MGA resulted from NS and CSXT's acquisition and division of Conrail, and neither the transactional agreements between the carriers themselves nor the Board's approval decisions requires one railroad to pay part of the other's Conrail acquisition cost. Case law is clear that SECI's obligation here is to provide for the SFRR's compliance with CSXT's actual obligations to NS with respect to joint use of the MGA lines, nothing

more. *AEPCO*, 7 S.T.B. at 228. SECI has met this requirement. *See* SECI Rebuttal at III-B-4-5.

C. SECI's Road Property Investment Costs are the Best Evidence

SECI's final restatement of road property investment for the SFRR is set out and explained in detail in Part III-F of its Rebuttal Evidence.⁵⁰ Therein, SECI demonstrates that its cost estimates are reasonable and consistent with Board precedent, and shows how CSXT has overstated the SFRR's investment requirements significantly in each of the eleven (11) principal cost categories.⁵¹ In this Brief, SECI focuses on three (3) areas that are among the most consequential on an economic basis, and are representative of the flaws in CSXT's challenges to SECI's road property calculations generally.

1. Land

Recognizing the size and routes of the SFRR, SECI calculated a total land acquisition cost of \$921 million, a figure significantly higher than any land valuation used in a previous coal rate proceeding under CMP. Not to be outdone, however, CSXT countered with a figure of \$2.4 *billion*, a 160% write-up of SECI's costs. As SECI demonstrates (SECI Rebuttal at III-F-2-20), the many shortcomings of and methodological errors in CSXT's approach preclude reliance on its inflated values.

⁵⁰ Part III-E of SECI's Rebuttal Evidence responds to and dispenses with CSXT's only point of difference with respect to SECI's Opening Evidence concerning non-road property investment.

⁵¹ SECI Rebuttal at III-F-2, Table III-F-1.

In past cases, the Board has emphasized the superiority of direct observation and actual inspections as a valuation method. *Duke/CXST*, 7 S.T.B. at 473; *CP&L*, 7 S.T.B. at 308; *TMPA*, 6 S.T.B. at 698. Consistent with precedent, in this case SECI's expert witness considered all segments of the SFRR right-of-way, touring most of the lines being replicated. Where physical access to segments was not possible, he relied on aerial maps and other direct observation data. CSXT's consultant, in contrast, did not perform any independent analysis of over 90% of the SFRR's right-of-way, limiting his evaluation to a select number of metropolitan areas. SECI Rebuttal at III-F-3. From the start, CSXT's valuation approach was inferior and less reliable.

Another defect in CSXT's valuation is its consultant's flawed application of the highest and best use ("H&BU") standard. By limiting his analysis to categorizing existing uses, rather than the more extensive analysis of various applicable market factors conducted by SECI's expert, CSXT's consultant ignored many factors that influence H&BU, failed to account for use changes within defined areas of related economic activity, and could not accurately discern value differences on a parcel-by-parcel basis. SECI Rebuttal at III-F-6. SECI's analysis suffers from none of these flaws.

Compounding the foregoing errors, CSXT's estimates utilized markedly irrelevant comparables,⁵² and yielded wildly differing (and inherently unreliable) values

⁵² SECI Rebuttal at III-F-7-8. For example, half of the "residential" sales that CSXT's consultant evaluated in developing his land value estimates for right-of-way in Rockville, MD were of homes in Potomac, MD, one of the most exclusive and highest priced residential enclaves in the entire country, and at least seven (7) miles removed from Rockville.

for similar if not identical parcels located adjacent to one another.⁵³ CSXT's analyses of Savannah and Atlanta, GA, Chattanooga, TN and Richmond, VA are replete with examples such as:

- Retail uses within two (2) blocks of each other valued at \$0.20 psf and \$5.50 psf, respectively, a variance of 2750%.⁵⁴
- Industrial land parcels within 1100 linear feet of each other valued at \$2.75 psf and \$0.05 psf, respectively.⁵⁵
- Retail land at MP 91 valued at \$6.00 psf, and a virtually identical parcel at MP 128 (1900 feet away) valued at \$20.00 psf, a variance of 333%.⁵⁶
- A vacant land valuation equal to 71%-87% of total improved land cost, when land generally accounts for only 25%-33% of total improved cost.⁵⁷

Consistent with the Board's expressed preference, SECI based its land values on a valid across-the-fence ("ATF") analysis,⁵⁸ dividing the subject corridors into segments with similar utility, and applying observed values of adjacent parcels to estimate ATF for each segment. SECI Rebuttal at III-F-13. CSXT attempts to critique SECI's valuation segments, but offers no support in Board precedent or respected appraisal literature to support its claims. *Id.* at III-F-14.

⁵³ SECI Rebuttal at III-F-8-12.

⁵⁴ SECI Rebuttal at III-F-9.

⁵⁵ *Id.*

⁵⁶ *Id.* at III-F-10.

⁵⁷ *Id.* at III-F-12.

⁵⁸ *PSCo/Xcel*, 7 S.T.B. at 473.

CSXT likewise can muster no real support for its challenge to SECI's use of January 1, 2009 -- the start of SFRR operations -- as a valuation date, or its application of a market adjustment to reflect anticipated further price declines following the close of 2008. The January 1, 2009 valuation date is endorsed by prior case law,⁵⁹ and the market adjustment is supported by a number of credible publications showing that late-2008 market participants anticipated further, future price declines. SECI Rebuttal at III-F-16.⁶⁰

Finally, there is no merit to CSXT's claim that easement prices should be adjusted for inflation or replaced by current land prices. SECI Rebuttal at III-F-19-20. Easements properly are valued based on a one-time payment -- the usual method by which they are acquired in the real world⁶¹ -- and easement agreements typically do not prescribe inflation adjustments. Further, under precedents such as *TMPA*,⁶² a SARR proponent is not required to acquire greater title to property than the incumbent has, and is entitled to the costs and benefits of easement terms negotiated by the incumbent. CSXT's proposed write-up of easement costs to current land purchase prices violates both of these principles.

⁵⁹ *Westmoreland Coal Sales Co. v. Denver Rio Grande Western R.R.*, 5 I.C.C. 2d, 1067, 1091 (1988).

⁶⁰ CSXT's criticisms of certain of SECI's property classifications likewise lack merit. SECI's expert employed classifications which applied to the mix of uses and population densities that characterized the areas surrounding the SFRR right-of-way. SECI Rebuttal at III-F-17-18.

⁶¹ See *Duke/CSXT*, 7 S.T.B. at 474; *CP&L*, 7 S.T.B. at 308.

⁶² *TMPA*, 6 S.T.B. at 697.

2. Bridges

SECI developed capital costs for bridges on the SFRR following an approach which has been approved by the Board in prior cases. Working with CSXT bridge data produced in discovery, SECI divided bridges into four (4) basic types based on required length and traffic considerations, then assigned costs based upon SECI's engineers' actual project experience with rail bridge construction.⁶³ Unfortunately, the bridge data provided by CSXT did not include the height of the bridges, the lengths of individual spans, or any clear identification of the obstacle(s) crossed by any particular bridge, which complicated the analysis. A full explanation of SECI's restatement of bridge costs and the methodology used to derive it is set forth in its Rebuttal Evidence at pages III-F-77 through III-F-109.

CSXT proposed to nearly double SECI's Opening bridge costs, based on a variety of theories and criticisms, most of which are without merit. SECI Rebuttal at III-F-78. CSXT's improper cost write-up principally can be attributed to three (3) factors: an overstatement of the number of bridges needed by the SFRR; use of a construction standard and design approach which is unnecessary to meet the 286,000 lbs. gwr maximum load requirement for the SFRR trains; and an unfounded inflation of unit costs.

A major source of CSXT's overstatement of the number of bridges needed is its erroneous assumption that the SFRR would have to build the former MGA lines that are owned by NS and over which CSXT (and, thus, the SFRR) exercises operating rights.

⁶³ *Duke/CSXT*, 7 S.T.B. at 493-494.

SECI Rebuttal at III-F-80.⁶⁴ As discussed *supra*, there is no sound basis on which to require that the SFRR build or otherwise contribute capital to those lines, which includes the 77 bridges located thereon that CSXT argued should be added to the SFRR inventory. Additionally, CSXT added facilities or costs at several locations which it either did not have to pay to build itself (*e.g.*, because a governmental entity or other railroad did), or are only required because of barriers or roads that post-dated the original rail construction. SECI Rebuttal at III-F-80-90, 105, 107, 108. In both cases, the related costs should be excluded as improper barriers to entry. *See Duke/NS*, 7 S.T.B. at 188-189; *TMPA*, 6 S.T.B. at 726.

A second key source of CSXT's bridge cost overstatement is its insistence on a construction standard applicable to 315,000 lbs. gwr load requirements, even though cars moving on the SFRR will not exceed 286,000 lbs. gwr, and its unnecessary redesign of SECI bridges to address minor component flaws. SECI Rebuttal at III-F-78, 98-99.⁶⁵ CSXT's over-reliance on the "Cooper E-80" standards results in a massive and unnecessary increase in bridge costs. In a similar vein, CSXT challenged SECI's bridge designs for spans over certain navigable waterways and questioned related horizontal

⁶⁴ SECI did correct the inadvertent omission of 31 bridges on various SFRR subdivisions and 104 overhead bridges. *Id.*

⁶⁵ For example, CSXT argues that the pier caps proposed by SECI for Type II and Type III bridges would not fit. CSXT Reply at F-73. Rather than simply re-sizing the caps, however, CSXT proposes a re-design of the entire bridge, which increases substructure costs by 250%. SECI Rebuttal at III-F-98.

and/or vertical clearances, but provided no explanations to justify its cost additives.⁶⁶

SECI responds in detail to these claims in its Rebuttal Evidence at III-F-87-95. And while CSXT argued that SECI relied on “outdated” AREMA standards in certain cases, it offered no evidence that the components used by SECI were inadequate, and ignored the fact that the newer publication simply referred back to the standards in the prior editions that SECI had used. *Id.* at III-F-84-85.

SECI’s bridge-related unit costs are derived from real-world bridge projects which were designed, bid out and supervised by the same engineers that are sponsoring SECI’s evidence. SECI Rebuttal at III-F-103. As shown in SECI’s Exhibits and workpapers, the costs are sourced and the underlying data are well-supported. Consistent with the *Coal Rate Guidelines*, since SECI has demonstrated the feasibility of its least cost options, SECI’s evidence should govern for SAC purposes.

In challenging SECI’s costs in order to advocate higher numbers, CSXT offers generalized claims of “cherry picking,” and that the projects referenced by SECI somehow are “not representative.” However, CSXT makes no showing that the reference projects omitted key components or that there are other, more “representative” actual projects that support its cost adjustments. Instead, it simply defaults to Means costs or arbitrary averages of SECI unit costs and some “budget number quotes” collected by

⁶⁶ CSXT also took issue with SECI’s combining span types on certain structures, even though CSXT itself employs multiple bridge types interchangeably in single structures. SECI Rebuttal at III-F-83. The one constant in CSXT’s proposed adjustments was a shift to higher cost components in each instance. *Id.*

CSXT. This sort of approach has been rejected by the Board in the past,⁶⁷ and should be again here. SECI's costs have been established as feasible on the record, and therefore can be relied upon in the SAC calculation.

3. Earthwork

SECI's Rebuttal Evidence (at III-F-20 through III-F-65) addresses in detail the parties' respective positions as to issues related to roadbed preparation, and explains why the preponderance of alternative methods and higher costs advocated by CSXT are without merit and should be rejected. On the specific matter of unit costs for common earthwork, clearing and grubbing, and certain other categories, a key dispute centers on SECI's use of an actual railroad construction project analogous to the conditions impacting construction of the SFRR as a source of unit costs, in lieu of higher "book" estimates offered by CSXT. As with the issues related to bridges, SECI put forward a feasible, least cost approach, which represents the better evidence of record.

The Trestle Hollow Project, a rail project in Tennessee undertaken and overseen by SECI's expert engineering witness, involved construction of a complicated new alignment for the South Central Tennessee Railroad in the vicinity of the planned SFRR right-of-way. The new alignment was to improve vertical grade and reduce curvature. The terrain was hilly, with several ridges and valleys impacting construction in a major way. Additionally, and significantly, because much of the land needed for the new right-of-way had not been accessed in decades, construction effectively took place in

⁶⁷ *WFA/Basin* at 106; *Duke/CSXT*, 7 S.T.B. at 489.

virgin territory, with requisite measures to address embankments, slope degradation, and excavation spoils disposal. SECI Rebuttal at III-F-21-22. In short, the Trestle Hollow Project bore all of the more important earmarks of basic new railroad construction, and represents a sound, comparative model for reliable unit costs for the SFRR.

Like the Walker-to-Shawnee, Wyoming project relied upon with approval in *WFA/Basin*,⁶⁸ the Trestle Hollow Project's unit costs for clearing, grubbing and common earthwork were substantially lower than those estimated in the Means Handbook. Naturally, CSXT advocates the higher costs derived from Means, and thus makes several forays in an attempt to discredit the Trestle Hollow Project as a valid model. None of CSXT's arguments rings true.

CSXT first asserts that the Trestle Hollow alignment is adjacent to only a portion of the SFRR route. This is true (given that the SFRR route is considerably longer), but irrelevant. SECI demonstrates that in terms of terrain, grades, excavation requirements, and construction challenges generally, the Trestle Hollow Project is *more* difficult than what the builders of the SFRR would encounter in most areas. SECI Rebuttal at III-F-23-25.

CSXT also attempts a bit of semantic sleight-of-hand, claiming that the grading line-item in the Trestle Hollow Project is not applicable to common earthwork because it was labeled "Mass Excavation." *Id.* at III-F-23. Here too, however, CSXT advances what fundamentally is an irrelevant point. As SECI showed, "Mass

⁶⁸ See *WFA/Basin* at 81-83.

Excavation” was a term used by a contractor in response to a Project bid request. The bid request used the term “Unclassified Excavation,” meaning all encountered material would be removed at the same rate of compensation. Common earthwork falls within that description. *Id.* at III-F-25.

Finally, CSXT’s criticisms based on right-of-way width and the geographic location of the Trestle Hollow re-alignment do nothing to diminish the Project’s value as a credible model for SFRR unit costs. The wider right-of-way involved in the Project was necessitated by steep hills, which mandated taller fills and deeper cuts. They made the Project more challenging, not easier or more efficient than construction of the SFRR. In addition, CSXT offers no evidence or explanation to support its inference that any regional geography differences present here materially alter basic roadbed preparation work. *Id.* at III-F-26.⁶⁹

D. SECI Correctly Executed the Board’s DCF Model and Demonstrated That the Challenged Rates are Unreasonable

In Parts III-G and III-H of its Rebuttal Evidence, SECI addresses in detail the proper execution of the Board’s DCF Model as applicable to this case, and the resultant calculation of maximum reasonable rates. Therein, SECI also demonstrates that with only a few exceptions -- including the inclusion of updated information which was

⁶⁹ CSXT actually endorses application of the Trestle Hollow Project as a model for SFRR roadbed preparation when it comes to equipment selection, an area where the Project data favors CSXT. SECI Rebuttal at III-F-27.

not available when SECI filed its Opening Evidence⁷⁰ -- CSXT's criticisms of and adjustments to SECI's Opening calculations are without merit and should be rejected. SECI will not repeat that complete rebuttal in this Brief. Rather, SECI takes this opportunity to succinctly summarize the correct resolution of certain key issues.

1. Cost of Capital

Consistent with Board precedents establishing that a SARR stands as a replacement for the defendant,⁷¹ SECI employed the same approach to financing locomotive purchases by the SFRR that CSXT itself followed in 2007 and 2008. Relying on specific evidence of the debt issuances used by CSXT to acquire some \$340 million of locomotives in 2007 and another \$351 million in 2008, SECI applied the CSXT debt rates to the SFRR's approximately \$320 million purchase for service starting in 2009. *See* SECI Rebuttal at III-G-2-4. CSXT argues for an artificially higher debt rate, solely on the basis of the Board's ruling in *PSCo/Xcel*, which CSXT claims precludes any financing vehicle other than general funds financing based on the industry cost of capital. CSXT Reply at III-G-2-3. As SECI shows, however, the complainant in *PSCo/Xcel* presented no evidence confirming that the defendant had ever used the financing method in question, and only raised the issue after the defendant pointed out that the complainant had not included *any* financing costs in its opening evidence. The *PSCo/Xcel* decision properly should be limited to the circumstances of that case; it is not a valid rule of

⁷⁰ *See, e.g.*, SECI Rebuttal at III-G-1, III-H-11.

⁷¹ *Major Issues*, at 37; *West Texas Utilities*, 1 S.T.B. at 670; *McCarty Farms II*, 2 S.T.B. at 472.

general applicability that overrides a SAC proponent's right to take advantage of the same demonstrable economics that are available to the incumbent.

Likewise, the Board's acceptance of an equity flotation cost component under the unique (on this issue) circumstances of the *AEP Texas* case properly cannot be read as a rule of general application, overturning consistent and established precedent⁷² without comment or discussion. As SECI explains (SECI Rebuttal at III-G-4-5), in *AEP Texas* the *complainant* included flotation costs in its financing plan because it proposed to refinance 100% of its construction capital. The flotation cost was tied to the refinancing. However, when the Board rejected the refinancing, for some reason it did not remove the flotation adder as precedent required. Absent a showing that the defendant in recent years actually incurred such costs or that a SARR would incur them at levels beyond those already included in the industry cost of capital,⁷³ there is no basis for including them in the SAC calculation. CSXT has made no such showing in this case.

2. Indexing Land Values

Traditionally, the Board has expressed a preference for forecasts produced by impartial third parties in the ordinary course of business as the basis for projecting changes in SARR land values. Due to a lack of availability of such a forecast in this case, SECI used historical changes in urban and rural land values as calculated by impartial third parties, consistent with the Board's preference where no acceptable forecast is

⁷² See *PSCo/Xcel*, 7 S.T.B. at 659; *Duke/CSXT*, 7 S.T.B. at 433; *TMPA*, 6 S.T.B. at 751; *Wisconsin P&L*, 5 S.T.B. at 1040.

⁷³ *AEP Texas* at 106.

available.⁷⁴ SECI Rebuttal at III-G-8. In contrast, CSXT offers a made-for-litigation forecast prepared by its retained consultant, and purports to criticize SECI's approach in several respects. *Id.* SECI's projected land values represent the better evidence of record.

CSXT criticizes SECI for using a relatively short historic timeframe to develop its forecast,⁷⁵ but that is exactly what Board precedent requires. In eschewing long-term averages,⁷⁶ the Board has adopted averages of between five and twenty years.⁷⁷ SECI's eight-year average is squarely within that range, and it covers the time period which encompasses the actual construction of the SFRR. SECI also updated its forecast analysis to include 2009 values for all three of its unbiased source studies, once the data became available,⁷⁸ and it followed Board precedent⁷⁹ and logic in weighting land values based on relative acreage by land type, rather than values. SECI Rebuttal at III-G-10-11.

CSXT attempts to counter SECI's unbiased evidence with a made-for-litigation study that makes frequent references to various macro-economic statistics, but establishes no link between these statistics and land values along the SFRR route. SECI Rebuttal at III-G-11-12. CSXT then bases its proposed inflation factor on a conclusory

⁷⁴ See *McCarty Farms II*, 2 S.T.B. at 474.

⁷⁵ SECI Rebuttal at III-G-9.

⁷⁶ See *McCarty Farms II*, 2 S.T.B. at 523-524.

⁷⁷ *APS*, 3 S.T.B. at 81; *McCarty Farms II*, 2 S.T.B. at 523.

⁷⁸ SECI Rebuttal at III-G-10.

⁷⁹ *AEP Texas* at 109.

opinion as to what a “prudent investor” would expect. The Board has rejected such cursory, litigation-based exercises before,⁸⁰ and should do so here.

3. The Capital Cost Recovery Period

Despite the Board’s clear determination in *Major Issues* that all future DCF calculations under CMP would be based on a 10-year period, CSXT insists that a 20-year period still should be used for capital carrying charges and accelerated depreciation,⁸¹ asset price inflation,⁸² and tax liability computations.⁸³ CSXT also collaterally attacks the longstanding rule⁸⁴ that in calculating terminal value, tax benefits that are not consumed during the DCF period are not to be discounted. *See* SECI Rebuttal at III-G-13, 17. CSXT’s departures from the Board’s established rules, which serve only to artificially inflate SAC, should be rejected.

CSXT offers a truncated (and distorted) reference to a portion of the *Major Issues* decision as the sole support for the “guidance” it claims to have discovered that capital carrying charges somehow were exempted from the new 10-year DCF. SECI Rebuttal at III-G-15. However, as SECI shows,⁸⁵ the actual subject of the cited excerpt was debt amortization, not capital carrying charges (*id.*), and the immediately preceding

⁸⁰ *See PSCo/Xcel*, 7 S.T.B. at 639; *Otter Tail* at B-4; *TMPA*, 6 S.T.B. at 603.

⁸¹ SECI Rebuttal at III-G-12-13; III-H-7.

⁸² *Id.* at III-H-6.

⁸³ *Id.* at III-H-7.

⁸⁴ *See APS*, 3 S.T.B. at 82.

⁸⁵ SECI Rebuttal at III-G-14-16.

portion of the decision makes clear that except for debt amortization (which always has been calculated over the life of the asset(s) in question), the 10-year DCF rule applies to all elements of the calculation:

We believe that a 10-year SAC analysis period strikes the most reasonable balance. It covers an average business cycle but removes unreliable distant forecasts from our core analysis. This is not to suggest that the revenue requirements of a SARR over the 10-year period would need to recover the full capital investment, often billions of dollars, within that 10-year window. *Just as has been done in a 20-year analysis, we would continue to calculate a "terminal value" at the end of the shorter SAC analysis period.*⁸⁶

The terminal value calculation is one of the key components of the DCF analysis, as it is what allows for the continuous recovery of rail investment. If the Board had intended to maintain a 20-year analysis, it would not have instructed parties to develop a terminal value after 10 years.

CSXT's collateral attack on the Board's rule for the handling of unconsumed tax benefits in the terminal value calculation likewise is without merit. For over ten years, the Board has aggregated remaining unamortized interest and depreciation as partially offsetting SARR terminal value as of the end of the DCF period. The same argument made by CSXT here -- that those benefits should be discounted first -- was considered and rejected, for sound reasons, in *APS*:

⁸⁶ *Major Issues* at 64 (emphasis supplied).

Santa Fe asserts that we erred by failing to calculate the present value of the unused tax benefits from depreciation that would be available in the post-analysis period. We disagree. If we were to separately discount the stream of annual depreciation allowances in the post-analysis period, which could be used to offset earnings generated after 2013, we would also have to separately project and discount earnings (and annual taxes due on those earnings) that the AGRR would realize in the post-analysis period. However, developing present values for various projected revenue requirements in the post-analysis period would convert our analysis to a perpetual model, which, as we have explained, would be inappropriate.⁸⁷

As explained in *APS*, discounting unconsumed tax benefits as CSXT now advocates would entail the speculative development of future earnings estimates and taxes on those earnings. The Board rightfully rejected that concept previously, and should do so here.

4. Maximum Rate Calculations

In Part III-H of its Rebuttal, SECI responds to claims made by CSXT with respect to certain elements of SECI's Opening DCF calculation beyond the arguments addressed in Part II-G. On Rebuttal, SECI made selective adjustments to its DCF model in light of certain points raised by CSXT. For the most part, however, SECI's Rebuttal shows why CSXT's various, proposed adjustments to the DCF calculations should not be adopted. *See* SECI Rebuttal at III-H-2-7.

⁸⁷ *APS*, 3 S.T.B. at 82. In *APS*, the terminal value was calculated after 20 years. Under *Major Issues*, the relevant period is now 10 years.

One issue of consequence that has emerged with regard to maximum SAC rate calculations under the Maximum Markup Methodology (“MMM”)⁸⁸ concerns the index that should be used to adjust 2008 variable costs for MMM purposes. In *WFA/Basin II*, the Board used the RCAFA to adjust variable costs. Subsequently, however, the Board adopted a general prescription rule based on r/vc ratios, and directed use of the standard URCS indexing approach. *See OG&E* at 11. SECI follows that directive here, and employs a forecasted CSXT-specific URCS index. Given that the goal is an accurate estimate of the *defendant’s* future variable costs, a carrier-specific URCS provides a more accurate result than the industry-wide RCAFA. *See SECI Rebuttal* at III-H-9-10. This approach also avoids the obviously illogical use of two (2) different indices to accomplish the same purpose.

SECI’s Rebuttal SAC analysis demonstrates that in each year of the 10-year DCF period, SFRR revenues exceed the annual stand-alone revenue requirements. *Id.* at III-H-12, Table III-H-1. Application of MMM to this imbalance (excess) produces maximum r/vc ratios of between 135.4% and 158.2% over the DCF period. *Id.* at III-H-12, Table III-H-2. Because these ratios all are lower than 180%, maximum lawful rates for coal and petcoke shipments to SGS must be set at the jurisdictional threshold. *See* 49 U.S.C. § 10707 (d). Tables III-H-4 and III-H-5 show the maximum rates per ton

⁸⁸ CSXT also raised an issue with respect to SFRR tons, revenues and variable costs. *See Rebuttal III-H-11*. As discussed *supra*, most of the adjustments proposed by CSXT in those areas are unsupported by the evidence and/or inconsistent with precedent.

applicable to each origin named in the challenged tariff, separately for shipments in SECI-supplied railcars and CSXT-supplied railcars.⁸⁹

CONCLUSION

Upon consideration of the foregoing, and the entire record in this proceeding, the Board should issue a decision finding that CSXT possesses market dominance over the transportation to which the challenged rates apply, and that those rates exceed a maximum reasonable level and therefore are unlawful. The Board should order CSXT to establish and maintain rates for coal transportation service to SGS at levels no higher than those shown by SECI's Rebuttal Evidence -- calculated separately for movements in SECI-supplied and CSXT-supplied railcars -- for each of the years 2009 through 2018, and to pay SECI reparations equal to the difference between freight charges calculated in accordance with such rates and freight charges actually paid by SECI on all shipments under Tariff CSXT 32531 from January 1, 2009 through the date of CSXT's compliance with the Board's order, together with compensatory interest.⁹⁰

⁸⁹ SECI Rebuttal at III-H-15-16.

⁹⁰ See SECI Opening at I-38-41.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June, 2010, I caused copies of SECI's Brief of Complainant to be served by hand-delivery on counsel for Defendant CSX Transportation, Inc., as follows:

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