UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

+ + + + +

ORAL ARGUMENT

b------------------»
IN THE MATTER OF: :
SEMINOLE ELECTRIC :
COOPERATIVE :
COMPLAINANT :

-- V. -- :
CSX TRANSPORTATION :
DEFENDANT. :
b------------------¼

Wednesday,
June 30, 2010

Surface Transportation Board
Hearing Room
395 E Street, S.W.
Washington, D.C.

The above-entitled matter came on
to hearing, pursuant to notice, at 9:30 a.m.

BEFORE:
DANIEL R. ELLIOTT III Chairman
FRANCIS P. MULVEY Vice Chairman
CHARLES D. NOTTINGHAM Commissioner

Neal R. Gross & Co., Inc.
202-234-4433
APPEARANCES:

On Behalf of Seminole Electric Cooperative, Complainant:

KELVIN J. DOWD, ESQ.
Of: Slover & Loftus, LLP
1224 17th Street, N.W.
Washington, D.C. 20036
(202) 347-7170

On Behalf of CSX Transportation, Inc., Defendant:

C. PAUL MOATES, ESQ.
Of: Sidley Austin, LLP
1501 K Street, NW
Washington, D.C. 20005
(202) 736-8175
## TABLE OF CONTENTS

**INTRODUCTION:**

Chairman Daniel Elliott .......................... 4

**ARGUMENT OF COUNSEL:**

On Behalf of Seminole Electric Cooperative,

  Kelvin J. Dowd, Esq. .......................... 6

  Rebuttal ....................................... 59

On Behalf of CSX Transportation, Inc.,

  G. Paul Moates, Esq. .......................... 30
Good morning and welcome here today. Today we will hear oral arguments in the case of Seminole Electric Cooperative versus CSX Transportation, NOR 42110. In an effort to move things along, the Board Members will not be making opening remarks this morning. But I wanted to cover a few procedural matters before we begin.

I've asked each party to make a short statement of their arguments. But Counsel should be prepared to answer questions from the Board at any time during your allotted time. I assure you that we have read all of your pleadings and there is no reason to repeat every argument. We have the following time allotments for Counsel. Complainant Seminole Electric Cooperative has been allotted a total of 20 minutes. Seminole has asked to use 14 minutes for opening and
has asked to reserve six minutes for rebuttal.

If you wish to make a change to your reserved rebuttal time, please advise us when you begin your presentation. Counsel for Defendant CSX will be allotted 20 minutes. Both parties have sought leave to make a Power Point presentation, using materials previously placed in the record and have filed these materials in hard copy with opposing Counsel and the Board. We have received no objection to the materials proffered. We will have the pages used today as Power Point slides bound in the transcript of this proceeding.

Speakers, please note that the timing lights are in front of me. You will see a yellow light when you have one minute remaining and a red light when your time has expired. The yellow one-minute light will be accompanied by a single chime and the red light, signifying that your time has expired, will be accompanied by two chimes. Please keep to the time you have been allotted. When
you see the red light and hear the double chime, please finish your thought and take a seat.

In addition, just a reminder to everyone, please turn off your cell phones.

We will now proceed. Counsel for Seminole, please step up to the podium, introduce yourself, indicate if you wish to change your time for rebuttal, and then begin.

MR. DOWD: Thank you, Mr. Chairman. Kelvin Dowd of Slover & Loftus.

It's my privilege to appear on behalf of Seminole Electric and its members and consumers. And I do not wish to change the allotment for my rebuttal. With me at Counsel's table is Robert Strickland, the President of the Board of Trustees of Seminole Electric.

I'd like to begin by addressing briefly the legal standard that should govern the Board's determination of market dominance in the evaluation of CSX's claim of inter-
modal competition. According to CSX, the Board need only decide whether some configuration of water transportation could work. There's no authority cited for this proposition and this is not the applicable test. And, indeed, it would stretch the inquiry to an unrealistic degree. The correct test is whether there are any alternatives sufficiently competitive to bring market discipline to a railroad's pricing. Now the D.C. Circuit has added to that, that even if an alternative is physically available, inquiry must extend to whether it actually imposes a meaningful constraint on pricing. We submit that where an alternative doesn't actually exist, the inquiry should be even sharper and even more skeptical.

Now CSX does not claim that an effective alternative actually exists today. CSX's argument is that, if Seminole would invest substantially more than $300 million in equipment and infrastructure, it could create
an alternative. Now the alternative that they propose to create from the principal coal origins for the Seminole Generating Station is an eight-step water delivery system. Now, on brief, CSX has expressed some mystification as to the eight steps. So we have them up on the screen.

Step one involves a move from the mine to the river by rail or truck. Step two is a transload to barges. Where would the barges come from? According to CSX, we'd buy them. Step three is a barge movement down the river to New Orleans. Step four, another transload to ocean vessel. Where would the vessels come from? We would buy them. Step five, a vessel move around the Florida peninsula to Jacksonville. Step six, a midstream transfer from ocean barges to river barges at Jacksonville.

CHAIRMAN ELLIOTT: Can I ask you about that midstream transfer? Are you aware of any other instances where that type of
transfer is used?

MR. DOWD: There are midstream transfers that take place in the Gulf of Mexico and in the Mississippi River. There are no open ocean midstream transfers. And that's what CSX is proposing here.

CHAIRMAN ELLIOTT: Thank you.

MR. DOWD: Exactly where that would take place, we don't know. Because there is no place in the Jacksonville port area where a midstream transfer of this type could occur. Step seven is a barge up the St. Johns river to the Seminole Generating Station. Where would the barges come from? Again, we would have to buy them. And the, finally, step eight would be an unloading and conveyance system to SGS. Again, the dock, which does not exist, would have to be built.

CSX's own numbers show that the capital costs for this scheme would significantly exceed $300 million. And we show that even that is understated.
Now, the Board has considered claims that shippers can build their way to competition before. In the West Texas Utilities case and the TMPA case, the Board rejected those claims as not feasible due to cost. The cost of the CSX scheme in this case is over four times higher than earlier cases on a capital costs per annual ton basis. Really, that could be the end of the inquiry.

Now, in our evidence, we've demonstrated that the CSX plan is not operationally feasible. It's not economically feasible. And there's no evidence that the alleged threat has constrained CSX's pricing at all.

CHAIRMAN ELLIOTT: Mr. Dowd, in this situation, who do you consider to have the burden of proof to establish whether market dominance is here?

MR. DOWD: Well, as the Complainant in the case, Seminole has the burden on all key issues, including
jurisdiction. In our opening evidence, we presented evidence that there was no effective intermodal alternative. In reply, CSX presented considerable testimony and material challenging that. And, on rebuttal, we have responded in kind.

CHAIRMAN ELLIOTT: In reading your opening, the evidence that I saw in there that made this for your argument regarding marked dominance, to me, it seemed like the two arguments that you made are one, that the river is not navigable; and two, that the study that you mentioned -- the 2003 study -- is evidence that the barge option is not feasible. Was there any other evidence in your opening statement or opening submission that would have established that there was a market dominance?

MR. DOWD: Well, you know, I believe our position on opening was not that the St. Johns River is not navigable, but that it is not a navigable waterway that presents
an effective competitive option for SGS.

CHAIRMAN ELLIOTT: And do you believe that still to be the case?

MR. DOWD: That's still the case because the facilities -- the infrastructure that would be necessary, even assuming that the draft of the St. Johns is sufficient to handle coal barges, the infrastructure that would be necessary at the power plant is infeasible as a matter of construction. And there is no place in the Jacksonville area where coal can be transferred from ocean vessels to river barges.

VICE CHAIRMAN MULVEY: You, in the past, have used barge transportation to bring coal to the plants. Correct? Before the CSX movements began?

MR. DOWD: Not entirely, sir.

VICE CHAIRMAN MULVEY: That was partly --

MR. DOWD: For a number of years,
portion of the routing to Florida. It has never delivered coal by water to the plant. It's never been able to deliver coal by water to the plant. Throughout the entire time period, 100 percent of the coal has been delivered to the plant by rail, by CSX.

VICE CHAIRMAN MULVEY: Normally, barges or water transportation is considerably cheaper on a ton mile basis, than railroad transportation or especially truck or other kind of transportation. Are there any potential barge movements that could be used to move down the Mississippi River, as well as along intercostal waterways, that would not require as much transloading as you project? In other words, can you use ocean going barges that might be used on the Mississippi, as well? Or does that technology not quite exist? Do you know?

MR. DOWD: To our knowledge, ocean vessels which draft at 35 feet, can't be operated on the Mississippi River.
VICE CHAIRMAN MULVEY: Right.

Okay.

MR. DOWD: And, from the Illinois Basin, which is the principal source of coal for SGS, access to the ocean -- to the Atlantic ocean -- would involve a rail movement on CSX.

VICE CHAIRMAN MULVEY: The last question I have -- on that map you showed the barge moving through the Gulf of Mexico. And there's been some problems down there now with the oil spill. Do you think that could have any long term effects on the ability to move coal traffic on the Gulf? Or is that a temporary thing? I mean, I know you might not be able to answer that.

MR. DOWD: I'm not an expert on the oil slick in the Gulf of Mexico. But I think that that is an appropriate touch point for the assumptions that CSX makes regarding their system. One of the assumptions they make is that there will never be a delay.
There will never be a storm; never be a wave event; never be a dock closed; never be a ship that's late and has to then sit at anchor and bring a new crew in. All of the many things which are a routine matter of maritime life. Most of those were assumed away in the scheme that CSX describes. Something like the spill in the Gulf, to the extent that it interfered with shipping, would be yet another example of the kinds of events that would add to the costs.

VICE CHAIRMAN MULVEY: Thank you.

MR. DOWD: Now, the two principal obstacles, historically, to moving coal by water to SGS are the unavailability of any transfer facilities at Jacksonville and the unavailability of a coal unloading dock at the power plant, itself. Now CSX has proposed a system whereby ocean vessels would approach the Port of Jacksonville and would transfer coal in what they consider to be -- what they call midstream, but it would be done about a
mile and a half northeast of the entrance to Jacksport Harbor. That's in the ocean. And you cannot physically transload coal from an ocean vessel to a river barge in the middle of the ocean. River barges are not certified for ocean operation. They could be swamped, even in normal seas. And the cranes that CSX proposes to use are not certified for ocean operation, nor are they usually mounted on barges. They also propose to fleet or store the barges approximately 20 miles away from where the transfer from the ocean vessel would take place. Again, a highly inefficient operation. And you take these facts together and it shows that the scheme they envision simply won't work. And it's significant that no such operation has ever been conducted at Jacksonville.

Now, on brief, CSX suggests that the transfer could be moved into protected waters -- into the intercoastal waterway. But that won't work either. The intercoastal
waterway can't handle ocean vessels. The intercoastal is dredged to a depth of 12 feet. Ocean vessels draft 30-35 feet. So whether it's a question of the river barges trying to get out to the ocean to meet the ocean vessel or the ocean vessel trying to get into the intercostal to meet the barges, the system won't work either way.

CHAIRMAN ELLIOTT: I want to ask you a quick question. Back in 2003, you did this -- I believe your client did this BTG study. And wouldn't you consider that to be, since it wasn't made in anticipation of litigation or during litigation, to be the best evidence of what we have here to show whether the barge is operational -- the barge system would actually work?

MR. DOWD: No, I would not. Because the BTG draft clearly states, first of all, that it offers no opinion on the feasibility of a barge operation. And secondly, at several key points in the draft,
the authors point out that infrastructure that
would be necessary to implement a particular
step doesn't exist. And the unavailability of
transfer points in Jacksonville was one of the
points that's specifically mentioned. Now, I
think it's important to put this draft in
context. CSX attempts to suggest that a
statement by the consultant in 2003 is the
equivalent of a conclusion drawn by Seminole
Electric. It is the case that, for a number
of years, Seminole had experience moving coal
part of the way by barge. They have
considerable experience and understanding as
to what works and what doesn't work when it
comes to water transportation. And, when they
received the draft that proposed a transfer
from ocean vessels to barges in the Port of
Jacksonville, when there were no facilities
for that, and an unloading operation at SGS,
using a dock that can't be built, they
concluded to put the draft to one side. And
no further steps were taken to pursue it.
COMMISSIONER NOTTINGHAM: Mr. Dowd, if I could, I'd like to explore with you a little bit and ask you to help us think through what I see as one of the key issues here, which is really what are the boundaries and/or expectations when we think about self-help in the case of a shipper. Looking at the record here, you may well have a strong case. I'm not going to speak to the merits here at this moment. But certainly, it's clear to me that your client's not what I would call the poster child of captivity. You are right on a navigable waterway. You are located on a navigable waterway for the very reason of having the barge option. That's clearly spelled out in the environmental permitting documentation when the facility was opened. Your client deserves credit for that. That's a smart strategic business decision. Your client relied, in large part, on maritime transportation of commodities for a long time in the past. And you're only three and a half
miles from a competing railroad, Norfolk Southern that has trackage rights into the Georgia Pacific Plant. At what point do -- help us think through why we shouldn't ask your client to implement self-help steps to seek competitive options. There are many shippers around the country who would love to be located on a navigable waterway and also three and half miles from a competing railroad. We get those cases all the time. And we usually don't have to spend too much time on the issues that are presented here. But it's difficult, I submit. It's not an easy judgment call to know whether a three and a half mile build-out is reasonable or whether building a wharf or a pier and the other infrastructure for barging is reasonably. But help us think through why -- how we should approach some of the issues I've just discussed.

MR. DOWD: Well, Commissioner Nottingham, first of all, I don't believe
there is a poster child for captivity. I think every situation has to be judged on its own facts and on its own merits. If a hypothetical utility had a railroad three miles away across open desert, they would be in a considerably different position than a utility that had a railroad three miles away across the Everglades.

The facts of this case are that SGS, when it was permitted, the important consideration was water supply, not water transportation. And its original site certification permit is for rail delivery, not for water delivery. The fact that the power plant is three nautical miles from the river moves into the question of how accessible would river transport be to that facility. And we've shown that it is not accessible, because there is no feasible way to get the coal from the ocean to the river barge. And there is no feasible way to get the coal from the river barge to the power plant because
there is no property available for the
construction of the kind of large industrial
dock facility that you would need in order to
unload this coal. And we have photographs of
that, which I think have been submitted to the
Board. And they're on pages 17 and 19 of our
Exhibit 2B1.

So I think the answer to your
question is that there's no bright line rule.
The statute speaks of effective competition.
The cases have interpreted that as a
reasonable, feasible alternative that has a
meaningful constraining influence on the
railroad's pricing. In this particular case,
when the parties were unable to agree to a new
contract, the prices were raised by multiples
of the former levels and not a single ton of
coal was lost by CSX. The financial analysts,
in public statements, applaud this litigation
as a sign that CSX is aggressively maximizing
its market power and aggressively pricing its
service. So I think the answer to your
question is that, as the Board has done in the past, you have to look to the specific facts of each case. And the facts of this case, of Seminole Generating Station, is captive to CSX.

COMMISSIONER NOTTINGHAM: So, if I can just properly understand what you're saying, are you submitting that the Board should expect some self-help, but the self-help in this case would be unreasonable -- unreasonably too expensive and impractical? In other words, if we change the facts here and said your client was located next to a major interstate highway but, for some strange reasons, the connecting road system just didn't quite reach the driveway of your facility and it was -- there was a 100 yard gap of some unpaved dirt that needed to be improved in order to give you access to the interstate highway, you wouldn't be here saying that the truck option is not even possible to look at, putting aside the cost of
trucking. But, in other words, at what point
do we go from the completely easy sort of
proverbial open court lay-up of self-help,
versus the crossing of the proverbial Andes
Mountains with the highway?

MR. DOWD: Well, I think that
there are plenty of examples in the real world
of shippers -- utility companies that have
constructed facilities in order to access
alternative rail service. Certainly, those
can be looked to as a template of the kind of
cost benefit analysis that a utility does when
trying to determine how to best invest their
capital. In the case of Seminole Electric,
they went to considerable trouble and expense
many years ago to use a barge transit system
for a portion of the haul, but were never able
to avoid the rail service for the delivery.
That is, I think, highly significant, even in
the face of the repeated references to that
prior barge delivery system. So --

COMMISSIONER NOTTINGHAM: I'm
Mr. Chairman, can I just ask one quick question to close that line?

CHAIRMAN ELLIOTT: Sure.

COMMISSIONER NOTTINGHAM: Thanks.

On the issue or question of the three and a half mile distance between your client's facility and the Norfolk Southern served Georgia Pacific plant, I understand your client actually studied that possibility and the costs were far less than this $300 million that you've referenced for the barge option. Could you elaborate on that or -- without getting into anything that's confidential? And also, put it in context of how much your client is spending per year on coal purchases and transportation, so we have some sense of the relative reasonableness of spending $60-70-80 million versus $300 million, for example?

MR. DOWD: Well, the idea of a build to Norfolk Southern, I would submit, is not really an issue in this case. Because it
was described as infeasible on opening. It was not challenged by CSX on reply. And therefore, the matter should be considered closed. Without getting into confidential information, I can tell you that there was a disqualifying obstacle to that plan in the form of the unavailability of the use of property owned by a third party. And then there was a further obstacle in the need to cross major highways and cross CSX, itself, with a rail line. I can't go into more detail without getting into highly confidential information and we're all trying to avoid that here today.

VICE CHAIRMAN MULVEY: Well, did you have any negotiations at all with Norfolk Southern as to their willingness to enter into a contract if indeed you decided to pursue that option? Because, quite frankly, very often what utilities have done or other firms that were captive have done is they have threatened to build out or build in, in order
to provide competition. And that very threat
has caused the railroad to re-enter into
negotiations and perhaps come up with a more
favorable rate to the shipper. So was there
any attempt at all at talking to Norfolk
Southern? Or was that never advanced?

MR. DOWD: I think that the more
recent experience has been that the threat of
construction has done nothing to assist a
utility in negotiating. It has to be the
actual act has to go forward. You have to put
the stake in the ground, if you will.

VICE CHAIRMAN MULVEY: Well, you
need to begin doing surveying and that sort of
thing or begin to negotiate for the
acquisition of property. Wouldn't you have
the eminent domain rights? If you're going to
begin building to the Norfolk Southern? You
would have eminent domain rights as the
railroads have, to acquire private property or
to cross highways or to cross land owned by
other railroads. I mean, those tend not to be
insurmountable barriers.

MR. DOWD: Well, Seminole Electric is not a railroad. It's a utility.

VICE CHAIRMAN MULVEY: No. But the railroad you're preparing to build to the Norfolk Southern would have eminent domain.

MR. DOWD: However, there's no -- there is no real record of existing railroads doing that. The record has been to the contrary; that the railroads are unwilling to undertake construction to encroach on another railroad's market share. If the shipper's willing to build out, then they're willing to serve. But it doesn't go the other way around.

VICE CHAIRMAN MULVEY: Yes, the shipper builds out, the shipper creates a short-line railroad to connect itself to the Norfolk Southern. I understand that. The other thing I was going to note is that you mentioned about the difficulty of building through the Florida Everglades. Is this
project one that would have to go through the Florida Everglades? My understanding is the Florida Everglades are considerably south of where you're talking about.

MR. DOWD: They are. My reference to the Everglades was in response to Commissioner Nottingham's question about is there a standard for what you should be able to build. And I was just trying to point out that it depends on where your three miles go.

VICE CHAIRMAN MULVEY: Right.

MR. DOWD: If they go in the middle of the desert, it's one thing. If it's over protected wetlands, the Everglades or something else, it would be something entirely different.

VICE CHAIRMAN MULVEY: Right.

There are no mountain ranges in Florida either, but nonetheless, let's not talk about going through the Everglades. So that was my only question.

MR. DOWD: Okay. Thank you.
CHAIRMAN ELLIOTT: Thank you, very much, Mr. Dowd. You'll have six minutes on rebuttal. And Mr. Moates, please step up to the podium; introduce yourself, Counsel for CSX; and begin. You have 20 minutes, by the way.

MR. MOATES: Right. Thank you, Chairman Elliott. May it please the Board, I am Paul Moates and I am privileged to represent the Defendant, CSX Transportation, Inc., here today. With me at Counsel table, to my immediate left, is Mr. Seth Schwartz, who is President of Energy Ventures Analysis. He's the primary author of the expert report that we put in on reply. And, to his left, is Mr. Peter Shudtz, who is Vice President of Federal Regulation for CSX.

Mr. Chairman, I think we have -- I know we have a serious problem here today with this case. And I believe some of your questions of Mr. Dowd foreshadowed that. The problem is stated very simply. In their
complaint, Seminole said two lines -- two sentences about market dominance. They said there are no navigable waterways to the plant and the only way they could ship coal was by rail. We answered and denied that; said that was absolutely untrue. And we'll demonstrate that there are alternatives. Eleven months later, because that's how long it was from the filing of the complaint to their opening of it -- 11 months later, they come in at their opening and filed literally three and a half pages on barge alternatives. It was a little bit more than that. I don't remember, maybe 12-15 under what was called qualitative market dominance. But only three and a half pages dealing with why a barge alternative would not be viable. We came in, as you know in our reply, as we're entitled to do, in our one and only filing that we're permitted to make in a stand-alone cost case, on all issues, and put in what we respectfully submit is a very substantial probative study by Mr. Schwartz.
and his colleagues Mr. Stamberg, supported by
lots of other evidence, demonstrating that
yes, it is a much longer route and there are
transloads and certainly there are issues that
need to be dealt with. But this utility knows
how to deal with them. This utility, in the
history of its plant, has moved more coal to
that plant by water than it has by rail. This
utility spent $100 million to buy its own
private barge fleet when it built that plant.
And CSX, you know, in a very aggressive move,
essentially helped them buy out of that
contract when we first got this business by
rail, that helped then with such a good rate
package that they were able to get out from
their barge contract.

CHAIRMAN ELLIOTT: Mr. Moates, I
do have similar concerns about the initial
filing by Seminole, in that it was a little
bit of a skeleton product and I understand, I
think, that is a serious concern for the
Board. Because the process won't work if you
can't respond to the full argument. One question I do have, though, is just by looking at the increase in the rates that came about here, once they asked you to quote the rate, isn't that very strong evidence of market dominance in itself, even without all the evidence?

MR. MOATES: With respect, no. Why not? Because that contract I referred to that they entered into -- CSX entered into with Seminole to help Seminole buy out of its barge lien, was at a very low rate. And CSX did that consciously. It wanted the business. Over time -- over the period of that contract, that rate got lower and lower, compared to the other utilities in Florida, compared to what the market was doing. By the time their contract expired, they were way below the market in Florida. And CSX attempted to negotiate with them for a new contract, at a higher rate. I won't say it was as high as the rate that's, you know, being challenged.
here today. I don't think the Board will be
shocked to know that railroads typically will
make a better rate in a contract than they
will in a common carrier rate, because there
are other items in a contract, minimum
volumes, sometimes, you know, deals on
equipment, deals on scheduling, you know, lots
of other things, refunds. So no, I don't,
with all respect, think so. Our belief is
that we brought their rate up much closer to
the market for other Florida utilities, water
served and rail served. They're now higher
than they were. No doubt about that. But, in
our reply evidence, you'll see there's, you
know, a chart where we show they went from the
very lowest delivery cost for a utility in
Florida to about the, you know, the middle of
the range.

CHAIRMAN ELLIOTT: Doesn't the
delivery cost chart, though, really take into
consideration the cost of coal also, and, as
a result, isn't that not a really good
indicator of whether the rates are high or
low?

MR. MOATES: Well, your comment is
accurate. Yes, it does, obviously take into
account the cost of the coal. And they have
a good deal, apparently, with Alliance, you
know, for whatever period of time. And I
submit, not as long a period of time as they
had said on their evidence. If you'd look,
we've referred you twice in brief to the
actual contract, which is in the record. It
doesn't -- they're not bound to that, as long
as they say they are. But yes, they have had
a lower coal price. They've done a good job
of negotiating for those coal supplies. But,
at the end of the day, they are, you know, in
a market too. And they are delivering a
product -- electricity, you know, to rate
payers in central Florida, and they are, we
submit that chart does show that they're not
disadvantaged vis-a-vis other utilities.

VICE CHAIRMAN MULVEY: But you
would admit that the transportation costs, per
se, taking out the cost of the coal, the
transportation costs in the proposed contract
would be substantially higher than the
transportation costs paid by other Florida
utilities. Or are you saying that the
transportation costs that CSX is asking
Seminole to pay are similar to what other
Florida utilities are paying to transport
coal, taking out of the equation the mining
cost of the coal?

MR. MOATES: Mr. Dowd submitted an
exhibit he'll no doubt use here in his last
six minutes, the last of the charts he put in,
that shows mills per ton mile of certain
selected utilities. And it shows that
Seminole is way far on the right's paying more
on a mills per ton basis. Well, first of all,
you know, the Board doesn't determine rate
reasonableness on a mills per ton mile basis.
We all know that. But also, those -- I ask
you to look hard at that chart and look at
what those utilities actually are. They're all -- they have contracts. They all have different circumstances under which they negotiated those contracts. Again, the contracts for some of those utilities that are to the left of Seminole, if you can visualize that on the chart, have other kinds of provisions. They get other kinds of benefits and other kinds of concessions. And CSX gets some too, notably certainty of volume and length.

But, if I may, just come back before I lose it, Chairman Elliott, on the fundamental fairness point, and this really, I think is important. They put in, as I said, three and a half pages on opening on why a barge alternative wouldn't work. On rebuttal, they put in 133 pages. And, you know, we have literally no chance to respond to that, other than in brief and in my obviously inadequate efforts here today. I'm not an expert. I'm not testifying. I'm the lawyer arguing from
the record. Your rules -- and you know very
well what they say, you were very clear in
your market dominance procedural rules -- to
say that a complainant must -- or a party with
the burden of proof must put in all of its
evidence in its opening case on the issue as
to which it has the burden of proof. They
didn't do that. They didn't come close to
doing that. And I submit that if you allow
them to get away with that, that you're going
to give a signal to other complainants that is
not going to be a very helpful and fair one.
And again, as you know, railroad, in these
cases, has one filing and one filing only on
all issues.

COMMISSIONER NOTTINGHAM: Mr.
Moates, this, in some ways, touches on that
point, I believe. Do you believe the Board is
prohibited, either procedurally or legally, or
for any other reason, from examining the rail
option that the three and a half miles I
referenced earlier that would connect
Seminole's facility to the Georgia Pacific plant that's served by your competitor? Are we not able or are we not allowed to look at that because there's not enough in the record? And, if so, why isn't there enough in the record on that?

MR. MOATES: I think the Board is fully within its power to take official notice of things of which it has knowledge, you know, which there is public information. There is public information, as I recall, about their exploration of a possible build out to Norfolk Southern some years back. We did not make that our case in our market dominance submission. We candidly thought that the water alternative was very real, very viable, and we thought we could well support it. I guess maybe, in a sense, Commissioner Nottingham, you're asking me why didn't we make that argument. And, I guess, the answer is we had to pick and choose our battles. And we went with the water option.
COMMISSIONER NOTTINGHAM: I worry that --

MR. MOATES: In light of your question, maybe I should rethink that.

COMMISSIONER NOTTINGHAM: No. It's just that -- well, I just worry that the Board may be inappropriately handcuffed. It may well be in Seminole's interest not to explore the three and half mile build-out on the record. And it may well be in your client's -- CSX's interest not to demonstrate how simple a proposition that may or may not be, because your client's corporate policy may be very opposed to pointing out the ease of access to a competing rail service. So then we're left with a record that strategically is lacking on a very key -- in my view -- a very key area of exploration for the Board. We don't seem to know the details here. We have just clarified that it's not the Everglades. It appears to be pretty flat terrain. We know, on the record, that it's only three and
a half miles. We know, on the record, there's been some examination of the feasibility by Seminole of that build-out. The dollar amounts referenced in that examination are far less than the dollar amounts reference in the barge infrastructure build-out. And so, you know, the question is begging to be answered, in my view, from the Board's perspective, you know, how can we better understand that? Because, in my view, a three and a half mile build-out could -- I say could very easily fall within the realm of reasonableness for self-help that we would expect. At the same time, a three and half mile build-out could be the opposite of reasonable, depending on the terrain and the environmental permitting and the costs. But, without more on the record there, it is frustrating. And I guess I would have expected your team to have helped build that record out, perhaps more than I would have expected Seminole to. But, in any event --
MR. MOATES: I'm sorry about the disappointment. I'm sorry, as I'm standing here, that we didn't put in a lot more about that. I can tell you, as you know, that Norfolk Southern is a fabulous terrific railroad. It's a major competitor of CSX. And I don't think -- it's not our instinct, normally, to try to, if you will, develop new marketing opportunities for the competition. I think they're fully capable of doing that for themselves.

COMMISSIONER NOTTINGHAM: I didn't say that. I would add, I guess that, in my view, we shouldn't look in the record for glowing testimonials from Norfolk Southern in a case like this, about how eager they are to serve Seminole. That, to me, is irrelevant. If the line extends to Norfolk Southern's track, on CSX's track, on which Norfolk Southern, in this case, has trackage rights, it doesn't matter whether Norfolk Southern's enthusiastic about that or not. They have a
common carrier obligation in that scenario --

MR. MOATES: I understand.

COMMISSIONER NOTTINGHAM: -- to quote a rate. And so, I do -- that is one of the things in some of the relevant case law, including the TMPA case, where I do wonder why, in the past, this Board or our predecessor agency have put much stock in the demonstrated enthusiasm of the purported or proffered competing railroads to provide service. That, to me, is not relevant when there's a common carrier obligation there.

MR. MOATES: Well, I'll say what I think you know. You clearly have the power to direct these parties to submit additional evidence on that issue if you thought that was important. And, listening to you here today, I'm beginning to think it's pretty darn important. So that is within your discretion. And, by the way, you know, I'm not high tech. I don't have Power Point slides. I gave you
hard copy slides that I hope you have. But
the two things that are up here on the easels,
obviously, that's -- this is a blow-up of
something you have that's a satellite overhead
of the St. Johns, you know, down to their
plant, which is here. And the Everglades are
way over here somewhere on the floor. So,
Vice Chairman Mulvey, you're absolutely right
about that. And that is a fuel barge going
past the Seminole plant in the "non-navigable
waterway" which, you know, we thought a
picture speaks a 1000 words. There is, and
our evidence shows, there's all kinds of
commercial barge traffic on this river today.
Are there tows going to utilities? No.
They're the only utility up there on the
river. But we think we've demonstrated that
it is, in fact, very feasible.

CHAIRMAN ELLIOTT: Mr. Moates, let
me ask you a quick question, you know, just
about the general project itself. I mean,
we're talking a substantial amount of money
and probably a very complex process. How long
do you think or does your expert think that
this type of project would take. I mean, is
it going to be -- are we talking a year, ten
years? I mean, if it's ten years, obviously,
the market dominance argument starts to shrink
away.

MR. MOATES: It's not ten years
and you have a volume. Again, I'm not going
to quote from it here, of this BTG report from
2003.

CHAIRMAN ELLIOTT: Yes.

MR. MOATES: They, of course, are
very interested in not talking about it and
saying it's a draft and we never agreed to it
and so forth. And that's true. They didn't
go do this. But this is the same consulting
firm. They have come in on a rebuttal and put
in a very big report that basically undermines
most of all the important findings that they
made here. And this includes, if you have a
chance to look at it, and I strongly urge you
to look at it, and I think from the nods, some
of you obviously have, a lot of the issues
that they raised for the first time in
rebuttal, that we couldn't speak to, are
addressed here. One of their own people says
that the water outlet is exactly the place
where you'd put a dock. You know, that's at
page 004785 of the draft. What about the
issue of all this permitting? They've raised
a lot of that. Pages 4803-4812, this
consultant back then addressed that. They
didn't say it was infeasible. It would take
some time --

CHAIRMAN ELLIOTT: My question,
tonight, isn't as much towards feasibility
here as timing.

MR. MOATES: Cost and timing.

CHAIRMAN ELLIOTT: If it takes ten
years to build it, to get the permitting, and
then that would still have CSX with an ability
to be market dominant for that ten-year
period.
MR. MOATES: I wouldn't suggest it happen, you know, in six months.

CHAIRMAN ELLIOTT: Right.

MR. MOATES: But certainly it wouldn't be ten years. I'm not the expert. He is, here. But I'm guessing it would take maybe no more than I'm going to say a year and you're going to say a little over one year. Okay. Well, but you know, the reality is too, yes, it's $300 plus million to go out and buy all the pieces of that chain. And that is the way we costed it because they owned their barges before. And we assume that's what they'd want to do. But, obviously, you can lease these assets too. Right now, especially the water industry, would love to have that kind of business. There are lots of barges available. There are tow boats available. The transloading, again, I'm all over the place here, but I've got to be a little bit of a witness. This issue about transloading on the open ocean, that's called the Jacksonville
anchorage. The U.S. Coast Guard told us that's where they would recommend this kind of an operation take place. You know, it isn't in the Bermuda Triangle. It is off the mouth of the St. Johns River. It is out into the beginning of the ocean. But we think that's feasible. On those high wave days, there were 49 of those in 2009. How many days does that leave to be able to do the operation? And even probably a little bit more interestingly, again, if you look at this, I love this report, this BTG report, they say at page 004782, if you all have it there and would look at this with me, I really would like you to just take a look at this, if you can. It's page 1-2 of their numbering, 004782 of ours.

VICE CHAIRMAN MULVEY: Yes.

MR. MOATES: And look at the second paragraph from the bottom of the page. It's only three sentences and I'm not going to read it out loud. But that, I submit, is a complete answer to this nonsense about, you
know, there's nowhere to transload. There
certainly are. And there are lots of places
and there are people who like to do that
business, as well.

On the issue of the conveyor and
the right of way, again, on the little
exhibits that I hope you have, I'm not going
to put them up here, we give you some
successive shots from the video that we
submitted into evidence that marches you sort
of that right of way from the water intake on
the bank of the St. Johns, up to their coal
pile. And you can see, it's not real wide,
but it's -- we think it's wide enough or
nearly wide enough for a conveyor. Again,
their consultants addressed the relative ease
of broadening that easement or, if necessary,
purchasing that property. In their brief --
they describe at page 13 of their final brief
that that is the land that is "already fully
occupied." Look at those pictures. Does that
land look fully occupied? It isn't. I mean,
it is -- It's mowed beyond the pump house, up all the way to their plant. Can conveyors be used there? Again, look at the last photograph I've given you of their plant. You'll see conveyors in the plant today, moving coal from the pile to the reclaimer. They move limestone. There are -- there's common use of conveyors to move coal and transload operations much longer distances than we're proposing be done here.

VICE CHAIRMAN MULVEY: One of the things I'm interested in is this transloading in the ocean issue. I mean, Seminole made a case that it really can't be done. And you're saying now that the Coast Guard said that the Jacksonville Anchorage a mile outside of the mouth of the harbor, is okay to transload from ocean going vessels to river barges and that river barges then could safely navigate that part of the ocean into the channel and up the St. Johns River? This is becoming important now, obviously, because of what's happened in
MR. MOATES: Yes.

VICE CHAIRMAN MULVEY: I think that any new activities that are proposed that could, in fact, result in any more degradation of our coastal waterways is to be looked at with askance. So the question is, is the certainty that you have that, in fact, this operation can take place, this transloading can take place one mile outside of the mouth of the St. Johns River?

MR. MOATES: Yes. And I'll refer you to our reply evidence. They made this argument about you can't do it out there in their rebuttal, so we haven't been able to come back. But yes, we have work papers behind his report that shows that it was the U.S. Coast Guard that said it's the Jacksonville Anchorage area in primary caps, by the way, is part of the Gulf -- not the Gulf, the Atlantic intracoastal waterway, whereby the would recommend that kind of
transloading be done. If there is a high wave
day -- if there is a storm, of course, you
know, you would suspend your operations. You
would bring those barges back inside the mouth
of the river and do it, you know, the next
calm day. But again, I don't want to lose
this point. The page I just referred you to
in here, by their consultants, tells you that
there are multiple places that it can be done
within the river itself, before you get to the
City of Jacksonville. And, you know, Mr.
Dowd's quote, in the beginning, from his
briefs, and he said we have the wrong legal
standard and he has the right one. Well, yes.
He has the right one. I agree. West Texas
sets out the standard and that isn't a
standard. That little piece he quoted from
was our wrap-up in saying they've thrown all
this stuff at us in rebuttal about this isn't
feasible, that isn't feasible. And all we
said was the Board doesn't need to know
precisely how a dock would be designed or what
path a conveyor would take. You only need to
know that it would work. And that's what
we've attempted to show. If you need to buy
another 50 feet along the easement to expand
it to get the leg of the conveyor down, that
could be done.

VICE CHAIRMAN MULVEY: One follow-up question on that then. I mean, in this
country, and I guess with the technology, the
creative ability and the entrepreneurial
spirit, you could pretty much do anything. A
long time ago, a Nobel Prize winning economist
wrote an article about the implications for
the nation if we never build the railroads.
Were the railroads indispensable to U.S.
economic development? And he showed that you
could actually have built canals all over the
whole country and replaced the railroads.
Now, the question wasn't whether or not that
should have been done. The question was
whether it was feasible, whether it could have
been done, and what that would have meant to
long-term economic growth. There would have been a cost to the economy, but it was not that great of a cost. I think it was about three percentage points lower in GDP 100 years later. The point being is you can do pretty much anything if you want. So any time a utility says it's captive, a railroad could always point and say well, if you do this, regardless of what it is, it can be done. You can always have an alternative. Is there any cap? Is there any limit as to how much the utility would have to pay in order to take advantage of these alternatives? I mean, we have Seminole saying it's going to cost them $300 million. Well, if they could do that and spend that and they could have a water alternative, is that still a viable option? And how do we determine when spending is too much, in order to take advantage of the alternative?

MR. MOATES: I don't have an easy test for you. I can tell you, when they
analyzed it for business purposes and not litigation purposes, nobody said it would be too expensive. Would it be expensive? Yes. But don't forget, if they do it, they're out of their CSX contract. They're not paying that rail. You asked the question earlier, Vice Chairman, what do they spend in a year. I'm told last year it was about $230 million. But last year was a really bad year for them. They had a lot of outages at their plant. Their coal deliveries were down. Normally, a year, it's about $350 million. Annual revenues for this utility, about $1.4 billion. It's a big company. It can finance these things. Or, if it prefers to lease them on the open market, it's capable of doing that, as well.

My colleagues here remind me, on the issue of the high wave days or, you know, it's not the best day to load the barge in the Jacksonville Anchorage, so you suspend operations, the railroad has to do that. You
all know what happened after the hurricanes in
the Gulf and what happened to CSX and Norfolk
Southern, and you know the very significant
damage to the infrastructure and they have to
suspend operations. But they find a way to
get it done.

COMMISSIONER NOTTINGHAM: Mr.
Moates, if I could ask you, do you believe
that the record before us demonstrates a
history of the barge option in the past
creating market discipline and enabling a --
as you referred to earlier -- a very, very
competitive low rate at the very beginning of
CSX's modern day relationship with Seminole?
We're told we have in the record a very real
eexample of the barge alternative creating a
very meaningful example of market discipline?

MR. MOATES: Mr. Nottingham, I
think it's stark. It's real. We can't argue
about whether it happened. It happened. They
invested $100 million. They moved coal for
years and years on those barges to Port St.
Joseph, by the way, down there on the -- I'm not very good at geography -- the Gulf part of the panhandle, I guess, in Florida is where it is. And it was short haul railed from there. We didn't even get to haul from there, by the way. We got the haul from the short-line railroad that brought it to us at Chattahoochee, I think it was. I'm learning Florida geography. Chattahoochee, Florida. And yes, the railroad sure got the message. And the railroad was very aggressive. Maybe you could say in retrospect, too aggressive, in the way they priced that contract for that length of time. But I'm repeating myself. But it's a darn good point. By the time that contract expired, they were way below the market. And the barge option had done that. And, as we renegotiated with them, we were very aware of the fact that that option, you know, that they still could go pursue that.

COMMISSIONER NOTTINGHAM: So, if you just run the numbers briefly, in general
fashion, you reference about a $300 million dollar a year coal purchase budget roughly for Seminole. Your contract periods often run ten years. If that fairly common? I don't want to get into business secrets.

MR. MOATES: Full supply or transportation?

COMMISSIONER NOTTINGHAM: For transportation and/or either or.

MR. MOATES: Very few ten-year contracts any more. That was more of the norm maybe right after Staggers and into the early '90s. But five year contracts are fairly common for movements of this type. Again, that kind of a contract would certainly come with a volume commitment, quite possibly a liquidated damages provision for failure to meet the volume. It would come with provisions dealing with who provided the equipment. You know, there would be other items of economic importance in that kind of a contract.
COMMISSIONER NOTTINGHAM: So what type of percentage savings do you proffer that the Seminole might be able to achieve if they were to build out their barge option. Are we talking about ten percent a year? Twenty? Thirty?

MR. MOATES: I don't think I can answer that. I have something I think I have in mind. But I'm not sure -- I don't want to say because I'm not sure I'm right. And I'm not sure it's in the record. So it's a great question.

CHAIRMAN ELLIOTT: Thank you, Mr. Moates.

MR. MOATES: Thank you.

CHAIRMAN ELLIOTT: Mr. Dowd, you have six minutes on rebuttal.

MR. DOWD: Thank you, Mr. Chairman. I'll try to move through some of these points as succinctly as I can. First of all, on the question of the submission on opening and the submission on rebuttal, we
did, on opening, present evidence -- verified evidence in narrative, that the barge option or the barge hypothetical was not feasible, and that the notion of building to Norfolk Southern, while considered, was also not feasible. On reply, CSX chose not to challenge the issue of intramodal competition. I would submit that the Board's rules and policies are quite clear that that issue is closed. In your decisions, in Duke and in Carolina Power and Light, where you laid out your guidance on the proper scope of rebuttal, it was clearly stated that if a shipper presents credible evidence on opening and that evidence is not challenged by the railroad, the shipper's evidence will be accepted. This is not a case of judicial notice. Something like a build-out to another railroad would be very fact specific. It would be an issue in contention. And it's not one that's suitable for decision, based on principles of judicial notice.
CHAIRMAN ELLIOTT: What about to
Mr. Moates’ point regarding your initial
filing and then having such a substantial
rebuttal filing, not permitting them to really
respond after that? It does raise some
concerns.

MR. DOWD: What CSX was not able
to engage in was surrebuttal. And that’s how
the rules are organized. Everything that
Seminole submitted on rebuttal was in direct
response to an argument made by CSX on reply.
Market dominance is not the same as stand
alone cost. Stand alone cost, the Board has
set out a structure and an organization of all
the specific components that need to be
addressed. And it's very clear to all parties
exactly what has to be addressed, in-depth, in
each and every case. Market dominance is a
legal standard. And there, the appropriate
analysis is whether and to what extent what is
submitted on rebuttal is new evidence or is it
responsive evidence. And, in our case,
everything submitted on rebuttal was in direct response to an argument made by CSXT on reply.

Now, I'd like to touch briefly on this issue of market rates. And I cannot get into details because of confidentiality concerns. But it is in the record and it is not the case that the rates that were initially agreed upon in 1998 were below market rates. And we have evidence in the record in the highly confidential sections, which demonstrate that. And I would refer the Board to that evidence.

Secondly, on the issue of delivered costs into Florida and the notion of Seminole's status vis-a-vis other utilities, it was correctly pointed out that delivered cost does include the cost of the coal. And therefore, it masks the relative rail rates. The chart that we submitted, which is up on the screen today, we didn't select these utilities out of thin air. These are the utilities that CSX selected to do their
delivered cost comparison. And the purpose of this chart is to expose the difference between the two. And, as the D.C. Circuit held in the Coal Exporters decision, if a railroad has the ability to price discriminate in order to secure the economic rents that are made available by other links in the supply chain, that is a classic indicator of monopoly power. And that's what we have here. In terms of the question about the construction of the dock, and I think it's important to differentiate between the dock and the conveyor. CSX spends a lot of time talking about acquiring land and refers to the BTG draft and has, in the photograph, the mowed property. That's all for a conveyor. You don't get to the conveyor unless you can build the dock. And there is no space to build the dock. In terms of time, by comparison, the third unit at the Seminole Generating Station, which is a brownfield site -- it was already set aside for a third unit, it was already a preliminary -- in the site
plan, it was already preliminarily intended to
include a third unit -- and it still took
three and a half years to get the permits.
And, even then, they didn't get all the
permits. And, ultimately, the plan was
shelved. That's on a brownfield site, right
next door to an existing use. To do something
like build a large industrial coal dock on a
greenfield site in the middle of a residential
neighborhood, and we have the photographs that
demonstrate that whatever you see from the
river, you see trees. You go behind those
trees and you see residences. And there are
no for sale signs in any of those yards. To
build a large industrial coal dock on a
greenfield site would take, I would assume,
considerably longer to get permitted, much
less to get it built.

VICE CHAIRMAN MULVEY: But how is
that site zoned today? Is that site zoned
residential or zoned industrial or zoned --
we'd have to have changes in the zoning laws
or the zoning laws could accommodate building
the dock?

MR. DOWD: Among the regulatory
permits that would have to be -- or the
regulatory actions that would have to be
satisfied in order to attempt to construct a
dock like that, is a rezoning. But that may
be among the easiest. There are other permits
and approvals that would have to be required,
including a change in the Putnam County Master
Plan and a variety of environmental and other
regulatory approvals that would be necessary.
All of which would be met with considerable
organized community opposition.

COMMISSIONER NOTTINGHAM: Mr.
Dowd, let me just try to understand your point
a second ago. You pointed out that, did I
hear correctly, that to get the permitting
necessary to build a new coal fired electric
generating plant, it could take a couple years
or longer?

MR. DOWD: No. That was to build
a third unit at an existing --

COMMISSIONER NOTTINGHAM: You're taking about -- basically, you're talking about the Clean Air Act as the driving factor there, is it not, typically?

MR. DOWD: No. I'm sorry. It was also the Florida Department of Environmental Protection, the various county requirements, the Army Corps of Engineers, it was a variety of regulatory hurdles that had to be cleared. And that was for a third unit at a power plant that already had two units. They were simply adding on. What you would be talking about on a dock on the St. Johns River is a brand new industrial facility on a greenfield site, surrounded by residences.

COMMISSIONER NOTTINGHAM: I'm just not sure I follow the comparison. I mean, I'm looking again in the record to see if the comparison is there. But there are docks, and sometimes in that part of the world, they're called wharfs, built every day in Florida.
Building a dock is not necessarily the same thing as building a heavy duty industrial energy generating facility that has extensive potential Clean Air Act ramifications. You're talking about barges pulling up to a dock and unloading some coal onto a conveyor. I just don't -- I'm not quite sure I get your premise a minute ago, that it would be, obviously, in your view, more complicated to build and get permitted a dock than it would be an expansion of your electric generating facility.

MR. DOWD: Well, first, we're not talking about a recreational dock or a wharf for pleasure boats. We have photographs. They are pages 17 and 18 of our Exhibit 2B1, that show the dock at Plant Crist, which is in Pensacola. And that is not a pleasure wharf. That's a large industrial facility. There is a photograph of the type of crane that CSX posits could be installed on that dock. It's enormous. It's an enormous piece of equipment. And the comparison that I'm
drawing is in the amount of time it would take
to get permits to construct an industrial
facility like that on a greenfield site,
surrounded by residences, as compared to what
it took to simply add onto an existing power
plant on a brownfield site. The latter took
three and a half years. I would submit that
to do the former would take considerably
longer than that. And that's before you begin
construction. I see my time has expired and
I thank you.

CHAIRMAN ELLIOTT: Yes. Thank
you, very much, Mr. Dowd. And thank you, very
much, Mr. Moates, for your excellent
arguments. We'll take the matter under
advisement. And the hearing is now closed.

(Whereupon, the hearing was closed
at 12:29 a.m.)
| contracts 37:2,4,5 58:11,13 |
| contrary 28:10 |
| conveyance 9:17 |
| conveyors 49:5,15 53:1,5 63:12,16 63:16 67:6 |
| copy 5:9 44:1 |
| corporate 40:13 |
| Corps 66:9 |
| correct 7:7 12:16 |
| correctly 62:16 65:18 |
| costed 47:12 |
| Counsel's 6:16 |
| country 20:7 53:9 53:18 |
| county 65:10 66:8 |
| couple 45:13 52:2 |
| court 24:3 |
| cover 4:10 |
| crane 67:19 |
| cranes 16:7 |
| create 7:22 8:2 |
| creates 28:17 |
| creating 56:11,16 |
| creative 53:10 |
| credible 60:14 |
| credit 19:18 |
| crew 15:4 |
| Crist 67:16 |
| cross 26:10,10 27:21,21 |
| crossing 24:4 |
| CSXT 62:2 |
| C-O-N-T-E-N-T-S 3:8 |
| degradation 51:5 |
| degree 7:7 |
| delay 14:22 |
| deliver 13:3 |
| delivered 13:2,6 62:14,16 63:1 |
| deliveries 55:11 |
| delivering 35:17 |
| demonstrate 31:6 40:11 62:11 64:11 |
| demonstrated 10:11 43:9 44:17 |
| demonstrates 56:9 |
| demonstrating 32:2 |
| denied 31:5 |
| Department 66:7 |
| depending 41:15 |
| depends 29:10 |
| depth 17:2 |
| describe 49:19 |
| described 26:1 |
| describes 15:7 |
| desert 21:5 29:13 |
| deserves 19:18 |
| designed 52:22 |
| detail 26:11 |
| details 40:19 62:5 |
| determination 6:21 |
| determine 24:13 36:19 54:18 |
| develop 42:8 |
| development 53:16 |
| difference 63:2 |
| different 21:6 29:16 37:3 |
| differentiate 63:11 |
| difficult 20:13 |
| difficulty 28:21 |
| direct 43:16 61:10 62:1 |
| dirt 23:18 |
| disadvantaged 35:21 |
| disappointment 42:2 |
| discipline 7:10 56:11,17 |
| discretion 43:20 |
| discriminate 63:5 |
| discussed 20:20 |
| disqualifying 26:6 |
| distance 25:6 |
| distances 50:9 |
| Docket 1:8 |
| docks 66:20 |
| documentation 19:17 |
| doing 27:14 28:9 33:17 38:9 42:10 |
| dollar 41:3,5 58:2 |
| domain 27:17,19 |
| 28:6 |
| dominant 46:21 |
| door 64:7 |
| double 6:1 |
| doubt 34:13 36:13 |
| Dowd's 52:12 |
| drawing 68:1 |
| drawn 18:9 |
| dredged 17:2 |
| driveway 23:16 |
| driving 66:4 |
| due 10:5 |
| Duke 60:10 |
| duty 67:2 |
| D.C 1:17 2:10,20 7:11 63:3 |
events 15:10
Everglades 21:8
expressed 63:2
Exhibit 8:5
extend 7:13
extends 42:18
extensive 67:3
extent 15:8 61:20

F
fabulous 42:5
face 24:20
facilities 12:5 15:16
fact 49:19
fact 18:13 27:8
facts 42:5
fail 10:5,12,13
failure 11:15 21:19,21
far 42:15
farms 11:18 68:3
five 35:9 57:3
floor 44:7
Florida 8:16 13:1
O
F

G
Gulf 8:3 9:13
Generating 202-234-4433
202-234-4433

Neal R. Gross & Co., Inc.
secure 63:6
see 5:16 6:1 19:4
34:14 49:13 50:5
64:11,12,13 66:19
68:10
seek 20:6
select 62:20
selected 36:16
62:22
self 19:6 23:9
self-help 20:5 23:9
24:3 41:13
Seminole 1:7 2:3
3:17 4:5,20,21 6:6
6:13,17 7:20 8:3
9:13 10:21 12:22
18:9,11 23:4
24:14 28:2 31:1
32:19 33:11,11
36:8,17 37:6 41:3
41:21 42:17 44:10
50:13 54:14 56:14
58:3 59:3 61:10
63:19
Seminole's 39:1
40:8 62:15
sense 25:16 39:18
sentences 31:2
48:20
serious 30:19 32:21
serve 28:14 42:17
served 25:7 34:12
34:12 39:2
service 22:22 24:10
24:18 40:15 43:11
set 61:14 63:21
Seth 30:12
sets 52:16
seven 9:12
SGS 9:17 12:1 14:5
15:15 18:19 21:10
share 28:12
sharper 7:17
shelled 64:6
ship 15:2 31:4
shipper 19:7 27:4
28:17,17 60:13
shippers 10:2 20:7
24:8
shipper's 28:12
60:16
shipping 15:9
shocked 34:2
short 4:13 57:4
short-line 28:18
57:6
shots 49:9
show 9:19,22 17:15
34:15 35:20 53:3
67:16
showed 14:9 53:16
shown 21:18
shows 16:15 36:15
36:16 44:13 51:17
shrink 45:6
Shudtz 30:16
side 18:21
Sidley 2:18
sign 22:20
signal 38:11
significant 16:16
24:19 56:3
signifying 5:20
signs 64:14
similar 32:18 36:8
simple 40:12
simply 16:16 30:22
66:12 68:5
single 5:19 22:17
sir 12:18
sit 15:3
site 21:12 63:20,22
64:6,9,16,20,20
66:15 68:3,6
situation 10:17
21:2
six 5:1 8:17 30:2
36:14 47:2 59:17
skeleton 32:20
skeptical 7:17
slick 14:18
slides 5:12 43:22
44:1
Slover 2:8 6:11
smart 19:19
sorry 25:1 42:1,2
66:6
sort 24:2 27:14
49:10
sought 5:6
source 14:4
south 29:3
Southern 20:2 25:7
25:21 26:17 27:6
27:18 28:6,19
39:13 42:5,15,20
56:3 60:5
Southern's 42:18
42:21
space 63:18
speak 19:9 46:4
Speakers 5:14
speaks 22:10 44:12
specific 23:2 60:19
61:15
specifically 18:5
spelled 19:16
spend 20:11 54:16
55:7
spending 25:15,17
54:18
spends 63:12
spent 32:9
spill 14:12 15:7
spirit 53:11
St 9:12 11:21 12:7
44:5 48:3 49:12
50:21 51:11 56:22
66:14
Staggers 58:12
stake 27:12
Stamberg 32:1
stand 61:12,13
standard 6:20 29:8
52:14,16,17 61:19
standing 42:2
stand-alone 31:20
stark 56:19
starts 45:6
stated 30:22 60:13
statement 4:13
11:16 18:8
statements 22:19
states 1:1 17:19
Station 8:3 9:14
23:4 63:20
status 62:15
statute 22:10
STB 1:8
step 6:7 8:8,9,12,13
8:15,17 9:12,16
18:3 30:3
steps 8:6 18:22
20:5
stock 43:8
store 16:10
storm 15:1 52:2
strange 23:14
strategic 19:19
strategically 40:16
Street 1:17 2:9,19
stretch 7:6
Strickland 6:16
strong 19:8 33:5
strongly 45:22
structure 61:14
studied 25:9
study 11:13,13
17:12 31:22
stuff 52:19
submission 11:16
39:15 59:21,22
submit 7:15 20:13
25:21 31:21 35:8
35:20 38:9 43:16
48:21 60:8 68:7
submitted 22:5
36:12 49:10 61:10
61:21 62:1,19
submitting 23:8
substantial 31:22
44:22 61:3
substantially 7:21
36:4
successive 49:9
succinctly 59:20
sufficient 12:7
sufficiently 7:9
suggest 18:7 47:1
suggests 16:19
suitable 60:20
supplies 35:15
supply 21:11 58:6
63:7
support 39:17
supported 32:1
sure 25:3 57:10
59:9,10,11 66:18
67:7
Surface 1:2,15
surrebuttal 61:8
surrounded 66:16
68:4
surveying 27:14
suspend 52:3 55:21
56:5
swamped 16:6
system 8:4 9:17
12:22 14:21 15:19
17:7,17 23:15
24:16,21
S.W 1:17

T

table 6:16 30:11
take 6:2 9:3,9
16:13,14 34:20
35:4 39:8 45:3
46:12 47:6 48:3
48:15 51:9,10
53:1 54:12,19
64:16 65:20 68:1
68:8,15
taken 18:22
takes 46:18
talk 29:19
talking 27:5 29:4
44:22 45:4,14
59:5 63:13 66:3
66:13 67:5,13
team 41:19
tech 43:21
technology 13:18
53:9
CERTIFICATE

This is to certify that the foregoing transcript
in the matter of: Seminole Electric Cooperative
V. CSX Transportation
STB Docket No. NOR 42110

Before: United States of America
Surface Transportation Board

Date: June 30, 2010

Place: Washington, DC

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
typewriting.

James Salandro

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701
www.nealrgross.com
June 25, 2010

VIA HAND DELIVERY

Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Re: Docket No. 42110, Seminole Electric Cooperative, Inc. v. CSX Transportation, Inc.

Dear Ms. Brown:

Enclosed for submission to the Board on behalf of Complainant Seminole Electric Cooperative, Inc. (“SECI”), please find a disc containing a copy of the PowerPoint slides that counsel for SECI may use during the oral argument scheduled for Wednesday, June 30, 2010. We have also enclosed one (1) paper copy, in color, and ten (10) paper copies, in black and white, of the PowerPoint slides.

The information and materials on the slides all are already part of the record in this proceeding, and none of the slides disclose any information that has been designated as Highly Confidential under the protective order that governs this case. Copies of the slides also are being provided to counsel for CSXT, pursuant to an agreement between the parties.

An additional copy of this letter is also enclosed. Kindly indicate receipt of the enclosed disc and paper copies by time-stamping the extra copy of the letter and returning it to our messenger.

Thank you for your attention to this matter.
Respectfully submitted,

[Signature]

Stephanie M. Adams
An Attorney for
Seminole Electric Cooperative, Inc.

Enclosures
cc: Counsel for Defendant CSX Transportation, Inc.
CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June, 2010, I caused copies of the enclosed PowerPoint slides for SECI's oral argument to be served by hand-delivery on counsel for Defendant CSX Transportation, Inc., as follows:

G. Paul Moates, Esq.
Paul A. Hemmersbaugh, Esq.
Matthew Warren, Esq.
Sidley & Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005

Stephanie M. Adams

[Signature]
The Board does not need to decide precisely how a dock would be designed or what path a conveyor might take—it need only decide whether some configuration of water transportation could work.

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.

Be shown that the existent competition acts as a true economic constraint on the defendant’s rate adjustments.
CSXT's "Alternative" Routes Compared To CSXT's Existing Route
Dr. Sansom’s FPSC Testimony

Q. What is Seminole’s situation and approach?
A. Seminole has a rail-served plant at Palatka, Florida. In 2002 and 2003 Dotiki coal delivered by rail cost Seminole’s members less than Dotiki coal delivered by barge to Big Bend. This is shown in the table below and demonstrates that CSXT’s service to Palatka, which does not enjoy rail/barge competition, is more efficient and cost-effective by a wide margin for Seminole’s members than TECO’s water route to Big Bend is to TECO’s ratepayers.

... 

Q. What, if anything, is noteworthy about this?
A. This is noteworthy because it demonstrates substantial cost savings via rail, even though Seminole is captive to the CSXT rail system and Big Bend could have rail/water competition.
Permitting & Regulatory Requirements

1. Amend Putnam County's future land use map to rezone land parcels next to the river;


3. Seek authorization from the State Board of Trustees of the Internal Improvement Trust Fund for use of sovereign state lands for portions of dock system in river;

4. Modify existing SGS site certification by Florida Electrical Power Plant Siting Board;

5. Seek air construction permit for new facilities and revision of existing air operation & surface water discharge permits for SGS from FL Dept. of Environmental Protection;

6. Obtain dredge & fill permit from U.S. Army Corp of Engineers for facilities construction in river.
EVA’s Cost Estimates Are Too Low

- EVA relies on an outdated source that does not reflect current market conditions.
- EVA assumes SECI would incur no additional costs for coal shipments originating at inland barge terminals.
- EVA provides no support for assumption that barge rates paid by SECI for river coal transport would always reflect the low end of prevailing spot rates.
- EVA assumes that coal transfers between river and ocean barges could take place without delays.
- EVA assumes CSXT would voluntarily “short-haul” itself on movements from NAPP mines to ports.
- EVA underestimates loading/unloading times at all hypothetical points of transfer thus underestimating capital & operating costs for required transfer crane capacity.
- EVA ignores costs associated with coal degradation.
BEFORE THE SURFACE TRANSPORTATION BOARD

SEMINOLE ELECTRIC COOPERATIVE, INC.

Complainant,

v.

CSX TRANSPORTATION, INC.

Defendant.

Docket No. NOR 42110

ORAL ARGUMENT EXHIBITS OF CSX TRANSPORTATION, INC.