

UNITED STATES OF AMERICA  
SURFACE TRANSPORTATION BOARD

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ORAL ARGUMENT

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IN THE MATTER OF: :

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SEMINOLE ELECTRIC :

COOPERATIVE :

STB Docket

:

No. NOR 42110

COMPLAINANT :

:

-- V. -- :

:

CSX TRANSPORTATION :

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DEFENDANT. :

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Wednesday,

June 30, 2010

Surface Transportation Board

Hearing Room

395 E Street, S.W.

Washington, D.C.

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

BEFORE:

DANIEL R. ELLIOTT III Chairman

FRANCIS P. MULVEY Vice Chairman

CHARLES D. NOTTINGHAM Commissioner

APPEARANCES:

On Behalf of Seminole Electric  
Cooperative, Complainant:

KELVIN J. DOWD, ESQ.

Of: Slover & Loftus, LLP  
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On Behalf of CSX Transportation, Inc.,  
Defendant:

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Of: Sidley Austin, LLP  
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T-A-B-L-E O-F C-O-N-T-E-N-T-S

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P-R-O-C-E-E-D-I-N-G-S

9:31 a.m.

CHAIRMAN ELLIOTT: 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

1 has asked to reserve six minutes for rebuttal.  
2 If you wish to make a change to your reserved  
3 rebuttal time, please advise us when you begin  
4 your presentation. Counsel for Defendant CSX  
5 will be allotted 20 minutes. Both parties  
6 have sought leave to make a Power Point  
7 presentation, using materials previously  
8 placed in the record and have filed these  
9 materials in hard copy with opposing Counsel  
10 and the Board. We have received no objection  
11 to the materials proffered. We will have the  
12 pages used today as Power Point slides bound  
13 in the transcript of this proceeding.

14 Speakers, please note that the  
15 timing lights are in front of me. You will  
16 see a yellow light when you have one minute  
17 remaining and a red light when your time has  
18 expired. The yellow one-minute light will be  
19 accompanied by a single chime and the red  
20 light, signifying that your time has expired,  
21 will be accompanied by two chimes. Please  
22 keep to the time you have been allotted. When

1       you see the red light and hear the double  
2       chime, please finish your thought and take a  
3       seat.

4                     In addition, just a reminder to  
5       everyone, please turn off your cell phones.  
6       We will now proceed. Counsel for Seminole,  
7       please step up to the podium, introduce  
8       yourself, indicate if you wish to change your  
9       time for rebuttal, and then begin.

10                    MR. DOWD: Thank you, Mr.  
11       Chairman. Kelvin Dowd of Slover & Loftus.  
12       It's my privilege to appear on behalf of  
13       Seminole Electric and its members and  
14       consumers. And I do not wish to change the  
15       allotment for my rebuttal. With me at  
16       Counsel's table is Robert Strickland, the  
17       President of the Board of Trustees of Seminole  
18       Electric.

19                    I'd like to begin by addressing  
20       briefly the legal standard that should govern  
21       the Board's determination of market dominance  
22       in the evaluation of CSX's claim of inter-

1 modal competition. According to CSX, the  
2 Board need only decide whether some  
3 configuration of water transportation could  
4 work. There's no authority cited for this  
5 proposition and this is not the applicable  
6 test. And, indeed, it would stretch the  
7 inquiry to an unrealistic degree. The correct  
8 test is whether there are any alternatives  
9 sufficiently competitive to bring market  
10 discipline to a railroad's pricing. Now the  
11 D.C. Circuit has added to that, that even if  
12 an alternative is physically available,  
13 inquiry must extend to whether it actually  
14 imposes a meaningful constraint on pricing.  
15 We submit that where an alternative doesn't  
16 actually exist, the inquiry should be even  
17 sharper and even more skeptical.

18 Now CSX does not claim that an  
19 effective alternative actually exists today.  
20 CSX's argument is that, if Seminole would  
21 invest substantially more than \$300 million in  
22 equipment and infrastructure, it could create

1       an alternative. Now the alternative that they  
2       propose to create from the principal coal  
3       origins for the Seminole Generating Station is  
4       an eight-step water delivery system. Now, on  
5       brief, CSX has expressed some mystification as  
6       to the eight steps. So we have them up on the  
7       screen.

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

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



1 transfer is used?

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

7 CHAIRMAN ELLIOTT: Thank you.

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

19 CSX's own numbers show that the  
20 capital costs for this scheme would  
21 significantly exceed \$300 million. And we  
22 show that even that is understated.

1                   Now, the Board has considered  
2                   claims that shippers can build their way to  
3                   competition before. In the West Texas  
4                   Utilities case and the TMPA case, the Board  
5                   rejected those claims as not feasible due to  
6                   cost. The cost of the CSX scheme in this case  
7                   is over four times higher than earlier cases  
8                   on a capital costs per annual ton basis.  
9                   Really, that could be the end of the inquiry.

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

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

20                  MR. DOWD: Well, as the  
21                  Complainant in the case, Seminole has the  
22                  burden on all key issues, including

1 jurisdiction. In our opening evidence, we  
2 presented evidence that there was no effective  
3 intermodal alternative. In reply, CSX  
4 presented considerable testimony and material  
5 challenging that. And, on rebuttal, we have  
6 responded in kind.

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

19 MR. DOWD: Well, you know, I  
20 believe our position on opening was not that  
21 the St. Johns River is not navigable, but that  
22 it is not a navigable waterway that presents

1 an effective competitive option for SGS.

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

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

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

18 MR. DOWD: Not entirely, sir.

19 VICE CHAIRMAN MULVEY: That was  
20 partly --

21 MR. DOWD: For a number of years,  
22 Seminole used a barge transport system for a

1       portion of the routing to Florida. It has  
2       never delivered coal by water to the plant.  
3       It's never been able to deliver coal by water  
4       to the plant. Throughout the entire time  
5       period, 100 percent of the coal has been  
6       delivered to the plant by rail, by CSX.

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

20                   MR. DOWD: To our knowledge, ocean  
21      vessels which draft at 35 feet, can't be  
22      operated on the Mississippi River.

1 VICE CHAIRMAN MULVEY: Right.

2 Okay.

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

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

17 MR. DOWD: I'm not an expert on  
18 the oil slick in the Gulf of Mexico. But I  
19 think that that is an appropriate touch point  
20 for the assumptions that CSX makes regarding  
21 their system. One of the assumptions they  
22 make is that there will never be a delay.

1       There will never be a storm; never be a wave  
2       event; never be a dock closed; never be a ship  
3       that's late and has to then sit at anchor and  
4       bring a new crew in. All of the many things  
5       which are a routine matter of maritime life.  
6       Most of those were assumed away in the scheme  
7       that CSX describes. Something like the spill  
8       in the Gulf, to the extent that it interfered  
9       with shipping, would be yet another example of  
10      the kinds of events that would add to the  
11      costs.

12                   VICE CHAIRMAN MULVEY: Thank you.

13                   MR. DOWD: Now, the two principal  
14      obstacles, historically, to moving coal by  
15      water to SGS are the unavailability of any  
16      transfer facilities at Jacksonville and the  
17      unavailability of a coal unloading dock at the  
18      power plant, itself. Now CSX has proposed a  
19      system whereby ocean vessels would approach  
20      the Port of Jacksonville and would transfer  
21      coal in what they consider to be -- what they  
22      call midstream, but it would be done about a

1 mile and a half northeast of the entrance to  
2 Jacksport Harbor. That's in the ocean. And  
3 you cannot physically transload coal from an  
4 ocean vessel to a river barge in the middle of  
5 the ocean. River barges are not certified for  
6 ocean operation. They could be swamped, even  
7 in normal seas. And the cranes that CSX  
8 proposes to use are not certified for ocean  
9 operation, nor are they usually mounted on  
10 barges. They also propose to fleet or store  
11 the barges approximately 20 miles away from  
12 where the transfer from the ocean vessel would  
13 take place. Again, a highly inefficient  
14 operation. And you take these facts together  
15 and it shows that the scheme they envision  
16 simply won't work. And it's significant that  
17 no such operation has ever been conducted at  
18 Jacksonville.

19 Now, on brief, CSX suggests that  
20 the transfer could be moved into protected  
21 waters -- into the intercoastal waterway. But  
22 that won't work either. The intercoastal



1 waterway can't handle ocean vessels. The  
2 intercoastal is dredged to a depth of 12 feet.  
3 Ocean vessels draft 30-35 feet. So whether  
4 it's a question of the river barges trying to  
5 get out to the ocean to meet the ocean vessel  
6 or the ocean vessel trying to get into the  
7 intercostal to meet the barges, the system  
8 won't work either way.

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

18 MR. DOWD: No, I would not.  
19 Because the BTG draft clearly states, first of  
20 all, that it offers no opinion on the  
21 feasibility of a barge operation. And  
22 secondly, at several key points in the draft,

1 the authors point out that infrastructure that  
2 would be necessary to implement a particular  
3 step doesn't exist. And the unavailability of  
4 transfer points in Jacksonville was one of the  
5 points that's specifically mentioned. Now, I  
6 think it's important to put this draft in  
7 context. CSX attempts to suggest that a  
8 statement by the consultant in 2003 is the  
9 equivalent of a conclusion drawn by Seminole  
10 Electric. It is the case that, for a number  
11 of years, Seminole had experience moving coal  
12 part of the way by barge. They have  
13 considerable experience and understanding as  
14 to what works and what doesn't work when it  
15 comes to water transportation. And, when they  
16 received the draft that proposed a transfer  
17 from ocean vessels to barges in the Port of  
18 Jacksonville, when there were no facilities  
19 for that, and an unloading operation at SGS,  
20 using a dock that can't be built, they  
21 concluded to put the draft to one side. And  
22 no further steps were taken to pursue it.

1 COMMISSIONER NOTTINGHAM: Mr.

2 Dowd, if I could, I'd like to explore with you  
3 a little bit and ask you to help us think  
4 through what I see as one of the key issues  
5 here, which is really what are the boundaries  
6 and/or expectations when we think about self-  
7 help in the case of a shipper. Looking at the  
8 record here, you may well have a strong case.  
9 I'm not going to speak to the merits here at  
10 this moment. But certainly, it's clear to me  
11 that your client's not what I would call the  
12 poster child of captivity. You are right on  
13 a navigable waterway. You are located on a  
14 navigable waterway for the very reason of  
15 having the barge option. That's clearly  
16 spelled out in the environmental permitting  
17 documentation when the facility was opened.  
18 Your client deserves credit for that. That's  
19 a smart strategic business decision. Your  
20 client relied, in large part, on maritime  
21 transportation of commodities for a long time  
22 in the past. And you're only three and a half

1 miles from a competing railroad, Norfolk  
2 Southern that has trackage rights into the  
3 Georgia Pacific Plant. At what point do --  
4 help us think through why we shouldn't ask  
5 your client to implement self-help steps to  
6 seek competitive options. There are many  
7 shippers around the country who would love to  
8 be located on a navigable waterway and also  
9 three and half miles from a competing  
10 railroad. We get those cases all the time.  
11 And we usually don't have to spend too much  
12 time on the issues that are presented here.  
13 But it's difficult, I submit. It's not an  
14 easy judgment call to know whether a three and  
15 a half mile build-out is reasonable or whether  
16 building a wharf or a pier and the other  
17 infrastructure for barging is reasonably. But  
18 help us think through why -- how we should  
19 approach some of the issues I've just  
20 discussed.

21 MR. DOWD: Well, Commissioner  
22 Nottingham, first of all, I don't believe

1       there is a poster child for captivity. I  
2       think every situation has to be judged on its  
3       own facts and on its own merits. If a  
4       hypothetical utility had a railroad three  
5       miles away across open desert, they would be  
6       in a considerably different position than a  
7       utility that had a railroad three miles away  
8       across the Everglades.

9               The facts of this case are that  
10       SGS, when it was permitted, the important  
11       consideration was water supply, not water  
12       transportation. And its original site  
13       certification permit is for rail delivery, not  
14       for water delivery. The fact that the power  
15       plant is three nautical miles from the river  
16       moves into the question of how accessible  
17       would river transport be to that facility.  
18       And we've shown that it is not accessible,  
19       because there is no feasible way to get the  
20       coal from the ocean to the river barge. And  
21       there is no feasible way to get the coal from  
22       the river barge to the power plant because

1       there is no property available for the  
2       construction of the kind of large industrial  
3       dock facility that you would need in order to  
4       unload this coal. And we have photographs of  
5       that, which I think have been submitted to the  
6       Board. And they're on pages 17 and 19 of our  
7       Exhibit 2B1.

8                       So I think the answer to your  
9       question is that there's no bright line rule.  
10      The statute speaks of effective competition.  
11      The cases have interpreted that as a  
12      reasonable, feasible alternative that has a  
13      meaningful constraining influence on the  
14      railroad's pricing. In this particular case,  
15      when the parties were unable to agree to a new  
16      contract, the prices were raised by multiples  
17      of the former levels and not a single ton of  
18      coal was lost by CSX. The financial analysts,  
19      in public statements, applaud this litigation  
20      as a sign that CSX is aggressively maximizing  
21      its market power and aggressively pricing its  
22      service. So I think the answer to your

1 question is that, as the Board has done in the  
2 past, you have to look to the specific facts  
3 of each case. And the facts of this case, of  
4 Seminole Generating Station, is captive to  
5 CSX.

6 COMMISSIONER NOTTINGHAM: So, if I  
7 can just properly understand what you're  
8 saying, are you submitting that the Board  
9 should expect some self-help, but the self-  
10 help in this case would be unreasonable --  
11 unreasonably too expensive and impractical?  
12 In other words, if we change the facts here  
13 and said your client was located next to a  
14 major interstate highway but, for some strange  
15 reasons, the connecting road system just  
16 didn't quite reach the driveway of your  
17 facility and it was -- there was a 100 yard  
18 gap of some unpaved dirt that needed to be  
19 improved in order to give you access to the  
20 interstate highway, you wouldn't be here  
21 saying that the truck option is not even  
22 possible to look at, putting aside the cost of

1 trucking. But, in other words, at what point  
2 do we go from the completely easy sort of  
3 proverbial open court lay-up of self-help,  
4 versus the crossing of the proverbial Andes  
5 Mountains with the highway?

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

22 COMMISSIONER NOTTINGHAM: I'm



1       sorry. Mr. Chairman, can I just ask one quick  
2       question to close that line?

3                   CHAIRMAN ELLIOTT: Sure.

4                   COMMISSIONER NOTTINGHAM: Thanks.

5       On the issue or question of the three and a  
6       half mile distance between your client's  
7       facility and the Norfolk Southern served  
8       Georgia Pacific plant, I understand your  
9       client actually studied that possibility and  
10      the costs were far less than this \$300 million  
11      that you've referenced for the barge option.  
12      Could you elaborate on that or -- without  
13      getting into anything that's confidential?  
14      And also, put it in context of how much your  
15      client is spending per year on coal purchases  
16      and transportation, so we have some sense of  
17      the relative reasonableness of spending \$60-  
18      70-80 million versus \$300 million, for  
19      example?

20                   MR. DOWD: Well, the idea of a  
21      build to Norfolk Southern, I would submit, is  
22      not really an issue in this case. Because it

1 was described as infeasible on opening. It  
2 was not challenged by CSX on reply. And  
3 therefore, the matter should be considered  
4 closed. Without getting into confidential  
5 information, I can tell you that there was a  
6 disqualifying obstacle to that plan in the  
7 form of the unavailability of the use of  
8 property owned by a third party. And then  
9 there was a further obstacle in the need to  
10 cross major highways and cross CSX, itself,  
11 with a rail line. I can't go into more detail  
12 without getting into highly confidential  
13 information and we're all trying to avoid that  
14 here today.

15 VICE CHAIRMAN MULVEY: Well, did  
16 you have any negotiations at all with Norfolk  
17 Southern as to their willingness to enter into  
18 a contract if indeed you decided to pursue  
19 that option? Because, quite frankly, very  
20 often what utilities have done or other firms  
21 that were captive have done is they have  
22 threatened to build out or build in, in order

1 to provide competition. And that very threat  
2 has caused the railroad to re-enter into  
3 negotiations and perhaps come up with a more  
4 favorable rate to the shipper. So was there  
5 any attempt at all at talking to Norfolk  
6 Southern? Or was that never advanced?

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

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

1 insurmountable barriers.

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

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

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

16 VICE CHAIRMAN MULVEY: Yes, the  
17 shipper builds out, the shipper creates a  
18 short-line railroad to connect itself to the  
19 Norfolk Southern. I understand that. The  
20 other thing I was going to note is that you  
21 mentioned about the difficulty of building  
22 through the Florida Everglades. Is this

1 project one that would have to go through the  
2 Florida Everglades? My understanding is the  
3 Florida Everglades are considerably south of  
4 where you're talking about.

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

11 VICE CHAIRMAN MULVEY: Right.

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

17 VICE CHAIRMAN MULVEY: Right.  
18 There are no mountain ranges in Florida  
19 either, but nonetheless, let's not talk about  
20 going through the Everglades. So that was my  
21 only question.

22 MR. DOWD: Okay. Thank you.

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

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

18 Mr. Chairman, I think we have -- I  
19 know we have a serious problem here today with  
20 this case. And I believe some of your  
21 questions of Mr. Dowd foreshadowed that. The  
22 problem is stated very simply. In their

1 complaint, Seminole said two lines -- two  
2 sentences about market dominance. They said  
3 there are no navigable waterways to the plant  
4 and the only way they could ship coal was by  
5 rail. We answered and denied that; said that  
6 was absolutely untrue. And we'll demonstrate  
7 that there are alternatives. Eleven months  
8 later, because that's how long it was from the  
9 filing of the complaint to their opening of it  
10 -- 11 months later, they come in at their  
11 opening and filed literally three and a half  
12 pages on barge alternatives. It was a little  
13 bit more than that. I don't remember, maybe  
14 12-15 under what was called qualitative market  
15 dominance. But only three and a half pages  
16 dealing with why a barge alternative would not  
17 be viable. We came in, as you know in our  
18 reply, as we're entitled to do, in our one and  
19 only filing that we're permitted to make in a  
20 stand-alone cost case, on all issues, and put  
21 in what we respectfully submit is a very  
22 substantial probative study by Mr. Schwartz

1 and his colleagues Mr. Stamberg, supported by  
2 lots of other evidence, demonstrating that  
3 yes, it is a much longer route and there are  
4 transloads and certainly there are issues that  
5 need to be dealt with. But this utility knows  
6 how to deal with them. This utility, in the  
7 history of its plant, has moved more coal to  
8 that plant by water than it has by rail. This  
9 utility spent \$100 million to buy its own  
10 private barge fleet when it built that plant.  
11 And CSX, you know, in a very aggressive move,  
12 essentially helped them buy out of that  
13 contract when we first got this business by  
14 rail, that helped them with such a good rate  
15 package that they were able to get out from  
16 their barge contract.

17 CHAIRMAN ELLIOTT: Mr. Moates, I  
18 do have similar concerns about the initial  
19 filing by Seminole, in that it was a little  
20 bit of a skeleton product and I understand, I  
21 think, that is a serious concern for the  
22 Board. Because the process won't work if you



1       can't respond to the full argument. One  
2       question I do have, though, is just by looking  
3       at the increase in the rates that came about  
4       here, once they asked you to quote the rate,  
5       isn't that very strong evidence of market  
6       dominance in itself, even without all the  
7       evidence?

8                   MR. MOATES: With respect, no.  
9       Why not? Because that contract I referred to  
10      that they entered into -- CSX entered into  
11      with Seminole to help Seminole buy out of its  
12      barge lien, was at a very low rate. And CSX  
13      did that consciously. It wanted the business.  
14      Over time -- over the period of that contract,  
15      that rate got lower and lower, compared to the  
16      other utilities in Florida, compared to what  
17      the market was doing. By the time their  
18      contract expired, they were way below the  
19      market in Florida. And CSX attempted to  
20      negotiate with them for a new contract, at a  
21      higher rate. I won't say it was as high as  
22      the rate that's, you know, being challenged

1 here today. I don't think the Board will be  
2 shocked to know that railroads typically will  
3 make a better rate in a contract than they  
4 will in a common carrier rate, because there  
5 are other items in a contract, minimum  
6 volumes, sometimes, you know, deals on  
7 equipment, deals on scheduling, you know, lots  
8 of other things, refunds. So no, I don't,  
9 with all respect, think so. Our belief is  
10 that we brought their rate up much closer to  
11 the market for other Florida utilities, water  
12 served and rail served. They're now higher  
13 than they were. No doubt about that. But, in  
14 our reply evidence, you'll see there's, you  
15 know, a chart where we show they went from the  
16 very lowest delivery cost for a utility in  
17 Florida to about the, you know, the middle of  
18 the range.

19 CHAIRMAN ELLIOTT: Doesn't the  
20 delivery cost chart, though, really take into  
21 consideration the cost of coal also, and, as  
22 a result, isn't that not a really good

1 indicator of whether the rates are high or  
2 low?

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

22 VICE CHAIRMAN MULVEY: But you

1 would admit that the transportation costs, per  
2 se, taking out the cost of the coal, the  
3 transportation costs in the proposed contract  
4 would be substantially higher than the  
5 transportation costs paid by other Florida  
6 utilities. Or are you saying that the  
7 transportation costs that CSX is asking  
8 Seminole to pay are similar to what other  
9 Florida utilities are paying to transport  
10 coal, taking out of the equation the mining  
11 cost of the coal?

12 MR. MOATES: Mr. Dowd submitted an  
13 exhibit he'll no doubt use here in his last  
14 six minutes, the last of the charts he put in,  
15 that shows mills per ton mile of certain  
16 selected utilities. And it shows that  
17 Seminole is way far on the right's paying more  
18 on a mills per ton basis. Well, first of all,  
19 you know, the Board doesn't determine rate  
20 reasonableness on a mills per ton mile basis.  
21 We all know that. But also, those -- I ask  
22 you to look hard at that chart and look at

1     what those utilities actually are.  They're  
2     all -- they have contracts.  They all have  
3     different circumstances under which they  
4     negotiated those contracts.  Again, the  
5     contracts for some of those utilities that are  
6     to the left of Seminole, if you can visualize  
7     that on the chart, have other kinds of  
8     provisions.  They get other kinds of benefits  
9     and other kinds of concessions.  And CSX gets  
10    some too, notably certainty of volume and  
11    length.

12                   But, if I may, just come back  
13    before I lose it, Chairman Elliott, on the  
14    fundamental fairness point, and this really,  
15    I think is important.  They put in, as I said,  
16    three and a half pages on opening on why a  
17    barge alternative wouldn't work.  On rebuttal,  
18    they put in 133 pages.  And, you know, we have  
19    literally no chance to respond to that, other  
20    than in brief and in my obviously inadequate  
21    efforts here today.  I'm not an expert.  I'm  
22    not testifying.  I'm the lawyer arguing from

1 the record. Your rules -- and you know very  
2 well what they say, you were very clear in  
3 your market dominance procedural rules -- to  
4 say that a complainant must -- or a party with  
5 the burden of proof must put in all of its  
6 evidence in its opening case on the issue as  
7 to which it has the burden of proof. They  
8 didn't do that. They didn't come close to  
9 doing that. And I submit that if you allow  
10 them to get away with that, that you're going  
11 to give a signal to other complainants that is  
12 not going to be a very helpful and fair one.  
13 And again, as you know, railroad, in these  
14 cases, has one filing and one filing only on  
15 all issues.

16 COMMISSIONER NOTTINGHAM: Mr.  
17 Moates, this, in some ways, touches on that  
18 point, I believe. Do you believe the Board is  
19 prohibited, either procedurally or legally, or  
20 for any other reason, from examining the rail  
21 option that the three and a half miles I  
22 referenced earlier that would connect

1 Seminole's facility to the Georgia Pacific  
2 plant that's served by your competitor? Are  
3 we not able or are we not allowed to look at  
4 that because there's not enough in the record?  
5 And, if so, why isn't there enough in the  
6 record on that?

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

1                   COMMISSIONER NOTTINGHAM: I worry  
2     that --

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

5                   COMMISSIONER NOTTINGHAM: No.  
6     It's just that -- well, I just worry that the  
7     Board may be inappropriately handcuffed. It  
8     may well be in Seminole's interest not to  
9     explore the three and half mile build-out on  
10    the record. And it may well be in your  
11    client's -- CSX's interest not to demonstrate  
12    how simple a proposition that may or may not  
13    be, because your client's corporate policy may  
14    be very opposed to pointing out the ease of  
15    access to a competing rail service. So then  
16    we're left with a record that strategically is  
17    lacking on a very key -- in my view -- a very  
18    key area of exploration for the Board. We  
19    don't seem to know the details here. We have  
20    just clarified that it's not the Everglades.  
21    It appears to be pretty flat terrain. We  
22    know, on the record, that it's only three and



1 a half miles. We know, on the record, there's  
2 been some examination of the feasibility by  
3 Seminole of that build-out. The dollar  
4 amounts referenced in that examination are far  
5 less than the dollar amounts reference in the  
6 barge infrastructure build-out. And so, you  
7 know, the question is begging to be answered,  
8 in my view, from the Board's perspective, you  
9 know, how can we better understand that?

10 Because, in my view, a three and a half mile  
11 build-out could -- I say could very easily  
12 fall within the realm of reasonableness for  
13 self-help that we would expect. At the same  
14 time, a three and half mile build-out could be  
15 the opposite of reasonable, depending on the  
16 terrain and the environmental permitting and  
17 the costs. But, without more on the record  
18 there, it is frustrating. And I guess I would  
19 have expected your team to have helped build  
20 that record out, perhaps more than I would  
21 have expected Seminole to. But, in any event  
22 --

1                   MR. MOATES: I'm sorry about the  
2                   disappointment. I'm sorry, as I'm standing  
3                   here, that we didn't put in a lot more about  
4                   that. I can tell you, as you know, that  
5                   Norfolk Southern is a fabulous terrific  
6                   railroad. It's a major competitor of CSX.  
7                   And I don't think -- it's not our instinct,  
8                   normally, to try to, if you will, develop new  
9                   marketing opportunities for the competition.  
10                  I think they're fully capable of doing that  
11                  for themselves.

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

1 common carrier obligation in that scenario --

2 MR. MOATES: I understand.

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

14 MR. MOATES: Well, I'll say what I  
15 think you know. You clearly have the power to  
16 direct these parties to submit additional  
17 evidence on that issue if you thought that was  
18 important. And, listening to you here today,  
19 I'm beginning to think it's pretty darn  
20 important. So that is within your discretion.  
21 And, by the way, you know, I'm not high tech.  
22 I don't have Power Point slides. I gave you

1     hard copy slides that I hope you have. But  
2     the two things that are up here on the easels,  
3     obviously, that's -- this is a blow-up of  
4     something you have that's a satellite overhead  
5     of the St. Johns, you know, down to their  
6     plant, which is here. And the Everglades are  
7     way over here somewhere on the floor. So,  
8     Vice Chairman Mulvey, you're absolutely right  
9     about that. And that is a fuel barge going  
10    past the Seminole plant in the "non-navigable  
11    waterway" which, you know, we thought a  
12    picture speaks a 1000 words. There is, and  
13    our evidence shows, there's all kinds of  
14    commercial barge traffic on this river today.  
15    Are there tows going to utilities? No.  
16    They're the only utility up there on the  
17    river. But we think we've demonstrated that  
18    it is, in fact, very feasible.

19                   CHAIRMAN ELLIOTT: Mr. Moates, let  
20    me ask you a quick question, you know, just  
21    about the general project itself. I mean,  
22    we're talking a substantial amount of money

1 and probably a very complex process. How long  
2 do you think or does your expert think that  
3 this type of project would take. I mean, is  
4 it going to be -- are we talking a year, ten  
5 years? I mean, if it's ten years, obviously,  
6 the market dominance argument starts to shrink  
7 away.

8 MR. MOATES: It's not ten years  
9 and you have a volume. Again, I'm not going  
10 to quote from it here, of this BTG report from  
11 2003.

12 CHAIRMAN ELLIOTT: Yes.

13 MR. MOATES: They, of course, are  
14 very interested in not talking about it and  
15 saying it's a draft and we never agreed to it  
16 and so forth. And that's true. They didn't  
17 go do this. But this is the same consulting  
18 firm. They have come in on a rebuttal and put  
19 in a very big report that basically undermines  
20 most of all the important findings that they  
21 made here. And this includes, if you have a  
22 chance to look at it, and I strongly urge you

1 to look at it, and I think from the nods, some  
2 of you obviously have, a lot of the issues  
3 that they raised for the first time in  
4 rebuttal, that we couldn't speak to, are  
5 addressed here. One of their own people says  
6 that the water outlet is exactly the place  
7 where you'd put a dock. You know, that's at  
8 page 004785 of the draft. What about the  
9 issue of all this permitting? They've raised  
10 a lot of that. Pages 4803-4812, this  
11 consultant back then addressed that. They  
12 didn't say it was infeasible. It would take  
13 some time --

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

17 MR. MOATES: Cost and timing.

18 CHAIRMAN ELLIOTT: If it takes ten  
19 years to build it, to get the permitting, and  
20 then that would still have CSX with an ability  
21 to be market dominant for that ten-year  
22 period.

1 MR. MOATES: I wouldn't suggest it  
2 happen, you know, in six months.

3 CHAIRMAN ELLIOTT: Right.

4 MR. MOATES: But certainly it  
5 wouldn't be ten years. I'm not the expert.  
6 He is, here. But I'm guessing it would take  
7 maybe no more than I'm going to say a year and  
8 you're going to say a little over one year.  
9 Okay. Well, but you know, the reality is too,  
10 yes, it's \$300 plus million to go out and buy  
11 all the pieces of that chain. And that is the  
12 way we costed it because they owned their  
13 barges before. And we assume that's what  
14 they'd want to do. But, obviously, you can  
15 lease these assets too. Right now, especially  
16 the water industry, would love to have that  
17 kind of business. There are lots of barges  
18 available. There are tow boats available.  
19 The transloading, again, I'm all over the  
20 place here, but I've got to be a little bit of  
21 a witness. This issue about transloading on  
22 the open ocean, that's called the Jacksonville

1 anchorage. The U.S. Coast Guard told us  
2 that's where they would recommend this kind of  
3 an operation take place. You know, it isn't  
4 in the Bermuda Triangle. It is off the mouth  
5 of the St. Johns River. It is out into the  
6 beginning of the ocean. But we think that's  
7 feasible. On those high wave days, there were  
8 49 of those in 2009. How many days does that  
9 leave to be able to do the operation? And  
10 even probably a little bit more interestingly,  
11 again, if you look at this, I love this  
12 report, this BTG report, they say at page  
13 004782, if you all have it there and would  
14 look at this with me, I really would like you  
15 to just take a look at this, if you can. It's  
16 page 1-2 of their numbering, 004782 of ours.

17 VICE CHAIRMAN MULVEY: Yes.

18 MR. MOATES: And look at the  
19 second paragraph from the bottom of the page.  
20 It's only three sentences and I'm not going to  
21 read it out loud. But that, I submit, is a  
22 complete answer to this nonsense about, you



1 know, there's nowhere to transload. There  
2 certainly are. And there are lots of places  
3 and there are people who like to do that  
4 business, as well.

5 On the issue of the conveyor and  
6 the right of way, again, on the little  
7 exhibits that I hope you have, I'm not going  
8 to put them up here, we give you some  
9 successive shots from the video that we  
10 submitted into evidence that marches you sort  
11 of that right of way from the water intake on  
12 the bank of the St. Johns, up to their coal  
13 pile. And you can see, it's not real wide,  
14 but it's -- we think it's wide enough or  
15 nearly wide enough for a conveyor. Again,  
16 their consultants addressed the relative ease  
17 of broadening that easement or, if necessary,  
18 purchasing that property. In their brief --  
19 they describe at page 13 of their final brief  
20 that that is the land that is "already fully  
21 occupied." Look at those pictures. Does that  
22 land look fully occupied? It isn't. I mean,

1       it is -- It's mowed beyond the pump house, up  
2       all the way to their plant. Can conveyors be  
3       used there? Again, look at the last  
4       photograph I've given you of their plant.  
5       You'll see conveyors in the plant today,  
6       moving coal from the pile to the reclaimer.  
7       They move limestone. There are -- there's  
8       common use of conveyors to move coal and  
9       transload operations much longer distances  
10      than we're proposing be done here.

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

1 the Gulf.

2 MR. MOATES: Yes.

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

12 MR. MOATES: Yes. And I'll refer  
13 you to our reply evidence. They made this  
14 argument about you can't do it out there in  
15 their rebuttal, so we haven't been able to  
16 come back. But yes, we have work papers  
17 behind his report that shows that it was the  
18 U.S. Coast Guard that said it's the  
19 Jacksonville Anchorage area in primary caps,  
20 by the way, is part of the Gulf -- not the  
21 Gulf, the Atlantic intracoastal waterway,  
22 wherey the would recommend that kind of

1 transloading be done. If there is a high wave  
2 day -- if there is a storm, of course, you  
3 know, you would suspend your operations. You  
4 would bring those barges back inside the mouth  
5 of the river and do it, you know, the next  
6 calm day. But again, I don't want to lose  
7 this point. The page I just referred you to  
8 in here, by their consultants, tells you that  
9 there are multiple places that it can be done  
10 within the river itself, before you get to the  
11 City of Jacksonville. And, you know, Mr.  
12 Dowd's quote, in the beginning, from his  
13 briefs, and he said we have the wrong legal  
14 standard and he has the right one. Well, yes.  
15 He has the right one. I agree. West Texas  
16 sets out the standard and that isn't a  
17 standard. That little piece he quoted from  
18 was our wrap-up in saying they've thrown all  
19 this stuff at us in rebuttal about this isn't  
20 feasible, that isn't feasible. And all we  
21 said was the Board doesn't need to know  
22 precisely how a dock would be designed or what

1 path a conveyor would take. You only need to  
2 know that it would work. And that's what  
3 we've attempted to show. If you need to buy  
4 another 50 feet along the easement to expand  
5 it to get the leg of the conveyor down, that  
6 could be done.

7 VICE CHAIRMAN MULVEY: One follow-  
8 up question on that then. I mean, in this  
9 country, and I guess with the technology, the  
10 creative ability and the entrepreneurial  
11 spirit, you could pretty much do anything. A  
12 long time ago, a Nobel Prize winning economist  
13 wrote an article about the implications for  
14 the nation if we never build the railroads.  
15 Were the railroads indispensable to U.S.  
16 economic development? And he showed that you  
17 could actually have built canals all over the  
18 whole country and replaced the railroads.  
19 Now, the question wasn't whether or not that  
20 should have been done. The question was  
21 whether it was feasible, whether it could have  
22 been done, and what that would have meant to

1 long-term economic growth. There would have  
2 been a cost to the economy, but it was not  
3 that great of a cost. I think it was about  
4 three percentage points lower in GDP 100 years  
5 later. The point being is you can do pretty  
6 much anything if you want. So any time a  
7 utility says it's captive, a railroad could  
8 always point and say well, if you do this,  
9 regardless of what it is, it can be done. You  
10 can always have an alternative. Is there any  
11 cap? Is there any limit as to how much the  
12 utility would have to pay in order to take  
13 advantage of these alternatives? I mean, we  
14 have Seminole saying it's going to cost them  
15 \$300 million. Well, if they could do that  
16 and spend that and they could have a water  
17 alternative, is that still a viable option?  
18 And how do we determine when spending is too  
19 much, in order to take advantage of the  
20 alternative?

21 MR. MOATES: I don't have an easy  
22 test for you. I can tell you, when they

1 analyzed it for business purposes and not  
2 litigation purposes, nobody said it would be  
3 too expensive. Would it be expensive? Yes.  
4 But don't forget, if they do it, they're out  
5 of their CSX contract. They're not paying  
6 that rail. You asked the question earlier,  
7 Vice Chairman, what do they spend in a year.  
8 I'm told last year it was about \$230 million.  
9 But last year was a really bad year for them.  
10 They had a lot of outages at their plant.  
11 Their coal deliveries were down. Normally, a  
12 year, it's about \$350 million. Annual  
13 revenues for this utility, about \$1.4 billion.  
14 It's a big company. It can finance these  
15 things. Or, if it prefers to lease them on  
16 the open market, it's capable of doing that,  
17 as well.

18 My colleagues here remind me, on  
19 the issue of the high wave days or, you know,  
20 it's not the best day to load the barge in the  
21 Jacksonville Anchorage, so you suspend  
22 operations, the railroad has to do that. You

1 all know what happened after the hurricanes in  
2 the Gulf and what happened to CSX and Norfolk  
3 Southern, and you know the very significant  
4 damage to the infrastructure and they have to  
5 suspend operations. But they find a way to  
6 get it done.

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

18 MR. MOATES: Mr. Nottingham, I  
19 think it's stark. It's real. We can't argue  
20 about whether it happened. It happened. They  
21 invested \$100 million. They moved coal for  
22 years and years on those barges to Port St.



1 Joseph, by the way, down there on the -- I'm  
2 not very good at geography -- the Gulf part of  
3 the panhandle, I guess, in Florida is where it  
4 is. And it was short haul railed from there.  
5 We didn't even get to haul from there, by the  
6 way. We got the haul from the short-line  
7 railroad that brought it to us at  
8 Chattahoochee, I think it was. I'm learning  
9 Florida geography. Chattahoochee, Florida.  
10 And yes, the railroad sure got the message.  
11 And the railroad was very aggressive. Maybe  
12 you could say in retrospect, too aggressive,  
13 in the way they priced that contract for that  
14 length of time. But I'm repeating myself.  
15 But it's a darn good point. By the time that  
16 contract expired, they were way below the  
17 market. And the barge option had done that.  
18 And, as we renegotiated with them, we were  
19 very aware of the fact that that option, you  
20 know, that they still could go pursue that.

21 COMMISSIONER NOTTINGHAM: So, if  
22 you just run the numbers briefly, in general

1 fashion, you reference about a \$300 million  
2 dollar a year coal purchase budget roughly for  
3 Seminole. Your contract periods often run ten  
4 years. If that fairly common? I don't want  
5 to get into business secrets.

6 MR. MOATES: Full supply or  
7 transportation?

8 COMMISSIONER NOTTINGHAM: For  
9 transportation and/or either or.

10 MR. MOATES: Very few ten-year  
11 contracts any more. That was more of the norm  
12 maybe right after Staggers and into the early  
13 '90s. But five year contracts are fairly  
14 common for movements of this type. Again,  
15 that kind of a contract would certainly come  
16 with a volume commitment, quite possibly a  
17 liquidated damages provision for failure to  
18 meet the volume. It would come with  
19 provisions dealing with who provided the  
20 equipment. You know, there would be other  
21 items of economic importance in that kind of  
22 a contract.

1                   COMMISSIONER NOTTINGHAM:   So what  
2     type of percentage savings do you proffer that  
3     the Seminole might be able to achieve if they  
4     were to build out their barge option.   Are we  
5     talking about ten percent a year?   Twenty?  
6     Thirty?

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

13                  CHAIRMAN ELLIOTT:   Thank you, Mr.  
14    Moates.

15                  MR. MOATES:   Thank you.

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

18                  MR. DOWD:   Thank you, Mr.  
19    Chairman.   I'll try to move through some of  
20    these points as succinctly as I can.   First of  
21    all, on the question of the submission on  
22    opening and the submission on rebuttal, we

1 did, on opening, present evidence -- verified  
2 evidence in narrative, that the barge option  
3 or the barge hypothetical was not feasible,  
4 and that the notion of building to Norfolk  
5 Southern, while considered, was also not  
6 feasible. On reply, CSX chose not to  
7 challenge the issue of intramodal competition.  
8 I would submit that the Board's rules and  
9 policies are quite clear that that issue is  
10 closed. In your decisions, in Duke and in  
11 Carolina Power and Light, where you laid out  
12 your guidance on the proper scope of rebuttal,  
13 it was clearly stated that if a shipper  
14 presents credible evidence on opening and that  
15 evidence is not challenged by the railroad,  
16 the shipper's evidence will be accepted. This  
17 is not a case of judicial notice. Something  
18 like a build-out to another railroad would be  
19 very fact specific. It would be an issue in  
20 contention. And it's not one that's suitable  
21 for decision, based on principles of judicial  
22 notice.

1                   CHAIRMAN ELLIOTT: What about to  
2 Mr. Moates' point regarding your initial  
3 filing and then having such a substantial  
4 rebuttal filing, not permitting them to really  
5 respond after that? It does raise some  
6 concerns.

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

1 everything submitted on rebuttal was in direct  
2 response to an argument made by CSXT on reply.

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

13 Secondly, on the issue of  
14 delivered costs into Florida and the notion of  
15 Seminole's status vis-a-vis other utilities,  
16 it was correctly pointed out that delivered  
17 cost does include the cost of the coal. And  
18 therefore, it masks the relative rail rates.  
19 The chart that we submitted, which is up on  
20 the screen today, we didn't select these  
21 utilities out of thin air. These are the  
22 utilities that CSX selected to do their

1 delivered cost comparison. And the purpose of  
2 this chart is to expose the difference between  
3 the two. And, as the D.C. Circuit held in the  
4 Coal Exporters decision, if a railroad has the  
5 ability to price discriminate in order to  
6 secure the economic rents that are made  
7 available by other links in the supply chain,  
8 that is a classic indicator of monopoly power.  
9 And that's what we have here. In terms of the  
10 question about the construction of the dock,  
11 and I think it's important to differentiate  
12 between the dock and the conveyor. CSX spends  
13 a lot of time talking about acquiring land and  
14 refers to the BTG draft and has, in the  
15 photograph, the mowed property. That's all  
16 for a conveyor. You don't get to the conveyor  
17 unless you can build the dock. And there is  
18 no space to build the dock. In terms of time,  
19 by comparison, the third unit at the Seminole  
20 Generating Station, which is a brownfield site  
21 -- it was already set aside for a third unit,  
22 it was already a preliminary -- in the site

1 plan, it was already preliminarily intended to  
2 include a third unit -- and it still took  
3 three and a half years to get the permits.  
4 And, even then, they didn't get all the  
5 permits. And, ultimately, the plan was  
6 shelved. That's on a brownfield site, right  
7 next door to an existing use. To do something  
8 like build a large industrial coal dock on a  
9 greenfield site in the middle of a residential  
10 neighborhood, and we have the photographs that  
11 demonstrate that whatever you see from the  
12 river, you see trees. You go behind those  
13 trees and you see residences. And there are  
14 no for sale signs in any of those yards. To  
15 build a large industrial coal dock on a  
16 greenfield site would take, I would assume,  
17 considerably longer to get permitted, much  
18 less to get it built.

19 VICE CHAIRMAN MULVEY: But how is  
20 that site zoned today? Is that site zoned  
21 residential or zoned industrial or zoned --  
22 we'd have to have changes in the zoning laws



1 or the zoning laws could accommodate building  
2 the dock?

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

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

22 MR. DOWD: No. That was to build

1 a third unit at an existing --

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

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

17 COMMISSIONER NOTTINGHAM: I'm just  
18 not sure I follow the comparison. I mean, I'm  
19 looking again in the record to see if the  
20 comparison is there. But there are docks, and  
21 sometimes in that part of the world, they're  
22 called wharfs, built every day in Florida.

1 Building a dock is not necessarily the same  
2 thing as building a heavy duty industrial  
3 energy generating facility that has extensive  
4 potential Clean Air Act ramifications. You're  
5 talking about barges pulling up to a dock and  
6 unloading some coal onto a conveyor. I just  
7 don't -- I'm not quite sure I get your premise  
8 a minute ago, that it would be, obviously, in  
9 your view, more complicated to build and get  
10 permitted a dock than it would be an expansion  
11 of your electric generating facility.

12 MR. DOWD: Well, first, we're not  
13 talking about a recreational dock or a wharf  
14 for pleasure boats. We have photographs.  
15 They are pages 17 and 18 of our Exhibit 2B1,  
16 that show the dock at Plant Crist, which is in  
17 Pensacola. And that is not a pleasure wharf.  
18 That's a large industrial facility. There is  
19 a photograph of the type of crane that CSX  
20 posits could be installed on that dock. It's  
21 enormous. It's an enormous piece of  
22 equipment. And the comparison that I'm

1 drawing is in the amount of time it would take  
2 to get permits to construct an industrial  
3 facility like that on a greenfield site,  
4 surrounded by residences, as compared to what  
5 it took to simply add onto an existing power  
6 plant on a brownfield site. The latter took  
7 three and a half years. I would submit that  
8 to do the former would take considerably  
9 longer than that. And that's before you begin  
10 construction. I see my time has expired and  
11 I thank you.

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

17 (Whereupon, the hearing was closed  
18 at 12:29 a.m.)  
19  
20  
21  
22

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18:12 21:19,21 28:14 30:6 31:4 33:18 36:17 43:21 44:7 47:12 49:6 49:11 50:2 51:20 56:5 57:1,6,13,16 <b>ways</b> 38:17 <b>Wednesday</b> 1:14 <b>welcome</b> 4:4 <b>went</b> 24:15 34:15 39:22 <b>West</b> 10:3 52:15 <b>wetlands</b> 29:14 <b>we'll</b> 31:6 68:15 <b>we're</b> 26:13 31:18 31:19 40:16 44:22 50:10 56:15 67:12 <b>we've</b> 10:10 21:18 35:10 44:17 53:3 <b>wharf</b> 20:16 67:13 67:17 <b>wharfs</b> 66:22 <b>wherey</b> 51:22 <b>wide</b> 49:13,14,15 <b>willing</b> 28:13,13 <b>willingness</b> 26:17 <b>winning</b> 53:12 <b>wish</b> 5:2 6:8,14 <b>witness</b> 47:21 <b>wonder</b> 43:6 <b>words</b> 13:16 23:12 24:1 44:12 <b>work</b> 7:4 16:16,22 17:8,17 18:14 32:22 37:17 51:16 53:2 <b>works</b> 18:14 <b>world</b> 24:7 66:21 <b>worry</b> 40:1,6 <b>wouldn't</b> 17:12 23:20 27:16 37:17 47:1,5 <b>wrap-up</b> 52:18 <b>wrong</b> 52:13 <b>wrote</b> 53:13  <hr/> <b>Y</b> <hr/>	<b>yard</b> 23:17 <b>yards</b> 64:14 <b>year</b> 25:15 45:4 47:7,8 55:7,8,9,9 55:12 58:2,13 59:5 <b>years</b> 12:21 18:11 24:16 39:13 45:5 45:5,8 46:19 47:5 54:4 56:22,22 58:4 64:3 65:20 68:7 <b>yellow</b> 5:16,18  <hr/> <b>Z</b> <hr/> <b>zoned</b> 64:20,20,21 64:21 <b>zoning</b> 64:22 65:1  <hr/> <b>P</b> <hr/> <b>p</b> 1:5,13  <hr/> <b>\$</b> <hr/> <b>\$1.4</b> 55:13 <b>\$100</b> 32:9 56:21 <b>\$230</b> 55:8 <b>\$300</b> 7:21 9:21 25:10,18 47:10 54:15 58:1 <b>\$350</b> 55:12 <b>\$60</b> 25:17  <hr/> <b>0</b> <hr/> <b>004782</b> 48:13,16 <b>004785</b> 46:8  <hr/> <b>1</b> <hr/> <b>1-2</b> 48:16 <b>100</b> 13:5 23:17 54:4 <b>1000</b> 44:12 <b>11</b> 31:10 <b>12</b> 17:2 <b>12-15</b> 31:14 <b>12:29</b> 68:18 <b>1224</b> 2:9 <b>13</b> 49:19 <b>133</b> 37:18 <b>14</b> 4:22	<b>1501</b> 2:19 <b>17</b> 22:6 67:15 <b>17th</b> 2:9 <b>18</b> 67:15 <b>19</b> 22:6 <b>1998</b> 62:8  <hr/> <b>2</b> <hr/> <b>2B1</b> 22:7 67:15 <b>20</b> 4:21 5:5 16:11 30:5 <b>20005</b> 2:20 <b>2003</b> 11:13 17:10 18:8 45:11 <b>20036</b> 2:10 <b>2009</b> 48:8 <b>2010</b> 1:14 <b>202</b> 2:11,22  <hr/> <b>3</b> <hr/> <b>30</b> 1:14 3:22 <b>30-35</b> 17:3 <b>347-7170</b> 2:11 <b>35</b> 13:21 <b>395</b> 1:17  <hr/> <b>4</b> <hr/> <b>4</b> 3:12 <b>42110</b> 1:8 4:7 <b>4803-4812</b> 46:10 <b>49</b> 48:8  <hr/> <b>5</b> <hr/> <b>50</b> 53:4 <b>59</b> 3:19  <hr/> <b>6</b> <hr/> <b>6</b> 3:18  <hr/> <b>7</b> <hr/> <b>70-80</b> 25:18 <b>736-8175</b> 2:22  <hr/> <b>9</b> <hr/> <b>9:30</b> 1:19 <b>9:31</b> 4:2 <b>90s</b> 58:13		
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**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



227350

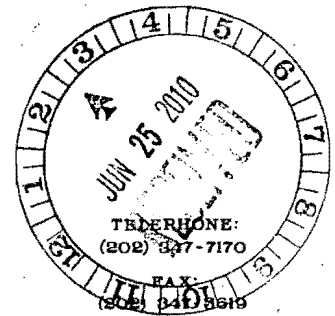
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June 25, 2010

**VIA HAND DELIVERY**

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

ENTERED  
Office of Proceedings

JUN 25 2010

Part of  
Public Record

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.

Ms. Cynthia Brown  
June 25, 2010  
Page 2

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Stephanie M. Adams". The signature is fluid and cursive, with the first name being the most prominent.

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

## From CSXT's Closing Brief at 27

one question for the Board, and it has nothing to do with crane design capacity or local zoning laws or environmental regulations. The question is whether water transportation is a real and viable option. The Board does not need to decide precisely how a dock

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.

its use for water transportation, the fact that many other utilities in Florida rely on water transportation supply chains like that proposed in CSXT's evidence, and the fact that nearby businesses regularly use barge transportation all speak to the viability of the barge option. Nothing more is required for the Board to find that water transportation constitutes an effective competitive option and therefore that CSXT is not market dominant.

### D. CSXT Is Not Market Dominant Over Movements Through Charleston.

Regardless of the Board's ruling as to CSXT's market dominance over the mine origins, there can be no question that CSXT is not market dominant over movements through Charleston. Charleston is not a mine, and coal shipments do not "originate" at the Port of Charleston. Rather, if coal or petcoke ever were transported

## From SECI's Closing Brief at 6

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-v-c") ratios produced by the rates subject to SECI's Complaint substantially exceed 180%.

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

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 erstwhile competition acts as a true economic constraint on the defendant's rate ambitions.

In its Reply Evidence, CSXT framed four (4) points of contention with respect to SECI's Opening presentation on variable costs. On Rebuttal, SECI adjusted the framing 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 11-25-12.

# CSXT's "Alternative" Routes Compared To CSXT's Existing Route



From CSXT's Reply Exhibit II-B-2 (EVA Report) at 1-2 and SEC's Opening Exhibit III-A-1



## Dr. Sansom's FPSC Testimony

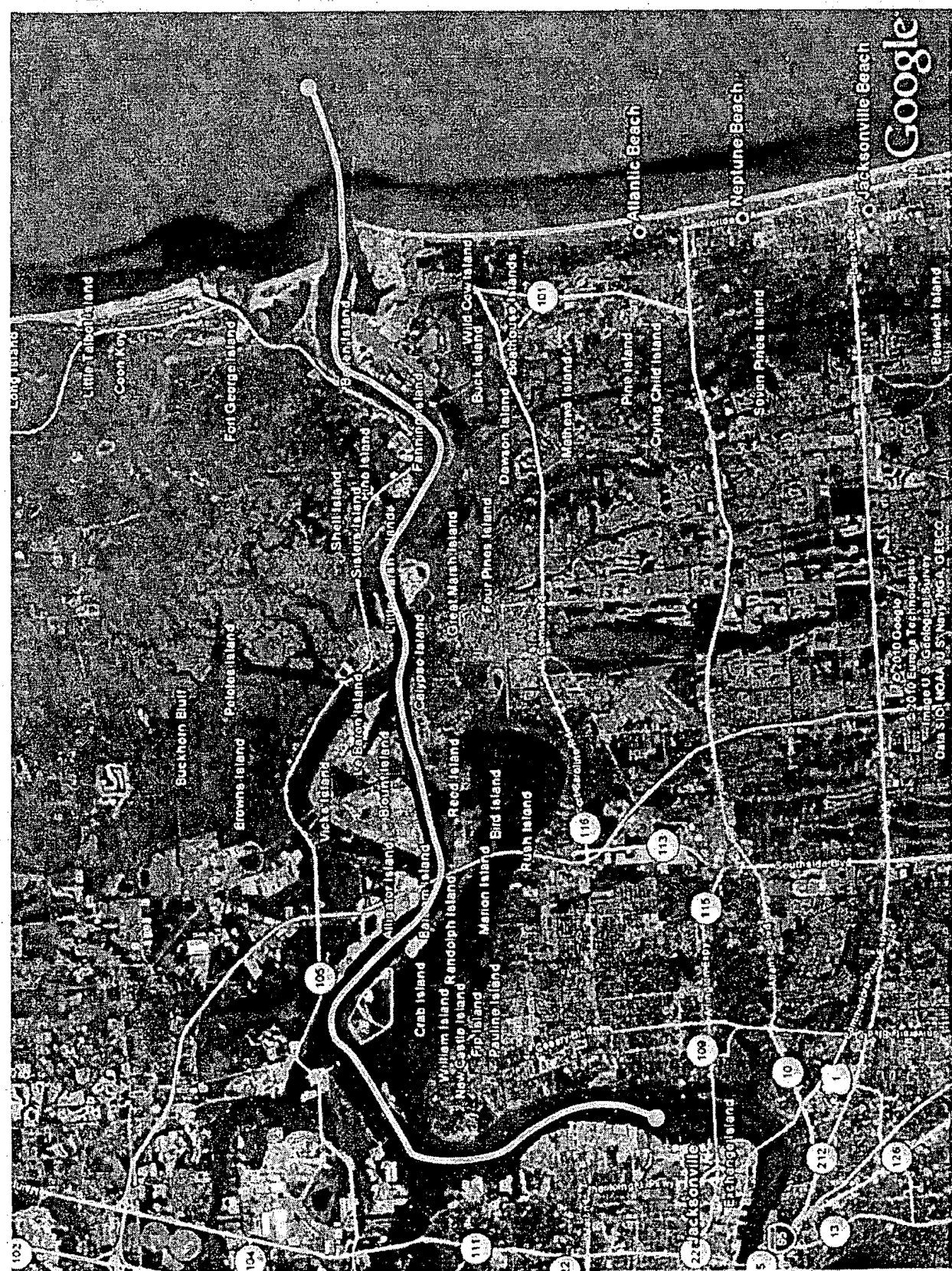
### **Q. What is Seminole's situation and approach?**

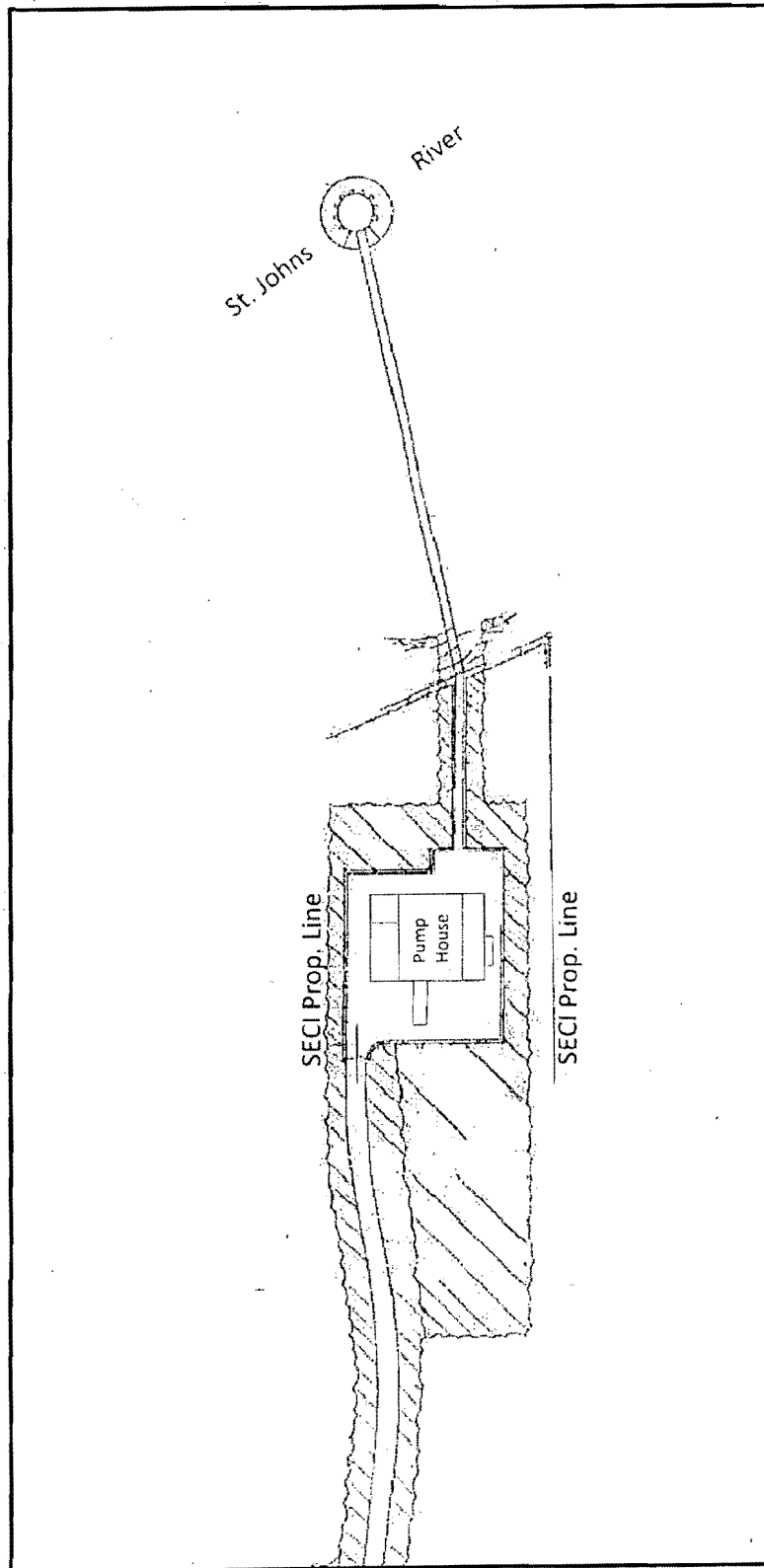
**A.** Seminole has a rail-served plant at Palatka, Florida. In 2002 and 2003 Dotiki coal delivered by rail cost Seminole's members less than Dotiki coal delivered by barge to Big Bend. This is shown in the table below and demonstrates that CSXT's service to Palatka, which does not enjoy rail/barge competition, 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.

...

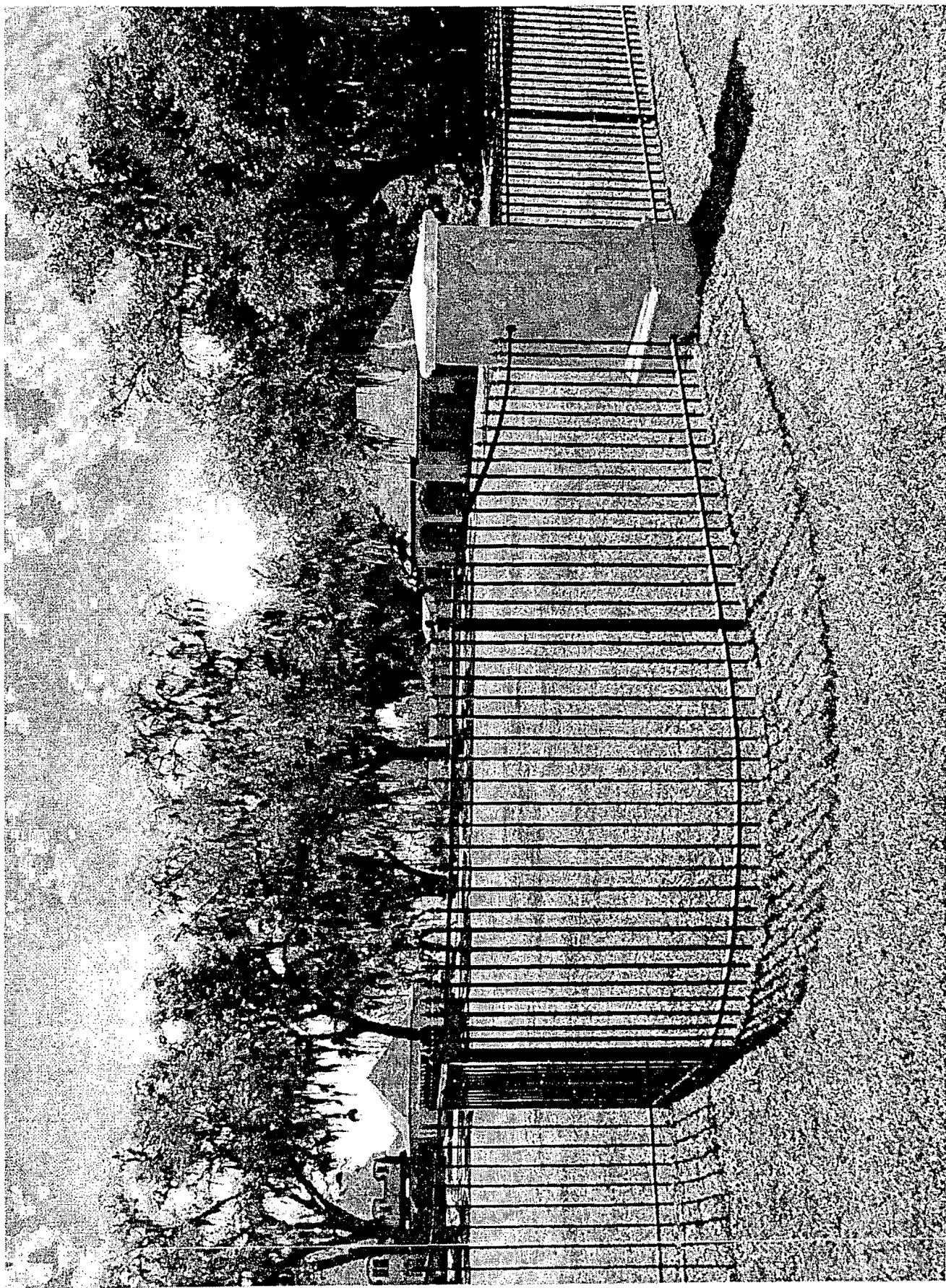
### **Q. What, if anything, is noteworthy about this?**

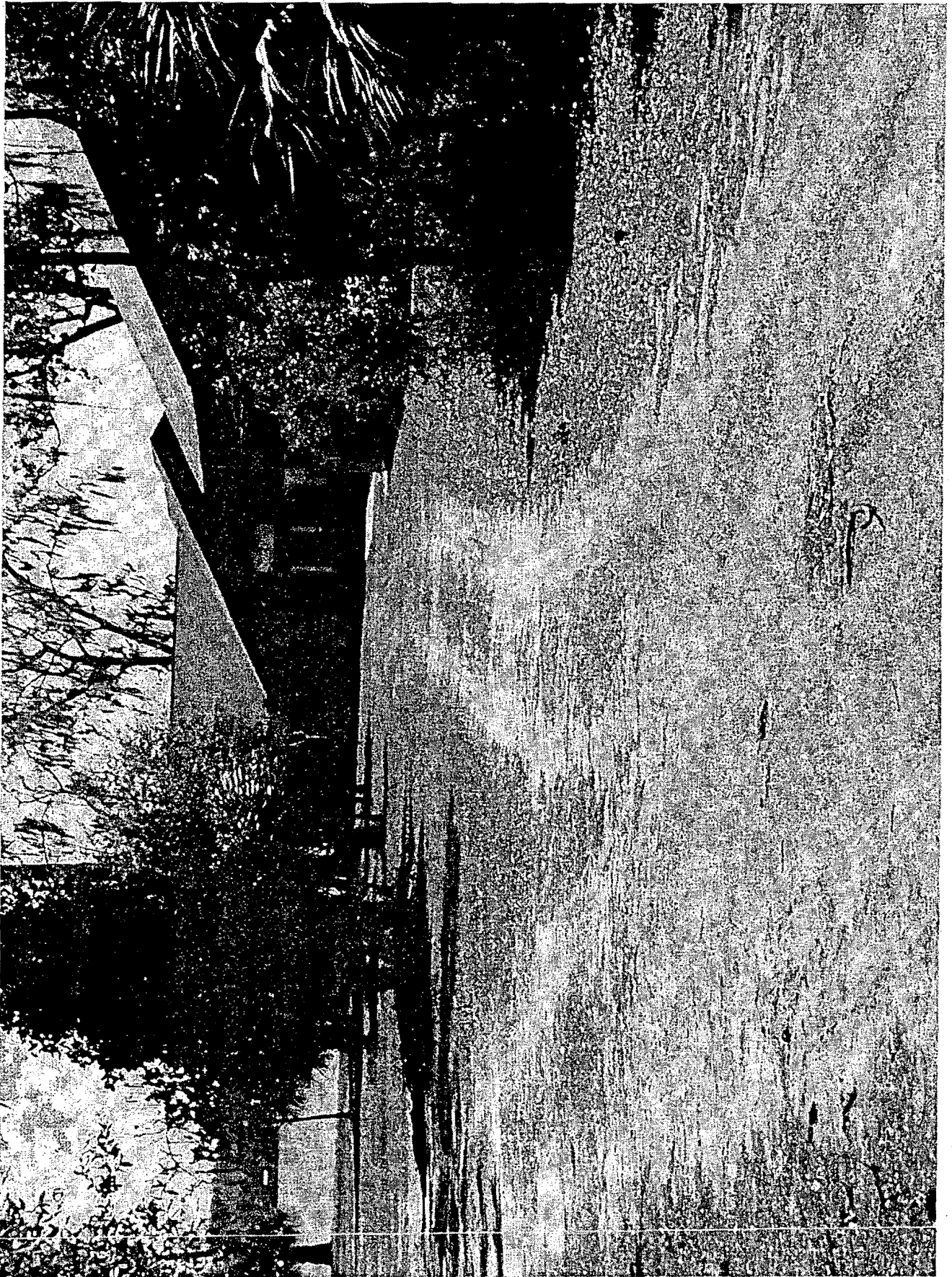
**A.** This is noteworthy because it demonstrates substantial cost savings via rail, even though Seminole is captive to the CSXT rail system and Big Bend could have rail/water competition.



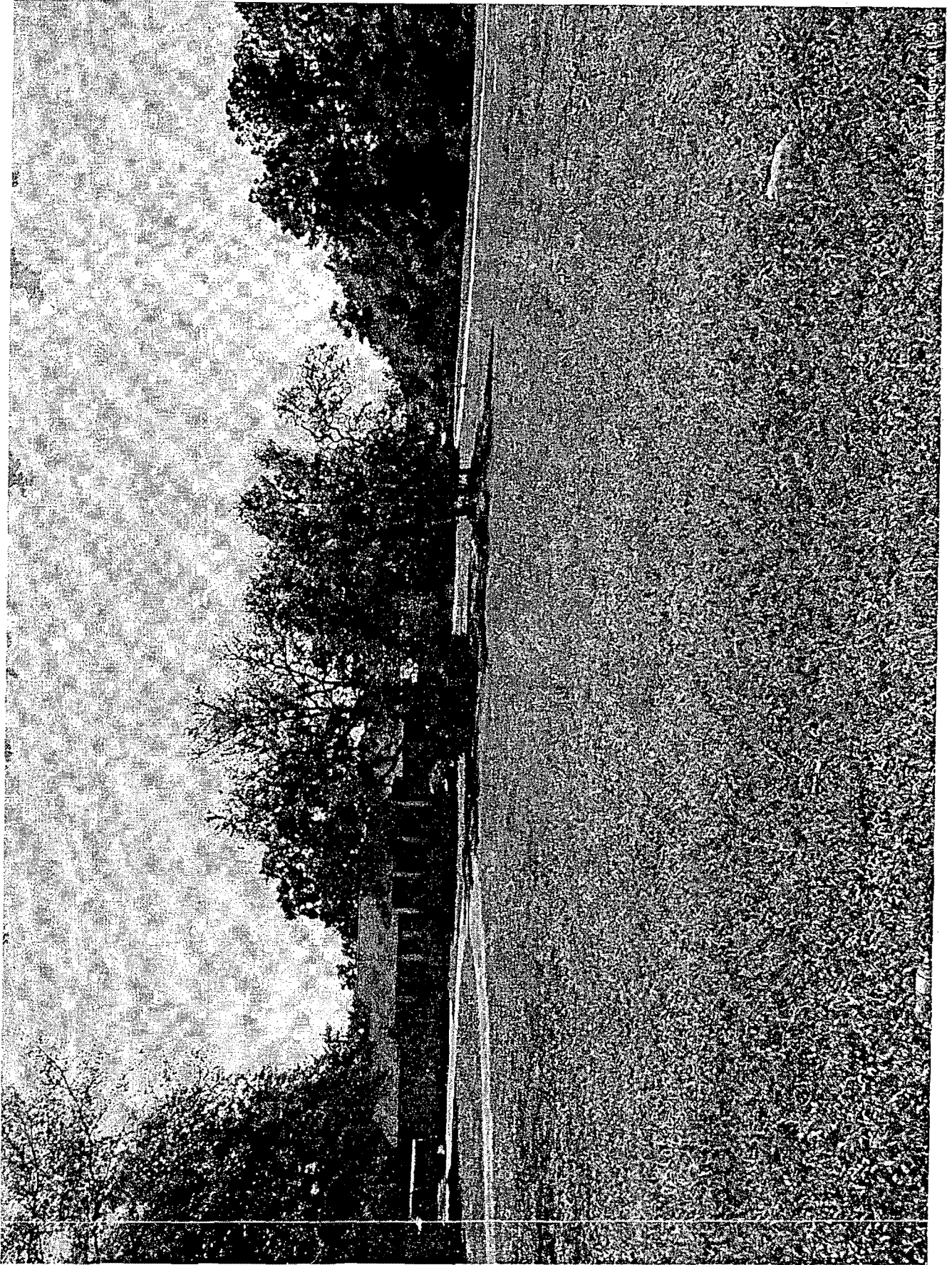


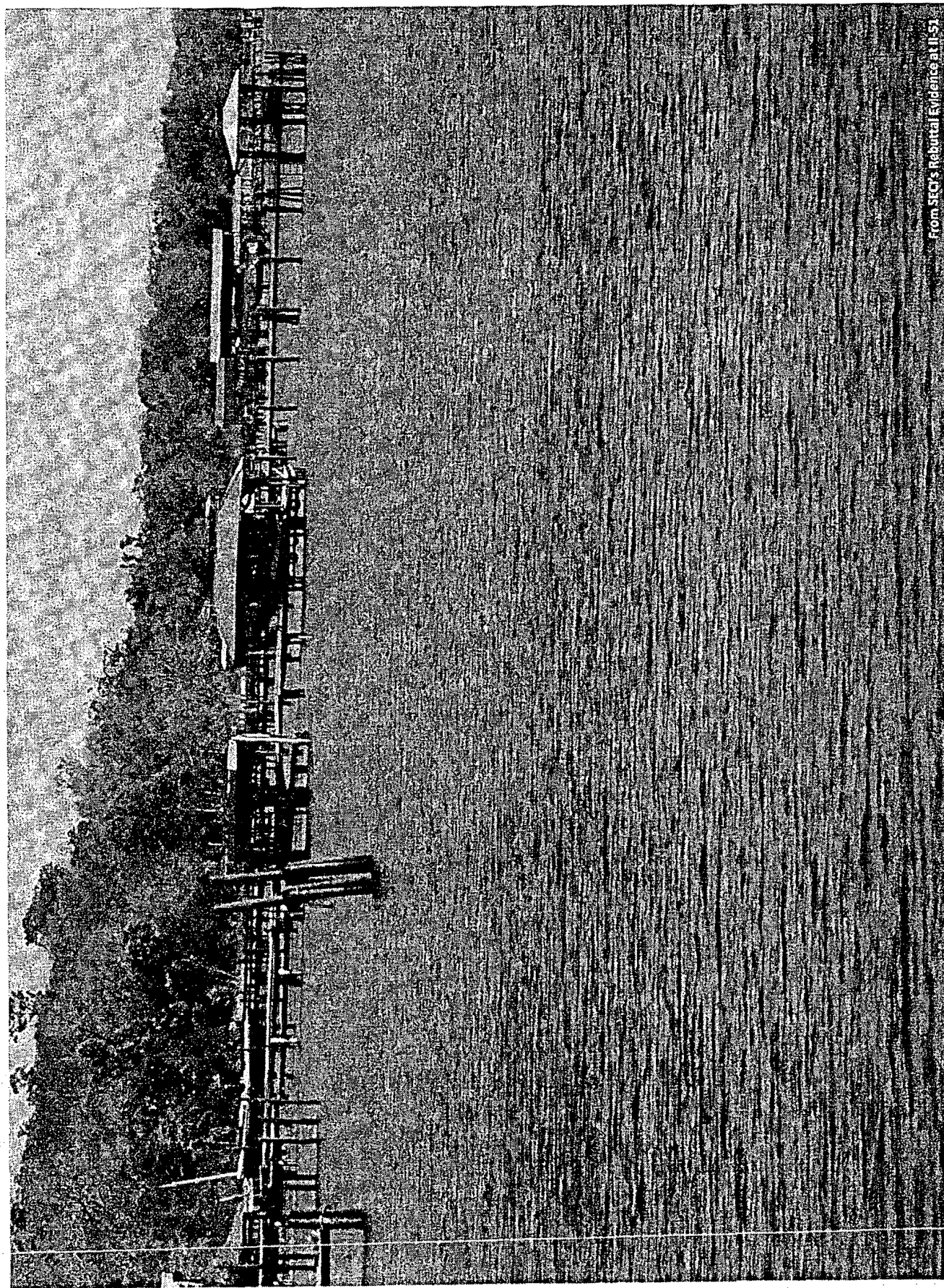












From SEC's Rebuttal Evidence at II-51



# Permitting & Regulatory Requirements

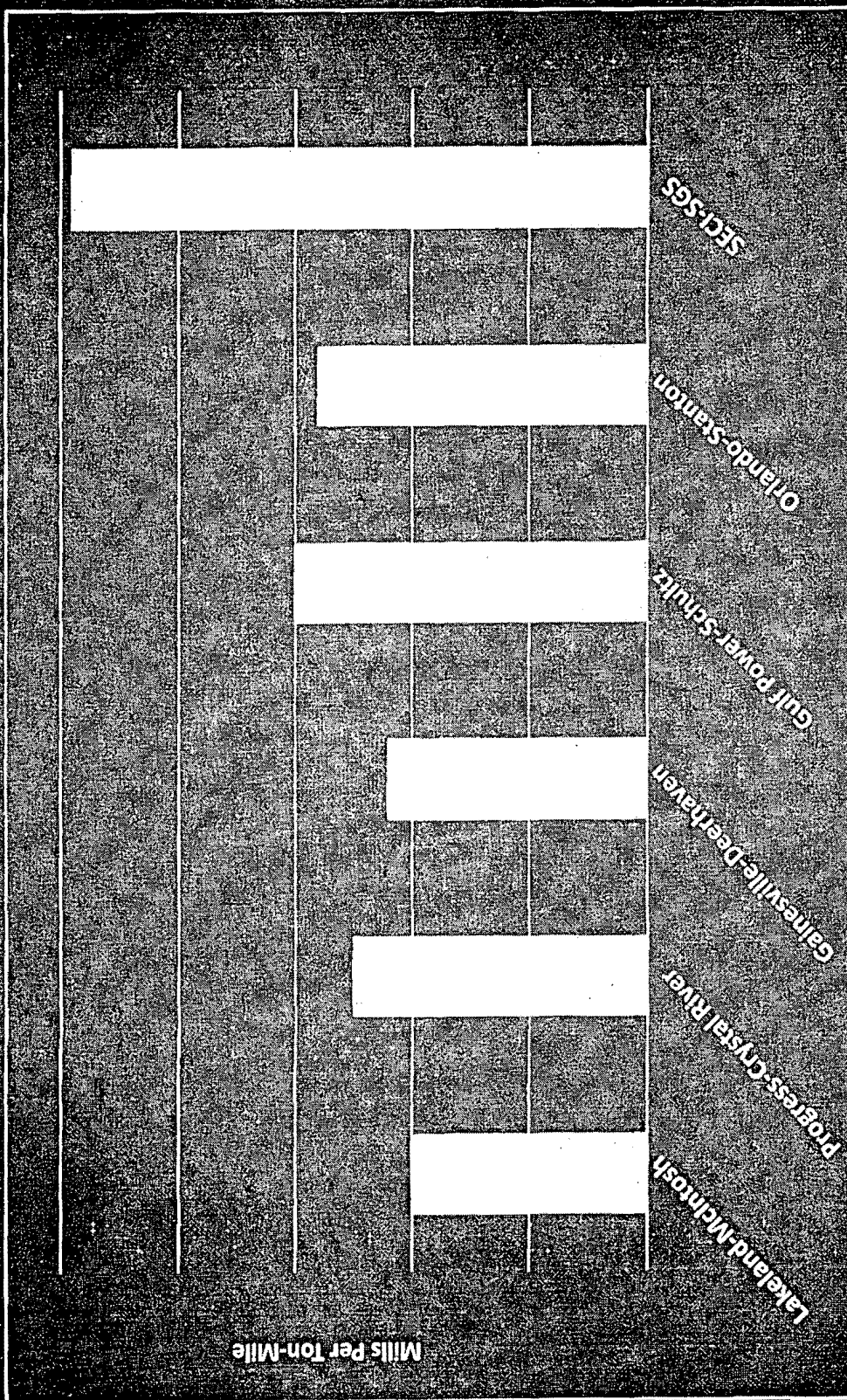
1. Amend Putnam County's future land use map to rezone land parcels next to the river;
2. Obtain Putnam County's & Florida D.O.T.'s authorization for coal conveyor's undercrossing/overcrossing of C.R. 209 and associated right-of-way;
3. Seek authorization from the State Board of Trustees of the Internal 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

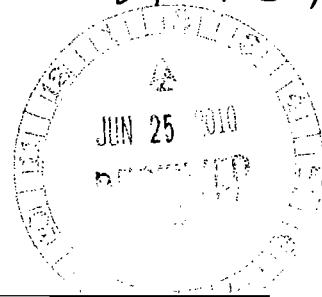


# Rail Transportation Rates to Florida Utilities



From SEC's Rebuttal Evidence at 1-8 (redacted)

227348



**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

SEMINOLE ELECTRIC COOPERATIVE, INC.

Complainant,

v.

CSX TRANSPORTATION, INC.

Defendant.

Docket No. NOR 42110

**ENTERED  
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**JUN 25 2010**

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**ORAL ARGUMENT EXHIBITS OF  
CSX TRANSPORTATION, INC.**





# VICINITY OF PALATKA, FL PUTNAM COUNTY

Revised Date: June 22, 2010



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