

BEFORE THE  
SURFACE TRANSPORTATION BOARD



SEMINOLE ELECTRIC COOPERATIVE, INC

223843

Complainant,

Docket No NOR 42110

v

CSX TRANSPORTATION, INC

Defendant

ENTERED  
Office of Proceedings

OCT 27 2008

Part of  
Public Record

**DEFENDANT CSX TRANSPORTATION, INC.'S REPLY TO  
COMPLAINANT'S MOTION TO STRIKE PORTIONS OF DEFENDANT'S  
REPLY TO COMPLAINANT'S PETITION FOR INJUNCTIVE RELIEF**

Defendant CSX Transportation, Inc ("CSXT") hereby submits its Reply to Complainant Seminole Electric Cooperative Inc.'s ("Seminole" or "SECI") "Motion to Strike Portions of Defendant's Reply to Complainant's Petition for Injunctive Relief" ("Motion to Strike" or "Motion").

**INTRODUCTION**

Seminole's Motion is much ado about nothing CSXT did not publicly disclose any confidential information, and Seminole does not contend otherwise Seminole's rate suspension petition sought to enjoin CSXT's future common carrier rates on the ground that they would impose an unexpected and unduly large increase In response, CSXT submitted – under seal and to the Board only – limited information showing {

} CSXT

carefully limited the information it submitted to the Board, and did not publicly disclose highly sensitive information such as the rates Seminole was paying under its existing contract or the rates and other specific terms the parties had discussed in their contract negotiations

Significantly, Seminole does not describe the limited information CSXT provided to the Board, or make any effort to explain how the provision of that information may harm Seminole. In fact, Seminole itself has *publicly* disclosed far more confidential information concerning the parties' contract than the information the Motion seeks to strike.

The parties do not have a confidentiality agreement governing their contract negotiations. They have not yet commenced settlement negotiations, but once such negotiations commence, they will be subject to regulatory confidentiality requirements and any other confidentiality agreement the parties may wish to enter. CSXT's provision to the Board of information responsive to Seminole's erroneous allegations was entirely appropriate and did not violate any confidentiality agreement or requirement

The Board should recognize the Motion for what it is, a meritless and unnecessary diversion of the resources of the parties and the Board. The Board should promptly deny the Motion and proceed to determination of the merits of Seminole's Petition for extraordinary injunctive relief

## ARGUMENT

As a threshold matter, Seminole does not mention the standard for granting a motion to strike, and makes no attempt to show that it satisfies that standard. Any redundant, irrelevant, immaterial, impertinent, or scandalous matter may be ordered stricken from any document. 49 C.F.R. § 1104.8, *see International Bhd of Elec Workers, Local Union 465—*

*Petition for Declaratory Order—San Diego Trolley, Inc*, 9 I C C 2d 672, 674 (1993) (denying motion to strike reply where it did not contain type of material enumerated in the rule). As movant, Seminole has the burden of proving entitlement to the relief it seeks. *See, e g, Union Pacific Corp—Control & Merger—Southern Pacific Corp*, STB Fin. Docket No. 32760 (Sub-No 44) (July 27, 2005) Alone, Seminole’s failure to demonstrate the information it seeks to strike is “redundant, irrelevant, immaterial, impertinent, or scandalous” compels denial of its Motion.

**I. COMPLAINANT SEMINOLE PUT AT ISSUE THE MATTERS AND INFORMATION DISCUSSED IN CSXT’S REPLY TO SEMINOLE’S MOTION FOR EXTRAORDINARY AND UNPRECEDENTED INJUNCTIVE RELIEF.**

CSXT provided to the Board the information Seminole’s Motion seeks to strike – filed under seal and designated Highly Confidential to shield it from public disclosure – in direct response to Seminole’s claim that the rate increase it anticipated would be large, sudden, and unexpected CSXT did not publicly disclose allegedly confidential information, and the limited information it provided to the Board was solely for the purpose of responding to Seminole’s petition for unprecedented pre-adjudication rate suspension. That limited “disclosure” was necessary to demonstrate the inaccuracy of Seminole’s allegations

At the same time it filed its Complaint, Seminole filed an extraordinary Petition for Preliminary Injunction (October 3, 2008) (“Petition”), asking that the Board suspend CSXT’s statutory ratemaking initiative and order CSXT to extend the rates and terms of an expiring contract for Seminole traffic during the pendency of the case. CSXT has demonstrated that Seminole is not entitled to the extraordinary relief it seeks and that the Board should deny the Petition. *See* Defendant CSX Transportation Inc ’s Reply to Petition for Injunctive Relief (Oct. 17, 2008) (“Reply”) For purposes of Seminole’s present Motion, however, the important point

is that Seminole put at issue the question of whether CSXT's scale rates would represent an "abrupt" and "massive" increase over the rates Seminole is presently paying under the parties' long-term contract. *See, e.g.* Petition at 7-9.<sup>1</sup> In the single unique case in which the Board suspended a carrier's statutory ratemaking authority during the pendency of a rate case, the Board did so in large part because it found the increase represented by the carrier's new rate to be large, "dramatic, sudden, and unexpected," and the extraordinary circumstances prevented the receiving utility from adequately budgeting for the increase. *See* Petition at 7-8 (quoting *Arizona Public Service Co v BNSF*, 2003 WL 21055725 ("*McKinley*"))<sup>2</sup>

In an attempt to show that the circumstances surrounding this case were similar to those in *McKinley*, Seminole argued that the rate increases represented by the scale rates were "abrupt" (*i.e.* sudden and unexpected) and "massive," "represent[ing] increases well in excess of 100%" Petition at 4, 7, *V.S. Geeraerts* at 2, 4, 6. Unlike CSXT, Seminole did not file its Petition under seal or otherwise seek to shield the parties' confidential contract rates from public disclosure.<sup>3</sup> Because CSXT's scale rates are publicly available (and quoted in Seminole's public Petition), Seminole's unilateral decision to make public the proportionate increase of the scale rates over its existing contract rates necessarily disclosed the approximate level of the rates under

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<sup>1</sup> As demonstrated in CSXT's Reply, the scale rates on which Seminole's Petition rests likely will not apply to its traffic, as CSXT will issue a Seminole-specific common carrier tariff on or before November 15, 2008. *See* CSXT Reply at 2.

<sup>2</sup> As explained in CSXT's Reply, another critical distinction between *McKinley* and the present case is that in *McKinley* the carrier consented to suspension of its ratemaking authority during the pendency of the (reopened) rate case. *See* CSXT Reply at 19-20.

<sup>3</sup> All of the information Seminole seeks to strike from CSXT's Reply was filed under seal and designated Highly Confidential, thereby limiting "disclosure" of that information to the Board and members of its staff having need to review that information for purposes of this case. *See* CSXT Reply, Highly Confidential Version (Oct. 17, 2008). Seminole's Motion does not claim that CSXT made the information it seeks to strike available to anyone other than the Board.

the existing contract<sup>4</sup> Moreover, Seminole issued a press release stating that the challenged “tariff rates are more than twice as high as the expiring contract rates.” See Seminole News Release, “Seminole files rate complaint to protect its members” at 2 (Oct 3, 2008) (“Seminole News Release”), available at [http://www.seminole-electric.com/main/public/2008/sec12008-10-03\\_STB.pdf](http://www.seminole-electric.com/main/public/2008/sec12008-10-03_STB.pdf) Thus, to the extent it may be a breach of the 1998 Contract to disclose its terms publicly, it is Seminole that has breached that contract requirement, not CSXT

In response to Seminole’s rate suspension Petition and supporting allegations, CSXT presented evidence demonstrating that, in context, the change represented by its scale rates was neither “massive” nor unexpected or “abrupt” See Reply at 12-13, 16; V.S. Sullivan at 2-5 This information was highly relevant and important to demonstrating that Seminole could not satisfy the essential requirements for extraordinary injunctive relief<sup>5</sup> Importantly, CSXT classified information concerning the parties’ contract and their contract negotiations as “Highly Confidential” under the agreed protective order the parties had submitted to the Board See Decision, STB Docket No 42110 (Oct. 22, 2008) (adopting the Protective Order) Moreover, in contrast to Seminole’s public Petition and press release, CSXT’s Reply does not publicly

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<sup>4</sup> Similarly, Seminole repeatedly stated in its public filing that the CSXT scale rates would represent an increase of { } Given the other information Seminole has made public (including applicable scale rates and annual coal volumes transported by rail), a competitor or other interested person readily could use that information to determine the approximate contract rates Seminole is presently paying.

<sup>5</sup>In order to rebut Seminole’s claims that CSXT’s rate increases were unduly large and unexpected, it was necessary that CSXT describe to the Board {

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Having put those very facts at issue, Seminole should not be heard to complain when CSXT responded by providing truthful responsive information, filed under seal to maintain confidentiality, to the Board

disclose information that could be used to determine the rates Seminole was paying under the existing contract

**II. NONE OF THE INFORMATION THAT SEMINOLE SEEKS TO STRIKE IS SUBJECT TO A CONFIDENTIALITY AGREEMENT OR OTHER NON-DISCLOSURE PROVISION OF APPLICABLE LAW.**

Conspicuously absent from the Petition is any description of the confidential information that Seminole alleges was improperly disclosed or how Seminole might be harmed by the “disclosure” (to the Board) of that information. As demonstrated below, the information that Seminole seeks to strike from CSXT’s Reply is already public, not protected by any confidentiality agreement or requirement, or both.

**A. Submission of Information Concerning the 1998 Contract to the Board is Authorized by that Contract, and Seminole Publicly Disclosed the Information in Question and Even More Sensitive Information Before CSXT Provided it to the Board.**

In its Reply, CSXT furnished the Board with some very limited information concerning the parties’ existing contract (the “1998 Contract”) The only information in CSXT’s Reply and the Sullivan verified statement concerning the terms of the 1998 Contract that is subject to the Motion consists of. {

} See Reply at 13-14, 16, V S Sullivan at 3-5

With respect to the first item, Seminole itself published the information and made it widely available Regarding the 10-year term of the contract, Seminole issued a press release stating that the parties’ current contract is ten years long, commenced in 1998, and expires at the

end of 2008. *See* Seminole News Release at 1. The length of the contract term, the fact that it is an all-rail contract, and the contract's expiration date may also be determined from information that Seminole itself publishes each year in its annual reports, which are publicly available documents. *See, e.g.*, Seminole Electric Cooperative, Inc. Annual Report 2007 at 52, n. 11 (disclosing that the 1998 Contract will expire on December 31, 2008, and the amounts paid under rail transportation contracts in 2007 and 2006)<sup>6</sup>; Seminole Annual Report 2001, Financial Statements, n. 11; Seminole 1999 Annual Report at 19-20, Seminole 1998 Annual Report at 33-34.

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} Without more, such non-specific statements could not be used to determine the Contract's actual rates, or any of its other terms and conditions.<sup>7</sup> Here again, Seminole's own public disclosure of rate information is more specific and revealing, and potentially more damaging than the more general information CSXT provided to the Board. *See, e.g.*, Seminole Press Release at 2 (stating that challenged rates, which Seminole included in its public Complaint, are "more than twice as high as the expiring contract rates.") Moreover, Seminole now concedes that it has long had notice that its rates are below market levels and would increase substantially at the end of the contract term, stating that it "has known for some time that [it] would likely be facing a rate increase when [the 1998 Contract] expires," and that the new rates would be at "substantially higher" levels. *See* Motion, V S Reid at 7; *cf McKinley*

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<sup>6</sup> Seminole's annual reports are available on its internet website. Presently, reports for 2001 through 2007 are available at [www.seminole-electric.com](http://www.seminole-electric.com).

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<sup>8</sup> Seminole itself has not acted in a manner consistent with its newly minted interpretation of the Contract. Just three weeks ago, Seminole issued a press release that effectively disclosed the most confidential term of the 1998 Contract, its rates. *See supra* at 5, 6-7. Seminole did not present CSXT with a written confidentiality agreement from *any*, let alone all, of the potential recipients of that information. Moreover, Seminole has publicly disclosed terms of the 1998 Contract in its annual reports in every year since the execution of that agreement. To CSXT's knowledge, Seminole has never asked CSXT's permission to publish such information, and it has never presented a written confidentiality agreement from any recipient of that information. Thus, Seminole's course of conduct demonstrates that it did not adopt its current view of the confidentiality requirements of the Contract until very recently.

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} Surely it cannot be Seminole's position that the Board is not entitled to know the terms of the contract that Seminole

In all events, the Board could not grant the relief Seminole seeks – imposing the terms of an expired contract on CSXT during the pendency of a rate case – without first reviewing that contract. The peril in such a course of action is illuminated by CSXT’s Reply, which demonstrates that many of the R/VCs generated by the 1998 Contract would be insufficient to allow the Board to exercise jurisdiction. See CSXT Reply at 17-18; see also Motion at 9-10 (attempting to confer jurisdiction over Seminole’s Petition by proposing that the Board prescribe a rate for the duration of this proceeding that would have the effect of increasing the rates in the 1998 Contract to a level Seminole alleges generates an R/VC above 180% R/VC) CSXT does not consent to such an untimely and inappropriate attempted amendment of Seminole’s Petition, and does not agree that any such modification would confer jurisdiction on the Board in any event <sup>10</sup>

**B. The Parties Have No Confidentiality Agreement Concerning Their Contract Negotiations.**

Although Seminole’s Motion asserts that the parties had an agreement regarding confidentiality of contract negotiations, the only support it cites for that claim is the verified statement of Mr. Reid. See Motion at 2. However, Mr. Reid’s statement does not aver that Seminole and CSXT had a binding confidentiality agreement regarding contract negotiations. See V.S. Reid. Nor does Seminole present a scintilla of other evidence to support the unfounded claim that the parties had a confidentiality agreement concerning negotiations for a contract to

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is asking the Board to impose on CSXT after its expiration. Without access to that information, how could the Board even know what it was ordering?

<sup>10</sup> This response to Seminole’s motion to strike is not the proper place to raise or address issues concerning the merits of the Petition. If Seminole properly presents a request to amend its Petition, CSXT will respond to that request.

replace or succeed the 1998 Contract. The plain fact is, despite Seminole's belatedly declared subjective intentions, the parties had no such agreement.

Most of Mr. Reid's statement refers to provisions of the 1998 Contract, which by definition has no bearing on subsequent negotiations concerning a potential successor contract. *See* V S Reid 2-6<sup>11</sup>. In addition, Mr. Reid makes several references to his private, subjective "understanding" of the parties' confidentiality obligations and his personal view that a 1998 letter agreement did not authorize the parties to disclose information concerning their negotiations for a successor contract. *See id.* Importantly, nowhere does Mr. Reid claim that Seminole communicated these subjective views to CSXT, let alone that CSXT agreed to be bound by them.

As a matter of law and of common sense, there can be no "agreement" or contract between two parties when one party is not aware of the purported agreement and has not agreed to terms silently assumed by the other party. While it is not the Board's role to interpret private contract provisions or the effect of contract negotiations, the general governing law is well-established: binding contractual agreements require the knowledge and assent of all parties to be bound. An individual party's unannounced, "hidden, secret or subjective intent" is irrelevant. 1 Williston on Contracts § 3.5 ("Neither the assent needed to form a contract nor the contractual intent of the parties can be based on the secret purpose or intention of one of them, and the uncommunicated, privately held intent of any party to a contract will not bind any other party."); *see id.* at § 3.4 ("In order to create a legal obligation by way of a contract, it is the parties'

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<sup>11</sup> Seminole's arguments concerning the confidentiality provisions of the 1998 Contract are irrelevant to the question of whether the parties entered a separate agreement providing for confidential treatment of information exchanged in negotiations concerning a potential successor contract.

objective manifestations, not their secret intentions, that determine whether mutual assent is present ") Here, Seminole alleges only Mr. Reid's subjective and unannounced intent, which is not sufficient to form a valid offer, let alone a binding contract.

The fact that both of these sophisticated and experienced businesses are well aware of the requirements for a binding confidentiality agreement is further demonstrated by the written confidentiality agreement they entered concerning separate contract negotiations in 2005. Those negotiations concerned Seminole's potential addition of another generating unit at SGS, and whether and under what terms CSXT would transport additional coal to be burned by that unit. See *V S Reid* at 6-7, n 3 {

} Obviously, the parties know how to enter a confidentiality agreement concerning contract negotiations, when they wish to do so. In this context, the absence of a written agreement or other evidence of a confidentiality agreement concerning the parties' discussions of a contract to succeed the 1998 Contract speaks volumes: the parties did not enter into such an agreement. Contrary to Seminole's belated assertions, the parties had no confidentiality agreement regarding their negotiations for a contract to succeed the 1998 Contract.

Moreover, as with contract terms, Seminole has publicly disclosed information concerning contract negotiations, which it now claims is protected by a silent confidentiality (and previously undisclosed to CSXT) "agreement." Speaking with the Tampa Tribune a year ago, Seminole's Jack Reid discussed the parties ongoing contract negotiations, stating "We've had

discussions with CSX . . . We know there is going to be an increase, and we believe it is going to be a significant increase”<sup>12</sup> If Seminole, or its witness Mr Reid, truly thought statements to the Board about the parties’ contract negotiations were inappropriate or violated Seminole’s subjective “understanding” of the parties’ confidentiality obligations, certainly public statements in a wide-circulation newspaper regarding those same negotiations would also violate that understanding.

With respect to the limited information concerning contract negotiations in the mid-1990s that CSXT provided to the Board as background to the 1998 Contract, Seminole’s Motion presents two possible conclusions. Regardless of which is correct, the agreements Seminole cites demonstrates CSXT is entitled to present information to the Board concerning the 1998 negotiations. First, as Seminole notes, the parties entered a letter agreement in 1998 concerning confidentiality of information exchanged during negotiations leading to the 1998 Contract. {

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<sup>12</sup> “CSXT Seeking Public Aid Amid Its Growing Profit,” The Tampa Tribune (Oct 11, 2007), available at <http://www.tbo.com/news/metro/MGBZZ5YQM7F.html>

Second, if, as Seminole contends, the integration clause of 1998 Contract extinguished the March 1998 Letter Agreement, then CSXT had no further obligation to keep information concerning the negotiation of that contract confidential *See* Motion at 5 (contending that Section 34 of the 1998 Contract superseded and replaced the prior confidentiality agreement), *see also* Restatement of Contracts (Second) § 213 (“A binding integrated agreement discharges prior agreements to the extent it is inconsistent with them . . . [and] to the extent that they are within its scope.”) If Seminole’s argument were accepted, then the March 1998 Letter Agreement has no force and the parties have no confidentiality obligation concerning negotiations leading to the 1998 Contract

**C. FRE 408 Does Not Apply to Commercial Contract Negotiations, and To Date There Have Been No Settlement Negotiations.**

Fed R. Evid. 408 applies only to *settlement* negotiations. It has neither application nor relevance to standard contract negotiations like those at issue in the Petition and CSXT’s Reply. Contrary to Seminole’s assertion, the parties have not yet engaged in settlement negotiations. Instead, until Seminole filed its Complaint three weeks ago, the parties had been engaged in standard commercial negotiations, seeking to agree upon a contract to govern transportation of coal to SGS after the existing contract expires. Seminole’s contention that Federal Rule of Evidence 408 “disfavors” evidence of settlement negotiations erroneously conflates two separate and distinct activities: (i) contract negotiations between two parties to a commercial relationship between whom there is no litigation pending, which is the sort of information at issue in this Motion; and (ii) settlement (or “compromise”) negotiations between parties in litigation, one or more of whom have asserted a claim for relief against the other.<sup>13</sup> *See*

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<sup>13</sup> As Seminole notes, the Federal Rules of Evidence do not govern proceedings before the Board in any event. *See* Motion at 7. CSXT wishes to make clear that, both in mediation before the

Fed R Evid. 408 (applying to “negotiations *regarding the claim*”(emphasis added)) Until Seminole filed this rate case with the Board on October 3, 2008, there was no logical possibility of, nor any need for, settlement negotiations, because there was no claim(s) to settle. Indeed, CSXT was surprised to find that, in response to its September 2008 contract proposal, Seminole terminated contract negotiations and filed this rate case.

Rule 408 does not bar evidence of ordinary contract negotiations that take place before the existence of a “clearly-defined disputed claim between the parties that they could have settled.” *Advanced Accessory Sys. LLC v Gibbs*, 71 Fed. Appx. 454, 465 (6th Cir. 2003) (affirming district court’s admission of communications regarding contracts where “the communications in question all took place before the filing of any legal claim”); *see McCormick on Evidence* § 266 (for Rule 408 to apply “an actual dispute must exist”). Stated differently, Rule 408 does not attach or apply until one party has filed a legal “claim” seeking relief from the other party.<sup>14</sup> The parties have not engaged in settlement negotiations, or any substantive discussions, following Seminole’s filing of its Complaint. Therefore, even if the parties were in federal court, there would be no settlement negotiations to which Rule 408 would apply.

Seminole does not explain why contract negotiations that occurred months and years before it filed its Complaint might be considered “settlement negotiations” for Rule 408 purposes, except in a footnote asserting that “agreement on a new or extended contract would

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Board and in any other actual settlement negotiations, it is willing to enter and abide by appropriate confidentiality agreements. What Seminole seeks to do here, however, is retroactively to impose confidentiality requirements the parties did not discuss or agree to, and which Seminole itself has not heretofore followed.

<sup>14</sup> While it may be true that one purpose of the parties’ negotiations was to attempt to avoid rate case litigation, that alone does not transform contract negotiations into settlement negotiations. Otherwise, all commercial negotiations involving any potential for litigation would be governed by Rule 408.

result in [Seminole's] voluntary dismissal of its Complaint ” This makes little sense, because the contract negotiations at issue occurred before Seminole filed its Complaint – there was no legal “claim” that the parties could have been seeking to settle Contract negotiations from before Seminole filed a complaint, or any other legal “claim” for relief, cannot possibly be seen as an attempt to “settle” a claim that Seminole had not yet asserted. The parties have not engaged in settlement negotiations and Rule 408 is not relevant to the parties’ contract negotiations

**III. IN ALL EVENTS, THE LIMITED INFORMATION DISCLOSED TO THE BOARD RESPONDS DIRECTLY TO THE NECESSARY PREREQUISITES FOR THE EXTRAORDINARY RELIEF SEMINOLE SEEKS.**

The information that Seminole seeks to strike is unobjectionable, and not particularly sensitive, material that has been filed under seal (in an abundance of caution) and is directly responsive to Seminole’s own representations to the Board First, CSXT designated every statement that Seminole seeks to strike “Highly Confidential” information and filed them under seal CSXT did not disclose *any* of this information to the public— it provided the information to the Board and only to the Board. There is no harm to Seminole nor should there be any “chilling effect” from CSXT’s limited disclosure of information to the Board. Indeed, CSXT’s careful treatment of information regarding the parties’ negotiations stands in stark contrast to Seminole’s treatment of that same information *See supra* at 4-5, 6-7, 11-12 (discussing some of the confidential information that Seminole has publicly disclosed) It makes no sense for Seminole to claim that it is improper for CSXT to file with the Board under seal information that in the past Seminole itself has publicly disclosed

Second, the information CSXT submitted to the Board was directly responsive to Seminole’s representations in its Petition for Injunctive Relief. For example, Seminole’s Petition depended on the claim that, if CSXT’s common carrier rates were not suspended when the 1998

Contract expired, Seminole would suffer “irreparable harm” (one of the several essential prerequisites for the extraordinary remedy of a preliminary injunction) <sup>15</sup> Seminole attempted to satisfy that prerequisite by claiming that it was facing a large and unexpected rate increase. Seminole asserted that the increase would be “abrupt” and “massive,” and it represented that the scale rates it challenged “would raise [Seminole’s] coal transportation rates by over 100% overnight ” Petition at 8 & n 5. The evidence CSXT presented directly responded to Seminole’s allegations of irreparable harm and its claimed likelihood of success on the merits <sup>16</sup>

Seminole also asserted in its Petition that CSXT would not be harmed by having its rates suspended at contract levels, claiming that the contract rates “provide CSXT with what it considers to be an acceptable level of profit and/or return on its investment in the SGS movement ” Petition at 12 (attempting to satisfy the essential element of lack of harm to other parties). Seminole’s suggestion that CSXT considers the 1998 Contract rates to represent “an acceptable level of profit” under current market conditions is flatly wrong, and CSXT was

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<sup>15</sup> Seminole repeatedly asserted that it was facing an “abrupt” increase and that its contract rates would more than double See Petition at 4 (claiming that rate increase would be “dramatic”); *id* at 7 (quoting case where rate increase would be “dramatic, sudden, and unexpected”); *id* at 10 (representing that scale rates “would more than double [Seminole’s] annual coal transportation costs”), *id* at 12 (claiming that rate increase would “abruptly more than double[]” Seminole’s coal transportation costs); *id*, V.S. Geeraerts at 2 (stating that “CSXT has proposed to increase its rates . by more than 100%, over the levels that [Seminole] currently pays under a contract set to expire at the end of this year”), {

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<sup>16</sup> Because Seminole predicated its “irreparable harm” claim on the assertion that a rate increase in 2009 would be “abrupt,” CSXT was entitled to respond with evidence that Seminole has known for years that CSXT believed that a rate increase was warranted. Seminole’s selective characterization of the facts left the erroneous impression that CSXT, suddenly and without prior notice or warning to Seminole, announced an abrupt increase and that Seminole was unfairly left unprepared to respond The negotiating history that Seminole now seeks to strike directly responds to Seminole’s assertions and makes it very clear that {

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entitled to respond to this suggestion by pointing out the multiple occasions that {  
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Third, CSXT carefully limited its disclosure to information necessary to rebut the points that Seminole put into issue. In response to Seminole's claims that rate increases would be "abrupt," CSXT explained that it had proposed rate increases years ago, and that the parties had been negotiating rate increases for some time. Answering Seminole's claim that the 1998 Contract rates represented "acceptable" rates, CSXT responded by explaining that the unique circumstances of the 1998 Contract's negotiation had given Seminole very favorable rates that are far below market rates today. CSXT did not disclose any more information than was necessary to respond to Seminole's claims. For example, CSXT did not disclose specific rates proposed in any particular offer or counteroffer, and it did not attach any of the parties' correspondence or term sheets.

In short, CSXT's filing of limited information under seal that directly responded to points Seminole had placed into issue was reasonable and justified.

#### **IV. THIS MOTION SHOULD NOT AFFECT PROSPECTS FOR MEDIATION**

CSXT is disappointed that Seminole asserts that, unless the Board grants its Motion, Seminole will be "less willing" to share information in negotiations and settlement prospects will be damaged. Petition at 9; V S. Reid at 8. CSXT disagrees with that assessment. There should be no "chilling effect" on settlement negotiations caused by CSXT's provision of truthful information to the Board (filed under seal) in response to Seminole's representations, given the absence of a confidentiality agreement proscribing such a limited and reasonable response. And there is no reason for Seminole to be unwilling to cooperate fully in Board-supervised mediation, which will be private and confidential by rule. See 49 C.F.R. § 1109.4(d).

CSXT remains optimistic that Board-supervised mediation can successfully help the parties resolve their differences

CSXT and Seminole have had a constructive, productive, and mutually beneficial commercial relationship for years, and CSXT looks forward to mediation as an opportunity for the parties to settle their disputes without the need for burdensome litigation.

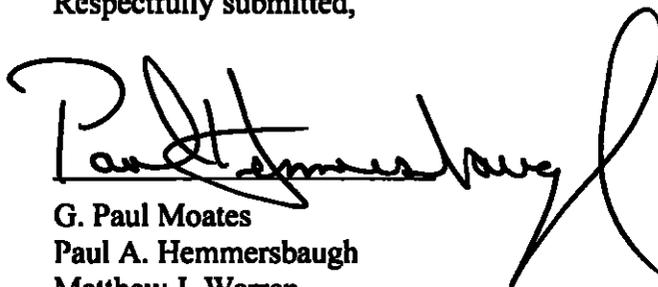
### SUMMARY AND CONCLUSION

The central purpose of the Motion to Strike is not to strike information submitted by CSXT, but to attempt to correct a fatal flaw in Seminole's injunction Petition, which requests that the Board exceed its jurisdiction, vitiate CSXT's statutory ratemaking initiative, and prescribe an indefinite extension of the economic terms of an expiring § 10709 contract for the duration of this proceeding. In the Motion to Strike, Seminole seeks to modify its Petition substantially by asking that the Board issue a wholly unprecedented preliminary injunction prescribing rates at 180% of R/VC. Motion at 10. Under this strategy, Seminole attempts to replace one unlawful remedy (*i.e.*, prescription of a privately negotiated § 10709 contract in a challenge to a common carrier rate) with another remedy that is equally unlawful – the prescription of a rate to which the parties never agreed, and which they never even discussed. In both cases, Seminole seeks an unprecedented rate prescription: (i) where there has been no finding of market dominance conferring jurisdiction on the Board, (ii) suspending the carrier's ratemaking initiative with no lawful way for it to recover underpayments at the end of the case; (iii) prior to any adjudication on the merits of the challenged rate (indeed, before the applicable rate has even been established), and (iv) without any application of the Board's Constrained Market Pricing principles, or any evidence or finding concerning the reasonableness of the

challenged rate Such a baseless and unprecedented ruling would be unwise, unsound, and unlawful

The Motion to Strike should not divert the Board's attention from the fundamental flaws of the Petition For the above reasons, the Motion to Strike should be denied

Respectfully submitted,



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*Counsel to CSX Transportation, Inc*

Dated: October 27, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that on this 27th day of October, 2008, I caused a copy of the foregoing Reply of CSX Transportation, Inc. to Seminole's Motion to Strike to be served on the following parties by first class mail, postage prepaid or more expeditious method of delivery

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\_\_\_\_\_  
Richard Bryan