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September 17, 2004

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Mercury Building, #711
1925 K Street, N.W.
Washington, DC 20423-0001

Re: Docket No. AB-400 (Sub-No. 4)
Seminole Gulf Railway, L.P. - Adverse Abandonment -
in Lee County, Florida

Dear Secretary Williams:

Upon further review of our Reply filed on August 30, 2004 (Lee-12), we noted certain typographical and grammatical errors as well as omitted references to the record that we wish to correct. We are requesting permission to file a corrected version of our Reply to Protest and Comments. The edits are listed in the enclosed ERRATA.

Also enclosed are public versions of Lee County's corrected Reply and a corrected verified statement of Donald DeBerry. Since these changes do not change the substance or scope of submissions filed on August 30, 2004, no parties will be prejudiced by this filing.

Respectively submitted,

Robert P. vom Eigen

Enclosures

cc: All persons shown on the Certificate of Service

BRUSSELS
CHICAGO
DENVER

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JACKSONVILLE
LOS ANGELES
MADISON

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002.1264601.1

PUBLIC VERSION

Lee-13

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423

STB Docket No. AB-400 (Sub- No. 4)

SEMINOLE GULF RAILWAY, L.P.
ADVERSE ABANDONMENT
IN LEE COUNTY, FL

ERRATA TO REPLY
AND SUPPORTING VERIFIED STATEMENT BY
LEE COUNTY, FLORIDA

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Dated: September 17, 2004

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423

STB Docket No. AB-400 (Sub- No. 4)

SEMINOLE GULF RAILWAY, L.P.
ADVERSE ABANDONMENT
IN LEE COUNTY, FL

ERRATA BY
LEE COUNTY, FLORIDA

On August 30, 2004, Lee County, Florida (“Lee County” or “the County”) filed its Reply to Protest and Comments (Lee-12) (“Reply”) with the Surface Transportation Board (“the Board”). Upon further review of the Reply, Lee County noted various typographical and grammatical errors and omitted references to the record. To avoid any confusion, Lee County decided to take this opportunity to correct those errors and omissions.

After reviewing Lee County’s Reply and Donald DeBerry’s Rebuttal Verified Statement, these typographical changes were made:

To Lee County’s Reply:

- A. On page 4, in the first sentence of the first full paragraph, “it’s” was changed to “its”.
- B. On page 5, on the first line, “Ovane” was changed to “Dwane”.
- C. On page 8, a footnote was added to reference the verified statements of Timothy McCullers, and William Van Meter and Phillip Graffy.

- D. On page 9, third line from the top, a comma was removed so that it reads “the public convenience and necessity would be promoted...”
- E. On page 10, the word “this” was added to the second sentence of the second paragraph so that it now reads “...and advance its own interest of saving public funds through this proceeding.”
- F. On page 10, a period was removed from the third sentence of the second paragraph so that it now reads “SGLR’s efforts to introduce these disputes within this proceeding is an attempt to distract the Board from the merits of this case.”
- G. On page 10, in the last sentence of the second paragraph, the word “is” was changed to “were” so that it reads “...if an abandonment were granted.”
- H. On page 11, no words were changed, only the spacing in the first bullet point was corrected.
- I. On page 12, in the last sentence to the first full paragraph, “Table 2” was changed to “Tab 2”.
- J. On page 13, in the first bullet point, “3” was changed to “three”.
- K. On page 13, in the third bullet point, “(...)” was removed as extraneous.
- L. On page 13, in the third bullet point, a space was added to “toleave” so that it now says “to leave”.
- M. On page 15, “costs of” was removed from the next to last line.

N. On page 15, “also must be questioned” was added to the next to last line so that it now reads “Moreover, claims about suddenly reduced grade crossing costs, discussed infra in section B.6 of this Reply also must be questioned, since such costs were at the core of the criminal information to which the guilty plea was entered.”

O. On page 15, the sentence “See, Tab 1, page 11, to J. Turner V.S.” was added to footnote 9.

P. On page 17, a period was removed from heading number 7.

Q. On page 18, the word “to” was changed to “not” in the last sentence of the first paragraph so that the sentence reads “To divert those funds for use on a grade crossing that will not save lives and otherwise does not need to be built would be contrary to the public interest.”

U. On page 19, in the second line, a period was added after the word “crossing”.
To the Rebuttal Verified Statement of Donald DeBerry

A. On page 1 a comma was removed from the second full sentence after the word “counsel” so that it reads: “...transmitted the letter to us through counsel because even though...”

B. On page 1, footnote number 1 was moved from page 2 to page 1.

C. On page 3, in the sixth line from the top, the word “would” was added between “still” and “be” so that the sentence now reads “We analyzed the claims and told Mr. Corson that we believed the railroad still would be able to provide safe and efficient service to FP&L after the abandonment of the subject line.”

D. On page 3, in the second line from the bottom, the word “of” was added and the word “location” removed so that the sentence now reads “My discussions with FP&L indicate that they are not concerned with the location of the new median on the expanded Alico Road for the purposes of gaining access to its property to the north of Alico Road.”

E. On page 5, in first paragraph, the word “as” was removed and a double negative was corrected so that the third full sentence reads “The glowing descriptions by Messrs. Fay and Curley of robust traffic growth on other railroads in different parts of the country (G. Fay V.S. at A-1 and M. Curley V.S. at A-39-40), and indeed Mr. Fay’s unsupported claim that SGLR has “been able to stabilize the business, and in the last several years, the base traffic has increased by five to eight percent per year” (G. Fay V.S. at p. A-2) have nothing to do with the events on the Baker Spur.”

F. On page 5, in footnote 3, the word “that” was removed from the next to last line.

G. On page 6, in the first sentence of the second full paragraph, “SGLR waits until” was removed and the word “the” was added so that the last part of the sentence now reads “...and that the Subject Line should be permitted to remain in active service until the current ‘speculators’ sell the property for industrial users who will eventually see the light...”.

H. On page 6, in the last paragraph, the word “an” was changed to “am” so that the sentence reads “I am unable to accurately describe which of these and other available properties would be suitable for a prospective buyers’ particular use since the types of businesses these companies are involved in is considered highly confidential information that I am not allowed to access.”

I. On page 8, in the next to last line, the citation to the record was changed from “(Davis/Schuchmann V.S. at 10, 15-16)” to “(Davis/Schuchmann V.S. at 10, 14-15).”

J. On page 9, in the middle of the page, the word “is” was changed to “are” and the word “the” was removed and the reference to “Messrs. Davis/Schuchmann’s V.S. at 15” was changed to reference page 14. The sentence now reads “Also, it is not clear that Mr. Misiura was told that large segments of SGLR’s main line track used to gain access to the Baker Spur are classified by SGLR as “excepted track”, as reported in Messrs. Davis/Schuchmann’s V.S. at 14.”

K. On page 10, the word “it” was added to the next to last line so that the sentence now reads “SGLR already has at least one such facility and there is no showing by SGLR that it is operating anywhere near capacity.”

L. On page 12, the word “Line” was inserted into the heading so that it reads “The Abandonment of the Subject Line will impose no significant costs upon SGLR.”

M. On page 12, in the next to last line, the word “County’s” was changed to “County”.

N. On page 15, in the second line, the word “is” was changed to “were” so that the sentence reads “Therefore, even if the Miller spur were removed prior to the construction of the new grade crossing, the County would incur costs in excess of \$1 million under SGLR’s bid.”

O. On page 17, footnote number 9 was deleted and moved to page 16.

None of these typographical changes alters the substance of Lee County’s Reply and so therefore no parties are prejudiced by this filing.

Respectfully submitted,

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Dated: September 17, 2004

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the ERRATA BY LEE COUNTY TO was served electronically and by overnight courier on the 17th day of September 2004, on the following:

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The undersigned hereby certifies that a copy of the ERRATA BY LEE COUNTY was served by U.S. mail on the 17th day of September 2004, on the following:

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Fort Myers, FL 33906

Robert P. vom Eigen

PUBLIC VERSION

Lee-13

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423

STB Docket No. AB-400 (Sub- No. 4)

SEMINOLE GULF RAILWAY, L.P.
ADVERSE ABANDONMENT
IN LEE COUNTY, FL

CORRECTED REPLY BY
LEE COUNTY, FLORIDA,
TO PROTEST AND COMMENTS

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Dated: September 17, 2004

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423

STB Docket No. AB-400 (Sub- No. 4)

SEMINOLE GULF RAILWAY, L.P.
ADVERSE ABANDONMENT
IN LEE COUNTY, FL

CORRECTED REPLY BY
LEE COUNTY, FLORIDA,
TO PROTEST AND COMMENTS

On June, 16, 2004, Lee County, Florida (“Lee County”) filed an application for adverse abandonment seeking the abandonment of a portion of Seminole Gulf Railway’s, L.P. (“SGLR’s”) the Baker Spur line. The western terminus of the portion of line in question (the “Subject Line”) begins at railroad engineering station 36+35 +/-, which is approximately 100 feet to the west and south of where the line crosses Alico Road, approximately one mile east of U.S. 41, and parallel to Alico Road station 79+00. The Subject Line continues across Alico Road and then runs parallel to and north of Alico Road for approximately 4,260 feet to the eastern terminus of the line at railroad engineering station 79+95.¹

¹ SGLR has introduced a new survey that appears to establish that existing railroad markings along the Baker Spur depicting the location of various engineering stations are inaccurate. Cooner V.S. at A-20-21. The County is seeking abandonment of the Subject Line to the point of the prior abandonment to the east of the Subject Line. Lee County does not believe that the Board is the proper forum to determine the location of the previous abandonment. If need be, this issue should be addressed by state courts after this proceeding has concluded.

On August 9, 2004, SGLR filed its written protest and supporting verified statements.

The following reply and supporting verified statements show that:

1. No existing SGLR shipper opposes Lee County's application;
2. The Subject Line, upon the impending departure of its only shipper (J.J. Taylor), will have no reasonable prospect for future shippers locating there and no prospective shipper will be dependent on SGLR service from that location;
3. The only shipper that uses the adjoining portion of the Baker Spur (Florida Power & Light or "FP&L") continues to support abandonment because the alleged service difficulties cited by SGLR do not in fact exist;
4. The alleged prospects identified for future transloading or storage activities on the Subject Line are highly implausible given the history of the Baker Spur and SGLR's stewardship of it, and even were there any life to these prospects they could be performed elsewhere on SGLR's railroad;
5. SGLR will not incur significant costs as a result of the abandonment;
6. Lee County will save in excess of \$1 million in public funds; and therefore
7. The balancing of the public interest, even under the authority cited by SGLR, weighs heavily in favor of granting Lee County's application for abandonment.

A. Background information

The Baker Spur line runs east from a point on SGLR's main line approximately 10 miles south of Fort Myers, Florida. The Baker Spur was built in 1973 to service a limestone quarry (called Florida Rock) located 5.30 miles from the main line. SGLR purchased the Baker Spur (among other rail lines) in 1987. Traffic to the quarry ceased in 1992. During the next two years no shippers located along the line or utilized the line for transloading or other purposes, and in 1994 SGLR filed a notice exemption to abandon the eastern 3.55 miles of the Baker Spur. See, *Seminole Gulf Railway, Inc. – Abandonment Exemption*, Docket No. AB-400 (Sub-No. 2X) served December 22, 1994 for an account of this history. The western terminus of this previous

abandonment was 79+95 +-, which is the eastern terminus of the Subject Line in this abandonment action.²

The Baker Spur is currently about 1.75 miles long. Since 1992, the only regular and active shipper on the Subject Line has been J.J. Taylor's beer distribution facility. FP&L has a facility located along the Subject Line, and on occasion uses a transloading area on the adjacent segment of the Baker Spur that will remain in service following abandonment of the Subject Line for movement of electrical transformers to its facilities in southwest Florida, including its facility adjacent to the Subject Line. Service to the FP&L transloading location can be performed without serious difficulty after the abandonment of the Subject Line. (T. Corson, V.S. at 2, D. DeBerry R.V.S. at 2-4; Davis/Schuchmann R.V.S. at 11-14.)

In the seventeen years that SGLR has owned the Baker Spur, its two principal on line shippers have departed or will depart. No new shipper has located along the Baker Spur, nor is it likely that any shippers will locate on the Subject Line in the foreseeable future (D. DeBerry, R.V.S. at 4-5). In 1997, it became apparent that Alico Road, an important connection between I-75 and highway 41, would eventually become overcrowded as the surrounding area developed. For years the Alico Road widening project was delayed due to environmental and permitting concerns. (Lee County's Response to Interrogatory No. 6, SGLR's Protest, Appendix C-6.) Eventually, all permits for the road widening project were granted and in 2003 Lee County entered into a construction contract with Phoenix Construction Services. (*Id.*) At that time, J.J.

² In striking contrast with its current posture, it is apparent from this Decision that SGLR attempted to defeat Florida Rock's effort to keep that line in operation under the offer of financial assistance procedures. Apparently, SGLR did not at that time see for this eastern segment of the Baker Spur the tremendous opportunities it now sees for the Subject Line. SGLR's President now claims he was "forced" to seek abandonment of that portion of the Baker Spur (G.Fay V.S. at A-4), but there is no evidence of that in the Interstate Commerce Commission's decision in that proceeding.

Taylor was an active shipper on the Subject Line, and the County discussed with SGLR the new grade crossings necessitated by the road widening project. SGLR submitted its proposal for the grade crossing work in December 2003. (See D. DeBerry V.S., tab 1) SGLR's proposal stated that it would cost \$1,105,484.00 to relocate the existing signals to the Alico Center Road crossing, install the necessary signals at the Alico Road crossing, and make necessary upgrades to the grade crossings at Alico Road, Alico Center Road, and FP&L's access road.

Lee County first received word that J.J. Taylor was relocating from its facility in February 2004, and at that time the County began to reconsider the possibility that the expense of the grade crossing could be avoided if the Subject Line were abandoned. (Lee County's Response to Interrogatory No. 6, SGLR's Protest, Appendix C-6.) When J.J. Taylor's relocation was confirmed in March 2004, Lee County was also informed that the new owners, Alico Industries LLC, would not be utilizing rail service and would support an abandonment. (*Id.*, and see D. Swanson V.S. on behalf of Alico Industries, LLC.) Lee County sought to negotiate a voluntary resolution with SGLR in April as a means of avoiding this adverse abandonment proceeding. (J. Turner R.V.S. at 1-2) However, SGLR sought an exorbitant amount to abandon the Subject Line voluntarily, and its President stated that it would take two years to obtain an abandonment without its support, thereby delaying the Alico Road project. (*Id.*) Therefore, on May 3, 2004, Lee County filed with the Board its notice of intent to file an adverse abandonment application. On June 16, 2004, Lee County filed its formal application for adverse abandonment (Lee-10) with supporting statements from D. DeBerry, a professional licensed engineer for Lee County's Department of Transportation, Tim Corson on behalf of FP&L, Jose Rivera on behalf

of J.J. Taylor, Dwane Swanson on behalf of Alico Industries, LLC, and Franz J. Rosinus on behalf of Airport Holdings.³

B. Discussion

1. Applicable Legal Standards Support Abandonment of the Subject Line.

The statutory standard governing an abandonment is whether the present or future public convenience and necessity require or permit abandonment. 49 U.S.C. § 10903(a). In an adverse abandonment proceeding, the noncarrier third-party applicant has the burden of showing that the public convenience and necessity require or permit the abandonment. See, *Chelsea Property Owners - Abandonment. -- The Consol. R. Corp.*, 8 I.C.C.2d 773, 778 (1992) (“*Chelsea*”). In making this determination in an adverse abandonment, the Board must balance the benefits and burdens of abandonment on all interested parties, including the railroad, the shippers who have used the line, the community involved, and interstate commerce generally. *New York Economic Development Corporation - Adverse Abandonment - New York Cross Harbor Railroad in Brooklyn, NY.*, 374 F.3d 1177, 2004 U.S. App. LEXIS 14304, pgs. 5-6 (D.C. Cir. July 13, 2004) (“*New York Cross Harbor*”) (citing *City of Cherokee v. ICC*, 727 F.2d 748 (8th Cir. 1984)).

The Court in *New York Cross Harbor* states that the Board should consider a public entity’s interests, the burdens placed on any shippers, and the history of a rail line’s use and its future prospects for continued service. *Id.* at 12-13, citing *Norfolk & Western Railway Company- Abandonment Exemption*, 3 S.T.B. 110, 1998 STB Lexis 126, at *21-22 (May 12, 1998) (holding that the public interest in developing Cincinnati’s central business district,

³ Subsequently, on June 23, 2003 Lee County filed additional verified statements in support of the Application (Lee-11) from Dan Miller on behalf of DTB Properties, LLC, Mitchell Bruce Nicholas on behalf of Joe & Bruce, LLC and West Coast Roofing & Waterproofing, Inc.

outweighed the need for maintaining the tracks even in the face of testimony by prospective shippers opposing the abandonment). Of course, in *New York Cross Harbor*, the Court remanded the case in view of testimony by active, existing shippers in opposition to the abandonment. *New York Cross Harbor* at 12.

The opposite is true here. No current shipper objects to the abandonment. Upon the departure of J.J. Taylor, there will be no active shippers on the Subject Line. Lee County has clearly specified why the land is needed (to save over \$1 million on an unnecessary grade crossing). Finally, the history of decreasing use of the Baker Spur, and the hostility between SGLR and the landowners along the Subject Line, is evidence that there is no reasonable expectation of future business that is dependent upon the Subject Line. Therefore, the abandonment of the Subject Line should be granted.

As the Board has frequently stated, the function of its exclusive and plenary jurisdiction over abandonments is to provide the public with a degree of protection against the unnecessary discontinuance, cessation, interruption, or obstruction of available rail service. See, *Modern Handcraft, Inc. Abandonment*, 363 I.C.C. 969, 972 (1981) (“*Modern Handcraft*”). The Board has a statutory duty to preserve and promote continued rail service where the carrier has expressed a desire to continue operations and has taken reasonable steps to acquire traffic. See, *Chelsea*, 8 I.C.C.2d at 779. On the other hand, the Board will not allow its jurisdiction to be used to shield a carrier from the legitimate processes of State law where no overriding Federal interest exists. See, *CSX Corporation and CSX Transportation, Inc.-Adverse Abandonment Application-Canadian National Railway Company and Grand Trunk Western Railroad, Inc.*, 2002 STB LEXIS 81 (served February 1, 2002). When the Board permits abandonment, the line

is removed from the Board's jurisdiction and the parties can undertake other legal remedies. *See, Modern Handcraft* at *7-8.

Here, Lee County has satisfied its burden of proving that the public interest does not require that rail service continue over the tracks and facilities at issue. Because no existing shippers will be affected,⁴ and because the business prospects SGLR describes are not dependent upon the Subject line,⁵ no shippers will be affected by this abandonment, the Subject Line should be abandoned, allowing the County to save taxpayer dollars and allowing the underlying right of way to be put to more efficient use.

SGLR relies on principally three cases to support its proposition that Lee County has not met its burden of proving that the public convenience and necessity permit abandonment. SGLR's reliance on these cases is misplaced.

The first case, *Wisconsin Department of Transportation- Adverse Abandonment*, 1988 ICC 359 (served November 23, 1988) ("*Wisconsin DOT*") is clearly distinguishable. *Wisconsin DOT* stands for the proposition that a public agency applicant cannot simply count up the dollars it will save, and compare these dollars against the costs to existing shippers on the line, the carrier and adjoining land owners and expect to prevail on an adverse abandonment. (*Id.* at *13.) However, the facts in *Wisconsin DOT* bear no resemblance to those in this particular case. There, the Board denied the abandonment citing the opposition of the current shippers on the line, an adjacent landowner, a prospective shipper, and the town within which the line was located. *Id.* *10-11, and *15. Additionally, in *Wisconsin DOT*, the line was active, and

⁴ See *T. Corson V.S.* at 2, *J. Rivera V.S.*

⁵ See *DeBerry, R.V.S.* at 6, 8-10 and *Davis/Schuhman R.V.S.* at 8-12.

shipments by rail had been increasing from the current shipper on the line, so there was reason to believe that future rail service was likely. *Id.*

There are no such factors weighing against abandonment in this case. Unlike in *Wisconsin DOT*, there will be no active shippers on the Subject Line at the effective date of the abandonment, and no present SGLR shippers or adjacent property owners oppose the abandonment. Indeed, the current shippers, FP&L and J.J. Taylor, and, to the best of the County's knowledge, all adjoining land owners, support Lee County's abandonment application.⁶

SGLR also relies on *Salt Lake City*, but that case is also distinguishable. In *Salt Lake City*, the City did not argue that the line should be abandoned because the City needed the line for any particular purpose, but rather argued that it should be abandoned since it had not been used by UP for two years, conflicted with the City's plans for the area and presented safety, traffic, and quality of life issues. The Board found that little weight should be given to the railroad's previous non-use of the line, since it was caused by the Utah department of transportation's construction project. As soon as that project was completed, UP resumed use of the line, and showed a steady increase in traffic, leading the Board to conclude that future prospects for service on the line were good. *Id.* *4-5. Additionally, since the line presented no unusual safety, traffic, or quality of life issues other than those that would normally exist when a rail line is in an urban area, the city was found not to have satisfied its burden of proof that the public convenience and necessity permitted abandonment. *Id.* *20-21.

⁶ See Exhibit D, *T. McCullers V.S.*, and Exhibit E, *W. Van Meter and P. Graffy V.S.*

Again, the facts of *Salt Lake City* bear no resemblance to this case. Here, as we will discuss below, the history of declining growth on the Baker Spur is not to due to any third party's action, there is simply no demand for rail service on the Subject Line. Therefore, there is no reason to expect a growth in demand for service on the Subject Line, and SGLR's fanciful forecasts for the line are not credible. See, Section B.4 infra. Additionally, Lee County has satisfied its burden of showing that the public convenience and necessity would be promoted by the abandonment by saving taxpayers over \$1 million.

The Board's precedent makes it clear in adverse abandonment cases that if a railroad's expectations of future service are not reasonable, the abandonment application will not be defeated based solely on those expectations. The Board, like the ICC before it, should be especially wary when predictions of future growth deviate from a line's history of usage, particularly when they are manufactured only after adverse proceedings have begun. For example, in *Chelsea*, a case relied upon by SGLR, Conrail, the owners of an inactive line of rail, opposed the Chelsea Property Owner's ("CPO's") application for adverse abandonment and claimed there was opportunity for future growth because the line could be used to haul solid waste out of Manhattan. *Id.* at *3-4. CPO contended that since this 'opportunity' arose shortly after the application for abandonment was filed, that it was just a sham by Conrail to avoid the costs the owners would incur should an abandonment be granted. *Id.* at *5. The Commission in *Chelsea* determined that:

"CPO has met its burden of proof. It has demonstrated that Conrail's proposed waste hauling operation is neither operationally nor economically feasible. It has also shown the absence of future traffic prospects to offset the public interest concerns raised by New York. COP has supported a finding that the public convenience and necessity permit the abandonment...no commercial entity is interested in pursuing the project and...local and government interests are uniformly opposed [to the waste

hauling project]...the trash haulage proposal appears to be nothing more than an effort by Conrail to avoid an obligation to dismantle the [line].”

Id. at *37-38.

Similarly, in this case, SGLR is now claiming numerous future rail prospects that run counter to the 17 year history of SGLR’s ownership of the Subject Line.⁷ Here, as shown infra, the future expectation of growth is unreasonable, and runs counter to the line’s last 17 years of service. Therefore, the Board should give minimal weight, if any, to SGLR’s claims future growth on the Subject Line.⁸

SGLR, in its Protest and supporting statements, has attempted to make much of the fact that there have been on-going disputes involving the rail line and adjacent land owners whom it labels “land speculators.” (Protest at 7, and G. Fay V.S. at A-3-6) Lee County is acting “solely” to protect and advance its own interest of saving public funds through this proceeding. (DeBerry R.V.S. at 2). SGLR’s effort to introduce these side disputes within this proceeding is an attempt to distract the Board from the merits of this case. The Board has stated that state actions are irrelevant to whether or not an abandonment should be granted. *See, Wisconsin DOT* at *16 Therefore, the Board should not give weight to SGLR’s insinuations regarding state court cases nor should the Board concern itself with state law issues that may arise if an abandonment were granted.

2. No Shippers Will be Harmed by this Abandonment.

⁷ However, unlike Conrail in the *Chelsea* case, the abandonment sought here will impose no significant costs upon SGLR. *See, D. DeBerry R.V.S.* at 12-13 and *Davis/Schuchman R.V.S.* at 2-7 and Appendix 3.

⁸ SGLR finds comfort in the Commission’s statement that it has “a statutory duty to protect and promote continued rail service where the carrier has expressed a desire to continue operations and has taken reasonable steps to acquire traffic”. Protest at 9. However, the Commission in *Chelsea* makes very clear that if future prospects are implausible, they alone will not defeat an adverse abandonment application.

J.J. Taylor has been the only shipper on the Subject Line for many years. There is no dispute that J.J. Taylor is relocating its facility at the end of the year and will no longer need or desire rail service on the Baker Spur. (J. Rivera V.S.) SGLR does not contest this fact, but states that the Subject Line should not be abandoned because it is useful in performing services for the FP&L at the transloading area on a segment of the Baker Spur which will remain in service after the abandonment. Protest at 11-16.⁹

3. Service to Florida Power & Light Will Remain Unaffected.

Experts retained by Lee County confirm that SGLR will have several options for safely and efficiently serving the transloading needs of FP&L. (Davis/Schuchmann R.V.S. at 11-14.) SGLR claims that FP&L's service will be affected by the abandonment proceeding, but this contention runs counter to FP&L's verified statement in support of the abandonment. FP&L feels confident that its ability to use the western portion of the Baker Spur will remain unaffected by the abandonment, and since FP&L is in the best position to judge its own shipping needs, the Board should defer to FP&L's decision to support the abandonment.

Service to FP&L will be unaffected by the abandonment. SGLR communicated the same concerns expressed in its testimony here directly in a letter to FP&L as a means to encourage FP&L to change its position in this case. (DeBerry R.V.S. at 2-3 and Tab 1) In fact, experts retained by Lee County confirm that SGLR will have several options for safely and efficiently serving the transloading needs on FP&L on the adjoining segment of the Baker Spur after the abandonment. (Davis/Schuchmann R.V.S. at 11-14) Messrs. Davis and Schuchmann show the following options will be available to SGLR:

⁹ SGLR's witness, Haberle, does not claim that the Subject Line is essential to service at this location, but that is "usually" or "often" used. (J. Haberle V.S. at B-34.)

- SGLR could use an existing spur (the Schwab spur) to achieve the same operation that SGLR's witness Haberle describes as SGLR's usual practice (*Id.* at 12-13);
- SGLR could uncouple the lead locomotive, leave it on the main line and shove the train to the unloading location, a routine practice in the rail industry (*Id.* at 13-14);
- SGLR could leave the lead locomotive ("a 1950's – vintage GP-9") attached to the train with a "modest" opportunity cost (*Id.* at 14);
- SGLR could shove onto the Baker Spur using a caboose on the east end of the movement (*Id.*); or
- SGLR could build a spur as it claims it would do on the Subject Line in the event the J.J. Taylor (or "Miller") spur were removed. (*Id.* and G. Fay V.S. at A-9.)

Upon review of the options, FP&L has decided not to change its position in this case. (DeBerry R.V.S. at 3).

In addition to the alleged operating problems at the FP&L transloading location, SGLR claims that FP&L may have difficulty accessing its transformer facility located to the north of Alico Road (G. Fay V.S. at A-8). Mr. DeBerry shows that this is not accurate and that FP&L has its own easement across the property adjacent to the Subject Line (DeBerry at R.V.S. at 3-4 and Tab 2.)

4. SGLR's Fanciful Projections of Future Business are not Credible.

The 17 year history of no traffic growth on the Baker Spur belies SGLR's protection that the line is on the eve of a grand renaissance. Additionally, the adjoining property owners support the abandonment, and do not plan uses that would benefit from rail service. (D. DeBerry R.V.S. at 4-5.) The uses contemplated by SGLR for the Subject Line could be replicated at other locations on SGLR, including the adjacent segment of the Baker Spur, and are not dependent upon this particular segment of track. (*Id.* at 6 and Davis/Schuchmann R.V.S. at 8-12.)

There are no potential shippers who offer any commitment to bring business to the Subject Line. The Ringling Bros. and Barnum & Bailey Circus does come forward to suggest

that it “would consider” making an annual stop in Ft. Myers (Misiura V.S. at B-39-40), but as Mr. DeBerry and Messrs. Davis and Schuchmann show:

- The Baker Spur does not conform to the “general criteria” mentioned by Mr. Misiura, such as distance to the arena is six not three miles, there is no availability of services within walking distance of the track (D. DeBerry R.V.S. at 8; and Davis/Schuchmann R.V.S. at 14);
- The Circus made a stop at the Estero/Germain Center in 2000 and found a place on the SGLR other than the Subject Line (D. DeBerry R.V.S. at 8; and Davis Schuchmann R.V.S. at 14);
- The Subject Line is not suitable for the circus because there is no service road parallel to the track that would permit egress/ingress for performers; it is adjacent to what will become a six-lane highway that would be dangerous for occupants attempting to leave the railroad’s right-of-way (D.DeBerry R.V.S. at 9); and
- The current designation of the SGLR’s main line to the north of the Baker Spur contains large segments of excepted track, thereby precluding movement of an occupied passenger train across those segments (Davis/Schuchmann R.V.S. at 14).

SGLR claims that certain multi-car and unit train business is possible on the Subject Line, but a review of the underlying correspondence and workpapers provided by SGLR indicated that the only such movement reflected in those documents clearly was not one that involved the Baker Spur and that it does not appear to be alive in any event. (Davis/Schuchmann R.V.S. at 17.) Mr. DeBerry did speak to a representative of the Port Authority which operates the Southwest Florida International Airport, and that individual confirmed that Messrs. Fay and Curley attempted to solicit the airport’s support for its position in opposition to the abandonment. However, the Authority apparently has no interest in the delivery of fuel via a rail transload operation from the Baker Spur, and the Authority has not opposed Lee County’s application. (D. DeBerry R.V.S. at 10.)

The next alleged group of prospects arises from SGLR’s plan to create a public delivery or team track on the Subject Line. (G. Fay at A-10.) However, Florida DOT is already prepared

to construct for SGLR such a facility at a location near an existing public delivery facility closer to Ft. Myer, and there is no evidence that that facility is operating at capacity. (D. DeBerry R.V.S. at 10.) Indeed, if an additional facility of this nature is needed, the remaining portion of the Baker Spur is suitable for such a use. (Davis/Schuchmann R.V.S. at 8.)

In a supplemental verified statement filed by SGLR's President in the wake of Hurricane Charley, it was claimed that SGLR would immediately convert the Subject Line to unload ballast and building materials to address urgent needs in Southwest Florida caused by the hurricane. Lee County has been monitoring the Subject Track since the hurricane, and as of noon on the date of this filing, no activity or preparations of that nature is occurring on the Subject Line. (D. DeBerry R.V.S. at 7.) Apparently, this demand for service is being addressed by other means.

5. The Prior Conviction of SGLR for Grand Theft in Lee County Impeaches the Credibility of its Representations in this Proceeding.

The projections of future growth, as well as SGLR's now changed estimate of the real cost of the grade crossing improvements on Alico Road discussed below, raise an issue of the credibility of the company and the individuals which present them to the Board.

Various individuals have submitted verified statements in this proceeding on behalf of SGLR, which puts the credibility of these individuals and SGLR squarely in issue. In April 2000, SGLR and other individuals were the subjects of a criminal information in the Circuit Court of the Twentieth Judicial Circuit in and for Lee County, Florida for, *inter alia*, grand theft – a second degree felony in Florida punishable by imprisonment for as many as 15 years. The Information is attached at Tab 1 to the J. Turner R.V.S. Eventually, SGLR pleaded guilty to one count of grand theft, and agreed to pay \$111,861.68 to the Florida Department of Transportation, in addition to \$239,771 that it had already returned to FDOT. (J. Turner R.V.S. at ¶ 4 and

attached plea agreement at Tab 2) The Board should consider this evidence of criminal conduct in evaluating the veracity of representations made by SGLR in this proceeding.

At the time of the acts giving rise to the criminal charges set forth in the Information, Gordon Fay was the president and principal owner of SGLR. As such, SGLR's felony conviction is admissible to impeach his testimony in this proceeding because "it may be fairly inferred that he shared responsibility for the criminal act, or have actually participated in the criminal act."¹⁰ *GCM Contractors, Inc. v. Contractors Environmental Services, Inc.*, 181 W.Va. 679, 383 S.E.2d 861, 866 (1989); accord *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 524 n.16 (3d Cir. 1997) (quoting *CGM Contractors, supra* but finding no evidence that the witnesses whose testimony was sought to be impeached had been involved in Georgia-Pacific's prior criminal conduct). In addition, SGLR's felony conviction is also relevant to impeach the credibility of all witnesses who have made representations to the Board on SGLR's behalf in this proceeding. See *Stone v. C.R. Bard, Inc.*, 2003 WL 22902564, *1-3 (S.D.N.Y. 2003) (corporation's vicarious representations through a representative may be impeached by evidence of prior corporate felony conviction); *Hickson Corp. v. Norfolk Southern Railway Co.*, 227 F.Supp.2d 903, 907 (E.D. Tenn. 2002) (Federal Rule of Evidence 609 allows the use of a corporation's felony conviction to impeach the corporation's vicarious testimony).

This authority is particularly relevant in the context of projections about future business, where personal credibility of the witnesses is important. Moreover, claims about suddenly reduced grade crossing costs, discussed *infra* in section B. 6 of this Reply, also must be

¹⁰ Indeed, although the copy of the Information that we were able to obtain has the name of "Defendant A" redacted, Gordon Fay is in fact "Defendant A" named in the Information. See, Tab 1, page 11, J.Turner V.S.

questioned since such costs were at the core of the criminal information to which the guilty plea was entered.

6. The Abandonment of the Subject Line Will Impose No Significant Costs on SGLR

Lee County's consultant, Mr. Gene Davis, performed a net liquidation value analysis of the Subject Line, and concludes that it has a net liquidation value of \$11,300. (Davis/Schuchmann R.V.S. at 2-4 and Appendix 3.) Mr. Davis concludes that the net liquidation value computations offered by SGLR witness Bruce Fay, showing nearly \$66,000 in out of pocket cost in salvaging the rail and materials from the right of way, understates the value of the rail and other track materials and overstates the costs of salvage. (*Id.* at 5-7.) Reducing the costs of removal even further, Lee County has offered to remove the track and grade crossing equipment and materials from the Alico Road right of way, and to return to SGLR any rail and track materials recovered in the process.¹¹ (D. DeBerry R.V.S. at 12.)

The only other adverse consequences of the abandonment cited by SGLR are the loss of billboard revenues and the loss of profits from the maintenance of the Alico Road grade crossing that would be removed. (G. Fay at A-10.) Lee County granted the permits for the two billboards to SGLR, and it is not clear as a matter of state law that the railroad would be deprived of the right to net revenues from such billboards once the Subject Line is abandoned. (D. DeBerry R.V.S. at 11.) The magnitude of the profits projected by SGLR are not significant even if they were lost to SGLR, increasing only to \$11,600 in the forecast year based upon a several fold

¹¹ In assessing the credibility of the two NLV estimates, the Board should also note that Mr. Bruce Fay does not claim that he has a degree in engineering or that he is a professional engineer. Mr. Davis is a professional engineer who worked in the engineering department of the Norfolk Southern for 18 years. (*Compare* B. Fay V.S. at B-1 with Appendix 1 to Davis/Schuchmann R.V.S.)

increase in the projected revenues from the billboards.¹² Even if Lee County were to accept SGLR's projections, these revenues should not weigh heavily in the balancing of the public benefits of the proposed abandonment. These are not benefits or interests recognized by Congress in the rail transportation policy contained in the ICC Termination Act. 49 U.S.C. §10101.

If the billboard revenues increase by any amount, they do so only because Lee County is expanding Alico Road to six lanes (thereby increasing the number of people exposed to the advertisements), and the best thing for that project is to eliminate the need for a crossing that serves no shipper. If the maintenance agreement for the existing grade crossing over-compensates SGLR for its expenses incurred in that maintenance, the highway project is causing a public benefit in saving expenditure of public funds for reimbursement of non-existent maintenance costs. Considering the source and magnitude of these projected revenues, it is difficult to attribute much weight to them in the analysis by this Board. Contrast these impacts with those cited in *Wisconsin DOT, supra*, where a shipper with growing business would lose service, and adjoining land owners would lose a transportation option that they wanted to preserve. None of that is present in this case.

7. The County Will Save in Excess of \$1 million in the Event of the Abandonment

SGLR claims that the County has overstated the costs that it will save as a result of the proposed abandonment. As explained by Lee County's Don DeBerry, the alleged overstatements of avoided costs fall in three principal categories:

¹² Lee County's experts after reviewing the Highly Confidential version of the testimony conclude that costs of maintaining the Subject Line during the forecast year will exceed the revenues received from Lee County under the grade crossing agreement.

(1) the \$1,100,000 price tag assigned by SGLR to the project in the bid it submitted to County unnecessarily overstated costs of construction and that only had the County just asked SGLR, the railroad would have explained to the County that it had lower cost options;

(2) the County will begin incurring penalties under the Alico Road construction contract at the rate of \$1500 per day on November 19, 2004; and

(3) the County will never have to pull up the new grade crossing because the Subject Line will generate so much business that the railroad will never need to abandon it, and at least in the Protest there is a commitment not to do so for 10 years.

(D. DeBerry R.V.S. at 13) Mr. DeBerry proceeds to analyze each of these claims, and concludes that the County will still save in excess of \$1 million. First, it is very unlikely that the County would accept a lower cost option if the consequence of installing “a less heavy duty alternative” would simply have been to increase its maintenance costs under the grade crossing agreement with SGLR. (*Id.* at 15) SGLR claims that the County could have sought FDOT funds for the grade crossing. However, State funds are still is public funds, which in the words of Mr. DeBerry “...are otherwise provided to construct grade crossings that save lives.” *Id.* To divert those funds for use on a grade crossing that will not save lives and otherwise does not to need to be built would be contrary to the public interest.

The exposure of the County to contract damages under the construction contract for the expansion of Alico Road does not begin accruing on November 19, 2004, as SGLR assumes. (*Id.* at 16) Rather, as Mr. DeBerry explains, the November 19 date is the date provided to the County by the contractor as the deadline for when the County must decide whether or not it is proceeding with the grade crossing construction or removal. If the decision is reached by that date, the County will not incur delay damages from the contractor. *Id.* Given the existing schedule for the Board’s decision, the County should be able to make its decision by November 19, and any suggestion that it will need to delay its decision at this point is purely speculation.

The assertion that the County will never incur the cost of removing the grade crossing, which it estimates to be \$300,000, is premised upon unrealistic projections of future business on the Subject Line. As shown above, those projections are not reliable, and even assuming the undertaking not to abandon the Subject Line for ten years is binding on SGLR, that only puts off the day that these real costs must be borne by the County to eliminate this unnecessary crossing.

C. Conclusion

For all the preceding reasons, applicant Lee County respectfully requests that the Board find that the public interest is served by the substantial savings of public funds cited by Lee County and that those savings outweigh any harm cited by SGLR to itself or to other parties that have not offered testimony to support SGLR's protest of this application.

Respectfully submitted,

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Dated: September 16, 2004

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the CORRECTED REPLY BY LEE COUNTY TO SGLR'S PROTEST AND COMMENTS was served electronically and by overnight courier on the 17th day of September 2004, on the following:

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The undersigned hereby certifies that a copy of the REPLY BY LEE COUNTY TO SGLR'S PROTEST AND COMMENTS was served by U.S. mail on the 17th day of September 2004, on the following:

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Fort Myers, FL 33906

Melissa A. Burt

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423

STB Docket No. AB-400 (Sub- No. 4)

SEMINOLE GULF RAILWAY, L.P.
ADVERSE ABANDONMENT
IN LEE COUNTY, FL

APPLICATION FOR ADVERSE ABANDONMENT
OF LEE COUNTY, FLORIDA

CORRECTED REPLY VERIFIED STATEMENT
OF
DONALD DEBERRY

1. My name is Donald DeBerry. I am a professional engineer licensed in the state of Florida, employed by the Department of Transportation for Lee County, Florida (“Lee County”). I have previously submitted a verified statement in these proceedings in support of Lee County’s Application for Abandonment (Lee-10) of a portion of SGLR’s Baker Spur, designated in the Application as the Subject Line.
2. The purpose of this reply statement is to respond in part to allegations made by SGLR in the protest and supporting verified statements. I say “in part” not only because my statement is to be read in conjunction with other statements being presented in conjunction with Lee County’s reply, but also because a detailed response to every misstatement, distortion or exaggeration of fact contained in the protest filed on behalf of SGLR would in my judgment distract the Board from the key issues relevant to its evaluation of the merits of this adverse abandonment

application. However, my failure to respond specifically to each and every assertion made in SGLR's pleadings is not an admission or concession that they are accurate. I believe the Board should keep its eye on the ball, and hope to show with the help of others that the abandonment of the Subject Line:

- will not adversely affect service to Florida Power & Light ("FP&L") or any other shipper;
- will neither deprive SGLR of significant revenues, nor impose upon it additional costs;
- will save Lee County in excess of \$ 1 million in public funds; and therefore
- will serve the public interest.

Extraneous issues concerning disputes between SGLR and the private land owners located along the Subject Line, which preoccupy SGLR's President in his statement, should not concern this Board, except to the extent that they to some degree have sealed the fate of this rail line. Lee County is before this Board *solely* to protect its own interest in eliminating the need to commit public funds to the construction of an expensive and unneeded grade crossing protection system for a rail line that goes nowhere and has no realistic future in promoting interstate commerce. SGLR's President concedes the "critical nature" of the Alico Road expansion project (G. Fay V.S. at 3) and I believe that elimination of an unnecessary grade crossing will make it a safer road. The unanimous support from existing shippers and adjoining landowners for this application, in my judgment, should be viewed by the Board as a positive factor in its analysis of the interests it must balance in evaluating this application.

Service to FP&L will remain unaffected by the abandonment.

3. SGLR's claims concerning the problems created for FP&L by the proposed abandonment were presented to FP&L in a letter dated July 27, 2004 from Michael Curley to Dennis Merchant, who works for Mr. Tim Corson at FP&L. A copy of the letter is attached to this

statement at Tab 1. Those claims largely parallel the claims repeated in the testimony of Messrs. Gordon Fay and Jerry Haberle. (G. Fay VS at A-7,8 and J. Haberle V.S. at B-35-36.) Mr. Corson transmitted the letter to us through counsel because even though after reading the letter and discussing the matter with Mr. Curley and Mr. Merchant he still believed FP&L should support the abandonment, he thought that we should have the opportunity to respond to the claims. We analyzed the claims and told Mr. Corson that we believed the railroad still would be able to provide safe and efficient service to FP&L after the abandonment of the Subject Line. We communicated these conclusions and described the railroad's options in a telephone conference with Mr. Corson. The verified statement of Messrs. Davis and Schuchmann from R. L. Banks & Associates describes the options we discussed with Mr. Corson in greater detail. This conversation confirmed FP&L's belief that its use of the rail line could continue even after the abandonment is granted.

4. There are several responses that I can provide to other aspects of SGLR's claims. FP&L is an occasional user of the Baker Spur for the purpose of transloading transformers that are moved via truck to other locations within Southwest Florida.¹ FP&L has explained to me that because the transformer station located on property it owns to the north of Alico Road is relatively new, the vast majority of transformers unloaded at the location to the south of Alico Road go elsewhere. My discussions with FP&L indicate that they are not concerned with the location of the new median on the expanded Alico Road for purposes of gaining access to its property to the north of Alico Road. However, we have assured FP&L that if it wants a

¹ As is clear from Mr. Gordon Fay's supplemental verified statement filed on August 18, 2004, FP&L apparently off-loads transformers at other locations on the SGLR. (G. Fay, Supp. V.S. at 2).

special cut in the median for making that movement, the County will provide it. Concerning access to the FP&L property along Alico Road, Mr. Fay suggests that the only access to the property is via an easement granted by SGLR, which would be terminated upon the abandonment. (G. Fay V.S. at A-8). This is not accurate. FP&L has acquired an independent easement from the owner of the adjacent property for access, a copy of which is attached at Tab 2.

5. The new loading pad currently proposed by SGLR to the north of the Alico Road, which neither I nor FP&L had heard about prior to this proceeding, is unnecessary for FP&L's needs, and it raises its own safety issues for the County. SGLR would have to construct its own access road, and apply to the County for an access permit to Alico Road, which we would almost certainly not grant due to safety concerns with the proposed operation of trucks in the limited space between the railroad right of way and Alico Road. The existing unloading location to the south of Alico Road is far superior because it has an existing access road parallel to Alico Road where the trucks could be loaded, and then proceed safely to gain access to Alico Road via Alico Center Road. SGLR wrongly suggests that the new sidewalk being constructed along the south edge of the expanded Alico Road project will restrict the area for transloading. (Protest at 14). That suggests that the transloading occurs directly on to Alico Road, which is not the case now and certainly would not be permitted after the road is expanded to six lanes.

SGLR's Fanciful Projections of Future Business are not Credible.

6. After owning the Baker Spur for about 17 years, SGLR's record is pretty clear. The major rock quarry for which the line was originally constructed apparently ceased using SGLR's rail service, and 3.55 miles of the line was abandoned in 1995 upon the exemption petition filed

by SGLR.² The largest remaining shipper, J.J. Taylor, is now in the process of departing, and does not oppose this application. The only remaining shipper, FP&L, which is an occasional user of the Spur, supports the abandonment in the face of efforts by SGLR to persuade it to change its position. The glowing descriptions by Messrs. Fay and Curley of robust traffic growth on other railroads in different parts of the country (G. Fay V.S. at A-1 and M. Curley V.S. at A-39-40), and indeed Mr. Fay's unsupported claim as that the SGLR have "been able to stabilize the business, and in the last several years, the base traffic has increased by five to eight percent per year" (G. Fay V.S. at p. A-2) have nothing to do with the events on the Baker Spur. It appears that the only achievement by the railroad during its tenure on the Spur has been to so alienate the adjoining property owners as to cause them to take steps to advance the departure of the railroad and to promote non-rail dependent industrial development.³

7. Implausible as they seem against this historic backdrop, SGLR's claims of booming commercial opportunities for the Subject line (Mr. Fay calls it a "rare opportunity" at A-10) are not really a surprise to the County. They are in fact predictable given the behavior of this railroad. However, these claims are not credible, and credibility is at the core of evaluating forecasts of future traffic growth. I direct the Board's attention to the verified statement of Lee

² Mr. Gordon Fay claims that it was "forced" to abandon the 3.55 mile eastern segment of the Baker Spur (G. Fay V.S. at A-4), but the Interstate Commerce Commission's decision issued at the time reflects nothing of the kind. See ICC Decision in AB-400 (Sub-No, 2X) served December 22, 1994.

³ The effort by Mr. Fay to discredit the motives of the land owners by calling them "speculators" is both unpersuasive and irrelevant. Their motives and the nature of their disputes with the railroad are irrelevant to this case. However, if they were truly just speculators, they would be driven solely by financial factors, and naturally would promote the highest and best use for the property they own. Apparently, these owners have concluded that use in this case is not dependent upon, and in fact is inconsistent with, continued rail use.

County Attorney John Turner, who describes events which draw into question the credibility of the railroad and its witnesses.

8. Messrs. Gene Davis and Walter Schuchmann discuss in their joint verified statement the projected future uses identified by Messrs. Fay and Curley. Clearly, many of the supposed opportunities no longer are alive, and those that are can be accommodated at other locations along the railroad. SGLR has identified no shipper that would be dependent upon service on the Subject Line, including the circus, as I and Messrs. Davis and Schuchmann will show.

9. There is some suggestion in Mr. Fay's testimony that the property along the Subject Line is among the few parcels along the SGLR that is available to be zoned and suitable for industrial development, and that Subject Line should be permitted to remain in active service until the current "speculators" sell the property for industrial users who will eventually see the light and welcome his railroad's service. (G. Fay V.S. at A-6-7, 9) Mr. Fay is wrong on both scores. First, there is substantial acreage available in Lee County that can be zoned industrial. For instance, land is available for industrial zoning north of the Caloosahatchee river along the railroad line, south of the Caloosahatchee river and north of Colonial Boulevard, between Colonial Boulevard and Cypress Lake Drive, along the main line north of Alico Road, and in the city of Bonita Springs. There are clearly plenty of opportunities for industries interested in rail service to find locations within Lee County. I am unable to accurately describe which of these and other available properties would be suitable for a prospective buyers' particular use since the types of businesses these companies are involved in is considered highly confidential information that I am not allowed to access. Second, one of the major property owners along the Subject Line, Harvey Youngquist, has a parcel under contract. Verified statements from this future owner clearly confirm that it has no interest in seeing rail service continue on the Subject

Line, and both the current owner and the future owner support Lee County's application. (T. McCullers V.S., William Van Meter and Phillip Graffy V.S.)

10. Mr. Fay in his supplemental statement claims that the Baker Spur will serve as a key strategic facility for transloading building materials and ballast in response to Hurricane Charley. Our contractors have been monitoring activities on the line daily during this post hurricane period have witnessed virtually no activity on the Spur, aside from the delivery of a few boxcars of beer to the J.J. Taylor facility. My most recent report on the status on the Spur was at noon on Monday, August 30, 2004. The longer term prospects are not likely to be much better, and to the degree there is any life in them they can be accomplished on the remaining portion of the Baker Spur or elsewhere on SGLR, as shown by Messrs. Davis and Schuchmann.

11. In his original statement, Mr. Fay outlines a number of potential revenue generating ideas that the railroad has developed on the Subject Line for the period subsequent to the departure of J. J. Taylor which he claims will "substantially exceed costs." (G. Fay V.S. at A-8-10) First, he plans to use the Subject Line to serve FP&L. I have already commented upon the infeasibility and the absence of a need for the new loading pad in this area, but there are several other points to be made. This loading pad, which FP&L does not need, will only yield revenues in excess of costs only to the extent FP&L is prepared to pay for it. In the letter Mr. Curley sent to FP&L (perhaps in an effort to persuade FP&L to change its position) SGLR promised to provide the pad at no cost to FP&L. See Tab 2 at 2. Mr. Fay describes the use of the Miller (or J.J. Taylor) siding for run around purposes, but there is no certainty that that spur will remain in place after the departure of J.J. Taylor. Therefore, Mr. Fay's back up plan is to construct a run-around track on his own right of way. (*Id.* at A-9) However, that use of the right of way is inconsistent with other plans he describes for the Subject Line that would require an access road in the right of

way, and certainly it will not generate additional revenues unless FP&L has agreed to pay for it, and there is no evidence that it will do so. FP&L service can be provided safely and efficiently on the remaining segment of the Baker Spur, and denial of this abandonment application will not contribute net revenues from that customer.

12. Next, Mr. Fay cites the circus, and unlike the other claims for new business, SGLR has produced a statement from Mr. Misiura of the Ringling Bros. and Barnum & Bailey circus, who claims they “would consider” making an annual stop there including wintering one of their shows on the Subject Line. (Misiura V.S. at B-39-40) However, in my judgment the Subject Line is not suitable for such use. The Subject Line does not appear to conform to Ringling Bros.’ “general criteria” as described by Mr. Misiura, and the circus train can be accommodated at other locations on SGLR. Messrs. Fay, Haberle and Misiura each state that this circus has used SGLR tracks in the past for storage during the two or three week winter quartering of the train or for show dates, but not since 2000. (G. Fay V.S. at A-9; J. Haberle at B-36 and Misiura V.S. at B-39) First, there is no evidence that SGLR ever stored the circus train cars on the Baker Spur, and none of SGLR witnesses say that they have. The circus has appeared at the Estero arena (actually called the Germain Center) once in the past, and apparently found another location on SGLR to store the train. Messrs. Davis and Schuchmann have identified areas where the train could be stored, including the remaining portion of the Baker Spur, and confirm, based upon Mr. Davis’ experience in storing the same circus train while he worked for Norfolk Southern Corporation, that it can be stored in segments. (Davis/Schuchmann V.S. at 10, 14-15). Although Mr. Haberle refers vaguely to “new customers, track changes and other operation

considerations”,⁴ there is no documentation of why the train cannot be stored where it was in the past.

13. The Subject Line is not suitable for the circus for a number of reasons. First, it is not located within three miles of the Estero/Germain Center, as Mr. Misiura assumes in his statement. The distance is six miles. The Subject Line has no parallel access road to permit unloading of equipment, animals or egress/ingress for performers, and it will be adjacent to a six lane highway that will be dangerous and noisy for the occupants. There are no local retail or restaurant options, which Mr. Misuira claims are “important” and must be “nearby ‘walking distance’” for the performers and crews. Also, it is not clear that Mr. Misiura was told that large segments of the SGLR’s main line track to gain access to the Baker Spur are classified by SGLR as “excepted track”, as reported in Messrs. Davis/Schuchmann’s V.S. at 14. The significance of this designation, as they explain, is that the circus train will not be able to gain access to the Ft. Myers area with passengers on board. Finally, the prospect of the circus conducting a parade of its animals and performers for six miles to the Estero/Germain Center down a high-speed, six lane connector road linking major highways, which is far distant from commercial or residential areas, raises questions of safety and strains credulity. The circus would need to obtain a special event permit from the County for such a parade. While we would seek to accommodate the circus when and if it were to come to town, we would permit it to use the route they have used in the past, from a grade crossing on SGLR at Corkscrew Road to the Arena (2 miles) as opposed to Alico Road to the arena (6 miles). In conclusion, the prospects for the circus coming to SGLR

⁴ Sources at the Florida Department of Transportation tell us that although the State does not have access to SGLR’s traffic records, the amount of freight interchange traffic on the Arcadia to North Naples segment is handled three times a week on Monday, Wednesday and

are very uncertain, but if it were to return, there are other locations on SGLR where it can be accommodated.

14. Next on Mr. Fay's list of prospects involves certain multi-car and unit train volumes which involve access to correspondence and work papers which SGLR designated as "highly confidential", to which I do not have access. However, that prospect is analyzed by Messrs. Davis/Schuchmann in their statement, and they conclude it was never intended for the Baker Spur, and apparently is no longer a viable option. However, I can speak to the reference in Mr. Curley's verified statement concerning inbound unit train movements of fuel oils and the so-called "target market" at the newly expanded Southwest Florida International Airport. (Curley V.S. at A-40-41.) I spoke with Debra Lemke with the Port Authority staff which operates the Airport, and she related a meeting held with Mr. G. Fay and Mr. Curley, where Mr. Fay attempted to elicit Port Authority support against the abandonment. The Port Authority told Mr. Fay at that meeting they had no interest in delivery of fuel via a rail transload operation from the Baker Spur on Alico Road, and also that the Port Authority would not oppose the abandonment. In addition, there is no safe location along the Baker Spur to transload fuel, and no discussions have taken place with county officials concerning construction of a necessary access road to serve such a facility. Finally, the new airport access road is five miles from the end of the Subject Line, not two miles as Mr. Curley suggests.

15. The next proposed use for the Subject Line is as a public delivery team track. SGLR already has at least one such facility and there is no showing by SGLR that it is operating anywhere near capacity. (G. Fay at A-10) Moreover, FDOT has committed as a part of its

Friday. SGLR does not appear to be a busy freight railroad, and SGLR has not offered evidence that it is.

Metro Highway project north of the Route 41 intersection with Alico Road to relocate this old facility, and to construct a new public delivery facility for SGLR at an alternative location near the existing facility. There is no need for such a facility along the Subject Track, although there is no reason SGLR could not construct such a facility on the remaining portion of the Baker Spur. At least at that location there is a parallel access road where trucks could be loaded or unloaded. Again, such a road cannot be safely constructed along the right of way of the Subject line north of Alico Road. Lee County would not issue an access permit for SGLR to connect to Alico Road because the separation of the access road from the pavement at Alico Road would not meet minimum safety standards set by the County.

16. Two existing billboards are the next revenue generators cited by Mr. Fay.⁵ (G. Fay V.S. at A-10) He is correct that Lee County granted the permits to construct these billboards to SGLR, and for that reason I am not certain that SGLR would lose these revenues once the Subject Line is abandoned. The railroad holds the permits, and it is not clear to me or our local counsel that upon the abandonment those rights would convey automatically to the residual property owners when the railroad's easement expires. Certainly, the railroad would have leverage with the property owners to preserve all or a portion of the revenues earned by those billboards.

17. Finally, Mr. Fay claims that SGLR will lose the income it generates under the 1988 easement agreement with Lee County for maintenance of the existing right of way. (G. Fay at A-10) As will become more apparent from the discussion of the now revised estimate of the cost

⁵ In my initial Verified Statement and the Adverse Abandonment Application, I referred to a billboard that extends across the skeletal tracks set down by SGLR, but I failed to recall that there is a second billboard located along the Subject Line that apparently is also located in the right of way.

of the new expanded grade crossing for Alico Road (not to mention the incident leading to the consent decree discussion in Mr. Turner's verified statement) it is apparent that SGLR views grade crossings as a profit center. I am told that the 1988 easement agreement with SGLR is extraordinary in the railroad business. Here is a case where the railroad line was constructed after Alico Road, and the railroad needed access across county property. The county agreed to pay the cost of installation of the grade crossing safety devices, and 100% of the cost of maintenance, subject to an annual inflationary adjustment. Now we learn that not only are we paying for the cost of maintenance, we are also generating income for SGLR which they now attempt to use as a reason for opposing the abandonment now that the grade crossing is no longer necessary. That's chutzpah! Any income realized by SGLR from the maintenance of the grade crossing should be disregarded in the public interest assessment of this application, and I suggest that it should be returned to the County.

The Abandonment of the Subject Line will impose no significant costs upon SGLR.

18. Mr. Bruce Fay testifies that in the event the Lee County application were granted to abandon the Subject Line, SGLR would incur net out of pocket cost of nearly \$66,000. Lee County retained the firm of R.L. Banks & Associates to perform an analysis of the net liquidation value of the Subject Line, and Mr. Davis performed such study, the results of which are attached to the Davis/Schuchmann verified statement. Mr. Davis concludes that the removal to the rail, ties and other track material will yield a positive return of more than \$11,000, and addresses the differences in estimates in the joint verified statement. I rely upon his opinion in concluding that SGLR will not incur significant costs as a result of the abandonment. However, in view of SGLR's position in the matter, the County will agree to remove the track and grade crossing equipment and materials from Alico Road and the adjacent locations required for

construction of the expanded Alico Road project, and return to SGLR any rail and track materials recovered in the process (thereby saving it the cost of removal). Mr. Bruce Fay erroneously suggests that my \$300,000 estimate of the cost of removing the grade crossing over the expanded, six lane Alico Road *after* the County has constructed the road would apply equally to the situation where it was removing the existing crossing from Alico *during* the construction phase of the new expanded road project. (B. Fay at B-2) This is patently ridiculous. In fact, the cost of removing the grade crossing in the context of an on-going construction program, where the entire road is being resurfaced in the course of the project, will be negligible for the County. The \$300,000 estimate is based upon a separate solicitation of bids that would be required to remove the expanded grade crossing material and equipment from the upgraded highway, plus the cost of resurfacing that highway around the location of the grade crossing.⁶

The County Will Save in Excess of \$1 million in the Event of the Abandonment of the Line.

19. SGLR witnesses claim that the County has overstated the costs which will be avoided as a result of the abandonment principally because of three factors: (1) the \$1,100,000 price tag assigned by SGLR to the project in the bid it submitted to the County unnecessarily overstated costs of construction and that only had the County just asked SGLR, the railroad would have explained to the County that it had lower cost options; (2) the County will begin incurring penalties under the Alico Road construction contract at the rate of \$1500 per day on November

⁶ Mr. Fay also incorrectly cites my answer to Interrogatory No. 8 where I responded that the SGLR question as to cost of removing the existing crossings over a number of the private road crossings adjacent to Alico Road. Our answer did not concede that those crossings would need to be removed by the County as a result of the abandonment, but we stated that if the County removed them it would cost it “less than \$50,000” to do so for all the crossings (not for each crossing as Mr. Fay infers.) Of course, the net liquidation value computed by Mr. Davis for SGLR as owner of the track structures would cover those removal costs in the event the abandonment caused SGLR to remove the track from the right of way of the Subject Line.

19, 2004; and (3) the County will never have to pull up the new grade crossing because the Subject Line will generate so much business that the railroad will never need to abandonment it, and at least in the Protest there is a commitment no to do so for 10 years. (B. Fay V.S. 1-3; Protest at 21.⁷

20. The Application and my original verified statement estimated the savings resulting from the abandonment to be “in excess of \$1 million” with an additional savings of \$300,000 that would otherwise be incurred from removal of the new grade crossing across Alico upon the inevitable abandonment of the Subject Line. The County has not overstated the savings it will incur as a result of the proposed abandonment.⁸ See Application (Lee-10) at 3,4 and DeBerry V.S. at 2. There is only one caveat to the estimate that is necessary. SGLR’s bid for installation of the new crossing was in excess of \$1.1 million, but it included \$108,000 for construction of a new culvert under the Miller Spur which accesses the J.J. Taylor facility. It is unclear whether the spur would be removed or not upon the departure of J.J. Taylor from the property. But, if it were removed, the County would not need to construct the new culvert. However, there would still incur some cost in making modifications to the existing drainage ditch thereby saving some, but not all, of the cost attributed to the culvert in the SGLR bid. Mr. Bruce Fay’s suggestion that the existing drainage ditch is adequate for construction of the expanded Alico Road is flat wrong. (B. Fay V.S. at B-3) Mr. Fay does not appear to be registered as a professional engineer in

⁷ No SGLR witness confirms the ten year commitment, but even if this were a binding commitment, thereafter the work would still need to be done. SGLR also claims that the County will lose unitary ad valorem tax revenue paid by SGLR; sales tax because the circus wont be able to come to Ft. Myers and additional costs for public utility service by FP&L. The circus can still come to Ft. Myers, and these other impacts are truly of *de minimus* economic consequence to the County.

⁸ The Protest incorrectly characterizes Lee County’s representations to the Board in its Application of the savings to be realized as \$1.5 million. See Protest at 24.

Florida, and I see no reference to an engineering degree in his verified statement. He is not qualified to offer an opinion on that subject. Therefore, even if the Miller spur were removed prior to the construction of the new grade crossing, the County would incur costs in excess of \$1 million under SGLR's bid.

21. The County and this Board are now told by SGLR that that bid was overstated. We are told that "less heavy duty alternatives" and "new products" would reduce the grade crossing portion of the project from \$796,000 to \$405,000 (B. Fay V.S. at B-1,2) and that the \$201,000 bid price for signal work could be reduced to \$128,500 "if the County would like us to revisit the signal estimate". (H. Neeves V.S. at B-9-10). It is very likely that the County would never have heard of these possible cost reductions if it had not have filed its Application, and the cost it would have incurred in construction of this crossing would have been in excess of \$1 million. I base that in part on SGLR's history with grade crossing work in Lee County, as outlined by Mr. Turner's statement. I base it also on the fact that given the traffic on the expanded Alico Road and the County's obligation to pay for the full cost of maintenance of the crossing it would not have elected "a less heavy duty alternative." The Davis/Schuchmann statement confirms that the so-called "new product" by Performance Polymers has been on the market for several years, and if there are savings for equivalent crossing performance, I do not believe SGLR would have shared them with the County. As for "revisiting" the signal expenses, that offer would not have been made but for this application.

22. SGLR claims the County could save money by applying for FDOT grade crossing funds. In effect, SGLR is suggesting that Lee County use State funds that are otherwise provided to construct grade crossings that save lives, and divert those funds for use on a grade crossing that

will not and does not need to be built. It is public money either way, and it is not in the public interest to waste the expenditure of it.

23. The County can be liable to the contractor for delay damages under the construction contract for expansion of Alico Road, but those damages would not begin accruing for the County on November 19, 2004 as SGLR suggests. The County used the stipulated \$1,500 per day charge applicable to the contractor for delay penalties as a surrogate for the damages and other losses that the County would incur if it delays construction while it determines whether or not it must proceed with the grade crossing construction at Alico Road. We need to know, and under the Board's schedule we will know, its ruling on the adverse abandonment by November 19, 2004. This date was established by the contractor as the date by which it would need to know whether or not we were proceeding with the grade crossing installation without delaying the contract beyond the February 2005 completion date.⁹ However, by that date we will know the Board's decision which is anticipated on or before October 4. Mr. Bruce Fay suggests that there may be an appeal of the Board's decision. (B. Fay V.S. at B-2) In the event the abandonment application were approved by the Board, we will know whether SGLR has been successful in obtaining a stay of the Board's decision, which I am advised would be resolved within 30 days of the Board's decision. If the SGLR stay request were denied, the County will have to evaluate the risk of proceeding with the expansion project and removing the rail crossing over Alico Road pending appeal against the certain costs that would be incurred if we delay the contractor beyond the February 2005 completion. I think it is likely that the Board of County

⁹ The precise completion date of date of the contract is not now known. The construction contract contains a provision requiring completion within 660 days of April 21, 2003, but that schedule is tolled by force majeure events, such as the recent hurricane.

Commissioners would direct that we proceed with the project and remove the crossing under those circumstances, thereby not incurring delay costs but assuming the risk of damages, if any, resulting from a reversal of the Board's affirmative decision on appeal. Given the uncertainties that any delay costs would be incurred by the County, it is not appropriate to assume, as SGLR does, that the County will incur these delay costs. Therefore, the savings of not constructing the grade crossing should not be decreased.

24. The third major claim by SGLR is that the County would never incur the cost of removing the grade crossing once it was constructed across the expanded Alico Road because of the many uses it has projected for the Subject Line. The County believes those prospects are highly speculative or non-existent and that they are not dependent upon the Subject Line. Sooner or later, we believe that SGLR would abandon the Subject Line.

VERIFICATION

State of Florida

Lee County

I, Don DeBerry, the Design Program Manager at Lee County Department of Transportation; declare that: (a) I have been authorized by Lee County to verify and file with the Surface Transportation Board the foregoing statement in STB AB-400 (Sub-No. 4); (b) I have carefully examined the foregoing Rebuttal Verified Statement as corrected; (c) I have knowledge of the facts and matters relied upon in the statement; and (d) All representations set forth herein are true and correct to the best of my knowledge, information, and belief.

Executed in Lee County this ____ day of September, 2004.
