



**FILED**

MAY - 3 2004

**SURFACE  
TRANSPORTATION BOARD**  
May 3, 2004

210788

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

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)  
Petition of Lee County, Florida for Waiver regarding  
Seminole Gulf Railway, L.P. Adverse Abandonment  
in Lee County, Florida



**ENTERED**  
**Office of Proceedings**

MAY - 3 2004

**Part of  
Public Record**

Dear Secretary Williams:

Enclosed please find for filing the original and ten (10) copies of the above-referenced Petition for Waiver. Also enclosed is our check in the amount of \$1,300.00 representing the filing fee.

Please time stamp the extra copy of this letter to indicate receipt, and return it to me in the stamped, self-addressed envelope provided for your convenience.

Very truly yours,

Robert P. vom Eigen

**FEE RECEIVED**

MAY - 3 2004

**SURFACE  
TRANSPORTATION BOARD**

Enclosures

cc: All persons shown on the Certificate of Service

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002.1193439.1

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

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**SURFACE  
TRANSPORTATION BOARD**

PETITION FOR WAIVER AND EXEMPTION  
OF  
LEE COUNTY, FLORIDA

**EXPEDITED CONSIDERATION REQUESTED**



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Public Record

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Dated: May 3, 2004

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**SURFACE  
TRANSPORTATION BOARD**

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

PETITION FOR WAIVER AND EXEMPTION  
OF  
LEE COUNTY, FLORIDA

**EXPEDITED CONSIDERATION REQUESTED**

Petitioner, Lee County of Florida ("Lee County"), petitions the Surface Transportation Board ("the Board") for the waiver of certain of the Board's abandonment regulations in 49 C.F.R. 1152.1 and for exemption from certain provisions of the Subtitle IV of Title 49 of the U.S. Code, and in support thereof Lee County states, as follows:

I.

INTRODUCTION

Alico Road is a heavily traveled thoroughfare between Interstate 75 and U.S. 41 that services industrial, commercial, and residential traffic. It is presently a congested two-lane road that handles approximately 20,000 vehicles per day on average. Lee County is in the process of

widening Alico Road to six lanes, at which point it will be capable of handling more than 65,000 vehicles a day.

The portion of the line in question begins at engineering station 33+35+/-, which is approximately 400 feet to the west and south of where the line crosses Alico Road, approximately .9 of a mile east of U.S. 41, and parallel to Alico Road station 76+00, continuing across Alico Road and then running parallel to and north of Alico Road for approximately 4,260 ft. to the eastern terminus of the line at engineering station 79+55, which is parallel to Alico Road station 122+60. The portion of railroad line in question is the end of the Baker Spur. The Baker Spur is owned by Seminole Gulf Railway, L.P. (hereinafter "Seminole Gulf") and the sole shipper on this line is J.J. Taylor Distributors Ft. Myers/Naples, Inc. ("J.J. Taylor"), a distributor of beer.

Currently, the expansion of Alico Road to six lanes will require a new grade crossing to be built where the affected railroad lines cross Alico Road. The cost of installing the required grade crossing equipment will be approximately \$1 million dollars. Lee County seeks to avoid the expenditure of public funds to construct this crossing.

J.J. Taylor's lease on its facility ends January 5, 2005, and it is in the process of relocating its operations. Once that relocation occurs, it will no longer require rail service on this line. The owner of the leased facility and the other owners of land adjacent to the applicable rail line support the abandonment of this line and no longer wish to have rail service. Therefore, if the line were abandoned, no new grade crossing would be built – at a savings of \$1 million to the County. If the abandonment were not approved now, the eventual abandonment of the line is inevitable, since the sole shipper on the applicable line and the adjacent owner will no longer be in need of the Baker Spur's service. However, the County would have the additional expenditure

of \$500,000 to remove the new grade crossing infrastructure from the expanded Alico Road once the abandonment has occurred. Lee County seeks an adverse or third party abandonment of this portion of the Baker Spur because such abandonment promotes the present and future public convenience and necessity, and avoids the unnecessary expenditure of approximately \$1.5 million of taxpayer funds. Additionally, the abandonment that Lee County seeks will not deprive the shipper on the Baker Spur line of needed rail service because the abandonment application will request that the abandonment authority become effective only after J.J. Taylor has either converted its operations to be no longer in need of rail service or has departed its Alico Road facility.

## II.

### WAIVERS

As the Board and its predecessor have consistently found, much of the information that the Board's regulations otherwise required in an abandonment or discontinuance application is largely inapplicable or irrelevant to the issues in an adverse discontinuance or abandonment case. CSX Corporation and CSX Transportation, Inc. – Adverse Abandonment – Canadian National Railway Company and Grand Trunk Western Railroad Inc., STB Docket No. AB-31 (Sub.-No. 38) (served on March 2, 2001); Chelsea Property Owners – Abandonment – Portion of Consolidated Rail Corporation's West 30<sup>th</sup> Street Secondary Track in New York, NY, Docket No. AB-167 (Sub.-No. 1094) (served July 19, 1989); and City of Rochelle, Illinois – Adverse Discontinuance – Rochelle Railroad Company, STB Docket No. AB-549 (served June 5, 1998). Therefore, Lee County requests the waiver of the following provisions of the Board's abandonment regulations:

Waiver of filing fees. Lee County requests a waiver of the filing fees for this waiver petition (49 C.F.R. 1002.2(f)(24)) and its adverse abandonment application (49 C.F.R. 1002.2(f)(21)(i)). The filing fee for an adverse abandonment proceeding is \$16,300 (49 C.F.R. 1002.2(f)(21)(i)) and the fee for this petition for waiver is \$1,300 (49 C.F.R. 1002.2(f)(24)). The Board has decided that a fee may be waived if in the “the best interest of the public or if payment of the fee would impose an undue hardship upon the requestor.” 49 C.F.R. 1002.2(e)(2). While there is no given definition of what would be in the best interest of the public, it is clear that when a government entity is acting on behalf of their citizens, it is in the public interest that they do so as economically as possible. Therefore, when, as here, the County is seeking an adverse abandonment in order to save the tax payers approximately \$1.5 million dollars, it is in the public interest to allow them to do so without burdening the taxpayers with the associated petition and application fees. Napa Valley Wine Train, Inc. – Adverse Abandonment – In Napa Valley, CA., STB Docket No. AB-582 (decided March 21, 2001) (a flood control and water conservation agency was granted a waiver of the filing fees for its waiver petition and adverse abandonment application because of its status as a government entity).

Notice of Intent. Lee County is prepared to file and publish a notice of the proposed adverse abandonment. In view of its other waiver requests, however, Lee County believes the wording of the notice, as prescribed in 49 C.F.R. 1152.21, is inappropriate for use in these proceedings. It therefore asks for the waiver of the provisions of 49 C.F.R. 1152.21, proposing instead to be allowed to use the form of notice as set forth in Attachment A.

Lee County does not have access to the facilities of the railroad, and therefore, asks for the waiver of 49 C.F.R. 1152.20(a)(3), which requires that the notice be posted at each of the railroads' stations.<sup>1</sup>

Lee County also requests a waiver of 1152.20(a)(2)(xiii), requiring serving notice on the headquarters of all duly certified labor organizations that represent employees on the affected rail line. Lee County will attempt to ascertain and notify all labor organizations representing affected Seminole Gulf employees, but as a third party it might not be possible to determine all organizations that should be notified under 49 C.F.R. 1152.20(a)(2)(xiii). Therefore, Lee County requests a waiver of 49 C.F.R. 1152.20(a)(2)(xiii).

For the reasons more fully discussed hereinafter, Lee County asks for the waiver of 49 C.F.R. 1152.20(c), which requires service of copies of the Environmental and Historic Report at least 20 days in advance of the filing of the application.

Content of Application. It is unlikely that Seminole Gulf included the line which is subject of the proposed adverse abandonment in category 1 of their system diagram maps, and a search by Lee County of the Surface Transportation Board's system maps on file did not reveal a system diagram map that includes the Baker Spur line. Accordingly, Lee County asks for the waiver of 49 C.F.R. 1152.22(a)(4).<sup>2</sup> See also, Grand Trunk Western Railroad Incorporated at 1 (finding that the filing of a system diagram map is not appropriate in the context of an adverse abandonment).

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<sup>1</sup> In connection therewith, Lee County seeks and exemption from 49 U.S.C. 10903(a)(3)(B).

<sup>2</sup> In connection therewith, Lee County seeks and exemption from 49 U.S.C. 10903(c).

Lee County is without knowledge of the condition of the affected railroad line, the service which heretofore has been rendered by Seminole Gulf Railways on the line and the revenue and cost data associated with this line. Lee County, therefore, asks for the waiver of 49 C.F.R. 1152.22(b) – (d).

For the reasons more fully discussed hereinafter, Lee County asks for the waiver of 49 C.F.R. 1152.22(f), requiring the disclosure of the information relating to the environmental impact of the proposed adverse abandonment. Lee County is prepared to submit a draft Federal Register notice with its application. In view of its other waiver requests, however, Lee County believes the wording of the notice, as prescribed in 49 C.F.R. 1152.22(i), is inappropriate for use in these proceedings. Therefore, Lee County asks for the waiver of 49 C.F.R. 1152.22(i) and proposes instead to be allowed to use the form of notice as set forth in Attachment B.

Public use, trails and OFA conditions. We are seeking an exemption from the public use, trails, and OFA conditions in 49 C.F.R. 1152.28<sup>3</sup>, 49 C.F.R. 1152.29, and 49 C.F.R. 1152.27<sup>4</sup> on the assumption that the Board will find, based upon Lee County's application, that the abandonment of the line is consistent with the present and future public convenience and necessity, and that the public interest does not require retention of the Board's jurisdiction over the line. Union Pacific Railroad Company – Abandonment Exemption – In Monroe County, IA, STB Docket No. AB-33 (Sub-No. 153X) (served September 1, 2000); Doniphan, Kensett and Searcy Railway – Abandonment Exemption – In Searcy, White county, AR, STB Docket No. AB-558X (served May 6, 1999). Adherence to the procedures will serve no useful purpose in

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<sup>3</sup> In connection therewith, Lee County seeks an exemption from 49 U.S.C. 10905.

<sup>4</sup> In connection therewith, Lee County seeks an exemption from 49 U.S.C. 10904.

view of the findings to be requested by Lee County and is not necessary to carry out the railroad transportation policy of 49 U.S.C. 10101.

Environmental and historic report. As already noted, the sole current shipper on the affected line is moving its facility for reasons unrelated to this abandonment application. After that shipper is gone, no shippers will be on the affected line. Lee County has asked that their application for adverse abandonment not become effective until this sole shipper no longer needs the Baker Spur for their Alico Road facility, or until their lease ends, whichever comes first. Accordingly, the proposed adverse abandonment, if it were to come into effect, would not cause a departure from the consist or volume of railroad traffic when it becomes effective. The proposed adverse abandonment, therefore, will come within the provisions of 49 C.F.R. 1105.6(b)(7)(2), requiring no environmental or historical documentation in any action that does not result in significant changes in carrier operations, that is, changes that do not exceed the thresholds established in 49 C.F.R. 1105.7(e)(4) or (5). See, Salt Lake City Railroad Company, Inc. – Adverse Abandonment – Line of Utah Transit Authority in Salt Lake City, UT, STB Docket No. AB-520, (served August 24, 1999) (holding that where service will continue on the line and will not be effected by the adverse abandonment, no environmental document is required) . Therefore, a waiver of the environmental and historical reporting requirements should be granted.

Lee County is prepared to submit environmental data relating to the relocation of the J.J. Taylor facility and other information prepared by the County for the Alico Road project. Copies of these reports will be filed with the Board's Section of Environmental Analysis.

Lee County is also seeking a waiver of the historical report in this petition because the Baker Spur was built in approximately 1973, less than 50 years ago, and it is our understanding

that the historic report requirement does not apply to a line less than 50 years old. 49 C.F.R. 1105.8.

The foregoing waiver requests are consistent with the waivers heretofore granted by the Board in adverse abandonment proceedings. E.g., Napa Valley Wine Train, Inc. – Adverse Abandonment – In Napa Valley, CA., STB Docket No. AB-582 (decided March 29, 2001); CSX Corporation, et al. Adverse Abandonment Application – Canadian National Railway Company, et al., STB Docket No. AB-31 (Sub.-No. 38) (served March 2, 2001); Salt Lake City Railroad Company, Inc. – Adverse Abandonment – Line of Utah Transit Authority in Salt Lake City, UT, STB Docket No. AB-520 (served August 24, 1999). Lee County, therefore, asks that its waiver requests be granted.

### III.

#### REQUEST FOR EXPEDITED CONSIDERATION

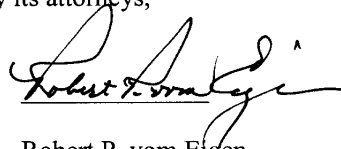
Lee County intends to file its adverse abandonment application on or soon after June 1, 2004. The County will benefit from prompt consideration of the abandonment application since the widening of Alico Road has already begun and any delays in construction caused by the County will result in penalty fees by the contractor. The Board's regulations and decisions indicate a preference that waivers be requested and obtained before an adverse application is filed. 49 C.F.R. 1152.24(e)(5); Grand Trunk Western Railroad Incorporated – Adverse Discontinuance of Trackage Rights Application – A Line of Norfolk and Western Railway Company in Cincinnati, Hamilton County, OH, Docket No. AB-31 (Sub.-No. 30) (served February 12, 1998). Therefore, Lee County respectfully requests expedited consideration of this Waiver Petition and a Board decision issued and effective on or before June 1, 2004.

WHEREFORE, petitioner, Lee County, seeks the waiver of certain of the Board's abandonment regulations and exemption from certain of the provisions of subtitle IV of Title 49 of the U.S. Code in connection with the anticipated filing by Lee County of its adverse abandonment application.

Respectfully submitted,

Lee County, FL.

By its attorneys,

A handwritten signature in black ink, appearing to read "Robert P. vom Eigen", with a stylized flourish at the end.

Robert P. vom Eigen  
Melissa A. Burt  
Foley & Lardner, LLP  
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3000 K Street, NW  
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Tel: 202-672-5300

John Turner  
Assistant County Attorney  
Lee County  
P.O. Box 398  
Fort Myers, FL 33902-0398  
Tel: 239-335-2236

Dated: May 3, 2004

ATTACHMENT A  
NOTICE

BEFORE THE  
SURFACE TRANSPORTATION BOARD  
WASHINGTON, DC 20423

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

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

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NOTICE OF ADVERSE ABANDONMENT  
OF  
LEE COUNTY, FLORIDA

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Lee County, Florida ("Lee County") gives notice that on or about June 1, 2004, it intends to file with the Surface Transportation Board ("the Board"), Washington, D.C. 20423, an application seeking the adverse abandonment of approximately 4,600 ft. of Seminole Gulf Railway L.P.'s (hereinafter "Seminole Gulf") Baker Spur line in an unincorporated area of Lee County, Florida. The applicable line of railroad to be abandoned begins at engineering station 33+35+/-, which is which is approximately 400 feet to the west and south of where the line crosses Alico Road, approximately .9 of a mile east of U.S. 41, and parallel to Alico Road station 76+00, continuing across Alico Road and then running parallel to and north of Alico Road for approximately 4,260 ft. to the eastern terminus of the line at engineering station 79+55, which is parallel to Alico Road station 122+60. The affected railroad line is situated in U.S. Postal Service Zip Codes 33912 and 33913, it traverses no other U.S. Postal Zip Codes and the line includes no stations. The public record of the Board does not contain a system diagram map for

Seminole Gulf, and therefore it is not possible for Lee County to determine whether this line of railroad appears on a system diagram map. Based on information in the possession of the County, the line does not contain federally granted rights-of-way. Any documentation relating to this abandonment in the County's possession will be made available promptly to those requesting it.

Alico Road is a heavily traveled thoroughfare between Interstate 75 and U.S. 41 that services industrial, commercial, and residential traffic. It is presently a congested two-lane road and Lee County is in the process of widening Alico Road to six lanes. The cost of installing the required grade crossing equipment as part of widening Alico Road will cost approximately \$1 million dollars. The only shipper on the applicable portion of this line is J.J. Taylor Distributors Ft. Myers/Naples, Inc. ("J.J. Taylor"). J.J. Taylor's lease on its facility ends January 5, 2005. It is in the process of relocating to a different facility, and no longer will be in need of rail service on this line. The owner of the leased property supports the abandonment of this line, and no longer wishes to have rail service to its property. This abandonment is necessary to save the County the \$1 million in costs to build the grade crossing. Additionally, should this abandonment not be granted, since the only shipper on the applicable line is relocating, service on this line will cease and eventually the line will be abandoned, forcing the County to spend an additional \$500,000 to remove the grade crossing.

The interests of Seminole Gulf Railway's employees will be protected in accordance with the conditions of Oregon Short Line R. Co. – Abandonment – Goshen, 360 I.C.C. 91 (1979).

The application, when filed, can be viewed following its filing on the Board's webpage, [www.stb.dot.gov](http://www.stb.dot.gov), or a copy can be secured from Lee County's counsel, whose name and address appear below. The application will include Lee County's entire case for abandonment.

Any interested person, after the application is filed on or about June 1, 2004, may file with the Surface Transportation Board its protest of, or written comments concerning, the proposed abandonment identifying them by the proceedings' docket numbers. These filings are due 45 days from the date of filing of the application. Persons who may oppose the abandonment, but who do not wish to participate fully in the process by appearing at any oral hearings or by submitting verified statements of witnesses containing detailed evidence, should file comments. Persons opposing the proposed abandonment that do wish to participate actively and fully in the process should file a protest. Protests must contain that party's entire case in opposition including the following: (1) the protestant's name, address and business, (2) the protestant's interest in the proceeding, including their use of the line or the public interest represented, (3) the protestant's reasons for protesting or commenting on the proposed abandonment, including their reliance on the involved service, and (4) any rebuttal of material submitted in the application.

Protests or comments need to be notarized or verified, and an unbound original and ten copies are required to be filed with the Secretary of the Board, at 1925 K Street, N.W., Washington, D.C. 20423-0001, together with a certificate of service attesting that copies of the comments or protests have been served on Lee County's counsel in this matter, Robert P. vom Eigen, Foley & Lardner, LLP, Suite 500, 3000 K Street, N.W., Washington, D.C. 20007. Except

as otherwise set forth in 49 C.F.R. 1152, each document filed with the Board must be served on all parties to the abandonment proceeding. Protests and comments will be considered by the Board in determining what disposition to make of the application. A commenting party or protestant may participate in the proceeding as its interests may appear.

If an oral hearing is desired, the requester must make a request for an oral hearing and provide reasons why an oral hearing is necessary. Oral hearing requests must be filed with the Board no later than 10 days after the application is filed.

Those parties filing protests to the proposed abandonment should be prepared to participate actively either in an oral hearing or through the submission of their entire opposition case in the form of verified statements and arguments at the time they file a protest. Parties seeking information concerning the filing of protests should refer to 49 C.F.R. 1152.25.

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Service at (202) 565-1592 or refer to the text of the abandonment regulations at 49 C.F.R. 1152.1, *et seq.*, which can be viewed at [www.gpo.gov/nara.cfr](http://www.gpo.gov/nara.cfr).

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by the Section of Environmental Analysis will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Any other persons who would like to obtain a copy of the EA (or EIS) may contact the Section of Environmental Analysis. EAs in these abandonment proceedings normally will be made

available within 33 days of the filing of the application. The deadline for submission of comments on the EA will generally be within 30 days of its service. The comments received will be addressed in the Board's decision. A supplemental EA or EIS may be issued where appropriate.

ATTACHMENT B  
FEDERAL REGISTER NOTICE

**FEDERAL REGISTER NOTICE**  
**BEFORE THE**  
**SURFACE TRANSPORTATION BOARD**  
**WASHINGTON, DC 20423**

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

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

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**NOTICE OF ADVERSE ABANDONMENT**  
**OF**  
**LEE COUNTY, FLORIDA**

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Lee County, Florida ("Lee County") gives notice that on June 1, 2004, it filed with the Surface Transportation Board ("the Board"), Washington, D.C. 20423, an application seeking the adverse abandonment of approximately 4,600 ft. of Seminole Gulf Railway L.P.'s (hereinafter "Seminole Gulf") Baker Spur line in an unincorporated area of Lee County, Florida. The applicable line of railroad to be abandoned begins at engineering station 33+35+/-, which is which is approximately 400 feet to the west and south of where the line crosses Alico Road, approximately .9 of a mile east of U.S. 41, and parallel to Alico Road station 76+00, continuing across Alico Road and then running parallel to and north of Alico Road for approximately 4,260 ft. to the eastern terminus of the line at engineering station 79+55, which is parallel to Alico Road station 122+60. The affected railroad line is situated in U.S. Postal Service Zip Codes 33912 and 33913, it traverses no other U.S. Postal Zip Codes and the line includes no stations.

The public record of the Board does not contain a system diagram map for Seminole , and therefore it is not possible for Lee County to determine whether this line of railroad appears on a system diagram map. Based on information in the possession of the County, the line does not contain federally granted rights-of-way. Any documentation relating to this abandonment in the County's possession will be made available promptly to those requesting it.

The interests of Seminole Gulf Railway's employees will be protected in accordance with the conditions of Oregon Short Line R. Co. – Abandonment – Goshen, 360 I.C.C. 91 (1979).

The application can be viewed on the Board's webpage, [www.stb.dot.gov](http://www.stb.dot.gov), or a copy can be secured from Lee County's counsel, whose name and address appear below. The applicant's entire case for abandonment was filed with the application.

Any interested person may file with the Surface Transportation Board its protest of, or written comments concerning, the proposed abandonment identifying them by the proceedings' docket numbers. These filings are due 45 days after the application is filed. Persons who may oppose the abandonment, but who do not wish to participate fully in the process by appearing at any oral hearings or by submitting verified statements of witnesses containing detailed evidence, should file comments. Persons opposing the proposed abandonment that do wish to participate actively and fully in the process should file a protest. Protests must contain that party's entire case in opposition including the following: (1) the protestant's name, address and business, (2) the protestant's interest in the proceeding, including their use of the line or the public interest represented, (3) the protestant's reasons for protesting or commenting on the proposed

abandonment, including their reliance on the involved service, and (4) any rebuttal of material submitted in the application.

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If an oral hearing is desired, the requester must make a request for an oral hearing and provide reasons why an oral hearing is necessary. Oral hearing requests must be filed with the Board no later than 10 days after the application is filed.

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An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by the Section of Environmental Analysis will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Any other persons who would like to obtain a copy of the EA (or EIS) may contact the Section of Environmental Analysis. EAs in these abandonment proceedings normally will be made available within 33 days of the filing of the application. The deadline for submission of comments on the EA will generally be within 30 days of its service. The comments received will be addressed in the Board's decision. A supplemental EA or EIS may be issued where appropriate.