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April 2, 2004

ENTERED
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Public Record



VIA FEDERAL EXPRESS

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

FD - 30487

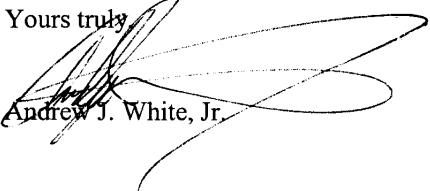
Re: Greenville County Economic Development Corporation –
Petition for Declaratory Order

Dear Secretary Williams:

Please find enclosed an original and ten (10) copies of the Comments of the Greenville County Economic Development Corporation, for filing in the proceeding referenced above.

Please date-stamp the extra copy of the Comments and this Letter, provided for that purpose, and return them to me in the envelope provided.

Yours truly


Andrew J. White, Jr.

AJWjr:sec
Enclosure

#436855

THE
SURFACE TRANSPORTATION BOARD

34487
FINANCE DOCKET NO. 34487



GREENVILLE COUNTY ECONOMIC DEVELOPMENT CORPORATION
PETITION FOR DECLARATORY ORDER

ENTERED
Office of Proceedings

COMMENTS OF THE GREENVILLE COUNTY ECONOMIC
DEVELOPMENT CORPORATION

APR 05 2004

Part of
Public Record

By decision served March 22, 2004, the Surface Transportation Board (Board) instituted a declaratory order proceeding and requested comments on the following question: Whether the preemption provisions of 49 U.S.C. § 10501(b)(2) preclude a state court from hearing a lawsuit alleging that a railroad has failed to carry out its common carrier obligation to provide service. For the reasons discussed below, Greenville County Economic Development Corporation ("GCEDC") respectfully submits that the Interstate Commerce Commission Termination Act ("ICCTA") precludes a state court from hearing such a lawsuit and, additionally, precludes a person from asserting against a railroad state statutory and common law remedies relating to the operations and services of railroads.

I. BACKGROUND

On June 20, 2003, in Docket No. AB-490X, *Greenville County Economic Development Corporation – Discontinuance of Service Exemption – in Greenville County, SC*, the Greenville County Economic Development Corporation (GCEDC) sought to use the Board's class exemption procedures to obtain authorization to discontinue service over a line of railroad that it had acquired in 1999. In response, Lee Groome and Groome & Associates, Inc. (Groomes)

indicated to the Board that it had unsuccessfully sought service over the line, and that it was pursuing an action against GCEDC in a South Carolina state court. In a decision served January 24, 2004, the Board dismissed the notice of exemption, finding that Groomes raised sufficient concerns to make it inappropriate for GCEDC to use the class exemption, and informed GCEDC that it would have to petition for an individual exemption or apply for abandonment. The Board did not address the state court proceeding, other than to note that its existence indicated that the discontinuance matter was controversial.

By letter to the Board dated March 11, 2004, GCEDC's counsel raised questions about the state court's jurisdiction in light of 49 U.S.C. § 10501(b). Specifically, counsel furnished the Board with a copy of a recent decision issued in the state court proceeding that (1) rejected GCEDC's argument that the state court lacked jurisdiction to hear claims for damages resulting from failure to provide service, and (2) ruled that South Carolina's statutes regulating the operation of railroads, and also granting damages for failure to provide rail service, were not preempted by the ICCTA and were enforceable against GCEDC.

The Board treated the March 11 letter as a petition for declaratory order and instituted this proceeding.

II. ARGUMENT

The ICCTA became effective January 1, 1996 (see Section 2, Public Law 104-88). 49 U.S.C. §10501 of the ICCTA establishes the jurisdiction of the STB, and subsection (b) of that section reads as follows:

(b) The *jurisdiction of the Board over-*

- (1) *transportation by rail carriers, and the remedies provided in this part with respect to* rates, classifications, rules (including car service, interchange, and other operating rules), *practices, routes, services, and facilities of such carriers;* and

- (2) the construction, acquisition, operation, abandonment or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

(emphasis added)

The legislative history of the ICCTA is informative about Congress' intent in giving the STB exclusive jurisdiction of railroad operations and services:

This provision replaces the railroad portion of former Section 10501. Conforming changes are made to reflect the direct and complete preemption of State economic regulation of railroads.... Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass *all* such regulation and to be completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation.

U.S. Code, Congressional and Administrative News, 1995, Vol. 2, pp807-808

As a consequence of the clear exclusivity language of the ICCTA as well as Congress' clear intent in granting such exclusive jurisdiction, courts deciding cases after the ICCTA's enactment have uniformly and without exception held that (a) except for police powers (e.g., public safety, health, etc.), state courts have no subject matter jurisdiction to adjudicate claims concerning railroad operations, services and damages relating thereto, and (b) except for state police and public safety matters, claims against railroads arising from state statutes, regulations or common law, are barred.

(a) State Courts Have No Subject Matter Jurisdiction of Claims which Relate to the

Operation or Services of Railroads and which Do Not Concern Matters of Public Health or Safety.

The Supremacy Clause of the United States Constitution provides that "the Laws of the United States . . . shall be the supreme law of the land." U.S. Const. art VI, cl.2. As such, any state law that conflicts with federal law is preempted and thus "without effect." Cippollone v. Liggett Group, Inc., 505 U.S. 504, 516, 120 L.Ed.2d 407, 422 (1992). With respect to the ICCTA, the statutory language and accompanying legislative record is evidence of Congress' clear and manifest intent to occupy the entire field of economic regulation of rail transportation. See: City of Auburn v. Burlington Northern Santa Fe Corporation, 154 F.3d 1025 (9th Cir. 1998), cert. denied, 527 U.S. 1022, 144 L. Ed. 2d 771, 119 S. Ct. 2367 (1999), holding that the ICTAA's plain language expressly preempts state regulation of railroads and therefore state and local environmental review procedures are not enforceable against a party seeking to re-open an abandoned rail line; Fla. E. Coast Ry. v. City of West Palm Beach, 266 F.3d 1324 (11th Cir. 2001), recognizing ICCTA's preemption of state regulation of railroad operations but holding that such preemption applied only to railroad transportation and service issues; Wisconsin Cent. Ltd. v. City of Marshfield, 160 F. Supp. 2d 1030 (W.D. Wis. 2000), holding that the ICCTA is a pervasive scheme of federal regulation which completely preempts state jurisdiction of railroad regulation; Friberg v. Kansas City Southern Railway Company, 267 F. 3d. 439 (5th Cir. 2001), ruling that under the express wording of the ICCTA, the STB has exclusive jurisdiction over rail operations, and all state laws or regulations affecting rail operations are preempted; Rodgers v. Burlington Northern Santa Fe Corporation, 98 F. Supp. 2d 1186 (E.D.Wash., 2000), holding that the ICCTA vests exclusive jurisdiction in the STB to decide railroad operation and service issues; Dakota Missouri Valley & Western Railroad, Inc. v. Burlington Northern & Santa Fe

Railway Company, 280 F. Supp. 2d 919 (D.S.D., 2003), holding that the ICCTA is a comprehensive federal act which completely divests the states from regulating railroad operations and places exclusive jurisdiction of such activities in the STB; Burlington Northern Santa Fe Corp. v. Anderson, 959 F. Supp. 1288 (D. Mont. 1997), holding that the ICCTA preempts state regulation of railroad services and that the state agency could not prevent railroad from closing a business office; Cedarapids, Inc. v. Chicago, Central & Pacific Railroad Company, 265 F.Supp.2d 1005 (N.D. Iowa, 2003), holding that the ICCTA completely preempts state court jurisdiction of rail service issues and ruling that a state land abandonment statute was not effective against a railroad; Columbiana County Port Authority v. Boardman Township Park District, 154 F.Supp.2d 1165 (N.D. Ohio, 2001), holding that the ICCTA trumps a state condemnation statute and that the STB has exclusive authority over issue of railroad abandonment; City of Seattle v. Burlington Northern Railroad Company, 22 P.3d 260 (Wash. App. 2001), holding that in matters of railroad operations, state laws and jurisdiction are totally preempted by the ICCTA; Burlington Northern Railroad Company v. Page Grain Company, 545 N.W.2d 749 (Neb. 1996), the state court holding that that the ICCTA divests state courts of all subject matter jurisdiction over rail matters affecting practices, routes, services and facilities of rail carriers; Village of Ridgefield Park v. New York, Susquehanna and Western Railway Corporation, 724 A.2d 267 (N.J. Super., 1999), aff'd and modified 724 A.2d 267 (App. Div. 1999), modified and remanded 750 A.2d 57 (N.J., 1999), the state appellate court holding that the ICCTA divests the state court of subject matter jurisdiction over damage claims against a railroad arising from rail operations and that ruling that the plaintiff's remedy lay solely with the STB; Appeal of Conservation Law Foundation, 782 A.2d 909 (N.H. 2001), holding that the ICCTA preempts state law affecting railroad operations.

49 U.S.C. §§11101 of the Act states:

Common carrier transportation, service, and rates

(a) A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request. A rail carrier shall not be found to have violated this section because it fulfills its reasonable commitments under contracts authorized under section 10709 of this title before responding to reasonable requests for service. Commitments which deprive a carrier of its ability to respond to reasonable requests for common carrier service are not reasonable....

§11704 provides a private action remedy with the STB for persons who are damaged by a railroad's violation of the ICCTA.¹ That section states:

Sec. 11704. - Rights and remedies of persons injured by rail carriers

(a) A person injured because a rail carrier providing transportation or service subject to the jurisdiction of the Board under this part does not obey an order of the Board, except an order for the payment of money, may bring a civil action in a United States District Court to enforce that order under this subsection.

(b) A rail carrier providing transportation subject to the jurisdiction of the Board under this part is liable for damages sustained by a person as a result of an act or omission of that carrier in violation of this part. A rail carrier providing transportation subject to the jurisdiction of the Board under this part is liable to a person for amounts charged that exceed the applicable rate for the transportation.

(c) (1) A person may file a complaint with the Board under section 11701(b) of this title or bring a civil action under subsection (b) of this section to enforce liability against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

(2) When the Board makes an award under subsection (b) of this section, the Board shall order the rail carrier to pay the amount awarded by a specific date. The Board may order a rail carrier providing transportation subject to the jurisdiction of the Board under this part to pay damages only when the proceeding is on complaint. The person for whose benefit an order

¹ As discussed below, the private action must be brought with the STB, although one case, Pejepscot, has held that the claim can be brought either with the STB or in theoretically in federal district court (but the federal court should defer to the STB's primary jurisdiction).

of the Board requiring the payment of money is made may bring a civil action to enforce that order under this paragraph if the rail carrier does not pay the amount awarded by the date payment was ordered to be made.

(d) (1) When a person begins a civil action under subsection (b) of this section to enforce an order of the Board requiring the payment of damages by a rail carrier providing transportation subject to the jurisdiction of the Board under this part, the text of the order of the Board must be included in the complaint. In addition to the district courts of the United States, a State court of general jurisdiction having jurisdiction of the parties has jurisdiction to enforce an order under this paragraph. The findings and order of the Board are competent evidence of the facts stated in them. Trial in a civil action brought in a district court of the United States under this paragraph is in the judicial district -

(A) in which the plaintiff resides;

(B) in which the principal operating office of the rail carrier is located; or

(C) through which the railroad line of that carrier runs.

In a civil action under this paragraph, the plaintiff is liable for only those costs that accrue on an appeal taken by the plaintiff.

(2) All parties in whose favor the award was made may be joined as plaintiffs in a civil action brought in a district court of the United States under this subsection and all the rail carriers that are parties to the order awarding damages may be joined as defendants. Trial in the action is in the judicial district in which any one of the plaintiffs could bring the action against any one of the defendants. Process may be served on a defendant at its principal operating office when that defendant is not in the district in which the action is brought. A judgment ordering recovery may be made in favor of any of those plaintiffs against the defendant found to be liable to that plaintiff.

(3) The district court shall award a reasonable attorney's fee as a part of the damages for which a rail carrier is found liable under this subsection. The district court shall tax and collect that fee as a part of the costs of the action.

The wording of the statute is significant. Subsection (c)(1) allows a person to recover damages either by filing a claim with the STB or bringing a "civil action. Subsection (c)(2) is the only part of the statute which addresses the jurisdiction of a state court, and it expressly limits a state court's jurisdiction to a claim in which the plaintiff seeks to enforce an STB order. This

limited jurisdiction is logical inasmuch as the state court, in such circumstances, will not interpret or otherwise adjudicate federal railroad law, but merely will enforce an STB decision in which that federal agency itself interpreted federal railroad law. There is no such similar concurrent jurisdiction granted to the state court when a claimant such as Groome and Associates, Inc. seeks to file a suit for damages under subsection (b). This is logical because to grant such concurrent jurisdiction to a state court would contradict the ICCTA's purpose of federalizing all decisions regarding the operations of railroads. The fact that a law suit under §11704 cannot be brought in state court is further manifested by subsection (d)(3), which provides that the "district court" shall award attorney fees as damages to a successful claimant under §11704. There is no similar provision for a state court's awarding attorney fees because the state court has no jurisdiction under the statute except in the limited case of enforcement of an STB order, and in that event the STB order itself can address the issue of attorney fees.

Federal cases decided under the ICCTA have consistently held that claims under the ICCTA can be heard only by the STB (however, with one case, Pejepscot, taking a slightly different tack and ruling that the federal district court has concurrent jurisdiction with the STB to hear a claim under §11704(b), see footnote 1, above). See cases cited on pages 2, 3 and 4 12, above and also: Burlington Northern Santa Fe Corporation v. Anderson, 959 F. Supp. 1288 (D. Mont., 1997), holding that the ICCTA totally preempts the state's right to regulate rail operations; Englehard Corporation v. Springfield Terminal Railway Company, 193 F. Supp.2d 385 (D.Mass. 2002), dismissing plaintiff's damage claims and holding that the STB alone has jurisdiction to hear a claim under §11704(b); Rushing v. Kansas City Southern Railway Company, 194 F. Supp. 2d 493 (S.D. Miss. 2001), holding that the STB has exclusive jurisdiction to hear claims which have an economic impact on railroad operations; Debruce

Grain, Inc. v. Union Pac. R.R., 983 F.Supp. 1280 (W.D. Mo. 1997), aff'd on other grounds, 149 F.3d 787 (8th cir. 1998), dismissing plaintiff's claim for damages and holding that the STB has exclusive jurisdiction over plaintiff's claims; Flynn v. Burlington N. Santa Fe Corp., 98 F. Supp. 2d 1186 (E.D. Wash. 2000), dismissing case for plaintiff's lack of standing, but noting the exclusive jurisdiction of the STB over rail operations; Soo Line R.R. Co. v. City of Minneapolis, 38 F. Supp. 2d 1096 (D. Minn. 1998), holding that the ICCTA preempts state regulation of rail operations and finding the city's process of requiring railroad to obtain demolition therefore is preempted by the ICCTA.

As is the case with federal courts deciding jurisdictional issues under the ICCTA, all reported state appellate courts examining this jurisdictional issue likewise have held that the ICCTA divests state courts of subject matter jurisdiction over claims relating to the services and operations of a railroad which do not relate to the police powers of the state. The Supreme Court of Nebraska in Burlington Northern Railroad Company v. Page Grain Company, *supra*, held that the ICCTA divested state courts of all subject matter jurisdiction over interstate rail matters affecting practices, routes, services and facilities of rail carriers, noting:

State courts no longer have jurisdiction to consider the practices, routes, services, and facilities of interstate rail carriers because §10501(a) of the federal IC Termination Act of 1995 grants the federal Surface Transportation Board with exclusive jurisdiction over transportation by rail carriers as part of the interstate rail network.

545 N.W.2d at 751

In Village of Ridgefield Park v. New York, Susquehanna and Western Railway Corporation, *supra*, the state appellate court held that the ICCTA divested the state court of subject matter jurisdiction over a nuisance damage claim against a railroad and that the state court's intrusion into railroad operation matters would be an invasion of the preempted area of exclusive federal regulation.

In Appeal of Conservation Law Foundation, *supra*, the Supreme Court of New Hampshire considered a case in which the Conservation Law Foundation (“CLF”) had petitioned the state Public Utilities Commission seeking a ruling under state statutes that the city, as owner of a rail line, must restore the line to service. The Commission ruled that the state statutes were preempted by the ICCTA and dismissed the petition. The Supreme Court of New Hampshire sustained the Commission’s ruling, holding that the ICCTA preempted the state law issues as well as the regulatory power of the Commission over the issue. The court stated in regard to 49 U.S.C. §10501:

“It has been noted that ‘it is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.’ CSX Transp., Inc., v. Georgia Public Serv. Com’n, 944 F.Supp. 1573, 1581 (N.D. Ga. 1996). ... CLF argues that preemption does not apply here because the abandonment of the railroad line has already taken place. Now that abandonment of the line has been completed, CLF argues, the STB no longer has jurisdiction over the railroad track. CLF relies upon Hayfield Northern Railroad Co., Inc., et al. v. Chicago & North Western Transportation Co., 467 U.S. 622, 633, 81 L. Ed. 2d 527, 104 S.Ct. 2610 (1983), in which the Court stated that unless the Interstate Commerce Commission (the STB’s predecessor) “attaches postabandonment conditions to a certificate of abandonment, the Commission’s authorization of an abandonment brings its regulatory mission to an end.”

We are not persuaded by CLF’s argument. First, Hayfield was decided prior to the enactment of the ICC Termination Act, which broadened the preemption language of 49 U.S.C. §10501.... ‘The statutory language and accompanying legislative record evidence Congress’ clear and manifest intent to occupy the entire field of economic regulation of rail transportation.’ Burlington Northern Santa Fe Corp. v. Anderson, 959 F. Supp. 1288, 1296 (D. Mont. 1997).

783 A. 2d at 911, 912

In Carleton Nursery Co. v. CSX Transportation, Inc., 2002 Mich. App. Lexis (the most recent state appellate decision on the issue of federal preemption under the ICCTA) the Court of Appeals of Michigan dealt with a situation where the railroad’s operations habitually blocked the driveway of the elderly plaintiff’s nursery business, which of course adversely affected the

business.² The trial court enjoined the railroad from unreasonably preventing plaintiffs driveway access and ordered the railroad not to block access for more than 45 minutes. While recognizing and acknowledging the validity of legal authorities holding that the ICCTA preempts all state regulation of matters which would have an economic effect on a railroad, the Michigan appellate court noted that the railroad had never claimed that it would have to make capital expenditures to comply with the injunction and, therefore, under the facts of the case, the court found that the ICCTA did not apply to the insignificant actions imposed on the railroad by the court's injunction:

We conclude that the trial court's injunction is not an economic regulation, nor has it been shown that it would have an economic effect. It is not addressed to infrastructure and there has been no showing that infrastructure expenditures would be needed.

2002 Mich. App. LEXIS at 2354-37

Nursery, rail service to Groome and his damages claim are subject to the ICCTA, and the state court would have no subject matter jurisdiction of those issues. Also see Sunflour R.R. v. Paulson, 670 N.W.2d 518 (S.D. 2003), Supreme Court of South Dakota recognizing ICCTA's complete preemption of railroad regulation, but holding that a claim for rent against a railroad did not concern rail operations subject to ICCTA preemption.

In contrast to the above state and federal cases which hold that a state court does not have subject matter jurisdiction of railroad operations and damage claims under the ICCTA, there is no reported state or federal case which holds to the contrary and which supports Groome & Associates' position that this court has subject matter jurisdiction of Plaintiffs' damage claims arising from GCEDC's failure to provide rail service.

² Carleton Nursery, being an unpublished decision, is not precedentially binding under Michigan state law. However, the case nevertheless is cited in this Memorandum because it is illustrative of the unanimity of state and

(b) State Law Claims Are Preempted by the ICCTA and Are Barred.

As discussed above, the ICCTA was enacted as a consequence of Congress' desire that all regulation of railroad services and operations, excepting police powers of the states relating to public health and safety issues, be exclusively within the federalized system established by the ICCTA and administered by the STB. §10501(b)(2), quoted in full above, expressly states that "... the remedies provided by this part with respect to the regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." In that regard, GCEDC notes that both §§11101 and 11704 are within the "part" referenced in §10501(b)(2).

In Village of Ridgefield Park, the New Jersey state appellate court also ruled that the ICCTA barred the plaintiff's assertion of state law nuisance claims against the defendant railroad, and in that regard the court noted:

As aptly stated in CSX Transportation, Inc. v. Georgia Public Service Commission, 944 F. Supp. 1573 (N.D. Ga. 1996), 'by preempting state regulation of railroad operations, and granting exclusive jurisdiction over the regulation of railroad operations, and granting exclusive jurisdiction over the regulation of almost all aspects of railroad operations to the [Board], Congress removes the ability of states to frustrate its policy of deregulating and reviving the railroad industry.' The Act obviously intended that national transportation interests dominate over parochial concerns and impulses.

724 A.2d at 274

The Supreme Court of New Hampshire likewise has held that the ICCTA totally preempts all state court remedies against a railroad, thereby depriving a state agency of the ability to remove railroad tracks under a state statute. Appeal of Conservation Law Foundation, *supra*. Also see Rushing, *supra*, in which the court held that plaintiff's common law nuisance and negligence claims under Mississippi law were preempted by the ICCTA because they impacted the operations of the carrier.

federal court decisions finding complete ICCTA preemption of state jurisdiction of railroad operations.

In a case similar to the facts in Groome & Associates' case, the plaintiffs in Friberg v. Kansas City Southern Railway Company, 267 F.3d 439 (5th Cir. 2001) contended that the railroad put their company out of business by blocking entrances to their facility. The plaintiff's sued the carrier under a Texas statute that prohibited a railroad from blocking crossings and other rights of way. The district court allowed the plaintiffs to sue under the Texas statute, but the circuit court reversed that decision, holding that the ICCTA preempted the state claim and noting:

The language of the [ICCTA] could not be more precise, and it is beyond peradventure that regulation of KCS train operations, as well as the construction and operation of the KCS side tracks, is under the exclusive jurisdiction of the STB unless some other provision in the ICCTA provides otherwise. The regulation of railroad operations has long been a traditionally federal endeavor, to better establish uniformity in such operations and expediency in commerce, and it appears manifest that Congress intended the ICCTA to further that exclusively federal effort....

Other courts holding that state remedies are precluded by the ITCAA include: Pejepscot, supra; Englehard, supra; City of Auburn v. Burlington Northern Santa Fe Corporation, supra; CSX Transp., supra; Burlington Northern Santa Fe Corporation v. Anderson, supra; Norfolk Southern Ry. Co. & Central of Ga. RR Co. v. City of Austell, 1997 U.S. Dist. N.D. Ga. LEXIS 17236; Green Mt. R.R. Corp. v. Vermont, 2003 U.S. Dist. Vt. LEXIS 23774.

It therefore is clear that the ICCTA completely preempts state statutory as well as common law remedies which Groome & Associates seeks to recover against GCEDC. If enforced, these state statutes and remedies would directly affect the railroad operations of GCEDC by penalizing it for not providing rail service on the subject rail line, something not possible unless GCEDC undertakes substantial infrastructure expenses that would have a material economic impact on GCEDC. Such state regulation of GCEDC clearly is preempted by the ICCTA and is barred.

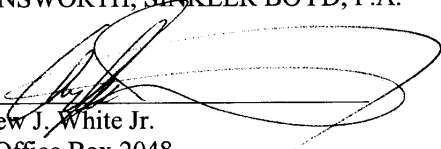
III. Conclusion

For the reasons stated above, the Board should declare that (1) state courts have no subject matter jurisdiction to hear a lawsuit which concerns the services or operations of a railroad and which does not relate to public safety or health matters and (2) state statutory and common law remedies are preempted by the ICCTA except to the extent they concern public safety or health matters.

April 2, 2004

Respectfully submitted,

HAYNSWORTH, SINKLER BOYD, P.A.

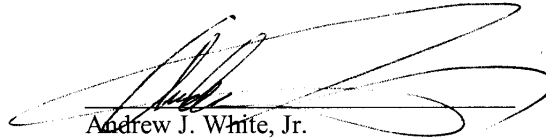
By: 
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Development Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 2d day of April, 2004, I served a copy of the foregoing
comments by Greenville County Economic Development Corporation by first class mail,
postage prepaid, upon:

Dennis J. Starks, Esq.
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