

LAW OFFICE  
THOMAS F. McFARLAND, P.C.  
208 SOUTH LASALLE STREET - SUITE 1666  
CHICAGO, ILLINOIS 60604-1228  
TELEPHONE (312) 236-0204  
*mcfarland@aol.com*

300972

ENTERED  
Office of Proceedings  
August 10, 2020  
Part of  
Public Record

THOMAS F. McFARLAND

August 10, 2020

By e-filing

Ms. Cynthia T. Brown, Chief  
Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20024

Re: Finance Docket No. 36284, *Seven County Infrastructure Coalition—Construction and Operation—in Utah, Carbon, Duchesne, and Uintah Counties, UT*

Dear Ms. Brown:

Hereby transmitted is a Reply in Opposition to Motion for Leave to File a Response to Replies for filing with the Board in the above referenced matter.

Respectfully submitted,

/s/ Thomas F. McFarland

Thomas F. McFarland  
Attorney for Argyle Wilderness  
Preservation Alliance

TMcf:mg:1858\efSTB3

cc: Kathryn K. Floyd, Esq., *kkfloyd@venable.com*  
All parties of record  
Mr. Darrell Fordham, *darrellfordham@hotmail.com*

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

SEVEN COUNTY INFRASTRUCTURE )  
COALITION -- CONSTRUCTION AND ) FINANCE DOCKET  
OPERATION EXEMPTION -- IN UTAH, ) NO. 36284  
CARBON, DUCHESNE, AND UINTAH )  
COUNTIES, UT )

---

**REPLY IN OPPOSITION TO MOTION  
FOR LEAVE TO FILE A RESPONSE TO REPLIES**

---

ARGYLE WILDERNESS  
PRESERVATION ALLIANCE  
511 South 600 East  
Lehi, UT 84043

Protestant

THOMAS F. McFARLAND  
THOMAS F. McFARLAND, P.C.  
208 South LaSalle Street, Suite 1666  
Chicago, IL 60604-1228  
(312) 236-0204  
mcfarland@aol.com

Attorney for Protestant

DATE FILED: August 10, 2020

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

|                                 |   |                |
|---------------------------------|---|----------------|
| SEVEN COUNTY INFRASTRUCTURE     | ) |                |
| COALITION -- CONSTRUCTION AND   | ) | FINANCE DOCKET |
| OPERATION EXEMPTION -- IN UTAH, | ) | NO. 36284      |
| CARBON, DUCHESNE, AND UINTAH    | ) |                |
| COUNTIES, UT                    | ) |                |

---

**REPLY IN OPPOSITION TO MOTION  
FOR LEAVE TO FILE A RESPONSE TO REPLIES**

---

Pursuant to 49 C.F.R. § 1104.13(a), Protestant ARGYLE WILDERNESS PRESERVATION ALLIANCE (AWPA) hereby replies in opposition to a Motion for Leave to File a Response to Replies (Motion) filed on behalf of Petitioner SEVEN COUNTY INFRASTRUCTURE COALITION (the Coalition) on July 21, 2020.

**I. MISCHARACTERIZATION OF THE RESPONSE**

The Response sought to be filed is erroneously characterized as a run-of-mill reply to reply in an attempt to come within decisions that often accept such replies in the interest of a more complete record.

In fact, the Response is a rebuttal argument that is flatly prohibited in petition-for-exemption procedure. What's more, the rebuttal is impermissible in that instead of providing facts to rebut allegations in the Opposition Statements, the rebuttal attempts to rectify numerous deficiencies in the Coalition's case-in-chief after they were identified in the Opposition Statements. The Motion should be denied on either or both of those grounds.

**II. THE MOTION SHOULD BE DENIED BECAUSE THE RESPONSE IS REBUTTAL ARGUMENT THAT IS STRICTLY PROHIBITED IN PETITION-FOR-EXEMPTION PROCEDURE**

---

A necessary corollary of use of simplified and accelerated petition-for-exemption procedure (instead of formal application procedure) is inability to file rebuttal evidence or argument.

The Board's petition-for-exemption procedure is set out in 49 C.F.R. Part 1121. There is no provision in those regulations for filing rebuttal evidence or argument. On the contrary, a party choosing to take advantage of petition-for-exemption procedure is required to file all of the evidence and argument on which it relies at the time that it files its petition for exemption. Thus, it is provided in 49 C.F.R. § 1121.3(a), as follows:

A party filing a petition for exemption shall provide its case-in-chief, along with its supporting evidence, workpapers, and related documents at the time that it files its petition.

Board decisions confirm that use of petition-for-exemption procedure precludes the filing of rebuttal evidence or argument. Thus, in rejecting rebuttal evidence and argument in *Central Railroad Company of Indiana -- Abandonment Exemption -- in Dearborn, Decatur, Franklin, Ripley, and Shelby Counties, IN*, 1990 WL 221442 (Docket No. AB 459 [Sub-No. 2X], decision served May 4, 1998), the Board said (at \*2, emphasis added):

. . .CIND filed its petition knowing that our procedures provide only for the filing of a petition and a reply thereto. *Had CIND wished to assure itself the right to rebut a filing in opposition to its abandonment request, it could and should have filed a formal application.* CIND's reply is prohibited by our rules. .

.

Similarly, in rejecting rebuttal in *The Burlington Northern and Santa Fe Railway Company -- Abandonment of Chicago Area Trackage in Cook County, IL*, 1999 WL 732246 (STB Docket No. AB-6 [Sub-No. 382X], decision served September 21, 1999), the Board said (at \*1, emphasis added):

On August 27, 1999, BNSF filed a motion for leave to file a reply and a reply to the joint (opposition) reply. BNSF made those filings knowing that our procedures provide only for the filing of a petition and a reply thereto (citing the *Central Railroad* decision, *supra*). *If BNSF had desired to assure itself of the right to rebut a filing in opposition to its abandonment request, BNSF could and should have filed a formal application. . .*<sup>1/</sup>

The Board should find that when the Coalition filed its Petition for Exemption, it knew that the Board's procedures provide only for the filing of that Petition and any statements in opposition, and that if the Coalition desired to assure itself of the right to rebut any such opposition statements, the Coalition could and should have filed a formal application for authority to construct the track. Based on those findings, the Board should deny the Coalition's Motion.

### **III. THE MOTION SHOULD BE DENIED BECAUSE THE RESPONSE IS IMPROPER REBUTTAL**

---

Even if rebuttal were not prohibited in petition-for-exemption procedure, the Coalition's Motion should be denied because the Response is not proper rebuttal.

Rebuttal is to be stricken as improper when it merely serves to aid a party's case-in-chief after its deficiencies were identified by protestants. The leading case on that principle is *Malone Freight Lines, Ins. v. United States*, 204 F.Supp. 745, (SD Ala, SD, 1962). In that case, a motor

---

<sup>1/</sup> There would be no rational basis for a determination that the foregoing principles that were applied in abandonment decisions do not apply with the same force in track construction cases.

carrier filed evidence in rebuttal that was designed to bolster its case-in-chief rather than to rebut facts put forth by opponents. In upholding the Interstate Commerce Commission's decision striking that evidence, the Court said (at 755):

Asserting procedural errors committed by the Commission to its prejudice, plaintiff insists that the evidence which it offered, in purported rebuttal, relating to the rental rates of an unidentified truck leasing company and the annual earnings of four unidentified owner-operators was improperly stricken. We hold that such evidence was not in rebuttal of any facts appearing in any statements but served merely to aid plaintiff's case in chief after its deficiencies had been pointed out by protestants. Under the Commission's General Rules of Practice (footnote omitted) it was proper to strike such evidence.<sup>2/</sup>

*See, also, Duke Energy Corporation v. CSX Transportation, Inc.*, 2003 WL 1523337 (Docket No. NOR 42070, decision served March 25, 2003) (rebuttal is not to be used as an opportunity to introduce evidence that should have been submitted in the case in chief).

Instead of challenging facts asserted in Opposition Statements, the Coalition's Response is replete with argument attempting to shore up numerous shortcomings in the Coalition's case-in-chief. As one of many examples, instead of challenging opponents' evidence that funding for the track construction is lacking, the Coalition argues that evidence of funding is not required in track construction cases -- despite a specific agency ruling to the contrary in *Ozark Mountain Railroad - Construction Exemption*, 1995 WL 561990. As made clear in the *Malone* decision, rebuttal does not exist in order that the Coalition may have the last word in argument.

The foregoing provides an additional ground for denial of the Coalition's Motion.

---

<sup>2/</sup> The *Malone* decision was cited at Page 2 of AWPAs' Opposition Statement. That decision was ignored in the Coalition's Motion.

**CONCLUSION AND REQUESTED RELIEF**

WHEREFORE, for either or both grounds set forth in AWWPA's Reply, the Coalition's Motion should be denied.

Respectfully submitted,

ARGYLE WILDERNESS  
PRESERVATION ALLIANCE  
511 South 600 East  
Lehi, UT 84043

Protestant

/s/ Thomas F. McFarland

THOMAS F. McFARLAND  
THOMAS F. McFARLAND, P.C.  
208 South LaSalle Street, Suite 1666  
Chicago, IL 60604-1228  
(312) 236-0204  
mcfarland@aol.com

Attorney for Protestant

DATE FILED: August 10, 2020

**CERTIFICATE OF SERVICE**

I hereby certify that on August 10, 2020, I served the foregoing document, Reply In Opposition To Motion For Leave To File A Response To Replies, by e-mail on Kathryn Kusske Floyd, Venable, 600 Massachusetts Ave NW, Washington, DC 20001, *kkfloyd@venable.com*, and on all other parties of record by e-mail.

*/s/ Thomas F. McFarland*

Thomas F. McFarland