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October 24, 2006

### VIA ELECTRONIC FILING

The Honorable Vernon A. Williams

Secretary

Surface Transportation Board

1925 K Street, N.W.

Washington, D.C. 20423-0001

217907 217908

RE: STB Finance Docket Nos. 34890 and 34922

*PYCO Industries, Inc. — Feeder Line Application — Lines Of South Plains  
Switching, Ltd. Co.; Keokuk Junction Railway Co. — Feeder Line Application —  
Lines of South Plains Switching, Ltd. Co.*

### **Motion to Strike Portions of the Rebuttal of Pyco Industries, Inc.**

Dear Secretary Williams:

On October 19, 2006, PYCO Industries, Inc. ("PYCO") filed its rebuttal ("Rebuttal") in response to reply comments addressed to PYCO's feeder line application in Finance Docket No. 34890. Via electronic filing, Keokuk Junction Railway Co. hereby files a motion to strike portions of the Rebuttal. If there are any questions about this filing, please contact me directly, either by telephone: (202) 663-7823 or by e-mail: [wmullins@bakerandmiller.com](mailto:wmullins@bakerandmiller.com).

Respectfully submitted,



William A. Mullins

Attorney for Keokuk Junction Railway Co.

cc: All Parties of Record

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB DOCKET NO. 34890  
STB DOCKET NO. 34922**

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**PYCO INDUSTRIES, INC. — FEEDER LINE APPLICATION —  
LINES OF SOUTH PLAINS SWITCHING, LTD. CO.**

**KEOKUK JUNCTION RAILWAY CO. — FEEDER LINE APPLICATION —  
LINES OF SOUTH PLAINS SWITCHING, LTD. CO.**

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**MOTION OF KEOKUK JUNCTION RAILWAY CO. TO STRIKE PORTIONS OF THE  
OCTOBER 19, 2006 REBUTTAL OF PYCO INDUSTRIES, INC.**

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**EXPEDITED CONSIDERATION REQUESTED**

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**Attorneys for Keokuk Junction Railway Co.**

**DATED: October 24, 2006**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB DOCKET NO. 34890  
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**PYCO INDUSTRIES, INC. — FEEDER LINE APPLICATION —  
LINES OF SOUTH PLAINS SWITCHING, LTD. CO.**

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**MOTION OF KEOKUK JUNCTION RAILWAY CO. TO STRIKE PORTIONS OF THE  
OCTOBER 19, 2006 REBUTTAL OF PYCO INDUSTRIES, INC.**

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**EXPEDITED CONSIDERATION REQUESTED**

On October 19, 2006, PYCO Industries, Inc. ("PYCO") filed its rebuttal ("Rebuttal") in response to the separate reply comments of Keokuk Junction Railway Co. ("KJRY") and South Plains Switching, Ltd. Co. ("SAW"), both of which responded to PYCO's amended feeder line application ("FLA") to acquire the entire SAW rail system ("All-SAW"). As will be discussed below, PYCO's Rebuttal attempts to introduce new evidence and new arguments in support of its FLA. PYCO's action is inappropriate, unjustified, and, if allowed at this point in the proceeding, would be highly prejudicial to KJRY. Accordingly, KJRY requests that certain sections of PYCO's Rebuttal, described below, be stricken from the record.

In the alternative, KJRY requests that it be permitted to respond to PYCO's new evidence and arguments via a surrebuttal, and will necessitate taking further discovery as appropriate to respond fully to PYCO's new evidence. In order that it may know soon whether it would need to expend additional time addressing wholly inadmissible new evidence at this phase in the

proceeding, KJRY respectfully requests expedited Board action on its motion. In the absence of a prompt decision on this motion to strike, KJRY intends to provide further comment responding to PYCO's inappropriately filed evidence in KJRY's rebuttal, due October 31, 2006.

### **BACKGROUND**

On October 12, 2006, pursuant to the Board's procedural schedule, KJRY and SAW filed comments responding to PYCO's amended valuation evidence for All-SAW.<sup>1</sup> PYCO filed its Rebuttal to these reply comments on October 19, 2006. As part of that Rebuttal, PYCO has included the following exhibits: (1) the verified declaration of Steven Mahle ("Mahle Declaration," (2) the verified rebuttal declaration of Robert Lacy (with an appendix filed under seal), (3) the rebuttal verified statement of Charles Banks, (4) the verified declaration of Stephen Gregory ("Gregory Declaration"), (5) the rebuttal verified statement of Gene Davis ("Davis Rebuttal V.S."), and (6) a letter from PYCO's CFO Morton, dated October 18, 2006 (filed under seal) ("Morton Letter"). Of these exhibits, the Mahle Declaration and Gregory Declaration involve the testimony of two witnesses who have not previously submitted statements in this proceeding. In addition, PYCO states for the first time on rebuttal that it would subsidize the "purchase, operation and rehabilitation" of All-SAW (Rebuttal at 19 and 21) after stating to the contrary in earlier filings.

PYCO offers the Davis Rebuttal V.S. to address the issue of All-SAW rehabilitation. Mr. Davis states at the outset that his statement responds to the following, previously submitted comments and verified statements: Edward W. Landreth's "Engineering Inspection Report of

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<sup>1</sup> As the Board's procedural schedule clearly reflects, PYCO's amended valuation evidence, filed on September 28, 2006, was, in essence, the culmination of PYCO's case-in-chief for its FLA to acquire SAW's assets.

Railroad Assets” (dated July 27, 2006) and “Second Verified Statement” (dated September 5, 2006), Thomas F. McFarland’s “Response to PYCO’s Feeder Line Application to Acquire All-SAW” (dated September 15, 2006), and the Verified Statement of Roger Stice (included in KJRY’s expanded FLA to acquire All-SAW, filed on September 27, 2006).

PYCO offers the Gregory Declaration in connection with the issue of PYCO’s financial responsibility. In particular, the Gregory Declaration indicates how PYCO’s intended operator of All-SAW, West Texas & Lubbock Railway (“WTL”), would, among other things – (1) operate over, and provide service to shippers located on, All-SAW, (2) fund its operations, (3) fund rehabilitation of All-SAW, and (4) be, in its view, a better choice to operate All-SAW.

Also, in support of its showing of financial responsibility, PYCO offers the Morton Letter. This letter and accompanying materials purport to “update” to a previous letter from Mr. Morton, dated June 7, 2006.

### **ARGUMENT**

Consistent with PYCO’s scattershot approach to these proceedings and its continuing disregard for the Board’s regulations and procedures, PYCO’s Rebuttal includes material that is responsive to KJRY’s expanded FLA (rather than to KJRY’s or SAW’s reply comments to PYCO’s All-SAW FLA) and introduces new evidence and argument which are, of course, inappropriate for rebuttal. In particular and as will be shown, the Davis Rebuttal V.S., PYCO’s new subsidy claims at Rebuttal pages 19 and 21, the Gregory Declaration, and Morton Letter, constitute new evidence and/or argument to which other interested parties are not permitted to respond under the current procedural schedule. Such new evidence and argument are not permitted under the Board’s rules, and, accordingly, should be stricken from the Rebuttal.

**I. BOARD PRECEDENT IS CLEAR THAT PYCO MAY NOT FILL IN HOLES IN ITS CASE-IN-CHIEF WITH NEW INFORMATION PROVIDED ON REBUTTAL**

A party's rebuttal filing is limited to "issues raised in reply statements to which they are directed." 49 CFR 1112.6. In other words, a party legitimately may use its rebuttal filing to critique, comment on, submit evidence directed toward, or otherwise address the arguments and evidence submitted by an opponent. However, a party may not use a rebuttal filing to address gaps contained in its original filing. Rather, the case-in-chief (in this case, PYCO's amended valuation evidence filed on September 28, 2006) must establish, on its own, all of the elements necessary to carry that party's burden of proof:

We remind parties that, in presenting evidence, the party with the burden of proof on a particular issue must present its entire case-in-chief in its opening evidence. Rebuttal presentations are limited to responding to the reply presentation of the opposing party. Rebuttal may not be used as an opportunity to introduce new evidence that could and should have been submitted on opening to support the opening submissions. New evidence improperly presented on rebuttal will not be considered.

General Procedures For Presenting Evidence In Stand--Alone Cost Rate Cases, STB Ex Parte No. 347 (Sub-No. 3), slip op. at 5 (STB served Mar. 12, 2001) (addressing the standards for the admission of rebuttal evidence in stand-alone rate cases).

The reasons for requiring a party to establish all of the elements of its case-in-chief in its opening filing are well understood. Opposition parties are not accorded an opportunity to address matters raised in rebuttal, and therefore arguments and evidence raised for the first time on rebuttal would be immune from the light of cross-examination. In fact a party could withhold the most controversial or provocative aspects of its case until rebuttal in order to shield such materials from the critical eye of opposing parties. To avoid just that scenario, parties are

required to present all of the facts supporting their petition in their case-in-chief, and, if rebuttal is permitted, it must rebut the issues raised by their opponents in reply only.

On numerous occasions, the Board and its predecessor, the Interstate Commerce Commission ("ICC"), have addressed the proper scope of rebuttal. In many instances, the agency has stricken material that exceeded the proper scope of rebuttal. For example, in SWKR Operating Co. – Abandonment Exemption – In Cochise County, AZ, STB Docket No. AB-441 (Sub-No. 2X) (STB served Nov. 12, 1997), Chemical Lime Company ("CLC") filed an Offer of Financial Assistance ("OFA") pursuant to 49 U.S.C. 10904 to acquire a rail line slated for abandonment. In its original OFA filing, CLC provided a one-page analysis of the operating railroad's expenses to develop an appropriate subsidy. However, on rebuttal, CLC presented a detailed report on these same issues. The Board struck the new rebuttal study, finding that it was "improper, and would prejudice" the operating railroad, which would have no opportunity to comment on it. PYCO's actions here are entirely comparable.

In many other cases, parties impermissibly have sought to use rebuttal as a means to supplement cases-in-chief with new evidence which those parties could have and should have presented earlier. In such instances, the agency upheld the integrity of its processes and struck the offending material. See, e.g., Wisconsin Power and Light Co. v. Union Pacific RR. Co., STB Docket No. 42051, (STB served Sept. 13, 2001) (striking rebuttal testimony that significantly enhanced unsupported claims in an original filing); Portland Traction Company – Abandonment Exemption – In Multnomah and Clackamas Counties, OR – In the Matter of a Request to Set Terms and Conditions, Docket No. AB-225 (Sub-No. 2X) (ICC decided Jan. 4, 1990) (striking material introduced on rebuttal because to allow it into the record on rebuttal would prejudice the other side); Green Field Transport Co., Extension – General Commodities, United States (Fort

Dodge, IA), No. MC-119741 (Sub-No. 275) (ICC decided Feb. 19, 1981) (limiting the use of a rebuttal study to rebutting the claims of protestants and holding that “in considering whether applicant has made out a *prima facie* case for the grant of all or any part of the authority it seeks, we have considered only the matters contained in the application and the supporting documents filed therewith.”); Georgia Highway Express, Inc., Petition for Modification, No. MC-58923 (Sub-No. 33) (ICC decided Feb. 14, 1978) (striking rebuttal material that “should have been presented during the case in chief”).

Indeed, out of concern that PYCO would not adhere to the Board’s rules in this regard, KJRY twice already has urged that parties adhere to the rules and not use their respective rebuttals to introduce new evidence. See Reply of KJRY to Amended Valuation Evidence of PYO (filed October 12, 2006) at 4 (“PYCO cannot now, at this stage of the proceeding and in its rebuttal, provide such evidence”); KJRY Reply to PYCO Request for Adjustment in Schedule (filed October 13, 2006) at 6 n. 5, and 8-9 (“[n]either applicant may submit new evidence at the rebuttal phase of the proceeding”).<sup>2</sup> Of course PYCO ignored these requests and presented just such new evidence on rebuttal.

## **II PORTIONS OF PYCO’S REBUTTAL ARE IMPROPER AND SHOULD BE STRICKEN**

Applying the Board’s standards for rebuttals as set forth at 49 CFR 1112.6 and in agency precedent cited and discussed above, the following portions of PYCO’s rebuttal should be

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<sup>2</sup> In both cases, KJRY cited Texas Municipal Power Agency v. The Burlington Northern & Santa Fe Railway Company, STB Docket No. 42056 (STB served Mar. 24, 2003) slip op. at 142 (a party may not introduce new evidence on rebuttal); and CSX Transportation, Inc. – Discontinuance – At Memphis, In Shelby County, TN, STB Docket No. AB-55 (Sub-No. 618) (STB served Oct. 28, 2002) slip op. at 7 n.19 (the Board will not consider new evidence submitted on rebuttal).

stricken: the Davis Rebuttal V.S. containing PYCO's new argument concerning its willingness to subsidize All-SAW; the entire Gregory Declaration, and the entire Morton Letter. All constitute new evidence and argument, are all wholly inappropriate for rebuttal, and should be stricken from the record.

#### **Davis Rebuttal V.S.**

The Davis Rebuttal V.S. is not intended to rebut anything in the reply comments filed in response to PYCO's amended valuation evidence. Rather, Mr. Davis states that PYCO has requested him to respond to filings and testimony that *preceded* and were *not offered in response* to PYCO's September 28 amended valuation filing.<sup>3</sup> See Davis Rebuttal V.S. at 1-2. Mr. Davis could have, and did, respond to SAW's supplemental valuation evidence for All-SAW in PYCO's amended valuation evidence filing on September 28. There simply is no excuse for him doing so again now. Mr. Davis testimony is not only a textbook example of impermissibly-filed new evidence offered on rebuttal, but it is also redundant and blatantly beyond the scope of the respective reply comments of KJRY and SAW.

In addition, Mr. Davis' response to Mr. Stice's verified statement (included with KJRY's expanded FLA) is entirely out of place in PYCO's rebuttal. If anything, Mr. Davis's comments directed to Mr. Stice's statement might be appropriate for PYCO's reply to KJRY's expanded FLA, but they are not appropriate here. Accordingly, consistent with its rules and precedent, the Davis Rebuttal V.S. and the latter half of PYCO's Rebuttal at page 15 (which introduces and relied upon Mr. Davis' testimony) must be stricken.

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<sup>3</sup> As noted at pages 3-4, above, Mr. Davis' statement addresses materials filed by SAW before or with SAW's supplemental valuation evidence (filed on September 15, 2006) and filed by KJRY in its expanded FLA (filed on September 27, 2006).

### **PYCO's new position on All-SAW subsidy**

At pages 19 and 21 of its Rebuttal, PYCO states for the first time that it will subsidize the purchase, operation, and rehabilitation of All-SAW. (PYCO does so in acknowledgment of, and in agreement with, KJRY's assertion that, under PYCO's proposed acquisition, All-SAW would require a subsidy to be self-sustaining.) PYCO has never before squarely addressed the issue of a subsidy, and has instead generally asserted that operations over All-SAW would be self-sustaining. PYCO has merely noted, in vague and contradictory terms, that "PYCO Industries will bear the full cost of acquisition. No other form of subsidization is expected." PYCO Original FLA filed in STB Finance Docket No. 34844 at 23. PYCO now admits that it would indeed have to subsidize operations and its planned rehabilitation.

Because PYCO has changed its tune concerning its subsidization of All-SAW on rebuttal, other parties have been deprived of the opportunity to evaluate how that subsidy would be carried out, how subsidy funding would be budgeted,<sup>4</sup> and whether PYCO's extant evidence supports a finding that PYCO is financially responsible under any specific subsidy program. PYCO's abrupt change in position, which is central to the issue of PYCO's ability to assure operation of All-SAW for at least three years, is a new argument that should have been presented long ago. It is inappropriate for PYCO to make that argument now. Accordingly, PYCO's discussion of a subsidy at pages 19 and 21 of its Rebuttal must be stricken.

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<sup>4</sup> PYCO previously indicated that it would engage in extensive rehabilitation of All-SAW under a 7-year program. PYCO offers only "present value" cost estimates for that rehabilitation, but no estimates of per-year actual costs for each of those seven years. Moreover, KJRY questions whether PYCO would borrow all of the assertedly necessary rehabilitation funds in year one or if

### **Gregory Declaration**

Mr. Gregory, the Vice President – Marketing for WTL, a new witness in this proceeding, and one apparently unqualified to opine on financial matters, never once indicates what parts of the respective reply comments of KJRY and SAW his declaration is intended to rebut. Indeed, as PYCO's Rebuttal makes clear, the Gregory Declaration is not offered to rebut anything, but rather is offered to show that WTL would not impose surcharges on SAW shippers, wrongly to accuse KJRY of planning to impose surcharges against SAW shippers,<sup>5</sup> to acknowledge PYCO's proposed subsidy, to indicate (for the first time ever) that it would seek out loans or additional funding to rehabilitate All-SAW, and to make the entirely irrelevant claim (at great length) that WTL would be a better operator for All-SAW than KJRY would be.

Its irrelevance aside, there is absolutely no reason why the Gregory Declaration could not have been included in PYCO's filing of September 28, and it should have been. The declaration is not responsive to the reply comments. It appears that PYCO has pushed for such a declaration at least in part to compensate for the absence of 3-year *pro forma* balance sheets to show how the line would be operated either as a self-sustaining or subsidized operation for at least three years. Introduction of Mr. Gregory's testimony coincides with PYCO's efforts to explain why its

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it would try to secure those funds on a per-year basis, and in either case whether PYCO has demonstrated that it can secure the funds when they are needed.

<sup>5</sup> As the record clearly shows, neither PYCO nor Mr. Gregory know what they are talking about when they state that KJRY would impose a surcharge or seek "other revenue augmentations" were KJRY to acquire and operate All-SAW. To the contrary, KJRY has predicated its valuation of All-SAW on the very clearly-stated view that surcharges, other than one reasonably calculated to offset increased fuel costs (when necessary), are inappropriate. See KJRY expanded FLA, Verified Statement of William J. Brennan at 13-18. KJRY has *never* stated that it would impose surcharges to augment its revenues in operating All-SAW. Indeed, such an utterly false accusation flies in the face of KJRY's understanding that, as a matter of economic principle, such surcharges would cause All-SAW traffic to decline. See *id.* at 16-17.

showing of financial responsibility is not flawed by the absence of such *pro formas*, including *pro formas* generated by its would-be operator of All-SAW, or similar operating data directly from WTL.<sup>6</sup> Mr. Gregory's declaration does not compensate for the absence of *pro forma* balance sheets, but, through all of its bluster about how WTL is somehow "more qualified" to operate All-SAW than KJRY is, it is rather a diversionary tactic intended to distract the Board from this critical flaw in PYCO's case-in-chief.

The Gregory Declaration, bloated with irrelevant WTL self-promotion and unsupported attacks on KJRY and Pioneer, is the first time WTL has come forward on this record to discuss its intended operation of All-SAW, its view of PYCO's proposed track rehabilitation, and most importantly its financial plans and commitments concerning its future operation of All-SAW. As to the last point, WTL introduces highly relevant testimony that it would seek out Federal Railroad Rehabilitation & Improvement Program funding to support its own rehabilitation initiatives and would enjoy the benefits of a "shortline tax credit." Gregory Declaration at 10. For the first time, then, we learn that WTL intends to borrow funds to support its own operations, but, in the absence of balance sheets, neither KJRY nor the Board can determine how such borrowing initiatives would impact WTL's ability to sustain its operations. This is neither the time nor place for such new, highly important information. For all of these reasons, the Gregory

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<sup>6</sup> Claiming that it need not supply *pro formas* to show that it can operate All-SAW for at least three years, PYCO admits that such documents are a good idea, but only for KJRY. Apparently, to PYCO, *pro forma* balance sheets are useful indicators of financial wherewithal, but only in the event that a party chooses to file them, but that is not what the regulations and precedent required. PYCO was required to file such information and without such information its application cannot be approved as being consistent with the statute.

Declaration and the latter half of page 22 of PYCO's Rebuttal which introduces and relies upon that declaration, constitute new evidence filed on rebuttal and must be stricken.

### **Morton Letter**

As with the other new evidence and argument PYCO has introduced, the Morton Letter is inappropriate for inclusion in the Rebuttal. As noted above, PYCO explains that the Morton Letter is "an update to his letter of June 7, 2006, which provides PYCO's most recent balance sheet and Statements of Operations ... confirm[ing] that PYCO has 'the ability to operate the railroad even at significant losses without impairing the financial position of PYCO.'" Rebuttal at 23. PYCO nowhere states that this new information is offered in rebuttal to any reply comments, but indicates that it is merely an "update" to previously-filed information. PYCO does not explain why it could not have offered financial data through August 2006, which could have accompanied PYCO's case-in-chief on September 28, 2006. Such data through August could have been examined, and responded to, by other parties. Certainly, PYCO knew that end-of-September financial data would not be available until after its amended valuation evidence was scheduled to be filed. Therefore, even if PYCO had articulated some reason why that financial information was essential to its case (as opposed to end-of-August data), the appropriate course would have been for PYCO to request an extension in the procedural schedule to permit the material to be included in PYCO's amended valuation evidence. PYCO neither sought such an extension, nor did it indicate that it would need to supplement its case-in-chief with new information that would be filed at a later date.

By assembling financial data that PYCO clearly intended to offer on rebuttal only (even though it is unresponsive to any reply comments), it is clear that KJRY and SAW would have no practical opportunity to respond to it. PYCO is fully aware that such late filing of new

information is highly prejudicial to KJRY and SAW, and it could have taken steps to ensure that no such prejudice occurred. For these reasons, the Morton Letter, including the attached financial data, must be stricken.

### **CONCLUSION**

By attempting to introduce considerable new evidence into the record at this phase of the proceeding, PYCO once again reveals its willingness to disregard the Board's regulations and the decisions it has issued in this proceeding. PYCO's attempt to introduce new evidence and new argument is all the more egregious in light of KJRY's two prior urgings that PYCO restrain itself from trying to file new information on rebuttal. PYCO must not be permitted to benefit from new evidence and argument to which it knows its opponents in this proceeding would have no procedural right to respond.

Given the utter callousness of PYCO's actions, the most appropriate course by far would be to strike the Davis Rebuttal V.S., PYCO's new evidence concerning its proposed subsidy of All-SAW, the Gregory Declaration, and the Morton Letter.<sup>7</sup> Not striking this information promptly would only necessitate further, avoidable extension of the record. If the Board allows PYCO's objectionable new evidence and argument to remain, however, then fairness requires that KJRY be afforded an opportunity to take discovery, examine the evidence, and then file an appropriate response. To this end, KJRY urges expedited action on its motion. If the Board

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<sup>7</sup> KJRY believes that the portions of PYCO's rebuttal discussed here are not the only parts that include new evidence or argument. There is most likely more inappropriate content that SAW or others may point out, but KJRY has limited its motion to that which is most prejudicial to itself.

grants KJRY's motion promptly, KJRY will not be compelled to respond to this new evidence on surrebuttal, and to pursue discovery in connection with preparing such a rebuttal.

Respectfully submitted,



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Attorneys for Keokuk Junction Railway Co.

October 24, 2006

### **CERTIFICATE OF SERVICE**

I, Robert A. Wimbish, hereby certify that on October 24, 2006, I caused a copy of the foregoing motion to strike to be served by first class mail, postage prepaid, or by more expeditious service upon all parties of record in Finance Docket Nos. 34890 and 34922.

R. A. Wimbish  
Robert A. Wimbish