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THOMAS F. MCFARLAND

October 27, 2006

By overnight mail

Vernon A. Williams, Secretary  
Surface Transportation Board  
Case Control Unit, Suite 713  
1925 K Street, N.W.  
Washington, DC 20423-0001

ENTERED  
Office of Proceedings  
OCT 30 2006  
Part of  
Public Record

Re: Finance Docket No. 34890, *PYCO Industries, Inc. -- Feeder Line Application --  
Lines of South Plains Switching, Ltd. Co.*

Dear Mr Williams:

Enclosed please find an original and 10 copies of Motion To Strike Declaration Of  
Stephen E. Mahle And Reply Verified Statement Of Gene A. Davis In PYCO's Rebuttal, filed  
October 19, 2006, for filing with the Board in the above referenced matters.

Very truly yours,

*Tom McFarland*

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Thomas F. McFarland  
Attorney for South Plains Switching, Ltd. Co

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cc: All parties of record

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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PYCO INDUSTRIES, INC. -- FEEDER )  
LINE APPLICATION -- LINES OF ) FINANCE DOCKET  
SOUTH PLAINS SWITCHING, LTD.CO. ) NO. 34890

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MOTION TO STRIKE DECLARATION OF STEPHEN E. MAHLE AND REPLY VERIFIED  
STATEMENT OF GENE A. DAVIS IN PYCO'S REBUTTAL, FILED OCTOBER 19, 2006

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SOUTH PLAINS SWITCHING, LTD. CO.  
P.O. Box 64299  
Lubbock, TX 79464-4299

Respondent

THOMAS F. McFARLAND  
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Attorney for Respondent

DATE FILED: October 30, 2006

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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|---------------------------------|---|----------------|
| PYCO INDUSTRIES, INC. -- FEEDER | ) |                |
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**MOTION TO STRIKE DECLARATION OF STEPHEN E. MAHLE AND REPLY  
VERIFIED STATEMENT OF GENE A. DAVIS IN PYCO'S REBUTTAL, FILED  
OCTOBER 19, 2006**

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Pursuant to 49 C.F.R. § 1117.1, South Plains Switching, LTD. CO. (SAW) hereby moves that the Board strike the Declaration of Stephen E. Mahle and the Rebuttal Verified Statement of Gene A. Davis, which are Exhibits A and E, respectively, of the Rebuttal of PYCO Industries, Inc. (PYCO) filed on October 19, 2006.

SAW also joins in the Motion to Strike Portions of PYCO's Rebuttal, filed by Keokuk Junction Railway Company (KJRY) on October 24, 2006.

**ARGUMENT IN SUPPORT OF MOTION TO STRIKE**

The ground for this Motion to Strike is that the Mahle Declaration and the Davis Reply Verified Statement are improper rebuttal inasmuch as they are not directed at matter contained in SAW's Reply Statement filed on October 12, 2006, as required by the Board's procedural order. Instead, they are directed at earlier SAW filings, as to which PYCO had an earlier opportunity to respond.

As here pertinent, it is provided in the Board's procedural decision served August 16, 2006 as follows (at 5):

"Each applicant will have the opportunity to file a rebuttal concerning the replies to its application. These rebuttals will be due 7 days after the latest filing of any replies referred to in the preceding paragraph." (emphasis added).

The "replies referred to in the preceding paragraph" are replies to PYCO's amended valuation evidence (id.). SAW filed such a reply on October 12, 2006. Therefore, the Board's

procedural decision authorizes PYCO to file rebuttal as to SAW's reply to PYCO's amended valuation evidence.

As explained below, the Mahle Declaration and the Davis Reply Verified Statement are directed at SAW's valuation evidence filed on September 18, 2006. Pursuant to the Board's procedural decision, PYCO was permitted to respond to that evidence by filing amended valuation evidence within seven days of receipt of SAW's responses to discovery requests, which were required to be filed within three days after the filing of SAW's valuation evidence (decision served August 16, 2006 at 5). PYCO filed such amended valuation evidence in accordance with that procedural decision on September 28, 2006. By virtue of the Mahle Declaration and the Davis Reply Verified Statement, PYCO is attempting to supplement its amended valuation evidence long after the date for filing such evidence, under the guise that such evidence is rebuttal evidence. That is clearly improper, and should not be allowed.

PYCO makes no bones about the fact that the Mahle Declaration and the Davis Rebuttal Verified Statement are aimed at SAW filings made long before the SAW Reply filed on October 12, 2006, which is the only proper subject of rebuttal. Thus, Mr. Mahle himself states the following on page 1 of his declaration:

"... I have focused on the testimony of SAW's proffered witness, Joseph Plaistow, as articulated in his statement of September 15, 2006..."

That Plaistow statement was filed as part of SAW's valuation evidence on September 18, 2006. Any PYCO evidence aimed at the Plaistow statement was required to be filed in PYCO's amended valuation evidence on September 28, 2006. PYCO cannot use rebuttal to late-file evidence in response to that Plaistow statement.

The Davis Reply Statement is even more blatant. Consider the following from page 1 of that statement, identifying the matter to which Mr. Davis' statement is responsive:

**"Scope of Testimony**

PYCO requested RLBA to review and provide comments concerning Verified Statements regarding South Plains Switching, Ltd. Co. (SAW) tracks submitted by:

- Mr. Edward W. Landreth "Engineering Inspection Report of Railroad Assets" dated July 27, 2006 on behalf of SAW;

- Mr. Edward W. Landreth “Second Verified Statement” dated September 5, 2006, on behalf of SAW;
- Mr. Thomas F. McFarland “Response to PYCO’s Feeder Line Application To Acquire *All-SAW*” dated September 15, 2006, on behalf of SAW...”

The Landreth statement dated July 27, 2006, was filed as part of a SAW Statement filed on August 2, 2006. The other matter was part of SAW’s valuation evidence and argument, filed on September 18, 2006. The time for filing responsive evidence to those filings has long since come and gone. PYCO cannot make additional filings in response to that evidence at this time under the guise that such filings are rebuttal, when such rebuttal is limited to a later SAW filing. Indeed, SAW’s reply to PYCO’s amended valuation evidence, which is the only proper subject of rebuttal, did not contain a verified statement of Mr. Landreth, nor evidence nor argument of any kind on the subject of track rehabilitation. It is evident, therefore, that the Davis Reply Verified Statement, which relates solely to track rehabilitation, is improper rebuttal evidence.

The law is clear that evidence should be stricken which purports to be rebuttal, but which is not directed to matter contained in an opponent’s reply statement, but instead is filed in an attempt to bolster the party’s case-in-chief after its deficiencies have been identified by an opponent. The leading judicial authority is Malone Freight Lines, Inc. v. United States, 204 F. Supp. 745 (ND, Ala. SD, 1962). In upholding a decision of the Interstate Commerce Commission that struck evidence as improper rebuttal, the Court there 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 owneroperators 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 it was proper to strike such evidence.” (Footnote omitted)

Numerous agency decisions are in accord. See, e.g., SKWR Operating Co. -- Aband. Exempt. -- in Cochise County, AZ, STB Docket No. AB-441 (Sub-No. 2x), served Nov. 12,

1997; Wisconsin Power + Light Co. v. Union Pacific R. Co., STB Docket No. 42051, served Sept. 13, 2001; and Portland Traction Co. -- Aband. Exempt. -- in Multnomah and Clackamas Counties, OR, ICC Docket No. AB-225 (Sub-No. 2x), served Jan. 4, 1990.

The Mahle Declaration and the Davis Reply Verified Statement are required to be stricken in accordance with the foregoing legal authority as improperly-filed rebuttal. SAW respectfully requests the Board to strike those statements on that basis.

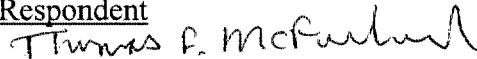
SAW recognizes that the Board sometimes accepts improperly-filed rebuttal into the record, subject to an opponent's opportunity to reply in the nature of surrebuttal. That is not possible here in light of the procedural schedule, which calls for a Board decision on or about November 23, 2006. Although the Mahle Declaration and the Davis Reply Verified Statement are eminently rebuttable<sup>1</sup>, there is insufficient time between now and the Board's decision date for SAW to prepare appropriate surrebuttal evidence and argument, and for the Board to give appropriate consideration to such surrebuttal evidence and argument. Consequently, the only appropriate remedy is for the objectionable rebuttal evidence to be stricken.

WHEREFORE, the Mahle Declaration and the Davis Reply Verified Statement (Exhibits A and E to PYCO's Rebuttal filed October 19, 2006) should be stricken from the record.

Respectfully submitted,

South Plains Switching, Ltd. Co.  
P.O. Box. 64299  
Lubbock, TX 79464-4299

Respondent



By: THOMAS F. McFARLAND  
THOMAS F. McFARLAND, PC.  
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<sup>1</sup>For instance, Mr Mahle makes extensive reference to the Law of Demand, but he does not apply that Law to the specific circumstances of the case. Mr. Mahle does not rebut the testimony of SAW Witness Plaistow that a surcharge of \$ 60 per car, which amounts to only a 2-percent increase of the average total freight charge, would not result in diversion of traffic.

Attorney for Respondent

DATE FILED: October 30, 2006

**CERTIFICATE OF SERVICE**

I certify that on October 27, 2006, I served the foregoing document, motion to Strike Declaration of Stephen E. Mahle and Reply Verified Statement of Gene A. Davis in PYCO's rebuttal, filed October 19, 2006, by overnight mail, on the following:

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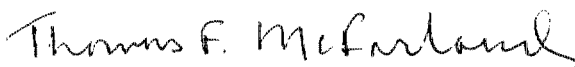
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