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31 October 2006
by express

Hon. Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: PYCO Industries -- Feeder Line Application -- 218012
South Plains Switching, Ltd., F.D. 34890
and related F.D. ~~34992~~ FD 34922

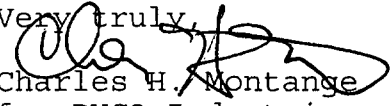
PYCO's Reply to SAW Motions to Strike
filed October 18 and October 30

218013

Dear Mr. Williams:

On behalf of PYCO Industries, enclosed please find an original and ten copies of PYCO's Reply to the Motions to Strike filed by South Plains Switching (SAW) on October 18 and October 30, 2006. At the request of Floyd Trucking, I also enclose their reply to the October 18 SAW motion to strike.

Thank you for your assistance.

Very truly,

Charles H. Montange
for PYCO Industries, Inc.

Encls.

cc. counsel per certificate of service (w/encl.)

Mr. McLaren (for PYCO) (w/encl.)

BEFORE THE
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. --	)	
FEEDER LINE DEVELOPMENT --	)	F.D. 34890
SOUTH PLAINS SWITCHING LTD.	)	and F.D. 34992

PYCO INDUSTRIES, INC.'S
REPLY TO
(1) SAW MOTION TO STRIKE
FLOYD TRUCKING COMMENT AND BNSF COMMENT
and
(2) SAW MOTION TO STRIKE
PORTIONS OF PYCO'S REBUTTAL

PYCO Industries, Inc., hereby opposes the two motions to strike filed by incumbent railroad South Plains Switching (SAW). In chronological order, SAW's first motion (filed Oct. 18) is directed against Floyd Trucking Company and BNSF. SAW's second motion (filed Oct. 30) is directed against portions of PYCO's Rebuttal. Neither motion has merit.

I.

PYCO opposes SAW's motion to strike BNSF's Reply filed October 12. SAW claims that the only permissible comment for October 12 is comment on KJRY's competing feeder line application, or upon PYCO's amended valuation evidence. But the KJRY and PYCO valuation evidence necessarily address the issue of the surcharge, and BNSF properly addresses that issue: BNSF merely supports the position of PYCO and KJRY that SAW may not purport to increase its valuation by reliance on the evidence it presented in respect to the surcharge. A comment is legitimate either in support of a position taken by PYCO or KJRY, or in opposition to them, or even if neutral. 49 C.F.R. § 1104.13(c)

is thus not applicable.

SAW moves to strike the Floyd Trucking letter dated October 5 essentially on the same ground it offers for its motion against BNSF. However, the Floyd Trucking letter in fact is supportive of the PYCO (and KJRY) position that SAW's alleged ability to surcharge is unpersuasive as to valuation. In addition, it notes continued support for PYCO generally, and opposition to KJRY's competing application. Moreover, it is submitted under 28 U.S.C. § 1746, and is thus tantamount to a verified statement. It is not just germane comment but effectively sworn evidence.

SAW also moves to strike the Floyd Trucking letter on the ground that Floyd Trucking is not a "party." Normally, a "party" in an STB proceeding does not apply to become a party, but automatically becomes one when it files a document with the Board and serves the railroad (SAW), which indeed manifestly happened in the case of Floyd Trucking.¹ In any event, there is nothing in the Board's regulations at 49 C.F.R. Part 1151 that require an entity or person to be formally admitted as a party in order to comment. Instead, 49 C.F.R. § 1151.2(e) seems to give anyone the right to comment on FLA's and competing FLA's. PYCO believes that the October 12 deadline for comments was intended to implement (on an expedited timeframe) the

¹ Floyd Trucking has certainly participated in this proceeding from the onset, having furnished numerous letters and statements in support of PYCO, including a statement detailing its rough treatment at the hands of SAW filed as Exhibit H to PYCO's initial FLA in F.D. 34844.

opportunity for comment (by anyone) embodied in section 1151.2(e), and was not intended to eliminate any ability by shippers and prospective shippers, whose interests are definitely at stake, to file comments in the proceeding, if they chose to do so, by that date. Indeed, PYCO questions whether such a restriction would pass legal muster. Accordingly, the Floyd Trucking letter was appropriately filed as it met the general comment deadline of October 12. Finally, if there is any doubt, PYCO hereby adopts the Floyd Trucking letter as an exhibit to its "initial comments" filed October 12. There is no prejudice to any party by this action of incorporation for all were served.

II.

SAW's motion to strike against PYCO's October 19 Rebuttal is directed at two items: the Mahle Declaration and the Davis Reply Verified Statement. SAW is correct (at unnumbered p.2 of its motion) that "PYCO makes not bones about the fact that the Mahle Declaration and the Davis Rebuttal are directed at [all] SAW filings [previously] made...."² But that is indeed what a Rebuttal is all about, so one wonders what SAW's problem is, other than SAW does not like what the statements say.

SAW's problem is really a mistake; in particular, SAW's motion is based on a fundamental misreading of this Board's procedural order. This has been a proceeding with a number of

² Mr. Davis also presents information germane to KJRY claims to date.

procedural wrinkles derived from acceptance of PYCO's Revised FLA only as to Alternative Two, then acceptance of KJRY's competing FLA as to Alternative Two, and then acceptance of PYCO's Revised FLA as to all-SAW, and then allowance for KJRY to pursue all-SAW, and overarching all this, allowing PYCO discovery-related modifications to valuation first on Alternative Two and then all-SAW. The procedural orders have changed over time. However, the last germane order, in terms of relative times for reply and rebuttal, is (as SAW notes) this Board's August 16 order. That order states that rebuttals must be filed "7 days after the latest filing of any replies [to an FLA applicant's] application."

SAW states that it "replied" on September 18 to PYCO's "all-SAW" application, and argues that PYCO should have rebutted on September 28, seven days after relevant SAW discovery. But the Board's order called for PYCO to file a revised valuation on September 28 in lieu of a rebuttal. If PYCO filed a revised valuation, then SAW had until October 12 to comment, followed seven days later by PYCO's rebuttal. If PYCO did not file a revised valuation on September 28, then under the order its rebuttal apparently would have been due on September 25.

In other words, PYCO's time period flowed from the "latest" SAW reply filing, not from each SAW reply filing. This seems perfectly clear from this Board's explanation as page 5 of its August 16 decision, where the Board clearly speaks of only one PYCO rebuttal, not a partial rebuttal at one point, and another

at another point. The only fair reading is that the Board anticipated one rebuttal by PYCO, seven days after the "latest filing of any replies [to its expected amended valuation filing]."

SAW's construction also does not comport with 49 C.F.R. § 1141.2. That sets out procedures calling for the incumbent to have one reply and the FLA applicant to have one rebuttal, not rebuttals at various mid-points, and sur-replies to those, and then presumably another round of sur-rebuttals.

This proceeding has grown complicated enough. SAW (and KJRY) should be worrying more about the merits than trying to jigger some way to argue that PYCO should have said something earlier or later than it did in their continued and misleading attempts to avoid the merits.

PYCO in good faith has done its best to comply with the procedural schedules laid out by this Board. PYCO similarly has responded to all discovery in a timely fashion. Would that the other "parties" had done as much.

SAW also claims that the Mahle statement purports belatedly to "supplement" PYCO's valuation case. This is obviously false. The Mahle statement on its face is directed at the methodology used by SAW witness Plaistow. It does not set forth a valuation case for PYCO.

Under applicable precedent (see PYCO Rebuttal at pp. 5-6), the way to contest the reliability (and thus admissibility) of another side's expert is to file a Daubert motion supported by a

Daubert expert opinion that the other side's expert used faulty methodology.³ Mr. Mahle is a PHD economist and attorney who specializes in reviewing economics and valuation methodology for Daubert purposes. He did not purport to "value" SAW; he merely examined whether SAW's alleged expert (Plaistow) followed applicable scientific (in this case economic science) methodology. He concluded that Plaistow did not. This is not a supplement to PYCO's valuation; it indicates instead that Plaistow's views are unscientific and either should be excluded or given no weight. It follows that if anything is struck from the record as between SAW and PYCO in this proceeding, it should be anything said by (or in reliance upon) Mr. Plaistow. Junk science has no more place before this Board than in other forums.

As to Mr. Davis's Rebuttal, SAW objects that parts of that Rebuttal are directed at statements by Landreth filed on August 2, 2006, as well as parts of SAW's case filed September 18.⁴ Assuming arguendo all this is true, this Board's order of August 16 still only requires PYCO to file one rebuttal, and that

³ Daubert refers to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), a decision that requires a trier of fact to ensure that expert testimony is reliable and relevant before admitting it into evidence. It guards against "junk science" in the guise of expert opinion. And "[j]unk science" has no more place in administrative proceedings than in judicial ones." Niam v. Ashcroft, 354 F.3d 652, 660 (7th Cir. 2004).

⁴ Mr. Davis also responded to some of KJRY's case as well. Interestingly, in KJRY's motion to dismiss, KJRY objected that Mr. Davis's arguments were too early, and should have been made in comments filed the following week.

rebuttal was clearly due seven days after the last reply to PYCO's Revised All-SAW FLA. That reply was on October 12, when both SAW and KJRY filed replies and comment. PYCO thus acted in a timely fashion in filing Mr. Davis's Rebuttal on October 19.

In all events, SAW cannot claim any prejudice. Under section 1151.2(f), PYCO as FLA applicant is supposed to have the last word. And if SAW wanted to ascertain details on which PYCO's experts might rely when they eventually rebutted, SAW had ample time to seek that information in discovery. Indeed, on August 18, two days after the procedural schedule was announced, this Board granted SAW an extension of at least thirty days at SAW's request to allow it more thoroughly to prepare its case. During that period, and indeed before that period, SAW could have served discovery upon PYCO. Indeed, SAW did make some informal discovery requests, to which PYCO responded, for certain workpapers and other information relied upon by the RL Banks firm. SAW simply did not inquire into the rehabilitation and track condition facts on which PYCO's experts relied for their rehabilitation and NLV estimates. In short, if SAW now feigns surprise, or if SAW now regrets it did not say something more, then that problem is SAW's creation, not PYCO's. SAW had a discovery opportunity, but did not use it. In that light, it cannot claim any prejudice here, no matter the circumstances.

Mr. Davis's statement properly replies to (among other things) the ad hominem attacks by Landreth against him, and to Landreth's misjudgments concerning SAW's trackage, with detailed

facts (including photographs) from Mr. Davis' actual inspection of the SAW trackage (conducted pursuant to this Board's order dated July 13, 2006 compelling SAW to allow entry and to make discovery). The information Mr. Davis presents is supportive of his final testimony, and is like that which could be expected upon review of any expert's workpapers. Again, SAW has shown no more grounds to strike Mr. Davis's Rebuttal than did KJRY, and KJRY showed none.

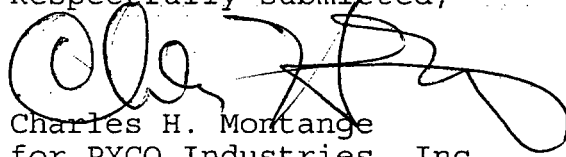
In short, SAW fails to justify any strike, fails to show prejudice, and certainly shows no basis for any kind of kind of sur-reply. PYCO's evidence was timely, proper, and in full accord with the August 16 schedule.

III.

PYCO agrees with SAW that this Board's schedule looks to a decision prior to November 22, 2006. Motion practice must come to an end.

SAW's motions to strike must be denied. If anything is deleted from the record in connection with the "debate" between SAW and PYCO, SAW's motion serves to emphasize that the material that should be discarded is the Plaistow statements and anything relying thereon.

Respectfully submitted,



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Certificate of Service

I hereby certify service of the foregoing Reply to SAW's Motions to Strike and, at the request of Mr. Floyd, the Floyd Trucking reply dated October 26 to SAW's Motion to Strike upon the following counsel of record by express service, next business day delivery, this 31st day of October 2006:

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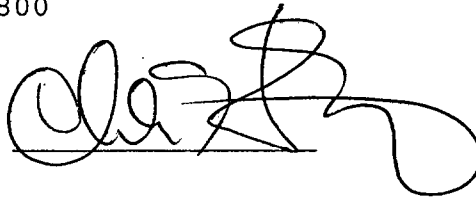
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A handwritten signature in black ink, appearing to read 'John Heffner', with a large, stylized flourish extending from the end of the signature.

cc. Mr. O.E. Floyd
Floyd Trucking Company
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Brownfield, TX 79316