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Hon. Anne Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W., Suite 100
Washington, D.C. 20024

Re: PYCO Industries - Feeder Line Application - Lines
of South Plains Switching Ltd, F.D. 34890

Dear Ms Quinlin:

Enclosed please find an original and ten copies of a Reply in Opposition to the petition for partial reopening filed by South Plains Switching Ltd. (SAW) in this proceeding. The Reply is on behalf of PYCO Industries, Inc.

Thank you for your assistance in this matter.

Very truly,


Charles H. Montange
for PYCO Industries, Inc.

Encls.

cc. Counsel (w/encl.)

BEFORE THE SURFACE TRANSPORTATION BOARD

PYCO Industries, Inc. -)
Feeder Line Application -) F.D. 34890
Lines of South Plains)
Switching, Ltd. Co.)

Reply in Opposition
on behalf of PYCO Industries, Inc.
to
Petition for Partial Reopening

This proceeding arises out of a feeder line application ("FLA") directed at the properties of South Plains Switching, Ltd. Co. ("SAW"), located in the southern portion of Lubbock Texas. PYCO Industries, Inc. ("PYCO"), originally filed the FLA to acquire either the entirety of SAW's rail properties (this option is referred to as "All-SAW"), or, if for some reason acquisition of the entirety of SAW was not permitted, then only those SAW properties north of the BNSF mainline and south of the mainline around PYCO's Plant No. 1 (this option has been termed "Alternative Two" in the course of the proceeding).

SAW vehemently resisted "Alternative Two," taking the position that all of SAW should be sold or nothing. PYCO certainly preferred that result as well, and ultimately this was the All-SAW option was the only option pursued by the parties. In a decision served August 31, 2007, this Board set terms and conditions for the sale of All-SAW to either PYCO or a "me-too" applicant (KJRY). SAW selected PYCO and the parties closed on November 9, 2007, about 22 months ago.

After PYCO acquired All-SAW, SAW took the position the acquisition did not include certain SAW trackage that all the

parties (and this Board) had included in their valuation analyses, and which PYCO had paid for, known as the "Burris trackage." PYCO sought clarification from this Board that the sale did encompass the Burris trackage. In a decision served September 8, 2008, this Board so clarified. SAW filed, but subsequently voluntarily dismissed, a review proceeding in the D.C Circuit against STB's September 8, 2008 decision on the Burris trackage issue. SAW initially sought judicial review of this decision, but withdrew its petition. The time period for judicial review has lapsed. That decision and all prior decisions are now final and beyond review by SAW.

On August 11, 2009, SAW filed a "petition for partial reopening" of the September 8, 2008 and August 31, 2007 decisions insofar as those decisions involved the Burris trackage.

PYCO opposes SAW's petition to reopen. SAW bears a heavy burden of proof on a petition to reopen. See Farmers Export v. United States, 758 F.2d 733, 737 (D.C. Cir. 1985) ("[p]etitions to reopen previously final agency decisions are to be granted only in the most extraordinary circumstances"). Reopening may be permitted only under the narrow criteria of 49 U.S.C. 722(c). That statute provides that a party may seek, and STB may allow, reopening only on the basis of new evidence, changed circumstance or material error. BNSF Rwy v. STB, 453 F.3d 473, 479 (D.C.Cir. 2006). SAW does not purport to present new evidence or changed circumstance, and petitions for reopening only on grounds of material error. See SAW Pet. at 3. However, SAW fails to show

any such error. To the contrary, if there was error in this proceeding, it was error by SAW or induced by SAW, and thus not material error by this agency at all. This Board should accordingly deny SAW's petition to reopen.

PYCO further requests that the denial be clear, so that SAW is foreclosed from seeking further judicial review pursuant to the doctrines enunciated in Brotherhood of Locomotive Engineers v. ICC, 482 U.S. 270 (1982) (no judicial review from denial of reopening on grounds of material error).

PYCO has now invested substantial additional assets in purchasing rail equipment, training staff, and rehabilitating the line. Rescinding or reconfiguring the sale at this time would be prejudicial.

Although SAW attempts to characterize its petition in narrow terms, PYCO does not see how it can be granted without reopening the proceeding for a valuation of a new set of former SAW assets and potentially additional "me-too" feeder line applications for those assets. This would be prejudicial to PYCO in the extreme.

I. SAW's Claim

SAW admits that 49 U.S.C. 722(c) controls, and argues that the Board should reopen on grounds only of "material error." SAW Pet. at 3. The crux of SAW's argument is that since SAW never operated the Burris trackage, it could not be found to have provided inadequate service there, and in any event there is no evidence of inadequate service at Burris. SAW reasons that STB therefore erred in finding that PYCO met the "public convenience

and necessity" ("PCN") standard for that trackage. Id. At p. 14 of its Petition, SAW argues that PYCO failed to show a majority of shippers sustained inadequate service if Burris trackage is included in the sale.

II. Summary Response

Any error in respect to the Burris trackage that SAW asserts, much less any material error, was in fact clearly induced by SAW itself, and under applicable precedent, it thus does not qualify as error at all. SAW insisted on a sale of All-SAW, said it would not contest PCN if All-SAW were sold, affirmatively represented that the Burris trackage was part of All-SAW (by including same in its inventory of assets and by relying on Burris revenues in its own valuation evidence). The parties and this agency relied on SAW's representations as to All-SAW. This reliance included with respect to the initial PCN portion of the proceeding, and then during the valuation portion. Any "mistake" here was by, or induced by, SAW and not material error by the agency, or anything that allows reopening.

In any event, the PCN finding is made for the SAW lines as a whole, not for particular segments. The fact that SAW claims never to have provided service for the Burris segment of its Lubbock lines does not disqualify them from an FLA for All of SAW so long as PCN is met for the whole. In addition, SAW's reliance on BNSF to provide service at Burris is as much a confession that SAW could not provide adequate service as of anything else. SAW in the end is engaged in illegal cherry-picking of the lines, to

retain a segment it thinks may still be profitable to it.

Contrary to SAW's claims, the record shows that PYCO showed, and indeed that STB has found, inadequate service as to a majority of shippers inclusive of the Burris trackage.

For these and other reasons, SAW shows no material error and reopening must accordingly be denied.

III. Overview of Facts Germane to Burris Trackage

PYCO, the major shipper on SAW's lines, sought both short-term and long-term relief against SAW for inadequate rail service. The main source of long-term relief administered by STB is the feeder line statute, 49 U.S.C. 10907. Under this statute, the applicant may file a feeder line application ("FLA") to compel the sale of a feeder line system like SAW's at a price fixed by the agency if the applicant shows either that the system is on a System Diagram Map (SDM) as an abandonment candidate, or that sale of the system is consistent with the public convenience and necessity ("PCN"). The PCN standard is further defined in the statute. One of the showings required to meet the PCN standard is that a majority of shippers experienced inadequate service. 49 U.S.C. 10907(c)(1)(B). The statute does not say if this means an arithmetic majority of shippers, or a majority of shippers by carloadings.

PYCO filed a PCN FLA. Relying on shippers Attebury and Compress (the only shippers besides PYCO's Plant No. 2 located on the SAW system north of the BNSF mainline), PYCO quickly assembled a majority of shippers by carloadings who found SAW

service inadequate, and filed a PCN FLA to acquire all of the assets of SAW (this alternative is referred to in STB decisions below as "All-SAW"). Because PYCO was concerned STB might require a arithmetic majority, and because it was unclear at the time what entities would be determined to be shippers (or prospective shippers), PYCO in the same FLA also sought, as its "Alternative Two," all of SAW on the north side of the BNSF mainline (that is, the part serving PYCO's Plant No. 2, Attebury, and Compress), and the trackage on the south side of the BNSF mainline necessary to serve PYCO's Plant No. 1, located around the SAW yard. PYCO could identify with certainty the shippers for Alternative Two. PYCO's preference, however, was to acquire all of SAW.

To make a long story short, STB construed the majority requirement in section 10907 to refer to an arithmetic majority of the shippers as opposed to a majority of shippers by volume. See PYCO Industries - Feeder Line Acquisition - South Plains Switching, Ltd. Co., F.D. 34844, served June 2, 2006. STB accordingly refused initially to accept PYCO's FLA for All-SAW, but ultimately allowed it to go forward, over objections from SAW,¹ for "Alternative Two." Id., Decision served July 3, 2006.

After accepting PYCO's application for "Alternative Two," STB also accepted a "me-too" competing FLA filed by Keokuk Junction Railway (KJRY) for that subset. Keokuk Junction Railway Co. - Feeder Line Application - Lines of South Plains

¹ SAW Statement filed August 2, 2006.

Switching, Ltd., F.D. 34922, served August 17, 2006.

SAW adamantly opposed dividing itself up. See, e.g., SAW, Statement in Opposition to Revised Feeder Line Application, in F.D. 34890, filed Aug. 2, 2006, at 6-7.

PYCO very much agreed that the shippers of Lubbock would be better served if SAW were gone entirely from Lubbock. In a cover letter and "Compilation" filed on the same day as the aforementioned SAW pleading (i.e., August 2, 2006), PYCO showed that a majority of shippers on the shipper list filed in the proceeding by SAW agreed that SAW service over its system was inadequate. In a letter e-filed on August 4, 2006, SAW indicated it would likely not contest a PCN finding for the entirety of SAW in light of evidence that "a majority of its shippers do not favor its operation."

In a Decision served August 16, 2007, in this docket, STB accepted the PYCO application for All-SAW, noting that all parties including SAW agreed that the entirety of SAW should be transferred. On September 18, 2006, SAW specifically confirmed that it would not contest PCN if SAW in its entirety were sold. See SAW, "Statement in Response to PYCO's Feeder Line Application to Acquire 'All SAW'," Sept. 18, 2006, in F.D. 34890, at p. 2. In the same pleading, SAW filed an asset inventory (by its expert, Mr. Landreth) specifically including the so-called Burris trackage. Landreth V.S. at 21.

SAW's September 18, 2006 concession effectively ended litigation on the PCN issues, and the parties all focused on

evidence and arguments pertaining to valuation of all of SAW.

The parties submitted evidence on both net liquidation value (NLV) (the value of SAW's assets for non-rail purposes) and going concern value (GCV). As STB acknowledged in its August 31 Decision, slip at 18, PYCO based its NLV calculations on SAW's inventory of assets (that inventory was prepared by SAW's expert Landreth). That inventory specifically included the Burris trackage. No party contested PYCO's valuation in any way germane here. No party called for exclusion of anything at Burris. To the contrary, SAW and the other parties relied on revenue from the Burris trackage in their GCV computations. See August 31 Decision at 20 & 22. We underscore that STB itself intentionally and explicitly relied on the inclusion of its Burris assets. Id. at 27. There is accordingly no question that all parties including SAW treated the Burris trackage as part of "All-SAW."

Although SAW asserts there are two shippers on the Burris trackage (Jarvis and Lubbock Feed Mill or LFM), it supplies no evidence that there in fact are two. For purposes of this reply, PYCO will assume *arguendo* that one of the candidate shippers at Burris (namely, Jarvis) is in fact a shipper. Based on the record, rail traffic for Jarvis Metals on the Burris trackage has been a source of net revenue (profit) for the feeder line owner. Shortly after BNSF sold the feeder system to SAW in 1999, BNSF apparently determined that allowing SAW access over trackage rights on the BNSF mainline to reach the Burris trackage either (1) would be excessively disruptive to BNSF operations or (2)

would not result in adequate service to Jarvis (the record is not clear on this issue). BNSF and SAW entered into an agreement whereby BNSF served Jarvis Metals directly and in lieu of SAW, and BNSF agreed to pay SAW \$75 per carload, which SAW elsewhere has represented was the profit it claims it would have received had it been able to provide the service. Of course, SAW represents that it never provided any service, so there is no indication that it was able to provide same, or feasibly could have. However, there is no evidence in the record of this proceeding that LFM shipped anything on any of SAW's lines, including the Burriss trackage. LFM has not shipped during PYCO's tenure. BNSF advises it has no record of LFM shipments for at least five years. If LFM is a shipper, that is not "new evidence" that would justify reopening, but only "newly discovered" evidence that would not qualify for reopening. In short, LFM cannot be assumed or deemed a shipper at this time, even if it were a shipper, which it most definitely is not.

PYCO acquired SAW pursuant to the Board's August 31 Decision valuing the feeder system at NLV value, and pursuant to a settlement agreement. In the settlement agreement, PYCO, well aware of SAW's litigious nature, paid SAW a substantial sum over and above the amount established by STB not just for some additional property (necessary to serve 84 Lumber, one of SAW's customers, whose lead SAW had transferred to Choo Choo) but also for a release by SAW and other SAW-related entities from all claims, known or unknown, now or in the future, against PYCO.

BNSF prepared to pay the \$75/carload for the Jarvis business on the Burris trackage to PYCO. SAW claimed the revenues. BNSF began holding the revenues in escrow. PYCO filed a motion dated February 8, 2008, for enforcement or clarification with STB on this issue.² On March 17, 2008, PYCO filed supplemental evidence showing, among other things, that the Burris trackage was in Lubbock.

In its Decision served Sept. 8, 2008, STB ordered SAW to quitclaim the Burris trackage to PYCO. SAW petitioned for judicial review of that portion of STB's Decision in the D.C. Circuit (No. 08-1309). After STB and PYCO filed their briefs responding to SAW's opening brief, SAW filed a motion for voluntary dismissal. SAW basically explained that the arguments it sought to raise with the D.C. Circuit concerning the Burris trackage had never been presented to STB. It stated that it wished to dismiss the court case so it could raise the issues first with STB without the hindrance of an adverse judgment from the D.C. Circuit. The D.C. Circuit allowed the dismissal. SAW has now filed its petition to reopen to raise its new arguments concerning the Burris trackage.

SAW's arguments meet the criteria for frivolousness, because they fly in the face of SAW's September 18, 2006 statement (and later submissions as well) that it would not contest PCN issues if all of SAW were sold. The parties relied on these

² The motion also sought clarification on SAW's claim that it still owned the mainline switches and that PYCO's use of same was a trespass.

representations for purposes introducing further evidence in the proceeding. In particular, in its September 28, 2006 statement, SAW says clearly and categorically that it will not contest PCN issues if all of SAW, rather than a part of it, is valued and ordered sold.³ When a party seeks to raise an issue that it previously said it would not contest, that is a classic case for frivolousness (and the award of attorneys' fees against it).

SAW's belated August 11, 2009, motion to reopen is in fact SAW's second tardy effort at this agency to renege on its September 18, 2006 concession on PCN issues. SAW's first untimely effort was in June 2007, long after the close of the evidence phase of the proceeding below. SAW's claim at this first bite at the PCN apple was that it wanted to reopen the PCN issues because it alleged it was subject to an unlawful alternative service order during the pendency of the FLA and that STB was taking too long on the FLA. SAW explained that it now wished to argue that Penny Newman Grain Company (as a major consignor-shipper) was a necessary party to PYCO's PCN FLA, and that Penny Newman had failed to join or attest to the quality of SAW's rail service. This Board denied leave to reopen on the ground that SAW's justification for reopening was inadequate. STB also noted that Penny Newman had submitted a statement supporting PYCO, which statement the Board viewed as

³ See Geoffrey E. Macpherson Ltd. v. Brinecell, Inc., 98 F.3d 1241, 1246 (10th Cir. 1996), citing FRAP 38 and 28 U.S.C. 1927 (a party risks attorneys fees for arguing a point it earlier waived).

corroborating inadequate service for that traffic. STB Decision served August 31, 2007, at pp. 9-10.

In its second even more untimely effort to renege on PCN, namely the one before us now, SAW's explanation for its tardiness (see SAW Petition at p. 7, incorrectly referring to page 24 of the STB August 31, 2007 Decision) is that it saw an opening to contest the Burris trackage due to a parenthetical reference to Burris and Slaton trackage at page 35 of this Board's August 31, 2007 Decision (which the Board said was mistaken in its September 8, 2008 Decision⁴). Since STB clarified that the parenthetical was mistaken on September 8, 2008, it is hard to see how the parenthetical can justify SAW's waiting eleven more months to take a second bite. Moreover, since there are numerous references in the record and the August 31, 2007 Board decision to SAW's own reliance on the Burris trackage as part of All-SAW, it is hard to see how the mistaken parenthetical serves as any justification for tardiness at all. In addition, between SAW's first unsuccessful effort to reopen PCN issues and the one now before the Board, SAW signed a settlement agreement barring SAW from the kind of unwinding it now seeks here.

The SAW property, including the Burris trackage, has now been transferred in its entirety to PYCO. SAW withdrew from judicial review of the decisions so requiring. The time for

⁴ SAW's owns no trackage at Slaton, although a related company (South Plains LaMesa, or "SLSR") does. PYCO understands that SLSR also owned some storage trackage between SAW's Burris trackage and SAW's trackage north of the Burris trackage.

seeking same has long ago expired. All STB decisions are therefore final, not subject to review in any fashion germane here, and thus properly relied upon. PYCO has now so relied. The PCN apple that SAW wants another bite of is now part of a pie, and there is no longer an apple available for SAW to nibble at. SAW's tardiness in seeking reopening is inexplicable, and its second bite if allowed would be even more disruptive than its unjustified first attempt.

IV. Argument

A. SAW Fails to Meet the Requirements for Reopening

1. SAW's September 18, 2006 Concession and Orderly Proceedings

In the feeder line proceeding below, litigation of the PCN issues ended on September 18, 2006, when SAW stated it would not contest PCN issues if all of SAW were sold. See SAW, Statement in Response to PYCO's Feeder Line Application to Acquire "All-SAW," filed Sept. 18, 2006, at p. 2. See also SAW Reply to (1) KJRY Expanded Competing FLA and (2) PYCO's Amended Valuation Evidence, filed Oct. 12, 2006, at 3. SAW's concession on September 18, 2006, reiterated October 12, 2006, was consistent with its prior position that the entirety of its lines must be under one carrier. In the words of STB, "[t]he parties agree that it would be preferable for the entirety of SAW's rail lines to be operated by one rail carrier. ... SAW also desires that only one carrier operate its lines, because, in SAW's view, splitting up its lines would be the worst possible result for all parties." STB Decision served August 16, 2006, at 4. After

SAW's September 18, 2006, the parties focused exclusively on valuation matters.

SAW's reversal of its three year old position, on which all parties relied, has to be viewed as untimely, for the proceeding long since was concluded, the decisions are all final, and the sixty day judicial review period provided under the Hobbs Act has expired. PYCO has moved on with the lines. To revisit PCN at this time in order to re-configure the sale is contrary to the orderly presentation of cases before the agency, as well as concepts of finality, repose, law of the case, and laches.

In all events, SAW cannot "freeze" the PCN record by conceding it in 2006, and then three years later seek to litigate PCN by applying an argument it never raised to a record foreshortened by SAW concessions to the contrary. That would deny due process to PYCO. If SAW were to gain reopening based on its contrivances to date, then PYCO must be given a chance to show (again) that either the parties that SAW claims are shippers are not, or that parties SAW claims are not shippers in fact are, and that in any event a majority of the entities that SAW lists, as adjusted by those properly in or out in fact viewed SAW service as inadequate. In any event, the record already shows that a majority of shippers view SAW service as inadequate.

2. SAW Seeks Relief that Cannot Be Granted

It is hard to see how this Board could grant the relief SAW professes now to want. PYCO and, according to the Board, KJRY filed FLA's to acquire All-SAW, not All of SAW less Burris.

When SAW, PYCO and KJRY submitted their valuation cases, they included Burris not only on the net liquidation value ("NLV") side, but on the going concern value ("GCV") side as well. Presumably all that evidence would have to be amended if Burris is deleted. If some part of SAW that is now less than All-SAW is the system to be sold, it is not clear how this Board can avoid letting third parties have another crack at making an offer for it, and participating in a valuation of the assets, in response to a new round of me-too FLA's. In any event, STB will have to recalculate GCV as well as NLV, re-determine which now is greater, and re-establish terms and conditions.

SAW may claim it would waive all rights to revaluation, or to further me-too FLA's, in order to mitigate the mess its petition otherwise risks creating. However, SAW's entire petition to reopen is predicated on the notion that SAW concessions and waivers are not binding on SAW, and may not be relied upon by the parties or by the Board. Thus, if SAW were to claim that it is conceding away "rights," then this should be viewed more as an admission that SAW should not be here in the first place. In any event, concessions by SAW are not binding on possible "me-too" applicants.

If there is a new FLA proceeding for some newly defined less than All-SAW, then SAW would presumably claim another chance to choose between KJRY and PYCO and anyone else that got their nose under the tent with a new me-too. And if SAW chose KJRY or some third entity, what becomes of PYCO's payments to SAW, and PYCO's

legitimate investments in plant and equipment in the switching system in Lubbock, and the money PYCO paid SAW for the comprehensive release from what SAW is attempting to do here? PYCO certainly does not concede that any entity has power now to divest it of any portion of SAW in response to SAW's latest petition. However, if SAW is reconfiguring the system for sale to PYCO (and/or others), as deletion of Burris would do, then SAW is essentially opening this whole matter up for a re-do, not for what it says it is seeking.

In short, the relief that SAW requests - return of the Burris trackage for a refund of money to PYCO for that trackage - is not relief that this Board can grant without potentially huge disruption and a host of legal problems. No reopening should be granted in the circumstances.

There is another problem with SAW's arguments and the relief it seeks. If the Burris trackage is profitable, as it would be as operated under the BNSF/SAW agreement if BNSF paid \$75 per carload, then SAW's effort to retain that trackage is an illegal cherry pick in violation of Caddo Antoine. But if the Burris trackage is not profitable for SAW to operate on its own (as we believe would be the case without revenue from the rest of the SAW system), then the shipper at Burris (i.e., Jarvis, for LFM is not a shipper) would be faced with inadequate rail service from SAW. Indeed, no short line could serve Jarvis at current volumes if it did not also have other traffic on which to share overhead expenses. But SAW no longer has additional traffic on which to

defray overhead. In the circumstances, if SAW were allowed to retain Burris, it would not be able to provide adequate service there.⁵ This would appear to violate 49 U.S.C. 10907(c)(1)(C)&(D) (sale would result in adverse effects on incumbent railroad). The relief SAW seeks is thus contrary to the statute as well as equitable doctrines like laches and repose.

3. The Standards for Reopening Cannot Be Met

This Board may only reopen this proceeding due to changed circumstances, new evidence, or material error. In particular, 49 U.S.C. 722(c) provides that this agency may reopen only if it finds "new evidence," "changed circumstances," or "material error." BNSF Rwy v. STB, *supra*, 453 F.3d at 479 (D.C.Cir. 2006), confirms that the only way a party, or the STB, may reopen a proceeding is pursuant to 49 U.S.C. 722(c). SAW concedes that its argument is not based on changed circumstance or new evidence (the circumstances and evidence on which SAW relies existed throughout the feeder line proceeding). SAW Pet. at 3. SAW states that its petition is based on material error. Id.

But SAW faces two insurmountable barriers to any showing that the STB materially erred in connection with PCN and inclusion of the Burris trackage.

First, we have already noted that SAW stated that it "does

⁵ SAW cannot claim otherwise. It argued that under Alternative Two, it would be left with a non-viable system. Leaving SAW with the small Burris customer base would be even more non-viable for SAW.

not oppose a finding that PC&N permits sale of All-SAW." SAW, Statement in Response to PYCO's Feeder Line Application to Acquire "All-SAW," filed Sept. 18, 2006, at p. 2. In the same pleading in which SAW waived all of PCN arguments against sale of All-SAW, SAW filed an inventory of the trackage comprising All-SAW. See id. Landreth Statement 19-21. The Burris trackage is found in SAW's inventory at 21. Thus, at the same time SAW included the Burris trackage, it stated it would not contest PCN if the sale included the Burris trackage along with all other trackage on its inventory. SAW reiterated its concession in a Reply to both KJRY and PYCO filed October 12, 2006, at p.3.

Second, SAW not only included the Burris trackage in its inventory, but then subsequently proceeded to rely on that trackage for parts of its valuation case. This accordingly was not a case of an action on which SAW did not later rely in the proceeding; it was a case of an action on which SAW later placed strategic reliance, suggesting it was intentional and purposeful to obtain a valuation more advantageous to SAW. Indeed, SAW based a major part of its going concern valuation on revenue streams extrapolated from the Burris trackage.⁶ Other parties and the Board included the Burris assets in their valuations as well. For example, PYCO⁷ and STB⁸ included the Burris revenue

⁴ August 31, 2007 Dec. at 20 (discusses SAW reliance on Burris revenue).

⁷ August 31, 2007 Decision at 21 (discusses PYCO treatment of Burris revenue).

⁸ August 31, 2007 Decision at 27 (STB inclusion).

stream in their going concern valuations. In addition, PYCO based its trackage net liquidation value estimates on the Landreth (SAW) statements (including Burris), and KJRY and STB basically relied on PYCO's calculations of salvage values, which SAW did not contest. See August 31, 2007 Decision at 15, 16 and 18.

The D.C. Circuit has explained that a litigant like SAW before the STB cannot argue that this Board committed material error when the error the litigant complains of "was induced by [the litigant]'s own failure to raise the argument in good time." BNSF Rwy. v. STB, supra, 453 F.3d at 479. "Even a defect in the jurisdiction of the agency ... when not timely raised before that agency, is forfeit." Id.

Here, SAW did not just fail to argue "in good time" that PCN requirements were not met in connection with the Burris trackage, or that it should otherwise not be included. SAW also expressly included the Burris trackage, and urged a higher going concern valuation based on its relationship to BNSF in connection with that trackage. Even more devastating for SAW's position, SAW (repeatedly) stated that it would not contest PCN if STB ordered sale of All-SAW, doing so in the first instance in the same pleading represented and admitted that the Burris trackage was part of All-SAW.

SAW can hardly claim something is an error, much less a material error, on the part of the agency when any error, if an error, was in SAW's representations, or, at the very least, where

SAW repeatedly induced the error it asserts the agency made. Under BNSF, supra, any one of these reasons necessitates the finding that SAW has forfeited any basis to claim material error on any PCN grounds, and most especially on PCN grounds relating to inclusion of the Burris trackage. SAW did not just impliedly forfeit the grounds; it expressly did so.

Wholly apart from the BNSF decision, it is well-established that an argument that could have been raised during the regular course of a proceeding but was not does not qualify as grounds for reopening. Friends of Sierra RR v. ICC, 881 F.2d 663, 667 (9th Cir. 1989), cert. denied, 493 U.S. 1093 (1990). Since SAW could have raised all the arguments it now seeks to raise in a timely fashion but chose not to do so (indeed, SAW not only affirmatively renounced PCN contentions, but actually relied on the very relationship it had with BNSF to argue for a higher valuation), it cannot claim material error here.

Another way to view the situation is to examine SAW's contention that an error was made. The first "error" in the proceeding below that SAW points to is that SAW included the Burris trackage in its inventory. SAW now says this was a "mistake."⁹ Since SAW compounded this "mistake" with a statement that it would not contest PCN for All-SAW, and with subsequent

⁹ In a Brief filed in the D.C. Circuit on the Burris trackage, SAW states that it "mistakenly included the Burris tracks in the inventory of property to be valued" in the feeder line proceeding. SAW opening Brief in South Plains Switching, Ltd. V. STB, D.C.Cir. No. 08-1309, dated March 16, 2009, at p. 19 (attached as Exhibit A).

reliance on the inclusion of Burris to demand a higher going concern valuation, SAW is not identifying an "error" which the Board made in connection with Burris, but what in retrospect SAW views as a strategic mistake on its part in including Burris. SAW now wishes it had kept Burris out, with the apparent hope of retaining that \$75/car revenue stream from BNSF. But SAW's retrospective sense that it made a strategic blunder does not mean that STB made any error at all. STB, and certainly parties opposed to SAW such as PYCO, properly rely on SAW's representations during the course of the regular proceeding. BNSF, supra. SAW does not show any material error justifying reopening when it argues one thing in the regular proceeding, and then decides over a year later it wishes now, in an untimely fashion, to argue the opposite, whether it views its earlier position as a mistake or just good gamesmanship at the time. To the contrary, 49 U.S.C. 722(c) bars reopening in such circumstances. See BNSF, supra.

Another way to view the issue of error is that the error SAW now identifies is not inclusion of Burris, but failure to identify Jarvis (or LFM) as a shipper in SAW's shipper list (dated June 15, 2006, and attached to SAW's Petition as p. 1 of Appendix IV).¹⁰ But this "error" is inherently evidentiary in nature. Since the evidence concerning Jarvis (or any other Burris entity) was available to SAW throughout the evidentiary

¹⁰ SAW also claims in its Petition that LFM is a shipper at Burris, which is not true, but even if true, the same arguments apply to LFM as to Jarvis.

phase of this proceeding, and SAW simply failed to submit it, that evidence is not new evidence such as would justify reopening, but instead is "newly discovered" old evidence. It is well-established that "newly discovered" old evidence is, like a new argument based on old evidence, not grounds for reopening. Friends of Sierra RR v. ICC, 881 F.2d 663 (9th Cir. 1989), cert.denied, 493 U.S. 1093 (1990). Indeed, SAW's entire reopening argument can be analyzed as an attempt by SAW to introduce "newly discovered" old evidence, either as to shippers, or as to BNSF's operation of the Burriss trackage in lieu of SAW's ability to operate there. SAW in this sense is mischaracterizing its argument as material error in nature, because the only error SAW points to is SAW's own in connection with making concessions instead of presenting evidence and making arguments. But SAW's newly discovered evidence/argument is a flop for reopening, which can only be on evidentiary grounds for evidence that in fact is truly new. Nothing is new in the legally relevant sense in what SAW has to say.

B. The Relief that SAW Seeks (namely, Keeping the Burriss Trackage) Is Illegal

In Caddo Antoine and Little Missouri R. Co. v. United States, 95 F.3d 740 (8th Cir. 1996), five shippers on the north end of a branch complained of inadequate service and supported a PCN FLA for an entire line. The shipper at the south end supported the incumbent rail carrier. All parties appeared to agree that providing service to the five shippers on the northern end was unprofitable, but that providing service to the southern

customer was so profitable that the entire line would be profitable. The incumbent railroad objected to including the southern shipper, arguing that the feeder line statute "was never intended to give an adversary carrier a mechanism by which to force a rail carrier to sell a profitable segment of line which is adjacent to a line being abandoned." 95 F.3d at 744. STB's predecessor, the Interstate Commerce Commission (ICC), bifurcated the line as requested by the incumbent, allowing the FLA to proceed only as to the northern portion, thus permitting the incumbent railroad to retain the profitable segment. The Eighth Circuit reversed, holding that the agency could not arbitrarily restrict PCN FLA's for an entire line to some lesser segment. 95 F.3d at 747-48.

In the proceeding below, STB construed Caddo Antoine exactly as does PYCO here. The Board explained, when it initially accepted PYCO's FLA for Alternative Two, that Caddo Antoine stands for the proposition that an incumbent rail carrier (here, SAW) cannot "cherry pick" a feeder line so as to retain particular profitable pieces. PYCO Industries - Feeder Line Acquisition - South Plains Switching, Ltd., F.D. 34844, et al., served July 3, 2006, slip op. at 6.

SAW is clearly attempting to "cherry pick" here. It wishes to retain the Burris trackage because it thinks that rail business there is profitable. But STB may not lawfully cherry pick the feeder line system in Lubbock to keep that or any other portion that SAW thinks profitable in the hands of SAW.

In any event, as STB indicated in its September 8, 2008 Decision at p. 7, SAW conceded that the PCN standard had been met for PYCO's FLA for "All-SAW." It is far too late to unwind the proceeding by allowing SAW to contest its own concessions and evidentiary submissions.

C. SAW's Claims Violate the Settlement Agreement

When PYCO purchased the rail properties of SAW pursuant to this Board's order in this proceeding, PYCO did so pursuant to a settlement agreement in which paid a premium to SAW for peace. Well aware that SAW has a reputation for litigation and re-litigation, PYCO paid SAW a substantial sum for a release of all claims, known or unknown, now or in the future, arising from the property transferred. See Attachment V to Motion for Enforcement or Clarification filed Feb. 8, 2008. In addition, at closing SAW and PYCO signed a mutual release. See Exhibit B. SAW's claims that conveyance of all of SAW now is unlawful clearly violate SAW's release of PYCO from all claims arising from the transaction.

This agency's August 31, 2007 order establishing terms and conditions for the sale by SAW allowed the parties to vary the terms of the sale from those in STB's order by agreement. SAW's release of PYCO constitutes a variance of the terms in accordance with STB's August 31, 2007 terms and conditions by agreement. This agency should no more facilitate SAW in violating that agreement than in violating any other term or condition established by the agency which the parties did not modify. SAW

was paid for its property pursuant to this agency's August 31, 2007 decision, and paid to stop litigating per the settlement agreement. SAW's repeated litigation over Burris is a violation of its contractual obligations, as well as this Board's orders.

PYCO also places SAW on notice that it will assert a claim for its attorneys fees, expert witness fees, and costs for the first proceeding, as well as the second, if there is a second (which there should not be), as well as all other appropriate costs, damages and expenses, because SAW is acting in breach of the settlement agreement it entered with PYCO by pursuing this petition to reopen.

D. SAW's Legal Arguments Lack Merit

SAW's main claim is that this agency cannot find that its service on the Burris trackage is inadequate because SAW never provided service on the Burris trackage. But the statute does not require a demonstration of inadequate service on each subset of trackage within a whole. Indeed, the incumbent carrier, either directly or through another, may be providing perfectly adequate service for a subset of the trackage but the trackage in its entirety remains subject to OFA. See Caddo Antoine, supra. The incumbent carrier is not permitted to cherry-pick. As a corollary, whether the shippers on the Burris subset received adequate service from BNSF as contract provider or as a holder of an unlicensed trackage right over SAW trackage is irrelevant to an FLA for all of SAW. Moreover, SAW's failure to provide any service suggests that SAW's service was inadequate.

SAW also seems to argue at p. 10 of its Petition that a successful FLA requires a showing that the railroad "operating" the lines in question provided inadequate service. SAW appears to contend that although it operated "more than 98 percent of the total lines ordered to be sold," it did not operate at Burriss (instead BNSF did) and thus those lines could not be sold.

This argument is again sophistical. PYCO need not show inadequacy for each subset of the system, but only for the "majority of shippers." Thus it does not matter whether SAW operated at Burriss or not, and whether service at that segment was inadequate or not. SAW service, by itself or via another carrier, could be perfect for one shipper, but if deficient for the majority, the PCN criteria are still met. In other words, section 10907(c)(1)(A) does not somehow mean that every shipper must receive inadequate service; it only means that the incumbent carrier must have a "reasonable time" to be responsive. Section 10907(c)(1)(B) indicates that ultimate inadequacy must be shown only for a "majority of shippers."

At p. 11 of its Petition, SAW suggests that BNSF operates at Burriss under its own name, and suggests this is legally significant. But at p. 5 of the Petition, SAW says that SAW "was legally entitled to provide rail service over the [Burriss] trackage." Given this concession, PYCO is therefore in a quandary why BNSF's services at Burriss are somehow legally significant. SAW has previously represented that it acquired all of the BNSF trackage in Lubbock pursuant to this Board's

authorization in South Plains Switching Ltd. Co. - Acquisition Exemption - BNSF, F.D. 33753 (Sub-no. 1), served July 14, 1999. According to SAW's representations at page 5 of its Petition, a Texas court found that the transaction covered by F.D. 33753 (Sub.-no. 1) included the Burris trackage. SAW thus acquired a common carrier obligation there as well as the rail property, and not just some underlying land interest. So far as the record shows, neither SAW nor BNSF has contended that the transfer of the Burris trackage to SAW was unauthorized by this agency by its order in F.D. 33753 (Sub-no. 1). Instead, SAW at p. 5 of its Petition represents that the transaction including Burris was STB-authorized.

If the conveyance was authorized by this Board, as SAW argues, then BNSF operates at Burris either as a contract carrier to SAW, or pursuant to a trackage right (in which case it may continue to have its own common carrier obligation there, whether or not it obtained this Board's authorization for same, if required). In either event, the Burris properties remain part of SAW's rail system because they were authorized for sale to SAW and sold. In short, if they were acquired by SAW in the transaction authorized by F.D. 33753 (Sub-no. 1), as SAW argues at p. 5, then they are "in." If they are not "in," then SAW has no lawful ownership claim to the trackage in the first place. In either case, SAW's petition to reopen has no merit.

SAW claims at page 12 of its Petition that the Burris trackage was not part of the rest of its system. But SAW

represents everywhere else (e.g., as it admits at p. 5, this is its position in Texas state courts) that it was part of the BNSF/SAW package covered in this Board's F.D. 337453 (Sub-no. 1) decision. This suggests that BNSF and SAW viewed the trackage as part of the same system. If one reviews the 1999 STB decision in F.D. 37453, one notes that SAW obtained some three miles worth of trackage rights on the BNSF system. It is PYCO's understanding that SAW viewed those trackage rights to include the right to operate between BNSF's Lubbock yard and the Burris trackage (so that SAW might serve that trackage) as part of the rest of its (former) Lubbock system. (It is not clear where or how SAW would otherwise need to use three miles of trackage rights on the BNSF mainline except for purposes of reaching track 9298 or the BNSF yard from Burris, because three miles of rights exceeds the requirements necessary to connect other destinations on the SAW system to either track 9298 or the BNSF yard.) Since SAW itself indicates at p. 5 of its Petition that the Burris trackage was part of the conveyance of the entire SAW system in Lubbock authorized in F.D. 33753 (sub-no. 1), the fact that SAW and BNSF subsequently decided to operate the Burris subset in a distinct way does not excise it from the SAW system. It signifies if anything that SAW could not adequately serve Burris, or at least could not do so without fouling BNSF's mainline. SAW is simply grasping at straws to disguise an effort to cherry-pick in violation of Caddo Antoine.

In the end, SAW wants to re-litigate PCN. If STB were, over

our objections, to reopen on grounds of material error on this point, then the agency would have to do so on the ground that the record was insufficient concerning whether SAW service was inadequate to a majority of SAW shippers. SAW does not make this question the gravamen of its case to the agency, but it did raise it in its voluntarily dismissed court of appeals action, and it does raise it at p. 14 of its Petition. At that point, SAW claims that PYCO failed to show that a majority of SAW's shippers received inadequate service. SAW's arguments in this respect are confusing, and thus not amenable to a quick analysis, for one has to explore first what SAW is saying and not saying, and then what can be said.

SAW's statements at p. 14 claiming that PYCO has failed to demonstrate that a majority of shippers received inadequate service if Burriss is included seem to suggest that there are 25 total shippers, counting two at Burriss, and that PYCO made a showing of inadequacy only as to 12. SAW's argument cherry-picks the record, just as SAW seeks to cherry-pick its former lines.

SAW asserts at p. 14 that PYCO made an inadequacy showing for 12 of 23 shippers. At p. 7, SAW refers to its Appendix 4 for a listing of shippers by SAW (dated June 15, 2006), and a listing of the 12 shippers for which it says PYCO made an inadequacy showing (PYCO list dated August 2, 2006). SAW says that if two shippers at Burriss (Jarvis and Lubbock Feed Mill) are now included in the shipper count, PYCO shows only 12 of 25 received inadequate service.

SAW's effort to include shippers at Burriss is inconsistent with its position elsewhere in its petition to reopen that such shippers belong to BNSF, not SAW, and thus should not be part of the FLA. Thus, SAW's argument about number of shippers seems to be more in the alternative than as supportive of its main position. Since SAW by its own admission does not serve anyone at Burriss, PYCO does not concede that any shipper at Burriss may be included as a SAW shippers even though clearly on a part of the SAW system. However, for purposes of the discussion that follows, we will assume *arguendo* that any shippers on the Burriss trackage are properly included in the SAW shipper count, provided however there is evidence that they in fact are shippers.

The majority of shippers requirement is a ratio, which has a numerator (shippers showing inadequate service) and a denominator (shippers total). Focusing first on the denominator, SAW's June 15, 2006 list of 23 shippers included Farmrail, which this Board has determined is not a shipper for FLA purposes. See Sept. 28, 2008 Decision, slip op at p. 12 n.28. SAW's list included Weaver Grain as a prospective shipper. PYCO's August 2, 2006 list also included Weaver Grain. We infer from SAW's assertion that PYCO has shown inadequacy as to 12 of 23 that SAW concedes that Weaver Grain is a shipper and Farmrail is not.

But SAW cannot limit the record to its "Appendix IV" materials (SAW's June 15, 2006 list), nor should it be, for there are numerous other points in the record discussing who is a shipper and finding inadequacy as to those entities. Moreover,

SAW's September 18, 2006 concession (coupled with other SAW concessions) cut off the need for further evidence or clarification of arguments on service inadequacy. If we look at the record in the proceeding below as a whole, it is quickly apparent that SAW proclaimed that Penny Newman was a major shipper (with more evidence than SAW has for many entities on its June 15, 2006 list). But Penny Newman (as STB has acknowledged) clearly viewed SAW's service as inadequate and the Board so found.¹¹ Addition of Penny Newman moves the numerator (shippers showing inadequacy) to 13, and the denominator (total shippers) to 24. Floyd Trucking, which unsuccessfully sought SAW service for years, also submitted evidence of service inadequacy, as referenced in the PYCO submission dated August 2, 2006. STB found that PYCO and Floyd had shown service to Floyd was inadequate very early in the proceeding (see Decision in F.D. 34844, served June 2, 2006, at p. 5). Since SAW apparently

¹¹ Long after the conclusion of evidentiary proceedings, SAW filed a paper with STB seeking to change its position. The sole grounds given for the change of position was that SAW felt STB was taking too long in reaching a valuation decision. See SAW pleading dated June 22, 2007, at p. 3. On this basis, SAW stated that it sought leave "to supplement the record" with an argument that a PYCO consignee (Penny Newman Grain Company) was a major shipper, and thus a necessary party to (among other things) the feeder line proceeding. SAW argued that STB could not find PCN for purposes of 49 U.S.C. 10907 without Penny Newman. PYCO responded under cover letter dated July 3, 2007 that SAW overlooked a letter from Penny Newman complaining it had sustained \$750,000 in damages due to SAW's inadequate rail service, and also stating that it supported and joined in PYCO's FLA. See PYCO's FLA, Exhibit K, in F.D. 34844, incorporated into PYCO's FLA in F.D. 34890. PYCO in its response also objected that SAW did not meet the agency's standard for reopening the proceeding on this issue. STB denied SAW's motion for leave to supplement in its August 31 Decision at p. 9.

concedes that Weaver Grain is a shipper, then Floyd Trucking must now be counted as well as they stand in a similar position, and both provided evidence of inadequacy. This shifts the numerator to 14 and the denominator to 25.

SAW states that Jarvis and LFM should be counted at Burris. SAW provides no evidence as to Jarvis or LFM. As we have said, there is no showing whatsoever that LFM is a shipper, and it is not. LFM should not be counted as a shipper. There is evidence for Jarvis (a claim of revenue by SAW). If Jarvis is counted as a shipper, SAW admits it provided no service to Jarvis. Assuming *arguendo* that SAW's admission it provided no service does not amount to an admission that SAW's service was inadequate, the numerator remains at 14, but the denominator goes to 26. But 14 out of 26 shippers is still a majority.

If this case, contrary to PYCO's position, were reopened, then PYCO would also show that Acme Brick ceased being a shipper (indeed, Acme evidently stopped shipping when its lead was sold to Acme by SAW over PYCO's objection in the proceeding below). This reduces the denominator to 25. PYCO would also show that SAW removed the lead to ABC Supply, which SAW lists as a shipper. ABC should therefore be dropped from the list (that is, the denominator should shrink to 24) or SAW's action demonstrates inadequacy as to ABC (that is, the denominator stays at 25 but the numerator goes up to 15). PYCO repeatedly complained about SAW intimidation of shippers during the course of the proceeding below. PYCO management advises counsel that at least three

additional shippers on SAW's list did not supply evidence of inadequacy for fear of retaliation by SAW, but that they will now openly discuss inadequate service by SAW. If these adjustments are made in the event of reopening, and PYCO definitely is entitled to put in evidence those adjustments, for they truly are "new evidence" for the shippers were too frightened of SAW to come forward, then the count stands even more in favor of PYCO and against SAW (at least 17 of 24).

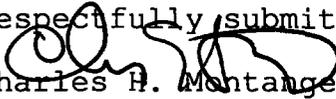
In short, there is no question but that SAW's service was inadequate to a majority of customers in Lubbock. SAW does not establish any chance of prevailing on this issue. SAW can no more cherry-pick the record on shippers than it can cherry-pick the rail system under Caddo Antoine.

SAW's argument about numbers of shippers is also not a material error argument, but an evidentiary argument. It relies on old evidence that Jarvis was a shipper at Burris. But reopening is allowed only for "new evidence," not old evidence, or new argument based on old evidence. SAW's p. 14 material simply does not meet the statutory standard for reopening. See also Friends of Sierra Railroad, supra.

Conclusion

SAW's petition for reopening should be denied. SAW offers nothing about Burris that justifies reopening, and instead the door should be shut, locked, and indeed double-bolted. SAW's petition does not meet the standards for reopening. SAW's arguments in any event have no merit. PYCO requests that the

Board in its discussion make clear that SAW's petition to reopen on grounds of material error is denied, so that further resource expenditures devoted to judicial review may be avoided under the Brotherhood of Locomotive Engineers doctrine.

Respectfully submitted,

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Attachments.

Verification
Mutual Release of Claims

Certificate of Service

I hereby certify service by placement of two copies of the foregoing reply in a Federal Express depository on 29 August 2009 for next business day delivery, all delivery fees pre-paid, addressed as follows:

Thomas McFarland
208 South LaSalle St., # 1890
Chicago, IL 60604-1112

John D. Heffner
1920 N Street, N.W., Suite 800
Washington, D.C. 20036



Verification by
of Robert L. Lacy

I, Robert Lacy, am Senior Vice President-Marketing for PYCO Industries, Inc., am responsible on behalf of PYCO to oversee our rail operations, and am authorized to speak for PYCO concerning same. I have read the foregoing Reply in Opposition on behalf of PYCO Industries, Inc. to Petition for Partial Reopening. Pursuant to 28 USC 1746, I declare and verify that the factual statements in the foregoing Reply are true and correct to the best of my knowledge and belief.

Robert L. Lacy

MUTUAL RELEASE OF CLAIMS

This Mutual Release is pursuant to the letter settlement agreement dated September 20, 2007, of Claims ("Agreement") is entered into by and between **PYCO INDUSTRIES, INC. ("PYCO")**, **SOUTH PLAINS SWITCHING LTD. CO. ("SAW")** and **CHOO-CHOO PROPERTIES, INC. ("CHOO-CHOO")**. A copy of that Agreement is attached as Exhibit A. Together PYCO, SAW and CHOO-CHOO are sometimes herein referred to collectively as "the Parties".

Pursuant to the Agreement, the Parties agree that upon closing pursuant to STB's order dated August 31, 2007, the Parties will and do mutually release each other as follows:

1. **Mutual Release by SAW.** SAW, its legal representatives, shareholders, agents, successors and assigns, upon receipt of the entire amount of consideration as noted in the Agreement, acknowledge the sufficiency thereof, shall release and forever discharge PYCO and its legal representatives, member owners, agents, successors and assigns, of and from all claims and causes of action underlying the Agreement and any and all claims, demands, damages, actions, causes of action, or suits in equity, of whatsoever kind or nature, whether heretofore or hereafter accruing or whether now known or unknown to the Parties, now existing or hereafter arising, common law or statutory, in contract or in tort, including claims for attorneys' fees and costs incurred for or because of any matter or thing done, omitted, or suffered to be done by and between PYCO and SAW prior to and including the date of the Agreement and in any way arising out of or connected with the facts, circumstances, contract and contentions, arising from the acts and occurrences made the subject of this Agreement save and except only those two STB Finance Dockets, as more specifically described by the Agreement.

2. **Mutual Release by CHOO-CHOO.** CHOO-CHOO, its legal representatives, shareholders, agents, successors and assigns, upon receipt of the entire amount of consideration as

noted in the Agreement, acknowledge the sufficiency thereof, shall release and forever discharge PYCO and its legal representatives, member owners, agents, successors and assigns, of and from all claims and causes of action underlying the Agreement and any and all claims, demands, damages, actions, causes of action, or suits in equity, of whatsoever kind or nature, whether heretofore or hereafter accruing or whether now known or unknown to the Parties, now existing or hereafter arising, common law or statutory, in contract or in tort, including claims for attorneys' fees and costs incurred for or because of any matter or thing done, omitted, or suffered to be done by and between PYCO and CHOO-CHOO prior to and including the date of the Agreement and in any way arising out of or connected with the facts, circumstances, contract and contentions, arising from the acts and occurrences made the subject of the Agreement.

3. **Mutual Release by PYCO.** PYCO, its legal representatives, member owners, agents, successors and assigns, shall release and forever discharge SAW and CHOO-CHOO and their its legal representatives, shareholders, agents, successors and assigns, of and from all claims and causes of action underlying the Agreement and any and all claims, demands, damages, actions, causes of action, or suits in equity, of whatsoever kind or nature, whether heretofore or hereafter accruing or whether now known or unknown to the Parties, now existing or hereafter arising, common law or statutory, in contract or in tort, including claims for attorneys' fees and costs incurred for or because of any matter or thing done, omitted, or suffered to be done by and between PYCO and SAW and CHOO-CHOO prior to and including the date of the Agreement and in any way arising out of or connected with the facts, circumstances, contract and contentions, arising from the acts and occurrences made the subject of the Agreement, save and except as to SAW only those two STB Finance Dockets, as more specifically described in the Agreement.

4. **Representation as to Capacity, Authority, Etc.** Each Party on behalf of itself, and all of its predecessors, successors, legal representatives and assigns, agents, shareholders, officers, directors, and employees hereby acknowledges and expressly warrants and represents that he, she, it, or they (a) are legally competent and authorized to executed the Agreement; (b) have not assigned, pledged, or otherwise in any manner, sold or transferred, either by instrument in writing or otherwise, any right, title, interest, or claims with respect to any matter described in the Agreement; (c) have read and understands the effect of the Agreement; (d) are represented by independent legal counsel of their choice; (e) have received all additional information requested prior to executing the Agreement; (f) execute the Agreement voluntarily and of free will and accord for the purposes or consideration set forth herein, without reliance upon any statement, representation, or inducement, by any other party or person that is not contained herein; (g) have the full right and authority to enter into the Agreement and to consummate the transfers and releases contemplated herein; and (h) are authorized to sign the Agreement on behalf of each designated on the signature pages following.

5. **Agreement Binding on Successors, Assigns.** Each Party understands and agrees that the Agreement and all of its terms and conditions shall be binding upon and all inure to the benefit of the Parties and their respective successors, assigns, creditors, and legal representatives.

6. **Counterparts and Effective Date.** This Agreement may be executed in counterparts. This Agreement shall be binding and effective upon each of the parties when (a) each party has delivered a properly executed and verified counterpart to the designated ESCROW AGENT and (b) the real estate transaction involving the property contemplated in STB Finance Docket 34890, decision served August 31, 2007, closes between PYCO, SAW and CHOO-CHOO. Each of the counterparts shall be deemed an original instrument, but all of the counterparts shall constitute one and the same instrument.

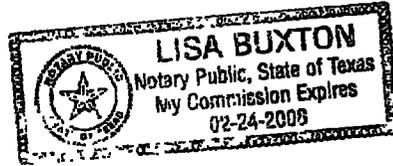
EXECUTED AND AGREED to this 8th day of November, 2007.

PYCO INDUSTRIES, INC.

By *Paul Krings*
Its Authorized Agent

THE STATE OF TEXAS §
 §
COUNTY OF LUBBOCK §

This instrument was acknowledged before me on the 8th day of November, 2007, by
Paul Krings, as authorized agent of PYCO INDUSTRIES, INC.



Lisa Buxton
Notary Public, State of Texas

EXECUTED AND AGREED to this 7th day of November, 2007.

CHOO-CHOO PROPERTIES, INC.

By: *Larry Williams*
Its Authorized Agent

THE STATE OF TEXAS §
 §
COUNTY OF LUBBOCK §

This instrument was acknowledged before me on the 7th day of November, 2007, by November, as authorized agent of SOUTH PLAINS SWITCHING LTD.

Dale A. Robinson
Notary Public, State of Texas

