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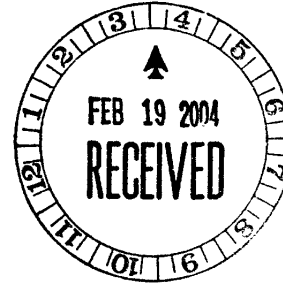
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February 19, 2004

210107



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

Re: Finance Docket No. 34429; *New York City Economic Development Corporation*
Petition for Declaratory Order

Dear Sir:

I am enclosing an original and ten (10) copies of the Verified Reply of the New York City Economic Development Corporation in the above-referenced proceeding. An extra copy is enclosed for date stamp and return to our messenger. In addition, we are enclosing a 3.5" diskette with this document.

Thank you.

Sincerely,

Charles A. Spitulnik

ENTERED
Office of Proceedings

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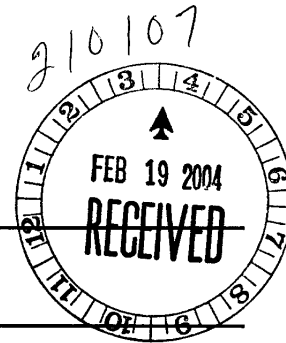
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Enclosures

cc: Joseph H. Dettmar, Esquire
All parties on Certificate of Service

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34429



PETITION OF
THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION
FOR DECLARATORY ORDER

ENTERED
Office of Proceedings

FEB 19 2004

VERIFIED REPLY OF
THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION

Part of
Public Record

The New York City Economic Development Corporation ("EDC"), the Petitioner in this proceeding, hereby submits its reply to the comments of the New York State Department of Environmental Conservation ("NYSDEC") dated January 29, 2004 ("*NYSDEC Comments*"), the New Jersey Department of Environmental Protection ("NJDEP") dated January 30, 2004 ("*NJDEP Comments*") and the letter submitted by Mr. William D. Fidurski on January 26, 2004 ("*Fidurski Letter*"). The issues raised by the commenters provide no basis to deny the relief EDC seeks. For the reasons stated below, as well as for all of the reasons stated in EDC's Petition for Declaratory Order, the Board should issue the requested order at this time.

This Reply addresses the various points raised by the commenters in turn. Several points bear emphasis, however, to place the matter in context.

- The new industrial lead and switching track that EDC plans to construct at the south end of the Travis Branch is part of a larger regional plan, formulated by the Port Authority of New York and New Jersey ("PANYNJ"), the City of New York and the states of New York and New Jersey to reintroduce direct freight rail service between Staten Island, New York and the Chemical Coast Line in New Jersey. This plan encompasses new construction by PANYNJ

at the Howland Hook Marine Terminal/Port Ivory Intermodal Rail Yard, including reconstruction of the connection between that marine intermodal terminal and the pre-existing Arlington Yard on the North Shore Branch of the former Staten Island Railroad ("SIRR"), as well as the construction of the connection between the North Shore Line of the old SIRR and the Chemical Coast Line of the Conrail system that is now used by Conrail, CSX Transportation, Inc. ("CSXT") and Norfolk Southern Railway Company ("NS").¹

- The entire project rests on the premise that the abandoned SIRR lines on Staten Island are to be reintroduced to active service. CSXT, NS and Conrail have filed with the STB a notice that they are the designated operators of these lines pursuant to a Modified Certificate of Public Convenience and Necessity covering lines of the former SIRR that were acquired by the State of New Jersey and the City of New York at the time those lines were abandoned by the former operator.²

- The project also entails rehabilitation of the existing track by replacing old bridges, rail and ties, and construction of a new "wye" connector between the North Shore Branch and the Travis Branch, to permit trains moving to and from the Travis Branch to move directly between that branch and the Chemical Coast Line Connector without having to go to and through Arlington Yard. The wye connector will permit traffic to move to and from all shippers on the Travis Branch, including the new New York City Department of Sanitation ("DSNY") Solid Waste Transfer Facility at Fresh Kills, without having to await handling in Arlington Yard,

¹ The latter construction project is the subject of the Decision issued by this Board in F.D. No. 34428, *Petition of the Port Authority of New York and New Jersey for a Declaratory Order*, Service Date January 21, 2004 (the "*PANYNJ Decision*").

² The Notice of Modified Certificate of Public Convenience and Necessity has been filed in Finance Docket No. 34473, *CSX Transportation, Inc., Norfolk Southern Ry. Co., Consolidated Rail Corp. - - Modified Certificate of Public Convenience and Necessity - - Operation of Lines and Facilities in Staten Island, NY and New Jersey*, on February 18, 2004.

and will free capacity at Arlington Yard for the traffic moving to and from the Port Authority's Howland Hook/Port Ivory facility.

- Contrary to the arguments of commenters NYSDEC and NJDEP, EDC has carefully assessed the environmental impacts of each component of the reactivation project and of the project as a whole. EDC began in 2001 the process of securing permits from pertinent agencies and proposing mitigation for any adverse consequences to the environment. EDC acknowledges the potential wetlands impacts of the proposed reactivation of the SIRR³, and has proposed mitigation of those impacts.

- The construction of the new industrial lead and switching track on the Travis Branch is but one part of this overall project. It is not the whole line of the railroad to be operated by CSX, NS and Conrail, and it is not the sole purpose for the reactivation of the SIRR.

EDC hereby states the following in specific response to the points made by the commenters.

1. EDC is acting fully within, not outside the scope of, its authority as an entity created by a political subdivision of the State of New York. (*See NYSDEC Comments* at 6.) Because track that is the subject of this Petition is track that will be used by a carrier that is providing transportation subject to the jurisdiction of this Board (*see* fn. 2, *supra*), the activity on the track remains subject to the Board's jurisdiction pursuant to 49 U.S.C. §10501(b)(2), even though the

³ The wye connection will impact 1.1 acre of low quality wetlands. The replacement of the three trestle bridges will impact a total of approximately 1,500 square feet of wetlands. The industrial spur/switching track will impact - 1.7 acres of wetland. EDC have met with NYSDEC numerous times to discuss mitigation for the tidal wetland impacts from the project. NYSDEC has suggested that EDC support, together with the PANYNJ, work to reprofile and/or dredge portions of Bridge Creek to improve existing hydrology and tidal flow and potentially implement shoreline stabilization efforts along the creek at selected locations. These efforts would allow for the improvement of 25 or more acres of existing wetlands located within a NYSDEC State Preserve, the Wilpon Property. EDC and the PANYNJ are amenable to NYSDEC's proposal and investigative work is underway to determine the work scope for the mitigation plan.

Board's approval is not required for that operation or for the track's construction. *See* 49 U.S.C. §10906.

Accordingly, the Commerce Clause and the Tenth Amendment to the U.S. Constitution preclude either NYSDEC or NJDEP from succeeding with an argument that construction of the spur/industrial track is subject to regulation by the State of New York or any locality. The Tenth Amendment reserves to the States all "powers not delegated to the United States by the Constitution nor prohibited by it to the States." *U.S. Const.* Amend. X. The Commerce Clause specifically confers upon the U.S. Congress the power "to regulate Commerce . . . among the several States . . ." *U.S. Const.*, Art. I, § 8, cl. 3. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005 (1985), the Supreme Court ended the era in which a state could hope to preclude the application of federal law to various aspects of the functioning of a state agency by arguing that the activity was "in an area of traditional government functions." *Id.*, 469 U.S. at 530, 105 S.Ct. at 1007, *quoting National League of Cities v. Usery*, 426 U.S. 833, at 852 (1976).⁴ While the Supreme Court in *Garcia* acknowledged that "[t]he States unquestionably do 'retai[n] a significant measure of sovereign authority", it clarified that "[t]hey do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." *Id.*, 469 U.S. at 549, 105 S.Ct. at 1016-1017.

Addressing a subsequent controversy that arose out of a question of the Federal government's ability to force states to accept solid nuclear waste for disposal, the Supreme Court looked again at the interplay between the Commerce Clause and the retained rights of the State governments. In *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408 (1992), the Court

⁴ *Garcia* specifically overruled *National League of Cities*.

acknowledged the limits that the Tenth Amendment places on the Federal Government but noted that “[a]s interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly come within Congress’ commerce power.” *Id.*, 505 U.S. at 158, 112 S.Ct. at 2419.

It does not matter, as NYSDEC and NJDEP would have this Board conclude, that the Petitioner in this proceeding is a corporation created by the City of New York rather than the carrier that will use the track. According to 49 U.S.C. §10501(b), “[t]he jurisdiction of the Board over . . . (2) the construction . . . operation . . . of industrial, team, switching or side tracks, or facilities, even if the tracks are located . . . entirely in one State is exclusive.” 49 U.S.C. §10501(b)(2). The Supreme Court in *Garcia* quoted James Madison’s address to the Members of the First Congress as follows:

Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States.

Garcia, 469 U.S. at 549, 105 S.Ct. at 1017 (emphasis added).

Thus, even though the State laws that created New York City, and which authorized New York City to create EDC, might attempt to impose requirements on the City’s or EDC’s conduct, the STB’s plenary jurisdiction over lines used in interstate commerce, 49 U.S.C. §10501(b), supersedes those laws. Any attempt to require compliance with state laws that interfere with interstate commerce cannot survive the Constitution’s allocation of authority over interstate commerce to the Congress, which in turn has delegated much of that authority to the STB.

2. The suggestion of NYSDEC (*NYSDEC Comments* at 7) that the industrial lead/switching track constitutes the entire operation of the SIRR ignores the bigger picture presented by the Petition for Declaratory Order filed by PANYNJ in F. D. No. 34428, the Notice of Modified

Certificate of Public Convenience and Necessity filed by CSXT, NS and Conrail in F. D. No. 34473⁵, and the description of the SIRR system to which the new track will attach that EDC included in its Petition. While the Petition in this proceeding did in fact describe the rehabilitation work that EDC is supervising for the entire SIRR reactivation project, the new track construction project is but one component of that project.

NYSDEC bundles together the two separate pieces of EDC's Petition, rather than recognizing that Petition raises two issues that need to be considered separately. Issue 1 is the discussion of the construction of the new track and the request for a declaration that the construction of that track does not require STB authorization because it is subject to 49 U.S.C. §10906. If, as NYSDEC argues, that new track were to constitute the entire rail system, then the cases upon which NYSDEC relies might be relevant to the Board's inquiry here. Because, however, this is a spur/switching track that will be appended to the reactivated SIRR, those cases are not only distinguishable but also inapplicable.

Issue 2 is the request for a declaration that state and local regulation of the construction of the new track and in fact of the rehabilitation work on the remainder of the SIRR system is preempted by the Board's plenary jurisdiction as stated in 49 U.S.C. §10501(b). The preemption analysis can be further subdivided to examine the rules with respect to (a) the new track and (b) the remainder of the SIRR system. With respect to (a), preemption is appropriate because the track will be used and operated by rail carriers in interstate commerce and is fully subject to the Board's jurisdiction under §10501, even though no prior authorization for its construction is required (49 U.S.C. §10906). *See Friends of the Aquifer, et al.*, STB F. D. No. 33966 (Service Date August 15, 2001), *slip op.* at 4, *citing* STB F. D. No. 33971, *Joint Petition*

⁵ See fn. 2, *supra*.

for Declaratory Order – *Boston and Maine Corp., et al.*, (Service Date May 1, 2001), *slip op.* at

8.

With respect to (b), no STB authorization is required because the work constitutes improvement to existing railroad facilities within the railroad's existing right-of-way. *See City of Detroit v. Canadian National Ry. Co.*, 9 I.C.C. 2d 1208 (1993), *aff'd sub nom. Detroit/Wayne County Port Authority v. I.C.C.*, 59 F.3d 1314 (D.C. Cir. 1995). Again, however, even though no STB approval is required for that work, the STB's broad preemption authority precludes application of state or local laws that would stand in the way of completion of the work and improvement of the efficiency of lines to be used in interstate commerce.

3. Contrary to NYSDEC's and NJDEP's implications⁶, EDC is not attempting to skirt all environmental review processes for either the spur/industrial lead track or for any of the rehabilitation activities on the pre-existing SIRR. The process of seeking these permits began over two years ago, and EDC has persistently worked with federal and state agencies that, but for the federal preemption of otherwise applicable regulation, would have the obligation and authority to review and issue permits with respect to this project. In addition to preparation of the permit applications described in the timeline set forth in paragraph 4, below, EDC has sought the following federal and state permits.

U.S. Army Corps of Engineers :

Action: Bridge Replacement Activities

Permit/Approval: Nationwide Permit No. 3

Proposed replacement of CSX Bridge Nos. 386, 389 and 392 require Corps' review. A formal letter was received on July 31, 2003 from the Corps of Engineers indicating that the action is permitted under Nationwide Permit No. 3. EDC had applied for this in December 2002 at the same time that it submitted the joint application to the NYSDEC.

⁶ *E.g., NYSDEC Comments* at 3 ("We see Petitioners attempts to skirt all environmental review processes").

Action: Development of Wye Connection between the SIRR Travis and North Shore Branches
Permit/Approval: Section 10/404 Permits

Portions of the proposed wye connection would be within a tidal wetland. Activity would include construction within waters of the United States and dredge and fill activities. Application was submitted to the Corps in December 2002 at the same time that the information was submitted to the NYSDEC. Corps of Engineers requested an update with regard to the status of the State consent to a mitigation plan for the wye connection on September 25, 2003.

Action: Development of Travis Branch Industrial Lead
Permit/Approval: Section 10/404 Permits

Portions of the proposed new track will likely extend through areas of tidal wetlands. EDC is preparing the permit application now that the investigation of the site has been completed.

United States Coast Guard:

Action: Bridge Replacement Activities
Permit/Approval: Bridge Permit

Proposed replacement of CSX Bridge Nos. 386, 389 and 392 requires the acquisition of a bridge permit. Coast Guard initially granted Advanced Approval for the action in Summer 2002, but subsequently indicated a formal application for permit was required. A formal application was submitted to the Coast Guard in July 2003. Coast Guard requested additional information in late August 2003, specifically a full Essential Fish Habitat (EFH) analysis, Section 401 Water Quality Certification and Coastal Zone Management (CZM) Consistency Assessment documentation. An EFH analysis was submitted on September 26, 2003 to the Coast Guard. CZM documentation was submitted in early September 2003 to the Coast Guard and the Coast Guard was informed that an application for a Water Quality Certification had been previously submitted in December 2001 to NYSDEC. The Coast Guard public notice period ended in December 2003. Coast Guard received minor comments regarding the proposed action. The Coast Guard is awaiting confirmation of receipt of a Section 401 Water Quality Certificate from the NYSDEC.

NYS Department of State ("NYSDOS"):

Action: Bridge Replacement Activities
Permit/Approval: Coastal Zone Consistency Assessment

The proposed replacement of CSX Bridge Nos. 386, 389 and 392 is located within the coastal zone. Approval provided by NYSDOS in May 2003.

Action: Development of Wye Connection between the SIRR Travis and North Shore Branches
Permit/Approval: Coastal Zone Consistency Assessment

Proposed wye connection is in the coastal zone. Approval provided by NYSDOS in May 2003.

Action: Development of Travis Branch Industrial Lead
Permit/Approval: Coastal Zone Consistency Assessment

Proposed Travis Branch Extension is in the coastal zone. Application is being prepared. On-site investigations of wetland resources and hazardous materials were completed in December 2003 and January 2004.

4. Notwithstanding NYSDEC's statements to the contrary, the delays in completion of the state-level review of the proposed construction project are not to be "found in Petitioner's own domain." *NYSDEC Comments* at 2. The following timeline of EDC's presentation of materials and applications to NYSDEC demonstrates that EDC has since December 2001 been briefing NYSDEC and providing it with the materials necessary for it to undertake its review of the proposed project. To re-emphasize, the following description of EDC's engagement of NYSDEC, which began over two years ago, belies the latter's assertion that EDC is evading environmental review or is somehow disregarding the potential environmental impacts in an environmentally sensitive area.

December 14, 2001	Meeting between EDC and NYSDEC to present the SIRR Project.
October 14, 2002	Information package sent to NYSDEC, regarding verification of wetland line at wye connection (part of the rehabilitation of the pre-existing SIRR system).
November 6, 2002	Wetland field verification meeting with NYSDEC regarding wye connection.
December 18, 2002	Joint Application submitted to NYSDEC for Wye Connection. Joint Application submitted to NYSDEC for Travis Branch Bridge Replacement efforts. (NYSDEC has not provided EDC with comments on either application).

January 24, 2003	Meeting with NYSDEC to discuss wetland issues.
February 10, 2003	Telephone discussion between NYSDEC and EDC staff regarding verification for wetland delineation efforts at Travis Branch Bridges.
Late Winter/Early Spring 2003	NYSDEC raises issues regarding the scope of the environmental review documentation for the SIRR project with EDC.
July 2, 2003	Letter provided to NYSDEC from EDC providing follow-up to previous emails regarding the scope of environmental review documentation for the SIRR project.
November 19, 2003	Meeting between NYSDEC and EDC personnel to discuss the STB submission and EDC's intent to continue to work with the NYSDEC to address effects of the proposed SIRR rehabilitation and new construction projects.
December 10, 2003	Draft Environmental Assessment of the SIRR provided to DEC for review and comment.
December 11, 2003	Meeting between PANYNJ, EDC and NYSDEC personnel to discuss plan for wetland mitigation.

EDC has continued attempts to maintain a dialogue with NYSDEC throughout this entire period, including the period since it filed the Petition in this proceeding. EDC met with NYSDEC as recently as January 14, 2004, to attempt to resolve these issues. EDC expressed its willingness to continue the permit application process while the STB proceeding continued. NYSDEC declined to review EDC's permit applications unless EDC withdrew the portion of the Petition requesting a declaratory order that state and local permitting is preempted. The delay in processing the NYSDEC permits in this matter does not rest with EDC or its personnel.

5. NYSDEC incorrectly states the scope of the Permit to which it refers in footnote 5 on page 3 and at pages 10-11, and which is attached as Exhibit 1 to the *NYSDEC Comments*. The rail construction that is within the scope of that Permit is all track that is within the staging yard on the premises of the new DSNY facility (Area A on the map that is attached to the NYSDEC

Comments at Exhibit 1-A). The new spur track that is the subject of the Petition in this proceeding is in the area designated on that map as Area B, which was not covered by that Permit.⁷ Careful review of the Permit and the contract drawings that were attached to it demonstrates that it gives DSNY authority to construct the Solid Waste Transfer Facility, but that the new spur track to connect that facility to the pre-existing SIRR Travis Branch is not included. The Permit covers the transfer facility site, the parking area and the rail yard staging area (which is distinct from the spur track that will connect the facility to the Travis Branch), and the culvert bridge that would cross over Smith Creek. The map that NYSDEC appends to its Comments at Exhibit 1-A was not part of the City's Permit but is a map that the DSNY prepared and used in the May 3, 2000 Draft Environmental Impact Statement ("DEIS") on the City's proposed Solid Waste Management Plan ("SWMP"), which included review of the rail yard staging area developed adjoining the Fresh Kills Transfer Station specifically.⁸ This map is in the Final EIS ("FEIS") as well. The "rail spur construction" mentioned in the Permit summary (Exhibit 1 to *NYSDEC Comments* at 1, "Description of Authorized Activity") refers to the rail yard and track up to the culvert bridge, all of which are located on City property, as shown on the contract drawings that were referenced in the Permit. NYSDEC incorrectly asserts that the Permit covers the track beyond the culvert bridge.

⁷ NJDEP appears to rely on NYSDEC's erroneous statements about the scope of the earlier Permit when it states, on page 10 of its Comments, that "NJDEP is informed that EDC has voluntarily assumed an obligation to comply with environmental requirements imposed by the State of New York through NYSDEC. In particular, NJDEP understands that EDC has assumed such obligations in connection with both the contract with New York City under which it is operating in connection with the SIRR project, as well as in connection with a permit granted to EDC for the construction of the New Track." As noted here, this misstates the scope of the Permit that the City sought for construction of the DSNY facility and the rail staging facilities that are within the confines of that facility. NJDEP's reliance on NYSDEC's erroneous reading of the Permit invalidates NJDEP's contentions on this point.

⁸ The draft scoping document for the SWMP EIS was presented at a scoping meeting on April 13, 1999. More than 300 people attended. 81 individuals presented comments at the meeting. The comment period ran through May 9, 1999. The Final Scoping Document was issued on May 28, 1999. The SWMP DEIS issued on May 3, 2000 was the subject of a public hearing held on June 1, 2000. 39 individuals commented at the hearing. 16 written comments were received during the DEIS comment period that ran from May 3, through June 16, 2000. A findings statement for the FEIS was issued on October 28, 2000.

6. NYSDEC is correct that Visy Paper, one of the shippers located along the Travis Branch, may begin receiving rail service following reactivation of the SIRR upon implementation of the authority granted CSX, NS and Conrail in the Modified Certificate. *NYSDEC Comments* at 8. NYSDEC is not correct, however, in its assumption that the construction of the new industrial lead/switching track will make that possible. Rather, the spur into Visy's plant (that Visy will construct or arrange for construction on its own) will connect with the Travis Branch at the end of the existing line pursuant to a separate agreement between Visy and Consolidated Edison Company of New York, dated December 28, 1995 (as amended June 25, 1999). The new track to be constructed at the south end of the Travis Branch will serve only the DSNY facility.

7. NJDEP's focus on the identity of the Petitioner, and EDC's status as a non-carrier (*NJDEP Comments* at pages 1, 6-8) is misplaced. This is track that will be used by a carrier operating in interstate commerce. If STB approval of the new track construction were required (instead of being obviated by 49 U.S.C. §10906), EDC would be seeking authority for (i) construction of the track and (ii) operation of that track by a railroad pursuant to 49 U.S.C. §10901 and 49 C.F.R. Part 1150. The track is to be used by a carrier moving traffic in interstate commerce (that is, the operator(s) that are receiving the authority described in the Modified Certificate of Public Convenience and Necessity in F. D. No. 34473), and will become, upon its completion, subject to the Board's jurisdiction under §10501. Preemption of state and local law applies in this instance with equal force even though §10906 precludes the STB from requiring prior approval of its construction or operation.

8. NJDEP's recent unfortunate experience with Hi Tech Trans LLC (*see cases cited in NJDEP Comments* at 3) have caused it to react to EDC's Petition out of concern that EDC is attempting to do what New Jersey feared that Petitioners in the cited cases were seeking to

accomplish. To the contrary, the City has complied fully with all environmental permitting and other related requirements with respect to the construction of the solid waste transfer facility on the site of the former Fresh Kills landfill property. The Permit that NYSDEC attaches to its comments is the Permit that resulted from that comprehensive review of the environmental issues raised by that construction. EDC's Petition relates solely to the switching/industrial lead tracks that will be constructed to connect the new waste transfer facility to the pre-existing, and soon-to-be-reactivated Travis Branch. Neither this Board nor NJDEP should misapprehend the scope of the relief EDC is seeking.

9. NJDEP's argument that the new track is not spur or industrial switching track (*NJDEP Comments* at 3 – 6) fails for several reasons:

(a) The new track does constitute a connection to an existing railroad. The Notice of Modified Certificate of Public Convenience and Necessity to which EDC referred in the Petition has now been filed. CSXT, NS and Conrail will have the right to serve all of the lines and facilities that formerly comprised the SIRR prior to its abandonment and the new track connects to the southern end of that track.

(b) This new track does not permit any carrier to reach into territory served directly by a competitor.

(c) The new DSNY solid waste transfer facility is being constructed to permit movement of waste by rail or by truck. When the facility opens, until direct rail service is available, the waste that will move out of this facility will move by truck to rail yards in New Jersey operated by or for the benefit of the same carriers that will be the holders of the Modified Certificate.

(d) The statement in footnote 2 on page 6 of *NJDEP Comments* that “the construction of the New Track to provide rail service to the DSNY facility appears to be one of the primary, if not *the* primary, reasons for the entire SIRR project” ignores the significant expenditure of funds and effort that PANYNJ is undertaking to revitalize the Howland Hook facility, to construct the new Port Ivory facility adjacent to Howland Hook and to construct the connection to the Chemical Coast Line. With the restoration of direct rail service to this marine facility, which was described more fully in F.D. No. 34428, the Port of New York will have another competitive intermodal facility that will permit it to continue to serve the vast volume of marine traffic moving to and from the U.S. Enhancing the competitive posture of that intermodal facility is at least as important a factor in the restoration of direct rail service to Staten Island as is the opportunity for direct rail movement of waste from the new DSNY facility at Fresh Kill. In addition, Visy Paper and Vanbro Corporation will also become important users of this railroad once reactivation occurs.

10. Notwithstanding NJDEP’s statement to the contrary (*NJDEP Comments*, footnote 3 at 8), there is no question that the Modified Certificate procedures set forth in 49 C.F.R. §1150.21, *et seq.*, are applicable to the restoration of operations on the former SIRR. Section 1150.21 states the following:

These special rules apply to operations over abandoned rail lines, which have been acquired (through purchase or lease) by a State. The rail line must have been fully abandoned, or approved for abandonment by the Board or a bankruptcy court. As used in these rules, the term “State” includes States, political subdivisions of States, and all instrumentalities through which the State can act.

49 C.F.R. §1150.21. There is no part of that description of the scenario to which “these special rules apply” that is not present here. The rail lines that are the subject of the Notice, except for the new track to be constructed for switching the traffic to the new DSNY facility, were

abandoned by the former SIRR in the late 1980's and early 1990's.⁹ The lines were approved for abandonment and were fully abandoned. The lines in New Jersey were acquired by the State of New Jersey. The lines on Staten Island were acquired by the City of New York, a political subdivision of the State of New York, and the current action is being undertaken by EDC, which is "an instrumentality through which [a political subdivision of] the State can act." The purpose for which the rules were adopted, as cited in NJDEP's footnote, is being accomplished here; the then-current carrier proposed to and in fact did elect not to continue operations over the lines at issue here, and the States acquired them for the purpose of preserving them so that service could be restored. Service is now about to be restored. NJDEP fails to cite to any part of the applicable rules in 49 C.F.R. §1150.21 that the current case does not satisfy.

11. NJDEP states, at page 11, that the Board's preemption power cannot be used to allow EDC to dump excavated earth into or otherwise fill environmentally sensitive wetlands. EDC has taken into account any impact of the construction of the new industrial/switching tracks on tidal wetlands, and has proposed extensive mitigation of those impacts. NJDEP's assertions to the contrary reveal only that either (a) NJDEP has not inquired of NYSDEC about the mitigation that EDC has proposed, or (b) NYSDEC has not shared with NJDEP the extensive information EDC has provided to the State about its wetland mitigation plans.

12. Mr. Fidurski addresses NJDEP's request for an extension of time to file its comments in reply to EDC's Petition. Since this Board granted that extension, EDC will not address Mr. Fidurski's comments on this point further.

⁹ ICC Docket No. AB-263 (Sub-No. 2X), *Staten Island Ry. Corp. – Abandonment Exemption – In Richmond County, NY* (Decided June 20, 1990, Service Date July 3, 1990) (authorizing abandonment of the Travis Branch); ICC Docket No. AB-263 (Sub-No. 3), *Staten Island Ry. Corp. – Abandonment* (Service Date December 5, 1991) (authorizing abandonment of North Shore line and line serving Howland Hook).

13. At the end of the first (carryover) paragraph on page 2 of *Fidurski Letter*, Mr. Fidurski questions why the City would have built a waste transfer facility without any way to move waste from it. Mr. Fidurski's inquiry is misplaced. The City has planned for and built a facility that can be served directly by rail or by truck. If by truck, the containerized waste will be loaded onto chassis for transportation over the highway, across the bridges, to the railheads operated by these same rail carriers in New Jersey. If by rail, the railroads will pick up the containers of waste directly at the Fresh Kills facility, thus relieving highway and bridge congestion and reducing emissions and energy consumption. Contrary to Mr. Fidurski's statement, the City has made no presumption about the availability of rail service that is intended to put undue pressure on this Board.

14. The issues Mr. Fidurski raises related to the expansion plans of the PANYNJ are implicated by the Petition for Declaratory Order filed in F.D. No. 34428, not this proceeding. The plans for Howland Hook and Port Ivory have been included in all of the documents that the PANYNJ has prepared for the Comprehensive Port Improvement Plan and any issues related to them need not be addressed here.

15. Mr. Fidurski attempts to tie the Port Improvement Project, the Morristown & Erie Railroad's reactivation of the Rahway Valley line and the lines of the former SIRR that are west of the New Jersey Turnpike, as well as other plans for rail service, all together, decrying the creation of a "Wild West atmosphere within the railroad industry". To be clear, EDC has no direct knowledge of any plans with respect to rail facilities except for the ones that are the subject of the instant proceeding, the CSX/NS/Conrail Notice of Modified Certificate of Public Convenience Necessity in F.D. No. 34473, and the PANYNJ Petition for Declaratory Order in F.D. No. 34428. New Jersey's plans, as described by Mr. Fidurski on pp. 4-5, are not within the

scope of the project that EDC has presented to this Board. EDC requests the Board to reject Mr. Fidurski's invitation to broaden the scope of the inquiry beyond the matters that EDC has raised.

16. On page 5, Mr. Fidurski states that "[a] full properly scoped Environmental Impact Statement would be necessary to adequately evaluate the cumulative and indirect impacts of the massive expansion of port facilities and the extension of the Staten Island Railway to a Municipal Solid Waste Transfer Station on Staten Island." In October 2003, the following agencies jointly issued a Draft Scoping Document for the Comprehensive Port Improvement Plan Environmental Impact Statement: the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency; the Federal Highway Administration; Empire State Development Corporation; New Jersey Department of Transportation; The City of New York; and PANYNJ. Mr. Fidurski's concerns can be addressed in the context of that study. The issues Mr. Fidurski raises on page 6 in the final paragraph of his letter will be encompassed within that study. And, to emphasize one point that both EDC and PANYNJ have made previously, the traffic moving from Staten Island to CSXT, NS or Conrail will not be moving across the former lines of the SIRR to the west of the New Jersey Turnpike unless or until either Morristown & Erie or someone else reconstructs that connection. The purpose of the Chemical Coast Connector that is the subject of the Petition in F. D. No. 34428 is to permit efficient movement of traffic generated on Staten Island to the connection with the remainder of the nation's rail system without requiring re-activation of the western lines of the former SIRR. Any plans by any carrier to move this traffic via that route is beyond the scope of the plans that EDC or PANYNJ have formulated.

WHEREFORE, and in view of all of the foregoing and of the facts and argument included in the Petition for Declaratory Order filed by EDC on October 29, 2003, EDC respectfully requests this Board to issue the order granting the relief stated in that Petition.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Charles A. Spivak', is written over the printed name.

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Dated: February 19, 2004

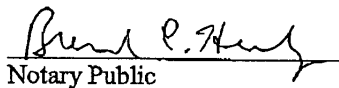
VERIFICATION

City of New York)
) ss:
State of New York)

Alice Cheng makes the following oath and says that she is a Vice President of the New York City Economic Development Corporation ("NYCEDC"), that she has been authorized by NYCEDC to verify the facts stated in the foregoing Reply of NYCEDC, that she has carefully examined all of the statements in the foregoing Reply, that she has knowledge of the facts and matters relied upon in the Reply, and that all factual statements and representations set forth therein are true and correct to the best of her knowledge, information and belief.



Subscribed and sworn to
before me this 19 day of February, 2004.


Notary Public

My Commission Expires:
6/06/2007

BRENDAN C. HEALEY
Notary Public, State of New York
No. 01HE5079803
Qualified in Richmond County 6/06/2007
Commission Expires _____

CERTIFICATE OF SERVICE

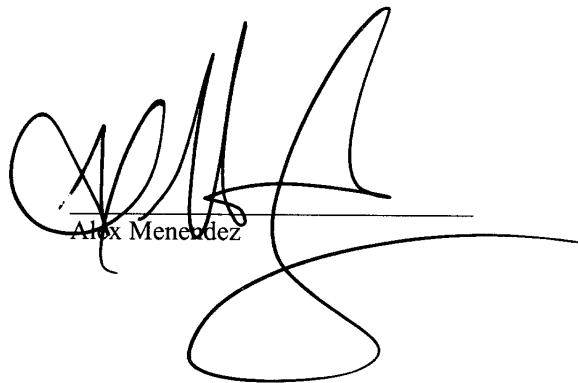
I certify that I have this 19th day of February 2004, caused copies of the Verified Reply of the New York City Economic Development Corporation to be served by first class mail, postage prepaid upon:

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