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BEFORE THE
SURFACE TRANSPORTATION BOARD



FINANCE DOCKET NO. 34429

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

OPPOSITION OF THE NEW YORK CITY ECONOMIC DEVELOPMENT
CORPORATION TO MOTION OF WILLIAM T. FIDURSKI
FOR LEAVE TO FILE REPLY

The New York City Economic Development Corporation ("NYCEDC" or "City"), the Petitioner in this proceeding, hereby submits its opposition to the motion of William T. Fidurski ("Mr. Fidurski") for leave to file a reply ("NYCEDC Opposition") set forth in the letter submitted by Mr. Fidurski on March 22, 2004 ("*Fidurski Letter*"). The *Fidurski Letter* is an impermissible reply to a reply and the issues raised in it are erroneous, repetitious and/or raise matters that Mr. Fidurski could have raised but chose not to in earlier pleadings filed in this proceeding.

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In support here of NYCEDC states the following:

I. **ARGUMENT**

- a. **Mr. Fidurski fails to establish an adequate basis for leave to file a reply to a reply.**

It is well settled that it is improper for a party to file a reply to a reply. 49 C.F.R. § 1104.13(c); *see also J. Alan Co., Inc., et al. v. United Parcel Service, Inc.*, 1989 WL 237899 (I.C.C. 1989) (replies to replies are not permitted under the (former) ICC's rules). Mr. Fidurski expressly states that the *Fidurski Letter* is a "reply and comment" on the Verified Reply of the New York City Economic Development Corporation filed on February 19, 2004.

Mr. Fidurski seeks leave to file the *Fidurski Letter*, it appears, on the basis that adhering to the procedural requirements of 49 C.F.R. § 1104.13(c) would “tend to limit participation by the general public without expertise or resources to participation in the submission process.” See *Fidurski Letter* at p.1. Mr. Fidurski expressly states that:

The participation of the general public in the above referenced docket remains essential because of the domination of the docket record by **interrelated state and local government agencies** and the consequential indirect effects of the proposed expansion of freight rail service throughout the northeastern North American Continent.

Id. at 1 (emphasis added). To begin with, Mr. Fidurski’s earlier participation in this proceeding belies his own assertion. He is a member of the general public, and he participated. Who is being excluded? No one. Moreover, Mr. Fidurski makes very clear that there is a “domination of the docket record by interrelated state and local government agencies”. Is it not the case that government agencies are the representation of the voice of the people in the states that created them? Thus, the general public that Mr. Fidurski claims is not participating or is somehow being deprived of the ability to participate, is in fact being represented by these “state and local government agencies”. The voices of the people are being heard in this process.

Mr. Fidurski’s “lack of public participation argument” is simply wrong. Moreover, assuming *arguendo* that the public has not adequately participated in the process, Mr. Fidurski has failed to establish, demonstrate or otherwise prove that the public has not had the opportunity to participate in the process, nor has Mr. Fidurski demonstrated how allowing him to file the *Fidurski Letter* as a reply to a reply would benefit the general public.

- b. **The *Fidurski Letter* is repetitive, adds nothing to the proceeding, would serve only to instigate another round of pleadings, and/or adds an unjustifiable burden to the processing of the case.**

The arguments raised by Mr. Fidurski in his purported reply to the *Verified Reply of The New York City Economic Development Corporation* filed on February 19 (“City’s Reply”) are

misplaced, unnecessary and/or already have been addressed in these proceedings. Accordingly, his request for leave to file a reply should be denied and the reply stricken from the record. *See San Jacinto Rail Limited Construction Exemption And The Burlington Northern And Santa Fe Railway Company Operation Exemption--Build-Out To The Bayport Loop Near Houston, Harris County, Texas*, STB Finance Docket No. 34079 (Service Date July 9, 2003) (Motion for leave to file reply to reply denied where reply added nothing to the proceeding, served only to instigate another round of pleadings, and added an unjustifiable burden to the processing of the case).

First, Mr. Fidurski claims that:

...the petition under Finance Docket No. 34429 indicates that there was "interim" ability to export containerized waste in "transfer trailers," the petition made no representations regarding the long term ability of the new transfer facility to continue export of containerized waste. In contrast, the petitioner's Verified Reply of February 19, 2004 states "The City has planned for and built a facility that can be served directly by rail or by truck." It would seem, therefore, that an indefinite ability of the facility to continue to transfer containerized waste by truck would have a material bearing upon the urgency of the Board to render a decision in this matter regarding the petitioner's request for "EXPEDITED HANDLING."

See Fidurski Letter at p.1. Mr. Fidurski is simply wrong. NYCEDC requested expedited handling for a number of reasons including, but not limited to: 1) the short construction season in New York; 2) the process relating to the offering of the construction contracts for bid; 3) the delays associated with NYCEDC pending applications for wetlands permits; and 4) the impact of these delays on the project and the City's ability to carry out its Solid Waste Management Plan using rail transport. *See Verified Petition Of The New York City Economic Development Corporation, Acting On Behalf Of The City Of New York, New York For Declaratory Order*, STB Finance Docket No. 34429 at p. 15-16 (filed October 29, 2003) ("City Petition"). Mr. Fidurski's point that the City has planned for and built a facility that can be served directly by rail

or by truck has no relevance to the factors cited by the City in support of its request for expedited consideration.

Second, Mr. Fidurski claims:

Although the petitioner's Verified Reply of February 19, 2004, contends that my concerns can be addressed within the ongoing scope of the referenced Comprehensive Port Improvement Plan Environmental Impact Statement (CPIPEIS), there is no guarantee that the operations of the New York City Department of Sanitation at Fresh Kills Landfill, the operations of Visy Paper and the operations of Vanbro Corporation will be determined to be port operations and included within the scope of that Environmental Impact Statement.

See Fidurski Letter at p.2. Once again, Mr. Fidurski raises an issue that was previously addressed in these proceedings. As NYCEDC explained in the *City's Reply* at 17, in October 2003, the following agencies jointly issued a Draft Scoping Document for the Comprehensive Port Improvement Plan Environmental Impact Statement ("CPIPEIS"): 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. As was stated in the City's Reply, Mr. Fidurski's concerns can be addressed in the context of that study. Specifically, the Draft Scoping Document for the CPIPEIS specifically states under the "Cumulative Impact" section that:

The CPIP EIS will evaluate the cumulative impacts of the combination alternatives for all of the Port's facilities, which will include both port and associated transportation improvements. These impacts will be evaluated against the future No-Action alternative, which will include all other significant projects, programs and initiatives...

See CPIPEIS at p.43. The Draft Scoping Document for the CPIPEIS, which was published in October of 2003, was publicly noticed, public hearings¹ were held relating to it and a website was

¹ There were a series of eight (8) public hearing held relating to CPIP EIS that began on December 2, 2003 and ended on January 15, 2004. Furthermore, phase I of the public meetings relating to the CPIP EIS public scoping comment period ended on February 15, 2004, however, the website states that "the project is always interested in receiving your input" and interested parties can submit all comments via the website or make contact via the

... Footnote continued on next page

designed so that the public participation in the process would be maximized. *See*

<http://www.cpipeis.com/eis/default.asp>. In fact the website has a section titled "Get Involved"

which states:

CPIP will affect everyone in the New York and New Jersey region, one way or another, and your active involvement in its formulation is of critical importance to its success. We welcome any comments or suggestions you may have about the scope and shape of CPIP as it progressively develops, your concerns and hopes for the future development of the Port of New York & New Jersey and, most importantly, your views on its potential adverse or beneficial impacts to you, your community, your business and your quality of life.

Your views, comments and suggestions will be carefully collated and considered and will form a corner stone in the preparation of CPIP. They will also be analyzed and summary periodically posted on this web page so that you know what others think and can comment further if you wish.

This is your opportunity to shape the future development of the Port of New York & New Jersey and the impact it has on you and your quality of life.

See <http://www.cpiponline.org/plan/getinvolved.html>. Thus, this information was accessible to

Mr. Fidurski, as it was to the rest of the public, who had an opportunity to review the Draft Scoping Document for the CPIPEIS and comment on it in this matter. As NYCEDC stated in its earlier pleading, there is a forum for Mr. Fidurski to raise his concerns about the cumulative impacts of all of these projects on Staten Island and in New Jersey. This proceeding is not and need not be that forum.

Third, Mr. Fidurski claims:

...the petitioner has made no representations about the ability of the Transfer Station to assemble railcars of trash containers that have been containerized in the other four boroughs of New York and brought to the Fresh Kills facility for rail shipment or the number of trains that might emerge from the facility as a result of such transfers.

See Fidurski Letter at p.2. Mr. Fidurski's point is misplaced. The permit for the DSNY facility is

telephone information line, regular mail, or direct mail.

See http://www.cpipeis.com/eis/whats_new/public_participation.asp

clear that the facility is limited to the export municipal solid waste generated on Staten Island. See NYSDEC Permit No. 2-6403-00141/00001 attached as Exhibit 1 to *Comments from the New York State Department of Environmental Conservation to the Petition*, STB Finance Docket No. 34429 (filed January 30, 2004). In other words, issues relating to the other four boroughs are irrelevant to this proceeding and thus so is Mr. Fidurski's point.

Lastly, Mr. Fidurski states:

The Board therefore needs to consider the ultimate consequence of accepting the petitioner's argument that the Board need exert no jurisdiction over the need for an Environmental Impact Statement that considers both the reactivation and extension of the Travis Branch of the Staten Island Railway and planned expansion of rail facilities, both in New York State and across the State of New Jersey...

See *Fidurski Letter* at pp. 3-4. Once again, Mr. Fidurski attempts to tie this 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.² To repeat the point the City stated in its Reply at pp. 16-17, the City 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.

II. CONCLUSION

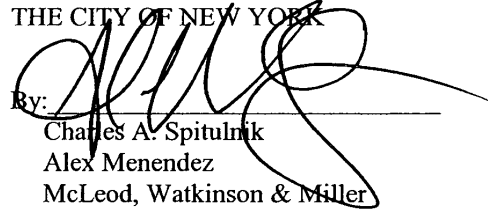
The *Fidurski Letter* fails to add any substance to these proceedings but rather constitutes an improper effort by Mr. Fidurski to reargue issues previously addressed or to argue and put forth new issues that he could have raised earlier but did not. The untimely submission of the *Fidurski Letter* deprives the other parties in this proceeding of the ability to respond to the arguments, allegations and material raised absent the instigation of another round of pleadings

² Mr. Fidurski raised this point in the letter he filed in this matter on January 26, 2004.

which would add an unjustifiable burden to the processing of the case. This Board should deny Mr. Fidurski's motion for leave to file a reply and strike the *Fidurski Letter* as an improper reply to a reply under 49 C.F.R. 1104.13(c).

Respectfully submitted,

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Dated: April 6, 2004

CERTIFICATE OF SERVICE

I certify that I have this 6th day of April 2004, caused copies of the foregoing Opposition of the New York City Economic Development Corporation to Motion of William T. Fidurski For

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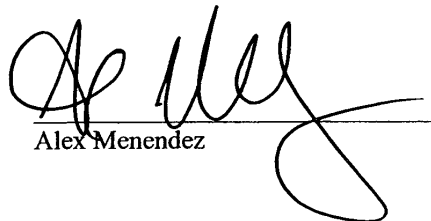
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