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Part of
Public Record

April 23, 2004

Via Facsimile (202-565-9004) and US Mail

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



Re: Finance Docket No. 34429
Petition of the New York City Economic Development Corporation,
Acting on Behalf of the City of New York, New York for Declaratory Order

Dear Secretary Williams,

Please accept this submission as a petition under 49 CFR 1117.1 for relief from procedural requirements under 49 CFR 1104 and as reply and comment on the motion of the New York City Economic Development Corporation (NYCEDC) dated and filed April 6, 2004, which requested the striking of my submission dated March 22, 2004 in the above referenced matter.

Relief under 49 CFR 1117.1 is requested because the referenced motion to strike has created the procedural necessity of a response, and because the NYCEDC has both misrepresented my position and introduced significant, but contradictory, additional argument into the docket record. In addition, the procedural requirements under 49 CFR 1104 would tend to limit participation by the general public without the expertise or resources to participate in the submission process. 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 governmental agencies and the consequential indirect effects of the proposed expansion of freight rail service throughout the northeastern North American Continent.

Participation of the General Public

Although the NYCEDC motion of April 6, 2004 acknowledges my standing as a general public participant in the initial stages of this proceeding, the referenced motion to strike would improperly seek a procedural device to restrain my further participation with regard to the introduction of new and significant argument and information by the NYCEDC. For example, the perpetual ability of the Fresh Kills Transfer Station to ship all outgoing containers of solid waste by truck was not entered into the docket record until the NYCEDC filing of February 19,

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2004. Similarly, the referenced filing finally verified that "Visy Paper and Vanbro Corporation will also become important users of the railroad once reactivation occurs." Likewise, the NYCEDC motion of April 6, 2004 provides critical information regarding the scope of the Comprehensive Port Improvement Plan Environmental Impact Statement (CPIPEIS) for entry into the record, and also incorrectly asserts that I was "wrong" in arguing that the ability of the completed Fresh Kills Transfer Station to function solely as a truck-to-truck facility had material bearing on the NYCEDC request for "EXPEDITED HANDLING." While the specifics of these matters will be further discussed in subsequent paragraphs, the NYCEDC cannot continually proceed in attempts to supplement the docket record at every opportunity, without creating the procedural necessity for the provision of equity for other parties.

Potential for Conflicts of Interest

In addition, the NYEDC motion of April 6, 2004 incorrectly equates the somewhat monolithic pursuit of the "public interest" by various representatives of the executive branch of government to the concept of the "general public." Taken to its logical conclusion, the NYCEDC position would close all public hearings and proceedings to all but governmental agencies on the premise that the public interest would be adequately safeguarded. In response, I would respectfully suggest that the Board consider that the purpose of public hearings, and the absolute need for public hearings within the realm of an Environmental Impact Statement under the National Environmental Policy Act of 1969, as amended (NEPA) and 40 CFR 1500 in the matters at hand, relates to the need to balance any monolithic pursuit by the executive branches of government with the potentially divergent opinions that may be found among the general public. Clearly, the legislative intent of NEPA requires participation of the general public as a means of balancing the exigencies of government and the essential need to protect environmental, historic and cultural resources. Notably, the interest in and/or ownership of rail and port facilities by the State of New Jersey and the State of New York and their various subdivisions and agencies creates the potential for conflicts of interest, which in the matter at hand would tend to create a prejudice in favor of economic development and the proliferation of rail facilities. Indeed, my continued participation in the proceedings at hand is essential, because none of the participating agencies has expressed any concern over indirect effects and cumulative impacts under 40 CFR 1508 regarding the ability of the Fresh Kills Transfer Facility, Visy Paper, Vanbro Corporation, Howland Hook and Port Ivory terminals, and any existing or future facilities to place additional freight loads on an aging, century-old rail system in New Jersey. Any additional loads will compete with commuter trains on shared portions of track and with motor vehicles at literally dozens and dozens of road crossings at street level throughout New Jersey. This is not merely a question of arguing the advantages of trains over trucks. Such an argument of public policy would have to include the fact that ships are three times as efficient as trucks, and the fact that floating cargo onto the Great Lakes/St. Lawrence Seaway system could get cargo to Chicago or Green Bay without having to ram it through New Jersey. Rather than lapse into redundancy, please refer to my submission of January 26, 2004 for more particulars in this regard. Under existing circumstances or under anticipated future scenarios of increasing traffic movements, automobiles and trucks will still have to carry the bulk of commuters and

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freight in New Jersey. The plans to allow the passage of additional freight trains will reduce the carrying capacity of roadways and create traffic delays on both road and commuter rail and consequential losses of productivity and increases in air pollution emissions from both trains and lines of waiting motor vehicles. Putting increased numbers of trains on the rail freight system in New Jersey has potential to shut down road movements across large areas of the state. On April 15, 2004 U. S. Environmental Protection Agency (USEPA) announcement that every county in New Jersey had failed to meet federal standards for ground level ozone, and that the State of New Jersey was in jeopardy of losing federal highway funding as a result. Under these circumstances, summarily adding additional freight trains onto the New Jersey rail system, without a full federal EIS, extensive traffic and pollution modeling and a workable air quality management plan, is reckless at best.

The Comprehensive Port Improvement Plan Environmental Impact Statement

The April 6, 2004 motion of the NYCEDC also relies on the faulty argument that my concerns over the cumulative and indirect impacts associated with the extension of the Travis Branch of Staten Island Railway and the contribution of the Fresh Kills Transfer Station, Visy Paper and Vanbro Corporation to rail freight traffic can be addressed within the context of the CPIPEIS, because the Draft Scoping Document for the CPIPEIS indicates that "cumulative impacts" will consider "both port and associated transportation improvements." Unfortunately, *BLACK'S LAW DICTIONARY*, abridged sixth edition, West Publishing Co., St Paul, Minn., 1991, defines "Port" thusly:

Port. A place for the loading and unloading of the cargoes of vessels, and the collection of duties or customs upon imports and exports. A place, on the seacoast, great lakes, and or on a river, where ships stop for the purpose of loading and unloading cargo, or for the purpose of taking on or letting off passengers, from whence they depart, and where they finish their voyage. A port is a place intended for loading or unloading goods; hence includes the natural shelter surrounding water, as also sheltered water produced by artificial jetties, etc.

Under this definition, it would be a simple matter for the Fresh Kills Transfer Station, Visy Paper, Vanbro Corporation or other interested parties to argue that the extension of the Travis Branch of the Staten Island Railway is not involved in stevedoring operations, that the parties serviced by the extension are simply shipping freight by land-based rail, and that all parties serviced by the extension should be excluded from the CPIPEIS, because the extension is not a port-associated improvement. Matters relating to the expansion of rail lines, EIS preparation relating to cumulative and indirect effects of the expansion of rail services, and the ability to order grade separation as a contingency of approval, clearly, fall within the jurisdictional authority of the Board in its mission to assure competitive, safe and efficient surface transportation. The jurisdictional authority of the Board in these matters has already been discussed, relative to case law and legislative intent in these matters, by the filing of the New

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Jersey Department of Environmental Protection (NJDEP) dated and filed on January 30, 2004. Notably, the test of whether or not the addition of trackage is an extension of service or merely an excepted spur or auxiliary track is discussed by NJDEP at page 6 relating to *Riverview Trenton Railroad Co.*, STB Finance Docket No. 34040, served May 15, 2003, which states in part: "if track - even track that is used for purposes such as switching ... is essential to the through-movement of traffic from shipper to consignee, then it is deemed to be a railroad line subject to Board licensing requirements rather than excepted spur or auxiliary track." Clearly, the proposed extension of the Travis Branch of the Staten Island Railway would be essential to the through-movement of traffic, and therefore a new railroad line. In addition, in anticipation of any further action in these matters, pages 8-9 of the referenced NJDEP filing speaks to legislative intent of 49 USC 10505 regarding the inapplicability of the modified certificate of public convenience and necessity under 49 CFR 1150.21 to the case at hand. Notably, NJDEP cites *Common Carrier Status of States, State Agencies and Instrumentalities, and Political Subdivisions*, 36 I.C.C. 132, 136 (1980), which clearly establishes that the modified certificate was intended to apply only to situations in which "lines may be in danger of immediate termination" in order to avoid "temporary cessation of service to shippers." As the I.C.C. ordered abandonment of service on the Staten Island Railway over ten years ago and there is therefore no danger of temporary cessation of service to shippers, the Board would be fully within its jurisdictional authority to deny any petition for the modified certificate and require appropriate licensing and environmental review to assure that service could only be restored or created in a competitive, safe and efficient manner. It would therefore appear imprudent for NYCEDC to advise the Board to abandon its jurisdictional authority to a proceeding that would not have the jurisdictional authority held by the Board. I would therefore respectfully suggest to the Board that an EIS may well indicate that the ongoing and proposed expansions of rail services in New York and New Jersey will only interact with the rest of the surface transportation system in a competitive, safe and efficient manner, if the Board requires significant separation of road and rail traffic.

Expedited Handling Arguments

The April 6, 2004 submission of the NYCEDC states that I am "wrong," because the perpetual ability of the Fresh Kills Transfer Station to ship containers of garbage "by truck has no relevance to the factors cited by the City in support of its request for expedited consideration." Clearly, it is not within the jurisdictional authority of the NYCEDC to rule whether the indefinite ability of the completed Fresh Kills Transfer Station to ship by truck or train has any material bearing on the NYCEDC request for "EXPEDITED HANDLING." Such a ruling would reside within the pleasure of the Board. Certainly, the NYCEDC provided reasons for "EXPEDITED HANDLING," but what options existed if the Board decided that "EXPEDITED HANDLING" was not imperative, or what options would exist if the Travis Branch extension is never built? In addition, although the NYCEDC's April 6, 2004 motion provides a numerical enumeration of four reasons for expedited handling and alludes to the existence of others in the phrase "including, but not limited to ...", the NYCEDC filing of October 29, 2003 was somewhat more expansive. Under the heading "EXPEDITED HANDLING OF NYCEDC'S REQUEST IS REQUIRED," the referenced filing at pages 15-16 indicates: "To allow the tracks and related

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facilities to be completed by the time the DSNY waste transfer facility is fully operational, NYDEDC must begin offering the construction contracts for bid by November 2003 to allow contracts to be let in time for the construction to commence no later than March 2004." Did the urgency for which "EXPEDITED HANDLING" was "REQUIRED" by the NYCEDC simply exist because the NYCEDC has plans? Everyone has plans. March 2004 has come and gone, and New York City continues to move garbage as it did previously. I would respectfully submit to the Board that the passage of time is a witness to the lack of urgency in the NYCEDC's request for "EXPEDITED HANDLING." In addition, as the ensuing exchange has firmly established that the Fresh Kills Transfer Station has the ability to function solely as a truck-to-truck facility, it would appear that the materiality of that capability to the NYCEDC request for "EXPEDITED HANDLING" continues to have bearing on petitions before the Board. It should, however, be noted that the question of material bearing or relevance does not hinge on reasons provided by NYCEDC or even to information that may be completely outside NYCEDC's scope of knowledge in these matters. For example, what if the presence of threatened or endangered species on a piece of property was not known by an applicant for a license or permit affecting that property? Would information from a third party about the existence of threatened or endangered species on the subject property be irrelevant or immaterial, simply because that existence was not reported or known by the applicant? *BLACK'S LAW DICTIONARY*, abridged sixth edition, West Publishing Co., St Paul, Minn., 1991 speaks to the issue of "Relevant evidence" as follows:

Relevant evidence. Evidence tending to prove or disprove an alleged fact. Evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Fed.Evid.R. 401. Evidence is "relevant" if it tends to make existence of material fact more or less probable.

Basic test for admissibility of evidence is relevancy, and testimony is "relevant" if reasonable inferences can be drawn therefrom regarding or if any light is shed upon, a contested matter. Evidence is "relevant" not only when it tends to prove or disprove precise fact in issue but when it tends to establish fact from which existence or nonexistence of fact in issue can be directly inferred.

See also Material; Material evidence; Relevancy; Unfair prejudice.

I would therefore submit that the perpetual ability of the completed Fresh Kills Transfer Station to function solely on a truck-to-truck basis sheds light on the alleged necessity for "EXPEDITED HANDLING" in the matters at hand, whether or not NYCEDC initially addressed this issue, and that the establishment of this fact is relevant to the proceedings at hand and therefore not "wrong."

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Garbage from the Five Boroughs of New York City

As has already been discussed under the heading ***The Comprehensive Port Improvement Plan Environmental Impact Statement*** above, the issue of New York City garbage was addressed in my submission dated March 22, 2004 in direct response to the unfounded February 19, 2004 assertion of the NYCEDC that the movement of New York City garbage on the Travis Branch of the Staten Island Railway would be somehow addressed within the CPIPEIS. However, the issue of whether or not containerized garbage on freight cars from the four boroughs of New York City beyond Staten Island will ever move on the Travis Branch or anywhere along the Staten Island Railway remains unclear. The number of train movements potentially associated with garbage from the other four boroughs of New York City also remains unclear. Although the April 6, 2004 filing of the NYDEDC is correct in the regard that the Fresh Kills Transfer Station is not planned for permitting to operate with municipal solid waste from outside of Staten Island, DSNY or a private contractor would not be precluded from maintaining that any garbage from the other four boroughs that was containerized outside of Staten Island and placed on truck or train was therefore freight and no longer considered municipal solid waste and therefore not controlled or regulated by the permit for the Fresh Kills Transfer Station. The NYCEDC filing of October 29, 2003 at page 5 states: "Rail service *to and from* the DSNY facility will be in unit trains that will be approximately 4,700 feet long." (emphasis added). The argument, therefore, could clearly be made that any containerized freight, that arrives on the Travis Branch or anywhere else along the Staten Island Railway and is consigned to interstate destinations, is therefore freight in interstate commerce and outside of the control of either the State of New York or the State of New Jersey

Accordingly, I therefore respectfully motion that the Board deny the referenced NYCEDC motion to strike filed on April 6, 2004 and additionally deny the NYCEDC petition for summary relief in these matters filed on October 29, 2003, as the docket record would now appear to be complete for adjudication.

I herein certify that I have this day, March 23, 2004, transmitted this letter by first class mail and by facsimile at 202-565-9004 to the Surface Transportation Board as noted above and by first class mail to:

Charles A. Spitulnik, Esquire
McLEOD, WATKINSON & MILLER
One Massachusetts Avenue, N.W.
Suite 800
Washington, D.C. 20001

Thank you for your kind attention to this matter.

Respectfully submitted,

William T. Fidurski