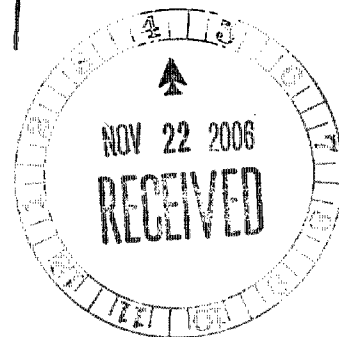




KAPLAN KIRSCH ROCKWELL

218/31



November 22, 2006

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

ENTERED
Office of Proceedings

NOV 22 2006

Part of
Public Record

Re: *Tri-State Brick and Stone of New York, Inc. and Tri-State Transportation Inc. –
Petition for Declaratory Order*; Finance Docket No. 34824

Dear Sir:

I am enclosing an original and ten copies of the Opposition of New York City Economic Development Corporation on behalf of the City of New York, NY to Petition to Reopen in the above referenced proceeding. An additional copy is enclosed for date stamp and return to our messenger. Please note that a 3.5 inch diskette is enclosed with this document.

Thank you for your attention to this matter.

Sincerely,

Charles A. Spitulnik

Enclosure

111377

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218131

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34824

**TRI-STATE BRICK AND STONE OF NEW YORK, INC. AND TRI-STATE
TRANSPORTATION INC. – PETITION FOR DECLARATORY ORDER**

**OPPOSITION OF
THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION ON BEHALF
OF THE CITY OF NEW YORK, NY TO PETITION TO REOPEN**

**ENTERED
Office of Proceedings**

NOV 22 2006

**Part of
Public Record**

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Development Corporation
and the City of New York, NY

Dated: November 22, 2006

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34824

**TRI-STATE BRICK AND STONE OF NEW YORK, INC. AND TRI-STATE
TRANSPORTATION INC. – PETITION FOR DECLARATORY ORDER**

**OPPOSITION OF
THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION ON BEHALF
OF AND THE CITY OF NEW YORK, NY TO PETITION TO REOPEN**

Pursuant to the applicable rules of the Surface Transportation Board (“Board”) the New York City Economic Development Corporation (“EDC”) and the City of New York, NY (the “City”) file this opposition to the Petition to Reopen of Tri-State Brick and Stone of New York, Inc. and Tri-State Transportation Inc. (“Petition to Reopen”) and state the following in support thereof:

SUMMARY

Petitioners Tri-State Brick and Stone of New York, Inc. and Tri-State Transportation Inc. (collectively “Petitioners”) are once again asking this Board to intervene in a matter that is outside its jurisdiction. The Board, as it did in the decision issued in this proceeding on August 11, 2006 (the “*Board Decision*”) should decline that invitation.

In their Petition for Declaratory Order, Petitioners appear to assert that the City, as the landowner of the 65th Street Rail Yard, cannot require Petitioners to pay a commercially reasonable rate for the land they currently occupy because that would interfere with the ability of the New York & Atlantic (“NY&A”), the railroad that serves that facility to fulfill its common

carrier obligation and/or ability to provide rail service. The *Board Decision* correctly determined that the City has not and will not interfere with NY&A's ability to fulfill its common carrier obligation and/or ability to provide rail service if it pursues an eviction of Petitioners or requires Petitioners to pay a commercially reasonable rent. In fact, the Board clearly articulated that the 65th Street Rail Yard has continued to receive uninterrupted rail service and can continue to receive uninterrupted rail service irrespective of whether Petitioners remain tenants at the 65th Street Rail Yard.

This is where this case should end. The Petition to Reopen demonstrates no basis for a conclusion that the *Board Decision* involves material error. Rather, Petitioners ignore the language in the *Board Decision*, and re-characterize and re-argue the points raised in the Petition for Declaratory Order. Simply stating that the Board was wrong is not a sufficient basis under 49 C.F.R. § 1115.4 to reopen and revise the *Board Decision*. See *Big Stone-Grant Industrial Development and Transportation, L.L.C.--Construction Exemption--Ortonville, MN and Big Stone City, SD; Big Stone-Grant Industrial Development and Transportation, L.L.C.--Petition under 49 U.S.C. 10901(d)*, Finance Docket No. 32645, Finance Docket No. 32645 (Sub-No. 1), 2000 STB LEXIS 291 (STB 2000).

Contrary to Petitioners' assertions, the Board fully considered and correctly concluded that the requests raised by the Petitioners in their Petition for Declaratory Order should be denied and the proceeding should be discontinued. *Board Decision* at p. 6. No matter how much Petitioners bend, twist and reshape their attempts to have this Board validate their unlawful occupancy of the City's property, the essential questions are those stated on page 4 of the Petition to Reopen. That is:

- (1) Are Petitioners entitled to receive rail service at the 65th Street Yard in Brooklyn?; and

- (2) Can and will the Board set the terms and conditions for that service, including land use charges?

The Board correctly said yes to the first and no to the second, stating the following:

While it is true that Petitioners have a right to demand service upon reasonable request, that is not the issue here. There is no evidence that the City is interrupting NY&A's rail service. The president of NY&A has stated that NY&A has no intention of abandoning service to Petitioners. Petitioners admit that they have continued to receive uninterrupted rail service, despite their holdover occupancy status with the City. Both the City and NY&A have stated that the City has not attempted to limit NY&A's ability to provide service to the 65th Street Yard or sought to abandon rail service at the Yard. Petitioners' concern is not that rail service at the Yard is being interrupted, but that their occupancy of the Yard, against the will of the owner, is being interrupted. In any case, the City is not interfering with rail service, directly or indirectly, by using state or local laws to evict a noncarrier occupant over whose activities the Board has no jurisdiction.

Board Decision, slip op. at 5. There is no *de facto* abandonment of rail service. The City is not preventing NY&A (or any other qualified rail carrier) from servicing the 65th Street Yard, or any shipper that might lawfully request service to receive shipments there, and the Board has committed no material error. Accordingly, the Petition to Reopen should be denied.

BACKGROUND FACTS

EDC and the City adopt and incorporate by reference the background facts identified in the *Opposition of The New York City Economic Development Corporation on Behalf of The City of New York, To Petition of Tri-State Brick and Stone of New York, Inc. and Tri-State Transportation Inc. for Declaratory Order* filed in this matter on February 15, 2006.

LEGAL STANDARD

A petition to reopen under 49 C.F.R. § 1115.4, requires a detailed showing of material error, new evidence, or substantially changed circumstances that would materially affect the Board's prior decision. STB Docket No. AB-855 (Sub-No. 1X), *A & R Line, Inc.--Abandonment*

Exemption--In Cass and Pulaski Counties, 2004 STB LEXIS 518 (STB 2004). The evidence that Petitioners submitted with their Petition is new to this proceeding but not relevant to the issues they raise. There are no substantially changed circumstances – the Board acted within its authority by issuing the *Board Decision* with only two (2) members. *See* 49 U.S.C. §701(b)(7). The only possible basis then is material error. No such error occurred here.

The Board has stated previously that "we must approach petitions to reopen . . . cautiously, on a case-by-case basis, striving to achieve an appropriate balance between the interests of fairness to all parties and of administrative finality and repose." *Arizona Pub. Serv. Co. v. Atchison, T. & S.F. Ry. Co.*, 3 S.T.B. 70, 75 (1998). Furthermore, "it is not the purpose of reopening under 49 C.F.R. § 1115.4 to afford a petitioner a second bite at the apple. In alleging material error under that section, it is not enough for a petitioner to say that we were wrong; he must state in detail the respects in which the proceeding involves material error. In other words, there must be a showing of material error." Finance Docket No. 32645, *et al.*, *Big Stone-Grant Industrial Development and Transportation, L.L.C.--Construction Exemption--Ortonville, MN and Big Stone City, SD*, 2000 STB LEXIS 291 (STB 2000). Petitioners have not met this standard.

ARGUMENT

I. The Board Did Not Commit Material Error.

A. The Evidence Demonstrates that the City Has Not Interfered with Common Carrier Rail Service

The Board in this matter clearly and correctly determined and articulated that the City has not interfered with any railroad's ability to fulfill its common carrier obligation to provide shipping services to the Petitioners. *Board Decision* at p. 5. The Board stated:

While it is true that Petitioners have a right to demand service upon reasonable request that is not the issue here. **There is no evidence that the City is interrupting NY&A's rail service. The president of NY&A has stated that NY&A has no intention of abandoning service to Petitioners. Petitioners admit that they have continued to receive uninterrupted rail service, despite their holdover occupancy status with the City. Both the City and NY&A have stated that the City has not attempted to limit NY&A's ability to provide service to the 65th Street Yard or sought to abandon rail service at the Yard.**

Id. (emphasis added). Petitioners do not dispute this. Instead, Petitioners present an argument that boils down to the following sequence of points:

1. They should not be required to pay the fair market rental value for their use and occupancy of the Yard.
2. Petitioners claim that they can not pay both the rates the City seeks to charge for occupancy of the land and the charges assessed by NY&A and other railroads for transportation.
3. NY&A remains ready, willing and able to serve.
4. Petitioners claim that the fact that the City is trying to charge Petitioners a market rate for occupancy AND that the NY&A is charging a fee for transportation to and from the facility, is causing a *de facto* abandonment.¹

The leap from point 3 to point 4 of that argument lacks support or foundation in fact or law. The Board correctly recognized that, and rejected Petitioners' request for a Declaratory Order.

Among the many mistaken assumptions in the Petition to Reopen, two require careful attention. First, the Petitioners allege that the Board "mistakenly assumes that Tri-State claims to be a rail carrier." *Petition to Reopen* at p. 5. This is not true. The Board stated in the Board Decision that:

Petitioners do not claim that Tri-State Transportation is a rail carrier, and there is no evidence in the record that it has ever sought or obtained Board authority to act as a rail carrier. Instead, they argue that Tri-State Transportation's transloading activities at the 65th Street Yard are integrally related to the line haul service of NY&A, which they argue benefits from the

¹ Petitioners, in essence, are asking this Board to require the City to subsidize Petitioners' businesses. The Board correctly rejected that request previously, and should do so again here.

transload facility, because without the transload facility, NY&A would have no one to serve at the Yard. Petitioners, however, fail to address the considerable body of law developed by the Board and courts that address the scope of federal preemption relating to just such transloading activities by non-carriers.

Id. at 4 (emphasis added). The Board did not “mistakenly assume” the Petitioners were claiming that they were rail carriers.

Second, the Petitioners assert that the Board “mistakenly assumed that Tri-State contended that the City is preempted by 49 U.S.C. 10501(b) from interfering with NY&A’s ability to deliver shipments to Tri-State.” *Petition to Reopen* at p. 5. Petitioners assert that their argument instead is that “the City’s actions in seeking Petitioners’ eviction or raising Petitioners’ charges effected a *de facto* abandonment of the railroad line. *Id.* at 6. The Board did, in fact, acknowledge Petitioner’s argument precisely, when it stated the following:

...[a]rgue that Tri-State Transportation’s transloading activities at the 65th Street Yard are integrally related to the line haul service of NY&A, which they argue benefits from the transload facility, because without the transload facility, NY&A would have no one to serve at the Yard.

Board Decision at p. 5. The Board recognized that this argument has no merit, cutting through the chaff of Petitioners’ argument and stating:

Petitioners’ concern is not that rail service at the Yard is being interrupted, but that their occupancy of the Yard against the will of the Owner, is being interrupted. In any case, the City is not interfering with rail service directly or indirectly by using state or local laws to evict a noncarrier occupant over whose activities the Board has no jurisdiction.

Id. NY&A remains ready, willing and able to serve the 65th Street Yard. If Petitioners are no longer there, perhaps someone else will be.

Based on these two erroneous assumptions, Petitioners attempt to build a restated version, which is in all material respects the same as the argument they raised (and the Board rejected) in the Petition for Declaratory Order, that is:

...the City, by seeking to evict Petitioners or, alternatively, increasing Petitioners' use charges, has raised their rates to such an exorbitant level that they cannot accept delivery of the shipments consigned to them. The result is to effect an unauthorized *de facto* abandonment of this railroad line so as to divert scarce railroad assets to non-railroad uses.

See *Petition to Reopen* at p. 14.² In other words, the Petitioners argue that whether common carrier rail service is available at the 65th Street Rail Yard is dependent on whether the Petitioners are tenants at the 65th Street Rail Yard. This argument cannot succeed. Even if Petitioners are no longer occupying the Yard, NY&A or another rail carrier that the City might authorize would still have access to it. NY&A or any other rail carrier that the City may authorize could serve other shippers at the 65th Street Rail Yard.

The Board recognized the deficiency in Petitioners' argument as it acknowledged that all the evidence in the record demonstrated without doubt that the City was not and is not interrupting rail service because notwithstanding the Petitioners presence at the 65th Street Rail Yard, NY&A would still have access to and could serve the 65th Street Rail Yard. *Board Decision* at p. 5. For example, the Board noted that the president of NY&A stated that NY&A had no intention of abandoning rail service the 65th Street Yard. See *Declaration of Fred L. Krebs* ¶ 10 attached as Exhibit B to Petition for Declaratory Order.

Furthermore, despite the Petitioners' repeated assertions that the City is seeking to interfere with rail service and/or restrict access to rail service at the 65th Street Yard, they acknowledged that the City has issued a Request for Proposals seeking an occupant for the intermodal portion of the yard. In other words, the evidence demonstrated that the City has no

² At no time has any of the evidence in this proceeding established or even suggested that the City was seeking "to divert scarce railroad assets to non-railroad uses." In fact, just the opposite is true. The City has repeatedly stated, through sworn testimony that it does not plan to stop using the 65th Street Yard for railroad uses.

plan to abandon or cause abandonment of the facilities Petitioners are occupying. As a result the Board understood that there was no “*de fact* abandonment” or interference with rail service in the instant action. Moreover, the evidence established that just the opposite was true, that the City is, in fact, upgrading, investing in, and improving rail service at the 65th Street Rail Yard. *See Declaration of Joan McDonald, Exhibit F to Petition for Declaratory Order.*

The Board also recognized that the Petitioners were not really concerned with the interruption of rail service, stating the following:

Petitioners’ concern is not that rail service at the Yard is being interrupted, but that their occupancy of the Yard, against the will of the owner, is being interrupted. In any case, the City is not interfering with rail service, directly or indirectly, by using state or local laws to evict a non-carrier occupant over whose activities the Board has no jurisdiction.

Board Decision at p. 5.

The Board correctly considered all the issues presented and determined that the Petitioners are using the City’s property to transload cargo and that they are rail customers and that:

Because we do not have jurisdiction over Tri-State Transportation’s activities, we cannot set the terms and conditions, including land use charges, for Tri-State Transportation’s use of the 65th Street Yard, or even insist that Petitioners’ use of the Yard should continue. Those are issues for the courts to decide. Therefore, the petition to institute a declaratory order proceeding will be denied.

Board Decision at p. 6.

The Petitioners cite *U.S. v. B. & O. R. Co.*, 333 U.S. 169 (1948) (“*B&O*”) in an effort to support their argument that the City’s attempts to increase Petitioners’ rent would somehow interrupt rail service, and that the STB can prevent the City from effecting that increase. The Petitioners reliance on *B&O* is misplaced. The issue there was whether a non-carrier owner of a segment of railroad track that allowed an interstate railroad to use the segment could reserve a

right to regulate the type of commodities that the railroad transported over the segment without violating the Interstate Commerce Act. *Id.* Specifically, in *B&O* a stockyards company owned a segment of railroad track that was used to link portions of a railroad-owned spur, which as a result afforded access to private sidetracks. The track owner permitted its use by the railroad for the transportation of livestock to packing house sidetracks only upon condition that the railroad pay an amount equal to the fee it collected for receiving and unloading such shipments. *Id.* at 177. The Supreme Court held that the Interstate Commerce Commission could forbid such a practice, even though the owner of the track was not a railroad. *Id.* at 178.

B&O is not relevant to the issues in this proceeding. There, the property owner charged the railroad a fee that made the provision of service impractical. Here, NY&A – the only railroad that currently uses the track – continues to have the unimpeded ability to provide that service. NY&A's charges to Petitioners bear no relation to the rent that the City seeks to charge Petitioners. The pertinent legal authorities as well as the facts confirm that the Board did not commit material error when it determined that the City has not interfered with common carrier rail service in the instant action.

B. The Board's Decision Not to Address Whether the City has a Common Carrier Obligation was Not Material Error

The Board correctly recognized that a determination as to whether the City is a carrier or has a common carrier obligation is not dispositive here. No one is interfering with rail service here, and the Board correctly chose to avoid deciding an issue that is not material to the issue that actually lies at the core of this proceeding. In addressing the above issue, the Board stated:

Both Petitioners and Congressman Nadler ask the Board to determine that the City is a common carrier subject to our jurisdiction. They maintain that the City, which built the rail facilities and added them to the nation's transportation system, controls access to the transportation services of a common carrier. Petitioners and Congressman Nadler contend that the City has sufficient power over operation of

the Yard such that the City is effectively a common carrier and the Board should not relieve the City of its common carrier obligation.

We need not address whether the City has a common carrier obligation at the Yard because of its control over access to the Yard. Nor will this decision relieve the City of any obligation with respect to the Yard that it may have. Even assuming, for the sake of argument, that the City has a common carrier obligation to provide service at the Yard, that would not alter our analysis here. Indeed, even if a rail carrier owned the Yard, as was the case in Hi Tech and Milford, our analysis would remain the same.

Board Decision at p. 5-6.

In their criticism of the Board and in support of their argument that the Board committed material error here, the Petitioners state that in view of the Board's "rush to judgment" it can only be concluded that "the Board never even bothered to examine the Operating Agreement" at issue as it failed to determine whether the City has a common carrier obligation. *See Petition to Reopen* at p. 10.³ The Board correctly concluded that an examination and discussion of the Operating Agreement is not material here. The Board stated in its analysis that even if the City has a common carrier obligation, the key issue in this proceeding would still be whether the City interfered with NY&A's ability to fulfill its common carrier obligation. Because the City took no such action, the questions concerning the City's status can be reserved for another day. Petitioners cite many cases, and spend several pages, addressing the question of the City's status. However, by declining the invitation to address this previously, the Board was following longstanding precedent holding that it will not issue declaratory orders when the controversy is not ripe for determination. *See, Delegation of Authority – Declaratory Order Proceedings*, 5

³ Petitioners' surprising allegation of a "rush to judgment" by the Board is belied by the facts that the Petition for a Declaratory Order was filed on January 17, 2006 and the Decision in this matter was issued almost eight (8) months later on August 11, 2006. Eight months of deliberative review hardly constitutes a "rush to judgment".

I.C.C. 2d 675, 676 (1989) ("Recently, we have exercised our discretion and declined to institute declaratory order proceedings where it was not shown that such a proceeding was necessary to terminate an actual controversy.") Here, there is no need for the Board to reach out and address the question because the City is not taking any action that interferes with the current freight railroad's ability to fulfill its common carrier obligations.

Notwithstanding Petitioners' contention, the Board's decision in F.D. No. 32173, *Orange Co. Transp. Auth., et al. - Acquisition Exemption - The Atchison Topeka and Santa Fe Railway Company*, (Service Date - March 12, 1997) ("*Orange County*") does not compel a different result. Petitioners cite *Orange County* for the proposition that a public agency that acquires an active rail line must not be able to interfere with the railroad's common carrier obligation. See *Petition to Reopen* at p. 10-11.⁴ This misstates the impact of that decision. The Board asserted jurisdiction over the County Agencies to monitor their exercise of the rights acquired when they bought the lines from the freight railroad. *Orange County, slip op.* at 4.

Specifically, *Orange County* involved a petition filed by five transportation agencies requesting an exemption from 49 U.S.C. Subtitle IV relating to the acquisition of six active railroad lines. The I.C.C. had previously granted that exemption because regulation was not necessary to carry out the transportation policy of section 10101a, the transaction was of limited scope and that regulation was not necessary to protect shippers from abuse of market power. *Id.*

⁴ Petitioners also relied improperly on *Orange County* in their Petition for Declaratory Relief. *Orange County* stands for the proposition that a public agency that acquires an active rail line will itself be considered a rail carrier providing transportation subject to the Board's jurisdiction if it acquires the ability to interfere with the railroad's common carrier obligation. In the Petition for Declaratory Order, Petitioners attempted to rely on *Orange County* for the proposition that a land owner cannot evict a customer of a common carrier from rail facilities. However, nowhere in *Orange County* did the Board make such a finding.

The Board stated that the agencies had the obligation to not interfere with the provision of rail freight service by the carrier. *Id.* The implication there was that, if the County Agencies did interfere, the Board would be able to quickly step in and correct the situation.

Here, the analysis and remedies discussed *Orange County*, are not relevant. As the Board found in the *Board Decision*, the City is not interfering with NY&A's ability to provide freight service. The City is not obstructing the rail common carrier's fulfillment of its obligations at the 65th Street Yard. Since there "is no evidence that the City is interrupting NY&A's rail service," *Board Decision* at p. 5, there was no reason for the Board to address the City's regulatory status.

II. It Was Not Material Error For The Board To Refuse To Set The Land Use Charges For Petitioners Occupancy Of The City's Property.

Petitioners themselves cite the line of cases that undermine their request to have the Board intervene in a dispute that, at its base, is between a landowner and a squatter that wishes to pay less than the fair market rental value for its occupancy of the property on which it sits. In the *Petition to Reopen*, at page 14, Petitioners cite rulings of this Board that confirm the Board's "statutory duty to protect against the unnecessary discontinuance, cessation, interruption or obstruction of available rail service." *Petition to Reopen*, at 14, *citing Modern Handcraft, Inc. – Abandonment*, 363 I.C.C. at 969, 972 (1981).

In *Modern Handcraft* and other similar of cases, as in cases like *Orange County*, discussed above, the Board stressed the importance of ensuring that rail carriers that wish to provide rail service do not face obstruction to that service. The record here confirms, despite Petitioners' unfounded protestations to the contrary, that the City is not obstructing NY&A's ability to operate the rail service to and from the yard.

If the City is not obstructing NY&A's ability to serve, then the only remaining question is whether there is some other rail carrier whose service is being discontinued, ceased, interrupted

or obstructed by the City's attempt to assert control over its land. This inquiry led the Board to examine Petitioners to see whether they might have some status that would give the Board jurisdiction over them and the services they provide to ensure that the City does not take action that interferes with their ability to provide rail service. Here, the Board correctly concluded that Petitioners are:

... merely using the City's property to transload cargo. They are simply rail customers. They have presented no argument or evidence that would justify treating them differently than any other non-rail carrier lessor or occupant of rail property, or anyone that desires rail service for that matter.

Board Decision, at 6. As a result, the Board correctly stated that:

Because we do not have jurisdiction over Tri-State Transportation's activities, we cannot set the terms and conditions, including land use charges, for Tri-State Transportation's use of the 65th Street Yard, or even insist that Petitioners' use of the Yard should continue. Those are issues for the courts to decide.

Id. at p.6.

The Board's refusal to set the terms for Petitioners' use of the City's property did not amount to permitting interference with any rail carrier's ability to fulfill its common carrier obligation. Therefore, the Board did not commit material error and was absolutely correct in refusing to set the land use charges for Petitioners use of the 65th Street Yard.

III. The Appointment Of Charles Nottingham As Chairman Of A New Three Member Board Is Not A New Circumstance Justifying Reopening This Matter Pursuant to 49 C.F.R. § 1115.4.

The Petitioners argue that the appointment of Charles Nottingham as new chairman of a three member board that had only two members when the *Board Decision* was issued constitutes a "substantially changed circumstances" under 49 C.F.R. § 1115.4 sufficient to reopen the final action of the Board in this matter. Not surprisingly, the Petitioners cite no law or authority in support of this position.

The Board's governing statute states that:

(7) A vacancy in the membership of the Board does not impair the right of the remaining members to exercise all of the powers of the Board. The Board may designate a member to act as Chairman during any period in which there is no Chairman designated by the President.

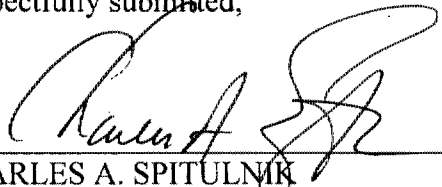
49 U.S.C. § 701 (7)(emphasis added). The Board clearly had the authority to act and issue the Board Decision in this matter. Logic dictates that the addition of a new board member does not create a substantially changed circumstance sufficient to reopen this matter.

CONCLUSION

In view of all of the foregoing and of all of the pleadings submitted by the City and NYCEDC in this proceeding previously, the City and NYCEDC respectfully request that this Board issue an order denying the Petition to Reopen this matter.

Dated: November 22, 2006

Respectfully submitted,

By: 

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Counsel for the New York City Economic
Development Corporation and the
City of New York, NY

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of November, 2006, a copy of the foregoing Opposition of the New York City Economic Development Corporation on behalf of the City of New York, NY to Petition to Reopen was served by first class mail, postage prepaid, upon the following:

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