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December 13, 2004

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Re: *Docket No. AB-167 (Sub-No. 1094) A Chelsea Property Owners - Abandonment - Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track in New York, NY*

Dear Secretary Williams;

Enclosed for filing in the above-captioned proceeding is an original and ten (10) copies of FORTY PLUS FOUNDATION / MANHATTAN CENTRAL RAILWAY SYSTEMS, LLC, [MCRS] leave to supplement the record and the:

**MOTION OF THE FORTY PLUS FOUNDATION / MCRS
TO DISMISS THE "JOINT STATEMENT"
OF THE CITY OF NEW YORK et al:**

with prejudice, for filing with the Board in the above referenced matter.

Kindly acknowledge receipt by date stamping the enclosed duplicate copy of this letter and returning it in the self addressed, stamped envelope provided.

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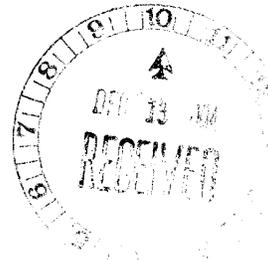
Enclosures

cc: All Parties of Record

Respectfully submitted,

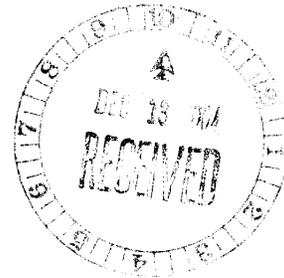
Tomislav R. Neuman,
Executive Director

FORTY PLUS FOUNDATION &
MANHATTAN CENTRAL RAILWAY SYSTEMS, LLC



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BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.



Docket No. AB-167 (Sub-No. 1094)A

MOTION OF THE FORTY PLUS FOUNDATION / MCRS
TO DISMISS THE "JOINT STATEMENT"
OF THE CITY OF NEW YORK *et al*:

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FORTY PLUS FOUNDATION &
MANHATTAN CENTRAL RAILWAY SYSTEMS, LLC

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Dated: December 13, 2004

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

Docket No. AB-167 (Sub-No. 1094)A

**MOTION OF THE FORTY PLUS FOUNDATION / MCRS
TO DISMISS THE "JOINT STATEMENT"
OF THE CITY OF NEW YORK *et al*:**

PETITIONER, FORTY PLUS FOUNDATION / MANHATTAN CENTRAL RAILWAY SYSTEMS, LLC, [MCRS] pursuant to 49 C.F.R. § 1117.1 respectfully requests leave to file the accompanying supplement and motion on behalf of the public convenience and necessity to correct the record and focus all parties efforts on the constructive and practical option of reactivating rail service on CONSOLIDATED RAIL CORPORATION'S West 30th Street Secondary Track in New York, NY -- commonly referred to as the "*Highline*". Good cause exists for granting this Motion, and will not infringe on the rights of any party, in light of the current active multiple extensions offered to other parties, and will lead to a decision based on a complete and accurate record with respect to the issues raised in this filing. Permitting PETITIONER to supplement the record and file this Motion is consistent with the public interest and will not prejudice any party. In anticipation of a favorable ruling on this motion, PETITIONER'S supplement and motion is attached for filing today:

PETITIONER respectfully asks the SURFACE TRANSPORTATION BOARD ("STB") for leave to supplement the record of this proceeding with respect to certain developments that have taken place in the interim of the September 22, 2004, filing by the CITY OF NEW YORK ["THE CITY"] a document entitled "JOINT STATEMENT OF THE CITY OF NEW YORK, NY, THE NEW YORK STATE URBAN DEVELOPMENT

CORPORATION D/B/A THE EMPIRE STATE DEVELOPMENT CORPORATION, CONSOLIDATED RAIL CORPORATION, CSX CORPORATION AND CSX TRANSPORTATION, Inc. With Respect To The Request For a CERTIFICATE OF INTERIM TRAIL USE.” (The “JOINT STATEMENT”).

PETITIONER, respectfully asks the SURFACE TRANSPORTATION BOARD (“STB”) to dismiss the “JOINT STATEMENT” and REQUEST FOR A CERTIFICATE OF INTERIM TRAIL USE, with prejudice

The JOINT STATEMENT asks THE BOARD to rule on legal issues pending before THE BOARD and to issue a CITU with respect to the *Highline*. Implicitly, the parties to the JOINT STATEMENT assume that the only issue remaining relating to the issuance of a CITU is the CHELSEA PROPERTY OWNERS’ [“CPO”] and THE FORTY PLUS FOUNDATION and MANHATTAN CENTRAL RAILWAY SYSTEMS, LLC [“MCRS”] objection on the grounds that a CITU is not available in an adverse abandonment proceeding such as this -- in addition to the recent filing of MCRS’ **FEEDER RAILROAD DEVELOPMENT APPLICATION, [FD 34606]** concluding in PETITIONER’S imminent acquisition and reactivation of rail services on the *Highline* – in which BOARD policy encourages feeder line applications and has a statutory duty to preserve and promote continued rail service, would under STB regulations take precedence over a request for a CITU (assuming of course that one could be issued in an adverse abandonment proceeding such as this). While MCRS agrees with CPO’s argument and believe there is a serious question whether the TRAILS ACT can be interpreted as permitting a railroad to collude with a potential “trail operator” to circumvent the purposes for which THE BOARD permits adverse abandonment’s, this is not the only issue open to challenge the requested CITU.

INTRODUCTION AND SUMMARY

As THE BOARD is well aware, the *Highline Proceeding* has been on the docket for over 15 years. See *Chelsea Property Owners – Abon. – The Consol. R. Corp., 8 I.C.C. 2d 773, aff’d sub nom. Consolidated R. Corp. v I.C.C., 29 F.3d 706 (D.C. Cir. 1994)*. This proceeding has been plagued by the incessant delays, misdirection, ceaseless legal choreography and false starts fashioned by “THE CITY”, and now, the failure on “THE CITY’S” part to resolve “*issues*” solely within their control regarding a future for this Line.

This proceeding is now at a stage according to the most recent FEEDERLINE APPLICATION filed by MCRS [*Finance Docket No. 34606*] on behalf of the public convenience and necessity specifically designed to acquire and reactivate rail service on the “*Highline*”.

“THE CITY” has demonstrated a flawed sense of purpose over the past 15 years that has unfortunately not been on *behalf of the public convenience and necessity* and “THE CITY” habitually remains the leading proponent and fervent sponsor for the demolition of this Line ever since inducing the ICC’s’ original adverse abandonment ruling over 15 years ago.

“THE CITY”, is keenly aware of MCRS’ interests and historic efforts to acquire and reactivate the *Highline*, which predates “THE CITY’s” very recent *inclination* to pursue their defective antediluvian demolition agenda -- now ineffectually masquerading as a “CITU”. “THE CITY’S” desire for the abstraction of the Line has not changed only the method in which “THE CITY” intends to execute the final abandonment *coup de grace* of this valuable and historic resource as PETITIONER will clearly document.

FORTY PLUS (40+) is a nationally renown and respected cornerstone charitable institution inaugurated in New York City on January 19th 1939; nationally lauded for our exceptional volunteer charitable mission by numerous US Presidents, Governors, and NYC elected officials -- **40+** has tirelessly worked to help our neighbors regain lost employment, self-confidence and integrity for over 65 years.

FORTY PLUS, as an authority in recognizing *discrimination* and *intimidation* in their many disguises’ has effectively combated employment related discrimination in virtually every form – and has successfully championed and sponsored legislation designed to eliminate age, race, gender, religious and even “legally” condoned coercion and discrimination in the work place when our efforts were not a popular agenda to pursue on both a local and national level. In these proceedings, “THE CITY” is fully knowledgeable and premeditated that **FORTY PLUS** has been intentionally excluded from all of “THE CITY’S” negotiations.

After exhaustive efforts to obtain information, audiences with City officials, also following prescribed protocols, *etc.* we have been sent on fools errands and run around in bureaucratic circles,

although greatly disappointed, we are no longer *naive* to “THE CITY’S” “coded” *cooperation* in which their dire policy towards this respected charity has been “don’t go away mad, just go away”.

“THE CITY” has been continually aware and appraised of MCRS’ activities to institute our “*plan*” to acquire and reactivate rail service that in fact has a priority over “THE CITY’S” convoluted CITU (if a CITU is even available in an adverse abandonment such as this)... “THE CITY” now appears *anguished*, that on behalf of the public convenience and necessity, BOARD policy encourages feeder line applications and has a statutory duty to preserve and promote continued rail service and to provide the public with a degree of protection against unnecessary discontinuance, cessation, interruption or obstruction of rail service. See e.g., *Western Stock Show Association*, supra, 2 S.T.B. at 131; *Salt Lake*, supra, slip op. at 6. Although impediments to State and local government projects are entitled to some weight, agency precedent clearly states that those interests are subordinate to its statutory duty to preserve and promote continued rail service where a carrier (MCRS) has expressed a desire to continue or establish operations and has taken reasonable steps to acquire traffic. *Chelsea Property Owners – Aban. – The Consol. R. Corp.* supra. 8 I.C.C. 2d 773, 778-9 (1992).

MCRS has clearly documented, on numerous occasions to “THE CITY’S” attention, the fact that our proposal would, effectively reactivate this Line , generate employment plus further reinforce the shield that THE BOARD’s plenary jurisdiction erects around the *Highline* to preserve and reactivate rail service.

ARGUMENT

Ironically, as the Board is aware, CONRAIL had proposed to the ICC prior to (during and subsequently) it’s adverse abandonment ruling over 15 years ago the feasibility to utilize the *Highline* for waste removal, and today, as “THE CITY” is presently attempting to identify solutions, such as the reactivation of the decades dormant MARINE TERMINALS, to deal with this expensive and growing problem -- unfortunately the ICC, arguably influenced by “THE CITY’S” special interests, failed to grasp the wisdom in CONRAIL management’s ability to both understand the NY marketplace and accurately forecast the pending requirements of NY City and the intrinsic value the *Highline’s* developers envisioned that the

Line would (and still can) be able to contribute to NYC -- therefore not surprisingly providing "THE CITY" with a solution even before the waste removal predicament became so colossally out of control.

"THE CITY" maintains an illogical "policy" of seemingly anti-railroad development that affects a number of vital rail related projects throughout the City -- for example, "THE CITY'S" recent unprecedented filing of STB Docket No. AB-596, New York City Economic Development Corporation -- Adverse Abandonment -- New York Cross Harbor Railroad in Brooklyn, NY clearly demonstrates "THE CITY" will attempt any coercive conduct to undermine and dislodge legitimate rail commerce by attempting to evict an active 103 year old NY rail institution. Another glaring *anti rail* action is the much needed re-establishment of a freight-rail link between Staten Island and the rest of the country. "THE CITY" originally bought and repaired the ARTHUR KILL LIFT BRIDGE and a 15-mile spur of track a decade ago, but again for some unexplainable reason, the revival of this crucial rail service is unfinished and has been no more than a dream with no prospect of completion on the horizon. This project would be instrumental to keep from overloading the highways systems, the PORT AUTHORITY hopes to nearly double the use of rail by 2020 to handle twice the number of containers a year than today's capacity allows. A reactivated *Highline* would be instrumental in solving traffic congestion, pollution, provide mass transit to neglected neighborhoods, employment, waste removal, postal efficiency, Convention Center intermodal support, construction access and employment, etc..... The *Highline*, the ARTHUR KILL LIFT BRIDGE and NYCH are just some examples of important rail related projects that "THE CITY" attempts to abolish through the lack of understanding, shortsightedness, avarice or hubris to yield to self serving special interests throughout the City.

It is troubling that in light of PETITIONER'S endless unselfish contributions within our City... FORTY PLUS is treated in this impertinent manner. FORTY PLUS who has tirelessly contributed to NYC for over 65 years, placing over 100,000+ of its membership in gainful employment dramatically assisting the economy and community plus offering simple, cost effective yet self sufficient and viable solutions to the

City's problems, -- we unselfishly make a major impact within our home town plus offering solutions to difficult problems -- it just doesn't seem to matter to "THE CITY".

Questions have persisted over the past several years as to how a obviously dubious impracticable concept of incorporating an unwanted \$60+ million elevated park on the *Highline* from *interests* with no "inner-city park" or "rails-to-trails" experience in an admittedly implausible location on an elevated rail line, has gotten to the point where it has received unprecedented financial commitments from "THE CITY" while a respected 65 year old charitable institution with an exemplary track record of community service offers a logical, rational and economically viable proposal with vast rail expertise to reinstate rail service on a properly located 150+ year old established rail line (and the only freight rail line into Manhattan that the City obviously desperately needs), **on behalf of the public convenience and necessity**, is essentially disregarded? The New York media wondered the same and recently investigated and reported the duplicitous process as excerpted in the following articles:

NY Post:

"Council speaker awards \$50M to 'friends'
by Andy Softis, Nov. 26, 2004 --

City Council Speaker Gifford Miller, who is expected to run for mayor next year [due to term limits as Speaker], has directed **more than \$50 million** to groups represented by lobbyists and others who have either **donated money to his campaign or have raised money for him**. An **Associated Press investigation** found that Miller benefited from his authority as speaker to **award public money with little or no oversight**.

For example, **\$35.7 million** has gone to **Friends of the High Line**, whose leaders have donated \$7,700 -- close to the legal limit -- to Miller campaigns. The organization, which wants to turn an abandoned Manhattan rail line into a public park, uses the speaker's support as a way to raise private money. "Knowing him obviously helped," said Robert Hammond, the speaker's former roommate who co-founded the organization.

The preceding media reports (in addition to others) are now illuminating the very disturbing and insidious habit of local *pay-to-play* politics infecting our region, in which immature elected officials award lucrative no-bid contracts and grants to campaign contributors and associates with little or no oversight -- a dangerous precedent that has been proven to be against the public's best interests.

Furthermore, even under ideal moral and ethical conditions a CITU has never been available in an adverse abandonment proceeding such as this, but it appears obvious now that "THE CITY", with its imperious "*let them eat cake*" attitude towards its' own constituency is not above willing to manipulate

the TRAILS ACT and to permit a railroad to collude with a potential "trail operator" to circumvent the purposes for which THE BOARD permits adverse abandonments.

While "THE CITY'S" abject "*plan*" to randomly imitate the *Promenade Plantée* of Paris may look a lot like an *ersatz soufflé* -- it's still not very filling for our community's safety, security, environmental, transportation and economic *nutritional* needs -- and worst of all, as illustrated above, it doesn't pass the smell test.

As we have now effectively peeled back the corroding *facade* of "THE CITY'S" problematic involvement within the CITUs *evolution* -- the ASSOCIATED PRESS' ongoing investigation both answers and raises many more questions in their recent NY POST expose' clearly illuminates serious objectionable conduct and obvious conflicts of interests on the part of "THE CITY" that should not be tolerated by THE BOARD and may further compromise and undermine THE "RAILROADS" which THE BOARD should protect from coercion and intimidation tactics that appear to be in force in this and other instances. In the *Joint Statement*, it makes clear that the EMPIRE STATE DEVELOPMENT CORPORATION ("ESDC") is to be the recipient and trail operator of that portion of the *Highline* north of 30th Street that lies over the MTA's Hudson Yards and part of the property of the JACOB JAVITS CONVENTION CENTER. The *Joint Statement* admits, however, that ESDC does not have the approval of its Board of Directors or the NEW YORK STATE PUBLIC AUTHORITIES CONTROL BOARD to undertake the financial commitments that will be involved in participating in a Trails Act agreement for the *Highline*. ESDC's support for a CITU is also contingent on its concluding certain agreements with the City which have not yet been reached.

The financial commitments are enormous in light of THE CITY'S plans to develop the *Highline* in a manner inconsistent with its return to rail use, and the plans of the state agencies to demolish the Highline over the Hudson Yards without providing an alternative right-of-way. The state agencies intend to sever the Highline from the national rail system, **resulting in an abandonment** of the entire line and removal of the *Highline* from the Boards' jurisdiction. Furthermore, the *Joint Statement* notes;

"the proposed agreements contemplate a zoning change during which the agreements will be held in escrow pending action under the City's zoning law",

a process that under the best conditions would take at least 2 years, and would overlap an incoming new administration that arguably has a new agenda, and could undoubtedly look *askance* at any disbursements of public funds for impractical projects such as “THE CITY’S” CITU, all while New York City is facing a budget deficit of at least \$3 Billion for the next fiscal year which may result in a combination of deep spending cuts on core services and tax increases.

Additionally, to date and arguably in the future, there has been no workable or implementable “park plan” that can be incorporated anywhere on the *Highline*. Interestingly, over the past 2 years 700+ failed designs have been considered for a “park” model -- not surprisingly, not a one is feasible or even possible to implement in any fashion on the *Highline*, raising the question whether any unlikely “park” effort would ever be realistic on this Line, notwithstanding that a multi Billion \$ riverfront - street access park directly adjacent to the *Highline* is presently being completed and would vastly overshadow an ersatz *hovering Highline* “park” or proposed “1 mile long swimming pool” with its much greater entrée impediments forced upon the general public to navigate.

A number of independent studies have been conducted since 1999 in reference to how best the community could benefit from the *Highline’s* existence or removal. Studies conducted to date include: “*What to do with the High Line?*” – REGIONAL PLAN ASSOCIATION [RPA] June 21, 1999; “*The Future of the High Line*” – Public Space Makers forum, Port Authority WTC, June 11, 2001; “*A Vision for the West Side Rail Yards*” – Manhattan Borough President, Nov, 2001: “*Far West Midtown – A Framework for Development*” – NYC Dept. of City Planning, Dec. 2001. All studies unanimously illustrate the public’s fervent support to preserve the *Highline* – plus each study universally agreed that the reactivation of rail service would best serve the public as a preferable option.

**DECEMBER 2004 ~ REGIONAL PLAN ASSOCIATION STUDY
HOUSING VS STADIUM**

THE BOARD should be aware that in spite of all the disingenuous protestations on the part of “THE CITY”, a very recent report by the REGIONAL PLAN ASSOCIATION [“RPA”] casts “THE CITY’S”

aspirations into grave doubt on the part of the public. The RPA report argues that a mixture of residential housing and office development would generate much more revenue than a new sports stadium on Manhattan's West Side. Developing 75 percent of the area with housing and the rest with commercial buildings would produce over 600% more revenues and generate taxes of \$510 million a year, compared with only \$74 million from the stadium, the report said. The report is available at <http://www.rpa.org>.

The above studies reflect a growing concern that any plans for sports stadiums may never see the light of day, and the argument that "THE CITY'S" Olympic plans rely on an *imaginary \$600 Million Stadium* when there are a minimum of 3 world class professional sports stadiums within minutes of Mid-town serviced by mass transit today for \$-0- Millions. As past City administrations from the 1980's to present have been convinced that no Rail Road company would wish to operate the *Highline*, so they obviously supported the demolition of the *Highline*... in a few years another administration may opt to scrap any new zoning initiatives and revert back to demolishing the Line, or genuinely lament the lost opportunities of a reactivation of this extraordinary Rail Line, a change in attitude obviously just happened with the present administration, so why *not again and again and?* One glaring fact stands out, no party will be prejudiced by the **reactivation** of the *Highline*, **no public project or alternate use for the right of way is being impeded by the proposed operation of rail service on the Highline.**

Predictably, any administration can refuse to underwrite further support for an ill conceived CITU, which would undoubtedly place this case back into both CSX and STB's province to again determine some manner to conclude any further litigation. The one constant fact remains and studies justify -- the *Highline* works best as a Rail Road and not a *park, swimming pool or feral forest*. The *Highline* presently relies on historic zoning and precedent to begin rail service immediately as Congress had intended the rail industry to serve the public. Obviously, PETITIONERS' reactivation of this line would solve each and every parties concerns!

CONCLUSION

As the inhabitants of Paris' *Promenade Plantée* would say "*The Cities soufflé has fallen.*" For all the foregoing reasons and based on the evidence offered by PETITIONER above, the results are summarized below:

1. the filing of a formal **Feederline Application**, [Finance Docket No. 34606] has precedence over any CITU.
2. the fact that a CITU has never been issued in an adverse abandonment such as this
3. the **ASSOCIATED PRESS'** ongoing investigation uncovering questionable conduct and an obvious conflict of interest involving both "THE CITY" and parties' intent on benefiting from public funds surreptitiously designed to support a **Highline** demolition agenda under the pretense of a CITU.
4. no party will be prejudiced by the reactivation of the **Highline**,
5. no public project or alternate use for the right of way is being impeded by the proposed operation of rail service on the **Highline**.
6. "THE CITY" has demonstrated questionable judgment in it's efforts to wrest control of the **Highline** from the jurisdiction of THE BOARD and has had ample opportunity over the past 15 years to comply with the ICC conditions governing this Line, since it has plainly demonstrated that it can provide sufficient funds (when it wishes) to comply with the ICC ruling and has refused to do so to date.
7. "THE CITY" has chosen to pursue an artificial policy designed to undermine any efforts to reinstate much needed, viable commercial rail service on this Line by PETITIONER
8. "THE CITY" ignores the public convenience and necessity that demands the preservation and reactivation of this valuable rail resource.
9. PETITIONER'S numerous efforts to be included in discussions and negotiations affecting the Line only to be rebuffed.
10. "THE CITY" has essentially refused to provide clear and concise information as to how PETITIONER may participate within the **\$35.7 million in public funds** that "THE CITY" has allocated for the rehabilitation of the **Highline**, under which PETITIONER most certainly should qualify more readily than *ersatz "roommates"* and political contributors or unlikely floating "*parks or pools*".
11. the unprecedented filing of STB Docket No. AB-596, New York City Economic Development Corporation — Adverse Abandonment — New York Cross Harbor Railroad in Brooklyn, NY clearly demonstrates "THE CITY" will attempt any coercive conduct to undermine and dislodge legitimate rail commerce, and will unquestionably be met with the same results overturned by the Courts, in the unlikely event it prevails in coercing the Board to provide entrée to an unprecedented CITU that has never been issued in an adverse abandonment such as this
12. Each and every study to date supports the reactivation of rail use on the **Highline** over all other options.
13. There are absolutely no guarantees of any projects eventually transpiring over the 30th St. rail yards.
14. PETITIONER, as a respected non-profit and valuable contributor within the NYC community for over 65 years, has been an unwitting victim of questionable conduct engaged by "THE CITY" whom THE BOARD should not encourage to continue freely exploiting public funds and resources for the personal benefit of campaign contributors and associates.

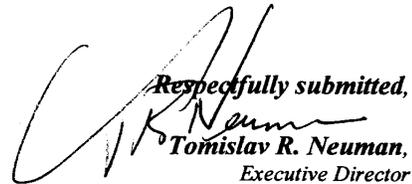
This foregoing conduct engaged in by "THE CITY" is rife with dangerous conflicts and accordingly not in the public's or THE BOARD'S best interests. PETITIONER has documented a modest sample of the

weakness of "THE CITY" transparent efforts to demolish this historic and valuable "life line of NY City" camouflaged as a CITU.

As the evidence illustrates, "THE CITY" and the state agencies plan to use the Highline in a manner inconsistent with the TRAILS ACT, THE BOARD has an obligation under its own regulations (49 CFR 1152.29(b)(1) to determine whether the TRAILS ACT is even applicable. PETITIONER has demonstrated that the TRAILS ACT is not applicable to permit issuance of a CITU to "THE CITY" in this instance, for the reasons discussed above -- in addition, BOARD policy encourages feeder line applications and has a statutory duty to preserve and promote continued rail service, that takes precedence over a request for a CITU (assuming of course that one could be issued in an adverse abandonment proceeding such as this).

PETITIONER respectfully request that SURFACE TRANSPORTATION BOARD ("STB") dismiss with prejudice the September 22, 2004, filing of the CITY OF NEW YORK ["THE CITY"] the document entitled "JOINT STATEMENT OF THE CITY OF NEW YORK, NY, THE NEW YORK STATE URBAN DEVELOPMENT CORPORATION D/B/A THE EMPIRE STATE DEVELOPMENT CORPORATION, CONSOLIDATED RAIL CORPORATION, CSX CORPORATION AND CSX TRANSPORTATION, Inc. With Respect To The Request For a CERTIFICATE OF INTERIM TRAIL USE." (The "JOINT STATEMENT"). STB Filing ID No. 212059. In the alternative THE BOARD at the very least should suspend "THE CITY'S" out of place CITU efforts until review of PETITIONER'S FEEDER RAILROAD DEVELOPMENT APPLICATION and all options relating to the reactivation of rail service on the *Highline* have been exhausted.

Good cause exists for granting this Motion that is consistent with the public interest and will not prejudice any party


Respectfully submitted,
Tomislav R. Neuman,
Executive Director

FORTY PLUS FOUNDATION &
MANHATTAN CENTRAL RAILWAY SYSTEMS, LLC
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Dated: December 13, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December, 2004, copies of the forgoing Notice of Intent to File FEEDER RAILROAD DEVELOPMENT APPLICATION of the FORTY PLUS FOUNDATION & MANHATTAN CENTRAL RAILWAY SYSTEMS, LLC was served by first-class mail, postage prepaid, or (hand-delivery), upon all required parties of record.


Tomislav R. Neuman