



**COMMONWEALTH OF PENNSYLVANIA**

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**In re: Application of CSX Transportation, Inc. for Approval for the Abolition of the Crossing (DOT No. 140634G) where Cemetery Avenue crosses above grade two Of CSX Transportation, Inc. located in the City of Philadelphia, Philadelphia County, Pennsylvania** : **DOCKET NO. A-2019-3013783**  
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**PETITION FOR PROTECTIVE ORDER**

The City of Philadelphia (“City”), by and through its counsel, James C. Kellett, submits the following in support of its Petition for Protective Order pursuant to 52 Pa. Code § 5.362(7) and 52 Pa. Code § 5.365:

1. The instant action concerns an application to abolish a bridge in Philadelphia carrying a City highway over a CSX Transportation, Inc. (“CSX”) bridge.

2. The Pennsylvania Department of Transportation (“PennDOT”) caused to be prepared an Interim Bridge Inspection Report (“Report”) of the condition of the bridge. That report is dated March 30, 2020, and the City intends to introduce the Report as evidence.

3. The Pennsylvania Utility Commission (“Commission”) may issue a Protective Order where "a party demonstrates that the potential harm to the party of providing the information would be substantial and that the harm to the party if the information is disclosed without restriction outweighs the public’s interest in free and open access to the administrative hearing process." 52 Pa. Code § 5.365(a).

4. One of the factors that the Commission weighs in determining whether to grant or to deny a protective order includes consideration of other statutes or regulations dealing specifically with disclosure of the information. 52 Pa. Code § 5.365(a)(5).

5. A bridge inspection report is an in-depth safety study for the purpose of determining how to increase the safety of the bridge. The Report would therefore be treated as confidential pursuant to 75 Pa.C.S. § 3754 in the event of a request under the “Right-to-Know Law.” 65 P.S. §§ 67.101 *et seq.*

6. The Report is also protected from discovery and production into evidence in any *Federal and State court* cases (emphasis added), under 23 U.S.C. § 409.<sup>1</sup>

7. Requiring the City or other party to this proceeding to submit the Report into the public record of the Commission is in direct conflict with the Federal and State prohibitions and protections provided under the aforementioned statutes.

8. Producing this Report for general public review, scrutiny, and use undercuts the main reason that these reports are treated as confidential: confidentiality promotes independent and critical analysis by engineering professionals without concern for the potential liability concerns the results of such reports or studies might raise. *See Harrison v. Burlington Northern R. Co.*, 965 F.2d 155, 160 (7th Cir. 1992).

9. Engineers issuing reports for the purpose of addressing a potential safety hazard should not be concerned with the ramifications their study in a court proceeding.

10. The Commission’s need for the Report stems from its responsibility to evaluate the proposed alternative to the removal of the bridge and to determine what, if any, work should be performed to allow the bridge to remain in place.

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<sup>1</sup> The City recognizes that the Commission’s August 12, 2002, Order in the *West Road* case (M-00021610), determined that Section 409 was not applicable to PUC proceedings. Without waiving the right to raise the issue in a subsequent proceeding or to seek the appropriate appellate review of that question in the present matter, the City provides citation to Section 409 to highlight the strong public policy favoring the non-disclosure in a public forum of this sensitive inspection information.

11. The Commission must limit the use of the Report for the sole and express purpose of determining whether the subject bridge is safe and should remain in place.

12. The City requests that the Report be treated as under seal.

13. The parties to the instant matter already possess copies of the Report.

14. The parties agree that the Commission should grant this petition.

15. The City requests that the Commission require any party, its counsel, witnesses, and representatives, furnished the Report be required to treat the report as confidential, and agree to not provide the Report or any data contained therein to any third party or to use this report in any litigation other than this current proceeding.

16. The potential harm to the City outweighs the public's interest in free and open access to the administrative hearing process, insofar as bridge inspection reports are not routinely subject to disclosure to any party.

17. The Commission must provide that any protective order issued be served on any and all parties who receive a copy of the Report, here the parties to this proceeding and their representatives.

18. The Commission must provide that any party who discloses the Report, or any reports, surveys, schedules, lists or data contained in such report, to a third party or uses said bridge inspection report, or any reports, surveys, schedules, lists or data contained in the Report in other litigation matters be subject to appropriate sanctions from the Commission.

*Wherefore*, based upon the foregoing, the City respectfully requests that the Commission enter the following Protective Order:

1. That the City's Petition for Protective Order is granted.

2. That any party, and any contractor or other assign of a party to this proceeding, already in receipt of the Report shall maintain its confidentiality.
3. That neither counsel, witnesses, nor other representatives for the parties receiving the Report shall provide access to the Report to any other person except as authorized by further order of the Commission or the presiding officer.
4. That any party who discloses the Report to any person other than those persons set forth in this Order will be subject to sanctions by the Commission.
5. That any copy of the Report that is made part of the official record be placed under seal.
6. That upon completion of this proceeding, including any administrative or judicial review, all copies of the Report shall be returned to the Pennsylvania Department of Transportation. In the alternative, parties may provide an affidavit of counsel stating that the Traffic Control Study has been destroyed.

Respectfully Submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
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DATED: December 4, 2020

**COMMONWEALTH OF PENNSYLVANIA**  
**BEFORE THE**  
**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**In re: Application of CSX Transportation, : DOCKET NO. A-2019-3013783**  
**Inc. for Approval fo the Abolition of the :**  
**Crossing (DOT No. 140634G) where :**  
**Cemetery Avenue crosses above grade two :**  
**Of CSX Transportation, Inc. located in the :**  
**City of Philadelphia, Philadelphia County, :**  
**Pennsylvania :**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the City’s Petition for Protective Order was served upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54, this 4<sup>th</sup> day of December 2020:

By Electronic Mail”

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