



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
COMMONWEALTH KEYSTONE BUILDING  
400 NORTH STREET, HARRISBURG, PA 17120

BUREAU OF  
INVESTIGATION  
&  
ENFORCEMENT

April 1, 2021

**Via Electronic Filing**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120

Re: Application of CSX Transportation, Inc. for Approval of the Abolition of the Crossing (DOT 140 634 G) where Cemetery Avenue crosses above grade the tracks of CSX Transportation, Inc. located in the City of Philadelphia, Philadelphia County, Pennsylvania, and the allocation of cost thereto.  
Docket No. A-2019-3013783  
**I&E's Main Brief**

Dear Secretary Chiavetta:

Enclosed please find the **Proprietary and Non-Proprietary** versions of the **Main Brief** of the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement in the above-referenced proceeding.

Copies have been served on the parties of record in accordance with the Certificate of Service. Due to the temporary closure of the Commission's physical offices, I&E is only providing electronic service. If you have any questions, please contact the undersigned.

Sincerely,

A handwritten signature in blue ink that reads 'Kayla L. Rost'.

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of CSX Transportation, Inc. :  
for Approval of the Abolition of the Crossing :  
(DOT 140 634 G) where Cemetery Avenue :  
crosses above grade the tracks of CSX : Docket No. A-2019-3013783  
Transportation, Inc. located in the City of :  
Philadelphia, Philadelphia County, :  
Pennsylvania, and the allocation of cost thereto. :

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**MAIN BRIEF  
OF THE  
BUREAU OF INVESTIGATION AND ENFORCEMENT**

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\*\*NON-PROPRIETARY VERSION\*\*

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Dated: April 1, 2021

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## **I. PROCEDURAL HISTORY**

By letter dated October 24, 2019, CSX Transportation, Inc. (“CSXT”) submitted an application (“Application”) for approval to abolish the public rail-highway crossing where CSXT’s tracks cross under a highway bridge carrying Cemetery Avenue in the City of Philadelphia.

Receipt of CSXT’s Application by the Commission was confirmed by Secretarial Letter dated October 24, 2019. An initial field investigation and conference was held on February 26, 2020. The Commission’s Bureau of Technical Utility Services, Rail Safety Section (“Rail Safety”), the Pennsylvania Department of Transportation (“PennDOT”), CSXT, the Philadelphia Water Department, the City of Philadelphia Department of Streets, and a local landowner attended the field conference.

On August 11, 2020, Rail Safety requested that the matter be referred to the Office of Administrative Law Judge, noting that two parties objected to the abolition of Cemetery Avenue at the field conference.

On August 19, 2020, a Call-in Telephone Conference Notice was issued, scheduling a telephonic prehearing conference for September 29, 2020 before Administrative Law Judge Darlene Heep. On August 20, 2020, a Prehearing Conference Order was issued.

On August 26, 2020, a corrected Hearing Notice and Prehearing Order were issued, converting the Initial Telephone Conference into a Prehearing Conference. The parties were instructed to provide Prehearing Memoranda no later than noon on September 28, 2020. I&E, PennDOT, CSXT, and the City of Philadelphia (“the City”)

submitted timely prehearing memos and participated in the September 29, 2020 prehearing conference.

On October 7, 2020, Administrative Law Judge (“ALJ”) Darlene D. Heep issued a Prehearing Order scheduling an evidentiary hearing on February 9-10, 2021 and instructing the parties to submit written testimony by December 18, 2020 and rebuttal testimony by January 22, 2021.

On December 3, 2020, I&E issued a letter to CSXT and the City notifying the parties of the Priority 0 and Priority 1 maintenance items of the March 30, 2020 Bridge Inspection Report which have not been addressed, thus creating an unsafe condition. Pursuant to PennDOT’s Bridge Safety Inspection Manual, the Priority 0 items were to be resolved or mitigated in seven (7) days and the Priority 1 items were to be resolved or mitigated in six (6) months. I&E urged the parties to complete any necessary repairs or actions needed to alleviate the Priority 0 and Priority 1 maintenance items.

On December 4, 2020, the City filed an unopposed Motion<sup>1</sup> for Protective Order for the March 30, 2020 Interim Bridge Inspection Report. On December 14, 2020, ALJ Heep granted the Motion for Protective Order and marked the March 30, 2020 Interim Bridge Inspection Report as “CONFIDENTIAL.”

On December 17, 2020, PennDOT submitted its written direct testimony.

On December 18, 2020, I&E, CSXT, and the City submitted their written direct testimony. Also, on December 18, 2020, CSXT issued a letter to I&E in response to its

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<sup>1</sup> The City labeled the document as a “Petition for Protective Order.” ALJ Heep treated the filing as a motion pursuant to 52 Pa. Code § 5.362.

December 3, 2020 letter. CSXT claimed that the City was in the process of resolving three (3) of the items which were its responsibility and that CSXT recently replaced the missing pedestrian railing. CSXT further disputed two (2) of the items listed as Priority 1 items.

On January 22, 2021, I&E, PennDOT, CSXT, and the City submitted written rebuttal testimony.

On February 9, 2021, shortly before the hearing began, CSXT emailed two (2) cross examination exhibits to the parties.<sup>2</sup> The hearing occurred as scheduled on February 9, 2021 and was attended by I&E, PennDOT, CSXT, and the City.

On February 18, 2021, the City served and offered a late-filed exhibit labeled “Existing Cemetery Avenue 1960” into the record.

On February 22, 2021, I&E compared the late-filed exhibit to the original certified design plans and noted that the Commission’s certified plans match the dates, initials, and signatures of the late-filed exhibit offered by the City. However, the late-filed exhibit provided by the City was missing the last 3 pages of the Commission’s plans and the Commission’s plans did not include the last white sheet entitled “Details of Repairs.” I&E explained that if the City’s intention to providing the late-filed exhibit was to offer proof of lead-based paint, then I&E had no objection to the exhibit as the certified stamped bridge plans and the proposed exhibit contain language that lead-based paint

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<sup>2</sup> At the hearing, I&E and the City objected to Cross Examination Exhibit 2 on the basis of hearsay, inability for the parties to cross-examine the drafter of the memo, and the purported opinion not being supported by any analysis. In the event a decision is made regarding the life-span of the bridge, I&E reserves its right to challenge the admittance of Cross Examination Exhibit 2.

would be used. I&E informed ALJ Heep and the parties that it and Rail Safety were looking into other ways to have the Commission's certified stamped plans scanned outside the Commission's normal resources.

On February 23, 2021, CSXT lodged its objection to the City's late-filed exhibit.

On February 25, 2021, I&E provided the scanned certified stamped bridge design plans, labeled as Cemetery Avenue Bridge Plan Stamp 1<sup>st</sup> page City of Philadelphia Co. and Cemetery Avenue Bridge Certified Plans City of Philadelphia Co., to the parties and ALJ Heep.

On February 26, 2021, CSXT noted its ongoing objection to any decision regarding the lead-based paint issue which was raised by the City.

On March 10, 2021, an Evidence and Briefing Order was issued, directing the parties to submit main briefs by April 1, 2021 and reply briefs by April 22, 2021. In addition to setting the briefing schedule, ALJ Heep admitted the City's and I&E's late filed exhibits and directed the submission of these exhibits by March 15, 2021.

I&E submits this Main Brief in accordance with the briefing schedule that was established at the conclusion of the evidentiary hearing and later modified by agreement of the parties and ALJ Heep through the March 10, 2021 Evidence and Briefing Order.<sup>3</sup> Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Ordering Paragraphs are attached as Appendix A, B and C, respectively.

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<sup>3</sup> N.T. pgs. 135-136; *see also* Evidence and Briefing Order, dated March 10, 2021.

## II. STATEMENT OF THE CASE

CSXT submitted the instant application to abolish the public highway bridge located on Cemetery Avenue which carries the public road over CSXT railroad tracks. Cemetery Avenue bridge has been in existence and an integral part of the City's roadway system for 135 years.<sup>4</sup> In an 1885 City ordinance, signed by the mayor on July 3 of 1885, the City authorized the crossing of Cemetery Avenue by the railroad, conditioned upon the approval by the Chief Engineer of the City and the requirement that the railroad maintain the facility carrying the street over the rail line.<sup>5</sup>

The public highway bridge is a single span fracture critical, steel through girder bridge structure that is 88 feet long and 48.3 feet wide with a curb-to-curb width of 30 feet.<sup>6</sup> The bridge was first constructed in 1886 by the Baltimore and Ohio Railroad ("B&O Railroad") and reconstructed in 1961 by the B&O Railroad after a train derailment.<sup>7</sup> The bridge is bordered by a vacant lot, a storage facility, residential housing, and a commercial facility that appears to be an auto body shop and/or scrap yard.<sup>8</sup>

The bridge has two (2) main components, the substructure and the superstructure. The substructure supports the superstructure and transfers all the bridge loading to the

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<sup>4</sup> I&E Direct Testimony, pgs. 3-4; *see also Application of The Baltimore and Ohio Railroad Company for approval of the alteration of the crossing where Cemetery Avenue crosses above the grade of the tracks of said company, in the City of Philadelphia, and the allocation of the costs and expenses incident thereto*, A-00088079, filed April 14, 1961 (hereinafter "B&O Application").

<sup>5</sup> City Statement No. 1, Exhibit 1.

<sup>6</sup> I&E Direct Testimony, pgs. 3-4; CSXT Statement No. 1, pg. 3.; *see also B&O Application*, A-00088079.

<sup>7</sup> I&E Direct Testimony, pgs. 3-4; CSXT Statement No. 1, pg. 3.; *see also B&O Application*, A-00088079 (June 15, 1961 transcript, pg. 10, offering testimony that the absence of the Cemetery Avenue bridge resulted in "economic hardship" to local businesses, the bridge was needed to "expedite traffic," and that the bridge was an "important traffic artery.")

<sup>8</sup> City Statement No. 1, pg. 1.

foundations beneath the ground.<sup>9</sup> The bridge has two (2) substructures (abutments) each consisting of stone masonry elements and reinforced concrete elements and are located at each end of the bridge.<sup>10</sup> The superstructure is comprised of two (2) steel through girders connected together with a steel floorbeam system. The floorbeam system primarily supports the bridge deck, roadway, and vehicle loading.<sup>11</sup>

The sidewalk, bridge pedestrian railing, and pedestrian loading on this structure are primarily supported by steel support angles which are directly connected to the two (2) main girders.<sup>12</sup> The support angles and floorbeams transfer all the bridge loading to the two (2) steel main through girders which in turn carries and transfers all the loading to the substructures.<sup>13</sup> The bridge currently has a load posting limit of 14-tons with 21-tons for combinations.<sup>14</sup>

CSXT is responsible for the maintenance and any costs associated with the bridge pedestrian railing, bridge sidewalk, bridge concrete deck, substructures, superstructures, and bridge expansion joints.<sup>15</sup> The City is responsible for the maintenance and any costs associated with the roadway, bridge regulatory and advanced warning signs, sidewalk approaches, roadway approaches, and roadway surface across the bridge.<sup>16</sup>

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<sup>9</sup> I&E Direct Testimony, pg. 4.

<sup>10</sup> I&E Direct Testimony, pg. 4.

<sup>11</sup> I&E Direct Testimony, pg. 4.

<sup>12</sup> I&E Direct Testimony, pg. 4.

<sup>13</sup> I&E Direct Testimony, pg. 4.

<sup>14</sup> CSXT Statement No. 1, pg. 3; *see also* March 30, 2020 Interim Bridge Inspection Report.

<sup>15</sup> I&E Direct Testimony, pg. 9; *see also B&O Application*, A-00088079 (Order dated October 2, 1961)(“That . . . The Baltimore and Ohio Railroad Company, at its sole cost and expense, furnish all material and do all work necessary thereafter to maintain the remainder of the crossing improvement, including the entire substructure and superstructure of the altered bridge.”); *see also PennDOT Statement No. 3*, pg. 2.

<sup>16</sup> I&E Direct Testimony, pg. 9; *see also B&O Application*, A-00088079 (Order dated October 2, 1961)(“That . . . City of Philadelphia, at its sole cost and expense, furnish all material and do all work necessary thereafter to maintain the highway approaches to the altered crossing, above grade.”)

Per City Code Section 11-505(1), sidewalks of all public streets must be maintained and repaired by the property owners whose property the sidewalk fronts.<sup>17</sup>

While the sidewalks are the property owner's responsibility, by law, the property owners will be notified and given an opportunity to cure the defect before the City can fix the issue and bill the owner.<sup>18</sup>

PennDOT has the legal obligation to make sure that all bridges over twenty (20) feet are inspected, including the Cemetery Avenue bridge.<sup>19</sup> PennDOT has an agreement with a consultant to inspect the bridge, and the inspection is paid with federal funds and withheld liquid fuels funds.<sup>20</sup>

On or about March 30, 2020, the civil engineering firm McCormick Taylor completed an interim bridge inspection on Cemetery Avenue, labeled as March 30, 2020 Interim Bridge Inspection Report ("Report").<sup>21</sup> The Report provided a list of Priority 0 to Priority 5 maintenance items that needed to be completed and/or resolved for the continued safe use of the bridge.<sup>22</sup>

Per PennDOT policy, Priority 0 and 1 maintenance items are defined as critical deficiencies that threaten either the structural integrity of the bridge or public safety.<sup>23</sup> Priority 0 items are to be addressed with seven (7) days of identification.<sup>24</sup> Priority 1 items are to be scheduled and completed within six (6) months of notification, if and only

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<sup>17</sup> City Statement No. 3, pg. 4.

<sup>18</sup> City Statement No. 3, pg. 4.

<sup>19</sup> PennDOT Statement No. 3, pg. 1; I&E Direct Testimony, pgs. 2-3.

<sup>20</sup> PennDOT Statement No. 3, pg. 1; I&E Direct Testimony, pgs. 2-3.

<sup>21</sup> City Statement No. 1, Exhibit 3.

<sup>22</sup> City Statement No. 1, Exhibit 3.

<sup>23</sup> I&E Direct Testimony, pgs. 4-5.

<sup>24</sup> I&E Direct Testimony, pgs. 4-5.

if the item will not degrade further or compromise public safety.<sup>25</sup>

On behalf of CSXT, Grove Miller Engineering completed the Traffic Impact Study in August 2019 and determined that the average daily traffic on the Cemetery Avenue bridge is approximately 5,400 vehicles.<sup>26</sup> The Traffic Impact Study recommended detouring traffic to Kingsessing Avenue, 65<sup>th</sup> Street, 61<sup>st</sup> Street, Greenway Avenue, and Woodland Avenue.<sup>27</sup>

The pedestrian/bicycle count (“Count”) was completed on Wednesday, September 2, 2020 and determined that approximately 119 pedestrians use the crossing a day.<sup>28</sup> Mr. Gregory Creasy, of Grove Miller Engineering, opined that the pedestrian traffic will likely be diverted to Kingsessing Avenue and Greenway Avenue and crossing the railroad tracks at 65<sup>th</sup> Street.<sup>29</sup> The additional walking distance for pedestrians to walk from the intersection of Kingsessing Avenue/Cemetery Avenue to Greenway Avenue/Cemetery Avenue is 1,400 feet (the existing route from intersection to intersection totaling 700 feet and the suggested route totaling 2,100 feet).<sup>30</sup>

### **III. BURDEN OF PROOF**

CSXT, as the applicant requesting approval to abolish the Cemetery Avenue bridge crossing, bears the burden of proving, by a preponderance of evidence, that the abolition of the crossing is necessary and proper for the service, accommodation,

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<sup>25</sup> I&E Direct Testimony, pgs. 4-5.

<sup>26</sup> CSXT Statement No. 2, Exhibit 4; CSXT Statement No. 2, pg. 5, Exhibit 4.

<sup>27</sup> CSXT Statement No. 2, pg. 5, Exhibit 4.

<sup>28</sup> N.T. pg. 60; CSXT Statement No. 2, pg. 9.

<sup>29</sup> N.T. pg. 69.

<sup>30</sup> CSXT Statement No. 2, pg. 9, Exhibit 5.

convenience, and safety of the public.<sup>31</sup> “A preponderance of the evidence means only that one party has presented evidence that is more convincing, by even the smallest amount, than the evidence presented by the other party.”<sup>32</sup> As evident in the record of this case and as supported by I&E’s Main Brief, CSXT has failed to prove that the abolition of the Cemetery Avenue bridge is necessary and proper.

#### IV. SUMMARY OF ARGUMENT

It is well established that in rail-highway crossing cases, the guiding principle for Commission action is the public interest, i.e., to ensure and promote the protection, safety, convenience, and welfare of the travelling public.<sup>33</sup> CSXT, as the party charged with the burden of proof in this proceeding, has not credibly or convincingly demonstrated that the abolishment of the public highway bridge located across Cemetery Avenue is within the public interest. Rather, Cemetery Avenue, a public highway bridge located over railroad tracks, is in integral part of the City’s roadway system that has been in existence for 135 years.<sup>34</sup> Not only is the bridge utilized by the local residents and commercial businesses in the surrounding area, but it is also an essential route for local emergency responders.

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<sup>31</sup> 66 Pa. C.S. § 332(a). Section 332(a) of the Public Utility Code, 66 Pa. C.S. § 332(a), provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding; *see also Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600, 602 n. 1 (Pa. Cmwlth. 1990); *Borough of Bridgewater v. Pa. P.U.C.*, 124 A.2d 165 (Pa. Super. 1956); *N. Lebanon Twp. v. Pa. P.U.C.*, 962 A.2d 1237 (Pa. Cmwlth. 2008).

<sup>32</sup> *Energy Conservation Council of Pennsylvania v. Pa. P.U.C.*, 995 A.2d 465, 478 (Pa. Cmwlth. 2010).

<sup>33</sup> *Application of the Dep’t of Transportation of the Commonwealth of Pennsylvania for Approval to Abolish the Existing Crossing Where S.R. 0522 Crosses at Grade Two Tracks of E. Broad Top R.R. & Coal Co. (Aar 003 135\*) in Cromwell Twp., Huntingdon County; & the Allocation of Costs & Expenses Incident Thereto.*, Docket No. A-00114338, Opinion and Order dated Mar. 14, 2002.

<sup>34</sup> I&E again notes that *B&O Application*, A-00088079, filed April 14, 1961, offered testimony that the absence of the Cemetery Avenue bridge resulted in “economic hardship” to local businesses, the bridge was needed to “expedite traffic,” and that the bridge was an “important traffic artery.” June 15, 1961 transcript, pg. 10.

The detours suggested by CSXT through this application are not safe and do not fully take into consideration the needs of the local residents or impact on the City's finances. Notably, the Traffic Impact Study recommends that traffic be detoured to Kingsessing Avenue, 65th Street, 61st Street, Greenway Avenue, and Woodland Avenue, but does not recognize or acknowledge that 65<sup>th</sup> Street is on the City's High Injury Network. Moreover, the neighborhood is generally low-income residential, and removal of the Cemetery Avenue bridge assumes the ability of nearby residents to physically get to the other bridges or financially have the means to easily travel the extra distance. Not to mention that removal of the bridge will create two dead-end streets, which will not only impact the local residents, businesses, and first responders, but will also negatively impact the City's ability to receive Federal funds and liquid fuels funds.<sup>35</sup>

Furthermore, the Cemetery Avenue bridge does not have a history of any vehicular or train accidents or conflicts and is accordingly the safest route for the traversing public as well as CSXT's trains to navigate the densely populated area.<sup>36</sup> It is odd that CSXT is attempting to abolish the public roadway and prevent the City from their right and ability to move traffic, people, goods, and services without an iota of evidence that the public highway bridge is adversely affecting or creating an unsafe condition to CSXT's tracks or train traffic.

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<sup>35</sup> PennDOT Statement No. 2, pgs. 3-4; City Statement No. 1.

<sup>36</sup> I&E Rebuttal Testimony, pg. 9.

## **V. ARGUMENT**

### **A. LEGAL STANDARD**

Whether an application should be granted to abolish a crossing is dependent upon whether the applicant has established that the abolition is necessary and proper for the service, accommodation, convenience or safety of the public.<sup>37</sup> Factors to be considered in applying this standard include traffic congestion, access for emergency responders, any impact on businesses, and the economic feasibility of the proposed change.<sup>38</sup>

### **B. THE APPLICATION TO ABOLISH IS NOT IN THE PUBLIC INTEREST**

CSXT failed to prove by a preponderance of evidence that the abolishment of the Cemetery Avenue bridge is in the public interest because the abolishment would negatively impact the service, accommodation, convenience, and safety of the public. Abolishing the bridge, diverting traffic away from Cemetery Avenue, and creating a dead-end street would negatively impact local businesses and residents. First, the abolishment of the bridge will eliminate the drive-by exposure of the local businesses and potentially impact their clientele's ability to access the business. The Traffic Impact Study determined that approximately 5,400 vehicles utilize the highway bridge crossing. The Traffic Impact Study recommended diverting those 5,400 vehicles to Kingsessing Avenue, 65th Street, 61st Street, Greenway Avenue, and Woodland Avenue. With the abolishment of the bridge, those 5,400 vehicles will be diverted to other routes and will

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<sup>37</sup> *Borough of Bridgewater v. Pa. P.U.C.*, 124 A.2d 165 (Pa. Super. 1956).

<sup>38</sup> *Pa. P.U.C. v. Borough of Souderton*, 231 A.2d 875 (Pa. Super. 1967); *Bueg v. Pa. P.U.C.*, 144 A.2d 511 (Pa. Super. 1958).

not be exposed to the local businesses on Cemetery Avenue. The businesses and local residents would also have to deal with the negative impacts of two (2) dead-end streets, as discussed in more detail below.

Second, the width of the street will negatively impact the residents' and local businesses' access to trash removal, package delivery, ambulance services, and any other service which utilizes a vehicle with a large turn radius. These vehicles will be unable to complete a three-part turn to safely maneuver the proposed dead-end street and exit Cemetery Avenue. CSXT, through the testimony of Mr. Gregory Creasy, suggested that these vehicles can either utilize a driveway to turn around, back up the length of Cemetery Avenue to exit the roadway, or that the City could limit/prevent on-street parking to allow these vehicles space to complete a three-point turn. These suggestions will create an even bigger burden on the local residents, who are limited to street parking, and the local businesses, who will most likely be impacted by all these vehicles attempting to use their business parking lots/driveways to turnaround. Moreover, suggesting that a large vehicle attempt to back its way out of a dead-end street is preposterous and could create an unsafe situation for both the vehicle backing up and incoming traffic.

Third, the City's regulations would require the construction of a cul-de-sac if a street were to be converted into a dead-end. If a cul-de-sac were to be constructed, this could potentially impact the local residents' and businesses' property rights since the construction may involve use of property beyond the City's right of way. This would also create a bigger burden on the City to construct the cul-de-sac and a negative impact for

the local residents to endure the challenges of constructing a cul-de-sac in an urban area on a dead-end street. Moreover, the abolishment of the Cemetery Avenue bridge could negatively impact the City's ability to receive liquid fuels funds and Federal funding.<sup>39</sup>

In addition to the local residents and local businesses, the local emergency services will be detrimentally impacted by the removal and abolishment of the Cemetery Avenue bridge. Lieutenant Joseph Ruff credibly and unequivocally testified that the Cemetery Avenue bridge is an essential transport option for the City's emergency services. Lieutenant Ruff is a lieutenant with the Philadelphia Police Department 12th District located on Woodland Avenue in Philadelphia.<sup>40</sup> The Cemetery Avenue bridge is located approximately two (2) city blocks from Lieutenant's Ruff's district headquarters and is used frequently by the City's officers daily.<sup>41</sup> In addition to the police department, Lieutenant Ruff has personally observed the Philadelphia Fire Department use the Cemetery Avenue bridge frequently.<sup>42</sup>

The Cemetery Avenue bridge bisects the 12th District and its abolishment would create significant problems with the police department's access to both sides.<sup>43</sup> The abolishment would result in increased response time and preventing an officer from responding in a timely manner when backup is needed.<sup>44</sup> A police officer answers calls every day in the vicinity of the Cemetery Avenue bridge.<sup>45</sup> Year to date, there have been

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<sup>39</sup> PennDOT Statement No. 2, pgs. 3-4; City Statement No. 1.

<sup>40</sup> City Statement No. 2, pg. 1.

<sup>41</sup> City Statement No. 2, pg. 2.

<sup>42</sup> City Statement No. 2, pg. 2.

<sup>43</sup> City Statement No. 2, pg. 2.

<sup>44</sup> City Statement No. 2, pg. 2.

<sup>45</sup> City Statement No. 2, pg. 2.

195 confirmed Part 1 crimes (Part 1 crimes, as designated by the FBI's Uniform Crime Reporting Program, are higher grade felonies, such as murder, non-negligent manslaughter, forcible rape, robbery, aggravated assault, burglary, larceny, motor vehicle theft, and arson) in the vicinity of the bridge, and approximately 4,500 calls for service in the immediate area.<sup>46</sup> The Cemetery Avenue bridge would be a primary route to facilitate access to each of these calls.<sup>47</sup>

Lieutenant Ruff acknowledged that there are other bridges which could provide access, but explained that the police and fire department provide emergency responses and that they are hampered by a railroad-created lack of access for 3-5 blocks at a time in the 12th District.<sup>48</sup> Lieutenant Ruff explained that removing one access route for the local emergency responders adds seconds to a response time when seconds really matter, especially in light of the hundreds of Part 1 crimes the police departments responds to in a year.<sup>49</sup> Thus, the Cemetery Avenue bridge is an essential transport option for the City's emergency services and is in the public's interest to remain open.

Moreover, the substantial impact of potentially detouring 5,400 vehicles and 119 pedestrians to other routes in a densely populated area would provide additional stress on those routes, one of which, 65<sup>th</sup> Street, is already on the City's High Injury Network. The High Injury Network is one of a series of highways on which an unusual or concentrated or increased number of accidents are charted over a period of time. The designation is

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<sup>46</sup> City Statement No. 2, pg. 2.

<sup>47</sup> City Statement No. 2, pg. 2.

<sup>48</sup> City Statement No. 2, pg. 2.

<sup>49</sup> City Statement No. 2, pg. 2.

based upon police reports. The pedestrian/bicycle count determined that approximately 119 pedestrians use the Cemetery Avenue bridge daily and the suggested diverted route was to cross the tracks at 65<sup>th</sup> Street. Thus, the suggested detoured route of 65<sup>th</sup> Street, which is the closest route that crosses the railroad tracks, already provides a dangerous condition in normal/current traffic settings, and whose condition will only be exasperated by adding an additional 5,400 vehicles and 119 pedestrians. Notwithstanding the dangerous suggested route of 65<sup>th</sup> Street, the local residents in the urban, low-income area would be forced to walk an additional 1,400 feet to reach the other side of the crossing, resulting in the distance totaling 2,100 feet- three times the original distance.<sup>50</sup>

As stated above, the pedestrian/bicycle count determined that approximately 119 pedestrians use the Cemetery Avenue bridge daily. I&E questions the legitimacy and accuracy of the pedestrian count since it did not take into account the affects of the COVID-19 pandemic, namely schools transitioning to either a virtual format or hybrid format which included both virtual and in-person attendance; a statewide recommendation to stay at home/shelter at home and to quarantine for fourteen (14) days if sick with COVID-19 or after having direct contact with someone who tested positive for COVID-19; record unemployment rates in light of the pandemic and government shutdowns; and individuals who were still working transitioning to teleworking and not commuting to work.<sup>51</sup> Moreover, Mr. William Sinick and Mr. Darin Gatti offered testimony which suggested that the bridge was utilized much more than the study

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<sup>50</sup> CSXT Statement No. 2, pg. 9, Exhibit 5.

<sup>51</sup> N.T. pgs. 60-61.

suggests. Specifically, Mr. Gatti observed several people using the bridge during the February 26, 2020 field conference (pre-COVID-19 pandemic) and noted that people used the bridge as a link between the Woodland Avenue and Cobbs Creek Parkway corridors, two heavily-used arterial roads, and Mr. Sinick observed five (5) pedestrians use the bridge during his roughly 15-minute visit on November 17, 2020.<sup>52</sup>

Notably, the Cemetery Avenue bridge does not have a history of any vehicular or train accidents or conflicts and is statistically the safest route for the traversing public as well as CSXT's trains to navigate the densely populated area. Remarkably, the bridge is an above grade public highway bridge over railroad tracks. It is not lost on I&E that CSXT is attempting to abolish the public roadway and prevent the City from their right and ability to move traffic, people, goods, and services without any indication that the public highway bridge is adversely affecting or creating an unsafe condition to CSXT's tracks or train traffic.

The facts established in this matter are similar to the Commission's decision in *North Lebanon Township v. Pa. P.U.C.*, 962 A.2d 1237 (Pa. Cmwlth. 2008). In *North Lebanon Township*, the Commission denied Norfolk Southern Railway Company's application to abolish the 11<sup>th</sup> Avenue crossing located in North Lebanon Township, City of Lebanon, Lebanon County.<sup>53</sup> The Commission relied upon evidence that there was no prolonged history of accidents, that the increased daily volume of traffic which would be detoured to other roads would worsen the level of service and public safety in the area,

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<sup>52</sup> City Statement No. 1; I&E Rebuttal Testimony, pg. 5, Exhibit A.

<sup>53</sup> *North Lebanon Township v. Pa. P.U.C.*, 962 A.2d 1237, 1240 (Pa. Cmwlth. 2008).

the increased response time for emergency responders, the municipalities' snow removal problems that would be the result of the abolished crossing and the road converting to two (2) dead-end streets, and the little to no visibility of vehicles that would be driving in reverse to exit the dead-ends.<sup>54</sup> Notably, the Commission determined that 11<sup>th</sup> Avenue was used regularly based upon the traffic study performed which indicated that approximately 1,300-1,450 vehicles used the crossing daily and noted that the abolishment would eliminate an alternative route for emergency responders that needed to cross the railroad tracks, especially when the nearby roads were congested.<sup>55</sup> Thus, the Commission denied Norfolk Southern Railway Company's application to abolish and the denial was upheld on appeal by the Commonwealth Court of Pennsylvania.

CSXT may argue that the Cemetery Avenue bridge is redundant and thus can be removed without impacting the City's roadway network or ability to cross the tracks. However, this argument is misguided because the City's roadway network depends on the redundancy to ensure flexibility with interim closures. The Cemetery Avenue bridge is a necessary link to maintain a redundant transportation system and to ensure the ability to cross the railroads tracks in the event one of the other crossings is unavailable.<sup>56</sup>

Accordingly, CSXT's application to abolish the Cemetery Avenue bridge should be denied because the abolishment is not necessary and proper for the service, accommodation, convenience, or safety of the public. As explained above, the abolishment of the bridge would negatively impact the local residents, businesses, and

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<sup>54</sup> Id. at 1243, 1245-1246.

<sup>55</sup> *North Lebanon Township*, 962 A.2d 1237, 1245-1246.

<sup>56</sup> City Statement No. 3, pg. 6; City Statement No. 1.

emergency responders, the bridge does not have a history of accidents or conflicts, a large number of vehicular and pedestrian traffic will be negatively affected, and the bridge is not redundant.

**C. THE PRIORITY MAINTENANCE ITEMS IN THE INSPECTION REPORT NEED TO BE ADDRESSED**

It is well settled that the Commission has exclusive jurisdiction over matters involving railroad-highway crossings, which jurisdiction includes exclusive authority to determine and order which parties shall perform such work at the crossings and which parties shall maintain the crossings in the future.<sup>57</sup> The Commission also has exclusive authority to assess the costs of any work it orders upon the concerned parties in the proceeding in such proper proportions as the Commission may determine.<sup>58</sup> Among the factors which the Commonwealth Court noted as relevant to the assignment of costs and maintenance responsibilities, as noted in *Greene Township v. Pa. P.U.C.*, 668 A.2d 615 (Pa. Cmwlth. 1995), are the following:

- (1) which party built the crossing;
- (2) whether a roadway existed before or after the construction of the crossing;
- (3) relative benefit conferred on each party with the construction of the crossing;
- (4) whether either party is responsible for the deterioration of the crossing which has lead to the need for its repair, replacement or removal; and

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<sup>57</sup> 66 Pa. C.S. §§ 2702, 2704; *AT&T v. Pa. P.U.C.*, 709 A.2d 980 (Pa. Cmwlth. 1998), *appeal granted in part*, 717 A.2d 1022; *Application of the Dep't of Transportation of the Commonwealth of Pennsylvania for Approval to Abolish the Existing Crossing Where S.R. 0522 Crosses at Grade Two Tracks of E. Broad Top R.R. & Coal Co. (Aar 003 135\*) in Cromwell Twp., Huntingdon County; & the Allocation of Costs & Expenses Incident Thereto.*, Docket No. A-00114338, Opinion and Order dated Mar. 14, 2002.

<sup>58</sup> 66 Pa. C.S. § 2704.

- (5) the relative benefit that each party will receive from the repair, replacement or removal of the crossing.

However, while the Commission has considered the foregoing factors to be relevant in the past, this in no way limits the factors that it can consider.<sup>59</sup>

**1. Priority 0 Maintenance Items**

On or about March 30, 2020, the engineering firm of McCormick Taylor completed an interim bridge inspection on Cemetery Avenue, labeled as March 30, 2020 Interim Bridge Inspection Report (“Report”).<sup>60</sup> The Report provided a list of Priority 0 to Priority 5 items that needed to be completed and/or resolved for the continued safe use of the bridge. \*BEGIN CONFIDENTIAL\*

█ [REDACTED]

█ [REDACTED]

█ [REDACTED] \*END

CONFIDENTIAL\*

Per PennDOT policy, Priority 0 items are defined as critical deficiencies that threaten either the structural integrity of the bridge or public safety and are to be addressed with seven (7) days of identification. The pedestrian crossings/sidewalks on the bridge are part of the superstructure, and CSXT has maintenance responsibilities for the superstructure.<sup>61</sup>

<sup>59</sup> *Bell Atlantic-Pa., Inc. v. Pa. P.U.C.*, 672 A.2d 352 (Pa. Cmwlth. 1996).  
<sup>60</sup> City Statement No. 1, Exhibit 3.  
<sup>61</sup> N.T. pg. 46.

The bridge sidewalk is approximately 20 feet above an active railway in a heavily populated area.<sup>62</sup> The pedestrian bridge railing is in substandard condition and poses a dangerous situation for the public, with the potential for small children or adults to slip on the sidewalk or hazard-prone walkway and fall between the exposed areas of the pedestrian railing.<sup>63</sup> The pedestrian railing, in its current condition, does not meet current standards of today or current code safety requirements.<sup>64</sup>

When the bridge was rebuilt in 1961, the 1961 design plans approved by the Commission included an aluminum railing about 3-feet high to the top of the rail with spindles on 6-inch centers the length of the sidewalk on both sides.<sup>65</sup> There was a 4.5 inch gap between each spindle.<sup>66</sup> Today, the railing is made of timber with much more than 4.5 inch spacing between the rails.<sup>67</sup> Specifically, the railing consists of a top rail and bottom rail with a piece of timber which divides the space between and presents a gap large enough that a small child could fall through.<sup>68</sup>

The sidewalk approach is currently grade separated and unsafe for pedestrians.<sup>69</sup> There is a significant height difference between the sidewalk on the bridge and the sidewalk on the approaches, in addition to voids and crevasses between the approaches.<sup>70</sup> Pedestrians and individuals who use a wheelchair or stroller have trouble using the sidewalk due to the massive tripping hazard, not to mention the debris and vegetation.<sup>71</sup>

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<sup>62</sup> I&E Direct Testimony, pg. 7, Exhibits B, E, and F; *see also* CSXT Statement No. 1, pg. 3.

<sup>63</sup> I&E Direct Testimony, pg. 7, Exhibits B, E, and F; City Statement No. 1.

<sup>64</sup> CSXT Statement No. 3, pg. 6; City Statement No. 3, pg. 2; *see generally* I&E Direct Testimony and I&E Rebuttal Testimony; N.T. pg. 109.

<sup>65</sup> N.T. pg. 109; *see also* Late-filed Exhibit 2 and Late-filed Exhibit 3, pg. 2.

<sup>66</sup> N.T. pg. 109; *see also* Late-filed Exhibit 2 and Late-filed Exhibit 3, pg. 2.

<sup>67</sup> N.T. pg. 110, 124-127.

<sup>68</sup> N.T. pg. 110, 124-127.

<sup>69</sup> I&E Direct Testimony, pgs. 6-7.

<sup>70</sup> I&E Direct Testimony, pgs. 6-7.

<sup>71</sup> I&E Direct Testimony, pg. 7, Exhibits A, C, D, and G.

The City is responsible for any maintenance or costs associated with the sidewalk approaches.<sup>72</sup>

Additionally, the bridge is currently load posted for 14-tons with 21-tons for combinations.<sup>73</sup> CSXT replaced damaged floorbeams, specifically floorbeams 19, 20, 21, and 22, in 2016 to restore their design capacity.<sup>74</sup> On October 9, 2017, McCormick Taylor issued a letter indicating that CSXT's replacement of the floorbeams resulted in the bridge no longer requiring posting.<sup>75</sup> As such, the Report noted that, while the bridge is currently posted for 14 tons except combination 21 tons, the bridge posting may be removed.<sup>76</sup> Changing a load posting on a public highway bridge is considered an alteration to the crossing subject to Commission review and approval.<sup>77</sup> The record is void on whether the load posting sign should be removed. The record does contain evidence that the bridge does not require the posting, but it does not contain any evidence on whether the posting is needed or not needed to ensure the usefulness and life-span of the bridge.

Accordingly, I&E requests that Your Honor order the parties to immediately address the Priority 0 items listed in the Report and elevate the public safety issues currently existing at the bridge. Specifically, I&E requests Your Honor to order CSXT to replace any missing railing, if not already completed, and order the City to repair the sidewalk approaches in a safe, smooth, and satisfactory condition to transition from the

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<sup>72</sup> I&E Direct Testimony, pg. 9; *see also B&O Application*, A-00088079 (Order dated October 2, 1961)(“That . . . City of Philadelphia, at its sole cost and expense, furnish all material and do all work necessary thereafter to maintain the highway approaches to the altered crossing, above grade.”)

<sup>73</sup> CSXT Statement No. 1, pg. 3; *see also* March 30, 2020 Interim Bridge Inspection Report.

<sup>74</sup> CSXT Statement No. 1, pg. 5; CSXT Statement No. 3, pg. 3.

<sup>75</sup> CSXT Statement No. 3, Exhibit 6.

<sup>76</sup> City Statement No. 1, Exhibit 3.

<sup>77</sup> N.T. pg. 108.

sidewalk approaches to the sidewalk facilities located on the bridge. In reference to the load posting, I&E does not believe the record is fully developed to warrant the removal of the load posting sign at this time, and requests that Your Honor instruct the filing of an application with the Commission if a party should decide that the load posting sign should be removed.

**2. Priority 1 Maintenance Items**

The Report also listed Priority 1 items that are defined as critical deficiencies that threaten either the structural integrity of the bridge or public safety. Priority 1 items are to be scheduled and completed within six (6) months of notification, if and only if the item will not degrade further or compromise public safety.

\*BEGIN CONFIDENTIAL\* [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] \*END  
CONFIDENTIAL\*

Girders, an essential part of the bridge, are part of the bridge’s superstructure, and CSXT has maintenance responsibilities for the superstructure. If a vehicle impacts the through girder, the girder could buckle and cause a catastrophic collapse of the structure.<sup>78</sup> Today, engineers build bridges with redundancy so that in the event a beam or girder fails, the other beams and girders within the structure will carry the load/tension

<sup>78</sup> N.T. pg. 52; City Statement No. 3, pg. 2.

and prevent a collapse.<sup>79</sup> Thus, the Report listing the addition of a structure-mounted guiderail is warranted and necessary to ensure the ongoing safety and structural condition of the bridge.<sup>80</sup>

As explained above, the current condition of the pedestrian railing and sidewalk is unsafe and poses a public safety threat to the traversing public. Thus, while CSXT should continue to maintain the railing and replace any missing pieces, CSXT should be ordered to install the pedestrian fencing so that the pedestrian railing can be brought up to today's safety standards.

Accordingly, I&E requests that Your Honor order CSXT to immediately submit an application to install structure mounted guide rails across both side of the bridge and to install pedestrian fencing along both sides of the bridge as outlined in the Report.

### **3. Priority 4 Maintenance Item**

Last, the Report listed several items as a Priority 4, \*BEGIN CONFIDENTIAL\*

 \*END

CONFIDENTIAL\* CSXT does not paint bridges, per its own policy.

CSXT's witness, Mr. Derek Mihaly, stated in his rebuttal testimony that "it is CSXT policy to not paint bridges, as painting has no impact on the structural integrity of the bridge."<sup>81</sup> However, when asked at the hearing, Mr. Mihaly changed his position and agreed that painting a bridge structure, such as the Cemetery Avenue bridge, can prevent rust and corrosion, which contribute to the deterioration of the bridge structure.<sup>82</sup>

Accordingly, it is undisputed that painting a steel structure, such as the Cemetery Avenue

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<sup>79</sup> N.T. pgs. 121-122.

<sup>80</sup> N.T. pg. 52; City Statement No. 3, pg. 2.

<sup>81</sup> CSXT Statement No. 3, pg. 4.

<sup>82</sup> N.T. pg. 55.

bridge, will help prevent the accumulation of rust and corrosion on the bridge, thereby enhancing its structural integrity over its design life.

Thus, I&E requests that Your Honor order CSXT to place the painting of the bridge structure on its programming to be completed within a 5-year plan.

In conclusion, acknowledging that the bridge is roughly 60 years old and requires some repairs to ensure its ongoing safety to the public, the Cemetery Avenue bridge is necessary to the City's roadway network, an integral route for local residents and emergency responders, and is clearly within the public's interest to remain open and available to the traversing public. It is important to emphasize that the itemized recommendations provided in the Report do not render the bridge unnecessary or imply that the bridge needs to be abolished. The safety of the bridge is a separate matter, i.e., the Commission does not have to abolish the bridge to make the bridge safe. Instead, repairing the bridge per the recommendations in the Report or replacing the bridge to meet current bridge standards (American Association of State Highway and Transportation Officials and PennDOT Bridge Design Standards and Specifications) will make the bridge safe. To be clear, I&E opposes the application to abolish the Cemetery Avenue bridge and stands firm in its position that the current safety issues raised in the Report need to be immediately addressed.

**D. ANCILLARY ISSUES RAISED DURING THE EVIDENTIARY HEARING**

During the February 9, 2021 evidentiary hearing, CSXT and the City raised two ancillary issues for the first time. First, CSXT objected to the City's assertion that CSXT owns the Cemetery Avenue bridge. As stated above, an 1885 City ordinance authorized

the railroad, B&O Railroad at the time, to construct the Cemetery Avenue bridge crossing with the requirement that the railroad maintain the crossing. The bridge was constructed in 1886 and reconstructed in 1961 after a train derailment. At some time after 1961, CSXT acquired the tracks under the Cemetery Avenue bridge<sup>83</sup> and became responsible for the maintenance responsibilities as described in this brief.

CSXT points to *City of Philadelphia v. Consolidated Rail Corporation*, 747 A.2d 352 (Pa. 2000) to support its position that the City is the owner of the bridge. In *City of Philadelphia v. Consolidated Rail Corporation*, the Supreme Court of Pennsylvania applied the common law principle that “where a railroad company has constructed at its own expense a bridge over its tracks at a street crossing, and the bridge is to constitute part of the public highway *and be maintained by the municipality*, title to the bridge rests in the municipality.”<sup>84</sup> The Supreme Court pointed to the plain language of the City ordinance and its silence on the ownership of the bridge to find that the City, in that case, owned the bridge once it became a part of the City’s street.<sup>85</sup>

Nevertheless, while CSXT has challenged the City’s position on the Cemetery Avenue bridge’s ownership, ownership is not a controlling factor considered in allocating costs and/or maintenance.<sup>86</sup> The relevant factors traditionally considered in allocating the costs include, but are not limited to: (1) the party who originally built, owned and maintained the crossing; (2) the relative benefits initially conferred by the construction of the crossing; (3) the party who is responsible for the deterioration of the crossing; and (4)

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<sup>83</sup> The record is not clear when CSXT acquired the B&O Railroad tracks or under what circumstances.

<sup>84</sup> *City of Philadelphia v. Consolidated Rail Corporation*, 747 A.2d 352, 354 (Pa. 2000)(emphasis added).

<sup>85</sup> *City of Philadelphia v. Consolidated Rail Corporation*, 747 A.2d 352 (Pa. 2000).

<sup>86</sup> *Trustees of Property of Penn Central Transportation Company v. United States Ry. Assoc.*, 463 F. Supp. 1321, 1328 (Special Ct. 1979)(“ the issue of costs of future maintenance and repair is separable from the issue of compensation for property rights appropriated.”)

the benefits accrued from the reconstruction of the crossing.<sup>87</sup> These factors are neither mandatory nor exclusive of other considerations, and the Commission's allocation of cost will stand as long as the allocation is just and reasonable and has a sound legal and factual basis.<sup>88</sup>

The record is clear that CSXT's predecessor built the bridge, CSXT is responsible for maintaining the bridge, both parties receive a benefit from the bridge (CSXT benefits from having a safe route to traverse a densely populated area and the City benefits from having the ability to safely cross CSXT's tracks), and that CSXT is the party responsible for the bridge's deterioration due to its lack of maintenance to the bridge evidenced by the *fracture critical* nature of the bridge and specific findings of deterioration in the Report. Thus, I&E does not possess a formal position on the bridge's ownership because the real public safety concern centers around who is responsible for the bridge's maintenance and the costs associated with such maintenance.

Second, during the hearing, the City raised the question of whether the Cemetery Avenue bridge is currently covered in lead-based paint. It is undisputed that the Commission's original certified stamped bridge plans indicate that red and black lead-based paint would be used on the steel structure. \*START CONFIDENTIAL\*

[REDACTED]

[REDACTED] \*END

CONFIDENTIAL\*

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<sup>87</sup> *Wheeling & Lake Erie Railway Co. v. Pa. P.U.C.*, 778 A.2d 785, 793 (Pa. Cmwlth. 2001).

<sup>88</sup> *AT&T v. Pa. P.U.C.*, 737 A.2d 201, 209 (Pa. 1999); *Wheeling & Lake Erie Railway Co.*, 778 A.2d at 793.

<sup>89</sup> City Statement No. 1, Exhibit 3.

As such, the record does not contain enough information on whether the Cemetery Avenue bridge is currently covered in lead-based paint. I&E requests that, in the event the Application is granted or a subsequent application is filed seeking to replace the bridge in its entirety, a study be completed to ascertain whether or not the bridge is currently painted with lead-based paint and what remedial steps will be taken if lead-based paint exists.

## **VI. CONCLUSION**

I&E respectfully requests that presiding ALJ Heep and the Commission find that CSXT's application to abolish the Cemetery Avenue crossing is not in the public interest and is therefore denied. Furthermore, I&E respectfully requests that Your Honor instruct the parties to address the Priority 0 and 1 maintenance items immediately and as explained in this Main Brief, as well as the other Priority items in a timely manner.

Respectfully submitted,



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Dated: April 1, 2021

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of CSX Transportation, Inc. :  
for Approval of the Abolition of the :  
Crossing (DOT 140 634 G) where :  
Cemetery Avenue crosses above grade the : Docket No. A-2019-3013783  
tracks of CSX Transportation, Inc. located :  
in the City of Philadelphia, Philadelphia :  
County, Pennsylvania, and the allocation :  
of cost thereto. :

**PROPOSED STATEMENT OF FACTS**

1. The corporate name of the railroad is CSX Transportation, Inc (“CSXT”) with a business address of 4 Neshaminy Interplex, Suite 205, Trevose, PA 19053.<sup>1</sup>

2. CSXT is the owner and operator of the railroad tracks located under the Cemetery Avenue highway bridge.<sup>2</sup>

3. By letter dated October 24, 2019, CSXT submitted an application (“Application”) for approval to abolish the public rail-highway crossing where CSXT’s tracks cross under a highway bridge carrying Cemetery Avenue in the City of Philadelphia. The Application stated that CSXT will bear all costs associated with removing the crossing and constructing any barricades, in addition to future maintenance of the remaining abutments.<sup>3</sup>

4. Receipt of CSXT’s Application by the Public Utility Commission (“Commission”) was confirmed by Secretarial Letter dated October 24, 2019.

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<sup>1</sup> CSXT Statement No. 1, pg. 2.

<sup>2</sup> CSXT Statement No. 1, pg. 2.

<sup>3</sup> See generally CSXT’s October 24, 2019 Application; CSXT Statement No. 1, pg. 6.

5. An initial field investigation and conference was held on February 26, 2020. The Commission's Bureau of Technical Utility Services, Rail Safety Section ("Rail Safety"), the Pennsylvania Department of Transportation ("PennDOT"), CSXT, the Philadelphia Water Department, the City of Philadelphia Department of Streets, and a local landowner attended the field conference.

6. On August 11, 2020, Rail Safety requested that the matter be referred to the Office of Administrative Law Judge, noting that two parties objected to the abolition of Cemetery Avenue at the field conference.

7. On August 19, 2020, a Call-in Telephone Conference Notice was issued, scheduling a telephonic prehearing conference for September 29, 2020 before Administrative Law Judge Darlene Heep. On August 20, 2020, a Prehearing Conference Order was issued.

8. On August 26, 2020, a corrected Hearing Notice and Prehearing Order were issued, converting the Initial Telephone Conference into a Prehearing Conference. The parties were instructed to provide Prehearing Memoranda no later than noon on September 28, 2020. I&E, PennDOT, CSXT, and the City of Philadelphia ("the City") submitted timely prehearing memos and participated in the September 29, 2020 prehearing conference.

9. On October 7, 2020, Administrative Law Judge ("ALJ") Darlene D. Heep issued a Prehearing Order scheduling an evidentiary hearing on February 9-10, 2021 and instructing the parties to submit written testimony by December 18, 2020 and rebuttal testimony by January 22, 2021.

10. On December 3, 2020, I&E issued a letter to CSXT and the City notifying the parties of the Priority 0 and Priority 1 maintenance items of the March 30, 2020 Bridge Inspection Report which have not been addressed, thus creating an unsafe condition. Pursuant to PennDOT's Bridge Safety Inspection Manual, the Priority 0 items were to be resolved or mitigated in seven (7) days and the Priority 1 items were to be resolved or mitigated in six (6) months. I&E urged the parties to complete any necessary repairs or actions needed to alleviate the Priority 0 and Priority 1 maintenance items.

11. On December 4, 2020, the City filed an unopposed Motion for Protective Order for the March 30, 2020 Interim Bridge Inspection Report.

12. On December 14, 2020, ALJ Heep granted the Motion for Protective Order and marked the March 30, 2020 Interim Bridge Inspection Report as "CONFIDENTIAL."

13. On December 17, 2020, PennDOT submitted its written direct testimony.

14. On December 18, 2020, I&E, CSXT, and the City submitted their written direct testimony. Also, on December 18, 2020, CSXT issued a letter to I&E in response to its December 3, 2020 letter. CSXT claimed that the City was in the process of resolving three (3) of the items which were its responsibility and that CSXT recently replaced the missing pedestrian railing. CSXT further disputed two (2) of the items listed as Priority 1 items.

15. On January 22, 2021, I&E, PennDOT, CSXT, and the City submitted written rebuttal testimony.

16. On February 9, 2021, shortly before the hearing began, CSXT emailed two (2) cross examination exhibits to the parties. I&E and the City objected to Cross Examination Exhibit 2 on the basis of hearsay, inability for the parties to cross-examine the drafter of the memo, and the purported opinion not being supported by any analysis.<sup>4</sup>

17. The hearing occurred as scheduled on February 9, 2021 and was attended by I&E, PennDOT, CSXT, and the City.

18. On February 18, 2021, the City served and offered a late-filed exhibit labeled “Existing Cemetery Avenue 1960” into the record.

19. On February 22, 2021, I&E compared the late-filed exhibit to the original certified design plans and noted that the Commission’s certified plans match the dates, initials, and signatures of the late-filed exhibit offered by the City. However, the late-filed exhibit provided by the City was missing the last 3 pages of the Commission’s plans and the Commission’s plans did not include the last white sheet entitled “Details of Repairs.” I&E explained that if the City’s intention to providing the late-filed exhibit was to offer proof of lead-based paint, then I&E had no objection to the exhibit as the original and the proposed exhibit contain language that lead-based paint would be used. I&E informed ALJ Heep and the parties that it and Rail Safety were looking into other ways to have the original plans scanned outside the Commission’s normal resources.

20. On February 23, 2021, CSXT lodged its objection to the City’s late-filed exhibit.

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<sup>4</sup> N.T. pg. 35.

21. On February 25, 2021, I&E provided the scanned certified stamped bridge design plans, labeled as Cemetery Avenue Bridge Plan Stamp 1<sup>st</sup> page City of Philadelphia Co. and Cemetery Avenue Bridge Certified Plans City of Philadelphia Co., to the parties and ALJ Heep.

22. On February 26, 2021, CSXT noted its ongoing objection to any decision regarding the lead-based paint issue which was raised by the City.

23. On March 10, 2021, an Evidence and Briefing Order was issued, directing the parties to submit main briefs by April 1, 2021 and reply briefs by April 22, 2021. In addition to setting the briefing schedule, ALJ Heep admitted the City's and I&E's late filed exhibits and directed the submission of these exhibits by March 15, 2021.

24. CSXT, as the proponent of the application to abolish, holds the position that the bridge should be abolished because it is redundant. CSXT's position is that if the bridge is not abolished, then maintenance responsibilities should be reassigned to the City because CSXT does not benefit from the crossing.<sup>5</sup>

25. The City's position is that the application should be denied because the bridge is used by the public, including emergency services, and that its closure will affect residences, businesses, and emergency services. The City objects to any reassignment of maintenance responsibilities, noting that placing the burden of maintenance on the City would be an inequitable resolution for the residents and the City itself.<sup>6</sup>

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<sup>5</sup> N.T. pg. 25; CSXT Statement No. 1, pg. 7.

<sup>6</sup> N.T. pgs. 26-27.

26. PennDOT is of the position that this is a local matter, but that it has some concerns related to the other modes of transportation that may be affected by the abolishment of the bridge.<sup>7</sup>

27. I&E objects to the application to abolish as not being in the public's interest and requested that the Commission order the immediate resolution of the Priority 0 and 1 maintenance items in the March 30, 2020 Interim Bridge Inspection Report. I&E's immediate safety concern with the bridge is the bridge and sidewalk approaches and the pedestrian railing.<sup>8</sup>

28. CSXT presented the testimony of Derek Mihaly, P.E. and Gregory E. Creasy, P.E.

29. The City presented the testimony of Darren L. Gatti, P.E. and Lieutenant Joseph Ruff.

30. PennDOT presented the testimony of Mary Ann Lang and Charles H. Davies, P.E.

31. I&E presented the testimony of William Sinick, P.E.

32. The subject crossing is a public highway bridge over railroad tracks located in the City of Philadelphia. The bridge is bordered by a vacant lot, a storage facility, residential housing, and a commercial facility that appears to be an auto body shop and/or scrap yard.<sup>9</sup>

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<sup>7</sup> N.T. pg. 27; *see also* PennDOT Statement No. 2, pg. 2.

<sup>8</sup> N.T. pg. 27-28; I&E Direct Testimony, pg. 8.

<sup>9</sup> City Statement No. 1.

33. The specific location of the bridge is in an urban environment consisting of more density of people, businesses, and services.<sup>10</sup>

34. In an 1885 City ordinance, signed by the mayor on July 3 of 1885, the City authorized the crossing of Cemetery Avenue by the railroad, conditioned upon the approval by the Chief Engineer of the City and the requirement that the railroad maintain the facility carrying the street over the rail line.<sup>11</sup>

35. The public highway bridge is a single span fracture critical, steel through girder bridge structure that is 88 feet long and 48.3 feet wide with a curb-to-curb width of 30 feet. The bridge was first constructed in 1886 by the Baltimore and Ohio Railroad (“B&O Railroad”) and reconstructed in 1961 by the B&O Railroad after a train derailment.<sup>12</sup>

36. Fracture critical is defined as “a steel member in tension, or with a tension element, whose failure would probably cause a portion of or the entire bridge to collapse.” Fracture critical bridges are more expensive to maintain, are generally more problematic than other types of bridge structures and are systematically being replaced in this state and across the country.<sup>13</sup>

37. Due to the fracture critical designation of the bridge, the failure of one of the girders would result in the whole bridge collapsing. Today, engineers build bridges

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<sup>10</sup> N.T. pg. 74.

<sup>11</sup> City Statement No. 1, Exhibit 1.

<sup>12</sup> I&E Direct Testimony, pgs. 3-4; CSXT Statement No. 1, pg. 3.; *see also Application of The Baltimore and Ohio Railroad Company for approval of the alteration of the crossing where Cemetery Avenue crosses above the grade of the tracks of said company, in the City of Philadelphia, and the allocation of the costs and expenses incident thereto*, A-00088079, filed April 14, 1961 (hereinafter “B&O Application”).

<sup>13</sup> I&E Rebuttal Testimony, pg. 3, I&E Exhibit J.

with redundancy so that in the event a beam or girder fails, the other beams and girders within the structure will carry the load/tension and prevent a collapse.<sup>14</sup>

38. The bridge has two (2) main components, the substructure and the superstructure.

39. The substructure supports the superstructure and transfers all the bridge loading to the foundations beneath the ground. The bridge has two (2) substructures (abutments) each consisting of stone masonry elements and reinforced concrete elements, and are located at each end of the bridge.<sup>15</sup>

40. The superstructure is comprised of two (2) steel through girders connected together with a steel floorbeam system. The floorbeam system primarily supports the bridge deck, roadway, and vehicle loading.<sup>16</sup>

41. The sidewalk, bridge pedestrian railing, and pedestrian loading on this structure are primarily supported by steel support angles which are directly connected to the two (2) main girders. The support angles and floorbeams transfer all the bridge loading to the two (2) steel main through girders which in turn carries and transfers all the loading to the substructures.<sup>17</sup>

42. The bridge currently has a load posting limit of 14-tons with 21-tons for combinations.<sup>18</sup>

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<sup>14</sup> N.T. pgs. 121-122.

<sup>15</sup> I&E Direct Testimony, pg. 4.

<sup>16</sup> I&E Direct Testimony, pg. 4.

<sup>17</sup> I&E Direct Testimony, pg. 4.

<sup>18</sup> CSXT Statement No. 1, pg. 3; *see also* March 30, 2020 Interim Bridge Inspection Report.

43. CSXT is responsible for the maintenance and any costs associated with the bridge pedestrian railing, bridge sidewalk, bridge concrete deck, substructures, superstructures, and bridge expansion joints.<sup>19</sup>

44. The City is responsible for the maintenance and any costs associated with the roadway, bridge regulatory and advanced warning signs, sidewalk approaches, roadway approaches, and roadway surface across the bridge.<sup>20</sup>

45. Per City Code Section 11-505(1), sidewalks of all public streets must be maintained and repaired by the property owners whose property the sidewalk fronts. While the sidewalks are the property owner's responsibility, by law, the property owners will be notified and given an opportunity to cure the defect before the City can fix the issue and bill the owner.<sup>21</sup>

46. PennDOT has the legal obligation to make sure that all bridges over twenty (20) feet are inspected, including the Cemetery Avenue bridge. PennDOT has an agreement with a consultant to inspect the bridge, and the inspection is paid with federal funds and withheld liquid fuels funds.<sup>22</sup>

47. CSXT replaced damaged floorbeams, specifically floorbeams 19, 20, 21, and 22, in 2016 to restore their design capacity.<sup>23</sup>

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<sup>19</sup> I&E Direct Testimony, pg. 9; *see also B&O Application*, A-00088079 (Order dated October 2, 1961)(“That . . . The Baltimore and Ohio Railroad Company, at its sole cost and expense, furnish all material and do all work necessary thereafter to maintain the remainder of the crossing improvement, including the entire substructure and superstructure of the altered bridge.”); *see also* PennDOT Statement No. 3, pg. 2.

<sup>20</sup> I&E Direct Testimony, pg. 9; *see also B&O Application*, A-00088079 (Order dated October 2, 1961)(“That . . . City of Philadelphia, at its sole cost and expense, furnish all material and do all work necessary thereafter to maintain the highway approaches to the altered crossing, above grade.”)

<sup>21</sup> City Statement No. 3, pg. 4.

<sup>22</sup> PennDOT Statement No. 3, pg. 1; I&E Direct Testimony, pgs. 2-3.

<sup>23</sup> CSXT Statement No. 1, pg. 5; CSXT Statement No. 3, pg. 3.

48. On October 9, 2017, the civil engineering firm McCormick Taylor issued a letter indicating that CSXT's replacement of the floorbeams resulted in the bridge no longer requiring posting.<sup>24</sup>

49. On or about March 30, 2020, the civil engineering firm McCormick Taylor completed an interim bridge inspection on Cemetery Avenue, labeled as March 30, 2020 Interim Bridge Inspection Report ("Report").<sup>25</sup>

50. The Report was conducted according to National Bridge Inspection Standards ("NBIS") and is an important document for professional engineers to ensure that the requirements for public safety and structural integrity are met.<sup>26</sup>

51. The Report stated that the bridge is currently posted for 14 tons except combination 21 tons but recommended that the bridge posting may be removed.<sup>27</sup>

52. Changing a load posting on a public highway bridge is considered an alteration to the crossing which is subject to Commission review and approval.<sup>28</sup>

53. The City has not changed or removed the load posting sign at Cemetery Bridge following receipt of the Report. The City stated that it will remove the signs if directed to by the bridge owner, CSXT. CSXT disputes that it is the owner of the bridge.<sup>29</sup>

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<sup>24</sup> CSXT Statement No. 3, Exhibit 6.

<sup>25</sup> City Statement No. 1, Exhibit 3.

<sup>26</sup> I&E Direct Testimony, pgs. 2-3.

<sup>27</sup> City Statement No. 1, Exhibit 3.

<sup>28</sup> N.T. pg. 108.

<sup>29</sup> N.T. pgs. 86-87, 89.

54. The owner of the bridge has the authority and ability to post a load limit lower than the calculated capacity of the bridge to preserve the bridge's useful life.<sup>30</sup>

55. The Report provided a list of Priority 0 to Priority 5 maintenance items that needed to be completed and/or resolved for the continued safe use of the bridge.<sup>31</sup>

56. \*BEGIN CONFIDENTIAL\* [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] \*END CONFIDENTIAL\*

57. Per PennDOT policy, Priority 0 maintenance items are defined as critical deficiencies that threaten either the structural integrity of the bridge or public safety. Priority 0 maintenance items are to be addressed within seven (7) days of identification.<sup>33</sup>

58. The pedestrian crossings/sidewalks on the bridge are part of the superstructure, and CSXT has maintenance responsibilities for the superstructure.<sup>34</sup>

59. The bridge sidewalk is approximately 20 feet above an active railway in a heavily populated area.<sup>35</sup>

60. The sidewalk is currently grade separated and unsafe for pedestrians. There is a significant height difference between the sidewalk on the bridge and the sidewalk on

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<sup>30</sup> N.T. pg. 88.

<sup>31</sup> City Statement No. 1, Exhibit 3.

<sup>32</sup> City Statement No. 1, Exhibit 3.

<sup>33</sup> I&E Direct Testimony, pgs. 4-5.

<sup>34</sup> N.T. pg. 46.

<sup>35</sup> I&E Direct Testimony, pg. 7, Exhibits B, E, and F; *see also* CSXT Statement No. 1, pg. 3.

the approaches, in addition to voids and crevasses between the approaches.<sup>36</sup>

61. Pedestrians and individuals who use a wheelchair or stroller have trouble using the sidewalk due to the massive tripping hazard, not to mention the debris and vegetation.<sup>37</sup>

62. The pedestrian bridge railing is in substandard condition and poses a dangerous situation for the public, with the potential for small children or adults to slip on the sidewalk or hazard-prone walkway and fall between the exposed areas of the pedestrian railing.<sup>38</sup>

63. The parties agree that the pedestrian railing, in its current condition, does not meet current standards of today or current code safety requirements.<sup>39</sup>

64. When the bridge was rebuilt in 1961, the 1961 design plans approved by the Commission included an aluminum railing about 3-feet high to the top of the rail with spindles on 6-inch centers the length of the sidewalk on both sides. There was a 4.5 inch gap between each spindle.<sup>40</sup>

65. Today, the railing is made of timber with much more than 4.5 inch spacing between the rails. Specifically, the railing consists of a top rail and bottom rail with a piece of timber which divides the space between and presents a gap large enough that a small child could fall through.<sup>41</sup>

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<sup>36</sup> I&E Direct Testimony, pgs. 6-7.

<sup>37</sup> I&E Direct Testimony, pg. 7, Exhibits A, C, D, and G.

<sup>38</sup> I&E Direct Testimony, pg. 7, Exhibits B, E, and F; City Statement No. 1.

<sup>39</sup> CSXT Statement No. 3, pg. 6; City Statement No. 3, pg. 2; *see generally* I&E Direct Testimony and I&E Rebuttal Testimony; N.T. pg. 109.

<sup>40</sup> N.T. pg. 109; *see also* Late-filed Exhibit 2 and Late-filed Exhibit 3, pg. 2.

<sup>41</sup> N.T. pg. 110, 124-127.

66. Any change made to the pedestrian railing would be considered an alteration to the crossing subject to Commission review and approval.<sup>42</sup>

67. \*BEGIN CONFIDENTIAL\* [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] \*END  
CONFIDENTIAL\*

68. Per PennDOT policy, Priority 1 maintenance items are defined as critical deficiencies that threaten either the structural integrity of the bridge or public safety. Priority 1 maintenance items are to be scheduled and completed within six (6) months of notification, if and only if the item will not degrade further or compromise public safety.<sup>44</sup>

69. The pedestrian railing in its current condition is unsafe to the traversing public, thus installing pedestrian fencing as recommended by the Report and in accordance with current Pennsylvania highway bridge standards will address the substandard timber railing and the safety hazards currently existing at the Cemetery Avenue bridge.<sup>45</sup>

70. Girders are part of the bridge's superstructure, and CSXT has maintenance responsibilities for the superstructure.<sup>46</sup>

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<sup>42</sup> N.T. pg. 110.

<sup>43</sup> City Statement No. 1, Exhibit 3.

<sup>44</sup> I&E Direct Testimony, pgs. 4-5.

<sup>45</sup> CSXT Statement No. 3, pg. 6; City Statement No. 1, Exhibit 3; City Statement No. 3, pg. 2; see generally I&E Direct Testimony and I&E Rebuttal Testimony; N.T. pg. 109.

<sup>46</sup> N.T. pg. 43.

71. Girders are an essential part of the bridge. If a vehicle impacts the through girder, the girder could buckle and cause a catastrophic collapse of the structure. Thus, the Report listing the addition of a structure-mounted guiderail is warranted and necessary to ensure the ongoing safety and structural condition of the bridge.<sup>47</sup>

72. \*BEGIN CONFIDENTIAL\* [REDACTED]

[REDACTED] \*END CONFIDENTIAL\*

73. Per the Commission's certified stamped copy of the 1960 design plans, the bridge was to be painted with red and black lead-based paint.<sup>49</sup>

74. \*START CONFIDENTIAL\* [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] \*END CONFIDENTIAL\*

75. CSXT does not paint bridges, per its own policy.<sup>51</sup>

76. Painting a bridge structure, such as the Cemetery Avenue bridge, can prevent rust and corrosion, which contribute to the deterioration and degradation of the

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<sup>47</sup> N.T. pg. 52; City Statement No. 3, pg. 2.  
<sup>48</sup> City Statement No. 1, Exhibit 3.  
<sup>49</sup> Late-filed Exhibit 2; Late-filed Exhibit 3.  
<sup>50</sup> City Statement No. 1, Exhibit 3.  
<sup>51</sup> N.T. pg. 55.

structural integrity of the bridge structure. Painting the structure protects the steel members from corrosion and reduction in section loss.<sup>52</sup>

77. The City was made aware of the Priority items by letter dated March 31, 2020. CSXT was not sent a notification letter but was aware of the Priority items.<sup>53</sup>

78. On behalf of CSXT, Grove Miller Engineering completed the Traffic Impact Study in August 2019.<sup>54</sup>

79. Mr. Gregory Creasy of Grove Miller Engineering did not consult with any local people in completing the study, including school districts, bus routes, EMS, police departments, fire departments, the City's Streets Department, the City's Traffic Engineer, or anyone else local to the affected area.<sup>55</sup>

80. Per the Traffic Impact Study, the average daily traffic on the Cemetery Avenue bridge is approximately 5,400 vehicles.<sup>56</sup>

81. The Traffic Impact Study recommended detouring traffic to Kingsessing Avenue, 65<sup>th</sup> Street, 61<sup>st</sup> Street, Greenway Avenue, and Woodland Avenue.<sup>57</sup>

82. 65<sup>th</sup> Street is on the City's High Injury Network. The High Injury Network is one of a series of highways on which an unusual or concentrated or increased number of accidents are charted over a period of time. The designation is based upon police reports.<sup>58</sup>

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<sup>52</sup> N.T. pg. 55, 111.

<sup>53</sup> City Statement No. 1, Exhibit 3.

<sup>54</sup> CSXT Statement No. 2, Exhibit 4.

<sup>55</sup> N.T. pgs. 65-66.

<sup>56</sup> CSXT Statement No. 2, pg. 5, Exhibit 4.

<sup>57</sup> CSXT Statement No. 2, pg. 5, Exhibit 4.

<sup>58</sup> N.T. pg. 68, 104; PennDOT Statement No. 2, pg. 3.

83. Mr. Creasy opined that Cemetery Avenue is utilized more by local traffic and commuter traffic, and that out-of-town traffic would utilize more major highways such as Kingsessing Avenue or 65<sup>th</sup> Street or Woodland Avenue.<sup>59</sup>

84. The City's regulations require a cul-de-sac if a street is turned into a dead end.<sup>60</sup>

85. If cul-de-sacs are not constructed at the dead-end streets, the City will lose its liquid fuels money for the length of Cemetery Avenue.<sup>61</sup>

86. Cemetery Avenue is a Federal Aid Route, and thus is eligible for federal funds. However, if the bridge is removed, it is possible that Cemetery Avenue will lose its Federal Aid Route designation and not be eligible for federal funds.<sup>62</sup>

87. Closing the bridge and abolishing the crossing would impact local commercial businesses' drive-by exposure. Moreover, bigger vehicles, such as ambulances, trash trucks, and delivery vehicles, have a bigger turning radius and would have more difficulty attempting to leave the dead-end street, if not an impossible task.<sup>63</sup>

88. The neighborhood is generally low-income residential, and removal of the bridge assumes the ability of nearby residents to physically get to the other bridges or financially have the means to easily travel the extra distance.<sup>64</sup>

89. All roadway networks require some redundancy to ensure their ability to

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<sup>59</sup> N.T. pgs. 79-80.

<sup>60</sup> N.T. pg. 68.

<sup>61</sup> PennDOT Statement No. 2, pg. 3; City Statement No. 1.

<sup>62</sup> PennDOT Statement No. 2, pg. 4; City Statement No. 1.

<sup>63</sup> N.T. pg. 67.

<sup>64</sup> City Statement No. 1.

flexibly manage interim closures. The Cemetery Avenue bridge is a necessary link to maintain a redundant transportation system and to ensure the ability to cross the railroad tracks in the event one of the other crossings is unavailable.<sup>65</sup>

90. The pedestrian/bicycle count (“the Count”) was completed on Wednesday, September 2, 2020.<sup>66</sup>

91. The Count determined that approximately 119 pedestrians use the crossing a day.<sup>67</sup>

92. During the February 26, 2020 field conference, Mr. Darin Gatti observed several people walking over the bridge and opined that the bridge is a routinely used link between the Woodland Avenue and Cobbs Creek Parkway corridors, two heavily-used arterial roads.<sup>68</sup>

93. Mr. William Sinick visited the Cemetery Avenue bridge on Tuesday, November 17, 2020, and saw at least five (5) pedestrians use the crossing during an approximate 15-minute timeframe.<sup>69</sup>

94. Mr. Creasy believes that pedestrian traffic will likely be diverted to Kingsessing Avenue and Greenway Avenue and crossing the railroad tracks at 65<sup>th</sup> Street.<sup>70</sup>

95. The additional walking distance for pedestrians to walk from the

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<sup>65</sup> City Statement No. 3, pg. 6; City Statement No. 1.

<sup>66</sup> N.T. pg. 60.

<sup>67</sup> CSXT Statement No. 2, pg. 9.

<sup>68</sup> City Statement No. 1.

<sup>69</sup> I&E Rebuttal Testimony, pg. 5; *see also* I&E Exhibit A.

<sup>70</sup> N.T. pg. 69.

intersection of Kingsessing Avenue/Cemetery Avenue to Greenway Avenue/Cemetery Avenue is 1,400 feet (the existing route from intersection to intersection totaling 700 feet and the suggested route totaling 2,100 feet).<sup>71</sup>

96. The subject crossing is located in an urban environment, which would involve more houses and people than it would a suburban setting and closing this type of public crossing will inconvenience more people surrounding the bridge.<sup>72</sup>

97. In 2020, Pennsylvania was dealing with a pandemic, commonly referred to as the COVID-19 virus. As consequence to the pandemic, schools transitioned to either a virtual format or hybrid format which included both virtual and in-person attendance. Additionally, Pennsylvania issued a statewide recommendation to stay at home/shelter at home and to quarantine for fourteen (14) days if sick with COVID-19 or after having direct contact with someone who tested positive for COVID-19. Moreover, Pennsylvania suffered record unemployment rates in light of the pandemic and government shutdowns, and those individuals who were still working transitioned to teleworking and not commuting to work.<sup>73</sup>

98. The pedestrian/bicycle count does not take into account the effects of the COVID-19 pandemic, such as fewer pedestrians crossing the bridge in light of recent unemployment or students not attending in-person instruction.<sup>74</sup>

99. Lieutenant Joseph Ruff is a lieutenant with the Philadelphia Police

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<sup>71</sup> CSXT Statement No. 2, pg. 9, Exhibit 5.

<sup>72</sup> N.T. pg. 74.

<sup>73</sup> N.T. pgs. 60-61.

<sup>74</sup> N.T. pg. 61.

Department 12<sup>th</sup> District located on Woodland Avenue in Philadelphia. Lieutenant Ruff has been a police officer for 27 years, the last 9 years as a lieutenant.<sup>75</sup>

100. The Cemetery Avenue bridge is located approximately two (2) city blocks from Lieutenant's Ruff's district headquarters and is used frequently by the City's officers daily.<sup>76</sup>

101. A police officer answers calls every day in the vicinity of the Cemetery Avenue bridge. Year to date, there have been 195 confirmed Part 1 crimes in the vicinity of the bridge, and approximately 4,500 calls for service in the immediate area. The Cemetery Avenue bridge would be a primary route to facilitate access to each of these calls.<sup>77</sup>

102. Part 1 crimes, as designated by the FBI's Uniform Crime Reporting Program, are higher grade felonies, such as murder, non-negligent manslaughter, forcible rape, robbery, aggravated assault, burglary, larceny, motor vehicle theft, and arson.<sup>78</sup>

103. Lieutenant Ruff has personally observed the Philadelphia Fire Department use the Cemetery Avenue bridge frequently.<sup>79</sup>

104. The Cemetery Avenue bridge bisects the 12<sup>th</sup> District, and its abolishment would create significant problems with the police department's access to both sides. The abolishment would result in increased response time and prevent an officer from

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<sup>75</sup> City Statement No. 2, pg. 1.

<sup>76</sup> City Statement No. 2, pg. 1.

<sup>77</sup> City Statement No. 2, pg. 2.

<sup>78</sup> City Statement No. 2, pg. 2.

<sup>79</sup> City Statement No. 2, pg. 2.

responding in a timely manner when backup is needed.<sup>80</sup>

105. Lieutenant Ruff acknowledged the other bridges which could provide access but explained that the police and fire department provide emergency responses and that they are hampered by a railroad-created lack of access for 3-5 blocks at a time in the 12<sup>th</sup> District.<sup>81</sup>

106. Removing one access route for the local emergency responders adds seconds to a response time when seconds really matter, especially in light of the hundreds of Part 1 crimes the police department responds to in a year.<sup>82</sup>

107. The Cemetery Avenue bridge is an essential transport option for the City's emergency services.<sup>83</sup>

108. The removal and abolishment of the bridge would put an undue burden on the City and adversely affect the low-income community surrounding the bridge on both sides.<sup>84</sup>

109. The Cemetery Avenue bridge has not been a source of rail or vehicular conflicts or accidents, and thus provides the statistically safest route for the traversing public in addition to CSXT's trains as both navigate through the densely populated area.<sup>85</sup>

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<sup>80</sup> City Statement No. 2, pg. 2.

<sup>81</sup> City Statement No. 2, pg. 2.

<sup>82</sup> City Statement No. 2, pg. 2.

<sup>83</sup> City Statement No. 2, pg. 2.

<sup>84</sup> I&E Rebuttal Testimony, pg. 4; *see generally* City Statement 1.

<sup>85</sup> I&E Rebuttal Testimony, pg. 9.

110. The safety of the bridge is a separate matter, i.e., the Commission does not have to abolish the bridge to make the bridge safe. Instead, repairing the bridge per the recommendations in the Report or replacing the bridge to meet current bridge standards (American Association of State Highway and Transportation Officials and PennDOT Bridge Design Standards and Specifications) will make the bridge safe.<sup>86</sup>

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<sup>86</sup> I&E Rebuttal Testimony, pg. 2.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of CSX Transportation, Inc. :  
for Approval of the Abolition of the :  
Crossing (DOT 140 634 G) where :  
Cemetery Avenue crosses above grade the : Docket No. A-2019-3013783  
tracks of CSX Transportation, Inc. located :  
in the City of Philadelphia, Philadelphia :  
County, Pennsylvania, and the allocation :  
of cost thereto. :

**PROPOSED CONCLUSIONS OF LAW**

1. The Public Utility Commission (“Commission”) has jurisdiction over the subject matter of and the parties to this proceeding. 66 Pa.C.S. §§ 2702 and 2704.
2. The Commission has the authority to order the construction, reconstruction, alteration, relocation, repair, maintenance, protection, suspension or abolition of railroad crossings, and the authority to determine and order which concerned parties should perform such work, in order to prevent accidents and promote the safety of the public. 66 Pa.C.S. §§2702 and 2704.
3. The Commission’s Bureau of Investigation and Enforcement, the Pennsylvania Department of Transportation, CSX Transportation Inc., and the City of Philadelphia are all concerned parties within the meaning of 66 Pa.C.S. §§ 2702 and 2704.
4. Pursuant to Section 332(a) of the Public Utility Code, CSX Transportation Inc. has the burden of proof by a preponderance of evidence that the abolition of the

crossing is necessary and proper for the service, accommodation, convenience, and safety of the public.<sup>1</sup>

5. A preponderance of the evidence means only that one party has presented evidence that is more convincing, by even the smallest amount, than the evidence presented by the other party.<sup>2</sup>

6. CSX Transportation Inc. did not sustain its burden of proving that the abolition of the crossing was necessary and proper for the service, accommodation, convenience and safety of the public.

7. Accordingly, CSXT's Application to Abolish the Cemetery Avenue bridge (DOT 140 634 G) is denied and the public highway bridge shall remain open.

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<sup>1</sup> Section 332(a) of the Public Utility Code, 66 Pa. C.S. § 332(a), provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding; *see also Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Commission*, 578 A.2d 600, 602 n. 1 (Pa. Cmwlth. 1990); *Borough of Bridgewater v. Pennsylvania Public Utility Commission*, 124 A.2d 165 (Pa. Super. 1956); *N. Lebanon Twp. v. PUC*, 962 A.2d 1237 (Pa. Cmwlth. 2008).

<sup>2</sup> *Energy Conservation Council of Pennsylvania v. Pennsylvania Public Utility Commission*, 995 A.2d 465, 478 (Pa. Cmwlth. 2010).

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of CSX Transportation, Inc. :  
for Approval of the Abolition of the :  
Crossing (DOT 140 634 G) where :  
Cemetery Avenue crosses above grade the : Docket No. A-2019-3013783  
tracks of CSX Transportation, Inc. located :  
in the City of Philadelphia, Philadelphia :  
County, Pennsylvania, and the allocation :  
of cost thereto. :

**PROPOSED ORDERING PARAGRAPHS**

1. That the application of CSX Transportation, Inc., for the approval to abolish the public crossing (DOT 140 634 G) where Cemetery Avenue crosses, above grade, the two tracks of CSX Transportation, Inc., located in the City of Philadelphia, Philadelphia County, is denied.

2. That CSX Transportation, Inc., at its sole cost and expense, shall furnish all material and perform all work necessary to replace any missing railing on the bridge pedestrian sidewalk as directed in the March 30, 2020 Interim Bridge Inspection Report, if not already completed.

3. That CSX Transportation, Inc., at its sole cost and expense, shall furnish all material and perform all work necessary to immediately file an application to install pedestrian protective fencing on the outside edge of both sides of the subject bridge superstructure as per the current Pennsylvania Department of Transportation's Bridge Construction Standards (Pub 219M) entitled BC-701M sheet 3 of 3 "Standard Protective Fence Bridge over Railroads."

4. That any party who requests to alter the load posting sign located at the subject bridge immediately file an application with the Commission for the safe load posting re-evaluation of the subject structure and by serving all parties to this proceeding.

5. That the City of Philadelphia, at its sole cost and expense, furnish all material and perform all work necessary, to immediately repair the sidewalk approaches to the subject structure in a safe, smooth, and satisfactory condition to transition from the sidewalk approaches to the sidewalk facilities located on the subject bridge structure.

6. That the Pennsylvania Department of Transportation, at its sole cost and expense, furnish and copy the Commission's Rail Safety Section on any Priority Maintenance Notification Letters issued to the City of Philadelphia or CSX Transportation, Inc., as a result of any NBIS Bridge Safety Inspections conducted on the subject structure.

7. That the City of Philadelphia and CSX Transportation, Inc., at their sole cost and expense, shall furnish all material and perform all work necessary to conform with the Priority Maintenance Notification Letters issued as a result of any NBIS Bridge Safety Inspections conducted on the subject structure.

8. That the City of Philadelphia cooperate with CSX Transportation, Inc., so that during the repairs to the subject structure, the operations and facilities of the railroad company will not be endangered or unnecessarily impeded.

9. That CSX Transportation, Inc., cooperate with the City of Philadelphia and conduct their operations in the vicinity of the subject structure in a safe manner during the repairs to the subject structure.

10. All parties involved herein cooperate fully with each other so that during the time the work is being performed, vehicular, pedestrian, and railroad traffic will not be endangered or unnecessarily inconvenienced, and so that the requirements of each of the parties will be provided for and accommodated insofar as possible.

11. All work necessary to complete the repairs as outlined above be done in a manner satisfactory to this Commission within sixty (60) days of the entry date of this Order, and that on or before said date, the City of Philadelphia and CSX Transportation, Inc., report to this Commission in writing the date of actual completion of the work.

12. That the City of Philadelphia and CSX Transportation, Inc., at least three (3) days prior to the start of their work, notify local emergency management services and all parties in interest of the actual date on which work will begin.

13. That the City of Philadelphia and CSX Transportation, Inc., pay all compensation for damages, if any, due to owners of property taken, injured, or destroyed by reason of the repairs to the crossing in accordance with this Order.

14. That upon completion of all repairs herein ordered, CSX Transportation, Inc., at its sole cost and expense, shall furnish all material and perform all work necessary thereafter to maintain its tracks, wire lines, drainage facilities, and any other railroad facilities, existing or altered, located within the limits of the subject structure.

15. That upon completion of all repairs herein ordered, CSX Transportation, Inc., at its sole cost and expense, shall furnish all material and perform all work necessary thereafter to maintain the superstructure and substructure of the bridge, including the

pedestrian railing, bridge sidewalk, bridge concrete deck, protective pedestrian bridge fencing, and bridge expansion joints.

16. That upon completion of all repairs herein ordered, the City of Philadelphia, at its sole cost and expense, shall furnish all material and perform all work necessary thereafter to maintain the roadway surface across the bridge, sidewalk approaches, highway/bridge approaches, load posting and bridge signage, any bridge regulatory and advanced warning signs, drainage facilities, and snow, debris, and ice removal on the roadway, including completion of the NBIS bridge inspections.

17. Upon completion of all repairs herein ordered, each non-carrier public utility company and municipal authority, at its sole cost and expense, shall furnish all material and perform all work necessary thereafter to maintain its respective facilities, existing or altered, located within the limits of the improvement.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of CSX Transportation, Inc. :  
for Approval of the Abolition of the Crossing :  
(DOT 140 634 G) where Cemetery Avenue :  
crosses above grade the tracks of CSX : Docket No. A-2019-3013783  
Transportation, Inc. located in the City of :  
Philadelphia, Philadelphia County, :  
Pennsylvania, and the allocation of cost thereto. :

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day, April 1, 2021, served a true copy of the foregoing **Proprietary and Non-Proprietary** versions of the **Main Brief of the Bureau of Investigation and Enforcement**, upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).


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