


**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

BY: 

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MAIN BRIEF OF THE CITY OF PHILADELPHIA

The City of Philadelphia, by and through its undersigned counsel and pursuant to 52 Pa. Code 5.501, hereby respectfully submits this main brief in support of its position in the above-captioned matter, and avers as follows:

I. Statement of Case

On or about October 24, 2019 CSX Transportation, Inc. (“CSXT”) filed an application with the Pennsylvania Public Utility Commission (“Commission”) to abolish the bridge carrying Cemetery Avenue over its tracks in the City of Philadelphia. The Commission subsequently conducted a field conference in which the City of Philadelphia (“City”) objected to abolition of the Crossing. After subsequent prehearing conferences and submission of written direct and rebuttal testimony on behalf of CSXT, the City, The Pennsylvania Department of Transportation (“PennDOT”) and the Bureau of Investigation and Enforcement (“BIE”), a hearing was held before the Honorable Judge Heep on February 9, 2021.

The Cemetery Avenue Bridge (“Crossing”) was established by City ordinance in 1885. *See* City Exhibit 1. The Crossing was established as an accommodation for the railroad. The ordinance allowed the railroad to lay below-grade tracks, and required the railroad to, at its sole cost and expense, construct and maintain the bridge to keep the continuity of Cemetery Avenue.

After a rebuild of the bridge in 1961, CSXT has done little if anything to maintain the Crossing and now contends, after decades of neglect and without substantial evidence, that the bridge should be abolished as it is unnecessary to the City's system. If it is not abolished, CSXT suggests, then the City should be burdened with the maintenance of this neglected bridge in perpetuity. Contrary to this ill-conceived notion, the City contends that (1) the bridge should not be abolished; (2) that CSXT should uphold its responsibilities under the enabling ordinance and subsequent Order of this Commission; and (3) if ownership of the bridge should be transferred, the City deserves a significant cost allocation from CSXT – not punitively, as CSXT might argue – but as necessary compensation to address the ignored maintenance that should already have been provided.

II. Statement of Questions Presented

(1) Should the Commission grant the application to abolish the Crossing?

Suggested Answer: No. It is a necessary component of the City's local system.

(2) If the Commission denies the application, should CSXT be required to refurbish the Crossing?

Suggested Answer: Yes. CSXT failed in its duty to maintain the Crossing, and allocation of maintenance responsibilities to another party fails to do justice either in law or equity.

III. Argument

The Commission should deny the application to abolish the Crossing because it is necessary to the service, convenience, and safety of the public. The Commission should order CSXT to refurbish the Crossing because the railroad built the bridge, this Commission ordered the railroad

to maintain the bridge, and through its neglect CSXT is the party primarily responsible for the bridge's deterioration.

A. The Commission should deny the application because the Crossing is a necessary component of the local highway network.

The Commission holds exclusive jurisdiction to determine how railroad-highway crossings shall be constructed, altered, maintained, or abolished "to effectuate the prevention of accidents and promote the safety of the public." 66 Pa.C.S. § 2702(a). This includes the power to order any crossing involving a public highway "to be relocated or altered, or to be suspended or abolished upon such reasonable terms and conditions" as determined by the Commission. 66 Pa.C.S. § 2702(c). Where a highway crosses a railroad right-of-way via a bridge, the Commission's jurisdiction includes not only that bridge's structure, but also the highway approaches. *Commonwealth Dep't of Transp. v. PUC*, 440 A.2d 657, 662 (Pa. Commw. Ct. 1982).

The proponent of a rule from this Commission, in this case the applicant CSXT, bears the burden of proof. 66 Pa.C.S. § 332(a). To meet that burden, the applicant must demonstrate that the abolition is necessary and proper for the service and accommodation, convenience, or safety of the public. *N. Lebanon Twp. V. Pa. Pub. Util. Comm'n*, 962 A.2d 1237, 1244-45 (Pa. Commw. Ct. 2008). In deciding this question, the Commission may consider various factors, including but not limited to: (1) the importance of the road in the roadway system, the bridge closure's impact on traffic patterns; (3) safety of the traveling public and pedestrians; and (4) public necessity. *Mun. of Monroeville v. Pa. Pub. Util. Comm'n*. 600 A.2d 655, 657 (Pa. Commw. Ct. 1991). Other factors include (1) traffic congestion; (2) access to emergency responders; (3) impact on local business; and (4) economic feasibility of the change. *N. Lebanon Twp.*, 962 A.2d at 1245. Finally, the Commission may also consider the presence or absence of

other adjacent crossings servicing the same area. Ultimately, abolition of a bridge crossing is only proper where it meets this substantial burden of necessity.

Here, CSXT clearly fails to establish that abolition of this bridge benefits anybody but CSXT. Evidence in this case plainly shows this bridge's importance to the local roadway system and for the safety and access of the traveling public and pedestrians. First, and most importantly, Lieutenant Joseph Ruff's testimony characterizes this bridge as a vital component of emergency and police servicing. *See* City Statement No.2. Specifically, Lt. Ruff states that in 2020 alone, the Crossing would act as the "primary route to facilitate access" to approximately 4500 calls for service. *Id.* at Page 2, Lines 2-5. Of these 4500 calls, the Crossing facilitated access to answering 195 confirmed Type 1 crimes. "Higher grade felonies. Murder and non-negligent manslaughter, forcible rape, robbery, aggravated assault, burglary, larceny, motor vehicle theft, and arson. *Id.* at Page 2, Lines 8-11. Lt. Ruff stated that the Philadelphia Fire Department also utilizes the crossing. *Id.* at Page 2, Line 13. Closure of the bridge would already compound other railroad-created closures in his district, and from a practical standpoint delay thousands of emergency responses. *Id.* at Page 2, Lines 15-23. This factor alone, undisputed, unchallenged, and not countered or questioned by any other testimony, eviscerates the contention that this bridge is superfluous, and demands the Commission deny the application to abolish.

Even notwithstanding the public safety hazard of closing this bridge, numerous other factors require that it remain open. Supporting its assertion of superfluosity, CSXT offered a traffic study and witness that inadequately assessed the potential closure's impact. Mr. Creasy's traffic study purports to demonstrate only minor changes in traffic with the closure of the Crossing, but even Mr. Creasy acknowledges the report's shortcomings.

The report inadequately counts traffic volume. Participants counted traffic on a day at the peak of the COVID-19 lock down, which Mr. Creasy admitted lessened the total number. *See* Transcript at Page 62, Lines 20-23. Mr. Creasy himself only visited the crossing on one day, and solicited no public input. He did not consult police, fire, EMS, the school district, school bus dispatcher, Streets Department (operator of waste services), or the City's traffic engineer to better understand the area's volume. *See* Transcript, Pages 64-66.

The report inadequately addresses the multimodal nature of urban transportation. At the bridge area the report simply conducted a count of motor vehicles, and of bicycles and pedestrians together. In addition to the parties above, the report did not consult public transit agencies. *See* Transcript, Page 71, Line 16. The report failed to analyze the condition of the sidewalks that pedestrians would use after a closure, nor their accessibility to disabled persons. *See* Transcript, Page 69, Line 19.

The report failed to even consider the physical road consequences of a closure. Under City law, creating dead ends requires the creation of a cul-de-sac. Closure here necessitates two cul-de-sacs. Mr. Creasy stated that he did not know if a cul-de-sac would fit after closure, and that the report did not consider the possibility. *See* Transcript, Page 68, Line 4. In his testimony, Mr. Creasy acknowledged that he did not know the width of the street, that cars parked on the street in the residential areas, and that closure would make three point turning difficult for passenger vehicles and even harder for larger vehicles. *See* Transcript. Page 67, Line 23.

Because closure of the bridge decimates emergency responses, and because the case for closure relies on a traffic study that essentially just counts cars at off-peak travel times, CSXT does not meet its burden of proof and the Commission must deny its application.

B. The Commission should require CSXT to rehabilitate the bridge at its sole cost and expense.

The Commission is authorized to assess the costs of any work it orders upon the concerned parties to a proceeding, in such proportions as the Commission may determine. 66 Pa. C.S. § 2704(a). In deciding cost allocation the Commission may consider (1) the party that originally built the crossing; (2) the party that owned and maintained the crossing; (3) the relative benefit initially conferred on each party with the construction of the crossing; (4) whether any party is responsible for the deterioration of the crossing that has led to the need for its repair, replacement, or removal; and (5) the relative benefit that each party will receive from repair, replacement, or removal of the crossing. *Greene Township Bd. of Sup'rs v. Pennsylvania Public Utility Com'n*, 668 A.2d 615, 619 (Pa. Commw. Ct. 1995). The totality of these circumstances dictates that CSXT pay to rehabilitate the Crossing.

Here, the City may currently derive some benefit from the bridge, but justice at law and equity require CSXT to rehabilitate the crossing. The City clearly utilizes the bridge, or it would not dispute its abolition. Cemetery Avenue, as set forth more fully in Section A, *supra*, provides a vital link for neighborhood residents and emergency responders. The railroad, however, clearly benefits currently as well: the bridge was established after the highway, so the railroad's existence in its current form relies on that bridge. The City will benefit from the bridge's repair, but so too will CSXT.

CSXT's predecessor in interest, the Baltimore and Ohio Railroad, built the original bridge in approximately 1886 and its successor in 1961. The ordinance enabling the first bridge's construction expressly lays out authority of the railroad to construct below-grade lines and establish the bridges. *See* City Exhibit 1, Section 1. It requires that the railroad agree "to keep its railroads and all its structures crossing any of the streets aforesaid in good order and condition at

all times, and to save the city of Philadelphia harmless from any liability or responsibility whatever which may grow out of the establishment and use of the said railroad.” *See* City Exhibit 1, Section 5. Finally, it demands that the railroad “shall, at all times hereafter, maintain and keep in repair all bridges constructed by it in the City of Philadelphia.” *See* City Exhibit 1, Section 8. This ordinance therefore establishes that (1) the railroad established the bridge and (2) both the City and the railroad expected and agreed that the railroad would be the primarily-responsible party for the Crossing. As the constructor of the bridge, the railroad, here CSXT, should pay for its rehabilitation.

Furthermore, CSXT’s own Exhibit 2 also places responsibility for maintenance of this structure solely with CSXT. The Order provides the history of the bridge’s construction at the railroad’s sole cost and expense in exchange for the license to cross City right-of-way. It notes the railroad’s proposal to reconstruct the bridge at its sole cost and expense. It then orders the railroad to construct and thereafter maintain the bridge. This includes such items as the pedestrian railing, bridge sidewalk, substructure, superstructure, and bridge expansion joints. *See* City Statement No. 1, Page 3, Lines 19-21. The City, in turn, is tasked only with maintaining the highway approaches. *See* CSXT Exhibit 2.

These exhibits – the City Ordinance and Commission Order – also clearly establish that the railroad derived all the benefit from the bridge’s establishment. Cemetery Avenue existed on the City plan in the 1860s. *See* City Statement No. 1, Page 4, Line 2. The railroad required alteration to the road, and others in its path, to establish its line through the City. The bridge’s construction, and subsequent reconstruction, required detour and inconvenience to highway traffic. Once established, the railroad benefited from a new rail line with which to conduct its business, and the highway merely attained some condition close to the status quo. Any

subsequent rehabilitation, replacement, or closure of the bridge will follow the same pattern: the railroad will continue its business along the unaffected line, and the highway will suffer. Establishment of the bridge clearly, and lopsidedly, favored the railroad, and suggests the railroad should pay for its rehabilitation.

Finally, and most importantly, CSXT is responsible for the bridge's deterioration. CSXT agrees that this Commission's 1961 order requires they maintain the structure. *See* Transcript, Page 44, Line 18. But CSXT will not address the maintenance items assigned to them, nor address the general wear and tear on a sixty-year old bridge. Instead, CSXT appears trapped in a contradictory loop, simultaneously stating that the bridge's condition is adequate, while agreeing that the structure needs repair and disclaiming responsibility. To wit, CSXT variously states both "it's our position that this bridge is safe and it's not structurally deficient in any manner" *See* Transcript, Page 25, Lines 11-13. And "CSX did not take exception to or object to the [recommendations of the McCormick Taylor Report]. We just stated it should be the State or City's responsibility to install those features."

The record demonstrates significant deterioration of this bridge, and repeated inexplicable omissions by CSXT. Failure to install adequate guardrail imperils every pedestrian that traverses the superstructure, but CSXT will not adequately replace it. *See* BIE Exhibits E and F.

The girders require reinforcing, but CSXT will not reinforce without an Order from this Commission, and will not initiate proceedings to obtain such an Order. *See* Transcript, Page 43, Lines 13-24. In addition, components of the superstructure suffer defects that affect the structural integrity of the bridge. *See* City Statement No. 1, Page 5, Lines 7-14. *See also* City Exhibit 2, Page 47 (10th Photo Page).

CSXT acknowledges that paint reduces rust and corrosion, and that rust and corrosion deteriorates the structure. *See* Transcript, Page 55, Lines 11-16. CSXT will not even paint the bridge. *See* Transcript, Page 54, Line 20. This policy persists despite significant paint loss, and that the original paint was a hazardous lead-based substance. *See* Late-Filed Exhibits 1 and 3. CSXT allocates money in its yearly budget for bridge repairs, but cannot demonstrate any work performed to the bridge in its sixty years of existence except for some vaguely-described work approximately six years ago. *See* Transcript at Page 44, Line 22. CSXT failed in its duty to maintain this bridge, now seeks to disclaim responsibility to the detriment of the City and its residents, and should be ordered to rehabilitate the bridge and rectify its omissions.

All of this constitutes neglect, but unsurprising neglect. CSXT's witness acknowledged that he himself had visited but not inspected the bridge. *See* Transcript, Page 38, Lines 1-3. According to Mr. Mihaly, CSXT's Bridge Department performs annual inspections, but CSXT did not present any. Asked if he himself looked at CSX's own inspections, Mr. Mihaly replied "I've glanced over them." *See* Transcript, Page 53, Line 18. While the superstructure deteriorates, and railing pieces go under-repaired or ignored, CSXT cannot summon the effort to read its own reports or investigate, beyond visiting and reading someone else's assessment. This indifference reflects in the state of the bridge, and underscores CSXT's responsibility for its rehabilitation.

IV. Conclusion and Requested Relief

CSXT seeks to abolish this bridge because it failed to keep up with its maintenance and now does not want to pay for its years of neglect. This bridge cannot be abolished because it is a vital link in the local highway network that serves multimodal transit needs. Its closure would negatively and significantly affect emergency services, residents of Cemetery Avenue, and any

person who regularly traverses the area by any other means than a car – which is to say most of the people in an urban environment. CSXT’s traffic study fails to justify the closure and in fact reinforces the City’s stance.

CSXT should pay for the bridge’s rehabilitation. CSXT engaged in a pattern and practice of neglect and half-measures to repair and maintain the bridge, knowing that the Commission’s 1961 Order required action. Where CSXT believed certain measures required another order by the Commission, it simply did not seek such an order, thus avoiding any action. CSXT simultaneously contends that the bridge is in adequate condition and that McCormick Taylor’s report is accurate. The bridge has deteriorated and is unsafe due to the omissions of CSXT, and CSXT should pay to abate those conditions.

V. Proposed Findings of Fact

1. On or about October 24, 2019, CSXT filed an application to abolish the Crossing. *See* Application of CSX Transportation, Inc.
2. The Crossing carries Woodland Avenue over CSXT’s tracks in the City of Philadelphia, Philadelphia County. *See* Application of CSX Transportation, Inc.
3. The bridge was originally constructed in 1886 by the Baltimore and Ohio Railroad, predecessor in interest to CSXT, pursuant to an ordinance of Philadelphia City Council in 1885. *See* City Exhibit 1.
4. The bridge was fully reconstructed by Baltimore and Ohio Railroad in 1961, pursuant to an authorizing Order by the Commission. *See* CSXT Exhibit 2.
5. The Commission’s 1961 Order delegated maintenance responsibilities for the substructure and superstructure of the bridge solely to the railroad. *See* CSXT Exhibit 2.

6. The Commission's 1961 Order required the City of Philadelphia to maintain the roadway and the right-of-way approaches to the bridge. *See* CSXT Exhibit 2.
7. The City of Philadelphia has never been required to maintain the structure of the bridge. *See* CSXT Exhibit 2.
8. Since 1961, the bridge's condition has deteriorated without discernable improvements by CSXT. The findings of City Exhibit 2 are hereby incorporated by reference.
9. The bridge is necessary to the service, convenience, and safety of the public. *See* City Statement No. 2.
10. The bridge requires extensive rehabilitation. *See* City Exhibit 2.

VI. Proposed Conclusions of Law

1. The Commission holds exclusive jurisdiction over railway-highway crossing alterations and abolition under Section 2702 of the Pennsylvania Public Utility Code.
2. The Commission may consider granting an application to abolish a crossing if the abolition is necessary and proper for the service, accommodation, convenience, or safety of the public. *N. Lebanon Twp. V. Pub. Util. Comm'n*, 962 A.2d 1237, 1244-45 (Pa. Commw. Ct. 2008).
3. This standard is applied by weighing numerous factors, including (1) the importance of the road in the roadway system; (2) the bridge closure's impact on traffic patterns; (3) safety of the traveling public and pedestrians; (4) public necessity; (5) traffic congestion; (6) access to emergency responders; (7) impact on local business; (8) economic feasibility of the change; and (9) the presence or absence of other adjacent crossings in the same area. *N. Lebanon Twp.*, 962 A.2d at 1245. *Municipality of Monroeville v. Pennsylvania Pub. Util. Comm'n*, 600 A.2d 655, 668 (Pa. Commw. Ct. 1991).

4. The Commission is authorized to assess the costs of any work it orders upon the concerned parties to a proceeding, in such proportions as the commission may determine.
66 Pa. C.S. § 2704(a).
5. In deciding cost allocation the Commission may consider (1) the party that originally built the crossing; (2) the party that owned and maintained the crossing; (3) the relative benefit initially conferred on each party with the construction of the crossing; (4) whether either party is responsible for the deterioration of the crossing that has led to the need for its repair, replacement, or removal; and (5) the relative benefit that each party will receive from repair, replacement, or removal of the crossing. *Greene Township Bd. of Sup'rs v. Pennsylvania Public Utility Com'n*, 668 A.2d 615, 619 (Pa. Commw. Ct. 1995).
6. The Applicant, CSXT, bears the burden of proof in this matter. 66 Pa. C.S. § 332(a).
7. The Applicant failed to meet this burden of proof.
8. The preponderance of the evidence demonstrates that the bridge is necessary for the service, accommodation, convenience, and safety of the public, and should not be abolished.
9. The preponderance of evidence demonstrates that CSXT knew or should have known about the extensive deterioration of the bridge, is primarily responsible for that deterioration, and should bear the cost of abating those conditions.

VII. Proposed Ordering Paragraphs

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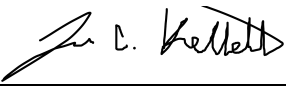
ORDER

AND NOW, this day of , 2021, after a hearing and consideration of evidence and testimony in the above-captioned matter, the following is hereby ORDERED:

1. The Crossing is necessary for the service, convenience, and safety of the public, and the application to abolish the Crossing is DENIED.
2. The City of Philadelphia, at its sole cost and expense, shall repair the sidewalk approaches to the bridge, consistent with the recommendations in City Exhibit 2.
3. The substructure and superstructure of the bridge shall immediately be made safe and rehabilitated by CSXT, at CSXT's sole cost and expense, to meet all current design standards, and CSXT shall make application to this Commission for the said rehabilitation within three hundred sixty five (365) days of the date of this Order.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served true and correct copies of the foregoing Main Brief of the City of Philadelphia upon the parties listed below, in accordance with ALJ Heep's order dated February 18, 2021 and the Emergency Order at M-2020-3019262.

Service by Electronic Mail Only

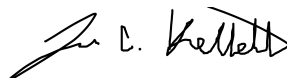
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DATED: April 1, 2021