



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

BUREAU OF  
INVESTIGATION  
&  
ENFORCEMENT

April 22, 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 Reply Brief**

Dear Secretary Chiavetta:

Enclosed please find the **Reply 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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Bureau of Investigation and Enforcement  
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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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**REPLY BRIEF  
OF THE  
BUREAU OF INVESTIGATION AND ENFORCEMENT**

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Dated: April 22, 2021

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## **I. PROCEDURAL HISTORY**

The Bureau of Investigation and Enforcement (“I&E”) incorporates the procedural history as set forth in its Main Brief submitted on April 1, 2021, on pages 1 through 4. A Main Brief was also submitted by the Pennsylvania Department of Transportation (“PennDOT”) on March 31, 2021 and by CSX Transportation, Inc. (“CSXT”) and the City of Philadelphia (“the City”) on April 1, 2021. Pursuant to the procedural schedule established in the March 10, 2021 Evidence and Briefing Order and in accordance with Commission regulations at Section 5.501, I&E now submits this Reply Brief.<sup>1</sup>

## **II. STATEMENT OF THE FACTS**

I&E herein references and incorporates the Statement of the Case section as set forth in its Main Brief submitted on April 1, 2021, on pages 5 through 8, as well as Appendix A – I&E’s Proposed Findings of Fact. I&E’s Main Brief and accompanying appendices include an extensive discussion of the facts that are supported by the record in a substantial and credible manner. While I&E will not repeat all of that information here, a few salient points bear reiteration.

The public highway bridge located on Cemetery Avenue 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>2</sup> 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.”<sup>3</sup> 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

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<sup>1</sup> 52 Pa. Code § 5.501.

<sup>2</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>3</sup> I&E Rebuttal Testimony, pg. 3, I&E Exhibit J.

country.<sup>4</sup> Due to the fracture critical designation of the bridge, the failure of one of the girders would result in the whole bridge collapsing.<sup>5</sup>

On February 9, 2021, shortly before the evidentiary hearing began, CSXT emailed two (2) cross examination exhibits to the parties.<sup>6</sup> Specifically, CSXT Cross Examination Exhibit 2 (hereinafter “the memo” or “the exhibit”) is a memo from Bergmann, Architects, Engineers, and Planners, dated February 8, 2021, stating that the Cemetery Avenue bridge, which is “owned and maintained by CSXT,” has a remaining service life of “greater than 25 years” following the repairs completed in 2016 by CSXT.<sup>7</sup> Mr. Derek Mihaly testified at the hearing that the memo was being offered to prove that the repairs completed by CSXT roughly 5 years ago extended the service life of the bridge.<sup>8</sup>

I&E and the City objected to CSXT 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>9</sup> Your Honor overruled the objection, stating that it is a matter of the weight to be placed on the document.<sup>10</sup>

In its Main Brief, CSXT argued that the Cemetery Avenue bridge is expected to have a service life of greater than 25 years due to CSXT’s “extensive repairs” and included this assertion in its proposed statement of facts, number 16.

### **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

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<sup>4</sup> I&E Rebuttal Testimony, pg. 3, I&E Exhibit J.

<sup>5</sup> N.T. pgs. 121-122.

<sup>6</sup> I&E notes that while the exhibits were labeled as Cross Examination exhibits, CSXT did not use the exhibits in conducting its cross examination but rather as an extension of its direct and rebuttal testimony of Mr. Mihaly.

<sup>7</sup> CSXT Cross Examination Exhibit 2.

<sup>8</sup> N.T. pgs. 35-36.

<sup>9</sup> N.T. pg. 35.

<sup>10</sup> N.T. pg. 36.

crossing is necessary and proper for the service, accommodation, convenience, and safety of the public.<sup>11</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>12</sup> As evident in the record of this case and as supported by I&E’s Main Brief and this Reply Brief, CSXT has failed to prove that the abolition of the Cemetery Avenue bridge is necessary and proper, and has failed to show that the bridge will be safe to the traversing public and has a service life greater than 25 years.

#### **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>13</sup> Over I&E’s objection, Your Honor admitted CSXT’s Cross Examination Exhibit 2 but noted that it is a matter of the weight to be afforded the exhibit. I&E maintains its objection to the exhibit because the memo itself is unsupported hearsay offered by Bergmann/CSXT to prove the assertion that the bridge has a lifespan of greater than 25 years. Moreover, the exhibit was prepared the day before the hearing without any support or basis for the assertions made in the memo and the exhibit was provided to the parties the morning of the hearing which did not allow either party to properly address the assertions made in the memo. Lastly, I&E notes the clear contradiction in CSXT’s argument that it has not completed the work recommended in the Bridge Inspection Report because the work constitutes an alteration to the crossing subject to Commission approval. Accordingly, I&E avers that CSXT

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<sup>11</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>12</sup> *Energy Conservation Council of Pennsylvania v. Pa. P.U.C.*, 995 A.2d 465, 478 (Pa. Cmwlth. 2010).

<sup>13</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.

Cross Examination Exhibit 2 should be afforded no weight in reaching a determination in this case.

## V. ARGUMENT

### A. I&E MAINTAINS ITS OBJECTION TO CSXT CROSS EXAMINATION EXHIBIT 2

Hearsay is defined in Pennsylvania as “an out-of-court statement offered to prove the truth of the matter asserted.”<sup>14</sup> An administrative decision based on hearsay may be overturned by the courts.<sup>15</sup> For this reason, Pennsylvania courts do not regard the hearsay rule as a technical rule of evidence, but a basic, vital and fundamental rule of law, which ought to be followed by administrative agencies at those points in their hearings, when facts crucial to an issue are sought to be placed upon the record.<sup>16</sup> The general rule is that hearsay evidence, properly objected to, is not competent to support a finding in an administrative hearing; however, hearsay evidence admitted without objection may support a finding, only if corroborated by competent evidence in the record.<sup>17</sup>

In *Catherine J. Frompovich v. PECO Energy Company*, Docket No. C-2015-2474602 (Order entered May 3, 2018), the Commission ruled that whether simple hearsay may support a finding of an agency depends on whether the evidence meets the criteria of the *Walker/Chapman* rule.<sup>18</sup> The *Walker/Chapman* rule provides that simple hearsay evidence may support an agency’s finding of fact so long as the hearsay is admitted into the record without objection and

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<sup>14</sup> Pennsylvania Rule of Evidence, Rule 801; see also *Brenda Smith v. Blue Pilot Energy LLC and PPL Electric Utilities Corporation*, Docket No. F-2015-2472890 (Initial Decision entered July 9, 2018); *Commonwealth v. Cassidy*, 462 A.2d 270 (Pa. Super. 1983).

<sup>15</sup> *Bridges v. Wixon*, 326 U.S. 135, (1945).

<sup>16</sup> *Bleilevens v. Pa. State Civil Service Commission*, 312 A.2d 109 (Pa. Cmwlth. 1973).

<sup>17</sup> *Anderson v. Pa. Department of Public Welfare*, 468 A.2d 1167 (Pa. Cmwlth. 1983).

<sup>18</sup> *Brenda Smith v. Blue Pilot Energy LLC and PPL Electric Utilities Corporation*, Docket No. F-2015-2472890 (Initial Decision entered July 9, 2018) (discussing *Catherine J. Frompovich v. PECO Energy Company*, Docket No. C-2015-2474602 (Order entered May 3, 2018)).

is corroborated by competent evidence in the record.<sup>19</sup> Specifically, the Commonwealth Court stated:

Hearsay evidence, *properly objected to*, is not competent evidence to support a finding of the agency...Hearsay evidence, admitted without objection, will be given its natural probative effect and may support a finding of an agency if it is corroborated by any competent evidence in the record ... a finding of fact based solely on hearsay will not stand.<sup>20</sup>

Here, I&E and the City properly objected to CSXT's Cross Examination Exhibit 2 on the basis of hearsay during the February 9, 2021 evidentiary hearing. The exhibit is a clear example of hearsay, it is an out of court statement drafted by an engineer from Bergmann offered by CSXT's witness to prove the truth of the matter asserted, i.e., the lifespan of the bridge. The engineer who drafted the memo was not available for cross-examination and the record is devoid of any corroborating evidence to support the assertion that the bridge has a lifespan greater than 25 years. Instead, the record is clear that the bridge is currently fracture critical and has severe signs of deterioration. Thus, I&E maintains its ongoing objection to CSXT's Cross Examination Exhibit 2 on the basis of hearsay.

**B. CSXT CROSS EXAMINATION EXHIBIT 2 SHOULD NOT BE GIVEN ANY WEIGHT**

In light of the admission of the exhibit at the hearing, it is I&E's position that the exhibit should be given no weight and no finding of fact should be made on the life expectancy of the Cemetery Avenue bridge. It is well settled that the Commission is the ultimate factfinder and makes all decisions as to the weight and credibility of evidence.<sup>21</sup> For a Commission finding to be supported by substantial evidence, which is "the amount of relevant evidence which a

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<sup>19</sup> See *Walker v. Unemployment Compensation Board of Review*, 367 A. 2d 366, 370 (Pa. Cmwlth. 1976) (*Walker*) (citations omitted); see also *Chapman v. Unemployment Compensation Board of Review*, 20 A. 3d 603, fn. 8 (Pa. Cmwlth. 2011) (*Chapman*).

<sup>20</sup> *Walker*, 367 A. 2d at 370 (emphasis added).

<sup>21</sup> *New Garden Township v. Public Utility Commission*, 241 A.3d 115 (Table)(Pa. Cmwlth. 2020); *Borough of Duncannon v. Pa. Pub. Util. Comm'n*, 713 A.2d 737, 739 (Pa. Cmwlth. 1998).

reasonable person would accept as adequate to support a determination,”<sup>22</sup> there must be “more than a mere trace of evidence or suspicion of the existence of a fact sought to be established.”<sup>23</sup>

The Commission, as an administrative body, is bound by due process provisions of constitutional law and by principles of common fairness.<sup>24</sup>

Here, the exhibit is dated February 8, 2021, the day before the hearing, and was provided to the parties on the morning of the hearing. The memo contains no support or basis for the purported opinion that the Cemetery Avenue bridge has a life expectancy greater than 25 years. Instead, the memo attempts to render an opinion on the life expectancy of the bridge based upon work completed in 2016 without any reference to whether the drafter of the memo has visited and evaluated the bridge in the last 5 years. Furthermore, the parties did not have the opportunity to cross examine the drafter of the memo. The memo was proffered as an exhibit by CSXT’s witness, Mr. Mihaly, who was not the drafter. Accordingly, the exhibit should be given no weight for the purported opinions expressed in the memo are not supported and the parties did not have an opportunity to cross examine the drafter of the memo.

Additionally, the exhibit was provided to the parties the morning of the hearing which did not allow either party to properly address the assertions made in the memo. I&E was unable to provide its own research, investigation, or even have a discussion with its witness about the assertions made in the memo because the memo was provided to the parties approximately 30 minutes before the hearing began.<sup>25</sup> Thus, it would be unjust to render a finding of fact regarding the life expectancy of the bridge.

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<sup>22</sup> *Popowsky v. Pennsylvania Public Utility Commission*, 937 A.2d 1040, 1054 (Pa. 2007).

<sup>23</sup> *HIKO Energy, LLC v. Pa. Pub. Util. Comm'n*, 163 A.3d 1079, 1094 (Pa. Cmwlth. 2017) (quoting *Lyft, Inc. v. Pa. Pub. Util. Comm'n*, 145 A.3d 1235, 1240 (Pa. Cmwlth. 2016)), *aff'd*, 209 A.3d 246 (Pa. 2019).

<sup>24</sup> *Hess v. Pa. Pub. Util. Commission*, 107 A.3d 246, 266 (Pa. Cmwlth. 2014); *Borough of Bridgewater v. Pa. P.U.C.*, 124 A.2d 165 (Pa. Super. 1956); *McCormick v. Pa. Pub. Util. Commission*, 30 A.2d (Pa. Super. 1943).

<sup>25</sup> While not a part of the record, I&E requests that Your Honor take judicial notice that the email containing the cross examination exhibits were sent to Your Honor and the parties at 9:21 a.m. on February 9, 2021.

Finally, as stated above, the exhibit is uncorroborated and not substantiated by the record. The record is bursting with references to the deteriorated condition of the bridge but is lacking any testimony suggesting the life expectancy of the bridge. Accordingly, CSXT's Cross Examination Exhibit 2 should be afforded no weight and not be a basis for any finding of fact, as the purported opinions expressed in the memo have neither been properly authenticated nor supported by the evidence of record and the parties did not have an opportunity to cross examine the drafter of the memo.

**C. WORK CONSTITUTING AN ALTERATION DOES NOT EXCUSE CSXT FROM COMPLETING THE WORK**

It should be noted that CSXT attempts to argue in its main brief that it has not completed the Priority items contained in the Bridge Inspection Report since it believes the maintenance items constitute an alteration to the crossing. I&E agrees that the Bridge Inspection Report's directive to install mounted guide rails and to install pedestrian fencing are considered alterations to the crossing subject to Commission approval.<sup>26</sup> Ironically, CSXT did not seek Commission approval in 2015 when it purportedly added steel plates over the corroded and perforated webs of the steel girders and when it removed and replaced a portion of the concrete deck in the floor system.<sup>27</sup> Both repairs are considered an alteration to the crossing and resulted in street closures.<sup>28</sup>

Notably, to date, CSXT has not filed an application to complete the work listed as Priority 0 and Priority 1 items in the Bridge Inspection Report or indicated its intention to do so during the course of this litigation. Nor has CSXT attempted to make the repairs/complete the work and simultaneously seek approval from the Commission due to the immediate danger

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<sup>26</sup> N.T. pg. 110.

<sup>27</sup> CSXT Statement No. 1, pgs. 4-5; CSXT Statement No. 3, pgs. 3-5; CSXT Exhibit 8 and 9.

<sup>28</sup> CSXT Exhibit 9.

presented by the current condition.<sup>29</sup> Thus, it appears that CSXT argues that work that needs to be completed is only an alteration subject to the Commission's approval when it best suits the interest of CSXT.

I&E is alarmed that CSXT has allowed these dangerous conditions to exist at the Cemetery Avenue bridge for **over five years** after the issues were identified in the Bridge Inspection Report in 2016 and again in 2020.<sup>30</sup> I&E submitted a letter to CSXT and the City on December 3, 2020 strongly encouraging the parties to immediately address the ongoing safety hazards present at the Cemetery Avenue bridge, but to no avail.<sup>31</sup> The pendency of this litigation should not be a basis to justify a party's failure to immediately address a public safety issue. Thus, I&E reiterates its position that CSXT and the City should be ordered to immediately address the Priority 0 and Priority 1 items listed in the 2020 Bridge Inspection Report.

## VI. CONCLUSION

I&E respectfully requests that presiding ALJ Heep and the Commission (1) find that CSXT's application to abolish the Cemetery Avenue crossing is not in the public interest and is therefore denied; (2) instruct the parties to address the Priority 0 and 1 maintenance items immediately and as explained in I&E's Main Brief, as well as the other Priority items in a timely

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<sup>29</sup> See I&E Rebuttal Testimony, pgs. 7-8 ("If the matter poses an immediate threat to public safety, we expect the party responsible for maintenance of that facility to immediately correct or mitigate the immediate threat, either by temporary or permanent means, and concurrently notify the Rail Safety Section by phone or email the nature of the threat and what is being done to rectify it. At that point in time, if it is determined to be an alteration by the Rail Safety Section, we will ask that particular party to file, after the fact, an application to affirm the alteration that was done to mediate the immediate threat to public safety or we may introduce a docket addressing the matter through the Commission's internal processes. This happens routinely and happens on a monthly basis.")

<sup>30</sup> City Statement No. 1, Exhibit 2 and Exhibit 3; I&E Main Brief, pgs. 18-23.

<sup>31</sup> Furthermore, CSXT's failure to submit an application for the work completed in 2015 and to address these current ongoing public safety concerns is potentially a violation subject to civil penalties. *See generally In re Consolidated Rail Corp.*, A-00115212 (Opinion and Order entered January 12, 2001) (The Commission imposed a \$35,000.00 civil penalty against Conrail/CSXT for a continuing violation of 66 Pa. C.S. § 2702(a) for 350 days from the date the unauthorized alteration occurred.) An entity may not alter, relocate, suspend or abolish an existing crossing without an order from the Commission pursuant to Section 2702(a) of the Public Utility Code. 66 Pa. C.S. § 2702(a); Any entity that violates a provision of the Public Utility Code should forfeit and pay to the Commonwealth a sum not exceeding \$1,000. Each day that the violation continues is a separate and distinct offense. 66 Pa. C.S. § 3301(b).

manner; and (3) give no weight to CSXT's Cross Examination Exhibit 2 and not make a finding of fact on the lifespan of the Cemetery Avenue bridge.

Respectfully submitted,



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Prosecutor

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Dated: April 22, 2021

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Pennsylvania, and the allocation of cost thereto. :

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day, April 22, 2021, served a true copy of the foregoing **Reply 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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