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April 22, 2021

**Via Electronic Filing**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
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**

Dear Secretary Chiavetta:

Enclosed please find the Reply Brief of CSX Transportation, Inc. for filing in the above-referenced matter. A copy has been served upon all interested parties of record.

Thank you.

Sincerely yours,

A handwritten signature in blue ink that reads 'Benjamin C. Dunlap, Jr.'.

Benjamin C. Dunlap, Jr.

Enclosure

BCDjr/law

cc: All Parties of Record

**BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of CSX Transportation,	:	
Inc. for Approval of the Abolition of the	:	
Crossing (DOT No. 140634G) where	:	Docket No. A-2019-3013783
Cemetery Avenue crosses above grade the	:	
tracks of CSX Transportation, Inc. located	:	
in the City of Philadelphia, Philadelphia	:	Electronically Filed
County, Pennsylvania	:	

**REPLY BRIEF OF CSX TRANSPORTATION, INC.**

**I. Both the City and I&E argue against abolition of the crossing by criticizing the data in CXST’s Traffic Study and other evidence, without offering any substantive evidence supporting their own positions.**

Both the City of Philadelphia (“City”) and the Commission’s Bureau of Investigation and Enforcement (“I&E”) argue against closure of the crossing to a large extent by criticizing the findings of the Traffic Study conducted by CSX Transportation, Inc. (“CSXT”), which is CSXT Exhibit 4.

The City states that the study inadequately counted “traffic volume” because such traffic was counted “on a day at the peak of the COVID-19 lock down.” City Brief, pg. 8. To the contrary, however, the vehicular traffic volume data at the Cemetery Avenue crossing and at nearby intersections was collected in March 2019, a year before any COVID lock down in the area. See CSXT Exhibit 4, pg. 5.

The pedestrian counts for the bridge were taken during COVID restrictions, in the 24-hour period on Wednesday, September 2, 2020. CSXT Statement 2, pg. 9, lines 6-10. Contrary to what the City states at pg. 8 of its Brief, Mr. Creasy in his testimony had not “admitted [that the timing of the pedestrian count] lessened the total number.” See City Brief, pg. 8. To the contrary, he testified that while students may not have been walking to school or their bus stops

and more people were at home due to COVID, that could actually mean that more people than usual were out walking in the area of the crossing. Hearing Transcript, pg. 62, lines 3-20.

Similarly, I&E argued that more pedestrians used the crossing than the Traffic Study count showed based solely upon the observation of “several people using the bridge during the February 26, 2020 field conference” and that I&E witness William Sinick “observed five (5) pedestrians use the bridge during his roughly 15-minute visit on November 17, 2020.” I&E Brief, pgs. 15-16. These “observations” during short periods of time are merely anecdotal and provide no substantive evidence whatsoever.

City Police Lieutenant Joseph Ruff did testify that there were approximately 4,500 calls for police service “in the immediate area” of the crossing, but provided no evidence as to whether that area entailed the entire 12<sup>th</sup> District or why the Cemetery Avenue bridge “would be a primary route to facilitate access to each of these calls.” City Statement 2, pg. 2, lines 1-5. Thus, Lieutenant Ruff’s testimony in this regard has no substantive basis. See City Brief, pg. 7.

Relatedly, Lieutenant Ruff testifies that there is a “railroad-created lack of access for 3 to 5 blocks at a time across our entire district.” City Statement 2, pg. 2, lines 19-20. I&E repeats this as its proposed Finding of Fact 105. However, the pertinent fact is how many crossings are near the Cemetery Avenue crossing, not how many there are throughout the 12th District. In that regard, in the relevant 10-block area from 58<sup>th</sup> Street to 68<sup>th</sup> Street, there are five streets other than Cemetery Avenue that have grade-separated crossings over the railroad: 58<sup>th</sup> Street, 60<sup>th</sup> Street, 61<sup>st</sup> Street, 65<sup>th</sup> Street and 68<sup>th</sup> Street. That is the relevant statistic.

Likewise, neither the City nor I&E produce any substantive evidence to counter that closure of the crossing would have any effect on emergency response times. Thus, there is no

support for the City's overly dramatic assertion that closure of the bridge "decimates emergency responses." City Brief, pg. 8.

Nor is there any evidence to support I&E's assertion that "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." I&E Brief, pgs. 11-12. To the contrary, of the two businesses adjacent to the crossing discussed by CSXT's traffic expert, the auto repair business is located on the corner of Cemetery Avenue and Kingsessing Boulevard, and so closure of the bridge will have absolutely no effect on the number of cars driving by that business. Furthermore, it is difficult to imagine that the storage facility located just off Kingsessing Boulevard would be adversely affected by a reduction in vehicles driving by. Any customer wanting to access these vehicle-centered businesses post closure would experience little to no delay in reaching them.

CSXT Statement 4-R, pg. 7, lines 18-23 and pg. 8, lines 1-3; CSXT Exhibit 4, pgs. 16-17.

It is ironic that the City criticizes the Traffic Study for allegedly having "failed to analyze the condition of the sidewalks that pedestrians would use after closure, nor their accessibility to disabled persons," when the City has failed to maintain the sidewalks on the approaches to the present Cemetery Avenue Bridge in an appropriate manner. City Brief, pg. 8; I&E Proprietary Statement 1, pg. 6, lines 20-22 and pg. 7, lines 1-13; I&E Exhibits A, C, D and G.

Finally, both the City and I&E assert that City ordinances would require cul-de-sacs to be constructed at either end of the former crossing should it be closed. I&E Brief, pg. 12; City Brief, pg. 8. However, neither the City nor I&E have provided a copy of or specific reference to any alleged ordinance requiring this, which if it exists at all may or may not be correct under the circumstances of closure of the Cemetery Avenue crossing.

**II. If the crossing is not closed, neither the City nor I&E produced any credible evidence as to why future maintenance responsibilities should not be assigned to the City, which owns the bridge, is in the best position to maintain it and most able to arrange for its eventual reconstruction.**

Contrary to the assertions of the City, CSXT has properly maintained the bridge. City Brief, pg. 11. Mr. Mihaly provided a detailed description of the repairs that were performed in 2015 to add steel plates, patch over and strengthen deteriorated conditions in the web, as well as replace floor system components that had been damaged by a bridge strike and replacement of the concrete deck. CSXT Statement R-3, pg. 3, lines 16-19. Plans for these repairs were submitted as CSXT Exhibit 7 and shown in the photos from contemporaneous site visits in CSXT Exhibit 8. Furthermore, CSXT replaced floor beams 19, 20, 21 and 22 in 2016, which caused McCormick Taylor to state in an October 9, 2017, letter to the City that the 14-ton weight limit on the bridge could be removed. CSXT Statement R-3, pg. 3, lines 21-22; CSXT Exhibit 6. Thus, the maintenance work that CSXT performed is not “some vaguely-described work,” as the City alleges on pg. 12 of its Brief.

If the bridge remains open, the Commission should order that its load posting be removed. No party is requesting that the bridge remain posted. To the contrary, the City’s witness testified that he would have no objections to the postings being removed from the bridge. Hearing Transcript, pg. 91, lines 7-14. CSXT performed its repairs in order that the bridge could carry all legal weights and McCormick Taylor confirmed that it could do so more than three years ago.

To delay the removal of the load postings any further would serve no useful purpose and in fact would be contrary to the asserted goals of the City and I&E in keeping the bridge open. Both the City and I&E expressed concerns about emergency vehicles not being able to use the crossing and larger vehicles having trouble making three-point turns on the street approaches if

the bridge were removed. See City Brief, pgs. 7-8; I&E Brief, pg. 12. However, continued posting of the bridge would create this exact same situation by prohibiting larger emergency vehicles and trucks from using the bridge. Despite the load postings, Lieutenant Ruff testified that he personally observed the Philadelphia Fire Department using the Cemetery Avenue Bridge on a frequent basis. City Statement 2, pg. 2, line 13.

Furthermore, the Commission's public records do not show that whoever posted the bridge, most likely the City, obtained Commission approval to do so. Dragging this matter out through a further hearing "on whether the posting is needed or not needed to ensure the usefulness and life-span of the bridge" is frankly absurd, when no party is requesting continued posting and such a posting would be contrary to the very reasons advanced by both the City and I&E for keeping the bridge open.

Similarly, to require further proceedings regarding the installation of structure-mounted guide rails on the bridge and to install pedestrian fencing along both sides of the bridge, as recommended in the McCormick Taylor inspection, would likewise be counterproductive. There is sufficient evidence in the record as to whether these items are needed, and the Commission can order a party (or parties) to install and maintain them as a result of these proceedings.<sup>1</sup> To drag that matter out through further proceedings serves merely to delay their installation, which I&E otherwise argues poses "a public safety threat." I&E Brief, pg. 23.

There is no evidence in the record to support replacement of the bridge at this time. To the contrary, CSXT provided evidence that the bridge is projected to have another 25 years of

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<sup>1</sup> As argued by CSXT at pages 10-13 of its Main Brief, this work and costs should be allocated to the City.

useful life following the repairs it performed several years ago. CSXT Cross Examination Exhibit 2.

Also, the plans submitted by I&E as Late-Filed Exhibit 2 do not support that both the red and black paint put on the bridge in 1961 were lead based. To the contrary, Drawing No. 42313 in that exhibit shows that the Shop Paint put on the bridge was one coat of “red lead paint,” while the two coats of black paint for the structural steel applied in the field were merely “Field Coat Black.”

As to ownership of the bridge, there can be no reasonable doubt that the City owns the Cemetery Avenue Bridge, contrary to the assertions of I&E on page 25 of its Brief. The quote from the City of Philadelphia case cited by I&E concerned the situation where a municipality had maintenance responsibilities for a railroad-built bridge carrying a municipal roadway, in which case all parties agreed the bridge would be owned by the municipality. However, the issue in the City of Philadelphia case was whether a bridge built by the railroad and which carried a city street was likewise owned by the City, if there was an agreement for the railroad to maintain the bridge. The Supreme Court held that absent some other definitive document transferring ownership to the railroad, a mere maintenance agreement did not serve to shift ownership. City of Philadelphia v. Consolidated Rail Corp., 747 A.2d 352, 354-355 (Pa. 2000). That is the exact same situation as here, where the B&O Railroad built the bridge, had an agreement to maintain it, but the City has produced no evidence that ownership of the bridge was ever transferred from the City to CSXT or its predecessor. Thus, the Cemetery Avenue Bridge is owned by the City.

The City owns the bridge. The City is in the best position to maintain it. Presumably it would pay more attention to such matters as unnecessary load postings if it is assigned

maintenance responsibilities. The City is also in the best position to obtain federal funding for the reconstruction of the bridge, when that is eventually necessary, as it must be the project sponsor. Therefore, if the crossing is not ordered to be abolished, all maintenance responsibilities should be assigned to the City, at its sole cost and expense.

Respectfully Submitted,

**NAUMAN, SMITH, SHISSLER & HALL, LLP**

By           *Benjamin C. Dunlap, Jr.*          

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Date: April 22, 2021

**BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of CSX Transportation, Inc. for :  
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Inc. located in the City of Philadelphia, :  
Philadelphia County, Pennsylvania, and the :  
allocation of cost thereto : Electronically Filed

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true copy of the foregoing **Reply Brief of CSX Transportation, Inc.**, upon the parties listed below, via electronic mail, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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Dated: April 22, 2021