



## CITY OF PHILADELPHIA

April 22, 2021

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

**RE: A-2019-3013783**

Dear Secretary Chiavetta,

Enclosed for filing please find the City of Philadelphia's Reply Brief in the above-captioned matter. Administrative Law Judge Heep and the parties were served copies of this brief in accordance with the Certificate of Service below.

Very truly yours,

A handwritten signature in cursive script, reading "James C. Kellett".

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James C. Kellett, Esq.

Deputy City Solicitor

**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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DATED: April 22, 2021

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**REPLY BRIEF OF THE CITY OF PHILADELPHIA**

The City of Philadelphia, by and through its undersigned counsel, hereby respectfully submits this Reply Brief in support of its position in the above-captioned matter, and avers as follows:

**I. Introduction**

The City hereby incorporates as if set forth at length the Introduction and Statement of Case provided in its April 1, 2021 Main Brief. *See* City of Philadelphia Main Brief at Pages 4-5. By way of further introduction, on April 1, 2021 the Parties to this proceeding submitted Main Briefs in support of their respective positions. In its submission, CSXT proffered assertions of varying levels of credibility with respect to the necessity and condition of the crossing. The City submits that its Main Brief accurately anticipated and forcefully rebutted CSXT's main arguments. The crossing remains necessary to public convenience and safety, and CSXT should adhere to its current maintenance responsibilities.

**II. Summary of Reply Argument**

To the extent that the City's Main Brief did not address CSXT's claims, the City asserts that the record clearly demonstrates the crossing's necessity to public convenience and safety. The bridge is an important link in the local road network that services multimodal transportation

needs and emergency services. CSXT’s traffic study treats the bridge in isolation, and its arguments and testimony totally ignore the Philadelphia Police Department’s account of the crossing’s importance.

Furthermore, substantial evidence points to CSXT as the party primarily responsible for maintenance of this structure. CSXT mischaracterizes its previous repair efforts as “extensive,” fails to establish that the City is either the primary beneficiary of the bridge or responsible for its deterioration, and also makes the preposterous argument that because the City may have an opportunity to apply for federal funding, CSXT should be absolved of any responsibility.

### **III. Reply Argument**

#### **A. The Crossing is Necessary to Public Convenience and Safety.**

CSXT’s Main Brief relies on a flawed traffic study and completely ignores the undisputed testimony of Philadelphia Police Lieutenant Joseph Ruff, who clearly and succinctly outlined the crossing’s importance.

##### **1. The Crossing is Not Superfluous.**

CSXT contends that the crossing is “not an integral part of the roadway network.” *See* CSXT Main Brief, Page 6. On the contrary, the crossing acted as the “primary route to facilitate access” to approximately 4500 calls for emergency services in 2020. *See* City Statement No. 2, Page 2, Lines 2-5. CSXT further points to a one-day traffic count that found 5400 vehicles crossing the bridge in a twenty-four hour period, and a finding by the study that closure would not affect levels of service. *See* CSXT Main Brief, Page 6. This reasoning is overly simplistic in an urban environment. Just counting cars for a day in no way does justice to a crossing’s overall use. The study participants counted traffic on a random weekday, on a day when city services such as waste hauling were not in effect in that area, and without consultation with the public, police,

fire, EMS, the school district, or the City's traffic engineer. *See* Transcript, Pages 64-66. The level of service determination examined vehicles, ignoring the multimodal reality of modern transportation. Offhandedly dismissing the crossing as superfluous in this manner, treating the crossing in isolation and as a service only to passenger vehicles, reveals a "we want this bridge gone, so it should just be gone" mindset that pervades all of CSXT's arguments.

## 2. Removal of the Bridge Would Deleteriously Impact Travel Times

CSXT also asserts the unlikely contention that closing the crossing would not materially affect travel times. CSXT again points to its traffic study which alleges that (1) diverted vehicular traffic routes will not impact travel times; (2) that "in a vehicle, the ability to reach [the businesses on either side of the crossing]...will not be impacted at all;" and (3) that potential pedestrians would only be delayed six minutes. *See* CSXT Main Brief, Pages 7 and 8.

Here, CSXT again omits the full picture. Leaving aside the credibility of the study's findings, its reliance only on vehicular travel times does not adequately portray the effect on a multimodal system. Bicycles, public transit, and any other user of the right-of-way will be deleteriously affected by closure of the crossing. The study also fails to examine the effect of an additional closure, which Lieutenant Ruff stated already exists. *See* City Statement No. 2, Page 2, Lines 15-23. Moreover, and a point borne out in cross examination of Mr. Creasy, while the study purports to calculate pedestrian delay time, it makes no consideration for the condition of the sidewalk nor the circumstances of the pedestrian. *See* Transcript, Page 69, Line 19. This crossing does not sit in an affluent part of the City. The sidewalks and approaches are not uniformly in good repair, and the study does not consider a pedestrian with disabilities. This failure to adequately even consider the real conditions of the area that CSXT wishes to alter so drastically exposes the railroad's flippant attitude towards its responsibilities.

3. The Crossing is Necessary to Public Safety.

Finally, CSXT explicitly, and wrongly, states that abolition of the crossing “does not present any public safety concerns,” and that removal of the bridge “would have no such impact [on emergency response times].” *See* CSXT Main Brief, Page 9. Moreover, CSXT bafflingly contends that, since larger vehicles could theoretically reverse back down the street or make a three-point turn from potential closure, the status quo remains. *Id.*

On the contrary, Lieutenant Ruff clearly stated that the crossing served responses to 195 confirmed Type 1 crimes in 2020. *See* City Statement No. 2, Page 2, Lines 8-11, and that closure of the bridge would already compound other railroad-created closures in his district, from a practical standpoint delaying thousands of emergency responses. *Id.* at Page 2, Lines 15-23. This factor alone, unchallenged and not countered or questioned by any other testimony, eviscerates the contention that this bridge is not necessary to public safety. Moreover, the image of a trash truck or other heavy vehicle routinely and safely backing into a high-density crash network route, is optimistic at best. Accordingly, the substantial evidence in this case demonstrates that the crossing should remain.

B. The Commission Should Assign Maintenance of the Crossing to CSXT.

Nothing in the record convincingly demonstrates that maintenance responsibilities should shift to the City, and CSXT should be held accountable for their current maintenance responsibilities and tasked with continuing that role.

1. The *N. Lebanon Township* Factors Weigh Heavily in the City’s Favor.

CSXT accurately states the factors the Commission considers in allocating cost: (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. *N. Lebanon Twp. V. Pa. Pub. Util. Comm'n*, 962 A.2d 1237, 1247 45 (Pa. Commw. Ct. 2008). CSXT also cites *City of Philadelphia v. Consol. Rail Corp.*, 747 A.2d 352 (Pa. 2000) to allege that the City, as the purported owner of the bridge, must bear the full burden of its rehabilitation.

These facts remain: CSXT's predecessor built the bridge and the City authorized construction of the bridge for the railroad's benefit. *See* City Exhibit 1, Section 1. CSXT still benefits from the bridge. CSXT is the party responsible for the bridge's deterioration. Whether or not the City owns the bridge is not a controlling factor in allocating cost. The preponderance of the evidence and totality of circumstances dictate that, if the Commission properly weighs these factors, CSXT will be assigned maintenance responsibilities.

## 2. The Current Condition of the Bridge Requires CSXT to Continue Maintenance.

CSXT's description of the bridge's condition and its repair efforts belies the current state of the crossing. In its argument, CSXT liberally uses the term "extensive" to describe its repair efforts, noting that in 2015 CSXT replaced some floor beams in the superstructure. CSXT Statement No. 3, Page 3, Lines 11-13. CSXT at the eleventh hour also provided an exhibit purportedly evidencing the projected lifespan of the current bridge. *See* CSXT Cross Examination Exhibit 2. This hearsay exhibit was offered without the opportunity to cross-examine the provider of the opinion nor supported by any analysis, properly objected to by BIE and the City, and should be deemed inadmissible.

Here, the record reflects the egregious condition of the bridge superstructure. The bridge sidewalks are dangerous for pedestrian crossings, and the protective railings on either side have been inadequately replaced. *See* BIE Exhibits E and F.

The girders require reinforcing, and CSXT will not reinforce them. *See* Hearing Transcript, Page 43, Lines 13-24. Painting will help reduce corrosion, but CSXT will not paint the bridge. *See* Transcript, Page 54, Line 20. The McCormick Taylor report evidenced *fracture critical* aspects and specific findings of deterioration. *See* City Statement No. 1, Page 5, Lines 7-14. *See also* City Exhibit 2, Page 47 (10<sup>th</sup> Photo Page). CSXT, to avoid these repairs, unilaterally decided that the bridge is unnecessary. The crossing deteriorated on CSXT's watch, and CSXT should repair this bridge.

### 3. Eligibility for Federal Funding Should Not Control Responsibility.

Finally, in its main brief CSXT seems to make the argument that because the City may potentially obtain federal funding to repair the crossing, all maintenance responsibilities should shift to the City. *See* CSXT Main Brief, Page 13. As evidence, CSXT states:

“As owner of the bridge, the City would be in the best position to navigate this funding process. City of Philadelphia v. Consol. Rail. Corp., 747 A.2d at 355 (Pa. 2000).”

First, the case cited does not provide evidence for the truth of the matter asserted in this sentence – that the City could best navigate a federal funding process – it merely reiterates CSXT's stance that the City owns the bridge which, to be clear, is not a controlling factor in assigning maintenance responsibility. Second, this position fully crystalizes CSXT's attitude toward their legal responsibilities in this matter. For the life of this bridge, the railroad has been charged with maintaining the structure. CSXT does not dispute that in 1961 the PUC further re-ordered the railroad to maintain the rebuilt structure. Since then, the structure has steadily deteriorated, and this is clearly demonstrated by the McCormick Taylor report, by the

photographs introduced, and by the testimony of every party to this matter. Nevertheless, by CSXT's viewpoint, they performed the "extensive" repair of replacing floorbeams five years ago, and should now be absolved of further work. This Commission cannot be misled by the twisted logic that says "we have been ordered to maintain this bridge, but another party *may* have an easier time obtaining third-party funding to repair our omissions, so that party should maintain this bridge moving forward." CSXT should recognize its responsibilities, expend the money they clearly do not want to release to repair the bridge, and keep its maintenance responsibilities moving forward.


#### **IV. Conclusion and Requested Relief**

The City fully articulated its conclusions and requested relief in its Main Brief. In reply to the arguments of the other parties, particularly CSXT, the City further asserts that (1) ownership of the bridge is not a controlling factor in assigning maintenance; and (2) the City's theoretical eligibility for federal funding should in no way cause a shift in maintenance responsibilities, especially for a neglected structure.

#### **V. Proposed Findings of Fact, Conclusions of Law, and Ordering Paragraphs.**

The City of Philadelphia fully articulated its proposed findings of fact, conclusions of law, and ordering paragraphs in its Main Brief. Nothing in the Main Briefs of the other parties causes the City to deviate from these proposed findings, and therefore the City hereby incorporates those proposals as if set forth more fully at length here.

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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Respectfully Submitted,



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