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August 30, 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 Exceptions 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 black ink that reads 'Benjamin C. Dunlap, Jr.' in a cursive script.

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 :

EXCEPTIONS OF CSX TRANSPORTATION, INC.

CSX Transportation, Inc. (“CSXT”) hereby files the following exceptions to the Recommended Decision (“RD”) of Administrative Law Judge Darlene Davis Heep issued August 6, 2021, in the above-referenced matter, pursuant to 52 Pa. Code 5.533, as follows:

1. CSXT excepts to Recommended Ordering Paragraph 2 on page 27 of the RD.

If the bridge remains open, the Commission should order that its load posting be removed in its Order issued at this time. McCormick Taylor determined in 2017 that the load postings could be removed and so informed the City. CSXT Ex. 6. It has repeated in its inspections since that time that posting is not needed. City Ex. 3, under Load Rating Summary section.

No party is requesting that the bridge remain posted. To the contrary, the City’s engineering 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 four years ago. CSXT Ex. 6. It is only due to the City not attending to this matter that the load postings have not been removed.

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 Main Brief, pgs. 7-8; I&E Main 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 of the Philadelphia Police 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 application and hearing on a "safe load posting re-evaluation of the subject structure" when the matter was thoroughly covered in the present hearing would be frankly absurd, when posting has been determined by the bridge inspectors to be no longer needed, no party is requesting continued posting and such a posting is contrary to the very reasons advanced by both the City and I&E for keeping the bridge open.

Therefore, Recommended Ordering Paragraph 2 should be amended to require the City to remove the load postings from the bridge within 30 days of the Commission's Order.

2. CSXT excepts to Recommended Ordering Paragraph 3 at page 27 of the RD.

CSXT already completed the only Priority 0 item for which it would have responsibility (Replace the missing pedestrian railing at the near left corner and at midspan of the right railing) prior to the hearing on February 9, 2021. CSXT Statement No. 1 at page 4, lines 19-21; CSXT

Statement No. 3 at page 6, lines 1-4; CSXT Ex. 11. Therefore, that reference should be removed from Recommended Ordering Paragraph 3.

3. CSXT excepts to Recommended Ordering Paragraph 4 at page 27 of the RD.

CSXT already completed the only Priority 0 item for which it would have responsibility (Replace the missing pedestrian railing at the near left corner and at midspan of the right railing) prior to the hearing on February 9, 2021. CSXT Statement No. 1 at page 4, lines 19-21; CSXT Statement No. 3 at page 6, lines 1-4; CSXT Ex. 11. Therefore, that reference should be removed from Recommended Ordering Paragraph 4.

4. CSXT excepts to Recommended Ordering Paragraph 5 at page 27 of the RD.

There is no substantial evidence in the record to support that CSXT should be ordered to “conduct a study to determine whether the paint on the bridge requires special remedial measures due to its content.” The City and I&E brought up the paint issue at the tail end of the hearing, without an opportunity for CSXT to develop any testimony or prior evidence in this regard. It is to be noted that CSXT objected to the admission of this late-filed exhibit on this basis. See email to ALJ Heep dated February 26, 2021, attached hereto as Exhibit A.

Furthermore, 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.”

In addition, the 2020 McCormick Taylor inspection report states that the through-girders on the bridge have 100% paint loss, while the floor beams and diaphragms have “heavy paint loss.” City Ex. 3 (see “Superstructure” and “Paint Condition” summaries in Inspection Summary section of report). Thus, there is very little if any paint left to study.

Finally, if such a study is ordered, 30 days is far too little time to conduct it.

Therefore, Recommended Ordering Paragraph 5 should be deleted.

5. CSXT excepts to Recommended Ordering Paragraph 6 at page 28 of the RD.

While paint on a bridge is primarily aesthetic, it does have some long-term maintenance benefit by inhibiting corrosion. Particularly if all of the maintenance responsibility remains with CSXT, however, it should not be a concern to others whether the bridge is painted or not. Instead, it should be a cost-benefit decision internally at CSXT as to whether that cost provides sufficient benefit. In this regard, it should be noted that CSXT does not paint its own railroad bridges. Hearing Transcript, pg. 54, lines 20-21.

Furthermore, the McCormick Taylor inspection report does not even recommend painting at any defined point in the future. It merely mentioned painting as a priority 4 item to be “programmed.” See City Ex. 3 (in Recommendations section under “Maintenance”).

Therefore, Recommended Ordering Paragraph 6 should be deleted.

6. CSXT excepts to Recommended Ordering Paragraph 8 at page 28 of the RD.

CSXT objects to the City being provided eight months to make sidewalk and roadway repairs on the bridge. These repairs were rated by McCormick Taylor as Priority 0 and 1 repairs in its latest bridge inspection report, and I&E's witness termed the safety hazards presented by these deficiencies as "a massive tripping hazard at the very least for all pedestrians, and the debris and vegetation adds to the safety issues." He noted these hazards are especially acute for pedestrians in wheelchairs or pedestrians who face challenges when they walk as well as pedestrians with strollers. I&E Statement 1 at pg. 6, lines 20-22 and pg. 7, lines 1-13; I&E Exhibits A, C, D and G.

Therefore, the City should be ordered to perform these repairs within the recommended timeframes in the McCormick Taylor inspection report.

7. CSXT excepts to Recommended Ordering Paragraph 9 at page 28 of the RD.

CSXT should not be required to submit a letter to the Commission's Bureau of Technical Utility Services within 10 days of completion of the sidewalk and roadway repairs, which are the City's responsibility. CSXT Ex. 2. CSXT might not even be aware of when the City performs this work, which would not require any coordination with the railroad. Therefore, this responsibility should be assigned to the City.

8. CSXT excepts to Recommended Ordering Paragraph 10 at page 28 of the RD.

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, recommended as priority 1 items in the McCormick Taylor inspection, City Ex. 3, would be a waste of the parties' time and Commission resources. There is sufficient evidence in the record as to whether these items are needed, and the Commission can order CSXT or another party to install and maintain them as a result of these proceedings. 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.

Therefore, Recommended Ordering Paragraph 10 should be deleted.

9. CSXT excepts to Recommended Ordering Paragraph 14 at page 29 of the RD.

In assigning maintenance costs and responsibilities, the Commission "is not limited to any fixed rule, but that all relevant factors must be taken into consideration with the fundamental requirement being that the order be just and reasonable." Com. Dep't of Transp. v. Pa. Pub. Util. Comm'n, 346 A.2d 371, 375 (Pa. Commw. Ct. 1975).

The allocation of costs between the parties is within the discretion of the Commission. N. Lebanon Twp. v. Pa. Pub. Util. Comm'n, 962 A.2d 1237, 1247 (Pa. Commw. 2008). For rail crossing cases, the PUC should consider the following factors:

1) the party that originally built the crossing; 2) the party that owns and maintains 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 the repair, replacement or removal of the crossing.

N. Lebanon Twp., 962 A.2d at 1247.

The bridge was constructed in 1886 by the B&O Railroad. An 1885 City ordinance authorized the B&O to cross Cemetery Avenue and required the railroad to maintain the facility carrying the street over the rail line. City Ex. 1. These maintenance responsibilities did not serve to transfer title to CSXT's predecessor or establish ownership of the bridge with CSXT's predecessor, as similar responsibilities did not do so in the Pa. Supreme Court's decision regarding the 41st Street bridge in Philadelphia. Thus, "[t]he normal principle that the bridge is owned by the City, as owner of the street that the bridge supports, therefore governs." City of Philadelphia v. Consol. Rail Corp., 747 A.2d 352, 355 (Pa. 2000).

Under Pennsylvania law it is well-established that "a bridge carrying a public street is deemed to be a part of the street, and, as such, it is owned by the entity that owns the street." City of Philadelphia v. Consol. Rail Corp., 747 A.2d at 354. Accordingly, a bridge carrying a public highway over a railroad track, upon its completion, becomes part of the public highway and is owned by the entity that owns the public highway. Id.; N. Pa. R. Co. v. Inland Traction Co., 55 A. 774, 775 (Pa. 1903). Thus, upon completion of the bridge carrying Cemetery Avenue over the railroad tracks, it became part of the public highway and is owned by the City, in spite of CSXT's current maintenance responsibilities under the 1961 PUC Order, as was also the case in the 41st Street proceeding.

The City clearly benefits from the bridge as much if not more than CSXT. See RD Findings of Fact 18, 20, 23-26. It is not just and reasonable for the PUC to order CSXT to continue to pay 100 percent of the maintenance costs for a crossing structure it does not own and from which the City derives substantial benefits.

CSXT performed extensive repairs to the bridge structure in 2015 and 2016 incurring costs of approximately \$645,000. CSXT Statement No. 3 at 3, lines 11-13; CSXT Ex. 9.

CSXT's replacement of floor beams increased the load capacity to be greater than the original bridge design. CSXT Statement No. 3 at 3, lines 19-22; CSXT Ex. 6. This increased load capacity permitted the load limit postings to be removed four years ago, which the City did not bother to do and did not ask CSXT to do. CSXT Ex. 6.

Given these extensive repairs, the remaining service life of the structure is expected to be greater than 25 years. CSXT Cross Examination Ex. 2. The Cemetery Avenue bridge can be open to all traffic, if the load posting signage is removed by the City, according to its engineering witness. Hearing Transcript at pg. 91, lines 7-11. In fact, if the City has maintenance responsibility for a bridge carrying one of its streets, it might pay greater attention to matters such as whether the bridge needs to be posted for load limits.

Additionally, the City receives Liquid Fuels Money for Cemetery Avenue. PennDOT Hearing Statement No. 2 at 3, lines 12-13. Removal of the approximately 650 feet of Cemetery Avenue where the bridge is located could result in the loss of approximately \$2,000 per year in Liquid Fuels Money according to the 2020 PennDOT Municipal Liquid Fuels (MLF) Allocation Report. CSXT Statement No. 4 at 4, lines 7-10; CSXT Ex. 12. Because the City is the owner of the bridge, receives the greatest benefit from the maintenance of the bridge, and receives Liquid Fuels Money due to the existence of the bridge, it would be reasonable to assign at least a portion of future maintenance responsibilities to the City.

If the structure is ordered to remain, the City is in the best position to obtain state or federal funding for any future construction work. First, Cemetery Avenue is a Federal Aid Route and any work on Cemetery Avenue is eligible for federal funding. PennDOT Statement No. 2 at 3-4, lines 12-21 and 1-7. The Cemetery Avenue bridge currently is not on the Transportation Improvement Plan ("TIP"), meaning there are no federal or state funds currently available for the

bridge. PennDOT Statement No. 2 at 3, lines 12-21 and at 4, lines 1-7. Id. For a project to be on a TIP and be funded, the project sponsor has to go through a detailed approval process. PennDOT Statement No. 2R at 1-3. As owner of the bridge, the City would be in the best position to supervise and direct this funding process. City of Philadelphia v. Consol. Rail Corp., 747 A.2d at 355.

In addition, while PennDOT's witness on federal funding could not say categorically that a railroad cannot be a sponsor for such funding, he has never seen a situation where other than the state or a municipality was the project sponsor to obtain federal funding. Hearing Transcript, pp. 101-103. The City is familiar with the federal TIP funding process. Id., pp. 91-95. As the City would need to be the project sponsor, assigning the City maintenance responsibility for the Cemetery Avenue bridge would help to assure that the City follows through with the TIP process to obtain funding when the bridge eventually does need to be replaced.

I&E's engineering witness testified that if the bridge is not abolished, then maintenance should be reassigned to the City and that it be provided a cost allocation for this work. I&E Statement 1, page 11, lines 8-11.

For these all reasons, CSXT respectfully requests that the current maintenance responsibilities for the Cemetery Avenue bridge superstructure be assigned to the City, with the maintenance costs being divided between the City and CSXT.

Respectfully Submitted,

NAUMAN, SMITH, SHISSLER & HALL, LLP

By *Benjamin C. Dunlap, Jr.*

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Date: August 30, 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 tracks of CSX Transportation, : Docket No. A-2019-3013783
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 document 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).

Honorable Darlene Heep
Administrative Law Judge
Pennsylvania Public Utility Commission
801 Market Street
Suite 4063
Philadelphia, PA 19107
Email: dheep@pa.gov

Karen Cummings, Esquire
Pennsylvania Department of Transportation
P.O. Box 8212
Harrisburg, PA 17105-8212
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Kayla L. Rost
Pennsylvania Public Utility Commission
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400 North Street
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City of Philadelphia
1515 Arch Street
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Philadelphia, PA 19102
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/s/ Lori Wyman
Lori Wyman, Legal Assistant

Dated: August 30, 2021

EXHIBIT “A”

Benjamin Dunlap

From: Benjamin Dunlap
Sent: Friday, February 26, 2021 1:54 PM
To: dheep@pa.gov
Cc: James Kellett; Rost, Kayla; D'Alfonso, Gina
Subject: FW: A-2019-3013783 Cemetery Ave.
Attachments: Cemetary Ave Bridge Certified Plan Stamp 1st page City of Philadelphia Co.pdf;
Cemetary Ave Bridge Certified Plans City of Philadelphia Co.pdf

Dear Judge Heep,

Again, just to be sure it is on the record in regard to the certified plans, CSXT objects to any decision regarding lead paint being made on the basis of this exhibit if admitted. That would be outside the scope of this hearing. Also, CSXT did not have the opportunity to present any testimony on this exhibit and issue, which was not mentioned by any party prior to the very end of the hearing. To make any decision based on the exhibit without the ability to present testimony would be a violation of CSXT's due process rights.

Thank you,

Ben



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From: Rost, Kayla <karost@pa.gov>
Sent: Thursday, February 25, 2021 1:52 PM
To: Heep, Darlene <dheep@pa.gov>
Cc: James Kellett <James.Kellett@Phila.gov>; Benjamin Dunlap <bdunlapjr@nssh.com>; D'Alfonso, Gina <GDALFONSO@pa.gov>
Subject: A-2019-3013783 Cemetery Ave.

Good Afternoon,

I am pleased to announce that Mr. Sinick was able to utilize resources outside of the Commission to have the Commission's certified stamped bridge plans scanned. Please see the attachments for the plans.

I do have to note that since the plans were blueprints and actually printed on blue paper, the plans were scanned in reverse to get the black and white copy. In doing this, the certified stamp was lost during the scan. Thus, Mr. Sinick had the stamp scanned normally and it is attached as well. Thank you.

Sincerely,

L. Rost |

Investigative

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