



## CITY OF PHILADELPHIA

September 8, 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 to Exceptions of CSXT 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,

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/s/

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 :**

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DATED: September 8, 2021

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**CITY OF PHILADELPHIA’S REPLY TO EXCEPTIONS OF CSXT**

The City of Philadelphia (“City”), by and through its undersigned counsel, hereby respectfully submits this Reply in opposition to the Exceptions of CSX Transportation, Inc (“CSXT”), dated August 30th, 2021, and in support of its position in the above-captioned matter, averring as follows:

**I. Introduction**

On August 6, 2021 the Honorable Judge Darlene Heep issued her recommended decision in the above-captioned matter. The decision was filed to the docket on August 9, 2021, and accompanied by a letter directing the Parties to file any Exceptions within twenty (20) days. On August 30, 2021, CSXT filed Exceptions to the Recommended Decision, which were posted to the docket on August 31, 2021 and cited specific objections to nine paragraphs of the sixteen-paragraph order. The City hereby submits the below replies to those exceptions.

**II. Summary of Reply Exceptions**

CSXT’s Exceptions may be summarized as follows:

1. That the subject bridge’s load posting should simply be removed, instead of a party seeking its removal petitioning the Commission for same. CSXT Exceptions at Paragraph 1;

2. That CSXT should not be directed to complete its Priority 0 and 1 items, because that has already been accomplished. CSXT Exceptions at Paragraph 2;
3. That the timeframe to complete CSXT Priority 0 and 1 items is unnecessary, as they have already been completed. CSXT Exceptions at Paragraph 3;
4. That CSXT should not be required to complete a study of the bridge's paint and any deleterious effects of potential lead. CSXT Exceptions at Paragraph 4;
5. That CSXT should not have to paint the bridge to prevent further rust and corrosion. CSXT Exceptions at Paragraph 5;
6. The timeframe for the City to complete its Priority 0 and 1 items. CSXT Exceptions at Paragraph 6;
7. That CSXT should have to report to the Commission's Bureau of Technical Utility Services, Rail Safety Section, upon completion of sidewalk repair efforts. CSXT Exceptions at Paragraph 7;
8. That CSXT and the City of Philadelphia should immediately file an application with the Commission for the work ordered in the Recommended Decision. CSXT Exceptions at Paragraph 8; and
9. That CSXT should not bear the ongoing maintenance costs of the bridge. CSXT Exceptions at Paragraph 9.

The City is happy to comply with the Recommended Decision as filed. The City offers no reply to CSXT's first Exception. As to the remaining CSXT Exceptions, in the strongest possible terms the City rejects CSXT's arguments as lacking basis in the record, disregarding public health, safety, and welfare, and continuing its pattern and practice, as borne out in the entirety of this litigation, of neglectfulness and shirking of its responsibilities for this bridge.

### **III. Reply Exceptions**

1. No reply.
2. The City agrees with Recommended Decision Paragraph 3 at Page 27. That paragraph requires CSXT to complete the Priority 0 and Priority 1 items noted in the McCormick Taylor inspection report. CSXT claims, erroneously, that its Priority 0 item has been completed (and ignores that it has also been ordered to complete the Priority 1 items as well). To the contrary, CSXT installed completely inadequate, unsafe railings that the record, and ALJ Heep's own questions during the hearing, comprehensively reflects. *See* BIE Exhibits E and F. To claim otherwise demonstrates a continuing disregard for public safety. Paragraph 3 should remain.
3. The City agrees with Recommended Decision Paragraph 4 at Page 27. For the reasons stated above, this paragraph cannot possibly be redundant, because CSXT has not completed its Priority 0 and 1 items.
4. The City agrees with Recommended Decision Paragraph 5 at Page 27. CSXT contends that there is no substantial evidence to suggest the bridge's paint requires special remedial measures. Despite this dubious claim, the record reflects otherwise. *See* Late-Filed Exhibits 1 and 3. Moreover, CSXT bears all maintenance responsibilities for this bridge. CSXT has failed in the past to either remove the lead paint or perform any mitigating work to abate its deleterious effects. CSXT has outright refused to paint the bridge. *See* Transcript, Page 54, Line 20.

It is also unlikely that CSXT would ever even attempt to determine if the paint is hazardous of its own accord. 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 at the hearing. Asked if he himself looked at CSX's own inspections, Mr. Mihaly replied "I've glanced over them." *See* Transcript, Page 53, Line 18. As the party responsible for maintenance, it is incumbent upon CSXT to ensure that the paint on their bridge is safe, and must be ordered to do so if they refuse.

5. The City agrees with Recommended Decision Paragraph 6 at Page 28. Bridge paint is not "primarily aesthetic." CSXT acknowledges that paint reduces rust and corrosion, and that rust and corrosion deteriorates the structure. *See* Transcript, Page 55, Lines 11-16. Contrary to how CSXT interprets this order, the Commission did not require painting to beautify the structure or interfere with CSXT's internal decisions, but rather as a necessary component to CSXT's maintenance responsibilities. The City mentions throughout its filings and reiterates here that CSXT's neglect of the structure, and assumption that it would be absolved of future maintenance responsibilities for no other reason than complacency, is the primary cause of its disrepair today. CSXT is required to maintain the structure. Painting the structure will prevent further deterioration. Requiring CSXT to paint is therefore a proper order.
6. The City agrees with Recommended Decision Paragraph 8 at Page 28. The City does not deny that it bears responsibility for sidewalk approaches to the bridge. Given the various requirements of CSXT under this Recommended Decision, and the potential necessity for access to and closure of the bridge and its approaches to perform this necessary work, 240 days is a reasonable amount of time for the CSXT to comply with this order and for the City to bid out the necessary paving contracts.

7. The City agrees with Recommended Decision Paragraph 9 at Page 28. It appears CSXT may misunderstand the directive in this paragraph. The City admits it must maintain the sidewalk approaches, and thus takes no exception to the preceding Paragraph 8. It appears that Paragraph 9 assumes that the sidewalk approaches will be the last, or close to last repair (given that it must be completed within 240 days). After the City repairs the approaches, CSXT must then submit a report of its own work and date(s) of completion. This is a reasonable reporting requirement for an extensive rehabilitative effort, especially given the historic neglect by CSXT of this bridge. The order is proper and should remain.
8. The City agrees with Recommended Decision Paragraph 10 at Page 28. CSXT takes exception to the need to apply to the Commission for work on the bridge. This paragraph, of course, only demands such application *where required* (emphasis added). The crossing certainly falls under the Commission's jurisdiction, and CSXT's previous attempts at repairing the pedestrian guard rail (*see* BIE Exhibits E and F) demonstrate the need for oversight. Further proceedings are not a "waste of time," but a further demand of accountability, which should not be rejected.
9. The City agrees with Recommended Decision Paragraph 14 at Page 29. In its Exception, CSXT seeks to relitigate the allocation of maintenance cost and the factors set forth in *N. Lebanon Township*, but adds no additional information and, indeed, mostly copies and pastes from its Briefs. The City respectfully refers the Commission to its own Brief at pages 9 through 11 and reiterates the following: the railroad built the crossing, the railroad has been charged with maintaining the crossing throughout its existence (though clearly they have not in an acceptable manner); CSXT derives benefit from the crossing;

CSXT is responsible for its deterioration; and CSXT would benefit from its repair. The totality of circumstances dictates that CSXT rehabilitate the crossing.

Moreover, justice not only at law but at equity demand that CSXT continue to maintain the bridge. Under its watch the superstructure deteriorated, defective railing pieces went under-repaired or ignored, and CSXT could not 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.

Finally, CSXT continues to argue 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 (not a controlling factor in assigning maintenance responsibility). Second, this position yet again underscores 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 floor beams 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**

For the reasons stated above and in its previous filings before the Commission in the above-caption matter, the City respectfully requests that the Commission reject CSXT’s Exceptions.

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 Reply  
Exceptions of the City of Philadelphia upon the parties listed below, in accordance with the  
Emergency Order at M-2020-3019262.

**Service by Electronic Mail Only**

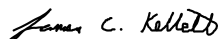
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Respectfully Submitted,



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