



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

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

September 9, 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 to CSX Transportation Inc.'s Exceptions

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the **Non-Proprietary** version of the **Bureau of Investigation and Enforcement's Reply to CSX Transportation Inc.'s Exceptions** of the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement in the above-referenced proceeding. The **Proprietary** version has been submitted to the Secretary via email.

Copies have been served on the parties of record in accordance with the Certificate of Service. If you have any questions, please contact the undersigned.

Sincerely,

Kayla L. Rost
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney ID No. 322768
(717) 787-1888
karost@pa.gov

KLR/ac
Enclosures

cc: As per Certificate of Service
Office of Special Assistants (*via email – ra-OSA@pa.gov*)
Pamela McNeal, Legal Assistant (*via email – pmcneal@pa.gov*)
William Sinick, P.E. (*via email – wilsinick@pa.gov*)

**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. :

**BUREAU OF INVESTIGATION AND ENFORCEMENT'S
REPLY TO
CSX TRANSPORTATION INC.'S EXCEPTIONS**

NON-PROPRIETARY VERSION

Kayla L. Rost
Prosecutor
PA Attorney ID No. 322768

Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120
(717) 787-1888
karost@pa.gov

Dated: September 9, 2021

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. I&E REPLY EXCEPTIONS.....1

A. I&E Reply to CSXT Exception to Recommended Ordering Paragraph 2: The ALJ correctly did not render a decision on the load posting of the bridge and instructed a party requesting a load posting change to file an application. 1

B. I&E Reply to CSXT Exception to Recommended Ordering Paragraphs 3 and 4: The ALJ correctly ordered CSXT to complete the Priority 0 and 1 items within a specified time-frame..... 2

C. I&E Reply to CSXT Exception to Recommended Ordering Paragraphs 5 and 6: The ALJ correctly ordered CSXT to paint the bridge structure and the order for a study prior to painting is reasonable in light of the facts, or lack thereof, contained on the record..... 4

D. I&E Reply to CSXT Exception to Recommended Ordering Paragraph 10: The Ordering Paragraph should either remain or be modified to order the installation of structure-mounted guide rails on the bridge and pedestrian fencing. 6

E. I&E Reply to CSXT Exception to Recommended Ordering Paragraph 14: The Recommended Decision properly affirmed the assignment of costs and maintenance for the superstructure and substructure of the bridge to CSXT. 6

III. CONCLUSION.....9

I. INTRODUCTION

On August 6, 2021, Administrative Law Judge (“ALJ”) Darlene Heep issued a Recommended Decision in the above-captioned proceeding, which correctly denied the Application to Abolish the Cemetery Avenue road bridge filed by CSX Transportation Inc. (“CSXT”) and ordered various maintenance and repairs to be completed by both the City of Philadelphia and CSXT.

On August 30, 2021, CSXT filed Exceptions to the ALJ’s Recommended Decision.

Pursuant to the procedural schedule established in the August 9, 2021 Cover Letter for the Recommended Decision and in accordance with Commission regulations at Section 5.535, I&E now submits this Reply to CSX Transportation Inc.’s Exceptions.¹ For the reasons fully explained below, I&E respectfully requests that the Pennsylvania Public Utility Commission (“Commission”) deny CSXT’s Exceptions and wholly affirm the ALJ’s Recommended Decision without modification.

Pursuant to 52 Pa. Code § 1.33 and to avoid repeating arguments, I&E hereby incorporates the Main Brief, including the Appendices, and Reply Brief that it filed in the instant proceeding on April 1, 2021 and April 22, 2021, respectfully.

II. I&E REPLY EXCEPTIONS

A. **I&E Reply to CSXT Exception to Recommended Ordering Paragraph 2: The ALJ correctly did not render a decision on the load posting of the bridge and instructed a party requesting a load posting change to file an application.**

I&E agrees with and supports Recommended Ordering Paragraph 2 because the evidence of record does not support a finding that the load posting on the bridge should be

¹ 52 Pa. Code § 5.535.

removed.² The Application related to an application to abolish, and thus the analysis of this matter related to whether the crossing was necessary and proper for the service, accommodation, convenience, and safety of the public as well as what safety measures needed to be immediately addressed if the application was denied. None of the parties provided any analysis or data related to the load posting other than pointing to a section in the March 30, 2020 Bridge Inspection Report (“Report”) which stated that the bridge is currently posted for 14 tons except combination 21 tons but recommended that the bridge posting **may** be removed.³ There is no other evidence on the record to support or counter this recommendation, not to mention that the evaluation of a bridge load posting is a separate and distinct analysis.⁴ Accordingly, I&E supports Ordering Paragraph 2 and holds the position that the record does not contain enough evidence to substantiate a change in the load posting at this time.

B. I&E Reply to CSXT Exception to Recommended Ordering Paragraphs 3 and 4: The ALJ correctly ordered CSXT to complete the Priority 0 and 1 items within a specified time-frame.

Recommended Ordering Paragraphs 3 and 4 are as follows:

3. That CSX Transportation, Inc., at its sole cost and expense, shall complete the Priority 0 and 1 items set forth in the Report referenced herein pertaining to the substructure and superstructure of the bridge that are not assigned to the City of Philadelphia.

² See also I&E Main Brief and I&E Reply Brief.

³ City Statement No. 1, Exhibit 3.

⁴ See generally PennDOT standards- Publication 238 Part IP, Chapter 4- Bridge Size and Weight Restrictions 2021 Edition Page IP 04-11. PennDOT was assigned the responsibility and authority to ensure proper posting through Act 44 of 1988.

4. That CSX Transportation Inc. shall complete Priority 0 items within seven (7) days from entry of the date of the Final Order and Priority 1 items within six (6) months from the entry of the Final Order in this matter.

Priority 0 and 1 items are defined as critical deficiencies that threaten either the structural integrity of the bridge or public safety. Priority 0 items are to be addressed within seven (7) days of identification and Priority 1 items are to be scheduled and completed within six (6) months of notification, if and only if the item will not degrade further or compromise public safety. *BEGIN CONFIDENTIAL*

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

⁵ City Statement No. 1, Exhibit 3.

START CONFIDENTIAL

[REDACTED]

[REDACTED] *END CONFIDENTIAL* Thus, the original paint is still present on the bridge as only the girders had 100% paint loss while other areas have heavy paint loss. Additionally, the Report shows the correlation between the heavy paint loss and the surface rust and pitting on the bridge.

Moreover, the record contains unequivocal testimony stating that painting a bridge structure can prevent rust and corrosion, conditions that contribute to the deterioration and degradation of the structural integrity of the bridge structure.¹³ The painting of a bridge is not purely for aesthetics, as CSXT has argued, but rather aides in the bridge's structural integrity.

BEGIN CONFIDENTIAL

[REDACTED] *END CONFIDENTIAL* If painting a bridge was primarily for aesthetics reasons, then the engineering report charged with reviewing and analyzing the structural integrity and safety of a bridge would not have discussed it and listed it as a priority item.

¹¹ City Statement No. 1, Exhibit 3.
¹² City Statement No. 1, Exhibit 3.
¹³ N.T. pgs. 55, 111; I&E Rebuttal Testimony, page 5.
¹⁴ City Statement No. 1, Exhibit 3.

Thus, Recommended Ordering Paragraphs 5 and 6 are supported by the record and are necessary for the maintenance and structural integrity of the Cemetery Ave Bridge, and should not be deleted.

D. I&E Reply to CSXT Exception to Recommended Ordering Paragraph 10: The Ordering Paragraph should either remain or be modified to order the installation of structure-mounted guide rails on the bridge and pedestrian fencing.

CSXT attempts to argue that further proceedings on the installation of structure-mounted guide rails on the bridge and the pedestrian fencing is not needed, and thus Ordering Paragraph 10 should be deleted. CSXT's position and requested relief are not consistent. As fully explained in its Main Brief, I&E strongly supports the installation of structure-mounted guide rails on the bridge and pedestrian fencing¹⁵ (and other Priority 1 items) to make the bridge safe to pedestrians and to ensure its structural integrity. The Ordering Paragraph ensures that not only is the work completed, but that CSXT properly drafts the plans for the work and submits those plans for approval to the Commission prior to completing the alterations. This is consistent with Section 2702 and the proper procedure for altering a crossing.¹⁶

E. I&E Reply to CSXT Exception to Recommended Ordering Paragraph 14: The Recommended Decision properly affirmed the assignment of costs and maintenance for the superstructure and substructure of the bridge to CSXT.

The relevant factors traditionally considered in allocating the costs include, but are not limited to: (1) the party who originally built, owned and maintained the crossing; (2) the

¹⁵ I&E notes in its Main Brief that the pedestrian railing currently installed at the bridge is unsafe and not consistent with the replacement bridge plans approved by the Commission in 1961. *See generally* I&E Main Brief, pages 20-23; N.T. pgs. 109-110, 122, 124-127, 131.

¹⁶ 66 Pa. C.S. § 2702.

relative benefits initially conferred by the construction of the crossing; (3) the party who is responsible for the deterioration of the crossing; and (4) the benefits accrued from the reconstruction of the crossing.¹⁷ These factors are neither mandatory nor exclusive of other considerations, and the Commission's allocation of cost will stand as long as the allocation is just and reasonable and has a sound legal and factual basis.¹⁸

The Recommended Decision noted that CSXT's predecessor, Baltimore and Ohio Railroad, built the original bridge in 1886 and the replacement bridge in 1961.¹⁹ The bridge was constructed pursuant to a City Ordinance which permitted the bridge to be constructed only if the railroad kept the structures and streets in good order and condition at all times and that the City was held harmless from any liability.²⁰ These facts are undisputed.

Furthermore, the 1961 Order regarding the replacement of the bridge structure assigned maintenance of the structure solely to CSXT.²¹ This is also undisputed.

The record is clear that CSXT's predecessor built the bridge, CSXT is responsible for maintaining the bridge, both parties receive a benefit from the bridge (CSXT benefits from having a safe route to traverse a densely populated area and the City benefits from having the ability to safely cross CSXT's tracks), and that CSXT is the party responsible for the bridge's deterioration due to its lack of maintenance to the bridge evidenced by the fracture-critical nature of the bridge and specific findings of deterioration in the Report.

¹⁷ *Wheeling & Lake Erie Railway Co. v. Pa. P.U.C.*, 778 A.2d 785, 793 (Pa. Cmwlth. 2001).

¹⁸ *AT&T v. Pa. P.U.C.*, 737 A.2d 201, 209 (Pa. 1999); *Wheeling & Lake Erie Railway Co.*, 778 A.2d at 793.

¹⁹ Recommended Decision, page 21.

²⁰ Recommended Decision, page 21.

²¹ Recommended Decision, page 22; *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.

ALJ Heep’s well-reasoned decision correctly states that CSXT should be ordered to complete and absorb the expenses of the priority items and maintenance because assigning these costs and work to another party “would encourage entities to simply neglect maintenance until the facility is rendered too frail or requires what the responsible party deems too much work to bother at a great cost to the other entities affected.”²² It would be unjust to push the costs of maintaining this fracture-critical bridge to the City after CSXT’s years of neglect. CSXT may argue that they recently completed some work on the bridge, but the fact remains that the bridge is fracture critical and still requires work to ensure its structural integrity and safety to the traversing public.

Additionally, while CSXT continues to challenge the allocation of costs and maintenance based upon the ownership of the bridge,²³ its argument is misguided because ownership is not a controlling factor considered in allocating costs and/or maintenance.²⁴ Recommended Ordering Paragraph 14 should remain because it is supported by substantial evidence and is reasonable in light of the facts placed on the record.

²² Recommended Decision, page 23.

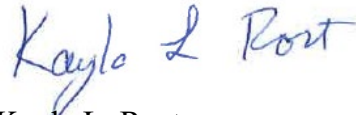
²³ CSXT also argues that the bridge has a life-expectancy of 25 years. I&E continues to challenge this assertion and CSXT’s Cross Examination Exhibit 2 on the basis of hearsay, due process (inability of the parties to cross-examine the drafter of the memo), and the purported opinion not being supported by any analysis. I&E’s full argument relating to this issue can be found on pages 4-7 of its Reply Brief.

²⁴ *Trustees of Property of Penn Central Transportation Company v. United States Ry. Assoc.*, 463 F. Supp. 1321, 1328 (Special Ct. 1979) (“ the issue of costs of future maintenance and repair is separable from the issue of compensation for property rights appropriated.”).

III. CONCLUSION

I&E respectfully requests that the Commission reject the Exceptions of CSXT for the reasons discussed above and approve, in its entirety, the ALJ's Recommended Decision.

Respectfully submitted,

A handwritten signature in blue ink that reads "Kayla L. Rost". The signature is written in a cursive style.

Kayla L. Rost

Prosecutor

PA Attorney ID No. 322768

Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120
(717) 787-1888
karost@pa.gov

Dated: September 9, 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 : Docket No. A-2019-3013783
Transportation, Inc. located in the City of :
Philadelphia, Philadelphia County, :
Pennsylvania, and the allocation of cost thereto. :

CERTIFICATE OF SERVICE

I hereby certify that I have this day, September 9, 2021, served a true copy of the foregoing **Proprietary and Non-Proprietary** versions of the **Bureau of Investigation and Enforcement's Reply to CSX Transportation Inc.'s Exceptions**, upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

Service by Electronic Mail:

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

Benjamin C. Dunlap Jr., Esquire
Nauman Smith Shissler & Hall
200 North Third Street
18th Floor
P.O. Box 840
Harrisburg, PA 17108
bdunlapjr@nssh.com

Karen Cummings, Esquire
Pennsylvania Department of
Transportation
Office of Chief Counsel
P.O. Box 8212
Harrisburg, PA 17105-8212
kcummings@pa.gov

James Clifford Kellett, Esquire
City of Philadelphia
1515 Arch Street
16th Floor
Philadelphia, PA 19102
james.kellett@phila.gov



Kayla L. Rost
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney ID No. 322768
(717) 787-1888
karost@pa.gov