



## CITY OF PHILADELPHIA

February 28, 2022

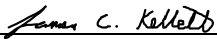
Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
400 North Street  
Harrisburg, PA 17120

**RE: A-2019-3013783**

Dear Secretary Chiavetta,

Enclosed for filing please find the City of Philadelphia's Answer to the Petition for Reconsideration of CSX Transportation, Inc. in the above-captioned matter. Administrative Law Judge Heep and the parties were served copies of this petition in accordance with the Certificate of Service below.

Very truly yours,

  
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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: *James C. Kellett*  
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DATED: February 28, 2022

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PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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<b>Philadelphia, Philadelphia County,</b>	<b>:</b>	
<b>Pennsylvania, and the allocation of cost Thereto</b>	<b>:</b>	

**CITY OF PHILADELPHIA’S ANSWER TO PETITION FOR RECONSIDERATION**

The City of Philadelphia (“City”), by and through its undersigned counsel, hereby respectfully submits this Answer in opposition to the Petition for Reconsideration of CSX Transportation, Inc (“CSXT”), dated February 18, 2022, and in support of its position in the above-captioned matter, averring as follows:

**I. Procedural History**

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.

On September 8 the City submitted its replies to those exceptions, and the Bureau of Investigation and Enforcement (“I&E”) followed suit one day later.

On February 3, 2022, the Commission issued an order denying CSXT’s Exceptions and adopting the Recommended Decision of ALJ Heep. CSXT subsequently filed a Petition for Reconsideration of its Ninth Exception on February 18, 2022.

## II. Standard of Review

The Commission's standard of review is best set forth in *Duick*, which states in pertinent part:

A petition for reconsideration, under the provisions of 66 Pa. C.S. §703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. In this regard we agree with the Court in the Pennsylvania Railroad Company case, wherein it was said that “[p]arties..., cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them...” What we expect to see raised in such petitions are *new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission.* (Emphasis Added). *Duick v. Pa. Gas & Water Co.*, 56 Pa. PUC 553, 558-559 (1983).<sup>1</sup>

A petition for relief under this standard must demonstrate “new and novel arguments” raised by the Petitioner, and not previously considered by the Commission. Notably, in *Duick*, the petitioner failed to meet this standard because it contained no newly discovered evidence, nor change of circumstances since the Commission's order.

Further, Petitions for reconsideration of a final agency order may only be granted judiciously and under appropriate circumstances because such action results in the disturbance of final agency orders. *City of Pittsburgh v. Pa. Dep't of Transp.*, 416 A.2d 461 (1980).

Here, CSXT raises the same questions, fails to offer a new or novel argument, and does not highlight an overlooked aspect of its case. No newly discovered evidence nor change of circumstances exists. Even if it did, the totality of the circumstances dictate that the Commission issued a proper Order. The Petition should be denied.

## III. Discussion

Petitioner raises the same arguments set forth previously. Nothing within the petition constitutes (1) a new or novel argument not previously heard; nor (2) an argument overlooked or

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<sup>1</sup> See also *Feleccia v. PPL Electric Utilities Corp.*, 2003 WL 1901914 (finding “to establish a proper basis for rescission, a petitioner must first establish the existence of newly discovered evidence, a substantial change in circumstances, or an error of fact or law. *Duick v. Pennsylvania Gas & Water Co.*, C-R0597001, 56 Pa. P.U.C. 553 (Order entered December 17, 1982). We must then determine whether, under the totality of the circumstances, we should exercise our discretionary authority to rescind.

not addressed by the Commission. Granting reconsideration under these circumstances is injudicious as it fails to uphold justice at law or equity.

A. The Commission Neither Overlooked nor Failed to Address Facets of Petitioner's Argument

Nothing within CSXT's Petition constitutes a new or novel argument, nor a contention overlooked or not addressed. In its Petition, CSXT variously states that: (1) the City should be assigned maintenance of the bridge's superstructure (*See* Petition at Paragraph 9) and (2) that the City may be eligible for federal funding to repair the bridge, and has experience obtaining third-party funding for infrastructure projects. *See* Petition at Paragraphs 10-15. Compare these assertions with CSXT's previous attempts in this case:

"And another reason to transfer maintenance responsibility is that the City is in the best, if not only, position to ensure federal funding when the time does come [to reconstruct the bridge.]" *See* Hearing Transcript at Page 25, lines 22-25.

"Cemetery Avenue is a Federal Aid Route and any work on Cemetery Avenue is eligible for federal funding...The Cemetery Avenue bridge is currently not on the Transportation Improvement Plan...the City would be in the best position to navigate this process." *See* main Brief of CSX at Page 13.

"The City is also in the best position to obtain federal funding for reconstruction of the bridge, when that is eventually necessary, as it must be the project sponsor." *See* Reply Brief of CSXT at Page 7.

Petitioner is literally repeating the same, tired arguments. They have been decided, constitute a classic example of issue preclusion, and fail to meet the threshold established in *Duick*.

CSXT may believe, erroneously, that it offers a new or overlooked argument elsewhere, either in the notion that precedent should not apply, or that the Commission failed to address the testimony of the I & E witness. Taking each in turn, CSXT first suggests that

“just because something has been done one way in the past does not mean that it makes sense in the present. The trend in recent decades, in fact, has been that the involved state or municipal entity maintains the highway bridges carrying their roadways and the involved railroad maintains the railroad bridges carrying its tracks.” *See* Petition at Paragraph 6.

This is not even an argument. It is an anecdotal statement, footnoted by purportedly-relevant caselaw, but with no application of any rule nor facts of this case or the cases cited. The novelty of this contention may be its dearth of evidence, and the Commission should reject its assertion.

CSXT also suggests that the Commission did not properly address I & E witness testimony, specifically noting that

“Rail Safety’s own witness testified in this proceeding that if the crossing is abolished, ‘then I suggest reassigning maintenance of the bridge to the City of Philadelphia and providing cost allocation to the City of Philadelphia from CSX Transportation, Inc.’ I & E Statement No. 1, pg. 11, lines 8-11.”

To the contrary, this contention (1) completely contradicts I & E’s position and (2) was clearly considered by the Commission. Mr. Sinick qualified the quote used by CSXT by stating that he reserved the right to revise his opinions after consideration of other evidence, and after presentation of such evidence clearly states in his rebuttal testimony that CSXT’s neglect of the bridge led to its current condition, and that assignment of maintenance to the City would be “unfair.” *See* I & E Statement 2R at pages 7-8. In its brief, I & E argues that “CSXT is responsible for the maintenance and any costs associated with the bridge pedestrian railing, bridge sidewalk, bridge concrete deck, substructures, superstructures, and bridge expansion joints. *See* Main Brief of I & E at Page 6. This position repeats in I & E’s reply brief, stating that “I & E is alarmed that CSXT has allowed this dangerous conditions to exist at the Cemetery

Avenue bridge for **over five years** after the issues were identified in the Bridge Inspection Report in 2016 and again in 2020.” (Emphasis theirs).

The Recommended Decision incorporates the parties’ position that CSXT bears maintenance responsibilities. *See* Recommended Decision at Page 19. Additionally, it adds that “the record supports allocating repair, maintenance, and rehabilitation of the crossing to CSXT.” *See* Recommended Decision at Page 21. CSXT’s grievance here is not that Mr. Sinick’s testimony was overlooked, but that the Commission considered the entire record, determined that that one specific line of testimony was not dispositive, and that the totality of the circumstances opposed their view.

The single line of testimony Petitioner offers does not constitute new evidence or circumstances and therefore fails the *Duick* standard. CSXT makes a second (or third) attempt at the same argument, fails to present any new argument or evidence overlooked, and the Commission should refuse to reconsider.

B. The Merits of the Petition, and Totality of the Circumstances, Do Not Warrant Reconsideration

Even if the Commission decides that somewhere within its Petition CSXT proffers a new or overlooked argument, their content still does not merit reconsideration. Petitioner, *again*, trots out the illogical concept that it should somehow be absolved of its negligence and omissions because the City may find an easier path to third-party funding for repair. To say nothing of CSXT’s own financial might, the argument is contrary to law, equity, and basic standards of fairness, and represents a last throw of the dice since they could not unilaterally abolish a crossing they did not want to pay for, without any regard for the community it would affect.

These are the facts: the road existed before the bridge. The ordinance authorizing the bridge was enacted so that the railroad might, to its benefit, run its tracks through the City. A

condition of the crossing's creation was that the railroad would maintain the bridge. This condition has not changed, and has indeed been reaffirmed, by orders and agreements. Under CSXT's watch the superstructure deteriorated, defective railing pieces went under-repaired or ignored, and it 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.

CSXT first attempted to abolish the bridge, to the detriment of the community, to escape the consequences of its decisions. Now it argues, no less than three times, that it should be absolved of maintaining anyway because another entity *may* be able to secure outside funding more easily. Flatly, this is an argument flimsier than the railings they attempted to pass as safe. The Petition must be rejected and the order for CSXT to retain maintenance responsibilities upheld.

#### 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**

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

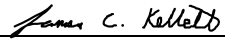
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Respectfully Submitted,



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