



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

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

February 28, 2022

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 Answer in Opposition to CSX Transportation Inc.'s Petition for Reconsideration

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the **Bureau of Investigation and Enforcement's Answer in Opposition to CSX Transportation Inc.'s Petition for Reconsideration** in the above-referenced proceeding.

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
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KLR/jfm
Enclosures

cc: As per Certificate of Service
Office of Special Assistants (*via email – ra-OSA@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. :

**THE BUREAU OF INVESTIGATION AND ENFORCEMENT’S
ANSWER IN OPPOSITION
TO THE PETITION OF
CSX TRANSPORTATION INC.
FOR RECONSIDERATION OF THE
COMMISSION’S FEBRUARY 3, 2022 OPINION AND ORDER**

TO THE HONORABLE COMMISSION:

Pursuant to 52 Pa. Code § 5.572(e), the Bureau of Investigation and Enforcement (“I&E”) of the Pennsylvania Public Utility Commission (“Commission”) hereby submits its Answer in Opposition to the Petition for Reconsideration of the Commission’s February 3, 2022 Opinion and Order (“Opinion and Order” or “February 3, 2022 Order”) in the above-captioned proceeding filed by CSX Transportation Inc. (“CSXT”). In support of this Answer, I&E avers as follows:

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 CSXT and ordered various

maintenance and repairs to be completed by both the City of Philadelphia (“City”) and CSXT. CSXT filed Exceptions.

On February 3, 2022, the Commission issued an Opinion and Order denying CSXT’s Exceptions and adopting ALJ Heep’s Recommended Decision.

On February 18, 2022, CSXT filed a Petition for Reconsideration, requesting that the Commission reconsider its cost allocation responsibilities for the Cemetery Avenue bridge superstructure.

CSXT’s argument is a mere repackaging of its August 30, 2021 Exceptions to the Recommended Decision of ALJ Heep. The Commission fully addressed this argument in its Order and rejected CSXT’s position. As such, CSXT has not met the standards for reconsideration and its Petition should be denied.

Pursuant to 52 Pa. Code § 1.33 and to avoid repeating arguments, I&E hereby incorporates its Main Brief, including the Appendices, its Reply Brief, and its Reply to Exceptions that it filed in the instant proceeding on April 1, 2021, April 22, 2021, and September 9, 2021 respectfully.

II. LEGAL STANDARD

Section 5.572(c) of the Commission’s regulations permits a party to petition for reconsideration within fifteen (15) days after entry of a Commission order.¹ The standard found in *Duick v. Pennsylvania Gas and Water Company*, 56 Pa. P.U.C. 553, 559 (1982) requires that a reconsideration petition identify “new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the

¹ 52 Pa. Code § 5.572(c).

Commission,” and is not “a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them.”²

Absent a new and novel argument or consideration that appears to have been overlooked by the Commission, the Commission has stated that it is “unlikely that a party will succeed in persuading us that our initial decision on a matter or issue was either unwise or in error.”³ Indeed, the Commonwealth Court has affirmed the Commission’s decision to deny reconsideration requesting a second review of questions that were definitively decided against a party.⁴

CSXT’s arguments in the instant Petition do not meet the Commission’s standards for granting relief in the form of reconsideration as the Commission has fully and completely addressed CSXT’s argument in the February 3, 2022 Opinion and Order. For the reasons fully explained below, I&E respectfully requests that the Commission deny CSXT’s Petition for Reconsideration and wholly affirm the February 3, 2022 Opinion and Order.

III. SUMMARY OF ARGUMENT

CSXT argues that the Commission failed to consider the Rail Safety Section’s testimony when reviewing cost allocation of the bridge superstructure. CSXT reiterates its position that the maintenance of the bridge superstructure should be re-allocated to the City. In short, CSXT restates its argument made in its Ninth (9th) Exception and does not present

² *Duick v. Pennsylvania Gas and Water Company*, 56 Pa.P.U.C. 553, 559 (1982) (quoting *Pennsylvania Railroad Co. v. Pennsylvania Public Service Commission*, 179 A. 850, 854 (Pa. Super. 1935)).

³ *Duick v. Pennsylvania Gas and Water Company*, 56 Pa.P.U.C. 553, 559 (1982).

⁴ *Executive Transp. Co., Inc. v. Pa. Pub. Util. Comm’n*, 138 A.3d 145, (Pa. Cmwlth. 2016) (holding that the PUC did not err or abuse its discretion in denying a Petition for Reconsideration that reiterated the same arguments that had been previously advanced).

any new or novel argument. Accordingly, CSXT did not meet the standards of *Duick* and its Petition should be denied.

ALJ Heep’s well-reasoned decision correctly stated that CSXT should be allocated the costs of 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.”⁵ It would be unjust to push the costs of maintaining this fracture-critical bridge to the City after CSXT’s years of neglect.

The Opinion and Order also specifically addressed CSXT’s argument when disposing of its Ninth Exception. The Commission found that CSXT’s predecessor built the bridge and later reconstructed it, and that the responsibility for maintenance was clearly delegated to CSXT in both instances.⁶ The Commission also found that “the consideration of additional factors further support this conclusion,” noting that CSXT receives a benefit from the bridge and that CSXT is responsible for the deterioration of the bridge due to its lack of maintenance.⁷ Thus, the Opinion and Order reviewed and fully addressed CSXT’s arguments related to cost allocation in CSXT’s Ninth Exception and denied the Exception.

IV. I&E’S ANSWER

1. The averment sets forth conclusions of law to which no response is required.

To the extent a response is required, the averments are denied.

⁵ Recommended Decision, page 23.

⁶ Opinion and Order, pg. 20 (entered February 3, 2022).

⁷ Opinion and Order, pgs. 21-22 (entered February 3, 2022).

2. The averment set forth conclusions of law to which no response is required. To the extent a response is required, the averments are denied.
3. Admitted that CSXT made the same or substantially similar arguments in its Ninth Exception. Admitted that the Commission agreed with the ALJ that the allocation of the maintenance responsibilities and costs of Cemetery Avenue to CSXT is just and reasonable.⁸ By way of further response, CSXT's Exceptions and the Opinion and Order speak for themselves, and any interpretation or characterization thereof is denied.
4. Admitted that the Commission discussed the 1886 City Ordinance and October 2, 1961 Order in the Opinion and Order.⁹ By way of further response, the Opinion and Order speaks for itself, and any interpretation or characterization thereof is denied.
5. Admitted that Paragraph 14 of the Recommended Decision is accurately copied and that the Recommended Decision was adopted by the Commission. By way of further response, the Recommended Decision and Opinion and Order speak for themselves, and any interpretation or characterization thereof is denied.
6. Denied. The averment sets forth conclusions of law to which no response is required.
7. Admitted in part, Denied in part. Admitted that CSXT's witness made a similar or substantially same statement in his direct testimony. Denied that the statement has any relevance or bearing on the instant Petition.

⁸ Opinion and Order, pg. 20 (entered February 3, 2022).

⁹ Opinion and Order, pgs. 20-22 (entered February 3, 2022).

8. Admitted in part, Denied in part. Admitted that I&E's witness made a similar or substantially same statement in his direct testimony.¹⁰ By way of further response, Mr. William Sinick's testimony speaks for itself, and any interpretation or characterization thereof is denied.

9. Denied. The averment sets forth conclusions of law to which no response is required.

10. Denied. The averment sets forth conclusions of law to which no response is required.

11. Admitted in part, Denied in part. Admitted that Cemetery Avenue is a Federal Aid Route and any work completed on Cemetery Avenue is eligible for federal funding. By way of further response, Mr. Charles Davies' testimony speaks for itself, and any interpretation or characterization thereof is denied.

12. Admitted. By way of further response, Mr. Charles Davies' testimony speaks for itself, and any interpretation or characterization thereof is denied.

13. Admitted in part, Denied in part. Admitted that a proposed project must go through a process to get on the Transportation Improvement Plan. By way of further response, Mr. Charles Davies' and Mr. Darin Gatti's testimony speak for themselves, and any interpretation or characterization thereof is denied. Mr. Gatti testified that the City had previously supported SEPTA's application for federal funds to reconstruct a road bridge over a SEPTA track.¹¹

¹⁰ I&E notes that Mr. Sinick stated in his rebuttal testimony that "In my opinion, if an administrative law judge were to entertain the possibility of reassigning maintenance responsibilities, it would be unfair to reassign maintenance to the City without a robust cost allocation for future maintenance or contribution towards its replacement." I&E Statement No. 2, pgs. 5-6.

¹¹ N.T. pgs. 93-94.

14. Admitted in part, Denied in part. By way of further response, it is admitted that Mr. Charles Davies provided testimony on federal funding, however Mr. Davies' testimony speaks for itself, and any interpretation or characterization thereof is denied.

15. Denied. The averment sets forth conclusions of law to which no response is required. By way of further response, the record does not support a finding that the City would need to be the project sponsor.

16. Denied. The averment set forth conclusions of law to which no response is required. By way of further response, it is not logical or in the best interest of the public to reassign maintenance of a critical fracture bridge to the City after CSXT's years of neglect.

V. CONCLUSION

I&E respectfully requests, for the reasons discussed above, that CSXT's Petition for Reconsideration be denied.

Respectfully submitted,



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Dated: February 28, 2022

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CERTIFICATE OF SERVICE

I hereby certify that I have this day, February 28, 2022, served a true copy of the foregoing **Bureau of Investigation and Enforcement's Answer in Opposition to CSX Transportation Inc.'s Petition for Reconsideration**, 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:

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