

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Public Meeting held November 10, 2022

Commissioners Present:

Gladys Brown Dutrieuille, Chairman
Stephen M. DeFrank, Vice Chairman
Ralph V. Yanora
Kathryn L. Zerfuss
John F. Coleman, Jr.

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, and the allocation of cost thereto

A-2019-3013783

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition for Reconsideration (Petition) filed by CSX Transportation, Inc. (CSXT) on February 18, 2022, directed to the Commission's Opinion and Order issued February 3, 2022 (*February 2022 Order*), in the above-captioned proceeding. By Order entered, February 24, 2022, we granted reconsideration pending review of, and consideration on, the merits, pursuant to Pa. R.A.P. 1701(b)(3).

The City of Philadelphia (City) and the Commission's Bureau of Investigation and Enforcement (I&E) filed Answers in opposition to the Petition on February 28, 2022.

For the reasons stated below, we shall deny the CSXT Petition, consistent with the discussion in this Opinion and Order. On consideration of the Petition, we conclude that it does not meet the standards for reconsideration established in *Duick v. Pennsylvania Gas & Water Co.*, 56 Pa. PUC 553 (1982) (*Duick*).

History of the Proceeding

On October 24, 2019, CSXT filed an application requesting approval to abolish the public rail-highway crossing where CSXT's tracks cross under a highway bridge carrying Cemetery Avenue in the City of Philadelphia (Crossing) (Application).

On February 26, 2020, a field investigation and conference was scheduled and conducted at the site.

On December 3, 2020, I&E issued a letter to CSXT and the City notifying them of certain priority maintenance items noted in a March 30, 2020, Bridge Inspection Report which had not yet been addressed.

On February 9, 2021, an evidentiary hearing was held and subsequently, the Parties filed Main Briefs on April 1, 2021 and Reply Briefs on April 22, 2021.

On August 9, 2021, the Commission issued ALJ Heep's Recommended Decision.

On August 30, 2021, CSXT filed Exceptions. On September 8, 2021 and September 9, 2021, respectively, the City and I&E filed Replies to Exceptions.

Background

CSXT filed the Application, under the provisions of 66 Pa. C.S. § 2702 of the Public Utility Code, 66 Pa. C.S. §§ 101, *et seq.* (Code) and Commission Regulations. *See* 52 Pa. Code § 5.13. Through the Application, CSXT requested approval to abolish the public rail-highway crossing where CSXT's tracks cross under a highway bridge carrying Cemetery Avenue in the City of Philadelphia (Crossing). *February 2022 Order* at 2. A description of the Crossing at issue is set forth in the *February 2022 Order*. *Id.*

A field investigation and conference was scheduled and conducted on February 26, 2020. The following Parties of interest were noted as participating in the conference: representatives of CSXT, I&E, the City, the Pennsylvania Department of Transportation (PennDOT), and a local landowner. The matter was subsequently referred to the Commission's Office of Administrative Law Judge (OALJ) because, *inter alia*, several Parties objected to the proposed abolition of the Crossing. *February 2022 Order* at 2. The matter was assigned to an Administrative Law Judge (ALJ) for the receipt of evidence and issuance of a Recommended Decision (R.D.).

As noted previously, I&E issued a letter to CSXT and the City notifying them of certain priority maintenance items noted in a March 30, 2020, Bridge Inspection Report prepared by the civil engineering firm, McCormick Taylor, (Report) which had not yet been addressed.¹ CSXT responded in a letter to I&E that the priority items in the

¹ The Report is confidential and maintained in the Commission's confidential records as the result of an unopposed Motion for Protective Order regarding its contents. *See February 2022 Order.*

Report were new features and constituted alterations of the bridge requiring Commission approval rather than repairs. *February 2022 Order* at 2.

By Notice issued January 29, 2021, an evidentiary hearing was scheduled for February 9, 2021. Prior to the evidentiary hearing, written direct and rebuttal testimony was submitted by the Parties. The hearing convened as scheduled and was attended by the interested Parties. Witnesses were presented by CSXT, I&E, the City, and PennDOT. Seventeen exhibits were admitted into evidence. The record consists of the following statements and exhibits as admitted by the presiding officer, ALJ Heep:

CSX Transportation

- St. 1 (Direct Testimony of Derek Mihaly, P.E., with Exhibits 1 and 2)
- St. 2 (Direct Testimony of Gregory Creasy, P.E., with Exhibits 3, 4, 5)
- St. R-3 (Rebuttal Testimony of Derek Mihaly, P.E., with Exhibits 6 through 10) (Confidential and Public)
- St. R-4 (Rebuttal Testimony of Gregory Creasy, P.E., with Exhibit) 2
See Tr. at 132-134. 5
- Cr-Exh 1 (Photographs)
- Cr-Exh 2 (2/8/21 Bergmann 15 Memorandum to Mihaly)

City of Philadelphia

- St. 1 (Direct Testimony of Darin L. Gatti with 18 Exhibits 1, 2, 3)
- St. 2 (Direct Testimony of Lt. Joseph Ruff)
- St. 3-R (Rebuttal Testimony of 21 Darin L. Gatti)

Pennsylvania Department of Transportation

- St. 1 (Direct Testimony of Mary Ann Lang)
- St. 2 (Direct Testimony of 25 Charles H. Davies, P.E.)
- St. 3-R (Rebuttal Testimony of 4 Charles H. Davies, P.E.)

Bureau of Investigation and Enforcement

I&E Direct Testimony Bureau of Investigation and Enforcement (with Exhibits A through I) (Proprietary and Nonproprietary)
(I&E Rebuttal Testimony with Exhibits J through L)

The following post hearing, or late-filed exhibits were admitted:

City Late-filed Exhibit 1 – Plans Existing Cemetery Avenue 1960
I&E Late-filed Exhibit 2 - Cemetery Ave Bridge Certified Plan Stamp 1st page
I&E Late-filed Exhibit 3 - Cemetery Ave Bridge Certified Plans City of Philadelphia Co.

The record includes the afore-mentioned exhibits and a 138-page transcript. The record closed on April 22, 2021, upon submission of Reply Briefs by the Parties. *See February 2022 Order* at 2 referencing R.D. at 4-5, for a complete list of exhibits; *February 2022 Order* at 3 for reference to transcribed notes of testimony.

In the August 9, 2021 Recommended Decision, ALJ Heep reached thirty-three (33) Findings of Fact and drew nine (9) Conclusions of Law. The findings of fact and conclusions of law were adopted by the *February 2022 Order*. *February 2022 Order* at 9.

Significantly, ALJ Heep noted the following Finding of Fact in the Recommended Decision:

33. The July 3, 1885 City of Philadelphia Ordinance authorizing construction of the Crossing provides that the railroad will maintain and keep in repair all bridges that it constructs in the City.

R.D. at 10; (note omitted).

We note that, during the evidentiary hearing, and in briefs, CSXT asserted that if the Application were denied, it should not be responsible for certain priority items listed in the Report or ongoing repair and maintenance of the Crossing. Rather, those responsibilities should, according to the position of CSXT, be assigned to the City as the owner of the bridge and public highway. *See* R.D. at 1; *also* CSXT Main Brief at 10-13.

I&E, the City and PennDOT all took the position that maintenance and repair responsibilities for the Crossing's bridge structure should be conducted, and the costs borne by CSXT. *See* R.D. at 19, citing PennDOT Main Brief at 8; I&E Main Brief at 6; City Main Brief at 4. The City and I&E further asserted that CSXT should be ordered to make certain repairs to the bridge to secure the safety of the Crossing. *Id.*, citing City Main Brief at 5; I&E Main Brief at 18-24.

On consideration of the record and the positions of the Parties, ALJ Heep recommended that the Commission deny the CSXT Application. ALJ Heep further recommended that CSXT be assigned certain repair and maintenance responsibilities on the structure of the Crossing bridge. Additionally, the Recommended Decision recommended that the Commission assign to the City repair and maintenance of the approach roadway and sidewalk and the removal of snow, ice, trash, and debris at the Crossing. Finally, the Recommended Decision recommended that the Commission direct CSXT to examine and submit a report to the Parties and the Commission's Bureau of Technical Utility Services, Rail Safety Section, regarding the paint on the Crossing bridge, and take whatever remedial action is required. *See February 2022 Order* at 3.

The recommendations of ALJ Heep were detailed and extensive. We, hereby, reprint the recommended Ordering Paragraphs of the Recommended Decision:

1. That the Application to abolish the public rail-highway crossing where CSX Transportation, Inc. tracks cross under a

highway bridge carrying Cemetery Avenue in the City of Philadelphia, Philadelphia County, be denied.

2. That any party that requests to alter the load posting sign located at the subject bridge shall immediately after the Final Order is entered in this matter file an application with the Commission for the safe load posting re-evaluation of the subject structure and serve all parties to this proceeding.
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.
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.
5. Within thirty (30) days of the entry of the Final Order in this matter, CSX Transportation Inc. will conduct a study to determine whether the paint on the bridge requires special remedial measures due to its content. CSX Transportation Inc. shall provide a copy of the results of this study to the Commission's Bureau of Technical Utility Services, Rail Safety Section, and the other parties within ten (10) days of completion of the study.
6. That CSX Transportation Inc. shall complete any required painting to prevent rust and corrosion within twelve (12) months from the date of entry of the Final Order.
7. That within ten (10) days of completion of each item, CSX Transportation Inc. will submit a letter to the Commission's Bureau of Technical Utility Services, Rail Safety Section, with a copy to each party, describing the work and the date of completion.
8. That the City of Philadelphia, at its sole cost and expense, shall repair the sidewalk approaches to the bridge, consistent with the recommendations in the Report referenced

herein within two-hundred forty days (240) days from the date of the entry of the Final Order.

9. That within ten (10) days of completion of the sidewalk repair, CSXT will submit a letter to the Commission's Bureau of Technical Utility Services with a copy to each party, describing the work and the date of completion.

10. That upon entry of a Final Order in this proceeding, CSX Transportation Inc. and the City of Philadelphia will immediately file an application with the Commission seeking authorization for the work ordered herein, where required.

11. That upon completion of the work addressed herein, the City of Philadelphia shall furnish all materials and do all work necessary to remove snow, ice and debris from bridge and the pedestrian walkway at the Crossing.

12. That all work ordered herein will shall conform with American Association of State Highway and Transportation Officials ("AASHTO") and PennDOT Bridge Design Standards and Specifications.

13. That the City and CSX Transportation Inc. shall coordinate the work ordered herein so as to limit street closure and public inconvenience as much as possible.

14. That in all respects not inconsistent herewith, all previous orders and secretarial letters of the Pennsylvania Public Utility Commission pertaining to the subject crossing shall remain in full force and effect.

15. That this Order, insofar as it assigns responsibilities to various parties, is without prejudice to their rights to enforce such responsibilities by others pursuant to any applicable law or lawful agreement.

16. That this Order is binding upon the parties hereto, their respective successors and assigns.

R.D. at 27-29.

CSXT filed Exceptions to the Recommended Decision on August 30, 2021. On September 8, 2021 and September 9, 2021, respectively, the City and I&E filed Replies to the Exceptions. By our *February 2022 Order* entered, February 3, 2022, we adopted the Recommended Decision and denied the Exceptions of CSXT. As noted, on February 18, 2022, CSXT filed the instant Petition.

Discussion

Legal Standards

The Code establishes a party's right to seek relief following the issuance of our final decisions pursuant to Subsections 703(f) and (g) of the Code, 66 Pa. C.S. § 703(f)-(g), (relating to rehearings, rescission and amendment of orders). Such requests for relief must be consistent with Section 5.572(b) of the Commission's Regulations, 52 Pa. Code §5.572(b), (relating to petitions for relief following the issuance of a final decision). The standards for review of a petition for relief following the issuance of a final decision are well established and have been addressed in the case of *Duick*.

Duick held that a petition for rehearing under Subsection 703(f) of the Code must allege newly-discovered evidence not discoverable through the exercise of due diligence prior to the close of the record. *Duick*, at 558. A petition for reconsideration under Subsection 703(g), however, may properly raise any matter designed to convince us that we should exercise our discretion to amend or rescind a prior order, in whole or in part. Such petitions are likely to succeed only when they raise "new and novel arguments" not previously heard or considerations which appear to have been overlooked or not addressed by us. *Duick*, at 559; *see also*, *AT&T v. Pa. PUC*, 568 A.2d 1362 (Pa. Cmwlth. 1990). Because a grant of relief on such petitions may result in the disturbance of final orders, a petition for reconsideration should be granted judiciously

and only under appropriate circumstances. *West Penn Power v. Pa. PUC*, 659 A.2d 1055 (Pa. Cmwlth. 1995), *petition for allowance of appeal denied*, No. 576 W.D., Allocatur Docket (April 9, 1996); *City of Pittsburgh v. PennDOT*, 490 Pa. 264, 416 A.2d 461 (1980).

As noted by CSXT in its Petition, our analysis of a petition seeking reconsideration will generally proceed in two steps. First, the Commission will determine whether a party has offered new and novel arguments or identified considerations that appear to have been overlooked or not addressed by the Commission in its previous order. The second step of the *Duick* analysis is to evaluate the proffered, new or novel argument, or overlooked consideration, in order to determine whether to modify the previous decision. *See* Petition at 1-2, citing *Petition of Metro. Edison Co. for Approval of A Default Serv. Program . . .*, Docket Nos. P-2017-2637855, *et al* (Order entered November 1, 2018); 2018 WL 5994761; *See, also, SBG Management Services, Inc./ Colonial Garden Realty Co., L.P. v. Philadelphia Gas Works*, Docket No. C-2012-2304183 (Order entered May 19, 2019) (*SBG Order*)² (discussing *Application of La Mexicana Express Service, LLC, to transport persons in paratransit service, between points within Berks County*, Docket No. A-2012-2329717; A-6415209 (Order entered September 11, 2014).

We will not necessarily modify our prior decision just because a party offers a new and novel argument or identifies a consideration that was overlooked or not addressed by the Commission in its previous order. *See Glen Riddle Station, L.P. v. Sunoco Pipeline, L.P.*, Docket No. C-2020-3023129 (Order entered September 13, 2022); 2022 WL 4465413 (Pa. P.U.C.), citing *SBG Order*.

² *Affirmed, Phila. Gas Works v. Pa. PUC*, 249 A.3d 963 (2021); No. 14 EAP 2020 (April 29, 2021); 2021 WL 1681311; *remand granted, in part* (June 15, 2021); 2021 WL 2697432 (Table).

Finally, we advise the parties that we are not required to consider expressly or at great length each and every contention raised by a party to our proceedings. *See University of Pennsylvania, et al. v. Pa. PUC*, 485 A.2d 1217, 1222 (Pa. Cmwlth. 1984). Any argument that is not specifically addressed herein shall be deemed to have been duly considered and denied without further discussion.

CSXT's Petition

In the Petition, CSXT acknowledges that the issue it raises on reconsideration was broached in its Exception No. 9 filed to the Recommended Decision of ALJ Heep in this matter. Petition at 2. In its Exception No. 9, CSXT requested that the current maintenance responsibilities for the bridge superstructure be assigned to the City, with the maintenance costs being divided between the City and CSXT. *See February 2022 Order* at 19. CSXT argued, *inter alia*, that the City owned the subject Crossing bridge and that the City benefits as much from the bridge as does CSXT. Therefore, pursuant to CSXT's position, it is not just and reasonable for CSXT to be ordered to pay 100 percent of the maintenance costs for a structure it does not own. CSXT additionally pointed out that the City receives federal funding for work on Cemetery Avenue, and due to the receipt of federal funds, the City receives the greatest benefit from the Crossing, making it reasonable to assign a portion of the maintenance responsibilities to the City. *Id.*³

In its Petition, CSXT raises as its core argument, the following: "The Commission failed to consider that its own Rail Safety Section recommended that bridge maintenance responsibilities should be re-allocated to the City." Petition at 2.

³ *See also*, Petition at ¶ 3: "... CSXT further argued that the cost of maintaining the superstructure should be divided between the two entities. It agreed to maintain sole maintenance and cost responsibility for the bridge substructure. *See* CSXT Statement No. 1 at 7, lines 3-6."

CSXT argues, in pertinent part, that reconsideration should be granted on the issue of the assignment of future costs and maintenance to CSXT, as opposed to assignment to the City, as it would be both logical and in the best interest of public safety to reassign maintenance responsibility for the Cemetery Avenue bridge superstructure to the City. Petition at 5.

CSXT cites, essentially, three reasons in support of its position. First, the *Order* adopted the Recommended Decision’s recommendation that all prior orders of the Commission pertaining to the crossings regarding the assignment of cost and maintenance be preserved which, in the opinion of CSXT, overlooks a “trend” in recent decades, that has assigned maintenance and costs to the involved state or municipal entity to maintain the highway bridges carrying their roadways and the involved railroad maintains the railroad bridges carrying its tracks. Petition at ¶ 6. CSXT further notes that this trend has been the subject of numerous Commission orders and agreements among the Parties. *Id.*, n. 1, and citations. Second, CSXT has historic maintenance responsibility for only “a handful” of highway bridges in Pennsylvania. Petition at ¶ 7, citing CSXT Statement No. 1, pg. 7, lines 12 – 18. Third, the Commission’s Rail Safety witness testified in this proceeding and recommended that if the subject crossing is not abolished, then maintenance of the bridge should be reassigned to the City and cost allocation should be provided to the City from CSXT. Petition at ¶ 8, citing I&E Statement No. 1, pg. 11, lines 8 – 11.

As an additional basis on which CSXT suggests reconsideration is warranted, it points out that the City is in the best position to obtain state or federal funding for any future construction work at the Crossing. CSXT observes that Cemetery Avenue is a Federal Aid Route and any work on Cemetery Avenue is, in its view, eligible for federal funding. Petition at ¶ 11, referencing PennDOT Statement No. 2.

The City's Answer

In its Answer to the CSXT Petition, the City replies that the *February 2022 Order* neither overlooked nor failed to address any facet of CSXT's arguments. The City states that nothing within CSXT's Petition constitutes a new or novel argument, nor a contention overlooked or not addressed.

The City, thereafter, specifically addresses the contentions raised in the CSXT Petition; namely that: (1) the City should be assigned maintenance of the bridge's superstructure (Petition at ¶ 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. (Petition at ¶¶ 10-15). The City, in response to these contentions, cites portions of CSXT's pleadings filed in the matter. These excerpts of pleadings are noted for a basis on which to compare the assertions in the Petition with CSXT's previous filings in the case. *See City Answer at 4-5.* On citing the relevant portions of CSXT pleadings, the City asserts that CSXT is merely repeating arguments previously considered and addressed in the *Order*. *City Answer at 4.*

The City does, however, directly counter two considerations raised by the CSXT Petition on which there is a colorable claim under the standards of *Duick*.

First, the City responds to the argument of CSXT that the Commission precedent of prior orders entered in the present case concerning the Crossing should not apply. This position is assailed by the City as not an argument, but an "anecdotal statement." *City Answer at 5.* The City takes the position that the support for this contention, as raised in Petition footnote #1 should be rejected. The footnote #1 cited administrative Commission decisions so as to illustrate a "trend" that is contrary to the disposition reached in the *February 2022 Order*. The City states that the cases cited do not have any application of any rule or facts of this case. And, contrary to supporting

reconsideration, the citation of the decisions shows a dearth of evidence in support of the proposition of a trend as suggested by CSXT.

Second, the City addresses the argument in the CSXT Petition that the Commission did not properly consider the I&E witness testimony. This response is directed to the allegation that the Commission Rail Safety witness testified in the proceeding that if the Crossing is abolished, then maintenance of the bridge should be reassigned to the City and certain costs allocated to the City rather than CSXT. *See City Answer at 5, discussing I&E Statement No. 1, pg. 11, lines 8-11.*

The City replies that this contention contradicts I&E's position in the case and was expressly considered by the Commission. The City adds that the I&E witness qualified the quote used by CSXT in its Petition by clearly reserving the right to revise his opinions after consideration of other evidence. The City notes that, after presentation of such other evidence, the I&E witness, in his rebuttal testimony, expressed the opinion that CSXT's neglect of the bridge/Crossing led to its current condition, and that assignment of maintenance to the City would be "unfair." *See City Answer, referencing I&E statement 2R at pages 7-8.*

I&E's Answer

I&E, in its Answer, argues that the CSXT Petition should be denied. I&E finds that the Recommended Decision correctly recommended 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." I&E Answer at 4, quoting R.D. at 23.

I&E also responds that the *February 2022 Order* also specifically addressed CSXT's arguments when disposing of its Ninth Exception. It points out that 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. I&E adds that 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. I&E Answer at 4.

In reply to the suggestion that the Commission overlooked the testimony of the I&E witness that would propose an allocation of costs to the City, I&E notes that the testimony of its witness speaks for itself and was duly considered. I&E advises that its witness, 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." *See City Answer*, n. 10, referencing I&E Statement No. 2, pgs. 5-6.

Disposition

On consideration of the CSXT Petition, we shall deny it, consistent with the discussion in this Opinion and Order. We agree with the City and I&E, that a threshold showing under the standards of *Duick* has not been established.

The Commission may consider many factors when allocating highway-rail maintenance responsibilities, such as:

1. The party that originally built the crossing.
2. The party that owned and maintained the crossing.

3. The relative benefit conferred on each party with the construction of the crossing.
4. Whether each party is responsible for the deterioration of the crossing that has led to the need for its repair, replacement, or removal.
5. The relative benefit that each party will receive from the repair, replacement, or removal of the crossing.

See February 2022 Order at 8-9, citing *N. Lebanon Twp.* at 1247 (citing *Greene Twp. Bd. of Supervisors v. Pa. PUC*, 668 A.2d 615, 619 (Pa. Cmwlth. 1995)).

As noted in the *February 2022 Order*, the Commission is not restricted to the above-cited factors. *Millcreek Twp. v. Pa. PUC*, 753 A.2d 324 (Pa. Cmwlth. 2000) (citing *AT&T v. Pa. PUC*, 737 A.2d 201 (Pa. 1999)). The Commission can consider other factors such as the availability of state and/or federal funding for a project and the general equities of the case in its determination. *Erie L.R. Co. v. Pa. PUC*, 278 A.2d 188 (Pa. Cmwlth. 1971); *SEPTA v. Pa. PUC*, 802 F. Supp. 1273 (E.D. Pa. 1992); *Application of the City of Wilkes-Barre*, Docket No. A-00101606 (Order entered April 9, 1981). Moreover, the Commission may “determine which factors are relevant in assessing costs within the context of the particular case before it.” *Bell Atl. Pa. v. Pa. PUC*, 672 A.2d 352, 355 (Pa. Cmwlth. 1995).

In the Petition, CSXT, essentially, argues that equitable principles support reconsideration and, upon reconsideration, support modifying the *February 2022 Order* allocating maintenance and costs of the Crossing to CSXT. The basis of this position is that the Crossing, notwithstanding that it was originally built by CSXT’s predecessor corporate entities, has, over time, become integral to the transportation system of the City. This is so, whereas the Crossing’s usefulness to the operations of CSXT has waned

over time. However, on review of the Recommended Decision and our *February 2022 Order*, these considerations have been thoroughly considered.

While not dispositive, the history of the Crossing has been expressly considered by the presiding ALJ and the Commission. It is noted that CSXT's predecessor entities and the City reached an agreement for the original construction of the Crossing and these Parties reached an agreement between themselves for the future responsibility for its maintenance. This agreement has been memorialized through a City Ordinance. *See February 2022 Order* at 19-22; City Ex. 1, Sec. 8. Based on the foregoing, as *quid pro quo* for the construction of the Crossing, it was contemplated that the railroad would accept the responsibility for maintenance of the crossing. The City Ordinance authorizing the original construction of the bridge in 1886 required that the railroad maintain the Crossing. Specifically, the City Ordinance required that the authority to construct the bridge was subject to the following condition:

Sect. 5. That the said railroad company shall agree to keep its railroad and all its structures crossing any of the streets aforesaid in good order and condition at all times, and to save the city of Philadelphia harmless from any liability or responsibility whatever which may grow out of the establishment and use of the said railroad over and across the streets aforesaid.

See City Exh. 1 at 187, Sec. 1 and Sec. 5.

That argument of CSXT, that the relative utility of the Crossing has changed over time, is an equitable consideration for consideration within the scope of Commission authority. However, it is not one that has not been considered and resolved against CSXT based on the record in this matter.

Based on the foregoing, we find that the threshold considerations of *Duick* have not been met. Therefore, we see no need to and decline to go forward with consideration of the second step of the two-step *Duick* analysis based on the CSXT Petition.

IV. Conclusion

On consideration of the Petition for Reconsideration of the Opinion and Order entered February 3, 2022, adopting the Recommended Decision of ALJ Heep issued August 9, 2021, the said Petition is denied; **THEREFORE,**

IT IS ORDERED:

1. That the Petition for Reconsideration of CSX Transportation, Inc., filed on February 18, 2022, to the Opinion and Order entered February 3, 2022, in the above-captioned proceeding is denied, consistent with this Opinion and Order.
2. That the Recommended Decision of Administrative Law Judge Darlene Heep, issued on August 9, 2021, at the above-captioned docket, is adopted, consistent with the February 3, 2022, Opinion and Order.
3. That a copy of this Opinion and Order shall be served on the Bureau of Technical Utility Services.
4. That this proceeding be referred to the Bureau of Technical Utility Services for monitoring of completion of the project.
5. That upon the satisfactory completion of the project the Bureau of Technical Utility Services shall issue a Secretarial Letter closing the proceeding.

6. That upon the submission, as set forth in Ordering Paragraph 5, the Secretary's Bureau shall mark the proceeding at Docket No. A-2019-3013783 closed.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive, flowing style.

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: November 10, 2022

ORDER ENTERED: November 10, 2022