

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of CSX Transportation, Inc., for : A-2023-3041598  
approval to abolish four (4) at-grade crossings :  
where East Bayfront Parkway (DOT # 918 322 D); :  
Ore Dock Road (DOT # 976 924 B and 932 473 C); :  
and East Bay Drive (DOT # 918 325 Y) cross, at :  
at-grade, the tracks of CSX Transportation, Inc. :  
in the City of Erie, Erie County. :

Application of the Department of Transportation : A-2022-3036626  
of the Commonwealth of Pennsylvania for :  
approval to alter one (1) public at-grade crossing :  
(DOT 918 324 S) by the installation of Z Gates at :  
the multi-use trail along East Bayfront Parkway :  
(State Route 4034) and alter two (2) public :  
at-grade crossing (DOT’s 524 337 C, and :  
524 335 N) by installing pedestrian crossing :  
improvements and altering the pre-emption and :  
timing where East 8<sup>th</sup> Street and East 10<sup>th</sup> Street :  
cross the tracks of CSX Transportation, Inc., in the :  
City of Erie, Erie County, and the allocation of costs :  
incident thereto. :

**COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF  
TRANSPORTATION’S PREHEARING STATEMENT**

In accordance with the September 28, 2023, Prehearing Conference Order of Administrative Law Judge Charece Z. Collins in the above-referenced matter, the Department of Transportation (“Department”) offers the following:

**I. History of the Proceedings:**

On November 8, 2022, the Department filed an application with the Pennsylvania Public Utility Commission (“Commission”) to alter three at-grade crossings in Erie County, including an at-grade crossing located East Bayfront Parkway (DOT # 918 324 S). The Department’s application was docketed at A-2022-3036626. A Secretarial Letter was issued on February 24, 2023, to which CSX Transportation, Inc. (“CSX”) filed a Petition to Amend on July 3,

2023. CSX's Petition to Amend sought removal of the rail tracks located at the East Bayfront Parkway rail crossing. In response, Erie Sewer Authority and Erie-Western Pennsylvania Port Authority filed Protests and Objections, alleging that the rails are needed to serve the local wastewater treatment plant and to ensure a fully functional Port which serves several industrial customers.

On July 5, 2023, CSX filed an application with the Commission to abolish four grade crossings located at East Bayfront Parkway (the same crossing at issue in A-2022-3036626), Ore Dock Road (DOT # 976 924 B and DOT # 932 473 C), and East Bay Drive (DOT # 318 325 Y) because CSX no longer uses those crossings to service rail customers. CSX's application as docketed at A-2023-3041598. CSX's application represented that the Department would be solely responsible for the costs and expenses related to the abolishment of those four crossings and that the Department would be responsible for the maintenance of the former crossings after the project is completed.

In July and August 2023, Erie-Western Pennsylvania Port Authority, Erie Sewer Authority, and the City of Erie filed Protest and Objections to CSX's application. Erie Western Pennsylvania Port Authority and Erie Sewer Authority made similar objections to A-2023-3041598 as in A-2022-3036626. The City of Erie objected to CSX's application based on their ownership of the wastewater treatment plant and alleged that the rails and associated crossings have been essential access points to service the plant.

On August 4, 2023, the Department filed a Protest and Objections to CSX's application based solely on CSX's proposal that the costs and expenses of abolishing and maintaining all of the crossings should be performed at the Department's sole cost and expense. Specifically, neither Ore Dock Road nor East Bay Drive are state roads; and East Bayfront Parkway was not

part of any Department project. Since the filing of its Protest and Objections, the Department has agreed to be financially responsible for the East Bayfront Parkway because it was determined that the crossing referenced in A-2023-3041598 was the same crossing at issue in A-2022-3036626.

At some point during the proceedings, both A-2022-3036626 and A-2023-3041598 were consolidated; no party objected to the consolidation of these matters.

II. **Issue in the Proceedings and the Department's Position Thereon:**

- a. Should CSX be required to solely bear the costs of the abolishment of the rail crossings at Ore Dock Road and East Bay Drive?

*Suggested Answer:* Yes.

Pennsylvania law concerning the allocation of costs involved in abolishing rail-highway crossings is well settled. The Commission has exclusive authority to assess the costs of the work involved in abolishing rail-highway crossings in such proportions as it may determine to be proper. 66 Pa.C.S. § 2704(a). The costs may be allocated to public utilities, municipal corporations, municipal authorities, non-profit organizations, or the Commonwealth. *Id.*

In so apportioning the costs, the PUC is to take all relevant factors into deliberation, with the fundamental requirement being that its order be just and reasonable. *Green Township Bd. Of Supervisors v. Pa. Pub. Util. Comm'n*, 642 A.2d 541, 543 (Pa. Cmwlth. 1994). These relevant factors include consideration of the following: 1) the party that originally built the crossing, 2) the party that owns and maintains the crossing, 3) the relative benefit initially conferred on each party with the construction of the crossing, 4) whether either party is responsible for the deterioration of the crossing that has led to the need for its repair, replacement or removal, and 5) the relative benefit that each party will receive from the repair, replacement or removal of the crossing. *N.*

*Lebanon Twp. v. PUC*, 962 A.2d 1237, 1247 (Pa. Cmwlth. 2008) (citing *Greene Township Bd. of Supervisors v. Pa. Pub. Util. Comm'n*, 642 A.2d 541, 619 (Pa. Cmwlth. 1994)).

Further, it is not the mere usage of a rail crossing, but the ownership interest that gives the PUC the authority to allocate costs and which places liability on the railroad for costs associated with a crossing, including, but not limited to, its removal or reconstruction. *City of Chester v. Pa. PUC*, 798 A.2d 288, 294 (Pa. Cmwlth. 2002) (citing *Consolidated Rail Corporation v. Pennsylvania Public Utility Commission*, 423 A.2d 1108 (Pa. Cmwlth. 1980); *Pennsylvania Public Utility Commission v. Southeastern Pennsylvania Transportation Authority*, 343 A.2d 371 (Pa. Cmwlth. 1975)).

Here, the Department does not play a role in any of the factors listed above – the Department did not originally build the Ore Dock Road and East Bay Drive crossings, it does not own or maintain the crossings, it was not benefitted by the initial construction of the crossings, it is not responsible for the deterioration of the crossings, nor will it receive any true benefit from the abolishment of the crossings. Additionally, the Department has no ownership interest in the Ore Dock Road and East Bay Drive crossings as neither of those streets are owned or maintained by the Department. Because Ore Dock Road and East Bay Drive are not owned nor maintained by the Commonwealth, the allocation of costs to abolish and maintain the rail crossings at those locations should exclude the Department as a party responsible for payment of any costs.

III. **Proposed Plan and Schedule of Discovery:**

The Department does not anticipate the need for discovery on this issue.

IV. **Testimony and Witnesses:**

The Department intends to offer the following witness to address the issue and any questions which are directed to the Department:

Thomas McClelland  
Assistant District Executive  
Pennsylvania Department of Transportation  
Engineering District 1-0  
255 Elm Street  
Oil City, PA 16301

Thomas McClelland will testify regarding the ownership of Ore Dock Road and East Bay Drive and the Department's jurisdiction, or lack thereof, over those streets.

The Department reserves the right to call additional witnesses deemed necessary or to modify its proposed witnesses as the case develops.

V. **The Department's Position on the Consolidation of the Proceedings:**

The Department does not object to the consolidation of the proceedings.

VI. **Possibility of Settlement:**

The Department is aware of settlement negotiations between CSX and the Erie-Western Pennsylvania Port Authority but has not been privy to the terms of the tentative settlement agreement. No settlements have been reached regarding the financial responsibility of the abolishment and maintenance of the crossings at Ore Dock Road and East Bay Drive. The Department is hopeful that a settlement can be reached and is willing to work with the parties to reach any situations or settlements that may expedite these proceedings.

VII. **Hearing Time:**

The Department anticipates it will need at most one-half day of hearing time to present its sole witness.

VIII. **Proposed Litigation Schedule:**

Although the parties have not agreed to a litigation schedule prior to the filing of this statement, the Department proposes the following litigation schedule based on BIE's suggested dates for the parties consideration;

- Written direct testimony due on February 21, 2024;
- Written rebuttal testimony due on March 25, 2024;
- Witness schedule due 3 business days before the hearing;
- Hearing to occur the week of April 15, 2024; and,
- Briefing schedule to be established at the hearing.

IX. **Lead Representative:**

As the Department is represented by multiple attorneys, and in accordance with the September 18, 2023, Order, the Department designates Karen L. Cummings, Senior Counsel, as their lead representative for the purposes of the November 9, 2023, prehearing conference.

Respectfully Submitted,

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF TRANSPORTATION

[/s/ Karen L. Cummings](#)

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DATED: November 2, 2023

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true copy of the foregoing document upon the participants listed below, in accordance with the requirements of 52 Pa. Code §1.54, by:

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DATED: November 2, 2023