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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO **PUCO**

In the Matter of the Petition of CSX
Transportation, Inc. to Close to Vehicular
Traffic the Bloominggrove-New Winchester
Road (Crawford-Morrow County Line Road)
Crossing in Washington Township, Morrow
County, Ohio

Case No. 14-0379-RR-UNC

* * *

POST-HEARING BRIEF OF PETITIONER CSX TRANSPORTATION, INC.

I. History of these Proceedings

On November 8, 2011, a diagnostic survey, initiated by the Ohio Rail Development Commission, was conducted at the Crawford-Morrow County Line Road¹ (hereinafter "County Line Road") grade crossing formed by CSX Transportation, Inc.'s ("CSXT") tracks and County Line Road, which runs generally east and west and forms the border between Crawford County to the north and Morrow County to the south. Because the road is divided down the middle between the two counties, it is maintained by both counties and emergency response is divided as well, with Crawford County responding to the north or Crawford County side and Morrow County responding to the south or Morrow County side. Because of an irregularity in the border between the two counties, the entire crossing is actually located in Morrow County. (3/3/15 Hearing Transcript, p. 26).

At the diagnostic survey those in attendance, including representatives from CSXT, the Ohio Rail Development Commission ("ORDC"), the Public Utilities Commission of Ohio

¹ This road is known by various names including County Line Road, County Road 8, and Bloominggrove/New Winchester Road. Petitioner will refer to it herein as County Line Road.

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("PUCO"), and Morrow County, reviewed and surveyed the crossing and as reflected on the Diagnostic Survey form, came to the consensus that this crossing is a candidate for closure. (3/3/15 Hearing Transcript, pp. 38-39; CSXT Exb. 16) On April 20, 2012, based on this consensus, ORDC sent a letter to Morrow County offering various financial incentives to the County if they would agree to close this crossing. (Hearing Transcript, pp. 42-43, CSXT Exb. 17). ORDC sent a follow up letter to Morrow County dated October 25, 2013, offering similar, but additional incentives. (Hearing Transcript, pp. 42-43, CSXT Exb. 18). CSXT, through counsel, renewed these incentives, with ORDC's consent, by letter dated December 24, 2013. (Hearing Transcript, pp. 42-43, CSXT Exb. 19). Because Morrow County rejected these offers, CSXT filed the within Petition on March 7, 2014. (CSXT Exb. 22) Although the facts supporting closure were also addressed at the March 3 Hearing, the grounds supporting closure are set forth in detail in CSXT's Petition for Closure and the Exhibits attached thereto.

Pursuant to statute, the PUCO invited comments by Morrow County and any other interested persons and after providing proper notice, conducted two public hearings, one each in Morrow and Crawford counties, on July 15, 2014. Testimony was provided at these hearings, both of which were attended by a representative from CSXT and the undersigned counsel. Thereafter, the PUCO scheduled and conducted an evidentiary hearing on March 3, 2015, at which time CSXT offered evidence and Morrow County, through its prosecuting

attorney, cross-examined². Pursuant to the Hearing Examiner's Order, CSXT now submits its Post-Hearing Brief.

II. The Statutory Framework

The PUCO is vested with the statutory authority to close grade crossings pursuant to Ohio Revised Code Sections 4907.474 and 4907.475. Closure of a rural grade crossing such as this³ is governed by Section 4907.475, however, that statute incorporates by reference the criteria for closure set forth in Section 4907.474. There is no dispute that these are the criteria for closure. Pursuant to these Ohio Revised Code sections, the PUCO is to determine whether there is a "demonstrable need for [the] crossing to exist and whether the crossing could be closed... and the travel over the crossing directed to other crossings." In making this determination, the following nine (9) criteria are to be considered:

1. The daily vehicular and train traffic at the crossing to be closed;
2. The daily vehicular and train traffic at any alternate crossings;
3. The daily increase in vehicular traffic at alternate crossings resulting from proposed crossing closures;
4. The nature of the roadway at any alternate crossings;
5. The total number of crossings within one linear mile of the crossing to be closed;
6. The type of advance warning devices at any alternate crossings;
7. The sight distances at any alternate crossings, including any permanent obstruction affecting distance of view;

² Morrow County opted not to put on any evidence of its own at the hearing. Crawford County did not formally move to intervene, although a Crawford County Commissioner was in attendance at the March 3 hearing.

³ See description contained in Diagnostic Survey form, CSXT Exb. 16.

8. The impact of closure on vehicular traffic, emergency vehicles, commercial enterprises, and any other factors pertinent to municipal corporations and other populated areas;
9. Any other factor the commission determines appropriate.

III. The County Line Road Grade Crossing Meets the Criteria for Closure

CSXT, through the Petition for Closure and Exhibits thereto, as well as the testimony provided at the March 3 Hearing either by CSXT witness Amanda DeCesare or by deposition⁴, has submitted evidence which fully supports a finding that there is no demonstrable need for the County Line Road crossing and that this crossing should be closed.

1. The daily vehicular and train traffic at the crossing to be closed

The daily vehicular traffic count at the County Line Road crossing is 121-184 vehicles. (Petition, p.2; Hearing Transcript, p. 52). This and other similar vehicular traffic count information cited in the Petition and referenced in testimony at the evidentiary hearing are based on the PUCO's Railroad Information System website and the U.S. DOT-Crossing Inventory Information, which information was attached as an exhibit to the Petition for Closure.

The daily train count for this crossing as of the date the Petition was filed was 17-20 trains per day, however, Ms. DeCesare testified on behalf of CSXT at the hearing that daily

⁴ By Order dated 2/2/15, the Hearing Examiner ordered that deposition transcripts can be considered as evidence without the presence of the witnesses so long as no party objects to the admission of the deposition testimony. The transcripts were timely filed along with correspondence confirming the agreement of both Morrow and Crawford Counties (although Crawford County never formally moved to intervene) that the depositions may be admitted and be given the same consideration as if these witnesses testified live at the hearing. This agreement served to streamline the hearing and eliminated significant further imposition on the time of these witnesses. The cooperation of the Counties, and the Hearing Examiner's ruling, in this regard are appreciated.

train use has increased to between 26 and 27 trains per day. (Petition, pp. 2-3; Hearing Transcript, p.52).

2. The daily vehicular and train traffic at any alternate crossings

There are three alternate crossings that logic dictates will be used by the motoring public if the County Line Road crossing is closed. Keifer Road, also known as County Road 32, is located 1.2 miles to the southwest, and has a daily vehicular traffic count of 116-131 vehicles per day. The train count would be essentially the same at these alternate crossings as at County Line Road as the same mainline track runs through both crossings, although there is a single track at Keifer Road because the double track that exists at County Line Road ends just northeast of Keifer Road. (Petition p.3; Hearing Transcript pp.54, 57)

The Biddle Road crossing is located about ½ mile to the northeast of County Line Road and the vehicular traffic count there is approximately 274 vehicles per day. (Petition, p.3; Hearing Transcript, pp. 53-54).

State Route 61/309 is about 1.15 miles to the northeast, involves the same double tracks and train count, and has a vehicle count of 6,623-6,700 vehicles per day. (Petition, p. 3; Hearing Transcript pp.53-54)

3. The daily increase in vehicular traffic at alternate crossings resulting from the proposed closure of the County Line Road crossing

Although there is no way to determine the precise impact on the three alternate crossings- Keifer Road, Biddle Road, and State Route 61/309- without closing this crossing and doing a traffic study, it seems logical that the vehicles that would have used County

Line Road (121-184 total vehicles per day) would be split somewhat equally between the alternate crossings. (Petition, p.3; Hearing Transcript, p. 55). No evidence was presented by any potentially affected party as to any concerns regarding the impact of closure of the County Line Road crossing on these alternate crossings.

4. The nature of the roadway at any alternate crossings

Unlike the two lane County Line Road crossing, which involves an angled approach with the roadway being somewhat parallel with the tracks until a short distance prior to the crossing and significant obstructions to view resulting from both the angled approach and the raised contour of the land in the southeast quadrant, the alternate crossings, which are all also two lane roads, approach the crossing at closer to a ninety degree angle and provide a much more wide open site view. Although the State Route 61/309 roadway also approaches at a slight angle, it is a somewhat wider state road and the crossing is equipped with flashers and gates in addition to having a significantly better site view as compared to the County Line Road crossing. (Petition, p. 4; Hearing Transcript pp. 55-58).

5. The total number of crossings within one linear mile of the County Line Road Crossing

The only crossing located within one linear mile of the County Line Road crossing is Biddle Road, which is approximately one-half mile to the northeast. The Biddle Road crossing is wide open, approaches at approximately ninety degrees with the tracks and is already equipped with flashers and gates. However, the Keifer Road and State Route 61/309 crossings are both just over one linear mile away and should be considered readily

accessible, alternate crossings even though just outside one linear mile. (Petition, p. 4; Hearing Transcript, pp.53-57)

6. The type of advance warning devices at any alternate crossings

Two of the three alternate crossings, Biddle Road and State Route 61/309, are already equipped with flashers and gates. Kiefer Road is equipped with standard approved crossbucks. (Petition, p.4; Hearing Transcript, pp.57-58)⁵

7. The sight distance at any alternate crossings, including any permanent obstruction affecting distance of view

The sight view at each of the alternate crossings is wide open, particularly in comparison to the crossing that is the subject of the Petition for Closure. The Keifer Road crossing, which is the only one of the three alternate crossings that is not protected with flashers and gates, is particularly wide open. Furthermore, the impact of obstructions to view at the Biddle Road or State Route 61/309 crossings, if any, is mitigated by the fact that these crossings already have flashers and gates in place. (Petition, p. 5; Hearing Transcript pp. 57-58).

8&9. The impact of closure on vehicular traffic, emergency vehicles, commercial enterprises, and any other factors pertinent to municipal corporations and other populated areas, as well as any other factor the commission determines appropriate

⁵ At page 57, line 6 and page 58, line 3 of the transcript, it is indicated that the undersigned and the witness referenced the presence of a "crossbar". While it is possible both speakers misspoke, CSXT believes the term "crossbuck" was used, referring to the presence of standard, approved crossbucks at those locations. CSXT would submit that the Court Reporter may not have been familiar with the "crossbuck" terminology.

A. Morrow County's arguments do not support keeping this crossing open

The County Line Road grade crossing was identified by representatives of ORDC, PUCO, and CSXT as a candidate for closure at the time of the diagnostic survey on November 8, 2011.⁶ A fair reading of Morrow County's position, based on the questions asked of Ms. DeCesare of CSXT, at the March hearing, and comments made by Prosecutor Howland at the Public Hearing on July 15, 2014, is that the crossing should not be closed on two grounds- 1) there may be other crossings in Morrow County which should be closed based on accident statistics (Hearing Transcript pp. 63-64), and 2) the blocking of crossings by CSXT trains and resulting citations and fines are not among the criteria for closure under the Ohio Revised Code, Sections 4907.474 and 4907.475 and should not be a consideration. (Hearing Transcript, pp. 64-65)

CSXT does not dispute either of these points. There could conceivably be other crossings in Morrow County which should be considered for closure if and when they are scheduled by ORDC or the PUCO for a diagnostic survey. (Hearing Transcript, p. 63). Furthermore, any issue CSXT has had in relation to blocked crossings in this area is not a factor in motivating CSXT to close this crossing and is not a factor to be considered under the above referenced statutes. There is no evidence that blocked crossings at County Line Road were even a factor at the time of the Diagnostic Survey in 2011, which is the proceeding that initiated the crossing closure process. (Hearing Transcript, pp. 40-41, 64-65.) Furthermore, the PUCO has previously noted "... the issue of train-blocked crossings is

⁶ A representative from Morrow County attended the diagnostic survey and signed off on the form which indicated, in two places, that the crossing should be considered for closure. However, based on Morrow County's response to the incentives offered by ORDC and CSXT prior to the filing of the Petition for Closure, and their position at the recent hearing, CSXT assumes the County was not part of this consensus.

a local jurisdictional issue and, therefore, this should continue to be addressed at the local level... pursuant to Sections 5589.21 and 5589.99” *See Opinion and Order, In the Matter of the Petition of CSX Transportation, Inc. to Close to Vehicular Traffic the County Road 205/Ulsh Road Grade Crossing (262-061N), Located in Claridon Township, Marion County, Ohio*, Case No. 09-125-RR-UNC, at p. 10 (October 28, 2009) (Copy attached). The issue of blocked crossings does not impact any of the factors properly considered in relation to closure of a grade crossing under Ohio law.

B. Safety is a factor which supports closure

The safety of the crossing is a factor the PUCO can consider under Sections 4907.474 and 4907.475 as safety would seem to fall under Section (9), “any other factor the commission determines appropriate”. Ms. DeCesare testified that the hazard ranking for this crossing, established by the State of Ohio, at the time of the diagnostic survey was 454 out of approximately 5,800 crossings but that, as of the time of the recent Hearing, the hazard ranking had jumped to 110. (Hearing Transcript, p. 35). The evidence further shows that the number of trains per day through this area has increased from about 20 per day to between 26 and 27 trains per day. (Hearing Transcript, p. 52). The school transportation director for Galion City Schools testified that it appeared to him that his predecessors have routed around the crossing and he would do so too based on safety concerns. (Duffner depo., pp.16-17). Dean Van Horn, transportation director for Northmor Schools, testified that to square up a school bus so the bus driver has the opportunity to look for trains coming from both his or her left and right, it is necessary to stop the bus such that it is positioned left of center on County Line Road. (Van Horn depo., pp. 48-49). The evidence

further indicates that as of the time of the respective depositions of school transportation personnel, neither school system that operates school busses in this area was actively using this crossing. (Duffner depo., pp. 16; Van Horn depo., pp. 58).

Ms. DeCesare further testified as to the site view limitations at this crossing and numerous witnesses testified when deposed that this crossing presents a greater challenge than most to the motoring public. (Hearing Transcript, p. 30; Duffner depo., pp. 17-18; Kent depo., pp. 31-32; Brenneman depo., p. 26; Fox depo., p. 10; Jackson depo., p. 49). Although, fortunately, there have not been any accidents at this crossing, that does not mean that safety is not a factor to be considered when analyzing whether this crossing should be closed.

C. The lack of impact on emergency vehicles

The closure of this crossing will not significantly impact emergency response to the area surrounding the County Line Road grade crossing. As discussed at the hearing, the geographic area potentially impacted by the closure of this crossing in terms of emergency vehicle activity is the triangular shaped area formed by the tracks and the borders of Morrow and Crawford Counties. (Hearing Transcript, p. 47). Although vague concerns were presented by witnesses who testified at the public hearings regarding the impact of closure on emergency vehicle activities, the sworn testimony of the persons most familiar with that operation, Fire and EMS chiefs and County Sheriffs responsible for providing this service, does not support such a finding.

From the standpoint of Crawford County, which would include residences/properties on the north side of County Line Road, any such Fire or EMS response would be by the Galion Fire Department, housed in the City of Galion. Chief Jackson of the Galion Fire Department testified that his department already responds to this area northwest of the crossing by going west on one of the east/west roads out of Galion and then south on a connecting road such as Taylor Road. (Jackson depo., pp. 23-24). The subject crossing is not involved in that response route. To travel to Crawford County properties east of the subject crossing, the Galion Fire Department would go south on State Rt. 61/309 and then west on County Line Road. Again, this crossing would not be involved. Although on a couple of occasions in the past, the Galion Fire Department used this crossing to get to the residence closest to the crossing, owned by Mr. and Mrs. Fox, Chief Jackson testified that he is not concerned about responding to that residence if this crossing were closed as they would respond as they already do to get to addresses west of the crossing (west out of Galion and south on, for example, and most likely, Taylor Road). Any minimal additional distance is offset by the certainty provided by the fact that the Taylor Road route involves no grade crossings whereas the County Line Road route involves two crossings (State Rt. 61/309 and County Line Road), either of which could be temporarily blocked. (Jackson depo., pp. 44-45).

With respect to Morrow County EMS and Fire response, both Chief Sparks (EMS) and Assistant Fire Chief Smith (Iberia Volunteer Fire Department), the two responding departments, have testified that there are available routes that do not involve this crossing. Both the Iberia Volunteer Fire Department and Morrow County EMS would typically be responding from the same building, located in Iberia, Ohio. (Smith depo., p. 6-7, 10; Sparks

depo., p. 7). Iberia is located in the northwest quadrant of Morrow County. (Smith depo., pp. 8-9; Sparks depo., pp. 11-12; Hearing Transcript, pp. 48-49).

Chief Sparks has testified that, to get to this area, EMS would always travel north on County Road 30 out of Iberia, west on County Road 31, and north on County Road 32 (which is also known as Keifer Road, one of the alternate crossings.) (Sparks depo., pp. 22-23). Assistant Fire Chief Smith testified that when there is not a lot of recent snow, the fire trucks could also travel this route (Smith depo., pp. 15-16). On snowy days, Assistant Chief Smith prefers to have his men travel on state routes because they tend to be plowed sooner. (Smith depo., pp. 14). In the past, to get to this northwest corner of the County, the Fire Department has used State Rt. 61/309 to County Line Road, where they would head west to get to this area. This route would involve use of the County Line Road crossing. (Smith depo., pp. 16, 29). However, Assistant Chief Smith agreed, consistent with the letter which he provided to the PUCO at the Public Hearing (See Exhibit 2 to Smith depo.), there is an alternate route which is only .3 mile longer than the State Route 61/309 route, takes about the same length of time (8 minutes) and utilizes another state route (State Route 100). Both the alternate route and the route used in the past involve traversing one grade crossing. (Smith depo., pp. 31-34). Thus it seems clear that even when the roads are snow covered, the Iberia Fire Department has an equally viable route which does not involve use of the County Line Road grade crossing to get to this northwest corner of the County. *Id.*

Once EMS from either county reach this triangular area, they may then be required to transport the injured party(ies) to a hospital for treatment. Seriously injured individuals could be life flighted such that the closure of this crossing would have no impact on

transportation for treatment. (Sparks depo., p. 24). Individuals who are not life flighted but nevertheless are in need of immediate care would be required to be taken to the hospital located in Galion based on the level of trauma care required and available there. (Sparks depo., p. 25). The route to Galion from this area would typically be the reverse of the route described by Galion Fire Chief Jackson to get to this location, and would not involve the County Line Road grade crossing. (Sparks depo., pp. 29-30; Jackson depo., pp. 23-24, 43-45). Consequently, closure of this crossing will not significantly impact EMS and/or Fire response to this area⁷.

Much the same way, law enforcement response to this area, which would primarily be by the Crawford County Sheriff's Department and the Morrow County Sheriff's Department, is not significantly affected. In both counties, on any given shift, there are several deputy sheriffs on duty travelling through their County. Although the counties are divided up into territories to which the on duty officers are assigned, because of the activities of the job, it is not unusual at any given moment in time for the officers to be in various locations in the County, sometimes outside their designated territory, when a call comes in. (Kent depo., pp. 6-7, 23-24, 33-34; Brenneman depo., pp. 15-16, 42-43). It is, therefore, more difficult when discussing emergency response by the Sheriff's departments

⁷ There was also testimony presented regarding emergency and fire response to the reservoirs located to the south and east of this crossing and to the gas pipeline substation located on the northwest side of the crossing. Regarding the reservoirs, owned by the City of Galion, the response would typically be from within the Galion City limits and the route would be down State Rt. 61/309 and into the reservoir from the north entrance off County Line Road or from the east entrance off St. Rt. 61/309. (Jackson depo., pp. 16-18). Either way, this crossing is not involved. Police response by the Galion Police Department to the reservoirs would be the same. (Satterfield depo., p. 11). During the annual cross county meets at the reservoirs, police and EMS have a presence at the reservoirs throughout the event and traffic is routed one way through the reservoirs with the entrance on the north side off of County Line Road, and the exit to the east onto State Rt. 61/309. Again, the closure of this crossing has no impact on the cross country event. (Satterfield depo., pp. 18-19). With respect to the pipeline, no one deposed is aware of any incidents having occurred there, and no emergency personnel deposed have been told there is a greater chance of an incident there than anywhere along the pipeline. (Fox depo., pp. 27-28; Jackson depo., p. 52; Smith depo., pp. 37-39).

to discuss a specific route. However, the testimony of the Sheriffs supports a finding that there would always be a route available to get from any location to the location of the emergency, and the closure of the crossing would eliminate any potential that the responding officer might get part way in his emergency response only to have to reverse himself because the County Line Road crossing is blocked by a moving or a stopped train. (Kent depo., pp. 36-38; Brenneman depo., pp. 30-31, 39).

Finally, it should also be noted that, taking all of the testimony of the various emergency responders as a whole, the number of runs to properties located within this triangular area north and west of the crossing, including to both the north and south sides of County Line Road, and more generally to the geographic area within approximately one mile of this crossing (the scope of Petitioner's subpoena requesting that the witnesses bring run reports to their deposition), is small. There is some overlap in these run reports as between fire, EMS and police, however, a review of each deponent's testimony reveals that there were not a lot of runs to this northwest corner of Morrow County where it meets Crawford County. This is not surprising as there are not a lot of residents living or businesses operating in this rural area. (See, for example, generally, Jackson depo., pp. 25-29 and Exhibit 4; Sparks depo., p. 17 and Exhibit 1; Brenneman depo., pp. 17-18; Kent depo., pp. 11-12 and Exhibit A; Satterfield depo., pp. 9; Smith depo., pp. 19, 26).

D. The lack of impact on commercial enterprises

The evidence establishes that this is a rural crossing with very little in the way of commercial enterprises located in the area or which would otherwise be affected by closure of the County Line Road crossing. (Hearing Transcript pp. 37-38). The Fox

residence and farm is located in Crawford County, north of the crossing and there are other farms west of the crossing. There is a gas pipeline substation located in the northwest quadrant of the crossing. (Hearing Transcript, p. 38).

Mr. Fox has testified that the closure of the crossing would not impact the ability of pickup trucks, some of which pull large flatbed trailers, to come to his property to pick up his primary crop, hay. These vehicles typically come up his driveway and can turn around on his property so as to leave the same way they came. (Fox depo., p. 17). Mr. Fox's primary concern in relation to the closure of the crossing relates to emergency response to his property which has been required a couple times in the past, but he acknowledges that he is satisfied that closure of the crossing will not present an issue in that regard if Chief Jackson of the Galion Fire Department is satisfied in this regard. (Fox depo., pp. 12-13). As indicated above, Chief Jackson has testified he has no concerns. (Jackson depo., pp. 44-45).

Mr. Fox also was aware of larger farming operations located along County Line Road and intersecting roadways to the west of his property, and acknowledged that large semi tractor trailers already use these roadways to get to these farms to pick up crops. When doing so they generally pull out into the field to be loaded and then turn around in the field so they can leave facing forward, the same way they came into the area. (Fox depo., pp. 20-21).

Furthermore, as referenced in footnote 7 above, the gas pipeline substation in the northwest quadrant of this crossing has been at that location for about 10-12 years. (Fox depo., p. 26; Jackson depo., p. 53). There has never been an incident there requiring emergency response. (Fox depo., pp. 27-28; Jackson depo., p. 54; Smith depo., p. 37). And

emergency responders have not been told there is any greater potential for an event requiring emergency response at that substation than there would be anywhere else along the pipeline. (Jackson depo., p. 52; Smith depo., p. 38) And, of course, the available response routes for EMS, Fire and the County Sheriffs would be the same as described above. (See, Section C above, pp. 10-14).

The testimony regarding the lack of impact closure of this crossing would have on school bus routes or upon the use of, or emergency response to, the reservoirs, located in Morrow County but owned by the City of Galion, has also already been detailed above. (See above at p. 9 and at p. 12, footnote 7).

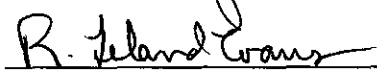
Thus, the closure of the County Line Road grade crossing will have minimal, if any, impact on any commercial enterprises located and/or operating in the area.

IV. CONCLUSION

For all of the foregoing reasons, the evidence establishes that there is no demonstrable need for the County Line Road grade crossing to exist for either vehicular or pedestrian traffic. CSXT requests that the PUCO exercise its authority under Ohio Revised Code Sections 4907.474 and 4907.475 to order the necessary governmental body or bodies to effect the closing of the subject crossing through the passage of the appropriate ordinance or ordinances and/or a city or county resolution. Further, should the necessary governmental body or bodies fail to effect the closing of this railroad grade crossing to all vehicular and pedestrian traffic within the statutory thirty (30) day period of time, CSXT

further requests that the PUCO exercise its authority to petition the Court of Common Pleas for Morrow County to order the closure of said crossing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. Leland Evans", written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing *Post-Hearing Brief of Petitioner CSX Transportation, Inc.* was served by mailing same, regular U.S. mail, postage prepaid, this 2nd day of April, 2015 upon the following:

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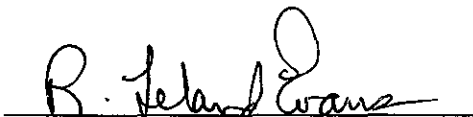
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R. Leland Evans

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Petition of CSX)
Transportation, Inc. to Close to Vehicular)
Traffic the County Road 205/Ulsh Road) Case No. 09-125-RR-UNC
Grade Crossing (262-061N), Located in)
Claridon Township, Marion County, Ohio.)

OPINION AND ORDER

The Commission, considering the applicable law and evidence of record, and being otherwise fully advised, hereby issues its opinion and order in this matter.

APPEARANCES:

Porter Wright Morris & Arthur, LLP, by R. Leland Evans and David K. Orensten, 41 S. High Street, Columbus, Ohio, 43215, on behalf of CSX Transportation, Inc.

HISTORY OF THE PROCEEDINGS:

On February 18, 2009, CSX Transportation, Inc. (CSX) filed a petition to close to vehicular traffic the grade crossing located at County Road 205/Ulsh Road, AAR-262061N, (Ulsh Road crossing), located in Claridon Township, Marion County. By entry of February 20, 2009, CSX was directed to amend its petition to provide supplemental information regarding the Ulsh Road crossing, pursuant to Sections 4907.474 and 4907.475, Revised Code. The entry also invited Claridon Township to comment on CSX's petition. On March 16, 2009, CSX filed an amendment to its petition. On March 23, 2009, Claridon Township filed objections to CSX's petition. By entry of April 14, 2009, a local public hearing was scheduled for May 4, 2009, in Caledonia, Ohio. Legal notice of the hearing was published in *The Marion Star*, a newspaper of general circulation in Marion County. The local public hearing was held as scheduled where ten witnesses provided sworn testimony. By entry of May 7, 2009, an adjudicatory hearing was scheduled for July 14, 2009. The July 14, 2009 adjudicatory hearing was continued to and held on August 12, 2009. At the adjudicatory hearing, Todd Darfus, Terry Ludban, and Clint Canterbury testified.

I. Statute

It is well established that the Commission is vested with the statutory authority to close grade crossings located in municipal corporations pursuant to Section 4907.474, Revised Code, and to close rural grade crossings not on state highways, pursuant to Section 4907.475, Revised Code, which applies in this case. These sections require that an applicant seeking to close a railroad grade crossing to vehicular traffic must demonstrate

that there is not a demonstrable need for the grade crossing to exist. While the term "demonstrable need" is not specifically defined, Section 4907.474, Revised Code, provides that, in making that determination, the Commission shall consider the following: the daily vehicular and train traffic at the crossing and at alternate crossings; the increase in vehicular traffic at alternate crossings resulting from the crossing closure; the nature of the roadway at any alternate crossings; the total number of crossings within one linear mile of the crossing to be closed; the type of warning devices and sight distances at alternate crossings; the impact of the closure on vehicular traffic, emergency vehicles, commercial enterprises, and municipal corporations and other populated areas; and any other factor the Commission determines appropriate.

II. Discussion

In our determination of whether there is a demonstrable need for the continued existence of the Ulsh Road crossing, we first consider the daily vehicular and train traffic at the crossing and at alternate crossings, the increase in vehicular traffic that would result from closing the Ulsh Road crossing, the nature of the roadways at the alternate crossings, the total number of crossings within one linear mile of the Ulsh Road crossing, and the type of advance warning devices and the sight distances at the alternate crossings.

A. Daily vehicular and train traffic at the crossing and at alternate crossings

Ulsh Road is a paved road, approximately 15 feet in width and approximately one and one half miles in length, and has a posted speed limit of 55 mph (Tr. II at 32). It is oriented in an east to west direction and connects State Route 98 (SR 98) on the west with Marion-Galion Road on the east. A single railroad track, operated by CSX, crosses Ulsh Road in a southwest to northeast orientation (CSX Ex. 9, at 2). According to motor vehicle traffic counts performed by the Marion County Engineer on May 19, 2009, the average daily vehicle count on Ulsh Road is 137 vehicles (CSX Ex. 2).¹ The average daily train count over the Ulsh Road crossing is approximately 19 trains traveling at speeds up to a maximum of 60 mph (CSX Ex. 9, at 2).

According to CSX's application, there are two alternate crossings to the Ulsh Road crossing, including the Nesbitt Road crossing, located to the northeast, and the SR 98 crossing, located to the southwest. The estimated daily vehicular traffic at the Nesbitt Road crossing is 287 vehicles per day and the estimated daily vehicular traffic at the SR 98 crossing is 3,450 vehicles per day. Because the same CSX railroad track passes through all three grade crossings, the daily train count would be the same at all three grade crossings (*Id.*).

¹ The average daily vehicle count has remained relatively constant as the average daily vehicle count in April 2005 was 132 vehicles (Tr. II at 23).

- B. The daily increase in vehicular traffic at alternate crossings resulting from the crossing closure

If the Ulsh Road crossing is closed, the increase in vehicular traffic at the alternate crossings would be approximately 132 vehicles per day (*Id.* at 3). There was no evidence regarding whether traffic diverted from the Ulsh Road crossing would be more or less likely to use either alternate grade crossing.

- C. Total number of crossings within one linear mile of the Ulsh Road Crossing

According to CSX's amended petition, there are two crossings within one linear mile of the Ulsh Road crossing. However, the railroad information on which the amended petition is based, taken from the Commission's Grade Crossing Inventory Database, identifies only one crossing within one linear mile of the Ulsh Road crossing. The Ulsh Road crossing is located at milepost 94.32. The SR 98 crossing is located at milepost 95.15, approximately 0.83 miles from the Ulsh Road crossing. The Nesbitt Road crossing is located at milepost 93.00, approximately 1.32 miles from the Ulsh Road crossing (CSX Ex. 9, at 2).

- D. Nature of the roadway at the alternate crossings

As indicated above, the two alternate grade crossings to the Ulsh Road crossing are located at Nesbitt Road and SR 98. Both Nesbitt Road and SR 98 are paved, two-lane roads. Nesbitt Road is a township road, while SR 98 is a state highway. Both roads are comparatively straight and both crossings are at grade with minimally raised profiles. The information related to the angle of the crossings is based on the Federal Railroad Inventory information which identifies the smallest angle between the road and the track. The crossing angle of the Ulsh Road crossing is between 30 to 59 degrees; whereas the crossing angles of the Nesbitt Road and SR 98 crossings are both less severe, at between 60 to 90 degrees (*Id.*).

- E. Type of advance warning devices and sight distances at the alternate crossings

Both the Nesbitt Road and SR 98 crossings are actively protected by crossbucks, flashing lights, and roadway gates. The Ulsh Road crossing is only passively protected by crossbucks. As noted previously, the Ulsh Road crossing is impacted by the sharp angle that the CSX track intersects Ulsh Road which creates limited sight distance. With respect to the alternate grade crossings, neither has any obstructions affecting sight distance. In its amended petition, CSX noted that Section 4511.62, Revised Code, provides that motorists must stop within 50 feet, but no less than 15 feet, of the nearest rail of a crossing if

conditions set forth in that section exist and one such condition is the activation of crossing lights and or gates. According to CSX, there are no significant obstructions to view with a distance of 15 to 50 feet from the alternate grade crossings along CSX's right-of-way (*Id.* at 3-4).

- F. Impact of the closure on vehicular traffic, emergency vehicles, commercial enterprises, and any other factors pertinent to municipal corporations and other populated areas

Evidence on the impacts of the closure of the Ulsh Road crossing on vehicular traffic, emergency vehicles, and Claridon Township was provided by witnesses who testified at the public hearing, as well as the evidentiary hearing. Ten witnesses provided sworn testimony at the local public hearing. One witness indicated that there are only two houses on Ulsh Road and that only two individuals live on Ulsh Road (Tr. I at 12). One Claridon Township Trustee testified that the River Valley School District had requested that the Ulsh Road crossing remain open and that lights and gates be installed (*Id.* at 4). Another witness, representing the River Valley School District, acknowledged that the Ulsh Road crossing is not to be used on a regular basis or when the buses are transporting school children.² He noted that when the school buses are empty, at least three daily school buses use the Ulsh Road crossing to reduce travel time; and, if the Ulsh Road crossing is closed, it would increase the travel distance for school buses by approximately one-half mile (*Id.* at 6, 10). One witness similarly commented that closing the Ulsh Road crossing would add an additional 2.1 miles per day travel distance for mail delivery (*Id.* at 11-12). Another witness testified that her family owns farm land on both sides of the Ulsh Road crossing and that, if it was closed, it would create a tremendous inconvenience for the transfer of farming equipment between their parcels of land (*Id.* at 14). The fire chief testified that, in the past, the SR 98 crossing has been blocked for routine maintenance. He claimed that, if the SR 98 crossing ever became blocked and the Ulsh Road crossing was closed, emergency vehicles would have to detour to other grade crossings creating delay in responding to emergencies (*Id.* at 19). One person claimed that, if the Ulsh Road crossing is closed, Ulsh Road would become a dead-end road and this would increase the likelihood that farm equipment would be vandalized, trash would be illegally dumped, and property values would decrease (*Id.* at 24). Several other witnesses testified that, if the Ulsh Road crossing is closed, farm equipment, semi-tractor trailers, and emergency equipment would be forced to back-up their vehicles on Ulsh Road because there is no turnaround and the equipment is too heavy to drive onto the field (*Id.* at 22, 36). Ulsh Road was characterized by several of the public witnesses as both a "cut-through" road for many people and a "nice side road" for tractor equipment in order to let other vehicles pass on SR 98 (*Id.* at 14, 16, 32). Other than the testimony related to farming operations,

² One witness claimed that school buses do use the crossing while transporting school children (Tr. I at 7)

there was no testimony that related to any commercial enterprises that would be affected by the closure of the Ulsh Road crossing.

At the adjudicatory hearing, three witnesses provided testimony. Todd Darfus, a project manager for the Ohio Rail Development Commission (ORDC), testified that he participates in diagnostic reviews of grade crossings and that he is in charge of upgrading the protection at grade crossings with both surface improvements, as well as through the installation of advanced warning devices (Tr. II at 9).³ He indicated that a diagnostic review was performed on the Ulsh Road crossing on September 23, 2008, and that the general consensus of the diagnostic team, consisting of CSX, the Commission, local authorities, and the ORDC, was that the Ulsh Road crossing should be closed (*Id.* at 12-13).⁴ He explained that part of ORDC's mission is to protect the safety of the traveling public and that is done by funding grade crossing improvement projects which cost, on average, between \$170,000 and \$250,000. He also noted that ORDC is only able to complete 10 to 12 grade crossing improvement projects each year and, as a result, ORDC evaluates all identified crossings to determine which are redundant and could be closed and which should be upgraded with automatic warning devices. He noted that there were several factors that led him to the recommendation that the Ulsh Road crossing should be closed. First, he cited the fact that there had been at least two accidents at the Ulsh Road crossing in the past five years, with the most recent crash occurring prior to 2008. According to Mr. Darfus, this, in part, was the cause for the Ulsh Road crossing to be ranked as the twelfth most dangerous crossing in Ohio (*Id.* at 16). He referred to other factors that account for the ranking including the extreme skew or angle of the crossing, the fact that it is a double-hump crossing (having previously had another railroad line in use), and that the crossing is elevated above the surrounding area, all of which negatively affect the visibility and safety for motorists. While the speed limit of Ulsh Road is 55 mph, he claimed it would be very dangerous to travel over the crossing at that speed because of the angle and elevation of the crossing (*Id.* at 36-37).

Mr. Darfus testified that he performed measurements of various distances to and from Ulsh Road. Based on his calculations, if the Ulsh Road crossing is closed, the additional travel distance on an alternate route would be no more than one tenth of a mile (*Id.* at 30-32). Mr. Darfus testified that he believed there are three alternate roads that can be used with very little inconvenience to anybody and which are much safer choices, both because of the orientation of the crossings and because the crossings are equipped with active grade crossing protection. According to Mr. Darfus, the Ulsh Road crossing "is probably one of the worst cases of a crossing scenario as far as safety that I've seen in my 15 to 16 years at the Rail Commission." (*Id.* at 38). Mr. Darfus also indicated that, while

³ A diagnostic review occurs once a crossing has been identified for possible upgrade or closure.

⁴ He acknowledged that he was not part of the team that performed the diagnostic review of the Ulsh Road crossing.

some individuals suggested that lights and gates be installed at the Ulsh Road crossing as an alternative to closure, over 50 percent of the crashes that occur at railroad grade crossings in Ohio happen at grade crossings already equipped with active warning devices and that over 40 percent of accidents occur at grade crossings equipped with gates (*Id.* at 44). Mr. Darfus disputed some of the comments raised at the public hearing regarding the difficulties for trucks and farming equipment on Ulsh Road if the crossing is closed. He indicated that any trucks hauling grain or corn into the fields to seed or hauling harvest out of the fields would drive into the fields and be able to negotiate a turn around point to exit Ulsh Road. "Whether they do a T turnaround at the crossing or they use somebody's driveway, or there could be a cul-de-sac, there's variable ways. But as far as large semi trucks and farm equipment that's going in and out of field drives, they have their own property to turn around on." (*Id.* at 77-78.) He also claimed that township vehicles that maintain the roads would still be able to turn around on Ulsh Road if the crossing is closed because there is a turn-around area close to the crossing (*Id.* at 78).

Terry Ludban testified that he is a manager of community affairs and safety for CSX. He verified the information set forth in CSX's amended application (*Id.* at 88-91.) He also noted that he performed distance measurements consistent with those performed by Mr. Darfus (*Id.* at 91). In response to comments regarding previous incidents where SR 98 was blocked, he acknowledged that under CSX's maintenance schedule, the SR 98 crossing could be closed for maintenance purposes an average of three days, every seven years and that this routine maintenance could be what was referred to by the public witnesses (*Id.* at 96). He explained that CSX has a telephone system for reporting whenever a train is blocking any grade crossing and that this telephone system can be accessed by private citizens or the township. He testified that, for the past three years, CSX records indicate that there have been no call-in reports for any CSX train blocking the Ulsh Road, SR 98, or Nesbitt Road crossings (*Id.* at 94). He also noted that, under certain circumstances, CSX would have no opposition to a private crossing in the vicinity of the Ulsh Road crossing, provided the private crossing was constructed at a less severe angle⁵ (*Id.* at 97).

Clint Canterbury, fire chief for the First Consolidated Fire District, testified that his district provides emergency service to four townships, including Claridon, as well as the city of Caledonia (*Id.* at 105). He indicated that the current policy of the fire department is that personnel are generally not to use the Ulsh Road crossing to respond to an emergency. He also noted that, if a fire occurred on Ulsh Road, the Ulsh Road crossing would not initially be used to access the area (*Id.* at 175). He explained that the Ulsh Road crossing is not used because "It takes a lot of communication between the driver and the passenger to travel over the crossing and... it's not practical and the crossing grade is pretty steep there and it's just a really bad angle...I don't disagree this is a bad crossing at

⁵ Section 4955.27, Revised Code, provides that for owners of 15 acres of property located on both sides of a railroad track, private crossings may be constructed at the expense of the property owner.

all, it is." (*Id.* at 148.) He claimed that if the Ulsh Road crossing had gates, it would be used.

He testified that department responses to emergency calls attempt to avoid the CSX tracks entirely; so that for emergencies north of the CSX tracks, responders stay north of the tracks and the Ulsh Road crossing, and for emergencies south of the tracks, responders stay south of the tracks and south of the Ulsh Road crossing (*Id.* 113-114). Chief Canterbury also did not dispute the measurements of Mr. Darfus and acknowledged that, for 80 to 90 percent of emergency calls, the Ulsh Road crossing is irrelevant to emergency responses for his department (*Id.* at 151). While Mr. Canterbury expressed concern that the future expansion of an intermodal transportation facility, located in Marion and southwest of the Ulsh Road crossing, may increase the number of trains on the tracks or increase the likelihood of trains blocking tracks, he presented no actual information or studies on the intermodal facility (*Id.* at 129, 181). Chief Canterbury also testified that, in the event he became aware there was a planned closure of a grade crossing in his jurisdiction, he would plan accordingly by stationing emergency vehicles north of the CSX tracks. He also acknowledged that he was aware of the CSX telephone number to report blocked grade crossings (*Id.* at 129). Chief Canterbury indicated that department data show that, in the past, there have been EMS responses to the two houses on Ulsh Road, as well as emergency responses for field fires; however, he noted that EMS responses generally do not travel over the Ulsh Road crossing when responding. He also noted that there have been no structure fires on Ulsh Road necessitating emergency response (*Id.* at 131-133). He further testified that, if the Ulsh Road crossing is closed and a structure fire occurred at either of the two houses on Ulsh Road, it would not mean the fire department could not fight the fire or that emergency equipment could not turn around to go back out Ulsh Road; only that it would mean that it would be more difficult to do so (*Id.* at 139-140).⁶ He also noted that, because the nearest hospital is located in Marion, the principal routes of travel are SR 98 or SR 309 and this avoids the necessity of using the Ulsh Road crossing (*Id.* at 168).

G. Any other factor the Commission determines appropriate

There are approximately 6,100 railroad grade crossings in Ohio. As noted by ORDC witness Darfus, each crossing is ranked according to its accident history and level of safety. At hearing, CSX provided evidence that, in 2007, the Ulsh Road crossing was ranked as the 12th most dangerous grade crossing in the state of Ohio. This high rating was the result, in part, of prior accidents at the crossing. As directed by the attorney examiner, the ORDC filed a notice following the hearing that, effective August 12, 2009, indicated the Ulsh Road crossing is ranked as the 14th most dangerous grade crossing in

⁶ Chief Canterbury claimed that, because Ulsh Road is only 15 feet wide, two emergency vehicles would be unable to simultaneously drive on Ulsh Road, without one vehicle driving on the berm (*Tr. II* at 144).

the state of Ohio. Mr. Darfus also noted that, while light and gates do improve the safety at grade crossings, the evidence shows that accidents still occur at crossings with active warning devices approximately 50 percent of the time. Also important to the Commission is the fact that the current policy of the First Consolidated Fire District is that emergency vehicles and division personnel are not to use the Ulsh Road crossing. The evidence shows that even though this policy was in place before the current chief, he has continued the policy since becoming chief.

In addition, there was evidence related to the angle and profile of the Ulsh Road crossing, as well as the speed limits for motor vehicles and trains. The evidence shows that the angle of the Ulsh Road crossing is between 30 and 59 degrees. This extreme degree angle creates a very limited sight view for drivers of vehicles as they approach the railroad track. There is a 55 mph speed limit for motor vehicles on Ulsh Road and a relatively high speed for trains at 60 mph. The profile of the Ulsh Road crossing is characterized as elevated and steep.

Finally, the evidence in this case demonstrated that, if the Ulsh Road crossing is closed, drivers of motor vehicles would have only an additional one-tenth of a mile in travel distance. Although there was some testimony regarding the increased costs to the post office, there was insufficient evidence that the additional travel distance would create an unreasonable burden on the traveling public.

III. Conclusion

As previously noted, the term "demonstrable need" is not defined in the statute. Historically, the Commission has made the determination as to whether a demonstrable need exists, by weighing the record evidence. In prior cases involving petitions for closure of railroad grade crossings, the Commission has found that a demonstrable need exists when the evidence shows that the crossing is essential, vital, and indispensable to the general public and when its closure would negatively impact the interests and well being of the general community. After consideration of the evidence in this case, we find that there is not a demonstrable need for the Ulsh Road crossing to exist and, therefore, CSX's petition should be granted. In making this determination, we note that we have balanced the concerns raised by the residents of Claridon Township, the evidence presented by CSX, and the evidence related to the crossing profile, safety ranking, number and speed of trains, and the angle of the crossing. The balance in this case weighs heavily in favor of closure of the Ulsh Road crossing.

The evidence demonstrates that the Ulsh Road crossing is one of the most dangerous grade crossings in Ohio and is currently rated as the 14th most dangerous crossing out of over 6,100 grade crossings in Ohio. The evidence shows that while it was previously ranked as the 12th most dangerous crossing two years ago, it remains very

dangerous. The dangers of this crossing are evidenced by the frequency of accidents, which occurred in the past several years. The perils posed by the Ulsh Road crossing are, in part, related to the 30 to 59 degree angle at which Ulsh Road crosses the CSX track. This severe angle creates an extreme sight view for motor vehicles traveling over the crossing and was characterized by the Claridon Township fire chief as "really bad". As described by Chief Canterbury: "It takes a lot of communication between the driver and the passenger to travel over the crossing and the "crossing grade is pretty steep there and it's just a really bad angle...I don't disagree this is a bad crossing at all, it is."

While ORDC witness Darfus testified that crossing lights and gates could reduce the element of dangers at the crossing, such warning devices would not eliminate the dangers at this crossing, because he noted that 40 percent of crossing accidents occur at grade crossings equipped with lights and gates. The evidence regarding the Ulsh Road crossing demonstrates that, while the volume of daily vehicular traffic on Ulsh Road is low at 137 vehicles per day, the relative speed limit for motor vehicles is high at 55 mph. In addition, the volume of train traffic is high at 19 trains per day and the train speed is also high at 60 mph. These vehicle counts and speeds, coupled with the volume of trains traveling at such high speeds, and the track grade, crossing profile, and severe angle all create hazardous conditions that pose an extreme danger and unsafe conditions for drivers and passengers of motor vehicles that travel over the Ulsh Road crossing.

Further evidence weighing in favor of closure of the Ulsh Road crossing relates to school bus and emergency vehicle usage. The evidence shows that the crossing is unsafe for school buses which do not use the Ulsh Road crossing while transporting school children. The safety of the crossing is also manifested by the fire chief's standing order that emergency personnel not use the Ulsh Road crossing.

The evidence also shows that the two alternate crossings are equipped with more advanced safety equipment and have more favorable grade crossing characteristics than the Ulsh Road crossing. Both the SR 98 and Nesbitt Road crossings are equipped with active warning devices, including warning lights and gates; whereas the Ulsh Road crossing is only passively equipped with crossbucks. Further, both the SR 98 and Nesbitt Road crossings have lower crossing profiles and less severe crossing angles than the Ulsh Road crossing, making them safer grade crossing alternatives. Beyond the safety aspects of the Ulsh Road crossing, there was also insufficient evidence that the additional one-tenth of a mile in travel distance to these alternate crossings would create an unreasonable burden for anyone. While the evidence indicates that there are two individuals residing on Ulsh Road that could be inconvenienced by the closure of the Ulsh Road crossing, that inconvenience must be balanced with the immediate positive benefit to the safety to the traveling public and the general public residing in and around Claridon Township. Furthermore, there was public testimony that Ulsh Road and the Ulsh Road crossing function more as a convenience, rather than a need, for motorists, having been

characterized by several witnesses at the local public hearing as a "cut-through" street and a "nice side road." While we note that there was an issue raised at the public hearing regarding the accessibility and maneuverability of trucks and farm equipment on Ulsh Road, there was both testimony that it could present a problem, as well as testimony that it would not present any problem for such vehicles which would turn-around in the fields. Further, Chief Canterbury testified that, even if the Ulsh Road crossing is closed, emergency service would still be able to be provided to the two individuals residing on Ulsh Road, albeit with some delay in response time. In addition, Chief Canterbury testified that for 80 to 90 percent of emergency calls, the Ulsh Road crossing is irrelevant to emergency responses for his department.

Lastly, we address several issues raised by witnesses at the public hearing and one procedural issue raised by CSX at the adjudicatory hearing. First, there was testimony from Chief Canterbury claiming that, at times, trains have blocked alternate crossings, making use of the Ulsh Road crossing all the more important to remain open. The Commission believes that the issue of train-blocked crossings is a local jurisdictional issue and, therefore, this should continue to be addressed at the local level by Claridon Township, pursuant to Sections 5589.21 and 5589.99, Revised Code. In addition, there was testimony at the public hearing claiming that if the Ulsh Road crossing is closed, Ulsh Road will be changed to a dead-end road. As a result, illegal trash dumping will increase on Ulsh Road and there will be more incidents involving persons vandalizing farm equipment situated on Ulsh Road. The Commission believes that the official responses to any alleged criminal activity in Claridon Township should similarly be addressed at the local level by Claridon Township. Finally, one public witness indicated that closing the Ulsh Road crossing might have a negative effect on property values. We would note that there are a myriad of things and events that can and do affect the relative property values of houses and real estate; however, there is nothing in the record evidence regarding the economic effect closing the Ulsh Road crossing will or will not have on property located on Ulsh Road or in the vicinity of the Ulsh Road crossing. Accordingly, we believe that the evidence demonstrates that there is not a demonstrable need of the Ulsh Road crossing to exist and, therefore, the petition to close the Ulsh Road crossing should be granted.

At the August 12, 2009 adjudicatory hearing, CSX sought to read into the record portions of two depositions of individuals who were not present.⁷ The attorney examiner denied CSX's request finding that the Commission's rules did not permit such a practice and that under Ohio Civil Rule 32, the circumstances under which a deposition transcript may be read into the record, in the absence of the witnesses, did not exist in this case. On September 30, 2009, CSX filed a letter requesting that the Commission consider the transcripts of the depositions in arriving at its decision. CSX claimed, in part, that, under

⁷ CSX deposed three individuals, Cliff Canterbury, Roger Kepford, and Gary Collins, all of whom reside outside Franklin County.

Ohio Civil Rule 32, the deposition of a witness may be used if that witness is beyond the subpoena power of the court in which the action is pending or resides outside of the county in which the action is pending. CSX claimed that, because the two deposed witnesses live outside Franklin County, which it claimed is where the action is pending, it should have been permitted to read the transcripts into evidence at the adjudicatory hearing.

Initially, we note that CSX's request was improperly made through the filing of a letter, rather than a motion, pursuant to Rule 4901-1-12, Ohio Administrative Code (O.A.C.). Secondly, it is well established that the Commission has broad discretion as to how it manages its cases and procedures during hearings and that it is not strictly bound by the Ohio Rules of Evidence or the Ohio Civil Rules. Nevertheless, we find no merit to CSX's argument relating to Ohio Civil Rule 32, which provides a limited number of exceptions where depositions may be used at hearing when the deposed individuals are not present. In particular, CSX failed at the hearing to identify how the circumstances of this case qualify as an exception under Ohio Civil Rule 32. Furthermore, CSX's post-hearing argument that the depositions should be considered because the two deposed individuals live outside Franklin County and beyond the subpoena power of the Commission frankly lacks merit. CSX readily conceded to the attorney examiner at the hearing that it could have subpoenaed these two individuals, but simply chose not to do so (Tr. II at 83-84). Nor did CSX cite, at hearing or in its September 30, 2009 letter, that it would have incurred some hardship by attempting to subpoena the two men. It simply chose not to do so. More importantly though, CSX did choose to subpoena Chief Canterbury, one of the three individuals it deposed in this case, to appear at the adjudicatory hearing, even though Chief Canterbury resides outside Franklin County.⁸ Accordingly, we deny CSX's request to consider the transcripts of the depositions.

Pursuant to Section 4907.474, Revised Code, if after the hearing it is the opinion of the Commission that there is not a demonstrable need for the crossing to exist and that the crossing should be closed, the Commission shall issue an order to the legislative authority of the municipal corporation in which the crossing is located directing it to discontinue the crossing and close it to vehicular traffic or to pedestrian traffic, or both, by ordinance. The legislative authority of the municipal corporation, within 30 days after receipt of the order from the Commission, shall discontinue the crossing and close it to vehicular traffic, or to pedestrian traffic, or both, as specified in the order of the Commission. In this case, the evidence demonstrates that there is not a demonstrable need for the Ulah Road crossing to exist and it should be closed. Accordingly, within 30 days of this opinion and order, Claridon Township, as the local highway authority for the Ulah Road crossing, is directed to issue an ordinance discontinuing the use of the Ulah Road crossing. Also, within 30

⁸ On August 6, 2009, CSX docketed a motion for a subpoena and a subpoena signed by the attorney examiner directing Clint Canterbury to appear at the August 12, 2009 adjudicatory hearing in Columbus.

days of this opinion and order, Claridon Township is directed to close the Ulsh Road crossing to all vehicular and pedestrian traffic.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On February 18, 2009, as amended on March 16, 2009, CSX filed a petition to close the Ulsh Road crossing.
- (2) On March 23, 2009, Claridon Township filed objections to CSX's petition.
- (3) A local public hearing was held in Caledonia, Ohio, on May 4, 2009.
- (4) The evidentiary hearing was held at the offices of the Commission on July 14, 2009.
- (5) CSX's petition was filed pursuant to Sections 4907.474 and 4907.475, Revised Code.
- (6) Proof of publication of the local public hearing was published in *The Marion Star*, a newspaper of general circulation in Marion County, Ohio.
- (7) The evidence demonstrates that there is not a demonstrable need for the Ulsh Road crossing to exist.

ORDER:

It is, therefore,

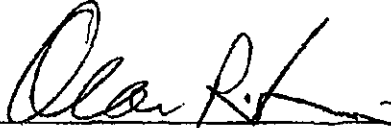
ORDERED, That CSX's petition for closure of the Ulsh Road crossing be granted. It is, further,

ORDERED, That, within 30 days of this opinion and order, Claridon Township issue an ordinance discontinuing the use of the Ulsh Road crossing to vehicles and pedestrians. It is, further,

ORDERED, That, within 30 days of this opinion and order, Claridon Township close the Ulsh Road crossing to all vehicular and pedestrian traffic. It is, further,

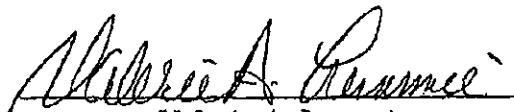
ORDERED, That a copy of this opinion and order be served on CSX, Claridon Township, and all other interested persons of record.

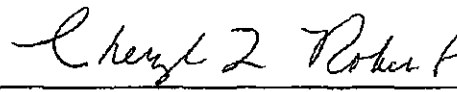
THE PUBLIC UTILITIES COMMISSION OF OHIO


Alan R. Schriber, Chairman


Paul A. Centolella


Ronda Hartman Fergus

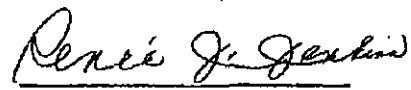

Valerie A. Lemmie


Cheryl L. Roberto

SEF:ct

Entered in the Journal

OCT 28 2009


Renee J. Jenkins
Secretary