

Temporary closure is warranted here, due to the involved equities, and more notably, since “it will enhance the safety of the traveling public”.

A memorandum in support is attached.

Respectfully submitted,

EASTMAN & SMITH LTD.

DICKIE, MCCAMEY & CHILCOTE, P.C.

/s/ D. Casey Talbott

/s/ R. Leland Evans

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CSX Transportation, Inc.

MEMORANDUM IN SUPPORT

By way of history, the ORDC and NSRC/CSXT had identified the Franklin Street crossings as potentially viable closure candidates since, among other reasons, Franklin Street is a mere cut-through road which experiences a low volume of vehicular traffic, and has alternate access via adjacent crossings located less than 1/10th of a mile away); accordingly, these parties engaged in prolonged discussions with Orange Township – the local highway authority – to explore voluntary closure. These discussions ultimately proved fruitless, as Orange Township declined the ORDC/NSRC/CSXT’s incentive offer in solicitation of voluntary closure. In light of same, NSRC and CSXT filed the instant petition seeking the permanent closure of these crossings. Following preliminary discovery (document production and depositions, etc.), the petition was scheduled for evidentiary hearing to be held on March 2, 2021. A month or so before the scheduled hearing, Orange Township approached NSRC/CSXT and asked whether the railroads (together with the ORDC) would be willing to re-commit to their pre-petition incentive offer;

assuming so, Orange Township represented that the offer would be accepted. NSRC/CSXT therefore revisited voluntary closure discussions with the ORDC, and ultimately secured the ORDC's authority to join the railroads in re-committing to the pre-petition incentive offer. At this point an agreement in principle was reached to close the Franklin Street crossings, and thus via Joint Request of February 18, 2021 the parties asked the Commission to continue the March 2, 2021 evidentiary hearing, with the hope/expectation that the hearing would not ultimately prove necessary. The Commission approved the Joint Request, but erred on the side of rescheduling the evidentiary hearing for June 1, 2021.

The settlement in principle was thereafter reduced to writing, with the ORDC re-issuing the incentive offer via letter of March 8, 2021, Orange Township "gladly accepting" the offer via letter of March 17, 2021, and Orange Township then passing a formal, confirmatory resolution on April 19, 2021 which stated in pertinent part as follows: "The Township finds the proposal to be in the best interest of the community in that it will enhance the safety of the traveling public." (Copies of these documents are attached.) In reliance thereon, the ORDC thereafter expended significant resources (personnel hours, etc.) toward securing requisite federal funding, and the parties then turned their attention to logistical closure. Unfortunately, on May 21, 2021, as closure logistics were being finalized, Orange Township did an unanticipated, absolute about-face, and passed a resolution purporting to rescind its earlier resolution agreeing to close the Franklin Street crossings. Orange Township's actions culminated in its counsel filing an immediate notice of withdrawal and, ultimately, in the Commission further continuing the evidentiary hearing through October 12, 2021, more than seven (7) months after it otherwise would have been held.

Under Ohio law (R.C. 4905, *et seq.*), the Commission claims plenary power to promote and enforce orders relating to the protection, welfare, and safety of both railroad employees and the traveling public. In the instant case, due to the involved equities, and more notably toward "enhancing the safety of the traveling public," the Commission should exercise this power to temporarily close the Franklin

Street crossings, pending the Commission’s determination whether the crossings should be permanently closed.

As for the equities, Orange Township’s actions – specifically, its request that ORDC/NSRC/CSXT re-commit to their pre-petition incentive offer, its informal and then formal acceptance of the incentive offer, and then its 11th hour attempt to rescind that acceptance – resulted in the evidentiary hearing being pushed back for over seven (7) months – from March 2, 2021 through the currently-scheduled date, October 12, 2021. As for safety, one of the involved crossings currently ranks #32 in the State, in the PUCO hazard rankings, and the Township’s own resolution of April 19, 2021 confirms that closure would “enhance the safety of the traveling public”.

For the foregoing reasons, the Commission is asked to exercise its plenary power by ordering the Franklin Street crossings temporarily closed, pending the Commission’s determination whether the crossings should be permanently closed.

Respectfully submitted,

EASTMAN & SMITH LTD.

DICKIE, MCCAMEY & CHILCOTE, P.C.

/s/ D. Casey Talbott

/s/ R. Leland Evans

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Attorneys for Co-Petitioner
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CERTIFICATE OF SERVICE

A copy of the foregoing **Co-Petitioners' Motion for Temporary Closure** was filed electronically with the Commission this 29th day of July, 2021. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

/s/ D. Casey Talbott

Attorney for Co-Petitioner

Norfolk Southern Railway Company



Rail Development Commission

Mike DeWine, Governor
Jon Husted, Lt. Governor

Scott Corbitt, Chair

March 8, 2021

Christopher D. Betts
Assistant Prosecuting Attorney
Delaware County Prosecuting Attorney's Office
145 North Union Street, 3rd Floor
Delaware, Ohio 43015

Dear Mr. Betts:

In May of 2013, September 2016 and August 2018, the Ohio Rail Development Commission (ORDC) provided proposals to Orange Township for the closure of the TR 1041, Franklin Street grade crossing (Norfolk Southern (NS) #481482D and CSX #518257V). Each of these proposals was rejected by Orange Township. Since that time, NS and CSX petitioned the Public Utilities Commission of Ohio (PUCO) to close Franklin Street. It is my understanding that NS, CSX, the Delaware County Board of Commissioners, Orange Township and the Delaware County Engineer have an agreement in principle to voluntarily close Franklin Street if Orange Township and ORDC can identify an eligible project for ORDC's funding.

Based on the most current information provided, ORDC proposes the following in consideration for the closure of Franklin Street:

- A \$25,000 cash incentive from NS to be used for any purpose deemed appropriate by Orange Township;
 - A \$5,000 cash incentive from CSX to be used for any purpose deemed appropriate by Orange Township;
 - A *reimbursement* of up to \$5,000 from ORDC to the Township to be used toward associated costs of permanently barricading the roadway at Franklin Street; and
 - Depending on project viability and community input, to be determined jointly by ORDC and Orange Township as project details become known, either of the following alternatives:
 - ORDC will provide up to \$350,000 to Orange Township toward the proposed underpass for DEL-TR114 (East Orange Road DOT# 481481W), under CSX and NS;
- OR-
- ORDC will provide up to \$350,000 to Orange Township toward the upgrade of the warning devices to four-quadrant gates at the Lewis Center Road at-grade crossing (DOT# 481483K) so the community can pursue a quiet zone.



The closure process does require public involvement and consent legislation to be passed by the township in order to move forward. ORDC has worked with many communities over the years to assist with this process, so if you have any questions please do not hesitate to contact us. It is our hope that you will seriously consider this proposal. The increased safety benefits for travelers within your community will be enjoyed for years to come. This offer will remain in effect for 30 days from the date of this letter. If you wish to pursue this opportunity, please respond within that timeframe.

We look forward to hearing from you soon.

Sincerely,

A handwritten signature in black ink, appearing to read 'Matthew Dietrich', written in a cursive style.

Matthew Dietrich
Executive Director

c: Rusty Orben, Director of Public Affairs, CSX Transportation, Inc.
Jason Wazelle, Regional Vice President, Norfolk Southern Corporation
D. Casey Talbott, Attorney at Law, Eastman & Smith, Ltd.
Amanda DeCesare, Project Manager, Public Projects, CSX Transportation, Inc.
Kurt Young, Project Engineer, C&S Construction, Norfolk Southern Corporation
Chris Bauserman, PE, PS, Delaware County Engineer
John Williams, Director, Transportation Department, PUCO
Jill Henry, Rail Division Chief, PUCO
Greg Gronbach, Project Manager, ORDC

CRIMINAL DIVISION
MARK C. SLEEPER, CHIEF
CHRISTOPHER E. BALLARD
J. HAWKEN FLANAGAN
CORY J. GOE
JAQUELINE J. RAPIER
PAYTON ELIZABETH THOMPSON
R. JOSEPH VARVEL
JOEL C. WALKER

JUVENILE DIVISION
ELIZABETH A. MATUNE, SUPERVISOR
ELIZABETH S. FLIGNER
MEGAN A. HAMMOND



CIVIL DIVISION
CHRISTOPHER D. BETTS, CHIEF
MARK W. FOWLER
TYLER D. LANE
ERIC C. PENKAL
VINCE J. VILLIO

VICTIM SERVICES DIRECTOR
TRISH S. WRIGHT

INVESTIGATOR
ROBERT J. PETERSON

March 17, 2021

Matthew Dietrich
Executive Director
Ohio Rail Development Commission
1980 West Board Street
Mail Stop #3140
Columbus, Ohio 43223

Email **ONLY**: Matt.Dietrich@dot.ohio.gov

Re: Response to ORDC Offer Letter Dated March 8, 2021 – Closure of Franklin Street Crossings in Orange Township, Delaware County, Ohio

Dear Mr. Dietrich:

Thank you for your March 8, 2021 letter containing ORDC's offer of funding to Orange Township in consideration of the closure of the Franklin Street grade crossings. The Township greatly appreciates the offer and gladly accepts. A copy of your letter containing the offer is attached as Exhibit A.

Regarding the Township's use of the \$350,000, the Township is willing to use those funds for either one of the two (2) alternative projects listed in your letter. It is my understanding the decision as to which of the projects to use the funds for does not need to be made now. Instead that decision will be made jointly by ORDC and the Township at a later time as project details become known and based on project viability and community input. That said, of the two (2) projects, the Township currently prefers the upgraded warning devices at Lewis Center Road.

Please let me know if there is anything else you need from the Township in order to accept the offer. Also, please advise as to next steps. Again, your time and attention to this matter is greatly appreciated. Should you have any questions, please feel free to contact me directly at (740) 833-2707 or cbetts@co.delaware.oh.us.

Sincerely,

Christopher D. Betts
Assistant Prosecuting Attorney
Counsel for Orange Township and
The Delaware County Engineer

Enclosure:

cc:

Orange Township

Delaware County Engineer

D. Casey Talbott, Eastman & Smith Ltd., Counsel for Norfolk Southern Railway Company

R. Leland Evans Dickie, McCamey & Chilcote, P.C., Counsel for CSX Transportation

Richard Silk, Dickie, McCamey & Chilcote, P.C., Counsel for CSX Transportation

Aric I. Hochstetler, Staff Attorney, Counsel for the Delaware County Board of Commissioners

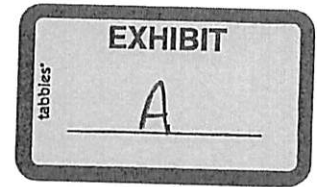
Melissa A. Schiffel



Rail Development Commission

Mike DeWine, Governor
Jon Husted, Lt. Governor

Scott Corbitt, Chair



March 8, 2021

Christopher D. Betts
Assistant Prosecuting Attorney
Delaware County Prosecuting Attorney's Office
145 North Union Street, 3rd Floor
Delaware, Ohio 43015

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The closure process does require public involvement and consent legislation to be passed by the township in order to move forward. ORDC has worked with many communities over the years to assist with this process, so if you have any questions please do not hesitate to contact us. It is our hope that you will seriously consider this proposal. The increased safety benefits for travelers within your community will be enjoyed for years to come. This offer will remain in effect for 30 days from the date of this letter. If you wish to pursue this opportunity, please respond within that timeframe.

We look forward to hearing from you soon.

Sincerely,

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Matthew Dietrich
Executive Director

c: Rusty Orben, Director of Public Affairs, CSX Transportation, Inc.
Jason Wazelle, Regional Vice President, Norfolk Southern Corporation
D. Casey Talbott, Attorney at Law, Eastman & Smith, Ltd.
Amanda DeCesare, Project Manager, Public Projects, CSX Transportation, Inc.
Kurt Young, Project Engineer, C&S Construction, Norfolk Southern Corporation
Chris Bauserman, PE, PS, Delaware County Engineer
John Williams, Director, Transportation Department, PUCO
Jill Henry, Rail Division Chief, PUCO
Greg Gronbach, Project Manager, ORDC

D. Casey Talbott

From: Betts, Christopher <CBetts@co.delaware.oh.us>
Sent: Friday, April 23, 2021 12:03 PM
To: Matt.Dietrich@dot.ohio.gov; Timothy.Brown@dot.ohio.gov;
Wende.Jourdan@dot.ohio.gov
Cc: Riley, Rob; D. Casey Talbott; Evans, Lee; Silk, Richard; Schiffel, Melissa; Hochstettler, Aric;
Debbie Taranto
Subject: Orange Twp. BOT - Approved Resolution to Accept Offer and Close Franklin Street
Attachments: Signed Res.No.21-140 - Closing of Public Grade Crossings on Franklin - 4-23-21.pdf

Matt, Tim, and Wende:

Happy Friday! Attached, please find a copy of the resolution signed by the Orange Township Board of Trustees accepting the ORDC offer and to close Franklin Street. The NEPA notice of the closure was posted 4/19/21. Here is the link to the notice: <https://orangetwp.org/CivicAlerts.aspx?AID=851>. I understand this needs to be posted for 30 days before actual closure. That should mean posting is complete on May 19, 2021. Please advise as to next steps for the Township and what you need from me. Any questions, please let me know. Have a great weekend!

Sincerely,

Christopher D. Betts

Assistant Prosecuting Attorney
Delaware County Prosecuting Attorney's Office
145 North Union Street, 3rd Floor
Delaware, Ohio 43015
Telephone: (740) 833-2690
Facsimile: (740) 833-2689
Email: cbetts@co.delaware.oh.us

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RES.NO.21-140 ACCEPTING THE PROPOSAL OF THE OHIO RAIL DEVELOPMENT COMMISSION (ORDC), CSX TRANSPORTATION (CSX) AND NORFOLK SOUTHERN RAILWAY COMPANY (NS) FOR THE CLOSURE OF PUBLIC GRADE CROSSINGS ON FRANKLIN STREET, TR 1041.

The Board of Trustees of Orange Township, Delaware County, Ohio ("Board") met in regular open session on April 19, 2021.

Mr. Grumbles Moved the adoption of the following Resolution.

PREAMBLE

To provide consent for the permanent closure to vehicular and pedestrian traffic of a public grade crossing as recommended by the Ohio Rail Development Commission (ORDC), CSX Transportation (CSX) and Norfolk Southern Railway Company (NS).

WHEREAS, a proposal has been made to change the character of Franklin Street, TR 1041 by prohibiting through vehicular and pedestrian traffic over the at-grade, CSX and NS crossings thereby benefitting the safety of the traveling public; and,

WHEREAS, if vehicular and pedestrian traffic at the grade crossing is discontinued, Orange Township (Township), and ORDC have agreed to arrange for the accommodation, funding, and installation of improvements to the Township highway system; and,

WHEREAS, the Township agrees with the foregoing and desires to provide its consent to permit permanent closure of the aforementioned public grade crossing subject to the terms and conditions set forth herein; and

WHEREAS, the proposal has been submitted to the Township and the Township finds the proposal to be in the best interest of the community in that it will enhance the safety of the traveling public.

NOW THEREFORE, BE IT RESOLVED by the Board, at least a majority of its members concurring:

SECTION I

That the Board hereby authorizes and approves changing the character of Franklin Street, by barricading and prohibiting vehicular and pedestrian traffic across the at-grade railroad crossings traversing the street.

SECTION II

That the Board hereby accepts the following incentive offer of the ORDC, CSX and NS in exchange for the Township's permanent closure of the Franklin Street crossing:

- \$25,000 from NS that may be used by the Township for any purpose;

Ryan Rivers
Trustee

ATTEST:

Lisa Kraft
Lisa Kraft
Orange Township Fiscal Officer

4/19/2021
Date

State of Ohio :
Delaware County :

I, the undersigned Orange Township Fiscal Officer, hereby certify that the foregoing Resolution is taken and copied from the record of proceedings of the Orange Township Board of Trustees and that it has been compared by me with the resolution on the record and is a true copy. Further, I certify that the adoption of such resolution occurred in an open meeting held in compliance with R.C. § 121.22.

Lisa Kraft
Lisa Kraft
Orange Township Fiscal Officer
Delaware County, Ohio

4/19/2021
Date

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

7/29/2021 4:27:47 PM

in

Case No(s). 19-0180-RR-UNC

Summary: Motion Co-Petitioners' Motion for Temporary Closure electronically filed by Mr. D. Casey Talbott on behalf of Norfolk Southern Railway Company