

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Joint Petition of Norfolk)	
Southern Railway Company and CSX)	Case No. 19-180-RR-UNC
Transportation, Inc., to Close the Franklin Street)	
Crossings (DOT Nos. 481482D and 518257V))	
in Orange Township, Delaware County, Ohio.)	

**ORANGE TOWNSHIP BOARD OF TRUSTEES' MEMORANDUM IN OPPOSITION
TO THE CO-PETITIONERS' MOTION FOR TEMPORARY CLOSURE**

Now comes the Board of Trustees of Orange Township, Delaware County, Ohio (the "Board" or "Township") by and through its attorneys, Brosius, Johnson & Griggs, LLC, in opposition to the motion of the Co-Petitioners, Norfolk Southern Railway Company ("NSRC") and CSX Transportation, Inc. ("CSXT"), (collectively, the "Co-Petitioners") for an order temporarily closing the Franklin Street crossings (the "Crossings") prior to the decision of the Public Utilities Commission of Ohio (the "Commission") in this matter.

Respectfully submitted,

By /s/ Julia E. Donnan

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MEMORANDUM

The Township respectfully requests that the Commission deny the Co-Petitioners' Motion for Temporary Closure. In sum, the Co-Petitioners have failed to set forth adequate grounds or any authority upon which their motion may be granted. The Co-Petitioners are not entitled to have the Crossings temporarily closed as a result of the rescheduling of the evidentiary hearing. Furthermore, it is inappropriate for the Co-Petitioners to request that this Commission take extraordinary steps to temporarily close the Crossings under the vague and unsupported guise of enhancing the safety of the traveling public. For the reasons set forth herein, the Township requests that the Co-Petitioners' motion be denied.

- 1. The Co-Petitioners have failed to set forth adequate grounds or any authority upon which their motion may be granted.*

The Co-Petitioners' motion is devoid of any authority upon which the Commission may grant the temporary closure they seek. Ohio Adm. Code 4901-1-12(A). The Co-Petitioners cite Chapter 4905 of the Ohio Revised Code, in its entirety and then some, and fail to point to any specific section or provision that would provide the Commission with clear authority to temporarily close the Crossings. For this failure to specifically state sufficient grounds and authority upon which the request may be granted, the Commission should deny the Co-Petitioners' Motion and allow the determination of the Crossings' closure to occur in accordance with this Commission's hearing process.

- 2. The Co-Petitioners are not entitled to a temporary closure as a result of the parties failing to enter into a settlement agreement.*

First, the parties' inability to enter into a settlement agreement in this case is not inequitable to the Co-Petitioners or appropriate grounds for a temporary closure. Rather, such an outcome is a potential occurrence in any negotiation. The Township set forth its objections to the proposed

closure of the Crossings in April of 2019. In the meantime, the Township and the Co-Petitioners attempted to enter into a mutually agreeable settlement and negotiated a potential settlement in good faith. The Township maintains those objections.

Like all governmental bodies, the Board serves on behalf of its constituents and residents. Township residents are among those who will be most strongly impacted if the Crossings are closed. After the salient terms of the proposed settlement agreement were negotiated, the Board held a meeting for the residents to provide, and the Board to receive, public comment on the matter and the proposed settlement. This meeting occurred long before any agreement had been drafted, finalized, or executed, because such steps have not yet occurred. After hearing comments from the public, the Board decided that it could not, in service to those residents, proceed with entering into the proposed agreement.¹ Therefore, in keeping with its responsibilities to its constituents and residents, the Board rescinded its prior resolution that acknowledged its general approval, at the time, of the proposed settlement terms.

Second, the Co-Petitioners attempt to frame the Township's actions as the sole cause of the delay of the evidentiary hearing, and that said delay is inequitable to the Co-Petitioners. The fact is that the parties submitted three prior Joint Requests to continue the evidentiary hearing: from August 2020 to November, November to March 2021, and March to May. The parties attempted to coordinate, but were unable to reach, a settlement. Furthermore, the Co-Petitioners are well aware that many factors contributed to the most recent extension of the hearing to October.

It is unfortunate when settlements are not attained despite the parties' efforts. Here, though, it would be inequitable and inappropriate to characterize the Township's actions as anything other

¹ The Co-Petitioners' Motion inaccurately stated that "at this point the Township is not amenable to closing these crossings, temporarily or permanently...". Co-Petitioners' Motion for Temporary Closure, footnote 1. This is incorrect. The Township's position, which has been communicated to the Co-Petitioners, is that the Township would be open to the closure of the Crossings subject to and after the completion of the extension of Home Road.

than those of an elected body serving its most fundamental purpose: zealously representing its constituents. It would also be inequitable and inappropriate to temporarily close the Crossings on this thin basis, and deny the Township and other parties the opportunity to fully present their objections in the context of the October hearing.

3. *If the Crossings place the public in such immediate danger, the Co-Petitioners have neither reconciled the timing of this request nor explained the preference for temporary closure over other safety mechanisms.*

A single sentence of the Co-Petitioners' Motion asserts that the Crossings should be closed because of safety concerns, and that the Crossings should be closed because one Crossing is ranked thirty-second in the PUCO hazard rankings. The Motion fails to explain why this statistic is more relevant or indicates a higher degree of danger now than when the Co-Petitioners filed their initial petition over two years ago. Additionally, the Motion fails to explain why temporary closure is the sole or best means to address the Co-Petitioners' alleged safety concerns, or why other safety mitigation efforts (for example, the installation of additional safety devices, signage, etc.) would not be sufficient. Alternative safety mitigation efforts may be able to be implemented quicker than closure; may be even more effective in addressing the alleged safety concerns; and may not result in the anticipated negative impacts of the closure of the Crossings.

Rather than pursuing alternative temporary safety mitigation efforts at any point over the last two years, the Co-Petitioners now attempt to bypass them completely, two months before the evidentiary hearing. The fact that this lone point regarding the safety of the Crossings is delivered after the Co-Petitioners' extensive discussion on the alleged inequities of the Township's refusal to enter into a final settlement agreement hints that the intent of seeking the temporary closure is to chastise the Township for the perceived unfairness of its rescission of its earlier resolution. For

these reasons, the Co-Petitioners' request that the Crossings be temporarily closed now to address vaguely alleged safety concerns is inappropriate and should be denied.

CONCLUSION

As set forth herein, the Township respectfully requests that the Commission deny the Co-Petitioners' Motion for Temporary Closure. The Co-Petitioners' Motion fails to state any authority upon which the Crossings should be temporarily closed. Furthermore, by requesting that this Commission temporarily close the Crossings pending the approaching hearing, the Co-Petitioners attempt to prevent the Township from and/or penalize the Board for fulfilling its responsibility to represent its residents, and prevent due process from occurring through this Commission's evidentiary hearing process. Additionally, the Co-Petitioners have failed to establish the urgent need for the closure, or that their safety concerns cannot be obviated through some other means. The Co-Petitioners' Motion for Temporary Closure should be denied.

Respectfully submitted,

By /s/ Julia E. Donnan

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CERTIFICATE OF SERVICE

A copy of the foregoing was filed electronically with the PUCO on August 13, 2021. Copies of this document will automatically be served on the following parties by the PUCO's e-filing system and by email at the indicated email addresses:

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Summary: Memorandum Orange Township Board of Trustees' Memorandum in Opposition to the Co-Petitioners' Motion for Temporary Closure electronically filed by Ms. Julia Donnan on behalf of Orange Township Board of Trustees