

[illegible]

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

[illegible]

In the Matter of the Joint Petition of Norfolk Southern Railway Company and CSX Transportation, Inc. to Close the Franklin Street Crossings (DOT Nos. 481482D & 518257V) in Orange Township, Delaware County.	:	Case No. 19-180-RR-UNC
	:	<b><u>CO-PETITIONER NORFOLK SOUTHERN RAILWAY COMPANY'S REPLY BRIEF</u></b>
	:	D. Casey Talbott (0046767) (Counsel of Record)
	:	EASTMAN & SMITH LTD. One SeaGate, 24 <sup>th</sup> Floor
	:	P. O. Box 10032 Toledo, Ohio 43699-0032
	:	Telephone: (419) 241-6000 Fax: (419) 247-1777
	:	E-Mail: dctalbott@eastmansmith.com
	:	Attorneys for Co-Petitioner Norfolk Southern Railway Company

[illegible]

## Introduction:

All parties agree that R.C. §§4907.474 and 4907.475 provide the statutory framework of factors to be considered when evaluating a closure petition. Pursuant to these provisions, the Commission must determine whether there is a “demonstrable need” for the crossing to exist. R.C. 4907.474(A). While the term “demonstrable need” is not defined by the statute, the Commission has previously held that a demonstrable need exists when the evidence shows that a crossing is “essential, vital, and *indispensable* to the general public and when its

closure would negatively impact the interests and wellbeing of the general community.” (PUCO Case No. 15-1714-RR-UNC, ¶27, italics added.)

The Commission has also summarized the “goal” of the statute:

**The goal of the statute is to reduce the number of crossings in the state where it is reasonable to do so, thereby reducing the exposure of motorists to the inherent dangers posed by any location where vehicular traffic and trail traffic meet at grade. Where it is possible to divert traffic to readily accessible alternative highways with the same or superior safety characteristics, the closure process serves a public good through reduction of potential injuries and deaths and more efficient use of available financial resources used to install warning gates and lights.** (PUCO Case No. 02-3052-RR-UNC, bold-face added.)

In the instant case, based upon the evidence in the record, it is or should be clear that there is no “demonstrable need” for the Franklin crossings to exist, since they are not “indispensable” to the traveling public, and consistent with the statute’s goal, it is in fact possible to divert impacted traffic (approximately 64 vehicles per day) to a readily accessible, alternative roadway – specifically, Lewis Center, which is only 6/100ths of a mile away, and has “superior safety characteristics.”

Any objections to closure are overstated and/or simply not credible. Perhaps the best evidence of this is the Township’s own actions/words – specifically, when on April 29, 2021, with full support of the County, the Township passed a resolution admitting that closure was “in the best interests of the community, in that it will enhance the safety of the traveling public.” (Co-Petitioner Exhibit 9; Boni testimony, p. 232.)

The Township should be held to its actions and words, and the Franklin crossings closed.

### **Law and Argument:**

The Township/County appear to have four main, substantive objections to closure – specifically, they claim: (1) that the impact on emergency and other vehicular traffic will be “monumental,” and the harm “incalculable”; (2) that closure will cause “inconvenience” to the traveling public; (3) that the adjacent roadway – Lewis Center – is incapable of absorbing additional traffic; and (4) safety concerns raised by NSRC and CSXT are less than genuine.

These objections will be addressed separately, below:

**A. Any impact on emergency services is negligible, not “monumental” and/or “incalculable”.**

In its Post-Hearing Brief (at p. 7), the Township contends that the impact of closure on emergency and other related traffic would be “monumental,” and the harm “incalculable”. This contention is overstated, to say the least.

First, there is absolutely no impact on fire, since fire response territories have been created using the tracks as a dividing line – specifically, Station 362 (located on the east side of the tracks) services territories to the east, whereas Station 361 (located on the west side of the tracks) services territories to the west). (Brandt testimony, pp. 106-108; McNeil testimony, p. 199.) Second, any impact on EMS service is negligible – specifically: (1) there is absolutely no impact to three of the four quadrant areas services by the local Medic 3 station (those areas to the east), since Medic 3 can service these areas without crossing the tracks; (2) there is no appreciable impact on service to the fourth quadrant (the “Kroger area,” to the west), since EMS can’t get to that area via Franklin, anyway, and therefore need only divert 6/100ths of a mile to the north one block sooner than it otherwise would; (3) with respect to servicing the eight or so homes

immediately west of the Franklin crossings, EMS need only divert 6/100ths of a mile to the north, with sirens blaring, cross the tracks at Lewis Center, and then return 6/100ths of a mile to the south, adding mere seconds to its response time; and (4) in any event, Township/County witnesses acknowledge that, even in instances when the Franklin crossings have been closed, in the past, the Township/County have experienced no response time concerns servicing area residents – rather, response times have been at an acceptable level, certainly well-within the national standard (see, *e.g.*, Brandt testimony, pp. 142-145; McNeil testimony, pp. 196-198).<sup>1</sup>

In any event, in other cases wherein concerns have been voiced with respect to the impact of closure upon emergency services, frankly more credible concerns than in the instant case, the Commission has still ordered closure when these concerns have been trumped by other factors, such as those present in this case. See, *e.g.*: (1) PUCO Case No. 15-1714-RR-UNC (closure ordered notwithstanding alleged compromise to fire/EMS services, in large part due to the fact that, as in the instant case, only three vehicles per hour would need to be diverted); (2) PUCO Case No. 14-379-RR-UNC (closure ordered notwithstanding alleged compromise to emergency services, and alleged inconvenience of traveling to an adjacent crossing one-half of a mile away, due in large part to the fact the crossing was inherently dangerous – #110 on the hazard ranking – with a fairly sizable gap existing between the tracks, with the Commission stating in pertinent part as follows: “\* \* \* [W]hile emergency service providers would prefer to keep the crossing open to have better access to emergencies on the opposite side of the crossing, it is our

---

<sup>1</sup> The Township suggests, at page 11 of its Post-Hearing Brief, that closure would “practically eliminate” Medic-3’s ability to service areas to the west of the crossing. As stated above, there is absolutely no factual support for this.

desire to prevent an emergency from happening at the crossing itself”); and (3) PUCO Case No. 12-2145-RR-UNC (closure ordered notwithstanding that the crossing provided the “preferred route” for emergency response services, and the next closest crossing was one-half of a mile away, due in large part to the fact that, as in the instant case, the involved roadway was a mere cut-through, lightly traveled, with a relatively high profile, and was protected by passive warning devices).

**B. Any “inconvenience” to Lewis Center residents would be nominal.**

In the event the Franklin crossings are closed, local residents desiring to travel from one side of the tracks to the other need divert only 6/100ths of a mile north to Lewis Center, and then 6/100ths of a mile back. That is all. So as with EMS, closure would add, at most, a total of 12/100ths of a mile of travel time. The Township/County witnesses acknowledged as much, at evidentiary hearing. See, *e.g.*, Keating testimony, p. 183; Boni testimony, pp. 216-217.<sup>2</sup>

Mere inconvenience, especially as nominal as that in the instant case, does not and cannot suffice to defeat a closure petition. See, *e.g.*, PUCO Case No. 14-379-RR-UNC, at p. 7, stating in pertinent part as follows: “For there to be a demonstrable need for a crossing, the impact of closing the crossing must provide more than just an inconvenience to local residents and motorists.” In that case, closure was ordered notwithstanding alleged compromise to emergency services, and alleged inconvenience to the traveling public which would be forced to drive one-half of a mile further, to the next adjacent crossing. See also, PUCO Case No. 02-589-RR-UNC

---

<sup>2</sup> Assuming local residents are heading anywhere else – meaning out of the immediate Lewis Center community – then there is no impact at all, because by necessity, these folks must divert 6/100ths of a mile to the north, to Lewis Center. (Riley testimony, pp. 80-81.)

(closure ordered notwithstanding testimony that it would add an additional three to five minutes of travel time, as opposed to mere seconds in the instant case, for residents seeking to travel from one side of the tracks to the other).

**C. Lewis Center can readily absorb an additional 64 vehicles per day.**

During the evidentiary hearing, and in its Post-Hearing Briefs, the Township/County purport to contend that Lewis Center is incapable of absorbing the approximately 64 vehicles per day which would be re-routed from Franklin.

Again, the Township/County's contention is not credible, and in any event is belied by the testimony of their own witnesses.

Both the Township and County contend that Lewis Center currently experiences approximately 10,000 vehicles a day. This is not factual. County Engineer Riley – and multiple other witnesses – admitted that the roadway currently experiences 8,000 to 10,000 vehicles a day. (Riley testimony, pp, 81, 96.) Not 10,000. But 8,000 to 10,000. And that by design, Lewis Center could absorb approximately double that, meaning approximately 15,000 to 20,000 vehicles per day. (Riley testimony, pp. 81-83, 96.) Riley also admitted that closing Franklin would require the re-routing of only 64 or so vehicles a day, or an average of 2.66 vehicles per hour. (Riley testimony, p. 89.) And notwithstanding the Township/County's assertions to the contrary, Riley admitted that he is in no way, shape, or form attempting to suggest to the Commission that Lewis Center would be unable to absorb the minimal, re-routed traffic:

Q. So you're not – if you are, so be it – but you're not trying to tell the Hearing Officer that in your expert opinion Lewis Center could not absorb an additional 64 vehicles a day? Are you telling him that?

A. That's not what I'm – that's not what I'm saying. (Riley testimony, pp. 96-97.)

**D. Safety is an important consideration for the Commission, and weighs in favor of closure.**

The Township/County attempt to downplay related safety concerns and their significance, suggesting that there is a “limited” crash history at Franklin, that the crossings are not “inherently dangerous,” and that the roadway/crossings’ characteristics are “essentially the same” as Lewis Center. Again, the Township/County’s contentions are belied by the evidence in the record.

Many witnesses (and supporting exhibits) confirm the concerning characteristics of Franklin – specifically, that it’s a mere cut-through, that it’s narrow, humped, with a sizable gap existing between the tracks, and that the crossing is protected by passive as opposed to active warning devices. And there is in fact a crash history (x4).

And seemingly, the Township/County fail to acknowledge that the safety concerns aren’t being raised only by NSRC and CSXT but, rather, by the State itself, by and through Catherine Stout, the long-time manager of grade crossing safety for the Ohio Rail Development Commission. Stout testified that the Franklin crossings currently have a hazard ranking of 31, meaning the ORDC considers these crossings to be the 31<sup>st</sup> most hazardous of the State’s 5,700 public crossings. (Stout depo., p. 17.) For this and other reasons, Stout testified, unequivocally, that the ORDC would like to see the crossings closed. Stout also testified that installing lights and gates at the crossings would not be a good use of federal safety (taxpayer) money, as this would do absolutely nothing to change the concerning characteristics of the Franklin roadway/crossings.

(Stout depo., pp. 54-55.) Again, this was the State’s testimony, by and through the ORDC – not the railways’.

In past cases, the Commission has emphasized the import of safety considerations.

See, *e.g.*, PUCO Case No. 14-379-RR-UNC, stating in pertinent part as follows:

Grade crossing safety has been an essential part of the Commission’s regulatory mission and the Commission has worked extremely hard to keep safety concerns at the forefront of railroad development in Ohio . . . . Each year, the Commission considers whether to approve applications for closure of railroad grade crossings []. Our evaluation of those applications always is undertaken in the ultimate effort toward increasing the safety of motorists and pedestrians.

Accordingly, in that case, the Commission ordered closure, primarily based upon safety considerations, notwithstanding opposition by emergency response personnel, stating in part as follows (at p. 8):

\* \* \* [T]he risk of injury or loss of life and the danger of a vehicle being stuck between two sets of tracks, or on a set of tracks, is too great for us to permit this crossing to remain open. \* \* \* [W]hile emergency service providers would prefer to keep the crossing open to have a better access to emergencies on the opposite side of the crossing, it is our desire to prevent an emergency from happening at the crossing itself.

And the Commission noted (at pp. 9-10) that, as in the instant case, the crossing may “remain dangerous even with the addition of warning lights and gates.”

**Conclusion:**

There is simply no credible evidence that there is a demonstrable need for the Franklin crossings. Franklin is a short cut-through road, it has concerning characteristics (narrow roadway, humped profile, with a significant gap between the crossings, etc.), it is protected by



passive warning devices, and an alternate roadway – Lewis Center – is located just 6/100ths of a mile away, with superior safety characteristics.

The Franklin crossings are certainly not “indispensable” to emergency responders and/or the traveling public.

For reasons articulated by ORDC witness Stout, the NSRC/CSXT in-house grade crossing safety experts, and frankly, the Township/County’s own witnesses, the Franklin crossings should be closed. Again, with the blessing of the County, the Township admitted this very point, only months before the evidentiary hearing, when it passed a resolution agreeing to close the crossings, stating that closure was “in the best interests of the community, in that it will enhance the safety of the traveling public”. The Township should and must be held to its own words.

For these and other reasons, NSRC respectfully requests that the Joint Petition be granted, and the Franklin crossings ordered closed, at the Township/County’s expense, within thirty (30) days of the Commission’s related Opinion and Order.

Respectfully submitted,

EASTMAN & SMITH LTD.

/s/ D. Casey Talbott

D. Casey Talbott

(Counsel of Record)

One SeaGate, 24<sup>th</sup> Floor

P.O. Box 10032

Toledo, Ohio 43699-0032

Telephone: (419) 241-6000

Facsimile: (419) 247-1777

Attorneys for Co-Petitioner

Norfolk Southern Railway Company

**CERTIFICATE OF SERVICE**

A copy of the foregoing **Co-Petitioner Norfolk Southern Railway Company's Reply Brief** was filed electronically with the Commission this 7<sup>th</sup> day of January, 2022. 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

**This foregoing document was electronically filed with the Public Utilities  
Commission of Ohio Docketing Information System on**

**1/7/2022 4:30:19 PM**

**in**

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

Summary: Reply Co-Petitioner Norfolk Southern Railway Company's Reply Brief  
electronically filed by Mr. D. Casey Talbott on behalf of Talbott, D. Casey Mr.