

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>CSX TRANSPORTATION INC.,</b>	:	
<b>Plaintiff</b>	:	<b>No. 04-CV-5023</b>
	:	
<b>v.</b>	:	<b>Judge Kauffman</b>
	:	
<b>CITY OF PHILADELPHIA,</b>	:	<b>Filed Electronically</b>
<b>Defendant</b>	:	

**ANSWER OF CSX TRANSPORTATION, INC.**  
**IN OPPOSITION TO MOTION FOR INTERVENTION**

CSX Transportation, Inc., (“CSXT”), by and through its counsel, Nauman, Smith, Shissler & Hall, LLP, hereby answers in opposition the motion for intervention pursuant to Fed.R.Civ.Pro. 24(a), and in the alternative Fed.R.Civ.Pro. 24(b), and in the alternative a conditional motion for intervention by Free Schuylkill River Park, Logan Square Neighborhood Association, Bicycle Coalition of Greater Philadelphia, Philadelphia Parks Alliance, Darrell L. Clarke, Jack Kelly, Anna C. Verna, State Rep. Babette Josephs, and State Senator Vincent J. Fumo, as follows:

1. Paragraph 1 of Applicants’ Motion states a conclusion of law to which no response is required.

2. Paragraph 2 of Applicants’ Motion states a conclusion of law to which no response is required. To the extent a response may be deemed to be required, however, it is denied that any Applicant has any interest in the Schuylkill River

("River") or the Schuylkill River Park ("Park") which would confer standing or alternatively a basis for intervention which is not identical to the public interest at large or an interest being adequately represented by the City of Philadelphia in this proceeding.

3. Paragraph 3 of Applicants' Motion states a conclusion of law to which no response is required. To the extent a response may be deemed to be required, however, it is denied that any Applicant has any interest in the River or the Park which would confer standing or alternatively a basis for intervention which is not identical to the public interest at large or an interest being adequately represented by the City of Philadelphia in this proceeding.

4. Denied. By way of further answer, it is denied that Applicants have any interest in the River or the Park which would confer standing in this proceeding or alternatively a basis for intervention which is not identical to the public interest at large or an interest being adequately represented by the City of Philadelphia.

5. Paragraph 5 of Applicants' Motion states a conclusion of law to which no response is required. To the extent that a response may be deemed to be required, however, the averments of Paragraph 5 are denied.

6. Paragraph 6 of Applicants' Motion states a conclusion of law to which no response is required.

7. Paragraph 7 of Applicants' Motion states a conclusion of law to which no response is required. To the extent that a response may be deemed to be required, however, it is specifically denied that Locust Street and Race Street "have been . . . used by the public for hundreds of years, since they were constructed to the present time." To the contrary, according to the City of Philadelphia's own averments, they were only alleged to be open to the public in the area of the asserted crossings and the Schuylkill River in 1883, while from about 1885 until the present time numerous railroad tracks crossed the area of the asserted streets, and the land on the west side of the tracks was owned by the Railroad until condemned by the City for the Schuylkill River Park. Furthermore, there was no crossing at Race Street prior to the Park construction and the crossing at Locust Street was private and used for Railroad operational purposes only.

8. Paragraph 8 of Applicants' Motion states a conclusion of law to which no response is required. To the extent that a response may be deemed to be required, however, the averments of Paragraph 8 are denied.

9. Denied. To the contrary, according to the City of Philadelphia's own averments, Race and Locust Streets were only alleged to be open to the public in the area of the asserted crossings and the Schuylkill River in 1883, while from about 1885 until the present time numerous railroad tracks crossed the area of the asserted streets,

and the land on the west side of the tracks was owned by the Railroad until condemned by the City for the Schuylkill River Park. Furthermore, there was no crossing at Race Street prior to the Park construction and the crossing at Locust Street was private and used for Railroad operational purposes only.

10. Denied. By way of further answer, it is denied that Applicants or their asserted members have any interest in this proceeding which confer standing or alternatively a basis for intervention which is not identical to the public at large or an interest being adequately represented by the City of Philadelphia.

11. Denied. After reasonable investigation, CSXT lacks sufficient knowledge or information to form a belief as to the truth of the averments in Paragraph 11.

12. Denied. After reasonable investigation, CSXT lacks sufficient knowledge or information to form a belief as to the truth of the averments in Paragraph 12.

13. Denied. After reasonable investigation, CSXT lacks sufficient knowledge or information to form a belief as to the truth of the averments in Paragraph 13.

14. Denied. CSXT records show that while three CSX trains passed on its tracks alongside the Park on Sunday, November 7, 2004, those records show that only six CSX trains passed alongside the Park on Monday, November 8, 2004.

15. Denied. After reasonable investigation, CSXT lacks sufficient knowledge or information to form a belief as to the truth of the averments in Paragraph 15 of Applicants' Motion.

16. Denied. After reasonable investigation, CSXT lacks sufficient knowledge or information to form a belief as to the truth of the averments in Paragraph 16 of Applicants' Motion. By way of further answer, numerous trespassers have been observed crawling between cars or over or under trains at Locust and Race Streets when Railroad operations necessitated trains to be parked in those locations for periods of time.

17. Denied. After reasonable investigation, CSXT lacks sufficient knowledge or information to form a belief as to the truth of the averments in Paragraph 17 of Applicants' Motion. By way of further answer, it is denied that "classification and other yard-type operations" occur on the tracks adjacent to the Park.

18. Denied. After reasonable investigation, CSXT lacks sufficient knowledge or information to form a belief as to the truth of the averments in Paragraph 18 of Applicants' Motion.

19. Denied. After reasonable investigation, CSXT lacks sufficient knowledge or information to form a belief as to the truth of the averments in Paragraph 19 of Applicants' Motion.

20. Admitted in part and denied in part. It is admitted that no gate, signal or crossing device exists now at the temporary construction crossings in the area of Race or Locust Streets or that any such device has ever existed at such locations. It is denied that the temporary construction crossings in the areas of Race and Locust Streets were ever intended to be, or that Applicants have any rights to their use as, public at-grade entrances to the Park and River.

21. Denied. After reasonable investigation, CSXT lacks sufficient knowledge or information to form a belief as to the truth of the averments in Paragraph 21 of Applicants' Motion.

22. Denied. After reasonable investigation, CSXT lacks sufficient knowledge or information to form a belief as to the truth of the averments in Paragraph 22 of Applicants' Motion.

23. Denied. It is specifically denied that any “sophisticated motion detection and other warning devices” installed at other rail-highway crossings would serve to adequately protect the public or CSXT in light of the particular rail operations which have occurred at the proposed crossings for over a hundred years and continue to occur there.

24. Admitted in part and denied in part. While it is admitted that Free Schuylkill River Park and Applicants’ other asserted members have posed to CSXT that the installation of warning devices and gate crossing and signal systems would be a potential solution to preserve the rights of both the Railroad and Park and River users, it is denied that such devices could serve as such a solution in light of the particular rail operations which have occurred at the areas of the proposed crossings for over a hundred years and continue to occur there.

25. Denied. After reasonable investigation, CSXT lacks sufficient knowledge or information to form a belief as to the truth of the averments in Paragraph 25 of Applicants’ Motion.

26. Admitted. By way of further answer, CSXT is asserting such rights conferred upon it by the City of Philadelphia, both by an express contract lawfully entered into with and executed by the City of Philadelphia and by promises made as an inducement to settle a condemnation proceeding.

27. Denied. CSXT has no contractual or other legal obligation to maintain a fence along its tracks. While CSXT has not maintained fencing or some other barricade separating its tracks from the Center City neighborhoods to the east of the Park area, prior to the construction of the Park there was no enticement for pedestrians to cross the tracks in this area to the unimproved land between the tracks and the River, which were owned by CSXT's predecessor prior to the City's condemnation. Recognizing the danger posed by the construction of the Park and the public attraction it would become, the City agreed to construct an "effective permanent barricade or wall" between the railroad tracks and the Park when it acquired the land in 1979. In addition, it is impossible for CSXT to fence the thousands of miles of track throughout its system.

28. Denied. By way of further answer, CSXT incorporates its answer in Paragraph 27 above as if stated in full herein.

29. Paragraph 29 of Applicants' Motion states a legal conclusion to which no response is required. To the extent that a response may be deemed to be required, however, it is denied that the fence erected by the City between its tracks and the Park, with openings remaining in the areas of Locust and Race Streets, which were intended as temporary construction crossings, fulfills the City's obligations to construct an "effective permanent barricade."

30. Denied. It is specifically denied that the City has erected adequate signs as required by the Construction Agreement warning Park users to keep off the railroad tracks.

31. The Construction Agreement is a legal document which speaks for itself. Any characterization of such document by quoting a portion of it out of context is specifically denied.

32. Paragraph 32 of Applicants' Motion states a legal conclusion to which no response is required.

33. The Construction Agreement with the Exhibits attached thereto is a legal document which speaks for itself. Any characterization of the Construction Agreement or its Exhibits asserted by Applicants in Paragraph 33 of their Motion is specifically denied.

34. Paragraph 34 of Applicants' Motion states a legal conclusion to which no response is required. Any characterization of the documents referred to in Paragraph 34 is specifically denied.

35. Admitted in part and denied in part. While CSXT's right of way in this general area varies, it is believed that CSXT's right-of-way in the area of Race and Locust Streets is approximately 60 feet wide. After reasonable investigation, CSXT lacks sufficient knowledge or information to form a belief as to the truth of the

remainder of the averments in Paragraph 35 of Applicants' Motion, which are therefore deemed denied.

36. Denied.

37. Denied.

38. Paragraph 38 of Applicants' Motion states a conclusion of law to which no response is required. To the extent that a response may be deemed to be required, however, it is specifically denied that Applicants have any legally cognizable interests in this proceeding, and to the extent that any such interests may exist, that they are not adequately represented by the City of Philadelphia.

39. Denied. It is denied that Applicants have any rights in regard to the Park and River access separate from those of the public at large. It is denied that Applicants' interests, if any, in this proceeding are not adequately represented by the City of Philadelphia. How the City of Philadelphia chooses to defend its rights and those of the public at large in this proceeding, *i.e.*, by choosing to defend or not defend on any specific ground, does not constitute inadequate representation.

40. Denied. It is specifically denied that the public or Applicants in particular have any littoral right of access or rights under the public trust doctrine to "formally tidally flowed lands (now the Park)."

41. Paragraph 41 of Applicants' Motion states a legal conclusion to which no response is required. To the extent that a response may be deemed to be required, however, the averments of Paragraph 41 are specifically denied.

42. Paragraph 42 of Applicants' Motion states a legal conclusion to which no response is required. To the extent that a response may be deemed to be required, however, the averments of Paragraph 42 are specifically denied. By way of further answer, the City's primary defense in this proceeding is based upon the alleged public nature of Race and Locust Streets at the area of the proposed crossings and the public rights attendant thereto. What Applicants are essentially contending in this paragraph is an alleged right to usurp the City's exclusive authority to control its own streets, which is denied.

43. Denied as stated. While it is admitted that Applicants are requesting the relief as summarized in Paragraph 43 of their Motion, it is denied that Applicants have any standing to request the relief sought or right to request the reformation of a contract to which they are not a party where such relief would involve other non-parties to the contract, or that the Applicants have any rights to support their intervention, or that they are not being adequately represented by the City.

44. Denied. Applicants' presence in this proceeding would add nothing to the resolution of the relevant issues, but would instead serve only to prolong the

proceeding and add extraneous matters, where Applicants have no right to the relief requested and their interests, if any, are adequately represented by the City.

45. Denied. It is specifically denied that CSXT's "real purpose" in these proceedings "is business convenience." To the contrary, CSXT's primary purpose, as detailed in its prior filings in these proceedings, is both the public safety and the safety of its own operations, the means to address which were delineated in the 1979 Construction Agreement with the City. By way of further answer, CSXT incorporates the averments of Paragraph 27 above as if stated in full herein.

46. Paragraph 46 of Applicants' Motion states a legal conclusion to which no response is required. To the extent that a response may be deemed to be required, however, it is specifically denied that Applicants have any rights apart from those asserted by the City which could be impeded or impaired by a ruling adverse to the City in this proceeding. It is further denied that the City is not adequately representing Applicants' rights as members of the public in this proceeding.

47. CSXT incorporates its answers in Paragraphs 1 through 46 above as if stated in full herein.

48. Denied as stated. While Applicants are alternatively requesting permissive intervention under Federal Rule of Civil Procedure 24(b), it is denied that there is any valid basis to grant such a request.

49. Paragraph 49 of Applicants' Motion states a conclusion of law to which no response is required. To the extent that a response may be deemed to be required, however, the averments of Paragraph 49 are denied.

50. Admitted. By way of further answer, Applicants' contentions in regard to the common issue addressed by Applicants' and the City's responses to CSXT's claims shows that Applicants' interests and relief sought are the same as those of the City.

51. Denied. It is specifically denied that Applicants' claims will aid in any manner in the Court's interpretation of the Construction Agreement and the City's defense to the promissory estoppel claim, especially as Applicants are contending that their asserted claims are separate and distinct from the contract or promissory estoppel claims being defended by the City. See Applicants' Motion for Intervention at ¶¶ 39-40.

52. Denied. It is specifically denied that Applicants' involvement in this proceeding will aid the Court in any manner in resolving whether the City promised to fence off Race and Locust Streets. It is further denied that whether the City had the capacity to make such an agreement cannot be adequately represented by the City, as the City in its response to CSXT's Motion for Issuance of a Preliminary Injunction has

already asserted such as a defense. See City's Memorandum of Law in Opposition to CSXT's Motion for Issuance of a Preliminary Injunction at 9-10.

53. Paragraph 53 of Applicants' Motion states a legal conclusion to which no response is required. To the extent that a response may be deemed to be required, however, it is specifically denied that Applicants have any rights to the use of the River or the Park distinct from those asserted by the City on behalf of the public or which are not being adequately represented by the City in this proceeding.

54. Paragraph 54 of Applicants' Motion states a legal conclusion to which no response is required. To the extent that a response may be deemed to be required, however, the averments of paragraph 54 are denied. It is specifically denied that Applicants' have any rights to assert the counterclaims appended to their Motion.

55. Denied. It is specifically denied that Applicants' intervention will not delay or prejudice the adjudication of this proceeding, as Applicants have no rights to use of the Park or the River distinct from those being asserted by the City or that the City cannot adequately represent in this proceeding.

56. Paragraph 56 of Applicants' Motion states a legal conclusion to which no response is required. To the extent that a response may be deemed to be required, however, the averments of Paragraph 56 are specifically denied.

57. CSXT's answers to the Motion for Intervention in Paragraphs 1 through 56 above are incorporated herein by reference as if stated in full.

58. Denied. It is denied that Applicants should be permitted leave to intervene as a conditional motion, on standby, to be renewed and considered at a later time.

59. Denied. It is specifically denied that the reason asserted in Paragraph 59 of Applicants' Motion would serve as an appropriate basis to permit leave to intervene as a conditional motion.

60. Denied. It is specifically denied that the reasons asserted in Paragraph 60 of Applicants' Motion serve as a basis to permit leave to intervene as a conditional motion. To the contrary, the City has complete authority over its own streets and Applicants have no rights distinct from those of the public as asserted by the City or which cannot be adequately represented by the City.

61. CSXT submits a Memorandum of Law in conjunction with this Answer in Opposition to Applicants' Motion for Intervention, which is submitted herewith.

WHEREFORE, CSX Transportation, Inc., respectfully requests that the Motion for Intervention by Applicants, Free Schuylkill River Park, Logan Square Neighborhood Association, Bicycle Coalition of Greater Philadelphia, Philadelphia Parks Alliance, Darrell L. Clarke, Jack Kelly, Anna C. Verna, State Rep. Babette

Josephs, and State Senator Vincent J. Fumo, for intervention as of right or permissive intervention with full party status, or, in the alternative, permission for conditional intervention be denied. In the alternative, if intervention should be granted, it is respectfully requested that Applicants' incorporated request for leave to file the counterclaims against CSX Transportation, Inc., which were attached to their Motion, be denied.

Respectfully submitted,  
NAUMAN, SMITH, SHISSLER & HALL, LLP

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***Counsel for Plaintiff, CSX Transportation, Inc.***

Date: December 30, 2004

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>CSXT TRANSPORTATION INC.,</b>	:	
<b>Plaintiff</b>	:	<b>No. 04-CV-5023</b>
	:	
<b>v.</b>	:	<b>Judge Kauffman</b>
	:	
<b>CITY OF PHILADELPHIA,</b>	:	<b>Filed Electronically</b>
<b>Defendant</b>	:	

**CERTIFICATE OF SERVICE**

**AND NOW**, on the date stated below, I, **Benjamin C. Dunlap, Jr., Esquire**, of Nauman, Smith, Shissler & Hall, LLP, hereby certify that I this day served the foregoing **Answer of CSX Transportation Inc. in Opposition to Motion for Intervention** by electronic filing and by United States Mail, first class, postage prepaid, at Harrisburg, Pennsylvania, addressed to the following:

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Supreme Court ID#66283

Date: December 30, 2004

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>CSX TRANSPORTATION INC.,</b>	:	
<b>Plaintiff</b>	:	<b>No. 04-CV-5023</b>
	:	
<b>v.</b>	:	<b>Judge Kauffman</b>
	:	
<b>CITY OF PHILADELPHIA,</b>	:	<b>Filed Electronically</b>
<b>Defendant</b>	:	

**CSX TRANSPORTATION, INC.'S**  
**MEMORANDUM OF LAW IN OPPOSITION TO**  
**APPLICANTS' MOTION TO INTERVENE**

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## I. INTRODUCTION

CSX Transportation, Inc. (hereinafter “CSXT”), filed an action requesting the Court to construe the Construction Agreement it entered into with the City of Philadelphia, (hereinafter “the City”) regarding the Schuylkill River Park (hereinafter “Park”), and, by injunction, enforce its rights thereunder in light of the Acquisition Agreement entered into between those parties. Both agreements were executed October 9, 1979.<sup>1</sup> The Construction Agreement *inter alia* delineates work methods and responsibilities for construction of the Park as it affects the Railroad, including access permitted to the City via temporary crossings during construction and access following construction only at points as designated by the Railroad, to address safety concerns expressed by the parties resulting from the Park construction. The City maintains that it is not now required to bar access to the Park through the construction crossings in the area of Race and Locust Streets, alleging they are public streets open to public use.

CSXT filed suit against the City due to its failure to perform its contractual obligation to erect a permanent and effective barricade along the west side of the railroad tracks to bar public access to the Park over the railroad right-of-way. CSXT’s

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<sup>1</sup> Copies of the Acquisition Agreement and Construction Agreement are appended to CSXT’s Complaint as Exhibits “A” and “B” respectively.

claims consist of breach of contract, promissory estoppel and a claim for injunctive relief due to the imminent danger the proximity of the unfenced sections of railroad track pose to the Park-going public and Railroad operations. Each of the counts of the action filed against the City requests court intervention relative to the City's promise to erect a permanent effective barricade, made both expressly via the Construction Agreement, and orally as an inducement to enter into the Acquisition Agreement.

Applicants Free Schuylkill River Park, the Bicycle Coalition of Greater Philadelphia, Logan Square Neighborhood Association, Philadelphia Parks Alliance (asserted to be comprised of Schuylkill River Park users) and City political representatives (collectively hereinafter "Applicants"), seek to intervene in the litigation.

With the exception of the promissory estoppel claim, consisting of the City's oral promise to bar access, the action before the Court does not extend beyond the contract obligations that arose out of the transactions between the City and CSXT's predecessors in 1979. The contract, if interpreted as CSXT maintains it must be, requires the City to complete its fence across Race and Locust Streets. Accordingly, the status of the streets and at-grade public crossings alleged to exist at Race and Locust are subsumed in the litigation only to the extent that they impact upon the validity or interpretation of the contract at issue.

Provided that this Court determines the City had the authority to undertake and perform the Construction Agreement, and the contract is valid, disposition is a matter of contract interpretation. Applicants assert rights to access the Park via Race and Locust through the Ordinance of 1885 attached to the City's Memorandum of Law in Opposition to CSXT's Motion for Preliminary Injunction, and the alleged long-standing public use of Race and Locust streets to reach the Schuylkill River prior to Park construction. These arguments are identical to the reasons the City asserts in favor of its contract interpretation. In addition, Applicants' counterclaims and defenses, such as contract reformation and riparian rights, are interests that may only be asserted by the City as party to the contract, and owner of the river-abutting property, and are best represented by the entity with the right asserted. Applicants have no interests that are not shared by the public at large, and the interests that they share in common with the public are represented by the City.

## **II. ARGUMENT**

Essentially, Applicants seek to intervene to represent their interests as users of the Schuylkill River and the Park. The Park is open to the public generally, and the Applicants have no particular interest that is not represented by the City or any member of the public as a park user. Applicants lack the requisite Article III standing to invoke the jurisdiction of this Court, and thus cannot intervene in the litigation. Unable to assert any interest impaired by CSXT, Applicants also fail to show that they meet the criteria for non-statutory intervention as of right, or permissive intervention pursuant to Rule 24. Since the Applicants can assert no legal interest separate from the alleged public right to access the River via the public streets alleged to exist at Race and Locust, their only cognizable interests are adequately represented by the City and preclude their separate intervention.

The Applicants are not a party to the contract to be construed by this Court, and have no stake in its construction greater than any members of the public. Applicants should not be permitted leave to intervene in this action because all issues they propose to raise as defenses and counterclaims are either identical to those of the City, or fall outside the scope of the contract and promissory rights to be determined by this Court. As Applicants' non-identical claims relate to the condition of the alleged at-grade crossings, matters not subsumed within the current action, they are not properly brought before the Court here and are in fact matters within the exclusive jurisdiction

of the Pennsylvania Public Utility Commission. At this stage of the litigation, Applicants cannot show an interest to warrant their intervention, and are not eligible for conditional intervention absent such an interest.

**A. Applicants Cannot Establish Standing to Appear Before the Court.**

Article III standing is a constitutionally mandated prerequisite for federal jurisdiction, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130 (1992), that must be established prior to undertaking intervention analysis. *Pansy v. Boro. of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994). Applicants must also satisfy prudential standing requirements that are “part of judicial self-governance.” *See UPS Worldwide v. US Postal Svc.* 66 F.3d 621, 626 (3d Cir. 1995) (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. at 2136). Applicants bear the burden of establishing their stake in the controversy in order to participate in it.<sup>2</sup> *Lujan, supra*.

“Article III requires the party who invokes the court’s authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant’... and that the injury ‘fairly can be traced to the

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<sup>2</sup> Applicants virtually ignore their inability to establish Article III standing, presuming that the patchwork of associations, non-profits, citizen groups and public officials stitched together can assert the requisite injury on behalf of their members to establish representational standing. Applicants must first show that they could establish standing of the individuals— an assertion completely lacking substantiation or substance. *See Natural Resources Defense Council, Inc. v. Texaco Refining and Marketing, Inc.*, 2 F.3d 493 (3d Cir. 1993) (in order for organization to have representational standing to represent the interests of its members, organization must show its members would have individual standing to sue).

challenged action’ and ‘is likely to be redressed by a favorable decision.’” *Public Interest Res. Grp. of NJ, (“PIRG”) v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 70 (3d Cir. 1990)(quoting *Valley Forge Christ. Coll. v. Amer. United for Sep. of Church & State*, 454 U.S. 464, 472, 102 S.Ct. 752, 758 (1982)); *Whitmore v. Arkansas*, 495 U.S. 149, 155-56, 110 S.Ct. 1717 (1990).

Prudential standing rules require: (1) litigant “assert his own legal interests rather than those of third parties,” (2) courts “refrain from adjudicating ‘abstract questions of wide public significance’ which amount to ‘generalized grievances,’” and (3) a litigant demonstrate her interests are within “the zone of interests” intended to be protected by the law on which the claim is based. *Wheeler v. Trav. Ins. Co.*, 22 F.3d 534, 538 (3d Cir. 1994). As Applicants assert only a general hypothetical ‘injury’ to the public, the prudential rule alone precludes Applicants’ participation. Applicants sidestepped standing because they cannot support a stake that would allow them to litigate their claims in federal court, much less intervene.

**1. Applicants cannot show that they suffered an ‘injury in fact.’**

To show an injury in fact, Applicants must demonstrate that they have suffered an injury that is concrete and particularized, and actual or imminent rather than hypothetical. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60, 112 S.Ct. 2130, 2136 (1992). Although the injury can be non-economic, including aesthetic and

environmental harm, Applicants must show that they have suffered an *actual* injury or impending threat to legally recognized interests. See *United States v. SCRAP*, 412 U.S. 669, 93 S.Ct. 2405 (1973); *Mausolf v. Babbitt*, 85 F.3d 1295 (8<sup>th</sup> Cir. 1996). Thus, absent a legal interest, Applicants are incapable of asserting an actual or imminently threatened injury to that interest.

Nowhere in their Motion to Intervene or Memorandum of Law in Support can the Applicants point to a single injury to their interest in enjoyment of the River or the Park. Applicants do not assert that CSXT has harmed their enjoyment of or navigability of the Schuylkill River as is necessary given their stated legal interests in riparian rights.<sup>3</sup> Applicants cannot assert an interest in the riparian rights asserted, as such rights are held by the City as riparian owner; the only rights they have are as members of the public, which is only the right to navigation between the high and low water marks. *United States v. Pa. Salt Mfg. Co.*, 16 F.2d 476, 480 (E.D. Pa. 1926). The only alleged *injury* to their stated interest is to the possibility of less convenient access to the Park via permissible means, and again, legal precedent does not support their asserted right to access at the points used. See *Commonwealth v. YMCA*

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<sup>3</sup>Applicants also assert an injury to a view of the Park alleged to ensue should the fencing be completed; Pennsylvania law does not recognize a right to an unobstructed view, unless conveyed by contract, which is not the case here. *Maioriello v. Arlotta*, 364 Pa. 557 (1950).

(*Warren*), 32 A. 121, 169 Pa. 24 (1895)(public has no right to travel over property of another to exercise riparian rights).

Presuming the Applicants alleged a cognizable injury that they can establish, the mere possibility that there may be an injury to a claimed interest is not enough to meet the injury in fact test. *Mausolf, supra*, at 758. Applicants must make an adequate showing that the injury is actual, or if threatened is *certain* to occur, to qualify as an injury in fact. *Whitmore, supra*, 495 U.S. at 158, 110 S.Ct. at 1724 (quoted in *Sierra Club v. Robertson*, 28 F.3d 753 (8<sup>th</sup> Cir. 1994)(holding that presentation of forest plan does not constitute requisite injury in fact because plan was not approved, and in plan form does not cause an injury in fact)). Otherwise, the injury is merely hypothetical and not yet ripe for judicial resolution. Were fencing completed, it would not harm any legally supportable interest that Applicants possess, or suffer injury to as individuals.

Applicants acknowledge the hypothetical nature of their asserted injury to their non-legally supported stated interests when they point out that it is only CSXT's alleged 'threat' of closing the fence to impair their alleged 'right' to access the Park via the alleged public streets at Race and Locust that may be grounds for an injury in fact. *See Applicants' Memorandum of Law*, pp. 12-13. Hypothetical non-

particularized assertions of interests and future impairment cannot sustain the standing prerequisites.

The injury in fact test requires that the Applicants show a ‘particularized’ injury, meaning a showing that they themselves are among the injured. *Lujan, supra*. Applicants fail to support their alleged stakes in the controversy through documentation or specification of the injuries suffered by the groups or the individual members as required for representational standing. *PIRG, supra* at 71 (individual injuries shown to be suffered from group members via affidavits). Affidavits are necessary for the court to assess whether the standing requirements are satisfied. *See, e.g., Lujan, supra* at 563, 112 S.Ct. at 2137-38 (affidavits show particularized injury in degree of endangerment of species and *direct* injury to each individual as a result of a special interest in the species). Further, the only interests asserted are those of the public, and standing cannot be conferred upon Applicants merely asserting general public rights; injury to the public cannot meet either the particularized or prudential standing requirements.

Moreover, to meet the Article III case or controversy requirement, all litigants must show a justiciable controversy, not merely conjecture as to a potential impairment of a right. *See Lujan*. The counterclaims Applicants propose are illustrative of their lack of a present injury requiring the court’s redressability as three

of the five counts seek declaratory judgments. In declaratory judgment cases, the court must ask whether the facts alleged “show a substantial controversy between the parties having adverse interests of sufficient immediacy and reality to warrant issuance of a declaratory judgment.” *Armstrong World Indus., v. Adams*, 961 F.2d 405, 411 (3d Cir. 1992). In this context, since Applicants lack an injury, they seek this Court’s recognition to obtain advisory opinions relative to their own interests. The Article III case or controversy requirement was developed to prevent the manipulation of the courts’ jurisdiction for advice only. Lacking a qualifying injury in fact suffered by their groups or members, Applicants have no standing.

**2. Applicants cannot trace any ‘injury in fact’ to CSXT’s conduct.**

CSXT has taken no action that could be the cause of an injury to Applicants. CSXT has not interfered with Applicants’ stated interests in the navigation or enjoyment of the Park or River. CSXT’s only ‘act’ has been to sue the City for its failure to comply with its contractual obligations or separate promises. Absent a clear causal connection between the alleged injury, *i.e.*, less convenient access to the Park, and action by the party claimed to have caused the injury, the elements of standing cannot be satisfied. *See, e.g., Streater v. USDOT*, 1996 WL 134807 (E.D. Pa.)(no standing because alleged aesthetic injury not traceable to DOT approval).

The enforcement of the City's contractual obligations is not an injury traceable to CSXT, but rather an injury traceable to the City for agreeing to barricade the alleged streets in which Applicants assert a right of access.<sup>4</sup>

**B. Applicants Cannot Show They Are Entitled to Intervene as of Right.**

Applicants assert that they qualify for Intervention as of Right under Rule 24(a) with superficial analysis. Rule 24(a) requires that four elements be established for a proposed intervenor to establish intervention as of right: (1) a timely application for leave to intervene; (2) a sufficient interest in the litigation; (3) a threat that the interest will be impaired or affected by the disposition of the action; and, (4) inadequate representation of the prospective intervenor's interest by existing parties to the litigation. *Kleissler v. United States Forest Svc.*, 157 F.3d 964 (3d Cir. 1998). Applicants bear the burden to establish each of these four elements.<sup>5</sup> *Id.*

Pursuant to Rule 24(a), Applicants must show that they have an interest in the property or transaction that is the subject of the action, and are so situated that the disposition of the action may impair or impede their ability to protect that interest.

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<sup>4</sup> Applicants recognize that the City's barricading of the fence at Race and Locust streets would be an injury traceable to the City, to be litigated against the City. *See* Memorandum p. 22-23.

<sup>5</sup> CSXT does not assert that Applicants' filing for intervention was untimely, and therefore does not address this element of intervention. However, it should be noted that a motion to intervene as of right, which requires lack of adequate representation, is premature on its face when the City has not yet filed defenses and counterclaims so that the adequacy of its representation of Applicants' interests can be fairly assessed.

Applicants can show no such interest here. Moreover, Applicants are not entitled to intervention as of right when their interests are adequately represented by an existing party to the litigation– the City.

**1. Applicants do not have a legally cognizable interest.**

To meet the test for intervention as of right, the legal interest asserted must qualify as a cognizable legal interest, and not simply an interest of a general and indefinite character. *See Brody v. Sang*, 957 F.2d 1108 (3d Cir. 1992). The type of interest that will be recognized must be *direct* as opposed to tangential or collateral, and be *substantial* and legally protectable. *Mountain Top Condo. Ass’n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 366 (3d Cir. 1995). Applicants have failed to assert a legally protected interest implicated by the subject litigation.

The legally cognizable interest upon which Applicants premise their intervention is a claim to riparian and littoral rights. Applicants conflate the two water-related rights, as only riparian rights can be the basis for their asserted right to access the Schuylkill River; littoral rights are limited to ocean and shore access. *See Black’s Law Dictionary*, (8<sup>th</sup> ed. 2004) (riparian means “[o]f, relating to, or located on the bank of a river or stream,” while littoral is defined as “[o]f or relating to the coast or shore of an ocean, sea, or lake”). Riparian rights are *not* vested in the public at large, but rather exist as incidents of the ownership of land located on the bank of a

river or stream. *See Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 445 (1892). Applicants have no property rights in the land along the Schuylkill River, and no riparian rights in the Schuylkill River itself as they are not owners of the abutting land. Rather, the City is the riparian owner of the shore of the Schuylkill River, per its condemnation action and the Acquisition Agreement between it and the Railroad.

A riparian landowner's rights in his property are only curtailed by the public to the extent that the public has a right to participate in the enjoyment of the navigable river. The sole right the public "has in the lands below high-water mark and above low water is the right of navigation." *United States v. Pa. Salt Mfg. Co.*, 16 F.2d 476, 480 (E.D. Pa. 1926). Applicants can point to no action by CSXT that has impaired the public's right to navigation of the Schuylkill River, or closed access to, or prevented enjoyment of the property along the River located between the high and low water marks.

Although the Schuylkill River is a navigable river to which the public may have rights of access, the public's right of access to the Schuylkill River is not absolute. Riparian rights do not include a right to access over another's property to access the property along a navigable river, *Commonwealth v. YMCA, supra*, especially when use

of such a path constitutes trespass as in this case.<sup>6</sup> Further, since the low water mark is the bulkhead, *see Pa. Salt Manufacturing*, 16 F.2d at 479, and the area between the high and low water mark has been filled and the high and low water marks are now likely the same, *id.*, the public can have no practical right of navigation in the existing land.

Likewise, Applicants cannot show a legally cognizable interest founded in the public trust doctrine. The public trust doctrine permits the public a right of access to navigable rivers, but again the public only has a right to the land between the low and high water marks. *See Rose v. Mitsubishi Int'l Corp.*, 423 F.Supp. 1162 (E.D. Pa. 1976)(land between low and high water lines is subject to public rights of navigation and fishing). The only matter before the Court in this case, and thus the only matter upon which the Applicants may predicate their legal interest in the litigation, is the public's alleged right to travel upon Race and Locust streets where they are alleged to intersect with the railroad right-of-way. The completion of the partially erected fence to keep the public from using the alleged at-grade crossings to enter the Schuylkill River Park does not implicate any such public trust rights because the fence

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<sup>6</sup> In *Commonwealth v. YMCA*, the Pennsylvania Supreme Court affirmed the legal conclusion of the lower court that “[t]he method, manner, and the place of access to or of reaching a navigable stream is to be determined by the authority to whom the law has committed such determination.” *Id.*, 169 Pa. at 32 and 41. In this case, that Authority is the City, which agreed to not permit Park access via Locust or Race Streets by its agreement to erect a “permanent effective barricade or wall” between the Railroad tracks and the Park.

would not be erected between the low and high water marks of the river, the only land in which the public may assert a right. *Id.*

Accordingly, Applicants fail to show a legally protectable interest in the transaction that CSXT seeks to have adjudicated as is necessary for non-statutory intervention as of right. Applicants have no interest that cannot be represented by the City. Applicants have no protectable property interest because the streets, whether public or not, are asserted to be owned in fee by the City, and thus within its power and discretion to restrict, as discussed in CSXT's Brief in Support of Its Motion for Preliminary Injunction. Under the Construction Agreement, at-grade access points over the Railroad's right of way at Race and Locust Streets was expressly permissive and temporary, and cannot now be expanded by non-parties to the contract that seek an access to a public area via a route to which they have no specific right.

**2. Applicants can claim no impairment of a legally cognizable interest as a consequence of the litigation.**

Lacking a legally cognizable interest, it is not possible that Applicants can show that the relief sought in the litigation will adversely affect their stated legal interest. Presuming for purposes of argument only that this Court were to find that Applicants asserted a legally cognizable interest deserving of protection and consideration in the disposition of the subject action, the Applicants must show that the stated interests

will be impaired by the disposition of the action. *See United States v. W.R. Grace & Co.*, 185 F.R.D. 184 (D. N.J. 1999).

The completion of the City's barricade would not impair the legal interests asserted by Applicants. The relief CSXT sought in the litigation is not to eliminate any and all access to the Park, but to allow access over its right of way and into the Park via the steps at Walnut Street and steps and ramps at Chestnut and Market Streets.<sup>7</sup> These means of access are least likely to lead to injury and minimize the inherent risk posed by the proximity of railroad tracks to the Park.<sup>8</sup> Applicants simply cannot support a legal right to the most convenient access to a navigable waterway held in the public trust, *see Commonwealth v. YMCA, supra*, which is the only right that, if legally protectable, could be implicated by the outcome of this case.

In addition to the riparian rights asserted, Applicants presume that they have a right to use the areas at Race and Locust because they assert that they constitute at-grade public crossings. Applicants have no support for a right in streets that a City previously agreed would not be open to public use. Granting CSXT's relief would

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<sup>7</sup> The Park can also be accessed by a ground level entrance at its north end which does not cross the Railroad tracks.

<sup>8</sup> Indeed, CSXT has offered to cooperate with the City to establish additional overhead crossings for Park access at Race and Locust Streets.

only construe the contract to bar at-grade public access at those points, as intended by the parties.

The disposition of the action by this Court will not impair the legal interest asserted by the Applicants, which is limited to their public right to access the navigable Schuylkill River. The enforcement of the Construction Agreement and requirement that the City barricade the entirety of the railroad tracks, including at Race and Locust, does not impair the Applicants' enjoyment of the Schuylkill River. The Schuylkill River will remain accessible to Applicants, as to the rest of the Park-going public, via the ground level entrance at the north end of the Park, in addition to the stairway access provided at Walnut Street, and the ramps and stairs at Market and Chestnut Streets.

### **3. Applicants' interests are adequately represented by the City.**

Third Circuit precedent is clear and consistent that adequate representation is presumed, particularly when the representative of the proposed intervenor is a governmental entity. *Del. Citizens' Council for Clean Air v. Com.*, 674 F.2d 970 (3d Cir. 1982); *Bolden v. Pa. State Police*, 578 F.2d 912 (3d Cir. 1978); *Kleissler, supra*, at 972; *Com. v. Rizzo*, 530 F.2d 501, 505 (3d Cir.), *cert. den.*, 426 U.S. 921, 96 S.Ct. 2628 (1976); *United States v. City of Philadelphia*, 798 F.2d 81 (3d Cir. 1986). As

a government entity charged with representing the public's interests, the City's representation has a presumption of adequacy, *see Kleissler, supra*, at 972; *Del. Citizens' Council, supra*, unless they show that they stand to lose or gain in a way that diverges from the general public interest. *Chiglo v. City of Preston*, 104 F.3d 185 (8<sup>th</sup> Cir. 1997). This precedent applies equally to cases in which the government entity is the defendant. *See, e.g., U.S. v. City of Phila., supra*, at 90-91 (City's representation not inadequate despite its different view of the law than task force, alleged insufficient challenge to evidence and improper stipulation to facts).

Applicants fail to overcome the presumption of adequacy of the City's representation. "Representation is presumed to be adequate if no collusion is shown between the representative and an opposing party, if the representative does not represent an interest adverse to the proposed Intervenor and ... has been diligent in prosecuting the litigation." *Del. Citizens, supra*, at 973. Applicants have not shown collusion or a conflicting interest represented by the City. Until such a conflict is established, the presumption of adequacy stands. *Bolden, supra*.

Particularly when the concerns of a proposed intervenor such as a public interest group are similar to that of the public entity, "the would-be intervenor [must make] a strong showing of inadequate representation." *Kleissler, supra*, (citing *Mausolf, supra*, at 1303). Because the Applicants assert no interest unique to

themselves arising out of interests they can claim in the subject matter of the litigation, apart from the interest generally held by the public in public access in alleged public streets, their interests are presumed to be represented by the City.

Applicants have provided no basis for their assertion that their interests conflict with the City, or that the City is incapable of representing their interests. Rather than show an actual conflict of interest, or an interest shared by the Applicants that is not coterminous with the public at large, Applicants assert only that the City has not pursued arguments regarding public access to the Schuylkill River and surrounding Park that it would pursue. At this stage, and given that at the time the Applicants filed the Motion and CSXT filed its Answer thereto, the City had not filed an answer or counterclaims, it cannot be known what arguments the City *will* or *will not* assert; such claims of inadequacy are premature and are immaterial according to case law.

Applicants' assertion that the City would not vigorously defend the public street interests as Applicants intend to do, even if true, does not establish inadequate representation.<sup>9</sup> Simply because would-be intervenors "may have been less prone to agree to the facts, and would have taken a different view of the applicable law does

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<sup>9</sup> Applicants' Memorandum of Law, which refers to conversations with City counsel regarding the legal arguments to be made by each, belies the claimed inadequacy of representation and is rather indicative of collusion. See Applicants' Memorandum of Law at 17.

not mean that [defendants] did not adequately represent their interests in the litigation.” *City of Phila. supra* (quoting *Rizzo*, 530 F.2d at 505).

The assertion that representation is inadequate cannot be supported when both the Applicants and the City seek the same relief, *i.e.*, to establish that the gaps in the fencing opposite Race and Locust Streets are permissible, despite an express contract and inducement to the contrary, due to the alleged public status of the streets and the public’s right to those streets. Applicants have no other argument to assert within the framework of the claims CSXT seeks to enforce here. The City must address the public’s asserted right of passage in the alleged public streets and at-grade crossings to defend the action, thus requiring the City to request relief similar to that of Applicants, as admitted in ¶51 of Applicants’ Motion to Intervene.

**C. Permissive Intervention Should Be Denied When it Will Cause Undue Delay and Prejudice to the Parties.**

Rule 24(b) provides that where intervention as of right is not established, a court may grant leave to applicants to intervene “when an applicant’s claim or defense and the main action have a question of law or fact in common.” F.R.C.P. 24(b). Permissive intervention should be denied when the intervention raises additional issues of law and fact that would bring other issues into the matter and cause delay in the adjudication on the merits of the original action. *See Rollins Cableview*, 115

F.R.D. 484 (D. Del. 1986). Applicants acknowledge that “(the City’s and Applicants’) [interests] devolve to the common question of fact of whether CSXT has the right to erect (or force the City to erect) a *continuous* fence across Race and Locust Streets.” Applicants’ Memorandum of Law at 22. The difference in the legal arguments to be asserted in support of that common interest, and relief to be sought, are all that Applicants predicate their intervention upon. Differing legal defense theories do not undermine the adequacy of representation, or alter the legal issues to be decided by the Court. *United States v. City of Phila., supra*.

Due to the similarity between the interests sought to be advanced by Applicants to the interests that the City must advance to defend the contract action and promissory estoppel claim, this Court would be within its discretion to find that the Applicants’ “contributions to the proceedings would be superfluous and that any resulting delay would be ‘undue.’” *Hoots v. Commonwealth*, 672 F.2d 1133 (3d Cir. 1982)(upholding denial of motion to intervene because the similarity of issues to be asserted by applicants to the Commonwealth showed adequate representation such that the intervention would be repetitive and without purpose).<sup>10</sup>

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<sup>10</sup> Applicants cannot base their argument for permissive intervention upon the possibility that the City will exercise its authority to vacate its streets, and thus create interests adverse to Applicants. The City and the Applicants’ interests are now the same and preclude intervention. Further, based upon the City’s aggressive assertion of its alleged right to keep the streets open at the crossing areas, Applicants’ asserted adverse interest is not only speculative, but extremely remote.

The delay that the adjudication of the interests that Applicants introduce in their Motion to Intervene may permit accidents and injuries to persons trespassing upon the railroad right of way. The interjection of the arguments relative to a theoretical injury, which may or may not be brought about by the subject litigation, will prejudice the parties because it detracts from the contract and separate promises upon which CSXT relied that are the subject of the litigation that necessitates this Court's review. *See Harris v. City of Phila.*, 1997 WL 343597 (E.D. Pa. 1997).

The claims and defenses that a proposed intervenor may raise are limited to the subject matter of the litigation before the Court. *See Salem Eng'g Co., v. Nat'l Supply Co.*, 75 F.Supp. 993 (W.D. Pa. 1948). Applicants assert claims and defenses that are either adequately represented by the City, or that are beyond the scope of the main action before this Court for disposition. Applicants' claims regarding the necessity of a diagnostic study upon which warnings may be developed for the alleged public crossings at Race and Locust street are beyond the scope of the contract and promissory estoppel claims. Adequacy of warnings for public crossings are within the exclusive jurisdiction of the Public Utility Commission under 66 Pa.C.S. §2702. *Nat'l Freight v. SEPTA*, 698 F.Supp. 74, 78 (E.D. Pa. 1988), *aff'd*, 872 F.2d 413 (3d Cir. 1989). These matters are not relevant to the action and would detract the Court's attention from the matter to be decided. The rights that Applicants seek to assert in

this case, as far as they require an assessment of the safety of the alleged at-grade crossings, are not properly considered within this lawsuit as they do not involve the City's legal obligations.

Applicants also assert claims that are not within their authority to invoke. The City alone can assert a diminution or denial of its riparian rights, as such rights are not held by the public, as discussed above. Applicants seek reformation of the Construction Agreement in Count V of their counterclaims, a claim that can only be raised by a party to the contract. Reformation of contracts is rarely performed, and presupposes that a valid contract between the parties was created, but did not reflect the intent of the parties. *See Giant Eagle, Inc., v. Federal Ins. Co.*, 884 F.Supp. 979 (W.D. Pa. 1995). In the absence of fraud, mutual mistake or illegality, a court will not change the terms of a contract. *Id.* Applicants are not in a position to assert mutual mistake of fact or the intentions of the parties because they are not parties to the contract and were not present for the negotiations.

Applicants mischaracterize the contract action as arising out of “an unpaid bill” to buttress its assertion that the City does not adequately represent its interests in the suit. The unpaid bills are but another example of the City's non-compliance with the contract obligations that CSXT seeks to enforce. The City and the Applicants seek essentially the same relief— for the alleged streets in the areas of Race and Locust to

be declared now and forever public and that the City lacked the power to contract away the public's right of passage over them. The Declaratory Judgment Count of CSXT's complaint requires the City to defend against the argument that the alleged streets are not open to public passage to prevail on the breach of contract and promissory estoppel claims.

**D. Conditional Intervention Should Not Be Granted.**

A proposed intervenor may request conditional intervention in the event that the representation of existing parties becomes inadequate at a later stage of litigation. *See Harris v. Pearnsey*, 820 F.2d 592, 595 (3d Cir. 1987). At this stage of the litigation, the Applicants' interests in the litigation are shared by the City such that permitting their intervention would add nothing to the litigation other than delay. CSXT posits that since Applicants cannot establish a right or interest sufficient to confer standing or a cognizable stake in the litigation by asserting a legally protectable interest that can be compromised by the outcome of the case without its participation, they will not be able to establish intervention at a later date. Accordingly, Applicants' request for deferral of its intervention until such time that they can establish the inadequacy of the City's representation should be dismissed. Should Applicants establish an injury, or interest that will not be protected by parties to the suit, Applicants may move to intervene at that time.

### III. CONCLUSION

Based on the foregoing, Applicants' Motion to Intervene should be denied in its entirety.

Respectfully submitted,

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Date: December 30, 2004

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>CSXT TRANSPORTATION INC.,</b> <b>Plaintiff</b>	:	
	:	<b>No. 04-CV-5023</b>
	:	
<b>v.</b>	:	<b>Judge Kauffman</b>
	:	
<b>CITY OF PHILADELPHIA,</b> <b>Defendant</b>	:	<b>Filed Electronically</b>
	:	

**CERTIFICATE OF SERVICE**

**AND NOW**, on the date stated below, I, **Benjamin C. Dunlap, Jr., Esquire**, of Nauman, Smith, Shissler & Hall, LLP, hereby certify that I this day served the foregoing **Memorandum of Law of CSXT Transportation Inc. in Opposition to Applicants' Motion to Intervene** by electronic filing and by United States Mail, first class, postage prepaid, at Harrisburg, Pennsylvania, addressed to the following:

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