



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

October 10, 2013

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

RE: **Docket No.'s C-2011-2237486 & P-2011-2241780**

Dear Secretary Chiavetta:

Enclosed for filing please find the Department's *Reply Exceptions to the Exceptions Filed by The Bureau of Investigation and Enforcement and the Delaware and Hudson Railway Company*, in the above-captioned matter.

I hereby certify that a copy has been sent to all parties of record as indicated by the Certificate of Service.

Very truly yours,

A handwritten signature in blue ink that reads "Gina M. D'Alfonso".

Gina M. D'Alfonso
Assistant Counsel in Charge

Enclosure

220/GMD:aca

cc: Parties of Record
Debbie Noone, Assistant District Executive, District 4-0
Gerard Babinski, Senior Civil Engineer Supervisor, District 4-0
Joseph Strok, District Grade Crossing Administrator, District 4-0

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

A. EDWARD SCHWARTZ	:	Complaint Docket
Complainant	:	No: C-2011-2237486
	:	P-2011-2241780
	:	
v.	:	
	:	Electronically Filed
CANADIAN PACIFIC RAILROAD,	:	
LACKAWANNA COUNTY,	:	
La PLUME TOWNSHIP,	:	
COMMONWEALTH OF	:	
PENNSYLVANIA, DEPARTMENT	:	
OF TRANSPORTATION	:	
Respondents	:	

**REPLY EXCEPTIONS OF THE COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION TO THE EXCEPTIONS FILED
BY THE BUREAU OF INVESTIGATION AND ENFORCEMENT AND
THE DELAWARE AND HUDSON RAILWAY COMPANY**

AND NOW, comes the Commonwealth of Pennsylvania, Department of Transportation (“Department”), by and through its counsel, Gina M. D’Alfonso, and offers the following in Reply to the Exceptions filed by the Bureau of Investigation and Enforcement (“I&E”) and the Delaware and Hudson Railway Company (“D&H”) to the Recommended Decision (“R.D.”) issued by Administrative Law Judge David A. Salapa (“ALJ”) on August 14, 2013 and re-issued on September 10, 2013:

REPLY TO THE EXCEPTIONS OF I&E

1. The Department has addressed this issue in its Exceptions and incorporates by reference Department Exceptions Two (2) and Three (3) initially filed on September 3, 2013 and refiled on September 30, 2013. Additionally, the Department objects to any claim by I&E that the Department should be responsible for installation of the cul-de-sacs and the cost

and expense of same. The installation of the cul-de-sacs is necessitated by removal of the subject bridge and, as such, it is a component of the work set forth in Ordering Paragraphs Six (6) and Seven (7). The design and installation of the cul-de-sacs, and all costs associated with the same, should be the sole responsibility of D&H.

REPLY TO THE EXCEPTIONS OF D&H

1. The Department's reply to D&H Exception 1 is as follows. This Exception is without merit for the following reasons. The ALJ's decision to allocate costs upon D&H for the Department's work performed pursuant to the August 3, 2012 Order is both "just and reasonable" and supported by substantial evidence. The ALJ conducted a detailed analysis of the relevant factors and specifically addressed the factors set forth in *Green Township Board of Supervisors v. Pennsylvania Public Utility Commission*, 668 A.2d 615 (Pa. Cmwlth. 1995). Neither 66 Pa.C.S. § 2704(a) nor case law imposes a "mandatory [or] exclusive list of considerations upon the Commission or limit [on] the scope or results of the Commission's determination" when allocating costs upon concerned parties. *PECO Energy Co. v. Pa. Pub. Util. Comm'n*, 791 A.2d 1155, 1153 (Pa. 2002) citing *AT&T v. Pa. Pub. Util. Comm'n*, 737 A.2d 201, 210 (Pa. 1999). The Commission "is free to determine which factors are relevant in assessing costs within the context of the particular case before it." *Bell Atlantic – Pa. v. Pa. Pub. Util. Comm'n*, 672 A.2d 352, 355 (Pa. Cmwlth. 1995). As such, if the Commission determines that a factor, regardless of its past consideration, is not relevant to the present allocation it may choose to not consider such a factor.

The ALJ based his decision allocating costs upon the following factors: (1) D&H's "predecessors constructed the bridge and created the crossing"; (2) both D&H and the Department "benefit from the continued existence of the grade-separated crossing"; (3) both D&H and the Department "have an interested in seeing that the work be performed on the bridge"; and (4) D&H bore "some responsibility for the deteriorated condition of the crossing." R.D., page 22–23. It appears that the ALJ placed particular importance on the fact that D&H's predecessor built the bridge which predated the highway in order to accommodate its rail line. R.D., page 22 ("the existence of the crossing is due to the construction of a rail line by DL&W" and "[a]s part of the construction of that rail line, DL&W constructed the bridge"); D&H Statement No. 2, lines 33–36. *See Dep't of Trans. v. Pa. Pub. Util. Comm'n*, 464 A.2d 645 (Pa. Cmwlth. 1983) (the Commonwealth Court affirmed the Commission's decision allocating costs upon Conrail when the Commission placed particular emphasis on the fact that Conrail's predecessor constructed the crossing).

The R.D. is additionally supported by the ALJ's Findings of Fact ("Finding"), including, but not limited to the ALJ's conclusions that: (1) "[t]he Commonwealth's transportation system does not benefit from the existence of the crossing," Finding 33; (2) "[t]here are no federal or state funds available for any improvements to the bridge carrying S.R. 4009," Finding 40; and (3) a viable alternative route is available, Finding 43. R.D., page 15–16. It is overt that the ALJ took all relevant factors into consideration in regards to Ordering Paragraph Two (2) in allocating the costs not associated with the

roadway upgrade, approximately 75% of the costs initially incurred by the Department, onto D&H.¹

In support of the Department's position that Ordering Paragraph Two (2) is both "just and reasonable" and supported by substantial evidence, the Department incorporates its Main Brief, Argument Section II (relating to the Commission's §2704(a) allocation powers), filed on July 10, 2013, as if set forth fully herein. Additionally, the R.D. allocated all such costs and responsibilities without prejudice, so that any and all parties are free to enforce any contractual obligations that may exist. *See Consolidated Rail Corp. v. Harrisburg*, 842 A.2d 369 (Pa. 2004).

¹ D&H further decries the R.D., arguing that the ALJ "ignores well-settled Pennsylvania law that upon completion of construction of a bridge carrying a road over railroad tracks, the road authority owns and is responsible for maintenance of the bridge." D&H contends that the Department owns the subject bridge.

The Department does admit that the general rule in Pennsylvania is "that a bridge carrying a public street is deemed to be part of the street, and, as such, it is owned by the entity that owns the street. *Phila. v. Pa. Pub. Util. Comm'n*, 747 A.2d 352, 354 (Pa. 2000) citing *Heinlein v. Allegheny County*, 98 A.2d 36, 38 (Pa. 1953). However, in the present matter, the Department disputes that it is subject to the general rule. *See* Department's Main Brief, Argument Section II.b.ii (filed July 10, 2013). Regardless of ownership status, it is clearly established law that no single factor is dispositive as to the Commission's allocation jurisdiction pursuant to §2704(a).

D&H's argument that that ownership equates to maintenance is mislaid as it ignores §2704(a) and well-established Pennsylvania case law. If the Commission determines that ownership is a relevant factor, it may consider such fact; however, it is well established in Pennsylvania that the Commission "is not confined to any fixed rule or formula" when allocating costs. *Wheeling & Lake Erie Ry. Co. v. P.U.C.*, 778 A.2d 785, 793 (Pa. Cmwlth. 2001) citing *AT&T*, 737 A.2d 201. As such, the Commission may determine that it "just and reasonable" to allocate a majority of expenses upon a railroad, even if it does not own the structure, so long as such an allocation is supported by substantial evidence. Section 2704(a) gives the Commission the exclusive authority to allocate costs "in such proper proportions as [it] may, after due notice and hearing, determine." 66 Pa.C.S. §2704(a).

Additionally, while the cases cited by D&H discuss the common law rule regarding ownership of highway bridges—albeit in regards to tort matters—its contention that they are dispositive as to maintenance responsibility plainly ignores the Commission's jurisdiction to allocate costs and maintenance responsibilities of highway-rail crossings. Neither of the latter two cases cited by D&H involved railroad crossings. *See Schlosser v. Manor Township*, 142 A. 322 (Pa. 1928); *Rapho and West Hempfield Townships v. Moore*, 68 Pa. 404 (1871). Even if the cited cases involved highway-rail crossings, both cases predate the Public Utility Law of 1937, as amended by Act of July 3, 1963, P.L. 212, No. 121, which is the initial statutory authority granted to the Commission to allocate costs relating to highway-rail crossings upon concerned parties. The amended Public Utility Law of 1937, § 411, is the predecessor of the modern § 2704(a). The Public Utility Law of 1937 was repealed by the General Assembly by the Public Utility Code of 1978. Act of July 1, 1978, P.L. 598, No. 116. As such, the two cases cited by D&H are overruled inasmuch as they can be construed to require a municipality or the Department to maintain, absent a Commission Order, a bridge which rests solely within the jurisdiction of the Commission. *See* 66 Pa. C.S. §§ 2702 and 2704.

2. The Department's reply to D&H Exception Two (2) is as follows. D&H Exception Two (2) is without merit. Ordering Paragraph Five (5) is both "just and reasonable" and supported by substantial evidence. The Department incorporates its Reply to D&H Exception One (1), since it applies to D&H Exception Two (2), hereto as if set forth in full.

In support of the Department's position that Ordering Paragraph Five (5) is both "just and reasonable" and supported by substantial evidence, the Department incorporates its Main Brief, Argument Section II (relating to the Commission's §2704(a) allocation powers), filed on July 10, 2013, as if set forth fully herein. Additionally, the R.D. allocated all such costs and responsibilities without prejudice, so that any and all parties are free to enforce any contractual obligations that may exist. *See Consolidated Rail Corp. v. Harrisburg*, 842 A.2d 369 (Pa. 2004).

3. The Department's reply to D&H Exception Three (3) is as follows. D&H Exception Three (3) is without merit and not in the interest of public safety. Ordering Paragraph Six (6) is both "just and reasonable" and supported by substantial evidence. The Department incorporates its Reply to D&H Exception One (1), since it applies to D&H Exception Three (3), hereto as if set forth in full.

D&H requests that the Commission require the submission of demolition plans when "it is actually determined that the bridge has become impaired to a point which requires removal. D&H contends that Ordering Paragraph Six (6) is inconsistent with the language of the R.D. as it imposes an arbitrary Twelve (12) month timeline for D&H to submit demolition plans for the demolition and removal of the subject bridge. However, the ALJ's timeline for abolition of the crossing is supported by the evidence and not

arbitrary. *See* R.D., page 34–36. D&H contends that since the crossing is not in immediate danger of collapse that requiring it to submit plans within Twelve months is not supported by the R.D. It is clear that the subject bridge “will only continue to deteriorate,” R.D., page 34, and that eventually the structure will need to be replaced or abolished. The timeframe established by the ALJ allows D&H sufficient time to prepare, as well as budget for, plans to remove the subject bridge. A Twelve (12) month timeframe is necessary to ensure that the subject bridge is removed within a reasonable time before it becomes unsafe for both the traveling public and the railroad operations below.

In support of the Department’s position that Ordering Paragraph Six (6) is both “just and reasonable” and supported by substantial evidence, the Department incorporates its Main Brief, Argument Section II (relating to the Commission’s §2704(a) allocation powers), filed on July 10, 2013, as if set forth fully herein. Additionally, the R.D. allocated all such costs and responsibilities without prejudice, so that any and all parties are free to enforce any contractual obligations that may exist. *See Consolidated Rail Corp. v. Harrisburg*, 842 A.2d 369 (Pa. 2004).

4. The Department’s reply to D&H Exception Four (4) is as follows. D & H Exception Four (4) is without merit. Ordering Paragraph Seven (7) is both “just and reasonable” and supported by substantial evidence. R.D., pages 34–36. The Department incorporates its Reply to D&H Exceptions One (1) and Three (3), since it applies to D&H Exception Four (4), hereto as if set forth in full.

In support of the Department’s position that Ordering Paragraph Seven (7) is both “just and reasonable” and supported by substantial evidence, the Department incorporates

its Main Brief, Argument Section II (relating to the Commission's §2704(a) allocation powers), filed on July 10, 2013, as if set forth fully herein. Additionally, the R.D. allocated all such costs and responsibilities without prejudice, so that any and all parties are free to enforce any contractual obligations that may exist. *See Consolidated Rail Corp. v. Harrisburg*, 842 A.2d 369 (Pa. 2004).

5. The Department's reply to D&H Exception Five (5) is as follows. D&H excepts to Ordering Paragraphs Nine (9) and Ten (10) to the "extent that they impose responsibilities on the Railroad that are inconsistent with the Railroad's exceptions to Ordering Paragraphs 6 and 7." Insomuch, as the Commission may deny D&H's exceptions to Ordering Paragraphs Six (6) and Seven (7), the Department contends that Exception Five (5) should be deemed as moot and denied. In the alternative, if the Commission is inclined to grant the Exceptions filed by D&H, the Department respectfully requests that the Commission amend Ordering Paragraphs Nine (9) and Ten (10) to reflect such amendments to Ordering Paragraphs Six (6) and Seven (7).

WHEREFORE, the Department of Transportation, based upon the foregoing, respectfully request that the Pennsylvania Public Utility Commission deny the Exceptions, filed by D&H and any exception by I&E that seeks to allocate the costs of cul-de-sacs installation onto the Department, to the Recommended Decision issued on August 14, 2013 and re-served on September 10, 2013 filed by the Bureau of Investigation and Enforcement and the Delaware and Hudson Railway Company.

Respectfully Submitted,

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION



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DATED: October 10, 2013

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

A. EDWARD SCHWARTZ	:	
Complainant	:	
	:	Complaint Docket
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LACKAWANNA COUNTY,	:	
La PLUME TOWNSHIP,	:	
COMMONWEALTH OF	:	
PENNSYLVANIA, DEPARTMENT	:	
OF TRANSPORTATION	:	
Respondents	:	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Department's *Reply Exceptions to the Exceptions Filed by The Bureau of Investigation and Enforcement and the Delaware and Hudson Railway* was served upon the parties below by E-mail and First-Class mail; postage prepaid this 10th day of October, 2013:

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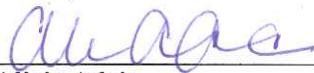
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COMMONWEALTH OF PENNSYLVANIA
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DATED: October 10, 2013