

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

DELAWARE AND HUDSON RAILWAY COMPANY, INC., d/b/a CANADIAN PACIFIC  
RAILROAD,  
PETITIONER

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,  
RESPONDENT

No. C-2011-2237486  
P-2011-2241780

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**PETITION TO REVIEW**

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Date Filed: January 6, 2014

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PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

1. This Court has jurisdiction over this matter by reason of Section 763(a)(1) of the Judicial Code, 42 Pa. C.S.A. §763 (a)(1).
2. Delaware and Hudson Railway Company, Inc., d/b/a Canadian Pacific Railroad ("D&H") seeks review of the December 5, 2013 Opinion and Order of the Pennsylvania Public Utility Commission (the "Commission") at C-2011-2237486 and P-20112241780, attached hereto as Exhibit 1.
3. A Notice to Participate, as is required by Pa. R. A. P. 1513 (d), is attached hereto as Exhibit 2. It will be served upon all parties to the proceeding before the Commission as indicated on the Certificate of Service.
4. The Order and Opinion of the Commission should be reversed because:
  - a. Ordering paragraphs 6 and 9, which require D&H to reimburse \$239,238.50 of the Pennsylvania Department of Transportation's ("PennDOT") past costs, 20% of PennDOT's future inspection costs and 80% of PennDOT's future maintenance costs, are not supported by substantial evidence; fail to consider, *inter alia*, PennDOT's ownership of, and contractual obligation to maintain, repair and inspect the bridge; and are therefore inequitable, arbitrary, inconsistent, unjust, and contrary to law.
  - b. Ordering paragraphs 10 and 11, which require D&H, at its sole cost and expense, to submit demolition plans for removal of the bridge within twelve months of the Order and to demolish and remove the bridge within twelve months of the Commission's approval of the plans, are not based on substantial evidence; fail to consider, *inter alia*, PennDOT's ownership of, and contractual obligation to maintain, repair and inspect the bridge; and are therefore inequitable, arbitrary, inconsistent, unjust, and contrary to law.

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5. WHEREFORE, Petitioner prays that this Court review and set aside the Order and Opinion of the Pennsylvania Public Utility Commission and grant relief as may be just and proper.

Dated: January 6 2014

Respectfully submitted,

Oliver, Price & Rhodes

by Erin A. Brennan

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**PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17105-3265**

Public Meeting held December 5, 2013

Commissioners Present:

Robert F. Powelson, Chairman  
John F. Coleman, Jr., Vice Chairman  
James H. Cawley  
Pamela A. Witmer  
Gladys M. Brown

A. Edward Schwartz

C-2011-2237486

v.

\* P-2011-2241780

Delaware and Hudson Railway Company, Inc.  
d/b/a Canadian Pacific Railroad and Pennsylvania  
Department of Transportation

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions filed by the following Parties: (1) the Commission's Bureau of Investigation and Enforcement (I&E) on September 20, 2013; (2) Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railroad (Railroad) on September 30, 2013; and (3) the Pennsylvania Department of Transportation (PennDOT) on September 30, 2013. The Exceptions were filed in response to the Recommended Decision Upon Remand (R.D.) of Administrative Law Judge (ALJ) David A. Salapa issued on August 14, 2013.

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PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

The Commission issued a Secretarial Letter on September 10, 2013 (*September 2013 Secretarial Letter*) stating that some of the Parties in this proceeding had been inadvertently omitted from the service list. Accordingly, in order to provide all Parties with due process, the Commission stated that it would be re-serving the Recommended Decision to all Parties and that any Party that had already filed Exceptions and/or Replies should file those documents again.<sup>1</sup> The Recommended Decision was re-served with the Secretarial Letter.

On October 10, 2013, the Railroad filed Reply Exceptions in response to PennDOT's Exceptions. Also on October 10, 2013, PennDOT filed Replies to I&E's Exceptions and also to the Railroad's Exceptions.

For the following reasons we shall: (1) deny PennDOT's Exceptions; (2) deny the Railroad's Exceptions; (3) deny I&E's Exceptions; and (4) adopt the Recommended Decision of ALJ Salapa.

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<sup>1</sup> Prior to the issuance of the *September 2013 Secretarial Letter*, I&E had filed Exceptions on August 29, 2013. In accordance with the instructions of the Secretarial Letter, it re-filed the exact same Exceptions on September 20, 2013. Similarly, PennDOT had filed Exceptions on September 3, 2013. It also re-filed the exact same Exceptions on September 30, 2013. The Railroad filed a document entitled "Exceptions and Request for Leave to File Further Exceptions" on September 3, 2013. In that document, the Railroad complained that it had not timely received a copy of the ALJ's Recommended Decision issued August 14, 2013. In order to cure this deficiency, the Commission issued the *September 2013 Secretarial Letter* affording the Parties the opportunity to re-file any Exceptions and/or Replies to the R.D. The Railroad re-filed that document on September 16, 2013 and subsequently filed Exceptions. Consequently, there is no need at this time to address the Railroad's request for leave to file further Exceptions.

## History of the Proceeding<sup>2</sup>

On April 15, 2011, A. Edward Schwartz (Complainant) filed a Complaint with the Commission against the Railroad and PennDOT, which was docketed at No. C-2011-2237486. The Complaint alleged that the Bridge carrying S.R. 4009 over the facilities of the Railroad (Bridge) was unsafe and was not being properly maintained by the Railroad and PennDOT. The Complaint also claimed that the Railroad is responsible for maintaining the Bridge, pursuant to a deed dated May 30, 1917.

According to the Complaint, the Bridge and S.R. 4009 have been posted with ten ton weight limit signs. The Complainant owns a horse farm along S.R. 4009 and receives deliveries in excess of thirty tons on a regular basis. The Complaint requested that the Commission direct that the Bridge be repaired and that the weight limit on the Bridge be increased. Alternatively, the Complaint requested that the Commission direct that the Railroad construct and maintain an at-grade crossing.

A Commission staff engineer conducted a field investigation and conference on April 6, 2011, at the site of the Bridge. At the conference, PennDOT agreed to place a steel plate over the hole in the deck of the Bridge, which it did on April 8, 2011. A Secretarial Letter issued on May 5, 2011, affirmed PennDOT's action covering the hole and also directed PennDOT to provide the most recent in-depth inspection report for the Bridge to the Railroad, LaPlume Township (Township), Lackawanna County (County) and the Commission within thirty days.

On May 9, 2011, PennDOT filed an Answer to the Complaint in which it denied that the Bridge was unsafe. The Answer also asserted that PennDOT has been maintaining the wearing surface on the Bridge, and noted that it is not the Bridge that is

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<sup>2</sup> For a complete history of the proceeding, please refer to the Recommended Decision at pages 3-11.

posted for ten tons, but rather S.R. 4009. The Answer requested that the Commission schedule a field conference in this matter.

On May 13, 2011, the Complainant filed a Petition for Expedited Hearing and Interim Emergency Order. The Petition alleged that, since the Complaint was filed, the Bridge had further deteriorated and that it was closed by PennDOT on May 11, 2011.

A telephonic prehearing conference was scheduled by the Commission for May 23, 2011, and an emergency hearing was scheduled for May 25, 2011. The matter was assigned to ALJ Salapa. On May 10, 2011, PennDOT notified the Commission that a portion of the Bridge had fallen onto the Railroad's right of way, blocking the tracks. Railroad personnel were dispatched to the site to remove the debris. A Commission staff engineer conducted another field investigation and conference at the site on May 12, 2011.

The Commission entered an Order on May 19, 2011 (*May 2011 Order*), which recounted the above-outlined facts. The order also did the following: (1) affirmed PennDOT's action in closing Bridge to vehicular traffic; (2) directed PennDOT to perform any work necessary to prevent pedestrian access to the Bridge; and (3) directed PennDOT to provide for detours during the time the Bridge remained closed.

The ALJ conducted the telephonic prehearing conference as scheduled on May 23, 2011. At the conference, the Complainant stated that emergency vehicles had no access to his property since PennDOT closed the Bridge and requested that the Commission order the construction of a public at-grade crossing in order to provide access to his property. The ALJ informed the Parties that the emergency hearing would be limited to the issues raised by the Complainant's petition for interim emergency relief, and not the merits of the underlying Complaint.

The emergency hearing was held as scheduled on May 25, 2011. The following Parties appeared at the hearing and were represented by counsel: the Complainant; PennDOT; the Railroad; the Township; and the Commission's Bureau of Transportation and Safety (BTS).<sup>3</sup>

In his Order, issued May 27, 2011, the ALJ concluded that the Complainant failed to demonstrate by a preponderance of the evidence that he was entitled to interim emergency relief, pursuant to 52 Pa. Code § 3.6(b). Accordingly, the ALJ denied the Complainant's request for interim emergency relief and he also certified the question of that denial to the Commission, pursuant to 52 Pa. Code § 3.10(b), to be processed as a material question in accordance with 52 Pa. Code § 5.305.

The Commission issued an Opinion and Order on July 15, 2011, which took the following actions: (1) upheld the ALJ's Order denying the Complainant's request for interim emergency relief; and (2) referred the matter to the Office of Administrative Law Judge (OALJ) for further proceedings.

A telephonic prehearing conference was held as scheduled by ALJ Salapa on December 15, 2011. At the conference, PennDOT indicated that it was willing to do the work necessary to reopen the Bridge to traffic, but that the Bridge would be restricted to a load limit of thirteen tons. PennDOT stated that the work could be accomplished by Spring, 2012.

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<sup>3</sup> By Order entered August 11, 2011, at Docket No. M-2008-2071852, the Commission reorganized the Bureau of Transportation and Safety into the new Bureau of Investigation and Enforcement and the Bureau of Technical Utility Services (TUS). At the time the instant Complaint was filed, the Bureau was still denoted as the Bureau of Transportation and Safety.

ALJ Salapa conducted another hearing, as scheduled, on March 21, 2012. At the hearing, the following Parties appeared and were represented by counsel: the Complainant; PennDOT; I&E; the Railroad; the Township and the County.

On May 11, 2012, the ALJ issued a Recommended Decision which directed, *inter alia*, that PennDOT, at its initial cost and expense, perform and complete the work set forth in the approved plans. The Recommended Decision also directed that, upon completion of the work, this proceeding be scheduled for a hearing to allocate the costs of the work performed and to assign inspection and future maintenance responsibilities for the Bridge. No Party filed Exceptions to the Recommended Decision.

On August 3, 2012, the Commission issued an Opinion and Order adopting the ALJ's Recommended Decision (*2012 Order*). However, the Commission expressed concern that the repair work, which was characterized as a "temporary fix," might allow permanent repairs to languish. Accordingly, the Commission remanded the matter to OALJ for a determination on the future disposition of the crossing, and on the allocation of costs for the work performed.

By Secretarial Letter dated January 24, 2013, the Commission directed that the Bridge be reopened to vehicular traffic for a maximum weight limit of thirteen tons.

The hearing was held as scheduled on May 23, 2013. At the hearing, the following Parties appeared and were represented by counsel: the Complainant; PennDOT; I&E; the Railroad; the Township; and the County. The hearing resulted in a transcript of 102 pages, numbered 195-297. At the conclusion of the hearing, the parties requested the opportunity to file briefs and agreed to a briefing schedule. Tr. at 294-296.

The Complainant, PennDOT, the Railroad and I&E filed Main Briefs (M.B.) on July 10, 2013. The County filed a Main Brief on July 12, 2013, but that Brief was rejected as late-filed and was not considered by the ALJ. The Complainant, PennDOT and the Railroad filed Reply Briefs (R.B.) on July 30, 2013. The record closed on July 30, 2013, upon the filing of Reply Briefs.

In his Recommended Decision, ALJ Salapa recommended, *inter alia*, that the Railroad shall reimburse PennDOT for a portion of the costs of the work performed by PennDOT. R.D. at 36. Additionally, PennDOT was directed to inspect and maintain the Bridge until it is removed by the Railroad and the Railroad was directed to reimburse PennDOT for a portion of the costs of inspection and maintenance incurred by PennDOT. *Id.* Finally, the Railroad was directed to remove the Bridge and PennDOT was directed to erect and maintain barricades on the approaches to the crossing. *Id.* Upon completion of the work, the crossing would be abolished.

Exceptions and Reply Exceptions were filed as above noted.

### **Discussion**

The ALJ made forty-three Findings of Fact and reached fifteen Conclusions of Law. R.D. at 11-16, 36-38. We shall adopt and incorporate herein by reference the ALJ's Findings of Fact and Conclusions of Law, unless they are reversed or modified by this Opinion and Order, either expressly or by necessary implication.

We note that any issue or Exception that we do not specifically delineate has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider, expressly or at length, each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth.

1993); *see also, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

### **Legal Standard**

The Commission has jurisdiction over rail highway crossings pursuant to 66 Pa. C.S. § 2702 and 2704. The general rule granting jurisdiction over rail highway crossings is set forth in 66 Pa. C.S. § 2702(a) as follows:

No public utility engaged in the transportation of passengers or property, shall, without prior order of the Commission, construct its facilities across the facilities of any other such public utility or across any highway at grade or above or below grade, or at the same or different levels; and no highway without like order, shall be so constructed across the facilities of any such public utility, and, without a like order, no such crossing heretofore or hereafter constructed shall be altered, relocated, suspended or abolished.

Therefore, in order for a rail highway crossing to be within the Commission's jurisdiction as set forth above, the road or street involved must be a highway.

The Code defines the term "highway" at 66 Pa. C.S. § 102 as follows: "[a] way or place of whatever nature opened to the public as a matter of right for purposes of vehicular traffic."

When a crossing is within the Commission's jurisdiction, the Commission has the authority, pursuant to 66 Pa. C.S. § 2702, to order the construction, reconstruction, alteration, repair, protection, suspension or abolition of a rail highway crossing, as well as the authority to determine and order which parties shall perform such work at the crossing and which parties shall maintain the crossing in the future in order to prevent

accidents and promote the safety of the public. *Southeastern Pennsylvania Trans. Auth. v. Pa. PUC*, 592 A.2d 797 (Pa. Cmwlth. 1991).

The Commission is empowered, pursuant to 66 Pa. C.S. § 2702(b), to determine and prescribe the manner in which such a crossing may be constructed, altered, relocated, suspended, abolished, maintained, operated or protected. The Commission is also empowered, pursuant to 66 Pa. C.S. § 2702(c), to order the relocation, alteration, suspension or abolition of a crossing upon such reasonable terms and conditions as the Commission prescribes. In evaluating a rail/highway crossing matter, the Commission is not limited to any fixed rule but must take all relevant factors into consideration, with the fundamental requirement being that its order is just and reasonable. *AT&T v. Pa. PUC*, 737 A.2d 201, 213 (Pa. 1999) (citing *Bell Atlantic-Pa., Inc. v. Pa. PUC*, 672 A.2d 352, (Pa. Cmwlth. 1995)).

### **ALJ's Recommendation**

Initially, the ALJ observed that a property owner filed this Complaint alleging that the instant crossing located adjacent to his property was unsafe and should be repaired. R.D. at 3. The ALJ recommended that the Complaint be denied but that the Bridge carrying the roadway over the Railroad's facilities should be removed. *Id.*

The ALJ also addressed three separate issues, as follows: (1) the allocation of the costs of work performed by the Parties in reopening the existing Bridge;<sup>4</sup> (2) the assignment of future inspection and maintenance responsibilities for the Bridge; and (3) the disposition of the crossing. R.D. at 16. Before delving into those issues, the ALJ provided a discussion of the historical background and current status of the crossing. *Id.* at 16-18.

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<sup>4</sup> This work was performed pursuant to the Commission's 2012 Order herein.

## Allocation of Costs of Work Performed by the Parties

With regard to the first issue, the allocation of the costs of work performed by the Parties in reopening the Bridge, the ALJ initially observed that PennDOT submitted an Exhibit, PennDOT Exhibit 9, which outlined the costs it incurred for the work it performed pursuant to the Commission's *2012 Order*. R.D. at 20. The ALJ observed that PennDOT's Exhibit 9 was unchallenged by any other Party. Accordingly, the ALJ concluded that the costs outlined therein are accurate and reasonable. *Id.* The costs shown in PennDOT's Exhibit 9 are as follows:

Road closure costs	\$26,937.00
Roadway upgrade on detour after road closure	\$84,447.00
Parapet removal cost	\$49,045.73
Railroad inspection during parapet removal and fence installation to close structure	\$10,546.00
In-depth-Pennoni structural analysis	\$24,151.00
Installation of structure mounted guide rail and pedestrian fencing	\$128,558.77
Total PennDOT cost	\$323,685.50

R.D. at 21.

PennDOT sought reimbursement of the total sum from the Railroad, arguing that PennDOT had ultimately performed work that should have been previously performed by the Railroad. R.D. at 21. The Railroad did not agree to reimburse PennDOT for any of the costs it had incurred. *Id.*

After analysis of the pertinent issues, the ALJ recommended that the Railroad should be directed to bear all the costs incurred by PennDOT, except for the cost of the roadway upgrade, in the amount of \$84,447. R.D. at 22. Accordingly, the ALJ recommended that we direct the Railroad to reimburse PennDOT the amount of

\$239,238.50, for the work PennDOT performed at the crossing pursuant to the 2012 Order. *Id.* at 22-23.

### **Future Inspection and Maintenance Responsibilities for the Bridge**

The next issue discussed by the ALJ is the assignment of future inspection and maintenance responsibilities for the Bridge. In this regard, PennDOT has stated that it will continue to monitor and inspect the Bridge every twelve months, regardless of which Party is assigned maintenance thereof by the Commission. PennDOT St. 6 at 7-8; R.D. at 24. However, PennDOT requested that the Commission order the Railroad to reimburse it 20% of the costs of the annual inspection, which is the portion normally paid by municipal entities for PennDOT's inspection of local bridges. PennDOT St. 6 at 8; PennDOT M.B. at 19; R.D. at 24. As to future maintenance, PennDOT agreed to maintain only the wearing surface on the structure, the structure mounted guiderail and pedestrian fencing on the Bridge. PennDOT St. 7 at 4; R.D. at 24.

The Railroad, on the other hand, argued that PennDOT is responsible for maintaining the substructure, superstructure and wearing surface of highway structures over rail facilities. Railroad St. 1 at 5; Railroad M.B. at 18; R.D. at 24. After his analysis, the ALJ recommended that we direct PennDOT to inspect and maintain the Bridge and that we also direct the Railroad to reimburse PennDOT 20% of the costs of the inspection incurred and 80% of the costs of maintenance. R.D. at 25.

### **Disposition of the Crossing**

The final issue discussed by the ALJ is the ultimate disposition of the crossing. The Complaint requested that the Commission direct that the Bridge be repaired and that the weight limit on the Bridge be increased or that, alternatively, the Railroad be directed to construct and maintain an at-grade crossing. R.D. at 26. On this

issue, the ALJ recommended that the Complaint be denied, on the basis that the Complainant had failed to establish his case by a preponderance of the evidence. *Id.* at 27. The ALJ observed that, at the hearing held herein on March 21, 2012, the Complainant did not present any credible testimony to support the following assertions: (1) that the Bridge is no longer safe to carry any loads; (2) that the entire structure will collapse; or (3) that the methodology used by PennDOT's engineering consultant is questionable. *Id.* at 28-30.

The ALJ observed that, ordinarily, the denial of the Complaint would be the end of the discussion regarding the disposition of the crossing. R.D. at 30. However, as discussed above, the Commission's 2012 Order remanded this matter with specific instructions that this proceeding determine the future disposition of the crossing, in addition to allocating the costs of the work performed pursuant to the approved plans. *Id.*

In this connection, the ALJ noted that there is sufficient evidence in the record to establish that the Bridge, while not in danger of imminent collapse, is in a deteriorated and poor condition. R.D. at 30. PennDOT conducted an in-depth inspection that it presented at the hearing held herein on March 21, 2013. PennDOT Exh. 1. Additionally, before commencing the work we ordered in the 2012 Order, PennDOT had performed an inspection of the Bridge on August 14, 2012. PennDOT St. 6 at 2, PennDOT Exh. 7. After that inspection, the condition of the Bridge was rated as "serious." PennDOT St. 6 at 3, PennDOT Exh. 7. PennDOT conducted another inspection on April 30 and May 1, 2013, and found that the condition of the Bridge was little changed. PennDOT St. 6 at 4, PennDOT Exh. 7; R.D. at 30.

At the hearings, PennDOT offered testimony, and I&E concurred, that the Bridge will eventually need to be replaced. PennDOT St. 6 at 7. However, PennDOT was not willing to bear the cost of a new bridge. PennDOT St. 6 at 7. In this connection,

PennDOT contends that the Railroad built and owns the Bridge, and should therefore be responsible for its replacement. *Id.*

As such, the ALJ observed that there were several options available to the Commission with respect to the future disposition of the Bridge. R.D. at 31. The ALJ outlined those options as follows: (1) the Commission could direct that the existing structure be rehabilitated so as to carry heavier loads; (2) the Commission could direct that the existing structure be removed and replaced with an at-grade crossing at the same location; (3) the Commission could direct that the existing bridge be removed and replaced with a new bridge at that same location; or (4) the Commission could direct that the existing structure be removed, the roadway be barricaded and the crossing be abolished. *Id.*

The ALJ discussed, in turn, the advantages and disadvantages of each of the options. R.D. at 31-34. After his analysis, the ALJ recommended that the Commission adopt the fourth option, *i.e.*, that the Bridge be removed and the crossing be abolished. R.D. at 34. In support of his recommendation, the ALJ pointed to testimony presented by both PennDOT and the County that the crossing is not necessary for their respective transportation systems. *Id.* No other Party presented any testimony that the crossing was necessary for the travelling public. Second, noted the ALJ, the amount of vehicle traffic using the crossing is minimal. *Id.* Specifically, before PennDOT posted the Bridge for a thirteen ton weight limit, only 625 vehicles per day used the crossing. Finally, the ALJ noted that there are alternate routes available should the Bridge be removed.

Accordingly, the ALJ concluded that the Commission should direct the Railroad to prepare plans for the demolition and removal of the Bridge and that, upon Commission approval of those plans, the Railroad should be directed to remove the structure at its sole cost and expense. R.D. at 34. PennDOT, at its sole cost and expense, should be directed to erect and maintain barricades on S.R. 4009 on the approaches to the

crossing. *Id.* at 35. The ALJ then provided the rationale for his recommendation on this issue, noting that both the Railroad and PennDOT bear some responsibility for the deteriorated condition of the crossing, which led to the need to remove the structure. *Id.*

### **Summary of ALJ's Recommendations**

The ALJ recommended that the Railroad be directed to reimburse PennDOT for a portion of the costs of the work already performed by PennDOT. R.D. at 36. The ALJ also recommended that we direct PennDOT to inspect and maintain the Bridge until it is removed by the Railroad. *Id.* The ALJ recommended that we direct the Railroad to reimburse PennDOT for a portion of its costs for inspection and maintenance. Finally, the ALJ recommended that we direct the Railroad to remove the Bridge, and also direct PennDOT to erect and maintain barricades on the approaches to the crossing. *Id.* Finally, upon completion of the work, the ALJ recommended that the instant crossing be abolished.

### **PennDOT's Exceptions and the Railroad's Reply**

In its Exception No. 1, PennDOT refers to Ordering Paragraph No. 5 of the Recommended Decision, which is as follows:

5. That Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railroad shall reimburse the Pennsylvania Department of Transportation for 20% of the costs of the inspection and 80% of the costs of maintenance the Pennsylvania Department of Transportation incurs inspecting and maintaining the bridge carrying S.R. 4009 over the facilities of the Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railroad, located in LaPlume Township, Lackawanna County.

R.D. at 39.

PennDOT states that it objects to Ordering Paragraph No. 5 only to the extent that it does not require the Railroad to bear its own costs during the inspection of the structure in addition to the local share of inspection costs as well as when PennDOT is performing any required maintenance of the structure. Exc. at 1. PennDOT opines that it would be just and reasonable to so order since the ALJ has recommended that the Railroad bear 80% of the maintenance cost and the local share (20%) of the inspection costs. *Id.* On the other hand, argues PennDOT, it would not be just and reasonable to have the taxpayers bear any portion of the Railroad's costs. *Id.* at 1-2.

In response, the Railroad contends that PennDOT's Exception No. 1 is inconsistent with the ALJ's findings that both the Railroad and PennDOT received benefit from the continued existence of the grade-separated crossing and that both Parties bore responsibility for the crossing's deteriorated condition. Reply at 1-2.

On review, we conclude that PennDOT's Exception No. 1 lacks merit. We have reviewed the ALJ's rationale for his allocation of the costs for inspection and maintenance of the Bridge, and we find no flaw in his reasoning. As noted by the ALJ, both Parties benefit from the continued existence of the grade-separated crossing. R.D. at 25. Also, assigning maintenance responsibility to PennDOT will allow the grade separated crossing to remain open to both train and vehicle traffic and the safe interface between rail and vehicle traffic is a factor which may be considered by the Commission in assigning maintenance. *D&H Corp. v. Pa. PUC*, 613 A.2d 622 (Pa. Cmwlth. 1992); *Norfolk Southern Railway Co. v. Pa. PUC*, 971 A.2d 545 (Pa. Cmwlth. 2009).

Additionally, both the Railroad and PennDOT bear some responsibility for the deteriorated condition of the crossing. R.D. at 25. Whether a party is responsible for the deterioration of the crossing, which has led to the need for its repair, replacement or removal is a factor that the Commission may consider in allocating costs and assigning maintenance. *Pennsylvania Department of Transportation v. Pa. PUC*, 469 A.2d 1149

(Pa. Cmwlth. 1983). Assigning future inspection and maintenance responsibility will at least provide some monitoring of the Bridge, and perhaps slow its deterioration.

In its Exception Nos. 2 and 3, PennDOT objects to Ordering Paragraphs Nos. 6 and 7, which are as follows:

6. That the Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railroad, at its sole cost and expense, within twelve (12) months of the date of the Pennsylvania Public Utility Commission Order entered in this matter prepare and submit to the Pennsylvania Department of Transportation, LaPlume Township and Lackawanna County for examination and review and to the Pennsylvania Public Utility Commission for approval, complete detailed final demolition plans for the removal of the bridge carrying S.R. 4009, including the abutments and retaining walls, over its facilities located in LaPlume Township, Lackawanna County.

7. That the Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railroad at its sole cost and expense, within twelve (12) months from the date that the Pennsylvania Public Utility Commission approves its submitted demolition plans, shall furnish all materials and do all work necessary to demolish and remove the bridge carrying S.R. 4009 over its facilities, including the abutments and retaining walls, in accordance with the approved plans.

R.D. at 39, 40.

PennDOT objects to Ordering Paragraphs Nos. 6 and 7 on the basis that they do not require the Railroad to include the construction of cul-de-sacs at both ends of the Bridge, in accordance with PennDOT's standards. Exc. at 2-3. PennDOT avers that, without cul-de-sacs, vehicles will not have the ability to turn around in a safe manner. *Id.*

In response, the Railroad contends that it is the responsibility of PennDOT to maintain the highways of the Commonwealth. Accordingly, the Railroad contends that PennDOT should be responsible for the construction and maintenance of, and bear the cost of, any cul-de-sacs that may be determined to be necessary. Reply at 2.

On review, we conclude that PennDOT's Exception Nos. 2 and 3 lack merit. ALJ Salapa carefully considered all aspects of this proceeding, and made reasoned recommendations on the apportionment of the work and costs associated with this project. He made no findings and reached no conclusions on the issue of the possible construction of cul-de-sacs at both ends of the Bridge. As such, we decline to assign that responsibility at this point. We do note, however, that in general it is PennDOT's responsibility to maintain the Commonwealth's highways, and also to protect the safety of motorists. Accordingly, PennDOT's Exceptions will be denied.

### **The Railroad's Exceptions and PennDOT's Reply**

In its Exception No. 1, the Railroad objects to Ordering Paragraph No. 2 of the Recommended Decision which is as follows:

2. That the Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railroad shall reimburse the Pennsylvania Department of Transportation the amount of \$239,238.50 for work the Pennsylvania Department of Transportation performed pursuant to the Pennsylvania Public Utility Commission's August 3, 2012 order.

R.D. at 39.

The Railroad contends that the ALJ's conclusion on this issue is not supported by his reasoning as contained in the body of the Recommended Decision. Exc.

at 1-2. Specifically, the Railroad objects to the fact that a “disproportionate share” of PennDOT’s costs have been allocated to the Railroad. *Id.* at 2.

In response, PennDOT avers that the ALJ’s recommendation to allocate some costs to the Railroad for work performed pursuant to the Commission’s *2012 Order* is just and reasonable, and is supported by substantial evidence. Reply at 2-3.

On review, we conclude that the Railroad’s Exception No. 1 lacks merit. As we have noted above, ALJ Salapa conducted a detailed analysis of the relevant factors. R.D. 18-20. In *Greene Twp. v. Pa. PUC*, 668 A.2d 615 (Pa. Cmwlth. 1995), the Commonwealth Court noted the following relevant factors: (1) which party built the crossing; (2) whether the roadway existed before or after the construction of the crossing; (3) the relative benefit conferred on each party with the construction of the crossing; (4) whether a party is responsible for the deterioration of the crossing which has led to the need for its repair, replacement or removal; and (5) the relative benefit that each party will receive from the repair, replacement or removal of the crossing. However, neither Section 2704(a), *supra*, nor case law imposes a “mandatory [or] exclusive list of considerations upon the Commission or limit [on] the scope of results of the Commission’s determination” when allocating costs upon concerned parties. *PECO Energy Co. v. Pa. PUC*, 791 A.2d 1155 (Pa. 2002) *citing* *AT&T v. Pa. PUC*, 737 A.2d 201 (Pa. 1999). In short, the Commission is free to determine which factors are relevant in assessing costs within the context of the particular case before it.

With this standard in mind, we find no error in the ALJ’s determination outlined in Ordering Paragraph No. 2.

In its Exception No. 2, the Railroad objects to Ordering Paragraph No. 5 of the Recommended Decision, which has been quoted above. Specifically, that Paragraph directs the Railroad to reimburse PennDOT for 20% of the costs of inspection and 80%

of the costs of maintenance that PennDOT will incur in the future for the Bridge. Exc. at 2. The Railroad contends that the ALJ's recommended allocation of costs in the Paragraph is inconsistent with the language of the Recommended Decision in that: (1) both Parties benefit from the continued existence of the grade-separated crossing; and (2) both Parties bear some responsibility for the deteriorated condition of the crossing. R.D. at 25; Exc. at 2-3.

In response, PennDOT avers that the ALJ's recommended allocation outlined in Paragraph No. 5 is just and reasonable and is also supported by substantial evidence. R. Exc. at 5.

On review, we conclude that the Railroad's Exception No. 2 lacks merit. We have above outlined the relevant criteria for allocation of expenses, as described in *Greene Twp*. With those criteria in mind, we find no error in the ALJ's determination outlined in Ordering Paragraph No. 5.

In its Exception No. 3, the Railroad objects to Ordering Paragraph 6 of the Recommended Decision, which has been quoted above. Specifically, that Paragraph directs the Railroad "at its sole cost and expense" to complete detailed final demolition plans for the removal of the Bridge within twelve months of the disposition of this matter. Exc. at 3. The Railroad argues that the allocation of the cost for the plans solely to the Railroad is inconsistent with the language of the Recommended Decision that "the Railroad and [Penn]DOT both bear some responsibility for the deteriorated condition of the crossing, which has led to the need to remove the bridge" and also with the ALJ's observation that both Parties will benefit from the removal of the Bridge. R.D. at 35. The Railroad suggests that the Commission direct that the costs associated with the demolition plans be allocated solely to PennDOT. Exc. at 3. Additionally, the Railroad avers that it should not be required to submit the plans within twelve months, but that

such submission be delayed until such time as it is actually determined that the Bridge has become impaired to a point where it requires removal. *Id.* at 3-4.

In response, PennDOT avers that the Railroad's Exception No. 3 lacks merit. R. Exc. at 5-6. Specifically, argues PennDOT, delaying the requirement that the Railroad complete demolition plans for the Bridge until it is actually determined that the Bridge has become impaired to a point which requires its removal would not be in the interest of public safety. *Id.*

On review, we conclude that the Railroad's Exception No. 3 lacks merit. We have above outlined the relevant criteria for the allocation of expenses, as described in *Greene Twp.* With those criteria in mind, we find no error in the ALJ's determination to allocate the costs of the demolition plans solely to the Railroad.

We also see no error in the ALJ's determination that the Railroad should be directed to complete the plans for the removal of the Bridge within twelve months of the disposition of this matter. We believe that our adoption of the ALJ's directive on this issue will serve to enhance public safety. As noted by the ALJ, "[s]ince there is no need for a crossing at this location, the existing bridge should be removed, since it will only continue to deteriorate." R.D. at 34. Finally, we conclude that the twelve month timeframe recommended by the ALJ will allow the Railroad sufficient time in which to prepare plans for the Bridge's removal.

In its Exception No. 4, the Railroad objects to Ordering Paragraph No. 7 of the Recommended Decision, which has been quoted above. Specifically, that Paragraph directs the Railroad at its sole cost and expense to demolish the Bridge with twelve months of the Commission's approval of its demolition plans. Exc. at 4. The Railroad contends that this allocation of costs is inconsistent with the language of the Recommended Decision. *Id.* The Railroad suggests that PennDOT be directed to bear

100% of the cost of demolition. Additionally, the Railroad avers that the actual demolition of the Bridge should be delayed until it is determined that the Bridge has become impaired to the point that it must be removed. *Id.* at 4-5.

In response, PennDOT avers that the Railroad's Exception No. 4 lacks merit. R. Exc. at 6. Specifically, argues PennDOT, delaying the requirement that the Railroad complete demolition of the Bridge twelve months after the Commission's approval of the relevant plans would not be in the interest of public safety. *Id.* at 6-7.

On review, we conclude that the Railroad's Exception No. 4 lacks merit. We have above outlined the relevant criteria for allocation of expenses, as described in *Greene Twp.* With those criteria in mind, we find no error in the ALJ's determination to allocate to the Railroad all costs of demolition of the Bridge. Additionally, we see no error in the ALJ's determination that the Railroad should be directed to complete demolition of the Bridge within twelve months after the Commission's approval of the relevant plans for the demolition. As we discussed in our disposition of the Railroad's Exception No. 3, *supra*, our adoption of the ALJ's recommendation on this issue will serve to enhance public safety because the Bridge is in a deteriorated condition and should be removed as soon as practicable.

Finally, in its Exception No. 5, the Railroad states that it "objects to Ordering Paragraphs 9 and 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." Exc. at 5.

Since we have denied the Railroad's Exceptions to Ordering Paragraphs 6 and 7, the Railroad's Exception No. 5 shall be deemed to be moot, and denied on that basis.

## **I&E's Exceptions and PennDOT's Reply**

I&E files one Exception to the Recommended Decision, requesting that, as part of the Bridge removal project, either PennDOT or the Railroad be directed to install *turn-around cul-de-sacs for vehicles*. *Exc. at 2*. I&E also requests that appropriate signs be placed along S.R. 4009 indicating that the road is now a dead-end and/or that no through traffic is allowed. *Id.*

In its Reply, PennDOT notes that it raised the issue of cul-de-sacs in its own Exceptions. Reply at 1-2. PennDOT avers that, while the installation of cul-de-sacs is a good idea, it does not want to be responsible for any work or costs associated with that installation, and that all such work and costs should be the responsibility of the Railroad. *Id.*

Ordering Paragraph No. 7 of the Recommended Decision, concerning the *demolition and removal of the Bridge*, has been quoted above. Ordering Paragraph No. 8 of the Recommended Decision, found on page 40 thereof, is as follows

8. That the Pennsylvania Department of Transportation, at its sole cost and expense, shall erect and maintain barricades, in accordance with the Manual on Uniform Traffic Control Devices, where the bridge carrying S.R. 4009 crosses over the facilities of the Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railroad, located in LaPlume Township, Lackawanna County.

Neither Ordering Paragraph No. 7 nor Ordering Paragraph No. 8 makes mention of cul-de-sacs or appropriate signs. We decline at this point to require either PennDOT or the Railroad to install them. I&E's Exception is denied.

## **Conclusion**

Consistent with the above discussion, we shall: (1) deny PennDOT's Exceptions; (2) deny the Railroad's Exceptions; (3) deny I&E's Exceptions; and (4) adopt the Recommended Decision of ALJ Salapa; **THEREFORE,**

### **IT IS ORDERED:**

1. That the Exceptions of the Commission's Bureau of Investigation and Enforcement, filed on September 20, 2013, to the Recommended Decision are denied.
2. That the Exceptions of the Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railroad, filed on September 30, 2013, to the Recommended Decision are denied.
3. That the Exceptions of the Pennsylvania Department of Transportation, filed on September 30, 2013, to the Recommended Decision are denied.
4. That the Recommended Decision of Administrative Law Judge David A. Salapa originally issued on August 14, 2013, and re-issued on September 10, 2013, is adopted.
5. That the Complaint of A. Edward Schwartz against the Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railroad and the Pennsylvania Department of Transportation at Docket No. C-2011-2237486 is hereby denied.

6. That the Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railroad shall reimburse the Pennsylvania Department of Transportation the amount of \$239,238.50 for work the Pennsylvania Department of Transportation performed pursuant to the Commission's Order entered on August 3, 2012.

7. That the Pennsylvania Department of Transportation shall bear the remaining amount of \$84,447.00 for work it performed pursuant to the Commission's Order entered on August 3, 2012.

8. That the Pennsylvania Department of Transportation, at its initial cost and expense, shall inspect and maintain the bridge carrying S.R. 4009 over the facilities of the Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railroad, located in LaPlume Township, Lackawanna County, until such time as the bridge is removed.

9. That the Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railroad shall reimburse the Pennsylvania Department of Transportation for 20% of the costs of the inspection and 80% of the costs of maintenance the Pennsylvania Department of Transportation incurs inspecting and maintaining the bridge carrying S.R. 4009 over the facilities of the Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railroad, located in LaPlume Township, Lackawanna County.

10. That the Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railroad, at its sole cost and expense, within twelve months of the date of entry of this Opinion and Order, shall prepare and submit to the Pennsylvania Department of Transportation, LaPlume Township and Lackawanna County for examination and review and to the Pennsylvania Public Utility Commission for approval,

complete detailed final demolition plans for the removal of the bridge carrying S.R. 4009, including the abutments and retaining walls, over its facilities located in LaPlume Township, Lackawanna County.

11. That the Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railroad at its sole cost and expense, within twelve months from the date the Pennsylvania Public Utility Commission approves its submitted demolition plans, shall furnish all material and do all work necessary to demolish and remove the bridge carrying S.R. 4009 over its facilities, including the abutments and retaining walls, in accordance with the approved plans.

12. That the Pennsylvania Department of Transportation, at its sole cost and expense, shall erect and maintain barricades, in accordance with the Manual on Uniform Traffic Control Devices, where the bridge carrying S.R. 4009 crosses over the facilities of the Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railroad, located in LaPlume Township, Lackawanna County.

13. That the Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railroad, at least ten days prior to the start of work, shall notify the Pennsylvania Department of Transportation, LaPlume Township and Lackawanna County of the actual date on which work will begin.

14. That the Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railroad shall report to the Pennsylvania Public Utility Commission the date of actual completion of the work at the earliest practicable time subsequent to said date of completion.

15. That, upon completion of the demolition and removal work by the Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railroad, and the inspection and approval of that work by the Pennsylvania Public Utility Commission, the

crossing carrying S.R. 4009 over the facilities of the Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railroad located in LaPlume Township, Lackawanna County is abolished.

16. That the Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railroad, at its sole cost and expense, upon abolition of the crossing, shall furnish all material and perform all work necessary to maintain its track and other facilities at the abolished crossing.

17. That the Pennsylvania Department of Transportation, at its sole cost and expense, upon abolition of the crossing, shall maintain the S.R. 4009 approach roadways and barricades where the bridge carrying S.R. 4009 formerly crossed over the facilities of the Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railroad, located in LaPlume Township, Lackawanna County.

18. That this Opinion and Order, insofar as it imposes any costs on any of the Parties, is without prejudice to any Party's right to recover all or part of such costs incurred from others in accordance with any lawful agreement.

19. That, upon completion of the demolition and removal work by the Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railroad, the inspection and approval of that work by the Pennsylvania Public Utility Commission and the abolition of the crossing carrying S.R. 4009 over the facilities of the Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railroad located in LaPlume

Township, Lackawanna County, the dockets at Nos. C-2011-2237486 and P-2011-2241780 shall be marked closed.

**BY THE COMMISSION,**

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive style with a large initial "R".

Rosemary Chiavetta  
Secretary

(SEAL)

ORDER ADOPTED: December 5, 2013

ORDER ENTERED: December 5, 2013



COMMONWEALTH COURT OF PENNSYLVANIA

DELAWARE AND HUDSON RAILWAY  
COMPANY, INC., d/b/a CANADIAN  
PACIFIC RAILROAD

COMMONWEALTH DOCKET NO.:

Petitioner

vs.  
PENNSYLVANIA PUBLIC UTILITY  
COMMISSION

PUC DOCKET: C-2011-2237486  
P-2011-2241780

Respondent

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**NOTICE TO PARTICIPATE**

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**To Pennsylvania Department of Transportation A. Edward Schwartz, LaPlume Township, Lackawanna County and Bureau of Inspection and Enforcement:**

You have not been named as a respondent; however, you were a party before the governmental unit whose decision is sought to be reviewed.

If you intend to participate in this proceeding in the Commonwealth Court, you must serve and file a Notice of or Application for Intervention under Rule 1531 of the Pennsylvania Rules of Appellate Procedures **within thirty days**.

**Respectfully submitted,**

**Oliver, Price & Rhodes**

by \_\_\_\_\_  
**Erin A. Brennan**  
**Attorney I.D. 87748**  
**1212 South Abington Road**  
**PO Box 240**  
**Clarks Summit, PA 18411**  
**(570) 585-1200**  
**(570) 585-5100 (fax)**  
**email: cab@oprlaw.com**

**RECEIVED**

JAN - 6 2014

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

## CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the Notice to Participate on the following by U.S. Regular Mail and by U.S. Certified Mail on the 6<sup>th</sup> day of January, 2014:

Jill M. Spott, Esquire  
Shiels Law Associates, P.C.  
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Gina D'Alfonso, Esquire  
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ATTORNEY FOR BUREAU OF INSPECTION AND ENFORCEMENT

Oliver, Price & Rhodes

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## CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served a true and correct copy of the Petition for Review in the above captioned case on the date set forth below by mailing, postage prepaid in the manner indicated below, to the parties listed below, which satisfies the requirements of Pa. R.A.P. 121(b) and 1514(c):

Service by certified mail, return receipt requested as follows:

Kathleen Kane, Attorney General  
Pennsylvania Office of Attorney General  
16<sup>th</sup> Floor, Strawberry Square  
Harrisburg, PA 17120

Rosemary Chiavetta, Secretary  
Public Utility Commission  
PO Box 3265  
Harrisburg, PA 17105-3265

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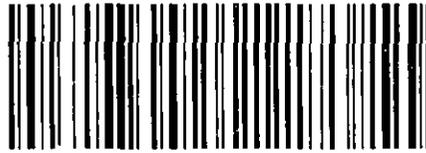
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Harrisburg, PA 17105  
ATTORNEY FOR BUREAU OF INSPECTION AND ENFORCEMENT

Dated: January 6 2014

Erin A M  
Erin A. Brennan, Esquire

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