

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Bridge Structure where State Route 1025	:	
crosses over a single track of Delaware	:	
and Hudson Railway Company, Inc.	:	M-2013-2364201
(264 293 K) in Nicholson Borough,	:	
Wyoming County	:	

**ORDER GRANTING PETITIONS TO INTERVENE OF THE NORFOLK SOUTHERN  
RAILWAY COMPANY AND PENNSYLVANIA ELECTRIC COMPANY AND  
SUSPENDING LITIGATION SCHEDULE.**

On May 23, 2013, the Pennsylvania Public Utility Commission (Commission) issued an order regarding the crossing where State Route 1025 crosses over the facilities of the Delaware and Hudson Railway Company, a wholly owned subsidiary of the Canadian Pacific Railway Company (D&H) located in Nicholson Borough (Borough), Wyoming County (County). The order alleges that a field meeting was held at the site of the crossing on May 14, 2013. Present at the meeting were representatives of D&H, the Commission and the Pennsylvania Department of Transportation (DOT).

The parties at the field meeting concluded that the bridge carrying State Route 1025 was in such poor condition that it was necessary for DOT to take action to close the structure to vehicular and pedestrian traffic immediately. The May 23, 2013 order directed DOT, at its initial cost, to perform all work and furnish all material necessary to close the bridge to all pedestrian and vehicular traffic and provide for any detours necessary and to maintain any barricades or fencing installed to prevent vehicular and pedestrian access to the bridge. The order further directed DOT, at its initial cost, within 30 days of the order, to provide any engineering inspections and analyses evaluating the condition of the bridge. In addition, the order directed DOT, at its initial cost, within 90 days of the order, to provide an engineering study and analysis evaluating the feasibility of reopening the bridge and if reopening the bridge was feasible, what work was necessary to reopen the bridge. The order directed that DOT, D&H, the Borough and the County all be made parties to the proceeding.

On June 3, 2013, DOT filed a petition for reconsideration of the May 23, 2103 Commission order, a motion for certification of interlocutory order and stay of proceedings pending appeal and a petition for protective order. No answers were filed to these pleadings. By order dated June 13, 2013, the Commission granted DOT's petition for reconsideration, pending review and consideration on the merits.

On July 31, 2013, DOT filed a petition for leave to withdraw its motion for certification of interlocutory order and stay of proceedings pending appeal and its petition for reconsideration. By order dated August 16, 2013, the Commission granted DOT's petition for leave to withdraw its motion for certification of interlocutory order and stay of proceedings pending appeal and its petition for reconsideration. The Commission granted DOT petition for a protective order. The August 16, 2013 order extended the deadline for DOT to file its engineering studies and analyses with the Commission to 120 days from the May 23, 2013 order. The order referred the matter to the Office of Administrative Law Judge.

By notice dated August 21, 2013, the Commission scheduled a telephonic prehearing conference for this matter on October 4, 2013 at 10:00 a.m. I issued a prehearing conference order on August 22, 2013, setting forth the procedural matters to be addressed at the prehearing conference.

I conducted a telephonic prehearing conference in this case as scheduled on October 4, 2013 at 10:00 a.m. Participating were counsel for D&H, the Borough, the County, DOT and the Commission's Bureau of Investigation and Enforcement (I&E). As a result of the prehearing conference, I issued Prehearing Order #2 on October 11, 2013. Prehearing Order #2 established litigation and briefing schedules.

By notice dated October 7, 2013, the Commission scheduled hearings in this matter for November 20, 2013 in Hearing Room 2, Commonwealth Keystone Building, Harrisburg.

On November 1, 2013, DOT filed a joint petition for partial remand of matters pending. The joint petition alleged that DOT provided the parties with copies of its studies and analyses of the State Route 1025 bridge, evaluating the feasibility of reopening the bridge. DOT's analyses indicated that the bridge could be reopened to a single lane of traffic with a posted weight limit of 28 tons for single vehicles and 32 tons for combination vehicles. Traffic would be controlled by stop signs at either end of the bridge. Attached to the joint petition were plans setting forth the scope of work.

According to the joint petition, D&H would perform the work described in the plans and would reimburse DOT for the costs, in the amount of \$12,045.73, that DOT had incurred to date. DOT would inspect the bridge and D&H agreed to reimburse DOT 20% of the costs of inspecting the bridge. The joint petition asserted that none of the parties objected to reopening the bridge in the manner set forth in the joint petition.

The joint petition stated that the parties did not object to the Office of Administrative Law Judge reassigning the matter to the Commission's Bureau of Technical Utility Services for approval of the attached plans, final inspection upon completion of the work and reopening of the bridge. The joint petition asserted that the parties waived the right to reply to the joint petition and requested an order as soon as possible.

The joint petition indicated that the parties were still discussing future maintenance responsibility for the bridge and future disposition of the crossing. The joint petition requested that these issues remain pending before the Administrative Law Judge. The parties also requested that the hearing scheduled for November 20, 2013, be converted to a telephonic status conference and that the litigation schedule for this proceeding be suspended.

By order dated November 5, 2013 I granted the joint petition and referred the entire case to the Commission's Bureau of Bureau of Technical Utility Services for further action, rather than just the portion addressing the approval of the plans, final inspection upon completion of the work and reopening of the bridge. I stated that if the parties could agree on future maintenance responsibility for the bridge and future disposition of the crossing, the

Commission's Bureau of Bureau of Technical Utility Services could issue a further order adopting and approving that agreement. If the parties could not agree on future maintenance responsibility for the bridge and future disposition of the crossing, the Commission's Bureau of Bureau of Technical Utility Services could refer the case to the Office of Administrative Law Judge for a hearing and recommended decision on those issues.

On November 8, 2013, the Commission issued a Secretarial Letter that approved plans for the alteration of the structure carrying State Route 1025 over the facilities of D&H and ordering various parties to perform the work set forth in the approved plans. The Secretarial Letter directed that the work necessary to alter the crossing be completed on or before December 13, 2013. Upon completion of the work, the Secretarial Letter ordered that the proceeding be scheduled for a hearing to allocate the costs of construction, assign future maintenance and consider the future disposition of the bridge structure.

On November 12, 2013, the Pennsylvania Electric Company (Penelec) filed a petition to intervene in this proceeding, pursuant to 52 Pa. Code §§ 5.72-5.75. Penelec's petition alleges that it has facilities in the vicinity of the crossing and that there was a high probability that a Commission order in this proceeding could direct it to relocate its facilities. A Commission order directing it to relocate its facilities could raise issues concerning the feasibility, safety and cost of such a relocation. According to the petition, Penelec's interests are not adequately represented by any other party in this proceeding. Penelec' petition requested that it be permitted to intervene in this proceeding. None of the parties filed an answer to Penelec's petition to intervene opposing the petition.

On December 11, 2013, the Commission issued a Secretarial Letter indicating that the work ordered by the November 8, 2013 Secretarial Letter had been completed. The December 11, 2013 Secretarial letter directed that the structure carrying State Route 1025 over the facilities of D&H be reopened with a maximum weight limit of twenty-eight tons for single vehicles and thirty-two tons for combination vehicles.

On October 30, 2014, DOT filed a petition requesting that the Commission schedule a hearing for the purposes of allocating costs incurred for work performed pursuant to the November 8, 2013 Secretarial Letter. The petition alleged that DOT incurred costs of approximately \$40,000.00 in performing the work ordered by the November 8, 2013 Secretarial Letter. The petition requested that the Commission schedule a hearing to allocate costs and assign maintenance responsibilities. None of the parties filed an answer to DOT's petition opposing the petition.

By notice dated February 20, 2015, the Commission scheduled a hearing in this matter for April 14, 2015 at 10:00 a.m. in Hearing Room 2, Commonwealth Keystone Building, Harrisburg. I issued Prehearing Order #3, dated February 24, 2015 establishing litigation and briefing schedules.

On March 9, 2015, Norfolk Southern Railway Company (NS) filed a motion to join or in the alternative, a petition to intervene. In its pleading, NS alleges that it currently operates over D&H's facilities at the crossing location. In addition, the pleading asserts that NS is currently negotiating with D&H to purchase the rail line located at the proposed project location from D&H. NS requests that the Commission permit it to intervene in this proceeding. In addition, NS requests that the Commission continue the hearing scheduled for April 14, 2015 and suspend the litigation schedule established by Prehearing Order #3, pending NS' purchase of the rail line, which it expects to occur in the summer of 2015.

On March 17, 2015, D&H filed an answer to NS' pleading. D&H's answer supports NS' request to intervene, as well as its request to continue the April 14, 2015 hearing and suspend the litigation hearing established by Prehearing Order #3. The answer requests that the Commission grant NS' request to intervene in the proceeding, continue the April 14, 2015 hearing and suspend the litigation schedule.

On March 18, 2015, DOT filed an answer to NS's pleading. DOT's answer does not object to NS' request to intervene in the proceeding. DOT does not object to NS' request to

continue the April 14, 2015 hearing and suspend the litigation hearing established by Prehearing Order #3.

As of the date of this order, none of the parties has filed an answer to Penelec's petition to intervene. I will also treat NS' pleading as a petition to intervene. The petitions to intervene are ready for decision. For the reasons set forth below, I will grant the petitions.

The Commission's Rules of Practice and Procedure permit petitions to intervene. 52 Pa.Code §§ 5.71-5.76. The provision at 52 Pa.Code § 5.72 governs what entities are eligible to intervene in a proceeding and states as follows:

**§ 5.72. Eligibility to intervene.**

(a) *Persons.* A petition to intervene may be filed by a person claiming a right to intervene or an interest of such nature that intervention is necessary or appropriate to the administration of the statute under which the proceeding is brought. The right or interest may be one of the following:

(1) A right conferred by statute of the United States or of the Commonwealth.

(2) An interest which may be directly affected and which is not adequately represented by existing participants, and as to which the petitioner may be bound by the action of the Commission in the proceeding.

(3) Another interest of such nature that participation of the petitioner may be in the public interest.

(b) *Commonwealth.* The Commonwealth or an officer or agency thereof may intervene as of right in a proceeding subject to paragraphs (1)—(3).

(c) *Supersession.* Subsections (a) and (b) are identical to 1 Pa. Code § 35.28 (relating to eligibility to intervene).

Allowance of intervention is a matter within the discretion of the Commission. City of Pittsburgh v. Pa. Pub. Util. Comm'n, 33 A.2d 641 (Pa. Super. 1943); N.A.A.C.P., Inc. v. Pa. Pub. Util. Comm'n, 290 A.2d 704 (Pa. Cmwlth. 1972).

Penelec's and NS' petitions to intervene are governed by 52 Pa.Code § 5.72(a)(1) since statutes of the Commonwealth at 66 Pa.C.S. §§ 2702 and 2704 confer on them a right to intervene. 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. Pub. Util. Comm'n, 592 A.2d 797 (Pa. Cmwlth. 1991), alloc. denied, 611 A.2d 714 (Pa. 1992). 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. Pennsylvania Game Comm'n v. Pa. Pub. Util. Comm'n, 651 A.2d 596 (Pa. Cmwlth. 1994), alloc. denied, 664 A.2d 977 (Pa. 1995). The Commission's jurisdiction over a rail-highway crossing includes the highway approaches to the crossing. Dept. of Trans. v. Pa. Pub. Util. Comm'n, 440 A.2d 657 (Pa. Cmwlth., 1982); Springettsbury Twp. v. Pa. Pub. Util. Comm'n, 289 A.2d 762 (Pa. Cmwlth., 1972). Pittsburgh and L.E.R. Co. v. Pa. Pub. Util. Comm'n, 445 A.2d 851 (Pa. Cmwlth 1982); Pittsburgh and Shawmut R. Co v. Pa. Pub. Util. Comm'n, 14 A.2d 903 (Pa. Super. 1940).

In a rail-highway crossing proceeding, the Commission determines what parties are concerned within the meaning of 66 Pa. C.S. §2704 (a) and §2702 (c). County of Chester v. Pa. Pub. Util. Comm'n, 408 A.2d 552 (Pa. Cmwlth. 1979); Consolidated Rail Corp. v. Pa. Pub. Util. Comm'n, 671 A.2d 24 (Pa. Cmwlth. 1995). Pursuant to 52 Pa. Code §§ 3.361 and 5.13, the Commission makes public utilities, owners of the railroad right of way, municipal corporations

concerned and DOT parties respondent to a rail highway crossing complaint or application. The Commission has the authority to assess the costs of any work it orders performed upon the concerned public utilities, municipal corporations, or the Commonwealth, in such proper proportions as it may determine. 66 Pa. C.S. §2704(a). In apportioning costs in rail-highway crossing cases, the Commission is not limited to any fixed rule but takes all relevant factors into consideration; the only requirement being that its order is just and reasonable. Wheeling and L. E. Rwy. Co. v. Pa. Pub. Util. Comm'n, 778 A.2d 785 (Pa. Cmwlth. 2001), alloc. denied, 790 A.2d 1021 (Pa. 2001).

Since NS has operating rights over the D&H line at this crossing it is a concerned party for purposes of the Commission's cost allocation jurisdiction and authority. Norfolk Southern Rwy. Co. v. Pa. Pub. Util. Comm'n, 77 A.2d 619 (Pa. 2013). Similarly, since Penelec has facilities at or near the crossing, it is a concerned party for purposes of the Commission's cost allocation jurisdiction and authority. AT&T v. Pa. Pub. Util. Comm'n, 737 A.2d 201(Pa. 1999); PECO Energy Co. v. Pa. Pub. Util. Comm'n, 791 A.2d 1155 (Pa. 2002).

In conclusion, Penelec and NS have demonstrated that they are eligible to intervene in this proceeding. I will grant Penelec's and NS' petitions to intervene, subject to the limitations set forth in 52 Pa.Code § 5.75.

In addition, as of the date of this order none of the parties has objected to NS' request to continue the hearing and suspend the litigation schedule. I will therefore grant the request.

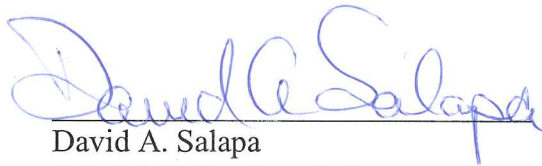
ORDER

THEREFORE,

IT IS ORDERED:

1. That the petitions to intervene of Pennsylvania Electric Company and Norfolk Southern Railway Company are granted.
2. That Pennsylvania Electric Company and Norfolk Southern Railway Company are admitted as intervenors in the above-captioned case, pursuant to 52 Pa.Code § 5.75.
3. That admission of Pennsylvania Electric Company and Norfolk Southern Railway Company as intervenors will not be construed as recognition by the Pennsylvania Public Utility Commission that they have a direct interest in the proceeding or might be aggrieved by an order of the Commission in the proceeding, pursuant to 52 Pa.Code § 5.75(c).
4. That the Pennsylvania Electric Company and Norfolk Southern Railway Company be added as intervenors to the service list in the above-captioned proceeding.
5. That the litigation schedule set forth in Prehearing Order #3, dated February 24, 2015, issued in this proceeding, is suspended.
6. That the hearing scheduled for April 14, 2015 in this proceeding is cancelled.

Dated: March 23, 2015

  
David A. Salapa  
Administrative Law Judge

M-2013-2364201 – Bridge structure where state Route 1025, crosses over a single track of Canadian Pacific Railroad (264 293 K) in Nicholson Borough, Wyoming County

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