

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Uniform Cover and Calendar Sheet

1. REPORT DATE: April 10, 2006	2. BUREAU AGENDA NO. APR-2006-OSA-0118*
3. BUREAU: Office of Special Assistants	
4. SECTION(S):	5. PUBLIC MEETING DATE:
6. APPROVED BY: Director: C. W. Davis 7-1827 Mgr/Spvr: K. G. Sophy 7-8108 Legal Review:	April 20, 2006 DOCUMENT FOLDER
7. PERSONS IN CHARGE: M. Knezevich 7-1828	9. EFFECTIVE DATE OF FILING:
8. DOCKET NO.: A-00117798; C-20042702	N/A

10. (a) CAPTION (abbreviate if more than 4 lines)
 (b) Short summary of history & facts, documents & briefs
 (c) Recommendation

DOCKETED
MAY 04 2006

(a) Amended Application of PennDOT for approval to replace the existing overhead bridge . . . in the City of Lancaster (City) . . . ; Susan Wood (Complainant) v. Amtrak

(b) PennDOT's Application and the Complainant's Complaint were consolidated. In his Recommended Decision, the ALJ recommended that the City of Lancaster (City) complete all repairs to the sidewalk of the Bridge within six months of the date it receives the Commission's Opinion and Order. The City filed Exceptions and the City and Manheim Township (Township) filed Amended Exceptions. PennDOT filed a Motion to Strike the Amended Exceptions (Motion to Strike). By Order entered February 23, 2006, the Commission, *inter alia*, denied PennDOT's Motion to Strike and remanded the proceeding to the Office of Administrative Law Judge. On March 10, 2006, PennDOT filed a Petition for Reconsideration (Petition).

(c) The Office of Special Assistants recommends that the Commission adopt the proposed Opinion and Order which: (1) grants PennDOT's Petition; (2) grants PennDOT's Motion to Strike Amended Exceptions; (3) grants the City's Exceptions; and (4) adopts the Recommended Decision as modified by this Opinion and Order.

Order Doc. No. 602303v1

Calendar Doc. No. 603058v1

11. MOTION BY: Commissioner Chm. Holland	Commissioner Shane - Yes
SECONDED: Commissioner Cawley	Commissioner Pizzingrilli - Yes
	Commissioner Fitzpatrick - Yes

CONTENT OF MOTION: Staff recommendation adopted.



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

April 24, 2006

A-00117798
C-20042702

GARY C FAWVER P E CHIEF
RIGHT OF WAY & UTILITIES DIVISION
P O BOX 3362
HARRISBURG PA 17105-3362

DOCUMENT
FOLDER

Amended Application of the department of Transportation of the Commonwealth of Pennsylvania for approval to replace the existing overhead bridge and request exemptions from horizontal clearances where S.R. 0072, Section 006 (Fruitville Pike) crosses over the tracks of National Railroad Passenger Corporation (AAR No. 518 172 T) in the City of Lancaster Manheim Township, Lancaster County; And the allocation of costs incident thereto; Susan Wood v. National Railroad Passenger Corporation

To Whom It May Concern:

This is to advise you that the Commission in Public Meeting on April 20, 2006 has adopted an Opinion and Order in the above entitled proceeding.

An Opinion and Order has been enclosed for your records.

Very truly yours,

DOCKETED
OCT 3 - 2007

James J. McNulty
Secretary

MMB
encls
cert. mail

RJP

See attached list for additional parties

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held April 20, 2006

Commissioners Present:

Wendell F. Holland, Chairman
James H. Cawley, Vice Chairman
Bill Shane
Kim Pizzingrilli
Terrance J. Fitzpatrick

DOCUMENT
FOLDER

Amended Application of the Department
of Transportation of the Commonwealth of
Pennsylvania for approval to replace the existing
overhead bridge and request exemptions from
horizontal clearances where S. R. 0072, Section 006
(Fruitville Pike) crosses over the tracks of National
Railroad Passenger Corporation (AAR No. 518 172 T)
in the City of Lancaster and Manheim Township,
Lancaster County; and the allocation of costs incident
thereto

A-00117798
C-20042702

Susan Wood

DOCKETED
OCT 3 - 2007

v.

National Railroad Passenger Corporation

OPINION AND ORDER

BY THE COMMISSION:

Before the Commission for consideration and disposition is a Petition for Reconsideration and Clarification of Commission Order (Petition) filed by Pennsylvania Department of Transportation (PennDOT) on March 10, 2006, relative to the above-captioned proceeding. The Order to which the Petition refers was issued on February 23,

2006. No Response to the Petition has been filed.

Additionally before the Commission are the following documents: (1) the Recommended Decision of Administrative Law Judge (ALJ) Louis G. Cocheres, issued August 17, 2005; (2) the Exceptions thereto filed by the City of Lancaster (City) on September 1, 2005; (3) the Amended Exceptions of the City and Manheim Township (Township), filed on October 31, 2005; (4) the Reply Exceptions of Ms. Susan Wood (Complainant) to the City's Exceptions, filed on September 15, 2005; (5) PennDOT's Motion to Strike Amended Exceptions, filed on November 10, 2005; and (6) an Answer to PennDOT's Motion to Strike filed by the City and the Township on November 30, 2005.

History of Proceeding

PennDOT's Application was filed on May 2, 2001, wherein it requested that it be permitted to alter the crossing by reconstructing the bridge that carried State Route 0072,¹ over and above the tracks of National Railroad Passenger Corporation (Amtrak) in the City and the Township, Lancaster County (County). PennDOT also proposed to replace the existing two-span bridge that carried the roadway over five shared electrified passenger/freight tracks and two non-electrified yard tracks with a new two-span bridge which met Amtrak's clearance requirements.

By Order entered October 1, 2001 (2001 Order), the Commission took the following actions: (1) approved the Application; (2) directed PennDOT to prepare detailed construction plans at its sole cost and expense; (3) granted an exemption from the Commission's horizontal minimum clearance requirements; (4) appropriated property for

¹ One bridge carries State Route 0072 and the Fruitville Pike over Amtrak's tracks.

the project; (5) generally directed PennDOT to complete the project at its sole cost and expense with the exception of relocation costs for the non-carrier utilities; (6) directed the non-carrier utilities to relocate at their initial cost and expense; (7) directed that PennDOT, upon completion of the project, maintain the highway facilities at its sole cost and expense; (8) directed that Amtrak, upon completion of the project, maintain the railroad facilities at its sole cost and expense; (9) directed that the non-carrier utilities, upon completion of the project, maintain their facilities at their sole cost and expense; (10) allowed for appropriate federal reimbursement; and (11) scheduled, upon completion of the project, a hearing for unresolved issues and for the allocation of costs and future maintenance responsibilities.

On March 23, 2004, the Complainant filed a Complaint against Amtrak regarding the condition of the pedestrian walkway on the bridge carrying PA Route 501² above the tracks of Amtrak in the Township and the City. She alleged therein that the sidewalk was unsafe due to the failure to remove snow, ice and debris and made a similar allegation about snow and ice on the sidewalk of the newly-completed bridge carrying Fruitville Pike across the same tracks. As a remedy, she asked that the sidewalk maintenance be assigned to a responsible party. By letter dated June 3, 2004, she added to her Complaint by noting that the walkway on the Route 501 bridge was in state of disrepair.

On April 21, 2004, the City and the Township filed a joint Answer in which they denied responsibility for the condition of the sidewalks. On April 23, 2004, counsel for PennDOT entered his appearance. On April 26, 2004, Norfolk Southern Railway

² The other bridge carries State Routes 501 and 222\272 over Amtrak's tracks (the Lititz Pike bridge).

Company (Norfolk Southern)³ filed an Answer and New Matter which denied the material allegations and which additionally claimed that it owned no property at the crossings.

On April 29, 2004, PennDOT filed an Answer to the Complaint which alleged that maintenance responsibilities for the new Fruitville Pike Bridge had not yet been assigned and that it could not identify the "PA Route 501" bridge which was referenced in the Complaint. On September 3, 2004, Norfolk Southern filed a Motion for Judgment on the Pleadings and a Brief in Support. On September 21, 2004, counsel for the County entered his appearance.

On October 12, 2004, a Prehearing Conference was held before ALJ Cocheres for both the Application case and the Complaint case. The ALJ denied a Motion for Judgment on the Pleadings made by Norfolk Southern pending in the Complaint case due to the fact that Norfolk Southern operated at both crossings, and there could be safety issues which would be addressed in both cases. (Prehearing Tr. at 10-11).

On December 8, 2004, the Initial Hearing was held before ALJ Cocheres for both the Application case and the Complaint case. The following Parties appeared and were represented by counsel: the County, PennDOT, the City, the Township, Norfolk Southern, the Commission's Bureau of Transportation and Safety (BTS) and Amtrak. The Complainant, who is an attorney, also appeared.

The ALJ's Recommended Decision was issued on August 17, 2005, in which he recommended, *inter alia*, that the City shall complete all repairs to the sidewalk and create a smooth walking surface on the Bridge within six months of the date it receives the Commission's Opinion and Order. (R.D. at 22). The City filed Exceptions

³ Norfolk Southern operates on the tracks at the pertinent crossings pursuant to a lease with Amtrak.

to the Recommended Decision on September 1, 2005. On October 31, 2005, the City and the Township filed Amended Exceptions.

The Complainant filed Reply Exceptions to the City's Exceptions on September 15, 2005. On November 10, 2005, PennDOT filed a Motion to Strike Amended Exceptions (Motion to Strike). On November 30, 2005, the City and the Township filed an Answer to PennDOT's Motion to Strike.

By Order entered February 23, 2006, the Commission took the following actions: (1) denied PennDOT's Motion to Strike the Amended Exceptions of the City and the Township; and (2) assigned the proceeding to the Office of Administrative Law Judge for a determination of the issue of responsibility for snow and ice removal on the relevant Bridge. PennDOT filed the instant Petition with reference to that Order as above noted.

Discussion

PennDOT's Petition for Reconsideration

The Code establishes a party's right to seek relief following the issuance of our final decisions pursuant to Subsections 703(f) and (g) of the Code, 66 Pa. C.S. § 703(f) and (g), relating to rehearings, rescission and amendment of orders. Such requests for relief must be consistent with Section 5.572(b) of our Regulations, 52 Pa. Code § 5.572(b), relating to petitions for relief following the issuance of a final decision. The standards for a petition for relief following the issuance of a final decision were addressed in *Duick v. PG&W*, 56 Pa. PUC 553 (1982) (*Duick*).

Duick held that a petition for rehearing under Subsection 703(f) of the Code must allege newly-discovered evidence not discoverable through the exercise of due diligence prior to the close of the record. *Duick* at 558. A petition for reconsideration

under Subsection 703(g), however, may properly raise any matter designed to convince us that we should exercise our discretion to amend or rescind a prior Order, in whole or in part. Furthermore, such petitions are likely to succeed only when they raise “new and novel arguments” not previously heard or considerations which appear to have been overlooked or not addressed by us. *Duick* at 559.

We note that, pursuant to 66 Pa. C.S. § 703(g) and 52 Pa. Code § 5.572, our power to modify or rescind final orders is limited to certain circumstances. A petition to modify or rescind a final Commission order may only be granted judiciously and under appropriate circumstances, because such an order will result in the disturbance of final orders. *City of Pittsburgh v. Pennsylvania Department of Transportation*, 490 Pa. 264, 416 A.2d 461 (1980); *City of Philadelphia v. Pa. PUC*, 720 A.2d 845 (Pa. Cmwlth. 1998); and *West Penn Power Company v. Pa. PUC*, 659 A.2d 1055 (Pa. Cmwlth. 1995).

In its Petition, PennDOT contends that the Recommended Decision made a clear, just and reasonable recommendation as to the allocation of snow, ice and debris removal from the relevant bridge sidewalks. PennDOT is to remove snow, ice and debris from the roadway, and the affected municipalities are to remove snow, ice and debris from the sidewalks. (Petition ¶¶ 10, 11).

On August 31, 2005, the City and the Township filed Exceptions to the Recommended Decision, requesting an enlargement of time within which to complete the requested repairs to the Lititz Pike bridge sidewalk. PennDOT did not oppose this request. On October 31, 2005, the City and the Township filed Amended Exceptions to the Recommended Decision. The Amended Exceptions requested, *inter alia*, that the Commission specify in its order that PennDOT was not to plow any snow onto the sidewalks of both bridges.

In our Order entered on February 23, 2006, we concluded that “there remain significant unresolved issues in this proceeding.” (Order at 8). We remanded the case for further action by the Office of Administrative Law Judge. In the instant Petition, PennDOT requests that we reconsider that remand.

On review of the instant Petition, we find it to be meritorious. The only issue which could be considered on remand would be the City and the Township’s last minute request for the Commission to micromanage PennDOT’s plowing operations, something the Commission has not previously done. *Millcreek Township v. Pa. PUC*, 753 A.2d 324 (Pa. Cmwlth. 2000); *Tredyffrin Township v. Pa. PUC*, 539 A.2d 925 (Pa. Cmwlth. 1988); *In Re: Pennsylvania Department of Transportation*; 70 Pa. PUC 103 (1989) (all the cited cases allocating snow, ice and debris removal from roadways to the highway owner and allocating snow, ice and debris removal to the local municipalities, but not dictating the manner or specifics of such maintenance).

Accordingly, we find that the instant Petition meets the evidentiary standards outlined in *Duick* in that it raises considerations which appear to have been overlooked or not addressed by us. The issues in this case have been litigated and addressed, and thus returning this matter to the ALJ at this point is unnecessary. Additionally, defining PennDOT’s maintenance responsibilities down to minute levels would invite the opportunity for error and omission, and set a bad precedent. Accordingly, for the above-outlined reasons, we will grant the instant Petition and reconsider our Order of February 23, 2006. We now proceed to consideration of the other documents in this proceeding.

PennDOT's Motion to Strike Amended Exceptions

Before we consider the ALJ's Recommended Decision and the Exceptions thereto, we must dispose of PennDOT's Motion to Strike the Amended Exceptions of the City and the Township.

The City initially filed Exceptions to the Recommended Decision herein on August 31, 2005, requesting an enlargement of time within which to complete the requested repairs to the relevant bridge sidewalk.

On October 31, 2005, the City and the Township filed Amended Exceptions to the Recommended Decision. The Amended Exceptions request that the Commission clarify in its order that PennDOT not plow any snow onto the sidewalks on both bridges, because that would increase the amount of snow which the City and the Township have to remove from the sidewalks. PennDOT filed a Motion to Strike the Amended Exceptions (Motion to Strike) on November 10, 2005. The City and the Township filed an Answer to the Motion to Strike on November 30, 2005.

As outlined above, we denied PennDOT's Motion to Strike in our Order entered February 23, 2006. We now conclude that we acted erroneously in denying PennDOT's Motion to Strike. On reconsideration, we shall grant PennDOT's Motion to Strike, due to two major considerations.

Initially, we note that amendment of exceptions is not allowed under the regulations on practice and procedure before the Commission. Exceptions are not pleadings, and the applicable regulations only allow for amendments to pleadings. Under Section 5.1 of our Regulations, 52 Pa. Code § 5.1, the Commission considers the following documents to be pleadings: applications, protests, formal complaints, answers,

rules/orders to show cause, petitions and preliminary motions. Under Section 5.91-94, amendment to those pleadings is allowed. Exceptions, however, are governed by a separate provision, Section 5.533 of our Regulations, which makes no allowance for amendments.

We also reject the Amended Exceptions on their merits. While we understand that some snow from plowing may end up on the sidewalks, this situation exists along thousands of miles of highways in the Commonwealth and must be dealt with by the sidewalk maintainer. Moreover, requiring PennDOT to avoid pushing or plowing snow on the sidewalk could compromise traffic safety, if the proposed restriction forces PennDOT to pave overly narrow travel lanes. In general, the main priority of PennDOT must be to clear travel lanes for vehicular traffic.

Accordingly, for the above-outlined reasons, PennDOT's Motion to Strike the Amended Exceptions is granted, and those Exceptions are stricken from the record.

ALJ's Recommended Decision and Exceptions thereto

In his Recommended Decision, ALJ Cocheres reached Findings of Fact Nos. 1-99 on the Fruitville Pike Bridge (R.D. at 3-11) and Findings of Fact Nos. 63-99 on the Lititz Pike Bridge (R.D. at 12-17). The ALJ also reached Conclusions of Law Nos. 1-3 (R.D. at 20-21). We shall adopt and incorporate herein by reference the ALJ's Findings of Fact and Conclusions of Law unless they are either expressly or by necessary implication overruled or modified by this Opinion and Order.

Initially, we are reminded that we are not required to consider expressly or at great length each and every contention raised by a party to our proceedings. *University of Pennsylvania, et al. v. Pa. PUC*, 485 A.2d 1217, 1222 (Pa. Cmwlth. 1984). Any

exception or argument that is not specifically addressed herein shall be deemed to have been duly considered and denied without further discussion.

Exceptions of the City

The City objects to that portion of the Recommended Decision which requires the City to complete all repairs to the sidewalk and create a smooth walking surface on the bridge carrying S.R. 222 (Lititz Pike) within six months of receipt of the Commission's Order. (Ordering Paragraph No. 5; R.D. at 22). The City avers that, because of the budgetary process, the funds for the repairs cannot be appropriated and the work completed within the recommended time period. The City requests that the time period be enlarged to one year from the receipt of the Commission's Order in this proceeding. (City's Exc. at 1-2).

PennDOT has no objection to the grant of the City's request. On review of the City's Exceptions, we conclude that they are meritorious. We will enlarge the time to afford the City one year from the receipt of the Commission's Order to complete the necessary work. We note that the City intends to complete the necessary work before the 2006-2007 winter season. The City's Exceptions are granted.

Conclusion

We have carefully reviewed the record as developed in this proceeding, including the ALJ's Recommended Decision, the Exceptions filed thereto, the Amended Exceptions filed thereto and PennDOT's Petition for Reconsideration. Premised upon our review of the record evidence, we conclude that PennDOT's Petition for Reconsideration is meritorious, and it will be granted. The City's Exceptions are meritorious, and they will be granted. The Amended Exceptions have been stricken from

the record. Accordingly, the ALJ's Recommended Decision will be adopted, as modified by this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Petition for Reconsideration and Clarification of Commission Order entered herein on February 23, 2006, filed by Pennsylvania Department of Transportation, is granted.
2. That the Motion to Strike the Amended Exceptions of the City of Lancaster and Manheim Township, filed by Pennsylvania Department of Transportation on November 10, 2005, is granted.
3. That the Recommended Decision of Administrative Law Judge Louis G. Cocheres issued on August 17, 2005, is adopted as modified by this Opinion and Order.
4. That the Exceptions filed by the City of Lancaster on September 1, 2005, are granted.
5. That each of the involved non-carrier utilities shall bear 100% of their respective costs for completion of all necessary work done to alter or relocate their facilities to accommodate construction of the new bridge carrying S. R. 0072, Section 006 (Fruitville Pike) over the tracks of National Railroad Passenger Corporation (AAR No. 518 172 T) in the City of Lancaster and Manheim Township, Lancaster County.
6. That, upon completion of the highway improvement project and its opening to public use, the non-carrier utilities involved, each, at its sole cost and expense,

shall furnish all material and do all work necessary to maintain their respective facilities at the subject crossing, all in a safe and satisfactory condition.

7. That the Complaint of *Susan Wood versus National Railroad Passenger Corporation* at Docket No. C-20042702 is hereby sustained.

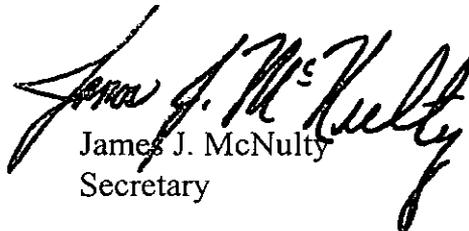
8. That Manheim Township shall furnish all material and do all work necessary to maintain in a safe condition, remove debris and promptly remove snow and ice from the sidewalk of the new bridge carrying S. R. 0072, Section 006 (Fruitville Pike) over the tracks of National Railroad Passenger Corporation (AAR No. 518 172 T) in the City of Lancaster and Manheim Township, Lancaster County.

9. That, within one year of receipt of the instant Opinion and Order, the City of Lancaster shall complete all repairs to the sidewalk and create a smooth walking surface on the bridge carrying S.R. 222 (Lititz Pike) over the tracks of National Railroad Passenger Corporation in the City of Lancaster and Manheim Township, Lancaster County and, thereafter, the City of Lancaster shall furnish all material and do all work necessary to maintain in a safe condition, remove debris and promptly remove snow and ice from the sidewalk of the Lititz Pike Bridge.

10. That the City of Lancaster shall report the date of actual completion of the work and certify to this Commission's Secretary, Bureau of Transportation and Safety, Pennsylvania Department of Transportation and Susan Wood that the work was

completed satisfactorily in accordance with the instant Opinion and Order. Upon receipt of certification, the Secretary shall mark the proceedings as Docket Nos. A-00117798 and C-20042702 closed.

BY THE COMMISSION,


James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: April 20, 2006

ORDER ENTERED: APR 24 2006