

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Whitehall Township

v.

R. J. Corman Railroad Company

DOCUMENT
FOLDER C-20054822

**ORDER GRANTING RECONSIDERATION,
RESCINDING INTERIM ORDER DATED
NOVEMBER 20, 2006, AND CLOSING THE RECORD**

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I. INTRODUCTION

On November 20, 2006, an Interim Order was issued in this matter which reopened the record for the admission of additional evidence, pursuant to 52 Pa. Code §§5.404(a) and 5.571(d). In that Interim Order, I stated that an engineering study was needed to address the cause of the retaining wall's deterioration, including any curbing and drainage deficiencies which were contributing to the deterioration. The study was also to address remediation and costs. I concluded that it would not be reasonable to order repairs and to allocate repair costs without this additional information. The Pennsylvania Department of Transportation (Department) and the Law Bureau had advocated for the engineering study in their respective briefs.

I also determined in the Interim Order that it would be reasonable to require the Department to provide this study, at its initial cost and expense, within six (6) months, or by May 21, 2007. I provided the opportunity for other parties to evaluate the study and present evidence in opposition to its findings and conclusions at a hearing to be scheduled at a later time. I indicated that the final allocation of these costs and expenses, as well as other costs necessary to repair the retaining wall, would be considered as part of the Recommended Decision to be issued in this matter. All parties were directed to cooperate with the Department to enable it to prepare and

complete its study. The parties were further admonished to notify me immediately if the condition of the retaining wall deteriorated to the point that an emergency situation had been created.

On December 1, 2006, the Department filed a Petition for Reconsideration of the Interim Order dated November 20, 2006 (Petition for Reconsideration).¹ In support of reconsideration, the Department raised five (5) issues: (1) the Respondent R.J. Corman Railroad Company's (RJ Corman) motion to dismiss on the basis of jurisdiction was still pending and it would not be reasonable to require any party to bear additional cost when that issue was outstanding; (2) the Complainant Whitehall Township, as the party with the burden of proof, should bear the costs of the additional study; (3) the assignment of even initial study costs to the Department was unreasonable and unsupportable because Lehigh Avenue, which is supported by the retaining wall, was deleted from the State Highway System in 1976 and the Department no longer has responsibility for the road; (4) there are significant budgetary and other constraints involved with potential funding sources; and (5) there are additional time constraints as the Department does not have in-house staff to perform the study and it would have to be outsourced. The Department estimated that, if it was still ordered to perform the study, it would need eighteen (18) months rather than six (6) months. It asserted that another party that did not have similar constraints may be in a better position to perform the study in the time period provided by the Interim Order.

On or about December 7, 2006, Whitehall Township (Complainant or Township) filed an Answer in Opposition to Petition for Reconsideration (Township Answer). The Township supported the Interim Order and disagreed with the Department's contentions that the initial costs of the engineering study should be placed upon the Township as the party with the burden of proof. It referenced, in support of its position, the testimony of Department witness Jack W. Hubbard, who testified that an engineering study would be critical to any repair plan, and contrasted that with the Township's witness, who testified that there was no drainage problem requiring a study. It asserted

¹ While the Petition for Reconsideration was addressed to the "Court", and it is presumed that the Department meant "Commission," the Petition should have been addressed to the presiding officer as the ruling from which reconsideration was sought was an interim order in a case pending before an administrative law judge.

an inability to admit or deny the Department's allegations about funding difficulties and timing constraints.

On December 11, 2006, RJ Corman filed an Answer to the Petition for Reconsideration (RJ Corman Answer). In its Answer, RJ Corman agreed with the Department that the issue of subject matter jurisdiction should be decided before any party to the proceeding would be required to perform additional work and/or present additional testimony. It averred that without subject matter jurisdiction, the ALJ and the Commission would not have the requisite statutory authority to direct any party to perform work associated with that section of the retaining wall at issue in this proceeding. It further averred that the question of jurisdiction was a matter of law and that no further litigation was required to decide that issue. RJ Corman also agreed with the Department that the Township should bear the cost of supplementing the record and that the Department's maintenance responsibility for the road ended when Lehigh Avenue was deleted from the State Highway System in 1976. Similar to the Township, RJ Corman asserted an inability to admit or deny the Department's allegations about funding difficulties and timing constraints.

On December 12, 2006, Law Bureau provided a letter to me which indicated that it would not be submitting a response to the Department's Petition for Reconsideration. However, Law Bureau indicated that it did not object to the eighteen (18) month timetable proposed by the Department if it is determined that the Department should provide the engineering study.

The County of Lehigh, the only other party to this case, indicated to me that it was not going to be filing a response to the Petition for Reconsideration. As all parties have now filed responses or have indicated that they would not be filing a response, the matter is now ready for a ruling.

II. DISCUSSION

The Commission has generally used the standards set forth in Duick v. PG & W, 56 PA PUC 553 (1982) (Duick) in determining whether to grant reconsideration under 66 Pa. C.S.

§703(g). In Duick, it was determined that petitions for reconsideration could properly raise any matter designed to convince the Commission that it should exercise its discretion to amend or rescind a prior order, in whole or in part. However, such petitions would be likely to succeed only when they raised “new and novel arguments” not previously heard or considerations which appear to have been overlooked or not addressed.

In its Petition for Reconsideration, the Department raised a number of issues which have not previously been heard and were not addressed. Therefore, I find that the Department has met the Duick standards and that reconsideration of the Interim Order should be granted. Upon reconsideration, and in light of the delays inherent in requiring an interim engineering study, I have concluded that the Interim Order should be rescinded.

First of all, I have considered the Department’s contention, joined in by RJ Corman, that it is premature to require any party to bear additional cost when the jurisdictional issue is outstanding. RJ Corman had made an oral motion to dismiss for lack of subject matter jurisdiction on the record at the June 29, 2006 hearing. I had intended to address that issue in my Recommended Decision and had requested that the parties address the matter in their briefs. However, the Department and the Law Bureau, in their respective briefs, had advocated for an engineering study. I considered those views and determined that I needed further information on the drainage issue in order to render a full and complete Recommended Decision on the issue of costs and cost allocation; hence, the Interim Order was issued. I now agree that the jurisdictional question should be addressed either before or simultaneously with any assignment of additional costs.

Secondly, the Department raised issues concerning burden of proof and the reasonableness of assigning initial costs when the road supported by the retaining wall was deleted from the State Highway System. These issues go to the merits of the case and if I should decide these issues prior to assigning initial costs for the engineering study, and decide the jurisdictional issue, I would be deciding a considerable part of what would be addressed in the Recommended Decision.

Thirdly, the Department has raised significant budgetary and other issues related to funding, and has requested eighteen (18) months to perform the study. No party has challenged the Department's assertions that finding public funds for the project would be problematic and time-consuming.² However, at the end of eighteen (18) months, I would only have an engineering study about the drainage system and no repairs to the retaining wall. I was of the understanding that the Department had in-house personnel which could perform the study, but the Department has indicated that the study would have to be outsourced, and no party has challenged that assertion.

My preferred course of action would have been to issue one Recommended Decision which addressed all cost issues. I now realize that the better course is to issue a Recommended Decision which addresses the jurisdictional issue and initial costs, including any additional study requirements, and to reserve the final cost allocation until a subsequent phase after the retaining wall deterioration has been addressed and repaired. In the interim, the parties are under a continuing obligation to notify me immediately if the condition of the retaining wall deteriorates to the point that an emergency situation has been created.

I will also close the record on the issue of initial costs, and decide these costs on the basis of the existing record.

III. ORDERING PARAGRAPHS

THEREFORE,

IT IS ORDERED:

² I note that ability to pay is not relevant or determinative of the issue of cost allocation in rail highway crossing cases. City of Chester v. Pa. P.U.C., 773 A.2d 1280 (2001), alloc. den., 788 A.2d 379 (2001): My decision to rescind the Interim Order is instead motivated by what will likely secure the speediest resolution of this matter, in the interest of the traveling public.

1. That the Petition for Reconsideration, filed by the Pennsylvania Department of Transportation, concerning the Interim Order Reopening The Record For Admission Of Additional Evidence, issued November 20, 2006 in this matter, is hereby granted.

2. That, upon reconsideration, the Interim Order Reopening The Record For Admission Of Additional Evidence, issued November 20, 2006, is rescinded with the exception that the parties continue to be under an obligation to inform the presiding officer immediately if the condition of the retaining wall deteriorates to the point that an emergency situation has been created.

3. That the record of this phase of the proceeding regarding initial costs is now closed, and a Recommended Decision will be forthcoming on the basis of the existing record.

Date: December 20, 2006

Kandace F. Melillo
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Administrative Law Judge

C-20054822 WHITEHALL TOWNSHIP v. R J CORMAN RAILROAD COMPANY

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