

PUC-77 Rev.
304007

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Uniform Cover and Calendar Sheet

1. <u>REPORT DATE:</u> April 21, 2009	2. <u>BUREAU AGENDA NO.</u> 1156151-OSA
3. <u>BUREAU:</u> Office of Special Assistants	
4. <u>SECTION(S):</u>	5. <u>PUBLIC MEETING DATE:</u> April 30, 2009
6. <u>APPROVED BY:</u> Director: C. W. Davis 7-1827 Mgr/Spvr: K. Sophy 7-8108 Legal Review:	
7. <u>PERSONS IN CHARGE:</u> M. Knezevich 7-1828	9. <u>EFFECTIVE DATE OF FILING:</u>
8. <u>DOCKET NO.:</u> C-00004202	

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

(a) White Haven Borough (Borough) v. Reading, Blue Mountain & Northern Railroad (Railroad)

(b) On September 18, 2000, the Borough filed a Complaint against the Railroad concerning two areas along the Railroad's tracks. After preliminary proceedings, ALJ Jandebaur issued a Recommended Decision in November of 2007 in which she recommended, *inter alia*, that the Railroad should be directed to do the necessary work for the replacement of the pertinent retaining wall. Exceptions were filed to the Recommended Decision. By Order entered on February 19, 2008, the Commission adopted the ALJ's Recommended Decision, as modified, and denied the Railroad's Exceptions thereto. On August 1, 2008, the Railroad filed the instant Petition for Reconsideration (Petition), seeking reconsideration of the February 19, 2008 Order. The Borough filed a Reply to the Petition.

(c) The Office of Special Assistants recommends that the Commission adopt a draft Opinion and Order thereby denying the Petition.

11. **MOTION BY:** Commissioner Chm Cawley
SECONDED: Commissioner VC Christy

Commissioner Pizzingrilli- Yes
Commissioner Gardner - Yes
Commissioner Powelson - 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 30, 2009

C-00004202

REBECCA SATRYAN
1608 BELASCO AVENUE
PITTSBURGH PA 15216

**DOCUMENT
FOLDER**

White Haven Borough
v.
Reading, Blue Mountain & Northern Railroad Company

To Whom It May Concern:

This is to advise you that the Commission in Public Meeting on April 30, 2009 has adopted an Opinion and Order in the above entitled proceeding.

An Opinion and Order has been enclosed for your records.

Very truly yours,

James J. McNulty
Secretary

encls
cert. mail
JF

38

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held April 30, 2009

Commissioners Present:

James H. Cawley, Chairman
Tyrone J. Christy, Vice Chairman
Robert F. Powelson
Kim Pizzingrilli
Wayne E. Gardner

White Haven Borough

C-00004202

v.

Reading, Blue Mountain & Northern
Railroad Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Commission for disposition is a Petition for Reconsideration (Petition)¹ filed by Reading, Blue Mountain and Northern Railroad Company (Railroad) on August 1, 2008, relative to the above-captioned proceeding. On August 15, 2008, White Haven Borough (Borough) filed a Reply to the Petition.

¹ Although the Railroad styled its Petition a "Petition to Reopen the Record, or in the Alternative, Grant Leave to File an Appeal Nunc Pro Tunc," it is actually a Petition for Reconsideration, since a final Order has been issued in this case. We will accordingly consider the Petition under the standards for reconsideration.

History of Proceeding

The history of this proceeding dates back to September 18, 2000, when the Borough filed a Formal Complaint against the Railroad concerning two specific areas along the Railroad's tracks. One of the areas involved the railroad trestle bridge at Susquehanna Street and the associated retaining walls.

After hearings, the Recommended Decision of ALJ Richard Lovenwirth was issued on October 10, 2001. By Opinion and Order entered February 8, 2002, the Commission, *inter alia*, sustained the Complaint relative to the Susquehanna Street below-grade crossing and associated retaining walls. That Opinion and Order also directed, in pertinent part, as follows:

5. [The Railroad] shall, within nine months of the entry of this Opinion and Order, furnish all material and do all work necessary to cut and remove all trees growing around the Susquehanna Street Bridge and between its tracks and the retaining walls along the track approaching the bridge.

* * *

9. [The Railroad] shall, within twelve months . . . perform an in-depth inspection and evaluation of the stone retaining walls along its tracks leading from the Susquehanna Street railroad bridge and prepare and submit to this Commission and each party of record a written report of its in-depth inspection and evaluation of the retaining walls including an evaluation of the stability of the stone walls, locations of failures or potential failures, reasons for failures or bulges in the walls, recommendations for prevention of future problems and recommendations for any necessary repairs including cost estimates for said work.

* * *

19. That, upon the submission of the in-depth inspection and load rating analysis report of the bridge and the in-depth inspection and evaluation report of the retaining walls, a further hearing be held to consider the reports and their recommendations and any other issues involved.

The Railroad employed an engineer, Mr. Timothy S. Benner, P.E., to inspect the retaining wall and to make recommendations as to how to maintain the integrity of the wall during its remaining service life. The engineer's report (the Benner Report), dated June 21, 2004, was provided to the Railroad and to the other Parties of record. The Benner Report indicated that the retaining wall was decrepit and in need of repair and/or replacement.

When efforts to resolve the issues proved unsuccessful, the Commission's Law Bureau Prosecutory Staff (Prosecutory Staff), on behalf of the Bureau of Transportation and Safety (BTS), submitted a Letter to ALJ Jandebour which averred that the Railroad had failed to make the necessary repairs in order to comply with the Commission's order. The Letter also recommended that a hearing be scheduled.

On October 18, 2006, a hearing was held attended by the Borough, Prosecutory Staff, PennDOT, and the Railroad. PennDOT was subsequently released from this proceeding with respect to the issues related to the retaining wall. Tr. at 103.

At the hearing, the Borough, Prosecutory Staff and the Railroad agreed that the retaining wall was the sole issue which needed to be addressed. The Borough and Prosecutory Staff agreed that the recommendations contained in the Benner Report had not been implemented and that the Railroad should immediately undertake to do the recommended work. The Railroad took the position that the retaining wall is sufficient as it stands and that continued monitoring is all that is necessary.

In her Recommended Decision, issued on November 8, 2007, the ALJ concluded, *inter alia*, that, within six months of the Commission's order herein, the Railroad should prepare complete and detailed construction plans for the replacement of the retaining wall and that the Railroad should, thereafter, be directed to do the necessary work at its sole cost and expense. R.D. at 19. Prosecutory Staff and the Railroad filed Exceptions to the Recommended Decision, and the Borough filed Reply Exceptions to the Exceptions of the other Parties.

By Order entered herein on February 19, 2008, the Commission, *inter alia*, adopted the Recommended Decision of ALJ Jandebaur, as modified, and denied the Railroad's Exceptions thereto. The Railroad filed the instant Petition on August 1, 2008, as noted above.

Discussion

The Public Utility Code (Code) establishes a party's right to seek relief following the issuance of our final decisions pursuant to Subsections 703(f) and (g), 66 Pa. C.S. §§ 703(f) and 703(g), relating to rehearings, as well as the rescission and amendment of orders. Such requests for relief must be consistent with Section 5.572 of our Regulations, 52 Pa. Code § 5.572, relating to petitions for relief following the issuance of a final decision. Section 5.572(a), 52 Pa. Code § 5.572(a) provides that:

Petitions for rehearing, reargument, reconsideration, clarification, rescission, amendment, supersedeas or the like shall be in writing and shall specify, in numbered paragraphs, the findings or orders involved, and the points relied upon by petitioner, with appropriate record references and specific requests for findings or orders desired.

The standards for granting a Petition for Reconsideration were set forth in *Duick v. Pennsylvania Gas and Water Company*, 56 Pa. PUC 553, 1982 Pa. P.U.C.

LEXIS 4 (1982). *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. *Duick* at 559. A petition seeking reopening of the record (more properly one for rehearing) may be entertained as a petition for reconsideration, under the provisions of 66 Pa C.S. § 703(g), if the newly discovered evidence was not in existence, or was not discoverable through the exercise of due diligence, prior to the expiration of the time within which to file a petition for rehearing, under the provisions of 66 Pa C.S. § 703(f). *Id.*

Our Order entered February 19, 2008, included Ordering Paragraph No. 4, as follows:

4. That Reading Blue Mountain & Northern Railroad Company shall, at its sole cost and expense, replace the 171' retaining wall approaching the Susquehanna Street Bridge, in White Haven Borough, Pennsylvania. That work on the retaining wall shall be completed within one (1) year of the date of entry of the instant Opinion and Order.

Opinion and Order at 8.

We note that the Railroad's current counsel entered his appearance on behalf of the Railroad on or about July 30, 2008. The instant Petition was filed on August 1, 2008.

We also note that, per the terms of our Order entered herein on February 19, 2008, the pertinent work was to be completed within one year of the date of entry of the Order, that is, the work was to be completed by February 19, 2009.

In its Petition, the Railroad asserts that there are various substantive and procedural errors with respect to the Commission's Order of February 19, 2008. With respect to the Railroad's allegation that substantive errors were committed, we conclude that the Commission's Order with respect to the relevant work was well supported by the facts on record. The record reflects a sound and thorough analysis and basis for decision. Cost and alternatives to the replacement of the retaining wall were considered. Also considered was the testimony of the Borough's engineer Mr. Yanuzzi and the Railroad's engineer Mr. Benner.

The Railroad also asserted that procedural errors were committed in the service of the February 19 Order. On review of that assertion, we conclude that the Order was properly served upon the Railroad, and that the statutory period of thirty days has lapsed. Specifically, we note that Mr. Gregory F. Lepore, Esquire, entered his appearance for the Railroad on September 14, 2005, and noted that all service on and communications to the Railroad in this proceeding should be directed to him at his address in Lansdale, Pennsylvania. Although subsequent filings with the Commission listed a different address for Mr. Lepore, he never directed the Commission to redirect its communications to the Railroad to that address. The Railroad, through its attorneys, failed to follow Pennsylvania's Rules of Civil Procedure by duly withdrawing the appearances of its former attorneys when new counsel was obtained and became counsel of record.

Accordingly, we find no basis on which to grant reconsideration in this proceeding. Additionally, we note that the work at issue herein was originally scheduled

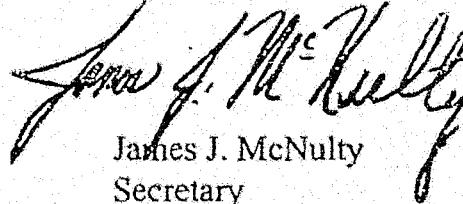
to be completed by February 19, 2009, per the terms of our Order entered on February 19, 2008, *supra*. We will therefore direct the Railroad to expeditiously complete the relevant work by August 31, 2009, or face the risk of sanctions, pursuant to Section 3301 of the Public Utility Code, 66 Pa. C.S. § 3301. For the foregoing reasons, we will deny the instant Petition; **THEREFORE,**

IT IS ORDERED:

1. That the Petition for Reconsideration, which was filed by Reading, Blue Mountain and Northern Railroad herein, on August 1, 2008, is denied.

2. That Reading, Blue Mountain and Northern Railroad complete the work which had been assigned to it per our Order entered herein on February 19, 2008, by August 31, 2009.

BY THE COMMISSION,



James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: April 30, 2009

ORDER ENTERED: April 30, 2009