

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Whitehall Township	:	
	:	
v.	:	C-20054822
	:	
RJ Corman Railroad Company	:	

RECOMMENDED DECISION

Before
Joel H. Cheskis
Administrative Law Judge

INTRODUCTION

This Decision recommends that the Joint Petition of Settlement be approved in its entirety without modification because it is in the public interest and is supported by substantial evidence. This Decision finds that the settlement complies with relevant sections of the Public Utility Code regarding convenience and safety at railroad crossings and is consistent with Commission regulations promoting settlements.

HISTORY OF THE PROCEEDING

On July 26, 2007, the Pennsylvania Public Utility Commission (Commission) entered an Opinion and Order at Docket Number C-20054822 adopting a Recommended Decision that directed the Pennsylvania Department of Transportation (PennDOT) to perform certain work, at its initial expense, regarding a retaining wall located underneath the Race Street Bridge along South Lehigh Avenue, West Catasauqua, Whitehall Township. The Order further stated that, upon completion of the repairs, and upon receipt of a written request by PennDOT, a proceeding will be scheduled for a hearing to receive evidence relative to the final allocation of

costs incurred by PennDOT, assignment of responsibility for future maintenance and any other matters relevant to this proceeding.

On June 19, 2015, PennDOT filed with the Commission a Petition Requesting a Hearing for the Purpose of Allocating Future Maintenance and Costs Associated with the Commission's Opinion and Order Entered July 26, 2007 (Petition). In its Petition, PennDOT noted that the Commission previously allowed it to request the final allocation of costs incurred pursuant to the July 26, 2007 Order, as well as assignment of responsibility for future maintenance and any other matters relevant to the proceeding. PennDOT added that it is not willing to assume the costs initially incurred in complying with the July 26, 2007 Order or future maintenance for the retaining wall. PennDOT averred that it is just and reasonable for the Commission to allocate future maintenance of the retaining wall and all associated costs to Whitehall Township. PennDOT concluded the Petition by requesting that a hearing be scheduled to determine the allocation of future maintenance of the retaining wall and all costs incurred by the Department as a result of the July 26, 2007 Order.

On November 17, 2015, the Commission issued a Notice scheduling an Initial Prehearing Conference for this matter for Tuesday, December 22, 2015 and assigning me as the Presiding Officer. A Prehearing Conference Order was issued on November 20, 2015 setting forth various requirements that would govern the Initial Prehearing Conference. On December 10, 2015, at the request of counsel, the Initial Prehearing Conference scheduled for Tuesday, December 22, 2015 was continued until January 26, 2016. The Initial Prehearing Conference scheduled for January 26, 2016, however, was cancelled due to inclement weather and rescheduled for Wednesday, February 10, 2016.

The Initial Prehearing Conference convened on February 10, 2016, as scheduled. The following counsel was present: Nicholas Mertens, Esquire, on behalf of PennDOT; Rhonda Daviston, Esquire, on behalf of the Commission; Thomas Caffrey, Esquire on behalf of Lehigh County; and Charles Fonzone, Esquire, on behalf of Whitehall Township.

During the Initial Prehearing Conference, various procedural matters were discussed. A Scheduling Order dated February 11, 2016 was issued memorializing those procedural matters. Additionally, an Order Directing Publication was issued on February 25, 2016 directing PennDOT to publish notice of the July 12 and 13, 2016 hearing in a newspaper of general circulation in the county where the crossing is located once a week for two consecutive weeks immediately prior to the hearing date, pursuant to Section 3.361(b) of the Commission's regulations.

On March 15, 2016, counsel for PennDOT filed a Petition for a Protective Order asserting that a protective order is needed because any and all inspection reports, studies and/or load rating analyses for the retaining wall should be treated under seal. No other party objected to the petition. As a result, the petition was granted via order dated March 22, 2016.

On March 24, 2016, counsel for PennDOT requested that this matter be referred to the Commission's Mediation Unit for mediation review. PennDOT noted that all parties agreed with this request. PennDOT further noted that it is conducting an updated inspection of the retaining wall that is the subject of this proceeding and that an up to date inspection report will give the parties a more recent picture of the present conditions of the wall. PennDOT added that such information will be helpful during the mediation process and that the litigation schedule should be postponed or continued while the case is being considered for mediation. PennDOT's request for a suspension of the litigation schedule and for the matter to be referred to the Commission's mediation unit for mediation review was granted via order dated March 28, 2016. The parties were directed to provide a status report within 90 days of the order indicating whether mediation will continue or a new litigation schedule should be established.

Two additional requests for a suspension of the litigation schedule were subsequently made by the parties so that settlement discussions could continue. Both requests were granted.

On December 29, 2016, I inquired with the parties whether a settlement of all issues would be achieved. In response, the parties noted that, although settlement was still

possible, several questions remain and additional information exchange was necessary. Therefore, to avoid this case from lingering, a hearing notice was issued January 2, 2017 scheduling a Further Prehearing Conference for Tuesday, January 24, 2017 in Hearing Room 3 of the Commonwealth Keystone Building in Harrisburg so that a litigation schedule can be re-established for this case. As a result, Prehearing Conference Order #2 was issued on January 3, 2017 confirming the establishment of the Further Prehearing Conference. Pursuant to Prehearing Conference Order #2, Whitehall Township, PennDOT, Lehigh County and the Commission submitted further prehearing memoranda on January 17, 2017.

The Further Prehearing Conference convened on January 24, 2017, as scheduled. Again, the following counsel was present: Nicholas Mertens, Esquire, on behalf of PennDOT; Rhonda Daviston, Esquire, on behalf of the Commission; and, Thomas Caffrey, Esquire on behalf of Lehigh County. Chris Gittinger, Esquire, appeared on behalf of Whitehall Township.

During the Further Prehearing Conference, the parties agreed to the following procedural schedule:

All parties' pre-served written direct testimony	April 24, 2017
All parties' pre-served written rebuttal testimony	June 26, 2017
Evidentiary hearings in Harrisburg	July 25 th and 26 th , 2017

A discussion was also held regarding the need to publish notice of the evidentiary hearings. The parties were reminded that the Commission strongly encourages settlement and that, even though a litigation schedule has been established again for this matter, further efforts toward settlement are not precluded.

Scheduling Order #2 was issued on January 26, 2017 memorializing the various agreements made during the Further Prehearing Conference. Also on January 26, 2017, Order Directing Publication #2 was also issued directing Whitehall Township to publish notice of the hearing scheduled for July 25th and 26th, 2017 once a week for two consecutive weeks

immediately prior to the hearing in a newspaper of general circulation in Lehigh County. A Hearing Notice was issued by the Commission on January 30, 2017 formally establishing the evidentiary hearings for July 25th and 26th, 2017 in Hearing Room 3 in the Commonwealth Keystone building in Harrisburg.

Pursuant to Scheduling Order #2, the parties submitted the following pre-served testimony:

Whitehall Township

Direct Testimony of Carl P. Lagler, Jr. P.L.S.
Direct Testimony of John Rackus
Direct Testimony of Christopher S. Blechschmidt, P.E.

PennDOT

Direct Testimony of Rodney Rehnert
Direct Testimony of Kamlesh A. Ashar

Lehigh County

Direct Testimony of Rick Molchany

Commission

Direct Testimony of William Michael Sinick, P.E.

On June 20, 2017, counsel for PennDOT indicated that the parties were close to reaching a settlement in principal. As a result, PennDOT requested that the procedural schedule be modified so that the rebuttal testimony would be due on July 14, 2017, instead of June 26, 2017, to allow the parties time to finalize the settlement. No party opposed PennDOT's request and the request was informally granted via email. On July 11, 2017, counsel for PennDOT indicated that the settlement in principal had been reached and requested that the hearings scheduled for July 25th and 26th be cancelled. The request to cancel the hearing was again informally granted. A cancellation notice was issued on July 11, 2017 formally cancelling the hearing.

On July 24, 2017, a Joint Stipulation of Settlement (settlement) was submitted by PennDOT, Whitehall Township, Lehigh County and the Commission. Two exhibits were attached to the settlement. Also on July 24, 2017, the parties submitted joint proposed findings of fact, conclusions of law and ordering paragraphs, as well as a Joint Motion to Admit Written Testimony and exhibits into the formal evidentiary record. Finally, statements in support of the settlement were submitted by PennDOT, Lehigh County and the Commission.

The record in this proceeding closed on July 24, 2017, the date the settlement was submitted. For the reasons set forth below, the settlement will be recommended for approval in its entirety without modification because it is in the public interest and supported by substantial evidence. In addition, this Decision grants the Joint Motion to Admit Written Testimony and Exhibits into the formal evidentiary record submitted by the parties.

FINDINGS OF FACT

1. The crossing at issue in this proceeding is an above-grade crossing known as Race Street Bridge (SR 1004) that is a 386-foot, 4-span bridge carrying two lanes of motor vehicle traffic and one sidewalk over the Lehigh River and the former right-of-way of R.J. Corman Railroad Company. Commission St. 1 at 3.

2. The western abutment of the bridge is tied into a retaining wall on the left and right side of the bridge superstructure which is located in Whitehall Township. Commission St. 1 at 3.

3. The bridge and the retaining wall were constructed in 1910 by the Lehigh Valley Railroad Company. Commission St. 1 at 3; PennDOT St. 2 at 7.

4. In 1956, the bridge was reconstructed in which the roadway alignment at the western abutment in Whitehall Township was moved approximately 40 feet north of its original location and the retaining wall was raised to meet the new vertical alignment of Race Street and the adjoining Lehigh Avenue. Commission St. 1 at 3; PennDOT St. 2 at 7.

5. The retaining wall in dispute supports Lehigh Avenue (formerly state route 39093) and ties into the western abutment and wings of Race Street Bridge in Whitehall Township. Commission St. 1 at 3-4.

6. South Lehigh Avenue is a local road that runs from the north at Cherry Street to the south at Franklin Street in the West Catasauqua section of Whitehall Township and is a one-way street running north from Bridge Street and a two-way street running to the south of Bridge Street. PennDOT St. 2 at 3.

7. The daily volume of vehicular traffic on the Race Street Bridge is 18,527 vehicles. PennDOT St. 2 at 4.

8. South Lehigh Avenue is a township road that is constructed with a bituminous surface and has concrete curbing on both sides of the roadway. PennDOT St. 2 at 5.

9. The right of way width is 33 feet and narrows to 23 feet just beyond the area of the retaining wall. PennDOT St. 2 at 5.

10. A Drainage Design Feasibility Study concluded that the stormwater flows from both the roadway surface and within the drainage system have played a contributory role in the deterioration and damage to the structural retaining wall along South Lehigh Avenue. PennDOT St. 2 at 10.

11. The retaining wall is 538 feet long, including the abutment section. PennDOT St. 2 at 11.

12. PennDOT performed extensive repairs to the retaining wall. PennDOT St. 2 at 13-14.

13. The total cost to PennDOT to comply with the Commission's 2007 Order was \$1,825,807.97, including for the drainage design feasibility study, construction design work,

construction support services, right-of-way acquisition and construction work. PennDOT St. 2 at 16-18.

14. PennDOT Statement Number 2 is the Direct Testimony of Rodney Renhert and includes Exhibits A thru S. PennDOT St. 2.

15. PennDOT Statement Number 3 is the public version of the Direct Testimony of Kamlesh A. Ashar, P.E. and includes Exhibits T and V. PennDOT St. 3.

16. PennDOT Statement Number 3a is the proprietary version of the Direct Testimony of Kamlesh A. Ashar, P.E. and includes Exhibit U. PennDOT St. 3a.

17. Whitehall Township Statement Number 1 is the Direct Testimony of Carl P. Lagler, Jr., P.L.S. and includes Exhibits A-F and K. Whitehall St. 1.

18. Whitehall Township Statement Number 2 is the Direct Testimony of John Rackus and includes Exhibits G-I. Whitehall St. 2.

19. Whitehall Township Statement Number 3 is the Direct Testimony of Christopher D. Blechschmidt, P.E. and includes Exhibit J. Whitehall St. 3.

20. Lehigh County Statement Number 1 is the Direct Testimony of Rick Molchany and includes Exhibits 1-3. Lehigh St. 1.

21. Commission Statement Number 1 is the Direct Testimony of William Michael Sinick, P.E. Commission St. 1.

DISCUSSION

Legal Standard

In this case, the parties submitted a settlement of all issues. Commission policy promotes settlements. 52 Pa.Code § 5.231. Settlements lessen the time and expense the parties must expend litigating a case and at the same time conserve administrative resources. The Commission has indicated that settlement results are often preferable to those achieved at the conclusion of a fully litigated proceeding. 52 Pa.Code § 69.401. The focus of inquiry for determining whether a proposed settlement should be recommended for approval is not a “burden of proof” standard, as is utilized for contested matters. Pa. Pub. Util. Comm’n., et al. v. City of Lancaster – Bureau of Water, Docket Nos. R-2010-2179103, *et al.*, Opinion and Order (entered July 14, 2011) (Lancaster). Instead, the benchmark for determining the acceptability of a settlement or partial settlement is whether the proposed terms and conditions are in the public interest. *Id.*; *citing*, Warner v. GTE North, Inc., Docket No. C-00902815, Opinion and Order (entered April 1, 1996) (Warner); Pa. Pub. Util. Comm’n. v. CS Water and Sewer Associates, 74 Pa. PUC 767 (1991).

The decision of the Commission must be supported by substantial evidence. 2 Pa.C.S. § 704. "Substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm’n, 489 Pa. 109, 413 A.2d 1037 (1980); Erie Resistor Corp. v. Unemployment Comp. Bd. of Review, 194 Pa. Superior Ct. 278, 166 A.2d 96 (1961); and Murphy v. Comm., Dept. of Public Welfare, White Haven Center, 85 Pa. Cmwlth Ct. 23, 480 A.2d 382 (1984).

In addition, Section 2702 of the Public Utility Code provides that “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.” 66 Pa.C.S. § 2702(a). Similarly, Section 2704 provides:

The compensation for damages which the owners of adjacent property taken, injured, or destroyed may sustain in the construction, relocation, alteration, protection, or abolition of any crossing under the provisions of this part, shall, after due notice and hearing, be ascertained and determined by the commission. Such compensation, as well as the cost of construction, relocation, alteration, protection, or abolition of such crossing, and of facilities at or adjacent to such crossing which are used in any kind of public utility service, shall be borne and paid, as provided in this section, by the public utilities, municipal corporations, municipal authority or nonprofit organization authorized under section 2702(h) (relating to construction, relocation, suspension and abolition of crossings) concerned, or by the Commonwealth, in such proper proportions as the commission may, after due notice and hearing, determine, unless such proportions are mutually agreed upon and paid by the interested parties.

66 Pa.C.S. § 2704(a).

It is against this legal backdrop that the settlement is judged.

Terms of the Settlement

In the settlement submitted on July 24, 2017, Whitehall Township, Lehigh County, PennDOT and the Commission have agreed to resolve the June 19, 2015 Petition filed by PennDOT that originated this portion of the proceeding as follows (with original paragraph numbering maintained):

1. Township shall, at its sole cost and expense, furnish all material and perform all work necessary to maintain the portion of the Retaining Wall north of the Race Street abutment (from Retaining Wall stations 0+50N to 4+50N). See attached Exhibit "A" for a copy of the structure plans which identify the Retaining Wall stations.

a. Maintenance shall include performing repairs necessary to maintain the present condition of the Retaining Wall, as of the date of this Stipulation of Settlement entered into between the Parties on the 24th day of July, 2017.

2. Department shall, at its sole cost and expense, furnish all material and perform all work necessary to maintain the Race Street Bridge abutment and the portion of the Retaining Wall south of the

Race Street abutments (from Retaining Wall stations 0+88S to 0+50N). See attached Exhibit "A."

3. The Department hereby agrees to assume the costs of the repairs to the Retaining Wall performed in accordance with the Commission's Order entered July 26, 2007 and completed on October 28, 2014.

4. The Department hereby agrees to perform the inspections of the Retaining Wall, pursuant to Department Publication 238 and as updated, on a six (6) year inspection cycle. The last inspection occurred on March 29, 2016 and the date of the report is April 20, 2016.

a. The Department shall share the inspection reports with the Township. Such inspection reports may provide and list necessary and recommended repairs for the Retaining Wall. Any inspection reports of the Retaining Wall shall be kept confidential by the Township and shall not be provided to the public unless in compliance with a court order or in compliance with State or Federal law.

a. The Department shall provide the Township with the estimated costs for the inspection of the Retaining Wall. If the Township rejects the estimated costs for inspection of the Retaining Wall, it may hire its own inspector to perform inspection of the Retaining Wall. However, the inspector used by the Township shall be certified under the National Bridge Inspection Standards program or any other programs or certifications required by State or Federal Law.

b. When the Department performs an inspection of the Retaining Wall, the Township shall reimburse the Department for the costs associated with the Inspection of the Retaining Wall. Such costs shall be reimbursed within a reasonable timeframe of ninety (90) days.

c. In the interest of efficiency, the Department intends to incorporate the inspection of the Retaining Wall into the inspection of the Race Street Bridge. However, the Township shall only be responsible for the costs associated with the inspection of the Retaining Wall.

5. In the event of a failure of the Retaining Wall, from stations 0+50N to 4+50N, within twenty-four (24) years from the date of the completion of the repairs by the Department, October 28, 2014, the Department shall perform the necessary repairs or rehabilitation to restore the Retaining Wall to its condition as of the date of this Stipulation of Settlement. Furthermore, the Parties agree that:

a. In such an event, the Township shall enter into a reimbursement agreement with the Department and reimburse the Department for fifty percent (50%) of the agreed costs to repair or rehabilitate the Retaining Wall.

b. The Department's duty to conduct the necessary repairs or rehabilitation of the Retaining Wall shall only occur if the Township meets its maintenance obligations as set forth in Section One (1) above.

c. The term "failure" of the Retaining Wall, as used in this Section, is defined as wall rotation that has permitted slope failure and subsidence adjacent to nearby structures or roadways resulting in foundation damage or differential deflection between any sections or the entire wall out-of-plumb exceeds four (4) inches, or any other condition needing priority 0 maintenance work as defined and specified by the then present version of Department Publication 100A. A copy of the present version of Department Publication 100A is incorporated by reference herein as if fully set forth herein.

d. There were pictures shown at the Mediation session that exhibited the deterioration of the original concrete parapets. The representative from the Department said that they were occasioned by splash over from the street and cars driving by. See attached Exhibit "B" for representative photographs of some of these conditions. The Township insists that those areas be repaired prior to transfer. These areas of repairs are as listed on the most recent inspection report dated April 20, 2016.

e. The Department shall permit the Township to access the Department's right of way, for purposes of inspecting and maintaining the Retaining Wall, in compliance with the Department's publications, rules, and regulations.

f. Upon expiration of the twenty-four (24) year period provided in Section Five (5) above, October 28, 2038, the Township shall have sole maintenance responsibilities in compliance with Section One (1) of this Settlement.

6. Department shall, prior to turning maintenance responsibilities over to Whitehall Township pursuant to this Stipulation and any future Commission Order, perform repairs to the Retaining Wall as set forth in the Inspection Report dated April 20, 2016. A copy of said Inspection Report has been provided to all Parties in the subject proceeding. Additionally:

a. The Department shall, prior to turning maintenance responsibilities over to the Township pursuant to this Stipulation and any future Commission Order, conduct a Land Survey and mark the survey monuments near the Retaining Wall.

b. Upon completion of the survey and receipt of invoice from the Department, the Township shall reimburse the Department fifty percent (50%) of the costs for said survey. Such costs shall be reimbursed within a reasonable timeframe of ninety (90) days.

Settlement at 2-5. The settlement further notes that the parties have agreed to abide by the work responsibilities and financial obligations delineated in the settlement and that the settlement is contingent upon its approval and the issuance of a Commission Order accepting and approving the same. Id. at 6. As is typically the case, the settlement also provides that any party may request a hearing or withdraw from the settlement if the settlement is modified in anyway. Id.

Public Interest

1. Introduction

As noted above, it is the policy of the Commission to promote settlements. 52 Pa.Code § 5.231(a). The benchmark for determining the acceptability of a settlement or partial settlement is whether the proposed terms and conditions are in the public interest. Lancaster, Warner, supra. In the settlement, the parties stated that the public interest will be served by adopting this settlement because the settlement will save the parties time and expense they would incur further litigating this matter before the Commission, including eliminating any possibility of appeal from the Commission Order. The settlement further provides that adopting the settlement will further the statutory provisions of Section 2702 of the Public Utility Code regarding public safety and convenience. In addition, PennDOT, the Commission and Lehigh County each filed individual statements in support of the settlement articulating their reasons why they believe the settlement should be approved in its entirety without modification.

2. Position of the parties

In its statement in support of the settlement, PennDOT stated that the settlement is in the public interest because it addresses all of the issues involved in the litigation, namely the allocation of costs attributed to repair the retaining wall and drainage system, and the assignment of future maintenance responsibilities for the retaining wall. PennDOT added that the settlement will serve to protect the public safety because all safety issues involving the retaining wall have been resolved. PennDOT also noted that the settlement will save the parties and the Commission the time and expense that would otherwise be incurred in further litigating this matter, including the possibility of any appeal. PennDOT also recognized the Commission's policy to encourage settlements.

The statement in support of the settlement submitted by Lehigh County is identical to the statement in support of the settlement submitted by PennDOT.

The statement in support of the settlement submitted by the Commission is also identical to the statement in support of the settlement submitted by PennDOT, with the exception that the Commission also noted that adopting the settlement will further the statutory provisions regarding convenience and safety at railroad crossings and noting the conditions contained in the settlement.

Whitehall Township did not submit a statement in support of the settlement.

3. Disposition

Substantial record evidence demonstrates that the settlement submitted by PennDOT, Lehigh County, Whitehall Township and the Commission is in the public interest and supported by substantial evidence. Therefore, the settlement should be adopted in its entirety without modification.

Most significantly, as noted in the statements in support of the settlement submitted by the parties, the settlement is in the public interest because it addresses all the issues raised in the original petition filed by PennDOT that initiated this portion of the proceeding. PennDOT's original petition, filed on June 19, 2015, sought the allocation of future maintenance and costs associated with the retaining wall located underneath the Race Street Bridge along Sought Lehigh Avenue in Whitehall Township. PennDOT noted that it incurred the initial expense associated with the work performed but that it was no longer willing to assume those initial costs or future maintenance costs for the retaining wall. The settlement allocates the costs attributed to the repairs and rehabilitation of the retaining wall, including repairs to the South Lehigh Avenue drainage system and the assignment of future maintenance responsibilities for the retaining wall. As a result, the settlement is in the public interest because it addresses the underlying issues that gave rise to this proceeding.

Specifically, the settlement provides that Whitehall Township shall, at its sole cost and expense, furnish all material and perform all work necessary to maintain the retaining wall north of a certain demarcation and PennDOT will, at its sole cost and expense, furnish all material and perform all work necessary to maintain the bridge abutment and the portion of the retaining wall south of the demarcation. The settlement also includes significant detail regarding PennDOT's agreement to perform inspections of the retaining wall on a six-year inspection cycle, noting that the last inspection occurred on March 29, 2016. The settlement also includes significant detail regarding the parties' responsibilities in the event of a failure of the retaining wall. The parties are commended for providing such significant detail regarding the various responsibilities each has undertaken. Doing so will serve to protect the public safety.

Of note, the settlement provides that it is effective as of the last day upon which it is signed by any party. Although settlements are typically effective upon approval by the Commission, this settlement will be effective earlier. Making the settlement effective as of the last day upon which it is signed by any party – in this case, July 20, 2017 – ensures that the public safety provisions contained in the settlement are realized sooner. In fact, under the terms of the settlement, these public safety provisions are already in effect.

The settlement is also in the public interest because, as with most settlements, it will avoid the substantial time and expense involved in further litigation. Settlements lessen the time and expense the parties must expend litigating a case and at the same time conserve administrative hearing resources. Pa. P.U.C., et al. v. PECO Energy Co., et al., Docket No. R-2010-2161575 (Recommended Decision issued November 2, 2010) (Opinion and Order entered Dec. 21, 2010). The Commission has indicated that settlement results are often preferable to those achieved at the conclusion of a fully litigated proceeding. 52 Pa.Code § 69.401. In this case, the parties spent one year in formal mediation and also pre-served written direct testimony in support of their positions. By settling the case, however, the parties avoided the time and expense associated with pre-serving written rebuttal testimony, hearings, main and reply briefs and possible exceptions and reply exceptions, as well as any possibility of appeal. Avoiding these expenses serves the interests of all parties involved and the Commission and is, therefore, in the public interest.

Finally, the settlement is also in the public interest and should be approved without modification because it is supported by substantial evidence. As noted above, concurrent with the submission of the settlement, the parties filed a motion for admission of written testimony and exhibits into the formal evidentiary record in support of the settlement. Those testimonies and exhibits comprised testimony from seven expert witnesses. That motion is being granted as part of this Decision and the parties are directed to submit two copies of each piece of testimony and exhibit to the Commission's Secretary for inclusion in the official record of the proceeding. All parties should be commended for the development and submission of the expert testimony which further supports adopting the settlement in its entirety as being in the public interest.

In conclusion, each of the benefits described above are reasonable and support approving the settlement in its entirety without modification. The issues raised by PennDOT in its initial petition initiating this portion of the proceeding have been addressed and the settlement is supported by substantial evidence. As such, the settlement will be recommended for adoption.

CONCLUSION

The settlement should be approved in its entirety without modification because it is consistent with relevant sections of the Public Utility Code regarding convenience and safety at railroad crossings and is consistent with regulations promoting settlements. The settlement provides significant detail regarding PennDOT's agreement to perform inspections of the retaining wall on a six-year inspection cycle, noting that the last inspection occurred on March 29, 2016, and the parties' responsibilities in the event of a failure of the retaining wall, among other things. All issues raised in the initial petition that initiated this proceeding have been addressed and in a manner that promotes public safety.

In addition, the Joint Motion to Admit Written Testimony and Exhibits into the formal evidentiary record in support of the settlement will be granted. As noted above, decisions of the Commission must be supported by substantial evidence. The parties pre-served written direct testimony during the proceeding in support of their positions. That testimony was not admitted in to the record because the settlement was filed prior to the evidentiary hearing. The joint motion, however, formally seeks admission of the pre-served testimony into the record. As the joint motion is unopposed, it will be granted, and the parties will be directed to submit two copies of the testimony to the Secretary's Bureau for inclusion in the official record. As a result, the settlement is also supported by substantial evidence.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter of this proceeding. 66 Pa.C.S. §§ 2702, 2704.
2. Commission policy promotes settlements. 52 Pa.Code § 5.231.
3. The Commission has indicated that settlement results are often preferable to those achieved at the conclusion of a fully litigated proceeding. 52 Pa.Code § 69.401.

4. The focus of inquiry for determining whether a proposed settlement should be recommended for approval is not a “burden of proof” standard, as is utilized for contested matters; rather, the benchmark for determining the acceptability of a settlement or partial settlement is whether the proposed terms and conditions are in the public interest. Pa. Pub. Util. Comm’n, et al. v. City of Lancaster – Bureau of Water, Docket Nos. R-2010-2179103, *et al.* (Opinion and Order entered July 14, 2011); Warner v. GTE North, Inc., Docket No. C-00902815 (Opinion and Order entered April 1, 1996); Pa. Pub. Util. Comm’n. v. CS Water and Sewer Associates, 74 Pa. PUC 767 (1991).

5. The decision of the Commission must be supported by substantial evidence. 2 Pa.C.S. § 704.

6. "Substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm’n, 489 Pa. 109, 413 A.2d 1037 (1980); Erie Resistor Corp. v. Unemployment Comp. Bd. of Review, 194 Pa. Superior Ct. 278, 166 A.2d 96 (1961); and Murphy v. Comm., Dept. of Public Welfare, White Haven Center, 85 Pa. Commonwealth Ct. 23, 480 A.2d 382 (1984).

7. 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. 66 Pa.C.S. § 2702(a).

8. Such compensation, as well as the cost of construction, relocation, alteration, protection, or abolition of such crossing, and of facilities at or adjacent to such crossing which are used in any kind of public utility service, shall be borne and paid, as provided in this section, by the public utilities, municipal corporations, municipal authority or nonprofit organization authorized under section 2702(h) (relating to construction, relocation, suspension and abolition of crossings) concerned, or by the Commonwealth, in such proper proportions as

the commission may, after due notice and hearing, determine, unless such proportions are mutually agreed upon and paid by the interested parties. 66 Pa.C.S. § 2704(a).

9. Settlements lessen the time and expense the parties must expend litigating a case and at the same time conserve administrative hearing resources. Pa. P.U.C., et al. v. PECO Energy Co., et al., Docket No. R-2010-2161575 (Recommended Decision issued November 2, 2010) (Opinion and Order entered Dec. 21, 2010).

10. The Joint Stipulation of Settlement filed by the parties in this proceeding on July 24, 2017 is in the public interest and should be adopted in its entirety without modification.

ORDER

THEREFORE,

IT IS RECOMMENDED:

1. That the Joint Stipulation of Settlement entered into by the Pennsylvania Department of Transportation, Whitehall Township, Lehigh County, and the Commission's Bureau of Investigation and Enforcement at Docket Number C-20054822 on July 24, 2017 is hereby approved and adopted.

2. That the Petition Requesting a Hearing for the Purpose of Allocating Future Maintenance and Costs Associated with the Commission's Opinion and Order Entered July 26, 2007 is granted consistent with the above discussion.

3. That Whitehall Township, at its sole cost and expense, shall furnish all material and perform all work necessary to maintain the portion of the Retaining Wall north of

the Race Street abutments starting at Retaining Wall Station 0+50N and ending at Retaining Wall Station 4+50N.

4. That the Pennsylvania Department of Transportation, at its sole cost and expense, shall furnish all material and perform all work necessary to conduct the repairs referenced in Section Six (6) of the Stipulation of Settlement entered into between the Parties on the July 24, 2017.

5. That the Pennsylvania Department of Transportation, at its sole cost and expense, shall furnish all material and perform all work necessary to maintain the Race Street abutment and the portion of the Retaining Wall south of the Race Street abutment starting at Retaining Wall Station 0+88S and ending at Retaining Wall Station 0+50N.

6. That the Pennsylvania Department of Transportation shall, at its initial cost and expense, perform inspections of the Retaining Wall once every six (6) years with a copy of the inspection report being provided to Whitehall Township and Whitehall Township reimbursing the Department for the costs associated with the inspection of the Retaining Wall.

7. That any inspection reports of the Retaining Wall shall be kept confidential by any party in possession of such a report and shall not be provided to the public unless in compliance with a court order or in compliance with State or Federal law.

8. That the Pennsylvania Department of Transportation is hereby allocated the sole cost and expense of the repairs performed on the Retaining Wall, and drainage system, which amount totaled \$1,825,807.97.

9. That in the event of a failure of the Retaining Wall from Retaining Wall Stations 0+50N to 4+50N, within twenty-four (24) years from the date of the completion of the repair work, the Department shall conduct the necessary repairs or rehabilitation to ensure the safety of the Retaining Wall, and the Department and Whitehall Township shall agree on and

equally share the costs and expenses of such repairs or rehabilitation pursuant to the terms of the Stipulation of Settlement entered into on the July 24, 2017.

10. That this Order, insofar as it allocates costs and expenses to the Parties, is without prejudice to their rights to recover those costs and expenses from others pursuant to any applicable law or lawful agreement.

11. That the Joint Motion to Admit Written Testimony and Exhibits into the Formal Evidentiary Record submitted by the parties on July 24, 2017 is hereby granted and the parties are directed to submit two copies of the pre-served testimony identified in the motion to the Secretary of the Pennsylvania Public Utility Commission.

12. That this matter be marked closed.

Date: August 4, 2017

/s/
Joel H. Cheskis
Administrative Law Judge