

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265**

Public Meeting held July 25, 2007

Commissioners Present:

Wendell F. Holland, Chairman
James H. Cawley, Vice Chairman
Terrance J. Fitzpatrick
Tyrone J. Christy
Kim Pizzingrilli

Whitehall Township

C-20054822

v.

R.J. Corman Railroad Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Commission for consideration and disposition are the following Exceptions: (1) filed by the County of Lehigh (County) on June 18, 2007; (2) filed by Pennsylvania Department of Transportation (PennDOT) on June 18, 2007; and (3) filed by R.J. Corman Railroad Company (Railroad) on June 18, 2007, to the Recommended Decision of Administrative Law Judge (ALJ) Kandace F. Melillo, issued herein on May 29, 2007. On June 25, 2007, Whitehall Township (Township) filed Reply Exceptions, as did PennDOT on June 26, 2007. On June 28, 2007, the Railroad filed a Letter indicating that it would not be filing Reply Exceptions.

History of Proceeding

On May 31, 2005, the Township filed a Formal Complaint with the Commission against the Railroad in which it alleged that the Railroad, the successor in interest to Lehigh Valley Railroad Company (LVRC), had failed to comply with a Commission Order, dated July 2, 1956, at Docket No. 16444 (1956 Order). Specifically, the Township sought enforcement of the 1956 Order with respect to the Railroad's alleged obligation to repair and maintain a retaining wall located underneath the Race Street Bridge along South Lehigh Avenue, in West Catasauqua in the Township.

The Township's Complaint was served by the Commission upon the Railroad, PennDOT and the County, as concerned Parties. On August 26, 2005, PennDOT filed an Answer, as did the County, on August 31, 2005, and the Railroad, on September 12, 2005. On September 26, 2005, a Field Investigation and Conference was held with the Parties at the site of the crossing. By Memo dated January 23, 2006, the Commission's Rail Safety Division requested that the proceeding be assigned to the Office of Administrative Law Judge (OALJ) for hearings and a decision. On February 13, 2006, the Commission's Law Bureau filed a Notice of Appearance in this matter.

On April 10, 2006, a second Field Investigation and Conference was held with the Parties at the site of the crossing. A further hearing was held on June 29, 2006, with all Parties present. The Township, the Railroad, PennDOT and the County were each represented by counsel and presented testimony and/or exhibits. The Law Bureau was represented by counsel and did not present any witnesses or exhibits.

The transcribed hearing record consists of 216 pages. In her Recommended Decision, the ALJ recommended, *inter alia*, that PennDOT, at its initial cost and expense, obtain a drainage study, with copies provided to all Parties, to examine whether improper

drainage is contributing to the retaining wall's deterioration, and to recommend a remediation plan, if warranted. (R.D. at 43). The ALJ further recommended that PennDOT take all necessary preliminary steps, including obtaining funding, for the commencement of the repair to the drainage system, if required, and the retaining wall. (R.D. at 43). Exceptions and Reply Exceptions to the Recommended Decision were filed as above noted.

Discussion

This proceeding involves a retaining wall that runs parallel to South Lehigh Avenue in the Township. South Lehigh Avenue was originally a State Road but was deleted from the State Highway records when it was transferred to the Township by Act 229 of 1976. The transfer took place in 1977. South Lehigh Avenue intersects with the west end of the Race Street Bridge. The lower portion of the retaining wall was constructed in 1910 pursuant to an agreement between the Railroad's predecessor and the Township. The upper portion of the retaining wall was constructed by PennDOT pursuant to the 1956 Order, mentioned *supra*, that authorized the reconstruction of the Race Street Bridge and the raising of South Lehigh Avenue and the South Lehigh Avenue retaining wall to meet the raised elevation of the new bridge. The portion of the retaining wall which is in need of immediate repair is, at its closest point, about 140 feet from the rail-highway crossing.

In her Recommended Decision, ALJ Melillo reached Findings of Fact Nos. 1- 23 (R.D. at 6-10) and Conclusions of Law Nos. 1-14 (R.D. at 40-42). 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 County

The County filed one Exception to the Recommended Decision, in which it objects to the ALJ's denial of its Motion to be dismissed from this proceeding. Specifically, the ALJ, citing *County of Chester v. Pa. PUC*, 408 A.2d 552 (Pa. Cmwlth. 1979), stated as follows:

In accordance with County of Chester, supra, it is appropriate to consider municipal benefits in determining whether a municipality is "concerned" for purposes of cost assessment. It is undisputed that, as argued by [PennDOT], the Township is a concerned party herein as it would benefit from repair to the retaining wall supporting South Lehigh Avenue. Accordingly, by definition and location, Lehigh County, the county in which South Lehigh Avenue is situated, would also benefit and therefore is "concerned."

Since Lehigh County is a concerned party, it is not appropriate for it to be released as a party prior to the conclusion of the proceeding. As will be further explained herein, this Recommended Decision addresses only the initial costs of the repair and not final costs. Additional evidence may become available when final costs are determined, and the County should remain as a party throughout these proceedings.

(R.D. at 22). While the County admits that the Commission is empowered to amend its 1956 Order so as to change the existing repair and maintenance schedule, it argues that the Commission may only do so “prospectively,” and may not, “at its whim,” unilaterally ignore the dictates of its previous Order. (County Exc. at 1-5).

On review of this Exception, we find it not to be meritorious. We note initially that Sections 2702(c) and 2704(a) of the Code, 66 Pa. C.S. §§ 2702(c) and 2704(a), authorize the Commission to assess rail-highway crossing costs upon “concerned parties,” including municipal corporations, such as counties. In addition, the Commission determines what parties are “concerned,” within the meaning of these statutes. We also note that the ALJ correctly relied on *County of Chester* for her finding that the County is a concerned party in this proceeding and was properly joined thereto pursuant to Section 3.361 of our Regulations, 52 Pa. Code § 3.361.

In *County of Chester*, the Commonwealth Court reviewed a Commission Order which had allocated 25% of bridge reconstruction costs to a county. The Court ruled that, in order to determine whether a municipality was “concerned,” it would look to whether the bridge reconstruction resulted in substantial local improvement or provided a distinct local benefit to the residents of the municipality. In so doing, the Court indicated that any benefit provided to the City and its residents from the reconstructed bridge would, by definition and location, also provide a benefit to the County and its residents. Since the Court found substantial evidence that the County would benefit, it affirmed the Commission Order.

Therefore, in accordance with the *County of Chester* case, it is appropriate for us to consider municipal benefits in our determination whether the instant municipality is “concerned” for purposes of cost assessment. We note that it is undisputed that the Township is a concerned party herein as it would benefit from repair

to the retaining wall supporting South Lehigh Avenue. One obvious benefit would be enhanced safety for the citizens of the Township. Accordingly, by definition and location, Lehigh County, the county in which South Lehigh Avenue is situated, would also benefit from that repair and is, therefore, also a concerned party. Since Lehigh County has been found to be a concerned party, it would not be appropriate for us to release it as a Party prior to the conclusion of this proceeding.

We note that the ALJ has not made a recommendation as to the final allocation of the maintenance responsibilities and costs herein. Accordingly, as above stated, the County must remain a Party hereto and, if the facts of the case warrant, we will be free to allocate costs to the County, pursuant to Section 2704, *supra*. For the above reasons, the County's Exceptions are denied.

Exceptions of PennDOT

In its Exception No. 1, PennDOT objects to the ALJ's Finding of Fact No. 12, found on page 8 of the Recommended Decision, which is as follows:

12. The above described retaining wall underlies and supports the Race Street Bridge, which crosses over RJ Corman's lines. Township Ex. C (photos #5, #53); Township Ex. G; Tr. 76. It also supports South Lehigh Avenue. Department Hearing St. No. 1, p. 3.

PennDOT avers that the ALJ misinterpreted PennDOT's testimony and concluded that the retaining wall supports the Race Street Bridge, which is not the case. (PennDOT Exc. at 1).

On review of this Exception, we find it not to be meritorious. The evidentiary record in this proceeding supports the ALJ's conclusion that the retaining wall

is part of the support structure for the Race Street Bridge. PennDOT's Exception No. 1 is denied.

PennDOT's Exception No. 2 relates to the ALJ's interpretation of the effect of the Commission's 1956 Order herein. The ALJ concluded that the 1956 Order assigned maintenance responsibility for the entire retaining wall, not just the new upper portion of the wall, to the Department of Highways.¹

The ALJ furthermore concluded that since the Department of Highways was clearly assigned maintenance responsibility under the 1956 Order, and since that Order was never amended by the Commission or appealed, the relevant inquiry is whether the 1976 deletion of South Lehigh Avenue from the State Highway System (Act 229) and subsequent transfer of South Lehigh Avenue to the Township in 1977 automatically amended the 1956 Order so as to require the Township to maintain the entire retaining wall from that point forward. (R.D. at 29). After analysis of the positions of the Parties and the relevant history and precedent, the ALJ concluded that the deletion of South Lehigh Avenue from the State Highway System, and the transfer of the relevant road from the Department of Highways to the Township in 1977, did not automatically amend the 1956 Order without prior Commission approval. (R.D. at 30). In the instant Exception, PennDOT avers that the ALJ erred in her conclusion that it is seeking a retroactive amendment of the 1956 Order. (PennDOT Exc. at 1-2).

On review of this Exception, we find it not to be meritorious. The ALJ correctly determined that Paragraph No. 25 of the 1956 Order directed PennDOT, at its sole cost and expense, to furnish all material and do all work necessary to maintain the "altered retaining wall." Additionally, the ALJ correctly rejected PennDOT's argument

¹ The Pennsylvania Department of Highways is the predecessor agency to PennDOT.

that there was a material change in circumstance in this matter that nullified the 1956 Order. Specifically, PennDOT argued that that circumstance arose when the subject road, South Lehigh Avenue, was deleted from the State Highway System and transferred to the Township. (R.D. at 27-33). However, we note that since the transfer of responsibility for the road, which occurred in 1977, did not automatically amend our 1956 Order, that Order remains binding on PennDOT with regard to its continued maintenance responsibility for the retaining wall underneath South Lehigh Avenue. Accordingly, for the above reasons, PennDOT's Exception No. 2 is denied.

In its Exception No. 3, PennDOT objects to Ordering Paragraphs 5, 6 and 7 of the Recommended Decision, which are as follows:

5. That the Department of Transportation, at its initial cost and expense, within eighteen (18) months from the date of service of the Commission Order, obtain a drainage study, with copies provided to all parties, to examine whether improper drainage is contributing to the retaining wall's deterioration and to recommend a remediation plan if warranted.

6. That the Department of Transportation, at its initial cost and expense, within eighteen (18) months from the date of service of the Commission Order, take all necessary preliminary steps, including obtaining funding, for the commencement of the repair to the drainage system, if required, and the retaining wall, consistent with this Order.

7. That the Department of Transportation, at its initial cost and expense, after the expiration of six (6) months measured from the submission of the drainage study to all parties, shall furnish all materials and do all work necessary to repair the drainage system as recommended in the study and to repair the retaining wall, consistent with this Order, and shall complete the repairs within twelve (12) months.

(R.D. at 43). PennDOT again avers, as it did in the preceding Exception, that “the circumstances changed in 1976 when the legislature turned the road over to the Township.” PennDOT also avers that, although the Township has taken maintenance responsibility of the roadway itself, it now balks at the maintenance of the supporting structure necessary for the roadway. PennDOT argues that the Township should not be rewarded for this dilatory action. (PennDOT Exc. at 2-3).

On review of this Exception, we find it not to be meritorious. As we discussed in our disposition of Exception No. 2, *supra*, the “changed circumstance,” *i.e.*, the 1977 transfer of the road from PennDOT to the Township, did not automatically amend the Commission’s 1956 Order without prior Commission approval. As such, the 1956 Order remains binding on PennDOT with regard to its continued maintenance responsibility for the retaining wall. We note that PennDOT admits that the Commission’s 1956 Order was not modified as a result of the action of the legislature with regard to the instant road. (PennDOT Exc. at 3). Accordingly, PennDOT’s Exceptions are denied.

Exceptions of the Railroad

The Railroad objects to the ALJ’s conclusion that the Commission has jurisdiction to sustain the instant Complaint and also to order repairs to a deteriorated section of the instant retaining wall. Specifically, the Railroad argues at length that the legal precedent relied on by the ALJ does not apply to the facts in the instant proceeding. (Railroad Exc. at 1-11).

On review of this Exception, we find it not to be meritorious. We note that the Railroad has acknowledged that, pursuant to Section 2702(a) and (b) of the Code, 66 Pa. C.S. § 2702(a) and (b), the Commission has jurisdiction to order the maintenance and repair of crossings and rail-highway crossings. (R.D. at 17). Additionally, the

Railroad has not disputed that the Race Street Bridge is a rail-highway crossing, as defined in *County of Bucks v. Pa. PUC*, 684 A.2d 678 (Pa. Cmwlth. 1996). The Railroad's sole basis for arguing against Commission jurisdiction is the distance of the deteriorated section of the wall from the crossing. In support of its argument, the Railroad cites *AT&T v. Pa. PUC*, 558 Pa. 290, 737 A.2d 201 (1988).

In *AT&T*, the Pennsylvania Supreme Court reviewed a challenge to the Commission's decision to exercise jurisdiction only as to those portions of a 3,600 foot railroad tunnel which were directly beneath a state highway. Importantly, the Court did not find that the Commission lacked jurisdiction over the entire tunnel; it merely provided factual criteria for determining whether jurisdiction could be declined at the Commission's discretion. Thus, *AT&T* provides no support for the Railroad's contention that the Commission lacks jurisdiction.

Additionally, *AT&T* does not provide support for a discretionary refusal on the part of the Commission to take jurisdiction, because the criteria under which discretion could be exercised do not apply to the instant case. The Railroad argues that the *AT&T* criteria were met because, *inter alia*, the original 1910 retaining wall was independent of, and incidental to, the bridge. However, that assertion is not supported by the evidence. The photographs of the bridge, as it interfaces with the retaining wall, show that the wall underlies and supports the bridge. (Township Exh. C, Photos Nos. 5 and 53). While the bridge was reconstructed, the retaining wall was also altered to meet the new level of South Lehigh Avenue and the Race Street Bridge.

Furthermore, while the Railroad claimed that the Commission has no special expertise concerning retaining walls and, therefore, should decline to exercise jurisdiction under *AT&T*, the Railroad provided no record support for this assertion. We note that, in *AT&T*, the Court indicated that a public safety concern within an area of the

Commission's expertise would support the exercise of jurisdiction by the Commission, and that is exactly what is presented herein. In this case, a retaining wall supporting a rail-highway crossing, which is an area within the exclusive jurisdiction of the Commission, is in need of repair due to deterioration. Without question, the Commission has the special expertise necessary to decide this case and should not decline jurisdiction.

Finally, we note that the Courts have upheld Commission jurisdiction over areas which have been considerably more removed from the rail-highway crossing than the 150 feet which is the case here. For example, in *Springettsbury v. Pa. PUC*, 289 A.2d 762 (Pa. Cmwlth. 1972), the Commonwealth Court upheld the authority of the Commission to order traffic signals to be installed at locations as far as 3,500 feet from the bridge. Also, in *Bartron v. Northampton*, 342 Pa. 163, 19 A.2d 263 (1941), the Pennsylvania Supreme Court upheld a Commission Order which allocated costs, and required highway construction, at a distance of about two miles from the relevant crossing. In those cases, the Courts reasoned that the required construction was related to the enhancement of the public safety at railroad crossings, and that public safety is the Commission's primary concern in the area of rail-highway crossings. (R.D. at 17-20). Accordingly, for the above reasons, the Railroad's Exceptions on this issue are denied.

Conclusion

We have reviewed the record as developed in this proceeding, including the ALJ's Recommended Decision, as well as the Exceptions and Reply Exceptions filed thereto. Premised upon our review of the record evidence, we conclude that the Exceptions filed by the County, PennDOT and the Railroad are not meritorious and, accordingly, those Exceptions will be denied. The ALJ's Recommended Decision will be adopted; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions filed by Lehigh County to the Recommended Decision of Administrative Law Judge Kandace F. Melillo, issued on May 29, 2007, are denied.

2. That the Exceptions filed by the Pennsylvania Department of Transportation to the Recommended Decision of Administrative Law Judge Kandace F. Melillo, issued on May 29, 2007, are denied.

3. That the Exceptions filed by R.J. Corman Railroad Company to the Recommended Decision of Administrative Law Judge Kandace F. Melillo, issued on May 29, 2007, are denied.

4. That the Recommended Decision of Administrative Law Judge Kandace F. Melillo herein, issued on May 29, 2007, is hereby adopted.

5. That the Formal Complaint of Whitehall Township at Docket No. C-20054822 is hereby sustained, to the extent it requests enforcement of the Order of the Pennsylvania Public Utility Commission, dated July 2, 1956, at Complaint Docket No. 16444, concerning maintenance and repair of a retaining wall addressed therein, along South Lehigh Avenue, Whitehall Township, and is in all other respects denied.

6. That in all respects not inconsistent with this Opinion and Order, the Commission's Order dated July 2, 1956, at Complaint Docket No. 16444, remains in full force and effect.

7. That the Pennsylvania Department of Transportation, at its initial cost and expense, within eighteen (18) months from the date of service of this Opinion and Order, obtain a drainage study, with copies provided to all Parties, to examine whether improper drainage is contributing to the retaining wall's deterioration and to recommend a remediation plan, if warranted.

8. That the Pennsylvania Department of Transportation, at its initial cost and expense, within eighteen (18) months from the date of service of the instant Opinion and Order, take all necessary preliminary steps, including obtaining funding, for the commencement of the repair to the drainage system, if required, and the retaining wall, consistent with this Opinion and Order.

9. That the Pennsylvania Department of Transportation, at its initial cost and expense, after the expiration of six (6) months measured from the submission of the drainage study to all Parties, shall furnish all materials and do all work necessary to repair the drainage system, as recommended in the study, and to repair the retaining wall, consistent with this Opinion and Order, and shall complete the repairs within twelve (12) months.

10. That the Pennsylvania Department of Transportation shall certify to the Commission's Bureau of Transportation and Safety, Rail Safety Division, and all Parties, when the repairs have been completed.

11. That the Pennsylvania Department of Transportation shall provide status reports to the Commission's Bureau of Transportation and Safety, Rail Safety Division, and all Parties, at the conclusion of the intervals set forth in Ordering Paragraphs 7, 8, and 9.

12. That this Opinion and Order, insofar as it imposes costs on any of the Parties, is without prejudice to any party's right to recover all or any part of such costs incurred from others in accordance with any lawful agreement.

13. That upon completion of the repairs, and upon receipt of written request by the Pennsylvania Department of Transportation, this proceeding will be scheduled for a hearing at a time and place assigned by this Commission, upon due notice to all Parties hereto, to receive evidence relative to the final allocation of costs incurred by the Pennsylvania Department of Transportation, assignment of responsibility for future maintenance, and any other matters relevant to this proceeding.

14. That the Parties notify the Commission immediately if the condition of the retaining wall deteriorates to the point that an emergency situation is created.

15. That this Order is binding upon the Parties hereto, their respective successors and assigns.

BY THE COMMISSION,

James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: July 25, 2007

ORDER ENTERED: July 26, 2007