



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

March 15, 2018

David A. Salapa, Administrative Law Judge
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

RE: I-2015-2472242 and M-2013-2364201

Dear Judge Salapa:

Enclosed for filing please find the Department's *Certificate of Service* confirming that the *Department of Transportation's Direct Testimony* was served upon the parties listed in the above captioned matter. Additionally, I have enclosed a copy of the protective order granted August 15, 2013 as a reminder to all parties that the information contained within the red packet is under seal and any improper dissemination of said information will be subject to sanctions.

I hereby certify that a copy has been sent to all parties of record as indicated by the Certificate of Service.

Very truly yours,

A handwritten signature in blue ink that reads "Jennifer B. Sweeney".

Jennifer Brown-Sweeney
Assistant Counsel

cc: Parties of Record
Rosemary Chiavetta, Secretary, E-filed (Cover Letter and Certificate of Service)
Mark Chappell, P.E., Chief, Utilities and Right-of-Way Section
Sarah J. Fenton, District Grade Crossing Engineer, District 4-0
Daniel D. Leonard, Grade Crossing Engineer, Central Office, CKB 7th floor

Enclosure

220/JBS:igl

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

Public Meeting held August 15, 2013

Commissioners Present:

Robert F. Powelson, Chairman
John F. Coleman, Jr., Vice Chairman
Wayne E. Gardner
James H. Cawley
Pamela A. Witmer

Bridge Structure where State Route 1025
crosses over a single track of Canadian
Pacific Railway (264 293 K) in Nicholson
Borough, Wyoming County

M-2013-2364201

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the following documents filed by the Department of Transportation of the Commonwealth of Pennsylvania (PennDOT) on June 3, 2013: (1) a Petition for Reconsideration and Amendment (Petition for Reconsideration) of the Order entered May 23, 2013 (*May 2013 Order*), in the above-captioned proceedings; (2) a Motion for Certification of Interlocutory Order and Stay of Proceedings Pending Appeal; and (3) a Petition for Protective Order. No Answers have been filed to any of these documents.

Additionally, on July 31, 2013, PennDOT filed a Petition for Leave to Withdraw Certain Pleadings (July 31 Petition). The Commission received one letter in response to this filing.

For the reasons that follow, we will: (1) grant PennDOT's July 31 Petition; (2) grant PennDOT's Petition for Reconsideration, as modified by its July 31 Petition; (3) grant PennDOT's Petition for Protective Order; and (4) assign this matter to the Office of Administrative Law Judge (OALJ) for expedited proceedings.

History of Proceeding

On May 2, 2013, PennDOT notified the Commission of a safety concern regarding the condition of the existing bridge structure (Bridge) carrying State Route 1025, above grade, over the single track of Canadian Pacific Railway (Railroad or Canadian Pacific).

A field investigation and conference was arranged by PennDOT and held at the site of the crossing on May 14, 2013. The following entities were represented at the conference: the Commission, PennDOT and Canadian Pacific. At the conference, it was determined that the condition of the Bridge was so poor that it was necessary for PennDOT to close the Bridge to all vehicular and pedestrian traffic in order to ensure public safety.

The *May 2013 Order* noted that PennDOT agreed to do the following: (1) close the Bridge to all vehicular traffic; (2) prevent pedestrian access to the Bridge; and (3) establish and maintain any detours or traffic controls that may be required to properly and safely accommodate highway traffic during the time the Bridge is closed. *May 2013 Order* at 2. The Order further noted that neither Canadian Pacific nor PennDOT have agreed to perform or provide any engineering inspections and analyses to determine the feasibility of any remedial action required to safely reopen the Bridge for public use. *Id.*

Accordingly, the *May 2013 Order* assigned responsibility for closing the Bridge to vehicular and pedestrian traffic, maintaining the safety of utility facilities and operations while the Bridge is closed, and similar activities. The *May 2013 Order* also made an initial allocation of costs for the assigned activities. In addition, the *May 2013 Order* directed that this matter should be sent for hearing, as follows:

Upon full consideration of the matters before us at this time, we determine that a hearing should be held to determine the condition [of] the subject bridge, the future disposition of it and to determine the party or parties responsible for the construction of any improvements and any required maintenance at the crossing.

May 2013 Order at 2.

PennDOT filed its Petition for Reconsideration and other documents as above noted. No Answers were filed.¹ By Order entered June 13, 2013, the Petition for Reconsideration was granted, pending further review of, and consideration on, the merits.

On July 31, 2013, in the interest of expediting the case, PennDOT filed its July 31 Petition. In that Petition, PennDOT requested the withdrawal of: (1) its entire Motion for Certification of Interlocutory Order and Stay of Proceedings Pending Appeal; and (2) the major portion of its Petition for Reconsideration. PennDOT attached a Notice to Plead to its July 31 Petition, notifying the other Parties that they had twenty days in which to file an Answer thereto.

By Secretarial Letter issued August 1, 2013, the Commission shortened the response period, so that Answers to PennDOT's July 31 Petition were due by the close of

¹ We note, however, that correspondence dated July 11, 2013 was received from the Office of Congressman Lou Barletta.

business on August 8, 2013. On August 5, 2013, the Commission received a Letter from Mr. James G. Day. In his Letter, Mr. Day stated, *inter alia*, as follows:

[Closure of the Bridge] is a considerable inconvenience for those of us who are now forced to take Station Hill Road (North) to the town of Hop Bottom and then take Route 11 (South) to reach the town of Nicholson. This detour is a waste of time and causes additional expense.

Letter at 1. On August 12, 2013, the Commission received correspondence from Elaine Perry, containing a Petition to Open SR 1025, which was signed by 84 individuals.

Discussion

We note that any issue that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the Parties. *Consolidated Rail Corporation v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *also see, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

Petition to Withdraw

In its Petition, PennDOT cites our Regulation at 52 Pa. Code § 5.94, which states, in pertinent part:

. . . a party desiring to withdraw a pleading in a contested proceeding may file a petition for leave to withdraw the appropriate document with the Commission and serve it upon the other parties. The petition must set forth the reasons for the withdrawal. A party may object to the petition within 20 days of service. After considering the petition, an objection thereto and the public interest, the presiding officer or the

Commission will determine whether the withdrawal will be permitted.

In its July 31 Petition, PennDOT stated that its Petition for Reconsideration was founded on the belief that the Commission's initial allocation of certain costs and responsibilities to it was not "just and reasonable," because the Commission's proposed allocation contradicted a prior Commission Order. July 31 Petition at ¶ 6, citing *In re: Application of Department of Highways of the Commonwealth of Pennsylvania – For approval of the alteration of the crossing where State Highway Route 65025 crosses over and above the tracks of the Delaware, Lackawanna and Western Railroad Company in Nicholson Borough, Wyoming County, and the allocation of the costs and expenses incident thereto*, Docket No. 76276 (June 11, 1951). PennDOT's July 31 Petition contended that, although PennDOT's prior filings have merit, "it is in the best interest of public safety to withdraw its objections to the May 23, 2013 Commission Order and to continue to move this process forward." July 31 Petition at ¶12. PennDOT therefore requested permission to withdraw those portions of the Petition for Reconsideration objecting to the initial allocation of costs and responsibilities in the *May 2013 Order*. In addition, PennDOT requested permission to withdraw its entire Motion for Certification of Interlocutory Order and Stay of Proceedings, which sought to stay the Commission proceedings in this matter in order to pursue an appeal of the *May 2013 Order*.

However, PennDOT renewed the request in the Petition for Reconsideration for additional time in which to prepare certain engineering reports and analyses that the *May 2013 Order* requires that PennDOT complete. As a result of PennDOT's agreeing to perform those studies and analyses, PennDOT renews its request for a Protective Order.

We agree with PennDOT that the public interest favors moving this proceeding forward expeditiously. Consequently, we believe the public interest favors

PennDOT's request to withdraw (a) the entire Motion for Certification of Interlocutory Order and Stay of Proceedings and (b) much of the Petition for Reconsideration and Amendment. The Commission is aware that the closing of the Bridge, while necessary to protect public safety, has had a considerable impact on residents and businesses in the community. We will, therefore, grant the Petition to Withdraw.

Petition for Reconsideration, as modified by the July 31 Petition

As stated above, PennDOT renews a portion of its Petition for Reconsideration. Specifically, PennDOT requests a change in Ordering Paragraphs Nos. 5 and 6 of the *May 2013 Order*, which are as follows:

5. That [PennDOT], at its initial cost and expense, within thirty (30) days of the issuance of this Order, provide any engineering inspections and analysis necessary to determine the existing structural condition of the subject bridge and report its findings to the Commission.

6. That [PennDOT], at its initial cost and expense, within ninety (90) days of the issuance of this Order, provide any engineering study and analysis to determine the feasibility and any remedial action to reopen the bridge safely to the public and report its findings to the Commission.

May 2013 Order at 3.

PennDOT contends that the above Paragraphs place an unreasonable timing burden on it. July 31 Petition at ¶ 15. Accordingly, PennDOT requests that the Commission amend the *May 2013 Order* so as to allow it 120 days from the issuance of the Commission's Opinion and Order, in which to complete such work. *Id.*

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, which provides that:

Petitions for rehearing, reargument, reconsideration, clarification, rescission, amendment, supersedeas or the like must be in writing and 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.

Additionally, we recognize that, while a petition under Section 703(g) may raise any matter designed to convince us that we should exercise our discretion to amend or rescind a prior order, at the same time “[p]arties . . . , cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them.” *Duick v. Pennsylvania Gas and Water Company*, 56 Pa. P.U.C. 553, 559 (Order entered December 17, 1982) (quoting *Pennsylvania Railroad Co. v. Pennsylvania Public Service Commission*, 179 A. 850, 854 (Pa. Super. 1935)). Such petitions are likely to succeed only when they raise “new and novel arguments” not previously heard or considerations that appear to have been overlooked or not addressed by the Commission. *Duick* at 559.

We find that PennDOT's request for additional time to complete the required engineering studies and analyses meets the *Duick* standards and we will approve it. The *May 2013 Order* did not adequately consider the time necessary to complete the required engineering studies and analyses. PennDOT has represented that 120 days is sufficient for it to complete those studies and analyses. As such, Ordering Paragraphs 5

and 6 of the *May 2013 Order* will be modified, as requested by PennDOT, in the appropriate paragraphs of this Opinion and Order.

Petition for Protective Order

PennDOT filed a Petition for Protective Order at the same time it filed its Petition for Reconsideration, on June 3, 2013. As above noted, the terms of the *May 2013 Order* directed PennDOT, *inter alia*, to provide engineering studies and analysis to determine the structural condition of the bridge, and to determine the “feasibility and any remedial action to reopen the bridge.” *May 2013 Order* at Ordering Paragraphs Nos. ¶¶ 5, 6. In the Petition for Protective Order, PennDOT requests that any Bridge inspection reports and studies that it produces be treated as under seal. Petition at ¶ 16.

In its Petition for Protective Order, PennDOT notes that it has conducted the inspections of the Bridge in order to ensure that the Commonwealth is in compliance with the National Bridge Inspection Program. Petition at ¶ 5. The most recent bridge inspection report was conducted on November 11, 2012. *Id.* at ¶ 6.

Protective orders, which keep information confidential, are issued “when a participant demonstrates that the potential harm to the participant of providing the information would be substantial and that harm to the participant if the information is disclosed without restriction outweighs the public’s interest in free and open access to the administrative hearing process.” 52 Pa. Code § 5.423(a). Under Section 5.423(a) of the Commission’s Regulations, the following five factors should be considered when determining whether to issue a protective order:

- (1) the extent to which the disclosure would cause unfair economic or competitive damage;
- (2) the extent to which the information is known by others and used in similar activities;

- (3) the worth or value of the information to the participant and to the participant's competitors;
- (4) the degree of difficulty and cost of developing the information; and,
- (5) other statutes or regulations dealing specifically with disclosure of the information.

On review of PennDOT's Petition for Protective Order, we conclude that it is meritorious and it will be granted. In this case, we believe that PennDOT has met the above-outlined criteria for the grant of a protective order. The Commission's need for the reports stems from its responsibility to evaluate the status of the Bridge, and to determine what work, if any, should be performed thereon. PennDOT, however, expresses concern about the physical security and safety of the bridge, if the engineering reports and analyses were public information. PennDOT also argues that requiring it to place the reports in the record of a Commission proceeding would violate state and federal laws. Petition for Protective Order at 2 (citing, in particular 23 U.S.C. § 409). Disclosure of the reports could also undermine the ability of engineers performing bridge inspection reports, studies and analyses to properly evaluate and assess the status of the Bridge's structure. Therefore, we believe that, in this case, we should limit the use of the relevant bridge inspection reports, studies and analyses for the sole and express purpose of determining the current condition of the Bridge.²

Accordingly, PennDOT's Petition for Protective Order is granted. The requested ordering paragraphs will be included in this Opinion and Order.

² PennDOT undertakes to disclose the bridge inspection report from November 11, 2012, to the Commission, as required in the *May 2013 Order*, within thirty days from the date of issuance of the Protective Order. July 31 Petition at ¶ 17.

OALJ Proceedings to be Expedited

As stated above, the *May 2013 Order* directed that this matter be sent for hearing to determine the condition of the Bridge, the future disposition of it, the Parties responsible for performing the construction of any improvements and required maintenance, and the allocation of costs. As also stated above, the closing of the Bridge has had a significant impact on the community. We therefore direct OALJ to expedite the proceedings in this matter.

Conclusion

Consistent with the foregoing discussion, we shall, *inter alia*: (1) grant PennDOT's July 31 Petition; (2) grant PennDOT's Petition for Reconsideration, as modified by its July 31 Petition; (3) grant PennDOT's Petition for Protective Order; and (4) assign this matter to the OALJ for expedited hearings; **THEREFORE**,

IT IS ORDERED:

1. That the Petition for Leave to Withdraw Certain Pleadings filed on July 31, 2013, by the Pennsylvania Department of Transportation, is granted.

2. That the Petition for Reconsideration and Amendment, filed on June 3, 2013, by the Pennsylvania Department of Transportation, as modified by the Petition for Leave to Withdraw Certain Pleadings filed on July 31, 2013, by the Pennsylvania Department of Transportation, is granted.

3. That the Motion for Certification of Interlocutory Order and Stay of Proceedings, filed on June 3, 2013, by the Pennsylvania Department of Transportation, is withdrawn.

4. That the Petition for Protective Order filed on June 3, 2013, by the Pennsylvania Department of Transportation, is granted.

5. That Ordering Paragraphs Nos. 5 and 6 of the Order entered at this Docket Number on May 23, 2013 are modified to read as follows:

5. That Pennsylvania Department of Transportation, at its initial cost and expense, within one hundred and twenty (120) days of the date of entry of this Opinion and Order, provide any engineering inspections and analysis necessary to determine the existing structural condition of the subject bridge and report its findings to the Commission.

6. That Pennsylvania Department of Transportation, at its initial cost and expense, within one hundred and twenty (120) days of the date of entry of this Opinion and Order, provide any engineering study and analysis to determine the feasibility and any remedial action to reopen the bridge safely to the public and report its findings to the Commission.

6. That, in all other respects, the Order entered at this Docket Number on May 23, 2013 shall remain in full force and effect.

7. That neither counsel nor witnesses for the Parties, including Commission Staff, receiving any bridge inspection reports for the State Route 1025 Bridge shall provide access to the inspection report to any other persons except as authorized by further order of the Commission or by the presiding officer.

8. That the Parties shall use the most recent bridge inspection report for the State Route 1025 Bridge to determine the current condition of the bridge, to plan or carry out maintenance activities, and to determine if the condition of the bridge warrants repair, rehabilitation, replacement or abolishment.

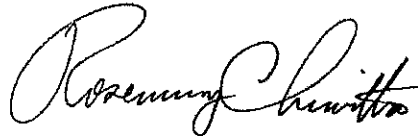
9. That any Party who discloses the most recent bridge inspection report for the State Route 1025 Bridge to any person other than those persons set forth in this Opinion and Order will be subject to sanctions by the Commission.

10. That any copy, and testimony thereof, of the bridge inspection report, that is made part of the official record be placed under seal.

11. That upon completion of this proceeding, including any administrative or judicial review, the Parties shall return all copies of the most recent bridge inspection report, study, or analysis for the State Route 1025 Bridge to the Pennsylvania Department of Transportation. In the alternative, Parties may provide an affidavit of counsel stating that the inspection report has been destroyed.

12. That this matter is referred to the Office of Administrative Law Judge for expedited hearings.

BY THE COMMISSION,



Rosemary Chiavetta
Secretary

(SEAL)
ORDER ADOPTED: August 15, 2013
ORDER ENTERED: August 16, 2013

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Investigation upon the commission's own motion to :	
determine the condition and disposition of six (6) :	
existing structures carrying various highways above :	Docket No. I-2015-2472242
the grade of the tracks of the Canadian Pacific Railroad :	
in Great Bend Township, New Milford Township, :	
Brooklyn Township, Hop Bottom Borough, Lathrop :	
Township, Susquehanna County and Benton :	
Township, Lackawanna County :	Docket No. M-2013-2364201
Bridge structure where State Route 1025, crosses over :	
a single track of Canadian Pacific Railroad (264 293 :	
K) in Nicholson Borough, Wyoming County :	Electronically Filed

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Department's Certificate of Service confirming *Department of Transportation's Direct Testimony* was served upon the parties listed below, by overnight carrier this 15th day of March, 2018.

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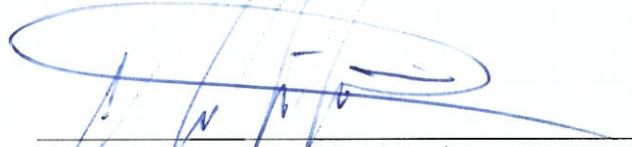
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Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION



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DATED: March 15, 2018
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