



COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR'S OFFICE OF GENERAL COUNSEL

March 14, 2019

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

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

Dear Secretary Chiavetta:

Enclosed for filing please find the Department's *Petition for Clarification and Reconsideration of the February 28, 2019 Commission Order*, in the above captioned matter.

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, appearing to read "Jennifer Brown-Sweeney".

Jennifer Brown-Sweeney  
Assistant Counsel

220/JBS:igl

Cc: Parties of Record  
Michelle Adolini, Acting Highway Division Chief  
Susan Hazelton, ADE- Design, District 4-0  
Daniel Leonard, Grade Crossing Engineer, Central Office, CKB 7th floor

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Bridge structure where State Route 1025, crosses over: a single track of Canadian Pacific Railroad (264 293 K) in Nicholson Borough, Wyoming County	M-2013-2364201 <b>Electronically Filed</b>
Investigation upon the Commission's own motion to determine the condition and disposition of six (6) existing structures carrying various highways above 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	I-2015-2472242 <b>Electronically Filed</b>

**PETITION FOR CLARIFICATION AND RECONSIDERATION OF THE  
COMMISSION ORDER ENTERED FEBRUARY 28, 2019**

AND NOW, comes the Commonwealth of Pennsylvania, Department of Transportation ("Department"), by and through its counsel, Jennifer Brown-Sweeney, and submits the following in support of its Petition for Reconsideration, pursuant to 52 Pa. Code § 5.572:

1. The name and address of your Petitioner is:

Commonwealth of Pennsylvania  
Department of Transportation  
Bureau of Project Delivery  
P.O. Box 3362  
Harrisburg, Pennsylvania 17105-3362

2. The name and address of Counsel for the Petitioner is:

Jennifer Brown-Sweeney  
Assistant Counsel  
Commonwealth of Pennsylvania  
Department of Transportation  
Office of Chief Counsel  
P.O. Box 8212  
Harrisburg, PA 1715-8212

3. On February 28, 2019 the Pennsylvania Public Utility Commission (“Commission”) held a public meeting and adopted and entered an Order disposing of the Exceptions and Reply Exceptions of Norfolk Southern Railway Company (“NS”), the Department, and Great Bend Township (“Great Bend”), to the Recommended Decision of Administrative Law Judge David A. Salapa that was issued on August 6, 2018 for the above-captioned proceeding (“Final Order”).
4. The Department respectfully requests that the Commission reconsider its Final Order for reasons set forth below.

**The Department Requests Clarification of the Following Items.**

5. Ordering Paragraph 7 of the Final Order assigns work to NS on the SR 1025 bridge, however the language of Ordering Paragraph 7 references SR 2015. The Department requests that Ordering Paragraph 7 be clarified as follows:
  7. That Norfolk Southern Railway Company, at its sole cost and expense, within three (3) months of the date of this Order, prepare and submit to all parties of record for examination and to this Commission for approval, complete detailed final repair plans, consistent with the repairs outlined in the evidence in this proceeding and this order, for the proposed repair of the existing bridge carrying ~~SR 2015~~ SR 1025, including restoration of the concrete on each side of the arch, patching and sealing the underside of the arch, moving the existing barriers to the edge of the bridge and permanently anchoring the existing barriers to the bridge to become a new parapet wall.
6. Ordering Paragraph 19 of the Final Order requires clarification. The Department requests that Ordering Paragraph 19 be clarified as follows:
  19. That Norfolk Southern Railway Company shall provide supplemental services and personnel at no cost to the Pennsylvania Department of Transportation during the Pennsylvania Department of Transportation’s eventual maintenance and/or reconstruction of SR 1025 and for future inspection of the bridge.



7. Ordering Paragraph 60 of the Final Order requires clarification. The Department requests that Ordering Paragraph 60 be clarified as follows:

60. That Norfolk Southern Railway Company shall provide supplemental services and personnel at no cost to the Pennsylvania Department of Transportation during the Pennsylvania Department of Transportation's eventual maintenance and/or reconstruction of the SR 2041 Bridge and for future inspections of the bridge.

8. On page 125, the Commission discusses the bridge on SR 2017. However, clarifying footnote 20 references SR 1018. The Department requests that footnote 20 be modified as follows:

<sup>20</sup> Based on our disposition of Great Bend's Exception No. 6, herein, NS will be directed to reimburse PennDOT 20%, rather than \$300,000, of the costs that PennDOT incurs in removing and replacing the ~~SR 1018~~ SR 2017 bridge.

**The Disposition of Department Exception No. 24 is neither "just and reasonable" nor supported by a legal basis.**

9. Paragraphs One (1) through Four (4) are incorporated herein as if set forth at length.

10. The Department's Exception No. 24 states:

24. PennDOT excepts to assuming the costs that it has borne to date to close the bridge and to maintain the closure of a bridge carrying a local road. See General Exception 9.

11. The Disposition of Department Exception No. 24 ("Disposition No. 24") under the Final Order states:

**Disposition**

For the disposition of this issue, please refer to our Disposition for PennDOT's General Exception No. 9, *supra*. We will not grant PennDOT's Exception as it applies to costs PennDOT has incurred to date for the closure of the bridge. *Additionally, in our January 2018 Secretarial Letter which affirmed PennDOT's action to close the bridge, we assigned PennDOT, at its initial cost*

*and expense, the responsibilities for furnishing all material and performing all work necessary to close the bridge and to maintain the closure, including signs, fencing, and barricades at the ends of the bridge and approaches thereto. Our records indicate that PennDOT did not object to this initial assignment of work and associated costs by filing a Petition for Reconsideration from Staff Action. Accordingly, the directives in the Secretarial Letter became the final action of the Commission pursuant to 52 Pa. Code § 5.44. We do not find any reason to rescind our prior decision on this issue relating to costs PennDOT has already incurred. Accordingly, this Exception is denied.*

Final Order III(d)(4)(j)(1)(a), p. 103. Emphasis added.

12. For purposes of this petition, the Department is focusing solely on the italicized language.
13. The allocation of costs between the concerned parties must be both “just and reasonable.”  
*PECO Energy Co. v. Pa. P.U.C.*, 791 A.2d 1155, 1163 (Pa. 2002).
14. A decision issued by the Commission must be supported by a “sound legal or factual basis.”  
*City of Phila. v. Pa. P.U.C.*, 676 A.2d 1298, 1301 (Pa. Cmwlt. 1996).
15. The Disposition of No. 24 is not “just and reasonable” nor is it supported by a legal basis, as the Commission redefined a previously relied on definition of the term “initial cost and expense” and disregarded case law indicating that the January 4, 2018 Secretarial Letter was an interlocutory order.
16. As noted in Disposition of No. 24, the Commission “...assigned PennDOT, at its *initial cost and expense* the responsibilities for furnishing all material and performing all work necessary to close the bridge and to maintain the closure...” (emphasis added). Disposition of No. 24 *quoting* January 4, 2018 Secretarial Letter, PennDOT Ex. D13.
17. “Initial cost and expense” has been consistently interpreted as requiring the party assigned such costs to pay for the required work up front, with the understanding that such costs may be reimbursed by other parties at a later date.

18. Commission staff frequently orders parties to perform items of work in the interest of public safety at their “initial cost and expense” so that work can be performed in a timely manner and without having to litigate costs first, as is the case with the T-821 bridge. The Commission’s current interpretation of “initial cost and expense” dulls a party’s willingness to agree to do work at its initial cost and expense.
19. The Commonwealth Court has found that where parties were assigned work at their “initial cost and expense” by order of the Commission, the parties were given an opportunity to determine the final allocation of costs. *City of Phila. v. Pennsylvania PUC*, 458 A.2d 1026 (Pa. Commw. Ct. 1983); *Parkesburg Borough v. Pennsylvania PUC*, 681 A.2d 872 (Pa. Commw. Ct. 1996); *Township of Middletown v. Pennsylvania PUC*, 729 A.2d 640 (Pa. Commw. Ct. 1999).
20. In *Parkesburg Borough* and *Township of Middletown*, the orders included language reminding the parties that upon completion of the work and written request of any party, a hearing to receive evidence relative to the allocation of initial costs and to determine the final allocation of costs would be scheduled. *Parkesburg Borough v. Pennsylvania PUC*, 681 A.2d 872, 875 (Pa. Commw. Ct. 1996); *Township of Middletown v. Pennsylvania PUC*, 729 A.2d 640, 644 (Pa. Commw. Ct. 1999).
21. In *City of Phila.*, the order only included language that the initial costs “would be held in abeyance until completion of the project.” *City of Phila. v. Pennsylvania PUC*, 458 A.2d 1026, 1028 (Pa. Commw. Ct. 1983)
22. But in all of the cases the Commonwealth Court speaks to the temporary aspect of “initial cost and expense.” *City of Phila. v. Pennsylvania PUC*, 458 A.2d 1026 (Pa. Commw. Ct.



1983); *Parkesburg Borough v. Pennsylvania PUC*, 681 A.2d 872 (Pa. Commw. Ct. 1996); *Township of Middletown v. Pennsylvania PUC*, 729 A.2d 640 (Pa. Commw. Ct. 1999).

23. In our case, the January 4, 2018 Secretarial Letter did not contain language referencing a final hearing or whether the costs would be held in abeyance. Instead, it just assigned the costs of closing the bridge carrying a local road to the Department, at its initial cost and expense. January 4, 2018 Secretarial Letter ¶ 2, ¶ 3. Indeed, in this instance the language would have been superfluous as the matter was already assigned to an Administrative Law Judge and in active litigation mode.
24. Regardless of the absence of future allocation language, the Department believes that a plain language interpretation of “initial cost and expense” as well as past usage by the Commission, indicates that costs that are “initial” are not final, and instead are subject to become final at a subsequent time.
25. It was not “just and reasonable” for the Commission to disrupt a well-settled definition of the phrase “initial cost and expense” and then allocate costs to the Department based on that change in definition.
26. Therefore, the italicized analysis in the Disposition of No. 24 is not “just and reasonable” nor is it supported by a legal basis. *See paragraph 11 above.*
27. The Department did not file a Petition for Reconsideration from Staff Action, as it was directed to do in the January 4, 2019 Secretary Letter if it was “dissatisfied”, because the Department was not dissatisfied.
28. The Secretarial Letter assigned the Department the “initial costs and expense” of closing a severely deteriorating bridge whose inspection had just indicated safety and integrity concerns. Great Bend St. No. 1 at 4. Despite the bridge carrying a local roadway and the

railroad already being assigned maintenance of the bridge, the Department was happy to close the bridge for the safety of the public at its “initial cost and expense”, especially given that all past experiences indicated that those costs could later be recouped. *Id.*; PennDOT Ex. D10, D11, D12; NS St. 1 at 5; Tr.196.

29. This is a unique situation wherein the matter was currently pending before Administrative Law Judge Salapa when the safety concern was discovered and addressed by Commission staff. The parties were already postured for a cost allocation proceeding on all of the subject structures. Therefore, the Department did not need to file a Petition for Reconsideration from Staff Action.
30. The Disposition of No. 24 indicates that the January 4, 2018 Secretarial Letter then became a final order.
31. The Commonwealth Court has found orders assigning work at a party’s “initial cost and expense” to be interlocutory, not final. *City of Phila. v. Pennsylvania PUC*, 458 A.2d 1026, 1028 (Pa. Commw. Ct. 1983); *Parkesburg Borough v. Pennsylvania PUC*, 681 A.2d 872, 875 (Pa. Commw. Ct. 1996); *Township of Middletown v. Pennsylvania PUC*, 729 A.2d 640, 643-44 (Pa. Commw. Ct. 1999).
32. In *Parkesburg Borough*, the Commonwealth Court has reiterated that under Pa. R.A.P. 341(b), a final order is any order that: (1) disposes of all claims or of all parties; or (2) any order that is expressly defined as a final order by statute; or (3) any order entered as a final order pursuant to subsection (c) of this rule. *Parkesburg Borough v. Pennsylvania PUC*, 681 A.2d 872 (Pa. Commw. Ct. 1996) quoting Pa. R.A.P. 341(b). Subsection (c) states:

(c) Determination of finality.—When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim or when multiple parties are involved, the trial court or other government unit may enter a final order as to one



or more but fewer than all of the claims and parties only upon an express determination that an immediate appeal would facilitate resolution of the entire case. Such an order becomes appealable when entered. In the absence of such a determination and entry of a final order, any order or other form of decision that adjudicates fewer than all the claims and parties shall not constitute a final order.

Pa. R.A.P. 341(c).

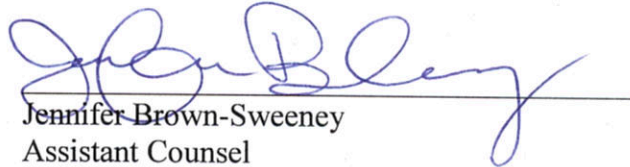
33. Here, the January 4, 2018 Secretarial Letter did not dispose of all claims or all parties under (a). The case went to hearing for outstanding issues and no parties were dismissed from the case. Under (b) the January 4, 2018 Secretarial Letter is not expressly defined as a final order by statute. Finally, under (c) there was no express determination that an immediate appeal would facilitate resolution of the entire case entered in the January 4, 2018 Secretarial Letter, nor would it have been appropriate due to the large number of outstanding issues. Therefore, under Pa. R.A.P. 341(b)-(c), the January 4, 2018 Secretarial Letter was not a final order.
34. In fact, in *Township of Middletown*, the PUC argued that the appeal to the Commonwealth Court should be quashed because the “order was not final because it only stated who was required to perform the initial work on the Bridge but not who was ultimately going to be held responsible for the associated costs.” *Township of Middletown v. Pennsylvania PUC*, 729 A.2d 640, 643 (Pa. Commw. Ct. 1999).
35. In *City of Phila.*, the Commonwealth Court specifically found that where the city was assigned to install traffic signals at its initial cost and expense, with the matter of the final allocation to be held in abeyance until completion of the project, that “the order was not a final order with respect to the costs of this item and is therefore an order not yet subject to review.” *City of Philadelphia v. Pennsylvania PUC*, 458 A.2d 1026 (Pa. Commw. Ct. 1983).

36. As set forth above, past Commonwealth Court cases have found that an order allocating costs at a party's initial cost and expense is not a final order.
37. Therefore, the Department was authorized to pursue cost allocation at the upcoming hearing and the italicized portion of Disposition of No. 24 is not "just and reasonable" nor is it supported by a legal basis.
38. The current analysis in the Disposition of No. 24 results in a detrimental precedent. Not only the Department, but any other party, will be forced to file petitions for reconsideration from every secretarial letter or order directing it to bear costs at its "initial cost and expense" before any work will be performed to preserve its right for reimbursement. It is common for Commission staff to order parties to perform work at its "initial cost and expense" in the interest of public safety. This application of "initial cost and expense" will result in wasted efforts by all parties and delays in addressing safety concerns at railroad/highway crossings.
39. The Department requests that the Commission strike the italicized portion of Disposition of No. 24, as shown in paragraph 11 above, as well as adopt the clarifying modifications in paragraphs 5-8.

**WHEREFORE**, the Commonwealth of Pennsylvania Department of Transportation respectfully requests that the Pennsylvania Public Utility Commission grant the Petition for Clarification and Reconsideration of the Commission Order entered February 28, 2019.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF TRANSPORTATION



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DATED: March 14, 2019





**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Bridge structure where State Route 1025, crosses over: a single track of Canadian Pacific Railroad (264 293 K) in Nicholson Borough, Wyoming County	M-2013-2364201  <b>Electronically Filed</b>
Investigation upon the Commission's own motion to determine the condition and disposition of six (6) existing structures carrying various highways above 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	I-2015-2472242  <b>Electronically Filed</b>

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the Department's *Petition for Clarification and Reconsideration of the February 28, 2019 Commission Order* was served upon the parties listed below, by first class mail, postage prepaid this 14<sup>th</sup> day of March 2019.

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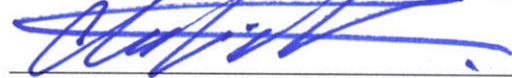
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Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF TRANSPORTATION



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DATED: March 14, 2019