



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
COMMONWEALTH KEYSTONE BUILDING
400 NORTH STREET, HARRISBURG, PA 17120

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

December 10, 2021

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Re: Application of the Department of Transportation of the Commonwealth of Pennsylvania for approval to alter the crossings where State Route 3104 crosses, above grade, the tracks of CSX Transportation Inc. (DOT 584 825 U), Norfolk Southern Railway Company (DOT 507 455 K), and the Pittsburgh and Ohio Central Railroad Company (DOT Unknown) in the City of Pittsburgh, Stowe Township and McKees Rocks Borough, Allegheny County.
Docket No. A-2020-3020667
I&E's Main Brief

Dear Secretary Chiavetta:

Enclosed please find the **Main Brief** of the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement in the above-referenced proceeding.

Copies have been served on the parties of record in accordance with the Certificate of Service. If you have any questions, please contact the undersigned.

Sincerely,

A handwritten signature in blue ink that reads 'Kayla L. Rost'.

Kayla L. Rost
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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of the Department of	:	
Transportation of the Commonwealth of	:	
Pennsylvania for approval to alter the	:	
crossings where State Route 3104 crosses,	:	
above grade, the tracks of CSX	:	
Transportation Inc. (DOT 584 825 U),	:	Docket No. A-2020-3020667
Norfolk Southern Railway Company (DOT	:	
507 455 K), and the Pittsburgh and Ohio	:	
Central Railroad Company (DOT	:	
Unknown) in the City of Pittsburgh, Stowe	:	
Township and McKees Rocks Borough,	:	
Allegheny County.	:	

**MAIN BRIEF
OF THE
BUREAU OF INVESTIGATION AND ENFORCEMENT**

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Dated: December 10, 2021

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I. PROCEDURAL HISTORY

By letter dated July 2, 2020, the Pennsylvania Department of Transportation (“PennDOT”) submitted an application (“Application”) for approval to alter the public highway bridge crossing where State Route 3104 crosses the tracks of CSX Transportation, Inc. (“CSXT”) (DOT No. 584 825 U), Norfolk Southern Railway Company (“NS” or “Norfolk Southern”) (DOT No. 507 455 K), and the Pittsburgh & Ohio Central Railroad Company (“POHC”) (DOT unknown) in the City of Pittsburgh, Stowe Township, and McKees Rocks Borough, Allegheny County. Receipt of PennDOT’s application by the Pennsylvania Public Utility Commission (“Commission”) was confirmed by Secretarial Letter dated July 6, 2020.

An initial field investigation and conference was held on October 21, 2020. The Commission’s Bureau of Technical Utility Services, Rail Safety Section (“Rail Safety”), PennDOT, CSXT, Norfolk Southern, POHC, the City of Pittsburgh, McKees Rocks Borough, Peoples Natural Gas Company, and Verizon attended the field conference. PennDOT agreed to complete the construction project at its sole cost and expense, utilizing 80% federal funds and 20% state funds.

On February 4, 2021, Rail Safety requested that the matter be referred to the Office of Administrative Law Judge, noting that the City of Pittsburgh objected to the proposed resolution of the future maintenance and costs associated with the bridge lighting and removal of snow, ice, and debris from the sidewalks.

On March 10, 2021, a Secretarial Letter was issued granting PennDOT permission to submit final detailed constructions plans of the proposed work and allowing PennDOT to begin construction once the plans are submitted and approved by the Commission. The

Secretarial Letter referred the outstanding future maintenance items and any other unresolved items to the Office of Administrative Law Judge for adjudication.

Additionally, on March 10, 2021, Administrative Law Judge Conrad A. Johnson issued a Prehearing Conference Order for Telephonic Hearing and Call-in Telephone Prehearing Conference Notice, scheduling a telephonic prehearing conference for April 13, 2021.

On April 13, 2021, the prehearing conference occurred as scheduled and was attended by the Commission's Bureau of Investigation and Enforcement ("I&E"), PennDOT, McKees Rocks Borough, Norfolk Southern, and CSXT. While notice was provided to the City of Pittsburgh and Stowe Township, neither party participated/attended.

On May 27, 2021, ALJ Johnson issued a Prehearing Order outlining the litigation schedule.

On June 1, 2021, a Call-In Telephone Hearing Notice was issued, scheduling the telephonic evidentiary hearing for September 30, 2021.

On July 21, 2021, I&E, PennDOT, Norfolk Southern, and CSXT submitted direct testimony.

On August 25, 2021, PennDOT submitted rebuttal testimony.

Of importance, the City of Pittsburgh, Stowe Township, and McKees Rocks Borough did not submit written testimony in this proceeding.

On September 30, 2021, the telephonic evidentiary hearing occurred as scheduled and was attended by I&E, PennDOT, Norfolk Southern, CSXT, and McKees Rocks Borough. Notably, McKees Rocks Borough did not provide any expert or witness testimony at the evidentiary hearing.

I&E submits this Main Brief in accordance with the briefing schedule that was established at the September 30, 2021 Evidentiary Hearing. Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Ordering Paragraphs are attached as Appendix A, B, and C, respectively.

II. STATEMENT OF THE CASE

The subject crossing, the McKees Rocks Bridge (SR 3104) provides traffic connection between Ohio River Boulevard (SR 0065) and Island Avenue (SR 0051) through the City of Pittsburgh, Stowe Township, and McKees Rocks Borough.¹ It is approximately 5,800 feet long and consists of steel spandrel-braced deck arches, steel-trussed through arches, Warren deck trusses, and an elevated concrete structure.²

In light of mold destroying the Commission's archived files, the parties are only aware of one prior Commission Order relating to the McKees Rocks Bridge through Docket No. C-18734.³ A January 20, 1975 Order in Docket No. C-18734 noted that PennDOT provide testimony that it only agreed to assume the cost of installing the bridge lighting on the bridge upon the condition that the maintenance and energizing be complete/paid for by others.⁴ The January 20, 1975 Order ordered that upon completion of the reconstruction project, PennDOT, at its sole cost and expense, shall furnish all material and do all work necessary to maintain the substructure and superstructure of the bridge, paving on the bridge structure, including the sidewalks, and the approaches to the bridge, and roadway and navigation lighting.⁵ In light of the lost archived records, it is unknown if PennDOT appealed

¹ PennDOT Statement No. 1, pgs. 2-3; I&E Statement No. 1, pg. 2.

² PennDOT Statement No. 1, pgs. 2-3; I&E Statement No. 1, pg. 2.

³ PennDOT Exhibit 2; N.T. pgs. 99-100.

⁴ PennDOT Exhibit 2, January 20, 1975 Order, pg. 2.

⁵ PennDOT Exhibit 2, January 20, 1975 Order, pg. 6, Ordering Paragraph 6.

the January 20, 1975 Order or whether the January 20, 1975 Order is the last Commission Order and/or Decision related to the McKees Rocks Bridge and the maintenance thereof.⁶

PennDOT's current Application includes bridge sidewalk repair/replacement at various locations, sidewalk railing paint, full-depth concrete pavement reconstruction of approximately 1145' of mainline SR 3104 and the 4 ramps at Helen Street, ADA ramps at Helen Street, approach slab replacement, approach pavement work at intersections with SR 65 & SR 51, barrier repair, expansion joint repair, deck overhang repair, backwall repair, protective fencing installation above railroads, and miscellaneous construction.⁷

Rail Safety held an initial field conference with the parties to discuss the work proposed by PennDOT and any future maintenance issues.⁸ The parties were unable to resolve the outstanding maintenance issues at the field conference, so Mr. Helfrich provided a proposed resolution for the parties' consideration and allowed the parties time to review and discuss.⁹ Mr. Helfrich's proposal would have assigned the cost and maintenance of the highway lighting and sidewalk winter maintenance to the City of Pittsburgh, Stowe Township, and McKees Rocks Borough within their own respective municipal limits.¹⁰ The City of Pittsburgh objected to Mr. Helfrich's proposal on the maintenance issues and requested a hearing.

PennDOT's Application was approved pursuant to the March 10, 2021 Secretarial Letter. However, noting the objection by the City of Pittsburgh, future maintenance and costs associated with navigational lighting, highway lighting, and winter sidewalk maintenance

⁶ N.T. pgs. 66-67, 98-100.

⁷ PennDOT Statement No. 1, pg. 3.

⁸ *See generally* March 10, 2021 Secretarial Letter.

⁹ PennDOT Statement No. 1, pg. 6.

¹⁰ PennDOT Statement No. 1, pg. 6.

was referred for a hearing. I&E cannot emphasize enough the fact that litigation on this matter ensued due to the City of Pittsburgh objecting to Mr. Helfrich’s proposed resolution, and yet the City of Pittsburgh has failed to actively participate in this matter.

III. BURDEN OF PROOF

PennDOT, as the applicant requesting approval to alter the McKees Rocks Bridge, bears the burden of proving, by a preponderance of evidence, that the alteration of the public crossing is necessary and proper for the service, accommodation, convenience, and safety of the public.¹¹ “A preponderance of the evidence means only that one party has presented evidence that is more convincing, by even the smallest amount, than the evidence presented by the other party.”¹²

IV. SUMMARY OF ARGUMENT

It is well established that in rail-highway crossing cases, the guiding principle for Commission action is the public interest, i.e., to ensure and promote the protection, safety, convenience, and welfare of the travelling public.¹³ It is I&E’s position that the alterations proposed by PennDOT are within the public interest and that the Secretarial Letter dated March 10, 2021 should remain in full force and effect. The main issues raised through this litigation relate to the costs associated with current and future maintenance of three (3) outstanding items: the removal of ice, snow, and debris from the sidewalks, the costs and

¹¹ 66 Pa. C.S. § 332(a). Section 332(a) of the Public Utility Code, 66 Pa. C.S. § 332(a), provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding; *see also Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600, 602 n. 1 (Pa. Cmwlth. 1990); *Borough of Bridgewater v. Pa. P.U.C.*, 124 A.2d 165 (Pa. Super. 1956); *N. Lebanon Twp. v. Pa. P.U.C.*, 962 A.2d 1237 (Pa. Cmwlth. 2008).

¹² *Energy Conservation Council of Pennsylvania v. Pa. P.U.C.*, 995 A.2d 465, 478 (Pa. Cmwlth. 2010).

¹³ *Application of the Dep’t of Transportation of the Commonwealth of Pennsylvania for Approval to Abolish the Existing Crossing Where S.R. 0522 Crosses at Grade Two Tracks of E. Broad Top R.R. & Coal Co. (Aar 003 135*) in Cromwell Twp., Huntingdon County; & the Allocation of Costs & Expenses Incident Thereto.*, Docket No. A-00114338, Opinion and Order dated Mar. 14, 2002.

maintenance associated with the navigational lighting, and the costs and maintenance associated with the highway lighting. As explained in more detail below, I&E submits that the local municipalities should be responsible for the removal of ice, snow, and debris from the sidewalks, PennDOT should remain responsible for the costs and maintenance associated with the navigational lighting, and I&E takes no position regarding whether PennDOT provided enough support or evidence to shift the costs and maintenance of the highway lighting to the local municipalities.

V. ARGUMENT

A. LEGAL STANDARD

It is well settled that the Commission has exclusive jurisdiction over matters involving railroad-highway crossings, which jurisdiction includes exclusive authority to determine and order which parties shall perform such work at the crossings and which parties shall maintain the crossings in the future.¹⁴ The Commission also has exclusive authority to assess the costs of any work it orders upon the concerned parties in the proceeding in such proper proportions as the Commission may determine.¹⁵

Among the factors which the Commonwealth Court noted as relevant to the assignment of costs and maintenance responsibilities, as noted in *Greene Township v. Pa. P.U.C.*, 668 A.2d 615 (Pa. Cmwlth. 1995), include the relative benefit conferred on each

¹⁴ 66 Pa. C.S. §§ 2702, 2704; *AT&T v. Pa. P.U.C.*, 709 A.2d 980 (Pa. Cmwlth. 1998), *appeal granted in part*, 717 A.2d 1022; *Application of the Dep't of Transportation of the Commonwealth of Pennsylvania for Approval to Abolish the Existing Crossing Where S.R. 0522 Crosses at Grade Two Tracks of E. Broad Top R.R. & Coal Co. (Aar 003 135*) in Cromwell Twp., Huntingdon County; & the Allocation of Costs & Expenses Incident Thereto.*, Docket No. A-00114338, Opinion and Order dated Mar. 14, 2002; *see also Pa. P.U.C. v. Borough of Souderton*, 231 A.2d 875 (Pa. Super. 1967) (“ . . . the commission [has the] power to inquire into the safety, and adequacy of a utility's facilities and order such changes as it finds necessary.”)

¹⁵ 66 Pa. C.S. § 2704.

party with the construction of the crossing and the relative benefit that each party will receive from the repair, replacement or removal of the crossing.¹⁶

However, while the Commission has considered the foregoing factors to be relevant in the past, this in no way limits the factors that it can consider.¹⁷ The factors are neither mandatory nor exclusive of other considerations, and the Commission’s allocation of cost will stand as long as the allocation is just and reasonable and has a sound legal and factual basis.¹⁸

Pursuant to Section 2704, the Commission has the authority to apportion the costs of constructing, removing or altering rail-highway crossings amongst the parties affected.¹⁹ Specifically, the General Assembly expressed its intention that the Commission should have the power to impose those costs on “the public utilities or municipal corporations . . . concerned, or [on] the Commonwealth, in such proper proportions as the commission may, after due notice and hearing, determine”²⁰ The Pennsylvania Supreme Court has noted that “[l]ocal governments and the Commonwealth obviously share the requisite sort of interest, as they are by nature concerned with the public safety of their residents.”²¹

¹⁶ *Greene Township v. Pa. P.U.C.*, 668 A.2d 615, 619 (Pa. Cmwlth. 1995); *see also Transportation Authority v. Pennsylvania Public Utility Commission*, 802 F. Supp. 1273 (E.D. Pa. 1992) (indicating that factors to be considered by the Commission in allocating costs include, amongst other things, prior ownership and maintenance responsibilities, benefits that will flow to the parties, and the general equities of the case); *see also Pittsburgh and Lake Erie Railroad Co. v. Pa. P.U.C.*, 556 A.2d 944, 946 (Pa. Cmwlth. 1989) (finding that the Pittsburgh and Lake Erie Railroad Company “benefits from [the] separated crossing due to the elimination of the need for and maintenance of automatic crossing signals and the uninhibited use of its rail line stands,” and thus affirming the assignment of maintenance responsibilities.)

¹⁷ *Bell Atlantic-Pa., Inc. v. Pa. P.U.C.*, 672 A.2d 352 (Pa. Cmwlth. 1996).

¹⁸ *AT&T v. Pa. P.U.C.*, 737 A.2d 201, 209 (Pa. 1999); *Wheeling & Lake Erie Railway Co.*, 778 A.2d at 793.

¹⁹ *PECO Energy Co. v. Pennsylvania Public Utility Commission*, 791 A.2d 1155 (Pa. 2002); 66 Pa. C.S. § 2704(a).

²⁰ *PECO Energy Co. v. Pennsylvania Public Utility Commission*, 791 A.2d 1155 (Pa. 2002) (quoting 66 Pa. C.S. § 2704(a)).

²¹ *Norfolk S. Ry. Co. v. Pa. P.U.C.*, 77 A.3d 619, 631 (Pa. 2013).

B. THE LOCAL MUNICIPALITIES SHOULD BEAR THE COSTS AND MAINTENANCE RELATED TO THE REMOVAL OF ICE, SNOW, AND DEBRIS FROM THE SIDEWALKS

The local municipalities, specifically the City of Pittsburgh, Stowe Township, and McKees Rocks Borough, should be responsible for the future costs and maintenance associated with snow, ice, and debris removal from the sidewalks within their respective municipal boundaries for the accommodation, convenience, and safety of the public.²² Mr. Helfrich credibly and unequivocally opined that the residents of the local municipalities will benefit the most from proper winter maintenance of the sidewalks.²³

Mr. Helfrich opined that a majority of the foot traffic on the bridge sidewalks would be by local residents since they live in the vicinity of the bridge and can utilize the sidewalks on a regular basis.²⁴ PennDOT agrees with Mr. Helfrich, noting that the sidewalks are a function of the municipalities for the commuting of residents and movement of residents.²⁵

Mr. Helfrich further noted that winter maintenance of the sidewalks is more of a discreet occurrence, occurring a couple times a year or a couple times a month, in which the locals are in the best position to address the maintenance of these discreet events.²⁶ Mr. Helfrich explained that the local municipalities are located at/near the subject bridge and have the ability to react quickly and appropriately to any kind of incident which involves snow, ice, or debris removal from sidewalks.²⁷ The local municipalities have people in the area to react quickly as opposed to PennDOT who would have to pull resources from other

²² I&E Statement No. 1, pg. 5.

²³ I&E Statement No. 1, pg. 5.

²⁴ N.T. pg. 103.

²⁵ N.T. pgs. 83-84.

²⁶ N.T. pgs. 103-104.

²⁷ N.T. pg. 113.

aspects of their work.²⁸ Mr. Helfrich opined that clearing roadways has priority over clearing sidewalks, and that pulling PennDOT's personnel from clearing roadways to clear sidewalks would be illogical.²⁹

Furthermore, PennDOT's maintenance responsibility for the McKees Rocks bridge is limited to the structural integrity of the sidewalks and curbs only.³⁰ It does not perform and has never performed winter maintenance, including snow, ice, and debris removal, on the sidewalks.³¹ PennDOT's priority during winter events is the removal of snow and ice from the roadways in order to ensure safe travel for the public and first responders.³² Taking maintenance staff away to clear sidewalks would significantly impact vehicular traffic and create a safety concern.³³

Notably, the City of Pittsburgh, Stowe Township, and McKees Rocks Borough did not offer any testimony or evidence to refute or challenge the testimony of Mr. Helfrich or PennDOT on this issue.

To calculate the shared costs related to sidewalk maintenance, Mr. Helfrich proposed aligning the cost and maintenance responsibility by determining the length of the sidewalk within each municipal boundary and dividing it by the total length of sidewalk to determine an appropriate percentage of obligation.³⁴ Another option is to assign responsibility of the sidewalks to each municipality within their respective municipal boundaries.³⁵

²⁸ N.T. pg. 113.

²⁹ N.T. pgs. 121-122.

³⁰ PennDOT Statement No. 1, pg. 5.

³¹ PennDOT Statement No. 1, pg. 5; N.T. pgs. 78, 81.

³² PennDOT Statement No. 6, pg. 1.

³³ PennDOT Statement No. 6, pg. 1.

³⁴ N.T. pg. 105.

³⁵ I&E Statement No. 1, pg. 5; N.T. pgs. 104-105.

C. PENNDOT SHOULD CONTINUE TO BEAR THE COSTS AND MAINTENANCE RELATED TO THE NAVIGATIONAL LIGHTING

PennDOT should continue to bear the costs and responsibly associated with the maintenance and energization of the navigational lighting system on the bridge, consistent with the January 20, 1975 Order and 33 CFR § 118.1.³⁶ Navigational lighting relates to river travel or traffic and consists of channel markers and red and green lights mounted on the piers for river barge traffic or boat traffic.³⁷ Mr. Helfrich and PennDOT agree that PennDOT should continue bearing the costs and maintenance associated with the navigational lighting on the McKees Rock Bridge.³⁸

D. COSTS AND MAINTENANCE RELATED TO THE HIGHWAY LIGHTING

With the filing of this application, PennDOT has brought the issue of costs and maintenance associated with the highway lighting to the Commission, seeking to reassign the costs and maintenance to the local municipalities to be consistent with PennDOT policy and manuals.³⁹ As noted above, the January 20, 1975 Order in Docket No. C-18734 assigned maintenance cost of the roadway lighting to PennDOT, but was silent on the costs associated with energizing the highway lighting.⁴⁰ The highway lighting on the McKees Rocks Bridge is energized by Duquesne Light Company and includes the actual lights along the bridge and which light the roadway.⁴¹

³⁶ I&E Statement No. 1, pg. 6.

³⁷ N.T. pgs. 89-90.

³⁸ I&E Statement No. 1, pg. 6; N.T. pgs. 90, 97.

³⁹ N.T. pgs. 62-63, 66, 87-88; PennDOT Statement No. 3, pg. 3.

⁴⁰ PennDOT Exhibit 2, January 20, 1975 Order, pg. 6, Ordering Paragraph 6.

⁴¹ N.T. pg. 90.

PennDOT currently maintains all roadway lighting on the McKees Rocks Bridge, including re-lamping of all fixtures, repair and replacement of accident-damaged facilities, and energy costs.⁴² PennDOT does not regularly or normally pay for maintenance or energization of lighting systems on bridges due to its policy, specifically PennDOT Design Manual Publication 10C (DM-1C) 2015 Edition, Change #4.⁴³

It is PennDOT's position that the local municipalities should be responsible for the signage associated with the signals because the municipalities are responsible for the ownership and maintenance of traffic signals.⁴⁴ Signal signage would include all traffic signs relating to the traffic signals and lanes and the supports that hold up the signal signage.⁴⁵ Accordingly, to PennDOT, since the municipality is responsible for the traffic lights and signage, that they should also be responsible for paying the costs to energize the traffic lights and signals.⁴⁶ PennDOT stated that it has never been responsible for signage associated with the traffic signals.⁴⁷

In further support of its position, PennDOT points to the cited testimony in the January 20, 1975 Order where PennDOT stated that it only agreed to assume the cost of installing the bridge lighting on the bridge upon the condition that the maintenance and energizing be complete/paid for by others.⁴⁸ PennDOT argues that it should have never been assigned the cost and maintenance of the roadway lighting system, and that PennDOT policy

⁴² PennDOT Statement No. 3, pg. 3.

⁴³ PennDOT Statement No. 3, pgs. 3-4; PennDOT Exhibit 5; N.T. pgs. 62-63.

⁴⁴ PennDOT Statement No. 5, pgs. 2-3; N.T. pg. 79.

⁴⁵ PennDOT Statement No. 5, pgs. 2-3; N.T. pg. 79.

⁴⁶ N.T. pgs. 80-81.

⁴⁷ N.T. pg. 80.

⁴⁸ PennDOT Exhibit 2, January 20, 1975 Order, pg. 2.

dictates that this cost be assigned to the local municipalities, PennDOT did not agree to absorb these costs, and PennDOT specifically asked not to be responsible.⁴⁹

Mr. Helfrich opined that lighting on a highway portion of a bridge is a safety feature that benefits the travelling public, and thus, barring any agreement or other legal document, the safety component should be the responsibility of the primary maintainer of the bridge structure.⁵⁰ Mr. Helfrich opined that PennDOT did not provide any justification to shift the responsibility of the highway lighting from PennDOT to the local municipalities.⁵¹

Again, the City of Pittsburgh, Stowe Township, and McKees Rocks Borough did not offer any testimony or evidence to refute or challenge the testimony of Mr. Helfrich or PennDOT on this issue.

Thus, I&E takes no position regarding whether PennDOT provided enough justification to shift the costs of maintaining and energizing the highway lighting to the local municipalities and leaves such determination to the presiding officer.

VI. CONCLUSION

I&E respectfully requests that presiding ALJ Johnson and the Commission order (1) the City of Pittsburgh, Stowe Township, and McKees Rocks Borough to be responsible, at their sole cost and expense, for the future costs and maintenance associated with snow, ice, and debris removal from the sidewalks within their respective municipal boundaries; (2) PennDOT to continue bearing the costs and maintenance associated with the navigational lighting on the McKees Rock Bridge; and (3) for ALJ Johnson and the Commission to render

⁴⁹ N.T. pgs. 65-66.

⁵⁰ N.T. pgs. 101-102.

⁵¹ N.T. pg. 101.

a decision on who should bear the costs and maintenance associated with the highway lighting, including who shall be responsible for energizing the lighting, on the McKees Rocks Bridge.

Respectfully submitted,

A handwritten signature in blue ink that reads "Kayla L. Rost". The signature is written in a cursive style.

Kayla L. Rost
Prosecutor
PA Attorney ID No. 322768

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Dated: December 10, 2021

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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Central Railroad Company (DOT :
Unknown) in the City of Pittsburgh, Stowe :
Township and McKees Rocks Borough, :
Allegheny County. :

PROPOSED STATEMENT OF FACTS

1. By letter dated July 2, 2020, the Pennsylvania Department of Transportation (“PennDOT”) submitted an application (“Application”) for approval to alter the public highway bridge crossing where State Route 3104 crosses the tracks of CSX Transportation, Inc. (“CSXT”) (DOT No. 584 825 U), Norfolk Southern Railway Company (“NS” or “Norfolk Southern”) (DOT No. 507 455 K), and the Pittsburgh & Ohio Central Railroad Company (“POHC”) (DOT unknown) in the City of Pittsburgh, Stowe Township, and McKees Rocks Borough, Allegheny County.¹
2. Receipt of PennDOT’s application by the Commission was confirmed by Secretarial Letter dated July 6, 2020.²

¹ See generally *Application of the Department of Transportation of the Commonwealth of Pennsylvania for approval to alter the crossings where State Route 3104 crosses, above grade, the tracks of CSX Transportation Inc. (DOT 584 825 U), Norfolk Southern Railway Company (DOT 507 455 K), and the Pittsburgh and Ohio Central Railroad Company (DOT Unknown) in the City of Pittsburgh, Stowe Township and McKees Rocks Borough, Allegheny County, A-2020-3020667* (hereinafter “Application”).

² See generally *Application, A-2020-3020667*.

3. An initial field investigation and conference was held on October 21, 2020. The Commission's Bureau of Technical Utility Services, Rail Safety Section ("Rail Safety"), PennDOT, CSXT, Norfolk Southern, POHC, the City of Pittsburgh, McKees Rocks Borough, Peoples Natural Gas Company, and Verizon attended the field conference.³

4. PennDOT agreed to complete the construction project at its sole cost and expense, utilizing 80% federal funds and 20% state funds.⁴

5. On February 4, 2021, Rail Safety requested that the matter be referred to the Office of Administrative Law Judge, noting that the City of Pittsburgh objected to the proposed resolution of the future maintenance and costs associated with the bridge lighting and removal of snow, ice, and debris from the sidewalks.

6. On March 10, 2021, a Secretarial Letter was issued granting PennDOT permission to submit final detailed constructions plans of the proposed work and allowing PennDOT to begin construction once the plans are submitted and approved by the Commission. The Secretarial Letter referred the outstanding future maintenance items and any other unresolved items to the Office of Administrative Law Judge for adjudication.⁵

7. Additionally, on March 10, 2021, Administrative Law Judge Conrad A. Johnson issued a Prehearing Conference Order for Telephonic Hearing and Call-in Telephone Pre-hearing Conference Notice, scheduling a telephonic prehearing conference for April 13, 2021.⁶

³ See generally March 10, 2021 Secretarial Letter.

⁴ See generally *Application*, A-2020-3020667.

⁵ See generally March 10, 2021 Secretarial Letter.

⁶ See generally Prehearing Conference Order for Telephonic Hearing dated March 10, 2021 and Call-In Telephone Pre-Hearing Conference Notice dated March 10, 2021.

8. On April 13, 2021, the prehearing conference occurred as scheduled and was attended by the Commission's Bureau of Investigation and Enforcement ("I&E"), PennDOT, McKees Rocks Borough, Norfolk Southern, and CSXT. While notice was provided to the City of Pittsburgh and Stowe Township, neither party participated/attended.⁷

9. On May 27, 2021, ALJ Johnson issued a Prehearing Order outlining the litigation schedule.⁸

10. On June 1, 2021, a Call-In Telephone Hearing Notice was issued, scheduling the telephonic evidentiary hearing for September 30, 2021.⁹

11. On July 21, 2021, I&E, PennDOT, Norfolk Southern, and CSXT submitted direct testimony.¹⁰

12. On August 25, 2021, PennDOT submitted rebuttal testimony.¹¹

13. The City of Pittsburgh, Stowe Township, and McKees Rocks Borough did not submit testimony in this proceeding.¹²

14. On September 30, 2021, the telephonic evidentiary hearing occurred as scheduled and was attended by I&E, PennDOT, Norfolk Southern, CSXT, and McKees Rocks Borough.¹³

15. In light of mold destroying the archived files relating to the subject bridge, the only prior Commission Order PennDOT was able to provide was a October 29, 1969 Order,

⁷ See generally N.T. pgs. 1-28.

⁸ See generally Prehearing Order dated May 27, 2021.

⁹ See generally Call-In Telephone Hearing Notice dated June 1, 2021.

¹⁰ See generally Application, A-2020-3020667.

¹¹ See generally Application, A-2020-3020667.

¹² See generally Application, A-2020-3020667.

¹³ See generally N.T. pgs. 35-142.

a July 7, 1969 Order, and January 20, 1975 Order at Docket No. C-18734.¹⁴

16. The January 20, 1975 Order noted that PennDOT provide testimony that it only agreed to assume the cost of installing the bridge lighting on the bridge upon the condition that the maintenance and energizing be complete/paid for by others.¹⁵

17. The January 20, 1975 Order ordered that upon completion of the reconstruction project, PennDOT, at its sole cost and expense, shall furnish all material and do all work necessary to maintain the substructure and superstructure of the bridge, paving on the bridge structure, including the sidewalks, and the approaches to the bridge, and roadway and navigation lighting.¹⁶

18. In light of the lost archived records, it is unknown if PennDOT appealed the January 20, 1975 Order or whether the January 20, 1975 Order is the last Commission Order and/or Decision related to the McKees Rocks Bridge and the maintenance thereof.¹⁷

19. PennDOT provided the testimony of Philip Mutunga, Christopher Ciesa, William J. Lester, and Michael Adams.¹⁸

20. Philip Mutunga is a District 11-0 Grade Crossing Engineer and is a registered professional engineer.¹⁹

21. The subject crossing, the McKees Rocks Bridge (SR 3104) provides traffic connection between Ohio River Boulevard (SR 0065) and Island Avenue (SR 0051) through the City of Pittsburgh, Stowe Township, and McKees Rocks Borough. It is approximately

¹⁴ PennDOT Exhibit 2; N.T. pgs. 99-100.

¹⁵ PennDOT Exhibit 2, January 20, 1975 Order, pg. 2.

¹⁶ PennDOT Exhibit 2, January 20, 1975 Order, pg. 6, Ordering Paragraph 6.

¹⁷ N.T. pgs. 66-67, 98-100.

¹⁸ *See generally* N.T. pgs. 51-91; PennDOT Statement Nos. 1, 2, 3, 5 and 6; PennDOT Exhibits 1, 2, 3, 4, and 5.

¹⁹ PennDOT Statement No. 1, pgs. 1-2.

5,800 feet long that consists of steel spandrel-braced deck arches, steel-trussed through arches, Warren deck trusses, and an elevated concrete structure.²⁰

22. The average daily traffic volume is 22,180 vehicles for segments 0020 and 0030; 11,509 vehicles for segment 0010; and 10,671 vehicles for segment 0011.²¹

23. PennDOT's application includes bridge sidewalk repair/replacement at various locations, sidewalk railing paint, full-depth concrete pavement reconstruction of approximately 1145' of mainline SR 3104 and the 4 ramps at Helen Street, ADA ramps at Helen Street, approach slab replacement, approach pavement work at intersections with SR 65 & SR 51, barrier repair, expansion joint repair, deck overhang repair, backwall repair, protective fencing installation above railroads, and miscellaneous construction.²²

24. On Act 615 bridges, such as the McKees Rocks Bridge, PennDOT's maintenance responsibility is limited to curb-to-curb.²³

25. PennDOT performs winter maintenance on the roadway from segment 0020 offset 0000, at the intersection of state route 3104 and Helen Street, to segment 0030 offset 3864, and at the intersection of state route 3104 and state route 65.²⁴

26. PennDOT has a winter services agreement with McKees Rocks Borough.²⁵

27. PennDOT's policy dictates that it provide winter maintenance on bridge roadways carrying a state route either through an agreement with the municipality or through PennDOT forces.²⁶

²⁰ PennDOT Statement No. 1, pgs. 2-3; I&E Statement No. 1, pg. 2.

²¹ PennDOT Statement No. 1, pg. 3.

²² PennDOT Statement No. 1, pg. 3.

²³ PennDOT Statement No. 6, pgs. 1-2.

²⁴ PennDOT Statement No. 1, pg. 4.

²⁵ PennDOT Statement No. 1, pg. 4; PennDOT Exhibit 3.

²⁶ PennDOT Statement No. 1, pg. 5.

28. PennDOT's maintenance responsibility for the McKees Rocks bridge is the structural integrity of the sidewalks and curbs only. It does not perform winter maintenance, including snow, ice, and debris removal, on the sidewalks.²⁷

29. PennDOT's priority during winter events is the removal of snow and ice from the roadways in order to ensure safe travel for the public and first responders. Taking maintenance staff away to clear sidewalks would significantly impact vehicular traffic and create a safety concern.²⁸

30. It is PennDOT's position that the locals will receive the best level of service if the local municipality provides the snow and ice removal on sidewalks.

31. Mr. Mutunga attended the October 21, 2020 field conference. He reached out to the City of Pittsburgh, Stowe Township, and McKees Rocks Borough after the field conference, but only McKees Rocks Borough responded.²⁹

32. On January 14, 2021, Mr. Helfrich contacted all the parties with a proposed resolution for the future maintenance and costs associated with the bridge lighting and removal of snow, ice, and debris from the sidewalks. Mr. Helfrich's proposal would have made the City of Pittsburgh, Stowe Township, and McKees Rocks Borough responsible for those items within their own respective municipal limits.³⁰

33. The City of Pittsburgh objected to Mr. Helfrich's proposal.³¹

34. Mr. Mutunga is familiar with prior PennDOT projects where PennDOT did not install new sidewalk on a bridge whenever the local municipality stated it would not agree to

²⁷ PennDOT Statement No. 1, pg. 5.

²⁸ PennDOT Statement No. 6, pg. 1.

²⁹ PennDOT Statement No. 1, pgs. 5-6.

³⁰ PennDOT Statement No. 1, pg. 6.

³¹ PennDOT Statement No. 1, pg. 6.

be responsible for sidewalk maintenance and snow and ice removal. PennDOT adjusted its construction plans to remove the installation of a sidewalk from that project.³²

35. Mr. Ciesa is a Bridge Inspector Supervisor in Engineering District 11-0 and is a registered professional engineer.³³

36. PennDOT agrees to maintain the McKees Rocks Bridge structure itself as well as the structural integrity of the sidewalks only. On Act 615 bridge such as this, PennDOT's policy dictates only curb-to-curb maintenance by provided.³⁴

37. Act 615 of 1961 transferred ownership of various highways and bridges from counties and municipalities to the State Department of Highways. The McKees Rocks Bridge was included in Act 615 and ownership was transferred from Allegheny County to the Department of Highways.³⁵

38. Publication 23- Maintenance Manual, Chapter 7, dictates maintenance of highways that were added to the State System.³⁶

39. Maintenance activities considered outside the curb line include general maintenance of the sidewalks such as sweeping, litter, and snow removal. Generally, the local municipality is responsible for maintenance outside the curb line.³⁷

40. In accordance with PennDOT policy, PennDOT is not responsible for and does not intend to provide maintenance outside the curb line. PennDOT's position is that the municipalities should be responsible for the maintenance outside the curb line.³⁸

³² PennDOT Statement No. 6, pg. 1; *see also* A-2020-3015375.

³³ PennDOT Statement No. 2, pg. 1.

³⁴ PennDOT Statement No. 2, pg. 3.

³⁵ PennDOT Statement No. 2, pg. 3.

³⁶ PennDOT Statement No. 2, pg. 3; PennDOT Exhibit 4.

³⁷ PennDOT Statement No. 2, pg. 3.

³⁸ PennDOT Statement No. 2, pg. 4; PennDOT Exhibit 4.

41. Mr. Lester is a Transportation Construction Manager II and has over 22 years of experience with PennDOT.³⁹

42. The McKees Rocks Bridge is energized by Duquesne Light Company. The lighting system is one contiguous system which covers the entire bridge and originates in McKees Rocks Borough.⁴⁰

43. PennDOT currently maintains all roadway and navigational lighting on the McKees Rocks Bridge, including re-lamping of all fixtures, repair and replacement of accident-damaged facilities, and energy costs. PennDOT currently pays for maintenance and energization of both the roadway and navigational lighting.⁴¹

44. Under the January 20, 1975 Order, PennDOT was ordered to pay for the cost and expense to construct and maintain the lighting system, but it is unclear why PennDOT is paying to energize the lighting system.⁴²

45. Specifically, the January 20, 1975 Order states that PennDOT shall be responsible for maintenance of the lighting system, but does not state that PennDOT should be responsible for the costs to energize the lighting system, thus Mr. Lester is unsure why PennDOT is paying that cost.⁴³

46. With this application, PennDOT is bringing this matter before the Commission to bring it into compliance with its policy and manuals.⁴⁴

³⁹ PennDOT Statement No. 3, pg. 1.

⁴⁰ PennDOT Statement No. 3, pgs. 2, 6.

⁴¹ PennDOT Statement No. 3, pg. 3.

⁴² PennDOT Statement No. 3, pg. 3.

⁴³ N.T. pg. 66.

⁴⁴ N.T. pgs. 87-88.

47. PennDOT does not regularly or normally pay for maintenance or energization of lighting systems on bridges due to its policy.⁴⁵

48. Pursuant to PennDOT Design Manual Publication 10C (DM-1C) 2015 Edition, Change #4, the local government must agree in writing to assume the ownership and 100% costs of construction, energy, and maintenance of lighting systems on existing bridges when the lighting system is updated or installed.⁴⁶

49. If the local government does not agree to pay the energy and maintenance costs associated with the lighting system, the District Executive or the Deputy Secretary for Highway Administration may apply cost sharing, agree to have PennDOT cover the costs, or install provisions for future lighting.⁴⁷

50. During any proceeding with the Commission regarding this bridge, PennDOT did not agree to pay for the maintenance and energization of the lighting system. Docket C-18734 states that PennDOT would, at its sole cost, construct the new sidewalks and install roadway lighting and navigational lighting on the bridge if others are made responsible for energizing and maintaining the roadway lighting.⁴⁸

51. It is clear, under Docket C-18734, that PennDOT would not have installed the lighting system if it would have known it would have to maintain and energize the system.⁴⁹

52. It is PennDOT's position that the Department should not be responsible for the costs to maintain and energize the roadway lighting consistent with its Design Manual and

⁴⁵ PennDOT Statement No. 3, pg. 3; N.T. pgs. 62-63.

⁴⁶ PennDOT Statement No. 3, pg. 4; PennDOT Exhibit 5.

⁴⁷ PennDOT Statement No. 3, pgs. 4-5; PennDOT Exhibit 5.

⁴⁸ PennDOT Statement No. 3, pg. 5; PennDOT Exhibit 2.

⁴⁹ PennDOT Statement No. 3, pg. 5; PennDOT Exhibit 2.

Lighting Policy. Instead, the local municipalities should be responsible for the costs to maintain and energize the lighting system.⁵⁰

53. According to 33 CFR 118.1, PennDOT is responsible for the ownership and maintenance costs of the navigational lighting over navigable waters on bridges owned and operated by PennDOT.⁵¹

54. There are two types of lighting systems at issue here- navigational lighting and roadway lighting.⁵²

55. Navigational lighting relates to river travel or traffic and consists of channel markers, and red and green lights mounted on the piers for river barge traffic or boat traffic.⁵³

56. Highway or roadway lighting are the actual lights which run along the bridge and light the roadway.⁵⁴

57. It is PennDOT's position that it is responsible for navigational lighting, but that the municipalities are responsible for the highway or roadway lighting.⁵⁵

58. Mr. Adams is the District Maintenance Operations Engineer for District 11-0 and is a registered professional engineer.⁵⁶

59. It is PennDOT's position that future maintenance obligations of PennDOT include the substructure, superstructure, parapets, structural sidewalk components, fencing and deck of the State Route 3104 bridge, as well as the remainder of the improvements

⁵⁰ PennDOT Statement No. 3, pg. 5; PennDOT Exhibit 5.

⁵¹ N.T. pg. 89. I&E notes that while the transcript states that Mr. Lester said "CRM," the correct cite is 33 CFR 118.1.

⁵² N.T. pgs. 89-90.

⁵³ N.T. pgs. 89-90.

⁵⁴ N.T. pg. 90.

⁵⁵ N.T. pg. 90.

⁵⁶ PennDOT Statement No. 5, pgs. 1-2.

including the roadway pavement, highway approaches, roadway surface, and drainage facilities.⁵⁷

60. The ancillary features that PennDOT is responsible for include the structural integrity of the stairways and stairway railings, the structural integrity of the bridge ramps leading to the surface streets, as well as the longitudinal white and yellow pavement markings.⁵⁸

61. The municipalities should be responsible for the signage associated with the signals because the municipalities are responsible for the ownership and maintenance of traffic signals. Signal signage would include all traffic signs relating to the traffic signals and lanes and the supports that hold up the signal signage.⁵⁹

62. Traffic signs and signal signage are requirements of the MUTCD.⁶⁰

63. PennDOT has never been responsible for signage associated with the traffic signals.⁶¹

64. It is PennDOT's position that since the municipality is responsible for the traffic lights and signage, that they should also be responsible for paying the costs to energize the traffic lights and signals.⁶²

65. Mr. Adams testified that it is not uncommon for the Commission to order municipalities to provide snow removal on sidewalks since the residents of the municipalities receive most of the benefit from the sidewalks. It is Mr. Adams' understanding that there are

⁵⁷ PennDOT Statement No. 5, pg. 2.

⁵⁸ PennDOT Statement No. 5, pg. 2.

⁵⁹ PennDOT Statement No. 5, pgs. 2-3; N.T. pg. 79.

⁶⁰ N.T. pg. 75.

⁶¹ N.T. pg. 80.

⁶² N.T. pgs. 80-81.

court cases where this has been upheld.⁶³

66. If a local municipality does not agree to maintain the sidewalk after construction, then PennDOT will not construct sidewalks on the bridge.⁶⁴

67. While not personally involved with those projects, Mr. Adams is aware of PennDOT projects where sidewalks were not constructed due to the local official's refusal to enter into a maintenance agreement.⁶⁵

68. In this case, the sidewalk is a function of the municipality for commuting of residents and movement of residents, therefore the municipalities should be responsible for the debris, snow, and ice removal from the sidewalks.⁶⁶

69. Sidewalks and lighting are optional on a bridge project.⁶⁷

70. Prior to 2020, PennDOT has never performed snow, ice, or debris removal on the bridge sidewalks.⁶⁸

71. Since this is an Act 615 bridge, and in accordance with PennDOT policy, PennDOT's responsibility is from curb-to-curb, and thus it is not responsible for the sidewalks.⁶⁹

72. Mr. Adams agrees with Mr. Helfrich's testimony that the residents of the City of Pittsburgh, Stowe Township, and McKees Rocks Borough benefit the most from the proper winter maintenance of the sidewalks since the residents utilize the sidewalks to

⁶³ PennDOT Statement No. 5, pg. 3.

⁶⁴ PennDOT Statement No. 5, pg. 4; N.T. pgs. 83-84.

⁶⁵ PennDOT Statement No. 5, pg. 4.

⁶⁶ N.T. pgs. 83-84.

⁶⁷ N.T. pg. 74.

⁶⁸ N.T. pgs. 78, 81.

⁶⁹ N.T. pg. 85.

commute across the bridge.⁷⁰

73. It is PennDOT's position that it should have never been assigned the cost and maintenance of the roadway lighting system, and that PennDOT policy dictates that this cost be assigned to the local municipalities, PennDOT did not agree to absorb these costs, and PennDOT specifically asked not to be responsible.⁷¹

74. I&E presented the testimony of Daniel R. Helfrich.⁷²

75. Mr. Helfrich is a licensed professional engineer with the Commission's Bureau of Technical Utility Services, Rail Safety Section.⁷³

76. The current litigation ensued after the March 10, 2021 Secretarial Letter was issued to resolve the allocation of work and costs for snow, ice, and debris removal from the sidewalks and connected stairways on the structure, the allocation of future maintenance for the bridge roadway lighting and navigational lighting systems, and the allocation of cost to energize the bridge roadway and navigational lighting systems.⁷⁴

77. Mr. Helfrich reviewed an August 27, 2008 Federal Highway Administration memorandum which requires a State DOT to maintain projects constructed with federal funds or to enter into a maintenance agreement with the local officials where such projects are located. The memorandum also notes that a public agency must maintain its sidewalks in an accessible condition for all pedestrians, which includes Americans with Disabilities Act ("ADA") accessibility.⁷⁵

⁷⁰ PennDOT Statement No. 5, pg. 4.

⁷¹ N.T. pgs. 65-66.

⁷² *See generally* N.T. pgs. 91-129; I&E Statement No. 1.

⁷³ I&E Statement No. 1, pg. 1.

⁷⁴ I&E Statement No. 1, pgs. 2-3.

⁷⁵ I&E Statement No. 1, pgs. 4-5; N.T. pg. 112.

78. Mr. Helfrich opines that PennDOT should bear the initial costs for snow, ice, and debris removal from the sidewalks until an Order is issued in this matter assigning future maintenance.⁷⁶

79. The assignment of costs or maintenance responsibility on an initial basis is simply to have that cost or maintenance covered until the final allocation of that cost or maintenance is assigned through the litigation process.⁷⁷

80. It is normal practice for the Commission to assign a party initial cost or maintenance in a matter until the matter is resolved and final costs or maintenance is assigned. The party who is assigned initial costs/maintenance is not always then assigned final cost/maintenance.⁷⁸

81. Mr. Helfrich opined that the City of Pittsburgh, Stowe Township, and McKees Rocks Borough should share in the future costs and responsibility for the snow, ice, and debris removal from the sidewalks within their respective municipal boundaries for the accommodation, convenience, and safety of the public.⁷⁹

82. One possible solution to assigning sidewalk maintenance and cost would be to determine the length of the sidewalk within each municipal boundary and dividing the total length to determine an approximate percentage of obligation.⁸⁰

83. It should be noted that the exact municipal boundaries are not a part of the record because the City of Pittsburgh, Stowe Township, and McKees Rocks Borough did not

⁷⁶ I&E Statement No. 1, pg. 5.

⁷⁷ N.T. pg. 111.

⁷⁸ N.T. pgs. 111-112.

⁷⁹ I&E Statement No. 1, pg. 5; N.T. pgs. 104-105.

⁸⁰ N.T. pg. 105.

participate in this proceeding.⁸¹

84. Mr. Helfrich supported his position by noting that the residents of the local municipalities will benefit the most from proper winter maintenance of the sidewalks.⁸²

85. Mr. Helfrich opined that a majority of the foot traffic on the bridge sidewalks would be by local residents since they live in the vicinity of the bridge and can utilize the sidewalks on a regular basis.⁸³

86. Mr. Helfrich further noted that winter maintenance of the sidewalks is more of a discreet occurrence, occurring a couple times a year or a couple times a month, in which the locals are in the best position to address the maintenance of these discreet events.⁸⁴

87. Mr. Helfrich explained that the local municipalities are at the subject bridge and have the ability to react quickly and appropriately to any kind of incident which involves snow, ice, or debris removal from sidewalks. The locals have people in the area as opposed to PennDOT who would have to pull resources from other aspects of their work.⁸⁵

88. Mr. Helfrich opined that clearing roadways has priority over clearing sidewalks, and that pulling PennDOT's personnel from clearing roadways to clear sidewalks would be illogical.⁸⁶

89. Referring to the January 20, 1975 Order, Mr. Helfrich opined that PennDOT was initially assigned the responsibility for maintenance and energization of the lighting of the roadways on the bridge and should continue to bear the work and costs.⁸⁷

⁸¹ N.T. pg. 106.

⁸² I&E Statement No. 1, pg. 5.

⁸³ N.T. pg. 103.

⁸⁴ N.T. pgs. 103-104.

⁸⁵ N.T. pg. 113.

⁸⁶ N.T. pgs. 121-122.

⁸⁷ I&E Statement No. 1, pg. 6.

90. Mr. Helfrich opined that PennDOT should continue to bear the costs and responsibly associated with the maintenance and energization of the navigational lighting system on the bridge, consistent with the January 20, 1975 Order and 33 CFR § 118.1.⁸⁸

91. Mr. Helfrich opined that lighting on a highway portion of a bridge is a safety feature that benefits the travelling public, and thus, barring any agreement or other legal document, the safety component should be the responsibility of the primary maintainer of the bridge structure.⁸⁹

92. Mr. Helfrich opined that PennDOT did not provide any justification to shift the responsibility of the highway lighting from PennDOT to the local municipalities.⁹⁰

93. The Commission does not review a party's economic status when assigning costs and/or maintenance responsibilities.⁹¹

94. Norfolk Southern presented the testimony of Douglas "Shawn" Starling.⁹²

95. Mr. Starling is a Senior Public Improvements Engineer for Norfolk Southern and is a licensed engineer in the state of Georgia.⁹³

96. Norfolk Southern is the owner and operator of one of the lines under the subject highway bridge.⁹⁴

97. Norfolk Southern has two tracks under the bridge which run an average of 35 trains a day at 40 mph.⁹⁵

⁸⁸ I&E Statement No. 1, pg. 6; N.T. pg. 97.

⁸⁹ N.T. pgs. 101-102.

⁹⁰ N.T. pg. 101.

⁹¹ N.T. pgs. 94-95.

⁹² N.T. pg. 47; Norfolk Southern Statement No. 1.

⁹³ Norfolk Southern Statement No. 1, pg. 1.

⁹⁴ Norfolk Southern Statement No. 1, pg. 1.

⁹⁵ Norfolk Southern Statement No. 1, pg. 2.

98. Norfolk Southern has never had any responsibility for the sidewalk maintenance or lighting at the subject bridge crossing.⁹⁶

99. It is Norfolk Southern's position that the sidewalks and lighting on the bridge do not provide any benefit to its operations.⁹⁷

100. CSXT presented the testimony of Derek Mihaly.⁹⁸

101. Mr. Mihaly is a Project Manager II in the Design and Construction Department of CSXT and is a licensed engineer in the state of Delaware.⁹⁹

102. CSXT is the owner and operator of one of the lines under the subject highway bridge.¹⁰⁰

103. CSXT has 4 tracks under the subject bridge, 2 main lines, a lead track, and a spur track. An average of 34 trains traverse the crossing each day at a maximum speed of 50 mph.¹⁰¹

104. CSXT has never had any responsibility for the sidewalk maintenance or lighting at the subject bridge crossing.¹⁰²

105. It is CSXT's position that the sidewalks and lighting on the bridge do not provide any benefit to its operations.¹⁰³

106. McKees Rocks Borough did not present any witness testimony.¹⁰⁴

⁹⁶ Norfolk Southern Statement No. 1, pg. 2.

⁹⁷ Norfolk Southern Statement No. 1, pg. 2.

⁹⁸ N.T. pg. 46; CSXT Statement No. 1.

⁹⁹ CSXT Statement No. 1, pg. 1.

¹⁰⁰ CSXT Statement No. 1, pg. 1.

¹⁰¹ CSXT Statement No. 1, pg. 2.

¹⁰² CSXT Statement No. 1, pg. 2.

¹⁰³ CSXT Statement No. 1, pg. 2.

¹⁰⁴ N.T. pg. 39.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of the Department of :
Transportation of the Commonwealth of :
Pennsylvania for approval to alter the :
crossings where State Route 3104 crosses, :
above grade, the tracks of CSX :
Transportation Inc. (DOT 584 825 U), : Docket No. A-2020-3020667
Norfolk Southern Railway Company (DOT :
507 455 K), and the Pittsburgh and Ohio :
Central Railroad Company (DOT :
Unknown) in the City of Pittsburgh, Stowe :
Township and McKees Rocks Borough, :
Allegheny County. :

PROPOSED CONCLUSIONS OF LAW

1. The Pennsylvania Public Utility Commission (“Commission”) has jurisdiction over the subject matter of and the parties to this proceeding.¹

2. The Commission has the authority to order the construction, reconstruction, alteration, relocation, repair, maintenance, protection, suspension or abolition of railroad crossings, and the authority to determine and order which concerned parties should perform such work, in order to prevent accidents and promote the safety of the public.²

3. The Commission’s Bureau of Investigation and Enforcement, the Pennsylvania Department of Transportation, the City of Pittsburgh, Stowe Township, McKees Rocks Borough, CSX Transportation, Inc., Norfolk Southern Railway Company,

¹ 66 Pa.C.S. §§ 2702 and 2704.

² 66 Pa.C.S. §§ 2702 and 2704.

and the Pittsburgh & Ohio Central Railroad Company are all concerned parties within the meaning of 66 Pa.C.S. §§ 2702 and 2704.

4. Even though they are interested parties to the proceeding, the City of Pittsburgh, Stowe Township, and the Pittsburgh & Ohio Central Railroad Company did not participate in the litigation of this matter. McKees Rocks Borough's counsel attended all relevant hearing dates but did not offer testimony or evidence in this matter.

5. Pursuant to Section 332(a) of the Public Utility Code, the Pennsylvania Department of Transportation bears the burden of proving that the proposed alterations of the public highway bridge which cross the tracks of CSX Transportation, Inc. (DOT No. 584 825 U), Norfolk Southern Railway Company (DOT No. 507 455 K), and the Pittsburgh & Ohio Central Railroad Company (DOT unknown) are necessary and proper for the service, accommodation, convenience, and safety of the public.³

6. It is well settled that the Commission has exclusive jurisdiction over matters involving railroad-highway crossings, which jurisdiction includes exclusive authority to determine and order which parties shall perform such work at the crossings and which parties shall maintain the crossings in the future.⁴

7. Among the factors which the Commonwealth Court noted as relevant to the assignment of costs and maintenance responsibilities include the relative benefit conferred on

³ Section 332(a) of the Public Utility Code, 66 Pa. C.S. § 332(a), provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding.

⁴ 66 Pa. C.S. §§ 2702, 2704; *AT&T v. Pa. P.U.C.*, 709 A.2d 980 (Pa. Cmwlth. 1998), *appeal granted in part*, 717 A.2d 1022; *Application of the Dep't of Transportation of the Commonwealth of Pennsylvania for Approval to Abolish the Existing Crossing Where S.R. 0522 Crosses at Grade Two Tracks of E. Broad Top R.R. & Coal Co. (Aar 003 135*) in Cromwell Twp., Huntingdon County; & the Allocation of Costs & Expenses Incident Thereto.*, Docket No. A-00114338, Opinion and Order dated Mar. 14, 2002; *see also Pa. P.U.C. v. Borough of Souderton*, 231 A.2d 875 (Pa. Super. 1967) (“ . . . the commission [has the] power to inquire into the safety, and adequacy of a utility's facilities and order such changes as it finds necessary.”)

each party with the construction of the crossing and the relative benefit that each party will receive from the repair, replacement, or removal of the crossing.⁵

8. While the Commission has considered the foregoing factors to be relevant in the past, this in no way limits the factors that it can consider. The factors are neither mandatory nor exclusive of other considerations, and the Commission’s allocation of cost will stand as long as the allocation is just and reasonable and has a sound legal and factual basis.⁶

9. The General Assembly expressed its intention that the Commission should have the power to impose those costs on “the public utilities or municipal corporations . . . concerned, or [on] the Commonwealth, in such proper proportions as the commission may, after due notice and hearing, determine”⁷ The Pennsylvania Supreme Court has noted that “[l]ocal governments and the Commonwealth obviously share the requisite sort of interest, as they are by nature concerned with the public safety of their residents.”⁸

⁵ *Greene Township v. Pa. P.U.C.*, 668 A.2d 615, 619 (Pa. Cmwlth. 1995); *see also Transportation Authority v. Pennsylvania Public Utility Commission*, 802 F. Supp. 1273 (E.D. Pa. 1992) (indicating that factors to be considered by the Commission in allocating costs include, amongst other things, prior ownership and maintenance responsibilities, benefits that will flow to the parties, and the general equities of the case); *see also Pittsburgh and Lake Erie Railroad Co. v. Pa. P.U.C.*, 556 A.2d 944, 946 (Pa. Cmwlth. 1989) (finding that the Pittsburgh and Lake Erie Railroad Company “benefits from [the] separated crossing due to the elimination of the need for and maintenance of automatic crossing signals and the uninhibited use of its rail line stands,” and thus affirming the assignment of maintenance responsibilities.)

⁶ *Bell Atlantic-Pa., Inc. v. Pa. P.U.C.*, 672 A.2d 352 (Pa. Cmwlth. 1996); *AT&T v. Pa. P.U.C.*, 737 A.2d 201, 209 (Pa. 1999); *Wheeling & Lake Erie Railway Co.*, 778 A.2d at 793.

⁷ *PECO Energy Co. v. Pennsylvania Public Utility Commission*, 791 A.2d 1155 (Pa. 2002) (quoting 66 Pa. C.S. § 2704(a)).

⁸ *Norfolk S. Ry. Co. v. PUC*, 77 A.3d 619, 631 (Pa. 2013).

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of the Department of :
Transportation of the Commonwealth of :
Pennsylvania for approval to alter the :
crossings where State Route 3104 crosses, :
above grade, the tracks of CSX :
Transportation Inc. (DOT 584 825 U), : Docket No. A-2020-3020667
Norfolk Southern Railway Company (DOT :
507 455 K), and the Pittsburgh and Ohio :
Central Railroad Company (DOT :
Unknown) in the City of Pittsburgh, Stowe :
Township and McKees Rocks Borough, :
Allegheny County. :

PROPOSED ORDERING PARAGRAPHS

1. That the Pennsylvania Department of Transportation, at its sole cost and expense, shall construct the proposed project utilizing an estimated 80% federal funds and 20% state funds. The proposed project costs shall include the maintenance and protection of pedestrian and vehicular traffic during the duration of the project.

2. That the Pennsylvania Department of Transportation, at its sole cost and expense, upon completion of the construction project, shall maintain the substructure and superstructure of the entire length of the McKees Rocks Bridge, including the parapets, structural sidewalk components, fencing and deck of the bridge, roadway pavement, highway approaches, roadway surface, and drainage facilities.

3. That the Pennsylvania Department of Transportation, at its sole cost and expense, upon completion of the construction project, shall maintain the structural integrity of the stairways and stairway railings, the structural integrity of the bridge lamps leading to the surface streets, and the longitudinal white and yellow pavement markings at the McKees Rocks Bridge.

Appendix C

4. That Norfolk Southern Railway Company, CSX Transportation, Inc., and Pittsburgh and Ohio Central Railroad Company, at their sole cost and expense, shall continue to furnish all material and perform all work necessary thereafter to maintain their respective railroad facilities, including but not limited to the tracks, wire lines, drainage facilities, and any other railroad facilities located within the limits of the McKees Rocks Bridge.

5. That the City of Pittsburgh, Stowe Township, and McKees Rocks Borough, at their sole cost and expense, shall maintain and provide ice, snow, and debris removal from the sidewalks within their respective municipal boundaries.

6. That the Pennsylvania Department of Transportation, at its sole cost and expense, shall maintain the navigation lighting on the McKees Rocks Bridge.

7. That [the Pennsylvania Department of Transportation, the City of Pittsburgh, Stowe Township, and/or McKees Rocks Borough], at [its/their] sole cost and expense, shall maintain the highway lighting on the McKees Rocks Bridge [within their respective municipal boundaries].

8. Upon completion of all repairs ordered in the March 10, 2021 Secretarial Letter, each non-carrier public utility company and municipal authority, at its sole cost and expense, furnish all material and perform all work necessary thereafter to maintain its respective facilities located within the limits of the improvement.

9. Upon completion of all repairs ordered in the March 10, 2021 Secretarial Letter, the parties agree to provide written notice to the Rail Safety Division of the Commission's Bureau of Technical Utility Services. Rail Safety will then complete a final inspection to determine if the work was completed satisfactorily.

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Township and McKees Rocks Borough, :
Allegheny County. :

CERTIFICATE OF SERVICE

I hereby certify that I have this day, December 10, 2021, served a true copy of the foregoing **Main Brief of the Bureau of Investigation and Enforcement**, upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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