

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

In Re:

Docket No. A-2020-3020667

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 504 455 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 MCKEES ROCKS BOROUGH

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I. Procedural History

On July 2, 2020, the Pennsylvania Department of Transportation (hereinafter “Department”) filed an application with the Pennsylvania Utility Commission (hereinafter, “Commission”), seeking approval to alter the crossings where State Route (SR) 3104 crosses, above-grade, the tracks of Norfolk Southern Railway Company (NS), the Pittsburgh & Ohio Central Railroad Company (POHC), CSX Transportation, Inc. (CSXT), the Ohio River and numerous surface streets located in the City of Pittsburgh, Stowe Township and McKees Rocks Borough. The application was assigned Docket No. A-2020-3020667.

An initial field investigation and conference was held on October 21, 2020. The Department proposed various rehabilitation work, including the following: expansion dam replacements, bridge deck concrete barrier repairs and replacements, protective fencing replacements above the railroads, strip seal replacements, limited sidewalk replacement with concrete filled steel grate decking, miscellaneous steel and concrete repairs, limited steel structure painting (pedestrian railing and sidewalk support elements) and approach slab replacement. Further, the Department proposed that the maintenance responsibilities relative to salting, plowing, and lighting be assigned to the municipal entities.

On March 10, 2021, the Commission issued a Secretarial Letter, in accordance with Section 2702 of the Public Utility Code, finding that the alteration of the crossings is necessary and proper for the service, accommodation, convenience, or safety of the public.

A Prehearing Conference Notice was issued to all parties on March 10, 2021, informing them that a prehearing conference would be conducted by Administrative Law Judge Conrad A. Johnson (hereinafter, “ALJ Conrad”), as the presiding officer, on April 13, 2021, at 10:00 a.m.

Additionally, on March 10, 2021, ALJ Conrad issued a Prehearing Conference Order for Telephonic Hearing.

Prehearing memorandums were submitted by the parties on April 9, 2021, outlining the issues they intended to present, a listing of their proposed witnesses, the subject of their testimony, and a list of any exhibits or documents they intended to present at the hearing in this proceeding. The Telephonic Prehearing Conference proceeded as scheduled on April 13, 2021.

ALJ Conrad issued a Prehearing Order on May 27, 2021, scheduling an evidentiary hearing for September 30, 2021. Pursuant to the May 27th Prehearing Order, parties submitted Direct Testimony by July 21, 2021, with written rebuttals submitted by August 25, 2021. The evidentiary hearing proceeded as scheduled on September 30, 2021, before ALJ Conrad. ALJ Conrad directed all parties to submit their main briefs by December 10, 2021, and any reply briefs by December 20, 2021.

II. Proposed Findings of Fact

1. The McKees Rocks Bridge crosses, above-grade, the tracks of Norfolk Southern Railway Company (“NS”), the Pittsburgh & Ohio Central Railroad Company (“POHC”), CSX Transportation Inc. (“CSXT”), the Ohio River, and numerous surface streets located in the City of Pittsburgh, Stowe Township, and McKees Rocks Borough, all in Allegheny County. (I&E Statement No. 1, Direct Testimony of Daniel Helfrich, p. 2:8-12.).

2. The McKees Rocks Bridge provides traffic connection between Ohio River Boulevard (SR 0065) and Island Avenue (SR 0051) through the various local municipalities. (I&E Statement No. 1, Direct Testimony of Daniel Helfrich, p. 2:12-14).

3. The McKees Rocks Bridge is a 5,800-foot-long structure that consists of steel spandrel-braced deck arches, steel-trussed through arches, deck trusses, and an elevated concrete causeway structure. (I&E Statement No. 1, Direct Testimony of Daniel Helfrich, p. 2:14-17).

4. The bridge is of varying width with the main river-crossing span that carries 3 travel lanes with sidewalks on both sides of the structure. (I&E Statement No. 1, Direct Testimony of Daniel Helfrich, p. 2:17-19).

5. At the crossing, the average daily traffic volume (“ADT”) is 22,180 vehicles for segments 0020 and 0030; 11, 509 vehicles for segment 0010; and 10,671 vehicles for segment 0011. (PennDOT Statement No. 1, Direct Testimony of Philip Mutunga, p. 3:6-8).

6. The crossing not only benefits just the residents of the City of Pittsburgh, Stowe Township, and the McKees Rocks Borough, but it may be used by anyone in the State of Pennsylvania. (Tr., p. 69:19-25; p. 102:23-25).

7. There are two different lighting systems on the bridge, the navigational lighting, which corresponds to river travel or river traffic, and highway lighting, which lights the roadway. (Tr., p. 2-9).

8. Per Commission Order entered on January 20, 1975, at Docket C-18734, the Department was assigned the responsibility for maintenance and energization of the lighting on the roadways and sidewalks for the McKees Rocks Bridge at its sole cost and expense. (I&E Statement No. 1, Direct Testimony of Daniel Helfrich, p. 6:1-5).

9. Per Commission Order entered on January 20, 1975, at Docket C-18734, the Department was assigned the responsibility for maintenance and energization of the navigation

lighting system attached to the bridge structure at its sole cost and expense. (I&E Statement No. 1, Direct Testimony of Daniel Helfrich, p. 6:1-5).

10. The Department currently maintains all roadway and navigational lighting on the McKees Rocks Bridge, including but not limited to, re-lamping of all fixtures, repair and replacement of accident-damaged facilities and replacement of accident-damaged facilities, and energy costs. (PennDOT Statement No. 3, Direct Testimony of William J. Lester, p.3:3-7).

11. The Department currently pays for maintenance and energization of both roadway and navigational lighting. (PennDOT Statement No. 3, Direct Testimony of William J. Lester, p.3:8-11).

12. Lighting is optional on bridges and would be optional on the span of the McKees Rocks Bridge. (Tr., p. 74:18-20; p. 75:1).

13. Lighting serves a safety purpose for drivers, in addition to pedestrians. (Tr. p. 101: 21-23.; Tr.p.132: 1-2).

14. Per Commission Order entered on January 20, 1975, at Docket C-18734, the Department maintains the substructure and superstructure of the bridge, the paving on the bridge structure, including the sidewalks, the approaches of the bridge and the roadway. (PennDOT Statement No. 1, Direct Testimony of Philip Mutunga, p. 4:5-9).

15. Sidewalks are optional on any bridge that is constructed. (Tr., p. 74:16-17).

16. The Department 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, at the intersection of State Route 3104 and State Route 65. (PennDOT Statement No. 1, Direct Testimony of Philip Mutunga, p. 4:10-15).

17. There is no evidence of record that the Borough has ever maintained the snow, ice or debris on bridge sidewalks. (Tr. p. 129: 6-10).

18. Maintenance services by a party, including a municipality, for a Department facility is separate from the issue of who pays for it. (Tr. 118, 13-17).

III. Parties' Positions

A. CSXT and Norfolk Southern

CSXT and Norfolk Southern submit the position that they do not have any responsibility for the maintenance costs associated with the sidewalk or the lighting at the crossing.

B. I&E

It is the position of I&E that all snow, ice, and debris removal of the sidewalks should be assigned to the local municipality or municipalities in whatever proportions that this Commission deems reasonable. I&E further submits that the cost and maintenance of the navigational system and highway lighting shall remain at the Department's sole cost and expense.

C. Pennsylvania Department of Transportation

The position of the Department is that the municipalities should be assigned sidewalk maintenance in whatever proportions that this Commission deems reasonable. The Department also holds that the three municipalities should be assigned the responsibility of lighting and energization; however, the Department agrees to assume the responsibility for navigational lighting. The Department expresses that so long as the maintenance obligations are addressed

D. Borough of McKees Rocks

The Borough of McKees Rocks (hereinafter, the "Borough") holds the position that the Department did not meet its burden of proof to establish justification for transferring

responsibilities to the local municipalities. The January 20, 1975 Commission Order, at Docket C-18734, assigned the Department the responsibility, at its sole cost and expense, to maintain and energize the lighting on the roadways and sidewalks for the bridge, along with the navigation lighting system attached to the bridge structure. This position supports the *status quo*. At this time, nothing has changed as a matter of law, that would necessitate the transferring of such responsibilities to the Borough. Thus, the Borough maintains that the Department should continue to be responsible for lighting and energization of the bridge, and also assume the responsibilities and cost associated with sidewalk maintenance. However, should the Commission hold in favor of the Department, the Borough submits that the responsibilities and costs should be assigned to the City of Pittsburgh, Borough, and Stowe Township equally based upon the rationale that the crossing benefits and serves all members of the public. Additionally, as lighting and sidewalks have been identified as optional in nature, each municipality should be provided with a meaningful opportunity to opt out of said features during the point of design.

IV. Argument

The Department has filed an application that attempts to transfer responsibilities and costs on to the local municipalities of the City of Pittsburgh, Borough of McKees Rocks, and Stowe Township. Under Section 332(a) of the Public Utility Code, 66 Pa. C.S. § 332(a), “the proponent of a rule or order has the burden of proof.” 66 Pa. C.S. § 332(a). In the present case, the Department has failed to meet its burden of proof to justify changing the *status quo* by allocating the responsibilities and costs onto the municipalities.

Pursuant to the Commission Order entered on January 20, 1975, at Docket C-18734, the Department was assigned the responsibility, at its sole cost and expense, to maintain and

energize the lighting on the roadways and sidewalks for the bridge, along with the navigation lighting system attached to the bridge structure. The Department's assignment of responsibility is further supported by 33 CFR § 118.1, which requires that all persons owning and operating bridges over the navigable waters of the United States to maintain lights at their own expense. The Department is currently maintaining all roadway and navigational light on the bridge and pays energization costs of the roadway and navigational lighting system, and there is no justifiable reason to reappoint such responsibilities to the municipalities.

The Department attempts to rely on a lighting policy in its Department Design Manual Publication 10C(DM-1C) 15 Edition- Change #4 in order to justify departure from the 1975 PUC Order and transfer of responsibilities and costs onto the three municipalities; however, a policy is not a legal basis to do so. *See Borough of Bedford v. Com., Dep't of Env't Prot.*, 972 A.2d 53, 64 (Pa. Cmwlth. 2009)(noting that policies are not binding). Such a policy is internally generated and self-serving. Further, highway lighting is a key feature of safety for drivers and not solely for pedestrians. And as such, the cost should be borne by the Department. Otherwise, the municipalities should have the option of opting out of lighting entirely, as well as the sidewalks.

Generally, municipalities are not responsible for sidewalk snow, ice, and debris removal throughout their boundaries, except for their own property. The Department's Application does not address the dedication of the sidewalks in municipalities. There is no evidence of record that the Borough has ever maintained the snow, ice or debris on bridge sidewalks. Furthermore, the sidewalks should not be the responsibility of the Borough of McKees Rocks.

Alternatively, should the Commission decide to transfer the responsibilities and costs onto the three (3) municipalities, it should be done so equally. Per Section 2702(a) of the Public

Utility Code, the Commission has jurisdiction over construction, alteration, relocation, suspension, and abolishment (collectively, “alterations”) of rail-highway crossings. 66 Pa. C.S. § 2702 cited by *Norfolk S. Ry. Co. v. Public Utility Commission*, 77 A.3d 619, 620–21 (Pa. Cmwlth. 2013). It has long been established that, in apportioning costs in highway-rail crossing cases, the Commission is not limited to any fixed rate but takes all relevant factors into consideration, with the fundamental requirement being that its order be just and reasonable. *Department of Transportation v. Public Utility Commission*, 346 A.2d 371, 375 (Pa. Cmwlth. 1975).

In this matter, the primary argument made by the other parties is that the municipalities should assume the responsibilities and costs because the municipalities’ residents use the bridge and thus, benefit the most from the proper maintenance of the sidewalks. Since the other parties’ rationale is based on the convenience and safety of the public, it would be appropriate to allocate the costs equally between City of Pittsburgh, Borough of McKees Rocks, and Stowe Township, as the availability of pedestrian facilities is equal and not directly correlated to the quantity of linear feet within its respective jurisdiction. See *Commonwealth, Department of Transportation v. Pennsylvania Public Utility Commission*, 469 A.2d 1149, 1154 (Pa. Cmwlth. 1983)(assigning all three municipal bodies one-third of the future maintenance costs based on the general good of the motorists and pedestrians using the bridge). Sidewalk maintenance is a matter of use, and not simply a matter of distance.

Furthermore, pursuant to 66 Pa. C.S. § 2702(b), the Commission directs the manner and conditions under which alterations, operations, maintenance, and protection are undertaken, in furtherance of the public safety, and for that reason, the Borough maintains that it is most reasonable and just to allocate the costs equally between the three local municipalities based on

the safety impact it will have on the residents of the City of Pittsburgh, Borough, and Stowe Township.


To the extent that features such as sidewalks and lighting are not required elements for the bridge currently or as part of the proposed revitalization project, a sufficient opt out period should be provided to the municipalities during the design phase. If required by funding sources, the costs should be borne solely by the Department of Transportation.


V. Conclusion

For the foregoing reasons, the Borough of McKees Rocks respectfully submits that the Pennsylvania Department of Transportation has not met their burden of proof to establish justification for transferring responsibilities to the local municipalities.

To the extent that the Commission decides to allocate the work and costs of snow, ice, and debris removal from the sidewalks and connected stairways on the structure, along with cost and maintenance responsibilities for the bridge roadway lighting, the Borough requests that the responsibilities and cost be spread across the City of Pittsburgh, Borough of McKees Rocks, and Stowe Township equally. To the extent that features, such as sidewalks and lighting, are not required elements for the bridge currently or as part of the proposed revitalization project, a sufficient opt out period should be provided to the municipalities during the design phase.

Respectfully submitted,

By: 
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By: 
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McKees Rocks Borough Solicitors

Appendix A: Proposed Conclusions of Law

1. The proponent of a rule or order has the burden of proof. 66 Pa. C.S. § 332(a).
The Public Utility Commission has jurisdiction over construction, alteration, relocation, suspension, and abolishment (collectively, “alterations”) of rail-highway crossings. 66 Pa. C.S. § 2702.

2. The Public Utility Commission directs the manner and conditions under which alterations, operations, maintenance, and protection are undertaken, in furtherance of the public safety. 66 Pa. C.S. § 2702(b).

3. All persons owning or operating bridges over the navigable waters of the United States or any international bridge constructed after March 23, 1906, shall maintain at their own expense the lights and other signals required by this part. 33 CFR § 118.1.

Appendix B: Proposed Order

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

In Re:

Docket No. A-2020-3020667

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 504 455 K), and the Pittsburgh and Ohio Central Railroad Company (DOT Unknown) in the City of Pittsburgh, Stowe Township and McKees Rocks Borough, Allegheny County.

ORDER

AND NOW, to-wit, this ____ day of _____, 202____, it is ORDERED that:

1. That the Pennsylvania Department of Transportation (hereinafter, the “Department” shall bear at its own cost and expense, all maintenance of snow, ice, and debris removal from the sidewalks and connected stairways on the structure.

2. In the alternative, should the Commission find in favor of allocating the cost and maintenance of snow, ice, and debris removal from the sidewalks and connected stairways on the structure on to the municipalities, it will be allocated equally between the City of Pittsburgh, Borough of McKees Rocks, and Stowe Township.

3. The Department shall continue to bear responsibility for maintenance and energization of the lighting on the roadways and sidewalks for the cross, along with the navigation lighting system attached to the bridge structure.

BY THE COMMISSION

Certificate of Service

I, Megan M. Turnbull, Esquire, do hereby certify that a true and correct copy of the foregoing **Main Brief of McKees Rocks Borough** was served by electronic mail on this 10th day of December, 2021, upon the following:

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