

**PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17120**

Public Meeting held June 16, 2022

Commissioners Present:

Gladys Brown Dutrieuille, Chairman  
John F. Coleman, Jr., Vice Chairman  
Ralph V. Yanora

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

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions filed by the Commonwealth of Pennsylvania Department of Transportation (PennDOT) on April 7, 2022, to the Recommended Decision (R.D.) of Administrative Law Judge (ALJ) Conrad A. Johnson, issued March 18, 2022, in the above-captioned proceeding. The Commission's Bureau of Investigation and Enforcement (I&E) filed a Letter Reply to PennDOT's Exceptions on April 15, 2022, and the McKees Rocks Borough (Borough) submitted a late-filed Letter

Reply to PennDOT’s Exceptions on April 27, 2022.<sup>1</sup> For the reasons stated below, we shall grant, in part, and deny, in part, PennDOT’s Exceptions, and adopt the ALJ’s Recommended Decision, as modified by this Opinion and Order.

## I. History of Proceeding

On July 2, 2020, PennDOT submitted an application (Application) to the Commission for approval to alter the public highway bridge crossing (McKees Rocks Bridge or bridge) where State Route 3104 crosses the tracks of CSX Transportation, Inc. (CSXT) (DOT No. 584 825 U), Norfolk Southern Railway Company (Norfolk Southern) (DOT No. 507 455 K), and the Pittsburgh & Ohio Central Railroad Company (POCR) (DOT unknown) in the City of Pittsburgh (City), Stowe Township (Township), and the Borough, Allegheny County. PennDOT is the owner of the bridge, and specifically sought approval to install new protective fencing at the crossing. R.D. at 2; Application at ¶ 5.

A field investigation and conference were held on October 21, 2020, which were attended by the Commission’s Bureau of Technical Utility Services’ Rail Safety Section (Rail Safety), PennDOT, CSXT, Norfolk Southern, POCR, the City, the Borough, Peoples Natural Gas Company, and Verizon Pennsylvania LLC. As outlined in the preliminary plans attached to the Application, PennDOT proposed to: (1) replace the

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<sup>1</sup> The Secretarial Letter accompanying the ALJ’s Recommended Decision was issued to all Parties on March 18, 2022. The Secretarial Letter included, *inter alia*, instructions and deadlines for filing Exceptions and Replies to Exceptions. Pursuant to the Secretarial Letter, Exceptions were due within twenty days of the date of the Secretarial Letter (April 7, 2022), and Replies to Exceptions were due within ten days of the date when Exceptions were due (April 17, 2022). Since April 7, 2022 was a Sunday the Reply Exceptions were due the next business day or Monday, April 8, 2022. Pursuant to 52 Pa. Code § 1.2(a), we will allow the late-filing of the Borough’s Letter Reply to Exceptions because there is no indication the filing affects the substantive rights of PennDOT or any other party.

expansion dam; (2) repair and replace the bridge deck's concrete barriers; (3) replace the protective fencing above the railroads; (4) replace the strip seals; (5) replace some sidewalk with concrete filled steel grate decking; (6) repair miscellaneous steel and concrete; (7) paint some parts of the steel structure relating to the pedestrian railing and sidewalk support; and (8) replace the approach slab. PennDOT agreed to complete the project at its sole cost and expense, utilizing 80% federal funds and 20% state funds. *Id.*

Future maintenance of the bridge lighting and associated bridge lighting electrical costs, as well as future maintenance for removal of snow, ice and debris from the sidewalks, remained undetermined at the time of the field conference. On February 4, 2021, Rail Safety requested that the matter be referred to the Commission's Office of Administrative Law Judge (OALJ) to resolve future maintenance and costs associated with the bridge lighting and removal of snow, ice, and debris from the sidewalks of the bridge. *Id.* at 2-3.

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 were submitted and approved by the Commission.<sup>2</sup> The Secretarial Letter referred the outstanding future maintenance items and any other unresolved items to the OALJ for adjudication. *Id.* at 3.

On September 30, 2021, the telephonic evidentiary hearing convened as scheduled and PennDOT, I&E, Norfolk Southern, CSXT, and the Borough were represented by their respective counsel. The City and Township did not participate at the hearing. *Id.* at 4. Witnesses were presented and written testimonies and exhibits were

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<sup>2</sup> On May 11, 2022, PennDOT filed for Commission approval a copy of the final signed structure and construction plans for the project. Subsequently, on May 17, 2022, the Commission issued a Secretarial Letter approving the plans as submitted and providing the Parties with an opportunity to respond by filing a Petition for Reconsideration from Staff Action within twenty days pursuant to 52 Pa. Code § 5.44.

admitted into evidence.<sup>3</sup> Main Briefs were submitted on December 10, 2021; no Reply Briefs were filed. The record was closed on December 23, 2021. *Id.* at 6.

The Recommended Decision was issued on March 18, 2022, and recommended assignment to PennDOT at its sole cost and expense the following items: (1) the maintenance and energization for the navigational lighting and roadway lighting of the McKees Rocks Bridge; (2) the year-round maintenance of the sidewalks on the McKees Rocks Bridge, including removing snow, ice, and debris; (3) the application of anti-skid and de-icing material to the McKees Rocks Bridge; and (4) the maintenance of the signage and signals of the McKees Rocks Bridge. *Id.* at 1-2.

As noted, *supra*, PennDOT filed Exceptions on April 7, 2022. A Letter Reply to PennDOT's Exceptions was filed by I&E on April 15, 2022, and the Borough submitted a late-filed Letter Reply to PennDOT's Exceptions on April 27, 2022.

## **II. Background**

After the field investigation and conference conducted on October 21, 2020, two issues remained unresolved concerning the bridge project: (1) the assignment of responsibility for the bridge's highway lighting maintenance and energization costs; and (2) the assignment of the future maintenance and cost of removing snow, ice, and debris from the sidewalks of the bridge. R.D. at 15-16. These unresolved matters were referred to the OALJ for adjudication. In his Recommended Decision, the ALJ also addressed assignment of responsibility of the bridge's signals and signage, an issue that was identified by I&E in its Prehearing Conference Memorandum. R.D. at 27-28.

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<sup>3</sup> See R.D. at 4-6 for a complete description of participating witnesses and written testimonies and exhibits admitted into evidence.

We refer to the Recommended Decision for a detailed description of the Parties' positions regarding the aforementioned issues which is incorporated herein. *See* R.D. at 16-18, 22-24, 27-28. The positions of the Parties are briefly summarized below.

### Bridge Lighting and Energization

PennDOT argued that it should not be responsible for the bridge's lighting. Although PennDOT is the current owner of the bridge, it states that the bridge was originally constructed by Allegheny County in 1931. PennDOT also averred that even though the Commission assigned responsibility for the bridge's roadway lighting to PennDOT in 1975, *See Pa. PUC v. Dept. of Highways of the Commonwealth of Pa., Allegheny County, Penn Central Transportation Co., Pittsburgh, Chartiers & Youghiogheny Railway Co., The Pittsburgh and Lake Erie Railroad Co., Duquesne Light Co., City of Pittsburgh, Borough of McKees Rocks, and Township of Stowe*, Docket No. C-00018734 (Order entered January 20, 1975) (*1975 Order*), at the time PennDOT contended that it would install the lighting if others were made responsible for maintenance and energization costs. Further, although PennDOT currently maintains the bridge's roadway lighting and pays the energization costs, PennDOT averred that the *1975 Order* did not specifically assign energization costs to it. Finally, PennDOT argued that the primary benefit in constructing the crossing was to the City, Township and Borough. R.D. at 16-17; PennDOT M.B. at 18-21.

The Borough argued that PennDOT did not meet its burden of proof or provide a justifiable reason to transfer the bridge lighting maintenance and energization responsibilities to the local municipalities. The Borough averred that the *1975 Order* assigned the lighting maintenance and energization responsibility and costs to PennDOT, and that PennDOT is currently maintaining and paying for all roadway and navigational lighting on the bridge. In addition, the Borough contended that federal regulations,

33 C.F.R. § 118.1, require PennDOT, as the owner and operator of the bridge, to maintain navigational lighting. R.D. at 17; Borough M.B. at 6-7.

I&E argued that PennDOT should remain responsible for the costs and maintenance associated with the navigational lighting, and it took no position on whether PennDOT provided enough support to shift the costs and maintenance of the highway lighting to the municipalities. However, I&E's witness testified that lighting on a highway portion of a bridge is a safety feature that benefits the traveling public, and the safety component should be the responsibility of the primary maintainer of the bridge. R.D. at 17-18; I&E M.B. at 10-12.

#### Bridge Sidewalk Maintenance

PennDOT argued that it does not have any obligation under Act 615 of 1961, 36 P.S. § 1758-101, *et. seq.* (Act 615), to remove snow from the bridge's sidewalks, and that the municipality is generally required to perform maintenance of removing snow, ice and debris from the sidewalks of Act 615 bridges. PennDOT further averred that it has never performed maintenance of removing snow, ice and debris from the sidewalks of the bridge. R.D. at 22-23; PennDOT M.B. at 9-12; PennDOT St. 1 at 5 and St. 2 at 3.

The Borough argued that municipalities are generally not responsible for removing snow, ice and debris within their boundaries, except for their own property. The Borough also averred that there is no evidence that it ever maintained snow, ice or debris on bridge sidewalks. Further, the Borough argued, in the alternative, that if the Commission transfers these responsibilities and costs onto the three municipalities, that it should be done equally. R.D. at 23; Borough M.B. at 7-8.

I&E argued that the municipalities should be responsible for removing snow, ice and debris from the sidewalks of the bridge. This position is based upon the residents of the municipalities benefitting the most from proper winter maintenance of the sidewalks on the bridge. R.D. at 24; I&E St. 1 at 4-6; Tr. at 103.

### Bridge Signals and Signage

Neither PennDOT, nor the Borough, raised the bridge's signals and signage as an issue. On the other hand, while I&E identified the assignment of future maintenance and costs associated with road signage as an issue; the evidence on the signals and signage issues, however, is not sufficient to render a determination in this case. R.D. at 27.

Even though PennDOT did not raise the issue, it averred that the municipalities should be responsible for the bridge's ancillary features, including traffic signals and signage, because the municipalities are responsible for the ownership and maintenance of the traffic signals. R.D. at 27; PennDOT St. 5 at 2-3. I&E argued that roadway signage is an ancillary feature of the bridge, that future maintenance of the bridge's ancillary features was assigned to PennDOT by the Commission in the Secretarial Letter issued on March 10, 2021, and that PennDOT did not provide justification for transferring this responsibility. R.D. at 28; I&E St. 1 at 3; Tr. at 101.

### **III. Discussion**

As a preliminary matter, we note that any argument or Exception that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v.*

*Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

## **A. Legal Standards**

### **1. Burden of Proof**

Section 332(a) of the Public Utility Code (Code) provides that the proponent of a ruling or order from the Commission bears the burden of proof. 66 Pa. C.S. § 332(a). The term “burden of proof” means a duty to establish a fact by a preponderance of the evidence. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950); *Feinstein v. Phila. Suburban Water Co.*, 50 Pa. P.U.C. 300 (October 6, 1976). The term “preponderance of the evidence” means one party must present evidence which is more convincing, by even the smallest amount, than the evidence presented by the other party. *Id.* Here, PennDOT, as the applicant, is the party seeking affirmative relief from the Commission and, therefore, is the party with the burden of proof.

The Commission’s decision must be supported by substantial evidence in the record. *See, e.g.*, Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704; *Yellow Cab Co. v. Pa. PUC*, 524 A.2d 1069 (Pa. Cmwlth. 1987). The Pennsylvania appellate courts have defined the term “substantial evidence” to mean such relevant evidence that a reasonable mind may accept as adequate to support a conclusion. Substantial evidence is more than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 413 A.2d 1037 (Pa. 1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 166 A.2d 96 (Pa. Super, 1961); and *Murphy v. Pa. Dep’t of Pub. Welfare, White Haven Ctr.*, 480 A.2d 382 (Pa. Cmwlth. 1984).

## 2. Crossing Maintenance Work and Cost Allocation

Section 2702 of the Code, 66 Pa. C.S. § 2702, vests the Commission with exclusive jurisdiction to determine the points at which and the manner in which a rail-highway crossing is to be constructed, relocated, altered, protected, suspended, or abolished, as well as the manner and conditions under which a rail-highway crossing will be maintained, operated, and protected to prevent accidents and promote public safety. The Commission may order any public utility or municipal corporation concerned or the Commonwealth to perform work associated with any order issued regarding the crossing. 66 Pa. C.S. § 2702(c). The Commission has the exclusive authority to determine and order which parties shall perform the work at the crossing and which parties shall maintain the crossing in the future to prevent accidents and promote the safety of the public. *SEPTA v. Pa. PUC*, 592 A.2d 797 (Pa. Cmwlth. 1991), *alloc. denied*, 611 A.2d 714 (1992).

In addition, the costs of any ordered maintenance work may be assessed and allocated among concerned parties “in such proper proportions as the Commission may . . . determine.” 66 Pa. C.S. § 2704(a). The Commission determines which parties are concerned or interested within the meaning of 66 Pa. C.S. §§ 2704(a) and 2702(c). *County of Chester v. Pa. PUC*, 408 A.2d 552 (Pa. Cmwlth. 1979). The assignment of future maintenance of any portion of a crossing remaining in place falls logically within the parameters of “reasonable terms and conditions.” 66 Pa. C.S. 2702(c).

In apportioning maintenance costs, the Commission is not limited to any fixed rule, but takes all relevant factors into consideration; the only requirement is that its order must be just and reasonable. *Pa. Dept. of Transp. v. Pa. PUC*, 346 A.2d 371 (Pa.

Cmwlth. 1975). The Commission has considered many factors when allocating highway-rail maintenance responsibilities and costs, such as:

1. The party that originally built the crossing.
2. The party that owned and maintained the crossing.
3. The relative benefit conferred on each party with the construction of the crossing.
4. Whether each party is responsible for the deterioration of the crossing that has led to the need for its repair, replacement, or removal.
5. The relative benefit that each party will receive from the repair, replacement, or removal of the crossing.

*N. Lebanon Twp.* at 1247 (citing *Greene Twp. Bd. of Supervisors v. Pa. PUC*, 668 A.2d 615, 619 (Pa. Cmwlth. 1995)).

The Commission is not restricted to the above-cited factors. *Millcreek Twp. v. Pa. PUC*, 753 A.2d 324 (Pa. Cmwlth. 2000) (citing *AT&T v. Pa. PUC*, 737 A.2d 201 (Pa. 1999)). The Commission can consider other factors such as the availability of state and/or federal funding for a project and the general equities of the case in its determination. *Erie L.R. Co. v. Pa. PUC*, 278 A.2d 188 (Pa. Cmwlth. 1971); *SEPTA v. Pa. PUC*, 802 F. Supp. 1273 (E.D. Pa. 1992); *Application of the City of Wilkes-Barre*, Docket No. A-00101606 (Order entered April 9, 1981). Moreover, the Commission may “determine which factors are relevant in assessing costs within the context of the particular case before it.” *Bell Atl. Pa. v. Pa. PUC*, 672 A.2d 352, 355 (Pa. Cmwlth. 1995).

## **B. ALJ's Recommended Decision**

In his Recommended Decision, the ALJ made forty-eight Findings of Fact and reached seven Conclusions of Law. R.D. at 6-13 and 28-29. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

The ALJ recommended assignment to PennDOT, at its sole cost and expense, the maintenance and energization for the navigational lighting and roadway lighting of the bridge. The ALJ found that under federal regulation, 33 C.F.R. § 118.1, PennDOT, as the owner and operator of the bridge, is required to maintain the bridge's navigational lighting, and implicit in the federal regulation is PennDOT's duty to energize the lighting. The ALJ concluded that "[i]t would be absurd to conclude that PennDOT is only required to affix and maintain the lighting equipment and not energize that lighting at PennDOT's expense." Therefore, he recommended the assignment of the bridge's navigational lighting maintenance and energization costs to PennDOT. R.D. at 18-19.

With regard to the roadway lighting of the bridge, the ALJ found that the *1975 Order* specifically assigned the maintenance of the bridge's roadway lighting to PennDOT at its sole cost and expense. R.D. at 19, citing *1975 Order* at ¶ 6. While the ALJ found that the *1975 Order* did not specifically reference energization costs of the roadway lighting, the ALJ concluded, similar to the energization costs of the navigational lighting discussed above, that "it would be an absurd result to construe the *1975 Order* as not requiring PennDOT to be responsible for bearing the costs of energizing the bridge's highway lighting." *Id.* The ALJ noted that PennDOT is currently paying for the maintenance and energization of the bridge's roadway lighting, and he concluded that the absence of a specific assignment of energization costs for the bridge's highway lighting to PennDOT in the *1975 Order* does not warrant reassignment to the municipalities. *Id.*

at 19-20. In reaching his decision on this issue, the ALJ relied on three factors: (1) PennDOT is the owner of the bridge; (2) the bridge's roadway lighting is a safety feature for pedestrians and motorists; and (3) the general public traverses the bridge, not just local residents. *Id.* at 20. Finally, the ALJ found that 66 Pa. C.S. § 2702(b) controls the outcome of this issue, and that the overarching purpose of Section 2702(b) is “*to effectuate the prevention of accidents and the promotion of the safety of the public.*” (emphasis added by the ALJ). *Id.* at 21. To that end, the ALJ concluded that the general public benefits from the bridge's roadway lighting, and it is not a safety feature only for the local residents of the municipalities. As a result, the ALJ found that PennDOT did not establish its burden of proof with substantial evidence or a rationale to justify the reassignment of the bridge's roadway lighting maintenance and energization costs; therefore, he recommended the assignment of those costs to PennDOT. *Id.*

Next, the ALJ recommended assignment to PennDOT, at its sole cost and expense, the year-round maintenance of the sidewalks on the bridge, including removing snow, ice, and debris, and the application of anti-skid and de-icing material to the bridge. The ALJ found PennDOT's arguments that it does not have any obligation, under Act 615 of 1961, to remove snow from the bridge's sidewalks, and that the municipality is generally required to perform maintenance of removing snow, ice and debris from the sidewalks of Act 615 bridges, to be without merit. The ALJ further concluded that the Commonwealth Court ruled that the provision in Act 615 of 1961 that PennDOT relies on refers only to its obligations with respect to the maintenance of highways, not bridges. R.D. at 26, citing *Pa. Dept. of Trans. v. Pa. PUC*, 346 A.2d 371 (Pa. Cmwlth. 1975).

Furthermore, the ALJ was not persuaded by the arguments of PennDOT and I&E that the municipalities must be responsible for the maintenance and cost of snow, ice and debris removal from the sidewalks of the bridge because residents of the municipalities benefit the most from such maintenance. Rather, the ALJ concluded that because PennDOT is the owner of the bridge and received federal funding for the

construction project for the bridge, that it is required to maintain the structural integrity of the sidewalks, as well as reasonable snow, ice and debris removal from the sidewalks, and in a manner that is accessible to persons with disabilities, pursuant to 23 U.S. Code § 116(b) and 28 C.F.R. § 35.133(a). *Id.* at 26-27.

Finally, the ALJ recommended assignment to PennDOT, at its sole cost and expense, the maintenance of the signage and signals of the bridge. The ALJ concluded that PennDOT failed to carry its burden of proof on this issue because there was no substantial evidence on the record regarding the bridge's signals and signage. The ALJ found that the prior assignment of future maintenance of the bridge's ancillary features to PennDOT must remain in effect, and, therefore, he recommended the assignment of the bridge's signals, signage, and signal energization and maintenance costs to PennDOT. *Id.* at 28.

### **C. Exceptions, Replies and Dispositions**

PennDOT styled its Exceptions to include Exceptions to the Recommended Decision's Finding of Facts, the Conclusions of Law, and the Recommended Order.

In its Letter Reply to Exceptions, I&E states that it generally supports PennDOT's Exceptions, excluding Exception No. 4,<sup>4</sup> related to characterizing lighting as an optional safety feature. I&E R. Exc. at 1.

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<sup>4</sup> While I&E refers to this Exception as Exception No. 4, it appears to be the third Exception of PennDOT (it is found at Paragraph No. 4 of PennDOT's pleading) and is referred to herein as Exception No. 3.

The Borough, in its Letter Reply to Exceptions, avers that the ALJ correctly found that PennDOT is responsible for: (1) the maintenance and energization of the navigational and roadway lighting on the bridge; (2) the removal of snow, ice, and debris from the bridge's sidewalks; (3) the maintenance of the bridge's signage; and (4) the application of anti-skid and de-icing material to the bridge. The Borough states that the Recommended Decision is consistent with the testimony in the proceeding and requests that the Commission deny PennDOT's Exceptions and affirm the ALJ's Recommended Decision without modification. Borough R. Exc. at 1.

Upon our review of the record and arguments in this matter, we shall grant, in part, and deny, in part, the Exceptions of PennDOT. We will address each of the Exceptions and our disposition thereof, in turn, below.

#### **1. PennDOT Exception No. 1 and Disposition**

In its first Exception, PennDOT excepts to the Recommended Decision's Finding of Fact No. 24, which states, "The record is silent as to which party currently provides snow, ice and debris removal from the McKees Rock Bridge. Tr 96." PennDOT argues that the party providing such removal is not specifically noted, but the record states which party should be responsible for it. PennDOT avers that it never maintained snow, ice, and debris removal on the bridge's sidewalks and that such maintenance would have been the responsibility of the municipality. Exc. at 1-2.

Upon review of the record, we conclude that Finding of Fact No. 24 states the fact that the record is not clear as to which party currently provides snow, ice and debris removal from the bridge. PennDOT averred that it has never maintained snow, ice and debris removal on the bridge's sidewalks, and the Township argued that there is no evidence of record that the Borough has ever done so. PennDOT M.B. at 11; Borough M.B. at 7. Based upon our review of the record, we find Finding of Fact No. 24 to be

accurate, as it is not clear as to which party has provided snow, ice and debris removal from the sidewalks of the bridge. For this reason, we will not modify Finding of Fact No. 24. Therefore, PennDOT's Exception No. 1 shall be denied.

## **2. PennDOT Exception No. 2 and Disposition**

In its Exception No. 2, PennDOT argues that the Recommended Decision's Finding of Fact No. 35, which states "Traffic signs and signal signage for the McKees Rocks Bridge are required by the federal Manual on Uniform Traffic Control Devices (MUTCD) based upon the design of the bridge. Tr. 75," mischaracterizes the testimony in the case. Rather, PennDOT avers that any signals or signage required per the bridge design would not be optional, and that the record is silent as to what, if any, signage is required per the design or whether any design features relate to the requirements of the MUTCD. Exc. at 2.

Upon our review, we find that the record is not clear on the signal and signage requirements for the bridge. However, the testimony in the record does support that traffic signals and signal signage on a bridge are requirements of the MUTCD, and they are not optional if required per the bridge design. Tr. at 75. Therefore, we will modify Finding of Fact No. 35 to state: "Traffic signs and signal signage for a bridge are required by the federal Manual on Uniform Traffic Control Devices (MUTCD) based upon the design of the bridge." Accordingly, PennDOT's Exception No. 2 will be granted.

## **3. PennDOT Exception No. 3, Reply and Disposition**

PennDOT's Exception No. 3 seeks a modification to the Recommended Decision's Finding of Fact No. 37, which states "The highway lighting of the McKees Rocks Bridge is a safety feature that benefits the general public. Tr. 101-102."

PennDOT argues that the highway lighting of the bridge would be optional, but not necessarily a primary safety feature. For this reason, PennDOT suggests that Finding of Fact No. 37 be modified to clarify that the highway lighting of the bridge is an optional safety feature that benefits the general public. Exc. at 2-3.

In reply, I&E avers that it does not agree with PennDOT's suggested modification. I&E opposes any suggestion that the current highway lighting is optional and can be removed because doing so would greatly impact safety at the bridge. I&E contends that, as a safety feature of the bridge, no quantifier of the highway lighting is necessary or appropriate. I&E R. Exc. at 1.

With respect to PennDOT's Exception No. 3, we find that the ALJ's Finding of Fact No. 37 needs no modification or revision. We disagree with PennDOT and concur with the Parties that the highway lighting on the bridge is a safety feature that benefits the public. We further agree with I&E that it should not be designated as optional because removing the lighting could impact safety at the bridge. Based upon our review, we agree with I&E that no quantifier of the highway lighting is necessary here. PennDOT's Exception No. 3 will be denied.

#### **4. PennDOT Exception No. 4 and Disposition**

In its Exception No. 4, PennDOT argues that the Recommended Decision's Finding of Fact No. 38, which states "The sidewalks of the McKees Rocks Bridge are available for use by any pedestrian traversing the bridge. Tr. 69, 102-103," mischaracterizes the testimony in the case. PennDOT contends that the expert testimony and record evidence indicate that most of the foot traffic on the bridge would be by local residents. Therefore, PennDOT requests a modification to Finding of Fact No. 38 to clarify this point. Exc. at 3.

We conclude that Finding of Fact No. 38 should be modified. Finding of Fact No. 38, as stated, does not include an important addition provided by I&E's expert witness. For instance, I&E's expert witness, in responding to a question about who could traverse the bridge, testified that he believes "that most of the foot traffic would be by local residents." Tr. at 103. For this reason, we will revise Finding of Fact No. 38 to state: "The sidewalks of the McKees Rocks Bridge are available for use by any pedestrian traversing the bridge, but most pedestrian traffic is by local residents." Accordingly, PennDOT's Exception No. 4 shall be granted.

### **5. PennDOT Exception No. 5 and Disposition**

PennDOT, in its Exception No. 5, argues that the Recommended Decision's Finding of Fact No. 41, which states "PennDOT as a public entity and owner of the McKees Rocks Bridge is required to maintain the bridge in a condition accessible to pedestrians. Tr. 108; I&E St. 1 at 4-5; 28 U.S. Code § 35.133," is a mischaracterization and miscite of the record. PennDOT contends that the testimony in this case demonstrates that PennDOT is required to maintain pedestrian access until such time as it is otherwise assigned or agreed. Specifically, PennDOT avers that the testimony and record evidence support its position that PennDOT has the initial responsibility for snow, ice and debris removal due to the significant federal funding for the project, unless and until a final agreement is reached among the parties or a resolution regarding the assignment of maintenance is achieved via Commission order to transfer that responsibility and obligation. Exc. at 3-5.

Upon our review of the record, we shall strike Finding of Fact. No. 41, consistent with PennDOT's Exception No. 5. We agree that the testimony and record evidence in this case demonstrates that PennDOT is required to maintain pedestrian access until such time as it is otherwise assigned or agreed, and that PennDOT has the initial responsibility for snow, ice and debris removal due to the significant federal

funding for the project, unless and until a final agreement is reached among the parties or a resolution regarding the assignment of maintenance is achieved via Commission order to transfer that responsibility and obligation. I&E St. 1 at 5; Tr. at 111-112. Therefore, PennDOT's Exception No. 5 shall be granted, and the Recommend Decision's Finding of Fact No. 41 will be stricken.

## **6. PennDOT Exception No. 6 and Disposition**

In its Exception No. 6, PennDOT avers that the Recommended Decision's Finding of Fact No. 42, which states "The McKees Rocks Bridge spans the boundaries of the City, Borough, and Township, however, the record is silent as to the exact lengths of the bridge's sidewalks that are within the respective boundaries of the three municipalities. Tr. 105," requires clarification. Noting that the data regarding length of bridge sidewalks are typically provided by the municipalities, PennDOT states that I&E's witness testified regarding the approximate percentages of lengths of the bridge's sidewalks within the Borough, Township and the City. Exc. at 5.

With regard to PennDOT's Exception No. 6, we do not agree with PennDOT that Finding of Fact No. 42 requires further clarification. Finding of Fact No. 42 describes the municipalities in which the bridge is located, and notes that the record is silent regarding the exact lengths of the bridge's sidewalks within the respective boundaries of each of the three municipalities. We find this to be an accurate description of the record. Although I&E's witness may have testified regarding the approximate percentages of lengths of the bridge's sidewalks within each of the municipalities, he did not testify to the exact lengths of the bridge's sidewalks in those municipalities. For this reason, we conclude that Finding of Fact No. 42 is accurate, and that no modification is necessary. Therefore, PennDOT's Exception No. 6 is denied.

## 7. PennDOT Exception No. 7 and Disposition

PennDOT, in its Exception No. 7, seeks clarification to the Recommended Decision's Conclusion of Law No. 2, which states "The Pennsylvania Department of Transportation as the proponent of a rule or order has the burden of proof. 66 Pa. C.S. § 332(a)." PennDOT agrees that it has the burden of proof in this proceeding; however, it disagrees with the ALJ's discussion regarding the burden of proof in the Recommended Decision. PennDOT argues that " 'burden of proof' and the 'weight of the evidence' are not one and the same; the former remains on the party upon whom is imposed the duty of producing a certain amount of evidence in order that he may not lose summarily while the latter involves the credibility or persuasive quality of the evidence produced and, during a trial, may shift from side to side as the trial proceeds." Exc. at 5-6, citing *Morrissey v. Pa. Dept' of Highways*, 225 A.2d 895, 898 (Pa. 1967). PennDOT requests that the following clarification be added to Conclusion of Law No. 2:

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

*Id.*

We are not persuaded that Conclusion of Law No. 2 requires clarification. Conclusion of Law No. 2. is an accurate statement of the legal standard regarding the burden of proof in proceedings before the Commission, and we find that it is not necessary to revise Conclusion of Law No. 2 to further include a definition of "preponderance of the evidence" as PennDOT suggests. The ALJ thoroughly and accurately explained the legal standard regarding the burden of proof standard,

preponderance of the evidence,<sup>5</sup> and the need for the Commission to base its decision on substantial evidence in the Discussion section of the Recommended Decision.

R.D. at 14-15. Inasmuch as the Recommended Decision's Conclusion of Law No. 2 is an accurate statement, and because the ALJ thoroughly and correctly summarized the burden of proof standard in the Recommended Decision, we conclude that Conclusion of Law No. 2 does not require any further modification. Accordingly, PennDOT's Exception No. 7 is denied.

### **8. PennDOT Exception No. 8 and Disposition**

In its Exception No. 8, PennDOT excepts to Ordering Paragraph No. 1 of the Recommended Decision and the assignment of roadway lighting maintenance and energization costs to PennDOT, and it argues that those costs should instead be shifted to the local municipalities. PennDOT avers that while the *1975 Order* assigned the maintenance cost of the roadway lighting to PennDOT, it was silent as to the cost of energization. In addition, although PennDOT owns the bridge, it argues that the lighting system covers the entire span of the bridge and the electric service that provides the energy to the system originates in the Borough. PennDOT states that it does not typically engage in maintenance or energization of lighting systems on bridges as it is contrary to its policy. Moreover, PennDOT contends that its position that the roadway lighting on the bridge is optional, rather than a primary safety feature, supports it not being assigned the costs of roadway lighting maintenance and energization as the primary maintainer of the bridge. Exc. at 6-7.

Based upon our review of the record and the arguments, we agree with the ALJ that PennDOT did not meet its burden of proof to justify the reassignment of the bridge's roadway lighting maintenance and energization costs. The *1975 Order* assigned

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<sup>5</sup> In addition, the preponderance of the evidence standard is also discussed in the Legal Standards section of this Opinion and Order.

the maintenance and costs of the bridge's roadway lighting to PennDOT. *1975 Order* at ¶ 6. Currently, PennDOT is paying for the maintenance and energization costs of the bridge's roadway lighting. PennDOT St. 3 at 3. Although the *1975 Order* did not specifically assign energization costs, including those for navigational lighting as well, to PennDOT, the ALJ found that it would be an absurd result to construe the *1975 Order* as not requiring PennDOT to be responsible for bearing the costs of energizing the bridge's roadway lighting, and that the absence of a specific assignment of energization costs does not warrant reassignment now to the municipalities. R.D. at 19. We agree. In addition, we disagree with PennDOT that the municipalities and their residents benefit the most from the bridge's roadway lighting. Rather, the record in this proceeding demonstrates that PennDOT owns the bridge, the bridge's roadway lighting is a safety feature for pedestrians and motorists, and the general public traverses the bridge, not just local residents. R.D. at 20; PennDOT St. 2 at 3; Tr. at 101-102. Finally, pursuant to 66 Pa. C.S. § 2702(b), and in the interest of public safety, we agree with the ALJ that the general public, not just the local residents of the municipalities, benefits from the bridge's roadway lighting. Therefore, the bridge's roadway lighting maintenance and energization costs shall be assigned to PennDOT. Accordingly, PennDOT's Exception No. 8 shall be denied.

## **9. PennDOT Exception No. 9 and Disposition**

PennDOT, in its Exception No. 9, excepts to Ordering Paragraph No. 2 of the Recommended Decision regarding the responsibility for snow, ice and debris removal from the bridge's sidewalks. PennDOT avers that the bridge is an Act 615 bridge, and that, pursuant to Act 615 and PennDOT policy, it does not perform winter maintenance on the sidewalks of Act 615 bridges. In addition, PennDOT contends that municipalities are in the best position to perform such maintenance to provide the greatest benefit to local residents, and PennDOT should not divert its attention from the duty of clearing roadways during a snow event. Furthermore, PennDOT argues that the Recommended

Decision's reliance on *Dept. of Transp. v. Pa. PUC*, 346 A.2d 371 (Pa. Cmwlth. 1977) is misplaced because the maintenance referenced in that case was addressing the actual restoration of the bridge and future continued repair and maintenance of the substructure and superstructure of the bridge and its approaches, not snow removal from sidewalks. Moreover, PennDOT contends that the plain language of 36 P.S. § 1758-103<sup>6</sup> supports its position that it is not responsible for snow removal from sidewalks on Act 615 bridges. PennDOT also argues that the Recommended Decision improperly relies on 23 U.S. Code § 116(b)<sup>7</sup> to assign responsibility for snow removal on the bridge's sidewalks to PennDOT; rather, PennDOT submits that it is undertaking the current required maintenance which does not include snow, ice and debris removal from sidewalks, and it is not obligated to take on the responsibility of snow removal under Act 615 or 23 U.S. Code § 116(b). Finally, PennDOT contends that ownership alone should not determine the responsible party for a future maintenance responsibility. Given the lack of current assignment of snow, ice and debris removal from the sidewalks, PennDOT argues that the local municipalities are the greatest benefactors of the sidewalks and are in the best position to remove snow, ice and debris from the bridge's sidewalks, and should be assigned this responsibility. Exc. at 7-12.

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<sup>6</sup> The section of Act 615 discussing "Rights, obligations, liabilities, duties of state, counties, cities" states that the Act shall not be construed: ...[t]o place upon the Commonwealth any obligation for maintenance, construction, reconstruction or resurfacing of any highway other than the base or surface courses. The maintenance authorized by this article shall not include snow removal, street cleaning or maintenance or replacement of guide rail or drainage facilities and shall be limited to the portions available to vehicular traffic regardless of whether there are existing curbs. 36 P.S. § 1758-103.

<sup>7</sup> 23 U.S. Code § 116(b) states: "It shall be the duty of the State transportation department or other direct receipt to maintain, or cause to be maintained, any project constructed under the provisions of prior Acts." However, PennDOT argues that "[t]he term "maintenance" means the preservation of the entire highway, including surface, shoulders, roadsides, structures, and such traffic-control devices as are necessary for safe and efficient utilization of the highway," 23 U.S.C. § 101(a)(14), but it does not include snow, ice and debris removal from sidewalks.

Upon our review, we find that the local municipalities should bear the costs and maintenance related to the removal of ice, snow, and debris from the bridge's sidewalks. The Commission has previously held that bridge sidewalks are primarily for the benefit of local residents and should be maintained and kept clean of snow and ice by the local municipalities,<sup>8</sup> and the Commonwealth Court of Pennsylvania has upheld the Commission's assignment of the responsibility for snow, ice, and debris removal from similar bridge sidewalks to local municipalities because local residents primarily benefit from those sidewalks. *Millcreek Twp. v. Pa. PUC*, 753 A.2d 324 (Pa. Cmwlth. 1999). Here, different than the roadway lighting issue discussed above, the evidence of record demonstrates that the residents of the local municipalities will benefit the most from

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<sup>8</sup> See, e.g., *Application of the Pa. Dept. of Transportation for approval of: (1) the abolition of the crossing (AAR No. 545097F) where State Highway Route 181 (Traffic Route 136) crosses above the grade of the tracks of Consolidated Rail Corporation, in the City of Monongahela, Washington County, and (2) the abolition of the crossing (AAR No. 584789B) where State Highway 181 (Traffic Route 136) crosses above the tracks of Pittsburgh and Lake Erie Railroad Company, in Forward Township, Allegheny County, and construction of crossings, in lieu thereof, where same highway, relocated as proposed, will cross above the grade of the same tracks of said corporation and said railroad in the respective municipalities, and the allocation of the costs and expenses incident thereto*, Docket No. A-00106313 (Opinion and Order entered February 21, 1989) ; *City of New Castle v. Pa. Department of Highways, Shenango Valley Transportation, Buffalo, Rochester and Pittsburgh Railway Co., The Baltimore and Ohio Railroad Co., The Pittsburgh and Lake Erie Railroad Co., Erie Railroad Co., City of New Castle Water Co., Pennsylvania Power Co., The Bell Telephone Co. of Pa., and Manufacturers Light and Heat Co.*, Docket No. C-16920 (Opinion and Order entered June 1, 1988) ; *Application of the Pa. Dept. of Transportation for approval of (1) the alteration of the crossing where State Highway Route 23 (Bridge Street) crosses above the grade of tracks of Consolidated Rail Corp., in Jersey Shore Borough, Lycoming County and the allocation of costs and expenses incident thereto, and (2) exemption from the minimum overhead clearance requirement of 52 Pa. Code, Chapter 33, Subchapter C*, Docket No. A-00105583,(Opinion entered November 21, 1988); *Application of the City of Phila. for the approval of: (1) the reconstruction of the highway bridge carrying 40th Street (City Bridge Number 122, Railroad Bridge Number 2.75) over and above the tracks of Consolidated Rail Corp. and National Railroad Passenger Corp. in the City of Phila.; (2) exemption from the minimum overhead clearance as required by 52 Pa. Code Section 33.121; and (3) the allocation of costs and expenses incident thereto*, Docket No. A-00113226 (opinion and Order entered May 14, 2007).

winter maintenance of the sidewalks, because the local residents that live in the vicinity of the bridge will traverse the sidewalks by foot on a regular basis. *See*, I&E St. 1 at 5; Tr. at 83-84, 103.

Moreover, PennDOT has never performed snow, ice, and debris removal from the sidewalks of the bridge. PennDOT St. 1 at 5; Tr. at 78, 81. In addition, the local municipalities are located near the bridge and are able to react quickly to winter weather at the bridge, whereas PennDOT would need to take resources away from its priority job of clearing roads, which would not make sense. Tr. at 113, 121-122. Notably, no testimony was offered by the City, Township, or the Borough contesting these facts. For these reasons, we shall assign responsibility for the maintenance of the bridge's sidewalks, including snow, ice and debris removal, to each municipality within their respective municipal boundaries. Therefore, PennDOT's Exception No. 9 shall be granted.

#### **10. PennDOT Exception No. 10 and Disposition**

In its Exception No. 10, PennDOT excepts to Ordering Paragraph No. 3 of the Recommended Decision regarding the maintenance of the bridge's signals, signage and signal energization. Initially, PennDOT avers that maintenance of signals, signage, and signal energization was not raised as an issue in this proceeding beyond references to "ancillary features." PennDOT contends that, pursuant to its regulations at 67 Pa. Code § 212.5, the municipalities are responsible for the installation and maintenance of traffic signals and signage. In addition, PennDOT argues that the municipalities should be responsible for the signage associated with signals because they are responsible for ownership and maintenance of the signals, and that signal signage would include all traffic signs relating to the traffic signals and lanes. PennDOT states that the traffic signals associated with the bridge are owned by the municipalities, and it is not requesting that these items be transferred, but instead is seeking to have them remain

under the ownership and maintenance of the municipalities. PennDOT requests that the assignment of responsibility related to the maintenance of the bridge's signals, signage and signal energization remain with the local municipalities. Exc. at 12-14.

Here, we find that PennDOT failed to carry its burden of proof regarding the assignment of the maintenance and expenses of the traffic signage and signals of the bridge. We agree with the ALJ's conclusion that there was no substantial evidence on the record regarding the bridge's signals and signage. Neither PennDOT, nor the Borough, raised the bridge's signals and signage as an issue in the proceeding, R.D. at 28, and no justification was provided for changing the Commission's prior assignment of future maintenance of the bridge's ancillary features to PennDOT, pursuant to Paragraph No. 18 of the Commission's Secretarial Letter of March 10, 2021, at this docket.

Moreover, we will not consider new arguments and claims raised by PennDOT for the first time in its Exceptions. The Commonwealth Court and this Commission have determined that permitting new claims or proposals at a late stage in a proceeding raises due process concerns because opposing parties would not have an adequate opportunity to respond to adverse positions. *See Hess v. Pa. PUC*, 107 A.3d 246, 265-2669 (Pa. Cmwlth. 2014). In prior cases, we have determined that arguments not raised by parties earlier in a proceeding are deemed to be waived. *See Pa. PUC v. Uber Technologies, Inc.*, Docket No. C-2014-2422723 (Order entered September 1, 2016); *Ruth Matieu-Alce v. Philadelphia Gas Works*, Docket No. F-2015-2473661 (Order entered April 7, 2016); *Petition of PPL Electric Utilities Corporation for Approval of a Distribution System Improvement Charge*, Docket Nos. P-2012-2325034, *et al.* (Order entered October 1, 2015).

For the reasons delineated above, the prior assignment of the bridge's signals, signage, and signal energization and maintenance costs to PennDOT shall remain in effect. Therefore, PennDOT's Exception No. 10 will be denied.

#### **IV. Conclusion**

Based upon our review of the record and the applicable law, we shall grant, in part, and deny, in part, the Exceptions of PennDOT, and therefore, adopt the ALJ's Recommended Decision, as modified by this Opinion and Order; **THEREFORE,**

#### **IT IS ORDERED:**

1. That the Exceptions of the Commonwealth of Pennsylvania Department of Transportation, filed on April 7, 2022, to the Recommended Decision of Administrative Law Judge Conrad A. Johnson, issued on March 18, 2022, at this docket, are granted, in part, and denied, in part, consistent with this Opinion and Order.

2. That the Recommended Decision of Administrative Law Judge Conrad A. Johnson, issued on March 18, 2022, at this docket, is adopted, as modified by this Opinion and Order.

3. That Finding of Fact No. 35 of the Recommended Decision of Administrative Law Judge Conrad A. Johnson, issued on March 18, 2022, at this docket, is modified as follows:

Traffic signs and signal signage for a bridge are required by the federal Manual on Uniform Traffic Control Devices (MUTCD) based upon the design of the bridge.

4. That Finding of Fact No. 38 of the Recommended Decision of Administrative Law Judge Conrad A. Johnson, issued on March 18, 2022, at this docket, is modified as follows:

The sidewalks of the McKees Rocks Bridge are available for use by any pedestrian traversing the bridge, but most pedestrian traffic is by local residents.

5. That Finding of Fact No. 41 of the Recommended Decision of Administrative Law Judge Conrad A. Johnson, issued on March 18, 2022, at this docket, is stricken.

6. That upon completion of the construction of the project at the McKees Rocks Bridge, the City of Pittsburgh, at its sole cost and expense, shall furnish all material and perform all work necessary thereafter to perform the maintenance of removing snow, ice, and debris from the sidewalks on the structure of the McKees Rocks Bridge within its municipal boundaries.

7. That upon completion of the construction of the project at the McKees Rocks Bridge, Stowe Township, at its sole cost and expense, shall furnish all material and perform all work necessary thereafter to perform the maintenance of removing snow, ice, and debris from the sidewalks on the structure of the McKees Rocks Bridge within its municipal boundaries.

8. That upon completion of the construction of the project at the McKees Rocks Bridge, McKees Rocks Borough, at its sole cost and expense, shall furnish all material and perform all work necessary thereafter to perform the maintenance of removing snow, ice, and debris from the sidewalks on the structure of the McKees Rocks Bridge within its municipal boundaries.

9. That the proceeding at Docket No. A-2020-3020667 shall be marked closed.

**BY THE COMMISSION**

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive style with a large initial "R".

Rosemary Chiavetta  
Secretary

(SEAL)

ORDER ADOPTED: June 16, 2022

ORDER ENTERED: June 16, 2022