



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

July 1, 2022

Via E-File

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
400 North Street 2nd FL
Harrisburg, PA 17120

RE: **A-2020-3020667**

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Department's "Petition for Reconsideration and/or Clarification of the Opinion and Order of The Public Utility Commission Issued June 16, 2022" in the above captioned matter.

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

Respectfully,

A handwritten signature in blue ink, appearing to read "Eric W. White".

Eric W. White
Assistant Counsel

cc: Parties of Record
Commission's Office of Special Assistants (OSA) at ra-OSA@pa.gov
Mark Chappell, P.E., Chief, Highway Delivery Division (Email)
Gregory J. Vaughn, Grade Crossing Engineer, Central Office, KCB 7th Floor (Email)
Philip Mutunga, P.E., District Grade Crossing Engineer, District 11 (Email)

**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. : A-2020-3020667
(DOT 584 825 U), Norfolk Southern Railway :
Company (DOT 507 455 K), and the Pittsburgh and :
Ohio Central Railroad Company (DOT Unknown) : **Electronically Filed**
in the City of Pittsburgh, Stowe Township and :
McKees Rocks Borough, Allegheny County. :
:

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION
PETITION FOR RECONSIDERATION AND/OR CLARIFICATION OF THE OPINION
AND ORDER OF THE PUBLIC UTILITY COMMISSION ISSUED JUNE 16, 2022

AND NOW, comes the Commonwealth of Pennsylvania, Department of Transportation (“Department”), by and through its counsel, Eric W. White, and hereby files the following Petition for Reconsideration regarding the Opinion and Order of the Public Utility Commission dated June 16, 2022, in the above-referenced matter, pursuant to the provisions set forth in 52 Pa. Code § 5.572, based upon the following:

1. On July 2, 2020, the Pennsylvania Department of Transportation (“Department”) submitted an application (“Application”) to the Public Utility Commission (“Commission”) for approval to alter the crossings where State Route 3104 crosses, above grade, the tracks of Norfolk Southern, CSXT, and the Pittsburgh & Ohio Central Railroad Company (“POHC”), in the City of Pittsburgh, Stowe Township and McKees Rocks Borough in Allegheny County.
2. On October 21, 2020, a field investigation and conference was conducted by a Commission staff engineer, with representatives from PennDOT, CSXT, Norfolk Southern, the City of

Pittsburgh, McKees Rocks Borough, Peoples Natural Gas Company and Verizon in attendance.

3. At the field conference, the Department agreed to maintain the substructure and superstructure of the entire length of the McKees Rocks Bridge and the railroad parties agreed to maintain their respective railroad facilities in the area of the subject crossings. At the time of the field conference, future maintenance of the bridge lighting and removal of snow, ice, and debris from the sidewalks had not been resolved.
4. By Secretarial Letter dated March 10, 2021, the Commission approved the Application and directed PennDOT to construct the project at its sole cost and expense. It was further determined that PennDOT would establish and maintain all traffic controls required to accommodate pedestrian and highway traffic at its sole expense and reimburse the railroad parties for the cost of flagmen and protection of train traffic.
5. A telephonic evidentiary hearing took place on September 30, 2021 before Administrative Law Judge Conrad A. Johnson. The Department, I&E, Norfolk Southern, CSXT, and the Borough were represented by their respective counsel. The City and Township did not participate in the hearing.
6. Briefs were submitted on December 10, 2021. No reply briefs were filed, and the record was closed on December 23, 2021.
7. On March 18., 2022, a Recommended Decision was issued by Administrative Law Judge Conrad A. Johnson (“Recommended Decision”).
8. The Recommended Decision recommended assignment to the Department 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 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.

9. The Department filed Exceptions to the Recommended Decision on April 7, 2022 (“Department Exceptions”).
10. I&E filed a Letter Response on April 15, 2022, and the Borough submitted a late-filed Letter Reply to the Department’s Exceptions on April 27, 2022.
11. On June 16, 2022, the Commission held a public meeting and adopted and entered an Order disposing of the Department’s Exceptions to the Recommended Decision of Administrative Law Judge Conrad Johnson (“ALJ”) that was issued on March 18, 2022 for the above-captioned proceeding (“Final Order”).
12. With the Final Order, the Commission granted the exceptions regarding year-round maintenance of the sidewalks on the McKees Rocks Bridge, including snow, ice, and debris and Ordered assignment to the local jurisdiction in proportion to the percentage of the bridge within each local jurisdiction and granted various factual/legal exceptions.
13. The Final Order specifically Ordered that upon completion of the construction of the project, the City of Pittsburgh, at its sole cost and expense, shall furnish all materials 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. The Commission further determined that Stowe Township and McKees Rocks Borough would be responsible for future maintenance of the sidewalks that are within their municipal boundaries.
14. The remaining Ordering Paragraphs excepted by the Department were denied.

A. The Disposition of Department Exception No. 10 is neither “just and reasonable” nor supported by a legal basis.

15. Paragraph One (1) through Thirteen (13) are incorporated herein as if set forth at length.

16. The Department’s Exception No. 10 states, *inter alia*, three main points:

- a. “The Department excepts the Recommended Order Paragraph 3, and its related justification. (RD Pg. 30 ¶ 3). As an initial matter, the Department notes that the determination of maintenance of signals, signage, and signal energization was not raised as an issue for this proceeding beyond being referred as ‘ancillary features.’”
- b. “[T]he local jurisdictions are responsible for maintenance of traffic control devices under the applicable regulations and explicitly responsible for traffic signals which are recommended assigned to the Department within the Recommended Order Paragraph 3.”
- c. “[T]he traffic signals associated with the McKees Rocks Bridge are beyond Station 2 + 00 and Station 58 + 00 as shown on the Plans submitted as Exhibit “B” with the Department’s application in this matter. This is the tentative jurisdiction taken by the Commission in its Secretarial Letter assigning the ALJ on March 10, 2021. Specifically stating, “[t]he Commission has tentatively established jurisdiction over those portions of the project between survey baseline station 2+00 to 58+00 as shown on the preliminary plans accompanying the application.” The Department submits there has been no reason given to extend that jurisdiction and submits the traffic signals are outside of same.”

17. In short, the Department Exception No. 10 argued: the of maintenance of signals, signage, and signal energization was not an issue to be decided by the hearing before the ALJ; the local jurisdictions are responsible for such maintenance under other regulations; and the

traffic signals associated with the McKees Rocks Bridge are beyond the jurisdiction taken by the Commission.

18. The Disposition of Department Exception No. 10 (“Disposition No. 10”) under the Final Order reasons: “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[;]” and “we will not consider new arguments and claims raised by PennDOT for the first time in its Exceptions.” Final Order p. 25.
19. As such, the Department’s Exception No. 10 was denied by the Commission.
20. The allocation of costs between the concerned parties must be both “just and reasonable.” *PECO Energy Co. v. Pa. P.U.C.*, 791 A.2d 1155, 1163 (Pa. 2002).
21. A decision issued by the Commission must be supported by both “sound legal or factual basis.” *City of Phila. v. Pa. P.U.C.*, 676 A.2d 1298, 1301 (Pa. Cmwlth. 1996).

Maintenance and Expenses of the Traffic Signage and Signals of the Bridge was not at Issue During the Hearing.

22. Our Supreme Court in *Lyness v. Commonwealth* states that, “[w]hile not capable of exact definition, the basic elements of procedural due process are adequate notice, opportunity to be heard, and the chance to defend oneself before a fair and impartial tribunal having jurisdiction of the case.” 605 A.2d 1204, 1207 (Pa. 1992) (*quoting Commonwealth v. Thompson*, 281 A.2d 856, 858 (Pa. 1971)).
23. As argued by the Department in its exceptions and reiterated here, the issue of Traffic Signage and Signals of the Bridge was not at issue during the Hearing.
24. A thorough review of the transcript of the hearing, Commission’ Secretarial Letter of March 10, 2021 at this docket, as well as language within the Recommended Decision itself

supports this position:

- a. “This matter is re-assigned to the Office of Administrative Law Judge and all parties of record will be served notice of when a hearing is scheduled to determine year-round maintenance of the sidewalks on the bridge by removing snow, ice, and debris; applying anti-skid and de-icing material; to determine maintenance for lighting and provide energization for the lighting on the structure; and any other unresolved issues that may arise.”

Commission Secretarial Letter of March 10, 2021 ¶ 23.

- b. “Upon completion of the construction of the project the Pennsylvania Department of Transportation, at its sole cost and expense, furnish all material and perform all work necessary thereafter to maintain the entire State Route 3104 bridge (substructure, superstructure, parapets, structural sidewalk components, fencing and deck) and the remainder of the improvement including the roadway pavement, highway approaches, roadway surface, drainage facilities and any other ancillary features of the improvement constructed in accordance with the provisions of this Secretarial Letter.”

Commission Secretarial Letter of March 10, 2021 ¶ 18.

- c. “I’m again reading from the secretarial letter. The issue in this case we’ll characterize it, future maintenance of a bridge lighting and associated bridge lighting, electrical costs, as well as future maintenance for removal of snow, ice and debris from the sidewalks had not been determined at the time of the field conference. *And I understand that that’s the issue presently before me as to assignment of cost for the maintenance involved in this railroad bridge crossing.*”

H.T. 43 Ln 16-25 (emphasis added).

- d. “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. pg. 16 (citing I&E St. 1 at 2-3 and Brief at 5-6) (emphasis added).

25. As such, the Department was not on notice that maintenance of traffic signals and signage that were outside of the railroad bridge crossing would be a matter as issue for the ALJ to determine.

26. Because the Department was not on notice that maintenance of traffic signals and signage that were outside of the railroad bridge crossing would be a matter as issue, it did not present evidence regarding the current and historical maintenance responsibilities for the traffic signal.
27. Ultimately, the Recommended Decision relies upon I&E's Prehearing Memorandum to determine that signals and signage must be addressed and notes that neither the Borough nor Department raised it as an issue. R.D. pg. 27.
28. While I&E did raise additional concerns within its Prehearing Memorandum, that document was filed prior to the Prehearing Conference held on April 13, 2021 in this matter as well as the subsequent Prehearing Order setting a litigation schedule and hearing date issued May 27, 2021.
29. As Commission regulations state, prehearing conferences are intended "[t]o make possible a *more effective use of hearing time* in formal proceedings ... to otherwise *expedite the orderly conduct and disposition of the proceedings* and to serve the ends of justice and the public interest, it is the policy of the Commission to arrange for conferences between parties to the proceedings prior to the commencement of hearings." 52 Pa. Code § 5.222(a) (emphasis added).
30. Commission regulations further state "[t]he following matters shall be considered at the prehearing conference: ... [o]ther matters that may aid in expediting the orderly conduct and disposition of the proceeding and the furtherance of justice, including the following: ... [t]he simplification of the issues." 52 Pa. Code § 5.222(c)(4)(i).
31. Although I&E raised additional issues within its prehearing memorandum, the timing of that document is important and should be considered.

32. Further, the issues as framed within the hearing itself reveal the issues to be decided, namely future maintenance of a bridge lighting and associated bridge lighting, electrical costs, as well as future maintenance for removal of snow, ice and debris from the sidewalks.

33. This point is further confirmed by the briefing of all active litigants as well as the replies to the Department's Exceptions.

34. First, I&E frames three issues within its brief as:

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 maintenance associated with the navigational lighting, and the costs and maintenance associated with the highway lighting.

I&E Brief at 5-6.

35. Next, the Borough argues only regarding allocation of "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." Borough Brief at 9.

36. Finally, the Department also only addresses future maintenance of removing snow, ice, and debris from the sidewalks and highway lighting maintenance and energization costs as it abandoned the navigational light issue during the hearing. Department Brief at 1; H.T. 90 Ln 10-16.

37. In short, all three active litigants argue and address the same issues, excepting navigational lighting for which the Department conceded, in briefing.

38. As the issue of traffic signs and signals was not an issue understood by the parties during the hearing, it was not an issue to be properly decided.

39. This is further supported by the replies to the Department Exceptions.

40. I&E's "Reply to PennDOT's Exceptions" specifically supports the position of the Department in all respects except Exception No. 4 related to characterizing lighting as an optional feature, but does not in any way contest the Department's position regarding traffic signs and signals.
41. Next, the Borough's reply does ask for the Commission to wholly affirm the Recommended Decision, but in no way addresses the specifics of the Department's Exceptions or arguments therein.
42. The Final Order states that the Department raised these arguments for the first time in Exceptions and denies same relying on the inability to hear new arguments at that time. Final Order pg. 25.
43. This, however, ignores the reality of the situation.
44. While it is true the Department did not raise these arguments during briefing, traffic signs and signals was not an issue raised by the active litigants for which a decision was necessary at the hearing.
45. This is supported by the hearing transcript itself, briefs of the parties, and can be inferred by the replies to the Department Exceptions.
46. The ALJ in this matter decided to include the matter of traffic signs and signals in the Recommended Decision *sua sponte* by relying upon a Prehearing Memorandum of one litigant, the Commission's I&E, which had been submitted prior to a prehearing conference and before the active litigants had time to engage in "simplification of the issues" at the prehearing conference and prior to the hearing.
47. Our Supreme Court has stated in a similar circumstance, "[t]he Superior Court by sua sponte deciding the constitutional issue exceeded its proper appellate function of deciding

controversies presented to it. The court thereby unnecessarily disturbed the processes of orderly judicial decisionmaking. *Sua sponte consideration of issues deprives counsel of the opportunity to brief and argue the issues and the court of the benefit of counsel's advocacy.* *Wiegand v. Wiegand*, 337 A.2d 256, 257 (Pa. 1975) (emphasis added).

48. Despite this, the Department did argue against this assignment in Department Exceptions to ensure its position was clear and also raised that it was not an issue to be decided at the hearing before doing so.

49. Unlike the potential in other circumstances, the active litigants were still afforded due process and were given an opportunity to respond to the arguments.

50. The two other active litigants did in fact respond to Department Exceptions and either supported the position of the Department or decided not to specifically raise arguments against same.

51. As such, this is a different situation than the cases cited within the Final Order regarding raising new arguments.

52. For the reasons stated above, the Department was not afforded proper notice to defend the issue of traffic signal and signage maintenance and costs and it is not just and reasonable to assign such future maintenance costs to the Department and, as such, reconsideration of the Commission Final Order is requested.

The traffic signals approaching the bridge are beyond the jurisdiction taken by the Commission in this matter.

53. Paragraph One (1) through Fifty-Two (52) are incorporated herein as if set forth at length.

54. As noted above, the Department's Exceptions also argued that the traffic signals approaching the bridge were not subject to the jurisdiction taken by the Commission in this matter.
55. That issue, however, was not directly addressed within the Final Order.
56. Unlike disposition of the argument above which were deemed newly raised and therefore not considered, "an issue of subject matter jurisdiction is not waivable, it may be raised at any stage of a proceeding by a party, or sua sponte by the court or agency." *Blackwell v. State Ethics Comm'n*, 567 A.2d 630, 636 (Pa. 1989) (citing *Commonwealth v. Little*, 314 A.2d 270, 272 (Pa. 1974)).
57. These specific traffic signals associated with the McKees Rocks Bridge are beyond Station 2 + 00 and Station 58 + 00 as shown on the Plans submitted as Exhibit "B" with the Department's application in this matter.
58. The jurisdiction taken by the Commission in its March 10, 2021 Secretarial Letter specifically states, "[t]he Commission has tentatively established jurisdiction over those portions of the project between survey baseline station 2+00 to 58+00 as shown on the preliminary plans accompanying the application."
59. No justification has been supplied for extending that jurisdiction.
60. As such, maintenance of those specific traffic signals is beyond the jurisdictional limits of the Commission and it was error to assign any responsibility for the traffic signals during these proceedings.
61. This jurisdictional argument, however, was not addressed within the Final Order and given the foregoing the Department requests reconsideration of that argument or clarification as requested below.

B. The Department Requests Clarification of the Following Item

62. Paragraph One (1) through Sixty-One (61) are incorporated herein as if set forth at length.
63. As noted above, the specific traffic signals in the area approaching both sides of the bridge are outside of the jurisdiction taken by the Commission in this matter.
64. The Department intends to fully comply with the Final Order, or any reconsideration thereof, and wants to ensure it is not erroneously taking on additional traffic signals it has never owned or maintained.
65. Specifically, the traffic signals at the intersection of SR 0051 and SR 3104 and the traffic signals at the intersection of SR 0065 and SR 3104, as indicated on PennDOT Traffic Signal Permits #1-069-04 and #1-092-108 issued to McKees Rocks Borough and the City of Pittsburgh respectively.
66. As such, the Department requests clarification as to whether those traffic signals in the area approaching both sides of the bridge are intended to be encompassed by the Commission's jurisdiction in this matter and therefore within the scope of the Recommended Decision and subsequent Final Order.

WHEREFORE, the Commonwealth of Pennsylvania Department of Transportation respectfully requests that the Pennsylvania Public Utility Commission grant the Petition for Reconsideration and/or Clarification of the Commission June 16, 2022 Order.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF TRANSPORTATION



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DATED: 6/30/2022

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of PENNDOT for approval to : Docket No. A-2020-3020667
install new protective fence on the structure :
where State Route 3194 crosses the tracks of : Electronically Filed
CSX Transportation Inc (DOT # 584 825 U), :
Norfolk Southern Railway Company (DOT # :
507 455 K), and the Pittsburgh and Ohio :
Central Railroad Company in the City of :
Pittsburgh, Stowe Township and McKees :
Rocks Borough, Allegheny County. :

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document, 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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Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION



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DATED: 7/1/2022