

July 11, 2022

Via Electronic Filing

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

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

BOROUGH OF MCKEES ROCKS' LETTER REPLY TO PENNDOT'S EXCEPTIONS

Dear Secretary Chiavetta:

Please accept this Answer to the Department of Transportation's ("Department") Petition for Reconsideration in the above-referenced proceeding.

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

Respectfully,



Megan Turnbull, Esquire

cc: Per Certificate of Service

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.

**BOROUGH OF MCKEES ROCKS' ANSWER TO THE COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION'S PETITION FOR RECONSIDERATION**

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Date: July 11, 2022

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of the Department of Transportation of the Commonwealth of Pennsylvania for approval to alter the crossings where State Route 3104 crosses, above grade, the tracks of CSX Transportation Inc. (DOT 584 825 U), 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.

Docket No. A-2020-3020667

**BOROUGH OF MCKEES ROCKS' ANSWER TO THE COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION'S PETITION FOR RECONSIDERATION**

Pursuant to 52 Pa. Code § 5.572(e), the Borough of McKees (hereinafter, the "Borough") hereby submits its Answer to the Commonwealth of Pennsylvania, Department of Transportation's (hereinafter, the "Department") Petition for Reconsideration of the Public Utility Commission's June 16, 2022 Opinion and Order. In support of this Answer, the Borough avers as follows:

I. BACKGROUND

1. 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.

2. 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. Future maintenance of the bridge lighting and removal of snow, ice, and debris from the sidewalk were not resolved at the time of the initial field investigation and conference.
3. 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.
4. 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. Additionally, on March 10, 2021, ALJ Conrad issued a Prehearing Conference Order for Telephonic Hearing.

5. A telephonic evidentiary hearing was held on September 30, 2021 before ALJ Conrad.
6. The Department, I&E, and the Borough filed briefs on December 10, 2021. No reply briefs were filed.
7. ALJ Conrad issued a Recommended Decision on March 18, 2022, which assigned all costs associated with the altering of the McKees Rocks Bridge, including 1.) the maintenance and energization of the navigational and roadway lighting; 2.) year-round maintenance of the sidewalks and applying anti-skid/de-icing material; and 3.) maintenance of the signage, to the Department.
8. The Department filed Exceptions on April 7, 2022, challenging the Recommended Decision. Accordingly, I&E and the Borough of McKees Rocks each filed a Letter Reply in response to PennDOT's Exceptions.
9. The Commission considered the Exceptions and Reply Letters, and on June 16, 2022, the Commission issued an Order modifying the Recommended Decision in part (hereinafter, the "Final Order").
10. The Final Order granted the Department's Exception concerning the bridge sidewalk maintenance. Therefore, the Final Order determined that, upon completion of the construction of the project at the McKees Rocks Bridge, the City of Pittsburgh, Borough of McKees Rocks, and Stowe Township would each be responsible for all materials and maintenance of removing snow, ice, and debris from the sidewalks on the bridge within each of their respective municipal boundaries. However, all other Exceptions filed by the Department were denied.

II. LEGAL STANDARD

The Commission's standard of review is articulated in *Duick v. Pennsylvania Gas and Water Company*, 56 Pa.P.U.C. 553, 559 (1982). *Duick* requires that a reconsideration petition identify "new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission," not "a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them." *Id.* (quoting *Pennsylvania Railroad Co. v. Pennsylvania Public Service Commission*, 179 A. 850, 854 (Pa 1935)). *Duick* found that the standard was not because there was no newly discovered evidence, nor change of circumstances since the Commission's order. Notably, Petitions for reconsideration of a final agency order may only be granted judiciously and under appropriate circumstances because such action results in the disturbance of final agency orders. *City of Pittsburgh v. Pa. Dep't of Transp.*, 416 A.2d 461 (1980). Here, given the totality of the circumstances, the Petition should be denied.

III. ARGUMENT

The Commission's Secretarial Letter dated March 10, 2021 addressed maintenance of the bridge's ancillary features in Paragraph No. 18 as follows:

18. 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.


Further, I&E explicitly raised “road signage and support” as an “issue to be addressed” in its Prehearing Memorandum dated April 9, 2021. To argue that the issue of traffic signs and signals was not understood as issue in this matter is disingenuous. Rather, the Department simply failed to present evidence as to such issue in order to satisfy the Department’s burden of proof. At no point prior to issuance of the Recommended Decision was the Department precluded from providing testimony or evidence concerning the bridge’s signs and signals. As noted in the Commission’s Opinion and Order dated June 16, 2022, the Department’s failure to provide evidence concerning signs and signals during the appropriate time may result in a waiver of such issues. The Department had the burden, and its failure to develop a comprehensive case is not in the interest in efficiency and judicial economy. The Borough maintains the position that the parties had knowledge of the issue of signs and signals, the Department simply failed to meet its burden of proof; however, in the alternative, if the issue of the assignment of the maintenance and expenses of the traffic is now re-opened and re-acknowledged, the Borough requests that the matter be referred back to a hearing officer to develop a complete record of the issue.

IV. CONCLUSION

WHEREFORE, for all the foregoing reasons, the Borough of McKees Rocks respectfully requests that the Department’s Petition for Reconsideration be denied in its entirety. In the alternative, should the Commission afford reconsideration, the Borough

requests that the matter be referred back to a hearing officer to develop a complete record for the issue of the assignment of the maintenance and expenses of the traffic.

Respectfully submitted,

By: 

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Docket No. A-2020-3020667

CERTIFICATE OF SERVICE

I, Megan M. Turnbull, Esquire, do hereby certify that a true and correct copy of the foregoing **McKees Rocks Borough Answer the Department's Petition for Reconsideration** was served by electronic mail on this 11th day of July 2022, upon the following:

Service by Electronic Mail:

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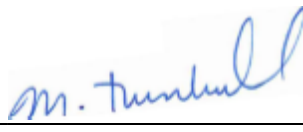
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Respectfully submitted,

By: 

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