



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

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

September 28, 2023

Via Electronic Filing

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

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

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Pennsylvania Public Utility Commission's **Bureau of Investigation and Enforcement's Reply to the Exceptions of the Pennsylvania Department of Transportation to the Recommended Decision on Remand of Administrative Law Judge Issued September 11, 2023** in the above-referenced proceeding.

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

Sincerely,

Kayla L. Rost
Prosecutor
Bureau of Investigation and Enforcement
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KLR/ac
Enclosures

cc: As per Certificate of Service
Office of Special Assistants (via email - ra-OSA@pa.gov)
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Michael L. Swindler, Deputy Chief Prosecutor (via email - mwindler@pa.gov)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**BUREAU OF INVESTIGATION AND ENFORCEMENT’S
REPLY TO THE EXCEPTIONS OF
THE PENNSYLVANIA DEPARTMENT OF TRANSPORTATION**

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Dated: September 28, 2023

I. INTRODUCTION

On September 11, 2023, Administrative Law Judge (“ALJ”) Conrad A. Johnson issued a Recommended Decision on Remand in the above-captioned proceeding. In the Recommended Decision on Remand, ALJ Johnson approved the Joint Petition for Settlement (“Joint Petition”) filed on June 9, 2023 with modification. Specifically, ALJ Johnson removed the following two (2) settlement terms:

4. The Parties agree that the McKees Rock Bridge contains no traffic signals and that the jurisdictional limits established in the March 10, 2021 Secretarial Letter do not extend to include the traffic signals at the intersections of State Route 3104 and Ohio River Boulevard (SR 65) and State Route 3104 and Island Avenue (SR 51). Therefore, no assignment of traffic signals is necessary in this matter.

5. The nearby traffic signals are not part of this agreement and will remain owned and maintained under applicable law or agreement.¹

On September 20, 2023, the Pennsylvania Department of Transportation (“PennDOT”) served its Exceptions to the ALJ’s Recommended Decision on Remand issued on September 11, 2023.

In accordance with Commission regulations at Section 5.535 and the Recommended Decision on Remand’s cover letter, I&E now submits this Reply to PennDOT’s Exceptions.² For the reasons fully explained below, I&E respectfully requests that the Commission grant PennDOT’s Exceptions and affirm the Joint Petition for Settlement without modification.

¹ Recommended Decision on Remand, Ordering Paragraph 2, pgs. 19-20 (September 11, 2023).

² 52 Pa. Code § 5.535.

II. SUMMARY OF ARGUMENT

The Commission has “exclusive power to determine and prescribe, by regulation or order, the manner in which highway-rail crossings may be constructed, altered, relocated, suspended or abolished, and the manner and conditions in or under which such crossings shall be maintained, operated and protected to effectuate the prevention of accidents and the promotion of public safety.” *Pittsburgh & Lake Erie R. Co. v. Pa. PUC*, 445 A.2d 851, 853 (Pa. Cmwlth. 1982); *see also* 66 Pa. C.S. § 2702(b); *Pa. Game Commission v. Pa. PUC*, 651 A.2d 596, 603 (Pa. Cmwlth. 1994), *alloc. denied*, 664 A.2d 977 (1995). A Commission Order must be just and reasonable. *Mun. of Monroeville v. Pa. PUC*, 600 A.2d 655, 657 (Pa. Cmwlth. 1991).

In short, PennDOT’s Exceptions must be granted because the modifications ordered in the Recommended Decision in Remand substantially change the substance and intention of the Parties and go beyond the jurisdictional limits established in the March 10, 2021 Secretarial Letter. The Commission’s jurisdiction is limited to the metes and bounds established in the March 10, 2021 Secretarial Letter, and to go beyond those limits at this stage in the proceeding to include the traffic signals is not appropriate and will have everlasting consequences.³ Moreover, removing the two settlement terms from the Joint Petition substantially modifies the parties’ agreement, which resulted in PennDOT’s Exceptions and could possibly result in one of the parties withdrawing from the settlement.

³ If the Commission were to extend its jurisdiction to include the traffic signals, the establishment of jurisdiction is ongoing and not limited to this one project. This would result in the various parties being required to submit applications with the Commission for any modifications made to the traffic signals and would potentially overlap or conflict with PennDOT’s jurisdiction and/or other state regulations/statutes.

III. I&E REPLY EXCEPTIONS

A. **I&E Reply to PennDOT Exception 1, Paragraph 2: The ALJ incorrectly ordered the Settlement Terms in Paragraphs 4 and 5 be excluded.**

The ALJ's conclusion that Paragraphs 4 and 5 shall be excluded is not supported by the record nor the jurisdictional limits placed on this matter. As shown in I&E Exhibit A, attached to I&E Statement No. 2, the Commission's jurisdiction as established in the March 10, 2021 Secretarial Letter does not extend to the traffic signals where the McKees Rocks Bridge intersects with Island Avenue or State Route 65.⁴ Specifically, the March 10, 2021 Secretarial Letter "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."⁵ The traffic signals at the intersections of State Route 65 and Ohio River Boulevard, and the intersections of Island Avenue and State Route 51 are beyond the jurisdictional limits established in the March 10, 2021 Secretarial Letter. This fact is clearly supported by the evidence of record.⁶

Moreover, the March 10, 2021 Secretarial Letter has not been overturned during this litigated proceeding. Rather, ALJ Johnson ordered that the March 10, 2021 Secretarial Letter shall remain in full force and effect subject to the amendments regarding future maintenance and costs made in his March 17, 2022 Recommended Decision.⁷ The Secretarial Letter remains in effect as it was not overturned or vacated in the June 16, 2022 Opinion and Order

⁴ I&E Statement No. 2, pg. 1; I&E Exhibit A; *see also* PennDOT Statement No. 1, pg. 6; PennDOT Statement 3, pg. 4; PennDOT Statement No. 4, pg. 5; PennDOT Exhibits BB and CC.

⁵ March 10, 2021 Secretarial Letter, pg. 2.

⁶ *See generally* I&E Statement No. 2; I&E Exhibit A; PennDOT Statement No. 1, PennDOT Statement 3; PennDOT Statement No. 4; PennDOT Exhibits BB and CC.

⁷ Recommended Decision, Ordering Paragraph 5, pg. 30 (March 17, 2022).

or the October 27, 2022 Opinion and Order.⁸ Notably, no fact or argument exists on the record which would support a finding that a public safety concern exists at the crossing which would justify the extension of the Commission's jurisdiction to include the traffic signals, and no fact exists to support a finding that the traffic signals are affecting the safety of the public highway-bridge crossing.

Additionally, the inclusion of Paragraphs 4 and 5 are consistent with the Parties' agreement and the direction of the Commission in the October 27, 2022 Opinion and Order. In the October 27, 2022 Opinion and Order, the Commission remanded this proceeding to the Office of Administrative Law Judge for the sole issue regarding the responsibility for the future maintenance and expenses of the traffic signals and signage on the bridge.⁹ The Parties, through the submission of testimony and discussion during the evidentiary hearing, reached an agreement on that sole issue. Specifically, in accordance with the October 27, 2022 Opinion and Order, the Parties executed a settlement which included stipulated facts related to the responsibility for future maintenance and expenses of the traffic signals,¹⁰ but also explicitly included settlement terms consistent with the facts of this case, i.e., the McKees Rocks Bridge does not have traffic signals and that the traffic signals referenced in the stipulated facts are beyond the Commission's established jurisdiction and will not be a part of the settlement terms.¹¹ The Parties crafted the Joint Petition for Settlement to be responsive to the Commission's October 27, 2022 Opinion and Order, but also to not acquiesce to the notion that the Commission retains jurisdiction over the traffic signals.

⁸ *See generally* Opinion and Order (dated June 16, 2022); Opinion and Order (dated October 27, 2022).

⁹ Opinion and Order, Ordering Paragraph 2, pg. 16 (dated October 27, 2022).

¹⁰ *See generally* Joint Petition for Settlement, Proposed Stipulated Facts Paragraphs 32-39, pgs. 8-9.

¹¹ Joint Petition for Settlement, Settlement Terms Paragraphs 4-5, pg. 11.


Indeed, during the May 9, 2023 evidentiary hearing, the Parties engaged in extensive discussions with the ALJ relating to this issue and how it will be addressed through settlement.¹² Accordingly, Paragraphs 4 and 5 should not be excluded from the Joint Petition for Settlement and PennDOT's Exceptions should be granted.

Lastly, I&E supports and agrees with the arguments and analysis presented by PennDOT in its Exceptions. Thus, the record supports a determination that Paragraphs 4 and 5 are essential terms of the Joint Petition and should not be excluded.

IV. CONCLUSION

I&E respectfully requests that the Commission grant the Exceptions of the Pennsylvania Department of Transportation for the reasons discussed above and affirm the Joint Petition for Settlement without modification.

Respectfully submitted,



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Dated: September 28, 2023

¹² See generally Hearing Transcript, pgs. 192-199 (May 9, 2023).

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Unknown) in the City of Pittsburgh, :
Stowe Township and McKees Rocks :
Borough, Allegheny County. :

CERTIFICATE OF SERVICE

I hereby certify that I have this day, September 28, 2023, served a true copy of the foregoing **Bureau of Investigation and Enforcement’s Reply to the Exceptions of the Pennsylvania Department of Transportation to the Recommended Decision on Remand of Administrative Law Judge Issued September 11, 2023**, upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

Service by Electronic Mail:

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