

**PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17105-3265**

Public Meeting held July 11, 2024

Commissioners Present:

Stephen M. DeFrank, Chairman  
Kimberly Barrow, Vice Chair  
Ralph V. Yanora  
Kathryn L. Zerfuss  
John F. Coleman, Jr.

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 of the Commonwealth of Pennsylvania, Department of Transportation (PennDOT or Applicant), filed September 20, 2023, to the Recommended Decision on Remand issued by Administrative Law Judge (ALJ)

Conrad A. Johnson on September 11, 2023, in the above-captioned proceeding.<sup>1</sup> Replies to the Exceptions of PennDOT have been filed by the Commission's Bureau of Investigation and Enforcement (I&E), on September 28, 2023.

The Recommended Decision (R.D.) recommends that the Commission adopt a Joint Petition for Settlement (Settlement) between the Parties. The Settlement, as proposed, would resolve a sole issue identified for disposition upon remand, as directed by the Commission's Opinion and Order entered October 27, 2022, in the proceeding. The Exceptions of PennDOT are directed to the recommendation of the R.D. which would modify two provisions of the Settlement. The Replies to Exceptions of I&E support the Exceptions of PennDOT to adopt the Settlement without the modification. Consistent with the discussion in this Opinion and Order, the Exceptions of PennDOT shall be granted. On consideration of the Settlement, it shall be adopted as in the public interest without modification.

## **I. Background**

The proceeding before the Commission is an Application of PennDOT initiated July 2, 2020, (confirmed by Secretarial Letter dated July 6, 2020) whereby PennDOT requested approval to alter the public highway bridge crossing (McKees Rocks Bridge or bridge) where State Route 3104 crosses, above grade, 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 of McKees Rocks (Borough), Allegheny County. PennDOT is the owner of the bridge and PennDOT specifically sought approval to install new protective fencing at the crossing. *See* Application at ¶ 5; R.D. at 2.

---

<sup>1</sup> The appearance of Karen L. Cummings, Senior Counsel, on behalf of PennDOT, was noted by letter of September 20, 2023.

A field investigation and conference were conducted on October 21, 2020, where the following Parties attended: the Commission's Bureau of Technical Utility Services' Rail Safety Section (Rail Safety), PennDOT, CSXT, Norfolk Southern, POOCR, 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 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. R.D. at 2.

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 (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. R.D. at 2-3.

On March 10, 2021, a Secretarial Letter (*March 2021 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. The *March 2021 Secretarial Letter* referred the outstanding future maintenance items and any other unresolved items to the OALJ for adjudication. 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. The proceeding was assigned to the ALJ Johnson, as presiding officer.

On, September 30, 2021, after notice was provided to the Parties, an evidentiary hearing was convened. PennDOT, I&E, Norfolk Southern, CSXT, and the Borough were represented by their respective counsel. The City and Township did not participate in the hearing. Witnesses were examined and written testimonies and exhibits were admitted into evidence. Main Briefs were submitted on December 10, 2021. No Reply Briefs were filed. The record was closed on December 23, 2021. R.D. at 3.

A Recommended Decision on the Application was issued March 18, 2022 (*March 2022 R.D.*). The *March 2022 R.D.* recommended the 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. R.D. at 3.

Exceptions were filed to the *March 2022 R.D.* by PennDOT. Replies to Exceptions were filed by I&E and the Borough.

On June 16, 2022, the Commission issued an Opinion and Order (*June 2022 Order*) whereby the Commission: (1) adopted, as modified by the *June 2022 Order*, the *March 2022 R.D.*; and (2) granted, in part, and denied, in part, the PennDOT Exceptions. Specifically, the Commission ordered that, upon completion of the construction of the project at the McKees Rocks Bridge, the City, the Borough, and the 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. *See*, R.D. at 4. The Commission adopted the ALJ's recommendations to assign to PennDOT the costs of the maintenance and energization for the navigational lighting and roadway lighting of the bridge, and the maintenance of the signage and signals of the bridge. *See*, R.D. at 4, referencing *June 2022 Order*.

PennDOT, thereafter, filed a Petition for Reconsideration and/or Clarification of the *June 2022 Order*. The Borough and I&E filed Answers to the Petition. By Opinion and Order entered October 27, 2022 (*October 2022 Order*), the Commission: (1) granted the PennDOT Petition for Reconsideration and/or Clarification; and (2) referred the sole issue regarding the responsibility for the future maintenance and expenses of the traffic signals and signage on the bridge to the OALJ to conduct an evidentiary hearing, develop a complete and comprehensive record of the issue, and prepare and issue a Recommended Decision for the Commission's consideration and disposition. R.D. at 4-5.

Norfolk and CSXT submitted a letter on November 2, 2022, informing the Commission that the companies would not be participating in any further call-in telephonic prehearing conference on remand or any further hearing or proceedings in this matter because the companies were not involved in the remaining issue being considered. R.D. at 5.

On December 22, 2022, a prehearing conference was convened for the proceeding upon remand as directed by the *October 2022 Order*. The following Parties submitted Prehearing Memoranda as requested by the ALJ: PennDOT, I&E, the Borough, and the City. Respective counsel for the Parties appeared and participated in the conference. The following were also noted as present for the conference: Paul Vidmar, an engineer with the Pittsburgh and Ohio Central Railroad Company; and Michael Maloch and Jeffrey Skalican from the City's mobility department. R.D. at 5. Stowe

Township received notice of the conference; however, no counsel appeared to represent the Township. *Id.*

A telephonic evidentiary hearing convened as scheduled on May 9, 2023. Counsel for PennDOT, I&E, the Borough and the City were present for the hearing. Upon stipulation, the pre-served written testimony and exhibits of the respective Parties were admitted into the record. R.D. at 5.<sup>2</sup>

#### **A. October 27, 2022 Opinion and Order**

As noted, our Opinion and Order entered October 27, 2022 (*October 2022 Order*) granted, in part, and denied, in part, PennDOT's Petition for Reconsideration.

In the Petition for Reconsideration of the *June 2022 Order*, PennDOT, in pertinent part, objected to the Commission's disposition assigning the cost and expense to maintain the signage and signals of the subject bridge to PennDOT. PennDOT argued, *inter alia*, that the maintenance and expenses of the traffic signage and signals on the bridge was not an issue during the hearing. *October 2022 Order* at 9. PennDOT averred that it was not placed on notice that maintenance of traffic signals and signage that were outside of the railroad bridge crossing would be a matter at issue in this proceeding. As a result, PennDOT took the position that it did not present evidence regarding the current and historical maintenance responsibilities for the traffic signal. *Id.*, citing PennDOT Petition at 4-7.

PennDOT also contended that the traffic signals approaching the bridge are beyond the Commission's jurisdiction. In support of this position, PennDOT relied upon caselaw which stood for the proposition that subject matter jurisdiction may be raised at

---

<sup>2</sup> A list of the admitted exhibits and transcript references for their admission is set forth at R.D., p. 6.

any stage of a proceeding. See *October 2022 Order* at 11, citing, *inter alia*, *Blackwell v. State Ethics Comm'n*, 523 Pa. 347, 358, 567 A.2d 630, 636 (1989), citing *Commonwealth v. Little*, 455 Pa. 163, 166, 314 A.2d 270, 272 (1974). It was noted:

PennDOT avers that the specific traffic signals associated with the bridge are beyond Station 2 + 00 and Station 58 + 00 as shown on the Plans submitted as Exhibit B with its Application in this matter, which is beyond the jurisdiction taken by the Commission in the March 2021 Secretarial Letter. PennDOT argues that it was error to assign any responsibility for the traffic signals in the proceeding because the maintenance of those traffic signals is beyond the jurisdictional limits of the Commission. PennDOT requests reconsideration of this jurisdictional argument because it was not addressed in the June 2022 Order. *Id.* at 11.

*October 2022 Order* at 11.

While noting our disagreement with the position of PennDOT concerning adequate notice of the issue, we granted reconsideration, reasoning as follows:

. . . Upon review of the Petition and Answers in response thereto, while we disagree with PennDOT that the maintenance and expenses of the traffic signage and signals on the bridge was not an issue during the hearing, upon further review we do find that the issue of future responsibility of the maintenance and expenses of the traffic signals and signage on the bridge was not litigated and addressed in this proceeding as thoroughly, and with the same degree of detail, as the issues of bridge lighting and energization and bridge sidewalk maintenance. To that end, the ALJ described the evidence on the traffic signals and signage in this proceeding as “scant,” and concluded that there was no substantial evidence on the issue of the bridge’s signals and signage to support PennDOT’s position. R.D. at 27-28. Accordingly, we find that reconsideration is warranted here.

Therefore, in an abundance of caution and in order to alleviate any potential confusion going forward, we will refer the sole issue regarding the responsibility for the future maintenance and expenses of the traffic signals and signage on the bridge to the OALJ to conduct an evidentiary hearing, develop a complete and comprehensive record of the issue, and prepare and issue a Recommended Decision for the Commission's consideration and disposition. Under the ALJ's oversight, this further proceeding will allow the Parties to thoroughly and accurately clarify for the Commission the specific traffic signals included in the Application and associated with the bridge and to confirm whether they are within or beyond the jurisdiction taken by the Commission in this matter. Additionally, this further proceeding will assist in clarifying the specific traffic signals in the area approaching both sides of the bridge to determine precisely which signals are to be encompassed by the Commission's jurisdiction in this matter.

\* \* \*

2. That the sole issue regarding the responsibility for the future maintenance and expenses of the traffic signals and signage on the bridge is referred to the Office of Administrative Law Judge to conduct an evidentiary hearing, develop a complete and comprehensive record of the issue, and prepare and issue a Recommended Decision for the Commission's consideration and disposition.

*October 2022 Order at 14-16.*

## **B. Settlement Petition and The Record on Remand**

In proceedings on remand, ALJ Johnson noted that the outstanding remand issue was amicably resolved during the hearing. Consequently, the hearing concluded with the ALJ's directive for the Parties to submit a Petition for Joint Settlement on or before June 9, 2023.

In compliance with the ALJ's directive, on June 9, 2023, the Parties submitted their Joint Petition for Settlement (Settlement) together with their respective Statements in Support of the Settlement (Supporting Statement or Statements in Support). The Settlement and Statements in Support were admitted into the record through issuance of the Recommended Decision on Remand. R.D. at 7. By an interim order entered on June 15, 2023, the record was closed.

The record in this proceeding consists of the Application, transcripts of the prehearing conferences and evidentiary hearings, written testimonies and exhibits, the Joint Petition for Settlement, Supporting Statements, Secretarial Letters, and Orders issued herein. *Id.*

ALJ Johnson reached nine (9) Findings of Fact, which findings adopted and incorporated forty-four (44) Stipulations agreed to by the Parties. R.D. at 7.

## **1. Settlement Terms**

Pursuant to Section 2702 of the Code, 66 Pa. C.S. § 2702, the Parties agreed to the following Settlement terms:

1. The Parties, by the signatures of their representatives below, stipulate to the facts as presented in the Proposed Stipulated Facts within this Joint Petition for Settlement.
2. The Parties agree to perform their responsibilities specified herein in a combined effort to ensure proper future maintenance at the crossing.
3. PennDOT, at its sole cost and expense, will assume future maintenance of the signage on the McKees Rock Bridge.

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.

6. Subject to a party's right to withdraw from this Joint Petition for Settlement pursuant to Paragraph 8 below, the Parties hereto agree to abide by the responsibilities and financial obligations delineated in this Joint Petition for Settlement.

7. This Joint Petition for Settlement is contingent upon its approval pursuant to Sections 2702 of the Code and the issuance 10 of a Commission Secretarial Letter or Order accepting and approving the same.

8. The Parties agree that any party may petition the Commission for rehearing if the Commission Secretarial Letter or Order substantively modifies the terms of this Joint Petition for Settlement. In that event, any party may give notice to the other parties that it is withdrawing from this Joint Petition for Settlement. Such notice must be in writing and must be given within twenty (20) days of the issuance of any Initial or Recommended Decision or any Commission Order or Secretarial Letter which adopts this Joint Petition for Settlement with substantive modifications of its terms. The consequence of any party withdrawing from this Joint Petition for Settlement as set forth above is that all issues associated with the requested relief presented in the proceeding will be fully litigated unless otherwise stipulated between the parties and all obligations of the parties as set forth above to each other are terminated and of no force and effect.

9. The parties executing this Joint Petition for Settlement agree that its purpose is to act as a General Release, except as

specifically noted within, and is to settle, compromise and release all claims, actions, suits and rights whatsoever existing between and on behalf of those respective parties as set forth above, their successors and assigns, including all such claims, actions, suits and rights whatsoever; whether known or unknown to those parties, except to enforce the terms of this Joint Petition for Settlement.

10. The benefits and obligations of this Joint Petition for Settlement shall be binding upon the successors and assigns of the Parties to this Joint Petition.

11. This Joint Petition may be signed in counterparts and all signatures attached hereto will be considered as originals.

*See*, R.D. at 9-10.

The active Parties to the proceeding, as noted, filed Statements in Support of the Settlement. *See*, R.D. at 12-14.

PennDOT, in its Statement in Support, advised that the subject crossing is an above-grade crossing spanning multiple local jurisdictions which has historically not had clear maintenance responsibilities between the jurisdictions and other interested parties. *See*, PennDOT Statement in Support at 2. PennDOT urges adoption of the Settlement and asserted that by the terms of the Settlement, all remaining future maintenance of the bridge signage will be accounted for, thus completing assignment of all outstanding maintenance matters at the crossing. This would, thereby, promote continued future safety at the crossing and for this, and other reasons of promoting settlement, PennDOT requested that the Settlement be approved. R.D. at 12-13.

I&E, in its Statement in Support, advised that the Settlement will save the Parties the time and expense they would otherwise incur in further litigating this matter before the Commission and eliminates the possibility of an appeal. I&E is of the position

that the Settlement, as proposed, is the most cost-effective solution for all interested Parties and resolves all outstanding issues related to the application to alter the McKees Rocks Bridge. *See*, R.D. 1t 13-14.

Continuing with its reasons in support for the Settlement, I&E asserts that the assignment of the future cost and maintenance of the signage on the McKees Rocks Bridge pursuant to the terms of the Settlement addresses the safety concerns to the satisfaction of I&E. I&E contends that the Settlement resolves the last outstanding issue raised in this proceeding and Commission approval of the Settlement will serve the public interest. *See*, R.D. at 13-14.

The Borough and City filed Statements in Support. In their respective Supporting Statements, the Borough and the City mirror or track the assertions set forth in PennDOT's Supporting Statements and both Parties request that the Commission adopt the terms outlined in the Settlement. R.D. at 14.

## **2. ALJ's Recommendation re Settlement**

ALJ Johnson recommended that the Settlement be adopted as in the public interest, however, with the modification of two provisions which he found "unnecessary" or "contradictory." R.D. at 16.

ALJ Johnson found the following provision unnecessary or contradictory:

"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."; and

“5. The nearby traffic signals are not part of this agreement and will remain owned and maintained under applicable law or agreement.” *See*, R.D. at 16, citing Joint Petition for Settlement at 11.

Regarding Para. No.4 of the Settlement, the ALJ reasoned as follows:

Paragraph 4 of the Settlement Terms asserts a conclusion of law as to the Commission’s jurisdictional limits over traffic signals and further asserts that “no assignment of traffic signals is necessary in this matter.” However, the Parties in their stipulations agree that the Borough on one end of the bridge and the City on the other end of the bridge will be responsible for assignment and maintenance of the nearby traffic signals. Consequently, Paragraph 4 of the Settlement Terms is counterintuitive to the Parties’ stipulation and overlooks the Commission’s remand directive to address assignment of responsibility for the traffic signals. More importantly the Commission should exercise restraint in approving a conclusion of law as to its jurisdictional limits when jurisdiction need not be addressed nor approved under the circumstances. Accordingly, in the ordering paragraphs below, I will recommend that the Settlement be modified to exclude Paragraph 4 from the Settlement Terms.

R.D. at 16-17; (note omitted).

Concerning Para. No. 5, ALJ Johnson concluded the following:

Paragraph 5 of the Settlement Terms asserts the nearby traffic signals are not part of the agreement and applicable law will apply to the maintenance of the traffic signals. This Settlement Term essentially contradicts the Parties’ Proposed Stipulations 36 and 38, which state as follows:

36. PennDOT possesses a Traffic Signal Maintenance Agreement with McKees Rocks Borough that established the future ownership and maintenance of the traffic signal at the

intersection of State Route 51 and the McKees Rocks Bridge.

38. The City currently maintains the traffic signals at the intersection of the McKees Rocks Bridge and State Route 65 and represents it will continue maintaining this infrastructure.

Settlement at 8-9 (footnotes omitted). Here, Commission approval of Paragraph 5 of the Settlement Terms, i.e., nearby traffic signals are not part of this agreement, would negate the Parties' Proposed Stipulations. Such a result is illogical. Additionally, as stated above the Parties have agreed to the assignment for responsibility for the maintenance of the bridge's nearby traffic signals. Accordingly, in the ordering paragraphs below, I will recommend that the Settlement be modified to exclude Paragraph 5 from the Settlement Terms.

R.D. at 17; (note omitted).

Based on the foregoing, the R.D. recommends adoption of the Settlement, with the modifications as noted above. *See*, R.D. at 17:

Upon due consideration of the terms and conditions of the Settlement, including the Supporting Statements of the respective Parties and the above analysis, I conclude that the Settlement Terms, with modifications, constitute a fair, just, and reasonable resolution of the issue presented on remand in this proceeding. As a result, I conclude and will recommend to the Commission that the Settlement Terms of the Joint Petition for Settlement, as modified, be approved because with modification the Settlement Terms are in the public interest.

### **3. PennDOT Exceptions and I&E Replies**

PennDOT, in Exceptions, objects that the R.D. modification of the Settlement by excluding Paragraphs Nos. 4 and 5 related to the Parties' agreement

regarding nearby traffic signals should be rejected and the Settlement approved, without modification.

In support of its Exceptions, PennDOT explains: PennDOT has always maintained that traffic signal maintenance is outside of the scope of these proceedings as they are governed by regulation. *See*, PennDOT Exc. at 2, citing 75 Pa. C.S. §§ 6122 and 6124 (relating to authority to erect traffic-control devices; and erection of traffic-control devices at intersections); and 67 Pa. Code § 212.5(a) and 67 Pa. Code § 212.5(b)(1)(v)(A). PennDOT repeats its position that the determination of maintenance of traffic signals near the subject crossing was not raised as an issue by the Parties to this proceeding and the construction plans did not propose to modify the signals. PennDOT notes that the Parties recognize that the regulations are clear with regard to the responsibility for traffic control devices. As such, the matter is only an issue in the instant case because, without any indication of a dispute from the Parties, the ALJ has opted to assign maintenance of the signage and signals.

PennDOT disagrees with the ALJ's rationale for excluding Para. Nos. 4 and 5. It explains that Paragraph No. 4 is not "counterintuitive" to the Parties' stipulation as the Stipulations referred to, (nos. 36 and 38), state that there is a Traffic Signal Maintenance Agreement with McKees Rocks Borough that established the future ownership and maintenance of the traffic signal at the intersection of State Route 51 and the McKees Rocks Bridge; and that the City currently maintains and will continue to maintain the signal on its side of the bridge. PennDOT Exc. at 4.

In response to the concern over Para. No.4, PennDOT states, this paragraph contains a statement of fact – the traffic signals are outside of the established jurisdictional limits, and the Parties' agreement that, therefore, no assignment of traffic signals is necessary. PennDOT adds: "Stipulations 36 and 38 do not contradict Settlement Term Paragraph 4 and the statements are not mutually exclusive. The fact that

there is a maintenance agreement with the Borough and that the City is and will continue to maintain the signal on its side of the bridge wholly supports the Parties' agreement in Paragraph 4 that assignment of the traffic signals is unnecessary. PennDOT Exc. at 4.

According to PennDOT, Para. No. 4 does not overlook the Commission's remand directive to address assignment of responsibility for the traffic signals. Indeed, that is exactly what the Parties are agreeing to with the proposed Settlement Term.

Finally, PennDOT objects that Para. No. 4 does not purport to contain a conclusion of law with regard to the Commission's jurisdictional limits that would warrant an exercise of restraint by the Commission. Rather, it merely represents the Parties' understanding of the location of the signals and the natural consequence thereof.

In Replies to Exceptions (R. Exc.), I&E expresses its concurrence in the position of PennDOT concerning the Settlement.

I&E argues that the conclusion that Para. Nos. 4 and 5 be excluded is not supported by the record nor the jurisdictional limits placed on this matter. I&E refers to an Exhibit A, attached to I&E Statement No. 2, wherein 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.

R. Exc. at 3. In pertinent part, I&E states:

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." 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.

R. Exc. at 3; (notes omitted).

In conclusion, I&E argues that the Settlement, without modification, is consistent with the *October 2022 Order*. It continues, the matter was remanded for the sole issue regarding the responsibility for the future maintenance and expenses of the traffic signals and signage on the bridge. I&E states the Parties, through the submission of testimony and discussion during the evidentiary hearing, reached an agreement on that sole issue and specifically, in accordance with the remand, the Parties executed a settlement which included stipulated facts related to the responsibility for future maintenance and expenses of the traffic signals, but also explicitly included settlement terms consistent with the facts of this case.

## **II. Discussion**

### **A. Legal Standards**

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*, 364 Pa. 45, 70 A.2d 854 (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.*

In this matter, PennDOT, as Applicant, is the party seeking affirmative relief from the Commission. Therefore, PennDOT is the party with the burden of proof.

Additionally, the Commission's decision must be supported by substantial evidence in the record. *See, e.g.,* 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*, 489 Pa. 109, 413 A.2d 1037 (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).

## **1. 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. *PennDOT 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.

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

Additionally, 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*,

558 Pa. 290, 737 A.2d 201 (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).

As noted, pursuant to our *October 2022 Order*, we have substantially apportioned the costs of the instant project among the parties, with the exceptions of the issue reserved for remand.

## **2. Terms of the Settlement**

It is the policy of the Commission to encourage settlements. 52 Pa. Code § 5.231(a). As we have noted, “[s]ettlements lessen the time and expense the parties must expend litigating a case and at the same time conserve administrative hearing resources and are often preferable to those achieved at the conclusion of a fully-litigated proceeding.” 52 Pa. Code § 69.401.

The Commission must review proposed settlements to determine whether the terms are in the public interest. *Pa. PUC v Philadelphia Gas Works*, Docket No. M-00031768 (Order entered January 7, 2004); *Pa.PUC v. C.S. Water and Sewer Associates*, 74 Pa. P.U.C. 767 (1991). In a rail proceeding, “the basis for the Commission’s action is the public interest, and the standard to be applied is ‘the prevention of accidents and the promotion of the safety of the public.’” *Pittsburgh R. Co. v. Pa. PUC*, 182 A.2d 80, 84 (Pa. Super. 1962) (citing *Pennsylvania Railroad Co. v. Pa. PUC*, 35 A.2d 588 (Pa. Super. 1944)).

### 3. Disposition

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).

On consideration of the Exceptions of PennDOT to the R.D., we shall grant the Exceptions and approve the Settlement without modification. In the *October 2022 Order* we directed the following:

2. That the sole issue regarding the responsibility for the future maintenance and expenses of the traffic signals and signage on the bridge is referred to the Office of Administrative Law Judge to conduct an evidentiary hearing, develop a complete and comprehensive record of the issue, and prepare and issue a Recommended Decision for the Commission's consideration and disposition.

*October 2022 Order* at 16; (emphasis added)

As emphasized, the *October 2022 Order* was primarily concerned with the responsibility for the future maintenance and expenses of the traffic signals and signage on the bridge. We agree with the positions of PennDOT and I&E, which are supported by the Parties to this matter, that the jurisdictional limits were established in the *March 2021 Secretarial Letter* and have not been the subject of dispute.

The subject crossing is an above-grade crossing spanning multiple local jurisdictions. The Commission's paramount goals in regulating crossings are to prevent

accidents and promote public safety. 66 Pa. C. S. § 2702(b). Adoption of the Settlement without further dispute or litigation concerning jurisdictional limits that have been established through prior Secretarial Letter and not challenged, will further those goals. and establish responsibility for the crossing which has historically not had clear maintenance responsibilities between the jurisdictions and other interested parties.

### **III. Conclusion**

Consistent with the discussion in this Opinion and Order, we will grant the Exceptions of PennDOT to the Recommended Decision and adopt the Recommended Decision as modified consistent with this Opinion and Order. The Joint Petition for Settlement is, hereby, approved, without modification; **THEREFORE;**

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

1. That the Exceptions of the Commonwealth of Pennsylvania, Department of Transportation filed September 20, 2023, to the Recommended Decision on Remand issued by Administrative Law Judge Conrad A. Johnson on September 11, 2023, at Docket No. A-2020-3020667, are granted.
2. That the Recommended Decision of Administrative Law Judge Conrad A. Johnson issued on September 11, 2023, at Docket No. A-2020-3020667, is adopted, as modified, consistent with this Opinion and order.
3. That the Joint Petition for Approval of Settlement is, hereby, approved without modification as in the public interest.

4. That the Commission Secretary shall mark this matter closed.

**BY THE COMMISSION,**

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

Rosemary Chiavetta  
Secretary

(SEAL)

ORDER ADOPTED: July 11, 2024

ORDER ENTERED: July 11, 2024