

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

Public Meeting held August 1, 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 replace the existing structure that carries State Route 0068 over four tracks of the Bessemer and Lake Erie Railroad (DOT No. 051 674 J) and ten tracks of the Buffalo and Pittsburgh Railroad, Inc. (DOT No. 149 033 D) in Butler Township and Summit Township, Butler County and the allocation of costs incident thereto.

A-2020-3022688

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition for Reconsideration (Petition) of the Department of Transportation of the Commonwealth of Pennsylvania (the Department or Applicant) filed on June 27, 2024, seeking reconsideration of the Commission's Opinion and Order entered June 13, 2024 (*June 2024 Order*), in the above-captioned proceeding.

No answers to the Petition have been filed. For the reasons stated below, we shall grant the Petition and modify our *June 2024 Order*.

I. History of the Proceeding

On November 2, 2020, the Department filed an Application before the Commission seeking approval to alter the public crossings (DOT 051 674 J) and (DOT 149 033 D) by removal and replacement of the existing highway bridge structure.

On February 28, 2024, the Department submitted right-of-way plans and the metes and bounds description for any railroad property for approval for Commission appropriation.

On March 19, 2024, Canadian National Railway Company objected to the February 28, 2024 right-of-way plans.

On May 6, 2024, the Department filed revised right-of-way plans to the Commission for approval and all parties of record for review; these plans consisted of seven sheets and were to amend and replace sheets 1, 10, 11, 12, 14, 31, and 32 of the February 28, 2024 plans.

On June 13, 2024, the Commission issued an Opinion and Order approving both the February 28, 2024 plans and the May 6, 2024 plans. *June 2024 Order*.

On June 27, the Department filed the present Petition.¹

¹ The Petition asserts additional facts which are not in the record supported by the attached verification of Jeffrey Matko, Grade Crossing Engineer for the Department.

No answers to the Petition have been filed.

II. Discussion

A. Legal Standards

1. Petitions for Reconsideration

With respect to petitions for rehearing, reconsideration, rescission and amendment of Commission orders, the Public Utility Code (Code), 66 Pa.C.S. §§ 101, *et seq.* establishes a party's right to seek relief within fifteen days following the service of a Commission order pursuant to Subsections 703(f). 66 Pa.C.S. § 703(f) (relating to rehearing).² Upon the filing of a petition for relief pursuant to Section 703(f), the Commission may affirm, rescind, or modify its original order. 66 Pa.C.S. § 703(f). The Code further provides that the Commission may, at any time, after notice and opportunity to be heard by all affected parties, rescind or amend any order made by the Commission, pursuant to Section 703(g). 66 Pa.C.S. § 703(g) (relating to rescission and amendment of orders). A request for relief pursuant to § 703(f) or § 703(g) must be brought as a petition for relief consistent with Section 5.572 of Commission Regulations. 52 Pa. Code § 5.572 (relating to petitions for relief).

Petitions for relief predicated upon Sections 703(f) and 703(g) of the Code, whether brought under Section 5.572(c) of Commission Regulations as a petition for reconsideration, rehearing, reargument, clarification, supersedeas or others within fifteen days of the service of a Commission order, or under Section 5.572(d) as a petition for

² Petitions under this section which do not allege new evidence are typically treated as petitions for reconsideration. Petitions for rehearing pursuant to Section 703(f) of the Code, typically include an allegation of new evidence. 66 Pa.C.S. § 703(f); *see West Penn Power Co. v. Pa. PUC*, 659 A. 2d 1055 (Cmwlth. 1995).

rescission or amendment filed at any time following service of a Commission order, are reviewed by the Commission as matters seeking relief falling within the agency's discretion.

The Commission's application of the standard for granting a petition for amendment, reconsideration, or rescission is set forth in *Philip Duick, et al v Pennsylvania Gas and Water Company*, 56 Pa. PUC 553 (1982) (*Duick*) as follows:

A petition for reconsideration, under the provisions of 66 Pa. C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part on the grounds that the decision or ruling of the Commission on a matter or issue was either unwise or in error.

In this regard we agree with the Court in the Pennsylvania Railroad Company case, wherein the Court said,

[b]ut the grounds for reconsideration should be restricted to the new matters and new or changed conditions set up in the joint petition, which had arisen since and were not presented in the several petitions of these appellants ... and dismissed by the Commission ... and not appealed from. Parties, ..., cannot be permitted, by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them and not appealed from. ...

Pennsylvania Railroad Co. v. Public Service Commission, 118 Pa. Super. 380 (1935).

What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission. Absent such matters being presented, we consider it unlikely that a party will succeed in persuading us

that our initial decision on a matter or issue was either unwise or in error.

Duick at 559; *see also*, *AT&T v Pa. PUC*, 568 A.2d 1362 (Pa. Cmwlth. 1990).

The Commission utilizes a two-step analysis in determining whether to exercise its discretion to grant relief under *Duick*. *See, e.g.*, *SBG Management Services, Inc./Colonial Garden Realty Co., L.P. v. Philadelphia Gas Works*, Docket No. C-2012-2304183 (Opinion and Order entered May 19, 2019) (SBG Order)³ (discussing *Application of La Mexicana Express Service, LLC, to transport persons in paratransit service, between points within Berks County*, Docket No. A-2012-2329717; A-6415209 (Opinion and Order entered September 11, 2014)).

The first step is to determine whether a party has offered any basis to persuade the Commission to exercise its discretion, including but not limited to, new and novel arguments or identified considerations that appear to have been overlooked or not addressed by the Commission in its previous order. This initial step examines whether a party raises the same questions which were specifically considered and decided against them by the prior Order of the Commission. If so, it is unlikely that the Commission will be persuaded to exercise its discretion to grant relief. *Duick* at 559 (citing *Pennsylvania Railroad Co. v. Public Service Commission*, 118 Pa. Super. 380 (1935)). The second step of the *Duick* analysis is to evaluate any matter the Commission has deemed worthy of consideration, to determine whether to grant any relief.

³ *Affirmed, Phila. Gas Works v. Pa. PUC*, 249 A.3d 963 (Pa. 2021); No. 14 EAP 2020 (April 29, 2021); 2021 WL 1681311; *remand granted, in part* (June 15, 2021); 2021 WL 2697432 (Table).

2. Petition to Reopen the Record

After the close of the record in a proceeding, a party “may file a petition to reopen the proceeding for the purpose of taking additional evidence.” 52 Pa. Code § 5.571(a). Such a petition must clearly state the basis for the petition. *Id.* at (b). Further, the Commission may reopen the record in the proceeding “after the presiding officer has issued a decision or certified the record” if there are changes to facts or law necessitating such an action. *Id.* at (d), (d)(2).

B. The Petition

In the Petition the Department seeks modification of the Commission’s *June 20204 Order* to correct the record title owner of the CSX Transportation, Inc. property identified as Parcel 15, Tracts 3, 4, and 5⁴.

Specifically, the Department avers that Ordering paragraphs nos. 2, 3, 4, 5, and 6 of the *June 2024 Order* lists the record title owner of the CSX Transportation, Inc. Parcel 15, Tracts 3, 4, and 5 as:

CT Corporation System
600 North Second Street, Suite 401
Harrisburg, Pennsylvania, 17101.

However, shortly after the *June 2024 Order* was issued, the Department was informed that the record title owner of Parcel 15, Tracts 3, 4, and 5, is not in fact

⁴ Although the Department did not request to reopen the record, we find that the Petition includes additional facts which are not in the record, and which are material to our consideration of the Petition. Therefore, we will treat the Petition as including a request to reopen the record for inclusion of the additional facts. Accordingly, our disposition will allow twenty (20) days for interested parties to object to the admission of additional facts.

CT Corporation System, as stated in the Department's filings and Ordering Paragraphs 2, 3, 4, 5, and 6. Further, the Department has confirmed, as verified by Jeffrey Matko, Grade Crossing Engineer for the Department, that the record owner of those parcels is Allegheny and Western Railway Company. Petition at 2.

As such, the Department requests that the Commission reconsider its *June 2024 Order* and modify ordering paragraphs 2, 3, 4, 5, and 6 to reflect that the record title owner of the CSX Transportation, Inc. Parcel 15, Tracts 3, 4, and 5, is:

ALLEGHENY AND WESTERN RAILWAY CO.
500 WATER STREET
JACKSONVILLE, FLORIDA 32202

C. Disposition

In considering the instant Petition, we note that any issue or contention that we do not specifically address 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).

Based on our review of the Department's Petition, we will grant the modification of our *June 2024 Order*. Based upon the verified facts set forth in the Petition, we shall modify our *June 2024 Order* to correct the record title owner of CSX Transportation, Inc. Parcel 15, Tracts 3, 4, and 5, to be:

ALLEGHENY AND WESTERN RAILWAY CO.
500 WATER STREET
JACKSONVILLE, FLORIDA 32202

III. Conclusion

Upon review and consideration of the record in this proceeding, we shall grant the Department's Petition and modify our *July 2024 Order*, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Petition for Reconsideration of the Department of Transportation for the Commonwealth of Pennsylvania filed on June 27, 2024, is granted, consistent with this Opinion and Order.

2. That the Opinion and Order at Docket No. A-2020-3022688 entered June 13, 2024, is modified at ordering paragraph nos. 2, 3, 4, 5, and 6 to reflect that the record title owner of the CSX Transportation, Inc. Parcel 15, Tracts 3, 4, and 5, is:

ALLEGHENY AND WESTERN RAILWAY CO.
500 WATER STREET
JACKSONVILLE, FLORIDA 32202

3. That a copy of this Opinion and Order be served upon the parties of record and:

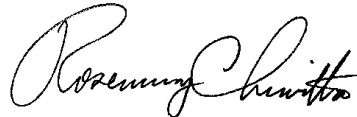
ALLEGHENY AND WESTERN RAILWAY CO.
500 WATER STREET
JACKSONVILLE, FLORIDA 32202

4. That the parties of record to this proceeding and Allegheny and Western Railway Co., shall have twenty (20) days to object to the corrected/additional facts of record in this proceeding and modification of the Commission's Opinion and Order at Docket No. A-2020-3022688, entered on June 3, 2024.

5. That if no objection to the corrected/additional facts of record and modification of the Commission's Opinion and Order at Docket No. A-2020-3022688, entered on June 3, 2024, is received within twenty (20) days, this Opinion and Order shall become final without further action.

6. That if no objection allowed under Ordering Paragraphs Nos. 4 and 5, above, is received within twenty (20) days, this proceeding at Docket No. A-2020-3022688, shall be marked closed.

BY THE COMMISSION,



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: August 1, 2024

ORDER ENTERED: August 1, 2024