**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

Public Meeting held December 17, 2015

Commissioners Present:

Gladys M. Brown, Chairman

John F. Coleman, Jr., Vice Chairman

Pamela A. Witmer

Robert F. Powelson

Andrew G. Place

Investigation upon the Commission’s own motion I-2015-2472242

to determine the condition and disposition of six (6) existing structures carrying various highways above the grade of the tracks of the Canadian Pacific Railroad in Great Bend Township, New Milford Township, Brooklyn Township, Hop Bottom Borough, Lathrop Township, Susquehanna County and Benton Township, Lackawanna County

**OPINION AND ORDER**

**BY THE COMMISSION:**

On April 9, 2015, the Pennsylvania Public Utility Commission (Commission) entered an order at this docket number to investigate the condition and disposition of six existing structures carrying various highways above the grade of railroad tracks of the Canadian Pacific Railroad in Susquehanna County and Lackawanna County. Before the Commission for consideration and disposition is the following: (1) a Petition for Protective Order filed by the Pennsylvania Department of Transportation (PennDOT); (2) a Petition to Modify the Commission’s April 9, 2015 Order filed by PennDOT; and (3) requests by Lackawanna County and Susquehanna County to be dismissed as a parties to the investigation proceeding at this docket number.

For the reasons that follow, we will: (1) grant PennDOT’s Petition for Protective Order; (2) grant PennDOT’s Petition to modify the Commission’s April 9, 2015 Order; and (3) deny the requests of Lackawanna County and Susquehanna County to be dismissed as a parties to this case.

**BACKGROUND**

On April 9, 2015, the Commission on its own motion initiated an investigation to determine the condition and disposition of six existing structures carrying various highways above the grade of railroad tracks of the Canadian Pacific Railroad in Susquehanna County and Lackawanna County. Those structures are located at crossings in Great Bend Township, New Milford Township, Brooklyn Township, Hop Bottom Borough, and Lathrop Township in Susquehanna County and in Benton Township in Lackawanna County. *See* Docket No. I-2015-2472242 (Order entered Apr. 9, 2015).

On April 24, 2015, Lackawanna County filed a two page letter with the Commission, requesting to be dismissed as a party from the proceeding. As support for its request, Lackawanna County noted that the County was not invited to participate at a field investigation in November 2012, that the County does not own the bridge in question, and that the County has no history of maintenance over the bridge. In its letter request filing, Lackawanna County did not include a certificate of service or indicate that it served other parties to the proceeding. *See* Docket No. I-2015-2472242 (Letter filed Apr. 24, 2015).

On May 12, 2015, PennDOT simultaneously filed two petitions with the Commission: (1) a Petition to Modify the April 9, 2015 Order at this docket; and (2) a Petition for Protective Order. In the Petition to Modify the April 9, 2015 Order (Petition to Modify), PennDOT requested an extension of time until September 30, 2015 to submit in-depth load rating analyses for the six structures subject to the investigation. PennDOT indicated it would disclose the National Bridge Inspection Standards (NBIS) inspection reports within 30 days of the Commission’s issuance of a protective order. Accordingly, PennDOT sought a modification of the April 9, 2015 Order as follows:

1. That Pennsylvania Department of Transportation, ~~within sixty (60) days from the service of this order,~~ submit to Canadian Pacific Railroad, Great Bend Township, New Milford Township, Brooklyn Township, Hop Bottom Borough, Lathrop Township, Benton Township, Lackawanna County, Susquehanna County and this Commission, the most recent NBIS inspection report within (30) days from the service of the Commission’s Protective Order, ~~including~~ and an in-depth load rating analysis of the subject structures by September 30, 2015.

Petition to Modify, Docket No. I-2015-2472242 (filed May 12, 2015).

In its Petition for Protective Order, PennDOT cited Commission regulations and explained that “[p]ublic disclosure of the detailed bridge inspection reports, studies, or analyses could pose a danger to the safety or physical security of the structure” under investigation. Petition for Protective Order, at 2, Docket No. I-2015-2472242 (filed May 12, 2015). Furthermore, PennDOT contended that confidentiality of bridge inspection reports/analyses “promotes independent and critical analysis of bridges by engineering professionals without concern for [any] potential liability” in a court proceeding or elsewhere. *Id.* (citing *Harrison v. Burlington Northern R. Co.*, 965 F.2d 155, 160 (7thCir. 1992)). Therefore, according to PennDOT, state and federal law prohibit the submission of these reports/analyses into the public record. *Id.* (citing 23 U.S.C. § 409 and asserting that only redacted reports would be made public pursuant to the Right to Know Law, 65 P.S. §§ 67.101 *et seq.*).

Acknowledging that the Commission’s need for the NBIS reports stems from its responsibility to evaluate the safety and status of certain bridge crossings, PennDOT stressed that the Commission should limit the use of any submitted bridge inspection reports/analyses for the singular purpose of determining the current condition of the bridge/structure. Petition for Protective Order, at 3. PennDOT avows that it will disclose the NBIS reports for the subject structures within thirty days of issuance of the requested Protective Order, but asks that those reports and the in-depth load rating analyses, that are made part of the official record in this investigation, be treated as confidential documents under seal. *Id.* 3, 4. PennDOT further requested that the Protective Order mandate that any party or Commission staff receiving the NBIS reports or in-depth load rating analyses shall not disclose those reports/analyses unless authorized by further order of the Commission or presiding officer. *Id.* at 4. If a person otherwise discloses those reports/analyses, PennDOT requests that that person would be subject to sanctions by the Commission. *Id.* Finally, PennDOT requested that the Protective Order mandate that, upon completion of this instant proceeding (and any subsequent appeals), all copies of the NBIS inspection reports and in-depth load rating analyses of the subject structures be either returned to PennDOT or destroyed, as acknowledged in an affidavit by counsel. *Id.* at 5.

On October 8, 2015, PennDOT filed an Answer to Letter/Motion Filed by Lackawanna County. PennDOT Answer, Docket No. I-2015-2472242 (filed Oct. 8, 2015). PennDOT explained that it never received a copy of the County’s letter and only inadvertently discovered the letter while searching the docket file housed in the Commission’s filing room. *Id.* at 2. First, PennDOT contended that the letter/motion should be denied for failure to serve all parties in accordance with the Commission’s regulations, 52 Pa. Code § 1.54. *Id.*  Acknowledging the Commission’s authority over formal investigations, 66 Pa. C.S. § 331, and authority to allocate costs to the parties at certain bridge/rail crossings, 66 Pa. C.S. § 2704, PennDOT asserted that the County is a concerned/interested party under the Public Utility Code and governing case law and thus should not be dismissed from the proceeding. *Id.* (citing 66 Pa. C.S. §§ 2702, 2704 and *City of Chester v. Pa. Public Utility Commission*, 408 A.2d 552, 553 (Pa. Cmwlth. 1979)). PennDOT explained that the Commission has “routinely determined that a county government constitutes a ‘concerned’ party by virtue that a subject crossing is located within its boundaries” even if the county does not maintain the subject highway. *Id.* at 3 (citing *City of Chester v. Pa. Public Utility Commission*, 408 A.2d 552, 554 (Pa. Cmwlth. 1979) and *PennDOT v. Pa. Public Utility Commission*, 469 A.2d 1149 (Pa. Cmwlth. 1983)). Accordingly, PennDOT asked the Commission to deny Lackawanna County’s letter/request. *See id.* at 4.

On October 29, 2015, PennDOT renewed its Petition to Modify the April 9, 2015 Order. PennDOT explained that it has been diligently working toward completing the reports, but has experienced some delays resulting from protracted discussions with the consultant preforming the work and the change in ownership of the rail line.[[1]](#footnote-1) As the Commission had not yet acted on PennDOT’s May 12, 2015 Petition to Modify or Petition for Protective Order, PennDOT requested a new extension of time until March 31, 2016 to complete the NBIS inspection report. Therefore, PennDOT requested this modification of ordering paragraph four (4) in the *April 9, 2015 Order* as follows:

1. That Pennsylvania Department of Transportation, ~~within sixty (60) days from the service of this order,~~ submit to Canadian Pacific Railroad, Great Bend Township, New Milford Township, Brooklyn Township, Hop Bottom Borough, Lathrop Township, Benton Township, Lackawanna County, Susquehanna County and this Commission, the most recent NBIS inspection report within (30) days from the service of the Commission’s Protective Order, ~~including~~ and an in-depth load rating analysis of the subject structures by March 31, 2016.

Petition to Modify, Docket No. I-2015-2472242, at 2 (filed Oct. 29, 2015).

On November 12, 2015, Susquehanna County filed a two page letter with the Commission, requesting to be dismissed as a party from the proceeding. Similar to Lackawanna County, Susquehanna County noted that it was not invited to participate at a field investigation in November 2012, that the County does not own the bridge in question, and that the County has no history of maintenance over the bridge. In its letter request filing, Susquehanna County also did not include a certificate of service or indicate that it served other parties to the proceeding. *See* Docket No. I-2015-2472242 (Letter filed Nov. 12, 2015).

**DISCUSSION**

We will render dispositions in the following order: (1) PennDOT’s Petition for Protective Order; (2) PennDOT’s Petition to Modify the Commission’s April 9, 2015 Order; and 3) the requests of Lackawanna County and Susquehanna County to be dismissed as parties to the investigation proceeding at this docket.

**PennDOT’s Petition For Protective Order**

*Legal Standard For Petition For Protective Order*

The Commission will grant a protective order, which keeps information confidential, “when a party demonstrates that the potential harm to the party of providing the information would be substantial and that the harm to the party if the information is disclosed without restriction outweighs the public’s interest in free and open access to the administrative hearing process.” 52 Pa. Code § 5.365(a); *see* *Bridge Structure where State Route 1025 crosses over a single track of Canadian Pacific Railway* *et al.*, Docket No. M-2013-2364201 (Order entered Aug. 15, 2013). The Commission considers, alongside any other relevant factors, the following five factors in determining whether to issue a protective order:

(1) the extent to which the disclosure would cause unfair economic or competitive damage;

(2) the extent to which the information is known by others and used in similar activities;

(3) the worth or value of the information to the participant and to the participant’s competitors;

(4) the degree of difficulty and cost of developing the information; and,

1. other statutes or regulations dealing specifically with disclosure of the information.

52 Pa. Code § 5.365(a). As to the scope of a protective order, the Commission shall apply the least restrictive means of limitation that still provides the necessary protection of certain information from disclosure. 52 Pa. Code § 5.365(a).

*Disposition*

In justifying its Petition for Protective Order, PennDOT explained that “[p]ublic disclosure of the detailed bridge inspection reports, studies, or analyses could pose a danger to the safety or physical security of the structure” under investigation. Petition for Protective Order at 2. According to PennDOT, state and federal law prohibit the submission of these reports/analyses into the public record. *Id.* (citing 23 U.S.C. § 409 and asserting that only redacted reports would be made public pursuant to the Right to Know Law, 65 P.S. §§ 67.101 *et seq.*). PennDOT contended that confidentiality of bridge inspection reports/analyses “promotes independent and critical analysis of bridges by engineering professionals without concern for [any] potential liability” in a court proceeding or elsewhere. *Id.* (citing *Harrison v. Burlington Northern R. Co.*, 965 F.2d 155, 160 (7th Cir. 1992)). PennDOT further explains that the Commission’s need for the reports stems from the Commission’s responsibility to evaluate the status of the subject bridges/crossings and to determine the condition of the bridges and any work to be performed. *Id.* at 3.

Given the Commission’s interest in obtaining independent analyses of the condition of bridges and crossings and ensuring public safety at rail crossings under our jurisdiction, we find persuasive PennDOT’s assertions regarding the nondisclosure of the reports and analyses into the public record at this stage in the proceeding. Therefore, we will grant the Petition for Protective Order. We note that this matter has not been scheduled for hearing and a hearing may not be necessary if the parties have an opportunity to review the inspection reports and analyses. *See Bridge carrying West Road et al.*, Docket M-00021610 (Order entered Oct. 29, 2002).

Since we are granting the Protective Order, we must now determine the scope of the Protective Order. *See Bridge carrying West Road*, Docket M-00021610; 52 Pa. Code § 5.365(a). In the past, we have granted similar protective order requests from PennDOT. *See Bridge Structure where State Route 1025 crosses over a single track et al.*, Docket No. M-2013-2364201 (Order entered Aug. 16, 2013). In accordance with PennDOT’s request, since the Commission will limit the use of the NBIS bridge inspection reports and in-depth load raying analyses to the sole purpose of determining the current condition of the subject structures, those reports and analyses shall be treated as under seal. *See* Petition for Protective Order at 3, 4. Parties and counsels to this investigation proceeding shall not provide these reports and analyses to any other person except as authorized by order of the Commission or a presiding officer. *See id.* at 4. A party that improperly discloses the reports and analyses will be subject to sanctions by the Commission. *See id.* Upon completion of this proceeding, the reports and analyses shall be returned to PennDOT or destroyed, as evidenced by an affidavit by counsel. *See* *id.* at 5.

Accordingly, PennDOT’s Petition for Protective Order, as requested, is granted. The requested ordering paragraphs regarding the scope of the Protective Order will be included in this Order.

**PennDOT’s Petition To Modify**

*Legal Standard For Petitions To Modify*

A petitioner may file for reconsideration seeking rescission or amendment/modification of a final Commission order pursuant to Section 703 of the Public Utility Code. *See* 66 Pa. C.S. § 703(g); *see* 52 Pa. Code § 5.572 (must file petition within 15 days after Commission order is entered). Answers to a petition for reconsideration must be filed within ten days after service of the petition. 52 Pa. Code § 5.572(e).

Petitions for reconsideration of a final agency order may only be granted judiciously and under appropriate circumstances because those petitions seek to disturb final agency orders. *City of Pittsburgh v. Pa. Dep’t of Transp.*, 416 A.2d 461, 465 (Pa. 1980). In deciding whether to deny reconsideration, the Commission considers whether the petitioner has presented new evidence, changed circumstances, or previously unconsidered law. *J.A.M. Cab Co. v. Pa. Public Utility Commission*, 572 A.2d 1317, 1318 (Pa. Cmwlth. 1990). A successful Petition for Reconsideration will convince the Commission to exercise its discretion to amend its prior final order by raising new or novel arguments not previously heard or considerations which were overlooked or not addressed by the Commission. *See Duick v. Pa. Gas & Water Co.*, 56 Pa. P.U.C. 553 (1982). Section 1.15 of the Commission’s regulations confers on us the authority and discretion to grant an extension of time upon a finding of good cause. *See* 52 Pa. Code § 1.15(a).

*Disposition*

PennDOT’s request to modify the April 9, 2015 Commission order consists of a request for an extension of time to complete: (1) the recent NBIS inspection report within 30 days from the service of the Commission’s Protective Order, and (2) an in-depth load rating analysis of the subject structures by March 31, 2016. As justification for this request, PennDOT explained that it has been diligently working toward completing the reports, but has experienced some delays resulting from protracted discussions with the consultant preforming the work and the change in ownership of the rail line. Petition to Modify at 2 (filed Oct. 29, 2015).

No answers were filed to PennDOT’s request for an extension of time. The *April 9, 2015 Order* did not adequately consider the time necessary to complete the required engineering reports and analyses. Therefore, we will grant PennDOT’s request for additional time to complete the reports and analyses. Since Norfolk Southern Railway Company purchased the Canadian Pacific Railroad line for some of the subject structures in this investigation, we will also require PennDOT to submit the reports and analyses to Norfolk Southern. Therefore, Ordering Paragraph 4 of the *April 9, 2015 Order* will be modified, as follows:

1. That Pennsylvania Department of Transportation shall submit to Canadian Pacific Railroad, Norfolk Southern Railway Company, Great Bend Township, New Milford Township, Brooklyn Township, Hop Bottom Borough, Lathrop Township, Benton Township, Lackawanna County, Susquehanna County and this Commission, the most recent NBIS inspection report within (30) days from the service of the Commission’s Protective Order and an in-depth load rating analysis of the subject structures by March 31, 2016.

**Requests Of Lackawanna And Susquehanna Counties For Dismissal As Parties**

*Legal Standard For Concerned Parties Under 66 Pa. C.S. § 2804*

The Commission has jurisdiction over the construction, relocation, alteration, suspension, and abolition of highway-rail crossings in Pennsylvania. 66 Pa. C.S. § 2702. Chapter 27 of the Public Utility Code empowers the Commission with the discretion to allocate costs at these crossings and to determine “concerned” and “interested” parties to formal investigations regarding the condition of these crossings. 66 Pa. C.S. §§ 2702, 2704; *City of Chester v. Pa. Public Utility Commission*, 408 A.2d 552, 553 (Pa. Cmwlth. 1979). Municipalities and counties that benefit from an improved crossing may be considered concerned parties with respect to allocation costs. *See City of Chester*, 408 A.2d at 554. The Commission has routinely determined that a county government constitutes a “concerned” party if a subject crossing is located within its boundaries, even if the county does not maintain the subject crossing. *See id.* at 554; *see PennDOT v. Pa. Public Utility Commission*, 469 A.2d 1149 (Pa. Cmwlth. 1983); *see In re: Colebrook Road*, Docket No. I-00000088 (Commission Order entered Sep. 17, 2010).

*Disposition*

In filing an answer in Opposition to Lackawanna County’s request for dismissal from this proceeding, PennDOT cited the relevant laws and regulations and also noted that Lackawanna County failed to provide effective service of its request for dismissal on the other parties to the investigation. *See* PennDOT Answer to Letter, Docket No. I‑2015-2472242 at 2 (citing 52 Pa. Code § 1.54). Based on PennDOT’s assertion it was not served and the fact that Lackawanna County did not include a certificate of service with its filing, it does appear that the County failed to adhere to the Commission’s regulations at 52 Pa. Code § 1.54. Moreover, this investigation involves a subject crossing in Lackawanna County. Since the Commission routinely determines that a county government is a “concerned” party for purposes of cost allocation and construction at rail-highway crossings located within the county’s boundaries, Lackawanna County is a concerned party to this formal investigation. Therefore, we will deny Lackawanna County’s request for dismissal.

Susquehanna County also sought dismissal for the same reasons as Lackawanna County. Susquehanna County also did not include a certificate of service in its filing as verification that it served the other parties to this proceeding. Beyond that defective service, this investigation involves five crossings in Susquehanna County. Since the Commission routinely determines that a county government is a “concerned” party for purposes of cost allocation and construction at rail-highway crossings located within the county’s boundaries, Susquehanna County is a concerned party to this formal investigation. Therefore, we will deny Susquehanna County’s request for dismissal.

**CONCLUSION**

Consistent with the foregoing discussion, we shall: (1) grant PennDOT’s Petition for Protective Order; (2) grant PennDOT’s Petition to Modify the Commission’s April 9, 2015 Order; and (3) deny the requests of Lackawanna and Susquehanna Counties to be dismissed as a party to this case; **THEREFORE,**

**IT IS ORDERED:**

1. That the Petition for Protective Order filed on May 12, 2015, by the Pennsylvania Department of Transportation, is granted, under the following conditions:

a. That neither counsel nor the parties, including Commission staff, receiving any bridge inspection report and/or in-depth load rating analysis shall provide access to those reports and analyses to any other person except as authorized by further order of the Commission or a presiding officer.

b. That the parties shall use the information in the reports to determine the current condition of the bridges, to plan and/or carry out maintenance activities, and to determine if the condition of any of the bridges or subject structures warrants repair, rehabilitation, replacement, or removal.

c. That any party who discloses the NBIS bridge inspection reports and/or in-depth load rating analyses or any of the information contained therein for the subject bridges/crossings in this investigation to any person other than those persons set forth in this Opinion and Order will be subject to sanctions by the Commission.

d. That any copy of the bridge inspection report and/or in-depth load rating analysis, and testimony based upon that report and/or analysis, that is made part of the official record, be placed under seal.

e. That upon completion of this proceeding, including any administrative or judicial review, all copies of the NBIS bridge inspection reports and in-depth load rating analyses for the subject structures of this investigation shall be returned to the Pennsylvania Department of Transportation. In the alternative, parties may provide an affidavit by counsel stating that the inspection reports and in-depth load rating analyses have been destroyed.

2. That the Petition to Modify the April 9, 2015 Order at this Docket Number filed on May 12, 2015 by the Pennsylvania Department of Transportation and renewed on October 29, 2015, is granted. Ordering Paragraph No. 4 of the Order entered at this Docket Number on April 9, 2015 is modified to read as follows:

1. That Pennsylvania Department of Transportation shall submit to Canadian Pacific Railroad, Norfolk Southern Railway Company, Great Bend Township, New Milford Township, Brooklyn Township, Hop Bottom Borough, Lathrop Township, Benton Township, Lackawanna County, Susquehanna County and this Commission, the most recent NBIS inspection report within (30) days from the service of the Commission’s Protective Order and an in-depth load rating analysis of the subject structures by March 31, 2016.

3. That Lackawanna County’s request to be dismissed from this proceeding is denied.

4. That Susquehanna County’s request to be dismissed from this proceeding is denied.

5. That, in all other respects, the Order entered at this Docket Number on April 9, 2015, shall remain in full force and effect.

 **BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: December 17, 2015

ORDER ENTERED: December 17, 2015

1. Norfolk Southern Railway Company purchased the Canadian Pacific rail line on September 18, 2015. [↑](#footnote-ref-1)