IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Department of Transportation,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1773 C.D. 2010
	:	
Pennsylvania Public Utility Commission,	:	Argued: March 7, 2011
	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: May 13, 2011**

The Department of Transportation (DOT) petitions for review of two orders of the Pennsylvania Public Utility Commission (PUC). The first order on appeal is an April 20, 2010, order (Merits Order) granting the exceptions to an administrative law judge's (ALJ) recommended decision (R.D.) and finding DOT and Snyder Township to be the parties financially responsible for removing a railroad crossing that is no longer in use. The second order on appeal is the PUC's order dated August 2, 2010, (Reconsideration Order) denying DOT's Petition for Reconsideration and Rehearing. For the following reasons, we are constrained to affirm the orders of the PUC.

This case began when Buffalo and Pittsburgh Railroad, Inc. (B&P) filed an application with the PUC on December 28, 2004, requesting the abolition of all eleven public crossings[1] in the Brockway to Brookville line (Application).[2] The crossing at issue is located where the P&S Subdivision – Brockway to Brookville branch rail line crosses above State Route 1015, known as Arch Street, in Snyder Township, Jefferson County ("the Crossing").[3] At the Crossing location, Route 1015 passes beneath the railroad tracks through a concrete arch tunnel under an earthen berm that rises approximately forty feet above the road surface. The Crossing is 20 feet wide and approximately 100 feet long. There is approximately 25 feet of earth between the top of the concrete arch tunnel and the railroad line. (See DOT Hr'g Statement No. 1 Ex. B, P1-P3, R.R. at 28a-30a.)

A hearing was held on March 16, 2006, before the ALJ and the following relevant parties testified and submitted evidence: B&P; DOT; Joseph Kovalchick, President of Kovalchick Corporation; Snyder Township; and the Tri-County Rails to Trails Association. After the record was closed, the ALJ issued the R.D. in which the ALJ allocated the cost of abolishing the Crossing to B&P. Kovalchick Corporation,

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[1] It appears that the parties have entered into settlements regarding the other ten railroad crossings.

[2] B&P has no plans to resume rail service on the line and shipments were last made on the line in February 1997. Thus, the line and the crossings of the line were no longer necessary.

[3] Prior to filing the Application, B&P filed a notice of consummation of abandonment with the Surface Transportation Board for the subject rail line, which was approved in a January 2, 1998, order. Subsequent to the abandonment, but prior to this appeal, B&P quitclaimed its right, title and interest in the subject rail line to Kovalchick Corporation by deed dated December 31, 2001. As part of the transaction, Kovalchick Corporation took on any responsibility B&P might incur as a result of a PUC hearing. Kovalchick Corporation subsequently salvaged rail from the line. In October 2004, Kovalchick Corporation sold the rail line to Clarion Timber.

as part of its purchase of the rail lines from B&P, had agreed to be responsible for whatever liability B&P might incur from the PUC. B&P and Kovalchick Corporation filed Exceptions to the R.D. on January 18, 2010, and DOT filed Reply Exceptions on January 29, 2010. In its Exceptions, B&P and Kovalchick Corporation argued that the Crossing should be considered a DOT-owned "highway tunnel" that DOT constructed *after* the existence of the railroad to allow the highway to pass through the berm beneath the railroad right-of-way, and not a "bridge" as described by the ALJ, which assumes that the highway was in existence before the railroad line and that the Crossing was constructed by B&P.

The PUC, in its Merits Opinion and Order, noted that the railroad line was originally constructed in 1906, but there was no evidence submitted to establish the date when the highway was constructed or the date when the tunnel was constructed. "Accordingly, there is no conclusive evidence as to whether the railroad or the highway was in operation first. Therefore, the question remains as to whether the railroad was built to cross over the road, or the roadway was cut through the berm after the railroad had been in operation." (PUC Merits Op. at 7.) The PUC ultimately granted the Exceptions and concluded that it was "more appropriate to characterize [the Crossing] as a highway tunnel, the removal of which would benefit primarily the highway users." (PUC Merits Op. at 10.) The PUC reasoned as such because along the rail line's right-of-way, whenever an obstruction was encountered in constructing the rail line, "the normal means of executing the crossing was to erect a bridge structure either carrying the railroad over or under a highway. It was not to erect a concrete arch structure, with severe limitations as to dimensions and sight, and cover it with dirt." (PUC Merits Op. at 9.) The PUC also explained that the Crossing did not represent an expense for either party over the past century and, therefore,

there was no benefit "to the railroad from an elimination of expense standpoint." (PUC Merits Op. at 9.) The PUC also noted that removing the Crossing would not serve to limit liability on the part of the railroad. Finally, the PUC evaluated the benefits in removing the Crossing:

> When evaluating the overall benefits of the removal of [the Crossing], we weigh the benefit to the highway users, the increased visibility, the increased distance at edge of road, and the overall safety considerations, as well as the benefit to trail users for the development of a trailhead parking area. Against all that, we weigh the limited benefit to the railroad and we conclude that the highway users would benefit significantly more. We also note the fact that the decision was made to bore a tunnel through the railroad berm rather than to create an at-grade crossing, and that the decision is a significant reason for the limitations that exist today.

(PUC Merits Op. at 10.) Accordingly, the PUC ordered DOT and Snyder Township, within 6 months of its Merits Order, to submit plans for the: (1) removal of the Crossing; (2) re-sloping of the earthen sidewall to an acceptable slope and pave the shoulders to match the existing roadway; and (3) maintenance and protection of traffic. The PUC further ordered DOT and Snyder Township to, within 12 months of its Merits Order: (1) furnish all materials and do all work necessary to remove the Crossing; and (2) effectuate the concomitant alterations to the terrain and highway and, upon completion, to notify the PUC in writing. (PUC Merits Order at 11.)

DOT filed its Petition for Reconsideration and Rehearing with the PUC asserting that the record did not reveal who built the Crossing or when it was built and, thus, it was erroneous to find that the railroad pre-dated the highway in the area of the Crossing. DOT requested a rehearing so that it could present newly discovered evidence in the form of a road docket that indicates that Route 1015 at the Crossing

was opened as of September 16, *1861*, such that the roadway clearly existed before the rail line. However, the PUC denied the Petition for Reconsideration and Rehearing for three reasons: (1) the issue raised by DOT was not new or novel because the issue had been considered by the PUC; (2) the PUC considered other factors besides whether the railroad likely pre-dated the tunnel in allocating the costs of abolition to DOT; and (3) the road docket, which is a public document recorded in Jefferson County, was in existence for approximately 130 years and discoverable through the exercise of due diligence prior to the close of the record and could not be considered new evidence. Pennsylvania Game Commission v. Pennsylvania Public Utility Commission, 651 A.2d 596 (Pa. Cmwlth. 1994).

DOT now petitions this Court for review of both the Merits Order and the Reconsideration Order.[4] B&P and Kovalchick Corporation (together, Intervenors) have intervened in this appeal. Before this Court, DOT argues that the PUC erred in denying its Petition for Reconsideration and Rehearing, and granting the Exceptions to the ALJ's R.D. We will discuss each issue in turn.

I. RECONSIDERATION ORDER

We first address DOT's argument that the PUC abused its discretion in denying its Petition for Reconsideration and Rehearing. Before our Court at oral argument, Intervenors argued that DOT waived this issue. However, we note that in its Petition for Review, DOT clearly requests this Court to review the Reconsideration Order in

[4] On appeal, this Court must determine whether the PUC violated any party's constitutional rights, whether the PUC erred as a matter of law, or whether the factual findings are supported by substantial evidence. Millcreek Township v. Pennsylvania Public Utility Commission, 753 A.2d 324, 326 n.3 (Pa. Cmwlth. 2000).

addition to the Merits Order. Moreover, DOT addressed the denial of its Petition for Reconsideration and Rehearing in its brief on page 17, footnote 6. Therefore, because the issue of whether the PUC abused its discretion in denying the Petition for Reconsideration and Rehearing was properly raised before this Court, we address the issue below.

A party to the proceedings before the PUC may request a rehearing under Section 703(f) of the Public Utility Code (Code), as amended, 66 Pa. C.S. § 703(f).[5] A party may also request reconsideration of the PUC's order raising any matter designed to convince the PUC that it should exercise its discretion to amend or rescind a prior order, in whole or in part, under Section 703(g) of the Code, 66 Pa. C.S. § 703(g).[6]

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[5] Section 703(f) provides as follows:

> **(f) Rehearing.--**After an order has been made by the commission, any party to the proceedings may, within 15 days after the service of the order, apply for a rehearing in respect of any matters determined in such proceedings and specified in the application for rehearing, and the commission may grant and hold such rehearing on such matters. No application for a rehearing shall in anywise operate as a supersedeas, or in any manner stay or postpone the enforcement of any existing order, except as the commission may, by order, direct. If the application be granted, the commission may affirm, rescind, or modify its original order.

66 Pa. C.S. § 703(f).

[6] Section 703(g) provides as follows:

> **(g) Rescission and amendment of orders.--**The commission may, at any time, after notice and after opportunity to be heard as provided in this chapter, rescind or amend any order made by it. Any order rescinding or amending a prior order shall, when served upon the person, corporation, or municipal corporation affected, and after notice thereof is given to the other parties to the proceedings, have the same effect as is herein provided for original orders.

(Continued…)

It is within the PUC's discretion "as to whether to open a record after the case is closed and whether to grant a rehearing." Pennsylvania Game Commission, 651 A.2d at 601. Under the abuse of discretion standard, a court may not substitute its judgment for the judgment of the agency even where the court might reach a different conclusion from the agency's conclusion. Williams v. State Civil Service Commission, 457 Pa. 470, 473, 327 A.2d 70, 71 (1974). In applying this standard, courts should not disturb the agency's discretionary action unless the decision evidences bad faith, fraud, capricious action, or abuse of power. West Penn Power v. Pennsylvania Public Utility Commission, 659 A.2d 1055, 1065 (Pa. Cmwlth. 1995). It is proper to conclude that the PUC abuses its discretion in denying a motion to reopen the record or grant a rehearing if "new facts or circumstances ar[i]se *that were not available at the time of the prior hearings*." Pennsylvania Game Commission, 651 A.2d at 602 (emphasis added).

In its Petition for Reconsideration and Rehearing, DOT admitted that the road docket it wanted the PUC to accept and consider after the close of the record "appears to have been recorded in the Jefferson County Road Docket Book 2, page 280." (Petition for Reconsideration and Rehearing ¶ 38, R.R. at 256a.) There was no explanation as to why this evidence would not have been available or discoverable through the exercise of due diligence prior to the time of the hearing before the ALJ and before the PUC closed the record and filed its Merits Order and Opinion. Accordingly, we conclude that the PUC did not abuse its discretion in denying the Petition for Reconsideration and Rehearing. Pennsylvania Game Commission, 651

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66 Pa. C.S. § 703(g).

A.2d at 602; see also Duick v. Pennsylvania Gas and Water Company, 56 Pa. P.U.C. 553, 1982 Pa. PUC LEXIS 4 (1982).

II. MERITS ORDER

On appeal, DOT argues that the PUC erred as a matter of law in allocating the entire cost of removing the Crossing to DOT and Snyder Township because the Crossing is a *bridge*, which presumably was constructed by and in favor of the railroad, and because the removal of the Crossing benefits the railroad that no longer uses the rail line for railroad purposes.

Sections 2702(b)-(c) and 2704(a) of the Code, 66 Pa. C.S. §§ 2702(b)-(c) and 2704(a), vest the PUC with the authority to determine who shall bear the costs associated with the abolition of a railroad crossing. Section 2702 provides in pertinent part:

> **(b) Acquisition of property and regulation of crossing.**--The commission is hereby vested with exclusive power to appropriate property for any [rail-highway] crossing . . . and to determine and prescribe, by regulation or order, the points at which, and the manner in which, such crossing may be . . . abolished, and the manner and conditions in or under which such crossing shall be maintained, operated and protected to effectuate the prevention of accidents and the promotion of the safety of the public. . . .
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> **(c) Mandatory relocation, alteration, suspension or abolition.**--Upon its own motion or upon complaint, the commission shall have exclusive power after hearing, upon notice to all parties in interest . . . to order any such crossing heretofore or hereafter constructed to be . . . abolished upon such reasonable terms and conditions as shall be prescribed by the commission. . . .

66 Pa. C.S. § 2702(b)-(c). Section 2704(a) provides in relevant part:

> [T]he cost of . . . abolition of such crossing . . . shall be borne and paid, as provided by this section, by the public utilities, municipal corporations, municipal authority . . . or by the Commonwealth, in such proper proportions as the commission may, after due notice and hearing, determine, unless such proportions are mutually agreed upon and paid by the interested parties.

66 Pa. C.S. § 2704(a). Although the allocation of costs between the relevant parties is a matter within the PUC's discretion, such allocation must, nevertheless, be just and reasonable; that is, the decision must be based upon some sound legal or factual basis. City of Philadelphia v. Pennsylvania Public Utility Commission, 676 A.2d 1298, 1301 (Pa. Cmwlth. 1996).

Before this Court can reach the issue of whether the allocation of costs was just and reasonable, we must determine whether there is substantial evidence to support the challenged findings of the PUC. Specifically, DOT takes issue with the PUC's findings that the railroad pre-dated the highway, and that a highway entity must have bored a "tunnel" through the earth berm. DOT contends that substantial evidence was not presented establishing which entity built the Crossing or when the Crossing was built, and the PUC improperly relied on tenuous circumstantial evidence in the form of testimony from Mr. Kovalchick, a rail salvage operator who bought the rights to the line. DOT argues that it was erroneous to rely on Mr. Kovalchick's testimony because he has a financial interest in the outcome, he is not a professional engineer or certified expert in this field, and he failed to present any design plans, records, maps, deeds, etc., to substantiate his belief that the highway tunneled underneath the railroad fill. Contrary to Mr. Kovalchick's testimony, DOT argues that the physical characteristics of the area surrounding the Crossing would lead a reasonable person to conclude that the railroad had to be placed on fill in the area of the Crossing to maintain a level grade.

"[T]he proponent of a rule or order in a Commission proceeding has the burden of" proving its case by a preponderance of the evidence. 66 Pa. C.S. § 332; See Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Commission, 578 A.2d 600, 602 n.1 (Pa. Cmwlth. 1990). "A preponderance of the evidence means only that one party has presented evidence that is more convincing, by even the smallest amount, than the evidence presented by the other party." Energy Conservation Council of Pennsylvania v. Pennsylvania Public Utility Commission, 995 A.2d 465, 478 (Pa. Cmwlth. 2010). The PUC is entitled to great deference when it comes to interpreting the Code, and this Court may not substitute its judgment for that of the PUC when there is substantial evidence supporting its findings. Id. Additionally, this Court should not indulge in the process of weighing evidence and resolving conflicting testimony. Popowsky v. Pennsylvania Public Utility Commission, 550 Pa. 449, 457, 706 A.2d 1197, 1201 (1997).

Both Intervenors and DOT presented testimony. Mr. Kovalchick opined that the rail line existed first because other bridges or overpasses built on this line, which were constructed during the same time period, were not concrete structures like the Crossing at issue. (Hr'g Tr. at 138-39, R.R. at 173a-74a.) Mr. Kovalchick testified that the other 10 or 12 bridges or overpasses along a 42-mile segment of the rail line were in the form of "two bridge piers, or abutments, either made from stone or concrete, [with] a set of deck plate girder[s] on top." (Hr'g Tr. at 139, R.R. at 174a.) Mr. Kovalchick believed that, at this particular location, the railroad would not go to the expense of constructing this cement culvert or arch because "[t]hey would have put up an abutment here [], go over 30 feet, put an abutment, and put two bridge girders on top, and have a trestle bridge, a short trestle bridge, and continue on their way." (Hr'g Tr. at 139, R.R. at 174a.) Mr. Kovalchick opined that the

Commonwealth constructed the arch tunnel because "they wanted to build something that, after it was built, would have virtually no maintenance." (Hr'g Tr. at 139, R.R. at 174a.) At no time did DOT object to the testimony of Mr. Kovalchick. DOT presented the testimony of Robert Hull, a professional engineer with the Bureau of Transportation and Safety for the PUC. Mr. Hull testified that he "assumed" the Crossing was built by the railroad because of the terrain. (Hr'g Tr. at 123, R.R. at 158a.) Mr. Hull explained that "[t]he railroad is placed on a fill at that location. So obviously, that culvert would have been placed in conjunction with the fill of the railroad." (Hr'g Tr. at 123, R.R. at 158a.)

Mr. Hull's opinion was in direct contrast to the opinion of Mr. Kovalchick and it appears that, in weighing the evidence, the PUC chose to place greater weight on Mr. Kovalchick's testimony, which it is empowered to do as the ultimate fact finder. Energy Conservation Council, 995 A.2d at 486 n.19. This Court has stated that "in a substantial evidence analysis where both parties present evidence, it does not matter that there is evidence in the record which supports a factual finding contrary to that made by the fact[]finder, rather, the pertinent inquiry is whether there is any evidence which supports the fact[]finder's factual finding." Id. (quoting Mulberry Market, Inc. v. City of Philadelphia, Board of License and Inspection Review, 735 A.2d 761, 767 (Pa. Cmwlth. 1999)). DOT is correct that there was no documentary evidence submitted to establish that the rail line existed before the highway; however, substantial evidence can consist of credited testimony. Because Mr. Kovalchick's testimony supports the PUC's finding that the highway entity must have bored a tunnel through the earth berm beneath the Crossing because the rail line was in existence before the highway, there is substantial evidence to support that finding, and we may not overturn it.

We now turn to the issue of whether the PUC's decision allocating all costs to DOT and Snyder Township for the removal of the Crossing is just and reasonable under the circumstances. In determining which party or parties shall bear the costs of the abolition of a crossing, and in what proportions, the PUC is not limited to a specific formula or list of considerations, but must simply take all relevant factors into consideration. City of Philadelphia, 676 A.2d at 1301. We have noted, however, that there appears to be several factors that have been consistently viewed to be relevant to the PUC's decision to allocate costs. These are:

1. The party that originally built the crossing.
2. The party that owned and maintained the crossing.
3. The relative benefit initially conferred on each party with the construction of the crossing.
4. Whether either party is responsible for the deterioration of the crossing that has led to the need for its repair, replacement or removal.
5. The relevant benefit that each party will receive from the repair, replacement or removal of the crossing.

Id. at 1301 n.5 (quoting Greene Township Board of Supervisors v. Pennsylvania Public Utility Commission, 668 A.2d 615, 619 (Pa. Cmwlth. 1995)).

DOT argues that the PUC's analysis of what is just and reasonable is skewed because it failed to recognize that there is a legal presumption that Intervenors owned the Crossing. Relying on City of Philadelphia v. Consolidated Rail Corporation, 560 Pa. 587, 747 A.2d 352 (2000), for the proposition that a *bridge* is owned by the entity whose traffic it carries, DOT contends that Intervenors own the Crossing because it is a "bridge" that carries rail traffic, and the PUC should have considered Intervenors' ownership of the Crossing in weighing the factors. However, contrary to DOT's

argument, the presumption set forth in City of Philadelphia does not apply in this case.

There was no question in City of Philadelphia that the rail crossing at issue was a highway bridge which was owned by the City of Philadelphia (City). As a result of legal proceedings, this Court directed the PUC to reapportion costs for the maintenance and repair of the bridge among Consolidated Rail Corporation (Conrail), National Railroad Passenger Corporation (Amtrak),[7] and the City. See City of Philadelphia v. Pennsylvania Public Utility Commission, 676 A.2d 1298 (Pa. Cmwlth. 1996). Because of an ordinance agreement indicating that Conrail and Amtrak's predecessor, Pennsylvania Railroad Company (PRR), were responsible for the maintenance of the bridge, the City argued that it no longer had any responsibility. However, the Supreme Court noted that "[i]t is undisputed that the City owns the public street that is supported by the 41st Street bridge" and that "[i]t has long been established that a bridge carrying a public street is deemed to be a part of the street, and, as such, it is owned by the entity that owns the street." City of Philadelphia, 560 Pa. at 592, 747 A.2d at 354. The Supreme Court stated that while the ordinance agreement was silent as to the ownership of the bridge, there was "no language that could be construed as shifting title from the City to PRR." Id. at 593,

[7] The bridge was built pursuant to a City ordinance that required the Pennsylvania Railroad Company (PRR) to build and maintain the bridge at its own expense under supervision of the Philadelphia Department of Public Works. On May 11, 1927, an ordinance agreement was signed on behalf of PRR accepting the terms of the ordinance. PRR and its successor, the Penn Central Transportation Company (Penn Central), complied with the ordinance agreement until a financial crisis befell the rail industry and Penn Central filed for bankruptcy. Subsequently, Penn Central reorganized by becoming part of the financially viable operations of Conrail and Amtrak pursuant to Congress' enactment of the Regional Rail Reorganization Act of 1973, 45 U.S.C. §§ 701 – 797m. City of Philadelphia, 560 Pa. at 590, 747 A.2d at 353.

747 A.2d at 355. Accordingly, the Supreme Court held that the ordinance agreement only created a contractual obligation for PRR to *maintain* the bridge, and that ownership of the bridge would be determined by "[t]he normal principle that the bridge is owned by the City, as owner of the street that the bridge supports." Id. at 593, 747 A.2d at 355.

The "presumption," or the "normal principle," set forth in City of Philadelphia that a *bridge* is owned by the "owner of the street that the bridge supports," id., is not applicable to the case at bar. Unlike in City of Philadelphia, where it was undisputed that the structure at issue was a *bridge* which was built second in time to the railroad line and for the purpose of carrying traffic over the existing railroad, here, there was a dispute over whether the Crossing was a *bridge* or a *tunnel*. In making that determination, the PUC considered evidence regarding whether the rail line was in existence before or after the highway underneath. As explained previously, the PUC credited evidence that the rail line was created first and, thus, a highway entity must have bored a *tunnel* through the earthen berm. Accordingly, *ownership of a bridge* is not at issue in this case because there is substantial evidence to support the finding that the Crossing is structured as a tunnel made by the highway entity. Indeed, the PUC considered this in weighing the factors listed in City of Philadelphia because it concluded that the "railroad pre-dated the highway" and that the highway could only exist if the highway entity bored a tunnel "through the pre-existing berm." (PUC Merits Op. at 9.) The PUC also considered which party maintained the Crossing and concluded "that neither Party claimed responsibility for the maintenance of the tunnel structure, [nor did] the tunnel clearly . . . represent an expense for either Party over the past century." (PUC Merits Op. at 9.)

DOT also argues that the PUC erred in its allocation of costs because it improperly assigned existing negative safety sight distance issues to DOT's predecessors. While DOT concedes that it would benefit from safety improvements that could result from removing the Crossing, DOT contends that Intervenors have received a benefit in divesting itself of this rail line and bridges, and profited from this abolition by reducing line upkeep costs, lessening maintenance responsibilities, and lessening liability exposure for property damage.

The PUC considered the benefits to each party from the removal of the Crossing. In weighing the benefits of the removal, the PUC noted that, historically, Intervenors did not maintain the Crossing; therefore, removal of the Crossing would not benefit Intervenors. (PUC Merits Op. at 9.) The PUC also explained that because "there is no basis for liability to the railroad for an auto accident on Interstate 80, under the railroad bridge, there would be no basis for liability [to the railroad] for auto accidents in the tunnel at [the] Crossing." (PUC Merits Op. at 10.) The PUC, thus, reasoned that removing the Crossing would not benefit Intervenors by eliminating liability. Additionally, the PUC agreed with the R.D., which found that the Crossing is the scene of numerous vehicular accidents due to horizontal and vertical clearance problems and sight distance issues. (PUC Merits Op. at 10; R.D. FOF ¶¶ 15-20 and discussion at 10, R.R. at 200a, 203a.) This finding was based on the evidence submitted by Lawrence M. Cernansky, DOT's District Grade Crossing Engineer and District 10-0 Pavement Management Engineer. (DOT Hr'g Statement No. 1 at 4-5, R.R. at 20a-21a.) While Mr. Cernansky could not testify with certainty what the increased sight distance would be on the roadway with the Crossing removed, he did note that "removing the structure and cutting back the side slopes will clearly increase sight distance for vehicles coming out of each section of the "S"

curve leading to the tangent or straight section of roadway currently running through the crossing." (DOT Hr'g Statement No. 1 at 4, R.R. at 20a.) The PUC found that removal of the Crossing would primarily benefit the travelling public,[8] which, in turn, benefits DOT because it admits that it is the entity "responsible for maintenance of the roadway pavement, side slopes, and signs within the highway right-of-way." (R.D. FOF ¶ 14; DOT Hr'g Statement No.1 at 3, R.R. at 19a.) While this Court may have weighed the evidence differently than the PUC and not relied so heavily on the self serving testimony of Mr. Kovalchick, who would be required to pay for the removal of the Crossing had the PUC affirmed the R.D., this Court is not a super PUC with the authority to reweigh the evidence in favor of DOT.[9] Popowsky, 550 Pa. at 457, 706 A.2d at 1201. As such, under our scope of review, we are constrained to affirm the PUC's Merits Order because it has not erred as a matter of law or abused its discretion.

[8] The PUC also found that removal of the Crossing would benefit "trail users for the development of a trailhead parking area." (PUC Merits Op. at 10.) While it is unclear how DOT benefits from a trailhead parking area, we note that a parking area would benefit the public at large.

[9] In the current economic climate, the PUC's Merits Order allocating all costs to DOT and Snyder Township, when Mr. Kovalchick admitted to pecuniary gain from salvaging the rail lines over the Crossing, may be troubling. But see City of Chester v. Pennsylvania Public Utility Commission, 773 A.2d 1280, 1287 (Pa. Cmwlth. 2001) ("The financial condition of a party and its ability to pay the fees associated with the cost of maintaining a crossing is not controlling or determinative for purposes of allocating costs regardless of the party. . . . Amtrak and SEPTA both have financial difficulties but that does not mean they should be excluded from the cost allocation for that reason. The costs associated with the maintenance and repair of the Bridge are costs of doing business and are no different than when the City buys materials or supplies for which its financial condition is not given any consideration, and the PUC was correct by not considering the City's financially distressed status when allocating costs.")

Accordingly, the Reconsideration Order and the Merits Order of the PUC are affirmed.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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	:	
v.	:	No. 1773 C.D. 2010
	:	
Pennsylvania Public Utility Commission,	:	
	:	
Respondent	:	

O R D E R

NOW, May 13, 2011, the orders dated April 20, 2010 and August 2, 2010 of the Public Utility Commission in the above-captioned matter are hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge