

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE JOINT PETITION OF
NORFOLK SOUTHERN RAILWAY COMPANY
AND CSX TRANSPORTATION, INC. TO
CLOSE THE FRANKLIN STREET CROSSINGS
(DOT Nos. 481482D AND 518257V) IN
ORANGE TOWNSHIP, DELAWARE COUNTY,
OHIO.

CASE NO. 19-180-RR-UNC

SECOND ENTRY ON REHEARING

Entered in the Journal on March 22, 2023

I. SUMMARY

{¶ 1} The Commission adopts the Stipulation and Recommendation filed by the parties on February 14, 2023, resolving all issues raised on rehearing.

II. DISCUSSION

A. *Applicable Law*

{¶ 2} Pursuant to R.C. 4907.474 and R.C. 4907.475, the Commission is vested with the statutory authority to close grade crossings located in municipal corporations and on rural roads.

{¶ 3} R.C. 4907.475 requires that a petitioner seeking to close a railroad grade crossing on a rural road must demonstrate that there is not a demonstrable need for the grade crossing to exist.

{¶ 4} Collectively, R.C. 4907.474 and R.C. 4907.475 provide that, in making the determination as to a demonstrable need, the Commission shall consider several factors.

{¶ 5} R.C. 4903.10 permits any party who has entered an appearance in a proceeding to apply for a rehearing, within thirty days, in respect to any matters determined in the proceeding. Further, R.C. 4903.10 states that if the commission does

not grant or deny such application for rehearing within thirty days from the date of filing, the application for rehearing is denied by operation of law.

B. Procedural History

{¶ 6} On January 28, 2019, Norfolk Southern Railway Company (NSRC) and CSX Transportation Inc. (CSXT) (collectively, the Railroads) filed a joint petition to close to vehicular and pedestrian traffic the grade crossings at Franklin Street (DOT Nos. 481482D and 518257V), located in Orange Township, Delaware County, Ohio.

{¶ 7} On February 1, 2019, Staff filed a memorandum to add parties to the case, including the Orange Township Board of Trustees (Orange Township).

{¶ 8} On April 23, 2019, the Delaware County Board of Commissioners (Delaware Commissioners) filed a motion to intervene in the case. The motion was granted by Entry issued on July 8, 2019.

{¶ 9} The evidentiary hearing was held on October 12, 2021. CSXT, NSRC, Delaware County Board of Commissioners (Delaware Commissioners), and Orange Township Board of Trustees (Orange Township) filed initial and reply briefs.

{¶ 10} On November 30, 2022, the Commission issued its Opinion and Order which granted the joint petition of NSRC and CSXT to close the Franklin Street crossings.

{¶ 11} On December 20, 2022, Delaware Commissioners filed an application for rehearing, citing as issues, the Order's not having directed one of the legislative authorities involved in the case to take action to discontinue use of the subject crossings; and the lack of an assessment of costs of the closure of the subject crossings against the joint petitioners.

{¶ 12} On December 30, 2022, the CSXT and NRSC filed a response to Delaware Commissioner's application for rehearing, stating that it agrees the application should be granted for the limited purpose of consideration of the issues specified on rehearing.

{¶ 13} On January 11, 2023, the Commission granted the application for rehearing for the limited purpose of considering the issue of which legislative authority is responsible for discontinuing use of the crossings and assessing the costs of closure to the petitioners, NRSC and CSXT.

{¶ 14} On February 14, 2023, the parties filed a Joint Stipulation and Recommendation (Stipulation).

C. Summary of the Stipulation

{¶ 15} The Stipulation, signed by NSRC, CSXT, Delaware Commissioners, and Orange Township (Signatory Parties), is intended by the Signatory Parties to resolve the issues raised on rehearing. As part of the Stipulation, the Signatory Parties stipulate, agree, and recommend that the Commission find as follows:¹

- (1) The Commission entered its Opinion and Order in this matter on November 30, 2022.
- (2) The Signatory Parties agree with the Opinion and Order, subject to the clarification and additional condition stated in this Stipulation.
- (3) The Signatory Parties agree that paragraphs 44 and 57 of the Opinion and Order require clarification because they are internally inconsistent with paragraph 54 of the Opinion and Order.

¹ This is a summary of the Stipulation filed by the parties and is not intended to replace or supersede the Stipulation filed on February 14, 2023.

- (4) In order to clarify and correct paragraphs 44 and 57 of the Opinion and Order, the Signatory Parties agree that the Commission should, in accordance with R.C. 4907.475, issue an order to the Delaware Commissioners directing it to, within thirty days of the order, discontinue the Franklin Street crossings and to close the crossings to vehicular and pedestrian traffic, by resolution as provided by R.C. 5553.01 to 5553.07.
- (5) The Signatory Parties agree that the Opinion and Order does not include an assessment of costs of the closure of the Franklin Street crossings against NSRC and CSXT, as required in R.C. 4907.475(C).
- (6) The Signatory Parties agree that the Commission should, in accordance with R.C. 4907.475(C), issue an order assessing the costs of the closure of the Franklin Street crossings against NSRC and CSXT.
- (7) The Signatory Parties agree that the costs of the closure of the Franklin Street crossings are \$7,750, which NSRC and CSXT, shall bear jointly and severally as they may allocate between them by separate agreement.
- (8) The Signatory Parties agree that NSRC and CSXT, or a contractor working on their behalf, shall perform the physical work to accomplish closure of the Franklin Street crossings and that the Delaware Commissioners and Orange Township shall not be required to perform any such work or bear any cost for such work. Notwithstanding the foregoing, the Delaware Commissioners or Orange Township may, at their own expense, undertake any additional measures outside the railroad right-of-way consistent with their respective legal authority.
- (9) The Signatory Parties agree that this Stipulation establishes no precedent to be relied upon in any manner in any other proceeding except any

proceeding that may be necessary to enforce the provisions of this Stipulation.

D. Consideration of the Stipulation

{¶ 16} Ohio Adm.Code 4901-1-30 authorizes parties to Commission proceedings to enter into a stipulation. Although not binding upon the Commission, the terms of such an agreement are accorded substantial weight. *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125, 592 N.E.2d 1370 (1992), citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978). This concept is particularly valid where the stipulation is unopposed by any party and resolves all issues presented in the proceeding in which it is offered.

{¶ 17} The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. See, e.g., *Dominion Retail, Inc. v. The Dayton Power and Light Co.*, Case No. 03-2405-EL-CSS, et al., Opinion and Order (Feb. 2, 2005); *In re Cincinnati Gas & Elec. Co.*, Case No. 91-410-EL-AIR, Order on Remand (Apr. 14, 1994); *In re Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al., Opinion and Order (Dec. 30, 1993); *In re Cleveland Elec. Illum. Co.*, Case No. 88-170-EL-AIR, Opinion and Order (Jan. 31, 1989). The ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

- (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- (2) Does the settlement, as a package, benefit ratepayers and the public interest?
- (3) Does the settlement package violate any important regulatory principle or practice?

{¶ 18} The Supreme Court of Ohio has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 561, 629 N.E.2d 423 (1994), citing *Consumers' Counsel* at 126. The Court stated in that case that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission.

{¶ 19} Concerning the aforementioned factors under which the Commission analyzes a stipulation, we find that the unanimous Stipulation should be adopted. The parties to this case and agreement are all sophisticated and were represented by counsel in negotiating the agreement, as is stated in the Stipulation. Further, the agreement reached within the Stipulation benefits the public where it clarifies the respective obligations of the local legislative authorities and the Railroads, all of whom were parties to this case. Finally, the agreement does not violate any important regulatory principle or practice where it is merely clarifying upon whom certain duties will fall, following the Commission's issuance of its Order and the application for rehearing.

{¶ 20} In accordance with the terms of the Stipulation, the Commission finds that Delaware Commissioners should, within thirty days of the issuance of this Second Entry on Rehearing, discontinue use of the Franklin Street crossings, closing them to vehicular and pedestrian traffic, which should be effectuated by adoption of a resolution, in accordance with R.C. 5553.01 to 5553.07.

{¶ 21} Further, in accordance with R.C. 4907.475(C), costs associated with and resulting from closure of the Franklin Street crossings are to be assessed to CSXT and NSRC, in accordance with the Stipulation.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 22} On January 1, 2019, NSRC and CSXT filed a joint petition to close the Franklin Street crossing, pursuant to R.C. 4907.474 and 4907.475.

{¶ 23} On November 30, 2022, the Commission issued its Opinion and Order which granted the joint petition of NSRC and CSXT to close the Franklin Street crossings.

{¶ 24} On December 20, 2022, Delaware Commissioners filed an application for rehearing, which was granted by the Commission on January 11, 2023, for the limited purpose of further consideration of the issues raised on rehearing.

{¶ 25} On February 14, 2023, the parties filed a Stipulation to resolve the issues raised on rehearing. The Stipulation meets the criteria used by the Commission to evaluate stipulations, represents a just and reasonable resolution of the issues raised on rehearing, and should be adopted.

IV. ORDER

{¶ 26} It is, therefore,

{¶ 27} ORDERED, That the Stipulation be adopted and approved. It is, further,

{¶ 28} ORDERED, That, within 30 days of this Second Entry on Rehearing, Delaware Commissioners adopt a resolution discontinuing the use of the Franklin Street crossings to vehicles and pedestrians. It is, further,

{¶ 29} ORDERED, That all costs associated with the closure of the Franklin Street crossings be assessed to NSRC and CSXT, in accordance with the Stipulation.

{¶ 30} ORDERED, That a copy of this Second Entry on Rehearing be served on the Orange Township, Delaware Commissioners, NSRC, and CSXT, and all other interested persons of record.

COMMISSIONERS:

Approving:

Jenifer French, Chair
Lawrence K. Friedeman
Daniel R. Conway
Dennis P. Deters

JMD/dmh

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in

Case No(s). 19-0180-RR-UNC

Summary: Entry Second Entry on Rehearing adopting the Stipulation and Recommendation filed by the parties on February 14, 2023, resolving all issues raised on rehearing electronically filed by Debbie S. Ryan on behalf of Public Utilities Commission of Ohio.