

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

O.P. Murphy Produce Company, Inc., A
Texas Corporation,

Complainant,

vs.

Union Pacific Railroad Company,

Defendant.

Case 12-12-006
(Filed December 14, 2012)

**DECISION GRANTING PARTY STATUS TO THE MARIA FIELD TRUST AND
ADOPTING THE SETTLEMENT AGREEMENT BETWEEN O.P. MURPHY
PRODUCE COMPANY, INC., UNION PACIFIC RAILROAD COMPANY AND
THE MARIA FIELD TRUST**

1. Summary

This decision grants the Maria Field Trust’s (Trust), motion for party status.

This decision also grants the joint motion for adoption of a settlement between O.P. Murphy Produce Company, Inc., (Murphy), Union Pacific Railroad Company (UP), and Trust (jointly parties) for safety improvements to the O.P. Murphy crossing of the UP tracks.

This proceeding is closed.

2. Procedural Background

Prior to the filing of the complaint, Union Pacific Railroad Company (UP) posted notice of its intent to close the O.P. Murphy crossing (Murphy Crossing),

a private railroad crossing located near Soledad, California, identified as Department of Transportation (DOT) Crossing Number 752161 W. For years, O.P. Murphy Produce Company, Inc., (Murphy), and the Maria Field Trust (Trust), shared the use of the Murphy Crossing. Several vehicle/train collisions with fatalities have occurred at the passively controlled (i.e. signs only, no automatic warning devices) crossing, prompting UP to initiate closure of the Murphy Crossing.

On December 14, 2012, Murphy filed case (C.) 12-12-006 seeking Commission action to prevent UP from closing the Murphy Crossing. The complaint states that the crossing is critical to Murphy's processing business, that Murphy has a legal right to use the crossing, and if the crossing is closed, without a viable alternate crossing, Murphy will lose physical access to its business.

UP filed its Answer to the Complaint on January 23, 2013. The Administrative Law Judge (Judge) assigned to the proceeding held a Prehearing Conference (PHC) on February 11, 2013. On February 13, 2013, the Judge suggested the parties seek alternative dispute resolution. On March 5, 2013, the matter was referred to an Alternative Dispute Resolution neutral. On March 7, 2013, Trust filed a motion for party status.

On March 14, 2013, the Judge formalized an email ruling authorizing the closure of the Murphy Crossing due to the unsafe conditions of the passively controlled crossing and because settlement negotiations were underway. The ruling set June 1, 2013, as the date to achieve settlement on the safety improvements or find an alternate crossing. The processing season for Murphy begins in June, and access to the crossing is most critical.

In late May, the Judge was informed that the parties had reached a settlement. On June 26, 2013, the parties filed a joint motion for approval of settlement.¹

3. Motion for Party Status

The issues in this proceeding affect Trust's interest in safe access to its property and therefore, party status is appropriate and should be granted.

4. Overview of the Settlement

Pending construction of permanent improvements, the settlement provides Murphy and its contractor access to the Murphy Crossing to implement interim safety improvements such as installing gates. Murphy is to post a flagman at the crossing during business hours when the gates are open. During off hours when no flagman is present, the gates are to be closed. The interim gates will be replaced with permanent automatic crossing gates as part of the permanent safety improvements.

Pursuant to the settlement, Murphy agrees to purchase and maintain a Commercial General Liability policy with a limit of not less than \$5 million for each occurrence and an aggregate limit of not less than \$10 million. In addition, Murphy agrees to purchase Railroad Protective Liability Insurance coverage with a limit of not less than \$2 million per occurrence with an aggregate limit of not less than \$6 million. Murphy is to provide UP and Trust with a certificate from its insurer naming UP and Trust as additional insureds on the policies. Upon proof of the requisite insurance, UP agrees to take the necessary steps to design, order, and install warning lights, crossing gates, signals, signs, sounding devices, and other necessary permanent safety upgrades at the Murphy Crossing. UP

¹ <http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M071/K162/71162323.PDF>

agrees to have the permanent safety improvements installed and functioning by June 1, 2014. In consideration for UP's timely installation of the permanent safety improvements and the permanent reopening of the Murphy Crossing, Murphy and Trust agree to the closure of the adjacent Silliman Crossing (DOT Number 752160P; CPUC Number 001E-136.25-X). If in the future UP closes the Murphy Crossing at any time, in addition to other remedies Murphy and Trust may have, UP agrees to reopen the Silliman Crossing at the time of any closure of the Murphy Crossing and keep the Silliman Crossing open so long as the Murphy Crossing remains closed.

The settlement allocates the costs for the interim and permanent safety improvements among the parties as follows;

- The cost of interim improvements such as flagmen, temporary gates and liability insurance will be borne by Murphy with any contributions from Trust set out in a separate agreement between Murphy and Trust;
- Railroad shall pay \$30,000 toward the cost of the ingress egress improvements related to roadway engineering. The \$30,000 is an off-set against Murphy's contributions toward the permanent safety improvements. Murphy shall pay the remainder with any contribution from Trust set out in a separate agreement between Murphy and Trust;
- Upon completion of the permanent safety improvements, Murphy shall contribute \$120,000 toward the cost of the improvements made by UP. Any contribution from Trust will be toward Murphy's share of the cost and be part of a separate agreement between Murphy and Trust.
- The cost of maintenance and repair of the Murphy Crossing permanent safety improvements shall be borne by UP.
- Each party is responsible for its own attorney's fees.

In the settlement, Murphy agrees to defend, indemnify and hold harmless UP, its directors, agents and employees from and against any and all claims, actions, suits, proceedings, costs, expenses, damages and liabilities, including reasonable attorney's fees, arising out of:

- Work done by Murphy on or in connection with the Murphy Crossing;
- Use of the Murphy Crossing by Murphy, their agents, patrons, invitees and employees related to Murphy's operations; and
- Acts or omission of the flagmen hired by Murphy at the Murphy Crossing.

According to the settlement, Murphy and Trust are not required to defend, indemnify or hold harmless UP, its directors, agents and employees from and against any and all claims, actions, suits, proceedings, costs, expenses damages and liabilities, including reasonable attorney's fees, arising out of or related to the active or passive negligence of UP, its director, agents and employees, or as to any willful misconduct of UP, its directors, agents and employees.

The parties reached settlement on all the issues prior to hearings on the issues, and on that basis Murphy could have merely withdrawn its complaint. However, the parties agreed to seek Commission approval of the settlement terms even though interim safety improvement measures were implemented in advance of filing the motion to adopt the settlement.

5. Settlement Standard of Review

In order for the Commission to consider a proposed settlement in this proceeding as being in the public interest, the Commission must be convinced that the parties had a sound and thorough understanding of the facts in the case, and all of the underlying assumptions and data included in the record. This level of understanding and development of an adequate record is necessary to meet

our requirements for considering any settlement. These requirements are set forth in Rule 12.1(a)² which states:

Parties may, by written motion any time after the first prehearing conference and within 30 days after the last day of hearing, propose settlements on the resolution of any material issue of law or fact or on a mutually agreeable outcome to the proceeding. Settlements need not be joined by all parties;

Rule 12.5 limits the future applicability of a settlement:

Commission adoption of a settlement is binding on all parties to the proceeding in which the settlement is proposed. Unless the Commission expressly provides otherwise, such adoption does not constitute approval of, or precedent regarding, any principle or issue in the proceeding or in any future proceeding.

In short, we must find whether the settlement comports with Rule 12.1(d), which requires a settlement to be “reasonable in light of the whole record, consistent with law, and in the public interest.” We address below whether the settlements meet these three requirements.

5.1.1. Does the Settlement Meet the Standard of Review for Settlements

The record consists of all filed documents, transcripts of the PHC, the proposed settlement, and the motion for its adoption. The settlement resolves all issues in the complaint.

The settling parties represent a cross-section of interests. Murphy represents the company whose primary access to its processing plant is via the Murphy crossing. UP represents the interest of the railroad and its concerns

² All referenced Rules are the Commission’s Rules of Practice and Procedure. (http://docs.cpuc.ca.gov/published/RULES_PRAC_PROC/70731.htm)

regarding the safety of the crossing. Trust represents the interests of adjacent landowners who also have an interest in the crossing. Thus, the settling parties are knowledgeable about the issues, and the settlement is the result of extensive and vigorous negotiations. The parties to the settlement have a sound and thorough understanding of the issues, and all of the underlying assumptions and data, and could therefore make informed decisions in the settlement process. The settlement is reasonable in light of the whole record, because the settling parties fairly reflect the affected interests, these parties actively participated in this process, and the settlement fairly and reasonably resolves the issues in the complaint.

The Commission could have resolved the issues in favor of either of the parties. Accordingly, the settling parties have balanced a variety of issues of importance to them and have agreed to the settlement as a reasonable means by which to resolve the issues. Thus, for the reasons discussed above, and taken as a whole, the settlement is reasonable in light of the whole record.

There are no terms within the settlement agreement that would bind the Commission in the future or violate existing law. Therefore, we find the settlement consistent with the law.

The settling parties addressed and resolved the issues identified in the complaint proceeding. The settlement terms ensure that Murphy has access to its processing facility and that Trust, an adjacent landowner, has access to its property. The settlement also ensures that UP, Murphy, Trust, and the public are protected from an unsafe rail crossing. We may therefore conclude that the settlement with its provisions for continued access and improved safety of the crossing is in the public interest.

There is public policy favoring the settlement of disputes to avoid costly and protracted litigation.³ The settlement satisfies this public policy preference for the following reasons:

1. The sponsors of the settlement represent the interests of Murphy's business operations, Trust's interest in access to its land, and UP's interest in ensuring a safe crossing to avoid future vehicle train collisions. Thus, the settling parties represent the interests of landowners, land users, the railroad, and the public;
2. The settlement serves the public interest by resolving competing concerns in a manner that protects the public from an unsafe rail crossing in a collaborative and cooperative manner. By reaching agreement, the parties avoid the costs of further litigation in this proceeding, and eliminate the possible litigation costs for rehearing and appeal; and
3. Approval of the settlement provides complete resolution of the issues. Thus, the settlement meets the applicable settlement standards of Rule 12.1(d) and therefore should be accorded the same deference the Commission accords settlements generally, and should be adopted.

Adoption of the settlement is binding on all parties to the proceeding. However, pursuant to Rule 12.5, the settlement does not bind or otherwise impose a precedent in this or any future proceeding. We specifically note therefore, that parties must not presume in any subsequent action that the Commission would deem the outcome adopted herein to be presumed reasonable, and it must therefore, fully justify every request and proposal without reference to, or reliance on the adoption of the settlement.

³ Decision (D.) 88-12-083, 30 CPUC 2d 189, 221.

6. Categorization and Need for Hearing

In the Instructions to Answer dated December 24, 2012, the Commission preliminarily categorized this complaint as Adjudicatory, and preliminarily determined that hearings were necessary. Because the parties reached settlement prior to hearings being held on the matter, the determination is changed to no evidentiary hearings are necessary.

7. Comments on Proposed Decision

Pursuant to Rule 14.6(c) of the Commission's Rules of Practice and Procedure, this decision is exempt from the 30-day comment period because the decision grants the requested relief by adopting the all-party settlement.

8. Assignment of Proceeding

Michel Peter Florio is the assigned Commissioner and Linda A. Rochester is the assigned Judge in this proceeding.

Findings of Fact

1. On March 7, 2013, Trust filed a motion for party status.
2. The issues in this proceeding affect Trust's interest in safe access to its property via the Murphy crossing.
3. On June 26, 2013, the parties filed a Joint Motion for Approval of Settlement.
4. The record for the proposed settlement is composed of the complaint and answers of the defendant and all other filings.
5. The parties to the settlement adopted by this decision have a sound and thorough understanding of the issues and all of the underlying information and could therefore make informed decisions in the settlement process.
6. The proposed settlement is a balance between the original positions of the parties that would otherwise be litigated in the proceeding.

7. The Commission preliminarily determined that hearings were necessary in this matter, however no hearings were held.

Conclusions of Law

1. Trust's interest in the issues presented in this proceeding is reasonable and therefore, party status should be granted.

2. Rule 12.1(d) provides that the Commission will not approve settlements, whether contested or uncontested, unless the settlement is reasonable in light of the whole record, consistent with law, and in the public interest.

3. The proposed settlement is reasonable because it fairly balances the interests of the parties.

4. The proposed settlement is reasonable in light of the whole record.

5. The Proposed settlement is consistent with the law as it does not contravene or compromise any statutory provisions or Commission decision.

6. Adoption of the settlement is binding on all parties to the proceeding. However, pursuant to Rule 12.5, the settlement should not bind or otherwise impose a precedent in this or any future proceeding. Parties should not presume in any subsequent action that the Commission would deem the outcome adopted herein to be presumed reasonable and it should, therefore, fully justify every request without reference to, or reliance on, the adoption of the settlement.

7. The determination that hearings are necessary in this matter should be changed to no hearings are necessary.

O R D E R

IT IS ORDERED that:

1. The motion for party status of the Maria Field Trust is granted.
2. The joint motion of O.P. Murphy Produce Company, Inc., Union Pacific Railroad Company, and the Maria Field Trust, to adopt the June 26, 2013, settlement is granted.
3. The preliminary determination that hearings were necessary in this matter is changed to no hearings are necessary.
4. Case 12-12-006 is closed.

This order is effective today.

Dated _____, at San Francisco, California.