

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITIES COMMISSION**

CITY OF POTTSVILLE	:	
	:	
v.	:	C-2012-2330567
	:	
READING BLUE MOUNTAIN AND	:	
NORTHERN RAILROAD, SCHUYLKILL	:	
COUNTY AND PENNDOT	:	

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RESPONDENT'S POST HEARING BRIEF

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NOW COMES the Respondent, Reading Blue Mountain and Northern Railroad, by and through its attorneys, Paul R. Ober, Esquire, and Paul R. Ober & Associates, and files this Brief as instructed by the Administrative Law Judge ("Judge") at the conclusion of the evidentiary hearing on May 28, 2013.

**I. Concise Statement of the Case:**

On October 12, 2012, the City of Pottsville ("Complainant" or "City") filed a formal complaint against Respondent alleging that Respondent "*continued to fail to repair or replace pedestrian guide rails along their property on South Centre Street*" and further alleging that the condition of the pedestrian guide rails "*threatens safety and welfare of pedestrians using the sidewalks along their property*".

The Pennsylvania Department of Transportation ("PennDOT") filed an answer on November 13, 2012, in which it concedes that the pedestrian guide rails "*run adjacent to a local road*", i.e., South Centre Street.

Respondent filed preliminary objections on November 21, 2012, which were denied by

the Judge on April 3, 2013. An evidentiary hearing was conducted on May 28, 2013.

**II. Statement of Questions Involved:**

Does the Commission lack jurisdiction over the pedestrian guide rails, the subject matter of this complaint, in the absence of even an allegation, much less evidence, that the pedestrian guide rails are owned by Respondent or that the pedestrian guide rails are part of the services or facilities of the Railroad for which Respondent is responsible?

**III. Summary of Argument:**

The City of Pottsville has neither pleaded nor proved sufficient facts to show that Respondent has violated Section 1501 [66 Pa.C.S.A. §1501]; therefore, the Commission lacks jurisdiction. The Judge has given the City at least three chances to prove: (1) the pedestrian guide rails are part of Respondent's railroad facilities; or (2) that Respondent is otherwise responsible to maintain the pedestrian guide rails. In the Briefing Order the Judge itemized what was to be presented, as follows: "*(1) identify with specificity the location of the guide rail; (2) address with specificity how Reading Blue Mountain & Northern Railroad does or does not have responsibility to repair the pedestrian guide rails; and (3) identify the applicable rights of way.*"

Rather than comply with the request, the City chose to rely upon a state statute and a local ordinance dealing with responsibility for damaged sidewalks, which is not in dispute. The City did not offer any explanation as to how the defective pedestrian guide rails "along" a repaired sidewalk are part of the services and facilities of the Railroad, which is the threshold inquiry concerning the Commission's jurisdiction to hear and adjudicate this Complaint.

**IV. Argument:**

The complaint is fatally deficient from a legal standpoint because it is not based upon nor

does it cite any legal authority at all. The City did not assert any legal basis for its attempt to hold Respondent liable for repairing or replacing the pedestrian guide rails. There is no reference to the PUC Code, the Third Class City Code, any City Ordinance, or any other applicable law or regulation, nor to any court decisions, equitable principals, or constitutional provisions.

In its brief in response to preliminary objections PennDOT attempted to provide legal underpinnings for the complaint by suggesting that: *“The Commission’s jurisdiction in this matter depends on whether or not the Complaint sufficiently alleges that Reading has violated 66 Pa.C.S.A Section 1501 , which states:*

*Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. [PennDOT Brief, pages 4-5].*

Assuming for the moment that PennDOT’s Section 1501 paradigm is applicable, then the City’s burden, as the moving party, is to show that: (1) Respondent is a public utility (undisputed); (2) the pedestrian guide rails are *“facilities”* of the Respondent; and (3) Respondent has breached a duty to maintain the pedestrian guide rails.

“Facilities” is a term defined in the PUC Code as follows:

*“Facilities.” All the plant and equipment of a public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with, the business of any public utility.” [66 Pa.C.S.A. Section 102]*

The City, in the complaint and at the evidentiary hearing, offered no proof whatever that the pedestrian guide rails are now, or at anytime in the past, ever were the property of Respondent, or ever formed a part of the plant and equipment of a railroad. Respondent, at page

5 of the notes of testimony made the exact same argument as advanced by PennDOT - namely, that the City must plead and then prove that the pedestrian guide rail is in: "any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with, the business of any public utility." In this the City utterly failed.

The complaint is deficient from a factual standpoint because it does not aver any cognizable relationship or connection between the pedestrian guide rails and Respondent's business sufficient to give rise to any responsibility for repair of the pedestrian guide rails, or to create any duty to protect pedestrians using the City's sidewalk. The only allegation in that regard was that the pedestrian guide rails are "*along*" the Respondent's property.

Nor did the City even come close to meeting its burden at the hearing. The sum-total of the testimony offered by the City's Zoning Officer was:

*"A. On the east side [of the street] there is a pedestrian walkway. It runs right along the side. A railing system that sits above an old stone wall, right adjacent to or maybe possibly located on the railroad property, but that's all we have in that section right there until you get down to the far end, then you're out of the City.*

*Q. Okay. Now just - - - within the City of Pottsville, on the east side of the property, there's a rail that goes **along** the walkway; is that correct. That you just testified to; correct?*

*A. Correct.*

*Q. Now what you describe - - - again, there's - - - and we heard different testimonies in the pictures you've collected. There was damages to certain sections of this rail all along the railroad property that's damaged.*

*A. Correct.*

*Q. Is that correct?*

*A. Correct.*

*Q. And the basis of our complaint is that; is that correct?*

*A- Yes." [N.T. pages 45 - 46]*

Here again the City's witness stopped short of saying the pedestrian guide rails belonged to Respondent, or were on Respondent's property. It is hard to imagine a more equivocal

statement than to say the pedestrian guide railing is “*right adjacent to or maybe possibly located on the railroad property*”. The only thing clearly discernable from the testimony of the City’s Zoning Officer was that he had nothing upon which to hazard a guess as to where the property lines “maybe-possibly- might” be found.

He came equipped with a tax map (Exhibit P-1) which provided absolutely no information of value. The witness provided two parcel numbers from the County assessment records [#68-44-004.8 and #68-44-004.9], but could not identify either parcel by its number on the map. Despite having identified two parcel numbers for Respondent’s land, there was only one parcel on the map. “*Q. Show me where the line is separating these two parcels. You don’t know, do you?*”  
*A. Not off of this map, I don’t*” [N.T. page 54-55].

Exhibit P-2 shows one parcel on the east side of South Centre Street and the other parcel on the north side of Centre Street. The witness explained that his exhibit “*Is just incomplete*” and that “*there’s a misprint in here somewhere*”. [N.T pages 50-51].

Any temptation to accept the City’s invitation to consider the tax map for any reason is destroyed by a disclaimer on its face which reads: “*This map prepared for assessment purposes only. It is not designed to provide engineering data.*”

In the Revised Interim Order of April 24, 2013, the Judge admonished that:

*“The issue then becomes where are the rights of way - is the railing within the Complainant’s right of way, the Railroad’s, or someone else’s? Jurisdiction to hear the Formal Complaint hinges on these answers. The briefing Order required that each brief: (1) identify with specificity the location of the guide rail; (2) address with specificity how Reading Blue Mountain & Northern Railroad does or does not have responsibility to repair the guide rails ; and (3) identify the applicable rights of way.*

\* \* \*

*In its brief in response to the Briefing Order, the Complainant failed to address the requirements of the Briefing Order and answered its own question.”*

The last sentence of the Revised Interim Order states: “*Further, an evidentiary hearing regarding jurisdiction, specifically addressing ownership, rights of way and responsibility must be held and is scheduled in the ordering paragraphs below.*”

The Judge’s calls for specific information concerning the location and ownership of facilities and configuration of rights of way have been unanswered by the City of Pottsville, the party with the burden of proof. Rather than obtain the requested information, the City relied upon a tax map which does not address even one of the Judge’s requirements.

The tax map does not show the dimensions of parcels on it. It does not label the widths of street rights-of-way, or the railroad right-of-way. There is nothing reflecting the location of the street cartway, the sidewalk, the pedestrian guide rail, or the railroad tracks.

Rather than obtain and place into evidence the information requested by the Judge, the City has on at least three occasions<sup>1</sup> chosen to rely upon such assertions as follows:

- “*the railroad is responsible for even adjacent property, that’s what PUC’s jurisdiction is.*” [N.T. page 7].
- “*I’m trying to show that this rail is **along** the railroad property . . . and my purpose is is showing that this is property **adjacent** to the railroad and this is what we’re trying to prove here today for jurisdictional purposes.*” [N.T. page 40].
- See the Zoning Officer’s testimony at pages 45-46 in the transcript, which is quoted verbatim

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<sup>1</sup>In the Formal Complaint, in its Brief in opposition to Preliminary Objections, and at the evidentiary hearing.

on page 4 of this brief.

● “*That the adjoining property owner is responsible to maintain sidewalks, anything that abuts their property. The Third Class City Code also covers it. You’re responsible for sidewalks that reflect in front of your — along your property.*” [N.T. page 58].

● “*If I could just address that as solicitor, just as he said it, the Third Class City Code and the Pottsville Code that it says that property — the abutting property owner is responsible for — Judge: For the sidewalk? Attorney Pellish: Yeah. Judge: Okay*” [N.T. page 55].

● “*That the rail goes **along** the railroad tracks . . . and that the PUC has jurisdiction of this*” [N.T. page 62].

The City’s code of ordinances and the Third Class City Code might purport to authorize the City to hold the abutting landowner or occupier responsible to keep sidewalks in good repair.

But that is not this case.

That rule of law pertains to sidewalks.

This case does not relate to sidewalks.

Nothing in those legislative enactments provides any authority for the City to claim that Respondent is “*responsible for even adjacent land*” or that “*property adjacent to the railroad*” is within PUC jurisdiction, or that “*the adjoining property owner is responsible to maintain sidewalks, **anything that abuts their property***”. That rule of law is specifically limited to sidewalks and the City’s audacious attempt to expand it to any adjacent property, including pedestrian guide rails is over-reaching and should be rejected as such.

There is no dispute in this case about the responsibility for the repair of defective sidewalks. The City has already repaired the sidewalk [see Exhibits P-4 through P-11]. There

is no claim asserted against Respondent concerning the sidewalk. This case is about pedestrian guide rails which the City, in its complaint and in its proof, has not shown to belong to Respondent, or that the pedestrian guide rails are on railroad property, or more importantly, that the pedestrian guide rails are part of the services and facilities of the Railroad. The City relies upon its expansive reading of the Third Class City Code and its own Ordinance to mean that a landowner whose land is “along” or “adjacent” to a defective feature which is not a sidewalk, can be required to repair it as though it were a sidewalk. But the Third Class City Code applies only to “owners of property abutting on any street” [53 P.S. §38001]. The Ordinance applies to owners or occupiers of “any premises in front of” sidewalks in disrepair. [§194-22]. In this case the City has not demonstrated physical arrangement of streets, the sidewalk, property lines, rights of way, or ownership of any land or other features.<sup>2</sup>

In the Revised Interim Order the Judge re-emphasized the importance of establishing precise boundaries, including rights of way lines as follows: “*The issue then becomes where are the rights of way - is the railing within the Complainant’s right of way, the Railroad’s, or someone else’s?*” The City, on the other hand, is content to rest its claim upon the bare allegation, without any proof, that being “along”, “adjacent”, or “maybe possibly on” Respondent’s land is close enough to satisfy its burden of proof.

Could the pedestrian guide rail be on the City’s right of way? Certainly it could and Respondent submits that it is more likely associated with and part of the sidewalk than part of railroad facilities. The pedestrian guide rail has no significance to the operation of the railroad,

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<sup>2</sup>The City is not without a remedy. If there is a violation of either the Third Class City Code or the City’s ordinances, jurisdiction for enforcement lies in the Schuylkill County Court of Common Pleas; but not the PUC.

yet the City insists that it is of great importance to the safe use of the sidewalk by pedestrians. The pedestrian guide railing is accessory to and a crucial part of the sidewalk, but is unrelated to the use of the railroad.

The Judge may have been prescient in voicing concern that the railing might not be on the right of way of either the City or the Respondent, but might be located on “*someone else’s*” right of way. In the photograph placed in evidence by the City [See: page 2 of 2 of Exhibit P-2 -- CAMA Card] there appears a large diameter flanged pipeline running “along” the sidewalk. If this is a sewer line then it almost certainly belongs to the City, or some other municipality, or municipal authority, and it almost certainly includes a right of way which is customarily ten (10') feet on either side of the centerline. But of course those issues were not addressed by the City.

Despite repeated requests by the Judge, the City has not come forward with sufficient proof to be entitled to pursue its Formal Complaint. The City has the burden of proof and has failed to establish the essential elements of its cause of action. To sustain its position the City should have shown that the pedestrian guide rails, not the sidewalk, are in any manner: “*owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with, the business of any public utility.*” [66 Pa.C.S.A. Section 102]. This the City has not done, and cannot do, despite being given repeated opportunities.

The Complaint itself failed to plead sufficient facts to justify proceeding with the Formal Complaint. In its complaint the City states quite clearly that the conditions of the pedestrian guide rails “*threatens safety and welfare of pedestrians using the sidewalks along their (railroad) property*”. There is no allegation that Respondent has failed “. . . to furnish and maintain adequate, efficient, safe, and reasonable services and facilities,” which is the foundation of the

Commission's jurisdiction in this matter. The Commission has no power to enforce the common law, state statutes, or local ordinances against Respondent in the absence of pleading and proof that Respondent has violated Section 1501 [**66 Pa.C.S.A. §1501**].

The Commission has the power and duty to enforce the PUC Code, but a Third Class City may not prescribe regulations related to a public utility's business, facilities, or service. **PECO v. Township of Upper Dublin**, 922 A.2d 996 (Pa.Cwmlth. 2007).

There is simply no case or controversy which is ripe for adjudication.

**V. Conclusion:**

Section 102 of the PUC Code states that to be a facility of the railroad and thus subject to jurisdiction of the Commission, the railing must be **in connection with the business of any public utility**. The testimony of the City's Zoning Officer was not a marvel of clarity, but it at least conveyed the City's belief that the pedestrian guide railing should be repaired or replaced to assure the safety of pedestrians using the City's sidewalk. The pedestrian guide railing provides no health, safety, welfare or other benefit to the property or the business of Respondent. The pedestrian guide railing is not part of the railroads services and facilities.

The Formal Complaint must be dismissed.

Respectfully submitted,

*Michelle A. Ober for Paul R. Ober*

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Paul R. Ober, Esquire  
Attorney For Respondent

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

CITY OF POTTSVILLE	:	Complaint Docket
Complainant	:	No. C-2012-2330567
	:	
v.	:	Electronically Filed
	:	
READING BLUE MOUNTAIN &	:	
NORTHERN RAILROAD,	:	
SCHUYLKILL COUNTY,	:	
PENNDOT	:	
Respondents	:	

**CERTIFICATE OF SERVICE**

I hereby certify that on August 8, 2013, I have served a true and correct copy of the foregoing Respondent's Post Hearing Brief upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).


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Charissa M. Chamuras, Legal Assistant  
to Paul R. Ober, Esquire