



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

August 9, 2013

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: City of Pottsville v. Reading Mountain & Northern Railroad,
Schuylkill County, Commonwealth of Pennsylvania
Department of Transportation
C-2012-2330567

Dear Ms. Chiavetta:

Enclosed for filing is a Memorandum of Law of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission in the above-referenced case. Copies have been served on the parties of record in accordance with the Certificate of Service.

Sincerely,

Adam D. Young
Prosecuting Attorney
Attorney ID No. 91822

Counsel for the Bureau of
Investigation and Enforcement

Enclosures

cc: As per Certificate of Service

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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City of Pottsville	:	
	:	
v.	:	C-2012-2330567
	:	
Reading Blue Mountain & Northern	:	
Railroad, Schuylkill County,	:	
Commonwealth of Pennsylvania	:	
Department of Transportation	:	

**MEMORANDUM OF LAW OF THE
BUREAU OF INVESTIGATION AND ENFORCEMENT**

BACKGROUND:

The City of Pottsville (Complainant) initiated this action by way of Complaint filed against Reading Blue Mountain and Northern Railroad (“RBMNR”). Complainant alleges in its Complaint that: “[The] Railroad has continued to fail to replace and/or repair pedestrian guide rails along their property on South Center Street in the City of Pottsville since 2009. Said condition threatens the safety and welfare of pedestrians using the sidewalk along their property.” Complaint ¶ 3. Complainant is asking the PUC to impose an order against RBMNR to repair a hand rail that runs along the sidewalk next to the railroad. In their response to the complaint RBMNR stated that the PUC did not have jurisdiction in this matter, as the sidewalk and hand rail is not on Blue Mountain property, thus not being a facility of Blue Mountain.

An evidentiary hearing was held on May 28, 2013, to determine whether the Commission has jurisdiction to hear this case. At the hearing one witness and several exhibits were presented by Complainant. RBMNR entered one exhibit and presented no witnesses. At the end of the hearing it was requested that Memorandums of Law be presented on the jurisdictional issue before a decision is made.

ARGUMENT:

This Commission is a creature of statute, and its power to act in any particular case must be clear. *City of Philadelphia v. Philadelphia Electric Company*, 504 Pa. 312, 473 A.2d 997 (1984). Under the Public Utility Code, a complaint may be entertained *only* concerning “any law which the commission has jurisdiction to administer, or of any regulation or order of the commission.” Section 701 of the Public Utility Code, 66 Pa.C.S. § 701. RBMNR’s liability in this case depends on whether or not RBMNR has violated 66 Pa.C.S. § 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.

66 Pa.C.S. § 1501. Therefore, for the Commission to have jurisdiction to determine liability, the evidence at the evidentiary hearing must establish: (1) Reading Blue Mountain and Northern (RBMNR) is a public utility under Sections 102 and 1501 of the Public Utility Code; and (2) the guide rails constitute facilities of RBMNR. Subsequent thereto, Complainant must establish that that RBMNR has failed to maintain its facilities in an “adequate, efficient, safe, and reasonable” manner. *Id.*

It is undisputed that a railroad is a “public utility” within the meaning of the Public Utility Code. 66 Pa.C.S. § 102, and accordingly, is subject to the provisions of Section 1501. The remaining issues in this matter involve questions of fact including: (1) the location of guide rail; and (2) whether or not said guide rail is a railroad facility. The Public Utility Code defines a “facility” is as:

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. § 102 (emphasis added). The meaning of "facility" within the context of §1501 is to be "broadly construed." *Country Place Waste Treatment Co. v. Pa. Pub. Util. Comm 'n.* 654 A.2d 72, 76 (Pa.Cmwlth.1995). The Complainant must demonstrate that the railing is in "any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with" the railroad. 66 Pa.C.S. § 102. This is solely a question of fact.

Evidence presented at the evidentiary hearing clearly established that the railing was supplied by RBMNR's predecessor in interest, Pennsylvania and Reading Railroad. Complainant's Exhibit P-12 is a photograph of a portion of the railing showing a stamp reading "P&RR." N.T. 46-47. The evidence also establishes that the railing is approximately four (4) feet from the track, running parallel thereto, and is part of an elevated sidewalk that sits about four (4) feet above the grade of the track. Id. at 48-49. The proximity of the railing as well as the elevated nature of the sidewalk indicate that that the railing was put in place to protect the safety of both the public, as well as the interests of the railroad. There is no evidence, however, to suggest that the railing is actually on RBMNR's property. To the contrary, it appears as though the railing is a part of the sidewalk, which is Complainant's property. While the railroad undoubtedly supplied the railing, and perhaps even installed it, it was not installed on railroad property. At one point in time, the railroad furnished or supplied the railing for, by, or in connection with its business as a public utility, but it appears as though the railing was dedicated for public use. "The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefinite or unrestricted quality that gives it its public character." See *Overlook Development Co. v. Public Service Commission*, 158 A. 869 (Pa.1932) (citing *White v. Smith*, 42 A. 125, 126 (Pa.1899).

Assuming, then, that the railing at issue was furnished or supplied in connection with the railroad's business as a public utility, but dedicated to the public use, the question becomes whether the railroad is *still* responsible for maintaining that facility in a safe, reasonable and reliable manner under 66 Pa.C.S. § 1501. There is no evidence to suggest that the RBMNR or its predecessors in interest maintained the railing since its installation. However, Complainant admitted that it performed emergency repairs on the railing and sidewalk on at least one occasion when the deterioration of the sidewalk began to undermine the integrity of the roadway. N.T. 39-40. No testimony was presented indicating that Complainant sought reimbursement from RBMNR for these repairs. Moreover, in the instance when a motor vehicle accident damaged the railing, repairs were made by Complainant, but at no time was RBMNR ever made aware of the accident. N.T. 40-43, 56.

Prior to initiating this action before the Commission, Complainant twice attempted to cite RBMNR under its local zoning ordinance for failure to maintain the sidewalk; however, both citations were dismissed. N.T. 20. However, no evidence was presented at the hearing about why these complaints were dismissed. *Id.* The city ordinance of Pottsville states:

No owner, tenant or occupant of any premises in front of which any curbs, gutters or pavements are or may become out of repair shall neglect or refuse to repair the same within 10 days of service of notice to that effect to be given by the City Engineer, in the case of gutters, and by the Director of Streets and Public Improvements, in the case of curbs and sidewalks, if, in their opinion, the condition shall be liable to cause injury to pedestrians.

Pottsville City Code § 194-22(A). The law is unclear, however, as to whether a public utility occupying a right-of-way has a responsibility to maintain the sidewalks running adjacent thereto. It is safe to say that RBMNR is not responsible for snow or debris removal from the sidewalk adjacent to its property, but does that extend to maintenance of the railing?

Instructive on the jurisdictional issue is the case of PECO Energy Co. v. Township of Upper Dublin, 922 A.2d 996 (Pa.CmwltH.2007). While PECO dealt directly with the “service” aspect of Section 1501 of the Public Utility Code, the analysis and rationale behind the decision can be rightly applied to this case. In its supporting opinion, the Commonwealth Court recognized the Public Utility Code grants the PUC full authority to regulate the character of a public utility's service and facilities under Section 1501. The Public Utility Code defines “service” as follows:

Used in its broadest and most inclusive sense, includes any and all acts done, rendered, or performed, and any and all things furnished or supplied, and any and all facilities used, furnished or supplied by public utilities ... in the performance of their duties under this part to their patrons, employees, or other public utilities, and the public....

66 Pa.C.S. § 102. (emphasis added). As such, the definition of “service” includes a public utility’s “facilities,” so any legal rationale applying to one should apply to the other.

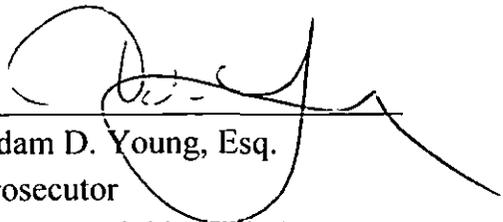
In PECO the Court observed that vegetation management, including the removal of trees, falls within the Public Utility Code's definition of utility “service.” W. Penn Power v. Pa. Pub. Util. Comm'n, 578 A.2d 75 (Pa. CmwltH.1990) (electric utility “service” is not confined to the distribution of electrical energy; it includes any and all acts related to that function, including vegetation management/tree trimming or removal). See also Popowsky v. Pa. Pub. Util. Comm'n, 653 A.2d 1385 (Pa.CmwltH.1995) (vegetation maintenance constitutes a utility service and must be performed in a safe, adequate, reasonable and efficient manner). Citing County of Chester v. Philadelphia Electric Company, 218 A.2d 331, 333 (Pa.1966), confirming the PUC's role as sole regulator of public utilities, the Court states that “[t]he PUC's jurisdiction covers matters including rates, service, rules of service, *hazards to public safety due to the use of utility facilities, installation of utility facilities, and location of utility facilities.*” Id. (Emphasis added).

The Court went on to agree with PECO and the PUC, and concluded that the legislature, by granting the PUC sole regulatory authority under 66 Pa.C.S. § 1501 over utilities' facilities and services, preempted local regulation of public utilities' facilities and services. The Court concluded that local regulation of a utility's service is preempted by the Public Utility Code, stating that the "Commonwealth, through the Public Utility Code and its predecessor statutes, gave the PUC all-embracing regulatory jurisdiction over the operations of public utilities." *PECO*, 922 A.2d at 1003. (citing *County of Chester*, 218 A.2d 331 (Pa.1966); see also *Duquesne Light Company v. Upper St. Clair Township*, 105 A.2d 287 (Pa.1954)).

With this in mind, we go back to the original questions, which must be answered in the affirmative for jurisdiction to lie with the Commission, namely, whether: (1) Reading Blue Mountain and Northern (RBMNR) is a public utility under Sections 102 and 1501 of the Public Utility Code; and (2) the guide rails constitute facilities of RBMNR. Bearing in mind that the definition of "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*] is subsumed within the definition of "service," which includes: "and any and all facilities used, furnished or supplied by public utilities ... in the performance of their duties under this part to . . . the public," it is the conclusion of the Bureau of Investigation and Enforcement that the railing at issue here is, indeed, a railroad facility.

CONCLUSION:

It is the position of the Bureau of Investigation and Enforcement that the railing at issue here, as it sits atop a wall running adjacent to (or perhaps on) the property of RBMNR, and bears the marking of the Pennsylvania and Reading Railroad, is a “facility” furnished and/or supplied by said railroad, to the public, in connection with its business as a public utility. The railing at issue here serves to protect public pedestrians as well as the legal interests of RBMNR, in as much as the sidewalk is raised four (4) feet from the grade of the tracks of RBMNR, and is located only four (4) feet laterally from the tracks of RBMNR. Accordingly, the Commission has jurisdiction to hear this case.



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Dated: August 9, 2013

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CERTIFICATE OF SERVICE

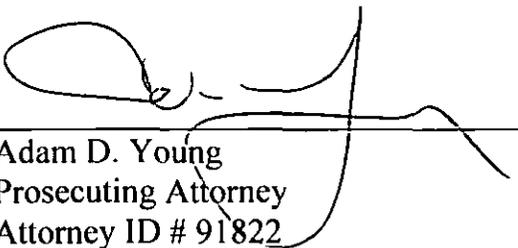
I hereby certify that I am this day serving the foregoing documents in accordance with the requirements of 52 Pa. Code § 1.54 *et seq.* (relating to service by a participant).

Notification by first class mail addressed as follows:

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