



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

July 3, 2014

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

RE: **Docket No. C-2014-2426416**

Dear Secretary Chiavetta:

Enclosed for filing please find the Department's *Brief in Support of its New Matter* in the above-captioned matter.

I hereby certify that a copy has been sent to all parties of record as indicated by the Certificate of Service.

Very truly yours,

A handwritten signature in blue ink that reads "Gina M. D'Alfonso".

Gina M. D'Alfonso
Assistant Counsel in Charge

Enclosure

220/GMD:aca

cc: Parties of Record
Mark J. Chappell, P.E., Chief, Utilities and Right-of-Way Section
Joseph Strok, District Grade Crossing Administrator, District 4-0
Thomas A. Walter, Assistant District Traffic and Operations Manager, District 5-0

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

READING BLUE MOUNTAIN	:	
AND NORTHERN RAILROAD	:	Complaint Docket
COMPANY	:	No: C-2014-2426416
	:	
Complainant	:	
	:	
v.	:	
	:	Electronically Filed
COMMONWEALTH OF	:	
PENNSYLVANIA, DEPARTMENT OF	:	
TRANSPORTATION	:	
	:	
Respondent	:	

**COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF
TRANSPORTATION'S BRIEF IN SUPPORT OF ITS NEW MATTER**

AND NOW, comes the Commonwealth of Pennsylvania, Department of Transportation (“Department”), by and through its counsel, Gina M. D’Alfonso, Assistant Counsel in Charge, and Nicholas D. Mertens, Assistant Counsel, and files the foregoing Brief in Support of its New Matter in response to the Formal Complaint of the Reading Blue Mountain and Northern Railroad Company (“Reading”):

I. Statement of the Case

On or about June 13, 2014, Reading filed a Formal Complaint Form with the Pennsylvania Public Utility Commission (“Commission”) against the Department.¹ The Complaint was also served on June 13, 2014. Reading’s complaint is in the form of a public utility complaint form. *See generally* Complaint. It alleges that the Department is a public utility;

¹ On or about April 11, 2013, Reading filed a substantially similar complaint. The complaint was docketed at C-2013-2357454. The Department responded by filing an Answer and New Matter, Preliminary Objections, and Briefs supporting same. On June 12, 2013, Reading’s counsel filed a Petition seeking to withdraw the complaint based on the fact that Reading believed the Department’s Preliminary Objections “may have merit.” On July 30, 2013, the Commission granted Reading’s Petition and closed the matter. Copies of these documents have been included as exhibits to the Department’s Answer and New Matter and its Preliminary Objections.

however, Reading failed to state the service allegedly provided. Complaint ¶ 3. Reading alleges that the Department's decision to permit vehicles hauling beneficial combustion ash, or fly ash, is causing damage to an at-grade highway-rail crossing where a single track owned by Reading crosses State Route 940 (Berwick Street) in the Borough of White Haven, Luzerne County. (DOT Number 361 403 J). Complaint ¶ 4. In Paragraph five (5) of Reading's complaint, it asks the Commission to order the Department to:

- 1) Discontinue permitting overweight vehicles to cross over any RBMN crossing
- 2) Order PaDot to reimburse RBMN for all costs associated with maintenance, replacement and repair of this crossing
- 3) Order PaDot to require a Bond in favor of PaDOT and RBMN to assure payment for the costs addressed above in the amount not less than \$100,000.00
- 4) Without an order from the PUC, PaDot will not reimburse RBMN for the cost of repairing the damage caused by the overweight trucks nor will it restrict the excessive weights causing the destruction to the crossing

Complaint ¶ 5. As such, Reading is requesting that the Commission: prohibit vehicles, traveling under present and future special hauling permits, from crossing over Reading owned and operated crossings; allocate future maintenance, repair, and replacement costs of Reading's crossing onto the Department—for damages allegedly caused by the motoring public; and to require the Department to bond the crossing.

This crossing is the subject of four prior Commission orders; the most recent Secretarial Letter directs all future costs and maintenance responsibilities for the crossing and up to twenty-four (24") inches from the outermost rails onto Reading. *Application of Aqua Pa, Inc.*, PUC Docket No. A-2011-2264535 (Secretarial Letter, Nov. 22, 2011). The assignment of maintenance responsibility, and the cost thereof, has not been questioned.

II. Question Presented

Is the Department immune from suit, under the Doctrine of Sovereign Immunity, when the Complainant is seeking to compel an affirmative action on the part of the Department or seeking money damages from the Commonwealth?

Suggested Answer: Yes.

III. Summary of the Argument

The Doctrine of Sovereign Immunity bars suit against the Commonwealth and its agencies, unless specifically waived. In the present context, the General Assembly has waived Sovereign Immunity by permitting the Commission to allocate costs onto the Commonwealth, through the Department, pursuant to 66 Pa.C.S. §2704. Reading is not seeking to construct, relocate, alter, suspend, or abolish any of its crossings. Instead, Reading is requesting that the Commission allocate future maintenance, relocation, and repair costs upon the Department and to require the Department to bond certain state routes. As such, Reading has failed to bring a cause of action under that provision of the Public Utility Code (“Code”), 66 Pa.C.S. §§2702 and 2704. Therefore, any request for damages or a mandatory injunction requiring action on the part of the Department is barred under the Commonwealth’s immunity from suit.

IV. Argument

a. Reading's request for a mandatory injunction is barred by Sovereign Immunity.

The Commonwealth of Pennsylvania is immune from suit, unless the General Assembly has specifically waived Sovereign Immunity. 1 Pa.C.S. §2310. The Doctrine of Sovereign Immunity extends to all agencies of the Commonwealth, including the Department. *See Powell v. Drumheller*, 653 A.2d 619 (Pa. 1995). Sovereign Immunity fully applies, unless waived by the General Assembly, to proceedings before the Commission. *See Pet. Of Metro. Edison Co.*, 2011 Pa. PUC LEXIS 272 (Commission Order, Oct. 28, 2011). The Doctrine of Sovereign Immunity applies when a plaintiff/complainant seeks money damages from the Commonwealth. *Legal Capital, LLC v. Med. Prof'l Catastrophe Loss Fund*, 750 A.2d 299 (Pa. 2000). The General Assembly has waived Sovereign Immunity, in the context of the Code, in very limited circumstances. In the present matter, the Code allows damages to be allocated to the Commonwealth for “damages occasioned by construction, relocation or abolition of crossings.” 66 Pa.C.S. §2704. Additionally, actions which seek to compel *mandatory or affirmative* actions, via an injunction, by Commonwealth officials are barred by the Doctrine of Sovereign Immunity.² *Legal Capital, LLC*, 750 A.2d 299. *See Fawber v. Cohen*, 532 A.2d 429 (Pa. 1987). The Doctrine does not bar suits which only “seek[] to restrain the agency from performing an affirmative act.” *Legal Capital, LLC*, 750 A.2d at 302. As such, any request that compels the Department to act in a specific manner falls under Sovereign Immunity as a mandatory

² There are two types of final injunctions, mandatory, also known as affirmative, and prohibitive. *See Sci. Games Int'l, LLC v. Pa. Dep't of Revenue*, 66 A.3d 740, 757 (Pa. 2013). Mandatory or affirmative injunctions are defined as an injunction that “orders an affirmative act or mandates a specified course of conduct.” *Black's Law Dictionary* 855 (9th ed. 2009). Whereas, a prohibitive injunction merely “forbids or restrains an act.” *Id.* Injunction practice in Pennsylvania follows similar meanings. *See Mazzie v. Pennsylvania*, 432 A.2d 985, 988 (Pa. 1981) (discussing the distinction in the context of preliminary injunctions).

injunction. However, any request to prohibit the Department from a specific action is not barred by Sovereign Immunity.

In the present case, Reading is seeking two *mandatory* injunctions: (1) for the Commission to order the Department to reimburse Reading for future maintenance, replacement, and repair costs associated with the crossing and (2) require the Department to condition its special hauling permits upon the posting of a \$100,000.00 bond for the subject rail-highway crossing. In the alternative, the request for future cost allocation may be deemed as a request for damages, to which Sovereign immunity applies.

The General Assembly has waived Sovereign Immunity in regards to cost allocation of rail-highway crossings, pursuant to 66 Pa.C.S §2704(a), only when the costs are related to the “construction, relocation, alteration, protection, or abolition” of a crossing. Because Reading’s claims do not properly invoke the Commission’s jurisdiction under 66 Pa.C.S. §2702, Sovereign Immunity bars the Commission from allocating future costs and/or maintenance responsibilities onto the Commonwealth. *See generally* Department’s Preliminary Objections and Brief in Support which are being filed simultaneously with the Answer and New Matter and Brief in Support.

b. Reading’s requested relief is improper as it does not name a Department Official as a party to the present action.

Reading’s requested relief, seeking to enjoin the Department from issuing special hauling permits on certain state routes must fail, as Reading has not named a Department Official as a party to this matter. While Sovereign Immunity does not bar suits which seek to enjoin governmental action, it is well-established that a plaintiff/complainant must seek injunctive relief against a state official or executive officer. *Phila. Life Ins. Co. v. Pennsylvania*, 190 A.2d 111 (Pa. 1963). *See* 42 Pa.C.S. §761 (Commonwealth Court has original jurisdiction over

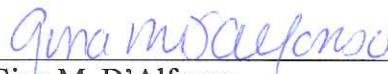
governmental officials acting in their official capacity); *Fawber*, 532 A.2d 429. The Commonwealth Court held that it is important to draw “a distinction between the sovereign state itself and its executive officers or officials, since suits against the sovereign, including those in equity, are within the immunity doctrine while those against executive officers or officials in certain classes of action are not.” *Ross v. Keitt*, 308 A.2d 906, 908 (Pa. Cmwlth. 1973). Although Sovereign Immunity does not apply to injunctions prohibiting actions by state officials or executive officers, the Commission does not have jurisdiction over the Department’s officials. The Commission only has jurisdiction over the Department itself and only in limited circumstances clearly set forth in the Code. *See generally* Department’s Preliminary Objections and Brief in Support which are being filed simultaneously with the Answer and New Matter and Brief in Support.

V. Conclusion

Sovereign Immunity bars Reading's Complaint with the Commission in so much as it requests money damages and a mandatory injunction on behalf of the Commonwealth, through the Department. The Department respectfully requests that the Commission dismiss Reading's Complaint because the requested relief, contained in Paragraph Five (5) Sections Two (2) and Three (3) of the Complaint, are barred under the Doctrine of Sovereign Immunity. Additionally, the Department respectfully requests that the Commission dismiss Reading's Complaint because the requested relief, contained in Paragraph Five (5) Section One (1) of the Complaint, as the Complaint does not name a governmental official nor does the Commission have jurisdiction over same and any claims are barred under the Doctrine of Sovereign Immunity.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION



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DATED: July 3, 2014

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TRANSPORTATION	:	
Respondent	:	

CERTIFICATE OF SERVICE


I hereby certify that a true and correct copy of the Department's *Brief in Support of its New Matter* was served upon the parties below by first-class mail, postage prepaid, this 3rd day of July, 2014:

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COMMONWEALTH OF PENNSYLVANIA
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