

**BEFORE THE PENNSYLVANIA
PUBLIC UTILITY COMMISSION**

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

**READING BLUE MOUNTAIN AND NORTHERN RAILROAD COMPANY'S
RESPONSE TO THE PRELIMINARY OBJECTIONS OF THE COMMONWEALTH
OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION**

AND NOW, come Reading Blue Mountain and Northern Railroad Company (“RBM&N”), by and through its undersigned counsel, and responds to the Preliminary Objections of the Commonwealth of Pennsylvania, Department of Transportation (“PennDOT”) as follows:

1. Admitted that RBM&N filed a Complaint on or about April 11, 2013. To the extent this paragraph suggests that the April 2013 Complaint influence the above-captioned matter, this is specifically denied. RBM&N withdrew its April 2013 Complaint and the Pennsylvania Public Utility Commission (“the Commission”) did not make a substantive ruling on RBM&N’s April 2013 Complaint and PennDOT’s responses. By way of further answer, the Commission made a conclusion of law when allowing RBM&N to withdraw its April 2013 Complaint that “the Commission has jurisdiction over the subject matter and the parties to this proceeding.” See 2013 WL 3355964 attached as Exhibit “A.”

2. Exhibit “A” to PennDOT’s Preliminary Objections speaks for itself. To the extent this paragraph suggests that the April 2013 Complaint and any responses thereto have any relevance to this matter, this is specifically denied for the reasons stated above in Paragraph 1.

3. The Commission’s July 30, 2013 Final Order speaks for itself. By way of further answer, the Commission made a conclusion of law in this Final Order that “the Commission has jurisdiction over the subject matter and the parties to this proceeding.” See Exhibit “A.”

4. It is admitted that RBM&N filed a Complaint on or about June 13, 2014 in the above-captioned matter. To the extent this paragraph suggests that the April 2013 Complaint and any responses thereto have any relevance to this matter, this is specifically denied for the reasons stated above in Paragraph 1.

5. RBM&N is without information to admit or deny the averments of this Paragraph, and for that reason, the averments are specifically denied.

6. Denied. PennDOT is subject to the jurisdiction of the Commission. Whether or not PennDOT is a “public utility” is irrelevant.

7. RBM&N’s Complaint speaks for itself.

8. It is admitted that RBM&N is seeking damages and an injunction to prohibit PennDOT’s actions subject to this dispute. To the extent this Paragraph suggests that the relief sought by RBM&N requires sustaining PennDOT’s preliminary objections on either an immunity or lack of jurisdiction theory, this is specifically denied.

9. RBM&N’s Complaint speaks for itself.

Count I: The Commission Lacks Subject Matter Jurisdiction

10. No answer required.

11. The averments of this paragraph are conclusions of law for which no answer is required. To the extent an answer is required, it is denied that PennDOT's preliminary objections should be sustained under a subject matter jurisdiction theory.

12. The averments of this paragraph are conclusions of law for which no answer is required. To the extent an answer is required, it is denied that PennDOT's preliminary objections should be sustained under a subject matter jurisdiction theory.

13. The averments of this paragraph are conclusions of law for which no answer is required. To the extent an answer is required, it is admitted that the Commission "is vested with the authority to determine who shall bear the costs associated with the repair or maintenance of a railroad crossing...." See e.g. City of Philadelphia v. Pennsylvania Public Utility Com'n, 676 A.2d 1298, 1301 (Pa. Cmwlth. 1996) citing 66 Pa.C.S.A. § 2702, 2704.

14. The averments of this paragraph are conclusions of law for which no answer is required. To the extent an answer is required, it is admitted that the Commission "is vested with the authority to determine who shall bear the costs associated with the repair or maintenance of a railroad crossing...." See e.g. City of Philadelphia v. Pennsylvania Public Utility Com'n, 676 A.2d 1298, 1301 (Pa. Cmwlth. 1996) citing 66 Pa.C.S.A. § 2702, 2704.

15. RBM&N's Complaint speaks for itself. By way of further answer, the Commission "is vested with the authority to determine who shall bear the costs associated with the repair or maintenance of a railroad crossing...." See e.g. City of Philadelphia v. Pennsylvania Public Utility Com'n, 676 A.2d 1298, 1301 (Pa. Cmwlth. 1996) citing 66 Pa.C.S.A. § 2702, 2704.

16. The averments of this paragraph are conclusions of law for which no answer is required. To the extent an answer is required, it is specifically denied that the Commission does

not have jurisdiction to hear this matter. Pennsylvania law is clear that the Commission “is vested with the authority to determine who shall bear the costs associated with the repair or maintenance of a railroad crossing....” See e.g. City of Philadelphia v. Pennsylvania Public Utility Com’n, 676 A.2d 1298, 1301 (Pa. Cmwlth. 1996) citing 66 Pa.C.S.A. § 2702, 2704.

17. RBM&N’s Complaint speaks for itself. By way of further answer, the Commission “is vested with the authority to determine who shall bear the costs associated with the repair or maintenance of a railroad crossing....” See e.g. City of Philadelphia v. Pennsylvania Public Utility Com’n, 676 A.2d 1298, 1301 (Pa. Cmwlth. 1996) citing 66 Pa.C.S.A. § 2702, 2704.

18. The averments of this paragraph are conclusions of law for which no answer is required. To the extent an answer is required, it is specifically denied that the Commission does not have jurisdiction to hear this matter. Pennsylvania law is clear that the Commission “is vested with the authority to determine who shall bear the costs associated with the repair or maintenance of a railroad crossing....” See e.g. City of Philadelphia v. Pennsylvania Public Utility Com’n, 676 A.2d 1298, 1301 (Pa. Cmwlth. 1996) citing 66 Pa.C.S.A. § 2702, 2704.

19. Pennsylvania statute 66 Pa.C.S.A. § 1501 speaks for itself. To the extent that the averments of this paragraph suggest that PennDOT’s classification of a “public utility” have any relevance to this dispute, these averments are specifically denied. By way of further answer, the Commission “is vested with the authority to determine who shall bear the costs associated with the repair or maintenance of a railroad crossing....” See e.g. City of Philadelphia v. Pennsylvania Public Utility Com’n, 676 A.2d 1298, 1301 (Pa. Cmwlth. 1996) citing 66 Pa.C.S.A. § 2702, 2704.

20. The averments of this paragraph are conclusions of law for which no answer is required. To the extent an answer is required, these averments are specifically denied for the reasons stated in Paragraph 19, above.

21. The averments of this paragraph are conclusions of law for which no answer is required. To the extent an answer is required, these averments are specifically denied for the reasons stated in Paragraph 19, above.

22. RBM&N's Complaint speaks for itself.

23. RBM&N is not challenging PennDOT's authority to issue permits. RBM&N is not seeking an injunction to prevent PennDOT's issuing of permits. RBM&N is seeking damages for its past repairs given PennDOT's issuing of permits and is seeking to have PennDOT be responsible for repairs and maintenance that is caused by its own actions.

24. Denied. RBM&N's 2009 replacement of the crossing subject to this dispute was specified and designed for 80,000 pound loads. PennDOT unilaterally and without notice issued permits and diverted traffic over RBM&N's crossing subject to this dispute.

25. The Commissions November 22, 2011 Secretarial Letter speaks for itself. To the extent this Paragraph suggests that the Commission does not have jurisdiction to review and allocate damage and maintenance responsibility given PennDOT's 95,000 pound permits, this is specifically denied. The Commission "is vested with the authority to determine who shall bear the costs associated with the repair or maintenance of a railroad crossing...." See e.g. City of Philadelphia v. Pennsylvania Public Utility Com'n, 676 A.2d 1298, 1301 (Pa. Cmwlth. 1996) citing 66 Pa.C.S.A. § 2702, 2704.

26. Denied for the reasons stated in Paragraph 13.

27. The averments of this paragraph are conclusions of law for which no answer is required. To the extent an answer is required, these averments are denied for the reasons stated in Paragraphs 13 and 23.

28. Denied for the reasons stated in Paragraph 13.

29. The averments of this paragraph are conclusions of law for which no answer is required. To the extent an answer is required, it is specifically denied that the Commission does not have jurisdiction to hear this matter. Pennsylvania law is clear that the Commission “is vested with the authority to determine who shall bear the costs associated with the repair or maintenance of a railroad crossing....” See e.g. City of Philadelphia v. Pennsylvania Public Utility Com’n, 676 A.2d 1298, 1301 (Pa. Cmwlth. 1996) citing 66 Pa.C.S.A. § 2702, 2704.

Count II: Reading’s Complaint is Legally Insufficient

a. Reading has failed to state a claim upon which relief can be granted.

30. No answer required.

31. The averments of this paragraph are conclusions of law for which no answer is required. To the extent an answer is required and to the extent this paragraph suggests that RBM&N has failed to state a claim upon which relief can be granted, this is specifically denied.

32. RBM&N’s Complaint speaks for itself.

33. 66 Pa.C.S.A. § 701 speaks for itself. To the extent that this paragraph suggests that the Commission does not have jurisdiction over this claim or that RBM&N has not stated a claim for which relief can be granted, these averments are specifically denied for the reasons stated in Paragraph 13, above.

34. The averments of this paragraph are conclusions of law for which no answer is required. To the extent an answer is required, the averments are denied. To the extent that this

paragraph suggests that the Commission does not have jurisdiction over this claim or that RBM&N has not stated a claim for which relief can be granted, these averments are specifically denied for the reasons stated in Paragraph 13, above.

35. It is admitted that RBM&N can file a Complaint “regarding any regulation or order of the Commission.” RBM&N has done that. Pennsylvania law is clear that the Commission “is vested with the authority to determine who shall bear the costs associated with the repair or maintenance of a railroad crossing....” See e.g. City of Philadelphia v. Pennsylvania Public Utility Com’n, 676 A.2d 1298, 1301 (Pa. Cmwlth. 1996) citing 66 Pa.C.S.A. § 2702, 2704.

36. Denied.

37. The averments of this paragraph are conclusions of law for which no answer is required. To the extent an answer is required, these averments are specifically denied for the reasons stated in Paragraph 35, above.

38. The averments of this paragraph are conclusions of law for which no answer is required. To the extent an answer is required, these averments are specifically denied for the reasons stated in Paragraph 35, above.

39. The averments of this paragraph are conclusions of law for which no answer is required. To the extent an answer is required, these averments are specifically denied for the reasons stated in Paragraph 35, above.

40. The averments of this paragraph are conclusions of law for which no answer is required. To the extent an answer is required, these averments are specifically denied for the reasons stated in Paragraph 35, above.

b. Reading's requested relief in Paragraph 5(2) of the Complaint is not ripe for adjudication.

41. The averments of this paragraph are conclusions of law for which no answer is required. To the extent an answer is required, the averments are specifically denied.

42. The averments of this paragraph are conclusions of law for which no answer is required. To the extent an answer is required, the averments are denied.

43. RBM&N's Complaint speaks for itself.

44. RBM&N's Complaint speaks for itself. It is denied that RBM&N has not alleged that the subject crossing has severely deteriorated and is in need of repairs or replacement.

45. Denied.

46. Denied.

47. It is admitted that RBM&N is currently responsible for the repair and maintenance of the crossing subject to this dispute. This is one of the reasons that RBM&N has filed a Complaint against PennDOT since PennDOT is responsible for the subject crossing's rapid deterioration.

48. Denied.

WHEREFORE, Reading Blue Mountain & Northern Railroad Company respectfully requests that the Preliminary Objections of the Commonwealth of Pennsylvania Department of Transportation are OVERRULED in their entirety.

Respectfully submitted by:



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EXHIBIT ‘A’

2013 WL 3355964 (Pa.P.U.C.)
Slip Copy

Reading, Blue Mountain and Northern Railroad Company

v.

Commonwealth of Pennsylvania, Pennsylvania Department of Transportation, Berks County
Port Clinton Borough, Schuylkill County, White Haven Borough and Luzerne County

Docket No. C-2013-2357454

Pennsylvania Public Utility Commission

June 24, 2013

INITIAL DECISION GRANTING REQUEST FOR LEAVE TO WITHDRAW COMPLAINT

Before Salapa, Administrative Law Judge

INTRODUCTION

*1 A railroad filed this complaint alleging that overweight trucks were using one of its crossings. This decision grants the railroad's request to withdraw the complaint.

HISTORY OF THE PROCEEDING

On April 12, 2013, the Reading, Blue Mountain and Northern Railroad Company (Railroad) filed a complaint with the Pennsylvania Public Utility Commission (Commission) against the Pennsylvania Department of Transportation (DOT). The complaint alleges that trucks weighing over 95,000 pounds are being permitted by DOT to avoid interstate highways and instead use the crossing where State Route 0940 crosses the Railroad's facilities in the Borough of White Haven (Borough), Luzerne County (County). According to the complaint, the trucks are damaging the crossing which is maintained by the Railroad. The complaint further alleges that the crossing was installed less than five years ago and the truck usage is causing the crossing to deteriorate at a rapid rate. The complaint requests that the Commission direct DOT to discontinue permitting overweight trucks to use the crossing, order DOT to reimburse the Railroad for the damage to the crossing caused by the overweight trucks and order DOT to require trucks using the crossing to be bonded to assure payment for the costs of repairing and maintaining the crossing.

Pursuant to 52 Pa. Code §§3.361 and 5.21, the Commission served copies of the complaint on the Borough and the County. It also appears that the Commission incorrectly served the complaint on Port Clinton Borough, Berks County and Schuylkill County. On May 7, 2013, the County filed an answer to the complaint. The County's answer asserts that the County has no responsibility for trucks being permitted to use the crossing that is the subject of the complaint.

On May 16, 2013, DOT filed an answer with new matter and preliminary objections in response to the Railroad's complaint. The answer denies that DOT is a public utility but rather an agency of the Commonwealth of Pennsylvania. The answer admits that DOT has issued permits, in accordance with its statutory authority, allowing vehicles weighing 95,000 pounds to travel on State Route 0940. The answer further alleges that the trucks are hauling "beneficial combustion ash", pursuant to 75 Pa. C.S. §4979.2, which provides that vehicles hauling "beneficial combustion ash" may not travel upon interstate highways.

The new matter alleges that the Commission by Secretarial Letter dated November 22, 2011 at A-2011-2264535, has ordered the Railroad to maintain the crossing where State Route 0940 crosses its facilities. The new matter further states that DOT enjoys official and sovereign immunity and has not waived its immunity. The new matter contends that the relief sought by the

Railroad, requiring DOT to bond certain State Routes or seeking damages from DOT, does not fall under any of the exceptions to sovereign immunity.

*2 The new matter acknowledges that the Commission has the authority, pursuant to 66 Pa. C.S. §§2702 and 2704, to order the construction, relocation, alteration, protection or abolition of crossings. However, the new matter points out that the Railroad is not seeking to construct, relocate, alter, protect or abolish a crossing. The answer and new matter requests that the Commission dismiss the Railroad's complaint.

DOT's preliminary objections, pursuant to 52 Pa. Code §5.101(a)(1) assert that the Commission lacks subject matter jurisdiction over the Railroad's complaint. The preliminary objections reassert that the Railroad is not seeking to construct, relocate, alter, protest or abolish a crossing, pursuant to 66 Pa. C.S. §§2702 and 2704. Therefore, the Commission does not have jurisdiction over the complaint, pursuant to 66 Pa. C.S. §2702 and 2704.

The preliminary objections also assert that DOT is not a public utility as defined by 66 Pa. C.S. §102. Therefore, the new matter argues that DOT does not have public utility facilities that are subject to the Commission's jurisdiction, pursuant to 66 Pa. C.S. §1501. The preliminary objections also contend that the Commission lacks jurisdiction over the issuance of special hauling permits and lacks the authority to order DOT to require trucks using the crossing to be bonded.

The preliminary objections further assert that, pursuant to 52 Pa. Code §5.101(a)(4), the Railroad's complaint fails to state a claim upon which relief can be granted. The preliminary objections point out that 66 Pa. C.S. §701 authorizes complaints to be filed against public utilities regarding violations of the Public Utility Code or Commission regulations. The Railroad's complaint fails to demonstrate that DOT is a public utility and fails to allege that DOT has violated any provision of the Public Utility Code or Commission regulations. The preliminary objections request that the Commission dismiss the Railroad's complaint.

On June 12, 2013, the Railroad filed a petition for leave to withdraw its complaint, pursuant to 52 Pa. Code §5.94. The petition acknowledges that DOT's preliminary objections may have merit. The petition asserts that the Railroad contacted DOT, the Borough and the County requesting their agreement to withdraw the complaint. The petition asserts that none of the respondents have objected to the withdrawal. The petition requests that the Commission grant it leave to withdraw the complaint.

*3 By notice dated June 19, 2013, the Commission notified the parties that it had assigned the case to me as motion judge. The Railroad's petition for leave to withdrawal is ready for decision. For the reasons set forth below, I will grant the petition for leave to withdraw.

FINDINGS OF FACT

1. The complainant in this case is the Reading, Blue Mountain and Northern Railroad Company.
2. The respondents in this case are the Pennsylvania Department of Transportation, the Borough of White Haven and Luzerne County.
3. On April 12, 2013, the Reading, Blue Mountain and Northern Railroad Company filed a complaint against the Pennsylvania Department of Transportation, the Borough of White Haven and Luzerne County.
4. On May 16, 2013, the Pennsylvania Department of Transportation filed an answer with new matter and preliminary objections.
5. On June 12, 2013, the Reading, Blue Mountain and Northern Railroad Company filed a petition for leave to withdraw its complaint.

DISCUSSION

The Commission's Rules of Practice and Procedure at 52 Pa. Code §5.94 permit parties to withdraw pleadings in a contested proceeding. The provision at 52 Pa. Code §5.94(a) allows withdrawal of pleadings by a petition for leave to withdraw the pleading. The petition is granted only by permission of the presiding officer or the Commission. The presiding officer or Commission must consider the petition, any objections thereto and the public interest in determining whether to permit withdrawal of the pleading.

Turning first to the Railroad's request to withdraw its April 12, 2013 complaint, the June 12, 2013 petition to withdraw states that DOT's preliminary objections may have some merit. The Commission has no interest in mandating that the Railroad continue litigation where the Railroad believes that the Commission may lack jurisdiction over the issues raised in its complaint. The Railroad is free to pursue the issues raised in its complaint in other forums.

Turning next to any objections to the withdrawal of the April 12, 2013 complaint, the Railroad alleges it contacted the respondents in this case and none oppose the withdrawal. The Railroad, DOT, the Borough and the County are the only parties involved in this proceeding. Therefore, there are no objections to the Railroad's petition for leave to withdraw.

Turning finally to the public interest, the complaint does allege facts that could impact the public interest. According to the complaint, the crossing is being damaged by trucks weighing over 95,000 pounds. Since this is a public crossing used by the vehicle operating public, the condition of the crossing impacts the public interest.

However, it appears that the Commission has previously assigned maintenance responsibility for the crossing by Secretarial Letter, dated November 22, 2011, at A-2011-2264535. The entities that the Commission has directed to maintain the crossing have an ongoing obligation to perform the work necessary to maintain the crossing so that it can be safely used by the public. There are no allegations in the complaint that the entities the Commission has directed to maintain the crossing have failed to maintain the crossing in a safe condition. Therefore, it appears that granting withdrawal of the Railroad's complaint will not impact the public interest.

*4 Having reviewed the petition to withdraw, any objections to the petition and the public interest, I conclude that the petition to withdraw should be granted. Granting the petition to withdraw will terminate the litigation, saving the parties the costs in time and money they would otherwise incur litigating the case. Granting the petition to withdraw will not impact the public interest and will conserve administrative hearing resources.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and the parties to this proceeding.
2. The Commission's Rules of Practice and Procedure at 52 Pa. Code §5.94 permit parties to withdraw pleadings in a contested proceeding by permission of the presiding officer or Commission.
3. In determining whether to permit withdrawal of the pleading, the presiding officer or Commission must consider the petition, any objections thereto and the public interest.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the petition for leave to withdraw the April 12, 2013 complaint of the Reading, Blue Mountain and Northern Railroad Company filed at Docket No. C-2013-2357454 on June 12, 2013, is granted.
2. That the complaint of the Reading, Blue Mountain and Northern Railroad Company at Docket No. C-2013-2357454, filed April 12, 2013, is withdrawn.
3. That the docket at Docket No. C-2013-2357454 is marked closed.

End of Document

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PENNSYLVANIA, DEPARTMENT OF	:	
TRANSPORTATION	:	
	:	
Respondent	:	

CERTIFICATE OF SERVICE

I hereby, hereby certify that a true and correct copy of the foregoing document was mailed upon the following parties in accordance with the requirements of Pa. Code Section 1.54 *et. Seq.* (relating to service by participant):

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Dated: 7-17-14