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P R O C E E D I N G S

1  
2 ADMINISTRATIVE LAW JUDGE LOUIS G. COCHERES: Ladies  
3 and gentlemen, as you all know by now, my name is Louis  
4 Cocheres, and I am the Administrative Law Judge assigned to  
5 hear the matter of the application of Consolidated Rail  
6 Corporation at Commission Docket No. A-00111016. We're here  
7 this morning, instead of three days of hearing, we're having  
8 a prehearing conference. I do have a court reporter here  
9 with me. I have multiple parties on the phone, and I have  
10 many parties here in the room with me.

11 First of all, I'd like to thank you all for your  
12 cooperation in being flexible enough to adjust to this shift  
13 in the schedule. I do need to know who is on the phone, and  
14 I do have a roster here that I would like to use to take  
15 roll with so I know what is going on and who is here.

16 MS. PALMOSKI: Carol Palmoski from Lancaster County.

17 JUDGE COCHERES: Fine. You were the first name I was  
18 going to ask about.

19 MS. PALMOSKI: Oh, I'm sorry.

20 JUDGE COCHERES: That is quite all right.

21 The next name is Kathie Shirk Gonick, and Ms. Gonick  
22 contacted my office at the end of last week and asked not to  
23 be included.

24 Mr. Newcomer, are you on the line?

25 (No response.)

1 JUDGE COCHERES: No Mr. Newcomer.  
2 Ms. Nettke, you're on the line, aren't you?  
3 MS. NETTKE: I'm on the line. Thank you.  
4 JUDGE COCHERES: And who is present with you?  
5 MS. NETTKE: Larry Keating is here and Julie Nettke.  
6 JUDGE COCHERES: Mr. Keating is on the appearance  
7 list, as I recall.  
8 MS. NETTKE: I think so.  
9 JUDGE COCHERES: Yes. Okay.  
10 The next name on my list is Thomas Whiteman.  
11 MR. WHITEMAN: Yes, Your Honor, I'm here.  
12 JUDGE COCHERES: Thank you.  
13 The next name on my list is John Halsted.  
14 MR. WHITEMAN: I'm here in his stead, Your Honor.  
15 JUDGE COCHERES: Okay. Let me make a note here. Mr.  
16 Whiteman is appearing on behalf of Mr. Halsted.  
17 Mr. Whiteman, refresh my recollection. Who are you  
18 representing?  
19 MR. WHITEMAN: I represent Chester County.  
20 JUDGE COCHERES: Chester County; all right, fine.  
21 Your name appears on the appearance sheet a couple times,  
22 and I know there are occasionally some changes.  
23 Mr. Moore, are you present?  
24 MR. MOORE: Yes, I am, Your Honor.  
25 JUDGE COCHERES: Mr. Mylin?

1 MR. MYLIN: Yes, Your Honor.

2 JUDGE COCHERES: Mr. MacEwen?

3 (No response.)

4 JUDGE COCHERES: No Mr. MacEwen.

5 Mr. Chase?

6 MR. MYLIN: No, Mr. Chase isn't on. I'm representing  
7 the Quarryville Borough Sewer Authority. This is Dan Mylin  
8 also.

9 JUDGE COCHERES: Okay. That is Quarryville Borough  
10 Sewer Authority.

11 Mr. Phillipowicz?

12 (No response.)

13 JUDGE COCHERES: Mr. Little?

14 MR. WHITEMAN: Your Honor, he had earlier been on --  
15 this is Tom Whiteman for Chester County -- when they were  
16 trying to set up the call, and he had indicated to everyone  
17 on the phone at that time that he was no longer a supervisor  
18 and therefore had no interest in this matter.

19 JUDGE COCHERES: All right. Well, I think we have  
20 someone representing his municipality here today.

21 Ms. Weir?

22 (No response.)

23 JUDGE COCHERES: Marie Weir?

24 (No response.)

25 JUDGE COCHERES: Mr. Novak?

1 (No response.)

2 JUDGE COCHERES: Mr. Keen?

3 MR. KEEN: Yes, Your Honor.

4 JUDGE COCHERES: Mr. Keen, would you refresh my  
5 recollection and tell me who you are representing?

6 MR. KEEN: West Sadsbury Township.

7 JUDGE COCHERES: Did you say West Sadsbury Township?

8 MR. KEEN: West Sadsbury, yes.

9 JUDGE COCHERES: All right; thank you.

10 Is there anyone whose name I did not call that is on  
11 the phone line with me?

12 (No response.)

13 JUDGE COCHERES: Oh, good; we have no one who  
14 volunteered. All right. I hope by now -- I'm fairly  
15 certain this has occurred, but I think by now all of you  
16 have received copies of two settlement documents, one  
17 executed between the Department of Transportation and  
18 Conrail, and one executed between a multitude of  
19 municipalities and Conrail.

20 I suspect, and I haven't looked closely at the  
21 service list, that you may also have received a variety of  
22 discovery motions and objections filed by the municipalities  
23 and Lancaster County.

24 I will deal with the discovery motions at the end of  
25 this proceeding; and those of you who don't want to stay for

1 that long, sad tail are more than welcome to leave, but at  
2 least at this point I did want to talk with the parties  
3 about where this proceeding goes from here. I brought with  
4 me my calendar, and I certainly hope you have your calendars  
5 with you, because I have reviewed the settlement, not real  
6 closely, but I did have a chance to go through it this  
7 morning before I came into the hearing room, and I see some  
8 minor, little things that I can probably clear up in the  
9 courtroom right now, but I do want some time to look at this  
10 document and to make sure I understand it.

11 I think I may have given this little speech before  
12 when I thought I had a settlement document coming in many  
13 months ago, but generally it is my practice to review a  
14 settlement document carefully and determine where my  
15 questions are and schedule a hearing for the purpose of  
16 asking the parties to explain things that are not clear to  
17 me.

18 What I often find is that parties who draft  
19 settlement documents are extremely familiar with the factual  
20 situation, far more familiar than I am, and in their efforts  
21 to construct documents to reflect their agreements, they are  
22 sometimes a little more brief than I am; and since I am not  
23 always familiar with all of the terminology or things that  
24 are being referred to, I always have a settlement hearing  
25 for the purpose of answering what I call all of my stupid

1 questions. That's so that when I render a decision on  
2 reviewing the settlement, that I know what is going on and,  
3 as the best I can, at least understand what the parties are  
4 involved in, too.

5 In this instance, we have another issue that we must  
6 consider, and that is that not all of the parties to this  
7 proceeding have agreed to the terms of the settlement; and I  
8 take the position in those instances that we should have a  
9 hearing to allow those parties who are not signing on the  
10 settlement documents to present their view. Many times they  
11 present good points that haven't been considered in the  
12 settlement document. And I will tell you quite honestly  
13 that what we have here is a partial settlement. Yes, it  
14 encompasses the vast majority of the parties to this case,  
15 but that does not mean that the parties who are not signing  
16 on the stipulation are completely shut out. They do have  
17 the opportunity to influence my decision. I do have the  
18 authority to reject the settlement in its entirety. I have  
19 the authority to recommend revisions be made; and I have the  
20 authority to just simply leave it alone and recommend that  
21 it be adopted the way it is and overrule any objection or  
22 comment that is produced by any party that did not sign on  
23 the stipulation.

24 With those facts in mind, I think that it is  
25 appropriate that we schedule a settlement hearing sufficient

1 time in advance for the parties to review the documents as  
2 well as me and to prepare to make whatever comments and, if  
3 necessary, objections to the documents that are pending  
4 before me or to present their side of the case in whichever  
5 format that they wish.

6 I am not going to require those parties who have  
7 started to put their testimony in -- and this particularly  
8 pertains to F.A.S.T. -- from retaining the position they  
9 originally started in. What is in the settlement may cause  
10 them to reconsider the position that they have espoused  
11 previously on the record and amend it, change it completely,  
12 or continue to stay in the position that they were. This is  
13 not only true of F.A.S.T., but of any party that has already  
14 submitted pre-filed, written, direct testimony.

15 Now, there aren't many parties that did that that  
16 still remain outside the scope of the settlement, but I did  
17 not want anyone who was in the courtroom or with me by  
18 telephone to understand that they are required to rely on  
19 the position that they had started with prior to the  
20 formation of the settlement.

21 Now, that all takes some time. You've got to look at  
22 the settlement documents. You've got to decide what is  
23 going on on your side of the case. I've got to take a look  
24 at the settlement documents closely, and I've got to decide  
25 what I need to ask.

1           With that in mind, I'm going to turn briefly to the  
2 comments I have about the settlement documents for the  
3 parties to consider that are with me today. The first  
4 document that I looked at was from PennDOT and Conrail. I  
5 don't recall having any specific questions about the  
6 document that they produced for me, but interestingly  
7 enough, the document that they produced is cross-referenced  
8 to the settlement document which has been entered into by  
9 the municipalities, and there was some language in the  
10 second settlement document, the big one, that pertained to  
11 PennDOT that I didn't quite understand, and I'm sure it  
12 won't take very long to explain it to me; but basically,  
13 there was a reference -- and I am trying to find the page  
14 here -- there was a reference to directing the Department to  
15 scope a project for safety purposes. I think it was scoping  
16 for safety purposes.

17           MR. WYLAND: 7.3 of the township stipulation,  
18 perhaps.

19           JUDGE COCHERES: Mr. Wyland is suggesting paragraph  
20 7.3 of the main agreement, and that is found on page 9.

21           (Pause.)

22           JUDGE COCHERES: I don't see the language in there.

23           Ms. D'Alfonso, you are here on behalf of the  
24 Department. Do you know the reference to the language I'm  
25 talking about?

1 MR. WYLAND: Page 6 of PennDOT.

2 JUDGE COCHERES: Six in the PennDOT agreement?

3 (Pause.)

4 JUDGE COCHERES: Yes; page 6 of the PennDOT  
5 agreement, Crossing No. 27, the language is, "The Department  
6 will perform a scoping for a betterment project." What does  
7 that mean, counselor?

8 MS. D'ALFONSO: The Department will go out to the  
9 site, will evaluate the site, and will -- I'm going to turn  
10 to the engineer for a lay person word for scoping.

11 JUDGE COCHERES: Investigate?

12 MS. D'ALFONSO: Investigate, look into, progress,  
13 begin. I'm advised that that is an accurate rendition of  
14 scoping.

15 JUDGE COCHERES: Just a minute. We have to go off  
16 the record for a moment.

17 (Discussion off the record.)

18 JUDGE COCHERES: Back on the record.

19 Off the record I was informed that a party has lost  
20 contact with us by phone. It is not a name that I frankly  
21 recognize, but I have instructed the administrative staff  
22 that came in to inform me to take the lady's phone number  
23 and call the conference call operator and be reconnected.

24 In any event, Ms. D'Alfonso, were you able to confirm  
25 that we are on the same wavelength here?

1 MS. D'ALFONSO: If that's what you understood scoping  
2 to be, then we are on the same wavelength; and I have been  
3 advised when we were off the record that the Department has  
4 in an unofficial way gone out and looked at the site to try  
5 to plan a betterment project and will have to do it in a  
6 formal way and provide that to the townships.

7 JUDGE COCHERES: Okay.

8 MS. D'ALFONSO: So we've even progressed beyond what  
9 is in the stipulation.

10 JUDGE COCHERES: All right. My next question that I  
11 really think is perhaps of a more serious nature is directed  
12 to Mr. Wyland. If you will turn to the signature page, I  
13 note that on the signature page of the townships' agreement,  
14 that the Secretary for Eden Township did not attest to the  
15 Chairman's signature, which I wish you could address. I  
16 have brought with me the original signature page if you need  
17 to return it to your clients and have that properly attested  
18 to.

19 I might also add that it is my understanding of the  
20 municipal code involved that we may need a photocopy of each  
21 of the authorizations from each of the municipalities for  
22 the Chairman to enter into this agreement; and it can be  
23 simply a photocopy from the minute book if that's what they  
24 have.

25 MR. WYLAND: I can address that, Your Honor. The

1 issue for us in the execution of the document was whether or  
2 not the document was properly approved, and I agree with  
3 Your Honor that evidence of that can be presented in terms  
4 of reference to the minutes or the actual action by the  
5 township supervisors. We also took a look at the idea of  
6 who had to by matter of law sign and whether there had to be  
7 particular signatures in a particular way in order to bind  
8 the township, and it was our conclusion that the  
9 unavailability of the Secretary on the particular day we had  
10 to sign these was not a fatal flaw in the execution. In  
11 fact, any authorized representative of the township could  
12 properly endorse the document without the Secretary's  
13 signature. We did in fact go the extra yard and have the  
14 Eden Township representative's signature notarized for  
15 purposes of that.

16 I can represent on the record that to the best of my  
17 knowledge, the townships have all properly approved of the  
18 document at a public meeting in accordance with all of the  
19 legal requirements that we are aware of. If we need to go  
20 the extra step to try to provide copies of the minutes or  
21 whatever official authorization there was as part of the  
22 record, we can make efforts to assemble those official  
23 references to complete the record, if that's your wish.

24 JUDGE COCHERES: Yes, I think it would be  
25 appropriate. This is a fairly extensive agreement. It

1 binds the townships to several activities, and it binds  
2 Conrail to not only certain activities, but the payment of  
3 money. Some of the townships, as a matter of fact, may  
4 possibly owe Conrail some money as a result of this  
5 agreement. I want to make sure that all the "t's" are  
6 crossed and the "i's" are dotted.

7 Along those same lines, I have another question for  
8 Mr. Eaton and Mr. Wyland. I noted in one paragraph, and I  
9 think it is the section where Providence Township is  
10 assuming ownership of a portion of the line that is in  
11 Quarryville Borough, that Quarryville Borough is agreeing to  
12 take responsibility for maintaining the roadway. That would  
13 be on page 6, paragraph 5.4.

14 Mr. Zielonis, as I recall, you have entered your  
15 appearance on behalf of Quarryville Borough.

16 MR. ZIELONIS: That is correct, Your Honor.

17 JUDGE COCHERES: Can you confirm, since Quarryville  
18 Borough is not a signatory to this agreement, that they have  
19 indeed agreed to continue maintenance of Lime Street?

20 MR. ZIELONIS: Your Honor, that is one of my notes I  
21 have in the settlement document. Quarryville Borough has  
22 not agreed to this provision.

23 JUDGE COCHERES: Is that currently a borough street?

24 MR. ZIELONIS: Your Honor, I do not know. I frankly  
25 do not know at this time if it is a borough street or not.

1 JUDGE COCHERES: Well, I think somewhere along the  
2 line in our many discussions -- and I'm not even sure if it  
3 is on the record or not at this point -- but I think it is  
4 identified as a borough street.

5 MR. MYLIN: Your Honor, Dan Mylin, Quarryville  
6 Borough Manager. That is a borough street.

7 JUDGE COCHERES: Thank you, Mr. Mylin.

8 In any event, I thought it was interesting that the  
9 document would represent that Quarryville Borough, not a  
10 signatory to the document, would in fact undertake the  
11 maintenance of a particular street, and I think it is  
12 consistent, but it is just unusual that this document  
13 doesn't involve the borough, but does give them a  
14 maintenance responsibility.

15 MR. EATON: I think I can explain it perhaps in this  
16 way.

17 JUDGE COCHERES: Mr. Eaton.

18 MR. EATON: Neither the stipulation with the  
19 municipalities -- I ought to state that differently. The  
20 stipulation with the municipalities has not been signed or  
21 formally agreed to by PennDOT, and the stipulation of  
22 Conrail with PennDOT has no formal approval of the  
23 municipalities. Consequently, there are references  
24 throughout both documents to what a non-signatory party  
25 would do, including this reference to Quarryville Borough

1 maintenance.

2 Where those appear, they should be treated as  
3 recitals as opposed to obligations imposed by either party.  
4 They represent a stated state of facts which the parties  
5 believe exist, and including the reference here to  
6 Quarryville Borough. That was because we understood this  
7 was a borough street and that the maintenance obligation  
8 factually was that of Quarryville Borough. It was no way  
9 intended to either bind Quarryville Borough or operate as a  
10 condition on the acceptance of this agreement by the  
11 parties' signatory.

12 JUDGE COCHERES: I think Quarryville Borough is  
13 really the main exception because the townships are all  
14 party to the settlement and PennDOT's stipulation is cross-  
15 referenced; and to the extent that either document refers to  
16 the townships or PennDOT having a responsibility, they have  
17 the opportunity vis-a-vis their own stipulations to assume  
18 that maintenance responsibility; and I think from the brief  
19 review that I did of the documents, they seem to dovetail  
20 very well, but it was only Quarryville that is just simply  
21 not involved in either document, per se, that raised the  
22 issue with me.

23 Another comment I would like to make about the  
24 municipalities' stipulation with Conrail is that there are a  
25 series of references to not only the Amtrak facilities, the

1 electrical facilities of Amtrak, but other utility  
2 facilities; and I am sure that at the hearing I would like  
3 to know what utility facilities we are talking about to the  
4 extent we know what they are, but there are several cross-  
5 references in the agreement to utility facilities, and I  
6 think it is important to the extent that we know which ones  
7 exist, and I am not expecting Herculean efforts here, but I  
8 think some of the things are fairly well identified already  
9 and we ought to have that on the record as to what they are.

10 Basically, that covers the vast majority of the  
11 questions that I was able to think up this morning. I am  
12 concerned about the Martic Forge crossing. I have not had  
13 the opportunity to do this. I note that the agreement gives  
14 a lump sum of money -- and we've been through that part of  
15 it earlier -- to Martic Township and Conestoga Township,  
16 which are lucky enough to have one end of the bridge in each  
17 municipality. My concern is the condition of the bridge. I  
18 know it is a very big structure. We have jurisdiction over  
19 the safety of the crossing, and I want to know a little more  
20 about the condition of the bridge vis-a-vis the safety of  
21 the motoring public.

22 Now, that is not to say that there aren't other major  
23 structures involved here. I've seen the pictures. They  
24 certainly depict tunnels and bridges of major proportions,  
25 but nothing quite as big as Martic Forge, and I may have

1 questions about the conditions of other structures that are  
2 supposed to remain, but Martic Forge always is a big red  
3 flag.

4 Now, in a very general manner, that takes care of all  
5 of the issues that I saw off the top of my head.

6 MR. EATON: Let me interrupt for a moment.

7 JUDGE COCHERES: Certainly. Mr. Eaton.

8 MR. EATON: I believe that the prepared testimony  
9 which Conrail has submitted and quite possibly that of other  
10 parties has addressed the condition of structures based upon  
11 inspections. Those inspections are now one to two to three  
12 years old. Are you going to be content with inspection  
13 reports that are within say the past five years from the  
14 date of hearing?

15 JUDGE COCHERES: That is an excellent question. I  
16 wish I had as good an answer. I don't recall off the top of  
17 my head when we had the last hearing whether Conrail's  
18 witnesses were put on the record or not. Do you, Mr. Eaton?

19 MR. EATON: I think they were not.

20 JUDGE COCHERES: All right. So I have at least at  
21 this point no record information about the condition of the  
22 structures.

23 MR. EATON: I think that is correct; except as  
24 written testimony has been filed, it has not yet been made a  
25 part of the formal record.

1 JUDGE COCHERES: I think it is also safe to say that  
2 this case has been on my docket more than two years and that  
3 testimony has come in some time ago.

4 MR. ZIELONIS: October of 1995, Your Honor, was the  
5 original prepared direct testimony.

6 JUDGE COCHERES: The original prepared testimony was  
7 submitted in October of '95. Mr. Eaton, you've raised a  
8 very good point, and I am concerned about it. I'm wondering  
9 since at least most of them are the responsibility of  
10 Conrail at the present time, not all of them, what would be  
11 involved in a brief review of comparing the testimony to the  
12 current condition of the bridge?

13 MR. EATON: Probably -- and Mr. Hebner is here in the  
14 room with me. He'll correct me if I'm wrong. Probably the  
15 simplest way would be to conduct Conrail's routine bridge  
16 inspections on the structures on this line. It would  
17 probably involve one man, perhaps two days, three days, Mr.  
18 Hebner?

19 MR. HEBNER: I think longer than that. I guess we're  
20 on the record here?

21 JUDGE COCHERES: If you're more comfortable, Mr.  
22 Hebner, I'll take us off the record. It doesn't matter.

23 MR. HEBNER: Toward what end I guess is what I'm  
24 looking at here? Where are we going with this?

25 JUDGE COCHERES: All I'm looking for here is a

1 response to a very valid question raised by your own counsel  
2 about the validity of a current report on the condition of  
3 these bridges.

4 Let me approach it differently. The agreement calls  
5 for the demolition of a large number of the bridges.

6 MR. EATON: Eight or nine, I think.

7 JUDGE COCHERES: Right. How long would it take to  
8 inspect the ones that are at least allowed to remain  
9 standing that are Conrail's responsibility?

10 MR. HEBNER: I would think a week. It depends I  
11 guess on what depth you want to do these. Are these going  
12 to be a cursory inspection with a check-off list? Are these  
13 going to be with somebody on a ladder or a bucket truck?  
14 Again, that goes back to my question: toward what end? I  
15 mean, to what detail is this supposed to be?

16 JUDGE COCHERES: Mr. Hebner, my concern is that  
17 because we have continuing jurisdiction over the safety of  
18 the crossings, that we should have relatively current  
19 information about the condition of the crossing structures  
20 that are to remain in place. I'm not an engineer, and I  
21 don't recall -- I believe it's probably your testimony that  
22 has been submitted as the railroad's direct testimony. I  
23 don't remember what you represented the condition of those  
24 bridges to be. My real operative question is: has the  
25 condition changed in any significant respect? I suspect

1 none of the bridges have gotten better, and I don't know on  
2 what information you based your testimony, what the level of  
3 inspection was, so I can't tell you much more than that to  
4 give you a direct answer to your question.

5 MR. HEBNER: Well, I guess my question has to do with  
6 if we're looking for something, then the depth of inspection  
7 changes, and that is normally what you would do if you  
8 suspect a problem. I don't think anyone suspects a problem,  
9 so I'm not sure what we're exactly looking for.

10 MR. EATON: Judge, let's go off the record for a  
11 moment.

12 JUDGE COCHERES: All right. We can go off the  
13 record.

14 (Discussion off the record.)

15 JUDGE COCHERES: Let's go back on the record.

16 We've had an extensive off-the-record discussion  
17 about the issue raised by Mr. Eaton about the condition of  
18 the structures and when the evaluation was made of these  
19 structures and the testimony that has been prepared but not  
20 yet put into the record.

21 I have decided to revert to a time-honored format in  
22 resolving this issue. Mr. Eaton, you represent the  
23 Applicant in this proceeding. You have a burden of proof.  
24 The burden of proof in accordance with your application is  
25 to demonstrate that the crossings should be abandoned and

1 that the safety of the public will either be enhanced or  
2 certainly not jeopardized by your application.

3 I am not going to tell you how you best want to  
4 support your application. If you choose, you may go forward  
5 with the previously prepared testimony of Mr. Hebner. I  
6 will give you the opportunity to supplement that. You and  
7 Mr. Wyland and Ms. D'Alfonso are also signatories  
8 essentially on behalf of your respective clients to  
9 settlement stipulations which are more than appropriate to  
10 be introduced into the record, and I will expect them to be  
11 introduced into the record. It is still your burden of  
12 proof, and I am going to just simply give you the  
13 opportunity to supplement your testimony if you desire. I  
14 am not going to require it. I don't normally give the  
15 parties legal advice, although occasionally I break that  
16 rule. This is not going to be one instance where I am going  
17 to do so.

18 I think while it does put the ball firmly back in  
19 your court, I do think that Mr. Zielonis' question that was  
20 posed during our off-the-record discussion about there  
21 should be some record in the evidence of what the condition  
22 of these crossings are, because it is still your burden to  
23 demonstrate that the application should be granted, I will  
24 rely on your vast experience as a member of the Bar to be  
25 able to produce that.

1 Is that clear enough, sir?

2 MR. EATON: Fine. Somehow I feel my original  
3 question hasn't been totally answered.

4 JUDGE COCHERES: I think that is the best we can do  
5 right now.

6 MR. EATON: I'm satisfied with that. I'm warned that  
7 while we may use the evidence based upon earlier  
8 examinations, that may not be sufficient should that be  
9 challenged, and that is fair enough.

10 JUDGE COCHERES: Very good. All right. Moving right  
11 along, while we were off the record, Mr. Wyland, you made a  
12 suggestion procedurally about using an existing Commission  
13 regulation that is normally used in the rate case setting.  
14 That is an interesting point. I don't think I am going to  
15 accept your comment at least until I have heard from Mr.  
16 Zielonis, who did want to talk on that issue, and I am  
17 interested in hearing what he has to say.

18 MR. ZIELONIS: Your Honor, unlike a rate case where  
19 the public utility places into the record its filed  
20 testimony and has been cross-examined, thus developing a  
21 factual record to support a settlement, in this proceeding  
22 there is no evidence at all in the record at this point  
23 regarding the condition of the structures, the condition of  
24 the roadway approaches, and the condition of the roadway  
25 itself. There is no indication regarding the alignment of

1 the road, the vertical or horizontal clearances, all the  
2 questions that the Commission has filed in its questions and  
3 procedures in every case involving the safety of a  
4 structure. So I think it would be inappropriate to switch  
5 the burden of proof to the parties who may oppose the  
6 settlement -- and I say may oppose the settlement -- and the  
7 burden should be placed upon those who request, as a  
8 proponent of a rule of order, the townships, the signatories  
9 to the settlement, as well as Conrail, an order approving  
10 the settlement. There has to be some factual basis for the  
11 Commission to conclude it is appropriate to remove the  
12 structure, it is appropriate to keep the structure in. If  
13 there is removal, must there be other things done to that  
14 crossing to make it safe?

15 JUDGE COCHERES: Mr. Zielonis, is there a reason why  
16 the comments you just made aren't encompassed by the  
17 direction I just gave to Mr. Eaton?

18 MR. ZIELONIS: I heard your discussion, Your Honor,  
19 refer to the crossing structure, the bridge structure  
20 itself, but Conrail obviously would have no evidence  
21 regarding the roadway approaches, the alignments of the  
22 road, et cetera. That original testimony was presented by  
23 PennDOT and by the townships, and I don't know if Mr. Eaton  
24 can provide testimony on that factual issue.

25 JUDGE COCHERES: Mr. Zielonis, I believe it is

1 Section 316 of the Public Utility Code that essentially says  
2 that findings made by this Commission are prima facie  
3 evidence of the facts upon which they rely and binding on  
4 all parties. With that in mind, I revert to a comment that  
5 I made off the record, and that is simply that the  
6 Commission has reviewed all of these crossings at some time  
7 or other. They have made findings that the alignments, the  
8 grades, the roadways leading to these crossings are safe to  
9 establish the crossings.

10 I am not going to drag out the record of this case  
11 and deprive the parties who have settled in the expectation  
12 of having lower litigation costs, I'm not going to require  
13 them to come forward and present a case just as if they  
14 hadn't settled, which is essentially what you are pointed  
15 at. How do I avoid that?

16 MR. ZIELONIS: Your Honor, number one, I don't  
17 believe the Commission has reviewed each and every crossing  
18 along this line. Some of these bridges were built prior to  
19 the establishment of the Public Utility Commission. As a  
20 matter of fact, I think the majority of those were  
21 established prior to the establishment of the Public Utility  
22 Commission except for some of the new state highways.

23 Number two, I don't think that the settlement  
24 sections of the Commission's regulations permit the majority  
25 to oppress the rights of the minority. I think it is black

1 letter law that simply because the parties believe that a  
2 settlement is in the public interest doesn't necessarily  
3 mean that the Commission can agree that the settlement is in  
4 the public interest.

5 JUDGE COCHERES: You're correct on that point. The  
6 stipulation that has been entered into and has been  
7 submitted for my review is only binding on the parties who  
8 signed it.

9 MR. ZIELONIS: Well, Your Honor, it would be binding  
10 upon the parties who do not sign it -- for example, F.A.S.T.  
11 -- in terms of bridge removal, et cetera.

12 JUDGE COCHERES: It is only binding on other parties  
13 if I and my Commission agree that it should be binding on  
14 the other parties.

15 MR. ZIELONIS: That is correct, Your Honor.

16 JUDGE COCHERES: Right.

17 MR. ZIELONIS: That is correct. My only point is  
18 what will be the basis for the Commission to determine  
19 factually that abolishment of certain crossings in place or  
20 removal is necessary and have you considered all the options  
21 under the Public Utility Code?

22 JUDGE COCHERES: What options are you talking about?

23 MR. ZIELONIS: Your Honor, as you know, there is a  
24 requirement that the Commission consider trail development  
25 along a right-of-way. There is no testimony in this regard

1 whether that issue was ever considered in the four corners  
2 of the settlement document.

3 JUDGE COCHERES: It doesn't have to be considered in  
4 the four corners of the settlement document, and certainly  
5 Ms. Nettke has been an ardent advocate on her group's  
6 behalf. Indeed, as I recall the testimony that we have so  
7 far, she is actually in the middle of the presentation of  
8 her case, and I certainly contemplate that she has every  
9 right to continue presenting her case.

10 In addition, I might add that while it is a  
11 consideration that my Commission is required by law to give  
12 to Ms. Nettke's group and they are certainly entitled to it,  
13 they are not the determining factor. As you well know, in  
14 crossing cases there is no determining factor.

15 MR. ZIELONIS: And that is the problem, Your Honor.  
16 We have no evidence at all in the record now upon which to  
17 make a determination. The parties who at this time are not  
18 in support of the settlement have not had an opportunity to  
19 cross-examine any evidence regarding these crossings.

20 JUDGE COCHERES: I agree with you -- and I know we  
21 are going to get into this when I get into the discovery  
22 motions that are pending here -- that the parties have not  
23 yet had an opportunity to do much cross-examination at all,  
24 and that was simply I believe borne of a professional  
25 courtesy to Ms. Nettke that she present her case first.

1 I have not excused the Applicant from presenting  
2 their case, whatever they believe is necessary to carry  
3 their burden of proof. I don't necessarily regard the  
4 remaining parties as having a burden of proof. Indeed, the  
5 Commission would have been able to proceed if some of the  
6 parties hadn't shown up and testified at all, as often  
7 occurs in this case; and even most particularly, Mr.  
8 Zielonis, your client didn't submit any testimony in support  
9 or against the application, yet there are probably questions  
10 and procedures that are directed toward you.

11 MR. ZIELONIS: Your Honor, we submitted extensive  
12 testimony and exhibits that probably encompass at least half  
13 a box regarding this proceeding.

14 JUDGE COCHERES: In that case, I owe you an apology,  
15 and I don't know yet whether the testimony that you  
16 presented needs to be changed in view of the current view of  
17 your board, but the point is that we often have in grade  
18 crossing cases, as evidenced by the absence of all of the  
19 fixed utility services from these proceedings, parties that  
20 don't show up; and I am not going to require the  
21 municipalities to necessarily present a case so that you  
22 have the right to cross-examine it. They don't have a  
23 burden of proof in this case. The Applicant does.

24 MR. ZIELONIS: As a proponent of a rule of order  
25 stating demolition of these bridges as well as assignment of

1 future maintenance and the conditions of the roadways, Your  
2 Honor, I think they do have a burden of proof. Questions  
3 were posed to them that the Commission requested be  
4 developed for safety reasons. No one has presented  
5 testimony, and the only testimony that I now anticipate will  
6 be in the record is the condition of the structures, but not  
7 the other remaining portion of the crossing; and if that is  
8 what will be presented to the Commission, that is fine, Your  
9 Honor, as long as that is on the record. I mean, I don't  
10 have a burden of proof in the proceeding.

11 JUDGE COCHERES: If you don't have one, why do the  
12 municipalities have one?

13 MR. ZIELONIS: Because they are the proponent of an  
14 order stating that this settlement meets the public  
15 interest, that these crossings will be safe after the  
16 settlement is approved.

17 JUDGE COCHERES: Your point is well made, Mr.  
18 Zielonis. I hear other people who want to interrupt.

19 Who first; Mr. Wyland or Mr. Eaton?

20 MR. EATON: I was simply going to ask a question and  
21 explain the reason for the question. That is: what  
22 interest does Lancaster County retain in these proceedings?  
23 Prior to these proceedings it had not been assigned  
24 responsibility for any roadway, for any bridge. During the  
25 course of the proceedings, both on the Bart Township matter

1 two years ago or three years ago and in the course of  
2 various meetings prior to this on this application,  
3 Lancaster County had declined to participate in any way,  
4 either monetarily or even with respect to assistance with  
5 respect --

6 MR. ZIELONIS: Your Honor, I am going to object at  
7 this time.

8 MR. EATON: No.

9 JUDGE COCHERES: Now, wait a minute, counselor. In  
10 my courtroom I like to hear one attorney at a time, and  
11 right now I am listening to Mr. Eaton. If you have an  
12 objection, I will hear it, but not right now.

13 MR. EATON: It is also true that Lancaster County was  
14 advised of Conrail's application in October of 1989 for  
15 abandonment of this line before the ICC, and I know that in  
16 April of 1993 after numerous extensions to Lancaster County  
17 to participate in a rails to trails project, the ICC held  
18 that the condition earlier imposed to delay total  
19 abandonment until Lancaster County had had a chance to act  
20 was vacated on the ground that Lancaster County had failed  
21 to act.

22 Against that background, I do not understand why  
23 Lancaster County retains any interest in these proceedings.  
24 And that is the question which I have asked.

25 JUDGE COCHERES: All right. Mr. Zielonis, what is

1 the nature of your objection?

2 MR. ZIELONIS: The Commission's rules and regulations  
3 prohibit the use of unaccepted offers of settlement against  
4 another party. Now it is intended to be used by Conrail to  
5 somehow show bad faith on the part of Lancaster County, and  
6 I take offense to that, Your Honor.

7 JUDGE COCHERES: Well, I agree with your statement of  
8 the law that the regulations do not allow unaccepted offers  
9 of settlement to be used against a party. I do not  
10 necessarily characterize Mr. Eaton's comments as evidencing  
11 bad faith. They are very directly challenging the standing  
12 of your client, the county, in this instance; and insofar as  
13 they do, do you have a comment?

14 MR. ZIELONIS: I don't understand your question, Your  
15 Honor. Are we a party to this proceeding or are you saying  
16 we are not a party because a settlement has been reached?

17 JUDGE COCHERES: No, I'm certainly not making either  
18 comment. I said Mr. Eaton's remarks to me challenged the  
19 standing of your client to raise an objection, and do you  
20 have a comment?

21 MR. ZIELONIS: Well, Your Honor, we were named as a  
22 party to this proceeding by the Pennsylvania Public Utility  
23 Commission. We were requested and I believe required to  
24 participate in settlement discussions. We've encouraged the  
25 parties to reach a comprehensive settlement discussion.

1 We've submitted testimony in the proceeding regarding these  
2 structures. The bridges are located in Lancaster County,  
3 and we remain a party to this proceeding.

4 JUDGE COCHERES: I agree, and I would also add that  
5 theoretically your client is also subject to any cost  
6 allocation that comes from this.

7 MR. ZIELONIS: That is correct, Your Honor. I did  
8 not want to say that, but that's true.

9 JUDGE COCHERES: I didn't think you did.

10 Now, Mr. Wyland, did you have a comment?

11 MR. WYLAND: Yes. The stipulation, of course,  
12 removes the county's main reason for participation in the  
13 first place in that it is under the terms of stipulation not  
14 financially responsible for any of the crossings, and I  
15 think Mr. Zielonis' comments about my initial suggestion on  
16 procedure may have gone far beyond my initial intention,  
17 which was simply to establish a procedure only and not to  
18 shift the burden of proof necessarily to the county, but the  
19 procedure requires a party that has a problem to tell us  
20 what it is.

21 If the county has some particular dispute or if any  
22 party does with the disposition of any particular crossing,  
23 it is incumbent on that party to let all the other parties  
24 know what that objection is, and the procedure alone here  
25 that I am discussing is designed to do that. It narrows the

1 issues, it makes the proceeding more efficient, and it  
2 requires parties that have at this point at least vague  
3 objections about the stipulation to narrow those to a  
4 specific, factual claim and to outline the claim with  
5 supporting evidence and a request for an opportunity to  
6 submit it; and I think that is only fair to all of the  
7 parties that went through the long, involved negotiation  
8 process and have come to a disposition or recommended  
9 disposition of each of the crossings.

10 I'll add that the disposition of the crossings is to  
11 governmental entities that have the current responsibility  
12 for care and safety for miles and miles of roadways.  
13 Certainly, the townships and PennDOT are capable or at least  
14 do now have the responsibility of safety of roadways. This  
15 disposition gives that responsibility at certain select  
16 crossings to those entities that are used to that kind of  
17 obligation.

18 JUDGE COCHERES: Well, I'm going to take that point  
19 under consideration, Mr. Wyland, but what I want you to  
20 respond to is Mr. Zielonis' comment that as representative  
21 of the municipalities, that the municipalities are the  
22 proponent of a rule from the Commission essentially in  
23 keeping consistent with the stipulation that you are  
24 submitting here and that you bear at least part of the  
25 burden of proof of demonstrating why that stipulation should

1 be accepted.

2 MR. WYLAND: I'll respond by saying that the  
3 stipulation is a proposed disposition of the abolishment  
4 application filed by Conrail, and simply it shifts the  
5 burden of safety to the townships from the Public Utility  
6 Commission, something that is very common at the close of an  
7 abolishment proceeding. The townships as well as PennDOT  
8 are governmental entities that are as fully capable as the  
9 Commission to determine safety issues. In that sense, there  
10 is no factual dispute that the townships really need to  
11 address vis-a-vis the Commission.

12 I would think that the current issue is whether any  
13 particular crossing is safe at any particular time. There  
14 is nothing on this record to indicate that the Public  
15 Utility Commission feels that any of these crossings is in  
16 need of immediate repair. That being the case, it is simply  
17 a shift of the watch from the Public Utility Commission to  
18 other governmental entities that are able to address into  
19 the future the safety issues.

20 JUDGE COCHERES: Let me be more specific, Mr. Wyland,  
21 since you did not answer my question. As I recall, Section  
22 332 of the Public Utility Code specifically puts the burden  
23 of proof on an advocate of a rule or order of the  
24 Commission; and in this instance, isn't the stipulation that  
25 you are submitting a request for a ruling that your

1 municipalities, that your clients, be given the  
2 responsibility for certain maintenance at currently existing  
3 crossings?

4 MR. WYLAND: Yes, Your Honor; and I'm sorry my answer  
5 was a bit obtuse. I think the answer to your question is  
6 that that is a legal position and not necessarily a factual  
7 one.

8 JUDGE COCHERES: All right. Your point is also well  
9 made.

10 Are there any other issues that we have to discuss  
11 before moving to scheduling the settlement hearing?

12 MR. EATON: Yes.

13 JUDGE COCHERES: Mr. Eaton.

14 MR. EATON: There are outstanding discovery motions  
15 by Lancaster County.

16 JUDGE COCHERES: Yes, there are, and I intend to deal  
17 with them last.

18 MR. EATON: Then I will defer my comment until last.

19 JUDGE COCHERES: Oh, okay. All right, fine.

20 MR. ZIELONIS: Your Honor, I had a comment on the  
21 discovery request.

22 JUDGE COCHERES: Well, if you think it is appropriate  
23 now, I'll certainly hear it.

24 MR. ZIELONIS: Mr. Wyland's principals and my  
25 principals have been in discussions I would say over the

1 last week or so to determine whether there is a basis for a  
2 final resolution of this proceeding on behalf of all the  
3 parties, and I discussed with Mr. Wyland this morning some  
4 of the thoughts that the County Commissioners had for  
5 purposes of settlement. Mr. Wyland had agreed to a deferral  
6 of any action on your motion -- any action on my motions to  
7 compel.

8 JUDGE COCHERES: You both have motions. None of them  
9 are mine, though.

10 MR. ZIELONIS: Our motions, Your Honor, in this  
11 proceeding. I believe Mr. Wyland and I wanted to sit down  
12 with you this afternoon, if you did not have a problem with  
13 that and assuming the other parties didn't have a problem  
14 with that, to discuss resolution of those issues.

15 JUDGE COCHERES: That's fine; and certainly, I can  
16 make my time available. That's not a problem. What I  
17 really want to deal with next is scheduling the settlement  
18 conference. To that end I brought my calendar, although it  
19 is probably not totally accurate since even as we speak, the  
20 scheduling staff of the Office of Administrative Law Judge  
21 is scheduling things for me to do. But at least this part  
22 of the discussion will take place off the record.

23 (Discussion off the record.)

24 JUDGE COCHERES: Back on the record.

25 During our off-the-record discussion, we spent some

1 time at least talking to Ms. Nettke about her intentions to  
2 continue with her case, and she made it perfectly clear that  
3 she does intend to do so, and that is fine and that is her  
4 right.

5 We then got down to the task of deciding procedurally  
6 how this particular settlement conference is going to work.  
7 I have determined that any party wishing to supplement or  
8 file new direct testimony in this matter must serve that  
9 testimony on April 7 on all parties; and when I say serve, I  
10 mean in-hand, received no later than 4:00 in the afternoon.  
11 I don't care if you do it by telecopier, by messenger; but  
12 if you're going to do it by mail or by Federal Express, I  
13 picked April 7, which I believe happens to be a Monday.  
14 That means it goes out sufficiently in advance that the  
15 party gets it on April 7; and that is me included.

16 The same is true for rebuttal testimony. Having  
17 reviewed the direct testimony and any supplemental direct  
18 testimony that may be submitted, the parties are required to  
19 serve written rebuttal testimony upon each other in-hand on  
20 May 12.

21 We have reviewed the calendars and have agreed that  
22 the settlement hearing in this case will occur during the  
23 week of June 9 through 13. I don't think there is anything  
24 on my calendar for that week, but I will have the scheduling  
25 staff send out an appropriate notice as soon as possible

1 because we must plan the use of hearing rooms at a minimum  
2 that quickly.

3 Now, does anyone have any questions about the  
4 scheduling of this case?

5 MR. SALAPA: I have one point of clarification, if I  
6 could, Your Honor, just to reiterate.

7 JUDGE COCHERES: Yes, Mr. Salapa.

8 MR. SALAPA: If any of the parties have already filed  
9 written direct and they are satisfied in total with the  
10 written direct that they have previously filed, there is no  
11 reason for them to file that same direct on April 7 then?

12 JUDGE COCHERES: That is absolutely correct, Mr.  
13 Salapa. If you currently served written direct testimony on  
14 the parties and you are content with your position as it  
15 stands, then you may stay that way. I think since there has  
16 been such a lapse in time, that I am going to require people  
17 in that position to at least send a letter which indicates  
18 that they are going to continue to rely on testimony  
19 previously submitted. That way all parties will be aware  
20 that the testimony they've previously submitted is going to  
21 be what they expect to be cross-examined on.

22 MR. SALAPA: Thank you, Your Honor.

23 JUDGE COCHERES: Is there anyone else who has a  
24 question?

25 (No response.)

1 JUDGE COCHERES: All right. Hearing none, the last  
2 entry on my agenda is to deal with the discovery motions  
3 which have already been alluded to on the record of this  
4 proceeding. Before I get there, because I know this may not  
5 be of much interest to all of the other parties and some of  
6 you may actually have lives and want to go to lunch and  
7 other things, I will excuse those parties; but before I do,  
8 I do have a question.

9 Is there any other matter that I have to deal with?  
10 Is there anyone who wishes to raise any other questions that  
11 I should be aware of before I launch into the discovery  
12 issues?

13 (No response.)

14 JUDGE COCHERES: I hear none. Fine.

15 MR. ZIELONIS: Your Honor --

16 JUDGE COCHERES: Mr. Zielonis.

17 MR. ZIELONIS: Your Honor, I had anticipated that we  
18 were going to defer that, because I think Mr. Wyland had  
19 another commitment.

20 MR. WYLAND: May we just have a few minutes to  
21 consult?

22 JUDGE COCHERES: Well, actually, I was going to take  
23 a break.

24 MR. EATON: Before you take the break, may I be  
25 heard?

1 JUDGE COCHERES: Certainly. Mr. Eaton wants to be  
2 heard first.

3 MR. EATON: I have no record of having been served  
4 with the discovery recently directed by the county to  
5 townships. Having been provided with copies of that  
6 discovery by Mr. Wyland in his response, I would like to  
7 also enter Conrail's objection on the record to that  
8 discovery effort as not relevant to any issue pertaining to  
9 Conrail's application to abolish crossings on this line, and  
10 I request that you consider Mr. Wyland's brief in support of  
11 his objections as being on behalf of Conrail as well.

12 JUDGE COCHERES: That's fine, Mr. Eaton. I normally,  
13 if I am going to be asked to rule on the record -- and I  
14 have my doubts because Mr. Zielonis and Mr. Wyland have  
15 indicated that they may not need a ruling right now -- I  
16 normally allow parties to speak in favor or against any  
17 particular motion that is pending before me even if they're  
18 not the ones who drafted it. So I have no problem with your  
19 comments, but I do want to take a break at least for ten  
20 minutes and allow Mr. Wyland and Mr. Zielonis to caucus and  
21 those people who don't want to stay for the rest of this to  
22 be on their way, but I am going to leave the telephone  
23 connection open because there is no other way to re-  
24 establish it, frankly, and I'll check back to see who is  
25 left on the phone after ten minutes.

1 For now, we'll be on a ten-minute break.

2 (Recess.)

3 JUDGE COCHERES: As I understand it, I have Mr. Mylin  
4 and Ms. Palmoski to continue on the phone.

5 All right. Mr. Zielonis and Mr. Wyland, I have a  
6 pile of paper from both of you relating to certain  
7 interrogatories and motions and protective orders and  
8 depositions and all this stuff. Who is going to tell me  
9 that I don't have to make a decision?

10 MR. ZIELONIS: I will do that, Your Honor.

11 JUDGE COCHERES: Okay. You can be the bearer of glad  
12 tidings, Mr. Zielonis.

13 MR. ZIELONIS: Your Honor, we have reached an  
14 agreement that I will withdraw the existing interrogatories  
15 that were sent out by Lancaster County within the last two  
16 weeks. Those would be sets I through VI. We will defer any  
17 request for depositions at this time of the witnesses that  
18 we sought notice and applications of depositions,  
19 specifically the dates that were scheduled in those  
20 deposition notices, and my client intends and I intend to  
21 continue settlement discussions with Mr. Wyland at this  
22 time.

23 JUDGE COCHERES: That's fine. I am certainly  
24 delighted that your discovery essentially -- and I want to  
25 get the proper characterization here -- your interrogatories

1 are withdrawn and your request for depositions has been  
2 deferred.

3 MR. ZIELONIS: Yes, Your Honor; and the discovery is  
4 withdrawn based on the fact that the testimony no longer  
5 exists.

6 JUDGE COCHERES: Yes.

7 MR. ZIELONIS: But that is not to say that if  
8 settlement talks break down that I won't obviously initiate  
9 additional discovery at some future date and want that  
10 option available, Your Honor.

11 JUDGE COCHERES: That is always available to you,  
12 counselor. I agree with your evaluation, that the testimony  
13 upon which the discovery is based has been withdrawn. I  
14 think you are correct in your assessment that you can  
15 withdraw the discovery with no prejudice to you, albeit I am  
16 very well aware that Mr. Wyland and his clients are very  
17 nervous about getting large quantities of discovery from any  
18 party.

19 MR. ZIELONIS: Hence the reason to continue  
20 settlement discussions, Your Honor.

21 JUDGE COCHERES: Fine; whatever works.

22 Mr. Wyland, do you have anything else for me?

23 MR. WYLAND: Only that the townships would like to  
24 reserve the objections as to the depositions.

25 JUDGE COCHERES: Well, as I understand it, based on

1 what Mr. Zielonis has just said, his request for depositions  
2 is also withdrawn.

3 MR. ZIELONIS: No, Your Honor. It is only deferred.

4 JUDGE COCHERES: Deferred; fine.

5 MR. WYLAND: Then again, we defer the objections that  
6 we had submitted to that.

7 JUDGE COCHERES: Fine. I have no problem with having  
8 them deferred. All parties are entitled to the right of  
9 discovery. There are limits on those rights. I will  
10 enforce them if I have to. I prefer settlement discussions  
11 on all topics, discovery included.

12 Is there anything else I need to deal with?

13 MR. WYLAND: No, Your Honor.

14 MR. ZIELONIS: No, Your Honor.

15 JUDGE COCHERES: Gentlemen, I thank you for coming.  
16 I am going to put all of your paper into a file and forget  
17 about it. Thank you. I think we're adjourned.

18 (Whereupon, at 1:05 p.m., the prehearing conference  
19 was adjourned.)

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C E R T I F I C A T E

I hereby certify, as the stenographic reporter, that the foregoing proceedings were taken stenographically by me, and thereafter reduced to typewriting by me or under my direction; and that this transcript is a true and accurate record to the best of my ability.

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