

COMMONWEALTH OF PENNSYLVANIA  
Department of Conservation and Natural Resources

December 2, 1997

**SUBJECT:** A-00111016  
C-00913256  
Opinion and Order  
Public Meeting Held November 21, 1997  
Lancaster County, Pennsylvania

021499

**TO:** Office of Prothonotary File Room  
Public Utility Commission

**FROM:** Roger Fickes  
Director  
Bureau of State Parks  
Department of Conservation and  
Natural Resources

*sub*  
*Rog Fickes*

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Attachment

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B-973671 SC

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

FRIENDS OF THE ATGLEN-  
SUSQUEHANNA TRAIL, INC.,

Petitioner

v.

PENNSYLVANIA PUBLIC  
UTILITY COMMISSION,

Respondent

File in: A-00111016

NO. 3003 C.D. 1997

ARGUED: April 15, 1998

BEFORE: HONORABLE JAMES GARDNER COLINS, President Judge  
HONORABLE BERNARD L. MCGINLEY, Judge  
HONORABLE DORIS A. SMITH, Judge  
HONORABLE DAN PELLEGRINI, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Judge  
HONORABLE JAMES R. KELLEY, Judge  
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge

REC-11  
AUG 18 1998  
PA P.U.C.  
LAW BUREAU

OPINION BY JUDGE SMITH

FILED: August 18, 1998

Friends of the Atglen-Susquehanna Trail, Inc. (FAST) petitions for review of an order of the Pennsylvania Public Utility Commission (Commission) that with minor modifications adopted the decision of an Administrative Law Judge (ALJ) and approved two Stipulations of Settlement (Settlements) that the Consolidated Rail Corporation (Conrail) entered into with seven townships in Lancaster County and with the Pennsylvania Department of Transportation (DOT). The Settlements relate to the abolition of rail-highway crossings along the former Enola Branch rail line and to the transfer of Conrail's property.

FAST questions whether the Commission was preempted from ordering the demolition of historic bridges by Interstate Commerce Commission (ICC) and Surface Transportation Board (STB) orders; whether the Commission complied with the History Code, 37 Pa. C.S. §§101 - 906; whether the Commission erred by not including this case in a moratorium on such cases that it

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adopted pursuant to the Governor's policy of bridge preservation; whether the Commission complied with the Rails to Trails Act, Act of December 18, 1990, P.L. 748, 32 P.S. §§5611 - 5622; and whether the Commission's conclusion that certain bridges are near the end of their life span is supported by substantial evidence. The Commission questions whether FAST has standing to appeal.

Conrail filed notice with the ICC in October 1989 of its intent to abandon the Enola Branch, which runs primarily through seven townships in Lancaster County. In an order of February 14, 1990, the ICC authorized termination of rail service subject to conditions including that Conrail not transfer the property and take no steps to alter the historic integrity of the bridges on the line until completion of the historic review process under Section 106 of the National Historic Preservation Act, 16 U.S.C. §470f. The Pennsylvania Historical and Museum Commission (Historical Commission) commenced a review of the structures along the Enola Branch as part of the Section 106 process, but it failed to follow through when Conrail sent in required information. In a decision of April 19, 1993, the ICC authorized Conrail to abandon the line but made no mention of the condition concerning the Section 106 review process.

Conrail filed an application with the Commission on September 29, 1993 for approval of the abolition of 31 rail-highway crossings along the Enola Branch. FAST was permitted to intervene in May 1994. On March 7, 1995, the Commission issued an order abolishing 6 crossings and listing 24 others for hearing. A separate proceeding involving a single crossing was consolidated with the larger case. The matter was submitted to alternative dispute resolution proceedings, and, after extensive negotiations, the parties arrived at the Settlements. Conrail agreed in the Settlements to convey the entire rail line in

segments to the townships through which it passed and to give each township a lump sum of money related to the condition of the crossings. The majority of the crossing structures were to be kept in place; however, some were scheduled to be removed for safety reasons.

FAST objected, and the ALJ held hearings in June 1997. The Historic Preservation Trust of Lancaster County (Lancaster Trust) joined FAST's brief in opposition. The Department of Conservation and Natural Resources (DCNR) approved of the Settlements. The ALJ issued an order adopting the Settlements, as modified slightly, on September 17, 1997. On September 23, 1997, the STB, successor to the ICC, issued an order reopening the proceeding before it, denying FAST's request to extend the historic preservation condition to the entire Enola Branch and reaffirming the historic preservation condition as slightly modified. Several parties filed exceptions to the ALJ's order, and the Commission entered its final order October 9, 1997, from which only FAST now appeals.<sup>1</sup>

## I

The Court turns first to the Commission's request that the Court quash this petition for review based on its contention that FAST lacks standing to appeal. The Commission acknowledges that FAST is a citizen-based, not-for-profit organization formed for the purpose of acquiring the Enola Branch to preserve the natural and historical resources of this corridor and to provide a multiple use greenway for non-motorized transportation and recreation for all residents of Lancaster County. The Commission notes, however, that under Section 702 of the

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<sup>1</sup>This Court's review of a decision of the Commission is limited to determining whether the necessary findings are supported by substantial evidence and whether there was an error of law or a constitutional violation. *Yellow Cab Co. of Pittsburgh v. Pennsylvania Public Utility Commission*, 673 A.2d 1015 (Pa. Cmwlth. 1996).

Administrative Agency Law, 2 Pa. C.S. §702, only a person who is aggrieved by an agency adjudication and has a direct interest therein may appeal.

The Commission cites the standard articulated by the Pennsylvania Supreme Court in *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975). To have standing to appeal a party must have a direct interest in the subject matter; the interest must be immediate and pecuniary, not a remote consequence of the judgment, and the interest must be substantial and not simply the common interest of all citizens in procuring obedience to the law. The Commission asserts that FAST has no immediate or substantial interest, noting that FAST does not own the land or have a reasonable expectation of owning the land because of the agreements between Conrail and the townships. The Commission also stresses that permission for FAST to intervene did not confer standing to appeal. "Admission as an intervenor will not be construed as recognition by the Commission that the intervenor has a direct interest in the proceeding or might be aggrieved by an order of the Commission in the proceeding." 52 Pa. Code §5.75(b).

On the merits of the standing issue, FAST notes that the requirement of a "substantial" interest means simply that it must have substance – there must be some discernible adverse effect to some interest other than the general interest in having others comply with the law. *William Penn Parking Garage, Inc.*, 464 Pa. at 195, 346 A.2d at 282. The requirement that an interest be "direct" means simply that the person claiming to be aggrieved must show causation of the harm by the matter of which he or she complains. *Id.* FAST refers to the evidence in the record of its efforts to purchase the Enola Branch for recreational and preservation purposes, including securing substantial funding and negotiating with Conrail, and

asserts that approval of the Settlements results in the loss of opportunity for FAST to carry out its mission. Further, FAST contends that, as a trails group, it is uniquely qualified to present issues relating to the Rails to Trails Act. Also, it claims standing based on Section 512 of the Historic Preservation Act, 37 Pa. C.S. §512,<sup>2</sup> which provides in part that any “person or other legal entity may maintain an action in an administrative tribunal or court for the protection or preservation of any historic resource in this Commonwealth.”

The Court agrees that FAST has standing to bring this appeal. First, there is no question that FAST possesses such standing as is conferred by Section 512 of the Historic Preservation Act because it is seeking to enforce both that Act and federal laws and policies relating to historic preservation. Second, as a trails group that has concededly exerted substantial efforts to acquire and convert the rail line at issue, FAST has an interest under the Rails to Trails Act that is direct, and it is well situated to advance the concerns of that Act.

## II

FAST contends first that the subject matter jurisdiction of the Commission was preempted by the orders of the ICC and the STB, where the Settlements provided for the demolition of certain bridges. The Commission’s authority over abolition of crossings derives from the mandate of Section 2702 of the Public Utility Code, 66 Pa. C.S. §2702. Subsection (b) vests the Commission with exclusive power “to determine and prescribe, by regulation or order, ... the manner in which [rail-highway] crossings may be constructed, altered, relocated, suspended or abolished ... to effectuate the prevention of accidents and the

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<sup>2</sup>Chapter 5 of the History Code, 37 Pa. C.S. §§501 – 512, is designated the Historic Preservation Act by Section 501.

promotion of the safety of the public.” The ALJ concluded on this question that the jurisdictions of the STB and the Commission are independent and exclusive of each other, noting that there is no requirement that the STB formally approve abandonment of a rail line before the Commission is permitted to authorize abolishment of rail-highway crossings. The Commission agreed with this analysis.

FAST notes that the ICC was vested with broad power to regulate the abandonment of rail lines, which was later conferred on the STB. FAST quotes *Hayfield Northern R.R. Co., Inc. v. Chicago and North Western Transp. Co.*, 467 U.S. 622, 633 (1984), where the Supreme Court stated: “[U]nless the [ICC] attaches postabandonment conditions to a certificate of abandonment, the [ICC’s] authorization of an abandonment brings its regulatory mission to an end.” Preemption of state law by federal law may take various forms, FAST notes, including what is known as “conflict preemption,” where state law actually conflicts with federal law such that it is impossible for a private party to comply with both “or where state law ‘stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.’ ” *English v. General Electric Co.*, 496 U.S. 72, 79 (1990) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). FAST asserts that conflict preemption applies here to divest the Commission of jurisdiction until the Section 106 review process is complete.

The Commission cites *CSX Transp., Inc. v. Pennsylvania Public Utility Commission*, 558 A.2d 902 (Pa. Cmwlth.), *appeal denied*, 523 Pa. 651, 567 A.2d 654 (1989), where a rail carrier asserted that the Commission was preempted from assigning maintenance responsibilities to it in regard to a crossing on a line for which the ICC had approved abandonment. This Court held that ICC authority over abandonment of rail lines, in the course of regulating commerce, did not

preempt the Commission's authority to abolish crossings and to assign maintenance responsibilities, in the course of regulating the safety of crossings. The Commission notes further that the STB order requires conduct only on the part of Conrail and asserts that, should a conflict arise, Conrail could petition the Commission for an extension.

The Court concludes that the Commission was not preempted from proceeding in this matter and that its order is not in conflict with STB requirements. There is no question that in general the jurisdictions of the Commission over crossing abolition and the STB over rail line abandonment are different matters. *CSX Transp., Inc.* The Commission's conducting its proceeding directed toward the ultimate and necessary disposition of the crossings within its unquestioned jurisdiction did not violate the STB's order or require Conrail to violate the order. Although approval of the Settlements will ultimately result in transfer of Conrail property and the eventual demolition of some bridges, the Commission took care to require that Conrail proceed with completion of the Section 106 review process in compliance with the STB order, and it thereby avoided any possible conflict between the state and federal regulatory agencies, with their different priorities and concerns.

### III

Next FAST contends that the Commission did not comply with the requirements of the History Code, incorporating the arguments advanced in the brief of the Lancaster Trust, which assert that the Commission does not have a specific written plan regarding compliance with Section 508 of the Historic

Preservation Act, as amended, 37 Pa. C.S. §508.<sup>3</sup> Although the Commission's procedures under 52 Pa. Code §§5.71 – 5.76 permit intervention by the Historical Commission, the Lancaster Trust argues that these procedures are passive in nature and not consistent with the action-oriented role required by the History Code. It states that the Historical Commission's opinion was not sought during the development of the Settlements, and in the absence of specific internal procedures and policies acknowledging Commission responsibility under the History Code, the Settlements are flawed.

The Lancaster Trust acknowledges *O'Connor v. Pennsylvania Public Utility Commission*, 582 A.2d 427 (Pa. Cmwlth. 1990), which held that opinions of the Historical Commission are advisory and not binding upon other agencies, but it contends that the record shows that preservation of the historic resources involved here has not been considered adequately. It argues that the preservation-focused perspective is extended even further when historic properties are under the "ownership or control" of Commonwealth agencies or are likely to be affected by agency actions under Sections 508(1) – (3).

The Court agrees with the Commission that *Goldsborough v. Department of Education*, 576 A.2d 1172 (Pa. Cmwlth. 1990), *aff'd*, 528 Pa. 588,

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<sup>3</sup>Section 508 provides in subsection (a) that Commonwealth agencies shall (1) consult the Historical Commission "before demolishing, altering or transferring any property under its ownership or control that is or may be of historical, architectural or archaeological significance"; (2) seek the advice of the Historical Commission "on possible alternatives to the demolition, alteration or transfer of property under their ownership or control that is or may be eligible for the Pennsylvania Register of Historic Places"; (3) "[i]nitiate measures and procedures to provide for the maintenance by means of preservation, rehabilitation or restoration of historic resources under their ownership or control" that are or may be eligible for such listing; (4) "[i]nstitute procedures and policies to assure that their plans, programs, codes, regulations and activities contribute to the preservation and enhancement of all historic resources in this Commonwealth"; and (5) submit the procedures to the Historical Commission for review and comment.

599 A.2d 645 (1991), applies to this question. There a school district sought statutorily required approval from the Department of Education (DOE) to partially demolish and reconstruct a school building eligible for inclusion on the Pennsylvania Register of Historic Places. This Court determined that DOE did not have "control" over the property within the meaning of the phrase property "under their ownership or control" in Sections 508(1), (2) and (3) of the Historic Preservation Act by virtue of its regulatory authority. Rather, that term meant physical ability to manage the day-to-day operation of the property and to make use of it for the agency's own needs. Therefore, DOE did not have to comply with Section 508, and the school district, as a political subdivision, was outside Section 508's express application only to Commonwealth agencies.

In the present case, although the Commission has jurisdiction to approve the abolition of rail-highway crossings, and its orders in that regard certainly have an effect on crossing structures, up to and including requiring other parties to demolish them where safety concerns in the public interest require, the Commission does not exercise the kind of control held to be required in *Goldsborough*. Also, State Historic Preservation Officer Brenda Barrett agreed with the ALJ when he asked whether he should consider her testimony as the opportunity for the Historical Commission to have input on Conrail's application.

#### IV

FAST also asserts that the Commission erred by not including this case in a moratorium upon such cases that was issued by the Commission pursuant to the Governor's policy of bridge preservation. FAST notes that the Commission adopted the 18-month moratorium by order of October 23, 1997, that is, at its next public meeting after the order in this case. Further, the Commission denied

FAST's request for reconsideration on November 6, 1997. FAST argues that this case, with 26 bridges, 6 bridges ordered to be demolished and all others at risk under the terms of the Settlements and with a Master Plan for trail use already prepared and with funding in place, is the perfect case for inclusion in the moratorium. In addition, FAST asserts that the timing of events creates an inference that *ex parte* communications resulted in the deliberate exclusion of this case from the moratorium. It bases this allegation on the ALJ's imposing an abbreviated briefing schedule, the short period allowed by the Commission for filing exceptions and the fact that the moratorium was adopted at the next public meeting on October 23, 1997, although not effective until December 10, 1997. 52 Pa. Code §1.14.

The Commission responds that its decision not to apply the moratorium order to a case that had been completed is outside the subject matter of the October 9, 1997 order approving the Settlements. The Commission notes that it did not grant FAST's requests for reconsideration within the appeal period of the prior order. Should the merits of the denial of reconsideration be considered, the Commission refers to the reasons expressed in its order, i.e., that this case had been finally determined after extensive proceedings and that to apply the moratorium to a proceeding in which a final order had been entered would violate the due process rights of the other parties.

The Court agrees that this issue is not properly presented. FAST did not petition for review from the denial of its petition for reconsideration, in which the issue of the possible applicability of the newly adopted moratorium was raised. The Commission acknowledged in its order of October 9, 1997 that the Governor's policy was under development; however, at that time there was no Commission

moratorium in existence that could be applied to this case. Even if the Court reviewed the merits of the denial of reconsideration, such review is limited to determining whether the Commission abused its discretion. *J.A.M. Cab Co. v. Pennsylvania Public Utility Commission*, 572 A.2d 1317 (Pa. Cmwlth. 1990). Assuming, *arguendo*, that the record here implies an intent on the Commission's part to conclude this four-year-old case before adopting its moratorium, FAST's argument amounts to nothing more than a disagreement with such a policy decision. This Court could not conclude that the Commission's action constituted an abuse of discretion.

V

FAST argues also that the Commission failed to fulfill its mandate under the Rails to Trails Act. Section 10(b) of that Act, 32 P.S. §5620(b), requires that the Commission, before taking action on any request for the abandonment or removal of a railroad grade crossing, bridge or tunnel, "shall consider the impact of such action upon the development, expansion and existing use of recreational trails pursuant to this act and identify and evaluate alternatives which will minimize any adverse impacts of commission actions upon the development and use of recreational trails." FAST's trail designer witness, Charles A. Flink, offered into evidence the Atglen-Susquehanna Trail Master Plan, which he had prepared. Mark Wilson, sponsored by FAST, was the only engineer witness who examined 14 of the rail bridges crossing public roads and who provided cost estimates of repairs and modifications needed for trail use. The engineer witness for the Commission's Bureau of Transportation and Safety (BTS) conceded that the 2:1 slope that he recommended where structures over roads were to be removed is a very steep slope, not of the type preferred for trail use.

FAST contends that this issue goes directly to whether the ALJ considered mitigation under the Rails to Trails Act. Further, it argues that mitigation is left out of the picture by the provision of the Settlement with the townships that expressly includes removal of a structure in the definition of the responsibility to "maintain" it. The ALJ had the duty to determine whether the Settlements were in the public interest and to set aside provisions that were not, pursuant to the Commission's authority in Section 508 of the Public Utility Code, 66 Pa. C.S. §508. That authority includes the power to reform and revise contracts of public utilities upon a fair, reasonable and equitable basis when the Commission determines after notice and hearing that terms of such obligations are adverse to the public interest and general well-being.

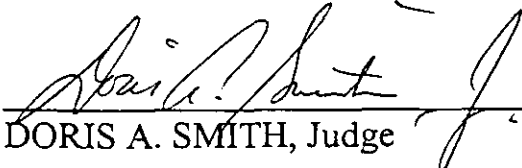
The Commission responds that its duty to consider the impact of its rail-highway crossing decisions upon recreational trails and to identify alternatives to minimize adverse impacts is not a requirement that it accommodate the desires of any particular entity advocating a particular proposal. The ALJ's order directed removal of only 10 of the 25 crossing structures at issue, determining that valid safety reasons existed for the removals. The Commission notes that DCNR, which is charged with the initial responsibility to evaluate the suitability of this and other railroad lines for trail development, was an active party in the proceedings and supports the Settlements. Further, the Commission's duties under the Rails to Trails Act cannot remove the original mandate to the Commission to protect public safety under Section 2702(b) of the Public Utility Code.

This Court agrees that the record in this case shows that the Commission did comply with its obligations under the Rails to Trails Act to consider the impact of its action of approving the Settlements and to identify

alternatives. The extensive participation of FAST in this case and the admission into evidence of its Master Plan, as well as the participation of DCNR pursuant to the Commission's procedures for providing notice to DCNR in such cases, show that the ALJ and the Commission considered alternatives to the proposed action. The Commission approved letting some bridges stand that might otherwise have been ordered to be removed for the benefit of any future trail use. The Rails to Trails Act does not require more.

## VI

Finally, FAST contends that the Commission's conclusion that some bridges are near the end of their life span to support the option for demolition was not supported by substantial evidence. FAST asserts that the ALJ misunderstood the testimony of its witness Wilson in concluding that the bridges had neared the end of their useful lives. The ALJ made over 350 factual findings, most of which concerned detailed descriptions of the condition of each of the bridges at issue here, based upon reports of the BTS, Conrail and the townships. The Commission adopted these findings. Substantial evidence is such evidence as a reasonable person might accept as sufficient to support a finding of fact. *O'Connor*. In the Court's view the record contains ample evidence to support the finding that the older bridges involved here, all of which were constructed shortly after the turn of the last century, may reasonably be viewed as nearing the end of their useful lives. Accordingly, the order of the Commission is affirmed.

  
DORIS A. SMITH, Judge





B-973671-SC

File in:

A-00111016

IN THE SUPREME COURT OF PENNSYLVANIA

**DOCKETED**  
OCT 20 1998

No.

FRIENDS OF THE ATGLEN-SUSQUEHANNA TRAIL, INC.  
and  
HISTORIC PRESERVATION TRUST OF LANCASTER COUNTY,  
Petitioners

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,  
Respondent

**DOCUMENT  
FOLDER**

PETITION FOR ALLOWANCE OF APPEAL FROM  
THE ORDER OF THE COMMONWEALTH COURT DATED  
AUGUST 18, 1998 AT DOCKET NO. 3003 C.D. 1997

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REFERENCE TO REPORT OF OPINION BELOW

Friends of the Atglen-Susquehanna Trail, Inc., ("FAST"), and Historic Preservation Trust of Lancaster County ("HPT"), seek review of the Order of the Commonwealth Court dated August 18, 1998, which states: "AND NOW, this 18th day of August, 1998, the order of the Pennsylvania Public Utility Commission is affirmed."

The opinion of the court below is not reported, and is included in the Appendix to this Petition, at page 1.

The decision of the Commonwealth Court affirmed an expedited decision of the Pennsylvania Public Utility Commission ("PUC"), (Appendix, page 16). The PUC adopted a recommended decision of Administrative Law Judge Louis Cocheres (Appendix, page 93), that provided, inter alia, for the certain demolition of ten bridges and probable demolition of fifteen remaining bridges, and the conveyance of the subject abandoned rail line, by Consolidated Rail Corporation ("Conrail"), in seven segments, to seven local municipalities.

In a dissenting opinion, President Judge Colins stated:

"... I do not feel that the ALJ properly considered the "mitigating" issues under the Rails to Trails Act.

"I would remand to the ALJ for additional findings of fact regarding mitigation and, thereafter, a reconsideration of the propriety of the settlements made with the various townships."

By Order dated December 18, 1998, Commonwealth Court excused FAST from printing the record.

QUESTIONS PRESENTED FOR REVIEW

1. Did the PUC have subject matter jurisdiction to enter its Order for demolition of bridges and transfer of the rail line to municipalities prior to completion of the National Historic Preservation Act's "Section 106" process?

2. Did Commonwealth Court ignore the constitutional and statutory framework intended to preserve and protect the historic values of Pennsylvania's environment?

3. Did the PUC fail to fulfill its mandate under the Pennsylvania Rails to Trails Act to consider alternatives and mitigate adverse effects of its actions upon a future trail?

## STATEMENT OF THE CASE

This case involves the fate of a rail line across Lancaster County, known as the "Enola Low Grade Line." This corridor, recognized by the Smithsonian Institution and numerous other experts as a resource of national historic significance, is slated for destruction unless this Court acts to overturn the Commonwealth Court's Order. Extending for twenty-three miles across Lancaster County's unspoiled landscape to the Susquehanna River, the line was built around 1900, and is an engineering marvel. The entire 850-acre corridor and its stone arch bridges are eligible for listing in the National Register of Historic places, and are irreplaceable.

The Commonwealth Court's Order affirmed a decision by the PUC that approved conveyance of the line in dissected segments, orders imminent destruction of ten of the bridges out of twenty-five at issue, and allows the probable demolition of the others. The PUC entered its decision despite the existence of federal agency orders prohibiting conveyance of the line and any steps toward alteration of the bridges until the federal historic review process is completed.

The Order precludes the opportunity to preserve this resource for the people of the Commonwealth and establish a public rail trail across Lancaster County. The proposed trail, with the bridges intact, would be a premier trail in the Commonwealth and

the nation, both for its scenic and recreational value and because of its safe, grade-separated highway crossings and low-grade construction. FAST's experts offered detailed design and cost estimates showing alternatives for the bridges in question, and mitigation designs for configuration of crossings where a bridge was ordered to be removed. The PUC failed to order any mitigation.

Petitioners seeking review are non-profit organizations. FAST, a community-based rails-to-trails group, with strong public support, has been working for nearly a decade to save the line and its bridges for a greenway. HPT is a private, not-for-profit membership organization formed in 1966 to preserve the historic architectural heritage of Lancaster County.

After hearings in June 1997, the PUC ordered demolition of ten bridges, and approved the Stipulation between Conrail and seven Townships, along with a companion Stipulation between Conrail and Pennsylvania Department of Transportation ("PennDOT"). These stipulations enable Conrail to convey the line in seven segments to the Townships, along with cash, and permit the demolition of the remaining bridges at the sole discretion of the municipalities. The PUC's Order will result in unsafe crossings post-demolition, and preclude the use of the line as a public trail.

Without question, this rail line would have fallen under the PUC's moratorium on crossing cases where the record indicates the potential for a trail, but for the PUC's expedited ruling on this case.

## REASONS TO ALLOW APPEAL

This case is of substantial public importance. The Commonwealth Court's decision, if allowed to stand, will mean the destruction of a nationally significant and irreplaceable part of Pennsylvania's heritage.

I. The holding of the Commonwealth Court directly conflicts with a holding of the United States Supreme Court on the same legal question.

The Commonwealth Court affirmed a decision which the PUC had no jurisdiction to enter. In so doing, the Commonwealth Court conflicted with the United States Supreme Court's holding in Hayfield Northern R. v. Chicago and N.W. Transp., 467 US 622, 81 L Ed 527, 104 S Ct 2610 (1984). Hayfield held that there is federal preemption of state proceedings with respect to rail abandonments, when "the Commission (ICC) (now Surface Transportation Board) attaches post-abandonment conditions to a certificate of abandonment." 467 US 622,633; 81 L Ed 527,537. In the instant case, such conditions were in effect. The ICC, in 1990, expressly placed conditions on Conrail's abandonment of the line, including a condition that Conrail "take no steps to alter the historic integrity of the bridges of the line until completion of the 106 process of the National Historic Preservation Act." (Order at Appendix, page 409; "Section 106 regulations, Appendix 414.)

When the PUC entered its Order, the federal Surface Transportation Board (ICC's successor), had issued a further Order dated September 23, 1997, which stated in pertinent part:

"2. The historic preservation condition imposed in the decision served and published in the Federal Register on February 22, 1990, is modified to read as follows: Conrail shall retain its interest in and take no steps to alter the historic integrity of the 32 bridges eligible for the National Register and the potential archaeological sites near 36 of the bridges." (Appendix 413).

The PUC approved the Stipulations while acknowledging that Section 106 was not complete, thus directly conflicting with the federal jurisdiction.

II. The Commonwealth Court ignored the constitutional and statutory framework intended to preserve and protect the historic values of Pennsylvania's environment.

Article I, Section 27 of the Pennsylvania Constitution, (the Environmental Rights Amendment), gives the people a right "to the preservation of the natural, scenic, historic, and aesthetic values of the environment". Pa.Const.art. 1 Section 27 (adopted May 18, 1971) (Appendix 419).

Section 508 (a) (4-5) of the History Code, 37 Pa.C.S., provides that state agencies must "institute procedures and policies to assure that their plans, programs, codes, regulations, and

activities contribute to the preservation and enhancement of all historic resources in the Commonwealth...: and agencies must "submit procedures and policies...to the PHMC for review and comment." These constitutional and statutory provisions assign every agency in Pennsylvania a responsibility to preserve the historic environment affected by its actions. It harnesses the energy and program authority of all state agencies for the preservation of our state's irreplaceable heritage.

The PUC, a state agency within the meaning of the History Code, neither adopted nor applied policies and procedures to fulfill the obligations recited above. It did not examine the impact that the destruction of these historic bridges would have on the citizens of Pennsylvania, whose will is expressed in our Constitution and History Code.

The lower court failed to address these omissions. Instead, it limited its analysis to a different section of the History Code (section 508(a)(1-3), relating only to property under the direct jurisdiction and control of a Commonwealth agency. Concluding that the PUC did not have jurisdiction and control over the bridges, because it did not own them, it looked no further. In turning a blind eye to the express requirements of the History Code, the court has frustrated the legislative framework designed to promote an important public purpose.

In so doing, the court relied on its previous holding in which an identical failure to enforce the relevant section of the History

Code occurred: Goldsborough v. Dept. of Education, 576 A.2d 1173 (Pa. Cmwlth.1990) (affirmed without opinion, 528 Pa. 588, 599 A.2d 646 (1991)). As here, the court focused solely on the ownership and control provision, failing to address the policies and procedures mandate that Petitioners now ask to have enforced. This case offers an opportunity for the Court to recognize the state's historic preservation policies as articulated in United Artists' Theatre Circuit, Inc. v. City of Philadelphia, 535 Pa. 370, 635 A.2d 612 (1993).

In this case, the lower court observed that a representative of the Historical and Museum Commission had an opportunity to testify before the PUC (although not at the PUC's request). This fortuitous circumstance does not discharge the statutorily imposed duty to have the requisite policies and procedures in place. To conclude otherwise is to make preservation of our historic resources a matter of happenstance, not policy.

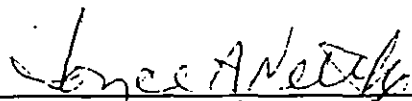
III. This case is one of first impression and of such substantial public importance as to require prompt and definitive resolution by this Court, where ascertainable standards for mitigation in trail crossing cases as mandated by the Pennsylvania Rails to Trails Act do not exist at the PUC.

This Court has not yet decided what is required of the PUC, under the Pennsylvania Rails to Trails statute ("Trails Act") mandate to consider alternatives in crossing cases where a potential trail is involved, and to mitigate the adverse effects of its actions upon existing and future trails. The PUC does not have in place any ascertainable standards for evaluating existing crossings where a highway intersects a potential trail. In this case the PUC did not make sufficient findings concerning alternatives, although as Commonwealth Court noted, FAST's engineering and design experts offered studies, detailed design and costs estimates for alternatives. The PUC did not make findings about why it refused to configure crossings to accommodate trail use, where it ordered a bridge removed. The PUC did not make a finding concerning extensive testimony that the crossings after demolition will be unsafe for the travelling public: the corridor will be unsafe and unusable for a public trail and extremely unsafe if used as a de facto trail. As the Order stands, there will be no mitigation whatsoever. Commonwealth Court President Judge Colins dissented and would have remanded for further findings on the mitigation issue and the propriety of the Stipulations.

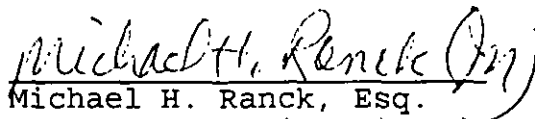
The PUC, in its eagerness to approve the stipulations in this case, purposely excluded this case from a Moratorium on all such crossing cases, enacted pursuant to the Commonwealth's policy, advanced by the Governor, of trying to save bridges like those in question. (Appendix at 436). The PUC imposed an expedited briefing and exceptions schedule, to get this case out of the way before the Moratorium began. This case was the paradigmatic case to which the Moratorium should have applied, with twenty-five grade-separated crossings at issue and paramount historic and recreational value. The Moratorium remains in effect at this moment. Meanwhile, in Lancaster County, some of the most valuable historic structures in the Commonwealth are slated for destruction.

For these reasons, this Court should accept this appeal and prevent a loss to the Commonwealth of a part of our heritage which, if lost, can never be replaced.

Respectfully submitted,



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Supreme Court ID 06991

Dated: September 16, 1998

CERTIFICATE OF SERVICE

I, Joyce A. Nettke, hereby certify that I am this day serving the foregoing Petition and the Appendix filed therewith upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P.121:

BY FIRST CLASS MAIL:

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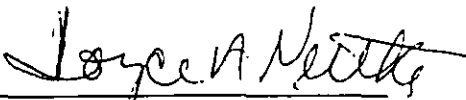
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Dated: 9-16-98

  
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January 20, 1999

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DOCKETED  
JAN 25 1999

VIA HAND DELIVERY

James McNulty, Secretary  
Pennsylvania Public Utility Commission  
P. O. Box 3265  
Harrisburg, PA 17105-3265

**In Re: Conrail Enola Branch - Lancaster County  
PUC Dockets No. A-00111016 and C-00913256  
Conrail File No. MPAC-486  
Our File No. 12607**

RECEIVED  
99 JAN 20 PM 4:04  
P.A.P.U.C.  
SECRETARY'S BUREAU

Dear Secretary McNulty:

Based upon inspections by Conrail of the bridge carrying Fairview Road (S.R. 3016) over the right-of-way of Consolidated Rail Corporation ("Conrail") in Providence Township, Lancaster County, Conrail has down posted the load limit on the bridge from 9 tons to 3 tons. I am writing to inform you of this action and to request Commission affirmance of Conrail's action.

The subject crossing is located over Conrail's former Enola Branch at mile post 15.00. Conrail's most recent inspection conducted October 12, 1998, revealed the stringer webbing, the stringer top flange and the stringer bottom flange all to be in poor condition, as shown on the attached copy of the inspection report. The bottom lateral plates of the bridge were also in poor condition. In addition, the deck is in poor condition, with the timber flooring soft and rotted in places and holes in the stringer webs.

As a result of the inspection, Bob Cieszynski, Conrail's Supervisor of Structures, reviewed the situation on site and took the attached photos illustrating the conditions noted in the inspection report. Mr. Cieszynski thinks that the bridge is no longer safe for a load limit of 9 tons, particularly as he suspects that farmers with tractors hauling heavy loads use the crossing. He changed the load limit signs at the crossing to a 3-ton limit on January 18, 1999.

DOCUMENT  
FOLDER

2/3

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James J. McNulty, Secretary  
January 20, 1999  
Page 2

The crossing is currently scheduled to be removed by PennDOT by October 9, 1999, pursuant to Ordering Paragraph 99 of the Commission's Opinion and Order entered October 9, 1997, in the proceedings docketed to A-00111016 and C-00913256. PennDOT was assigned maintenance responsibility for the bridge until such time as it is removed in Ordering Paragraphs 102-103. Gina M. D'Alfonso, counsel for PennDOT, has informed the undersigned that PennDOT concurs in the down posting of the bridge by Conrail.

The Friends of the Atglen-Susquehanna Trail, Inc., ("FAST") and the Historic Preservation Trust of Lancaster County have petitioned the Pennsylvania Supreme Court for allowance of appeal of the Commonwealth Court's affirmance of the aforementioned Commission Opinion and Order. FAST has also filed an application for review of the Commonwealth Court's denial of FAST's request for a supersedeas. No action on these matters has been taken to date, but those proceedings would have no effect on the down posting of the bridge.

I am filing an original and three copies of this letter and attachments and providing a copy of the letter and attachments to counsel for all potentially interested parties to the aforementioned proceedings, as listed below. Please contact me if you have any questions.

Sincerely yours,



Benjamin C. Dunlap, Jr.

BCDjr/bmd  
Enclosure

cc:	Gina M. D'Alfonso, Esquire	Joyce A. Nettke, Esquire
	David A. Salapa, Esquire	Melvin Newcomer, Esquire
	Kenneth Zeilonis, Esquire	Dennis M. Moore, Esquire
	Scott T. Wyland, Esquire	Scott K. Wasserkrug, Esquire
	Michael H. Ranck, Esquire	Mark Sawyer

RECEIVED  
99 JAN 20 PM 4:04  
PA.P.U.C.  
SECRETARY'S BUREAU



BRIDGE NUMBER 11ST. 10P

LINE CODE 113123

<b>GENERAL CONDITION</b>			
<input type="checkbox"/> CLEARANCE SIGNS LOOSE	<input type="checkbox"/> GIRDER OR BEAM WEB REDUCED	<input type="checkbox"/> FLOOR BEAM CONN CRACKED	
<input type="checkbox"/> LOAD LIMIT SIGNS MISSING	<input type="checkbox"/> HOLES IN WEB OVER BEARING	<input type="checkbox"/> BOLTS/RIVETS LOOSE/MISSING	
<input type="checkbox"/> ONLY ONE LOAD LIMIT SIGN	<input type="checkbox"/> HOLES IN WEB ALONG BOT FLG	<input type="checkbox"/> STRINGER WEBS REDUCED	
<input type="checkbox"/> LOAD LIMIT SIGNS ILLEGIBLE	<input type="checkbox"/> DIAGONAL LOOSE ON PINS	<input type="checkbox"/> STRINGER WEBS CRACKED	
<input type="checkbox"/> LATERAL MOTION UNDER LOAD	<input type="checkbox"/> DIAGONAL DAMAGED BY IMPACT	<input checked="" type="checkbox"/> HOLES IN STRINGER WEBS	
<input type="checkbox"/> EXCESSIVE VERTICAL MOTION	<input type="checkbox"/> HANGERS CRACKED AT TOP	<input checked="" type="checkbox"/> TOP FLG STR RED/CRACKED	
<input type="checkbox"/> BEARINGS PUMPING	<input type="checkbox"/> HANGERS CRACKED AT BOTTOM	<input checked="" type="checkbox"/> BOT FLG STR RED/CRACKED	
<input type="checkbox"/> LOW APPROACHES	<input type="checkbox"/> HANGERS DAMAGED BY IMPACT	<input type="checkbox"/> STRINGER CONN CRACKED	
<input type="checkbox"/> TRACK LINE POOR	<input type="checkbox"/> COUNTERS LOOSE ON PINS	<input type="checkbox"/> STR BOLTS/RIVETS MISSING	
<input type="checkbox"/> TRACK SURFACE POOR	<input type="checkbox"/> COUNTERS DAMAGED BY IMPACT	<input type="checkbox"/> WELDS CRACKED	
<input type="checkbox"/> RAIL JOINTS POOR	<input type="checkbox"/> RIVETS LOOSE OR BROKEN	<input type="checkbox"/> STEEL FLOOR RED OR CRACKED	
<input type="checkbox"/> PAVING BROKEN UP	<input type="checkbox"/> RIVET HEADS REDUCED TOP FLG	<input type="checkbox"/> HOLES IN STEEL FLOOR	
<input type="checkbox"/> WATER FLOWING UNDER PAVING	<input type="checkbox"/> RIVET HEADS REDUCED BOT FLG	<input type="checkbox"/> CONCRETE FLOOR CRACKED	
<input type="checkbox"/> NO PAVING	<input type="checkbox"/> PINS LOOSE	<input type="checkbox"/> CONCRETE FLOOR SPALLED	
<input type="checkbox"/> RUSTY OR DEFORMED SHEETING	<input type="checkbox"/> PINS WORN	<input type="checkbox"/> BALLAST FALLING THRU	
<input type="checkbox"/> SHEET FILING DESTROYED	<input type="checkbox"/> NUTS LOOSE OR MISSING	<input checked="" type="checkbox"/> TIMBER FLOOR SOFT	
<input type="checkbox"/> SCOUR UNDER ABUTS OR PIERS	<input type="checkbox"/> COLUMNS REDUCED AT BOTTOM	<input checked="" type="checkbox"/> TIMBER FLOOR ROTTED	
<input type="checkbox"/> SCOUR UNDER WINGWALLS	<input type="checkbox"/> COLUMNS REDUCED AT TOP	<input type="checkbox"/> HOLES IN TIMBER FLOOR	
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<input type="checkbox"/> RIP RAP NEEDED PIER/ABUTS	<input type="checkbox"/> SOLE PLATES DEFORMED	<input type="checkbox"/> TIES SPIKE KILLED	
<input type="checkbox"/> SPECIAL COMMENTS 1	<input type="checkbox"/> SOLE PLATES CRACKED	<input type="checkbox"/> TIES SPLIT	
<b>FENDER SYSTEM</b>			
<input type="checkbox"/> SHEETING DAMAGED OR MISSING	<input type="checkbox"/> MASONRY PLATES DEFORMED	<input type="checkbox"/> TIES PLATE CUT	
<input type="checkbox"/> WALERS DAMAGED OR MISSING	<input type="checkbox"/> MASONRY PL WORN INTO B-SEAT	<input type="checkbox"/> SPACE BAR/TIMBER DAMAGED	
<input type="checkbox"/> PILING DAMAGED OR MISSING	<input type="checkbox"/> SHOES WORN INTO MASONRY	<input type="checkbox"/> HOOK BOLTS BROKEN/MISSING	
<input type="checkbox"/> SPECIAL COMMENTS 2	<input type="checkbox"/> SHOES OUT OF LEVEL	<input type="checkbox"/> GUARD RAILS MISSING	
<b>MASONRY</b>			
<input type="checkbox"/> ABUTMENTS CRACKED/SPALLED	<input type="checkbox"/> ROCKERS OUT OF LEVEL	<input type="checkbox"/> SOME DECK HARDWARE MISSING	
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<input type="checkbox"/> WINGWALL CRACKS WIDENING	<input type="checkbox"/> SHIMS NEEDED	<input type="checkbox"/> DRAINAGE SYSTEM NOT WORKING	
<input type="checkbox"/> TIMBER B-WALLS DISPLACED	<input type="checkbox"/> ANCHOR BOLTS MISSING	<input type="checkbox"/> SPECIAL COMMENTS 6	
<input type="checkbox"/> TIMBER B-WALLS DETERIORATING	<input type="checkbox"/> ANCHOR BOLTS BENT	<b>TIMBER TRESTLES</b>	
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<input type="checkbox"/> PIERS CRACKED OR SPALLED	<input type="checkbox"/> WOOD BLOCKING CRUSHING	<input type="checkbox"/> TIMBER BULKHEADS UNDERCUT	
<input type="checkbox"/> PIERS LEANING	<input type="checkbox"/> REMOVE DIRT/STONE FROM BRGS	<input type="checkbox"/> PILING HOLLOW	
<input type="checkbox"/> PIER CRACKS WIDENING	<input type="checkbox"/> SPECIAL COMMENTS 4	<input type="checkbox"/> PILING SPLIT	
<input type="checkbox"/> PEDESTALS CRACKED/SPALLED	<b>STEEL BRACING</b>		
<input type="checkbox"/> ARCHES CRACKED OR SPALLED	<input type="checkbox"/> TOP LATERALS REDUCED	<input type="checkbox"/> SILLS ROTTED & CRUSHING	
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<input type="checkbox"/> SLAB SPALLED STEEL EXPOSED	<input type="checkbox"/> BOT LAT PLS REDUCED	<input type="checkbox"/> STRINGER SPLIT	
<input type="checkbox"/> SLAB SPALLED STEEL NOT EXPD	<input type="checkbox"/> BOT LAT PLS BROKEN	<input type="checkbox"/> HELPER STRINGER INSTALLED	
<input type="checkbox"/> SLAB CRACKED	<input type="checkbox"/> SWAY FRAMES RED OR CRACKED	<input type="checkbox"/> SPECIAL COMMENTS 7	
<input type="checkbox"/> SPECIAL COMMENTS 3	<input type="checkbox"/> PORTALS DAMAGED OR CRACKED	<b>TIMBER BRACING</b>	
<b>BEAMS OR TRUSSES</b>			
<input type="checkbox"/> TOP FLG/CHORD RED IN WIDTH	<input type="checkbox"/> TOWER LEGS RED OR CRACKED	<input type="checkbox"/> BRACING SPLIT OR LOOSE	
<input type="checkbox"/> TOP FLG/CHORD RED IN THICK	<input type="checkbox"/> TOWER BRACING REDUCED	<input type="checkbox"/> BRACING MISSING OR BROKEN	
<input type="checkbox"/> BOT FLG/CHORD RED IN WIDTH	<input type="checkbox"/> COVERED WITH VEGETATION	<input type="checkbox"/> ADDITIONAL BRACING REQUIRED	
<input type="checkbox"/> BOT FLG/CHORD RED IN THICK	<input type="checkbox"/> SPECIAL COMMENTS 5	<input type="checkbox"/> LONG BRACING SPLIT OR LOOSE	
<input type="checkbox"/> BOT FLG/CHORD CRACKED @ BRG	<b>FLOOR SYSTEM</b>		
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	<input type="checkbox"/> HOLES IN FLOOR BEAM WEBS	<input type="checkbox"/> ADDITIONAL LONG BRACE REQ'D	
	<input type="checkbox"/> FLOOR BEAM WEBS CRACKED	<input type="checkbox"/> MUD SILLS ROTTED & CRUSHING	
	<input checked="" type="checkbox"/> TOP FLG FLBM RED/CRACKED	<input type="checkbox"/> SPECIAL COMMENTS 8	
	<input checked="" type="checkbox"/> BOT FLG FLBM RED/CRACKED	<input type="checkbox"/> SPECIAL COMMENTS 9	
		<input type="checkbox"/> SPECIAL COMMENTS 10	
		<input type="checkbox"/> SPECIAL COMMENTS 11	

