
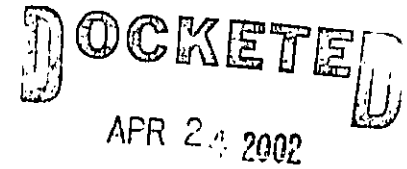


**PENNSYLVANIA PUBLIC UTILITY COMMISSION**  
**Uniform Cover and Calendar Sheet**

25

<b>1. REPORT DATE:</b> April 2, 2002	<b>2. BUREAU AGENDA NO.</b> APR-2002-OSA-0106*
<b>3. BUREAU:</b> Office of Special Assistants	
<b>4. SECTION(S):</b>	<b>5. PUBLIC MEETING DATE:</b>
<b>6. APPROVED BY:</b> Director: C.W. Davis 7-1821 Supervisor:	April 11, 2002  
<b>7. PERSONS IN CHARGE:</b> R. Albert 7-8108	
<b>8. DOCKET NO.:</b> A-00111016; C-00913256	

- 9. (a) CAPTION (abbreviate if more than 4 lines)**  
**(b) Short summary of history & facts, documents & briefs**  
**(c) Recommendation**

**DOCUMENT FOLDER**

(a) Application of Consolidated Rail Corporation for the abolition of 31 Crossings of the Enola Branch LC.....; Board of Supervisors of Bart Township v. Consolidated Rail Corporation (Conrail), Pennsylvania Department of Transportation, and Lancaster County

(b) Conrail filed an Application with the Commission on February 25, 1991, requesting the abolition of thirty-one crossings of the Enola Branch located in Lancaster County. After preliminary proceedings, the Commission, per Opinion and Order entered on October 9, 1997, adopted the Recommended Decision of ALJ Louis Cocheres as modified. The October 9, 1997 Opinion and Order was subsequently modified by various Orders which granted extensions of time. On September 18, 2001, Conrail and Norfolk Southern (NS) filed a Petition for Extension of Time (Conrail and NS' Petition). On October 10, 2001, Bart, Martic and Sadsbury Townships also filed a Petition for Extension of Time (Townships' Petition), as did PennDOT on October 22, 2001.

(c) The Office of Special Assistants recommends that the Commission adopt the proposed draft Opinion and Order which grants the Petitions filed by Conrail and NS, the Townships and PennDOT to the extent discussed.

Order Doc. No. 288289v1

Calendar Doc. No. 288472v1

- 10. MOTION BY:** Commissioner Chm. Thomas      Commissioner Wilson - Yes  
    Commissioner Fitzpatrick - Yes  
**SECONDED:** Commissioner Bloom     Commissioner Pizzingrilli - Yes

**CONTENT OF MOTION:** Staff recommendation adopted.



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

IN REPLY PLEASE  
REFER TO OUR FILE

April 15, 2002

REP

A-00111016  
C-00913256

SCOTT WASSERKRUG ESQ  
2001 MARKET ST 16-A  
PO BOX 41416  
PHILADELPHIA PA 19101-1416

**DOCKETED**  
APR 22 2002

Application of Consolidated Rail Corporation for the abolition of thirty-one crossings of the Enola Branch, LC201323, MP 3.5 to MP 27.0, Sub No. 1095X, Harrisburg Division, Lancaster County  
(A-00111016)

Board of Supervisors of Bart Township  
V.

Consolidated Rail Corporation and the Pennsylvania Department of Transportation and Commissioners  
of the County of Lancaster, et al  
(C-00913256)

DOCUMENT  
FOLDER

To Whom It May Concern:

This is to advise you that an Opinion and Order has been adopted by the Commission in Public Meeting on April 11, 2002 in the above entitled proceeding.

An Opinion and Order has been enclosed for your records.

Very truly yours,

James J. McNulty  
Secretary

Enclosure  
Certified Mail  
TAB

See Attached List for Additional Parties

PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17105-3265

Public Meeting held April 11, 2002

**Commissioners Present:**

Glen R. Thomas, Chairman  
Robert K. Bloom, Vice Chairman  
Aaron Wilson, Jr.  
Terrance J. Fitzpatrick  
Kim Pizzingrilli

**DOCKETED**  
APR 22 2002

Application of Consolidated Rail Corporation  
for the Abolition of Thirty-One Crossings of  
the Enola Branch, LC201323, MP 3.5 to  
MP 27.0, Sub No. 1095X, Harrisburg Division,  
Lancaster County

A-00111016

Board of Supervisors of Bart Township

C-00913256

v.

Consolidated Rail Corporation and the  
Pennsylvania Department of Transportation  
and Commissioners of the County of  
Lancaster, *et al.*

DOCUMENT  
FILED

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Commission for consideration and disposition are the following  
Petitions: (1) the Petition to Stay Commission Order<sup>1</sup> (Conrail and NS' Petition) filed  
jointly by Consolidated Rail Corporation (Conrail) and Norfolk Southern Railway

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<sup>1</sup> Although styled a "Petition for Stay," Conrail and NS' Petition is in essence  
a Petition for Extension of Time, and will henceforth be so referenced.

Company (NS) on September 18, 2001; (2) the Response to Conrail and NS' Petition (Townships' Response) filed by Bart, Conestoga, Martic, Providence and Sadsbury Townships (collectively, Townships) on October 10, 2001; (3) the Petition for Extension of Time (Townships' Petition) filed by Bart, Martic and Sadsbury Townships (Petitioning Townships) on October 10, 2001; (4) the Response to the Townships' Petition for Time Extension (PennDOT Response) filed by the Pennsylvania Department of Transportation (PennDOT) on October 22, 2001; and (5) Petition for Extension of Time (PennDOT's Petition) filed by PennDOT on October 22, 2001.

The Opinion and Order to which the above-enumerated documents refer was initially entered on October 9, 1997, and was subsequently modified by an Opinion and Order entered on November 22, 1999, and by another Opinion and Order entered on January 26, 2001.

### **History of the Proceedings**

This proceeding involves two consolidated proceedings at Docket Nos. C-00913256 and A-00111016. The Complaint at the C-docket was initiated on February 25, 1991. The proceeding at the A-docket was initiated when Conrail filed an Application with the Commission on September 29, 1993, requesting approval for the abolition of thirty-one rail-highway crossings along its Enola Branch located in Lancaster County.

After preliminary proceedings, the Commission, per Opinion and Order entered on October 9, 1997, adopted the Recommended Decision of Administrative Law Judge (ALJ) Louis G. Cocheres, as modified. A Stipulation of Settlement among the Parties was subsequently approved, consistent with the October 9, 1997 Opinion and Order. As above noted, the October 9, 1997 Opinion and Order was subsequently

modified by an Opinion and Order entered on November 22, 1999, and by another Opinion and Order entered on January 26, 2001.

Petitions and Responses to those Petitions were filed as above enumerated.

### Discussion

We note that Section 1.15 of our Regulations, 52 Pa. Code §1.15, confers upon us the authority and discretion to grant an extension of time. Section 1.15 provides, in pertinent part, as follows:

#### **§ 1.15. Extensions of time and continuances**

- (a) Extensions of time shall be governed by the following:

Except as otherwise provided by statute, whenever under this title or by order of the Commission,...an act is required or allowed to be done at or within a specified time, the time fixed or the period of time prescribed may, by the Commission, the presiding officer or other authorized person, for good cause be extended upon motion made before the expiration of the period originally prescribed or as previously extended. Upon motion made after the expiration of the specified period, the act may be permitted to be done where reasonable grounds are shown for the failure to act.

Petitions for Time Extensions and Responses thereto were filed as above enumerated. We shall address each request separately.

## Conrail and NS' Petition, the Townships' Response, PennDOT's Response

Our Opinion and Order entered herein on October 9, 1997, *inter alia*, required Conrail to remove six crossing structures and to relocate the National Railroad Passenger Corporation's (Amtrak's) transmission line towers. Specifically, Conrail was given one year from the date of entry of that Opinion and Order to remove the structures at Crossing Nos. 15, 16, and 21, and was given eighteen months from the date of entry to remove Amtrak's transmission line tower at Crossing No. 28. Conrail was given two years from the date of entry to remove the structures at Crossing Nos. 4, 10, and 26. (Conrail and NS' Petition, ¶1).

Subsequently, by our Opinion and Order entered on November 22, 1999, we granted Conrail's Petition for an Extension of Time. We thereby also amended our October 9, 1997 Opinion and Order herein to provide Conrail with an extension of time to perform the work related to Crossing No. 16,<sup>2</sup> the transmission line towers at Crossing No. 28,<sup>3</sup> and the structures at Crossing Nos. 4, 10, 15, 21 and 26.<sup>4</sup> (Petition, ¶2). By our Opinion and Order entered on January 26, 2001, we granted Conrail's Petition to Request a Further Extension of Time for Conrail to remove the structure at Crossing No. 16.<sup>5</sup> (Petition, ¶3).

On June 1, 1999, the subject rail line was conveyed to Pennsylvania Lines, LLC, a wholly owned subsidiary of Conrail. NS has the right to operate on lines owned by Pennsylvania Lines LLC and will perform the work ordered by the Commission herein on behalf of Conrail. (Petition, ¶4).

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<sup>2</sup> Conrail was granted until December 31, 2000, to do the relevant work.

<sup>3</sup> Conrail was granted until June 30, 2001, to do the relevant work.

<sup>4</sup> Conrail was granted until December 31, 2001 to do the relevant work.

<sup>5</sup> Conrail was granted until June 30, 2001 to do the relevant work.

Conrail was prevented from performing the work ordered at Crossing Nos. 10, 15, 16, and 21 pursuant to a Decision of the Interstate Commerce Commission (ICC), decided on February 14, 1990. That Decision imposed a historic preservation condition that required Conrail to retain its interest in and take no steps to alter the historic integrity of the bridges on the line until completion of the Section 106 process of the National Historic Preservation Act (NHPA), Section 470(f) of the United States Code, 16 U.S.C. §470(f).

The 1990 Decision of the ICC was subsequently modified by the September 23, 1997 Decision of the Surface Transportation Board (STB). That Decision modified the original stay condition imposed by the ICC. The modification was that the stay would only be applicable to those bridges which have been determined by the Pennsylvania Bureau of Historic Preservation<sup>6</sup> as being eligible for listing in the National Register, and also to potential archeological sites near certain bridges. That fact was noted in the SHPO's September 4, 1991 Letter to J. Mikowychok of the Lancaster County Department of Parks and Recreation.<sup>7</sup> (Petition, ¶5).

The stay conditions imposed in the ICC's 1990 Decision, as modified by the STB's 1997 Decision, which prevented Conrail from removing the structures at Crossing Nos. 10, 15, 16 and 21, remained in effect until a Decision of the STB issued on August 13, 1999. That Decision lifted the stay condition, pending compliance with the

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<sup>6</sup> Otherwise known as the State Historic Preservation Officer (SHPO).

<sup>7</sup> Conrail and NS attached to their Petition copies of the ICC's Decision, the STB's Decision, and the SHPO's Letter as Exhibits "A," "B," and "C."

terms of the proposed Memorandum of Agreement (MOA) between the STB and the SHPO appended to the Decision.<sup>8</sup> (Petition, ¶6).

The Friends of the Atglen-Susquehanna Trail, Inc. (FAST) filed an appeal of the STB's 1999 Decision to the U.S. Court of Appeals for the Third Circuit, challenging the manner in which the STB carried out its responsibilities under Section 106 of the NHPA.<sup>9</sup> (Petition, ¶7).

By Opinion and Order filed on May 31, 2001, the Third Circuit determined that the STB did not follow the required procedures established under the NHPA. The Third Circuit further concluded that the STB had accordingly abused its discretion in implementing the MOA and in terminating the consultation process mandated under the NHPA regulations. As a result of its determination, the Third Circuit vacated the 1997 and 1999 Orders of the STB, and remanded the matter to the STB for further proceedings consistent with its Opinion.<sup>10</sup> (Petition, ¶8).

The crux of Conrail and NS' Petition is that, pursuant to the requirements of the Third Circuit Opinion, it is expected that the STB will issue an Order reimposing the stay condition of the 1990 Order. If that happens, it would require Conrail to retain its interest in, and take no steps to alter the historic integrity of, the bridges on the line until

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<sup>8</sup> Conrail and NS attached a copy of the STB's Decision, issued on August 13, 1999, to their Petition as Exhibit "D."

<sup>9</sup> Specifically, FAST objected to the manner in which the STB identified and protected historic properties along the line, to the STB's alleged failure to consider evidence that the corridor as a whole was entitled to protection as a historic property, and to the manner in which the STB terminated consultation on an alleged plan to protect historically eligible property.

<sup>10</sup> See *Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transportation Board and United States of America*, 252 F.3d 246 (3<sup>rd</sup> Cir. 2001) (*FAST v. STB*).

the STB completes the Section 106 process. However, Conrail and NS note that no such Order has been issued to date. (Emphasis added). (Petition, ¶9).

Accordingly, NS requests an extension of time to comply with the requirements, found in the Commission's October 9, 1997 Opinion and Order, that NS remove the structure at Crossing No. 16 and remove the transmission line towers of Amtrak at Crossing No. 28. NS requests that this extension of time be granted until nine months *after the lifting of any stay, anticipated to be imposed by the STB*, preventing the alteration of the subject bridge structures herein, pursuant to the Third Circuit's May 31, 2001 Opinion. (Petition, ¶11).

Additionally, Conrail requests that Amtrak be ordered to relocate its transmission line and towers, so that Conrail may perform the work ordered by the Commission, within six months following the lifting of any stay, anticipated to be imposed by the STB. (Petition, ¶12). NS, *inter alia*, also requests that an extension of time be granted to comply with the Commission's Order requiring Conrail to remove certain other crossing structures until eighteen months following the lifting of any stay, anticipated to be imposed by the STB. (Petition, ¶¶13, 14).

In response, the Townships also note the above referenced pending proceeding of *FAST v. STB*. The Townships indicate that they anticipate that the STB will take additional action with respect to its obligations under Section 106 of the NHPA, referenced *supra*. (Townships' Response, ¶¶3, 4). The Townships note that, by the terms of our Opinion and Order entered on October 9, 1997, as subsequently modified, Conrail and NS are required to convey to the Townships the property that is the subject of the Section 106 process. (Townships' Response, ¶6).

The Townships aver that they do not object to the grant of Conrail and NS' Petition for an extension of time to perform the ordered work. However, the Townships request that Conrail and NS also be directed to provide reports to the Commission and to the Parties setting forth the status of the STB proceeding. (Townships' Response, ¶7).

Additionally, PennDOT indicated that it did not oppose the extension of time requested by Conrail and NS. (PennDOT Response, ¶8).

On review of the merits of the instant Petition, we conclude that it is prematurely filed. As above discussed, it is anticipated that, pursuant to the requirements of the Third Circuit Opinion, the STB will, in the future, issue an Order. That STB Order is expected to reimpose the stay condition of the 1990 Order, requiring Conrail to retain its interest in, and take no steps to alter the historic integrity of the bridges on the line until the STB completes the Section 106 process. However, we note that no such Order has been issued to date. (Petition, ¶9).

Despite the fact that the instant Petition has been prematurely filed, we note that the deadlines we have previously imposed for the completion of the relevant work, per our Opinion and Order entered herein on October 9, 1997, as modified, are already past. Since this is the case, and since Conrail and NS did attempt to work within the system by seeking time extensions, we will grant Conrail and NS an extension of time of one year to perform the relevant work. If STB action, or inaction, does not permit the relevant work to be completed within a year from the date of entry of this Opinion and Order, Conrail and NS may at that time seek an additional extension of time

Accordingly, the instant Petition is granted to the extent discussed above.

## **Petition of Bart, Martic and Sadsbury Townships**

In their Petition, the Petitioning Townships request that, in light of the considerations set forth in Conrail and NS's Petition, an extension of time also be granted to them. The Petitioning Townships request that that extension of time be consistent with any extension granted to Conrail and NS, to perform the work specified in the Commission's October 9, 1997 Order, as modified. (Petitioning Townships' Petition, ¶2).

Consistent with our disposition of Conrail and NS's Petition, *supra*, we will also grant the Petitioning Townships a one year extension for the completion of the relevant work. The Petitioning Townships may seek an additional extension before the end of that time period if the action, or inaction, of the STB does not permit the relevant work to be completed by that time.

## **PennDOT's Petition**

In its Petition, PennDOT also request that, in light of the considerations set forth in Conrail and NS's Petition, an extension of time also be granted to it to complete the work it has been ordered to perform at Crossing Nos. 14 and 23 herein. (PennDOT Petition, ¶¶6, 7).<sup>11</sup>

Consistent with our disposition of the two previous Petitions, *supra*, we will also grant PennDOT a one year extension for the completion of the relevant work. PennDOT may also seek an additional extension before the end of that time period if the

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<sup>11</sup> PennDOT notes that the work it was ordered to perform at Crossing No. 24 herein has already been completed.

action, or inaction, of the STB does not permit the relevant work to be completed by that time.

### Conclusion

We have carefully reviewed the record as developed in this proceeding. Premised upon our review, we find that Conrail and NS' Petition, the Petitioning Townships' Petition, and PennDOT's Petition, all requesting time extensions, are meritorious to the extent discussed. Accordingly, they will all be granted to the extent discussed, consistent with this Opinion and Order; **THEREFORE,**

#### **IT IS ORDERED:**

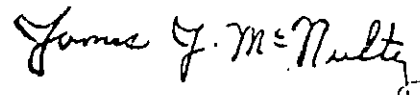
1. That the Petition for Extension of Time filed by Consolidated Rail Corporation and Norfolk Southern Railway Company on September 18, 2001, with reference to our Opinion and Order herein originally entered on October 9, 1997, as subsequently modified, is granted to the extent discussed in the body of the instant Opinion and Order.
  
2. That Consolidated Rail Corporation and Norfolk Southern Railway Company are granted an extension of one year from the date of entry of the instant Opinion and Order in which to perform the relevant work.
  
3. That the Petition for Extension of Time filed by the Townships of Sadsbury, Bart and Martic on October 10, 2001, with reference to our Opinion and Order herein originally entered on October 9, 1997, as subsequently modified, is granted to the extent discussed in the body of the instant Opinion and Order.

4. That the Townships of Sadsbury, Bart and Martic are granted an extension of one year from the date of entry of the instant Opinion and Order in which to perform the relevant work.

5. That the Petition for Extension of Time filed by the Pennsylvania Department of Transportation on October 22, 2001, with reference to our Opinion and order herein originally entered on October 9, 1997, as subsequently modified, is granted to the extent discussed in the body of the instant Opinion and Order.

6. That the Pennsylvania Department of Transportation is granted an extension of one year from the date of entry of the instant Opinion and Order in which to perform the relevant work.

**THE COMMISSION,**



James J. McNulty  
Secretary

(SEAL)

ORDER ADOPTED: April 11, 2002

ORDER ENTERED: **APR 15 2002**